Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.s 21392/2018
and 1152/2019

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 17-19 October 2022
Date of judgment: 28 November 2022

In the matters between:

STUART GUY STOKES Applicant / Plaintiff

and

CANCAPE (PTY) LTD Respondent / Defendant

JUDGMENT

BINNS-WARD J:

[1] This judgment is concerned primarily with the determination of an action in case no. 1152/2019 instituted by the plaintiff, Mr Stuart Stokes, against his erstwhile employer, Cancape (Pty) Ltd, for payment of the sum of R753 689,67, allegedly due to him following the termination of his employment with the company upon his resignation on 27 June 2018. A further matter for determination is the incidence of liability for costs in case no. 21392/2018,

in which Mr Stokes applied for the winding-up of Cancape (Pty) Ltd on the grounds of the company's alleged inability to pay its debts, in particular his aforementioned claim of R753 689,67. The winding-up application was abandoned and action proceedings instituted instead when the company paid the sum of R140 259,45, in which it admitted being indebted to Mr Stokes, into its attorneys' trust account. It was then agreed that the costs of the winding-up application should stand over for determination in the action that was thereafter instituted to recover the full amount of Mr Stokes's claim.

[2] The plaintiff's claim is made up of three components; viz. (i) R466 659.00 in respect of the amount that plaintiff alleges is due to him in respect of his entitlement to a 10% share in the defendant's nett profit calculated monthly, but excluding any months in which the company sustained a loss, (ii) R187 030.67 in respect of his share in the value of what has been referred to as the defendant's rental book and (iii) R100 000.00 in respect of an agreed termination bonus. The defendant takes no issue with the computation of the latter two components of the plaintiff's claim and does not dispute his entitlement to payment of those parts of his claim. The dispute is about the plaintiff's profit-share claim.

[3] The defendant alleges that the profit-share arrangement in the plaintiff's contract of employment provided that he would share not only in the profits of the company but also in its losses. It was the defendant's case that, as at the termination of his employment with the company, plaintiff was overdrawn by R146 771.22 on his profit-share account. Its admitted liability to the plaintiff in the forementioned amount of R140 259,45 was computed by setting off what it contends is the plaintiff's indebtedness to it against the amounts owed to him in respect of his share of the rental book and termination bonus.

[4] The financial information supporting the respective cases of the protagonists is not in issue. The issue in contention is the relevant terms of the plaintiff's employment as the

defendant's sales director during the period May 2015 to July 2018; more particularly those concerning his entitlement to share in the nett profit of the company.

[5] As mentioned, the plaintiff alleges that his profit-share entitlement fell to be computed monthly in arrears, and that in months in which the company sustained a loss no entitlement would accrue. In other words, on the plaintiff's version of the contract, his profit-share account could never reflect a negative amount because the agreement did not provide for him to share in any of the company's losses. The defendant, on the other hand, pleaded that the agreement provided that the plaintiff's share in the company's nett profits '*would be due monthly and would be reconciled annually, by considering and calculating any accumulated monthly losses and profit-share payments to the Plaintiff, which would be brought forward to each financial year*'. The defendant's case, therefore, was that the plaintiff's profit-share entitlement was administered on a running account basis, and that the plaintiff was entitled to draw on the account at any time that it was in the black.

[6] The plaintiff was initially employed by the defendant in 2011 as a sales manager: new business. His letter of appointment recorded that he would be remunerated by way of a monthly basic salary of just under R22 000.00 per month plus certain benefits such as medical aid and provident/group life cover. He was also to be paid commissions on sales concluded by himself and on those concluded by members of the new business team that he would be heading. Those commissions were calculated at 18% of gross profit on each transaction after a certain base of sales had been exceeded.

[7] It was undisputed that the plaintiff performed well in the company, and within a short time he was promoted to branch manager and thereafter put in charge of a group of branches in the greater Cape Town area. His commission remuneration was amended when he became a branch manager, becoming 10% of the gross profit of the branches under his management.

[8] The plaintiff's stellar performance was noted by the chief executive officer of the group, Mr Warren McClintock, who invited him to take up an appointment as sales director when that position fell vacant in 2015. The terms of the appointment were settled orally between the plaintiff and Mr McClintock. There were no witnesses to their discussions. It follows that, to the extent that the parties differ on the terms of the contract they concluded, it is one man's word against the other's. The court is, of course, entitled in any determination of the mutually conflicting versions to have regard to the manner in which the contract was implemented, for if the parties acted consistently with a particular version their conduct would, absent any cogent explanation to the contrary, suggest, as a matter of probability, that that version reflected what they had agreed.

[9] The approach adopted in cases such as this, where the court is confronted with irreconcilable versions was authoritatively summarised in *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others* [2002] ZASCA 98 (6 September 2002), 2003 (1) SA 11 (SCA) in para 5:

> 'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised 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 the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's 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 fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre 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 he 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 an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the 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 a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[10] In the current case, I was unable to make any distinction between the quality of the credibility and reliability of the principal witnesses, being the plaintiff and Mr McClintock, respectively. Both made satisfactory impressions in the witness box. I was left in no doubt about the genuineness of the plaintiff's understanding of the terms, concerning profit-share, of his engagement as sales director. But Mr McClintock's adamant assertion of a different understanding appeared no less genuine. The onus was on the plaintiff to prove on a balance of probability that the contract he made with Mr McClintock was in the terms upon which the relevant part of his claim is founded.

[11] The plaintiff testified that when his appointment as sales director was under discussion with Mr McClintock, he was concerned that any commission-based remuneration related to the company's profits should not penalise him for the company's losses. His evidence was that in the 2015 financial year the company had suffered a nett loss of R2,2 million. He added – although this cannot have been a factor in negotiating his appointment in May 2015 – that the company had suffered a further loss of R404 000 in the 2016 year.

[12] The computation of the forementioned losses testified to by the plaintiff was not interrogated in the evidence, but I am unable to reconcile them with the profit and loss results that it was common ground were applicable for the purpose of computing the plaintiff's profit-share claim. The evidence did establish that the defendant's financial yearend was at the end of February each year. The figures that were common ground reflected that in the 10-months between May 2015 and February 2016 (ie in the defendant's 2015 financial year) the company

made a nett profit before tax of R6 732 196 and in the year ended February 2017 (the 2016 financial year) it made a net profit of R3 145 548.

[13] When I put it to the group financial director, Mr James Durand, that the plaintiff had testified that it would not have made sense for him to accept a profit-share arrangement that included a risk of losses and that he would have been better off remaining on his previously obtaining commission arrangement, Durand replied as follows:

> '*My comment on that would be that the opportunity, his earning potential was much, much bigger because he had the ability to earn on the entire company and not just his team, and with that opportunity comes you know, some consequence if the company does not perform well. The company was performing very well, and I believe up until 2016 he was earning more than he earned as a sales manager. Then the performance of the company took a negative turn and then that is when things started to get a little bit difficult, because he had taken a big advance and the company was not making sufficient profits to offset that advance. So, that would be my opinion on your question, M'Lord.*'

When given the opportunity to put any questions arising from the questions that I directed to Mr Durand, the plaintiff's counsel did not challenge or in any way take issue with the testimony that I have just quoted from the transcript. In the result, and having regard to the empirical information that was available to me concerning the company's performance in the 2015 and 2016 years, it is difficult to give much credence to the plaintiff's claim that it would have been demonstrably disadvantageous in the conditions prevailing when he took up the appointment for him to have concluded a profit-share agreement on the terms alleged by the defendant.

[14] The plaintiff's evidence as to precisely what was agreed in respect of the profit-share arrangement was notably vague, however. That much is illustrated in the following passages of his evidence that followed on the question from his counsel: *'... at the time of your employment, of the change of your terms, what in fact then were the terms of that you agreed to with the defendant?*':

'*Mr McClintock and I had multiple discussions, and how we needed to improve it, improve the business, and to try and get the business out of a negative. He did assure me that I would not be penalised on nett losses, but I am to drive the business into becoming more profitable and keep growing the business aggressively. We needed to take a much more aggressive stance. He had then said to me that he would sit with me and go through my commission with me on a regular basis to ensure that we - that I am earning decent commission, and my understanding was that we would sit down and go through this. That never - we never sat down and signed any commission manuals. My understanding was always that it would be 10% of the commission on months that we are profitable and ... [intervenes]*

....

So in - from month to month, all our sales managers and sales reps, everybody got a commission sheet which they would then go through their figures for the month, they would verify it with either the accountant or whatever financial representative, and then you would sign off your commission, saying 'I agree that I earned X of GP for the month'. That was meant to be the relationship with Mr McClintock as the CEO. That was what we had discussed initially. But that - other than discussing monthly sales numbers, we never discussed monthly ... the commission reports, nor did I ever sign to a ... sign nor agree to a monthly commission with the cumulative losses included.

MR HACK: Can I ask you just to go back and just to be absolutely sure that you clarify what you're saying earlier. I understood you correctly to say that there was reference to accumulated losses, that you and Mr McClintock had a specific discussion in that regard. Please clarify what you mean.

MR STOKES: Mr McClintock and I, in the discussions before I'd been promoted to sales director, had various discussions where he assured me that I wouldn't be penalised on nett losses that the business should - should the business not achieve, also due to the fact that the business, in terms of what I was taking over from running the entire Cancape business, it's not just nett losses on the sales businesses. It's a business that has many different arms into it. So its logistics, administration, finance, and the sales company, and a lot of those expenses I didn't have any control over.'

[15] The plaintiff sought to support his evidence concerning the terms of his remuneration by pointing out that during his tenure in the position there had never been any deduction from

his pay in respect of losses suffered by the company. The evidence was not particularly helpful. The plaintiff received monthly salary advices, but these did not reflect his profit-share entitlements on an accumulating basis. They reflected only the drawings he made on his profit-share account. The plaintiff testified that he did not regularly draw his profit-share, but allowed it to accumulate until he decided to make a draw. The payment history supports the plaintiff's evidence that profit-share payments were made upon request, and not monthly. The plaintiff's profit-share drawings were initially – until November 2015 – reflected on his salary slips as 'commission', but the notation was corrected by way of notations reflected on the salary slip for November. The plaintiff's evidence that the defendant had throughout his employment conflated or confused profit-share with commission on his salary slips was overstated. The plaintiff did continue to earn commission on an ad hoc basis, in addition to his profit-share entitlement, during his tenure as sales director. (The only confusing notation identified after November 2015 occurred when the plaintiff was paid an advance of R230 000 against a profit-share draw of R640 000 in October 2016 and the advance was reflected on his salary advice as '*Commission Paid*').

[16] The plaintiff testified that in August 2016 he received an email from the company's then financial manager, Mr Shahier Adams, enclosing a statement of his profit-share account for the period May 2015 (the month in which he was appointed as sales director) to July 2016. The statement reflected that the plaintiff had during that period drawn on his profit-share account in June, July, August, November, December 2015 and in February 2016. The total amount drawn on the account during that period was R537 550. The statement also reflected that the accumulated total credited to the plaintiff's profit-share account during that period was R673 220. The statement did not, however, reflect any profit or loss figures for the months after February 2016. It reflected that the company had made a profit in every month from May 2015 to February 2016, except for December 2015 when a loss of R646 290 was made. An

examination of the information provided in the statement attached to Mr Adams's email showed that whereas the plaintiff's profit-share account had been credited with amounts equalling 10% of the reported monthly profits, it had also been debited with an amount equalling 10% of the loss reported for December 2015.

[17] The plaintiff testified that he contacted Mr Adams to point out that the debit to his profit-share account in respect of the loss suffered by the company in December 2015 was not in accordance with his employment agreement. He said that Adams subsequently reported to him that he (Adams) had raised the matter with Mr McClintock, who had confirmed the plaintiff's understanding concerning the computation of his profit-share entitlement.

[18] There was no written record of the exchanges between Mr Adams and the plaintiff to which the plaintiff testified, and notwithstanding the availability of Mr Adams as a witness at the time of the trial, the plaintiff elected not to call him. It needs mention that Mr Adams was no longer an employee of the defendant company at the time of trial.

[19] Quite apart from the failure by the plaintiff to call Mr Adams to corroborate his evidence concerning the forementioned events in August 2016, the documentary evidence is inconsistent with any understanding by Adams that monthly losses were to be excluded in the computation of his accumulated profit-share. That much is apparent from an email from Adams to the forementioned Mr James Durand, dated 7 June 2017. It appears that Durand had requested Adams to inform him of the state of the plaintiff's profit-share account. Adams's email read as follows:

> '*Hi James*
> *As requested please see the attached workings for Stuart's profit-share.*
> *Let me know if you require any further information.*
> *Thanks.*'

The 'attached workings', which purported to reflect the plaintiff's profit-share account in respect of the period May 2015 (the date of his appointment as sales director) to April 2017, showed that as at the end of April 2017 the profit-share account was in debit in the amount of R497 067. The debit balance was the product of the account having been debited with 10% of the monthly losses reflected as having been sustained in the months December 2015, April, May and December 2016 and February and April 2017.

[20] That evidence begged the question – which went unanswered in the plaintiff's case – why Mr Adams should have persisted in computing the plaintiff's profit-share in that manner if, as claimed by the plaintiff, a protest by the plaintiff in August 2016 had caused him (Adams), after discussion with the chief executive officer, to appreciate that it was wrong. It is apparent from the information that Adams provided to Mr Durand that he had not made any changes to the method of computing the running record that he provided to the plaintiff in August 2016. Absent an answer to the begged question, the plaintiff's evidence concerning the content of his exchanges with Adams in August 2016 is not supported by the objective evidence. And it was contradicted by Mr McClintock's evidence denying that he had ever informed Adams that the plaintiff's profit-share calculation was exempt from the effect of any losses. The evidence adduced by the defendant that the profit-share of no other director of the defendant company, nor of that of any other company in the group of companies of which it is part, was calculated on the basis contended for by the plaintiff was not contradicted.

[21] It has also to be noted that in an email sent to Mr Durand on 6 August 2018, at a time when it was already apparent that the computation of his profit-share had become contentious, the plaintiff made no mention of the incidents arising from his alleged exchanges with Mr Adams in August 2016. Instead, he addressed Durand as if there had never previously been an issue with the computation of his entitlement. (When reading the document, it needs to be borne in mind that the plaintiff consistently misdescribed his profit-share as 'commission', so

the term 'commission' falls to be understood to be synonymous with 'profit-share'.) In relevant parts, the email read as follows:

> '*Hi James*
> *The agreed upon commission was never calculated on a* (sic) *accumulated profit-share, this was brought to my attention by Matthew* [Mill][1] *only after I had resigned, ...*
> ...
> *Why has the amendment to my commission earnings never been constantly* [?consistently] *calculated and brought to my attention and recons only been done after I resigned?*
> ...
> *Stuart Stokes*'

I would have expected the plaintiff to refer to the incidents that allegedly happened in August 2016, and to point out that the incorrect basis for computing his profit-share had been previously identified and that it had been reported to him by Adams that the error had been rectified after clarification had been provided by Mr McClintock. His failure to have done so is conspicuous, in my view.

[22] Mr Durand's response, sent the following day, noted that, according to his records, the plaintiff's profit-share had always been calculated taking accumulated losses into account. The documentary evidence supports Durand's assertion.

[23] The adverse effect on the plaintiff's case of his failure to call Mr Adams was not assisted by the fact that he had previously indicated in correspondence between his then attorneys and the defendant's attorneys that he would be able to rely not only on the evidence of Adams to support his version of the agreement, but also that of a certain Mr Gregg Coull. Coull was described in the correspondence as 'the company's financial director', but it appears

[1] Matthew Mill was Shahier Adams' successor as financial manager of the defendant company.

he may have actually been Adams's predecessor as financial manager.[2] Coull was also not called, and despite attention having been drawn to the relevant correspondence in the course of the plaintiff's cross-examination, no reason was offered for the failure to do so.

[24] It must be recorded that, in an opposed application by the plaintiff for the winding up of the defendant for failing to pay his claim, Adams made an affidavit confirming an averment by Mr McClintock in the company's answering affidavit that '*Adams denies that he ever questioned the calculation of the* [plaintiff's] *profit-share*.' Adams also confirmed McClintock's averment that it was untrue that he (Adams) had been told by McClintock to recalculate the plaintiff's profit-share so as not to take the company's accumulated losses into account. Coull also made an affidavit in the liquidation application confirming McClintock's statement that Coull would deny that he could confirm that he was aware that the plaintiff's profit-share fell to be calculated without taking account of the losses suffered by the company.

[25] If I correctly understood the argument advanced by Mr *Hack* for the plaintiff, he contended that the onus was on the defendant because it was the sole repository of relevant information in the case. The argument appeared to be advanced in support of the notion that if anyone should be penalised for failing to call Mr Adams, it should be the defendant, not the plaintiff. He called in aid of his argument the minority judgment of Innes J in *Union Government (Minister of Railways) v Sykes* 1913 AD 156 and also that in *Titus v Shield Insurance Co Ltd* 1980 (3) 119 (A) at 133.

[26] I do not think that the *Sykes* case is in any way in point. It concerned a claim by a property owner for damages sustained as result of a fire caused by a spark from a steam engine passing by on an adjacent railway line. The steam engine concerned was not identified on the

[2] Mr McClintock described him in the affidavit opposing the winding-up application as an employee and director of another company of the group of which the defendant is part. CPIC records included in the papers in the winding-up application indicate that Coull was a quondam director of the defendant company.

scene because it went on its way, leaving the incipient blaze behind it. It was accepted that, as the operation of steam engines was authorised by statute, the mere fact that a spark from such a machine set the nearby grass alight did not, of itself, establish negligence on the part of the railway company because the emission of sparks was an inherent feature of operating a steam engine. The railways were not liable for a fire caused by such a spark provided they took reasonable precautions to limit or avoid the inherent potential danger to third parties' property. If, however, they failed to take such precautions adequately or at all, they would be negligent and delictual liability would follow. A reasonable precaution in the circumstances would be the fitting of an effective spark arrester. The issue in the case was the incidence of what was referred to as 'the onus'.

[27] The onus of proving negligence on the part of the defendant in a delictual claim under the *Lex Aquilia* burdens the plaintiff. That is trite, and a matter of law. The onus, so understood, may conveniently be referred to as the 'true onus'. When the incidence of the true onus is fixed by law, it does not shift during a trial.[3] What may shift, depending on the peculiar circumstances, is the evidential burden. The evidential burden is, however, also often referred to as 'the onus'. When it is, it should, strictly speaking, be distinguished from the concept of true onus and described as the evidential onus. That would avoid confusion.

[28] Mr Justice Innes' judgment in *Sykes*, when it treated of 'the onus', was concerned with the evidential burden in that case. The learned judge of appeal unequivocally confirmed that it was for the plaintiff in that case to make out a prima facie case of negligence against the railways, failing which he could not have succeeded, for there would have been no case for the railway company to answer. He found that the evidence adduced by the plaintiff established that the sparks that caused the fire had emitted from the steam engine in an uncommonly high

[3] See e.g. *Pillay v Krishna and Another* 1946 AD 946 at 951-2 and *Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others* 1994 (1) SA 708 (A) at 761B-762H.

volume and the fact that they had carried for an unusually far distance in the wind suggested that the particles of burning material of which they consisted must have been of an unusually large dimension. The expert evidence adduced by the plaintiff suggested that these features pointed to a defect in the engine's spark arrester. The learned judge proceeded from that finding to say (at p. 175) that the forementioned proven facts '*do not by any means prove that there was such a defect, but they raise a sufficient prima facie case to call for rebutting evidence in a matter peculiarly and specially within the knowledge of the defendant. When a dispute of this nature arises, it is impossible for a plaintiff to identify the particular engine or to find out what appliances were used for the prevention of sparks, and whether they were in working order at the time. The evidence, on those points is available to the defendant alone. I therefore think that the onus which originally rested on the plaintiff with regard to the existence of negligence in this particular respect was at a subsequent stage of the inquiry transferred to the defendant and fell to be discharged by him.'*

[29] In the current matter, the onus is on the plaintiff to establish the terms of the contract on which he relies for his profit-share claim. He has adduced evidence to the effect that the terms excluded any liability to share in the losses sustained by the company. The defendant, on the other hand, has adduced evidence that the agreement did not contain a term to that effect. The agreement was concluded orally in negotiations conducted between the plaintiff and Mr McClintock with no-one else present. There are no identified points that are peculiarly or specially within the knowledge of either side. It is the content of the contract, not the underpinnings of the financial results that inform the computation of the plaintiff's entitlement, that is in contestation. We are not concerned in the current matter with a shifting onus in the sense discussed in *Sykes*. We are concerned with making a determination in the face of

mutually conflicting versions of what was orally agreed upon. This case therefore engages the matter of principle identified in *SFW v Martell & Cie* supra,[4] not that in *Sykes*.

[30] The case of *Titus*, insofar as relevant to Mr *Hack*'s argument, concerned the circumstances in which an inference might be drawn against a party for failing to call an available witness. The authority is legion that whether an adverse inference is justified depends on the circumstances of the given case; see the discussion of a broad range of relevant authority by Didcott J in *Magagula v Senator Insurance Co Ltd* 1980 (1) SA 717 (N), to which Miller JA made an endorsing reference in *Titus*. In the current case, it was the plaintiff who contended that Adams would be able to give evidence that supported his case. It was the plaintiff who at an early stage of the dispute indicated that he would call Adams to testify in his support. And it was evident from the plaintiff's evidence during the trial that Adams was available and might be called if his counsel decided to do so. Adams was no longer in the defendant's employ, and there was no reason to think he would feel under pressure to favour either party's case. The incidence of the onus, and the weight of the objective evidence made it understandable that the defendant would not feel it necessary to call Adams. If an adverse inference fell to be drawn for not calling him, it seems to me that it fell to be drawn against the plaintiff, not the plaintiff. As discussed, however, the difficulty that the plaintiff would have if he had called Adams was that Adams had previously given an affidavit denying the plaintiff's version of what had transpired in August 2016 and the documentary records indicated that Adams had not amended his method of computing the plaintiff's profit-share entitlement after August 2016. It is therefore clear that if he were called to support the plaintiff's case, Adams would have some explaining to do.

[4] Paragraph 9 above.

[31] Lastly, on the matter of the plaintiff's profit-share claim, it is necessary to mention an argument advanced by Mr *Hack* in the written heads of argument that counsel forwarded after the conclusion of the hearing.[5] He submitted that an analysis of the plaintiff's profit-share draws demonstrated that on three occasions the plaintiff had been permitted to draw more than he would have been entitled to were he liable to share in the company's losses, as contended by the defendant. As I understand the argument, it is to the effect that because the plaintiff was allowed to draw R19 033,95 more than his running balance entitlement in December 2015 and R162 392,26 and R144 290 more in October 2016 and November 2016, respectively, this demonstrated that the version of the agreement contended for by the defendant could not be correct.

[32] There are some difficulties with the argument. Firstly, the analysis and its supposed implications were not raised in the course of the plaintiff's evidence, nor were they put to either of the defendant's witnesses in cross-examination. Secondly, the fact that the plaintiff was on occasion permitted to draw more than his profit-share entitlement was acknowledged by Mr Durand. He said that the defendant was generally accommodating of qualifying employees' requests in this regard when advance payments on their profit-share accounts were asked for. Mr Durand said that he could remember two occasions when advances were made to the plaintiff. It is significant that both of the large overdraws identified in Mr *Hack*'s analysis occurred at the time when it was common ground that the plaintiff had asked for a substantial advance because he was buying a new house. If Mr *Hack* intended to make anything of the figures used in his analysis, he should have explored them with Mr Durand in the witness box.

[5] Counsel on both sides had indicated at the hearing that they had, for one reason or another, been unable to complete preparing their respective written submissions overnight between the completion of the evidence on the second day of the trial and the continuation of the hearing on the following day. I invited them to email those submissions to me when they were ready, which was duly done.

[33] The analysis undertaken by Mr *Hack* in his written submissions in any event ignores the features therein that the support the defendant's version. Thus, it confirms that the plaintiff did not make any profit-share withdrawals between November 2016 and his resignation in June 2018. The plaintiff's profit-share account, computed in accordance with the defendant's version of the contract, was consistently in debit throughout that period and, on the defendant's version, he would therefore not have been entitled to any payment notwithstanding the fact that the company in several months made profits. If, however, the effect of the running losses were ignored, as the plaintiff's version would have it, he would, on the figures tabulated by Mr *Hack*, have been entitled during that period to draw just short of R286 000 from his profit-share account. The fact that the plaintiff made no drawings at all during the extended period in question, if anything, therefore lends support to the defendant's version.

[34] For all the reasons discussed above, I have concluded that the plaintiff has not succeeded in discharging the onus of proving his profit-share claim. If that component of his claim had stood alone, I would have made an order absolving the defendant from the instance.

[35] There remains, however, the question of the plaintiff's claims for his share of the defendant's rental book and payment of the agreed termination bonus. Those claims are not disputed, but they have not yet been paid. The defendant offered to pay those claims before the action was instituted, but its offer was made on the condition that the plaintiff had to accept the payment in full and final settlement of his disputed claim for payment of the amount of R753 689,67. In other words, if the plaintiff had accepted the offered payment, he would thereby be taken to have compromised his claim for payment in any higher sum. Furthermore, the amount that the defendant offered was computed by setting-off the amount of R146 771, in which the defendant contends the plaintiff is indebted to it in respect of the debit balance on his profit-share account. It was not entitled to do so, however, because set-off applies only in

respect of reciprocal debts in admitted or established amounts. It cannot apply when either of the debts is wholly in dispute, as was the case in the current matter.

[36] If the defendant wished to limit its liability in the litigation effectively, the defendant would have been well advised to pay unconditionally the amount it admitted owing to the plaintiff and to have counterclaimed for the amount it alleges he owes the company on his profit-share account. It did neither.

[37] In the result, in the action, judgment will be granted in favour of the plaintiff in the sum of R287 030.67, together with interest thereon at the prescribed rate *a tempore morae,* viz. from date of demand, being 27 September 2018. As the claims in respect of which the plaintiff succeeded fell comfortably within the jurisdiction of the regional court and involved no difficult or novel questions of law, it is appropriate that the costs, including the fees of counsel, be declared taxable on the regional court tariff. Furthermore, as the trial was concerned exclusively with the profit-share claim, in respect of which the plaintiff has been unsuccessful, I consider that it would be just and equitable to award him only 50% of his costs in the action.

[38] Turning now to determine liability for costs in the winding-up application.

[39] It is trite that it is an abuse of process to use liquidation proceedings in a debt collecting context when the creditor should appreciate that its claim is the subject of bona fide dispute. In the current matter, it was evident that only the profit-share component of the applicant's claim was in dispute. Notwithstanding its uncontested liability in the amount of at least R140 259,45, in respect of the other legs of the applicant's claim, the company failed to make payment; although, as described earlier, it did make a tender of payment in that amount in full and final settlement of the entire amount of the applicant's claim. A tender does not equate to payment. The failure to make unconditional payment of its admitted liability exposed the company to the allegation that it was unable to pay its debts.

[40] When it instituted the application, the applicant relied on the deeming provision in s 345 of the Companies Act 61 of 1973 to support his allegation that the company was, at least, commercially insolvent. That provision reads, in relevant part: '*A company ... shall be deemed to be unable to pay its debts if - (a) a creditor ..., to whom the company is indebted in a sum not less than one hundred rand then due – (i) has served on the company, by leaving same at its registered office, a demand requiring the company to pay the sum so due; ... and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor*'.

[41] In the current matter the demand that the applicant purported to serve on the company was delivered by hand to the company's principal place of business, which, notwithstanding the provisions of s23(3) of the Companies Act 71 of 2008,[6] was not its registered office, approximately six weeks before the institution of the winding-up application. It is not in dispute that the demand was received by the company.

[42] Mr *Williams*, who appeared for the company, submitted, however, that the demand was legally void for non-compliance with the letter of s 345(1)(a) of the 1973 Act. He supported his contention with reference to *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W), which was concerned with equivalent provisions in the 1926 Companies Act. The facts in that case were wholly distinguishable in my judgment.

[43] In *Phase Electric* the demand in issue was not served at the respondent's company's registered address, which was 87 Beit St, Doornfontein, but at 89 Beit St. The registrar of companies had, however, issued a certificate to the applicant wrongly confirming the incorrect address as the respondent company's registered address. On the strength of the certificate, the

[6] Section 23(3) requires a company to register the address of its office, or where it has more than one office, its 'principal office', as its registered address. Contextually, it is evident that a company's 'office' or 'principal office' is the place from which it is administered and where its records are kept. That ordinarily coincides with its principal place of business

court had been satisfied that service had been duly effected at the registered address and, in the absence of any opposition by the company, granted a provisional winding-up order. The company had not received the demand, and came to learn of it only after the order for its provisional winding-up had been granted. The applicant in that matter advisedly conceded that the provisional order it obtained had to be rescinded. In the circumstances, the only question before the court when the matter was argued was the costs of the ill-founded application. The court (Coetzee J) confirmed that in the face of the non-compliance with s 112(a) of the 1926 Act, the respondent company had been entitled to have the provisional order rescinded, for there had not been a valid jurisdictional basis for the court to have granted it. It awarded costs against the applicant for reasons peculiar to features of the case that have no bearing on the current matter.

[44] In my view, where, notwithstanding non-compliance with one or other prescript in the provision, it is evident that the object of the formalities prescribed by s 345(1)(a) has been achieved and that the demand has come to the respondent company's notice, an applicant may rely on the deeming provision to seek the company's winding-up in terms of s 344(f) of the 1973 Companies Act. This approach finds support in the dicta of Van Winsen AJA in *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646D-E that '[t]*he enquiry I suggest, is not so much whether there has been 'exact' 'adequate' or 'substantial' compliance with this* [statutory] *injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and the resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be*

achieved by the injunction and the question whether this object has been achieved are of importance.'

[45] Those words were uttered in the time when the courts focussed in questions of this sort on determining whether the character of a statutory prescript was 'peremptory' or 'discretionary'. Such formalism is out of fashion now; cf. *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013); 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC)) at para 30. Notwithstanding the context of the now outmoded approach to statutory interpretation in which they were made, Van Winsen AJA's dicta in *Maharaj* anticipated the modern approach exemplified in the following statement by Olivier JA in *Weenen Transitional Local Council v Van Dyk* [2002] ZASCA 6 (14 March 2002); 2002 4 SA 653; [2002] 2 All SA 482 at para 13 (which, together with the above quoted passage from *Maharaj*, was endorsed by the Constitutional Court in *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1 (24 February 2006); 2006 (3) SA 305; 2006 (5) BCLR 579 at para 25):

> '*It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the Ordinance is to follow a commonsense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 434 A - B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment*

is; they cannot tell us how to interpret. These debates have a posteriori, not a priori significance. The approach described above, identified as '… a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in Ex parte Mothuloe (Law Society Transvaal, Intervening) 1996 (4) SA 1131 (T) at 1138 D - E, seems to be the correct one and does away with debates of secondary importance only.'

[46] The respondent company showed its ability to pay the uncontested debt by depositing the amount in its attorneys' trust account only at the time it delivered its answering papers in the winding-up application. In my view, and because of the deeming effect of the respondent's failure to make payment after the statutory demand, the applicant should be entitled to its costs in the winding-up application up to and including the receipt of the respondent's answering papers. When the applicant was apprised of the deposit into the attorneys' trust account it should have withdrawn the application, save as to costs. The delivery of lengthy replying papers - after the institution of the action - was misdirected in the circumstances, and the applicant should be liable for the wasted costs occasioned thereby.

[47] Orders will issue in the following terms:

A. In case no. 1152/2019 (the action):

Judgment is granted in favour of the plaintiff against the defendant for –

(i) payment of the sum of R287 030.67;

(ii) interest thereon *a tempore morae* from 27 September 2018 to date of payment, at the rate prescribed in terms of s 1(1) and 1(2) of the Prescribed Rate of Interest Act 55 of 1975;

(iii) payment of fifty percent of the plaintiff's costs of suit on the regional court tariff, including the fees of counsel.

B. <u>In case no. 21392/2018 (the winding-up application):</u>

(i) The respondent is ordered to pay the applicant's costs of suit incurred up to and including the delivery of the respondent's answering affidavits.

(ii) The applicant is directed to pay the costs incurred by the respondent after the delivery by the respondent of its answering affidavits.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Plaintiff's counsel:	**Bryan Hack**
Plaintiff's attorneys:	**Bill Tolken Hendrikse Inc.** **Bellville**
	DKVG Attorneys **Cape Town**
Defendant's counsel:	**D.L. Williams**
Defendant's attorneys:	**Quinn Attorneys Inc.** **Roodepoort**
	Schoeman Law Inc. **Cape Town**