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

Case number: A177/2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED. YES

In the matter between:

EDM ANNANDALE

APPELLANT

and

MEINTJIES AND MEINTJIES

REKENMEESTERS CC

FIRST RESPONDENT

(REG.NO.1998/024722/23)

OLD MUTUAL TRUST (PTY) LTD t/a

OLD MUTUAL TRUST

SECOND RESPONDENT

JUDGMENT

NEUKIRCHER J:

1] The respondent (Meintjies) sued the appellant (Annandale) a quo for a statement and debatement of account and payment of monies found to be due pursuant thereto. The application was referred to oral evidence by Collis J on

the issue of *"the nature of the oral agreement concluded between them during June 2015 and the terms agreed upon."*

2] The trial proceeded before Collis J on this issue and on 10 December 2019 she handed down judgment in which she rejected Annandale's version and accepted that of Meintjies and granted the initial relief sought.

3] Leave to appeal being refused, this appeal followed with the leave of the Supreme Court of Appeal (SCA).

The Condonation

4] There is an application for reinstatement of the appeal which lapsed as the transcripts could not be obtained timeously. Annandale's attorney has been at pains to point out the lengths he went to obtain the transcripts and at the hearing the court granted the application for condonation and reinstated the appeal as the explanation for the delay was explained and was cogent.

The Versions

5) It is common cause that the parties presented two mutually destructive versions. In **Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others**¹ Nienaber JA stated the test thus:

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c)

¹ 2003 (1) SA 11 (SCA) at par [5]

the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis::, and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

6] It is thus on this basis that the evidence is to be approached.

7] The approach on appeal is that factual findings of a trial court bind an appeal court unless it can be shown that they are vitiated by material misdirection.²

² R v Dhlumayo & Another 1948 (2) SA 677 (A) at 705-706; Shembe v Shembe NO (957/2018) [2019] ZASCA 172 (2 December 2019)

The Witnesses

8) 4 witnesses testified: on behalf of the respondent. Mrs Meintjies. Mrs Koen and Ms Van Taak gave evidence; and then Mrs Annandale testified. From that, certain uncontroversial evidence was elicited.

The facts

9] Mrs Meintjies is the surviving spouse of Mr Meintjies who died on 27 April 2015- he was an accountant and the sole member and director of Meintjies and Meintjies Rekenmeesters CC³ (the firm).

10] At the time of his passing it appears that various clients of the firm had paid R218 000 for accounting work but which, by the time of his death, had not yet been completed. As Mrs Meintjies could not perform the work (she is not an accountant), she decided to contract the services of a registered tax practitioner, and was introduced to Ms Annandale by a mutual acquaintance, one Ernst Grobbelaar.

11] Prior to their meeting on 13 June 2015, Mrs Meintjies received permission from the 2nd respondent⁴ to continue the business. She was also empowered to collect money due to the business which was paid into her ABSA credit card as the firms' trust account had been frozen after Mr Meintjie's passing and some clients were paying the firm a monthly fee for services to be rendered⁵.

12] As stated, the parties met on 13 June 2015. According to Mrs Meintjies, she gave Mrs Koen instructions to conduct negotiations with Mrs Annadale - she stated that she was not part of those negotiations and was simply

³ The plaintiff a quo and now in the process of deregistration

⁴ The executor of the deceased's estate

⁵ Mrs Koen's evidence was also that Mrs Meintjies did not have the passwords to any of the accounts anyway and so she would not have been able to operate them

informed of the outcome by Mrs Koen.

13] According to what was relayed to her, the oral agreement was that Mrs Annandale would come into the firm's offices in Pretoria North twice a week, she'd use the firm's computers and equipment and would utilise the services of the firm's employees⁶, neither of which was an accountant - they were administrative assistants⁷. Furthermore, the agreement was that one third of the nett profit would be paid to Mrs Annandale and the remaining two thirds to the firm. Mrs Annandale would pay R10 000 per month office rental.

14) As stated, the firm's clients paid monies due into Mrs Meintjies ASSA credit card after her husband passed away. As some clients were struggling to pay into that account, Mrs Annandale then suggested that these monies be paid into her firm's⁸ trust account.

15) Bearing in mind that the negotiations conducted between Koen and Annandale were relayed to Mrs Meintjies by Mrs Koen and she was not present, Mrs Meintjie's evidence in this regard is hearsay. It is permissible simply because Koen testified.

16] The executor's instructions and permission states, inter alia the following (which is important regarding context and probabilities):

"I the undersigned, Executor in the aforementioned estate, hereby confirm that the surviving spouse and beneficiary, Helia Antoinette Meintjes (ID : [...]), may continue with the deceased's business known as "MEINTJES AND MEINTJES REKENMEESTERS" which will devolve upon her in terms of the Last Will & Testament dated 1 August 2013. The continuation of the business by the beneficiary until it is transferred or sold shall be subject to the following conditions:

⁶ Mrs Koen and Mrs van Taak. At a later date Mrs Anna Alberts also joined the firm

⁷ Mrs Koen was the office manager and Mrs van Taak did administrative work, accounts, banking, filing etc.

⁸ EA Financial Services

- a) *The business will be under the beneficiary's management and she will account and be responsible to the Executor. The Executor shall not be responsible for any loss which may result from carrying on the said business.*
- b) *The Executor is indemnified against any loss which may be suffered and any claim which may be made against the Executor and/or the estate, arising from the beneficiary's continuation of business and also any attendant costs.*
- c) *The beneficiary/surviving spouse may take the necessary steps to recover any money or funds that is due to the abovementioned business and all costs involved in respect of such actions will be for her own account. "*

17] Mrs Koen's evidence echoed that of Mrs Meintjies as regards the terms of the agreement negotiated with Mrs Annandale. Her evidence was also that, as the deceased had handled the clients and invoicing directly⁹, they only became aware of the extent of the outstanding work some months after June 2015 when Annandale began to go through the clients' files - the extent of the outstanding work was valued at± R218 000.

18] According to Koen the one third net sales to be paid to Annandale would vary monthly depending on sales and expenses, but *"ons het net so aangegaan, dit was alles, alles Oom Johan Meintjies se Kantoer, se doerusting, niks, niks snaaksof iets, ja."* However, in July 2015, Annandale refused to allow the expenses to be deducted and demanded the one third payment gross. Mrs van Taak paid the firm's expenses from Mrs Annandale's Trust account¹⁰ as she was given access to this account by Mrs Annandale.

19] She confirmed that when the deceased passed away, the firm's back

⁹ These clients paid a monthly fee for the accounting services and some of their financial affairs were 5 years behind

¹⁰ From the EA Financial Services Trust Account

accounts were frozen and Mrs Meintjies had no passwords for any account, so the clients would pay into her credit card but this became problematic and so Mrs Annandale offered the use of her Trust account.

20] Koen denied Annandale's version that she took over the firm's clients. According to her:

"Nee, sy moes hulle dien, want ongelukkig belastingsake moet gedoen word en sy moet dit op haar Tax Practitioner Profile submit aan SARS want dis die enigste manier hoe jy dit kan doen."

21] None of the women employed at the firm ever had employment contracts with Annandale. According to Mrs Koen they remained employed by the firm. The fact that they were paid from Mrs Annandale's firm's account is logical as the monies were paid to her Trust account. Emails were received on their existing email addresses and although the letterhead changed to reflect Mrs Annandale's particulars, the Meintjies office landline and fax number remained. But the letterhead no longer referred to Meintjies and Meintjies Rekenmeesters it referred to "Meintjies Kantoor"

22] According to Mrs Koen.

"Hulle"¹¹ het gebly by ons. Alles het aangegaan soos wat dit aangegaan het, niks het verander nie, end it is wat ons vir all kliente gese het. Die kantoordeur het nogsteeds oopgestaan, die kantoor was op dieselfde plek, ons gaan aan soos wat ons aangegaan het, niks het verander nie. Ons het net nou we/ 'n nuwe rekenmeester gekry, maar sy is definitief 'n gekwalifiseerde Tax Practitioner want dit is definitief noodsaaklik."

23] The relationship between Mrs Annandale and the office staff began to

¹¹ ie the clients

sour in late 2016 when just before the office closed for the festive season. They were informed that they didn't qualify for their full bonus and not long after that Mrs Meintjies terminated the working relationship with Mrs Annandale. After her termination, the firm continued. Some existing clients chose to remain with her whilst others remained with the firm and the firm also acquired new clients.

24] Mrs Koen denied the version that Mrs Annandale would take over the firm's client base for the R218 000 owed in regards of existing work to be completed; would pay insurance for the existing office equipment, that the agreement was that one third would go to Mrs Annandale. one third to salaries and one third to office expenses.

25] Importantly, that no emails were ever sent to existing clients that Mrs Annandale was going to take over their files.

26] Mrs van Taak's evidence was that there was no agreement that Mrs Annandale would take over the existing clients for the work to be done for R218 000 and that the executor had not given Mrs Meintjies permission to sell the business anyway.

27] She corroborated Keen's evidence: the terms of the agreement, the reason that Mrs Annandale's Trust account was used, the one third of nett profits, the fact that Mrs Annandale ended up taking one third gross sales (ie on invoiced, not paid, amounts), the fact that in 2016 the relationship soured because Mrs Annandale refused to pay full bonuses that there was no written, oral or other employment agreement with Mrs Annandale or EA Financial Services.

28] She confirmed that Mrs Annandale took out insurance on the office equipment *"so that if something happens to her it would be covered"* yet, after she left the office, she never returned to collect any of the equipment she alleged was hers.

29] Mrs Annandale's version is that she met with them in June 2015 and Mrs Meintjies insisted that all the work be conducted at the Pretoria North office for which she'd pay Mrs Meintjies R10 000 per month rental and she'd pay the employees¹² their monthly salary. She further stated *"Dis ooreengekom dat ek die kliente sal diens and dat ek aangestel sat word as ... hulle rekenkundige beample."* She denied that she'd be employed by the firm. But later in her evidence she states *"Mevrou Meintjies kannie die kliente diens nie, en dis hoekom ek die kliente oorgeneem het om hulle verder te diens."* But she did not take over the practice itself- this was because clients had already paid for work to be done, which never was.

30) According to her, Mrs Meintjies informed her that the fee structure would be one third for overheads, one third for salaries and one third as her profit, as a result of which she would receive ± R150 000 per month.

31] She admits that the firm used her firm's Trust account to pay funds into. All the firm's staff were paid by her, co-ordinated their leave with her, received new email addresses with the @EAFS address and she paid insurance on the office equipment from 2016 and all payments made were effected from the EA Financial Service Business Account.

The Court a quo

32] The court a quo had no difficulty in accepting the evidence by Mrs Meintjies, Mrs Koen and Mrs van Taak and stated:¹³

"They all tendered their evidence in a coherent and honest manner and throughout their versions not only corroborated one another but it remained consistent."

¹² Mrs Koen, Mrs von Taak and Annelise Gelipsie (who resigned in July 2015)

¹³ At par 12 of the Judgment

33] The evidence of Mrs Annandale was found to be "*opportunistic and simply false*" and her version improbable.

This Appeal

34] I cannot fault the Court a quo's summation of the evidence. I also find her findings on the credibility of the witnesses correct.

35] In my view, where Mrs Annandale's evidence leaves much to be desired is the myriad of unanswered questions that weigh heavily against her version on the probabilities:

- a) on her version she agrees to take over existing clients and do all the outstanding work (valued at R218 000) without receiving one cent of that amount which, on the evidence has already been paid to the firm; - this was in any event only discovered after the agreement in June 2015 and thus it is not probable that this was mooted at the initial meeting is highly or would have formed a basis for the agreement contended for my Mrs Annandale;
- b) no client had ever received an email informing them that she had taken over their portfolio and giving them the option of either moving their business to her (or to another accountant) or remaining with the firm - thus clients would have thought she was working for the firm;
- c) on her version she agreed that fees received would be allocated one third to expenses, one third to salaries and one third to her - but if she is taking over the client base and the clients pay her, the money is hers to do with as she pleases and it makes no sense that she would explain to her employees how the money earned would be allocated;
- d) why agree to operate out of the Pretoria North office? She has offices in Centurion. She is now saddled with extra unnecessary expenses of R10 000 office hire (and she was only there 2 times a week), staff salaries, insurance for office furniture and

equipment which she says became hers and yet when she left, she did not take with;

e) there is no evidence that Mrs Meintjies conducted negotiations - all the evidence points to Mrs Koen conducting them on behalf of Mrs Meintjies;

f) there are no emails or documents pointing to any formal or informal employment contracts with Mrs Koen or Mrs Van Taak and they testified that they did not have one with her.

36] Mrs Annandale points to the payment of salaries and expenses by her business account and the emails and add on the letterhead reflecting her firm's details as proof of her version. What this ignores is the following:

a) as all clients' fees were paid into her Trust account, salaries and expenses had to be paid by her business account - the firm had no Trust account after its only qualified Tax Practitioner passed away and as none of its office staff were qualified Tax Practitioners. it could not operate one.

b) although the staff were given @EAFS addresses, they continued to operate the firm's email of JHM@lantic.net;

c) whilst the new letterhead no longer referred to Meintjies and Meintjies Rekenmeesters, it did refer to "Meintjies Kantoor".

37] Thus, in my view, the probabilities all point to the version of Mrs Meintjies and the court a quo therefore correctly rejected Mrs Annandale's version and granted the order sought in the notice of motion.

Order

38] Thus, the order granted is the following:

The appeal is dismissed with costs.

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

C SARDIWALLA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 28 February 2023

DISSENTING JUDGMENT

MALUNGANA AJ

Introduction

[39] I have had the pleasure of reading the draft judgment of my learned colleague, Neukircher J. I am unfortunately unable to agree that the appeal be dismissed. I hold the view that the plaintiff in the court *a quo* did not succeed in discharging the evidentiary burden of proving on the balance of probabilities, the terms of the oral agreement concluded between the parties.

[40] This appeal raises the question whether the court *a quo* correctly dealt with the issue of two mutual destructive and irreconcilable versions, when it accepted the version of Mrs Mentjies and rejected that of the Appellant.

[41] It is common cause that in June 2013 the appellant, who is a registered

tax practitioner, and the first respondent concluded an oral agreement, the terms of which were at the centre of dispute in the court below.

[42] On 29 November 2017 the first respondent instituted proceedings by way of a notice of motion against the appellant in which it sought *inter alia*, the relief in the following terms:

- (a) that the income and necessary expenses of the business of the appellant from 01 June until 2017 be investigated by an independent auditor appointed by the Chairperson of the South African Institute of Chartered Accountants within 10 days of the order;
- (b) that a some of money equivalent to two thirds of the nett income of the business of the appellant from 01 June 2015 until 14 July 2017 be paid to the first respondent within ten days of the report;

[43] The matter came before Collis J in the court *a quo*, who after hearing the matter on the 12th of June 2018 reserved judgment. On 20th November 2018 Collis J handed down her judgment in which she ordered that the matter be referred for oral evidence for the determination of the nature and terms of the oral agreement in terms of Rule 6(5)(g) of the Uniform Rules¹⁴. On 10 December 2019 the court *a quo* delivered its judgment in which it accepted the version of the first respondent and rejected that of the appellant.

[44] The appeal is before us with leave of the Supreme Court after the court *a quo* refused the appellant's application for leave to appeal.

Brief Factual matrix

[45] In the founding affidavit which served before the court *a quo*, the first respondent contended that the business required the services of a registered

¹⁴ Case lines 020-1 Judgment handed down by Collis J, for the referral of the matter in terms Rule G(S)(g) of the Uniform Rules.

tax practitioner after the death of the deceased. On 01 June 2015 she attended a meeting with the appellant in Pretoria, at which meeting an oral agreement was concluded. The terms of the oral agreement according to Mrs Meintjies were as follows: (i) The appellant would work as a sub contractor for the first respondent; (ii) She would oversee and submit the work done by the first respondent's employees; (iii) She would receive a payment equivalent to one third of the nett profits of the business as remuneration; (iv) She would invoice the first respondent each month for the agreed remuneration of one third of the nett profits; (v) The agreement would endure from the 1st June 2015 until termination.¹⁵

[46] On 13 July 2017, the first respondent discovered that the appellant had transferred the first respondent's trust account into her own name, without permission. The company's trust account were now known as EA Financial Services. The appellant begun to accept payments from the clients of the first respondent through her new trust account. She also created a new E-Filling profile in the name of her business in which only the appellant had control and access thereto. As a result the first respondent decided to terminate the agreement through her attorneys of record.¹⁶

[47] Turning now to her oral testimony. During her oral evidence Mrs Meintjies testified that she instructed the first respondent's administrative clerk, Ms Wanda Koen who was clued up with the business to negotiate the terms of agreement on her behalf with the appellant.

[48] Under cross examination she denied that rentals and salaries of the employees were paid by the appellant from EA Financial Services bank account. She maintained that there were paid from the first respondent's bank account. In clear contrast with this position Mrs Meintjies testified that the upon the death of her husband the first respondent's bank

¹⁵ Paras 4.1.1- 4.1.5. Founding Affidavit. The terms of the oral agreement. Case lines 001-10

¹⁶ Para.5.7 of the Founding Affidavit. Annexure "HM7" letter from Schoeman Attorneys.

"Accordingly, we hereby provide written notice that your sub-contracted mandate with the "owner" and the "Practice" is cancelled with immediate effect."

account was frozen by the bank. Clients had to make payments into her personal bank account. She also testified that when the appellant became involved it was agreed that they would use the the appellant trust account. Regarding the outstanding work, she testified that she became aware of the work a few months after the death of the deceased. She conceded that she did not have a personal knowledge of the terms of the agreement as she left everything to Ms Wanda Koen to negotiate with the appellant.

[49] During the oral testimony, Ms Wanda Koen, who is the administrative clerk confirmed that she negotiated the agreement with the appellant. She also testified to the effect that in terms of the said agreement one third of the sales would go to the appellant after deductions. It was agreed that the appellant would come to the office twice per week to check on the work, but she gradually started coming once a week. According to Ms Koen, subsequent to reaching an agreement the clients of the first respondent were notified of the changes in the firm, and in particular about the appellant's involvement in the company. Accordingly, a letterhead was developed to reflect these changes which bore the appellant's details. Clients were also given an option to either stay with the first respondent or go somewhere else. She too denied that their salaries were paid by EA Financial Services.

[50] On the R218 000,00 outstanding value of the work , Ms Koen testified that neither her nor Ms van Taak knew how much was outstanding, and therefore they would not have agreed with the appellant regarding this aspect. She only realized that there were five years behind a few months after the death of Mr Mentjies. Ms Van Taak started working on the files to get their tax affairs in order. After the deceased's death his bank account was frozen, and the appellant suggested that they make use of her bank account. It was a requirement that the work had to have a tax practitioner number for submission to SARS, that is the only way you can do it, she added.

[51] Ms Antoinette van Taak, also an employee of the first respondent, by and large corroborated the evidence of Ms Koen. She testified that she was

present when the agreement in question was concluded. After the death of the deceased they realized that an amount of R218 000 was received from the company's clients and there is still some outstanding work in respect of the payments.

[52] In response to the first respondent's claim the appellant filed her answering affidavit. According to the appellant she met with Mrs Meintjies on two occasions in Pretoria. The first meeting was held in Pretoria North in the presence of her employees on 12 June 2015. The second meeting took place with her on the 17th of June 2015. The purpose of the last meeting on the 17th of June 2015 was to finalize a take over agreement.¹⁷

[53] The appellant further states that the agreement was to the effect that she would take over the clients of the first respondent which was at the time effectively defunct. There was an outstanding work to the value of R218 000 which was invoiced and paid for by the clients of the first respondent during the deceased's life time. The outstanding work is set out in the in the spreadsheet attached to opposing affidavit marked "EA2." The completion of the outstanding work would serve as payment in full- and final payment for the take over of the clients. Further terms of the agreement were that the practice would operate from the Mrs Meintjies' premises and she would take over the furniture and equipment of the business as well as the employees. In return, the appellant would pay her a monthly rental of R10 000.00.

[54] Before taking over the clients of the first respondent, Mrs Meintjies was receiving payments from its clients into her personal account. When the appellant took over the clients Mrs Mentjies transferred an amount of R51,891.87 from her credit card into the appellant's trust account on 08 July 2015. Followed by further payments as reflected in bank statements of EA Financial Services attached to the opposing affidavit as annexures "EA3" and "EA4."

¹⁷ Para 4 of the Answering Affidavit. Case lines 002-10

[55] The appellant also attached copies of her certificate as tax practitioner as well as proof of registration with SARS for e-filing to her affidavit as annexures "EA5" and "EA6." In line with the agreements the records of the employees of the first respondent were transferred to her company, EA Financial Services and were registered with SARS for PAYE. The appellant denies that there was ever any profit sharing agreement with the first respondent. The only profit sharing was with the newly acquired staff, and not with Mrs Meintjies as the latter's business interest ceased on the date of take over.

[56] By and large her oral evidence confirmed what is contained in the answering affidavit. It is not necessary to repeat everything here. Her oral testimony is to the effect that she was introduced to Mrs Meintjies by her friend, Ernst Grobbelaar. She then made contact with Mrs Koen who asked for her tax number. The meeting was subsequently arranged for the 12th of June 2015, in which an agreement was reached that she would take over the clients of the company, pay R10 000 towards rental to Mrs Meintjies, pay salaries from the net income, pay overheads of the business, and then the balance would be for her account.

Assessment

[57] It is trite that the appeal court will not disturb the findings of the trial court based on credibility unless such finding are plainly wrong.¹⁸ The issues of credibility, however, cannot be judged in isolation. They require to be considered in light of proven facts and the probabilities of the matter under consideration.

[58] Counsel on both sides dealt extensively with what was contended to be, on the one hand, probabilities favouring the contention of the appellant that the oral agreement was for taking over of the first respondent's clients, and,

¹⁸ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) 706.

conversely, probabilities favouring the contention of the first respondent that the oral agreement pertained to the hiring of the appellant as a sub- contractor. It is therefore unnecessary for me to embark on the consideration of their respective arguments.

[59] In my view the starting point in resolving this matter, is the correspondence from the first respondent's legal representatives dated 14 July 2017 headed "URGENT CORRESPONDENCE" addressed to the appellant. The relevant portions of the letter read:

4. FEES AND PAYMENT

(a) The "Practice" shall receive an invoice from yourself as agreed at the rate of one third of the nett profit per month;

5. TERMINATION

The verbal agreement was not meant to last for a fixed period of time;

Current Position:

We accordingly record, that you had actively managed the "Practice", and made the following arrangements with effect from the 1st of June 2015, namely:

1. You transferred the "Practice" Trust Account to a new trust account in your name, namely, EA Financial Services, Trust Account Number...
2. You received direct payment from the "Practice" clients into your new trust account;
3. You paid the following expenses per month:

- a. Monthly rental of the business premises to the "owner" in the amount of R10, 000.00 (Ten thousand rand) per month;
- b. Salaries and/or bonuses of the employees, employee of the "Practice".
- c. Miscellaneous expenses such as paper etc.
- d. You registered a new E-Filing profile on behalf of the "Practice".

However, you failed to pay our client the agreed two thirds of the "Practice" nett profit, and furthermore failed to account to the "owner" at any stage whilst acting as a sub-contracted Accountant.'

[60] Prima facie, the above correspondence raises another ground for the termination of the oral agreement, which differs from the one stated in the founding affidavit. In the correspondence the first respondent the reason proffered was the failure to pay 'the two thirds' of the practice nett profit to the first respondent. Apart from stating another ground for the termination of the agreement, any reasonable reader who peruses the letter, particularly the transfer of the accounts will assume that the original trust account and e-filing of the first respondents were moved to the appellant's accounts. Clearly that is not the case as the witnesses for the respondent testified that the appellant had her own trust account, and the first respondent's trust account was frozen.

[61] In 5.2 of the founding affidavit Mrs Meintjies stated that on 13 July 2017 she discovered that the appellant had transferred the applicant's trust account into her own name, without permission to do so, and that the name of the new account is EA Financial Services. This averment does not accord with her oral evidence in which she her testimony was to the effect that clients of the first respondent were struggling to pay into the business account, as a result of

which she used her personal bank account held at ABSA.

[62] For reasons which are not material in this appeal, the court *a quo* found that the appellant was an astute businessman who ensured that the letterheads and financial statements are drawn up in the names of her business EA Financial Services. This reasoning misses the point. Mrs Meintjies and Ms Koen's evidence is to the effect that they required a registered tax practitioner to operate the business of the first respondent. In this regard Ms Koen also confirmed in her testimony that when the appellant became involved in the business the letterhead had to be changed into the name of the appellant's business, and clients were subsequently notified and given an option to either stay or go elsewhere. The reasonable inference that can be drawn from this averments was that the clients of the first respondent would now deal with the appellant, otherwise why would there be a need to give clients an option to either remain or stay with the company. It is in any event unlikely that the appellant would have done all of these without the permission of the Mrs Meintjies, or the first respondent when regard is to the passage of time which has lapsed since the agreement was concluded.

[63] In paragraph 5.5 of the founding affidavit, Mrs Meintjies conceded that she discovered that the appellant had created a new E-Filing profile, which conduct she had not authorised. She goes on to state in paragraphs 5.6- 5.7 as follows:

'5.6 Neither I nor the applicant ever authorised the first respondent either to create a new E-Filing profile or to alter the details of the applicant's trust account, as aforesaid.

5.7 As a result of the above, I caused the agreement between the appellant and the first respondent to be terminated by way of notice given by the applicant's attorneys of record on 14 July 2017.'

[64] With respect, I am of the view that the new e-filing was necessary to

submit whichever work the appellant was doing to SARS in compliance with the relevant legislation. It follows that all the relevant correspondences and other business activities were to be conducted in the names of the company whose names were reflected in the letterhead. The probabilities support the inference that the usage of the new trust account signals the end of the first respondent's business. Unquestionably the appellant and not the first respondent was now answerable to the former clients of the first respondent, and the relevant regulatory bodies involved in the accounting profession.

[65] There is evidence that the first respondent was given a notice of deregistration by SARS on 15 July 2016. This is shown in annexure UES8" of the opposing affidavit, case-lines 002-35. The inherent probabilities are such that it is inconceivable for the appellant to have been employed as an independent sub- contractor without using her own names in the e-filling to be able to provide such services. Even if I am wrong in this regard, Mrs Meintjies would not have been able to continue with the business of the first respondent. She is not a registered tax practitioner. The first respondent did not have the trust account to receive clients' monies, which is a prerequisite to run the practice. In essence the permission granted to her by the second respondent is not worth anything if she did not meet the requirement of running an accounting practice. There is no evidence of the first respondent changing the membership with the CIPC for purposes of operating the business as a going concern with the first appellant. In the absence thereof, the probabilities are that the business would be conducted in the names of the appellant.

[66] In assessing the evidence placed before her, Collis J came to the conclusion that the court *a quo* was faced with two mutual destructive versions as to what had transpired on the day that the terms of agreement were negotiated. As stated above it is clear from the judgment of the court *a quo*, that Collin J accepted the version of the first respondent. While I accept that the versions of the appellant and the first respondent are mutually destructive, I disagree with the findings and the conclusion reached by the court *a quo*.

[67] The techniques generally employed by courts in resolving factual dispute of this nature are set out by Nienaber JA, in *Stellenbosch Farmers' Winery Group Ltd and Others v Martel and Cie SA and Others*.¹⁹ Briefly, they are as follows:

'(a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness candour and demeanour in the witness-box,

(ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) the calibre and cogency of his performance compared to that of other witness testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(i), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probabilities or improbabilities of each party's version on each of the disputed issues. In light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[68] To accept the first respondent's version as true I first have to accept that it was able to operate its business as a going concern without a registered tax practitioner. This is reinforced by the improbabilities and the contradictions

¹⁹ *Stellenbosch Farmers' Winery Group Ltd and Another v Martel & Cie SA and Others* (427/01)[2002] ZASCA 98 (6 September 2002), para [5].

attending to the first respondent's account of the events leading to the conclusion of the oral agreement. The first respondent had waited for almost two years to demand the two thirds of what it claims is the nett profit earned by the appellant from the business. Moreover, it is clear from the evidence that the first respondent had at all material times been aware that the business was being conducted in the names of the appellant. At all material times she stood by and did nothing about the situation. She sought to deny that all the expenses including rental and salaries were paid from the trust account of the appellant.

[69] Perhaps the strongest indication that the first respondent knew exactly who was paying all the expenses is contained in the correspondence from her legal representatives on 14 July 2017 *supra*. The unsatisfactory aspect attending Mrs Meintjies evidence, ultimately reflecting adversely on her credibility and reliability is when she stated in the founding papers that she only discovered in July 2017 that the appellant had changed the trust bank account of the first respondent. This is obviously not true and is not born out of the evidence which has been adduced before the court *a quo* in which she clearly stated that they agreed to use the trust account of the appellant in 2015 when the appellant became involved. Her account of events is highly improbable when regard is had to the fact that she also deposited the monies which she collected from the clients in July 2015 into the same account which she is disputing.

[70] In dealing with similar issue, Navsa J in *S v Joseph Trainor* ²⁰ set out the approach to be adopted in cases involving mutual destructive and irreconcilable factual accounts.

'... A conspectus of all the evidence is required. Evidence that is reliable should be weighted alongside such evidence as may be found to be

²⁰ *S v Tainor* 2003 (1) SACR 35 (SCA), Para [9] '... The compartmentalized and fragmented approach of the magistrate is illogical and wrong.

false. Independently verifiable evidence, if any, should be weighed to see if it supports any evidence tendered. In considering whether evidence is reliable , the quality of that evidence must of necessity be evaluated , as must corroborative evidence, if any. Evidence must be evaluated against the onus of any particular issue or in respect of the case in its entirety.'

Conclusion

[71] In my view, there are wider probabilities which should have been considered by the court below. The first respondent's evidence does not fit with other evidence, especially the common cause documents which have been placed before the court *a quo* as argued by the appellant's counsel. Furthermore the evidence of the first respondent appear to be contradictory in the material respects. It has given two different reasons for the termination of the oral agreement .One being the opening of trust account, and the other being for the failure to pay the two thirds nett profit of the business. The Learned Judge seems to have failed to deal with this important aspect adequately. If this was the case the first respondent would not have waited until July 2017 to raise the issue which she knew of its existence since 2015.

[72] Finally, the failure of the court below to deal with the evidence without due regard to other probabilities is a clear misdirection and entitles us to reassess the merits. Under the circumstances, and having assessed all the probabilities I have come to the inescapable conclusion that the appeal must be allowed.

[73] Consequently I would make the following order:

1. The appeal succeeds with costs, including costs of Counsel.

MALUNGANA PH
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 28 February 2023.