



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 9006/2010

In the matter between:

ABDUL GANI

PLAINTIFF

and

ANICE HASSIM

DEFENDANT

CASE NO: 4554/2011

And in the matter between:

EAST COAST ACCESS (PTY) LTD

PLAINTIFF

And

ABDUL GANI

DEFENDANT

JUDGMENT

Date: 16 February 2015

PLOOS VAN AMSTEL J

[1] The two actions which came before me as a consolidated trial arise out of the sale of shares in a private company known as East Coast Access (Pty) Ltd (ECA). It carries on business as a provider of access to the internet, servers, email facilities and maintenance and support relating thereto. It also provides hardware for these functions. It owns a subsidiary, East Coast Internet (Pty) Ltd, which trades under the name 'immedia' and renders services relating to software development, web design and strategic decisions relating to the internet.

[2] The shares in the company were owned by Mr Abdul Gani and Mr Anice Hassim. Mr Gani was involved in ECA on the technical side while Mr Hassim focused on immidia. In 2006 Mr Gani suffered a heart attack. He decided to scale down on his working activities and pay more attention to his health and family. This led to his decision to leave ECA and sell his 50 per cent shareholding to Mr Hassim.

[3] In one of the actions Mr Gani seeks payment of the balance of the purchase price, alternatively the return of those shares which have not been paid for. In the other action ECA seeks damages from Mr Gani arising out of the fact that he opened a new business in competition with it and allegedly lured away two of its key employees and some of its clients.

[4] The written agreement for the sale of the shares was prepared by Mr Hassim. Mr Gani made some alterations to it and they signed it. It is unfortunate that they did not seek the input of an attorney, having regard to the importance of the transaction to both of them. The agreement is poorly drafted and the proper meaning of some of its provisions forms part of the dispute before me.

[5] The agreement reads as follows:

'Agreement between Anice A Hassim and Abdul R Gani effective 31 May 2007.

Hassim agrees to purchase with immediate effect (31 May 2007) Gani's 50% shareholding in East Coast Access Pty Ltd.

The purchase consideration is R1 million per year with a balloon payment of R2 million at the end of Year 3. Mr Hassim will make repayments at a monthly rate of R83 400 and this will be contingent on the company generating a profit of at least R1 million per year.

At the end of the 3 years, providing the company has made a further R2.7 million in profits over that period, Mr Hassim will pay the remaining R2 million to Mr Gani.

Mr Gani will remain available to the company to provide information, support and advice to ensure its continued operation during this term.

Mr Hassim will assume immediate ownership of the company upon this agreement, and all Mr Gani's suretyships and guarantees shall lapse and be assumed by Mr Hassim. Mr and Mrs Gani will cease to be officers, representatives or signatories to bank accounts of the company.

Mr Gani shall have no further claim on the company or Mr Hassim beyond the amounts specified in this agreement.

Should Mr Hassim be unable to meet these financial obligations at the end of the three years, shares to the value of the amount unpaid shall revert to Mr Gani or the term (sic) and conditions may be extended or revised by mutual agreement.'

[6] Mr Hassim paid Mr Gani a sum of R3 million over a period of three years. He however did not pay the 'remaining' amount of R2 million (referred to in the agreement as a 'balloon payment') as he contends that the profit target referred to in the agreement was not achieved. Mr Gani contends that the target was achieved and that the remaining amount of R2 million became payable at the end of the three year period. The issue relates to the meaning of the word 'profits' in the clause which reads 'At the end of the 3 years, providing the company has made a further R2, 7 million in profits over that period, Mr Hassim will pay the remaining R2 million to Mr Gani'. Mr Hassim contends that this was a reference to profits after tax, while Mr Gani contends that the word should be given its ordinary meaning, which he says is profit before tax. It was common cause before me that if regard is had to profit after tax then the target of R2, 7 million was not met, but if it is profit before tax then the target was met.

[7] The particulars of claim in the matter where Mr Gani is the plaintiff is not a model of clarity and may be somewhat confusing to someone who reads it for the first time. It starts with a claim for rectification, but the rectification is not relevant to the main claim for payment of the balance of the purchase price. It is relevant to the

alternative claim, which is premised on the non-achievement of the profit target. The main claim, for payment of the balance of R2 million, raises the question of the proper interpretation of the agreement, to which I now turn.

The Interpretation of the Agreement

[8] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹ Wallis JA set out the current state of our law with regard to the interpretation of documents. It is sufficient in the present case to emphasize that the inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*² Wallis JA referred with approval to the following passage in *Society of Lloyd's v Robinson*³:

‘Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language’.

[9] Unfortunately neither Mr Gani nor Mr Hassim impressed me as particularly reliable witnesses. There is clearly no love lost between them, and it was my impression that both of them answered some of the questions in a way which they thought was best for their cases and not necessarily in a genuine attempt to reflect the truth.

[10] In seeking to find the proper interpretation of the contract evidence as to what the parties intended is not admissible. Where there is a claim for rectification, however, evidence is admissible in order to establish what the common intention of

¹ 2012 (4) SA 593 (SCA)

² 2014 (2) SA 494 (SCA) para 12 fn 7

³ [1999] 1 All ER (Comm) 545,551.

the parties was. Both Mr Gani and Mr Hassim were questioned about their respective intentions, on the basis that this was relevant to Mr Gani's claim for rectification. The evidence however sometimes strayed beyond the boundaries of the claim for rectification, and I need to make it clear that in interpreting the contract I will endeavour to give the language used the appropriate meaning, having regard to the context and purpose of the provision in question, with no regard to what the parties testified their respective intentions were.

[11] Both Mr Gani and Mr Hassim said when the agreement was concluded there was no discussion between them as to whether 'profits' would be before or after tax profits. Neither contends for rectification or for a tacit term with regard to this issue. It is purely a matter of interpretation and attributing to the provision a meaning which is appropriate in the circumstances. It is necessary at the outset to consider the background to the agreement and the purpose of the provision in question.

[12] Mr Gani and his wife testified that they calculated and then rounded off the amount for which Mr Gani would be willing to sell his 50 per cent shareholding to Mr Hassim, which came to R5 million. Mr Gani said he and Mr Hassim agreed that he would be paid in monthly instalments of R83 400, over a period of three years, and the remaining R2 million at the end of the three years. Mr Gani was thereafter advised by an accountant that he would have to pay capital gains tax pursuant to the agreement of sale, in spite of the fact that he would only receive the purchase price over a period of three years. He was also advised that this would not be the case if his receipt of the purchase price was made subject to a condition, in which event he would only have to pay the capital gains tax when the condition was met. It was for this reason that the condition relating to the achievement of a specified profit target was inserted. Its purpose was to delay the payment of capital gains tax.

[13] The accountant's advice⁴ was set out in a letter⁵ addressed to both Mr Hassim and Mr Gani on 12 June 2007. He recorded that the purchase consideration for the shares was R5 million and that in terms of the 8th Schedule to the Income Tax Act⁶ the sale would attract capital gains tax. He pointed out that sub-paragraph (4) of the definition of 'proceeds' in paragraph 35 of the Schedule provides that

⁴ The accountant was Mr Brian Payne, who was at the time an associate director of KPMG Services (Pty) Ltd.

⁵ The potential problem was first discussed with Mr Payne at a meeting on 29 May 2007, where both Mr Gani and Mr Hassim were present.

⁶ Act 58 of 1962.

where during any year of assessment a person has become entitled to any amount which is payable on a date or dates falling after the last day of that year, that amount must be treated as having accrued to that person during that year. He then considered whether there was a way to avoid the payment of capital gains tax before the receipt of the purchase price. He considered paragraph 13 of the Schedule, which deals with the time of disposal. In terms of sub-paragraph (1) (a) the time of disposal is, in the case of a change of ownership effected because of an agreement which is subject to a suspensive condition, the date on which the condition is satisfied. Where the agreement is not subject to a suspensive condition, it is the date on which the agreement is concluded. Mr Payne expressed concern as to whether the condition in the draft agreement was a suspensive or resolute one, and then considered the possible application of section 24N of the Act. Sub-section (1) provides⁷ that where a person during a year of assessment disposes of equity shares in the circumstances contemplated in sub-section (2), the amount payable to the seller must, to the extent that it is not due and payable during that year, be deemed for purposes of the Act not to have been accrued to the seller in that year, and to the extent that it becomes due and payable to the seller in any subsequent year of assessment, be deemed for purposes of the Act to have been accrued to the seller during that subsequent year. Sub-section (2) provides that sub-section (1) applies in respect of the disposal by a seller to a purchaser of any equity shares in a company where, *inter alia*, more than 25 per cent of the amount payable for those shares becomes due and payable after the end of the year of assessment of the seller and the amount payable is based on the future profits of that company, and the purchaser is obliged to return the equity shares to the seller in the event of failure by the purchaser to pay any amount when due.

[14] Mr Hassim contends that the context indicates that Mr Gani was going to be paid out of the profits of the company. He says he would have had to pay Mr Gani out of the dividends which he received, as it was not permissible for the company to make those payments or for him to borrow money from the company to enable him to do so, having regard to the provisions of section 38 of the Companies Act 61 of 1973, which prohibited the giving of financial assistance by the company in connection with a purchase of its shares. Counsel for Mr Hassim submitted that the purpose of the condition regarding the profit target was to ensure that Mr Hassim would be able to pay the purchase price out of the profits, and that it will therefore

⁷ My paraphrasing.

make no sense to interpret the word 'profits' as before tax profits as, so he submitted, the company had to pay tax first and then declare a dividend.

[15] It is true that the agreement established a link between the amount of profits achieved and the payment of the purchase price. The monthly payments of R83 400 were said to be contingent on the company generating a profit of at least R1 million per year. The payment of the 'remaining R2 million' was conditional on the company having made a further R2,7 million in profits during the period of three years referred to in the agreement. But there is nothing in the contract which suggests that the purchase price would be paid entirely from dividends declared by the company, and Mr Hassim himself testified that he would pay the purchase price from dividends or from his personal reserves.

[16] The evidence and the probabilities in my view indicate overwhelmingly that the purpose of the condition regarding the profit target was to delay the payment by Mr Gani of capital gains tax. This was the evidence of Mr Gani and Mr Payne, and also Mr Hassim. I do not accept the contention that the purpose of the condition was to ensure that Mr Hassim would be able to pay the entire purchase price out of the profit of the company. Its only purpose was to delay the payment of capital gains tax by bringing the agreement within the ambit of paragraph 13 of Schedule 8 or section 24N of the Act.

[17] The language used and the context must be considered together, without the one predominating the other. In *The New Shorter Oxford English Dictionary*⁸ the word 'profit' is defined, inter alia, as 'the excess of returns over outlay; the surplus of a company or business after deducting wages, cost of raw materials, interest, and other expenses'. The phrase 'profit and loss account' is defined as 'a financial statement showing a company's net profit after offsetting all other ordinary expenses against the gross profit from trading'. 'Profit margin' is defined as 'the amount by which revenue from sales exceeds cost of sales'. In *Sugar Corporation of Malawi Ltd v Elgin Engineering Co (Pty) Ltd*⁹ Trollip JA said 'profit' usually means the excess of the proceeds derived from supplying or disposing of something over the outlay incurred in acquiring, manufacturing, or supplying it.

⁸ 4th ed 1993

⁹ 1977 (3) SA 594 (A) at 603C

[18] The word 'cost' is defined in the *New Shorter Oxford Dictionary* as 'what must be given in order to acquire, produce or effect something; the price (to be) paid for a thing'. 'Outlay' is defined as 'an act or the fact of spending; (an) expenditure'.

[19] It seems plain that income tax is not part of the expenses of a business in order to determine its profit. Tax is paid out of the profits of a business. In the words of the Earl of Halsbury LC in *Ashton Gas Company v Attorney-General and Others*¹⁰, income tax is part of the profit itself. He added:

'The income tax is a charge upon the profits; the thing which is taxed is the profit that is made, and you must ascertain what is the profit that is made before you deduct the tax- you have no right to deduct the income tax before you ascertain what the profit is. I cannot understand how you make the income tax part of the expenditure.'

[20] It seems to me that a sensible and businesslike interpretation is that the word 'profits' in the agreement means profit before tax. That is, I think, what business people mean when they ask how much profit a business made. I see nothing in the context or purpose of the agreement, or the background, which militates against this interpretation.

[21] It follows that the condition regarding the further profit of R2,7 million was met and that Mr Hassim became obliged to pay the remaining R2 million to Mr Gani.

[22] This finding makes it unnecessary to deal with the issue as to the consequence of the profit target not having been met. I nevertheless deal with it briefly, in case I erred in my main finding. The clause in question reads as follows:

'Should Mr Hassim be unable to meet these financial obligations at the end of the three years, shares to the value of the amount unpaid shall revert to Mr Gani or the term (sic) & conditions may be extended or revised by mutual agreement'.

Mr Gani contends that if he is not paid the remaining R2 million, shares to that value must revert to him. Mr Hassim disputes this and says the provision for the return of shares related to the obligation to pay the R3 million and has nothing to do with the remaining R2 million. On his construction Mr Gani receives nothing further if the

¹⁰ 1906 AC 10 at 12. This case was referred to with approval in *Commissioner for Inland Revenue v Oppenheimer & Co* 1951 (1) SA 618 (TPD) at 625G. Also see *Edwards v Saunton Hotel Co Ltd* [1943] 1 All ER 176 at 178.

target is not met – neither the money nor the shares. This is a most unbusinesslike interpretation. It would mean that if the target of R2,7 million is achieved Mr Gani would receive the further R2 million, but if the target is missed by, say R1000, he would receive no further payment and no shares would revert to him. This interpretation is absurd and contrary to the context and purpose of the agreement. The clause was plainly inserted with reference to section 24N (2) (d) of the Income Tax Act, as appears from Mr Payne's letter of 12 June 2007. The reference to 'these financial obligations' seems to me to refer to payment of the R3m and the remaining R2 million. This is how Mr Hassim himself construed the agreement in March 2010 when he sold shares in the company to Mr Bevan Andries. There is nothing in the context of the agreement or its purpose or the background to suggest that the proper meaning of the clause is as now contended for by Mr Hassim. The interpretation which he suggests is in my view an afterthought and an opportunistic attempt to benefit from the clumsy wording of the agreement. The proper meaning of the clause in my view is that if Mr Hassim does not pay any part of the purchase price of R5 million (as computed in the second and third clauses), shares to the value of the amount unpaid shall revert to Mr Gani. In other words, if the further amount of R2 million is not paid to him because the profit target of a further R2,7 million was not achieved, then 20 per cent of the shares in the company must revert to him.

Rectification

[23] It is also unnecessary to deal with the issue of rectification. I nevertheless make a few observations in case the matter ends up in a higher court.

[24] The first rectification point related to the purchase price. Mr Gani maintained that it was R5 million while Mr Hassim was adamant that it was R3 million. The difference is more apparent than real as they were agreed that a sum of R3 million was payable by way of instalments over a period of three years and, provided that the company had made a total of R5,7 million in profits over that period (R1 million per year for three years plus a further R2,7 million), a further sum of R2 million would be paid. This is what the written agreement provides and it seems to me to be in accordance with the common intention of the parties. There is therefore no need for rectification as far as the purchase price is concerned.

[25] The next point relates to what would happen if the company failed to make a further R2,7 million in profit over the three year period. The proposed rectification provides that in that event the remaining R2 million would be paid from the further profits of the company according to a ratio of 3:1. Mr Hassim's first draft of the agreement contained the following clause:

'At the end of the 3 years, providing the company has made a further R2, 7 million in profits, the R2 million will be paid at a 3:1 ratio of profits being Mr Gani: Mr Hassim respectively until the R2 million is discharged.'

Mr Gani changed this clause and removed the reference to a ratio of 3:1. He explained this by saying that the ratio was irrelevant. If the further profit of R2,7 million was made he would be entitled to the remaining R2 million at the end of the three years and if it was not made he would be entitled to the return of shares to the value of the unpaid amount. The clause in the agreement is therefore not inconsistent with the common intention of the parties and there is no need for it to be rectified.

[26] The last point seeks to replace the words '*be unable to meet these financial obligations at the end of the three years*' with the words '*fail to pay any amount when due*'. There was no evidence that the clause as it stands does not accord with the common intention of the parties.

[27] During Mr Gani's evidence he was asked to read the written agreement carefully and to identify which part of it was there due to a mistake. His answer was that he had agreed to all of it. He was then asked to specify what should be in the agreement but, due to a mistake, was not there. He said what should have been in the agreement was a clause giving Mr Hassim the option, in the event of the target of a further R2,7 million not having been met at the end of the three years, to pay the remaining R2 million out of future profits in a ratio of 3:1, instead of returning shares to him. He agreed however that this may be catered for in the last clause, which provides that the terms and conditions could be extended or revised by mutual agreement.

[28] In those circumstances I do not consider that a case for the rectification of the agreement was established.

The Defence of a Reduced Purchase Price

[29] My finding that Mr Gani is entitled to payment of the remaining R2 million is subject to the defence pleaded by Mr Hassim, which is a novel one. He contends that the purchase price for the shares must be reduced because Mr Gani breached the agreement by competing with ECA and luring away two of its employees and some of its customers, thereby damaging its goodwill and causing it to suffer a loss of profits. He contends that the agreement contained a tacit or implied term that Mr Gani would not do anything to undermine the goodwill of the business.

[30] It is not necessary to deal in any depth with the question whether in law Mr Hassim can claim a reduction in the purchase price (which seems a doubtful proposition), or whether the tacit or implied term contended for formed part of the agreement, as the evidence did not establish the conduct complained of. I proceed to deal with the evidence in this regard.

[31] It was common cause that when Mr Gani told Mr Hassim that he was leaving, Mr Hassim asked him to sign a restraint of trade agreement. It was also common cause that he did not do so. They disagreed in their evidence as to what was said in this regard. Mr Gani said he told Mr Hassim that he was going to start a small business which would sell access to the internet, while according to Mr Hassim he said he was going to operate as a consultant. The fact of the matter is that there was no express agreement which prevented Mr Gani from competing with ECA once he had left. The only clause in the agreement which placed an obligation on him after he had left was one which provided that he would remain available to the company to provide information, support and advice to ensure its continued operation during the period of three years referred to in the agreement. Mr Gani's uncontested evidence was that he complied with this obligation and provided advice and assistance whenever he was asked to do so. This is borne out by numerous documents in the bundles of documentary exhibits.

[32] There was no evidence that Mr Gani solicited or encouraged or persuaded any of ECA's customers to leave it and support Infostream, which was his new business. It was not disputed that no more than five of ECA's approximately fifteen hundred customers later used Infostream, and did so because they became dissatisfied with the service provided by ECA. The two key employees who left ECA

were Mrs Gani and Ismail Paruk. Mrs Gani testified that she intended to leave with her husband, but agreed to stay on for a specific period in order to train the person who was going to perform her duties. She said this was made clear to Mr Hassim from the outset. This is supported by the fact that the sale agreement records that she would cease to be a signatory to the company's bank account. Mr Paruk was a senior employee on the technical side in ECA and took over most of Mr Gani's duties. He said he had been unhappy with ECA for a substantial period and had applied for numerous positions with other companies. He went for a number of interviews but could not find anything acceptable. He eventually decided to leave and went to work for Infostream. There was no evidence that Mr Gani influenced him to do so. On the contrary, his evidence was that when he complained to Mr Gani that he was unhappy at ECA, Mr Gani encouraged him to stay there and make the best of it.

[33] There is no basis for a finding that Mr Gani undermined the goodwill of ECA or actively prevented it from earning the profit target. It was in his interests that the target be met. Nor was there any evidence that ECA lost any clients as a result of competition by Infostream. Those who left did so because they were not satisfied with the quality of the service which they received, and Kagiso Media, which was a large client, left because they decided to provide the service in-house, and not in order to go to Infostream.

[34] I should add, in any event, that I am unpersuaded that the evidence of Mr O' Leary established the reduction in value of the shareholding relied on by Mr Hassim. The basis of his valuation was that the company had failed to grow at a compound rate of 8 per cent per annum since March 2007. It was demonstrated later that if the earnings of the Geek Patrol division, which was part of ECA, were included the company had in fact achieved that growth. This undermined the very basis of his valuation.

[35] I will nevertheless allow myself a brief reference to the legal position. If Mr Gani had breached the agreement in a material respect, Mr Hassim would have had an election as to whether to cancel the agreement or abide by it. He took no steps to cancel it and it remained in force. Both parties therefore had to perform their obligations in terms of the agreement. An innocent party who elects to abide by the agreement in spite of a breach is nevertheless entitled to claim damages if he

suffered any as a result of it. Mr Hassim did not claim damages. Instead he claimed, as a defence, that the purchase price should be reduced. I am not aware of a legal basis for such a defence in the circumstances of this case. The obligations in question were not reciprocal and the decisions in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*¹¹ and *Thompson v Scholtz*¹², relied on by counsel, provide no support for this defence.

Claim for Damages by ECA

[36] This brings me to the claim by ECA for damages. It contends that Mr Gani was obliged, in terms of the agreement between him and Mr Hassim, not to undermine the goodwill of ECA's business or actively to prevent it from earning the profits referred to in the agreement. It also contends that Mr Gani was obliged, for a period of three years, not to carry on any business, or render any service to a business, in direct competition with ECA, or to utilise any of its confidential information, approach any of its customers or persuade any of its employees to resign and take up employment with a competitor.

[37] There are no such express terms in the written agreement. ECA contends that these were tacit or implied terms, that they were for its benefit and that it accepted such benefit. The claim for the existence of a *stipulatio alteri* and the acceptance thereof was made for the first time in an amendment to its particulars of claim on 29 August 2011, some four years after the agreement was concluded. There was no contract between Mr Gani and ECA before the purported acceptance of the *stipulatio alteri*. If such acceptance was proper, then a contract came into being when the acceptance was communicated to Mr Gani. The difficulty is that the conduct complained of, and which forms the basis of the claim for damages, took place long before the purported acceptance of the *stipulatio alteri*, in other words, at a time when there was no *vinculum iuris* between Mr Gani and ECA. I do not accept the contention that a contract was created retrospectively and that a claim for damages can be founded on conduct which occurred before the contract came into being and was not a breach when it occurred. This is contrary to principle and there is no authority for it. I am in any event not persuaded on the evidence that any of the terms of the agreement between Mr Gani and Mr Hassim was intended to be a

¹¹ 1979 (1) SA 391 (A)

¹² 1999 (1) SA 232 (SCA)

stipulatio alteri in favour of ECA. There is the further difficulty that a *stipulatio alteri* has to be accepted within a reasonable time, which it was not.¹³

[38] I am also not persuaded that it was a tacit term of the agreement that Mr Gani would not compete with ECA. He was not willing to sign a restraint of trade agreement and testified that he told Mr Hassim of his intention to start a new business, albeit on a small scale. Mr Hassim conceded that he knew from the outset about Mr Gani's new business, and never complained about it until ECA's action was instituted some four years later, after Mr Gani had sued for the balance of the purchase price. There is no need to consider whether the other terms pleaded were tacit or implied terms of the agreement, as the evidence did not establish the alleged breach. The evidence did not establish that Mr Gani used any of ECA's confidential information, solicited its customers or lured its employees away. I should add that ECA did not establish the quantum of its alleged losses either. For all these reasons its claim for damages cannot succeed.

[39] During the interlocutory stages the question of costs was reserved on a number of occasions. Mr Hassim applied for the consolidation of the two actions some three weeks before the trial date of the first action, which had been set down for two days, commencing on 26 August 2013. The application was granted, which made it inevitable that the trial had to be postponed. The wasted costs occasioned by the adjournment were reserved for the decision of the trial court. While it made good sense to consolidate the trials, Mr Hassim should have brought the application earlier. On the other hand, Mr Gani should have agreed to the consolidation when it was first mooted¹⁴, and the matter could have been removed from the trial roll by agreement. Both parties are open to criticism and I think it will be fair to order each of them to pay their own costs. The same will apply to the occasions when the consolidation application was adjourned and the costs were reserved. There is no need for me to make an order with regard to the costs of the application to separate the issues as Gorven J ordered those to be costs in the cause. The application for security for costs was settled and those costs were not reserved for my decision.

¹³ *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 404A-B

¹⁴ At a pre-trial conference on 27 June 2013.

[40] The order which I make is as follows:

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- (i) The defendant is ordered to pay to the plaintiff the sum of R2 million, together with interest thereon at the rate of 15, 5% per annum from 1 June 2010 until 30 September 2014 and thereafter at the rate of 9% per annum until the date of payment.
- (ii) The defendant is ordered to pay the costs of the action, including those occasioned by the employment of two counsel.
- (iii) With regard to the application for the consolidation of the two actions the parties are each ordered to pay their own costs relating to the postponements on 13 and 21 August 2013, and the same order is made with regard to the wasted costs occasioned by the adjournment of the trial on 26 August 2013.

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- (i) The defendant is absolved from the instance with costs.
- (iv) The plaintiff is ordered to pay the costs of the action, including those occasioned by the employment of two counsel.

Ploos van Amstel J

Appearances:**Case no: 9006/2010**

For the Plaintiff : Adv. G D Harpur SC / Adv. W A J Nicholson

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For the Defendant : Adv. C J Pammanter SC / Adv. R Pillimer

Instructed by : Larson Falconer Hassan Parsee
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Case no: 4554/2011

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Date of Hearing : 6, 7, 8, 9, 10, 13, 14, 15, 16 October 2014
14 January 2015 argument

Date of Judgment : 16 February 2015