

SOUTH AFRICA / JUDGMENT

Leshaba v Tayfin Auditors (26883/2013) [2014] ZAGPPHC 965 (10 December 2014)

[2014] ZAGPPHC 965**COURT**

North Gauteng High Court, Pretoria

BEFORE

J W Louw

CASE / FILE NUMBER

26883/2013

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Source record**IN****THE GAUTENG DIVISION OF THE HIGH COURT. PRETORIA****CASE NO: 26883/2013****DATE HEARD:**

27/11/2014

DATE DELIVERED: 10

DECEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

In the matter

between:

GEORGE

LESHABA.....Plai
ntiff

and

TAYFIN

AUDITORS.....Defe
ndant**JUDGMENT****J W LOUW. J**

- [1] The plaintiff claims payment of the sum of R1 million from the defendant. The plaintiff's claim is based on an oral agreement entered into between the parties during November 2010. The plaintiff alleges in his particulars of claim that the terms of the agreement were that the plaintiff would invest an amount of R1 million with the defendant which the defendant would, in turn, lend out to clients who needed finance on a short term basis, for a

guaranteed monthly return of 4.9%, i.e. R49 000.00, payable by the defendant to the plaintiff. It is further alleged that for as long as the plaintiff's investment was held by the defendant, the defendant would pay the monthly return to the plaintiff and that the plaintiff would be entitled to claim repayment of his investment from the defendant on reasonable notice.

- [2] It is common cause that the plaintiff paid the amount of R1 million over to the defendant in two tranches of R500 000.00 each during December 2010 and that the defendant made 24 monthly payments of R49 000.00 each to the plaintiff from January 2011 to December
2012. The plaintiff alleges in his particulars of claim that he gave the defendant reasonable notice during November 2012 that he wished to withdraw his investment, but that the defendant breached and repudiated the agreement by contending that the monthly repayments which the defendant made were a repayment in full of a loan which the plaintiff made to the defendant.
- [3] The defendant alleges in its plea that the terms of the oral agreement were that the plaintiff would advance a capital amount of R1 million to the defendant as a loan, that the loan would be repaid over a period of two years, that the defendant would pay interest over the period of two years in the amount of R176 000.00 and that the capital and interest would be repaid in instalments of R49 000.00 per month. The defendant pleads that it has complied with its obligations and has fully repaid what it owed the plaintiff.
- [4] The plaintiff testified that he knew Mr. Mahomed Mahier Tayob, to whom he referred as Mr. Mahier, very well. Mr. Tayob had for a number of years been his personal auditor and also the auditor of two companies, Langane Investment Holdings (Pty) Ltd and Raiiform Investments (Pty) Ltd, of which the plaintiff was the sole director and shareholder. He considered Mr. Tayob to be the owner of the defendant. He said that Mr. Tayob told him about investment opportunities in other commodities and that he was also the auditor for other people and that, if the plaintiff invested money with him, he would receive better returns than what the banks paid. He said that it was then agreed that he would invest R1 million for a period of 12 months. After the 12 months, he could recall the investment or he could re-invest it for a further period of 12 months. It was further agreed that he would be paid interest of R49 000.00 every month. The plaintiff's evidence was that nothing was discussed after expiry of the period of 12 months and that the money just continued to be invested with the defendant.
- [5] A few 'days before 17 September 2012, the plaintiff sent a sms message to Mr. Tayob in which he said that he did not want to continue with the investment and that it was time to recall it. On 17 September 2012, Ms Tina Rafael, who is Mr Tayob's personal assistant, sent the following e-mail to the plaintiff on Mr. Tayob's instructions:

"We are somewhat confused by your text message, firstly your transfer was already effectuated this afternoon and your last instalment is due on the 15th December 2012.

We are further totally confused on your intent to the R1 million you wish to iwithdraw, your instalments include your capital re-payments.

It would be incongruous if not foolish if you believe that you had a 110% return.”¹

[6] On the same date, 17 September 2012, Ms. Rafael sent a further e-mail to the plaintiff in which she referred to the telephonic conversation which the plaintiff had with Mr. Tayob and confirmed that a meeting was scheduled for them for 27 September 2012 at 15h00. The plaintiff testified that such a meeting did take place but that he and Mr. Tayob were unable to come to an agreement because Tayob denied that the R1 million was an investment. He said he decided to hand the matter over to his attorneys because it appeared that Tayob was "shifting" from the initial agreement.

[7] The plaintiff did not, however, hand the matter over to his attorneys at that stage. What happened is that the defendant continued to make monthly transfers of R49 000.00 into the plaintiff's bank account until December 2012. What further happened is that the plaintiff sent a further sms message to the defendant on 25 January 2013 in which he again demanded the return of the R1 million. In response thereto, Ms. Rafael, again on the instructions of Mr. Tayob, sent the following e-mail to the defendant on the same day:

"The sms sent to Mahier this morning has been forwarded to me for reply. Kindly note that this matter was ventilated at your meeting with Mahier on 27th September 2012, wherein you perfectly understood and agreed that the monthly payments were capital plus interest We are now somewhat bemused by your request once again.

Furthermore I attach the last payment done on the 13th December 2012 wherein we used the reference (full and final). (Attached forease (sic) of reference)".

[8] The e-mail went unanswered until a letter was written by the plaintiff's attorneys to the defendant on 23 April 2013. The letter contains the following paragraph:

"In terms of an oral agreement reached between our client personally and Tay fin Auditors, represented by your Mr Mahier, our client invested with Tayfin Auditors an amount of R1 million. The oral agreement reached', was that for as long as the investment is with Tayfin Auditors, our client would be paid a monthly return on the investment on (sic) an amount of 4,5% (i.e. R45 000.00 per month) and later this monthly return was increased to 4,9% (i.e. R49 000.00)."

The letter then continues to state that the plaintiff called up the investment towards the end of 2012, that Mr. Tayob repudiated the agreement by alleging that the payments made were in reduction of a loan and interest and that the R1 million was not repayable. Demand is then made for repayment of the R1 million plus interest at the rate of 15,5%.

[9] During cross-examination, the plaintiff was asked why the return on the investment changed from R45 000.00 to R49 000.00 per month. He said that the economy was doing well, that he had been receiving R45 000.00 for a long time and that he said to Mr. Tayob that the amount must increase. Mr. Tayob then said he would look into it, and then increased the payments

to R49 000.00. It was then put to him that it was common cause that he had received 24 payments of R49 000.00 each and that the defendant never made any payments of R45 000.00. He accepted that this was so. His evidence that he received payments of R45 000.00 for a long time, and his instructions to his attorneys in this regard, must then simply be untrue. Later during cross-examination he attempted to suggest that the amount of R45 000.00 mentioned by his attorneys was just an error made by his attorneys. This must also be untrue. It is specifically stated in the attorneys' letter that the agreed monthly return of R45 000.00 was later increased to R49 000.00. It also contradicts his earlier evidence about his request to Mr. Tayob to increase the amount because the economy was doing well.

[10] The plaintiff's evidence that the investment was made for a period of 12 months whereafter the money could be re-invested for a further period of 12 months, contradicts the statement in his attorneys' letter and the allegation in his particulars of claim that he would be paid a return of R49 000.00 per month for as long as the investment remained with the defendant. No attempt was made by or on behalf of the plaintiff to explain this contradiction.

[11] The plaintiff was then asked in cross-examination why he asked for his money back in September 2012. He said that it was his money and he wanted to put it in the bank as it was at the time that he had a dispute with Mr. Tayob. When pressed for the reason why he wanted to withdraw the money, he said that he did not feel comfortable leaving the money with the defendant because there were "issues". When asked whether he had issues with Mr. Tayob, his answer was "not necessarily". He was asked what caused the discomfort, but he simply repeated that he wanted to put the money in the bank. When asked again what the reason was for wanting to withdraw the money, he said that he wanted to put it in the bank where it would be safe and that he was "OK" with getting less interest from the bank. The plaintiff was clearly evasive in answering the simple question why he wanted to withdraw

the money. His evidence that he asked to withdraw the money in September 2012 also contradicts the allegation in his particulars of claim that he gave the defendant notice in November 2012 that he wished to withdraw the investment.

[12] Mr. Tayob's evidence was that he at some stage was introduced the plaintiff to someone from FNB bank at the defendant's offices when the plaintiff happened to be there and that the plaintiff said to that person that he had an investment with FNB but that he was not getting enough interest on the investment. The plaintiff then told Mr. Tayob that if he could find an investment with a better return, he would make such investment. A couple of months later Tayob contacted the plaintiff and told him that he had clients who required funding and who would give him a better rate than the banks. The plaintiff had earlier said that the bank's interest rate was 5% or below. The plaintiff indicated that he was interested.

[13] Mr. Tayob testified that a meeting then took place between himself and the plaintiff where he explained to the plaintiff that the amount required would be R1 million which would be repayable at R49 000.00 per month over a two year period. The plaintiff then agreed to the proposed deal and transferred the R1 million to the defendant in two tranches of R500

000.00 each. The first payment of R49 000.00 by the defendant was made by cheque which was made payable to Lengane Investment Holdings (Pty) Ltd at the plaintiffs request. The further 23 payments were made by way of electronic transfers to the plaintiff's personal bank account.

- [14] Mr. Tayob was asked how he arrived at the amount of R176 000.00. His answer was that the deal which he structured benefited the clients on both sides. He helped clients to obtain unsecured loans and at the same time the plaintiff was getting more interest than what the banks paid. He said that there was nothing in it for the defendant and that he explained to the plaintiff that the Muslim faith does not permit the defendant to charge interest. The clients therefore pay the same interest as the plaintiff receives. His answer was not an explanation of how the amount of R176 000.00 was arrived at.
- [15] With regard to the meeting of 27 September 2012, Mr. Tayob testified that the plaintiff asked whether he, Tayob, could pay 2% more. Mr. Tayob's response was negative and he told the plaintiff that they had concluded a deal. The plaintiff understood, and shook Tayob's hand. He was asked why the plaintiff then in January 2013, before he went to his attorneys, again asked for the R1 million. His answer was that he guessed it was because the plaintiff wanted to avoid payment of the defendant's fees and that it was a figment of the plaintiff's imagination.
- [16] During cross-examination, Mr. Tayob was again asked how he had calculated the amount of R176 000.00. He said that it was calculated
- "at 8 point something for a year and 16 point something over two years". He said there was a schedule which shows the capital, interest and repayments. The schedule was, however, not discovered by the
- defendant.
- [17] Mr. Tayob was asked in cross-examination about the inscriptions on the plaintiff's bank statements which in some instances reflected the payments of R49 000.00 as "investment returns" He said that the payments were made by his personal assistant and that it was clearly a "typo" which she later corrected. He didn't know where she had got it from as she was very familiar with what happened in the office.
- [18] It was submitted on behalf of the defendant that Mr. Tayob's evidence was fraught with more difficulties than that of the plaintiff. It was firstly submitted that his demeanor in court and his mode of answering questions did not accord with that required of an honest and forthright witness. In this regard it was said that he became argumentative, that he referred to the plaintiff's evidence as a "flight of fancy"², his reference to the fact that the plaintiff did not file an answering affidavit to his summary judgment application and the fact that the plaintiff was not present during the latter part of the trial. Although I agree that these criticisms of the plaintiff expressed by Tayob were not justified, and that he was at times argumentative, I do not agree that this justifies a conclusion that he is a dishonest witness, I

did not consider his demeanor to be that of a dishonest witness.

[19] It was further submitted that Mr. Tayob's explanation of how he calculated the R176 000.00 was opaque and convoluted and that the question had to be repeated four times before he was prepared to answer it. My impression of his evidence was that he and the

plaintiff focused at the time more on the amount of interest to be paid rather than on the rate of interest. It was common cause that the amount of R49 000.00 was discussed between Mr. Tayob and the plaintiff. Neither of them made mention of any rate of interest being discussed at the time. His answer that the rate of interest was "8 point something for a year and 16 point something over two years" appears to be the result of a calculation which was done subsequently.

[20] Mr. Tayob was further criticized for being vague as to the clients to which he had in turn loaned the R1 million and in respect of the terms of such a loan. He did, however, state during cross-examination that the money was lent to one Natasha and one David who he said had a compendium of companies. He also testified that their loan was extended for more than two years and that they were advanced additional amounts by his (Mr. Tayob's) company. His evidence in this regard was not explored further in cross-examination.

[21] Mr. Tayob was also criticized for initially making out that he would not benefit from the subsequent loans made to clients but that he later conceded that he charged "consultancy fees" and "accounting fees". This criticism is in my view not justified. He was questioned about the rate of interest which his clients would pay, which he said was the same as that which would be paid to the plaintiff. It was in answer to a question by the court whether there was anything in the deal for the defendant that he said that he charged consultancy and accounting fees.

[22] The defendant brought winding-up applications against the plaintiff's two companies which applications did not come to the plaintiffs attention due to the manner in which they were served. The applications were set down in the unopposed motion court on 23 November 2014, which was three days before the trial. The basis of the applications was that the two companies owed the defendant accounting fees and that the companies had not responded to letters in terms of s 345 of the Companies Act which were sent by registered mail to them. The plaintiff came to hear of the applications by chance, and they were then postponed to afford the companies an opportunity to oppose the applications. It was submitted on behalf of the plaintiff that there was no cogent explanation why these applications were only launched on the strength of affidavits deposed to by Mr. Tayob on 4 October 2014 and that they were clearly so launched in order to bring pressure to bear on the plaintiff by way of pressure on his companies. I agree that the probabilities certainly indicate that this was the purpose despite Mr. Tayob's protestations that the setting down of the applications was left in the hands of his attorneys. The fact that it was done appears to me to be no more than litigation tactics. No conclusion of dishonesty can in my view be drawn from it.

- [23] Mr. Tayob was further criticized for not discovering the books of account of the defendant wherein, according to Tayob, the defendant's version would be supported. The simple answer to this is that the plaintiff knew that the defendant's version of the oral agreement was that it was a loan and he could, therefore, in terms of rule 35, have required discovery of the defendant's books of account relating to the transaction.
- [24] It was lastly submitted that Mr. Tayob's evidence that the changing of the description of the payments of R49 000.00 as they appeared on the plaintiff's bank statements to "instalments" was a correction of a typographical error, was implausible. What needs to be pointed out in this regard is that in January 2012 the description of the payment on the plaintiff's bank statement read "Leshaba-instalment", where it had previously read "Investment Returns". After January 2012, it reverted to "Investment Returns" until April 2012, when it became "Instalments This happened before there was any dispute between the plaintiff and Mr. Tayob about the terms of the agreement. It appears to me that not much can be made of the changes which occurred in the description of the payments and that the possibility that they were the result of a correction done by Mr. Tayob's personal assistant cannot be excluded. The inference that it was purposely done to defraud the plaintiff would certainly have required more evidence.
- [25] The version of the plaintiff and that of the defendant about the terms of the oral agreement are mutually destructive. In Stellenbosch Farmers' Winery Group Ltd and another v Martell et cie and others³, Nienaber JA said the following:

"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' 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' 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."
- [26] As far as the credibility of the plaintiff is concerned, I have referred to the fact that his evidence about receiving payments of R45 000.00, and his instructions In this regard to his attorneys, was untrue. As far as the reliability of the plaintiff is concerned, I have referred to his evidence that the Investment was made for a period of 12 months whereafter the money could be re-invested for a further period of 12 months, which evidence contradicts the statement in his attorneys⁷ letter and in his particulars of claim that he would be paid a return of R49 000.00 per month for as long as the investment remained with the defendant. I also referred to the plaintiff's evasive evidence concerning the reason why he wanted to withdraw the money in September 2012. In this regard, it is not insignificant that, on his own version, he would only have been entitled to withdraw the money in December 2012. I have further referred to the plaintiff's evidence that he asked for the return of the investment in September 2012, which evidence contradicts the allegation in his particulars of claim that the demand was made in November 2012.
- [27] As far as Mr. Tayob is concerned, I am not able to find that he is not a credible or reliable witness, despite the criticisms of plaintiffs counsel to which I referred above.
- [28] The probabilities further, in my view, favour the defendant's version. On the plaintiff's version, the defendant would have had to pay interest at the rate of 4,9% per month, which equates to 58,8% per annum. Mr. Tayob is an auditor and businessman. There was no suggestion that he could not have borrowed the money from the bank if he needed it for himself instead of paying an unrealistic rate of interest to the plaintiff. But it was, in any event, common cause that he was not going to use the money for himself, but that it was going to be lent to clients of the defendant. An interest rate of 58,8% per annum becomes even more unrealistic if the agreement was, as alleged in the plaintiff's particulars of claim, that the concomitant return of R49 000.00 would be paid indefinitely for as long as the investment remained with the defendant. I agree with the submission of the defendants counsel that the explanation given to the plaintiff on 27 September 2012 that the instalments included capital and interest, read with the plaintiff's inaction after the meeting and his silence after the defendant's e-mail of 25 January 2013, makes the defendant's version more probable than that of the plaintiff.
- [29] It was further submitted that the fact that the plaintiff wanted to withdraw his investment in September 2012 for no apparent reason to put the money in the bank, renders the probability in favour of a low interest rate with the defendant, though higher than that paid by the banks, far more probable than a high interest rate of 58,8% per annum to which the monthly payments of R49 000.00 equate. I agree with the submission. No convincing reason was given by the plaintiff why he wanted to forego the payment of interest at such a high

rate in favour of the much lower rate paid by the banks.

[30] It follows from the foregoing that the plaintiff has failed to discharge the onus of proving his version of the oral agreement concluded between the parties on a balance of probabilities.

[30] In the result, the plaintiff's claim is dismissed with costs, such costs to include the costs of two counsel.

Counsel for plaintiff: Adv. N Davis SC

Instructed by: Tintingers Inc, Pretoria

Counsel for defendant: Adv. A.F. Arnoldi SC, Adv. C. de Villiers

Instructed by: Gani Attorneys, Pretoria

1Mr Tayob testified that 110% would be the total return which the plaintiff would receive over the period of two years. At a rate of 4.9% per month, the return for one year would have been 58.8% and for two years 117.6% not 119%

2 The words actually used were "a figment of his imagination".

3 2003

(1) SA 11 (SCA) para [5]

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