IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case Number : 6998/99

In the matter between:-

DR W A A GOUWS MANAGEMENT SERVICES CC Plaintiff

and

ESHU SEEVNARAYAN First Defendant

NAREN PATTUNDEEN Second Defendant

SELVASEELAN NAIDOO Third Defendant

KOGIELAN NAIDOO Fourth Defendant

JUDGMENT

VAN ZYL, J.:-

1. Plaintiff is a close corporation and the alter ego of Dr W A A Gouws, a chartered accountant and its sole member. Dr Gouws had been, at the

time of giving evidence, in practice for some forty two years and claims particular expertise in matters relating to taxation. In the course of this judgement I will, for convenience, refer to them as plaintiff or Dr Gouws, as the context requires.

2. There are four defendants, all individuals. Although the third and fourth defendants, who are brothers, were cited when the proceedings commenced and entered appearance to defend, it appears that subsequent pleadings were not served upon them. In any event they had not pleaded, were not represented at and took no part in opposing the plaintiff's claims in the trial of this matter. However, the third defendant appeared as a witness for the plaintiff at the trial. The first and second defendants both defended the matter, pleaded to the plaintiff's amended declaration and were represented by Mr Thatcher throughout the trial.

3. The issues in dispute between the parties (effectively the plaintiff and the first and second defendants), which took a long time to come to trial, have their origin in difficulties experienced by a company called Sebcom (Proprietary) Limited. For convenience this concern will simply be referred to as Sebcom. Sebcom was incorporated and commenced conducting business as a service provider for the MTN Cellular Network (herein called MTN) in 1994 during the early days of the cellular telephone industry in Southern Africa. It marketed to members of the public cellular telephones and accessories, as well as access to the cellular telephone network developed and operated by MTN by way of

what is commonly known as “air time”. The third and fourth defendants were its initial directors and only shareholders.

4. Sebcom found itself in financial difficulties almost from the outset. It is unnecessary to analyse and set out herein the full reasons therefor. Broadly it appears that Sebcom experienced various cash flow and administrative challenges and that it was probably under capitalised for a new concern at that time trying to establish itself in the developing field of mobile communications. In planning its infrastructure and operations it also relied upon incorrect assumptions relevant to its ultimate performance and profitability, all of which combined to add to its difficulties.

5. As a result Sebcom incurred significant losses during the 1995 and 1996 tax years and eventually it was unable to pay its creditors in the normal course of business. During March and April 1995 Cellular Sales CC, one of its creditors, brought two successive applications for the winding up of Sebcom. Each of these applications were settled, so that Sebcom was not provisionally liquidated. However, its financial and administrative difficulties persisted and during 1998 MTN, its major creditor, successfully moved for the provisional winding up of Sebcom. It was, in order to overcome this crisis, to settle the dispute with MTN and to discharge the rule nisi, urgently necessary for the third and fourth defendants to raise sufficient finance. That gave rise to the disposal by them of a portion of their shareholdings in Sebcom and set the stage for

the disputes at the heart of the present litigation.

6. First and second defendants are businessmen. The first defendant in particular would appear to have been a highly successful businessman and investor. He heads a group of businesses, the primary business being a company called Kiran Sales (Pty) Limited trading as Lylax Bedding and of which the first defendant is the sole shareholder and the managing, if not the only director. Lylax Bedding is a manufacturer of beds and related products and is based in the Jacobs industrial area of Durban. According to the undisputed evidence of the plaintiff's second witness Mr Sunjeeth Sahadave, the former group accountant employed by the first defendant, the other companies making up the group comprised mostly property owning enterprises and the offices of Lylax Bedding served as the group headquarters and as its administrative centre. The first defendant was the driving force of the group with undisputed authority regarding its affairs.

7. When the third and fourth defendants faced the crisis brought about by the provisional winding up order obtained by MTN against Sebcom, it is clear that conventional sources of finance were no longer available to them. Sebcom was in deep financial distress and had been suffering repeated and substantial annual losses over an extended period. It had been trading in insolvent circumstances and although its business, with its expanding customer base, was a potentially valuable asset in the longer term, Sebcom was not in a position to obtain further credit in the

ordinary course at that stage and faced imminent liquidation, unless a solution were to be found as a matter of urgency.

8. Thus the stage was set for what turned out to be a very unhappy commercial marriage of convenience. This involved the first and second defendants as investors on the one hand and the third and fourth defendants who, out of necessity, were compelled to sacrifice fifty percent of their equity in Sebcom, in exchange for a dowry in the form of the financial bailout of Sebcom. The full terms of what might conveniently be called the bailout agreement are by no means clear and comprehensive details thereof were not produced during the course of the trial. However, sufficient details of how the agreement was structured and as relevant to the present dispute, emerged in the course of the evidence.

9. The investment vehicle used by the first and second defendants was a company called Seev-Patt Properties (Pty) Limited (Seev-Patt), which then acquired a fifty percent shareholding in Sebcom. As a result the first and second defendants joined the third and fourth defendants as directors on the board of Sebcom.

10. A sum of twenty million, five hundred thousand Rand was committed by the investors as part of the bailout agreement in order to assist Sebcom in extricating itself from the financial quagmire in which it had fallen. This sum was acknowledged by the third and fourth defendants in clause 1.1 of an agreement in which they subordinated their loan accounts in

Sebcom in favour of Seev-Pat. The mechanism of where exactly the money came from is also unclear. The evidence suggests that Seev-Patt was one of the companies falling into what was described as the first defendant's group of property investment companies, but it was by no means established that it was the source of the investment funding.

11. The position of the second defendant is also ambivalent and was not clarified or fully explored in the course of the evidence, nor did he himself give evidence during the trial. However, against the background of the evidence it would appear that the second defendant was a pre-existing fellow investor with (colloquially a partner of) the first defendant in Seev-Patt when it was agreed to use the latter as the vehicle for the acquisition of the shareholding in Sebcom. Whilst the evidence is silent on how such shareholding was apportioned between the first and second defendants and who in reality provided the investment capital made available to Sebcom, the irresistible suggestion is that the first defendant, through his group of companies, was the major financier and controlling force of the transaction.

12. After the solemnisation of the commercial marriage, the investment funds made available to Sebcom were applied to settling its most pressing debts, including MTN, so that the provisional winding up order obtained by the latter was discharged. However, its troubles were by no means over. Both the third defendant and Sebcom had fallen foul of the South African Revenue Services (SARS) and the position of the third

defendant in particular was precarious. SARS was in the process of investigating the financial and taxation affairs of the third defendant, with potentially significantly adverse consequences to follow for the first and second defendants, as investors in Sebcom.

13. If not common cause, it was not seriously disputed that the position after the bailout was that, whatever taxes and penalties SARS imposed upon the third defendant, would have to be settled by Sebcom against the third defendant's existing loan account in it. Sebcom itself was also exposed to the risk of arrear payments, interest and penalties being levied against it by SARS for unpaid VAT and PAYE. Since Sebcom itself would be unable, out of its own resources to pay SARS, the investors (primarily the first defendant), would then have to provide the additional bailout funding.

14. Dr Gouws and Mr Sahadave knew each other from when the latter had been employed in an accounting firm in which Gouws was at the time a partner. Sahadave left that employment in 1991 to join the first defendant in the Lylax Bedding group. Subsequently and through the intervention of Sahadave, Gouws was approached and retained to assist and represent the first defendant when the latter, Lylax Bedding and a number of his other companies became the subject of an investigation by SARS, very similar in nature to the investigation against the third defendant in the present matter. Gouws explained that the modus operandi usually followed by SARS is to launch the initial investigation against the individual who effectively controls the corporate entity. If it

can be shown that such individual misreported income derived from the corporation, it is easier then to extend the investigation also into the affairs of the corporate entity as well.

15. In the present matter Gouws was likewise approached, through the intervention of Sahadave and on the instructions of the first defendant, to assist in respect of the difficulties with SARS and involving the third defendant and Sebcom. At that stage Gouws knew the first defendant, but not any of the other defendants. The initial meeting took place during May 1998 at the Lylax Bedding offices, which also served as the administrative headquarters of the group and where Gouws met with the first defendant, assisted by Sahadave.

16. Although the first defendant and Sahadave only had limited information at that stage, two problem areas were identified, namely alleged VAT arrears owing by Sebcom and an intended tax evasion investigation to be launched by SARS against the third defendant as the person who effectively controlled the affairs of Sebcom from its inception. As indicated above, the intended investigations by SARS held grave implications for the first defendant as the primary investor in Sebcom because he might well have to find and advance considerable sums in excess of the R20,5 million already advanced to Sebcom. At that stage they speculated that SARS might demand an additional R2 million and from the first defendant’s perspective it was therefore imperative that clarity regarding the extent of the risk and the intentions of SARS be

obtained.

17. Gouws was supplied with formal authority to represent the third defendant and Sebcom and went forth to meet with SARS. The investigating officer at SARS was a Mr Bender who advised that the investigation was still in its preliminary stages, but that it was envisaged that the third defendant and Sebcom (in that order) would be the subject of extensive investigations. By reason of subsequent tax irregularities attributed to the third defendant, the tax amnesty previously granted to him would be withdrawn and arrear taxes, interest and penalties to the extent of the maximum permissible 200% would be levied against the third defendant and amounting to an estimated R10 million. Bender further advised that it was suspected that Sebcom had also failed to make all the payments required for VAT, as well as PAYE deductions from its employees and which he estimated, together with interest and penalties at a further R8 million. In total the estimated additional tax liability thus came to an alarming R18 million which, in the circumstances already alluded to above, the first defendant would have to finance in addition to the monies already advanced to Sebcom in the course of the bailout operation.

18. As a result Gouws called for a meeting with the interested parties. Such a meeting took place at Gouws' offices in Durban and was attended by the first, second and third defendants, as well as Sahadave. What followed was what Gouws described as a "very hot" crisis meeting, where

tempers flared to the extent that by the end thereof it threatened to develop into a physical confrontation.

19. According to Gouws, during the course of the meeting, he explained to those present the steps which needed to be taken to address the concerns of SARS and to resolve the tax disputes as speedily and cheaply as possible. This would involve, inter alia, a painstaking analysis of Sebcom's and the third defendant's financial records extending over several tax years and demonstrating to SARS that items appearing to represent irregular transactions could in fact be satisfactorily be accounted for. Where irregularities in fact occurred, the circumstances of each should be analysed, explained, rectified and SARS prevailed upon to exercise leniency in its discretion. Insofar as arrear VAT payments were concerned, he pointed out that SARS could often be prevailed upon to accept payments of the arrears in instalments and to waive, or reduce, penalties in deserving circumstances.

20. All of this would, however, be both time consuming and labour intensive, which brought the discussion to the subject of the remuneration to be charged by Gouws, through the medium of the plaintiff, should they be instructed to deal with the problem. According to Gouws he made it clear to those present that he (and though him the plaintiff) would not prepared to embark upon such an extensive exercise, which he estimated was likely to occupy some 80% of his productive time for the foreseeable future, unless there was clear understanding and agreement as to how

payments would be made for the services to be rendered. Gouws said that in particular he stressed that he was not prepared afterwards to run between four shareholders (sic) and a bankrupt company to try and recover the plaintiff's monies for services rendered.

21. According to Gouws he specifically addressed the first defendant and reminded him of their past association and the manner in which they dealt with payment issues at that stage, namely that Gouws reported to the first defendant, who undertook personal responsibility for payment of the obligations, irrespective of the entity who actually acted as the instrument of payment thereafter. He explained that during their previous association the first defendant accepted personal responsibility to ensure that Gouws was paid for his services and it mattered not which of the first defendant's companies or entities were thereafter debited with any particular payment in the course of the group's administration. In any event, according to Gouws, where he performed a particular service at the behest of one of the first defendant's companies, inevitably one or more of the others forming part of the group were also effected or benefitted, so that it became entirely impractical to try an attribute a particular service to a particular beneficiary. Gouws said he accordingly made it clear at the meeting that he required a similar arrangement and undertaking from the first defendant in regard to the instructions in the present matter, to which the first defendant agreed.

22. Gouws said that he adopted this attitude in the interests of certainty and

also in the light of the fact that he knew the first defendant as a man of financial substance, whilst the second and third defendants were unknown to him. In fact, it was only at the meeting that he met them for the first time and the fourth defendant was not even present, although he understood that the third defendant was authorised to represent him. Given the nature of the financial demands SARS intended making against the third defendant, the latter would not at that stage have inspired much confidence in his ability to pay the plaintiff's accounts at a later stage, whether wholly or in part. According to Gouws, following this meeting he did not have any further contact with the second defendant, to the extent that he failed to recognise him at the commencement of the present trial.

23. Gouws gave evidence to the effect that the defendants agreed at the meeting that the plaintiff (Gouws) be instructed to proceed. Although the second and third defendants, the latter also representing the fourth defendant, in addition agreed to be personally liable for the plaintiff's fees and charges, Gouws (and through him the plaintiff) accepted the instruction primarily based upon the first defendant's undertaking of personal responsibility for all payments. He said that the first defendant directed that all payments becoming due to the plaintiff would come from his (group) office, via Sahadave, who would act as intermediary and to whom accounts for services rendered should be delivered for the attention of and approval by the first defendant. The first defendant would thereafter resolve the respective liabilities of the four "partners"

amongst themselves. Effectively Gouws was to report to and ultimately take his instructions from the first defendant only, the latter representing the overriding authority as between the four "partners".

24. Asked what his attitude would have been had he been told at the meeting that Sebcom would be liable for the payment of the plaintiff's fees and charges, Gouws responded that in such an eventuality the plaintiff would have required a deposit of R500 000-00, without which it would not have rendered any services at all. It was only due to the high regard which Gouws had for the financial strength of the first defendant and the fact that the first defendant, in their past association, had not only accepted personal responsibility for the payments becoming due to Gouws, but had also ensured that such responsibilities were duly discharged, that Gouws was prepared to agree that the plaintiff would accept the instructions without requiring the payment of any deposit.

25. Following the meeting Gouws proceeded to execute the plaintiff's instructions. Upon the authority of the first defendant both Sahadave, as well as one Persadh, another accountant also in the employ of the first defendant's group, were made available to assist Gouws in the execution of the plaintiff's mandate which involved both the SARS investigation aimed against the third defendant, as well as the VAT and PAYE contraventions apparently perpetrated by Sebcom. In the process the third defendant's tax amnesty was reinstated after the formulation of an application to the High Court where Gouws cooperated with attorneys

and counsel retained for this purpose by the first defendant, additional tax assessments against him were disallowed and the affairs of Sebcom were brought in order.

26. Two progress payments, respectively R85 000-00 on 31 May 1998 and R50 000-00 on 30 June 1998, were made to the plaintiff, according to Gouws in compliance with the first defendant's undertaking and towards the end of October 1998 the end of the assignment was within sight, although some work remained to be done. At that stage fees and charges already due to the plaintiff amounted to R484 570-00 exclusive of VAT, to which the cost of the remaining work until the completion of the assignment and estimated at R73 150-00, exclusive of VAT, would still be added.

27. On 6 November 1998 a meeting took place between Gouws and the first defendant relative to the outstanding balance already due, as well as the estimated future charges. In the result the plaintiff compromised combined figure of R557 720-00, exclusive of VAT and it was agreed that the plaintiff would complete the assignment for the sum of R500 000-00, exclusive of VAT and payable in ten equal instalments. In this regard the plaintiff was supplied with ten post dated cheques for R57 000-00 each, the drawer of which was Sebcom and the first he first of which was payable on 6 Novemeber 1998. Gouws said that he remembered the date because it coincided with his birthday.

28. These cheques were presented and paid, save for the last four totalling a face value of R228 000-00, which were unpaid by reason of the fact that Sebcom had been liquidated. Subsequently the plaintiff unsuccessfully tried to demand payment of these from the four "partners", but they all resisted. Eventually the present action was instituted and in the amended declaration the plaintiff claims payment of this claim, styled as "Claim 1", from the first defendant personally, and in the alternative from all four defendants.

29. During the course of the trial the defendants submitted a letter dated 4 November 2010, together with a schedule thereto, from PKF Chartered Accountants, the liquidators of Sebcom. These documents were received by consent as exhibit "F" and it appears there from that, following the liquidation of Sebcom on 31 March 1999, the plaintiff had in fact proved a claim against the company in liquidation and had received dividends totalling R98 349-23, thus leaving a balance of its Claim 1 in the sum of R129 650-77 only.

30. The question to be answered is whether such claim lies against the first defendant only, alternatively against the four defendants jointly and severally as contended by Mr Combrinck who appeared for the plaintiff, or whether the claim lies only against the defendants jointly, if at all, as contended for by Mr Thatcher for the first and second defendants.

31. Much criticism was levelled at Gouws for the somewhat inept wording

contained in subsequent correspondence by him, or by representatives of the plaintiff acting on its behalf. I do not propose to embark upon an exercise of trying to analyse each document, in order to judicially interpret its contents, because I do not consider this to be either necessary or helpful. The May 1998 agreement relied upon by the plaintiff was concluded orally and it is necessary to consider the proven facts as they emerge from the evidence before me in order to determine the terms of the agreement concluded at the time.

32. Gouws was adamant that he contracted on behalf of the plaintiff on the basis that the first defendant undertakes primary personal responsibility for the settlement of the fees and charges becoming due to the plaintiff. He motivated this approach in some detail, as already discussed above. In my judgment the probabilities weigh heavily in favour of the version put forward by Gouws. Not only had he followed such a course in dealings with the first defendant in similar circumstances before, but given the precarious situation of Sebcom at the time, it was not credit worthy. That much appears to be conceded by counsel for the first and second defendants, but counsel then argued that the intention of the parties in contracting was to render each of the “partners” personally liable on the basis of joint, but not several, liability.

33. I find Gouws’ explanations persuasive and in accordance with the probabilities, namely that at the time he knew the first defendant as a man of financial substance, whilst the others were unknown to him. He

knew nothing about the second defendant, save that he was a director of Seev-Patt. Since he was not privy to the shareholders of that company, he could not even be certain that the second defendant held any such shares. Certainly the third defendant would not have appeared credit worthy, given the stated intention of SARS to levy taxation claims and penalties amounting to an estimated R10 million against him, as well as the fact that both the third and fourth defendants found themselves beholden to the first defendant specifically because they had been unable themselves to raise finance in order to protect Sebcom from the claims made against it by its creditors. Fourth defendant, even if represented at the meeting by the third defendant, remained unknown to Gouws in any event.

34. I therefore consider it very improbable that Gouws would have been prepared to embark upon a venture which would have required of him to devote some 80% of his productive time over an extended period, when he was uncertain whether he would be paid in full by all four his debtors, or whether one or more of them might become unable or unwilling to effect his share of the payments due, thereby leaving the plaintiff short and requiring it potentially to sue men of straw. It is, in my view, much more probable that in such an event Gouws would have called for the suitable deposit to have been paid, failing which he would not have accepted the instruction offered to the plaintiff.

35. In my judgement it is far more likely that Gouws, and thus the plaintiff,

required and obtained the undertaking of personal liability as alleged from the first defendant in the course of that meeting and that the plaintiff accepted the instruction on that basis. This conclusion is fortified by the subsequent conduct of the parties whereby Gouws reported to the first defendant and accepted his ultimate authority as decisive of any conflicts between the uneasy directors of Sebcom. The fact that the plaintiff's claims for services rendered and to be rendered were compromised by the agreement of 6 November 1998, in my view takes the matter no further. The nature of this agreement, as initiated by the first defendant, was merely to effect a saving on the total commitment and not to change the fundamental nature of the original transaction by substituting a new debtor in the place of the old.

36. In any event, the version advanced by Gouws finds support in the evidence of both Sahadave, as well as the third defendant who gave evidence as a witness for the plaintiff. Counsel for the first and second defendants suggested that these witnesses were prejudiced against the first defendant and that each had reason to falsify their evidence. It is so that both witnesses parted with the first defendant in circumstances of some disunity and unhappiness. But I am not persuaded that either of these witnesses perjured themselves in order to assist the plaintiff. Both of them, as well as Gouws, favourably impressed me as witnesses and some allowance regarding the quality of their evidence and their ability at recall needs to be made in their favour, by reason of the very long time which had elapsed before they were called to the stand.

37. The first defendant, on the other hand, did not impress ne as favourably. I came away with the distinct impression that his memory veered to the demands of opportunism and that the thread of his evidence clashed with the obvious probabilities emerging in this case.

38. At the end of the day and having considered the evidence and arguments before me, I have come to the conclusion that the plaintiff has established with the requisite degree of certainty the primary personal undertaking by the first defendant to assume personal responsibility for the charges becoming due to the plaintiff. The fact that the instruments of payment may have been any one or more of the entities controlled by the first defendant makes no difference to his assumption of responsibility.

39. Since the Plaintiff's claim 1 is framed in the alternative and on the basis that any claim as against the first, second, third and/or fourth defendants jointly only come into play in the event of the main claim against the first defendant failing, the issue of their joint liability falls away and requires no further consideration. This includes the argument advanced by counsel for the first and second defendants to the effect that their alleged joint liability in fact amounts to an invalid oral suretyship in contravention of the provisions of section 6 of the General Law Amendment Act 50 of 1956.

40. The respective positions of the second defendant on the one hand and the third and fourth defendants on the other however differ from each other. In the case of the second defendant he had joined the unsuccessful first defendant in resisting the plaintiff's claims. But for the fact that the claim against him was framed in the alternative, he may well have been found liable upon the evidence that he independently also undertook personally to pay the plaintiff's charges. In the circumstances I take the view that an appropriate order in regard to the second defendant would be one of absolution from the instance, with no order as to costs.

41. In the case of the third and fourth defendants they nominally remain in an adversarial position relevant to the plaintiff. They entered appearance to defend the claims made against them by plaintiff. However, there is no indication on file that the plaintiff's amended declaration was ever served upon them, nor that they have pleaded thereto. There is also no indication on record that they have been barred in terms of Rule 26 from pleading. Accordingly, as against the third and fourth defendants, there has not been compliance with Rule 31(4) requiring at least five days' notice to them, so that even if plaintiff were so inclined, it could not seek judgement against them at the present time. The most appropriate order regarding the third and fourth defendants would therefore be simply to adjourn the matter as against them *sine die*, with no order as to costs.

42. In contrast to Claim 1 the plaintiff's Claim 2 stands on a different footing.

It is alleged in paragraph 16 of the declaration that the nature of the instruction was for the plaintiff to facilitate the unscrambling of the egg, by reversing the joint venture effectively embarked upon when the first and second defendants invested in Sebcom and through Seev-Patt, acquired a 50% shareholding in Sebcom. That the relationship between the two camps was unhappy from its inception is without doubt. The plaintiff's allegations are simply denied in the first and second defendants' plea.

43. It should be remembered that the position regarding Sebcom had changed between May 1998 and the beginning of November 1998. The taxation onslaught by SARS against Sebcom and the third defendant had by then largely been contained, Sebcom had apparently become profitable because, according to Gouws, it had repaid all but R6 million of the original R20,5 million advanced to it and the two camps actively disliked each other. Whilst first defendant wanted the R6 million balance of the loan to Sebcom repaid, as well as payment for the 50% shareholding in Sebcom which Seev-Patt had acquired, the third defendant felt aggrieved at how much money had been spent in repaying Seev-Patt and considered the demand for payment for the shares held by it to be unreasonable.

44. According to Gouws he was asked on 6 November 1998 by the first respondent to try and arrange for the re-purchase of the shares which Seev-Patt held in Sebcom, as well as for Seev-Patt's loan account in

Sebcom to be repaid. Gouws' evidence does not bear out the allegation, albeit made in the alternative, in the amended declaration that an agreement was reached between plaintiff and all the defendants acting together, nor does the plaintiff's allegations in this regard find support in the evidence of Sahadave or the third defendant.

45.On behalf of the first and second defendants counsel emphasised the contents of a letter written on behalf of the plaintiff to Sebcom on 14 December 1998, but it is by no means clear that this letter purports to deal at all with the position relating to the plaintiff's Claim 2. At the time Gouws was still involved in the ongoing taxation disputes relative to the third defendant, as well as Sebcom. He was also assisting Sebcom in regard to other issues, such as releasing the attachment by SARS of monies belonging to Sebcom and further difficulties which the third defendant had experienced with SARS, but which were not included in the ten post dated cheques agreed upon between Gouws and the first defendant on 6 November 1998. It is also not clear why, if plaintiff was asked to act as a facilitator for the re-purchase by the third and/or fourth defendants of the portion of Sebcom's shares then held by Seev-Patt, the plaintiff would then address a letter Sebcom in regard thereto.

46.In the course of his evidence Gouws also devoted very little time to fleshing out the details of how the instruction at the heart of Claim 2 came about. The nature and extent of the work allegedly agreed upon remains uncertain, as does the basis upon which plaintiff would be remunerated for such service. If one were to accept that Gouws and the first defendant had a discussion regarding possible assistance which the former could give to the latter, or indeed to all four the “partners”, then it remains unclear exactly what the terms of the agreement was.

47. In my view there remains too many unanswered questions around the plaintiff’s Claim 2 and it cannot be said that the plaintiff, upon whom the onus of proof rests, has satisfactorily discharged that onus in regard to Claim 2. It follows that absolution from the instance in regard to this claim is called for as against the first and second defendants.

48. By reason of the long delays in the progress of the litigation herein, counsel for the first and second defendants also sought to invoke the *in duplum* rule in order to limit the interest accruing upon such sums as the first and/or second defefdants may be held liable for. In my view there is no merit in this submission. In Standard Bank of SA Ltd vs Oneanate Investments (in liquidation) 1998 (1) SA 811 (SCA) the Court of Appeal made it clear that after the service of the summons, but before judgment, the *in duplum* rule does not apply.

49. Finally, counsel for the first and second defendants urged me not the make a costs order adverse to the first and second defendants. The initial argument presupposed a finding by this court that such defendants are individually liable for only a joint share of the monetary award, that in the circumstances it cannot be said that the plaintiff had achieved

substantial success and accordingly, so the argument goes, "*..this should be reflected in any order for costs.*".

50. A further line of argument advanced on behalf of the first and second defendants relates to the application to amend the plaintiff's declaration which was set down for opposed hearing on 13 December 2004, but was then adjourned whilst the wasted costs occasioned by the adjournment were reserved. They now contend that the adjournment was solely attributable to fault on the part of the plaintiff, who should therefore be ordered to pay the wasted cost involved. The reason for the adjournment was that the plaintiff followed the incorrect procedure in seeking to amend its declaration.

51. The plaintiff had given notice of intention to amend its declaration, the defendants filed a notice of objection thereto and the plaintiff then served and enrolled for hearing on 13 December 2004 and application to amend, but omitted simultaneously therewith also to deliver a founding affidavit. After the matter was adjourned and the plaintiff granted leave to deliver its founding affidavit by 31 January 2005, it duly did so. In response the defendants gave notice withdrawing their opposition to the amendment, which thereafter proceeded uneventfully.

52. There is no indication that the defendants, upon receipt of the defective application to amend, sought to draw to the attention of the plaintiff that the application was defective, or sought to invoke the mechanism of

irregular proceedings as provided for in Rule 30. It is also unclear upon what basis the original objection to the proposed amendment was made or, once the founding affidavit was filed, why the objection was summarily withdrawn.

53.The rules of court are not there to be opportunistically employed in tactical manoeuvres to disadvantage the opposition. I am of the view that the fault for the adjournment is not to be laid solely at the door of the plaintiff and that criticism may justifiably be directed at both the plaintiff and defendants in this regard. The most appropriate order would be that no order be made in regard to the costs of the application to amend.

54.It appears from the court file that in regard to the summary judgement application the "*usual order*" was granted, so that the costs thereof would also have been reserved. Considering that the plaintiff, subsequent to the application for summary judgment, significantly amended its declaration, it leaves itself open to criticism for having applied for summary judgement on the initial version. However, the defendants have not argued this point and in the circumstances I am of the view that fairness dictates that no order be made as to the reserved costs of the summary judgment application.

55.At the end of the day the order which I make is therefore as follows:-

a. I grant judgement in favour of the plaintiff against the first defendant, for payment in respect of the plaintiff's Claim 1;

i. in the sum of R129 650-77;

ii. together with interest thereon at the legal rate of 15,5 % per annum from 1 July 1999 to date of payment, both dates inclusive; and

iii. costs of suit, save that such costs will exclude;

1. the costs occasioned by the application for summary judgment which were reserved on 30 August 1999; and

2. the costs of the application for the amendment of the plaintiff's declaration, including the costs of the adjournment thereof on 13 December 2004;

both of which were which were reserved, and in respect of which no order as to costs is hereby made.

b. In respect of the second defendant I order in regard to the plaintiff's Claims 1 and 2 absolution from the instance, but with no order as to costs.

c. In respect of the third and fourth defendants the matter is adjourned *sine die*, with no order as to costs.

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VAN ZYL , J.

APPEARANCES:

For Plaintiff	:	Adv P J Combrinck Instructed by Du Toit, Havemann & Lloyd of Durban
For First and Second Defendants	:	Adv G R Thatcher Instructed by the Garlicke & Bousfield of Durban.
Date written argument submitted	:	11 November 2010
Delivered	:	14 MARCH 2012