



**IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE DIVISION, BLOEMFONTEIN)**

Reportable:
YES/NO
Of Interest to other Judges:
YES/NO
Circulate to Magistrates:
YES/NO

Case no. 2322/2021

In the matter between:

**DAVID HERCLASS
SYLVIA HERCLASS**

First Plaintiff
Second Plaintiff

and

LETSHEGO MIRRIAM ROSY HERCLASS

Defendant

CORAM: DE KOCK, AJ

HEARD ON: 12 APRIL 2022 AND 13 APRIL 2022

JUDGMENT BY: DE KOCK, AJ

DELIVERED:

This Judgment was handed down electronically by circulation to the parties' representatives by e-mail and released to SAFLII. The date and time for handing down is deemed to be 13h00 on 29 June 2022.

INTRODUCTION:

[1] The First Plaintiff claims payment of the amount of R536 000.00 together with interest and costs from the Defendant. It is pleaded in the particulars of claim that the Second Plaintiff is cited in the proceedings only because the money lent to the Defendant was channelled through her account.

[2] The essence of the First Plaintiff's claim is pleaded as follows in the particulars of claim:

“

4.

The First Plaintiff is the father of the Defendant. During the year of 2018 the Defendant was involved in a divorce matter with her husband. The Defendant, who did not want to lose her immovable property as a result of the divorce, approached the 1st Plaintiff to loan her an amount equal to half of the value of the property so that she could buy her husband out of the property.

5.

As a parent who was looking after the interest of his child, the First Plaintiff advanced an amount of R536 000.00 (five hundred and thirty six thousand rand) on 18 June 2018 to the Defendant.”

[3] The Defendant in her Plea pleaded that she received an amount of R300 000.00 from the First Plaintiff on or about 18 June 2018 and that she received an amount of R240 000.00 from the Second Plaintiff on or about 18 June 2018. It is further pleaded in the Defendant's Plea that the Defendant denies that the amount of R536 000.00 or any portion thereof was advanced to her by the First Plaintiff as a loan.

[4] It appears *ex facie* the pleadings before this Court that the existence of a loan agreement and the terms thereof are in dispute.

[5] It was submitted on behalf of the Plaintiffs that because, the Defendant admitted that she received the money, the onus shifted to her to prove on a balance of probabilities that the money she received was not a loan as stated by the Plaintiffs. Counsel for the Plaintiffs in support of the latter submission referred to the matter of *Pillay v Krishna and Another* 1946 AD 946. It was further submitted that the statement that no evidence was presented by the First Plaintiff as to where, when, and how the purported verbal loan agreement was concluded is far from the truth. It was submitted that the First Plaintiff was approached by his daughter seeking a loan to pay her husband's half share in their house as she was divorcing her husband. It was also submitted that the latter averment is supported by the Defendant in her evidence. It was submitted that the Defendant has stated in her evidence that in June 2018 she was approached by her father and asked him:

"Can you borrow me the whole amount of R540 000.00?"

[6] It was also submitted that the latter was confirmed by the Second Plaintiff.

[7] It was submitted on behalf of the Defendant that the First Plaintiff failed to produce sufficient evidence to establish *prima facie* that the Defendant had *animus contrahendi* in respect of the sum of R536 000.00 after she received R540 000.00 from the First and Second Plaintiffs in that no *prima facie* evidence was presented to show that the specific sum of R536 000.00 was advanced to and accepted by the Defendant as a loan for consumption to be repaid. It was further submitted that the Plaintiffs bore the risk of losing if the evidence on the existence of the agreement and/or the terms thereof was ultimately found to be lacking. It was consequently submitted that the claim should be dismissed for costs for this reason alone.

- [8] Accordingly the Court needs to adjudicate the issues as to whether the First Plaintiff has proved and pleaded the existence of a loan agreement and the specific terms of such a loan agreement.

APPLICABLE LEGAL PRINCIPLES:

- [9] In *Minister of Agriculture and Land Affairs and Another v De Klerk and Others* 2014 (1) SA 212 (SCA) at para [39] Majiedt, JA said:

"It is trite that the parties are bound by their pleadings – the object thereof being to delineate the issues to enable the other party to know what case has to be met. It is impermissible to plead one particular issue and to then seek to pursue another at the trial."

- [10] In the matter of *EC Chenia and Sons CC v Lame and Van Blerk* 2006 (4) SA 574 (SCA) it was held that it is necessary to allege and prove unequivocal conduct that establishes the parties intended and did in fact tacitly contract on the terms alleged. regard will be had to the conduct of all the parties objectively.

- [11] In accordance with the *Kriegler v Minitzer and Another* 1949 (4) SA 821 (A) the person who claims relief must assert and prove the facts on which that claim is based. If the defendant instead of merely denying the Plaintiffs' version of a contract, adduce different terms as a defence, the onus will remain on the Plaintiff to prove his version of the contract in order to succeed with the claim.

[12] In the matter of *South African Reserve Bank v Leathern N.O. and Others* 2021 (5) SA 543 (SCA) at para [17] it was held:

“Generally, where money is deposited into a bank account of an account-holder it mixes with other money and by virtue of commixtio, it becomes the property of the bank. The account holder has no real right of ownership of the money standing to his credit but acquires a personal right to payment of that amount from the bank arising from the bank customer relationship.”

THE COURT’S FINDINGS:

[13] It is apparent from the particulars of claim that the First Plaintiff did not plead the existence of either a written, oral, or tacit loan agreement. Further the date on which the alleged loan agreement was reached and the place where the agreement was reached was not pleaded. It was merely pleaded as highlighted in this Judgment that the Defendant approached the First Plaintiff for a loan in 2018 and that amount was advanced to her on 18 June 2018 (my own emphasis).

[14] No material terms and conditions of the alleged loan agreement were pleaded. In particular the date or time period for repayment of the alleged loan amount and consequent breach of the alleged loan amount by virtue of the Defendant’s failure to make repayment on an agreed date or time period has not been pleaded.

[15] During examination in chief the First Plaintiff was asked by his Counsel how the Defendant was going to refund him. Counsel for the Defendant raised an objection that testimony is being led to a term of the alleged loan agreement which has not been pleaded in the particulars of claim. The Court pointed out that indeed no such term has been pleaded in the particulars of claim. The Plaintiffs’ legal representatives did not take the issue further.

- [16] The First Plaintiff testified that the Defendant promised to refund him after the Defendant's divorce. It has however not been pleaded in the particulars of claim that it was in fact agreed that the alleged loan would be repayable after the Defendant's divorce. No amendment of the particulars of claim to the latter effect was either requested.
- [17] During examination in chief the First Plaintiff was asked whether from the time that the money was given to the Defendant up until the summons was issued or the letter of demand was issued to the Defendant the First Plaintiff and the Defendant discussed anything about the Defendant returning the money that the First Plaintiff has given. The First Plaintiff answered that they have never done it. The First Plaintiff testified that the Defendant only said she will return the money, but she did not explain when. The First Plaintiff contradicted himself with this evidence opposed to his evidence that the Defendant promised to repay him after the divorce.
- [18] The First Plaintiff further testified during cross-examination that the First Plaintiff and the Defendant did not agree about the repayment date and did not reduce it to writing.
- [19] It was put to the First Plaintiff during cross-examination that he is saying that he loaned R536 000.00 of his money to the Defendant but that he cannot explain to the Court where the payment of R240 000.00 comes from. The First Plaintiff replied that he did not know whether the money was coming from the union or what. His best guess that it was coming from the union. Further the First Plaintiff testified that the R240 000.00 was not paid from his account, when he was referred to the bank statements of the Second Plaintiff. In regard to the R300 000.00 the First Plaintiff testified that he cannot remember exactly about the R300 000.00 whether he loaned it to the Defendant. He stated that he was a bit confused. He testified that the Defendant would refund his money the amount of R500 000.00 plus but, that he cannot remember the R300 000.00.

- [20] When questioned during cross-examination to explain the allegation that the sum of R536 000.00 that was his money that was channelled through the Second Plaintiff's account, the First Plaintiff failed to supply a full and proper explanation and only stated that he instructed the Second Plaintiff to draw money from his bank account and pay it to the Defendant.
- [21] The Second Plaintiff admitted during cross-examination that the account from which the R240 000.00 was paid was an account held by her in her name that she had free and full access to the money, that she did not account to the First Plaintiff in respect of the account and that she could use the account freely. The funds of the First Plaintiff comingled with the funds of the Second Plaintiff through the concept of *commixtio* and it is no longer possible to identify the amount paid by the First Plaintiff if any as the exclusive property of the First Plaintiff. At best the Second Plaintiff had a personal right to instruct the bank to pay the funds in the account to her or another nominated person.
- [22] The First Plaintiff did not produce any documentary evidence to prove the sum of R240 000.00 was his money, for instance his own bank statements or proof of payments.
- [23] The Plaintiff did not testify in isolation "*Can't you borrow me the whole amount of R540 000.00?*" but testified:

"... you promised me an upgrade. So on the upgrade monies that you promised me which was R300 000.00 can you please give me the money. I actually did not start, yes I started with R300 000.00 but firstly I started with can you not borrow me the full amount for the house. Then he was like no, I cannot give you the full amount for the house. I do not have that kind of cash, but I am able to give you the R300 000.00..."

[24] The Defendant further testified:

“So I was like in, to my father can you advance me the amount in cash rather than upgrade my vehicle because I want to buy my husband out. So he was like in okay for now, I do not have that amount of cash to give you the full amount for the house because it was R540 000.00 something due to transfer costs and all that. So it is like in I can only give you the R300 000.00 that I promised you.”

[25] The onus rested on the First Plaintiff to prove the existence of a loan agreement, its terms and consequent breach thereof on a balance of probabilities. The onus thus rested on the First Plaintiff to firstly prove that the alleged loan which includes proof of the anterior question whether both parties had a requisite *animus contrahendi* and secondly the material terms and conditions agreed upon including the amount of the loan and the date of repayment (my own emphasis).

[26] The Court agrees with the Defendant that the First Plaintiff failed to produce sufficient evidence to establish *prima facie* that the Defendant had *animus contrahendi* in respect of the sum of R536 000.00 after she received R540 000.00 from the First and Second Plaintiffs. No *prima facie* evidence was presented to show that the specific sum of R536 000.00 was advanced to and accepted by the Defendant as a loan for consumption to be repaid.

[27] The First Plaintiff failed to prove the creation of contractual obligations. The First Plaintiff has failed to prove the establishment of a contract from which rights may flow. The First Plaintiff did not prove or plead that there was indeed consensus *ad idem* between the First Plaintiff and the Defendant as to the conclusion of a loan agreement and the terms thereof. The First Plaintiff most certainly failed in proving the existence of a loan agreement containing a contractual term stipulating when the alleged amount was due and payable by the Defendant. The letter of demand that was sent to the Defendant does not

assist the First Plaintiff. It was not pleaded, and no evidence was led to the effect that the alleged loan amount was repayable on demand. No onus rested on the Defendant to prove her defence. The Defendant did not raise any special defence. Taking all into consideration the First Plaintiff's claim stands to be dismissed without further ado.

ORDER:

[28] In the circumstances the Court grants the following order:

1. The First Plaintiff's action is dismissed with costs.



DE KOCK, A.J.

Appearances on behalf of the Plaintiffs:

Counsel - Advocate N M Bahlekazi
Attorney - Mlozana Attorneys, Suite B, Property Park, 60 Kellner Street,
Westdene, Bloemfontein

Appearance on behalf of Defendant:

Counsel - Advocate AJ van der Merwe
Attorney - J J Kachelhoffer, McIntyre & Van der Post, 12 Barnes Street,
Westdene, Bloemfontein