IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 22283/2019

DELETE WHICHEVER IS NOT APPLICABLE

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

11 April 2022
DATE

L.B. Vuma

Heard on: 11 October 2021
Delivered on: 11 April 2022

In the matter between:

AL MPHAGO CIVIL CONSTRUCTION CC **Applicant**

and

HM EYETHU CONSTRUCTION & PLANT HIRE CC **Respondent**

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] On 1 April 2019 the applicant launched the application for an order in the following terms:

"*1. That the respondent be compelled to co-operate with the applicant and the owner by, inter alia, complying with the owner's requirements, which includes but not limited to, completing the owner's supplier database form and any other document required by the owner in order to register the Joint Venture on its supplier database in order to secure the release of the final payment due to the Joint Venture in the amount of R510 804.78 (five hundred and ten thousand eight hundred and four rand and seventy eight cents);*

Alternatively

2. That the respondent be ordered to pay to applicant an amount of R255 420.39 (two hundred and fifty thousand four hundred and twenty rand and thirty nine cents) being its equal, 50% share in respect of the outstanding invoice;

3. Interest on the amount R255 420.39 (two hundred and fifty thousand four hundred and twenty rand and thirty nine cents)…….

4. Costs of suit; and

5. Further and/or alternative relief."

FACTUAL BACKGROUND

[2] On or about January 2016 in Pretoria the applicant and respondent ("the parties") entered into a joint venture agreement for purposes of bidding for a project with the City of Johannesburg (the Owner or "CoJ").

[3] As a joint venture, the parties traded as H.M Eyethu AL Mphago JV (hereinafter referred to as "the parties"). They were appointed by the CoJ under contract number: 485/15 for the construction of roads and related storm water in Braamfischerville.

[4] The parties were requested by the CoJ to nominate a bank account as the CoJ did not have provision for and could thus not make payments to a joint venture account. The parties obliged and nominated the respondent's bank account.

[5] In due course the applicant requested the CoJ to pay any future amounts due to the joint venture into the bank account of the joint venture. The CoJ provided the joint venture with the supplier database forms and other related documents necessary to enable the request by the applicant.

[6] The parties completed the project as required by the CoJ and submitted their final invoice on 13 June 2018, to the value of R510 804.78 (Five Hundred and Ten Thousand, Eight Hundred and Four Rand and Seventy Eighty Cents).

[7] The CoJ informed the parties that until the documents mentioned in paragraph 5 above are completed by the parties it would not be able to pay the money into the bank account of the joint venture.

[8] The parties failed to fulfil the above request by the CoJ which failure prompted the applicant to launch this application as stated in paragraph 1 above for an order to compel the respondent to co-operate with the applicant and complete the cited CoJ documents.

[9] On 30 May 2019 the respondent filed its notice to oppose the application.

[10] On 17 July 2019 the respondent filed a document titled "Respondent's Answering Affidavit/ Founding Affidavit in Counter-application." The document included therein various sub-headings. The main heading of the document was titled "Respondent's Answering Founding Affidavit" deposed to by a Mr Harry Makoti Mtswheni wherein he stated that he was authorized to depose to the affidavit on behalf of the respondent due to the fact that he was the only member of the respondent.

[11] Paragraph 8 of the Respondent's Answering Affidavit/ Founding Affidavit in Counterapplication is titled "Purpose of this affidavit" and the following is stated:

> "*This affidavit serves as an answering affidavit to the allegations contained in the founding affidavit and as alluded to above. It also serves as a founding affidavit in a counter application in terms of which I seek a statement and debatement of account. In this regard I attach hereto as annexure "**HM4**" a copy of my notice of*

motion in the counter application." Annexure "HM4" is captioned with a heading "Notice of motion in the counter application", dated 15 July 2019, with the prayers being sought appearing therein.

[12] As appears above the respondent opposes the application and even files a counterapplication to that effect, raising also some points *in limine*. The applicant also raises points *in limine* in reply to the respondent's answering affidavit and its counterapplication. For congruence purposes I propose to deal with the applicant's submissions *in re* its main application followed by the respondent's points *in limine* thereto and thereafter the respondent's submissions *in re* the applicant's application (including its answering affidavit and counterapplication) and then the applicant's points *in limine* thereto.

SUBMISSIONS BY MR THUMBATHI ON BEHALF OF THE *IN RE* THE MAIN APPLICATION

[13] In regard to the main application, prayer 1 of the applicant's notice of motion seeks an order directing the respondent to complete the documents that would enable the CoJ to register the joint venture on the supplier database for payment of due monies into the joint venture banking account.

[14] In regard to the respondent's contentions to prayer 1 as sought by the applicant, the applicant submits that same are unmeritorious and baseless. The applicant argues that the respondent's allegation that the applicant seeks to gain access to the funds

ignores the fact that both parties would be signatories to the account and that no monies therefore would leave the account without the consent of the other. The applicant further argues that for as long as the money resides with the CoJ, no interest accrues on the amount to the detriment of the parties.

[15] In regard to the prayers sought by the respondent in its counterapplication, *inter alia*, the dissolution of the joint venture, the applicant argues that this prayer is illogical in that a joint venture is geared towards a particular project or task upon the completion of which such joint venture comes to its natural end.

[16] In regard to the respondent seeking a debatement of the joint venture account, the applicant argues that this is untenable as the respondent evades the fact that it has been receiving money on behalf of the joint venture yet it does not seek that its account be debated. The applicant submits that it has no qualms with the debatememnt of the account except that same can be done once the funds have been deposited into the bank account of the joint venture.

[17] The applicant further takes issue with the prayer that seeks to appoint Mr Jan Erasmus as the receiver in that the individual is unknown to the applicant and the extent of his relationship to the respondent is also unknown. The applicant thus argues that to the extent that a receiver may be necessary (although the applicant contends it is not), then the parties should agree on the individual to be so nominated.

[18] The applicant submits that but for the respondent's failure and/or refusal to attend and acquiesce to a meeting requested by the applicant, which meeting was intended to get the respondent to sign such necessary documents to enable payment as required by the CoJ, this application would not have been initiated. However, it is the respondent's failure that led to the applicant instructing its attorneys to send a letter of demand to the respondent on 12 December 2018 for the respondent to sign the relevant documents, which demand the respondent neglected, and which refusal ultimately led to the application before this court. For reasons stated above, the applicant argues that the respondent's counterapplication should be dismissed with costs and that the applicant's claims should be upheld with costs.

POINTS *IN LIMINE* RAISED BY MR THUMBATHI ON BEHALF OF THE APPLICANT AND IN RESPONSE TO THE ANSWERING AFFIDAVIT AND THE COUTERAPPLICATION BY THE RESPONDENT

[19] The applicant raises the following, *inter alia*, points *in limine*:

19.1 That there is no counterapplication before court by virtue of the fact that the notice of motion in the counterapplication was annexed to the answering affidavit as annexure "HM4" which was (although that the answering affidavit was filed on the applicant) not served on the applicant. The applicant argues that further to the above, there is that no counterapplication is validly before court in that annexure "HM4" does not meet the requirements of rule 18 and 24 of the Uniform Rules of Court ("URC") insofar as a party having an option to bring a claim in

reconvention uses a separate document. The applicant further argues that coupled with the above, no founding affidavit is annexed to the notice of motion in the counterapplication and as such there is no counter-application before court.

19.2 In regard to the non-joinder point *in limine* raised by the respondent about the applicant having failed to cite the CoJ in its application, the applicant argues that in line with the ***Judicial Services Commission*** decision below, the applicant argues that the CoJ would not be prejudiced at all by the order sought it seeks since the applicant merely seeks that the respondent sign documents that will enable the joint venture to be registered in the supplier database of the CoJ. The applicant further argues that the CoJ does not have a direct and substantial in the matter and that the respondent's point *in limine* be dismissed.

19.3 In regard to the counterapplication as envisaged in Rule 6(g) which the respondent brings, the applicant argues that same should comply with Uniform Rule 18 and 24 respectively. The applicant argues that the respondent failed to comply with Rule 24 in that it (the respondent) failed in its affidavit to provide a heading between the counterapplication and the answering affidavit in its papers which conflates the two applications and thus the counter-application the respondent seeks to institute. The applicant argues that the effect of such failure to comply with the rules is that it allows it (the respondent) a

second bite of the cherry in that it essentially get to file an extra affidavit purporting to be a reply to the counterapplication.

The applicant further contends that the respondent failed to comply with the requirements of Rule 6(5)(a) in that the notice of motion in respect of the counterapplication has not been properly served on it, arguing that the respondent cannot purport to serve the notice of motion as an annexure to its answering affidavit. In light thereof the applicant submits that the respondent's counterapplication is not properly before this court and should be dismissed with costs on a punitive scale.

19.4 In regard to the respondent's contention that there is a material dispute of fact on the papers, the applicant argues that in its answering affidavit the respondent fails to state why the alleged dispute is material to warrant a dismissal, alternatively a referral of the matter to oral evidence. The basis for the alleged material dispute of fact stems from the respondent's denial of the existence of the written joint venture agreement. The applicant denies the existence of what the respondent raises as a material dispute of fact especially in light of the respondent's admission that there was indeed a joint venture agreement, *albeit* an oral one. The applicant further argues that it has never indicated in its papers that the deponent had personally signed the agreement but rather that an individual acting on the respondent's behalf entered into the written joint venture agreement.

On the basis of the above, the applicant contends that no material dispute of fact exists and that the matter be decided on the papers as they currently stand in the manner stated in the Plascon-Evans case. It (the applicant) thus argues that the respondent's point *in limine* be dismissed with costs.

SUBMISSIONS BY MR HERSHENSOHN IN REPLY TO THE APPLICANT ON THE MERITS OF THE MAIN APPLICATION, INCLUDING THE POINTS *IN LIMINE* THE RESPONDENT RAISES

[20] The respondent raises two points *in limine* in opposition to the applicant's application, namely:

20.1. Non-joinder of the CoJ:

Considering the relief sought by the applicant in terms of its notice of motion and more particularly prayer 1 thereof, it submits that (prayer 1) cannot be granted by virtue of the fact that it seeks the CoJ to register the joint venture on its supply database. The respondent argues that to the extent that the CoJ has not been cited as a party to the proceedings and therefore not properly joined, the application is doomed to fail. It argues that *in casu* this constitutes a joinder by necessity, further arguing that the CoJ has a direct and substantial interest given that the subject matter of the litigation is not merely incidental to the litigation.

It further argues that in this regard it is clear that the relief sought particularly in prayer 1 places upon the CoJ a certain onus and as such ought to have a

right to participate in the proceedings. It therefore submits that for a joinder to be essential, the parties to be joined must have a substantial and direct interest and not only in the subject matter of the litigation but the outcome of it.

20.2 Existence of a material dispute of fact:

The respondent argues that reliance is placed by the applicant on a written document which is a fraud and denied by the respondent which then gives rise to a material dispute of fact which cannot be adjudicated upon the papers. The respondent argues that whether or not the agreement was signed either by the deponent on behalf of the respondent or by an authorized person thereto, it is not a matter which can be resolved on the papers, particularly in circumstances where the written document itself is at the heart of the dispute. Resultantly the respondent argues this court cannot decide the essence of the relief sought by the applicant in the main application due to the abovementioned facts except to do either of the following:

20.2.1 Dismiss the application with costs;

20.2.2 Order that oral evidence be heard in terms of the rules of court;

20.2.3 Order that the parties be referred to trial.

[21] *Re* the dismissal sargument, the respondent contends that the application ought to be dismissed with costs given that the applicant should have realized when launching the application that a serious dispute of fact was bound to arise.

[22] In regard to the disputed written agreement, the respondent contends that although an oral agreement was entered into to establish a joint a joint venture or otherwise known as a partnership between the parties, no written agreement was ever concluded. It argues that the applicant cannot even identify who the individual who allegedly signed the written document on behalf of the partnership and "*pp*" is.

[23] Despite its denials about the existence of the written agreement, the respondent however concedes that an oral partnership agreement was entered into between the parties, resulting in three projects entered into by the joint venture.

[24] Despite the above concession, the respondent argues that the given the existence of the partnership and/or joint venture between the parties, a proper reconciliation needs to be undertaken before any payment can be made into any account other than the existing joint venture account, which reconciliation ought to take the form of a statement and debatement of an account.

[25] The respondent contends that the applicant chose to take trivial points *in limine* instead of dealing with the real issue which is at the heart of the dispute, namely, that

there ought to be a dissolution of the partnership particularly in circumstances where the applicant *qua* partner claims from the respondent.

RESPONDENT'S SUBMISSIONS TO THE APPLICANT'S POINTS *IN LIMINE* (AND THE MAIN APPLICATION)

[26] In regard to the applicant's point *in limine re* the respondent's not complying with Rule 24(1) of the URC, the respondent submits that this view is misguided as it is trite and common practice that a counterapplication be dealt with in a founding/answering affidavit and in the same application as launched by the applicant. The respondent argues that the points *in limine* relied upon by the applicant are not sustainable in light of the Rule 6(7) as appears below herein.

[27] In regard to the applicant's denial about the existence of a partnership between the parties (despite its admission to the existence of a joint venture although it appears that its terms of agreement too are disputed), the respondent argues that that notwithstanding, it does however appear that the applicant concedes to the necessity for a statement and debatement of an account of the joint venture. However, the respondent fails to understand why the applicant wishes to only limit it to the Braamfischerville projects and not the other two projects which were concluded by and conducted by the partnership. The respondent further argues that in line with the decided authorities, the applicant's application is stillborn or premature to the extent that a statement and a debatement of account has not taken place yet.

[28] Still on the question of the existence or otherwise of the partnership between the parties, the respondent argues that even if one were to rely on the written document (which the respondent still disputes since he has no knowledge of it), it is clear that the agreement constitutes a partnership agreement and as such the *action pro socio* becomes applicable as the cause of action applicable for the applicant to enforce its rights.

[29] In light of the above, the respondent submits the following:

29.1. Although there is a dispute as to whether or not a partnership and joint venture is one and the same thing (the respondent contends that this is in fact the case), it (the respondent) submits that the agreements as pleaded by both parties indeed constitute a partnership and as such, the *action pro socio* is the cause of action upon which it ought to be relied;

29.2. In terms of the *action pro socio*, a partner cannot claim from another partner until such time as a statement and debatement of the partnership account is concluded. The respondent seeks in its counterapplication such a statement and debatement of an account; and

29.3. From submissions by the parties thus far it is clear that the parties are *ad idem* and it is common cause that a statement and debatement of the account ought to take place.

RESPONDENT'S SUBMISSIONS *IN RE* ITS COUNTERAPPLICATION (AND THE MAIN APPLICATION)

[30] In response to the applicant's application, the respondent filed a counterapplication in terms of which it seeks, *inter alia,* the following relief:

"30.1 An order declaring the partnership concluded between the applicant and the respondent dissolved as the applicable order;

30.2 An order declaring the applicant and the respondent as the partners of the partnership to undertake a statement and debatement of an account;

30.3 That the respondent be ordered to prepare a true and proper statement of account together with substantiating documents affecting all income and expenditure incurred in the partnership for presentation to the Receiver of Revenue;

30.4 That a Receiver be appointed and authorized to reconcile the various accounts presented by both the applicant and the respondent and determine what amount, if any, is due and payable to each partner and to the partnership, alternatively the other party;

30.5 To, upon making such determination, recover from the funds held in the bank account and any such monies as may be paid to such a partner founding to have claimed such monies;

30.6 To determine as a result of the said statement of account as presented above if there was any profit or loss and to apportion the said profit and/or loss between the applicant and the respondent as partners;

30.7 That the receiver be authorized to call upon the creditors of the joint venture to prove claims in the estate of the joint venture;

30.8 That the receiver be authorized to, on behalf of the joint venture, recover any debtors who owe any monies whatsoever to the joint venture;

30.9 That the Receiver be entitled to recover his/her fees from the parties in equal shares; and

30.10. That the respondent's counterclaim for the statement and debatement of an account and ultimate dissolution of the partnership agreement between the parties ought to be granted in terms of the notice of motion in the counter-application and as per annexure "HM4" to the founding/answering affidavit, with costs.

[31] In regard to its late filing of its answering affidavit, the respondent concedes same and submit that hence it sought condonation in terms of Rule 27 of the URC. As already stated above, the applicant opposes the condonation application.

[32] As its reasons for the condonation, the respondent states the following:

32.1. The applicant relies on a signed written agreement which the respondent denies, which agreement the respondent alleges it sent for forensic analysis by a handwriting expert. The respondent submits that this expert report took some time to finalize and reported back that the signature was not the respondent's;

32.2. The counsel instructed to attend to the application was out of the Republic for a period of three weeks and as such it was not possible to settle the affidavit timeously;

32.3 The applicant's attorneys were notified in writing that the affidavit would be filed out of time but refused to condone same.

[33] The respondent submits what is trite that the court has a discretion whether or not to grant an application in instances of irregular proceedings even if the irregularity is established, arguing that the general attitude which the courts adopt in this regard is that a court is entitled to overlook in proper cases any irregularity and procedure which does not work any substantial prejudice to the other side. In this regard the respondent cites rule 27 which provides that a court may on good cause shown condone any non-compliance with the rules.

[34] The respondent submits that insofar as condonation is concerned, the court should grant condonation for the late filing of the answering affidavit for the following reasons:

34.1. The signature on the document is disputed by the respondent given that the respondent being the only individual authorized to depose to such documents, especially when regard is had to the fact that this impacts on the enforceability and binding nature of the agreement. As such, the use of a handwriting expert was warranted.

34.2. The fact that the affidavit was filed out of time has not prejudiced the applicant in any meaningful manner and neither has the applicant raised in its affidavit any prejudice it has suffered as a result of the late filing thereof. Also, considering the period of delay, it too was not a lengthy period and was justified in the circumstances.

LEGAL PRINCIPLES

[35] Rule 6(7) provides as follows:

"*6(7)(a) Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter application or join such party where a defendant in an action and other parties to the application were parties to such action. In the latter event Rule 10 shall apply mutatis mutandis.*

(b) The periods prescribe with regards to the application shall apply mutatis mutandis to the counter applications: provided that the court may on good cause shown postpone the hearing of the application."

[36] In regard to the above Civil Practice of the High Courts of South Africa, 5th edition, Volume 1 at p 430-431 states the following:

"*The common-law rule will accordingly apply where the respondent has no defence to the applicant's claim but raises a counterclaim and asks the court to stay*

judgment pending the decision on the counter application. The premise of the rule is that the claim and counterclaim should be adjudicated pari-passu, but the court has discretion to refuse to stay judgment on the claim. That discretion is wide and is not limited to cases in which the counterclaim is frivolous or vexatious and instituted merely to delay judgement on the claim."

[37] In regard to the issue of condonation, Rule 27 of the Uniform Rules of Court states that:

"*(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.*

(2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these Rules.

(3) The court may, on good cause shown, condone any non-compliance with these Rules."

[38] In ***Uitenhage Transitional Local council v South African Revenue Service 2004 (1) SA 292 (SCA) para 6,*** *see also* ***Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & Others [2013] ZASCA 5; 2013 (2) All SA 251 (SCA) para 11***, the requirements for granting an application for condonation were stated as follows:

> "*One would have hoped that the many admonitions concerning what is required of an appellant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking: a full, detailed and accurate account of the causes of the delay and its effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out*."

[39] In ***Melane v Southern Insurance Co Ltd 1962 (4) SA 531 (AD) at page 532 B-E***, the following is stated in regard to the factors that will be taken into account when considering a condonation application:

> "*In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach*

incompatible with a true discretion, save of course that if there are prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

[40] In respect of non-joinder issue, in ***Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA) at para [12]***, the court held that:

"*It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see e.g* ***Bowring NO v Verededorp Properties CC and Another*** *2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one*."

[41] In regard to the Material dispute of fact issue, Rule 6(g) of the Uniform Rules of Court states:

> "*Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet 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 him 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*."

[42] In ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (2) All SA 366 (A) at 368***, Corbett JA stated:

> "*…..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*."

[43] In regard to the Non-compliance of the counter-application, Rule 6 of the Uniform Rules of Court states that:

"*(7)(a) Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action. In the latter event rule 10 shall apply mutatis mutandis.*

(5)(a) Every application other than one brought ex parte shall be brought on notice of motion as near as may be in accordance with Form 2 (a) of the First Schedule and true copies of the notice, and all annexures thereto, shall be served upon every party to whom notice thereof is to be given.

[44] Rule 24 of the Uniform Rules of Court provides:

"*(1) A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage. The claim in reconvention shall be set out either in a separate document or in a portion of the document containing the plea, but headed 'Claim in reconvention". It shall be unnecessary to repeat therein the names or descriptions of the parties to the proceedings in convention.*

(3) A defendant who has been given leave to counterclaim as aforesaid, shall add to the title of his plea a further title corresponding with what would be the title of any action instituted against the parties against whom he makes

claim in reconvention, and all further pleadings in the action shall bear such title, subject to the proviso to subrule (2) of rule 18.

(5) If the defendant fails to comply with any of the provisions of this rule, the claim in reconvention SHALL be deemed to be an irregular step and the other party shall be entitled to act in accordance with rule 30."

[45] Rule 18 of the Uniform Rules of Court states that:

"*The title of the action describing the parties thereto and the number assigned thereto by the registrar, shall appear at the head of each pleading, provided that where the parties are numerous or the title lengthy and abbreviation is reasonably possible, it shall be so abbreviated*."

[46] Still on condonation, the Supreme Court of Appeal held in ***Mtshali & Others v Buffalo Conservative 97 (Pty) Ltd (250/2017) [2017] ZASCA 127 (28 September 2017)*** that factors relevant to the discretion to grant or refuse condonation include:

"*the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice*."

[47] Still on condonation, in ***Darries v Sheriff, Magistrate's court, Wynberg & Another 1998 (3) SA 34 (SCA) at 40I – 41E***, Plewman JA pointed out that condonation is not a mere formality. He stated:

"*An appellant should whenever he realizes that he has not complied with a Rule of court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort, the appellant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the court's discretion unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be*."

[48] *In re* condonation, in the matter of ***Van Wyk v Unitas Hospital and Another (CCT 12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (6 December 2007) at paragraph 22***, the Constitutional court stated that:

"*an applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable*."

[49] In regard to the applicant standing or falling by his founding affidavit, in ***Bowman N.O. v De Souza Raldao 1988 (4) SA 326 (TPD) at 327 H***, the following was quoted with approval:

"*It lies, of course in the discretion of the court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit*."

[50] In ***Minister of Environmental Affairs & Tourism v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) at 439 G – H***; Schultz JA said:

"*There is one other matter that I am compelled to mention – replying affidavits. The great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest – and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the courts declare war on unnecessary prolix replying affidavits and upon those who inflate them*."

[51] In ***Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) at 307 G – H**, Harms ADP, after quoting Schultz JA above said:

> "*A reply in this form is an abuse of the court process and instead of wasting judicial time in analyzing its sentence by sentence and paragraph, such affidavit should not only give rise to adverse cost orders, but should be struck out as a whole. Mero motu*."

[52] In regard to *ex parte* applications disclosures, in ***Powell & Others v Van der Merwe & Others* 2005 (5) SA 62 (SCA) at par. 42**, the court stated what is trite that in an *ex parte* application that all material facts which are within the applicant's knowledge should be disclosed.

[53] In ***Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153C – E**, the court stated that if material facts are not disclosed in an *ex parte* application, or if the facts are deliberately misrepresented and the court makes an order, such an order would be one erroneously granted.

THE ISSUES FOR DETERMINATION

[54] According to the applicant, the principal issue for determination is whether the applicant has sufficiently made out a case for its application to compel as appears in its Notice of motion.

[55] From the pleadings between the parties, a variety of secondary issues relevant to the determination of the main dispute arise, namely:

55.1 Condonation of respondent's late filing of its an Answering affidavit;

55.2 Non-joinder of the CoJ;

55.3 Whether there exists a material dispute of fact which warrant a referral to oral evidence; and

55.4 Whether the respondent's counterclaim is properly before court.

ANALYSIS IN RE THE POINTS *IN LIMINE*

[56] In regard to **the respondent's counterapplication**, the applicant takes issue with same for not being properly and validly before court in that no founding affidavit is annexed to the notice of motion in the counterapplication. As already stated, rule 6(7) of the URC provides how a counterapplication is to be dealt with in a founding/answering affidavit and in the same application launched by the applicant. In my view, the bottom line is that annexure "HM4" is succinctly self-explanatory as to what it is all about. Although the period within which to file the necessary notice to oppose is indeed not stated therein, the fact of the matter is that other than denigrating the non-compliance with the URC, the applicant does not allege any prejudice it suffered resultantly. In as much as one takes cognizance of the fact that rules of court are meant to be complied with by every litigant, the indisputable fact that form should never take precedence over substance in an instance where no prejudice is alleged to have been suffered can never be overemphasized. When regard is had to paragraph 8 of the respondent's answering

affidavit with the heading “PURPOSE OF THIS AFFIDAVIT” and which makes reference to annexure “HM4” as being the notice of motion in respect of the respondent’s counterapplication, this, in my view, ought to be sufficient to address any possible non-compliance issue. In the premises I am satisfied that the respondent has properly instituted its counterapplication and accordingly the applicant’s point *in limine* is dismissed and the counterapplication is accepted.

[57] In regard to the point *in limine* by the respondent **as to the existence of a material dispute of fact** warranting the matter to a referral to oral evidence, I am of the view that none such material dispute of fact exists. The reason for same is because the fact that a legal relationship exists between the parties is not in dispute, despite its description having been the subject of contention between the parties. As correctly argued by the applicant, to the extent that the confirmation of the existence of a relationship is not confined to a written agreement or a duly signed document, the fact of the matter remains to which the respondent concedes, namely, the existence of a joint venture agreement entered into between the parties. This concession by the respondent in itself suffices to moot the question in regard to the authenticity of the signatory who allegedly “*pp*” on behalf of the respondent. I am duly persuaded by the applicant and this point *in limine* by the respondent therefore stands to be dismissed.

[58] In regard to the **condonation of respondent’s late filing of its answering affidavit**, two issues arise, namely, the report from the handwriting expert in relation to the signature on the written agreement allegedly between the parties and the unavailability of the respondent’s counsel who at the time was allegedly out of the

Republic for three weeks. In my view, the test is trite in instances of this nature and the applicant's argument in the main relates to (1) the scantiness detail-wise about respondent's counsel unavailability and (2) the relevance of such handwriting expert report in light of what is actually in dispute before court.

[59] The notoriety of the courts' displeasure in unreasonable delays in litigants complying with the rules is trite, especially where the time period contravened is way too lengthy and not duly explained in the condonation application. In *casu* it is indeed so that the respondent did not explain fully in its condonation application why it had to be this particular counsel whose identity is not even disclosed to the court nor why the handwriting expert report could not be filed in due course but at least the answering affidavit in the meanwhile. These are the arguments raised by the applicant in its point *in limine*. In my view, these arguments by the applicant are not sustainable in light of the fact that the delay is not that unreasonable nor for a lengthy period. Again, neither does the applicant allege any prejudice it suffered as a result thereof. The premise being that rules are for the people and not the other way around, I therefore find no merit in this point *in limine*. Accordingly same is dismissed, especially when regard is had to the courtesy displayed by the respondent in a letter explaining the foreseeable delay and thus requesting the applicant's consent and acquiescence in that regard.

In the result, the respondent's condonation application for the late filing of its answering affidavit, including the counterapplication, is granted.

[60] Whereas the persuasion of this court by the case made out by the respondent resultantly means that the applicant's points *in limine* stand to be dismissed, same can

however not entirely be said about the respondent's counterapplication, in particular point *in limine* re the issue of **non-joinder of the CoJ by the applicant**. In my view, I fail to appreciate the CoJ's interest as alleged by the respondent. Accordingly, this point *in limine* is disallowed.

ANALYSIS IN THE APPLICATION AND THE COUNTERAPPLICATION

[61] Perhaps as a side, mention worthy at this point is the fact that during argument the parties reached concessions of note regarding how the matter should be finalized by the court but all that collapsed and the parties abandoned same when they could not agree in regard to the issue of costs.

[62] *In re* the main application, the applicant seeks a declaratory relief for an order to compel the respondent to complete certain documents identified in prayer 1 of its notice of motion. During argument the applicant abandoned its prayer 2, namely, that the respondent be ordered to pay the applicant an amount of R255 420-39 being its equal 50% share in respect of the outstanding invoice.

[63] In opposition to the applicant's application the respondent launched a counterapplication in terms of which it seeks, *inter alia,* the dissolution of the partnership concluded between the parties and for the parties to undertake a statement and a debatement of the account.

[64] In regard to the main application, the applicant submits that its case is premised on the respondent's refusal to complete certain documents to enable the registration of a joint venture on the City of Johannesburg ("CoJ")'s supplier database form in order to secure the release of the final payment due to the joint venture. The applicant argues that the respondent's refusal to complete such documents for the registration of a joint venture is what precipitated the launching of this application. The applicant submits that it has made out a case for an order to compel the respondent as sought and thus argues for the trite approach that costs should follow the event.

[65] What cannot be gainsaid is the centrality of the statement and debatement of the account in resolving the main issue the application raises.

[66] Despite the applicant's argument that for the longest time it has requested for the audit from the respondent, which request the respondent has neglected, in my view, this argument does not deal with the core issue, namely, a statement and debatement of an account by the applicant and/or parties as sought by the respondent. On the contrary there is overwhelming evidence that supports the respondent's argument that it (the respondent) has always been willing to participate in the debatement. It denies the respondent's argument that it (the applicant) has refused to accede to an audit but that it has always been willing to participate in the debatement.

[67] It is common cause that despite numerous commitments in correspondences wherein the applicant conceded the indispensability regarding its participation in the debatement at the instance of the respondent, it has however never made good on those

concessions. Given these facts, it is therefore factually incorrect that but for the non-cooperation on the part of the respondent, the parties are resultantly where they are now. From the evidence before this court, the reason why the debatement of the account has never been undertaken is due to the non-cooperation on the part of the applicant. The argument by the applicant that its alleged refusal debatement-wise is untruthful as borne out by such allegation's absence in the counterapplication is untenable in light of the undisputed facts before this court.

[68] Another glaring issue is the applicant's apparent reluctance to limit the debatement only to the Braamfischerville projects and not the other two projects awarded in Limpopo relating to engineering works to be done in Roossenekal and Laersdrift which were concluded by and conducted by the partnership.

[69] I further find no merit in the applicant's argument that the joint venture has ceased to exist and that each and every joint venture should therefore have its own debatement account and be considered independently.

[70] Perhaps what will put to bed the question whether or not the applicant has made out a case entitling it to the relief it seeks, is an issue that can best be determined by defining or determining the nature of the legal relationship that exists between the parties. In this regard the respondent argues that the parties' relationship is a partnership whereas on the other hand the applicant argues that same is a joint venture as evidenced by the written joint agreement entered into between the parties.

[71] The basic definition of a partnership is the following: "*an association of between two and twenty people who are contractually bound to one another to operate a joint, profit-generating business*." Loosely speaking *action pro socio* entitles each shareholder or partner to demand a fulfilment of obligations towards the company from their co-partners or an order of specific performance of the partnership agreement and/or performance of personal obligations. In my view, this definition accords with what is argued for by the respondent as relates to the *actio pro socio* having to have been the cause of action pursued by the applicant instead since it is under this cause of action that the issues herein can best devolve.

[72] Although the particular terms of the agreements (oral or written) as pleaded by the parties differ materially, it is common cause that:

72.1. At least some sort of a partnership exists between the parties;

72.2. As partners to such a partnership and/or joint venture agreement, the partnership and/or joint venture entered into three different projects;

72.3. The parties seem to agree and it is inescapable that a statement and debatement of the account ought to take place.

[73] Accordingly, in regard to this question whether or not the relationship between the parties is a partnership, I am satisfied that it cannot be gainsaid that the parties' business relationship is indeed that of a partnership, whatever name either party chooses to call it by. In my view, the parties' relationship does indeed bear all the hallmarks of a

partnership. Accordingly, this finding makes prayer 1 of the applicant's notice of motion legally incompetent as effectively to grant same would be tantamount to putting the cart before the horse.

[74] In the premises, the ascertainment and confirmation of the legal nature of the parties' relationship now gives certainty to the question whether or not the applicant has made out a case entitling it to prayer 1 it seeks in terms of its notice of motion. On the other hand, it cannot be gainsaid that the merits of the applicant's application cannot be determined absent the consideration of the respondent's counterapplication. In juxtaposing the two applications before me, I am satisfied that the respondent's refusal to acquiesce to the applicant's demand for its cooperation in regard to the completion of the relevant CoJ supplier database documents was well-placed given the nature of the parties' relationship, as already stated above. In my view, the only practical solution to be employed therefore in order to address the impasse herein is for this court to grant the respondent's counterapplication. (This view flows from the findings of this court in respect of the points *in limine* raised *in casu* as appears below herein). The reason for this finding arises from what the court held in ***Pataka v Keefe*** ***1947 (2) SA 962 (A)*** that a partner has no right of action against another for the balance owing to him or her until final settlement of accounts. A partner must therefore allege winding-up or a settlement of account before he or she can sue for monies due.

[75] Considering the conspectus of the facts before me, I am satisfied that the respondent has made out a case in its counterapplication entitling it to the relief it seeks. In *casu*, it would be irrational to endorse prayer 1 of the applicant's application in light of,

amongst other things, the undenied animosity existing between the parties. Under the circumstances, I am of the view that what makes a better business and legal sense are the prayers as sought by the respondent to be granted.

[76] In regard to the question as to which receiver to be appoint to execute the terms of the order in *casu*, I am satisfied that Mr Jabu Mahlangu be appointed for that purpose as suggested and agreed upon by the parties during argument.

COSTS ARGUMENT ON BEHALF OF THE APPLICANT

[77] The applicant submits that it is entitled to costs in relation to the main application instituted by the applicant and the costs associated with the respondent's counterclaim, alternatively that each party pay their own costs in relation to the counter-application in the event of success by the respondent. It argues that but for the respondent's refusal to sign the joint venture documents, it would not have launched this application. The applicant submits that it has made out a case for the creation of the joint venture and thus argues for the trite approach that costs should follow the event.

[78] In regard to the respondent's counterapplication, the applicant contends that same is not properly before court and that should the court so find, then the applicant must be awarded the costs occasioned by its defence to the respondent's counterapplication. The applicant further submits that in the event the court finds that the respondent has properly instituted its counterapplication, still the respondent is not entitled to the costs associated with the application, the contention being that the

respondent has failed to exhaust other remedies prior to the institution of the counter-application.

COSTS ARGUMENT ON BEHALF OF THE RESPONDENT

[79] The respondent argues that it is evident that the applicant's contention *in re* the absence of the debatement is not factually correct, particularly in light of the 15 June 2018 unqualified concession made by the applicant thereto which it did not attend to fulfil. It further that the respondent has been consistent in seeking the statement and debatement of account to no avail.

ANALYSIS IN RE COSTS SUBMISSIONS

[80] From the evidence before this court, it cannot be gainsaid that it has indeed been the respondent who from the get go had been the party insisting on securing the statement and debatement of the account to which the applicant, despite its concessions, never made good on.

[81] Foremost it is common cause that in determining who is the successful party in a matter the court will attempt to ascertain which of the parties has been substantially successful. The respondent argues that it has been substantially successful in opposing the main application and in seeking and obtaining the relief in terms of its counterapplication.

[82] In regard to the issue of costs, I am satisfied that the respondent, being the party which is substantially successful herein, is entitled to costs.

[83] In the result I make the following Order:

ORDER

1. It is declared that the partnership concluded between the applicant and the respondent is dissolved with effect from the date of this order;
2. The applicant and the respondent as the two partners of the partnership are to undertake a statement and a debatement of an account as follows:

    2.1 That Mr Jabu Mahlangu is appointed as a receiver in the partnership;

    2.2 That all funds held in the joint venture account (the partnership bank account) held at Nedbank with account number [….] be paid to the receiver;

3. The applicant shall prepare a true and proper statement of account together with substantiating documents reflecting all income and expenditure incurred in the partnership for presentation to the receiver;

4. The respondent shall prepare a true and proper statement of account together with substantiating documents reflecting all income and expenditure incurred in the partnership for presentation to the receiver;

5. The receiver is authorized to reconcile the various accounts presented by both the applicant and the respondent and to determine what amounts if any

are due and payable by each partner and to the partnership, alternatively to the other party;

6. To upon making such determination, recover from the funds held in the bank account any such monies as may be paid to such partner found to having a claim to such monies;

7. To determine, if as a result of the said statement of accounts as presented above, there is any profit and/or loss and to apportion the said profit and/or loss between the applicant and the respondent and in a ration of 50/50;

8. The receiver is authorized to call upon any of the creditors of the joint venture to prove claims in the estate of the joint venture;

9. The receiver is further authorized to, on behalf of the joint venture, recover any debtors who owe any monies whatsoever to the joint venture;

10. The receiver will be entitled to recover these/his fees from both parties and in equal shares;

11. Costs of the counterapplication.

Livhuwani Vuma
Acting Judge
Gauteng Division, Pretoria

Head on: 11 October 2021

Judgment delivered: 11 April 2022

Appearances

For Applicant: Adv. D Thumbathi
Instructed by: G Chabalala Inc.

For Respondent: Adv. J Hershensohn
Instructed by: Couzyn Hertzog & Horak Inc.