IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Case Number: **20360/21**

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

06/02/2023
DATE

SIGNATURE

In the matter between:

MPHO DIPELA **Applicant**

and

ALHEIT FAURE FISCHER **1st Respondent**

E-VEHICLE MOBILITY (PTY) LTD **2nd Respondent**

JUDGEMENT

MNYOVU A J:

INTRODUCTION

[1] This is an application for money judgement where the applicant is claiming payment in the amount of R1 695 000. 00 (one million, six hundred and ninety five thousand rand) and R1 570 000.00 (one million five hundred and seventy thousand rand) from the first and second respondent jointly and severally the one paying the other to be absolved, with interest at the rate of 7.5% and attorney and client costs.

BACKGROUND

[2] On or about the end of 2017, the applicant and Mr Christo Lindeque, applicant's former business associate and first respondent entered into Oral Sale of Share Agreement. In terms of the agreement the applicant and Mr Christo Lindeque will purchase 40% of the first respondent's shares he held at in Leisure Mobility Group (Pty) Limited, a company in which the first respondent is the sole shareholder and Director.

[3] It was between the parties that the purchase price in the amount of R2 500 000.00 (two million five hundred thousand rand) will be payable for the shares to the first respondent on his nominated bank account, the first respondent nominated the second respondent's account, the terms of payment were that, the first half of the purchase price would be payable immediately, the second half of the purchase price would be payable on or before the sixth month anniversary of the agreement.

[4] The shares would only be transferred to purchasers upon receipt of the final payment. It then happened that the applicant and Mr Christo Lindeque could not pay the purchase price in two instalments as agreed upon. The parties engaged in other negotiations, and the applicant and Mr Christo Lindeque deposited the money in different instalments for Sale of Shares, to the nominated bank account by the first respondent, which is the

LMG account, as per the initial agreement. The first respondent being the shareholder and the Director of LMG accepted the funds deposited to LMG account. The total amount paid to the second respondent's account amounted to R2 070 000.00 (two million and seventy thousand rands).

[5] On or about 30 March 2020 the first respondent instructed his attorney to advise the applicant and Mr Christo Lindeque, in a form of letter , about his position with regards to their initial oral agreement, his concerns were about share purchasers failing to make first and second payments, payments made sporadically as an when the purchasers deemed fit, breaching the agreement, during various negotiations no consensus could be reached relating to the payment terms for the 51% shares in total, offer for the purchase price of the shares was also rejected in October 2019, there was no consensus when the oral agreement was amendment relating to the purchase price, then first respondent substituted oral agreement by further agreement that was not finalised.

[6] In doing so, the first respondent informed the applicant and Mr Christo Lindeque that the fact that the amendment of the initial agreement was never concluded, he will only consider them as Investors, and negotiations pertaining to the repayment if any investment can commence, or should applicant and Mr Christo Lindeque wish, they can consider revisiting the negotiations previously entered into in attempt to finalise the agreement.

[7] On or about 08 April 2020 the first respondent addressed a letter to the applicant attempting to withdraw the repudiation of the agreement, on or about 10 April 2020, both the applicant and Mr Christo Lindeque instructed their attorneys, to address a letter advising the first respondent that repudiation of the agreement as per letter on 30 March 2020 was accepted, the transactions are cancelled, and they demanding the refund of

the purchase price paid by them, but they do not accept the first respondent's attempt to withdraw such repudiation and cancellation as per letter 08 April 2020 and the offer was rejected in his letter 09 April, 2020. As it transpired that they mistakenly believe that they were purchasing shareholding.

[8] The applicant instituted this application for payment of the portion of his money (R1 695.000. 00) one million, six hundred and ninety-five thousand rand) against the first respondent and R1 570.000.00 (one million five hundred and seventy thousand rand) second respondent, jointly and severally the one paying the other to be absolved, solely for his own money he paid to the first respondent and not on behalf Mr Christo Lindeque.

[9] The first respondent opposes the application.

DEFENCE IN LIMINE

[10] The first respondent in his answering affidavit has raised three defences *in limine* that this application has no prospect of success and it must fail, the court should take regard to, I will summarise as follows:

(a) First Defence *in limine*:- no case is made out for the relief sought against the first respondent and the second respondent.

i) It is clear from the provisions of third agreement, the applicant and Mr Christo Lindeque do not have claim against the first and second respondent, but against LMG

ii) As a result of non-performance in terms of first and second agreement, and subsequently unlawful actions by the applicant and Mr Christo Lindeque, as

described herein above, LMG has become worthless. The applicant's alleged claim is ill-founded, he is confused as to what amount is allegedly owing to him.

iii) The claim is not consistent and differs significantly in various parts of his affidavit, he contends that they paid R2 480 000.00 to the first respondent and/ or second respondent, and yet contends that they paid R2 070 000.00 to first respondent and/or second respondent. The first respondent further alleges that applicant in his founding affidavit made payment of R1 980 000.00 to the second respondent, but only claims R 1 570 000.00 from the second respondent, it is unclear how the applicant's claim is quantified.

iv) The first respondent contends that it was express terms of the first and second agreement that first respondent could nominate the bank account where the applicant and Mr Christo Lindeque had to make payments. The first respondent further admits that the payments concerned remain payments to himself, in terms of the first and second agreement, and later, the same payments remain to LMG in terms of the third agreement. Whereof, repayment thereof can be claimed from the second respondent.

v) The first respondent further contends that even if the applicant could claim repayment of the payments made to him personally (which he denies), such repayments can only be made in terms of first agreement, which means the applicant's claim is limited to R1 250 000.00.

vi) The first respondent concluded that the applicant did not disclose a cause of action that would entitle him to the relief sought, simply because of the fact that he is factually and legally unable to do so. the applicant does not have any claim against him personally and/or the second respondent.

(b) Second defence *in limine*:- There first respondent contends that there are Factual dispute and counterclaim, regarding the alleged factual basis and quantum of the applicant's purported claim.

i) The first respondent contends that from the applicant's pleaded case it was clear that a factual dispute should or could have been foreseen, and applicant's claim could have been prosecuted by means of action procedure, instead of application proceedings. The first respondent referred the court to the first, second and third agreements he had set out earlier in his answering affidavit.

ii) Further the respondent contends that, even if applicant could claim repayment of payments of R 1 250 000.00 from him personally (which he denies), he has a counter-claim against the applicant and Mr Christo Lindeque far excess of any amount he may owe them in terms of the first and second agreement, based on the losses that he had suffered through the diminishing of the value of his shareholding in LMG resulting from the wrongful and unlawful acts by them, on face value , his counterclaim amounts to R73 million.

iii) The first respondent further contended that he has instituted an action case against the company Legacy, in this action, the amount he is claiming is in excess of R5 million from the Legacy, based on monies due and payable by Legacy to him in terms of various service level agreements, therefore the applicant's ill-advised attempt to prosecute this claim on motion proceedings, has real intention to frustrate the instituted action against the Legacy.

(c) Third Defence *in limine:*- the first respondent contended that the applicant's founding affidavit is fatally defective it was not dated by the Commissioner of Oaths as required in terms of Regulation 4(1) that provides that the commissioner shall *inter*

alia state the manner, place and date of taking the declaration. Therefore, there is in fact no admissible evidence before court upon which the applicant's claim can be adjudicated, application should be dismissed with costs.

CONDONATION OF LATE FILING OF THE REPLYING AFFIDAVIT

[11] The applicant in his replying affidavit alleges that he realised that the affidavit will be filed out of the prescribed time period as set out on Uniform Rules of Court, their newly appointed candidate attorney did not realised that the opposing affidavit was served on 25 May 2021, once it was conveyed that the respondent served answering affidavit on 17 June 2021, they gave instructions to prepare plea and counterclaim on the other matter they are involved with the first respondent, for that reason he waited for the amendment of their particulars of claim, finalisation of a plea, and counterclaim to consider the outcome of forensic report regarding monies paid due to one of first respondent's companies. I am of the view that the degree of lateness and explanation of delay was established by the applicant, and confirmed by affidavit, and condonation is not opposed, in that aspect, condonation is granted. See *Dengetenge Holdings (PTY) (Ltd) v Southern Sphere Mining and Development Company Ltd and Others* 2013 (2) All SA 251 (SCA) at para11.

ARGUMENTS

[12] The matter was heard before me for submissions by the counsels for the applicant and respondent. The counsel for the applicant raised point *in limine,* submitted to this Court that at the time of commissioning of the founding affidavit, on 22 April 2021, the commissioner who swore the applicant mistakenly did not date the affidavit, when it was brought into their attention, it was brought into the attention of the Commissioner, who immediately act upon it by filing confirmatory affidavit. The counsel argued

further that what kills the issue of sworn affidavit, is when there is no signature, and the applicant was not sworn before the commissioner, to attest to his oath, this issue has been dealt, it is evident in submitting of the Confirmatory Affidavit, by the Commissioner of Oath that the applicant has attested and sworn before the him, the Commissioner mistakenly omitted to put the date, with regard to the above, the Court cannot just dismiss the application without considering the reasonable explanation.

[13] The counsel for the applicant submitted that there is no factual dispute. It was clear intention of the parties that the agreement constituted a sale of shares agreement, throughout the negotiations pertaining to the possible sale of shares, the negotiations were done between the first respondent, the applicant and Mr Christo Lindeque and the payments received were made from personal accounts of all individuals involved. The applicant admitted on his replying affidavit that he and Mr Christo Lindeque did not make payment within the prescribed time period as agreed upon but that was not relevant. the applicant and Mr Christo Lindeque made payment of R2 070 000.00 to the second respond's bank account as agreed on the initial agreement for purchase of shares.

[14] The counsel for the applicant argued that the allegations by the first respondent that the applicant and Mr Christo Lindeque were Investors, are not real and genuine. There was no Second or third agreement concluded between the parties, only the negotiations were being held, which did not materialise and finalised by the parties, the whole agreement mentioned by the first respondent are false. The first respondent repudiated the oral agreement in writing and considered the applicant and Mr Christo Lindeque as Investors, no agreement to that effect.

[15] The counsel for the applicant further submitted to this court that the first respondent has no counterclaim, as contended in his answering affidavit, the purported dispute is without merit and farfetched. The counsel argued that it cannot be possible that after the conclusion of the first agreement, LMG was informally valued in an amount of R73 million rand, and due to non-payment of the agreed purchase price of R 2, 5 million rand, because of the applicant and Mr Christo Lindeque not complying with their payments as such the first respondent suffered personal damages, as the value of his shareholding in LMG diminished significantly.

[16] The counsel for the applicant submitted that the court has to take regard on the fact that the year ending February 2019 versus year ending 2018 comparison appears skewed given that there was insignificant activity in the year ended February 28 , 2019 and year ending February 2020 versus year ending February 2019 comparison appears disproportionate due to the low base of year ending 2019 giving that it is start up business, according to valuation LMG had a revenue R209 000.00 for the year ending February 28, 2018 operating expenses of R790, 967.00 and a loss of R581 967.00 would be improbable to accept, as the LMG was registered on 22 January 2018, within such financial projections are far- fetched as they stand to be rejected. There is no basis put forward that the applicant's short payment for the respondent's shares caused loss suffered by the company and the first respondent.

[17] The counsel of the applicant submitted to this court that so-called counterclaim is an ill -conceived and *mala fide* attempt to create factual dispute that does not exist. There no *bona fide* dispute of fact, the allegations in the first respondent's answering affidavit are farfetched, untenable and it stands to be rejected. The court must take a robust approach on this matter and grant relief a prayed for against the first respondent only.

[18] The counsel for the first respondent submitted that after filing of first respondent's answering affidavit the factual disputes manifested, cannot be resolved on affidavit. I need not to repeat the first respondent's defences as alluded on paragraph 10.

[19] The counsel for the first respondent submitted that there are no bald denials raised by the first respondent on its answering affidavit, there was a Second and Third Agreements concluded by the parties, the parties agreed that the moneys will be retained by the first respondent, as capital investment paid to LMG. The applicant cannot expect payments after making investments.

[20] The counsel for the first respondent further submitted that the applicant cannot possibly have any claims against the respondents, any claim that the applicant, lies against LMG, that was confirmed by the letter of demand issued by the applicant's erstwhile attorneys, in terms of Section 345 of the Companies Act, was addressed to the second respondent.

[21] However, the applicant in his replying affidavit indicated that the letter was addressed to second respondent erroneously, he did not give his attorneys any instructions to send the letter of demand to the LMG, the instructions were sent to the first respondent. The counsel of the first respondent argued to this court that was a clear confirmation of the version as put up by first respondent, a confirmation of a material factual dispute which cannot be possibly be resolved on affidavit, in favour of the applicant, the applicant should have instituted the action proceedings not the motion proceedings. The application should be dismissed with costs.

ISSUES TO DE DETERMINED

[22] In the present case, after perusing the papers and evidence brought before me and hearing oral evidence from both parties counsels, the court has been tasked to determine

issues before it. Firstly, whether the respondent is liable towards the application to pay the amount as set out in the applicant's, notice of motion. Secondly, the respondents contend that that the applicant has failed to make a case for the relief that applicant seeks. Thirdly, the respondents contends that the there is factual dispute which cannot be resolved on affidavit, the respondent, in addition has a counterclaim against the applicant, last but not least, the applicant is of the view that there exists no factual dispute on the papers, and that the purported dispute is without merit and farfetched, applicant contends that he is entitled to a monetary judgement.

LAW

[23] The applicant is instituting action by way of motion proceedings for payment of money allegedly to be owed by the respondents. In normal proceedings such action can be brought to court by action proceedings, where the plaintiff will issue summons and pleadings will follow. Application proceedings cannot be recommended where a litigant foresees that his opponent will raise material dispute of fact in an answering affidavit in response to his founding affidavit. If a material dispute of fact arises when comparing the founding and answering affidavits, The court will be faced with the following choices Rule 6 (5) (g) of the Uniform Rules of Court, which must be made in a judicious matter.:

(a) dismiss the application if the litigant who initiated the proceedings foresaw or ought reasonably to have foreseen, before initiating the proceedings that a dispute of fact would;

(b) refer the material dispute of fact to oral testimony if it can be disposed easily and speedily without affecting any other issues in the case, with a view to resolving any dispute of fact and to that and may order any deponent to appear personally or grant

leave for such deponent or any other person subpoenaed to appear and be examined and cross-examined as a witness and/ or,

(c) refer the entire matter for trial and order that the notice of motion stand as a simple summon, that the founding affidavit stand as the plaintiff's declaration, that the answering affidavit stand as defendant's plea, and make any order relating to the conduct of the proceedings as a trial.

Dispute of fact and applicable legal principles.

[24] In dealing with disputes of fact in motion proceedings, Conradie J in *Cullen v Haupt*[1] said:

"I have consulted some of the better known decisions concerning the referral of applications to evidence or to trial. The leading decision in this regard, of course, Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3)SA 1155(T) at 1162, where Murray AJP said that if a dispute cannot properly be determined it may either be referred to evidence or to trial, or it may be dismissed with costs, "particularly when the applicant should have realised when launching his application a serious dispute of fact was bound to develop" .

The next of better known cases on this topic is that of Conradie v Kleingeld 1950 (2) SA 594 (0) at 597, where Howirtz J said that a petition may be refused where the applicant at the commencement of the application should have realised that a serious dispute of fact would develop" .

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[1]1988(4)SA39(C)at-p40F-H

[25] In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26, the test laid down in *Plascon Evans* was restated, Harm DP observed that motion proceedings were really designed for the resolution of legal disputes based on common cause facts. In most applications, however, disputes of facts, whether minor or more substantial, arise. As a result, rules have been developed to determine the facts upon which matters must be decided where disputes of fact have arisen and the parties do not want a referral to oral evidence or trial. The Supreme of Court of Appeal also emphasised that motion proceedings cannot be used to resolve factual issues because they are not designed to determine the probabilities, unless the circumstances are special.

[26] In this present case based on the background of this matter, the first respondent contends that because there are factual disputes, these disputes cannot be determined on motion proceedings rather be determined on action proceedings. The respondent in his answering affidavit disputes the material facts in the applicant's founding affidavit. The applicant instituted his claim on motion proceedings and contends that the are no factual disputes, the principal ways in which disputes of facts arise are when the respondent denies material allegations made in the applicant's founding affidavit and produces positive evidence to the contrary in the answering affidavit.

[27] The first respondent further alleged additional facts and evidence in his answering affidavit, where he avers that there are factual disputes which the applicant did not disclose in its founding affidavit. The first respondent avers that he does not owe the applicant any monies (in person), alleges that the applicant's claim lies within the second respondent, but not with him personally, however, if the applicant persists, he has *bona fide* defence. The first respondent avers that disputes of facts did arose

between the parties during negotiations and alleged that second and third agreements were concluded between the parties.

[28] The applicant denies all the allegations made by the first respondent in his answering affidavit, in that, his version consists of bald or uncrediworthy denials, the first respondent raises factual disputes that do not exist. The first respondent version is far-fetched and untenable that the court must reject merely on paper, the first respondent does not have a real, genuine and *bona fide* disputed facts. The first respondent is in possession of the applicant's monies, which the applicant is entitled for his refund, the applicant did not agree on any Investment with the first respondent.

[29] The court did consider the Plascon-Evans Rule, the general rule is that final relief may only be granted if those facts stated by the respondent, together with those facts stated by the applicant that are admitted by the respondent, justify the granting of order. I have considered the facts that have been alleged by the respondent in his answering affidavit, as alluded in paragraph 10 against the facts and/ or version of the applicant's which have been admitted by the respondent.

[30] It is my view that, the facts which are common cause between both applicant and first respondent are that, first respondent admits to receiving payment from the applicant and Mr Christo Lindeque and there was a sale agreement of shares entered between the parties as alluded in paragraph 3, 4, and 5. As mentioned above disputes of fact arose on the negotiations between the parties and when the first respondent repudiated the initial agreement and considered the applicant and Mr Christo Lindeque investors, the court further consider that the defence raised by the respondent against the facts alleged by the applicant are indeed, disputes of fact.

CONCLUSION

[31] The disputed issues raised in this application ought to be properly ventilated in a trial. It was argued on behalf of the first respondent that the applicant should have foreseen when launching the application that material dispute of facts was bound to develop in that applicant's version in respect of negotiations that were not finalised. In view of the importance of the application to the parties, the amount involved and the fact that the application relates to money judgement, dismissing the application will be unfair.

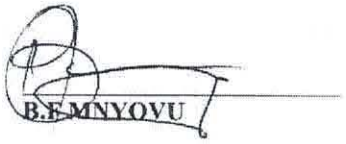
[32] In the result, I make the following order:

32.1 The application is referred to a trial.

32.2 The notice of motion and the founding affidavit shall stand as combined summons. The answering affidavit shall stand as the defendant's plea and the replying affidavit shall stand as a replication.

32.3 The provisions of the Uniform Rules of Court then apply.

32.4 Costs are reserved.



B.F MNYOVU

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	:	**Adv W J Botha**
Instructed by	:	
	:	**Cawood Attorneys**
Counsel on behalf of Respondent	:	**Adv R Raubenheimer**
Instructed by	:	
		Roestoff Attorneys
Date heard	:	**11 October 2022**
Date of Judgement	:	**06 February 2023**