

In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: A196/2024

In the matter between:

NORDIEN FAMILY ENTERPRISES (PTY) LTD

First Appellant

THE IT EXPERIENCE GROUP SA (PTY) LTD

Second Appellant

BAKED GROUP (PTY) LTD

Third Appellant

and

NEONOMAD CAPITAL (PTY) LTD

Respondent

Matter Heard: 10 March 2025

Judgment Delivered: 27 March 2025

JUDGMENT

MANTAME, J

[1] The first, second and third appellants (*appellants*) appeal against the judgment and order of the Court *a quo* that was handed down on 20 March 2024 cancelling the agreement that was concluded between the appellants and the respondent on account of the appellant's repudiation; ordering payment of an amount of R 5.7 million to the respondent and the respondent, upon receipt of the payment of R5.7 million, to provide the appellants with a duly signed and completed

share transfer form in terms of which the respondent's shares in the third appellant are to be transferred to the transferee identified by the respondent.

[2] The appeal is opposed by the respondent on the basis that it lacks merit. Essentially the respondent stated that the refusal to perform in accordance with the terms agreed upon amounted to a repudiation. However, if both parties believe a contract was concluded, but each contend for materially different terms, then there can be no doubt that both parties are mistaken and that no contract was concluded.

[3] The first appellant established the Baked restaurant business (*Baked*) in 2020. Basically, it conducts the business of operating café's, deli's, bars, lounges and online shops specialising in the sale of cannabis infused products. It was a year later that the respondent became interested in this business. The appellants contended that during 2021, Mr Beukes approached them and expressed his wishes to branch into the cannabis industry and a cannabis – friendly retail business such as Baked was identified by him as an ideal one. He was aware that the appellants do not have funds to open more Baked branches.

[4] During 2021/2022, the appellant's represented by Mr. Shaan Nordien (*Mr. Nordien*) and the respondent represented by Mr. JA Beukes (*Mr Beukes*) entered into an agreement in terms of which the respondent would invest an amount of R5.7 million in the Baked business.

[5] According to the appellants, Mr Beukes presented them with a proposal that would generate sufficient funds to expand the Baked brand in South Africa and internationally. Mr. Beukes proposed that 200 000 000 crypto currency tokens would be issued when the respondent launched the crypto currency tokens on behalf of the third appellant. It was then agreed that Mr Beukes would prepare a prospectus for the respondent to present to the crypto currency market to raise the funds for the expansion of the Baked brand globally. The prospectus was never provided and Baked was never listed on the crypto market.

[6] For the purposes of this proposal, the appellants said that Baked Bloubergstrand was estimated to be worth R10 million, based on the annual profits at the time. Based on Mr. Beukes's proposal the parties agreed that:

6.1 The respondent would invest an amount of R10 million for purposes of opening two more Baked branches, before taking the Baked to the crypto market to raise the funds;

6.2 Mr. Beukes undertook to sell 200 000 000 Baked tokens on the crypto currency in stages;

6.3 From the funds raised, an amount of R10 million would be paid to the first appellant and the respondent's investment of R10 million would be repaid;

6.4 The assets of the first appellant would be transferred to a new entity to be formed called Baked Group (Pty) Ltd and the balance of the funds raised from the crypto currency listing would be used to expand the Baked brand globally;

6.5 Once this obligation was fulfilled by Mr Beukes to launch the respondent and raise the capital on the crypto currency market, Baked Group (Pty) Ltd would commence operations;

6.6 Once the Baked Crypto tokens were launched on the crypto currency market, the third appellant would pay Mr. Beukes a director's salary, an office rental, vehicles and vehicle insurance.

[7] The appellants contended that the motivation to become involved with Mr. Beukes and the reason for the acceptance of his proposal was not so much about the R10 million investment to open two more branches, but rather the stated intention by Mr. Beukes that would expose Baked Group (Pty) Ltd to the crypto currency and utilise the funds so generated to open more branches in South Africa and globally.

[8] The respondent denied the entire version of the appellant's agreement and that the R5.7 million investment paid was part of a R10 million which he would have paid to open two more branches. On the respondent's interpretation of the entire agreement the appellants relied on, the respondent would have to provide the first

appellant with R20 million of non-refundable funding in return for a 50% share in the third appellant, which would remain an empty shell until the respondent has fulfilled all the obligations stated in paragraph 6 above. In the respondent's view, that did not make business sense.

[9] A dispute in this matter centres around the terms of the oral agreement that prompted the respondent to pay an amount of R5.7 million in the expectation that it would become the co –owner of the Baked business in De Waterkant, Green Point and which would be housed in the third appellant.

[10] The respondent stated that if regard is had to its version of the agreement, it is more probable than the “detour type of an agreement” that the appellants relied on. The respondent averred that it was agreed with the second appellant that the third appellant would be incorporated in order to use it as a vehicle to conduct and expand the Baked business. The first appellant would contribute the existing Baked outlet in Bloubergstrand and the various activities related thereto. The R5.7 million investment in the Baked business would be utilised to conduct and expand the business and, more particularly would fund the establishment of a new Baked outlet in De Waterkant, Green Point. It would further be utilised to provide some office space for the third appellant and the respondent.

[11] The respondent and the second appellant would each obtain 50% of the authorised and issued share capital in the third appellant. The respondent, Mr. Nordien, his wife and son would all be entitled to serve as directors of the third appellant's board. An amount of R5.7 million was duly paid by the respondent in 2022 and the respondent and second appellant were each issued with their 50% shares in the third appellant. It was the respondent's understanding that Mr. Nordien required his investment as he could not afford the establishment of the new Baked outlet in De Waterkant, Green Point.

[12] On 02 February 2022 Mr. Nordien confirmed to Mr Beukes that the Baked Green Point outlet would consist of the head office, bakery, an online shop, a Baked café and deli, a fine dining space called The Vault, a Baked hookah lounge and a

cocktail bar. This outlet was opened during October 2022 and has remained operational until to date.

[13] The appellants raised four grounds of appeal. *First*, that the Court *a quo* applied the incorrect test for the determination of factual disputes in motion proceedings. In so doing, it erred in concluding that the appellants' version was untenable. Their version can only be rejected in motion proceedings only if it is "fictitious" or so far- fetched and untenable that it can confidently be said, on the papers alone, that it is demonstrably, and clearly unworthy of credence – They found support in their contention in *Fakie N.O v CCII Systems (Pty) Ltd*.¹

[14] The respondent contended that a determination as to whether, upon the application of the correct test and principles, a litigant's version is so improbable that it is rendered untenable or far – fetched and maybe dismissed out of hand involves the exercise of a discretion in 'broad' or "loose" sense of a value judgment that is performed after regard is had to a variety of diverse and contrasting considerations. Accordingly, an appellate court is entitled to interfere if it should find that it would have come to a different conclusion than the Court *a quo*.²

[15] The Court *a quo*, the respondent argued, correctly resolved the issue pertaining to the terms of the oral agreement considering the facts as presented by the parties in order to determine whether the dispute of fact was a genuine and *bona fide* one or whether the appellants' version was far – fetched and untenable that it could be rejected out of hand.

[16] The respondent agreed that the correct approach and a stringent test to be applied is the one that was espoused in *National Scrap Metal (Cape Town) (Pty) Ltd v Murray and Roberts Ltd*.³ The parties differed on the appellants contention that a mere fact that a version may be unsatisfactory, or even improbable, does not render it so far – fetched and untenable as to be dismissed without evidence. The

¹ 2006 (4) SA 326 SCA at para [56]

² *Oakdene Square Prop (Pty) Ltd vs Farm Bothasfontein (Kyalami)(Pty) Ltd* 2013 (4) SA 539 (SCA) paras [18] – [21]; and *Trencon Construction (Pty)Ltd vs Industrial Development Corporation of South Africa (Pty) Ltd* 2015 (5) SA 245 (CC) paras [82] to [92]

³ 2012 (5) SA 300 (SCA)

respondent submitted that the Court *a quo* considered and evaluated the parties' respective versions of the terms of their oral agreement in the light of the objective facts which emerged from the papers. Such objective facts include the contemporaneous WhatsApp messages the parties' exchanged, their respective conduct in performance of their agreement and the contention advanced in correspondence by their attorneys on their behalf. The respondent submitted that the Court *a quo* correctly came to a conclusion that the appellants' version of the oral agreement was utterly inconsistent and incompatible with the available objective evidence. In this respect, the court *a quo* held that, the appellants' version was untenable and the appellants failed to raise a *bona fide* genuine dispute of fact warranting referral to oral evidence.

[17] For instance, if the appellants stated that the respondent was supposed to have paid an amount of R10 million upfront for the two Baked businesses, it should have insisted that it be paid because that was a *quid pro quo* for the 50 % shareholding. That did not happen. The appellant's version is therefore not supported by the objective facts.

[18] Whilst it is common cause that there is a dispute, in so far as to what was the ultimate agreement between the parties, however, the objective fact is that all the terms alleged by the respondent were complied with. The fact that the respondent admitted that some issues were discussed during the negotiation phase by the parties, does not necessarily, in our view, amount to an agreement and clearly such may not necessary constitute a genuine dispute of fact. A *bona fide* genuine dispute of fact means a real and sincere disagreement over a factual matter, not a mere denial or a fabricated claim.

[19] In this instance, it was incumbent upon the appellants' raising a real, genuine and *bona fide* dispute of fact to seriously and unambiguously address the disputed facts on their answering affidavit.⁴ However, they failed to do so. The Court *a quo* correctly pointed out in its judgment that the objective facts support the respondent's version. On the other hand, the appellants' failed to support their long list of

⁴ Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) para [13]

allegations with evidence. In such a situation, an unsupported mere say – so of the appellants cannot amount to a genuine dispute of fact that would result in the matter being referred to oral evidence. In our view, there is no merit to this ground.

[20] *Second* ground, the appellants contended that the Court *a quo* erred in its evaluation of the facts, and in so doing incorrectly found that there were unsatisfactory aspects of the appellants' version. For instance, the appellants said the Court *a quo* did not attach due weight to certain common cause facts relied upon by the appellants; it relied on factual allegations that were not made in the papers; and impermissibly relied on a presumption as to what constitutes business like consequences.

[21] This contention was denied by the respondent and it was stated that the mere fact that ideas were bandied about or a creation of crypto currency tokens was discussed as means of raising capital whilst negotiating a contract does not mean that these ideas were adopted as terms of any contract.

[22] It is trite that in motion proceedings, the affidavits constitute both the pleadings and evidence, and the issues and averments in support of the parties' case should appear clearly from the affidavits.⁵ Where a party annexes documents to their affidavits, it is incumbent on a party to identify portions thereof in which reliance is placed as an indication of the case which is sought to be made out on the strength of the document. It cannot be expected of a party to speculate on the relevance of annexures.⁶

[23] When the appellants were presented with the respondent's case in the Court *a quo* it was not their defence that they did not know which case to meet. Similarly, in their answering affidavit, they did not indicate that they had difficulties with the relevance of the annexures. Clearly there are inconsistencies in as far as the appellants alleged their version of the contract that was agreed upon and the respondent alleged a totally different one.

⁵ Minister of Land Affairs and Agriculture v D and F Wevell Trust 2008 (20 SA 184 (SCA)

⁶ Swissborough Diamond Mines (Pty) Ltd and Others v Government of the RSA 1999 (2) SA 279 (T)

[24] In this instance, common cause facts remained common cause. There was no obligation on the Court *a quo* to adjudicate on such matters, unless an area of importance and/or concern was brought to its attention. In fact, this Court agrees with the respondent's view that the version of an oral agreement as alleged by the appellants is unbusinesslike. That is a matter of interpretation and need not necessarily be alleged factually as the appellants suggested.

[25] The Court *a quo* in its evaluation of the evidence and its finding of the aspects of the appellants' evidence cannot be faulted as its case was littered with unsupported defences. The respondent submitted that where a party's version of an agreement is not merely found to be unbusinesslike but is held to be extremely unbusinesslike, if not absurd, that would certainly be a ground for rejecting such a version. We agree with this submission. Similarly, there is no merit on this ground.

[26] *Third* ground, the appellants submitted that the Court *a quo* erred in making an order that was inconsistent with its earlier finding that the parties were not *ad idem* as to the terms of their agreement. The appellants argued that the Court *a quo* erred in ordering that the agreement was cancelled by virtue of the appellants' repudiation thereof. In the appellants' interpretation, such a finding presupposes that a valid agreement existed and a consensus between the parties as to the terms of the agreement was reached. It was therefore not competent to order cancellation based on repudiation.

[27] The respondent submitted that the Court *a quo* correctly observed that upon receipt of the appellants' response to the respondent's cancellation of the agreement, it became apparent that the parties held divergent views of the terms of their agreement. The Court *a quo* came to the conclusion that the respondent's version of the agreement was the correct one and the appellants' implicit refusal to perform in accordance with its terms amounted to a repudiation, which repudiation justified the respondent's cancellation.

[28] It is indeed so that the parties held divergent views with regards to the terms of their oral agreement. Despite that being so, that did not preclude the Court *a quo*

from analysing the evidence that was put before it and coming to conclusion that the agreement was cancelled by virtue of the appellants' repudiation. As stated in this judgment, there was no *bona fide* genuine dispute of fact that warranted a referral of the matter to oral evidence. Importantly, a court's observation or a comment in passing (*obiter dictum*) should be differentiated from the court's findings. The Court *a quo* had enough evidence to observe and conclude as such. In this Court's view, there is no inconsistency between the observations, the findings that were reached by the Court *a quo* and the ultimate order.

[29] *Fourth* and final ground, the appellants contended that the Court *a quo* erred in not dismissing the application or referring the matter for oral evidence, as required by Rule 6 (5) (g). The appellants submitted that in light of the dispute as to the terms of the oral agreement, the Court *a quo* should have resolved the dispute by referring the matter to oral evidence and not decided the matter on papers.

[30] The appellants' suggestion seems to lose sight of the fact that a dismissal of an application or a referral of a matter to oral evidence cannot be made as of right and or entitlement. There is a balancing act which the Court has to take into consideration. As stated in *Wightman* it was held that a Court must be satisfied that a party raising a dispute has seriously and unambiguously addressed the fact in question. That means a party cannot simply deny a fact to create a dispute. It should be a *bona fide* genuine dispute of fact. A party must provide a specific and a reasoned basis for its denial. The Court will therefore employ a balancing act of considering whether the dispute is genuine and/or whether it is capable of resolution on the papers presented or it will call for further evidence or trial. Referral of a matter to oral evidence is not a forgone conclusion if raised. The Court has to be satisfied that there is indeed merit to the point raised and consequently there is not merit to this ground.

[31] Dissensus between the parties, although it was the last point raised in the parties' submissions, it was said to be irrelevant and not a basis for the Court *a quo*'s decision. However, it is the natural alternative to repudiation. Be that as it may, this Court is of the view that it should not be occupied by the issues that were not before the Court *a quo*.

[32] In the result the following order shall issue:

[32.1] The appeal is dismissed with costs.

MANTAME J
WESTERN CAPE HIGH COURT

I agree, it is so ordered:

DOLAMO J
WESTERN CAPE HIGH COURT

I agree:

SLINGERS, J
WESTERN CAPE HIGH COURT

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