IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 8112/10

In the matter between:

KEVIN MOORE — Plaintiff

and

GIFTS & CRAFTS — Defendant

JUDGMENT

SEEGOBIN J

INTRODUCTION

[1] The plaintiff, Kevin Moore, sues the defendant, Gifts & Crafts, for payment of the sum of R232 891.00 (TWO HUNDRED AND THIRTY TWO THOUSAND EIGHT HUNDRED AND NINETY ONE RAND), being monies allegedly advanced by him to the defendant in terms of a series of oral agreements concluded between the parties some time prior to alternatively on or about the 20 June 2003.

[2] There is no dispute that during the period in question, various amounts of money were deposited into the Gifts & Crafts account by or on behalf of the plaintiff and/or an entity known as Coastal Kitchens. The issue for determination is whether these amounts were paid as loans or, as the

defendant avers, for the purposes set out in her amended plea.

THE PLEADINGS

[3] To place the above issue in context, it is perhaps necessary to refer to the pleadings. In his amended particulars of claim dated 11 October 2010, the plaintiff alleged, *inter alia*, that:

(a) During the period 20 June 2003 to 18 January 2010 and at Durban, the plaintiff and the defendant concluded a series of oral loan agreements.

(b) In concluding the same, the plaintiff acted personally and Gifts and Crafts was represented by Vanessa.

(c) The express, alternatively tacit, alternatively implied, material terms of each of the loan agreements were that:

    i) The plaintiff agreed to lend and advance money to Gifts & Crafts for use in its business;

    (ii) Vanessa agreed to repay the loan, the monies loaned upon demand.

d) The dates upon which the aforesaid agreements were concluded, and the amounts advanced in terms of each agreement, are set out in a schedule annexed to the particulars of claim, marked “A”.

e) On 6 May 2010 the plaintiff served written demand on the defendant to repay to him the sum of R191 675.00 (ONE HUNDRED AND NINETY ONE THOUSAND SIX HUNDRED AND SEVENTY FIVE RAND) the sum of which became due and payable by the defendant to the plaintiff on the said date.

f) The plaintiff further demanded the balance of the alleged loans in the sum of R41 216.00 (FORTY ONE THOUSAND TWO HUNDRED AND SIXTEEN RAND).

[4] In her plea, the defendant denied that any loan agreement was concluded and pleaded further that:

(a) during the subsistence of the marriage between the parties, the plaintiff would, from time to time utilize the following bank accounts held by the defendant and/or Vanessa, namely:

(i) Nedbank current account number 1380-08940 (Gifts & Crafts);

(ii) Nedbank current account number 1305-846923 (VM Moore) (staff number 2 account).

b) The amounts reflected in annexure "A" to the plaintiff's amended particulars of claim were deposited into one or other of the aforementioned accounts by the plaintiff, or alternatively the plaintiff would cause the said amount to be paid by one or more of his clients and/or customers.

c) The said amounts so deposited were intended to be utilized as follows:

i) for the plaintiff's own personal benefit, being payments to his suppliers and/or creditors;

ii) as payment in respect of loans to certain of his nominees;

iii) as payment to the creditors and/or suppliers of Coastal Kitchens;

iv) as contributions towards maintenance of the matrimonial home;

v) as payment as medical and other allied expenses in respect of the plaintiff and/or Vanessa and/or the children of the parties;

vi) as gifts and/or donations to the benefit of the children of the plaintiff and Vanessa;

vii) as gifts and/or donations to Vanessa for her own personal use.

d) The said payments were made by the plaintiff with the intention of avoiding same being reflected in the books of account of the plaintiff and/or "Coastal Kitchens".

COMMON CAUSE FACTS

[5] The following facts were either common cause or alternatively not in dispute:

1. At all material times, the plaintiff was a sole member of Coastal Citi Home Improvements CC trading as Coastal Kitchens.

2. Vanessa Melanie Moore (Mrs Moore) was the sole proprietor of the defendant.

3. The plaintiff and Mrs Moore were married to each other out of community of property by antenuptial contract without accrual on 4 January 2001.

4. The parties separated during February 2010 and are currently involved in divorce proceedings which are still pending.

5. Mrs Moore was the sole proprietor of the defendant and as such would be liable for the payment of the aforesaid amount claimed

by the plaintiff in this action.

[6] At the commencement of the hearing on the 17 October 2011, the parties, by agreement, placed the following bundles of documents before the court:

1. Exhibit "A" comprised the plaintiff's bundle and Exhibit B1-B8 comprised the defendant's bundle. These Bundles comprised mainly bank statement and other documents relating to the payment of monies to and on behalf of the parties. Additionally, in the defendants bundle, the pleadings in the pending divorce action were included.

2. The original cash book or ledger of the defendant was produced and handed in during the evidence of Mrs Moore.

3. Over the course of the 17 and 18 October 2011, the plaintiff testified and called a witness, one Rodney Lovegrove ("Lovegrove") who was his personal accountant and the accountant of Coastal Kitchens. Mrs Moore gave evidence on behalf of the defendant.

THE ONUS

[7] The plaintiff bore the *onus* of proving on a balance of probabilities that various amounts totaling R232 891.00 (TWO HUNDRED THIRTY TWO THOUSAND, EIGHT HUNDRED AND NINETY ONE RAND) were paid over to the defendant as loans in terms of an oral agreement concluded between the plaintiff and Mrs Moore. For the purposes of this judgment I do not intend recounting the evidence of the witnesses in detail. I will, however, endeavour to highlight those aspects of the evidence which are relevant to a determination of the issue herein.

THE EVIDENCE

[8] The plaintiff testified that when the first loan was made, there was an initial discussion between him and Mrs Moore at their home in terms of which she requested funds for her business in order to pay certain expenses and to assist with cash flow. He agreed to lend her the money. According to the plaintiff his wife agreed to repay the funds so advanced whenever he demanded repayment. The loans would be interest-free. This principal discussion took place some time in 2003. He testified that over the ensuing months and years his wife repeatedly requested funds to be advanced to the defendant and he would accede. He did this by instructing his bookkeeper to effect payment of the amount requested from his business, viz Coastal Kitchens. He did this without even verifying whether such funds were in fact required and for what purpose. According to the plaintiff he trusted his wife and as such he did not consider it necessary to enquire what the funds were required for.

[9] Under cross-examination, the plaintiff conceded that he had no independent recollection of the date when the loan agreement was concluded and/or of the individual amounts and/or dates when such amounts were paid over to the defendant. He merely relied on the bank statements of Coastal Kitchens and/or the schedules prepared by his bookkeeper. While the plaintiff maintained initially in his evidence that in terms of the agreement, the loan would be repaid whenever he made demand for same, under cross-examination he changed this to suggest that his wife had agreed right at the outset i.e. some time in 2003, that she would repay whatever monies he had advanced to her business whenever the business was sold. For a period of seven (7) years the plaintiff never provided his wife or her business for that matter with statements of account evidencing proof of these loans. Nor did he inform his accountant Lovegrove about these loans. The plaintiff conceded under cross-examination that, but for the divorce, he would probably never have requested the amounts to be repaid to him.

[10] The witness Lovegrove readily accepted that he was unaware, from any record kept either by the plaintiff or Coastal Kitchens or from the plaintiff

himself, that loan agreements existed between the parties. According to Lovegrove, the schedules which constitute Annexure A to the claim in this action were prepared by one Fernando Lima (“Lima”). Lima of course was never called as a witness. The plaintiff’s case was closed with no other witnesses being called.

[11] Mrs Moore was the only witness to testify on behalf of the defendant. She vehemently denied that there ever was a loan agreement concluded between her and the plaintiff. When she met the plaintiff in 1996 and moved in with him in 1997, the plaintiff was already operating a successful business. According to her the plaintiff was a loving and doting husband and being the greater earner, was a good provider to her and her children. She became interested in purchasing the “Gifts and Crafts” business sometime in 2003. At that stage she was employed with Nedbank. However, her position at the bank was made redundant and she chose to take a voluntary retrenchment package which was between R85 000.00 – R115 000.00 (EIGHTY FIVE THOUSAND RAND to ONE HUNDRED AND FIFTEEN THOUSAND RAND). She utilized a major portion of this to purchase the business. The plaintiff of course was always very encouraging and supportive of her when she acquired the business. The plaintiff himself had testified that he was happy to provide for her in the pursuit of her business which made her happy.

[12] Mrs Moore readily accepted that the plaintiff had on numerous occasions deposited various amounts of money not only into her business account but also in the other operated by them. The VM No.1 account for instance was utilized for the purposes of paying the home loan (bond) in respect of the immovable property situated at Humber Crescent, Durban North. It was also used for effecting payments in respect of the plaintiff’s motor vehicle, the payment of medical aid contributions and certain other insurance policies for the benefit of the plaintiff. The VM Moore No.2 (staff) account on the other hand was operated by the plaintiff almost exclusively for his own benefit and for a variety of purposes which he allowed Mrs Moore to conduct at his instance and request.

[13] Mrs Moore testified that from the commencement of the business she had an overdraft facility of R20 000.00 (TWENTY THOUSAND RAND) on the business account. She further testified that at some stage she received an inheritance in the amount of R191 675.00 (ONE HUNDRED AND NINETY ONE THOUSAND SIX HUNDRED AND SEVENTY FIVE RAND). The plaintiff was aware of this. According to Mrs Moore she utilized this money to settle some of her debts, bought herself certain items and funded some of her business expenses. The effect of all this is that she was not dependent on the plaintiff for monies to fund her business. In spite of this, the plaintiff continued to deposit funds into her account from time to time without her requesting the same. She testified that in respect of the period December 2009 for instance, she had a credit balance in her personal account of R223 867.97 (TWO HUNDRED AND TWENTY THREE THOUSAND EIGHT HUNDRED AND SIXTY SEVEN RAND, NINETY SEVEN CENTS) and despite the fact that her business account went into overdraft from 7 October 2009 to 15 December 2009, the defendant was in a position to pay all its creditors utilizing its overdraft facility.

[14] The upshot of Mrs Moore's evidence is that it came as a huge surprise to her to learn that the plaintiff was claiming that monies deposited into the Gifts and Crafts account were loans made by him to her business. She testified that she was '*horrified'* to learn this as "*there was never, ever any discussion about any loans".*

RELEVANT BACKGROUND

[18] The issue in this matter must be considered against the backdrop of the marriage relationship between the plaintiff and Mrs Moore which by all accounts was a harmonious one from its inception but which disintegrated during or about December 2009 resulting initially in a separation and thereafter in the institution of divorce proceedings by Mrs Moore in March 2010. As the evidence revealed, the plaintiff was a successful businessman,

a generous and loving husband who maintained Mrs Moore and the children of the parties at a very high standard. The evidence further revealed that the plaintiff was highly supportive of Mrs Moore in her business venture which commenced during or about March 2003 and he was "*happy*" to assist her in pursuing an interest that made her happy. The numerous transactions (almost thirty seven (37) in all) took place over a seven (7) year period and in all that time, the plaintiff had at no stage until May 2010, requested any payment from Mrs Moore, nor did he present to her an account detailing what amounts were owing to him. On the plaintiff's own evidence, the event that "*triggered*" his demand for payment for the first time was the divorce proceedings instituted by Mrs Moore in 2010.

FINDINGS

[16] The plaintiff bore the *onus* of proving on a balance of probabilities that a loan agreement/s was/were concluded between him and the defendant, represented by Mrs Moore. For the reasons set out hereunder I find the plaintiff's evidence to be unconvincing, unreliable and improbable in the extreme.

> [16.1] In his particulars of claim the plaintiff specifically alleged "*a series of oral loan agreements",* being concluded on each of the dates referred to in annexure "A" of the particulars of claim. He further alleged that Mrs Moore agreed to repay the monies in respect of each such agreement when each agreement was concluded. However, when the plaintiff testified he referred to one agreement only which according to him, was concluded at the very beginning, some time in 2003. This agreement covered each and every payment made subsequent to 20 June 2003 to 18 January 2010 at Mrs Moore's request and as such, according to the plaintiff, there was no need for the parties to discuss the terms of repayment of each and every amount whenever this occurred. In my view, if this was the true position, one would have expected the plaintiff to plead such facts in

his particulars of claim which he clearly did not do.

[16.2] In his particulars of claim, the plaintiff pleaded that Mrs Moore had agreed to repay the monies loaned "*upon demand*". In his evidence, however, the plaintiff indicated that it was the divorce proceedings instituted by his wife which "*triggered*" his counterclaim in respect of the monies. He would not have made any claim for these monies had the divorce action not been instituted.

[16.3] Still on the issue of the repayment of these monies, the plaintiff, under cross-examination, changed his evidence to suggest that Mrs Moore had agreed at the very outset in 2003, to repay whatever monies he had advanced to her business, whenever the business was sold. It is common cause that during March and/or April 2010, Mrs Moore did in fact sell her half-share in the business for the sum of R140 000.00 (ONE HUNDRED AND FORTY THOUSAND RAND). In spite of this, the plaintiff made no demand for repayment of the alleged loans.

[16.4] As already pointed out, the alleged loans were apparently made over a period of seven (7) years commencing in 2003, yet at no stage in all this time did the plaintiff provide the defendant with a statement of account or inform his accountant of the existence of these loans. Additionally, the loans have not been reflected in his personal income tax returns.

[16.5] According to the plaintiff payments were often made to the defendant by his bookkeeper, Maryanne, on his instructions. Maryanne would no doubt have known whether these were loans or not. She was not called to testify. Nor was Fernando Lima who together with Maryanne was responsible for compiling the annexures attached to the particulars of claim and the claim-in-reconvention.

[16.6] In his claim-in-reconvention in the divorce proceedings (Bundle

B4 at pages 1-6), the plaintiffs initial demand was for payment of the sum of R191 675.00 (ONE HUNDRED AND NINETY ONE THOUSAND SIX HUNDRED AND SEVENTY FIVE RAND). Annexure A (Bundle B4 page 5) contains various payments/transactions which the plaintiff maintained were all payments made in terms of the loan agreement concluded between him and Mrs Moore in January 2005. This amounted to the sum of R49 450.00 (FORTY NINE THOUSAND FOUR HUNDRED AND FIFTY RAND) in total. The various amounts in Annexure A were included in the amount of R191 675.00 (ONE HUNDRED AND NINE ONE THOUSAND SIX HUNDRED AND SEVENTY FIVE RAND) which the plaintiff initially claimed in his claim-in-reconvention. It is rather strange and somewhat inexplicable that if one compares the amounts claimed in Annexure “A”. Pleadings Bundle page 8) with the amounts claimed in Annexure A to the claim-in-reconvention (Bundle 4 page 5). It is apparent that the various amounts which make up R49 450.00 (FORTY NINE THOUSAND FOUR HUNDRED AND FIFTY RAND) have not been claimed in the present action. Similarly, a comparison of the amounts claimed in Annexure “A” (Pleadings Bundle page 8) with Annexure “A” of the claim-in-reconvention, it is apparent that the following amounts, viz: 25/4/2005 (R1000.00),8/8/2005 (R2 200.00), 6/10/2005 (R1 500.00), 30/11/206 (R4 000.00), 3/4/2007 (R3 000.00), 12/6/2007 (R3 356.00), 25/1/2008 (R3 740.00), 2/6/2008 (R6 000.00), 27/7/2007 (R10 000.00), 23/32009 (R1 900.00), 19/5/2009 (R4 900.00) and 7/10/2009 (R3 000.00), were not claimed as being loans in the claim-in-reconvention.

[17] All in all I consider the plaintiff’s evidence to be fraught with inconsistencies, vague in the extreme and unsubstantiated. Mrs Moore’s evidence on the other hand has the ring of truth about it and is consistent with the kind of relationship that the parties enjoyed and their dealings with each other as husband and wife.

CONCLUSION

[18] Having carefully considered the plaintiff's claim herein against the background of the relationship that existed between him and Mrs Moore, I am driven to conclude that the probabilities favour Mrs Moore's version that the payments made by the plaintiff to her and/or into the various accounts utilized by the parties, were made for the purposes outlined by Mrs Moore both in the pleadings and in her evidence.

COSTS

[19] The costs must follow the result. Mr Prior who appeared on behalf of the defendant has urged that such costs should include the reserved costs for 1 August 2011 when the trial was initially set down for hearing. It was apparent at the pre-trial conference held on 8 July 2011 that the matter would not be finalized in one day. Given the voluminous nature of the documents in the matter, it should have been plain to the plaintiff that more than one (1) day would be required. In my view, there is no reason why the costs reserved on that occasion should not be borne by the plaintiff given the fact that he was responsible for setting the matter down for one day only.

ORDER

[20] For the reasons set out herein, I grant the following order:

> The plaintiff's claim is dismissed with costs, such costs to include the reserved costs for 1 August 2011.

Date of Hearing : 18 October 2011

Date of Judgment	:	19 December 2011
Counsel for Plaintiff	:	Advocate Mills
Instructed by	:	Johnston & Partners
Counsel for Defendant	:	Advocate Prior
Instructed by	:	Retha Meiring