



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 25524/2019

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

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In the matter between:

MATLALA, MARY-ANNE PHUTI

Applicant

and

MMELA INVESTMENT HOLDINGS (PTY) LTD

First respondent

**CLAIMS ADMINISTRATION & RECOVERY
SERVICES (PTY) LTD**

Second respondent

MR MOHOBI RAMATSETSE

Third respondent

JUDGMENT

MALINDI J:

[1] This Matter is set down for hearing on 19 to 22 April 2022 on the preliminary

points of whether the matter is capable of proceeding by way of motion proceedings and condonation for late filing of the respondents replying affidavit.

[2] On 15 March 2022 the Applicant wrote a letter proposing that I give a directive that the matter is referred to trial with appropriate directives. The Respondents adopted a position to the effect that as it was their view during the Case Management conference that the matter cannot proceed on motion the applicant is conceding that point. They further proposed that because of the concession the matter to trial but dismissed.

[3] On 31 March 2022 I directed that the application be heard on 14 April 2022 in terms of uniform rule 60 (5)(g). I later directed that short heads of argument be filed on the morning of 11 April 2022. The respondents did but the applicant did not.

[4] In the notice of application the applicant seeks the following order:

“1. The matter is referred to trial by action.

2. The Notice of Motion and Founding Affidavit(s) in the case number 25524/2019 are to serve as summons by the Applicant.

3. The Notice of Intention to Oppose and Answering Affidavit(s) by the Respondents, are to serve as an Appearance to Defend.

4. The Applicant is to deliver her Declaration on or before Tuesday 19 April 2022.

5. The Respondents are to deliver their Pleas to the Declaration within 15 (fifteen) days of delivery of the Declaration.
6. The Applicant is to deliver her Replication, if any, within 5 (five) days of delivery of the Plea.
7. Discovery of documents etc. by the parties including any expert notices should be delivered simultaneously by the parties on or before the date of 20 May 2022.
8. A judicial Pre-Trial Conference is to be held with the parties on or before Friday, 27 May 2022.
9. Costs to be costs in the action."

[5] The applicant's admissions to essentially that the application is made necessary by the respondents belated production of the financial statements would now require further investigation by the applicant and by the respondent's failure or refusal to make Discovery. She contends therefore that dispute of fact have risen where as such disputes were not present until then.

[6] The respondents contend that the dispute of fact existed from the outset and that proceeding by motion was fatal ab initio. They contended therefore that this application and the main application be dismissed and that the applicant initiate further proceedings by summons.

The Law

[7] Rule 6(5)(g) envisages a manner by which a court may deal with a matter after hearing it, where " an application can I properly be decided on affidavit."

this procedure has been brought forward by my directive that the application be brought and heard before the hearing.

[8] The respondents refer to the dictum in *economic Freedom Fighters v Manuel* to the effect that generally " A court will an application when, that the application is launched, an applicant should have realised that a serious dispute of fact was found to develop." detecting to refer to an applicant who persist on motion proceedings up to the hearing itself. In this case the applicant has pre-empted the hearing by applying for a referral to trial before.

[9] In *law Society, northern provinces v Mogami Harms DP* said:

"an application for hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the applicant is convinced the court on the papers or an appeal. Be circumcises must be exceptional before a court will permit and applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail(...)"

[10] I am satisfied therefore that it was proper for the applicants to have brought this application even before the day of the main application to raise it as a point in limine.

[11] The respondent submission that the caitian be dismissed together with the main application at the same time is therefore not in accordance with the general rule. As is clear from the cases above and application for referral to oral evidence on specific aspects or to trial must be made before the hearing

so that the court time is not wasted by hearing the application only to be asked to be refer the matter to trial or to oral evidence. Find therefore that because of the intractable disputes of fact that are apparent from the preceding not only a few and precise aspects would have required referral to oral evidence but the whole matter.

[12] I therefore make the following order:

1. The matter is referred to trial by action.
2. The Notice of Motion and Founding Affidavit(s) in the case number 25524/2019 are to serve as summons by the Applicant.
3. The Notice of Intention to Oppose and Answering Affidavit(s) by the Respondents, are to serve as an Appearance to Defend.
4. The Applicant is to deliver her Declaration on or before Tuesday 19 April 2022.
5. The Respondents are to deliver their Pleas to the Declaration within 15 (fifteen) days of delivery of the Declaration.
6. The Applicant is to deliver her Replication, if any, within 5 (five) days of delivery of the Plea.
7. Discovery of documents etc. by the parties including any expert notices should be delivered simultaneously by the parties on or before the date of 20 May 2022.

8. A judicial Pre-Trial Conference is to be held with the parties on or before Friday, 27 May 2022.

9. Costs to be costs in the action.

**M ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearances

For the applicants:

Instructed by:

For the respondents:

Instructed by:

Date of hearing: