

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: 41/2003

In the case between:

DR. A ELGONI

Plaintiff

and

ALI EL-SHAHIR

Defendant

HEARD ON: 25 APRIL 2005

CORAM: BECKLEY *et* CILLIé JJ

JUDGEMENT: BECKLEY J

DELIVERED ON: 5 MAY 2005

[1] In this matter a dispute exists between the parties as to whether the plaintiff entrusted 30 000 US dollars, as alleged by the plaintiff, or 20 000 US dollars, as alleged by the defendant, with the defendant for safe keeping. The court *a quo* found that 30 000 US dollars were entrusted to

with the defendant and gave judgment for the balance owing, namely 10 000 US dollars. This appeal is directed at this finding of the magistrate in the court *a quo*. The parties are referred to herein as plaintiff and defendant.

[2] The court *a quo* fully dealt with the evidence that was tendered at the trial and I do not propose repeating the evidence herein. The only question to be decided is whether the court *a quo* was correct in giving judgement for the balance of 10 000 US dollars or whether it should have absolved the defendant from paying the balance of 10 000 US dollars.

[3] Mr. Reynders, on behalf of the defendant, conceded that the version of the plaintiff was not inherently improbable in any respect and I respectfully agree with that submission. The defendant's version, however, contains a number of inherent probabilities, *inter alia* the following:

a. According to the defendant, the plaintiff was in dire

straits and that the financial hardship of the plaintiff was the reason why he decided to “give charity” to the plaintiff and, in particular, to pay him an amount of R2 000.00. It is common cause that the plaintiff entrusted at least 20 000 US dollars with the defendant. It follows to my mind that, on these facts, it cannot be said that the plaintiff was in need of financial assistance.

- b. The fact that the defendant offered to provide the plaintiff with a cellphone, does not indicate that the plaintiff was financially handicapped, having regard to the fact that it was common cause at the trial that the plaintiff had, at the relevant time, not yet obtained a residential permit, could therefore not open a bank account, and could therefore not meet the requirement of a bank account, being one of the terms required by Vodacom as a service provider for a cellphone.

- c. The plaintiff's undisputed evidence was that, when the parties met with other members of the family, the defendant agreed to pay the 10 000 US dollars in instalments of R2 000,00 and that he, the plaintiff, insisted that the undertaking be reduced to writing. The defendant testified that the R2 000,00 cheque was given in favour of the plaintiff as charity, and not as partial repayment of the 10 000 US dollars. It is inherently improbable to my mind that the plaintiff would insist on a written agreement if the R2 000,00 payment in his favour was paid as charity, and not as part payment of the 10 000 US dollars.
- d. At the time when the R2 000,00 was paid, the defendant suspected that the plaintiff was trying to cheat him by falsely alleging that there was still an amount of 10 000 US dollars outstanding. It is inherently improbable that the defendant would be prepared to pay an amount of R2 000,00 as charity to the very person who was trying to cheat him.

- e. Mr. Reynders, on behalf of the defendant, conceded in this Court, and correctly so, that it is unlikely that the plaintiff made a *bona fide* error when he told the defendant that he had deposited 30 000 US dollars and that it was more probable that the plaintiff claimed the additional 10 000 US dollars whilst he knew that the amount that he had deposited with the defendant had been repaid in full. Under those circumstances, it is unlikely that the plaintiff would have politely and courteously suggested

“No, I think I remember I give you 30 000.”

It is more probable, to my mind, that he would have been more aggressive and demanding.

- [4] Having regard to the improbable aspects that have been referred to above, I am satisfied that the version of the defendant is so improbable that it can safely be rejected

and that the court *a quo* correctly found that the plaintiff must succeed. In the result the appeal is dismissed with costs.

A.P. BECKLEY, J

I concur.

C.B. CILLIÉ, J

On behalf of plaintiff: Adv. S. Reynders
Instructed by:
Kramer Weihmann &
Joubert

BLOEMFONTEIN

On behalf of defendant: Adv. J.J. Teesen
Instructed by:
Honey Attorneys
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