IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

22 September 2022

DATE SIGNATURE

CASE NO: 5270/18

DATE: 22 SEPTEMBER 2022

In the matter between:-

JAN ADRIAAN MOOLMAN Plaintiff

VS

ANDRE DREYER MOTORS t/a AUTO BAVARIA MIDRAND Defendant

JUDGMENT

KOOVERJIE J

THE CLAIM

[1] These action proceedings emanate from the plaintiff's claim in an amount of R1,422,093.00 which he alleged is due and owing to him by virtue of a profit share scheme that was approved and agreed upon by the parties for the 2017 financial year.

[2] The plaintiff was employed as the defendant's chief financial officer until 31 October 2017 when his services were terminated. The defendant's case is that no such profit share scheme was approved and agreed upon with the defendant.

ISSUE FOR DETERMINATION

[3] The issue for determination is whether the profit share scheme was accepted and approved on the terms pleaded by the plaintiff or whether on the version of the defendant, being that the shareholders would consider a management performance bonus and the basis and parameters would still be debated and contemplated.

[4] It is the defendant's case that at no time during that meeting were any specific financial performance criteria for the executive management team discussed and thereafter approved or agreed upon by the shareholders.

COMMON CAUSE FACTS

[5] Mr Andre Dreyer ("Mr Andre Dreyer") and Mr Ndaba Ntsele ("Mr Ntsele") were representing the two shareholders of the defendant, namely, the Dreyer Family Trust and the Friedshelf 1297 (Pty) Limited (a company with limited liability). The Dreyer Family Trust was represented by Mr Andre Dreyer and Mr Ntsele represented the said company.

[6] The executive management team comprised of the plaintiff, Mr van der Merwe (the chief operations officer) and Mr Luke Dreyer (the dealer principal). For the 2016 financial year an amount of R3 million was proposed and divided equally to the executive management team, (three individuals), where each one received R1 million.

[7] At the special meeting of the shareholders held on 7 June 2016, the shareholders announced to the executive management team that based on the defendant's financial performance for the year ending 28 February 2016 a management performance bonus of R3 million would be paid to them. The total performance bonus was R3 million. It was further at this meeting that discussions ensued regarding the bonus for the 2016/2017 financial year.

[8] It had also not been disputed that by virtue of the shareholders' agreement entered into, particularly clause 13, which stipulates that in the event that the defendant incurs any indebtedness in excess of R100,000.00 then approval by special majority of the shareholders must be obtained. This entails that there must be 75% approval of the shareholders.

[9] The issue for consideration is whether Mr Moolman was entitled to the outstanding amount which he claimed. In so doing, consideration has to be given "whether on 7 June 2016 at the shareholders meeting the profit share scheme was approved and agreed upon by all the relevant parties".

THE PLEADINGS

[10] The plaintiff's version (paragraph 5 of its particulars of claim) is that:

"The profit share scheme as accepted and approved had, inter alia, the following terms:

5.1 The financial performance, for purposes of the calculation, be measured based on the "Net Profit before tax and distributions" (hereinafter referred to as "Net Profit") of the Company and its subsidiaries approved in the "Annual Financial Budget" (hereinafter referred to as "AFB") of the Company;

5.2 Where the actual consolidated Net Profit was less than approved AFB for the relevant financial year, no performance bonuses will be paid;

5.3 Where the actual consolidated Net Profit exceeded the approved AFB for the relevant financial year by less than R5 000 000.00 (Five Million Rand) a performance bonus of 15% of the actual consolidated Net Profit would be paid to the Senior Executives in equal proportions;

5.4 Where the actual consolidated Net profit exceeds the approved AFB for the relevant financial year by R5 000 000.00 (Five Million Rand) or more, a

performance bonus of 20% of the actual consolidated Net Profit will be paid to the Senior Executives in equal proportions;

5.5 The Net Profit for the 2016/2017 financial year, as per the AFB approved by the board on the 26 May 2016, amounted R17 159 960.00 (Seventeen Million One Hundred and Fifty Nine Thousand Nine Hundred and Sixty Rand);

5.6 In order for a Senior Executive to qualify for the performance bonus, he or she must be in the employment of the Company or its subsidiaries on the last day of the financial year."

[11] At paragraph 6 the plaintiff further pleaded:

"6.1 By virtue of the abovementioned Net Profit being achieved and virtue of acceptance thereof by the board, the Defendant earned a profit far exceeding R5 000 000.00 (Five Million Rand) over the AFB, which thus entitled the Senior Executives to a profit share of 20% of the actual consolidated Net Profit;

6.2 The Plaintiff was in the employment of the Defendant on the last day of the financial year;

6.3 The Plaintiff is thus entitled to the agreed upon profit share."

[12] The plaintiff sets out the quantum of the amount that he is entitled to in terms of paragraph 7:

"The profit share that the Senior Executives (of which there are three) are entitled to amounts to a gross bonus of R1 762 093.00 (One Million Seven Hundred and Sixty Two Thousand and Ninety Three Rand) per Senior Executive and thus amounts to a net amount of R969 151.00 (Nine Hundred and Sixty Nine Thousand One hundred and Fifty One Rand) per Senior Executive after deducting the applicable tax to the South African Revenue Services."

[13] The plaintiff was paid R340,000.00 and now he claims the outstanding balance, namely an amount of R1,422,093.00 (one million four hundred and twenty-two thousand and ninety-three rand) before deduction.

[14] The defendant in its plea denied the plaintiff's claim and pleaded the following:

"5.1.4 a special meeting of the Shareholders was held on 7 June 2016 at which the Shareholders announced, based on the Defendant's financial performance for the year ending 28 February 2016, a management performance bonus to the then executive management team, in the amount of R3 000 000.00 (three million rand);

5.1.5 at the time of the announcement, the executive management team comprised of 3 (three) individuals, one of which being the Plaintiff;

5.1.6 each of the three members of the executive management team, including the Plaintiff, received an amount of R1 000 000.00 (one million rand) from which amount tax was to be deducted;

5.1.7 during the course of the aforesaid special Shareholders meeting the Shareholders indicated that they would consider a management performance bonus for the year ending 28 February 2017, the basis and parameters of which they would debate and contemplate, it being within their pure discretion to authorize the Defendant's Board of Directors to pay any gratuitous management performance bonuses to the executive management team;

5.1.8 at no time during the meeting were any specific financial performance criteria for the executive management team for the year ending 28 February 2017, and thereafter, either approved and/or agreed upon, in any manner or form whatsoever by the Shareholders."

[15] Further, on the issue as to why only R340,000.00 was paid, the defendant, at paragraph 9, pleaded the following:

"9.1.1 in July 2017, the Shareholder, in the exercise of their discretion:-

9.1.2 authorized the Defendant's Board of Directors to make payment of management performance bonuses to members of the Defendant's executive management team, including to the Plaintiff, for the financial year ending 28 February 2017;

9.1.3 the methodology adopted in respect of the payment of the management performance bonuses aforesaid was to, inter alia, take into account and evaluate the individual performance and contributions of each of the members of the executive management team which could, based on

individual performance and contributions, result in members of the executive management team not being rewarded equally."

It was on that basis that the plaintiff was evaluated and paid the amount of R340,000.00.

THE PLAINTIFF'S EVIDENCE

[16] Mr Moolman testified that the meeting of 7 June 2016 was indeed a shareholders' meeting and the executive management were called/invited to the meeting. At this meeting the profit share scheme was agreed and approved by the shareholders' representatives. Both representatives, Mr Dreyer and Mr Ntsele were present at the meeting and the special majority vote was attained. At this very meeting they were also informed that a bonus of R3 million (in total) would be paid to them for the 2016 financial year. This amount was agreed and approved by both Mr Dreyer and Mr Ntsele representing the shareholders. Mr Moolman pointed out that there had been no written resolution passed in respect of the R3 million payment and to date no such resolution exists.

[17] He further testified that at this meeting the shareholders had agreed to incentivize the executive management team by virtue of the profit share scheme. Furthermore, both shareholders made the decision, hence a special majority was reached.

[18] He testified at some point that he prepared the draft round robin resolution in respect of the 2017 year bonus payout was as he was not getting any kind of response from the shareholders after various communications with them.

[19] When specifically asked why he prepared the draft resolution and submitted same to Ms Ntsele, he testified *"as CFO I did it. Any one of the directors, I guess, could have given the terms of reference but being the CFO and best qualified from a financial perspective I was instructed by the board to do so."*

[20] Mr Moolman testified that no written recordal of the minutes of the 7 June 2016 meeting exists. The fact is common cause.

[21] It was Mr Moolman's version that what he had set out in the written resolution was, in fact, what had been agreed and approved to at that meeting of 7 June 2016. The draft proposal was headed "Written Resolution of the Shareholders of the Company passed in terms of Section 60(1) of the Companies Act 71 of 2008 as amended". This draft was prepared and firstly circulated to Mr Luke Dreyer and Mr van der Merwe and was referred to in the email as "Draft Resolution of our profit share". They were asked for their input thereon before the draft was sent to Ms Ntsele.

[22] The said draft was subsequently sent to Ms Ntsele, and the wording read as follows:

"Please find herewith a rough draft of the "profit share" resolution for your drafting/clean-up.

The principles are as were agreed upon – perhaps the legal wording needs fine tuning."

[23] In his testimony, reference was made to the correspondence[1] where the rough draft was communicated to Ms Ntsele on 21 December 2016. On 22 December 2016 Ms Ntsele commented on the draft resolution and referred same to Mr Moolman.[2] On the same date Mr Moolman responded to Ms Ntsele in an email.[3] The only concern raised by Ms Ntsele was whether the profit should be calculated as net profit before tax or net profit after tax. Mr Moolman was of the view that it should be based on net profit before tax.

[24] Later, on 22 December 2016 at 16:36, Mr Luke Dreyer confirmed after he considered issues raised between Ms Ntsele and Mr Moolman and replied via email that the performance bonuses should be benchmarked against the budgeted numbers <u>before tax</u>.[4]

[25] On 25 May 2017 Mr Moolman again communicated with Mr van der Merwe, Mr Dreyer and Ms Ntsele, and amongst others who were copied was the auditor, Ms Labuschagne.[5] Mr Moolman, in such correspondence, attempted to convene a board meeting regarding the approval of the annual financial statements.[6] He further indicated that the resolutions can be approved by way of round robin. He testified that he was aware of the fact that the audit committee meeting was important since the financials had to be finalised.

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[1] 004-17 of the record
[2] 004-20, 005-38 of the record
[3] 004-15 of the record
[4] 004-14 of the record (my underlining)
[5] 005-68 of the record
[6] It was common cause that in this period the annual financial statements had to be finalized

[26] During examination in chief and cross examination, Mr Moolman was referred to the various correspondence which included correspondence dated 12 June 2017 from Mr Ndaba Ntsele, who was quite upset about a provision being made in the financial statements for an allocation of the bonus remuneration. Mr Ntsele accused Mr Moolman of unethical and unprofessional behavior as a chartered accountant. Mr Ntsele in this letter expressed[7]:

"Dear Mr Moolman

On the 08/06/2017, we had a Audit and Risk Committee meeting chaired by myself. We had a quorum with the following Audit and Risk Committee members present:

Mr Andre Dreyer

Ms Nthabiseng Ntsele

Mr Piet van der Merwe.

On invitation, we had Mr J A Moolman, representing Andre Dreyer Motors as a Chief Financial Officer and Ms R Labuchagne from Harris Dowden & Fontaine representing our external auditors.

The main reason for the meeting was to approve the draft annual financial statements for the 2016/17 financial year ending 28 February 2017.

In the Audit and Risk Committee pack, one of the reports tabled was the Independent Auditors Report on page2-3. Whilst going through the pack, I noticed a discrepancy on page 19 under provisions. There was a provision of R5 286 278 that was agreed by the board and shareholders for profit share to the management team, which is Luke Dreyer, Piet van der Merwe and Riaan Moolman. I queried this provision because our Memorandum of Incorporation, an amount of R100 000 needs shareholders and board approval. I then asked the auditors where did they get the authority to put this amount of money into the audit report. I specified that there was

[7] 005-79 of the record

no shareholder and board approval for this amount. The response of the auditor was that "you prepared the financials and provided an unsigned resolution" relating to this matter.

I used the phrase that you snuck in this provision in an unethical and unprofessional manner as a chartered accountant … I must highlight that Piet van der Merwe wanted us to sign the financial statement at that time and I refused as I want the matter to be resolved first. Ultimately the financial statements were signed without the provision in place. Had we signed off on the initial document, having not checked the fine print, the company would have been liable to pay out the said amount without the relevant approvals. I would like to put it to you that you knowingly and willfully misled the Audit and Risk Committee as well as the board of directors…"

[27] Mr Moolman was also referred to correspondence from Mr Luke Dreyer. Mr Luke Dreyer responded to Mr Ntsele's letter. In an email to Mr Moolman and copied to Mr Andre Dreyer (his father), Mr Luke Dreyer confirmed that an agreement in fact existed. The correspondence reads:

"Hi Rian and Andre

Thank you for this.

I am trying to respond to this in a business manner, rather than responding emotionally. I, as Dealer Principal of Auto Bavaria, am not only disheartened by the below stance, but this goes against the sheer ethics of the culture that ABM stands for. Whilst I appreciate that we are remunerated extremely well, we also had an agreement.[8] *Through the most testing year in over two decades, we not only excelled, but we exceeded the fair budget by a large margin. Additionally, through my relationships at ABS and BMW SA, we put together a deal that increased the*

[8] my emphasis

value of the business by over 40%. There have been discussions regarding the performance bonus from Dec 2016 and 6 months down the line, there is still uncertainty.

Being a family business this puts me in a extremely difficult situation. @Andre – I would ask that you address this with Ndaba as a matter of urgency that we can have a clear and final decision on the matter. Should the shareholders feel that there is no ground for these bonuses to be paid, I will make my decisions accordingly.

Best Regards

Luke"

[28] Following this email, Mr Moolman, in correspondence of 14 June 2017 expressed that he fully supported Mr Luke Dreyer's views.[9]

[29] On the same day (14 June 2017) Ms Ntsele, in an email, *inter* alia, expressed her concerns and advised that the provision regarding the bonus was never agreed upon, that one cannot rely on an unsigned resolution from the board and was concerned about how the auditors took the resolution into account. She also confirmed that the provision of the bonus was removed from the financials.

[30] The auditing firm, not pleased with the response of Mr Ntsele, replied in correspondence and advised that they had taken instructions from the CFO who has ostensible authority on matters involving company finance functions. It was Mr Moolman who instructed them to treat the bonuses as having accrued pending the outcome of a management meeting to determine whether they had in fact accrued. It was on that basis that they included the bonus provision in the draft financials.

[9] 005-84 of the record

[31] Mr Moolman was also referred to correspondence from his instructing attorney dated 23 June 2017[10] and where Mr Moolman's version was put forward. I find it necessary to reiterate an extract from the said response:

"5.1.4 On 7 June 2016 a special meeting was held between the shareholders and the Management Team, the former being represented by Mr Andre Dreyer as representative of the Dreyer Family Trust and yourself as representative of Friedshelf 1297 (Pty) Ltd, as set out in 2.3 supra. At the said meeting a management performance bonus was agreed to and announced for the Management Team in the amount of R3,000,000.00 up to and including the financial year ended on 28 February 2016. You, at this very same meeting, presented to the Management Team a profit share incentive scheme for the 2016/17 financial year, which was agreed to by all relevant persons.

5.1.5 At the Board Meeting following the special meeting referred to in 5.1.4 supra, our client proposed that "…NNN [NN Ntsele] prepare a draft shareholders resolution on the profit sharing arrangement agreed upon during the special meeting."[11] It was further recorded in the Minutes of the Meeting of the Board of the Company held on 22 November 2016 that our client "… will provide NNN with the terms of reference to compile the draft document."

[10] 005-107 of the record
[11] my emphasis

5.1.6 Our client instructs us that this was done and that our client provided a draft resolution to NN Ntsele, which was amended by NN Ntsele and then further discussed and amended, as is evident from a whole host of emails which were exchanged between the Management Team and NN Ntsele.

5.1.7 It is also important to note that in this string of mails exchanged in regard to the proposed shareholders' resolution recording the profit share incentive scheme to the Management Team, both you and Mr Dreyer as the representatives of the shareholders, were copied in, and not once did either of you voice any objections or disagreement to the terms being discussed and/or amended.

5.1.8 It is also important to note that the only points in issue were the date of accrual and whether the profit share would be calculated on profit before tax and dividends or on profit after tax and dividends. The latter makes no logical sense, as this could have the effect that the agreement can be completely negated in an instance where the full profit after tax is declared as a dividend, and this is certainly not the spirit of the agreement between the Shareholders and the Management Team.

*5.1.9 All of the above culminated in a final draft being prepared. A copy of this draft is attached hereto as **Annexure "A"**.*

*5.1.10 **Annexure "A"**, and more particularly Resolution 1, evidences that an agreement had been concluded between the Company on the one hand and the Management Team on the other hand and in terms of which the*

Management Team was to receive a performance based profit share/bonus in respect of the 2016/17 financial year, provided certain criteria was met. At worst, the draft resolution provides evidence of the verbal agreement concluded between the Company and the Management Team, and this is substantiated by the e-mail correspondence referred to above.

5.1.11 ***In summary, for you to, in your letter under reply imply that you have no knowledge of the verbal agreement between the Company and the Management Team in regard to the profit share incentive scheme to the Management Team is blatantly untrue. In this regard we record that: -***

(i) *A verbal agreement incentivizing the Management Team was reached between the Company, its shareholders and the Management Team on 7 June 2016 during the special meeting.*

(ii) *The terms of the verbal agreement is recorded in the proposed resolution attached hereto as* ***Annexure "A"****.*

(iii) *As the representatives of both shareholders were present at the said meeting, the requirements of clause 13 of the Shareholders' Agreement insofar as it relates to a Special Majority was met.*

There was therefore no alleged agreement between the Company and the Management Team, but an actual agreement*.*

5.1.12 ***The provision as included in the draft financial statements was therefore a reflection of an actual liability of the Company that had to be provided for and the Board's approval for inclusion of such***

***provision in the draft financial statements is not required as will more fully be seen hereunder**."*

[32] At 5.2.13 it was further stated:

*"**We also find it extremely strange that you claim to have had no advance notice or knowledge of the inclusion. The draft Financial Statements were provided to Mr. Dreyer at a meeting with him on 9 May 2017, prior to the meeting of the Audit & Remuneration Committee on 8 June 2017, together with the calculations of the profit share provision, among other calculations, and he advised our client that same would be discussed with you. What is even more concerning is that Mr Dreyer, who was present at this meeting, did not point this out**."*

[33] Mr Moolman further testified that at the meeting held on 20 July 2017, the items for discussion on the agenda were the annual financial statements 2017 and the executive incentive scheme.[12] The minutes recorded that Mr Ntsele advised that the executives will be rewarded and the shareholders will decide on the amount, however, not in the current incentive format. Mr Ntsele added that the perception that the shareholders do not want to reward the executives were incorrect. Thereafter, Mr Ntsele proposed that the effective members recuse themselves for the shareholders to make a decision for an ex gratia amount. The meeting then adjourned and when the executives returned to the meeting Mr Ntsele advised that the shareholders resolved to pay a performance amount and that Mr Andre Dreyer will meet each executive to discuss and issue performance letters.

[12] 005-354 of the record

[34] However not only Mr Moolman, but Mr van der Merwe, in their respective testimonies, indicated that there were no such discussions held with Mr Andre Dreyer.

[35] Under cross-examination Mr Moolman pointed out that the senior manager's reward structure had been a point of discussion prior to the June 2016 meeting. In fact, on 17 February 2016, in an email, Mr Andre Dreyer set out a list of some points for discussion and finality which included "senior manager reward structure". Such email was communicated to the executive management.[13]

[36] On 29 March 2016 Mr Andre Dreyer once again communicated with the executive management, requesting them to come up with a beneficial scheme for all parties concerned as he pointed out that Mr Ntsele was not satisfied with the last presentation and also advised that there were discussions between Mr Moolman, Mr Dreyer and Mr Ntsele. Mr Dreyer then requested management to address this issue in order to get the incentive scheme finalised.[14]

[37] Mr Moolman confirmed that as at May 2016 there was still no agreement. In fact, from the minutes of the meeting of 28 May 2016 it was noted that Ms Ntsele and Mr Andre Dreyer will meet to discuss and advise on the profit sharing. Ms Ntsele further advised that she will meet with Mr Moolman and Mr van der Merwe to discuss the share participation.[15]

[13] 005-17 of the record
[14] 005-19 of the record
[15] 005-311 of the record

[38] At paragraph 6.2 of the said letter, it was noted that Mr Ntsele will create time to meet with Mr Moolman and Mr van der Merwe to discuss the shareholding participation issue.

[39] Under cross-examination it was pointed out to him that as at 22 November 2016 there was still no document or agreement that set out what had happened at the June 2016 meeting.

[40] It was further pointed out to Mr Moolman that by him submitting the rough draft of the profit share resolution meant that there was still no agreement, particularly on the issue whether it to be net profit after tax or before tax. This could be seen from the correspondences with Ms Ntsele.

[41] Mr Moolman testified that the fact that the draft resolution existed and the fact that it was not signed did not mean that there was no agreement. He testified that he had prepared the written resolution to formalize the decision. He further testified that as part of the senior executive team they were all treated equally and were entitled to receive equal bonuses.

[42] It was again put to him that without the resolution not being signed there could be no approval of the shareholders. Mr Moolman again responded that the resolution was merely prepared to have the agreement already reached, formalized.

[43] He again testified that when the R3 million was paid to the executive management team for the 2016 financial year, no written resolution existed. On this aspect he persisted that the shareholders' decision was never formalized or put in writing.

Similarly, with the 2017 incentive bonus issue, the terms were agreed and approved in a meeting. Although the agreement existed, it was never put in writing. He also explained that the defendant had not adopted strict corporate governance processes. Many decisions were made without being put in writing.

[44] Still under cross-examination, he testified that a further reason for formalizing the decision of June 2016 was that he had a trust issue with Mr Ntsele due to their previous interactions at Pamodzi. He, however, stated that this was not a relevant determining factor for him to have put the resolution in writing.

[45] Under cross-examination he was asked as to why the issue of the profit share incentive scheme was only recorded at the 22 November 2016 meeting (which was almost 5 months of the June 2016 meeting). He explained that the November meeting followed the June meeting. No other meetings were held between June and November 2016.

[46] On the second day, under cross-examination, it was once again put to Mr Moolman that there could have been no basis for an agreement and approval of the profit share scheme including the amounts that each would get if consideration is given to the various correspondence and discussions that ensued between the parties.

[47] He persisted with his response that the terms were already agreed upon on 7 June 2016 and the draft resolution was prepared to merely formalize the agreement.

[48] On the quantum issue, it was pointed out that the annual financial statements reflecting the accurate profits were not at his disposal at the time he instituted these

proceedings. It is common cause that they were finalised later. Mr Moolman, therefore, relied on the draft calculation prepared by the auditor.[16]

[49] He was referred to the relevant provisions of the Companies Act and Memorandum of Incorporation which requires broadly that a decision must be effected in writing. On this basis, therefore, it was put to him that an unsigned resolution had no effect. Mr Moolman disagreed and persisted that a verbal agreement was reached on 7 June 2016 at the special shareholders meeting.

[50] Mr Moolman was further asked to comment on the recordal regarding the profit share incentive scheme in the minutes of the 20 July 2017 meeting. It was pointed out to him that even at that stage there was no agreement existed on the profit share issue. Mr Moolman persisted with his version that an agreement on the profit share incentive scheme had come into existence on 7 June 2016.

THE DEFENDANT'S EVIDENCE

[51] The defendant called one witness, Mr Piet van der Merwe. Mr van der Merwe admitted that the meeting took place on 7 June 2016. In his testimony he initially denied that discussions took place in respect of the possible share incentive scheme. However, under cross-examination he conceded that there were in fact discussions which were initiated by Mr Ndaba Ntsele at the shareholders' meeting regarding the proposed target bonus for the financial year going forward. He however testified that there was no approval.

[16] 005-67 of the record

[52] Mr van der Merwe testified that he could not remember all that was discussed but recalls that the shareholders had accepted that they would consider an incentive scheme for the executives. Mr Ntsele conveyed that if they achieved budget, they would be entitled to 15% of the profit and if they exceeded the budget then they were entitled to 20% of the profits.

[53] Mr van der Merwe testified that Mr Ntsele advised the executive team that they would be rewarded for the 2017 financial year if they achieved the budget, the reward would be 15% of the net profit and if they exceeded budget by R5 million or more, they would be rewarded 20% of the net profit. To this proposition, Mr van der Merwe replied that “we can do that”. He also testified that he was happy with the proposal and thanked the shareholders.

[54] However, when Mr van der Merwe was shown Mr Luke Dreyer’s response to Mr Ntsele’s letter, Mr van der Merwe conceded that there was indeed an agreement. His version corroborated the sentiments expressed in Mr Luke Dreyer’s email of an agreement in place.

ANALYSIS

[55] In my determination, the starting point would be to consider both parties’ pleadings. The defendant has raised various procedural and substantive defences which have not been pleaded. The plaintiff’s case is based on clause 13 of the Shareholders Agreement which in essence required that there must be approval of a special majority of shareholders. Secondly, that the profit share scheme was not agreed to and approved. Thirdly, that the bonuses were based on management performances.

[56] In my assessment of both witnesses, I did not find them to be dishonest. Mr Moolman remained steadfast that there was in fact an agreement and approval on 7 June 2016. Mr van der Merwe testified independently and under cross examination conceded on certain aspects. Under cross examination he explained in sufficient detail how Mr Ntsele proposed the calculation in respect of the profit share scheme. He, however, testified that there was no approval. [17]

[57] I am mindful that although the demeanour of a witness is an important factor in assessing the credibility of the witness, it must always be considered in conjunction with the surrounding circumstances, inferences and other factors affecting the probabilities[18].

[17] 005-82 of the record

[18] The Constitutional Court in **President of the Republic of South Africa and others v South African Rugby Football Union and others** 2000 (1) SA 1 (CC) at para [79] stated:
"*The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, the probabilities. ...., a finding based on demeanour involves interpreting the behaviour or conduct of the witness while testifying. .... A further and closely related danger is the implicit assumption, in deferring to the trier of fact's findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of the witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact*."

[58] Further in respect of Mr van der Merwe's version regarding the agreement and the approval thereof, there are two different versions before me. Our courts have set out the process when considering two irreconcilable versions.[19]

[59] In the matter of **National Employers General Insurance Co Ltd v Jagers** 1984 (4) SA 437 (E) at 440E - 441A. The court stated:

"*… 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 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*

[19] The Supreme Court of Appeal in **Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others** 2003 (1) SA 11 (SCA) at 14J - 15E, further set out on how to approach such a situation. It was stated:

"*To come to a conclusion on the disputed issues the 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 of 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 extra curial 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… But when all factors are equiposed probabilities prevail"*. (My emphasis)

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." (My emphasis)

[60] Having considered the evidence of both parties, I have noted that Mr van der Merwe conceded on the following facts, namely that:

(i) the shareholders meeting occurred on 7 June 2016;

(ii) both shareholders' representatives were present;

(iii) all three executive management team members were called to the shareholder's meeting;

(iv) the R3 million payout split in equal shares was communicated at the meeting. This was the first time it was communicated to the executive management;

(v) no written or signed resolution authorizing the R3 million payout or split in equal shares were made;

(vi) the three executive members were treated equally and paid the same amounts for the 2016 financial year;

(vii) Mr van der Merwe conceded that Mr Andre Dreyer had not met with him on the 2017 performance bonus issue;

(viii) there was no performance policy in place;

(ix) Mr Ntsele advised the executive team that they would be rewarded for the 2017 financial year with 15% of the net profit if they achieved the budget or 20% of the net profit if they exceeded the budget by R5 million or more.

[61] It is further not in dispute that the executive team was invited to propose a beneficial reward structure prior to the 7 June 2016 meeting. A month prior – in a meeting of 28 May 2016, there were talks that Mr Ntsele will meet with Mr Moolman and Mr van der Merwe on the profit share.

[62] From the minutes of the 20 July 2017 meeting, I have noted the recordal that Mr Moolman proposed that Ms Ntsele prepare a draft shareholder's resolution on the profit sharing arrangement agreed upon during the special meeting. It was also resolved that Mr Moolman would provide Ms Ntsele with the terms of reference to compile the draft report.[20] It should be noted that recordal pertained to what was discussed at the previous meeting (7 June 2016) and appeared under "matters arising from the previous meetings".

[63] It is further noted that when the draft was circulated to his co executive colleagues, both Mr Luke Dreyer and Mr van der Merwe did not disagree on the terms as per the resolution. Further, Ms Ntsele, when considering the draft resolution at no point questioned the terms. Her amendments pertained mainly to the issue of the net profit before tax or net profit after tax. Surely at this point, if there was no agreement, at least Mr van der Merwe and Mr Luke Dreyer would have raised an objection or concern. Instead, their responses to the draft confirms that there was indeed an agreement.

[20] 005-30 of the record

[64] Both Mr Luke Dreyer and Mr van der Merwe made mention of an agreement being entered into. More importantly, from Mr Luke Dreyer's correspondence and Mr van der Merwe's testimony, it is evident that an agreement existed as to the 2017 bonus payout.

[65] On the issue of performance criteria, the defendant's version that there would be a performance management bonus for the 2017 financial year, has no merit. Both Mr van der Merwe and Mr Moolman testified that no such performance criteria existed.

[66] From both Mr Moolman's and Mr van der Merwe's testimony, it was evident that the defendant had not followed corporate management practices. It appears that it was not the practice of the day to have always effected decisions in the form of written and signed resolutions. This is evident for R3 million payout announced at the 7 June 2016 meeting as well as the performance bonus made to all three members of the executive management team for the 2017 financial year.

[67] There is further no dispute that the financial statements reflected profit over R5 million (above budget). Based on Mr Ntsele's proposal at the 7 June 2016 meeting, the only inference one can draw is that an agreement was reahed where the executive team were entitled to a 20% profit share calculated on the total amount if they exceeded the budget.

[68] Even when Mr Moolman suggested that Ms Ntsele prepare a "shareholders resolution on the profit sharing arrangement agreed upon during the special meeting and that "Mr Moolman will provide NNN with the terms of reference to compile a draft

document neither Mr Ntsele nor Mr Andre Dreyer questioned or disputed that an agreement was reached at the special meeting.[21]

[69] Under cross-examination it was pointed out that Mr van der Merwe's response "yes we can do it" could only have been a response to Mr Ntsele's proposal of advancing a bonus based on 15% on achieving the budget and 20% on exceeding the budget. Furthermore, as per Ms Ntsele's email, if there was no profit share agreement, why would Ms Ntsele request the details in order to prepare the resolution.[22]

[70] It was further not disputed that the next meeting after 7 June 2016 was on 22 November 2016. At this meeting I have noted from "matters arising from the previous meeting" were recorded in the minutes of the 22 November 2016 meeting.

[71] Consequently, the defendant's contention that no agreement and approval was in place on 7 June 2016, if one has regard to the various correspondences and recordals in the minutes which reflected that the profit share issue was still under discussion, cannot be sustained if one has regard to the evidence presented aforesaid.

[72] On the argument that an unsigned resolution has no effect, is also weak.[23] The defendant contended that there is no basis in law to conclude that the plaintiff has discharged the onus to prove that the profit share scheme was approved by way of a written resolution signed on behalf of not less than 75% of the shareholders.

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[21] 005-320 of the record
[22] 005-26
[23] P15 of the respondent's heads of argument

[73] I find this argument misplaced for the following reasons: firstly, both Mr Moolman and Mr van der Merwe, in their evidence, testified that decisions and resolutions were not always put in writing with formal signatures. This was evident from the manner in which the defendant went about doing business. If such formalities had to be adhered to, no explanation was proffered why no written resolutions or written minutes exist for the payouts, for the 2016 and 2017 years to the three members of the executive management team. In fact, the special meeting on 7 June 2016 was also not recorded in minutes.

[74] Secondly, on the reading of the previous shareholders' agreement, more particularly Sections 12 and 13 thereof, all that is required is an approval of a special majority of the shareholders. It has not been disputed that both Mr Ntsele and Mr Andre Dreyer, who represented the shareholders, were present at the special meeting where the profit share scheme was discussed and agreed. From the evidence before me the only reasonable inference which can be drawn is that there was an agreement and approval of the profit share incentive scheme by special majority of the shareholders.

[75] There was further no explanation as to how the plaintiff was paid the R340,000, Mr van der Merwe paid R1 million and Mr Luke Dreyer, R1.5 million. No meetings were held to discuss the performance of the executive management team neither were performance assessments or letters issued.

[76] Moreover, the version set out in paragraph 5.1 of the plea is not aligned with the testimonies of Mr van der Merwe and the plaintiff. An agreement was reached that if they made the budget they would be rewarded 15% and if they exceeded the budget they would be rewarded 20%.

[77] On the issue of quantum, Mr Moolman based his calculations on the estimated profits for the 2017 financial year prepared by the auditors.[24] Therefore his profit share bonus amounts to R1,762,093.00. It was pleaded that this was the estimated amount each senior executive would have received based on the estimated total profit share of R5,286,278.03.

[78] In comparing the estimated auditor's calculation from the finalised and actual profit share as set out in the Annual Financial Statements of 2017, it is noted that the former estimated profit share calculation is much less. The total profit share before taxation as per the said financials was calculated to be R7,402,353.00.

[79] It is not in dispute that the defendant exceeded the budget by over R5 million for the 2017 year. In the premises Mr Moolman is entitled to 20% of the net profit before tax. I have noted that he only claims the profit share as per the estimated calculation and has not amended the quantum to be in line with the final figures as per the financial statements of 2017.

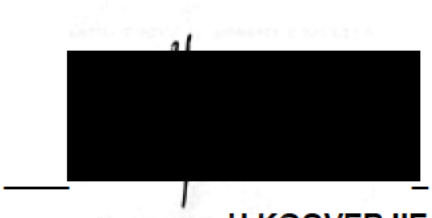
[80] In my view, on the balance of probabilities, the evidence portrays that an agreement and approval was reached at the meeting on 7 June 2016 entitling Mr Moolman to the net profit before tax. Since he pleaded on the estimated figures, he is entitled to the amount claimed. As alluded to above, not only did the proposed draft resolution record same, but Mr Luke Dreyer, in his email confirmed that performance was benchmarked against budgeted members before tax. This confirmation was

[24] 005-67 of the record

communicated after he had regard to Ms Ntsele's and Mr Moolman's input on the draft resolution.[25]

[81] In the premises I make the following order that:

1. Mr Moolman is entitled to an amount of R1,422,093.00 of his profit share before deduction of the tax.
2. Interest at 10.25% per annum on the said amount a *tempore mora*.
3. The defendant is ordered to pay the costs on a party and party scale.



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JUDGE OF THE HIGH COURT

Appearances:

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Instructed by:	*Fiona Marcandonatos Inc*
	c/o Solomon Nicolson Friedland Hart
Date heard:	*1 – 4 August 2022*
Date of Judgment:	*22 September 2022*

[25] 004-14 of the record