IN THE HIGH OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

14/12/2012 DATE

SIGNATURE

CASE No: 4402/07

DATE: 14/12/2012

In the matter between:

MOTSAMI PETRUS RANTHO	**PLAINTIFF**
AND	
MODITI LUCAS MANKOE	**1ST DEFENDANT**
JOLINA NANANA MASHILE	**2ND DEFENDANT**

JUDGMENT

RANCHOD J:

[1] The plaintiff in this matter instituted a claim against the first and second defendants for the payment of an amount of R650,000.00 in terms of a loan agreement.

[2] The first defendant does not dispute his liability in terms of the loan agreement, but relies on a counterclaim. Judgment has already been entered against the first defendant in separate proceedings prior to this trial having commenced but the execution of the judgment has been suspended pending the decision on the counterclaim raised by the first defendant.

[3] Even though judgment has already been entered against the first defendant, the plaintiff insisted on proceeding with the claim against the second defendant, having alleged in the pleadings that there was a written agreement that was entered into with both the first and the second defendants.

[4] The counter claim is based on an alleged agreement in terms of which certain services were rendered to the plaintiff. It is alleged that the first defendant was to calculate the annual increases to which a close corporation, of which the plaintiff is a member, would be entitled to in terms of a tender awarded to the close corporation. (The first defendant said he had a formula to do the calculations which, it was alleged, rendered higher amounts than the calculations based on the Consumer Price Index (CPI).) The first defendant alleges that this agreement was entered into telephonically between himself and the plaintiff. The plaintiff denies that a telephonic agreement was concluded.

[5] Two pertinent issues have to be decided in this matter. First, whether a written agreement in terms of which plaintiff loaned the first defendant R650,000.00 was also signed by the second defendant and thus assumed joint liability for repayment of the loan. A determination of this issue will determine whether the second defendant is liable jointly with the first defendant for the amount as admitted by the first defendant himself. Second, whether the counterclaim is to be upheld.

[6] At the commencement of the trial an application for the separation of the merits and quantum in respect of the counterclaim was granted. I was also asked to make a ruling on whether the plaintiff may lead evidence on both the claim and the counterclaim in circumstances where the first defendant had already admitted liability in respect of the claim. I ruled that the plaintiff may do so as the liability of the second defendant remained in dispute. As will be apparent in what follows, the second defendant's defence is intertwined with that of the first defendant.

[7] The plaintiff testified that the agreement, titled "Memorandum of Loan Agreement" was drafted by the first defendant (who is a practising attorney) and faxed to him in Kimberley. The second defendant was to be a party to the agreement in terms of the draft. Thereafter he had a meeting with the first defendant, which was also attended by Mr Tebogo Rakgoale, who was a friend of both the plaintiff and first defendant. It is common cause that at this meeting, the first defendant undertook to take the draft agreement back to the second defendant, his wife, in order to obtain her signature.

[8] Both the plaintiff and Rakgoale testified that the next day the first defendant returned with the agreement duly signed by him and that he said that the other signature appearing on the document was the second defendant's signature. They testified that the signed copy was thereafter lost.

[9] The first defendant, however, testified that the second defendant had in fact refused to sign the agreement and that he then went back to plaintiff and persuaded the him to conclude and oral agreement between him (the plaintiff) and the first defendant. The second defendant was therefore not a party to the agreement. This is then the crucial factual dispute on the plaintiff's claim in convention: whether the

first defendant did return with the agreement bearing two signatures, and whether he said the signatures were those of himself and his wife.

[10] The second defendant pleaded that she did not receive the loan amount. This is, in my view in relevant, if she signed the agreement she is liable to repay. If it is found that she did not sign the agreement then, absent any oral agreement, she cannot be held liable. There is, in any event, evidence that the first defendant and the second defendant, being husband and wife, would both have benefited from the loan, whether directly or indirectly.

[11] A striking feature of both the defendants' pleadings and affidavits resisting summary judgment is that they at no stage deny that the loan agreement was signed by them. In response to plaintiff's allegation that a written agreement was signed by the parties the first defendant simply admits having received the loan amount, but denies that itt was also in favour of the second defendant. There is no explicit denial of the agreement having been signed.

[12] The second defendant pleaded as follows:

> "The second defendant admits to having seen an agreement similar to annexure 'POC1' brought to her by first defendant, but denies having received an amount of R650,000 from plaintiff".

It is apparent in the case of the second defendant as well that there is no explicit denial of having signed the agreement.

[13] In a request for further particulars for trial in terms of Uniform Rules of Court 21, the plaintiff asked whether the second defendant denied having signed the loan agreement. The second plaintiff responded as follows:

"The second defendant did not have any duty to sign the loan agreement marked annexure 'POC1' as she had never spoken to plaintiff."

[14] It is clearly apparent that the request was not answered and, once again, there is no denial of having signed the agreement.

[15] After first and second defendants entered appearance to defend the plaintiff had applied for summary judgment. In the first and second defendants' affidavits resisting summary judgment, there are again no denials of having signed the loan agreement.

[16] Rule 22 of the Uniform Rules of Court, inter-alia, reads:

"(2) The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted, and to what extent, and shall clearly and concisely state all the material facts upon which he relies.

(3) Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea."

[17] Having regard to rule 22, the first and second defendants are deemed to have admitted that the loan agreement had been signed by them. (See Jones and Buckle, The Civil Practice of the Magistrates' Court in South Africa on rule 19 of the Magistrate's Court Rules for examples of the application of this rule and similar rules of other courts.)

[18] In the circumstances, the first defendant's evidence that neither he nor the second defendant signed the loan agreement falls to be rejected.

[19] Apart from this a negative inference can be drawn from the defendants' pleadings because of the rather peculiar manner in which they pleaded (and in particular how the second defendant responded to a question whether she denied having signed the loan agreement). This negatively affects their credibility. It is clear from the summons and particulars of claim that the plaintiff pays he had lost the signed agreement. The unusual responses of the defendants in the pleadings in my view justify the inference that they were worried that the signed agreement may surface before trial, in which case a denial of the signatures would have destroyed their defence. The defendants were clearly being opportunistic when they became aware that the plaintiff had lost the signed copy of the agreement.

[20] The first defendant's version that an oral agreement was concluded regarding the loan at a second meeting is, in my view, from the evidence, improbable. It is not in dispute that the plaintiff was initially reluctant to advance money to the first defendant. It is also clear from the evidence that the plaintiff insisted on some security, which was to be furnished by the second defendant. It is only after the written agreement was faxed to him in Kimberley and in which the issue of security for the loans was addressed that the plaintiff agreed in principle to advance the money. The plaintiff says he had valuations done on the properties to be furnished as security by the second defendant at his own expense. He also engaged the services of an attorney to check whether there were any encumbrances over the properties. He testified that he drove a considerable distance, from Kimberley to Polokwane to look at the properties himself. Under these circumstances, it is in my view highly improbable that the plaintiff would, after having gone to all that trouble, simply have agreed to an oral agreement without any security. The first defendant's version becomes even more improbable. Bearing in mind that according to his

version the second defendant did not point blank refused to sign the agreement, but simply refuse to sign it in the format in which it was presented to her. It is clear from his evidence under cross examination that he could easily have gone back to his office (the first defendant being as I said, an attorney who himself had drafted the loan agreement in the first place) in order to have the agreement amended to a format which would have satisfied both the second defendant and the plaintiff. The first defendant had required the loan urgently. It is therefore improbable that he would have returned to the second meeting without another agreement having been drafted knowing that the plaintiff had previously demanded security.

[21] If one accepts that the unsigned copy of the loan agreement which was faxed to the plaintiff is a true copy of the original signed agreement which is missing, and I accept that it is, then it is apparent that there is a clause in the agreement that the money would be repaid after the sale of one of the second defendant's properties before 30 November 2006. However, when giving evidence, both first and second defendants testified that there was no sale being contemplated. From this it would appear clearly that the first defendant misrepresented the facts to the plaintiff. When plaintiff's Counsel put it to the first defendant in cross-examination that he had made a misrepresentation to the plaintiff, he did not deny it. This too reflects adversely on the credibility of the first defendant.

[22] The plaintiff and Rakgoale testified that the first defendant said he needed the money because a property of his was at risk of being attached. When giving evidence, the first defendant denied it and said that he had in fact required the money for a project he was involved in in Venda. However, his evidence can be safely rejected in light of his credibility. It is apparent that the first defendant impressed upon plaintiff that the money was urgently needed to save the common

home of the first and second defendants in order to persuade the plaintiff to make the loan and that the loan was in fact procured for that purpose. This would have given the second defendant ample reason to have become a party to the agreement.

[23] Whilst giving testimony the first defendant initially said under cross examination that he had discussed the agreement with the second defendant before he faxed it to the plaintiff in Kimberley. He said the second defendant had agreed in principle with the agreement. However, when he continued with his testimony on the next court day, the first defendant contradicted what he had said earlier and denied that he had ever spoken to the second defendant about the agreement until after he had met the plaintiff in Polokwane. He said it was only after the meeting with the plaintiff in Polokwane that he had shown the agreement to the second defendant. It is highly improbable that the first defendant would have negotiated an agreement with the plaintiff in terms of which the second defendant was to furnish the properties as security and then tax the agreement to the plaintiff, without having first discussed it with the second defendant.

[24] I turn then to the evidence of the second defendant.

[25] I said earlier that the second defendant also did not deny in her pleadings and in the affidavit opposing summary judgment that she had signed the agreement. It is in my view incomprehensible why the defence would be raised that she did not receive the money, when the obvious defence would simply have been that she did not sign the agreement and was not a party to it. It seems that like the first defendant, the second defendant also weighed up her options in order to see whether the signed agreement would materialise before for the first time in her evidence at the trial, denying having signed the agreement. The second defendant

also contradicted her further particulars in the pleadings, in which she stated that she had previously agreed that her properties can be used as security, whereas she testified in court that she only heard on the evening of the first meeting that the loan agreement had been drafted.

[26] It was put to plaintiff during cross examination that after having refused to sign the agreement, the second defendant never heard from the first defendant about the subsequent discussions with the plaintiff. It was also put to the plaintiff that the second defendant was surprised that the amount of R650,000.00 had been paid to the first defendant without her knowledge. However, her oral testimony contradicts what was put to the plaintiff in cross examination. She testified that on the evening of what must have been the second meeting between plaintiff and first defendant, the first defendant told her that he had met with his "friends" and that the loan was advanced to him. The second defendant's version that when she refused to sign, the first defendant did not even try to persuade her, is in the light of the history of the matter, the plaintiff's insistence on security, and the first defendant's urgent need of the loan, in my view improbable.

[27] The plaintiff and his witness Rakgoale gave somewhat different versions of the circumstances in which the signed agreement was lost. However, that was not material. I find them to have been truthful witnesses on the key aspects of the matter and, apart from the contradiction around circumstances of the lost document no criticism can be levelled against their evidence. In my view they were good witnesses and their demeanour also could not be faulted in the witness box.

[28] The first defendant suggests that the plaintiff and Rakgoale fabricated a version, but he could give no satisfactory explanation why Rakgoale, formerly the

Chief Law Adviser to the Premier's Office in the Northern Cape, would be part of such an unlawful conspiracy and would perjure himself. First defendant merely offered the explanation that Rakgoale is "closer" to the plaintiff than to himself. There is clearly no bad blood between them, and Rakgoale had in fact assisted the first defendant in arranging the loan from the plaintiff in the first instance.

[29] As far as the contradiction between the plaintiff's and Rakgoale's evidence regarding the circumstances under which the signed loan agreement was lost, it is the first defendant's version that the two of them fabricated their evidence that the agreement was signed and lost. If that was the case, one would have expected them to have connived beforehand on testifying as to how and where the document was lost. In my view, this is an instance where the contradiction actually supports the conclusion that they did not fabricate their evidence.

[30] In all the circumstances, I accept the plaintiff's version that the first defendant presented him with the loan agreement signed by himself and that he said that the second defendant had also signed it and that there was a signature in the space left for the second defendant's signature.

[31] I turn, then, to the first defendant's counterclaim.

[32] The first defendant alleges that a telephonic agreement was concluded between him and the plaintiff in terms of which he would do calculations for annual increases on a tender which had been awarded by the government to the plaintiff for a 10% commission. As I said, the first defendant has pleaded that the commission due to him in terms of this agreement would be set off against the amount owed by him to plaintiff in terms of the loan agreement.

[33] From plaintiff's evidence it is apparent that he and the first defendant had, prior to the present dispute between them, a close relationship which emanated from both of them having been awarded a tender in 2001 by the Northern Cape government when plaintiff secured 40% and the first defendant 60% of the tender. He testified further that that tender was for the period 2001 to 2004. That tender also provided for the escalations on a yearly basis, based on the consumer price index. He said that the first defendant would do the calculations for both of them. It was during this time that they developed a close relationship with each other. He further testified that the first defendant could not secure a later new tender of which he, that is the plaintiff, managed to get 95%. It was at this stage that the first defendant had handed him a page reflecting how he did the calculations for the yearly escalations. He discovered that the first defendant was not using the CPI but a certain formula which resulted in the higher amounts than those based on the CPI.

[34] Plaintiff testified that the loan agreement was signed in July 2006 by all the parties concerned. The first defendant was to have paid the loan amount by November 2006. By December, the first defendant had not as yet paid the loan and in the meantime the 2005/2006 increment calculations had to be done. Since the first defendant's calculations yielded a higher amount than the CPI calculations and the plaintiff could not find the first defendant's formula which he had given him earlier, he asked the first defendant to do the calculations. Plaintiff further testified that the first defendant did the calculations after he had sent him all the invoice copies for 2005/2006 which he had provided to the relevant departments to whom he provided the security services in accordance with the tender. The first defendant informed him several days later that he will charge 10% of the amount calculated as his commission and that he may reduce it to 6%. He told first defendant that since

he had loaned him money free of interest he was surprised that he would charge him a commission for doing the calculations. The first defendant responded by saying "nothing for nothing". He says the first defendant thereafter sent him a one-page agreement in which it was stated that the plaintiff owes him 10% for the calculations and said that he will not provide the plaintiff with the results of the calculations unless he signed the agreement. First defendant thereafter sent him a second copy of the agreement but he refused to sign it as well. Plaintiff says he then downloaded the CPI figures from the Internet and did his own calculations. The various departments then paid him according to his own calculations which amounted to some R4 000 000.00. The first defendant had informed him that his calculations gave a figure of R5 500 000.00. Plaintiff further testified that the first defendant never sent him the calculations that he had done and he had never seen them. That was his evidence in chief.

[35] Under rather lengthy cross-examination the plaintiff stood by his version that no agreement had been reached between him and the first defendant regarding the alleged commission that first defendant was to charge for performing the calculations. He said that the first defendant had raised the 10% commission issue only around January 2007, that is, sometime after the loan became due. He further testified that he even told the first defendant that he cannot set off what a close corporation may owe him against what he owed him (the plaintiff) personally.

[36] In my view, the fact that the government departments paid the plaintiff the increment based on his own calculations and not on that provided by the first defendant confirms the plaintiff's evidence that they did not come to any agreement as regards the commission.

[37] The evidence of Rakgoale is important. Rakgoale testified that after the first defendant defaulted in his obligations to the pay the loan, he contacted the first defendant on three separate occasions. The first time was towards the end of 2006. The first defendant undertook to make payment. Rakgoale then contacted the first defendant again during February 2007. The first defendant then told him that he was waiting for a fee with regard to a Road Accident Fund (RAF) matter and that he would make payment before the end of February 2007. Thereafter, he approached the first defendant again at the end of February 2007. It was at this time only that the first defendant stated that as a result of the setoff agreement, he was no longer indebted to the plaintiff. It was only during this third conversation that the first defendant for the first time raised the setoff agreement. This evidence, that the first defendant had never before mentioned the setoff agreement during the first or second telephonic conversations was not challenged during cross examination. First defendant testified that he was the attorney of record for both defendants, that is, himself and the second defendant, that he has experience in trial matters, knows that evidence must be challenged and he also sat next to his counsel in Court whilst Rakgoale and the plaintiff were being cross-examined. Yet he did not challenge the evidence.

[38] There is corroboration for Rakgoale's evidence that the first defendant had told him that he was waiting for the RAF fee and that it was eventually paid to him during March 2007. If Rakgoale fabricated the evidence in this regard, it would be a remarkable coincidence that a RAF fee was in fact on the verge of being paid to the first defendant. Rakgoale's evidence therefore has the ring of truth about it.

[39] Given that it was first defendant's evidence that the setoff agreement was concluded during or about November 2006, and the fact that the first defendant

failed to mention the setoff agreement during the first two conversations with Rakgoale is damning. The inevitable inference is that he did not mention it because no such agreement had been concluded and came as an afterthought.

[40] The first defendant's version that the plaintiff repudiated the setoff agreement is in my view also improbable. The first defendant testified that he had informed the plaintiff during January 2007 that according to his calculations the plaintiff would be entitled to payment by the government in the amount of some R8 500 000.00 for escalations on the tender. The first defendant's testimony was to the effect that his calculations will be higher and that the plaintiff knew it would be accepted by the government. The plaintiff's calculations that were submitted to the government at a later stage only yielded some R4 500 000.00. It is therefore inconceivable, in my view, that the plaintiff under those circumstances would repudiate the alleged telephonic agreement. On the first defendant's version, the plaintiff breached the telephonic agreement in a brazen manner, something which caused the plaintiff a loss of some R4 000 000.00. That appears to be highly improbable.

[41] Surprisingly, the first defendant testified that he would not have pursued his claim if the plaintiff did not issue summons and only intended to do that as a counterclaim. This is astounding to say the least as on the first defendant's evidence the plaintiff was in flagrant breach of the telephonic agreement. The first defendant was, according to himself, entitled to his commission and he had spent long hours late into the night doing the calculations. Given that the first defendant's alleged claim or counterclaim was much larger than the plaintiff's claim in convention, it is surprising that the first defendant says he had always only intended to raise it as a counterclaim. One would have thought that given the amount of the counterclaim. He would have vigorously pursued his claim if he was so confident that an

agreement had been concluded with the plaintiff in this regard. In my view, the first defendant's version is improbable and in fact justifies the inference that no agreement was concluded with the plaintiff. I say this also in the context that the first defendant has the onus to prove his counterclaim. In my view, he has not discharged that onus.

[42] If, as submitted by the first defendant, that plaintiff had repudiated the telephonic agreement then he had several options, none of which he elected to exercise. He could have ignored the repudiation and claim specific performance or cancel the agreement and claim damages. The first defendant did neither. The counterclaim falls to be dismissed.

[43] I make the following order:

1. Judgment is granted against the second defendant, jointly with the first defendant, for:

    1.1 payment of the amount of R650,000.00;

    1.2 interest on the amount of R650,000.00 at the rate of 15.5% per annum as from 30 November 2006 to date of payment;

    1.3 costs of suit.

2. The first defendant's counterclaim is dismissed with costs.

N RANCHOD

JUDGE OF THE HIGH COURT

Parties:

Counsel for the Applicant: Adv P Van Der Berg

Attorney for the Applicant: Joubert Attorneys, c/o Sanet De Lange Inc, Pretoria.

Counsel for the Defendant: Mankoe Inc , c/o Matabane Inc, Pretoria.

Attorney for the Defendant: Adv S M Malatji