

SOUTH AFRICA / JUDGMENT

Real People (Pty) Ltd v Lanissa Traders Holdings (Pty) Ltd (58989/2012) [2015] ZAGPPHC 797 (1 December 2015)

[2015] ZAGPPHC 797

COURT

North Gauteng High Court, Pretoria

BEFORE

Msimeki

CASE / FILE NUMBER

58989/2012

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)

Case

number: 58989/2012

DATE:

1/12/2015

NOT

REPORTABLE

NOT OF

INTEREST TO OTHER JUDGES

REVISED

In the matter between:

REAL

PEOPLE (PTY)

LTD APPLICANT

And

LANISSA TRADERS

HOLDINGS (PTY)

LTD RESPONDENT

t/a MONEY MENTOR

FINANCE

(REG. NO.

1999/0717501/070

JUDGMENT

MSIMEKI J

- [1] In an action which started by way of motion proceedings, plaintiff claims payment of R147 127.00 which is the balance after R40 000.00 was paid by defendant; interest on the amount claimed at the rate of 15.5% per annum from date of demand being 01 August 2012 to date of final payment and costs of suit on an attorney and own client scale. The action is defended.

BRIEF**FACTS**

- [2] The action, as alluded to in paragraph 1 above started as an application. The application was referred to trial by my sister Molopa-Sethosa J. Plaintiff's claim is based on a written acknowledgement of debt. Plaintiff and defendant contemplated starting a joint venture together. Defendant assisted contractors who obtained government contracts without financial means to do the work. Plaintiff, if the joint venture eventuated, would provide funding for the work of the joint venture. Pilot projects were to be embarked upon and, if successful, the parties would then conclude their main agreement. Contractors were identified.
- [3] The first project involved the first contractor, Sweet Dreams Trading. Before the contractor could begin with the work, an insurance policy had to be taken up with an insurance company. The Sweet Dreams project required payment of a premium in an amount of R188 127.00. This amount was paid by plaintiff which referred to it as a loan which had to be repaid by defendant.
- [4] Defendant contends that it is not liable to repay the amount to plaintiff. This, as it contends, because the amount was not meant to be refunded. Defendant signed an acknowledgement of debt (AOD) in favour of the plaintiff relating to the amount, the subject matter in this action. It is defendant's contention that the acknowledgement of debt has to be rectified because it does not reflect the true intention of the parties. Defendant, in the alternative, contends that the AOD is a simulated transaction and does not give the true intention of the parties.
- [5] In the further alternative, defendant contends that plaintiff misrepresented to it, stating that the AOD would be handled as a source document and that the amount would not have to be repaid by it. Defendant specifically contends that plaintiff, at the time, had the intention or later formed the intention to claim the amount stated in the AOD.

- [6] Lastly, defendant contends that the amount of R40 000.00 which was paid to plaintiff was paid by mistake or in error. Defendant also instituted a counterclaim against plaintiff for damages it alleges it is entitled to arising from the unlawful cancellation of the agreement by plaintiff and the repayment of the R40 000.00. Plaintiff is defending the defendant's counterclaim.
- [7] Adv. JH Wildenboer (Mr. Wildenboer) and Adv. Van Zyl (Mr Van Zyl) represented plaintiff and defendant respectively when the matter was argued.
- [8] Plaintiff's reply to defendant's plea was not part of the pleadings bundle while defendant had a supplementary discovery affidavit which also had to be part of the pleadings. Mr Wildenboer and Mr Van Zyl did not object to the documents being handed up.
- [9] The parties agreed that defendant had the onus to discharge or duty to begin.
- [10] Defendant then called Mr Christo I Clifford (Clifford), defendant's managing director, to prove the defendants case. No further witnesses were called by or on behalf of defendant.

Mr Bruce Aubrey Schenk (Schenk), plaintiff's executive responsible for developing the relationship with defendant and Mr Deon Van Niekerk (Van Niekerk), Project Manager of plaintiff testified on behalf of plaintiff.

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DEFENCE CASE

- [11] CHRISTO IAN CLIFFORD (CLIFFORD), defendant's CEO, testified. His evidence, briefly, is as follows:

Defendant assists contractors who obtain government contracts without financial muscle. These are contractors who build RDP houses, schools, hospitals and other government awarded projects. Defendant buys material for the contractors and mentors them. Defendant, according to Clifford, has 279 outlets across the country. They even had the honour of addressing Parliament in 2012.

- [12] Defendant started its work in KwaZulu Natal (KZN) and then moved to Pretoria. An Ex Stockbroker, Mr Andre Coetzee (Coetzee), introduced plaintiff to defendant. The idea was that plaintiff, if the envisaged plan became successful, would invest in the defendant.
- [13] The introductory meeting was attended by Coetzee, Mr Jeff Nel (Nel) who represented a group of suppliers of materials called Lliad which is now called Bruco, Neil, one of plaintiff's directors, Mr Bruce Schenk (Schenk) another plaintiff's director and the witness . A mutual non-disclosure and non-circumvention agreement was signed by plaintiff in East London while defendant signed in Pretoria on the 03 August 2010. The two agreements the parties signed, according to the witnesses, were co-existent.

- [14] Plaintiff presented them with a term sheet which appears on page 13 of the trial bundle with the heading: “MONEY MENTOR FINANCE/ REAL PEOPLE TRANSACTION PROPOSAL FOR DISCUSSION.” The document, annexure “MM4”, is called term sheet because it contains a summary of the terms and conditions.
- [15] The business relationship would be for the parties’ mutual benefit. Defendant, according to the witness, needed a business relationship with a funder. The parties would establish what they call “a special purpose vehicle.” There would be equity sharing by plaintiff and defendant. Plaintiff would bring in money and defendant would contribute market skills and technology. Shareholding would be 51% for plaintiff and 49% for defendant. The witness testified that plaintiff would bring in R5m. Plaintiff, according to the witness, needed to learn more about defendant before bringing the money in.
- [16] Clause 6.2 of annexure “MM4” on page 13 of the trial bundle provides that:
- “6.2 The detail terms of the pilot will be agreed between the parties.”*

This simply and clearly shows that no terms of the pilot were, at the time, agreed upon. Clause 7 deals with the approval process. There would be approval by plaintiff’s board. That would be followed by due diligence process which would be followed by the execution of legal agreements. The witness specifically testified that the terms and conditions were not agreed to between the parties. This confirms the provisions of clause 6.2 referred to above.

- [17] Clifford testified that the parties agreed that they, for a start, would concentrate on one project which would be funded. The insurance premium which the contractor had to pay was paid by plaintiff. The contractor did not have the money. Plaintiff, before paying the money, called upon defendant to sign the AOD which would be a temporary document to be replaced once the terms and conditions were agreed upon by the parties. The document, according to the witness, would justify the release of the money in plaintiff accounting system. Plaintiff committed R5m for the funding of the project and also asked for a list of other projects which required funding.
- [18] The witness referred the court to annexure “MM5” at page 17 of the trial bundle which mentions four names of contractors. These are Sweet Dreams Trading, Allegro Contractors, ATM Construction and FEA Civil with approximately 100 contractors.
- [19] The witness testified that the main contract called “the big contract” would follow once the terms and conditions were agreed upon. Only the Sweet Dreams pilot project commenced. The witness, shortly after saying this, and when asked as to which other projects had commenced, answered that the ATM and Allegro projects also commenced. This of course contradicts the statement before this because, funding for the Sweet Dreams project, according to him, would be covered by the R5m that plaintiff committed to the project. There would be profit in the projects which were not yet realised. Such profit would be shared on the basis of 51% and 49% .

- [20] Asked what clause 6 of the so called term sheet meant where it disclosed in clause 6.2 that no terms and conditions were not agreed on he answered that the terms and conditions were not yet written down, as they were agreed on orally. He testified that plaintiff's board approved the term sheet which would become the contract. However, even if that were so the term sheet was not yet an agreement. It remained the transaction proposal for discussion.
- [21] Asked what he understood by term sheet he answered that it meant immediate commencement of the pilot project together with the diligence process. Asked what he meant when he said that the AOD was a temporary document, he answered that the document was needed as a source document to enable plaintiff to release the money to pay for the insurance. The document, according to him, would be destroyed or reversed. It is also difficult to understand what this means. Defendant, according to him, would have received the money which it would not receive. How the terms and conditions, as he earlier testified, would replace the AOD is also not understandable.
- [22] He testified that plaintiff paid Eagle Watch financial Services an amount of R188 127.00 evidenced by their quotation (tax invoice) appearing on page 37 of the trial bundle. The payment was meant to cover Sweet Dreams in the project. The email on pages 27 and 28 of the trial bundle refers to the AOD which was signed, and appears on page 1 of the trial bundle. His testimony was that he signed the AOD in good faith knowing that they had the contract in place.
- [23] This, in my view, does not adequately explain why the AOD, which is not ambiguous, was signed notwithstanding what it says in so many words. Again asked as to who had to pay the premium he, this time, answered that the plaintiff had to pay the premium. This answer loses sight of the fact that his first answer, in respect of the same question, had been that plaintiff and defendant would pay the premium.
- [24] Referred to the email on page 64 of the trial bundle, he testified that the email relates to the due diligence process where they had to answer a questionnaire and give plaintiff permission to do full background check on a company called Krol. A due diligence meeting was attended at Plaintiff's attorneys' office. Coetzee was with him. He answered the questionnaire honestly without furnishing false information.
- [25] Asked if he still had something to say he then disclosed his health condition; that there was an issue between him and SARS and that the defendant had cases with third parties in court. Schenk, thereafter, contacted him telling him that plaintiff was no longer proceeding with the contract which it was terminating. This, according to Schenk, had been caused by his medical condition which was not favourable as he had been informed that he was not going to leave beyond 2 years.

He was referred to page 38 of the trial bundle and he testified that that was an email from Van Niekerk which communicated the termination of the main agreement. The email states that there initially was a non-disclosure which was followed by a subsequent disclosure. The email speaks of termination of the “proposed” deal implying that no agreement had been concluded at the time. This seems to be in line with the transaction proposal for discussion which is annexure “MM4” on page 13 of the trial bundle.

- [26] He testified that they did not commence with two projects one of which was F & A Civils. The pilot projects, after they were told of the termination, could not take off as there was no funding. The due diligence and his medical condition accounted for the termination, because doctors had informed him that they were not giving him much time to live. He had very serious diabetes.
- [27] Defendant, according to him, picked up huge reputation damage in the market place. It had to immediately get an alternative funder. A company bought 30% of its shares but the four pilot projects were lost. Annexure “MM6” of the trial bundle shows defendant’s cash flow as envisaged. His premium for the life policy he had with Keyman Insurance was R26 000.00 per month. Asked what the reason for not funding the projects was, he answered that none was given. This cannot be correct as his earlier answer was that the agreement was terminated because of his medical condition and the due diligence process.
- [28] Defendant, according to him, suffered damages in that it lost a total of R1 860 820.20 based on 7½% profit margin which consists of
1. 5% profit on materials.
 2. 2 ½% management fee.

Annexure “MM12” is a document on page 34 of the trial bundle evidencing how defendant calculated the loss. This again is based on the 49 and 51 percentages. The loss resulted from the fact that defendant never had the opportunity to realise the project. He testified that the defendant, in error, paid an amount of R40 000.00 to plaintiff and attributed this to large work load and several meetings that he had to attend in search of new investors. The reason proffered for the error does not seem convincing because defendant, on his own version, was not liable to pay plaintiff. It will be remembered that the intention of the parties, according to him, was to use the AOD only as a source document to enable plaintiff to pay the money. Furthermore the money, on his version, was not refundable. How then could he make such a big mistake. The reason is not plausible. It is highly improbable.

- [29] The cross examination got the witness to concede that the so called term sheet was but a proposal document for discussion and not a final agreement. Referred to annexure “MM4” and told that stage 7.4 which relates to execution of legal agreements was never reached he answered that the stage was reached because clause 7.3 which deals with due diligence was reached. The answer loses sight of the fact that due diligence, even on his own version, was not a written agreement. Indeed, no written agreement saw the light of day.

- [30] The witness ultimately conceded that the main agreement was not concluded. There was no way the execution of legal agreement could take place if the parties could not even go beyond the due diligence stage. He, in fact, conceded that due diligence, pertained to investigation prior to the conclusion of the legal agreements. He could not recall the sequence whether he disclosed that he was terminally ill at due diligence meeting or thereafter. Again this is an interesting answer because he, in his evidence in chief, testified that the disclosure of his terminal illness was done at the due diligence meeting.
- [31] He regarded his medical condition relevant. He was the main man on the side of the defendant regarding the business relationship and as the key man he was insured for R50 000 000.00. He was not aware of the existence off a document which discloses that he was unhappy with the cancellation.
- [32] His testimony was that the email of 7 June 2010 on page 38 of the trial bundle is his response to plaintiff's email which communicated the cancellation to defendout. Informed that his email never indicated that plaintiff's conduct had wronged him he answered that the email indicates his concern. The answer does not help defendant. Asked when the pilot projects would commence he answered that the pilot projects would commence when the R5m was made available as agreed. This simply means that the pilot projects did not commence because the R5m was never made available.
- [33] He was not sure if ATM Construction and Allegro Contractors had paid their premiums. This is again strange given the fact that they were first going to concentrate on Sweet Dreams which had needed to move on. He conceded that the presence of Van Niekerk at their offices made sense because he had been beasy with the due diligence process. Other than the R188 127.00 no money was ever released by plaintiff.
- [34] He conceded that his evidence had been that no terms and conditions had been agreed upon by the parties. He further conceded that he had changed the answer and said that the terms and conditions had not been in writing. He considered the pilot projects to be covered by one agreement and denied that he had testified that the AOD was signed because the terms and conditions were not yet in place. This is an obvious contradiction. According to him, the R5m would be released as soon as an account was opened with the bank although no specific date was set.
- [35] He never, in writing, communicated his dissatisfaction when the money was not released. He also did not register his dissatisfaction when he was not told that the bank account was opened. He did not ask when the bank account would be opened and the money deposited therein. The behaviour is, indeed strange. His evidence was that they and the government required the contractors insurance. His wife and two other brothers were directors of Englewatch Financial Services. Reminded that he had testified that the AOD and the payment of the money had been necessary because the terms and conditions had not been agreed he answered in the affirmative yet he had earlier denied that. He, this time, said that the terms and conditions had not been agreed upon in writing. According to him, if they

were not in writing, no bank account could be opened and no payment could be effected.

- [36] He denied that the terms and conditions were not agreed upon because there was no agreement. He again said that the AOD would be replaced once the terms and conditions were finalised. He agreed that it would have made sense had he demanded that the agreement be reduced to writing. He was not 100% aware of a document in the court file which communicated that an oral agreement had been reached.
- [37] Told that it would have been prudent for him, upon being told to repay the money, to tell Van Niekerk that defendant was not liable, he answered that he decided not to respond. He, however, conceded that he never said that defendant was not liable when they were later asked to pay. He agreed that he repaid R40 000.00 in six instalments between January and October 2011.
- [38] Reminded of the error and pressure of work and told that his version was highly improbable he answered that it was his (counsel's) prerogative. What this means is beyond comprehension. He agreed that the insurance quote was sent to defendant because the contractor was defendant's client and that they had a contractual relationship together.
- [39] He denied that the plaintiff treated the money that it paid as a loan and that that was evidenced by the AOD. He agreed that plaintiff's emails from page 84 to page 88 of the trial bundle refer to "leneng" which means "loan". He further conceded that the AOD specifically states that defendant owes plaintiff the money which it undertakes to repay.
- [40] Asked why he would sign the AOD which says something totally different to his version he answered that the plaintiff and defendant had so agreed and the AOD which they regarded as a source document would be replaced. This sounds a little absurd because the witness had ample time to read the AOD and to query it or refuse to sign it on behalf of defendant if he was unhappy therewith. Asked why the AOD was not referred to defendant's legal team he first came with an irrelevant answer ending up saying that he had not seen the need when the question was repeated.
- [41] He agreed that annexure REP3 on page 38 of index to trial bundle discloses that he and not van Niekerk was the one who raised the issue of the AOD after he was told that the proposed deal was terminated. Asked why he would raise the issue if it meant nothing to him he answered that he had signed in good faith. He recalled that he had been cheated upon being told of the termination. Reminded that he, when called upon to pay, never wrote back and said that defendant was not liable he first gave an irrelevant answer and only answered in the negative when the question was repeated.

- [42] The witness agreed that there is nothing in writing which refers to profit and loss. He testified that the terms and conditions, once finalised and reduced to writing would determine how the R5m would be utilised. The main agreement and the pilot project agreement, according to him, were two separate agreements and the success of the pilot project would lead to the conclusion of the main agreement which would be complex because terms and conditions needed to be finalised.
- [43] He came with a surprising statement when he said that the pilot agreement was a final agreement even though there were conditions which were still to be agreed upon. He conceded that his testimony was that terms and conditions were not agreed upon; were not agreed upon in writing; and that further conditions needed to be added and that the R5m was not a donation as it had to be paid back.
- [44] The witness contradicted himself. He conceded that the main agreement never came into being because the suspensive condition had not been fulfilled. He specifically testified that the three projects would have yielded profit but that R5m had not been considered in their calculation of profit. He further conceded that defendant, three days after it was informed of the cancellation, was in discussion with a party that ultimately purchased 30% equity in the defendant. The defendant closed its case.
- [45] BRUCE AUBREY SCHENK, on behalf of plaintiff, testified that a business relationship was started with defendant with the aim of concluding an agreement along the lines of the term sheet, annexure "MM4", on page 13 of the trial bundle. The document was not a legally binding document but a statement of intent. The due diligence therein referred to failed because of the medical condition of Clifford. Clifford informed him that he was terminally ill and only had less than 2years to live. Plaintiff, according to him, dependend on Clifford as defendant was a young company. Shortly after the disclosure a decision not to proceed and clinch the deal with defendant was taken as it would have been unwise to conclude the agreement. Clifford was terminally ill and the business relationship was terminated.
- [46] The pilot project was a joint venture which would run concurrently with the diligence process, which would enable plaintiff to understand defendant's business model and its inherent risks. No material terms relative to the pilot agreement were agreed upon between the parties save for the identification of the individual projects forming the subject matter of the project. The plaintiff had not formulated the terms and conditions of the agreement when the pilot project was terminated. Clifford was duly informed. The agreement, had it come into being, would have covered aspects such as the amount involved; the subject matter; profit sharing agreements; interest relating to funding in the amount of R5m; repayment terms; the governing structure of the joint venture; business rules relating to the granting of credit; method of managing cash disbursement; services to be rendered by each party and the price to be paid for the services.

- [47] He testified that plaintiff's claim is based on the AOD. He agreed with Clifford that in the absence of a pilot agreement plaintiff would not be in a position to make any payment which Clifford needed to proceed with the project. Clifford was under cash flow pressure. It was agreed that plaintiff would lend defendant the amount that was needed and he immediately instructed his legal department to draw up the AOD in respect of the loan.
- [48] Defendant wished to proceed with the Sweet Dreams pilot project and money was required to pay for the contractors insurance. The AOD evidences that the loan agreement was reached. He and Clifford represented plaintiff and defendant respectively. He was in Rosebank when he signed while Clifford was in Pretoria. Referred to annexure REP 3, on page on 38 of the trial bundle, he explained that that was the email from defendant to him dated 7 June 2010 at 07:14 am. He understood it to convey to him that the defendant had wanted to arrange repayment terms regarding the loan referred to in the AOD. It was agreed that the relationship had to end amicably. Six payments were made by defendant to plaintiff amounting to R40 000.00. He did not agree that the AOD needed any retification as its language is very simple and clear.
- [49] Cross examined he explained the business that plaintiff does. He agreed that plaintiff's business included funding and explained that the plaintiff had been in business for 10 years. Before lending money, plaintiff assessed and evaluated the request. If satisfied plaintiff assisted. There was no written application in the present case. He agreed that plaintiff's board approved the term sheet and explained that a pilot project was a process which involved stages. The process, according to him, started.
- [50] The email on page 30 is from Van Niekerk to defendant specifying the stages that had to be gone through before the pilot project started. Three stages remained after the due diligence process and these were: the setting up of the special purpose vehicle; the creation of the bank account and the starting of the pilot project. The email clearly tells us when the pilot project starts. Clifford disclosed his medical condition late and that resulted in the termination of the process. The due diligence process was still in progress when Clifford disclosed the status of his health.
- [51] He did not want to speculate when asked whether the insurance premium would have been part of the pilot project had the pilot project succeeded. His explanation was that the insurance premium related to the contractual relationship which plaintiff and defendant had. He testified that it was not correct that the insurance premium was part of the pilot project.
- [52] Informed that the aspect had been admitted in the plaintiff's reply to defendant's plea he answered that, that had to be read and understood in its proper context as it needed some clarification. He then explained that insurance cover was a requirement in business such as the business under discussion and denied that payment of the insurance premium was funding of the pilot project. He stressed that the relationship that existed between defendant and plaintiff at the time was contractual. There was no link between the AOD and the

terminal illness of Clifford. He emphatically denied that the joint venture had commenced. He testified that plaintiff and defendant proceeded jointly in the process and explained that it appeared that plaintiff and defendant understood pilot project differently. The insurance premium never became part of the R5m because the parties never progressed up to the stage where the R5m changed hands.

- [53] Defendant, according to him, would not have been expected to repay the insurance premium had the pilot project succeeded. He reiterated that only a loan was created when defendant was assisted with the payment of the insurance premium. Told that the AOD had no repayment schedule he answered that repayment in terms of clause 3 of the AOD was on demand.
- [54] Indeed defendant got the demand and started repaying the money. R40 000.00 was repaid in approximately six instalments. Asked why the interest was 0% per annum in terms of the AOD his reply was that that was because of the long term business relationship that was envisaged by the parties. The explanation, in my view makes sense. Defendant had to pay the insurance premium not Plaintiff.
- [55] Told that the AOD was to be used as a source document he answered that a source document in plaintiff's books which would have explained why the money was paid out was the tax invoice or quotation from Eagle Watch Financial services appearing on page
37. This is indeed so. That plaintiff had no business relationship with Eagle Watch is common cause. He never foresaw that defendant would suffer a loss if the pilot project was cancelled. The term sheet, according him, was not a business plan which is a lot more. The contractor and the amount were identified and R5m was earmarked for the pilot project.
- [56] The witness denied that the insurance premium was part of funding. The involvement of van Niekerk regarding defendant's client related to due diligence process. He denied that the AOD did not reflect the intention of the parties and explained that the AOD was unambiguous and conveys the parties' true intention. Defendant, duly represented, signed it well understanding and knowing what it says and signed it because of that correct understanding. He denied emphatically that the AOD was a simulated agreement which needed any rectification as the parties' intention is clearly contained and set out therein. There was, according to him, no misrepresentation on the part of plaintiff which would have caused defendant to acknowledge its indebtedness to plaintiff in the amount of R188 127.00 and to undertake to repay same to plaintiff on demand.
- [57] The last witness to testify on behalf of plaintiff was DEON VAN NIEKERK who was employed by plaintiff from 2005 to 2013 as project manager. His testimony is that they engaged defendant in business discussions from 2009 to 2010. He attended the meetings that dealt with the establishment of a business relationship between plaintiff and defendant. Clifford, for defendant, explained that he was under pressure as a contractor, we now know is Sweet Dreams, had needed money for insurance premium which defendant at the time, did not have.

- [58] Defendant, represented by Clifford, needed financial assistance and plaintiff was not willing to part with such money without a proper agreement, in this case, in the form of an AOD which was put in place to avoid plaintiff losing R188 127.00 which it would loan to defendant. Shown annexure “REP3” on page 38 of the trial bundle, he explained that that was an e-mail from defendant to Schenk. They discussed the defendant’s manner of repaying the money. Clifford ultimately indicated that defendant would pay the amount it would afford, as at the time, there was no money. An amount of R40 000.00 was repaid between January and October. He, for the first time, became aware of defendant’s defence in court. The AOD clearly reveals that defendant was liable to repay the money.
- [59] They were given a quotation when they asked for a source document. Under cross examination he testified that the due diligence process caused him to use defendant’s office. Nether the joint venture nor the pilot project agreement existed at the time as the pilot project did not commence. The R5m was up for discussion but the pilot project agreement was not in place and the insurance premium was not part of the R5m. Clifford informed him that the contractor was his client The AOD, according to him, was never a source document as the insurance quote to be used as a source document had already been furnished to plaintiff. Plaintiff would be at risk hence the money had to be repaid. It was standard practice for plaintiff to demand an AOD before releasing money.
- [60] The AOD clearly shows that the money was loaned to defendant. Defendant’s defence that he heard about in court was that the money, due to being busy, had been paid in error. That the AOD was a source document and that it was not evincing the parties’ intention regarding the money, according to him, was not correct. Page 30 of the trial bundle is the e-mail from plaintiff enumerating the stages that had to be gone through. He testified that there was no pilot project agreement between the parties.
- [61] Plaintiff too closed its case and both counsel promised to prepare heads of argument for which I thank them.
- [62] Defendant instituted counterclaims based on breach of contract and enrichment.

Defendant in its plea, and argument on its behalf, implored the court to dismiss the plaintiff’s claim. Plaintiff defended the defendant’s counterclaims and prayed that they too be dismissed.

[63] COMMON CAUSE FACTS

These are that:

1. The AOD has been signed by the plaintiff and defendant.
2. Both parties signed the AOD on the same day which is 21 May 2010.
3. The emails sent by Plaintiff to defendant appearing on pages 84 to 88 of the trial bundle, have the word “lening” which means “Loan”

4. Defendant never disputed liability in writing or otherwise notwithstanding the fact that it in various emails, was called upon to repay the R147 127.00 representing the balance after it repaid the R40 000.00.
5. The R40 000.00 was repaid by defendant to plaintiff in six (6) instalments.
6. Defendant, after termination of the agreement by the plaintiff concluded an agreement with a third party in terms of which it sold 30% of its equity to the third party.
7. Plaintiff paid EagleWatch Financial Services (EagleWatch) an amount of R188 127.00 meant to be the insurance premium which the contractor, Sweet Dreams Trading (Sweet Dreams), was supposed to have paid.
8. The National Credit Act, 34 of 2005 does not find application in this matter.
9. “the outstanding balance (and other amounts due to the creditor) shall be repaid on demand by the creditor.” (clause 3 of the AOD)
10. “In the event that the debtor fails to repay such amount, “the amount” shall attract interest at a rate of 0% per annum.” in other words the amount would not attract payment of interest. (Clause 3 of the AOD)
11. “The debtor renounces the benefits of the legal exceptions of revision of accounts, no value received, error calculi (error in calculation) , non numerate pecunie (money not paid) and non causa debiti (money not owed) the meaning of which the debtor declares it understands.” (Clause 4 of the AOD)
12. “the AOD constitutes the entire contract between the parties relative to the subject matter hereof and supersedes all representations, warranties agreements or undertakings previously made relative to such subject matter, and no such representations, warranties, agreements or undertakings shall be of force and effect unless contained herein.” (Clause 6 of the AOD)

“No variation of any terms and conditions of the AOD will be binding on the parties unless committed to writing and signed by then (sic) respectively. “

[64] THE ISSUES

The issues to be determined are whether:

1. The AOD was validity and properly concluded by the parties.
2. The AOD is a simulated transaction.
3. The AOD correctly reflects the intention of the parties.
4. The AOD was the result of misrepresentation on the part of plaintiff.

5. Defendant paid plaintiff the amount of R40 000.00 mistakenly or in error and whether plaintiff, as a result, was enriched at the expense of defendant and finally whether through the employment of *condictio indebiti* remedy defendant can successfully reclaim the R40 000.00 from plaintiff.
6. Defendant has made out a case to be entitled to damages allegedly suffered by him when the agreement was cancelled.

[65] THE LAW

NIENABER JA, in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Others* 2003 (1) SA 11 at 14I-J and 15A-D, deals with the technique which should be applied where a court is faced with "two irreconcilable versions" and also in "a number of peripheral areas of dispute which only have a bearing on the probabilities". He summarises the technique as follows:

"[5] ... 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 findings 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 the opportunities he had to experience or observe the event in question and (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."

[66] Going back to the facts of the case, the following is noteworthy.

1. In the main, Clifford testified that funding would come from the R5m which plaintiff would provide.
2. Defendant would monitor the systems while
3. Profit would be shared on a 51/49% basis.

The alleged terms, according to Mr Wildenboer, were not disclosed to any of the plaintiff's witnesses. This is in fact so.

- [67] Clifford contradicted himself. First he testified that the terms of the pilot project agreement were not agreed upon. This he changed and then said that the terms were not agreed upon in writing. His last answer was that the final terms were not agreed upon.
- [68] Clifford produced versions which were tainted by improbabilities. He testified that the AOD does not properly represent the true intention of the parties. The AOD is simply drawn up and easy to follow. Anybody who reads it will immediately, without assistance, understand what it conveys. There is, in my view, no reason why a person reading it will sign it if it does not properly convey the true intention of the parties. The AOD sets out the debt which is an amount of R188 127.00 and it gives the reason for the debt. Clause 2 of the AOD informs us that plaintiff is the creditor while defendant is the debtor.
- [69] The clause, in so many words, discloses that plaintiff disbursed the money and that the disbursed money was lent to defendant. The money is due and payable to plaintiff by defendant. We also know from clause 3 that the money would be repaid on demand. It is not as though the time schedule is unknown. The AOD specifically speaks of "repay" and "demand".
- [70] The AOD was criticised on the basis that it did not disclose when the money was to be repaid. It was, however, difficult for Clifford to explain how he would have signed the AOD which was this clear and also saying the direct opposite of his testimony. To sign a document such as this and still want to be heard to say that the document does not contain the true intention of the parties is simply beyond comprehension. It is absurd and improbable beyond limits.
- [71] Clifford conceded that defendant repaid R40 000.00 of the R188 127.00 that plaintiff loaned to it and disbursed. Six instalments were paid by defendant and they all in all amount to R40 000.00. It was also very difficult for Clifford to explain why the R40 000.00 was repaid when defendant was not liable to pay it. It is also incredible that defendant repaid the money when the AOD had no meaning to it because the document according to Clifford, was simulated. This is highly improbable.
- [72] It is intriguing to note that defendant, in none of the correspondence, complains about misrepresentation, simulation or that the document was/is not a reflection of the true intention of the parties. Defendant's version is simply improbable and incredible.
- [73] How Clifford could have signed the AOD when it in clause 8 specifically states that in the event of any default on the part of defendant and plaintiff then "consults its attorneys" or incur any legal costs "arising out of the enforcement of its rights in terms of the AOD, "the debtor undertakes to pay to the creditor (plaintiff), on demand the full amount of any such legal costs on an attorney and own client scale inclusive of collection commission".

- [74] Regarding the enrichment claim, if anyone was enriched at the expense of the other, that happens to be defendant. Payment that defendant effected in the amount of R40 000.00, if one closely examines the AOD, cannot be said to have been erroneously made if regard is had to the improbable version of Clifford.
- [75] Plaintiff's witnesses testified that the R188 127.00 was needed to pay Sweet Dreams insurance premium as Sweet Dreams had wanted to start with its project. The money was supposed to have been paid to Eaglewatch Financial Services by Sweet dreams which did not have the money. Clifford approached plaintiff which was prepared to loan the money on condition that an agreement was concluded. The AOD was signed and the required amount was duly advanced. I find nothing sinister with the arrangement and the conclusion of the AOD agreement. The AOD is simple, straightforward and easy to understand. One cannot correctly attribute any simulation or misrepresentation to an agreement as clear and understandable as this AOD.
- [76] It is noteworthy that the essence of defendant's defences is that the terms and conditions of the pilot project were already concluded when the insurance premium was paid. The question which then immediately springs to mind is whether defendant has proved this on a balance of probabilities. Clifford's evidence, in my view, does not demonstrate this.
- [77] Regarding the pilot project agreement, Clifford could not prove that the terms and conditions of the pilot project were agreed upon. As a matter of fact and as shown above, Clifford contradicted himself on this aspect.
- [78] In respect of the pilot project agreement, a question to be answered is whether such an agreement was even concluded. It will be remembered that Clifford testified that if successful, the pilot project would lead to the conclusion of the main agreement. Clifford conceded that the main agreement was never concluded. The due diligence stage, according to plaintiff, disclosed Clifford's medical condition late when he in fact should have done so earlier. A decision was then taken to stop the envisaged deal due to the fact that Clifford, the main man in defendant, was not given much time to live by his doctors.
- [79] The cancellation appears to have been in such a way that Clifford understood and accepted it and started repaying the money as arranged. At any rate, Clifford never complained in any correspondence about the cancellation and the repayment of the money. All he did was to thank plaintiff and then asked how the AOD that he had signed was going to be treated. This, because he realised the significance of the AOD. He did not insist or suggest that the AOD was cancelled because it had been simulated or that it had been concluded as a result of misrepresentation on the part of plaintiff.
- [80] Clifford, furthermore, did not in correspondence or telephonically, tell plaintiff that it (plaintiff) had been enriched at defendant's expense nor that the R40 000.00 that it had paid needed to be paid back. Instead, defendant, without objection, silently paid the R40 000.00. All this confirms that plaintiff's version is more probable and acceptable.

- [81] Clifford's evidence to the effect that he did not consult with his lawyers shortly after the cancellation of the agreement because he did not see the need therefor speaks volumes. Knowing fully well that the AOD was simulated or that the AOD had been concluded as a result of misrepresentation on the part of plaintiff or that the AOD was not a true reflection of the parties' intention, Clifford did not deem it fit to immediately consult with a lawyer but instead decided to pay back the R40 000.00. This is not an action of someone who is to be believed and who was treated by plaintiff as it was alleged and contended. All this points to one direction and one direction only, namely that defendant's version is about what did not happen.
- [82] Evidence, on behalf of plaintiff, was that the process of the pilot project commenced only in the sense that contractors were identified by defendant and visited by plaintiff. The success of the pilot project, as evidence demonstrates and as confirmed by Clifford, would lead to the conclusion of the main agreement. Its success was indeed a condition precedent which was never fulfilled. This clearly demonstrates that defendant failed to prove an agreement relating to the pilot project.
- [83] On behalf of plaintiff, it was submitted that defendant also failed to prove any terms relating to profit sharing. Defendant's attempt to incorporate the same profit sharing as contemplated in the term sheet relating to the main agreement, which evidence has shown never eventuated, "was speculative and untenable". There is merit in the submission. What complicates defendant's case is that Clifford conceded that the R5m expense which defendant would have to repay and the interest component of the money that plaintiff would invest were not included in the calculation of damages. The profit margin unfortunately was based on alleged agreements with certain suppliers which plaintiff, according to Clifford, did not know. Defendant furthermore did not prove the profit margin.
- [84] In the alternative, it was submitted on behalf of plaintiff, that defendant would only have suffered damages if the pilot projects had been completed by the relevant contractors. The submission has substance.
- [85] Clifford's evidence was that insurance was a prerequisite before a contractor could do the work. Clifford could not tell the court if the other two contractors had obtained such insurance. This led Mr Wildenboer to submit that in that event the alleged profit would remain "speculative and unfounded". I agree.
- [86] Clifford testified that shortly after the cancellation of the agreement, a third party concluded an agreement with defendant in terms of which the third party purchased 30% of defendant's equity. This asset was never considered when damages suffered were calculated. Defendant led no evidence concerning this transaction. It, indeed, is relevant in determining whether defendant suffered any damages. Mr Wildenboer finally submitted that defendant failed to prove the alleged damages. I agree.

- [87] It is defendant's case that there were negotiations between the parties and the aim therefor being that plaintiff, depending on the success of the pilot project, would invest in defendant. Indeed a non-disclosure and non-circumvention agreement as well as a non-disclosure agreement were concluded.
- [88] Defendant's case is further that the term sheet that was delivered to defendant by plaintiff formed the basis of the business relationship between the parties. It will be remembered that the term sheet was a transaction proposal for discussion. Of significance is that the document was a proposal document meant for discussion. Its heading does not tell one that the document was an offer meant to be accepted by defendant. If that were so an agreement would shortly thereafter have been concluded. It, almost invariably, would have spelt out all its terms and conditions. This agreement is not there.
- [89] The due diligence process which is admitted by the parties appears to have been a vehicle which determined whether or not the parties could go ahead and conclude an agreement. We now know that the due diligence unearthed valuable information which appears not to have been within the knowledge of plaintiff. This information relates to the medical condition of Clifford which, according to plaintiff, was disclosed late and which resulted in the cancellation of the parties' plans. An important question is: who would have proceeded with the plans under those circumstances where Clifford had not been given enough time to live by his own doctors? The answer is an obvious "none".
- [90] Indeed the insurance premium, according to evidence, was for "contractors all risk and credit insurance". It was a must take it. It was submitted on behalf of defendant that the AOD presented problems for plaintiff. The reason advanced is that the amount on the AOD is exactly the same as the amount due for the insurance premium for one of the contractors that forms part of the pilot project. I see no predicament. The fact that the amount of the premium is exactly the same as the amount on the AOD, in my view, does not mean that the AOD suddenly becomes a problem. It will be remembered that evidence demonstrated that the amount was required just for the purpose of paying the insurance premium. This therefore should never come as a surprise. It is this amount that plaintiff was not prepared to part with without an agreement. Defendant, to help its client, Sweet Dreams which needed the money, was prepared to conclude the AOD. This satisfied plaintiff which also signed the AOD and provided the money.
- [91] In paragraph 13.2 of defendant's heads of argument this is said:
- "13.2 Despite evidence that the plaintiff derived it's (sic) income from inter alia interest on finance, the AOD clearly indicate (sic) an amount lent to the defendant at 0% interest." (My emphasis)*
- [92] Further, paragraph 13.3 of the heads states:
- "No fixed date pertaining to the repayment of the 'loan' was indicated in the AOD." (my emphasis)*

Again one finds the use of 'lent' and 'loan' in these paragraphs. The words are derived from the AOD. This again informs one that one is dealing with indebtedness arising from money that was lent and advanced- a loan. There can be no mistake or doubt about it.

[93] That the money was not received by defendant makes no difference. The recipient is defendant's client which needed the money which it did not have. The AOD is clear as it discloses the entity that was going to repay the money and that is defendant. Again there is no doubt about it.

[94] That Schenk testified that if the pilot project continued the insurance premium would be paid out of the project's proceeds does not assist defendant. The money was paid already and the AOD concluded. It is also not correct that funding commenced with the provision of the insurance payment because that is properly taken care of by the AOD which spells it out in no uncertain terms. That there were no terms pertaining to payment is also incorrect because repayment would be on demand. The processing of the R5m has nothing to do with the lending of the money and acknowledgement of the indebtedness.

[95] Plaintiff's witnesses were honest, credible and reliable. The same cannot be said about defendant's witness. Plaintiff's version is much more probable and acceptable than that of defendant. I, in my judgment sufficiently dealt with the improbabilities in defendant's version. Clifford did not acquit himself well as a witness. Apart from the improbabilities in his evidence he materially contradicted himself. Defendant, in my view, failed to discharge the onus which rested on it. Plaintiff's claim, consequently should succeed.

[96] Having regard to what I say above, I find that:

1. The AOD was proper and validly concluded.
2. The conclusion of the AOD was not occasioned by any misrepresentation on the part of plaintiff.
3. The AOD is not a simulated agreement.
4. Defendant presented no evidence which entitled it to the relief that it seeks in its counter claims.
5. The indebtedness was properly acknowledged by defendant who must repay the R147 127.00 to plaintiff. Plaintiff, in any event, has made out a case for the relief that it seeks.

[97] Clause 8 of the AOD entitles plaintiff to costs which defendant has undertaken to pay on demand, on an attorney and own client scale.

[98] I, in the result, make the following order:

Judgment in favour of plaintiff is granted against defendant for:

1. Payment of the sum of R147 127.00

2. Interest on the aforesaid amount at rate 14.5% per annum, from date of demand being 1 August 2012, to date of final payment.
3. Costs of suit on the scale as between attorney and client.
4. Defendants' counterclaims are dismissed with costs.

MSIMEKI J

JUDGE OF THE GAUTENG DIVISION HIGH COURT, PRETORIA

APPELLANT'S REPRESENTATIVES

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INSTRUCTING ATTORNEY: DURANT DU TOIT PELSER ATTORNEYS

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