



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

CASE NO:27397/2021

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
DATE	SIGNATURE

In the application between:

PIETER ENGELBERTUS FOURCHE

Plaintiff

(Identity Number : [...])

And

A TO Z MOTORS CC

(Registration Number: 2008/161967/23

Defendant

JUDGMENT

MBONGWE J:

INTRODUCTION.

- [1] This is an opposed application for summary judgment in which the Plaintiff seeks an order for payment of the amount of R3 000 000-00, being an investment the Plaintiff made in the business of the Defendant pursuant to a partially written and partially oral agreement. The Plaintiff further seeks the payment of interest on the capital amount and costs. The Defendant denies the existence of any form of agreement between it and the Plaintiff.
- [2] The Plaintiff is Pieter Engelbertus Fouche, an adult businessman with identity number [...] who resides at [...] Park, Pretoria, Gauteng.
- [3] The Defendant is A to Z Motors CC, a close corporation with registration 2008/161967/23, duly registered and incorporated in terms of the Companies Laws Act, 1973 of the Republic of South Africa, with registered address situated at 100 Stormvoel Street, East Lynn, Pretoria, Gauteng.

BACKGROUND FACTS

- [4] On or about the 11 August 2008 and at Pretoria and shortly after the Defendant was registered, the Plaintiff, acting in person, and the Defendant duly represented by Barend Johannes Olivier and/or Sonet Breek, entered into a verbal, alternatively partly verbal and partly tacit agreement the salient terms of which were as follows:
- 4.1 The Plaintiff will from time to time, as an investment, make available to the Defendant capital to be used by the Defendant to buy pre-owned motor vehicles for the resale thereof.
- 4.2 The Defendant will keep a proper record of all vehicles acquired with the capital invested by the Plaintiff.

- 4.3 All nett profit made by the Defendant on the resale of any motor vehicle acquired with the capital invested by the Plaintiff will be shared equally between the Plaintiff and the Defendant.
- 4.4 The capital invested by the Plaintiff from time to time will be repaid by the Defendant on demand.
- 4.5 The Defendant will on a monthly basis, provide the Plaintiff with a written recordal of:
- 4.5.1 The balance of capital invested by the Plaintiff for the acquisition of pre-owned motor vehicles.
 - 4.5.2 Details of pre-owned motor vehicles acquired by the Defendant utilising the capital invested by the Plaintiff.
 - 4.5.3 The cost of the acquisition of the aforementioned vehicles and all expenditure incurred in respect thereof.
 - 4.5.4 The nett profit derived from the sale of any of the motor vehicles acquired with the capital invested by the Plaintiff.
 - 4.5.5 The Plaintiff's half share of all nett profit to be paid by the Defendant to the Plaintiff.
 - 4.5.6 The Plaintiff will not share in the risk inherent to the Defendant's business, that is, that of a pre-owned motor vehicle dealer.

[5] The Plaintiff alleges in paragraphs 4 and 5 of its particulars of claim that each party complied with its obligations in terms of the agreement between 11 August 2008 and 17 October 2019 in that;

5.1 The Defendant provided him with monthly written recordal in respect of the balance of the capital investment made by the Plaintiff, the acquisition of pre-owned motor vehicles with the aforementioned capital, the net profit derived from the resale of such motor vehicles and the Plaintiff's share of the profits;

5.2 The Defendant duly paid profits to the Plaintiff;

5.3 The Defendant from time to time repaid portions of Plaintiff's capital - investment on demand thereof.

[6] The date of the 17 October 2019 is the date the Plaintiff alleges to have been the last on which the Defendant had furnished the Plaintiff with written recordal as envisioned in the agreement between the parties. The recordal was done by way of an email dated the 17 October 2019 which the Defendant had sent to the Plaintiff. The Plaintiff has annexed a copy of that email marked Annexure "F1".

[7] The Plaintiff has also appended a further written recordal marked Annexure "F2" which reflects that;

7.1 The balance of the capital invested by the Plaintiff to be the amount of R3 000 000-00;

7.2 The details of the pre-owned motor vehicles acquired with the aforementioned capital that were still to be resold.

- [8] Appended further by the Plaintiff is Annexure "F3" which he prepared and is an extract from information on the last page of Annexure "F2".
- [9] The Plaintiff alleges that the Defendant has breached the terms of the agreement in that the Defendant has failed and/or neglected, in the period subsequent to the 17 October 2019, to furnish the Plaintiff with written recordal and to make payments to the Plaintiff of the profits made on the sale of pre-owned motor vehicles acquired by the utilisation of the capital invested by the Plaintiff.
- [10] On the 25 February 2021 the Plaintiff, by way of a notice in terms of Section 345 of the Companies Act 61 of 1973, demanded that the Defendant repays the capital it invested, the balance of which stood in the amount of R3 000 000-00.
- [11] On the 12 March 2021 the Defendant repudiated the agreement by denying the existence of any contractual agreement between it and the Plaintiff. The latter has accepted the repudiation.
- [12] As a result of the breaches and/repudiation by the Defendant, the Plaintiff instituted action against the Defendant on the 02 June 2021 seeking the following orders;
- 12.1 Payment of the sum of R3000 000-00;
- 12.2 Payment of interest on the amount of R3000 000 -00 a tempore morae from 25 June 2021 to date of payment (both days inclusive);
- 12.3 Rendering of all records/accounts in respect of pre-owned motor vehicles acquired by the Defendant by utilisation Plaintiff's capital in the

amount of R3000 000-00, for the period September 2019 to date of final repayment of the amount of R3 000 000-00;

12.4 Debatement of the aforementioned records/accounts referred to in prayer 1, supra;

12.5 Payment of half of the nett profit made by the defendant, in respect of all pre-owned motor vehicles acquired by utilisation of the Plaintiff's capital in the amount of R3 000 000-00 from September 2019 to date of final Repayment;

12.6 Interest on the aforementioned nett profit due to the Plaintiff a tempore morae;

12.7 Costs of suit.

[13] Upon receipt of the Plaintiff's summons, the Defendant indicated its intention to defend the action by notice, prompting the Plaintiff to bring the present application for summary judgment in pursuit of prayers 1 and 2 of the Plaintiff's particulars of claim.

[14] The Defendant has filed an affidavit resisting the application for summary judgment. The affidavit is deposed to by Sonet Beek, the sole member of the Defendant.

[15] The Defendant denies liability to pay the Plaintiff stating that it was not a party to the written agreement on which the Plaintiff relies for its claim and that the agreement was entered into between the Plaintiff and one Ben Olivier. The

Defendant further alleges that Olivier had neither the mandate nor authority to act on its behalf and to bind the Defendant contractually. The Defendant has also raised the fact that in the agreement itself Olivier is falsely described as the owner of the Defendant. Equally crucial is the Defendant's denial that the Plaintiff has at any relevant time personally dealt with the Defendant as pleaded in the papers.

- [16] The Defendant alleges that the Plaintiff had earlier sought to rely on the aforementioned agreement in the notice in terms of section 345 of the Companies Act to initiate the liquidation of the Defendant, but had inexplicably changed course after the Defendant's attorneys had communicated to him the Defendant's denial of the existence of any contractual relationship between the Plaintiff and the Defendant.

ANALYSIS AND FINDINGS

- [17] In addition to the denial of liability to repay the Plaintiff on the basis that the agreement on which the Plaintiff relies is not binding on it, the Defendant, at paragraphs 4.3, 5 and 6 of the Defendant's Plea;

17.1 Denies that there has been compliance by it with the terms of the alleged agreement to which the Plaintiff is a party;

17.2 Denies that the recordal referred to by the Plaintiff was sent in pursuance of any agreement to which the Defendant was a party to, and,

17.3 Pleads that the recordal concerned was sent from the Defendant's e-mail address by Olivier without having the mandate or authority to have bound the Defendant to any contractual terms thereby.

[18] By way of analysis, it appears prudent to consider the basis of the Defendant's defences from the perspective of the agreement relied upon and Annexures "F1" and "F2" in light of the admissions by the Defendant that the recordals, Annexures "F1" and "F2" were sent to the Plaintiff's email address from the Defendant's email address. That exercise will be aimed at establishing whether or not those annexures may or may not be linked to the contestation regarding the existence or absence of a contractual relationship between the parties. The scrutiny of the Defendant assertion that these emails were sent without its knowledge and authorisation is of paramount importance. Hereunder I consider the said Annexures individually.

ANNEXURE "F1".

[19] Annexure "F1" is a copy of an e-mail which reads as follows:

"From: Sonet Breek atozmotors@gmail.com.
Sent: Thursday, 17 October 2019 at 14h28
To: pfouche10@gmail.com.
Subject: STAAT
Attachments: Pieter Voorraad.XLSX

Goeie middag Pieter

Hoop dit gaan go

Aangeheg is die nuutste staat"

At the bottom of the email is a stamp print showing the name Sonet Breek, the name of the Defendant, details of the contact numbers and the physical address.

ANNEXURE "F2"

[20] Annexure "F2" is a nine pages' spreadsheet with columns showing various details of and relating to motor vehicles and amounts. It is not disputed that this annexure is the attachment to the e-mail referred to above.

ANNEXURE “F3”

- [21] According to the Plaintiff Annexure “F3” is an extract from and corresponds with details/information contained in the last page of Annexure “F2”. Annexure “F3” was prepared by the Plaintiff specifically to show details of the individual amounts invested by the Plaintiff in the Defendant as well as the partial repayments thereof by the Defendant, that is, the flow of money between the Plaintiff and the Defendant. The contents of this document per se are not in dispute and, in particular, the total balance of R3000 000-00 shown thereon as at 14 October 2016. According to this document, the last payment in the amount of R338 000-00 was made to the Plaintiff by the Defendant on 14 October 2016.
- [22] Of importance in the determination of this case and noteworthy is that the Defendant does not deny that Annexures “F1” and “F2” originate from its e-mail address. The Defendant merely states that the documents were sent from its email address by Johannes Olivier, who had no mandate or authority to do so. Equally important in this regard is that the sender of the email appears to be the sole member of the Defendant, Sonet Breek.
- [23] What discredits the purported bona fides of the Defendant’s defence and establishes the fallacy thereof are the undisputed and undeniable contents, accompanied by the proof thereof, of paragraph 6.10 of the rule 32 affidavit of the Plaintiff which read thus;

“6.10 The fallacy of the aforementioned pleaded defence, is that the said Olivier (with whom the sole member of the Defendant i.e., Sonet Breek co-habited), passed away already on 11 June 2018. In confirmation of his passing, I append the relevant death notice as annexure “PEF1”, and the Letters of Executorship as annexure “PEF2”.

FINDINGS

[24] It can conclusively be accepted from the contents of the afore-mentioned allegations and the proof thereof that Sonet Breek had prepared and sent Annexures “F1” and “F2” to the Plaintiff. Olivier died a year earlier than the email was sent by the Defendant. Her denial that the Plaintiff had never dealt personally with the Defendant is also false. Equally false is the Defendant’s unsubstantiated allegation that the transactions in annexures “F1 and “F2” relate to a different agreement that existed between the Plaintiff and Barend Johannes Olivier. For a defendant to successfully resist summary judgment, he must;

THE LAW

[25] For a Defendant to successfully resist summary judgment, he must:

25.1 *“satisfy the Court that there is a reasonable probability that his defence is good and is advanced bona fide”. [see Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)].*
Stated differently;

25.2 *“the defendant discharges that onus and avoids summary judgment when he advances a reasonably arguable and triable contention”. [see Barclays National Bank Ltd v Smith 1975 (4) SA 675 (D) 684A].*

The Defendant’s case does not come close to meeting the requirements in 25.1 and 25.2 or any other requirement and is a plain fabrication.

CONCLUSION

[26] In the light of the above findings, I conclude that annexures “F1” and “F2” were prepared by the Defendant and that the transactions described therein were in the furtherance of and compliance with the terms of the agreement on which the Plaintiff’s claim is founded. The application for summary judgment ought to succeed in these circumstances.

COSTS

[27] It is disturbing that the Defendant has gone so much to unjustifiably and wilfully seek to defend a legitimate claim against it that it was even prepared to use the name of a deceased person as a shield to escape its liability to the Plaintiff. I can find no reason why punitive costs should not be awarded against the Defendant in these circumstances.

ORDER

[28] Resulting from the findings in this judgment, the following order is made;

1. The Plaintiff's application for summary judgment is granted.
2. The Defendant is ordered to pay the Plaintiff the amount of R3 000 000-00 (three million rands).
3. The Defendant is ordered to pay interest on the amount in 2, above, at the rate of 12% per annum calculated from 25 February 2021 to the date of final payment (both dates inclusive).
4. The Defendant is ordered to pay the costs, including the costs of this application, on attorney and own client scale.

M. MBONGWE J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Plaintiff:

Adv G.F Heyns SC

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For the Defendant: Adv D.A De Kock

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Date of hearing: 06 September 2021

**JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON THE 08TH
FEBRUARY 2022.**