



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

Case No: 36428/2014

In the matter between:

4/5/2017

GERHARD PRETORIUS

Plaintiff

and

JOHN PETER BEACHY-HEAD

Defendant

(1)	REPORTABLE: YES ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED: ☒
4/5/17	
DATE	SIGNATURE

JUDGMENT

D S FOURIE, J:

[1] The plaintiff claims payment from the defendant in the amount of R833 000.00. The plaintiff relies on an oral agreement which, according to him, was entered into between himself and the defendant on 6 December 2012, in terms whereof he lent and advanced the amount of R833 000.00 to the defendant against transfer of 1% shareholding in a company known as Cuperex (Pty) Ltd as security for repayment of the loan. According to the

plaintiff this agreement was amended during February 2013 in terms whereof it was agreed that the defendant was released from his obligation to provide security and that he would repay the said amount on or before 6 December 2013 with interest calculated at 9% per annum.

[2] These allegations are denied by the defendant. According to him the Pretorius Family Trust and Turncard Trading 120 (Pty) Ltd, represented by the plaintiff and the defendant respectively, entered into an oral agreement in terms whereof the Trust purchased 1% of Cuperex's shares from Turncard for the amount of R833 000.00. It is also denied that an agreement was entered into during February 2013 as alleged by the plaintiff.

[3] It is common cause that on 3 December 2012 Cuperex concluded a term loan agreement with Grindrod Bank in terms of which Turncard Trading was obliged to cede its shares in Cuperex to Grindrod Bank *in securitatem debiti*. It is also not in dispute that the Cuperex shares were not transferred to either the plaintiff or his family trust and that the amount of R833 000.00 has not been repaid.

[4] The main issues between the parties are the following:

- the nature of the agreement concluded on 6 December 2012;
- the parties to that agreement;

- the terms of the agreement;
- whether a further agreement during February 2013 was entered into as alleged by the plaintiff.

EVIDENCE FOR THE PLAINTIFF

[5] The plaintiff testified without calling any witnesses. According to him the defendant approached him for a loan to finance another project. He was willing to do so on condition that security be provided. The security would be 1% of the defendant's shareholding in Cuperex which had a value of R833 000.00 during November 2012. On 6 December 2012 it was then orally agreed between them that he would lend and advance the amount of R833 000.00 to the defendant against transfer of 1% of the defendant's shareholding in Cuperex as security for repayment of the loan. Later that same day he made an electronic transfer of R833 000.00 from his account to the defendant's account.

[6] On 3 December 2012 the Grindrod transaction had already taken place. In terms thereof an amount of R31 million was lent and advanced by the Grindrod Bank to Cuperex for which Turncard and the plaintiff's trust (amongst others) had to sign a deed of suretyship and perform a session of shares in Cuperex as security for repayment of the loan to the bank. On 4 February 2013 the plaintiff sent an e-mail to the defendant and Mr Lake, the

Chief Executive Officer of Cuperex, with regard to their shareholder's agreement. The following was pointed out by the plaintiff:

"There is a mistake with the issued share capital. In December the GPFT Trust purchased 1% from Turncard for R833 000. Therefore, the GPFT Trust should have 27.70% and Turncard 25.70%."

[7] Mr Lake then replied as follows in an e-mail dated 5 February 2013:

"That share sale has been agreed, and paid for. However, as we have previously discussed, it cannot be put through until we have asked for and received the approval of Grindrod (those shares are currently pledged and cannot be sold without their approval) and the other shareholders (who need to waive their pre-emptive rights). I am sure that both approvals will be easily and readily given, but we still need to go through that process before the share sale can legally be executed and the transfer from John to Gerhard takes place. The number of shares in the shareholder's agreement is, therefore, currently correct."

[8] According to him he then told the defendant *"ons kan nie hierdie sekuriteits ding doen nie, want ons 'shares' is gebind in Grindrod. Leen die geld by my en betaal dit die einde van die jaar vir my terug met 9% rente"*. The defendant then accepted this proposal because they had no other choice.

[9] The plaintiff also referred to a number of other e-mails exchanged between him and the defendant. On 7 March 2014 he wrote to the defendant saying that *"Last time we spoke you wanted to keep your 1% share and said that you would like to give the money back with interest at a feasible time"*. On 9 March the defendant responded by saying *"Right now I propose we stick to the original deal"*. On 13 March 2014 the plaintiff said *"I propose that we stick to the new deal that was made last year whereby you will pay me back the R833 000 with interest at 9% per year"*.

[10] In cross-examination he was requested to explain why his family trust had become involved during February 2012. His answer was that he would have used his trust as a "vehicle" to keep the 1% shares as security. He was then referred to the original particulars of claim before an amendment was effected. In terms thereof it was pleaded that an agreement was entered into between his family trust and Turncard in terms whereof he would pay an amount of R833 000.00 to the defendant in turn for a transfer of 1% shareholding in Cuperex. He conceded this, but replied it was not the intention to involve the trust and Turncard as parties to the agreement. He also conceded that it would not have been impossible to obtain the approval of Grindrod Bank, although it would have been a "schlep" to go through that process.

EVIDENCE FOR THE DEFENDANT:

[11] The defendant also testified without calling any witnesses. He was the Chairman of the Board of Cuperex and through his family trust he owned 85% of the shares in Turncard and Turncard owned approximately 27% of the shares in Cuperex. At some stage he wanted to sell some of the shares in Cuperex and this is how it came about that the plaintiff became interested in buying shares in Cuperex. The value of 1% of the shares was R833 000.00. Turncard had to sell and the Gerhard Pretorius Family Trust had to receive the shares. There was no repayment as this was a share purchase which was agreed upon during December 2012. When it was time to do the share transfer the company's secretary would have approached Grindrod to obtain their consent. Later during 2013 it transpired that Cuperex was experiencing financial difficulties as a result whereof it had been put under business rescue. He also said that *"if the business is producing even if it was marginally and it was doing alright and it was solvent, I would have certainly have considered purchasing those shares back"*.

[12] In cross-examination he confirmed that on 6 December 2012 an agreement was concluded between the trust as represented by the plaintiff and Turncard as represented by himself in terms whereof 1% of the shares in Cuperex had been sold to the trust. According to him these shares would be

subject to the same session if Grindrod would be prepared to grant their approval for the sale.

[13] When it was put to him that there was no conceivable commercial logic for the plaintiff to have entered into an agreement of sale as explained by the defendant, he replied as follows:

"A conceivable business logic is very obvious, in that he believed the business was going to be worth a lot more than R83 million by the time he implemented the technology ...".

[14] It was also pointed out to him in cross-examination that he received the money in his personal account, suggesting a loan agreement was entered into as alleged by the plaintiff. He responded by giving the following explanation:

"The physical cash transaction was received by me in person. The accounting transaction which is absolutely verifiable and I can show you, went through Turncard to JBH Copper Trust, to JBH for repayment of the loan of R8 million, part payment of the loan of R8 million which I had made ...".

DISCUSSION:

[15] During argument counsel for the plaintiff pointed out that this is a case where there are "two mutually exclusive possibilities" of what had transpired between the parties. He contended that in such a case the

probabilities should indicate what the outcome should be. He argued that as the probabilities favour the plaintiff, I should grant judgment in favour of him.

[16] Counsel for the defendant argued that there are no probabilities in favour of the plaintiff's case. She argued that the documents (to which reference was made during the trial) do not support the plaintiff's case but, at least to a certain extent, are in favour of the defendant. I should therefore, so it was argued, dismiss the claim with costs.

[17] This is a case where there are serious factual disputes to such an extent that they can be regarded as mutually destructive. An assessment of the witnesses and the probabilities will therefore be necessary. This was explained as follows in *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D-G:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of

a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

(See also in this regard *SFW Group Limited & Another v Martell et Cie & Others* 2003 (1) SA 11 (SCA) par 5.)

[18] It is therefore not only desirable but also necessary, in a case like this, to say something about the credibility and reliability of the witnesses. Such an assessment has to take into account the general context, the witness' candour and demeanour in the witness box, internal and external contradictions and the probability or improbability of particular aspects of his or her version, to name only a few considerations in this regard (*SFW Group Ltd & Another v Martell et Cie & Another, supra*, par 5). Furthermore, one should distinguish between *bona fide* errors and an intentional untruth. I have had the opportunity to observe the demeanour of both the plaintiff and the defendant and to listen carefully to their evidence. I did not get the impression that anyone of them intentionally tried to mislead the Court or knowingly told an untruth. It is possible that their evidence with regard to some incidents is not so reliable and I shall refer to that later again. Notwithstanding my observations in this regard, I have no reason to conclude

that they were untruthful. This is a matter that should be decided on the evidence and the probabilities.

[19] I turn now to consider, as a first step, the issues with regard to the agreement concluded on 6 December 2012 and shall thereafter consider the question whether a further agreement was concluded during February 2013 as alleged by the plaintiff. It is the plaintiff's case that the first agreement was concluded between himself and the defendant personally in terms whereof he lent and advanced the amount of R833 000.00 to the defendant against transfer of 1% shareholding in Cuperex as security for repayment of the loan. According to the defendant this was a sale agreement concluded between the Trust and Turncard, represented by the plaintiff and the defendant respectively in terms whereof the Trust purchased 1% of Cuperex shares from Turncard for the amount of R833 000.00. No doubt, the plaintiff bears the onus of proof.

[20] In the amended particulars of claim (the final version thereof) it is alleged that the parties entered into a loan agreement and that the transfer of 1% shareholding in Cuperex would be security for repayment of the loan. This is also the evidence of the plaintiff who also demonstrated that the amount in question was transferred from his account to that of the defendant. Save for the transfer of the capital amount, there are various difficulties with the version of the plaintiff.

[21] First, on 6 December 2012 when transfer of the capital amount was made the plaintiff sent an e-mail to the defendant. It says the following: "Attached please find the proof of payment for the *purchase* of 1% share of your Cuperex shares" (Exh. "E" p 13). Second, on 4 February 2013 the plaintiff raised a complaint about the issued share capital in Cuperex. In an e-mail of even date he pointed out that "in December the GPF *Trust purchased* 1% from *Turncard* for R833 000.00" (Exh. "A" p 15). This e-mail refers to a sale of shares between the Trust and Turncard and not between the plaintiff and defendant personally. Third, in a notice of amendment dated 3 November 2014 the plaintiff indicated his intention to amend his particulars of claim (before the final amendment). In paragraph 4.1 thereof the following was alleged: "On 6 December 2012 and at Johannesburg the Gerhard Pretorius Family Trust represented by the plaintiff and Turncard Trading 21 (Pty) Ltd represented by the defendant entered into an oral sale of shares agreement ..." (Exh. "D" p 7). Again, reference was made to an agreement of sale entered into between the Trust and Turncard.

[22] According to the evidence of the plaintiff it was never the intention to involve the Trust and Turncard as parties to the first agreement. It was also submitted on his behalf that, on the probabilities, there was no conceivable commercial logic for the plaintiff to have entered into an agreement of sale. This is supported by the fact, so it was argued, that the capital amount was transferred from the plaintiff's personal account to the defendant's personal account.

[23] Notwithstanding the fact that the capital amount was transferred from one personal account to another, the documentary evidence does not support the submissions put forward. Furthermore, the difference between a loan agreement and an agreement of sale should be obvious to a reasonable person who involves himself in the business of a company such as Cuperex. The reason for entering into an agreement of sale was also explained by the defendant. According to him the plaintiff believed that the business was going to be worth a lot more than R83 million by the time he would implement the technology. I have no reason to reject this explanation, either because it is false or improbable. Having regard to all these considerations, I have to conclude that the plaintiff was unable to prove his version of the agreement which was entered into on 6 December 2012.

[24] I shall now consider the question whether a second agreement was entered into during February 2013 as alleged by the plaintiff. It is the plaintiff's case that the December 2012 agreement (as alleged by him) was orally amended during February 2013 in terms whereof it was agreed that the defendant was released from his obligation to provide security and that he would repay the capital amount on or before 6 December 2013 with interest calculated at 9% per annum. These allegations are denied by the defendant. Again, the plaintiff bears the onus to prove the agreement that he relies on.

[25] It is common cause that on 3 December 2012 Cuperex concluded a term loan agreement with the Grindrod Bank in terms of which, *inter alia*, Turncard was obliged to cede its shares in Cuperex to the bank *in*

securitatem debiti. The plaintiff testified that, as a result of this cession, it was agreed between the parties not to proceed with the transfer of shares in Cuperex to him as security and that the defendant would repay the capital amount by the end of December 2013 together with 9% interest. During March 2014 a few e-mails were exchanged between the parties regarding this issue. The first is an e-mail dated 7 March 2014 from the plaintiff to the defendant with the subject indicated as "SALE OF SHARE?" It reads as follows:

"I forgot to ask you about the R833 000.00. My auditors need to know what is happening with it to complete my financials for February 2014. Last time we spoke you wanted to keep your 1% share and said that you would like to give the money back with interest at a feasible time? Can you please confirm this and give me an indication of when you would be able to reimburse me".

[26] On 9 March 2014 the defendant responded to this e-mail. He said the following:

"Right now I propose to stick to the original deal. I can arrange the 1% transfer tomorrow if you would like. The most important thing right now is trying to save this business. Any money that we have or can scrape together should be focused here. Let's chat in the morning. I will send you the shareholders' resolution and proposal later ..."

[27] On 10 March the plaintiff replied by saying that: "I propose that we stick to the new deal that was made last year whereby you will pay me back

the R833 000.00 with interest at 9% per year". A few days later the defendant replied by saying: "Can't discuss anything if you don't answer phone, SMS or e-mail". On 19 March 2014 another e-mail was sent by the plaintiff to the defendant. The subject was indicated as "R833 000.00" and the response was "What do you propose?".

[28] The defendant testified with regard to this alleged agreement that if Cuperex as a business "is producing" and was also solvent, he would definitely have "considered purchasing those shares back". When this was put to the plaintiff in cross-examination his reply was: "Ons almal het gehoop die besigheid gaan baie geld maak, ons almal het ons geld daarin belê, maar dat ons so 'n gesprek gehad het, weet ek nie van nie". The fact that Turncard Trading was obliged to cede its shares in Cuperex to Grindrod Bank already during December 2012 was also addressed by the defendant. He testified that Grindrod would not have been in a different position, because "it was just swapping a name on a share and there would be no value change, or no value dissolution for Grindrod". Put differently, they would have had exactly the same shares under pledge, some of them registered in a different name if the transfer had taken place.

[29] It was argued on behalf of the defendant that there is no prove of an agreement as alleged by the plaintiff. I am inclined to agree with this submission. Taking into account the evidence referred to above, it seems to me that the plaintiff is confronted with the following difficulties: The e-mail of the plaintiff dated 7 March 2014 does not refer to an agreement at all. The

fact that it refers to the defendant who wanted to keep his 1% share and that he is requested to confirm this, creates a serious doubt whether the parties had come to an agreement. This is exacerbated by the fact that the plaintiff was unable to deny the defendant's version about this conversation, i.e. that he would have *considered* purchasing back those shares. It was only thereafter, on 10 March 2014, that the plaintiff was referring to a "new deal that was made last year whereby you will pay me back the R833 000.00 with interest at 9% per year". It is important to take into account, as far as this allegation is concerned, that the plaintiff's e-mail of 7 March 2014 only refers to "with interest at a feasible time", not mentioning the interest rate (of 9%) or a date for repayment, whereas he testified that the loan would be repaid by the end of 2013.

[30] Usually, to ascertain whether there has been agreement one has to look for an offer and an acceptance of that offer. It is trite that instead of signifying acceptance of an offer by written or spoken words, acceptance may also be inferred from conduct. Having regard to the contents of the e-mails and the evidence of the plaintiff and the defendant with regard to the alleged agreement, it is difficult to conclude that, on a preponderance of probabilities, the parties in fact came to an agreement. Taking into account all the evidence and the surrounding circumstances, I am unable to conclude that the plaintiff has discharged the onus to prove the existence of the agreement as alleged by him.

ORDER:

In the result I make the following order:

- (1) Absolution from the instance is granted to the defendant on the plaintiff's claim as set out in the amended particulars of claim dated 30 October 2015;
- (2) The plaintiff shall pay the costs of suit.



D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 4 May 2017