

SOUTH AFRICA / JUDGMENT

Elandsfontein Beverage Marketing (Pty) Limited v Joubert Scholtz Inc and Others (1167/03) [2010] ZAGPJHC 80 (21 September 2010) [2010] ZAGPJHC 80

COURT

South Gauteng High Court, Johannesburg

BEFORE

C.G. Lamont, H. Mayat, P. Coppin

CASE / FILE NUMBER

1167/03

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SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Not Reportable

CASE NO: 1167/03

DATE: 21/09/2010

In the matter between:

ELANDSFONTEIN BEVERAGE

MARKETING (PTY) LIMITED Appellant

(Plaintiff in the court a quo)

and

JOUBERT SCHOLTZ INC First Respondent

(First Defendant in the court a quo)

POLLOCK, R K, N.O. AND

MATLALA, N A, N.O.

(in their capacities as joint Trustees of

GOOSEN, PIETER ANDRIES) Second Respondent

(Second Defendant in the court a quo)

ELANDSFONTEIN 95 CC Third Respondent

(Third Defendant in the court a quo)

ELANDSFONTEIN BOTTLING CC Fourth Respondent

(Fourth Defendant in the court a quo)

J U D G M E N T

LAMONT, J:

[1] During December 1999 the appellant (then bearing a different name) Goosen, Elandsfontein 95 CC, Elandsfontein Bottling CC and Platinum Food and Beverages CC entered into a suite of contracts. Subsequent to the conclusion of the contracts Goosen's estate was sequestered. The trustees are cited as the second respondent. For the sake of convenience the second respondent will be referred to as Goosen.

[2] The suite of contracts concluded during December 1999 included contracts of sale of businesses, the sale of an immovable property

and a shareholders agreement.

[3] In terms of the contract to sell immovable property Goosen was to sell certain immovable property to the appellant at a price of R13, 4 million.

[4] In terms of the sale of business contract Goosen, the third respondent, fourth respondent and Platinum Food and Beverages CC (hereafter Platinum) sold to the appellant a business comprising the Elandsfontein 95 business, the Elandsfontein Bottling business and the Platinum business. It was a term of the contract that the appellant accept responsibility for certain of the liabilities of the business and the property limited to an amount of R12 million.

[5] The purchase price for the sale of the business and the property was R30 million comprising:

1. Sale of the property owned by Goosen R13,4 million.
2. Sale of fixed assets of the business R15,8 million
3. Stock R00,8 million

[6] The purchase price was to be paid as follows:

The issue to Goosen of 10 million ordinary par value shares in the Appellant of R1 (an amount of R10 million).

Payment by the appellant to the creditors of Goosen in respect of any obligations secured by mortgage bond over the immovable

property and the creditors of the other sellers in respect of such creditors of the businesses as the appellant would determine up to an amount of R12 million.

As to the balance by the creation of a loan account in favour of Goosen in the books of the appellant.

[7] It is immediately apparent that the mechanism of payment of the amount of R30 million comprises a set of payments to be made by the appellant by the issue of shares, the creation of a loan account for the difference between R12 million and the amount paid by the appellant to the creditors of Goosen for debts secured by a mortgage bond or bonds over the immovable property and such other creditors of the sellers as the appellant decided. No monies were to be paid directly to Goosen. No monies were to be paid directly to any of the sellers. Neither Goosen (save in respect of creditors secured by bonds over the immovable property) nor the sellers were entitled to require payment by the appellant to any of their creditors. Any amount paid in the discretion of the appellant to creditors of the sellers was to be taken into account in determining the amount to be paid to Goosen by way of adjustment to the loan account to be created for him. This being so any rights of accounting by the sellers lie against Goosen.

[8] At the time the contracts were concluded the sellers were in dire financial straits as was Goosen. For some 3 years Goosen had been assisted by Mr Joubert ("Joubert"), his close friend and attorney in his efforts to stave off his creditors and the other sellers' creditors. Some creditors had instituted proceedings and were aggressively pursuing their rights including perfecting security over movables and taking steps to execute on the mortgage bond over the immovable property.

[9] An amount was due to FNB Limited (FNB) in respect of monies it had lent and advanced to Goosen which were secured by the mortgage

bond registered over the immovable property. An amount was due by the third respondent to Standard Bank of South Africa Limited (Standard) in respect of monies lent and advanced. This debt was secured by a general notarial bond which had been passed over movables including the plant and equipment of the third respondent.

[10] Before the contracts could be implemented the rights of the banks had to be dealt with and the amounts due to them had to be paid to release the security they held over property which could not be transferred or dealt with until that time. The appellant in terms of the sale of Goosen's property would have to pay the amounts due to obtain the release of immovable property from the FNB bond. At the time of the conclusion of the contracts the appellant did not know of the existence of the notarial bond. It only came to know of the bond during or about April 2000. The appellant knew it had to make arrangements to pay the FNB bond debt and included provision for this in the contract. Goosen represented to the appellant that the amount required to obtain the release of the immovable property was some R4, 6 million. The obvious person to deal with the payment was Joubert. Joubert had been dealing with FNB for years. He had, together with Goosen, been present at the

settlement with FNB of the amount due to obtain the release. That amount during November 1999 was settled at R3, 8 million (unknown to the appellant) to be paid by 17 January

2000.

[11] The appellant's evidence given by one Abdoola ("Abdoola") was that the appellant and first respondent represented by Joubert had orally agreed that the appellant would pay the first respondent the monies to be paid to FNB. The first respondent would pay only such monies as were required to obtain the release of the immovable property from the bond (appellant believed this to be R4, 6 million in fact it was only R3, 8 million). At the time this arrangement was reached these were the only monies which were to be paid by any person other than the appellant to any creditor. They were also the only monies to be paid to any of Goosen's creditors.

[12] Joubert claimed not to have been aware of the terms of the suite of contracts as he had not been available to deal with their

drafting. It is improbable however that Goosen would have concluded the contracts without having taken the advice of Joubert. Joubert knew the affairs of Goosen and the other sellers intimately. The conclusion of the suite of contracts was an event involving the transfer of approximately 50% of Goosen's income earning assets at a price of many millions.

[13] If the contracts were implemented Goosen anticipated he would be saved from his parlous financial situation. I find on the

probabilities that Joubert knew of the terms of the contracts and in particular knew of the financial obligations of the appellant under the suite of contracts and how those obligations were to be performed.

[14] At the time the mandate was given to Goosen there was accordingly to the knowledge of both Goosen and Joubert no question

of the monies being paid to the first respondent being used for any purpose other than paying FNB the amount required to release the immovable property from the security held by FNB. It is unthinkable that any creditor other than FNB would even have been discussed at that time. In addition the only pressing issue at the time was the payment due to FNB.

[15] The appellant induced by Goosen paid R4, 6 million to the first respondent in two tranches one of R3, 8 million and one of R800 000,00. This was more than was required to obtain the release of the immovable property from the bond. The first respondent paid FNB R3, 8 million and paid the excess to persons directed by Goosen. It is that excess (R800 000) which forms the subject matter of the first claim against the first respondent.

- [16] Joubert and Goosen claimed that the terms of the mandate were that first respondent would receive the monies, and was to pay them to FNB and also to whomsoever Goosen indicated. Goosen's evidence was that he could use the monies, give instructions with regard thereto, in due course there would be an accounting and that this had been arranged with Abdoola. Goosen said he believed that the money which was paid to the first respondent was in fact his.
- [17] It is however improbable that the terms of the mandate would have encompassed payment to anyone other than FNB. The suite of contracts did not provide for Goosen to determine who would be paid. The appellant did not leave funds readily available and was required to borrow them. It is probable that the appellant would not have wanted to borrow funds until it was absolutely necessary and then in the minimum amount necessary. It is also improbable that the appellant who in terms of the contract maintained control over who was to be paid would relinquish that right.
- [18] Much later during 2000, the appellant paid the first respondent an amount. R2 724 024, 65 believing that to be the amount required to obtain the release of Standard's notarial bond as that was what Goosen had told Abdoola. In fact only the amount of R2 011 238, 13 was required to obtain the release of that bond and only that amount was paid by the first respondent to Standard. The first respondent paid the excess (an amount of R712 786, 52) as directed by Goosen. Goosen and Joubert gave evidence that those payments were authorised by the appellant represented by Abdoola. The evidence of Abdoola was that the mandate provided for monies to be paid to first respondent to pay Standard and no one else.
- [19] The appellant's case was accordingly that amounts of R800 000,00 and R712 786, 52 were paid by the first respondent otherwise than pursuant to the mandate; the first respondent's case was that the amounts were paid in accordance with the mandate.
- [20] It is necessary when analysing evidence to have regard to the quality of the witnesses and also to the probabilities. A witness's

evidence is contradictory and vague usually because it is inaccurate. It may be inaccurate for many reasons, deliberate falsehood, mistaken observation or mistaken recollection. A witness' evidence may be clear and satisfactory on the face of it but when it is considered in the light of the probabilities it may readily become apparent that it is unacceptable. A trial court is required to consider all these aspects and make findings accordingly. Findings and inferences not consonant with all the facts cannot be made.

- [21] There are three primary methods used to determine probabilities. Probability theory is a branch of mathematic concerned with determining the likelihood a particular event will occur. The three primary methods are:

Subjective probability.

Classical or theoretical probability.

Empirical probability.

[22] Subjective probability is determined by an individual's best available knowledge and his personal judgment of how events are likely to occur. This probability is not based on formal calculations but comprises the globular knowledge of the person who

makes the judgment and so reflects his opinions and past experiences.

[23] Classical or theoretical probability is a probability which can be determined in advance of any experiment. There are two sides to a coin and the chance (assuming the coin to be regular) of either of the surfaces facing up is equal.

[24] There is empirical probability, a probability calculated pursuant to experiments. Empirical probability is the most accurate

or scientific guess based on the results of experiments. Naturally the more experiments conducted the more likely the guess is to be accurate.

[25] It is not necessary for a judge to wander into the realm of precise calculation and scientific correlation of events. A judge is required to determine a probability only. A judge's answer to a particular question is that it is probably so based on the totality of the evidence. A scientist's approach to a particular problem is different. A scientist attempts to assess likelihood in terms of scientific certainty. This is not the correct approach of a judicial officer. See *Michael and Another v Linkfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at para [40].

[26] A judge when determining the probabilities will consider the totality of the evidence and draw appropriate inferences from those facts he finds proven. A judge may not read between the lines to speculate. See *Nedbank Ltd v Pestana*

[2008] ZASCA 140; 2009 (2) SA 189 (SCA) para [10]; *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) at paras [34] and [35].

[27] The facts relevant to determining the probabilities include the matters set out below:

Goosen and Joubert were well known to each other. They had had contact for many years and Joubert was au fait with the

circumstances in which Goosen found himself.

Goosen and the artificial entities which he controlled were in severe financial difficulty. The straits of Goosen were such that his estate was later sequestrated. The banks were aggressively seeking to recover debt due to them. The debts due to the banks were secured by bonds. The property bonded could not be transferred without obtaining the release of the bonds.

The contracts disposing of the businesses and Goosen's immovable property did not provide for Goosen to be paid money to deal with as he pleased or for him to pay creditors of the businesses and movable property. He was to receive a credit in a loan account. The appellant was to decide which creditor was to be paid and to actually implement payment.

The appellant had limited readily available liquid resources to use to make payment. The Applicant was compelled to borrow monies to enable it to pay.

If monies were paid to Goosen to enable him to make payment to the creditors, such monies were at risk. Goosen's other

creditors could attack the payments as comprising impeachable transactions. The result would be that the creditor intended by the appellant to be paid might have to disgorge the payment made by Goosen. This would place assets of the businesses at risk and create a possibility of the appellant being required to pay the debt afresh.

It would be sound business practice for the appellant to put in place controls over the monies paid over. There was no reason for the appellant to have become involved with paying over moneys to an attorney to act in accordance with its mandate if it wanted to permit Goosen to deal with the monies as he pleased.

Goosen produced a list of creditors at a point in time. The creditors of the close corporations were identified by Maria Goosen who is Goosen's wife. She prepared a creditors' list which was used to identify the creditors of the business to Abdoola. That list is known as Annexure "E". All the documents of the close corporations were collated by her and sent to Abdoola in Durban. It is apparent from the fact that the close corporations' documentation was sent to Durban that the appellant was enabling itself to exercise the rights it had under the contracts to identify and pay certain creditors and also disabling Goosen from being able to exercise control.

During November 1999 Joubert acting for Goosen and Goosen settled Goosen's indebtedness to FNB Limited at R3,8 million. The monies were to be paid to the bank on or before 17 January 2000. The appellant was unaware of this fact until after payments had been made, notwithstanding the fact that both Goosen and Joubert knew what the amount was. The appellant wrongly believed that the amount to be paid was R4,6 million.

On 17 January 2000 Goosen went to consult Joubert. During the consultation contact was made with the appellant concerning the mandate. There was no reason for this contact unless Joubert knew that Goosen was not authorised to deal with the funds, This corroborates the probability that Joubert knew the terms of the suite of contracts.

A cheque for R3,8 million dated 17 January 2000 was delivered to the first respondent. It was marked "for FNB" and was delivered on the day that payment was due.

A cheque for R0,8 million dated 16 February 2000 was delivered to the first respondent. It was marked "in lieu of purchase of" the immovable property.

On 17 January the first respondent represented by Joubert (notwithstanding that the reference is Mr. Scholtz) wrote a letter

to the appellant confirming that R3,8 million and R800 000 were to be received by it “ten einde eerste Nasionale bank te betaal”. The letter continues, “Ons bevestig dat U onderneem om met Eerste Nasionale bank te onderhandel en te kyk wat die minimum bedrag is wat hulle bereid sou wees om in volle en finale vereffening te ontvang.” Abdoola who knew only of the existence of one debt due to FNB for R4,6 million would understand the letter to be referring to that debt and dealing with a mandate he had given on his evidence. He would not be alerted to the position claimed by Joubert and Goosen to exist namely that the entire Goosen debt to FNB had been paid and that negotiation was to be undertaken in respect of another debt to FNB. Joubert and Goosen knew that the appellant was under a mistaken belief that the amount of R4,6 million might be reduced if there was successful negotiation. In fact there was no such opportunity available. The amount had long since been settled. Seen in this light the true intent of the author appears, namely, to perpetuate the incorrectly held belief of the appellant while setting out a different gloss to a person with knowledge. The latter person would understand what was actually contemplated to happen to the money namely that the R0,8 million was to be paid to FNB but not for the debt of Goosen for the bond. This language was inevitably seized upon by both Goosen and Joubert as evidence of the fact that the mandate was as they alleged namely that Goosen had a right to direct payment to FNB for other debts.

On 18 January 2000 Goosen wrote a letter to Joubert in the following terms. “Jan, Na die vele telefoon oproepe na Abdoola en Moosa gedurende Desember en begin Januarie gaan ons nou R3,8 miljoen rand by jou inbetaal, vandag of môre, wat jy asb. in trust moet neem en mnr. Uys van ENB laat weet (dringend). Dit is deel van die koopprys van die fabriek (deel van die krediteure lys). Die R3,8 m moet dringend aan Uys & Kie oorbetaal word en kan nie langer wag nie. ‘n Verdere bedrag van R800,000 sal aan jou oorbetaal word in die nabye toekoms welke bedrag jy moet oorhou totdat ek jou instruksies gee (aangesien ek nog met ENB probeer onderhandel vir afslag) hoe uitbetaling moet geskied. Is dit moontlik dat rente verdien kan word op gelde nog nie uitbetaal nie? Dankie vir jou hulp. “P.A. Goosen” This letter was solicited by Joubert. It sets out the true position which had been achieved by the implementation of the scheme. There was no reason for this letter to be written. Goosen was not authorised to give any instructions. To the knowledge of Joubert the only creditor of Goosen the appellant would pay was FNB and only to the extent it was necessary to do so to obtain release of the mortgage bond. The only part Joubert was playing in relation to the appellant was as its hand in making that payment. There was no need to discuss any other creditors at that time. In these circumstances it appears that Joubert solicited the letter in the hope it would bolster his claim that the appellant had agreed to his disbursements at the instance of Goosen.

On 26 January 2000 the first respondent wrote to the appellant confirming that the first respondent had paid R3,8 million to FNB “ter gedeeltelike vereffening van die eis” of FNB against the appellant. The letter further sets out that the appellant awaits specific instructions as to what the amount which had been agreed with the bank was as only R3,8 million had been received and

as according to the calculations of the first respondent a considerably larger amount was due to FNB. There was in fact to the knowledge of Joubert no such amount which the appellant was contractually obliged to pay. His statement that the payment was made in partial reduction of a debt due by the appellant is not comprehensible unless it was made in the course of misleading the appellant.

On 18 February the first respondent designedly wrote to Goosen, not to the appellant, advising that it had received R800 000.00 and that in accordance with instructions it had placed the funds in Goosen's account at NBS. (This was something never part of his mandate on any basis.) The letter further advises that Goosen had undertaken to see to it that any amount outstanding to FNB would be paid out of those funds. This advice of Joubert appears to be a recordal of an obligation. There is no other probable reason for the recordal save that one day Joubert might need to produce evidence of the transfer of the obligation from the first respondent to Goosen. That obligation would only have existed initially if the evidence of Abdoola is true namely that the First respondent pay FNB. In addition it is peculiar that this letter was sent to Goosen and not the appellant.

A shareholders meeting of the appellant was held on 24 February

2000. At that meeting it was disclosed that the appellant could obtain a loan inter alia against security of the immovable property and the movable assets. (This security could not be given unless the two banks rights to hold same as security was released). Goosen expressed thanks for that but raised neither the fact that lesser amounts than the R4,6 million had been paid nor the fact that he had been directing payments to persons other than FNB from the R4,6 million. It is probable that Goosen wanted to persist in keeping concealed the fact that the debt to FNB was settled at R3,8 to maintain the secrecy surrounding the windfall he had received.

During March 2000 Standard settled the amount of Goosen's and the fourth respondent's notarial bond debt due to it in an amount of R2,6 million.

Goosen did not pay Standard the monies on due date. Standard demanded payment of interest if the due date was to be extended.

The appellant agreed to pay interest.

A cheque for R1,0 million dated 30 June 2000 was delivered to the first respondent. It was marked "Standard Bank". A cheque for R1,6 million dated 31 July 2000 was delivered to the first respondent. A cheque for R124 024,65 dated 10 August 2000 was delivered to the first respondent. On the evidence of Abdoola all the cheques were delivered to enable first respondent to pay Standard.

At some stage prior to 8 August 2000 the amount due by the business to Standard bank was settled in the sum of R2 011 238,13. The amount due was actually paid over on 8 August 2000.

On the 11 August 2000 the bank advised the first respondent that it had been paid and that no further action would be taken.

On 11 August 2000 the first respondent advised the appellant that it had been instructed by Goosen to disburse monies in the amounts and on the dates set out below.

04/07 R900 000

31/07 R1,3 million

01/08 R200 000

01/08 R324 024,65.

In the letter the first respondent advises the appellant that Goosen had informed it that he, Goosen, had been paying for small items out of his pocket and that he required immediate reimbursement. The letter continues to set out that Goosen had been unable from his inspection of the books to ascertain what amounts out of the R12 million allowances for such payments had been made to creditors.

As Goosen was able to give instructions to the first respondent that monies which had been earmarked for Standard were to be disbursed otherwise than to Standard the inference can be drawn that the amount due to Standard by the business had been settled by that date.

The cheque for R124 024.65 which was paid to the first respondent by the appellant was handed to it by Goosen and deposited to the trust account on 10 August 2000. This amount represented interest on R2,6 million and was calculated as if the debt to Standard had not been settled and as if it were still due in terms of the earlier arrangement pursuant to which an extension had been granted by Standard. The pretence that the full amount was due to Standard was maintained. Joubert must have been aware of the amount of the debt due to Standard to obtain the release of the movables from the notarial bond. He had been involved in the affairs of Goosen and his businesses for years and paid the amount to Standard. He also dealt with the excess in accordance with the instructions of Goosen. It is improbable that he as he claimed in evidence had no knowledge of the Standard settlement. Joubert was aware that funds were being collected from first respondent in excess of the Standard debt and that the first respondent was disbursing them otherwise than all to Standard.

On 20 December 2000 the first respondent in response to a claim made in a letter written by the appellant's attorneys dated 13 December 2000 stating that the purchaser had negotiated settlement with FNB and Standard Bank. He stated "Wat die skikkingsonderhandelinge betref het u klient geen onderhandelinge gevoer nie en was dit die firma (with reference to the first respondent wat dit gedoen het nadat die sake vir etlike jare geduur het." This is an admission that the first respondent had participated in the settlement negotiations and hence must have at all times been aware of the true state of affairs concerning the amounts actually due to the banks.

- [28] Joubert sought to justify the conduct of the first respondent by relying on a mandate which he stated included a right to act on instructions received from Goosen. His evidence concerning the FNB monies was founded on an agreement reached with Moosa on 17 January 2000. During the meeting Moosa of the appellant had told him that monies which were paid to first respondent were to be paid out in accordance with instruction of Goosen. At the time of the meeting there was no other creditor to be paid. There was no contractual obligation on the appellant to pay any one of Goosen's other creditors. The appellant was the person which was to decide and direct which creditors of the sellers was to be paid. Moosa was not the person dealing with the matter on behalf of the Appellant. The letter dated 17 January 2000 Joubert sent a letter to the appellant. In the letter Joubert sets out that he does not bear out the claimed arrangement. Joubert sought to explain the contradictions which arise out of the statements made in the letter and made by Joubert in his evidence by reference to a paragraph in the letter which indicates that the appellant had undertaken to negotiate with FNB in order to ascertain what the minimum amount was which they would be prepared to receive in full and final settlement. There was no such additional amount due by Goosen. In addition the explanation furnished by Joubert fails to explain why the total amount to be paid namely R4,6 million coincidentally amounts to the total amount originally due to FNB and was also the amount which had been represented to Abdoola as being the amount which had to be paid to FNB. The letter dated 26 January 2000 written by first respondent sets out that R3,8 million had been paid to the bank and that this resulted in a partial settlement of the claim of FNB against the appellant. This statement is not consonant with the facts. There was a full payment of any claim which FNB could make concerning the bond. Joubert cannot explain this at all.
- [29] The evidence of Joubert is improbable. Joubert's explanation that the extra amount represented a debt due by Goosen to FNB for another causa is implausible as that debt was of the order of R500000 not R800000. There is also the inexplicable fact that there was no need to negotiate as the letter suggests and further no need to do so at that time.
- [30] In my view the evidence of Abdoola falls to be accepted namely that the appellant was told that an amount of R4,6 million was required to settle the FNB debt, that he paid it to the first respondent to enable the first respondent to pay FNB the amount due to obtain the release of the bond over the immovable property. This debt was the only one with which the appellant had to deal at that time. The probability is that the instruction given to Joubert was as described by the appellant namely to receive the money and pay only FNB with it. The evidence in this regard is consistent with the terms of the contract, the other evidence and the probabilities.
- [31] Joubert throughout his evidence relied on the fact that Goosen was a director of the appellant and hence was entitled to give instructions in relation to the affairs of the appellant. Goosen was a director of appellant until July 2000. This issue does not arise in relation to the Standard payment. It is apparent from the first letter which was written on 17 January 2000 which recorded the mandate that the mandate involved payment of particular

monies to a particular person. That instruction is clearly recorded and would on the probabilities not change unless the terms of the suite of contracts changed. That had not happened. There was no reason for anyone to give any different instruction to first respondent. Joubert recognised that the person, who had the authority and control over the affairs of the appellant, was Abdoola. Joubert well knew that Goosen was in deep financial trouble and had been so for several years. To Joubert's knowledge the debts to Standard and FNB were secured by bonds. The entire transaction between Goosen, the other sellers and the appellant was to create a structure which would result in the affairs of the business being regularised and the new controlling entity being able to deal in the assets. The sole debt known to the appellant at the time which impacted on the sales was the loan secured by the bond. The suite of contracts recognised this. One would have expected Joubert to view an instruction to pay creditors as directed by Goosen as unusual and unexpected. It would be inexplicable in the light of his actual and commercial knowledge. To this must be added the fact that to Joubert's knowledge Goosen had sold assets and a new person was relevant to instructions he would receive from the appellant, namely Abdoola of 26 January 2000

in the manner in which he did to mislead the appellant and in an effort to maintain the appellant's belief that R4,6 was due to FNB.

[32] In my view the appellant established that the mandate given to the first respondent was as it had claimed.

[33] Insofar as the Standard debt is concerned the debt was originally settled at R2,6 million. The appellant sought an extension

of time within which to pay the debt and the debt became R2,6 million plus interest at 14,5% per annum compounded monthly from 22 March 2000 to date of payment being no later than 30 June 2000. As at June 2000 the bank had perfected the notarial bond and was entitled to possession of the movable assets in accordance with the terms of a Court order. These facts were drawn to the attention of Joubert on 30 June 2000 by way of a letter written by the bank's attorneys of that date. On 8 August 2000 the bank confirmed that the accounts of the mortgagor and Goosen had been repaid in full and that the files had been closed. There was accordingly a release of the movable assets from the effect of the pledge.

[34] During June and July 2000 the appellant paid R2,6 million to the first respondent. These payments were made to pay a debt due to Standard. Standard had written a letter claiming R2,6 million. Goosen instructed the first respondent to pay Standard an amount of some R2,2 million being an amount which unbeknown to Abdoola he had settled as being the indebtedness due by himself and the fourth respondent to Standard. Although a lesser amount than R2, 6 million was due the full amount of R2,6 million was required of the appellant which then paid that amount. Subsequently on 10 August 2000 the appellant paid the first respondent the sum of R124 024,65 being the amount represented to be due to Standard in respect of interest which the appellant had agreed to pay. On this basis the debt due to Standard was R2,6 million. This cheque was handed to Joubert by Goosen to whom it

had been handed by the appellant. It is apparent that at the time this cheque was handed over there was no debt due in respect of interest. The total amount due to Standard had been settled by Goosen previously. Goosen stated that he was unable to calculate the amount due and that it could only have been calculated by Standard. The evidence shows that the only parties who could have performed the calculation were Standard, Joubert or Goosen. Standard had no reason to and is unlikely to have calculated interest which was not due to it and in respect of which it made no claim. Goosen said he could not do the calculation. The only person who could have done the calculation was accordingly Joubert. It is probable in my view that Joubert did do the calculation. If this calculation was done by Joubert, as it appears to have been at a time after the debt to the bank had been compromised then Joubert was party to the representation made by Goosen that this was the interest amount and that it was due to the bank. The amount was calculated down to the last cent and is calculated on an artificial amount (R2,6 million) which was not due to the bank as the amount had been settled. In a letter of 11 August 2000 written by the first respondent to the appellant Joubert confirmed that Standard had been paid in full and that these amounts had been paid pursuant to instructions given. This letter corroborates Abdoolsa's evidence. It is however misleading in that it is not apparent that there was an excess paid over the amount due to release the movables from the operation of the notarial bond.

- [35] At the time Joubert made payment to Standard he must have known that that was more than the amount due to the bank to release the bond. It is improbable that he paid other debts without knowing the causa for the payments. Joubert knew he was dealing with monies otherwise than in terms of the mandate and knew that the excess over the actual amount due to Standard in terms of the mandate had been received by first respondent. The probabilities in my view favour that Joubert had knowledge of what the amount was which was due to the bank in reality and also that he knew that the appellant would not want to pay more than that amount to him. On 20 December 2000 the first respondent accepted that all negotiations with reference to FNB and Standard had been conducted by the firm comprising the first respondent. This telling admission is in a letter written at a time closer to the events and further indicates that Joubert must have had knowledge of the settlement.
- [36] The protestations of Joubert that he did not wish to become involved in the negotiations with Standard Bank which was a client of the first respondent in my view do not stand up to close scrutiny. These protestations amount merely to an attempt by Joubert to avoid the consequences of his having knowledge of the outcome of the negotiations.

[37] The claim based on unjust enrichment is dealt with below.

The first respondent received the following payments from appellant

R3,8 million

R0,8 million

R2,6 million

R124 024,65

The claim of the appellant against the first respondent totals the amounts it paid as allegedly directed by Goosen namely R800 000,00 and R712 786,52 i.e. R1 512 786,52.

The claim of the appellant against the other respondents is represented by the amounts each received in pursuance of Goosen's

directions. Those amounts are:

R800 000,00 paid to Goosen

R712 786,52 paid as follows:-

Goosen R150 000,00

Goosen R 50 000,00

Third respondent R 30 000,00

Third respondent R 20 000,00

Third respondent R 60 000,00

Goosen R 64 024,65

Fourth respondent R188 761,87

The total receipts were accordingly:

Goosen R1 214 024,65

Third respondent R 110 000,00

Fourth respondent R 188 761,87

[38] The monies were received sine causa as the payments were not made with the authority of the appellant and as there is no cogent evidence that the payments were made about any obligation of the appellant pursuant to the suite of contracts. The recipients were unjustly enriched by the amount each received. They bore an onus to establish that they were not enriched. They failed to discharge that onus.

[39] The counterclaim was founded on an obligation alleged to arise from the shareholders agreement. In fact no such obligation is to be found there. It is however to be found in the sale agreements which provide for the appellant to deal with monies and make adjustments to the loan account of Goosen. In my view on the probabilities the contracts show a tacit or implied obligation to account for the conduct of the appellant in dealing with moneys due to Goosen which it had in its control and which in due course were to be dealt with by of calculating a final amount due to Goosen. See: *Doyle v Fleet Motors*. The evidence was wide ranging and encompassed all issues concerning this claim as if it had been formulated correctly In these

circumstances it is proper in my view to deal with it as if it had been pleaded that the obligation arose from the suite of contracts.

[40] Goosen is entitled to an accounting and the usual accompanying relief. It follows that the appeal against the order made against the second respondent fails.

[41] The time spent on that portion of the appeal in which the appellant was unsuccessful was insignificant and in my view the appellant which has been substantially successful is entitled to the costs of the appeal.

[42] In the circumstances I make the following order:

The appeal against the order dismissing the claims against the first second third and fourth respondents is upheld. The first second third and fourth respondents are to jointly and severally pay the costs of the appeal.

The following order is substituted for paragraph 1 of the order made by Tshiqi J:

“A. Judgment is granted against the first defendant for:

Payment of the amount of R1 512 786, 52.

Interest on the aforesaid amount from the date of summons being 21 January 2003 to date of payment at the rate of 15, 5% per annum.

B. Judgment is granted against the second defendant for:

1. Payment of the amount of R1 214 018, 65.

2. Interest on the aforesaid amount from the date of summons being 21 January 2003 to date of payment at the rate of 15, 5% per annum.

C. Judgment is granted against the third defendant for:

Payment of the sum of R110 000.00;

Interest on the said amount from date of issue of summons being 21 January 2003 to date of payment at the rate of 15, 5% per annum.

D. Judgment is granted against the fourth defendant for:

1 Payment of the sum of R188 767.87;

2 Interest on the said amount from date of issue of summons being 21 January 2003 to date of payment at the rate of 15,5% per annum.

E The liability of each defendant is joint and several with each other defendant.

F Judgment is granted against the first second third and fourth defendants jointly and severally for the costs of suit.”

The appeal against the order made against the second respondent in paragraph 2 of the order made by Tshiqi J is dismissed.

C.G. LAMONT

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

I agree: _____

H. MAYAT

JUDGE OF THE SOUTH GAUTENG

I agree: _____

P. COPPIN

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Date of hearing :10 August 2010

Date of judgment :

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