

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

Case No: 25933/2020



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

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SIGNATURE

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DATE

In the matter between:

ANANDINI DABAS

Applicant

and

RAJIV DABAS

First respondent

ALTAF HUSSAIN MOTI

Second respondent

REGISTRAR OF DEEDS, JOHANNESBURG

Third respondent

MANGERA & ASSOCIATES

Fourth respondent

Delivered: This judgement was prepared and authored by the Judge whose name is reflected in it 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 11 September 2023.

JUDGEMENT

DUNN AJ:

Introduction and background

1. This application is concerned with the ownership of an immovable property described as follows in the deed of transfer attached to the applicant's founding affidavit:¹

- '(a) Section No. 71 as shown and more fully described on Sectional Plan No. SS 00000023 / 2013 in the scheme known as Parkwood Manor in respect of the land and building or buildings situate at Parkwood Township Local Authority: City of Johannesburg, of which section the floor area, according to the said sectional plan is 82 (Eighty Two) in extent; and
- (b) An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.'

(the property).

2. Until, at least, 26 June 2018, the applicant, Mrs Anandini Dabas (**Mrs Dabas**), was the registered owner of the property. On 27 June 2018 the second respondent, Mr Altaf Hussain Moti (**Mr Moti**) took transfer of the property² and it was then registered into his name by the third respondent's – i.e., the Registrar of Deeds, Johannesburg (**the Registrar**) – deeds registry.³

3. The fourth respondent, a firm of attorneys practising under the name Mangera & Associates (**Mangera**), where the conveyancers responsibly for undertaking the registration of the property into Mr Moti's name.

4. The hotly disputed *main* issue in this matter – although there are various other issues, both primary and secondary ones, that loom large too - is precisely how it came about in the first instance that the property was transferred from Mrs Dabas's name into that of Mr Moti's.

¹ Founding affidavit (**FA**): para 7, CaseLines, p. 01-3, read with annexure **A**, CaseLines, p. 01-8 to 01-10.

² Second respondent's answering affidavit (**AA 2R**): para 52, CaseLines, p. 06-18.

³ FA: para 15, CaseLines, pp. 01-5 and 01-6, read with annexure **E**, CaseLines, p. 01-29 to 01-32.

The nature and extent of the critical dispute

5. Mr Moti avers that, on 24 March 2018, he met – seemingly so, it is to be inferred, by prior arrangement – both the applicant and her husband (or erstwhile husband), i.e., the first respondent, Mr Rajiv Dabas (**RD**), at the Sandton police station’s ‘*Client Service Centre*’ where ‘*the agreement of sale was concluded ... and stamped by a police officer and witnessed.*’⁴ What Mr Moti does not expressly say in this regard, is that he actually saw Mrs Dabas sign the agreement of sale (**the sale agreement**). But that is what his above-quoted statement evidently *seeks to imply, viz.*, that the sale agreement was entered into (i.e., ‘*concluded*’) by the parties (allegedly) affixing their signatures thereto, which signatures were then also witnessed by persons who themselves signed it as witnesses, and that it also was stamped by a police officer.
6. Mrs Dabas – both in her founding affidavit⁵ and her replying affidavit⁶ – denies that she ever signed any sale agreement in respect of the property and, pertinently, denies ever being present at the Sandton police station’s ‘*Client Service Centre*’ to sign the sale agreement relied on by Mr Moti.
7. In her founding affidavit Mrs Dabas expresses herself on this topic as follows:⁷

‘I aver that I did not sell the property, nor did I have any intention of selling the property. I have been advised and which advice I accept, that in order to effect transfer of the property, I would be required to sign a purchase and sale

⁴ AA 2R: paras 36 to 38, CaseLines, pp. 06-15 and 06-16, read with annexure **AA 8**, CaseLines, p. 06-109 to 06-114.

⁵ FA: para 14, CaseLines, p. 001-5.

⁶ Replying affidavit (**RA**): paras 24 and 25, CaseLines, pp. 045-11 and 045-12; para 30, CaseLines, p. 045-14;

⁷ FA: para 14, CaseLines, p. 001-5.

agreement, a status affidavit, a FICA affidavit, a transfer duty application and a power of attorney. **I signed no such documents.**'

(My emphasis).

8. Concerning the further documents alluded to in Mrs Dabas's above-quoted statement, Mr Moti, in his answering affidavit, states that his attorneys had prepared the remaining documents required to formalise the transfer of the property into his name and that RD (i.e., the first respondent)⁸ had accompanied him to his attorneys for this purpose.⁹ Mrs Dabas was not present on this occasion, i.e., despite her presence (allegedly) having been requested.¹⁰
9. According to Mr Moti, the remaining documents his attorneys prepared in order to formalise the transfer of the property into his name comprised:¹¹ (i) a power of attorney to transfer the property; (ii) a transfer duty declaration; (iii) the seller's transfer affidavit/s; and (iv) and affidavit in terms of Regulation 68 (1) for the creation of a duplicate title deed.
10. Mr Moti further emphasises that the latter documents were attested to in front of a commissioner of oaths, Mr Quintin Ross du Plessis (**Mr Du Plessis**), a practising attorney in the firm of White & Case SA, 102 Rivonia Road, Sandton.
11. Mrs Dabas's testimony in her replying affidavit¹² understandably goes much further in reiterating the denials in her founding affidavit. In this regard:

⁸ RD has since absconded to the UAE and is untraceable (*per* Mr Moti - AA 2R: para 59, CaseLines, p. 06-19) and Mrs Dabas has also finally divorced him.

⁹ AA 2R: para 45, CaseLines, p. 06-16.

¹⁰ *Ibid.*, para 46, CaseLines, p. 06-17, where Mr Moti further states that RD informed him that Mrs Dabas was working in Sandton and that she could not attend.

¹¹ *Ibid.*, paras 47 and 50, CaseLines, p. 006-17, read with annexure **AA 10**, CaseLines, pp. 006-121 (*which has to be read in reverse*) to 006-116.

¹² RA: paras 24 and 25, CaseLines, pp. 045-11 and 045-12; paras 30 and 31, CaseLines, pp. 045-14 and 45-15.

11.1. First, concerning her signing of the sale agreement at the Sandton police station on 24 March 2018, Mrs Dabas states as follows:¹³

- ‘24.2 **I never attended the Sandton Police Station on the 24th March 2018 and concluded a purchase and sale agreement.**
- 24.3 It was my routine at that point in time and specifically on 24 March, being a Saturday, I would leave home at approximately 9 am and attend the temple where I taught Indian dance.
- 24.4 I concluded my lessons at approximately 12:30 pm, thereafter I had lunch at the temple and I remember very clearly that I spent the afternoon with my nephew at my home.
- 24.5 **I find it rather strange that an agreement of sale would be concluded at the police station when such document would be merely signed by the purchaser and seller with witnesses. There would be no need for the police, as the police would commission documents under oath. A purchase and sale agreement for immovable property does not require a commissioner of oaths, only the signatures of the respective parties with the witnesses.**
- 24.6 **I can only fathom that this was done, without me being present, in order to create the impression that the agreement was signed before an officer of the Law [sic], but this is nonsensical as the police official stamping the document, although not required would not require proof of identity, as no commissioning is done.’**

(My emphasis).

11.2. Second, as far as signing the sale agreement, as well as the other documents required to formalise the registration of transfer into Mr Moti’s name, are concerned, Mrs Dabas stated as follows:

- ‘8.5 **... I was unaware of such sale and did not sign the documents alleged to be signed by myself in effecting such sale and transfer.**
- 8.6 I aver further that in drafting my Founding Affidavit, I did not expect the Second Respondent to oppose this Application, as I stated under oath that I did not sign the documents effecting the sale and transfer of the property. Upon sight of the Second Respondents [sic] Opposing Affidavit **I will present the Court with the report of a handwriting expert. In considering the short constraint in time in which I have to file this Replying Affidavit I will accordingly file a Supplementary Replying Affidavit of the handwriting expert.**¹⁴

...

¹³ *Ibid.*, paras 24.2 to 24.6, CaseLines, pp. 045-11 and 045-12.

¹⁴ *Ibid.*, paras 8.5 and 8.6, CaseLines, pp. 045-4 and 045-5.

11 ... I further reiterate that **I did not sign any documents effecting transfer of the immovable property to the Second Respondent and neither did I provide any conveyancer and associated persons with my personal documents including that of my identity document. I reiterate that the transfer was effected fraudulently.**¹⁵

(My emphasis).

11.3. Third, as far as the commissioning of the documents in front of Mr Du Plessis, the commissioner of oaths, is concerned, Mrs Dabas stated that:¹⁶

‘31.2 I know ‘*Quinton*’ [sic] Ross Du Plessis personally.

31.3 I enquired with him as to the status of the documents and **he stated that he could not remember me being present at his offices on the said day.**

31.4 It would be noted from his email attached to the Opposing Affidavit, marked annexure “AA 11” that he confirms his signature and stamp but is unfamiliar as to the identity of the second witness on the power of attorney.

31.5 He further states that he could not recall the actual signature of the documents but confirmed that the signature of the First Respondent appeared to be his, which was known to him. **However, he says nothing about my signature and my presence.**

31.6 **I did not appear before ... Du Plessis and sign the documents mentioned in the Opposing Affidavit at paragraphs 47.3 and 47.4.4.**

31.7 **I never intended effecting transfer of the property to the Second Respondent for the reasons as contained in my Founding Affidavit and for the reasons stated herein.’**

(Own emphasis)

and, then, a little way further down, she proceeds further to state that:¹⁷

‘40.2 The Second Respondent attempts to create the impression that the signing of the documents was before Du Plessis, a commissioner of oaths, but when considering my allegations as contained in paragraph 31 above, **it is clear that Du Plessis gives no information or confirmation that I appeared before him and that he had properly commissioned the documents.**

¹⁵ *Ibid.*, para 11, CaseLines, p. 045-6.

¹⁶ *Ibid.*, paras 31.2 to 31.7, CaseLines, pp. 045-14 and 045-15.

¹⁷ *Ibid.*, paras 40.2 to 40.4, CaseLines, p. 045-19; and para 51.2, CaseLines, p. 045-23.

40.3 **The aforesaid accords with my version that I did not appear before him and sign the relevant documents. This will be confirmed by the report of the handwriting expert in my Supplementary Replying Affidavit.**

40.4 **I accordingly call upon the Second Respondent to prove ... without uncertainty, that I appeared before Du Plessis, I evidenced my identity document, took the oath and that I signed the document before him.**

...

51.2 **I further reiterate my allegations in respect of Du Plessis and that in the event that he is called to a trial of the matter, I doubt very much that he would be of any assistance. He does not confirm that I appeared before him and the Honourable Court would further note from my Supplementary Replying Affidavit *[which at this stage had not yet been delivered] that the signature purporting to be mine, is in fact not mine.'**

(Own emphasis and *insertion).

12. It is self-evident from this abridged analysis of Mr Moti's answering affidavit, and Mrs Dabas's version (as contained in both her founding affidavit and replying affidavit) that a real *bona fide* dispute of fact exists between them concerning the critical key element of Mr's Dabas's case, namely whether or not she had signed the sale agreement in respect of the property, as well as the further documents required to effect to the transfer thereof into Mr Moti's name. According to Mrs Dabas she did not sign any of the documents in question, while Mr Moti's evidence is to the contrary. Consequently, it was quite obvious that, based on the *Plascon Evans* rule,¹⁸ there was no reasonable

¹⁸ In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at p. 634 E - p 635 D, where Corbett JA (as he then still was) expressed this rule (i.e., the Plascon-Evans rule) in the following terms:

'... the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E - G, to be:

"... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938A - B; *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd* 1982 (1) SA 398 (A) at 430 - 1; *Associated South African*

prospect of Mrs Dabas's application succeeding to have the sale of the property, and its subsequent transfer to Mr Moti, set aside.

13. This dispute of fact would have been evident from a cursory reading of Mr Moti's answering affidavit after it had been served. What is said in the replying affidavit merely reinforces the nature and extent of this dispute of fact.

Is Mrs Dabas's supplementary affidavit to be allowed?

14. However, as already foreshadowed in her replying affidavit, Mrs Dabas's proceeded to file a supplementary replying affidavit (together with a handwriting expert's report and confirmatory affidavit) deposed to by her on 31 May 2022.¹⁹ According to the accompanying filing sheet - supposedly

Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere 1982 (3) SA 893 (A) at 923G - 924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*** 1949 (3) SA 1155 (T) at 1163 - 5; ***Da Mata v Otto NO*** 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf. ***Petersen v Cuthbert & Co Ltd*** 1945 AD 420 at 428; ***Room Hire*** case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see e.g. ***Rikhoto v East Rand Administration Board and Another*** 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the ***Associated South African Bakeries*** case, supra at 924A).'

See too: ***Fakie NO v CCII Systems (Pty) Ltd*** 2006 (4) SA 326 (SCA) at para [55], pp. 347 F - 348 A.

¹⁹ Supplementary affidavit (SA): CaseLines, pp. 015-1 to 015-7.

dated '10 June 2021'²⁰ - it appears only to have been served on Mr Moti's attorneys of record on 18 July 2022.²¹

15. The supplementary affidavit was filed substantially late - approximately sixteen (16) months after Mrs Dabas's replying affidavit was filed. Mr Moti's counsel submitted that I should simply ignore the whole supplementary affidavit on the basis of it being *pro non scripto*. In support of this submission counsel referred me to the case of *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another*,²² in which the Supreme Court of Appeal (SCA) sets out the position concerning the usual number of affidavits (i.e., three sets) permitted in terms of the Uniform Rules of Court (**the Rules**) and that the filing of any further affidavits is only permitted with the indulgence of the court.²³

'[10] A litigant in civil proceedings has the option of approaching a court for relief on application as opposed to an action. Should a litigant decide to proceed by way of application, rule 6 of the Uniform Rules of Court applies. This rule sets out the sequence and timing for the filing of the affidavits by the respective parties. An advantage inherent in application proceedings, even if opposed, is that it can lead to a speedy and efficient adjudication and resolution of the disputes between parties. Unlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence which would be led at a trial. **It is accepted that the affidavits are limited to three sets.** It follows thus that great care must be taken to fully set out the case of a party on whose behalf an affidavit is filed. **It is therefore not surprising that rule 6(5)(e) provides that further affidavits may only be allowed at the discretion of the court.**

[11] **Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so.**

[12] This court stated in *James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons NO* 1963 (4) SA 656 (A) at 660D – H that:

“It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be

²⁰ *Ibid.*, p. 015-30.

²¹ *Ibid.*, p. 015-29.

²² 2013 (1) SA 161 (SCA) at paras [10] to [14], p. 164 B – p. 165 D, but especially at para [13], p. 164 A – C.

²³ *Id.*

observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. **Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received.** Attempted definition of the ambit of a discretion is neither easy nor desirable. In any event, I do not find it necessary to enter upon any recital or evaluation of the various considerations which have guided Provincial Courts in exercising a discretion to admit or reject a late tendered affidavit (see e.g. authorities collated in *Zarug v Parvathie* 1962 (3) SA 872 (N)). It is sufficient for the purposes of this appeal to say that, on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry.”

[13] It was then later stated by Dlodlo J in *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) in paras 12 – 13:

“The applicant is simply not allowed in law to take it upon himself and [to] file an additional affidavit and put same on record without even serving the other party with the said affidavit. . . .

Clearly a litigant who wished to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court file (as it appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as *pro non scripto*.”

[14] To permit the filing of further affidavits severely prejudices the party who has to meet a case based on those submissions. Furthermore, no reason was placed before the court *a quo* for requesting it to exercise a discretion in favour of allowing the further affidavits. Consequently the court *a quo* was correct in ruling that the affidavits were inadmissible.’

(Own emphasis).

16. The specific passage in paragraph 13 that is cited *Hano* case, was especially emphasised by Mr Moti’s counsel in urging me to find that Mrs Dabas’s supplementary affidavit should be considered as *pro non scripto*. But the present case, is distinguishable from the scenario envisaged by Dlodlo J in *Standard Bank of SA Ltd v Sewpersadh and Another*. In the present case, Mrs Dabas’s attorney of record did not merely ‘put’ the supplementary affidavit on record (i.e., loaded it on CaseLines) without also serving it on Mr Moti’s attorneys of record. I already pointed out that it was served on the latter on 18 July 2022.²⁴ It is true that there is no formal application to permit

²⁴ SA: CaseLines *Ibid.*, p. 015-29.

the supplementary affidavit, but no one could have been surprised by its subsequent filing and service. After all this was already foreshadowed in Mrs Dabas's replying affidavit, in which she explained, among other things, that having regard to the short constraints of time in which she had to file her replying affidavit, she accordingly will file a supplementary replying affidavit of a handwriting expert at a later stage.²⁵ This is not an uncommon feature in litigation of this nature. Litigants frequently have to find witnesses, including expert witnesses, at short notice. Moreover, in the case of expert witnesses they are required to properly qualify themselves to opine on the issues they are required to testify about. This self-evidently takes time as well.

17. Unfortunately, there is no explanation why the forensic report of the handwriting expert in this matter, i.e. Mr Jannie Viljoen Bester (**Mr Bester**), was only issued on or about 7 April 2022 and delivered much later. This ought have been explained by, or on behalf, of Mrs Dabas.

18. Having found that the matter is distinguishable from the matter relied on by Mr Moti's counsel, I am also inclined – despite the lack of a full and or proper explanation as to why it took a further (approximately) sixteen months to file and serve Mr Bester's forensic report – to allow the supplementary affidavit. My reasons for doing so are the following:

18.1. First, the supplementary affidavit – unlike the one in *Standard Bank of SA Ltd v Sewpersadh and Another*, *supra* – was not merely loaded onto CaseLines ('put on record') without delivering it to, or serving it on, the opposing party;

²⁵ RA: paras 8.5 and 8.6, CaseLines, pp. 045-4 and 045-5; and para 40.3, CaseLines, p. 045-19.

- 18.2. second, the delivery thereof had already been portended in the replying affidavit when Mrs Dabas pointed out that she did not have sufficient time to file it with her replying affidavit;
- 18.3. third, although the delay in filing it was not fully or properly explained, it is not uncommon that it more often than not takes time to recruit suitable expert witnesses, who themselves need time to investigate the precise issues they are required to opine on and also need adequate time to prepare and finalise their expert reports;
- 18.4. fourth, the supplementary affidavit and expert report were served on Mr Moti's attorneys of record on 18 July 2022 and both he and his legal representatives would have been well-acquainted with its content when this matter was heard on Monday, 4 September 2023;
- 18.5. fifth, Mr Moti, were he to have elected to file a further affidavit in response thereto, had more than sufficient time to do so between the delivery of the supplementary affidavit and the hearing of this matter;
- 18.6. sixth, the prejudice Mrs Dabas is likely to suffer, if the supplementary affidavit is not allowed, far outweighs, in my opinion, any prejudice that Mr Moti might suffer if it is permitted; and
- 18.7. seventh, because the old adage, *viz.*, '*that the rules are made for the courts, not the courts for the rules*' would enable practical justice to be administered in the present matter and for it to be handled along practical lines.²⁶

²⁶ **Brown Bros. Ltd. v Doise** 1955 (1) SA 75 (W) at p. 77 B – C; **Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk** 1972 (1) SA 773 (A) at p. 783A – B; **Chelsea Estates & Contractors CC v Speed-O-Rama** 1993 (1) SA 198 (SE) at p. 201G; **Standard Bank of**

19. Consequently, in view of all these considerations, Mrs Dabas's supplementary affidavit is allowed.

The content of the supplementary affidavit

20. The supplementary affidavit is comprised of three documents: (i) Mrs Dabas's affidavit; (ii) Mr Bester's expert report; and (iii) Mr Bester's confirmatory affidavit. For present purposes, and in view of the ultimate conclusion I have arrived at, it suffices to briefly refer to the expert report only.²⁷

21. In essence, Mr Bester, who appears to be suitably qualified to express opinions on issues of handwriting, traverses, among others, the following matters in his expert report:

21.1. The examination he was required to perform in respect of '*the questioned initials and signatures of Anandini Padayachee* *[i.e., Mrs Dabas]' and to compare those with '*the collected specimen signatures and initials of Anandini Padayachee*';

21.2. The questioned initials and signatures are referenced to the documents identified in subparagraphs 1.1.1.1 to 1.1.1.4²⁸ of the expert report. These documents are the ones referred to in paragraphs 9 and 10 above, as well as the sale agreement allegedly concluded on 24 March 2018;

SA Ltd v Dawood 2012 (6) SA 151 (WCC) at para [12], p. 159 D – F.

²⁷ SA: para 4, CaseLines, p. 15-2, read with annexure **PS 1**, CaseLines, pp. 15-8 to 15-23.

²⁸ *Ibid.*, Annexure **PS 1**, para 1.1 (inclusive of subparagraphs 1.1.1.1 to 1.1.1.4), CaseLines, pp. 15-8 and 15.9.

- 21.3. That the abovementioned documents were examined by him at the offices of Mangera (i.e., the fourth respondent cited herein) on 27 January 2022;²⁹
- 21.4. That the opposing proposition of authorship of signature was also examined and considered at that time;³⁰
- 21.5. After dealing with ‘*the scientific principles applied*’³¹ and the topic of ‘*the principles of individuality*’,³² his observations are recorded and his opinion is expressed.
- 21.6. The observations recorded and the opinion expressed by him, are formulated by Mr Bester as follows:

- ‘2.3.1 No corresponding inherent handwriting characteristics were identified between the questioned signatures and initials of Anandini Padayachee and the collected specimen signatures and initials of this writer. Handwriting similarities were identified. The handwriting similarities are arrangement of the signature elements, class of handwriting style, use of the indicated writing line and the maintenance of the imaginary rewriting line.
- 2.3.2 Fundamental handwriting differences were identified between the questioned signatures, initials, and the collected specimen signatures and initials. The signature is a mixed style signature. The initials are text-based initials. The fundamental handwriting differences appear in the discriminating elements of handwriting in the elements of execution and the elements of style. The discriminating elements are the inter-letter connections, the construction of the signatures and initials, the dimension of the signature and initials with reference to (proportions, relative heights and sizes of letters, lateral expansion of the signature), the slant and slope of the signature relative to the perpendicular, spacing between letters, commencement and termination strokes of the signatures and the initials, ease of recognition of the letters, line quality of the signature inclusive of the line continuity and pen control, writing movement with references to arched strokes, garland strokes and angularity of lines.
- 2.3.3 There is a distinct difference in signature variation between the questioned signatures on the questioned documents, signed in four days in 2018 and the documents which contain the collected specimen signatures which was signed over a period of nine months and the signature including the collected specimen

²⁹ *Ibid*, para 1.1.3, CaseLines, p. 15-9.

³⁰ *Ibid*, para 1.2, CaseLines, p. 15-9.

³¹ *Ibid*, para 1.3, CaseLines, p. 15-9.

³² *Ibid*, para 1.4, CaseLines, pp. 15-9 and 15-10.

signature on the Letter of Instruction dated 06 March 2022. The collected specimen signatures display a consistency in design.

2.3.4 It is my **opinion**, based on the collective consideration of the identified forensic technical evidence, on a balance of probabilities, the writer of the Anandini collected specimen signatures and initials is not the writer of the Anandini Padayachee questioned signatures and initials on the documents mentioned form [sic] paragraph 1.1.1.1 to paragraph 1.1.1.4.

2.4 The opinion formed, is based on the documents made available for examination, an examination and comparison of the writing, consideration of corresponding inherent handwriting characteristics, handwriting similarities, presence or absence of fundamental differences and the natural handwriting variation of the writer.'

22. If the expert report of Mr Bester were to be accepted as it stands, it casts – or, at the very least, tends to cast grave doubt over the version deposed to by Mr Moti, precisely because the expert opines that the handwriting on the documents examined (inclusive of the sale agreement) is not Mr Dabas's handwriting. However, it cannot put the matter '*beyond doubt*', as Mrs Dabas's counsel sought to argue. The handwriting expert's opinion merely reaffirms the existing dispute of fact, albeit that the opinion seems to favour Mrs Dabas's case and the contentions she has put forward.

Dismissal or reference to trial?

23. Encouraged by the favourable expert's report, Mrs Dabas's counsel – rather uncompromisingly - sought to convince me that a final order was in any event apposite in these circumstances, i.e., despite the insurmountable difficulties the ***Plascon-Evans*** rule created for him. Even when I enquired from counsel whether the present case was not better suited for trial, he remained quite intransigent and only begrudgingly suggested that, *in the alternative*, it ought to be referred to oral evidence if I were to find that final relief could not be granted to Mrs Dabas.

24. The SCA has clearly stated that, save in exceptional circumstances, such an approach should not be countenanced. In *Law Society, Northern Provinces v Mogami and Others*³³ the SCA (*per* Harms DP, with Mthiyane JA, Heher JA, Mlambo JA and Maya JA concurring) expressed itself as follows on this question:³⁴

‘An application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail (*De Reszke v Maras and Others* 2006 (1) SA 401 (C) ([2005] 4 All SA 440) at paras 32 - 33).’

(Own emphasis).

25. In *De Reszke v Maras and Others*³⁵ 2006 (1) SA 401 (C) a full bench of the Western Cape High Court dealt with this very same topic in these terms:³⁶

‘[32] The appellant’s only way out of this difficulty, as it seems to me, is for this court on appeal to make the order which in my view should have been made *a quo*, namely referring the matter for oral evidence. I shall assume that we have that power, despite the absence of an application therefor at first instance. *Associated South African Bakeries (Pty) Ltd v Oryx & Vereingte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) from 916; *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) B at 544G - H. **Time was when in practice an application to refer for oral evidence had invariably to be made at the commencement of argument. Counsel in effect had to elect at that stage and could not save a reference for oral evidence as an alternative.** In *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 981F – G, Corbett JA *[as he then still was] said:

“This is no doubt a salutary general rule, but I do not regard it as an inflexible one. I am inclined to agree with the following remarks of Didcott J in the *Hymie Tucker* case *supra* at 179D:

‘One can conceive of cases on the other hand, exceptional perhaps, . . . when to ask the Court to decide the issues without oral evidence if it can, and to permit such if it cannot, may be more convenient to it as well as the litigants. Much depends on the particular enquiry and its scope.’”

[33] These observations seem to have ushered in a new era. It was welcomed by Botha JA in *Administrator, Transvaal, and Others v Theletsane and Others* 1991 (2) SA 192 (A) at 200C in these words:

“The recent tendency of the Courts seems to be to allow counsel for an applicant, as a general rule, to present his case on the footing that the applicant is entitled to relief on the papers, but to apply in the alternative for the matter to be referred to evidence if the main argument should fail: see *Marques v Trust Bank of Africa Ltd and Another* 1988 (2) SA 526

³³ 2010 (1) SA 186 (SCA).

³⁴ At para [23], p. 195 C - D.

³⁵ 2006 (1) SA 401 (C).

³⁶ At paras [32] and [33], pp. 412 J – 413 H.

(W) at 530E - 531I and **Fax Directories (Pty) Ltd v SA Fax Listings** CC 1990 (2) SA 164 (D) at 167B - J. It seems to me that such an approach has much to commend itself, for the reasons stated in the last-mentioned two cases, but for the purposes of the present case there is no need to pursue the point.”

See too **Bocimar NV v Kotor Overseas Shipping Ltd** 1994 (2) SA 563 (A) at 587B - G. **It is my impression in this division, however, that the pendulum has swung too far the other way. Some younger counsel, in particular, seem to take it half for granted that a court will hear argument notwithstanding disputes of fact and, failing success on such argument, will refer such disputes, or some of them, for oral evidence. That is not the procedure sanctioned by the Supreme Court of Appeal. On the contrary, the general rule of practice remains that an application to refer for oral evidence should be made prior to argument on the merits. The Supreme Court of Appeal has widened the exceptions to this general rule, but they remain exceptions.’**

(Own emphasis and *insertion).

26. As the latter two cases illustrate, the general rule of practice has always been that an application to refer a matter for oral evidence – or, I should add, as the occasion demands, for reference to trial - should be made *prior* to any argument on the merits. It is only in *exceptional* circumstances that this can be done in the alternative.
27. In his thorough address Mr Moti’s counsel sought to persuade me that there were no such exceptional circumstances present here and that I ought to dismiss Mrs Dabas’s application without further ado. It is obvious that the request for a referral to trial was made at the virtual death and, moreover, only as an alternative to the main relief sought.
28. The request for a referral to trial should have been made at a much earlier stage. Had Mrs Dabas’s attorney of record notified Mr Moti’s attorney of record *prior* to the hearing of the matter that she intended to seek a referral of the matter to trial, they would *in all probability* – I say ‘*in all probability*’ especially in the light of the email Mr Moti’s attorneys of record wrote to Mrs Dabas’s attorney of record on 6 March 2021³⁷ - have agreed to do so and

³⁷ Mangera’s email of 6 March 2021 – CaseLines, p. 59-1 – reads as follows:

saved the substantial costs incurred for the hearing of this opposed application on 4 September 2023.

29. Nevertheless, and despite the last minute request for a referral to trial in the alternative, I am loath to dismiss the application without more, because it will undoubtedly result in undue hardship for Mrs Dabas. The hardship she is likely to endure, is that if the matter were to be dismissed outright, any fresh proceedings instituted by her will probably be met with a plea to the effect that her claims have become prescribed. The prejudice Mr Moti will face if Mrs Dabas's application is not dismissed, is that he would have incurred unnecessary and quite substantial costs for the hearing on 4 September 2023, but such prejudice can be remedied by a suitable costs order. I certainly do not accept that Mr Moti should be mulcted in such unnecessary costs. His attorneys of record had forewarned Mr Dabas's attorneys of record that any recalcitrance on her/their part to have the matter referred to trial timeously could result in an application for dismissal and a punitive costs order..
30. Lastly, before setting out the order I am about to make, there is one other matter that Mr Moti's counsel sought to impress on me, namely that, no matter how carefully one trawls through the papers in this matter, there is no allegation to the effect that Mr Moti is (or ever was) a party to the fraud Mrs

'1 We are in receipt of your clients [sic] replying affidavit in which she alludes to a further supplementary report lying affidavit to be filed.

2 **There are already numerous disputes of fact in this matter and a further document from a handwriting expert will only serve to add to the dispute of fact.**

3 **We are of the view that this matter ought to be referred to trial and costs be costs in the cause for the trial. The matter can be in court within 12 - 18 months.**

4 **If your client is not agreeable to this practical proposal at this stage and it is later found by a Judge that there is a dispute of fact, we will seek a dismissal of the application with a punitive cost [sic] order.**

5 Kindly request your client to be sensible in her approach so that all witnesses can be placed before a court and the truth revealed.

6 All our clients [sic] remain reserved.'

(Own emphasis).

Dabas complains about. This was part of counsel's argument advanced to persuade me to rather dismiss the application outright. The answer to this, I consider, is that if the handwriting expert's evidence ultimately were to be accepted, i.e., hypothetically speaking at this stage, it would mean that Mrs Dabas could not have been present at the Sandton police station on 24 March 2018 for the signing of the sale agreement, as Mr Moti avers is the case, which may might justify an inference that he is not an innocent party to the alleged transaction.³⁸

31. In the circumstances, I make an order in the following terms:
- 31.1. The matter is referred to trial;
 - 31.2. the notice of motion is to stand as the summons and the answering affidavit is to stand as Mr Moti's (i.e., the second respondent's) notice of intention to defend;
 - 31.3. Mrs Dabas (i.e. the applicant) is to deliver her declaration within thirty (30) days of date of this order;
 - 31.4. all further pleadings, discovery and notices are to be exchanged in accordance with the Uniform Rules of Court;
 - 31.5. the costs for, and in relation to, the hearing of the opposed application on 4 September 2023 are to be paid by Mrs Dabas (i.e., the applicant) on the scale as between attorney-and-client; and

³⁸ I am not suggesting for one moment that the handwriting expert's evidence will necessarily trump Mr Moti's evidence on this issue, but only that if, in the final instance, upon a complete evaluation of the entire *conspectus* of evidence on this issue, both factual and expert, this expert's evidence is to be accepted, it might (not will) create difficulties for Mr Moti's version. See, in this regard, *Annama v Chetty and Others*, 1946 AD 142 at p. 150 *et seq.*

31.6. all further costs are to be costs in the cause.

EW DUNN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the applicant: Adv MR Naidoo

Instructed by: Kushen Sahadaw Attorneys, Durban

and Mark-Anthony Beyl Attorneys, Johannesburg.

Counsel for the respondent: Adv Z Kahn

Instructed by: Mangera & Associates, Johannesburg

Date of hearing: Monday, 4 September 2023

Date of Judgment: Monday, 11 September 2023.

Judgment handed down electronically