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

Case no: **D6021/2023**

In the matter between:

W[...] M[...] T[...]	**APPLICANT**
and	
M[…] T[…] 9[…] (Pty) Ltd	**FIRST RESPONDENT**
T[…] C[…] (P[…]) L[…]	**SECOND RESPONDENT**
B[...] C[...] B[…]	**THIRD RESPONDENT**

Coram: Mossop J
Heard: 29 April 2025
Delivered: 7 May 2025

ORDER

The following order is granted:

1. The application is referred for the hearing of oral evidence on a date to be fixed by the registrar, on the following issues:

(a) Was the oral agreement alleged by the applicant concluded or not?

(b) If it was concluded, upon what terms?

(c) Are the first and second respondents indebted to the applicant in the amounts of R1 013 862.90 and R654 000, respectively?

2. The evidence shall be that of any witnesses whom the parties, or any of them, may elect to call, subject, however, to what is provided in paragraph 3 hereof.

3. Save in the case of the applicant and respondents, whose evidence is set out in their respective affidavits filed of record, neither party shall be entitled to call any witness unless:

(a) he, she or it has served on the other party, at least 15 days before the date appointed for the hearing (in the case of a witness to be called by the applicant) and at least 10 days before such date (in the case of a witness to be called by the respondents), a statement wherein the evidence to be given in chief by such a witness is set out; or

(b) the court, at the hearing, permits such a person to be called despite the fact that no such statement has been so served in respect of his or her evidence.

4. The parties may subpoena any person to give evidence at the hearing, whether such a person has consented to furnish a statement or not.

5. The fact that a party has served a statement in terms of paragraph 3 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

6. The provisions of Uniform rules 35, 36, 37 and 37A shall apply to the hearing of oral evidence.

7. The costs of this application are reserved for determination by the court hearing the oral evidence.

JUDGMENT

MOSSOP J:

Introduction

[1] The applicant and the third respondent are married to each other but are in the throes of a protracted divorce. Having physically separated from each other in October 2021, and there being no minor children born of their marriage, they have yet to formally finalise their judicial separation.[1] The principal issue between them would appear to be an inability to agree on the patrimonial consequences of their divorce. That notwithstanding, the applicant remains of the opinion that:

> 'The facts in support of this application are not in dispute and I am advised that application proceedings are therefore appropriate.'

[2] Some concern over the accuracy of that statement must inevitably arise, when it is appreciated that the application papers are contained within six separate volumes and exceed 600 pages and that the applicant has, improbably, delivered a total of seven affidavits in support of his claim.[2]

The relief claimed

[3] The applicant seeks two money judgments against the first and second respondents, both of which are private companies. The first respondent conducts a business that trades under the name of 'V[…] S[…] B[…]' situated at the Shelley Centre on the lower south coast of KwaZulu-Natal. The second respondent conducts a business that trades under the name of 'V[…] 4[…]' from the South Coast Mall which, like the Shelley Centre, is also in Shelley Beach.

[4] The applicant and the third respondent are the guiding minds behind the first and second respondents (collectively referred to as 'the two companies'). The third respondent runs the administrative side of the two companies, including the financial and bookkeeping operations, whilst the applicant was, but no longer is, the physical presence in the two companies. The applicant apparently withdrew from the affairs of the two companies because of the disintegration of his marriage to the third

---

[1] They are married out of community of property subject to the accrual system.
[2] Objection cannot be taken to the filing of some of the affidavits, for the applicant was entitled, as of right, to deliver them. But a supplementary founding affidavit and four supplementary affidavits, ostensibly updating the applicant's claim, were also delivered without the leave of the court as required by Uniform rule 6(5)*(e)*.

respondent. His withdrawal, and the terms upon which he did so, is the event that has sparked the dispute between him and the third respondent.

[5] The applicant asserts that he and the third respondent, who at that stage acted on behalf of the two companies,[3] concluded an oral agreement (the oral agreement) in terms of which he would relinquish his involvement in them but would continue to be paid as if he remained in their service.

[6] Initially, the applicant sought payment of R2 179 748.36 from the first respondent and payment of R715 500 from the second respondent. Each of these amounts was made up of an amalgam of the amount due to the applicant arising out of the conclusion of the oral agreement, together with an additional amount in respect of which the applicant claimed he had been underpaid by the first and second respondents respectively whilst he was still involved with them.

[7] The applicant, ultimately, was forced to vary the amounts that he claimed when the third respondent pointed out in an answering affidavit delivered on behalf of the two companies that his calculations contained a fundamental error. The error was that the accountant, who calculated the amounts allegedly due to the applicant, had used the incorrect financial statements to do so. When the correct financial statements were considered, the applicant discovered that, in fact, he had not been underpaid as he had initially claimed. Having acknowledged the error, the applicant reduced the amount that he alleges that the first respondent owes him to R1 013 862.90 (a reduction of R1 165 885.46) and reduced the amount that he alleges the second respondent owes him to R654 000 (a reduction of R61 000). I shall refer to these amounts collectively as ‘the reduced amounts’.

The issues

[8] The issue of the underpayment has obviously been resolved by the concession and amendment made by the applicant. The only issues that then remain

[3] After delivering the first and second respondent’s answering affidavit, the third respondent sought, and was granted, leave to intervene in the application as the third respondent on 21 August 2023 by an order of Ngqanda AJ.

are whether the oral agreement was factually concluded on the terms proposed by the applicant and whether the two companies are indebted to the applicant in the reduced amounts.

The applicant's case

[9] The applicant contends that the oral agreement was concluded by him and the third respondent:

> '… during or about the end of October 2021/early November 2021.'

[10] The applicant apparently cannot be more precise than that. I find that to be surprising because I would have anticipated that he would be certain about the date upon which the agreement upon which he sues was struck. I accordingly asked Mr Phillips SC, who appears for the applicant, about this and inquired whether it was the applicant's case that the agreement was concluded *en bloc* on a specific date or whether it was arrived at by way of a process of accretion over a period of several days or weeks. Mr Phillips could not provide the necessary certainty to this rather basic, but nonetheless important, issue. I am consequently not able to confidently state by when the applicant asserts that the oral agreement was concluded and was in place. This has consequences when considering the correspondence put up by both parties as annexures, as will become apparent later in this judgment. I say this because it raises the question of whether this correspondence, which was largely exchanged at the beginning of November 2021, is evidence of the already concluded agreement or is simply evidence of the incipient process of arriving at an agreement? In other words, does the correspondence reveal that the agreement has been concluded or does it reveal that it is in the process of being concluded?

[11] The terms of the oral agreement, according to the applicant, were:

> '19.1 I would cease to be involved in the operations of both franchises but would continue to be a director;
>
> 19.2 the respondents would continue to pay me the same amounts they had been paying me by way of salary and benefits, for as long as I retained my beneficial interests in the respondents …'

[12] It will be observed that this explanation does not link the applicant's entitlement to the salary and benefits to a time period. Instead, it is linked to the applicant continuing to possess a beneficial interest in the two companies. If this was so, and if, for example, the applicant declined to relinquish his beneficial interests in the two companies, he would, on this version, perpetually be entitled to continue to receive his salary and benefits.

[13] Later in the founding affidavit, the applicant appears to vary this proposition when he sums up the effect of the oral agreement as follows:
'Although I would not be actively involved in their operations anymore, and this would thus not be employment income, I would receive the sum each month by virtue of the contract between us, and as an interim measure while we negotiated the division of our business interests.'

[14] I am accordingly uncertain which of the two statements made by the applicant correctly reflects the terms of the oral agreement that he alleges was concluded. The applicant provides no further specificity as to its terms and neither does he state, for example, where the oral agreement was concluded or who, if anyone, was present when it was concluded.

[15] The applicant claims that proof of the oral agreement may be found in certain electronic communications exchanged between himself and the third respondent after it had been concluded. Six emails and a single WhatsApp message are attached to the founding affidavit, presumably as proof of this proposition.

[16] In the first of these communications, a WhatsApp message, which is dated 7 November 2021, the third respondent stated the following:

> 'Bottom line is I agreed u keep your shares, but in addition to the annual dividends I agree to also pay your current salary and cost to company expenses. That is way more than generous and way more than u would earn in interest if u sold your shares. Ripping the company credit card was never part of that. Small expenses, maybe. Buth then u never put limits on anything. So maybe we should scrap the card entirely if this is the way u are going to abuse it.'

[17] I digress to briefly mention what prompted the reference to 'ripping the company credit card' in the WhatsApp message. The applicant apparently used a credit card associated with the two companies to pay for a personal trip to Cape Town with a female companion[4] that cost the two companies approximately R50 000. This was, ex facie the correspondence referred to when considering the respondents' defence, a calamitous event that severely impacted upon the parties' attempts to resolve their differences.

[18] The applicant states in his founding affidavit that his understanding was that the:

> '… use of the company credit card for travel would continue to be a benefit, as it always had been whilst I was employed by the respondents, for as long as I had beneficial interests in them. Bridgitte (sic) complained that my credit card use was limited to "small expenses" and that the trip to Cape Town was too costly. She therefore suggested that we "scrap the credit card entirely".'

It would appear from this explanation that the arrangement between the applicant and third respondent, whatever it was, was fluid and not definite.

[19] Immediately after the message of 7 November 2021, the third respondent went on to say the following to the applicant:

> 'I struggle to see why u cannot understand that me, being a working partner, and u being retired, that u think you are still entitled to the same benefits as when you were supposedly giving 50% input, which u haven't for years. When we were a couple I accepted it. We no longer are a couple. Just formal partners. U are now a retired partner whilst I take on both our responsibilities. That comes with benefits u are not entitled to.'[5]

[20] The next day, 8 November 2021, the applicant sent an email to the third respondent and stated the following:

---

[4] Described by the third respondent multiple times as being the applicant's 'floozie'.

[5] The last three lines of this message are not included in the copy of the message put up by the applicant. The complete message has, however, been put up by the respondents as an annexure to their supplementary answering affidavit and it is, therefore, quoted in full here.

> ‘Based on what we have discussed over the weekend and your WhatsApp last night I suggest we get Jose to structure a proper legal agreement, then there can be no ambiguity in terms of how the retirement package is structured.
> We agreed to certain things at the lunch at Ocean Basket, however our individual interpretation of those points is clearly different.
> Unless we have something in black and white that we are both comfortable with and it’s a win win binding agreement, there will be no peace going forward…’

[21] What was discussed, and what was apparently agreed upon, was not specified. But the reference to each party having its own interpretation of what had been agreed upon is, in my view, significant, as is the mention of the fact that a ‘proper legal agreement’ needed to be drawn up. Mr van Niekerk SC, who appears for the respondents together with Mr van der Veen, submits that the applicant’s description of what had occurred made it abundantly clear that there had been no consensus ad idem. That submission is attractive because it seems that this is what the wording employed would tend to indicate.

[22] The same day, 8 November 2021, the third respondent replied by email and said that:

> ‘Also since you are now retired, and have 365 days of the year to travel, I’m not going to agree to fund the travel.’

This appears to evidence an ongoing process of arriving at a binding and all-inclusive agreement, which appears not yet to have been achieved.

[23] Nine minutes later, the third respondent dashed off another email to the applicant, which reads in full as follows:

> ‘Anything I say you can use, like the company credit card, you abuse and go and blow R50,000 in two days.
> So even saying you can use it for entertainment expenses, I have no doubt I will be seeing lunches or sushi dinners coming through costing thousands.
> Since I cannot rely on you to be fair and reasonable then we need to take that off the table.
> Remember I’m the one now doing both our jobs, whilst you go off to play.

> How on earth can you believe you are still entitled to the same benefits totally as before? Which we did as a couple, and not separately.'

[24] Still on 8 November 2021, the third respondent directed another email to the applicant in which she had the following to say:

> 'If you wish to include a certain travel and accommodation allowance per year, and an entertainment allowance per year, then I'm happy to look at that.
>
> But going off straight after announcing your retirement, and before our meeting, and blowing 50k on a 5 day trip, was just underhanded and tantamount to thievery.
>
> If you cannot get into your head the difference between someone being "retired" and free to play the rest of their days, vs someone now having to do both jobs and run 2 businesses, then perhaps it's better you sell your shares; because then the difference will be black and white clear to you.'

[25] On 9 November 2021, the third respondent sent the following message to the applicant by email:

> 'Retiring on any kind of package is now off the table. You have proven that you will just abuse it, and I highly doubt you are capable nor willing to stick to any agreement. Be it legal and binding or not.
>
> You only want one for me to abide to.
>
> Having retired now all that needs to be clarified as whether you sell your shares, or remain a shareholder and earn dividends. My choice would be a clean break and we can all get on with our lives.'

[26] Rather than evidence a complete and binding agreement, the language employed in this message continues to indicate an ongoing process as the applicant and third respondent attempt to arrive at a mutually acceptable agreement.

[27] As mentioned, the correspondence just considered was attached to the applicant's founding affidavit. It is, however, not the only communications to which he referred. In his lengthy supplementary replying affidavit, he attached further electronic correspondence. I do not intend to examine all the messages but shall confine myself to considering but a few of them.

[28] On 9 November 2021, the applicant sent the following electronic communication to the third respondent:

> 'I will be back at work on Monday until we have a settled agreement. Like I said you don't get decide (sic) on your own. It has to be fair and a win win agreement.'

The applicant appears in this message to accept that a final agreement had not been concluded.

[29] That message prompted the following response from the third respondent less than two minutes after she received it:

> 'Wasting your time. A win win for u means u get to win and everyone else loses. U can be where you want. U still won't be earning a salary.'

[30] Five days later, on 14 November 2021, the applicant informed the third respondent that:

> 'I'm not doing anything until we have concluded a deal with Jose …'

[31] The gentleman referred to as 'Jose' (also mentioned in the applicant's WhatsApp message of 8 November 2021) is a reference to a Mr Jose Delgado (Mr Delgado), apparently an attorney who advises both the applicant and third respondent and who consequently appears to enjoy the trust of both.

[32] Precisely three minutes later, the third respondent responded to that message in the following manner:

> 'Well that's just the settlement. Everything else was official from 1 Nov. so the only difference is we settle on a payout value, or u remain a silent partner who owns shares but not active in the day to day business/either way your costs fall away from the business immediately. Only difference is that should u retain your share u would be entitled to a dividend should the company have funds to declare it. This would be subject to dividends tax.'

The respondents' case

[33] The respondents assert that the oral agreement contended for by the applicant was not concluded. They contend that there are significant disputes of fact that simply cannot be resolved on the papers and submit further that the applicant ought to have appreciated that this would be the case at the outset. If that had been realised, so they reason, the applicant would have had to proceed by way of action and not by way of motion. Because he did not do so, they submit that the application should be dismissed, alternatively that it should be referred to trial or to oral evidence.

[34] The respondents rely on some of the correspondence put up by the applicant, to which reference has already been made in this judgment, in support of the fact that no consensus was ever achieved, and which dispels the notion of the conclusion of the oral agreement relied upon by the applicant. Explaining why she would not have agreed to the terms proposed by the applicant, the third respondent submits in her answering affidavit that those terms would mean that she would have assumed the burden of conducting all the business activities of the first and second respondents, while the applicant would continue to be fully rewarded on the same scale as he had been rewarded at the moment of his departure from the first and second respondents, but would not be required to do any work in order to receive those benefits. Implicit in her explanation is the contention that she would not have agreed to this.

[35] Yet, there is, nonetheless, evidential material that this is what she may have agreed to. Mr Phillips drew my attention to two emails sent by the third respondent to multiple recipients, including the applicant and Mr Delgado. I consider each of them.

[36] The first email is dated 4 November 2021 and was addressed to Mr Delgado, with other persons copied in. It thus preceded the emails put up by the applicant to which I earlier referred in this judgment. It reads as follows:

> ‘I am writing to inform you that W[...] and I have come to an agreement going forward that he will retire and retain his shares, and continue to earn what he currently earns whilst consulting as and when we need him.’

[37] The second email is dated the next day, 5 November 2021, and in it the third respondent, essentially, repeated her message of the previous day. The email was primarily addressed to Mr Delgado, a part of which reads as follows:

> 'W[...] and I have agreed that he will retire, on his current package and all expenses covered, and I will run the businesses. He may consult from time to time with regards to security issues, etc.'

Mr Phillips referred to these two emails collectively as being the 'smoking gun emails.' It is a turn of phrase that I shall mimic.

[38] The smoking gun emails, on the face of it, would seem to conform with what the applicant asserts. However, the respondents assert that the context in which these two messages were sent must be considered and understood. To establish that context, the respondents applied for leave to deliver a supplementary answering affidavit. That application was opposed, but the respondents ultimately succeeded in obtaining an order from Radebe J on 8 November 2024 permitting them to do so. What is now discussed is the electronic communications put up by the respondents consequent upon being granted leave to deliver that supplementary affidavit. As with the annexures to the applicant's papers, I do not intend examining every message attached by the respondents but will only refer to those that I consider to be significant and I shall consider them in chronological sequence. Unless indicated that the communication is in the form of an email, it must be assumed that what is being referred to is a WhatsApp message.

[39] Fifty-four pages of WhatsApp and email communications were put up by the respondents, almost entirely conducted between the applicant and the third respondent. The overriding impression left by that sequence of communications is the intense anger of the third respondent at the conduct of the applicant. It would not be an exaggeration to state that she displays a dismissive contempt for the applicant. The language employed by both parties is scandalous and intentionally insulting. I shall not repeat any one of the unpalatable slurs traded between the two of them. The third respondent was the party primarily guilty of this but the applicant himself also descended to her level from time to time. The communications make for difficult reading, for in my estimation, no two human beings should speak so disrespectfully of each other. But the unadulterated level of aggression exhibited in

this series of communications causes one to wonder how any agreement could possibly have been concluded between the applicant and the third respondent.

[40] On 7 November 2021, the third respondent stated the following to the applicant:

> 'U may be a free agent and retired, but is (sic) doesn't mean u get to have six luxury trips a year on the business money.'

To this, the applicant responded as follows:

> 'That's why I say… Let's chat and sort out what's going to be agreeable.'
>
> This response, again, tends to indicate an ongoing process of working towards an agreement.

[41] Tellingly, the applicant, in a message sent on 8 November 2021, made the following comment:

> 'I have also said in writing that nothing is final until the i's are dotted and the t's are crossed… Read back on your WhatsApp.'
>
> That elicited the following response from the third respondent:
>
> 'My offer to cover your your (sic) package, current expenses and dividends was more than generous. It was almost charity. Because I thought u would regret it in a year. That offer is now withdrawn. Because u are too greedy. U want your cake and eat it too. As usual.'

[42] On 8 November 2021, the third respondent sent an email to the applicant. The email reads, in part, as follows:

> 'I was clear as to the fact I would run both businesses, and that you would retire, that you would continue to receive your current salary, dividends, and the expenses currently covered will continue to be covered as long as you hold onto your shares.
>
> I believe you took this to mean that all the benefits we both received as working partners and a married couple, you would currently as a retired partner and no longer a couple, continue to be entitled to. This is not what I meant and would not result in a win win.'

[43] On 16 November 2021, the applicant sent the following email to the third respondent:

> 'Good morning … may I make a suggestion. You clearly don't want me in the stores, I will stay out the shops on condition that my salary is paid in full until we finalise my exit. I will not spend on the credit card. We can agree on 2 tanks of petrol a month. We are going to have to transfer cell and medical eventually, I have no problem doing it now, let's just do it amicably.'

[44] I confess that I do not understand why the applicant made this proposal. On his version presented to the court, he had already concluded the oral agreement with the third respondent. Why then did he feel the need to propose something that, on his version, had already been agreed?

Analysis

[45] There is very little information advanced by the applicant as to the circumstances under which he alleges that the oral agreement was concluded. The oral agreement is simply presented by him as a fact without any specific details as to its genesis. Where an oral agreement is alleged, details are important. Where the oral agreement is disputed, details may be persuasive in establishing the likelihood of the agreement being concluded. Yet those details are lacking in this instance.

[46] The applicant appears to believe that the electronic communications that he attached to the founding affidavit bolster his claim and provide extraneous evidence of the fact of the conclusion of the oral agreement. He also places great weight upon the smoking gun emails and submits that they conclusively reveal the falsity of the third respondent's version. What he does not acknowledge, however, is that he put up those two emails in his supplementary replying affidavit and not in his founding affidavit. In *Business Partners Ltd v World Focus 754 CC*,[6] the following was observed:

> '[8] It is trite that in application proceedings the affidavits constitute not only the pleadings but also the evidence. Equally trite is that an applicant must

[6] *Business Partners Ltd v World Focus 754 CC* 2015 (5) SA 525 (KZD) paras 8-9.

make out his case in his founding affidavit and that he must stand or fall by the allegations contained therein. It follows therefore that the applicant must set out sufficient facts in his founding affidavit which will entitle him to the relief sought.

[9] The general rule is that the court will not permit an applicant to assert new facts in his replying affidavit which should have been set out in his founding affidavit. However, this rule, like all general rules, is not without exceptions.'

[47] On the evidence before me, there is scope to advance an argument that an oral agreement was concluded and, also, that it was not concluded. The smoking gun emails would point toward the former proposition On the other hand, the emails of the applicant of 7, 8 and 16 November 2021 would tend to point in the direction of an agreement not yet having being concluded.

[48] The applicant complains that the third respondent, who ordinarily controls the finances of the two companies, has refused to pay him anything. That is the very reason why he has approached this court. On the applicant's own understanding of the papers, there is a dispute over whether he is entitled to receive any payments. He must also have comprehended that the reason such a dispute exists is because the respondents deny the conclusion of the oral agreement upon which he relies. For the applicant to therefore insist, as he does, that there is no dispute of fact is, in my view, incorrect.

[49] I do not lose sight of the possibility that given the state of their relationship, it is almost inevitable that a dispute of some form or another would arise between the applicant and the third respondent. The existence, generally, of a dispute is, however, not insufficient to warrant the dismissal of an application. What must be appreciated by an applicant before launching an application is that there is a likelihood of a serious

dispute of fact arising.[7]

[50] Having considered the competing submissions, I am satisfied that there is a dispute of fact that does not permit this matter to be determined on the papers. How the applicant could have thought it that the obvious dispute of fact could have been sidestepped is somewhat mystifying. There is no basis upon which this court, or any other court for that matter, on these voluminous papers, could possibly hope to resolve the issue of whether the oral agreement was concluded or not and, if it was concluded, upon what terms. Only the presence in the witness box of the two protagonists would permit this to be determined.

[51] Where final relief is sought on motion, as is the case in this instance, the general rule is that it will only be granted if those facts as stated by the respondent, together with those facts stated by the applicant that are admitted by the respondent, justify the granting of the application, unless it can be said that the denial by the respondent of the facts alleged by the applicant is not such as to raise a real, genuine or *bona fide* dispute of fact. In other words, the approach formulated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[8] must be applied. Applying that test, I can make no finding in favour of the relief claimed. The submissions by the third respondent and a consideration of the documentation that has been put up, satisfy me that her opposition to the relief claimed is *bona fide* and cannot simply be dismissed out of hand as being far-fetched or clearly untenable.

[52] The issue therefore is what should then become of the application? The options available to a court in such a situation are set out in Uniform rule 6(5)*(g)*, which reads as follows:

> '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 aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end

[7] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162 and 1168; *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345 (A) at 350A.
[8] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-C.

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.'

[53] The Uniform rules accordingly point to three options that are available to a court where a serious dispute of fact arises.[9] In making the choice of which option to follow, I must consider all the facts and attempt to arrive at a just result.

[54] The respondents urge me to dismiss the application on the basis that the applicant must have appreciated that there was a significant dispute of fact prior to him launching his application. There is an argument to be made for this result. The wording of the emails of 4 and 5 November 2021, however, in my view may have led the applicant, at least initially, to the belief that an agreement had been concluded. What was intended by the third respondent in those two emails will need to be carefully and thoroughly explained by her. In my view, the probabilities are roughly evenly balanced and that assessment dictates what should become of the application.

Conclusion

[55] The dispute of fact that has arisen is, in my view, both real and *bona fide*. The issues that require determination are relatively crisp:

(a) was the oral agreement concluded or not?

(b) if it was concluded, upon what terms?

(c) are the first and second respondents required to pay the applicant the revised amounts?

[56] I am of the view that the interests of justice would best be served by referring the matter to oral evidence on the abovementioned grounds. In doing so, I consider that to be a convenient method of determining the dispute between the parties. I am unwilling to dismiss the application because of the wording of the two emails of 4 and

[9] *Red Coral Investments 117 (Pty) Ltd v Bayas Logistics (Pty) Ltd* [2020] ZAKZDHC 56 para 21; *Repas v Repas* [2023] ZAWCHC 24 para 17.

5 November 2021 and I can see no purpose in ordering the matter to trial, given the limited scope of the issues in dispute and the inevitable delay and increase in costs that the granting of such an order will occasion.

Order

[57] I accordingly grant the following order:

1. The application is referred for the hearing of oral evidence on a date to be fixed by the registrar, on the following issues:

(a) Was the oral agreement alleged by the applicant concluded or not?

(b) If it was concluded, upon what terms?

(c) Are the first and second respondents indebted to the applicant in the amounts of R1 013 862.90 and R654 000, respectively?

2. The evidence shall be that of any witnesses whom the parties, or any of them, may elect to call, subject, however, to what is provided in paragraph 3 hereof.

3. Save in the case of the applicant and respondents, whose evidence is set out in their respective affidavits filed of record, neither party shall be entitled to call any witness unless:

(a) he, she or it has served on the other party, at least 15 days before the date appointed for the hearing (in the case of a witness to be called by the applicant) and at least 10 days before such date (in the case of a witness to be called by the respondents), a statement wherein the evidence to be given in chief by such a witness is set out; or

(b) the court, at the hearing, permits such a person to be called despite the fact that no such statement has been so served in respect of his or her evidence.

4. The parties may subpoena any person to give evidence at the hearing, whether such a person has consented to furnish a statement or not.

5. The fact that a party has served a statement in terms of paragraph 3 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

6. The provisions of Uniform rules 35, 36, 37 and 37A shall apply to the hearing of oral evidence.

7. The costs of this application are reserved for determination by the court hearing the oral evidence.

MOSSOP J

APPEARANCES

Counsel for the applicant:	Mr D Phillips SC
Instructed by:	Strauss Daly Attorneys 9th Floor Strauss Daly Place 41 Richefond Place Ridge 5 Umhlanga
Counsel for the respondent:	Mr G O van Niekerk SC with Mr J P van der Veen
Instructed by:	S Stander and Associates Suite 1 Diamond Centre Manaba Locally represented by: Fathima Rajah and Company No 9 Bishop Road Morningside Durban