



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

Case no: 7287/24

In the matter between:

ARTHUR FREDERICK MERKEL

Plaintiff

And

CONSTANTINE GODFREY VARLEY

First Defendant

BASIC BLUE TRADING

Second Defendant

Coram : Nziweni, J

Heard : 15 May 2025

Delivered : 10 November 2025 (electronically)

Summary : Mis joinder- a dormant Close Corporation remains a legal entity with its own legal personality, which ceases only upon formal deregistration. - If evidence shows an agreement involved a particular entity, that entity is properly included in legal proceedings, irrespective of its operational status at the time.

Summary judgment – summary judgment applications have a specific timeframe after the defendant files their plea. A procedural rule setting a timeframe for filing a

replication does not force a plaintiff to choose between filing the replication or applying for summary judgment - both actions can be taken.

Summary judgment - while efficient, is only appropriate when no genuine issue of material fact exists or the defence is deemed a "sham" lacking a triable issue - genuine factual disputes requiring oral evidence necessitate a conventional trial. In this case, the plaintiff claims a written "sales agreement" (POC1) while the defendants assert an oral "joint venture" agreement, presenting conflicting versions of the contract and its nature. The court must determine if the evidence is sufficient to ascertain the true agreement or if a trial is required to resolve these disputes - A bare allegation in a plea does not constitute evidence and it must be substantiated with supporting proof, especially when countered by actual evidence presented by the opposing party.

ORDER

The Defendants are liable jointly and severally, the one paying the other to be absolved for:

- (a) Payment of the sum of R1 318 390.00.
 - (b) Interest on the aforesaid sum a tempore morae;
 - (c) Costs of suit.
-

JUDGMENT DELIVERED ELECTRONICALLY

Nziweni, J

Introduction and background

[1] The plaintiff lodged this application for summary judgment against both defendants. Before the issuance of this application, the plaintiff instituted an action, with which he seeks to recover an amount of R1 318 390, 00 from the defendants. In the particulars of claim, the plaintiff alleges that the parties entered a partly written,

partly oral agreement [“the investment agreement”]. According to the plaintiff, the investment agreement was concluded in May 2020.

[2] The plaintiff also alleges that in January 2021, he entered into an oral loan agreement with the defendants. The loan amount was R150 000.00. Basically, for his claim the plaintiff is relying on two documents and verbal agreement, in respect of the loan. The first document is POC1 [what the plaintiff refers to as the investment agreement], and the second one is what the plaintiff terms the defendant’s undertaking to repay [“POC 2”].

[3] The plaintiff contends that in POC2, the defendants undertook to repay all the amounts due, including the purchase price for the fifty percent members’ interest in the second and the loan amount.

[4] According to the plaintiff, the material terms of the “investment agreement” were:

- a. the plaintiff would pay an amount of R1 218 389.00 [the purchase price] into a bank account nominated by the first defendant;
- b. upon payment of the purchase price and in his capacity as sole member of second defendant, first defendant would sell fifty percent of his member’s interest in second defendant to Plaintiff for a stipulated purchase consideration of R1.00.
- c. the fifty members’ interest in second defendant would thereafter be transferred to Plaintiff as soon as reasonably possible;
- d. and when the payment of the purchase price, the farm, Zwartberg View Mountain Lodge, would be registered in the second defendant’s name.

[5] The plaintiff contends that he complied with his obligation, and the farm was registered in the second defendant’s name. The plaintiff further alleges that on the other hand, the first and second defendant failed to comply with their obligations, in

terms of the investment agreement by failing and / or refusing to transfer 50 % of the members' interest in second defendant to plaintiff.

[6] The plaintiff further asserts that during November 2020, the parties terminated the investment agreement and the defendants agreed to repay the purchase price to the plaintiff.

[7] Pursuant to the plaintiff's delivery of summons, the first and the second defendant filed a special plea together with a plea. In the special plea, the defendants allege that the joining of the second defendant in these proceedings is a misjoinder as the second defendant was dormant at the time of concluding what the defendant terms to be an 'alleged investment agreement'.

[8] On 14 August 2024, the plaintiff filed a replication to the defendants' plea. On 20 August 2024, the plaintiff filed the application for summary judgment.

[9] The defendant opposes the application on various grounds. Inter alia, the defendants raise the defence that the parties entered into a joint venture agreement and in so doing; the plaintiff accepted the risk of potentially losing his capital investment(s). The defendants asserts that the defence constitutes a bona fide defence for purposes of summary judgment.

[10] Furthermore, the defendants contend that a joint venture agreement was concluded with the following terms:

- a. the plaintiff would make available an amount of R 1 000 000,00 towards the venture capital in respect of the joint venture;
- b. in turn the plaintiff would be allocated a 50% membership interest in second defendant.
- c. that as part of the joint venture, second defendant would purchase a fixed property commonly known as Portion 9 of the Farm Scuinspad No 83, Western Cape Province and Portion 28 of the Farm Scuinspad No 81, Western Cape Province and also the business known as Zwartberg Mountain View Lodge as a going concern.

- d. that the plaintiff and the first defendant would equally be responsible for the expenses in the running of the aforementioned business and the costs of its improvement.

[11] At the same time, the defendants aver that this case is not an appropriate case for summary judgment. The defendants take the position that there are genuine issues that require a trial. The defendants further asserts that the fact that there is a dispute of facts in this matter, justify dismissal of the summary judgment.

[12] The defendant also raised a point of law that the fact that the plaintiff filed replication to the defendants' plea, waived his right to apply for summary judgment.

Evaluation

(a) Misjoinder of the second defendant

[13] The second defendant claims that it was dormant when the alleged agreement was made. The second defendant asserts that it only became relevant later as a vehicle for a joint venture involving just the plaintiff and the first defendant. Therefore, it is asserted that; any claim should be directed solely on the first defendant.

[14] First and foremost, the claim that the second defendant was dormant is a mere allegation in the special plea and there is no evidence supporting the defendants' assertion. In this regard, the defendants are simply making a conclusory statement. As such, the conclusory statement does not constitute evidence.

[15] For that matter, in this case it is not disputed that the agreement that was reached between the parties pertained to the shares of the Close Corporation ("CC"). Moreover, in contrast, the plaintiff has provided evidence (POC1) showing that on May 14, 2020, he was sold a member's interest in the second defendant. Thus, the evidence is inconsistent with any such assertion, because it is clear that POC1 indicates that the CC was active at that time.

[16] Even if we were to assume for purposes of argument the correctness of this assertion, in terms of South African Law, a "dormant" CC remains a legal entity. The argument postulated by the defendants, however, overlooks the fact that the legal personality of a CC only ceases to exist once it is deregistered. Furthermore, this contention of a misjoinder conflates deregistration and dormancy. It does not follow that a CC loses its status as a legal entity when it stops active trading or business operations [i.e. when it becomes dormant]. This special plea is a spurious argument and entirely without foundation.

[17] Thus, I am unable to accept the submission made regarding the misjoinder assertion; I am satisfied that the second defendant is properly joined in these proceedings.

[18] It follows from all these considerations that this special plea is without any merit. And stands to be dismissed.

(b) Rule 32

[19] Rule 32 has multiple purposes. It is well established that inter alia, the purpose for summary judgment mechanism is aimed at weeding out meritless defences or unnecessary trials, early in litigation and before they reach trial.

[20] Rule 32(1) to (4) reads as follows:

(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only-

- (a) on a liquid document;*
- (b) for a liquidated amount in money;*
- (c) for delivery of specified movable property; or*
- (d) for ejectment;*

together with any claim for interest and costs.

(2)(a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) The plaintiff shall, in the affidavit referred to in subrule (2)(a). verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

(3) The defendant may–

(a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

(4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence orally or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.

[21] The question which then arises is whether there is any force in the defendants' contention that the plaintiff waived his right to bring summary judgment.

(a) Has the plaintiff waived the right to bring summary judgment after taking a procedural step of filing a replication to the defendant's plea.

[22] I am very much mindful to the fact that this Court cannot change or create new laws while pretending to interpret existing ones. There is no difficulty in understanding what is meant by Rule 32. Rule 32 states explicitly that summary judgment may be applied for after a defendant has delivered a plea. Thus, summary judgment shall only be applied for upon the occurrence of a specified event. This

means that there is a window period to bring summary judgment. The window for summary judgment is after the filing of the defendant's plea.

[23] Rule 25 states the following:

“(1) Within fifteen days after the service upon him of a plea and subject to subrule (2) hereof, the plaintiff shall where necessarily deliver a replication to the plea . . .

[24] Rule 25 sets forth a peremptory timeframe for filing a replication.

[25] Therefore, in this case, the plaintiff filed its replication in accordance with Rule 25, to ensure compliance with the rule. In so doing, he fully complied with Rule 25. Proper construction of Rule 25 shows that its purpose is not to hinder the process of obtaining a speedy summary judgment. Rule 25 does not force a party to choose between filing a replication or filing an application for summary judgment; both options remain open.

[26] In so finding, this Court is mindful of the decision of this division in *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd* (9845/2022) [2023] ZAWCHC 129; [2023] 3 All SA 458 (WCC); 2023 (5) SA 439 (WCC) (29 May 2023), that buttress this court's finding, where Van Zyl AJ, stated the following at paragraphs 50,52,95 and 101:

“50. A replication also serves as a response to the defences raised in the plea and explains why they do not raise triable issues. It does not serve as amplification of the cause of action. In this sense a replication and the summary judgment affidavit under the amended Rule 32 effectively perform similar functions. There is no reason why a plaintiff should be precluded from delivering its replication simultaneously with its application for summary judgment and incorporating by reference the allegations in the replication.

52. I am of the view that the answer to the defendant's argument is that “it depends on the issues raised in the plea”. A Court dealing with a summary judgment application will have regard to the nature of the response in a replication, if delivered, in relation to the plea. Obviously, if anything in the replication (considered with the plea) indicates that there are issues that should be dealt with at trial, then summary judgment cannot be granted. The matter is then, in the words of the Task Team, “ill-

suited” for summary judgment proceedings. That does not mean, however, that a plaintiff who delivers a replication simultaneously with its application for summary judgment takes an irregular step as contemplated in Rule 30.

95. In determining whether the delivery of a replication constitutes a waiver, this Court would have to find that the plaintiff intended to waive its right to apply for summary judgment. In the absence of an express waiver, waiver of a right can be inferred from a plaintiff choosing to exercise a right that is inconsistent with another right.

101. As a final remark on this issue, Rule 32, prior to its amendment, did not permit the plaintiff to adduce evidence other than to confirm the cause of action and the amount stated in the summons. The plaintiff could also not deliver a replying affidavit in response to the defendant's affidavit. The amended Rule 32(2)(b) now not only permits but requires the plaintiff in its affidavit to "explain ... why the defence as pleaded does not raise any issue for trial". Given this obligation, a replication delivered simultaneously with an application for summary judgment cannot be regarded as a waiver by the plaintiff of its summary judgment remedy. On the contrary, in delivering a replication, the plaintiff amplifies the reasons why the defence raised in the plea does not raise triable issues. It does not amplify the plaintiff's cause of action."

[27] While several legal authorities were cited by the parties, I won't list them all here, except to note that the *Ignite* decision is sound and cannot be faulted. For that matter, as far as the filing of the replication is concerned, there are parallels between *Ignite* case and the present one. It does not matter that the replication and the summary judgment application were filed at different times in this case. The timing itself is not a decisive issue. In my view, this complaint by the defendants is rather technical in nature than substantive. In the light of what I have set out above it is axiomatic that there is no merit in this issue.

(b) Is this case amenable to be finally disposed by means of summary judgment procedure?

[28] Although summary judgment proceedings are well known for affording litigants an effective, efficient and affordable procedure compared to a conventional trial, the procedure should never compromise fairness on the altar of expeditious and cost-

effective way of resolving disputes. It is settled that summary judgment is appropriate when there is no genuine issue of material fact.

According to the defendants, the plaintiff is not entitled to summary judgment because this court is faced with conflicting versions. The defendants strongly assert that a conventional trial is best suited to make a determination about the issues between the parties.

[29] The central issue is whether the evidence presented by the parties is sufficient for the court to reach a fair and proper decision using motion proceedings. Put differently, whether a trial is necessary in order to fully comprehend the issues between the parties and the evidence.

[30] At this juncture, I find it convenient to recite the two documents, namely POC 1 and POC 2 in their entirety. The documents contained the following text:

‘POC1’

“Sales agreement Of Member’s Interest in Basic Blue Trading 458 CC

I, Constantine Godfrey Varley (ID no 6[...]) hereby sell 50% Member’s Interest in Basic Blue Trading 458 CC (registration no: 2006/037804/23) to Arthur Frederick Merkle (ID no ...) for R1-00 (one rand) with immediate effect.

Signed at Somerset West on 14 May 2020”

‘POC 2’

“On Wednesday, March 30, 2022, 9:16PM, Constantine Varley v[...] wrote:

Hi Arthur

Ek weet nie waar jy die idee kry dat ek jou nie ernstig opneem nie. My magtig ek slaap nie eers meer in die aand soos ek dink aan planne om jou geld bymekaar te maak nie. En ek deur al die mense in die steek gelaat raak.

Ons is hard besig om die boeke agter mekaar te kry sodat ons die aansoeke kan in die by die bank vir ‘n verband. Aangesien ek ook vir Jenny-hulle teen 15 Mei hulle geld moet gee.

Ek verstaan dat almal se omstandighede verander het sedert die koop. En niemand van ons gedink het dat dit so gaan uit draai nie.

Wat ek nie kan verstaan nie. IS wat het verkeerd gegaan met ons oorspronklike plan daarvan is vir “life” toe ons die transaksie bespreek het, het in ons sitkamer en toe ek jou 20% aandele aangebied het en jy se toe nee jy wil 50% hê. Ek en Hannalize het jou daardie tyd gesê onthou ons koop om nie weer te verkoop nie. So jou voorstel **“Ek voorstel om te verkoop.”** Is nie ‘n opsie nie en dit was so van dag een af.

Die kontrak wat ek die slag op gestel het was die mees regverdigste kontrak wat ons albei beskerm het.

Ek het om daardie stadium ook my somme gemaak om ‘n vennoot hê wat die helfte van die kostes sou dra was dit baie maklik haalbaar gewees. NOOIT het gedink ek gaan al die kostes moet dra nie. EN wat ek dalk verkeerd gedoen het was om alles wat ek het te investeer in die plaas om al die upgrades te doen. Maar ek moes dit doen met die hoop dat ek voete kan kry dat die plaas net weer by die punt kom waar dit vir homself kan betaal en dan dalk ook genoeg geld gemaak het om van die skuld ook te betaal. Wel Covid het ons goed almal deur die ore gewerk.

Wat my wel seermaak is dat jy my oor dieselfde kam skeer as Mario. Die plaas sou jou in geen moeilikheid laat beland het nie en as jy met enige iemand wat iets verstaan van belegging, sal vir jou toe oe se die plaas se koop was ‘n goeie transaksie en jou doel was suiwer en ongeag jou gesondheid of enige ander situasie en ons bly by oorspronklike redes hoekom ons dit gekoop het – vertsaan ek glad nie jou stelling van **“Ek is woedend met myself dat Ek myself in die situasie bevind. Self created (I know) deur te goedhartig te gewees het en te veel mense te help... – uiteindelik op my koste”**, want tot hede het niks aan ons kant verander nie. Nog nooit het ek van jou enige iets verwag nie of hoef jy ons vriendskap te gekoop het nie. Jy is en sal altyd een van ons wees ongeag.

Ons is nie Mario vir wie jy moet onderhou of moet gelukkig hou nie en jou in die situasie laat beland het waar jy jou nou bevind nie. En waarvoor ons nou die druk en die prys moet betaal nie. Maar dit daar gelaat.

Ek hoop om op die laatste 15 April al die aansoek in te hê vir 'n verband of vir 'n fasiliteit sodate ek vir jou en Jenny kan uitbetaal. Ek is steeds besig om my aandele in die aftree oord los te kry sodate ek daardie fondse kan uit kry. So ook is ek heeltyd besig om die ou wat vir my geld skuld te kry dat hy my terugbetaal, Want tussen daardie twee behoort ek genoeg te hê om jou geld terug te gee.

Ek ter selfde tyd besig om my fondse uit 'n ander ontwikkeling los te maak, maar dit gaan dalk met 'n moerse premie wees dat ek net my kapitaal met heersende rente koers gaan terug kry vs. 'n opbrengs van 1:8000, maar as dit gaan om ons vriendskap nie skade te laat lei nie, doen ek dit.

So ek wil jou die versekering gee dat ek jou nie ignoreer nie of dat ek jou nie ernstig op neem nie. En dat ek regtig alles probeer doen om die situasie op te los ASAP. En al is die laaste ding wat ek moet doen sal ek jou elke sent terug gee. Al verstaan ek tot vandag toe nie wie vir jou of wat jou van ons oorspronklike plan laat verander het nie. Maar dit hoef jy ook nie aan my te verduidelik nie. Jy wil uit en dit respekteer ek en daar doen ek alles om dit moontlik te maak. Maar asb verstaan ook date ek oor 'n klomp balle in die lug moet hou en die plaas soek sy pond vleis ook. EK is oortuig date die skip is besig om te draai en daarom is ek bereid om my nek baie ver uit te steek om dit wat nodig is te gaan leen om vir jou te betaal.

So om op te som:

- Ons is besig om boeke asap af te handel sodate die state afgeteken kan raak
- Ons wil voor 15 April al ons aansoeke ingedien he by die volgende banke ABSA, FNB, Standard Bank en Investec. Om die nodige verband of fasiliteit te kry om plaas te finansier.
- Dan wag ons net vir die registrasie van die fasiliteite of die verband en betaal almal se geld voor of op 15 Mei terug.

Ek hoop jy sal verstaan.

Vriendelike groete

Mnr Constatine G Varley”

[31] The defendants claim that the plaintiff provided R1,000,000 as venture capital for a joint business venture. The defendants further contend that the POC1 document does not constitute an investment agreement, as evidenced by its failure to even contain the word 'investment'. The defendants' plea essentially denies the formation of any investment agreement.

[32] In addition, the defendants deny that the plaintiff complied with his obligations in terms of the joint venture agreement.

[33] The defendants submitted in their plea that the plaintiff had expressed an intention to terminate his participation in the joint venture.

[34] The defendants do not deny that POC2 was authored by the first defendant. However, the defendants deny that POC2 constitutes an undertaking as alleged by the plaintiff. The defendant submits that POC2 constitutes non-binding negotiations aimed at exploring potential methods of reimbursing the plaintiff's venture capital and does not establish any legal obligation or admission of liability.

[35] According to the defendants, payments made to the plaintiff by them were friendly gestures aimed at repairing their relationship.

[36] The defendants admit that 50% interest was not transferred to the plaintiff. The defendants further aver that the reason why the first defendant's 50% membership interest was not transferred to the plaintiff was because it was going to complicate the plaintiff's Tax matters in Switzerland. The defendants dispute that in November 2020, they ended 'the investment agreement' with the plaintiff and agreed to refund the purchase price.

(c) Is there a genuine dispute of material facts that raise a genuine triable issue.

[37] Factual controversies and disagreements are typical in action proceedings. This explains precisely why action proceedings involve the presentation of oral evidence and cross-examination. Thus, trials are best suited and equipped to handle factual disputes. Trials have the most appropriate mechanisms to resolve them [factual disputes].

[38] It is now settled by many well known decisions that summary judgment is only appropriate for resolving factual disputes if the court determines the defence is not genuine and lacks a triable issue (i.e., is a "sham" defense). See *FirstRand Bank Limited v Badenhorst NO and Others* (2022/5936) [2023] ZAGPJHC 779 at para 34 (10 July 2023)

[39] In the present case, to determine if there is a genuine dispute over the facts of the case, I must first consider whether this court can accurately establish exactly what kind of agreement the parties reached.

(d) what agreement did the parties reach

[40] This case is not about whether the agreement between the parties is ambiguous or legally sound. It is clear therefore that the real and the obvious question that arises is, whether the evidence presented is sufficient to precisely identify the specific agreement that was made. In this summary judgment application, there are opposing contentions as to the agreements entered by the parties.

[41] Although the specifics of each case vary, even at the summary judgment stage, this Court should be satisfied that the evidence presented by the parties demonstrates objective manifestation of mutual assent to establish that the parties agreed to POC1. At the same time, the courts generally aim to resolve disputes based on the actual agreement between the parties, not on a technical mislabelling.

[42] I should also mention that, for a plaintiff to be successful in a claim involving breach of contract, the plaintiff must demonstrate that; there was an agreement, the defendant failed to meet their contractual obligations, and that the plaintiff performed

their part of the contract. Thus, it is critical at these proceedings that it should be ascertainable as to what agreement the parties agreed upon. The case of the plaintiff asserts that POC1 is the written version of the parties' agreement that was concluded in May 2020.

[43] As far as POC1 is concerned, this case really turns on the question of whether this written instrument constitutes part of the true agreement the parties agreed upon. The evidence in this matter shows that the parties had indeed entered into some form of an agreement, but as previously mentioned, they sharply disagree as to the nature of the contract.

[44] With the foregoing framework in mind, I am well alive to the fact that the character of the contract is determined by the intentions of the parties, which in turn [intentions of the parties] are evidenced or manifested by the terms of the contract.

[45] As is clear from the case-law; in determining the meaning of a contract, the court must give effect to the clear intentions of the parties as set forth in the express terms of the written instrument. Thus, a mere difference of opinion between contracting parties concerning the agreement's purport or character does not establish ambiguity. The true meaning is to be derived from an analysis of the surrounding circumstances and the clear, unambiguous language of the instrument. With these guiding principles in mind, I turn to the facts of the present case.

[46] Starting with the document itself [POC1]. It is abundantly clear from the evidence [more specifically, the particulars of claim], that the plaintiff's case largely hinges on the document POC1. It should be noted that the document POC1 is clearly titled "sales agreement of member's interest."

[47] POC1 provides for the sale of 50% of the first defendant's member's interests in the second defendant to the plaintiff. I find that POC1 on its face purports to be a sale transferring ownership and possession to the purchaser for a stipulated cash price. The pertinently stipulated terms in POC1 provide that the parties agreed that the first defendant, as the owner of 50% member's interest in the second defendant,

sells the plaintiff the 50% member's interest in the second defendant for R1.00, with immediate effect.

[48] The defendants' version does not cater for the existence of POC1. Likewise, the assertion by the defendants merely suggests that they do not bear knowledge of the character or essential terms of POC1.

[49] In their plea, the defendants simply deny the plaintiff's allegations regarding the main terms of the investment agreement, and they also deny that the attached document, labelled "POC1," is a copy of that agreement.

[50] Notably, the defendants are silent regarding the signature on POC1 that purportedly belongs to the first defendant; they do not address its authenticity in their plea. The defendants only argue that POC1 is not an investment agreement because the word "investment" is absent from the document. This, they argue, supports their assertion that the parties had formed a joint venture agreement.

[51] The defendants simply assert that the parties entered into an oral joint venture agreement. Given the circumstances of this case, it is quite strange that the defendants have not taken a firm or clear position regarding the document POC1. Fundamentally, the defendants do not pertinently state that the plaintiff is attempting to hold them to an agreement they never consented to. Instead, the defendants merely insists that POC1 does not constitute an investment agreement.

[52] In this case, the plaintiff has presented documentary evidence to show that the parties entered into a partly written agreement. The documentary evidence presented by the plaintiff also contains a signature purported to be that of the first defendant. Thus, the plaintiff presented evidence to back up his case. In the circumstances, the defendants ought to have presented evidentiary material to back up their assertions.

[53] While a defendant seeking to avoid summary judgment is not expected to present oral witness account, they cannot rely only on simple denials or general claims made in their pleadings.

[54] Instead, their response must clearly present specific facts demonstrating that a real dispute exists which requires a full trial. Obviously, there is evidentiary standards that need to be met when the court is assessing as to whether the factual dispute raised is genuine enough to warrant a full hearing. In court there is a standard of proof. A party cannot simply allege a fact without proving it. It is not enough to make bald assertions. Assertions must be substantiated with evidence; otherwise, they carry no probative weight.

[55] Indeed, it was in this vein that, as I have previously observed, the primary purpose of the summary judgment process is to resolve the case quickly by identifying defences that lack factual evidence.

[56] According to the defendants, the plaintiff is misstating the terms of the actual agreement between the parties [which the defendants call a joint venture agreement]. The defendants allege that as part of the joint venture, the plaintiff will be allocated a 50% interest in the second defendant. The defendants deny that the 50% interest was not transferred to the plaintiff because they failed or refused to comply with their obligations. The defendants also plead that the plaintiff informed them that he did not wish to continue with the joint venture any further.

[57] These assertions by the defendants ignore the fact that if the plaintiff had genuinely agreed to a joint venture, he could not simply back out of his obligations. By refusing to follow the terms of that agreement [joint venture], the plaintiff would essentially be making himself liable for a breach of contract. As correctly stated by Mr Steyn, plaintiff's counsel that had the plaintiff entered into a joint venture agreement, he would have accepted the risk of potentially losing his capital investment. There is absolutely no force in the joint venture argument. As such, the defendants have not set forth facts sufficient to support a finding in their favour that the plaintiff is relying on a wrong contract for his claim.

[58] In the particulars of claim POC1 is referred to as an "investment agreement". As noted earlier, it was never averred in the defendants' pleadings that the signature on POC1 does not belong to the first defendant, but it has been consistently pleaded

that the parties entered into a joint venture agreement. What is more is that the defendants do not even contend that they entered into a sale agreement.

[59] In this matter, it is quite evident that there are certain allegations in the defendants' version that do not accord with the evidence.

[60] Even though the defendants refuse to formally acknowledge POC1, it remains an undisputed fact that the first defendant sold a 50% member's interest to the plaintiff on May 14, 2020. It is undisputed that the plaintiff paid the purchase price for the membership interest. If one has regard to the defendants' plea, it becomes obvious that it is also common cause that the plaintiff subsequently cancelled the agreement [regardless of what type of agreement it was]. This demonstrates the defendants' concession that the plaintiff was entitled to the return of his 'venture capital.' Joint venture entails losing of capital contribution due to assumed risk. Thus, if things do not go as planned the investor is not automatically entitled to the return of their investment.

[61] While the act of paying funds is a significant indicator in establishing a "joint venture", it is not the sole or definitive factor that establishes a contract as a "joint adventure". Surprisingly, for a joint business venture agreement, the details of the joint venture agreement alleged by the defendants are unclear and quite lacking. The averments made by the defendants in his plea as far as this aspect is concerned, are quite sketch and inadequate to sustain a triable issue. This renders the assertion of a joint venture potentially vague. An assertion of a joint venture business agreement necessitates further, specific factual averments on the specific terms and conditions.

[62] The term "joint venture" is notably absent throughout the entire [POC1] document. For that matter, POC1 does not incorporate by reference or implication any "joint venture" terms. POC1 does not state that the member's interests purchased by the plaintiff from the first defendant were part of a joint venture. Of importance is the fact that the signatories to POC1 are described as the first defendant and the plaintiff.

[63] On the other hand, while the word "investment" is absent from POC1, the terms of the agreement establish a relationship that is, in effect, an investment. This is true, not only because the transaction [contemplated by POC1] itself most readily lends itself to that construction, but also because while it's true the agreement never mentions the word "investment;" however, buying an ownership stake in a close corporation is a way of investing money.

[64] Notably, paragraph 5 of the particulars of claim firstly outlines the agreement's terms and then makes the following statement:

"A copy of the written portion of the investment agreement is annexed marked "POC1".

[65] I have already mentioned, for all that appears in the evidence, POC1, is the document the plaintiff is relying on as the cause of action. The particulars of claim do not contain any evidence inconsistent with the terms of the POC1, and its oral components as alleged by the plaintiff. For that matter, there is no indication in the particulars of claim or in the plaintiff's replication that the parties created a separate investment agreement besides the one outlined in POC1. As such, the case presented by the plaintiff cannot be regarded as one based on an investment agreement.

[66] The important principle at play in this regard is that contractual consent requires objective evidence. Private uncommunicated thoughts are irrelevant to forming a binding agreement.

[67] From the above, it is evident that the plaintiff considers "POC1" and the "investment agreement" to be one and the same document or concept. After examining POC1's text and considering the meaning of such text, I am satisfied that the text of POC1 is clear and straightforward. Its meaning is not absurd, unworkable, or open to multiple interpretations. In accordance with the plain language of the POC1, despite being called an "investment agreement" by the plaintiff, POC1 is clearly a sales agreement.

[68] It is also significant to note that the first defendant wrote to the plaintiff on 13 June 2020. A key consideration in this aspect is that this was barely a month after the contract between the parties was concluded. The email reads as follows:

“Hi Arthur

Hier is solank **verkoop ooreenskoms** dat jy nou 50% van BK besit waain jou lening lê en waar in die plaas geregistreer gaan raak

S dra die BTW dranklisensie uitgesorteer het sal ek die CK vorm by CIPRO laat update met hierdie brief.

Jy moet dit dus net teken en terug stuur.” Emphasis added.

[69] This email is relevant to the case because it supports the argument that the parties reached a sale agreement. This is true, not only because the wording itself most readily lends itself to that construction, but also because the first respondent corroborates [POC1’s] the description of the agreement between the parties as a sales agreement.

[70] Fundamentally, the actual content and meaning of POC1 effectively override any general, inconsistent assertions made elsewhere, and this fact is sufficient to support the plaintiff’s case.

[71] It is evident from the defendant’s plea that the defendants are denying that they entered into a loan agreement with the plaintiff. In support of this denial, the defendants’ plea reveals the following:

“the Defendants repeat their Plea as contained in Paragraph 1 – 11 of the First and Second Defendants Plea above, as if it is specifically pleaded here as well.”

[72] It is plain in this regard that the defendants deny the existence of the loan agreement based on the same averments used to deny POC 1.

[73] It is appropriate at this stage to say something about POC2. In my mind, the most significant feature of the POC2, is that it reveals numerous admissions made by the first defendant.

[74] To me POC2 also reveals how aware the defendants were about their obligation to repay the plaintiff. Indeed, it was in this vein that, as I have previously

observed, that it is common cause that the plaintiff cancelled whatever agreement he had with the defendants. The defendants' willingness to acknowledge a debt makes no sense in the context of a joint venture agreement. Instead, the admission of debt is, however, completely consistent with a loan agreement that was breached.

[75] The sequence of events leading up to the first defendant writing the POC2 are highly significant. The particulars of claim reveal that the plaintiff on 23 March 2022, demanded repayment of the R150 000.00. Around the same time, the defendants on 30 March 2022, drafted POC2.

[76] In AMR3, on 10 December 2023, the first defendant wrote the following to the plaintiff:

“ . . . Ek sal van Februarie vi rook begin betaal saam met sy R10k, dat on hierdie lening so vining kan klaar maak betaal . . .
 . . . Jy sal ongeag die terugbetaling van jou lening is altyd ‘n plek hier hê en altyd welkom wees by ons.”

[77] I fully align myself with the sentiments as expressed in the plaintiff's heads of argument that the stark reality in this case is that the pleaded version of the defendants is not borne out by documentary evidence. There is no genuine dispute as to any material fact in this matter.

[78] The defendants' defence that the parties entered into a joint venture agreement making the plaintiff vulnerable to the potential of losing his investment capital, does not constitute a bona fide defence that raises a triable issue. It is a spurious assertion and entirely without foundation. Hence, I do not accept that argument. This is the common thread that is running through the entire defendants' defence against this summary judgment. The defences raised by the defendants have common denominator of being spurious, technical and having no foundation.

[79] I am thus satisfied that the plaintiff has established his claim against the defendant as prayed for in the notice of motion.

[80] In the result, I make the following order :

80.1 the Defendants are liable jointly and severally, the one paying the other to be absolved for:

(a) Payment of the sum of R1 318 390.00.

(b) Interest on the aforesaid sum a tempore morae;

(c) Costs of suit.

NZIWENI, J

Appearance:

Counsel for the Plaintiff : Advocate Roelof Steyn

Attorneys : Pfister Attorneys

Counsel for the Defendants: Advocate Tobie Benade

Attorneys : Gerhard Marè & Associates