

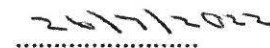
REPUBLIC OF SOUTH AFRICA



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

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

Case No: A5039/21

	
SIGNATURE	DATE

In the matter between:

PARK VILLAGE AUCTIONEERS (PTY) LTD

Appellant

And

FORUM EXPORTERS INTERNATIONAL (PTY) LTD

Respondent

JUDGMENT

THE COURT:

INTRODUCTION

[1] This is an appeal from the High Court, against a judgment in favour of Forum Exporters International (Pty) Ltd ("Forum") in the sum of R6 212 157.23 plus VAT, interest and costs. The appeal is with leave from the Supreme Court of Appeal.

[2] In the court *a quo*, Forum was the plaintiff; the appellant ("Park Village") was the first defendant; and a director of Park Village, Mr Clive Lazarus ("Mr Lazarus"), was the second defendant.

[3] Forum's claim is based on an oral joint venture agreement concluded on 15 May 2016 between Forum, represented by Mr Buda, Goodrich Auctioneers ("Goodrich"), represented by Mr Terblanche (a director of Goodrich at the time) and Park Village, represented by Mr Lazarus. It is alleged that under this agreement each party had certain roles and obligations. Park Village denied concluding any agreement with Forum and denied that it owed any money to Forum. Instead it claimed that Goodrich was the party bearing the relevant obligations to Forum.

[4] The court *a quo* found that the oral joint venture agreement was concluded between the respective parties and that the sum of R6 212 157.23 was owing by Park Village to Forum under the agreement. The claim against Mr Lazarus was dismissed.

[5] The issues on appeal are therefore whether Forum proved the agreement and, if it did, the amount due and owing to Forum under the agreement.

BACKGROUND

[6] During May 2016, Forum imported into South Africa over 100 containers of household furniture and goods from France, pursuant to an agreement with Valitus LLC in the United Kingdom. The household furniture and goods were sourced from Maisons du Monde in France.

[7] Forum first concluded an agreement with Goodrich, represented by Mr Terblanche, to sell those goods on behalf of Forum. Goodrich was unable to timeously secure the requisite storage facilities in Johannesburg to house the goods pending the sale

thereof. At the last moment, just before the goods arrived in Durban, Park Village was approached by Goodrich to assist. Park Village agreed, *inter alia*, that its storage facilities in Johannesburg could be used to store the goods.

[8] Soon after, on 15 May 2016, Mr Lazarus representing Park Village and Mr Buda representing Forum and Mr Terblanche (trading as Goodrich) met in Johannesburg. Forum alleged that on this day an oral joint venture agreement was concluded between itself, Goodrich and Park Village, with the following express, alternatively tacit, alternatively implied terms:

1. Forum would remain the owner of the goods until they were sold in accordance with the agreement.
2. Forum would clear the goods when it arrives in South Africa and transport it to warehousing in Gauteng belonging to or under the control of Park Village.
3. Goodrich would unpack the goods and prepare invoices.
4. Park Village would then take control of the operation and be responsible for all aspects of sales, advertising, marketing, delivery, invoicing and collection of moneys.
5. Forum would be paid the retail price (the retail price from Maisons Du Monde in British Pounds) ("the MDM price") multiplied by a factor of 6 on all goods sold. (On 4 July 2016, the parties agreed to reduce the factor of 6 to a factor of 4,9.)
6. Any moneys received in excess of Forum's price would be divided between Park Village and Goodrich on a basis agreed between them after expenses were paid.

[9] Forum alleged that 128 containers of goods were subsequently delivered to the warehouses, of which 98 were sold by Park Village between May and December 2016. It is not clear what happened to the other containers. Park Village pleaded that only 104 containers of goods were delivered and deny that 98 containers were sold.

[10] The MDM price of the goods in the 98 containers referred to above was alleged to be £ 4 300 800.00. Because Forum elected to claim a factor of 4.9 in respect of all goods sold, even the goods sold before 4 July 2016, Forum claimed from Park Village in respect of all 98 containers the sum of R21 073 920.00, excluding VAT.¹

[11] It was, however, pleaded that a final auction (a fire sale) for all of the goods remaining in the said warehouses was held on 8 December 2016. The remaining goods were sold for R151 900. Forum agreed to forfeit the amount of R151 900 multiplied by factor 4, equalling R607 600. (This amount was amended at the end of the trial to R856 350.99). It was therefore alleged that Park Village was indebted to Forum in the amount of R 20 466 320.

THE AGREEMENT

[12] Forum called three witnesses to prove the agreement; Mr Buda, Mr Terblanche and Ms Ubsdell (a director of Goodrich). They all confirmed the joint venture agreement. They also confirmed Park Village's position and role in the venture. Mr Buda testified that it was very clear that he (Mr Lazarus) wanted to make sure that all the money, all the administration be done by Park Village and that it was "*very much*

¹ It is unclear how this amount was calculated. If the value of the 98 containers was £ 4 300 800.00, and the exchange rate R21 to the pound, the amount in Rand (without adding factor 4,9) is at least R90 316 800. R4 300 800 x 4,9 is however R21 073 920.

a PVA operation as it were". Ms Upsdell, who was present at the meeting of 15 May 2016 in Johannesburg, further testified that Mr Lazarus was very specific that they (Goodrich) were not to handle the money or the invoicing. Park Village had a system in place and would do all the invoicing. Also, when goods were purchased, the money was paid into Park Village's bank account. She further stated that Park Village would also handle the security, that is secure the safety of the stock.

[13] Park Village's pleaded case as to the 15 May 2016 agreement was, from the start, unclear. In response to the allegation that a joint venture agreement had been struck between Forum, Goodrich and Park Village, it admitted in its plea that, (a) Forum and Goodrich had entered into an agreement, (b) in terms of which Forum, Goodrich and Park Village would contribute towards the venture. It further asserted that Park Village had three obligations under the agreement which it complied with. These admissions are clearly in contradiction to its plea, that no agreement was struck.

[14] In cross-examination, Mr Lazarus was asked why he maintained that Park Village was not part of the agreement when its plea admitted to obligations under the agreement. He answered that he was not a lawyer. Then later, despite initially denying that Park Village had concluded an agreement with Forum, he ultimately conceded under cross-examination that Park Village was part of the agreement of 15 May 2016. Moreover, in its plea, Park Village agreed that Forum would be paid the MDM Price multiplied by a factor of 6, but pleaded that, owing to a misrepresentation regarding the quality of the goods, it was no longer entitled to that amount. Mr Lazarus was also taken to two e-mails that he sent to Mr Buda in which he, in the first email, complained about profits and suggested changing the commission structure, and in the second

email, wherein he suggested to Mr Buda that Forum should decrease its commission. He did not dispute these e-mails.

[15] All of the above cannot be reconciled with Park Village's stance at the trial that it was not part of the agreement of 15 May 2016. Nor can it be reconciled with Park Village's reliance on Mr Terblanche's evidence in its heads of argument, namely that Park Village played the role of a *sub-contractor*, assisting Goodrich with its obligations to Forum, with no obligations to Forum itself. Firstly, a sub-contract was never pleaded, and secondly, Mr Terblanche's evidence must be seen in context. When Mr Terblanche made mention of a sub-contract, he referred to the situation prior to 15 May 2016. His evidence was that, as far as accountability to Forum was concerned, that had shifted from Goodrich to Park Village. In any event, a lay person's characterisation of something as being akin to a sub-contract cannot be given much weight.

[16] The court *a quo* found that Mr Buda was a good witness and that Ms Ubsdell was an excellent witness. The court found that although Mr Terblanche was not an ideal witness and prone to talking rather than listening, there was no reason to find that he was not a credible witness on the agreement issue, his evidence being consistent with that of Ms Ubsdell. On the other hand, however, the court found that Mr Lazarus, who was the only witness for Park Village, was an appalling witness. The court had the following to say:

'If a defendant is to have only one witness in its corner, it should not be a witness like Mr Lazarus. Mr Terblanche's meanderings in his evidence paled into insignificance when Mr Lazarus took the stand, particularly so when he

was under cross-examination. His default position was to avoid answering questions, or to give wholly irrelevant answers. He hid behind not understanding the law. He was difficult to pin down on facts. Indeed, it was difficult to understand what his case was from the evidence he gave.'

[17] From a reading of the record this serious criticism was clearly justified. Not only was Mr Lazarus a bad witness, he was caught out in at least two fraudulent schemes aimed at increasing Park Village's profits. In the first scheme Mr Lazarus was instrumental in the alteration of an invoice for a radio commercial from R160 183,68 to R388 000,00 in order to justify paying Forum less. In the second fraudulent scheme two sets of books were kept: an accurate set and a fake set, in which sales figures and costs were manipulated. By design, Forum was only shown the fake set.

[18] It is trite that an appeal court is not inclined to disturb findings by the trial court on the evaluation of the evidence. The advantage of seeing and hearing the witnesses is difficult to surpass.² Such findings are only overturned if there is a clear misdirection or the trial court's findings are clearly erroneous. The court *a quo* found, on the agreement issue, that Forum's witnesses were generally consistent in their versions of the agreement and its terms, as well as the role of Park Village. The court further found that Mr Lazarus ultimately accepted under cross-examination that there was an agreement between Forum, Goodrich and Park Village and that there was 'ample

² *Thabo Job Raleting v The State* [2021] ZAFSHC 198 at [4] and [9]; *AM and Another v MEC Health, Western Cape* (1258/2018) [2020] ZASCA 89 at [8].

other evidence’ to support such a finding. There is no scope for upsetting the court *a quo*’s finding on this score.

AMOUNT DUE

[19] Forum’s complaint, in a nutshell, is that Park Village failed to comply with its obligation to pay over to Forum the amount due under the agreement. The amount of R21 073 920 initially pleaded in the particulars of claim, alleged to be the value of the 98 containers, was amended at the end of the trial to R17 127 020. Forum further argued at the end of the trial that this amount should be further reduced by:

1. R2 324 051.68 paid by Park Village to Forum between May 2016 and December 2016.
2. R856 350.99 for goods sold at the fire sale.
3. R7 398 031.76 in respect of goods sold by Forum to Unicorn Auctioneers (“Unicorn”).

This brought the claim against Park Village down to R6 548 585.57.

[20] Park Village contends on appeal that the court *a quo* erred in holding that Forum proved the quantum of its claim in the amount found by the court, or at all. First, the starting point for the assessment of quantum was the amount disclosed on a spreadsheet prepared by Forum’s counsel, not any witness, and Park Village bore an onus to show reductions of quantum from the spreadsheet amount. Second, the court *a quo* overlooked the fact that sales were executed by Goodrich without proper accounting. Third, in the face of acknowledgment by Forum of a large amount of damaged goods, the court held that Park Village bore an onus to show what was and what was not damaged. Fourth, the court erred in finding that sales performed by

Goodrich for its own account was only in an amount of R336 729,00. Fifth, the court erred in not finding that, even after the fire sale, there remained unsold goods that had to be accounted for in any quantum assessment. Sixth, the court erred in accepting the value of the goods sold to Unicorn. Seventh, the court used, in a contractual setting, a test developed to deal with *quantum* in delictual claims.

[21] As far as the sale of the goods to Unicorn is concerned, Park Village put up no evidence at all to suggest that the spreadsheet showing what was sold to Unicorn was inaccurate. In its heads of argument, it is merely speculated that it is possible that more items than were on the list was taken. There is no basis for this speculation.

The modified spreadsheet issue.

[22] The first issue that needed to be determined was the quantity of the goods delivered by Forum and the value of such goods. Park Village discovered a spreadsheet containing approximately 9000 line items. The spreadsheet had its genesis in the inward documents of Valitas, the entity from whom Forum purchased the goods. Two days before the joint venture agreement was concluded, Mr Grant Cameron of Park Village sent an email to Mr Buda in which he referred to the spreadsheets and asked that they include five items of information: individual listings of stock per container, container numbers, quantity, stock number and code and cost and sales price.

[23] At a pre-trial meeting it was agreed that the discovered spreadsheet would be modified and presented at trial. It was recorded that, '*...the parties are agreed that to facilitate the giving of evidence and cross-examination that the spreadsheet discovered by the Defendant, at Caselines Trial Bundle 3 Volume 1, should be*

modified. The plaintiff has undertaking (sic) the process of modifying same and will deliver a copy to the defendants. The purpose of updating the spreadsheet was to quantify more accurately the plaintiffs claim by cross referencing it with the unpacking lists. The defendants will consider the updated spreadsheet and will revert to the plaintiff regarding any admission thereof.'

[24] The parties' agreement was eminently sensible as it would have taken many days of evidence if the spreadsheet was modified in court throughout the evidence. In any event, Park Village did not object to the modified spreadsheet at trial. In fact, it requested that a further column be inserted, which reflected the quantities of goods delivered, with reference to the unpacking sheets obtained from the transporters, African Compass International Cargo ("African Compass"). The original quantities stated by Valitas were therefore modified to conform to the unpacking sheets that Forum had to prove at trial.

[25] Ms Rosekilly from African Compass was called as a witness. She gave evidence about the unpacking of the goods from the containers and the recording of the number of items unloaded on the unpacking sheets. Column 13 of the spreadsheet gave the unit price of the item concerned. A further column was added to the spreadsheet to give the total of the unit price multiplied by the quantity as proved by the unpacking sheets. Finally, a column was added to reflect Forum's fee on each line item (a factor of 4.9 of the stated MDM Price in Rands). Ms Rosekilly's evidence was not materially challenged under cross-examination

[26] In examination-in-chief, Mr Buda stated that he had looked at the unpacking lists and satisfied himself that the modified spreadsheet did accord with the unpacking lists.

He therefore confirmed that the spreadsheet was accurate. No questions were directed to Mr Buda under cross-examination about the correctness of the spreadsheet.

[27] The court *a quo* therefore accepted the value attached to the goods as contended for by Forum in the spreadsheet, namely R17 127 020,71. In our view, there is no scope for upsetting the court *a quo*'s approach to the spreadsheet. As the court pointed out, it was open to Park Village to take issue with the spreadsheet if it wished.

How many items were sold?

[28] Forum carries the onus to prove, on a balance of probabilities, that 98 containers were sold to the value of R17 127 020. It failed to discharge the onus. We say so for the following reasons.

[29] Firstly, Forum would only be entitled to payment on goods actually sold. If goods went missing from the warehouse (as it did), or when goods were appropriated by Mr Terblanche and Mr Lazarus (as it were), or where goods were so badly damaged that it could not be sold (which is common cause), Forum would not be entitled to payment for those goods. This was confirmed by Ms Upsdell when she was asked whether Mr Lazarus said at the 15 May 2016 meeting that he was fully responsible for everything in that warehouse no matter what happens to it. She replied: *"I do not remember him using that term, whatever happens to it. But he was very specific that he would handle the security, the safety of the stock, the security, the selling on invoice, and the money."*

[30] When Mr Buda was asked why Park Village is liable for 98 containers' goods, he stated that, apart from the "5000 odd" items sold to Unicorn, minus the recorded sales,

a "quantity of merchandise has vanished into thin air". But, the goods did not vanish into thin air. It was clearly a free for all, where various parties, including Mr Buda, removed goods without the knowledge or control of Park Village.

[31] During his examination, Mr Terblanche admitted that he had removed goods from Park Village's warehouses and that they were sold separately under Goodrich invoices. He said he did this out of necessity because, while Goodrich had paid all of the expenses during April, May and June, Park Village paid it nothing by way of commissions in that time. Mr Terblanche testified that he disclosed this to Mr Lazarus by way of reconciliations. Although Ms Ubsdell confirmed Mr Terblanche's evidence in this respect, she also admitted that Park Village was not informed that items were removed. It was alleged that the total sum invoiced separately by Goodrich was R336 729,00.

[32] But, there is an issue with Mr Terblanche's evidence. He testified that Goodrich started issuing invoices from the beginning. He said: *"it was when we started unpacking, you know, it was towards the end of May"*. This statement reveals two things. First, Goodrich started selling goods for its own account even before all the items were unpacked, that is, before Goodrich had even compiled the full inventory given to Park Village's Grant Cameron to load onto the Park Village system. Second, Goodrich's motivation could not have been because Park Village was not paying its expenses. The first 4-day sale was only held in the beginning of June. Therefore, Park Village had not even received any proceeds from which expenses could be paid.

[33] Goodrich was clearly misappropriating stock from the word go, before Park Village could even take control over the stock. More importantly, no one knows how much

stock was misappropriated or its value. Forum failed to disclose, through Mr Buda or Mr Terblanche, any of these invoices over this initial period to indicate how much was taken, nor what the expenses were that they wanted to cover.

[34] The evidence is that when Mr Lazarus eventually became aware of Goodrich's invoices, it put a stop to it. Mr Terblanche was asked in cross-examination whether Goodrich issued any further invoices after Mr Lazarus put an end to it. He replied: *"Not as far as my knowledge. Everything came through via Grant."* Mr Terblanche was then referred to invoices issued by Goodrich during September 2016. These few invoices were located by Park Village. Of all these invoices only the proceeds of one sale to the value to R118 000.00, were paid over to Forum. When Mr Terblanche was confronted and asked in what context these invoices were issued, he replied that he *"was not in the country and Heather was there running the whole operation by herself"*, suggesting that Ms Ubsdell was now on a frolic of her own.

[35] Forum's case is that Park Village was responsible to account to it for the stock disposed of and to pay Forum its agreed cut on the goods sold. Park Village only produced some 134 invoices by way of discovery. The court *a quo* stated that, in view of the quantity of goods involved, there had to be far more invoices issued than those discovered. Consequently, Forum could not rely on Park Village's discovered records for purposes of quantifying its claim. Forum was clearly in a pickle. On 22 November 2016, Mr Buda addressed an email to Goodrich (Mr Terblanche and Ms Ubsdell) as follows: *"All that will be need to attend to is the inventory list You/Goodrich removed from PVA over the last few months without recording the goods movement."* On 6 December 2016, Mr Buda sent Ms Ubsdell another email in which he asked for the inventory: *"Finally, I think it's time to get the full inventory list of goods either currently*

at or previously sold by Goodrich. It has been constantly promised for several weeks."

She responded that neither she nor Mr Terblanche had the information. She testified that she told Mr Terblanche that she could not compile an inventory for Mr Buda as she did not have the full sales figures from Park Village. Mr Terblanche also testified that: *"At no time, at no time in the entirety of the contract were we ever given access into that inventory to see what the invoice amounts were, who was being invoiced, what was sold on auction to the true figures. All of us only Clive (Mr Lazarus) had control over that."* Park Village clearly failed to account to Forum and no inventories of goods sold were produced at court.

[36] Counsel for Forum submitted during argument that this was not an issue, as Forum proved that it delivered to Park Village what is reflected in the modified spreadsheet. As Park Village was responsible for security and was obliged to ensure the safety of the goods, any removal of goods or failure to produce the inventories, cannot be laid at Forum's door. We disagree for mainly two reasons. First, Forum carries the onus to prove that 98 containers of goods were sold. Second, the claim against Park Village is based on an oral joint venture agreement in terms of which payment is claimed for goods sold. The claim is not for damages suffered as a result of Park Village's failure to secure the goods or for its failure to account for the goods in the warehouse. The court *a quo* was therefore correct in subtracting the invoices from Goodrich from the amount claimed.

[37] However, as no inventory was presented at trial, it is still unknown how much stock, and to what value was removed from the Park Village warehouses. This was never established during evidence. What is clear is that Goodrich had removed stock, had not accounted for it, and this was known to Forum.

[38] Secondly, Mr Buda admitted that *"there was a high degree, or a much higher degree of damaged goods"*. It is obvious, even from the transcript, that Mr Buda had no way of dealing with this problem when he said the following under cross-examination: *"I ...I ...the ...the straight answer is I think it is a lot what ... more than ... sorry what one would normally expect would be a small percentage of damaged goods coming in and this was a greater amount than a small percentage."* Mr Buda also admitted that he did not know what happened to the damaged goods. Ms Ubsdell also testified that they realised that their expectations were not going to be met *"due to the damage and various reason ..."* In addition, Mr Lazarus testified that, because there was such a lot of damaged furniture, there were lots of refunds. He stated that 90% of the time, money was refunded.

[39] The real significance of the damaged goods and the influence it must have had on the sales (and the amount alleged to be due and owing to Forum), however, became clear when Forum's attorneys, in their letter of demand, indicated that they *"are prepared to write off 50% of the goods due to packing and/or transport damage"*. In the letter of demand, the value of 128 containers was calculated as being R43 535 842.00. That means Forum was prepared to write off more than R20 million, without any scientific or mathematical basis to justify either the write off, or the remaining "debt". This is not without implication for Forum's case. Having admitted large scale damage to the goods, Forum bore the onus to show what was sold and for what value. It did not discharge this onus.

[40] Thirdly, it is common cause on the pleadings that on 8 December 2016 a fire sale was held aimed at selling the last of the goods then still in Park Village's warehouses. However, the evidence was that goods remained unsold after the final fire sale. Mr

Terblanche admitted that there were still some goods at the Goodrich premises after the end of the venture, but that they were subsequently sold by Goodrich. No evidence was produced as to how many items were left after the fire sale and the value thereof.

[41] Fourthly, the fire sale was conducted on a different basis to the other sales. It was agreed that, instead of being paid the usual factor of 4.9, Forum would be paid what was left of the proceeds after 20% thereof had been split between Goodrich and Park Village. Forum also agreed to pay R90 000,00 towards expenses. As the modified spreadsheet included all of the items that had been delivered to Park Village and as the proceeds of the final sale were not to be distributed on the basis reflected in the spreadsheet, it was necessary for the Forum to remove the items forming the subject of the final sale from the spreadsheet. (Forum did not claim anything in respect of the final sale).

[42] This would have been an easy task if Park Village had complied with its obligations under the agreement to produce proper invoices for all of the goods sold. It failed to do so. In addition, to complicate things even further, the evidence showed that Mr Lazarus also took stock for himself during September 2016. The evidence given by Mr Terblanche is this:

'Mr Lazarus, uhm came and spoke to me and he said listen, we are not going to make any money out of this contract whatsoever. I am going to take you know a whole lot of goods for myself so I can at least make a you know I can sell it off and make some money.'

And also:

'So he just said to me, we are not going to make money out of this and you know I am taking a whole lot of stock for myself, so I can sell it off and you know, make some money and I suggest that you do the same. You know, take some stock for yourself.'

[43] Mr Terblanche testified that a few days after the above exchange, he saw Mr Lazarus's staff removing stock from the warehouse, packing them into wooden containers and sealing them. Mr Terblanche further said that Mr Lazarus took *'triple A'* stock and estimated that Mr Lazarus had removed stock of about R4 million. But, because of Park Village's complete failure to produce invoices, it was not possible for Forum to tell exactly how much ought to be removed from the modified spreadsheet on account of the final sale.

[44] The approach adopted by Forum was therefore to ask Mr Terblanche to estimate how much of all of the goods delivered comprised the final fire sale. His estimate was 3% – 5%. Forum used the higher estimate of 5% to be safe. That is 5% from the value of the goods valued at R17 127 020. It was on this basis that the court *a quo* subtracted R856 351,03 from Forum's claim.

[45] The court *a quo* came to this conclusion after it found that it cannot be determined with mathematical accuracy how much more Park Village should have paid Forum over and above the R2 324 051.68 that it had already paid. Relying on the dictum in *Esso Standard SA (Pty) Ltd v Katz*,³ the court *a quo* held that Park Village will not be

³ 1981 (1) SA 964 (A) at 970 E-H.

relieved of the necessity to pay, only because the court cannot assess “the damages” with precision.

[46] In *Esso*, the claim was for unliquidated delictual damages. The approach adopted in that case has also been adopted in cases of contractual damages:⁴

“Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate, but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the court is justified in giving absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it.”

[47] Even if the *Esso* principle could be applied to contractual damages, Forum claimed in paragraph 9 of the particulars of claim that Park Village sold (past tense) the goods delivered. Forum's case is therefore that it delivered goods to Park Village, Park Village sold all the goods, but failed to pay over Forum's agreed portion of the proceeds of the sales. Forum did not cancel the agreement and claim contractual damages. Forum also elected not to institute a claim for damages as an alternative to

⁴ *Hersman v Shapiro & Co* 1926 TPD 367 at p. 379 as quoted with approval in *Enslin v Meyer* 1960 (4) SA 520 (TPD) at 523H.

its claim. Nor did it establish that the evidence it adduced of quantum was the best it could in the circumstances. As a result, the court *a quo* erred in relying on *Esso* to establish the amount due and owing under the agreement.

CONCLUSION

[48] Forum failed to prove the amount due to it under the agreement, and the judgment falls to be set aside. In such circumstances, this court is permitted, under section 19(d) of the Superior Courts Act, 10 of 2013, to “confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.”

[49] Forum did not adduce sufficient admissible evidence to prove the amount owing to it under the agreement. An order granting absolution from the instance at the conclusion of the defendant’s case may be made in circumstances where the possibility exists that a plaintiff who bears the onus of proof in the matter might successfully discharge that onus by establishing other facts.⁵ On the assumption that there is a prospect that Forum may yet be able to prove the amount, it would be in the interests of justice to permit it to do so.

[50] As a result, and taking into consideration the circumstances of this case, an order for absolution from the instance, should have been granted at the end of the defendant’s case.

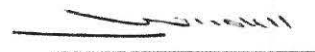
[51] In the result the following order is made:

⁵ *Damont NO v Van Zyl* 1962 (4) SA 47 (C) at 52G-H; *Mills Litho (Pty) Ltd v Storm Quinan t/a ‘Out of the Blue* 1987 (1) SA 781 (C) at 786H-I.

1. The appeal is upheld with costs.

2. The order of the court *a quo* is set aside and replaced with the following:

“Absolution from the instance is granted. Costs awarded to the defendant”

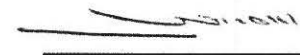


WINDELL J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree



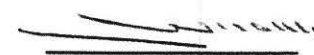
A P P

MUDAU J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree



A P P

MOLAHEHI J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is 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 26 July 2020.

APPEARANCES

Counsel for the appellant:	Advocate John Suttner SC Advocate Awie Du Plooy
Attorneys for the appellant:	A. Le Roux Attorneys
Counsel for the respondent:	Advocate Donovan Baguley
Attorneys for the respondent:	Oosthuizen & Co
Date of hearing:	25 April 2022
Date of judgment:	26 July 2022