REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 21/46473

(1) REPORTABLE: Yes☐/ No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 14 August 2023 WJ du

In the matter between:

POSWA INCORPORATED **APPLICANT**

and

MINCAP (PTY) LIMITED **RESPONDENT**

JUDGMENT

DU PLESSIS AJ

[1] This is an application to claim an amount of R3 963 022 for professional legal services which the Applicant rendered in terms of an agreement between the Applicant and Respondent.

[2] The Respondent got an instruction from Buffalo City Metropolitan Municipality ("the Municipality") to project manage debt collection from debtors who owed money to the Municipality for municipal services for more than 120 days. Since the Respondent is not a debt collector or a law firm, it entered into a signed written

agreement with the Applicant to collect the debt on 18 May 2018 ("the Agreement"). The Applicant was not the only debt collector so appointed.

[3] The Applicant alleged that the Respondent made it clear that the Applicant was assisting the Respondent in collecting the debt on the outstanding accounts and that the Applicant shall not have direct contact or a direct relationship with the Municipality.

[4] The Applicant was required to render certain debt-collecting services in terms of the agreement. In its Founding Affidavit,[1] it listed the following services:

i. Draft or prepare s 129 notices in terms of the National Credit Act 34 of 2005;

ii. Draft or prepare and issue out summons; and

iii. Where applicable, institute and see through summary judgment, default judgment and warrant of execution proceedings.

[5] The recovered debt is to be paid into a Trust Account managed by the Respondent and the Respondent. The Respondent pays the Municipality and must provide the Applicant with a full report ("payment report") of all payments made into and out of the Trust Account.

[6] The provision of the services is terminable only with 30 days' notice to the other party. The Applicant had to submit invoices/statements of services rendered and disbursements incurred to be paid by the Respondent within 30 days. The Respondent, in turn, has the right to audit the Applicant regarding the services rendered at any time and upon reasonable notice. In the case of a breach, the innocent party shall send the defaulting party 14 days of written notice to remedy such a breach, after which they may cancel the agreement and claim specific performance and/or damages.

[7] The Applicant avers that it rendered the services in terms of the agreement. By the time the agreement was terminated, they had prepared and issued 1000 letters of demand and summons.

[8] Since the Applicant is domiciled in Johannesburg, it had to employ corresponding attorneys in the jurisdiction of the Municipality to issue and serve some of the letters of demand and summons. Thus a disbursement was incurred in rendering the services and the claimed contract fee.

[9] The Applicant rendered the services and issued invoices to the Respondent for payment. These invoices were issued in terms of schedules and a format as advised and required by the Respondent.

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[1] CaseLines 002-4.

[10] The Respondent did pay some of the invoices but later defaulted on what the Applicant regards as "the same cycle of unfounded and unlawful excuses". After a few meetings with the Respondent, the Applicant sent a formal letter of demand to pay within 14 days as required in the agreement. After that, they cancelled the agreement.

[11] The Applicant avers that there is a signed agreement that sets out the terms of the contract and that the Applicant has fulfilled its part in terms of the contract. In other words, once the Respondent sent the outstanding accounts to the Applicant, the Applicant provided the services and charged the contract fee. They aver that the Respondent refuses to comply, has failed to pay as required on time, and has not provided the Applicant with the payment report per the agreement. It also did not request an audit to verify the services rendered and the fees charged.

[12] This, despite the contract fee being calculated according to the agreement and the applicable tariff for drafting and issuing letters of demand and summons. The Applicant states that the Respondent is obliged to pay the invoices within 30 days and that it has no right to withhold payment.

[13] The Respondent disagrees. Instead, it avers that the Applicant has overcharged or been double paid, worked on closed or duplicated accounts, and worked on accounts on hold. The Applicant should have known that the accounts were not for collecting because it has access to the Solar system to check the accounts before rendering services. However, the Applicant denies having access to this system to check. It is also frustrated because it has not received a payment report per the agreement to see if the Municipality has paid for the services.

[14] The Applicant persists that this is a simple issue: an agreement sets out what they should do, with a tariff applicable to the services rendered and then the payment terms. When they have delivered the services and invoiced according to the tariffs, the Respondent must pay, end of story. No term of the agreement states that the Applicant must check the accounts on the Solar system before doing so. That rests on the Respondent. Whatever denials the Respondent has here will not help them on trial, as they have no answers, the Applicant continues. This is why they resort to procedural issues.

[15] The Respondent disagrees. It persists with its argument that these proceedings are wrongly brought on application, as there is a material dispute of fact that was foreseeable and has arisen. They want an order referring the matter to trial. They pin the dispute on whether the Applicant delivered the services and whether it claims payment for unnecessary services not rendered per the agreement. This dispute, they aver, cannot be solved on the papers.

[16] The Respondent states that there is no basic information regarding the services for which it claims a fee and no supporting documentation and vouchers evidencing its performance of the services. The irregularities in its invoicing continue in the papers filed at Court, and the spreadsheet they rely on in Court continues these irregularities. They pointed out that although they tried to prove performance on the papers, they attached three examples of the work they produced, of which one example was a repeat, which they claim is precisely part of the problem.

[17] What it needs to do in Court, the Respondent continues, is set out and prove its claim by discovering supporting documents and leading evidence of the services it claims to have rendered. It must show when the services were performed, who performed, what services was performed, and the fee linked to it. This can only happen in a trial.

[18] Nevertheless, it answers the Applicant in acknowledging that it paid the first five batches of invoices in good faith. However, upon discovering irregularities in the invoices, they started with a reconciliation of invoices. This revealed an overcharge for work that had not, or should not have, been performed.

[19] Due to these irregularities, the Respondent could no longer accept the invoices or statements at face value. This led to conflict between the parties, evident from the emails attached to the affidavit. These disputes, the Respondent argues, cannot be solved on application according to the Respondent, which is why they advised the Applicant in a letter dated 31 October 2021 of the fact and recommended that it recommence by way of action and proposed that the matter be referred to a referee in terms of section 38(1) of the Superior Courts Act 10 of 2013. The Applicant declined this suggestion.

[1] The Law

[20] Motion proceedings are there to determine questions of law based on common cause facts.[2] However, if disputes of fact arise on papers, the Court, other than dismissing the application or referring it to trial in terms of Rule 6(5)(g), can apply the *Plascon-Evans* rule.[3] This rule states that where disputes of fact have arisen on affidavits, a final order may be granted 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 the order. In other words, the Court must consider the facts stated by the Respondent, together with the admitted facts in the Applicant's affidavits, to justify the order, unless the denials are so far-fetched or clearly untenable that justifies the Court rejecting it on the papers.[4] The Respondent's denials in this case are not far-fetched, which means that on the facts before me, the Applicant has not discharged the onus of establishing that it has indeed fully performed, and is therefore entitled to payment. This can only be proved, or disproved, by evidence.

[21] The Rule 6(5)(g) route enables a court to dismiss the application or make an order it deems fit, ensuring a just and expeditious outcome. If the Applicant should have realised upon launching the application that a serious dispute of fact will arise that cannot be settled on the papers, the Court can dismiss the application. The Court can, however, also refer the matter to trial.

[22] *Room Hire Co Ltd v Jeppe Mansions (Pty) Ltd*[5] stated that the route the Court elects will depend on the circumstances of each case. In this case, the court stated that there must be a real dispute of fact.

[23] In *Wightman t/a JW Construction v Headfour (Pty) Ltd*[6] the Supreme Court of Appeal (SCA) held

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[2] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 279 (SCA) par 26.

[3] *Plascon-Evans Paint Ltd v Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634.

[4] *Wightman t/a JW construction v Headfour (Pty) Ltd and Another* [2008] (3) SA 371.

[5] 1949 (3) SA 1155 (T).

[6] 2008 (3) SA 371 (SCA) para 13.

> "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed."

[24] *Minister of Land Affairs and Agriculture v D & F Wevell Trust*[7] further stated where a party seeks a referral to oral evidence or trial, it must show the existence of a real, genuine and bona fide dispute of fact; the import of the evidence that they seek to elicit from the trial; and that there are reasonable grounds for disbelieving the other party's version under oath.

[25] Whether a genuine dispute of fact exists is not always easy to determine. Part of the difficulty lies in the issue that not all disputes of facts are real disputes of fact. A respondent taking issue with arbitrary points in the applicant's affidavit does not make it a genuine dispute of fact. However, in this case, the Respondent disputes that the Applicant has done the work charged for and that it, therefore, claims fees that the Respondent is not obliged to pay. This is not a dispute that can be solved on application. The samples before the Court were inadequate for the Court to make a sensible legal assessment of whether the necessary services were rendered, and the Respondent is obliged to pay.

[26] There remains a dispute as to whether the services were delivered, for which the Applicant charged a fee; whether there are duplicates in invoices; and the possible services regarding accounts that had been closed, settled or placed on hold. This can only be solved by the leading of evidence.

[27] Therefore, the Respondent's contention that the application should have been launched as an action is accepted. In *Van Aswegan v Drotskie*[8] the court stated that costs can be awarded where the applicant should have had foresight of the dispute of facts arising. The court, however, does have a discretion in this regard.[9] While it is clear that the Respondent throughout warned the Applicant that this is a matter of trial, I will reserve the issues of costs for the trial.

[2] Order

[28] I, therefore, make the following order:

1. The matter is referred to trial, the notice of motion is to serve as a simple summons;
2. The applicant is to file its declaration within 20 days of the order;
3. The parties are to file their further pleadings in accordance with the Uniform Rules of Court;
4. Costs in this application are to be costs in the trial.

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[7] 2008 (2) SA 184 (SCA) para 56.

[8] 1964 (2) SA 391 (O).

[9] *Winsor v Dove* 1951 (4) SA 42 (N) at 54.

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the Applicant:	Mr E Mandowa
Instructed by:	POSWA incorporated
Counsel the for Respondent:	Mr D Watson
Instructed by:	Cliffe Dekker Hofmeyer Inc

Date of the hearing:	18 July 2023
Date of judgment:	14 August 2023