IN NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.
(3) REVISED
4/6/2013
DATE
SIGNATURE

CASE NO: 20380/2010

Date heard: 27 – 29/05/2013

Date delivered: 04/06/2013

In the matter between:

ROUNDTOP TRADING 10 (PTY) LTD **PLAINTIFF**

and

MR M S SEALETSA **DEFENDANT**

Coram: Ncongwane AJ

JUDGMENT

NCONGWANE AJ:

INTRODUCTION:

1. The plaintiff issued summons against the defendant for monies lent and advanced to the defendant, during the period of 30 May 2007 and 31 July 2009, in terms of an oral agreement between the plaintiff and the defendant.

2. Defendant has defended the action and has raised two special pleas to

the plaintiff's claim and also pleaded over on the merits. At the commencement of the trial I was informed that it was agreed between the parties that the adjudication on the defendant's special pleas should not be dealt with separately but the special pleas should be adjudicated upon together with the merits of the claim and a determination be made after having taken into account *viva voce* evidence and considering the merits in its entirety. I accepted this proposition and the trial proceeded on that understanding.

3. The first special plea raised by the defendant is on prescription. A relevant paragraph records the following:

"*Prescription:*

1.1 Having regard to the facts alleged by the plaintiff in paragraphs 2 and 3 of its particulars of claim the plaintiff is on the 30th of March 2007 had knowledge of the identity of the defendant and from facts from which the defendant's alleged indebtedness arose.

1.2 A proper interpretation of section 10(1) read with sections 11(d) and 12(13) of the Prescription Act, 68 of 1969 will demonstrate that the defendant's alleged indebtedness would have become extinguished after a period of three years, calculated from the 1st of April 2007, as expired.

1.3 The plaintiff caused summons to be issued on the 12th of April 2010 by which date the period of more than three years calculated from the 1st of April 2007 has already expired.

1.4 In the premise defendant pleads that defendant's alleged indebtedness has by the 12th of April 2010 become extinguished by the Prescription Act".

4. The second special plea is recorded in the following terms:

"*Non compliance with the provisions of section 129 and 130 of the National Credit Act, 34 of 2005 ("the Act"):*

2.1 Defendant pleads that the plaintiff's claim, for monies lent and advanced is based on a credit agreement.

2.2 Defendant pleads therefore that the provision of section 129(1)(b) and 130(1)(b) of the Act are applicable in the alleged agreement between the plaintiff and the defendant.

2.3 Defendant pleads that plaintiff has failed to give defendant notice as contemplated in the provisions of section 129(1)(b) and 130(1)(b) of the Act.

5. In so far as the merits are concerned, defendant's plea amounted to a denial as is discernible from his plea, he averred that the received the

monies on the basis of the employment contract that he had concluded with plaintiff and such monies constituted his salaries.

6. Mr Wildenboer appeared for the plaintiff and called two witnesses, one Mr Jeffrey Allen Miller, an erstwhile Managing Director of the plaintiff and one Ms Megan Asher, plaintiff's National Sales Manager.

7. Mr Serage assisted the defendant. The defendant gave evidence and two witnesses were called by Mr Serage on his behalf, namely Ms Isabelle Billa and Mr Nebert Makhubela.

8. Mr Miller testified that he was employed by the plaintiff for a period of twenty five years and more specifically during the years 30 May 2007 and 31 July 2009. He knows the defendant as the latter was the employee of plaintiff for a period of five years. The plaintiff is a holding company and traded under the name and style of Academy for Mathematics and Science. He confirms the employer / employee relationship between the plaintiff and the defendant by virtue of the letter of appointment dated 30 March 2007.[1]

9. In terms of that employment contract, the defendant was employed as a Labour and a legal advisor of the plaintiff and also undertook to carry out other functions or responsibilities on behalf of the plaintiff which had to include human resources and public relations functions. According to his

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1 See trial bundle, volume 1, pages 1 to 8.

evidence, defendant's salary was to be determined by a commission of 0,4% of the company's net turnover plus R5 per registered module of the Killarney sales office turnover.[2] This is contained in paragraph 4 of the letter of appointment. He testified about an existence of an alleged oral agreement between plaintiff and defendant in terms whereof plaintiff could draw money as against future earnings of the defendant. The agreement, was to the effect that plaintiff will attend to paying various expenses incurred by the defendant i.e. defendant's rental, transport, or any other such like expense and would deduct such advances made against the defendant's monthly remuneration. If there was any deficit which shows at the end of each month, it will be carried over as an opening balance for the following month. Every time this has occurred, the original document will be kept in the filing system of the head office.

10. His testimony is further that such document should be given to the recipient of the advanced payments, at the end of the month as soon as they have been finalised. He identified a written independent contract between the plaintiff and the defendant, concluded on the 4th of September 2008[3] and testified that this was another new contract between the defendant and the plaintiff. I presume that he referred to this contract as another new contract due to reasoning that already the plaintiff and the defendant had an employment contract as well as the alleged oral agreement. Mr Miller further testified that all the monies advanced to the

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[2] See trial bundle, letter of appointment, page 3.

[3] Independent contract, volume 1, page 8 -13.

defendant would become due and payable at the end of that month and if there is a negative balance, such will be rolled over to the next month if the said balance is not "wiped out". A deficit would become due and payable to the plaintiff at month end as this was a facility provided to the defendant by the plaintiff.

11. The first amount he identified as being a sum of money of R8 500,00 which was paid, is alleged to have been paid on behalf of the defendant and subsequently deducted from his monthly earnings and it appeared to him that the amounts were paid to the defendant's attorneys. The defendant wanted to ensure that the rental amount at his rented premises was paid timeously. He therefore also requested the plaintiff to pay a sum of R6 000,00 towards his rental. He testified that when the defendant moved to the Tshwane Branch of the plaintiff he was in a different category. According to him the two agreements, being the employment agreement as well as the independent contract agreement overlapped with each other but the company continued to pay him the 0.4% commission on the total turnover of the company plus the R5 per module sold for the Killarney branch.

12. He observed that the influence that the defendant had within Government institutions diminished over a period of time. The plaintiff still wanted to use the defendant's expertise on labour and legal advice capacity as well as any other capacity whenever such use arose. He testified that the defendant was always indebted to the plaintiff. He will approach him to

make payments for him for school fees, rental etc. He was not performing and the debt was mounting whilst in the meantime no income was coming. The plaintiff subsequently closed the operations at Tshwane branch because the defendant was not coping. In terms of the employment contract, he testified that he paid a sum of money to the defendant whether the defendant performed or not. However in terms of the second agreement Mr Miller testified that the defendant was only paid a commission on the turnover, and thus on his ability. Both the employment contract and the independent contractor's agreement were cancelled by notices issued on the 1st of July 2009. He confirms that defendant was paid his severance package but testified that he actually should not have been paid the severance package since he was an independent contractor of the plaintiff. An assertion was put to Mr Miller that the defendant was paid the severance package because he was regarded as an employee of the plaintiff and continued to be an employee until 28 August 2009. He was a manager and had people working under his supervision. Mr Miller did not dispute the statement put to him. He however, explained that this did not occur in terms of the first agreement. He testified that in 2007 nobody reported to the defendant. But after he became an independent contractor he had people reporting to him.

13. He knows Ms Isabelle Billa and do not dispute that Billa worked for the plaintiff from March 2007. Plaintiff paid the salary of Isabelle and debited against the account of the independent contractor (the defendant). He testified that the plaintiff paid defendant's employees on the defendant's

demand and on his instructions. He was referred to statements in the trial bundle[4] and his testimony is that the monies shown in statement were all advances made to the defendant. An amount of R6 545,00 paid around July 2008 was also described as an amount paid to establish the Pretoria branch of the plaintiff but at the expense of the defendant. He testified that all the independent contractors, in the same situation as the defendant, submitted all their bills for all expenses, salaries, etc. to him and he knew, using the funds of the plaintiff, pay until the defendant tells him to stop. He never received any invoice from the defendant and plaintiff did accept a request for an advance from an employee of an independent contractor. He confirms payments that were made by the plaintiff to Ms Billa and also payments made to Mr Makhubela and that those payments were made at their request but defendant knew about him. He accepted that it is not the defendant's account that was debited for these payments by reason of the payments made to the persons mentioned above.

14. Ms Megan Asher largely confirmed the evidence of Mr Miller. She confirmed that she was aware that defendant received the sum of R6 000,00 a month in advance for rental. She testified that the independent contractors promoted the products of the plaintiff but they were to run their own expenses. She testified that the defendant managed the Tshwane branch and will from time to time send the PRO's to see various schools and parents for purposes of the business of the

[4] See trial bundle, volume 1, pages 65 and 67 and volume 2, page 149,

plaintiff.

15. Under cross-examination she was referred to the request advance forms that were not signed by the defendant, or by the person making the request, or by any person alleged to have been under the employ of the defendant. She testified that she thinks that the request was made verbally over the phone and it would have come from the manager, being the defendant. She could not tell why the decision was made by the plaintiff to make these advance payments on behalf of the defendant. Under cross-examination, she did not dispute a statement put to her that the defendant had not employed Ms Billa and Mr Makhubela. All that she could mention was that the defendant was basically self-employed. She further could not dispute the defendant's statement that he did not sign many of the requests for advances but she was referred to under cross-examination and she testified that advance payments were indeed made to Ms Billa and Mr Makhubela but it was the defendant who requested the money. She could not reconcile her evidence in this regard with the documents in the trial bundle labeled "advance requests". Plaintiff closed its case.

16. And then the defendant testified that he worked for the plaintiff and when he signed the contract of employment for his employment with the plaintiff during 30 March 2007 to July 2009 he was at the plaintiff's Killarney office. His position was that of a legal advisor and he also assisted to resolve problems at the plaintiff's branches in Cape Town, Pretoria, Middelburg,

East London and Pietersburg. He earned a fixed salary of R6 000,00. In addition to a fixed salary, his remuneration consisted of 0.4% commission of the plaintiff's net turnover plus R5,00 per registered module of the Killarney sales office turnover.

17. He confirms having concluded an independent contract agreement with the plaintiff on the 4th of September 2008. Apart from being a labour and legal advisor, his duties involved assisting at the plaintiff branches that are struggling and also establishing new branches. In terms of the new contract or the independent contract agreement, he testified that his remuneration was also 0.4% commission on the turnover generated from the plaintiff's Pretoria branch. He confirms that there was also another arrangement between him and Mr Miller which came as a result of the delay on the orders and payment of commission that was due to him. He had leased a property for which he needed to pay the rental amount. Mr Miller would pay on his behalf an amount of R6 000,00 towards the rental which amount was equivalent of the R6 000,00 that he received as his fixed salary. When he is paid his salary together with his commission, Mr Miller would then deduct the amount that was paid on his behalf to his landlord as an advanced payment. According to him, the deductions against his salary for repayments occurred on a monthly basis and were paid in full and final settlement.

18. He never had any people working for him or contracted to him as employees. When he established the Pretoria branch he left the main

office of the plaintiff as a team leader and Billa and Makhubela were part of the team as his subordinates. His relocation to the plaintiff's Pretoria branch was on instructions of Mr Miller. As employees of the plaintiff, they were required to come to Pretoria and establish an office and after six months could go back the head office of the plaintiff in Killarney. The office in Pretoria was rented by the plaintiff and their salaries were paid by the plaintiff including monies for rental, stationary, telephone bills etc. In July 2009 he was informed by the plaintiff that his employment contract with the plaintiff was cancelled. Notwithstanding the cancellation of his contract in July 2009 he continued to receive his salary in 2009 for the months of May, June, July and August 2009. Over and above the salaries that he received, he also received a severance package which was paid to him by the plaintiff as his employer.

19. He denies that he had incurred any personal expenses that had to be paid by the plaintiff at his request. He explained that the nature of his work would require him to visit other offices of the plaintiff. It is within the performance of that duty that there was an arrangement that he would request for advance for petrol, field carding, visiting schools, telephone etc. just as was the case with the other employees of the plaintiff. They were all sent by the company to different places to do the work for the benefit of the plaintiff. He indicates that he did not sign many of the advanced request forms because he did not make such requests and the other requests that are signed by the other employees of the company, had nothing to do with him as he did not know anything about them.

20. He strongly denied that any of the payments referred to in the trial bundle[5] was made by him. He emphatically stated that he could not have made such payment as he is not an employer and there is no reason that he could use his money to pay for the expenses of another person or entity. He denies that he owes the plaintiff any monies and that the documents to which he was referred are documents that contain names of other people.

21. He started his employment with the plaintiff in 2005 and testified that in March 2007 when there were other added duties or obligations in terms of his employment contract with the plaintiff, involving human resource management and public relations functions, he approached Mr Miller indicating that the R6 000,00 is not enough. Mr Miller told him that all the offices that the defendant will be attending, will entitle him the amount of 0,4% commission in respect of those offices. This statement was however not put to the plaintiff's first witness. He was happy that he was getting the R6 000,00 as well as the additional 0.4% commission that was paid into his bank account. He did not have documentary proof of these payments neither is documentary evidence produced by the plaintiff evidencing the defendant's salary advice delivered to the defendant every month. His testimony is that the independent contract agreement did not at all affect anything about his employment relationship including employment benefits and his salary he was receiving from the plaintiff.

22. When cross-examined about the request for advances that were made by

[5] See trial bundle, volume 2, pages 135, 139, 142 and 155.

other people, he testifies that he could not have used his own salary to pay for the expenses incurred by the plaintiff. In one of the requests that were made, he testified that the request indicates that the money must be paid to Mr Nebert Makhubela. He remembers signing documents in the request for advance but he only did that in his capacity as a human resources manager. The request form[6] he is a request for a school carding and a field trip and that monies be paid to Mr Nebert Makhubela for the Pretoria expense account and were also expenses that were incurred on his motor vehicle. He uses the motor vehicle for the furtherance of the business of the plaintiff and also for amounts which was received when he had to take a trip to Tzaneen to go there and do some work on behalf of the plaintiff. These amounts which were requested totaled a sum of R9 000,00.

23. Ms Isabella Billa testified that she was employed by the plaintiff during the period March 2007 to August 2009. She was a receptionist and an earned amount of R3 000,00 per month. In 2008 to 2009 she continued to be employed by the plaintiff but was transferred to the plaintiff's Pretoria branch and there he continued to do the same work that he was doing at the Killarney Branch. The plaintiff continued to pay her salary of R3 000,00 per month. She knows the defendant and denies that she worked for the defendant as his employee. Any monies that were paid to her, were received by her in furtherance of the business of the plaintiff.

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[6] See trial bundle, volume 3, page 242.

24. Mr Nebert Makhubela also testified that she was employed by the Plaintiff and for the period March 2007 to August 2009 he worked at the plaintiff's first office in Killarney and later was transferred to the Pretoria Branch. She worked as the PRO of the plaintiff. He used to go to schools for presentations. His salaries was paid at the end of the month in the sum o R3 000,00 as fixed salary plus commission. When he went to the field trips the plaintiff paid the required monies to cover expenses into his bank account. He knows the defendant. He worked with him at Killarney and Pretoria branches. The defendant then closed his case.

25. There are three issues for determination. The first issue is whether the plaintiff should be non suited on the basis that its claim has become extinguished by section 11(d) read with section 12(3) of the Prescription Act, 68 of 1969. The second issue is whether the alleged oral agreement between the parties should be deemed to have been a credit agreement within the contemplation of section 4, alternatively section 8 of the National Credit Act, 34 of 2005 ("the NCA"). The third and the main issue is whether the plaintiff had discharged the onus on the balance of probabilities that the oral loan agreement existed on the terms as alleged by it, from the evidence tendered by its witnesses with regards to the exact terms allegedly entered into by the parties.

26. As stated above, the first question on which I must be satisfied is that the debt has not become extinguished by prescription. The provisions of the Prescription Act no 68 of 1969 relied upon by the defendant are of

relevance to this question. For ease of reference I propose to quote the provisions in full:

"11 *Periods of prescription of debts:*

The period of prescription of debts shall be the following:

(a) ...

(b) ...

(c) ...

(d) *Save where an Act of Parliament provides otherwise, three years in respect of any other debt.*

27. Section 12(3) provides that:

(3) The debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises – provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care"

28. In placing reliance on these two sections of the Prescription Act, defendant contends that prescription started to run against the plaintiff as soon as the debt became due and that is on the 1st of April 2007. Mr Serage in his heads of argument refers to MM LOUBSER'S EXTINCTIVE

PRESCRIPTION, page 54 and submits that a view expressed therein supports the defendant's position, which view is to the following effect:

"It is arguable on the other hand that a contract allowing a creditor to determine of his own accord when performance shall be made is in effect silent as to the tire of performance, and performance is therefore due immediately upon conclusion of the contract, when the prescription periods begins to run.

According to this argument, the stipulation that performance is due on demand merely reinforces the implicit term of the contract that performance is due as from the conclusion of the contract. An important policy consideration supports this argument, namely that if prescription begins to run only from the time of actual demand, the creditor will be in a position to defer the running of prescription indefinitely by merely refraining from making a demand."

29. Plaintiff's evidence is that the alleged advance payment made to the defendant became due and payable at the end of each and every month on which such payments were made. Plaintiff's summons was issued on 12 April 2010 and service of the summons upon the defendant occurred on 21 June 2010. It therefore follows that any alleged payments or advances made during the months of April 2007, May 2007 and before the 21st of June 2007 cannot be legally enforced as the defendant shall have made out a case of prescription against the plaintiff's portion of that

claim. From the statements in the trial bundle, the portion of that claim totals an amount of R3 499,92, which amount should be deducted from the sum of R139 816,13. With regards to the defendant's first special plea, and for the reasons stated above, I make a finding that the plaintiff's claim has become extinguished by prescription to the extent of the sum of R3 499.92 and that the plaintiff's portion of that claim is not enforceable.

30. The second question relating to the defendant's special plea on non-compliance with the National Credit Act, 34 of 2005 (the NCA). The defendant's second special plea is premised on the basis that the plaintiff's claim for monies lent and advance to the defendant is based on a credit agreement that is defined in the NCA and that the transactions alleged by the plaintiff constitutes a credit agreement as defined in the Act. This does not only raise factual questions but it raises mixed questions of fact and law. Accordingly, several inter related factors have an important role to play in addressing this question.

31. In my view, the oral agreement as alleged by the plaintiff cannot be an agreement contemplated in section 8 of the NCA as there was no charge or payment of any fee or interest that the defendant was to pay to the plaintiff in respect of the amounts that are allegedly advanced to the defendant. However, the facility established by the plaintiff in making the said advances to the defendant would be a credit facility between the parties that are dealing at arm's length as is contemplated in section 4 of the NCA. According to the plaintiff's evidence, both the plaintiff and the

defendant in terms of the relationship as governed by the alleged oral terms, they were to operate in fact and in law independent of each other. As it was mentioned during the plaintiff's evidence that the plaintiff had been striving to gain maximum possible benefit from the transactions that were concluded by the defendant on the plaintiff's behalf. In view of the plaintiff's approach in that the parties had to exist separately and independent of each other and had to apply maximum effort in deriving benefits from the transaction for both parties separately and independently, I am therefore inclined to conclude that there was an arm's length transaction that existed between the parties in terms of the independent contract concluded by plaintiff and defendant on the 4th of September 2008, to which the provisions of section 4(2)(b)(iv)(aa) of the NCA would apply.

32. Trollip JA surmised what an arm's length transaction is in the leading case in the subject, **Hicklin v Secretary for Inland Revenue 1980 (1) SA 481 at 494 para H and 495 para A**,

"When the "transaction, operation or scheme" is an agreement, as in the present case, it is important, I think, to determine first whether it was concluded "at arm's length" that is a criterion postulated in para II for "dealing at arm's length" is a useful and often easily determinable premise from which to start an enquiry. It connotes that each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself. Indeed, in the Afrikaans text

the corresponding phrase is "uiterse voorwaardes beding".

33. The dictum in the SCA was repeated and relied upon by Majiedajp in the unreported judgment of the High Court Northern Cape Division, case number 2150/09, a matter between Janet Gezina Elizabeth Bets and Johanna McElina Swanepoel. It is common cause that the plaintiff has not complied with the required procedure which set out in Sections 129 1(b)(i) and 130 1(b) by failing to deliver a notice on the defendant as peremptory prerequisite for commencement of legal proceedings under the transaction that falls within in the ambit of a NCA.

34. However, the dispute before me does not arise on any of the written terms agreed to under the independent contract and therefore I do not have to deal with the question whether non-compliance with section 129 of the NCA is fatal to the plaintiff's claim, taking into account that plaintiff's claim is not based on the independent contract.

35. Mr Wildenboer advanced an argument that the special plea on non-compliance with the NCA is not applicable to the alleged oral transactions. I agree, and the special plea would have been raised, correctly in my view if the plaintiff's cause of action was based on the written independent contract as that agreement falls under the category of an arm's length dealing. For purpose of this judgment, I can only take judicial notice of the independent contract, for the reasons that will become clear hereunder.

36. I acknowledge that my finding in respect of the two questions referred to above does not dispose of the main issue between the parties. This brings me to the third questions. It concerns the question whether the plaintiff had discharged the onus on the balance of probabilities that the oral loan agreement on the terms has emanated from the evidence tendered on behalf of the plaintiff, was entered into by the parties. The plaintiff's case effectively boils down to the existence of an alleged oral agreement between itself and the defendant during the same time and period when the employment contract concluded on the 30th of March 2007 between the two parties was still in force and the independent contractors agreement concluded on the 4th of September 2008 was also still in force.

37. It appears to me that plaintiff would have wished to amend the independent contractors agreement by including further terms and conditions to be applicable to that agreement but instead of making that proposal to the defendant, plaintiff decided to enforce such an amendment by proceeding with implementation of a practice, activities and conduct that did not become quite explicit to other role players. It is for this reason in my view, that the particulars of claim have been prepared in such a way that they do not contain sufficient particularity regarding the exact terms of the oral agreement.

38. The plaintiff's evidence has left plenty of questions unanswered and leads me to believe the defendant's version that he was employed by the plaintiff and received a fixed salary or an amount of R6 000,00 per month plus commission as part of his remuneration. I deduce this to have been

an essential feature of the evidence tendered by both parties and from the documents placed before me which were also referred to in the course of the trial.

39. It is inconceivable and indeed highly improbable to even start to imagine that an oral agreement could have been concluded between the plaintiff and the defendant and that the defendant could have been able to operate in terms of whatever terms that were agreed to under that oral agreement. I mention this because the terms of such an oral agreement will fly on the face of clause 9 of the employment contract which provided for the hours of work that the defendant is required to perform. It mentions that the defendant will be required to work certain hours per week for the plaintiff. It is perhaps apposite to quote the relevant portion of the paragraph:

"3.1 You shall be required to work 45 hours per week for the company. The daily schedule or hours maybe changed from consultation from time to time to suit the company's operational requirements.

3.2 You may be required to work beyond normal office hours as scheduled by the company from time to time and to work Sundays and Public Holidays. And as such when such circumstances arise you will be required to give a written report detailing the working done on behalf of the company and the hours utilized."

40. From the provision of the hours that the defendant had to work as an employee of the plaintiff, it is clearly evident that they would not have been any hours on any day between the periods March 2007 to July 2009 that would have been at the defendant's disposal for him to comply with any terms and conditions allegedly agreed in terms of the alleged oral agreement.

41. From the evidence of both plaintiff and the defendant, some of the advance payments were made by the plaintiff in respect of what has been referred to as the Pretoria Branch of the plaintiff. This is in direct contrast to the plaintiff's case in that Pretoria Branch in fact was the defendant's (independent contractor) branch. It is common cause from the evidence from both parties that the branch was established by the plaintiff for furtherance of the business of the plaintiff including its operations in terms of the duties and obligations that are referred to in the independent contractors agreement. There is therefore no cogent reasoning, on a balance of probabilities, it can be concluded that the Pretoria Branch is actually a branch opened by the defendant as the independent contractor and for the defendant's business. The facts as they stand, are diametrically opposed, to that conclusion.

42. What clearly fortifies the defendant's defence is the fact that not every request advance form is signed by the defendant signifying his authority or confirmation of the content of such request advance form. His evidence is that some of the forms are completed by the other employees of the

plaintiff. I have no reason to criticize him for that evidence and this is also the case, taking into account the fact that most of the advanced request forms are for the Killarney expense account and not for the Pretoria expense account. In addition to that, most of the advance request forms are not signed by the defendant. It emerged from the plaintiff's evidence that Mr Miller will only process a request for an advance if such a request is supported by a duly completed request form which is signed by the defendant. Quite to the contrary, the request forms relied upon by the plaintiff have not been signed by the defendant and as such liability cannot be placed on the defendant when the monies that were paid were not even deposited into the defendant's account but to the other employees of the plaintiff.

43. Ms Billa and Mr Makhubela testified that they were both the employees of the plaintiff and have never been employed by the defendant. There is no documentary evidence from the plaintiff that the advance payments allegedly made were also made for the salaries of Ms Billa and Mr Makhubela. The evidence from the two employees in question, is that they received their salaries directly from the plaintiff. It is common cause that they were employed by the plaintiff, however, the plaintiff alleges that from August 2008 they became employees of the defendant. What the plaintiff fails to proof is to place before the court whether by *viva voce* or documentary proof, an indication as to the date of termination of their employment contracts with the plaintiff in July 2008 or any other earlier period. In an absence of such termination of such contract for the two

employees, I find that both these employees remained the employees of the plaintiff and were never employed by the defendant.

44. As indicated above, in my view, the alleged oral agreement is inconsistent and incompatible with both the terms of the employment contract and the defendant's employment activities or occupational requirements that are provided for in terms of the employment contract. The alleged oral agreement is incompatible with the fact that the defendant concluded an employment contract for which he had to render services to the plaintiff and also concluded the independent contract in terms of which there were certain obligations that emanated.

45. Plaintiff does not seek rectification of the independent contract if same does not correctly reflect the true intention of the parties to that contract. The remedy of rectification was available to the plaintiff to prevent its alleged oral agreement from operating with the written employment contract or the independent contract. See **Shoprite Checkers (PTY) LTD v Bumpers Schwarmas CC and Others 2002 (6) SA 202 CPD at 215 A/B – C/D.**

46. It is without hesitation that I have come to the aforegoing conclusion. I am not convinced that the plaintiff has in all respects in its dealings with the defendant as well as its decision to open the branch in Pretoria, been completely *bona fide*, and more over acted in accordance with what was described as (albeit in somewhat different context) in **Fly and Another v**

First National Bank 1996 (4) SA 924 C as well as established business moral (which) requires creditors to act bona fide in their dealings with sureties.

47. I am of the view that plaintiff appears not to have acted *bona fide* in its dealings with the defendant. Apart from the payment of R6 000,00 in advance for defendant's rental, which amount is common cause that it was paid by the monthly deductions from the defendant's earnings.

48. I make a finding that the plaintiff has not proved the existence of the oral loan agreement between the plaintiff and the defendant and did not advance the monies to the plaintiff as claimed.

49. In the circumstances I make the order in the following terms:

(a) That the plaintiff's claim against the defendant is dismissed;

(b) That the plaintiff is ordered to pay the costs of the defendant.

AT NCONGWANE
ACTING JUDGE NORTH GAUTENG HIGH COURT