IN THE HIGH COURT OF SOUTH AFRICA

REPORTABLE

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: **5875/02**

In the matter between

OLGA ALEXSEEVNA DENISSOVA N.O. Plaintiff

and

HEYNS HELICOPTERS (PTY) LTD Defendant

JUDGMENT DELIVERED ON 4 SEPTEMBER 2003

YEKISO, J

[1] The issue which calls for determination at this stage of the proceedings is whether the oral agreement, inclusive of the material terms thereof, is enforceable in the light of the non-variation and non-waiver clause contained in a written acknowledgement of debt. The oral agreement itself is in dispute. It is thus necessary, in the first instance, to determine if the oral agreement itself was concluded, and if so, whether the alleged oral agreement is enforceable in the light of the non-variation and non-waiver clauses.

[2] The material terms of the alleged oral agreement are that Plaintiff, with full knowledge of her rights, waived all claims in favour of her late husband's estate against the Defendant whilst the Defendant, on the other hand, with full knowledge of

its rights, waived all claims it had against the estate of Plaintiff's deceased husband.

[3] The acknowledgement of debt referred to in paragraph [1] is the basis of an action for recovery of an amount of R 553,318.56, being the balance of an amount due and payable by the Defendant to Plaintiff in her capacity as the executrix in her deceased husband's estate, one Andrei Vladimirovitch Denissov (who I shall hereafter refer to as "Denissov") who died as a result of a motor vehicle accident on 7 October 1999.

[4] Plaintiff is the surviving spouse of the late Denissov and act in these proceedings in her capacity as the executrix in the estate of her deceased husband referred to in paragraph [3] above. The Defendant, on the other hand, is a company with limited liability incorporated in terms of the Companies Act, 61 of 1973 having its registered office and principal place of business at 4 Cedar Avenue, Heatherlands, George, Western Cape. The Defendant is represented in these proceedings by Martin Michael Steynberg who is the director and the chief executive officer in the Defendant company, and who I shall hereafter simply refer to as Steynberg. The Defendant has business interests and also carries on business at Nelspruit in the province of Mpumalanga.

[5] The acknowledgement of debt already referred was concluded at George on 12 August 1999. In terms thereof, the Defendant, duly represented by Steynberg acknowledged its indebtedness to Plaintiff's deceased husband in an amount of

R 646,737.00 being in respect of monies lent and advanced, salaries and rentals due and payable. The whole amount due ought to have been payable in seven equal instalments, the last of which such instalment would have been on the last day of February 2000. Only three payments were made in terms of the acknowledgement of debt. No further payments were made as, in the view of Steynberg, the Defendant had a claim against the estate of Denissov in an amount far in excess of the balance outstanding in terms of the acknowledge of debt. The first such payments was on 6 August 1999, followed by two further payments during August and September 1999 leaving a balance outstanding allegedly due and payable in an amount of R 553,318.56.

[6] On 2 August 2002 Plaintiff issued a summons out of this Court for recovery of the aforesaid amount of R 553,318.56. After service of the summons on it, the Defendant duly entered an appearance to defend. Thereafter there was filed on behalf of Plaintiff an Application for summary judgment which the Defendant successfully opposed. Defendant subsequently filed its Plea and Counterclaim. In its Plea, the Defendant, amongst other things, pleaded an oral agreement I have already referred to in paragraph [1] above, and which oral agreement is disputed by Plaintiff in her Plea to the Defendant's Counterclaim.

[7] Paragraph 5.3.8 and 5.3.9 of the Defendant's Plea to Plaintiff's Particulars of Claim, which is incorporated in the Defendant's Counterclaim, reads as follows:

"5.3.8 Op of omtrent 21 Maart 2001 en by die Johannesburgse Internasionale Lughawe, Gauteng, het Eiseres, handelende in haar hoedanigheid as eksekutrise van die bestorwe boedel van die oorledene, en Martin Michael Steynberg, handelende namens die Verweerder, 'n mondelinge ooreenkoms aangegaan, die wesenlike terme waarvan as volg is:

5.3.8.1 *Eiseres het, met volle kennis van haar regte, <u>afstand gedoen</u> van alle eise wat die bestorwe boedel van die oorledene teen die Verweerder het vooruitspruitende uit die voormelde*

skuldbewys.

5.3.8.2 *Steynberg het, met volle kennis van Verweerder se regte, afstand gedoen van alle eise, en in besonder die eise vir betaling van die voormelde bedrae van US$400,000-00, US$2,749,598-00 en R 3,580,000-00, wat die Verweerder teen die oorledene se bestorwe boedel het.*

5.3.9 *Uit die hoofde van die voorafgaande is daar gevolglik geen bedrag deur die Verweerder aan Eiseres in haar verteenwoordigende hoedanigheid verskulding kragtens die gemelde skuldbewys nie."* *(The underlinings are mine)*

[8] Plaintiff in turn, filed a Plea to Defendant's Counterclaim wherein she, apart from pleading prescription to the Defendant's various other categories of claims set out in Defendant's Counterclaim, places the conclusion of the oral agreement allegedly entered into between her and the Defendant in dispute.

[9] At the commencement of the hearing of this matter it was agreed between the parties that a matter of the alleged oral agreement, inclusive of the material terms thereof alleged and set out in paragraphs 5.3.8 and 5.3.9 of the Defendant's Plea first be adjudicated upon and that other issues raised in the pleadings be

adjudicated and determined at a later stage, if need be. In terms of Rule 33(4) I ordered the separation of the issues as agreed between the parties.

[10] The chronological sequence of events preceding the institution of these proceedings is set out in the evidence by Steynberg who testified for the Defendant. The salient features of Steynberg's evidence in chief are that he became associated with the Defendant during February 1999, initially as an adviser; he became a director in the Defendant company on 9 April 1999; he currently is the Chairman and a Chief Executive Officer of Heyns Helicopters, a holding company of the Defendant and that the main core of the Defendant's business activity is the provision of aviation services.

[11] There was at the time a lease agreement between the Defendant and a Russian based company known as Joint Stock Company Tuymenaviatrans Air (which I shall hereafter refer to as "Tuymen"). In terms of the lease agreement the Defendant leased from Tuymen several M18 helicopters. Plaintiff's deceased husband, Denissov, was a co-director of the Defendant company at the time; he resigned from this position towards the end of April 1999; Denissov was the South African agent of Tuymen and also a representative of the Federal Aviation Authority of Russia at the Civil Aviation Authority of

South Africa.

[12] As a co-director and the employee of the Defendant, it was the duty of Denissov to liaise with Tuymen; he was responsible for the purchase of spare parts for the fleet of helicopters, maintenance inspections thereof, the insurance of the fleet and the acceptance of insurance premiums for onward transmission to the insurance company, also based in Russia.

[13] On 9 February 1999 one of the helicopters was involved in an accident in Cape Town; in this accident a Russian national who was piloting the aircraft at the time died; few days before this accident occurred there was addressed a letter to the Russian based insurance company cancelling the insurance contract, so that when the accident occurred the aircraft in question had no insurance cover; the letter in question, dated 6 February 1999 purported to have been written by one Louis Venter who was a general manager in the Defendant company at the time; Venter, on the other hand, denied having been the author of the letter of cancellation of insurance; whoever wrote the letter cancelling the insurance had no authority to do so and did so without the knowledge of management of the Defendant firm. There was suspicion at the time that Denissov had forged the signature on the letter of cancellation, that

the premiums arising from the cancellation of insurance were refunded to Denissov and that he was responsible for the cancellation of the insurance cover in respect of the aircrafts. Tuymen, as the owner of the damaged aircraft, was holding the Defendant liable for the damaged aircraft and a claim in an amount of US$ 400,000.00 was contemplated against the Defendant.

[14] The fleet of helicopters leased from Tuymen was delivered in 1992. Steynberg testified that in terms of the Russian production system an aircraft has a calendar life extending over a period of six years or 3000 flying hours reckoned from the date of production, which ever period first expires, whereafter the Certificate of Airworthiness issued in respect of each such aircraft expires; The Certificate of Airworthiness could only be extended or re-issued after due performance of an inspection on that particular aircraft. Such inspection could only be carried out by the manufacturers who happened to be the same company as the lessors, Tuymen. It appears that the calendar life of the remaining aircrafts had expired. Denissov informed the South African Civil Aviation Authority of this fact resulting in the Certificates of Airworthiness in respect of all the remaining aircrafts being withdrawn, rendering the Defendant unable to fly the aircrafts. The required inspection would have to be carried out by Russian personnel which, in turn, would have to be flown into

the country at the Defendant's expense. Denissov, as a liaison person between the Defendant and Tuymen, was responsible for the travel arrangements of the inspectors into the country. Denissov was not prepared to arrange for the inspectors to be flown in not until the Defendant would have settled various amounts owed to him which he, at that stage, estimated to have been in an amount of R 3 million, being in respect of remuneration owing to him and certain travelling expenses. In the meantime the remaining aircrafts were grounded causing the Defendant to lose millions of rands in contracts.

[15] Negotiations between the Defendant and Denissov ensued. Denissov was prepared to arrange for the inspection of the aircrafts on condition that the Defendant signs an acknowledgement of debt in his favour as security for payment of amounts owing to him. Only on this condition was he prepared to have the inspection personnel flown in; have the aircrafts inspected in order to have the calendar life of the remaining aircrafts extended. Once the inspection would have been carried out, only then would the Civil Aviation Authority re-issue the Certificates of Airworthiness. The aircrafts were subsequently inspected and the required Certificates of Airworthiness were re-issued. The required acknowledgement of debt was signed on 12 August 1999. Denissov subsequently died

as a result of a motor vehicle accident on 9 October 1999. Shortly before the death of Denissov the Defendant, through Steynberg, had taken certain issues with him. These issues related to the liability of the Defendant arising from the damaged aircraft, loss of revenue as a result of withdrawal of Certificates of Airworthiness and certain travelling expenses which Denissov claimed were due to him. Steynberg had undertaken certain investigations and discovered that certain claims which Denissov claimed from the Defendant were not justified.

[16] As at death of Denissov, the issues referred to in the preceding paragraph still remained unresolved. Steynberg raised these issues with the Plaintiff, who in the meantime had been appointed the executrix in her deceased husband's estate. Steynberg held two meetings with Plaintiff, the first such meeting having been in Johannesburg on 3 November 2000. The second and the last meeting was held at the Holiday Inn, Johannesburg International Airport on 21 March 2001. At this last meeting, according to Steynberg's evidence, the issues under discussion, which comprised the Defendant's contemplated claim against the deceased estate and the claim the estate had against the Defendant, based as it is on the acknowledgement of debt, were settled on the basis that the parties would waive their respective claims, thereby releasing one another from their respective obligations. I am using the term "waive" in a generic sense as Mr Kirk-Cohen, who appeared for

the Defendant, had in his opening address contended that the alleged oral agreement not be construed as a waiver agreement but rather as an agreement between the parties having the effect of terminating the parties' respective obligations. I am thus by no means making a finding at this stage as to whether or not the alleged oral agreement entered into between the parties is a waiver agreement.

This, in a nutshell, is the evidence tendered on behalf of the Defendant. Plaintiff closed her case and elected not to testify so that the issues in dispute will be determined on basis of evidence by Steynberg, both in chief and under cross-examination over and above the other evidential material admitted by the parties.

[17] The acknowledge of debt referred to in Plaintiff's Particulars of Claim contains a non-variation clause which reads as follows in the penultimate paragraph at p6 thereof:

"This Acknowledgement of Debt constitutes and comprises the whole of the agreement between the COMPANY and the CREDITORS in respect of the indebtedness referred to herein and no variation of any sort thereof will be binding on either the COMPANY or the CREDITORS unless reduced to writing and signed by both the COMPANY and the CREDITORS or their representatives."

[18] Further, the acknowledgement of debt, in a paragraph immediately following the variation clause, contains a non-waiver clause which

reads as follows:

"No waiver of any rights of the CREDITORS, whether under law or in terms of this Acknowledgement of Debt shall be binding on the CREDITORS or any one of them unless such waiver is reduced to writing and signed by all the CREDITORS."

[19] In paragraph 5.3.8 of its Plea, the Defendant, in effect, pleads an oral agreement entered into at the Holiday Inn, Johannesburg International Airport on 21 March 2001 the material terms whereof are that Plaintiff, in her representative capacity, and with full knowledge of her rights, waives all claims her deceased husband's estate has against the Defendant in terms of the acknowledgement of debt whilst the Defendant, on the other hand, represented by Steynberg, and with full knowledge of its rights, waives all claims the Defendant has against the estate of Denissov in amounts referred to in paragraph 5.3.8.2 of the Defendant's Plea.

[20] At the cost of repeating myself, the issues that call for determination and reserved for separate adjudication are:

1 Whether an oral agreement was entered into between the parties incorporating the terms contained in paragraphs 5.3.8.1 and 5.3.8.2 of the Defendant's Plea; and

2 If so, what the effect of such an oral agreement is in the light of the non-variation and non-waiver clauses contained in the acknowledgement of debt.

I have already made a point that the Plaintiff, in her Plea to the Defendant's Counterclaim disputes the oral agreement which the Defendant alleges it concluded with Plaintiff as also the material terms thereof. If I find that the oral agreement was concluded, as Defendant alleges in its Plea and Counterclaim, the next issue I am asked to determine is whether the alleged oral agreement is enforceable in the light of the non-variation and a non-waiver clause.

I shall now consider these issues in turn.

[21] In terms of paragraphs 16.3 and 16.4 of the Pre-Trial Minute it was agreed

between the parties that the Defendant bears the *onus* of proof in respect of the allegations contained in paragraph 5.3.8 of the Defendant's Plea and also the duty to begin to give evidence, hence the Defendant having tendered evidence first.

[22] The oral agreement relied upon by the Defendant is alleged to have been concluded at the Holiday Inn, Johannesburg International Airport on 21 March 2001. Steynberg in his evidence in chief, could not recall at whose instance this meeting was except to say he happened to have been in Johannesburg when he had a telephonic conversation with Plaintiff and, arising out of that conversation, an arrangement was made for them to meet at the Holiday Inn, Johannesburg International Airport the following day which would have been 21 March 2001. It appears that the purpose of the meeting pertained to the forensic report by a handwriting expert as regards whether the letter of cancellation of insurance of the fleet of aircrafts was signed by the deceased, the late Denissov. According to Steynberg, a matter of the acknowledgement of debt was raised for the first time at this meeting and was not raised at all at the previous meeting held on 3 November 2000.

[23] Steynberg met the Plaintiff on the 21 March 2001 as arranged. He is not certain precisely what time the meeting started except that it was after he had met a Mr Kebill who he had met for about an hour prior to his meeting with Plaintiff. They had met in the reception area of the hotel and at an area specifically provided for the kind of consultation he had with the Plaintiff. Matters discussed ranged from Plaintiff's family, how the winding up of her deceased husband's estate was progressing and eventually the forensic report relating to the disputed signature on the letter of cancellation of insurance, purportedly signed by one Venter but which Steynberg suspected to have been signed by Denissov. The Plaintiff had the forensic report with her but, according to Steynberg's evidence in chief, Plaintiff did not want to give it to him to have a look at. Steynberg did not see the report itself but could see the paper containing the report. Plaintiff had it on her lap according to Steynberg. She mentioned to Steynberg that the report exonerated her late husband from blame and, in particular, that the disputed signature on the letter of cancellation was not that of her late husband.

[24] Ultimately the matter of the acknowledgement of debt came up for discussion. Steynberg mentioned to the Plaintiff that the Defendant faced a substantial claim from Tuymen arising from the non-insurance of the aircraft involved in an accident in Cape Town; that this claim amounted to US$ 400,000.00; that the Defendant, in turn,

intended to claim this amount from the estate; that this claim, together with a further claim, still to be quantified, in respect of loss of revenue arising from the withdrawal of Certificates of Airworthiness in respect of the remaining aircrafts for the period May 1999 up to the beginning of July 1999, far exceeded Plaintiff's claim against the Defendant in terms of the acknowledgment of debt. Steynberg estimated the claim in respect of loss of revenue to be in the approximate amount of R 3 million. Steynberg went on further to say that the Defendant is in business, that it can survive but it would make sense if the matter of the parties' respective claims were to be resolved on the basis that "We (the Defendant) won't claim against her(the Plaintiff in her representative capacity) if she does not claim against us" to put it in the words used by Steynberg in his evidence. According to Steynberg, Plaintiff's reaction was she had to accept the proposal as she did not want to waste money on litigation. The discussion then proceeded to the Russian crew who died in an aircraft accident in Cape Town and, after a brief discussion of the latter issue, according to Steynberg's evidence, the parties departed on a good footing and he was clearly under the impression that they had reached *consensus* in as far as the matter of the parties' respective claims are concerned.

[25] Subsequent to this meeting there was no communication between Steynberg and Plaintiff until a letter of demand from Plaintiff's Attorneys addressed to the Defendant dated 28 January 2002, and a further letter dated 11 February 2002 threatening proceedings by way of summons if no response to the demand was forthcoming.

[26] This, in broad terms, is a summary of Steynberg's evidence in chief. Under cross-examination Steynberg confirmed that the meeting held at the Holiday Inn on 21 March 2001 was at the instance of Plaintiff. It was a follow-up meeting to the initial meeting held at a coffee bar, also in Johannesburg, on 3 November 2000 at

which meeting, amongst other issues under discussion, was a matter of a letter of cancellation of the insurance cover in respect of the fleet. There was then a strong suspicion that Denissov may have engineered the cancellation of the insurance contract and that, in doing so, Denissov may have forged the signature of Venter who, at the time of the cancellation of the insurance contract, was the general manager in the Defendant company. Venter had by then already deposed an Affidavit denying knowledge of the signature in the letter of cancellation and, in particular, denying that the signature appearing in the letter of cancellation was his signature. Arising from this discussion, Plaintiff had undertaken to have the disputed signature analysed by a handwriting expert. Plaintiff had further undertaken to revert to Steynberg as soon as she would have been furnished with the forensic report relating to the disputed signature.

[27] Steynberg, so it further emerged in his evidence under cross-examination, had furnished Plaintiff with the documentation containing the disputed signature as also the specimen signature of Venter, and, in all probability, although not specifically mentioned in evidence, the specimen signature of the late Denissov for analysis by the handwriting expert.

[28] During early March 2001, Plaintiff had been furnished, and was in possession of the report by the handwriting experts. The opinion based on this report is that "a real possibility exists that the writer of the Denissov collected specimen writing signatures is not the writer of the dispelled signature on the (cancellation) document." The opinion further goes on to indicate that "a real possibility does exist that the writer of the L J Venter collected specimen signatures, initials, is also writer of the disputed signature on the (cancellation) document." It was put to Steynberg that, based on this report, Plaintiff's state of mind at the time the second meeting was held was that her husband, the late Denissov, did not sign the letter of cancellation to which statement Steynberg readily conceded.

[29] In his evidence in chief, Steynberg testified that Plaintiff had a piece of paper with her. This he saw as Plaintiff had this piece of paper on her lap. It later transpired that the piece of paper he is referring to contained the forensic report referred to in the preceding paragraph. He did not see the report. She did not want to give it to him and instead suggested to Steynberg he obtains his own report. Steynberg goes further to say all that Plaintiff said to him was that the report exonerated her husband from blame. But under cross-examination it emerged that Plaintiff did show the report to Steynberg particularly the portion of the report

containing an opinion exonerating Plaintiff's deceased husband from blame. The portion of the report which Plaintiff concealed from Steynberg is the one which seeks to incriminate Venter.

[30] *Mr Du Plessis*, who appeared for Plaintiff, put it to Steynberg that shortly after Plaintiff had shown him the report, she demanded payment of the amount due in terms of the acknowledgment of debt to which statement Steynberg conceded except to say Plaintiff made no reference to the acknowledgement of debt when demanding payment. *Mr Du Plessis* further put it to Steynberg that after Plaintiff demanded payment he (Steynberg) offered half the amount due in full and final settlement, that Plaintiff seriously considered this offer, but would have required collateral security, and in this regard Plaintiff had suggested the hangar in Nelspruit as a form of security. Steynberg denied having made the offer as suggested but admitted the discussion about the hangar in Nelspruit. It was further put to Steynberg that when a discussion about collateral security came up, Steynberg mentioned the hangar in Nelspruit, to which statement Steynberg conceded except to say that no reference was made to the word "security". Further, it was put to Steynberg that whilst the discussion revolved around the hangar in Nelspruit as a form of security, Steynberg intimated to Plaintiff that he was not the only director in the Defendant company, that he would have to consult with his co-directors as regards the hangar in Nelspruit and would revert to Plaintiff after he would have consulted his co-directors. As regards the latter statement, Steynberg's response was that whilst he cannot recall the details of this aspect of the discussion, he nonetheless conceded that he could have said something to that effect. *Mr Du Plessis* finally put it to Steynberg that Plaintiff denies having concluded the oral

agreement as contended by Steynberg and that, as far as Plaintiff is concerned, the main purpose of the meeting held at the Holiday Inn, Johannesburg International Airport on 21 March 2001 was to prove her husband's innocence, which statement Steynberg denied.

[31] What emerges from Steynberg's evidence under cross-examination as regards the meeting of 21 March 2001 is a totally different picture to the one portrayed in his evidence in chief. Whereas in his evidence in chief it would seem Steynberg had not had sight of the forensic report Plaintiff had in her possession, under cross-examination it appears that he was shown this report except the portion of the report which implicates Venter. In his evidence in chief one gets the impression that Plaintiff had this report on her lap all the time and did not give it to Steynberg, yet under cross-examination this does not appear to be so. No mention was made in evidence in chief of the discussion regarding the hangar in Nelspruit and a need to consult with co-directors. I shall further deal with this aspect of Steynberg's evidence later in this judgment.

[32] As has already been pointed out Plaintiff did not testify and elected to close her case so that, in the first instance, I shall have to determine whether the Defendant has made a strong *prima facie* case which entitles me to drawn an adverse inference against Plaintiff arising from failure by Plaintiff to testify.

[33] What I have before me, for purposes of making the required determination, is the uncontested evidence of Steynberg which would normally, in the absence of any contradictory evidence, be accepted as being *prima facie* true. It does not, however, follow that because evidence is uncontested, therefore, it is true. The evidence may be so improbable in the light of all the other evidence that it cannot be accepted [See in this regard *Meyer v Kirner 1974(4) SA 90*(N) at *93 G-H*]. The fact that evidence stands uncontradicted does not relieve the party from the obligation to

discharge the *onus* resting on him. [See *Minister of Justice v Seametso 1963(3) SA 530*(AD) at *534 G-H*]. In civil matters the *onus* is discharged upon a balance of probabilities but, no doubt, this simplistic statement must be used with caution since, even if the *onus*-bearing party puts into his 'pan of the scale of probability' slender evidence, as against no counter-balance on the part of the opponent, and although the scale should therefore automatically go down on the side of the *onus*-bearing party, the Court may still hold that the evidence tendered is not sufficiently cogent and convincing (See *Ramakulukusha v Commander, Venda National Force 1989(2) SA 813* (VSC) at *838 H-I* and other authorities cited therein).

[34] In the instance of this matter, the *onus* is on the Defendant to prove, on the balance of probabilities, the conclusion of an oral agreement inclusive of its material terms, in terms of which Plaintiff and the Defendant agreed to release one another from their respective obligations or, at the very least, an agreement in terms of which the Plaintiff agreed to release the Defendant from its obligations in terms of the acknowledgement of debt entered into on 12 August 1999.

[35] I have already referred to the first meeting which Steynberg had with Plaintiff on 3 November 2000 and at which such meeting a matter under discussion, amongst other things, was an issue of cancellation of insurance in respect of the fleet of aircrafts leased by the Defendant from Tuymen. At that meeting Steynberg was of the view, and in fact believed, that the late Denissov had engineered the cancellation of the insurance contract. The letter of cancellation had purportedly been signed by Venter. Steynberg, at that stage, had in his possession an Affidavit deposed to by Venter in which he denied that the signature appearing on the letter of cancellation was his. There was then a strong suspicion that the letter of cancellation was forged by Denissov and it was for this reason that a claim against the deceased estate of Denissov was contemplated.

[36] Although it is not explicit on the basis of the record, it would appear that, and in fact this was put to Steynberg, to which statement he later in his evidence conceded, that Steynberg had undertaken to furnish Plaintiff with documents which would have constituted a basis of a claim against the deceased estate including the letter of cancellation purportedly signed by Venter. Steynberg had forwarded these documents to Plaintiff by way of a telefax on 8 November 2000.

[37] Once Plaintiff was in possession of these documents, particularly the letter of cancellation, she had arranged with her attorney to have it analysed by a handwriting expert whose report she later obtained during early March 2001. As has already been pointed out, according to the opinion of the handwriting expert, the late Denissov was exonerated from any wrongdoing and, as matter of fact, the report implicated Venter.

[38] It was on the strength of this report that Plaintiff arranged a further meeting with Steynberg which took place at the Holiday Inn, Johannesburg International Airport on 21 March 2001. It was put to Steynberg and he readily conceded to this statement, that at the time this meeting took place, what was in Plaintiff's frame of mind was that her husband did not sign the letter of cancellation of insurance dated 1 February 1999 and, in view thereof, her husband was not guilty of any wrongdoing.

[39] What transpired at the meeting of 21 March 2001 appears to be the following: Plaintiff had the forensic report by the handwriting experts with her, she had shown Steynberg the portion of the report which exonerated her husband from blame except the portion implicating Venter, contrary to what Steynberg had said in his evidence in chief that he only saw a piece of paper which Plaintiff had on her lap; that Plaintiff refused to give the report to him on the basis that Steynberg would have to obtain his own report; Plaintiff had demanded payment, which Steynberg concedes, except to say that no specific reference was made to the acknowledgement of debt when payment was demanded; an offer to pay half the amount outstanding in terms of the acknowledgement of debt which Steynberg denies but agrees to a discussion of a demand for shares in a hangar in Nelspruit Airport; a discussion on a matter of collateral security which Steynberg denies but concedes to a demand in shares in a hangar in Nelspruit Airport; his undertaking to consult with his co-directors and undertaking to revert to Plaintiff in this regard and a reference by Steynberg that Plaintiff would have made an insinuation that Steynberg is a clever person, a clever guy as Steynberg puts it.

[40] What I am thus required to determine is whether the oral agreement which Steynberg contends was concluded could have been concluded in the light of the circumstances as outlined in the preceding paragraph. I am being asked to find that Plaintiff, despite being satisfied that her husband had nothing to do with the

cancellation of the insurance contract, nonetheless agreed to the conclusion of the oral agreement as pleaded and referred to in evidence; to find that such an agreement was concluded despite a demand for shares in a hangar in Nelspruit, all of which are but some of the factors pointing against a probability that such an oral agreement, inclusive of its terms as pleaded, could have been concluded.

[41] In the light of the circumstances I have just outlined, I am unable to find that the oral agreement alleged by the Defendant was concluded as alleged in Defendant's Plea and in Defendant's Counterclaim. Even if such an oral agreement was concluded, which is highly improbable in my view, I am unable to find that Plaintiff could have concluded such an oral agreement with a deliberate intention to be bound. This, in my view, is the most plausible conclusion, amongst several conceivable ones, from proved facts. I am thus of the view that the Defendant has failed to discharge the *onus* resting on it or has tendered sufficiently cogent and convincing evidence that the alleged oral agreement was concluded.

[42] I carefully observed Steynberg when he tendered evidence at the hearing of this matter. By all accounts he is a prudent business person. What I am finding strange though is his omission to confirm, in writing, either to Plaintiff herself or to the attorneys attending to the winding up of the deceased's estate, an agreement in terms of which Plaintiff waives the claim based on the acknowledgement of debt, as proof that the Defendant has been relieved of this claim if not also to ensure that this item of a claim be removed from the Liquidation and Distribution Account in the deceased estate.

[43] Because of the conclusion I have reached that the Defendant has failed to discharge the *onus* resting on it to prove the conclusion of the contract, there is no basis to draw for an adverse inference arising from failure by Plaintiff to testify or an

inference on inaction on the part of Plaintiff, from the date of the alleged conclusion of the oral agreement until 28 January 2002 when Plaintiff took active steps to recover the amount due in terms of the acknowledgement of debt.

[44] Further in the light of the conclusion I have reached, it is not necessary for me to venture into what hitherto used to be the troubled waters of a controversy, but for *Brisley v Drotsky 2002(4)* SA1 (SCA), as to what the effect the alleged oral agreement would have been in the light of the non-variation and non-waiver clause referred to in paragraphs [18] and [19] of this judgment.

[45] It follows therefore that the issues reserved for separate adjudication in terms of Rule 33 should be and are decided in favour of Plaintiff.

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N J YEKISO, J