

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE 16/05/2023

SIGNATURE

A handwritten signature in black ink, appearing to be 'A. O. O.', is written over the signature line.

Case No: 015450/2022

In the matter between:

Andrimarie Mathie N. O

1st Plaintiff/ Applicant

Lunn-Mari Botha N. O

2nd Plaintiff/ Applicant

And

Linda Ilene Lourens

1st Defendant/ Respondent

**THE MASTER OF THE HIGH COURT OF
SOUTH AFRICA, GAUTENG DIVISION,
PRETORIA**

2ND Defendant/ Respondent

JUDGMENT

INTRODUCTION

1. This is an opposed Summary Judgement application by the Plaintiffs, in their capacity as executrix of the deceased estate of Michael Albertus Bester for payment of R1 000 000.00 together with interest.

BACKGROUND AND COMMON CAUSE FACTS

2. The deceased, Mr. Michael Albertus Bester (herein referred to as the deceased) and the 1st Defendant were married out of community of property without accrual. The deceased died testate. The 1st Defendant was diagnosed with colon cancer and underwent significant medical interventions. It appears that the deceased was of more advanced in age which prompted them to have a realistic outlook on life and appreciated their mortality. On several occasions both discussed what would happen in the event one of them passes away. At some stage this discussion took place in the presence of a mutual friend whose mother endured hardship they intended to avoid.
3. The deceased was hospitalized on the 12 June 2021. On 15 June 2021 at approximately 04h00, an agent of Eugen Marais hospital telephonically informed her that the deceased was very ill and all signs were indicative that he was going to die and she remembered the deceased words and she transferred the amount of R500 000.00 at 04h03 and R400 000. 00 at 04h04.

She thereafter proceeded to the hospital and reported the transfers to the deceased. According to the medical records the deceased passed on the 15 June 2021 between 04h00 and 05h00. On 16 and 17 June 2021, withdrawals of R50 000.00 each were made respectively.

THE DEFENDANT 'S PLEA

4. The 1ST Defendant's plea is briefly that she and the deceased had discussed on several occasions what would happen to the surviving spouse in the event one of them passes away. Both orally and mutually agreed that in such an eventuality the surviving spouse should transfer funds held in the other spouse's bank account into his/her account in order to avoid unnecessary financial hardship until the estate is finally wound up.
5. At some stage this discussion happened in the company of a mutual friend, Ms. Max van Zyl, who deposed to a confirmatory affidavit. The latter informed them that her mother endured a similar hardship after the passing of her father whose wish was that after his demise the money in his bank account is her mother's and she failed to transfer same upon his demise and could not access it until after the estate was finally wound up. The deceased joined in and confirmed that they should avoid such an eventuality.
6. On the 12th of June 2021 at the hospital the deceased issued her with clear and lawful instruction to transfer money held in his account. It was at this stage that he issued her with his passwords and login details. On the 15th of June 2021 whilst the deceased was hospitalized she was informed telephonically that his condition has deteriorated and she should come and say her goodbyes. She

then remembered their agreement and she transferred an amount of R900 000.00 in two separate transactions. On the 16th and 17th June 2021 she transferred R50 000.00 respectively.

THE LAW

7. Summary judgement is an extraordinary and a stringent remedy in that it permits judgement to be given without trial. It is for this reason that the courts are generally reluctant to grant it. Summary judgement can only be granted where the court is satisfied that the Plaintiff's case is unanswerable. The test is whether on the facts before it, the court is able to conclude that the defense raised is bad in law or bogus. The crucial issue for determination is whether, on the facts by the plaintiff in its particulars of claim, it should grant summary judgement or whether the defendant's opposing affidavit discloses a bona fide defense in that it should refuse the summary judgement.
8. In *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) the court held as follows:

“ Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by A satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a B balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully'

disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence C which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully', as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material D facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence. (See generally, *Herb Dyers (Pty.) Ltd. V Mohamed and Another*, 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd. v. Webb and Another*, 1965 (2) SA 914 (N); *Arend and Another v. Astra Furnishers (Pty.) Ltd.*, *supra* E at pp. 303 - 4; *Shepstone v. Shepstone*, 1974 (2) SA 462 (N)). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading."

9. In *Firststrand Bank LTD v Huganel Trust* 2012 (3) SA 167 (WCC) the court held as follows"

"It appears to me that there are at least three important points that should be emphasised.

1. While summary judgment is an order which will prevent a defendant from having his day in court, there are many cases where the plaintiff is entitled to relief on the basis that, ex facie the papers which have been filed, there is no justification for concluding that opposition can be regarded as anything other than a delaying tactic.

2. As Corbett JA emphasised in Maharaj, excessive formalism should be eschewed. Hence the substance of the dispute, together with the purpose of summary judgment, needs to be taken into account during the evaluation of the papers which have been placed before court in order to determine whether the summary form of relief should be justified.”

CONCLUSION

10. The 1st Respondent stated that prior to 12 June 2021 they had an oral agreement relating to the transfer of funds from the deceased bank account to the account of the surviving spouse and to use it as he/she deems fit. She further stated that the deceased issued her with “clear and lawful instructions” during her visit at the hospital on the 12 June 2021. On the 15 June 2021 after being informed that the deceased condition has deteriorated she transferred amount of R900 000.00 in two separate transactions. This transfer clearly falls outside the alleged agreement. Consequently, I find that she has no *bona fide* defense.

11. It is apparent that what commenced as a casual discussion between the 1st Respondent and the deceased relating to what should happen in the event one of them passes on culminated into the alleged oral contract which was

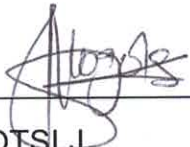
formalized was on the 12 June 2021 when she was issued with “clear and lawful instructions,” the password and login details. The purported oral agreement, in my view, became of force and effect on the 12 June 2021 four days before the demise of the deceased who was hospitalized and was on his death bed. At this stage the deceased lacked capacity to perform a juristic act. In my view, the 1st respondent has no *bona fide* defense in respect of all the transfers made pursuant to this agreement.

JUDGMENT

12. In the circumstances, I am persuaded that the Applicant made out a case for the relief sought.

ORDER

1. Therefore, the draft order marked “XYZ” signed and dated is made the order of court.



MOGOTSLJI
ACTING JUDGE OF THE HIGH COURT
NORTH GAUTENG DIVISION, PRETORIA

Date of hearing: 2 MAY 2023
Date of judgment: 17 MAY 2023
Counsel for the Applicant
Adv CL Markram-Jooste
Instructed by:
VZLR INC
Counsel for the 1st Respondent
Adv N. Terblanche

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO. 2022-015450

**ON THIS 2ND DAY OF MAY 2023 BEFORE MOGOTSI AJ
NUMBER 10**

[Signature]
17/05/2023

In the matter between:

ANDRIMARIE MATHIE N.O. *Private Bag X67, Pretoria 0001* **1ST PLAINTIFF / APPLICANT**

LLYN-MARI BOTHA N.O. **2ND PLAINTIFF / APPLICANT**

and

LINDA ILENE LOURENS **1ST DEFENDANT / RESPONDENT**

**THE MASTER OF THE HIGH COURT OF
SOUTH AFRICA, GAUTENG DIVISION,
PRETORIA** **2ND DEFENDANT / RESPONDENT**



DRAFT ORDER

After having read the documents filed of record, having heard the submissions made by counsel and having considered the matter, the following order is made:-

1. Payment in the sum of R1 000 000.00 together with interest thereon *a tempore morae* calculated that the prescribed legal rate of interest upon R900 000.00 from 15 June 2021 to date of payment and upon R50 000.00 from 16 June 2021 to date of payment; and upon R50 000.00 from 17 June 2021 to date of payment.

2. Costs of suit, including the summary judgment application.



Representation for the Applicant: Adv CL Markram-Jooste (karlienmarkram@gmail.com; 082 411 6313) instructed by DRAKE PLEMMER & ORSMONS EL INC C/O VZLR Inc (012 435 9405; REF: MAT183033/MR VAN RENSBURG/EC)

Representation for the Respondent: Adv N Terblanche (advterblanche@gmail.com; 079 509 3198) instructed by MJ Lombard Inc (012 346 4997; REF: FAM342)