IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

27/01/2014

CASE NUMBER: 5032/10

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

22/01/2015 ....

In the matter between:

DEWALD SMITH	**PLAINTIFF**
and	
RAY STRYDOM	**FIRST DEFENDANT**
STRYDOM PUMP ERECTION CC	**SECOND DEFENDANT**

JUDGMENT

<u>Moseamo AJ</u>

Introduction

[1] The plaintiff claims interest against first and second defendant for interest on the amount of R500 000 paid by him into the account of the second defendant.

[2] I firstly wish to deal with the issue of the defendants' plea which was a contentious issue. During the hearing counsel for the plaintiff referred me to the plea of the first defendant dated 18th May 2010. The plea referred to was amended by court order dated 12th November 2014. As a result I will not consider the submissions made in relation to the plea dated 18th May 2010.

Testimony of the plaintiff

[3] Plaintiff testified and did not call any witnesses. He testified that he has known first defendant for about 8 years. First defendant had bought lubricants from Antec, which is the plaintiff's company, for years. During 2007 first defendant proposed that plaintiff invest money in his cattle business and they will share in the offspring of the cattle. He rejected this proposal because the place where he rented the farm was next to Orange Farm and it was risky. A year passed and the first defendant approached him with another proposal, he proposed that the plaintiff invest an amount of R100 000 and he, defendant would pay him interest of 2% per month, which works out to 24% per annum. Plaintiff agreed to this proposal and defendant gave him banking details. He deposited the amount of R100 000 into the account of the second defendant. Even though the agreement was between plaintiff and the first defendant, he had no problem with depositing the money into the second defendants' account. He made subsequent payments in the sum of R400 000 on the same terms.

[4] He further testified that first defendant said he can claim the money during April or December which is a busy time during which they will be selling. After 7 months he felt he could use the money differently. They had a meeting and they agreed that the plaintiff will keep his money invested until April 2009. After the meeting first defendant called the plaintiff and told him that his wife said that he must pay him out with 'past' interest. According to plaintiff, first defendant said that his wife had indicated that the longer they keep the money the more they will have to pay and they may even suffer a loss. Plaintiff offered to compile a summary of the interest

calculation, which he did. He sent it to first defendant who brought it back and disputed the figures, second defendant said that the amount due to plaintiff was R74 000.

[5] First defendant refunded the plaintiff's R500 000 without the interest. Plaintiff was not happy with the defendant's failure to pay his interest so he went to the police station to open a case against first defendant. The police said it was a civil matter but one police officer undertook to help plaintiff resolve the matter. The police officer who attempted to mediate the dispute gave him a document from the first defendant (defendants' interest calculation) indicating total interest of R84 000. Plaintiff never asked about the finances of the second Defendant as they were not important to him. He asked for the money after the financial year end.

[6] During cross examination plaintiff stated that he understood joint venture to be 'people going into a venture together with each person in the venture having different responsibilities'. He reiterated that his understanding was that he will provide money to buy cattle while first defendant will earn interest on the money and he confirmed this to be in line with his understanding of a joint venture. Plaintiff reiterated that in terms of the oral agreement he would get 2% interest per month. The capital was to be paid on termination in a lump sum. He was asked about the interest calculation prepared by him which is on page 9 of the prescription bundle (plaintiff's interest calculation) . He did not only charge interest until the agreed date of termination but he charged interest up until the day defendant paid.

[7] He stated that he charged interest until 9th July 2009 and first defendant was not in agreement and prepared his own calculations which plaintiff obtained from the police officer. He was confronted with the letters from his attorneys, it was put to him that he was confused about the interest and that there was no agreement regarding interest and further that it was an after thought on his part. He was confronted with the different amounts of interests claimed. He stated that he agreed with the defendant's calculation of interest which is R84 000 and stated that an amount of R15 000 should be added to that amount.

[8] Plaintiff testified in a clear manner, made concessions some of which were not in favour to his case and did not try to conceal the truth. There were however external

contradictions with what was pleaded on his behalf and his testimony: (a) date the contract would terminate; (b) the amount of interest due to him.

Evidence on behalf of the defendants

[9] First defendant and his wife testified on behalf of the defendants. Hanette Strydom testified that she is responsible for preparing management financial statements and not audited financial statements as she is related to the first defendant. She does not know the plaintiff and has never spoken to him. She knows that there was a joint venture agreement in terms of which plaintiff would invest money and share in the profit in relation to the cattle. She knows about the payment made to the plaintiff. She did not prepare defendant's interest calculation but rather she did a profit calculation. The profit calculation was done at the instance of the first defendant who wanted to know where they were standing seeing plaintiff wanted to pull out of the agreement. They were four to five months into the venture when she was asked to calculate the profit. She compiled the formal report after plaintiff indicated that the first defendant owe him interest. The report only relates to the farming operation and not the entire close corporation.

[10] She further testified that on two occasions first defendant was upset because plaintiff wanted to withdraw his investment as soon as he was informed of the risk. First defendant said to her that if plaintiff was going to do that, then he must take his money. She said that if defendant told her that he was entering into an agreement on the terms alleged by the plaintiff, she would have advised against it because it is unsustainable. She prepared the report in 2009 after the cancellation of the agreement. She denied having compiled the defendant's interest calculation. She only saw the document the day prior to her giving evidence in this matter. When asked who could have prepared the defendant's interest calculation, she stated that defendant could have asked one of the people at his office to do it. She said either Anarieta Du toit or another personal assistant could have done it. She said that there was no dispute about the capital however there was no obligation to pay interest as there was no profit.

[11] During cross examination she was asked why plaintiff would invest more money despite his concerns about the risk and she said that it is because he accepted their conditions. She admitted that plaintiff never had anything to do with financials of the

second defendant. When she was asked by the first defendant how they were doing she did not prepare anything in writing but did a quick calculation and told him. She prepared the report from the financials of the second defendant. She said that the second defendant did not incur a loss but the farming division suffered a loss. She indicated that the business had to borrow R250 000 to pay plaintiff. She said that the amount of money paid in by the plaintiff will not be reflected as an investment but as a current liability because they already knew that they had to pay him out that year. They knew by February 2009 that they have suffered a loss. She admitted that the business made a profit the following year and that profit was not shared with the plaintiff because he had already pulled out.

[12] Regarding why the defendant's interest calculation was prepared, she said that 'first defendant wanted to see what the plaintiff was doing'. She said that defendant's interest calculation was prepared because first defendant wanted to negotiate with plaintiff. He wanted to reach an amicable solution. When asked why the defendant paid out the capital if it was a joint venture agreement, she said that one cannot have a partner who is 'one time in and another time out'.

[13] Ray Strydom, the first defendant, testified that he knew plaintiff from his dealing with Antech, plaintiff's company, over a period of 10 years. First defendant was involved in a cattle breeding business but the location was not good as it was next to Orange Farm. He, acting on behalf of the second defendant, entered into feedlot business with the plaintiff. It involved buying cattle, feeding them to a particular weight then slaughtering and selling. The feedlot business was moved to Hydelburg. He supposed that the plaintiff agreed to enter into the feedlot business after it moved to Hydelburg taking away the risk of Orange Farm. He and plaintiff discussed the business of Sparta which is also a feedlot business. They discussed how well the Sparta business was doing. The initial agreement was for a R100 000. The agreement was that the first defendant had the fascilities and staff while plaintiff would invest cash and their joint purpose was to make a profit. They further agreed that they will check the profit at the end of the financial year.

[14] He further testified that plaintiff brought up the question of risk for the first time after the second payment before August 2008. The discussion started off with how well the Sparta brothers were doing and then he made a point of discussing risk. He

gave plaintiff examples of risks that can be encountered in the feedlot kind of business like a lightning bolt or foot and mouth disease, which both have a potential to kill all cattle. He further informed plaintiff that Sparta never lost all their cattle so they could get rich. Plaintiff decided to invest more at that meeting. The issue of termination was not discussed at the first meeting it only came up after the second agreement. He told the plaintiff who was concerned about risk that if the issue of risk came up again they would then terminate the agreement. During February 2009 plaintiff told him that he could do better by investing his money in a car deal or car parts. He told plaintiff that if he terminated the agreement, the calculation stops. He said that once the agreement is terminated the plaintiff would be paid his capital and a 'recon' would be prepared. He said that payment of plaintiff's capital would be made after easter.

[15] He further stated that prior to April plaintiff showed him plaintiff's interest calculation. He however denied that there was was fixed interest. He said that with an agreement like that they would have had to make 48%. He paid the plaintiff in cash but the plaintiff did not give him a receipt for the R250 000. He panicked when he received a letter from plaintiff's attorney claiming R250 000 as he thought plaintiff wanted to deny that he had been paid. He agreed that the defendant's interest calculation was prepared at his instruction as he wanted to make sense of what plaintiff meant. He however denied that the preparation of defendant's interest calculation is an admission but simply duplication of plaintiff's interest calculation. He agreed that he met with the police officer who attempted to resolve their dispute and he took with him the plaintiff's interest calculation and defendant's interest calculation to the meeting. He gave defendant's interest calculation to the police offficer. He further testified that the second defendant suffered a loss. He lodged a counterclaim for the loss suffered by the plaintiff.

[16] During cross examination he was asked whether the issue of interest ever came up between him and the plaintiff and he said ' interest could have been discussed but I can't remember. It could have never been in this context...' He stated that the patnership endured until approximately 8th April 2009. He said that their agreement was not for one year but was supposed to be ongoing based on the Sparta Model. He gave the defendant's interest calculation to the police officer in exchange for a receipt for the R250 000 he paid in cash to the plaintiff. He denied that the

presentation of the defendant's interest calculation is an admission. He denied that the defendant's interest calculation was prepared by him, he stated that he cannot remember who prepared it but admitted that he put his name on the document. He however reiterated that it was not an admission that he owed plaintiff interest.

[17] I must state that I found the second defendant to be vague, evasive and long-winded. He argued with counsel and he was inconsistent.

[18] The following are common cause or not seriously disputed: (a) There was an oral agreement that was entered into and plaintiff paid an amount of R500 000 into the account of the second defendant as a result of that agreement; (b) the money was to be used by the first defendant to purchase cattle through second defendant; (c) plaintiff was never involved in the running of the feedlot business; (d) all the meetings relating to the feedlot business were held at plaintiff's offices; (e) when the agreement was terminated plaintiff prepared a document in which he calculated interest due to him by the defendant(s) and gave it to the first defendant; (f) according to the plaintiff's interest calculation the total interest amounted to R117 571; (g) defendant had another document prepared, which showed the total interest to be R84 000.

[19] It is also common cause that plaintiff paid the amount of R500 000 as follows: (a) R80 000 on the 5th May 2008; (b) R20 000 on the 7th May 2008; (c) R100 000 on the 14th August 2008; (d) R100 000 on the 2nd July 2008; (e) R200 000 on the 21st August 2008.

<u>Issues</u>

[20] Whether the agreement between the parties is a partnership agreement. Whether the plaintiff is entitled to interest claimed by him or whether the defendants are entitled to loss suffered by the feedlot business.

[21] The parties are not in agreement as to the terms of the agreement. The defendants submitted that the agreement was a partnership agreement between second defendant and plaintiff where the parties would share the profits equally. The plaintiff stated that the agreement could be called a partnership agreement or a joint venture agreement, it did not matter. However the plaintiff insisted that it was agreed

that the defendant(s) would pay him interest on his contribution at the rate of 2% per month.

I now turn to consider whether the agreement was a partnership agreement.

[22] A partnership agreement is defined as 'a contract between two or more parties under which each contributes or undertakes to contribute towards an enterprise to be carried on jointly by them with the object of making a profit and of sharing it between them'. See Business Transaction Law, seventh edition, by R Sharrock at 457.

[23] The essential elements of a partnership agreement are (a) each party had to contribute something; (b) the enterprise was being conducted for the joint benefit of both parties; (c) with the object of making a profit.

[24] It is important to note that even if all the essential elements are present in an agreement, the court will hold that it is not one of partnership if its terms as a whole, the conduct of the parties, and the sorrounding cicumstances, show that the parties did not intend to enter into a partnership. See Business Transaction Law at 460

[25] It is not in dispute that the plaintiff contributed R500 000 (Five Hundred Thousand Rand) while the defendant(s) contributed fascilities and labour. It is also not in dispute that the agreement was entered into for the benefit of the parties. The parties however do not agree on their intention for entering into the agreement. Plaintiff contends that he entered into the agreement to earn interest on his investment while defendant contends that the agreement was that the parties would make a profit and share it equally.

[26] Since the parties cannot agree on the terms of the agreement, it is important for me to consider the conduct of the parties and the sorrounding circumstances. It is not in dispute that : (a) plaintiff deposited the money into the account of the second defendant; (b) the plaintiff was never involved in the running of the feedlot business; (c) plaintiff prepared his interest calculation after the parties agreed to terminate the agreement; (d) plaintiff attempted to open a criminal case against the first defendant after his capital was refunded without the interest.

[27] It is also not in dispute that: (a) the first defendant approached the plaintiff with an intention to enter into feedlot business; (b) the meetings regarding the business

were all held at the plaintiff's offices as and when the first defendant travelled to Vereeniging; (c) the defendant(s) refunded the plaintiff's capital after the agreement was terminated; (d) the first defendant had a member of his office prepare the defendant's interest calculation after receiving plaintiff's interest calculation; (e) first defendant took along plaintiff's interest calculation and defendant's interest calculation to the meeting with the police officer; (f) first defendant gave the defendant's interest calculation to the police officer.

[28] I find it improbable that a person who is adamant that there was no agreement regarding interest would have prepared interest calculation instead of calculating whether the feedlot made a profit or a loss. I find it highly probable that the first defendant disagreed with the plaintiff's calculation of interest and had a member of his office prepare another interest calculation which turned out to be a lower amount than the amount the plaintiff claimed was due. He could not provide an explanation why he had the defendant's interest calculation prepared. This in my view indicates that the first defendant disagreed with the amount of interest rather than the payment of interest as a whole.

[29] The first defendant and his wife who is an accountant could not explain why the plaintiff's capital was refunded. The refund of the plaintiff's capital is in complete contrast with the defendant's contention.

[30] In Business Transaction Law at 458 it is stated that 'Whatever is given must be given entirely. If, for instance, capital is contributed, it must share in the risk of the enterprise, so that, if the enterprise fails, the party concerned cannot recover it. If a party is entitled to reclaim his contribution irrespective of the fortunes of the business, the contract is not a partnership, but a loan.'

[31] The conduct of the parties and in particular the refund of the plaintiff's capital contribution does not support the contention that the agreement was a patnership agreement. Had the parties intended for the agreement to be a partnership agreement, the plaintiff would not have been entitled to his capital contribution, he would have in addition to losing his money have been liable for the loss suffered by the partnership. The preparation of the defendant's interest calculation is also in stark contrast with the defendants' version. In my view the above lends support to the plaintiff's version that there was an agreement for payment of interest.

[32] I however find that the plaintiff was not successful in proving how he arrived at the amount of R 101 322. The amount of R15 000 that he said must be added to the R84 000 was not clearly explained.

[32] Despite criticism leveled against the evidence of the plaintiff, I am nonetheless satisfied that the version of the plaintiff stands to be accepted as true while the version of the defendants stands to be rejected as false. See National Employers General Insurance v Jagers 1984 (4) SA 437 (E)

I now turn to consider whether the agreement was between plaintiff and first defendant or the second defendant.

[33] In his particulars of claim the plaintiff indicated that the agreement was that the first defendant would purchase cattle through the second defendant. Plaintiff admitted that he did not have a problem with depositing money into the account of the second defendant even though he initially thought he was contracting with the first defendant.

[34] The first defendant's explanation that the agreement was between plaintiff and the second defendant was also not convincing. He testified that the plaintiff must have known that he was dealing with the second defendant as he, first defendant, personally had no cattle.

[35] I am of the opinion that the agreement was between plaintiff and both defendants.

In the result I make the following order:

1. First and second defendant are jointly and severally liable to pay interest to the plaintiff' as calculated by the first defendant in the sum of R84 000 plus interest at a legal rate *a tempore morae;*

2. First and second defendant are liable to pay plaintiff's costs of suit.

P D MOSEAMO

ACTING JUDGE OF THE HIGH COURT

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