



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

JUDGMENT

Not Reportable

Case no: 19172/2022

In the matter between:

LIBERTY GROUP LIMITED

PLAINTIFF

and

KOKERBOOM MANAGEMENT (PTY) LTD

FIRST DEFENDANT

PIERRE JACQUES THERON

SECOND DEFENDANT

Neutral citation: *Liberty Group Ltd v Kokerboom Management (Pty) Ltd and Another* (Case no 19172/2022) [2025] ZAWCHC 500 (28 October 2025)

Coram: NUKU J

Heard: 9-11 June, 11 August, and 11 September 2025

Delivered: 28 October 2025

Summary: Contract – Party claiming payment based on a contract is required to plead and prove the terms of the agreement and present evidence that brings its claim within the terms of the agreement.

ORDER

1. The absolution from the instance is granted with costs, including costs of counsel, on Scale B
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JUDGMENT

Nuku J:

Introduction

[1] The plaintiff sues the defendant for the repayment of R409 258.11, alternatively R345 758.11, plus interest from 22 December 2022, and costs on an attorney-client scale. The initial claim was for R518 230.95, based on a fee account and a certificate of balance attached to the plaintiff's particulars of claim as "POC6" and "POC7." The plaintiff's claim is based on three agreements discussed below.

[2] The first agreement, termed ‘Affiliate Operation Agreement (Entrepreneurs Division)’ (“Affiliate Agreement”), attached to the plaintiff’s particulars of claim as “POC1”, was signed on behalf of the first defendant on 9 March 2017.

[3] Under the Affiliate Agreement, the plaintiff appointed the first defendant, effective from 1 March 2017, to perform the outsourced activities described in annexure “A” to the Affiliate Agreement. The defendant would be paid the fees specified in annexure “D” of the Affiliate Agreement. However, annexure “D” to the Affiliate Agreement was blank—an issue the defendants raised, which I discuss later in the judgment.

[4] The plaintiff pleaded the following terms of the Affiliate Agreement that are relevant for the present purposes:

- (a) Any advances made to the first defendant at any time against the fees to be earned or amounts advanced to it for any purpose whatsoever, would constitute debts owed by the first defendant to the plaintiff, which the plaintiff could call upon to be repaid at any time;
- (b) Should such debts remain outstanding in excess of 30 days they would attract interest at 2% above the prime overdraft rate as charged from time to time by the Standard Bank of Africa Limited, or such other rate as may be determined by the divisional director or his designated nominee or the maximum rate permitted in terms of the applicable credit legislation, whichever is lesser;

- (c) A certificate setting out the indebtedness of the first defendant to the plaintiff, signed by the divisional director or his designated nominee, would be *prima facie* evidence of such indebtedness and would be valid as a liquid document for the purpose of obtaining provisional sentence or summary judgment against the first defendant;
- (d) Should a financial advisor allocated to the first defendant terminate his agreement with the plaintiff all debit and credit flows relating to that former financial advisor would be for the account of the first defendant;
- (e) The plaintiff could pay fees in respect of services rendered by the first defendant in advance at its sole discretion;
- (f) The plaintiff reserves the right to debit any fees from the first defendant, at its sole discretion, should services not be provided by the first defendant in accordance with the plaintiff's internal rules and standards;
- (g) The plaintiff could change annexure "D" from time to time at its sole discretion;
- (h) No fee whatsoever would accrue or be payable or paid after the termination of the Affiliate Agreement;
- (i) On termination of the Affiliate Agreement, payment of the fee to the first defendant in terms of clause 4 thereof would be subject to the liquidation or

set-off of all monies owing to the relevant parties and compliance by the first defendant with section 8.3 thereof; and

- (j) The Affiliate Agreement was the entire agreement between the parties and could only be amended or modified in writing and signed by all parties with the plaintiff represented by a head office manager.

[5] The second agreement, called “Partnership Funding New Entrepreneur Operation-Funded” (“Funding Agreement”), was signed on 10 May 2017. The Funding Agreement aimed to help the second defendant develop and expand the first defendant's business. This was to be done by providing up to R640 000 in funding to the first defendant, contingent upon meeting the targets outlined in the Funding Agreement.

[6] The Funding Agreement provided for an immediate payment of R250 000, with subsequent payments contingent on the first defendant reaching at least 50% of the specified target. The agreement would terminate if the first defendant fails to meet at least 50% of the required targets.

[7] The third agreement, titled “Confirmation of Settlement and Undertaking to Repay” (“AOD”), was also signed on 10 May 2017. In the AOD, the first defendant acknowledged its debt to the plaintiff of R250 000, which was described as the amount owed on the first defendant’s commission account with the plaintiff. The AOD also records that the amount is due, owing, and payable by the first

defendant to the plaintiff in accordance with the Funding Agreement. It is common cause that this amount was later paid to the first defendant on 12 May 2017.

[8] According to clause 1.1 of the AOD, the plaintiff would write off the amount paid if the first defendant meets all the targets specified in the Funding Agreement. If the first defendant fails to meet the targets, the repayable amount would be calculated by multiplying the percentage of Net Production Credits and Net Case Count not achieved by the amount advanced under the Funding Agreement.

[9] On 9 March 2017, the second defendant signed a deed of suretyship, agreeing to be jointly and severally liable as a surety and co-principal debtor *in solidum* with the first defendant for payment on demand to the plaintiff of all sums and money that the defendant could then or in the future owe or be indebted to the plaintiff due to causes arising from the agreements between the first defendant and the plaintiff.

[10] Alleging the defendant's failure to meet the targets required according to the Funding Agreement, the plaintiff seeks repayment of R250 000 or the reduced amount of R186 500. The remaining part of the plaintiff's claim, amounting to R159 258.11, relates to the advance commission payments made under the Affiliation Agreement.

[11] Relying on an email sent by the second defendant to one of the plaintiff's employees, Ms Chantal Muldoon ("Ms Muldoon"), dated 26 October 2022, the plaintiff alleges, in its particulars of claim, that the second defendant admitted the defendants' liability to the plaintiff in respect of the amount owed to the plaintiff.

[12] The defendants raised various defences in their pleading, some of which, based on my reading of the heads of argument filed on their behalf, were not pursued. In this judgment, I only outlined the three defences that the defendants persisted with.

[13] The defendants' first defence is to dispute their liability to the plaintiff for the claimed amount. Their second defence is that they are excused from performing under the three agreements because the plaintiff breached additional oral terms of the Funding Agreement. Their final defence is that the plaintiff's claim has prescribed under s 11 of the Prescription Act, 69 of 1969 ("Prescription Act"), because the plaintiff failed to serve the summons before the end of 2020.

[14] The plaintiff responded to the defendants' plea of prescription, denying that its claim has prescribed because (a) the debt became due upon the termination of the Affiliation Agreement on 31 January 2020, or (b) the second defendant's acknowledgment of liability on 26 October 2022, interrupted the running of prescription according to s 14(1) of the Prescription Act, or (c) the AOD constitutes a promissory note as defined in s 87(1) of the Bills of Exchange Act, 34 of 1964, as amended (Bills of Exchange Act), meaning the R250 000 amount is

subject to a six-year prescription period under s 11(c) of the Prescription Act, which has not expired.

Issues for Determination

[15] Having regard to the above, the issues that require determination in this matter are the following:

- (a) Whether the plaintiff has established the defendants' indebtedness, if it has,
- (b) Whether there are additional oral terms to the Funding Agreement, and if so, whether the defendants are excused from liability on account of the plaintiff's breach of those terms, and if not;
- (c) Whether the plaintiff's claim has become prescribed.

[16] Before addressing each of these issues, it is necessary to outline the evidence led at trial. In this regard, the plaintiff called two witnesses, Mr. Greg Hurly ("Mr. Hurly") and Ms. Muldoon. The defendants, on their part, only called the defendant.

The Evidence

[17] The plaintiff employed Mr. Hurly at the time of signing the agreements and is familiar with both defendants, including the second defendant's role in the second defendant's business.

[18] He testified that the Affiliate Agreement is the plaintiff's standard contract when engaging with financial services brokerage entities like the first defendant. He confirmed that the plaintiff acted according to the Affiliate Agreement after the first defendant signed it. This included assigning a code to the first defendant in the plaintiff's system, which allows the plaintiff to monitor the first defendant's performance and ensure it pays any amounts due under the Affiliate Agreement.

[19] He confirmed the clauses 3.9.1, 3.9.2, and 3.9.3 of the Affiliate Agreement. The contents of these clauses are summarized in paragraph [4] above (3.9.1 in subparagraph (a), 3.9.2 in subparagraph (c), and 3.9.3 in subparagraph (d)).

[20] He also testified that there is a Schedule of Commissions that is part of the contract documents signed by the second defendant. The Schedule of Commissions outlines how management fees are to be paid based on the number of Production Credits achieved by the first defendant.

[21] He testified that it is not common practice for the Funding Agreements to include additional oral terms. He confirmed that the plaintiff only paid R250 000 under the Funding Agreement because the first defendant failed to meet the required targets.

[22] His evidence was that the Funding Agreement lasted for the entire four-year period or until it was terminated. In cases where clause 7a applies, the full amount of funding that was advanced must be repaid to the plaintiff.

[23] He testified that, after the first defendant signed the AOD, the plaintiff opened a loan account for the first defendant in its system, with an initial balance of R250 000 to be paid in this case. Should an earnout occur, no repayment is required by the first defendant; however, if the first defendant falls short of its targets, repayment of the funding advances is payable in accordance with clause 1.1 of the AOD, with a proportionate amount to be repaid rather than the full amount.

[24] He confirmed that no written notice of termination was given to the first defendant and that the second defendant closed the first defendant's business at the end of June 2019, when the second defendant joined Standard Bank.

[25] Although admitting that the plaintiff might have been at fault regarding the defendants' related entity operating in a different market segment, he denied that the plaintiff was at fault regarding its obligation toward the first defendant.

[26] The plaintiff employs Ms Muldoon in its debt management department as a debt administrator. She was responsible for preparing the reconciliation statement and collating all relevant documents for these proceedings.

[27] She had interacted with the second defendant before these proceedings started. During these interactions, the second defendant tried to negotiate a settlement, admitted his debt to the plaintiff, and showed his willingness to the plaintiff. These negotiations, however, came to nothing because she was not happy with the amount that the second defendant was offering to pay.

[28] She confirmed that the defendants' debt included funding paid under the Funding Agreement and commission lapses related to commissions paid in advance to financial advisers employed by the first defendant.

[29] She explained that when compiling the reconciliation statements, she sourced the information from the system, and this data is the same as what would be included in the monthly statement sent to the first defendant. She confirmed that the amount of R250 000 was paid in May 2017.

[30] She demonstrated how the amounts listed in the Management Fee, Practice Summary, Commission Summary, and Commission Statements are correctly reflected in the correct reconciliation statement. She also explained that the first defendant continued to receive commission payments for the financial advisors who had left its employment before the termination of the Affiliate Agreement. However, after the termination of the Affiliate Agreement, the first defendant would be required to repay any advances if the policies had lapsed.

[31] Under cross-examination, she admitted that the reconciliation statement relied on in the particulars of the claim differs from the correct reconciliation statement. This was because R200 000 and R120 000 were included in the reconciliation statement attached to the particulars of claim, amounts that should not have been included.

[32] The second defendant confirmed the agreements made with the plaintiff. He testified that the first defendant operated in the higher-income market segment. Another related entity, Salt, served the lower-income segment, also known as the mass market. Mr. David Malan (“Mr. Malan”) was primarily responsible for Salt's operations, while he (the second defendant) was in charge of the first defendant's operations.

[33] It was Mr. Malan's idea that they should approach the plaintiff. When they did, they met with Mr. Chris Luck (“Mr. Luck”), who referred them to Mr. Khanda Mkhize (“Mr. Mkhize”). They had productive discussions with Mr. Mkhize about the mass market. During the same meeting, they also discussed how the mass market business could generate leads for the first defendant.

[34] Mr. Mkhize informed them about 300 existing leads in the Western Cape. He promised to provide the necessary contact details so they can follow up on

these leads. They also discussed a system called Ilanga that would help generate additional leads.

[35] When the discussions above took place, the second defendant was still operating a brokerage tied to Sanlam, and as such, he could not begin discussions about an agreement between the first defendant and the plaintiff.

[36] After an agreement was reached between the plaintiff and Salt, the second defendant decided to transfer the first defendant's business to the plaintiff. He had discussions with Mr. Luck, which led to the signing of the agreements at issue in these proceedings.

[37] The plaintiff did not fulfil the promises made by Mr. Mkhize regarding the 300 leads and access to the Ilanga system, as these were provided to the plaintiff's internal financial advisors.

[38] He referred to annexure "D" in the particulars of the claim, which was blank. However, he testified that the fee information was available on the plaintiff's website.

[39] He confirmed the payment of R250 000 and stated that no additional payments were made under the Funding Agreement because the first defendant

failed to meet the required targets. He testified that the first defendant never came close to achieving the 50% target, which, according to clause 7a of the Funding Agreement, would lead to the termination of the agreement.

[40] He testified that he did not fully understand how Production Credits worked because they were never explained to him. He also testified that the calculation mentioned in clause 1.1 regarding the proportional reduction of the amount payable if the targets were not met was never performed. The essence of this was that since they had failed to reach the target and the Funding Agreement was terminated, not all of the R250 000 was repayable. Instead, the defendants would be liable for a reduced amount reflecting what the first defendant had achieved.

[41] He confirmed that he had bound himself as a surety and co-principal debtor with the first defendant. He confirmed that the first defendant closed down during 2019 and that he started working for Standard Bank on 1 June 2019. He also confirmed that the code allocated to the first defendant was terminated on 31 July 2019.

[42] He testified that he was never provided with a detailed breakdown of what the first defendant owed to the plaintiff until 21 December 2020. He was not happy with the amount reflected as owing in that breakdown.

[43] Finally, he testified that he would never admit to a debt he did not owe and that his intention was always to settle the dispute with the plaintiff amicably. That

concludes the evidence. Next, I will address each of the issues mentioned earlier, starting with the issue of proof of the amount owed.

Has the plaintiff proven the amount owed?

[44] It was argued on behalf of the defendants that the plaintiff cannot rely on the certificate of balance attached to the particulars of claim because it has been shown that it does not accurately reflect the amount owed.

[45] I did not interpret the plaintiff as continuing to rely on the certificate of balance, as evidenced by the decrease in the amount claimed. The amounts the plaintiff claims, as set out in paragraph [1], are less than the amount reflected in the certificate of balance.

[46] The effect of the plaintiff's inability to rely on the certificate of balance, it was argued, is that the plaintiff now bears the full onus of proving the amount of its claim, which includes (a) proof of the contract's terms, and (b) evidence demonstrating that the claimed amount falls within those terms.

[47] It was argued that the plaintiff failed to discharge the onus in that:

- (a) The terms used in the various agreements, including the schedules on pages 174 to 220 of the bundle, are not clearly explained, and they were not

adequately clarified at trial by the plaintiff's witnesses, leaving one confused about the terms of the contracts the plaintiff relies on;

(b) When obvious gaps in the agreements were pointed out to Mr. Hurly, additional schedules related to commissions, fees, and production credits were added to pages 383 to 425. These reinforced the complex labyrinth that had to be navigated during trial to understand which contractual terms should apply;

(c) Then, when it was time to present the necessary facts, a number of "entrepreneur management fee summary statements" and "practice fee summary statements", containing various entries, as well as a so-called "legacy management fee recoveries summary statement" were added to the trial bundle.

(d) The factual basis for the various entries in these statements was not something that either Mr. Hurly or Ms. Muldoon could testify about, given their lack of personal knowledge; and

(e) Without a proper explanation from the plaintiff on how to determine the claimed amount, referencing (a) the contract terms and (b) the facts, it is impossible to understand how the contractual terms the plaintiff relies on should be applied to the relevant facts of this case to reach the claimed amount.

[48] In light of the shortcomings in the plaintiff's case, it was argued that an absolution from the instance should be granted. It was submitted that a court may do so at the end of the whole case.¹

[49] There are several issues with calculating the plaintiff's claim. Starting with the amount claimed under the Funding Agreement, it is clear from clause 1.1 of the Funding Agreement that 'the amount repayable shall be calculated as the percentage of Net Production Credits and Net Case Court not achieved multiplied by the amount advanced in terms of the Agreement.'

[50] The plaintiff's claim related to the Funding Agreement seeks repayment of R250 000 or a reduced amount of R186 500. The plaintiff's evidence indicated that the first defendant achieved some Net Production Credits and Net Case Counts, even though these were below the target. It follows that, based on clause 1.1 of the Funding Agreement, the amount of R250 000 should be reduced in proportion to the Net Production Credits and Net Case Counts achieved by the first defendant.

[51] The plaintiff presented no evidence to demonstrate how the reduced amount of R186 500 is calculated. The first time that this amount came to light was in the plaintiff's heads of argument, where a complex calculation is presented in the footnotes with numbers, percentages, and amounts that were not canvassed with any of the witnesses.

¹ Erasmus, Superior Court Practice, Vol 2, p39-19/20, *Forbes v Golach & Cohen* 1917 AD 559 and *Liberty Group Ltd t/a Liberty Life v K & D Telemarketing* (75525/2010) [2015] ZAGPPHC 1135 (4 September 2015).

[52] I do not doubt that the defendants owe the plaintiff some amount under the Funding Agreement. However, the lack of evidence regarding the amount owed leaves this court unable to determine it with confidence.

[53] Turning to the amount owed under the Affiliate Agreement, the plaintiff's major problem arises from the fact that the schedule intended to be attached as annexure "D"—which was supposed to outline the basis of remuneration and the clawback of lapsed policies—was blank.

[54] I can accept that, at any given time, there is a schedule based on which the plaintiff remunerates its tied agents, but such evidence, as with the evidence relating to the amount due under the Funding Agreement, was not presented to this Court.

[55] As submitted on behalf of the defendants, the witnesses who testified had no personal knowledge of the entries reflected in the system or whether they were properly recorded. A case in point is the entries that were made after the termination of the Affiliation Agreement in June 2019. Even the reconciliation statement that the plaintiff seeks to rely on contains credits and debits that extend all the way to March 2021, almost two years after the termination of the Affiliate Agreement.

[56] The plaintiff is the party best suited to explain how these amounts are calculated. Understandably, it relied on the certificate of balance when the action was started, but things changed when it could no longer rely on it after it was shown to be wrong. When that happened, as argued on behalf of the defendants, the plaintiff needed to (a) prove the terms of the agreements, and (b) show evidence that supports its claim within the contract's terms. The plaintiff has failed to do this, and as a result, the Court cannot come to its assistance.

[57] The result is that the absolution from the instance will be granted with costs. This conclusion renders it unnecessary for me to determine the remaining issues regarding the additional terms of the Funding Agreement and prescription, as their determination depended on the outcome of the first issue.

Order

[58] As a result, the following order shall issue:

The absolution from the instance is granted with costs, including costs of counsel, on Scale B

LG NUKU
JUDGE OF THE HIGH COURT

Appearances

For plaintiff: J Scallan

Instructed by: Gerings Attorneys, Johannesburg

C/O: Lamprecht Attorneys, Cape Town

For respondent: RB Engela

Instructed by: Snyman Attorneys, Paarl

C/O: Johan Victor Attorneys, Cape Town