NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION

CASE NO: EL 1556/12
ECD 3573/12

In the matter between

GRANT WALMSLEY **Plaintiff**

and

MOBILE BODYSHOP CC **First Defendant**
NICO JURGEN PRETORIUS **Second Defendant**

JUDGMENT

HARTLE J

1. The observation by Plasket J in Horner Investments CC v General Petroleum Installations CC[1] that "… generally speaking, it is preferable for contracting parties to record their agreement in a considered and carefully detailed document, rather than to rely on an oral agreement with all the dangers of misunderstanding and imprecision created by the potential for different perceptions arising as to what may have been agreed..." has a particular resonance in this matter.

2. The plaintiff, a retired businessman from Port Elizabeth, parted with a substantial sum of R500 000.00 to the second defendant with whom he has had a long association both as a golfing partner and in business, based on a casual oral agreement in order to 'join forces' in the running of the first defendant's tow truck and recovery business operating in East London and the "Transkei" ("Tow-Tech), for which he would in due course acquire a 50% member's interest in the said close corporation. The sticking point in this matter is that he says that he agreed to make the payment conditionally on the basis that the contribution would be strictly utilized for the purchase of a new tow truck to be used by the business. When it dawned on him that the monies paid by him were being utilized by the second defendant for a purpose other than what was agreed according to him, he sought to cancel the agreement and to recover the R500 000,00. This forms the basis for his primary claim in the action.

3. The defendants deny the conditional term. They plead that the monies paid by the plaintiff were simply intended to be a capital injection into the business of the first defendant to enable it to service its existing contracts for which contribution the plaintiff would acquire a 50% member's interest in the first

[1] Judgment of the Eastern Cape Division, Grahamstown, Case No. 3433/12, delivered on 27 February 2014.

defendant once certain legal requirements standing in the way of the registration of an amended founding statement had been obviated. (It is common cause that at the time the agreement was concluded the second defendant held only a 20% member's interest in the first defendant together with one Marjana Claasen who held the remaining interest. It was recognized that to use the first defendant as a business vehicle it would be necessary first for Ms. Claasen to transfer her member's interest back to the first or the second defendant before the plaintiff and the defendant could be enrolled as equal members of the close corporation.) By the time of the trial these impediments had been removed but the plaintiff refused to sign the amended founding documents of the close corporation, thus stymieing the formal conclusion of the agreement according to the defendants who were further of view that there was no breach, and hence no basis for cancellation of the agreement.

4. The second aspect of the plaintiff's claim is for payment of three months' remuneration for services which he rendered at the first defendant's branch in Mthatha with effect from mid-March 2012 and which he claims the second defendant agreed would be paid to him at the rate of R10 000,00 per month. The defendants do not deny an agreement to remunerate the plaintiff once he took charge of the Mthatha branch, but claim that such entitlement to payment would only arise "when funds became available".

5. It is apposite to begin with the material terms of the oral agreement which the plaintiff pleads he entered into with the second defendant on or about February 2012. These are that:

"6.1 The plaintiff would purchase a tow truck which was to be utilized by the first defendant;

6.2 Once the first defendant is transferred back to the second defendant, the second defendant would transfer 50% interest in the first defendant to the plaintiff in exchange for the tow truck that would have already been bought by the plaintiff; and

6.3 The plaintiff was to be placed in Mthatha and be responsible for that branch and in exchange for his service at Mthatha the plaintiff would be paid a sum of R10 000.00 monthly."

7 The plaintiff pleads that in line with their oral agreement, both he and the second defendant approached Ronnie's Motors, a dealer in East London, towards the end of February 2012. Together they placed an order for a truck and requested them to supply Tow-Tech with a rollback fitted to it. It was anticipated and agreed that on notification by Ronnie's Motors that the adapted vehicle was ready for collection, the first defendant would pay for it from the funds advanced by the plaintiff to it for such purposes which were in fact deposited to an account nominated by the second defendant in two instalments of R300 000,00 and R200 000,00 respectively in March 2012. That notification came in May 2012, but the defendants failed to pay the purchase price for the adapted vehicle. The plaintiff avers that that constituted a breach of the agreement entitling him to cancel, which he did by letters addressed to the defendants dated 7 November 2012.

8 The defendants deny that these are the material terms of their agreement with the plaintiff. They plead that the following terms were instead agreed between them and that payment of the R500 000.00 was made consonant therewith:

"3.2.1 Once there had been cancellation of the Sale to the Close Corporation a new "partnership" was to be formed i.e. 50% of the members interest in the First Defendant would be transferred to the Plaintiff

3.2.2 The sum of R500 000.00 was to be injected into the business

3.2.3 Further capital in the sum of R500 000.00 was to be injected at a later indefinite stage.

3.2.4 The purpose of the cash injection of R500 000.00 was to ensure that the contracts which had been entered into could be honoured."

9 The defendants attached to their plea a copy of a handwritten note of a consultation held by the plaintiff and the second defendant with the latter's attorneys in which the "material terms" referred to above are purportedly captured (Annexure "NJP 2"). It is obvious however that the pleaded terms are not a verbatim extract from the attorney's summary.

10 They concede that the parties indeed ordered a vehicle from Ronnie's Motors, but deny that it was in line with the oral agreement contended for by the plaintiff. They plead further that once the tow truck in fact became available, the first defendant did not have the funds to purchase it. They deny however that this constituted a basis for the plaintiff to resile from the agreement as he purported to do.

11 Although they do not seek any relief consequent thereupon, the defendants plead that the plaintiff's refusal to sign the amended founding statement (reflecting his acquisition of a 50% member's interest in the close corporation) once Ms. Claasen resigned on 7 July 2012, rendered the implementation of the terms of their oral agreement impossible.

12 In any event, they deny being liable to the plaintiff for either amount claimed in the summons.

13 Mr. Nzuzo who appeared for the plaintiff submitted that the only issue for the court to determine arising from the pleadings and which is decisive of the matter is the *purpose* for which the monies were transferred by the plaintiff to the first defendant's account, but this is a simplistic view to take of the matter. The plaintiff bears the onus of proving, firstly, the contentious terms of the agreement; secondly, that the defendants breached the contract by failing to perform in terms thereof and, thirdly, that their failure amounted to a repudiation of the agreement entitling the plaintiff to cancel when he did.

14 It is trite that in a civil case the onus is discharged by adducing credible evidence to support the case of the party on whom the onus rests. Here the onus rests on the plaintiff. Where there are two mutually destructive stories he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. This is what Mr. Nzuzo urged upon me to do, that is, to accept the Plaintiff's version and to reject that of the defendants.

15 In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of the case and, if the balance of probabilities

favour the plaintiff, the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.[2]

16 It is so, as was submitted by Mr. Nzuzo, that not much was placed in dispute in the pleadings, but the parties are diametrically opposed on the essential issue of what they agreed concerning the payment of R500 000,00 which was advanced. The date when the parties decided on the purpose for the payment had its own bearing on the matter, as I will shortly demonstrate.

17 The plaintiff in his testimony was resolute that the purpose of transferring the monies to the banking account nominated by the second defendant was "purely" to purchase a vehicle which was to be used in the "Transkei" for recoveries. This is the area he was to assume responsibility for. Tow-Tech owned five vehicles at the time, so he explained, only one of which was serviceable. He clarified that an additional vehicle was essential to their enterprise going forward because they might lose business if one of their vehicles was on one side of the vast area covered by the first defendant and a client needed to be serviced at the other end. He added that this was also the request of Tow-Tech's chief client, First Accident Management ("FAM"). Both he and the second defendant attended a meeting with the managing director of FAM in Johannesburg before embarking on their joint venture. This person had impressed upon them that more vehicles meant more money. Consequently he and the second defendant had agreed on the

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[2] National Employee's General Insurance Company Ltd v Jagers 1984 (4) SA 437 (E) at 440 E – F.

acquisition of a new vehicle as an "absolute" necessity. He only had R500 000,00 to contribute towards this end. If they could have bought two vehicles for this price this is what they would have done. This formed the basis for their visit to Ronnie's Motors in East London a few days later where they enquired as to prices. They realized that the cash which he had available would only buy a single vehicle. They ordered a demo model to be fitted with a rollback, R15 000,00 cheaper than a new vehicle, for R469 000,00. They then went to the second defendant's attorneys to draw up an agreement.

18 The expectation was that he would pay cash for the vehicle once it became available, but the second defendant urged upon him to pay the monies into an account nominated by him (purportedly that of the first defendant) rather than paying the dealer directly in order to enjoy "the tax benefits." He was advised that the first defendant was a vat vendor and so would be entitled to recover the "value added tax" ("VAT") back on the purchase price within a space of about two months thereafter. Two weeks after the order was placed, he paid the first tranche of monies to a banking account nominated by the second Defendant once he had moved around certain of his investments. This was a sum of R300 000,00 which, it is common cause, was deposited to an account held with First National Bank in the name of "The Mobile Body shop CC…. T/A Tow-Tech Recovery Services" on 2 March 2012. This is the same entity as the first defendant, but is not in dispute that this was not its official banking account at the time. Rather it was a prior account under which Tow-Tech had operated when the second defendant was the sole member of the first defendant before he had disposed of 80% of his shares in the business to Ms. Claasen. He paid the balance of R200 000,00 into the same account on 12 March 2012.

19 The plaintiff expected a delay of about six weeks before the new vehicle would become available. In the meantime, he went to Mthatha where he was to run the "Transkei" operation to familiarize himself with the road etc. Six weeks later the vehicle had not yet surfaced. Upon making enquiries with Ronnie's motors he learned that it had in fact become available and that the second Defendant had been notified in this regard, but had failed or refused to pay for it. When he broached the subject with the second defendant the latter advised him that he was going to see if he could arrange to finance the purchase. This displeased him extremely and made him suspicious because he had always been under the impression that the monies were sitting in the bank account in readiness for the delivery. He approached the attorney upon whom they had been waiting to draw up the business agreement but she was not prepared to deal with him on the basis that he was not her client. He believes that she must have contacted the second defendant because he called him minutes later and said that he wanted to see him. In a meeting in East London about two days later the second defendant informed him that he was closing the business. His response to him was that he should do what he wanted because he wanted out of the situation.

20 The plaintiff later consulted an attorney who advised him to lay a criminal charge of fraud against the second defendant, which advice he followed. Shortly after the second defendant was served with the summons to appear in court on this basis, he called the plaintiff to go and sign the amended founding statement of the first defendant, which he refused to do. He told him that he was not going to "sign for a CC" whose business had closed. Regarding the recovery of his monies paid to the business, the second defendant intimated to him that he would sell off the

vehicles and see what he got out of it, whereupon they would go “half, half,” but he does not know what happened after that. He received nothing back however.

21 Under cross examination he was presented with the file note of the attorney with whom he and the second defendant had met to discuss what was going to be in the written agreement (Annexure “NJP 2” to the plea). Although on the face of it the date on this document appears to be 7 March 2012, he was not convinced that this could be correct, especially since it postdates the first payment which he advanced to the second defendant on 2 March 2012, whereas he was of the view that the meeting had definitely preceded the payment of his contribution.

22 His understanding of the heads of agreement was that he was to acquire a 50% share in the business after the R500 000,00 was invested on the agreed basis, that is by the purchase of the new vehicle. The point in the summary: “Intention of further R500 000.00 @ later stage - indefinite” meant according to him that should the business be profitable enough to warrant the purchase of an additional vehicle, he would bring a further sum of money in from the United Kingdom, but this was not “part of” the 50% share in the business. In his view, if a further contribution was advanced it would probably have been on a loan account basis. In response to the submission put to him that no mention is made in Annexure “NJP 2” of the purpose stated by him, namely to purchase a vehicle, but simply of a cash injection “to keep contracts running”, he clarified that it was exactly for that objective that it was necessary to have the vehicles. They were critical to the running of the business.

23 He conceded that he had bought into the business of the first defendant blind as it were because he did not consider its financial position but rejected the notion that this somehow meant that he should forfeit his money because he ought to have been more diligent before investing. He did not agree that at the time of his pitch to the second defendant the business was "in trouble". Had the vehicle been purchased as was intended it would in his view have kept the contracts going "beautifully" and would also have generated a sufficient income for him to "at least get a salary out of it". He also disagreed that Tow-tech needed "to get back on its feet", in the sense that it was struggling financially at the time the oral agreement was concluded. On the contrary, the only challenge it was facing was that it needed vehicles for contracts to be run.

24 He acknowledged that the business would obviously have running expenses but he claims that he and the second defendant never spoke a word about these. He agreed though that what was to be recovered by way of a VAT refund after the purchase of the vehicle, together with the difference between his capital contribution and the purchase price quoted by Ronnie's motors (approximately R100 000,00), would indeed be utilized for running expenses of the business, such as the repair of vehicles. As for the registration of the vehicle he always understood that it would be owned by the close corporation and not be registered in his name.

25 To put into context his prior involvement and dealings with the second defendant he explained that he had previously made a loan to him. Although this time he paid the cash sum based on acquiring an interest in the business, he claims that he was tempted to rather regard the investment as a loan account when he

received nothing "for what (he) dished the money out for." In fact, he had anticipated that there might be an issue with the payment to the second defendant because when he deposited the money to the account which he did he had expressed the hope that the monies were not about to be utilized by him to "clear up an overdraft". Since the second defendant had not given him any assurances in this regard he added the rider that "until the paperwork is sorted out this time this is considered as a loan."

26 He denied that he was the one to approach the second defendant to become involved in the business. Instead the latter approached him and informed him that he was wanting to "take his old company back" and that he desired a partner. The reason for the partner, so the second defendant informed him, is that he needed someone with money to purchase vehicles because he was extremely short of these to operate effectively. It transpired that when he had previously made the loan to the second defendant three years before concerning a vehicle, he had hoped then already to become a partner with him in the business, but the latter had been reluctant to have him come on board on such a basis.

27 He explained that although it would take some time to transfer the business back to the second defendant (at least two weeks in his estimation), and a delay of about six weeks for the adapted vehicle to be delivered, he was happy to part with the money into the Tow-Tech account in the meantime (with the added benefit of getting the VAT back), because the vehicle would be "integrated" into the business of which he would in due course be getting a 50% share. The acquisition of the vehicle was however entirely central to the deal. This is evident from his logical reasoning that "if the vehicle was not purchased I would never have intercepted in

the business at all, because it would be like buying a garden service without lawnmowers."

28 He disagreed that he had abandoned the business in Mthatha or that he was responsible for Tow-Tech's demise in doing so. On the contrary, he stated that he had left to come and investigate with the second defendant's attorneys several months after the fact why the business agreement promised was not coming to the fore. It was only when he learnt from the second defendant that he was closing the business that he decided not to return to Mthatha. He conceded however that even before he knew this for sure, he had "smelt a rat" and had moved his possessions off the Mthatha premises. He was happy to return, so he explained, if he "got to grips with the situation", but since the contract was not forthcoming and given the second defendant's advices to him of the closure, there was no need for him to return there again.

29 The second defendant testified that at the time the oral agreement was concluded, he was only a nominal owner of a 20% share in the close corporation together with Ms. Claasen to whom he had sold the business and his shares. She was expected to acquire his member's interest as well once she had paid the purchase price in full. Consequently, he was not involved at all in the day to day running of the business. She even operated a separate banking account for Tow-Tech under her watch. Evidently, he needed to explain this background to understand why and how it had come about that the plaintiff paid the capital contribution to the account which he did. As an aside there is in my view nothing sinister about the fact that he nominated the Tow-Tech account over which he had control as an interim measure under the circumstances, because it is common cause

that Ms. Claasen had no interest in his dealings with the plaintiff. It was his shares in the business he was disposing of.

30 The second defendant had previously enjoyed the benefit of a loan from the plaintiff. The prequel to their last association, according to him, is that he had called the second defendant to inform him that he had just made the final payment on the loan when a discussion coincidentally ensued about the status of the business. The plaintiff conveyed to him that he was disappointed that he would no longer be receiving the monthly income from the loan and asked what had happened to the business. He informed him that he had sold it to Ms. Claasen, but that she was experiencing problems because her husband also owed a competing towing business (Buffalo Towing), and FAM were acting on the principle that there was a conflict of interest between Tow-Tech and that business and had threatened to have their towing quota cut in half. As a result, she had wanted to resell the business to him for basically no value. He had not yet made any decision regarding the option placed before him by her, because he did not have the funds to run the business.

31 It was under these circumstances that the plaintiff asked whether there was a possibility that he (the second defendant) could take the business back on the premise of him coming in with him as a partner. Ms. Claasen was still willing to do so it transpired, but he considered it a prerequisite to establish as well whether the business would still enjoy the support of FAM as he was uncertain how much damage had been done by its having been taken over by Buffalo Towing. A meeting with the CEO of FAM in Johannesburg (together with the plaintiff) followed. They were assured that FAM was happy with Tow-Tech’s services and

would certainly give them, this partnership of the two of them which was in the making, their support. However, no prescription was given to them by FAM that they would towards this end be required to buy another rollback truck.

32 Up until this point nothing was discussed between them concerning what sort of investment was needed for their enterprise or how they were going to take Tow-Tech over or back from Ms. Claasen. He emphasized though that it was an expensive business to run entailing the payment of fuels, insurance and wages. He reasoned that he could not go forward without the financial input of the plaintiff which investment he accentuated, at the prompting of his counsel, was to keep the current contracts of the business going and the existing assets in a proper state of repair rather than specifically to buy a new vehicle.

33 Rather than relating what he and the plaintiff had in fact discussed and agreed around these critical matters (an essential matter for the formation of their "partnership"), he offered, almost as an *ex post facto* assessment of the situation, that repairing Tow-Tech's third rollback vehicle (which was one of three in the fleet but which was nonoperational at the time) at an approximate cost of R30 000, 00, would have been preferable. He reasoned that he would rather have just maintained the vehicles owned by the business and which had been in use prior to Tow-Tech being sold before spending on new vehicles.

34 At the prompting of his counsel, the second defendant offered a long explanation to justify how it had come about (co-incidentally consistent with the plaintiff's pleaded case) that they had approached Ronnie's Motors together and in fact placed an order for a rollback truck. He repeated that it was the plaintiff's idea

(and went into detail why it was important to the latter from an operational point of view to get a new rollback truck), but hastened to assure the court that it was an extra and an unnecessary expense which he himself could not (not did not as a fact) support.

35 Despite his professed antipathy to the plaintiff's idea, he failed to convincingly explain in my view then why he went along with the order, in February 2012 already, even before the plaintiff had paid the capital contribution to him and when the formation of their joint enterprise was still in its infancy. He sought to set the record straight in this regard by offering the justification that, since he only expected delivery of the adapted vehicle within about 16 weeks, he was confident that if business carried on like he had run it before it would generate enough income in time to pay cash for at least the truck - the tractor part of the vehicle, which was approximately R250 000, 00. As for the rollback (priced at approximately R190 000, 00), they would be able to finance that aspect of the purchase.

36 Under cross examination on this issue he averred that there was in fact money available from the funds which the plaintiff contributed to pay for the tractor part once the vehicle was ready for collection, but that the plaintiff had instead advised him that they should not use the cash because they were going to need it to run the business. This was a startling revelation and new evidence which was not put to the plaintiff when he testified, bearing in mind the latter's testimony that he was unaware that Ronnie's Motors had even advised the second defendant that the tow truck had in fact become available, and that he had fobbed them off. This evidence is certainly inconsistent with the defendants' plea that the (only)

reason why they did not take delivery of the vehicle was because they had no funds to do so.

37 Asked how he and the second defendant had determined what amount was needed as a capital investment he claimed that they never really had a fixed amount in mind. It was only once they were in the meeting with the attorney that the plaintiff suggested a figure of R500 000, 00 when asked by her how much he was putting in. A statement by him which firmly settles in my mind that he is mistaken about the fact that the meeting with the attorney followed rather than preceded the first cash deposit on 2 March 2012 is evident from the following extract from the transcript:

> " So before the meeting with the attorney you did not really know what money was going to come into the business?
> ---Well there was, to be honest he probably did say that he had R500 000.00 available, it was never like (said) that is what he was *going to be* putting in."
> (Emphasis added)

38 In contradiction to his earlier testimony that the critical issues were only discussed at the offices of the attorney on his version after the plaintiff made the first deposit, he testified that they had discussed what they needed to in Johannesburg even before they parted. This makes sense because he also testified that on their return to East London afterwards (which must evidently have been before the month of March), he advised Ms. Claaasen that they wanted to get going with Tow-Tech by 1 March 2012 already even though the formal transfer of the business back to the second defendant could only be concluded later.

39 Concerning the plaintiff's taking over of the business in Mthatha, he bemoaned the fact that despite his hope that the plaintiff would reliably take care of business there to alleviate the burden on him to be in two places at once as it were, he was disappointed him because he did not do a good job. He went so far as to allege that the plaintiff's non-performance was "probably the main and only reason that (they) lost business in Mthatha", yet equivocated when asked to elaborate in this regard. For one he attributed the demise of the business generally to the slow reaction time of the Mthatha drivers (he did not single out the plaintiff) and that they were difficult to reach via the call centre. The fact that Buffalo Towing had not been operating in Mthatha during the period that Ms Claasen and her husband were at the helm of Tow-Tech also got a mention, but that reason clearly had nothing to do with the plaintiff's performance or lack of it. He also appeared to suggest, by referring to the plaintiff's request at some stage to take out drawings of R100 000,00 from the business to purchase machinery that he wanted to utilize in Port Elizabeth, that he was distracted from Tow-Tech's business by personal interests. He roundly rejected the plaintiff's version that Mthatha failed because the tow truck he had paid for did not materialize. He was further adamant that the plaintiff had not ever even complained of any concerns in running that branch. On the contrary, he said that his abrupt departure had come upon him entirely unexpectedly. Elsewhere however he conceded that he had sought to address with the plaintiff the issue of Mthatha lagging by urging upon him to pick up on his response times, but that he "just did not seem too worried about that". He also appeared to concede that the plaintiff had indeed complained to him that they were not busy in Mthatha.

40 He alleged that there was no issue on the part of the plaintiff in the delay in him re-taking transfer of all the shares in the close corporation before being able to ask him to sign an amended founding statement. He had no knowledge that the plaintiff had approached the attorney directly concerning the anticipated written contract which was not coming to the fore. In any event, as far as he was concerned, no contract could have been produced until the prior sale to Ms. Classen had been cancelled. He himself, spurred on by several calls from the plaintiff to enquire what was happening with the process, would call her each time to update him. Largely the delay had to do with the fact that Ms. Claasen had not signed off on the paperwork. He was not himself responsible for any delays.

41 Although the plaintiff's evidence concerning payment to the nominated banking account and the isolated reason therefor went unchallenged, the second defendant claimed that had discussed with him whether that account could be used for the running of the business generally in preference to opening a new one which would entail the unnecessary filling out of forms etc. He also averred that he had pertinently informed the plaintiff that there was a R150 000, 00 overdraft attached to the account. He claims that the plaintiff was purportedly fine both with them using the existing account and the fact that it was overdrawn. Indeed, he had intimated to him that it was no problem at all to use the overdrawn account and reasoned that, as the business grew, they would "just sort it out". These aspects are notably at variance with the plaintiff's case, but were not put to him when he testified.

42 Asked what the monies the plaintiff paid into the account had in fact been used for, the second defendant listed rentals, insurance, fuel, wages, salaries, spares

and maintenance on the truck. A look at the sample of bank statements over the critical period (Exhibit "B"), even in February 2012 before the commencement of the plaintiff as a "partner", reveals that he used the Tow-Tech account as his own even though he claimed to have a separate personal account. As stated before there could have been no issue with this based on the plaintiff's acquiescence that it was going to benefit the business in due course by a VAT refund, but under cross examination the second defendant purported to pass off debits on the account as being legitimate business transactions of the newly formed business between him and the plaintiff (even in February 2012 before the new enterprise commenced) which on his version the plaintiff had purportedly agreed should be made. Payments made against the deposits of the plaintiff were however patently applied toward the rental of his house (which he justified as business premises), security monitoring fees for his home, his personal medical aid (if he was entitled to "drawings" it begs the question why the plaintiff should not also have been reimbursed for his efforts once he commenced operations at the Mthatha branch since there would indeed have been funds available from his own contribution), payments for a private Isuzu "bakkie", telephone expenses, Tracker premiums (which he claimed were for the business fleet of vehicles even though he should not have had any responsibility to pay this from a private account once Ms. Claasen took over the vehicles), insurance premiums, Vodacom (which he claimed related to cellphones in use by the business to contact drivers) and "salaries".

43 On either version, the employment of staff other than themselves and their salaries was never discussed. The bank statements were only entered into evidence when the second defendant was under cross examination. Save for what he was quizzed about by plaintiff's counsel, he made no real attempt to justify or explain

the transactions on the account (especially the cash ones) which, on the face of it, do not appear to relate to the new joint venture.

44 He insisted that although he and the plaintiff had discussed the question of remuneration, no monthly amount was ever discussed. It was premature in his view for them to talk about any kind of entitlement. As far as he was concerned the plaintiff was aware that it would take time to grow the business before they could benefit from it by drawing salaries, or profits, as he preferred to call it.

45 The second defendant claims that that when he learned of the plaintiff's unhappiness and that he had left Mthatha, he informed him that the business was closing because he could (on his version) not run it without his capital. By this stage, however, he had already been paid the capital, and evidently used it as he desired, and since he knew that no more funds were forthcoming from the plaintiff as an additional capital contribution, this reason appears contrived. Given the justification offered by him for his decision to close the business (which settled in the plaintiff's mind that he was going to prosecute him for fraud), the reason which he furnished under cross examination for why he still called on the plaintiff afterwards to sign the" CC documents" to officially come on board as a member, is somewhat fatuous:

> "I thought that we could try and mend ways and obviously I had been charged with fraud and nobody likes to be charged with fraud. I felt it was my duty to phone him and I said to him that the documents are ready to be signed is he interested in signing. It was more of a courtesy than anything else, but that was maybe a way of reconciling possibly.
> So you wanted to reconcile with him? ---Well, not that I wanted to reconcile with him. I mean obviously we would come to some sort of arrangement…"

46 The defendants also adduced the evidence of Claudia Barachieby, the attorney who drafted the heads of agreement. Without being asked to independently verify the date upon which the parties consulted with her - she could easily have done so since she claimed to use Legal Suite which would have recorded a "more comprehensive version" of her notes, she was prompted by counsel to conclude, with reference to her summary (Annexure "NJP 2") that the consultation took place on 7 March 2012. She confirmed that the parties had approached her to draw up a "partnership agreement" but indicated that she knew that the vehicle of the existing close corporation would be used toward this end, and that each of the parties would hold a 50% member's interest in the said entity in due course. She was not drawn at all by counsel for the defendants on any of the peripheral issues, i.e. the delay in preparing the new agreement or amended founding statement of the close corporation, neither was she asked if the plaintiff had indeed been a pain in her side about producing the written agreement which she was expected to draft. Under cross examination she confirmed that her summary did not cover everything that the parties had discussed in her presence. She conceded though that mention had been made of contracts running in Mthatha. Regarding the purpose of the transfer of the R500 000,00 she recalled that it was going to be spent on the assets required to keep the contracts of the business running, more particularly tow trucks.

47 Asked pertinently what exactly the monies were going to do in respect of those vehicles and whether it would buy or service them, her response, recorded in the extract from the trial transcript which follows, accords with the plaintiff's version:

> "My understanding was that the CC had been, well it had been sold previously and the owner that it was sold to had run the assets, being the vehicles, the tow trucks into the ground and most of them were no longer operating and in order to keep the contracts running, obviously being a large income for the business, they had to invest in the purchasing of further tow trucks in order to honour their contracts.
> So they indicated to you that they want to go and buy, utilize the R500 000.00 to buy a truck? ---I did not know whether they would use the entire R500 000.00 but yes they did indicate that."

48 If I may begin with the aspect of the date of the consultation, the second defendant was asked on three occasions to reflect on when exactly their meeting with Ms. Barachieby had taken place and he hesitated to confirm that it was definitely on the 7th. He replied once that he did not really remember and on another occasion that he did not know. There are several indicators, even on his version, that the meeting could not have been held before the first payment was made by the plaintiff. I have highlighted one of those contrary indicators in paragraph 37 above. Further, according to both parties the Johannesburg meeting and the placement of the order with Ronnie's Motors happened in February 2012. The second defendant also informed Ms. Claassen that he wished to trade as Tow-Tech by 1 March 2012 and in fact commenced business on that date. It is therefore unlikely that the meeting on which occasion the summary was drafted took place after the effective date. Indeed the second defendant also deposed to an affidavit in an application for rescission of a judgement granted in the action that he and the plaintiff had come to their agreement during or about the end of February 2012 that that the plaintiff would acquire a membership interest from him.

49 In the result I am satisfied on the probabilities that the seminal meeting was held in February rather than on 7 March 2012 after the plaintiff made the first payment of R300 000,00 to the second defendant. What the parties read as a "7" may well have been a greater than sign – consistent with Ms. Barachieby's style of note-keeping. The month of March was evidently relevant because the parties had indicated that they wanted to be up and running by then, but the symbol written next to it could quite easily have been read as a figure "7".

50 The submission was made by counsel on behalf of the defendants that the contemporaneous note of 7 March is "fatally destructive" to the plaintiff's claim, but I do not agree. If by that the defendants mean that the probabilities favour its version that the plaintiff bought "willy nilly" into the business and even parted with money before they met with an attorney to discuss the outline of a basic agreement, rendering the conditional term that the monies were to be used for the purchase of the tow-truck an "afterthought", it loses its force by my finding above that the order was indeed the other way around, i.e. that the meeting with the attorney preceded the first payment and was probably held in February 2012.

51 The plaintiff in my view made a favourable impression as a witness. His version was consistent and entirely probable against the background of all the evidence. He gave a logical and plausible account of the basis upon which he was prepared to engage with the second defendant and why that was so. The purported criticism of him testifying contrary to how he did in the criminal trial fizzled out to nothing and was evidently based on a misunderstanding of his case that the purpose of paying the capital was for the close corporation to buy a vehicle without appreciating the essence of his version, which is that the purchase in itself was to

constitute that investment. If the plaintiff can be adjudged for anything it is for his naivety and blinding trust in the notion that the second defendant would respect his investment on the basis on which he was prepared to get involved, and the lifeline thrown to him to get Tow-Tech up and running again. The fact that the plaintiff preferred to regard the second defendant's misplaced investment as a loan instead when he disappointed him (a legal construction I expect his attorneys disabused him of), reflects his old-worldly style of doing business on the basis of a handshake and a "good faith" outcome.

52 The second defendant made much of the fact that it was the plaintiff who approached him to do business rather than the other way around but it appears to me to be more likely that the second defendant was desperate to recover Tow-Tech and needed the plaintiff's financial input which was extended to him on a conditional basis. If the initiative and interest had come from the plaintiff, the second defendant could have demanded a higher price for the acquisition of 50% of his shares, especially given the fact that he had sold it to Ms. Claasen for several millions. On the probabilities the second defendant was between a rock and a hard place and had to accept the plaintiff's help on the terms indicated by him.

53 The second defendant failed to impress me as a witness. He was evasive, speculative, longwinded and opportunistic. My summary of his evidence above is already infused with concerns regarding his poor performance in this regard and the probabilities which are patently against his version. The most notable aspect of his evidence is his turnaround to explain how it came about that they placed the order with Ronnie's Motors for a tow truck he was vehemently opposed to getting in the first place and how, after the fact, he supposedly could afford to pay for at

least part of it but that the plaintiff had purportedly supported their not making use of his contribution to pay for it at all.

54 It is improbable in my view that the plaintiff would so easily have relinquished the single condition upon which he was prepared to enter into a joint venture with the second defendant, more especially if he had been apprised of how his money was being appropriated in the Tow-Tech bank account operated by the second defendant and how badly the business was fairing on the latter's version at the time.

55 It is more probable, as the plaintiff testified, that they did not discuss the issue of running costs and that he was unconcerned in this regard because he legitimately expected that his contribution was being safeguarded in the account to which he had paid it. The way the second defendant reacted, when exposed for having used the funds entrusted to him for the specific purpose, is also entirely consistent with him having gone on the defensive to protect himself - and co-incidentally supports the plaintiff's case that he had acted contrary to their agreement. His reaction after being charged criminally for fraud, in wanting the plaintiff to sign the amended founding statement which had been so long delayed (but now emerged with some alacrity) is also indicative of the trouble he saw himself in and supports the plaintiff's case on a whole.

56 In the premises I have no hesitation in concluding that the plaintiff's version is true, accurate and acceptable and that the defendants' version is false and falls to be rejected. On this basis it follows that the plaintiff has proved on balance of probabilities that it was a conditional term of the parties' agreement that the

monies invested would be used for the particular purpose stated by the plaintiff and that the second defendant breached the terms of the agreement when he failed to apply the monies accordingly. The plaintiff was and remains in all the circumstances entitled to cancel the agreement and to recover his contribution.

57 It was submitted by counsel on behalf of the defendants that I should exonerate the second defendant of any personal liability on the basis that the plaintiff contracted with the close corporation, but it is abundantly plain from the evidence that although he represented the close corporation, he was disposing of his personal shares in Tow-Tech to the plaintiff. He also declared as much in his affidavit filed in the rescission application. But inasmuch as the monies were paid to the close corporation and used in furtherance of Tow-Tech's business and since it gained from the services offered to it, it appears to me prudent therefore to hold both the defendants (the first defendant as constituted post the sale of Ms. Claasen's shares back to the second defendant) liable for the plaintiff's damages.

58 As for the claim of remuneration I accept the plaintiff's evidence that the second defendant agreed separately to pay him for his services rendered in Mthatha (whether in his personal capacity or on behalf of the re-constituted close corporation) in the stated sum and that the R10 000.00 per month represents fair damages in this regard over the relevant period.

59 In the premises I issue the following order:

1. The parties' agreement is declared to have been validly cancelled.

2. The defendants are directed to pay to the plaintiff jointly and severally the one paying the other to be absolved:

   2.1 damages in the sum of R530 000.00;

   2.2 interest on the said amount at the legal rate of interest calculated from date of judgment to date of payment; and

   2.3 costs of suit together with interest thereon at the legal rate calculated from date of taxation to date of payment.

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B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 16 & 17 November 2016

DATE OF JUDGMENT: 3 May 2017 (Published by email)

Appearances:

For the plaintiff: Mr. Nzuzo instructed by Dengana Attorneys, Suite 7, Ground Floor, Zanempilo Building, 22 Oxford Street, East London (Ref. FTD/zs/W186/2012)

For the defendants: Ms. Mostert instructed by Changfoot Van Breda, 57 Recreation Road, Southernwood, East London, Ref. JC Heunis/eh/Pre42/0004)