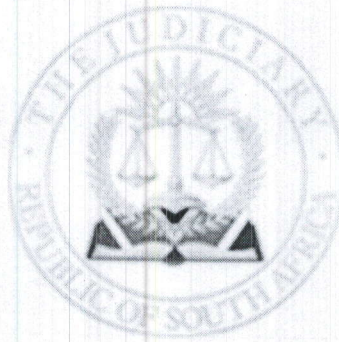




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

DATE: 12 AUGUST 2021

SIGNATURE OF ACTING JUDGE:

Case number: 17/28917

In the matter between:

CLINPETE (PTY) LTD

Applicant

and

K201146712 (SOUTH AFRICA) (PTY) LTD

First Respondent

JEFFREY FROMM

Second Respondent

RICHARD RUBIN

Third Respondent

CITY OF JOHANNESBURG

Fourth Respondent

JUDGMENT

SLON AJ

1. The applicant seeks payment by the first to third respondents of certain municipal charges levied by the fourth respondent in respect of certain immovable properties ('the property'). Its cause of action is an agreement of sale concluded between the applicant and the first respondent on 10 January 2014 in terms of which the latter purchased the property from the former for the sum of R25 million. The purchase price was payable in certain instalments over three years, commencing after transfer would have been registered, the final balance thereof due on the third anniversary of the date of transfer ('the agreement').
2. The second and third respondents (and another party which does not now feature) signed a deed of suretyship on the same date as the agreement was signed, binding themselves jointly and severally as sureties and co-principal debtors *in solidum* with the first respondent to the applicant for the due and punctual fulfilment and performance of all obligations of the first respondent under the agreement. A further provision appears at the end of the deed to the effect that the suretyship liability of the second respondent thereunder is limited to 27.5%, and of the third respondent to 72.5%, of any indebtedness of the first respondent to the applicant. Whether, on a proper construction of the deed of suretyship as a whole, that proportionality applies vis-à-vis the applicant, or merely as between the sureties themselves as seems to me more probable, is an interesting question which need not detain me.
3. The relevant clauses for purposes of this application appear under the heading 'POSSESSION AND OCCUPATION' as follows:
 - '5.1 Possession of the property, and occupation thereof, subject to the existing leases of which the purchaser is aware, shall be given to and taken by the purchaser on the date of signature hereof and from which date the property shall be at the sole risk and profit of the purchaser

which shall be liable for all rates, taxes and other imposts leviable in respect thereof.

- 5.2 Notwithstanding the provisions of clause 5.1, the purchaser agrees and undertakes to assume all the liability of the seller for any rates, taxes and other imposts leviable against the property for the period ending on the date of signature hereof. The purchaser hereby indemnifies and holds the seller harmless against any and all claims which may be made against the seller for payment of any such rates, taxes or other imposts.

4. The answering affidavit is deposed to by the second respondent who avers that he is a shareholder of the first respondent. He purports to speak on behalf of both of the first and third respondents, although neither of these produce a resolution or confirmatory affidavit, respectively, to that effect. By the time that this application came before me, it would appear that the first respondent had been deregistered, and the third respondent appears to have emigrated from South Africa at some point; he has delivered no papers on his own behalf and makes no appearance. The fourth respondent does not oppose the relief sought. The claim is, to all intents and purposes, now pursued against the second respondent only, although the applicant's further intentions vis-à-vis the third respondent are not expressly stated. Nothing turns on that for the purposes hereof. I shall henceforth use the term 'respondents' to refer to the first, second and third respondents collectively where necessary.
5. The first respondent took occupation of the property on 10 December 2013, about a month before the date of signature of the agreement, and thereafter received all rentals from the tenant or tenants occupying the same. In reply, the applicant, in response to a merely bald denial by the respondents that the rental was 'significant', states that, on its estimate based on a schedule it attaches, the rentals so received amounted to in excess of R1 million per month. That would have been, one

surmises, for the period 10 December 2013 to 12 January 2018, at least, the date of the replying affidavit. If that is so, the total rentals received by the first respondent (or whomever stepped into its shoes after its apparent deregistration) would have been of the order of R49 million.

6. The crux of the relief claimed by the applicant in its notice of motion is for payment, either to the applicant or to the fourth respondent, of 'municipal services charged to the property' (there was no dispute that this term could only have meant 'all rates, taxes and other imposts leviable in respect thereof' as per clause 5 of the agreement) pursuant to two clearance certificates dated 22 and 23 May 2017 respectively, obtained, presumably in order to advance the registration of the transfer of the properties under the agreement. The total alleged liability referred to in the certificates is some R13 million, and this excluded the imposts on a third erf included in the property sold which is, for various reasons, excluded from the calculation.
7. The crux of the respondents' defence in the answering affidavit is that the amounts claimed by the fourth respondent as reflected in the certificates are inaccurate for various reasons, and that the first respondent, and accordingly the second and third respondents, are not liable for payment thereof. They also dispute that the documents relied upon by the applicant are in fact clearance certificates at all.
8. The matter served before me in the form of a skirmish over an intricate peripheral issue which, upon careful reflection, seems to have been a futile diversion from the true issues to be determined between the parties. It concerned the attempt by the second respondent to deliver a supplementary answering affidavit ('the SSA'). It was sought to be filed, including therein an application for condonation, as early as 17

July 2018. The affidavit itself runs to 18 pages, and contains annexures of some 260 pages. The purpose of that affidavit was, firstly, to place before the Court an analysis of the respects in which the municipal charges referred to above were alleged to be incorrect or improbable, and secondly, to introduce a brand new and legally complex defence.

9. The jist of the latter defence was that the agreement and the suretyship are void or voidable by reason of an alleged misrepresentation made by the applicant to the second respondent that the building on the property had been constructed as a residential dwelling which construction was not in accordance with approved building plans. I am told that, contemporaneous with the filing of the SAA, the second respondent issued summons against the applicant on the basis of the latter cause of action. The applicant's contention is that it is merely an expedient afterthought and that, even if there were no building plans, that would have had no material bearing on the agreement, or on the property for the purposes for which it was purchased. It is not necessary, however, for me to venture into the merits of that claim.
10. The argument before me proceeded for some time by both parties on the subject of the admission of the SAA, interwoven with the merits of the application as a whole, for the purposes of which both parties had delivered submissions at the eleventh hour.¹

¹ The applicant filed supplementary heads of argument on 28 July 2021 and the second respondent on the morning of the hearing on 4 August 2021. Of the latter I was unaware until they were mentioned by counsel in argument. In the overall view I take of the matter, neither set of heads contains much substantive material directly relevant to the just and proper resolution of the application.

11. In argument as to whether or not the SAA should be admitted, there was some debate concerning the identity of the party upon whose shoulders rested the duty under the agreement to ascertain the correct quantum of the municipal charges, of what each party knew of the alleged inaccuracies thereof at various times and had or had not done about it:

11.1. I understood the applicant's submissions to be based on the clauses of the agreement, referred to above, and that (a) it was the respondents' duty to establish what the municipal charges were; (b) that they should have paid whatever was claimed by the fourth respondent in that regard, if necessary under protest; (c) that the respondents had consequently taken undue advantage of the situation by failing to pay the municipal charges (or even any proportion thereof which they might have established or believed to be owing), thereby frustrating transfer, and, with it, the payment of the purchase consideration the instalments of which, it will be recalled, were due to commence and run only after transfer; (d) that, all the while, the respondents were sitting pretty (my words, not the applicant's) while continuing to receive significant rentals from the property; and (e) that all of this conduct had been facilitated by way of an alleged entitlement to raise a dispute as to the quantum of the municipal charges for which the respondents were liable.

11.2. The second respondent, neatly side-stepping the consequences of the respondents' alleged behaviour as stated above, stuck doggedly to its guns that (a) the applicant itself was at all relevant times aware of the inaccuracies of the municipal account; (b) that it was its duty to establish the correctness

thereof before it could saddle the respondents with the liability therefor; (c) that no motion Court could make a determination on paper of the correctness of the amounts claimed; (d) that such a determination had indeed to be made if the applicant had any hope of success; (e) made a great deal of various delays and procedural missteps of which it claimed the applicant was guilty; and (f) that he would demonstrate in the action already instituted that the agreement and the deed of suretyship were in any event void or voidable.

12. Overall, the second respondent argued for the admission of the SAA on the grounds, *inter alia*, of its relevance, pointing out that it had been delivered some years earlier and that the applicant had not sought to answer it. The applicant opposed its admission on the basis that the second respondent had not make out a proper case therefor, that the evidence sought to be introduced was inadmissible and that the misrepresentation defence was excipiable.
13. The second respondent consequently sought the dismissal of the application on the basis of the existence of an irresoluble dispute of fact on the papers – with or without the SSA.
14. The applicant submitted that, should the SSA be admitted, an opportunity should be permitted to it to answer it, and the application postponed. Were it not to be admitted, the applicant sought to amend the relief such as to fix the period of the respondents' liability for the municipal charges to the period of December 2013 to May 2018; and to compel the respondents within 30 days to submit a 'formal dispute' to the fourth respondent addressing the alleged inaccuracies in the account (thereby, presumably, discharging the applicant from any responsibility as regards the

quantum of the claim), failing which the application could be re-enrolled and the claim should then proceed on the basis of the clearance certificates. The second respondent's counsel objected to such an informal amendment for obvious reasons.

15. All of these matters having thus been canvassed, including a reference by the second respondent's counsel to a letter in which it had been proposed by applicant that the application be referred to trial so that the alleged disputes of facts on the papers could be properly ventilated, the applicant's counsel then, rather suddenly, requested a referral to trial.
16. As far as I can make out from the second respondent's submissions, which the applicant did not dispute, the letter in which that proposal was made by the applicant was dated 21 July 2021, and was refused by the second respondent. The letter was received about a month after the applicant set the matter down, on 23 June 2021, for the hearing in the week of 2 August 2021.
17. Thus, the focus of the hearing then shifted from the question of the admission of the SSA to the question of whether or not the application should be referred to trial. Should that be refused, the question of the admissibility of the SSA would remain live; if granted, there would, in my view, be no practical purpose in deciding that question, save perhaps as to the matter of costs.
18. The applicant's counsel, in resisting the applicant's belated request, pertinently referred in this regard to *De Reszke v Marais & Others*² and *Law Society of the*

² 2006 (1) SA 401 (C) at 412J-413H

Northern Provinces v Mogami & Others³ in support of the proposition that counsel is, as a rule, and in the absence of exceptional circumstances, required to make his or her election as to the referral of a matter to oral evidence, *in limine*; and that, since the applicant had failed to do so, and could not point to any exceptional circumstances to excuse the lateness of the request, the request should be rejected.

19. The provisions of Rule 6(5)(g) of the High Court Rules are 'of wide import and empower the Court, where an application cannot properly be decided on affidavit, to make such order as to it seems meet with a view to ensuring a just and expeditious decision.'⁴ The question of whether a Court should refer a matter for oral evidence or to trial is a matter for the exercise of a wide discretion⁵ on all the facts before it.
20. Although, in an ideal world, the request to refer should certainly made at the commencement of a hearing, that is not an immutable rule. The authorities relied upon in ***De Reszke*** do not go that far. The Court was there concerned with a too far 'swing of the pendulum' in its Division in favour of permitting such requests in general.
21. Comrie J (in that matter, speaking on an appeal to the full Court) cited a dictum of Botha JA in ***Administrator, Transvaal, & Others v Theletswane & Others***⁶ in which the learned Judge of Appeal expressly held that the approach by a Court to

³ 2010 (1) SA 186 (SCA) at 195C-D

⁴ Erasmus: ***Superior Court Practice*** Vol 2 (Original Service 2015) at p D1-70 and authorities cited in fn 4 on that page.

⁵ *Ibid* at D1-73 and the authority cited in fn 1 on that page.

allow counsel for an applicant, as a general rule, to present his or her case on the footing that the applicant is entitled to relief on the papers, but to apply in the alternative for the matter to be referred to evidence if the main argument should fail, 'has much to commend itself'.

22. I note also that in the **Law Society's** case, the request to refer the matter to oral evidence appears, specifically from three or four lines at 195B-C of the report, to have been made in the first instance before the Supreme Court of Appeal ('the SCA'). There is no suggestion that such request was made at any time in the court *a quo*. It is not difficult to imagine the reluctance of the SCA to accede to such a request at such a late stage in circumstances where the request is not justified by exceptional circumstances. The same would appear to have been the case in **De Reszke**.
23. The basis of Harms DP's dictum in the **Law Society's** case that 'the circumstances must be exceptional' before a Court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail, is made in approval of the finding in **De Reszke**. That is in turn based on two other judgments, one authored by Corbett JA (as he then was)⁷ in which the learned Judge of Appeal said that the rule is a salutary general one, but not inflexible; and in doing so a

⁶ 1991 (2) SA 192 (A) at 200C

⁷ in the well-known authority of **Kalil v Decotex (Pty) Ltd & Another** 1988 (1) SA 943 (A) at 981F-G

judgment of Didcott J (as he then was)⁸ was cited with approval. In the latter judgment, a diversion from the general rule was stated to be 'exceptional perhaps' when justified by convenience, 'much depend[ing] on the particular enquiry and its scope'.

24. I do not, therefore, read the dictum in the *Law Society's* case as intending to lay down an absolute rule requiring the existence of exceptional circumstances at all costs. The question, as I have said, remains a matter for the exercise of a wide discretion within the ambit of the provisions of rule 6(5)(g) on a case-by-case basis. That entails, as a discretion almost invariably does, considerations of justice and fairness overall, the proper exercise of which is in its nature resistant to general overarching prescriptions.
25. Notwithstanding the applicant's conduct in the matter before me, and the second respondent's complaints about it, some of which may have been well-founded at least as regards the procedural aspects thereof, I have concluded that it would be just and expeditious to accede to the applicant's request.
26. I do so, in the exercise of my discretion, for the following reasons:
 - 26.1. As I have already intimated, the question of the admission of the SSA was, in my view, a mere side skirmish in relation to the real issues to be determined such that justice may be done between the parties. I would go as far as to say that the SAA was largely unnecessary since the quantum of the charges

⁸ in *Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd* 1981 (4) SA 175 (N) at 179D

had already been disputed in the answering affidavit, sufficient in any event to raise a dispute of fact, whether or not such dispute was legitimate; and a nagging suspicion remains that the filing of the SAA was an expedient calculated to deflect attention from the other, more important issues between the parties.

- 26.2. It seems to me (and I need put it no higher for present purposes) that the applicant has an arguable case, on the strength of the agreement construed as a whole, that clause 5 thereof places the responsibility on the respondents' shoulders to pay the municipal charges claimed by the fourth respondent, whatever they may be, it being known to both parties, as the second respondent itself pointed out, that the fourth respondent's billing system has for many years been a state of chronic disorder; and by extension, that, if such charges are indeed incorrect, to resolve that question, if they wished to do so, with the fourth respondent independently of the applicant.
- 26.3. The *quid pro quo* of the bargain seems to have been that the respondents would obtain all the lucrative benefits of possession, as well as that of being required to pay the purchase consideration over a period of several years commencing only after the date of transfer, in return for taking on that obligation: it is unlikely, in my view, that the parties' intention could have been such as to permit the respondents to frustrate the registration of transfer in due course by the use of such a tool.
- 26.4. Whether that case can be finally sustained by the applicant is another matter; it may, and, in my view based on the papers before me, probably would,

require evidence as to the relevant circumstances, including the surrounding facts and the conduct of the parties,⁹ to permit the Court to arrive at a proper construction of the parties' intention as regards clause 5.

26.5. Similarly, there can be no question that, if the second respondent is found to be entitled to raise the matter of the accuracy of the municipal charges, oral evidence would be required for the purposes of that determination; as it would regarding the defence of voidness sought to be introduced after the delivery of answering affidavit.

26.6. Since there is already an action underway in respect of the latter, I imagine that the same issues to be determined as a result of the referral may in any event come into play in that forum, and that, for that reason, and in any event, no material prejudice to the respondents would be occasioned thereby.

27. I come finally to the question of costs.

27.1. The amendment informally sought by the applicant in the supplementary heads, albeit in the alternative to the admission of the SSA, was certainly irregular, and the applicant's counsel's objection thereto well taken. Such an amendment may be a matter to be thrashed out in the trial process, if the applicant intends to persist in it.

⁹ *cf Capitec Bank Holdings Limited & Another v Coral Lagoon Investments 194 (Pty) Ltd & Others* – unreported (470/2020) [2021] ZASCA 99 (9 July 2021)

- 27.2. It is manifestly true that the decision of the applicant as to whether or not to request that the matter be referred to trial was made later than it should have been. It should at least have made up its mind prior to the set down of application before me so that the issues to be determined could have been limited to the question of the referral only – on the plausible assumption that the second respondent would most probably have persisted in its opposition thereto.
- 27.3. Had that occurred, it would probably not have been necessary to hear the merits of the application at such length as it was so heard, save in so far as they impacted on the request for a referral. A full hearing on the question of the admission of the SSA, which was interwoven with the argument on the merits, would similarly have been obviated, or, at least, curtailed.
- 27.4. I would estimate that the time taken for the hearing in those circumstances, and the preparation therefor, would have been reduced by approximately half, and the costs order made below reflects this.
28. I make the following order:
- 28.1. No order is made on the application.
- 28.2. The application is referred for determination to trial under the provisions of rule 6(5)(g), for the purposes of which:
- 28.2.1. the notice of motion will stand as the summons;

28.2.2. the applicant shall deliver its declaration within one month of the date of this order being handed down;

28.2.3. the regulation of all further pleadings and other steps will be governed by the provisions of the High Court Rules applicable to trial actions.

28.3. The costs of the application are reserved for the determination of the trial Court, save that the applicant shall pay half of the second respondent's costs incurred on and after 23 June 2021 and occasioned by the preparation for the hearing, and the hearing itself, of this application on 4 August 2021.

28.4. Should the applicant fail to deliver its declaration within the time stated above, this order will, save for this paragraph, *ipso facto* lapse in its entirety and the following order will apply:

The application is dismissed with costs.



B M SLON
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

This judgment was prepared and authored by Acting Judge Slon. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines.

HEARD ON: 4 August 2021
DECIDED ON: 12 August 2021
HANDED DOWN ON: 13 August 2021

For the Applicant:
Instructed by

Mr M V J Chauke
Thompson Wilks Inc

For the Second Respondent: Mr L Hollander
Instructed by:

Swartz Weil Van der Merwe Greenberg Inc