



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D7512/2021

In the matter between:

ICLEAR PAYMENTS (PTY) LTD

APPLICANT

and

SEAN WILLIAM HONEYWELL

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 13 February 2023 (Monday) at 15:30

ORDER

The following order shall issue:

1. The application to refer the matter to oral evidence is refused.
 2. The application is dismissed with costs on a party and party scale.
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JUDGMENT

Chetty J:

[1] This is a ruling in respect of a matter set down on the opposed roll where counsel for the applicant, on the day of the hearing, and after interaction with the court, sought to apply for leave to refer the matter to oral evidence. Counsel for the respondent opposed the referral for evidence, contending that the applicant ought to have foreseen at the time of the launching of proceedings, that a dispute of fact would emerge on the papers, and for that reason the application should be dismissed.

[2] By consent, both parties requested that they be afforded the opportunity to file submissions dealing with whether the matter ought to be referred to oral evidence, alternatively whether the application should be dismissed. It was further agreed that the matter could then be determined on the papers without the need for further argument.

[3] The applicant launched proceedings against the respondent wherein it sought an order compelling the latter to sign all documents and perform all such acts to transfer and assign the following to it:

- (a) a provisional patent filed under application number 2018/08490;
 - (b) an additional patent filed under registration number 2019/08429; and
 - (c) a final patent application filed under registration number 2019/03489,
- all of which fall under the title 'A FINANCIAL TRANSACTION SYSTEM AND METHOD'.

[4] In addition, the applicant sought that the international application published in terms of the Patent Co-operation Treaty be transferred and assigned to it by the respondent, failing which the sheriff be instructed to sign such documents on behalf of the respondent.

[5] The founding affidavit traces the history of the relationship between the parties and the involvement of other business partners leading to the registration of the patent in the name of the respondent. It should be noted that throughout this process, the parties were advised by a patent attorney. The contention on behalf of the applicant is that the patent was so registered in the name of the respondent solely as a matter of convenience due to the respondent having been FICA compliant at the material time of filing and, as time was of the essence prior to the closure of the South African Patent

Office on 18 December 2018. The applicant further contends that the decision to permit the filing of the patent in the respondent's name was strictly a provisional measure and that the registration would be transferred into the name of the applicant in due course.

[6] Subsequent to the filing of the patent, a perceived weakness in the first patent was identified, leading to a decision to review the first patent. It appears then that the relationship between the respondent and the business partners associated with the applicant became fractured. Eventually, the applicant, through its attorneys, demanded that the respondent transfer the patent into its name. The latter refused as he considered himself to be the owner of the patent, which had been registered in his name.

[7] In its heads of argument on the merits, the applicant concedes that there is a dispute as to the identity of the inventor of the idea giving rise to the patent. A clear dispute of fact emerges from the respondent's answering affidavit on this particular point. Counsel for the respondent submits that not only was the dispute foreseeable, but was actually foreseen by the applicant's attorney. In this regard, reference was made to a letter from the applicant's erstwhile attorney dated 11 December 2019 in which the attorney acknowledges, '[a]s you know there is a dispute as to the ownership of the patents'.

[8] There is a further dispute as to whether there was an agreement between the parties as to whether the patent would be registered, at the time, in the name of the respondent solely for convenience. Despite these disputes, the applicant contends that there are no material disputes of facts on the papers, and even if there are, the resolution of these matters is not germane to the relief sought by the applicant in the notice of motion.

[9] The applicant now contends that the issue of who invented the idea is not material to the outcome of the applicant's claim, which it submits is founded in contract.¹ Assuming that the applicant is correct (which is not admitted by the

¹ The applicant's replying affidavit, para 4, under the sub-heading 'Sole Inventor' says the following: 'Although I vehemently deny the Respondent was the sole inventor it is, for the purposes of this application, largely irrelevant to the relief sought. The applicant's relief is founded in Contract Law and

respondent), it ought to have been self-evident from the respondent's answer that a dispute of fact existed even in relation to a contractual claim, which could not be resolved on the papers. Importantly, the problem I encounter with the applicant's view that the matter can be resolved on the papers, is its change of approach from that of a dispute between two supposed co-inventors of a patent to what is now couched as a contractual dispute.

[10] The founding papers pay scant regard to pleading the terms of the contract between the parties. Counsel for the respondent submits that the papers are devoid of any agreement being reached between the respondent and the applicant's directors, particularly a Mr Stokes. The latter, at best for the applicant, posed a series of rhetorical questions via email to the applicant's other directors and the respondent. No definitive answer came from the respondent on the various queries posed by Mr Stokes, save for confirmation by the respondent that the patent had indeed been registered in his name. There is nothing on the papers to indicate acceptance on the part of the respondent that the patent would, at any time in the future, be transferred into the name of the applicant. It is for this reason that the respondent in his answering affidavit states that:

'the institution of motion proceedings renders the applicant's case without any prospects of success and – given that it was instituted in the face of the applicant's own admission that there was a dispute. . . it warrants a dismissal of the application.'

[11] When the matter came before me as an opposed motion, I raised with counsel for the applicant whether the disputes of facts which emerge on the papers, were capable of being determined on the basis of common cause facts. It is now well established on the basis of *National Director of Public Prosecutions v Zuma*:²

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.'

[12] Added to this is the approach to be adopted when factual disputes arise on the papers. The most recent pronouncement on the topic is *Wightman t/a JW Construction*

not Patent or Property Law. The inventorship is inconsequential and doesn't advance the Respondent's answer at all. However, in the event of the above Honourable Court finding same to be relevant I submit that the Respondent is in any event not the inventor.'

² *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243 (SCA) para 26.

*v Headfour (Pty) Ltd and another*³ where Heher JA set out a useful guide to be employed in determining whether there exists a real, genuine and bona fide dispute of fact. The Court said the following:

‘[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635C. . .

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say “generally” because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision.’

[13] Rule 6(5)(g) of the Uniform Rules of Court provides:

‘Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.’

[14] When counsel for the applicant was confronted by the court with the possibility that its claim could be dismissed in light of disputes on the papers, it was only at this

³ *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA).

stage that the notion of a referral to oral evidence was raised. At the time when the referral was contended for, no substantive reasons were advanced. The respondent, relying on *Moropa and others v Chemical Industries National Provident Fund and others*,⁴ submits that the referral to oral evidence must be made timeously (as opposed to being made spontaneously from the Bar); should be focused, and that the evidence to be adduced should be identified. The reason for the requirement that there be identification of the issues on which a referral is sought, is to avoid the situation where a referral is transformed into a trial.

[15] Moreover, it is submitted by the respondent that the application for referral should not be made where the applicant finds itself on shaky ground, where it becomes clear that it may face a significant burden in convincing the court to grant the relief sought on the papers. See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T). It is well established that while the court has a discretion in deciding whether to allow a referral to oral evidence, the court will dismiss an application if the applicant should have realised when launching his application that a serious dispute of fact, incapable of resolution on the papers, was bound to develop. The explanation proffered by the applicant that it should not be criticised for proceeding by way of motion proceedings to avoid the delay and expense of being involved in a trial action, is not persuasive. If such practice were allowed to gain traction, such litigants would be able to steal a march on others who proceed by way of action from the outset, having properly recognised the existence of disputes of facts arising. The applicant contends that if the matter were referred to oral evidence, the crisp issue for determination would be whether the respondent concluded a legally binding contract to hold the patent and transfer it at a later stage to the applicant.

[16] It is submitted on behalf of the applicant that there can be no prejudice to the respondent, which cannot be cured by an appropriate costs order, in having the matter referred to oral evidence rather than the application being dismissed. While it is correct that in dismissing the application, which would be tantamount to an order for absolution from the instance, the consequence thereof would be a delay in finality as the applicant

⁴ *Moropa and others v Chemical Industries National Provident Fund and others* [2020] 4 All SA 197 (GJ) para 13.

[17] In my view, to simply allow a litigant to resort to a referral to oral evidence when the shoe pinches in motion proceedings, would be to condone irregular procedure. The applicant elected to proceed by way of motion proceedings when it ought to have been clear to it and its legal representatives that a dispute of fact was bound to emerge, which a court would not be able to decide on the papers. As stated earlier, a reading of the founding affidavit conveys the impression of a dispute between the litigants in regard to the invention of the patent and the contract of registration. Neither of these disputes conceivably could have been resolved on the papers. For the applicant to suggest in its replying papers that the issue is simply one of contract, and that the laws pertaining to patent and property have no application, is to over-simplify the matter. I am accordingly of the view that this is not a case where the matter should be referred to oral evidence, where the issues are clearly narrowed and defined, and the affidavits would stand as evidence. On the contrary, I am of the view that there should have been, in the alternative, a referral to trial. That was not done.

[18] In light of the authorities which I have referred to above, it is not possible for me to make any determination on the papers as to the relief sought by the applicant. This situation could have been averted by the applicant proceeding by way of an action. In the result, I agree with counsel for the respondent that a robust and common-sense approach should prevail. The proper order which must follow, having regard to the circumstances, is that the application should be dismissed.

Order

[19] I make the following order:

1. The application to refer the matter to oral evidence is refused.
2. The application is dismissed with costs on a party and party scale.


Chetty J

Appearances

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