IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
17/7/14
DATE SIGNATURE

17/7/2014

APPEAL CASE NO: A876/2012

In the matter between:

F-CEE VAN WYK Appellant

and

PETRUS HENDRICK RHEEDERS Respondent

Date of hearing: 21 MAY 2014

Date of judgment: 17 JULY 2014

Coram: RABIE, MOTHLE, JJ VILAKAZI AJ

JUDGMENT

MOTHLE J,

1. The Appellant (*"Defendant in the trial"*) appeals against the judgment and order of the Honourable Madame Justice Tolmay delivered in the North Gauteng High Court, Pretoria (*"the Court a quo"*) on 18 October 2012.

2. The judgment of the Court *a quo* follows an action proceedings in which the Respondent (*"Plaintiff in the trial"*) sued the Appellant for an amount of R376,500.00 together with interest at the rate of 15.5% per annum calculated from September 2008 to date of payment and costs. The Court *a quo* granted judgment for the Respondent.

3. Before dealing with the merits of this case, this Court had to adjudicate on an application brought by the Appellant for an order reinstating the appeal as well as condonation for the late filing of the record of appeal. The Appellant states that due to the incompetence of his attorney, who failed to prepare and timeously file the record of proceedings with the Court, there was a delay in the prosecution of the appeal. In lodging the application for condonation, the Appellant delivered a founding affidavit in which the Officer who administered the oath failed to indicate in the oath, the proper gender of the deponent where it

referred to the deponent as "*his/her*". Apparently this failure by the Commissioning Officer to delete the part that is not applicable to the deponent led to the Respondent filing a notice in terms of Rule 30 of the Uniform Rules of Court which in turn necessitated the launching of an application for leave to supplement. The Gauteng Division of the High Court granted an order on the 30th October 2013 and the supplementary affidavit was properly before Court. The Respondent, however, did not file an answer to the supplementary affidavit on the merits. Having heard both Counsels on argument, this Court granted the order for reinstatement of the appeal as well as condonation for the late filing of the appeal record.

4. It needs to be mentioned at this stage that subsequent to the granting of the leave to appeal by the Court *a quo*, the Respondent filed a notice in terms whereof part of the order that related to the interest payable from September 2008 to 21 July 2011, was abandoned. I now turn to the merits of the appeal.

5. The background facts which appear from the judgment of the Court *a quo* are succinctly as follows:

5.1 Appellant and Respondent were the only two shareholders in a company known as PDR Technologies (Edms) Bpk ("*PDR Technologies*"). Appellant held 30% of the shares while the Respondent held 70% thereof. On the 21st May 2008 PDR Technologies was converted from a close corporation to a holding company of PDR IT Solutions (Edms) Bpk ("*PDR IT*") as well as in PDR Security Solutions (Edms) Bpk ("*PDR Security*"). The Appellant managed PDR IT while the Respondent managed PDR Security.

5.2 According to the evidence of the Appellant the subsidiary company's PDR Security experienced financial problems, during or about August 2008.

5.3 Appellant and Respondent entered into an oral agreement in terms of which both undertook to raise the necessary funds. The Respondent succeeded to raise an amount of R1 255 000.00 by taking out a second mortgage on his house while the Appellant could not obtain any amount. Both parties agreed that the amounts raised were to be advanced as a loan towards PDR Technologies as a holding company which

then will be able to keep the business of the subsidiaries afloat.

5.4 Further, the parties had agreed that the funds raised were to be contributed as loans in proportion to the shareholding that is 70/30%. The Respondent paid to PDR Technologies the amount he raised, which was recorded as a loan.

5.5 According to the Respondent, it was orally agreed between the parties that the Appellant would pay him an amount of R376,500.00 representing 30% of the R1,255,000.00. This amount, according to the Respondent was to be paid to him personally. The Appellant, concedes that he was supposed to raise 30% of the R1,255,000.00 raised by the Respondent which came to R376,500.00. However, he denies that this amount was to be paid to the Respondent, but rather to PDR Technologies in the same manner as the Respondent did with the loan he advanced to PDR Technologies. According to the Appellant therefore he had an obligation towards PDR Technologies and not to the Respondent personally as the latter had claimed.

5.6 It is common cause that the Appellant could not raise the 30% amount and in 2010 the companies were liquidated.

5.7 In July 2011 the Respondent issued summons against Appellant for payment of the amount of R376,500.00 plus interest as well as costs.

5.8 In his plea, Appellant avers that the Respondent paid the R1,255,000.00 to PDR Technologies as a loan, which loan PDR Technologies serviced through PDR Securities by making monthly payments in the mortgage bond account of the Respondent.

6. A dispute between the parties which the Court *a quo* had to adjudicate was whether it was a term of the oral agreement between the parties that Appellant owed to the Respondent, 30% of the amount raised by the Respondent, and that he was supposed to pay that money directly to the Respondent.

7. The parties also disagree as to what amount needed to be raised and for what purpose. The Plaintiff alleges that the amount needed is that which he raised namely R1,255,000.00 to be loaned to the holding company PDR Technologies. The Appellant on the other hand holds the view that the amount required was in the vicinity of R700,000.00 to R1,000,000.00

which money was to be loaned to PDR Technologies but for injection into PDR Securities.

8. The Respondent testified in support of his claim and also called the tax consultant and accountant of the companies, one Lucas Willem Botha (*"Botha"*) to testify in his support. The Appellant testified as the only witness for the Defendant.

9. It is common cause that the parties reached some kind of agreement as shareholders when PDR Technologies was still a close corporation. This agreement Botha refers to as "*samewerkingsooreenkoms*". In terms of that agreement, Appellant held 30% of shares while the Respondent held 70% of shares. Botha further testified that that agreement placed obligations on the shareholders to give security, if needed, in proportion to their respective shareholding.

10. As already stated, the dispute between the parties from Appellants point of view raises the question as to whether indeed there was or there was not an agreement that Appellant would pay his portion of the 30% funds raised towards the PDR Technologies, and not to the Respondent. This dispute is one of fact and not law.

11. The Court a quo found that there was an obligation on the part of Appellant to pay to the Respondent and not to PDR Technologies. I am of the view that this finding by the Court *a quo* is not supported by evidence, for the following reasons:

11.1 There appears to be no documentary proof on the record that since the parties reached an agreement to raise funds in August 2008 and up and until 2010 when the companies were liquidated, the Respondent made any demand to the Appellant for payment of the alleged debt. In fact the Appellant contends that the first he heard of the claim was when he received the summons in 2011;

11.2 Botha, in his evidence, under cross-examination conceded two important facts namely:

11.2.1 That the Appellant was obligated to pay 30% of the amount raised by the Respondent *to PDR Technologies*;

11.2.2 That the shareholders agreement defined the obligations of the shareholders towards the company and not against each other;

11.3 The amount of R1,255,000.00 was recorded in the books of the company as a loan received from the Respondent. The evidence points out that subsequent to the recording of that transaction, PDR Securities, which received the funds from PDR Technologies, began to repay the loan by making deposits in the mortgage account of the Respondent, to his credit on the mortgage. There is no evidence that similarly 30% of such payments were made to Appellant or his account;

11.4 The "*samewerkingsooreenkoms*" wherein apportionment is made in regard to the shares held by each of the parties, did not provide for any additional oral agreement to be concluded between the parties. The agreement specifically provided that no oral agreement which would vary or add to that agreement will be of force and effect.

11.5 The Respondent in his evidence was ambivalent. In the cause of action as pleaded in the particulars of claim, he clearly relies on the agreement apportioning percentage shares, as a basis upon which the Appellant had an obligation to pay his portion of the contribution to the loan. However, in Court he testified that the agreement reached with Appellant

was outside the company process and had nothing to do with the shareholders agreement. According to him, it was a separate side agreement reached between him and Appellant. Notwithstanding this evidence, the Court a quo found that the basis of the Respondent's claim arises out of the very agreement the Respondent denies as being the foundation of the claim.

11.6 In concluding as she did, the Learned Trial Judge should have found that the shareholders agreement to apportion the profits in the percentage 70%/30% raised obligations if any, on both parties towards PDR Technologies and not *inter se*.

12. The parties presented two mutually destructive versions as to whether there was or there was no oral agreement on the side, to the effect that Appellant was supposed to pay to the Respondent 30% of the amount loaned by the Respondent to PDR Technologies.

13. Where there are two mutually destructive versions before a Court, the question of the burden of proof becomes an important factor in deciding which version should prevail. The Respondent had the *onus* to prove, on a balance of

probabilities that there was an oral agreement between him and the Appellant to the effect that Appellant was to pay 30% of the R1,255,000.00 to him. The Court a quo did not pronounce on the question of the credibility, reliability and generally, the demeanour of the witnesses. See **SFW Group Life & Another v Marcel Cie and Others 2003(1) SA 11 SCA.** In my view, and for reasons stated above, the Respondent did not succeed, on the evidence and on a balance of probabilities to discharge this burden.

14. As I pointed out to counsel during argument, the particulars of claim makes reference to a meeting of the two parties in August 2008 wherein a decision was made to go and look for funds. The pleadings do not make any averment of a second meeting between the two parties after the Respondent had raised the amount. Logic dictates that the oral agreement if any, should have been concluded at a subsequent meeting. No date or fact is pleaded for any such subsequent meeting to that of August 2008, if such was held.

15. For reasons stated above I am of the view that the Court a quo erred in upholding the claim and should have dismissed it with costs.

16. In the premises I make the following order:

16.1 The ~~appeal against the~~ order and judgment of the Honourable Madame Justice Tolmay, delivered on 18 October 2013 is hereby set aside and substituted with the following:

"The Plaintiff's claim for payment in these action proceedings is dismissed with costs."

16.2 The Appellant is awarded the costs of appeal including the costs of the application.

S P MOTHLE
Judge of the High Court

I concur:

C P RABIE
Judge of the High Court

I concur:

T D VILAKAZI
Acting Judge of the High Court

For the Appellant:

Adv. SJ Myburgh

Instructed by: Coetzer & Partners

For the Respondent:

Adv. BP Geach SC

Instructed by: Rina Rheerders Attorneys