REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 42609/11

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

13 February 2013 FHD VAN OOSTEN

In the matter between

ERNEST JACQUES DU TOIT PLAINTIFF

and

MARGARET WYNNE BREDENKAMP FIRST DEFENDANT

GARY MARK CARLISLE SECOND DEFENDANT

*Trial - absolution from the instance after closure of plaintiff's case - considerations arising - defendants absolved from the instance.*
*Contract - interpretation of the word "confirmation" as used in sub-clause - principles applicable - meaning of word in context used uncertain and may lead to ambiguity- evidence aliunde admissible to arrive at true meaning of the word and clause.*

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J U D G M E N T

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**VAN OOSTEN J:**

[1] In this action the plaintiff claims payment by the defendants in the amount of R617 079.12 together with interest thereon "at the prime rate" and costs of suit. The

claim arises from a written cancellation of a sale of shares agreement that had been entered into between the plaintiff, as purchaser, and the defendants as sellers, in terms of which the total shareholding in Honey Fashion Accessories (Pty) Ltd (Honey) was sold to the plaintiff for a purchase consideration of R50m. The cancellation of the sales of shares agreement, which was concluded 4 July 2011, resulted from the non-fulfillment of the resolutive condition in the sales of shares agreement and the plaintiff's failure to pay the purchase price as provided for in the agreement. I shall henceforth refer to the cancellation of the sale of shares agreement as "the agreement". The agreement further provides for repayment by the defendants of two loan accounts, one of which is the plaintiff's loan account and the subject matter of this case. It is recorded as follows in the agreement:

"6. It is recorded that [the plaintiff] lent and advanced the following total amounts to the company[1] prior to the closing date[2] and save for such amounts, the purchaser warrants that no other person or entity has loaned and/or advanced any amount to the company other than as reflected in the closing accounts (as defined below)[3]:

> 6.1 ...
>
> 6.2 Ernest - as to R2,800,000.00 (which amount is subject to confirmation within 10 days after the closing date from the bank account receipts of the company and failing such timeous confirmation will be deemed to be R2,800,000.00 ("the Ernest loan account").

In terms of clause 7.2 of the agreement the plaintiff's loan account would be repaid by a payment of R1m on the closing date and as against delivery and transfer to the sellers of the shares, and the balance within 60 days after the closing date. Against this background the plaintiff pleads that the amount of the plaintiff's loan account was not confirmed within the required 10 days "by the first and second defendants with reference to the bank account receipts of Honey" and that it is "accordingly deemed to be R2, 800,000.00 in accordance with clause 6.2 of the agreement". The amount

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[1] Honey.
[2] 5 July 2011.
[3] The closing accounts referred to are not annexed to the agreement. The plaintiff was unable to identify or furnish any information as to which documents were supposed to have been attached to the agreement.

claimed is arrived at as follows: the defendants have paid an amount R2 182 930.88 which if subtracted from the amount of R2 800 000.00 leaves a balance of R617 079.12 "owing and payable" to the plaintiff.

[2] The plaintiff was the only witness called to testify. I do not propose to traverse the plaintiff's evidence in any detail. I will refer to the relevant parts thereof where necessary. The plaintiff intended calling an accountant as an expert witness but this was objected to by counsel for the defendants. I upheld the objection, to which I shall revert, and the plaintiff's case was closed. Counsel for the defendants applied for absolution from the instance. This is the application I now proceed to deal with.

[3] The starting point and of vital importance to the plaintiff's case, as correctly accepted by both counsel, is the correct interpretation to be afforded to clause 6.2 of the agreement, more in particular the words in brackets (the deeming provision). It is immediately apparent, upon a plain reading of the deeming provision that it does not confer a duty to confirm or to obtain confirmation of the amount on any particular person, be it the plaintiff, the defendants or any third party. The plaintiff's allegation that the defendants were required to do so, accordingly and in the absence of a prayer for rectification, cannot be sustained.

[4] The meaning of the word "confirmation" used in the deeming provision in my view is uncertain and may lead to ambiguity. As a first canon of interpretation the meaning of the words used must be established (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [17] *et seq*). I have been referred by counsel to the meaning of the word given in the Oxford Dictionary of English (second ed), which is "the action of confirming something or the state of being confirmed". The word has its origin in middle English via old French from the Latin word "confirmare" meaning "to make firm, establish". The verb "confirm" in turn is defined as "to establish the truth or correctness of [something previously believed or suspected to be the case].

[5] I am satisfied that there in fact is uncertainty concerning the meaning of the word "confirmation" in the context used. It is accordingly permissible to have regard to evidence *aliunde* in establishing its true meaning. In this regard the plaintiff testified that the exact amount of his loan account, at the time of concluding the agreement, was

anything but certain. The financial aspects of Honey, he testified, were dealt with by its Chief Financial Officer, Ms Nancy de Vries. The monthly management accounts of Honey were made available to him but his perusal thereof was confined to monitoring the financial and trade position and progress of Honey. The amount of his loan account is reflected in the May 2011 balance sheet R2,44m. How the amount could have jumped to R2,8m in the two months that followed until conclusion of the agreement, he was unable to explain. During the negotiations preceding the conclusion of the agreement, the plaintiff testified that the amount of his loan account was "approximately R2,8m", or "somewhere in the vicinity of that amount" and that no proper records of the loan account had been kept. Following the negotiations Ms de Vries was instructed to compile a reconciliation of the loan account in order to determine the *quantum* of the balance outstanding. The defendants in turn, he maintained, assumed the responsibility to do so, as the defendants in having been restored into possession of business of Honey, exercised control over Ms de Vries. The plaintiff readily conceded that a proper reconciliation of his loan account based solely on Honey's bank account statements and receipts of the company[4] was impossible: it could only be achieved by a formal audit requiring further documents and evidence. Finally, he for no apparent reason never requested Honey's bank statements from either Ms de Vries or the defendants.

[6] It is common cause between the parties that Ms de Vries, through her assistant, did by way of an email with an annexure thereto, respond within the required 10 day period. The annexure to the email purports to be a reconciliation of the plaintiff's loan account (the defendants' reconciliation) which the plaintiff testified one can assume, was based *inter alia* on Honey's bank statements. The defendants' reconciliation, at the bottom end, reflects the amount due as R2 381 711.44, which the defendants plead they have paid in full. No evidence was led from the plaintiff concerning the exact amount that was paid to him by the defendants. Be that as it may, the relevance of the defendants' reconciliation, if any, in the light of the provisions of clause 6.2, must now be considered.

[7] On the wider interpretation of the word "confirmation", being establishing the correctness of the amount owing, to which I have referred above, which I prefer, the

[4] As provided for in clause 6.2 of the agreement.

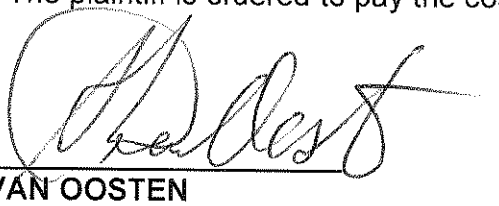
defendants' reconciliation indeed constituted the "establishment" of the correctness of the amount owing on the loan account. The process of course could have resulted in establishing either that the amount of R2,8m, or another amount, was owing. It is precisely for this reason that the words "which is subject to confirmation" have been inserted in the clause. This interpretation, in my view, is based on plain logic and affords business efficacy to the process envisaged by the parties and their manifest intention to reach finality on the amount owing. The parties clearly intended to provide for a mechanism to properly establish the *quantum* of the amount owing. The only person, who could do so, was Ms de Vries, as she, as the chief financial officer of Honey, had access to all financial records of Honey. The plaintiff's notional amount of R2,8m was used in the agreement merely as a pointer or indication of the amount that might be owing. But the "confirmation" process was subjected to a time limit, as is clearly conveyed by the words "failing such timeous confirmation" appearing in the second part of clause 6.2. Thus seen, the second part of the clause simply means that in the absence of a "confirmation" in the wider sense, as I have dealt with, within the time period stated, the deeming provision would take effect. To put it differently: inaction for 10 days would have resulted in the deeming provision taking effect. It follows that the defendants' reconciliation indeed sufficed in preventing the deeming provision from coming into operation. The plaintiff relying solely on the deeming provision having come into operation, must therefore be non-suited.

[8] Finally, I turn to the ruling I have made concerning plaintiff's proposed expert evidence. During the opening addresses by counsel, counsel for the defendants formally tendered that the *quantum* of the amount owing in respect of the plaintiff's loan account, if any, be established by way of a statement and debatement of account. I allowed the matter to stand down for the plaintiff to consider the tender. On resumption plaintiff's counsel informed me that the tender was not accepted. The matter accordingly proceeded on the narrow basis of the deeming provision having come into operation, as pleaded. The expert evidence the plaintiff intended presenting was that of an auditor who according to the summary of her evidence, filed in terms of Rule 36(9)(b), had performed a "limited review" of Honey's "documentation" as it pertains to the plaintiff's loan account in respect of which she has found a number of inaccuracies. The evidence, in my view, is irrelevant to the cause of action pleaded and pursued by the

plaintiff. I will accept that, as rightly conceded by counsel for the defendants, the plaintiff disputes the correctness of the defendants' reconciliation. The details of the items in dispute, in view of the plaintiff's refusal to proceed with a statement and debatement of account, are of no relevance. The correctness of the defendants' reconciliation being disputed, insofar as clause 6.2 is concerned, has this effect: a "confirmation" in the wider sense, did *not* establish the correctness of the amount of R2,8m, resulting in the deeming provision *not* coming into operation. How the plaintiff could or should have dealt with the disputed reconciliation in pursuing his perceived claim, is not for this court to answer. The fact remains: the deeming provision did not come into operation. On this basis the plaintiff similarly fails.

[9] In the result I make the following order:

1. The defendants are absolved from the instance.
2. The plaintiff is ordered to pay the costs of the action.



**FHD VAN OOSTEN**
**JUDGE OF THE HIGH COURT**

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| ***COUNSEL FOR THE PLAINTIFF*** | ***ADV E RUDOLPH*** |
| ***PLAINTIFF'S ATTORNEYS*** | ***WERKSMANS*** |
| ***COUNSEL FOR THE DEFENDANTS*** | ***ADV HA VAN DER MERWE*** |
| ***DEFENDANTS' ATTORNEYS*** | ***FLUXMANS INC*** |
| ***DATE OF HEARING*** | ***12 FEBRUARY 2013*** |
| ***DATE OF JUDGMENT*** | ***13 FEBRUARY 2013*** |