



**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 number: 4949/2013

In the matter between:

[P.....] [G.....] [J.....]

Plaintiff

And

[A.....] [E.....] [J.....]

Defendant

CORAM: LEKALE, J

HEARD ON: 4 & 6 MAY 2016

JUDGMENT BY: LEKALE, J

DELIVERED ON: 19 MAY 2016

BACKGROUND AND INTRODUCTION

- [1] Marriage, as a social institution, is not a business enterprise and parties thereto do not generally regard each other with calculated prudence as shrewd business individuals would each other when engaged in business transactions. They do not keep precise records of the favours they extend to each other, nor do they, as a matter of course and practice, reduce their daily undertakings to each other to writing. They are guided, in their dealings with each other, by trust and unquestioning acceptance that they would be together as husband and wife until “**death do [them] part**”. They generally remain gullible towards each other until their love for each other loses its flame and only then do they start to gaze around and tread with care and suspicion as against each other.
- [2] The foregoing propositions are borne out by the facts in the instant matter. Parties hereto are a couple married out of community of property excluding accrual system. As at the date of the marriage viz. the 26 January 2008 the defendant, who is a web master in the employ of the Mangaung Metropolitan Municipality, was the registered owner of an immovable property (the property) over which was registered a mortgage bond.
- [3] Prior to the marriage and during the course thereof the plaintiff, a self-employed female painter by profession, modified and developed a shed outside the house on the property into an art studio in which she worked until the 25 November 2013 when she left the property which the parties had been occupying jointly as their common home.

- [4] At all times material to the parties' cohabitation as a married couple the plaintiff used her financial resources to help maintain and improve the property. The plaintiff, further, advanced the total amount of R229 000 to and on behalf of defendant in differing amounts as and when she was able to do so commencing in February 2008, which funds were used to service the bond account relating to the property.
- [5] On the 21 November 2011 plaintiff deposited a further R200 000 into the bond account and, thus, reduced the balance outstanding thereon accordingly.
- [6] The marriage relationship between the parties deteriorated over time to such an extent that, on the 20 November 2013, plaintiff launched the present proceedings claiming, *inter alia*, decree of divorce on the ground that the marriage has reached such a state of disintegration that there exist no reasonable prospects of restoration of a normal marriage relationship between the parties.
- [7] Plaintiff, further, claims payment of R229 000 and mora interest as claim number 2 , payment of R200 000 and mora interest thereon as claim number 3 and payment of R71 000 together with mora interest as claim number 4 on the basis of alleged verbal loan agreements and unjust enrichment respectively.
- [8] Defendant resists the claims save for admitting that:

8.1 the marriage between the parties has broken down irretrievably;

8.2 payments amounting to R429 000 in total were made by plaintiff to him or on his behalf; and

8.3 plaintiff spent R71 000 on developing the art studio on the property.

[9] Defendant's position is that such payments and expenses were made and incurred as unconditional donations to him by the plaintiff in the same way as he did in favour of the plaintiff.

ISSUES IN DISPUTE

[10] It is clear *ex facie* the parties' rule 37 minute as well as submissions before the court that they are at variance on:

10.1 whether or not the plaintiff advanced the total amount of R429 000 to and on behalf of the defendant as a loan in terms of agreements between the parties;

10.2 Whether or not the defendant was unjustly enriched at the expense of the plaintiff to the total amount of R71 000;

10.3 who should bear the costs of the matter between the parties.

PLAINTIFF'S VERSION

[11] The plaintiff testified as the sole witness in her case to, *inter alia*, the effect that prior to advancing money to the defendant the latter pointed out that, because of their matrimonial property

system, he would pay back all money advanced to him regard further being had to the fact that the plaintiff was self-employed with no fixed income. Any money paid to and on behalf of the defendant is, thus, repayable as a loan. In October 2011 she won the Helgaard Steyn award and received R250 000 in prize money which she decided to invest and, as such, made enquiries at First National Bank and Investec with regard to interest rates. The defendant, who used to accuse her of not knowing how to deal with money, advised her to pay the amount into the bond account. Defendant undertook to pay more interest than Investec because they, as a couple, were going to save on interest payable on the bond account. She agreed and paid R200 000 into the bond account. Defendant, further, informed her that the bond account was to serve as her savings account in the sense that all the money she paid into the same remained hers. She only received R16 000 from defendant as interest which amount was used by defendant to buy an Optoma data projector for her at her instance.

- [12] She further made improvements on the property such as installing insulation in the roof but she is not claiming anything in that regard. Her father also spent a lot of money on developing the studio for which she is claiming only R71 000. She did not donate the money to the defendant. She confirmed the contents of her affidavit filed in support of the Rule 43 application. When it was necessary to pay or spend money on the property she did so without first discussing the issue with the defendant and without seeking his permission. She even used to pay domestic workers for their services and to transport them home all because she

wanted to make the marriage work. On his part defendant made her the sole heir of his estate in his Last Will and Testament.

DEFENDANT'S VERSION

[13] The defendant testified in support of his plea to, *inter alia*, the effect that he never concluded any loan agreements with the plaintiff and that all the money advanced to him or on his behalf by the plaintiff were unconditional donations motivated by love. He also donated money to the plaintiff and expended funds for her benefit. He has no use for the art studio and has, as such, not been unjustly enriched at her expense. No records were kept of moneys exchanged between them as husband and wife. He only heard and learnt that plaintiff expected repayment in 2013 when the latter left the common home. He wanted and expected the present marriage to be his last following two previous marriages which were unsuccessful. The property was their home in the sense that it was as much plaintiff's home as it was his. Plaintiff used to attend to issues calling for attention in the house without discussing same with him or asking for his permission. The general practice was for either of them to attend to such issues quietly. He now uses the studio for storage. He suggested to the plaintiff that she deposit the R200 000 into the bond account. He, effectively, confirmed that he filed an affidavit in opposition of the Rule 43 application in which he, *inter alia*, admitted that in February 2008 he suggested to the plaintiff that she deposit money into the bond account as and when it was available.

CONTENTIONS FOR AND ON BEHALF OF THE PLAINTIFF

[14] In argument Mr Grewar submits that the court should make value judgment on the evidence before it and that it is clear that the plaintiff is soft and a little naïve insofar as she was motivated by the wish to make the marriage work when she paid the relevant amounts over to the defendant. The agreement between the parties was for the plaintiff to use the bond account as her savings account and the defendant asked her to deposit her prize money into the said account. Defendant failed to explain how and when the alleged donations were accepted insofar as a donation is a contract. Defendant was unjustly enriched at the expense of the plaintiff regard being had to the improvements relating to the art studio. The fact that no expert evidence was tendered to prove the amount by which the property was enhanced does not detract from the fact that the studio has a value by which defendant is enriched. Not even the fact that defendant does not use the studio as the plaintiff did detracts from its general value.

CONTENTIONS FOR AND ON BEHALF OF THE DEFENDANT

[15] On behalf of the defendant Mr van Aswegen contends that the overall onus was on the plaintiff to prove the various claims and not on the defendant. The presumption against donation does not shift such an onus. The fact that the parties were intimate to each other renders the making of a donation probable in the instant matter.

- [16] The plaintiff's evidence to the effect that the bond account was used as her savings account is inconsistent with the existence of loan agreements. The evidence before the court shows that the plaintiff felt obliged to make a contribution towards the upkeep of the property as the couple's common home. The enrichment claim has not been proved insofar as no expert evidence was tendered to prove the value by which the property was enhanced insofar as the plaintiff's claim is apparently for alleged useful expenses. In his view plaintiff could not even give the exact amount she spent on developing the studio in question. The relevant claims should be dismissed with costs.

APPLICABLE LEGAL PRINCIPLES

- [17] In a case where the court is confronted with conflicting versions which cannot be reconciled it adopts a holistic approach to the matter and has regard to probabilities, among others. (See **State v Guess** 1976 (4) SA 715 (A) and **Stellenbosch Farmers' Winery Group Ltd & Ano. v Martell & Cie SA and Others** 2003(1) SA 11 (SCA) at para [5]).
- [18] The so-called presumption against donation serves to saddle a litigant who raises donation as a defence in his plea with evidentiary burden as opposed to overall onus of proof which never shifts and remains firmly embedded on the litigant claiming back what he or she advanced to or disbursed for such other litigant. (See **Barkhuizen v Forbes** 1998 (1) SA 140 (E) and

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)).

- [19] A loan agreement is a contract in terms whereof one party agrees to advance money to or to disburse same for another who accepts the same and undertakes to repay the same on agreed terms and conditions. (See **Mahomed & Son Ltd v Estate Horvitch** 1928 AD 1) A donation, on the other hand, is, in our law, genuine if it is made out of pure liberality in the sense that the donor was motivated by no reason other than sheer liberality in making the donation. (See **De Jager v Grunder** 1964 (1) SA 446 (A) at 463c-g and **Kay v Kay** 1961 (4) SA 257 (A)).
- [20] In our law *bona fide* possessors and lawful occupiers can enforce their right to compensation for necessary and useful improvements against the owner of the property through enrichment action. For the expenses incurred on improvements to be regarded as useful (*impensae utiles*) same must result in actual tangible improvement of the land and the market value of the property should be enhanced by such an improvement. (See **McCarthy Retail Ltd v Shortdistance Carriers** 2001 (3) SA 482 (SCA) at 489F-G).
- [21] A claimant for useful expenses may recover the lesser of an amount equal to the value by which the property has been enhanced and the actual expenditure incurred. (See **Nortje v Pool** 1966 (30 SA 96 (A) at 131G).

- [22] Absolution from the instance is an appropriate order where, at either the close of the plaintiff's case or the close of the case when both parties have had the opportunity to present whatever evidence they consider to be relevant, the evidence available before the court is insufficient for a finding to be made against the defendant. Such an order does not bar the plaintiff from reinstituting the action insofar as it has not prescribed. As opposed to a positive finding that no claim exists against the defendant **"it is the appropriate order when after all the evidence the plaintiff has failed to discharge the normal burden of proof."** (See **Principles of Evidence- Revised 3rd Edition, PJ Schwikkard and SE van der Merwe at Chapter 32 page 578**)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

- [22] As pointed out earlier in the judgment the parties are, in effect, *ad idem* that their marriage is beyond salvation. I am also persuaded by available evidence that it is in the interests of social justice and healthy family relations for the parties to go their separate ways.

CLAIM 2

- [23] The parties are in agreement that the plaintiff advanced a total amount of R229 000 to defendant by, *inter alia*, depositing the same into the bond account. On the papers the plaintiff asserts that the amount in question was a loan payable on demand. Defendant disagrees and maintains that the amounts in question were unconditional donations to him. A look at the plaintiff's oral

evidence before me and deposition in the Rule 43 application reveals that the parties never specifically and expressly agreed that the transactions were loans. According to the plaintiff defendant undertook to repay the amounts regard being had to the fact that the parties were married out of community of property excluding accrual system and the plaintiff did not have a fixed income. It is, further, plaintiff's case that the defendant pointed out that the amounts paid into the bond account remained her property and were, thus, repayable. The parties are effectively in agreement that the property was their common home and the plaintiff contributed to its upkeep because she wanted to make the marriage work. Plaintiff made the first payment into the relevant account shortly after the marriage viz. on 27 February 2008. At the relevant time the parties were, most probably, overwhelmed by their love and affection for each other which clouded their vision to the extent of rendering the plaintiff "**a little naïve**" in Mr Grewar's words. Defendant even allowed plaintiff to accompany him when he attended to bequeathing his estate to her as the sole heir in his Last Will and Testament.

- [24] The parties are, further, *ad idem* that defendant also paid cash amounts to the plaintiff and expended some funds for and on her behalf. It is possible, as Mr Van Aswegen submits, that in the light of the parties' love for each other during the early years of their marriage and their mutual intimacy they exchanged gifts and made donations to each other. It is, however, more probable, in my view, that the plaintiff regarded the property as the couple's joint property and expended money thereon in that view, motivated, further, by benevolent desire to improve and maintain

their lifestyle as a professional married couple. It is clear from her evidence that she even attended to maintaining the property without even discussing issues involved with the defendant as the registered owner. Her evidence was, further, to the effect that defendant stated that the bond account was her savings account which statement suggests, in my opinion, that the plaintiff was to have access to the account as and when she needed funds in the same manner in which the defendant utilised the account to purchase a new motor vehicle when he needed one. I am, thus, not persuaded that the payments were consciously and intentionally made as part of either a loan transaction or a donation. In my judgment such payments were made as plaintiff's contribution towards the household and in good faith inspired by a desire to make the property acceptable as a home for a couple of their class. In this regard it should be recalled that defendant's evidence was to the effect that the property was as much the plaintiff's home as it was his. It was the parties' joint hope and wish to stay married in line with the vows they exchanged when they first entered matrimony.

CLAIM 3

- [25] It is, further, common cause between the parties that the plaintiff deposited R200 000 into the bond account on defendant's advice. Plaintiff's evidence in this regard is to the effect that the account was once again to be used as her savings account. I am not persuaded by available evidence that the deposit was made as either a loan or donation to the defendant. Defendant was not very clear on the issue but did not dispute that he advised the

plaintiff against investing the money with Investec and encouraged her to deposit it in the bond account to save on interest payable on the same. It is, in my view, highly improbable that plaintiff would donate the relevant funds when her intention was to invest the same and she had already taken steps to realise that dream by enquiring after applicable interest rates.

- [26] If the bond account served as a savings account for the plaintiff she was entitled to access the funds as and when she desired in accordance with the terms and conditions applicable thereto. The parties were once again, in my view, most probably treating the bond account as a joint or a family account with the defendant, as the head of the family, holding the account for the family. According to the plaintiff the R16 000 saved on interest payable on the account was used to purchase a data projector for her as interest payable to her on the loan amount. Defendant disputes that the transaction was a way of paying interest on the loan amount and effectively contends that he donated the data projector in question to the plaintiff as his wife. In my opinion the fact of the relevant projector is neutral in the sense that it neither advances the defendant's case that the money was advanced to him as a gift, nor proves that the money was lent and advanced to defendant insofar as the plaintiff's evidence is to the effect that the account was used as her savings account. On her evidence, it is possible, in logic that the projector was effectively purchased with funds from that account as plaintiff's way of accessing the same through the defendant as the holder of the account.

- [27] If there was any R200 000 lent and advanced to the defendant by the plaintiff, then and only in that event it is, on available evidence, not the one testified about and referred to by the plaintiff in the present matter. Plaintiff did not, therefore, tender evidence sufficient to sustain this claim.

CLAIM 4

- [28] The parties are *ad idem* that the plaintiff incurred expenses in converting the shed on the property into an art studio. Defendant effectively admitted that R71 000 was expended in this regard in his plea. He, however, denies that the market value of the property has been enhanced thereby with Mr van Aswegen pointing out that, although an expert notice was filed by the plaintiff for this purpose, no evidence was tendered to prove the fact of the improvement by establishing the value of the property subsequent to the development of the studio.
- [29] The onus was on the plaintiff to prove that the market value of the property has been enhanced by the studio in question. It is true, as submitted by Mr Grewar, that the studio has some value. There is, however, in effect no evidence to show that the defendant has been enriched insofar as there exists no evidence whatsoever before the court to show that the value of the property has been enhanced by the studio. It was for the plaintiff to prove the fact of the enrichment on the part of the defendant and, with respect, not for the court to suck the value of the property following the relevant development out of the thumb. The court is, accordingly, not able to determine whether or not the actual

expenses incurred are recoverable as being less than the value by which the property has been enhanced. All that the court knows as a matter of evidence is that plaintiff incurred expenditure in the amount of R71 000 on converting the shed into the art studio. The action on this claim is, however, not simply for the recovery of such expenses. It is an enrichment claim which must be proved in accordance with applicable law. The defendant, thus, stands to be absolved. (See Wuldfliing-Eybers v Sandprops 2587 Investment CC 1994 (4) SA 640(C)).

COSTS

[30] Mr Van Aswegen argues for costs against the plaintiff and points out that the claim for a decree of divorce is neutral to the issue because the parties were effectively in agreement thereon. It is, further, clear from the Rule 43 papers that the defendant was ordered to make a contribution towards plaintiff's costs in that regard.

[31] There exists no cause before me to depart from the general principle with regard to costs as far as the other claims are concerned. The successful party is, in equity, simply entitled to its costs.

ORDER

[32] In the result the decree of divorce is granted.

[33] An order of absolution from the instance is granted with costs in favour of defendant on claims 2; 3 and 4.

LJ LEKALE, J

On behalf of plaintiff: Adv. D Grewar
Instructed by:
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Bloemfontein

On behalf of respondent: Adv. W Van Aswegen
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/PC