/SG

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 18/8/16

CASE NO: A5/2015

DELETE WHICHEVER IS NOT APPLICABLE

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

13/5/16 .....

DATE SIGNATURE

In the matter between:

ESSOP ISMAIL EBRAHIM APPELLANT

And

BREEZEWOOD TRADING 88 CC t/a
MICA CELTIS RESPONDENT

JUDGMENT

MAKHOBA, AJ

[1] This appeal comes before us following an action for damages instituted by the respondent against the appellant in the court *a quo*. Leave to

appeal was sought and granted by the trial court in respect of the order as well as costs of the action.

[2] In addition the appellant seeks for condonation in terms of rule 49(7), for the late filing of the outstanding portion of the complete record, and application in terms of section 22(a) of the Supreme Court Act 59 of 1959 to introduce new evidence on appeal.

[3] The respondent did not oppose the condonation application and it was duly granted by us. What remains to be decided by us is the application for the introduction of new evidence and the whole judgment and orders granted by the court *a quo*.

[4] In order to facilitate an easy understanding of the legal issues involved herein, a brief résumé of the facts of this case is necessary.

[5] Appellant and Mr Karim were members of the respondent a close corporation Breezewood Trading 88CC t/a Mica Celtis. They were the only two members and each held a 50% share in the respondent. Appellant became a member of the respondent during February 2008. The store was run by the brother of Mr Karim assisted by the wife of the said brother but the brother and his wife were not members of the respondent. Mr Karim did not participate in the business as he was permanently employed by Telkom. The bank account of respondent was solely controlled by the appellant.

[6] During the subsistence of the business the relationship between the appellant and Mr Karim became acrimonious. Mr Abdool Khalik Karim testified to the effect that in May 2010 the Appellant was requested to

bring all financial statements to the meeting of 13 May 2010 and before the 50% shareholding was purchased and any agreements were signed. He testified that on 13 May 2010 the Appellant and his attorney arrived at the meeting, however, 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 Appellant and Abdool Khalik Karim. According to Abdool Khalik Karim the sole purpose of the Memorandum of Agreement was to safeguard the interest of the Respondent because at that stage the Appellant had not been forthcoming in respect of the bank statement and financial statements.

[7] The reasons advanced by appellant for selling his 50% share in the business to Mr Karim are as follows:

- He had colon cancer.
- Mr Karim did not bank the monies he received from the business.
- Mr Karim's sister in law opened a card machine account in her own name in a fraudulent manner and took the proceeds from this account for her own benefit.

[8] The purchase price for the appellant's 50% share was R600 000.00 and was paid the same day when the contract was signed between the parties. It was paid the same day into the trust account of the appellant's attorney.

[9] Mr Karim testified in the court *a quo* that he received the bank statements later from the appellant he found that money had been withdrawn from the respondent's account without his knowledge. It is common cause that

appellant transferred four separate amounts (totalling R388 000.00) from the bank account of the respondent either into his own personal bank accounts and or the transfer of the monies was to his benefit. Appellant was then sued by respondent to pay back to respondent monies fraudulently withdrawn from the respondent. The appellant's main defences were as follows:

(i) He withdrew these monies from his loan account to the respondent. The loan amount was R750 000.00.

(ii) Whatever withdrawals he made was with the consent of Mr Karim.

(iii) The purchase price would have been higher had he not withdrawn these monies.

(iv) The withdrawals of these monies had been resolved between the parties before signing the agreement.

(v) He relies also on paragraph 12.3 of the sale of shares agreement which states that the agreement would be full in and final settlement of all issues between the parties.

[10] After evidence was led in the court *a quo* the trial court found that the version of Mr Karim was far more probable and that appellant did not bring the bank statements he was requested to bring with him when the agreement was signed. The court *a quo* found further that appellant acted in bad faith and could not rely on the protection afforded by a non-

variation clause. Judgment was then granted in favour of the respondent in the amount of R338 000.00.

[11] The crisp issues in this appeal are whether we should admit new evidence that the Appellant seeks to have admitted on the merits to determine whether the court *a quo* was correct in concluding that the probabilities favour the Respondent.

Legal position (new evidence)

[12] The question whether new evidence should be admitted has been the subject of numerous judgments of our courts and a particular approach has crystalized over time. In *S v De Jager* 1965 (2) SA 612 (A) p613, para B the court said the following:

> "*(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why evidence which it is sought to lead was not led at the trial.*
>
> *(b) There should be a* ***prima facie*** *likelihood of the truth of the evidence.*
>
> *(c) The evidence should be materially relevant to the outcome of the trial.*"

[13] The Supreme Court of Appeal in *DeAguiar v Real People Housing* 2011 (1) SA 16 (SCA) page 19 from par 10 dealt with the issue of adducing new evidence on appeal as follows:

> "*These provisions have been the subject of judicial scrutiny on innumerable occasions over the years and, although the requirements have not always been formulated in the same words, the basic tenor of the various judgments throughout has been to emphasise the court's reluctance to reopen a trial in the interest of finality, the court's powers should be exercised sparingly and further evidence on appeal should only be admitted in exceptional circumstances. It is incumbent upon an applicant for leave to adduce further evidence to satisfy the court that it was not owing to any remissness or negligence on his or her part that the evidence in question was not adduced at the trial. Furthermore, inadequate presentation of the litigant's case at the trial will only in the rarest instances be remediable by the adduction of further evidence at the appeal stage.*"

[14] I now proceed to apply the foregoing principles to the evidence before us.

(i) <u>A reasonable explanation</u>

Counsel for the appellant submitted to us that Mr Karim testified that he became aware for the first time of fraudulent transactions by the appellant after the bank statements were handed over to him and that failure to plead this assertion by the respondent resulted in the appellant's failure to discover the documents which constitute

new evidence before this court. In my view this argument cannot succeed because in paragraphs 6, 7 and 8 of respondent's particulars of claim, respondent pleaded that the monies were fraudulently withdrawn from the account of the respondent without the knowledge of Mr Karim. In the court a quo during the hearing of the evidence reference was made to the documents not discovered. Appellant when he testified intimated that the documents might be with his lawyers. However these documents, if they did indeed exist, were not discovered nor presented at the trial. Consequently I am of the view that there is no reasonable explanation for the Appellant's failure to lead the evidence during the trial.

(ii) *Prima facie* likelihood of the truth of the evidence

[15] In this regard it was submitted to us that the evidence sought to be introduced will rebut Mr Karim's evidence that he became aware of the withdrawals two weeks after signing the agreement. Mr Karim has already denied knowledge of the withdrawals and the loan account and this was dealt with at length in the court *a quo*. In addition the evidence sought to be produced by the appellant contradicts the evidence of the appellant on page 39 of the record where appellant says there was nothing in writing. Therefore, in my view, this court will be misdirecting itself in admitting evidence that contradicts appellant's evidence in chief. Furthermore it is clear to me that what the appellant contemplates is a new trial involving documents which will be strenuously contested by the respondent. This is a compelling consideration against granting the relief

sought. See *De Aguiar v Real People Housing supra* on par 23 paragraph B.

(iii) Evidence materially relevant to the outcome

[16] Counsel for the appellant argued that the effect of the new evidence to be introduced will substantially sway the balance of probabilities in favour of the appellant, and will therefore have a material and direct impact on the outcome of the trial. On the other hand counsel for the respondent in my opinion correctly argues that evidence sought to be introduced contradicts the version already before court. The financial statements appellant seeks to introduce are not even signed and, the authenticity therefore is put in dispute by the respondent. It is my view that this is another compelling consideration against granting the relief sought.

[17] I am of the view that the appellant has not satisfied any of the requirements set out in *S v De Jager supra* for the introduction of the further evidence and the application should be refused.

The merits

[18] It was submitted to us that respondent failed to plead essential elements required to sustain a cause of action of misappropriation. We were referred to the decision in *Trope v South African Reserve Bank* 1993 (3) SA 264 (A). However, this decision dealt with the upholding of an exception that the plaintiff's particulars of claim were vague and embarrassing. In any event in the matter before us the particulars of

claim in my view sets out satisfactory the necessary allegations to sustain the cause of action.

[19] In his judgment the learned judge of the court *a quo* found that from the evidence before him there was no evidence of a loan account between appellant and the respondent. In my view there is no tangible evidence to show that there was a loan account. I therefore agree with the finding of the court *a quo* in this regards.

[20] Counsel for appellant attempted to bring this matter within the ambit of the *Shifren* rule. The *Shifren* rule originated from the decision in *Sentrale Ko-op Graan Maatskappy Bpk v Shifren* 1964 (4) SA 760 (A). The *Shifren* rule is lucidly described in Christie: *The law of contract in South Africa* 6th edition on page 465 as follows:

> "*Having thus cleared their non-variation clause out of the way the parties may then do informally what the clause restricted them to do in writing. An entrenched non variation clause cannot be treated in the same fashion, as it entrenches not only the other clauses in the contract but also itself against the possibility of information variation, so if it is desired to vary any clause in the contract informally or to do informally whatever it is that the non-variation clause restricts the parties to doing in writing the non-variation clause must first be varied in writing. This is what Shifren primarily decided.*"

In *Van As v Du Preez* 1981 (3) SA 760 (T) the decision was referred to and relied on by the trial court in this matter on page 765 paragraph H the

court said "*A non-variation clause would of course not protect a party against his own fraud (Shifren and Others v SA Sentrale Ko-op Graan Maatskappy Bpk 1964 (2) SA 343 (O) at 366D-E)*"

In *Brisley v Drotsky* 2002 (4) SA 1 (SCA) on page 34 CAMERON JA as he then was in support of the majority judgment said "*And where a contracting party, strong or weak, seeks to invoke the writing only requirement in deceit or to attain fraud, the court will not permit it to do so.*"

In the matter before us the parties did not vary or seek to vary their agreement hence the court a quo said the following on page 227 line 20 of the judgment "*Disregarding the Shifren rule is not relevant in this case, as it is clear based on the testimony of Mr Abdool Ictialiq 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.*" It is therefore in my view incorrect that the court **a quo** in determining whether the appellant was not **bona fide** towards the respondent when signing the agreements relied on the Shifren rule. The court **a quo** only referred to the Shifren rule to illustrate that it was not applicable in this case.

The parole evidence rule

[21] It was argued by the counsel for the appellant that the court *a quo* disregarded the principles of the parole evidence rule, and in doing so found that the appellant should be precluded from relying on the provisions of clause 12.3 of the sale agreement.

[22] Clause 12.3 of the sale agreement 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."*

[23] Christie *The law of contract in South Africa* defines parole evidence or integration rule as follows on page 200 *"But despite the difficulties attendant upon it, it serves the important purpose of ensuring that where the parties have decided that their contract should be recorded in writing, their decision will be respected and the resulting document or document will be accepted as the sole evidence of the terms of the contract."*

[24] In *KPMG v Securefin Ltd* 2009 (4) SA 399 (13) (SCA) p409 para (39) the court of appeal defined the parole evidence rule as follows:

> *"First, the integration (or parole evidence) rule remains part of our law. However, is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a ... act, extrinsic evidence may not contradict, add to or modify its meaning (**Johnson v Leal** 1980 (3) SA 927 (A) at 943B)."*

In my view therefore considering the findings of the court *a quo* in reference to the parole evidence rule, the court *a quo* did not add or modify the meaning of the agreement before the parties but the court *a quo* simply found that respondent when entering into the agreement with the appellant was not aware of the withdrawals already made by the appellant from respondent's bank account. See page 229, paragraph 10 of the judgment of the court *a quo*. Therefore the submission that the court *a quo* disregarded the parole evidence cannot succeed.

[25] The court a quo made a finding pertaining to credibility, contradictions and improbabilities of the appellant. Therefore I see no need to repeat them in this judgment. I accept the findings of the trial court in this regard as correct. The trial court rightly found that failure by respondent to deliver the bank statements to Mr Karim prior to the sale of his 50% membership was to deceive the purchaser.

[26] Again for reasons already alluded to above the court *a quo* correctly found that on the probabilities the defendant did not bring all financial statements and bank statements to the meeting of 13 May 2010. The trial court rightly remarked as follows in his judgment on page 230 paragraph 10 of the record of the trial. "*Had he done so I fail to see why it was deemed necessary to draw up the Memorandum of Agreement.*" The court *a quo* accepted that Karim would never have entered into the agreements had he known that the appellant had misappropriated the amounts sued for and that the version of Karim is far more probable.

[27] Relying on the authorities referred to above the court *a quo* in my view rightly rejected the evidence by appellant and correctly found that the probabilities favoured the respondent.

[28] I agree therefore with the submission by counsel for the respondent that on a balance of probabilities the version of the appellant does not ring true.

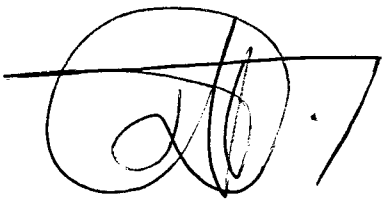
[29] In the circumstances the conclusion reached by the court *a quo* is not assailable and it must follow that the appeal must fail.

Order

I make the following order:

1. That the application to adduce further evidence is dismissed with costs.

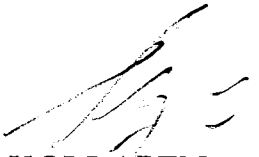
2. That the appeal is dismissed with costs.



D MAKHOBA
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

R G TOLMAY
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree



N KOLLAPEN
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

Heard on:	8 JUNE 2016
For the Applicant:	Adv. M. Jorge
Instructed by:	Afzal Lahree Attorneys
For the Respondent:	Adv. B.D.Stevens
Instructed by:	Johan Nysschen Attorneys
Date of Judgment:	