



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

Case No: 7274A/2011

In the matter between:

HERMAN CLOETE

Appellant

and

ZIMELE SONKE BUSINESS CONSULTING (PTY) LTD

Respondent

Neutral citation: *Cloete v Zimele Business Consulting* (Case No: 7274A/2011)
[2025] ZAWCHC...(18 September 2025)

Coram: FORTUIN J, LEKHULENI J et NZIWENI J

Heard: 25 July 2025

Delivered: Electronically on 18 September 2025

Summary: Company law - Sale of shares agreement - Respondent failing to pay selling price – Appellant suing respondent for breach of contract -Trial court granting absolution from the instance – Test for absolution from the instance restated - Trial court misdirecting itself - Appeal upheld - Matter referred to the trial court for continuation.

JUDGMENT

LEKHULENI J: (FORTUIN et NZIWENI JJ Concurring)

Introduction

[1] This appeal is directed against the whole judgment and order of the court *a quo*, handed down on 03 August 2023, in which the court granted absolution from the instance in favour of the respondent at the closure of the appellant's case. The appeal is with leave from the court *a quo*, granted on 03 October 2024. The appellant was the plaintiff at the court *a quo* and was a single witness for the plaintiff's case. At the end of his testimony, counsel for the appellant closed the plaintiff's case.

[2] Subsequent thereto, the respondent's counsel applied for absolution from the instance. The appellant opposed the application; however, the trial court found that the appellant did not discharge his duty or, at the very least, failed to present a *prima facie* case against the respondent. The trial court found that from the evidence, it was clear that the relationship between the appellant and the directors of the respondent had soured and that the appellant may well have succeeded in different circumstances. Having considered the matter, the trial court granted absolution from the instance with no order as to costs. It is this order that the appellant seeks to assail in this court.

The background facts

[3] For the sake of clarity, it is worth noting that on 12 July 2012, Zimele Sonke Technologies and the present respondent (Zimele Sonke Business Consulting (Pty) Ltd), concluded a sale of business agreement in terms of which Zimele Sonke Technologies sold its business to the respondent as a going concern. Zimele Sonke Technologies ceded to the respondent all its incorporeal rights. The respondent, Zimele Sonke Business Consulting, assumed liability for Zimele Sonke Technologies and undertook to discharge the assumed liabilities in accordance with the terms of the agreement. For all intents and purposes, the respondent in this judgment refers

to Zimele Sonke Business Consulting (Pty) Ltd, a cessionary of Zimele Sonke Technologies.

[4] The facts relevant to the determination of this appeal are largely undisputed. To the extent necessary, I will summarise the evidence led at the trial and will not repeat the evidence verbatim. The plaintiff testified that he studied together with one Thando Mjebeza (Mr Mjebeza) at the University of the Western Cape, and they became close friends as they had similar business interests. They were both passionate about black economic empowerment. At that time, the appellant had approximately 10 years' experience in the IT field. The appellant and Mr Mjebeza decided to start an IT company named Zimele Sonke Technologies, which later ceded its rights to Zimele Sonke Business Consulting, specialising in software development. The company was registered on 6 April 2004, with a board consisting of five directors. Following the company's formation, three directors resigned shortly thereafter, leaving the appellant and Mr Mjebeza as the remaining directors.

[5] The appellant took on the role of technical expert within the company. At the same time, Mr Mjebeza became the company's networking specialist, leveraging his extensive contacts. The company flourished and experienced a massive growth curve. The appellant testified that they got big contracts involving the City of Cape Town and Pick and Pay. Unfortunately, for their newly formed company, the appellant fell in love with somebody who resided in Spain and had to relocate to Spain. As a result, the appellant and Mr Mjebeza, after intense discussions and negotiations, agreed that the appellant would sell his shares to the company and that Mr Mjebeza and a newly appointed director, Sias Rafusa, would take over the directorship of the company.

[6] To place value on the appellant's shares, the parties agreed that an evaluation of the company must be done. Mr Mjebeza, who acted as the chief financial officer of the company, instructed an accountant of the respondent to attend to the valuation of the company without any input from the appellant. The parties later engaged the services of two independent valuers, who assessed the value of the appellant's shares at more than R1.2 million. Subsequently, the parties agreed on a fair value of R1.2 million for the appellant's shares.

[7] Thereafter, the appellant sourced a template of a sale of shares agreement from the internet, which they could use to facilitate the sale of shares. The appellant asserted that they made some amendments to the template and added some clauses to suit their needs. Mr Mjebeza, who represented the company, made certain amendments, and the appellant signed the written agreement at the offices of the respondent in Cape Town on 08 October 2008. As foreshadowed above, the parties agreed that the appellant would be paid the sum of R1.2 million for the fair value of his shares in the company. Payment was to be effected in monthly instalments of R50 000 per month as from 01 November 2008.

[8] Upon signature of the sale agreement on 01 November 2008, the appellant resigned as a director of the respondent. Despite resigning from the company and no longer holding an official position, the appellant continued to work online on various tasks to assist the respondent. He acted as an external consultant for the company on various projects, though he did not perform these duties in a capacity of a director. His contributions were made on a *pro bono* basis, and he did not receive any compensation for his efforts. He rendered these services freely, aiming to ensure that the knowledge would be transferred to the person who would take his position in the company.

[9] The appellant contended that it was mutually agreed that Mr Mjebeza, acting on behalf of the respondent, would be responsible for preparing all the requisite documentation to finalise the sale agreement in compliance with the Companies Act 1973. Furthermore, he would engage third parties to assist in ensuring adherence to the provisions of the Act.

[10] The appellant further asserted that he signed all the necessary documents required to effect the sale of his shares to the company, including the security transfer form. Additionally, Mr Mjebeza provided him with documents to sign, confirming compliance with sections 85(3) and 85(4) of the Companies Act 1973. These documents indicated that the company would still be able to pay its debts as they become due in the ordinary course of business, even after the payment for the

shares. The appellant stated that all necessary documents and processes to facilitate the sale of his shares to the company were complied with.

[11] The appellant stated that after finalising the sale agreement with the respondent, the respondent only paid him R30,000 as the first instalment instead of the agreed R50,000. He demanded payment in terms of the contract to no avail. Despite the respondent's failure to fulfil the payment obligations outlined in the written agreement, it was observed that the two directors of the respondent subsequently proceeded to each acquire a Land Rover vehicle. Later, when the appellant demanded payment according to their agreement, Mr Mjebeza informed the appellant that the respondent was facing financial cash flow issues. Furthermore, Mr Mjebeza informed the appellant that the South African Revenue Services claimed the sum of approximately R1 million from the respondent in respect of Value Added Tax, and for non-payments of Unemployment Insurance Fund.

[12] According to the appellant, any liability owed by the respondent did not fall under the warranty provided by the appellant in the sale agreement. The appellant further stated that after he signed the securities transfer form, he resigned as a director. Mr Mjebeza informed him that he would engage a third party and make sure that all the necessary documents to effect the sale of the shares to the company would be complied with. The board of directors passed a resolution on 01 November 2008, approving the resignation of the appellant as director of the respondent and accepting the appointments of other directors.

[13] In addition, the remaining directors signed a document confirming that the company had acquired shares according to section 85(2) of the Companies Act 1973, from the appellant in the amount of 57 shares back to the company. Furthermore, the appellant asserted that directors also signed a confirmation envisaged in section 85(4) of the Companies Act 1973, that the company would, after payment of the shares, still be able to pay its debts as they become due in the ordinary course of business. The appellant asserted that all the necessary provisions in terms of the Companies Act 1973, were complied with to effect the sale. The appellant prayed that judgment be granted in his favour as prayed for in the summons.

Applicable legal principles

[14] As explained above, at the end of the appellant's case, Mr Holland, counsel for the respondent, applied for an order absolving the respondent from the instance. The application was predicated on the grounds that there was no evidence presented that a solvency and liquidity test was done before the sale of shares agreement was concluded. Furthermore, Mr Holland premised his application on the fact that there was no resolution to support the sale of shares to the company, nor was such a resolution registered with the CIPC. Ms Brown, counsel who appeared for the appellant at the trial, opposed the application and submitted that the evidence adduced by the appellant was sufficient to avert the granting of absolution from the instance.

[15] Having heard the argument on the matter, the trial court granted an order of absolution from the instance. Subsequently, the court furnished its reasons in writing in terms of Rule 49(1)(c) of the Uniform Rules of Court.

[16] I must emphasise that the test for absolution from the instance at the closure of the plaintiff's case is well established in our law. The test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff. (*Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A); See also *Couldridge v Eskom and Another* 1994 (1) SA 91 (SE) at 95E.

[17] In determining the question whether the defendant's application for absolution from the instance should be granted, it is not whether the evidence adduced by the plaintiff required an answer, but whether such evidence holds the possibility of a finding for the plaintiff: put differently, whether a reasonable Court can find in favour of the plaintiff. At the absolution stage, the inference contended for by the plaintiff need not be the most probable, but only a reasonable inference. The plaintiff's evidence should consequently, at the absolution stage, hold a reasonable possibility of success for him, and should the court be uncertain whether the plaintiff's evidence

has satisfied this test, absolution ought to be refused. (See *Build-A- Brick BK en 'n Ander v Eskom* 1996 (1) SA 115 (O) 123-C-D / 128J).

[18] Crisply, the plaintiff must provide sufficient evidence relating to all the elements of the claim to avert a ruling of absolution from the instance at the end of the plaintiff's case. Importantly, if certain facts in issue are within the knowledge of the defendant, the court should take that into account and more readily refuse to grant absolution from the instance. A defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance. (*Supreme Service Station (1969) (Pty) Ltd Fox and Goodridge (Pty) Ltd* 1971 (4) SA 90 (RA) at 93G).

Discussion

[19] For clarity's sake, I will first examine the trial court's ruling regarding the granting of absolution in light of the principles mentioned above. Thereafter, I will proceed to determine if the appellant has adduced sufficient evidence to avert an award for absolution from the instance.

[20] It is trite law that a court of appeal should be slow to interfere with the findings of fact of the trial court in the absence of material misdirection. (*R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706). An appeal court's powers to interfere on appeal with the findings of fact of a trial court are limited. *S v Francis* 1991 (1) SACR 198 (A) at 204E.

[21] In the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct. They will only be disregarded if the recorded evidence shows them to be clearly wrong. When an appeal is lodged against the trial court's findings of fact, the appeal court should consider the fact that the trial court was in a more favourable position than itself to form a judgment, because it was able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial. (*S v Monyane and Others* 2008 (1) SACR 543 (SCA) para 15). The Supreme Court of Appeal in *S v Naidoo and Others* 2003 (1) SACR 347 (SCA) at para 26, reiterated this principle as follows:

'In the final analysis, a court of appeal does not overturn a trial court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.'

a. The trial court's findings

[22] In the present matter, I must emphasise at the outset that the findings of the trial court are not supported by the facts and the evidence that was presented during the trial proceedings. Accordingly, the trial court made erroneous findings of fact. This troubling disconnection raises serious questions on the soundness of the conclusion drawn by the court *a quo*. I do not intend to deal with all the misdirection committed by the court *a quo*; however, the discussion that follows is sufficient for the order I propose herein below.

[23] The court *a quo* found in its ruling that the agreement between the parties was verbal and that the appellant testified that the sale of shares agreement was not signed. To this end, the trial court found that there are inherent risks that come with verbal agreements and non-compliance with statutory provisions. This finding, with respect, is diametrically at variance with the evidence that was placed before the trial court. The conclusion of the written sale agreement was admitted by the respondent in the plea. It was also not in dispute even during the trial.

[24] The appellant testified that he acquired a template from the internet, which he subsequently modified to serve as a guide for their agreement. They incorporated the necessary amendments to the template to suit their needs. A copy of the signed written agreement was attached to the appellant's summons and was marked annexure POC1 and was exhibited in court during the evidence of the appellant. The appellant was not challenged during cross-examination on this evidence.

[25] In addition, the appellant testified that the parties signed the agreement on 1 November 2008, and a few days thereafter, certain amendments were made at the request of Mr Mjebeza, which were effected and initialled by the parties. It is worth noting that the evidence regarding the conclusion and the signing of this agreement

was not challenged or refuted by the respondent during cross-examination, even in the plea. Moreover, it was admitted during the hearing that the parties agreed on R1.2 million for the shares of the appellant, as specified in paragraph 2.1.4 of the sale of shares agreement. Clearly, the court *a quo* erred when it found that the agreement was verbal and that there are inherent risks in verbal agreements.

[26] The court *a quo* also found that the appellant sought to rely on email correspondence between him and Mr Mjebeza. This finding is at odds with the evidence presented at the trial. As correctly pointed out by Mr Rysbergen, counsel for the appellant, on the proper interpretation of the pleadings, the conclusion of the written sale of shares agreement and the terms thereof is not in dispute, nor was it in dispute that payment in respect of the shares was not made in full.

[27] In paragraph (a) of the respondent's plea, the respondent asserted that at the time when the sale of shares agreement was entered into, and immediately thereafter, the respondent was not liquid, its liabilities exceeded its assets, and the respondent was trading from a factually insolvent position. Ostensibly, from the respondent's plea, the agreement was not disputed. Furthermore, the evidence of the appellant is that the material terms of the sale of shares agreement were breached in that payment was not made in terms of the agreement. The only payment made was R30,000, with no further payments made.

[28] Clearly, the appellant's case is not only based on email correspondence. To the contrary, the email correspondence exchanged between the appellant and Mr Mjebeza corroborates the appellant's version of the sale of shares agreement and the respondent's default for non-payment of the agreed sum of R1.2 million. In those correspondences, the appellant demanded payment, and the appellant was informed that the respondent was experiencing cash flow problems. The trial court's finding that the appellant placed significant reliance on email correspondence is fundamentally flawed and unsupported by the facts.

[29] The trial court also found that the appellant confirmed under oath that the sale agreement was in fact unsigned and that the company's articles of association did not allow for the sale of shares. Furthermore, the court stated that the appellant

confirmed that no special resolution was passed to facilitate the sale of the shares. As explained above, the agreement was in writing and was signed by the parties. Moreover, the appellant testified that all the statutory requirements in terms of the Companies Act 1973 had been met to effect the transfer of the shares. The appellant was not challenged on this evidence. The findings of the trial court regarding these issues are demonstrably wrong and lack support from the evidence presented. A careful analysis of the evidence shows substantial discrepancies in the conclusions reached by the trial court.

[30] Consequently, the Court *a quo*'s finding that the appellant did not present at the very least *prima facie* evidence against the respondent, and that his evidence was unsupported by the agreement he relied on, entirely disregards the undisputed evidence the appellant presented before it. This analysis fails to adequately consider the unchallenged evidence adduced by the appellant at the trial. As foreshadowed above, I firmly believe that the trial court made significant errors in its factual findings. The conclusions reached by the court *a quo* are inconsistent with the evidence presented, as well as with the pleadings submitted by the parties. The disconnection between the trial court's conclusions and the evidence presented is not only disconcerting but fundamentally vitiates the ruling it made of absolving the respondent from the instance.

[31] I must stress again that the factual findings made by the court *a quo* are clearly wrong and must be disregarded.

b. Prima facie case

[32] I turn to consider whether the appellant has produced sufficient evidence to avert an award for absolution from the instance. From the summary of evidence discussed above, it is common cause that the parties entered into a written sale of shares agreement. The respondent agreed to pay the appellant the sum of R50 000 monthly as from 01 November 2008. The respondent failed to pay the said amount and only paid R30 000. To date, the respondent has not paid the appellant promptly in terms of their agreement. The respondent cited non-compliance with Section 85 of

the Companies Act 1973, noting the absence of a solvency and liquidity test when the share sale was effected.

[33] It must be stressed that in his evidence in chief and during cross-examination, the appellant explained that all the required steps to facilitate the sale of shares transaction had been complied with. Moreover, the respondent's counsel reinforced the appellant's case when he stated at the commencement of his cross-examination that the respondent's article of association had in fact been amended to facilitate the sale of shares agreement and that this occurred on 17 August 2007. This aspect was put to the appellant as a fact. In my view, it is incontestable that the article of association of the respondent was amended to effect the sale of these shares.

[34] Additionally, from the evidence of the appellant, it is indisputable that the parties allocated responsibilities to each other to effect the sale of the shares. To this end, the appellant testified during cross-examination that they did everything that had to be done in compliance with the Companies Act 1973 to permit the buyback of shares to happen. The appellant was not challenged with this piece of evidence. Significantly, the appellant added that Mr Mjebeza, the remaining director, promised the appellant that he would attend to all the necessary documentation to finalise the sale of shares in compliance with the provisions of the Companies Act 1973 and engaged a third party to assist with compliance with these provisions.

[35] In this regard, after the plaintiff had resigned as a director, the remaining directors were to sign the special resolution to effect transfer of the shares, the documents confirming that the respondent had a return of acquisition of shares done in terms of section 85(2) of the Companies Act; that the remaining directors had to sign documents in terms of section 85(4) of the Companies Act confirming that the company, after payment in respect of the shares, would be able to pay its debts as they became due in the ordinary course of the business. The evidence of the appellant was that these documents, in terms of section 85(2) and 85(4), were prepared by Mr Mjebeza, and the directors signed these documents. The resolution accepting the resignation of the appellant as a director of the respondent and appointing new directors was also adopted by the directors of the respondent.

[36] The appellant was not challenged on these issues during cross-examination. In fact, throughout the cross-examination, the version of the respondent was not put to the appellant. Furthermore, the respondent did not, during cross-examination, dispute or challenge the evidence presented by the appellant. The trial court failed to consider the fact that the respondent had acknowledged the existence of a valid written sale agreement and had performed, at least partially, in terms of the agreement by making the initial payment of R30 000. The trial court failed to acknowledge that the appellant testified that the directors of the respondent complied with section 85 of the Companies Act 1973.

[37] In conclusion, from the evidence presented, the appellant clearly established *prima facie* evidence at the closure of his case. At the closure of the appellant's case, there was evidence upon which a court might find for the appellant. In my view, the respondent must not be permitted to shelter behind the procedure of absolution from the instance. The registration of the resolution with CIPC falls within the knowledge of the respondent as the appellant has formally resigned from his position as a director within the respondent organisation. Our courts have stressed that if certain facts in issue are within the knowledge of the defendant, the court should take this into account and more readily refuse to grant absolution from the instance. (*Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-4)

[38] The respondent must explain why it has not paid the appellant the amount that the parties agreed upon. The respondent must be afforded the opportunity to address the assertions made by the appellant during his evidence in chief, particularly concerning the claims that Mr Mjebeza and his co-director bought expensive luxury vehicles following the appellant's resignation. This is of particular significance in light of the respondent's plea, which asserts that subsequent to the conclusion of the sale agreement, the respondent's liabilities exceeded its assets, resulting in a state of insolvency.

c. Conclusion

[39] In the circumstances, I agree with the appellant's counsel that the appellant has proven that the trial court committed several material or demonstrable

misdirection in respect of its factual findings on the evidence of the appellant during the trial. Furthermore, the appellant has proven that the court *a quo* erred by failing to properly apply the principles applicable to an application for absolution from the instance at the closure of the plaintiff's case.

Order

[40] In the result, I would propose the following order:

- 40.1 the appeal is upheld.
- 40.2 the order of the trial court granting absolution from the instance be set aside.
- 40.3 the matter be referred to the trial court for continuation.
- 40.4 the respondent is ordered to pay costs hereof on a party and party scale including counsel's costs on Scale B.

LEKHULENI J
JUDGE OF THE HIGH COURT

I agree:

NZIWENI J
JUDGE OF THE HIGH COURT

I agree and it is so ordered:

FORTUIN J
JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant: Adv Rysbergen

Instructed by: MacGregor Erasmus Attorneys

For the Respondent: Adv Holland

Instructed by: Maguga Attorneys