IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 332/2013

In the matter between:

A. G. THOMAS (PTY) LTD **Plaintiff**

and

DE BARRY ANITA BELINDA **Defendant**

Neutral citation: ***A. G. Thomas(Pty) Ltd v De Barry Anita Belinda (332/2013) [2015] SZHC 90 (7th May, 2015)***

Coram: **M. Dlamini J.**

Heard: **12 February2015**

Delivered: **7th May, 2015**

Counter-claim – onus rests on defendant to establish counter- claim on balance of probabilities – one of the essential element of contract is consensus ad idem - where there was no meeting of minds, there is no contract - "nemo debet locupletari cum aterius detriment – no one should gain profit to the detriment of another – where defendant's ground for counter-claim far fetched that no court of law would believe it, court to met out appropriate order of cost.

Summary: Plaintiff's declaration reflects a demand for the sum of R390,000 plus interest as money advanced to the defendant at her request and instance. Defendant does not dispute this amount claim. She, however, raises a counter-claim for the sum of R1million and interest at 10% as investment by her to plaintiff. Plaintiff disputes the counter-claim.

Pleadings

[1] Plaintiff declare:

> *"4. During or about October 2010 and at Matsapha. Plaintiff lent and advanced a sum of E390,000.00)Three Hundred and Ninety Thousand Emalangeni) to the Defendant in terms of an oral agreement between the Plaintiff and Defendant. The Plaintiff was represented by Percy Thomas.*
>
> *5. Defendant required the loan in order to purchase immovable property, and therefore successfully requested that the amount aforesaid be paid to M. J. Manzini and Associates. On or about the 28th October 2009 the amount E390,000.00 was paid to M. J. Manzini and Associates as requested.*
>
> *6. The aforesaid amount was in terms of the agreement , repayable through equal installments until the debt was paid in full or payable on demand.*
>
> *7. Despite the lapse of a reasonable period of time and demand being made, Defendant has either fail, ignored and / or refused to repay the aforesaid amount to the plaintiff."*

[2] The defendant pleaded:

> "*2.1 Defendant does not deny having acquired a loan from the Plaintiff.*
>
> *2.2 The Defendant pleads that the loan is not yet due and payable since the parties agreed that same was to be deducted from an investment that Defendant made to the Plaintiff, being a cash investment of E1 million, and which it was agreed, would bear interest at 10% per annum."*

Preliminary points

Defendant's case

[3] Following that there was no issue raised on the main claim by plaintiff, the *onus* rested upon the defendant to establish her counter-claim. Two witnesses were led in this regard.

Viva voce evidence

[4] DW1 was **Elane Petronella van Wyk.** She testified under oath. She informed the court that she was from the Republic of South Africa, Cape Town. She was a forensic handwriting expert since July 2008 having trained under the South African Police Service.

[5] In the course of her duties, she prepared a report which was marked by this court as exhibit A. She identified from exhibit A at page 23 as the questioned document she was called upon to examine. Pages 14 to 21 were standard documents, two of which were copies in their form while the balance originals. Her first port of call was to examine the standard document in order to ascertain the style of the individual writing in terms of speed, flow, impression and pattern. She did the study by enlarging the signatures appearing in the standard document by means of microscopic examination. She ascertained from her microscopic examination of the standard documents, that the writing was fast, there was a pen lift between letters T and H, the rhythm was good, the signatures slanted on the right and the range of natural variation was wide.

[6] It was DW1's further evidence that she then studied the questioned document by use of microscopic examination. She then technically made a

comparison of the signature in the questioned document with the signatures in the standard documents. She ascertained from the signature in the questioned document that the signature was also fast, pressure pattern was good, it slanted in the right, descended towards the end,there was no pen lift in the questioned document. All other features were similar to the standard document. As she did the comparison her attention was drawn to looking out for any signs of forgery or dissimilarities. Her conclusion was that the basic flow of the sequence and stroke sequence were the same although there were natural variations. There were therefore at the end, no signs of forgery on the questioned documents.

[7] She then explained that for someone to forge a signature with characteristics of genuineness, one had to copy the signature with the same speed flow and stroke sequence. This was a very difficult task, if not an impossibility by reason that one who forges a signature has to stop at one point in time to look at the standard writing or signature. In the questioned document, the flow, speed and stroke were similar and void of any signs of forgery. This observation supported her findings that the signatory of the standard documents was the same as that of the questioned document.

[8] This witness was cross examined at length on the finer details of her report. I will refer to her cross examination under adjudication.

[9] The second witness, DW2 was **Anita Belinda de Barry**, the defendant *in casu*. On oathshe told the court that she was residing at Zulwini, Mantenga estate. She was married to William Paul de Barry. She was working part time at Busi Quip Mbabane while on the other week days she was on call from any client who needed auditing to be done. Prior to working for Busi Quip, she was in the employ of plaintiff from 2003 to 2012. She had once

worked for Pricewater House. While at Pricewater House, she was auditing*inter alia* plaintiff's financials. Plaintiff however, decided to employ her as an accountant.

[10] She further testified that in 2009, she received a bank financial statement in respect of her husband's account. It was from First National Bank South Africa. This statement indicated low interest rate. When she received it, she was in the company of Mr. Thomas, the director of plaintiff. She then held discussions with Mr. Thomas to the effect that the account in South Africa was not generating sufficient interest. Mr. Thomas stated that he was getting special interest rate from his bank. He advised her that he could do the same for her. She then responded that as her husband was not residing within the country, she would speak to him when he returned to ascertain whether he could not give some of the money to Mr. Thomas in order to invest it. It was her evidence that although Mr. Thomas did not divulge the people he had invested money for, she knew that he had done so from reading his financial records. There were Mr. Myers and Tryson. The plaintiff's staff had a joint savings account where every month they contributed a certain amount from their salaries. At the end of the year, Mr. Thomas would double their savings and they would share same amongst themselves.

[11] Concerning the investment, it was her evidence that she did call her husband and convinced him that it was wise to invest money with someone who undertook to double their investment. Her husband was reluctant initially but finally agreed. In August 2009, she brought in the first batch if R500 000 and Mr. Thomas told her to put it in the safe. She duly did so. In the following month *viz*. September,she brought in the second batch which was R300,000.

[12] The first sum of R500,000 was used to build the Riverstone Mall. One of the Engineers, Mr. Malcolm, came to the office and told her that Mr. Thomas was instructing her to give him the money together with a sum of R11,500 which belonged to another employee, Ms Bongiwe Seyama.

[13] She also brought the last batch consisting of R200,000 in mid October. Mr. Thomas directed her to keep it in the safe. She then informed Mr. Thomas that as it was not her money but her husband's,she would therefore appreciate that it be reduced in writing that she brought the said sum of money. Thereafter, she found a document lying in her office desk. There were no further deliberations on the investment.

[14] She then informed the court that about two weeks after the last batch of money, there was a plot for sale at Lugaganeni for the sum of E390,000. She approached Mr. Thomas and requested him to pay for the plot. The reason was that all her money had been given to Mr. Thomas. Mr. Thomas did pay. It was her evidence that she assumed that plaintiff would deduct the sum of R390,000 from her investment. She left the plaintiff's employment in February 2012. Mr. Thomas never said anything about the sum of R390,000. She was, however, paid a sum of over R380,000 as terminal benefits.

[15] She also divulged that after a week of depositing the investment with plaintiff, there was a break-in in the plaintiff's office where the safe was emptied out and thesum of R200,000 was taken away. She explained that the sum of R300,000 was used as wages. When prompted by her Counsel to explain as to who gave her the instruction to use it for wages, she replied that she requested Mr. Thomas to use it for wages as there was no money for the same.

[16] Mr. Thomas instructed her to go to the police for finger prints. She later discovered that it was only her fingerprints that were caused to be taken. She also learnt from the walls of the plaintiff's that she was accused of masterminding the break-in. It was her evidence that her relationship with Mr. Thomas became strained and Mr. Thomas would now and again pass derogatory remarks about her.

[17] In February 2012 she needed money to pay for her children's school fees. Her husband advised her to approach Mr. Thomas to give her money from the investment. She obliged. Mr. Thomas, however did not answer her but duly did so days later. Mr. Thomas directed her to draw out a cheque for his signature. She then requested that the payment be made direct to the school in South Africa. This infuriated Mr. Thomas and he leveled accusations against her that she was a thief. It is when she received a letter suspending her from work.

[18] She denied ever having an interview with one Sifiso, an auditor from Synergy Chartered Accountants who was plaintiff's auditors. She however, pointed out that she was asked certain questions emanating from the questionnaire, Exhibit C.

[19] She concluded her evidence by praying that plaintiff be ordered to honour the investment agreement but be permitted to deduct the sum claimed from its summons.

[20] The defendant was subjected to a lengthy cross examination. She was cross examined mainly on the source of the R1million investment, her ability to keep substantive financial controls in place, on inconsistencies of her *viva*

voce evidence against her pleadings, failure to keep records of the investment, on terms of the investment agreement, failure to demand the investment and returns when exiting the employ of plaintiff, loan certificate and etc. I shall refer to her cross examination under the heading "*adjudication*" herein. The defendant closed her case.

Plaintiff's case

[21] PW1's full names were **Percy Frank Thomas**. On oath he testified that he was the director of plaintiff. Defendant approached him and requested that plaintiff pay the sum of E390,000 on her behalf in order to acquire an immovable property. Plaintiff then instructed its bank to pay the said sum direct to defendant's lawyers. At this period defendant was the Accountant for plaintiff.

[22] On a certain day, defendant came to PW1 with a pile of documents to be signed. He decided to peruse them before appending his signature. He noticed a letter to plaintiff's bank, instructing it to pay a sum of E22,000 to South Africa in respect of defendant's children school fees. It was his evidence that he did not know anything about this transfer. He enquired from defendant as to what the letter was all about. Defendant replied that she had requested him for the transfer. He summarily dismissed defendant from work on the basis that he could no longer trust her. He sought for advice and to avoid litigation, computed defendant's terminal full benefits and paid her.

[23] He waited upon defendant to pay for the sum owing. He later learnt that defendant was disposing of the property plaintiff paid for. He engaged his lawyers for the present action. This action was launched on 5th March

2013. On 18th March, 2013 he filed an urgent application interdicting the sale of the property by defendant. It is then that he learnt that defendant was claiming against plaintiff the sum of E1 million investment. It was his further evidence that neither plaintiff nor himself ever received a sum of E1million or any sum for that matter from defendant. He denied the documents submitted by defendant as proof of the sum invested to his company, the plaintiff. He stated that if there was money received from defendant, such amount would have been banked and proof of same would be available in receipt form. There were no records in his financial books of the sum of E1million investment. Defendant, as accountant, would be responsible for the said records as the accountant of plaintiff. He testified that the document defendant was relying upon was false.

[24] He explained that a document of that nature presented by defendant as basis for her counter-claim was, in normal circumstances, presented by plaintiff's auditors to be signed by him. The auditors would submit the document to defendant who would in turn present it to him for signing. He always signed at the bottom of it.

[25] It was further his evidence that he never signed a document where both the company and himself would be liable. If he did sign the document, it came with other documents in piles as he would sometimes sign documents handed to him by defendant without perusing them. He pointed out that if indeed the defendant did deliver the cash amount of E1million, he would have engaged his lawyers to draw up an agreement. At any rate during the period alleged by defendant as the time she deposited the money with plaintiff, plaintiff did not need any finances as it had just received from the bank a loan of E200million following that plaintiff was constructing the Riverstone Mall in Manzini.

[26] PW1 identified exhibit D as a letter given to his son Keith by defendant. He disputed the information in exhibit D to the effect that the defendant told him that "*all monies belonging to Paul and this money (E1million) was in South African currency and in cash*." He told the court that defendant informed him that he did not have any money. He had assisted defendant financially from the time she commenced working for plaintiff until she left. He also renovated defendant's house. It was his evidence that no bank statement of Paul's investment was shown to him as stated by defendant in exhibit D.

[27] PW1 then directed the court to exhibit 2. He identified exhibit 2 as plaintiff's financial records. It was his further evidence that the financial records as prepared by defendant never reflected a sum of E1million as investment or deposit into plaintiff's account.

[28] PW1 was subjected to a very lengthy cross examination. The bulk of his cross examination centered around the reason for defendant's dismissal. This was so done, as can be detected from the line of cross examination to show that PW1 was very angry at the defendant and therefore was deliberately denying the counter claim. With due respect to learned Counsel for defendant, I do not think that this line of cross examination carry much weight in resolving the issue at hand. Further, it was not a point given by defendant in her evidence in chief. It was emphasized before PW1 that the first sum of R500 000 was given to Malcolm. PW1 disputed this and informed the court that if it were so, Malcolm would have been given a receipt by defendant. When it was put to him that the sum of E300 000 was used to pay wages, PW1 pointed out that wages for plaintiff's employees were paid through the bank.

[29] Defendant's Counsel also challenged PW1 in his denial of Exhibit B, the agreement. PW1 did admit the authenticity of the signature but denied the document. He explained that if he did sign it, it was among a pile of documents usually brought by defendant. He randomly read those documents. It was put to PW1 that defendant did not demand the sum of E1m when she left plaintiff's employ because of this exhibit. It further came out for the first time that the sum of E300 000 was considered as petty cash by defendant. This question stands to be expunged by reason that defendant did not allude so during her evidence in chief. It was put to PW1 that the sum of E390 000 loaned to defendant was not reflected in plaintiff's financial records and *fortiori* was the sum of E1m. Again with due respect to learned Counsel, defendant did not adduce such evidence in chief. This court cannot accept this piece of evidence through the back door as it were.

[30] The next line of cross examination was in respect of exhibit D1 a correspondence testified by defendant in chief having been written by her explaining the turn of events between her and the plaintiff or PW1. He was blamed for not responding to it and this court was called upon to draw the inference that the content were not in dispute. This witness replied that he could not in his busy schedule draw himself to senseless issues and that when he discovered the document (Exhibit D) which is similar to Exhibit D1 as discovered by defendant, it was because he had to give everything to his attorneys. He explained that he received the document from his son.

[31] **Sifiso Harrison Mohale**, PW2, on behalf of plaintiff, testified under oath. He stated that he was an internal auditor currently serving Standard Bank. He was familiar with plaintiff as he had audited his books of accounts when

he was previously employed by Synergy Chartered Accountant. He held a bachelor's degree in Commerce from the University of Swaziland. He enrolled for his internship with Earnest & Young and completed the same in 2007. He joined Synergy in 2008 and left in 2011.

[32] It was his evidence that he prepared the financial year end statement for plaintiff in year ending June 2010. Firstly, he prepared a planning audit programme. He then proceeded to the plaintiff's business place to perform sample based tests. Thereafter he reviewed the financial statement of plaintiff. Based on the data collected during the process, he then prepared a draft financial statement for defendant's examination and approval. The final financial statement was then taken to the director for his signature. He testified further that defendant supplied her with all financial statement prepared by her. He had unlimited access to the filing cabinet where soft copies of support documents were kept.

[33] He then held a *viva voce* interview with a proformaquestionnaire. He recorded the answers to each question. He handed to the court exhibit C as documentary evidence of the interview with defendant. He explained that the whole basis for this exhibit was to determine fraud and errors in plaintiff's business and use it as a basis for his opinion in the financial statement. The interview based on questions from exhibit C would also assist in disclosing related party transactions and how they were related. He explained that related parties include employees and directors of plaintiff.

[34] Exhibit C was a standard document extracted from a software called caseware. Once extracted, he then arranged a date for the interview with defendant who was plaintiff's financial manager. A copy of exhibit C was

given to defendant in order for her to reference the questions during the interview. He did pose all the questions reflected in C and he received responses from defendant. Based on the answers given by defendant on related party transaction, he concluded that there was no investment made by defendant in plaintiff.

[35] Under cross examination it was stated to PW2 that he was under pressure following that there were a number of companies lined up for auditing and therefore breached some of the procedures. He denied this and pointed out that his work was reviewed by his seniors. It was specifically pointed out to him that he failed to have an interview with defendant thus violated the procedure. He denied this and pointed out that the recorded answers were accordingly as it was unethical to manufacture information in his profession. It was stated that as exhibit C was unsigned, this was a clear indication that the interview never took place. He replied that exhibit C was a standard template and as per international procedure the interviewee is not expected to sign by reason that there is no provision for signature in standard form. He further explained that the answer to related party transaction was congruent to the draft statement of account compiled by defendant and he conducted the interview in accordance with international standards and in good faith.

Issue

[36] From the evidence presented before court the question for determination is, "Was there a contract between plaintiff and defendant to have the sum of R1 million invested by plaintiff on behalf of defendant?"

Adjudication

Principle of law

[37] In **Standard Bank of South Africa Ltd. and Another v Ocean Commodities Inc. and Others 1983 (1) S.A. 276 A at 292 B-C,** it is stated:

> *"In order to establish a tacit contract it is necessary to show by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem."*

[38] **Corbett JA** in **Joel Melamed and Hurwitz v Cleveland Estate 1984 (3) 155** at 164-165 commenting on the above principle stated:

> *"The correctness of this general formulation has nevertheless been questioned on the ground that it would appear to indicate a higher standard of proof than that of preponderance of probabilities as regards the drawing of inference from proven facts."*

[39] The learned judge then highlights:

> "*In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence."*

[40] He then observed on the principle as laid down in **Standard Bank***supra* as follows:

> *"By analogy (with reference to **Van der Berg v Tenner 1975 (2) S.A. 268 at 276 H -277B**) it could be said that a tacit contract should not be inferred unless there was proved unequivocal conduct capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged."*(words in brackets my own)

[41] The honourable judge then wisely concluded:

> *"In the cases concerning tacit contracts which have hitherto come before our courts, there have always been at least two persons involved, and in order to decide whether a tacit contract arose the court has had regard to the conduct of both parties and the circumstances of the case generally. The general approach is an objective one. The subjective views of one or other of the persons involved as to the effect of his actions would not normally be relevant."*(page 165 G-H)

[42] In the circumstances of the case, it is imperative that one highlights on onus. Citing **Zeffertt**, "**The South African Law of Evidence 4th Edition at 511 – 12 Kroon J** in **Aida Uitenhage CC v Singapi 1992 (4) SA 675** at 687 pointed:

> *"It is not a principle of our law", remarked **Diemount JA** in **Gericke v Sack**,*
> "*that the onus of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact*." *This might appear to be clear law; but strangely enough in **Mabaso v Felix**, a composite decision of three Judges including **Diemont JA**, one of the reasons for placing the onus on the defendant was because "the onus of proving excuse or justification, such as self defence,should be placed on the defendant" because "usually the circumstances so excusing or justifying his wrongdoing are peculiar within his own and not the plaintiff's knowledge". It would seem that, at least as regards "delicts affecting the plaintiff's personality and bodily integrity" the Appellate Division regards it as being in "accord with experience and good common sense" to take into account, in determining the incidence of the onus, the fact that the circumstances are peculiarly within the defendant's knowledge. Otherwise, the incidence of the burden of proof cannot be altered merely because the facts happen to be within*

the knowledge of the other party. What may have been said to the contrary in ***Holmes v Salzmann*** *and in* ***Yusaf v Bailey*** *must be evaluated in the light of* ***Gericke v Sack****subject to the special consideration applicable to delicts, as set out in* ***Mabaso v Felix****.*

> *The Courts recognize that a litigant will be handicapped when facts are within the exclusive knowledge of his opponent and that (sic) they hold, when that is so, that less evidence will suffice to establish a prima facie case. Where facts are within the knowledge of one party his failure to give an explanation of evidence which suggests negligence may weigh very heavily against him, but this does not alter the onus."* (underlined, my emphasis)

Adjudication

[43] *In casu*this court is dealing with the counter-claim by defendant. The onus rests upon her to establish the existence of a contract between her and the plaintiff on a preponderance of probabilities.

[44] Defendant testified that she received a bank statement with little interest generated and showed it to PW1. PW1 undertook to invest the money as he received special rates. She pointed out that she then convinced her husband to have the money invested on their behalf. Her husband agreed and she brought in the money in batches of R500,000, R300,000 and R200,000 respectively. This money was contained in plastic bags.

> *"After giving the money to Malcolm, I brought in the next amount which was E300,000. … The third amount was R200,000 was the last amount in the middle of October. I said to him I have the money. He said, put it in the safe."*

[45] She then divulged as follows:

> "*I had asked him that we would like it in writing to know how much we had brought as it was the last sum of money and it was not my money. My husband wanted verification that he was actually investing some of the money with us…. When I requested him to reduce it in writing, there was no one there. I received*

this document. I found a copy of it in the morning of which the amount I brought then in and dates were stated. I was happy than to have it verbally."

[46] The defendant then referred the court to a document which was marked as Exhibit B.

She thereafter stated:

"*There were no further discussions with Mr. A. G. Thomas."*

[47] Defendant's attorney then posed:

"Mr. Shabangu:	*"Mr. Thomas says he does not know this document?"*
Defendant:	*"I cannot say anything. To my knowledge, it seems authentic. This is his signature. I know his signature."*
Mr.Shabangu:	*"At any point during the period of employment did Mr. Thomas allude to this document or make reference to?"*
Defendant:	*"No. We were happy that we had our investment on paper. We never questioned that it was forgery."*

[48] Defendant relied on the above evidence to show that there was a contract with plaintiff in order to invest the sum of R1 million. I must point out, however, that defendant in chief also pointed out that there was a break-in and the safe was emptied. She then proceeded:

"The only amount in the safe would be R200,000. The first batch was given to Malcolm, that is, R500,000. The R300,000 was used for wages as we did not have enough money so some of it was used for wages."

[59] It was defendant's further evidence that after the break-in which happened according to defendant on 17th to 19th October 2009 the relationship between Mr. Thomas and herself was strained. She stated in this regard:

"I think the trust started a long ago. Little things showed that he did not trust me and I also started not trusting him. It was after I had made the investment. This was a week after there was a break-in in the office."

[50] It was her evidence further that upon discovering that their relationship had gone she then authored exhibit D1. Exhibit D1 reflects *inter alia*:

"2) I don't have lump sums of money or savings or investments, any money we have all belongs to Paul. He is very angry with me because I asked and convinced him to draw money from his bank accounts and give to you to invest for us as you said you have done it for others and get a special interest rate from the banks. I had told you about one of Paul's accounts that did not earn much interest even though he had it in a fixed deposit account for years. This money was in South African currency and in cash for tax purposes and because I did not know if you would put it into A. G. Thomas or one of your P F Thomas accounts. We are now surprised that you think that this money was from your safe. The first time this was said, I tried to show you a copy of the bank statement, but you refused to look at it. This E500,000 and 11500 that belonged to Bongiwe was given to Black Balance Projects/ Malcolm for the Mall in Aug/Sept/Oct09, please confirm with him if and how much he received in cash in plastic bags. Paul has agreed for me to show you his bank balances/statements, but is not happy about it, showing the account where the money was drawn from. Please note the account name, date (not the period in question), way before I started working here and the credit balances."

[51] From the evidence adduced by defendant as pointed out *supra*, it can safely be concluded that defendant relies on the following as proof of the contract of investment between plaintiff and herself:

a) That there was a verbal agreement thus the three cash deposits made by her from August to October 2009 of the sums of R500,000, R300,000 and R200,000 respectively;

b) Exhibit B, which is titled "Loan Certificate" dated 13th October 2009 reflecting as terms of the contract,the following:

"2).. to be invested
3) the loan account bears interest per PR Thomas return investment made or 10% whichever is more; and
4) repayable when requested by William Paul or Anita De Barry."

c) Exhibit D1 confirming that this amount was handed over by being deposited into plaintiff.

d) Surrounding circumstances or subsequent conduct such that when she left plaintiff employ, plaintiff never demanded the sum of R390,000 which was due to it following a loan to purchase an immovable by defendant. From this, the court was urged to draw an inference to the effect that any sum due to plaintiff by defendant was to be deducted from the amount owing.

[52] My duty is to interrogate each of the above factors with the view of ascertaining as to whether they are as per the wise words of **Corbett JA** in **Joel Melamed and Hurwitz***supra* "*by a process of inference … the reasonable plausible probable conclusion*" from all the relevant, proved facts and circumstances of the case *in casu*.

a) Verbal agreement

[53] Defendant testified:

"In 2009 I received a statement from the post office for one of my husband's accounts. It was a thirty two day notice account held at First National Bank South Africa on which we did not receive much interest even though we had it for few years. When I received it, I was with Mr. A. G. Thomas. While he was having tea in the in the many talks we had, I told him that we have this account but it does not seem to be earning much interest. He said he gets a special

interest rate from the bank. He has invested for other people. He could do the same for us."

[54] The court notes that nothing further was said or adduced in chief in regard to this verbal agreement. For instance no evidence in a form of bank statements showing the account with First National Bank was produced in court. No statements from the bank reflecting cash withdrawals were presented in court. This was despite the statement in exhibit D1 which reads:

> "*I had told you about Paul's accounts that did not earn much interest even though he had it in a fixed deposit account for years. …We are now surprised that you think that this money was from your safe. The first time this was said, I tried to show you a copy of the bank statement, but you refused to look at it. Paul has agreed for me to show you this bank balances/statement, but is not happy about it, showing the account where the money was drawn from.*"

[55] It is not clear why defendant who authored exhibit D1 deemed it fit to show plaintiff documentary evidence of proof of the source of the money but failed dismally to show the court similar documents. This is more so in the face of her cross-examination on the source of the money which was as follows:

"Mr. Vetten:	*"The money had been withdrawn in South Africa and brought to Swaziland?"*
Defendant:	*"Yes."*
Mr. Vetten:	*"It was your husband's money?"*
Defendant:	*"Yes."*
Mr. Vetten:	*"There is no record of you having brought this money.*
Defendant:	*"Yes."*
Mr. Vetten:	*"You cannot show any documents through customs that you brought in this money?"*
Defendant:	*"No. It was brought in little by little over the years."*

[56] It is apposite to pause here and point out the glaring contradiction in defendant's evidence in chief and that under cross examination. In chief she stated that in 2009 she received a First National Bank statement reflecting investment by her husband which was accruing insignificant interest. In other words, the sum of money was in 2009 still at the bank. She further revealed that on that day, she approached PW1 and showed him the statement. It is upon this statement that the investment contract was verbally concluded. It was her further evidence that the money in three installments came in the same year, 2009 of consecutive months. The question that begs for an answer is then how could then under cross examination be said that this money which as per defendant's evidence found its way into plaintiff's safe could then be said to have come into the country "*over the years*" when in the same year it was in First National Bank South Africa coffers as pointed out by the same defendant. Obviously, needless to state that the reasonable plausible inference to be drawn under such contradictory evidence is one which is adverse to defendant. This is more so as defendant's insisted:

"Mr. Vetten:	*"You did not say so yesterday?"*
Defendant:	*"I was not asked yesterday."*
Mr. Vetten:	*"Today you want this court to believe that you accumulated this money over the years?*
Defendant:	*"Yes."*
Mr. Vetten:	*"That is R10,000 per person to be brought?"*
Defendant:	*"Yes."*
Mr. Vetten:	*"You need fifty people to bring in this money*
Defendant:	*"I know. My husband was frequenting Swaziland and he would bring this money."*

[57] A further point that needs canvassing is the terms of this verbal contract. Defendant did not say much in chief in this regard except that:

> "*I convinced my husband who was very reluctant to part with the money that it was convenient to invest with someone who said they [sic] can double our money. He finally agreed that we could give some of our money to Mr. Thomas in August 2009 and that is when I brought the first batch of money*."

[58] The court may only infer that the terms of the verbal agreement was that the investment would be "*double*" as communicated by defendant to her husband, if this piece of evidence is anything to go by. The question becomes, "In the circumstances could this be reviewed as an "unequivocal" term that gave rise to *a "consensus ad idem"* as per**Standard Bank of South Africa Ltd. and Another***opcit*.The answer is not far off as defendant in chief produced exhibit B as evidence of the agreement having been later reduced in writing. This document reads as the terms:

> *"The loan account bears interest per PF Thomas return on investmentmade or 10% whichever is more."*

[59] Obviously the terms as outlined in this exhibit are completely different from the ones said to have been reached *verbatim*. Defendant informed the court that as soon as she received over her desk exhibit B, she was happy that she had the oral agreement reduced in writing. One wonders how could she as the terms were different and adverse to the one agreed orally of doubling interest. The only reasonable inference that can be drawn from defendant's conduct of being satisfied with a term contrary and adverse to the one drawn orally is that there was no *consensus ad idem* on the terms of the verbal agreement. It is trite that one of the elements of a contract is *consensus ad idem.* Where there was no meeting of the mind, there is no contract. **AJ Kerr "The Principles of the Law of Contract" 4th Edition** at page 5 put it more precisely by stating:"*To say that a contract is founded on agreement, that it includes a concurrence of intention in at least two parties, does not*

mean that the parties are bound only by those obligations which at the end of the negotiation each has come to regard as favourable in all respect to himself." The court cannot hold otherwise *in casu*.

b) Exhibit B

[60] I now turn to exhibit B, the written agreement as per defendant's testimony. DW1, a forensic expert in handwriting testified that having conducted "*technical examination*" of the signature in exhibit B, he concluded that the questioned signature was done by the same person who did the standard signature. Defendant testified that the signature that appeared in exhibit B was that of Mr. Thomas. She supported this by pointing out that she knew Mr. Thomas's signature having worked for him for years.

[61] DW1 was cross examined *inter alia* as follows:

Mr. Vetten:	*"Now you only have two, that is, ST1 and ST11?"*
DW1:	*"Yes, as originals"*
Mr. Vetten:	*"See page 4, that is ST1 and ST7"*
DW1:	*"I scanned them."*
Mr. Vetten:	*"Scanning also suffers from pictorization, same as photocopies?*
DW1:	*"Yes"*

[62] From the above line of cross examination, two aspects turned out. Firstly, that only two standard documents instead of eleven as per the evidence adduced in chief actually remained which could be said to be reliable for purposes of the examination and these were ST1 and ST11. Secondly ST1 together with ST7 were scanned and the scanned copies were used. DW1 admitted that a scanned copy suffered from the same pictorialisation as copies. This piece of evidence then calls for ST1 to be eliminated from the

list of reliable documents. We are therefore left with ST11. It is no wonder then that DW1 thereafter testified under cross examination:

"DW1: "*I did request for more documents but they were not available but it is not an unexplainable difference*."

[63] This piece of evidence weighed against that of PW1 who denied ever signing for the contents in exhibit B tilt the scales in favour of plaintiff. This further lends more credence from DW1's cross examination that:

Mr. Vetten: "You don't know what was in the document before it was signed, that is, things put over?

DW1: "It is not certain to say if the signature was first and information inserted because the signature does not cross the base line of the letters. Therefore I am not able to say."

[64] **Addleson J** in **Menday v Protea Assurance Co. Ltd 1976 (1) SA 565** at 569 held:

> *"In essence the function of an expert witness is to assist the court to reach a conclusion on matters on which the court itself does not have the necessary knowledge to decide. <u>It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience</u>, the reasons for the opinion which he expresses are acceptable."* (underlined, my emphasis)

[65] In the light of the evidence under cross examination as demonstrated above it stands to follow that this court cannot say that the evidence is satisfactory as per the *ratio* in**Addleson J***supra.*

[66] If I have erred in my conclusion on DW1's evidence, there is another aspect of exhibit B that calls for examination. Defendant was cross examined as follows:

Mr. Vetten: *"You showed Mr. Thomas as director of A. G. Thomas?"*

Defendant: *"I was not sure if it was Mr. Thomas personally or it was to be invested in the company."*

Mr. Vetten: *"There was no agreement as to with whom this money was to be loaned to?"*

Defendant: *"It was not a loan but an investment."*

Mr. Vetten: *"There was no agreement as to where this money would be invested?"*

Defendant: *"Yes"*

Mr. Vetten: *"You would not know where this money would be invested. Whether A. G. Thomas (Pty) Ltd and Mr. Thomas had a number of companies, that is, Golden Bread, Quary, Mkhulu Coffee Shop etc. You did not know which of these?"*

Defendant: *"Yes, I had given my money to Mr. Thomas so it was up to him."*

Mr. Vetten: *"There was an agreement for Mr. Thomas to receive your money and invest it at his discretion?"*

Defendant: *"Yes"*

Mr. Vetten: *"The person you must look for payment of this money is Mr. Thomas personally?"*

Defendant: *"No, that is not correct as Mr. Thomas is director of A. G. Thomas Investments."*

Mr. Vetten: *"You should look to Mr. Thomas for your money?"*

Defendant: *"I do not know."*

[67] The line of questioning adopted by plaintiff's attorney find support in exhibit B. Exhibit B reads:

> "*LOAN CERTIFICATE*
> *A. G. THOMAS (PROPRIETORY) LIMITED / P F THOMAS*
> *DATE: 13 OCTOBER 2009*
> *As a director and shareholder of the above company, I certify that the following is correct.*
> 1. *The balance of E1,000,000 was owed by us to William Paul and Anita De Barry at the above date.*

2. *The amount was cash received and used by the company. Per my suggestion, to be invested, received as follows: Aug09 – E500,000, 10/09/09 – E300,000 and 13/10/09 – E200,000.*

3. *The loan account bears interest per P F Thomas return on investment made or 10% whichever is more.*

4. *The loan account is payable when requested by William Paul or Anita De Barry.*

P. F. Thomas
A. G. Thomas (Proprietary) Limited

Signature

13th October 2009
Date"

[68] Glaring from the above is:

(i) Although the agreement is on plaintiff's letter head, creating the impression that the agreement was between plaintiff and defendant, the contents reveal otherwise. Firstly, exhibit B is signed by one director whereas from the letter heads, there are two directors. Defendant's evidence and as confirmed under cross examination shown *supra*,was that the sum of R1 million was given to Mr. Thomas "*to invest at his discretion*." No evidence was adduced as to the reason for the non appearance of the other director *viz.* I. Thomas. Further there was no evidence alluded to that there was a resolution allowing PW1 to sign alone. With the evidence that Mr. Thomas could not have signed for the contents of this exhibit, it stands to reason that there was never any c*onsensus ad idem* between plaintiff and defendant to bind each other in terms of exhibit B. The response by defendant herself that the sum was given to Mr. Thomas

to invest at his discretion as supported by her evidence in chief stands to be accepted if it is anything to go by.

(ii) The term of exhibit B which reads: "*The loan account bears interest per P F Thomas return on investment made or 10% whichever is more."* seem to me to suggest that P F Thomas was duty bound to pay interest for the investment and not plaintiff. The totality of this therefore in law exculpates plaintiff from any liability in terms of the contract by reason that defendant is barking at the wrong tree as it were, if exhibit B is to be accepted.

(iii) Further, a close reading of exhibit B does not accords with the evidence in chief of DW2 in that paragraph marked at 1 reads:"*The balance of E1,000,000."* It is not clear why this sum was suddenly referred to as the balance when defendant in chief, testified to this sum as the capital amount invested.

(iv) Paragraph marked 2 reads:"*The amount was cash received and used by the company*."From the face of the document it was authored and signed on 13th October 2009. This was the date of the last batch of E200,000. This sum of R1 million was not "*used by plaintiff*" if company refers to plaintiff at that time. Why it is reflected that this sum of R1 million was used at that time is not clear as defendant testified that the sum of R200,000, was stolen on 17th to 19th October 2009 from plaintiff. This circumstance must be viewed together with the evidence of defendant in chief that she found this document(exhibit B) lying on her desk in the office. She was, as pointed out under cross examination, not given by plaintiff or PW1. Taking this evidence with PW1's undisputed evidence that he first learnt

of the existence of Exhibit B after he had instituted legal action against defendant for the payment of the sum of R390,000, the only reasonable and irresistible inference that can be drawn is that the author of this document is privy to defendant alone and not PW1 or plaintiff. For these reasons, exhibit B does not lend credence to defendant's case.

[69] The next enquiry is based on the principle of our law "*nemo debet locupletari cum alterius detrimento*" which simple means "*no one should gain profit to the detriment of another*" as per **JJL Sisson Q.C.**"**The South African Judicial Dictionary"** page 500. This maxim emanates from the principle of our law of unjust enrichment. It is therefore in the interest of justice imperative that the court embarks on an enquiry as to whether defendant did deposit into plaintiff's safe the sum of R1m.

[70] Defendant testified in this regard:

> "*Mr. Thomas said it was fine. I would tell him when I bring the first amount. I packed it in two plastic bags, Pick 'n Pay and Woolworths plastic bags. I told Mr. Thomas that I brought the first amount of money. What do I do with it? He said I should put it in the safe. I will see it later….. I put it on the safe. The first amount was R500,000 in South African currency. The second amount was in next month in September. The first amount when it was the building of his Riverstone Mall one of the Engineers, Malcolm was in the office with his father-in- law. Malcolm is a family friend of Mr. Thomas. He told me that I must take my money and Bongiwe Dlamini's and give it to him."*

She also revealed:

> "*I do not know whether Mr. Thomas did count this money as he has the keys to the safe or whether they did count it when I gave it to Malcolm."*

[71] What is noteworthy is that defendant in chief made the following startling revelation:

- that all three batches of money were put in shopping plastic bags;

- each consignment when brought, was not shown to the plaintiff except that plaintiff was told that "*I have brought the money*";

- defendant, who is a qualified auditor – accountant was satisfied by plaintiff's response "*put it in the safe.*"

- Defendant could not attest positively that plaintiff did see this money or counted it for that matter;

- Defendant was satisfied when Malcolm informed her that plaintiff was requesting that she gives him the sum of R500,000. She never verified Malcolm's instructions from plaintiff. She simply handed this money;

[72] In chief defendant was led:

> *Mr. Z. Shabangu:* *"Who authorized the use as wages?"*
> *Defendant:* *"I had told him we did not have enough money can we use it as wages. He said use it."*

- Defendant took the sum of R300,000 at her own instance and used it for salaries without the instruction of plaintiff. One wonders as to the rationale for this as the sum was to be deposited into plaintiff's investment account in order to accrue interest on behalf of defendant and not plaintiff, if defendant's version is to be accepted;

- The last sum of R200,000 is verified by defendant to have been stolen during the break-in of 17th to 19th October 2009. Not an iota of evidence was led on why it is suddenly claimed against plaintiff with interest. In fact, none of the entire sum of R1 million found its way to the plaintiff's or PW1's account. This evidence came from defendant without being solicited by plaintiff's counsel.

[73] The analysis of the above circumstances leads to the only conclusion that it is highly improbable that defendant could have taken into plaintiff's safe the said sum bearing in mind its highly significance in figure as well. For this reason, her evidence in this regard stands to be rejected in its entirety.

[74] What exacerbates defendant's evidence is that having realized that the relationship between her and plaintiff had strained, she amicably accepted her exit package which was far less than her capital investment. On her own version, she left without any demand. It is not until plaintiff instituted the present action that she sprang into action by demanding this so called investment. I note that during cross examination of PW1, it was put that plaintiff failed to demand from defendant the sum of E390 000 owed by defendant before she left for plaintiff's employment. Similarly, defendant too failed to demand a significant amount of E1m plus interest. As often said, what is good for the goose must be good for the geese. In fact, on the contrary, in the circumstance of the case one would expect at least defendant to demand this substantial sum of money.

c) <u>Exhibit D1</u>

[75] Defendant informed the court in chief that she wrote exhibit D1 when she was still in the employ of plaintiff and she was in plaintiff's office using her

desk-top. She, however, revealed to this court that after depositing into plaintiff's safe the sum of E200,000 she never spoke with PW1 about the R1 million investment. Even when she left, her investment was not discussed. It is surprising therefore, to read as authored by defendant from D1 before exiting plaintiff's employment:

> *"This money was in South African currency and in cash for tax purposes, and because I did not know if you would put it into A. G. Thomas or one of your P F Thomas's accounts. We are now surprised that you think that this money was from your safe." (*myemphasis*)*

[76] One wonders as to when such discussions took place in the light of her evidence in chief that after receiving exhibit B, the matter was not deliberated upon until she left plaintiff's employ. This glaring contradiction, in her evidence in chief, points further that the basis of her counter-claim exist only in the figmentof her mind and therefore stands to be dismissed.

d) Conduct of parties

[77] Turning to the conduct of the parties, as ably demonstrated by learned Counsel for plaintiff,defendant in the ordinary course of events, as an experienced accountant would have reflected the transaction in the books of account of plaintiff. It is common course that defendant did not do so when it was entirely upon her to reflect the transaction. PW2 gave evidence that she interviewed defendant in the financial year end of 2010 and posed, "*Do you have any investment in the company?"*Her answer according to PW2 was in the negative.She denied that this question was posed to her. She however, testified as follows:

> *Mr. Shabangu: "What is this (with reference to exhibit C)?"*

Defendant: "*It is a question you would ask when doing auditing*."

[78] In other words, defendant demonstrated that she was familiar with the questions in Exhibit C. She ought therefore to have expected the question on party transaction.

[79] That as it may, one question that begs for an answer in all her conduct is that as an accountant, it was not disputed that she prepared the draft statement for the auditors to produce a financial year end statement. Why did she fail to enter this sum of R1 million in the various ledgerbooks of plaintiff? Why did she omit to include it in her draft statement which is the working document for the auditors? This position is exacerbated by defendant's evidence in chief that when PW1 told her that he could invest the money, she believed him because she had seen in the financial records of plaintiff names of persons plaintiff had invested money on behalf. She divulged the names of the investors as Mr. Myer and Tryson. As to why she failed to include her name in the same financials is not clear. These questions arise from defendant's conduct which is admitted by herself that neither the sum of R1 million nor the several transactions in respect of R500,000, R300,000 and R200,000 were reflected in plaintiff's financial records. For this reason, her conduct cannot be said to be consistent with her counter-claim.

[80] Defendant also pointed out, "*I put in controls, a system where no one would take money without signing for it. I would make everyone sign*". As to why she then did not cause Malcolm to sign for the sum ofR500,000 is not clear in light of this evidence protruding from her mouth. The only irresistible inference to be drawn is that she never gave Malcolm the sum of R500 000.

This could be the reason she failed to call Malcolm to corroborate her claim.

Costs

[81] As can be deduced from above, the evidence adduced by defendant:

- crumbled at her very instance while she was giving evidence in chief, and was attended by serious material contradictions even before cross examination;

- the grounds for her counter-claim as can be gleaned under adjudication is so obviously far fetched such that no court of law could believe it;

[82] For this reason, the court must show its disapproval of defendant's conduct by meting out the appropriate orders as to costs.

Orders

[83] The totality of the above suggests that defendant's counter-claim ought to be thrown out root and branch. In the foregoing, I enter the following orders, there being no issue on plaintiff's main cause of action:

1. Defendant's counter-claim is hereby dismissed;

2. Plaintiff's cause of action succeeds and defendant is hereby ordered to:

    2.1 pay plaintiff the sum of E380,000;
    2.2 Interest at the rate of 9% per annum *a tempore morae*;

2.3 Costs of suit including costs of application for interdict *pendent lite*, summary judgment application.Costs of this action (summons) only to be paid in terms of Rule 68 (2), being cost of Senior Counsel at attorney own client scale.

_____

M. DLAMINI
JUDGE

For Plaintiff : D. J. Vetten instructed by Warring Attorneys

For Defendant : Z. Shabangu of Magagula Attorneys