REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2019/24673

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

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N. REDMAN **01 DECEMBER 2022**

In the matter between:

DITSEPU WILLIAM MALAU Applicant

and

REFILWE RAKGOLE First Respondent

REVCOUNT LOGISTICS Second Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto CaseLines. The date and time for hand-down is deemed to be 10h00 on 01 December 2022.

JUDGMENT

REDMAN AJ:

[1] The applicant seeks an order in the following terms:

1. *That the 1st and 2nd Respondents jointly pay to the Applicant the dividend due to him for the years in respect of 10% shareholding the Applicant has as a Shareholder of the 2nd respondent.*

2. *The Applicant's pro-rata salary owing and due to him for the period in the amount of R950 000,00.*

3. *That the 1st and 2nd Respondents be ordered to furnish the Applicant with the yearly shareholding for the year February and for the succeeding years thereafter and for the duration of the shareholding until the date of this Order.*

4. *That the Respondents be ordered to furnish the Applicant with the 2nd respondent's yearly shareholding and financial statements from the inception of the Respondent until 2019 Financial Statements.*

5. *Interest on the aforesaid amounts in terms of the Prescribed Rate of Interest Act, as amended from time to time.*

6. *Costs of the application on the scale as between attorney and client. [sic]*

[2] The relief sought and by the applicant is founded on his allegation that he is a shareholder of the second respondent, having concluded an agreement with the first respondent in respect thereof.

[3] The relief sought and the allegations contained in the founding affidavit are confusing and lacking in particularity. In his founding affidavit, the applicant alleges that on 28 February (no year mentioned) he entered into an agreement with the first respondent and agreed *inter alia*, that the applicant would have a 10% shareholding in the second respondent. The applicant avers that he is not in possession of a copy of the shareholding agreement but contends that annexures DWM1 and DWM2 to the founding affidavit constitute copies of draft shareholding agreements which were signed by him and the first and second respondents.

[4] Annexure DWM2 was not annexed to the founding affidavit and annexure DWM1 is a draft unsigned document headed "*Resolution of – Amendment of the Shareholding and Roles and Responsibilities*".

[5] The respondents deny that the applicant is a 10% shareholder of the second respondent and contends that annexure DWM1 was a resolution following upon a meeting held with the applicant during or about March 2014. According to the first respondent, the purpose of the meeting was to set up a business venture. He contended that this, however, did not materialise. The respondents dispute that annexure DWM1 was an agreement and state that it was merely a proposal which was not adopted. The respondents also

deny that there is any amount due to the applicant in respect of outstanding salary.

[6] In addition, the respondents deny that there was any dividend declared by the second respondent during the period 2015 to 2019 and thus no amounts are payable in respect thereof. This is not gainsaid by the applicant.

[7] It is manifest that a dispute of fact exists on material issues in this matter. As a general rule, conflicting affidavits are not a suitable means for determining disputes of fact in motion proceedings. See *Frank v Ohlssons Cape Breweries Ltd* 1924 AD 289 at 294. The applicable "*Plascon-Evans*" test (see *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 AD at 634) was reiterated in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para [55] as follows:

> *"[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been 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. 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. 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."*

[8] This is not a matter which can be resolved on affidavit. The two versions are irreconcilable and mutually destructive. Despite the clear and obvious dispute of fact, the applicant persisted with the application and attempted to persuade the court that an order should be granted on the terms sought.

[9] After full ventilation on the merits of the matter, counsel for the applicant asked that if the court was not with him, the matter should be referred to trial or oral evidence.

[10] In general, an application for a referral to oral evidence or trial in terms of Rule 6(5)(g) of the Uniform Rules of Court should be made at the commencement of the hearing and not as a last-ditch effort to save a faltering argument. See *De Reszke v Maras and Others* 2006 (1) SA 401 (C) at paras 33-34. See also *Law Society, Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA) at para [23].

[11] In the instant matter the request for referral to trial was made at the last possible moment and as an alternative to the main relief sought by the applicant. The request for referral ought to have been made at a much earlier stage as the dispute of fact was self-evident from the answering affidavit. If the applicant had notified the respondents prior to the hearing of the matter that he intended to seek a referral of the matter to trial, they may have agreed with this proposal and saved the substantial costs for the hearing of an opposed application.

[12] The applicant's founding affidavit is lacking in detail, is contradictory and confusing in many respects. The probabilities of the existence of an agreement in the terms alleged, however, cannot be rejected out of hand.

[13] Notwithstanding the last minute request for a referral to trial, I am reluctant to dismiss the application without further ado. In the same breath, however, I do not believe that the respondent should be mulcted with the unnecessary costs incurred by it for attending the hearing on 21 November 2022.

[14] In the circumstances, I make an order in the following terms:

1. The matter is referred to trial.

2. The Notice of Motion is to stand as the summons and the answering affidavit is to stand as the respondents' notice of intention to defend.

3. The applicant is to deliver its declaration within twenty days of date of this Order.

4. Further pleadings, discovery and notices are to be exchanged in accordance with the Uniform Rules of Court.

5. The costs for the hearing of the opposed application on 21 November 2022 are to be paid by the applicant.

6. All further costs are to be costs in the cause.

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N REDMAN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 21 November 2022
Judgment: 01 December 2022

Appearances:

For Applicant: M.V. Mangwale
Instructed by: Monageng Mangwale Attorneys

For Respondents: V. Mabuza
Instructed by: Sepamla Attorneys