

SOUTH AFRICA / JUDGMENT

Viljoen v Jiane and Others (17655/05) [2007] ZAGPHC 193 (11 September 2007) [2007] ZAGPHC 193

COURT

High Courts - Gauteng

BEFORE

Mokgoatlheng

CASE / FILE NUMBER

17655/05

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IN THE HIGH COURT OF SOUTH
AFRICA /ES
(TRANSVAAL PROVINCIAL
DIVISION)
CASE
NO: 17655/05

NOT REPORTABLE DATE: 11/9/2007
IN THE MATTER BETWEEN
ELRICH VILJOEN
PLAINTIFF
AND
JOSEPH TIMOTHY JIANE 1ST
DEFENDANT
MIKROLAB STELSELS CC
2ND DEFENDANT
THE REGISTRAR OF CLOSE
CORPORATIONS N.O.
3RD DEFENDANT

JUDGMENT

MOKGOATLHENG. J

Introduction

[1]

The plaintiff has instituted action against the first defendant for an order declaring that he concluded an agreement between himself and the first defendant on or about 20 June 2004 in terms whereof, (a) he purchased the first defendant's 50% member's interest and loan account in the second defendant for the amount of R120 000,00, (b) an order compelling the first defendant to sign a CK2 form

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indicating his resignation from the second defendant and, (c) to deliver such signed CK2 form to the plaintiff within seven days of the order being made.

[2]

The first defendant has lodged a counter-claim, claiming a payment of the amount of R5 000 000,00, this being the share of the profit he is entitled to, which plaintiff failed to pay to him, and (b) an order compelling the plaintiff to disclose the true and proper financial statements of the second defendant from September 2001 to date.

The evidence of the Plaintiff

A summary of his evidence adduced is as follows.

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The Plaintiff testified that since 2001 he and the First Defendant were equal 50%-50% partners and the only members of the Second Defendant. The First Defendant was employed by the Second Defendant as a manager. His partner in another business enterprise Eddie Moss, had a fall out with the first defendant and he advised him that the latter did not continue as a member of the second defendant.

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He approached the first defendant, and advised him that Eddie Moss who had advanced a loan to the Second Defendant in the amount of R800.000-00 intended to call back his loan unless the first defendant relinquished his 50% ownership of the second defendant.

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In response to Eddie Moss's ultimatum he initially offered the first defendant R50 000,00 for the 50% ownership of the Second Defendant. The first defendant declined this offer.

During June 2004, the first defendant offered him his 50% ownership of the second defendant for the amount of R120 000,00. He accepted this offer.

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On 15 June 2004 he had a meeting with the first defendant, at his other business premises. He made out a cheque in the amount of R120 000,00 in the first defendant's name.

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The first defendant informed him that he wanted to consult his attorneys before accepting the cheque.

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On 18 June 2004 he handed over the cheque in the amount of R120 000,00 to the first defendant. On 18 June 2004 his attorneys addressed a letter to the first defendant's attorneys Dolamo-Bam, advising them that he had paid the latter an amount of R120 000,00 in full and final settlement of his claim in and to the Second Defendant.

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On 20 June 2004 the first defendant's attorneys addressed a letter to his attorneys

advising that they have been instructed to accept his offer of R120 000,00 in full and final settlement on the following conditions-

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(a)

that the said sum of R120 000,00 be paid into their trust account within ten days;

(b)

that the first defendant be released from past, present and future obligations which any third party may have against the second defendant; and

(c)

that on being indemnified against any claim from any third party, first defendant would sign the CK2 form.

On 23 June 2004 in a letter addressed to Dolamo-Bam attorneys, his attorneys accepted the conditions stipulated in first defendant's attorneys' letter dated 20 June 2004, which enclosed a bank guaranteed cheque in the amount of R120 000,00 in favour of the first defendant, and also enclosed a CK2 form duly signed by himself for signature by the second defendant.

Attorney Dolamo requested that the cheque should be made payable to his firm to enable him to deposit same into his trust account. He instructed his attorneys to comply with Dolamo's request and says he regarded the matter as closed or finalised.

On 23 June 2004 the first defendant together with his new legal representative Skosana, arrived at his business premises and made fresh suggestions. He did not

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see the need to involve himself in fresh discussions as he regarded the matter as finalised. He did not send financial the documents they requested.

On 23 June 2004 the first defendant's new attorneys Thulani Mtsuki addressed a letter to his attorneys wherein they stated amongst others that-

"(a)

We confirm having taken instructions from Mr Jiane to represent him.

(b)

We further confirm our discussion between our Mr Skhosana and your client on the 23rd June 2004 and

(c)

Requested certain documents to enable their client to properly apply his mind to his offer.

On 25 June 2004, his attorneys addressed a letter to first defendant's attorneys Thulani Mtsuki advising them that the matter was settled on 20 June 2004 with Attorneys Dolamo-Bam.

On 25 June 2004, the first defendant's attorneys addressed a letter to his attorneys advising that:

(a)

the first defendant had terminated the mandate of his previous attorneys Dolamo-Bam on 24 June 2004; and that,

(b)

the first defendant had not accepted his offer in full and final settlement.

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On 28 June 2004 Dolamo-Bam attorneys wrote a letter to Attorneys Thulani Mtsuki advising that:

- (a)
- (b)
- (c)

the first defendant had consulted Attorney Dolamo on 18 June 2004, and instructed them to accept the offer of R120 000,00 in full and final settlement on condition that he is released from past or future obligations which the second defendant may incur; and that on 23 June 2004 the plaintiff's attorneys responded and accepted the offer and furnished them with a cheque of R120 000,00 plus the CKM2 form which the first defendant had to sign..

On 1 July 2004 Attorneys Thulani Mtsuki addressed a letter to Dolamo-Bam attorneys stating that:

- "(a)
- (b)
- (c)

Mr Jiane is adamant on the termination of your mandate herein;

Mr Jiane had not accepted the offer of R120 000,00 in full and final settlement of any claims against Mr Viljoen and/or Mikrolab Stelsels CC;

Mr Jiane only indicated his willingness to accept the offer subject to yourselves obtaining the financial statements of the close corporation in order to ascertain the origin and nature of the R800 000,00 debt previously referred to by Mr Viljoen, as well as Mr Jiane's liability for same;

- (d)

Transfer of Mr Jiane's interest in the close corporation is to be effected only by his signing of the deed of sale of interest in the Business and the

CK2 papers; and

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(e)

Mr Jiane further instructs us to require from your goodselves that you return the cheque for R120 000,00 to Messrs Krugel Heinsen Attorneys or to Mr Viljoen with immediate effect."

On 28 June 2004 his attorneys addressed a letter to Thulani Mtsuki Attorneys informing them that:

"(a)

Your client only cancelled the mandate of Messrs Dolamo-Bam on 24 June 2004;

(b)

the offer of acceptance was relayed by your client's attorneys of record at that time, Messrs Dolamo-Bam, on 20 June 2004; and that,

(c)

this effectively concludes the agreement between your client and our client."

On 21 July 2004 Attorneys Thulani Mtsuki addressed a letter to plaintiff's attorneys tendering a counter-offer to purchase his 50% interest in the second defendant, for the amount R120 000,00 subject to the delivery of the financial statements for the period ended 28 February 2004. This counter-offer was not accepted, as his attorney had already paid over the amount of R120 000,00 into Dolamo-Bam's trust account by electronic transfer on 30 June 2004.

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The plaintiff under cross-examination testified that the first defendant did not

contribute any funds to the second defendant, that when Eddie Moss made the

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loan of R800 000,00 to the second defendant was not involved in its financial affairs.

The second defendant did not pay any dividends to the first defendant because the former had liabilities and was not making any profit.

THE EVIDENCE OF THE FIRST DEFENDANT

He testified that he is employed as a manager of the second defendant.

He is the owner of a 50% interest in the second defendant, and has not to date received any dividends.

On 29 July 2003 he received a letter from Attorneys Harvey & Nortje demanding payment of R800 000,00 or his resignation from the second defendant. He knew nothing about this debt. He discussed the issue with the plaintiff in the presence of their attorneys. The latter suggested that he should transfer his 50% interest to Eddie Moss.

Subsequently the plaintiff offered an amount of R50 000,00 for his 50% interest.

He declined same. On 16 June 2004 the plaintiff offered him R120 000,00 for his 50% interest and issued a cheque. He refused the offer.

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On 18 June 2004 he consulted with Mr Skhosana of Thulani Mtsuki attorneys. He instructed him to fetch his file from Attorneys Dolamo-Bam. He went there but did not find Attorney Dolamo.

On 19 June 2004 he consulted with Attorney Dolamo who on his arrival raised a piece of document, and accused him of agreeing to accept the amount of R120 000,00 after showing him the letter dated 18 June 2004 from the plaintiff's attorneys. He denied that he had accepted the plaintiff's offer.

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He states that he terminated Attorney Dolamo's mandate on 19 June 2004 and requested his file. Attorney Dolamo refused to hand over same saying he still had to tax his bill and stated that there was nothing the he could do because he had accepted the offer of R120 000,00.

After 16 June 2004 he did not return to the plaintiff to advise him that he had consulted with his attorneys or that he accepted the offer.

He did not instruct Attorney Dolamo to accept the plaintiff's offer, he in fact told him that he had rejected the offer on the 16 June 2004.

On 23 June 2004 he did not at the plaintiff's business premises, when in the company of Skhosana his legal representative, accept the offer or a cheque in the amount of R120 000,00 which the former wanted to give him.

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Under cross-examination he stated that he terminated Attorney Dolamo's mandate on 19 June 2004, that he gave Attorneys Thulani Mtsuki a mandate on 18 June 2004.

He denied that he discussed the two conditions namely-

(a)

payment of R120 000,00 within ten days; and

(b)

indemnity from past, present and future obligations from the second defendant.

THE EVIDENCE OF SKOSANA

He testified that he was a candidate attorney in the employ of Thulani Mtsuki. On 18 June 2004 he consulted the first defendant. On 19 June 2004 he advised the first defendant to terminate Attorney Dolamo's mandate, and fetch with his file from the latter.

On 24 June 2006 he formally by letter advised Attorney Dolamo that his mandate was terminated to protect his client's interests.

On 23 June 2004 the plaintiff offered the first defendant a cheque. He requested that the plaintiff to furnish him with the financial statements of the second defendant.

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On receipt of Attorney Dolamo's letter advising Thulani Mtsuki that the matter was settled he consulted the first defendant, the latter denied any knowledge of the settlement offer.

THE EVIDENCE OF THE ATTORNEY DOLAMO

He testified that he was instructed by the first defendant on 18 June 2004 to accept the plaintiff's offer subject to two conditions, namely that

(a)

payment be made within ten days; and

(b)

the first defendant be indemnified against past, present and future obligations of the second defendant.

He stated that he was taken aback because the first defendant originally wanted R400 000,00 in lieu of his 50% interest in the second defendant.

In June the plaintiff handed him a cheque of R120 000,00 made out in the first defendant's name. He returned it and requested that the cheque should be made out into his trust account. On 30 June 2004 an electronic payment of R120 000,00 was transmitted by the plaintiff's attorneys into his trust account.

He presented the deed of sale to the first defendant, who refused to sign same. He received the termination of his mandate on 25 June 2004.

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Under cross-examination he stated that Attorney Mtsuki instructed him to accept the R120 000,00 from the plaintiff.

On 18 June 2004 the first defendant told him that he had discussions with the plaintiff and said that he did not want the latter to pay him the amount of R120 0000.00 directly as he did not trust him.

THE EVIDENCE OF THE FIRST DEFENDANT

He testified that he owns a 50% interest in the second defendant and is employed as its manager.

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On 29 July 2003 Harvey & Nortje attorneys addressed a letter to him demanding

an amount of R800 000,00 failing that to resign from the Second defendant. He thereafter met with the plaintiff, and asked him what was happening.

[46] He explained to the plaintiff that he knew nothing about the R800 000,00. The plaintiff told him that he had to sign the CK2 form and that his signature would attest to his resignation as a member of the second defendant.

He consulted Attorney Dolamo. The latter suggested that he should meet with the plaintiff for an explanation regarding the matter.

He met with Krugel, of

Heinsen, Viljoen's attorneys. Krugel showed him the memorandum of agreement, and he said either he sign or pays the R800 000,00. He asked what was the

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R800 000,00 for. He was advised it was Eddie Moss's loan. He refused to sign the memorandum of agreement.

On 16 June 2004 he had meeting with the plaintiff who said he wanted to tell him the holy truth. The plaintiff then took out a cheque of R120 000,00 and said "to him take this cheque and buy yourself a Kombi and sign the CK document". He refused and said he was not taking this R120 000,00, because at their last meeting the plaintiff had agreed that financial statements would be furnished.

He refused to sign the documents. He told the plaintiff that he had terminated Dolamo Attorneys mandate, and was going to fetch his file.

On 18 June 2004 he saw Skhosana of Thulani Mtsuki attorneys. He explained his problem to him. He asked him to fetch his file. He went to Dolamo but did not meet him.

On 19 June 2004 he went to Skosana. He instructed him terminate the mandate of

Attorney Dolamo. On arrival stated Dolamo raising a piece of document, that he had agreed to accept the amount of R120 000,00 . He said he did not accept the offer. Attorney Dolamo said he had accepted the Plaintiff's offer and there is nothing he could do. He said the only issue was that he had come to fetch his file and to terminate his mandate. Dolamo asked him where he was going. Dolamo said he would not give him the file because he still had to tax the bill. After the [55]

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16 June 2004 he did not return to the plaintiff to tell him that he had seen his attorneys, and that he was accepting his offer. He did not instruct Dolamo to write letter. He had rejected the offer of R120 000,00, and had told Dolamo that he was there to terminate his mandate.

On 23 June 2004 he and Skosana went to see the Plaintiff about the financial statements. The Plaintiff took out the cheque of R120 000,00 from his drawer, offered same to him. He refused to accept same

After the 23 June 2004 he saw Dolamo, after the former had telephoned and said he wanted to see him. He first went to Skosana about Dolamo's request. Skosana told him to go and hear what Dolamo had to say. On arrival Dolamo who had a Memorandum of Agreement, said issue of money was not important, here are the documents, he was to sign same he refused to do so.

THE EVALUATION AND ANALYSIS OF EVIDENCE

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It is common cause that since and during 2003, the plaintiff was desirous of acquiring the first defendant's 50% interest in the second defendant. This is evidenced firstly by the plaintiff requesting the first defendant to "resign his membership of the second respondent" due to the fact that the latter was indebted to his other business partner, Eddie Moss in the amount of R800 000,00. The first defendant did not accede to this request.

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The plaintiff subsequently offered to purchase the first defendant's 50% interest for R50 000,00. The latter did not accept this offer, insisting instead that the plaintiff should furnish him with the second respondent's financial statements. It is common cause that on 16 June 2004 the parties held a meeting whereat negotiations regarding the purchase of the first defendant's 50% interest in the second defendant were conducted.

The plaintiff alleges that the first defendant suggested an amount of R120 000,00 for his 50% interest, which amount he agreed to pay. The first defendant states that this amount was offered by the plaintiff and says that he did not accept same. In my view on the 16 June 2005 parties agreed that the first defendant's 50% interest was to be purchased by the plaintiff for R120 000,00.

That it is common cause that the first defendant made a counter-offer to purchase the plaintiff's 50% interest in the second defendant for an amount of R120 000.00 subject to the latter's financial statements being furnished to him. This in my view shows that the amount of R120 000,00 was mutually agreed upon by the parties as the value representing a 50% interest in the second defendant.

The plaintiff alleges that after the meeting of 15 June 2004 the second defendant stated that he was going to consult his attorney. In my view at that stage the first defendant needed to clarify certain aspects with his attorney Dolamo because the

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consultation did in fact take place on 18 June 2004. The first defendant did not accept the cheque from the plaintiff because he wanted to ensure that he was indemnified from the second defendant's liabilities. The first defendant corroborates the plaintiff's version because he testified that after the 16 June 2007 he did not return to the plaintiff to tell him whether he consulted his attorney or was accepting his offer.

Attorney Dolamo states that on 18 June 2004 he consulted the first defendant, and says that this consultation was predicated on the letter addressed to him by the plaintiff's attorneys stating that the respective parties had settled the matter for an amount of R120 000,00.

The first defendant's version that on 18 June 2004 attorney Dolamo stated,

waving plaintiff's attorneys' letter dated 18 June 2004 that, "Jiane you have accepted the offer of R120 000,00, there is nothing I can do" is improbable. Further in my view it is improbable, that the first defendant could have told plaintiff on 16 June 2004 that he had terminated Attorney Dolamo's mandate, because on his own version he only told terminated Attorney Dolamo's mandate on the 19 June 2004.

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In my view the first defendant on the 18 June 2004 agreed to accept the plaintiff's offer of R120 000,00 for his 50% interest in the second defendant subject to the condition that--

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(a)

payment of R120 000,00 is made within ten days into Dolamo Attorneys

trust account; and that

(b)

he is indemnified against past, present and future obligations of the second defendant.

The first defendant's version that on 18 June 2004 he never discussed the plaintiff's offer with Attorney Dolamo is improbable.

In my view it is also

improbable that the first defendant personally and verbally terminated Attorney Dolamo's mandate on 18 or 19 June 2004, because there was no reason at all for such a drastic step having regard to the fact that it was not disputed that the first defendant had initially instructed Attorney Dolamo that he should only accept the amount of R400 000,00 for his 50% interest in the second defendant.

In my view on 20 June 2004 when Attorney Dolamo accepted the plaintiff's offer of R120 000,00 subject to the two conditions, he was acting within his mandate as instructed on 18 June 2004 by the first defendant.

(a)

The first defendant did not dispute that he told attorney Dolamo that he does not trust the plaintiff,

(b)

he does not want the plaintiff to pay the amount directly to him.

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Legal representative Skosana of Thulani Mtsuki attorneys version that he advised the first defendant on 18 June 2004 to terminate Attorney Dolamo's mandate is

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improbable. If indeed Skosana was properly instructed by the first defendant on the 18 or 19 June 2004 to take over the matter from Attorneys Dolamo-Bam, one

would have expected that as duly instructed, he would address a letter on first defendant's instructions terminating Attorney Dolamo's mandate. It is not ethical for an attorney after being properly instructed, to send a client another attorney to personally fetch his file and to personally terminate his former attorney's mandate when the client has duly instructed his new attorney, and the new attorney is aware that there is a possibility of outstanding fees owed by client a client.

In my view Attorney Dolamo's mandate was terminated on 24 June 2004, as evidenced by the termination of mandate signed by the first defendant on 24 June 2004 and received by Attorney Dolamo on 25 June 2004.

It is illuminating that after Dolamo addressed a letter to Thulani Mtsuki attorneys on 28 June 2004 advising that the first defendant on 18 June 2004 had instructed him to accept the plaintiff's offer subject to two conditions, Attorneys Thulani Mtsuki in response thereto in their letter dated 1 July 2004 responded as follows:

"We confirm we have obtained instructions from Mr Jiane and our instructions are as follows-

(1)

Mr Jiane is adamant on termination of your mandate herein.

(2)

Mr Jiane had not accepted the offer of R120 000,00 in full and final settlement of any claims against Mr Viljoen and/or Mikrolab Stelsels CC.

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(3)

Mr Jiane only indicated his willingness to accept the offer subject to yourselves obtaining the financial statements of the close corporation in order to ascertain the origin and nature of the R800 000,00 debt previously referred to by Mr Viljoen as well as

Mr Jiane's liability for same.

(4)

Transfer of Mr Jiane's interest in the close corporation is effected only by his signing of the deed of sale interest in a business and the CK2 papers.

Mr Jiane further instructs us to require from your goodselves that you return the cheque of R120 000,00 to Messrs Krugel Heinsen attorneys or to Mr Viljoen with immediate effect."

The first defendant's version is he never on 18 June 2004 discussed the plaintiff's offer with Attorney Dolamo, and he says he did not instruct Attorney Dolamo to accept the offer correspondingly the cheque of R120 000,00 on his behalf.

In my view it is startling that the first defendant instructs his new attorneys that he only indicated his willingness to accept the offer subject to Attorney Dolamo obtaining the financial statement of the close corporation to ascertain the nature and origin of the R800 000,00 debt when he testified that he never discussed the plaintiff's offer of R120 000,00 with Attorney Dolamo, and neither did he instruct him to accept same.

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Further, if the first defendant never on 18 June 2004 instructed Attorney Dolamo to accept the plaintiff's offer of R120 000,00 subject to certain condition, why would he now request Attorney Dolamo to return the cheque of R120 000,00 with immediate effect to the plaintiff or his attorneys?

In considering the totality of the evidence, it is my view that on a preponderance of probabilities the plaintiff has discharged the onus that the parties validly entered into a contract on or about 20 June 2004.

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In my view the parties entered into a valid contract when the first defendant's counter-offer, encapsulated in Attorney Dolamo's letter dated 20 June 2004 was accepted by the plaintiff's attorneys in terms of their letter dated 23 June 2004, attaching,

- (a) a bank guaranteed cheque in the amount of R120 000,00 in favour of the first defendant.
- (b) the original CK2 forms to be duly signed by the latter; and
- (c) indemnifying the first defendant from any claims pertaining to the second defendant party or any suretyships.

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The plaintiff has performed his obligations in terms of the contract. The first defendant despite demand that he should sign the CK2 forms by the 25 June 2005, has failed to perform in terms of his contractual obligations, has refused to sign and return the CK2 form.

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In the premises the first defendant's failure to sign the CK2 forms constitutes a breach of the contract between the parties, entitling the plaintiff to specific performance.

In the premises the following order is made:

(1)

It is declared that on or about 20 June 2004 an agreement was concluded between the plaintiff and the first defendant in terms whereof the plaintiff bought the first defendant's 50% members interest and loan account in the second defendant for the purchase price of R120 000,00.

(2)

The first defendant is ordered to sign a CK2 form indicating his resignation from the second defendant and to deliver such signed CK2

form to the plaintiff within seven days of the order being made.

(3) In the event of failure by the first defendant to comply with the terms of paragraph 2 above, the sheriff is authorised and directed by this court to sign a CK2 form on behalf of the first defendant as a member of the second defendant, and is directed thereafter to hand such signed form to the plaintiff.

(4)

The first defendant is ordered to pay the plaintiff's costs.

HEARD ON: FOR THE PLAINTIFF:

INSTRUCTED BY: FOR THE DEFENDANTS:

INSTRUCTED BY:

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R MOKGOATLHENG JUDGE OF THE HIGH COURT

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