IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case Number: **453/2023**

In the Application between:

ECO TRADES (PTY) LTD **APPLICANT**

and

TRUSTEES FOR THE TIME BEING OF THE DA PAUW TRUST **1ST RESPONDENT**

TRUSTEES FOR THE TIME BEING PAVONIA TRUST **2ND RESPONDENT**

DANIEL AUGUST PAUW N.O. **3RD RESPONDENT**

CORAM: **BOONZAAIER AJ**

HEARD ON: **1ST FEBRUARY 2024**

DELIVERED ON: **29th FEBRUARY 2024**

JUDGMENT

INTRODUCTION:

[1] This is an application for vindicatory relief by way of motion proceedings.

[2] The issues at stake are the following:

i) the question of jurisdiction of this court;

ii) the applicant to make out a case for the final relief sought, based on the *rei vindicatio.*

iii)The Applicant has approached the court on motion proceedings with the knowledge of a foreseeable factual dispute and thus the application stands to be dismissed with costs

[3] The subject of the relief sought (‘the *solar system* “) has been affixed to property on a farm in the North West Province.

FACTUAL BACKGROUND:

[4] The Applicant, is a company with principal place of business, alternatively, registered address situated at 4 Soutpansberg Avenue, Spitskop, Langenhovenpark, Bloemfontein and with sales offices situated at 109 Elias Motsoaledi Street, Langenhovenpark, Bloemfontein.

[5] First Respondent is the Trustees for the Time Being of the DA Pauw Trust, Second Respondent is the Trustees for the Time Being of the Pavonia Trust, both not resident within the courts’ jurisdiction.

[6] The Third Respondent passed away. The parties conceded to the fact

that the deceased' s son had the same initials as his father, hereinafter called ("DA Pauw"). The latter was also the person who is the deponent in the founding affidavit of the First and Second Respondents. He is a trustee of both the First and the Second Respondent and he acted as representative of the First and Second Respondents.

[7] The Applicant delivered the solar system to the farm Bothmasrust, allegedly area Hendrina, which farm is registered in the name of the First Respondent and the solar system is presently in the possession of the First and Second Respondents jointly in the district of Vryburg, North West. ["NW"]

UNDISPUTED FACTS:

[8] It is undisputed that the solar electricity system is still in existence and is identifiable.

[9] It is also not disputed that the First Respondent has failed to pay the agreed purchase price to the Applicant.

[10] It is common cause between the parties that the Applicant sent a quotation to the First Respondent and the deponent to the Respondent's answering affidavit ("DA Pauw") appended his signature thereto. Annexure **"FA2"**

APPLICANT`S CASE:

[11] In terms of the quotation, ownership of all goods delivered and installed by the Applicant remained vested in the Applicant until such time as the purchase price, R 1,534.100.00 was paid in full. DA Pauw signed the said quotation thereby accepting the Applicant's terms and conditions contained therein at the Applicant`s business premises in Bloemfontein. In these premises the agreement was finally concluded between the Applicant and the First Respondent at Bloemfontein.

[12] It is also the Applicant's case that the Applicant sold the solar system consisting of the movable assets to the First Respondent (represented by DA Pauw) in terms of a partially written, partially verbal agreement (*"the agreement"*).

[13] Mr. Van der Merwe, counsel for Applicant, submitted that in terms of the agreement, the Applicant retained ownership of the solar system.

[14] The Applicant's claim against the First Respondent is thus founded in contract and is premised also on the *rei vindicatio* whereas the Applicant's claim against the Second Respondent is purely vindicatory.

[15] Mr. van der Merwe directed the Court's attention to the terms set out in the quotation [Annexure **"FA2"]** which terms he submitted were accepted by the First Respondent, due to the signature of DA Pauw on the quotation.

[16] The Applicant is therefore owner of the solar system, is entitled to take possession thereof as against the First and Second Respondents who in turn, have no contractual right or other right in law to remain in possession thereof.

RESPONDENTS' CASE:

[17] Counsel for the First and Second Respondents referred the court to **Cordiant Trading CC v Daimler Chrysler Financial Services Pty Ltd** [1]where Jafta JA succinctly put it as follows:

> *"Plainly, what is meant in the above interpretation is that 'causes arising'… does not refer to causes of action but to all factors giving rise to jurisdiction under the common law."*

[18] Counsel argued that the issue is therefore whether the legal proceedings in this application can be said to have arisen within the area of jurisdiction of this court.

[1] (237/2004) [2005] ZASCA 50 [2006] ALL SA 103 (SCA)

[19] Respondents rely on what was stated in **Zokufa v Compuscan (Credit Bureau)**[2]

> *"[32] The legal proceedings are based on facts from which legal inferences may be drawn. These facts are often referred to as the 'jurisdictional connecting factors' and will continue to use this description when referring to these facts.*
> *[33] The approach generally in considering jurisdictional connecting factors is now, I believe, firmly established by the supreme Court of Appeal. The enquiry depends on (a)the nature of the proceedings; the nature of the relief claimed herein; or (c) in some cases, both on (a)and (b)."*

[20] In **Erasmus v Snyders**[3] it was held that:

> "*Jurisdiction is a license for an aggrieved individual to enter a court of law and persuade it that it has the power and competency to receive and determine his or her case. In the matter between Gallo Africa Ltd & others v Sting Music (Pty) Ltd & 7 others, Harms DJ supported by other members of the court opined as follows:*
>
> '*Jurisdiction means the power vested in a court to adjudicate upon, determine and dispose of a matter. Importantly, it is territorial. The disposal of a jurisdictional challenge on exception entails no more than a factual enquiry****, with reference to the particulars of claim, and only the particulars of claim, to establish the nature of the right that is being asserted in support of the claim.*** *In other words, jurisdiction depends on either the nature of the proceedings or the nature of the relief claimed or, in some cases, on both. It does not depend on the substantive merits of the case or the defence relied upon by a defendant*'" **(Own emphasis added).**

[21] First and Second Respondents argued that it is evident from above that the *onus* rests on the Applicant to prove if the cause of action arose wholly within the district.

[22] The First and Second Respondents also raised the issue of a material dispute of facts which they argued is clear from the papers.

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[2] 2011(1) SA 272 (ECM)
[3] Gauteng High Court of Appeal Case A 69/2021

[23] Mr. Jagga pointed it out that if one has regard to Annexure "**FA2"** it contains the following two pertinent conditions;

> "a. Eco Trades Full terms & Conditions of the Sale & Installation apply. The ownership of the goods delivered, installed and supplied by Eco Trades will remain vested in the Applicant until the purchase price has been paid in full.
>
> b. Payment terms are determined to be:
>
> i) upon order placement-30 %;
>
> ii) Material on site -40 %; and
>
> iii) Commissioning-30. %"

[24] Annexure **"FA5",** being a tax invoice of Eco Trade to DA Pauw states that 100 % payment needs to take place in advance and further no product will be released before payment is not released by the bank.

> "No products will be released before payment is not cleared by the bank."

[25] Hence the above stated documents leave no doubt that at the time of the invoice, there was already a deviation from the terms and conditions.

[26] Mr. Jagga submitted that from Applicant`s own documentation and policies it is clear that they delivered the solar system well aware that payment has not been effected. Applicant was aware of the fact that Europlaw, who was registered in Europe and who was supposed to finance the solar venture did not honor their promise for financial support to First and Second Respondents.

[27] It is the First and Second Respondents case that the Respondent's awaited financial assistance from Europlaw (as represented by attorney Hanno Bekker from Bloemfontein). This financial support was crucial to the First and Second Respondents to obtain the solar system.

[28] At the time of the conclusion of the agreement the Applicant was represented by Mr. Gerhard van der Linde and later Mr. Janco Lubbe. The Applicant does not reveal what this agreement entails. Mr Lubbe (the Applicant`s representative in Vryburg, NW) provided a written quotation to DA Pauw on 14 October 2020.The quotation itself does not denote a place where it was signed.

[29] The First and Second Respondent is therefore of the view that the quotation does not constitute a lawful or binding agreement and was not signed and accepted in Bloemfontein.

[30] The First and Second Respondents are adamant that the agreement was concluded in the area of Vryburg, NW.

[31] Argument advanced for first and Second Respondents makes it clear that the Applicant did not prove on its papers that it retained ownership.

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DISPUTED FACTS:

[32] It is disputed by the Respondents that the agreement concluded between the parties have been concluded in Bloemfontein.

[33] The parties also dispute the terms and conditions of both the verbal and the written agreements.

[34] It is a further dispute between the parties whether a dispute of facts presented that should have been foreseeable by Applicant.

TO CONSIDER:

[35] The court is to consider whether:

a) this court has jurisdiction to adjudicate the matter.

b) the Applicant retained ownership of the solar system after it was installed on the First Respondents farm.

c) the term contained in the quotation Annexure "**FA2"** to the founding affidavit formed part of the agreement ultimately concluded between the parties.

d) there was a factual dispute foreseeable on the papers.

e) the Applicant disposed of the *onus* of proof.

JURISDICTION:

[36] The Respondent raises the issue that the agreement between the Applicant and the First Respondent was not concluded in Bloemfontein. The First and Second Respondents allege that;

i) The deponent to the Applicant's founding affidavit never had any interactions 'with any person in this matter';

ii) At the time that the agreement was concluded, the Applicant was represented, allegedly by Mr. Gerhard van der Linde and later by Mr. Jan Lubbe;

iii) The quotation, Annexure **"FA2"** to the Applicant's founding affidavit] does not constitute a 'lawful and binding agreement' and was not signed and accepted in Bloemfontein; and

iv) The agreement "was concluded in the area of Vryburg and area of Hendrina and later the farm Bothmasrust", NW.

v) Tellingly, the deponent does not deny that he signed Annexure "**FA2"** to the Applicant's founding affidavit, nor does he explain to the Court where he was when he appended his signature thereto on behalf of the First Respondent.

vi) The First and Second Respondents have placed cogent evidence before the Court which shows that the Applicant`s version in respect of where

the agreement between the parties was concluded stands to be rejected.

[37] The **Supreme Court Act,**[4] was repealed by section 55 of the **Superior Courts Act,** [5] **10 of 2013** which came into operation on 29 August 2013. Section 21 of the latter act provides for the jurisdiction of the High Court of South Africa in terms which are (for present purposes) the same as those of the said **section 19 of Act 59 of 1959.** The relevant parts of **Section 21 of Act 10 of 2013** read as follows:

> "Persons over whom and matters in relation to which Divisions have jurisdiction.
>
> *(1)* A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power …"

[38] It is trite law that Applicant bears the *onus* of establishing the court`s jurisdiction and to satisfy a conclusion of jurisdiction. The Applicant must prove that the whole of the legal proceedings has arisen within the jurisdiction of this Court.

[39] The main contention between the parties is if the whole cause of action in the present matter arose within Bloemfontein where the Applicant`s principle place of business is and where the written agreement was concluded, or in North West where the First and Second Respondents' accepted the oral agreement. The First and Second Respondents to the litigation were also domiciled within that jurisdiction at the time when the present action was instituted.

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[4] 59 of 1959

[5] 10 of 2013

[40] It is undisputed that the farm in respect whereof the moveable's were attached and affixed is not in the jurisdiction area of this court.

[41] With regard to Annexure "**F2":**

i) Annexure **"F2"** to the founding affidavit does not contain any evidence where it was signed and by whom it was signed.

ii) First and Second Respondent are adamant that the quotation did not constitute the entire agreement as the parties also entered into a verbal agreement.

iii) First and Second Respondents further make it clear that the verbal agreement which was concluded by Mr. Lubbe and Mr.van der Linde was concluded in the district of Vryburg, area Hendrina and Bothmasrust (NW) itself.

iv) Hence the First and Second Respondent`s submission that the Applicant did not address the issue that the whole cause of jurisdiction arose within this court's jurisdiction.

LEGAL PRINCIPLES:

[42] **Rule 6(5)(g) of the Uniform Rules** provides that where there is a material and *bona fide* dispute of fact that cannot be decided on the papers, a court is faced with three alternatives:

a) it may dismiss the application,

b) or direct that oral evidence be heard on specified issues,

c) or refer the matter to trial.

A court is not restricted to the listed remedies and may make any order it deems fit and which is directed at ensuring a just and expeditious decision.

[43] In **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd**[6] it was made clear what needs to be considered where a material fact arises which cannot be resolved by *viva voce* evidence, the court may either direct the parties to trial or dismiss the application with costs.

[43] In order for an owner to succeed with the *Rei Vincicatio* the Applicant must proof that:

(a) he is the owner of the solar system;

(b) that the other party was in possession of the solar system at the time of the commencement of the application; and

(c) that the item in question is still in existence and clearly identifiable.

The Constitutional Court has confirmed the legal requirements for this remedy in **Van der Merwe and Another v Taylor.**[7]

[44] Additionally, it is settled in our law that where the contract was concluded and/or where the breach occurred, this will be enough to warrant the basis for jurisdiction.[8]

[45] 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:**[9]

> "[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."

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[6] 1949 (3) SA 1155 (T)
[7] 2008(1) SA 1 (CC)
[8] Giddey NO v JC Barnard & Partners [2006] ZACC 13; 2007 (5) SA 525 (CC) at para [19].
[9] [2009] 2 All SA 243 (SCA) para 26.

[46] Added to this is the approach to be adopted when factual disputes arise on the papers. The pronouncement on the topic **is Wightman tla JW Construction v Headfour (Pty) Ltd and another**[10] 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[11].
>
> [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."

DISCUSSION:

[47] Assuming that the Applicant is correct (which are not admitted by the First and Second Respondents), it ought to have been self-evident from the Respondent's opposing papers that a dispute of fact existed in relation to the written and oral 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

[10][2008] ZASCA6;2008(3) SA 371 (SCA) at para 13.
[11][1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E - 635C...

the papers is the fact that from their own account it is not clear what actually transpired between the parties or where the contract was concluded.

[48] The Applicant`s founding papers pay scant regard to pleading the terms of the contract between the parties. Counsel for the First and Second Respondents submit that the papers are devoid of any agreement being reached between the First and Second Respondents and the Applicant with regard to ownership of the solar system. The latter, at best for the Applicant, installed the solar system, it was accepted by First Respondent which is still in possession thereof.

[49] There is nothing on the papers to indicate what exactly the terms and conditions entail with regards to the verbal and written contract. This court will have to speculate to the agreed terms.

[50] It is for this reason that the First and Second Respondents in their answering affidavit aver that –

a)institution of motion proceedings renders the Applicant's case without any prospect of success and - given that it was instituted in the face of the Applicant's own admission that there was a dispute;

b) it warrants a dismissal of the application.

c) the Applicant fails to acquit itself from this *onus.*

[51] 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.

[52] In my view, 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 verbal agreement as well as the jurisdiction aspect. Neither of these disputes conceivably could have been resolved on the papers. On the contrary, I am of the view that there should have been, in the alternative, a referral to trial. That, was *in casu* not requested by either of the parties.

CONCLUSION:

[53] I found it prudent at the time of the hearing of the application not to decide on the point *in limine* at that stage. The facts are intertwined and an overview of all the facts had to be considered. At the end it seems this court does not have the jurisdiction to adjudicate upon this matter.

[54] The Applicant avers that the agreement entered into was both in writing and verbal without elaborating what the verbal part entails.

[55] It does also not set out in the founding affidavit what exactly the terms of the oral agreement were and where it was concluded.

[56] Applicant further avers that on the 4th November 2020 D A Pauw signed the said quotation accepting the Applicants terms and conditions therein at the Applicants premises in Bloemfontein, hence the agreement was finally concluded in Bloemfontein. No explanation was given how the verbal part of the agreement must be incorporated to understand the whole agreement.

[57] The Applicant attached Annexures "**FA1"** and "**FA 2"** to be regarded. This court cannot decide on the papers if this signature on Annexure" **FA2"** of DA Pauw was indeed an acceptance of the quotation with the implied term that the further terms of the agreement is also accepted by him.

[58] Of course, it may be argued that given the fractious nature of the correspondence between the parties and the promised payment which did not realise before the application was launched, a dispute of some sort would arise. But more is required than the possibility of a dispute arising. What is required is that an Applicant should realise prior to the launch of the Application that a serious dispute of fact was bound to develop.

[59] The Applicant should have referred the matter to oral evidence on the basis that Applicant should have foreseen that a material dispute of fact would arise that could not be resolved on the papers.

[60] In **Mamadi and Another v Premier of Limpopo Province and Others**,[12] the Constitutional Court, referring to the power of dismissal in rule 6(5)(g), said that

> "it serves to punish litigants for the improper use of motion proceedings"

[61] 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 or referral to trial. In the result, I am of the view 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.

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[12] [2022] ZACC 26.

ORDER:

1. This court does not have jurisdiction to adjudicate the matter.
2. The application for vindicatory relief is dismissed with costs on a party and party scale.

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AS BOONZAAIER AJ

Appearances

For the Applicant:	Mr R van der Merwe
Instructed by:	B Jones
	Honey Attorneys
Address:	1st Floor, Honey Chambers
	Nortridge Mall
	BLOEMFONTEIN
Ref:	134309/BM JONES/ Rochelle/it

For the 1st and 2nd Respondents:	Mr Yagga
Instructed by:	Du Plessis – Viviers Inc
Address:	c/o Jacobs Fourie Attorneys
	158 Zastron Street Westdene
	BLOEMFONTEIN