/SG

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DATE: 4/9/14

CASE NO: 24260/2011

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO

(3) REVISED

2/9/2014 .....

DATE SIGNATURE

In the matter between:

BREEZEWOOD TRADING 88 CC T/A MICA CELTIS PLAINTIFF

And

ESSOP ISMAIL EBRAHIM DEFENDANT

JUDGMENT

JORDAAN, J

The action launched by the Plaintiff is a delictual claim for the repayment of monies misappropriated by the Defendant, a former member of the Plaintiff, appropriated throughout the Defendant's tenure as a 50% member of the Plaintiff. (The total amount so withdrawn was R 338 000.)

It is not an issue that the defendant that Mr AK Karim were members of the plaintiff a close corporation Breezewood Trading 88 CC t/a Mica Celtis. They were the only two members and each held a 50% share in the plaintiff.

The defendant became a member of the plaintiff during February 2008. The intention was to open a Mica hardware shop.

According to the evidence the business started from scratch. It is not in issue that the defendant was in control of the bank account of the plaintiff.

It was not in issue that the defendant from time to time made withdrawals from the bank account of the plaintiff. The allegation by the plaintiff is that such withdrawals were unauthorised and fraudulent. The withdrawals mentioned in the particulars of claim is not denied by the defendant but his case is that all withdrawals were authorised by Karim after he had consulted with him. Because the withdrawals were not in issue the parties agreed that the duty to begin was on the defendant.

The defendant was the only witness on his behalf. He testified that he, at the commencement of the business, advanced an amount of R750 000.00, stock, computers, cash pay points and other infrastructure had to be obtained and he provided the funds therefore. He said he opened a bank account for the plaintiff and arranged for an overdraft facility for it.

It is not in issue that the store was run by the brother of Karim assisted by the wife of the said brother. The brother and his wife were not members of the plaintiff. Karim did not take part in the business; he was in the permanent employment of Telkom.

It is not in issue that the relationship between Karim and the defendant became sour. It is not in issue that the on 13 May 2010 the two of them entered into two agreements, as a result of which Karim bought the 50% shareholding of the defendant and thus became the sole owner of the plaintiff.

The defendant testified that the decided to sell his 50% share in the business to Karim because of two reasons:

1. He had colon cancer.

2. Karim did not bank the monies he received from the business. Furthermore his sister in law opened a card machine account in her own name in a fraudulent manner and fraudulently took the proceeds from this account for her own

benefit. He testified that he took steps with Absa bank to close this fraudulent account. He says he discussed this matter with Karim.

He testified that in coming to the two agreements mentioned above they agreed to forget about the monies Karim and his sister in law had take and that he would sell his share in the plaintiff to Karim.

The defendant admits (as is also borne out by the papers) that they entered into two agreements.

The first agreement was the "Memorandum of Agreement" which appears at page 30 to 33 of the discovery bundle entered into by the parties on 13 May 2010 which was signed before the Sale Agreement. The Sale Agreement was signed on the same day. The purpose of this agreement, he says, was to oblige him to produce (*inter alia*) the bank statements, invoices, receipts and all other documents in his possession in respect of the plaintiff in his possession.

He testified that he complied with this agreement immediately after it was signed. I find it difficult to believe his version in this regard. If the documents were available at that stage why was it necessary to draw up the Memorandum of Agreement?

The defendant was referred to certain clauses in the memorandum of agreement (the first agreement). In terms of clause 2.6 the seller (defendant) undertakes to forward a complete set of bank statements to the purchaser (Karim) upon receipt of

the purchase consideration. This clause clearly implies that at that stage the "complete set" has not been produced. If it had been this clause makes no sense at all.

Clause 2.5 of this agreement provides as follows:

> *"2.5 The Agreement between the Seller and the Purchaser is in full and final settlement of all or any claims that either party may have against each other, either or a civil or criminal nature."*

In my view this clause clearly refers to any known claims at that stage.

In terms of clause 2.8 the defendant undertook to provide the purchaser (Karim) with necessary answers regarding the contents of the bank statements of the corporation.

The defendant testified that he provided those answers before the Sale of Members' Interest Agreement was signed.

Again one wonders why it was then necessary to include this clause in the first agreement. He said present during these events were his son, his attorney, Karim and his attorney. He said that they, apart from these events on 13 May 2010 also had other discussions where he provided answers. One wonders what meaningful questions and answers could have been discussed prior to 13 May 2010 if (on his version) the bank statements (or some of them) were only presented on 13 May 2010.

The Sale of Members' Interest Agreement was then signed on the same day. The agreement appears at page 18 to 29 of the discovery bundle. Karim signed it twice, on his own behalf and on behalf of the plaintiff.

Clause 3 of the agreement states that with effect from the effective date the seller sells the 50% members' interest and claims (voetstoots) to the purchaser against payment of the purchase price as one indivisible transaction.

Clause 4 sets out the purchase price, R600 000.00.

Clause 5 sets out how the purchase price had to be paid. It was paid the same day into the trust account of the defendant's attorneys.

Clause 12.3 reads as follows:

> *"Having regard to the existing acrimonious relationship between the parties, as a date of signature of this agreement, the parties wish to record that this agreement, in addition to the sale of members' interest, is full and final settlement of all issues between the parties on the one hand, and the parties and the close corporation on the other hand, arising from any existing or future civil or criminal liabilities."*

In clause 13, however, it is stated that "each party chooses as its *domicilium citandi et executandi* ("*domicilium*") for all purposes under this agreement, whether for serving any court process or documents ..." and then each party sets out its *domicilium*.

The parties therefore made provision for the fact that further litigation might ensue.

Clause 14 states in 14.1 that this agreement is considered the sole agreement between the parties, in 14.2 that no party shall be bound by any representation, warranty, promise or the like not recorded therein and 14.3 states that no addition to, variation, or agreed cancellation of the agreement shall be of any force unless in writing and signed on behalf of the parties.

The defendant repeated that there was a bad relationship between the parties. Karim did not bank monies and his sister in law fraudulently opened an account for her own benefit. This situation existed before the agreements were signed.

He testified that the plaintiff had an accountant to which Karim had access. The accountant had records of bank statements, receipts and invoices of the plaintiff.

He denied that he owes the plaintiff any money as claimed. Whatever withdrawals he made was with the consent of Karim. He withdrew these monies from his loan account. He says the purchase price would have been higher had he not have

withdrawn these monies. He said his withdrawal of the monies had been resolved before signing this agreement.

The loan account was the R750 000.00 he had put in initially. He said the withdrawals he made were not part of the dispute between him and Karim.

Under cross-examination he testified that what he answered and what questions were put to him he cannot remember. It was put that this is improbable.

It was put to him that he, on 13 May 2010, did not provide any bank statements, it only became available some two weeks later.

It was put to him that there was a dispute between him and Karim in that Karim had no access to the bank statements of the plaintiff. He replied that there was not such a dispute; Karim was satisfied that he did not have access to the bank statements. It was put that that is improbable. I agree that his is indeed improbable.

It was put to him that he did not have a loan account. There are no documents to the effect that he had a loan account. There is no documentation proving the fact that he put up an amount of R750 000.00. He said he paid for the furniture and computers when the business was set up. There are no documents to substantiate that.

He testified that the monies he withdrew from the plaintiff's account was by agreement. This was denied on behalf of the plaintiff. It was put Karim had no knowledge of these withdrawals and did not have access to the bank account. The defendant was the only one who had such access.

It was put that he stole the R338 000.00 he withdrew. He denied it. It was put Karim had no knowledge of the withdrawals and if he had known about it the selling price of his 50% share would have been less as a result of the withdrawals.

He was referred to the Memorandum of Agreement. Paragraph 2.5 thereof reads as follows:

> *"The agreement between the seller and the purchaser is in full and final settlement of all or any claims that either party may have against each other either of a civil or a criminal nature."*

He conceded that this clause is not binding on the plaintiff.

Paragraph 2.6 of the memorandum of agreement reads:

> *"The seller undertakes to forward a complete set of bank statements to the purchaser upon receipt of the purchase consideration."*

He testified that Karim had all the documents before he signed the sale agreement.

As I said earlier in my view this cannot be so. Why then was it necessary to enter into the Memorandum of Agreement.

It was put that he ensured that the agreements were signed before he produced the bank statements so that he could hide behind the clauses he now relies upon. It was put he cannot hide behind these clauses if he acted fraudulently.

He was referred to page 9 of the bundle, the bank statement of the plaintiff where he caused an amount of R26 000.00 to be paid to Plasmoline. He said this was an amount paid for goods supplied. His son worked at Plasmoline.

He was referred to page 17 of the bundle, the only invoice discovered from Plasmoline. The invoice amounts to only R8 578.26 and is dated 14 August 2009. The transfer to Plasmoline is dated 12 August 2009. His explanation of this was that he now suddenly remembers that at that stage other suppliers did not supply them anymore and that he bought stock for the business through Plasmoline. Plasmoline was thus used as a vehicle to supply goods to them.

This was of course never his defence on his pleadings. His defence was that all the withdrawals he made were done with the consent of *inter alia* Karim.

At page 15 of the bundle it appears from the bank statement that he withdrew an amount of R10 000.00 for legal fees. The plaintiff was not involved in any litigation at that stage. He conceded that he (in his personal capacity) approached attorneys in respect of this matter and withdrew the R10 000.00 to pay them. He said he discussed this withdrawal with Karim. It was put that Karim knows nothing about this. In my view Karim certainly would not have consented to the payment of the defendant's attorney from the plaintiff's bank account.

He then repeated that he handed the bank statements to Karim after they signed the first agreement. Karim and his attorney then perused the bank statements and then the sale agreement was signed. He said he obtained the bank statements from the accountant.

It was put that Karim never knew he appropriated money and he would not have authorised it. He only provided the bank statements two weeks after 13 May 2010.

He said they were at the attorneys of the plaintiff on 13 May 2010 for about two hours. During this two hours both agreements would have to be drawn up and Karim and his attorney would have to peruse the bank statements he allegedly gave to them. It was put that this is improbable. His explanation was he did not provide all the bank statements, only those they asked for.

He was again referred to paragraph 2.6 of the memorandum of agreement in which he undertook to provide a full set of bank statements. He replied the balance of the bank statements could have been provided later.

That was the case for the defendant.

On behalf of the plaintiff Mr Abdul Khaleq Karim was called. He confirmed that he and the defendant were both 50% members of the plaintiff.

He said both parties made investments. His brother paid an amount of R900 000.00 and the defendant an amount of R450 000.00.

He testified that he was not involved in the operation of the business at all. His brother was involved in it.

The bank account was solely controlled by the defendant. He had no access to the bank account nor the privilege to review the monthly balance statement, despite repeated requests to make it available. This caused their relationship to sour. They could no longer work together. He said only after the sale of the defendant's share he had sight of the plaintiff's bank statements.

He testified that before the defendant sold his 50% share to him they decided to open a new bank account for the business.

He and the defendant decided to part ways. An agreement was reached that he purchases the defendant's share for an amount of R600 000.00 based on the understanding that a complete set of bank statements be made available. That agreement (the Memorandum of Agreement) was part of the conclusion of the sale agreement. (This is indeed evident from clause 2.4 of the Memorandum of Agreement. It reads "The terms of the sale have been incorporated in a separate Sale of Members' Interest Agreement to which this agreement is attached".)

On 13 May 2010 the defendant and his attorney met. He said on that day he defendant made no bank statements available.

He said the original intention was to enter into just one agreement. However, when no bank statements were provided they entered into the Memorandum of Agreement to make provision that *inter alia* the bank statements be provided to safeguard his interest.

In terms of clause 2.6 of the Memorandum of Agreement the defendant undertook to provide a complete set of bank statements to the purchaser. The Memorandum of Agreement was drawn up because they had no sight of the bank statements. He denied that the defendant provided any bank statements on that day at all.

In paragraph 2.7 of the memorandum of agreement Plasmoline is mentioned. He said it was owned by the defendant. The defendant's son worked for that company.

In clause 2.8 of the memorandum of agreement the defendant undertakes to provide the purchaser with the necessary answers regarding the contents of the bank statements of the corporation. They only received the bank statements later and found that monies had been withdrawn. No explanation therefore was given by the defendant. He denied the defendant's evidence that he had access to the bank statements through the auditor. He said the auditor redirected them to the defendant for the bank statements. He was asked to comment on the version of the defendant that he was contacted when the defendant wanted to make payment from his loan account. He replied:

1. There was no loan account; and

2. No request in this regard was ever made to him at any stage.

He said that he would not have agreed to the defendant transferring money to himself. It was a new business.

He said they entered into the agreements to resolve the matter between the parties they decided to proceed with the sale of interest agreement based on the signing of the Memorandum of Agreement. He said there was an element of trust to conclude the matter on that particular day. At that stage he was never informed that R338 000.00 had been transferred from the business account to the defendant.

In respect of the R26 000.00 paid to Plasmolaine he said there was no purpose for that transfer. No documentation was provided by the defendant.

In respect of the R10 000.00 for the defendant's legal fees he said he would never have consented to such payment.

In respect of the further R302 000.00 transferred to the defendant's personal account he said he would also not have agreed to that.

These payments were only discovered after they obtained the bank statement. His brother went through the statements.

Under cross-examination he testified that he is employed by Telkom in the procurement department. He had intensive in-house training for eighteen months. His qualifications are comparable to an MBA.

He had a 50% interest in the plaintiff but was a non- active member. His brother did the day to day running of the business.

He denied that the defendant had a loan account of R750 000.00. It was never discussed.

It was put the defendant testified the business did not have a bank account. To start a business he had to pay for till points, shelves, etc. Not Karim or his brother. He replied he was a non-active member and was not involved in it.

He testified on 13 May 2010 two agreements were drawn up. Both their attorneys were present. Both parties gave inputs in the agreements. He was satisfied and signed both agreements.

The purchase price, R600 000.00, was paid the same day into the trust account of the defendant's attorney.

In terms of clause 2.4 there would be a separate sale agreement which would be attached to the Memorandum of Agreement.

In respect of clause 2.5 he testified there was an element of trust that there would be no surprises at a later stage. It was put that it is not what the clause says. He replied the trust element was the sole contributor to finalise the agreement on that day.

He testified that the Memorandum of Agreement was to safeguard the purchaser. He said clauses 2.5 and 2.8 are interlinked Clause 2.8 reinforces that. The bank statements were not yet available, hence the inclusion of clause 2.8. The seller still had to provide answers regarding the bank statements.

It was put that he would have acted with due diligence and did have access to the bank statements before we signed the agreements. This he denied.

The agreements were based on trust, there was an acrimonious relationship between them.

It was put that he had all the necessary information before he signed the sale agreement. This he denied. He says had that been the case there would have been no need to draw up the Memorandum of Agreement.

He was asked why he signed the sale agreement if he did not have all the documents. He said there was an element of trust and the two agreements should be read together. The agreements should not be read in isolation. Both must be seen as binding on the sale.

He was referred to clause 12.3 of the Sale of Members' Interest Agreement. It reads as follows:

> *"Having regard to the existing acrimonious relationship between the parties, as at date of signature of this agreement, the parties wish to record that this Agreement, in addition to the sale of the Sellers Members Interest, is in full and final settlement of all issues between the parties on the one hand, and the parties and the close corporation on the other hand, arising from any existing or future civil or criminal liabilities."*

It was put it wording is very clear. There is no question of an element of trust. He said no, the element of trust cannot be excluded.

It was put this clause puts an end to all disputes. He said on face value but the Memorandum of Agreement goes hand in hand with this agreement. The Memorandum of Agreement was entered into to safeguard the purchaser. The Memorandum of Agreement showed the bank statements were not made available.

He was referred to clause 14.1, 14.2 and 14.3 of the sale agreement. He testifies that the Memorandum of Agreement varied the sale agreement.

In re-examination he was again referred to clause 2.6 of the Memorandum of Agreement. He said it was inserted with clause 2.8. It was condition of finalising the sale agreement that the defendant provide the bank statements and answers. At that stage it was not yet available.

He was referred to clause 2.4 of the Memorandum of Agreement. He said the Memorandum of Agreement was an addendum to the sale agreement. He had no knowledge that the defendant withdrew monies. He had no reason to believe otherwise. Both agreements must be read together. They were told that the bank statements would be forthcoming.

That was the case for the plaintiff.

On behalf of the plaintiff it was argued as follows:

The action launched by the plaintiff is a delictual claim for the repayment of monies misappropriated by the defendant, a former member of the plaintiff, appropriated throughout the Defendant's tenure as a 50% member of the plaintiff. (The total amount so withdrawn was R 338 000.)

The defendant raises as its main defense the fact that there is a contractual term contained in the sale of shares agreement entered into between the parties on 13 May 2010 to the effect that the agreement would be in full and final settlement of all issues between the parties. It relies on the Sale of Shares Agreement on page 25 of the trial bundle at paragraph 12.3.

The defendant also alleges authority to do so based on an alleged loan account held with the plaintiff.

The plaintiff's case is that when the Sale of Share Agreement was entered into between the parties that it did not have in its possession or at its disposal the bank statements or financial statements of the Plaintiff.

It is argued that it is common cause that the defendant was the only party who had access to and control over the bank account of the plaintiff from the inception of the plaintiff to date of the present action or at least until the low water mark of 13 May 2010.

It is correctly pointed out that it is common cause that the defendant transferred four separate amounts (Totaling R 338 000) from the bank account of the plaintiff either into his own personal bank accounts and or the transfer of money was to his benefit.

Those amounts are set out in paragraph 7.2 to 7.4 of the Particulars of Claim and also appears from the bank statements at pages 6 to 16 of the trial bundle.

The defendant testified to the effect that he had a loan account with the plaintiff however the exact amount of the loan account could not be presented to court although the figure of R 750 000.00 was bandied about.

It is common cause that the defendant could not produce documentation to support his contention that firstly he had a loan account with the plaintiff, and secondly that he had made an initial investment of R 750 000.00 in the plaintiff would constituted a loan account.

The defendant testified that there were oral agreements on every occasion entered into between Karim and himself in respect of the transfer of the funds to the defendant's personal accounts or on his behalf.

Karim testified that there was never at any stage an agreement entered into between the parties in respect of the transfer of funds from the plaintiff to the defendant. He testified that he would never have agreed to same, especially in light of the fact that the business was a new fledgling business which could not afford to make such large transfers for the sole benefit one party.

Karim testified that in May 2010 the defendant was requested to bring all financial statements and bank statements to the meeting of the 13th May 2010 and before the 50% shareholding was purchased and any agreements were signed. He testified that on 13 May 2010 the defendant and his attorney arrived at the meeting but did not bring the financial statements and bank statements with. As a result thereof a further

agreement was entered into between the parties, namely the Memorandum of Agreement, entered into between the Defendant and Abdool Khalik Karim.

Karim testified that the sole purpose of the Memorandum of Agreement was to safeguard the interests of the Plaintiff because at that stage the Defendant had not been forthcoming in respect of the bank statements and financial statements. It was pertinently pointed out by Karim that he had not had sight of the financials or bank statements of the Plaintiff at the time when he signed the Sale of Shares Agreement.

It is correctly pointed out on behalf of the plaintiff that the defendant contradicted himself under cross examination in that he had maintained throughout that he had provided the documents requested to Karim prior to the signing of the two agreements. However towards the end of cross examination he conceded that he couldn't remember how many documents were provided and in fact stated that many documents could have / may have been provided at a later stage.

It is argued, in my view correctly, that there is absolutely no proof of a loan account before court and no basis has been laid by the defendant as to why is was entitled to receive monies on the basis of an alleged loan account however no other investing party received a repayment in respect of its own loan account.

It is argued that upon a perusal of the Memorandum of Agreement it was clearly meant to be an addition / addendum to the Sale of Shares Agreement. This is indeed clear from clauses 2.4 and 2.6 of the Memorandum of Agreement.

Clause 2.4 states that *"the terms of the sale have been incorporated in a separate sale of members interest agreement to which this agreement is attached.* The Defendant's version is that the Memorandum of Agreement was a precursor to the

sale itself. It is argued this allegation of the defendant is improbable where he states that the Memorandum of Agreement would be signed first and it was to accompany the Sale of Members Interest Agreement. It is clearly an addition, akin to an annexure or addendum. In any event why would the parties enter into the Memorandum of Agreement to agree to hand over documents, as per clause 2.6, and then hand over the documents when simply handing them over would suffice. I agree with these submissions.

It is correctly pointed out that clause 2.6 states that "*the seller undertakes to forward a complete set of bank statements to the purchaser upon receipt of the purchase consideration*". The defendant states that he signed the Memorandum of Agreement, then provided the financial statements and then signed the Sale of Members Interest Agreement. This is not probable. Why would the parties agree in writing to do something which can be done informally? This submission is clearly correct. The drafting of the Memorandum of Agreement would then be a waste of time.

It was submitted (correctly in my view) that the version of Karim is far more probable. The defendant clearly did not bring the documents he was requested to bring to the meeting. However in order to proceed with the resolution of the dispute, the Memorandum of Agreement was entered into which in essence made provision for bank statements at a later stage. This would also explain why the two agreements are signed on the same day.

I agree that all of the above can only lead to the inescapable conclusion on a balance of probabilities that Karim did not have sight of the bank statements and financial records of the Plaintiff prior to purchasing the Defendant's 50%

shareholding. It is common cause that the Defendant had sole access and control over the bank account.

It is common cause that the parties were in a very acrimonious dispute. I agree with the submission on behalf of the plaintiff that it is highly unlikely that the defendant would have telephoned the other 50% member (Karim) to ask permission to transfer an amount of R 338 000.00. This is denied by Karim and he stated further that he would not have provided his permission even if he was contacted by the defendant in this regard.

It was submitted that on the evidence it can be accepted on a balance of probabilities that Karim was never at any stage aware that the defendant had been misappropriating monies from the plaintiff.

Karim testified that despite it being a business transaction, he expected the defendant to have acted in good faith, with an element of trust and transparency in the conclusion of the agreement to sell the defendant's 50% membership in the plaintiff.

It was submitted the defendant now attempts to hide behind a clause in the agreement to avoid being liable to the Plaintiff for monies he cannot justifiably or evidentially prove he was entitled to.

I was referred to authority to the effect that a contracting party, who fraudulently or in bad faith seeks to rely on the protection afforded by a non-variation clause of sorts, will not succeed. In Van As v Du Preez 1981 (3) SA 760 (T) at 765 it was stated:

"*A no-variation clause would of course not protect a party against his own fraud (Shifren and Others v Sentrale Ko-op Graanmaatskappy Bpk 1964 (2) SA 343 (O) at 346 D – E)*

I was also referred to Brisely v Drotsky 2002 (4) SA 1 (SCA) at 34 where the "fraud or bad faith exception" has been recognized in the concurring judgment of Cameron JA. The relevance of bad faith in the conclusion of contracts is that public policy not only avoids agreements regarded as illegal or socially inadequate, but also precludes reliance on a provision, unexceptionable in itself, where to do so would be against public policy. In this regard I was referred to Contract General Principles: Van der Merwe, Van Huyssteen, Reinecke and Lubbe, Second Edition at page 144 – 145

I was further referred to Christie's The Law of Contract in South Africa at page 465 where it is stated:

"*...That is why, a the majority judgment in Brisley v Drotsky observed at 12A-B, the courts have sometimes allowed parties to escape from the non variation clause on doubtful grounds. The most doubtful and since Brisley v Drotsky, unacceptable ground is a bald allegation of bad faith. But Cameron JA, agreeing with the majority judgment added that*

"where a contracting party, strong or weak, seeks to invoke the writing only requirement in deceit or to attain fraud, the courts will not permit it to do so."

And added

"The jurisprudence of this Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy."

It was testified by Karim that he would never have entered into the agreements had he known that the Defendant had misappropriated the amounts sued for. There was no agreement to do so and the defendant had failed to disclose such money transfers prior to the signing of the agreement.

I was further referred to Standard Bank of SA Ltd v Prinsloo 2000 (3) SA 576 (CPD) at 585 A – F where it was stated:

"A measure of fairness and reasonableness must be incorporated into the principles on which contractual liabilities are based, as Van der Merwe et al Contract: general Principles (1993) submit at 233:

> *"A better approach would be to accept that good faith, as a value or principle which underlies and informs the more technical rules of the law of contract and which must be given concrete content when it is applied in particular instances, also applies to the operation of a contract."*

The Court further stated:

> *"Not only should this principle of good faith apply when performance is made when rights under the contract are exercised, but it should infuse the entire process by which a contract is concluded...Good faith does not depend on an analysis of abstract ethical principles but is rather based upon ordinary business decency."*

It was submitted that it is clear that the version of the defendant does not ring true and is based on unsubstantiated allegations which simply do not add up.

It was submitted that the defendant was not bona fide when entering into the Sale of Shares Agreement. There was a reason why he didn't provide the bank statements and financial statements to Karim prior to the sale of his 50% membership. His aim was to deceive the purchaser. The defendant did not wish to disclose the fact that he had misappropriated funds from the plaintiff.

It was submitted that the defendant's justification therefore are not bolstered by any evidence of any nature whatsoever. Not a single document could be provided to show the existence of the alleged loan account and as such it can be accepted that no such loan account exists.

It was submitted that the version of the plaintiff is undoubtedly true on a balance of probabilities. The dates add up in respect of the two agreement and the basis and reasons for the second Memorandum of Agreement make perfect sense. It is an ancillary agreement which acted as an addendum to the main Sale of Membership Interest Agreement and was entered into solely for the purposes of regulating the future conduct in respect of the Plaintiff's financial records.

It was submitted that good faith must be evident in all business transactions and agreements. The defendant's complete lack of transparency and failure to disclose the amounts withdrawn by himself prior to the signing of the sale agreement clearly show his lack of good faith in entering into the sale agreement and as such he should be precluded from relying on clause 12.3 of the Sale Agreement.

It was put to Karim by counsel for the defendant that the parol evidence rule precluded the reading in of trust or good faith into the agreements entered into between the parties. It was argued on behalf of the plaintiff this submission made by defendant's counsel is absurd and without any legal or factual basis. The notion of good faith in contracts is not a new phenomenon and has always been a part of the common law. Good faith has been regarded as the doing of simple justice between person and person. It involves a respect for the other party's interests in a contract.

To enter into a contract inherently contains an element of trust by both parties in the other.

It was argued, because a contract is an agreement between two or more parties and often involves the principle of reciprocity, parties should not enter into a contract in bad faith. To remove the element of good faith and trust from contractual situations would create commercial chaos.

Good faith is not an element of a contract which must be expressly included in the contract. It was argued this argument by the defendant's counsel is absurd. To approach a contract with certain facts not having been disclosed has always been a ground for the setting aside of a contract.

It was argued that the evidence of Karim was to a large extent unchallenged. The time periods and reasons for entering into the two respective agreements not only runs true but clearly evidences the untruthfulness of the evidence of the defendant. It is clear, even on the defendant's own version, that the bank statements and financial statements were not provided to the purchaser prior to the signing of the agreements.

It was submitted there was no transparency by the defendant leading up to the signature of the agreements and it is clear on a balance of probabilities that the reason for such non-disclosure was to extract as much financial benefit from the plaintiff and the intended sale without having to disclose material facts which would have a substantial bearing on the negotiations and the agreements entered into. To

now try and hide behind the contract itself in order to benefit from such conduct is not condonable.

I was requested to grant judgment in favour of the Plaintiff as prayed for with costs.

On behalf of the defendant it was argued as follows:

From the Memorandum of Agreement and the sale of members interest, the parties intentions are clear, namely that the parties intended to enter into a sale and purchase agreement of the defendant's members interest in the plaintiff; The purchaser would pay the purchase price of R600 000-00, which was duly done on the 13th May 2010.

Clauses 2.5 of the Memorandum of Agreement and 12.3 of the Sale of Members Interest Agreement is a full and final settlement of all disputes between the remaining members of the plaintiff and the defendant and the plaintiff and the defendant at the time of executing the agreements as well as any future claims, civil or criminal.

In *Christie: The Law of Contract in South Africa 6th edition, page 475*, compromise, or transactio, is defined as the settlement by agreement of disputed obligations whether contractual or otherwise.

In *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd & Others* 1978 (1) SA 914 (A) at 921 the court held that the purpose of a transactio is not only to put an end to existing litigation but also to prevent or avoid litigation.

In *Dennis Peters Investments (Pty) Ltd v Ollerenshaw* 1977(1) SA 197 (W) at 202 E-F and *Van Zyl v Niemann* 1966(4) SA 661(A) the court held that a compromise has the effect of res judicata and is an absolute defence to an action on the original contract.

In *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* [1992] ZASCA 56; 1992 (3) SA 234 at 238I the court held that "*The law, as a general rule, concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract.*". The elements of effective acceptance are a question of law, proof of these elements is juridically premised on the prevailing factual matrix. *See Paterson Exhibitions CC v Knights Advertising and Marketing CC* 1991 (3) SA 523 (A) at 529C-D;

In *Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (SCA) at para 10, Malan AJA (as he then was) stated:

> *"The essential issue is whether an agreement of compromise was concluded: one is concerned simply with the principles of offer and acceptance. The first question is whether the cheque accompanied by the Credit Request and Final Reconciliation constituted an offer of compromise. In other words, "the proposal, objectively construed, must be intended to create binding legal relations and must have so appeared to the offeree".....*

To be an effective offer of compromise,.....the tender must contain only one condition: that acceptance ends the dispute,.....the acceptance must be clear and unambiguous....." See *ABSA Bank Ltd v Van der Vyver NO* 2002 (4) SA 397 (SCA) para 17; *Bebop A Lula Manufacturing and Printing CC v Kingtex Marketing* 2008 (3) SA 327 (SCA) para 10 and 13.

Consequently the plaintiff and its members, entered in to a compromise of all their disputes and there was a clear offer and acceptance thereof in the form of the signed sale of member's interest agreement. As such the plaintiff and its members have no further claim against the defendant, arising from any disputes between the parties prior to the signing of the sale of members interest agreement.

The sale of member's interest agreement also sets out that the said agreement is the whole agreement between the parties, and that no variations to the agreement will have any force and effect unless reduced to writing, and that the agreement is binding of all successors in title. See *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en andere* 1964 (4) SA 760 (A): the Appellate Division ruled that such non-variation clauses are valid and binding on the parties. This principle has since been affirmed by the courts on many occasions.

Disregarding the Shifren rule is not relevant in this case, as it is clear, based on the testimony of Mr. Abdool Khaliq Karim, that there was no variation to the

Memorandum of Agreement or the Sale of Members Interest Agreement, and therefore, the Shifren rule remains in full force and effect.

The parties signing the agreement warranted that they were duly authorized to enter to the agreement.

I was referred to the Parol Evidence Rule, which applies to all written contracts. *In Union Government v Vianini Pipes 1941 AD 43 at 47 the court held that* the written agreement is the "exclusive memorial" of the agreement between the parties. The written agreement contains all the express terms of the contract and as such "the contents of the document [may not be] contradicted, altered, added to or varied by parol evidence". Furthermore, it was recently held in *ABSA Technology v Michael's Bid a House (212/2012) [2013] ZASCA 10 (26 February 2013) at para 20* that "a court may not admit evidence as to what the parties intended it to mean if that has the effect of changing the terms of which they clearly agreed [in writing]".

It should be noted that the both the memorandum of agreement and the sale of members interest agreement were drafted by Karim's erstwhile attorneys, as such Karim was fully aware of the terms and conditions of the respective agreements.

It was submitted that the defendant's version is consistent with the occurrence of events and supports the documentary proof relied upon in trial.

It was submitted that based on the oral evidence and the agreements before the court there can be no other possible conclusion than the fact that the plaintiff was fully aware of all or any withdrawals made by the defendant and therefore the defendant does not owe any amount to the plaintiff.

Furthermore, at all relevant times the plaintiff and its members were fully aware of the existence of the agreements and its terms and as such the instituting of this action is clearly frivolous. It was submitted that the action should accordingly be dismissed with costs on an attorney and client scale.

Conclusion:

The defendant's main defence is that there is a contractual term contained in the sale of shares agreement entered into between the parties on 13 May 2010 to the effect that the agreement would be in full and final settlement of all issues between the parties. It relies on the Sale of Shares Agreement clause 12.3.

The plaintiff's case is that when the Sale of Share Agreement was entered into between the parties that it did not have in its possession or at its disposal the bank statements or financial statements of the plaintiff.

It is common cause that the defendant was the only party who had access to and control over the bank account of the plaintiff.

It is not in issue that the Defendant transferred four separate amounts (Totalling R 338 000) from the bank account of the plaintiff either into his own personal bank accounts and or the transfer of money was to his benefit.

I agree with counsel on behalf of the plaintiff that there does not exist any documentation to the effect that the defendant had a loan account with the plaintiff of R 750 000.00 or at all.

I agree that it is improbable that there were oral agreements on every occasion between Karim and the defendant in respect of the transfer of the funds to the defendant's personal accounts or on his behalf. Karim testified that there was never such agreements. His evidence that he would never have agreed to same, especially in light of the fact that the business was a new business which could not afford to make such large transfers for the sole benefit one party has the ring of truth and is favoured by the probabilities.

I share counsel on behalf of the plaintiff's view that on the probabilities the defendant did not bring all financial statements and bank statements to the meeting of the 13th May 2010 and before the 50% shareholding was purchased and any agreements were signed. Had he done so I fail to see why it was deemed necessary to draw up the Memorandum of Agreement.

On the probabilities Karim's evidence that the sole purpose of the Memorandum of Agreement was to safeguard the interests of the plaintiff is true. Karim therefor had not had sight of the financials or bank statements of the plaintiff at the time when he signed the Sale of Shares Agreement.

The contradiction by the defendant under cross examination that he had on the one hand provided the documents requested to Karim prior to the signing of the two agreements but on the other hand could not remember how many documents were provided and that many documents could have / may have been provided at a later stage is in my view significant.

I agree that upon a perusal of the Memorandum of Agreement it was clearly meant to be an addition / addendum to the Sale of Shares Agreement. This is clear from clauses 2.4 and 2.6 of the Memorandum of Agreement.

The version of Karim is far more probable. The defendant clearly did not bring the documents he was requested to bring to the meeting. However in order to proceed with the resolution of the dispute, the Memorandum of Agreement was entered into which in essence made provision for bank statements at a later stage. This would also explain why the two agreements are signed on the same day. On a balance of probabilities that Karim did not have sight of the bank statements and financial records of the paintiff prior to purchasing the defendant's 50% shareholding.

It can be accepted on a balance of probabilities that Karim was never at any stage aware that the Defendant had been misappropriating monies from the Plaintiff.

The authorities, referred to above on behalf of the plaintiff, that a contracting party, who fraudulently or in bad faith seeks to rely on the protection afforded by a non-variation clause will not succeed, is clearly applicable.

Karim would clearly never have entered into the agreements had he known that the Defendant had misappropriated the amounts sued for. The defendant had failed to disclose such money transfers prior to the signing of the agreement.

The dictum quoted above from Standard Bank of SA Ltd v Prinsloo is clearly applicable in this case.

I agree that it is clear that the version of the defendant does not ring true and is based on unsubstantiated allegations which simply do not add up. The defendant was not bona fide when entering into the Sale of Shares Agreement. There was a reason why he didn't provide the bank statements and financial statements to Karim prior to the sale of his 50% membership. His aim was to deceive the purchaser. He did not wish to disclose the fact that he had misappropriated funds from the Plaintiff.

I agree that the defendant's justification for the withdrawals is not bolstered by any evidence of any nature whatsoever. Not a single document could be provided to show the existence of the alleged loan account and as such it can be accepted that no such loan account exists.

I agree that the version of the plaintiff is undoubtedly true on a balance of probabilities. The dates add up in respect of the two agreement and the basis and reasons for the second Memorandum of Agreement make perfect sense. It is an ancillary agreement which acted as an addendum to the main Sale of Membership Interest Agreement and was entered into solely for the purposes of regulating the future conduct in respect of the Plaintiff's financial records.

Good faith must clearly be evident in all business transactions and agreements. The Defendant's complete lack of transparency and failure to disclose the amounts withdrawn by himself prior to the signing of the sale agreement clearly show his lack of good faith in entering into the sale agreement and as such he should be precluded

from relying on clause 12.3 of the Sale Agreement. The parol evidence rule is clearly not applicable in circumstances like these. Parties should not enter into a contract in bad faith. I agree that to remove the element of good faith and trust from contractual situations would create commercial chaos.

I have considered the arguments on behalf of the defendant but for the above mentioned reasons I cannot find in his favour.

Judgment is granted in favour of the plaintiff as follows:

1. Payment in the amount of R 338 000;
2. Interest on the amount of R 338 000 at a rate of 15,5% *a tempora morae* from date of summons to date of payment;
3. Cost of the suit.

E JORDAAN

JUDGE OF THE GAUTENG DIVISION, PRETORIA