IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

7/10/2014

Case No: **11090/2012**

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

7/10/14
DATE

SIGNATURE

RICHARD FREDERICK PAPE Plaintiff

and

EL GONDOR TRADING 220 (PTY) LTD First Defendant

HENDRIK CHRISTOFF VILJOEN Second Defendant

JUDGMENT

FOURIE, J

[1] This is a claim for payment of R1 301 038.00 against the first defendant and for an order declaring that the second defendant is jointly and severally liable with the first defendant for what is owing to the plaintiff. The claim against the first defendant is based upon a written agreement, whereas the claim against the second defendant is premised on the allegation that he, as the sole director of the first defendant, managed the affairs of the first defendant recklessly. At the commencement of the trial the questions of liability of the two defendants were separated by agreement and the trial proceded with regard to the issue of the first defendant's liability only.

[2] In essence, the plaintiff's case is that on 1 April 2008 and in terms of a written management agreement with the first defendant, he paid the amount of R1.2 million as an investment into a bank account which was orally agreed with the second defendant. On 15 March 2010 the plaintiff terminated the agreement, but not withstanding demand, the first defendant has failed to make payment of the capital amount and interest. The defence raised by the first defendant is, in a nutshell, that the plaintiff failed to comply with his obligations in terms of the written agreement and made payment of the capital amount, not to the first defendant as was agreed in writing, but to a company known as Eminent Finance (Pty) Ltd. Therefore, according to the first defendant, it is not liable to make any payment to the plaintiff.

[3] In response to questions posed by the plaintiff during a pre-trial conference, the first defendant postulated 17 issues which it avers should be decided. It is not necessary to deal with each of those issues separately, as many of them (if not all) can be united into one central question: is the first defendant liable to make payment of the capital amount and interest to the plaintiff? Before considering this issue, I shall first refer to the pleadings and thereafter provide a summary of the evidence.

PLEADINGS

[4] It is common cause that on 11 March 2008 the plaintiff and the first defendant, represented by the second defendant, concluded a written management agreement. In terms of this agreement it was agreed that:

- the plaintiff was to transfer R1.2 million to the first defendant's bank account within 14 banking days upon signing of the agreement;

- the plaintiff was to receive yields of an estimated 25% per annum, payable in monthly instalments on the twelfth day of each month;

- the first defendant was to return the capital amount at the end of the term of the agreement;

- the term of the agreement shall be until notice is given by either party to terminate the agreement;

- either party could terminate the agreement by giving 180 days notice to the other party.

[5] The case pleaded for the plaintiff is that in pursuance of his obligations and on the instructions of the second defendant, duly authorised and acting on behalf of the first defendant, the plaintiff caused a transfer of the capital amount into the bank account of Eminent Finance (Pty) Ltd on 1 April 2008. The first defendant thereafter paid monthly yields to the plaintiff in the total amount of R623 962.00. On 15 March 2010 the plaintiff gave written notice of termination of the agreement whereafter the first defendant was obliged to repay the capital amount and all outstanding interest (or yield) as agreed.

[6] The case pleaded for the first defendant is, first, a denial of the aforegoing allegations and, second, that insofar as any payments have been

made by the first defendant to the plaintiff, this was not done in terms of the written management agreement. Insofar as any confirmation may have been given with regard to an investment, this did not relate to any agreement or payment in terms of the written agreement entered into between the parties.

EVIDENCE FOR THE PLAINTIFF

SWART

[7] Mr Swart testified that he was the managing director of Eminent Finance (Pty) Ltd. It was involved in the micro-lending industry by granting micro-loans to security personnel. On 1 September 2008 he appointed the second defendant as the financial director of Eminent Finance who then also became a shareholder of this company. In return Mr Swart also became a shareholder in the first defendant, El Gondor Trading (also known as Bridge IT).

[8] Eminent Finance was financed by investors such as, *inter alia*, the first defendant. The investment of the first defendant with Eminent Finance consisted of investments made by investors directly at the first defendant. The first defendant then reinvested these investments with Eminent Finance under the name of El Gondor Trading or Bridge IT as it was also known. In terms of a letter dated 1 October 2008 the second defendant resigned as a director of Eminent Finance. According to the witness this document (p 10 of Exhibit "B") only came to his knowledge a couple of weeks ago (i.e. during January or February 2014).

[9] When asked whether he knew anything about the plaintiff or his investment during the time when he was the managing director of Eminent Finance, he replied in the negative. He was then referred to page 52 of Exhibit "B". This is a ledger account of Bridge IT in the books of Eminent Finance for the period 1 March 2008 to 28 February 2009. It reflects an entry dated 1 April 2008 in terms whereof the account of Bridge IT was credited with R1.2 million. In the description column reference is made to Richard Papé. The witness also pointed out that according to this account Bridge IT would receive 36% interest per annum on its investment with Eminent Finance for that year.

[10] In cross-examination the witness testified that he was aware of the payment which the plaintiff had made, but the second defendant informed him that it would be allocated to Bridge IT. Later in cross-examination he conceded that he only became aware of this payment when he was informed about it by the liquidator of Eminent Finance. It was then put to him that the second defendant commenced his employment with Eminent Finance as financial manager and not as a director. He was also referred to the letter of resignation dated 1 October 2008. This was disputed by the witness who then pointed out that he was retrenched by the second defendant during 2009 when *"he signed my retrenchment documents as a director"*.

[11] The witness was then referred to page 30 of Exhibit "B". This is an e-mail dated 7 April 2010 which was sent by the second defendant to the plaintiff. It refers, *inter alia*, to the fact that the plaintiff had deposited money

directly into the bank account of Eminent Finance and that repayment thereof will start approximately within 12 months in monthly instalments of R100 000.00. He replied that during that time he had already been retrenched by the second defendant and was no longer employed by Eminent Finance.

[12] It was also put to him that the plaintiff had made this investment directly with Eminent Finance, but to simplify the administration payments to the plaintiff by Eminent Finance would go through Bridge IT and the second defendant would receive a commission from Eminent Finance on this investment. The witness answered that investors earned a certain percentage of interest on a monthly basis whereafter the investor would then pay its investors the interest on which they had agreed upon. If the plaintiff was an individual investor with Eminent Finance, he would have received a letter of acknowledgement and he would have been indicated as an individual investor in the books of Eminent Finance *"and not a Bridge IT investor"*. He also confirmed (to a question put by the Court) that the plaintiff was never paid any commission or interest by Eminent Finance.

BOTHA

[13] Mr Botha testified in his capacity as an insolvent practitioner employed by Corporate Liquidators. He was appointed during October 2013 as liquidator in the winding-up of Eminent Finance. He also confirmed that the second defendant was a director of Eminent Finance. According to him the first defendant (El Gondor Trading) was a company which, in the name of

Bridge IT, had made investments with Eminent Finance. He was also referred to page 52 of Exhibit "B", the ledger account of Bridge IT. When asked who prepared this document he replied as follows: *"Die enigste persoon wat ek van weet wat verantwoordelik was vir die finansiële sy van Eminent Finance, was mnr Viljoen. Wat voor dit gebeur het, voordat ons betrokke geraak het, kan ek nie oor getuig nie."*

[14] He also referred to page 43 of Exhibit "B". This is part of a claim, completed in the name of the plaintiff, in the insolvent estate of Eminent Finance. According to the witness this claim was later withdrawn after he had informed Mrs Papé that they could not rely on a contractual claim against Eminent Finance and that they should obtain legal advice in this regard.

[15] In cross-examination the witness conceded that he does not know who prepared the ledger account of Bridge IT (p 52 of Exhibit "B"), but he reiterated that the second defendant was in control of the "financial aspects" of Eminent Finance and that he was the person who provided information to the liquidator. He also explained that Mrs Papé was uncertain whether a claim should be lodged in the insolvent estate of Eminent Finance, or whether a claim should be instituted against the first defendant.

RICHARD PAPÉ

[16] Mr Richard Papé is the plaintiff in this matter. He knew the second defendant as he was the auditor of his previous company. The management agreement was concluded at the house of the second defendant. According

to him he would use the proceeds of an immovable property to fund the investment. With reference to certain e-mails at pp 2, 3 and 4 of Exhibit "B" he explained that Attorneys Dyks & Van Heerden were instructed to transfer the proceeds of the sale into two different accounts, being that of the first defendant and an account of his wife. The transfer into the account of Bridge IT was unsuccessful. The transferring attorney was then informed by the bank that the name of the account holder is El Gondor Trading 220 (Pty) Ltd. He then instructed the attorneys to transfer the full amount into his wife's bank account. He had to wait a couple of days for the money in his wife's account to become available for transfer again.

[17] On 1 April 2008 he went to the bank to do a transfer into the account of El Gondor Trading. He was concerned that he would be losing interest on the investment for that month. He then had a telephonic discussion with the second defendant about the account whereto the funds should be transferred. As he had been informed by the second defendant where his money would be invested, he asked him if he could transfer the funds directly into the bank account of Eminent Finance. According to the plaintiff the second defendant then agreed thereto and he also gave him the bank details of Eminent Finance. He then referred to page 6 of Exhibit "B". This is a copy of his wife's bank statement indicating that on 1 April 2008 a transfer of R1.2 million was made into the account of Eminent Finance.

[18] Shortly thereafter he requested the second defendant to send him a letter "confirming funds and interest payment thereof". He then received a

letter by e-mail on 24 April 2008. Copies of the e-mail and the letter appear at page 8 and 9 of Exhibit "B". The letter is addressed "to whom it may concern". It refers to Richard Papé "CONFIRMATION OF INTEREST INCOME". It reads as follows:

> *"We hereby confirm that the abovementioned individual will receive the following approximate monthly interest income from his investment with us:*
>
> *monthly income* *R25 000*
>
> *Should you have any queries in this regard please do not hesitate to contact us."*

The letter is signed by H C Viljoen and the name "El Gondor Trading 220 (Pty) Ltd t/a Bridge IT Finance" also appears on it. According to the plaintiff this Mr Viljoen is the second defendant and he was a director of El Gondor Trading. It was in this capacity that he had been doing business with Mr Viljoen.

[19] The plaintiff was then referred to copies of bank statements as they appear at page 33 to 33b of Exhibit "B". These bank statements indicate that payments were made from the bank account of El Gondor Trading into the bank account of the plaintiff. A schedule reflecting all these payments appears at page 34 of Exhibit "B". According to this schedule payments in the total amount of R623 962.00 were made during the period 12 May 2008 to 11 August 2010. The witness then also referred to a document at page 10 of Exhibit "B". This is a copy of a SARS "employee income tax certificate" for

the assessment year 2009. The employer is indicated as El Gondor Trading 220 (Pty) Ltd and the employee as R F Papé. It indicates that an income of R250 000.00 was received for the tax year 2009. According to the plaintiff this document was received by him from Mr Viljoen. He also referred to a document at page 24 of Exhibit "B". This is another SARS document for income tax purposes, also known as an "IT3(b)" certificate. This document indicates that El Gondor Trading 220 (Pty) Ltd t/a Bridge IT is the "payer" and R Papé as the person to whom payments were made. It also reflects the nature of the investment as "interest-bearing" and capital invested as R1.2 million. Interest earned for this tax year (2010) is declared to be R254 769.00.

[20] The plaintiff then referred to copies of certain correspondence between him and Mr Viljoen. On 17 April 2009 he received an e-mail from Mr Viljoen on the letterhead of Eminent Finance referring to a financial climate forcing "everyone (to) tighten their belts". On 26 October 2009 he wrote a letter to Mr Viljoen drawing his attention to clause 4.1 of the management agreement. On 5 November 2009 the plaintiff again sent an e-mail to Mr Viljoen pointing out that his last letter was from Eminent Finance, whereas the agreement relates to an investment which had been made with El Gondor Trading/Bridge IT. In reply thereto Mr Viljoen said the following on 5 November 2009:

> *"As you will remember well, you have made an investment into the Eminent Finance bank account after we signed the agreement between the Trust and Bridge IT. Bridge IT as*

> *such has not received the funds, but Eminent did, you contravened the contract with Bridge IT by depositing the money into the Eminent bank account, that is why you now received the letter from Eminent."*

On 15 March 2010 the plaintiff gave notice in writing, referring to "clause 6 of our agreement dated 11 March 2008" to terminate the agreement. This notice was sent by e-mail to Mr Viljoen on 15 March 2010 (p 25 and 26 of Exhibit "B"). At the request of Mr Viljoen they then had a meeting at the Mug and Bean restaurant during which he admitted he was unable to make payment as requested.

[21] In cross-examination it was put to the plaintiff that the payment of R1.2 million was not made in terms of the agreement and it was also not amended to provide for payment "into another account out of time". This was conceded by the plaintiff who then explained that he had done so on the instruction of Mr Viljoen who was acting on behalf of El Gondor Trading. It was also put to him that he did so on his own and not on the instruction of Mr Viljoen. He replied that Mr Viljoen was the only person with whom he had been dealing with and that was the "only way that I could have paid the money into Eminent account".

[22] He was also referred to his claim which was lodged in the insolvent estate of Eminent Finance, suggesting that he had all along been aware that he did not have a claim against the first defendant. His reply was that in all those documents there always was a reference to El Gondor

Trading and Bridge IT. He also explained that at that stage he was not yet fully aware of all the legal implications of the liquidation.

[23] It was also put to him in cross-examination that the letter dated 24 April 2008 (confirmation of interest income) erroneously refers to the investment being with Bridge IT. The words "with us" in that document is part of a template that was erroneously included. The plaintiff replied that he was unable to comment on that. With regard to the SARS documents it was put to him that Mr Scheepers from Eminent Finance had already compiled "his and submitted them" and "to keep the bookkeeping in order" similar documents were then also issued to the plaintiff. The response was that he had received those documents by e-mail from Mr Viljoen. With regard to the investment it was put to him that it was an investment with Eminent Finance and that Eminent Finance would pay a commission to the first defendant. The plaintiff replied by referring to his bank statements from which it appears that payments to him were made by Bridge IT.

URSULA PAPÉ

[24] Mrs Ursula Papé is the wife of the plaintiff. She testified that the transferring attorneys, Dyks & Van Heerden were instructed to pay R1.2 million into the first defendant's account. They issued a cheque payable to Bridge IT. Upon presentation the cheque was declined as the account holder was not Bridge IT. The money was then transferred into her account to prevent an unnecessary delay. Thereafter a transfer was made "into the account that my husband provided to me which he had received from

Mr Viljoen". According to her, her husband had a telephonic discussion with Mr Viljoen from Standard Bank, Midrand.

[25] She also testified about a claim completed by her and lodged with the liquidator in the insolvent estate of Eminent Finance. The power of attorney for proving claims is dated 18 November 2010. According to her she had received a letter from Scholtz Attorneys, acting on behalf of Mr Viljoen, informing them that they are a creditor in the insolvent estate of Eminent Finance. They were later advised by the liquidator, Mr Botha that in view of the fact that they had an agreement with El Gondor Trading, they should consider instituting an action against the first defendant.

[26] In cross-examination she indicated that they had decided to withdraw their claim during July 2012 as they had already been advised to pursue their claim against the first defendant. Later on she also explained that from the outset they thought it was inappropriate to engage with the liquidator, as they had no agreement with Eminent Finance.

EVIDENCE FOR THE FIRST DEFENDANT

VILJOEN

[27] Mr Viljoen is a chartered accountant and the sole director of the first defendant. He, who also is the second defendant, gave evidence for the first defendant. He represented the first defendant when the management agreement with the plaintiff was entered into on 11 March 2008. On 27 March 2008 he sent a copy of the first defendant's particulars to the plaintiff,

because he had been informed by the plaintiff that his attorney was struggling to make a deposit into the first defendant's bank account. He was then informed by Mr Scheepers, the financial director of Eminent Finance, that an amount of R1.2 million had been paid into the account of Eminent Finance by the plaintiff. Mr Scheepers asked him if he knew anything about this payment. He informed Mr Scheepers that he was aware of the plaintiff as they had signed an agreement, but he was surprised to learn that the money had been deposited directly into the bank account of Eminent Finance. He therefore did not regard it as a payment made in terms of the management agreement.

[28] When asked whether he had a telephonic discussion with the plaintiff before the money was paid into the bank account of Eminent Finance, his reply was "ek onthou nie so gesprek nie". To ensure that the first defendant would still get its commission on this investment and because he knew the plaintiff, it was then agreed with Mr Scheepers that "hy sommer die belegger se rente aan L Gondor (kan) betaal, en ek betaal dit oor aan die belegger".

[29] The witness was then referred to his letter of 24 April 2008 (confirmation of interest income) as it appears at page 9 of Exhibit "B". According to him he prepared 20 to 30 such letters per week and it is a "cut and paste" document. He said he had made a mistake by using the words "from his investment with us" and should have said "from his investment with Eminent Finance". He further testified that his appointment as director during

September 2008 took place without him consenting thereto and therefore he resigned as director as indicated in his letter at page 10 of Exhibit "B". According to him he was employed by Eminent Finance as financial manager.

[30] He confirmed that during April 2009 he circulated a letter on behalf of Eminent Finance as it appears at page 19 of Exhibit "B" (letter requesting investors to tighten their belts). He circulated this letter in his capacity as financial manager, as Eminent Finance was experiencing "ernstige finansiële moeilikheid" due to many loan accounts which had not been paid back. He sent a copy of this letter also to the plaintiff as he was an Eminent Finance investor. He also referred to his e-mail dated 5 November 2009 addressed to the plaintiff (p 22 of Exhibit "B"). According to him the purpose was to confirm that the first defendant no longer had an agreement with the plaintiff.

[31] The witness was then referred to the SARS document (IT3(b) at p 24 of Exhibit "B"). The reason for him issuing this document was explained as follows: he had received an IT3(b) document from Eminent Finance with regard to monies paid to the first defendant. To balance his books, he also had to issue an IT3(b) document for the plaintiff. With regard to the plaintiff's letter of 15 March 2010 (terminating the investment agreement) he first explained that he did not react thereto as there was no agreement to terminate. Later, when he was referred to his e-mail dated 16 March 2010 (p 28a of Exhibit "B"), he conceded that he did say "can we have a quick meeting?". He then confirmed that a meeting took place on 1 April 2010 at

the Mug & Bean restaurant. He was also referred to the plaintiff's e-mail addressed to him in this regard (p 30 of Exhibit "B"). In this e-mail it was put on record that "you informed us that as per clause 6 of our Funds Management Agreement, you are currently unable to fulfil the required termination condition". His response was the following:

> *"Ek sal nie gesê het L Gondor kan nie die geld betaal nie, want L Gondor het nie die kontrak nie. Ek sou gesê het Eminent Finance moet die geld terugbetaal."*

[32] In cross-examination he conceded that Eminent Finance ceased doing business during April 2009. When he was referred to a schedule setting out payments which had been made to the plaintiff (p 34 of Exhibit "B") he indicated that, although he did not verify it, he would be prepared to accept it as correct. When asked to explain why payments to the plaintiff were still being made during August 2010, he replied that as the first defendant was still receiving payments from Golden Ribbon Trading, he had to make payments to the plaintiff as well. When it was pointed out to him that the first defendant received those payments in terms of a cession which did not involve the plaintiff, he indicated that this construction was incorrect.

[33] He was then requested to identify documents indicating that there was a contractual relationship between the plaintiff and Eminent Finance. His reply was "u sal vir mnr Papé of vir mnr Swart moet vra. Ek kan nie namens hulle praat nie." He conceded that although he did not sign the financial statements of Eminent Finance for the tax year 2009, he did verify those

statements. He failed to notice the name of the plaintiff as an individual investor, as he was more concerned about outstanding loans and individual investors to whom money was owed by Eminent Finance.

[34] To questions put by the Court he answered that he first became aware during October 2008 that Eminent Finance was experiencing financial difficulties. When asked why the plaintiff's payment of R1,2 million was allocated to the account of Bridge IT, he replied that Mr Scheepers was responsible for recording this entry and that he did so to keep the administration as simple as possible. He conceded that the correct way of recording this transaction would be to open an account in the name of the plaintiff as was done for the other investors. According to him this was an exception, but he was unable to explain why.

DISCUSSION

[35] I shall first consider the question whether the payment of R1.2 million into the bank account of Eminent Finance vitiated the management agreement. I shall then consider the question whether the first defendant is liable to make any payment to the plaintiff.

PAYMENT TO EMINENT FINANCE

[36] It is common cause that payment was not made as stipulated in the agreement. First, the payment was not made to the bank coordinates referred to in Appendix "A" to the agreement and, second, it was not made within 14 banking days upon signing of the agreement. As far as the 14 day

period is concerned, clause 1.2 of the agreement provides that any delay shall give the company the right to terminate the agreement. There is no evidence that the company, i.e. the first defendant, terminated the agreement as a result of this delay. It should therefore be accepted that the agreement was not vitiated as a result of the funds not being made available within 14 banking days.

[37] What about the fact that payment was made, not to the first defendant, but to Eminent Finance? It was pointed out by counsel for the first defendant that the agreement contains a non-variation clause. It stipulates that any change or modification to this agreement shall be made in writing and executed by the parties as a condition prior to the implementation of any such change and/or modification. In any event, so it was argued, the plaintiff does not rely on any amendment of the agreement in his particulars of claim. I shall consider the last submission first.

[38] It is correct that the plaintiff does not rely in his particulars of claim on an amendment of the management agreement. However, it has been pleaded in paragraph 5.2 thereof that the "payment was so done on the instructions of the second defendant, duly authorised and acting on behalf of the first defendant in his capacity as its director". Furthermore, the plaintiff also gave evidence in this regard. Although this has not been pleaded as an amendment of the written agreement, the issue has been raised in the pleadings and fully canvassed during the trial. Even where no amendment of a pleading has been applied for our Courts have in the past adjudicated on

issues not raised on the pleadings, but fully canvassed at the trial. This approach was explained as follows in Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) at 433:

> *"This Court, therefore, has before it all the materials on which it is able to form an opinion, and this being the position it would be idle for it not to determine the real issue which emerged during the course of the trial."*

I see no reason why a similar approach should not be followed in this matter. I am of the view that, having regard to this *dictum*, the issue can and should be adjudicated on the evidence before me, notwithstanding the fact that no formal amendment was applied for.

[39] Usually a non-variation clause will prevent a party to vary informally a contract (SA Sentrale Ko-op Graanmpy Bpk v Shifren 1964 (4) SA 760 (A) and Brisley v Drotsky 2002 (4) SA 1 (SCA) at 16 and 17). However, this general statement of the law is subject to certain qualifications. Cameron JA, agreeing with the majority judgment in Brisley v Drotsky, also pointed out (at p 34, par 91) that:

> *"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. Public policy in any event nullifies agreements offensive in themselves – a doctrine of very considerable antiquity. In its modern guise, 'public policy' is now rooted in our Constitution and the fundamental values it enshrines."*

[40] The jurisprudence, as referred to by Cameron JA, can be traced back to Bank v Grusd 1939 TPD 286 in which a building owner was not permitted to rely on a non-variation clause after orally agreeing with the builder for certain extras (and cf. Robinson v Randfontein Estates GM Co Ltd 1925 AD 172 at 204-5 for a discussion of the common law). Also in Gray v Waterfront Auctioneers (Pty) Ltd & Another 1996 (2) SA 662 (WLD) at 668H Wunsh J was of the view, albeit perhaps obiter, that the applicant "may well have been precluded from relying on such a clause if his conduct is 'fraudulent or unconscionable, or a manifestation of bad faith'". See also in this regard Nyandeni Municipality v Hlazo 2010 (4) SA 261 (ECM) at 283, par 108 and 285, par 126 where reference was made to a municipal manager who relied on the Shifren principle "not for the legitimate purpose of vindicating his rights, but for the ulterior purpose of delaying his dismissal". Having determined that there are certain riders to the general rule, I shall now proceed to first consider the evidence, whereafter I shall decide whether the first defendant should be precluded from relying on the non-variation clause or not.

[41] Clause 1.1 of the management agreement provides for a transfer to be made into the bank account of the first defendant. Appendix "A" sets out the first defendant's bank details. It stipulates that the account holder is Bridge IT. The plaintiff testified that the transferring attorneys attempted to do a transfer into the name of Bridge IT, but was then informed by the bank that the name of the account is El Gondor Trading 220 (Pty) Ltd. This was confirmed by Mr Viljoen when he testified that on 27 March 2008 he provided

a copy of the first defendant's particulars to the plaintiff. This is a logic explanation for the delay caused by the fact that the account holder was not Bridge IT as indicated in appendix "A", but El Gondor Trading 220 (Pty) Ltd. The plaintiff's concern that he would be losing interest on the investment for April 2008 if a transfer is not made timeously, should be understood against this background.

[42] It would therefore make sense for him to discuss with Mr Viljoen the possibility of transferring the funds directly into the bank account of Eminent Finance. His version is, after having agreed thereto by Mr Viljoen, a transfer of R1.2 million was made directly into the bank account of Eminent Finance. He is supported by his wife in this regard who testified that her husband did have a telephonic discussion with Mr Viljoen from the offices of Standard Bank in Midrand.

[43] It was contended on behalf of the first defendant that the plaintiff has conceded that the payment was not made in terms of the management agreement and therefore, on his own version, the agreement does no longer apply. I do not agree with this submission. The plaintiff has clearly qualified his concession by adding that he had made the payment on the instruction of Mr Viljoen. He also said that Mr Viljoen was the only person with whom he had been dealing and that was the "only way that I could have paid the money into Eminent account". No doubt, he was relying on an oral agreement in terms whereof the written agreement was amended. That is

consistent with and supported by his notice during March 2010 to terminate the agreement in terms of "clause 6 of our agreement dated 11 March 2008".

[44] Mr Viljoen, on the other hand, is unable to deny having concluded such an agreement on behalf of the first defendant. His evidence was: "Ek onthou nie so gesprek nie". There is also the evidence of Mr Swart. He testified that if the plaintiff was an individual investor with Eminent Finance he would have received a letter of acknowledgement in this regard. There is no evidence of any such document indicating that the plaintiff was an individual investor with Eminent Finance. To the contrary, the ledger account of Bridge IT indicates the opposite. Furthermore, why would any person pay such a large amount of money into the bank account of another in the absence of any arrangement or agreement to do so? Having regard to the evidence and the probabilities, the inference is overwhelming that the plaintiff made the payment into the bank account of Eminent Finance in terms of an oral variation of an existing agreement with the first defendant, as represented by Mr Viljoen.

[45] Should the first defendant be allowed to rely on the non-variation clause as far as this oral variation is concerned? It is common cause that the amount of R1.2 million was paid into the bank account of Eminent Finance on 1 April 2008. According to Mr Viljoen he did not regard this payment as a payment in terms of the management agreement. However, he only informed the plaintiff more than a year later, on 5 November 2009 (p 22 of Exhibit "B") that he had breached the investment agreement by investing directly with

Eminent Finance. This belated notification should be considered against the background of Mr Viljoen having provided the plaintiff with a letter confirming his investment "with us", the payment of monthly yields to the plaintiff by the first defendant and having issued him with SARS documents.

[46] According to Mr Viljoen he made a mistake by referring to "his investment with us", he had to issue the SARS certificates to balance his books and the yields were paid in terms of an agreement with Mr Scheepers. If Mr Viljoen was from the outset of the view that the investment was not made in terms of the management agreement, why did he not then inform the plaintiff accordingly? Furthermore, he would have realised that the "confirmation of interest" letter, the monthly payments to the plaintiff and the issuing of the tax certificates are all in conflict with such a view. Why then waiting so long to inform the plaintiff that he had breached the management agreement? Should this be regarded as a mistake? I think not. Mr Viljoen is a chartered accountant. I observed him to be an intelligent person. According to his own evidence Eminent Finance was experiencing serious financial difficulties and was no longer doing business since April 2009. As the financial manager he realised, in my view, that his own company might be at risk as far as the plaintiff's investment is concerned, unless he could convince the plaintiff that his investment was with Eminent Finance.

[47] Having regard to the objective facts and the surrounding circumstances, I find Mr Viljoen's explanations with regard to his letter, payment of yields and the issuing of tax certificates to be so untenable that it

should be rejected as false. It is disturbing to see how the plaintiff was led down the garden path only to be surprised at the end by Mr Viljoen relying on a non-variation clause. No Court should, in my view, allow a person under these circumstances to avail himself of this defence for the ulterior purpose to perpetrate a deceit. The first defendant should, therefore, be precluded from relying on the non-variation clause as it appears in the management agreement. I accept the evidence of the plaintiff and find that on 1 April 2008 the management agreement was orally amended by agreement between the plaintiff and the first defendant, as represented by Mr Viljoen, in terms whereof the plaintiff was authorised to transfer the amount of R1.2 million directly into the bank account of Eminent Finance. The management agreement was therefore not vitiated as alleged by Mr Viljoen.

IS THE FIRST DEFENDANT LIABLE?

[48] In terms of clause 4.1 of the management agreement it was agreed that the plaintiff was to receive yields of an estimated 25% per annum, payable in monthly instalments on the twelfth day of each month. In terms of clause 5.2 it was agreed that the first defendant was to return the capital amount at the end of the term of this agreement. The term of the agreement was agreed to be until notice is given by either party to terminate the agreement. Either party could terminate the agreement by giving 180 days notice to the other party.

[49] The plaintiff testified that on 15 March 2010 he gave notice in writing, referring to "clause 6 of our agreement dated 11 March 2008" to terminate the

agreement. This notice was sent by e-mail to Mr Viljoen on 15 March 2010 (p 25 and 26 of Exhibit "B"). Mr Viljoen, acting on behalf of the first defendant, received this notice as he thereafter requested "a quick meeting". However, Mr Viljoen disputed the plaintiff's right to terminate the agreement because, according to him, there was no agreement to terminate. As I have already found that the management agreement was not vitiated by the payment made directly into the bank account of Eminent Finance, Mr Viljoen's evidence in this regard should be rejected.

[50] Furthermore, it is common cause that no account in the name of the plaintiff existed in the books of Eminent Finance. To the contrary, there was an account for the first defendant trading as Bridge IT. This is a ledger account of Bridge IT for the period 1 March 2008 to 28 February 2009. It reflects an entry dated 1 April 2008 in terms whereof the account of Bridge IT was credited with R1.2 million. In the description column reference is made to the plaintiff as "Richard Papé".

[51] It is quite clear from the evidence of Mr Viljoen that Mr Scheepers who made these entries did not know Mr Papé. For him to allocate a payment of R1.2 million to another person's account would be irresponsible, unless there was a good reason for him to have done so. That explanation could only have come from Mr Viljoen. His evidence that Mr Scheepers did so to keep the administration as simple as possible cannot be accepted, as there were other individual investors as well. He even conceded that this entry was an exception, but he was unable to explain why. Having regard to

the evidence and the probabilities, the inference is overwhelming that this particular entry was made in the ledger account of the first defendant because it was regarded by Mr Viljoen as an investment by the first defendant in terms of the investment agreement with the plaintiff as orally amended. I therefore conclude that the first defendant is liable to pay the capital amount of R1.2 million and any outstanding interest to the plaintiff.

[52] As far as the amount of interest is concerned, Mr Viljoen accepted in cross-examination that the schedule setting out payments to the plaintiff (p 34 of Exhibit "B"), to be correct although he did not verify it. According to this schedule the total amount due is R1 276 083.00. Notice of termination of the agreement was given on 15 March 2010. The first defendant was therefore obliged to repay the capital amount and interest by no later than 11 September 2010. In terms of paragraph 7 of the particulars of claim another amount of R25 000.00 is due for the period 12 August 2010 to 11 September 2010. The total amount due is therefore R1 301 038.00 plus further interest thereon calculated at the prescribed *mora* rate from 12 September 2010 to date of payment.

ORDER

In the result judgment is granted against the first defendant only, for:

(a) Payment of R1 301 038.00;

(b) Payment of interest thereon, calculated at the prescribed *mora* rate, from 12 September 2010 to date of payment;

(c) Costs of suit.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 7 October 2014

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