IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 54016/2013

REPORTABLE: YES / NO
OF INTEREST TO OTHER JUDGES: YES / NO
REVISED
2022.06.10

In the matter between:

JM VAN ZYL PLAINTIFF
(ID: [....])

And

CHRISTAAN JOUBERT DEFENDANT
(ID: [....])

JUDGMENT

MABUSE J,

[1] This is an application by the Plaintiff for an order for specific performance against the Defendant. By the combined summons issued by the Registrar of this Court on 30 August 2013, the Plaintiff, an adult male farmer of the farm Portion 8 of the Farm Rhenosterfontein, Cullinan, claims from the Defendant, Christian Joubert, an adult male farmer also of the Farm Portion 8 of the Farm, Rhenosterfontein, now deceased, and represented herein by Estate Late Christian Joubert:

1.1 delivery of the property known as Potion 8 of the Farm Rhenosterfontein 514, Registration Division JR, Cullinan district, Gauteng Province, to a company registered in terms of the laws of the Republic of South Africa, and;

1.2 the transfer of 25% of the shares in the said company into the Plaintiff's name.

1.3 in the alternative, the Plaintiff claims payment of the amount of R4154 970, 00 based on unjustified enrichment together with ancillary relief.

[2] From the beginning this action was defended by the Defendant who has for that purpose delivered a plea that incorporates a special plea of prescription. For purpose of convenience, I shall refer to Christiaan Joubert as the Defendant.

[3] By agreement between the parties the Plaintiff's alternative claim or the Plaintiff's claim for undue enrichment has been separated from the other claims and postponed *sine die* to be heard later. The battlefield between the parties is common cause in this matter.

[4] In his opening address Advocate J G Bergenthuin SC, counsel for the Plaintiff, informed the Court that the battlefield between the parties are two issues, namely, (1) prescription and (2) the terms of the oral agreement entered into by the Plaintiff and the Defendant. In his turn, Advocate SD Wagener SC, the Defendant's counsel, informed the Court, in his opening address, that the amendments to the particulars of claim were granted on the basis that the legal issues should be dealt with by the Trial Court and furthermore that Sardiwalla J did not make any determination on whether the Plaintiff's claims had become prescribed.

[5] The Plaintiff relied, inter alia, on the following allegations contained in paragraphs 4 and 5 of his particulars of claim ("poc"):

"During or about 2000 at Pretoria at the parties- both acting in person- concluded an oral agreement (the agreement) with the following explicit alternatively, tacit further alternatively, implied terms:

4.1 Plaintiff and his wife would relocate to the farm and improve it.

4.2 Plaintiff would contribute a pro rata share of 25% towards general and capital expenses on the farm.

4.3 Defendant would afford to Plaintiff an opportunity to acquire shares in a company by means of:

4.3.1 Defendant transferring the farm of which he was the owner to a private company registered in terms of the Statutes of the Republic of South Africa (company); and

4.3.2 Defendant ensuring the transfer of 25% shareholding in the company to plaintiff."

5

During or about 2006 the agreement was orally amplified at Pretoria as follows by the parties whilst acting in person: it was agreed that Plaintiff would pay R500,000 for his contemplated 25% shares in the company."

The Evidence

[6] The Plaintiff's first witness was Mr Johannes Hendrik Cilliers ("Mr Cilliers"), by profession an attorney and the Plaintiff's current attorney. He has been the Plaintiff's attorney since 1995. In 2001 he was involved in a matter in which the Plaintiff and his brother, a certain Johannes Hendrik Van Zyl, were the defendants. The plaintiff in that matter was Cowdray Park Investment (Pty) Ltd. He presented both defendants. That was case 24295/2001. There was another matter involving Cot Properties (Pty) Ltd ("Cot Properties") and Cot Props (Pty) ("Cot Props"), the first and second plaintiffs respectively against Willows Business Park (Pty) Ltd and Cowdray Park

Investments (Pty) Ltd, the first and second defendants, respectively. This was case no. 10701/2002.

[7] On the 15 May 2006 a settlement agreement was reached among the parties in both matters. In terms of the said settlement agreement, a total sum of R3.3million was to be paid to Attorneys Cilliers & Reynders. This amount was supposed to be shared by the directors of Cot Properties. He referred, in his testimony, to inter alia, the minutes of a meeting of the shareholders and directors of COT Properties of which the Plaintiff was a director since 1995.

[8] A total sum of R3,3000,000 was paid based on the settlement agreement. He had been instructed to make certain payments. Of this total amount, R750, 000 was to be paid to the Defendant. According to the reconciliation statement, a payment of R500, 060, was to be made to Mr Joubert. Payment of the said amount was made to the Defendant by Mr Cilliers on 26 May 2006 and a further payment of our R214,197 was made by Mr Cilliers to the Defendant on 22 October 2007. Mr Cilliers made those payments to the Defendant without having been furnished with any reasons whatsoever.

[9] According to the testimony of the Plaintiff, the history of the case is as follows. In 2000 the Plaintiff and the Defendant entered into an oral agreement which eventually allowed him, the Plaintiff, and his wife, to move to the Defendant's farm and to stay there.

[10] He testified that he and his wife were down on holiday in George, Western Cape, where his in-laws were living when they started thinking of the possibility of selling their property in Pretoria and relocating to the Western Cape, especially George. At that stage, the Defendant was staying in Mossel Bay in the Western Cape, but because he had property here in Pretoria the Defendant regularly visited Pretoria. One day, a Friday, on one of his visits here in Pretoria, the Defendant called him to establish if he and his wife would be home that night. He told him that he wanted to visit them as he wanted to speak to them. They invited him over. He came and they had a braai. They had already told him of their intentions to sell their property in Newlands, Pretoria, and relocate to George. The Defendant discouraged

them from leaving Pretoria and moving to George and instead suggested to them that they should rather consider settling on the farm and making their future there. He complained that it was becoming difficult for him, whenever he came up from Western Cape to Pretoria after every three months, to spend time mowing the lawns and mending the fences. That was late in 1999 or the beginning of 2000. They told him that they would consider his proposition. They discussed several possibilities. The first possibility that they discussed was that they would be selling their house in Newlands and that they would have to build a dwelling on the farm. Furthermore, they discussed the possibility of the Plaintiff buying a 25% stake in the farm. They were both advised that their plans would not work because such plans were not in accordance with the law. There was a suggestion to both by a certain Mr Mike Van Zyl, a land surveyor, that the Defendant should put his property into a company and sell shares. In this way the Plaintiff would eventually obtain a 25% shareholding in the company. No agreement with Mr Joubert was concluded immediately following that advice from Mr Mike van Zyl. He testified that it was part of their ongoing discussions that Defendant would put the farm in a company and the Plaintiff would eventually acquire 25% stake in the farm. That was the best option.

[11] If the Defendant put the farm in the company, the benefit that the Plaintiff stood to gain was that he would be able to acquire a 25% share in the company.

[12] Based on their agreement, the plaintiff and his wife settled on the farm towards the end of 2000. Once they had arrived on the farm, they started making some improvements, with the knowledge and blessings of the Defendant. The Plaintiff testified that he did nothing on the farm without consulting the Defendant. Regarding the property expenses, he testified that the costs of rebuilding or refurbishing the dwelling in which the employees stayed was for his own account. According to his testimony, he and the Defendant had planned that the cost of building and repairs to the property would be for his own account.

General Expenses on the Property

[13] After moving to the farm, he and his wife became increasingly involved in the general activities on the farm. From around 2002 they often had farm meetings and

discussions on the farm expenses. At that stage there were three of them on the farm. They divided the general expenses among the three of them, in other words, the plaintiff, Lisa and Andre, the Defendant's daughter and son respectively.

[14] The Plaintiff effected some improvements on the farm. For purposes of this judgment, I do not deem it necessary to set out the improvements that the Plaintiff testified he made on the farm. I accept that such improvements are required for the Plaintiff's claim for undue enrichment, which the parties have agreed to postpone for a hearing later.

[15] He had further discussions with the Defendant about his interests in the farm. He testified that he had to pay R500,000.00 for the 25% interest he sought in the farm. He testified about the 2001 financial statements of a company called Cot Properties which showed that the loan account of the Defendant remained at R244,900.00. He referred to the minutes and resolutions of the shareholders and directors of Cot Properties held on 10 May 2006 where he, his brother, JM Van Zyl, a Mr MP Van Wyk, Mr C Joubert (the Defendant) and a Mr HL Jooste were all present. The purpose of this meeting, according to him, was to determine allocation of the funds, that is, the R3.3million. Paragraph 2 of the minutes recorded that:

> *"It is authorized and recorded that JM van Zyl and JH van Zyl, MP van Wyk, C Joubert and H Jooste sell their shareholding, in Cot Properties (Pty) Ltd and transfer their right, title, and interest to any loan account and might have had in Cot Properties (Pty) Ltd as envisaged in the latest signed financial statements, being February 1996."*

Paragraph 4 of the same statement recorded that:

> *"C Joubert will receive R244,900.00, and sign the relevant documents to transfer his shareholding and loan account upon receiving payment, and to cede his loan account, and N P Van Wyk will receive R431 024 for his shareholding and loan account and H L Jooste will receive R100,000 for his shareholding"*

Paragraph 5 of the minutes recorded that:

> *"C Joubert and MP Van Wyk will not withstanding be entitled to receive an amount or R750,000 each inclusive of their loan accounts……,"* written here. But it should have been R750,000. While still at that meeting, he told the Defendant that he was going to give him an extra R500 over and above the R244 (meaning the R244,900)

[16] Notwithstanding his claim that he paid Mr Joubert the R500,000 for the 25% interest in the farm, the interest was never transferred to him; no company was registered, and the farm was never transferred to a company.

[17] At some stage the Defendant gave him some documents or forms he had to complete for the purpose of the formation of the company. This happened when Mr Joubert was on the verge of flying to England in 2008.

[18] According to him, the settlement amount for the Defendant and Mr Van Wyk was R750,000 each. According to the reconciliation, the indication was that the Defendant would be paid an amount of R500,060 and further calculations showed that there would be a final payment to him of the sum of R214,197.50. The Plaintiff could not confirm that the said payments were made to the Defendant, as these payments were made by the office of Mr Cilliers, his attorney. He could however infer from the way in which the Defendant intensely expressed his gratitude to him for the payment of the loan account and the fact that later the Defendant bought someone, a family member, a motor vehicle. This evidence that certain payments were made to the Defendant by Mr Cilliers was confirmed by Mr Cilliers. The testimony of Mr Cilliers that he made those payments was never challenged.

[19] After the financial statements of 2006 and 2007 were prepared he inquired from the Defendant about the transfer of his interest. He did not know the dates on which he did so. He could only say that he did it once or twice a month and the Defendant would always say that he was attending to it or was busy with it.

ANNEXURE "A" TO THE POC

[19.1] The Plaintiff testified as follows about how you got possession of annexure “A.” Attached to his POC was a document marked Annexure “A.” It is also marked in bundle as 10A. He came into possession of that document under the following circumstances. In the year 2009 he and his wife went down to George for their granddaughter's birth. Their daughter was booked in at the Mossel Bay hospital. While in Mossel Bay they stayed in the Defendant’s flat or home which he was letting. They lived there for two weeks.

[19.2] While they were there the Defendant asked him to bring one or two things up. These were two paintings. After they came back from Mossel Bay he confronted the Defendant one morning and said to him:

> *“You know it has been nearly three years now. It has been the promise before you left for England, and we are still waiting.” and what is bloedig vererg.”* The Defendant became furious. He lost his temper and said to him that: *“so you do not trust me*?” In response he, the Plaintiff, said to him that:
>
> “*Jeepers, how long must I wait*? The Defendant flew out of the house through the back door and came back shortly thereafter with the original Annexure “A.” He threw it on the table and said:
>
> *“There, if you do not trust me. That has been in the file for years.”* The Defendant then walked out. The original of Annexure “A” is in the office of Mr Cilliers.

[19.3] The Plaintiff then read some of the contents of Annexure “A” into the record. Among others, the document stated that “Michael betaal R1million.” I assume that Michael was the Plaintiff. But according to the Plaintiff he was supposed to pay the Defendant only R500,000. He confirmed that from the beginning of the negotiations the discussions were always that he would only pay R500,000, which was a quarter of R2 million.

[20] He stated that when he and the Defendant had discussions earlier it was mentioned that when in a company, they would draw a shareholder's agreement. Nothing happened after the Defendant had put the document on the table. There was no transfer of any interest. At the same time things were gradually becoming sour between them. The Plaintiff did not push for progress report because he was afraid that the situation would become unpleasant.

[21] In 2012 things had become sour. One morning he approached the Defendant in the rendezvous and greeted him by saying *"morning Chris*." The Defendant did not respond. He looked at the Plaintiff. He then said to the Defendant that:

> *"I can no longer go on like this. if anything happens to me my wife has got no…….. whatsoever. And if you have not investigated this, I will be forced to take legal action*." In response the Defendant simply said: "*maak wat jy wil"* and turned his back to him.

[22] In his affidavit, the Defendant had stated that:

> "*And I became the proprietor of 20% of the issued shares in the company by virtue of my financial contribution of R60000."*

Although the Plaintiff could not recall anything about the defendant owning 20% shares in the company by virtue of his financial contribution of R60,000, he did recall however that 100 shares in Cot Properties were issued to the Defendant.

[23] He testified that he sold his house in Pretoria because he and the Defendant had gone into an agreement that he would be buying 25% of the farm and settle on the farm.

[24] The Plaintiff's second witness was his wife, Annetta van Zyl. She moved to the farm with the Plaintiff in 2000. At a dinner that had been arranged and which he attended; the Defendant complained that he was unhappy that each time he came up to the farm he found that it was neglected. Her evidence did not really add any value to the Plaintiff's evidence. No questions were put to her. After he concluded

the Plaintiff's evidence Mr Bergenthuin informed the court that he had no more witnesses to call. He closed the plaintiff's case. Mr Wagener followed immediately and informed the court that he was also closing the Defendant's case. He did this without calling any witnesses.

[25] To the Plaintiffs particulars of claim the Defendant delivered a special plea of prescription in which he contended that:

> [25.1] the Plaintiffs main claim and the first alternative claim are both claims for specific performance of an alleged agreement set out in paragraphs 4 of the Plaintiff's amended particulars of claim that entails delivery of movables to the Plaintiff.
>
> [25.2] The relevant period for the prescription of the Plaintiffs various claims in terms of the provisions of section 11 of the Prescription Act 68 of 969 (the Act) is three (3) years referred to in s 11 (b) of the said Act.
>
> [25.3] Prescription of the Plaintiff's various claims commenced to run as soon as the debt was due, as provided in s 12 of the Act, when the Plaintiff.
>
> [25.3.1] had knowledge of the identity of the debtor and of the facts from which the debt arises, alternatively;
>
> [25.3.2] was deemed to have such knowledge when he could have acquired it by exercising reasonable care.
>
> [25.3.3] the Plaintiff had knowledge of the identity of the debtor and of the facts from which the debt allegedly arose, alternatively, is deemed to have had such knowledge, more than three years prior to the date on which the Plaintiff instituted his action against the Defendant, alternatively, prior to the date on which the Plaintiff amended his particulars of claim to introduce the claim concerned.

[25.4] In the premises, so contends the Defendant, the Plaintiff's various claims have been extinguished by prescription as provided for in s 10 of the Act. On that basis the Defendant prays for the dismissal of the Plaintiff's claims. Over and above, the Defendant contested the terms of the agreement as pleaded by the Plaintiff.

The Plaintiff's Special Plea of Prescription

[26] The Defendant's plea of prescription has been imperfectly pleaded. It lacks any precision. It is correct that the relevant period for prescription of the Plaintiff's various claims in terms of section 11 of the Act is three (3) years and furthermore that the period of three (3) years begins to run as soon as the debt is due, in terms of s 12 of the Act.

[27] The feet of clay or fundamental error or omission in the Defendant's plea is that it has omitted to state the date on which the debt became due or the date on which prescription of the Plaintiff's various claims began to run. It is of paramount importance for the party that pleads prescription of another party's claims, firstly, to state the period of prescription of the relevant claim or claims as envisaged by the provisions of section 11 of the Act and, secondly, to state the precise date on which prescription began to run. The purpose of stating the relevant date on which the debt became due is to establish the duration of the prescription period. Without this date, it is impossible to determine the duration of the prescription or to establish the date on which prescription of a debt began to run. It is therefore not enough just to plead that prescription of the Plaintiffs' various claims began to run when the debt became due without in any way indicating with precision that date.

[28] There is another critical issue that I must pay attention to and that is the question whether the running of prescription from whatever date the debt became due was not interrupted by express or tacit acknowledgement by the debtor, in other words, the Defendant. The running of prescription is by virtue of the provisions of s 14 of the Act, interrupted by the express or tacit acknowledgement of liability by the debtor, in this case the Defendant. In this regard it must be clear that the conduct relied upon as interrupting prescription amounts to an acknowledgement of liability,

see in this regard **Petzer v Radford (Pty) Ltd [1953] [4] SA 314 (N.P.D) at page 317H** where Broome J P had the following to say.

> "*To interrupt prescription an acknowledgement by the debtor must amount to an admission that the debt is in existence and that he is liable therefor. An admission that the debtor had incurred the obligation, coupled with an assertion that obligation has been extinguished will not interrupt prescription. The subsection requires an acknowledgement by the debtor. That acknowledgement may take any one of the three forms specifically set out, part payment, payment of interest, or giving security. The subsection then provides, generally, that the acknowledgement may be by admitting liability in any other manner. The use of the word "other" indicates that the admission of liability must be in a manner akin to part payment, payment of interest or the giving of security, that is to say that it must be an admission of present liability."*

[29] Section 14 of the Act provides for the interruption of prescription as follows:

> *"(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor*.
>
> *(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or anytime thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due."*

Section 15 of the prescription reads as follows:

> *"15 Judicial interruption of Prescription*
>
> *(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.*

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of Section (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute but abandons the judgment or the judgment is set aside.

(3) If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter parties postpone the due date of the debt, from the day upon which the debt again becomes due.

(4) if the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable."

[30] Now, relying on the judgment of **First Rank Bank Ltd v Nedbank (Swaziland) 2004 (6) SA 317 SCA**, counsel for the Plaintiff argued, in his heads of argument, that to establish when the running of prescription commenced, it must be established when the right of action eventually relied upon by a plaintiff first formed part of his particulars of claim or summons. The right of an action must be distinguished from "*the cause of action*." Even a summons which does not disclose a cause of action for one or the other averment may therefore interrupt the running of prescription provided only that the right of action sought to be enforced in the summons after its amendment is recognizable as the same or substantially the same action as the one disclosed in the original summons.

[31] According to him, the right of action founded upon enrichment was already incorporated in the original particulars of claim issued during August 2013. Interruption through service of the original summons upon the Defendant therefore occurred already in August 2013.

It is the Plaintiff's counsel's argument that the Defendant tacitly and by conduct acknowledged his liability in terms of the agreement relied upon by the Plaintiff. About conduct this is what the Court had to say in **Rane Investments Trust v Commissioner, SA Revenue Service 2003 (6) 332 SCA at par. [27]:**

> *"There is ample authority for the proposition that in seeking to establish the parties' intentions, when a person is questioning the meaning of a contract, regard may be had to the parties' conduct in executing their obligations."*

Counsel for the Plaintiff relies in support of this point regarding the conduct of the Defendant on the following circumstances:

> [31.1] Plaintiff's right of action for specific performance of oral agreement entered into between the parties was introduced in the particulars of claim by way of an amendment dated 7 April 2014. He submitted that consequently judicial interruption of the running of prescription of the claim for specific performance occurred on 7 April 2014. According to him the Plaintiff is still pursuing his claim for enrichment and consequently there is no question that the Plaintiff abandoned any judgment which followed upon his claims. S 15(2) of the Act consequently does not apply.

[32] Finding support in the judgment **of Cape Town Municipality v Allie NO 1981 (2) SA 1 C at 5G-H**, he pointed out that the reason for rules relating to prescription were explained as follows:

> "*Whatever the true rationale maybe, it cannot be denied that society is intolerant of state claims. The consequence is that a creditor is required to be vigilant in enforcing this right. If he fails to enforce them timeously, he may not enforce them at all. But that does not mean that the law positively encourages precipitate and needless lawsuits. It is quite plain that both at common law, and in terms of the Prescription Act 1943 and 1969, a creditor may safely forebear to institute action against his debtor if the debtor has acknowledged liability of the debt... and it seems right that it should be so. Why should the law compel a creditor to sue a debtor who does not dispute,*

but acknowledges his liability? That exception created to prescription by interruption was explained as follows in **Murray & Roberts Construction (Cape) Pty Ltd v Uppington Municipality 1984 (1) SA 571 (A) at 578F-579B:**

"*Moreover, s 14 of the Act provides that the running of prescription is interrupted by an express or tacit acknowledgment of liability by the debtor. The reason is clear-if the debtor acknowledges liability there is no uncertainty about the debt. No purpose would accordingly be served by requiring the creditor to interrupt prescription instituting legal proceedings for the recovery of the debt."*

[33] Finally on this point, **Investec v Erf 436 Elandspoort 2021 (1) SA 28 SCA par. [29]** has the following stay:

to discharge the debt. 'I admit I owe you R100' is manifestly an acknowledgement of liability to pay R100 but it is not a fresh or new undertaking to pay it…….

Secondly, full weight must be given to the legislature's use of the word 'tacit' in s 41) of the Act. In other words, one must have regard not only to the debtor's words, but also his conduct, in one's quest for an acknowledgement of liability. That, in turn, opens the door to various possibilities. One may have a case in which the act of the debtor, which is said to be an acknowledgement of liability, is plain and unambiguous. His prior conduct would then be academic. On the other hand, one may have a case where the particular act or conduct which is said to be an acknowledgement of liability is not as plain and ambiguous. In that event, I see no reason why it should be regarded in vacuo and without taking into account the conduct of the debtor which preceded it. If the preceding conduct throws light upon the interpretation which should be accorded to the later act or conduct which is said to be an acknowledgement of liability, it would be wrong to insist upon the later act or conduct being viewed in isolation. In the end, of course, one must also be able to say when the acknowledgement was made, for

otherwise it would not be possible to say from what day prescription commenced to run a fresh….

Thirdly, the test is objective. What did the debtor's conduct convey outwardly? I think that this must be so because the concept of a tacit acknowledgement of liability is irreconcilable with the debtor being permitted to negate or nullify the impression which his outward conduct conveyed by claiming ex post facto to have had a subjective intent which is at odds with his outward conduct….

Fourthly, where silence or mere passivity on the part of the debtor will not ordinarily amount in acknowledgement of a liability, this will not always be so. Even if the circumstances create a duty to speak and the debtor remains silent, I think that an acknowledgement of liability may rightly be said to arise….

Fifthly, the acknowledgement must not be of a liability which existed in the past, but of a liability which still subsists."

[34] Based on the following circumstances Mr Bergenthuin submitted that the evidence clearly indicates that the Defendant, through his conduct, tacitly acknowledged his intention to perform in terms of agreement entered into between the parties, upon acceptance of the content of agreement relied upon by the plaintiff:

[34.1] The Plaintiff and his spouse were allowed to move to the Defendant's farm and to build not only a home for themselves, but also guest unit, and barns to accommodate the Plaintiff's woodworking activities. The second barn was completed during 2010, and the evidence revealed that the Defendant never complained about the structures erected by Plaintiff.

[34.2] The Defendant accepted payment of R500,000.00 during 2006/2007 from the Plaintiff, in fulfillment of the Plaintiff's obligations in terms of the agreement.

[34.3] Before he left for Great Britain in 2008, the Defendant assured the Plaintiff that the company would be registered, whereupon 25% of shares in that company would be transferred to the Plaintiff.

[34.4] On 28 September 2009, the Defendant, in answer to Plaintiff's request when performance of obligations of the Defendant would be made, reacted by presenting the written note by him to the Plaintiff, re-assuring the Plaintiff that everything was being taken care of.

[34.5] Plaintiff was allowed to cut and bale grass on the Defendant's property at least until 2012.

[34.6] The Defendant presented Plaintiff with handwritten papers monthly, indicating payments to be made by plaintiff for electricity, conserve (security) and property tax until August 2012, when the rift between the parties arose. Thereafter the Defendant omitted to charge for property tax.

[34.7] Plaintiff regularly confronted the Defendant with the Defendant's omission to comply with his obligations in terms of the agreement between the parties. The Defendant in this regard asked whether the Plaintiff did not trust him, the Defendant, to comply with his obligations in terms of the agreement. This was the Defendant's attitude throughout until at least August 2012. The Defendant never denied liability to perform in terms of agreement. Evidence by the plaintiff in accordance with the aforegoing was not challenged in cross- examination.

[34.8] It was submitted by Mr Bergenthuin, and I agree with his submission that, viewed holistically, the above circumstances are indicative of a tacit acknowledgement of a liability by the Defendant at least until August 2012. In this regard, prescription in respect of all three of the Plaintiff's claims therefore commenced to run not before August 12. There can therefore be no question that the Plaintiff's claims were indeed not extinguished by prescription.

[35] The pertinent dispute regarding of the parties' oral agreement relates to the terms thereof. According to the Plaintiff, the following were the terms of the agreement:

> [35.1] Plaintiff and his wife will relocate to the farm and improve it through their labour and services.
>
> [35.2] The Plaintiff would contribute a pro rata share of 25% towards the general and capital expenses.
>
> [35.3] the defendant would secure:
>
> > [35.3.1] the transfer over the farm to a private company registered in terms of the laws of the Republic of South Africa (the company).
> >
> > [35.3.2] the transfer of 25% shareholding in the company to the plaintiff.
> >
> > [35.3.3] play tip would pay an amount of R500, 000. 00 as consideration for the 25% shareholding in the company.

[36] The first term set out in clause or paragraph 4.1 or the POC is common cause between the parties. No dispute exists about it. However, it is the rest of the terms set out by the Plaintiff that the Defendant disagrees with. The Defendant disputes terms of the parties' oral agreement as set out by the Plaintiff in paragraphs 4.2, 4.3, and 4.5 of the POC. According to the Defendant the terms of the oral agreement entered into by *buy them during two thousand are as follows:*

> *"11.1 the material express, alternatively tacit terms of agreement between the parties were that:*
>
> > *[11.1.1] the plaintiff and his wife could reside on the Defendant's farm without paying any rent.*

[11.1.2] The plaintiff could at his own risk and with reason, erect structures and conduct activities on the farm that he deemed appropriate to maintain his lifestyle."

[37] There is obviously a conflict in terms between the two versions. The two versions are in conflict in the following respects:

[37.1] The plaintiff's contribution of the pro rata share of 25% towards the general and capital expenses on the farm. According to the Defendant there was never such a term in the parties' agreement.

[37.2] The obligation of the Defendant to transfer the farm to a private company and to transfer 25% shareholding of the company to the Plaintiff. This is disputed by the Defendant.

[37.3] Payment by the Plaintiff of R500,000.00 as a consideration for 25% shareholding in the company. This was never a term of agreement, according to the Defendant.

[38] In disputing the Plaintiff's version of the terms of the parties' oral agreement, Mr Wagener relied entirely on an affidavit deposed to by the Defendant prior to his death on 4 October 2017. I deal with it hereunder. On the other hand, the Plaintiff testified orally about the terms of the agreement.

[39] The Plaintiff testified furthermore that the oral agreement was confirmed during 2008 partly in writing as shown in Annexure "A" to his poc in the following manner:

[39.1] payment by him do they Defendant of a sum of R500, 000. 00 as a consideration for the 25% share in the company to be transferred to the plaintiff was confirmed.

[39.2] an additional term was included which obliged the Defendant to secure a right of pre-emption in the event that any of the other shareholders in the company decided to sell their shares.

[40] It is now the duty of this court to determine the version that is acceptable to it. The authority of **Stellenbosch Farmers Winery Group Ltd v Martell et Cie and Others 2003 (1) SA 11 (SCA)** paragraph 5 provides this Court with a technique to resolve disputes where there are two mutually destructive versions. It provides as follows:

> *"To come to a conclusion on the disputed issues a Court must make findings on*
>
> *(a) the credibility of the various factual witnesses.*
>
> *(b) their reliability; and*
> *(c) the probabilities.*
>
> *As to (a), the Court's finding on credibility of a particular witness will depend on his impression of the veracity of the witness. That in turn will depend upon a variety of subsidiary factors, not necessarily in order of importance, such as;*
>
> *(i) that witness' candour and demeanour in the witness box;*
>
> *(ii) his bias, latent and blatant;*
>
> *(iii) internal contradictions in his evidence;*
>
> *(iv) external contradictions with what was pleaded or put on his behalf, or with established facts or with his own extracurial statements or actions;*
>
> *(v) the probability or improbability of particular aspects of his version;*
>
> *(vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events.*
>
> *As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on*

(i) The opportunities had to experience or observe the event in question; and

(ii) The quality, integrity, and independence of his recall thereof.

As to (c), this necessitates and analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of this assessment of (a), (b) and (c) Court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when the Court's credibility findings compelled it in one direction and its valuation of the general probabilities in another. The more convincing the former, the less convincing would be the latter. But when all factors are equipoised probabilities prevail."

[41] On the same topic, Mr Bergenthuin referred the Court in his heads of argument to the judgment of **Baring Eiendomme v Roux [2001] 1 ALL SA 399 SCA,** at para [6] where the SCA cited with approval the following passage from **National Employers' General Employers Insurance Co Ltd v Jagers 1984 (4) SA 437 A at 440E-441A:**

"Where there are two mutually destructive stories, [the Plaintiff] can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore falls and mistaken falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff, then the court will except his version as being properly true. If, however, the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case anymore than they do the Defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied his evidence is true and that the Defendant's version is false.

This view seems to me to be in general in accordance with the views expressed by Coetzee J in Koster Ko-operatiewe Landbou Maatskappy Bpk v Suid-Afrikaanse Spoorwëë & Hawens (supra) and African Eagle Assurance Co Ltd v Cainier (supra). I would merely stress however that when in such circumstances one talks about a Plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of the inquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies that recourse is hard to an estimate of relative credibility apart from the probabilities."

[42] Strengthened by judgment of the **President of the Republic of South Africa v African Rugby Football Union 2000 (1) SA (1) CC paragraph 79**, Mr Bergenthuin argued that Courts have emphasized that the importance of demeanour as a factor in the overall assessment of evidence should not be overemphasized. He pointed out that according to the said judgment the truthfulness or untruthfulness of the witness can rarely be determined by demeanour alone without regard to other factors including, especially, probabilities. The court further pointed out that a finding based on demeanor involves interpreting the behavior or conduct of the witness while testifying. The court proceeded further as follows:

"A further and closely related danger is the implicit assumption, in deffering to the trier of fact's findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class race or gender and someone whose life experience differs fundamentally from that of the trier of facts."

According to him, the proper test is not whether a witness is truthful or indeed reliable in all that he says but whether on the balance of probabilities essential

features of the story which he tells is true. In this regard he relied on **Santam Bpk v Biddulph 2004 (5) SA 586 SCA paragraphs 10 and 12**. Mr Bergenthuin submitted that a consideration of the probabilities in this matter, considering the evidentiary value of the affidavit deposed to by the Defendant, favours the plaintiff's version.

[43] In assessing the evidence of the Defendant the following factors must be considered:

[43.1] the meeting where the whole plan that led to the oral agreement between the Plaintiff and the Defendant was hatched has not been denied. That the plan was hatched at the Plaintiff's house where the Defendant was visiting is not denied.

[43.2] The evidence that Defendant discouraged the Plaintiff and his wife from moving to George and instead the Defendant suggested to them that they should consider settling on his farm was never contradicted.

[43.3] The Plaintiff's evidence that, among others, he and the Defendant discussed the possibility of buying a 25% stake in the Defendant's farm has not been disputed.

[43.4] Furthermore it has not been denied that it was a certain Mr Mike Van Zyl who advised the Plaintiff and the Defendant that their plans of just selling 25% of stake in the farm to the Plaintiff would not be in accordance with the law and that instead he advised them that the Defendant should put his farm in a company and sell shares.

[43.5] It was never disputed that the Plaintiff and the Defendant had ongoing discussions in terms of which Defendant would put the farm in a company and the Plaintiff would acquire 25% stake in the farm.

[43.6] The plaintiff made several improvements, some of them of a permanent nature, to demonstrate his intention to permanently settle on the farm.

[43.7] It was never denied that the Plaintiff sold his house in Pretoria because he and the defendant had agreed that he would be buying 25% stake in the farm and settle on it.

[43.8] The Plaintiff had his own property which he testified he sold after reaching an agreement with the Defendant. He sold it because he was going to settle on the Defendant's farm. It is therefore highly unlikely that a man could sell his house just to go and squat on another man's property with no hope of ever owning that property. He might as well have remained on his property. The fact that he sold his property to settle on the Defendant's property proves convincingly that there must have been a basic reason why he did so. That basic reason is the agreement that he had concluded with the Defendant.

[44.1] According to Mr Bergenthuin Plaintiff's version provides a logical explanation how the original of the handwritten document reflected in the court bundle came into his possession. In his affidavit, the deceased could not explain the existence of the document which provides for the sale transfer of his farm to a company and a transfer of the shares in that company to four people. Moreover, the Defendant mentioned that the note was made for his own personal future planning of his estate. Accordingly, he confirmed that the transfer of the 25% shareholding in a company become the owner of the farm was within his contemplation when he drew the document. The contents of the document note contradict the Defendant's version. Mr Wagener put it to the Plaintiff that Andre Joubert had the pencil notes. Andre could have explained his possession, as the Defendant's affidavit mentions nothing about this aspect, which is material and obviates the argument that it was a personal note.

[44.2] The content of the handwritten note by the Defendant carries remarkable similarities with the Plaintiff's version of the agreement. The intention by the Defendant to sell the farm to a company for an amount of R2 million corresponds with the Plaintiff's allegation relating to the undertaking by the defendant to transfer the farm to a company. The amount of R2 million is the exact amount of the value of the farm according to the Defendant, according to the Plaintiff's testimony. The division of shares between the deceased's three children and the Plaintiff in equal

parts, is in accordance with Plaintiff's allegation that he would have received 25% of the shares in the company. The obligation of the Plaintiff to make payment of R500, 000.00 accords with the Plaintiff's allegation that consideration of R500,000 had to be paid by him for the transfer of the 25% share in the property-owning company. The similarities between the Plaintiff's version and the deceased's intention as reflected in the note, cannot be simply coincidental.

[44.3] Furthermore, according to Mr Bergenthuin, no explanation exists for the estate planning reflected in the note by the defendant in accordance with the terms of the agreement alleged by the Plaintiff. There has never been any indication why the Defendant would have intended to transfer 25% of the shares in the property-owning company to Plaintiff if there was no agreement to that effect between the parties. In his affidavit, the Defendant did not mention when the note was created or that his planning in terms thereof had been abandoned.

[45] In cross examination Mr Wagener put to the Plaintiff that Defendant's son, would testify that:

> [45.1] he never received any documentation from his father before he, the Defendant, left for England. This statement was designed to contradict the Plaintiff's evidence. It was further put to the Plaintiff that the Defendant's son would testify that the only document which came into his possession was the note; and
>
> [45.2] the discussions between the Plaintiff and him about finalizing the deal between the Defendant and the Plaintiff were denied as well as his alleged boasting about the part he played to persuade the Defendant to finalize the deal; and
>
> [45.3] any discussion between the Defendant and his children about transferring an interest to Plaintiff was denied; and
>
> [45.4] the rift between the two families developed because of the paintings which vanished from the Defendant's residence in Mossel Bay.

The Defendant's son was present during the hearing of this matter but that notwithstanding, he was, for inexplicable reasons, never called to testify, despite the assurances by counsel for the Defendant. In the premises the Court is therefore bound to accept the testimony of the Plaintiff relating to the aspects put to him.

[46.1] During cross-examination, Mr Wagener referred the Plaintiff to paragraph 7.4 of his poc in which he had stated that he complied with his obligations to make payment of the R500, 000.00 for the shares in the company and he did so during 2006. The next statement by Mr Wagener was that the Defendant denies that there was ever such a term in their agreement. According to the Defendant there was never such a term that the Plaintiff should pay R500,000. 00 to obtain shares in the company. The Plaintiff was unwavering in his evidence that the money was paid to the Defendant because it was due to him. The Plaintiff went to explain the circumstances under which he arranged to pay the Defendant the said amount.

[46.2] Although the witness was told by Mr Wagener that the Defendant denies that there was any such term that he would pay R500,000.000 to the Defendant to obtain shares in the company, the Plaintiff's evidence that he paid the said amount through the office of Mr Cilliers, was never disputed. There was no evidence by or on behalf of the Defendant to contradict his evidence.

[46.3] The Plaintiff's evidence that the sum of R750,000 was paid by Mr Cilliers to the Defendant was corroborated by Mr Cilliers himself. Mr Cilliers testified that he had only received instructions to pay R750. 000000 to the Defendant. He had not been told what the payment was for. This evidence that he paid Defendant the said amount has not been disputed nor contradicted.

[46.4] Now the $1 million dollar question is this. If indeed there was no term of the parties' agreement that the Plaintiff should pay the Defendant the sum of R500,000.00 what was then the payment for? The circumstances that preceded the payment of the sum of R500,000 were not disputed.

[46.5] The attempted explanation by the Defendant that the Plaintiff is indeed confusing the sale of shares in respect Cot Properties and the agreement in terms of which he afforded the Plaintiff and his wife the right to take occupation on the farm, lacks merit. With full knowledge of the Plaintiff's contention that the R500,000.00 was indeed paid as consideration for the 25% shares in the company to become the owner of the farm, the Defendant simply did not give any reason why he received that amount in addition to the amount owing to him on loan account.

[46.6] It was furthermore argued by counsel for the Plaintiff that R500, 000.00 was paid to the Defendant in consideration of his shares in Cot Properties (Pty) Ltd, in addition to his loan account, put to the Plaintiff in cross-examination, is without any factual foundation and amounts to speculation and conjecture. Plaintiff asked at a pre-trial conference dated 20 May 2021 to admit that the Defendant received payment of an amount of R500, 060 on 26th May 22006. The admission was not made. After subsequent conclusive proof by Mr Cilliers that the payment was indeed made, the proposition was concocted that although the payment was made, it was indeed on probabilities made in consideration for the value of the shares of the Defendant or in terms of a pro rata division, considering the shareholding by the parties. That proposition for the first time arose during the trial, for the conspicuous reasons that some explanation had to be given for the payment of R500,060 and can never serve as a rebuttal of the direct evidence of the Plaintiff that an agreement was reached as reflected in the resolution signed by the relevant shareholders on 10 May 2006.

[47] No evidence was presented to Court in support of the proposition put forward by Mr Wagener that the said amount was paid not by the Plaintiff but by the certain companies.

[48] As I pointed out earlier, for his cross-examination of the Plaintiff and for purpose of putting before Court what he called the Defendant’s version, counsel for the Defendant relied extensively on the affidavit made by the Defendant on 4 October 2017. At the time of the trial of this matter the Defendant had passed away. And for obvious reasons he was not available. The purpose of said statement of

facts was to serve as evidence before the court in the event of his death. The court must now determine the evidentiary value of the relevant affidavit.

[49] The said affidavit was prepared in terms of Rule 38(2) of the Uniform Rules of Court. It states as follows:

> "*The witness at the trial of any action shall be examined viva voce, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as it may seem meet: Provided that where it appears to the Court that any other party reasonably requires the attendance of the witness for cross-examination, and such witness can be produced, the evidence of such witness shall not being given on affidavit*."

[50] The court possesses a discretion, which discretion should be exercised judicially and upon a consideration all the facts, to allow the testimony to be given in an affidavit. It is so that in civil action proceedings witnesses may only testify orally. Therefore, Rule 38(2) creates an exception to the general rule. The value of the witness' evidence cannot be over-emphasized. A witness who testifies may be cross-examined to establish the veracity of his testimony.

[51] There are several problems with the evidence being placed before court through an affidavit though, such as:

> [51.1] when the deceased made his affidavit referred to in this matter, the Plaintiff was not present nor was there any one present to cross-examine him.
>
> [51.2] in an affidavit, a deponent may say anything. The temptation to conceal the truth or misrepresent the facts always looms large at the horizon when a person makes such an affidavit. Such an affidavit may contain the truth or untruth or a combination of both. There is no way of testing the truthfulness of the person who made it.

[51.3] such an affidavit will lose any evidentiary value where it prejudices the other party. For instance, *in casu*, the Plaintiff has no way of cross-examining the Defendant. We have seen how their versions differ. It would be unfair, in the circumstances, to accept the untested version of the Defendant at the expense of the tested version of the Plaintiff. The Plaintiff's testimony has stood the scrutiny of cross-examination. Here we are reminded of what Whitmore stated in his book, Whitmore On Evidence, at paragraph 1367. In the said paragraph he said the following about cross-examination. He called it: "*the greatest legal engine ever invented for the discovery of the truth."* He never saw the engine in action where the evidence of one party is placed before the court by way of an affidavit.

[50.4] In their book, **The South African Law of Evidence, 2nd Edition,** the learned authors, **DT Zeffert and AP Paizes** had the following to say:

> "*The purposes of cross-examination are, first, to elicit evidence which supports the cross-examiner's case, and second, to cast doubt upon the evidence given for the opposing party. Cross-examination may therefore be directed either to the facts relevant to the issue, or facts relevant to the witness' credibility."*

The purpose of cross examination will be lost where a person merely submits an affidavit as evidence before a court. The use of affidavits for purposes of placing evidence before courts should be reserved for non-contentious matters where cross-examination is not an integral ingredient of the proceedings.

[52] Counsel for the plaintiff referred the Court in his heads of argument to the judgment of **Madibeng Local Municipality v Public Investment Corporation Ltd, 2018 (6) SA 55 SCA,** paragraph [26] in which the court held that a trial Judge may exercise his discretion judicially in considering an application to depart from the norm that oral evidence is to be led. The court has to determine whether the circumstances render it appropriate and suitable to allow such deviation. In assessing an application to adduce evidence by way of Affidavit, and also to

determine the evidentiary value of such an affidavit, the SCA stated that the court must take into consideration the nature of the proceedings, nature of the evidence whether the parties have agreed that evidence in the form of affidavit may be used, and ultimately whether it would be fair to allow evidence on affidavit. Factors such as prejudice and fairness to the parties are to be considered as well. An agreement between the parties relating to evidence by way of affidavit does not bind the court. Such an agreement between the parties is merely another factor to take into consideration by a trial Judge in deciding whether sufficient reason exists to allow an affidavit as evidence.

[53] In conclusion, no sufficient reason exists for this Court to allow the affidavit made by the Defendant on 4 October 2017 as evidence. Once the Court makes the aforegoing determination, the conclusion is inevitable that there is before Court only one version and that is the version of the Plaintiff, supported by his witnesses. The Plaintiff's version is, in any event, the more probable one.

In the result, I make the following order:

1. The Defendant's special plea of prescription is hereby dismissed, with costs.

2. The Defendant is hereby ordered to register a private company within thirty (30) days of this order as contemplated in paragraphs 4.3.1 of the Particulars of Claim.

3. The Defendant is hereby ordered to transfer his farm, Portion 8 of the farm Renosterfontein 514, Registration Division I.R., district Cullinan, Gauteng Province, to the private company referred to in paragraph 2 of this order within thirty (30) days after the formation of the said company.

4. The Defendant is hereby ordered to transfer, within fourteen (14) days after transferring his afore mentioned farm, twenty five (25)% of the shares in the said company to the Plaintiff.

5. The Defendant is hereby ordered to pay the costs of this action.

PM MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:	*Adv JG Bergenthuin SC*
Instructed by:	*Cilliers and Reynders Attorneys*
Counsel for the Defendant:	*Adv SD Wagener SC*
Instructed by:	*Weavind & Weavind Inc. Attorneys*
Date heard:	*4-8 October 2021*
Date of Judgment:	*10 June 2022*