IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 9699/2015

In the matter between:

VIRALAND INC. Applicant

and

OLE MEDIA GROUP (PTY) LTD First Respondent

TIMOTHY JOHN ORRILL-LEGG Second Respondent

JUDGMENT DELIVERED ON 18 FEBRUARY 2016

RILEY, AJ

[1] The applicant, a company which is registered and incorporated in the United States of America with its registered address at 442 Court Street, Elko, Nevada, has brought an urgent application against the first and second respondents jointly and severally for payment of US Dollars 470170-07 based on an oral agreement. Applicant alleges that a company called DigiKulture which is based in Milan, Italy concluded the

agreement on behalf of the first respondent acting as the agent for the first respondent concluded the agreement on behalf of the first respondent.

[2] First respondent is a company registered in South Africa. The second respondent is cited by virtue of the provisions of Section 77(3) of the Companies Act 71 of 2008 in terms of which a director of a company may be held personally liable for any loss, damages or costs sustained by the company as direct or indirect consequence of the director having acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by Section 22(1), which prevents a company from carrying on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purposes.

[3] Applicant in particular avers that the second respondent has persistently and falsely denied that first respondent concluded an agreement with applicant in January 2015 in circumstances where he has at all material times allegedly been aware that first respondent incurred a large debt towards applicant, a small portion of which was paid to it by first respondent on 9 March 2015. According to applicant the second respondent's conduct as managing director and chief executive officer of first respondent is reckless, which therefore entitles applicant to an order declaring second respondent to be held personally liable for first respondent's indebtedness to it.

[4] The applicant seeks final relief against the respondents on the basis of the alleged oral agreement. In addition, the applicant has brought an application to join

AddSuite (Pty) Ltd ("AddSuite") to the proceedings. The first and second respondent's dispute that they are indebted to the applicant and the application to join AddSuite as a party to these proceedings is opposed.

[5] Mr Kirk-Cohen who appeared on behalf of AddSuite and Mr Kelly who appeared on behalf of the respondent's, submitted that the applicant's application is littered with far reaching disputes of fact which are both genuine and material. According to them the most obvious and fundamental of the disputes is that the respondent denies that it entered into an agreement with the applicant and the fact that respondents in particular deny being indebted to applicant at all. First respondent avers that AddSuite concluded an agreement with DigiKulture, and that the latter contracted independently with the applicant.

[6] According to the respondents and AddSuite the disputes are material, were foreseen or should at least have been foreseen by the applicant. It was submitted that there was no credible basis for bringing the application on an urgent basis and that the applicant has persisted in bringing the application, knowing in advance that the existence of the contract was in dispute and more so the fact that it sued the incorrect party. Mr Kelly submitted that since applicant has now conceded that it sued the incorrect party, that as matters stand, AddSuite is not a party to the application and that no substantive relief can therefore be ordered against the first or second respondent.

[7] It was further submitted on behalf of the first and second respondents that even if the joinder application is successful the application should in any event fail, on the established principles applicable to motion proceedings.

The general principles applicable to motion proceedings where there are disputes of facts

[8] It is generally accepted that motion proceedings are not suited to the resolution of disputes of facts. In **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) the SCA stated the principle as follows at para 26 "*Motion proceedings, unless concerned with interim relief are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities*'.

[9] It is further accepted law that where disputes of facts arise on the affidavits in motion proceedings that final relief can only be granted if the facts averred in the applicants affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. See **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623(A) 634 – 635.

[10] I am mindful that in certain circumstances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. See **Room Hire Co (Pty) Ltd b Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA

1155(T) at 1163 – 5; **DA Mata v Otto NO** 1972 (3) SA 858(A) at 882 D – H. In such a situation, if the respondent has not availed himself of his right to apply for the deponents to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court, and the court is not satisfied as to the inherent credibility of the applicants factual credibility of the applicants factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. Moreover, there may be exceptions to this general rule for e.g. if the respondents version consists of bald or uncreditworthy denials, or he raises fictitious disputes of fact which is palpably implausible, far-fetched or so clearly untenable, then the court is justified in rejecting them merely on the papers. See **Associated South African Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckerein (Pty) Ltd** and Others 1982 (3) SA 893(A) at 924(A), Plascon Evans (*supra*) at 634 – 635, **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) para 55.

[11] It is however clear from the decisions of our courts that a court will dismiss an application where the applicant knew of, or ought to have realised when he launched the application that a serious dispute of fact was bound to develop. See Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd (*supra*) at 1162.

[12] It is submitted on behalf of the respondents and AddSuite that the dispute between the parties is incapable of resolution on the papers, that applicant ought to have realised when it launched the application that its claim would be disputed, but that

applicant nevertheless elected to proceed urgently on motion to enforce a disputed debt.

The background

[13] According to Tomer Itszak Cohen ("Cohen"), a director of the applicant's company, and the deponent of applicant's founding affidavit, applicant operates in the '*ad serving industry*' which describes the technology services that places advertisements on websites. Ad serving technology companies provide platforms to websites and advertisers to serve ads, count them, and choose the ads that will make the website or advertise the most revenue or monitor progress of different advertising campaigns. An ad server is a computer server that decides in milliseconds what ads to display for the purpose of maximising the revenue for the website owner. The ad server chooses the ad from the highest bidder. According to Cohen ad serving also performs various other tasks like counting or '*tracking*' the number of impressions or clicks for an ad campaign and report generation.

[14] It is accepted by the parties that Google provides the best known ad exchange in the industry. It has developed a product called the Google Double Click Ad Exchange (AdX) service. This is a service for managing revenue-generating methods of online display ads (known as "*banners*"). Google provides a platform that facilitates the buying and selling of online display ads whose prices are determined through bidding from multiple ad networks. These are companies that connect advertisers to websites whose aim is to generate revenues from selling advertising space on their

website. Another type of advertisement in the industry is a "*pop-up*", which opens in a window when the visitor clicks on a webpage which contains the "*pop-up*" code.

[15] Applicant therefore derives revenue from these advertisements based on two metrics:

1. A cost per thousand "impressions" known as a cost per mile ("cpm"), representing the number of times an advert is displayed on the website to visitors; or
2. On a 'cost per click' basis; where the advertiser will pay the website an agreed fee every time a visitor to the website clicks on the advertisement.

It is generally accepted that the online advertising industry is characterised by a relationship between different suppliers. For e.g. the owner of a website (as is the case of the applicant) will typically not have a contractual relationship with the ultimate companies whose products and services are advertised on its websites. Online advertising is "*served*" (delivered) to websites via third parties. Third parties include advertising agencies, online advertising brokers and Google. Put more simply, Google has developed a market place to connect advertiser with content websites with inventory (i.e. space on their websites) and the market place known as AdX operates like a stock market in a sense that the prices paid by advertisers will be based on a market price that is determined through a bidding process, as opposed to pre-agreed prices. Websites would therefore receive advertising on

either a cost per cpm or a cost per click basis and do so based on pre-agreed rates or via Google AdX at prevailing market prices.

The agreement

[16] According to the applicant it entered into an oral agreement with the first respondent on 14 January 2015 in terms of which it would display advertising on its website Viralands.com. According to Cohen:

> "55.1 Applicant would display AddSuite's Bet 365 pop-up on its two websites at $20 cpm for January 2015, where after the price would revert to $10 cpm;
>
> 55.2 Applicant would display AddSuite's ATF $2 cpm banners on Viralands.com;
>
> 55.3 The campaign would run for twelve months as long as performance was good for both parties;
>
> 55.4 Payment would be made by AddSuite to applicant on a net 45 day basis".

[17] After the agreement was allegedly concluded with AddSuite, applicant went "*live*" on 14 January 2015, i.e. it began displaying the advertisements on its websites.

[18] According to the applicant it terminated the Bet 365 campaign on 11 February 2015 and that from 20 March 2015 applicant removed AddSuite's Google AdX codes from applicants DFP and server.

[19] It is necessary to emphasise that at the heart of the application is the involvement of "*DigiKulture*", an online advertising agency, which is based in Milan, Italy. Applicant avers that it was approached by DigiKulture, a broker or agent and that DigiKulture had introduced first respondent to applicant which ultimately resulted in the conclusion of the agreement.

[20] In this regard it is accepted that the applicant places reliance for the existence of the alleged agreement, on transcripts of skype conversions which took place between Cohen and a certain Debra Fleenor ("Fleenor"), a representative of Digikulture. In this regard Cohen states that "*[i]n order to prove its case against AddSuite, applicant has annexed to this affidavit various screenshots depicting contents of the skype conversations that took place between Debra and me over this period*".

[21] The following appears to be common cause between the parties:

1. That there was no interaction at all between the first respondent (or AddSuite) and the applicant at the time the agreement was concluded.
2. On applicants version DigiKulture acted as first respondent's agent and concluded the alleged agreement with the applicant on behalf of the first respondent.
3. Fleenor has not filed a confirmatory affidavit confirming the content of her interactions with the applicant and the assertion by applicant that her company acted as agent for the first respondent.

Urgency of the application

[22] At the outset I deem it appropriate to deal with the question whether or not the applicant was justified in bringing this application on an urgent basis. The applicant has launched this application on an urgent basis for the following reasons:

22.1 Applicant avers that it is a start-up company that commenced operating on 21 September 2014 and that in order to raise the necessary capital expenditure it '… entered into a loan agreement with its associated company, Skylikes, a US based company, for an amount of US $ 750 000-00 on the basis that the full capital amount plus interest at the rate of 5% per annum would be repayable on 21 September 2015.

22.2 The failure by AddSuite to pay applicant its debt of US $ 477 170-07 has placed applicant under severe financial pressure as it is struggling to pay its service providers in the ordinary course of business.

22.3 The non-payment of the substantial amount owed by AddSuite had caused the applicant to be unable to generate revenues from its websites.

22.4 According to applicant it was able to generate solid revenues from its websites and thereby pay its service providers, before the AddSuite debacle.

[23] Mr Elliot submitted that applicant is a foreign company and it has demonstrated that it was not dilatory in bringing the application as one of urgency. Placing reliance on **20th Century Fox Film Corporate & Another v Anthony Black Films (Pty) Ltd** 1982

(3) SA 582 (WLD) at 586(G), he submitted that applicant had showed that the urgency of commercial interest justify the invocation of Rule 6(12) no less than other interest. In the alternative he submitted on the authority of **H & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd & Another** 1981 (4) 108 CPD, a judgment of Fagan J, that the respondents would not be prejudiced should this matter be heard on the semi-urgent roll and that respondents have had sufficient time to deliver their answering affidavits.

[24] Although the principles laid down in H & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd & Another (*supra*) and the 20th Century Fox case (*supra*) are sound, it is however also so that each case must depend upon its own circumstances and the court must be satisfied that the applicant has sound and good reasons upon which it relies for urgency.

[25] In the present matter the applicant was made aware of the respondent's attitude to its claim as early as 17 March 2015. The applicant however elected to wait until 26 May 2015, a period of more than two months, before it launched the main application. Upon closer examination of the reasons upon which applicant relies for urgency it appears that the so-called '*loan agreement*' between applicant and Sky Likes Inc. is not a loan agreement. It is in fact a credit facility granted by Sky Likes Inc. to applicant. The document which is headed "Advertising Agreement" provides under the heading "*Additional payment terms*" that:

'- *Skylikes will provide a credit line of up to $750 000-00 US Dollars;*

- *The amount ($750 000 US Dollars) plus interest at the rate of 5% per annum would be repayable 12 months from signing this agreement and will be paid to Skylikes Inc. bank account.*'

The document is signed by ORR Stern on behalf of Skylikes Inc. and Tomer Itzak Cohen on behalf of the Advertiser (the applicant in this matter).

The advertising agreement provides *inter alia* that Skylikes owns and operates a technology system and service for promoting and disseminating content, through social networks (the 'service') using various third party content promoters (Publishers) and that the applicant wishes to engage Skylikes in order to use the service and promote certain content through it. The agreement provides further that Skylikes shall provide applicant with their service for the purpose of "*disseminating and proliferating*" their "*content through social networks*" (an 'Advertising Campaign').

[26] Considering that the document was signed and executed on 21 September 2014, well before the agreement that the applicant alleges it concluded with AddSuite, it is difficult to understand how applicant can aver that there is any connection between the '*Advertising Agreement*' and its dealings with the first respondent or AddSuite for that matter. In my view there is no basis upon which the applicant can claim that the '*loan agreement*' was executed as a consequence of the applicant's alleged agreement with AddSuite and/or that it was in any way connected to its involvement with AddSuite. I am satisfied that there is no basis in fact or law for the suggestion or averment that applicants failure to repay monies owing under its credit facility with Skylikes is due

either to AddSuite and/or Ole Media. The assertion that it is unable to pay its suppliers is also unsubstantiated and must similarly be dismissed based on vagueness. Neither AddSuite nor the respondents can be held responsible or liable for the manner in which the applicant decided to structure its business when it commenced operating.

[27] In my view this kind of commercial pressure, if it can be described as such, that applicant finds itself in, is self-created and does not qualify as falling in the class of recognised urgency that justifies a litigant of obtaining a preference on the court roll at the expense of other litigants. See **Schweizer Reneke Vleis Mkpy (EDMS) Bpk v Die Minister van Landbou en Ander** 1971 (1) PHII (T) at FII – 12, **Nelson Madela Metropolitan Municipality & Others v Greyvenouw CC & Others** 2004 (2) SA 81 (SE). There is further merit in the submission that the fact that the applicant agreed to the postponement of the application has in any event, resulted in what may have started as an urgent application, into one of semi-urgency, or conceivable an application which has no urgency at all. The fact that it was postponed to the semi-urgent roll may at best indicate that it was regarded as being semi-urgent. Having regard to the particular facts and circumstances of this case, I am accordingly satisfied that '*the loss that applicants might suffer by not being afforded an immediate hearing is not the kind of loss that justifies the disruption of the roll and the resultant prejudice to other members of the litigating public*'. See **IL & B Marcows Caterers (Pty) Lyd v Greatermans SA Ltd** 1981 (4) SA 108 (c) at p. 114 A - B. Accordingly I am of the view that the applicants application is not urgent and that it should be dismissed for this reason alone.

The hearsay issue

[28] As stated, the applicant seeks to rely on the transcripts of the skype conversations between Cohen and Fleenor as a basis to establish an alleged oral agreement between it and AddSuite. It is common cause that AddSuite was not a party to these discussions. The question which arises is whether or not applicant is entitled in law to rely on the transcripts of the skype conversations between Cohen and Fleenor and more so whether or not the skype conversations are admissible as evidence in the application. It is accordingly necessary to consider this issue as the skype conversations between Cohen and Fleenor essentially form the basis of the applicant's case against the respondents and AddSuite (should I order that AddSuite be joined to these proceedings).

[29] Mr Elliot submitted that there can be no dispute about the admissibility of the information transmitted over skype by Cohen. On the other hand it was submitted on behalf of the respondents and AddSuite that the transcripts constitute inadmissible hearsay evidence. The essence of the objection is that Fleenor has not deposed to an affidavit confirming the skype conversations, to establish that she acted as AddSuite's agent and thus concluded an agreement on behalf of AddSuite with the applicant.

[30] In the present matter it is common cause that the applicant has not made an application in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988 ("The Act") for the admission of the transcripts into evidence. In oral argument and in his supplementary heads of argument, Mr Elliot submitted that the transcripts of the

skype conversations could be accepted into evidence on the basis of the dicta in **Southern Pride Foods (Pty) Ltd v Mohidien** 1982 (3) SA 1068(c), a judgment of this court.

[31] Section 3 of the Act provides that: "(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail;

(vii) any other factor which should in the opinion of the court be taken into account; and

(viii) is of the opinion that such evidence should be admitted in the interests of justice."

[32] Section 3(4) of the Act defines hearsay evidence as evidence whether oral or in writing, the probative value of which depends upon the credibility of any person other that the person giving such evidence.

[33] It is accepted law that hearsay evidence is inadmissible and that it can only be admitted into evidence pursuant to an application in terms of Section 3 of the Act which sets out the requirements for its admission. It is further accepted law that the admissibility of hearsay evidence is a matter of law and not of discretion. See **McDonalds Corporation v JoBurgers Drive-In Restaurant (Pty) Ltd** 1997 (1) SA 1 (A) at 27D – E. In Mohidien (*supra*), Odes AJ, with reference to **Galp v Tansley NO** and Another 1966 (4) SA 555 (c) held that our courts have permitted hearsay evidence in affidavits in interlocutory matters of an urgent kind. The learned acting judge held at 1071 H that, "*The courts were not indulging in formalistic fantasies in requiring an affidavit or affirmation 'of information and belief' for the admission of hearsay statements. Sound and practical reasons exist for the two fold requirement. The source of information must be disclosed to enable a respondent confronted by an allegation normally inadmissible as hearsay, to check its accuracy and when the courts prescribe the disclosure of the source of information, they mean, in my view, a disclosure with a degree of particularity sufficient to enable the opposing party to make independent investigations of his own, including, if necessary, verification of the*

statement from the source itself. General statements as to source such as "one of the respondent's creditors" will not suffice to constitute an adequate compliance with the requirements. Such statements tell the opposing party nothing and are no more a disclosure of source than the well-worn phrase, "I have been informed."

[34] It was contended on behalf of the respondents and AddSuite that since Mohidien's case was decided before the enactment of the Act and because the admission of hearsay evidence is now regulated under the Act, that the exception in Mohidien is now to be narrowly construed. It is so that the principle laid down in Mohidien recognises that in urgent matters it is often not possible for a party for logistical reasons to obtain affidavits urgently and that for this reason hearsay evidence must in certain cases be admitted. In **Cerebos Food Corp v Diverse Foods SA** 1984 (4) 149 TPD Van Dijkhorst J at 157 E confirmed this longstanding practice of the court '… *in urgent applications to receive hearsay evidence if an acceptable explanation is given why direct evidence is not available and the source of the information and the grounds for the belief in the truth*'. What is however clear from the authorities is that it is only in exceptional cases, where the urgency of the matter precludes evidence being confirmed under oath that it may be admitted into evidence. See also **Fey NO v Van Der Westhuizen and Others** 2005 (2) SA 236 CPD at 241 at F –.

[35] Mr Elliot has urged me to approach the matter on the basis that the urgency of the matter precludes the evidence of Fleenor from being confirmed under oath and that I may therefore admit the skype conversations into evidence. It is however important to

note, as stated hereinbefore, that on the applicants own version it delayed bringing the application by more than a month. As will be recalled, it alleges that *"[i]n order to raise the necessary capital expenditure, applicant entered into a loan agreement with its associated company, Sky Likes Inc, a US based company for an amount of US $ 750 000,00 on the basis that the full capital amount plus interest at a rate of 5% per annum would be repayable on 21 September 2015*". As stated, the document purporting to be the loan agreement is clearly not a loan agreement. It is described as an '*Advertising Agreement*' and provides that Sky Likes extends a '*credit line*' of up to USD 750 000-00 to applicant. There is nothing to suggest that this money was transferred to the applicant as '*necessary capital*'. The applicant has for some time prior to bringing the application, been aware that respondents dispute indebtedness in respect of its claims. It is further clear that for a substantial period of time prior to launching the application, that applicant and/or its representatives had contact with Fleenor. It must therefore be so that when the applicant contemplated instituting these proceedings, that it must, or at least ought to have realised that Fleenor was a crucial witness to its case. As I have mentioned, practically the whole of applicant's case relies on the skype conversations with Fleenor. I could however not find anything in the applicant's papers to suggest that circumstances of urgency precluded the applicant from obtaining an affidavit from Fleenor when the application was initially launched on 25 May 2015. At the time of the hearing of this application on 17 September 2015, applicant has still not given an explanation as to why Fleenor has still not deposed to an affidavit confirming the contents of the skype transcripts, and the applicant's interpretation of the content thereof.

[36] In regard to the issue of urgency and whether or not the present application is indeed urgent it is necessary to look at the history of the matter. By mid-March, respondent made it clear that it was disputing liability and that it did not contract with applicant. The founding affidavit of Cohen was deposed to on 22 May 2015 and the application was launched on 25 May 2015. Although the application was set down for hearing on 17 June 2015 it was removed from the roll by agreement between the parties on 12 June 2015. On 18 June 2015 the matter was postponed by agreement for hearing on the semi-urgent roll on 17 September 2015.

[37] Although the applicant has brought this application as if it is urgent, the applicant has not showed any circumstances of urgency or of an exceptional nature which allows me to absolve the applicant of the obligation to provide and/or to furnish this court with an affidavit by Fleenor. The fact that Fleenor is apparently overseas does not assist the applicant and cannot be used as justification for applicant's failure to provide an affidavit by her. I say this because in bringing the application in the way that it did, applicant was able to secure affidavits in support of its application from Daniel Treisman, who is based in Israel and Mr Soheil Amorpour who is based in Sweden. Apart from the fact that no real effort seems to have been made to obtain an affidavit from Fleenor, there are indications that the reason why Fleenor has not filed an affidavit in support of applicants case is that she declines to do so. In my view the applicant has failed to show that this matter falls to be dealt with in the category of exceptional cases where urgency of the matter precluded the hearsay evidence from being confirmed

under oath. In the result the attempt to have the hearsay evidence of the skype conversations between Cohen and Fleenor admitted into evidence is denied.

The respondent's case

[38] On the respondents version the first respondent is a holding company which provides management services to its subsidiary companies. The shares in the first respondent are held by the Manor Trust. First respondent in turn holds 100% of the shares in four trading companies, namely, Managed Mobile Services (Pty) Ltd; TeamTalk Media (Pty) Ltd, which in turns owns PA Sports SA (Pty) Ltd, Honeykome (Pty) Ltd and AddSuite. AddSuite specialises in the provision of online advertising services to publishers (i.e. owners of websites seeking to monetise advertising space on their websites), and advertises i.e. companies that seek to maximise advertising exposure through online advertising campaigns. In short AddSuite offers a full spectrum of services in the online industry, employing a team of sales people who it states are '*skilled in selling advertising space on websites that are clients of AddSuite, as well as a team specialising in the management and administration of digital advertisements known as Campaign, Managers, or Ad operations Executives*'.

[39] On the respondent's version, AddSuite concluded an agreement with Wi Get Media an advertising agency based in Stockholm, Sweden in November of 2014. It is not in dispute that Wi Get Media represents Bet 365.com. According to Timothy John Orrill-Legg ("Orril-Legg") who deposed to the answering affidavit on behalf of the first respondent, AddSuite was engaged by Wi Get Media to provide online advertising for

Bet 365 by way of banner advertisements and that Wi Get Media in turn agreed to pay AddSuite at a rate of USD $4 per cpm (i.e. per 1000 impressions), and would do so based on Wi Get Media's System of tracking/monitoring these impressions.

[40] According to Orril-Legg, AddSuite approached DigiKulture during December 2014 regarding the provision of online advertising services and concluded an agreement, the terms which are usefully summarised in respondents heads of argument as follows:

> '36.1 DigiKulture agreed to place Bet 365 banner advertisements on two websites owned by its clients, one being Viralands.com which is owned by the applicant.
>
> 36.2 AddSuite would pay DigiKulture a fee of USD 2 per cpm for Bet 365 banner advertisements. (The respondents explain that AddSuite was prepared to agree to these terms with DigiKulture because it would receive USD 4 per cpm from Wi Get Media – i.e. it was able to earn a margin of USD 2 per cpm).
>
> 36.3 Banner advertisements would also be delivered to Viralands.com via Google's AdX platform as managed by AddSuite. These banner advertisements would be in addition to Bet 365 banners, and based on the prevailing AdX market prices.
>
> 36.4 AddSuite would retain a commission of 15% of all revenue generated through AdX advertising, with the balance payable to DigiKulture. (For example, if an advertiser was prepared to pay USD 1 per cpm on Google's

AdX platform, AddSuite would retain 15c per cpm, and the remaining 75c would be payable to DigiKulture).

[41] The essence of respondents answer to applicants case is set out in the affidavit of Orril-Legg where he states that '… *at all times AddSuite dealt with DigiKulture. At no stage did Ole Media or AddSuite deal with Viralands in relation to the Bet 365 campaign, or the advertisements displayed on Viraland.com via Adx. Moreover, and for the avoidance of any doubt on this issue, DigiKulture did not act as an agent of Ole Media or AddSuite (or any of the Ole Media group of companies). AddSuite contracted directly with DigiKulture; both parties acting as principals*'.

[42] I am satisfied that the overwhelming objective facts support the respondent's version. In this regard I refer to the following:

1. The fact that AddSuite and DigiKulture dealt with each other directly. No money changed hands between Ole Media and/or AddSuite (on the one hand) and the applicant (on the other hand).
2. DigiKulture invoiced AddSuite for services rendered and AddSuite paid DigiKulture for those services directly.
3. There is no evidence of any direct dealing between the applicant and Ole Media or AddSuite.

[43] In addition to the above, I am satisfied that it is unlikely and highly improbable that Ole Media or AddSuite would have entered into an agreement with applicant as

alleged by it, i.e. to pay applicant USD 10 or USD 20 per cpm in respect of the Bet 365 campaign as this would have resulted in a situation where AddSuite would incur significant losses in terms of its contract with Wi Get Media in terms of which it received a fixed fee of 4 USD per cpm.

[44] I further take into account that as regards the applicants AdX claim i.e. for a fixed rate of USD 2 per cpm, the respondents aver that although AdX operated like a stock exchange where prices are not fixed, AddSuite and DigiKulture had agreed that the prevailing market prices would apply.

[45] It is necessary to mention that the applicant has also attempted to place reliance on an insertion order which Fleenor provided to Cohen on 17 February 2015. According to Cohen, Fleenor had informed him that she had received the insertion order from AddSuite. An insertion order (IO) is an industry term to describe a purchase order for future advertising space. In this regard Cohen states in the founding affidavit that she (i.e. Fleenor) '… *stated that she had "got them up to $1.60" and that she had told AddSuite that they must expect her to increase it "for the next time*". He states that *"Debra forwarded the email to me at 19h25 on 17 February 2015. A copy of the email containing the IO as an attachment is annexed hereto as "TC24". I was not happy with AddSuite's offered rate of $1.60 cpm and stated in a skype conversation with Debra that the rate should be $2 cpm for ATF and $1 cpm for BTF*".

[46] I agree with counsel for the respondents that it does not assist applicant to rely on the insertion order as the effect of the IO is in fact to undermine applicant's case in that:

1. The insertion order was issued by AddSuite to DigiKulture as the 'Client'. This in my view supports the respondent's version that AddSuite dealt only with DigiKulture and did so as principal.
2. The period referred to in the insertion order differs from the period of the contract as contended for by applicant. It has a commencement date of 1 March 2015 and an end date of 31 August 2015. The dates in the insertion order are clearly in conflict with applicant's assertion that it concluded an agreement with AddSuite in January 2015.
3. According to the terms and conditions, payments will be made according to the number of impressions served in the campaign and the contract sum is limited to USD 32 000-00 over the six month period.

[47] What is abundantly clear from the version presented by the respondents is that they at the outset and before commencement of the proceedings by applicant, made it clear to applicant and to applicants attorneys of record that no agreement was concluded between the respondents and applicant, and that the alleged debt owed by respondents to the applicant was disputed on other grounds. On the respondent's version, the applicant was advised as early as 17 March 2015 that AddSuite had no contractual relationship with Viraland and that there was no basis for any claims, when ORR Stern, a director of the applicant spoke telephonically to Orril-Legg. Subsequent

to this telephonic discussion and on 13 April 2015 applicants attorneys of record addressed an email to the Ole Media Group in which applicant demands payment of USD 477 170-07 within 72 hours. The second respondent to whom this letter was *inter alia* emailed to, responded to the letter of demand on the same day and advised that 'W*e have no contractual relationship with your client and do not understand why this letter was sent and how the claim of US $ 477 000-00 was calculated*'. Second respondent requested applicant's attorneys to provide more information. On 13 May 2015 applicants attorneys addressed a further letter to the Ole Media Group (Pty) Ltd in which *inter alia* the following is stated:

> "*Since you denied any liability to our client, it has furnished us with detailed instructions for the purposes of bringing High Court proceedings against your company in Cape Town. Draft court papers have been prepared and representatives of our client are scheduled to travel to Cape Town to finalise these over the period 20 to 22 May 2015.*
>
> *Having considered all the relevant documentation in the matter we have advised our client with a strong degree of confidence that it will be able to demonstrate in the High Court that your company's grounds of denying any liability to our client are false.*
>
> *Our client will demonstrate in the court papers that your company enjoyed a contractual relationship with it. We point out in this regard that your company paid our client the amount of $32265,75 on account on 15 February 2015. Our client is also confident that it can demonstrate to the High Court that the grounds upon which you stated that you were not able to process our client's invoice in an*

email to Debra Fleenor of DigiKulture.com on 17 March 2015 are devoid of any merit."

[48] It is necessary to point out at this stage that even though applicant avers that DigiKulture allegedly acted as first respondents agent and that this gave rise to the alleged agreement, that it concedes that the alleged agreement could not have been concluded with the first respondent but rather with AddSuite. In an attempt to bolster its case that there was indeed an agreement between applicant and first respondent through DigiKulture, Cohen states in the founding affidavit that on 4 March 2015, '*AddSuite paid applicant $32 265-75'*. I am not sure how much weight, if any, I can place on the fact that this payment was made by AddSuite to the applicant as Cohen later states in the founding affidavit that the amount of $32 265-75 was in fact not paid by first respondent or AddSuite to the applicant. On the respondent's version as contained in their answering affidavit, AddSuite paid DigiKulture based on an invoice that DigiKulture had rendered to AddSuite. According to the respondents AddSuite paid the $32 265-72 to DigiKulture based on two purchase orders issued by AddSuite as follows:

"40.1 The first purchase order ("AA12") was in respect of the advertising generated on Viralands.com by Google AdX and based on AdX revenue reports for January 2015, amounting to USD 20221.01.

40.2 The second purchase order ("AA13"), also for Google AdX revenue, amounted to USD 12043-71, in respect of Inquist (which as I have explained is another client of DigiKulture)."

[49] In the letter of 13 May 2015 applicant's attorney also threaten that applicant also intends to join Orril-Legg, Desere Orril-Legg and possibly Alessandro Valecic in their capacity as directors on the basis that they be held personally liable, jointly and severally with the first respondent in that they "*caused Ole Media to incur a large amount of debt to our client and thereafter deny any liability as being reckless, alternatively grossly negligent, at the very least"*.

[50] On 19 May 2015 the respondent's attorney replied to the letter of 13 May 2015 categorically denying that it has any contractual relationship with applicant; and that it is not indebted to the applicant in the amount claimed or any amount.

[51] In the same letter from respondents attorney, respondent declines to meet with applicant and in clarification states that:

> "… 4.1 *The amount of $32265-75 was paid by our client to DigiKulture in settlement of an invoice for this amount rendered by DigiKulture to our client and pursuant to a supply agreement concluded between our client and DigiKulture;*
>
> *4.2 Our client has had no dealings whatsoever with your client nor has it concluded any agreement or understanding with your client for the supply of services or any related activity;*
>
> *4.3 Our client stands by the contents of its email addressed to Debra Fleenor of DigiKulture, and we have been provided with copies of the*

notifications addressed to our client by Google AdSense advising of violations of Google Ad Sense program policies by your client …"

[52] Respondent's attorneys further made it clear to applicant's attorney that any proceedings which applicant may choose to institute for recovery of any amount referred to by applicant would be vigorously opposed. Applicant was also advised that its contention that respondent's directors are liable is without foundation in law or fact. Applicant was cautioned that should it institute proceedings against respondent's directors that an appropriate cost order would be sought against it.

[53] On consideration of the correspondence and more particularly the letter from respondents attorneys dated 19 May 2015, I am satisfied that the applicant knew or at the least should have known that the material facts of its claim was or would be disputed. It is difficult to understand why, faced with the information that it now had, that it persisted in bringing this application on an urgent basis as it did. It is apparent that notwithstanding the averment in the letter by the applicant's attorney '*that we have advised our client with a strong degree of confidence that it will be able to demonstrate …. that your company's grounds of denying any liability to our client are false*;' that applicant knew or must have known that there was no substance in this averment.

[54] The applicants claim that it is owed an amount of USD 477,170-07, appears on its own version, flawed or at the very least lacking in adequate substantiation. In this

regard I refer to the following aspects which further highlight the extent of the disputed issues in this matter:

1. In respect of the applicants AdX claim it alleges that it generated 254,630,425 impressions. If one applies a rate of USD 2 per cpm in respect of these impressions, based on the applicant's alleged agreement, one arrives at an amount of USD 509,260,85. Although the applicant attempts to deal with this in reply by stating that some of the impressions were charged at USD 2 it does not give a breakdown thereof.
2. The applicants attempt to rectify the dispute in regard to the calculation of the amount allegedly owed is at odds with and inconsistent with its version of the agreement as it alleges that the parties agreed to a fixed price of USD 2 per cpm.
3. The applicant has further failed to substantiate its claim in respect of the Bet 365 claim and does not explain how it arrived at an amount of USD 111 863-39 in respect of this claim if regard is had to the alleged agreement concluded between the parties.

[55] On the whole I have grave concerns about the calculation by the applicant of the amount allegedly owed by the respondents to the applicant considering the various disputes of facts and the problems relating to the calculation of the amount owing and the fact that the applicant has not properly substantiated and proved the amount owing to it by the respondents, if at all.

[56] It is common cause that the relief sought by the applicant is of a final nature. It was submitted on behalf of the respondents that even if I were to have regard to the skype transcripts on the basis that they are admissible notwithstanding their hearsay nature that, firstly, they do not establish the existence of an agreement as contended for by the applicant and secondly, considerations of evidential weight must be assessed because:

1. The Plascon Evans rule applies i.e. the facts upon which the application must be determined are those of the respondents;
2. The respondents have stated under oath that there was no agency relationship and that AddSuite dealt with DigiKulture qua principal, not qua agent.

[57] In its replying affidavit and its heads of argument and in oral argument the applicant attempts to counter the version presented by the respondent. In regard to Bet 365 claim applicant attempts to suggest that AddSuite had entered into an agreement with the applicant on wholly unfavourable terms, being at USD 20 or USD 10 per cpm in circumstances where it was in fact receiving only USD 4, because it was in breach of its contract with Wi Get Media and was anxious to remedy the breach. This theory, which only appears in reply, is based on an alleged dispute between AddSuite and Wi Get Media. Neither of these parties are party to this application. What is fatal to the applicant's case is that the belated introduction of this theory does not mean or demonstrate that the respondent's version that it did not contract with the applicant is

untenable or far-fetched. It also does not lead to the conclusion that the respondent's version should be rejected on the papers as being implausible.

[58] As appears from what is set out hereinbefore, the applicant also suggests that the respondent's version regarding the AdX claim should be rejected. In this regard it relies on the invoice from DigiKulture dated 17 March 2015 and avers that the invoice is proof that AddSuite and applicant had agreed to a fixed rate of USD 2 per cpm and USD 1 per cpm, respectively for advertising via Google AdX. This allegation is however expressly denied by the respondents. On the evidence before me the respondents disputed the contents thereof and in its answering affidavit state:

> '*As I have set out above, the amounts reflected on this invoice were not what was agreed between AddSuite and DigiKulture. In this regard I point out that they were inconsistent with the amount of USD 32 265-75 that DigiKulture invoiced on 15 February 2015 and which AddSuite paid to DigiKulture – which was in terms of the agreement.*'

[59] Applicant has also averred that the fact that; according to Google's terms and conditions, companies that have AdX accounts (such as AddSuite) must have a contractual relationship with publishers such as the applicant and that this proves that the parties contracted directly, and on the terms alleged by it. I do not agree with the applicant that the fact that the Google's terms and conditions may require parties such as AddSuite and the applicant to deal directly with one another is evidence that the agreement as alleged by the applicant, was in fact concluded. The overwhelming

objective evidence supports a finding that AddSuite dealt only with DigiKulture including receiving invoices from DigiKulture and making payment to DigiKulture. On the whole I am satisfied that the respondent's version is not far-fetched or untenable or implausible and that the existence of the alleged agreement between applicant and respondents must accordingly be determined on the version of the respondents which must prevail.

The liability of the second respondent

[60] Applicant avers that second respondent is liable jointly and severally with the first respondent for the liability incurred by the first respondent on the grounds set out in section 77(3) of the Companies Act No 71 of 2008.

[61] According to Henochsberg on the Companies Act Vol 1 [Issue10] p302, a director is liable to the company for any loss or costs arising as a direct or indirect consequence of the director:

- 'acting for and on behalf of the company, signed anything on behalf of the company or purported to bind the company or authorise the taking of any action by/or on behalf of the company despite knowing that he/she lacked authority;
- acquiesced to carrying on the business of the company while knowing that is prohibited under s22;
- being party to an act or omission by the company despite knowing that it was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;

- having signed, or consented to the publication of a financial statement that was false or misleading in a material aspect or of prospectus, or a written statement contemplated in s101, that contained an '*untrue statement*' as defied in s95 knowing that, or with reckless disregard as to whether the statement was false, misleading or untrue, as the case may be …'

Section 22 of the Act prohibits "*reckless trading*". Section 22(1) in particular prohibits a company from carrying on business recklessly with gross negligence, with the intent to defraud any person or for any fraudulent purpose.

[62] It is however clear from the authorities that liability in terms of s77 is to the company and not to third parties. See **Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd & Others** (2014) 3 All SA 454 (GJ) para 41. Third parties could, however in terms of s218(2) have a claim against the directors for each breach of their fiduciary and other duties to the company, although these duties are owed to the company and not to them. See **Grancy Property Limited & Another v Gihwala & Others**: In re: Grancy Property Limited & Another & Others (1961/10; 12193/11) [2014] ZAWCHC 97 (26 June 2014) para 103).

[63] On the evidence before me, the second respondent advised ORR Stern of the applicant on 17 March 2015 that AddSuite had never had any direct dealings with the applicant, that AddSuite had no contractual relations with applicant and that there was no basis for applicant's claim against AddSuite. On 13 April 2015 the second respondent received an email from applicants attorneys of record in which applicant

demanded the sum of USD 477 170-07 to be paid in 72 hours. Second respondent replied to this letter by recording his surprise at receiving the letter and explained that first respondent had no contractual relationship with applicant and queried how the amount was calculated. This was followed by a further letter by applicant's attorney of record in which they repeated their earlier demand and claimed that a contractual relationship existed between first respondent and applicant on the basis that an invoice of USD 32 265-75 was paid by first respondent. First respondent's attorney of record responded to this letter and again denied that first respondent had any contractual relationship with applicant and denied that first respondent is indebted to applicant and specifically stated that the amount of USD 32 265-75 was paid to DigiKulture in settlement of an invoice received by DigiKulture. Considering the facts of the matter and the defences raised by the respondents, second respondent's denials can hardly amount to reckless conduct and/or conduct which was committed with intent to defraud.

[64] On consideration of the papers before me, I am satisfied that the applicant has presented no evidence whatsoever upon which the second respondent can be held liable for '*any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having acquiesced in carrying on the company's business despite knowing that it was being conducted in a manner prohibited by s22(1) …*' I can further find no evidence that the second respondents conduct as managing director and/or chief executive officer of the first respondent was either reckless and/or with intent to defraud. Considering that the applicant has conceded that it cannot obtain relief against the first respondent and considering that applicant wishes to hold second

respondent liable in the main application based on his conduct as managing director of the first respondent, it must follow that applicant can never have any prospect of success either on the facts or in law against the second respondent.

[65] In short second respondent cannot be held liable *vis-a vis* the first respondent. I point out that applicant has also not made an application to file supplementary affidavits in respect of the second respondent *vis-a vis* AddSuite.

The application to join AddSuite (Pty) Ltd

[66] On 7 September 2015, ten days before the hearing of the main application, the applicant gave notice of its intention to join AddSuite (Pty) Ltd as a third respondent in the main application. According to Jeremy Ivo Simon, ("Simon") applicant's attorney of record, who deposed to the affidavit in support of the application, applicant was under the impression that AddSuite was a division of the first respondent and not a separate company when the applicant launched its application in May 2015.

[67] According to Simon, applicant had no reason to believe that it had not cited the correct legal entity at the time of preparing the founding affidavit. In this regard Simon relies on the response received from first respondents attorneys in which they state that first respondent had concluded a supply agreement with DigiKulture and that payment of the amount of $32 265-75 was paid by first respondent to DigiKulture in settlement of an invoice for this amount that was owing in terms of the supply agreement.

[68] Simon avers that it was only when respondent provided his answering affidavit, did it furnish proof that AddSuite is a separate legal entity in the Ole Media Group of companies.

[69] In his view AddSuite has contravened the provisions of s32(4) of the Companies Act 71 of 2008 which requires that it must have its name and registration number mentioned in legible characters in all notices and other official publications of the company, including such notices and publications in electronic format as contemplated in the Electronic Communications and Transactions Act, No 25 of 2002. Accordingly he averred that AddSuite had contravened the Companies Act due to its failure to comply with ss 32(4) and 32(5).

[70] According to Simon, grounds of convenience, equity, the saving of costs and the avoidance of unnecessary additional litigation justifies the joinder of AddSuite as the third respondent.

[71] Mr Elliot submitted that AddSuite will not be prejudiced by the joinder. In his view AddSuite has had ample opportunity to ventilate its opposition to the application and in any event stated that it will pay monies into its attorney's account pending the outcome of the matter.

[72] As he did in argument in respect of the main application, Mr Elliot persisted in his submission that there is no genuine or *bona fide* dispute of fact in this matter and

that the version put forward by respondents including AddSuite, is untenable and can be rejected on the papers. Accordingly he was of the view that AddSuite had no basis to oppose the joinder.

[73] It is generally accepted that a plaintiff may join separate defendants in one action and that under common law a number of defendants may be joined; whenever convenience so requires, subject to the power of the courts to order separation of actions. It is accepted law that where there is a reasonable prospect of an overlap of factual issues in different trials, convenience dictates that the risk of conflicting judgments on issues that are common to all actions should be avoided and that in such circumstances joinder is appropriate. See Lawsa (2ed vol. 3 part 1, para 61, **Dendy v University of Witswatersrand & Others** 2005 (5) SA 357 (W) [2005] 2 All SA 490 (at 387 A – B).

[74] In considering the merits of the joinder application, I agree that it is necessary to assess (both procedurally and on the merits) the main application. It is common cause from what I have already said in respect of the main application that the applicant seeks payment of a disputed debt based on an oral agreement, the existence of which is disputed.

[75] Although the answering affidavit filed in the main application already records aspects of the opposition AddSuite would advance (if joined), Orril-Legg states that the fact that it is already recorded that AddSuite is not a "*division of the Ole Media Group*

but a separate company and denies that it concluded the oral agreement as alleged by the applicant this is far from a full defence and was proffered as a show of good faith to demonstrate that Addsuite, although not a party to the proceedings, also denied liability to the applicant".

[76] I agree that should I come to the conclusion that AddSuite be joined as a respondent in the main application, that AddSuite should be allowed an opportunity to file what it has referred to as a substantive response to the main application as is requested by Orril-Legg in the answering affidavit to the applicant's application to join it. It is therefore necessary to consider the reasons advanced by the applicant as to why the joinder application should succeed. In doing so the starting point must be to look at the applicant's decision to litigate against Ole Media and not AddSuite when it launched the proceedings.

[77] On 17 February 2015 Fleenor of DigiKulture sent an email to applicant at Viraland@gmail.com. Attached to the email is an insertion order which bears the AddSuite (logo). No reference is made to Ole Media. DigiKulture is reflected as the client and the only reference to the applicant is that the campaign in question is the "*Viraland's*" campaign.

[78] According to the founding affidavit in the main application it is stated that limited consultations were held between applicant and its legal team in Cape Town on 13 April 2015. On the same day applicant performed a windeed search on the Ole Media

Group. On studying the windeed search document which is attached to the founding papers as TC2, it is clear that applicant focussed on the corporate detail of Ole Media and not AddSuite. All the indications are that, had they sought out the corporate detail of AddSuite, whose name appears boldly on the top of the insertion order, then applicant would easily have established that AddSuite was a separate company and not a division of Ole Media. Considering that it intended to launch proceedings in court it is hard to imagine how it failed and neglected to have ascertained this important aspect at the outset.

[79] For reasons of its own the applicant and its attorneys, in preparing its case, hastily jumped to the conclusion that AddSuite was a division of Ole Media Group. Applicant was clearly aware of the website presence of the Ole Media Group as it refers to it in its founding affidavit as www.olemediagroup.com. As appears from the screenshots of the home page the Ole Media Group website, (as is attached to the respondents answering affidavit to the joinder application), and if the screenshots are cross referenced to the organogram, then the following is clear:

1. Annexure “TL1-1” is a screenshot of the ‘above the fold’ section of the home page of this website.
2. Annexure “TL1-2” is the first ‘below the fold’ section of the website and makes it clear that AddSuite is a digital advertising services company. The four entities listed correspond to those four on the organogram.

3. Annexures “TL1-3” and “TL 1-4” pertain to Mobi Media and TeamTalk media respectively. These companies fall into the corporate structure which is clear from the organogram.
4. In annexure “TL1-5” which is the next section, AddSuite is described as “*a digital advertising services company*”. This description is in line with the organogram referred to hereinbefore.

[80] Considering the nature of the business that the applicant is involved in, it seems to me that minimal effort on its part would have yielded the information that AddSuite was a company separate from Ole Media Group. Further objective facts which point to the fact that applicants dealings were not with Ole Media are that:

1. There is no original documentation which applicant has annexed to its papers which suggest that it contracted with Ole Media Group;
2. The documentation relied on by applicant came into its possession via emails and indicates that AddSuite (as a separate company) and not Ole Media Group, was dealing with DigiKulture. Examples of this as appears from the papers are the following:

    - The email forwarded to Fleenor on 21 January 2015 at 08h41 am came from AddSuite;
    - Alessandro Valecic who sent the email has an email address which suggests his involvement with AddSuite and not Ole Media Group;

- In the digital signature at the bottom of the email it is mentioned that AddSuite is also Ole Media Group Company.

[81] Having regard to what I have referred to hereinbefore, there is no basis for the suggestion or allegation that applicant was or could have been misled into believing that Ole Media Group had paid DigiKulture the sum of USD 32 265-70. I say this as it is clear that Orril-Legg had drawn the corporate distinction between AddSuite and Ole Media at an early stage. What rather appears to be the case is that applicant had in its undue haste and for reasons of its own, made a decision to sue Ole Media Group before receipt of the letter of 19 May 2015.

[82] A further important factor to consider in the joinder application is that the applicant knew that the main application was set down for hearing on 17 September 2015. On 3 August 2015 the answering affidavit of the first and second respondents had been delivered on which date applicant again recorded that AddSuite is a company separate and distinct from Ole Media Group and that it had no contractual nexus with the applicant. Notwithstanding this the applicant took no steps whatsoever to rectify the non-joinder of AddSuite to the proceedings. Some 35 calendar days later and on 7 September 2015, the joinder application was served upon attorneys Cliffe Decker Hofmeyer but was never formally served upon AddSuite.

[83] Applicant has given no reasonable explanation for its delay in bringing the application for the joinder of AddSuite, in an application where it seeks final relief, and in

circumstances where AddSuite has not formally been served with papers and/or been given an opportunity to file papers.

[84] There is merit in the objections by AddSuite to its joinder, and particularly in relation to the manner that applicant has gone about doing so. As I have mentioned when dealing with the main application, the respondent's raise genuine and material disputes of fact which were foreseen or was at the very least foreseeable. It further appears that AddSuite has information concerning the applicant's business practices that are relevant to the merits of the main application and which it avers would only worsen the conflicts of fact which already exist on the record.

[85] It is therefore not unreasonable to conclude that if AddSuite were to be joined to the motion proceedings and file further affidavits, the existing disputes of fact, which are in my view already incapable of resolution on the papers, would only deepen.

[86] Of course there is nothing that prevents a litigant from claiming payment of a monetary debt by way of motion proceedings. It is however accepted that motion proceedings are not an appropriate mechanism to claim monetary relief in circumstances where the party instituting the proceedings is aware that there is a dispute of fact and/or that such dispute of fact was at the very least foreseeable, as is clearly demonstrated in this matter. In my view the applicant ought to have made certain of its facts at the outset and considering the issues in dispute, ought then to

have considered whether or not it was not better to proceed by way of action for the relief that it seeks.

[87] A further aspect that requires considerations is the impact of the joinder application on the first and second respondents. If AddSuite is joined, the matter will be delayed as AddSuite will require an opportunity to address the main application. No doubt this will have costs implications for first and second respondents as they will be forced to remain parties to the matter in circumstances where applicant has already accepted that it cannot obtain substantive relief against first respondent as it sued it in error and that it could not have concluded the oral agreement with first respondent.

[88] Considering what I have said hereinbefore about the disputes of fact which already exists and the fact that they are incapable of being resolved on the papers, I am not persuaded that the applicant has made out a case that AddSuite should be joined to the proceedings.

Conclusion

[89] In the result the applicants claim on the main application as well as the joinder application must fail. Although respondents have asked that I make a cost award against the applicant on the attorney client scale as it brought the present application urgently and on motion in the face of a clear dispute of fact, I am however not persuaded that this is a case where a cost award on the attorney client scale is justified.

[100] In the premises I make the following order:

The application by the applicant directing first and second respondents to pay applicant the sum of $477 170-07 and the application to join AddSuite (Pty) Ltd to these proceedings, is dismissed with costs including the costs of two counsel.

_____

RILEY, AJ