REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 49408/2020

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 2 May 2023 E van der Schyff

In the matter between:

HELIA ALETTA DE KLERK	APPLICANT
and	
LEON MARTHINUS DE LANGE	1ST RESPONDENT
ALIDAFORCE (PTY) LTD	2ND RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant approached the court on application, seeking payment against the first respondent in the amount of R1 000 000,00 (One Million Rand) together with interest *a tempora morae* from 1 December 2019 until date of full payment, and payment of

R20 000.00 (Twenty Thousand Rand) per month from November 2019 to full payment of the said R1 million, together with interest *a tempore morae* calculated from the end of each month upon which each instalment became due until the date of full payment of the said R1 million..

[2] On 11 May 2022, the parties' legal representatives signed a joint minute setting out the factual chronology, the common cause facts, and the issues requiring determination. After having considered the common cause facts, and the affidavits filed, the matter was referred to oral evidence on defined issues. The parties' oral evidence was led on 22 and 23 March 2023.

The joint practice note

[3] The parties set out the factual chronology, common cause facts, and issues for determination in their joint practice note. Counsel representing the parties during the proceedings signed the practice note. For reasons that will become evident later, it is necessary to have regard to both the factual chronology and the common cause facts.

[4] Factual chronology as per the joint practice note:

i. **'2015:** Applicant met first respondent and discussed the prospect of acquiring a business together and considered various options in regard thereto;
ii. **21.09.2016:** Applicant paid R1 500 000.00 into an attorney's trust account at the behest of the first respondent in order to pursue a joint business venture;
iii. **27.10.2017:** Registration of the second respondent together with the appointment of the applicant and first respondent as directors:
iv. **2017:** The applicant and the first respondent agreed to acquire a carwash business [that was for sale in Montana, Pretoria]
v. **Jun/Jul 2019:** First respondent paid an amount of R500 000.00 to the applicant in pursuance of apportioning their (equal) contributions towards the purchase of the Montana Carwash;

vi. **June/July 2019:** The applicant and the first respondent purchased the Montana Carwash in the name of the second respondent;

vii. **Sept 2019:** The applicant and the first respondent agreed that the first respondent would purchase the applicant's shareholding in the second respondent for an amount of R1 000 000.00;

viii. **24.03.2020:** Applicant insists on payment of her money by the end of March 2020;

ix. **30.03.2020:** First respondent informs applicant of his difficulties regarding payment to the applicant;

x. **10.04.2020:** Applicant insists on payment of the R1 000 000.00, which was due and payable by the end of November 2020 [2019];

xi. **26.05.2020:** Attorney's letter of demand addressed to first respondent on behalf of applicant;

xii. **04.06.2020:** Applicant resigns as director of second respondent;

xiii. **08.06.2020:** First respondent's attorney addresses a letter to applicant's attorneys;

xiv. **07.07.2020:** First respondent's attorney addresses a letter to applicant's attorneys.'

[5] The common cause facts, as set out in the joint practice note, informs that on 21 September 2016, the applicant paid an amount of R1 500 000.00 (One Million Five Hundred Thousand Rand) into a trust account nominated by the first respondent and held by the first respondent's attorney of record in terms of an agreement between the parties to contribute in equal shares towards the purchase of a business.

[6] The first respondent undertook to attend to acquiring a One Stop garage business, and after several months and without having acquired the One Stop garage, the first respondent informed the applicant that there were problems with the 'paperwork' of the business and suggested that they should rather consider other business options.

[7] The applicant thereafter suggested acquiring a car wash business in Montana, Pretoria, whereupon they agreed to buy the Montana Car Wash together in a

company, the second respondent, which the first respondent had already acquired for that purpose;

[8] The applicant and the first respondent were appointed as the second respondent's directors. They would be the only, and equal shareholders in the company. During June or July 2019, the first respondent paid an amount of R500 000,00 to the applicant on the basis that the balance, the R1 000 000.00, would be utilised towards payment of the purchase price for the Montana Car Wash, which had been reduced from R1 700 000.00 to R1 200 000.00 (the first respondent was responsible for negotiating the deal in regard to the Montana Car Wash in terms of which the applicant contributed the amount of R1 000 000.00 towards the purchase price of R1 200 000.00.)

[9] In September 2019, matters came to a head, and the applicant and the first respondent could no longer continue with the business together. The first respondent offered to pay the applicant the amount of R1 000 000.00 for her shares in the second respondent.

[10] The first respondent paid the applicant an amount of R20 000.00 at the end of September 2019 and again at the end of October 2019. The first respondent (Leon) and the applicant (Alta) exchanged the following WhatsApp messages on the said dates with each other:

i. 24 March 2020
Alta: 'Hi jy, jammer om dit te moet opbring maar asb ek moet jou herinner dat ek my geld MOET hê by die einde van die maand. Ek glo jy verstaan'

ii. 30 March 2020
Alta: Hi Leon, ek weet dit is lockdown maar jy het die laaste keer wat ek met jou gepraat het gesê jy sal kyk of jy dalk iewers iets kan doen. Ek het nog niks van jou gehoor nie.'

Leon: 'Hi Alta. Dis maar moeilik om dit telefonies te doen. Sal so iets aangesig tot aangesig moet doen, anders gaan dit regtig nie suksesvol wees nie.

iii. 5 April 2020

Leon: 'Hi ...dis goed om the hoor. Ek het met 'n paar mense gesels intussen, en sal hulle gaan sien na die inperking. Besig om voorbereiding the doen daarvoor'

(This was the first respondent's response to the applicant's telephonic plea for him to pay her money).

iv. 10 April 2020

Alta: 'Leon dit het alles niks met my uit te [waai] nie (omdat dit jou besluit was om my uit te skop). Ek moes my geld al einde November gekry het ... dit is nou amper einde April en nogsteeds het ek nie 'n sent nie soveel so dat ek nou 'n kans staan om als te verloor. My deadline is einde April anders [gaan] ek prokureur toe.'

Leon: 'Dis reg so Alta.'

Alta: 'Leon net een vraag. Daardie tyd toe ek nie die miljoen wou oorbetaal tot als geteken was vir die garage wat ons oorspronklik na gekyk het nie, het jy vir my gesê die geld is veilig in trust by jou prokureur en dat net ek dit kan uittrek want my handtekening moet daar wees voor hy dit mag release so ek hoef nie bang te wees nie. Hoe het jy die geld uitgekry?

Leon: 'Ek verstaan nie hoekom jy dit vra op hierdie stadium nie Alta. Met East Gate het jy al toestemming gegee.'

Alta: 'Ek het NOOIT toestemming gegee dat die geld gebruik kon word nie. Toe jy die aand in my huis vir my gesê het dat jy dit gebruik het, het ek nog vir jou gevra hoe jy dit reggekry het. Jy het net vir my sit en kyk en geglimlag maar nooit 'n antwoord gegee nie. Ek het dit maar laat gaan al die jare maar ek dink jy is my 'n antwoord verskuldig.'

Leon: 'Hieride gesprek het ons jare terug al gehad. Ek stem nie saam met jou stelling nie. In elk geval, die uiteinde tans is dat die vennootskap nie uitwerk nie, en daarom het ek aangebied om jou uit te koop. Dis die proses waarmee en mee besig is'

Alta: Snaaks genoeg het ons nooit daai gesprek gehad nie ... die rede hoekom ek nooit 'n antwoord gekry het nie. En terloops... jy het nie AANGEBIED om my uit te koop nie ... ek is AANGESÈ om te gaan en sou ek nie wou nie was ek met Prokureurs gedreig.'

v. 11 April 2020

Leon: 'Môre Alta. Ek sal graag hierdie op so manier wil doen sodat daar kans is om vriendskappe te probeer behou. Geld bemoeilik seker maar als tussen mense soos die ou gesegde lei. Daarom sal ek dit graag agter die rug wil kry so gou moontlik. Mens kan altyd weer geld maak, maar vriendskappe wat jare duur is nie so maklik om te kry nie. Hierdie ding maak dinge net baie ongemaklik en ek hoop om dit af te handel sonder om die vriendskap te verloor.'

vi. 12 May 2020:

Alta:'Hi jy, hoop dit gaan goed. Ek is jammer dat ek dit weer moet opbring... het gehoop dit sou nie nodig wees nie. Ek het vir jou probeer verduidelik dat ek die geld einde April MOET hê aangesien ek geen fondse en geen Inkomste het nie. Dit is vandag al die 4de en ek het nog niks van jou gehoor nie. Kan jy asseblief vir my duidelikheid gee".

Leon: 'Hi Alta, nee hierdie lockdown is regtig n baie groot problem veral met die extension daarvan ook en die onduidelikheid van wanneer mense weer aan die gang kan wees. Ek het op hierdie stadium glad nie vir jou nou antwoorde nie, die banke... meeste van die mense werk nog blykbaar van die huis af en so aan ja, dit is vir my nog moeilik om verdere goedjies te doen in terme van dit ja, ek sit nog in dieselfde situasie as wat ek gesit het, umm dat ek nie nou vir jou 'n antwoorod op hierdie oomblik het nie, skies daaroor'.

[11] The applicant submitted her resignation as a director of the second respondent in writing to the first respondent on 4 June 2020. On 7 July 2020 the first respondent, through his erstwhile attorneys, admitted that he agreed to acquire the applicant's 'share' in the business pursuant to the breakdown in their relationship regarding the day-to-day management.

[12] The parties identified the primary issue for determination by the court as to whether the first respondent undertook to pay the applicant the purchase price of R1 000 000.00 for her shares at the end of November 2019, or whether, on the first respondent's version, there was 'no specific timeline agreed upon' and that he would pay the purchase price 'when I am ready and able to do so'. The first respondent's contention is that the 'monies are not due and payable yet.'

[13] A secondary issue, which is not decisive of the primary issue, is whether the applicant was indeed a registered shareholder of the second respondent and whether she remains a shareholder of the second respondent to date. The first respondent contends that the applicant was and still is a shareholder of the second respondent. The applicant's issue in this regard arises out of the fact that she had not been provided with a share certificate

[14] The first respondent raised the point that disputes of fact existed and that the matter could not be adjudicated on motion proceedings. The matter was subsequently referred to oral evidence on the following issues:

i. Whether, on the applicant's version, the first respondent undertook to pay the applicant the purchase price of R1 000 000.00 for her shares in the second respondent at the end of November 2019, or whether, on the first respondent's version, there was no '*specific timeline agreed upon'* and that he would pay the purchase price '*when I am ready to do so*';

ii. Whether, on the applicant's version, the first respondent undertook to pay the applicant an amount of R20 000.00 per month (from September 2019) until the purchase price for her shares in an amount of R1 000 000.00 is paid

Oral evidence

[15] Only the applicant and the first respondent testified in the hearing. The applicant's evidence was for the greatest parts in line with the evidence already contained in her founding affidavit. In this judgment, I will only refer to significant aspects thereof.

[16] The applicant, a widow, testified that she wanted to engage in business with the first respondent, whom she thought was a good businessman. She wanted to learn the trade of business through him. She trusted the first respondent because he was 'a good businessman' who knew to 'handle things.' In 2016 they agreed to engage in a business venture in equal shares. The applicant and first respondent initially wanted to buy a garage close to the N1. The purchase price was R3 million. She contributed R1 500 000.00. She reluctantly paid her contribution into the first respondent's attorney of record's trust account after the first respondent assured her that the money would be safe and only be paid out on her instructions.

[17] The applicant testified that the first respondent conducted all the negotiations regarding this transaction. She was only later informed that the transaction did not realise. She asked whether she would receive her payment back, but the first respondent said they must leave the money in the attorney's trust account since there was another business prospect in East Gate. The first respondent informed the applicant that he withdrew the money from the attorney's trust account and invested it. She enquired as to how the money could be withdrawn without her consent. He did not answer her, 'but merely smiled'. She testified that 'I was naïve enough to leave it there'.

[18] The first respondent again did all the negotiations regarding the East Gate transaction, but again the transaction did not realise. By this time, almost three years have passed since the applicant paid the R1 500 000,00 into the attorney's trust account and she did not receive any benefit from the money.

[19] She identified a possible business opportunity in Montana. An agreement was ultimately reached between the parties. Again the applicant and first respondent

agreed to enter into the business in equal shares, using the second respondent as the vehicle to conduct the business venture. The seller reduced the purchase price from R1 700 00.00 to R 1 200 000.00. The first respondent paid the applicant R500 000.00 back. She asked him to pay back the remaining R1 million so that she could then pay over R600 000.00 to him, this being her 50% contribution. He informed her, however, that he had paid the R1 million into the new business.

[20] It is apposite to note that the applicant's evidence up to this point has not been challenged during cross-examination.

[21] The applicant testified that she oversaw the day-to-day management of the business. She received the amount of R20 000.00 per month, an amount she considered to be a salary for three months. Disputes arose between the parties. During September 2019, the first respondent invited the applicant to supper. He informed her that he could not continue in business with her and told her he was buying her out. He said he would pay her back her million by November 2019. He undertook that he would continue paying her R20 000.00 per month until he paid the R1 million. He told her that he is busy buying his house from a family trust and has already arranged with ABSA for a loan. I pause to state that while the applicant stated in her founding affidavit that this undertaking was given after the first respondent failed to pay the R1 million at the end of November 2019. During her *viva voce* evidence, she stated this undertaking was given during the supper. I am of the view that this confusion after the lapse of a substantial period of time does not indicate an inherent contradiction or dishonesty. It is human to err. Save for the exact time that this undertaking was given, the applicant's evidence was consistent.

[22] The applicant testified that she would never have agreed that the first respondent pay her back 'as and when' he could, because she needed the money. It was her income. She also testified that she only saw the share certificate on the morning that the trial started in March 2023. She was unaware that she held only 58 of 120 shares as the parties' agreement was that they would enter into the business in equal shares.

[23] Material aspects of the applicant's evidence were not challenged during cross-examination. Counsel for the respondents emphasised that the respondents discovered the share certificate timeously and that nothing prevented the applicant's legal team from requesting a copy thereof. He also emphasised that the applicant's access to the business's financial records was not limited, and that she could have relied on the remedies provided for in the Companies' Act to address the disputes that arose between herself and the first respondent. It was put to the applicant during cross-examination that the amounts of R20 000.00 that she received was not salary payments but drawings. The first respondent testified that the applicant was no longer entitled to receive said 'drawings' after she terminated her services at the Car Wash.

[24] It is not necessary to deal in detail with the first respondent's evidence. It is apt to state that the applicant and the respondent gave mutually conflicting evidence in regard to the time period for the payment of the purchase price of the applicant's shares as well as whether the first respondent agreed to pay the applicant an amount of R20 000.00 per month from 1 December 2019 pending the payment of the purchase price for her shares.

Discussion

[25] The principle as how to proceed in the face of mutually irreconcilable versions was set out by the Supreme Court of Appeal in *Stellenbosch Farmer's Winery Group Limited v Martell and Cie*:[1]

> 'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiarity factors, not

[1] 2003 (1) SA 11 (SCA) para [5].

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 facts or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under(a)(ii), (iv) and (v) above, ... 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.'

[26] In evaluating parties' evidence, it is also trite that the failure to challenge the evidence on a particular aspect in cross-examination may affect the findings of the court on that aspect.[2]

[27] The applicant's evidence that the parties agreed that they would be equal shareholders in the second respondent; that the Montana Car Wash business came to a head over the applicant's displeasure regarding the involvement of one Sammy in the business at the behest of the first respondent; that the first respondent invited her to a dinner where the first respondent informed her that Sammy will continue to be involved in the business despite her objections; that he demanded that she 'leave' the business and threatened with legal action if she did not, whereupon the applicant relinquished and agreed to sell her shares in the second respondent to the first respondent; that the first respondent offered to pay her the amount of R1 million for her shares in the second respondent; that the applicant received two payments of R20 000.00 each from the first respondent after she left the business in September and October 2019; and that the applicant contacted the first respondent numerous

[2] *President of the RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para [61].

times after not having received the money for the purchase price of her shares by the end of November 2019, was not challenged during cross-examination.

[28] Despite the parties agreeing in the joint practice note to certain common cause facts, which included, amongst others, that the parties agreed that the purchase price of the applicant's shares would be R1 million, that the parties previously agreed that they would be equal shareholders in the second respondent, and that these facts were not disputed in the first respondent's answering affidavit, the first respondent disputed these facts when testifying.

[29] When testifying, the first respondent said 'there was no agreement in writing that ..', 'there was no writing, there were no agreement that I would buy the shares at that point in time when she left', 'there was no agreement, there was no physical agreement that we agreed to', and that the applicant's 'ignorance of the law is no excuse'. The first respondent placed reliance on what he referred to as a shareholders' agreement concluded between himself and the applicant in 2016, to justify his contention that the parties did not agree to equal shareholding. The shareholders' agreement concluded in 2016 is, however, not applicable at all to the second respondent and the parties' shareholding in the second respondent.

[30] Due to the magnitude of discrepancies between the first respondent's *viva voce* evidence, his answering affidavit, and the common cause facts agreed to in the joint practice note, I cannot place much reliance on the first respondent's evidence. I found him to be an evasive witness who failed to answer questions cogently during cross-examination. His reliance on a shareholders' agreement that pre-dated the parties' involvement in the second respondent, and on the fact that no written agreement was concluded, is without merit. The first respondent's view that the applicant should have utilised the remedies available to directors and shareholders in terms of the Companies Act is misplaced, since the claim is based on an oral agreement concluded between the applicant and the first respondent in terms whereof he purchased her shares in the second respondent for an amount of R1 million. The submission that the first respondent 'technically could have withdrawn the offer to purchase the Applicant's shares in the Second Respondent at any given moment' is without merit, and neither here nor there.

[31] I perceived the applicant to be an honest witness. Although she was not 'the perfect' witness, her *viva voce* evidence was for the greatest part consistent, not only with the evidence contained in the founding affidavit, but with the agreed chronology and common cause facts. She admitted being naïve, having very little to no business acumen, and being completely reliant of the first respondent's guidance.

[32] The probabilities favour the applicant, a naïve party who implicitly trusted the first respondent with R1.5 million rand, who did not question him withdrawing the amount she paid into his attorney's trust account, and did not receive any benefit from her money for approximately three years. The applicant's version is probable, credible and reliable. When confronted by the applicant's WhatsApp message that the parties agreed that he would pay her the purchase price of R1 million for her shares by the end of November 2019, the first respondent did not deny the arrangement and responded with 'dis reg so Alta'.

[33] The first respondent was hard-pressed to concede that it would be unbusinesslike to agree to a term whereby parties would agree that the purchase price need only be paid when and if the purchaser is able to do so. The applicant's version that the respondent agreed to pay the purchase price by the end of November 2019 is further supported by the evidence that the applicant received payments of R20 000.00 for September and October, after she 'left' the business.

[34] From the respondent's counsel's supplementary heads of argument, it seems as if the applicant's claim for the R20 000.00 per month is misunderstood. It is not, and never was the applicant's case, that the monthly payments of R20 000.00 from the date of the agreement until she received the purchase price of her shares should be regarded as 'down payments' or any form of settlement towards the purchase price. According to the applicant, this amount is a monthly amount the first respondent undertook to pay for as long as it took him to get his finances in order to pay the purchase price. The first respondent stated in his answering affidavit that '[t]he amounts that were paid in September and October 2019 was done entirely in good faith, and without any obligation to do so'.

[35] The applicant proved her claim on a balance of probabilities. The first respondent did not honour the agreement to pay the applicant the agreed-upon purchase price for her shares in November 2019, nor did he continue with the payments of R20 000.00 per month until payment of the full purchase price. As for the time from which the payments of R20 000.00 is to be calculated, the first respondent is to be given the benefit of the doubt as to whether he undertook to make these payments from November 2019, or from December 2019.

[36] The applicant is entitled to the original shareholding certificate issued in her name, albeit only to hand it to the first respondent on receipt of the purchase price for the said shares.

[37] As for costs, there is no reason to deviate from the principle that costs follow success.

ORDER

In the result, the following order is granted:

1. **The first respondent shall forthwith deliver Share Certificate no. 4, dated 21 May 2019 and issued in the name of the applicant as a shareholder in the second respondent, to the applicant;**

2. **The first respondent shall pay the applicant an amount of R1 000 000.00 (One Million Rand) against the payment of which the applicant shall deliver the share certificate to the first respondent and take all steps reasonably necessary to ensure the transfer of the shares into the name of the first respondent;**

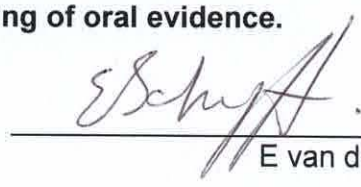
3. **The first respondent shall pay interest *a tempore morae* on the amount of R 1 000 000.00 (One Million Rand) from 1 December 2019 to the date of full payment;**

4. **The first respondent shall pay the applicant an amount of R 820 000.00 (Eight Hundred and Twenty Thousand Rand), which amount reflects the amount of R20 000.00 (Twenty Thousand Rand) payable by the first respondent to the applicant per month from 1 December 2019 to April 2023;**

5. **The first respondent shall pay interest *a tempore morae* on the amount of R820 000 00 (Eight Hundred and Twenty Thousand Rand), calculated from the end of each month upon which each instalment became due to the date of final payment;**

6. **The first respondent shall pay the applicant the amount of R 20 000.00 (Twenty Thousand Rand) per month from 1 May 2023 until full payment of the amount of R 1 000 000.00 (One Million Rand) referred to in paragraph 2 above;**

7. **The first respondent shall pay the costs of the application, including the reserved costs of 17 May 2022 and the costs of the hearing of oral evidence.**



E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:	Adv. H.P. West
Instructed by:	O'DONOGHUE & MARAIS ATTORNEYS
For the respondents:	Adv. L. Dixon
Instructed by:	PHOSA LOOTS INC.
Date of the hearing:	17 May 2022, 22, 23 March 2023, 13 April 2023
Date of judgment:	2 May 2023