

**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Appeal Case No: **A187/2024**

Case No: **466/15**

Before the Hon. Justices Dolamo et Mantame et Slingers

Hearing: **22 January 2025**

Judgment Delivered: **17 March 2025**

In the matter between:

CONCARGO (PTY) LTD

Appellant

(first defendant *a quo*)

and

DAVID JOHNSON

First Respondent

(first applicant *a quo*)

DAVID ALEXANDRA KRUYER

Second Respondent

(third defendant *a quo*)

BEVERLY KRUYER

Third Respondent

(fourth defendant *a quo*)

NKOSINATHI CHONCO

Fifth Respondent

(fifth defendant *a quo*)

JANINE BERANDETTE CONRADIE

Sixth Respondent

(sixth defendant *a quo*)

GREGORY BATHURST TIGHE

Seventh Respondent

(seventh defendant *a quo*)

This judgment is handed down electronically by circulation to the parties' legal representatives' email addresses. The date of hand-down is deemed to be 17 March 2025.

JUDGMENT

SLINGERS J

INTRODUCTION

[1] The appellant appeals against an order and judgment granted by the court *a quo* in terms whereof it had to pay R1 million rands, interest and costs to the first respondent as restitution following the cancellation of an oral agreement. In this appeal, the appellant raises numerous grounds. However, the contentious issues turned on:

- (i) whether the first respondent established which of the two alternative agreements (sale of shares with the second respondent or a subscription for shares with the appellant) was the true agreement;
- (ii) whether the first respondent discharged the onus of proving either of the agreements he relied upon;
- (iii) whether the judgment was correctly granted against the appellant on the facts found by the court *a quo*; and
- (iv) whether the acceptance of the first respondent's evidence over that of the second respondent who testified for the appellant in the court *a quo* was a proper evaluation of the evidence led.

[2] The appeal is opposed by the first respondent.

BACKGROUND FACTS

- [3] The first respondent met the second respondent, in 2009 whereafter their respective companies conducted business together. Over time the first and second respondent's relationship developed from a business relationship into a personal one, with the second respondent becoming one of the first respondent's best friends. They visited each other's homes, went for meals and spent weekends staying in each other's houses.
- [4] Towards the end of 2012, the first and the second respondents started discussions regarding the first respondent's involvement in the appellant. These discussions took place when the first and the second respondent would meet and speak on the phone and as the first respondent testified, it '*just developed*'¹. This was echoed by the second respondent who testified that he and the first respondent had many, many conversations and that they pieced together in their minds how they would envisage a relationship and how they would deal with one another and what opportunities the future may hold.
- [5] The first respondent testified that he held a number of discussions with the second respondent pertaining to him becoming a shareholder in the appellant. During December 2012 the first respondent moved to Johannesburg on the understanding that he would establish a branch and be a director of Concargo Distribution, and that he would be representing the appellant in Johannesburg.
- [6] The first respondent testified that towards the end of April 2013 they had agreed that he would invest one-million-rand (**'R1 million'**) into the appellant and in return he would be given a five percent (**'5%'**) shareholding therein. The first respondent assumed that this 5% shareholding would come from either the second respondent or both the second respondent and his wife, as they were, in his understanding, the existing shareholders of the appellant.

¹ Vol 1, page 66, ln 11- 18

- [7] The first respondent testified that during July 2013 he paid the R1 million rand into the cheque account of the appellant. He also testified that payment into this account was done on the second respondent's instruction. The first respondent testified that the second respondent had told him that he would receive 5% shareholding in exchange for the R1 million-rand investment, which he had no reason to disbelieve. However, notwithstanding the payment of the R1 million-rand investment, the first respondent did not receive the 5% shareholding.
- [8] The second respondent testified that it was his understanding that the payment of R1 million rand was made with the objective of funding Concargo Distributions Johannesburg and that the money would be accounted for on a managed – report basis on a monthly basis to see what the drawdown was.²
- [9] The second respondent denied that he had told the first respondent to deposit R1 million rand into the appellant's account and assumed that he had done so as that was the account number he had in hand. It was the second respondent's evidence that he understood that the Johannesburg office would be operated at first respondent's risk.³ It was never their agreement that the first respondent would receive 5% shareholding in the appellant. The payment of the R1 million rand was simply an at-risk investment.
- [10] During January 2015 the first respondent instituted action proceedings against the appellant and second to seventh respondents.⁴ He pleaded that he and the appellant, who was duly represented by the second respondent, concluded a verbal subscription agreement.
- [11] In terms of this subscription agreement, the first respondent would pay the appellant the amount of R1 million rand and in return he would receive 5% of the total issued shared capital of the appellant.

² Vol 3, page 275, ln 9-15

³ Vol 3, page 279, ln 10- 15

⁴ In the court *a quo* the first respondent was the plaintiff and the appellant was the first defendant.

[12] The first respondent duly paid the appellant the amount of R1 million rand but was not issued with the 5% of the appellant's total issued share capital. It was the first respondent's case that the failure to issue him with the shares constituted a repudiation of the subscription agreement. The first respondent elected to accept the appellant's repudiation and to cancel the subscription agreement. As the appellant failed and/or refused to return the amount of R1 million rand, the first respondent instituted action proceedings against the appellant for payment thereof.

[13] On 26 February 2024, the court *a quo* found that:

'40. In the premises, I find that Johnson has succeeded in establishing the existence of an agreement with Concargo on the terms alleged. It is common cause that Johnson paid the R1 million to Concargo but did not receive the promised shares. He is accordingly entitled to restitution of the amount he paid to Concargo.'

[14] On 31 May 2024 the court *a quo* granted the appellant leave to appeal to the full court. It is this appeal which serves before us.

COMMON CAUSE FACTS

[15] The first and the second respondents were good friends who shared almost all information when it came to business and their private lives.⁵ It is common cause that they concluded an oral agreement. However, the terms and the nature thereof are disputed. It is also common cause that the first respondent paid an amount of R1 million rand into the appellant's account.⁶ The first respondent trusted the second respondent and there was no reason for him to disbelieve the second respondent when he told him that he was a shareholder.⁷

⁵ Vol 3, page 256, ln 16-19

⁶ Vol 3, page 270

⁷ Vol 4, page 331, ln 10-19

GROUNDS OF APPEAL

ONUS

[16] The appellant avers that the court *a quo* erred and misdirected in finding that the first respondent discharged the onus he bore in order to obtain judgment in his favour. This ground of appeal is based on the manner in which the first respondent pleaded his cause of action. In the main he alleged the conclusion of a subscription agreement and in the alternative he alleged a contract of sale of shares. While both the subscription agreement and the contract of sale of shares agreement result in the acquisition of shares, they differ in respect of the merx and identity of the seller.

[17] The second respondent testified that the contractual relationship with the first respondent was finalised over time and that it was:

‘...based on many, many conversations with Mr Johnson, we sort of pieced together in our minds how would envisage or see a relationship. ... So we were just putting down ideas of how we envisaged we would deal with each other and what opportunities there may lie in the future.’⁸

[18] It is clear from the evidence, as exhibited by the above excerpt, that the parties adopted a flexible approach to the conclusion of their agreement and that the exact terms and nature thereof were not foremost in their minds or their primary concern.

[19] Consequently, it fell to the court to determine whether the parties intended to bind themselves and the terms to which they intended to be bound.⁹ The context and the factual matrix within which the agreement was concluded were material to this determination.

⁸ Vol 3, page 257, ln 24 – page 258, ln 5

⁹ *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA)

- [20] The oft repeated dictum of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* 147 LTR 503 at 514 that:

'Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding facts.'

seems appropriate to the facts of this case.

- [21] Although the dictum referred to written agreements, it would equally be applicable to verbal agreements. It is more likely that businessmen would be less precise with their modes of expression when concluding verbal contracts. Therefore, it would be the duty of the court to consider their expressions of the agreement fairly and broadly, with a robust approach to factual findings.
- [22] When the flexible approach adopted by the parties to their agreement is considered together with the fact that the first and the second respondent held each other in a position of trust, then the court *a quo* cannot be faulted for adopting a robust approach in making factual findings in respect of which party's version to accept.
- [23] The court *a quo* correctly found that there was an irreconcilable conflict of versions in respect of the nature and terms of the oral agreement concluded. Furthermore, that this conflict had to be resolved by the application of the test set out in *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* (**'the test'**).
- [24] After applying the test, the court *a quo* found in favour of the first respondent's version. An acceptance of this version meant that the court *a quo* accepted the first respondent's evidence that it was the parties' intention that he pay the appellant R1 million rand in exchange for five percent of its total shareholding.

It matters not that the first respondent did not know who the seller was when all his negotiations were conducted with the second respondent, who he understood to be the shareholder and controller of the appellant.

- [25] Therefore, there is no merit in the ground of appeal that the first respondent failed to discharge his onus as a result of pleading both a subscription agreement and the alternative of a contract of sale of shares.

INCORRECT PARTY TO MAKE RESTITUTION

- [26] The second ground of appeal is that the court *a quo* erred and misdirected itself *‘in granting judgment against the appellant when, to the extent that the court accepted any evidence as to the nature of the agreement, it was that the agreement was the second alternative agreement, viz. an agreement of sale, yet it held [that] the appellant liable to be liable, when the appellant could only be held liable in terms of the first alternative agreement.’*¹⁰

- [27] The court *a quo* found that the first respondent had established the existence of a subscription agreement and not a contract of the sale of shares agreement. As correctly stated in the appellant’s heads of argument, in such circumstances it is the appellant who would be liable.

- [28] It is trite that the pleadings establish the issues. No evidence needs to be presented in respect of common cause facts and/or issues. To present evidence on common cause issues and/or facts would serve no purpose other than to incur unnecessary costs and to waste judicial resources. It is in respect of disputed issues and in respect of factual disputes that evidence must be presented as these require judicial adjudication. A court is not called upon to make findings in respect of common cause issues. Therefore, it is not required to lead evidence thereon.

¹⁰ Paragraph 25 of the appellant’s heads of argument.

[29] In paragraph 9 of the amended particulars of claim the first respondent pleads that:

*'During or about December 2012 and at Cape Town, the plaintiff, in his personal capacity, and the first defendant, duly represented by the third defendant (the third defendant also acting as a representative of a company to be formed) concluded an oral agreement ("**the first agreement**").'*

[30] In paragraph 11 of the amended particulars of claim the first respondent also pleads that:

*'Contemporaneously with the negotiation and conclusion of the first agreement, the plaintiff and the first defendant, duly represented by the third defendant, concluded a further oral agreement ("**the subscription agreement**").'*

[31] The first respondent proceeds to set out the express, alternatively tacit, alternatively implied terms of the subscription agreement which include that he would pay the appellant the amount of R1 million rand in respect of subscription for 5% of the total issued share capital of the appellant.

[32] In pleading to paragraph 9 of the amended particulars of claim the appellant admitted that it was represented by the third respondent when it concluded the first agreement.¹¹ The appellant denied the contents of paragraph 11 of the amended particulars of claim and went on to plead that:

'10.2 The Defendants admit that during or about July 2013, the Plaintiff and the First Defendant, represented by the Third Defendant, concluded an oral agreement in terms whereof it was agreed that the Plaintiff would invest the sum of R1 million in the establishment of a subsidiary branch of the First Defendant in Johannesburg, being the Second Defendant.'

¹¹ Vol 1, page 47, paragraph 9.1

- [33] It is clear from the pleadings that although the appellant disputed the nature and terms of the agreement, it did not dispute the averment that the appellant was duly represented by the third respondent in its business dealings with the first respondent. Furthermore, the averment that the agreement was concluded between the first respondent and the appellant was not disputed.
- [34] In the circumstances, the submission that the court *a quo* erred in directing the appellant to make restitution cannot be sustained.

THE REJECTION OF THE SECOND RESPONDENT'S VERSION AND THE FINDING THAT THE SECOND RESPONDENT WAS UNRELIABLE

- [35] The further grounds of appeal are that the court erred and misdirected itself in rejecting the second respondent's version and in finding that he was unreliable. I deal with these grounds of appeal together in the judgment.
- [36] It is trite that an appeal court has limited power to interfere with a trial court's factual findings. This follows from the principle that a trial court's factual findings are presumed to be correct and may only be disregarded if the recorded evidence shows them to be clearly wrong. Put differently, an appeal court may interfere with a trial court's factual findings if it committed demonstrable and material mis-directions.¹²
- [37] Similarly, in respect of credibility findings, an appeal court must be deferential and slow to interfere with the trial court's credibility findings, unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong.¹³ It has repeatedly been said that the trial court is steeped in the atmosphere of the trial and has had the advantage of observing, assessing and evaluating the demeanour of the witnesses, which the appeal court does not have.¹⁴

¹² *S v Monyane and Others* 2008 (1) SACR 543 (SCA) at para [15]

¹³ *S v Pistorius* 2014 (2) SACR 315 (SCA) at para [30]; see also *S v Kebana* [2010] 1 All SA 310 (SCA) at para [12]

¹⁴ *ibid*

[38] An appeal court may only reject the trial court's assessments if it is convinced that it erred in its assessments. Doubt on the part of the appeal court is not sufficient to overturn the trial court's assessments. When determining whether or not to overturn the trial court's assessment, the appeal court must not only consider the trial court's findings but also its reasons for the findings.¹⁵

[39] I turn now to the evidence.

[40] In both the appellant's as well as the first respondent's versions, it was agreed that the first respondent would make payment of R1 million rand to the appellant. It is clear from the second respondent's evidence that he was surprised when the first respondent deposited money into the appellant's account.¹⁶ Furthermore, the second respondent testified that the defendants had not provided the first respondent with any instruction in respect of which banking account to use in which to deposit the R1 million rand.¹⁷ This evidence is inconsistent with the pleaded case. On the appellant's version the first respondent would invest R1 million rand at risk. Therefore, even on this version the appellant would have been expected to provide the first respondent with the necessary payment details and would have expected payment of the R1 million rand. He would not have been surprised by it.

[41] The first respondent's evidence was also inconsistent in respect of Concargo Distribution Cape's role in funding Concargo Distribution (Johannesburg). He initially testified that there would be no demand on the head offices' finances as Concargo Distribution (Johannesburg) would operate financially independently and that the first respondent had made a capital injection to cover all the expenses and disbursements in the foreseeable future.¹⁸ This was inconsistent with his later evidence that Concargo Distribution Cape would fund the Johannesburg office.¹⁹

¹⁵ *Gijana and Another v S* (CA 58/2017) [2018] ZAECHMHC 47 (14 August 2018)

¹⁶ Vol 3, page 270 ln 14 – page 271, ln2

¹⁷ Vol 3, page 271, ln 2- ln 6; page, 275 ln 22

¹⁸ Vol 3, page 279, ln 2-7

¹⁹ Vol 3, page 294 - 295

- [42] During the first respondent's cross examination it was put to him that the second respondent and his wife could never have been the sellers of shares as they were not the owners thereof. However, it is clear from the second respondent's evidence that he did not consider his lack of ownership of shares as a barrier to transferring equity to the first respondent.
- [43] The second respondent readily admitted that he held the prospect of the first respondent becoming an equity partner as a carrot.²⁰ Furthermore, on 19 June 2014 the second respondent sent the first respondent a WhatsApp message informing him that he would not entertain parting with equity.²¹ It is implicit in this message that the second respondent could elect to part with equity if he so chose and that he was not being prevented from doing so. Furthermore, the second respondent testified that prior to July 2014, he would have parted with equity but changed his mind as of July 2014.²² This evidence supports the conclusion that he could have parted with equity, if he wanted to and that it was within the second respondent's ability to make the first respondent a shareholder.²³
- [44] Even if the second respondent did not have the right to part with equity, he certainly created the impression with the first respondent that he could part with equity. This is evident from the email dated 25 September 2013 when the second respondent wrote to the first respondent that '*...I have committed to sell you equity...*'²⁴
- [45] During cross- examination, the first respondent testified that it was the second respondent who decided on the figure of 5% of the shares that would be given to him in exchange for payment of the R1 million rand.²⁵ This was not denied.

²⁰ Vol 4 page 310, ln 3- 19

²¹ Vol 6, page 561, ln 29

²² Vol4, page 309 ln 8

²³ Vol 4, page 342, ln 8- 18

²⁴ Vol 5, page 470

²⁵ Vol 2

The determination of the figure of 5% of the shares is inconsistent with an *at-risk* investment narrative.

[46] In my view it cannot be found that the court *a quo* committed any material or demonstrable misdirections in respect of its factual and credibility findings and there is no basis on which to overturn or interfere with it.

[47] Therefore, I would make the following order:

(i) the appeal is dismissed with costs, which costs shall be on scale B

SLINGERS J

I agree. It is so ordered.

DOLAMO, J

I agree.

MANTAME, J