

SOUTH AFRICA / JUDGMENT

Good Hope Plasterers CC t/a Good Hope Construction v E-Junction Property Developers (Pty) Ltd and Others (9671/2020) [2020] ZAWCHC 162 (19 November 2020)

[2020] ZAWCHC 162

COURT

Western Cape High Court, Cape Town

BEFORE

S Hockey

CASE / FILE NUMBER

9671/2020

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IN

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

CASE NO:

9671/2020

In

the matter between:

GOOD

HOPE PLASTERERS CC t/a GOOD HOPE
CONSTRUCTION

Applicant

and

E-JUNCTION

PROPERTY DEVELOPERS (PTY) LTD

1st

Respondent

MUTUAL

AND FEDERAL RISK FINANCING LIMITED

2nd

Respondent

ONE

INSURANCE UNDERWRITING MANAGERS (PTY) LTD

3rd

Respondent

Date

of hearing: 15 October 2020

Date

of Judgment: 19 November 2020 (delivered
by email to the parties' legal representatives)

JUDGMENT

HOCKEY AJ

INTRODUCTION

- [1] This matter was initially instituted on an urgent basis by the applicant wherein it sought an order prohibiting and restraining the second respondent from making payment to the first respondent under two guarantees which was issued in favour of the first respondent (i.e. “the main application”). The order sought was for the interdict to be granted pending the resolution of contractual disputes between the applicant and first respondent arising from a building contract.
- [2] The matter was initially set down for 12 August 2020, but on 8 August 2020, the applicant notified the first respondent that it intended to withdraw the application. A formal notice of withdrawal of the application was filed on 11 August 2020, wherein the applicant tendered the first respondent's costs.
- [3] The first respondent, however, believing that a dismissal instead of a withdrawal would entail a finding that the second respondent is liable to make payment under the guarantees, refused to consent to the withdrawal of the main application. This caused the applicant to bring an application for leave to withdraw the main application with the leave of the court.
- [4] When the matter appeared before Magona AJ on the urgent motion roll on 12 August 2020, she indicated that the matter was not urgent. The matter was accordingly postponed to the semi-urgent roll for hearing on 15 October 2020.
- [5] After the matter had been postponed, on 26 August 2020, the first respondent brought a counter-application, wherein it seeks,
- inter-alia, a declaratory order that the second respondent is liable to make payment to the first respondent in respect of the two guarantees.
- [6] The second respondent who is the guarantor who issued the guarantees which are the subject matter of the dispute and the third respondent who is the underwriter management agent of the guarantor, oppose the counter-application on the basis that it constitutes an irregular step. An application in this regard was delivered.
- [7] The issues to be decided before me are:

7.1 whether leave should be granted to the applicant to withdraw the main application, and if not, whether the main applications falls to be dismissed;

7.2 whether the first respondent's counter-application constitutes an irregular step; and

7.3 whether the matter should be referred to oral evidence.

BACKGROUND

- [8] The applicant is a building contractor who entered into an agreement with the first respondent, the employer in terms of the contract, for the construction of a residential apartment building in Elsies River, Cape Town. A standard building contract in the building industry, with the necessary alterations to make it fit for purpose, was utilised by the parties, namely the Joint Building Contracts Committee, Principle Building Agreement 6.1 March 2014 (commonly referred to as a "JBCC contract"). The JBCC contract is one of a number addenda to the actual contract between the parties. I shall refer to the agreement with all its addenda as "the building contract".
- [9] The total contract price was for R126 925 193.13 and was to be completed in four phases, the first phase on 19 June 2019 and the final one on 3 February 2020.
- [10] Problems arose between the parties to the building contract from the time that the contract commenced. A dispute which I shall briefly describe below relates to a guarantee for payment by the first respondent to the applicant in lieu of a builder's lien.
- [11] According to the applicant, it was contemplated that the first respondent would provide the applicant with either a guarantee for payment or a builder's lien. The payment guarantee would be based on three months' cash flow requirements of the applicant. The first respondent elected to provide the payment guarantee and was obliged to do so within 15 working days from the acceptance of the offer by the applicant.
- [12] According to the applicant, the first respondent's failure to provide a payment guarantee was a material breach of the contract from its inception and caused it to suffer prejudice. This had a serious knock-on effect in that:
- (a) several of the applicant's subcontractors demanded upfront payments which would not have been the case if the payment guarantee were in place; and
 - (b) the applicant was unable to obtain short term financing from its bank which would have supplemented cash flow for the project.
- [13] In response to the above, the first respondent, in its answering affidavit states that upfront deposits have nothing to do with payment guarantees. It alleges that the applicant received R17 million in advanced payments, a substantial part of which was for advanced payments to subcontractors. The first respondent also alleges that the applicant found itself in an unfavourable cash flow position because it used funds received from the first respondent for other projects. All of this are denied by the applicant.

- [14] The first respondent furthermore denies that the applicant was entitled to a payment guarantee and alleges that the parties accepted this. This is the reason why no amount was included in the contract data as required under the building contract. The building contract, it avers, expressly provides that the first respondent shall provide a payment guarantee where required in the contract data, and that on receipt of such guarantee, the applicant would waive its lien.
- [15] The applicant also avers that the contract provided that the first respondent would hand over possession of the building site by no later than 1 August 2018, but the site was only handed over on 17 September 2018. This, the applicant alleges, contributed to the delay in respect of the completion of the project in its various stages. The first respondent does not deny the late handing over of the site but avers that this did not cause the applicant to be late.
- [16] The project was yet to be completed when the matter was heard. The reasons for the delay are subject to a dispute between the applicant and the first respondent. The papers are replete with various disputes on the obligations of the parties flowing from the building contract.
- [17] It is not necessary for present purposes to detail all the disputes between the parties. It is however necessary to mention that matters came to the fore during December 2019 when the principle agent, appointed in terms of the building contract, who was responsible for the issuance of monthly payment certificates, issued a negative certificate by reversing previous payments (in respect of what is commonly referred to as preliminaries and generals in the building industry) and levying penalties against the applicant.
- [18] It bears mention that the contract provides for a penalty of R15 000.00 per day in the event that the applicant fails to bring the works or a section thereof to practical completion by the date for practical completion or such revised date.
- [19] What is important for the present issues under consideration, is that it is common cause that after the December/January builders'

holiday, the applicant and first respondent engaged in discussions to address the various issues in dispute. According to the applicant,

these discussions culminated in an agreement concluded in March 2020 ("the March agreement"). The first respondent denies that any such agreement was reached. Where I refer to the March agreement, which I will do for convenience, and without any acknowledgment that the agreement exist.

[20] According to the applicant, the terms of the March agreement were as follows:

20.1 the applicant would replace the previous variable performance guarantee, which by that time had been reduced to R5 077 007.72 and which was valid only until February 2020, with new fixed performance guarantee in the amount of R12 692 519.00 to expire in December 2020;

20.2 the applicant agreed to provide the first respondent with a replacement advanced payment guarantee in the amount of R10 million (the then existing advanced payment guarantee had been reduced to R4 million);

20.3 the first respondent would instruct the principle agent to remove the penalties which had been recorded at that stage, in the aggregate

amount of R4 155 000.00 (excluding VAT) and issue a positive certificate in favour of the applicant in respect of April

2020 for the same amount;

20.4 no further penalties would be levied by the principle agent until the end of the project, with the first respondent reserving the right to levy additional penalties at the end of the project in the event of the applicant failing to achieve the revised completion date; and

20.5 an additional amount of R6 million would be certified as payable to the applicant as a loan for cash flow purposes, which loan would be secured by the advance payment guarantee and recouped monthly over the remaining 5 months of the building contract.

The two guarantees which the applicant avers were to be issued in terms of the March agreement are referred to as “the replacement

guarentees”.

[21] Construction guarantees and advanced payment guarantees are typical forms of guarantees found in, or in combination with construction

contracts. A construction guarantee is issued to an employer (normally a developer) by a third party institution for quick access

of funds in the event that the contractor fails to discharge its duties to enable the former to complete the construction project. The purpose of an advanced payment guarantee is to secure repayment of advanced payments made to the contractor (which is normally done for cash flow purposes to secure resources for the project). Both forms of guarantees are on-demand guarantees which place an obligation on the issuer to make payment in terms of the guarantee to the beneficiary where the primary obligator fails to perform. Such payment must be made in demand irrespective of disputes between the parties in the underlying contract, save for instances of fraud and misrepresentation.

[22] The applicant alleges that the first respondent failed to comply with its obligations in terms of the March agreement, in that it failed to extinguish the penalties previously raised and to provide payment of the amount of R6 million. The first respondent, however, in its denial of the existence of the March agreement, alleges that the applicant delivered the advanced payment guarantee because it has fallen so far behind that the old advance payment guarantee expired in March 2020. Furthermore, that the performance guarantee was replaced from a variable guarantee with a fixed guarantee which suited the applicants cash

flow position as the former would require a portion to remain valid after practical completion of the project.

Should the applicant be allowed to withdraw?

[23] As already stated, on 11 August 2020, the day before the matter was set down for hearing on the urgent roll, and after having notified the first respondent of this intention, the applicant filed a formal notice of withdrawal of the matter with a tender for costs. Since the pleadings had closed, Rule 41(1)(a) of the Uniform Rules of Court (“the Rules”) is applicable. This Rule provides as follows:

“A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; ...”

[24] The wording of Rule 41(1)(a) is clear, with the effect that once a matter has been set down for hearing, it is not competent for a party who had instituted proceedings to withdraw such proceedings without the consent of the other parties or with the leave of the court. Without such consent or leave, a purported notice of withdrawal is “incompetent and invalid and must be set aside”, as held in *Protea Assurance Co. Ltd v Gamlase and Others* 1971 (1) SA 460 (E) at 465 G. (See also *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening)* 2003

(3) SA 547 (CPD) at 549 H).

[25] Due to the refusal by the first respondent to consent to the withdrawal of the main application, the applicant brought a formal

application for an order for leave to withdraw the matter, which application is opposed by the first respondent.

[26] It is trite that a court has a discretion whether to grant leave for a matter to be withdrawn under Rule 41(1). In *Pearson and Hutton NN.O. v Hitzeroth and Others* 1967 (3) 591 (ECD) the court held that (at 594H) ‘[t]he question of injustice to the respondents is naturally germane to the exercise of the Court's discretion under Rule 41(1)...’. In *Karoo Meat Exchange Ltd v Mtwazi* 1967 (3) SA 356 (CPD), the court had this to say:

“In the first place it seems to me important that the judicial officer should be in control of proceedings in his court. Once the case has been set down for hearing the court has an interest to see that justice is done both in regard to the merits of the dispute and in regard to costs. When the case has progressed to the stage of being set down for hearing, the parties can no longer do as they please. The court cannot be deprived of its control merely by reason of the fact that the plaintiff has served a notice of withdrawal. In the second place it seems to me wrong, in principle, that the plaintiff having initiated the proceedings and put his opponent to inconvenience, trouble and expense, should, subject only to the payment of costs, at his mere whim have the right to withdraw the action at any time before the hearing.”

[27] Mr Vivier who appeared for the applicant in these proceedings, argued that in exercising its discretion, a court must do so with great caution. I agree. In *Levy v Levy* [1991] ZASCA 81; 1991 (3) SA 614 (AD), it was held (at 620B):

“It is after all not ordinarily the function of the Court to force a person to institute or proceed with an action against his or her will or to investigate the reasons for abandoning or wishing to abandon one. An exception, though one difficult to visualise, would no doubt be where the withdrawal of an action amounts to an abuse of the Court’s process.”

The court then went on to quote from *Hudson v Hudson and Another* 1927 AD 259, where it was held per De Villiers JA:

“Where... the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the duty of the Court to prevent such abuse. But it is a power to be exercised with great caution, and only in a clear case.”

[28] In the present matter, the applicant instituted the proceedings in the main matter for an order restricting the second respondent from making payments under the replacement guarantees until such time that the disputes between the applicant and the first respondent arising out of the building contract, as well as the March agreement are resolved.

[29] The applicant alleges that it secured the issuance of the two guarantees by the second respondent in favour of the first respondent

in terms of its obligation under the March agreement, and that the second respondent issued the guarantees on the understanding that the project would be completed in terms of the building contract as well as the March agreement. The applicant further alleges that the first respondent never had any intention to implement the March agreement, but instead its goal was to (a) get rid of the applicant as the contractor and complete the project itself, and (b) obtain a new advanced payment guarantee to increase its existing security.

[30] The applicant further alleges that the first respondent fraudulently called up the guarantees and represented to the second respondent that the applicant had been paid in terms of the March agreement, which was not the case.

[31] The first respondent denies the above allegations, in particular that its conduct was fraudulent and that, in fact, it made advanced payments to the applicant in an amount more than R17 million.

[32] It bears mention that the second respondent, in issuing the guarantees, required strict compliance with the signed agreement between the applicant and the first respondent. In its letter dated 25 March 2020 to the applicant confirming that it was able to issue the guarantees, the second respondent stated, in paragraph 2 thereof, that the guarantees were issued subject to:

“2.1.1 All conditions and terms as per the signed JBCC Contract are strictly adhered to by all parties.

2.1.2 Provided there are no defaults on payment from your client.

2.1.3 Your client acts in a bona fide manner, in accordance with its contractual duties and obligations as per the signed contract of agreement.”

[33] There is detailed correspondence between the applicant and first respondent following the issuing of the guarantees, with serious allegations from both parties against the other. The second and third respondent were made aware of the disputes and adopted a position that the first respondent was not entitled to demand payment under the guarantees. In a letter from their attorneys, it was recorded on behalf of the second and third respondent:

“We have also been furnished with copies of two letters from the Contractor’s attorney to you (the Employer) and to the Employer’s legal representative, dated 15th July 2020 These letters served to record a litany of defaults/omissions/failures on the part of the Employer, and to terminate the construction agreement, which gives rise to an inference that the Employer had no intention of honouring the Agreement at the time that it entered into the Agreement, and that its intention was rather demand payment in terms of the Replacement Guarantees.

In all the circumstances, and in the light of the serious contentions by the Contractor and allegation of a misrepresentation and/or fraud by the Employer and/or you, the Guarantor necessarily requires that the Employer furnish in writing, by close of business on Friday, 17 July 2020, undertakings that it will not place itself in a position to make demands on the Replacement Guarantees, the Employer will not call on the Replacement Guarantees and no enforcement of any purported demand for payment on either of the Replacement Guarantees, to the extent made, will be sought by the Employer. The Employer is furthermore required to return the original Replacement Guarantees to us.”

[34] Whatever may have been communicated to the second and third respondents about the various disputes between the applicant and the first respondent concerning the entitlement to the call-up of the replacement guarantees, it is clear that the second and third

respondents adopted the position that the first respondent was not entitled to payments under such guarantees. Following a denial of the allegations of fraud, etcetera, the legal practitioner for the first respondent demanded payments in terms of the replacement guarantees.

[35] The attorney for the second and third respondents replied in a detailed letter dated 20 July 2020 wherein it is stated that the conclusion of the agreement between the applicant and the first respondent induced their client to issue the replacement guarantees. The letter further states:

“Your client's failure to carry out the obligations reflected in paragraph 3 of our previous letter demonstrates that there was no intention to carry out the said obligations, upon the conclusion of the Agreement, such that the conclusion of the Agreement by your client, constituted a misrepresentation to our client.”

The attorney concluded that such misrepresentation by the applicant rendered the replacement guarantees voidable at the instance of their client and further called upon the applicant to immediately withdraw its demand for payments under the replacement guarantees.

[36] Although the second and third respondents did not oppose the main application, an affidavit was filed on their behalf, wherein they contend "...that the First Respondent has failed to act honestly, in good faith and misrepresented the material facts to the Second Respondent, both in procuring the guarantees from the Second Respondent and in making (and persisting with) its purported demands on the guarantees."

It is further stated in the affidavit:

"In all the circumstances, and in the light of what is set out in this affidavit, the Second and Third Respondents contend that the First Respondent is not entitled to make demands for payment on the guarantees and the Second Respondent has no obligation to make

payment to the First Respondent in terms of the purported demands..., and will not make payment as demanded, or at all, unless it is determined that there is a legal obligation on the second respondent to do so."

[37] The affidavit of the second and third respondents was filed on 7 August 2020 and it was thereafter that the applicant decided to withdraw the application. On 8 August 2020, the attorney for the applicant informed the applicant's counsel to stop drafting the replying affidavit that had to be filed the next day on the assumption that the first respondent would accept the applicant's

withdrawal of the application.

[38] Mr Vivier, for the applicant, argues that there exist material disputes of fact on the papers which cannot be resolved without the aid of oral evidence. I agree that this is so, as is evident from just some of the disputes which I have already referred to. The papers are replete with such disputes and if I were to refer to and sum up all of them, it would make this judgment unnecessarily

drawn-out which would serve no purpose given the order I intend to make.

[39] In my view, it cannot be said that the applicant's withdrawal of the main application amounts to an abuse of process. At the time, it was clear that the second respondent was not going to make payments under the replacement guarantees, and all the applicant wanted in the main application was an interim order prohibiting such payments until the disputes with the first respondent were resolved. I agree with Mr Vivier that an order in the main application would not resolve the dispute between the first respondent and the second respondent that became apparent both in correspondence between them as well as on the papers filed, as to whether the latter was obliged to make payment under the guarantees on demand from the former.

[40] The first respondent was, and is not subjected to the level of prejudice as was alluded to in the Karroo Meat matter (at p 359 D-F), namely that witnesses were in attendance at court, one or more of whom may not be available in future, and

expenses having been incurred, such as in respect of qualifying witnesses that would not be recoverable in an ordinary award of

costs.

[41] I am not persuaded by the argument that the application for leave to withdraw the main application should fail on the basis that the first respondent is entitled to have its name cleared in the light of the fraud allegations raised against it. The first respondent will no doubt have such opportunity in the light of the outcome, not only of the main application, but also the counter-application, which will raise an opportunity for the first respondent to institute separate proceedings should it so wish.

[42] When the applicant filed its notice of withdrawal on 11 August 2020, and formally applied for the withdrawal of its application on 12 August 2020, it was only the issue of interim relief that was up for consideration on the record. Given the stance that was adopted by the second respondent, there was no longer a need for finality on this issue and it was not that the first respondent could not institute proceedings against the second respondent for payment under the replacement guarantees. Under these circumstances, I am of the view that, in the circumstances of this matter, and in the exercise of my discretion, the application to withdraw the main application should succeed.

THE FIRST RESPONDENT'S COUNTER APPLICATION

[43] As the first respondent refused to consent to the withdrawal of the main application, it was postponed on 12 August 2020 to the semi-urgent roll. Thereafter, the first respondent filed a counter-application on 26 August 2020, seeking relief, amongst other,

against the second respondent, in the form of a declaration that the second respondent is liable to make payments to it on the two replacement guarantees and for an order directing the second respondent to make such payments.

[44] In response to the first respondent's counter-application, the second and third respondent brought an application for the setting aside of the counter-application as an irregular step in terms of Rule 30(1) of the Rules, which provides that "[a] party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside"

[45] The alleged irregular steps by the first respondent in relation to the counter-application, are set out in paragraphs 8 – 13 of the supporting affidavit to the Rule 30 application as follows:

"8. On 26 Aug 2020, the First Respondent delivered the counter-application seeking, inter alia, an order against the Second Respondent for payment under [the] guarantees issued by the Second Respondent to the First Respondent.

9. The Second Respondent (and the Third Respondent) have disputed the validity of these guarantees and the demands on these guarantees by the First Respondent for the reasons set out in the Second and Third Respondents' Affidavit dated 4 August 2020.

10. The Second and Third Respondents are not the applicants in the main application. There is accordingly no lis between the First

Respondent, on the one hand, and the Second and Third Respondents, on the other hand, notwithstanding this the First Respondent seeks an order against the Second Respondent. The First Respondent therefore has no entitlement to ask for relief, which effectively amounts to an order against the Second and Third Respondents, by way of a so-called "counter-application", and accordingly the counter-application constitutes an irregular step.

11. In addition to the above, in terms of Rule 6(7)(a), read with Rule 24(1) of the Rules of this Honourable Court, any counter-application

that the First Respondent might have wished to institute or bring against the Second Respondent necessarily had to be filed together

with the First Respondent's answering affidavit in the main application. The First Respondent's answering affidavit in the main application has already been filed on or about 3 August 2020, and the so-called "counter-application" is therefore hopelessly out of time. The First Respondent has neither sought nor obtain condonation from the above Honourable Court for the late filing of its so-called "counter-application", as a result of which it also constitutes an irregular step.

12. As stated above, the Applicant has already given notice of its withdrawal of the main application, and the only issue which is left to be decided in the main application, is whether or not the Applicant should be granted leave to withdraw same. No indication was given that the First Respondent intended on counter-applying (to the extent permissible) against the Second Respondent, when the order in the main application was granted on 12 August 2020, incorporating an agreed timetable for the hearing of the aforementioned limited dispute. In this context, even if the First Respondent applies for condonation, which it has failed to do, there would not be any justification for granting condonation for the late filing of its so-called "counter application".

13. Lastly, to the extent that the counter-application fails to provide for any time periods for the late filing of a notice of opposition or opposing affidavits by the Applicant (or, for that matter, any affidavits by the Second and Third Respondents) it also constitutes an irregular step."

[46] Critical issues to be decided is what procedure is to be followed to bring a counter-application, and whether it is competent for the first respondent to bring a counter-application against the second respondent in casu. I shall now deal with the procedural issue.

[47] Rule 6(7)(a) provides that “[a]ny party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action.”

SubRule

(b) prescribes that the “[t]he periods prescribed with regard to applications apply to counter applications: ...”

[48] Rule 6(7) must be read with Rule 24, which deals with counterclaims and requires that a defendant who counterclaims, shall deliver a claim in reconvention together with his plea. This also implies to motion proceedings, in that a counter-application must be filed together with a respondent’s answering affidavit. My reading of Rule 6(7)(a) and (b) supports this supposition, but in addition, it is well established that suggested procedures for actions also applies to motions when it is “convenient and sensible”. In this regard, see *Reymond v Abdulnabi and Others* 1985 (3) SA 348 (WLD) at 349E-H, where it was held:

“Though it is not sanctioned by Supreme Court Rule 33(4), which applies only to actions, and is unfortunately not one of those sections which, in terms of Rule 6(14), is made applicable to applications, the suggested procedure is obviously a convenient and sensible one, which, under my inherent jurisdiction, I am, I consider, empowered to adopt. It would, if first respondent be successful, avoid a trial in which applicant’s cause of action would, ex hypothesi, be stillborn.

Moreover, it is one sanctioned by authority (*Aling and Streak v Olivier* 1949 (1) SA 215 (T) at 216).” (my underlining)

See also *Academy of Learning (Pty) Ltd v Hancock and Others* 2001 (4) SA 941 (CPD) at 950 F-H and also *Theron NNO v Loubser* 2014 (3) SA 323.

[49] It follows that the first respondent’s counter-application should have been filed together with its answering affidavit on 7 August 2020 (not 3 August 2020 as stated in the supporting affidavit to the Rule 30(1) application), and the counter-application was accordingly delivered out of time on 26 August 2020.

[50] As for the competency of a respondent to bring a counter-application against other respondents, this normally falls under the ambit of the third party procedure catered for under Rule 13. Rule 24 (2) makes it clear that the Rule provides for a counterclaim (or counter-application) against any other person and the plaintiff (or applicant), whether jointly and severally, or in the alternative, the defendant (or respondent) “may with leave of the court proceed in such action by way of a claim in reconvention [or counter-application] against the plaintiff [or applicant] and such other persons, in such manner and on such terms as the court may direct.”

[51] With reference to Rule 24, Page J in *Soundprops 1160 CC v Karlshavn Farm Partnership and Others* 1996 (3) SA 1026 (NPD) held (at 1031 D):

“It is apparent on a proper reading of this Rule that it is limited to a claim in reconvention against the plaintiff and the other person and cannot be invoked where there is no claim in reconvention against the plaintiff. It also requires the leave of the Court.”

Page J went further to state (at 1031 E):

“It seems clear that the only means whereby the respondents could permissibly bring a claim against their co-defendants in the action

in the absence of any counterclaim against the plaintiff would be by virtue of the provisions of Rule 13, which regulates third party procedure.”

[52] Mr Engela who appeared for the second and third respondents correctly makes the point that Rule 13 (also Rules 10,11,12, and

14) is applicable to motion proceedings by virtue of Rule 6(14). He argues that the third party procedure, contained in Rule 13, serves a very specific purpose, namely to allow a co-defendant or a co-respondent the necessary opportunity to respond to and deal with, the claim of its fellow defendant or respondent, with which it is suddenly faced. He further argues that it cannot be disputed that the second and third respondents are prejudiced as a result of the first respondent's failure to comply with Rule 13(1) read with Rule 13(8). I do not find it necessary to deal with the applicability of Rule 13 to the present matter, save to mention that at the time that the first respondent brought the counter- application, pleadings had closed, which make the service of a third party notice under the Rule possible only with the leave of the court. The fact is that the first respondent did not resort to Rule 13.

[53] I am of the view that the counter-application is irregular as not catered for in the Rules, more specifically Rule 24 which provides for counter-applications to be brought against the applicant and other parties, not other parties without the applicant being included; the counter-application, in any event, was not filed with the applicant's answering affidavit as required by Rule 24(1), and no application for condonation was filed in this regard. The counter-application also did not provide for any timeframes for the filing of further papers in the counter-application.

[54] Another issue raised by Mr Engela is that there is no lis between the first respondent and the second respondent in the present matter. Mr Patrick who appeared for the first respondent, counters this by arguing that the second and third respondents, joined cause with the applicant and are effectively co-plaintiffs. I do not agree. In the affidavit filed by the second and third respondents in the main application, it is clearly stated that they abide the decision by the court and even though the rest of the content of the affidavit does seem to support the case why payment should not be made in terms of the replacement guarantees, it largely deals with placing correspondence between the parties on record. Had the counter-application not been brought, it seems more likely that the second and third respondents would not have made an appearance at the hearing of the matter – they were compelled to make such appearance only because of the counter-application.

[55] I do not find it necessary to deal with the line of cases (discussed in detail in *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014

(2) SA 382 (SCA)) which deal with the requirements, in calling up the type of guarantees which are the subject matter in the present matter

and whether the second respondent is in fact required to make payment under the replacement guarantees by the mere demand for payment

thereunder. It is trite that fraud is a defense under any circumstances, and this is indeed what is raised by the second defendant in this matter.

[56] I am mindful that Rule 30(3) gives me a wide discretion, including that an irregular step need not necessarily be set aside. I may overlook any irregularities, especially where it does not cause any substantial prejudice to the parties affected. In *Trans-African Insurance v Maluleka* 1956 (2) SA 273 (A) it was held per Schreiner JA (at 278 F):

“.....technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

[57] To an extent that it might be argued that the counter-application should not be dismissed based on technical inefficiencies, this cannot be countenanced because of a further factor which militates against the proposition that the counter application should stand, namely the irresolvable dispute of facts in the matter. The papers are replete with disputes, but it is especially the dispute as to whether the March agreement exists or not that is most critical. Only oral evidence, in my view, will determine whether the March agreement exists or not, such evidence to center around when, where, and how negotiations, if any, took place, who represented the parties, what are the terms of the agreement if it exists, etc.

[58] In *Gounder v Top Spec Investments (Pty) Ltd* [2008] ZASCA 52; 2008 (5) SA 151, it was held per Mpati DP, at 154B-C:

“Much as it is preferable that claims like the present one should be instituted by way of an action, a claimant is not barred from

instituting a claim by way of notice of motion. The latter proceeding is pursued at a claimant’s own peril should a factual dispute arise which turns out to be incapable of being resolved on the papers; the risk being a dismissal of the application should the court, in the exercise of its discretion, decide not to refer the matter for trial, nor direct that oral evidence be placed before it.”

[59] The following paragraph from the judgement of Kirk-Cohan J in *Willowvale Estates CC and Another v Bryanmore Estates Ltd* 1990 (3) SA 954 (WLD) (at 961 H-I), may well have been written for the present matter:

“However, I would dismiss the counter-application on another ground. At the time it was launched the respondent was aware that it was based upon a then existing an irresoluble dispute of fact. It was aware of this both from the correspondence between the parties’ attorneys prior to the launching of the application and from the allegations in the founding affidavit. The respondent concedes that the counter-application cannot be decided on the papers and seeks an order that the matter proceed to trial. In the light of the principles laid down in Room Hire Co v Jeppy Street Mansions (Pty) Ltd 1949

(3) SA 1155 (T), the counter-application must be dismissed with costs.”

[60] In the present matter, too, it is abundantly clear that the factual disputes, and especially that concerning the March agreement cannot be resolved on the papers before me. It cannot be denied that the first respondent was aware of this when it instituted the counter-application. It has engaged in detailed correspondence on the issue with the attorneys for the second and third respondents yet took the chance to institute the counter-application. In the minority judgment by Heher JA et Shongwe JA in *Lombaard v Dropout CC and Others* 2010 (5) SA 1 (SCA), the judges referred to the trite principle (in paragraph 31) as follows:

“Motion proceedings are not designed or intended to resolve disputes of fact. Therefore, if a party has knowledge of a material and bona fide dispute, or should reasonably foresee its occurrence and nevertheless proceeds on motion, that party will usually find the application dismissed.”

[61] As for the question of costs, the applicant tendered costs up to and including 12 August 2020, the day when the matter was set down on the urgent roll for hearing. The matter was prolonged because of the refusal by the first respondent to agree to the withdrawal of the matter by the applicant, and by the ill-fated counter-application. The first respondent should therefore pay the costs of the other parties for all attendances post 12 August 2020.

[62] I make the following order:

1. The applicant is granted leave to withdraw the application under case number 9671/2020;
2. The first respondent’s notice of counter-application dated 26 August 2020 is set aside as an irregular step;
3. The applicant shall pay the first respondent’s party and party costs as taxed or agreed, up to and including 12 August 2020;
4. The first respondent shall pay the party and party costs as taxed or agreed of the applicant, second and third respondents for all

attendances after 12 August 2020, including that of the Rule 30(1) application.

S. HOCKEY

ACTING JUDGE OF THE HIGH COURT

For Applicants: Adv. P de B Vivier SC

Instructed by: Enderstein van der Merwe

For 1st Respondent: Adv. R Patrick

Instructed by: Advocate Zanda Roloff (Trust Account Advocate pursuant to section 34(2)(b) of the Legal Practice Act 28 of 2014)

For 2nd Respondent: Adv. R Engela

Instructed by: Edward Nathan Sonnenbergs

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Prepared on 11 October 2026 · Esheria