IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A877/2013

29/6/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED

27/06/16 .....
DATE SIGNATURE

In the matter between:

BURDEN & SWART ATTORNEYS **Appellant**

and

LENNY GOVENDER **First Respondent**

MICHELLE GOVENDER **Second Respondent**

Heard: **27 May 2015**

Delivered: 29 June 2016

JUDGMENT

A.A.LOUW J

Introduction

[1] This is an appeal against a judgment handed down by Molefe J on 27 August 2013, in terms of which the appellant was ordered to pay an amount of R426 000 to the respondents. She granted leave to appeal

[2] The respondents were the plaintiffs in the trial court. The respondents' case was that they had made a loan to the appellant (the defendant in the trial court) in the amount of R600 000 on 2 September 2008 and that an amount of R174 000 was repaid by the appellant to them, leaving a balance of R426 000.

[3] The appellant is a Pretoria firm of attorneys. The second respondent ("Mrs Govender") was employed there as a deeds secretary. She is married in community of property to the first respondent.

The Pleadings

[4] The cause of action is set out as follows in the respondents' particulars of claim:

> *"On or about 2 September 2008, and at Pretoria, the Plaintiffs personally lent and advanced to the Defendant, at the Defendant's request and instance, the sum of R600 000 in terms of a partly oral, partly written agreement between them. At the time of the agreement the Defendant was represented by Leonora Swart. The letter from the Defendant to confirm the terms of the agreement is attached hereto as annexure "A"."*

[5] Annexure "A" to the respondents' particulars of claim, allegedly written on behalf of the appellant, to the respondents reads as follows:

> *"Aan: Lenny en Michelle Govender*
>
> *i/s: Mascador/Max Return*
>
> *Ons bevestig dat ons die volgende voorskot verlang op bovermelde transaksie:*
>
> 1. *Die bedrag van R600 000-00;*
> 2. *Voorgemelde voorskot bedrag sal teen 'n administrasiefooi van 5% per maand (pro rata) van af voorskot tot datum van terugbetaling geskied;*
> 3. *Gelde voorgeskiet sal terugbetaalbaar wees op datum van registrasie van transport maar nie later dan 'n periode van 4 maande vanaf datum van die voorskot nie, waarop die administrasiefooi vir diè 4 (vier) maande ten volle betaalbaar is;*
> 4. *Indien toestemming verleen word tot verlenging van die voorskot sal al toekomstige administrasiefooie maandeliks betaalbaar wees.*
> 5. *Ons gee u hiermee ons firma-onderneming vir die terugbetaling van voormelde bedrag aan u."*

[6] Accordingly, the respondents rely heavily on Annexure "A" alleging that it confirms the terms of the alleged loan by the respondents to the appellant. Annexure "A" is unsigned.

[7] The appellant in its plea denied that any loan agreement was entered into with it, and denied the authenticity of Annexure "A", for the following reasons:

7.1. The purported letter was not issued by any partner and/or any authorized person on behalf of the appellant;

7.2. The purported letter was not signed by any partner and/or authorized person on behalf of the appellant;

7.3. The purported letter does not contain the true agreement entered into between the respondents and Union Equity Trust;

7.4. The appellant's plea, in essence, is that an oral loan agreement was entered into between the respondent and Union Equity Trust. The latter was represented by Mr Robert Linkmeyer.

Common cause issues

[8] It is not in dispute that Ms Swart is a conveyancer and partner of the appellant. In instances where the seller could not pay the outstanding rates or where bridging finance was needed for conveyancing transactions, an outside financier was sourced to advance the monies. The appellant never advanced any such monies itself. This appears to be a general practice among conveyancing attorneys. It is common cause that the risk of such a transaction was very low because the guarantee/s had been given and the transfer would take place soon. The loan was repayable on transfer but in any event not later than four months after the advance had been made. It was not the appellant who borrowed the money, received it or even paid the interest and capital so received to the lender. The second respondent, Mrs

Govender, came to Ms Swart's office and asked if she could make such a bridging finance advance transaction. Approximately 88 transactions were made by the respondents over the relevant period of time, and apart from the present transaction in issue, those were all transfer transactions.

[9] All such bridging finance transactions had as its heading the reference to a specific transfer of immovable properties. It contained the names of the buyer and the seller as well as the description of the property. Typical examples are the following:

"TRANSPORT: HEINEN // STRYDOM & JANSEN VAN RENSBURG

EIENDOM: ERF 124 TILEBA"

"ONS TRANSPORT: ROBBERTZE // RAMALITSE

EIENDOMSBESKRYWING: ERF 929 ROSSLYN EXT 18"[1]

[10] It is further common cause that these transfer matters are (except for the heading and the amounts therein) exactly the same as annexure "A" to the particulars of claim herein.

[11] The majority of the ordinary transfer transactions in which the respondents provided finance were entered into after non-performance in terms of annexure "A" i.e., after the appellant, which is the alleged debtor in

[1] Record pp 171 and 199

terms of annexure "A", failed to pay them. There are about 88 such transactions in the record.

Evidence on behalf of the respondents

[12] The only evidence led on behalf of the respondents was by Mrs Govender. She denied any meeting with Mr Linkmeyer and that there was any agreement with him to lend money to him or any of his companies. According to her version, she, as usual, only spoke to Ms Swart and the loan was of the usual kind as evidenced by annexure "A" to the particulars of claim.

[13] Although the respondents' further particulars state that the author of annexure "A" was Ms Swart, alternatively Ms Myburgh, on behalf and on instructions of Ms Swart, Mrs Govender testified that Ms Myburgh was the author of the document and also typed it. That is despite the main assertion in the further particulars that the author was Ms Swart and that Ms Swart also typed the document.[2]

[14] She also denied that she contacted Ms Myburgh after the latter had left the employ of the appellant, to ask Ms Myburgh to sign annexure "A".

[2] Record p 808 line 16 to p 812 line 8

Evidence for the appellant

Ms Swart

[15] She testified that her client, Mr Linkmeyer, came to see her on 3 September 2008. Linkmeyer was an investor involved in venture capital and a file in respect of his transactions was kept under the name *Mascodor.* Linkmeyer needed urgent finance for Union Equity Trust, a subsidiary of Union Capital (Pty) Ltd. By that time the name *Mascodor* had undergone a company name change to Union Capital. It may at this stage be mentioned that the office file *Mascodor* had not been changed to reflect the name change of the company, but in my view nothing turns on that.

[16] During that consultation she called in Mrs Govender and told her that Mr Linkmeyer needed an amount of R600 000 on an urgent basis. Mrs Govender came into her office, stood leaning against the wall, whilst both Mrs Swart and Mr Linkmeyer were seated at the desk.

[17] Mr Linkmeyer explained to Mrs Govender what he needed the funds for and that it would be for a short period of time.

[18] Mrs Govender left the office and stood outside whilst she telephonically discussed this with her husband, the first respondent. She came back into the office and said that "it is fine".

[19] The loan was transferred into the appellant's trust account on the same day. The payment was thereafter made on instructions of Union Equity Trust to Max Return Investments. The only involvement of the appellant was to receive the money into its trust account and pay it out on behalf of and on instructions of the client, in this instance, the respondents.

[20] It was not the normal kind of transaction that the Govenders were previously involved in and had nothing to do with the transfer of a property. Ms Swart testified that she would never have bound the appellant for that amount of money, especially with no security. She had nothing to do with the drawing or issuing of annexure "A". In fact it came as a shock to her when she first saw it as an annexure to the summons.

[21] The summons was issued during July 2010, but Ms Swart and Ms Riekert-Botha saw on Mrs Govender's desktop computer that a letter of undertaking to the respondents was issued during May 2010. That is despite the fact that it was at that stage a "dead" file and was not worked on. They wanted to make a printout from the computer screen but did not know how.

[22] When the computer experts arrived a week or so later that document had been deleted. Mrs Govender was at that stage still working for the appellant and had access to the computer.

[23] The only benefit for the appellant relating to this whole transaction was to receive 2% of the money coming in from overseas, but nothing regarding this specific loan transaction.

Mr Linkmeyer

[24] Linkmeyer testified and in all respects confirmed the oral agreement of the loan that was entered into in the office of Ms Swart. He confirmed the presence of Mrs Govender. I find no contradiction between his evidence and that of Ms Swart.

[25] He further testified that when the loan was not repaid timeously, Mrs Govender constantly phoned him about repayment.

[26] Of course Mrs Govender denied any such phone calls.

[27] He also testified on the name change from *Mascodor* to Union Equity Trust. Nothing turns on this name change. As already remarked, the name on the office file was not changed.

Ms Myburgh

[28] She was the senior deeds typist in the appellant's conveyancing department during 2008 and had a good working relationship with Mrs Govender. They worked together in an open-plan office. Mrs Govender had full access to the computer system and regularly drafted letters in the format of annexure "A" by using a template.

[29] She recalled that she saw Mrs Govender entering Ms Swart's office when Mr Linkmeyer was there. With regard to the drafting of Annexure "A" she denied being the author thereof. She testified that on the date mentioned in the letter, 2 September 2008, she was on leave as she had to take her father to a doctor.

[30] She further testified that after she had resigned from the appellant's employ, Mrs Govender contacted her to sign an undertaking which was unsigned. During that telephone conversation Mrs Govender explained her unhappiness regarding the monies owed to her. Ms Myburgh said that she did not want to be drawn into the matter. This must be seen in the context of the evidence of Mrs Govender that Ms Myburgh drafted annexure "A". Ms Myburgh could not have drafted annexure "A" as she was on leave on that date. She also would never have backdated such a letter, she testified.[3]

[31] On the last-mentioned issue, the cross-examination amounted to nothing. The last part of the cross-examination reads as follows:

> *"In regard to your version that Mrs Govender ever contacted you to sign a document. --- Ja?*
>
> *After you had already left, she denied that. I just wanted to place that on record.*
>
> *As it pleases the court, My Lady. I have no further questions for this witness"*[4]

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[3] Record p 989 line 23 to p 990 line 5
[4] Record p 1014 lines 9-15

Credibility

[32] The approach of a trial court when called upon to resolve directly conflicting factual issues is well set out in *Stellenbosch Farmers' Winery Group Ltd and Other v Martell et Cie and Others*[5]:

> *"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently 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 witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' 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 extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to 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*

[5] 2003 (1) SA 11 (SCA)

assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."[6]

[33] In that case, after having analysed the evidence the court remarked:

"But this appraisal does not seem to have depended on an analysis of the various factors enumerated in the previous paragraph but largely on the Court a quo's estimation of the overall probabilities. If that estimation is shown to be suspect, so too must be the Court a quo's conclusions on credibility. It is therefore on that exercise, an evaluation of the general probabilities, that the outcome of this case ultimately hinges."[7]
(my emphasis)

[34] If a trial court failed to make any express finding on credibility, a court of appeal is called upon and bound to do so. In the present matter, the trial court simply decided the mutually destructive versions on general probabilities without making any finding that any of the appellant's witnesses were dishonest or lying.[8] On a "strong probability" that Mrs Govender's version was true, the trial court was satisfied that the respondents' version was more probable and that they had to succeed. No reference was made to probabilities in favour of the applicant. This, with respect to the learned Judge, was a wrong approach.

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[6] Para 5
[7] Para 6
[8] See especially the court's findings from para 23 to the end of the judgment

[35] There was no finding on any of the six factors which play a role in deciding credibility.[9] On the record I cannot find any reason for the rejection of the evidence of Ms Swart, Mr Linkmeyer and Ms Myburgh as dishonest. As already mentioned, there is no express finding to this effect.

[36] Once I find that there was no basis for the court not to rely on their versions, the appeal is bound to succeed.

[37] Certainly probabilities play a role in coming to a decision on credibility, but that is not the point of entry. Counsel for the respondents, whilst also relying primarily on the *SFW* case, correctly argued as follows:

> *"1.2. It is to be noted that the appellant and the respondents gave mutually destructive versions during their testimony at the trial. The credibility of the witnesses is in issue which entails elements such as the appearance of the witnesses, their composure and the personal impression which the Honourable Court perceived during the trial supplementary to the evidence which can be transcribed and which form part of the record."*

The problem, however, is that this exercise does not seem to have been done by the trial court. There are no findings on impressions and veracity of the witnesses, including bias, internal and external contradictions. The court did not point out any of the kind of contradictions referred to in the *SFW* case.

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[9] Points (i) –(vi) – para 5 of the SFW case

[38] Counsel for the appellant correctly argued as follows:

> " 25.
>
> *It is not merely open for the court to pick between two mutually destructive versions. The court will have to say that, after considering the said factors, it rejects the one party's version and favours the other. Logic dictates that not both versions, being mutually destructive can be accepted i.e. it is the one or the other."*

I find that this is not the "hard case" referred to in *SFW* where credibility findings compel a court in one direction and general probabilities in another. On the record I can find no basis on which to doubt the veracity of the appellant's witnesses.

[39] Thus, I can and do come to the conclusion that Mrs Govender was blatantly lying. I do so on the following bases:

[a] She lied that the appellant was the borrower. It is improbable that she was unsure about the cardinal aspect of authorship of annexure "A". In the passage referred to in footnote 2 she stated that to some extent, there may have been a misunderstanding between her and her legal representatives in drafting of the further particulars. It was put to her that Ms Myburgh could not possibly have typed the letter and given it to her as on 2 September 2008 she, Ms Myburgh, was on leave.

Mrs Govender answered that she remembered Ms Myburgh was there.

[b] She lied by denying that she ever entered Ms Swart's office whilst Mr Linkmeyer was present. The three witnesses of the appellant are agrred on this and I accept their evidence.

[c] It is impossible that Ms Myburgh could have drafted annexure "A", as she was not in the office on that day. I accept her evidence that she, a senior deeds typist with 15 years' experience, would never have backdated such a letter.

[d] It is untrue that she never phoned Mr Linkmeyer regarding repayment of the loan.

[e] I unhesitatingly accept Ms Myburgh's evidence that, after she, had left the appellant's employ during February 2009, Mrs Govender phoned her, complained about her predicament, and asked her to sign "an undertaking". She was unshaken in cross-examination and objective. Well before the summons was issued, she had already resigned from the appellant.

[f] I find that Mrs Govender falsified annexure "A" by issuing it on her computer during approximately May 2010, shortly before summons was issued during July 2010. This was seen on the computer screen by Ms Swart but she did not have the technical know-how to print it from the computer screen. This thus happened after Mrs Govender's many phone calls to Mr Linkmeyer had come to nought.

[40] The claim should have been dismissed with costs. Thus I find that credibility alone should have been conclusive but in any event proceed to consider probabilities.

Probabilities

[41] Certainly the probabilities referred to by the trial court exist. Most notably it is improbable that the Govenders would have loaned such a huge amount without any form of security. I also accept that Mrs Govender could not have been aware of the risks associated as even Ms Swart did not know exactly when and by whom the "foreign monies" would be repaid. Secondly, it is also unlikely that an experienced attorney like Ms Swart had no paper trail of this transaction. I however find that nothing turns under change of name of Mascodor.[10]

[42] The answer to the first improbability is that Mrs Govender put her absolute trust in Ms Swart. Maybe the respondents would have had a better case on a breach of such relationship – but, of course, but that was never their case. The conclusion that I have to come to is that the Govenders simply became greedy after having made considerable profits with the bridging finance transactions. On the lack of correspondence or e-mails to substantiate the appellant's version, there seems to be no ready answer. The only document of significance is a contemporary note by Ms Swart dated 3 October 2008 wherein she noted an agreement with Mrs Govender that Mr Marais had to be repaid first.

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[10] Para 24 of the judgment

[43] The following objective probabilities favour the appellant's version:

[a] Ms Swart, as an experienced attorney, would not have taken this huge risk without any form of security. It is not disputed that there was nothing in it for the firm in obtaining these funds for Mr Linkmeyer's company. The appellant would only have been entitled to 2% commission on money that would have come in from overseas.

[b] Exhibit "A" has nothing to do with a transfer, yet the same standard template was used.

[c] Although the loan was not repaid by the appellant within the four months as stated in annexure "A", the respondents proceeded to engage in many further bridging finance transactions, thus implicitly at that stage not having blamed the appellant at all.

[d] No demand was made for repayment until approximately 18 months after the advance and then only by the respondents' attorneys. This was during approximately February 2010 whilst Mrs Govender was still working for the Appellant.

Costs

[44] In written argument the appellant asked for a punitive costs order on the basis that the respondents failed to properly engage in an exercise to drastically limit the extent of the appeal record. In that regard there is an affidavit by the appellant's attorney.

[45] However, during argument, counsel for the appellant did not persist with this argument.

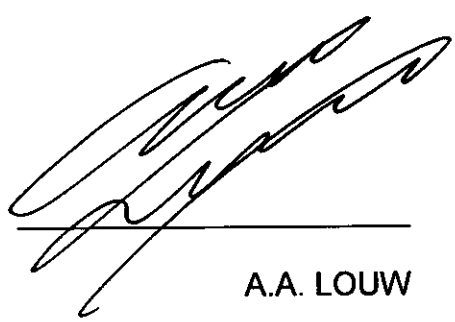
[46] Costs of senior counsel are requested. Certainly this is a complicated case of huge importance to both parties. I find that request to be justified.

Order

[47] It is ordered:

1. The appeal succeeds with costs which includes the costs of senior counsel.
2. The order of the trial court is set aside and replaced by the following:

"The plaintiffs' claim is dismissed with costs."



A.A. LOUW

Judge of the High Court

I agree

T.M. MAKGOKA

Judge of the High Court

I agree

F. KATHREE-SETILOANE

Judge of the High Court

For the Appellant	:	ADV. SJ MARITZ SC
Instructed by	:	BURDEN SWART & BOTHA ATTORNEYS
For the Respondents	:	ADV. A.A. BOTHA
Instructed by	:	HARDAM & ASSOCIATES INC