FORM A
FILING SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMSTOWN
JUDGMENT

PARTIES**:**

FAT BELLY PRODUCTS (PTY) LTD **PLAINTIFF**

and

JAN CHRISTIAAN VILJOEN **DEFENDANT**

- Registrar: **CASE NO. 1657/07**
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, GRAHAMSTOWN**

DATE HEARD: **3-5/2/09**

DATE DELIVERED: **2/4/09**

JUDGE(S): **Plasket J**

LEGAL REPRESENTATIVES –

Appearances:
- for the Plaintiff/Appellant(s): **Adv. De La Harpe**
- for the Defendant/Respondent(s): **Adv. Cole**

Instructing attorneys:
- Plaintiff/Appellant(s): **Netteltons Attorneys**
- Defendant/Respondent(s): **Whitesides Attorneys**

CASE INFORMATION -
- *Nature of proceedings* :

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE -- GRAHAMSTOWN)

CASE NO. 1657/07
DATES HEARD: 3-5/2/09
DATE DELIVERED: 2/4/09
NOT REPORTABLE

In the matter between:

FAT BELLY PRODUCTS (PTY) LTD **PLAINTIFF**

and

JAN CHRISTIAAN VILJOEN **DEFENDANT**

The plaintiff sued the defendant for an amount of R675 500.00, alleging that this was money advanced to him over a period of time. The defendant denied that the money had been lent to him. Instead, he alleged, he had been paid the amount in salary. The court found that the money had been lent to the defendant and was not salary. Judgment was accordingly granted in favour of the plaintiff, together with costs.

JUDGMENT

PLASKET, J:

[1] The plaintiff is a company in liquidation represented in these proceedings by its joint liquidators. I shall refer to the plaintiff in what follows as Fat Belly Products. It is common cause that the defendant, who I shall refer to as Viljoen, entered into a joint venture agreement with Fat Belly Products on 14 November 2003. The central issue to be decided is whether Fat Belly Products advanced him an amount of R675 500.00 over a period of time, as it

alleges – this being the amount it claims from him in these proceedings – or whether, as Viljoen alleges, that amount was paid to him as a salary. In addition, I am required to decide upon an application to amend the particulars of claim.

[A] THE PLEADINGS

[2] In its particulars of claim, Fat Belly Products alleges that, on 14 November 2003, a joint venture agreement was concluded by it, represented by its sole director Brian Craddock, and the defendant. It proceeds to state that during the currency of the joint venture Fat Belly Products 'lent and advanced to defendant the sum of R691 800.00 in terms of various oral agreements concluded between defendant acting personally and Fat Belly Products (Pty) Ltd represented by its director Brian Craddock…'.

[3] It claims that it was either an express or implied or tacit term that the amounts loaned would be repayable on demand or on the termination of the joint venture. Fat Belly Products was placed under final liquidation on 3 August 2006 and the joint venture agreement was terminated. Despite demand for the repayment of the amount lent to him, Viljoen has neglected or refused to pay.

[4] For his part, Viljoen's plea admits the joint venture agreement but states that in addition, 'it was an express oral term of the agreement between the parties' that he 'would be entitled to a salary as an employee of the plaintiff before liquidation, of between R26 000.00 to R30 000.00 per month to cover overheads, excluding travel and other work related expenses'.

[5] Viljoen therefore denies that the monthly amounts paid to him were loans to be repaid in due course and he denies 'that any oral agreements of loan were ever concluded between himself and the plaintiff …'. He accordingly denies that he is liable to repay the amount claimed by Fat Belly Products or, indeed, any amount.

[6] In its replication, Fat Belly Product denies 'the additional oral agreement alleged upon the terms alleged or at all'.

[B] THE APPLICATION TO AMEND

[7] During the course of the trial, Mr De La Harpe, who appeared for the plaintiff, applied to amend the particulars of claim. In its unamended form, paragraph 4 of the particulars of claim reads:

> 'During the currency of the Joint Venture Agreement, Annexure "A", Fat Belly Products (Pty) Ltd lent and advanced to defendant the sum of R691 800.00 in terms of various oral agreements concluded between defendant acting personally and Fat Belly Products (Pty) Ltd represented by its director Brian Craddock, at East London during the period December 2003 to February 2005.'

The amendment sought would replace the word 'February' with the word 'November'.

[8] The amendment was opposed by Mr Cole who appeared for the defendant. The basis of the opposition was that the amendment seeks to introduce a new cause of action, which has prescribed: the summons only interrupted prescription in respect of the cause of action premised on the period up to February 2005 and did not interrupt prescription in respect of the cause of action that arose from March 2005 to November 2005.

[9] Whether, in circumstances such as these, the prescription point is a good one depends on whether the amendment seeks to introduce a new cause of action. The approach to this question was set out as follows by Scott JA in *Firstrand Bank Ltd v Nedbank (Swaziland) Ltd*:[1]

> 'Section 15(1) of the Prescription Act 68 of 1969 provides:

[1] 2004 (6) SA 317 (SCA), para 4. See too *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A), 15A-16C; *Associated Paint and Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA), paras12-13.

> "The running of prescription shall, subject to the provisions of ss (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

As observed by Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 842E-F, "it is clear that the 'debt' is necessarily the correlative of a right of action vested in the creditor, which likewise becomes extinguished simultaneously with the debt". The distinction between "right of action" and "cause of action" has been repeatedly emphasised by this Court. More recently in *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* [2003] 2 All SA 597 (SCA), para [6], at 601c-d "debt" (and hence its correlative "right of action") was noted to bear "a wide and general meaning"; and not the technical meaning given to "cause of action", being the phrase ordinarily used to describe the set of material facts relied upon to establish the right of action. Even a summons which fails to disclose a cause of action for want of one or other averment may therefore interrupt the running of prescription provided only that the right of action sought to be enforced in the summons subsequent to its amendment is recognisable as the same or substantially the same right of action as that disclosed in the original summons. … If it is, the running of prescription will have been interrupted and it will not matter that the effect of the amendment is to clarify or even expand the claim. … The sole question in the present appeal is therefore whether the right of action relied upon in the particulars of claim as amended is recognisable as the same or substantially the same as that relied upon in the particulars of claim in its original form.'

[10] Essentially, when a court is called upon to decide whether a summons has interrupted prescription or not in these circumstances, it must 'compare the allegations and relief claimed in the summons with the allegations and relief claimed in the amendment to see if the debt is substantially the same'.[2] It is important to bear in mind that 'differences between the *facta probanda*

[2] Per Jones AJA in *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA), para 7.

necessary to prove the original cause of action and those necessary to prove the amended claim does not invariably lead to the conclusion that the original summons did not interrupt prescription' as the 'question is whether the right that is sought to be enforced and the relief claimed in the amended claim is the same or substantially the same as the right of action and the relief in the original claim'.[3]

[11] When the original particulars of claim are compared with the particulars of claim that include the amendment, it is clear that the cause of action that the plaintiff seeks to enforce remains the same – an agreement to lend money to the defendant which he has not repaid despite demand. It is merely expanded, and expanded in one respect only, namely that money was lent for a longer period than originally alleged.

[12] As a result of the above, the amendment is not affected by prescription and the amendment is granted.

[C] THE MERITS

[13] The plaintiff must, in order to succeed, prove its claim on a balance of probabilities. What that means, what has to be done to discharge the onus and how a court must approach the evidence in a civil trial were dealt with by Eksteen DJP in *National Employers General Insurance Co Ltd v Jagers*[4] in which he stated:

> 'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that

[3] Per Melunsky J in *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SE), 600H-J. See too *Dladla v President Insurance Co Ltd* 1982 (3) SA 199 (W), 201E-202C.
[4] 1984 (4) SA 437 (E), 440D-441A.

the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.'

[14] This dictum has been cited with approval on many occasions. In *Plaatjies and another v Road Accident Fund*,[5] Horn AJ summarised its import when he said that a trial court 'is required to consider the credibility of witnesses in conjunction with the probabilities and it is only when the probabilities fail to

[5] 1999 (1) SA 162 (SE), 168I.

indicate where the truth probably lies that the court should have recourse to an evaluation of the credibility of the plaintiff's witnesses on the one hand and the defendant's witnesses on the other hand'.[6]

[15] Three witnesses were called on behalf of the plaintiff. They were Mr Garth Voigt, one of the joint liquidators of Fat Belly Products and its former judicial manager, Mr Andrew Whitaker, the auditor and accountant of Fat Belly Products, and Mr Brian Craddock, its former director. The defendant, Mr Chris Viljoen, also testified.

[16] Before detailing the evidence, it is necessary to set out background facts of a common cause nature and to set out the terms of the joint venture agreement.

[17] The main line of business of Fat Belly Products, which was formed in 1995, was the processing, cleaning, packaging and distribution of dried agricultural products such as beans, peas, rice, lentils, popcorn and yellow maize. While it did well initially it later began to experience difficulties which led its sole director, Craddock, to look for ways of adding value to the products.

[18] This led Craddock to explore the possibilities of extrusion, a friction cooking process, and micronising, an infrared cooking process. The basic idea was that, instead of merely packaging and selling its products, Fat Belly Products would add value to them by cooking some of them.

[19] Craddock was put in touch with Viljoen who had expertise in micronising. Their discussions led to a joint venture agreement being entered into by Fat Belly Products, represented by Craddock, and Viljoen. The agreement was signed in East London on 14 November 2003.

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[6] See too *Baring Eiendomme Bpk v Roux* [2001] 1 All SA 399 (SCA), para 7; *Machewane v Road Accident Fund* 2005 (6) SA 72 (T), para 14.

[20] The introduction to the agreement – its preamble – stated that the parties wished to 'purchase and operate, on a profit sharing basis, a microniser and extruder for the purpose of maximising profit of waste currently generated by Fat Belly and to in due course generate profit from raw materials specifically sourced for these processes'.

[21] In terms of clause 2, Fat Belly Products was to arrange the necessary financing for the commissioning of the envisaged plant. It would become an asset of Fat Belly Products and all sales would, for the duration of the agreement, be invoiced by Fat Belly Products.

[22] In terms of clause 3, Viljoen would 'attend to the installation and operation of the necessary plant and equipment', which he would do to 'the best advantage of the joint venture'.

[23] Clause 4 dealt with administration. It provided that Fat Belly Products was to be responsible for the management and administration of the joint venture, that it would be created as a separate cost and the parties would have reasonable access to its books and records.

[24] Clause 5 is headed 'Distribution of Profits'. It states:

> 'Profits will be shared equally between the parties to this agreement. Profit will be calculated after allowing for a contribution to the overheads of Fat Belly for but not limited to the following expenses: finance costs, electricity, rent, insurance, administration costs, depreciation of the plant, and security.'

[25] Clause 6 deals with Viljoen's consulting work. It envisages the creation of a separate entity for this purpose, comprising of Fat Belly Products and Viljoen as equal partners and that all consulting work done by Viljoen for third parties would be invoiced by this entity.

[26] Clause 7 dealt with how the plant would be dealt with once it was paid for. It states:

> ‘It is agreed that once the plant has been paid for it will either be transferred to a separate entity, which will be owned equally by the parties to this agreement, or Chris will be given the opportunity of purchasing shares in Fat Belly.’

[27] In the event of Fat Belly Products selling its business interests, according to clause 8, the joint venture would remain in force unless the parties decided to dissolve it.

[28] Clause 9 is entitled ‘Ownership of information’. It provides that any confidential information that had been or was to be disclosed by Viljoen would ‘remain his property’ and ‘any research, developments, business activities, services and technical knowledge’ would remain confidential. If Viljoen was to withdraw form the joint venture, however, Fat Belly Products would be entitled to continue to use such information as it had acquired but would not be entitled to pass it on to third parties.

[29] In terms of clause 10, the joint venture agreement was to come into effect immediately and would remain in force ‘until such time as the assets are transferred into another entity or Chris takes up an interest in Fat Belly, at which time a new agreement will supercede this one’.

[30] Clause 11 provided for the joint venture insuring the life of Viljoen and clause 12 provided for the termination of the joint venture. It states:

> ‘Should either party wish to terminate this agreement they will be required to give six months notice unless a different notice period is agreed upon by both parties. The party retaining the business will be required to purchase the other party’s interest in this venture based on a valuation to be done at the time. Should the parties be unable to agree on a valuation an arbitrator shall be appointed. The arbitrator shall be an independent chartered accountant, agreed upon by both parties.’

[31] I now turn to the oral evidence that was adduced. The first witness called on behalf of the plaintiff was Voigt, the joint liquidator and former judicial manager of Fat Belly Products.

[32] His evidence was that soon after he was appointed as judicial manager of Fat Belly Products he met with Craddock, Viljoen and Whitaker, the accountant. The purpose of the meeting was to enable him to acquaint himself with the financial position of the company and an understanding of its trading operations.

[33] During the meeting he raised the issue of the loans that had been made to Viljoen and he told him that the company could not continue to make loans to him. As a judicial manager he could not make loans and it would create a problem if the judicial management failed and the company was wound up: the loans were assets of the company that would have to be realised.

[34] A solution to the problem was agreed to. From then on Viljoen would become an employee of the company and would receive a monthly salary. It would be more than the monthly loans that he had received as it was calculated so that, when income tax was deducted, Viljoen's nett salary would remain the same amount as the loans had been. Viljoen never challenged his liability but, after the judicial management had failed and Voigt was appointed as a liquidator, he made a demand of Viljoen but he refused or failed to pay.

[35] Whitaker testified that on 14 November 2003, he had been present at a meeting that was attended by Craddock and Viljoen. They had discussed the future path of Fat Belly Products and, particularly, the need to establish a pre-cooking plant. He had then drafted the joint venture agreement which was signed the same day. He confirmed that no agreement was reached that Viljoen would be employed by Fat Belly Products but only that he would be entitled to 50 percent of the profits of the joint venture. His contribution towards the joint venture was his expertise, his labour and some marketing. As it happened, however the joint venture never made a profit.

[36] Whitaker's evidence was further that the financial statements of Fat Belly Products reflected the amounts paid to Viljoen as being loans. They were not reflected as salary. Indeed, he stated that when he spoke to Viljoen about this, the defendant agreed that the payment were loans. Whitaker made a note of this which read: 'Chris Viljoen will share in profit from microniser. In meantime amounts paid to him are treated as advances. He has agreed to this.'

[37] Whitaker was present when Voigt, as the newly appointed judicial manager, met with Craddock and Viljoen. He confirmed that Voigt had said that he could not make loans to Viljoen and that he would have to be employed. Viljoen did not challenge this and agreed to the change.

[38] Craddock testified that he was the sole director of Fat Belly Products. He had been told of Viljoen's expertise and had contacted him at a time when it was imperative that something be done to make Fat Belly Products more profitable. They first spoke telephonically, then he went to Pretoria to meet with Viljoen and finally Viljoen came to East London and the joint venture agreement was entered into.

[39] It would appear that a document prepared by Viljoen was sent to Craddock before the agreement was reached. In it Viljoen wrote that it was a 'confirmation of what we have discussed and a few other points for your comment'. Of importance in this document are the following: first, Viljoen's obligations in designing and commissioning the new plant are detailed; secondly, he stated that the repayment of 'loans obtained for new installations will enjoy priority and must be repaid in full before any dividends (or profit sharing) are paid'; thirdly, he wrote that '[w]e will share 50/50 in profits after conditions in item 1.4 has been met and after deductions of all overheads', fourthly, a shareholding option in Fat Belly Products for Viljoen was an issue to be investigated; and fifthly as far as remuneration was concerned, Viljoen wrote that until the plant was operational and earning an income he would need 'between R26 000 and R30 000 (net) per month to cover overheads'. It

is clear that this document and the joint venture agreement are similar in important respects.

[40] Craddock confirmed that Whitaker had drafted the joint venture agreement which he and Viljoen then signed. He confirmed that the joint venture agreement made no provisions for a salary for Viljoen but, he stated, it was contemplated that 'Mr Viljoen would erect the plant and we would advance funds until such time that the company was profitable'.

[41] As to the motivation for advancing money to Viljoen and the agreement to do so, Craddock's evidence was this:

> 'Now it seems to be common cause that monies were paid by Fat Belly Products to Mr Viljoen. The only question is whether they were salaries or loans, are you with me – Correct.
> Well, why was money paid to him at all? – He specifically indicated that he needed to, that he needed certain funds to keep himself going until such time that the company was profitable or the cooking operation is profitable.
> And? – We agreed.
> What did you agree to? – We agreed to advance him against the portion of his future profits.
> Well, tell us a little more about it. How did you reach the figure? – He indicated that he needed rental and a certain amount to live on, which is what we agreed on.
> Do you recall now the figure? – The figure was round about R25 000.00'.

[42] Craddock stated that the defendant was never employed by Fat Belly Products and was never entered onto the payroll of Fat Belly Products. If he had been PAYE would have been deducted and that was never done. In addition, the monthly payment was made in three tranches. He gave the above evidence after it was brought to his attention that, in Viljoen's bank statements, some of the payments were described as salary. A second, related issue was raised with him. In the founding affidavit in the judicial

management application he had said with reference to Viljoen that Fat Belly Products had ‘employed a specialist’. He said that this was an error on his part.

[43] He was present at the meeting at which Voigt told Viljoen that he could not proceed as before but would have to become an employee and be paid a salary.

[44] A fax from Viljoen to Craddock was put to him. It was dated 8 December 2003, shortly after the joint venture agreement was entered into. It said, in part:

> ‘Referring to my own needs, I would appreciate a “contribution” of R13 500.00 (for period ending Nov ’03) plus R2 000.00 to provide for travelling costs.’

[45] When he was cross-examined, Craddock insisted that there had never been any discussion of Viljoen being paid a salary when the joint venture agreement was entered into and that he would not have countenanced such an arrangement. When he was asked by me whether there had been any discussion with Viljoen about remuneration his answer was: ‘Not specifically. Mr Viljoen had indicated that he needed money to live on’. It was put to him by Mr Cole that Viljoen had in effect said that until the plant was operational, he needed a certain amount per month to cover overheads. To this, Craddock said: ‘Correct, but as an advance.’

[46] Craddock was, however, vague on certain aspects. He could not say precisely when remuneration was discussed with Viljoen and precisely when it was agreed to advance money to him. He also was vague when he was asked how the defendant was to have known that the amounts he was given were a series of loans and not a salary. Apart from saying that it ‘was clear from the outset’ he could not say who made it clear and how. Eventually, he said the following:

> ‘As I indicated that there is no ways that Fat Belly would have entered into an agreement with him on a 50/50 basis and still paid him a salary

> of that magnitude. So he was clear from the outset, this discussion document that he faxed through to me became a discussion document at the final meeting, where the joint venture agreement was drawn up. If Mr Viljoen had thought of such an issue when he sent this through on the 10th, why was it not implemented in the joint venture agreement?'

[47] In re-examination, Craddock was asked whether Fat Belly Products had employed Viljoen. The record reads thus:

> 'Did you conclude an agreement of employment on behalf of Fat Belly with Mr Viljoen? – No, there was never an agreement of employment. Standard practice in the company was if someone was employed, an employment [contract] would be entered into, in that there would be discussions on how many days leave, all those aspects would come into the frame, which were never part of this discussion.
> And I assume that employees are issued with IRP documents, IRP 5's is what I think you issue an employee – That is correct.
> Had you ever issued such a document to Mr Viljoen? – We didn't as far as I can recall?

[48] When he testified, Viljoen confirmed the initial meeting with Craddock and the subsequent signing of the joint venture agreement. He stated, however, that at the first meeting they had discussed 'my salary, my package, my requirements, everything you know' and that this discussion was confirmed in his fax to Craddock of 10 November 2003.

[49] He stated that when the joint venture agreement was signed nothing was discussed about his remuneration. He insisted that he never asked for or received any loans from Fat Belly Products at any time.

[50] He confirmed that when he began to receive payments they came in three tranches in most months. He denied ever having had a conversation with Whitaker or anyone else in which he confirmed getting loans or that he would have to be paid a salary henceforth.

[51] When he was cross-examined he said for the first time that a contract of employment between him and Fat Belly Products was entered into orally in September 2003 and his fax of 10 November 2003 confirmed that agreement. He first said that the employment contract was for an indefinite period, then he said that he would only be paid a salary until the plant was operational (at which point his sharing in profits would be imminent) and then he stated adamantly once again that the employment contract was for an indefinite period and that he would ultimately have been entitled to a half share in the business, half of the profits and a salary. The salary agreed to was between R26 000.00 and R30 000.00 per month. He conceded, however, that the subsequent, written, joint venture agreement was different to the terms that he says were agreed orally and confirmed in the fax of 10 November 2003.

[52] He stated, however, that when the joint venture agreement was drafted, his fax of 10 November 2003 was used as 'a template', and it was at this meeting on 14 November 2003 that 'changes were made'. In other words, the effect of this evidence is that the joint venture agreement replaced the oral agreement. He said that he had no idea why the joint venture agreement was silent on his entitlement to a salary.

[53] When he was asked how many agreements he had with Fat Belly Products, his answer, with obvious reference to the joint venture agreement was: 'Only this.' Shortly thereafter, however, he changed his evidence, stating that he had two agreements, 'one oral, one written'.

[54] When he was asked about Voigt, he said that he met with him on one occasion and Voigt did not know who he was or what he was doing and had not heard of the micronising plant. This was after the judicial management order had been granted. He then said that he had had discussion with Voigt on several occasions before the judicial manangement order was granted. He also added that he had been present at a meeting with Craddock after the judicial management order had been granted when Voigt walked in and asked 'whether we've discussed the salary issue' – whether Craddock and he had 'reached agreement on the salary issue'. At this stage he left the room and

this, he now insisted, was the only meeting he had with Voigt. This version was never put to Voigt when he was cross-examined.

[55] Viljoen confirmed that no tax was deducted from the monthly amounts transferred to him but he ascribed this to the 'cash flow situation' in Fat Belly Products. He also did not render a tax return or receive an IRP5 document from Fat Belly Products. It would appear that he was the only person in Fat Belly Products from whom PAYE was not deducted but he ascribed this to the fact that he knew of the cash flow problems. He also did not receive a monthly pay slip.

[56] He was also cross-examined on evidence he had given in chief that he had only committed himself to Fat Belly Products by the end of October 2003. He experienced some difficulty in explaining this evidence in the light of his evidence given in cross-examination that he had entered a contract of employment with Fat Belly Products in September 2003. He also had some difficulty in explaining his evidence that the contract of employment was for an indefinite period in the light of his fax of 10 November 2003 which confirmed a discussion that he needed between R26 000.00 and R30 000.00 per month '[u]ntil we are operational and earning an income'. His eventual explanation was that this meant that when the plant was operational and earning an income, he would be entitled to be paid even more. This explanation is far from convincing.

[57] A number of documents were referred to during the trial. The following points emerge from a consideration of these documents. First, the joint venture agreement does not envisage the employment of Viljoen or any payments to him prior to the plant being profitable. Secondly, Viljoen's fax of 10 November 2003 does not purport to be confirmation of an agreement as he testified but rather a 'confirmation of what we have discussed and a few other points of comment'. It also does not expressly refer to Viljoen wanting to be employed, although it does speak of him receiving 'remuneration' to cover his needs. Thirdly, the financial statements of Fat Belly Products consistently reflect the amount paid to Viljoen as being owed to it – and thus being a loan

– and not as an expense as it would be reflected if it was a salary. Fourthly, when one looks at Viljoen's bank statements, it is so that one payment per month – for R15 000.00 – was described as salary, but the remaining two tranches paid to him are not. The explanation for this is that the first amount was paid with the salaries of employees. Fifthly, the note made by Whitaker to the effect that the defendant agreed that 'amounts paid to him are treated as advances' is consistent with the documents as a whole and is supportive of Whitaker's evidence. Finally, the defendant's fax of 8 December 2003 in which he claimed the first payment is instructive. In it, the defendant requests a 'contribution' for November 2003. He does not demand the payment of a salary, which would have been overdue by more than a week. If the amount claimed was a salary it is strange that it was not paid like all other salaries.

[58] It is common cause that the amount of R675 500.00 was paid to Viljoen over the period from December 2003 to November 2005. The only issue to be decided concerning these payments is whether they were loans or salary. It is also common cause that the monthly amounts were paid in three tranches, that no tax was deducted and that Viljoen received no payslip.

[59] I turn now to an assessment of the evidence. I can find no basis upon which to criticize the evidence of Voigt and Whitaker. Both were good witnesses whose versions remained unchanged during cross-examination and whose testimony was internally consistent, consistent with each other's evidence and with the documents.

[60] Craddock's evidence was at times vague and tentative. Despite this, I consider him to be an honest witness who tried his best to recall and deal with matters from about five years ago. He was confronted with his founding affidavit in the judicial management application, in which he had referred to Fat Belly Products having 'employed a specialist'. He stated that he had erred in his statement. When this passage of the affidavit is read in context, it appears to me that the word 'employed' is used loosely to mean 'engaged the services of' rather than in its strict technical sense. In any event, it runs

counter to the weight of the other documentary evidence and the evidence of Craddock as a whole.

[61] Craddock was adamant – and remained so throughout his evidence – that no contract of employment was ever entered into by Fat Belly Products with Viljoen. He also stated, however, that regular payments were made to Viljoen – and that everyone, including Viljoen knew that they were loans – because Viljoen needed an income before the plant realized a profit. He had difficulty, however, in identifying the moment when it was agreed to make the loans. Craddock's evidence, despite its shortfalls, is consistent with the documents and with the evidence of both Voigt and Whittaker.

[62] The defendant made a very poor impression on me. He was often evasive and, at times facetious. His answers, as I have shown above, were sometimes illogical and his evidence contains instances of him changing his evidence in order to tailor it to suit the exigencies of the moment. The main problem with the evidence of Viljoen, however, is that it is not supported by the probabilities and is not supported by the documents, including his own.

[63] In his plea, Viljoen pleaded that he had entered into an oral contract of employment in addition to the joint venture agreement but when he was cross-examined he raised for the first time that the oral agreement was reached in September 2003. This evidence, which one would have expected to have been given in chief, finds no support in the fax of 10 November 2003, which clearly confirms discussions that had been held and not an agreement. Furthermore, even though it talks of remuneration, it makes no mention of a contract of employment having been discussed.

[64] Similarly there is no mention of Viljoen being employed in the joint venture agreement. One would have expected such a term if the joint venture agreement replaced an earlier oral agreement to this effect or, indeed, if it was in the contemplation of the parties at all: it is improbable that, had it been in the contemplation of the parties, it would have been omitted.

[65] It is more likely, even on Viljoen's own documents, that there had been discussions about him being advanced money, in accordance with his needs until like plant was profitable: the fax of 10 November 2003 talks of payments that Viljoen required being made until 'we are operational and earning an income'. The fax of 8 December 2003 requested payment of a 'contribution' and, as I have already said, it on its own militates against Viljoen's version that the 'contribution' was, in fact, a salary.

[66] The way in which the amounts were paid makes it improbable that the payments were payments of a salary. I say this for four reasons. Firstly, no tax was deducted by Fat Belly Products and no IRP5 document was furnished to Viljoen. Secondly, Viljoen never received a payslip as one would have expected if he had been an employee. Thirdly, the payments were made in three tranches every month, which is most unusual if they were salary payments. Fourthly, at times the amounts paid in a particular month differed from those paid in previous months. Once again this is something that one would not expect if the payments were of Viljoen's salary.

[67] The payments to Viljoen were, as I have indicated, recorded in the books of Fat Belly Products as loans rather than salary. If that was not true, it would have required a deliberate distortion of the books to create the impression that this was the case and that the amounts were not salary. This would have required a conspiracy that would have involved a number of people and would have required them to 'cook the books' long before any litigation was contemplated. That is improbable. The same can be said of Whitaker's note. On Viljoen's version, it could only be explained by Whitaker deliberately concocting evidence to suit the case and then lying when he testified. Apart from the fact that nothing gave me the impression that Whitaker was a dishonest witness – indeed, I found the contrary to be true – such a version would be improbable too.

[68] In the result, I find that the version of Fat Belly Products, that the payments that it made to Viljoen, totalling R675 500.00 over the period from

December 2003 to November 2005 were loans advanced to him is more probable than that these amounts were salary paid to him as an employee.

[D] THE ORDER

[69] I make the following order:

(a) Judgment is granted in favour of the plaintiff and the defendant is directed to pay it the amount of R675 500.00 together with interest thereon calculated at the legal rate of interest *a tempore morae* to date of payment.

(b) The defendant is directed to pay the plaintiff's costs of suit together with interest thereon calculated at the legal rate of interest from a date 14 days after *allocatur* to date of payment.

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C. PLASKET
JUDGE OF THE HIGH COURT

APPEARANCES:

For the plaintiff: Mr D. De La Harpe instructed by Netteltons
For the defendant: Mr S. Cole instructed by Whitesides