276/74

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

CENTRACOM PROPERTY INVESTMENTS (PROPRIETARY) LIMITED — Appellant

and

ALAN GREEN — Respondent

Coram: BOTHA, WESSELS, TROLLIP, JJ.A., GALGUT et KOTZÉ, A.JJ.A.

Heard: 10th November 1975.

Delivered: 26th November 1975.

J U D G M E N T

BOTHA, J.A.:-

This is an appeal against an award of damages with costs made by KRIEK, J., in the Natal Provincial Division in favour of the respondent (I refer to him as the plaintiff) against the

appellant.../2

appellant (to which I refer as the defendant). In the Court a quo the plaintiff claimed from the defendant payment of the sum of R5 000-00 as damages alleged to have been suffered by him in consequence of the wrongful repudiation by the defendant of an oral agreement entered into between them in Cape Town. The agreement is set out as follows in plaintiff's particulars of claim:-

> "On the 4th June 1973 and at 37 Buitekant Street, Cape Town, the parties concluded an oral agreement in terms whereof defendant appointed plaintiff as consultant interior designer for a new hotel being constructed in Pietermaritzburg, Natal, for or by defendant, plaintiff to render services to defendant in the design of various interior work in respect of the said hotel (details whereof were to be supplied by defendant to plaintiff in Durban on the 10th June 1973) and to deliver drawings of a typical bedroom scheme to defendant which had been prepared by plaintiff, and in terms

whereof defendant undertook to pay to plaintiff a fee of R5 000-00."

In the particulars of claim it is further alleged that:-

"On the 4th June, 1973, and on conclusion of the said agreement, plaintiff handed over to the said Fienberg "(who, it is common cause, represented the defendant in the conclusion of the agreement)" one layout drawing (No. 150), 2 perspective sketches of a bedroom for the said hotel and a perspective sketch of a bathroom therefor, and the said Fienberg there and then accepted the said drawing and sketches.

Thereafter, and on the 8th June 1973, defendant (acting through the said Fienberg) informed plaintiff that he was not to proceed to Durban on the 10th June 1973, and that a contract for the work to be done by plaintiff in terms of the said oral agreement had been concluded with a company known as Interform Contracts (Proprietary) Limited."

In its plea the defendant admits that on the date and at the place alleged a discussion took place between plaintiff, Fienberg and one Roesstorff in connection with the interior decor of a new hotel which was in the course of construction in Pietermaritzburg, but denies that any agreement was concluded between Fienberg and plaintiff. The plea denies that the drawing and sketches mentioned in the particulars of claim were handed to Fienberg by the plaintiff, but alleged that they were handed to Fienberg by Roesstorff. The plea also denies a wrongful and unlawful repudiation of an agreement between plaintiff and defendant, and that plaintiff has suffered any damages.

The main issue between the parties at the trial was whether or not the discussions, which admittedly took place on 4 June 1973, led to the conclusion of an agreement between them as alleged.

Judgment was given in the Court a quo on

15 November 1974. Notice of appeal was filed and served on 22 November 1974. A copy of the record of the proceedings in the Court a quo should, in terms of the rules, have been lodged with the Registrar of this Court by 15 February 1975. Because of the delay in obtaining Senior Counsel's opinion on the prospects on appeal, the defendant applied for and plaintiff granted an extension of time for the lodging of the record until 15 March 1975. After obtaining counsel's opinion on 25 February 1975, an offer of settlement was made by defendant which was rejected on 13 March 1975. Steps were immediately taken for the preparation of the necessary copies of the record which were filed with the Registrar on 18 April 1975. It was accordingly necessary for the defendant to apply for condonation of the late filing of the record. As an important consideration relative to

this application is the prospects of success on appeal, counsel were invited to argue the appeal on the merits.

The only evidence given for the plaintiff at the trial was given by the plaintiff himself. He said he first met Fienberg during August 1972 at the house of an architect in Durban. He was shown the plans of an hotel about to be constructed in Pietermaritzburg. The possibility of his collaborating with the architect in regard to the interior decor of the hotel was discussed, but no agreement was reached. Roesstorff, a director of a group of companies referred to as Interform, was present. The plaintiff was then practising as an interior designer on his own account, but from 1 January 1973 to 31 May 1973 he was employed by Interform in that capacity. He, however, left their service on 11 May 1973.

On 10 May 1973 he received a telephone call from Fienberg who told him that he, Fienberg, had heard that plaintiff was about to practise on his own account, and suggested that plaintiff might do certain work in connection with the proposed hotel in Pietermaritzburg. He further suggested that plaintiff prepare certain drawings which could be discussed at a meeting in June.

This meeting took place in Cape Town on 4 June 1973, Roesstorff also being present. According to plaintiff he presented to Fienberg the layout drawing (No. 150), two perspective sketches of a bedroom and a perspective sketch of a bathroom therefor which he had prepared at the latter's request. These were, with one minor modification, accepted by Fienberg. They thereupon discussed plaintiff's fee for doing the interior designing of the entire hotel. A figure of R5 000-00 plus expenses was agreed upon. Fienberg then telephoned a firm known as Trust Express to

organise a flight for the plaintiff to Natal on the following Sunday (10 June) in order to go and discuss matters with the architects.

Before he left the meeting plaintiff undertook to confirm the agreement in writing. This he did by letter posted to Fienberg on 8 June 1973. The letter was not dated but was sent by registered post on 8 June. He said his wife, who had typed the letter, had inadvertently omitted to type the date. After the posting of the letter the plaintiff telephoned Fienberg in Pietermaritzburg in order to finalise the arrangements for his visit to Durban, but was then told by Fienberg that "what had been agreed was no longer in existence, and that all negotiations regarding the design work should go through Mr. Roesstorff." When plaintiff reminded Fienberg of their agreement of 4 June the latter replied that "it was most unfortunate but that was - that's what he had agreed with Mr. Roesstorff since the 4th June."

Fienberg admitted plaintiff's evidence in regard to their first meeting in Durban. He denied plaintiff's version of their telephone conversation on 10 May 1973. He said he wanted to speak to Roesstorff who, he was told, was out and he merely left a message with the plaintiff that Roestorff was to contact him.

Fienberg admitted the meeting in Cape Town on 4 June 1973. He said Roesstorff, Moser, plaintiff and he himself were present. They discussed the future of the interior design of the hotel. He had by then realised that plaintiff had left Interform's service and that he was going to practise on his own account. The purpose of the meeting was to discuss the possibility of the plaintiff undertaking the interior designing of the hotel. Interform was engaged to do the "shopfitting" and to supply the furnishings. Fienberg said he metioned certain difficulties which would be

caused by the fact that plaintiff lives in Cape Town while the new hotel was in Pietermaritzburg, but plaintiff said he could handle the work and that he could save Fienberg a lot of money by way of fees. He said that plaintiff initially mentioned an amount in excess of R5 000-00 in respect of his fees but that Roesstorff intervened and suggested R5 000-00 as reasonable. Fienberg said he would think it over, and discuss it with his co-directors and advise plaintiff of their decision. He said plaintiff then said "Well, any decision that we come to I want to make it quite clear that any work that I do must be specified, I want it detailed and there will be no agreement until such time as I have it in black and white". Fienberg said that he told plaintiff that that was the only way in which he ever did business.

Fienberg denied that any layout plan or sketches were given to him either by Roesstorff or plaintiff. He only noticed some "pretty pictures" or "artists

impressions" lying on Roesstorff's desk at which they were sitting, but nothing was handed to him. No further discussion took place and Fienberg said he left the meeting on the understanding - "nothing in writing, no agreement in writing, no deal".

He subsequently discussed the matter with his brother, a co-director, who thought as he did that it would not be a satisfactory arrangement "to work this thing from Cape Town". He also was not very impressed with plaintiff's attitude. His evidence continued, however, that after the meeting he discussed the matter with Roesstorff and they there and then decided against engaging plaintiff's services. It was apparently after that that he discussed the matter with his brother over the telephone. He had by then asked Roesstorff to convey their decision to the plaintiff.

At one stage in his evidence Fienberg stated categorically that after the meeting on 4 June he decided, after having discussed the matter, apparently with Roesstorff, that the plaintiff would not be a suitable

person to handle the project and that that was why no contract was concluded with him. Earlier in his evidence he stated, however, -

> "We just had a discussion that one afternoon, on 4th June, and nothing was finalised because Mr. Green insisted 'that there is no deal until everything is put in black and white, and I know what I have to do, and until I get that in black and white there is no deal'".

He admitted receiving a telephone call from the plaintiff round about 8 June. He said he told plaintiff that he was rather surprised that plaintiff had telephoned. He asked him whether Roesstorff had not told him that they had decided against engaging his services, and he suggested that plaintiff get in touch with Roesstorff to have the matter clarified. He said plaintiff said he would do so, and there was no further discussion.

Fienberg admitted that he did, either sho before or shortly after plaintiff's departure from meeting on 4 June, telephone Trust Express in ord

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make a reservation for plaintiff to travel by air from Cape Town to Durban, but said that he did so as a precaution in the event of a contract being concluded with plaintiff, and that he cancelled the reservation on the same day.

Fienberg admitted receiving plaintiff's undated letter posted on 8 June which reads as follows -

> "In response to our meeting of the 4th June, 1973, held at 37 Buitekant Street with yourself and Mr. B. Roesstorff.
>
> I wish to confirm the verbal contract with which you agreed, to appoint me as Consultant Interior Designer for the above Hotel, at an agreed Consultants fee of Five Thousand Rand R5000, for services in the design of various Interior work to be itemized next week when we meet in Durban, my 11.00 am Sunday flight, 10th June to be confirmed.
>
> I also wish to confirm your acceptance in principle of the typical bedroom scheme as presented and handed to you comprising of one layout drawing No. 150, two

perspective sketches of the bedroom and one perspective sketch of the bathroom.

It is understood that expenses involved in the execution of this work will be borne by you and that on visiting Durban or Pietermaritzburg, I will be housed either at the Masonic or Crown Hotels respectively, or possibly with the architect Derrick Crofton, to suit the benefit of the project.

Looking forward to our meeting next week."

Fienberg also admitted receiving a further letter from plaintiff's attorneys dated 13th June 1973 in which it is, inter alia, said that -

"We understand that in terms of the arrangements concluded between our client and yourself, he was to have proceeded to Durban for the purpose of consulting with you, but that you subsequently cancelled this arrangement in that you had apparently given the contract relating to the furnishing of the new hotel wherein you are interested in Pietermaritzburg to Interform Contracts (Pty) Ltd.

Our instructions are to notify you, as we hereby do, that our client does not wish

to be associated with the aforementioned firm in connection with the services rendered and/or to be rendered by him to you and our client hereby tenders his services in terms of the contract concluded between himself and yourself."

Fienberg handed the above letters to defendant's attorneys and he gave them the necessary instructions to reply thereto. Pursuant to these instructions defendant's attorneys wrote as follows to plaintiff's attorneys on 29 June 1973 -

"We act for Mr. A.S. Fienberg and he has handed us your letter of 13th instant with instructions to reply thereto, and we do so as follows:-

1) At the outset, our client denies that he agreed to appoint your client as Consultant Interior Designer for the new hotel in Pietermaritzburg as alleged in your client's letter, undated, and our client further denies that there was any agreement concluded.

2) All our client's negotiations were with Mr. B. Roestorff of Interform Contracts (Pty) Limited. Our client never at any time met your client alone and always met him with Mr. Roestorff.

3) Our client met your client at Mr. Roestorff's offices in Cape Town on the 4th instant and as far as our client was aware, Mr. Green was employed by Mr. Roestorff.

4) Mr. Roestorff handed to our client two sketches of proposed bedroom layouts, which had apparently been done by your client. Mr. Roestorff stated that these sketches were prepared by Green, who was employed by him and paid by him.

5) Various discussions took place in regard to the new hotel being erected in Pietermaritzburg and Mr. Roestorff stated that to save time, he would instruct Mr. Green to deal directly with our client instead of having three cornered correspondence and negotiations.

6) Your client then stated that his fees for his services would be R5 000,00 plus his expenses. Our client assumed that this fee would be paid through Mr. Roestorff. Our client stated that he thought the fee was too high and that he would have to discuss it with his co-directors and co-shareholders.

7) Both Mr. Roestorff and your client were well aware that the building was being erected by Centracom Property Investments (Pty) Limited.

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8) Your client telephoned our client on the 8th instant and our client advised him that he was unable to engage the services of your client directly and that he should work through Mr. Roestorff who had been employed by our client.

9) Dealing with your letter under reply, it appears from paragraph 4 that your client has severed his association with Mr. Roestorff's firm. That is no concern of our client's as all his dealings were with Mr. Roestorff.

10) Dealing with the last paragraph of your letter under reply, our client denies that any drawings were prepared by your client at our client's special instance and request. He may have prepared them for Mr. Roestorff and they were handed to our client at the meeting on the 4th June.

Under the circumstances, our client denies any liability whatsoever to your client."

Fienberg admitted that the contents of this letter were in accordance with his instructions.

Moser and Roesstorff also testified on behalf of the defendant. Their evidence agrees in very broad

outline with that given by Fienberg subject, however, to important contradictions and inconsistencies, to which I will refer in due course.

In regard to plaintiff as a witness the learned trial Judge said the following -

> "The impression the Plaintiff made as a witness was rather neutral; I would not describe him as an impressive witness, but on the other hand it is difficult to fault him in any particular respect. The only positive impression he made upon me was that he appeared to be completely at ease while giving evidence. I must emphasize however that I do not consider the remarks which I have made as detracting from Plaintiff's credibility; no serious criticism can be levelled at the substance of his evidence and the neutral impression he made as a witness can in my view be attributed to a rather colourless personality."

Of Fienberg the learned Judge said -

> "While he was giving evidence-in-chief I was rather more favourably impressed by Fienberg than I had been by the Plaintiff;

> he gave his evidence without hesitation and appeared to be quite confident. Under cross-examination, however, and especially when confronted with the contradictions between his evidence and the letter of the 29th June, he became extremely hesitant, his confidence disappeared completely, and he was obviously and distinctly uncomfortable. Fienberg failed signally to pass the crucial test of cross-examination, not only with regard to the substance of his evidence but also as to demeanour."

The impression the witness Moser made upon the learned trial Judge was that his memory of the meeting on 4 June 1973 was rather hazy, and that his endeavour to recall details was probably coloured by his understandable inclination to favour the defendant by reason of the association of the defendant with Interform of which Moser was a director.

Of Roesstorff the learned Judge said this -

> "As a witness Roesstorff appeared to be self-confident, but his demeanour was

not such as to inspire in me much confidence in his evidence. His confidence appeared to me to stem from the ability which some people have to exude confidence with regard to a matter in which they have no real confidence. He also left me with the distinct feeling that his recollection of the events in question was coloured by a desire to favour the defendant".

After a full analysis of the evidence of the various witnesses in the case the learned trial Judge concluded -

"It emerges from this analysis that I am firmly of the view that the plaintiff's version of the meeting of the 4th June is distinctly more probable than that testified to by the witnesses called on behalf of the defendant, and that I am in fact fully persuaded that the plaintiff has discharged the onus of proving on a balance of probabilities the terms of the oral agreement contended for by him. I am likewise satisfied that the defendant unlawfully repudiated this agreement, that plaintiff accepted this repudiation and that in consequence thereof he has suffered damages."

In regard to the question whether the plaintiff has established that he has suffered damages in the sum of R5 000-00, the learned Judge said -

> "That amount represents the remuneration, exclusive of expenses, to which plaintiff would have become entitled had the contract between the parties not been repudiated by the defendant. It was anticipated that plaintiff would have performed the work contemplated by the contract in various stages over a period of about one year, and he was cross-examined at some length as to other work which he in fact did during that year. Plaintiff has satisfied me that the defendant's work would have been absorbed quite comfortably into his practice during that year and that his performance of the defendant's work would not have resulted in his not being able to do any of his other work. He has therefore established that ..... he lost R5 000-00".

The question is whether it has been shown that the learned trial Judge erred in any way.

Counsel for the appellant contended that, having regard to the fact that, even on the evidence of the plaintiff, no details of the work to be performed by the plaintiff were discussed at the meeting on 4 June 1973, it is highly improbable that a concluded contract was arrived at on that date as alleged by plaintiff. It must be remembered, however, that as far back as August 1972 the possible collaboration of the plaintiff with the architect in regard to the interior decor of the proposed hotel, sketches of which were shown to the plaintiff, was discussed between Fienberg, plaintiff and Roesstorff but no agreement reached. Then again on 10 May 1973 during a telephone conversation between Fienberg and the plaintiff the possibility was, according to the plaintiff, again mentioned of the plaintiff doing certain work in regard to the hotel, and plaintiff was indeed requested to prepare certain drawings which could be discussed at the meeting in June. Whilst in the

employ of Interform from January to May 1973 plaintiff had occasion to do certain work for Interform in connection with the hotel. When the meeting of the 4th June took place, plaintiff was no doubt fully aware of the work that was expected of him and Fienberg obviously must have known what he wanted plaintiff to do. Indeed, the discussion about the reasonableness of the fee of R5 000-00 which would have become payable to plaintiff necessarily presupposes that the parties concerned in the discussions knew exactly what plaintiff's duties were to be. Moser, who said that he was present at the discussions, said that plaintiff knew what was expected of him.

Counsel for the appellant submitted that the following entry made by plaintiff in his diary for the 4th of June, viz. "Fienberg to accept me at 5 000 + expenses. to confirm in writing", (a full-stop appears after "expenses") supports the contention that no final

agreement was concluded on that date. While the entry obviously cannot be invoked as support for plaintiff's case, I cannot read either the words "Fienberg to accept me at 5 000 + expenses" or the words "to confirm in writing" as inconsistent with or destructive of it. It seems far more probable to me that the words "Fienberg to accept me at 5 000 + expenses" were intended to record a concluded agreement, otherwise no sensible meaning can be assigned to them. If the position at the end of the meeting on 4 June was that Fienberg would discuss the engagement of the plaintiff with his co-directors and advise the plaintiff of their decision, as alleged by Fienberg, a different entry would undoubtedly have been made. Counsel contended, however, that if the aforesaid words were intended to record an agreement, the words following thereon, viz. "to confirm in writing" clearly show that the agreement was subject to confirmation in writing by Fienberg, for if there were to have been any

confirmation in writing of a concluded oral agreement, the confirmation would as a matter of probability have had to come from the employer. It was, however, not part of defendant's case that any oral agreement concluded at the meeting of the 4th June was to be subject to confirmation in writing by the defendant or Fienberg. The only evidence relating to confirmation in writing of any agreement concluded on the 4th June came from the plaintiff, who said that after conclusion of the oral agreement on that date he said that he would confirm it in writing to Fienberg. He said he regarded it as a pure "formality of professional procedure. One informs the client or writes to the client of what has been agreed". Right or wrong, that is what the plaintiff said he believed and undertook to do, though why he allowed four days to pass before he wrote the confirmatory letter two days before he was due to go to Durban to

consult with the architects and to familiarise himself with what was happening at that stage, is not clear and is a matter for comment.

A matter of greater concern, however, is that the letter, though sent by registered post on 8 June 1973, was not dated. He said his wife who had typed the letter had inadvertently omitted to type the date. The question that naturally arises, is whether the letter was signed by plaintiff before or after the telephone conversation on that date in the course of which Fienberg told the plaintiff, according to the latter, that "what had been agreed was no longer in existence, and that all negotiations regarding the design work should go through Mr. Roesstorff". Plaintiff said that the conversation took place after the letter was posted, but he could not say precisely when the letter was posted or the telephone conversation took place, but he thought that the letter was posted early in the

morning and certainly before 5 p.m., while the telephone conversation did not take place until quite late that day because he could not get through to Fienberg earlier. According to Fienberg the conversation could not have taken place before lunchtime, because that was the only time he was available at the hotel where he received the call. Plaintiff suggested in his evidence that his wife could be more precise about the time the letter was posted. Yet he did not call her as a witness. He said she was not in Pietermaritzburg but was in Cape Town because he was advised that it was not necessary for her to attend. Even when counsel for the defendant told the plaintiff that he was going to suggest to the trial Court -

> "that there was never a contract concluded on the 4th June; that the most there was at that stage was a negotiation; the possibility of a contract being concluded; that you phoned Mr. Fienberg on the 8th June and when you were told that he was not interested in employing you as an

> interior designer, you then wrote this letter"

the plaintiff, though he denied the suggestion, made no effort to call his wife as a witness.

Plaintiff had the certificate of the posting of the registered letter to Fienberg on 8 June in his possession, but he did not discover it though he said that he had handed it to his attorneys.

It is not possible on the evidence to come to any firm conclusion on this aspect of the matter. The learned trial Judge dealt with this question on the basis of a suggestion made by counsel at the trial that the plaintiff may have had in mind claiming at a later stage that the letter had been sent before the 8th June. The learned trial Judge dealt with that suggestion as follows -

> "Having regard to the fact that the letter was sent by registered post, and that if the date of posting had ever become material it would have been a

simple matter to prove the date of posting, I do not consider Mr. Hurt's suggestion to represent even a reasonably possible explanation for the failure to date the letter, a failure which in my view is not reasonably capable of supporting any suggestion of a dishonest motive on the part of the plaintiff. For the same reason I do not consider the plaintiff's failure to mention the documentary proof of posting of the registered letter in his discovery affidavit to be of any consequence."

The important question is not the date of posting of the letter but whether it was signed before or after the telephone conversation on the 8th June. That question cannot on the evidence be determined one way or the other, for the probabilities are in my view fairly equally balanced. The fact that the letter was undated and posted on the same day on which the telephone conversation took place must, however, remain a suspicious circumstance in plaintiff's case,

particularly having regard to the fact that he failed to call his wife as a witness.

If it were to be accepted that the probabilities support the view that the letter was signed and posted after the telephone conversation, as was submitted by counsel for the appellant, that fact, though it would necessarily adversely affect plaintiff's credibility, would not be destructive of his case. The letter clearly could not have been written falsely to fabricate a case against the defendant, but, to put it at its highest, merely to provide support for plaintiff's case. The entry in plaintiff's diary referred to above and which must be accepted as a genuine contemporaneous entry, shows, in my view, that the confirmatory letter was not an afterthought. The question would, in any event, still remain whether the plaintiff had in the light of all the evidence succeeded in establishing the conclusion of the oral agreement.

Counsel for the appellant has, in his main

heads of argument referred to other alleged unsatisfactory features in the evidence of the plaintiff. I do not propose to deal with them. The learned trial Judge dealt with some of them. They are of no real importance and they do not, in my view, adversely affect plaintiff's credibility. Although the learned trial Judge did not specifically state that plaintiff's evidence was accepted on all aspects, he did say that no serious criticism could be levelled at the substance of his evidence, and that the neutral impression the plaintiff made as a witness was attributable to a rather colourless personality and not, I infer, to unreliability.

Strong support for plaintiff's case is provided by Fienberg's admission that he had at the close of the meeting on the 4th June telephoned Trust Express, as alleged by plaintiff, to reserve an air passage for the plaintiff to Durban on the following Sunday, 10 June. He said, however, that he cancelled the reservation the

same afternoon. His explanation that he made the reservation as a precaution in the event of their deciding to engage the plaintiff, is unconvincing, particularly in view of the following reasons also given by Fienberg for not engaging the plaintiff -

> "in the past Mr. Green had told me that he had done certain work which in fact he had not done. When I had spoken to him - when I had gone down to Cape Town on one of my visits and I had asked Mr. Green how - what's happening? Are you getting on with this job; yes, he's working on it, and the next thing, when I went down subsequently and I asked him to show me what he had done, and still nothing had been done, and quite frankly I was dubious, and it was for that reason that after having the meeting on the 4th June, after we had the meeting, I decided, after our discussions, I decided that he would not be the suitable person to handle this project."

If this evidence were true, one may well ask,

why the discussions at all? And why the reservation of the air passage for the plaintiff, as the latter's employment by Fienberg must at all material times have been most unlikely.

In his evidence Fienberg admitted that the discussions at the meeting on 4 June related to the possible engagement of plaintiff's services in connection with the interior decor of the proposed hotel in Pietermaritzburg. He knew then, he said, that plaintiff was at that time practising on his own account. His defence to plaintiff's claim, as set out in his evidence, was that no oral agreement was concluded at the meeting, as alleged by plaintiff, but that he had made it clear that he wanted to think it over and discuss the matter with his co-directors, and that he would advise plaintiff of their decision. After further discussing the matter with Roesstorff after the meeting, he had decided not to engage plaintiff's

services. The first reason given by Fienberg for that decision in his evidence was -

> "because Mr. Green insisted that there is no deal 'until everything is put in black and white, and I know what I have to do, and until I get that in black and white there is no deal'".

Later on in his evidence he advanced two other reasons for not engaging plaintiff's services, viz. that it was not a satisfactory arrangement to do the work from Cape Town, and that, in any event, plaintiff would not be a suitable person to handle the project.

The defence to plaintiff's action as set out in accordance with Fienberg's instructions by defendant's attorneys in their letter of 29 June 1973 addressed to plaintiff's attorneys, and cited above, however, differs entirely from the defence advanced by Fienberg in his evidence. It is clear from that letter that Fienberg denied any privity of contract between the defendant (through Fienberg) and plaintiff who, it is there

alleged, was, as far as Fienberg was aware, at that time employed by Roesstorff with whom alone Fienberg negotiated. According to the letter Roesstorff merely stated that, to save time, he would instruct plaintiff to deal directly with Fienberg instead of having three cornered correspondence and negotiations. The fee of R5 000-00 plus expenses stipulated for by plaintiff for his services would, so Fienberg assumed, have been paid through Roesstorff.

Clearly either the defence set out in the letter of 29 June 1973 or the defence set out in his evidence by Fienberg must be false. Apart from that there are a number of obvious contradictions between the allegations in the letter and Fienberg's evidence which must necessarily cast serious doubt upon his veracity and reliability as a witness. I shall mention only the more important one.

Plaintiff's alleged insistence that there

would be no agreement until the work that he was required to do is specified in writing, featured prominently in Fienberg's evidence as an important reason why no oral agreement was concluded with the plaintiff, yet no mention is made of it in the letter of 29 June. Fienberg's explanation that he had forgotten about it when he had instructed the attorneys is unacceptable because he later admitted in cross-examination that Roesstorff had reminded him of plaintiff's alleged insistence when he received the undated letter posted on 8 June and again when he received the letter from plaintiff's attorneys dated 13 June 1973, both of which he had handed to defendant's attorneys when he had instructed them to reply to the letter of plaintiff's attorneys. He could not, therefore, in the circumstances have forgotten, after having recently been reminded thereof, so important a reason why no oral agreement was concluded, and which would have provided a complete

answer to plaintiff's claim. In any event, it is clear from the evidence of both the plaintiff, who had just commenced practice on his own account, and Fienberg, that the former was anxious to secure the contract which would have ensured an income to him of R5 000-00, and it is therefore highly improbable that plaintiff would have endangered his prospects of securing the contract by insisting on the condition relating to the writing which both Moser and Roesstorff considered could not possibly have been complied with.

In defendant's plea it is admitted that on the 4th June 1973 Roesstorff handed to Fienberg a layout drawing (No. 150), two perspective sketches of a bedroom for the proposed hotel and a perspective sketch of a bathroom therefor. Fienberg must have given this information to the defendant's attorneys. Yet in his evidence he denied that he had ever received the

drawing or the sketches either from Roesstorff or the plaintiff. It will be remembered that plaintiff said that he had prepared those very documents at the request of Fienberg and that he had handed them to Fienberg on 4 June 1973 who accepted them with one minor modification. The defendant's admission in its plea that it had received those documents, albeit from Roesstorff, which it presumably retained, is further support for plaintiff's allegation that an oral agreement had been concluded on that occasion.

The witness Moser, a director of Interform, maintained that he was present at the meeting on 4 June 1973, but that he did not take part in the discussions at all. Plaintiff denied that Moser was present, but the trial Court accepted that he was, and considered that plaintiff was probably mistaken in this regard. Moser's assertion that he was present was supported by Fienberg and Roesstorff. Yet in its plea the defendant, in referring to the meeting on 4 June 1973, alleged that only Fienberg, Roesstorff and plaintiff were present. No mention was made of Moser. A fair reading of his

evidence as recorded creates the clear impression that he was extremely hazy about the discussions at the meeting of the 4th June. That may be due to the fact that, as he said, he continued with his ordinary work but also listened to the discussions in which he had some interest, or it may be due to the fact that, as plaintiff said, Moser was not present at all. Even if he were present very little weight can be attached to his evidence.

The only matter Moser seemed to be clear about was that plaintiff insisted on a written setting-out of his duties before he would be interested in entering into a contract at all. Moser himself considered that such a setting-out of plaintiff's duties would have been impossible. It must be assumed that plaintiff himself would have known that too, and it is extremely unlikely, as I have already pointed out, that plaintiff would have

prejudiced his prospects of securing a valuable contract by such an impossible demand, particularly having regard also to the fact that Moser thought that plaintiff knew what was expected of him.

Moser knew nothing about the fact, admitted by Fienberg, that the latter had telephoned Trust Express to reserve an air passage for plaintiff to Durban. He said this did not take place in his presence, as it must have if he had been there, for he said that plaintiff was the first to leave the meeting and the latter was still there when the call was made.

Fienberg admitted that he and Roesstorff had from time to time in the presence of Moser refreshed each others memories in regard to the matters discussed at the meeting, and it is possible that much of Moser's knowledge of those discussions was gained in that way.

Roesstorff's evidence in regard to the

discussions on 4 June 1973 broadly agrees, as I have already indicated, with the evidence of Fienberg. It must, however, be observed that Fienberg admitted that he and Roesstorff had from time to time, in the presence of Moser, refreshed each others memories in regard to the matters in dispute in this case. Notwithstanding that, there are differences in their evidence which are material.

Roesstorff said that, when Fienberg asked him after their discussion following upon the meeting of 4 June to advise plaintiff of his decision not to engage him, he had replied that it was unnecessary to do so because they had come to no arrangement. Fienberg did not mention this. On the contrary, Fienberg must have been under the impression that Roesstorff would have advised plaintiff, for when plaintiff telephoned him on 8 June he said to plaintiff that he was surprised as he was under the impression that Roesstorff

had already advised him of his decision. In any event, if the meeting of the 4th June ended on the understanding that Fienberg would consider the matter and discuss it with his co-directors and advise plaintiff of his decision, Roesstorff could not have told Fienberg that it was unnecessary to advise plaintiff.

According to Fienberg, Roesstorff had twice reminded him before the letter of 29 June 1973 was written that plaintiff had at the meeting on 4 June insisted on a written document setting out his duties before he was prepared to enter into any agreement at all. Roesstorff, however, denied this. He said that Fienberg would not have forgotten it. Although it featured so prominently in his evidence subsequently, Fienberg had indeed, according to his own evidence, forgotten it when he gave his instructions to the defendant's attorneys in consequence of which the letter

of 29 June was written.

Roesstorff denied any knowledge of a telephone call by Fienberg on 4 June to Trust Express to reserve an air passage for plaintiff to Durban on 10 June 1973. This call must have been made in his presence and is admitted by Fienberg. It is most significant that Roesstorff denied any knowledge of it. He said indeed that he was quite sure that there was no mention about a visit by plaintiff to Natal. He probably realised that such a telephone call by Fienberg and such a discussion about a visit by plaintiff to Natal, would have been irreconcilable with his evidence and, therefore, he denied it.

Although Roesstorff said that plaintiff was most unco-operative at the meeting on 4th June, to such an extent that he refused even to consider any offer of employment until the work that he was required

to do was detailed in writing, Fienberg said that plaintiff appeared to be anxious to secure the contract, and when he, Fienberg, expressed some reservations about plaintiff's ability to do the work in Pietermaritzburg while he was resident in Cape Town, he said that plaintiff assured him that he would be able to handle the project and added that he could save the defendant a lot of money by way of fees - an observation indicative of anything but an unwillingness to co-operate.

Finally, as the learned trial Judge rightly said, one cannot in considering the weight to be attached to the evidence of the defence witnesses, overlook the fact that the version of the discussions at the meeting as testified to by them is substantially at variance with the instructions given by Fienberg to defendant's attorneys within a matter of three weeks after the meeting.

Having regard to all the circumstances and

the learned trial Judge's findings in regard to credibility, I am not persuaded that the Court a quo erred in its conclusion that plaintiff's version as to what took place at the meeting on 4 June 1973, though far from satisfactory in all respects, is distinctly more probable than that testified to by the witnesses called on behalf of the defendant. Indeed, if the learned Judge had rejected as completely unreliable the evidence given on behalf of the defendant, I would not have been able to have disagreed with it.

As I have already indicated earlier in this judgment, the defence set out in the letter of 29 June 1973 written by defendant's attorneys on the instructions of Fienberg is so completely irreconcilable with the defence set out in defendant's plea and in the evidence given on behalf of the defendant that either the one or the other must necessarily be false. That, in my view, is indicative of defendant's consciousness that its defence to plaintiff's claim was unfounded (Wigmore, 3rd

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Ed. Sections 277, 278) which, in turn, must necessarily tend to reinforce plaintiff's cause.

The onus was clearly on the plaintiff to establish the loss suffered by him in consequence of the wrongful repudiation by the defendant of the oral agreement alleged to have been concluded on 4 June 1973.

In his further particulars plaintiff alleged that the agreement contemplated that he was to have rendered his services in Cape Town and in Pietermaritzburg over a period of about one year (that being the approximate period for the construction of the hotel in question), as and when his services were reasonably required. This was confirmed by plaintiff in his evidence, and he stated that the work under the alleged oral agreement could easily have been absorbed into the work he in fact did during that year. He was cross-examined at some length on this aspect of the matter,

particularly in regard to the time actually taken up by the work he in fact did during the year and the fees earned by him in respect thereof. Counsel for the appellant contended that, in the light of the evidence given by the plaintiff under cross-examination, he would not have been able to absorb the work under the agreement, which according to plaintiff would have taken about four months of his working time to complete, into the work he in fact did during that year. The trial Court was satisfied, however, that the work under the oral agreement could have been absorbed quite comfortably into plaintiff's practice during the year in question, and that his performance of that work would not have made it impossible for him to do any of his other work. I am not persuaded that the trial Court erred in this respect.

According to plaintiff the oral agreement provided for a fee to him of R5 000-00 plus expenses.

In the context the word "expenses" was clearly not intended to include expenses other than the expenses actually incurred by plaintiff in travelling to and from Pietermaritzburg in connection with the work, and his hotel expenses while in Pietermaritzburg. In the performance of his work under the oral agreement the plaintiff would necessarily, it was submitted, have incurred some expenditure, including the normal expenses of his practice, such as studio rental and other overhead expenses, and some expense in connection with drawing paper, ink and so forth. Plaintiff, however, failed to place any evidence before the trial Court as to how much of his normal overhead expenses would have been allocated to the performance of his work under the agreement, or what other expenses he would have had to incur in connection with the aforesaid work. He failed, therefore, it was submitted, to show how much of the agreed fee of R5 000-00 would

have represented his profits, for plaintiff was not entitled to recover more than the amount representing the loss of his profits. In the absence of such evidence as aforesaid, so it was contended, the plaintiff has failed by evidence available to him to prove his actual loss, and the only permissible judgment was therefore absolution from the instance.

Plaintiff was engaged in a consultative or advisory capacity. It is normally, I would think, not necessary to incur any expenditure or any substantial expenditure for the performance of such work. Much of the work the plaintiff contracted to do would have had to be performed in Pietermaritzburg. In the circumstances it seems probable that the work on this contract would not have increased his office or overhead expenses, nor would it have entailed the employment of extra staff. He emphasised that the work under the agreement

could easily have been absorbed into his practice. Because of the wrongful repudiation by the defendant of the oral agreement, the plaintiff has prima facie lost R5 000-00, the fee agreed upon for the work under the agreement. Although the plaintiff was cross-examined at some length in regard to the work he in fact did during the year in question, apparently with the object of showing that, because of the time actually taken up in the performance of that work, he would not have been able to do the work under the oral agreement, and that, therefore, he had in fact lost nothing, he was not asked a single question in regard to the expenditure, if any, he would have had to incur for the performance of the work under the oral agreement. That question does not seem to have been in issue at all at the trial.

Even if the plaintiff would have had to incur

some expenditure in connection with drawing paper, ink and so forth, required for the performance of his work under the agreement, the amount thereof would, not only have been extremely difficult to determine with any precision, but would necessarily have been negligible, particularly in comparison with the amount of R5 000-00.

This is not a case where, damage having been suffered, the actual amount thereof was not proved because the claimant failed to place before the Court evidence available to him of the actual damage suffered (Hersman vs. Shapiro & Co. 1926 T P D 367).

Here the plaintiff has led prima facie evidence that his loss amounted to R5 000-00. There was no evidence that he would necessarily have incurred any expenditure in earning the agreed fee of R5 000-00. The question was not canvassed at all at the trial.

Even if he would have had to incur some such expenditure, the amount thereof would, in all the circumstances, necessarily have been so negligible that it would be an injustice to dismiss plaintiff's claim merely on the ground that he failed to produce evidence to establish the actual amount of that expenditure.

In the circumstances the appeal cannot, in my view, succeed.

The application for condonation of the late filing of the record of appeal is accordingly dismissed. The appellant is ordered to pay the costs of that application and the costs of the appeal.

D.H. BOTHA, J.A.

WESSELS, J.A.
TROLLIP, J.A.
GALGUT, A.J.A.
KOTZÉ, A.J.A.
Concur.