



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

DATE: 29/05/2009

CASE NO: A440/2007

UNREPORTABLE

In the matter between:

MARIA CATHARINA ALETTA SMIT

Appellant

And

BENITA WILLERS

Respondent

JUDGMENT

LEDWABA, J

- [1] The appellant, the plaintiff in the court a *quo*, is appealing against the decision of the magistrate who granted absolution from the instance in the defendant's favour after the defendant closed her case. The plaintiff in the summons sought judgment against the defendant for payment of an

amount of R 12 750 plus interest and payment of R 375 when the amount, in terms of the agreement, became due and payable.

- [2] There was no appearance for the respondent, when the appeal was heard nor were heads of argument filed on behalf of the respondent. Respondent's attorneys withdrew and the notice of withdrawal was only filed and sent to the respondent by registered post on 4th May 2009, three days before the matter was heard.

- [3] According to the pleadings, applicant's claim arises out of a written agreement attached to appellant's particulars of claim as annexure 'A', which agreement was amended by the contents of annexure 'B' attached to the particulars of claim.

- [4] How annexures 'A' and 'B' originated has been captured in the pleadings explained in the appellants heads of argument. I will not repeat same.

- [5] The issue raised by the respondent in the plea is that the clause:
*"Ek ondeneem verder om h lewenspolis vir h bedrag van R180,00-00 uit te neem: die premies daarop te betaal en dit te sedgeer aan voormelde ERASMUS STEPHANUS WILLERS."*in annexure 'A' insured the debt owed by the respondent. Appellant submits it did not.

- [6] The magistrate's reasons for his/her judgement are the following:

“Eiseres was h̄ enkelgetuie, omtrent die lenings ooreenkoms. Sy het geen getuienis omtrent die bedrae soos geeis in haar dagvaardiging gegee nie. Sy het verder toegegee dat daar h̄ uitbetaling van h̄ polis was in haar oorlede seun se bedoel. Sy kon nie ontken dat die polis uitgeneem was ter versekering van die lening nie. Die boedel is nog nie afgehandel nie, en was daar geen bevestigende of ontkennende getuienis dat die polis nie die skuld gedelg het nie, soos verweerderes gepleit het nie.

Verweerderes het nie enige getuienis aangebied nie. Die hof kon nie op h̄ oorwig van waarskynlikhede bevind dat eiseres haar eis soos geëis in die dagvaardiging bewys het nie, en absolusie van die instansie is ten gunste van verweerderes toegestaan.”

- [7] On careful perusal of the pleadings the respondent does not deny nor dispute that the parties entered into a second agreement in about July 2003 contents of which read as follows:

“AANGESIEN bogemelde partye op die 13de dag van Junie 2000 h̄ Promesse ooreenkoms aangegaan het in terme

waarvan sekere betalings gemaak moes Word aan Erasmus Stephanus Willers;

EN VERDER AANGESIEN Martin Willers en Benita Willers van voorneme is om hulle huwelik te ontbind;

EN VERDER AANGESIEN Erasmus Stephanus Willers h gedeelte van sy eis aan sy voormalige eegenote Marita Willers oorgedra het.

EN VERDER AANGESIEN dit blyk dat as gevolg van die verandering van die versikillende partye se omstandighede soos bo uiteengesit daar nou h nuwe ooreenkoms gesluit behoort te word.

NOU DERHALWE kom die partye as volg ooreen:

1.

BENITA WILLERS is aanspreekliklik vir terugbetaling van die bedrag van R45 000.00 (vyf en veertig duisend rand) aan MARITA WILLERS en sal sy aanspreeklik wees vir h maandelikse betaling van R375.00 (drie honderd vyf en sewentig rand) aan MARITA WILLERS. BENITA WILLERS onderneem dan verder om die bedreg van R45 000.00 (vyf en veertig duisend rand) in Junie 2010 aan MARITA WILLERS te betaal.

2.

Die partye stem toe tot die jurisdiksie van die Landdroshof, in verband met enige aksie wat hieruit mag voortspruit.

3.

Indien enige betaling nie gemaak word op die vervaldag nie, sal die geheel van die uitstaande balans ingevolge hierdie ooreenkoms opeisbaar en betaalbaar wees.”

- [8] In my view, annexure ‘B’ amended annexure ‘A’ as the heading reads: ‘WYSIGING VAN PROMESSE’ and the parties entered into a new agreement.
- [9] The new agreement annexure ‘B’ is silent as far as a life policy is concerned. I fail to understand why did the magistrate in the reasons for judgment mention the relevance of the life policy in the new agreement, annexure ‘B’.
- [10] The appellant in paragraph 14 of the particulars of claim has set out why the amount of R12 750 is due and respondent admits that the monies were not paid.
- [11] Annexure ‘A’, clause 3 therein, has an acceleration clause in terms of when the appellant could counterclaim the

outstanding balance. However, the appellant asked for judgement as follows:

“(b) Betaling van R375 soos en wanneer die bedrag opeisbaar en verskuldig is plus rente a tempore morae.”

[12] Mr. Mills correctly in my view did not persist with prayer (b) in the particulars of claim.

[13] The plaintiff has, in my view, proved on the balance of probabilities that the respondent owes her the amount in prayer 8 of the particulars of claim. The respondent closed his case without leading any evidence.

[14] Having regard to the aforesaid, the magistrate erred in granting absolution from the instance. I therefore make the following order:

(i) The order of the court *a quo* is set aside and is replaced with the following order:

“Defendant (Respondent) is ordered to pay plaintiff (appellant) the amount of (twelve thousand seven hundred and fifty rand) R12 750 plus interest”.

(ii) Respondent (Defendant) is ordered to pay the costs of the action proceedings in the magistrate’s court and the costs of this appeal.

A. P. LEDWABA
JUDGE OF THE HIGH COURT

I agree,

P. EBERSOHN
ACTING JUDGE OF THE HIGH COURT
