



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

- (1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

Date: Signature: _____

CASE NO: 2021/25209

DATE:

In the matter between:

ANCHEN VENTER

First Applicant

ANCHEN VENTER N.O.

Second Applicant

and

ASTFIN (SA) (PTY) LIMITED

First Respondent

JOHANNES GEORGE VENTER

Second Respondent

JOHANNES GEORGE VENTER N.O.

Third Respondent

JONATHAN BARON N.O.

Fourth Respondent

SKIATHOS B2 PROPERTY INVESTMENTS CC

Fifth Respondent

NRB CAPITAL SOLUTIONS (PTY) LIMITED

Sixth Respondent

FOREST DAWN SYSTEMS (PTY) LIMITED

Seventh Respondent

NRB SERVICES (PTY) LIMITED

Eighth Respondent

SHELF INVESTMENTS NO. 32 (PTY) LIMITED

Ninth Respondent

NRB RENTAL SOLUTIONS (PTY) LIMITED

Tenth Respondent

SCRAP-N4 AFRICA (PTY) LIMITED

Eleventh Respondent

J KWADRANT (PTY) LIMITED

Twelfth Respondent

PLANET FINANCE CORPORATION (PTY) LIMITED

Thirteenth Respondent

SOUTH AFRICAN REVENUE SERVICE

Fourteenth Respondent

Coram: Ternent AJ

Heard on: 9 and 11 November 2022

Delivered: 8 September 2023

Summary:

JUDGMENT

TERNENT, AJ:

THE DECLARATORY APPLICATION

[1] This opposed application came before me on 9 November 2022. Before dealing with the application, I dealt with a further application brought by the applicants (jointly referred to in this judgment as “the applicant”) against the first respondent (“Astfin”), which came to my notice on 8 November 2022 when it was uploaded to CaseLines. The applicant sought a declaratory order that the main application had been settled between her and Astfin in terms of a settlement agreement, allegedly concluded between the parties on 26 October 2022, in the terms as stipulated in the Notice of Motion, namely that:

- 1.1 The relief against Astfin would be withdrawn;
- 1.2 Each party would pay its own legal costs, including the current costs order;
- 1.3 The Venter Family Trust would pay the cost consultant’s fee in opposing the bill of costs;
- 1.4 The main application would be removed from the roll, and

- 1.5 There would be a R1 000 000,00 reduction on the bond cancellation amount on the Camps Bay property in favour of Astfin.¹
- [2] Astfin delivered an answering affidavit, which had been prepared overnight, opposing the declaratory relief sought. I inquired of the applicant's counsel, Mr Whittington, whether the applicant sought an opportunity to deliver a replying affidavit and was informed that the applicant's attorney, Mr E Bihl, had been instructed that, and no doubt on the advice he had given, no replying affidavit would be delivered.
- [3] Having heard arguments from counsel for all the parties, I handed down an order on 10 November 2022, dismissing the application. I reserved the costs to be dealt with in my judgment. To the extent that I failed to record this, I also intend to furnish reasons for dismissing the declaratory application. As such, the main application proceeded on 11 November 2023.
- [4] Needless to say, the applicant delivered a request for reasons in terms of Rule 49 on 10 November 2022.² It was accompanied by an application for leave to appeal³ wherein the applicant sought leave to appeal to a Full Bench. The reasons underpinning the leave to appeal include that I erred in finding that:
- 4.1 There was no agreement between the parties that the relief against Astfin be withdrawn;
- 4.2 There was no agreement between the parties that each party was to pay their own legal costs;

¹ CaseLines, 034-2

² CaseLines, 036-1 to 036-3

³ CaseLines, 037-1 to 037-4

- 4.3 The matter should proceed in the week of 7 November 2022, when it was agreed that the matter be removed from the roll;
- 4.4 The settlement agreement reached between the parties disposed of a major portion of the application;
- 4.5 In dismissing the application, which was not just and equitable, the effect being that the second and third respondents misled the applicants, causing the applicants not to be ready for hearing;
- 4.6 By not accepting the details between the applicants' and Astfin that the application had been settled; and
- 4.7 By accepting that matters beyond the applicants', and Astfin also had to form part of a settlement between them.
- [5] It is not my intention to deal with the application for leave to appeal, which will, no doubt, on the handing down of this judgment, be proceeded with by the applicant in the usual course.
- [6] The affidavit in support of the declaratory application is deposed to by Bihl. Bihl sets out that he negotiated the purported settlement of the main application on behalf of the applicant, and as such, he has knowledge of the relevant factual matter. In so doing, Bihl purportedly waived any legal privilege attaching to *"the settlement negotiations and settlement itself"* and made privileged disclosures in the affidavit, which he contended supported the settlement. Later, in the judgment, I will deal with whether it is appropriate for Bihl to waive the legal privilege which belongs to his client. There was no suggestion that the applicant had waived this privilege, and there was also no confirmatory affidavit from her in support of the waiver or any affidavit at all.

- [7] Central to the determination of this dispute is Mr Jonathan Baron. Baron is a trustee of the Venter Trust together with the applicant and the second respondent, Mr Venter. He is an accountant by profession and appointed auditor for the Trust and the NRB Group, comprising the fifth to thirteenth respondents. The applicant alleged that Baron and Venter, her estranged husband (the Venters are currently embroiled in an acrimonious divorce), are defrauding her. She avers that in launching the application on behalf of the Trust, she does so without authority because they seek to act adversely and not in the protection of the Trust.⁴
- [8] At the outset, Baron has no relationship whatsoever with Astfin. He is not its employee or an independent contractor to it. He is employed by the Trust and the NRB Group, of which Venter is integral. Yet, Bihl says, *“It was at all times clear to me that Baron was representing the first respondent in the settlement negotiations as well as a representative of the second, third and fourth respondents, with the full knowledge of the first respondent.....”*⁵
- [9] Mr Bart De Nil, a director of and authorised to represent Astfin, deposed to the opposing affidavit on its behalf. He unequivocally says that the matter is not settled and that Baron did not represent Astfin. He says that although he had discussions with Baron, whom Venter had mandated to explore a settlement *“involving all Venter family matters,”* ...*“[i]t should be made absolutely clear that Mr Baron was at no point authorised by the first respondent to represent it in any settlement discussions”*.⁶
- [10] De Nil emphasises that any settlement involving Astfin would not only be limited to the main application but had to be all-encompassing. This, he says, required that an application under case number 31846/2021, also

⁴ CaseLines 001-12, para 8.4

⁵ CaseLines 034-6, para 7

⁶ CaseLines 035-2, para 8

referred to as “*the sham application*”, be settled and the financial disputes between Astfin and the NRB Group, which for all intents and purposes is represented by Venter. In so doing, any settlement encompassing these wide-ranging disputes, of necessity, would have to be reduced to writing for Astfin’s consideration together with its attorneys, namely Mr. O Tugendhaft and Ms. A Da Silva of TWB Attorneys. He emphasises that any proposal would have had to be reduced to writing and that this was always a condition of any settlement in the clearest terms. He explained that in settling the financial disputes, there are a suite of agreements underpinning these disputes. All of the agreements have been attached to the voluminous main application and contain non-variation clauses⁷. As such, as a matter of law, any settlement which involved the rights and obligations arising from these agreements would have to be reduced to writing for it to be effective.

[11] No written settlement agreement or confirmatory affidavit by Baron was placed before this Court by the applicant.

[12] It is trite that the applicant must make her case out in the founding papers and that the affidavits constitute evidence in motion proceedings.⁸

[13] In seeking an order that the application has become settled, the applicant seeks final relief. Accordingly, in determining this application, I am required to apply the well-known principles in the ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** matter⁹, which is also referred to in ***NDPP v Zuma***,¹⁰ as follows:

⁷ CaseLines 004 – 1112, Annexure “**BND48**” Restated and Amended Loan Agreement, clause 23.5.1 as an example and also in the agreements at “**BND 47**”, “**49**”, “**50**” and “**51**”

⁸ ***Minister of Land Affairs and Agriculture v D & F Wevell Trust*** 2008 (2) SA 184 (SCA); ***Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*** 1999 (2) SA 279 (T) at 323G-324A quoted with approval in ***National Credit Regulator v Lewis Stores*** 2020 (2) SA 390 (SCA), para 29

⁹ 1984 (3) SA 623 (A) at 634E-635C

¹⁰ 2009 (2) SA 277 (SCA), para 26

[26] *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. It is well established under the Plascon-Evans Rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's affidavits), which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable where the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."*

It is apparent that if there is a genuine dispute of fact, the Court must accept the respondents' version. In assessing whether or not a dispute is genuine, I must consider whether or not the allegations made in support thereof are farfetched or untenable, permitting their rejection on the papers.¹¹ In assessing whether or not there is a real dispute of fact, it is necessary to satisfy the Court that the party who purports to raise the dispute, namely the first respondent, has seriously and unambiguously addressed the disputed facts in the affidavit placed before the Court.¹²

[14] In ascertaining whether disputes of fact are *bona fide*, the Supreme

¹¹ *JW Wightman (Pty) Ltd v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA), para 12

¹² *PMG Motors Kyalami (Pty) Ltd (In Liquidation) v FirstRand Bank Ltd, Wesbank Division* 2015 (1) All SA 437 (SCA); 2015 (2) SA 634 (SCA); *Wightman supra* at para 13

Court of Appeal has set out the approach.¹³ It held that:

“The court should be prepared to undertake an objective analysis of such disputes when required to do so. In J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA), it was suggested how that might be done in appropriate circumstances. ...

A court must always be cautious about deciding probabilities in the face of conflicts of facts in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser’s shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. Nevertheless the courts have recognised reasons to take a stronger line to avoid injustice. In Da Mata v Otto 1972 (3) SA 858 (A) at 689D-E, the following was said:

‘In regard to the appellant’s sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted – the witness who could have disputed them had died – they should be taken as proof of the facts involved. Wigmore on Evidence, 3rd ed., vol. VII, p. 260, states that the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantitative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:

“it is not infrequently supposed that a sworn statement is necessary proof, and that, if uncontradicted, it established the

¹³ **Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another** 2011 (1) SA 8 (SCA) at paras 19 and 20

facts involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts - testimony which no sensible man can believe - goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit, cannot be disregarded."

- [15] It is clear from the order that I made that I accepted Astfin's version in the sense that it had raised a genuine dispute of fact, which had been addressed head-on. There is merit that, having anticipated disputes of fact prior to the launching of this application, a dismissal is warranted. I, however, elected to determine this application on the merits.
- [16] As the applicant did not file a replying affidavit, material allegations raised by Astfin that a settlement did not happen and, particularly, that Baron did not represent it were not refuted. The applicant did not seek to raise an estoppel or even proffer an affidavit by Baron.
- [17] Mr Whittington, for the applicant, submitted to me, at the outset of his argument, that Bihl had "*assumed*" that Baron was representing Astfin, Venter, personally, and the trustees of the Venter Trust. With these latter submissions, I have no issue. It is the former that is the subject matter of the dispute.
- [18] In support of this assumption, Bihl says that Baron contacted him telephonically at the beginning of September 2022 with a view to settling the application with Astfin. Bihl says he told Baron that he would speak to the applicant and revert to him. Without Bihl approaching the applicant, an e-mail was received from Baron dated 6 September 2022. This e-mail is titled "*Gesprek 'n week of wat gelede*". In this e-mail Baron records "*Ek volg net op oor ons gesprek rakende Astfin se skikking soos skyns oor 'n week terug. Kon jy daaroor dink en met dit*

*jou kliënt bespreek?”*¹⁴ As Bihl says this e-mail confirmed their conversation and also spoke about a potential settlement in relation to Astfin. Importantly, Bihl says that he was advised that Baron was representing Astfin, Venter personally as a trustee and Baron as a trustee in the potential settlement negotiations. He says no more than that. I am uncertain as to whether he intended to state that Baron informed him of this or a third party. For the purposes of this application, I will accept that he says that Baron informed him of his apparent authority to represent the parties as mentioned.

[19] Having taken instructions, Bihl, on 5 October 2022, sent an e-mail to Baron in which he confirmed that the applicant was agreeable to separate Astfin from the proceedings, with each party to pay its own legal costs, including an unrelated costs bill, which was to be taxed that very day, and that Bihl would *“draw up an arrangement to handle everything and will set it up and send it to you during the week”*.¹⁵ This appears to me to indicate that a written settlement agreement was going to be drawn by Bihl.

[20] On 13 October 2022, an e-mail was addressed by Bihl to Baron and Venter and copied to Sonja Pollock, who is Bihl’s colleague and an attorney in the firm. This email¹⁶ is written *“without prejudice”*. In the copy furnished by the applicant, paragraphs 3, 4, 5 and 7 are redacted. Bihl says that the redacted portions of this communication are irrelevant and that the remaining disclosed paragraphs provide for the settlement for which the applicant contends.

[21] Astfin disputes that the redaction is proper. De Nil provided an

¹⁴ CaseLines 034-21, Annexure **“EB1”**

¹⁵ CaseLines 034-7, para 13 and CaseLines 034-22, Annexure **“EB2”** which was translated to the Court

¹⁶ CaseLines 034-23 to 034-25, Annexure **“EB3”**

unredacted copy of this email within an e-mail trail.¹⁷ De Nil says that the redacted paragraphs are important because, as set out in this letter, it is clear that the “*exit of Astfin*” could not simply be isolated to this application. Instead, it contemplated that Astfin would exit from all the litigation i.e. the divorce litigation between the Venters and the further litigation/ disputes between Venter’s NRB Group and the Bi-Africa Group, of which Astfin is an entity.

[22] In my view, on a simple reading of the unredacted e-mail addressed by Bihl, it is clear in paragraph 2 that the applicant was proposing or consenting to settle with Astfin in the very same terms as those expressed by De Nil and that the letter constituted a comprehensive offer. The paragraph reads, “*Without prejudice to our client’s rights our client consents to the exit of Astfin as set out below.*” The word “*below*” refers to paragraphs 3 to 8 of the letter.

[23] Paragraphs 3 to 8 provide for an all-encompassing proposal to Astfin and require that Baron and/or Venter do a number of things, namely:

23.1 A recommendation that the NRB Group pay a settlement of R10 000 000,00 to Astfin. It appears that in suggesting a R10 000 000,00 settlement, the applicant believes it will result in closure so that “*It will be a full and final settlement of the disputes between Astfin and the rest of the parties*”.

23.2 The applicant would then consent to the cancellation of the bond over the Camps Bay property.

23.3 The proceeds of the sale of the Camps Bay property would be invested in an interest-bearing account with interest to be shared between the Venters.

¹⁷ CaseLines 035-27 to 035-32 at 035-29 to 035-32, Annexure “**BN2**”

- 23.4 The main application would then be withdrawn against Astfin, with each party to pay its own legal costs, including a current costs order.
- 23.5 The main application would be removed from the roll.
- 23.6 The unrelated bill of costs would be paid by the Trust.
- 23.7 The application, referred to as the “*sham application*” under case number 31846/21, be withdrawn against Astfin, each party to pay its own legal costs.
- 23.8 The proposal did not constitute an abandonment of the applicant’s rights against the NRB Group and the Trust and Venter and Baron as trustees.
- [24] The unredacted letter affirms, to my mind, that any settlement with Astfin also envisaged the settlement of the related disputes expressly referred to therein and as contended for by De Nil. As such, if an all-encompassing settlement was concluded, only one leg of it would be the resolution of this application, which could then be removed from the roll.
- [25] An e-mail response¹⁸ is then sent to Bihl, Venter and Pollock, who is copied again, by Baron on 13 October 2022. In the e-mail, Baron says, “*we will engage with Astfin around the settlement and re-engage with you once we have an answer from them*”. It is clear to me that Baron is referring to himself and Venter. The subject matter of that e-mail is the “*Venter Family Trust: Astfin Exit*”.
- [26] Notably, Bihl does not state that he knew that Astfin was aware of the potential settlement and of the negotiations and communications that were exchanged between himself and Baron but avers that he “*believed*”

¹⁸ CaseLines 031-26, Annexure “**EB4**”

that it was aware of the negotiations and communications exchanged between himself and Baron. The e-mails disclose that Venter, too, was aware of the proposals. Bihl also says that “*direct dealings between the trustees of the Venter Family Trust and Astfin were common, and the relationship between Astfin, the Trust and Venter were at a close and personal level.*”¹⁹

[27] There is no suggestion or evidence that Bihl, in relation to the potential settlement of this application, dealt directly with Astfin or De Nil or, as would have been anticipated, its legal representatives, TWB.

[28] Bihl says that there were direct dealings between Venter and Baron, as trustees of the Venter Trust, and Astfin, which is not denied by De Nil. De Nil says that he did meet with Baron and Venter. He denies, however, the unsubstantiated statement that the relationship between Astfin, the Trust and Venter was at a close and personal level. De Nil says that Astfin was not privy to the communications between Bihl and Baron at the time. None of the emails referred to above were sent to De Nil or his legal representatives. As De Nil points out, there is no direct evidence that Astfin or he were involved in the discussions that took place off the record between Baron and Bihl.

[29] In furtherance of this fact, De Nil attaches the WhatsApp communications exchanged with Venter, reflecting their discussions on the potential settlement during the course of October 2022. He affirms that he communicated with Venter directly and Baron, who he says had been authorised to represent Venter i.e. in a settlement involving all “*Venter family matters*”.²⁰ As such, at best, he says, Baron represented Venter personally, as a trustee and in the commercial transactions/ disputes.

¹⁹ CaseLines 034-9, para 18

²⁰ CaseLines 035-2, para 8

- [30] The WhatsApp messages²¹ commence on 1 October 2022 and continue until 31 October 2022. The exchanges are between Bi-Africa i.e. De Nil and Venter. Again, Baron does not feature in these exchanges. The early discussions reflect Venter as the person who informs De Nil that the first applicant will withdraw this application provided the Camps Bay home sale transaction is final, i.e. that the property must be sold. De Nil affirms that he had discussions with Baron in October 2022 and spoke to Venter telephonically as well.
- [31] On 26 October 2022, Baron responds to Bihl and includes Pollack again. Notably, De Nil and TWB are not included in this email. Baron does not say that he has a firm instruction to settle on behalf of Astfin but rather that it is "*prepared to settle*". Baron also says that "*detailed discussions with Astfin have been held*".²² That in and of itself indicates that the discussions could not simply have been limited to the resolution of this application. He says that Astfin is not prepared to write off any further debt except the R1 000 000,00 offered previously (which relates to the bond which was registered in favour of Astfin in respect of the Camps Bay property and which is owned by Skiathos B2 Property Investments CC of which the Venters are members). In addition, Astfin will pay its own legal costs and not pursue an order. He asks for a response as soon as possible to avoid additional legal costs being incurred.
- [32] On 26 October 2022, Bihl then responds to Baron, copying in Pollock, "*I confirm that we accept the statement below and that the litigation against Astfin be settled as proposed. Please proceed to arrange the necessary to give effect to this settlement*".²³ According to Bihl, this e-mail sealed the settlement. Bihl does not stipulate what he meant by "*the necessary*". According to De Nil, at the very least, a written agreement would need to be concluded.

²¹ CaseLines 035-26, Annexure "**BN1**"

²² CaseLines 034-27, Annexure "**EB5**"

²³ CaseLines 034-28, Annexure "**EB6**"

- [33] Baron's response, on 26 October 2022, to Bihl's e-mail is not sent to De Nil but only to Bihl and Pollock is included. His response is innocuous in that he states, *"Thanks for the response, I will advise the parties as such"*.²⁴
- [34] On 27 October 2022, at 08h23, Baron proceeded to on - forward this series of e-mails to De Nil, *"Sien asb hieronder soos bespreek"*. De Nil responds about half an hour later. He refers to the telephone conversation with Baron and asserts the Astfin offer, *"Soos telefonies bespreek, dit is die offer..."* He unequivocally sets out that the discussion held with Baron comprised an offer by Astfin to write off the R1 000 000,00 bond, as proposed, but importantly:

"We will also only withdraw the case, if we get a "MOU" form from all parties that are involved, that this will be a final binding agreement and that all agreements in its current undertaking will be honoured in totality.

*Julle moet asb vir ons 'n MOU gee wat al die partye insluit i.e Anchen Venter/Jan Venter/Skitahos/NRB Rentals etc. ... Wat bogenoemde inkorporeer ... of meer as een dokument as julle dit nie in een dokument wil sit nie Julle moet ons voorsien van 'n dokument, wat ons dan deur ons regsman sal laat nasien. R1 000 000,00 settlement discount incorporating (everything)."*²⁵

- [35] It is clear that any settlement required a comprehensive exit involving all of the parties. In addition, any settlement had to be reduced to writing. In fact, this e-mail reveals that De Nil was not alive to a settlement of the matter, as contended by Bihl, and believed the negotiations were ongoing. Baron does not tell De Nil that the matter is settled. Notably, De

²⁴ CaseLines 034-29, Annexure "EB7"

²⁵ CaseLines 035-27, Annexure "BN2"

Nil sends his e-mail to Baron and Venter. This e-mail puts paid to Bihl's conclusion that *"It was clear to me that the involvement of Astfin had become settled, particularly as all of the relief that may relate to Astfin had become moot as a result of the settlement"*.²⁶ The conclusion that all of the relief in the application had become moot is simply wrong. I will revert to this below.

[36] Simultaneously with the settlement negotiations, the main application was being prepared by all of the respondents for hearing. It was set down by Astfin, who had compelled the applicant to deliver her replying affidavit, which was due on 18 August 2021. The order was granted on 25 May 2022. Although heads of argument were exchanged, the applicant did not comply with the Practice Directive that a joint practice note be delivered five days before the hearing date. As a consequence, on 25 October 2022, TWB circulated a practice note requesting input from Bihl and attorneys Adams & Adams, who represent the NRB Group.²⁷ The e-mail highlighted that the hearing had been set down for the week of 7 November 2022 and that the practice note would be delivered by 12h00 on Thursday, 27 October 2022, if the respective attorneys did not respond. Adams & Adams responded on 26 October 2022, confirming that the practice note accorded with their instructions. Bihl, however, did not respond that week at all. He made no mention of his discussions with Baron, the settlement he contends for that very day or that the application was to be removed from the roll.

[37] I accept that if the settlement had been concluded, Bihl would have immediately and, at the very least, addressed correspondence to the respective attorneys recording the settlement reached followed by a notice of withdrawal of the application as between the applicant and Astfin, each party to pay its own costs. Yet, he did nothing.

²⁶ CaseLines 034- 11, para 25

²⁷ CaseLines 035-33, Annexure **"BN3"**

- [38] This failure to respond to the proposed joint practice note was extraordinary given that this Court is burdened with reading papers not only in this application but in other opposed motions allocated to it. One would have thought that it would have been expedient for Bihl to communicate that the application had been settled and was not proceeding. What was Bihl waiting for?
- [39] As of 26 October 2022, the only persons who apparently believed that the application had been resolved were Bihl and the applicant. Furthermore, “*the necessary*” was still to be attended to. De Nil only heard from Baron the next day when Bihl’s e-mail was forwarded to him, and he responded almost immediately.
- [40] Importantly, Baron is a layperson and would presumably not know what was required to settle. He, as a matter of fact, simply in forwarding Bihl’s e-mail to De Nil, left him to attend to the “*necessary*”. De Nil turned to TWB, which one would have anticipated Bihl would have done. Accordingly, I cannot accept that it was and, as stated by Bihl, clear to him that this e-mail on its own confirmed that the application had become settled and would be removed from the roll of 7 November 2022. Only one day earlier, a joint practice note had been circulated to him. The joint practice note stipulated that the application was proceeding. Despite same, he was not moved to contact or confirm the purported settlement with TWB and Adams & Adams.
- [41] I do not accept that the objective facts support Bihl’s insistence that Baron was representing Astfin and a settlement was concluded with Astfin.
- [42] The relief in paragraph 1 of the main application had been withdrawn. But the relief in paragraphs 2 and 3 would also have to be resolved if a settlement had been concluded.

- [43] This is compounded by the suggestion that the relief in paragraphs 2 and 3.1 against Astfin could also simply be withdrawn. As De Nil points out, the relief sought that the loan agreements concluded between Astfin and the NRB Group be declared a sham and of no legal force and effect. This relief impacts Astfin directly. It is not legally sound that Astfin can exit this application when this relief remains. Astfin is materially involved and interested in the adjudication of this contentious relief, and the determination of the status of these agreements is critical to it. As submitted to me by Astfin's counsel, Mr. Kromhout, if it were accepted that the matter had become settled against Astfin only, this would have resulted in a material non-joinder as Astfin would no longer be a party to the application. It can only be excised from the application if a settlement incorporated this relief too, all of which, as alluded to above, required a settlement in writing.
- [44] I also do not accept that the relief in prayers 3.3 and 4 could be adjudicated without Astfin, which was tied up contractually in the relief sought.
- [45] It is, therefore, incorrect that Astfin could exit the proceedings until such time as all of these issues in their entirety had been settled, and this would have required a written agreement as contended for by De Nil.
- [46] Bihl elected and/or was instructed not to deliver a replying affidavit. As such, he does not respond to De Nil's e-mail response to Baron. There is no suggestion that, as of 27 October 2022, Baron conveyed the direct and clear instructions from De Nil to Bihl. If he was representing Astfin, he would surely have done so.
- [47] Devoid of any explanation from Baron, I cannot speculate about these emails, Baron's alleged mandate or that a settlement had been reached.

[48] In PRASA v Swifambo Rail Agency (Pty) Ltd ²⁸, Francis J, stated:

*“[21] Hearsay evidence is generally not permitted in affidavits. Once again this is not an absolute rule and there are exceptions to it. Where a deponent states that he is informed and verily believes certain facts on which he relies for the relief, he is required to set out in full the facts upon **G** which he bases his grounds for belief and how he had obtained that information, and the court will be inclined to accept such hearsay evidence. The basis of his knowledge and belief must be disclosed, and where the general rule is sought to be avoided reasons therefore must be given. Where the source and ground for the information and belief is not stated, a court may decline to accept such evidence.*

*[23] A court has a wide discretion in terms of s 3(1) of the Evidence Amendment Act to admit hearsay evidence. The legislature had enacted **C** the provisions of s 3 to create a better and more acceptable dispensation in our law relating to the reception of hearsay evidence. The wording of s 3 makes it clear that the point of departure is that hearsay evidence is inadmissible in criminal and civil proceedings. However, because the legislature was conscious of various difficulties associated with the reception of hearsay evidence in our courts, it brought a better dispensation **D** and created a mechanism to determine the circumstances when it would be acceptable to admit hearsay evidence.*

*[24] The legislature also decided that the test whether or not hearsay evidence should be admitted would be whether or not in a particular case before the court it would be in the interests of justice that such evidence **E** be admitted. The factors that the court should take into account are those set out in ss 3(1)(c)(i) – (vii) of the Evidence Amendment Act which includes any other factor which in the opinion of the court should be taken into account.”*

²⁸ 2017(6) SA 223 (GJ)

[49] I agree that Bihl has the added problem that anything Baron conveyed to him does constitute hearsay evidence, especially where final relief is sought. However, in the main, he relied on e-mail evidence, which did not appear to be unreliable. In addition, the application was brought urgently. There was, however, no explanation why Baron did not provide a confirmatory affidavit. Even then, I am persuaded to admit this evidence in the interests of justice. The hearsay point was not vigorously pursued in argument.

[50] De Nil furnished his Whatsapp communications with Venter, which resumed on 29 October 2022, three days after Bihl said the matter was settled. These, too, were not refuted by Bihl. The Whatsapp evidence reveals that Venter informed De Nil that TWB should speak to Bihl as to what was required by it to withdraw this application and the wording so that the applicant would not bring another application in relation to the commercial litigation. In response, De Nil, who is oblivious to any settlement records, said that he would speak to Helen, I assume his attorney, on Monday in this regard.

[51] On 31 October 2022, Venter records at 09h36:

“2022/10/31, 09:36 – Jan Venter:

Jammer pla. Emil sê hy wag vir julle om skikking te aanvaar? Kan jy asb dat Anabela hom bel and dat hulle vandag die saak terugtrek. Ek gaan nie advocate op standby hou nie – Dit is belangrik dat sy bevestig julle aanvaar die skking (sic) – maar asb sy moet niks oor recourse(sic) praat nie. kam (sic) jy help dat dit vandag nog gebeur.”²⁹

[52] This WhatsApp, as stated above, contradicts Bihl’s version that the application has been settled. Bihl does not refute this WhatsApp or take

²⁹ CaseLines 035-26, Annexure “**BN1**”

any issue with the WhatsApp in which he is mentioned. On 31 October 2022, Venter said unequivocally that he understands that Bihl is waiting for a response to a potential settlement. De Nil, as set out in his affidavit, responds, as expected, that Bihl needs to meet with his attorney Oshy, referring to Tugendhaft, that afternoon and that he would let Venter know in due course.

[53] In response Venter immediately confirmed:

“22/10/31, 09:41 – Jan Venter:

Hi Jan. (I am told this means that he is saying Jan here). Daar is nog steeds niks formeel / opskrif dat die saak nie Maandag aangaan nie. Anabela antwoord nie my oproepe nie en Emil sê hy wag om te hoor of Astfin die skikking aanvaar. Ek raak bekommerd dat Astfin wel wil voortgaan. Ek stel voor dat ek Sybrand [I am advised that this is the junior counsel briefed by Venter] opdrag gee om Maandag beskikbaar te wees indien daar enige probleme opduik en/of ons dalk die Hof moet toespreek ten aansien van jou posisie. Dit sal egter sy dag fooi (R20 k) en kostes beloop.”

[54] Once again, Venter reinforces that Emil (referring to Bihl) is waiting to hear whether or not Astfin has accepted the settlement. Again, Bihl does not refute this. The next WhatsApp from Venter, also on 31 October 2022 at 09:41, suggests that Venter remained uncertain whether the matter had become settled, reflected with a question mark. This uncertainty is well-founded, in my view. De Nil confirms that his co-director, Terry Flintlock, has left the matter with the attorneys, and he has to decide, whereupon he will inform Venter. I accept that it is not attorneys who determine matters, but, needless to say, clients are guided by their attorneys, and there is nothing untoward in the wording of this WhatsApp.

- [55] Venter again, at 11h46 on 31 October 2022, sends a WhatsApp to De Nil seeking confirmation as to what has been decided by Astfin, more importantly because he has advocates waiting on brief. Eventually, at 14h45 that day, De Nil communicates that he has spoken to Astfin's attorney, Tugendhaft ("Oshy"), and even if "they" were looking for a solution, there is not sufficient time and there are too many complications. He furthermore confirms that his attorney has requested that all further communications take place between the attorneys and that the matter cannot be settled. This, to my mind, is sage advice. Bihl must appreciate, as an attorney, that TWB and Adams & Adams should be involved from the outset. He does not explain why he did not involve them. De Nil remains open to settlement and confirms that insofar as the NRB Group is concerned, discussions can be held.
- [56] It is clear to me from this WhatsApp exchange that Bihl "*jumped the gun*". Any impressions which Bihl held and formed in his dealings with Baron are not correct. This e-mail exchange clearly demonstrates that not only did Baron not have the authority to represent Astfin but that, as late as 31 October 2022, Venter, who had instructed Baron to settle matters on his behalf, did not believe that the application had been resolved particularly in relation to Astfin. As such, Baron could not have conveyed this to Bihl and did not do so.
- [57] Notably, it was only on 31 October 2022, at 09h56, that Venter's attorneys, Adams & Adams, Ms Shani van Niekerk, received word from Bihl that the matter had allegedly been settled, some three workdays later. Van Niekerk immediately addressed correspondence to Bihl and recorded that the matter had not been resolved, no withdrawal of the application had been received, there was no agreement, and the matter was proceeding. She called for proof of the withdrawal of the application. Bihl, who wants this Court to accept that the matter had been settled, still does not affirmatively address this with the respective attorneys or Baron.

- [58] Instead, he sends an e-mail to Baron at 09:59 on 31 October 2022. The e-mail is curt. It refers Baron to the Adams & Adams e-mail, which was not annexed to the founding affidavit, and asks him for an urgent reply. Bihl does not take issue with Baron in clear terms. He does not assert the settlement contended for, which he would have done if he knew that the matter had been settled.
- [59] Baron responds in an e-mail at 10:24 on 31 October 2022. He asserts, “*Would you please draw up the necessary paperwork to withdraw the case from your side? Astfin agreed late last week.*”³⁰ This email does suggest that Astfin has agreed to settle, but what it also does is call for Bihl to put something in writing.
- [60] On 31 October 2022, a letter from Bihl is sent to TWB on a “*without prejudice*” basis via e-mail at 11:55. The letter records that “*The Venter Family trust facilitated a settlement*” between our client and your client and sets out the terms contended for in this application. Bihl asks for confirmation of the settlement, whereupon he says a notice of withdrawal of the application will be delivered.³¹ Interestingly, Bihl’s email does not assert positively that Baron brokered the settlement and the application is resolved but rather seeks confirmation that this is so. The letter is also a privileged communication.
- [61] TWB sends an e-mail in reply on 31 October 2022 at 12:11, recording that no instructions regarding a settlement have been received and the application is proceeding.³²
- [62] Bihl then again sends an e-mail to Baron and includes Venter on 31 October 2022 at 12:16. It, too, is curt. It refers Baron to the correspondence below and asks him to attend to this as a matter of

³⁰ CaseLines 034-32, Annexure “**EB10**”

³¹ CaseLines 034-33 to 034-35, Annexures “**EB11**” and “**EB12**”

³² CaseLines 034-35, Annexure “**EB12**”

urgency. The correspondence is not attached, but I accept that it is the TWB email of the same date.

- [63] Unsurprisingly, the response from Baron to Venter and Bihl at 12h22 records, *“There is nothing I can do – you need to retract your client’s case”*.³³
- [64] In an e-mail from Venter, at 12h54, Venter tells Bihl that he is speaking to Astfin, not Baron. He says De Nil made a proposal but that he asked De Nil to meet with his lawyers, “ sy Prokureurs is moelik oor die kostes”, that day, revert by 16h00 and *“ppog (sic) om die settlement gemagtig te kry Sal jou en Jonathan op hoogte hou.”*³⁴ This e-mail reflects that Venter was still waiting to hear if a settlement from Astfin would eventuate and that Baron could not have had the authority to convey a settlement for Astfin.
- [65] Venter, not Baron, then informed Bihl that the application was proceeding and that it was too late to reach an agreement in an e-mail dated 31 October 2022 at 3:01 pm³⁵. Bihl’s answer is to simply thank Venter. He does not assert the settlement or that Baron had misled him.
- [66] It was submitted to me by Mr Whittington that it is not for Astfin’s attorney to scupper a settlement agreement and to insist that the costs remain a barrier to a settlement. In principle, the attorneys cannot stipulate that a matter cannot be settled even if it is only in relation to costs; it is their client’s decision. The concern, however, is that this submission presupposes that Astfin had agreed to a settlement, and all that was in dispute was the costs order. It is clear from the aforesaid that it was not only the issue of the costs but also the applicant’s failure to address the remaining disputes, commercial and otherwise, involving Astfin and the

³³ CaseLines 034-36, Annexure “**EB13**”

³⁴ CaseLines 034-37, Annexure “**EB14**”

³⁵ CaseLines 034-38, Annexure “**EB15**”

NRB Group. Any agreement, as a consequence, would have to be reduced to writing. It is clear that a written agreement was required, particularly in light of the non-variation clauses in the loan agreements to which I was referred.

[67] The submission that De Nil had the authority to propose and bind Astfin to a settlement agreement is not in dispute. The critical dispute as to Baron's authority to represent Astfin must have been foreseen by Bihl and the applicant. In fact, Bihl's letter, dated 2 November 2022, envisages opposition to the contention that a settlement was concluded.

[68] It has not been established by the applicant that Baron had the requisite authority to represent Astfin or that a settlement was agreed upon on 26 October 2022.

[69] On 2 November 2022, Bihl addresses a letter to TWB for the first time on the record.³⁶ Devoid of any mention of Baron and his role in the purported settlement, Bihl raises the purported settlement with TWB. This application was due to be heard in the opposed court the following week, on 7 November 2022, some three Court days later. It is understandable, therefore, that Astfin, who was not a party to the discussions with Bihl, refused to agree to the removal of the application on the basis that the applicant would now proceed with a declaratory application and in respect of which answering affidavits would need to be filed. TWB, in a letter dated 2 November 2022 to Bihl, affirmed that no settlement had been reached and, that there was no agreement to remove the matter from the roll and that the main application would proceed. TWB recorded that the bringing of the declaratory application was not only an attempt to derail the main application but indicative of it being ill-conceived in the first instance.

[70] The conclusion proffered by Bihl that the TWB letter patently fails to

³⁶ CaseLines 034-41, Annexure "EB17"

deny that De Nil had the authority to conclude the settlement agreement did not arise. Bihl never raised with TWB the materially contested fact that Baron was authorised to represent Astfin. It was not contended that De Nil or any representative of Astfin had expressly or impliedly conveyed to Bihl that Baron had any authority to represent it.

[71] As stated above, the defence of an estoppel was not and could not be raised by the applicant in reply. It is not surprising that a replying affidavit was not filed by Bihl.

[72] As held in **South African Eagle Insurance Co Ltd v NBS Bank Ltd**³⁷

*“[27] The reason for the distinction is this. Where two parties negotiate with one another directly and not through representatives they will be bound if, objectively regarded, they appear to have reached contractual consensus. That one or other of the parties did not subjectively intend to do so will not matter. The **F** objective theory of our law of contract dictates that result. Each party is entitled to rely upon the objective manifestations of consensus which emanate from the other. And where each party is responsible for those which emanate from him or her it seems right that such should be the result. However, where one of them purports to be acting in a representative capacity but has in fact no authority to do so, the person whom he or she purports to represent can obviously **G** not be held bound to the contract simply because the unauthorised party claimed to be authorised. That person will only be held bound if his or her own conduct justified the other party's belief that authority existed. **H**“*

[73] On the aforesaid facts, Astfin's version cannot be rejected. The applicant, in the face of the e-mails and WhatsApp communications, has not established that Baron had any authority to represent Astfin or that a settlement was concluded. The applicant must have appreciated that there would be a material dispute of fact as to whether or not the matter had been settled. In fact, she did, and yet it was not argued that the

³⁷ 2002 (1) SA 560 (SCA) at paragraph 27

matter should be postponed or there should be a referral to oral evidence or trial. I am of the view that Mr Whittington did not do so because, on the evidence placed before this Court, there is no basis for such a referral.

[74] A case has not been made out by the applicant, and it is trite that a party is not allowed to lead oral evidence in order to fill loopholes in its case.³⁸

[75] It is for these reasons that I made an order dismissing the application.

[76] Furthermore, I am not of the view that the unavailability of the applicant's chosen counsel, Advocate G Nel SC, has any bearing on this matter. The application was set down by Astfin on 26 August 2022. If I am to accept that the application, which is voluminous and running in excess of 2000 pages, has a level of complexity and is daunting (which I do), one would have anticipated that either Mr Nel would have been briefed immediately and timeously, alternatively if he was unavailable that Bihl would have advised TWB that their counsel was unavailable during the week of 7 November 2022. None of this transpired. I cannot, therefore, accept that the applicants were deceived and ambushed. Needless to say, the heads of argument in this matter were prepared by Mr. A Vorster and not Mr. Nel. Furthermore, it is trite that the non-availability of counsel is not a reason for the removal of a matter from the roll or a postponement.

[77] As Ogilvie Thompson J stated in **D'Anos v Heylon Court (Pty) Ltd**³⁹

"...the non-availability of counsel cannot be allowed to thwart the bringing before the Court of the matter in issue. In all but the rarest of cases, other

³⁸ ***Minister of Land Affairs and Agriculture v D & F Wevell Trust*** 2008 (2) SA 184 (SCA) at paras 57-59

³⁹ 1950 (1) SA 324 (C) at 335 to 336

suitable counsel will be available. The test is not the convenience of counsel; it is the reasonable convenience of the parties - and by that I mean both parties - and the requirement of getting through the Court's work which must be the dominant considerations. The availability of counsel is a subsidiary consideration. A party's predilection for a particular counsel to take his case can, in my view, seldom, if indeed ever, be regarded as a decisive objection to a date of set down which is in all other respects reasonable and acceptable to both parties."

- [78] It, therefore, cannot be accepted that the applicant sat back from 26 August 2022 and did not ensure that she was represented by her counsel of choice on 7 November 2022. Needless to say, counsel was briefed in Mr Whittington, who informed me that he was alive to the obligations upon him, having accepted the brief to argue the application.
- [79] To the extent that it is necessary, Mr Labuschagne also submitted that the applicant had not established that the matter had become settled on 26 October 2022 and that it was self-evident from the documentation proffered that discussions continued post that date. Furthermore, he submitted, in accordance with the ***Plascon-Evans*** Rule, that as Astfin's affidavits revealed that no settlement had taken place, the application should be dismissed. I agree with him.
- [80] He raised as a caution a point which had not been raised by Astfin. He submitted to me that the applicant and not Bihl must waive the legal privilege attached to the "*without prejudice*" settlement negotiations. It is undisputed that Bihl alone waived the privilege attached to the settlement negotiations. He cannot do so as held in ***Anglo American v Kabwe***⁴⁰ and ***Contango Trading SA and Others v Central Energy Fund SOC Ltd and Others***.⁴¹ In so doing, all of the privileged settlement evidence that was placed before me in this affidavit would be inadmissible. The application is then fatally flawed. However, as this

⁴⁰ 2021 ZAGPJHC 892 at para 33

⁴¹ 2020 (3) SA 58 (SCA) at paras 48 and 55

point was not raised by Astfin, I am inclined not to take this course. In any event, the result would have been the same – a dismissal of the application.

[81] Insofar as the costs are concerned, both Mr. Kromhout and Mr Labuschagne moved for a costs order on the attorney/client scale; Mr Labuschagne also seeking that the costs order include his junior. Furthermore, he submitted that should I be inclined to make a costs order, given the community joint estate, the applicant, personally, should be ordered to pay the costs from her portion of the joint estate in terms of section 17(3) of the Matrimonial Property Act 88 of 1984.

[82] Mr. Kromhout submitted, in regard to costs, that the objective facts indicate that the matter had not been settled. He sought to draw the Court's attention to the delays occasioned in the prosecution of this application by the applicant and furthermore that it took the applicant, having been informed on 2 November 2022 that the matter was not settled, until 8 November 2022, in the opposed court week to launch the application. He further submitted that the applicant is well aware of the commercial proceedings involving Venter and that, ultimately, the bringing of the application was simply a diversion and an attempt to delay the main application on its merits. He submitted to me that the applicant had launched this application both in her personal capacity and in her capacity as a trustee despite the fact that she had no authority to represent the Trust. I refer to my findings below that, indeed, the applicant had no *locus standi* to represent the Trust, let alone bring the application in her personal capacity. In all of the circumstances, he submitted that the application was unmeritorious and that an attorney-client costs order was appropriate against the applicant personally.

[83] It was further submitted that a costs order should be granted *de bonis propriis* against Bihl, who asserted the settlement.

[84] This application was launched at a very late stage, only on 8 November 2022 and burdened this court in a busy motion roll. No heads were filed, and Bihl was not alerted that costs would be sought *de bonis propriis*. I, accordingly, cannot allow such an order without input from Bihl. I indicated to Mr Whittington that should I be inclined to do so, I would afford Bihl an opportunity to deliver an affidavit in relation to such an order.

[85] As the position stands, I am not inclined to grant a *de bonis propriis* costs order or an order that costs be awarded on the attorney/client scale. Although the application has faltered, I cannot find that Mr. Bihl or the applicant acted unconscionably or in bad faith in bringing the application. The Court is of the view that it would be appropriate to order that the costs follow the result. I am inclined to grant an order that the costs be paid by the applicant personally and from that portion of the applicant's half share in the joint estate in regard to Venter, the Trust and the NRB Group.

COSTS ORDER – DECLARATORY APPLICATION

[86] Having dismissed the application, I make the following costs order:

86.1 The first applicant is ordered to pay the costs of the declaratory application on the party and party scale to the first respondent.

86.2 The first applicant is ordered to pay the costs of the declaratory application to the second to thirteenth respondents, such costs to be paid from her portion of the joint estate in compliance with section 17(3) of the Matrimonial Property Act 88 of 1984.

86.3 Insofar as the costs are concerned in relation to the second to thirteenth respondents, these costs are to include the costs of senior and junior counsel.

THE MAIN APPLICATION

- [87] The main application, as indicated above, then proceeded on 11 November 2023. I must thank Mr. Labuschagne S.C. and Mr. Kromhout for their very helpful heads.
- [88] At the outset of the hearing, Mr. Whittington informed me that a draft order⁴² had been prepared, which had been circulated but not discussed with the respondents. The applicant now sought that the application be referred to trial. He submitted to me that it was common cause there were material disputes of fact, and a referral was appropriate. Insofar as the court was inclined to grant the referral, wasted costs had been tendered in the order.
- [89] Mr Whittington pre-empted the respondent's opposition to a referral by stating that if it should be submitted that the dispute of fact was patently clear, as referenced in the TWB letter of 16 July 2021,⁴³ then the Court must take into account that the application is not urgent, and the draft order makes provision for an orderly progression of the matter. Any inconvenience caused to the respondents has been addressed by the wasted costs tendered in the draft order. Further, to the extent that a punitive costs order may be sought, it is inappropriate as Bihl had simply erred in not agreeing to a referral to trial. Mr Whittington submitted that if a party is mistaken or wrong and the application is unsuccessful, it is not appropriate for an adverse costs order to be granted.
- [90] As anticipated, both Mr Kromhout and Mr Labuschagne opposed the application for a referral.
- [91] In essence, Mr. Kromhout referred me to the commentary in *Erasmus* to

⁴² CaseLines 010-43 to 010-45.

⁴³ CaseLines 004-604 to 004-605, Annexure "BND2"

Rule 6(5)(g).⁴⁴ Mr. Kromhout submitted that the matter could be decided on the papers and that this application for a referral was simply an attempt “*to kick the can down the road when there is no life in the matter whatsoever*”. Mr. Kromhout submitted that once a party is aware that there is a material dispute of fact, a decision for referral must be made *in limine* and not only when it becomes clear that the applicant is failing to convince the Court as to the merits of the matter in the affidavit. He went on to emphasise that the warning to the applicant had been made by Astfin’s legal representatives time and time again, both in the letter, the opposing affidavit, and Astfin’s heads of argument, yet the applicant had pursued this application, nonetheless. This principle has been affirmed in the decisions to which I was referred.⁴⁵

[92] Mr Kromhout also submitted that the court has the discretion to dismiss an application when the applicant should have appreciated that a “*serious dispute of facts incapable of resolution on the papers, was bound to develop*”⁴⁶. The court was enjoined to dismiss the application in the face of these fundamental disputes of fact on the papers but, more pointedly, because the applicant had failed to make out a case for the relief claimed. The further submission made was that even on an unopposed basis, a court would not have countenanced the applicant’s case. Equally, therefore, there is simply no basis for a referral to oral evidence or trial as was expressly set out by Astfin’s attorneys, TWB, in the letter of 16 July 2021.

[93] The letter specifically records:

“2. *The application is an abuse of the court process. It is founded on allegations that a suite of agreements concluded by our client, are disguised sham transactions, based on frauds,*

⁴⁴ **Erasmus** D169 to D177.

⁴⁵ **De Reska v Maras & Others** 2006(1) SA 401, paras [33] to [34]

⁴⁶ **Erasmus** D176.

fabrications and collusion on the part of our client.

3. *Any litigant, advised by responsible attorneys, would immediately have been aware, that such serious allegations, would inevitably, give rise to serious disputes of fact, which could not be properly and appropriately ventilated in motion proceedings, but ought if at all to be brought by way of action.*
4. *The allegations are also gravely defamatory of our client. All our client's rights to claim damages for the defamation, are strictly reserved.*
5. *We accordingly invite the applicants to withdraw the application against our client with an appropriate tender of costs, failing which their persistence with the application will be an aggravating factor, and our client will seek a dismissal of the application with an appropriate punitive costs order against your client.*
6. *Should the aforementioned invitation not be accepted by your client by 17h00 on Monday, 17 July 2021, our client will deliver its answering affidavit as soon as reasonably possible. If necessary, an application for condonation of the late filing thereof will be brought, given the complexity of this matter and the voluminous documentation which will be dealt with in answer to your client's founding affidavit, as also your client's failure to respond to our Rule 35(12) notice which was served on you on 7 July 2021, and which is also delaying our ability to deal with all the convoluted allegations in the founding affidavit."*

[94] Notably, this letter was addressed prior to the delivery of the comprehensive and substantial answering affidavit, which was then filed by Astfin.

[95] In response, Bihl addresses a letter⁴⁷ to Tugendhaft and Da Silva, of TWB, some of which is redacted as it referred to settlement negotiations, wherein the applicant maintains her stance and records:

"2. We deny that the application is an abuse of process. Our client must protect her rights as set out in the notice of motion because:

2.1 The documents in our client's possession confirm that your client has been settled and your client had no right to encumber our client's primary residence and her personal estate;

2.2 Therefore, the bond registered over our client's primary residence, 3 Horak Avenue, Camps Bay, Western Cape, in favour of your client is unlawful; and

2.3 Our client is personally prejudiced by the unlawful binding of the joint matrimonial estate by your client, without our client's consent or authority.

3. There is no dispute of fact for the following reasons:

3.1 Our client's case is founded on documents (financial documents and statements), provided by Mr Jonathan Baron, the Accountant and Auditor of the NRB Group;

3.2 Contractual documents provided by Mr Venter's attorneys;

3.3 Mr Venter (second respondent) deposed an affidavit

⁴⁷ Case Lines 004 – 606 to 004 – 609, Annexure "BND3"

under oath explaining the business relationship with your client; and

3.4 *Mr Venter's explanation under oath is contrary to the contractual documents provided. Therefore:*

3.4.1 *the defamation allegations are denied; and*

3.4.2 *there is no dispute of fact on our papers.*

4. *As a result, the allegations in your paragraph 3 are unfounded.*

5. *Our client will not be intimidated by the tone of your correspondence, which is threatening and constitutes intimidation.*

6. *We urge your client to file its papers and to be forthcoming with all information. We believe that the court should follow a robust approach in this matter."*

[96] Accordingly, on 30 July 2021, Astfin had no alternative but to file its comprehensive affidavit, some 18 months prior to the hearing of this application.

[97] *"In exercising its discretion under the subrule, the court will to a large extent be guided by the prospects of viva voce evidence tipping the balance in favour of the applicant. If on the affidavit the probabilities are evenly balanced, the court will be more inclined to allow the hearing of oral evidence than if the balance was against the applicant. The more the scales are depressed against the applicant, the less likely the court will be to exercise its discretion in favour of the applicant. Only in rare cases will the court order the hearing of oral evidence where the*

preponderance of probabilities on the affidavits favour the respondent."⁴⁸

- [98] As submitted by Mr. Kromhout, the affidavit filed by Astfin and to which the court must turn in the face of the material disputes comprehensively provides context and detail for the arm's length commercial negotiations resulting in the suite of agreements that were concluded between Astfin and the NRB Group and guarantees furnished over an eight-year period. Yet, the runaway train did not stop there. No attempt was made by the applicant through Bihl to contact TWB, make enquiries and clarify any confusion in light of the serious allegations made by the applicant of fraud, impugning the business transactions that had been concluded. In so doing, Astfin reserved its rights to seek a punitive *de bonis propriis* costs order against Bihl, as set out in the answering affidavit⁴⁹.
- [99] There is merit that the applicant should have anticipated material disputes of fact arising prior to the launch of this application. There is also merit that no case has been made out by the applicant.
- [100] The applicant's founding affidavit is wholly lacking in evidence to substantiate the spurious claims which are made to the effect that Mc Lintock and Venter have a close friendship and that Mc Lintock was aiding Venter via the Bi-Africa Group, of which McLintock is chairman, in an elaborate scheme to denude the joint estate, over a 38-year marriage, to prejudice the applicant's claims in the divorce proceedings.
- [101] NRB Rental, one of the companies in the NRB group, buys rental agreements for automated office machines, including copiers and printers. These are on-sold or ceded to financial institutions for profit. NRB Rental requires substantial funding to do so.
- [102] The Bi-Africa Group specialises in the procurement of, selling and

⁴⁸ *Erasmus* D177.

⁴⁹ CaseLines 004 – 600 to 004 - 601, para 192

servicing a broad range of office equipment in South Africa. Astfin finances the acquisition of office equipment in the form of asset-backed operating lease agreements. It was, therefore, conducive for NRB Rental to look to Astfin for financing.

[103] In truth, Astfin, represented by McLintock, concluded loan agreements (and securities provided for) commencing in 2011, well before any potential divorce, until June 2019.⁵⁰

[104] Astfin's affidavits reveal, logically and convincingly, that Astfin had advanced R 200 312 799 to the NRB Group from 2011 to July 2021 to permit the conclusion by NRB Equity and NRB Rental of the asset-backed rental agreements with their customers. The upshot of the relationship was that, in 2019, the NRB group owed Astfin R15.4 million as stipulated in the 2019 restated loan agreement and Skiathos loan agreement.

[105] In 2019, the business relationship between Venter and McLintock soured. McLintock determined that Venter had used approximately R20 million in loan funding, advanced by Astfin to NRB Rental and NRB Equity, not to acquire goods and enter into rental agreements with customers for the rental of such goods, but to make loans to NRB Risk, Scrap 'N 4 Africa (Pty) Ltd and Compu-tyre CC, all companies related or inter-related to Venter. This caused an immediate deterioration in the relationship, and a decision was taken to terminate the relationship with the NRB Group. as a consequence.⁵¹ Astfin then sought to extricate itself from the business relationship. McLintock ceased dealing with Venter.⁵²

[106] The assumptions which the applicant sought to make are bald, illogical and unsubstantiated. In the face of the Astfin affidavit, the applicant's

⁵⁰ CaseLines 004 – 546 to 004 -560, paras 40 to 72

⁵¹ CaseLines 004-560 to 004-561, para 73

⁵² CaseLines 004-560 to 004-580, 73 to 107

version reveals a patent inability to understand the agreements⁵³ in favour of Astfin and concluded by NRB Rental Solutions, represented by Venter. In fact, the applicant concedes that this information is exclusively within Venter's knowledge. Yet when armed with the Astfin affidavit, to which she also has no answer, she refused to heed the information exclusively within Astfin's knowledge.

[107] The central allegation is that these loans were simulated transactions, described as "*shams and fraudulent*," hiding Astfin's acquisition of the shares in NRB Capital for R100 million and for which the purchase price was never paid to the Trust. Astfin denies this emphatically as a conspiracy. De Nil and McLintock aver that none of the companies in the Bi-Africa group purchased shares in NRB Capital. Notably, the applicant eventually abandoned, upon delivering her replying affidavit, the relief sought for payment of R100 million by Astfin to the Trust. This is testimony to the hollowness of these serious and *prima facie* defamatory allegations and the alleged fraud.

[108] As a consequence, the remaining relief premised thereon that the loan agreements and guarantees furnished in the course of the business relationship are simulated shams and must be set aside hold no water either. There is no evidence establishing the fraud in which Astfin and McLintock are alleged to have played a role.

[109] In all of the circumstances, I could simply dismiss the application in the face of the material disputes of fact, but the merits do not favour the applicant. There is no need to hear *viva voce* evidence. It is trite that a party is not allowed to resort to oral evidence where the affidavits do not present such evidence, and there are shortcomings in the applicant's case.⁵⁴

⁵³ The first extension agreement, the second extension agreement, the loan agreement and the guarantees.

⁵⁴ **Minister of Land Affairs and Agriculture v D & F Wevell Trust** 2008(2) SA 184 (SCS) at paras [57] to [59]

[110] As is set out in Mr. Labuschagne's heads, the answering affidavits provide a logical explanation of the various agreements and companies with which Astfin was connected. The reasons for the loans, the fundings and the agreements are explained in minute detail and why certain of the companies are linked with each other. It is quite clear that all of the transactions were concluded "*in the normal course of business, at arm's length*". As also set out in his heads, "*It is clear that the version of the applicants is a misconstrued version of reality. A definite, factual and lawful basis exist regarding the nature, content, purpose and reasons for the various transactions which were entered into*".

[111] There is no impropriety regarding the transactions, which have all been set out in great detail. The version given by Astfin cannot be rejected and is accepted by the court in its entirety. This creates an insurmountable obstacle for the applicant. For these reasons, I conclude that the applicant has not established that she is entitled to the declaratory orders sought in the Notice of Motion.

[112] In any event, to bolster this finding, the respective respondents' counsel raised a further *in limine* point, the *locus standi* point, which, to my mind, is definitive of the demise of the application. The point raised and persisted with, in the face of the application for a referral, is that the applicant, both personally and in her capacity as a trustee, did not have *locus standi* to institute this application in the first instance.

[113] The applicant, indeed, brought this application in her personal capacity and in her capacity as a trustee of the Venter Family Trust. She pertinently states.⁵⁵

"I believe that the other two trustees (in this case referring to Mr. Venter and Baron) are acting against me to defraud me and avoid liability towards me and for that reason, there is no resolution

⁵⁵ CaseLines 001 – 12 para 8.4

authorising me to launch this application, on behalf of the Trust, and it is also for this very reason that I seek the assistance from this Honourable Court to protect the Trust.”

[114] As submitted to me, a trust cannot be represented by one trustee. The trust is represented by all of its trustees, and all of its trustees⁵⁶ must resolve to take action on behalf of the Trust. In this instance, the applicant concedes that she acts alone.

[115] Section 12 of the Trust Property Control Act 57 of 1988 provides as follows:

“Trust property shall not form part of the personal estate of the trustee except insofar as he as the trust beneficiary is entitled to the trust property.”

[116] Furthermore, as stated above, the applicant correctly, so to my mind, abandoned the relief sought in paragraph 1 of the notice of motion pertaining to the Trust and in which she sought, unconvincingly, payment from Astfin to the Venter Family Trust the sum of R100 million for its alleged acquisition of 70% of the shares in the NRB Capital Solutions (Pty) Ltd in which the Trust holds 100% of the shareholding. This relief could not be persisted with in the face of the clear denial by Astfin that it or companies in the Bi-Africa Group purchased shares in NRB Capital Solutions (Pty) Ltd. Instead, on 31 August 2016, TAG, a wholly owned subsidiary of Bi-Africa, concluded a written sale of shares and shareholders agreement with NRB Rental in terms of which TAG acquired 900 ordinary shares comprising 45% of the issued share capital of NRB Rental from NRB Capital for a purchase price of R2 250 000.00 which purchase price was paid on 1 September 2016 by TAG to NRB Capital in cash.

⁵⁶ Namely the applicant, Venter, and Baron

[117] In her replying affidavit, the applicant cannot dispute the business transactions which were disclosed openly and transparently in Astfin's answering affidavit and, in fact, pointedly states that she has no knowledge of most of the paragraphs relating to these business transactions and is, therefore not in a position to respond thereto.⁵⁷

[118] As also submitted to me, the applicant alleges⁵⁸ that the Trust is "a sham", which allegation is completely destructive of the claim for payment to the Trust of R100 million being the alleged sale of shares owned by the Trust to Astfin. If the Trust was a sham, it could not have concluded this transaction, and none of the trustees, let alone the applicant, could have enforced the alleged agreement of sale on behalf of the Trust. As such, it is my finding that the applicant did not have the *locus standi* to claim on behalf of the Trust and, as such, should not have brought this application in such capacity.

[119] Turning now to the remaining relief sought in the notice of motion, the applicant, in her individual capacity, seeks a declaratory order as follows:

"2. *That the loan agreements between the first respondent and the NRB Group which includes the fifth to thirteenth respondents be declared a sham and of no legal force and effect; and*

3. *The setting aside of:*

3.1 *The loan agreements between the first respondent and the NRB Group;*

3.2 *The bond registered in favour of the first respondent over Erf 1536 Camps Bay, City of Cape Town belonging to the fifth respondent (namely Skiathos*

⁵⁷ Case Lines 005 – 16, para 45

⁵⁸ CaseLines, 001-47, para 42.2.5

B2 Property Investments CC); and

3.3 *Any personal guarantees issued by the second respondent for the debt of the NRB Group toward the first respondent.*

[120] As succinctly submitted to me, Astfin and the NRB Group entered into a suite of agreements. As their relationship continued, new and further agreements were entered into in terms of which certain security or guarantees were required and provided. The applicant has no contractual nexus to any of these agreements and, accordingly, as an outsider, is attempting to have the agreements declared null and void in circumstances where the parties thereto are abiding by the terms of the agreements. The respondents do not challenge the veracity of the agreements that they concluded with each other.

[121] Mr Labuschagne referred me to the decision of **ABSA Bank Bpk v G L von Abo Farms BK And Others**⁵⁹ in which the court found that what the applicants seek:

“is dat die hof aan hulle as derdes ‘n sterker reg tot kansellasië of nietigverklaring van die ooreenkoms moet verleen as dit waarvoor die partye self daardie beskik”.

[122] This the court cannot do. As explained in the judgement:

“Daar bestaan myns insiens geen beginsel, regtings of andersins waar kragtens derdes ‘n sterkte reg tot kansellasië van ‘n ooreenkoms kan verwerk as dit waarvoor die kontrakterende partye self beskik nie”.

[123] Accordingly, the applicant, who is a complete stranger to the agreements, cannot impugn them. This principle was also followed in the

⁵⁹ 1999 (3) SA 262 (O) at 274E-F

decisions of *Letseng Diamonds v JCI Limited and Others*⁶⁰ and *Theodosiou and Others v Schindler Attorneys and Others*⁶¹. In these circumstances, it is clear to the court that the applicant has no *locus standi* to request the relief which she seeks in her personal capacity either.

[124] In reply, Mr Whittington sought to distinguish the applicant's entitlement to at least, in her personal capacity, set aside:

"3.3 Any personal guarantees issued by the second respondent for the debt of the NRB Group toward the first respondent".

[125] In this regard, Venter concluded three guarantees, namely:

125.1 For the performance of Ned Equities' obligations in relation to the first extension agreement up to an amount of R5.5 million,⁶² which is dated 20 February 2015, in which Venter bound himself as guarantor and co-principal debtor for the repayment on demand by Astfin of certain loan facilities to NRB Equity Solutions (Pty) Ltd. The consent signature provision is deleted by two hand-drawn lines;

125.2 To Astfin in respect of certain further loan facilities to NRB Rental Solutions (Pty) Ltd, which is dated 25 March 2019⁶³. That guarantee makes no provision for signature by the applicant;

125.3 In favour of Astfin to secure NRB Capital's obligations⁶⁴, dated 12 December 2019, again not signed by the applicant.

⁶⁰ 2009 (4) SA 58 (SCA) at 63H-I

⁶¹ 2022 (4) SA 617 (GJ) at 547, paragraph 36

⁶² CaseLines 001 – 83 to 001 – 86, Annexure "FA5"

⁶³ CaseLines 001-100 to 001-102, Annexure "FA7"

[126] Mr Whittington argued that Venter had not given these guarantees in the ordinary course of his profession, trade or business, and because the applicant had not co-signed the guarantees, they could be set aside by her. Mr Whittington placed reliance upon section 15 of the Matrimonial Property Act⁶⁵. This section provides:

“(1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such a spouse shall not, without the written consent of the other spouse ... find himself a surety.

....

(5) The consent required for the performance of the Acts contemplated in paragraphs (a), (b), (f), (g) and (h) of subsection (2) shall be given separately in respect of each Act and shall be attested by two competent witnesses.

(6) The provisions of paragraphs (b), (c), (f), (g), and (h) of subsection (2) do not apply when an Act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business.”

[127] However, as submitted by Mr. Kromhout, the decision of ***Strydom v Engen Petroleum Limited***⁶⁶ puts paid to this. In this case, the husband sought to escape from a suretyship which he had given in the normal course of his profession, trade and business because his wife, Mrs. Strydom, had not consented thereto. Of relevance is that Mrs

⁶⁴ CaseLines 001 – 151 to 001 – 162, Annexure “**FA11**”

⁶⁵ 88 of 1984

⁶⁶ 2013 (2) SA 187 (SCA)

Strydom had not been cited in the litigation, and it was argued that she was non-suited. The court pertinently had to determine whether or not she was a necessary party thereto. Wallis JA held that:

[23] *Again I find myself in respectful disagreement. Joinder is necessary in the circumstances explained by Corbett J, with his customary lucidity, in United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another. He said:*

'It is settled law that the right of a defendant to demand the joinder of another party and the duty of the court to order such joinder or to ensure that there is a waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the court might make (see Amalgamated Engineering Union v Minister of Labour, 1949 (3) SA 637 (AD); Koch and Schmidt v Alma Modehuis (Edms) Bpk, 1959 (3) SA 308 (AD)). In Henri Viljoen (Pty) Ltd v Awerbuch Brothers, 1953 (2) SA 151 (O), Horwitz AJP (with whom Van Blerck J concurred) analysed the concept of such a direct and substantial interest and after an exhaustive review of the authorities came to the conclusion that it connoted (see p.169) –

"... an interest in the rights which is the subject matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation.

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions ...'.

Corbett J's exposition has been cited countless times as the correct statement of our law including in judgments of this court.

[24] *On that basis the question is whether Mrs Strydom has a direct and substantial interest in the subject matter of the litigation [my emphasis], that is, the suretyship and its validity or whether her interest is merely a financial interest that is only indirect and therefore does not require her joinder. The answer is clear. She has no interest in the suretyship or its validity. She is not a party to it [my emphasis] and, according to her husband she was opposed to its execution. The fact that he went ahead and executed it notwithstanding her disapproval is a potential source of financial prejudice to her and undoubtedly a source of matrimonial discord. However, that is not a direct and substantial interest in the issues in this case. It is an interest that exists only by virtue of the fact that she and Mr Strydom are married in community of property. I, accordingly, disagree with the proposition stated in paragraph 43 of my colleague's judgment.*

[25] *The consequence of my colleague's judgment would be that in every case where the effect of a judgment, or more accurately the execution of a judgment, would be to diminish the joint estate, joinder of the spouse who was not party to the underlying transaction or dispute, would be essential in order that they could protect their interests in the joint estate. Whilst the proposition in para [43] of his judgment is in terms confined to suretyship, I can see no reason why it would not apply in any situation where a claim against one spouse married in community of property would, if successful, detrimentally affect the joint estate. On my colleague's reasoning, particularly that in the final sentence of para [45] of his judgment, the other spouse would have to be joined to enable them to protect*

the joint estate and the interest in it. Not only has that never been our law, but it would fly in the face of the constitutional guarantee of equality between husband and wife by forcing them to litigate together in all situations where the joint estate could be affected by the outcome of the litigation. Sections 15(5) and 17(1) of the Act make it clear that this is not a requirement. In relation to matters relating to a spouse's profession, trade or business, that spouse is free to institute or defend litigation without obtaining the consent of their spouse. This provision would be entirely undercut by the requirement that the other spouse must be joined in that litigation".

- [128] As a consequence, the applicant, in her personal capacity, lacks the *locus standi* to set aside the guarantees furnished by Venter on behalf of the NRB group's debts to Astfin.
- [129] It was further submitted to me by Mr Labuschagne that should I find that the applicant lacked *locus standi*, both personally and in her capacity as a trustee to bring this application, that would mean that the application for referral to trial would also simply fail. This is, of course, correct, and I accept that to be the position. To my mind, that is the end of the matter.
- [130] Even if a proper case had been made out in the founding affidavit, which is not the case, the applicant's lack of *locus standi* is definitive of the application. Accordingly, the court must dismiss the application as the point *in limine* is sound, too.
- [131] What remains is a determination of the costs. Both Mr. Kromhout and Mr Labuschagne sought to describe the application as a vexatious abuse in respect of which no case had been made and in respect of which the applicant and her legal representative, Bihl, had been forewarned. Astfin made an invitation to the applicant to withdraw and

tender costs, in the letter referred to above, dated 16 July 2021. Punitive costs were reserved if this was not done. As already stated, the applicant failed to do so.

[132] As already set out above, in order to progress this application to finality, Astfin having not received the applicant's replying affidavit on 18 August 2021, nor heads of argument delivered its heads of argument and practice note on 24 November 2021. It then launched the interlocutory application in the face of non-compliance with demands made, compelling the applicant to deliver her heads of argument. The application to compel was set down for 25 May 2022. Eventually, on 23 May 2022, the replying affidavit was served. On 25 May 2022, an order was obtained compelling the applicant to deliver heads of argument by 7 June 2022. There was compliance in the face of the order.

[133] The NRB Group were also compelled under the 25 May 2022 order to deliver their heads of argument by 22 June 2022. This was likewise done.

[134] The replying affidavit came nine months after the answering affidavit.

[135] The replying affidavit did not disturb the uncontested facts flowing from the Astfin answering affidavit, as the applicant did not have any knowledge of the business transactions which were set out in extensive detail by Astfin. The applicant abandoned relief⁶⁷. It would have been appropriate for the application to be withdrawn as the remaining relief, to my mind, fell by the wayside as a consequence.

[136] As also submitted by Mr. Kromhout, the applicant needlessly and without foundation continued in her replying affidavit to make speculative and unfounded allegations against De Nil and persisted with the misguided conclusion that funds had been misappropriated, which allegations

⁶⁷ CaseLines 005 – 9, para 16

Mr. Kromhout labelled as scandalous. Mr. Kromhout filed supplementary heads of argument dealing with this further attack on the integrity of De Nil. Mr Kromhout persisted with the *de bonis propriis* costs order against Bihl.

[137] Mr Labuschagne submitted that the NRB Group made common cause with Mr Kromhout in relation to the costs of the application save for the formulation thereof. In this regard, because the applicant had no authority to bring the application in her capacity as a trustee, it would be inappropriate for an order to be made for costs against her in that capacity because this would mean that the Trust would be mulcted in costs where the bringing of the application was not agreed to by the Trust in any respect. As such, he contended that the costs should only be paid by the applicant personally. Furthermore, insofar as Venter's (and the NRB Group's) costs are concerned, it would be inappropriate for the joint estate to pay the costs, and the court should, in accordance with section 17(3) of the Matrimonial Property Act, ensure that Venter was not saddled with the costs. Rather, any order made against the applicant should come from that portion of the joint estate which belonged to her. I agree with these submissions.

[138] Mr Labuschagne also sought a *de bonis propriis* costs order against Bihl, and more particularly in relation to the allegations of fraud, which he correctly submitted are not permissible, in any event, in application proceedings as unquestionably from the outset a dispute of fact would be anticipated.⁶⁸

[139] Mr Whittington, in reply, submitted to me that despite the fact that *de bonis propriis* costs had been sought against Bihl in the answering affidavits, they had not been dealt with in the replying affidavit, and as such, he was hamstrung to a degree. He alerted me to the contradictory affidavits deposed to by Venter in what is known as the "*sham*

⁶⁸ **Commissioner for the SA Revenue Services v Sassin** 2015 JDR 2293 (KZD) at paras [45] to [48]

application” under case number 20837/2020.⁶⁹ Venter deposed to an affidavit in which he stated expressly that the loan agreements with Astfin created a partnership in terms of which Astfin acquired a 70% shareholding in NRB Capital and made funds available to the NRB Group to fund the transactions undertaken. This funding was substantial, he averred, and during 2019, it amounted to approximately R100 million.

[140] Notably, Venter does not deal with any of these allegations in his answering affidavit, given the *in limine* points taken and proper account of the business transactions which were concluded between the NRB Group and Astfin.

[141] Mr Whittington submitted that the applicant, in the face of these averments by Venter, now established to be false, genuinely believed that the Trust had been defrauded in that it had never received payment of the R100 million. She genuinely believed that she could and must launch this application.

[142] The problem that I have with this submission is that on receipt of the Astfin affidavit, Astfin resoundingly dismissed these and other fallacious allegations and provided indisputable proof of its business relationship with the NRB Group. The business transactions, although complicated, are detailed and are just that. There is no merit to the contention that Astfin never acquired the shareholding in NRB Holdings. Once the agreements attached to the founding affidavit are placed in context by De Nil, on behalf of Astfin, in the answering affidavit supported by McLintock, the conspiracy is exposed. As such, I do not believe that this assists the applicant, who persisted with the application.

[143] Mr Whittington also submitted that to the extent that defamatory allegations were made, the respondents could simply institute actions in which they claim damages for these defamatory allegations. I do not

⁶⁹ CaseLines 001 – 40 to 001 – 45, para 40, specifically CaseLines 001 – 42, para 4.4

accept this submission. It is totally within the rights of the respondents to determine whether they wish to go to the trouble and costs of launching defamation proceedings. What they seek here is a sanction in relation to what has transpired in this application, which is patently ill-founded and vexatious and which should have been resolved, at the very least, when the Astfin answering affidavit was delivered.

[144] Mr Whittington argued that because costs orders had been granted in the compelling application, an order herein would smack of “*double jeopardy*”. I do not agree with this submission. This is a separate substantive application, and I must exercise my discretion as to the costs to be ordered, punitive or otherwise.

[145] Mr. Whittington finally drew my attention to the fraught litigation⁷⁰ over the period August 2021 to May 2022, when the replying affidavit in this application was eventually delivered. As appears from the affidavit, August 2021 was consumed with a Rule 43 application. September 2021 was consumed with the perusal of an answering affidavit in a liquidation application that had been launched and the finalisation of the Rule 43 application. October 2021 resulted in the delivery of a Rule 43 answering affidavit and financial disclosure. Simultaneously, letters were exchanged with TWB relating to the perceived discrepancies in the answering affidavits filed by the NRB Group and Astfin, wherein TWB again affirmed that the proceedings launched were ill-advised. In addition, it appears that a replying affidavit was being settled in the Rule 43. In November 2021, settlement discussions ensued between the Venters in their divorce action and in respect of which this application was also discussed. Although I am not afforded much detail, the applicant contends that the default in payment of maintenance and her medical aid claims was an issue for her. In December 2021, the applicant’s replying affidavit was filed in the Rule 43 application. The compelling application to deliver heads of argument was received, and

⁷⁰ CaseLines 005 – 24 to 005 – 34, paras 70.3 to 70.12

settlement negotiations were ongoing. During January and February 2022, settlement discussions were ongoing, and counsel was briefed in respect of the replying affidavit. March 2022 was consumed with discovery in the divorce proceedings, and as a consequence, the replying affidavit could not be filed. Once again, the applicant avers that she is trying to decipher and understand the answering affidavits filed in this application. In April 2022, a pre-trial conference was held in the divorce. In May 2022, a preferential hearing had to be scheduled for the Rule 43 application because of its volume. This explanation is given in an effort to condone and receive the replying affidavit.

[146] Although this may well be a sufficient explanation to condone the filing of the replying affidavit, a point which was not pursued by the respondents, I do not believe that this aids the applicant when it comes to the determination of costs in this application. I accept that there is a complexity to this application, and I furthermore accept that the applicant must be guided by Bihl in the light thereof. It is inexplicable to me that the application was not withdrawn and that costs were not tendered, specifically subsequent to the filing of the Astfin answering affidavit. I cannot speculate as to what was discussed between the applicant and Bihl in relation to this application. To my mind, and given the unsubstantiated and serious allegations of fraud and the substantial nature of this application, much time and money has been wasted. Ultimately, this application was set down by Astfin. TWB prepared the practice note and, in addition, provided the court with the files to aid the hearing.

[147] That said, I am not of the view that Bihl should be mulcted with costs *de bonis propriis* on the attorney/client scale. Such costs are only awarded if there is "*negligence of a serious degree*". I cannot find that Bihl's conduct fell into this category. As also submitted, "*No order will be made where the representative has acted bona fide; a mere error of judgment*

does not warrant an order of costs *de bonis propriis*".⁷¹ Bihl's decisions were, to my mind, an error of judgment, but he remained *bona fide*.

[148] However, as set out in *In re: Alluvial Creek* decision:⁷²

"An order is asked for that he pay the costs between attorney and client. Now sometimes such an order is given because of something in the conduct of a party, which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious although the intent may not have been that they should be vexatious. There are people who enter into litigation for the most upright purpose and the most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case."

[149] It is my view that this approach is apposite in this matter. I do find that the applicant pressed on in circumstances where she not only had not made out a case but where material disputes of facts in the face of information not within her knowledge could reasonably have been anticipated. TWB was not engaged despite letters setting out emphatically the fallacy in the applicant's reasoning. In so doing, the effect of this application is vexatious. I am, therefore, of the view that an attorney/client costs order is appropriate and that it should be borne by the applicant personally.

As a consequence, I make an order in the following terms:

⁷¹ **Erasmus** D5-30 to D5 -31; **Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd** 2014(3) SA 265 (GP) AT 289 A-D

⁷² 1929 (CPD) 532 at 535

- [1] The application is dismissed.
- [2] The first applicant is ordered to pay the costs of the application on the attorney/client scale to the first respondent.
- [3] The first applicant is ordered to pay the costs of the application on the attorney/client scale to the second to thirteenth respondents, which costs are to be paid from her portion of the joint estate in compliance with section 17(3) of the Matrimonial Property Act 88 of 1984.
- [4] Insofar as the costs are concerned, in relation to the second to thirteenth respondents, the costs are to include both the costs of senior and junior counsel.

P V TERNENT
*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 8 September 2023.

HEARD ON: 9 and 11 November 2022

DATE OF JUDGMENT:

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