

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **420/2022**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
29 August 2024	
DATE	SIGNATURE

In the matter between:

KIM WARREN N.O.

Plaintiff

and

BEN MULLER

Defendant

JUDGMENT

This judgment has been delivered by being uploaded to the CaseLines profile on and communicated to the parties by email.

Wepener J

[1] The plaintiff is the executrix in the estate of the late Mr André du Toit. The defendant, Mr Muller, was a close personal friend of Mr du Toit. The plaintiff seeks payment of an amount of R1 323 0000 from the defendant, being amounts lent and advanced by Mr du Toit to the defendant during the lifetime of Mr du Toit.

[2] The amount claimed excludes certain additional amounts advanced to the defendant by a company of which Mr du Toit was the director and shareholder.

[3] It is common cause that as at 5 August 2020, the defendant agreed and admitted that the amount advanced by Mr du Toit was the sum of R1 322 000. It is also not disputed that a demand for the repayment of this amount was made on 16 November 2021, and that no payment was made by the defendant subsequent to the demand.

[4] The defendant advised that he does not rely on the plea of prescription which, according to him, was something introduced by the attorneys acting on his behalf at the time, but without his instructions to do so. In the circumstances, I need not consider the special plea as it was not persisted with.

[5] The defendant also testified that the plea, as drafted, was not in accordance with his instructions to his attorneys.

[6] Nevertheless, it is of some weight that the plea denies that the deceased made payments to the defendant in the sum of R1 323 000 (and also that there existed an agreement of loan). The defendant averred that the monies paid to him were for financial assistance to his business as he did not personally receive these loans but it was a loan to his business and that it was, nevertheless, not to be construed as a loan agreement. During his evidence, the defendant went further and stated that, save for

a minuscule amount, he had repaid the full amount advanced prior to the death of Mr du Toit on 28 December 2020.

[7] The difficulty with the allegation of repayment is that the employee of Mr du Toit, Ms Olivier, called by the defendant as a witness, had no knowledge of the alleged repayments. According to the evidence of Ms Olivier, she was the right-hand person of Mr du Toit and who did everything for him, such as even reading his emails for him and doing WhatsApp messages. She described Mr du Toit as a person who recorded matters meticulously and said that she was quite close to him and dealt with all aspects concerning Mr du Toit, including any monies lent by Mr du Toit.

[8] The further problem is that the repayment allegation does not appear in the defendant's plea. Even if his attorney pleaded issues not conveyed by the defendant, the one thing that would be a highlight is, if a client avers full repayment, that that allegation, which would constitute a complete defence to a claim based on a loan, be set out in the plea. The fact that the repayment allegation is absent from the defendant's plea, places further difficulties in the defendant's way.

[9] A defendant wishing to rely on a payment in his defence must allege and prove that payment.¹ The defendant's evidence falls far short of such proof.

[10] There are vague allegations of repayment of the amount between August 2020 when he agreed that the amount was correct and the date when the deceased passed away on 28 December 2020. Not a single document in support of those alleged repayments was produced. There is nothing to show any repayment. The defendant

¹ *Pillay v Krishna* 1946 (A) 946 at p 958: "For these reasons I come to the conclusion that, upon a plea of payment of money, the onus is on the defendant, and that if he fails to satisfy the court that there is a sufficiently strong balance of probabilities in his favour, judgement must be given to the plaintiff"

did not discover or produce his own bank statements, nor that of his business, to show when amounts were repaid.

[11] The defendant attempted to avoid the fact that the loan existed. He did so in contradictory terms. The plea denied a loan. In evidence he attempted to characterise it as anything but a loan, yet referred to it as a loan. All of this was completely unnecessary if the amount advanced had been repaid as the defendant wanted it.

[12] The probabilities swayed against the defendant. In addition to the above remarks, in a document, setting out the balance of the R1 323 000 which is headed "leuning staat", being an incorrect spelling for the Afrikaans word "leningstaat", which means a statement setting out the amounts of a loan, the defendant agreed that the balance is one hundred percent correct.

[13] On 31 March 2016, the defendant prepared a document setting out his financial position. In it he referred to the amount then advanced by Mr du Toit as "André du Toit Leningsrekening". That, too, refers to a loan. During his evidence the defendant agreed that the amounts advanced to him was not a gift. If not, the probabilities are that it was to be repaid, i.e., a loan. The defendant went further, and stated in evidence, that he regarded the advances as loans. During argument he referred to the "one loan" in order to attempt to refute a distinction between the loans from Mr du Toit and those from his company. I find that the defendant's evidence is most unsatisfactory, and save for the admissions that the money was lent to him, I reject his contradictory versions.

[14] The plaintiff called Ms Corbett, Mr du Toit's life partner as a witness. Her evidence was mainly hearsay and I was not pressed to allow the hearsay evidence.

However, on the findings that I made herein, it is not necessary for the plaintiff to rely on that evidence.

[15] Having regard to the totality of the evidence, I am satisfied that the plaintiff has proven her case on a balance of probabilities.

16] In the circumstances, I issue the following order:

The defendant must pay to the plaintiff:

1. The sum of R1 323 000.00;
2. Interest on the sum of R1 323 000.00 at a rate of 7% per annum from 16 November 2021 to date of final payment;
3. Costs of the action which costs will include the costs of counsel on scale B.


Wepener J

Heard: 26 and 28 August 2024

Delivered: 29 August 2024

For the Plaintiff:

Adv L. Acker

Instructed by KWA Attorneys

For the Defendant:

In person