

SOUTH AFRICA / JUDGMENT

Du Toit v Du Toit (59114/16) [2017] ZAGPPHC 731 (21 November 2017) [2017] ZAGPPHC 731

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie

CASE / FILE NUMBER

59114/16

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

21/11/2017

CASE

NO: 59114/16

Reportable:

No

Of

interest to other judges: No

Revised:

Yes

In the

matter between:

C.C.J. DU

TOIT Plaintiff

and

A.S.

DU

TOIT Defendant

JUDGMENT

1. The plaintiff claimed payment from the defendant of the amount of R 443 946, 27 plus interest and costs arising from to loan agreements.
2. It was common cause that on or about 26 April 2011 the amount of R220 000,00 and on or about 6 June 2011 the amount of R 150 000, 00 were lent by the plaintiff. According to the plaintiff, these amounts were lent to the defendant in his personal capacity. According to the defendant, these amounts were not lent to him in his personal capacity but to the company Online Stuff Pty Ltd (also "the company") of which he was the director and shareholder.
3. The main issues in dispute were, firstly, the identity of the borrower, i.e., the defendant in person or the company and, secondly, whether interest was payable on the loans as claimed by the plaintiff. The defendant raised three special pleas of which one remained namely the plea of prescription. This plea, however, depends on whether the defendant personally borrowed the money or not. This plea does not fall to be decided separately for the reason that if this court finds that the defendant borrowed the money in his personal capacity, the plaintiffs claim would not have become prescribed. This is because the summons was served within three years of the last payment in respect of the debt.
4. On behalf of the plaintiff the plaintiff himself testified as well as his daughter, Me Chantel du Toit ("Chantel"), who had previously been married to the defendant. On behalf of the defendant only the defendant himself testified. I shall now briefly refer to the evidence of these witnesses.
5. The plaintiff is an Engineering Consultant and Project Manager residing and working in Vietnam. He has been in Asia for approximately 10 years and visits South Africa approximately once a year on holiday. Chantel was married to the defendant from June 2006 until May 2016 when they were divorced. Chantel and the defendant resided in the Golf Estate in Centurion.
6. In respect of the first loan the plaintiff testified that he visited South Africa on holiday during April 2011. At the time the defendant's business was that of purchasing goods and selling same online to the public. The plaintiff did not know much of the defendant's business and his business activities and knew nothing of the company of the defendant. He was only aware that the defendant sold Apple related products online to the public. He testified that during the visit in April 2011 the defendant told him that he had been on an expedition trip to the United States of America. The defendant was interested in the sport of archery and told the plaintiff that he intended to purchase crossbows from the United States which he wanted to import and sell online in South Africa. For this purpose he requested the plaintiff to lend to him the amount of R 220 000,00.

7. According to the plaintiff there was no mention of the company during their discussions and there was no doubt that the loan requested by the defendant was to be to him in his personal capacity. The plaintiff was prepared to grant the defendant a loan as requested by him for the simple reason that he was prepared to assist his son-in-law with the project which he wanted to embark upon.
8. The plaintiff testified that they did not agree on fixed amounts of instalments to be repaid to him as the defendant promised to pay back the loan amount as and when he sold the crossbows and that it would be within a reasonable time. The plaintiff informed the defendant that he would be using money which he would borrow from his own access bonds relating to property he owned and that he wanted interest on the loan amount at the rate which he was paying to his bank at the time in respect of these access bonds. At the time the interest rate was 12% per year. He also informed the defendant that in 18 month's time he would have a cash flow problem in servicing his access bonds and insisted on being paid back the full loan amount prior thereto. He explained to the defendant that if that does not happen he would have to transfer money to South Africa from abroad, which would cost a lot of money, and that he was not prepared to do so. He testified that the defendant was quite adamant that he would pay back the loan long before that time arrived. They accordingly agreed that the defendant would pay interest on the amount at the same rate charged in terms of the plaintiffs access bonds in respect of the loan to plaintiff and furthermore that the full loan amount plus interest would be paid back in instalments as the products were sold and that the whole loan amount plus interest would be paid back within a reasonable time and not later than a date 18 months hence.
9. The plaintiff explained that the interest rate of 7, 8% which he claimed in terms of his Particulars of Claim is an interest rate decided upon between himself and his attorney during consultation. They decided that it would be difficult to calculate the different interest rates from time to time and that they decided to use the aforesaid interest rate which was the lowest during the relevant period. By doing so, the interest rate claimed would be to the benefit of the defendant.
10. The plaintiff further testified that he obtained the loan through his access bonds and paid the amount of R 220 000, 00 into the account which the defendant had provided him with. It is common cause that this account was that of the company Online Stuff Pty Ltd.
11. Regarding the second loan the plaintiff testified that during June 2011 and whilst he was in Vietnam, the defendant contacted him by email. This email, dated 5 June 2011, is quite a long email and served as exhibit A1 before this court. In the email the defendant stated that he wanted to share his business plan with the plaintiff. He then explained that he wanted to obtain a retail outlet from which he could conduct business instead of continuing to do so from his home. The defendant stated that he had obtained a premises in the Grey Owl Village Mall but that his cash flow was such that he would not be able to get going on that premises. He stated that he was not able to obtain assistance from local banks and that he required the amount of R150 000, 00 to shop-fit the premises.

12. The plaintiff responded by email on the next day, 6 June 2011, and informed the defendant that he was prepared to assist them but that his money in South Africa was fast drying up as he had already made big investments in the defendant and Chantel's businesses and that they have to realise that he was funding same from his access bonds in order to assist them. He then referred to the money he had lent to them as follows:

"Chantel se lening R 140, 000

Andre se Ross lening R 220, 000

Andre se Owl Village R 150, 000 (verdere lening)

Totaal R510,000

13. The plaintiff then referred to conditions relating to this further loan as follows:

"My voorwaardes vir die verdere lening is die volgende:

1. Ek wil geen aandeel aan julle besighede he nie
2. Ek ontvang 'n maandelikse bedrag van 1% rente per maand op julle uitstaande lening aan my verskuldig. Byvoorbeeld as die uitstaande saldo R510 000 is, verwag ek R5,100 betaling per maand. Dit is die impak op my cashflow. Geen verskoning vir geen maandelikse paaielemente sal aanvaar word
3. Maandelikse paaielement moet voor 7de van elke maand betaal word
4. Kapitaal skuld delging is betalings aan my wat hierdie 1% per maand paaielement oorskry. Byvoorbeeld as julle R10,100 oorbetaal op die R510,000 uitstaande lening dan is R5,100 die lenings paaielement en R5,000 vir skuld delging; nuwe leningsaldo verminder dan na R505,000 en volgende maand se paaielement is dan R5,050.
5. As julle my voorwaardes aanvaar soos bo uiteengesit, sal ek reel vir betaling van hierdie verdere lening"

14. The defendant responded to this email on the same day, 6 June 2011 as follows:

"Hi goeie more Pa!

Dankie vir die terugvoer!

Ek kan nie vir Chantel praat nie, sy sal haar eie opinie en besluite maak oor hierdie, Die Online Stuff deel (R220K + R150K) sal uit die Online Stuff rekening uit kom, en Online Stuff (en ek) neem verantwoordelikheid daarvoor.

So van my kant af aanvaar ek die terme. Chantel hulle sal dit in ons boeke inskryf as 'n liability, en dan salons dit afbetaal so spoedig moontlik.

Baie dankie! Ons waardeer die hulp! Hierdie is die laaste hupstoot wat ons nodig het om te kan gat skop in die mark!

Lekker dag!

/A"

15. On the same day, 6 June 20 11, the plaintiff responded by email to the defendant stating that he was prepared to pay the aforesaid amount and again stated that he would appreciate it if the defendant would pay the original loan back to him within 12 to 18 months and furthermore reminded the defendant that his cash flow was his greatest challenge and that it would cost too much to send money back into South Africa. He confirmed that Chantel has his banking particulars to where the repayments may be made.
16. The plaintiff testified that both loans were regarded as one, that the terms were similar and that payments made by the defendant were used in respect of both loans. This was not disputed by the defendant.
17. Regarding the aforesaid condition that the plaintiff wanted no part of the businesses of Chantel and the defendant the plaintiff testified that he wanted his cash back and that if the businesses went down he did not want them to say to him that they could not pay him. He did not want the repayments to him to be subject to the success or otherwise of the businesses.
18. The plaintiff further testified that the loan to Chantel was also a personal loan to her. This was confirmed by Chantel when she testified and not disputed by the defendant. This loan was paid back by Chantel within a short period of time after it was made to her.
19. The plaintiff testified that at no stage was it mentioned by either himself or the defendant that he was lending money to the defendant's company. The fact that the money would be used for purposes of the defendant's business was of no concern to him as the defendant remained responsible for the loan which was made to him personally. If the defendant used the money for purposes of his business, that would be something between the defendant and his company, i.e., a loan by the defendant to his company and would in no way constitute a loan by him, as plaintiff, to the company.
20. It was common cause between the parties that certain amounts were paid back to the plaintiff on a monthly basis from 6 July 2011 until 15 December 2011 with the last payment of R10 000,00 on 26 September
2013. The total amount of these payments was R 41 800, 00. These amounts were paid from the account of the company but according to the plaintiff it was of no relevance where the money came from and that he could in any event not see on his account where the money came from.

21. The plaintiff further testified that he sent a statement to the defendant on a monthly basis setting out the payments and the amount due. These statements were directed at the defendant in his personal capacity. The defendant at no time reverted to him indicating that the identity of the borrower was wrong in that it referred to himself instead of to the company.
22. The plaintiff testified that after the defendant failed to make further monthly payments he confronted the defendant on many occasions. At first the defendant would blame his bookkeeper and at other times he would say that he was struggling and made promises to pay. Later on he simply ignored the phone calls of the plaintiff. The plaintiff wrote many emails in this regard to the defendant which he simply ignored. The defendant also ignored the demand by the plaintiff's lawyers acting on his behalf.
23. During cross-examination it was, inter alia, put to the plaintiff that the defendant told him that the company, and not him personally, was borrowing the money from him. The company wanted to import Ross crossbows and required the money, i.e. the first loan, for that purpose. The plaintiff stated that he knew that the purpose was to import the crossbows but denied that it was ever suggested that he would lend money to a company. He stated that if he had lent money to a company he would have ensured that there was a proper written contract in place. He never asked for any security for the loans because he was not lending money to a company but was assisting his children in their personal capacities.
24. In respect of security for the loan the plaintiff testified that he knew that the defendant and his daughter had a residential property and that he would be repaid. On the other hand he knew nothing of the company of the defendant, how the company was structured and what the business dealings of the company were. He also denied the proposition that the defendant offered shares in his company to him. He said that he resided in Asia and would not have taken up shares in the defendant's company and that it was never offered to him. At that time he had been residing in Asia for many years. The plaintiff reiterated that he was assisting his children in their personal capacities as a father would assist his children and nothing more. They even refer to him as their "Vietnamese bank".
25. Me Chantel du Toit also testified. She was married to the defendant and the bookkeeper of the company. At the time reference was made on some of the websites of the company to the name Bow Stuff but this only later became a separate company but never traded as such.
26. Me du Toit referred to the financial statements of the company for the financial year ending 28 February 2012. These documents were prepared by her as bookkeeper of the company but never discussed with or signed off by the defendant. She drafted these documents from source documents and confirmed that they reflect the financial position of the company correctly. Of note is that under the heading "Shareholders' loan accounts" a loan account of R 1 071 866, 00 was indicated as the loan account of the defendant. Under the heading "Non-current liabilities" and "Shareholders Loans" the same amount was indicated. According to her this amount included the aforesaid two loans by the plaintiff to the defendant in his

personal capacity which the defendant had lent to the company and which thus formed part of his loan account in the company.

27. Me du Toit confirmed that the defendant received monthly statements from the plaintiff and she also confirmed the payments made to the plaintiff from the account of the company. These payments were made on behalf of the defendant and were reflected in the aforesaid calculation of the loan account. The loan account also included other money which the defendant had lent to the company and which he obtained from other sources. She further testified that the reference in the accounts to Bow Stuff was merely to indicate what the particular amount related to and that it did not mean that the loan had originally been made to the company. She confirmed that the monthly statements had been addressed to the defendant personally.
28. The defendant testified on his own behalf. He testified that he is a Software Engineer and that he wrote software programs directed at the online sale of products. For this purpose it was necessary to establish a business using these systems.
29. Regarding the two loans the defendant testified that he wanted to import crossbows from the United States and for this purpose he contacted the applicant "in his capacity as director" of the company to obtain financial assistance. He testified that he made it clear to the plaintiff that it was the company that would be borrowing the money from the plaintiff for business purposes. He also offered shares in the company to the plaintiff which the plaintiff considered for some time and later, after the second loan, declined.
30. Regarding the issue of interest the plaintiff testified that he cannot remember whether this was discussed when the first loan was made but that it could have been mentioned. Regarding repayment of the loan he testified that nothing specific was mentioned but that a reasonable time was mentioned. He stated that as and when the company sold the crossbows it would most probably have been in a position to repay the loan.
31. Regarding the second loan the defendant also referred to the emails referred to above. He stated that where he referred to himself in the emails, he was referring to himself as director of the company. He also referred to his email signature which referred to him as a director and which also contained the words "adt@bowstuff.co.za". This, according to the defendant, indicated that he was acting on behalf of the company.
32. Regarding his email of 6 June 2011 where he referred to the words "(en ek)", regarding who was responsible for the repayment of the loan, he testified that he was referring to himself in his capacity as director of the company.
33. The defendant testified that if it was a personal loan it would have been for something personal such as additions to his house or for a car for his children or other such personal items. According to him the reason for the loan is indicative of the fact that it was a loan to the company and not to him personally.

34. During cross-examination the defendant was, inter alia, confronted with the fact that in none of the emails reference was made to the company Online Stuff Pty Ltd and that he always referred to himself in the first person. The defendant's response was that the fact that his email address at the top of the email referred to his email address "adt@onlinestuff.co.za" and at the foot of the email referred to "Andre du Toit Director Bowstuff", are indications that he was acting on behalf of the company.
35. According to the defendant the plaintiff, by reading the emails, should have realised that he was making the loan to the company.
36. In analysing the evidence of the plaintiff and his witness and the defendant a few brief remarks are necessary. The plaintiff created a very good impression when he testified. His evidence was straightforward and in line with the probabilities and there were no contradictions. His evidence was supported by the emails and other documentation. His evidence was also corroborated by the evidence of Me du Toit who similarly created a very good impression when she testified. Both of these witnesses withstood their cross examination without any difficulty and I find no reason not to accept their evidence in full. I find their evidence credible and reliable.
37. The defendant, on the other hand, did not create a good impression. I shall refer to a few aspects in this regard. Firstly, the defendant failed in his attempts to show that the plaintiff should have realised from the contents of the emails that the defendant was not acting in his personal capacity but on behalf of his company. A reading of the emails shows that reference was never made to his company and the impression was never created that he was acting on behalf of the company. He referred at all times to himself in the first person and never in his capacity as a representative of the company. The fact that his email address contained the word "onlinestuff" and the word "bowstuff" appeared at the end of the letter, by no means create the impression that the defendant was acting on behalf of the company when he wrote the emails. The

impression created by the emails was that the defendant himself was asking for the loan and not the company.

38. The email of 6 June 2011 which the defendant wrote to the plaintiff accepting the second loan, is, in my view, conclusive in this regard. After indicating that he would make payment from the "Online Stuff" account, he stated that Online Stuff and himself take responsibility for the two loans. The words "en ek" is a clear indication that he regarded himself as responsible and liable for the two loans. The defendant's attempts to say that he was referring to himself as the director of the company and that his intention was to put the plaintiff at ease knowing that there was a director which will manage the company properly, do not make sense and is clearly a false attempt to exonerate himself.

39. From the emails it is also clear that the plaintiff at all times regarded his loans as being to the defendant and Chantel in their personal capacities. A good example of this is his reference in his email of 6 June 2011 to "Chantel se lening" and "Andre se Ross lening".
40. The probabilities also favour the version of the plaintiff. His evidence that he knew nothing, or very little, of the business of the defendant was not disputed. From his evidence it was clear that he had very little knowledge of the business of the defendant, the structure of his company and what dealings the company had. The plaintiff is not financially naive, and this fact was extracted from him during his cross-examination, and I find it most improbable that he would have made these rather large loans with money which he had to borrow from his own bank, without any written contract or any form of security, to a company of which he knew virtually nothing. He was prepared to assist his children and he trusted them and if it really became necessary he knew that they had immovable property to make good the loans. To make a loan to a company which had no assets is clearly quite a different proposition and I find the plaintiff's evidence more probable that in such an event he would have insisted on a proper written contract and some form of security.
41. It is also clear from the evidence that the plaintiff looked at the three loans to his two children, or rather his daughter and his son-in-law, as one, in the sense that he was assisting them both. It was never in dispute that the loan to his daughter was a loan to her personally and there is no reason to doubt that the two loans to his son-in-law, the defendant, would be on a different footing. That much is clear from the email of the plaintiff.
42. Furthermore, if the defendant had in so many words made it clear to the plaintiff that he was lending the money to the company, as the defendant testified that he did, one would on the probabilities have expected much more to have been said between them regarding the ability and the future ability of the company to make good on their loans. This was never done and the probabilities thus do not favour the version of the defendant.
43. For the same reason I regard the evidence of the defendant that he had offered shares in the company to the plaintiff and that the plaintiff had considered taking up such shares, as highly improbable. The plaintiff was permanently resident in Vietnam, visited South Africa for a short holiday every year, but not always, and knew virtually nothing of the business and company or companies of the defendant. It is improbable that he would have considered taking up shares in the company of the defendant in these circumstances. This fact was in a roundabout way corroborated by his email of 6 June 2011 where he indicated that he wanted no part of their businesses.
44. I have already referred to the fact that in the emails the defendant referred to himself in his personal capacity and never to the company. The defendant did not survive cross examination in this regard and more particularly in respect of his evidence that the plaintiff should have known from the contents of the emails that he was making a loan to the company.

45. The evidence also showed that the defendant was untruthful in respect of a number of crucial aspects. Firstly he testified that his business was at all times doing well but when confronted with his opposing affidavit in the Summary Judgement proceedings where he stated that his company was experiencing financial hardship at the time, he laughed and when confronted again, he said that that was the information they had at the time. When pressed on the issue he was constrained to admit that he had lied under oath.
46. The defendant was also confronted with his statement in his answering affidavit in the Summary Judgement proceedings that "the

formalities with regards to repayments were never discussed and interest certainly never played any role in our discussions".

His evidence during the trial, which was at a time when the evidence had been given by the plaintiff and the emails confirming the opposite had been presented, was to the contrary namely that the repayment of the loan and the issue of interest had been discussed in quite some detail. The defendant admitted that he had perjured himself when he signed his affidavit. In respect of all of these lies it is not only the fact of the lies but the manner in which the defendant responded to these issues in court which is a cause of concern. The fact that he had lied did not seem to bother the defendant one bit and the impression was created that he was prepared to change his evidence as required by the moment.

47. Another aspect which did not reflect well on the truthfulness and reliability of the evidence of the defendant was his evidence when confronted with the question why, even on his version, the company failed to continue to pay the plaintiff. His quick answer was that the bookkeepers should be asked why the plaintiff wasn't paid. This answer was clearly not acceptable. The defendant received the statements from the plaintiff on a monthly basis and they all set out the amount due to the plaintiff and there is no doubt that he knew exactly what had been paid and what not and what was due to the plaintiff. The defendant's attempt to shift the blame was disingenuous. When confronted with the fact that he had received the monthly statements and knew what the position was, the defendant said that he told the bookkeepers that the amounts had to be paid. Having regard to all the circumstances of the case, the long period of non-payment and the amount involved, this evidence can simply not be the truth.
48. Another aspect which speaks to the probabilities comes from the response by the defendant's attorney in a letter dated 27 July 2015 to the plaintiff in response to the plaintiffs email to the defendant wherein he referred to his latest statement to the defendant

reflecting the money due by the defendant to him. The attorney's response in this regard referred to the defendant's estate and does not state the simple fact, if it were true, and if it were the defendant's instructions to her, that the loan was not made to the defendant but to the company. It would have been the simplest thing to state this in the responding letter instead of making threats with relation to the estate of the defendant and the estate of the plaintiff's daughter which concerned the divorce they were going through.

49. Having regard to, inter alia, the aforesaid factors I do not find the defendant to be a credible witness on whose evidence reliance can be placed and I furthermore find his evidence to be against the probabilities. On the other hand, as I have mentioned before, the evidence of the plaintiff and Me du Toit, was credible and reliable and not against the probabilities. In the result I find that the plaintiff has proven his case on a balance of probabilities and that judgement should be granted in his favour. Having come to this finding it is clear that the plea of prescription should also be dismissed.
50. It was common cause that there remained no dispute about the amount of the claim and the interest in respect thereof. As far as costs are concerned there is no reason why costs should not follow the event.
51. In the result the following order is made:
1. The defendant is ordered to pay to the plaintiff the amount of R 443 946, 27 together with interest thereon at the rate of 7, 8% per annum, capitalised monthly, from 1 March 2015 until date of payment.
 2. The defendant is ordered to pay the plaintiff's costs of suit

C.P. RABIE

JUDGE OF THE HIGH COURT

21 November 2017

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