71/1959

71/1959

G.P.-S.134917–1955-6–1,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE [illegible] Division.)
([illegible] Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

N. T. NAICKER & Coy. *Appellant,*

versus

GEOFFREY CLEMENT XAKAZA *Respondent.*

Appellant's Attorney / *Prokureur vir Appellant* Lovius & Block
Respondent's Attorney / *Prokureur vir Respondent* H. J. Coetzee.

Appellant's Advocate / *Advokaat vir Appellant* J. Gurwitz / H. S. Mall
Respondent's Advocate / *Advokaat vir Respondent* I. J. Broome

Set down for hearing on / *Op die rol geplaas vir verhoor op* Tuesday, 10th November, 1959.

(DCLD)

B

23.7.59. 4.30 p.m.

9.45 a.m.

C. A. V.

Adolf Steyn
Reg.

Coram: Schreiner, de Beer, Ogilvie Thompson, Ramsbottom et Botha.

The appeal is allowed with costs and the judgment of the court below is altered to read "absolution from the instance with costs."

27.11.59

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

N. T. NAICKER & COMPANY Appellant

and

GEOFFREY CLEMENT XAKAZA Respondent

Coram:Schreiner,de Beer,Ogilvie Thompson,Ramsbottom JJ.A. et Botha, A.J.A.

Heard: 10th November, 1959. Delivered: 27-11-59

J U D G M E N T

OGILVIE THOMPSON J.A. :- Appellant, a firm duly registered under the Registration of Firms Act 1906 (Natal), has as its sole proprietor one Narainsamy Thumbi Naicker who practises as an attorney at 115 Victoria Street, Durban. In an action instituted in the Durban and Coast Local Division by Respondent against appellant, the latter was ordered to pay respondent the sum of £375 together with interest and costs of suit. Appellant now appeals.

The dispute between the parties relates to an amount of £375 which, in the circumstances hereinafter detailed, respondent claims to have deposited with appellant

in/.....

in trust on 22nd May 1957. Around about that time, Nairansamy Thumbi Naicker was, for reasons revealed in the record, frequently absent from Durban for protracted periods. During such absences, his practice was left in charge of his younger brother Celvar Naicker, then a young man of twenty-three studying for his matriculation examination and, of course, not a qualified attorney. The remainder of the office staff consisted of a typiste, one Miss Pillay, and an interpreter-clerk, Magubane. Following the course adopted at the trial, I shall refer to Celvan Naicker as "Naicker Junior"; and for convenience, I shall retain the designations "Plaintiff" and "Defendant" for respondent and appellant respectively.

It appears that one Dhlamini owned a butchery business, known as Funimpilo Butchery, conducted at stall No. 6, Native Beer Hall, Cato Manor, and that one Zondo, who owned a butchery business in Durban, wished to acquire Dhlamini's Funimpilo Butchery. Zondo proposed to enter into partnership with plaintiff, who is a schoolmaster, in relation to this Funimpilo Butchery. It is common cause that a written contract of sale was concluded between Dhlamini and Zondo in relation to the Funimpilo Butchery. In terms of that contract, the price was £750, payable by Zondo to Dhlamini, as to £350, on signing the contract and, as to the balance of £400, in monthly

instalments/.....

instalments commencing 25th June 1957. The contract also provided that possession of the butchery business should be given on the signing of the contract. It is further common cause that this contract of sale was drawn up by Naicker Junior on the instructions of Zondo, who had previously been a client of defendant. The contract was produced (Exhibit B) at the trial and, on the face of it, was duly executed by Dhlamini and Zondo on 22nd May 1957 in the presence of Miss Pillay and Magubane as witnesses. Plaintiff disputes the correctness of this date of execution (he says the contract was concluded a week earlier), but he does not otherwise question this contract of sale or its terms. It is further common cause that it was contemporaneously contemplated that Naicker Junior ~~and plaintiff~~ should draw up a Deed of Partnership between Zondo and plaintiff concerning the Funimpilo butchery business and that, in connection therewith, plaintiff would pay over to Zondo the sum of £350. It is also undisputed that a meeting took place at defendant's office on 22nd May 1957 in connection with the abovementioned transactions; that Naicker Junior, Zondo, plaintiff and Dhlamini were present at this meeting; that on this occasion some money, originating from plaintiff, was handled. From this point on, however, the respective versions of the parties diametrically differ.

Before/.....

Before examining this conflicting testimony, reference must first be made to the pleadings and to the question of onus. Plaintiff's declaration averred, in paragraph three, that plaintiff consulted Naicker Junior on 22nd May 1957 with regard to the drawing up of the sale and partnership agreements which I have mentioned above. Paragraph 4 of the declaration alleged that "during the course of such consultation" plaintiff handed Naicker Junior £375 to hold "in trust pending the conclusion of the said agreements." The declaration then went on to aver that these agreements were never concluded and that, despite demand, defendant refused to return the £375. In its plea, filed on 26th August 1958, defendant denied paragraph 3 of the declaration and said that it was consulted by Zondo in relation to the agreements of sale and partnership. The plea then went on in paragraphs 3 and 4 to aver as follows:

"3.On the 22nd May 1957,the plaintiff paid to the defendant the sums of £350.0.0. and £25.0.0. in cash and receipts for these amounts were given to him. The said sum of £350.0.0. was paid as a deposit on the purchase price of Store No.6,Cato Manor Beer Hall of ELIJAH DHLAMINI, that is to say the butchery business referred to, and the said sum of £25.0.0. towards the purchase of stock for the business. Save and in so far as is consistent herewith Defendant denies paragraph 4 of Plaintiff's Declaration.

4.At the request of Plaintiff and the said ELIJAH DHLAMINI and with the consent of the said ALBERT ZONDO,Defendant refunded to the plaintiff the sum of £375.0.0. in cash on the 22nd May 1958.

Plaintiff/.....

Plaintiff returned to the Defendant the receipts issued by the Defendant to Plaintiff and the said receipts were duly cancelled."

By notice dated 25th February 1959 the defence informed plaintiffls attorneys of an intention to apply at the hearing for an amendment of paragraphs 3 and 4 of the plea by substituting therefor two new paragraphs set out in an annexure to the notice. At the opening of the trial, counsel for the defence stated that he proposed to alter the wording of the annexure and would, therefore, not move for the amendment until later. The same day the defence handed in the altered annexure which reads as follows:

"3(a) On the 22nd May,1957,the Plaintiff paid to the Defendant the sum of £350.0.0. in cash and a receipt for this amount was given to him. The said sum was paid as deposit on the purchase price of Store No. 6,Cato Manor Beer Hall,belonging to ELIJAH DHLAMINI,that is to say,the Butchery Business referred to.

3(b) At the same time,the Plaintiff had intended to pay a sum of £25.0.0.for the purchase of stock for the aforesaid business and Defendant wrote out a receipt therefor. After the receipt had been made out Plaintiff decided not to pay the money to Defendant and the receipt for £25.0.0.was accordingly cancelled.

3(c) At the request of the plaintiff and the said ELIJAH DHLAMINI,and with the consent of the said ALBERT ZONDO,Defendant refunded to the Plaintiff the sum of £350.0.0. Plaintiff returned to the Defendant the receipt issued by the Defendant to the Plaintoff and the receipt was cancelled.

4. Save and in so far as is consistent herewith Defendant denies paragraph 4 of Plaintiff's Declaration. "

This amendment was moved by defence counsel at the conclusion of

plaintiff/s/.....

plaintiff's case. Plaintiff's counsel objected to the amendment, apparently on the ground that its effect was to raise a new issue and to withdraw the admission, contained in the original paragraph 3 of the plea, that £375 had been received. Defence counsel thereupon intimated that he would call Naicker Junior who would explain how the original plea, now sought to be amended, had come to be filed. When the defence had concluded its evidence, defence counsel again moved the amendment. The learned trial judge, however, took the view that it was not necessary to deal with the application for amendment and made no order thereon. He added, in the course of his judgment on the whole case that "if it was necessary to make an order, I would be inclined to allow the amendments solely for the purpose of being able to regard the evidence tendered for the Defendant as to what the plaintiff had said to the defendant as not conflicting with the plea. "

I am somewhat at a loss to understand why the learned judge did not allow the amendment. The divergence between the original plea and the proposed amendment related mainly to the £25. Save for immaterial differences in wording and a slight alteration in the sequence, the above-cited amendment moved was substantially identical with that of which notice had been given before the trial commenced. Naicker Junior's evidence afforded an explanation of why the original

plea/.....

plea took the form it did. The fact that an amendment was required was, of course, a matter upon which the plaintiff might reasonably comment; but no prejudice to plaintiff could possibly have ensued from allowing the amendment. In fact, evidence was led, and the trial proceeded, on the basis that the defence case was as set out in the amendment moved but never adjudicated upon. In my view this amendment should have been granted and this Court should approach the case on that basis - as, indeed, was the basis upon which both counsel argued the appeal.

The learned trial judge made no reference in his reasons to the onus of proof. Before this Court, Mr. Broome, for plaintiff, was disposed to accept that the onus rested upon plaintiff as to £25, but submitted that it lay on the defendant as to the £350. The essence of plaintiff's case, as made in his declaration, is (i) that he consulted Naicker Junior with regard to the agreements and, in the course thereof, (ii) handed Naicker Junior £375, (iii) to be held in trust pending the conclusion of those agreements. All three of these averments are put in issue by the amended plea. This latter, it is true, concedes the receipt of £350 "as deposit on the purchase price of Store No. 6 etc." and avers the repayment to plaintiff of £350; but that in no way impairs the denial of the plaintiff's allegations. The same obtains with regard to the original plea.

Save/.....

Save for the different treatment of the £25 in paragraph 3 of the original plea and in paragraph 3(b) of the altered plea respectively, there is, in relation to the matter under discussion, no material difference between the original and the amended plea. Both pleas put in issue plaintiff's vital allegations that defendant received £375 in trust pending the conclusion of agreements and that, despite the non-conclusion of those agreements, the £375 has not been repaid. These allegations form an essential part of plaintiff's case and the proof of those allegations rests upon plaintiff who is not relieved of that burden by the circumstance that, in addition to denying plaintiff's allegations, the defence has - very rightly -also pleaded its version of what occurred. In my judgment, therefore, the onus of proof lay upon the plaintiff in relation to the whole of the £375 (see Dave v. Birrell,1936 T.P.D.192;Kriegler v. Minitzer and Another,1949(4) S.A. 82(A.D.) at pages 825 - 828; Pillay v. Krishna and Another,1946 A. D. 946 at pages 951 - 954).

In the sharp conflict of fact revealed by the evidence, the learned trial judge found in favour of the plaintiff's version which he described as being the more probable of the two. The learned trial judge formed the opinion that plaintiff was a truthful witness and he described the three witnesses called for the defence (viz.Naicker Junior,Zondo and

Magubane/.....

Magubane) as untruthful witnesses of whom he "was not prepared to accept anything any one of them said unless there was corroboration by some other credible evidence." I shall later revert to these findings on credibility, but pause here to observe that findings of this nature by a trial court not only constitute formidable obstacles in the path of an appellant but also manifestly must be accorded due weight by this Court in deciding an appeal.

Naicker Junior deposed at the trial that he that Zondo brought Dhlamani to him on 21st May 1957 and, on that occasion, obtained instructions to draw up a contract of sale in relation to the Funimpilo Butchery. Later the same day Zondo and Dhlamini returned and approved his draft. It was arranged that they would return the next day and sign the completed contract. On 22nd May 1957 - so Naicker/s Junior's evidence continued - he returned to the office from court and Miss Pillay made a report to him. In consequence of this report, he took ~~£350~~ £350 from Miss Pillay's cash box and put it in the safe. Soon thereafter, Zondo, Dhlamini and plaintiff arrived: this was the first time he had ever seen plaintiff. The contract of sale was read out to, and approved by, Zondo and Dhlamini. The latter made it clear that, as provided in the contract, he wanted the £350 to be paid on the execution of the contract. Plaintiff then told Naicker Junior that he had paid money in to the office, which

Naicker/.....

Naicker Junior already knew from Miss Pillay. Plaintiff said this money should now be handed back to him so that he might give it to Zondo who, in turn, would pay Dhlamini the £350 provided for in the contract. Thereupon Naicker Junior went to the safe, took out the money, counted it and, against return of the receipt No. 2891 referred to below, handed it over to plaintiff. The amount was £350 in notes. Plaintiff then handed this money to Zondo who, after also counting it, paid it to Dhlamini. At the same time plaintiff took from his pocket £25 which he handed to Zondo. Receipt No. 2891, together with its carbon copy, was produced by Naicker Junior at the trial where it formed part of Exhibit C, which is the official receipt-book of defendant firm. This receipt No. 2891 is signed "R.Pillay For N.T.Naicker & Co." and reads :

" "22nd May 1957. Mr. Geoffrey Xakaza,three hundred and fifty, deposit purchase price Stall No.6 Cato Manor Beer Hall,Elijah Dhlamini', it was stamped, with a date 22/5/57 and the initial R.P., £350. "

The handwriting is that of Miss Pillay. Written across this receipt, between two parallel lines, is the word "Cancelled". This word is in Naicker Junior's handwriting. Naicker Junior's evidence is that when, in return for the £350, he obtained possession from the plaintiff of the original of this receipt No. 2891 he wrote "Cancelled" across it in such a way that this word is also

shown/.....

shown on the carbon copy. Naicker Junior also produced at the trial receipt No. 2892. This receipt, dated 22 May 1957 and also signed by Miss Pillay and in her handwriting, reads :

"Mr. Alpheus Zondo. Geoffrey Xakaza £25 on account deposit stock agreement between yourself and Elijah Dhlamini."

The words "Mr.Alpheus Zondo" are scored through. Across this receipt (as well as across its carbon copy) is also written, between parallel lines, the word "Cancelled". This word is in Miss Pillay's handwriting. It may here be mentioned that the defence case in relation to this £25 is that plaintiff intended to pay it to Miss Pillay contemporaneously with the £350 which was paid to her and that Miss Pillay, accordingly, wrote out the two receipts: but that, upon plaintiff's changing his mind with regard to the £25 and retaining it, she then cancelled receipt No. 2892. Evidence to this effect was given by Magubane. This witness also deposed to the circumstances whereunder Miss Pillay received the £350 from plaintiff. He said that on the morning of 22nd May 1957 plaintiff arrived at the office alone and paid over £350 in notes to Miss Pillay who gave plaintiff an official receipt for that sum. Plaintiff left the office with this receipt and, later the same morning, returned in the company of Dhlamini and Zondo. Naicker Junior was then in the office.

Naicker Junior further deposed that, at the interview in his office on 22nd May 1957, the following documents were signed in his presence (i)the contract of sale between Dhlamini and Zondo (Exhibit B);(ii) a receipt from Zondo to plaintiff for the £350; (iii) a receipt from Zondo to the plaintiff for the £2 5; and (iv) a receipt from Dhlamini to Zondo for £350. According to Naicker Junior, he retained only the first and fourth of these documents, the remaining two being

that/.....

that day taken away by the plaintiff. The receipt from Dhlamini to Zondo, and the two receipts from Zondo to the plaintiff were, according to Naicker Junior, typed, at his instance by Miss Pillay. Naicker Junior said that plaintiff insisted upon having two separate receipts for the £350 and the £25. The receipt from Dhlamini to Zondo was produced at the trial (Exhibit M). It bears what purports to be Dhlamini's signature and a duly cancelled stamp. It is in typescript and reads :-

"Received the sum of THREE HUNDRED AND FIFTY POUNDS (£350.0.0.) from Alpheus Zondo being deposit on purchase price of Stall No.6 Native Beer Hall. Cato Manor.
DATED at DURBAN this 22nd day of MAY 1957.
Sgd. Elijah Dhlamini."

It is common cause that no partnership agreement between Plaintiff and Zondo was ever in fact drawn up by Naicker Junior. The latter said that he first heard of the proposed partnership on 21st May from Zondo and that he then took some instructions "just in pencil and paper". Asked in chief why the deed was not drawn, Naicker Junior said he "could not get confirmation because of plaintiff not calling at the office and giving me instructions as well." Under cross-examination, however, he said that on 22nd May 1957 he was told that plaintiff and Zondo would be coming in the following day in regard to a partnership agreement, but that on the 23rd only Zondo came and -

who/.....

who told him to "jot down notes in regard to a partnership agreement" and that he (Zondo) would get plaintiff to "come round to the office in order to give us proper instructions to draw up a partnership agreement." Pressed as to why no such agreement was ever drawn up, Naicker Junior said that plaintiff never came and that he never received the required instructions. Naicker Junior was definite that there never was any intention, so far as he was aware, that a deed of partnership should be signed in his office on 22nd May and that there was no discussion, on that date, of the terms of any such partnership.

According to Naicker Junior he did not, after 22nd May 1957, see plaintiff again until toward the end of July. On this occasion - so Naicker Junior's evidence continued - plaintiff and Zondo complained that Dhlamini's son-in-law (one Mgadi) was still trading in the Funimpilo business and they wanted this man ejected. Plaintiff had brought with him the two receipts given him by Zondo on 22nd May 1937 (mentioned (ii) and (iii) supra), and Naicker Junior deposed that he put these two receipts into Zondo's file and sent the whole file over to Attorney Naidoo, as also Zondo, Plaintiff and Mgubane. Naidoo - with whom Naicker Junior had been in telephonic communication - there drafted an appropriate letter which was, under date 25th July 1957, thereafter despatched by defendant

firm/. ....

firm to Dhlamini. This letter, addressed to Dhlamini (Exhibit N) reads :

" Re: Memorandum of Agreement of Sale and Purchase:Yourself and Alpheus Zondo.

The Agreement of Sale and Purchase entered into between yourself and Alpheus Zondo on the 22nd May,1957, refers.

Alpheus Zondo has paid £350 and also an instalment of £20 in terms of the said agreement. He is therefore entitled to full possession of the business. He complains that your brother-in-law is carrying on business on the same premises contrary to the said agreement. Please see to it that your brother-in-law discontinues with such unlawful practice immediately.

We shall be glad if you will kindly see us in connection with this matter as soon as possible. "

On 8th August 1957, according to Naicker Junior, plaintiff came again to the office. This time he wished to get back his two receipts which, as mentioned above, had been put into the Zondo file. Miss Pillay spoke to Naicker Junior who instructed her to give Plaintiff the receipts against his signature. Thereafter Miss Pillay wrote out the following document (Exhibit E) which was signed by plaintiff :

"8th August 1957.

1.Uplifted receipt made by Alpheus Zondo in favour of Xakaza Geoffrey for £350 dated 22/5/57.

2.Uplifted receipt made by Alpheus Zondo in favour of Geoffrey Xakaza dated 22/5/1957.

Sgd. Geoffrey Xakaza.

8/8/57. "

Plaintiff then took the two receipts away.

Under/.....

Under date 21st November 1957, Plaintiff, through his attorneys Messrs. Van Aardt and Company, addressed to defendant firm the following letter of demand.

"re: AGREEMENT,JEFFREY XAKABA AND ALPHEUS ZONDO

We have been consulted by Jeffrey Xakaza and instructed to write to you.

Our client informs us that on 22nd May,1957, he,together with Alpheus Zondo who is your client, interviewed you in regard to the drawing up of a partnership agreement between himself and your client in regard to the Funimpilo Butchery. While in your office he paid you the sum of £350.0.0. to be held in trust by you until after the agreement had been signed.

He now informs us that no agreement was in fact signed and will you therefore kindly let us have your cheque for £350.0.0. as he does not intend negotiating further with Alpheus Zondo."

To this defendant firm replied under date 29th November,1957, as follows :-

"Re:JEFFREY XAKAZA AND ALBHEUS ZONDO

With reference to your letter dated 21st November,1957, and the writer's telephone conversation with your Mr.J.C.van Aardt we confirm that the £350.0.0.was not paid to us to be held in trust but paid to Mr. Alpheus Zondo by your client for which he has obtained an acknowledgment and a written promise by Zondo to repay him. The money was used apparently to purchase from one Dhlamini a butchery business namely Funimpilo Butchery. Your client conducted the business for a month.

Since the telephone conversation Mr.A.Zondo came to see us and we are informed by him that he is raising a loan to pay off all his liabilities including whatever he owes your client.

In the circumstances we do not see how your client can claim from us. We may point out that we act for your client in another matter. "

Further/.....

Further correspondence ensued wherein the parties maintained their respective contentions without, however, shedding any further light upon the matter. But it may here be mentioned that the "acknowledgment ~~of~~ and a written promise by Zondo to repay" (referred to in the defendant's above-cited letter of 29th November 1957), was produced by plaintiff at the trial. The document bears the signature of Zondo and the date 22.5.57 in his handwriting. It is one of the four documents which, according to the defence testimony (including that of Zondo himself) was signed on 22nd May 1957 in defendant's office and in the presence of Naicker Junior. This document (Exhibit A) reads :-

"Received the sum of Three Hundred and Fifty Pounds (£350) from Mr. Geoffrey Xakaza, of Cato Manor, Durban, to be admitted as a partner into the Business of Funimpilo Butchery which I purchased from Elijah Dhlamini on the 22nd May 1957. The Partnership agreement between Geoffrey Xakaza and myself will be properly drawn up and signed. If the partnership agreement is not signed I shall hand over the Butchery business or the sum of £350 (all) the amount by the 16th of June 1957. "

I pause at this juncture to make three observations in relation to the defence case. First, Naicker Junior's account of the critical events of 22nd May 1957 is, in its essentials, confirmed by Zondo's evidence and is corroborated by that of Mgubane. Dhlamini did not give evidence at the trial : he was ill in Johannesburg at the time. Miss Pillay

was/.....

was, at the date of the trial, studying in England and she also did not give evidence. In the circumstances, the failure to call either Dhlamini or Miss Pillay is, I think, adequately explained. It is true that the defence failed to call Naicker Senior in whose presence, according to plaintiff's evidence, Miss Pillay said there was something wrong with the official receipt. On the other hand, Naicker senior admittedly was not present on any of the earlier occasions and having regard to the unconvincing nature (discussed below) of some of the plaintiff's testimony it is, I think, understandable why Naicker senior was not called. It would have been better to have called him as a witness; but I do not consider that in all the circumstances any serious adverse inference is to be drawn from the failure to call him. Secondly, a careful perusal of Naicker Junior's evidence fails to reveal any serious grounds for criticism. Indeed, with the possible exception of his testimony, outlined above, in relation to the notes for the partnership agreement, Naicker Junior's evidence reads well. The written word gives no indication of those considerations which moved the learned trial judge to say in his reasons that Naicker Junior "cut a rather sorry figure in the witness box for he was uncomfortable throughout." Nor was Mr. Broome, in his valiant argument for plaintiff, able to refer us to any passages in the evidence of Naicker Junior which would

go/.....

go to demonstrate Naicker Junior as being an unsatisfactory witness. Such passages as Mr. Broome did advance in this regard relate to such trivial divergences as not to be worthy of serious examination. Thirdly, as the foregoing narrative will, I hope, have made plain, Naicker Junior's testimony is throughout supported by the documemts produced at the trial and which I have quoted.

The learned judge a quo directed some criticism towards these documents. He pointed out that a factor common to all of them is that they were prepared in the defendant's office and that "the truth or otherwise of what is stated in them is dependent upon the veracity or otherwise of the witnesses who testify to the circumstances in which they came into existence." He remarked upon the fact that, unlike Exhibit M, in Exhibit B the date of execution had not been typed in, but had been added in ink. He drew attention to the inaccuracy of Exhibit C in referring to plaintiff's £350 as being a deposit on the purchase price and to the failure of the second portion of Exhibit E to reflect any amount. He ~~explained~~ emphasised that, despite Miss Pillay's alleged practice of keeping copies of documents which she typed, no copies appeared to be extant of Exhibits A, B and M or of the £25 receipt allegedly given by Zondo to plaintiff. The learned judge also questioned the propriety of the "Cancelled" procedure in relation/.....

tion to receipt 2891 and receipt 2892 (Exhibit C) and adverted to the concluding portion of Exhibit A which was repudiated by Zondo in evidence.

That Zondo should deny the concluding sentence of Exhibit A is a reflection upon his honesty, but is readily explicable on the hypothesis that, in the events that have happened, he envisaged a claim against himself from plaintiff for the £350. With respect to the learned judge a quo, I do not find the "Cancelled" procedure, described by Naicker Junior, in regard to receipts Nos. 2891 and 2892 to be anything extraordinary or inherently suspicious. That it was not the best possible procedure may be conceded; but I am unable to agree that the procedure adopted gives rise to serious question. With regard to the other points mentioned by the learned judge in relation to the documents, it is noteworthy that, having mentioned them, the learned judge drew no conclusion from them. Presumably these various factors caused the learned judge to entertain some suspicion that these documents were not genuine documents: he, however, made no finding to that effect. Nor, on the evidence, could such a finding have been made. In view of the attitude adopted by Mr. Broome towards these matters at the hearing of the appeal, I do not propose to add to the length of this necessarily long judgment by attempting to explain in detail the various

features/.....

features singled out by the learned judge in relation to these documents. Suffice it to say that I think that most of them are readily explicable (e.g. there is no evidence that Miss Pillay, who typed Exhibit B, knew that it was proposed to execute it on the 22nd); and that others (e.g. the absence of copies of the typed receipts) tend to negative, rather than support, any hypothesis of fabrication. However that may be, in this Court Mr. Broome was careful to avoid any suggestion of forgery against the defence. In response to enquiry from the Bench, he explicitly disclaimed any suggestion of forgery, but advanced the theory that the typed receipts (Exhibits A and M) were actually executed on 22nd May 1957 but only after plaintiff had left defendant's office. I shall revert to this theory later. At this juncture it is sufficient to say that, on the evidence, the various exhibits to which I have referred can not be regarded as being anything other than genuine documents; and, as I have already remarked, those documents support the defence version of events.

I turn now to examine plaintiff's version which was accepted by the learned judge a quo. Plaintiff deposed that he saw Naicker Junior about a week before 22nd May 1957 concerning the proposed deed of partnership between himself and Zondo. Naicker Junior had a rough draft in lead pencil of the

proposed/.....

this was the first intimation to Naicker Junior that he had money with him - that he refused to part with his money until the deed of partnership was properly completed and signed. Naicker Junior promised to have it ready the next day. At this stage Zondo - who, with Dhlamini, was also present - proposed that plaintiff should, pending the execution of the deed of partnership, leave the money in safe custody with Naicker Junior. It was pointed out that, in this way, Dhlamini would feel sure about getting his initial payment of £350 from Zondo. Naicker Junior supported this idea. Plaintiff fell in with the suggestion and handed over the full £375 to Naicker Junior personally; that is to say, not to Miss Pillay. Plaintiff asked for,and was given,a receipt for this £375 by Naicker Junior. Plaintiff's evidence regarding this receipt is somewhat discursive and contradictory and I shall deal fully with it directly; but I refrain for the moment from pursuing that question in order to maintain the continuity of the narrative. After Naicker Junior had given plaintiff this receipt, Naicker Junior "suggested that seeing the money involved was such a large sum of money, it were better that the receipt was kept in safe custody, because if it got lost then these two people would lose the money". I have purposely cited plaintiff's own words from his evidence in chief to describe this - on the face of it - somewhat extraordinary proposal said to have been

made/.....

made by Naicker Junior. Plaintiff - so his evidence continued - was somewhat reluctant to fall in with this proposal but, because he "could not doubt Zondo" ultimately agreed. He then handed back to Naicker Junior the receipt he had been given for the £375 deposited in trust pending execution of the deed of partnership. Plaintiff, however, asked to be given some proof that he had left this large sum of money with Naicker Junior. Thereupon, according to plaintiff's evidence, Naicker Junior "typed out a strip of paper saying that I ~~could~~ had left £375 with him ". Plaintiff then departed for his work, being told by Naicker Junior that Zondo would inform him when to come for the signature of the partnershipmdeed.

This important "strip of paper" (whose existence is, of course, emphatically denied by the defence) was not produced at the trial. Plaintiff deposed that he always kept this ~~slip~~ strip of paper in the books of the Funimpilo Butchery (which he and Zondo took over, in collaboration, on 23rd May 1957). Why so important a document was kept "in the books", plaintiff made no attempt to explain. Nor was plaintiff's evidence at all satisfactory in regard to when this document was lost. Initially he said that "it must have gone back with the butchery books because I had it there. " Asked, in cross-examination, when he had discovered its loss, he

replied/.....

replied, "It was recently. I thought it was in the house, it may still be in the house." When defence counsel asked why he had not invoked the aid of this document when required to sign exhibit E on 8th August 1957, plaintiff's answer was:"I didn't find it even that day. I looked for it but I could not find it."

I now return to the question - deferred above - of the receipt which, according to plaintiff, he was first given by Naicker Junior in return for £375 deposited in trust. Plaintiff was emphatic that what he had been given was an official receipt - a single receipt - for £375 (A reference in his evidence to "two receipts" was explained as being an allusion to the above-mentioned strip of paper). Plaintiff was at first equally emphatic that this receipt was neither No. 2891 nor No. 2892 (Exhibit C) which, he added, he had never seen. When pressed on this point, however, he conceded that No. 2891 might be the one. Asked to explain the disparity between the £350 reflected on receipt No. 2891 and the £375 claimed, plaintiff's answer was that he thought all was well because the "strip of paper" reflected £375. When the cross-examiner pointed to the figure £350, appearing in the letter of demand (Exhibit D), plaintiff's answer was that his attorney would appear to have written "in terms of the receipt."

Plaintiff agreed that the proposed

deed/.....

deed of partnership had never been signed. He said he went several times to defendant's office, but was always told that the agreement was not ready. He deposed that he and Zondo took over the Funimpilo Butchery on 23rd May 1957 and that he kept the books of that business from that day. He confirmed that he had, together with Zondo, gone, at Naicker Junior's request, in July 1957 to Attorney Naidoo who had drafted the above cited Exhibit N. It was on this occasion that, according to plaintiff, he for the first time saw the receipt from Zondo for £350 (Exhibit A cited above). On returning from Naidoo's office to defendant(s office - so plaintiff's evidence continued - he saw Miss Pillay, Naicker Junior being absent. He referred to having "seen a receipt I did not know" and asked for the official receipt which he had, together with his £375, left with Naicker Junior on 22nd May 1957. Miss Pillay's reply was that Naicker Junior would tell him about that official receipt and that "there was something wrong with it." Plaintiff then left without obtaining either the "official receipt" or Exhibit A. He thereafter returned on 8th August 1957 - no explanation of this delay was given - but Miss Pillay would only give him (i.e. not the "official receipt") Exhibit A and then only if he signed for it. Ultimately, although reluctantly, he signed the above-cited Exhibit E. Plaintiff's evidence in chief on this point reads :-

"although/.....

"although I was trying to refuse that receipt she insisted that I should take it, then I agreed to take it and wanted to add that this was not the receipt I had expected to get from the office, but she would not allow me to add anything else, she said no, if I don't want this receipt she would rather keep it and I would go without anything, so rather than not have a scrap of paper I took that receipt and signed my name below. "

Under cross-examination plaintiff insisted that, notwithstanding the terms of Exhibit E (which refers to two receipts), he was in fact only given Exhibit A.

The foregoing summary of plaintiff's evidence is, I think, sufficient, without more, to expose the inherent improbability of his story and to reveal how what he says conflicts with the contemporaneous written documents. That being the case, it is hardly surprising that contradictions abound in the written record of plaintiff's evidence. By way of illustration I refer to one of the more striking of these contradictions. As pointed out earlier, plaintiff conceded that he was always aware that, in terms of Exhibit B, £350 was payable to Dhlamini on signature of the contract of sale and that, for that purpose, Zondo desired to utilize the £350 payable to him by the plaintiff. As plaintiff himself made clear, he and Zondo had de facto control of the Funimpilo Butchery as from 23rd May 1957. Asked in cross-examination where Zondo had obtained the money to pay Dhlamini, plaintiff at first said that, in response

to his enquiry, Zondo told him that he had got the money from his own butchery business. At a later stage, asked why Mgadi had remained at the Funimpilo business, plaintiff answered : ""They had to be there because no monies had been transferred to Dhlamini." When taxed with his earlier answer, he first denied that he made that answer and then, in effect, admitted it. Pressed further, plaintiff then deposed that what Zondo had told him was the following :-

"This man" (i.e.Dhlamini) "is sickly, this money is safe as long as he has seen the money is there with Naicker, he has allowed me to continue, and that is the arrangement between us. "

It only remains to add that plaintiff was a party to the compilation of Exhibit N which, dated 25th July 1957, avers that " Alpheus Zondo has paid £350 and also an instalment of £20."

Again, plaintiff's case is that £375 was paid over to Naicker Junior. Apart from the fact that this is contrary to the terms of Exhibit C and from the further fact that,as indicated earlier, plaintiff's evidence concerning receipts Nos. 2891 and 2892 was contradictory, there is additional documentary evidence against plaintiff's contention. In his own handwriting there appears under date 23rd May 1957, in the cash book of the Funimpilo Butchery, an entry reading "To capital G.C.X.£25"; and, as plaintiff's cross-examination reveals, this cash book can only balance if this £25 be included. Plaintiff's attempts,

as/.....

as reflected in his evidence, to reconcile the foregoing with his assertion of having paid the £25 over to Naicker Junior are in parts unintelligible and, for the rest, are utterly unconvincing.

The general overall probabilities are overwhelmingly against plaintiff's version being correct. Plaintiff was at all material times aware that Zondo proposed to utilize his £350/in order to pay Dhlamini. It is inherently unlikely that the latter, who was contractually entitled to £350 on signature of Exhibit B, would have waited for his money (on plaintiff's version) for at least a week prior to 22nd May 1957. It is still more unlikely that, having so waited, Dhlamini would, on 22nd May have been content with a mere deposit of £350 with defendant, who was Zondo's, and not his, attorney. That Dhlamini, having delivered the business on 23rd May would, in conformity with the passage from plaintiff's evidence last cited above, have waited for his money even after 22nd May 1957 is, in my view, utterly improbable. It is incredible that plaintiff - an educated man - would, as he deposes, have surrendered the official receipt which he had received from Naicker Junior for the money in return for a "strip of paper". It is grossly improbable that, having taken such a "strip of paper" he would have carelessly left it in the books of the butchery business

and/.....

and then lost it. On plaintiff's own version, the £350 was destined to go, upon completion of the deed of partnership, to Zondo and thence to Dhlamini. The execution of the deed of partnership would, to the knowledge of Naicker Junior and Zondo, at once have entitled Zondo to the £350. The only reason advanced by plaintiff for the non-execution of this deed is the alleged interminable procrastination by Naicker Junior and Zondo. Plaintiff nowhere suggests that it was the terms of the partnership which constituted the obstacle to execution. Quite apart from the fact that fraud is not lightly to be presumed, it is inherently improbable that Naicker Junior and Zondo would resort to an elaborate fabrication of documents when the release of the money to Zondo could be regularised by the simple expedient of executing the deed of partnership. To execute such a deed would have been much simpler than, in accordance with the theory advanced by Mr. Broome, first making an unauthorised payment of the money to Zondo after plaintiff had left the office on the 22nd. May and then evidencing that payment by a series of receipts which, if not literally false, approximate very closely thereto.

The various considerations I have mentioned lead, in my judgment, irresistibly to the conclusion

that/.....

that the decision in the court below was wrong. Mr. Broome, very naturally, sought to rely on the credibility findings made by the learned judge a quo, and the principles discussed in Rex v. Dhlumayo and Another (1948(2) S.A. 678(A.D.)) and similar cases were urged upon us. Without in any way derogating from those principles, we cannot, in my view, refrain, notwithstanding the trial court's findings on credibility, from disturbing the judgment of the court a quo. Had the learned trial judge rightly appreciated the implications of plaintiff's evidence, the significance of the documents, and the cogency of the probabilities in the defence's favour, it is, I think, in the highest degree unlikely that he would have made the credibility findings he did. This Court hesitates to disturb a finding of fact, especially where it depends upon the credibility, or even on the accuracy of witnesses whom it has not seen: but there may be circumstances which justify such interference - per INNES C.J. in Estate Kaluza v. Braeur (1926 A.D. at page 256) and referring to Parkes v. Parkes (1921 A.D. 69). In this latter case the same distinguished Judge made, at page 75, the following remarks which I cite in full as being peculiarly apposite to the present case :-

" Now/.....

"Now the manner in which a witness gives his evidence is often an important factor determining the weight of that evidence. His candour or evasion, his readiness or reluctance, and his whole demeanour are important elements in estimating his credibility. But the test must be applied with care and not pressed too far; for valuable though it may be, its application is full of difficulty. Still, a conclusion as to credibility arrived at by a skilled and experienced judge is not to be lightly set aside. But a Court of Appeal has power to set it aside, and will not hesitate to do so when it is satisfied from other circumstances that the trial court has reached a wrong conclusion. Now in some ~~circumstances~~ cases such other circumstances lie ready to hand; admitted facts, written documents, contemporaneous declarations and similar matters often afford valuable material for checking the estimate of credibility formed by a trial court. "

In the present case, I am, by reason of the various circumstances to which I have referred, satisfied that the trial court reached a wrong conclusion. I may add that I should have been of that opinion even had the onus rested upon the defence.

For the foregoing reasons, the appeal is allowed with costs and the judgment in the court below is altered to read "absolution from the instance with costs."

N.O. Genie Thompson

Schreiner, J.A.
De Beer, J.A.
Ramsbottom, J.A.
Botha, A.J.A. } Concur