Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Case No.: M124/20

In the matter between:

ORLANDO IGNATIUS NTSALA **Applicant**

And

RUSTENBURG LOCAL MUNICIPALITY **First Respondent**

MARKS RAPOO N.O **Second Respondent**

JUDGMENT

MTEMBU AJ

INTRODUCTION

[1] The applicant instituted motion proceedings against the respondent in which he sought the following relief: (i) an order directing the first respondent to assess the applicant's monthly time sheets for the months, **September** to **December 2015** and **January 2016** to **May 2016**; (ii) an order directing the first respondent, once assessment of time sheets is made, to pay the applicant the fees due as per the assessment. The first and

second respondents opposed the application and raised a number of points *in limine*.

THE PARTIES' SUBMISSIONS

[2] The applicant and first respondent, on or about **17 June 2015**, entered into a written contract. The applicant entered into a contract on a fixed term basis as an Independent Contractor. He provided services as an Independent Technical Adviser for the Intelligent Transport Systems for the Rustenburg Rapid Transport. The applicant contends that in terms of the contract, his remuneration was calculated at a rate of R2090, 00 per hour payable on the 25th day of each month. He however contends that before any payment became due to him, he was required to submit the approved time sheets. The assessment and approval were to done by the second respondent.

[3] The applicant contends that he duly submitted the time sheets as he was required to do, but the respondents failed to assess his time sheets for certain months, which I have already mentioned above.

[4] On the other hand, the respondents contend that the applicant's claim is a thinly veiled attempt aimed at claiming payment in order to disingenuously avoid the consequences of prescription. The respondents contend that the thinly veiled claim of damages has prescribed, in terms of section 11 of the Prescription Act 68 of 1969. The respondents' contention is that the applicant's claim is based on unpaid time sheets for the months of **September 2015** to **May 2016**, whilst the claim or application

was issued on **25 February 2020**. A period of three years has passed in which the applicant ought to have instituted his claim.

[5] Secondly, the respondents contend that the applicant knew that his claim would be met with a material dispute of fact and thus incapable of resolution on papers. He should have brought action proceedings.

[6] Thirdly, on the merits, the respondents contend that the applicant was informed that his time sheets were assessed by the second respondent. He was informed about anomalies that were found, in that there was some misrepresentation of facts in the time sheets, fraudulent entries noted in the time sheets and no supporting documentation was provided. The applicant was duly advised that his time sheets would not be approved. That the applicant never returned to the offices of the Respondents, after being informed of the assessment of his time sheets. The respondents contend that there is no debt owed to the applicant, and if there is any, it has prescribed. The respondents further contend that the applicant failed to follow internal or external review and/or appeal procedure, after the second respondent had rejected his timesheets.

[7] The applicant, in reply, contends that the matter has not prescribed. The debt would only become due and payable once there is assessment of timesheets. In the absence of assessment, there is no debt that is due and payable. Although, I must say that the application's submissions were sometimes

difficult to comprehend. Sometimes made in paradox. But, it is my duty to ensure that the interest of justice is served.

ANALYSIS OF THE FACTS AND THE LAW

[8] During argument, it became common cause between the parties that the matter is characterised by a material dispute of fact.

[9] In replying affidavit, para 47.1, the applicant concedes that:

> *"I have noted the invitation by Mr. Makona that I fear cross-examination. I have further been advised by attorneys that there is a dispute of fact as it relates to whether the time sheets were assessed or not. I have been advised by legal team in order for the dispute of fact to be resolved in this matter, the Honourable Court will have to make a credibility finding between myself and Mr. Rapoo or even Mr Makona."*

[10] The respondents' contention is that the applicant knew that his claim would be met with a dispute of fact, but nonetheless he elected to bring motion proceedings. Thus, the application ought to be dismissed.

[11] I accept that there is a material factual dispute between the parties. The dispute of fact is such that I am unable to determine this matter on papers. The dispute of fact is vast. The question therefore is whether I should dismiss the application on that basis, as the respondents contend, or I should refer the matter to trial.

[12] In terms of Rule 6(5) (*g*) of the Uniform Rules, a Court has a wide discretion with regard to referring matters to oral evidence

where application proceedings cannot be properly decided by way of affidavit. An application to refer a matter to evidence should be made at the outset and not after argument on the merits. However, in certain circumstances (and exceptional cases), the Court may decide that a matter should be referred to oral evidence even where no application for such referral had been made. See ***Pahad Shipping CC v Commissioner*****,** *SARS* [2010] 2 All SA 246 (SCA) at para 20; see also **Tryzone Fourteen (Pty) Ltd v Batchelor N.O and Others (**3535/2013) [2016] ZAECPEHC 9 (4 March 2016) at para 38.

[13] In **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1162, it was stated that it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits as opposed to viva voce evidence.

[14] In confirmation of the above, in ***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 277 (SCA) Harms JP ruled at paragraphs [26]–[27] that 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, motion procedures cannot be used to resolve factual issues because they are not designed to determine probabilities.

[15] If a Court is unable to decide an application on paper, it may dismiss the application or refer the matter for oral evidence or

refer the matter to trial. The Court should adopt the process that is best calculated to ensure that justice is done with the least delay on the merits of the case. The rule may, however, yield to the interest of justice and a resulting referral for trial. A proper costs order may repair an imbalance that was caused by negligent litigation if the dispute was foreseeable or the process abused. See **Golden Peanut and Tree Nut SA (Pty) Ltd v Vermeulen N.O and others** [2019] JOL 46046 (FB) at paras 5 & 8.

[16] In this matter there is a massive dispute of fact as to whether the applicant's timesheets were assessed or not. This also ties with the issue of prescription in that there is a dispute of fact as to when the debt became due and payable. As already stated above, the parties are also in agreement that indeed there is a material dispute of fact. The list of disputes of fact is not exhaustive. Dismissing the application instead of referring it to oral evidence is not a solution.

[17] Therefore, after scrutinising the papers and listening to the submissions by counsel, I am convinced that the claim of this nature, disputes and the interest of justice call for the parties to be sent to trial.

COSTS

[18] What remains is the question of costs. The general rule is that costs must follow the result. The respondent raised a point *in limine* regarding the existence of a dispute of fact in this matter. The applicant conceded in the replying affidavit. Instead of

making an application for referral at the outset, before hearing, since the applicant had become aware of the respondent's averments, decided, anyway, to proceed with the matter. It was only after being engaged by the Court that the applicant sought an order, in the alternative, of referring the matter to trial. The respondent succeeded in its point *in limine* on existence of dispute of fact, hence I referred this matter to trial. Therefore, a cost order is warranted against the applicant. Further, I am not particularly impressed with the manner in which the delay has occurred in bringing this application. This is however by no means of deciding the issue of prescription.

ORDER

[19] Therefore, I grant the following order:

a) The applicant's application under the above case number is referred to trial.

b) The notice of motion in the application shall stand as the applicant's combined summons.

c) The founding affidavit shall stand as the applicant's particulars of claim.

d) The respondents' answering affidavit shall stand as the respondents' plea.

e) The applicant's replying affidavit shall stand as the applicant's replication.

f) The further exchange of pleadings and pre-trial procedures, including discovery and the request for and provision of trial

particulars, shall be regulated by the Uniform Rules of the Court in respect of action proceedings. Discovery of documents not forming part of the application papers shall take place in accordance with the provisions of the Rules of Court.

g) The parties are granted leave to utilise Rule 28 in the event that either of the parties wishes to amend its papers.

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A.M. MTEMBU
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING	**22 JANUARY 2021**
DATE OF JUDGMENT	**20 APRIL 2021**
COUNSEL FOR THE APPLICANT	**ADV P J NGANDWE**
COUNSEL FOR THE RESPONDENT	**ADV J VAN ROOYEN**