IN THE HI GH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No. 3800/2015

In the matter between:

DAVID HASKINS Plaintiff

and

SHIRLEY MARGARET LEE N.O. 1st Defendant

THE MASTER OF THE FREE STATE

HIGH COURT N.O. 2nd Defendant

CORAM: VAN ZYL, J

DELIVERED ON: 2 DECEMBER 2016

[1] The plaintiff instituted action against the first defendant in her capacity as executrix of the estate of the late Adelaide Marion Haskins (referred to in the pleadings as "the deceased") the mother of the plaintiff, who died on 18 January 2015. The second defendant is cited in his/her official capacity and no relief is claimed against the second defendant. The plaintiff is the sole surviving child of the deceased and Peter Clarence Haskins

(referred to in the pleadings as "Haskins"), who died on 27 June 1999, the deceased and Haskins having been married in community of property.

[2] The averments in the particulars of claim constituting the plaintiff's cause of action are the following:

"5.

During the period 1968 to 1999 the plaintiff, Haskins and the deceased concluded an oral agreement which was orally confirmed from time to time at the home of Haskins and the deceased situated at [...] K. S., Harrismith, Free State.

6.

In entering into the agreement:-

(a) The plaintiff acted in person; and

(b) Haskins and the deceased acted personally, alternatively,

(c) Haskins acted on behalf of the deceased and himself in his capacity as administrator of the joint estate subsisting between him (Haskins) and the deceased at the time.

7.

At all material times hereto and at the time the agreement referred to was concluded and confirmed from time to time, Haskins and the deceased were experiencing financial hardship.

8.

Express, alternatively implied, further alternatively tacit terms of the agreement were as follows:-

(a) The plaintiff would assist his parents, Haskins and the deceased, financially from time to time; and

(b) The amounts expended by the plaintiff aforesaid would be repayable on the death of the survivor of Haskins and the deceased by:

(i) The plaintiff lodging a claim for such expenses against the estate of the survivor of Haskins and the deceased; alternatively

(ii) The plaintiff inheriting the estate of the survivor.

9.

The aforesaid agreement was orally confirmed on numerous occasions during the lifetimes of Haskins and the deceased and with the deceased after the death of Haskins.

10.

Pursuant to the agreement the plaintiff advanced money to Haskins, alternatively, the deceased, further alternatively to third parties on their behalf as set forth in the schedule annexed hereto marked 'DH2' read with the schedules attached thereto which set forth particulars of the various payments made.

11.

The plaintiff claims repayment of the sum of R876 166,30 as set forth in annexure 'DH2' annexed hereto.

12.

The amount claimed in this action became due and payable on the death of the deceased on 18 January 2015.

13.

The plaintiff has submitted his claim for the payments claimed in this action to the first defendant.

14.

The first defendant has rejected the plaintiff's claims.

WHEREFORE the plaintiff prays for judgment against the first defendant for:-

1. An order directing the first defendant to admit the plaintiff's claim against estate late Adelaide Marion Haskins in the sum of R876 166,30 and to reflect such claim in the liquidation and distribution account in the said estate.

2. Interest thereon at legal rate from 18 January 2015 to date of payment.

3. Costs of suit."

[3] The second defendant did not defend the action, but duly filed a report indicating that the second defendant does not wish to defend the action and abides by the decision of the court.

[4] The crux of the first defendant's defence to the plaintiff's claim as pleaded in the first defendant's plea in response to the plaintiff's particulars of claim is the following:

"5.

AD PARAGRAPHS 5, 6, 7, 8 AND 9 THEREOF:

5.1 The first defendant does not have knowledge of the contents of the paragraphs, consequently denies the contents thereof and puts the plaintiff to the proof of each and every averment contained therein.

5.2 Without derogating from the generality of the aforesaid denial, and in the event that the Honourable Court finds that the deceased and the plaintiff concluded the agreement, as alleged, then and in that event the first defendant pleads that:

5.2.1 The agreement had its purpose to fetter the deceased's freedom of testation;

5.2.2 The agreement constitutes a *pactum successorium;*

5.2.3 The agreement is invalid and void *ab initio.*

6.

AD PARAGRAPHS 10, 11 AND 12 THEREOF:

The first defendant does not have knowledge of the contents of the paragraphs, consequently denies the contents thereof and puts the plaintiff to the proof of each and every averment contained therein.

7.

AD PARAGRAPH 13 THEREOF:

Save to admit that the plaintiff submitted a claim in the amount of R879 439,34, the first defendant denies that the first defendant, as executrix of the estate of the deceased , is indebted to the plaintiff in the amount of R879 439,34 or any sum thereof.

8.

AD PARAGRAPH 14 THEREOF:

The first defendant admits having rejected the plaintiff's claim, which rejection was justified.

9.

The first defendant therefore prays that the plaintiff's claim be dismissed, with costs."

[5] The plaintiff filed a replication in response to the first defendant's plea, which reads as follows:

"1.

AD PARAGRAPH 5.2 OF THE FIRST DEFENDANT'S PLEA:

The plaintiff:

(a) denies each averment contained in paragraph 5.2 of the first defendant's plea;

(b) replies that the agreement in no way fettered the deceased's freedom of testation;

(c) replies that deceased retained the power to dispose of her assets in her Last Will and Testament as she saw fit;

(d) replies that the deceased in fact exercised such power in that she did not bequeath anything whatsoever to the plaintiff in her Last Will and Testament.

2.

The plaintiff joins issue.

WHEREFORE the plaintiff persists in his prayer for relief as claimed in the particulars of claim."

[6] At the inception of the hearing I was requested by Mr De Beer, appearing on behalf of the plaintiff, and Mr Pienaar, appearing on behalf of the first defendant, to issue an order in terms of Rule 33(4) by agreement between the parties, in terms of a draft order which they

handed to me. After perusal of the said draft order, I made an order in terms thereof:

> "1. The issues in respect of the merits and the quantum of the plaintiff's claim is separated in terms of the provisions of Rule 33(4) on the basis that the following issues shall be adjudicated first, and the remainder of the issues to stand over for later adjudication:
>
> > 1.1 Whether the plaintiff and Mr Peter Clarence Haskins and Adelaide Marion Haskins have concluded the agreement as pleaded in paragraphs 5 to 9 of the particulars of claim; and
> >
> > 1.2 If it is found that the agreement was concluded, whether the agreement is invalid and void *ab initio* as pleaded in paragraph 5.2 of the first defendant's plea."

[7] Four bundles of documents were handed to me. Mr De Beer indicated that the plaintiff's bundles 1 and 2 contain documentation pertaining to the quantum of the plaintiff's claim. Bundle 3 is a further bundle of the plaintiff which contains documents relevant to the merits of the matter. The fourth bundle is the first defendant's bundle of documents. Regarding the status of the documents, the parties agreed that the relevant documents are what they purport to be without necessarily agreeing on the correctness of the contents thereof. The parties further agreed that copies may be used and that it is accepted that all correspondence were sent on the date reflected on the relevant document and received shortly thereafter, unless specifically challenged.

<u>The plaintiff s evidence in chief:</u>

[8] The plaintiff testified that he is a retired mechanical engineer, born on [...] 1943, and he resides in Westville, Durban, KwaZulu-Natal. His late father passed away on 27 June

1999. The plaintiff had 1 brother, who passed away after the passing of their father. The plaintiff testified that he had a very good relationship with his father. His relationship with his mother was not at the same level as what he had with his father and they had disputes from time to time. At some stage the plaintiff decided to have several photos of his mother's ancestry copied and therefore took the photos home with him. His car was however broken into in Durban and all the photos, which were obviously irreplaceable, were stolen. The plaintiff's mother subsequently did not speak to him for 16 years. He however maintained contact with his father during this period.

[9] After the plaintiff and his mother reconciled, they had regular contact and he regularly visited his parents, sometimes accompanied by his late brother.

[10] The plaintiff's father was initially trained as a rigger on the mines. He however subsequently moved to Durban where he became a businessman; he bought and a retail store and later on he bought a second retail store. When the plaintiff's parents moved to Harrismith in 1966, his father sold the businesses in Durban and he bought and managed three retail stores in Harrismith. The plaintiff has no knowledge as to how those businesses progressed at the time. His father eventually sold the businesses. He was then employed as artistry by Nouwens Carpets factory in Harrismith and thereafter he was employed as a handyman by Sir Harry Motel in Harrismith.

[11] When asked about the alleged agreement between him and his parents, the plaintiff testified that the initial agreement was concluded in the late 1960's and was reaffirmed periodically after that. This initial agreement was concluded at the plaintiff's parent's house in Harrismith, which at the time was an apartment which had been established behind one of his father's stores. The parties to the agreement were himself, his father and his mother; they were also the only persons present. When asked by Mr De Beer as to what was agreed

upon, the plaintiff testified that at the time his parents were requesting loans from him for different purposes. Although they agreed that the funds would be repaid "possibly at the death of the latest party on their side", there was no clear and specific agreement on this aspect. There was no discussion on the payment of interest and according to the plaintiff he never asked for the payment of interest during this conversation.

[12] The plaintiff's parents continuously asked for loans. The plaintiff explained that although his father had three businesses in Harrismith at the time, he wanted to buy a fourth commercial site in Harrismith. From time to time the plaintiff advanced money directly to his parents and also paid third parties on their behalf. He explained that the plaintiff's bundles 1 and 2 comprise the amounts paid to his parents over a lengthy period of time, stretching from the time of the initial agreement up to his mother's death. The plaintiff further explained that he tried to keep as many dockets pertaining to the aforesaid payments as possible and in those instances where some of the dockets are missing, he can recall the approximate dates and amounts of those payments.

[13] When asked why he kept the dockets over such a lengthy period of time, he explained that it became apparent that whenever his parents were in financial difficulties, they sought reaffirmation that he would continue to support them by making the requested payments. The aforesaid requests to reaffirm the agreement emanated from the plaintiff's parents and not from him and occurred on various occasions over a lengthy period of time. The situation continued even after his father's death. On the day of his father's funeral his mother again requested him to reaffirm the agreement, which conversation took place at his mother's house, being the property situated at [...] W. S., Harrismith. According to the plaintiff the reaffirmation of the agreement was that he would continue to provide funds as and when required, which amounts would be repayable on his mother's death.

[14] After his father's death his relationship with his mother was very good. He phoned her on a weekly basis and he visited her, even after he moved to Johannesburg to seek employment, every second to third month, during which visits he also took groceries along for her.

[15] With regard to the first Will of the plaintiff 's mother, dated 13 November 2003 (plaintiff's bundle 3, p. 1-3), the plaintiff testified that his mother gave him her kist and that he saw that Will for the first time on the day he made an inventory of the contents of the said kist. In terms thereof the plaintiff was the appointed executor and the residual heir of 50°/o of the estate. He explained that Peter Haskins referred to in paragraph 6 of the Will is his mother's grandson, son of his late brother. Marion Heine is the granddaughter of his mother, the sister of Peter. Elizabeth is the daughter of his mother's brother, Harry, and her goddaughter. Dale Viljoen is unknown to the plaintiff .

[16] On 26 June 2014, the plaintiff addressed a letter to Mr David Bekker, his mother's attorney at the time (plaintiff's bundle 3, p. 4 - 5). Mr De Beer requested the plaintiff to explain the reason for this letter. The plaintiff testified that he was retired at the time, he could not find work because of his age and that he consequently no longer had an income, all of which he explained in the letter. He therefore informed Mr Bekker that he will no longer be in a position to pay his mother's expenses and that he will request his mother's service suppliers to forward their invoices to Mr Bekker's office for payment. The plaintiff testified that he did not receive any response to this letter from Mr Bekker.

[17] In terms of the second Will of the plaintiff's mother, dated 12 August 2014 (plaintiff's bundle 3, p.6), the plaintiff was again appointed as executor and he was the sole residual heir of the estate. The plaintiff testified that the first time he saw that Will was the day after his mother passed away when personnel of Mr Bekker's office sent him a

copy of the Will on his request.

[18] The plaintiff testified that his niece, Marion, from time to time travelled with him to visit his mother. Marion became aware of the extent of financial assistance the plaintiff has been giving his mother. Marion therefore expressed her concern towards the plaintiff that someone might exploit the situation and approach his mother in the old age home and unduly influence her to hand over her financial and other affairs to that person. She therefore suggested to the plaintiff that he should obtain a power of attorney from his mother. He subsequently telephonically discussed the principle of obtaining such a power of attorney with his mother and according to the plaintiff, she was happy about such an arrangement. The plaintiff then downloaded a power of attorney document from the internet, to which he made certain amendments (plaintiff's bundle 3, p.7 - p.14). His understanding was that it is a requirement for its validity that a justice of peace countersigns a power of attorney. Therefore, on 14 August 2014, when the plaintiff was on his way to take the power of attorney to his mother, he stopped at the police station and requested a constable to accompany him to the old age home where his mother was residing at the time, namely the E. L. H., Harrismith. His mother and two witnesses signed the power of attorney in his presence, where after the constable countersigned the document. As the constable was leaving the room, he said to the plaintiff "don't steal from your mother". According to the plaintiff his mother was very shocked about this remark in addition to her already being upset about the constable's mere presence. The plaintiff responded to the constable by saying "I cannot steal from my mother". The plaintiff testified that he never acted upon the power of attorney; it was only an assurance to look after her affairs.

[19] One of the witnesses who signed the power of attorney was Mr Gray. The plaintiff explained that he was his mother's neighbour, he visited her daily and he took fresh produce

to her on a weekly basis from the farm where Mr Gray was working. On the day of his mother's passing, the plaintiff phoned Mr Gray to inform him of her death. He said that he already knew, as the old age home had already phoned him.

[20] Because Mr Bekker previously informed the plaintiff that he was the appointed executor of the estate, he requested and received a copy of the Will from Mr Becker's office the following morning. However, that day Mr Gray advised the plaintiff that there is yet another Will. That was the first time the plaintiff heard about the existence of this (third} Will. Mr Gray provided him with the first respondent's details and the plaintiff requested a copy of the Will from the first respondent, which she duly sent to him via email.

[21] This third and last Will of the plaintiff's mother is dated 8 September 2014 (plaintiff's bundle 3, p.15 - p.16). In terms of this Will the plaintiff was completely excluded from inheriting from the estate and he was no longer the appointed executor. The Will stipulated three direct bequeaths and the E. L. H. was the sole residual heir of the estate. The first defendant was appointed as the executor. The plaintiff explained that at the time he did not know the first defendant, but his mother was a member of the women's institute of her church and his understanding was that the first defendant at the time served as the acting minister of that church and she was also involved in the said women's institute.

[22] According to the plaintiff he was confused after finding out about the third Will and he therefore made an appointment with his attorney to seek advice. As a result of this consultation, the plaintiff's attorney addressed a letter to the first respondent, dated 6 March 2015 (plaintiff's bundle 3, p. 17). The crux of this letter reads as follows:

> "Mr Haskins made certain advances to his late father and late mother over the years, which by agreement were loans to be repaid with interest upon the death of the survivor of the parents. I attach details of these loans together with a summary,

showing a total of R879 429,34. This figure excludes interest to be calculated.

Kindly acknowledge receipt of this claim against the estate."

[23] Mr Bekker, acting on behalf of the first respondent in her capacity as executrix, responded to the aforesaid letter in a letter dated 12 May 2015 (plaintiff's bundle 3, p. 57). The relevant part of this letter reads as follows:

> "In terms of Section 32(1) of the Estates Act, no 66 of 1965, the executrix requests your client to provide the following:
>
> 1. Proof of his claim supported by an affidavit accompanied by supporting documents of each item claimed;
>
> 2. Any written agreement/s between your client and the deceased in terms of which prescription of any of your client's claims has been stayed;
>
> 3. Proof of any agreement between the deceased and any other person or institution which makes out the basis of your client's claim.
>
> ….
>
> You are requested to let writer of behalf of the executrix have the aforementioned affidavit and supporting documents in terms of section 32(1) by not later than 31 May 2015."

[24] The plaintiff consequently had an affidavit prepared, as requested by Mr Bekker (defendant's bundle, bundle 4, p. 24 - p. 27, together with annexures thereto, p. 28 and further). In paragraph 8 of the said affidavit the plaintiff stated that the amount owing to him is R876 371,28. He explained the discrepancy between this amount and the amount currently being claimed by stating that the initial compilation of the claim, as set out and attached to the affidavit, was done in a limited time of two weeks and therefore specific provision was

made in paragraph 10 of the affidavit for further documentation that may come to hand. Paragraph 10 reads as follows:

> "I record that where available, supporting documentation is attached to the various annexures "D" through to "R". Further vouchers may come to light and I shall in due course supplement this affidavit. Where no vouchers exist or cannot be found, I confirm that the amounts are to the best of my recollection correct."

<u>Cross examination of the plaintiff:</u>

[25] Mr Pienaar subjected the plaintiff to extensive, thorough and gruelling cross examination, but, in my view, at all times in a courteous and reasonable manner.

[26] I do not intend to narrate the totality of the plaintiff s evidence during cross examination. I deem it expedient to rather deal with and concentrate on the evidence which is in my view crucial in the determination of paragraph 1.1 of the Rule 33(4) order; hence, whether the plaintiff and his parents concluded the agreement as pleaded in paragraphs 5 to 9 of the particulars of claim. In the process of such determination I will however obviously consider the totality of the evidence.

[27] The plaintiff was cross examined on the conclusion and the terms of the alleged agreement in general, but also with reference to specific events during the relevant time period. In my view it is crucial to deal with his evidence in this regard in quite some detail:

1. At the beginning of his cross examination, the plaintiff testified that the sixteen year period during which his mother did not speak to him, ended in approximately 1992. Mr Pienaar then enquired from the plaintiff whether he made monthly contributions to his father during the whole sixteen year period from 1976 to 1992.

The plaintiff responded that his father had financial constraints and that he therefore gave him money from time to time, but not necessarily throughout the whole period.

2. When asked what the initial agreement was, he testified that it was agreed that he will advance loans to his father, which will be repaid. The manner of repayment was not discussed, nor was interest discussed. A couple of questions later, the plaintiff however testified that initially his father only wanted to borrow R20 000.00 in order to buy a property adjacent to one he already had; no other loans were discussed at that stage. From the plaintiff s summary of loans as contained in the first defendant's bundle, bundle 4, p. 32, it is evident that according to the plaintiff this loan was advanced in October 1969. When asked about the aforesaid discrepancy in his evidence, the plaintiff said that he made a mistake.

3. Considering the time period mentioned in paragraph 5 of the particulars of claim, being 1968 to 1999, and the allegation in paragraph 7 of the particulars of claim where it is averred that his parents were experiencing financial hardship during that period, the plaintiff was asked whether those averments are correct. He responded that his parents did not experience financial hardship in 1968 already; they only had cash flow problems at that stage. They only started experiencing financial hardship at a later stage, but which was before the breakdown in the relationship between him and his mother. However, later in his cross examination the plaintiff testified that he never investigated his parents' financial position or their expenses, as he deemed it inappropriate. He did not even have knowledge of the amount of pension his mother was receiving. He merely accepted what his parents told him about their financial position.

4. The plaintiff was questioned on the contents of paragraph 8 of the particulars of claim. Although I already quoted paragraph 8 earlier in this judgment, it is apposite to repeat it:

"8.

Express, alternatively implied, further alternatively tacit terms of the agreement were as follows:-

(a) The plaintiff would assist his parents, Haskins and the deceased, financially from time to time; and

(b) The amounts expended by the plaintiff aforesaid would be repayable on the death of the survivor of Haskins and the deceased by:

(i) The plaintiff lodging a claim for such expenses against the estate of the survivor of Haskins and the deceased; alternatively

(ii) The plaintiff inheriting the estate of the survivor."

The plaintiff denied the correctness of the aforesaid averments. He repeated that the initial agreement only involved the R20 000.00. He further vehemently denied that he ever expected to inherit the estate; he accentuated that it was never discussed. When asked whether he agreed to the term pleaded in paragraph 8(b)(i), he testified "no, not in 1968". He again stressed that the pleaded term in 8(b)(ii) regarding him inheriting the estate, was never discussed. I have to remark that at that stage of the cross examination, the plaintiff became very agitated and responded in a heated, almost aggressive, manner.

5. Mr Pienaar then enquired from the plaintiff when they did then in fact agree on the terms pleaded in paragraph 8 (excluding the inheritance part), to which he

responded that it was in 1992. His father was ill and the plaintiff went to visit him and also took him some cash. That was also the day on which he and his mother reconciled. The three of them sat around his father's bed and his parents said that both of them are aware that his father has been receiving money from the plaintiff. They indicated that they will need further financial assistance in future and that the plaintiff will be repaid at the death of the survivor of his two parents.

6. Mr Pienaar then referred the plaintiff to paragraph 3.1 of the first defendant's request for further particulars, which reads as follows:

> 3.1 Is it the plaintiff s case that the parties, being the plaintiff, Haskins and the deceased, agreed to the terms of the agreement as set out in paragraph 8 of the particulars of claim during the conclusion of the initial agreement during 1968? If not, when was the agreement concluded in respect of the terms as set out in paragraph 8 of the particulars of claim?

Mr Pienaar pointed out to the plaintiff that the aforesaid question was answered in the affirmative in the plaintiff s response to the request for further particulars. He was then confronted about the reason for the discrepancy between his evidence and the pleadings in this regard, but merely stated that he was unable to explain it.

7. When Mr Pienaar repeated the averments to the plaintiff regarding the conclusion of the agreement as pleaded in paragraph 5 of the particulars of claim, he testified that the agreement was not concluded in 1968. At that stage (1968) it was one loan for purposes of buying the property and thereafter there was a loan towards the car expenses. The agreement pertaining to future loans was however only concluded at a later stage.

8. Mr Pienaar referred the plaintiff to paragraph 4 of the affidavit which he submitted

in support of his claim, referred to earlier. It reads:

> "Over the years, it was agreed explicitly with my late father and my late mother that the amounts loaned to and disbursed on behalf of them would be repayable upon the death of the survivor of them, the <u>understanding being that I would ultimately be repaid by inheriting the property situated at [..] W. S.. Harrismith.</u>" (Own emphasis)

The plaintiff again responded in an agitated manner and became argumentative towards Mr Pienaar. He stated that the aforesaid underlined statement is not correct, that his attorney drafted the affidavit and that he (the plaintiff) did not read it at the time. The plaintiff however confirmed that the aforesaid property is the main asset in the estate. Mr Pienaar then put it to the plaintiff that what he in fact agreed upon with his parents, was that he will be repaid by inheriting the estate. The plaintiff fervently denied this contention.

9. It is evident from the documentation that the plaintiff does not have all the dockets, slips and other supporting documents to substantiate the payment of all the expenses he summarized. The inception dates of the different types of alleged payments are also not the same; in fact, in some instances the respective inception dates are years apart. It is against the aforesaid factual framework that Mr keeping Pienaar cross examined the plaintiff about his record keeping in view of the alleged conclusion and terms of the agreement. The plaintiff testified about the compilation of the plaintiff's bundles 1 and 2 comprising the summaries of alleged payments and the documents/dockets/slips as prove of some of the alleged payments. When asked whether he kept record of all the payments right from the start, the plaintiff said no. He stated that he only started keeping record from a certain date. When asked as

from which date, he responded that he is uncertain. The plaintiff explained that it was unnecessary to keep record from the start, as those payments were only three specific loans, being the R20 000,00 for the property in October 1969, the costs of retrieving his mother's car from Mooi River in June 1970 and the costs of repairs to the car in August 1970. Mr Pienaar asked the plaintiff whether he started keeping record of payments after the alleged conclusion of the agreement at the bedside of his sick father, which the plaintiff confirmed. However, when asked whether he kept record of everything since that day, he again said no. The plaintiff again became agitated at that stage of the cross examination and responded in a heated manner. He stated that he did not keep receipts for items he paid cash. He further explained that the slips of the groceries he bought for his mother, he usually left in the bags for her to see. The invoice for a fridge which he bought for his mother in Harrismith, he left inside the fridge. The plaintiff conceded that he did not keep 100% record, but excused his failure to do so by stating that he is an engineer, not a bookkeeper. Mr Pienaar put it to the plaintiff that if they had in fact agreed that he will have to claim from the estate as he

avers, one would have expected that the he would have kept proper record to enable himself to eventually be in a proper position to prove such claim. The fact that he did not keep proper record supports the contention that it was agreed that the plaintiff will inherit the estate, or at least the property. The plaintiff again responded by merely stating that he is not a bookkeeper.

10. When asked whether Marion knew about the agreement, the plaintiff confirmed same and said that they frequently discussed it. Mr Pienaar requested the plaintiff to narrate what he told Marion the agreement entails. He testified that he told Marion

that his parents asked him to support them, that he promised his father that he would do so and he also told her that it is a condition that he would be paid from the estate. When she asked him how he was going to enforce that payment, he said that he does not know and that it will depend on how solvent the estate is. He explained that he had no idea what his mother was going to do regarding her Will, as she constantly threatened him with being excluded from her Will. He then would tell his mother that it is fine, as he has other resources, being to claim from the estate. On a further question he testified that he told Marion that they have an agreement that he will support his parents and that he will claim repayment from the estate, according to his understanding. He did not know how he was going to be paid; he did not think it through. He then further testified:

> "I come back to the point that if I had been the beneficiary of the estate, there would have been no need to put a claim against the estate. That is also an explanation why I had not kept records right from the beginning, there would have been no need." (Own emphasis)

Mr Pienaar then pointed out to the plaintiff that he is contradicting himself, because earlier on he explicitly testified that no mention was made of him inheriting the estate during the conclusion of the agreement next to the bedside of his father. In the questions that followed, the plaintiff again contradicted himself by, the one moment, testifying that he never thought about him being a beneficiary of the estate, but then, the very next moment, testifying that his understanding was that he would be a beneficiary together with his late brother.

11. I quote the following part of the evidence from my notes:

> "Pienaar: You are fabricating the version that it was a loan agreement; you

would have been repaid by inheriting the property, as stated in your affidavit.

Plaintiff: No.

Pienaar: Only in cross examination you changed your version as to when the agreement was concluded from 1968 to 1992.

Plaintiff: Yes.

Pienaar: Why?

Plaintiff: I don't have an explanation.

Pienaar: I put it to you that even on your 1992 version you cannot tell the court when exactly that was.

Plaintiff: No.

Pienaar: So it could have been later, even 1997.

Plaintiff: It could have been.

Pienaar: You don't know when the agreement was concluded that forms your cause of action.

Plaintiff: No."

12. I deem it essential to also quote the following part of the evidence from my notes:

"Pienaar: What did your mother tell you on the day of your father's funeral, when you were together at the house when the agreement was reaffirmed.

Plaintiff: She said to me you made a promise; you had an agreement with your father. She asked if I remember the agreement and I said yes. She said you will look after me, I said yes. The details were not discussed.

Pienaar: Not at all?

Plaintiff: Not at that stage, no.

Pienaar: So she said that you promised your father that you will look after me and you will do that?

Plaintiff: Promised your father that you will look after me and you will be repaid.

Pienaar: Why, after every question, you add a little bit to your version?

Plaintiff: Because I cannot remember what actually happened. I'm 73 years old, my memory is not that good, please excuse me. (The plaintiff was very annoyed when he gave this answer.)

Pienaar: I'm asking for the last time, what did she reaffirm?

Plaintiff: To the best of my knowledge she said to me you promised your father that you will look after me and that you will be repaid.

Pienaar: That s all? Plaintiff: That's it.

Pienaar: Not the manner in which you will be repaid?

Plaintiff: No, not at that stage, no.

Pienaar: Were anybody else present? Plaintiff: My wife would have been present.

Pienaar: According to my notes, in your evidence in chief, you

testified that the agreement that was reaffirmed on the day of the funeral is that you will provide funds and it will be repaid on the death of your mother.

Plaintiff: Not on the day of the funeral. I can't explain.

13. The plaintiff s further evidence regarding the affirmation of the agreement by his mother towards himself, was the following:

"Pienaar: Apart from the day of your father's funeral, when was the agreement confirmed towards you by your mother?

Plaintiff: It was confirmed on a number of visits to her, when taking groceries to her, we sat in the dining room and discussed the agreement. This happened periodically.

Pienaar: What did she say?

Plaintiff: She said thank you for the groceries. I left the slip most of the occasions in the bags, other times I paid cash and then did not keep the slip. My mother said she has all these receipts and 'you will be paid this when I die'."

[28] At the conclusion of the cross examination of the plaintiff, the plaintiff closed his case, whereupon the first defendant also closed her case.

Legal principles relevant to the assessment of the evidence, contentions by counsel and evaluation of the evidence in totality:

[29] It is common cause between the parties that the plaintiff's claim is based on an alleged agreement concluded with his parents, with the plaintiff consequently bearing the onus to prove the conclusion and the terms of the agreement on a balance of probabilities.

[30] Mr Pienaar submitted that in my assessment of the evidence, I should apply the principles (or those which are applicable to the circumstances of this case) enunciated in **Stellenbosch Farmers' Winery Group Limited and Another v Martell et Cie** 2003 (1) SA 11 (SCA). I agree with this contention. The principles set out in para [5] of the

judgment are the following:

> "... The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities

prevail."

[31] Both counsel also correctly pointed out that because the evidence deals with a claim against a deceased estate, a cautionary rule applies to the manner in which the evidence should be approached. In this regard the following was stated in **Borcherds v Estate Naidoo** 1955 (3) SA 78 (A) at para [79]:

> "The Court must therefore scrutinise with caution the evidence given by, and led on behalf of, the surviving party. This attitude has been adopted by the Courts in a number of cases in which a claim was preferred against a deceased estate, or a defence was set up to a claim by the estate. I may refer, inter alia, to Estate Lynch v Stewart1 1913 C.P.D. 451 at p. 454; Estate Schickerling v Schickerling, 1936 CPD 269 at p. 272; Estate van der Walt v Crooks, 1941 CPD 244 at pp. 247 - 249 and decisions reviewed there; to the remarks of DAVIS, A.J.A., on the last-mentioned case in Moyce v Estate Taylor, 1948 (3) SA 822 at p. 827; and to Wood v Estate Thompson and Another, 1949 (1) SA 607 (N), where SELKE, J., enunciated the principle, as deduced by him from the cases to which counsel had referred him, in the following words : -
>
>> 'I am not aware of any rule of our law or of any practice of our Courts which requires that, merely because a claim is one made against a deceased's estate, it must on that account be proved with a special degree of cogency, and I do not believe that any such rule exists. If it did, it would no doubt work for the protection of the estates of deceased persons against fraudulent claims, but, on the other hand, it might work considerable injustice on honest claimants against such estates. It seems to me that such a principle, if it existed, would obviously cut both ways, and, on the whole, I do not think the cases are really

> authority for more than the principle that the Court must examine with a very cautious eye uncorroborated evidence given in such cases; but I do not appreciate that the Court should do more in that respect than it is warned to do in all cases where interested evidence is given ex parte against someone who is not in a position to answer it'

I have no fault to find with the statement of the principle by SELKE, J., except that I should prefer to omit the word 'uncorroborated' , unless it means 'uncorroborated by evidence which is itself cogent enough to overcome the caution'. The mere fact that, as in the case before us, three witnesses corroborate each other by giving similar evidence on the one side cannot make the three or any one of them escape the cautious scrutiny which should be applied to evidence which the other party to the suit is not in a position to answer."

The rationale for the aforesaid cautionary rule is obvious, being that there is nobody to gainsay the evidence presented.

[32] Mr De Beer submitted that in assessing the plaintiff's evidence, I should take the following into consideration:

1. The plaintiff's advanced years (73) are a factor which should be taken into account in the general assessment of him as a witness and of his evidence.

2. The matter deals with a family dispute which is distressing to the plaintiff. Although he became argumentative during parts of the cross examination, I should show understanding for this considering the circumstances under which he testified.

3. The plaintiffs evidence covered events which stretched over a lengthy period of time, ± 45 years; a witness cannot be expected to remember everything in these

circumstances.

Mr De Beer therefore submitted that although there clearly were discrepancies and errors in the plaintiff's evidence, it is understandable having regard to the lengthy time period.

[33] Mr De Beer consequently submitted that the inadequacies in the plaintiff s evidence are not fatal to the plaintiff s case. He contended that I should consider the evidence as a whole, weighed against the general probabilities of the case. It was his submission that when doing so, mindful that the plaintiff is a single witness and that there is nobody to gainsay his evidence, corroboration is found which gives a ring of truth to his version. In this regard Mr De Beer relied on the following two factors:

1. The contents of the letter of 26 June 2014, addressed by the plaintiff to Mr Bekker, his mother's attorney at the time. Mr De Beer referred to, *inter alia,* the followi ng extracts from the letter:

> "For the past 25 years I have been assisting my parents financially, for 10 years before my father died and for 15 years since. For the past ten years I have paid all my mother's expenses including....as well as paying cash into her bank account monthly. Monthly expenses vary from R8000 to R10 000. However I am now over 70 years old and have not been able to find work for the past 2 years and am now in financial difficulties myself with the result that I will not be in a position to meet these costs, or the R3500 required by Eliza Little, this month or in future. I will request her service suppliers to forward their invoices to your offices for payment.
>
> I promised my father that I would look after her when he died and am very heart sore that 1 am no longer in a position to do this. I have crippled myself financially to try to fulfil the promise that I made but have simply run out of

> funds. My only income is a retirement annuity of R8 100 per month which has been used wholly to meet her expenses since she lost her government pension.
>
> Please understand the difficult position that I have been placed in and use whatever equity can be found in the property and contents to fund her future needs."

Mr De Beer submitted that despite the fact that this letter was extensively canvassed in cross examination, the aforesaid is and remains consistent with the plaintiff s version throughout. Nothing in the letter gainsays the plaintiff s version. With regard to the fact that repayment of the advanced amounts was not raised or addressed in the letter, Mr De Beer contended that the evidence should be considered in the context of the date of the letter. At that stage the plaintiff s mother was still alive and her death was not anticipated at the time. Only the first Will had been executed by the plaintiff s mother at the time. The plaintiff however, according to Mr De Beer's argument, had no knowledge of the contents of the first Will, let alone the fact that two other Wills were still to be executed in the future. Mr De Beer therefore contended that it was not necessary for the plaintiff to raise the issue of repayment at that stage, as it would have been premature as his mother was still alive.

2. Secondly, the dockets/documents contained in the plaintiff s bundles 1 and 2. Mr De Beer submitted that, on probabilities, the plaintiff kept the said documents, which cover a very lengthy period of time, to enable him to eventually prove the payments he made. It corroborates the crux of his version, despite the existence of other discrepancies. I raised the question to Mr De Beer as to what should be made of the fact that the plaintiff did not keep record/prove of payments as from a

specific date. Mr De Beer submitted that the plaintiff gave the explanation that he is not a good bookkeeper, which Mr De Beer submitted is a plausible answer. He contended that it does not distract from the fact that the bundles contain a vast volume of documentati on, extending over a long period of time, which is entirely consistent with the plaintiff's version and corroborates his version. Mr De Beer submitted that it is a strong factor which demonstrates that the plaintiff's evidence is creditworthy.

[34] During Mr De Beer's argument, I broached the issue of the differences between the pleadings and the plaintiff's evidence. He submitted that the pleadings were widely pleaded; it is a truncated version which gives an overall synopsis of the actual agreement. He submitted that a restrictive interpretation should not be applied; the pleadings are not to be understood to mean that the agreement in its final form and terms was concluded in 1968 already - it stretched over a period of time from 1968 to 1999. The terms pleaded in paragraph 8 of the particulars of claim constitute the terms of the final agreement which was eventually concluded.

With regards to paragraph 8(b)(ii) of the particulars of claim, Mr De Beer submitted that it was pleaded in the alternative and that the plaintiff relies on the first alternative, which is corroborated by the extensive documentation before court. The purpose of the pleading over is to identify the source of funds from which from which the loan will be repayable on the death of the survivor, namely the estate. The pleadings are wide enough to cover this. Mr de beer submitted that there is no discrepancy or inconsistency between the term as pleaded and the plaintiff's evidence in court. The mere fact that the plaintiff entertained the hope or expectation to inherit is neither here or there. It does not affect the agreement upon which the plaintiff relies. Mr De Beer contended that the two concepts, namely hoping to inherit on the one hand, and proving a claim as a creditor on the other hand, are not mutually exclusive.

[35] Mr De Beer consequently submitted that on all material aspects and having regard to the corroboration, the plaintiff has established the agreement he contends for and it has been borne out by the general probabilities of the case. He therefore submitted that paragraph 1.1 of the Rule 33(4) order should be decided in favour of the plaintiff.

[36] At the onset of his argument, Mr Pienaar highlighted the fact that paragraph 1.1 of the Rule 33(4) order specifically determines the first issue to be whether the agreement "as pleaded in paragraphs 5 to 9 of the particulars of claim" had been concluded. Mr Pienaar submitted that the plaintiff came to court on the basis of a particular agreement with precise terms as pleaded in the pleadings. However, in his evidence he gave different versions regarding the conclusion of the agreement as such and with regards to the terms thereof, which versions also differed from the pleadings. Mr Pienaar contended that it is not the court's duty to go through the different versions pertaining to the conclusion and the terms of the agreement to then decide which version actually constitutes the agreement.

With regards to the alternative pleaded in paragraph 8(b)(i) and

(ii) of the particulars of claim, Mr Pienaar submitted that it clearly refers to one of two ways of repayment that was agreed upon and not to two different, alternative terms of the agreement. The plaintiff cannot simply now choose which term he wishes to rely on.

[37] In **<u>Beck's Theory and Principles of Pleadings in Civil Actions</u>**, H. Daniels, 6th Edition, at p. 43 - p. 46, the principles of pleading and ant the function of pleadings are dealt with, which, *inter alia,* include the following:

"3.1.1 The function of pleadings

The function of pleadings may be said to be threefold.

(a)

(b) They must ensure that both parties know what are the points of issue between them, so that each party knows what case he has to meet. He or she can thus prepare for trial knowing what evidence he or she requires to support his own case and to meet that of his opponent. The object of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial, attempt to canvass another.

….

3.1.3 General principles of pleading

The rules of court embody the elementary principles of pleading but they do not set out in detail all the principles on which pleadings in a law suit are to be drawn. The general principles of pleading were explained by Wessels J -

"The plaintiff must not set out the evidence upon which he relies, but he must state clearly and concisely on what facts he bases his claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet him in court and tender evidence to disprove the plaintiff s allegations."

….

Every pleading must contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

Thus the plaintiff s claim must be such as to enable the defendant to know what case he or she has to meet.

….

Once pleadings are filed the parties are bound by them. If the pleadings raise certain issues and the evidence adduced at the trial does not substantiate them, the action (or defence as the case might be) would fail unless amendments are granted."

[38] In my view the particulars of claim indeed contains a "clear and concise statement of the material facts upon which the pleader relies for his...claim". In this regard I have to agree with Mr Pienaar's contention that the plaintiff came to court on the basis of a particular agreement with precise terms as pleaded. Although paragraph 5 of the particulars of claim mentions 'the period 1968 to 1999", this possible ambiguity was explicitly raised by the first defendant in paragraph 3.1 of the first defendant's request for further particulars, which reads as follows:

3.1 Is it the plaintiffs case that the parties, being the plaintiff, Haskins and the deceased, agreed to the terms of the agreement as set out in paragraph 8 of the particulars of claim during the conclusion of the initial agreement during 1968? If not, when was the agreement concluded in respect of the terms as set out in paragraph 8 of the particulars of claim?

The plaintiff, in response to the aforesaid, clarified this uncertainty by stating "yes" in paragraph 3.1 of his further particulars. With regards to the interpretation of the alternative pleaded in paragraphs 8(b)(i) and (ii) of the particulars of claim, I cannot agree with Mr De Beer's contentions. If it is to be interpreted as two different , alternative terms of the agreement, it would have the result that the pleading is to be read to state that it is the plaintiff's case that they concluded the agreement either on terms

(a) and (b)(i) or on terms (a) and (b)(ii), which would have the result that the parties had in fact not concluded a valid agreement as they did not have *consensus* on the material terms of the agreement. I therefore agree with Mr Pienaar's submission that it is to be interpreted as two alternative manners of repayment which were agreed upon.

[39] I am consequently of the view that I am compelled to approach this matter on the basis that, on the pleadings, the plaintiff relies on an agreement which was concluded in 1968 on the terms as pleaded in paragraph 8 of the particulars of claim.

[40] When I now turn to consider the plaintiff's evidence in chief regarding the agreement, the following is evident:

1. He testified that the initial agreement was concluded in the late 1960's, at his parent's house, which agreement was reaffirmed periodically after that. Although mention was made that that the funds would possibly be repaid at the death of the survivor of his two parents, he specifically testified that there was no agreement as to when and how the funds would be repaid. They did not discuss the payment of interest at all.

2. The plaintiff also testified that on the day of his father's funeral, his mother requested him to reaffirm the agreement. This conversation took place at the property described in the particulars of claim. He testified that the affirmation of the agreement was that he would continue to provide funds as and when required, which would be repayable on his mother's death.

[41] During cross examination, the following was his evidence regarding the agreement:

1. When asked about the initial agreement, he testified that it was agreed that he will advance loans to his father from time to time, which will be repaid, but the manner in which it was to be repaid, was not discussed. Interest was also not discussed. Shortly after that, the plaintiff however testified that it was only the loan of R20 000.00 that was discussed, no future loans were discussed at that stage. He was unable to explain this discrepancy in his evidence.

2. With reference to paragraph 8(b)(ii) of the particulars of claim, he vehemently denied that it was ever discussed that he would inherit the estate and he never expected for that to happen. According to him he did not even think about such a possibility. However, the plaintiff thereafter contradicted himself by not only testifying that his understanding was that he would be a beneficiary together with his late brother, but also testified that if he had been a beneficiary of the estate the current claim would not have been necessary, which is also an explanation for why he had not kept records of payments from the beginning.

3. The plaintiff subsequently testified that the agreement on the terms pleaded in paragraph 8 of the particulars of claim (excluding the inheritance part), was only concluded in 1992 when his father was ill, on which day he and his mother also reconciled. In his evidence in chief he testified that they agreed that the funds will be repayable on his mother's death. However, in cross examination he specifically testified that the manner in which the funds were to be repaid, was not discussed or agreed upon on that occasion.

3. The plaintiff thereupon conceded that he changed his version as to when the agreement was concluded from 1968 as testified in his evidence in chief to 1992 in

cross examination. He was unable to explain the inconsistency between this version and the date of 1968 which was provided in the plaintiff s further particulars. He further conceded that it might even have been later than 1992, even as late as 1997, and that he actually does not know when the agreement which constitutes his cause of action, was concluded.

4. He however testified that the agreement was confirmed to him by his mother during a number of visits to her, when he took her groceries. They would then sit in the dining room and discuss the agreement. When asked what his mother said, he explained that she said thank you for the groceries. On most of the occasions he left the slip in the grocery bags, other times he paid cash and he then did not keep the slip. According to the plaintiff his mother said she has all those receipts and that he will be paid when she dies.

[42] From a proper reading of the plaintiff's evidence regarding the agreement, I am consequently compelled to find the following:

1. The *viva voce* evidence adduced by the plaintiff is not in accordance with, nor does it substantiate, the averments in the particulars of claim, read with the further particulars, regarding the conclusion and the terms of the agreement which forms the plaintiff s cause of action. In addition his *viva voce* evidence as such contained different versions of the alleged conclusion and terms of the agreement.

2. Even if I completely ignore the pleadings with regard to the averments pertaining to when and where the agreement was concluded and also pertaining to the second alternative manner of repayment, the plaintiff still failed to prove the conclusion of an agreement in terms of which the term pleaded in paragraph 8(b)(i) was agreed upon. The plaintiff did not present any evidence regarding an agreement

on this term; to the contrary. His evidence pertaining to the discussions in 1968, 1992 and on the day of his father's funeral, was that the manner of repayment was not discussed nor agreed upon. Even if his own version is to be accepted, it is evident that he in fact did not know how he was going to be repaid and that he formed his own understanding that he will possibly have to claim it from the estate.

[43] In my view the last-mentioned conclusions already substantiates and necessitates a finding that the plaintiff did not discharge the onus of proving paragraph 1.1 of the Rule 33(4) order, moreover so in view of the applicable cautionary rule.

[44] If I am to ignore my aforesaid finding, and continue to assess the evidence of the plaintiff by considering the aspect of corroboration for the plaintiff s version, the following transpires:

1. The plaintiff's attorney wrote a letter of demand, dated 6 March 2015, to the first defendant’s attorney, Mr Bekker (first defendant's bundle, bundle 4, p. 427). The basis of the demand set out in the letter is the following:

> "Mr Haskins made certain advances to his late father and late mother over the years, which by agreement were loans to be repaid with interest upon the death of the survivor of the parents. I attach details of these loans together with a summary, showing a total of R 879 439.34. This figure excludes interest to be calculated."

I have already found that the plaintiff did not present any evidence that the term pleaded in paragraph 8(b)(i) of the particulars of claim, was agreed upon. It is noteworthy that, but for the payment of interest, the averments in the aforesaid letter corresponds with the evidence of the plaintiff, importantly also lacking an averment that it was agreed between the parties as to how the loans were to be repaid. However, the flipside of the coin is that the contents of the letter of demand do not correspond with the pleadings, more particularly with reference to paragraph 8(b)(i) thereof .

2. As mentioned earlier, the plaintiff signed an affidavit which was submitted in support of his claim against the estate. In paragraph 4 thereof the following is stated:

> "Over the years, it was agreed explicitly with my late father and my late mother that the amounts loaned to and disbursed on behalf of both of them would be repayable upon the death of the survivor of them, the understanding being that I would ultimately be repaid by inheriting the property situated at [...] W. S., Harrismith. I would point out that as I was dealing with my parents, the agreement to repay me the amounts set out was never reduced to writing"

The plaintiff testified that the aforesaid part about inheriting the estate is wrong. His explanation was that his attorney drafted the affidavit and that he, the plaintiff, did not read it at the time. His response was that his attorney should be questioned about it. The fact of the matter is that, on probabilities, the plaintiff must have given his attorney these instructions regarding the terms of the agreement, which version does not corroborate the plaintiff s current version of the terms of the agreement, but rather supports the contention on behalf of the first defendant.

3. The averment in paragraph 8(b){ii) of the particulars of claim does not only *mutatis mutandis* directly contradicts the plaintiff s version, but is also in accordance with the allegation in the aforementioned affidavit.

4. With regard to the letter of 26 June 2014, the plaintiff, in his evidence in chief, created the impression that he wrote the letter merely to explain that he was in financial dire straits and that he was therefore no longer in a position to pay his mother's expenses. He was heart sore about the situation and did not raise the

issue of repayment, as that was not the purpose of the letter. However, in cross examination and after he attempted to give two or three other reasons, it eventually became clear that he actually wrote the letter in response to his mother not wanting to talk to him during his visit on 24 June 2014. He conceded that he was cross and upset with her and that this was a factor in his decision to write the letter. He however maintained that he wrote the letter not only because he was cross, but also because of his financial position.

I still find it strange that the plaintiff did not mention the issue of repayment by the estate, moreover so because he was cross at the time when he wrote the letter. On probabilities one would have expected that if such a term had in fact been agreed upon, this would have been the perfect opportunity to bring it to the attention of his mother's attorney. He went to all the trouble to explain the first part of the agreement, namely that he undertook and promised to maintain his parents, but then he fails to mention that the said payments constituted loans which were to be repaid by the estate at the death of his mother. As already mentioned earlier, Mr De Beer accentuated the fact that at the time the plaintiff did not have knowledge of the contents of his mother's Will. Unfortunately that argument cuts both ways, because it can also serve to support Mr Pienaar·s contention that, on probabilities, the plaintiff and his parents agreed that he would be repaid by inheriting the estate and thus repayment by the estate was not mentioned as the plaintiff, at that time, still harboured under the impression that he was to inherit the estate as agreed between the parties. I therefore cannot agree that this letter corroborates the plaintiff's version, as the letter is silent on this alleged crucial term of the agreement.

5. With regards to the dockets/documents contained in the plaintiffs bundles 1 and 2, I have already referred to Mr De Beer's submission that the fact that the plaintiff kept the said documents which stretch over a lengthy period of time, corroborates the crux of his version. I cannot agree with Mr De Beer's submission. I have already dealt with the plaintiff's evidence regarding the bookkeeping issue and the fact that he did not start keeping record of his payments as from a specific date, nor did he keep prove of each and every such payment. Had the agreement been that the payments were to be repaid by the estate by means of the plaintiff lodging a claim against the estate, one would firstly have expected that the record of such payments would have started from, at least approximately, from a specific date. Secondly, one would have expected that the plaintiff would have kept a far more complete record of the payments and prove thereof, than what is contained in the plaintiff s bundles 1 and 2. In my view the contents of the said bundles, read together with the plaintiffs evidence and explanations regarding his record keeping, do not corroborate the plaintiff s version of the conclusion and terms of the agreement, to the contrary. In my view it is actually indicative of a desperate attempt to reconstruct a history of payments in circumstances where no conscious or active record keeping existed during the relevant period of time.

[45] I can consequently find no corroboration for the plaintiff s version in the aforesaid pleadings and documents.

[46] With reference to the plaintiff s evidence that he discussed the agreement with Marion on numerous occasions, Mr Pienaar submitted that she was available as a witness and could have been called by the plaintiff to corroborate his version regarding the conclusion and terms of the agreement. His failure to have done so in the

circumstances of this case, therefore, warrants an adverse inference. Mr Pienaar relied on the judgments in **Munster Estates (pty) LTD v Killarney Hills (pty) LTD** 1979 (1) SA 621 (AD) and **Leeuw v First National Bank LTD** 2010 (3) SA 410 (SCA) for this contention. Mr De Beer submitted that Marion's testimony in this regard would have been about a previous consistent statement of the plaintiff, which would have been inadmissible evidence.

[47] The general rule is indeed that previous consistent statements and evidence about such statements are inadmissible. There are however circumstances in which such evidence is admissible, one of which is to rebut a claim of previous fabrication. In **The Law of Evidence**, CWH Schmidt & H Rademeyer, Issue 14, at p. 14-5, the following principles are stated:

> **"14 2 Rebutting a claim of recent fabrication**
>
> In *R v Dart (2)* 1951 1 SA 483 (W) it was put to a state witness during cross-examination that his evidence was false and that, because he wanted to curry favour with the police, he and the police sergeant had prepared the evidence in advance. In order to rebut this allegation the state adduced as evidence his original affidavit in which he had told the same story. It was found to be admissible despite the general rule that a previous consistent statement is inadmissible.
>
> As indicated, evidence showing the witness to have said previously what he now says in court, generally contributes too little to be considered relevant; but as soon as the opposing party alleges that the witness's story is a fabrication, his credibility is placed in issue, and evidence of his consistency is clearly relevant to this issue.
>
> Although merely disputing what a witness said is insufficient to render his previous statement admissible, an express allegation that the evidence is a recent

fabrication is also unnecessary. It need not be expressed in so many words. As Rumpff CJ put it in *S v Bergh* 1976 4 SA 857 (A) 8680:

> 'Die begrip "onlangse versinsel" is nie 'n omlynde begrip nie en dit is die plig van 'n hof, by 'n probleem van hierdie aard, om vas te stel of die aanval op die getuie se getuienis wesenlik neerkom op 'n suggestie, uitdruklik of implisiet, dat vir doeleindes van die saak hy iets as 'n feit beweer wat tydens die afle van sy getuienis 'n versinsel is of in sy verbeelding bestaan.'

That the evidential weight of a previous statement plays a part was also confirmed in *S v Bergh.* The fact that the previous statement was made before a dispute arose, at a time when the declarant as yet had no motive to make a false allegation, in that case contributed to its admissibility.

Although it is customary to speak of a *recent fabrication,* the requirement is not so much that the alleged fabrication must have been recent. 'It appears that the comparative "recentness" of the fabrication has not been the deciding issue but rather the question whether, between the event under investigation and the trial of the matter, the witness invented a false version of what occurred.'

<u>The evidence is adduced only to rebut the allegation of fabrication and be used for no other purpose. It i s not corroboration of the consistent statement in court.</u>" (Own emphasis)

[48] Mr Pienaar did not directly put it to the plaintiff that his version of the agreement is a recent fabrication. However, Mr Pienaar's line of questioning and attack on the plaintiff s version was the following:

1. The plaintiff s version of the agreement is not true; what had in fact been

agreed upon is that the plaintiff will financially assist his parents, in return for which he will inherit the estate at the death of the survivor of his two parents.

2. The aforesaid is confirmed by the conduct of the plaintiff when he became aware that he had been excluded from the Will, in that he decided to dispute the validity of the Will. That begs the question why the plaintiff, if the agreement was in place at the ·time on the terms as alleged by the plaintiff, did not simply enforce his alleged claim for repayment against the estate.

3. Only once it became evident that there is no basis upon which the validity of the Will can be successfully disputed, the letter of demand based on the alleged agreement (although still without alleging an agreement as to how it was to be repaid), dated 6 March 2015, was addressed to Mr Bekker. No earlier or previous mention was made of the alleged agreement and the plaintiff's entitlement to repayment from the estate, not even in earlier letter of the plaintiff letter to Mr Bekker, dated 26 June 2014. In the plaintiff's affidavit which was drafted subsequent to the letter of demand, dated 2 June 2015, the agreement with his parents was mentioned, but then with an allegation that regarding the repayment upon the death of the survivor of his parents "the understanding being that I would ultimately be repaid by inheriting the property situated at [...] W. S., Harrismith".

[49] In my view Mr Pienaar's aforesaid line of questioning clearly suggested that the plaintiff s version of the conclusion and terms of the agreement is a recent fabrication, in the sense that the current version of the plaintiff only arose when the plaintiff was disinherited and it became apparent that the validity of the Will cannot successfully be disputed.

[50] On the plaintiff s version it is to be accepted that Marion's evidence would have

shown that what the plaintiff previously told her regarding the conclusion and the terms of the agreement with his parents, is the same as his current version thereof in court. Although her evidence could not have served as corroboration of the plaintiff's version in court, it could have rebutted the suggestion that the plaintiff s version is a recent fabrication. Such evidence of consistency would have been relevant to the credibility of the plaintiff.

[51] In the circumstances and bearing in mind that Marion would have been available as a witness, the plaintiff s failure to have called her as a witness indeed warrants an adverse inference. I should however immediately mention that this aspect is only another factor which I take into consideration in my determination of this matter, but it is definitely not the decisive factor.

[52] A further factor to consider with regard to the plaintiff s credibility is his candour and demeanour in the witness-box. I have already recorded that at times the plaintiff showed agitation and annoyance in the witness box and responded accordingly to certain questions posed to him. He was also argumentative in some of his responses. He unnecessarily raised his voice on occasions. As mentioned earlier, Mr De Beer contended that that as this matter deals with a family dispute, it is distressing for the plaintiff and that his demeanour in court is therefore understandable considering the circumstances in which he testified. I cannot agree with Mr De Beer's submission. As submitted by Mr Pienaar, with which submission I agree, the plaintiff presented and displayed the aforesaid negative behaviour in instances when he clearly found it difficult to explain certain inconsistencies and contradictions in his evidence as such or as between his evidence and the contents of the pleadings and documentary evidence. He at the same time changed his evidence whenever he was not in a position to explain such inconsistencies and contradictions. The plaintiff's aforesaid conduct constituted a negative reflection on his

credibility as a witness.

[53] In my view the plaintiff was also not a reliable witness. I have already dealt with numerous contradictions and inconsistencies in his evidence. There were also a number of incidental issues pertaining to which he presented evidence on the basis that he is very certain about the particular fact or event, but which evidence eventually during further examination turned out to have been factually incorrect. I do not consider it necessary to deal with the detail of these instances.

[54] The mere fact that the plaintiff s evidence was not contradicted, does not render it true or acceptable in the circumstances of this case. See **McDonald v Young** 2012 (3) SA 1 (SCA)

Conclusion:

[55] In the circumstances, I cannot find that the plaintiff discharged the onus of proving the conclusion of the agreement as pleaded in paragraphs 5 to 9 of the particulars of claim.

[56] Paragraph 1.1 of the Rule 33(4) order can therefore not be decided in favour of the plaintiff, with the result that the plaintiff's claim stands to be dismissed. It is consequently also unnecessary for me to deal with paragraph 1.2 of the said order.

[57] There is no reason why costs are not to follow the success in this matter.

[58] The following order is made:

The plaintiff s claim is dismissed, with costs.

C. VAN ZYL, J

On behalf of the plaintiff: Adv. H. A. de Beer SC

Instructed by

Matsepas Inc.

BLOEMFONTEIN

On behalf of the first defendant: Adv. T. Pienaar

Instructed by

Phatshoane Henney Inc

BLOEMFONTEIN