IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 5766/2023

In the matter between:

PETER GUY PARKER **Applicant**

and

QUANTUM LEAP INVESTMENTS 386 (PTY) LTD **First Respondent**
Registration Number 200001463107

THE REGISTRAR OF THE DEEDS OFFICE **Second Respondent**

REASONS DELIVERED: ELECTRONICALLY 06 MARCH 2024

NZIWENI, J

Introduction

[1] The present proceedings pertain to an opposed interlocutory application for an order that the matter [main application] be referred for trial alternatively for the hearing of oral evidence, together with an appropriate order regarding the further conduct of the main application. This [interlocutory] application is in terms of Rule 6 (5) (g) of

Uniform Rules. In so far as the main application is concerned, it was instituted [by the applicant] to enforce the terms of a written agreement that was concluded on 14 December 2022. The main application involves the sale of property between the applicant, as a purchaser, and the first respondent, as the seller. The first respondent is the owner of the said property. One point emerging clearly from the papers of this application is that something has gone awry with the property sale. Hence, the commencement of the litigation.

[2] Given the element of urgency in this matter, after the hearing of the arguments in the interlocutory application, I granted the motion sought by the applicant and indicated that I would give my reasons at a later date. I now give my reasons for granting the motion.

[3] In connection with the present application it was the applicant's strenuous contention that all along until the delivery of the answering affidavit, the first respondent maintained that it was not bound by the written agreement concluded on 14 December 2022, because of the existence of an oral agreement concluded on 03 December 2022.

Applicant's submissions

[4] The applicant's counsel further argues that in a correspondence dated 14 February 2023, from the first respondent's attorneys, it is alleged that in the oral agreement Mr Parker represented himself and Mr Leppan represented the first respondent. Yet, according to the applicant both the above-mentioned people deny that they ever concluded the oral agreement.

[5] In a nutshell the applicant in this interlocutory application, primarily puts forward two propositions on basis of which he argued that the matter be referred to trial. Firstly, it is the assertion of the applicant that there are new factual allegations arising from the first respondent's answering affidavit. In respect of this first contention, the applicant's counsel contended that the first respondent for the first time in its answering affidavit averred that the oral agreement concluded on 03 December 2022, upon which the first respondent had always relied, was actually confirmed at a meeting held on 9 December 2022.

The second aspect to the applicant's contention relates to two new substantive defences raised to the contractual claim. With regard to this aspect, the applicant's counsel contends that the two substantive defences currently raised by the first respondent are misrepresentations that led to the conclusion of the contract and a unilateral mistake on the side of the first respondent. According to the applicant's counsel, it is now alleged on behalf of the first respondent that as a result of the mistake, there was no consensus between the parties.

In this regard, firstly, the applicant's counsel argued that in the answering affidavit, a contention is made [on behalf of the first respondent] for the first time, that a misrepresentation was made by Mr Lepan, an estate agent who supposedly represented the applicant. Secondly, it was contended by the applicant's counsel that the answering affidavit contains further allegations to the effect that the authorised signatory on behalf of the first respondent, did not understand or did not look at certain clauses contained in the agreement of 14 December 2022.

[6] According to the contention made on behalf of the applicant, the new defences differ from what was asserted earlier on behalf of the first respondent. The applicant's

counsel developed his argument as follows: that initially when they received correspondence from the first respondent's attorney, there was consensus between the parties that there was no misrepresentation or mistake and the first respondent relied on a pre-existing oral agreement concluded on 3 December 2022. Therefore, the argument continued, the new defences and factual allegations were unknown to the applicant when the motion proceedings were instituted. According to the applicant, the answering affidavit has a new contention that a further meeting occurred on 9 December.

[7] To stress various facts of importance, applicant's counsel produced a chronology, to which I will return below, setting out various significant events and giving cross references to page numbers in the pleadings, emails, letters, notice of motion, offer to purchase, agreements and the answering affidavit. Though there is a lot of detail in the chronology, it is not necessary for the purposes of this judgment to recite the entire chronology.

[8] It is sufficient, in my view, to say that the chronology dealt with uncontended dates and also a summary of undisputed occurrences in relation to first offer to purchase, communications regarding the sale of property, conclusion of contracts and terms thereof, institution of this application including the notice of motion, delivery of answering affidavit and its contents. The chronology is from 02 December 2022 to 12 May 2023.

[9] It is strongly asserted on applicant's behalf that the chronology clearly reveals that the first respondent made a significant turnaround in its case, by introducing new

aspects in its answering affidavit. It is further argued that, due to the first respondent's new assertions, there are a number of issues that need to be properly ventilated in oral evidence. And that it cannot be said in the circumstances the applicant should have known about the *bona fide* dispute of facts. It was also asserted on applicant's behalf that there is no general rule that that litigation that concerns property must be brought by way of action.

[10] On the basis of what is set out above, it is argued on behalf of the applicant that the matter should be referred for trial as there is a *bona fide* dispute of facts.

The first respondent's submissions

[11] In response, the counsel on behalf of the first respondent did not try and persuade the court in so far as the existence and nonexistence of material dispute of facts. Basically, it was contended on behalf of the first respondent that the applicant brought its application very late. The argument continued as follows:

> ". . . [t]he application for oral evidence was not brought on receipt of the answering affidavit. It was not asked for in the replying affidavit. It was asked for, for the very first time in the practice note and the heads of argument."

[12] Mr Sievers, the first respondent's counsel developed these submissions in the course of his argument. He submitted that inasmuch as there is a dispute of facts, the applicant launched application proceedings for specific performance of a written contract in respect of immovable property. Mr Sievers placing reliance on the case of *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), submitted that motion proceedings are meant to resolve issues on common cause facts. In

reliance on the *Zuma* matter, it was argued that the applicant brought the main application well aware of the fact that it [the application] would have to be determined on common cause facts.

[13] Given the circumstances, it was further submitted that the applicant ought to have realised when he launched the application that a serious dispute of facts was bound to develop. Accordingly, so the argument goes, the applicant should not have commenced the proceedings by motion well aware of probability of a protracted enquiry into the disputed facts not capable of easy ascertainment, but in hope of inducing the Court to apply Rule 6 (5) (g).

[14] The essence of Mr Sievers' argument is that when the applicant launched the main application, the applicant not only ought to have reasonably anticipated the issues would arise, but the applicant was also aware that a serious dispute of fact was bound to develop. Yet, when the applicant filed the replying affidavit, he [the applicant] was persisting for final relief on motion proceedings despite facts in issue having been raised in the answering affidavit.

[15] Mr Sievers went on to submit that the applicant was actually aware of the existence of material dispute of facts even before he launched the main application. In this regard, Mr Sievers referred to a letter dated 23 March 2023, from the applicant's attorney stating that; by virtue of the clear factual disputes of facts between parties, action proceedings are the appropriate manner of obtaining the relief sought by the applicant.

[16] In further support of the argument that the applicant was aware of the dispute of facts before the launching of the main application, the first respondent's counsel referred to the letter dated 14 February 2023, written by an attorney of the first respondent. In that letter, the first respondent's attorney made reference to the fact that the sale of movables and staff takeover agreement were material to their client's sale of property and were negotiated and concluded prior to the sale of the property. Therefore, according to Mr Sievers, it cannot be correct to say that the misrepresentation was only raised in the answering papers. To reinforce his argument, it was submitted on first respondent's behalf that it was obvious from previous correspondence from the attorney of the applicant, that they knew already before the main application was launched that there was a material dispute of facts. Failure to promptly follow through the course of action proceedings, so the argument ran, is fatal to the application in terms of Rule 6 (5) (g).

[17] On the above-mentioned grounds, and placing heavy reliance upon the decisions of IClear *Payments (Pty) Ltd v Honeywell* (D7512/2021) [2023] ZAKZDHC 5 (13 February 2023) (unreported); *Winsor v Dove* 1951 (4) SA 42 N, *Van Aswegen & another v Drotskie & another* 1964 (2) SA 391 (O) and *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T); it was the first respondent's assertion that the application by the applicant ought to be dismissed.

Discussion

[18] As mentioned earlier, I decided to grant the application, for reasons which I now give. The parties to the instant litigation concede, and rightly so, that there is a material

dispute of facts in this matter. The underlying critical ingredient of application proceedings is that they allow the courts to determine cases that involve legal issues on common cause facts, as enunciated in the *Zuma* matter. It must be recalled that applications proceedings are meant to simplify and expedite the process of litigation and thereby lessen the costs involved in the determination of issues between parties. Particularly, where it is unlikely that there would be any material dispute of facts.

[19] It must also be remembered that in motion proceedings, affidavits are mainly used to present evidence. In essence, they [affidavits] provide the court with the necessary facts pertaining to the controversies between the parties. At the same time, it is important to note that on the other side, action proceedings are meant for a situation where in there is a dispute as to the material facts that might not be capable of resolution on papers or on application proceedings. In trial proceedings the factual issues may be subjected to scrutiny through a full-scale trial.

<u>Can a relief of specific performance out of contract be claimed by way of application proceedings?</u>

[20] What was stated in *Herbstein and Van Winsen Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009), is of interest to the matter at hand. Particularly, the following:

> "A noticeable procedural development in more recent times has been the increasingly extensive use of application procedure in the High Courts. There is an 'ever – growing practice of launching proceedings by way of motion which had previously only been initiated by way of action'. This is because, first, the scope of the application procedure has been greatly extended and, secondly, an application is immeasurably less costly

and more expeditious than a trial action. On the other hand, the application procedure is not without its inherent limitations and, broadly speaking, is not appropriate for the purpose of deciding real and substantial disputes of facts which properly fall for decision by action . . .

Generally speaking, therefore, therefore, the character or subject matter of the claim is not the touchstone, the real question being the proper method of determination in each case of the facts upon which any claim depends. Subject, therefore, to the test mentioned above, namely the existence or non-existence of a *bona fide* dispute on material question of facts, there appears to be no reason why, according to the present practice, motion proceedings should not be adopted generally in all classes of dispute other than those specially excepted. The fact that the specially excepted classes vary from province to province does not, . . . affect this general rule." Foot notes omitted.

[21] In the matter of *Room Hire*, *supra*, on page 1161, it is stated that:

"I propose to set out, first, as I understand it, the general position in regard to the permissibility of motion proceedings as opposed to trial actions. Two types of proceedings may be mentioned, as falling outside the scope of this enquiry. (1) There are certain types of proceedings (e.g., in connection with insolvency) in which by Statute motion proceedings are specially authorised or directed; in these the matter must be decided upon affidavit and Rule 9 may be invoked, as shown in *Mohamed v Malk* (1930, T. P. D. 615), to permit *viva voce* evidence to be led in order to counteract any balance of probability. (2) There are on the other hand certain classes of case (the instances given by DOWLING, J, are matrimonial causes and illiquid claims for damages) in which motion proceedings are not permissible at all. But between these two extremes there is an area in which (as I see the position) according to recognised practice a choice between motion proceedings and trial action is given according to whether there is or not an absence of a real dispute between the parties on any material question of fact . . ."

[22] In *Dunlop SA v Metal and Allied Workers Union* 1985 (1) 175at 189D, the court stated the following:

> "Mr Brassey submitted that the applicant has adopted the wrong procedure by proceeding by way of notice of motion when conflicts of facts were anticipated. It seems to me that motion procedure is appropriate in this case where *inter alia* an urgent interdict is asked for."

[23] In the main application, the notice of motion concerns an application for an urgent interdict relief ['Part A'] by the applicant pending a final determination of the issues in dispute between the parties ['Part B'].

The applicant in Part B sought the following interlocutory relief; that:

- the first respondent complies with all obligations flowing from the agreement of sale . . .
- the first respondent shall take all steps and sign all documents necessary to give effect to the terms of the agreement of sale . . .
- in the event that the first respondent fails to comply with the orders. . . above . . . the sheriff of this Court is authorised and directed to take all such steps and sign all documents . . .

[24] As is clear from the case-law, the primary consideration in deciding whether litigation should be commenced by application or by trial is not exclusively determined on the essential nature of the relief sought.

[25] Though a specific performance is a remedy typically claimed in a proceeding by action, there is nothing that prevents a party to claim it by motion proceedings. Put differently, seeking a relief by way of specific performance is no jurisdictional impediment to proceeding by way of motion proceedings. It is thus wrong to believe that such relief is not available by application. Applications are also meant for the adjudication of real issues. However, it is not necessary for the purposes of the application to delve further into this.

The timing of bringing the application for oral evidence

[26] Notably, there is no spelt out time bar or criteria for bringing an application for referral for oral evidence. I am fortified in that conclusion by the consideration that where there is dispute of facts, the court has a discretion to grant or to refuse an application brought in terms of Rule 6 (5) (g). This is a principle too well grounded in our jurisprudence to require reference to authority. Similarly, the case law is replete with authorities that state that the discretion to refer a matter for oral evidence does not subsist indefinitely. In *Adbro Investment Co. Ltd v Minister of Interior* 1956 (3) 345 (AD) at 350 A, the `court stated that the court may dismiss when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. Hence, a litigant who intends to commence proceedings is expected to discern before the launching of the proceedings as to which of the two routes it is going to use.

[27] Perhaps not surprisingly, the timing of making such a discernment is also very important. According to the first respondent, it was abundantly clear before the

launching of this application that the litigation should have been commenced by way of action and not application. Hence, the assertion that the applicant, even before the launching of the main action, should have foreseen that a material dispute of fact would arise that could not be resolved on the papers.

[28] Of course, whenever, the court is confronted with a Rule 6 (5) (g) application, it has a discretion which it must exercise and adjust in accordance with the needs of the case in front of it. For instance, it is also significant to note that in the case of *Pressma Services (Pty) LTD v Schutter and Another* 1990 (2) SA 411 at 419 C -E, the following was stated:

> "It was submitted on behalf of the respondents that a dispute of fact was reasonably foreseeable, and that the application should accordingly be dismissed with costs . . . No purpose would, in my view, be served by a detailed analysis of the history of the matter or the affidavits filed of record. It is clear from the nature of the proceedings and the disputes which have arisen (as summarized in the applicant's 'draft order') that such disputes were reasonably foreseeable and that it would ordinarily be appropriate to dismiss the application with costs. Such an order would, however, serve little purpose other than to cause further unnecessary expense . . ."

[29] A somewhat similar situation presented itself in *M [...] R[...] v A[...] R[...]* an unreported case Full Bench Appeal case of this division, case number A151/2022, delivered on 13 February 2023, the following was articulated:

> "[29] What is instructive from the passages of the judgment quoted above is that prior to the launch of the main application, the appellant expressly raised the issue of the existence of the partnership. The respondent, however, did not specifically deny the existence of the partnership and merely focused on the fact that the farm was hers

and that she did not consent to the appellant or any of his representatives accessing the property at any given time. As counsel for the appellant pointed out, nowhere in the correspondence prior to the launch of the application does the respondent unambiguously deny the existence of a partnership between her and the appellant.

[30] Of course, it may be argued that given the fractious nature of the relationship between the parties before the application was launched, a dispute of some sort would arise. But more is required than the possibility of a dispute arising. What is required is that an applicant should realise prior to the launch of the application that a serious dispute of fact was bound to develop. Given the facts available to the appellant at the time the application was launched, the respondent's rather equivocal response to the appellant's letter of 9 June 2020, and the respondent's failure to address the issue of the existence of a partnership at all, it is quite conceivable that the appellant would not have anticipated that a serious dispute of fact would arise on the existence of the partnership.

[31] In concluding that the appellant should have foreseen the dispute of fact arising in relation to the partnership, I am of the view that Hockey AJ misdirected himself on the facts he considered and the inferences he sought to draw from those facts; the exercise of the discretion was based on an incorrect appreciation of the facts. It follows that the court below did not exercise its discretion judicially. This court is, therefore, entitled to interfere in the order made by the court a quo.

[32] Counsel for the respondent also argued that the appellant ought to have applied for a referral to oral evidence as soon as a dispute was evident on the papers and before full argument was heard by the court below in respect of the application. It is indeed so that an application for a referral to oral evidence or trial, where warranted, should be applied for by a litigant as soon as the affidavits have been exchanged and not after argument on the merits. Whilst this is a salutary rule, it is by no means an inflexible one. In any event, in the matter at hand, the appellant raised the issue of a

possible material dispute of fact in reply to the respondent's answering affidavit. This was the earliest opportunity to do so because it was only in her answering affidavit that the respondent for the first time really nailed her colours to the mast.

[33] In application proceedings, where a dispute of fact has emerged and is genuine and far-reaching and the probabilities are sufficiently evenly balanced, referral to oral evidence or trial, as the case may be, will generally be appropriate. In my view, referring the matter to oral evidence would ensure a just and expeditious decision. The issues to be determined are simple and discrete and I can see no point in putting the parties through the unnecessary delay and costs of an action commenced afresh, especially as the delay in resolving this matter is not inconsiderable. After hearing oral evidence, the court will then be in a better position to determine whether or not a partnership agreement exists and the exact terms of any such agreement. . ." Foot notes omitted, and underlining added.

[30] As mentioned earlier, it is my view that the above-cited Full Bench decision bears at least some resemblance to this case. Since in this matter, it is not in dispute that there is a material dispute of facts, it cannot be said that the application that was launched by the applicant to refer the matter for oral evidence has no legal basis. Hence, the argument before this Court proceeded on the footing that the question to be asked was whether the applicant ought to have foreseen the material dispute of facts before he launched the motion proceedings. In essence, the first respondent is saying that the applicant anticipated a material dispute of facts, before the launching of the main application, yet he proceeded to launch application proceedings. According to the first respondent, the applicant acted in this fashion solely to jump the queue of litigation, thus abusing the legal process.

[31] At the very outset, I am the first to admit that the request for oral hearing does not entitle a party an automatic right to such a hearing. An applicant that foresees that the facts adduced to prove its case would be seriously challenged, should not proceed by way of application but by way of action. The question that aptly arises here is when the applicant should have anticipated or ought to have realised that the facts essential for him to prove his or her case would be seriously disputed.

[32] Further and significantly, at an early stage, it seems to me that a dispute of fact can arise from some correspondence exchange between lawyers representing parties. However, it is easy to determine a serious or material dispute of facts from pleadings, as parties have firmly and unequivocally nailed their colours to the mast of pleadings with categorical averments. In *Room Hire*, the court identified four principal ways in which a dispute of fact arises. The three of which are as follows. First, when the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and or produces or will produce, positive evidence by deponents or witnesses to the contrary. Secondly, when the respondent admits the applicant's evidence but alleges other facts which the applicant disputes. Thirdly, when respondent states that he has no knowledge of the facts stated by the applicant, but denies them, putting applicant to proof.

[33] Much was made in the submissions made on behalf of the first respondent regarding the letter that was written by the attorneys of record of the applicant on 23 March 2023. Essentially, it is common cause between the parties that the letter in

question was written before the main application was launched. It may be convenient at this stage to refer to the contents of the various letters.

The contents of the letter dated 23 March 2023, are as follows:

> "the above mentioned matter and previous correspondence exchanged between our respective offices and . . . regarding your client's purported cancellation of the sale agreement between our respective clients and relating to the above property, refer.
>
> I am, as stated in previous correspondence, instructed to enforce the terms of the contract and to obtain specific performance.
>
> I am of the opinion that by virtue of the clear factual disputes between the parties, which relates inter alia to an alleged oral agreement, that action proceedings are the appropriate manner of obtaining the relief sought by my client.
>
> I refer your letter of the 20th instant directed to . . ., and more particularly to paragraph 3 wherein your offices tendered a limited undertaking on behalf of your client " not to alienate, dispose of sell or encumber the property (referred to above) in any way for a period of three months to enable your client to bring an application to the High Court on a semi urgent basis in relation to the relief that your client allegedly intends seeking.
>
> Since the relief sought by my client will be pursued in action proceedings, I accordingly request that your client tender a similar undertaking which will remain binding, pending the determination of the intended action.
>
> Such action is to be instituted within 20 days of the date of the undertaking being made an order of court. My client undertakes to prosecute the action with due expedition and is willing to seek an expedited trial date from the Acting Judge President . . ."

[34] It is so that the above-cited letter was preceded by a letter dated 14 February 2023, sent by the first respondent's attorney to the applicant's attorney, that stated the following:

1. "We act on behalf of Quantum Leap Investments 386 (Pty) Limited, our client herein.
2. In or during December 2022, our client, duly represented by Mr John Leppan of Hermanus Property Sales, your client. Mr. Guy Parker and our clients Mr. and Mrs Ivy concluded a series of transactions aimed at transferring Lagoon Lodge which operated at portion 19 of farm 633, Hermanus (the property")
3. In this regard, the following agreements were concluded:
    3.1. On or about 3 December 2022 our client, represented by Mr Leppan and your client, acting personally conclude an oral agreement in terms whereof your client agreed to take over the staff presently employed by our client at the property.
    3.2. Our clients Bruce and Irene Ivy and your client, acting personally, concluded an agreement in terms of which your client agreed to purchase certain movable property situated at our client's property.
    3.3. On or about 14 December 2022, our client and your client concluded a written deed of sale in relation to the property.
4. The sale of movables and staff takeover agreements were material to our client's sale of the property and were negotiated and concluded prior to the sale of the property. Our client would not have concluded the deed of sale had the prior agreements not been concluded between the parties and had your client not represented his desire to perform and be bound by the terms thereof.
5. It was accordingly a material tacit *alternatively* implied term of the deed of sale that the sale of the property was conditional upon both the transfer of staff and the sale of movables agreements being perfected and performed by our client.
6. Notwithstanding, on 7 February 2023 your client unilaterally informed our client's conveyancer, Mr Kloppers, that your client no longer intended taking over the staff and performing in terms of the staff takeover agreement.

7. Your client has accordingly repudiated his obligations in terms of the staff takeover agreement which repudiation our client hereby accepts.
8. Because the deed of sale was conditional upon the perfection and performance of the series of agreements, the cancellation of the staff takeover agreement results in the termination of the deed of sale and the sale of movables.
9. Our client's rights remain strictly reserved, including the right to recover any damages it has suffered as a result of your client's unlawful conduct."

[35] On 15 February 2023, a legal representative on behalf of the applicant, replied to the letter of 14 February 2023, amongst others in the following manner:

> "We refer to your letter dated 14 February 202, the contents of which we have noted. We confirm that we act as supervising attorneys on behalf of Mr. Guy Parker . . .
>
> At outset we express our and our client's surprise and disbelief at the allegations by your client that the telephone conversation between the writer and Mr Klopper on 7 February 2023 was a formal notice that the staff members will not be employed . . . At no point in this correspondence was any indication given as to whether the staff would be employed or not . . .
>
> Your client's reliance on such to make its case for a "repudiation of the agreement of sale" is therefore fundamentally flawed and based on an incorrect premise or misunderstanding. The principle of an "inferred repudiation" simply cannot find application in this case.
>
> Furthermore, an "implied or tacit" term related to the takeover of employees is not naturalae of the sale of immovable property. . ."

[36] The starting point, of course in this matter is, it is common ground that the applicant's attorney entertained and expressed the intention to institute the proceedings by way of action, a few weeks before the main application was lodged.

Some key points which can be derived from the letter drafted by the legal representative of the applicant dated 23 March 2023, are as follows:

1. That it is his opinion that by virtue of the clear factual dispute between the parties which relate to *inter alia*, oral agreement that action proceedings are the appropriate manner of obtaining the relief sought.
2. Requesting an undertaking from the respondent not to alienate or sell the property the encumbered property pending an application to be brought.
3. That the applicant's rights are strictly reserved in the interim.

[37] On the other hand, the letter written on behalf of the first respondent dated 14 February 2023, revealed a key aspect that the first respondent was of the view that applicant repudiated his obligation in terms of the staff take over agreement which repudiation the first respondent accepted. In his reply to the letter of the14 February, the applicant's lawyers replied on 15 February, stating *inter alia*, that there is no repudiation of sale by their client and that the agreement remains valid and enforceable.

[38] Two points emerging clearly from the correspondence between the legal representatives is whether there was repudiation or not and the statement that there is a dispute of fact, and that the litigation should be commenced by action. The exchange of correspondence in this matter does not reveal that all the issues have been directly or fully explored in them [the correspondence].

[39] More problematic, it seemed to me, that it would absolutely be foolhardy for a party to be presumptuous as to what an opponent intends to plead in its court papers. While there may be suspicion and assumptions of existence of a dispute of facts, this is not sufficient. A suspicion of dispute of facts before litigation is not sufficient to mean that a party should act based on that suspicion or assumption.

[40] The suspicion or assumption of material dispute of facts by the applicant must be borne out or consequent upon by clear statements from the opposite side. In the circumstances and given the fact that the respondents did not make averments yet, to expect that the applicant to pre-empt and read into statements made in the letters would mean that the applicant acts on assumptions. By a parity of reasoning, therefore, it follows that the commencement of proceedings by an application may merely be indicative of a change of tack.

[41] There is no unwritten rule that states that motion proceedings can never be used where there are disputed facts. Conflicting or diametrically opposed versions in any litigation is inherent; regardless of whether the litigation is by action or by application. The question that aptly arises is whether the letters reveal a likelihood of a serious dispute of facts; that ought to have made it plain that a trial is required.

[42] The first respondent drew this Court to the case of *Room Hire* where it was on page 1162 the following was stated:

> " . . . [t]he application may even be dismissed with costs, particularly when the applicant should have realized when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with the knowledge of the probability of protracted

> enquiry into disputed facts not capable of easy ascertainment, but in hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action."

[43] In this matter, as previously mentioned, it is palpable that the main application cannot be properly decided on affidavits. Thus, trial proceedings are the appropriate forum in order to properly ventilate the material issues raised by the parties.

Counsel on behalf of the respondent vehemently argued that in light of what is enunciated in the letter dated 14 February 2023, that was sent to the applicant's attorney, it cannot be said that the issue of misrepresentation was only raised in the answering papers. In this matter, it is not in dispute that the correspondence exchange was made in contemplation of litigation. It is so that that the correspondence amongst others, related to matters that are potentially contentious between the parties.

[44] In my opinion, correspondence exchanged between the lawyers for the parties can be a precursor of the issues to be determined between the parties. However, the mere existence of factual dispute in the correspondence is not sufficient reason for creating a clear probability of a material or serious dispute of facts. Similarly, the fact that a lawyer expresses a view in some correspondence [words used in a letter] that litigation is going to be commenced by action is not sufficient to mean that he or she foresaw the likelihood of material dispute of facts. This is so because the likelihood of material dispute of facts is not only looked at from the perspective of a lawyer, but from the objective facts and the words used in the correspondence.

[45] An assertion is made on behalf of the applicant that the applicant was only able to see a material dispute of facts when he received the respondent's answering

affidavit. To my mind, the issue of material dispute of facts chiefly involves the comparison of parties' assertion in their affidavits. That said, it should be clear that it does not only involve parties' position in their exchange of correspondence but mainly involves comparison of evidence presented in the respective affidavits. Thus, as mentioned earlier, a speculation in this regard does not suffice. Surely, the affidavits allow the parties to fully flesh out their positions.

[46] In any event, I have to look at the correspondence in order to make a decision as to whether they [the exchange of correspondence] already indicated a likelihood that there would be a serious dispute of facts.

[47] By way of general observation, having read the exchange of correspondence, my impression is that the exchange of correspondence between the legal representatives of the parties is indeed illuminating. But they are not greatly illuminating the issues between the parties. It is evident from the correspondence exchanges that there were, in fact, disputable factual issues raised by them [the letters]. As it had been previously the case in the matter of *M [...] R [...] supra*, a careful analysis of the correspondence in this matter, does not adequately demonstrate serious dispute facts in or a need for trial. The answering affidavit consists of 31 pages. Yet, the letter written by the respondent's legal representatives contains only two pages. In my mind, that on its own palpably shows that the letter is bereft of certain serious statements. The letters did not flesh out issues with some clarity and more detail as done by the affidavits.

[48] When the letters in question are taken into account, in my mind, it becomes clear that the exchange of correspondence contained facts in dispute which did not underpin tangible topics that could raise serious dispute of facts. Surely, the facts in dispute must be material to the issues in dispute before they concern serious issues. The issues raised in correspondence on their own did not plainly raise serious disputes that may require a trial to determine. Thus, it could not be said that they [dispute of facts] indicated that the litigation should be commenced by action.

[49] That said, it should be clear that even if it could be said the exchange of correspondence revealed a plethora of dispute of facts. It is noteworthy, however, that the two letters did not really the issues between the parties with sufficient precision. Similarly, they do not give as much information as the pleadings provide. Moreover, as mentioned earlier, the fact that there is a dispute of fact, that on itself, does not mean an application route could not be commenced.

Conclusion

[50] In the circumstances, there is not one iota of evidence of force to indicate that the applicant elected to proceed by way of motion proceedings when it ought to have been clear to him and his legal representatives that a dispute of facts was bound to emerge. And therefore, it cannot be said that the applicant when he commenced litigation by motion proceedings was primarily motivated by the desire to jump the queue of litigation. That does not appear to be the situation in the present case. To my mind, any other interpretation would run counter the purpose of Rule 6 (5) (g). As has

been noted earlier, it was for these reasons that I announced that the application was upheld.

[redacted]

NZIWENI J
JUDGE OF THE HIGH COURT

Appearances

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Ref	**PM Taylor**
Counsel for First Respondent:	**Adv F Sievers SC**
	Adv DM Robertson
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