IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:41191/2012

DELETE WHICHEVER IS NOT APPLICABLE

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

11/3/2016
DATE

SIGNATURE

11/3/2016

In the matter between:

ODYSSEY CONSULTANCY CC **PLAINTIFF**

and

DALE HURWITZ **DEFENDANT**

JUDGMENT

RANCHOD J:

[1] This is an action in which the plaintiff ('Odyssey') relies on two liquid documents.

[2] First, a written acknowledgement of debt dated 22 February 2012 furnished by the principal debtor, GDCH Investment Holdings Pty Ltd ('GDCH') in which it acknowledges being indebted to Odyssey in an amount

of R1 821 820.00 together with interest thereon at the rate of 10% per month from 13 February 2012 until date of payment.

[3] Second, a deed of suretyship also dated 22 February 2012 in terms of which the defendant ('Hurwitz') personally bound himself to Odyssey jointly and severally as surety for and as co-principal debtor *in solidum* with GDCH for the "... due and punctual payment by ... [GDCH] of an amount and debt and time payment specified in the Acknowledgement of Debt plus interest at 10% per month from 13 February 2012 until date of payment...".

[4] It is common cause however that prior to the conclusion of these two agreements (the later agreements) Odyssey and GDCH had entered into agreements (and Hurwitz as surety for GDCH) which provided for a "profit-share" of 10% per month by Odyssey in return for providing "investment" capital to GDCH dated 9th and 11th May respectively ('the first and second written agreements').

[5] On 9 May 2011 Odyssey, represented by Mr Kevin Jenkins ('Jenkins'), and GDCH, represented by Hurwitz, entered into the first written agreement with each other in terms of which Odyssey advanced R1 440 000.00 to GDCH as the 'investment' of a capital amount for a period of 6 months, after which it was to be repaid.

[6] It is also not in dispute that two days later on 11th May, Odyssey and GDCH again represented by Jenkins and Hurwitz respectively, entered into the second written agreement in terms of which a further R280 000.00 was invested as a capital amount by Odyssey which also had to be repaid within 6 months by GDCH.

[7] It is also common cause that in both these agreements the return on the investment was stated to be 10% "profit-share" rather than 10% "interest" – payable monthly. Hurwitz bound himself as surety to the plaintiff for both these agreements.

[8] Whether it was intended to be a profit-share or interest is the subject of the present dispute.

[9] Prior to the conclusion of the first and second agreements, Jenkins and Hurwitz had discussions via e-mail about certain clauses or terms in the agreements which finally culminated as the ones signed on 9 and 11 May 2011 respectively.

[10] In an email addressed to Hurwitz and sent on 9 May 2011 at 10h04 am Jenkins says: "Have a look thru. Usual legal jargon shit." It is common cause or not in dispute that what Hurwitz was asked to peruse was a draft of the agreement concluded later the same day.

[11] At 12h34 pm the same day, Hurwitz replies in an email that "all seems in order but please could you consider the following ... [GDCH] will also pay 10% interest per month before the 9th day of each month...".

[12] Jenkins responds a little later at 1h09 pm and says, *inter alia*,

"The month when it starts is this month with *profit share* payment only being the 9th of June, 2011.

Sorry 4.2 must rather state 10% profit share rather than interest."

[13] The agreement signed on 9th May 2011 *inter alia* provides:

"4.2 [GDCH] will also pay 10% profit share per month...".

4.3 The profit share payable on the 9th day of each month will be calculated for the month preceding the month in which the profit share is payable."

5.1 If GDCH... fails to pay the interest as provided for in clause 4.2 Odyssey will notify GDCH... in writing to remedy such breach within (FIVE) days.

5.2 If payment is not received within the five days as specified in paragraph 5.1 the full outstanding amount of the capital will be due and payable as well as all interest which has accrued." (My underlining).

[14] Hurwitz contends that the email of 9 May 2011 at 1h09 pm shows that profit-sharing was intended and not the payment of interest.

[15] Jenkins referred to Mr Cedrik Puckrin SC ("Mr Puckrin") as his partner. Mr Puckrin had invested a portion of the funds that Odyssey provided to GDCH in terms of the agreement of 9 May 2011 but withdrew his investment at some point. I will revert to this aspect presently.

[16] Of importance for present purposes is that the May 2011 agreements were cancelled in terms of a written cancellation dated 22 July 2011 in which Hurwitz confirmed:

> "The two agreements between GDCH ... and Odyssey ... will be cancelled as at 9 August 2011.
>
> The total capital amount of R1 720 000.00 (R1 440 000.00 + R280 000.00) plus interest of R172 000.00 plus any outstanding interest amounts will be paid in full by no later than close of business on Friday 19th August 2011.
>
> Once this has been done there will be no further claims against GDCH ... by Odyssey...". (My underlining)

[17] Thereafter the acknowledgement of debt and suretyship agreements dated 22 February 2012 were concluded between the parties and which, as I said form the basis of the present action. These agreements provide for interest to be paid at the rate of 10% per month as from 2012. The acknowledgment of debt also provides that this agreement supersedes and replaces all prior instruments of debt between the parties. The debt amount is stated to be R1 821 820.00.

[18] In the affidavit resisting summary judgment, Hurwitz says these agreements are in conflict with the terms of the first and second agreements and that:

> "... by slight (sic) of hand, the plaintiff had misrepresented to me and convinced me of the fact that GDCH had to pay 10% interest per month on the capital investment by the Plaintiff in GDCH."

He alleges that a fraud was perpetrated on him.

[19] During the course of the trial Hurwitz, firstly, through his counsel and later personally, apologised for the allegations of misrepresentations and deception he made in his affidavit resisting summary judgment of and concerning Mr Puckrin which he had persisted in even during the pre-trial conference. He said he had bona fide believed that Mr Puckrin "was behind the whole thing". This was apparently with reference to the initial agreements and their later cancellation.

[20] When facing summary judgment, Hurwitz deposed to an affidavit resisting summary judgment and referred to the role played by a Mr Chris Schoeman ('Schoeman'), a former attorney and later, advocate, who had negotiated the signing of the later acknowledgment of debt and the defendant's suretyship. Hurwitz alleged that Schoeman had initially befriended him and had indicated to him that the plaintiff and Mr Puckrin were taking advantage of him (Hurwitz) and his brother. Lulled into a sense of complacency by Schoeman he then signed the acknowledgment of debt and personal surety and was purportedly surprised and shocked to find that Schoeman had all along been acting for the plaintiff.

[21] Schoeman testified on behalf of the plaintiff. He said he had from the start indicated to Hurwitz that he had been acting on behalf of the plaintiff. In this regard it is to be noted that in his pleadings Hurwitz did not persist in the allegations of alleged inducement by Schoeman. Having had the opportunity to carefully assess his evidence in court and to observe him, I have no reason to reject his version of events in which he was involved in this matter.

[22] At this point it is necessary to briefly state the background to the conclusion of the initial agreements. GDCH was to provide finance to a close corporation viz. Dendoflo CC which had entered into joint ventures with certain other entities for the supply of coal to the Pretoria West and Rooiwal Power Stations. GDCH sought investors to provide it with the necessary funds to in turn finance the coal project of Dendoflo.

[23] Hurwitz is no doubt a seasoned businessman. He is a director of several companies. His family owns properties. He is apparently involved in various business ventures with his three brothers. It seems highly improbable that he would sign documents in which he commits (himself and his business entity) to repayment terms without carefully perusing them. In this regard it is to be noted that it is Jenkins who initially suggested that the term 'interest' be replaced by 'profit-share'. Until then, Hurwitz appears to have accepted that the return on the investment would be in the form of interest. After the initial agreements were concluded payments of the return on investment were made at the rate of 10% per month without reference to or determination of what profit Dendoflo had made at each stage when payment of 10% per month was made.

[24] Hurwitz says this was because he trusted Jenkins as a long-time friend and accepted his calculations of the amounts due. This does not explain that it was he (Hurwitz) who was in a position to determine or obtain the figures of Dendoflo's profits at any given stage. The first thing a person in his position would have done, if indeed profit-sharing was intended was to inform Jenkins or the plaintiff that there was no profit hence there were no payments due by GDCH. Hurwitz attempts to explain this by saying that it was only during consultation with his attorney after action was instituted by the plaintiff that he came to realise that if there was no profit then "10% of R0.00 profit is R0.00". The inevitable inference to be drawn is that this is a defence he thought up after action was instituted and in preparation for the affidavit resisting summary judgment in which he relied heavily on this defence.

[25] It is also to be noted that in response to plaintiff's demand prior to the issuing of summons Hurwitz's attorney did not raise the issue of profit-sharing. Instead, the only issue raised was an allegation that the plaintiff had not taken into account the amounts already paid by the defendant at that time, being four interest payments and the repayment of the capital amount of R500 000.00, totalling R1 138 000.00. However, it appears that even that allegation was factually incorrect. In the affidavit resisting summary judgment which followed the aforesaid letter a prior document was annexed by Hurwitz as

annexure "O" thereto. This was a document which Hurwitz conceded Jenkins had previously furnished to him. The payments of R1 138 000.00 are reflected therein and were in fact taken into account in calculating the amount due by GDCH. It is therefore apparent that his attorney's letter was incorrect and misleading.

[26] In these circumstances, Hurwitz's reliance on a different alleged misrepresentation as raised in the affidavit for summary judgment and which I have referred to earlier was therefore not a bona fide defence.

[27] Hurwitz also alleged that the interest claimed in the acknowledgement of debt was usurious and/or *contra bonos mores*. This aspect was alluded to in passing by defendant's attorney in response to the letter of demand from plaintiff's attorney. However, it was not subsequently pleaded nor relied on in the trial by Hurwitz as a possible defence. This was probably because plaintiff's attorney referred defendant's attorney to the case of African Dawn Property Finance 2 (Pty) Ltd (234/10) [2011] ZASCA 45 which dealt with the issue of usurious interest. However, I need not deal with that aspect as it has not been raised as a defence.

[28] All the witnesses were in agreement that the concept of interest is fundamentally different to the concept of profit-sharing. It is improbable, in my view, that if profit-sharing was indeed what was intended, that the parties would not have at least considered, discussed or negotiated whose profit they were talking about; whether it would have been the profit received from Dendoflo and it's joint ventures or whether it would have been GDCH's profit received from Dendoflo and whether it would have been gross profit, nett profit, profit before or after tax and so forth. When he testified, Hurwitz could give no congent answer to this substantial inherent improbability.

[29] In my view, the probabilities are overwhelming that the change of terminology was no more than the use of different words (although for reasons that are not clear) while the parties had all along intended that the term "interest" should be given effect to. Hurwitz conceded during cross-

examination that at no stage was profit mentioned, at no stage were any documents (reflecting whether any profits were made by Dendoflo) furnished to Jenkins and at no stage would Jenkins have been in a position to know or calculate what the profit was or what the percentage profit sharing thereof was.

[30] In my view, there can be no doubt that on a balance of probabilities, Hurwitz had, well knowing the position of the parties, agreed on behalf of GDCH that it was indebted to the plaintiff in the sum of R1 821 200.00 on 13 February 2012 and had further agreed that it would pay interest thereon at 10% per month from that date in terms of the acknowledgement of debt signed on 22 February 2012.

[31] It was contended by defendant's counsel that Jenkins was not a reliable or credible witness. The first criticism is that he had by way of a scanned and modified copy (altering the percentage of 10%) to 5% in the agreement of 9 May 2011) negotiated a larger (or possibly even secret) profit as against his one investor, Mr Hennie de Kock. (He had not done this with investor Sharon Capriatti and Mr Puckrin. He had in fact paid Mr Puckrin 11.1% per month which is even higher than the 10% per month received from GDCH). The document reflecting the modified percentage, of which the defendant had no knowledge, was nevertheless discovered by the plaintiff. Mr de Kock is not a party to these proceedings. Whether Jenkins sought a secret profit in relation to Mr de Kock is not an issue before me.

[32] Jenkins was further criticized by defence counsel because he used Mr Puckrin's name and reputation (and stature as a senior counsel) in the plaintiff's attempts at getting the defaulting and financially floundering GDCH to make payments. It is important to note that Jenkins did this both in respect of monthly and in respect of defaulting capital repayments (about which there was no dispute). This use does not amount to the fraudulent misrepresentation level regarding the payment of interest rather than profit-share which Hurwitz contends was the case.

[33] Hurwitz was an unsatisfactory witness insofar as his evidence differs from that of the other witnesses or the ascertained facts and must therefore to that extent be rejected.

[34] All the plaintiff's witnesses testified in a forthright and honest manner. They made concessions when reasonably they had to do so and their evidence accords with all the common cause facts, the documents and the probabilities.

[35] In all the circumstances, judgment shall ensue in favour of the plaintiff. However, there is one aspect that deserves to be mentioned. The *in duplum* rule provides that the capital amount ceases to attract interest once the interest equals the capital amount. This was clarified in the matter of Paulsen v Slip Knot Investments 777 (Pty) Ltd 2015 (3) SA 479 (CC). There it was held that once the interest equals the capital amount, the running thereof is suspended until date of judgment, from which date it runs afresh.

[36] Although the written agreements provide for costs on the attorney and client scale, plaintiff's counsel, in the written heads of argument, asked for the normal costs order. Hurwitz had launched two applications to compel viz. an application to compel further and better discovery and an application to compel the provision of further particulars. Shortly thereafter the applicant complied and provided the further discovery and the further particulars. Hurwitz is entitled to the costs of the two applications.

[37] In the result the following order is made:

1. Payment of the amount of R1 821 820.00;
2. Interest on the aforesaid amount at the rate of 10% per month from 16 June 2012 up to a total of R1 821 820.00;
3. Interest on the total of the aforesaid amounts at the rate of 10% per month from date of judgment to date of payment thereof; and
4. Costs of suit including the reserved costs of the opposed application for summary judgment.

5. The defendant is awarded the costs of the two interlocutory applications referred to above.

RANGHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiff	: Adv N. Davis (SC)
Instructed by	: Tintingers Inc.
Counsel on behalf of Defendant	: Adv A. Bishop
Instructed by	:Peterson, Hertog & Associates
Date heard	: 30 November 2015
Date delivered	: 11 March 2016