**THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT)**

Case No: 7329/09

In the matter between: Not reportable

**DANIELLE MULLER** **PLAINTIFF**

And

**DANIELLE'S ENGINEERING CC** **FIRST DEFENDANT**

**CHRISTO VAN DER RIJST t/a CHRISTO'S ENGINEERING** **SECOND DEFENDANT**

**Coram**: ROGERS J

**Heard: 16 APRIL, 23, 25 & 31 MAY & 13 JUNE 2013**

**Delivered: 22 JULY 2013**

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**JUDGMENT**

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**ROGERS J:**

Introduction

[1] Since the plaintiff has withdrawn her claim against the first defendant I shall refer to it as 'the corporation' and the second defendant as 'the defendant'.

[2] The plaintiff sues the defendant for payment of R260 000 arising from money allegedly lent by her to him in late March 2006. The defendant denies the alleged loan agreement or being under a liability to pay the said amount to the plaintiff, and he has also raised prescription by way of a special plea.

[3] The plaintiff and defendant were previously married in community of property. After a marriage of many years they were divorced on 20 March 2006. The decree of divorce incorporated the terms of a consent paper.

[4] The evidence indicates that since at least 2004 the relationship between the parties was poor. They brought domestic violence proceedings against each other. The divorce itself was acrimonious. The relationship since then has evidently not improved. The history of emotional tension and personal animosity was apparent from their evidence.

[5] During May 1991 the parties took transfer of a residential property situated at 166 Station Road Brackenfell. This was the matrimonial home until they got divorced. At the time of the divorce there was a mortgage bond registered over the property in favour of Absa Bank Ltd ('Absa'). The balance owing by the parties on the bond account at the time of the divorce was about R382 000.[1]

[6] The corporation was registered in June 2001. The plaintiff was its sole registered member though the members interest formed part of the community estate. (In response to a question from the court the defendant said that the plaintiff was registered as the sole member of the corporation because this enhanced the corporation's empowerment credentials.) The corporation, which traded under the name Christo's Engineering, did precision engineering work. The plaintiff attended to

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[1] This would have been the approximate balance according to the bond statement at B5 immediately prior to the deposit made on 28 March 2006.

its financial and administrative affairs. The defendant took responsibility for the technical side of things. Pursuant to clause 4.5 of the consent paper the members interest was transferred to the defendant on 22 May 2006.

[7] The corporation maintained a current account with Absa. The corporation also had a credit card account with Absa. There were two cards: the plaintiff was the authorised user of the one card, the defendant was the authorised user of the other card. Most of the expenditure on the credit card account was generated by the use of the plaintiff's card. The defendant used his card for expenditure he might incur while out of office on the corporation's affairs. The card account was used for a mixture of business and personal expenses. It seems that the parties did not draw salaries as such from the corporation. A portion of the personal expenditure would annually be allocated by the corporation's accountants as salaries paid to the parties.

[8] Prior to the divorce the plaintiff was a co-trustee with the defendant of the Van Der Rijst Family Trust ('the Trust'). The Trust's only asset was an industrial erf in Brackenfell. By the time the consent paper was signed the erf had been sold and net proceeds of R620 000 were available for distribution. In terms of the consent paper the plaintiff was to resign forthwith as a trustee (clause 6.1). The parties agreed that a sum of R620 000 from the net proceeds would be applied as follows: R350 000 to be paid by the Trust to the corporation; and R270 000 to be paid by the Trust into the Absa bond account in reduction of the home loan on the Station Road property (clause 6.4).

[9] In regard to the Station Road property, the consent paper provided (clause 4.3) that it was to be marketed and sold in an agreed manner. The net proceeds from such sale (ie the balance remaining after payment of commission, the bond debt, bond cancellation fees, costs of obtaining an electrical certificate and each side's party-and-party costs in the divorce) were to be paid to the plaintiff. Both parties were entitled to continue living in the property until occupation was given to the buyer. Until that time the defendant was to be responsible for all bond payments, insurance, municipal accounts and rates. They were responsible in equal shares for the maintenance of the property.

[10] The plaintiff testified that she intended to use the net proceeds to buy a house. The property which she acquired was her current residence at 78 Robyn Street Durbanville, which she bought for R780 000. She took transfer of this property in February 2007, so it can be inferred that she purchased it in the latter part of 2006. The net proceeds from the sale of the Station Road property were paid to her in January 2007. The precise amount of the net proceeds does not appear from the documentary exhibits. The plaintiff thought the net proceeds came to about R500 000. She took out a mortgage bond to fund the balance of the price of her new house.

[11] In terms of the consent paper (clauses 2 and 3) the defendant was required to pay maintenance to the plaintiff in the amount of R5 500 per month – R2 000 in respect of their minor son Werner, and R3 500 in respect of the plaintiff herself (the defendant also had to pay monthly pocket money of R500 directly to Werner). The parties had two older sons – Christo and Wynand – but no maintenance was payable in respect of them.

[12] The amount of R350 000 contemplated in clause 6.4 of the consent paper was duly paid into the corporation’s current account on 27 March 2006. This reduced the corporation’s overdrawn balance from R573 355,72 to R223 355,72.

[13] On 28 March 2007 the amount of R270 000 contemplated in clause 6.4 of the consent paper was duly paid into the bond account (the actual deposit was R270 033,93). This reduced the amount owing by the parties to Absa on the bond account to R112 084,93.

[14] In terms of clause 4.5 of the consent paper the plaintiff undertook to sign without delay (‘onverwyld’) all documents necessary to transfer her members interest in the corporation to the defendant. There is no complaint from the defendant’s side that she failed to do so. However, the process took some time from an administrative perspective. It was only on 22 May 2006 that an amended founding statement reflecting the defendant as the sole member of the corporation was registered by the Registrar of Close Corporations.

[15] In the meanwhile, and on 30 March 2006, something happened which was not contemplated by the consent paper. On that day an amount of R260 000 was debited to the bond account (by way of a bank cheque) and paid into the corporation's current account. This was pursuant to a letter of joint instructions signed by the parties on 29 March 2006 and addressed to Absa's Ms Denise Rademeyer. The effect was to increase the balance owing on the bond account from R112 084,93 to R372 084,93; and to eliminate the corporation's overdrawn balance of R253 101,55, leaving a credit balance of R6 898,45.

[16] It appears that apart from the usual monthly instalments (just over R4 000 – payable by the defendant in terms of the consent paper) there were no further significant transactions on the bond account until the bond was cancelled on 15 January 2007 upon transfer of the Station Road property to the buyers (the property having been marketed and sold in the meanwhile in accordance with the terms of the consent paper).[2]

[17] From the corporation's current account statements one can see that immediately after the deposit of R260 000 on 30 March 2006 (which resulted in a credit balance of R6 898,45) various debit orders and cheque payments were made out of the current account resulting in an overdrawn balance of R281 441,37 by 31 March 2006. During April to June 2006 the overdrawn balance fluctuated between a lowest overdrawn balance of R88 172,15 on 25 May 2006 (following some significant payments received by the corporation) and a highest overdrawn balance of R342 580,88 on 19 June 2006. The balance on 30 June 2006 (the last date for which statements were adduced) was R323 906,70.

[18] The plaintiff's case, in essence, is that the transfer of R260 000 from the bond account to the corporation's current account was the implementation of an oral agreement she concluded with the defendant at his instance on about 28 March 2006. In terms of the consent paper the defendant was to acquire her members interest in the corporation. She says he wanted her agreement to the transfer of

[2] The home loan balance as at 31 August 2006 was R369 333,89. Statements for the period thereafter until 15 January 2007 were not adduced as exhibits. According to the bond cancellation figures as at 20 November 2006 [exhibit B35] the home loan balance at that time was R376 692,49.

R260 000 from the bond account to the corporation's account to enable the latter to pay various creditors. She agreed to do so on the basis that he promised to repay the money by the time the Station Road property was transferred to the buyers.

[19] The economic rationale for the alleged arrangement is self-evident. In terms of the consent paper the future welfare of the corporation was a matter which inured to the benefit of the defendant rather than the plaintiff. Pursuant to the consent paper the plaintiff was to receive the net proceeds from the sale of the Station Road property. Since such proceeds would be diminished by the amount required to settle the bond account, her agreement to transfer R260 000 from the bond account to the corporation would reduce her net proceeds by that amount unless the said sum were restored by the time the Station Road property was transferred to the buyers (since that is when she would receive the net proceeds). Because, on her version, the defendant failed to honour his promise to repay the amount of R260 000, she received in January 2007 net proceeds from the sale of the Station Road property which were R260 000 less than they would otherwise have been.

Prescription

[20] The plaintiff issued summons on 9 April 2009. The summons was served on the defendant and on the corporation (the latter cited as the first defendant) on 21 April 2009. On 1 July 2009 the defendant and the corporation filed, in addition to their plea on the merits, a special plea of prescription, contending that the plaintiff's cause of action arose on 25 or 26 March 2006 and had prescribed prior to service of summons.

[21] On 5 October 2012 the plaintiff served a notice of intention to amend her particulars of claim. There having been no objection, the amended particulars of claim were delivered on 24 October 2012. On 26 November 2012 the defendant and the corporation filed a notice of exception, mainly attacking the foundation of the claim advanced in the amended particulars of claim against the corporation. On 5 April 2013 the plaintiff withdrew her action against the corporation.

[22] The defendants did not file an amended plea or special plea. Mr Barnard was evidently of the view that the existing special plea stood. Following certain exchanges in court on 23 May 2013, Mr Barnard on 24 May 2013 handed in without objection an amended special plea. Despite the general language of the amended special plea, counsel explained that it was intended to cover not only the contention advanced in the original special plea but also a contention that the amended particulars of claim delivered in October 2012 advanced a new claim against the defendant in respect of which prescription was not interrupted by the summons served in April 2009.

[23] Both the original and the amended particulars of claim allege that the due date for repayment of the amount of R260 000 was on or before the date on which the Station Road property was transferred to the buyers; and that such transfer occurred on 15 January 2007. That is the date on which the debt sought to be enforced in each version of the particulars of claim fell 'due' for purposes of s 12(1) of the Prescription Act 68 of 1969. Prior to that date the debtor was not under an obligation to pay immediately (see *Van Reenen v Santam Ltd* [2013] ZASCA 74 para 12 and cases there cited). The special plea is thus bad unless the amended particulars of claim delivered in October 2012 introduced a new claim or debt.

[24] The plaintiff's original particulars of claim alleged in summary the following (I underline wording potentially relevant to the question whether the later amendment introduced a different claim):

[a] On 25 or 26 March 2006 the plaintiff <u>and the corporation, represented by the defendant</u>, concluded an oral agreement that the plaintiff would lend R260 000 <u>to the corporation</u>.

[b] It was a term of the agreement that the amount would be repayable by the corporation 'and/or' ('en/of') the defendant on or before the date on which the Station Road property was transferred to the buyer.

[c] As one of the terms of the agreement, the defendant 'indicated' to the plaintiff ('*het teenoor die Eiseres aangetoon*') that he bound himself jointly and severally with

the corporation as co-principal debtor in respect of the repayment of the money by the said date.

[d] On 30 March 2006 and pursuant to the agreement the plaintiff advanced R260 000 to the corporation by paying the money into its bank account.

[e] Transfer of the Station Road property was registered in favour of the buyers on 15 January 2007.

[f] The corporation 'and/or' the defendant were in breach of their obligations by failing to pay the amount of R260 000 to the plaintiff by that date.

[g] The prayed relief was an order for payment against the corporation and the defendants jointly and severally, the one paying the other to be absolved.

[25] The plaintiff's amended particulars of claim allege in summary the following (again I underline relevant wording):

[a] On 25 or 26 March 2006 the plaintiff and the defendant concluded an oral agreement that the plaintiff would lend him R260 000 by paying that amount into an account nominated by him, namely the account of the corporation.

[b] There then follow allegations identical to those summarised in points [b] and [c] of the preceding paragraph of this judgment.

[c] On 30 March 2006 and pursuant to the agreement the plaintiff advanced R260 000 to the defendant by paying it into the corporation's bank account as nominated by him.

[d] There then follow allegations identical to those summarised in points [e] and [f] of the preceding paragraph of this judgment, and concluding prayers identical to those contained in the original particulars of claim (see point [g] above).

[26] The authorities emphasise that what prescribes is not a 'cause of action' but a 'debt' and its correlative 'claim' or 'right of action'. When a defendant contends that

the plaintiff is attempting through an amendment to introduce a prescribed debt or claim, one must examine the original pleading and the amended pleading to ascertain, not whether the cause of action remains the same, but whether the debt or right which the plaintiff advances in the amended pleading is substantially the same as in the original pleading, this being a question of substance rather than form (see *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15C-16D; *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) paras 5-8; *Rustenburg Platinum Mines v Industrial Maintenance Painting Services* [2009] 1 All SA 275 (SCA) paras 11-14; *Aeronexus (Pty) Ltd v Firstrand Bank Ltd t/a Wesbank* [2011] ZASCA 21 paras 13-14; *Imperial Bank Ltd v Barnard NO & Others* [2013] ZASCA 42 para 9).

[27] The accommodating application of this test in current law is well illustrated by the cases just cited:

[a] In *Sentrachem* the original particulars of claim sought damages (arising from crop damage caused by the application of a product supplied by the defendant) on the basis of two causes of action in the alternative: negligent misrepresentation, alternatively strict product liability. The amended particulars of claim comprised a primary cause of action based on breach of contract and three alternative causes of action (negligent misrepresentation inducing the contract; delictual misrepresentations regarding the safety of the product; and negligence by the defendant (through its representatives) as an expert supplier). The court held that the debt was the alleged liability of the defendant to compensate the plaintiff for the damage to its crops. The causes of action originally pleaded were possibly deficient or unclear but the debt which the plaintiff sought to enforce through the amended pleading was nevertheless recognisable in the original pleading.

[b] In *CGU Insurance* the plaintiff sued its insurer for storm damage suffered during two separate periods. In its original summons the plaintiff alleged that the insurer’s liability was based on a single contract of insurance. The plaintiff later sought to amend its particulars of claim so as to allege that the said contract of insurance applied only to the one period and that the insurer’s liability in respect of the other period flowed from another contract of insurance. On appeal the Supreme Court of

Appeal agreed with the trial court that although the amendment introduced a new insurance contract the debt remained the same in the broad sense of the meaning of that word.

[c] In *Rustenburg Platinum Mines* the plaintiff's original particulars of claim alleged that the defendant was liable on the basis of unjustified enrichment to refund a sum allegedly overpaid by the plaintiff for goods and services supplied by the defendant. In the amended pleading the plaintiff relied on a tacit agreement in terms whereof the defendant allegedly agreed to refund the excess payment. Once again, the 'debt' (though plainly not the 'cause of action') was found to be substantially the same.

[d] In *Areonexus* the plaintiff issued a simple summons in which it sued the defendant (a bank) for a stated sum in respect of services and goods supplied by the plaintiff. More than three years later the plaintiff delivered a declaration in which it based its claim on a guarantee furnished by the bank in respect of the obligations of the recipient of the goods and services supplied by the plaintiff. Again, the amended pleading was found to be aimed at enforcing substantially the same debt as the original summons.

[28] These cases appear to me to go considerably further in favour of amending claimants than it is necessary to go in the present case. Neither the original particulars of claim nor the amended particulars of claim are examples of elegant and lucid draughtsmanship. Nevertheless, in both versions the plaintiff is seeking recovery from the defendant of the same amount of R260 000 paid into the corporation's bank account on 30 March 2006. Since the money came from the parties' bond account in respect of which they were joint and several debtors to Absa, it may not be strictly accurate to describe the alleged agreement as a loan. However, the label is not important. The terms of the consent paper are such as to make it readily understandable why the plaintiff would have conceived her agreement as involving a loan. The important point is that in both versions of the particulars of claim she alleges that the money was paid into the corporation's bank account on terms which required the defendant personally to repay the money by the time the Station Road property was transferred to the buyers. (Whether or not

the corporation was properly alleged to be jointly and severally liable to make repayment is neither here nor there; we are only concerned with the debt which the plaintiff seeks to enforce against the defendant.)

[29] Although the material part of the original particulars of claim commenced by alleging an oral agreement concluded by the plaintiff <u>with the corporation</u> (represented by the defendant) whereas the same part of the amended particulars of claim aver an oral agreement concluded by the plaintiff <u>with the defendant personally</u>, the relevant part of the original particulars of claim cannot be read in isolation. Among the alleged terms of the agreement pleaded in the original particulars of claim was that the defendant agreed to be liable as a co-principal debtor with the corporation for repayment. That being so, the plaintiff was in truth alleging an agreement concluded with the corporation and with the defendant personally. In the amended particulars of claim she again alleges an agreement concluded with the defendant personally.

[30] Mr Barnard placed considerable reliance on the judgment of Trollip JA in *Neon and Cold Cathode Illumination (Pty) Ltd v Ephron* 1978 (1) SA 463 (A). There the plaintiff (the appellant) issued summons in the magistrate's court against the defendant (Ephron, the respondent) alleging that the defendant was liable for arrear rentals as the lessee of certain equipment. The action was dismissed because the lessee was actually a company called Benan – the defendant (Ephron) had only signed as surety and co-principal debtor. The plaintiff then issued a second summons in the magistrate's court, now correctly alleging that the defendant (Ephron) was liable as a surety. By then, however, the claim against the respondent was prescribed unless the first summons had interrupted prescription. The Appellate Division held that the first summons had not interrupted prescription against the respondent in respect of the claim against him as surety. Trollip JA rejected an argument that the claim advanced in the second summons was the same or substantially the same as the claim advanced in the first summons.

[31] *Neon and Cold Cathode* was decided with reference to the Prescription Act 18 of 1943, not the current Prescription Act (see at 469A). The issue which arose in *Neon and Cold Cathode* could not now arise because in terms of s 15(2) of the 1969

Act service of a summons is deemed not to have interrupted prescription if the action is not successfully prosecuted. Be that as it may, it was held in *Neon and Cold Cathode* that a claim for a sum of money against a person as the principal debtor under a contract is not substantially the same as a claim for the same sum of money against the same person as a surety under that contract, even if the surety has agreed to be a co-principal debtor. If that still represents our law, the decision might nevertheless be distinguishable on the basis that the original particulars of claim in the present case did not allege that the defendant was a surety for the corporation. The original particulars of claim could not have been so understood by the defendant since no point was ever taken – either by way of exception or plea – that the claim against the defendant was bad in law because the alleged oral agreement did not comply with the formalities laid down in the General Law Amendment Act 50 of 1956. Maladroit though the original particulars may have been, they came closer to alleging that the corporation and the defendant were co-borrowers with joint and several liability. It appears from *Neon and Cold Cathode* that the court may well have viewed a claim alleging that a person is liable as a co-debtor with joint and several liability as substantially the same as a claim against that person as a sole debtor (see at 471F-472A and 472H- 473C).

[32] In any event, *Neon and Cold Cathode* was subsequently explained by the Supreme Court of Appeal in the *Rustenburg Platinum Mines* case *supra*. In that case it was argued for the defendant that *CGU Insurance supra* had been wrongly decided, having regard to the decision in *Neon and Cold Cathode*. In rejecting this argument, Mpati P did not refer to or rely on the manner in which Jones AJA had distinguished *Neon and Cold Cathode* in *CGU Insurance*. Instead Mpati P referred to the passage at 473H-474A of *Neon and Cold Cathode* where Trollip JA had said that the plaintiff could possibly have amended its original particulars of claim to substitute a cause of action based on the suretyship but had not done so. Mpati P then continued (para 18):

'To my mind, Trollip JA could have made this comment about a possible amendment only because, although the cause of action would be different, *viz* liability being based on the contract of suretyship, the "claim" or "debt" or "right of action" would still have been the same: arrear rental which had become due and payable. The significant distinction between *Neon and Cold Cathode*, on the one hand, and *CGU Insurance* (*supra*) and this case on the other, is that the plaintiff in *Neon and Cold Cathode* had not sought to amend the claim. The claim was dismissed. A new action was instituted against the defendant as surety and co-principal debtor. As Trollip JA indicated, had the plaintiff attempted to amend its first claim against the defendant as lessee, so as to claim against the defendant as surety, the amendment might have been allowed. I am accordingly not persuaded that the decision in *CGU Insurance* is in conflict with that in *Neon and Cold Cathode*, nor that it was wrongly decided.'

[33] Mr Barnard argued that Mpati P had misunderstood Trollip JA's *obiter dictum*, and that Trollip JA did not have in mind an amendment introduced outside the prescriptive period. However, I am bound by the way *Neon and Cold Cathode* was explained in *Rustenburg Platinum Mines*. In any event, even if *Neon and Cold Cathode*, when properly analysed, would support a stricter approach in assessing whether one claim is substantially the same as another for purposes of prescription, the more recent judgments of the Supreme Court of Appeal support a more liberal approach. If prescription was not a bar in *Aeronexus*, where the defendant was originally sued as a principal debtor and subsequently as a guarantor for the principal debtor, I fail to see how prescription could successfully be raised against the plaintiff in the present case.

[34] I am satisfied, therefore, that the debt the plaintiff seeks to enforce against the defendant in the amended particulars of claim is the same or substantially the same as the debt she sought to enforce against him in the original particulars of claim. The defence of prescription thus fails.

<u>The merits</u>

[35] The plaintiff avers that she concluded the pleaded agreement with the defendant. The defendant denies this. I must resolve the factual disputes arising from their irreconcilable versions in the manner described by Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie & Others* 2003 (1) SA 11 (SCA) para 5:

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

*The inherent probabilities*

[36] In the above passage the probabilities feature as the third of the main factors to be considered and also as a component of the assessment of the first factor (credibility). I propose to start with a consideration of the inherent probabilities, having regard to objectively verifiable facts.

[37] In terms of the consent paper the plaintiff was to get the net proceeds from the Station Road property while the defendant was to obtain the members interest in the corporation. In general terms, therefore, any transaction which reduced the net proceeds from the Station Road property for the benefit of the corporation was contrary to the plaintiff's financial interests and favourable to the defendant's financial interests.

[38] In terms of clause 6.4 of the consent paper the parties agreed that the sum of R620 000 available for distribution from the sale of the Trust's erf would be paid out as follows: R350 000 to the corporation and R270 000 to the bond account. In a

general sense, this was thus an allocation of R350 000 for the defendant's benefit (because it enhanced the welfare of the corporation of which he was to become sole member) and an allocation of R270 000 for the plaintiff's benefit (because a reduction in the bond debt by R270 000 would increase the net proceeds from the sale of the Station Road property by the same amount).

[39] On the defendant's evidence, the parties agreed upon the sum of R350 000 in clause 6.4 because Absa was insisting that the corporation's overdrawn balance be reduced by that sum. The approved overdraft facility, according to the defendant, was R340 000. The overdrawn balance on 20 March 2006, when the consent paper was signed, was about R580 000. One can thus infer that unless the parties had agreed upon an allocation to the corporation of R350 000 out of the Trust's available cash of R620 000, the continued existence of the corporation would have been imperilled. Since the defendant was to take over the corporation with immediate effect, this was a matter which vitally affected his future. But the bargain struck by the parties in the consent paper was that only R350 000 would go to the corporation; the balance of R270 000 was to be paid to the bond account, essentially for the plaintiff's benefit.

[40] The plaintiff was under no obligation to negate this benefit of R270 000 by agreeing to transfer a sum of R260 000 out of the bond account to the corporation. Unless the latter amount were restored to the bond account by the defendant or the corporation by the time the Station Road property was transferred, the plaintiff's net proceeds in terms of clause 4.3.9 would be R260 000 less than they would have been if she had refused to agree to the transfer of that sum to the corporation. (If the plaintiff's recollection is correct that in the event the net proceeds amounted to about R500 000, such proceeds would – but for the transfer of R260 000 – have been R760 000. The amount of R260 000 was thus not an insignificant part of the net proceeds.)

[41] The parties negotiated the allocation reflected in clause 6.4 as part of the overall divorce settlement. That was concluded on 20 March 2006. It is inherently unlikely that within a few days of having reached this bargain, which included a reduction of R270 000 in the bond debt and thus an enhancement of her net

proceeds in a like amount, the plaintiff would have agreed to a transfer of R260 000 from the bond account to the corporation in the absence of an undertaking for the restoration of that sum to the bond account by the time the Station Road property was transferred. In other words, she would not have donated the sum of R260 000 to the defendant or the corporation. She testified that she would not have consented to the payment of R260 000 to the corporation without an agreement for repayment.

[42] Mr Barnard argued that the 'fatal flaw' in this thesis was that the consent paper did not impose on the defendant an obligation to ensure that the net proceeds payable to the plaintiff from the sale of the Station Road property were not less than a specified amount. That is true but in my view misses the point. An increase in the bond debt would decrease the net proceeds. The bond debt could only be increased with the plaintiff's agreement. Since the giving of consent by the plaintiff would reduce her net proceeds, it is inherently unlikely that she would have done so without an undertaking by the defendant to repay the money. The fact that the defendant was not required by the consent paper to ensure that the net proceeds were not less than a specified amount strengthens rather than weakens this probability.

[43] The defendant sought to neutralise this view of the inherent probabilities by pointing out that the plaintiff did not in fact immediately transfer the members interest in the corporation to him and reaped personal benefits from the transfer of R260 000 to the corporation. However, if the plaintiff had viewed the transfer of R260 000 from the bond account to the corporation as being a transaction to her benefit there would have been no reason for clause 6.4 of the consent paper to stipulate that R270 000 out of the Trust proceeds of R620 000 should be paid into the bond account in order to reduce the home loan debt; the plaintiff would then simply have agreed to the full amount of R620 000 being paid to the corporation.

[44] It is common cause that the plaintiff continued to attend to the financial administration of the corporation until the transfer of the members interest to the defendant was registered and that she only ceased performing this function on or about 8 June 2006. During the intervening period the affairs of the corporation were administered as before – neither of the parties drew salaries but various personal

expenses were met from the corporation’s bank account or charged to the corporation’s credit card account. The plaintiff testified that the defendant asked her to continue performing this function. According to her, he had said it was better for her to retain signing powers since he worked mainly on the technical side and was often out of the office. In explaining his conduct in this and other respects, the plaintiff said that the defendant was in fact keen on a reconciliation. The defendant denied that he had asked the plaintiff to remain on in the business or that he had wanted a reconciliation. He said that the plaintiff refused to surrender control of the financial administration until the transfer of the members interest was registered. The plaintiff acknowledged during her evidence that she wished to retain this function for as long as she was the registered member lest she should be held personally liable for maladministration but she was nevertheless adamant that the defendant wanted her assistance and agreed to her continuing to perform the financial administration function.

[45] The defendant did not dispute that the amount of R260 000 was *inter alia* required to enable the corporation’s creditors to be paid. The precise extent to which the money was used for business and private purposes cannot now be determined because, according to the defendant, the relevant business records are no longer available. These records would, as from June 2006, have been under his control. He said that the business records only needed to be kept for five years. Since the plaintiff issued summons in April 2009 (while the records were still available), I am surprised that the defendant did not retain them, given their relevance to the litigation.

[46] Apart from an amount of R82 000 (to be considered hereunder), there was no evidence that the debit orders and cheques which were debited to the corporation’s account over the period 30/31 March 2006 and which used up the credit of R260 000 were personal expenses for the benefit of the plaintiff rather than business expenses of the corporation. The plaintiff was asked in cross-examination about various debits to the current account. She said that cash withdrawals would typically be for wages. There were some payments for food she had purchased for herself, the defendant and workers. There were payments to Virgin Active; she said these related to Werner’s gym membership which the defendant had agreed could

be paid out of the account. There were various debit orders in favour of Sanlam for polices which, according to the plaintiff, the defendant acquired as his sole property pursuant to the consent paper.

[47] The facts surrounding the cheque of R82 000 debited to the corporation's bank account on 30 March 2006 are in dispute though there is some common ground. The plaintiff had apparently promised their sons that they would each get a car when they turned 21. As at March 2006 the two older boys (Christo and Wynand) already had their cars. Werner was a minor and did not yet have a driver's license. The car Wynand had got for his 21st birthday was a VW Polo. The Polo was bought on hire purchase and the instalments were paid by the corporation. What was put to the plaintiff in cross-examination was that Wynand subsequently wanted to replace the Polo with a VW Golf, that the defendant did not agree to this, and that the plaintiff then caused the corporation on 30 March 2006 to pay R82 000 for the new Golf without the defendant's consent.

[48] The plaintiff agreed that the money had been used to buy a Golf for Wynand but she said that this occurred with the defendant's approval. She testified that they agreed that either the defendant or she would keep the Polo, on the basis that if she took over the Polo the defendant could deduct an amount of R85 000 from the sum of R260 000 which he owed her. In the event, she says, he kept the old Polo. (I should also mention here that according to the plaintiff she and the defendant subsequently discussed that she might take over the Polo in order to give it to their youngest son Werner when he obtained his driver's license and that in this event the defendant would again be entitled to make the deduction. This was, however, a later development. As at March 2006 what she had in mind was to take over the Polo for her own use.)

[49] It was also put to the plaintiff in cross-examination that she had caused the corporation, without the defendant's consent, to settle the hire purchase debt on the Polo and that when he found out he said that the Polo should then be an asset of the corporation. She denied this, saying that it had been his proposal that they acquire the Polo from Wynand. (The amount required to settle the hire purchase

debt on the Polo and the date on which the amount was paid did not emerge in the evidence.)

[50] The version put to the plaintiff differed somewhat from the evidence the defendant subsequently gave. When he came to testify, the defendant said that Wynand had wanted to buy a new Polo. In the meanwhile, the opportunity had arisen to buy a Golf on favourable terms. The Golf was purchased for R82 000 and sold a couple of weeks later for R85 000. Wynand's intention was to use the profit of R3 000 (together, presumably, with the proposed proceeds of the old Polo) towards the purchase of the new Polo. The defendant testified that he only found out about the purchase of the Golf and the plan to sell the old Polo after the Golf had already been bought and after the sum of R82 000 had already been paid out of the corporation's account. The defendant considered that Wynand would not get a good price for the old Polo and that it was better to keep it. The old Polo was thus not sold, and the defendant retained it for his own use. (I assume, on this version, that if the old Polo had been sold the sum of R82 000 for the purchase of the Golf would have been repaid to the corporation from the proceeds of R85 000 when the Golf was resold a couple of weeks later. But since the defendant thought it was a bad idea to sell the old Polo, the sum of R82 000 was not repaid to the corporation, and he instead kept the old Polo. If a new Polo was indeed purchased, Wynand presumably used the full proceeds of R85 000 from the sale of the Golf towards the purchase of the new Polo.)

[51] The defendant's evidence that the Golf was a short-term purchase to generate a profit of R3 000 and that Wynand's plan had been to buy a second Polo was not put to the plaintiff during cross-examination and I thus do not know what she would have said about that version.

[52] I do not think that the competing versions on this question shed much light on the inherent probabilities of the character of the arrangement pursuant to which the amount of R260 000 was transferred to the corporation. There is no evidence that the payment of R82 000 on 30 March 2006 was in the minds of the parties when, a day or two previously, they agreed to transfer the sum of R260 000 from the bond account to the corporation or that the proposed payment of R82 000 was a

motivating consideration in the transfer of R260 000. On the defendant's version a proposed payment of R82 000 was not in his mind, because he claims not to have been aware of the transaction regarding the Golf until some weeks later. On the plaintiff's version, the proposed payment of R82 000 may have been anticipated when the transfer of R260 000 was agreed upon but on the basis that the amount of the debt to be repaid by the defendant would be reduced by R85 000 if the plaintiff kept the old Polo. Alternatively, the discussion regarding the payment of R82 000 and the old Polo might have occurred independently a day or two later. The objective fact is that although a sum of R82 000 was debited to the corporation's bank account on 30 March 2006, the defendant took over the old Polo which he does not say was worth less than R82 000.

[53] For the rest, the evidence does not establish that the sum of R260 000 was needed or used for the immediate personal benefit of the plaintiff rather than for the urgent business requirements of the corporation. I accept that in April and May 2006 the plaintiff administered the corporation as she had done in the past, and that some personal expenses were met by the corporation in the same way as had occurred in previous years. But it is common cause that neither she nor the defendant drew salaries. She did in fact perform work for the corporation in April and May 2006 as she had done in the past. The evidence does not show that such personal expenses of hers as the corporation met in the period April and May 2006 exceeded a fair remuneration for the services she rendered.

[54] I have mentioned that both of the parties had credit cards for use on the corporation's credit card account. The credit card statements reflect that the debits on the cards of the plaintiff and defendant respectively were as follows over the relevant period: 24 March – 21 April 2006: R18 122,08/R1 523,47; 22 April – 23 May 2006: R19 237,51/R2 251,12; and 24 May – 23 June 2006: R20 063,55/R1 840,53. There are a number of cash withdrawals on the plaintiff's card which she testified would have related to the corporation's business. She also testified that she bought food for the defendant and other employees. There is an item of R6 958,39 for Bolt Engineering on 27 May 2006. There are other debits which are likely to be personal in nature (restaurants, clothing stores). Although a precise allocation between business and personal expenditure is not possible, it is apparent that the items of

personal expenditure incurred by the plaintiff on her card during April/May 2006 are only a fraction of the sum of R260 000.

[55] It must also be remembered that as at 28 March 2006, the date on which the plaintiff says the loan agreement was concluded, she was not to know that the transfer of the members interest would take nearly two months to be formally registered. She did not know for how long she would still work for the corporation and have the right to control its affairs. For all she knew the transfer might be effected within a week or two. On the defendant's version, he did not ask the plaintiff to stay – he wanted her to leave as soon as possible. On the plaintiff's version the defendant asked her to continue managing the corporation's financial administration, but even on her version he could have asked her to go at any time. In the circumstances, it is inherently unlikely that she would have seen any prospect of benefiting to an extent of anywhere near R260 000 from a transfer of money to the corporation (even if one treats the covering of personal expenses in lieu of salary as a personal benefit). She certainly had no guarantee of being there long enough in a caretaker capacity to see any real benefit from the money.

[56] I thus consider it inherently likely that if the defendant had said, in late March 2006, that he was not prepared for the corporation to accept a transfer of R260 000 on the basis that he or the corporation would be liable to repay it, the plaintiff would not have agreed to the transfer. She may still have retained administrative control of the corporation's financial affairs until the members interest was transferred, and she would have had to administer the corporation's affairs as frugally as possible. Quite possibly she would have needed to tell the defendant that unless he was able to raise funds from another source she would have to close the corporation's doors. Given the terms of the consent paper, the failure of the corporation was something which stood to prejudice him, not her.

[57] The defendant testified that the corporation's financial affairs were in a far worse condition in June 2006, when he finally took over, than he had anticipated. He blamed the plaintiff for maladministration. It is impossible to determine whether and to what extent his criticisms of her administration are justified. I do not see that this is of any relevance in determining, as a matter of probability, what agreement if any

the parties reached in late March 2006 regarding the transfer of the sum of R260 000. The defendant would not have bargained in March 2006 to take over the members interest in the corporation unless he thought at that time that the corporation was viable and that he stood to benefit financially from taking it over. In this state of mind, it is not unlikely that he would have agreed to borrow R260 000 in order to tide the corporation over what he saw as a short-term cash flow problem. The fact that he might not have agreed to take the corporation over if he had known in March 2006 what he discovered in June 2006 cannot have any bearing on the probabilities regarding the arrangement reached in March 2006. (As a fact, the defendant seems to have found it worth the while to keep the corporation, and it is still operating.)

[58] The defendant raised another countervailing consideration in regard to the inherent probabilities. He said that since the relationship between the parties was very poor at the time of the divorce and there was no communication, she would not have agreed to lend him R260 000. However, the force of this contention is much weakened by the uncontested fact that the plaintiff did agree to a transfer of R260 000 from the bond account to the corporation and that she did not and could not hope to benefit to anywhere near that extent from a transfer of that sum to the corporation. In assessing the inherent probabilities, one must thus contrast the plaintiff’s version that she agreed to lend the defendant this sum with the defendant’s version that she paid the money to the corporation without any right of recovery, ie in essence as a donation to him. I have no doubt that the latter is considerably less plausible than the former.

[59] One might have thought, if the relationship between the parties was very poor, that the plaintiff would simply have refused to allow the amount of R260 000 to be transferred out of the bond account at all. The fact that she agreed to do so may indicate that the plaintiff, having obtained to the divorce, was not as hostile as the defendant made out in his evidence and that she had no desire to see the defendant’s livelihood from the corporation ruined. He was, after all, the father of her three children. Even from her own selfish point of view, it would not have suited her for the corporation to collapse because that would deprive the defendant of his income and thus his ability to pay the maintenance specified in the consent paper.

And her financial administration of the corporation until the defendant was formally registered as the sole member would certainly be smoother if the corporation could obtain money to tide it over its cash flow difficulties.

*The SMS of 29 June 2006*

[60] There is a further important piece of evidence which I have not yet mentioned. On 29 June 2006 (about three weeks after the plaintiff finally ceased working at the corporation) the following text message was sent from the defendant's mobile phone to the plaintiff's mobile phone:

'Ek sal verband uitneem op nuwe huis as ek nie geld by daai tyd betaal het nie. Moet my nie verder druk nou. Ek het al die jare vir jou alles probeer gee. Ek wil vir jou ook sê sterkte vorentoe. Hoop regtig jy vind iemand wat jou gelukkig kan maak.'

[61] The defendant's counsel put to the plaintiff in cross-examination that the defendant could not remember sending such an SMS. In his evidence the defendant positively denied having done so. He even said at one stage, somewhat argumentatively, that there was no actual proof (apart from the plaintiff's oral testimony) that such an SMS was actually sent. In that regard, the plaintiff in her evidence said that she had the phone with her in court and that the message was still saved on her phone. Curiously the defendant and his legal team seem to have displayed no interest in examining the phone. After I raised this aspect during the course of the defendant's testimony, I gather that the defendant's counsel inspected the phone and satisfied himself that the alleged text message from the defendant's telephone number was indeed saved on the plaintiff's phone.

[62] The defendant's main assertion on this aspect was that if such a message was sent from his phone, <u>he</u> had not sent it. He testified that he often left his mobile phone in the office when he went into the factory, since there was so much noise in the factory that he could not use the phone there. He did not positively accuse the plaintiff of having sneaked back into the office to send the SMS while his phone was unattended – he acknowledged that this was somewhat unlikely. I may add that no such suggestion was ever put to the plaintiff for comment in cross-examination. He mentioned that the plaintiff's sister, Ms Kotze, was the corporation's bookkeeper and

continued working there after the plaintiff's departure. He also did not accuse her of having sent the SMS. In response to a question from the court, he said that he had a very good relationship with Kotze. In these circumstances, the idea that Kotze would have sent a bogus SMS from his phone is, I must say, preposterous. Furthermore, if Kotze sent the SMS it could only have been at the plaintiff's instance, yet no such hypothesis was put to the plaintiff in cross-examination. The defendant did not claim ever to have asked Kotze about the SMS.

[63] Apart from the utter implausibility that a bogus SMS would have been sent from the defendant's unattended phone by either the plaintiff (who had permanently left the corporation three weeks previously) or Kotze (who was on good terms with the defendant), the formulation of the message points strongly against such an hypothesis. If the plaintiff or Kotze were trying to fabricate evidence of an acknowledgment by the defendant that he owed the plaintiff money, the SMS would surely have been more specific than the one actually sent (it would, for example, have mentioned the sum of R260 000 and the repayment date). Moreover, the tone of self-justification adopted by the sender is entirely consistent with a message composed by the defendant personally and inconsistent with a message fabricated at the instance of the plaintiff.

[64] I thus reject as false the defendant's denial that he sent the SMS. I also regard it as unlikely that he could have forgotten sending the SMS and have made an honest mistake in his oral testimony. This is important not only in judging the probabilities but also in assessing the defendant's credibility.

[65] The SMS reflects a recognition by the defendant of a liability to pay money to the plaintiff. Although the amount is not mentioned, the only transaction to which it could relate is the transfer of R260 000 made on 30 March 2006. The plaintiff's evidence was that the SMS indeed related to this amount; and the defendant, having falsely denied sending the message, has offered no other explanation. (A dispute subsequently arose between the parties concerning a further amount of R97 903 deducted from the Absa bond account in arriving at the plaintiff's net proceeds. This was a term loan owing by the corporation to Absa and for which, it appears, the parties had signed personal suretyships. Because the mortgage bond

secured all liabilities by the parties to Absa and not only the home loan debt, Absa apparently required the term loan to be settled from the proceeds of the Station Road property in order to secure the cancellation of the mortgage bond, even though the term loan was not otherwise due for repayment. In correspondence the plaintiff's attorneys alleged that the defendant was liable to refund this further amount to the plaintiff, and according to the plaintiff there is a pending action in the Kuilsriver Magistrate's Court in that regard. However, it was not suggested by the defendant that the text message could have related to this amount. There is no indication that as at June 2006, when the text message was sent, the plaintiff was aware that the sum of R97 903 would be deducted from her net proceeds – that unpleasant surprise seems only to have come to the fore when the Station Road property was transferred in January 2007.)

[66] The SMS also reflects the defendant's awareness that the plaintiff needed the net proceeds from the Station Road property (of which the amount of R260 000 was intended to form part) to buy a new house.

[67] The defendant's statement that he would take out a bond on the new house (ie the new house to be bought by the plaintiff) if he had not repaid her by that time is puzzling. It seems that the defendant had in mind that if he could not repay the plaintiff R260 000 from other sources by the time she needed money for the new house he would take personal responsibility for a loan in that amount but would then need her new house to serve as security. I can imagine that such an arrangement would not have been very satisfactory to the plaintiff. Whether she would have agreed to it if the defendant could not afford to repay her from other sources I do not know; since she eventually had to take out a bond for about that sum in her own name, she might – if there was no other solution – have agreed to the defendant instead taking responsibility for the bond. In the event, the defendant later disavowed any liability, so the question did not arise.

[68] In summary, the terms of the text message sent by the defendant provide strong support for the conclusion, already indicated by the inherent probabilities, that the defendant was aware of and acknowledged a personal liability to repay the sum of R260 000.

*The corporation's financial statements*

[69] The corporation's financial statements for the year ended 28 February 2007 were adduced as an exhibit. These statements incorporate a report signed by the accounting firm Theron du Plessis dated 13 September 2007 and were signed by the defendant as the sole member on that date. The amount of R260 000 was paid into the corporation's bank account on 30 March 2006, ie during the course of that financial year. The money clearly did not constitute trading income and is not reflected in the income statement. There is also no record of an amount of R260 000 having been donated to the corporation during the course of the year. The financial statements reflect that as at 28 February 2007 the defendant had a credit loan account in the corporation of R295 762. It is difficult to see where else the receipt by the corporation of R260 000 could have been accounted for in the financial statements if not as part of this credit loan account. That would be consistent with the plaintiff's case – she lent the money to the defendant (although it was paid directly to the corporation) and he in turn lent it to the corporation. However, one might have expected the amount of R350 000, which was paid into the corporation's bank account on 27 March 2006 pursuant to clause 6.4(a) of the consent paper, also to have been reflected as a loan by the defendant to the corporation. If so, the defendant's credit loan account of R295 762 could represent a year-end balance after the receipt by the corporation of the loans of R350 000 and R260 000 and after payments made by the corporation to or on behalf of the defendant during the course of the year.

[70] Although he signed the financial statements, the defendant claimed to be unable to cast light on the relevant entries. He did not know how the accountants had dealt with the receipt of R260 000. The books of account were apparently no longer available. In the absence of clearer evidence, I do not think I can attach much significance to the manner in which the financial statements were prepared.

*Credibility*

[71] Up to now I have been addressing in the main the inherent probabilities. These are quite significantly in the plaintiff's favour. I must now assess the credibility

of the parties (apart from the light shed thereon by the probabilities). The long history of acrimony and emotional turmoil in the personal relationship between the parties complicates the assessment of credibility. I am thus disinclined to place too much reliance on demeanour. In general, though, the plaintiff made a somewhat more favourable impression on me than the defendant. Her answers were shorter and more to the point. Although she occasionally mentioned the defendant's allegedly abusive behaviour, she did not in my view do so gratuitously. The defendant, by contrast, was an argumentative and discursive witness who appeared to find frequent opportunity for maligning the plaintiff. Importantly, I have found that his evidence regarding the SMS of 29 June 2006 was untruthful.

[72] Neither of the parties was an impartial witness. The plaintiff had a financial motive to support her claim and the defendant had a financial motive to resist it. This is thus a neutral consideration.

[73] Mr Barnard cross-examined the plaintiff concerning various versions advanced on her behalf in correspondence and the pleadings with a view to casting doubt on her credibility. The first relevant document is the letter by her then attorneys, Visser & Partners ('VAP') in the person of Mr PR Nabal, to the defendant's then attorneys Abe Swersky & Associates on 21 February 2007. This was about a month after the transfer of the Station Road property. The letter raised various matters (including the amount of R97 903 I mentioned previously). For present purposes, however, paragraph 12 is relevant. In that paragraph VAP stated that their instructions were that the plaintiff lent the defendant 'and/or' his corporation an amount of R175 000 in about March 2006 as bridging finance relating to certain transactions undertaken by the defendant, and that the defendant and/or the corporation had failed to repay this money despite various requests from the plaintiff.

[74] Although VAP were no doubt conveying their instructions as they understood them, there was no evidence that VAP furnished a draft of the letter to the plaintiff for her approval before it was sent.

[75] The reference in this letter to the money having been advanced to the defendant <u>and/or the corporation</u> is not in my view of great moment. The letter clearly sought *inter alia* to hold the defendant personally liable in respect of an arrangement the plaintiff claimed to have reached with him. I do not find it altogether surprising that she may have thought, because the money was actually paid to the corporation, that the latter also had a liability. She testified that she had told her attorney that she lent the money to the defendant.

[76] The reference to bridging finance for transactions undertaken by the defendant also does not strike me as being of particular significance. The corporation evidently had a cash flow difficulty. The defendant was to become the sole member of the corporation. I do not find it implausible that VAP, having obtained the plaintiff's instructions in this regard, formulated their letter – perhaps not very felicitously – in the manner they did. The plaintiff testified that she did not give her attorneys this particular wording. (I add that VAP did not act for the plaintiff in the divorce proceedings.)

[77] In regard to the amount claimed (R175 000), the plaintiff testified that this was arrived at by deducting from R260 000 the sum of R85 000 in respect of the Polo. She said that by the time the letter was written (February 2007) she had in mind to take over the Polo (which the defendant had kept) and to give it to their youngest son, Werner, who was expected to get his driver's license in the near future. She wanted him, like the older boys, to be given a car. She said that it was again agreed with the defendant that if this happened a sum of R85 000 could be deducted from the amount of R260 000 which he owed her. In the event, however, the defendant kept the Polo. I confess to finding this rather puzzling. If it was still an open question whether the Polo would be given to Werner or kept by the defendant, I would have expected the letter to mention this rather than confining the plaintiff's claim to R175 000. Moreover, the letter did not say merely that R175 000 was owing but that this was the sum originally advanced in March 2006. Despite this confusion, we know as an objective fact that the amount paid to the corporation in March 2006 was R260 000, not R175 000. That there was a transaction relating to a car for one or more of the parties' sons is also evident, though the detail is obscure. VAP's letter is certainly consistent with the plaintiff's version that the transfer of R260 000 was

accompanied by an agreement for repayment. The claimed sum of R175 000 could only arise from this transfer. Possibly there was some misunderstanding on VAP's part regarding the deduction of R85 000. In the event, the Polo was kept by the defendant, and on her version the basis for deducting the amount of R85 000 fell away. Standing on its own, the inconsistency as to the amount of the loan when compared with the case advanced by the plaintiff at the trial does not cast a very significant shadow of doubt over her case.

[78] Although VAP's letter does not record the alleged term that the loan was to be repaid by the date on which the Station Road property was transferred, the letter is not inconsistent with that allegation. The letter was written about one month after the transfer of the Station Road property. The plaintiff's attorneys were clearly conveying their instructions that the money was already due and payable, hence the demand.

[79] Mr Barnard argued that the plaintiff failed to make discovery of this letter or to make reference to the letter in her evidence in chief; and that it was only after the defendant produced his exhibit bundle (which included this particular letter) that the plaintiff came up with her explanation for demanding the lesser amount of R175 000. I do not regard this criticism as justified. The plaintiff was testifying more than six years after the letter in question was written. She explained that if she ever had a copy of this letter in her possession it must have been among documents which disappeared when her briefcase was stolen during a burglary at her home in July 2009 (about four years before she testified). It was not among the documents which VAP handed over to the plaintiff's current attorneys in late 2008/early 2009. I have no reason to doubt, therefore, that the non-discovery of this letter by the plaintiff and her attorneys was innocent; and that it was only when the defendant (who himself failed to make discovery of the letter) produced it as part of the exhibit bundle submitted on 16 April 2013 that the plaintiff had occasion to apply her mind to it.

[80] The next relevant document is VAP's letter of 12 June 2008 to the defendant's new attorneys, Truter & Wessels ('TAW'). By this stage Mr L Lourens at VAP was handling the plaintiff's matters. In paras 5 to 12 of this letter VAP stated that their instructions were that R260 000 had been paid from the bond account to

the corporation's account on 30 March 2006 to meet expenses and liabilities of the corporation and that the defendant had undertaken to deposit that amount back into the bond account upon receipt of certain payments due to the corporation. Reference was made to the SMS of 29 June 2006. VAP continued that the defendant had failed to deposit the amount of R260 000 into the bond account and had also failed, as foreshadowed in the SMS, to take out a bond on the plaintiff's new house. The defendant's failure, VAP said, had resulted in the plaintiff's net proceeds from the Station Road property being R260 000 less than they should have been. It was then alleged that the corporation had been unjustly enriched by the transfer of R260 000, and payment of that sum was demanded from the corporation. (Again, there is no evidence that this letter was vetted by the plaintiff before it was sent.)

[81] It appears to me that this letter is substantially in accordance with the plaintiff's version at the trial. It refers to an arrangement reached with the defendant personally and alleges that he was obliged to pay the sum of R260 000 back into the bond account. In the nature of things, repayment in that form could occur only up to the time the Station Road property was transferred, since upon transfer the bond would be cancelled and the bond account closed. This obviously would not mean that the defendant's personal liability ceased. But it seems that as at June 2008 the plaintiff's attorneys were seeking to formulate a basis for claiming the same amount from the corporation, hence the reliance on unjust enrichment. Perhaps they were focusing on the corporation because it was believed the defendant in his personal capacity would not have the resources to repay the money.

[82] Mr Barnard emphasised in argument that the letter refers to repayment by the defendant upon receipt of certain monies owing to the corporation. He submitted that enforcement of an agreement on such terms would require the plaintiff to allege and prove [a] the precise amounts owing to the corporation from which the loan was to be repaid and [b] that the amounts in question had indeed been received by the corporation. However, the plaintiff's case as pleaded is not that the money was only repayable to her if and when the corporation received certain monies owing to it but that the money was repayable to her by not later than the date on which the Station Road property was transferred. I do not think that VAP, in their letter of 12 June

2008, were intending to convey that it was a term of the agreement that the sum of R260 000 would be repayable by the defendant only if and when certain identifiable monies owed to the corporation were received by the corporation. That would have been a most unusual and disadvantageous transaction for the plaintiff to conclude. It must also be remembered that in the very same paragraph VAP stated that the defendant's undertaking was that the sum of R260 000 would be repaid into the bond account, and in the nature of things the bond account could not exist beyond the date on which the Station Road property was transferred. An obligation to repay money into the bond account thus necessarily implied an obligation to repay the money by not later than the date on which the Station Road property was transferred. In my view, VAP were merely recording that the defendant, in his discussion with the plaintiff, had anticipated that the receipt of monies by the corporation would enable him to make such payment into the bond account. In the circumstances which prevailed in 2006 I have little doubt that that is exactly the source from which the defendant expected to obtain his funds. It by no means follows that it was a term of the agreement that he would only have to repay the money if the corporation received particular sums by particular dates and I do not think that VAP were suggesting that there was a term to this effect.

[83] Mr Barnard also argued that the content of the SMS of 29 June 2006, to which VAP referred in para 9 of this letter, was inconsistent with the terms of the agreement alleged by the plaintiff. I regard this argument as misconceived. The SMS emanated from the defendant, not the plaintiff. I have discussed the SMS earlier in this judgment and have concluded that it reflects a recognition by the defendant of a personal liability to the plaintiff in respect of the money transferred from the bond account to the corporation on 30 March 2006. The SMS does not reflect the plaintiff's version of the agreement; the SMS does not even purport to set out the defendant's version of any alleged agreement. The SMS is, though, evidence that the defendant recognised a personal liability. His request that she should not press him further and his statement that if necessary he would take out a bond on the new house indicate that he feared that he might not be able to comply with his undertaking to repay the money into the bond account. Paras 7 and 8 of VAP's letter set out the plaintiff's version of the agreement, namely that the sum of R260 000 was lent on the basis that the defendant would repay the money into the

bond account. Para 9 merely asserts that the defendant did not even comply with the alternative he had offered in his SMS of 29 June 2006.

[84] All things considered, I do not regard this letter as raising a material contradiction reflecting adversely on the plaintiff's credibility. (I mention that no reply to VAP's letter of 12 June 2008 was produced as an exhibit. I do not know whether there was a reply.)

[85] The next relevant document to which Mr Barnard referred is an 'affidavit' which the plaintiff made on behalf of her nephew Mr SJL Fourie in proceedings instituted by the latter against the corporation. (This document was not executed as an affidavit before a commissioner of oaths but it was signed, after the making of some handwritten corrections, by the plaintiff. It was presumably drafted by Mr Fourie's attorneys – it is in the same style and font as the other papers in the application.) It appears that the plaintiff signed this statement on 20 May 2008, shortly before VAP's letter of 12 June 2008 which I have already discussed. In para 5 of the statement the plaintiff refers to her claim of R260 000 in respect of money lent to the corporation. She says her attorneys will shortly be serving a letter in that regard on the corporation. Although the plaintiff in this paragraph refers to a loan to the corporation, she says that she is going to institute action against 'him' in respect of the money lent to the corporation which 'he' has failed to repay, which seems to be a reference to the defendant personally. The main founding affidavit in the proceedings in question, made by a Mr JC du Plessis (the father-in-law of Mr Fourie), states that he has been advised by the plaintiff that the corporation and/or the defendant owe her R260 000 and that she will shortly serve a summons on them. I do not think it can be inferred from the very terse statement signed by the plaintiff that she was giving her own attorneys one version and Mr Fourie's attorneys another version.

[86] The next document to which Mr Barnard referred in his cross-examination was the hand-over letter which VAP wrote on 12 November 2008 to the plaintiff's new attorneys, Theron & Partners ('TAP'). This letter *inter alia* summarised the content of VAP's letter to TAW dated 12 June 2008 and added that VAP had instructed counsel (on a contingency basis) to prepare particulars of claim to recover

the sum of R260 000 from the corporation and/or the defendant. What I have said concerning the letter of 12 June 2008 applies equally to this letter.

[87] I need to digress here to mention that VAP needed to hand over the plaintiff's matters to TAP because in September 2008 Firstrand Bank Ltd ('FRB') instituted proceedings against the plaintiff. Since FRB was a client of VAP, the latter firm could not act for the plaintiff in that matter. She wanted all her matters dealt with by the same attorneys. In FRB's action against the plaintiff the bank claimed about R96 000 on a credit card issued to the corporation and in respect of which the plaintiff was the authorised user and for which she was jointly and severally liable. The plaintiff testified that in September 2006 the defendant stopped paying maintenance on the basis that she was allegedly cohabiting with another man. (The fact that he stopped paying maintenance is common cause though the plaintiff disputed that he was entitled to cease payment.) The defendant's cessation of maintenance payments coupled with his failure to repay the amount of R260 000 placed the plaintiff in financial difficulty. According to her, the defendant agreed that she could start using the FRB card for her personal expenses because he was unable to repay the amount of R260 000. This was on the basis that he could deduct from the amount of R260 000 the debits incurred by her on the card. The premise of the arrangement obviously was that the corporation would pay FRB. The plaintiff says that in the event the defendant caused the corporation not to pay FRB, and FRB then sued her. She testified that she had had to accept liability and was still paying off the debt to FRB. The defendant, she said, was thus not entitled to any deduction in respect of the debits incurred by her on the FRB card. (The plaintiff in her evidence said that FRB's claim against her was about R70 000. The summons, which forms part of exhibit C, advances a claim for about R96 000. The discrepancy was not explored in cross-examination. It is possible that the corporation paid a portion of the claim but refused to pay the plaintiff's personal expenditure. The defendant's plea does not contain any allegation in the alternative to the effect that if there was a loan agreement the debt was partially repaid or reduced by subsequent transactions.)

[88] In para 3.6 of VAP's hand-over letter to TAP dated 12 November 2008 there is the curious statement that the credit card account on which FRB's claim against

the plaintiff was based had been fully paid out of the sum of R260 000 transferred to the corporation on 30 March 2006. That is not borne out by the corporation's bank statements and is patently incorrect. There are random small debits to the corporation's bank account over the period April to June 2006 which could relate to the FRB card but they total only a few thousand rand and were not funded by the transfer of R260 000 (the latter amount was fully used up by other debits on 30 and 31 March 2006). Furthermore, there is no evidence that the FRB card was used during the period April to June 2006 for the plaintiff's private purposes. Her evidence was that her use of the FRB card for private purposes was an arrangement reached with the defendant some time after September 2006 when he stopped paying maintenance. (The fact that the plaintiff was evidently permitted by the defendant to use the FRB card in circumstances where he was the controller of the corporation and could terminate her entitlement indicates that he felt himself to be under some obligation to her.)

[89] Mr Barnard then took the plaintiff to her original particulars of claim dated 9 April 2009 and contrasted them with her amended particulars of claim. I have already done this exercise in assessing the special plea of prescription. Insofar as the claim against the defendant is concerned, the two versions are consistent in asserting that the defendant agreed to repay the amount of R260 000. Whether the corporation was also contractually liable to repay the money is an issue which has fallen away because the plaintiff has withdrawn her claim against the corporation. Her legal representatives may have considered that a contractual obligation on the part of the corporation could be inferred from the circumstances of the case. In assessing the plaintiff's credibility, I must take into account that she is not a lawyer.

[90] All in all, the supposed inconsistencies in the documents and pleadings I have discussed do not lead me to conclude that the plaintiff is not a credible witness. Mr Barnard referred me to the judgment of Smalberger JA in *Pezzutto v Dreyer & Others* 1992 (3) SA 379 (A) where the defendants (the respondents in the appeal) had argued, and the trial judge had accepted, that the advancing of at least four different versions of an alleged oral partnership agreement by the plaintiff in that matter was indicative of the fact that no partnership agreement was concluded. In

overruling the trial judge Smalberger JA said the following concerning the alleged inconsistencies (392A-B):

‘On a common-sense approach, and having regard to substance rather than form, there do not appear to me to be any significant differences between the various versions. They all have as their central theme the creation of a partnership agreement between four equal partners. Whatever differences there may be, they are not sufficiently material or substantial to detract from the acceptability of the uncontradicted and largely unchallenged evidence of Pezzutto.’

Mr Barnard argued that in the present case, by contrast, there was no consistent ‘central theme’. Each case must naturally depend on its own facts and there are unsurprisingly many differences between the present case and *Pezzutto* (as there are between the present case and *McDonald v Young* 2012 (3) SA 1 (SCA), another case to which Mr Barnard referred me and which I have read but which I do not find it helpful to discuss). Nevertheless, and for reasons I have given in my consideration of the various ‘versions’ to which Mr Barnard referred me, I consider that the plaintiff’s versions in the present case indeed had a central theme, namely that the defendant took personal responsibility for repaying the money which the plaintiff, shortly after the conclusion of the divorce, agreed could be transferred from the bond account to the corporation.

[91] There are no other factors of significance in regard to the credibility and reliability of the plaintiff on the one hand and the defendant on the other.

*Conclusion on merits*

[92] It follows that the plaintiff has established on a balance of probability that an agreement was concluded with the defendant as alleged.

<u>Clause 9 of consent paper</u>

[93] The defendant pleaded, and Mr Barnard argued, that the claim should nevertheless be dismissed because it falls foul of clause 9 of the consent paper which reads as follows:

‘Die partye kom verder uitdruklil ooreen dat hierdie ooreenkoms die volle and finale ooreenkoms tussen die partye behels and dat bo en behalwe voormelde, geeneen van die partye enige verdere eise teenoor die ander sal hê voortspruitende uit hulle huwelik nie.’

[94] Mr Barnard submitted that the plaintiff’s claim in the present case was one *‘voortspruitende uit hulle huwelik’* within the meaning of clause 9. I disagree. The plaintiff has alleged and in my view established an agreement concluded subsequent to the termination of the marriage and subsequent to the conclusion of the consent paper. A clause in this form does not prevent the parties, subsequent to the termination of their marriage, from concluding commercial transactions with each other.

Conclusion

[95] The plaintiff is thus entitled to the relief claimed. The date from which *mora* interest must be paid is 16 January 2007, the day following the date on which the Station Road property was transferred and on which the amount of R260 000 should have been repaid.

[96] The trial of this matter commenced on 16 April 2013. After completion of the plaintiff’s evidence in chief the case was postponed because Mr Barnard wished to use in cross-examination a bundle of documents which included documents which had allegedly not been discovered. I gave directions for affidavits to be filed by the attorneys explaining the circumstances surrounding the alleged non-discovery. Such affidavits were duly filed. The trial resumed on 23 May 2013. I have read the affidavits filed by the attorneys. I do not wish to burden an already lengthy judgment with a detailed discussion of the affidavits. I am satisfied that certain of the documents in the bundle which Mr Barnard wished to use (and which became exhibit B) were not properly discovered and that the defendant should be ordered to pay the costs wasted by the postponement. The contention by the defendant’s attorney in his affidavit was that the wasted costs should rather be costs in the cause. Since I have found for the plaintiff on the merits, the practical effect of that proposal is the same as ordering the defendant to pay the wasted costs.

[97] I thus make the following order:

[a] The defendant is ordered to pay the plaintiff R260 000 together with interest thereon at 15,5% from 16 January 2007 to date of payment.

[b] The defendant is further ordered to pay the plaintiff's costs of suit, including any costs wasted by the postponement of this matter on 16 April 2013.

ROGERS J

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|---|---|
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