

SOUTH AFRICA / JUDGMENT

Dereck v Gardel [2008] ZAGPHC 443; 17434/05, 17436/05 (19 September 2008)

[2008] ZAGPHC 443**COURT**

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

17434/05 and 17436/05

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Source record**NOT****REPORTABLE IN****THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND****LOCAL DIVISION) JOHANNESBURG
DATE:**

19/09/2008 CASE

NO: 17434/05 and 17436/05 In

the matter between JOUBERT

DERECK.....Plaintiff and GAR

DEL'S

DINNER DANCE MARTINI BAR AND BURDETT,

DONALD MARSHALL

JOHN.....Defendant JUDGMENT WILLIS

J: This trial has to do with two separate cases. The first, case number 17434/05 is a claim by Dereck Joubert against Gardel's Dinner

Dance Martini Bar (Pty) Limited. The second, case number 17436/05 is a claim by the same plaintiff against Donald Marshall John Burdett.

These two cases have been consolidated for purposes of trial. In other words, what has occurred is that although they are separate

cases the evidence relating to them has been dealt with as they were one and accordingly one judgment will be delivered relating to both

cases. There has been no consolidation of pleadings in regard to these two separate cases. For

the sake of convenience I shall refer to Gardel's Dinner Dance Martini Bar (Pty) Limited as "the company". I shall refer

to Dereck Joubert as "the plaintiff" and Donald Marshall John Burdett as the defendant. The

plaintiff, at the commencement of the trial made application to amend the claim downwards in each case. Originally the claim in each case was for R1 412 173, together with a complicated formula relating to interest. The amended claim in each case is now for:-1.
Payment of the sum of R1 246 202;2.
Interest on the sum of R1 242 202 at the rate of 8 per cent per annum from the date of service of summons to date of payment;3.
Costs of suit, further and/or alternative relief.I wish to emphasise that the claim in both cases is for exactly the same amount and the explanation for this will emerge later during the course of the judgment.The defendant did not object to the amendment. Indeed he could not do so precisely for the reason that the amount of the claim was reduced, and accordingly there is no prejudice to him whatsoever. It occurs to me that we may not formally have granted the amendment during the course of these trial proceedings, and to the extent that it is necessary for me to do so I now grant the amendment, such that the claim in revised form in each case is for R1 246 202, together with interest and costs.It should be pointed out that the rate of interest at 6 percent per annum is a concessionary rate of interest made by the plaintiff to both the company and the defendant. It hardly needs to be mentioned that it is less than the currently prevailing mora rate of interest of 15.5 percent per annum, and accordingly there is no issue at all relating to the question of interestThe plaintiff is a world renowned producer of wildlife documentaries as well as the author of several wildlife books At the commencement of the proceedings I indicated that I was aware of this fact and was an admirer of the plaintiff's work. Wisely the defendant did not make any application for my recusal. I should record that I bear in mind that it is not unusual for talented creative people to be unscrupulous, and furthermore celebrities who have made their fortune in fields of activity other than in business are not infrequently notoriously incompetent businessmen and women. Accordingly, despite the plaintiff's renown he enjoyed no strategic advantage in these trial proceedings by reason thereof.It would appear that the plaintiff's sense of adventure and love of living "on the wild side" is not confined to the remoter

parts of Botswana. The plaintiff has an interest in tango dancing, in addition to his interests in wildlife. This interest is one that was shared by the defendant and it explains how they came together in a business relationship. They both enjoyed tango dancing. Mr Hutton, who appears for the plaintiff, coyly and delicately emphasised that they did not enjoy tango dancing together, although together they enjoyed tango dancing. In these politically correct times I think I should record that it is quite clear from the evidence that the relationship between the plaintiff and the defendant was, in more ways than one, an arms length relationship, and was commercial in nature. The version of the plaintiff is that he and the defendant orally agreed to try to establish successfully a restaurant and bar at which there would be tango dancing. Initially the plaintiff proposed to the defendant that he would lend money to the company to assist in this process, and that once the loan had been repaid by the company the profits would be divided 50/50 between them. It later emerged that the defendant was unable financially to contribute money in any serious measure for the start-up of this proposed venture. Accordingly, the plaintiff and the defendant orally agreed that the plaintiff would inject funds into the company on a basis that 50 percent of the funds would be a loan to the company and 50 percent of the funds would be a loan to defendant personally. This explains why in the two separate actions - the claims are identical as against the company and as against the defendant. This agreement is confirmed in a document which is headed "draft agreement regarding the arrangement for Gardel's". The plaintiff's version is that this was prepared at about the time or very soon after the oral agreement mentioned beforehand was entered into between the parties. The plaintiff says that he had attempted to secure the signature of the defendant thereon for some time but was unsuccessful until 15 May 2002, and it is common cause that the defendant signed this document, which as I have already indicated, in board outline confirms the evidence of the plaintiff. There has been some debate during the course of the trial as to the status of this document. I may point out that it is headed "draft agreement". At the bottom it is recorded that it constitutes the full and final agreement between the undersigned parties. It should be noted that it refers to an injection by the plaintiff of some 76

250 US Dollars, which is considerably less than the sum of money that had been advanced by the time the defendant signed the document, and considerably less than the amount that was paid over in total by the plaintiff. I do not think there is much advantage in adopting a nitpicking approach to this document. It could just as well be called a so called "heads of agreement" or "a memorandum of understanding". It clearly is a somewhat amateurish document prepared in note form by somebody who is after all a producer of wildlife documentaries and not an attorney or a businessman by profession. Be that as it may, this document does, in broad outline, confirm the evidence of the plaintiff relating to the nature of the agreement between them. At the outset it should be noted that it is difficult to determine quite what the defendant's version was save to note that he denies that there were any such loans, either to the company or to himself. He contends that such payments as may have been made by the plaintiff were made by way of "venture capital". It is common cause that the plaintiff effected payments in terms of the agreement between the parties, of R903 366 and the defendant furthermore cannot dispute that an additional sum of the Rand equivalent of R1 839 038 was effected by the plaintiff in US Dollars. The defendant admits that the amount in the Rand equivalent of R1 839 038 was made. He put the plaintiff to the proof of the fact that it was the plaintiff who effected this payment but he conceded that he could not dispute that the plaintiff had so effected payment. The plaintiff testified that he had done so. His evidence in this regard is credible, and accordingly I must accept for purposes of this trial that the plaintiff paid over the sum of R2 742 404 to the company in terms of the agreement that existed between the parties, even though the terms of that agreement may not be common cause. The plaintiff furthermore admits that he received R250 000, which was repaid by the defendant in terms of the agreement. The arithmetic of the plaintiff's claim is thus as follows: -Total payments received by the company R2 742 404 Less repayment of R250 000 Total payments less the amount received R2 492 404 This is a divided 50 percent as between the company and the i.e defendant R1

246 202 in respect of each claim in the two respective actions. This explains, accordingly, the quantum that appears in the respective claims in the cases 17434/05 and 17436/05. I should at this stage mention that the fact that the arrangement between the plaintiff and the company and the defendant was one of loan also appears from a document which is headed "loan agreement" drawn up by the defendant's attorneys between "the Wildlife Trust" on the one hand and the company and the defendant on the other. I shall deal later with the significance (such as it may be) to the fact that the document refers to "the Wildlife Trust" as the creditor. I earlier recorded that it was difficult to determine what precisely the defendant's version was other than that he denied that there was a loan made either to himself or the company. In both cases, the defendant filed an affidavit resisting summary judgment. The defendant testified and under cross-examination he was forced to concede that these affidavits were riddled with untruths, and no further purpose will be served by analysing these various untruths. As Mr Huttor put it to the defendant during cross-examination each of these affidavits was a litany of lies. The defendant, having admitted that these untruths loomed large in his affidavit and also that his plea contained untruths, sought to place the blame for this upon his attorney. In other words the defendant's version is that the attorney who acted for him right up until the commencement of this trial was not merely careless but untruthful and deliberately concocted lies. This attorney was not called to testify. Of course, I accept that there are dishonest attorneys in this world but (he inevitable question arises is why would the defendant's attorney have embarked upon such a feverish frolic of his own when there was no advantage to him (i.e. the attorney himself) by doing so, and when such a feverish frolic of blatant dishonesty would obviously inure to the disadvantage of the defendant during the course of the trial. In the plea and in (he affidavits resisting summary judgment the defendant contended that there was an acknowledgment of debt for an amount of R100 000 between himself and the plaintiff, which was fully paid consequent upon judgment having been obtained in this respect,

and which extinguished all debts that existed between the defendant and the plaintiff. During cross-examination the defendant conceded that this was not so and that the acknowledgement of debt in respect of the R100 000 relates to an entirely separate transaction which involved monies which the plaintiff paid over to the defendant for onward forwarding to his mother-in-law. Interestingly, despite this concession under cross-examination, the defendant today, during the course of argument, persisted with this version that the settlement of the R100 000 appearing in the acknowledgement of debt was a full and final settlement of all the claims that relate to the tango dancing venture. If, as I mentioned earlier the relationship between the parties was a commercial one then obviously the payment of R2 742 404 was not given by way of donation. It is obvious therefore that this payment, in total of R2 742 404 could only have been made either as an injection of share capital or as a loan, or as a combination of both. The difficulty for the defendant is that not only do the documents that have been put before me support the version of the plaintiff that the payment was by way of loan, but there is nothing whatsoever to suggest that the plaintiff injected the funds by way of share capital. The plaintiff was not issued with any share certificate in the company. There were no financial statements or documents, whether audited or otherwise, of the company, which indicate that the plaintiff had share capital in it. and moreover I need to record that the plaintiff was not even a director at any stage in the company. The defendant sought to make much of the fact that in a document which the plaintiff prepared, and which explored certain options that may be available to the plaintiff and the defendant it is recorded as a proposal that the plaintiff and his wife on the one hand, and the defendant and his wife on the other hand "will retain 10% each and hand over all operating to the new owners". This was the high water mark of the defendant's claim that there was evidence to support the contention that the plaintiff was a shareholder. This proposal must be read within the context in which the document was prepared. I read out the so called option 1, but I should record that

a very poor copy is all that is available to me, and certain aspects are illegible:-"Option 1, The buyer purchased 80 percent of the company with the value based on the asset value plus 25 percent of the difference between the asset value and the cost to us (we will discount the sale by (illegible) percent). That value is R1 375 million. The purchase price of the 80 percent will then be R1 1 million. DJ and BJ and DB and SB will retain 10 percent each and hand over all operating to the new owners." The uncontested evidence of the plaintiff was that this option was that the business of the company should effectively be sold to an outsider who would acquire 80 percent thereof. Firstly the fact that the purchase of the 80 percent is recorded as being R1.1 million when it is common cause that over R2.7 million had at that stage already been injected into the company (approximately R2.4 million after the R250 000 which was repaid is taken into account) supports the plaintiff's version that 50 percent of the payments which he effected were by way of direct loans to the defendant. How else would the capital in the company to be acquired be acquired for R1,1 million make sense? It seems to me that if one has regard to the context in which this proposal was recorded that what the plaintiff was trying to convey to the defendant is that after a sale of 80 percent of the shares in the company, there would be 20 percent retained, of which the plaintiff and his wife would receive 10 percent and the defendant and his wife hold the other 10 percent. The plaintiff, when he testified said that what should rather have been mentioned in that document was 'acquire' rather than 'retain'. In context, this gloss that the plaintiff puts on his proposal makes considerable sense. In other words, it was a proposal that he would acquire 10 percent interest in the company if 80 percent of it was sold off to an outside buyer. It certainly in context, and against the full background of the evidence cannot be interpreted as being an acknowledgement that he in fact had 10 percent shareholding. In any event, as) have already indicated there is absolutely nothing by way of evidence that should easily have been available, to indicate that the plaintiff had any shareholding

whatsoever in the company. The defendant also attempted to make much of the fact that there was a document, to which I have already referred, which was drawn up by his attorney, which refers to a loan that existed between the "Wildlife Trust" on the one hand and the company and the defendant on the other. The defendant also sought to make much of the fact that the plaintiff's attorneys, in initial correspondence with the defendant and the defendant's attorneys referred to the fact that they acted for the Wildlife Trust. I should record that it is common cause that the document in question, although signed by the defendant, was not signed either by the plaintiff or indeed any other person purporting to act on behalf of the Wildlife Trust. The plaintiff explained how the reference to the Wildlife Trust arose. He said that at the time he was considering consolidating his worldwide assets in a Trust that was to be registered in Guernsey, to be known as the Wildlife Trust, and that when he was in the throws of negotiation with the defendant's attorney, it seemed to him that it may be a good idea to put his assets consisting of a loan to the company and the defendant into the Wildlife Trust, and accordingly the document was drawn up on this basis originally. For reasons that are irrelevant to these proceedings he decided not to proceed with this plan to consolidate his assets worldwide in this particular Trust in Guernsey. This explanation by the plaintiff is in all the circumstances of the case entirely acceptable to me. Besides, it must be remembered that it is not and never has been defendant's version that he has been sued by the wrong plaintiff and that the debt is in fact owed to the Wildlife Trust, never mind that the debt was at some stage repaid to the Wildlife Trust. Indeed it is common cause that the Wildlife Trust, never mind not having been formed, never received any payment either from the company or the defendant. Accordingly no adverse inference whatsoever may be drawn from the fact that at a particular stage the attorneys acting for the plaintiff referred to themselves as acting for the Wildlife Trust, and indeed one must remember that the document in question was prepared by the defendant's attorney, and would have been handed to the plaintiff's attorney, and accordingly the reason why they originally

held themselves out as acting for the Wildlife Trust is perfectly understandable and certainly does not suggest anything untoward.

Ex facie the document it appears that the debts were owed to that particular Trust (and nothing more), but this has been satisfactorily explained. Insofar as the evaluation of probabilities is concerned I have borne in mind *African Eagle Life Assurance Co Limited v Comer* 1980 (2) SA 234(W) at 237. The reasoning of Coetzee J as he then was, was approved and developed slightly in *National Employers General Insurance v Jagers* 1984 (4) SA 437(ECD) by Eksteen AJP at 440 E -441 A. In this passage by Eksteen AJP was unanimously approved by the Supreme Court of Appeal in *Baring Eiendomme Beperk v Roux* [2001] 1 All SA 399(A) at paragraph [7], See also *Koster Ko-operatiewe Landboumaatskappy Bpk v SA Spoorwee en Hawens* 1974 (4) SA 420(W) at 425 and *National Employers Mutual General Insurance Association v Gany* 1931 (AD) 187 at 199. In *Stclienbosch Famers Winery Group Limited and another v Martel ET and Cie and others* 2003 (1) SA 11(SCA) at paragraph 5 the following is said "On the central issue as to what the parties actually decided there are two irreconcilable versions, so too on a number of peripheral areas of dispute which may have a bearing on the probabilities. 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 on the various factual witnesses, (b) their reliability and (c) the probabilities. As to (a) the court's finding on the credibility of the particular witness will depend on its impression of 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' 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 extrajudicial 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' 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."As
 has been said in the apt quoted case of *AA Onderlingc AssuransieAssosiasie*
*v de Seer*1982 (2) SA 603(A) at 614 H:"Dit
 is na my oordeel nie nodig dat "n eiser wat horn op
 omstandighedsgetuienis in 'n siviele saak beroep moet bewys
 dal die
 afleiding wat hy die hcf vra om te maak die enigste redelike
 afleiding moet wees nie. Hy sal die bewysias wat op horn rus
 kwyd
 indien hy die hof kan oortuig dat die afleiding wat hy voorstaan die
 mees voor-die-hand-liggende en aanvaarbare afleiding
 is van 'n aantal
 moontlike afleidings."This
 passage has been referred to with approval in numerous cases. See for
 example the judgment of Zulman JA in *Cooper* and another
NNO v
*Merchant Trade Finance Limited*2000 (3) SA 1009(SCAJ at paragraph
 [7]; *Minister of Safety and Security v Jo-daan T/A Andre Jordaan*
*Transport*2000 (4) SA 21(SCA) at paragraph [9]. In *Ocean Accident*
*and Guarantee Corporation v Koch*1963 (4) SA 147(A) at 159 C Holmes
 JA said:"As
 to the balancing of probabilities I agree with the remarks of Selke j
 in *Govan v Skidmore*1952 (1) SA 732(N) at 734, namely "in
 finding facts or making inferences in a civil case it seems to me
 that one may, as Wigmore conveys
 in his work on Evidence 3,a ed.
 paragraph 32 by balancing probabilities select a conclusion which
 seems to be the more natural
 or plausible conclusion amongst several
 conceivable ones even though that conclusion is not the only
 reasonably one"".
 I hardly need add that plausible is not
 here used in its bad sense of specious but in the connotation which
 is conveyed by words
 such as acceptable, credible, suitable (Oxford
 Dictionary and Webster's international Dictionary). This dictum has
 been referred
 to with approval in numerous cases, see for example
South British Insurance Co Limited v Unicom Shipping Lines (Pty)
Limited 1976

() SA 708 (A) at 713 E-G. Smit v Arthur 1976 (3) SA 378 at 386 B-D, Cooper and another v NNO v Merchant Trade Finance Limited 2000 (3) SA 1009 (SCA) at paragraph 17], Hulse-Reutter and others v Godde 2001 (4) SA 1336 (SCA) at para (14), Jordaan v Bloemfontein Transitional Local Authority 2004 (3) SA 371 (SCA) at paragraphs [20] - [21], De Maayer v Serehro; Screbro v Road Accident Fund 2005 (5) SA 588 (SCA) at paragraph [18] I hope it is clear that I have had regard to the factors mentioned in the various cases to which I have referred, and in particular the case of Stellenbosch Farmers Winery Group Limited and another v Martel ET Cie and others. I find the plaintiff to be a credible witness. I hope it is clear from my analysis of the evidence that I certainly did not find the defendant to be a remotely credible witness. The documents before me tend overwhelmingly to support the contention of the plaintiff. The probabilities, in context, inherently also favour the plaintiff's version of events. Accordingly, having regard to the facts disputed and undisputed set out above I consider that the most "Voor-die-hand-liggende en aanvaarbare afleiding" and the more plausible, acceptable and credible conclusion on a balance of probabilities is that the plaintiff must succeed. Accordingly in case number 17434/2005 I make the following order, the defendant is to pay the plaintiff:-1. The sum of R1 245 202; 2. Interest on the sum of R1 246 202 at the rate of 8 percent per annum from the date of service of summons to date of payment; 3. Costs of suit, in case number 17436/05 the identical order is to be repeated.

NOT
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IN
THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND
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JOHANNESBURG

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CASE
NO:17434/05 and 17436/05
In
the matter between
JOUBERT
DERECK.....Plaintiff
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and
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DINNER DANCE MARTINI BAR AND
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JOHN.....Defendant
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JUDGMENT

WILLIS J: This trial has to do with two separate cases. The first, case number 17434/05 is a claim by Dereck Joubert against Gardei's Dinner Dance Martini Bar (Pty) Limited. The second, case number 17436/05 is a claim by the same plaintiff against Donald Marshall John Burdett. These two cases have been consolidated for purposes of trial. In other words, what has occurred is that although they are separate cases the evidence relating to them has been dealt with as they were one and accordingly one judgment will be delivered relating to both cases There has been no consolidation of pleadings in regard to these two separate cases.

For the sake of convenience I shall refer to Gardel's Dinner Dance Martini Bar (Pty) Limited as "the company". I shall refer to Dereck Joubert as "the plaintiff" and Donald Marshall John Burdett as the defendant.

The plaintiff, at the commencement of the trial made application to amend the claim downwards in each case. Originally the claim in each case was for R1 412 173, together with a complicated formula relating to interest. The amended claim in each case is now for:-

1. Payment of the sum of R1 246 202;
2. Interest on the sum of R1 242 202 at the rate of 8 per cent per annum from the date of service of summons to date of payment;
3. Costs of suit, further and/or alternative relief.

I wish to emphasise that the claim in both cases is for exactly the same amount and the explanation for this will emerge later during the course of the judgment.

The defendant did not object to the amendment. Indeed he could not do so precisely for the reason that the amount of the claim was reduced, and accordingly there is no prejudice to him whatsoever. It occurs to me that we may not formally have granted the amendment during the course of these trial proceedings, and to the extent that it is necessary for me to do so I now grant the amendment, such that the claim in revised form in each case is for R1 246 202, together with interest and costs.

It should be pointed out that the rate of interest at 6 percent per annum is a concessionary rate of interest made by the plaintiff to both the company and the defendant. It hardly needs to be mentioned that it is less than the currently prevailing mora rate of interest of 15.5 percent per annum, and accordingly there is no issue at all relating to the question of interest

The plaintiff is a world renowned producer of wildlife documentaries as well as the author of several wildlife books. At the commencement of the proceedings I indicated that I was aware of this fact and was an admirer of the plaintiff's work. Wisely the defendant did not make any application for my recusal. I should record that I bear in mind that it is not unusual for talented creative people to be unscrupulous, and furthermore celebrities who have made their fortune in fields of activity other than in business are not infrequently notoriously incompetent businessmen and women. Accordingly, despite the plaintiff's renown he enjoyed no strategic advantage in these trial proceedings by reason thereof.

It would appear that the plaintiff's sense of adventure and love of living "on the wild side" is not confined to the remoter

parts of Botswana. The plaintiff has an interest in tango dancing, in addition to his interests in wildlife. This interest is one that was shared by the defendant and it explains how they came together in a business relationship. They both enjoyed tango dancing. Mr Hutton, who appears for the plaintiff, coyly and delicately emphasised that they did not enjoy tango dancing together, although together they enjoyed tango dancing.

In these politically correct times I think I should record that it is quite clear from the evidence that the relationship between the plaintiff and the defendant was, in more ways than one, an arms length relationship, and was commercial in nature.

The version of the plaintiff is that he and the defendant orally agreed to try to establish successfully a restaurant and bar at which there would be tango dancing. Initially the plaintiff proposed to the defendant that he would lend money to the company to assist in this process, and that once the loan had been repaid by the company the profits would be divided 50/50 between them.

It later emerged that the defendant was unable financially to contribute money in any serious measure for the start-up of this proposed

venture. Accordingly, the plaintiff and the defendant orally agreed that the plaintiff would inject funds into the company on a basis that 50 percent of the funds would be a loan to the company and 50 percent of the funds would be a loan to defendant personally. This explains why in the two separate actions - the claims are identical as against the company and as against the defendant.

This agreement is confirmed in a document which is headed "draft agreement regarding the arrangement for Gardel's". The

plaintiff's version is that this was prepared at about the time or very soon after the oral agreement mentioned beforehand was entered into between the parties. The plaintiff says that he had attempted to secure the signature of the defendant thereon for some time but was unsuccessful until 15 May 2002, and it is common cause that the defendant signed this document, which as I have already indicated, in board outline confirms the evidence of the plaintiff.

There has been some debate during the course of the trial as to the status of this document. I may point out that it is headed "draft

agreement". At the bottom it is recorded that it constitutes the full and final agreement between the undersigned parties. It should be noted that it refers to an injection by the plaintiff of some 76 250 US Dollars, which is considerably less than the sum of money that had been advanced by the time the defendant signed the document, and considerably less than the amount that was paid over in total by the plaintiff.

I do not think there is much advantage in adopting a nitpicking approach to this document. It could just as well be called a so called

"heads of agreement" or "a memorandum of understanding". It clearly is a somewhat amateurish document prepared in note form by somebody who is after all a producer of wildlife documentaries and not an attorney or a businessman by profession. Be that as it may, this document does, in broad outline, confirm the evidence of the plaintiff relating to the nature of the agreement between them.

At the outset it should be noted that it is difficult to determine quite what the defendant's version was save to note that he denies that there were any such loans, either to the company or to himself. He contends that such payments as may have been made by the plaintiff were made by way of "venture capital". It is common cause that the plaintiff effected payments in terms of the agreement between the parties, of R903 366 and the defendant furthermore cannot dispute that an additional sum of the Rand equivalent of R1 839 038 was effected by the plaintiff in US Dollars.

The defendant admits that the amount in the Rand equivalent of R1 839 038 was made. He put the plaintiff to the proof of the fact that it was the plaintiff who effected this payment but he conceded that he could not dispute that the plaintiff had so effected payment. The plaintiff testified that he had done so. His evidence in this regard is credible, and accordingly I must accept for purposes of this trial that the plaintiff paid over the sum of R2 742 404 to the company in terms of the agreement that existed between the parties, even though the terms of that agreement may not be common cause.

The plaintiff furthermore admits that he received R250 000, which was repaid by the defendant in terms of the agreement. The arithmetic of the plaintiff's claim is thus as follows: -

Total payments received by the company R2 742 404

Less repayment of R250 000

Total payments less the amount received R2 472 404 This is a divided 50 percent as between the company and the i.e defendant R1 246 202 in respect of each claim in the two respective actions. This explains, accordingly, the quantum that appears in the respective claims in the cases 17434/05 and 17436/05.

I should at this stage mention that the fact that the arrangement between the plaintiff and the company and the defendant was one of loan also appears from a document which is headed "loan agreement" drawn up by the defendant's attorneys between "the

Wildlife Trust" on the one hand and the company and the defendant on the other. I shall deal later with the significance (such as it may be) to the fact that the document refers to "the Wildlife Trust" as the creditor.

I earlier recorded that it was difficult to determine what precisely the defendant's version was other than that he denied that there was a loan made either to himself or the company. In both cases., the defendant filed an affidavit resisting summary judgment. The defendant testified and under cross-examination he was forced to concede that these affidavits were riddled with untruths, and no further purpose will be served by analysing these various untruths. As Mr Huttor put it to the defendant during cross-examination each of these affidavits was a litany of lies.

The defendant, having admitted that these untruths loomed large in his affidavit and also that his plea contained untruths, sought to place the blame for this upon his attorney. In other words the defendant's version is that the attorney who acted for him right up until the commencement of this trial was not merely careless but untruthful and deliberately concocted lies. This attorney was not called to testify. Of course, I accept that there are dishonest attorneys in this world but (he inevitable question arises is why would the defendant's attorney have embarked upon such a feverish frolic of his own when there was no advantage to him (i.e. the attorney himself) by doing so, and when such a feverish frolic of blatant dishonesty would obviously inure to the disadvantage of the defendant during the course of the trial.

In the plea and in (he affidavits resisting summary judgment the defendant contended that there was an acknowledgment of debt for an amount of R100 000 between himself and the plaintiff, which was fully paid consequent upon judgment having been obtained in this respect, and which extinguished all debts that existed between the defendant and the plaintiff.

During cross-examination the defendant conceded that this was not so and that the acknowledgement of debt in respect of the R100 000 relates to an entirely separate transaction which involved monies which the plaintiff paid over to the defendant for onward forwarding to

his mother-in-law. Interestingly, despite this concession under cross-examination, the defendant today, during the course of argument, persisted with this version that the settlement of the R100 000 appearing in the acknowledgement of debt was a full and final settlement of all the claims that relate to the tango dancing venture.

If, as I mentioned earlier the relationship between the parties was a commercial one then obviously the payment of R2 742 404 was not given by way of donation. It is obvious therefore that this payment, in total of R2 742 404 could only have been made either as an injection of share capital or as a loan, or as a combination of both.

The difficulty for the defendant is that not only do the documents that have been put before me support the version of the plaintiff that the payment was by way of loan, but there is nothing whatsoever to suggest that the plaintiff injected the funds by way of share capital. The plaintiff was not issued with any share certificate in the company. There were no financial statements or documents, whether audited or otherwise, of the company, which indicate that the plaintiff had share capital in it. and moreover I need to record that the plaintiff was not even a director at any stage in the company.

The defendant sought to make much of the fact that in a document which the plaintiff prepared, and which explored certain options that may be available to the plaintiff and the defendant it is recorded as a proposal that the plaintiff and his wife on the one hand, and the defendant and his wife on the other hand "will retain 10% each and hand over all operating to the new owners". This was the high water mark of the defendant's claim that there was evidence to support the contention that the plaintiff was a shareholder.

This proposal must be read within the context in which the document was prepared. I read out the so called option 1, but I should record that a very poor copy is all that is available to me, and certain aspects are illegible:-

"Option 1, The buyer purchased 80 percent of the company with the value based on the asset value plus 25 percent of the difference between the asset value and the cost to us (we will discount the sale by (illegible) percent).

That value is R1 375 million.

The purchase price of the 80 percent will then be R1 1 million. DJ and BJ and DB and SB will retain 10 percent each and hand over all operating to the new owners."

The uncontested evidence of the plaintiff was that this option was that the business of the company should effectively be sold to an outsider who would acquire 80 percent thereof.

Firstly the fact that the purchase of the 80 percent is recorded as being R1.1 million when it is common cause that over R2.7 million had at that stage already been injected into the company (approximately R2.4 million after the R250 000 which was repaid is taken into account) supports the plaintiff's version that 50 percent of the payments which he effected were by way of direct loans to the defendant. How else would the capital in the company to be acquired be acquired for R1,1 million make sense?

It seems to me that if one has regard to the context in which this proposal was recorded that what the plaintiff was trying to convey to the defendant is that after a sale of 80 percent of the shares in the company, there would be 20 percent retained, of which the plaintiff and his wife would receive 10 percent and the defendant and his wife hold the other 10 percent. The plaintiff, when he testified said that what should rather have been mentioned in that document was 'acquire' rather than 'retain'. In context, this gloss that the plaintiff puts on his proposal makes considerable sense. In other words, it was a proposal that he would acquire 10 percent interest in the company if 80 percent of it was sold off to an outside buyer. It certainly in context, and against the full background of the evidence cannot be interpreted as being an acknowledgement that he in fact had 10 percent shareholding. In any event, as) have already indicated there is absolutely nothing by way of evidence that should easily have been available, to indicate that the plaintiff had any shareholding whatsoever in the company.

The defendant also attempted to make much of the fact that there was a document, to which I have already referred, which was drawn up by his attorney, which refers to a loan that existed between the "Wildlife Trust" on the one hand and the company and the defendant on the other. The defendant also sought to make much of the fact that the plaintiff's attorneys, in initial correspondence with the defendant and the defendant's attorneys referred to the fact that they acted for the Wildlife Trust. I should record that it is common cause that the document in question, although signed by the defendant, was not signed either by the plaintiff or indeed any other person purporting to act on behalf of the Wildlife Trust.

The plaintiff explained how the reference to the Wildlife Trust arose. He said that at the time he was considering consolidating his worldwide assets in a Trust that was to be registered in Guernsey, to be known as the Wildlife Trust, and that when he was in the throws of negotiation with the defendant's attorney, it seemed to him that it may be a good idea to put his assets consisting of a loan to the company and the defendant into the Wildlife Trust, and accordingly the document was drawn up on this basis originally.

For reasons that are irrelevant to these proceedings he decided not to proceed with this plan to consolidate his assets worldwide in this particular Trust in Guernsey. This explanation by the plaintiff is in all the circumstances of the case entirely acceptable to me. Besides, it must be remembered that it is not and never has been defendant's version that he has been sued by the wrong plaintiff and that the debt is in fact owed to the Wildlife Trust, never mind that the debt was at some stage repaid to the Wildlife Trust. Indeed it is common cause that the Wildlife Trust, never mind not having been formed, never received any payment either from the company or the defendant.

Accordingly no adverse inference whatsoever may be drawn from the fact that at a particular stage the attorneys acting for the plaintiff referred to themselves as acting for the Wildlife Trust, and indeed one must remember that the document in question was prepared by the defendant's attorney, and would have been handed to the plaintiff's attorney, and accordingly the reason why they originally held themselves out as acting for the Wildlife Trust is perfectly understandable and certainly does not suggest anything untoward. Ex facie the document it appears that the debts were owed to that particular Trust (and nothing more), but this has been satisfactorily explained .

Insofar as the evaluation of probabilities is concerned I have born in mind *African Eagle Life Assurance Co Limited v Comer* 1980 (2) SA 234(W) at 237. The reasoning of Coetzee J as he then was. was approved and developed slightly in *National Employers General Insurance v Jagers* 1984 (4) SA 437(ECD) by Eksteen AJP at 440 E -441 A. In this passage by Eksteen AJP was unanimously approved by the Supreme Court of Appeal in *Baring Eiendomme Beperk v Roux* [2001] 1 All SA 399(A) at paragraph [7], See also *Koster Ko-operatiewe Landboumaatskappy Bpk v SA Spoorwee en Hawens* 1974 (4) SA 420(W) at 425 and *National Employers Mutual General Insurance Association v Gany* 1931 (AD) 187 at 199. In *Stclienbosch Famers Winery Group Limited and another v Martel ET and Cie and others* 2003 (1) SA 11(SCA) at paragraph 5 the following is said "On the central issue as to what the parties actually decided there are two irreconcilable versions, so too on a number of peripheral areas of dispute which may have a bearing on the probabilities. 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

1980 (2) SA 234

1984 (4) SA 437

[2001] 1 All SA 399

1974 (4) SA 420

2003 (1) SA 11

- (a) the credibility on the various factual witnesses,
- (b) their reliability and (c) the probabilities. As to (a) the court's finding on the credibility of the particular witness will depend on its impression of 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' 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 extra cunal 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' 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."

As has been said in the apt quoted case of *AA Onderlingc Assuransie*

Assosiasie v de Seer 1982 (2) SA 603(A) at 614 H:

1982 (2) SA 603

"Dit is na my oordeel nie nodig dat 'n eiser wat horn op omstandighedsgetuienis in 'n siviele saak beroep moet bewys dal die afleiding wat hy die hcf vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewysias wat op horn rus kwyd indien hy die hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-hand-liggende en aanvaarbare afleiding is van 'n aantal moontlike afleidings."

This passage has been referred to with approval in numerous cases. See for example the judgment of Zulman JA in *Cooper and another NNO v Merchant Trade Finance Limited* 2000 (3) SA 1009(SCAJ at paragraph [7]; *Minister of Safety and Security v Jo-daan T/A Andre Jordaan Transport* 2000 (4) SA 21(SCA) at paragraph [9]. In *Ocean Accident and Guarantee Corporation v Koch* 1963 (4) SA 147(A) at 159 C Holmes JA said:

2000 (3) SA 1009

2000 (4) SA 21

1963 (4) SA 147

"As to the balancing of probabilities I agree with the remarks of Selke J in *Govan v Skidmore* 1952 (1) SA 732(N) at 734, namely "in finding facts or making inferences in a civil case it seems to me that one may, as Wigmore conveys in his work on Evidence 3, a ed. paragraph 32 by balancing probabilities select a conclusion which seems to be the more natural or plausible conclusion amongst several conceivable ones even though that conclusion is not the only reasonably one". I hardly need add that plausible is not here used in its bad sense of specious but in the connotation which is conveyed by words such as acceptable, credible, suitable (Oxford Dictionary and Webster's international Dictionary). This dictum has been referred to with approval in numerous cases, see for example *South British Insurance Co Limited v Unicom Shipping Lines (Pty) Limited* 1976 () SA 708 (A) at 713 E-G. *Smit v Arthur* 1976 (3) SA 378 at 386 B-D, *Cooper and another NNO v Merchant Trade Finance Limited* 2000 (3) SA 1009(SCA) at paragraph 17], *Hulse-Reutter and others v Godde* 2001 (4) SA 1336(SCA) at para (14), *Jordaan v Bloemfontein Transitional Local Authority* 2004 (3) SA 371(SCA) at paragraphs [20]

- [21], De Maayer v Serehro; Screbro v Road Accident Fund 2005 (5) SA 588 (SCA) at paragraph [18]

1952 (1) SA 732

1976 (3) SA 378

2001 (4) SA 1336

2004 (3) SA 371

2005 (5) SA 588

I hope it is clear that I have had regard to the factors mentioned in the various cases to which I have referred, and in particular the case of Stellenbosch Farmers Winery Group Limited and another v Mart el ET Cie and others. I find the plaintiff to be a credible witness I hope it is clear from my analysis of the evidence that I certainly did not find the defendant to be a remotely credible witness. The documents before me tend overwhelmingly to support the contention of the plaintiff. The probabilities, in context, inherently also favour the plaintiff's version of events.

Accordingly, having regard to the facts disputed and undisputed set out above I consider that the most 'Voor-die-hand-liggende en aanvaarbare afleiding' and the more plausible, acceptable and credible conclusion on a balance of probabilities is that the plaintiff must succeed.

Accordingly in case number 17434/2005 I make the following order, the defendant is to pay the plaintiff:-

1. The sum of R1 245 202;
2. Interest on the sum of R1 246 202 at the rate of 8 percent per annum from the date of service of summons to date of payment,
3. Costs of suit.

in case number 17436/05 the identical order is to be repeated.

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Prepared on 9 October 2026 · Esheria