IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **23401/2013**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED ✓

13-12-16

Date: **WHG VAN DER LINDE**

In the matter between:

BERNARD SITHEMBISO NKOSI First Plaintiff

DANNY MOSS Second Plaintiff

and

SUGAR CREEK TRADING 278 (PTY) LTD First Defendant

BAFANA TREVOR DUBE Second Defendant

BONGA HORACE BELISHA KWITSHANA Third Defendant

Judgment

Van der Linde, J:

Introduction and background

[1] This trial is about whether four businessmen concluded a partnership, or whether their commercial arrangement was either some other contract, or none at all. The two plaintiffs contend for a partnership, but the second and third defendants deny it. The witnesses were the first and second plaintiffs, and the second defendant. The third defendant did not testify. The relief sought is for an appropriate declaratur, the statement and debate of an account, payment of what is found owing, and costs.

[2] The plaintiffs handed up without objection two bundles of documents at the commencement of the trial. The first was the trial bundle of documents and the second the opposed application papers.[1] The opposed application had preceded the trial but could not be resolved for factual disputes, and referred to trial.

The parties' basic contentions

[3] The events that are relevant for the determination of the present issues play out during the two and a half years from roughly March 2010 to September 2012. The plaintiffs' case is that the partnership came into existence by oral agreement concluded at a meeting with all four individuals present during or about March 2010.

[4] The second defendant denies such an agreement, although he concedes to, if not an agreement, then at least an understanding concluded during the first half of 2010. He says that, to begin with, the first plaintiff was not present, and only became involved in the parties' business arrangements towards the end of 2010.[2] The second defendant says too that according to their arrangement, he (the second defendant) would beneficially acquire all the shares in the first defendant, sourced for the purpose of their business venture by the second plaintiff, and that the second plaintiff and the third defendant would render consulting services and were to be paid, and were paid, for these.

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[1] These were received as exhibits A and B respectively.

[2] Already on 19 March 2010 the banker with whom the second plaintiff had a business relationship, was making enquiries to see if the bank would be satisfied with the first plaintiff as a 25% shareholder in the borrower; see B3/281.

[5] It is unclear whether the second defendant argues that the agreement for which he contends was concluded with the first defendant, represented by him, or whether it was concluded with him acting personally. The likelihood is that he contends for an agreement concluded with him personally, because when the agreement for which he contends was struck, in the early part of 2010 with only the second plaintiff and the third defendant at that stage, the first defendant – although acquired by the first plaintiff more than a year earlier, for an earlier venture - had not yet been taken off the shelf and in-spanned in the parties' commercial venture.

The role of the first defendant

[6] The first defendant plays the following role in the case. The plaintiffs say that the partnership agreement was an overarching one, whereby the parties anticipated that they would capitalize on the commercial space that was then availing, in which the government was keen to involve black businesspersons in acquiring office space to let to government departments. The partnership would capitalise on these opportunities and would use a separate company as a vehicle for each separate building that they would acquire. Each building would be registered in the name of a separate company, and the company would be the lessor to the relevant government department.

[7] The first defendant was such a vehicle. It was acquired off the shelf, on the plaintiffs' case, by the first plaintiff in February 2009, before the partnership for which the plaintiffs contend was established. At that time, in 2009, the two plaintiffs and another businessman, Mr Salala Malesela, were in an earlier partnership, and were scouting around for office properties. The first plaintiff, a qualified attorney, had bought the first defendant off the shelf so long, to be used as appropriate when they, call it the first partnership, would acquire a property. In the event they never did.

[8] The second defendant differed. He said the first defendant was acquired – and by the second plaintiff - after he, the second defendant, was approached by the third defendant to

become involved in the business prospects that were opening up in the field described above. After he had agreed to become involved, on the terms described, being amongst other things that he would be the sole beneficial owner of the business they were embarking on, he had asked the second plaintiff to source a company for purposes of acquiring the property at 36 Hamilton Street, Pretoria.

How the second defendant came on the scene

[9] According to the plaintiffs the second defendant became involved at all, because the two plaintiffs and the third defendant appreciated that without a person of substantial means represented by a significant net asset value, such as the second defendant was able to offer, the banks would not extend them any loans. That is why precisely why Mr Malesela, who had an unfavourable credit profile, dropped out of the first partnership.

[10] The second defendant's version was very different. Although he acknowledged that he was approached because he had financial clout, he said that he made it plain from the get-go that if he was to be put up front to carry the financial brunt, he wanted the full and final say in the venture. He made it plain too that that meant that he wanted all the shares in the company that would be acquired, and he wanted to be its sole director.

[11] The others would be remunerated, he said, on a consultancy basis. There was a prospect to which they could look forward, he said. That was that if the first defendant acquired R1bn worth of property within five years, he (the second defendant) would give them a share in the first defendant. Until then they would remain consultants that would have to share in the R100,000 a month he would avail for consultancy purposes.

The execution of the business venture

[12] In the event the first respondent acquired the building at 36 Hamilton Street, Pretoria. The building was identified by the third defendant, but it turned out that it had just been sold. The second plaintiff persuaded the buyer to sell the property to the parties' venture, to

which he agreed. The second plaintiff did not earn a fee or commission for his efforts. The deed of sale was signed on 30 July 2010, for R27m.

[13]Thereafter the first defendant successfully tendered for the lease of the building to the Department of Public Works, who put the newly established Department of Women, Children and People with Disabilities as tenants in it. The lease was for 9 years and 11 months. The first defendant refurbished the building and the lease commenced in mid-2011.

The termination of the parties' relationship

[14]Towards the end of 2011 the second defendant and the first plaintiff fell out. The second defendant felt that the first plaintiff was always absent and not pulling his weight. This led to them agreeing, eventually, that the second defendant would pay him R150,000 to exit the venture. The second defendant never paid him the R150,000 because, said the second plaintiff, on reflection, he felt he owed him nothing, as there was never a partnership between the parties. The first plaintiff called this failure to pay a repudiation of the R150,000 agreement, which he accepted. He consequently wrote an email in which he cancelled that agreement. The first plaintiff disappeared off the scene then, at the end of 2011, at least according to the second defendant.

[15]The relationship between the second defendant and the second plaintiff soured a year later, in September 2012, when it transpired that the second plaintiff had been misappropriating moneys from the first defendant.[3] The second defendant terminated the second plaintiff's management of the property, which he had been undertaking through his trust called the Mont Blanc Trust, and substituted the third defendant for him.[4] He laid a criminal charge against him,[5] and that was the end of their business relationship.

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[3] Exh A3/304.
[4] Exh A3/293; 294.
[5] Exh A3/296.

[16]Shortly after that, the second defendant, who had been threatening for some time to sell the building because of rising expenses which he felt only he was being called upon to foot,[6] sold the building to a buyer that was first introduced by the second plaintiff. The price was some R64m net of commission.

[17]Those proceeds went into the first defendant, and are therefore now the target of the plaintiffs' action. Commercially, the question is whether the four individuals get to share equally in those proceeds, or whether they ultimately belong, beneficially, to the second defendant to the exclusion of the others.

[18]Thus far by way of introduction and background. As will have been seen, the main dispute is the nature of the agreement concluded between the parties towards the end of the first quarter of 2010. The end game is really common cause; no-one disputes that the parties fell out and that the property was eventually sold at profit.

[19]The central question comes back to the oral agreement first concluded. In this regard the parties' credibility and reliability are obviously important, as are the probabilities. In this latter regard, the focus must be on their conduct subsequent to the conclusion of the agreement, particularly as manifested in the contemporaneous documents and emails. These often carry more weight than witnesses' subsequent self-serving say-so. Before considering the probabilities, however, it is necessary to say something about the way a court resolves factual conflicts.

Weighing probabilities and credibility

[20]The manner in which a court resolves conflicting factual versions was explained authoritatively by Nienaber, JA in Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others,[7] relied on by the second defendant:

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[6] Ostensibly in conflict with the notion that only he was the owner of the first defendant.
[7] 2003(1) SA 11 (SCA).

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[21]I should say too that the *dicta* of Van der Spuy, AJ in Selamolele v Makhado[8] have also been referred to frequently:

"The onus of proof and the legal requirements as to the discharge thereof

It is common cause that plaintiff bears the overall onus of proof, ie he must prove his version that he was pushed from behind and did not fall fortuitously backwards after a scuffle with defendant. It may be that defendant has some duty of adducing evidence in support of the latter version but the onus of proof in the overall case never shifts and remains on plaintiff. See Pillay v Krishna 1946 AD 946 at 952-3. A disagreement arose between counsel for the two parties, ie Mr Botha for plaintiff and Mr Pieterse for defendant, concerning that approach which I should adopt when determining whether plaintiff has discharged the onus of proving his version on a balance - preponderance - of probabilities. The disagreement arises from the well-known statement of the law in National Employers' Mutual General Insurance Association v Gany 1931 AD 187 at 199:

'Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false.'

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[8] 1988(2) SA 372 (V), at 374.

Mr Pieterse submits that this case presents 'a classic example of two mutually destructive versions. The one excludes the other.' With that submission I agree. Mr Pieterse then quotes cases in which the dicta in Gany's case have been interpreted, ie Koster Koöperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens 1974 (4) SA 420 (T) at 426 and African Eagle Life Assurance Co Ltd v Cainer 1980 (2) SA 234 (W) at 237 - 8, the latter case being cited with apparent approval but without comment in AA Mutual Insurance Association Ltd v Manjani 1982 (1) SA 790 (A) at 793G - H. He then submits that where there are probabilities, inherent or otherwise, the Court decides on the balance - preponderance - of probabilities. At the end of the day, so he contends:

"The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence that was led by plaintiff and defendant and all their respective witnesses as well as all the surrounding circumstances of the case.'

It is clear to me that defendant's submissions tend to overemphasise a scrutiny of the probabilities of the matter as against findings on credibility. Mr Pieterse no doubt had in mind what Coetzee J stated in the case of Cainer (supra at 237F): 'Where there are probabilities, inherent or otherwise, there is no room for this approach.' (The Gany approach.) But one must be careful not to interpret those remarks as signifying that the Court's function of discerning the truth or falsity of witnesses' evidence becomes unnecessary where probabilities exist or less important when looking at the probabilities. One must not lose sight of the earlier conclusion of the same learned judge at 237H when dealing with mutually destructive versions:

'The position is simply that there is no proof, by any criterion, unless one is satisfied that one witness (sic witness's) evidence is true and that of the other is false.'

Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable. See Maitland and Kensington Bus Co (Pty) Ltd v Jennings 1940 CPD 489 at 492 where Davis J stated:

'For judgment to be given for the plaintiff the Court must be satisfied that sufficient reliance can be placed on his story for there to exist a strong probability that his version is the true one.'

(Italicised by me.) As pointed out by Clayden J. in International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (1) 1955 (2) SA 1 (W) at 13 - 14:

'Though a "strong probability" may be less than "absolute reliance" it seems with respect that an unnecessary adjective has been introduced.'

It would therefore be correct for me to say that in order to give judgment for plaintiff I must be satisfied on adequate grounds that sufficient reliance can be placed on the story of the plaintiff and his witnesses, showing that their version is more probable than that of the defendant. But one still has to go through the process of considering the credibility of the witnesses and of assessing their weight or cogency and after these processes have been completed

'what is being weighed in the "balance" is not quantities of evidence, but are probabilities arising from that evidence and all the circumstances of the case'.
See Hoffmann and Zeffertt SA Law of Evidence 3rd ed at 411. When, on the other hand, Mr Botha submits that

'in view of the overwhelming evidence tendered by plaintiff and in my view the unreliability of the evidence preferred by the defendant, the Court is not called upon to consider inherent probabilities in the matter other than those borne out by the evidence'
his submission is also not entirely acceptable. Because, in the process of determining credibility, the Court is charged with the investigation not only of seeking demonstrations of falsehood in the evidence of an individual witness but of weighing the inherent probabilities in his/her evidence showing that it may be false, though these improbabilities would, of course, be revealed by the circumstances of the case as a whole. But, as I have said, Mr Pieterse in emphasising the 'probabilities favouring defendant's version' might also have underestimated the Court's duty of examining the credibility of the witnesses on both sides. I must say something about the balance of probabilities or the preponderance of probabilities argued by both counsel. It is of course clear that the Court is not engaged at the end of the day in a mere mechanical process of balancing out the number of acceptable witnesses on the one side and the other because

'the object of the law is, or ought to be, to secure the sequence of certain results upon certain objective facts'.
See Wigmore Evidence (1981 ed) para 2498. As to the degree of probability that is sufficient for plaintiff to discharge the onus, see the remarks of Denning J in Miller v Minister of Pensions [1947] 2 All ER 372 (KB) at 373 cited in Ocean Accident and Guarantee Corporation Ltd J v Koch 1963 (4) SA 147 (A) at 157D. If the acceptable evidence is such that I can safely say 'I think that it is more probable than not' the burden is discharged, but if the probabilities are equal, it is not."

[22]The three aspects of credibility, reliability and probability are thus intermixed, and all three must be examined. The focal point of the exercise remains to find the truth of what had happened. This is subject to the important qualification that where two protagonists in a civil trial have put up to the court for determination two competing versions, it is not open to the court to dismiss both versions, and to conclude that the truth of what had actually occurred lies in a third version, not pleaded by either side.

[23]Applied to this case, it means that there is no scope to dismiss both the plaintiffs' version and the defendants' version of the initiating meeting, and to find, say, that in truth the probabilities are that the parties had in fact (not in law) not reached any agreement at all on the legal contents of their understanding as regards their business venture, and but left that

open. Rather, the analysis must be whether the one version is more probable than the other and, should a resolution not be found, the onus must be the final arbiter.

The factual issues in the case

[24]In my view it is not necessary here to subject every factual dispute that arose to this type of detailed analysis. What is necessary, however, is to focus on the major milestones in the unfolding events. They are, in this case, the following.

[25]First, the overarching issue is of course that of the initial agreement. Here the opposing positions are the plaintiffs' case of the oral partnership agreement, and the defendants' case of a different compact. The plaintiffs' case is simple. The four of them were present, and they all agreed that they would explore the specific business opportunity that was being availed together, on the basis that they would be equal participants in the venture. They obviously were in it for profit. They resolved too that they would use the first defendant, the shelf company that the first plaintiff had obtained for the earlier, failed, first partnership, as the means by which to conduct the first business opportunity that was availing itself in Pretoria.

[26]The second defendant's case was that at that initial meeting the first plaintiff was not present, and was not on the scene at all. He only became involved towards the end of 2010 and early the following year, when a lawyer was needed to evict the then current tenants of the building that the first defendant had just acquired.

[27]The nature of the agreement was also different. It was that the second defendant would be the sole owner of all of the shares issued in the first defendant, not as nominee for the others, but as beneficial owner. The other two would work for the first defendant as consultants, each earning a consultancy fee of R30,000 per month. If within five years the first defendant should accumulate a property portfolio worth R1bn, then the second defendant would consider giving the two of them a shareholding in the first defendant.

The parties' submissions

[28]When the matter was argued at the end of the trial, these positions were refined. The plaintiffs stressed the notion of an informal, basic, hand-shake partnership agreement. The argument was that each partner contributed to a greater or lesser degree to the partnership. It was submitted that the second defendant was conniving and dishonest, and that his denial of the March/April 2010 meeting of the minds by all four partners was false. Particular store was put by the failure of the third defendant to have testified.

[29]For his part, the second defendant compared the template of what according to him would normally be expected of a partnership, on the one hand, with the manifestation of what had occurred here, on the other; and argued that these two were as different as chalk and cheese. He argued that the parties knew all too well that the agreement was that the second defendant would own all the shares in the first defendant, and the second plaintiff and third defendant, and later the first plaintiff, would be consultants.

[30]According to the submission, they were employed for a salary by the first defendant, on the basis that if the property portfolio of the first defendant achieved a value of R1bn, the second defendant would consider giving them each a shareholding in the first defendant.

[31]The language of the second defendant's emails towards the end of 2011, to the effect that the parties should all pull together to sell the property and split the profit, was explained as evidence of the second defendant's magnanimity. The non-calling of the third defendant as a witness was scoffed at, the suggestion being that it was the plaintiff that should in fact have called him, since there was no commonality of interest between the second and third defendants.

Some initial probability and credibility considerations

[32]There are in my view probability problems with the second defendant's version. First, it seems unrealistic to suggest that the second plaintiff and the third defendant who had come

from the previous, albeit failed, first partnership, but who together did have the important contacts in Pretoria to secure a building, and the important contacts in Nedbank to secure finance, would settle for, what in the words of Paul Simon and Art Garfunkel are *"... a pocket full of mumbles such are promises."*[9]

[33] For their consultancy fee they were to render services, on the second defendant's version. There were obliged to be out there sourcing further business opportunities for the first defendant. So the consultancy remuneration was not for them having brought opportunity to the door of the second defendant; it was for their employment by the first defendant.

[34]Although it might have been a close call if the case had to have been decided on the basis only of the probabilities surrounding the nature of the start-up agreement, I would nonetheless already here start tipping the scales in favour of the plaintiffs' version, on the basis of the consideration just mentioned.

[35]Second, I should add that I do not accept that there was no commonality of interest between the second and third defendants, and thus that no adverse inference should be drawn against the second defendant for not having called the third defendant. The second and third defendants not only had a prior history of friendship, but in this litigation they were represented by the same legal team.

[36]And in the litigation they made common cause. Their pleadings were the same, and so their version was the same. This goes too for the affidavits in the opposed application that preceded the reference of the matter to trial. It is also not disputed that the third defendant attended the trial throughout.

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[9] From "The Boxer".

[37]In these circumstances I believe it is fair to assume that the third defendant was available to be called by the second defendant, but that the third defendant was not called because he would not be able to defend the second defendant's version against the cross-examiner.[10]

Subsequent events and their inherent probabilities

[38]But the further subsequent events cast their shadow back on the second defendant's version of the start-up meeting. I turn now to discuss these.

[39]The *first subsequent event* was the email of the second plaintiff. He wrote on 20 October 2010[11] that the time had come to obtain certainty, *inter partes*, as to where *"our business and partnership"* stood. He annexed a draft agreement prepared by his attorney for discussion and signature by all.

[40]The draft agreement, called the *"fruits agreement"*, was a *pro forma* agreement that the second plaintiff had used in a different business relationship where it was necessary that his participation in the business venture was acknowledged, but not as an equal, sharing partner. So the design of the fruits agreement was that the second plaintiff, in the guise of his trust, MBT, would share in the fruits of the business of an incorporated company, in that instance called B'Enhle Investments (Pty) Ltd.

[41]The attachment is really meaningless for present purposes. It is a draft agreement that envisages that MBT would be entitled to 25% of the fruits of the company; but that the relationship between the shareholders *inter se* and with the company, would be regulated by a shareholders' agreement that was not also disclosed. So one does not know, looking only at the attachment, what the second defendant thought. It the event it never was executed.

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[10] Cf Galante v Dickinson, 1950(2) SA 460 (a) at 465; Marine and Trade Insurance Co Ltd v Van der Schyff, 1972(1) SA 26 (A) at 48; Titus v Shield Insurance Co Ltd, 1980 (3) SA 119 (A) at 133 E – F.

[11] Exh A2/137.

[42]The second defendant uses this draft agreement in argument to point to the fact that it does not simply record what on the plaintiffs' version was the obvious: that the four individuals were four equal partners in a partnership.

[43]But in my view the draft agreement actually supports the plaintiffs' version, for the simple but crucial reason that it conveys the second plaintiff's understanding of the parties' relationship among one another – a *"partnership."* The second defendant, who was adept at email correspondence and in fact responded to the draft, did not object in any way to this description of their relationship. It is also significant that the second plaintiff added the following post script to his email: *"PS with a bit of luck will we close at least 2 more deals out before the end of the year."* This is significant corroboration of the notion of an over-arching business relationship, not limited to 36 Hamilton Street.

[44] To be true, the name of the company in the draft was not Sugar Creek Trading 278 (Pty) Ltd; and the second plaintiff would not be a shareholder but would participate equally – as to 25% - in the fruits, through his trust, MBT. But fundamentally this notion of the second plaintiff sharing at all was completely at odds with the notion of the second defendant being the sole shareholder, and the others having no proprietary stake at all.

[45]In this regard, as also when the MOU draft by the first plaintiff the next year is considered, one must bear the following in mind. Uncomplicated as it may seem – at least notionally - to practising lawyers, the concept of an overarching partnership performing multiple business activities through a number of other legal forms or *personae*, may present challenging drafting problems to businessmen. This applies particularly where, as here, what they sought to achieve was to convince the Department of Public Works that their venture was fully black-owned, whereas they knew it was not, since the second plaintiff was not black.

[46]So one must distinguish between, on the one hand, the question whether in law the overarching informal partnership had been established; and whether, on the other hand, the parties succeeded in agreeing on the precise form that their legal vehicle that would drive

their 36 Hamilton Street investment, would take. Clearly they had difficulties formulating the latter. The former was simple enough and hardly needed formulation. This subsequent event therefore, to my mind, supports the partnership notion.

[47]The *second relevant subsequent event* is that on 9 April 2011 the second defendant paid each of the plaintiffs and the third defendant an amount of R150,000. The explanation was that he felt that they deserved it, and there was excess cash then in the business of the first defendant. That is a substantial amount to be paying persons who had no ownership interest in the business. It suggests rather the manifestation of an entitlement to share in the upside, derived from a proprietary interest.

[48]The *third relevant subsequent event* is the MOU prepared by the first plaintiff.[12] It was circulated on 22 May 2011, *"to be discussed and signed amongst all the parties."* The three addressees were the second plaintiff, and the second and third defendants. It was never signed by the parties.

[49]The document takes the form of a basic shareholders' agreement in the first defendant, and so the first defendant too is an anticipated party. Paragraphs 2.1 to 2.2 contain recordals of pertinent relevance. They include that the shareholders are, in equal shares, the first plaintiff, and the second and third defendants. The second plaintiff (through his trust) is said to be *"a strategic partner and specialist property development advisor to the first defendant."*

[50]In like fashion to the description of the second plaintiff, these first paragraphs also record the provenance of the three others: the second defendant is said to be *"currently the sole director of Sugar Creek in order to enhance the strategic value of Sugar Creek, in particular its relationship with the financial institutions"*; and of the third defendant and the first plaintiff it is said: *"Kwitshana and Nkosi are founder members of Sugar Creek."*

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[12] Exh A3/229 ff.

[51]Now obviously the MOU is not a signed agreement; and obviously it does not refer to any partnership. To this latter extent, it was suggested in argument as being inconsistent with the existence of an overarching, back-office partnership, of which the first defendant was merely the front office. But in my view that is not a valid proposition, as I have already indicated. The parties were obviously struggling to find a correct face to present to their clientele, hence the separate treatment of the second plaintiff, who would otherwise have endangered the BEE profile of the first defendant.

[52]But they were also trying to ensure that their propriety interest in the business venture was cemented in the first legitimate structure that was now moving forward into real asset acquisition and income generation.

[53]Importantly for present purposes is that, self-evidently to at least the mind of the first plaintiff, the four individuals each had not only a propriety interest in the business; but their interest was equal at that. One is generally slow to tack onto an addressee a duty to respond to correspondence at the price of a binding agreement for failure, but here – given the supposed firm rejection at the time by the second defendant of the notion that he should be a mere equal partner, and his supposed pertinent insistence on complete ownership - it is surprising that he did not reject this MOU out of hand.

[54]In my view this document and the second defendant's failure to reject it, support the notion of a partnership agreement being in existence between the parties, and they are inconsistent with an understanding that the second defendant would be the sole owner of the venture, to the exclusion of the others, their role being limited to perform at his bidding.

[55]The *fourth relevant set of events* occurred towards the second half of 2011 when the cash-flow around the letting project was getting tight. This led to frazzled attitudes among the four parties. The second defendant, for his part, was feeling that the cost of maintaining the building was coming down on him all the time, and he was complaining that he was not getting support from the others in terms of fresh projects being sourced.

[56]So he wrote to the others on 13 July 2011, saying that he would *"no longer stand surety for any Sugar Creek deals going forward".*[13] He concluded, asking the other three, *"Can we please discuss the way forward as I am feeling extremely uncomfortable at this moment."*[14]

[57]There were responses to this mail particularly by the first plaintiff; but the most telling response, copied to all, came from the third defendant on 14 September 2011. He wrote,[15] saying that he acknowledged the exposure to which the second respondent had been put from the first day. He said that he thought the project could still be saved, but that he thought that he should exit. He proposed that the second defendant paid him R500,000 for his stake. He wrote too that he knew cash flow pressures might preclude the money being paid from the first defendant, but that in the meantime the second defendant could pay him from his personal resources.

[58]Before looking at the second defendant's response, it must be noted that this letter is consistent only with the third defendant believing he had an ownership stake in the venture.

[59]The second defendant's response supports this notion. He wrote the next day,[16] saying he had no interest in pumping more money into the first defendant; rather, he was interested in off-loading the third defendant but could not even find a buyer on a break-even basis. He wrote (emphasis supplied): *"I still say let's all try and find a buyer, preferably someone who can pay off the debts and still have something left over to split between ourselves, failing which I will consider the best offer with guarantees that comes along. As for paying out R500k to each of you, I cannot afford that and as much as I want an amicable settlement, I do not want to further expose myself."*

[60]This response, which does not dispute the third defendant's claim and does not offer a share in any upside out of the goodness of his heart, shows that the second defendant was, in my view, on the same page as the others as regards their business relationship. It is especially

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[13] Exh A3/260.
[14] Ibid.
[15] Exh A3/273.
[16] Exh A3/275.

pertinent that the third defendant had not suggested that the second defendant should pay the other partners R500,000 as well. The second defendant however sensed instinctively that if one partner was to receive an exit price of R500,000, the others would surely be entitled to the same.

[61]The *fifth relevant set of events* involves particularly the position of the first plaintiff, reflected in the following exchange of emails. Towards the last quarter of 2011 the four parties met at the Michelangelo Hotel in Sandton, Johannesburg. They are not agreed on the detail of what happened there, but the thrust, at least, is that the second defendant agreed to pay the first plaintiff money to secure his exit from their business relationship. The first plaintiff said that the second defendant had first offered to pay him R850, 000 for his share, but eventually at the Sandton meeting had agreed to pay the first plaintiff and the third defendant each R150,000 for each of their shares in the venture.

[62]The second defendant denied this. He said that at that meeting he had agreed, as a gesture of generosity, to pay the plaintiff *"something"*, but the amount was not fixed. Later this did become R150,000. The second plaintiff said that the third defendant had told him that he, the third defendant, had agreed with the second defendant, in advance of the meeting, that he, the third defendant, would propose at the meeting that the second defendant paid the first plaintiff and the third defendant R150,000 each for their share in the venture. This proposal was merely intended to persuade the first defendant to accept that amount; the third defendant was not seriously considering exiting at that price.

[63]In other words, the third defendant and the second defendant had (according to the second plaintiff) connived at creating the impression that R150,000 was a fair exit price. It does not appear disputed that the third defendant in fact made such a proposal at the meeting.

[64]On 4 October 2011 the first plaintiff followed up whether the R150,000 payment was still on track.[17] The second defendant replied, confirming that *"yes everything is still on track."*[18] But

[17] Exh B3/287.

nothing came of it. The second defendant said that, in time, and on reflection, he thought that he owed the first plaintiff nothing and so would not pay him the agreed R150,000. The first plaintiff, for his part, wrote a letter to the second defendant, copied to the third defendant, on 19 December 2011.[19] In it, he recorded what he called the existence of the partnership in the first defendant, on the basis of four 25% shareholders. He recorded that the second defendant had proposed to buy his shares for R150,000, and that he, the first plaintiff, had accepted this.

[65] He wrote that the second defendant had breached that agreement and that he, the first plaintiff was accepting that breach. He wrote that accordingly they had returned to the *status quo ante*. He said that he was handing the matter over to his lawyers, and would be claiming an order declaring his entitlement to a 25% shareholding in the first defendant. The second defendant did not respond to this letter. It is not disputed that the first plaintiff then retreated from the stage and emerged again only at the end of the next year.

[66] This interaction with the first plaintiff and the agreement to buy him out is not consistent with the version that he had no ownership stake in the venture.

[67] The *sixth relevant event* is a meeting held in March 2012 between the second plaintiff, and the second and third defendants.[20] The parties there discussed the management of the first defendant on a number of fronts, as well as new business. This discussion does not fit the version of the second defendant being the sole beneficial owner of the shares in the first defendant, and is more compatible with at least those three parties regarding them all three as being interested, beneficially, in the first defendant.

[68] Finally, *the seventh relevant fact* is the execution by the third defendant of the *"Declaration of Trust and Deed of Waiver"*.[21] The third defendant and the second plaintiff had attended the offices of the first defendant's auditor, and had there briefed a person ostensibly with

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[18] Ibid.
[19] Exh B1/60.
[20] See minutes of meeting, Exh B1/58.
[21] Exh A4/385.

legal knowledge to prepare a document that would reflect that the second plaintiff was beneficially interested in the first defendant. The fear was that since the second plaintiff was not black, his beneficial interest in the first defendant would not receive acknowledgement when appropriate.

[69]The document is unhelpful generally; it says that the third defendant is the registered member of 33% of the shares in the first defendant, and that he was holding them in trust for the second plaintiff, who was the true owner of the shares. But of course the third defendant never was the registered shareholder of any shares in the first defendant.

[70]The relevance of the document for the present discussion is that it conveys that certainly the third defendant too considered that he had an ownership interest in the parties' business venture, for this reason. Presumably the second plaintiff and the third defendant reasoned that by that stage the first plaintiff had been bought out, leaving the second plaintiff, and the second and third defendants, as the three remaining shareholders, each as to a 33% interest.

[71]Further, presumably the document should be read as conveying that 33% of the registered shares in the first defendant that are in the name of the third defendant, are being held in trust for the second plaintiff – without detracting from the fact that there are another 33% registered shares in the first defendant, held in the name of the third defendant, beneficially owned by him.

[72]Either way, the document does not suggest that had the third defendant been called to testify, he would have supported the second defendant; to the contrary.

[73]Finally, something needs to be said about the second defendant running the first defendant as if it were his own fiefdom. The plaintiffs used this fact as a criticism of the personality second defendant, whereas the second defendant argued that it proved that no partnership had come into existence. I do not think this latter contention follows. The second defendant was a hard-nosed businessman who was entitled, as between the partners, to run the first

defendant. The parties had agreed that he would be the sole director, and so his sole control of the first defendant was a given.

[74]The next question is whether the witnesses' credibility and reliability fit the general picture painted by the probabilities.

Credibility and reliability

[75]Thus far the probabilities have been considered. They generally favour, for reasons set out above, the notion that the parties had concluded a partnership agreement. How do the reliability and credibility of the witnesses assist in reaching a conclusion on this issue?

[76]Not unexpectedly, the plaintiffs argued that the second defendant was thoroughly untruthful. The defendants in turn argued that the first plaintiff was a thoroughly unreliable and a bad witness, who was inclined to drift off into irrelevance when answering a question. They submitted that the second plaintiff, given particularly his misappropriation of the first defendant's funds, had been exposed as dishonest.

[77]There is a measure of truth in both parties' submissions on this score. The witnesses were inclined, not unusually, to favour their own case when testifying. I did think that the first plaintiff was inclined to drift when giving evidence, but this affects his reliability, not necessarily his credibility.

[78]The second plaintiff was clearly knowledgeable in the field of financing. I accept his evidence that a banker would have preferred to have seen one businessman with an unimpeachable record backing the principal debtor rather than more individual lenders of doubtful creditworthiness. It is disconcerting the second plaintiff dishonestly misappropriated moneys of the partnership and I would prefer to accept his evidence only where it is corroborated.

[79]The second defendant gave the impression of an impressive, if callous, businessman. His clear success is likely a function of taking control and brooking of no dissent. He is results

oriented and driven. But this does not make him a good witness. I cannot accept that his version of the agreement reached between the parties would have carried the approval of the others, including of the third defendant. After all, why would the third defendant, or for that matter any of the other two, have agreed to take no upside at all in the business project when they had initiated it? It is unavoidable to conclude that the second defendant's evidence on this score is not truthful.

Conclusion on existence of partnership

[80]Looking back then on the probabilities and the witnesses' credibility, I believe a partnership agreement has been shown to have been entered into at around March or April 2010. Clearly the four individuals had embarked upon a business venture. Clearly they all understood that they were each invested in that venture, and held a proprietary interest in it.

[81]In my view, for the reasons elaborated upon earlier in this judgment, the probabilities favour the conclusion that the four parties regarded their arrangement as a binding partnership agreement. The first plaintiff would contribute his knowledge and expertise as a lawyer and business man; the second plaintiff his knowledge and expertise as a banker; the second defendant his capital strength; and the third defendant his general business knowledge and network. They would conduct the business of office letting by a BEE lessor to government departments, and do so at a profit.

[82]It follows that in my view the partnership agreement for which the plaintiffs contended is supported by the probabilities and the witnesses' credibility, and was in fact concluded.

The end game

[83]Thus far the subsequent events that point to the existence of a partnership agreement between the parties, at least during the major part of 2010 and of 2011. It will be recalled

that the plaintiffs plead a dissolution agreement at around September 2012. What actually occurred then was the following.

[84]In about September 2012 it appeared that the second plaintiff, acting through his trust that was performing management functions to the first defendant, had been misappropriating for his own purposes moneys that were intended to pay the first defendant's creditors. The second plaintiff acknowledged that he had done so, and apologised to the second defendant.[22] As stated earlier, that was the end of the relationship between the second defendant and the second plaintiff, and the second defendant laid a charge of theft against the second plaintiff. The third defendant was substituted as the property manager.

[85] The second plaintiff nonetheless sourced a buyer for the 36 Hamilton Street building, but negotiations with the second defendant fell through, mainly because the latter would not accept that the second plaintiff had been mandated to find a buyer for the building. After the buyer thereafter approached the second defendant direct, the first defendant sold the building at R64m. It was transferred out of the first defendant to the buyer. The second defendant has since kept the shares in and control of the first defendant, and has used the first defendant in other ventures.

[86]The question of the alleged early exit of the first plaintiff arises. Here it was the submission of the second defendant that the partnership contended for by the plaintiffs terminated at the end of 2011, given the first plaintiff's exit then. But the first plaintiff did not actually exit the partnership then. He had reached an agreement that he would, but he cancelled that agreement for non-performance by the second defendant.

[87]It is true that the first plaintiff does not appear to have provided any input into the partnership for the last year, but this was not of his doing. The second defendant had turned his back on the first plaintiff but, absent a case of waiver or abandonment, or of cancellation

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[22] Exh A3/304.

of the partnership agreement, as a matter of law the first plaintiff's rights as partner remained extant.

[88]Whether in view of this evidence an agreement of dissolution in the form pleaded by the plaintiff was proved is doubtful. But it is clear that by latest end September 2012 all four the parties considered that the partnership was over. Their common attitude in this regard probably founds a tacit agreement of dissolution; the agreement pleaded by the plaintiffs was said to have been partly oral and party in writing.

[89]I do not believe that this manner of pleading has prejudiced the defendants who had from the outset denied the partnership altogether, and *a fortiori* too any dissolution agreement. I therefore do not believe that a finding that the parties had agreed to dissolve the partnership is precluded.

Appropriate relief

[90]It is thus clear that by the end of September 2012 the partnership was over. The issue of the appropriate relief must now be considered. In the usual course the partnership assets as of 30 September 2012 would have had to be liquidated, the partnership debts paid, and the net assets distributed equally among the partners. Absent agreement between the parties, a liquidator would be appointed to undertake this exercise.

[91]In this case the second defendant has kept for himself the partnership asset, being the shares in the first defendant, and has sold the property and has transferred it out of the first defendant. He has since carried on business with the first defendant as if beneficial owner of its shares. It would be unfair, even if possible, now to attempt to undo what has occurred since the termination of the partnership.

[92]Instead it is fairest to all to direct the second defendant, who kept the partnership asset, to give an accounting to the plaintiffs of the sale of the property, of all liabilities relating to the sale, and of all other assets and liabilities of the partnership as of 30 September 2012. One

half of the net asset value of the partnership as of 30 September 2012 must then be paid by the second defendant to the two plaintiffs by paying 25% of the aggregate net asset value to each of the first and second plaintiffs.

[93]In argument the second defendant submitted that the sale price of the property might actually be greater than its value as of 30 September 2012. If that is correct, that difference must be credited to the second defendant, just as the running cost of the property after 30 September 2012 is for the account of the second defendant. If the parties cannot agree whether there is such a difference in value of the property, then – just as would apply if they cannot agree on any aspect of the accounting and distribution – the aggrieved parties must approach the court for appropriate directions.

[94]As to costs, the second defendant submitted that the plaintiffs – even if successful - should bear at least the costs of the opposed application on the basis that factual disputes were foreseeable. Ordinarily that would have been a valid proposition but where, as here, the finding is that the denial of the partnership agreement was not justified, I cannot see why the plaintiffs should be mulcted in those costs.

Order

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

(a) It is declared that a partnership existed between the two plaintiffs and the second and third defendants during the period 30 April 2010 and 30 September 2012, and that the four individuals were equal partners.

(b) It is declared that the shares in the first defendant were partnership assets.

(c) The second defendant is directed within three months to render to the plaintiffs an account of the partnership business, which account must be supported by vouchers where appropriate, and must include:

(i) A list identifying the assets and liabilities of the partnership as of 30 September 2012;

(ii) The income and expenditure of the partnership during the above-stated period of the existence of the partnership;

(iii) The capital accounts in the partnership of each of the four partners as of 30 September 2012;

(iv) The sale on 24 January 2013 of the immovable property situated at 36 Hamilton Street, Erf 1284 Arcadia, Tshwane, held under title deed T200221/2013;

(v) The value of the said immovable property as of 30 September 2012;

(vi) The reasonable costs of preparing the said partnership accounts must be reckoned as a partnership debt;

(vii) The net asset value of the partnership.

(d) If the parties are unable to agree the said partnership accounts within three months of them having been rendered, the parties are permitted to approach the court on notice of motion for the appointment of a liquidator to undertake the preparation of the partnership accounts with power, acting not as an arbitrator but as an expert, to settle the accounts and any differences that might arise between the parties in relation to the said accounts.

(e) The second defendant is directed to pay to each of the first and the second plaintiffs, 25% of the net asset value of the partnership within 15 (fifteen) days of the said account being agreed between the parties or settled by the liquidator or, where necessary, by order of court.

(f) The costs of the action, including the costs of the opposed application and any other reserved costs, are to be paid by the second and third defendants, jointly and severally.

WHG van der Linde
Judge, High Court
Johannesburg

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