IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 66489/2011

DATE: 27 AUGUST 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

CORNELIUS JOHANNES HIBBERT DE KLERK **PLAINTIFF**

and

ANTON RENIER BOTHA **DEFENDANT**

JUDGMENT

VAN NIEKERK AJ

Introduction

[1] The plaintiff seeks to recover monies that he claims were lent and advanced to the defendant by him in terms of an oral agreement between them, in the sum of R 4 700 000. In his particulars of claim, the plaintiff avers that the monies were lent and advanced on 2 July 2004, repayable on 1 August 2008. The plaintiff avers further that after demanding payment, on 27 October 2008, the defendant issued a cheque in favour of the plaintiff in the amount of R4 700 000, drawn on the 'AR Botha Familie Trust' and annexed as "A" to the particulars of claim. It is not disputed that the cheque was deposited by him, and that it was not honoured by the defendant's bank. However, the plaintiff's claim is not based on the cheque - he sues in terms of the oral agreement that he contends was concluded between him and the defendant.

[2] The defendant denies that an agreement was concluded between him and the plaintiff in terms of which

the amount of R4 700 000 (or any other amount) was lent and advanced to him. In amplification of that denial, the defendant avers that in June 2004 an oral agreement was concluded between an entity known as Value Chemicals (Pty) Ltd ('Value Chemicals') and the plaintiff in terms of which the plaintiff agreed to lend and advance the sum of R2 200 000 to Value Chemicals, which in turn agreed to repay the loan in installments of R27 500 per month. The defendant avers further that during 2004, an oral agreement was concluded between an entity known as Marble Farming (Pty) Ltd (Marble Farming) and the plaintiff in terms of which the plaintiff agreed to lend and advance to Marble Farming, represented by a Mr. Koos van den Berg, the sum of R 2 500 000.

[3] The aggregate of the loan amounts that the defendant contends were advanced to Value Chemicals and Marble Farming respectively amounts to R4 700 000, being the amount claimed by the plaintiff from the defendant.

[4] The defendant further pleads that the sum of R2 380 000 was repaid to the plaintiff by or on behalf of Value Chemicals and Lebrusco (Pty) Ltd (a company of which the defendant was a director), and that the best of his knowledge, Marble Farming repaid of the sum of R 750 000 of the loan advanced to it, leaving an outstanding balance of R1 750 000 in respect of that loan. An acknowledgement of debt signed on behalf of Marble Farming on 23 June 2004 in favour of the plaintiff was attached to the plea.

[5] Prior to the commencement of the trial, after deliberation between the parties' representatives, it was accepted as common cause that the plaintiff had accepted payments totaling R 1 787 500, made either electronically or by way of a number of cash payments. The difference between this amount and the R 2 380 000 that the defendant pleads was repaid by Value Chemicals and Lebrusco relates to disputed cash payments in respect of the loan that the defendant contends was advanced to Value Chemicals. The defendant concedes that he is unable to prove that the balance of the cash payments were effected by Value Chemicals and Lebrusco and accepts that for present purposes, it has been established that an amount of R1 787 500 has been repaid to the plaintiff and that this sum should be deducted from the capital amount claimed.

[6] The material issue in dispute is whether the sum of R4 700 000 was lent and advanced by the plaintiff to the defendant in his personal capacity. The plaintiff bears the onus to prove this fact. There is also a dispute about the computation of interest, but for reasons that will become apparent, it is not necessary for me to make any decision in this regard.

The evidence

[7] The first witness called by the plaintiff was a Mr. Faan Botha, who at the relevant time was employed as a farm manager at Marble Farms. He testified that in June 2004, he accompanied the defendant and a Mr. Koos

van den Berg to Bedfordview, to a meeting with the plaintiff. The evidence given by Botha, who is related to the defendant, is encapsulated in a statement made by him to the South African Police Services. The statement is undated, but it warrants repetition here:

> Ek is ‘n volwasse man met id NO 5[...] en woonagtig te Grysbankplaas Marble Hall met kontak no [...].
>
> In Junie 2004 het ek saam met Anton Botha en Kood van den Berg na Bedfrodview gegaan om geld te leen by Corrie de Klerk. Anton en Kood het ‘n bedrag van R 2 700 000 geleen.
>
> ‘n Bedrag van R 250 000 terug betaal in Desember 2004 aan mnr Corrie, die bedrag wat uitstaande was, was dan R 2 500 000.
>
> Anton het my geskakel en my meegedeel dat hy al sy besighede gaan verloor en dat ek deel was van die besluitneeming en date k hom moes help anders sou hy als verloor het. Daar is besluit deur my en my twee seuns om die plaas Grysberg te verkoop om die skuld te betaal by Corrie. Die plaas toe vd bedrag van R 4 100 000 - Die bedrag wat oorgebly het sou aan my oorbetaal geword het om die ander skuld mee te betaal.
>
> Ek het later ‘n oproep vanaf Corrie ontvang wat my meegedeel het dat hy nooit sy geld ontvang het nie. Ek het op geleenthede met Anton gepraat wat my meegedeel het dat hy wel Corrie elke maand betaal an dat ek nie my moet “worry oor Corrie nie".

[8] Despite beirrg called as the plaintiffs first witness, Botha’s evidence is entirely destructive of the plaintiff’s case. The high water mark for the plaintiff in Botha’s testimony was his assertion that the defendant had acted as no more than a facilitator in the granting of a loan of R 2 500 000 by the plaintiff to Marble Hall -this because the defendant was acquainted with the plaintiff. Botha had no knowledge of any amount of R 2 200 000 that the defendant contends was advanced to Value Chemicals. In essence, Botha testified that a sum of R2 500 000 was advanced by the plaintiff to Marble Farming for the purpose of providing operating capital for that entity, and that the money was received by Marble Farming and utilised by it at a stage when the defendant had no involvement in the affairs or management of Marble Hall. Botha specifically denied that the plaintiff had lent and advanced any money to the defendant in his personal capacity.

[9] In his evidence, the plaintiff sketched the history of his relationship with the defendant, a friendship that prior to the incidents giving rise to these proceedings, had endured for some years. In essence, he stated that during June 2004, he was approached by the defendant for a loan to purchase a factory. The plaintiff agreed to advance the defendant the sum that he required. During the same month, the defendant, Faan Botha and

Koos van den Berg met with him and sought a loan to provide capital for Marble Farms. The plaintiff testified that the loans were sought by and extended to the defendant, in his personal capacity.

[10] The loans comprised amounts paid in respect of the purchase of the factory and the operational needs of Marble Hall respectively. The plaintiff testified that he made payments, by cheque, on 11, 12, 14 and 23 June 2004 and on 14 December 2004, into accounts designated by the defendant. The total of these sums amounts to R 4 950 000, which less R 250 000 repaid in December 2004, equates to his claim of R 4 700 000. The plaintiff was unable to recall specifically in whose favour the cheques were drawn. As far as he was concerned, he had loaned the money to the defendant in his personal capacity. To this end, he drew up an acknowledgement of debt, indicating the defendant's indebtedness to him in the sums of R 2 200 000 and R 2 500 000 respectively. The document is dated 2 July 2004, the day '02' being inserted in handwriting. He handed the agreement to the defendant, who undertook to read through it and sign. The defendant never signed the agreement. The material part of the document records that the defendant is indebted to the plaintiff in the sum of "R 2 *200 000.00 plus R 2 500 000.00*' *("four million seven hundred rands") 'the capital sum' arising from and being in respect of monies lent and advanced by the creditor to the debtor on the day of signature hereof ('the loan').*

[11] The plaintiff testified that he had been furnished with a series of post-dated cheques drawn on Marble Farming (Pty) Ltd, and dated on various dates between December 2004 and August 2005 But for a single payment of R 250 000 made in December 2004 by way of one of the cheques drawn on Marble Farms, none of the cheques were presented for payment, at the defendant's request.

[12] The plaintiff testified that during August 2008, he met with the defendant. The defendant produced a cheque in the sum of R 4.7, drawn on the AR Botha Family Trust. He accepted the cheque, although he had no knowledge of the trust. The plaintiff testified further that the defendant asked him to hold the cheque for a few months before presenting it, pending proceeds from his father-in-law's estate which would be paid into the account. The cheque is dated 27 October 2008. When the plaintiff deposited the cheque on 23 November 2008, the cheque was not honoured. He was later advised by his bank, in July 2009, that the cheque had been stolen and that there was fraud in involved.

[13] Under cross-examination, when confronted with the defendant's denial that the plaintiff presented any acknowledgment of debt to him in July 2004, the plaintiff was unable to explain how the acknowledgement of debt he presented to the defendant for signature came to be dated 2 July 2004 when, on his own version, the total amount of R4 700 000 was only due and owing after December 2004, since the last advance of R 1 000 000 was only made then. The plaintiff could also not explain the difference in interest rates applicable to the amounts of two point R 2, 200 000 and R 2 500 000 respectively reflected on the document, and why the claim of R4 700 000 was split into two amounts given that on his version, there was a single debtor, being the

defendant.

[14] Further, the plaintiff denied having seen the acknowledgement of debt signed on behalf of Marble Farming on 23 June 2004 but conceded that the cheques issued by Marble Farming accorded with the sequence of repayments reflected in the document. The plaintiff could not produce the cheques issued by him in June and December 2004, despite the fact that other documents over the period were made available, in particular, the unbanked cheques drawn on Marble Farming. The plaintiff could not recall the details of accounts into which he deposited the money. The plaintiff could not explain why he did not take steps against the directors of the companies involved, if the loans were made to the defendant personally.

[15] It is not disputed that on 7 September 2013, during the course of the trial, the plaintiff sent an sms message to Van den Berg, an erstwhile director of Marble Farming, which reads as follows:

> Hello Koos, jammer vir die hof ongerief, onthou ek sal nooit geld geleen het indien dit nie vir Anton se pa staan sou wees nie. Veral nie as ek geweet het Marble Plase is in moeilikheid nie en paar maande na ek geld voorsien gaan dit bankrot. Die direkteure kan aangekla word en kom dit neer op bedrog. Ek sai weer met jou praat na die hof verrigtinge want ek voel sterk dat ek moet voortgaan met die bedrogsaak. Beste groete.

[16] The plaintiff could not explain the reference to ‘pa staan’. When it was put to the plaintiff under cross-examination that one could only ‘staan pa’ for the debt of another i.e. to act as a surety, the plaintiff could not dispute that proposition. Indeed, the sms sent by the plaintiff is consistent with his evidence in chief where in response to a question by the defendant’s counsel regarding Botha’s evidence that the plaintiff had lent and advanced R 2 500 000 to Marble Farming the plaintiff said

> My reaksie is as volg. Ek het vertroue in Anton Botha gehad. Ek sou sonder onder geen omstandingheded gelde voorsien het aan enigieman aanders behalwe Anton Botha, want Anton Botha het vir my gesê hy staan pa vir die goed.

[17] Van den Berg testified on behalf of the defendant to the effect that in July 2004, a loan was made by the plaintiff to Marble Farming. He testified further that he prepared and signed the acknowledgement of debt dated 23 June 2004 on behalf of Marble Farming to acknowledge the latter’s indebtedness to the plaintiff and that he co-signed the post-dated cheques with Faan Botha. Van den Berg confirmed that he would not have signed acknowledgement of debt had Marble Farming not been indebted to the plaintiff. None of this evidence was seriously called into question during cross-examination.

[18] The defendant testified that during July 2004, Value Chemicals, of which he was the sole shareholder, borrowed the sum of R 2.200 000 from the plaintiff in order to purchase a building. The defendant denied

that the money was advanced to him personally. He also confirmed that during the same period, Marble Farming (in which he had no interest) borrowed R2 500 000 from the plaintiff. Value Chemicals, and later Lebrusco, paid the plaintiff in instalments of R 27 500 per month. The defendant testified further that it was decided to settle the debts of Value Chemicals and Marble Farming by selling the farm Grysbank, owned by Marble Plase (Pty) Ltd, and that part of the proceeds from the sale would be paid to the plaintiff by the AR Botha Family Trust. He testified that the plaintiff presented the acknowledgement of debt dated July 2004 to him during the course of 2008, at a meeting between them in a restaurant in Kempton Park. The defendant refused to sign the document as the sums in question had not been advanced to him. The defendant conceded having handed the plaintiff a cheque, drawn by the AR Botha Family trust, in the sum of R4 700 000 and advised the plaintiff that he would inform him when the cheque could be deposited. He testified further that the debts of Marble Plase were more extensive than envisaged, including bonds registered over the farm Grysbank, and that there were insufficient funds to pay the plaintiff.

Evaluation

[19] As I have indicated, the crisp issue in dispute is whether the plaintiff advanced the sum of R4 700 000 to the defendant in his personal capacity, or whether the money was lent and advanced to the separate entities concerned. The legal principles applicable to the determination of disputes of fact where irreconcilable versions are presented to the court are well -established. *In SFW Group Ltd & Another v Martell et Cie & others* 2003 (1) SA 11 (SCA) at 14 -15, the Supreme Court of Appeal held that the technique generally employed may be summarised as follows:

> To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witnesses. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance such as (i) the witnesses candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared with that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then as a final step, determine whether

the party burdened with the onus of proof succeeded in discharging it.

[20] In assessing the plaintiffs version, I must necessarily take into account that but for the acknowledgement of debt that the plaintiff said that he drafted in July 2004, which was not signed by the defendant, there is not a single document that reflects that the money in question was lent and advanced to the defendant in his personal capacity. There is no reason to disbelieve the defendant when he states that the acknowledgement of debt, while dated 2 July 2004, was only handed to him by the plaintiff during 2008. The amounts reflected in the acknowledgment of debt do not correlate with the amounts that the plaintiff, on his version, states that he had advanced to the defendant on 2 July 2004. In this regard, it should be recalled that it was only in December 2004 that the final advance of R 1 million was made. It was not put to the defendant under cross-examination that the acknowledgement of debt had been presented to him during July 2004. The only documents dating back to that period are the acknowledgement of date signed on behalf of Marble Farming in favour of the plaintiff, and the series of postdated cheques drawn by Marble Farming in favour of the plaintiff. The plaintiff's evidence in this regard and in particular, his inability to explain the dating and presentation of the acknowledgement of debt, was unsatisfactory

[21] The plaintiff was unable to offer a satisfactory explanation as to why Marble Farming would sign an acknowledgement of debt in his favour, and provide a series of cheques to him, if there was no loan agreement between the plaintiff and Marble Farming. . In short, the only documentary evidence that is available supports the defendant's version.

[22] Further, the plaintiff, on his own version, proceeded to bank the first of the checks proffered by Marble Farming, in the sum of R250 000, during December 2004. There is no evidence to show that any money was paid into the defendant's personal accounts. What appears from the pleadings that that the plaintiff does not dispute that all amounts were paid either to Value Chemicals or Marble Farming; this is consistent with his evidence. Further, all amounts repaid to the plaintiff were paid from the bank accounts of Value Chemicals, Lebrusco and Marble Farming.

[23] In the light of all these facts, which are not disputed, the most probable inference to be drawn is that the defendant did not request any loans from the plaintiff in his personal capacity, and that he acted on behalf of Value Chemicals. In respect the monies advanced to Marble Farming, it is more probable than not that the defendant's role was limited to an introduction of the relevant parties.

[24] The probabilities also favour the conclusion that the acknowledgement of debt was drafted in 2008, when it was presented to the defendant for signature, and backdated. It should be recalled that the acknowledgement of debt reflects that the loan amount is made up of two separate amounts, being R2.2 and R2.5 million respectively. Botha's version is supported by the acknowledgement of debt signed on behalf of

Marble Farming, and the series of cheques drawn by Marble Farming in favour of the plaintiff. The sequence of the cheques accords with what is set out in the acknowledgement of debt, signed on behalf of Marble Farming.

[25] Finally, there is the reference by the plaintiff to his role in the transactions concerned. In his evidence and the sms sent to Van den Berg the allusion to ‘pa staan’ is indicative of a relationship not between creditor and debtor, but as between creditor and guarantor of a loan. The plaintiff did not sue the defendant in this capacity; his claim is one of a personal loan to the defendant. This is a material inconsistency in the plaintiff’s evidence that he was unable to explain satisfactorily.

[26] In my view, having regard particularly to the reliability of the plaintiff’s evidence and the probabilities of the competing versions (which as I have indicated, overwhelmingly favour the defendant), the plaintiff has not succeeded in discharging the onus of proving his claim.

For these reasons, I make the following order:

1. The plaintiffs claim is dismissed, with costs.

ANDRÉ VAN NIEKERK

ACTING JUDGE OF THE HIGH COURT

REPRESENTATION

For the plaintiff Adv. M Olivier, instructed by Surita Marais Attorney

012 3430267 ref MD 1852

For the defendant: Adv. D Prinsloo, instructed by Jordaans Inc.

016 349 67001 ref MAT 1488