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

Appeal Case Number: A151/2022

In the matter between:

MICHEL REPAS Appellant

and

ADELE REPAS (nèe Nigrini) Respondent
(RSA ID No: 7[...])

Coram: Binns-Ward J, Samela J et Francis J
Date of hearing: 18 January 2023
Date of Judgment: 13 February 2023

JUDGMENT

FRANCIS, J

INTRODUCTION

[1] This is an appeal against the whole of the judgment and order handed down by Hockey AJ in respect of an application in which the appellant sought an order for the dissolution and winding up of a partnership which he alleges exists between him

and the respondent. The alleged partnership, known as Kwetu Guest Farm, is conducted on an immovable property in Swellendam ("the farm") which is registered in the respondent's name, and comprises game farming and guest lodges.

[2] Hockey AJ concluded that there was a material dispute of fact which could not be resolved on the papers and that the applicant, who bore the onus, had failed to prove his case. The application was dismissed. Hockey AJ refused to refer the matter to oral evidence because, in his view, the dispute of fact was foreseeable prior to the institution of the application proceedings.

[3] Hockey AJ was also requested to make a ruling on the award of costs in respect of an application to found and confirm jurisdiction and applications for security for costs ("the incidental applications"). In this regard, the learned judge made no order as to costs in respect of these applications. Although the appeal was lodged in respect of the whole judgment and order, including the orders relating to the incidental applications, this issue was not addressed in either of the parties' heads of argument or their oral submissions. A cryptic reference is made to this aspect in the appellant's notice of appeal in the following terms:

"*12. The Court a quo erred in finding that no order as to costs should be made in the applications dealt with in paragraphs 30 and 31 of the Judgment for the reasons set out above.*"

However, no reasons are provided in the notice of appeal substantiating why the court a quo was said to have erred in making the orders that it did. In the absence of any grounds for interfering with this finding, I do not see any reason why this Court should interfere with this aspect of the judgment and order of the court below.

[4] Hockey AJ refused leave to appeal and this appeal is with leave of the Supreme Court of Appeal.

[5] The issues on appeal are twofold:

[5.1] is there a *bona fide* dispute on the papers on the existence of the partnership; and

[5.2] did the court *a quo* exercise its discretion judicially when refusing the appellant's request to refer the issues in dispute for oral evidence.

[6] The undisputed facts relevant to this appeal, as they appear from the affidavits filed, are briefly as follows. The appellant is an American citizen who resides and works in Dubai in the United Arab Emirates. The respondent is a South African citizen. The parties married on 3 February 2001 in South Africa in terms of an ante nuptial contract incorporating the accrual system. Shortly after their marriage, the respondent joined the appellant and took up residence in Dubai.

[7] While on a visit to South Africa during 2016, the couple viewed the farm which they both considered as a business opportunity to be developed as a game farm with guest lodges. The farm was duly purchased and registered in the respondent's name. The purchase price was paid from monies advanced by the appellant who also paid the estate agent's commission and transfer duty. After the farm was purchased, the appellant arranged for and bought game, erected game fences, and made further improvements to the farm. The appellant was initially the sole financier of the farm. The respondent conducted the day-to-day business of the farm and the appellant visited the farm when his work schedule allowed it. Sometime after the business commenced, the respondent's parents moved onto the farm where they took up residence and helped out on the farm for which they received a monthly remuneration.

[8] The appellant's case is that a partnership agreement was concluded orally between him and the respondent in Swellendam during their visit to South Africa in 2016. The appellant averred that the parties had agreed that the farm would be registered in the name of the respondent but would be the property of the partnership, that the respondent would assist in and oversee the development and management of the partnership business in consultation with the appellant as agreed between them from time to time, and that the business of the partnership would be conducted for the mutual benefit of both parties with the object of making a profit that they would share equally.

[9] The respondent denies the existence of the partnership. She testified that there was no tacit, implied, oral, or written partnership agreement that was ever concluded between the parties in relation to the farm, any improvements on the farm, the game on the farm, or the business that is being conducted on the farm. The respondent's version is that the parties were happily married when the farm was purchased. Since the appellant owned two properties in Dubai which were registered in his name, it made sense to purchase the farm in the respondent's name. It was also easier to purchase the farm in her name as she was a South African citizen and there were certain tax advantages if the farm was bought in her name. The respondent argued in her affidavit that as the parties were married subject to the accrual system, it would have been nonsensical to enter into such a partnership agreement. Any liabilities that the parties may have incurred in respect of the farm, or any benefit that the parties may receive from the farm, would have formed part of the calculation of the accrual on the date of divorce. Whilst admitting that the appellant had paid for the farm as well as for the improvements on the farm, the respondent denied that this "investment" was a loan. She also argued that her contention that a partnership did not exist was supported by the fact that the farm was registered in the respondent's name only and the appellant had provided no good reason why, if there was a partnership, the farm was not registered in his name as well.

[10] The appellant argued that the respondent's denial that a partnership was ever concluded amounts to a bare denial which should be rejected out of hand. In rebuttal, the respondent submitted that the appellant's founding affidavit consisted of allegations that were very sparse on detail and particulars relating to the alleged oral agreement. As a consequence, the respondent could not answer to the alleged partnership in any other way but to deny it.

[11] The parties' contesting versions reveal a material dispute of fact on the papers on whether a partnership exists and the terms of any such partnership. The general rule is that final relief in motion proceedings may only be granted if those facts as stated by the respondent, together with those facts stated by the appellant that are admitted by the respondent, justify the granting of the application, unless it

can be said that the denial by the respondent of the facts alleged by the appellant is not such as to raise a real, genuine or *bona fide* dispute of fact.[1]

[12] In assessing whether a dispute of fact on the papers has been raised genuinely, the court does not go into the merits of a respondent's defence. It merely considers whether the respondent's averments, if they were to be established in a trial, would make out a defence to the applicant's claim. It also assesses whether the respondent's averments making out a prima facie defence are made bona fide. The respondent's bona fides are usually assessed with regard to the verisimilitude of the respondent's case on paper, something ordinarily demonstrated by the deponent seriously and unambiguously engaging with the issues sought to be placed in dispute.[2]

[13] In my view, the respondent did raise a bona fide defence on the papers. She has provided an explanation why the farm is registered solely in her name and why she considered it to be her property. Her evidence that the issue of a partnership was never discussed, as at the time the farm was purchased she and the appellant were happily married is a version that could not be dismissed out of hand. Thus, even if one discounts the legal defence relating to the marital regime regulating the parties' marriage, it cannot be said that the respondent's denial amounts to a bare denial that should be rejected on the papers. The respondent has seriously and unambiguously addressed the allegation relating to the existence of the partnership.

[14] I agree with counsel for the respondent that there was no other way open to the respondent but to deny that the partnership was ever formed. The founding affidavit lacked the sort of content and detail that would have required a different and more particularised response from the respondent.

[15] The question that arises is what ought to have been done in circumstances where the court a quo correctly concluded that there was a material dispute of fact

[1] ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1964 (3) SA 623 (A)** at 634 E-I and 635 A-C.
[2] **cf *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*** **2008 (3) SA 371 (SCA)** at para 13.

which could not be resolved on the papers. The situation was regulated by Uniform Rule 6(5)(g).

[16] Rule 6(5)(g) states as follows:

"*Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the a foregoing, it may direct that oral evidence he heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.*"

[17] The import of rule 6(5)(g) is that where there is a material and *bona fide* dispute of fact that cannot be decided on the papers, a court is faced with three alternatives: it may dismiss the application, or direct that oral evidence be heard on specified issues, or refer the matter to trial. A court is not restricted to the listed remedies and may make any order it deems fit and which is directed at ensuring a just and expeditious decision. The response of the court a quo was to dismiss the application instead of referring it to oral evidence.

[18] The question that arises is what is the nature of the discretionary power exercised by a court when making a determination under rule 6(5)(g) and to what extent, if any, may a court validly interfere with the exercise of such a discretion on appeal. Counsel for both parties provided a post-hearing note on this issue, for which the Court is thankful.

[19] In ***Trencon Construction***[3], Khampepe J, writing for a unanimous Constitutional Court, noted that two types of discretion have emerged in our case law in determining the standard of interference that an appellate court is justified in

[3] ***Trencon Construction v Industrial Development Corporation*** **2015 (5) SA 245 (CC)** at para [83].

applying when considering the exercise of a discretion by a court of first instance. The two types of discretion are often referred to as "*a discretion in the strict/narrow/true sense and a discretion in the broad/wide/loose sense*"[4].

[20] The distinction between a true discretion and a loose discretion is not merely one of semantics for the type of discretion will dictate the standard of interference that an appellant court must apply. It is thus critical for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in a true sense or whether it was a discretion in a loose sense[5].

[21] In ***Media and Allied Workers Association of South Africa***[6], EM Grosskopf JA explained that a "*truly discretionary power is characterised by the fact that a number of courses are available to the repository of power".* Thus, where the discretion contemplates that the court may choose from a range of options, it is a discretion in the strict or true sense[7]. This type of discretion is said to be "true" in that the lower court has an election of which option it will apply and any option chosen can never be said to be wrong as each is entirely permissible[8]. If the court of first instance followed any one of the available courses, it would be acting within its powers and the exercise of this type of discretionary power could not be set aside merely because an appellate court would have preferred the court below to have followed a different course amongst those available to it[9]. The rationale for the appellate court's restraint when faced with the exercise of a true discretion by a court of first instance is that the "*principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making*" ***[10]***.

[22] An appellate court may nonetheless interfere with the exercise of a discretion in a true sense if it finds that the court of first instance did not act judicially. The

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[4] Id at footnote [85].
[5] Id at para [83].
[6] ***Media Workers Association of South Africa and Others v Press Corporation of SA Ltd* 1992 (4) SA 791 (A)** at 800 D-E.
[7] See, ***Giddey NO v JC Barnard & Partners* 2007 (5) SA 525 (CC)** at para [19].
[8] ***Trencon*** above n 3 at para [85].
[9] ***Media Workers Association of South Africa and Others*** above n 6 at 800E.
[10] Comment of Moseneke DCJ in ***Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC)** at para 113.

courts have over time identified various grounds for interfering with the exercise of this type of discretion. These would include instances where the first instance court exercised its discretionary power capriciously, or exercised its discretion upon a wrong principle or on an incorrect interpretation of the facts, or has not brought its unbiased judgment to bear on the question, or it has not acted for substantial reasons[11], or reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles[12], or the choice of option by the court below does not lead to a just and expeditious decision[13].

[23] In contrast, a court exercising a discretion in a loose sense does not necessarily have a choice between equally permissible options. In ***Knox D'Arcy***[14], EM Grosskopf JA described the exercise of a discretion in the loose sense to mean "*no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision*"[15].

[24] Where a discretion in a loose sense applies, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion if it considers that the order of the first instance court was wrong. However, even where a loose discretion is involved an appeal court will still be cautious about interfering in recognition that the impugned decision was made in the exercise of the first instance court's discretion even if only in the broad sense of the concept.

[25] Rule 6(5)(g) contemplates the exercise of a discretion in the true sense in that the judicial decision-making process involves a choice between a number of equally permissible options. This was certainly the view expressed by the Constitutional Court in ***Mamadi***[16] where the court dealt *inter alia* with the exercise of the discretion of a court under rule 6(5)(g). Theron J, for a unanimous court, held that the

[11] ***Ferris v First Rand Bank* 2014 (3) SA 39 (CC)** at para 28.
[12] ***National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC)** at para [11].
[13] ***Lombaard v Droprop* 2010 (5) SA 1 (SCA) at** para [29].
[14] ***Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A)**.
[15] Id at 361 I.
[16] ***Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26**.

Constitutional Court was entitled to interfere with the discretion of the High Court under rule 6(5)(g) because it (the High Court) had been "moved by a mistake of law"[17]. In reaching its decision, the court cited with approval the judgment of the Constitutional Court in ***Ferris***[18] where Moseneke ACJ categorised the exercise of the discretionary power of the lower court to refuse a default judgment as the exercise of a discretion in the true sense[19].

[26] Counsel for the appellant submitted that the discretion exercised by a court below in terms of rule 6(5)(g) is not a true discretion but a discretion in the loose sense. For this submission, he relied on ***Lombaard***[20] where it was held by the majority that in resolving to refer a matter to evidence in terms of rule 6(5)(g), a court has "a wide discretion". Similarly, in ***Ploughman NO***[21] and ***Red Coral Investments 117 (Pty)***[22], the court expressed the view that rule 6(5)(g) vests a court with "wide discretion" in applications in which disputes of fact arise that cannot be resolved on the papers. One may add, too, that in ***Mamadi***[23], Theron J also stated that rule 6(5)(g) vests a court with a "wide discretion" in applications in which disputes of fact arise on the papers. In my view, the use of the term "wide" in the context of those cases means no more than that a court has wide decision-making powers in relation to the range of options available to it.

[27] The fact that a court may have a wide range of equally permissible options to choose from does not detract from the essence of a true discretion. In ***Trencon Construction***, Khampepe J commented on the meaning of "wide" in the context of the exercise of a true discretion. Dealing with the wide decision-making powers in relation to the options available to a court when it exercises a discretion in terms of section 8(1) of the Promotion of Administrative Justice Act 3 of 2000, Khampepe J explained[24]:

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[17] Id at para [46].
[18] Id at para [28].
[19] ***Ferris*** above n 11 at para [28].
[20] ***Lombaard*** above n 13 at para [25].
[21] ***Ploughman NO v Pauw and Another*** **2006 (6) SA 334 (CPD)** at 340 H-I.
[22] ***Red Coral Investments 117 (Pty) Ltd v Bayas Logistics (Pty) Ltd*** **(D6595/2018) [2020] ZAKZDHC 56 (5 November 2020)** at para [22].
[23] ***Mamadi*** above n 16 at para [3] citing with approval ***Lombaard*** above n 13 at para [25].
[24] ***Trencon*** above n 3 at para [90].

"[90] It is perspicuous that there are wide range of options available to a court exercising its discretion under s 8(1), as it lists a number of just and equitable remedies that a court may grant. Significantly, it does not seek to confine a court to the listed remedies. It provides that a court may award any order that is just and equitable, including, but not limited to the listed remedies. It follows that any of these remedies is equally permissible and an appellate court could legitimately favour a different remedy than that preferred by a lower court. But that alone does not permit it to interfere with the lower court's discretion".

[28] I now return to the reasons proffered by the court below for not referring this matter to oral evidence. As noted, Hockey AJ refused to exercise his discretion to refer the matter to oral evidence on the basis that the appellant should have foreseen that a material dispute of fact would arise that could not be resolved on the papers. Accordingly, proceeding by way of application was not the appropriate way to resolve this dispute. The learned judge dealt with this issue in the judgment as follows:

"*24. The present proceedings were instituted on 7 July 2020. This was after an application was launched for leave to serve the main application by edictal citation. Before these dates, the applicant's attorneys addressed a letter to the respondent dated 9 June 2020 wherein it is alleged that the parties "are equal partners in a partnership known as Kwetu Guest Farm…'. In the letter, it is further stated that the applicant 'was denied access to the books, records and accounts of the partnership and even denied access to the books, records and accounts of the partnership and even denied access to the Farm itself.*

25. The respondent appointed attorneys to respond to this letter, and on 11 June 2020 her attorneys advised that they in the process of taking instructions. They further stated that in the interim, i.e. before they furnish a further response, they are instructed to inform that the applicant's request to have access via a representative to the farm and for him and/or his representative and to utilise available accommodation in one or two cottages were not consented to. It was specifically stated that the respondent 'does not consent to (the applicant), or any of his

representatives accessing our client's property at any given time'. (underlining in the judgment).

26. From the above, it is clear that the respondent considered the property as her own, and by implication, rebuffed the existence of a partnership. Mr Olivier SC, who appeared for the applicant, argues that the respondent for the first time denied that a partnership exists in the letter by her attorneys dated 27 July 2020, after the application launched. But it is clear that the respondent's action before that application was launched was indicative that she denied any form of co-ownership or partnership in respect of the farm or the business conducted thereon."

[29] What is instructive from the passages of the judgment quoted above is that prior to the launch of the main application, the appellant expressly raised the issue of the existence of the partnership. The respondent, however, did not specifically deny the existence of the partnership and merely focused on the fact that the farm was hers and that she did not consent to the appellant or any of his representatives accessing the property at any given time. As counsel for the appellant pointed out, nowhere in the correspondence prior to the launch of the application does the respondent unambiguously deny the existence of a partnership between her and the appellant.

[30] Of course, it may be argued that given the fractious nature of the relationship between the parties before the application was launched, a dispute of some sort would arise. But more is required than the possibility of a dispute arising. What is required is that an applicant should realise prior to the launch of the application that a serious dispute of fact was bound to develop[25]. Given the facts available to the appellant at the time the application was launched, the respondent's rather equivocal response to the appellant's letter of 9 June 2020, and the respondent's failure to address the issue of the existence of a partnership at all, it is quite conceivable that the appellant would not have anticipated that a serious dispute of fact would arise on the existence of the partnership.

[25] ***Adbro Investment Co. Ltd v Minister of the Interior*** **1956 (3) 345 (AD)** at 350 A.

[31] In concluding that the appellant should have foreseen the dispute of fact arising in relation to the partnership, I am of the view that Hockey AJ misdirected himself on the facts he considered and the inferences he sought to draw from those facts; the exercise of the discretion was based on an incorrect appreciation of the facts. It follows that the court below did not exercise its discretion judicially. This court is, therefore, entitled to interfere in the order made by the court a quo.

[32] Counsel for the respondent also argued that the appellant ought to have applied for a referral to oral evidence as soon as a dispute was evident on the papers and before full argument was heard by the court below in respect of the application. It is indeed so that an application for a referral to oral evidence or trial, where warranted, should be applied for by a litigant as soon as the affidavits have been exchanged and not after argument on the merits[26]. Whilst this is a salutary rule, it is by no means an inflexible one[27]. In any event, in the matter at hand, the appellant raised the issue of a possible material dispute of fact in reply to the respondent's answering affidavit. This was the earliest opportunity to do so because it was only in her answering affidavit that the respondent for the first time really nailed her colours to the mast.

[33] In application proceedings, where a dispute of fact has emerged and is genuine and far-reaching and the probabilities are sufficiently evenly balanced, referral to oral evidence or trial, as the case may be, will generally be appropriate[28]. In my view, referring the matter to oral evidence would ensure a just and expeditious decision. The issues to be determined are simple and discrete and I can see no point in putting the parties through the unnecessary delay and costs of an action commenced afresh, especially as the delay in resolving this matter is not inconsiderable. After hearing oral evidence, the court will then be in a better position to determine whether or not a partnership agreement exists and the exact terms of any such agreement.

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[26] ***Lombaard*** above n 3 at [53].
[27] ***Kalil v Decotex (Pty) Ltd and Another*** **1998 (1) SA 943 (A)** at 981 D-F.
[28] ***Mamadi*** above n 16 at para [44].

[34] For those reasons, I have come to the conclusion that the appeal should be allowed and the order of the court a quo set aside in order to permit the matter to be referred for the hearing of oral evidence under rule 6(5)(g) of the Uniform Rules of Court. Counsel for the parties submitted a draft order purely for the sake of assisting this court and without any concessions by the respondent being implied thereby. I am in agreement with the order, subject to a few minor amendments.

[35] The appellant's counsel did not ask for the costs of the appeal at this stage. He indicated that the appellant would be content with an order that the costs of the appeal be costs in the cause in the application.

ORDER

[36] In the result, I would propose that the following order be made:

36.1 The appeal is allowed.

36.2 The order of the court below is set aside and replaced with an order in the following terms:

"1. The application is referred for the hearing of oral evidence on a date to be determined by the Registrar, on the issues whether a partnership agreement was entered into between the applicant and respondent in respect of the Kwetu Game Farm and Cottage and the business conducted thereon and, if so, what the terms of the agreement were.

2. The evidence shall be that of any witnesses whom the parties or either of them may elect to call, subject, however, to what is provided in paragraph 3 hereof.

3. Save in the case of applicant and respondent, whose evidence is set out in their respective affidavits filed of record, neither party shall be entitled to call any witness unless:

3.1 he or she has served on the other party, at least 15 days before the date appointed for the hearing (in the case of a witness to be called by the applicant) and at least 10 days before such date (in the case of a witness to be called by Respondent), a statement wherein the evidence to be given in chief by such witness is set out; or

3.2. the court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his/her evidence.

4. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

5. The fact that a party has served a statement in terms of paragraph 3 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

6. The provisions of rules 35, 36, 37 and 37A of the Uniform Rules of Court shall apply to the hearing of oral evidence.

36.3 The costs of the appeal shall be costs in the cause in the application.

M. FRANCIS
Judge of the High Court

BINNS-WARD J:

[37] I agree, for the reasons that he has given, that an order should issue in the terms proposed by my Brother, Francis J.

[38] For the following briefly expressed reasons, I would, however, prefer to refrain from making any conclusive determination one way or the other as to whether the discretion exercised by the court under rule 6(5)(g) is a 'loose' or 'true' one. Enquiries into the question are bedevilled by inconsistent nomenclature in the

jurisprudence; so, for example, whereas what EM Grosskopf JA in *Media Workers Association* supra, at 800D called discretion in the 'wide' sense plainly denoted a discretion in the 'loose' sense, the indications are that when Theron J in *Mamadi* supra, at para 46, spoke of 'a wide discretion' the learned judge had in mind a 'true' discretion. Reliance on cases like *Mamadi* and *Lombaard* for guidance on the proper characterisation of the discretion involved in making a decision under the sub rule is complicated by the fact that the interference by the appellate courts in those matters would, rather as in the current matter, have been warranted irrespective of whether they characterised the discretion that was engaged as 'loose' or 'true'. The first instance court in *Mamadi* had proceeded on a mistaken apprehension of the law, and, in *Lombaard*, according to the majority, on the basis of an erroneous finding that there was a genuine dispute of fact on the papers.

[39] It is not altogether clear to me that a court faced with deciding an appropriate order in terms of rule 6(5)(g) has a choice of the relatively unfettered nature that characterises well recognised truly discretionary decisions such as in matters of sentencing, general damages and costs etc. A court has to have regard to a number of disparate and incommensurable features in coming to an appropriate decision in terms of rule 6(5)(g): (i) the foreseeability of the dispute, (ii) the degree of blameworthiness, if any, in the circumstances of the given case of the applicant having proceeded in the face of a foreseeable dispute, (iii) the nature and ambit of the dispute in question, (iv) its amenability to convenient determination by a reference to oral evidence on defined issues, as distinct from in action proceedings to be commenced *de novo*, (v) the probabilities as they appear on the papers (if those are against the applicant, the court will be less inclined to send the dispute for oral evidence) (vi) the interests of justice, and (vii) the effect of any other feature that might be relevant in the circumstances of the given case.

[40] In *Mamadi,* the Constitutional Court, referring to the power of dismissal in rule 6(5)(g), said that it '*serves to punish litigants for the improper use of motion proceedings*'.[29] I would have difficulty accepting the notion that a decision whether conduct is worthy of punishment or not could be any more the subject of a 'true'

[29] *Mamadi*, supra at para 42.

discretion than a decision whether or not to grant an interim interdict. And as we know from *Knox D'Arcy* supra, the discretion engaged in making the latter type of decision is a 'loose' (or 'wide') one, not a 'strict' or 'true' one.

[41] It seems to me, on the face of matters, that the decision that a court has to make under rule 6(5)(g) involves what EM Grosskkopf JA referred to in *Media Workers Association* as *'a determination ... [to be] made by the court in the light of all relevant considerations'.*[30] The appropriate decision has to be informed by those considerations. Despite the sub rule affording a choice of courses to follow, the court's decision on which to adopt has to be informed by those considerations. Hence, if the dispute of fact were not reasonably foreseeable and the issue in dispute could be conveniently determined on a reference to

[42] oral evidence, dismissing the application on the papers instead of referring the dispute for the hearing of oral evidence would, in my view, not be an available choice.

[43] I am doubtful whether the characterisation issue was a necessary part of the Courts' decisions in *Mamadi* and *Lombaard*. It was not an issue that was investigated in any depth in either of those appeals. In the face of the misdirection's by the court a quo identified in the principal judgment, it is certainly not an essential issue in the current appeal.

A.G. BINNS-WARD
Judge of the High Court
I agree.
M.I. SAMELA
Judge of the High Court

In the High Court of South Africa
(Western Cape Division, Cape Town)

[30] At 800F.

[REPORTABLE]

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MICHEL REPAS Appellant

and

ADELE REPAS (nèe Nigrini) Respondent

Coram : BINNS-WARD J, SAMELA, J et FRANCIS J

Judgment by : FRANCIS J

For the Appellant : Adv L M Olivier SC

Instructed by : SP Beeselaar Attorneys Inc

For the Respondent : Adv R S van Riet SC & Adv H N De Wet

Instructed by : Werksmans Inc

Matter was heard on 18 January 2023.

The judgment was handed down on 13 February 2023.