

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

Case Number: 005559/23

17/02/25

DATE

SIGNATURE

In the matter between:

MILKOR (PTY) LTD

Applicant

and

EVOTEX ENGINEERING (PTY) LTD

Respondent

JUDGMENT

INTRODUCTION

- [1] This application concerns the cancellation of a contract between the applicant and the respondent. The contract was entered into on 16 March 2019.
- [2] The first purpose of this application is to obtain a declaratory order confirming that the contract was duly cancelled by the applicant due to respondent's material breach of its contractual obligations. However, the respondent denies that the contract was duly cancelled by the applicant.
- [3] The second purpose of the application is to obtain an order compelling the respondent to pay damages to the applicant in the aggregate of some of the amounts which the applicant had paid to the respondent before the cancellation of the contract. The respondent differs and it is of the view that the applicant is not entitled to any payment for damages. The respondent denies that the applicant is entitled to relief sought in the notion of motion.
- [4] According to the applicant, only the legality of the termination of the contract is in issue as the disputes are legal and not factual. The applicant foresees no genuine factual dispute between the parties on the core issues of this application. The applicant indicated in its founding affidavit that, should the respondent raise any genuine dispute of fact in its answering affidavit, the applicant reserves the right to apply to court for the application to be referred for evidence or for trial. The respondent in its answering affidavit argues that the applicant should have anticipated the factual disputes in this matter.
- [5] In its founding affidavit, the applicant contends that the respondent only achieved milestone 4 despite the applicant having paid for milestone 8 and a portion of milestone 9. The respondent in its answering affidavit denies this and argues that it has achieved milestone 8 and delivered 3 preproduction models. This is denied by the applicant in its further replying affidavit stating categorically that the 3 preproduction models were neither produced nor delivered by the respondent. In addition to these disputes of fact, another dispute is whether the respondent has transferred its rights to the design to the applicant.

FILING OF FURTHER AFFIDAVIT

- [6] As per applicant's request to court, its further affidavit is accepted into evidence and its contents are considered to be part of the evidence before court.

COUNTER-APPLICATION BY RESPONDENT

- [7] The respondent decided to submit to court a counter-application calling for the following prayers:

"1. The application and counter-application be referred to trial.

2. In the alternative to prayer 1: -

2.1 The design of the respondent's automatic grenade launcher capable of firing 40x53mm ammunition, rate of fire 350-500rpm, muzzle velocity 240m/s and maximum range of 2200m vest with the respondent.

2.2 The applicant is ordered to pay the respondent the amount of R8 330 600.00, together with interest in terms of section 1 of the Prescribed Rate of Interest Act 55 of 1975 from the date of service of this counterclaim to the date of payment;

2.3 Cost on the scale of attorney and client;

2.4 Further and/or alternative relief."

APPLICANT'S REACTION TO THE COUNTER-APPLICATION

- [8] The applicant opposed the counter-application and persists with its claim against the respondent in the main application.
- [9] The applicant furthermore submits that the counterclaim be dismissed with costs, including the costs consequent upon the employment of two counsel, where so employed.

LEGAL PRINCIPLES

- [10] As far back as 1949, in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,¹ the courts have held that the crucial question is whether there is a real

¹ 1949 (3) SA 1155 (T).

dispute of fact. The principal ways in which disputes of fact arise are when: The respondent denies material allegations made in the applicant's founding affidavit and further produces positive evidence to the contrary in the answering affidavit; the respondent admits the facts and evidence in the applicant's founding affidavit, but alleges additional facts and evidence that the applicant disputes; the respondent alleges that he has no knowledge of the facts deposed to in the founding affidavit and puts the applicant to the proof of those facts; and the respondent states that he can lead no evidence to dispute the truth of the applicant's statements but puts the applicant to the proof thereof by oral evidence subject to cross-examination.

- [11] In the case of *Wightman t/a JW Construction v Headfour (Pty) Ltd And Another*,² 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.*"

² (2008] (3) SA 371.

- [12] The provisions of Rule 6(5)(g) of the Uniform Rules of the 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).
- [13] In *Fakie NO v CCII Systems (Pty) Ltd*,³ the approach to contradictory affidavits was clarified: *"That conflicting affidavits are not a suitable means for determining disputes of fact has been a doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials (my emphasis). More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be "a bona fide dispute of fact on a material matter". This means that an uncreditworthy denial, or a palpably implausible version can be rejected out of hand without recourse to oral evidence (my emphasis). In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is "fictitious" or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."*

GENERAL RULE

³ [2006] ZASCA 52; 2006 (4) SA 326 (SCA).

- [14] In any claim, the decision to be made up front is whether to proceed by way of action or application procedure. In *Room Hire v Jeppe Street Mansions supra*, it was decided that, as a general rule, the choice between the procedures depends on whether a *bona fide* material dispute of fact should have been anticipated by the party launching the proceedings.
- [15] When such a dispute is anticipated, a trial action should be instituted. Motion proceedings are permissible in order to avoid the delay and expense involved in trials.
- [16] It follows, from this general rule, that motion proceedings should not be instituted in respect of unliquidated claims; matters in which it is anticipated that a material dispute of fact will arise; or claims for divorce.
- [17] Notwithstanding the rule regarding anticipated disputes of fact, there are certain types of proceeding in which applications should always be used: Insolvency proceedings; where a party seeks urgent relief; or where legislation so dictates.
- [18] Between these two extremes, the party suing has the choice between an action and an application; his only limitation in regard to an application is the anticipation of a real dispute on any material question of fact.
- [19] This principle is valid only for an application for final relief (such as an application for the payment of money, or for the vindication of an article) or for a final interdict.
- [20] The party suing (the applicant) is *dominus litis*; he chooses the procedure to be used. It must be appreciated that it is inherently unfair on the respondent to be brought to court in an application where there are disputes of fact and when he does not have the opportunity of giving *viva voce* evidence before a judge who is trained in the art of evaluating that evidence and observing his demeanour.

- [21] If the factual dispute is extensive or complicated, the court may refer the matter to trial. The result is that the application is converted into a trial action, where oral evidence may be led.

ANALYSIS

- [22] The factual disputes in this matter are extensive and complicated. The applicant underestimated the extent of the factual disputes when it said in its founding affidavit that *"only the legality of the termination of the contract is in issue as the disputes are legal and not factual."* It is noted that the applicant foresaw no genuine factual disputes between the parties on the core issues of this application. Be that as it may, the applicant indicated in its founding affidavit that, should the respondent raise any genuine disputes of fact in its answering affidavit, the applicant reserves the right to apply to court for the application to be referred for evidence or for trial. It is interesting that the applicant is now opposing the respondent's counter-application that is calling for the referral of the main application to trial.
- [23] There is a dispute of fact here where, on the one hand, the applicant seeks a declaratory order confirming that the contract was duly cancelled whilst the respondent, on the other hand, denies that the contract was duly cancelled by the applicant.
- [24] The applicant also seeks an order compelling the respondent to pay damages to the applicant in the aggregate of some of the amounts which the applicant had paid to the respondent before the cancellation of the contract. The respondent is of the view that the applicant is not entitled to any payment for damages. The respondent denies that the applicant is entitled to relief sought in the notion of motion.
- [25] There are many disputes of fact in this matter. In its founding affidavit, the applicant contends that the respondent only achieved milestone 4 despite paying for milestone 8 and a portion of milestone 9. The respondent in its answering affidavit denies this and argues that it has achieved milestone 8 and delivered 3 preproduction models to the applicant. This is denied by the applicant in its further affidavit stating categorically that the 3 preproduction

models were neither produced nor delivered by the respondent. In addition to these disputes of fact, another dispute of fact is whether the respondent has transferred its rights to the design to the applicant as the latter is denying it.

- [26] The respondent in its answering affidavit submits that the applicant should have anticipated the factual disputes as this matter cannot be adjudicated upon application and as such, should be referred to trial. I align myself with this sentiment.
- [27] I am convinced that the applicant's and the respondent's affidavits disclose that there are material issues in which there is a bona fide disputes of fact capable of being decided only after *viva voce* evidence has been heard.
- [28] Application proceedings are not recommended where a litigant foresees that his opponent will raise material disputes of fact in an answering affidavit in response to his founding affidavit.
- [29] If a material dispute of fact arises when comparing the founding and answering affidavits, the judge hearing the application will be faced with the following choices (see r 6(5)(g) of the Uniform Rules of Court for the High Court), which must be made in a judicious manner: Dismiss the application if the litigant who initiated the proceedings foresaw or ought reasonably to have foreseen, before initiating the proceedings, that a dispute of fact would arise; refer the material dispute of fact to oral testimony if it can be disposed of easily and speedily without affecting any other issues in the case; or refer the entire matter for trial.
- [30] By way of summary, only real, genuine or *bona fide* disputes of fact will be entertained by the courts before a decision is made to dismiss an application or refer it to trial or for oral evidence on a limited issue. Bare denials are not sufficient to establish disputes of fact, unless the facts in question are peculiarly in the knowledge of the applicant and the respondent has no knowledge of those facts.

[31] In order for a litigant to argue that disputes of fact were reasonably foreseeable, those disputes must be set out in the answering affidavit, which must set out the basis on which it is alleged that the disputes were reasonably foreseeable. This was done by the respondent *in casu*. The existence of letters and e-mails or other court proceedings based on similar facts between the same parties, in which the alleged disputes of fact were raised, will be insufficient.

CONCLUSION

[32] In determining this matter, I must be guided by the well-established principles referred to above applicable to applications of this nature. In this regard, I need to draw certain inferences and weigh probabilities as they emerge from the parties' respective submissions, affidavits, heads of argument and oral submissions by parties' counsel.

[33] If it appears that the applicant must reasonably have foreseen that a material dispute of fact would arise at the time the application was brought, but the applicant nevertheless proceeded by way of application, the court may dismiss the application with costs. This is perhaps the most drastic course of action open to the court.

[34] Even in such a circumstance, the court is not obliged to dismiss the application. It has a discretion to decide on one of the other options, and in addition to penalise the applicant with a costs order.

[35] The trial scope is wider and in a case like this one it will be in the interests of justice for the issues to be referred to trial for full and complete adjudication of all of them in order to avoid a piecemeal process which may lead to endless litigations.

[36] In my view, the matter must be referred to trial as there are a lot of issues which are intensive, complex, overlapping and have a material impact in the entire application.

[37] Referral to trial will assist the parties to adjudicate over the matter in its entirety.

COSTS

[38] I have considered both parties' argument relating to the costs of this application.

[39] I intend to order that the costs of the main application and counter-application are reserved for determination by the trial court at the end of the trial.

ORDER

[40] **In the circumstances, I make the following order:**

[40.1] The main application and counter-application are hereby referred to trial.

[40.2] Costs of the main application and counter-application are reserved for determination by the trial court at the end of the trial.


T E JOYINI
ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

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Dates of Hearing: 22 and 23 January 2025

Date of Judgment: 17 February 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 17 February 2025 at 10h00.