Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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

**Case No: 54065/2021**

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

DATE SIGNATURE

In the matter between:

**CENTRALITY (PTY) LTD** Applicant

and

**MATETE JOSEPH LEBAKENG** First Respondent

**MPATI M LEBAKENG** Second Respondent

**LBK CONSULTING (PTY) LTD** Third Respondent

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 25 August 2023.

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**JUDGMENT**

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**CARRIM AJ**
**Introduction**

[1] This is an application to refer the main application to trial in terms of Rule 6(5)(g) for the first and second Respondents and Ms Barnard, the architect that had been appointed by the Applicant, to give evidence and for them to be cross-examined ("the transfer application").

*The main application*

[2] The main application was launched in November 2021 by the Applicant in which it claims the amount of R570 081.47, together with interest thereon from the Respondents, jointly and severally.

[3] The essential dispute between the parties revolves around the supply of glass and aluminium fittings by the Applicant to the Respondents on a property at [M…], L[…].

[4] The Applicant's version is that it supplied the Respondents with aluminium and glass fittings and installed same at the property. The Applicant acknowledges that the Respondents had disputed the amount claimed on the basis that the installation was not in accordance with the SANS specifications and the workmanship was poor.[1] The Applicant alleges that despite attempting to resolve this, the Respondents have not specified what it is that they are dissatisfied with and have not attended meetings scheduled with the Applicant's representative, in an effort to resolve the dispute.

[5] The Respondents filed a notice to oppose but had failed to file an answering

[1] See Founding Affidavit para 4.2 and para 6.9 as at CaseLines section 005-20.

affidavit in time. The matter was enrolled on the unopposed roll for 20 October 2022. The matter was removed from the unopposed roll because Respondents filed their answering affidavit on 19 October 2022. The Respondents seek condonation of the late filing of the answering affidavit, which was granted by me at the commencement of the hearing.

[6] In their answering affidavit in the main application, the Respondents seek a dismissal of the application due to material disputes of fact and misjoinder. They dispute the liability of the first and second Respondents on the basis that they were acting in a representative capacity for third Respondent. They dispute the amount claimed and have brought a counterapplication.

[7] The Respondents' version is that after the Applicant had installed the aluminium and glass fittings, it issued a certificate of conformance which stated that the materials complied with technical specifications and the installation was done in accordance with SANS 10400-1990- Part N and SANS 10137.[2]

[8] After the second and third Respondents moved into the property, glaring deficiencies in the workmanship were identified and in all instances the Applicant was invited to correct these, without success. The Respondent then enlisted the assistance of Ms Barnard, to liaise with Thinus (Mr Thinus Cloete), the Applicant's employee.

[9] There have been various requests by Ms Barnard for the Applicant to rectify the various defects however, the Applicant has failed and/or neglected to attend to the defects.

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[2] Section 009-51 on CaseLines.

[10] Having observed a great degree of poor workmanship in the installation of the products by the Applicant and the quality of the products, the third Respondents then appointed the services of the Association of Architectural Aluminium Manufacturers of South Africa ("AAMSA") to conduct a full inspection of the products supplied and installed by the Applicant. A copy of the report is attached as Annexure "FA16" to the founding affidavit.

[11] The AAMSA report made key findings regarding the quality of the products supplied and the flaws in the installation thereof. It is unnecessary to deal with these in greater detail save to say that the report makes adverse findings in relation to the materials supplied and the applicable standard of installation of the products.

[12] The findings of the AAMSA report were shared with the Applicant who through its attorneys categorically disputed the AAMSA findings but agreed to replace/rectify certain concerns raised in the report and provided a further quotation of R284 646.65, dated 26 October 2021 to fix these issues which it alleged were not in its scope of work.[3]

[13] Ms Barnard has attached a confirmatory affidavit.[4]

[14] The Applicant did not file a replying affidavit to the Respondents' answering affidavit in the main application. Instead, it filed this application for the matter to be referred to trial some five months later.[5] ('transfer application')

[15] The Applicant was late in filing its replying affidavit in the transfer application

[3] Section 009-52 on CaseLines.
[4] See Annexure AA9 at section 009-65 on CaseLines.
[5] Section 010-1 on CaseLines.

and sought condonation thereof which was granted by me at the commencement of the hearing.

*The transfer application*

[16] The Applicant submits that it seeks transfer of the matter to trial because oral evidence would need to be heard and witnesses would need to be cross-examined in respect of -

[16.1] The factual basis of non-payment by the Respondents of the amount claimed.

[16.2] The liability of the first and/or second Respondent for the amount claimed which is now being denied.

[16.3] The version of Ms Barnard, the architect, as reflected in the Applicant's founding affidavit when compared to a confirmatory affidavit in the Respondent's answering affidavit is conflicting.

[16.4] The counterclaim, being in the nature of damages, cannot be adjudicated by motion proceedings.

[17] The Applicant alleges that it became aware of these disputes of fact only when the Respondents filed their answering affidavit in the main matter.

[18] The Respondents deny that the Applicant could not have foreseen at the time it launched motion proceedings that several factual disputes were likely to arise given the pre-litigation correspondence between the parties. The Applicant in

its own founding affidavit refers to the dispute raised by the Respondents.

[19] Despite knowing that there was already a material dispute of fact in relation to the payment claimed, the Applicant still elected to proceed on application. Instead of dealing with the Respondents answering affidavit, it now brings this application to avoid having its main application dismissed.

[20] Respondents oppose the transfer application on the basis that Applicant was aware that a material dispute of fact was likely to arise given the pre-litigation history of this matter and that application should be dismissed, alternatively decided in favour of the Respondents based on the guidance provided by ***Plascon Evans***.[6]

**The general approach to Rule 6(5)(g)**

[21] Rule 6(5)(g) provides:

[21.1] "*Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as*

[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984 (3) SA 623 (A).

*to pleadings or definition of issues, or otherwise*".

[22] In ***National Director of Public Prosecutions v Zuma (Mbeki and Another Intervening)*** [7] the SCA stated that:

[22.1] "*In general motion proceedings, unless concerned with interim relief, are 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 affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order*."[8]

[23] It is trite that where a dispute of material fact arises it is generally undesirable to endeavour to decide an application upon affidavit. In such a case, it is preferable to hear the witnesses before coming to a conclusion.[9]

[24] Whenever a genuine dispute arises in the affidavits about a material fact, the Court may deal with the matter in terms of its discretion in various ways. The emphasis here is that the decision whether to refer to oral evidence or dismiss is in the Court's discretion.

[25] However, if neither party asks that the matter be referred to oral evidence or to trial the court will not do so *mero motu*. Even if there is an application for

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7 All SA 243 (SCA) 2009 (2) SA 279 (SCA).
8 Paragraph [26].
9 Harms *Civil Procedure in the Superior Courts B-8* and the authorities listed in fn 2 at B-59.

referral to trail – as is the case here – the court may elect to adopt a robust approach avoiding fastidiousness and decide the issue on affidavits. Caution to this approach has however been voiced.

[26] If the dispute of fact should have been foreseen by the Applicant, the court may dismiss the application.[10]

**Evaluation**

[27] During argument the Applicant made a somewhat curious submission that the transfer application ought not to be decided by reference to the main application. I am not sure what was meant to be conveyed by this submission. The fact that the Applicant itself has asked that the matter be referred to oral evidence, because of material disputes of fact that have arisen in the main application is the *raison d'etre* for its transfer application. In other words, in bringing the transfer application, the Applicant accepts that material disputes of fact have arisen in the main application that cannot be resolved on the affidavits.

[28] Mr Prophy was at pains to point out that the only issue before me was to decide whether the matter should be referred to trial and nothing more. To suggest that I should have no regard to the main application does nothing but create an artificial line between the two applications and possibly create a pretext for a point of appeal. I cannot arrive at a decision of the merits of the transfer application without having regard to the extent of the disputes of fact between the parties and when the Applicant first became aware of them.

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[10] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

[29] However, in bringing the transfer application prematurely without the merits of the main application being heard, the Applicant has possibly created a further conundrum for itself which I discuss later.

[30] It is manifestly clear that the Applicant in its own founding affidavit in the main application acknowledges that pre-litigation disputes existed between the parties.[11] The Applicant was aware that the Respondents were unhappy with the quality of and workmanship of the glass and aluminium fittings. To this end, the Respondent had enlisted the assistance of the architect, Ms Barnard, who had been appointed by the Applicant, a fact which the Applicant was aware of. In an email dated 14 April 2021 to Mr Thinus Cloete, the deponent to the founding affidavit of the Applicant, Ms Barnard attempted to follow up the status of a range of defects and to check on each door for the same defects. [12] In a further email from Ms Barnard to Mr Cloete, dated 3 May 2021, she expresses her dismay that the no progress was made since her last communication and seeks clarification from Mr Cloete as follows: "*except for the site visit you did without feedback to the owner or myself. You have given commitment for this Wednesday 5 May to mr. L[…]? Please inform us in writing what you are planning to rectify by when*".[13]

[31] The Applicant had been furnished with the AAMSA report, which it attached to the founding affidavit as Annexure "FA16".[14]

[32] It may be that the Applicant disagrees with the findings of the AAMSA report

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[11] Paras 4.2 and 4.3 of the Founding Affidavit. 005-4 and 005-5. Also para 6.10 at 005-14
[12] Section 009-60 on CaseLines.
[13] Section 009-62 on CaseLines.
[14] Section 005-62 on CaseLines.

and which aspects of the defects identified were included in the scope of work agreed between the parties. However, what the Applicant cannot deny is that prior to bringing its main application it itself was fully aware of a dispute about the quality of the goods supplied and the workmanship which were the subject of the invoice it demanded payment for.

[33] In reply to the Respondents submission that the Applicant did not become aware of these material disputes of fact only after the answering affidavit was filed, Mr Prophy submitted that the Applicant could not have foreseen that first and second Respondent would dispute liability or that Ms Barnard would confirm the Respondents version.

[34] However, this version is not supported by the pre-litigation correspondence. In a letter addressed to the Applicant's attorney Jennings by first Respondent dated 3 August 2021[15] (in response to a letter of demand sent by Jennings Inc), the first Respondent advises the attorney that Centrality was doing work for LBK consulting (third Respondent) and not "ourselves". The Applicant itself in its founding affidavit refers to this letter.[16] It may be of course that the Applicant disagrees with this, as submitted in these proceedings. But it was appraised of the fact that the first and second Respondents had disputed their liability as far back as 3 August 2021.

[35] As to Ms Barnard's confirmatory affidavit, the Applicant was fully aware of the defects she had identified and her concern that these had not been attended to. Ms Barnard held a meeting at the house with Thinus and walked through all the

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[15] Section 009-50 on CaseLines.
[16] Para 6.8 of the Founding Affidavit 005-14

defects. Ms Barnard then sent an email on 14 April 2021 to Thinus in which she outlined several issues.[17] On 3 May 2021 a further email was sent to Thinus from Ms Barnard in which she noted that no progress had been made by the Applicant.[18]

[36] In the recent case of ***Economic Freedom Fighters and Others v Manuel***, the SCA re-affirmed that generally a court will dismiss an application when, at the time that the application is launched, an Applicant should have realised that a serious dispute of fact was bound to develop. It went further to state that bringing an application to claim relief that is not appropriate to be sought in motion proceedings, will ordinarily be an *a fortiori* case –

*[36.1] "[114] We now deal with the alternative relief sought by Mr Manuel in his notice of motion, namely, the referral of the issue of quantum to oral evidence. It is true that a court, in motion proceedings, in terms of Uniform Rule 6(5)(g), has a discretion to direct that oral evidence be heard on specified issues with a view to resolving a dispute of fact or, in appropriate circumstances, to order the matter to trial. Generally, however, a court will dismiss an application when, at the time that the application is launched, an Applicant should have realised that a serious dispute of fact was bound to develop. We would add that bringing application proceedings claiming relief that is not appropriate to be sought in such proceedings, will ordinarily be an a fortiori case."*[19]

[37] It was clear that Applicant had full knowledge of the disputes between the parties prior to bringing the main application and should have foreseen that material disputes of fact were likely to arise.

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[17] See Annexure "AA7" at section 009-61 on CaseLines.
[18] See Annexure AA8 at section 009-66 on CaseLines.
[19] [2020] ZASCA 172; [2021] 1 All SA 623 (SAC); 2021 (3) SA 425 (SCA) at [114].

[38] The Applicant in seeking to avoid a dismissal of this application relied on the Constitutional Court decision in ***Mamadi and Another v Premier of Limpopo Province and Others***[20] in support of the submission that courts should be hesitant to dismiss applications in terms of Rule 6(5)(g). Mr Prophy submitted that were I to dismiss this application, the main application would still be alive, and the parties would be back at square one. The Applicant would then have to withdraw its application and issue summons. The interests of justice required that the dispute be referred to trial for expeditious resolution.

[39] ***Mamadi*** however is distinguishable on the facts. In that case the court was dealing with the relationship between Rule 6(5)(g) and Rule 53. At the core of that matter was whether the High Court, in a review application of the findings of the Kgatla Commission and the decisions of the Premier of Limpopo province, had exercised its discretion judicially. This was a matter that dealt with the impact of administrative decisions on the lives of ordinary citizens.

[40] The facts of this case differ. First this matter concerns a dispute between private parties, a dispute that was already foreshadowed in pre-litigation correspondence. The Applicant, in full knowledge of the possible disputes between it and the Respondents, nevertheless elected to proceed with motion proceedings.

[41] Even if I am to assume, for arguments' sake, in favour of the Applicant that it could not have anticipated at the time of commencing motion proceedings that Ms Barnard's version might change or the counterclaim brought by the Respondents in the answering affidavit, it does not explain why it waited *five*

[20] (CCT 176/21) [2022] ZACC 26; 2023 (6) BCLR 733 (CC) (6 July 2022).

(5) months before bringing the transfer application. In that time, even on its own version that it became aware of the disputes of fact only after the Respondents answering affidavit, which version I must stress is not supported by its own documents, it could have withdrawn the application and issued summons. It elected not to do so. In my view the Applicant has itself caused delays in the expeditious resolution of this matter that it now argues for.

[42] During argument there was, as expected, some degree of elision between the two applications. Both parties referred to the affidavits in the main application, in support of their submissions. As discussed previously the Respondent asked that "the application be dismissed, alternatively decided in its favour in terms of *Plascon Evans*", without clarifying whether it was referring to the main application or the transfer application or both.

[43] In ***Room Hire Co (Pty) Ltd v Jeppe Mansions (Pty) Ltd*** [21]it was stated that:

*[43.1]* *"It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as is indicated infra) the Court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling viva voce evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings, or with a direction that pleadings are to be filed. Or the application may even be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial*

[21] 1949 (3) SA 1155 (T) at 1162

*action." (*my emphasis*)*

[44] In this matter, the issue is not merely that of foreseeability or probability, namely whether the Applicant could have foreseen that a dispute of fact would arise at the time it launched the application, but rather of an election made by the Applicant in full and actual knowledge of the pre-litigation disputes between the parties. A dismissal of the transfer application would of course leave the main application alive. However, the consequences for the Applicant in such event have been caused by the Applicant itself by electing to proceed in this manner.

[45] In the circumstances, the following order is made–

[45.1] The application to transfer the matter to trial brought in terms of Rule 6(5)(g) is hereby dismissed.

[45.2] The Applicant is to pay the Respondents' costs for this application on an attorney and client scale.

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**Y CARRIM**
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION**
**JOHANNESBURG**

**APPEARANCES**

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| COUNSEL FOR APPLICANT: | Adv E Prophy |
| INSTRUCTED BY: | Jennings Incorporated |
| COUNSEL FOR RESPONDENTS: | Adv T Mosikili |

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| INSTRUCTED BY: | Dyasi Incorporated |
| DATE OF THE HEARING: | 31 July 2023 |
| DATE OF JUDGMENT: | 25 August 2023 |