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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

- | | |
|-----|--|
| (1) | <u>REPORTABLE: YES/NO</u> |
| (2) | <u>OF INTEREST TO THE JUDGES: YES/NO</u> |
| (3) | <u>REVISED.</u> |

CASE NO: 3941/2016

Signature

Date.....

In the matter between:

**M M being the guardian
of A M**

PLAINTIFF

and

NTSIENI MORRIS KGOPANA

DEFENDANT

JUDGMENT

MAKGOBA JP

- [1] The Plaintiff in this matter M M is acting in her representative capacity as mother and natural guardian of the minor child, A M, born on 21 August 2003. The Plaintiff instituted an action against the Defendant to enforce an undertaking allegedly made by the Defendant to pay a certain amount of money to the Plaintiff for the benefit of the aforesaid minor child.
- [2] The Plaintiff claims the sum of R 900 000.00 against the Defendant who disputes the claim and denies having made any undertaking to pay any amount at all claimed by the Plaintiff.
- [3] At the start of the trial and by agreement between the parties a document marked Exhibit "B" was handed in as evidence and the following common cause facts are set out:
- 3.1. During or about 2003, the Plaintiff and the Defendant were involved in a romantic relationship with each other and out of the relationship the minor child A M was born on [...] August 2003.
- 3.2. At some later stage the relationship between the Plaintiff and the Defendant deteriorated and the parties separated.

The Plaintiff kept primary care in respect of A and the Defendant paid monthly maintenance contributions in the amount of R 1000.00 as per consent maintenance order made by the Mokopane Magistrate's Court, under case number 121/2003.

3.3. During or about July 2015 the Defendant contacted the Plaintiff and indicated *inter alia* that:

3.3.1. His health has deteriorated and he was no longer able to continue being employed;

3.3.2. He would receive his pension benefits as a result of the termination of his employment;

3.3.3. His pension benefits would amount to approximately R 600 000.00. That he would be willing to, from the proceeds of the pension benefit, transfer an amount R 100.000.00 in full and final settlement in respect of his maintenance duty towards A.

3.3.4. The Defendant agreed in January 2016 to pay an amount of R 100 000.00 to the Plaintiff in full and final settlement of his maintenance duty towards the minor child, but learned afterwards that such an agreement is not legally binding. The Defendant nonetheless paid the amount of R 100.000.00 in January 2016 to the Plaintiff as maintenance towards the minor child.

3.4. The parties approached the maintenance Court, Mokopane in order to have the agreement made an order of Court and the amount of

R 100 000.00 was then paid over by the Defendant to the Plaintiff.

3.5. On 29 July 2015 the Defendant received an amount of R 20 814 582.20 into his Standard Bank account with number [...]. This amount was received from the National Lottery (“the lotto”).

3.6. On 21 January 2016 the Defendant sent a WhatsApp message to the Plaintiff that reads as follows:

“If i get 20m I can give my children 1m and remain with 13m. I will just stay at home and not driving up and down looking for tenders”

[4] It is against this backdrop that the Plaintiff holds the Defendant to the above undertaking and claims the remaining amount of R 900 000.00 after the initial amount of R 100 000.00 was paid in January 2016. Summons in this matter was served on the Defendant on 17 October 2016. The Plaintiff contends that the unilateral undertaking made in the WhatssApp message should be enforced. The Defendant on the other hand contends that same should not be enforced as he never intended it to be enforceable. The Defendant states that he merely sent this WhatssApp message to the Plaintiff to get rid of the Plaintiff.

[5] The issue in dispute in this matter is the question whether the Defendant, when sending a WhatsApp message to the Plaintiff on the 21 January 2016, intended to create a legally binding agreement between him and the minor

child, with the Plaintiff acting on his behalf, that could be enforced in a Court of law. If such an intention is apparent from the evidence before Court, on a balance of probabilities, the action should succeed. It is common cause that there are pending maintenance proceedings in the Mokopane Maintenance Court which can be continued by the Plaintiff irrespective of whether this action succeeds or not. The present legal action instituted by the Plaintiff against the Defendant has nothing to do with the maintenance obligations of the Defendant towards the minor child, but this action is based on an undertaking made by the Defendant to pay R 1 000 000.00 to one of his children, A.

- [6] In her testimony in Court the Plaintiff stated that during July 2015 the Defendant informed her that he was no longer capable of continuing with his employment and would go on early pension. That his pension benefits would amount to R 600 000.00 out of which he would pay an amount of R 100 000.00 in full and final settlement towards the maintenance of the minor child. The Plaintiff accepted this offer and a Court order to that effect was made at Mokopane Magistrate Court. The amount of R 100 000.00 was paid to her on 5 January 2016.
- [7] During this time the Plaintiff heard from ladies at work that the Defendant had won R 20 Million rand in the lottery. She confronted the Defendant with this information at the maintenance Court and asked if it was true. The Defendant

denied that he won that amount in the lottery. She again confronted him on 20 January 2016 over the phone and asked him if he had received the money, and he again denied it. After denying this fact to her, on 21 July 2016 he sent her the WhatsApp message which forms the central point to this dispute. The Plaintiff states that she understood from this WhatsApp message that the Defendant would pay R 1 Million rand for the benefit of their minor child. She did not take it as a joke.

[8] The Plaintiff testified that she had been suspicious of the Defendant when it comes to maintenance payments as he was not a reliable maintenance payer according to her. After receiving the WhatsApp message she went straight to her attorney to enforce the undertaking as she could not trust the Defendant. Summons commencing action in this matter was issued by the Registrar of this Court on 7 September 2016 and served on the Defendant on the 17 October 2016.

[9] The Plaintiff was a good and honest witness. She did not attempt to hide any fact from the Court. During cross examination she openly and honestly answered the questions put to her. There are no contradictions in her evidence. I can therefore accept the Plaintiff's evidence as true and reliable.

[10] The Defendant testified that it is common cause that he received the lotto money on the 29 July 2015. That by agreement between him and the Plaintiff he paid the sum of R 100 000.00. The agreement was made an order of Court at the maintenance Court in Mokopane. After he paid the aforesaid amount the Plaintiff approached him in January 2016 and enquired from him about the lotto money. By that time he had already received the money from the National Lottery but he denied having received such money. He admitted his communication with the Plaintiff through WhatsApp message. When asked about the contents of the WhatsApp message of 21 January 2016 his response was that he sent that message to the Plaintiff in order to get rid of her and he denied that the WhatsApp message constituted an undertaking to pay to the Plaintiff an amount of R 1 000 000.00.

[11] The Defendant mentioned that he has seven children including the minor child of the Plaintiff. He conceded that the WhatsApp message does make mention of seven children getting one million rand each and he remaining with R 13 million rand. The R 100 000.00 paid to the Plaintiff was according to him a payment in full and final settlement of his maintenance obligations towards the minor child. The Defendant maintained that he left his employment due to ill health. When asked what type of ailment he suffered from he could not give any direct or sensible explanation.

[12] The Defendant's demeanor while testifying specifically in cross examination leaves much to be desired. He did not answer some questions put to him during cross examination, although such questions were simple and easy questions. The Court on more than one occasion had to intervene to request the Defendant to merely answer the simple questions that were put to him. During his testimony I gained the impression that he had something to hide, otherwise one would have expected his testimony and his demeanor to have been different. The Defendant's version is improbable and cannot be accepted in so far as it differs with the version of the Plaintiff.

[13] The Defendant is a person who admittedly lied to the Plaintiff regarding winning the lotto. Until he himself made mention of the lottery money in the WhatsApp message dated 21 January 2016 he had at all material times denied winning lottery when confronted and asked by the Plaintiff. The undisputed evidence of the Plaintiff that the Defendant at the meeting at the maintenance Court with the Maintenance Officer also persisted in denying that he won the lotto, is a further indication of the fact that the Defendant is untruthful and unreliable. He persisted in denying winning the lotto even in front of the Maintenance Officer, an officer of the Court.

[14] The Defendant testified that his health had deteriorated and he was no longer able to continue being employed. When confronted with this issue in cross examination, he maintained that his health has deteriorated but failed to give

an indication of what this alleged condition affecting his health is. One gets the impression that the Defendant terminated his employment not due to ill health but because he won the lotto. The Defendant therefore misled and lied to the Plaintiff and persisted in lying in Court during his testimony.

[15] It is a fact that the Defendant denies having made an undertaking to pay an amount of R 1 000 000.00 to the Plaintiff for the benefit of the minor child. I shall take into consideration the Defendant's mendacity as a witness to determine whether the Plaintiff has discharged the onus of proving the existence of an undertaking made by the Defendant.

[16] The amount allegedly owed by the Defendant in terms of the undertaking is R 1 000 000.00. However in her summons the Plaintiff claims an amount of R 900 000.00. Counsel for the Plaintiff submitted that the Plaintiff is generous and even decided to deduct the amount of R 100 000.00 already paid, hence she claims the balance of R 900 000.00.

[17] The Plaintiff contends that the WhatsApp message constitutes an undertaking in terms of which the Defendant undertook to pay the minor child an amount of R 1 000 000.00 if he won the lotto. Indeed by the time he made the undertaking on 21 July 2016 he had already won the lotto and received the money on 29 July 2015. On the other hand the Defendant contends that he

did not have the intention to create a binding agreement between him and the Plaintiff when he sent this message but to get rid of the Plaintiff and end their conversation at the time.

- [18] The Court has to determine whether the Defendant had the requisite *animus contrahendi* when making the aforesaid statement to enter into a binding agreement. It is trite law that when alleging the existence of a contract the burden of proof is on the Plaintiff to establish that both parties had the requisite intent or *animus contrahendi* before the conclusion of the alleged agreement. In the case of **Government of the Self-Governing Territory of Kwazulu v Mahlangu and Another 1994 (1) SA 626 (TPD) at 635 D** it was said that:

“What is required before a Court can be approached to exercise powers of review is that the contract should appear to have been entered into and formulated with the intention that it would be final and binding and legally enforceable.”

- [19] In *casu*, the contents of the WhatsApp message is clear and unequivocal. The Defendant who had by then won the lotto communicated the message to the Plaintiff that he would pay R 1 000 000.00 to the minor child. Not only this minor child but also his other six children so that out of the R 20 million rand he had, he would remain with R 13 million rand and not worry about doing any other work to earn a living. The Plaintiff accepted the undertaking and

proceeded to instruct her attorneys to enforce the undertaking. The offer or undertaking made by the Defendant was certain and definite in its terms. It was a firm offer made with the intention that when accepted, it will bind him as the offeror.

See **Efroiken v Simon 1921 CPD 367 at 370.**

[20] From the content of the WhatsApp message and from the surrounding circumstances as evidenced from the evidence of both parties I must determine whether the Defendant made an unambiguous offer with the clear intention to be bound to the Plaintiff by mere acceptance of the offer. When the Plaintiff received the WhatsApp message from the Defendant she already had information that the Defendant had won R 20 million rands at the lottery and she had already confronted him with this information. The prior information was confirmed by the receipt of the WhatsApp message and the contents thereof. Hence the Plaintiff readily accepted the offer.

[21] In my view the offer contained in the WhatsApp message was a conditional one, depending on whether the Defendant would win the national lottery. This condition was satisfied in that the Defendant did win the lottery. In any event by the time he made the offer on 21 July 2016 he had already won the lottery in July 2015. The condition set by the Defendant was thus fulfilled and this makes the undertaking enforceable.

[22] The reason given by the Defendant to go on early retirement was according to him ill health. That was on or about July 2015. It is significant to note that this was at the same period when he received the lotto money on 29 July 2015. I am inclined to draw an inference that the Defendant terminated his employment due to the fact that he became an instant millionaire and not due to his deteriorating health. The credibility and reliability of the Defendant as a witness is therefore put into question. It is improbable and strange that when the Defendant won the lotto during July 2015 and received the payment during July 2015, then, all of a sudden he became unhealthy. In my view the Defendant misled and lied to the Plaintiff and persisted in lying in Court during his evidence in chief and during cross examination.

[23] In his plea to the particulars of claim the Defendant pleaded as follows in paragraph 10.6.3:

“10.6.3 In the event of the Honourable Court finds that the Defendant in fact undertook to make the said payment of R 1 000 000.00 (one million rand) (which is not admitted) Defendant herewith withdraw such an undertaking before it may be accepted.”

If it was never his intention to be bound, then why now withdraw this undertaking? In any event it was too late for the Defendant to can withdraw the offer as same had already been accepted by the Plaintiff before she instituted this action against the Defendant.

[24] From the evidence on record the Defendant has seven children including the minor child with the Plaintiff. The offer as contained in the WhatsApp message is that out of the R 20 million rand he had he would give each child a million rand and remain with R 13 million rands. This shows that the Defendant had carefully done his calculations with the monies he had. From this I draw an inference or even a conclusion that the Defendant had the intention to pay R 1 000 000.00 to the Plaintiff for the benefit of the minor child.

[25] Counsel for the Plaintiff referred me to the often quoted passage in the judgment of Blackburn J in **Smith v Hughes (1871) LR 6 QB 597 at 607** which is as follows:

“If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, that man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”

[26] This then brings me to a further and crucial question whether a reasonable man in the position of the offeree would have accepted the offer in the belief that it represented the true intention of the offeror.

In my view this test is satisfied in the present case and the offeror (the Defendant herein) can be held contractually liable (See **Steyn v LSA Motors Ltd [1994] 1 All SA 483 (A)**).

If one considers the facts and surrounding circumstances in this case, a reasonable man in the shoes of the Plaintiff would have taken the WhatsApp message of the Defendant to be an unequivocal offer to give the minor child one million rands.

[27] In the latter case of **Steyn v LSA Motors Ltd** Botha JA said:

*“Where it is shown that the offeror’s true intention differed from his expressed intention, the outward appearance of the agreement flowing from the offeree’s acceptance of the offer as it stands does not in itself or necessarily result in contractual liability. Nor is it in itself decisive that the offeree accepted the offer in reliance upon the offeror’s implicit representation that the offer correctly reflected his intention. Remaining for consideration is the further and crucial question whether a reasonable man in the position of the offeree would have accepted the offer in the belief that it represented the true intention of the offeror, in accordance with the objective criterion formulated long ago in the classical dictum of BLACKBURN J in **Smith v Hughes [1871] LR 6 QB 597 at 607**. Only if this test is satisfied can the offeror be held contractually liable.”*

[28] In the case of **Sonap Petroleum (SA) (PTY) Ltd v Pappadogianis 1992 (3) SA 234 (AD)** the Court was concerned with *dissensus* relating to the terms of the contract proposed in the offer, but the test whether a reasonable man in

the position of the one party would have been misled applies also where it is shown that the other party's declaration was not intended by him to be an offer at all. (See **Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd 1983 (1) SA 978 (A)**).

[29] The principle outlined above must, in my view, apply equally when the *dissensus* relates to the addressee of the offer, that is where the offeror does not intend the offer to be open for acceptance by the other party, but the latter believes that it is and in that belief accepts it. In *casu* the fact that the Defendant might not have intended his offer as set out in the WhatsApp message to be accepted by the Plaintiff is neither here nor there. The Plaintiff, as a reasonable man believed him and she was made to accept the offer.

[30] I make a finding that the Plaintiff established her case on a balance of probabilities. The Defendant had the necessary *animus contrahendi* to enter into an agreement with the Plaintiff, and as a consequence, she has discharged the onus on her proving that an agreement was entered into between the parties.

[31] Accordingly I grant judgment in favour of the Plaintiff against the Defendant as follows:

(1) Payment of the amount of R 900 000.00.

(2) Interest at the rate of 9% per annum, calculated from the date of service of summons to date of final payment.

(3) Costs of the action.

**E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**

APPEARANCES

Heard on : 11 June 2018

Judgment Delivered : 29 June 2018

For Plaintiff : Adv. J Eastes

**Instructed by : De Beer Attorneys
Polokwane**

For Defendant : Adv. A C Diamond

**Instructed by : Hammann – Moosa Inc
c/o De bruin Oberholzer Attorneys**