

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 2033/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED. ✓

DAT: 30/01/2024

SIGNATURE: [REDACTED]

In the matter between:

SUSANNA CATHARINA VAN DER WALT (JNR) 1ST APPLICANT
SUSSANA CATHARINA VAN DER WALT (SNR) 2ND APPLICANT

and

RZT ZELPPY 4230 (PTY) LTD
(For its winding-up in terms of section
81(1)(d) of the Companies Act 71 of
2008, as amended)

1ST RESPONDENT

JUERGENS JOHANNES VAN DER WALT 2ND RESPONDENT

NATIUS VAN DER WALT 3RD RESPONDENT

JURGENS JOHANNES VAN DERR WALT,
NO 4TH RESPONDENT

NATIUS VAN DERR WALT, NO 5TH RESPONDENT

FREDERIL JAKOBUS EKSTEEN N.O 6TH RESPONDENT

KONRAD STOOP, NO 7TH RESPONDENT

LBG HOLDINGS (PTY) LTD

8TH RESPONDENT

REGISTRAR OF DEEDS, POLOKWANE

9TH RESPONDENT

**MASTER OF THE HIGH COURT,
PRETORIA**

10TH RESPONDENT

CLOUDED MOUTANS PROPERTIES CC

11TH RESPONDENT

FIRSTRAND BANK LIMITED

12TH RESPONDENT

DWM BOERDERRY (PTY) LTD

13TH RESPONDENT

JUDGMENT

This judgment is delivered electronically by way of dispatching same to email addresses of the parties' legal representatives and publishing same on SAFLII. The date of delivery of this judgment is deemed to be 30 January 2024.

SIKHWARI AJ

- [1] This matter was brought by way of an application in terms of a notice of motion. The nature of the dispute is that of a declaratory order relating to ownership of a certain shares in the first respondent and the ownership of immovable property known as Remaining Extent of the Farm Schilpadpan 271 in Alldays in the Limpopo Province ("immovable property"). The application is opposed. The court is requested to decide whether to refer the matter to the hearing of oral evidence or trial or adjudicate the matter on papers.

- [2] The law relating to referral to dispute of fact is regulated in terms of Rule 6 (5) (g) of the uniform rules of the High Court of South Africa which states that:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such as to it seems meet 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 of resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him 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.”

- [3] In the leading case of **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] 2 All SA 366; 1984 (3) SA 623 AD**, it was authoritatively held that:

*“It is correct that, where in proceedings on motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard **Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3)***

SA 1155 (T) at pp 1163-5; Da Malta v Otto. NO 1972 (30 SA 585 (A) at p 882 D-H).

*"If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines which he seeks (see eg. **Rikhoto v East Rand Administration Board 1983 (4) SA 278 (W) at p 283 E-H**). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untrainable that the Court is justified in rejecting them merely on the papers.*

- [4] In the case of **Sofiantini v Mould 1956 (4) SA 150 I at page 154E-F**, Price J held that:

"A bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduct a preliminary examination... and to ascertain whether the denials are not fictitious intended to delay the hearing." (or for some other purpose)

"The respondent's affidavits must at least disclose that are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard."

"If by mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then the motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common sense approach to dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute of fact."

- [5] More recently, in the case of **Wightman t/a JW Construction v Headfour (Pty) Ltd And Another [2008] (3) SA 371**, Heher JA held that:

"A real, genuine and bona fide dispute of fact 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. If the facts alleged 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 broader matrix of circumstances all of which needs to be borne in

mind when arriving at a decision. A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party.

- [6] The provisions of Rule 6(5)(g) of the uniform rules of this court do empower this court to refer the matter to oral evidence or trial, whatever the case may be, if there is such an application by the applicant or *mero motu* in deserving circumstances. The dispute of fact herein falls within the ambit of the said rule 6(5)(g).
- [7] This court is of the view that there is are several material disputes of fact regarding the sale between the first respondent and the Trust regarding the sale of immovable property herein. The authority of the second applicant, second respondent and fourth respondent to sell the immovable property to the first respondent is challenged by the third, fourth and fifth respondents. There is a dispute regarding the resolution authorizing the aforesaid sale transaction. The sale is said to be void on the basis that it was authorised by the trustees of the Trust. There is an issue regarding the resignation of one trustee as to whether such resignation has material effect in that it had not been communicated to the Master of the High Court at the time of the taking of the resolution. Some of the material witnesses are no longer alive, some of the documents are no longer in existence.
- [8] The parties will enjoy the benefits of the discovery process in terms of rule 35 and / or the right to reconstruct some of the missing documents and / or calling expert witnesses to fill the missing gaps if the matters herein are referred to trial, as opposed to oral evidence. The trial scope is wider and in a case like this it will be in the interests of justice for the matters to be referred to trial for

full and complete adjudication of all the issues in order to avoid a piecemeal process which may lead to endless litigations.

[9] In my view, the matter must be referred to trial as there are a lot of issues which are overlapping and have a material impact in the entire application. referral to trial will assist the parties to adjudicate over thew matter in its entirety as opposed to referral to oral evidence in a limited issue in dispute. The above disputes of fact were unforeseeable at the institution of the proceedings, and they are genuine dispute of fact. I intend to order that costs of this hearing for referral to trial or oral evidence to be in the course for adjudication by the trial court at the end of the trial.

[10] Accordingly, the following order is made:

1. That the main application and counter-application herein are hereby referred to trial.
2. Applicants' notice of motion shall stand as a simple summons.
3. Applicants are ordered to a declaration on or before 29 February 2024.
4. Respondents are ordered to file their respective plea on or before 31 March 2024, and whereafter the uniform rules of the High Court of South Africa will apply.
5. That costs of the main application and counter-application and costs of the hearing of the application for referral to oral evidence are reserved for determination by the trial court at the end of the trial.

MS SIKHWARI
ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO DIVISION,
POLOKWANE

APPEARANCES:

For Applicant	:	Adv Abraham Louw SC
Instructed by	:	Krugel Heinsen Inc c/o De Bruin Oberholzer
For Respondent	:	Adv SS Green
Instructed by	:	Deon Retief Attorneys c/o Weidemann Attorneys
Date of Hearing	:	14 December 2023
Date of Judgment	:	30 January 2024