

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case Number: 35418/2010

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. <i>J. Molefe</i>
<i>27/8/2013</i>	

In the matter between:

LENNY GOVENDER

FIRST PLAINTIFF

MICHELLE GOVENDER

SECOND PLAINTIFF

and

BURDEN AND SWART ATTORNEYS

DEFENDANT

JUDGMENT

MOLEFE, J:

[1] The Plaintiffs instituted an action against the Defendant, a firm of attorneys, for a recovery of a loan made to the Defendant on 2 September 2008 in the sum of

R600 000-00 of which an amount of R174 000-00 has been repaid, plus interest at 5% per month, from date of the advance to date of final payment.

[2] The Plaintiffs allege that they lent and advanced the sum of R600 000-00 to the Defendant in terms of a partly oral and partly written agreement. The Plaintiffs rely on a letter from the Defendant, (Annexure "A" letter) to confirm the terms of the agreement. The terms of Annexure "A" reads as follows:

"Aan: Lenny en Michelle Govender

i/s: Mascador/Max Return

Ons bevestig dat ons die volgende voorskot verlang op bovermelde transaksie:

- 1. Die bedrag van R600 000-00;*
- 2. Voorgemelde voorskot bedrag sal teen 'n administrasiefooi van 5% per maand (pro rata) van af voorskot tot datum van terugbetaling geskied;*
- 3. Gelde voorgeskiet sal terugbetaalbaar wees op datum van registrasie van transport maar nie later dan 'n periode van 4 maande vanaf datum van die voorskot nie, waarop die administrasiefooi vir die 4 maande ten volle betaalbaar is;*
- 4. Indien toestemming verleen word tot verlenging van die voorskot sal al die toekomstige administrasiefooi maandeliks betaalbaar wees.*
- 5. Ons gee u hiermeer ons firma-onderneming vir die terugbetaling van voormelde bedrag aan u. [...]"*

[3] The Defendant denies that the loan agreement was entered into with it and denies the veracity of Annexure "A". The Defendant avers that on 2 September 2008, the loan agreement was entered into between the Plaintiffs and the Defendant's Client Union Equity & Trust (Pty) Ltd and/or Mascador 160 (Pty) Ltd duly represented by Robert Linkmeyer and/or Leonora Swart.

Mrs Michelle Govender

[4] The Second Plaintiff was the sole witness on behalf of the Plaintiffs. Mrs Michelle Govender testified that she is married to the First Plaintiff and was employed by the Defendant as a conveyancing secretary during the period of May 2005 until December 2010. She and her husband were amongst several investors who over the years during her employment with the Defendant, advanced bridging finance to the Defendant at an interest fee of 5%.

[5] On 2 September 2008, Mrs Govender was approached by Mrs Leonora Swart, a partner at the Defendant firm and requested her to advance between R800 000-00 to R1000 000-00 as bridging finance and that the details of the loan would be given to her later. Mrs Swart was sitting with Mr Linkmeyer in her office when the request was made. The next day, after Mrs Govender had discussed the loan with her husband, they effected payment of R600 000-00 into the Defendant's trust account. Mrs Govender received Annexure "A" from Mrs Swart's secretary, Mrs Lizette Myburgh on 4 September 2008 after requesting same from Mrs Swart. She trusted Mrs Swart and was satisfied with the defendant's undertaking to repay the monies, in terms of Annexure "A".

[6] Annexure "A" was a standard letter used in bridging finance matters and was initially only available in Afrikaans. Later during 2008 when Mrs Govender demanded repayment of the loan from Mrs Swart, she referred her to Mr Linkmeyer and informed her that she had to recover the monies from him. Mrs Govender testified that she had seen Mr Linkmeyer several times at the defendant's offices but she had no personal relationship with him. She would not have advanced monies to him or any of his companies as she did not know him and had no trust relationship with him. She never discussed anything with Mr Linkmeyer regarding the loan and has never telephoned Mr Linkmeyer requesting the money. Mrs Govender testified that, since 2007, she and her husband had made a number of loans to the defendant as bridging finance and the monies were always repaid. The defendant made repayments to Mrs Govender over a period of time for a total amount of R174 000-00, towards the R600 000-00 loan.

Mrs Leonora Swart

[7] Three witnesses testified on behalf of the Defendant. Mrs Leonora Swart testified that she is a partner at Burden and Swart Attorneys (the Defendant) and that the second plaintiff was her conveyancing secretary. She testified that on the morning of the 2 September 2008, Mr Linkmeyer came to her office and requested funds from the defendant as he had a deadline to pay funds. He required R600 000-00 to fulfil the conditions and terms of a foreign investment agreement. Mrs Swart requested the second plaintiff to join her in her office and whilst both of them were sitting down, Mr Linkmeyer explained to the second plaintiff, who was standing at the door of the office why he needed the funds. The second plaintiff asked to speak to

her husband first. The plaintiffs transferred R600 000-00 into the Defendant's trust account on 3 September 2008.

[8] Mrs Swart did not explain to Mrs Govender that the loan was needed to pay a non-refundable deposit to a seller or any of the other risks of the foreign investments. She could not even supply any information about the contents of the agreements in the United Kingdom where the risk of non-payment lay. She however insisted that the R600 000-00 paid by the plaintiffs was a low-risk transaction, despite the fact that she had no knowledge of the risks in the United Kingdom. Mrs Swart could not identify any written instructions by Mr Linkmeyer on behalf of any legal entity requesting the advance payment of monies by the Plaintiffs to him or any legal entity. She confirmed that an amount of R174 000-00 was repaid to the plaintiffs over a period of time.

[[9] Mrs Swart testified that due to the recession, no further payments came through and Mrs Govender constantly asked her for their money. Mrs Swart constantly told Mrs Govender to phone Mr Linkmeyer directly to request her money and testified that she later advised her to litigate against Mr Linkmeyer.

[10] Mrs Swart denied that Annexure "A" was generated by her for the plaintiffs and her reasons for this was that the term "administrasiefooi" was used instead of the usual "interest" and further that the loan was not for a conveyancing transfer transaction.

Mr Robert Linkmeyer

[11] Mr Robert Linkmeyer testified he was the defendant's client. His company Mascador 160 (Pty) Ltd changed its name to Union Capital (Pty) Ltd, the holding company and that Union Equity & Trust Ltd's shares were held by Union Capital (Pty) Ltd. These shares were to be sold to investors, after they had made pledges and paid monies into the defendant's trust account. Union Equity & Trust Ltd was deregistered during 2012.

[12] Mr Linkmeyer testified that on 2 or 3 September 2008, he went to the defendant's offices and had a discussion with Mrs Swart about his deadline for payment in terms of a written agreement signed on 9 July 2008. He conveyed to Mrs Swart that he had secured R1 300 000-00 of the required R2 500 000-00 and needed bridging finance to cover the shortfall.

[13] Mrs Swart called Mrs Govender to her office and whilst Mrs Govender was standing at the door, he (Mr Linkmeyer) asked Mrs Govender for the money. Mr Linkmeyer conceded that he did not have a personal or trust relationship with Mrs Govender. He would normally not make a possible investor from whom he was asking for money stand at the door. Mr Linkmeyer told Mrs Govender that he needed R600 000-00 and Mrs Govender responded that she had to speak to her husband first. Mrs Govender paid the R600 000-00 into the Defendant's account. Mr Linkmeyer testified that pledges came in very slowly and due to the uncertainty in the mining sector, shareholders were under pressure. Monies did not come in due to unforeseen circumstances, and he could not pay the plaintiffs the balance of the

loan. Mr Linkmeyer never explained to Mrs Govender that the pledges were irrevocable.

[14] According to Mr Linkmeyer, this was the only finance agreement which was entered with Mrs Govender through the defendant. The other finance agreements were entered into directly with the investing parties. Mr Linkmeyer testified that on 3 October 2008, a meeting was held with Mrs Govender and Mrs Swart and it was agreed, at that meeting that the plaintiffs will stand back to allow the loan of Mr Adriaan Marais, Mr Linkmeyer's investor to be repaid first before the plaintiffs' repayment. Mr Linkmeyer testified that when Mr Marais advanced the loan to him and/or Union Equity & Trust Ltd, an undertaking was given to Mr Marais.

Ms Elizabeth Katarina Myburgh,

[15] Ms Elizabeth Katarina Myburgh, testified that she was the defendant's senior conveyancing secretary for approximately 15 years and left the defendant's employment in February 2009. She testified that she had a recollection of Mrs Govender attending the office of Mrs Swart when Mr Linkmeyer was there in 2008. She disputed that she issued Annexure "A" to Mrs Govender as the letter was not written in her style, but conceded that the letter was almost identical to the correspondence drafted by her for bridging finance transaction. Ms Myburgh further testified that some years later, she was contacted by Mrs Govender after she (Ms Myburgh) had left the defendant's employment, with the request to sign an undertaking letter for her, but she refused. Although she testified that she was not involved in the Govender/Mascador matter, she confirmed that she drafted the reconciliation statements in the matter when payments were made.

[16] Having heard the testimony of the parties' witnesses, it is my view that this is a case of mutually destructive versions and logic dictates that the court will have to accept the one version and reject the other.

[17] The defendant's counsel¹ relied on the **National Employers Mutual General Insurance v Ganny** case² wherein the following was stated:

"Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other (story) false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the court of first instance that the version of the litigant upon whom the onus still rests is the true version and that in this case, absolute reliance can be placed upon the story by A. Gany..."

I am entirely in agreement with the dictum in the **National Employers Mutual General Insurance** case *supra*.

[18] It is common cause that the defendant was running a bridging finance transaction business within its attorney's firm in the conveyancing department. Such monies were mostly advanced to the seller(s) and the defendant's employees including the plaintiffs, participated in these transactions as investors at an interest rate of 5% per transaction. Standard undertaking letters were issued by the

¹ Advocate T. Strydom SC

² 1931 AD 187 at 199

defendant to the people who advanced the money, which letters were identical to Annexure "A".

[19] The first issue to be determined by this Court *in casu* is whether Mr Linkmeyer or Mrs Swart requested the loan from the second plaintiff at a meeting held between the second plaintiff and the defendant's Mrs Swart and the defendant's client, Mr Linkmeyer on 2 September 2008 in Mrs Swart's office. The plaintiff's version is that Mrs Swart summoned her to her office and requested an advance of R800 000-00 to R1 000 000-00 as loan as the usual bridging finance transaction. The defendant's witnesses version is that the second plaintiff entered Mrs Swart's office and whilst standing at the door, discussions about the loan took place between her and Mr Linkmeyer.

[20] The defendant's version that a meeting was held with the second plaintiff on 2 September 2008, where a loan of a substantial amount was sought from her by Mr Linkmeyer, is in my opinion, on a balance of probabilities not true. The plaintiffs had a relationship of trust with the defendant and had conducted numerous bridging finance transactions with the defendant. Mr Linkmeyer was the defendant's client but did not know the second plaintiff personally. Furthermore, the second plaintiff did not have any relationship with Mr Linkmeyer or any of his companies. The probabilities are therefore that the plaintiffs contracted with the defendant on the basis that the defendant would give them the usual undertaking as per Annexure "A", which was usually given to them for bridging finance transactions.

[21] The second issue to be determined by this court is whether the defendant gave the plaintiffs an undertaking to repay the loan and issued Annexure "A". The defendant's counsel argued that the plaintiffs relied on the written document which is ostensibly the written part of the agreement (Annexure "A" letter). Counsel submitted that it is trite that the plaintiffs need to prove that the document was issued and signed by the defendant's representatives *alternatively in casu* that it was issued by the defendant's representatives and that the defendant is bound thereto and relied on the ***Da Silva v Janowski*** case³.

[22] The second plaintiff's version is that Annexure "A" was drawn and handed to her by Ms Myburgh on 4 September 2008 after requesting same from her. The defendant's version is that Annexure "A" was never drawn by Ms Myburgh nor Mrs Swart and that the letter was not Ms Myburgh's style. The defendant insisted that the plaintiffs contracted with Mr Linkmeyer and that the transaction was not a conveyancing transfer transaction and that Annexure "A" would not be used for this type of transaction. The defendant's counsel also proposed that the letter was created by the second plaintiff at a later stage as she had access to the defendant's computer system. The second plaintiff generated the letter in order to make a fraudulent representation that the letter was issued by the defendant and the letter was not signed by the defendant's representatives.

[23] In order to evaluate both parties' versions it is necessary to mention that the defendant, a firm of attorneys, with expert knowledge of the law, could not submit any corroboratory document, being a contract letter or other correspondence for its

³ 1982 (3) SA 205 A

proposition that the plaintiffs contracted with Mr Linkmeyer, their client, or any other company that he holds a stake in. The defendant could not even produce any written instructions from their client, Mr Linkmeyer on how the monies should be paid out. Annexure "A" letter was a template which was used in the defendant's office for bridging finance transactions at an interest fee of 5%. In the absence of any document to prove the alleged loan agreement between the plaintiffs and Mr Linkmeyer I am satisfied that the probabilities are therefore that the plaintiffs contracted with the defendant on the basis that the defendant would give an undertaking for the repayment of the loan. Annexure "A" was issued by the defendant's representative(s) and the defendant is bound thereto. The fact that Annexure "A" was not signed is not an issue *in casu* as there is evidence of numerous undertaking letters issued by the defendant to the investors without being signed.

[24] There is yet another ground which I consider that the defendant's version should fail. Annexure "A" indicated that the legal entity the plaintiff contracted with is Mascador/Max Return. From the companies' search produced by the defendant⁴, it was clear that Mascador 160 (Pty) Ltd changed its name to Union Capital (Pty) Ltd on 7 July 2006. By 2008, the defendant had no client called Mascador. According to Mr Linkmeyer's testimony, Mascador 160 (Pty) Ltd, changed the name to Union Capital (Pty) Ltd, a holding company and that Union Equity Trust Ltd's shares were held by Union Capital (Pty) Ltd. The monies paid into the defendant's trust account, was received on behalf of Mascador 160 (Pty) Ltd and/or Union Capital (Pty) Ltd. Union and Equity Trust Ltd was deregistered during 2012.

⁴ Exhibit "A"

In these circumstances, if the defendant's version is to be accepted as the truth, Mr Linkmeyer and/or Union & Equity Trust Ltd could not be held liable for the plaintiffs' loss because the companies do not exist.

[25] The argument advanced by the defendant cannot possibly be true in that the accounting statements of reconciliation sent to the plaintiff's dated 07 November 2007 and 10 December 2008 were done by the defendant's secretary Ms Myburgh. The defendant still referred to the transaction as between Mascador and the plaintiff, which company was not in existence.

[26] The argument advanced by the defendant carries within itself the seeds of its own destruction. One of the defendant's discovered documents was an undertaking by Mr Linkmeyer to Mr Marais, dated 19 September 2008.

The undertaking read as follows:

“ **MAGTIGING**

Ek, die ondergetekende:

ROBERT LINKMEYER

IDENTITEITSNOMMER: 741020 5131 08 3

In my hoedanigheid as gevolmagtigde van

UNION EQUITY & TRUST LTD

*Magtig ADRIAAN MARAIS om die bedrag van R400 000-00 (vierhonderd-
duisend rand) direk in MAX RETURN 106 (PTY) LTD se bankrekening te
deponeer.*

*Voormelde bedrag word deur ADRIAAN MARAIS aan UNION EQUITY &
TRUST LTD voorgeskiet teen 'n vergoeding van R20 000-00*

(TWINTIGDUISEND RAND). Die kapitale bedrag plus R20 000-00 vergoeding is terugbetaalbaar uit die eerste beskikbare fondse ten gunste van UNION EQUITY & TRUST, welke fondse ontvang word in BURDEN & SWART PROKUREURS se trustrekening.

GETEKEN TE PRETORIA OP HIERDIE 19DE DAG VAN SEPTEMBER 2008.

R LINKMEYER"

[27] If the defendant's version is to be believed it is strange that the defendant did not ensure that Mr Linkmeyer gave a similar undertaking to the plaintiffs. Furthermore, Mr Marais enjoyed an interest of 7% on his investment, which was interest not given to the plaintiffs. The plaintiffs' interest on their loan was the standard 5% given by the defendant.

[28] I agree with the plaintiff's counsel's⁵ submissions that the principles pertaining to the adjudication of this matter are set out in **Selamolele v Makhado** 1988 (2) SA 372 (V) at 374 f :

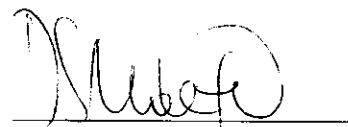
"Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the witnesses and, secondly, an ascertainment of which of two versions is the more probable."

⁵ Advocate A. Botha

[29] It is my view that the second plaintiff was an honest and credible witness and the court accepts her evidence as the truth. I am satisfied that sufficient reliance can be placed on her version for there exists a strong probability that her version is the true one. I am also satisfied that on adequate grounds above-mentioned, the plaintiff's version is more probable than that of the defendant. The defendant's version is unlikely and improbable. I am not persuaded that the loan was negotiated with Mr Linkmeyer and I am satisfied that the defendant undertook to repay the plaintiffs as set out in Annexure "A".

[30] In the circumstances, the following order is made:

- (a) *Judgement is granted in favour of the plaintiff for an amount of R426 000-00;*
- (a) *interest at a rate of 15,5% per annum from 18 March 2010 (being the date of demand) until date of payment;*
- (c) *Costs of the suit.*



D.S. MOLEFE

JUDGE OF THE HIGH COURT

Date Heard: 7, 8 and 9 May 2013

Date Delivered: 27 August 2013

On behalf of Plaintiff : HARDAM & ASSOCIATES INC.
Plaintiff's Attorneys
4TH Floor, Building 3, Outsurance Campus
1241 Embankment Road, Centurion
P O Box 11008, Centurion, 0046
Tel: (012) 336 3173
Fax: (012) 673 4916
Email: herbst@legalinc.co.za
Ref: GOV257/0001/GH

Counsel for Plaintiff : Adv. A Botha

On behalf of Defendant's : BURDEN AND SWART ATTORNEYS
Defendant's Attorneys
480 William Street
Crn Fehrsens Street
Brooklyn, Pretoria
Tel: (012) 346 3554
Ref: Mr Burden/at/B1356

Counsel for Defendant's : Adv. T Strydom SC