

SOUTH AFRICA / JUDGMENT

Lombard Finance (Pty) Ltd and Another v Mallach NO (13574/08) [2013] ZAWCHC 30 (26 February 2013) [2013] ZAWCHC 30

COURT

Western Cape High Court, Cape Town

BEFORE

Griesel

CASE / FILE NUMBER

13574/08

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IN

THE HIGH

COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH

COURT, CAPE TOWN)

Case

No 13574/08

In

the matter between:

LOMBARD

FINANCE (PTY) LIMITED

.....First

Plaintiff

IAIN

THEODORE HIRSCHSON

.....Second

Plaintiff

and

PENELOPE

ANNE MALLACH N O

(in

her capacity as executrix in the estate

of

the late Raymond Mallach) Defendant

Court:

GRIESEL J

Heard:

11, 12, 13 & 18 February 2013

Delivered:26 February 2013

JUDGMENT

GRIESEL J:

Introduction

- [1] The plaintiffs, Mr Iain Hirschson, and his company, Lombard Finance (Pty) Limited,¹ have instituted action against the defendant, Mrs P A Mallach, in her capacity as the executrix in the estate of her late husband, Mr Raymond Mallach, who passed away on 23 November 2006.² (For convenience I refer to the main protagonists herein by their surnames and to the first plaintiff as ‘Lombard Finance’.)
- [2] In the particulars of claim three claims were raised, of which only the first two are relevant for present purposes. In broad outline, Claim A is based on an oral agreement of loan allegedly entered into between Hirschson and Mallach on or about 7 November 2000; alternatively, on a series of oral agreements entered into over a period. The plaintiffs allege that an amount in excess of R6,5m (including interest) remains outstanding in respect of such loan(s). Claim B relates to an alleged oral agreement for the transfer by Mallach of 15% of the shares in Brimpharm SA (Pty) Ltd, formerly Generix International (Pty) Ltd (‘Generix’), alternatively their value, to Hirschson or his company, together with payment of a portion of the dividends that accrued to the estate late Mallach in the years 2007 to 2011.

Factual

background

- [3] Hirschson knew Mallach for about 20 to 25 years prior to his death and they were close friends. Mallach, who was an attorney, acted for Hirschson in his professional capacity and Hirschson - either through Lombard Finance or in his personal capacity - also entered into various business ventures together with Mallach. After Mallach moved into the same office building as Hirschson at the Water Club in Granger Bay they saw each other almost on a daily basis to discuss both business and personal matters. In the light of the close personal relationship between them, their business and other dealings were informal and were concluded on the basis of oral agreements, rather than formal written agreements. They only exchanged a relatively small amount of correspondence.
- [4] It is common cause that at some stage Mallach encountered serious financial problems arising from the collapse of Paradigm Holdings

Ltd, a business with which he had been involved. Mallach confided in Hirschson as to his financial embarrassment and Hirschson, via Lombard Finance, provided the necessary assistance. Thus, on 7 November 2000, Lombard Finance lent an amount of R600 000 to Mallach

to assist him in completing his house in Constantia, owned via a company, Condong Investments (Pty) Ltd. Hirschson also lent Mallach an amount of R91 200 to buy furniture for his new office at the Water Club. It is common cause that both these amounts had subsequently been repaid by Mallach.

[5] After the collapse of Paradigm Mallach, together with three other partners, became involved in the business of Generix, a company

involved in the development and distribution of generic drugs. The business operated from Mallach's office and became his main business investment after he acquired 34% of the issued share capital in that company. At that stage Generix was in the process of establishing itself, which required on-going funding from the shareholders. Mallach was financially unable to match the funding by his co-shareholders. In order to avoid his shareholding becoming diluted, he turned to Hirschson for assistance, which was forthcoming

in the form of a series of loans from Lombard Finance to Mallach, commencing with an amount of R1 million on 6 September 2001, followed by 18 further payments of between R100 000 and R300 000 at regular intervals during the period from April 2002 to February 2003.

[6] According to Hirschson, it was envisaged that the loans, together with interest thereon, would eventually be repaid out of Mallach's

investment in Generix. However, by September 2004, Hirschson became frustrated because a substantial portion of his capital had been tied up in the loans to Mallach, with the result that he was unable to exploit alternative business opportunities. He accordingly wrote to Mallach as follows:

'The company [i.e. Lombard Finance] is presently being audited and the loans outstanding are now apparently in excess of R7 million,

together with interest. As you are aware, things are tight and I think you should make it a priority to redeem some of the debt or at the very least the interest. As I have said to you a little while back you are placing me in an extremely embarrassing situation.

Please focus on this issue so that it does not get out of hand and lead to un-pleasantness.'

More or less at the same time Hirschson furnished Mallach with a schedule showing that up to that stage capital amounts (without interest) totalling R5 681 200 had been advanced by Lombard Finance to Mallach.

[7] Mallach responded by way of a lengthy undated letter that must have been written shortly afterwards. It is being quoted almost in full herein, not only for its content, but also for the illustration it provides of the nature of the relationship between the two men:

'At the outset let me make it abundantly clear that I will do anything, absolutely anything, in my power to avoid any unpleasantness. After all you helped me out when I most needed it and I will be eternally grateful to you for that.

A friend in need is a friend indeed and you certainly turned out to be my best friend. I cannot tell you how much that means to me.

When we did the casino deal you very generously (in fact more than generously) cut me in for a quarter share.

Then when I needed some financial assistance you again funded me. Originally it was a loan, but I then suggested to you that if you could look after me until I got on my feet I would give you a share of my share in Generix International SA (Pty) Ltd. You will recall that I had to contribute an enormous amount every month to get the company off the ground.

Originally Mehboob³ was doing all the funding but he then insisted that I pay my share. I did not want to water my share down so that he would become my “senior partner”, therefore I had to contribute millions of rand. And you helped me.

Then, we worked together on various projects none of which have as yet brought any dividends. But they are looking good. I brought you into contact with Andy and that has led to our Fabcos involvement and accordingly Tsogo.

Whilst you have been away I have worked flat out to secure the Johnic deal (as opposed to the Johnny deal).

That will certainly produce a couple of million rand for us. I said to you that you could have my share. I offered that as a gesture of my goodwill and affection for you.

I say this because the money which you gave me was not a loan but an investment in me and particularly a share of my share in Generix, as I have said.

Also, and on this understanding there can be no question of your being entitled to interest on the investment.

Despite this I have done what I can to give you an advantage in return for what you have done for me. I have, for example let you receive my share of the latkes from Harry. Also whilst we were paying Andy every month, I assumed your share and was paying him R27 000 per month on my own for nearly a year. I also gave you some cash which Mehboob had given me (R35 000 I think). All this is “smalls”, I know, but still, considering that the money you gave to me was not a loan but an investment I think it goes some way to demonstrate that I care.

Turning now to deal with the schedule of what you reckon I “owe” you (R5 681 200) I must record the following:

1. The payment of 7 November 2000 [R600 000] was a loan and was repaid to you on 11 December 2001.
2. The payment of R1 500 000 on 8 August 2001 was part of my share of the casino deal.
3. The 27 August 2001 payment of R160 000 was given to me to purchase travellers cheques for you.

4. The furniture which you paid for of R91 200 was repaid to you by me.

You see, Ian, Mirinda⁴ has a record of the payments to me but has not taken any of the repayments or other credits into account. I assume the schedule of payments is correct, I have not the inclination or frankly the chutzpah to check it. That being so and regard being had to what is set out in paragraphs 1-4 above the net payments made to me amount to R3 3330 000. Accordingly and if you regard the amount as a loan then the monies you receive from Harry⁵ is not a bad interest on it. So at least the amount due cannot increase. However, it is not a loan but an investment. If you would

like to regard it as a loan, rather then let me see if I can borrow R3.3 million elsewhere and repay you. Then we can work together on all the other projects for our mutual benefit.

Whatever you call [sic], our friendship must, I repeat must, remain intact. It is more important to me that all the money in the world. '

[8] Almost a year went by before the next letter from Lombard Finance was written on 1 August 2005, headed 'Brimpharm - Generix

Investment Loan'. Hirschson recorded that since Mallach's last letter 'not much had been finalised in the above regard'. He proceeded:

'You have stated repeatedly that I am a shareholder as well as a creditor in the venture. For the sake of clarity, I now require of you a full accounting of share-holdings and loan accounts (which may at present be in your name) in the group. I need to do so in order to plan my affairs accordingly. ... I would also like an update of the state of affairs of the company. '

[9] Mallach responded on 23 August 2005 as follows:

'Firstly, let me reiterate that I recognise that without your help I don't know what I would have done. When I last wrote to you I invited you to accept the return of the money which you gave me (R3,3m) or to have a share of my interest in Generix International (SA) (Pty) Ltd ("Generix").

You have effectively received interest on this sum all the time from my monthly share of Harry's pay-outs.

Secondly, let me emphasise that I always offered you a share of my interest in Generix in lieu of your assistance. It was always understood, as I have said, that your share would be a share of mine in Generix, the same way that I enjoyed a share of yours in Goodwood.

Brimpharm was never involved and in fact I don't think it existed then. Anyway, it doesn't really trade at all. It holds the IP.

All the shares in Generix are registered in Mehboob's name although I am entitled to $\pm 34\%$ which I beneficially hold through a "holdco".

When we spoke you said you did not want the money back but wanted your shares. Well and good. I cannot give you shares in Generix for lots of reasons, not least of which is the pre-emptive rights which my co-shareholders enjoy and in terms whereof my partners could then take those shares from me.

Also, as I have made plain to you, often, I cannot disclose to my partners (nor would they tolerate) any other partner in the company.

So, as has always been the position, your share will be a share of my share, i.e. a share of “holdco”. Mehboob has valued

Generix at R100m. whilst Yiv, conservative accountant that he is, has valued it at R60m. On Mehboob’s value, my shares are then worth R34m, whilst on Viv’s value, my shares are worth just over R20m.

I receive no income from the company and don’t anticipate getting any in the medium-term.

So, what we are all waiting and hoping for is the big sell-out of hundreds of millions one day.

This you may find too distant a return, which I respect, or, as I do, you may consider it well worth the wait.

Either way, you are entitled to a formalising of the arrangement which I agree is long overdue - mea culpa.

On the basis that you have “invested” R3.3m, this would equate to approximately 10% of my shares (on Mehboob’s value) and approximately 16% on Yiv’s valuation. May I suggest that we agree on, say 15%, i.e. I will give you 15% of “holdco”.

Once you are satisfied and happy I will have the auditors attend to the necessary secretarial work and deliver the shares to you.

We will then be back to a level playing field and I do look forward to my share of Harry’s tom and of course my share of the other deals on the table.

When there is a pay out - particularly from Peter, which should be quite soon, I need it desperately to service and part repay my new borrowings.’

[10] Hirschson took umbrage at the tone of this letter, which he described in his reply, dated 25 August 2005, as ‘distasteful and manipulative’. He proceeded as follows:

‘Whilst I hope that our friendship should remain intact notwithstanding, I believe that we have some serious issues to address. The money was paid over to you in good faith and at a great opportunity cost to me. There have been many opportunities that I have had to turn down to lack of funds over the past four years.

In regard to the amounts, I have done a simple calculation which I am going to have checked and even after your share of Harry’s

money, this amount is closer to R5 million with interest. I will let you have the schedule. Insofar as the valuation of the business and its entities are concerned, one would have to look at the current situation, the projections, the loan accounts and the situation of the business at the time the monies were paid to you, in order to formulate a fair and equitable agreement. I don't accept that this can't be done. Please have the figures of the business and all its entities available so that I can make an informed decision.'

[11] Mallach responded, expressing distress at Hirschson's interpretation of the tone of his earlier letter and explaining

that he had not intended to convey that impression. He reiterated the need for a discussion between them, stating:

'I certainly do not want to short change you or be unfair. What is due is due and if we are to err, I insist that we err in your favour.'

[12] In late April 2006 Mallach's long-awaited ship arrived when 50% of the shares in Generix was purchased by Aspen Pharmacare Holdings Ltd at a price of R40 million, of which R13.6 million accrued to Mallach. The successful conclusion of this deal was celebrated on Friday, 5 May 2006 in Hirschson's boardroom. On the same date

Mallach deposited an amount of R3,33 million into the bank account of Lombard Finance - the same amount mentioned in his earlier letter.⁶

[13] On the following Monday, 8 May, a meeting took place between Hirschson and Mallach, the outcome of which was purportedly recorded

by Hirschson in a letter dated 9 May 2006, reading inter alia as follows:

'I am in receipt of your cheque in the sum of R3 330 000 as part payment of the amount you owe. Lewis⁷ will be auditing all the amounts, together with interest, owed by you. Furthermore, you have stated that you will transfer 15% of your "hold co" which holds its interests in Brimpharm/Generix to me. As explained to me, I understand you have a shareholders'

agreement with Aspen, but this should not affect your holding. Kindly authorize your accountants to attend to the necessary

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documentation. I have spoken to Viv⁸ and he has given me a break down of the company with the various subsidiaries.'

[14] Great reliance was placed on this letter on behalf of the plaintiffs, who maintained that it records the oral agreement concluded by Lombard Finance and Hirschson with Mallach. The authenticity of this letter was heavily disputed on behalf of the defendant. Among the reasons for this scepticism was the fact that, unlike the other letters referred to above, it was not found among Mallach's

papers after his death. I shall revert to this aspect later in this

judgment.

[15] Some months after Mallach's death, in March 2007, Hirschson caused Gottschalk to prepare the schedule foreshadowed in the letter of 9 May and showing the monies owing to Lombard Finance by Mallach's

estate. In calculating the amount owing, Gottschalk used the prime overdraft rate from time to time. Furthermore, interest was calculated on a daily basis with the interest compounded. It showed total capital advances of R4 321 200, capital repayments of R4 021 200 and an outstanding balance, including accrued interest as at 26 March 2007, of R3 030 298.

[16] This schedule was forwarded by Gottschalk to Phelps in his capacity as co-executor in Mallach's estate and during June 2007 the two of them met to discuss the matter as well as various other transactions in which Hirschson and Mallach had been involved.

Subsequently Phelps wrote that they were 'at odds concerning 2 payments reflected on your schedule of R100 000 each', but that the main the argument revolves around the interest calculation included in the schedule:

'...I can find no reference in any correspondence or calculations set out by the parties in the correspondence agreeing to the principle of interest being due in relation to any of these loans. It appears to me that as at August 2005 there was agreement that [Hirschson] was due an amount of R3.3m which he could elect either to convert into an indirect holding of 15% in the Pharmaceutical holdco, alternatively be repaid in cash. This repayment was effected as [Hirschson] apparently did not take up the share offer on the 5th May 2006.'

[17] In order to try and resolve this stalemate, a meeting was held at Hirschson's office on 16 November 2007, attended by the defendant's attorney, Mr Brian Kahn, Hirschson and Gottschalk. Hirschson reiterated his claim against the estate for payment of approximately R3 million, together with 'a claim for shares in Generix/Aspen', but no agreement could be reached regarding these claims during the months that followed.

In the result summons was issued against the estate during August 2008. In the particulars of claim the loan claim (Claim A) was based on the schedule prepared by Gottschalk, claiming R3 030 298,60 (incorrectly pleaded as R3 330 298,60), together with further interest at prime rate as from 27 March 2007. In terms of Claim B, an order was claimed directing the defendants to transfer '15% of the shares in [Generix] to the first plaintiff, alternatively the second plaintiff, together with dividends received in respect of such shares.

Claim A

- [18] With regard to the loan claim, there is a large degree of common ground regarding the various payments and repayments. It was also common cause by the time it came to argument that the loans in question formed part of a series of loans that had been advanced to Mallach by Lombard Finance and not by Hirschson. The claim essentially revolves around three disputed issues: (a) the defendant's liability for repayment of an amount of R160 000 paid to Mallach on or about 27 August 2001;
- (b) the last three payments of R100 000 each, made on 16 January 2003, 28 January 2003 and 21 February 2003 respectively; and (c) the question of interest on the various loans.

Ad (a):

- [19] The amount of R160 000 was included in the original schedule furnished by Hirschson to Mallach.⁹ In his undated reply¹⁰ Mallach disputed four of the amounts in the schedule, one of which was this one.

He explained why he did so and Hirschson appears to have accepted his explanation in respect of the other three amounts. There is nothing on record to indicate that Hirschson at any stage contested Mallach's explanation with regard to this amount, namely that the amount had been given to him by Hirschson in order to buy travellers' cheques for the latter. Hirschson never subsequently made any claim for repayment of the amount, alternatively delivery of the travellers' cheques. What is more, Hirschson did not at any stage include it as part of the plaintiffs' claims - not even in the amended particulars of claim delivered on 16 February 2012. To the extent that it has now been included in the latest schedules prepared by the plaintiffs' expert forensic account, Mr Greenbaum, this appears to be an afterthought on the part of Hirschson in an attempt to resurrect this part of the claim.

- [20] On the probabilities, I find it inconceivable that Hirschson would have given Mallach R160 000 in order to obtain travellers'

cheques at a discount and that he would never have mentioned it afterwards if he had not in fact received the cheques, as he now

claims. To the extent that there may be an onus on the defendant to establish her defence in respect of this part of the claim, I find that such onus has been discharged.

- [21] There is in any event a further irrefutable defence against this part of the claim, namely prescription. The payment of R160 000 manifestly fell into a different category from the other loans. It was made as long ago as August 2001. In the absence of any agreement to the contrary, the debt created thereby would have become due within a reasonable time, which by all accounts has long elapsed. No interruption of prescription could have occurred in view of the fact that this amount has not at any stage formed part of the plaintiffs claim as pleaded. The fact that this claim has become prescribed is destructive of the plaintiffs' somewhat casual application for amendment during the course of reply. The amount of R160 000 accordingly falls to be excluded from the calculation of any amount due to the plaintiffs.

Ad (b):

[22] With regard to the three payments of R100 000 each, Hirschson testified that they were also loans, falling into the same category

as all the other advances. His evidence in this regard is corroborated in all three cases with reference to the relevant cheques and bank statements. The only ground for disputing these amounts is based on the absence of these amounts from the first schedule prepared by Hirschson's personal assistant. However, that schedule does not purport to be a model of accounting accuracy,

as Mallach has demonstrated in his undated reply referred to above. I am accordingly satisfied on a balance of probabilities that the three amounts were further loans, advanced on the same basis as the other loans. This means that the total amount of the loans advanced to Mallach amounted to R3.63m, of which R3.3m had been repaid.

[23] The focus accordingly shifts to the question whether or not the loans bore interest, as claimed by the plaintiffs. However, for reasons that will become apparent later, I prefer to deal with this part of the claim after a discussion of Claim B.

Claim B

[24] As mentioned earlier, the defendant vigorously assailed the authenticity of the letter of 9 May 2006, which purports to confirm

the oral agreement relied on by the plaintiffs. Bearing in mind the caution required when considering evidence in support of a claim where one of the parties to the alleged transaction is deceased,¹¹ the attack is by no means without merit. In the view that I take of the matter, however, it is not necessary to make any definite finding regarding the authenticity of the letter. The fact of the matter is that the letter, upon a proper interpretation thereof, does not confirm what the plaintiffs are claiming herein, namely 15% of the value of the shares in Generix: in the letter of 9 May 2006, Hirschson wrote that Mallach had undertaken to transfer 15% of his 'hold co' to Hirschson. This is in line with previous ex-changes between the parties on this topic. Thus, in his letter of 23 August 2005, Mallach spelt out quite unambiguously that 'your share will be a share of my share, i.e. a share of "holdco" V Mallach's own shareholding in Generix (apparently held through a holding company) was valued by his co-shareholders at between R20m and R34m. Thus -

'On the basis that you have "invested" R3.3m, this would equate to approximately 10% of my shares (on Mehboob's value) and approximately 16% on Viv's valuation. May I suggest that we agree on, say 15%, i.e. I will give you 15% of "holdco".'

[25] Converting the claim into Rands and cents, the total value of the Generix shares at the time of the sale agreement amounted to R80m, of which Mallach beneficially 'owned' 34%, worth R27.2m at that date.

What Mallach was offering was 15% of R27.2m, i.e. R4.08m. What the plaintiffs are claiming herein, however, is 15% of R80m, i.e. R12m. I conclude that the plaintiffs have not discharged the onus of proving on a balance of probabilities that there was ever consensus between the parties regarding the claim in its present form.

[26] In any event, the general probabilities also do not support the plaintiffs' version. First, it is clear that Mallach could not afford to pay Hirschson the amount claimed - not at the time of the sale, nor at the date of his death. Secondly, it is highly improbable that Mallach would have denuded his estate - to the detriment of members of his immediate family who were dependent on his support - in order to bestow a benefit on Hirschson far in excess of the actual financial contribution made by the latter. Thirdly, it is even more improbable that Mallach would have done so at a stage after he had been diagnosed with a serious form of lymphoma and while he was in the process of placing his earthly affairs in order. In this context, it is significant to note from the liquidation and distribution account prepared in Mallach's estate that his will was executed on 10 May 2006, i.e. a day after the disputed letter to him from Hirschson. It appears from the account that Mallach's remaining 17% shareholding in Generix, valued at R14 million, formed the major asset in his estate, which was bequeathed in its entirety to his widow. This behaviour is entirely inconsistent with a scenario where a binding agreement had been concluded two days earlier between Hirschson and Mallach for the transfer of the bulk of those same shares to Hirschson.

[27] For these reasons I am not persuaded that any enforceable agreement regarding transfer of a portion of Mallach's shareholding in Generix to Hirschson had been reached at any stage. Claim B accordingly falls to be dismissed.

Interest

[28] Reverting to the question of interest on the various loans, I agree with counsel for the defendant that this part of the claim is intimately interwoven with the transfer of shares claim. As counsel put it colloquially, what the parties had contemplated was a scenario where Hirschson would end up being entitled to either 'the money or the box', but not both, as the plaintiffs are now claiming. The irony, of course, is that on the defendant's argument herein, the plaintiffs will end up with neither money nor box. Clearly this is not what was contemplated between the parties and would produce a patently unfair result. Judging by the content of Mallach's letters quoted above, I am satisfied that this is not a result that he would have wanted. After all, it was Mallach who

wrote: 'I certainly do not want to short change you or be unfair. What is due is due and if we are to err, I insist that we err in your favour.'¹²

[29] The fact that no final agreement regarding a transfer of shares in Generix (or their value) was reached between the parties during Mallach's lifetime therefore makes the plaintiffs' claim for interest on the various loans all the more compelling.

[30] In my view, the evidence supports such a claim. In this regard, Hirschson testified that when the first loan of R600 000 was advanced to Mallach's company in 2000, he (Hirschson) regarded it as a short-term loan and did not stipulate for interest to be payable. However, it took more than a year for this loan to be repaid and in the interim, on 6 September 2001, Mallach approached Hirschson for a further loan of R1 million. It became clear to the parties at that stage that the loans to Mallach would not be short term loans as had been anticipated. They realised that the repayment of the loans was dependent upon Mallach realising benefits from his Generix investment. It was not clear at that time when the Generix investment would come to fruition. (As matters turned out it was only some five years later that Mallach realised any benefit from the Generix investment and was able to make a repayment to Lombard.) It was accordingly during September 2001, according to Hirschson, that he agreed with Mallach that the loans would bear interest.

[31] I am satisfied that Hirschson's evidence in this regard can be accepted. First, it is corroborated by the correspondence exchanged between them. Secondly, it would have been commercially unrealistic for two men of business, albeit ones who had become close friends, to enter into a long-term loan agreement of indefinite duration without agreeing on interest. This is particularly so, given that Lombard Finance is an investment and property development company that would in-evitably have had to forgo investment opportunities as a result of having a substantial portion of its capital tied up in the loans to Mallach. In these circumstances, I am satisfied that it was indeed necessary, in order to give business efficacy to the agreement, that there should be some quid pro quo for the loans, whether in the form of interest or in the form of an interest in Generix. However, I am not persuaded that the arrangement with regard to interest also applied to the first loan of R600 000.

[32] Counsel for the defendant argued that the claim for interest should be dismissed, inter alia, because no interest on the Mallach loans is reflected in the financial statements of Lombard Finance that have been prepared by

Moore Rowland for the relevant financial years. Although this argument is not without merit, I am satisfied that it should not be accepted; first, because the financial statements are in draft form and are yet to be finalised. Counsel argued that an adverse inference should be drawn against the plaintiffs in view of their failure to call Gottschalk of that firm as a witness. In my view, however, the argument loses much of its force in the light of the fact that it was Gottschalk himself who had earlier prepared the schedule of amounts loaned, together with interest thereon calculated up to 26 March 2007. He recorded in that schedule the basis on which interest had been calculated. The subsequent omission from the draft financial statements is an unexplained discrepancy which does not undo Hirschson's evidence regarding interest. Where various inferences are possible for the omission of interest from the draft financial statements, the inference that no interest was payable on the loans is not the most probable one.

[33] As for the rate of interest to be charged, the plaintiffs claim that this should be at the prevailing prime rate of interest charged by Absa Bank, calculated on the same basis as was done by Absa, who were the bankers of both of them at that stage. (In fact, both Hirschson

and Mallach shared the same private banker at Absa - a certain Mr Viola.) In my view, the inference is irresistible that, had the the parties been asked by an officious bystander at what rate interest on the loans was to be calculated, they would spontaneously have responded that it would be on the same basis and at the same rate as the interest charged by their bank from time to time.

[34] To summarise, with regard to Claim AI find -

- (a) that the amount of R160 000 should be excluded from the claim;
- (b) that the amount of R300 000 (i.e. three amounts of R100 000 each) should be included;
- (c) that interest at Absa's prime rate should be added to the amounts of the loans, excluding the first loan of R600 000.

Various schedules prepared on behalf of the plaintiffs were handed in and debated during the course of the trial based on different

permutations. On the scenario as found by me, the total amount outstanding as at 11 February 2013 is R5 755 187,72,13 which is the amount to which the first plaintiff is entitled.

Costs

[35] The plaintiffs brought two claims before court (disregarding for present purposes the third claim that had been abandoned). They succeeded (partially) on one of those, whereas the defendant successfully defended the other claim. Counsel agreed that in these circumstances an apportionment of the costs can and should be made. Taking a robust view of the matter, it would be fair, in my view, to order the defendant to pay one-half of the plaintiffs' costs of suit herein.

[36] A second aspect regarding costs relates to the costs of an earlier application to compel further discovery brought by the defendant,

which costs had been reserved for later determination. It was conceded on behalf of the plaintiffs that the defendant is entitled

to those costs.

Order

[37] For the reasons stated above, judgment is granted in favour of the first plaintiff as follows:

- (a) Payment of R5 755 187,72;
- (b) Interest on the aforesaid amount at the prime rate of ABSA Bank Limited prevailing from time to time, which interest shall be

compounded daily and capitalized from 12 February 2013 to date of payment;

- (c) One-half of the first plaintiffs costs of suit herein, including the costs of two counsel and the qualifying fees of Mr Hilton Greenbaum; provided that the first and second plaintiffs jointly and severally are liable to the defendant for the costs of the application to compel further discovery.

B M GRIESEL

Judge of the High Court

1Subsequently converted into a close corporation under the same name. Hirschson was at all material times the sole director of the company and is presently the sole member of the CC.

2A co-executor, Mr Steven Phelps, had originally been joined as the second defendant herein, but he has in the meantime also passed away and the defendant is presently the sole executrix in the estate.

3Mr Mehboob Adam, one of Mallach's co-shareholders in Generix.

4Hirschson's personal assistant.

5Referring to Mr Harry Sacks of Sacks Butchery, one of the joint ventures in which Hirschson and Mallach were involved.

6Para

[7] above.

7Mr Lewis Gottschalk of Moores Rowland International, Lombard Finance's accounts.

8Mr Vivian Hansen, another co-shareholder in Generix.

9See para [6] above.

10Para

[7] above.

11" See eg Low v Consortium Consolidated Corporation

[1998] ZASCA 92; 1999

(1) SA 445 (SCA) at 450E-45 IB and the cases referred to therein.

12Para

[11] above.

13As reflected in Exhibit A79.10.

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