IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Application No. 1312/05

In the ex parte application of

SWAZILAND READY MIX (PTY) LTD Applicant

In re:

SWAZILAND READY MIX (PTY) LTD Applicant

and

S & B BUILDING (PTY) LTD aka

STEFANUTTI AND BRESAN First Respondent

NEDBANK (SWAZILAND) LTD Second Respondent

Coram: J. P. Annandale, AC J

For the Applicant: Adv P.E. Flynn (instructed by Rodrigues and Associates, Manzini)

For the First Respondent: Adv. M. vd Walt (Instructed by Currie and Sibandze, Mbabane)

Second Respondent: No Appearance

JUDGMENT

18 August 2005

[1] This is an opposed application to stop and terminate the operations of a joint venture that produces ready mixed concrete in Swaziland, plus ancillary relief, should interim or final relief be granted. Peculiar to the matter is that both the applicant and the first respondent want the joint venture to be terminated, but each have a differing view as to the terms and consequences thereof.

[2] The second respondent, Nedbank (Swaziland) Limited, faces no order prayed for by the applicant and has wisely decided not to enter the arena by filing any papers in the matter, as it was cited as in interested party only on the basis that it is said to be the bankers of the joint venture, Swaziland Ready Mix (Pty) Ltd, the applicant.

[3] Prior to the matter being argued on both preliminary points as well as the merits, the present first respondent brought an application under Rule 30 to set aside the Notice of Motion in the main application on several grounds of alleged irregularities, mainly focussed on inter alia alteration of the Notice without an application to amend it, backdating of the notice, discrepancies in date stamped endorsements by the registrar, non service of the original (unaltered) notice, a complaint concerning re-instatement and filing of a supplementary

affidavit without leave of court.

[4] The supplementary affidavit complained about is not filed for consideration in the present (main application) and the court file has no indication of the outcome of the application to set aside the averred irregular proceedings. During argument in this court, both counsel were ad idem about only two aspects. Apart from being in agreement about the ultimate costs order concerning engagement of counsel, with which I agree, both informed this court that the application concerning alleged irregularities has been disposed of by my learned brother, the Hon. Maphalala J, whereat he dismissed that application, ordering costs to be costs in the cause. No transcript or copy of his ruling was filed, including the ruling on admissibility of the supplementary affidavit.

[5] The then preliminary points, dealt with in paragraphs 5 to 22 of the first respondent's answering affidavit and also paragraphs 47 and 48, as well as paragraph 6 of the applicant's replying affidavit, are therefore res judicata and require no further consideration.

[6] I accordingly deal with the matter as it was brought before this court under a Notice of Motion dated the 7th April 2005, under a certificate of urgency, datestamped both 31 March and 7 April 2005, the Notice being endorsed by the Registrar on the 31st March and stating the

date of the application to be brought as the 13th April 2005, endorsed over a painted (tippex) deletion of some other date. If this paragraph seems superfluous, it is ex abundanti cautela to avoid possible further confusion. Furthermore, there are duplicated references to annexures "SRM 9" to "SRM 17", which numbering is repeated in the replying affidavit of the applicant, but with a totally different document in each annexure bearing the same duplicated numbering. The bundle "SRM 9 - SRM 17" bears a handwritten endorsement on the back of the last document, dated 8 and 11 April 2005, prima facie made by the person who served the papers on litigants herein, as an aide de memoire. Those documents, bundled together as "SRM9 - SRM 17", are not also attached to applicant's replying affidavit, which is a volume stapled together, with annexures "SRM (Swaziland Ready Mix (applicant)) 10 - SRM 31" at the end thereof. For present purposes, I shall therefore ignore these papers, contained in the loose bundle of "annexures".

[7] The relief sought by the applicant, hereinafter referred to as "Ready Mix" for convenience, is set out in its Notice of Motion as follows :-

1) Dispensing with the Rules of the above Honourable Court as to time limits, service and procedure and hearing this matter on grounds of URGENCY.

2) That the Deputy Sheriff of the District of Manzini be and is hereby directed to stop and suspend the operations of the parties Joint Venture known as READY MIX SWAZILAND in particular of the BATCHMAN 2 OPERATING PLANT at Nkwalini Quarry at or near Bethany in the Manzini District.

3) That prayer 2 above, operate with immediate effect pending finalisation of these

proceedings;

4) That the bank account held and operated by the parties under joint venture under the style of READY

MIX SWAZILAND be and is hereby suspended pending finalisation of these proceedings.

5) That Messrs Kobla Quashie be and are hereby authorised to take into its possession all the accounting records, files, computer records to enable it to carry out an audit of the operations of the parties joint venture known as READY MIX SWAZILAND with immediate effect.

6) That Messrs Kobla Quashie be and is hereby authorised to conduct a financial audit of the operations of the Joint Venture known as READY MIX SWAZILAND.

7) That a debate of such accounts be and are hereby conducted;

8) That the joint venture as aforesaid be and hereby dissolved;

9) That payment be made to applicant of any amounts found to be owing to applicant upon dissolution of the joint venture.

10) Granting costs of application on the attorney and own client scale.

11) Granting further and/or alternative relief, (verbatim).

[8] Strictly, the application is not ex parte, as the citation suggests. It was ultimately brought in the long form, with notice to the respondents, albeit it reduced to a short period of time. Initially, it may have been the intention of the applicant to approach court ex parte, but, as said, it is not so in fact in so far as the actual hearing of the matter took its final course.

[9] In its answering affidavit, and as argued in the course of hearing of the matter, the first respondent firstly raise further points in limine, over and above the aspects already disposed of in an earlier ruling.

[10] Counsel agreed, with consent of the court, to argue the matter fully - dealing with the preliminary legal points as well as the merits, since if limited to first argue in limine and then await the outcome, thereafter to again run the gauntlet of a contested motion on the merits and again await the result, if not initially disposed of, would in the present state of affairs unduly protract finality being reached. With only three judges sitting in a jurisdiction with a population of over one million people, an extremely limited civil jurisdiction of the lower courts (E2 000) and a huge backlog of both civil and criminal cases as well as unduly prolonged reserved judgments, it was their best viable option under the circumstances. The sorry state of affairs concerning an overstressed judiciary adversely impacts on litigants who need matters to be adjudicated expeditiously. It has an impact on costs as well, over and above commercial implications. There is light at the end of a very long tunnel, to have the judiciary expanded, but it brings no consolation to aggrieved litigants who are left stuck in a quagmire without being able to reach out to courts of judicature to resolve their disputes in a timely manner; a matter of course in any investor friendly and judicious environment.

Be that as it may, each of the prayers of the applicant has a preliminary point raised against it (except the issue of costs as aforesaid) and furthermore it is contended that there are material

disputes of fact, to the extent that the matter cannot be resolved on the papers before court alone, negating the application procedure chosen by the applicant.

Prior to deciding these ten points, it is necessary to state that as the matter was presented and argued, both parties are ad idem that the basis from which to proceed is that Ready Mix is to be dealt with as a partnership per se and not as any other legal persona or entity. Whether Pothier's definition of a partnership, as modified over the years is compatible with an entity in the form of Ready Mix (Pty) Ltd as being a partnership or not, is not in issue. The parties are fully agreed that the law of partnership is applicable to the issues at stake and the matter is dealt with on that basis.

[13] There are attacks on the application from ten different angles, the last and most persuasive being the question of a factual dispute that cannot be resolved on the papers alone, expert and other viva voce evidence said to be required in order to adjudicate the issues. Since it is determinative of the outcome of the application, in limine, I will deal only briefly with the other nine aspects before returning to the issue of material disputes of fact. For the reasons stated below, the merits or demerits of the two diametrically opposed modes of dissolution of the joint venture remain undecided with the result that unless the parties come to a mutually acceptable agreement regarding dissolution of their joint venture or partnership, a time consuming action will have to be instituted. In order to facilitate an appropriate settlement arrangement, which very well could be reached, the litigants would be well advised to re-engage the services of both counsel who argued the matter, cutting their losses to a minimum in

the process.

[14] On urgency, the applicant alleges that the partner in the joint venture abuses its position by purchasing ready mixed concrete at non sustainable prices, below market value, contributing to ongoing operating losses. This is said to be due to the first respondent's assumption of management control to the disadvantage of the applicant.

[15] What the applicant fails to set out is for how long this alleged abuse of power has been going on. Seemingly, it is not a situation that has developed overnight.

[16] The applicant alleges that the first respondent has not been forthcoming with its contributions towards payments in respect of certain machinery and vehicles that were brought in by the applicant. Again, it is not shown to have been the position as of lately only - to the contrary, it is an ongoing pattern since shortly after the partnership was formed more than a year before coming to court.

[17] The applicant complains of being completely sidelined in the management of Ready Mix, by the applicant. It further is at pains for not having been brought up to speed with financial matters and management issues. Again, this is said by the applicant itself to have been the position for a considerable period of time, exacerbated since the time it offered to sell its 50% share in November 2004.

[18] Respondent's counsel rubbed further salt into the wound by highlighting the applicant's failure to disclose his role in being a required signatory of each cheque drawn by Ready Mix. As he is required to countersign cheques, it is argued, he is not in a position to say that the joint venture makes any expenditures without his express acquiescence. Also, that he has full access to the accounting records, whether kept in- house or wherever else he may state it to be. He has it against the accounts not being prepared by the partnership but by the respondent's nominee, but it is alleged to have been an ongoing practice for a long time. Nor is he alleging a refusal of access to the accounting records.

[19] Advocate van der Walt relies on the often quoted, unreported decision of Ben Zwane vs Deputy Prime Minister, Civil Case No. 624/2000 dated 24 March 2000 wherein Masuku J comprehensively and persuasively set out the peremptory requirements of the provisos under Rule 6(25)(b) in so far as the specific circumstances that renders a matter as urgent, to circumvent the ordinary procedures otherwise to be followed, as well as satisfying the court as to why substantial redress cannot be obtained in due course, ex facie the founding affidavit of the applicant. There are further aspects in addition, but neither of these two facets can be gleaned from the papers presently before court. There is furthermore no substantial averments of irreparable harm to be suffered by the applicant if he is not heard forthwith.

I was made to understand in the course of argument that a supplementary affidavit was sought

to be placed before the court, in which the abovementioned aspects relating to urgency were more fully canvassed. That affidavit is not up for consideration. Even if it was, urgency has to be properly addressed ab initio, not in a replying or supplementary affidavit.

A second ground in limine on which the relief is opposed concerns the propriety of ordering the deputy sheriff to "stop and suspend" the operations of Ready Mix. The applicant seeks a dissolution of the partnership and the respondent has since exercised his option, terminating the agreement under the provisions of Clause 4 thereof.

It reads that under certain expressed conditions, cancellation may be invoked. It is the consequences of termination that lies at the heart of the matter, and which ties in with the factual dispute, referred to herein below. Clause 4 reads:-

"4. DEFAULT

In the event of a material default of a Party in the discharge of its obligations under this agreement with respect to which such party fails to take immediate corrective measure upon receipt of written notice thereof by the other party, the other Party may by written notice immediately terminate this Agreement and/or take over the required operation and may assign it to another Company or introduce a new Party to the Joint Venture."

The argument of the first respondent regarding the relief prayed for in prayer 2, in so far as it pertains to the intervention of the sheriff, is that there is no cause of action to give rise to such

an order, making it incompetent in law. A clear right has to be established to obtain such a final interdict, and in the interim, at least prima facie, with a balance of convenience in its favour. Also, there has to be no other remedy to take satisfactory care of the matter.

[23] This, the applicant has not shown. Its counsel peremptory glossed over these aspects in the course of his argument - not because of not being prepared but because the issue is obvious and uncontroverted by the applicant. There is no order that is sought to prevent the first respondent from dealing with any of the partnership's assets or incurring further liabilities.

[24] The applicant seeks the partnership to be dissolved, and the first respondent did so, unilaterally. In full consequence, the result would be to have the deputy sheriff stop and suspend the operations of an entity that does not exist anymore.

[25] A further practical issue is the expertise and ability of a deputy sheriff to comply with such an order, over and above a mere locking up of the premises and preventing access to the offices and physical installations, vehicles and whatever is kept on the business premises. The founding affidavit does not expand on this requested part of relief. Furthermore, the respondents argue that there is no cause of action in this regard. Due to the outcome of the matter it is not necessary to decide this aspect, save to state that there are reservations about the competency of such a prayer.

[26] The aforementioned aspect pertaining to the deputy sheriffs involvement is further sought to be in the form of interim relief, with immediate effect, pending finalisation of the application.

[27] An interim interdict to prevent the first respondent from disposing of any assets of Ready Mix was not sought. The placing of the entity in the hands of a deputy sheriff, to stop and suspend all operations of Ready Mix, in particular the "Batchman 2 operating plant", has the same effect as an interim interdict, to be enforced by the sheriff, with the result that the first respondent effectively will have the doors of the joint venture closed to him.

[28] For an interim interdict of this nature to be granted, by whatever name the relief may be clothed in, there are well established criteria that have to be met. Primarily, it requires to be shown that there exists at least a prima facie right with a well founded apprehension of irreparable harm, that cannot be protected by any other other satisfactory remedy, should interim relief not be granted. The balance of convenience must favour the granting of interim relief until a final order takes effect. See for instance WEBSTER VS MITCHELL 1948(1) SA 1186 (W) at 1188-9, followed in numerous decisions and applified in GOOL VS MINISTER OF JUSTICE 1955(2) SA 682(C) at 688; SETLOGELO VS SETLOGELO 1914 AD 221 at 227 and many subsequent applications thereof; KNOX D'ARCY LTD VS JAMIESON 1966(4) SA 348(A) at 361 and the authorities referred to therein; NCONGWANE VS MOLORANE 1941 CPD 125 at 130. The applicant fails to convince that the first respondent should through the suspension of operations by a deputy sheriff be restrained and interdicted, through the

backdoor, from alienating assets of the joint venture or further burden it with liabilities. There are numerous allegations of impropriety against the first respondent, but as stated below, the factual dispute that by necessity had to be forseen by the applicant are serious and numerous, taking it out of the ambit of application proceedings. This adversely impacts on the interim and immediate effect of the powers sought to be given to a deputy sheriff to stop and suspend business operations and in effect, obtain an interim interdict without satisfying the requirements thereof.

The fourth prayer seeks the joint banking account of Ready Mix, held with the second respondent bank, to be suspended, pending finalisation of the application. It need not be determined whether this would favour either of the two principal litigants or the joint venture itself, or whether it would serve any useful purpose at all. It is common cause that it is a joint current banking account that is in issue, of which both the applicant and first respondent are co-signatories.

[30] Should either of the partners require a cheque to be drawn on the joint account in favour of either of themselves or any other entity, it requires both hands to sign. The one cannot outdo the other and spirit money out of the joint account without the other agreeing to co-sign. Moreover, in the normal course of business, it is common practice that even in the event that acrimony and distrust exist, such as presently, there may well be obligations to meet that remain to the mutual benefit of both partners. Should the account be suspended, it removes this possibility and as said, it requires both partners to jointly agree to effect any payments.

[31] At present, this relief will not be granted in the application, which will have to return for adjudication as an action, unless settled by the parties, assisted by counsel, as stated above.

[32] A more contentious issue is the enablement of an auditing firm to take all the "accounting records, files and computer records" to conduct an audit of the operations of Ready Mix. Coupled hereto, to authorise the conduct of such an audit, and a debatement of accounts.

[33] Again, this is tantamount to an interdict when regard is had to the effect and consequences of such orders, to effectively put an end to the running of the joint venture and winding it up. Mutatis mutandis, what was mentioned regarding the interim relief pertaining to the deputy sheriff, equally applies here. The requirements of an interim interdict have not been shown by the applicant to justify the relief it seeks.

[34] It is common cause that both partners want the dissolution of the joint venture, but on different terms and for different reasons since the effect of dissolution impacts differently on the parties, dependant on the modus of dissolution. This relief is sought, not as a result or consequence of dissolution, but as a precursor to it being done, in anticipation of dissolution.

[35] The parties entered into an agreement, annexure "SRM 2". In clause 20.2 thereof, they agreed on the aspects of auditing and books of accounting, which are to be kept, as follows:-

"20.2 Such books together with all records and documents pertaining to or concerning the business of the Joint Venture shall be kept at the residence of the Joint Venture where each party shall have access at all times to inspect, examine and copy the same whenever it shall think fit. The Auditors of each Party shall have all such entry and access as may be necessary so that they can do the necessary vouching to enable them to certify the annual accounts of a Party."

[36] Accordingly, each of the parties have a pre-agreed right to have full access by its own auditors, to do as the applicant now prays, save for the removal of the books, computer records etcetera from the premises in order to do so.

[37] The applicant fails to provide a basis to seek the additional aspect of removal of the books, computer records and such like, from the premises. There is no alleged justification for a need to do so, why the audit cannot be done at the premises where the items are kept. Neither the applicant, nor the firm of auditors, show an impossibility or any bar from conducting the audit in situ, as agreed at the time the parties were in good terms, commencing the joint venture and agreeing to this term.

A debatement of accounts is also sought. I can only presume that it was meant that once the audit has been done, an account would thereafter be rendered, for debatement now to be ordered.

However, prima facie, the first respondent has already rendered accounts, which are incorporated in the application. The accounts sought to be debated do not refer to the incorporated accounts, but to "such accounts" as are envisaged to be drawn by the auditors. To now seek a debatement of accounts, having regard to the current position where such accounts are still sought to be drawn by the auditors, should the court order that it be done, is somewhat premature.

It is repeated that this aspect is also not of such importance that the application is determined by it. It was suggested in court that in the event that the joint venture be terminated without intervention of the court, that the actio pro sociis may well provide an appropriate remedy for either of the parties who might be aggrieved by the dissolution of the joint venture or the manner in which it could have been manipulated by one of the partners. I do not propose to give advice to litigants, as their counsel is best placed to do so. Furthermore, to assist the partners in coming to an equitable dissolution agreement, which could well include debatement of accounts prepared by whosoever wishes to do so, their counsel may assist and advise.

[41] Prayer eight seeks dissolution of Ready Mix, the joint venture between the applicant and the first respondent.

[42] It seems as if the dissolution clause has already been invoked by one party at the time the

matter was argued, making this order academic to some extent. However, the other partner wishes the dissolution to be ordered by court, not as per the dissolution clause, in an attempt to rid itself of the agreed consequences. A bone of contention remains whether the one partner was entitled to invoke the dissolution clause or not.

[43] The dilemma that this brings is that on the one hand, the applicant seeks an order for dissolution while on the other hand, the applicant seeks to prevent the first respondent from dissolution of the joint venture. Hot and cold, approbate and reprobate, the two do not go hand in hand. Over and above this, the basis on which the application is brought to court, vigorously opposed, with an essential factual dispute underlying the matter to the extent that whatever way each of the partners seek a dissolution of their partnership, the factual dispute on essential elements and averments take it out of the realm of application proceedings, as dealt with below.

[44] The ninth prayer seeks payment to be made to the applicant of any amount due to it upon dissolution of the partnership.

[45] With all respect to the applicant, this presupposes that the first respondent owes a repayment, a one sided assertion the applicant seeks to be determined on a future date, if the audit report favours it. It is also superfluous.

[46] As a cart is not to be put before the horses, this order that is prayed for is premature. As a

matter of course, in the event that upon a proper determination of who owes who, should the first respondent owe the applicant, it may well then become an enforceable debt. On the other hand, the opposite may equally be so. It is only at such a time, when there is certainty of this aspect, that an order like this could be sought, compelling the indebted partner to pay the other pro tanto. Damages that may have been suffered by either partner, if that is the case, will give a cause of action against the other. At present, this remains to be determined. There are various legal remedies that could be involved at the appropriate time in an appropriate manner, but not presently by way of application.

From the aspects briefly referred to above, it should already be clear that the present application cannot be granted for diverse reasons. The main issue, which causes the end result, remains to be a factual dispute that cannot readily and properly resolved on the papers as they are before court at present.

Advocate Flynn, who presumably did not assist in the preparation of the papers filed in the application, endeavoured as well as could be expected of him to argue that there is no material dispute of fact that cannot be resolved by way of an application.

One such aspect, which puts the matter at rest, is that it is essential that the auditors, which the applicant seeks to have put in place and who are to audit and inspect the books of accounts, the computer records and such like, determine whether the first respondent company lived up to its

contractual obligations and the duty of uberrimae fidei The argument is that only once they have completed their task, and accounts have been debated, the liability of the first respondent can be determined, which it is at presently sought to be ordered to pay.

This contradictio in terminis is obvious. In order to have the one party pay the other, it has to be established that there is such an amount which is due and payable by the one partner of a dissolved joint venture to the other partner.

The applicant pre-supposes that the first respondent fell foul of their arrangement and that as a matter of course, it is only the quantum that has to be established by way of an audit.

The first respondent strongly disagrees with such a scenario. It brings a number of issues into the playing field, wherein the assertions of the applicant are not only denied but it counter-alleges material facts.

One such issue, which will in my view require expert evidence, is that of someone capable of informing the court about the costing aspects of pre-mixed cement or concrete, the costs of such mixtures to Ready Mix and the reasonable prices at which any of the partners may purchase it from their joint venture for its own use. It is an issue that is more complex than what is presently presented to the court.

[54] The first respondent highlights the material disputed factual issues in paragraphs 59.1 to 59.8 of its answering affidavit. For ease of incorporation, I quote in full:-

"59.1 Whether the applicant was excluded from the management and operations of the joint venture, whether there was lack of disclosure on the part of the first respondent, and the extent of the applicant's knowledge or lack of knowledge of the financial affairs of the joint venture;

59.2 Whether there was an agreement of sale and of a subsequent hiring out between the parties in respect of a truck;

59.3 Whether the First Respondent manipulated financial statements or records;

59.5 Whether the first respondent was honest and whether the prices at which it purchased concrete from the joint venture, were appropriate prices;

59.6 Whether the first respondent inappropriately manipulated the operations of the joint venture to suit its own operations;

59.7 Whether the conduct of the First Respondent justifies an audit by the Applicant's auditors of choice;

59.8 Whether the first respondent would be entitled to terminate the agreement due to breach by the applicant."

[55] The averment that the applicant was excluded, in whichever way, from participating in the joint management of Ready Mix is alleged by the applicant but disputed, and foreseeably so, by the first respondent. The applicant avers that the first respondent had an advantage over the

management and operations of Ready Mix, rendering it imperative to suspend further operations (para 35 and antecedents).

[56] The first respondent has a different version about the ousting from joint management. It should have been forseen that the management issue in itself would result in a factual dispute. More material is the material in which the joint venture dealt with - concrete. It is not "concrete" that the first respondent bamboozled the partnership when purchasing concrete at the prices it is alleged to have done. It answers to this allegation that both partners purchased concrete at the same price since the idea behind the scheme was to "supply concrete commercially and for the partners thereto to purchase concrete at the price most favourable to the partners." It carries on the state in para. 72.1.2 that

"The price of concrete depends on which raw materials are used, and according to which formulae. The prices of competitors and demand in the market also plays a role. These are only some of the variables which influence the calculation of a basic price".

The essential error that the applicant makes is to proceed from the pre-supposition that its assertions and allegations are fait accompli, a given fact, requiring no bespoke in contradiction.

A further example is the alleged assertion by the first respondent that it has been bearing the costs of running the joint venture. Also, that "if the first respondent had been honest and

purchased from (Ready Mix) at market value, the joint venture would be profit making (sic). (Para. 20 of the founding affidavit). Over and above the expected denials of such an accusation of impropriety, the first respondent raises a counter issue, namely that it "injected massive capital into the joint venture, which is the only reason why the business of (Ready Mix) was able to operate" (para 76 of the answering affidavit).

[60] These allegations and counter-allegations require a proper ventilation and scrutiny before a definitive finding can be made. It is one thing to refer to reports by accountants, allegations and counter allegations, denials and correspondence between attorneys, but quite another when it has to be used and solely relied upon in order to make a determinative finding of fact that results in the outcome of the matter.

[61] Another factual dispute that arises from the assertions by the applicant about the (non) payment for a "karoo concrete batch plant" and a 60 KVA generator should have been foreseen, as the first respondent raises a defence of non-furnishing of invoicing the joint venture for this, or any other "properly documented" demand for payment.

[62] Should this be discounted, a further remaining issue, which is material and goes to the heart of the dispute, is the price at which concrete was obtained by the partners, as already alluded to above.

[63] The applicant states that concrete was not supplied to the "respondents" (sic) at acceptable commercial rates. "They have supplied Ready Mix concrete to themselves at E645 per cubic metre whereas the going rate would be at least El 50 more than the going rate. As a consequence thereof, the operations of the (joint venture) have been manipulated by respondents (sic) to suit the operations of the respondents. Further, as a consequence thereof, on paper, the joint venture reflects as operating at a loss, which is doubtful". (paras 27 to 31 of the founding affidavit).

[64] It is a tall order to have such a challenge go by the wayside, expecting no vigorous attack on it unless it is common cause.

[65] The amounts pertaining to this is countered by an allegation by the first respondent that the applicant purchased concrete from Ready Mix at the same price as the respondent, said to be enforced by a person who used to be the manager, formerly in the employ of the first respondent, thereafter he was happily received into the arms of the applicant. Improper manipulation of prices remain the material disputed issue, having regard to the original purpose of the joint venture, whereby the partners would have been able to both benefit from their venture (para 83 and 84 of the answering affidavit).

Issues like the aforestated go on and on. For the court to now decide on acceptable trade

practices, the price structure of pre-mixed concrete, the prices each partner was to pay and such like, would require the hearing of experts in the fields of accounting, auditing and pre-mixed concrete, before the dispute, as it stands, can be decided. To do so on the available affidavits would not only be impossible to do without at least potential prejudice, but also to take a shot in the dark, so to speak, without giving the quarry a chance to have all relevant facts presented to the court, before a determination is made, in the manner that the applicant seeks.

One further has to be mindful of the ratio of the application, as it has unfolded. The disputes of fact, that could be foreseeable by the applicant and compelling it to follow the action procedure, time consuming as it may be, is really an endeavour to have the irretrievable breakdown of their partnership to follow the one course of events instead of the other. This should have been done by arbitration, if not so, by action and not application. Yet, it required the applicant to endeavour to establish a cause of action to lay a foundation to proceed by application. It is in this process that an inevitable material factual dispute arises from the necessary allegations that had to be made in order to try and satisfy the requirements for the relief it came to court for. In the process, it turned out to be a "catch 22" situation.

Without being definitive and exhausting, for the applicable principles of the ratio of this decision, insofar as material disputes of fact that give rise to application proceedings being inappropriate, useful guidance was found in the following decisions: -

MOOSA BROTHERS & SONS (PTY) LTD VS RAJAH

1975(4) SA 87(D) page 91 and 93; NKWENTSHA VS MINISTER OF LAW AND ORDER 1988(3) SA 99(A) and KHUMALO VS DIRECTOR GENERAL OF COOPERATION AND DEVELOPMENT 1991(1) SA 158(A) at 167.

It appears from these authorities and also the exigencies of the matter at hand that it would not be appropriate to simply refer the matter for hearing of viva voce evidence. The disputed issues were foreseeable at the time the application was instituted and must have given cause to question whether the present process would be adequate - see ROOM HIRE CO. (PTY) LTD vs JEPPE STREET MANSIONS 1949(3) SA 1153 (at 1162) as the hackneyed authority in this regard, resulting in a dismissal (in limine) rather than a referral for hearing of oral evidence.

It is for these reasons, and moreso the latter which focuses on a material factual dispute, that the application stands to be dismissed in limine, without regard be had to the merits.

As agreed by both counsel and which in my judgment is sustainable under the circumstances when the legal issue at stake is considered, it is ordered that the costs of counsel be justified and that it be taxed in accordance with the provisions of Rule 68(2).

In the result, the application is ordered to be dismissed in limine, with costs to follow the event.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE