IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, HIGH COURT PRETORIA)

CASE NO: 22746/2005

DATE: 5 MAY 2010

In the matter between:

MARTINUS THEUNIS STYN ERASMUS Appellant

and

FLEMMING JENSEN Defendant

JUDGMENT

MAKGOKA. J:

[1] This is a judgement on an action brought by the plaintiff for payment of a balance of a loan. In his simple, supplemented by a declaration, the following allegations were made:

> "*Plaintiff's claim against Defendant is for payment of the amount of R1 150 694.76 being monies lent and advanced by the Plaintiff to Defendant during June 1997 and which amount is due and payable by Defendant to Plaintiff and which amount Defendant despite demand refuses and/or neglects to repay to Plaintiff*"

[2] In his plea, the defendant admitted the conclusion of a loan agreement with the plaintiff during 1997 in terms which he borrowed the sum of US $60 000.00 from the plaintiff. He further admitted that he signed annexure "A" to the plaintiffs declaration. He denied however, that he borrowed any monies from the plaintiff in South African rands (ZAR). All other allegations were also denied.

[3] During the pre-trial conference, it was agreed that the defendant had repaid an amount of R441 800. 00 over the period between February 2002 to February 2009.

EVIDENCE

[4] Only the plaintiff testified. The defendant did not testify and closed his case without calling any witnesses. During the plaintiffs evidence it became clear that the amount claimed was lent and advanced to the defendant over a period of time prior to June 1997. The plaintiff testified that in March 2001, the defendant signed a document with the heading "**Promissory Note".** The relevant parts of the document read as follows:

> I. For value received, the undersigned, **Flemming Jensen** Passport no. A[...] of 4[...] C[...] F[...] Court, C[...], MARYLAND 21044 USA (the "Maker") promises to pay to the order of MTS ERASMUS, ID 3[...] of 2[...] G[...] St. Carslwarld Midrand, SOUTH AFRICA, (the "payee"), the principal sum of Ninety Three Thousand, U.S. DOLLARS ($93 000.00), which includes interest for the period 15th July 1997 to 15th March 2001.
>
> III. 50% of this Note shall become fully due and payable at the demand of the Payee, which demand shall not occur prior to 15th March 2001. The payments shall be paid in full as set out above by Maker within ten (10) calendar days after the Payee makes a written or oral demand thereof. Said payments shall be sent to the Payee at the address set forth above or at other address as the Payee may communicate to Maker as part of this demand for payment.
>
> IX This Note is payable in U.S. currency, and the terms hereto shall be governed by the laws of the State of Ohio, U.S.A. If any provision hereto is deemed invalid or enforceable by a court of competent jurisdiction such shell be deemed valid or enforceable to the fullest extent permitted by law and the validity or enforceability of the remaining provisions shall not in any way be effected thereto.

[5] On 12 June 2003, the defendant wrote a letter to the plaintiff, wherein a further acknowledgement of his indebtedness to the plaintiff in an amount of R1, 140. 000.00 was made by the defendant. The full text of the letter read as follows:

> *Dear Tins,*
>
> *This letter will serve two purposes:*
>
> *1. To acknowledge the indebtedness to you for a total amount of R1, 140,000.00 (One Million one hundred forty thousand Rand) comprising monies lent over a lengthy period of time as well as interest thereon.*

Said amount is owed to you by the undersigned in an individual capacity.

2. Repayment will occur along with the cash flows generated by our wholly owned subsidy, Witbank Housing Corporation's Presidential Job Summit Social Housing 5,000 housing unit project, currently being constructed in Witbank, and a firm schedule for the repayment will be forthcoming very soon, as this is being completed by the various parties involved in the project.

To put this into perspective, please, understand that we will deliver the first "super- block" - comprising 180 housing units - at the end of this month, and one such super-block at the end of every month following for a total of 20 super-blocks.

Each delivery will be invoiced by Witbank Housing Corporation for a developer's fee of R1 million-and out of which I will ensure repayment of the indebted amount and, as stated in the above, a schedule for such will be forthcoming soon.

In hoping that this will satisfy your request for directions in this matter, I remain.

Sincerely yours

Flemming Jensen

Chairman

[6] The plaintiff further testified that up to the time of the trial, he had been in regular contact with the defendant about the outstanding debt. Each time the defendant would make a promise of payment. During the past 4 years of issue of summons, the defendant has never denied his indebtedness to him. As recently as the week preceding the trial, the defendant sent him two text messages on his cellphone, promising payment. He also had a drink with the defendant who told him that he did not wish the matter to proceed to trial as he wished to settle the debt before the trial date.

[7] The repayments by the defendant to him were made in ZAR, although there were no payments in 2006, 2007 and 2008. Each time he received a payment from the defendant, he would convert it to USD with that day's exchange rate, which rate he obtained from the *Business Day* newspaper, and reduced the loan account accordingly.

[8] At the end of 2002/ beginning of 2003, the parties had a meeting in Sandton, where the parties agreed that the subsequent payments would be in dollars. However, he never received payment in dollars. It was then agreed to convert the amount of the loan into the rand. This agreement, although never reduced to writing by the parties, was recorded by the plaintiff subsequent to the meeting, in a letter dated 3 January 2003.

[9] The plaintiff explained how he converted the outstanding USD amount to rand as follows: At the end of December 2002, the outstanding loan amount to USD 109 846. 57. At that time, the USD/ZAR exchange rate was just R10 a dollar. When the loan was converted to Rand, the loan amounted to R 1 098 465. 70. He further testified that the claim amount of R1 210 694. 76, was the outstanding balance, plus interest at the time summons was issued.

[10] As to the calculation of interest, the plaintiff testified that at the end of every month, he added one twelfth interest on the outstanding amount. This interest he calculated from 15 March 2001. In this regard the plaintiff confirmed his manuscript schedule of interest and outstanding balances.

[11] During cross-examination, the plaintiff conceded that he did have the exact loan amount without interest. Other than that, nothing came of the cross-examination, which was limited to the above issues only. The defendant's version was also not put to the plaintiff.

[12] That concluded the plaintiffs case. An application for absolution from the instance on behalf of the defendant at the close of the plaintiffs case was made, which I dismissed. The defendant then elected to also close his case, without testifying or calling any witnesses.

[13] Mr. *Bester,* counsel for the defendant, argued for the dismissal of the plaintiffs claim. As I understood counsel's argument, the basis for his submission is three-fold. First, that the plaintiff was unable to clearly state the loan amount and the interest charged, with any certainly. Secondly, that the "promissory note", being annexure "A", did not incorporate any other terms save for those in the agreement. The upshot of this, counsel argued, was that the conversion of the amount stated in annexure "A", was not part of the agreement, and therefore any evidence purporting to prove such conversion, was inadmissible, irrelevant and prejudicial to the defendant, as the conversion was not ventilated in the pleadings.

[14] Thirdly, that there was insufficiency of evidence as the plaintiff failed to tender expert evidence as to the exchange rate between the USD and the ZAR. The plaintiff's evidence that he obtained such exchange rate from *Business Day* newspaper, was, according to Mr. *Bester,* hearsay.

[15] Considered in isolation, one might be persuaded to accept Mr. *Bester's* argument. However, all these submissions, cannot be considered in *vacuo.* They should be considered in the light of the totality of the evidence before court. In my view, three aspects significantly erode Mr. *Bester's* submissions.

[16] First, as regards the amount of the loan amount, it is significant that the defendant himself, in a letter dated 12 June 2003, acknowledged indebtedness to the plaintiff for a total amount of R1 140 000.00 (one million one hundred forty thousand rand) comprising monies lent over a period of time as well as interest thereon. The correctness of the contents of the said letter, had never being placed in dispute. The date of the

letter is also significant to the argument that there was no agreement to convert from USD to ZAR.

[17] It will be recalled that the plaintiff testified that the conversion was agreed to during December 2002/ January 2003. The conversion was recorded in a letter by the plaintiff to the defendant on 3 January 2003. The receipt of such a letter by the defendant, and the correctness of the contents thereof, have similarly, not been disputed by the defendant. The plaintiffs letter of 12 June 2003, if anything, fortifies the fact there was indeed an agreement to convert.

[19] It is also significant, that in the manuscript schedule reflecting the balance and interest charged at various dates, the balance owing as at end of April 2003, is R 1 139 658.00, a mere R342.00 short of the R1 140 000.00 which the defendant himself acknowledged to be owing towards mid June 2003.

[20] It is therefore, in my view, incorrect that defendant would have been prejudiced by the evidence relating to conversion from USD to ZAR. He was party to an agreement in this regard. He himself set out the converted amount with some measure of accuracy as at mid June 2003, as more fully set out in the preceding paragraph. It becomes irrelevant therefore, in my view, to consider the evidence as to how the plaintiff arrived at the claim amount, or the method used for conversion. The defendant himself had, at the risk of repeating myself, provided proof of agreement to convert, as well as the converted amount. The defendant himself made payments to the plaintiff in ZAR.

[21] Even if I am wrong in the view I take of this aspect, the central consideration is always that of fairness and justice. Put differently, whether the evidence relating to the conversion, not pleaded, was prejudicial to the defendant.

[22] Shorn all of its cursory and cosmetic complexities, this is a simple matter, based on a written acknowledgement of debt. The agreement to convert, was not new to the defendant. Although not specifically pleaded, it was in no way new to the defendant. It was not sprung upon him as a surprise in evidence. It was based on two letters, one written by him. He decided not to testify to challenge the correctness of the contents of the letters.

[23] In *Mastlite (Pty) Ltd v Stavracopolous* 1978 (3) SA 296 (T) the following was stated at 299 D-E:

> "*What, must, in my view, be emphasised is that the contemplated departure from the pleadings must not be such as to cause prejudice and that the new issue or matter should have been fully canvassed by both parties to the extent that it virtually amounts to a tacit agreement between them to enlarge the scope of the pleadings. Both parties must willingly participate in the effort, to canvas the new issue, otherwise the possibility of prejudice must almost inevitably arise which would be fatal to any attempt to depart substantially from the pleadings.* ''

[24] Mr. *Bester*, also refered me to the case of *EC Chenia and Sons CC v Lamé & Van Blerk* 2006 (4) SA 574 (SCA), wherein a proper approach was restated with regard to departure from the issues raised in the pleadings. It was reiterated that the question is one of prejudice. I have already found that there could not have been prejudice to the defendant in the circumstances of the present case.

[25] The above should take care of the last contention concerning the exchange rate at the time of conversion. I therefore do not consider it necessary to address this aspect any further.

[26] The cumulative effect of the above is that I am satisfied, given the totality of the evidence, that the plaintiff has proven his case on a balance of probabilities. The amount of R441 800.00 that had already been paid by the defendant should be deducted from the claim amount.

I therefore make the following order:

1. The defendant is ordered to pay an amount of R768 894.76 to the plaintiff.

2. Interest on the said amount at 15.5 % p.a *tempore morae.*

3. The defendant is ordered to pay the costs hereof

T M MAKGOKA

JUDGE OF THE HIGH COURT

DATE HEARD: 28 OCTOBER 2009

JUDEGMENTHEARD: 5 MAY 2010

FOR THE PLAINTIFF: ADV G SWANEPOEL

INSTRUCTED BY : *JOHN TRIBELHORN ATTORNEYS*

PRETORIA

FOR THE DEFENDANT: ADV A BESTER

INSRTUCTED BY : *MATTHEW KERR-PHILLIPS* , JOHANNESBURG

AND *FRIED LAND HART & PARTNERS,*

PRETORIA