IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 43967/2017

Not Reportable

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LIMITED Applicant

and

SHAWN TREVOR OLIVIER Respondent

JUDGMENT

FRANCIS J

1. The applicant brought an application to refer its application for monetary judgment to trial in terms of rule 6(5)(g) of the Uniform Rules of Court owing to a dispute of fact that had arisen after the respondent had filed his answering affidavit.

2. In the monetary application the applicant sought payment of R56 664 747.64 with interest and costs, being amounts due and owing by the respondent to the applicant for the supply of airtime to the respondent under a series of 47 invoices. In the answering affidavit the respondent raised a dispute that the payments made by him were appropriated to those particular 47 invoices

which had been paid and that those invoices could not find a claim against him.

3. The applicant's attorney before the applicant had filed its replying affidavit wrote a letter dated 28 February 2019 to the respondent's attorney that the respondent had in his answering affidavit raised factual disputes in relation to quantification which were not reasonably foreseeable. It pointed out that it had to make an election whether to persist with the motion proceedings or seek a referral of the matter to trial or oral evidence. It attached a proposed draft court order that the matter be referred to trial.

4. On 4 March 2019 the respondent's attorney responded and stated that any factual disputes that may have arisen were reasonably foreseeable if not in fact foreseen and disagreed with the applicant's decision. It stated further that it denied that the applicant has an election as referred to in its letter. Their understanding is that the applicant has the right to argue at the hearing of the opposed application – that – in the event of it being found that there are material disputes of fact which render the matter incapable of determination on motion – the court should exercise a discretion by not dismissing the application, but instead to refer the matter to trial or, if the issues are limited, refer those specific issues for the hearing of oral evidence. In response the respondent would argue that the application should be dismissed with costs. The court should exercise its discretion and make an order. He disagreed with the applicant's proposal.

5. It is common cause that the applicant and respondent concluded a pre-paid distribution agreement, an electronic distribution agreement and a credit facility. The terms of the agreements are set out by the applicant in its founding papers. The applicant provided cellular telephone goods (airtime) under the aforesaid agreements to the respondent, including those detailed in the applicant's bundle of invoices to the founding affidavit, which invoices make up the amount claimed by the applicant.

6. It is further common cause that on 22 July 2015 the respondent paid the applicant an amount of R2 800 000.00. On or about 24 July 2015 the applicant called up and received payment of the respondent's bank guarantee in the amount of R20 170 000.00 (but the respondent denies that the applicant was entitled to do so). In addition, the applicant received payment of an amount of R35 107 917.27 from its credit insurer. After the applicant had called up the guarantee, it had no security.

7. It is further common cause that the respondent paid the applicant the various amounts reflected in the schedule marked C. The respondent contended that those payments were earmarked in respect of the applicant's respective invoices in FA14.2 to its founding affidavit but the applicant denied that the payments were so earmarked and contended that they were allocated payments of other invoices listed in the applicant's statement of account.

8. It was contended on behalf of the applicant that the applicant did not

reasonably foresee that the respondent would dispute the quantification of its claim. The respondent had in the prior correspondence stated that he was unable to confirm the amount until he had concluded a reconciliation of his accounts and that was in July 2015, and was in the process of doing so. The respondent produced no such reconciliation. As such, a dismissal of the application is not appropriate – the factual dispute was not foreseeable by the applicant and the applicant made the election to seek a referral once this dispute arose after the respondent had filed his answering affidavit raising the dispute for the first time. The respondent's dispute is contrived but this issue is most appropriately resolved by way of trial proceedings after discovery.

9. It was further contended by the applicant that even if the court found that there was foreseeable factual disputes, it retains a discretion and could nonetheless order a referral. This has been done so as to not cause further unnecessary expense that would arise from a dismissal and subsequent issuing of action proceedings. A further consideration that must be relevant in this case is the extensive prejudice that the applicant may suffer if the application is dismissed and its very substantial claims against the respondent are then potentially extinguished by prescription.

10. It was contended on behalf of the respondent that it was clear from a mere reading of the respondent's account with the applicant, that the payments in question were intended to settle those 47 invoices. This much so it was contended appears from the applicant's own statement of account attached to

its founding affidavit as FA14.1, read with the schedule attached to the applicant's replying affidavit as RA4. Had the applicant applied its mind reasonably and diligently to its own books of account, it would immediately realise that those 47 invoices had been paid by the respondent, he having earmarked them as such. In such event, the applicant would – obviously – not have instituted proceedings for verbatim of the same 47 invoices.

11. It was further contended by the respondent that the applicant's contention that it could not reasonably have foreseen that the respondent would rely on the defence of payment and that a material dispute of fact would arise therefrom, is untenable. Any reasonable business person in the applicant's position would have and should have seen, from its own books of account, that those invoices had been earmarked and allocated by the respondent when making his payments.

12. It was further contended by the respondent that the applicant in its replying affidavit, apparently realising the dilemma that it faced, sought to contradict its founding affidavit by alleging that there are 34 other invoices (which do not form part of the claim formulated in the founding papers), which remain unpaid and that the respondent is indebted to it in respect of those other invoices. The applicant has attached to its founding affidavit copies of the 34 invoices on which it did not rely in its founding papers. It is impermissible for an applicant to effectively jettison its claim as formulated in its founding papers and to substitute it with a new claim formulated for the first time in

reply. The dispute of fact relating to the respondent's earmarking of his payments in respect of the specific 47 invoices on which the applicant has founded its claim, was reasonably foreseeable and that the application ought to be dismissed with costs on that basis alone.

13. The respondent had further contended that the applicant was obliged to register as a credit provider under the National Credit Act and that the agreements on which it relied as its cause of action were unlawful agreements and are consequently void as contemplated in section 40(4) read with section 89 of the NCA. It had failed to register as a credit provider and the application should be dismissed with costs.

14. The issues for determination is whether the application should be dismissed with costs by reason of what the respondent contends were foreseeable factual disputes of referred to trial. If a referral to trial is ordered whether costs should be costs in the cause or paid by the respondent. Whether condonation should be granted for the applicant's late delivery of its replying affidavit.

15. The referral application was brought in terms of rule 6(5)(g) which reads as follows:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such an 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 to pleadings or definition of issues, or otherwise."

16. It is trite that if the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent. The subrule is of wide import and empowers the court, where an application cannot properly be decided on affidavit, to make such an order as it deems fit with a view to ensuring a just and expeditious decision. In this regard see *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) 87 (D) at 91A.

17. It is trite that as a general rule an application for the hearing of oral evidence must be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on papers or on appeal. In this regard see *Law Society, Northern Province v Mogami* 2010(1) SA 186 (SCA) at 195C. 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. It is undesirable that a court *mero motu* orders a referral to oral evidence.

18. It is trite that a court has a wide discretion in resolving to refer a matter to evidence. The court is enjoined to examine the allege dispute of fact and see whether there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence. If this is not done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of an applicant. The test is a stringent one that is not easily satisfied. Vague and unsubstantial allegations are insufficient to raise the kind of dispute of fact that should be referred for oral evidence. A court must take a robust, common-sense approach to a dispute on motion and not hesitate to decide an issue on affidavit merely because it may be difficult to do so. This approach must, however, be adopted with caution and the court should not be tempted to settle disputes of fact solely on the probabilities emerging from the affidavits without giving due consideration to the advantages of *viva voce* evidence.

19. It is trite that a court should in deciding disputed facts in application proceedings, always be cautious about deciding probabilities in the face of conflicts of facts in the affidavits. This is so because affidavits are settled by legal advisers with varying degrees of experience, skill and diligence, and a litigant should not pay the price of an adviser's shortcomings. A court will dismiss an application of the applicant should he have realised when launching his application that a serious dispute of fact incapable of resolution on the papers, was bound to develop. It does not necessarily follow that because a dispute of fact is reasonably foreseeable that an application will be dismissed

with costs. There may be circumstances present that will persuade a court to order the parties to go to trial together with an order that costs of the application be costs in the cause or that the costs stand over for determination at trial.

20. I have carefully considered the application before me. It is clear that the applicant had already as early as 28 February 2019 before it had filed its replying affidavit requested that the matter be referred to trial in terms of rule 6(5)(g). This was rejected by the respondent on 4 March 2019. The application for referral to trial was made *in limine*. This is not one of those applications where the applicant had despite the fact that a dispute had arisen in the application decided to enrol the matter for a hearing in the motion court to argue that no dispute of fact had arisen and if the court was to find that such a dispute had arisen that the matter should be referred to trial. The respondent had agreed with the applicant that the primary issue at this juncture is whether the application should be referred to trial or whether it should be dismissed.

21. It cannot be said that the applicant reasonably foresaw that a factual dispute would arise when it proceeded on motion and despite such knowledge persisted by way of application. When the dispute arose it properly made the election to seek a referral to trial. I am satisfied that proper case has been made for this matter to be referred to trial. The trial court would be in a better position to render a just and expeditious decision taking into account the nature and quantification of the claim. It will be inappropriate for me to

comment on the merits of the applicant's claim and the defence raised by the respondent since this is a matter that should be determined by the trial court. The same applies to the issue about whether the applicant was a credit provider in terms of the provisions of the National Credit Act.

22. Since the matter is being referred to trial it becomes strictly speaking unnecessary to consider the application for condonation for the late filing of the replying affidavit but I am satisfied that a proper case has been made for condoning the late filing of the replying affidavit.

23. This brings me to the issue of costs. The applicant contended that the respondent should have accepted its proposal that the matter be referred to trial on an unopposed basis and that the costs incurred after the delivery of the answering affidavit should be paid by the respondent prior to this being costs in the action.

24. I do not agree with the applicant's contentions on the issue of costs. An appropriate order would be that costs be costs in the action.

25. In the circumstances I make the following order:

25.1 The matter is referred to trial with the following directions:

25.1.1 the applicant's notice of motion stands as its simple summons as the plaintiff in the trial;

25.1.2 the respondent's answering affidavit stands as his notice of

intention to defend as the defendant in the trial;

25.1.3 the applicant shall deliver its declaration within 20 court days of date of this order;

25.1.4 the further exchange of pleadings and procedure be governed by the rules of this court applicable to action proceedings;

25.1.5 costs are costs in the action.

FRANCIS J
JUDGE OF THE HIGH COURT

FOR APPLICANT	:	BM GILBERT WITH MCJ VAN KERCKHOVEN INSTRUCTED BY VILJOEN FRENCH & CHESTER INC
FOR RESPONDENT	:	J BOTH SC INSTRUCTED BY MARTIN HENNIG ATTORNEYS
DATE OF HEARING	:	9 NOVEMBER 2020
DATE OF JUDGMENT	:	12 MAY 2021