IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: **4664/2007**

In the matter between:

N V D P (BORN
E W) Plaintiff

and

J I D P Defendant

JUDGMENT GIVEN ON 15 NOVEMBER 2011

Plaintiff and Defendant were married to one another out of community of property by antenuptial contract with the exclusion of the accrual system on 4 November 1989. Plaintiff instituted divorce proceedings by summons dated 28 March 2007.

There are two minor children born of the marriage, a son Z Marcus born on 6 May 1991 and a daughter T C, born on 2 March 1993. It was not an issue between the parties (both of whom testified at trial) that the marriage relationship between them had irretrievably broken down and that a divorce order should be granted. By the time of trial the parties had been apart for four years and the level of acrimony which subsisted between them emerged clearly in the evidence, and there can be no question that the marriage relationship between them has irretrievably broken down.

While the issues on the pleadings were originally extensive, they had narrowed down by the time of trial. The parties reached agreement on the issues which are reflected in the orders made in 1, 2 and 3 below. All issues save two had been resolved as between the parties. The second issue was costs, which largely flowed from a decision on the first issue. The first issue arose from defendant's claim in reconvention, paragraph 5 of which reads as follows:

> *"In and during 2003, defendant lent and advanced a sum of R548 000,00 to Plaintiff for the purposes effecting payment of the costs of renovations to her property situated at and known as 25 Park Island Way, Marina da Gama The aforementioned sum of R548 000,00 was repayable upon demand."*

The Plaintiffs plea in reconvention was to deny the content of this paragraph in its entirety.

In and during May 2009, and at a time when she was still legally represented (Plaintiff acted in person at trial) her then attorneys addressed a request for further particulars regarding *inter alia* this alleged loan agreement. It elicited the response that the agreement was oral. In response to a query as to the exact date of the agreement, Defendant particularised that the agreement was entered into *"...during or about December 2002 to May 2003".* In particularising the terms of the agreement, Defendant stated that the sum loaned would be *"repayable on sale of the plaintiff's immovable property or on separation / divorce / demand".*

Investments in property characterised the married life of the parties. At the time of

their marriage the parties lived in a house at St James. Plaintiff testified that this was the property which he had undertaken to give Plaintiff as her sole and absolute property pursuant to paragraph 4 of their antenuptial contract. This property was sold in 1992 and no equity was realised in the sale. The parties thereafter rented accommodation.

Plaintiffs mother passed away in September 1995 and - with portion of her inheritance - Plaintiff purchased a house at 1 Delft Close which was registered in her own name. The house was bonded to the extent of approximately R250 000 and the balance including conveyancing and transfer duty paid by Plaintiff out of her inheritance.

Subsequent hereto and in 2001, Plaintiff (who was by then a successful estate agent, active in the Marina da Gama area) came across a house at 25 Park Island, Marina da Gama, being sold at a bargain price. Plaintiff purchased this property, funding it with a 90% bond and the balance payable from her inheritance. The parties moved into this dwelling which became their common home, and the property at Delft was tenanted. Defendant in his evidence described this house as being in a fairly bad state of repair, but purchased on favourable terms.

Also in 2001, Defendant inherited a property in Fourth Road, Rondebosch from his mother, who had passed away. The property was free of any encumbrance and was transferred to him.

There were two further properties which featured in the married lives of the parties, both in Marina da Gama. Defendant became the registered owner of 27 East Lake Drive, Marina da Gama, and Plaintiff the owner of 42 East Lake Drive, Marina da

Gama. Further detail as to these properties is not relevant for the purposes of resolving the issues between the parties.

In and during 2003, the family home at 25 Park Island Way was substantially renovated. Their renovations ultimately cost approximately R1 -million, having been initially estimated at R900 000. During this time, the parties vacated the house and went to live with Plaintiffs sister in Claremont. The renovations were ongoing until September or October 2003, at which time the parties moved back into the common home. During this period and in order to assist with the funding of the renovations, Defendant caused a bond to be registered over the Rondebosch property. On 14 March 2003, his bond account was debited with the sum of R585 000,00 and the sum of R579 360,62 was simultaneously credited to Plaintiffs home loan account over the common home at 25 Park Island Way. It is Defendant's case that - underpinning this transaction - was an agreement of loan. Plaintiff admits receipt of the sum of R579 360,62 into her bond account, but denies that it was a loan.

By the time of the trial, the parties had been separated for some time. Plaintiff had requested Defendant to leave the common home in 2007, but he refused to do so. Plaintiff and the minor children left the common home and Defendant continued living there until the property was sold on 2 August 2007. Its selling price was R2 950 000,00 and Plaintiff admitted in her evidence that she had netted R1.25-million after payment of the bond of approximately R1.2 million plus unpaid rates and taxes in the amount of approximately R50 000.

The parties are at variance as to whether the receipt by Plaintiff of the sum of R579 360,62 was a loan or not. Defendant contends that it was a loan. It is his case that -

given that the property has been sold, the parties are separated and about to be divorced, and furthermore that demand has been made for repayment - this sum is repayable. Plaintiff denies that the juristic nature of the transaction was that it constituted a loan.

Defendant's evidence in chief had a fairly narrow focus. He testified regarding the conclusion of the marriage, the birth of the children, his acceptance of the order reflected in paragraphs orders made in 1, 2 and 3 below, and the irretrievable breakdown of the marriage relationship. He then dealt with the properties to which reference is made above, and with his contention regarding the loan in more detail.

He testified that he had got a job with Topics at the time when the parties were living in the Delft house. When he inherited the property at 9 Fourth Road, Rondebosch, he testified that this placed the family in a position to do alterations to the common home. He caused these to be done by a friend, Mr Dowling, who initially estimated the cost of the renovations to be R750 000, but counselled to allow a 10% cushion for escalations and variations. He testified, when asked what agreement was reached about the financing of these renovations, that there were three properties which were available to be a source of finance. The first of these properties was the Delft property in Plaintiffs name, which was to be bonded. The second was his own Rondebosch property. He testified that he was not prepared to bond the property for the full extent of the cost of the renovations. It was, he stated, totally unencumbered and he was not prepared to take a bond for the whole sum. What he was prepared to do to limit his exposure was to borrow against the property to the extent that the rental income from the tenant would service the bond. Thirdly, and as regards the balance, Plaintiff was to raise mortgage finance on the common home to cover the rest of the renovation costs.

Defendant's evidence about the agreement between himself and Plaintiff requires scrutiny. He first testified about the agreement when asked whether interest was payable on the funds contributed by him from the Rondebosch property. His answer was that there was "...no *talk of interest. I did emphasise that if the property was sold, I expected the capital sum to be returned to me".* Asked regarding the Plaintiffs attitude, he testified that she had found this *"acceptable".*

There is a distinct lack of detail as to the agreement on Defendant's evidence. Indeed, he conceded as much. In the first instance, the amount of the loan is not clear. His counterclaim puts the amount at R548 000,00. The amount transferred out of his bond account on the Rondebosch property is R585 000,00. The amount received into Plaintiffs bond account at the common home was R579 360,62. Asked to explain the differential he conceded that there was confusion, and testified that he had tried to ascertain the origin of this confusion but had been thwarted when the bank had refused to give him information as the account was in Plaintiffs name. He stated simply that he was *"prepared to forego the differential between the amount received and the pleaded sum of R548 000,00".* The differential in rand terms is not, however, the issue. It is the quality of his evidence on the central issue before Court, and the accuracy of his recall, which is material.

Quite apart from the discrepancy on the amount, Defendant's evidence is hard to reconcile with the pleaded case. Paragraph 5 of his claim in reconvention is to the effect that the loan was *"repayable on demand'* simpliciter. Defendant disavowed such an agreement in his evidence, and said the loan would be repayable on separation or on divorce or on demand. This is furthermore in conflict with the particularity furnished by him in paragraph 1.3.3 of the further particulars, where the

first alternative relied upon was that it would be repayable on sale of the immovable property.

Nor, it must be observed, was Defendant able to isolate an occasion on which (or even a reasonably accurate time frame within which) the loan was entered into. The closest which Defendant could furnish in his further particulars is a span of six months from December 2002 to May 2003. He did not improve on this in his oral evidence.

Plaintiff, conducting her own case, took up this vagueness as her first line of cross-examination. Asked when and where a loan had been mentioned, Defendant answered unhelpfully that it was *"before the renovations took place".* Asked further whether he used the word *"loan",* Defendant avoided what was expressly discussed and resorted to an "understanding", which was that - if the house was sold - he would expect return of the capital amount of money. He did not testify that the word *"loan"* (or any derivative of it) had been used in discussions between himself and Plaintiff.

During her cross-examination of the Defendant, and during her own testimony, Plaintiff took the ambit of the evidence wider than that which had been traversed by Defendant. She focused to a large extent on Defendant's poor employment and earning record, and the fact that her own family had been compelled to assist the family financially. She advanced a case that Defendant had a chequered employment history. Her more detailed evidence on certain of these issues clarified the relevance of certain of the questions she had previously put to Defendant during cross-examination. I revert to this below.

Plaintiff testified that Morkels terminated the Defendant's employment shortly after their marriage, but accepted that he successfully disputed the fairness of the termination at the CCMA. Thereafter, Defendant became involved in two businesses, one of which installed sunshields on windows, and the other of which printed T-shirts. In 1991, the year that Z was born, the T-shirt printing business was closed down and the sunshield business failed. The parties moved into a flat in the same block as Plaintiffs mother, the latter paying the rent and feeding the family.

By 1992, Defendant became employed with a Mauritian company. While he was away on a sales trip, Plaintiff was advised by the bank that a large overdraft had been run up during the conduct of the failed businesses. She attended the bank with her brother-in-law and succeeded in negotiating better interest terms on the overdraft. She testified that this overdraft had simply become a family debt and was (largely as a result of her efforts) paid off over a period of time.

A further incident in occurred in 1992 relating to the sunshield business. Plaintiff testified that, in Defendant's absence, Mr Norman Jarvis - the seller of the business - arrived at Plaintiffs doorstep demanding unpaid instalments on the sale of the business totalling R140 000. (At the time, this was a significant amount of money. One must bear in mind that the parties had, some short time earlier, sold their house at St James for the sum of R177 000). Stating that she had "no *choice"* in the matter, Plaintiff approached her mother for an advance on her inheritance to settle this indebtedness. She testified that, in her presence and at the flat next door to her mother, Defendant signed a document acknowledging this payment, and stating that when he inherited his mother's house in Rondebosch it would be made over to their son, Z and such other children as may be born to the marriage.

This evidence gave some content to Plaintiffs cross-examination of Defendant. Without much contextualisation, the following exchange took place when Plaintiff cross-examined Defendant:

> *COURT: Do you recall that the previous owner of Sunshield made demand for payment?*
>
> *Plaintiff: His mother-in-law paid R140 000,00 for this claim.*
>
> *Defendant: I was not aware of this.*
>
> *Plaintiff: Are you aware that you signed a Deed ...which was witnessed by your mother-in-law saying you would let Fourth Road be inherited by your children on your gaining this property?*
>
> *Plaintiff: Did you sign a document like that?*
> *Defendant: No.*
>
> *Plaintiff: ...during a sales trip in this time the previous owner demanded payment of the balance of R140 000,00.*
>
> *Defendant: I do not recall.*
>
> *Plaintiff: He was overseas.*
>
> *COURT: Do you recall this demand?*
>
> *Plaintiff: Are you aware that your mom-in-law paid the amount? Aware that you signed a deed across witnessed by your mom-in-law? Did you sign the document?*
>
> *Defendant: I cannot remember ... No.*

Defendant's evidence in this regard stretches the limits of credulity. At one moment he seems to dispute the assertions made, the next he seems to concede that the events may have happened but without his knowledge. The latter stance is unsustainable. Defendant must have known that he was in default of payments in regard to the purchase of the business. The amount of money was significant. The impact on Plaintiff, her mother and the family must have been was significant too, and it is inherently improbable - if these events took place - that Defendant

remained in ignorance of them.

Defendant's counsel addressed extensive cross-examination to Plaintiff on the same issue. Plaintiff was asked why - if the parties were married out of community of property with no accrual - her mother would bail Defendant out of his financial difficulties. Plaintiff testified that the parties were newly married, with a young child. She testified convincingly that there was no realistic alternative.

Continuing with Plaintiffs evidence, she stated that, in 1993, Defendant's employment with the Mauritian employer was terminated. He took up employment for an importer of knitwear, but this employment lasted only some six months. While he was there, Defendant became exposed to the business of bond-origination, and left his employment to start a bond origination business himself which became known as Home Investments. The business was run from the flat next door to Plaintiffs mother, which was still funded and paid for by her.

Defendant had a further stint of employment with a firm called Ellen Arthur (during which time Plaintiff ran the bond origination business called Home Investments) but this employment was terminated in 1995. From 1995 until 2002 Defendant was unemployed, and contributed to the financial wellbeing of the family through the bond origination business, as also attending to the management of certain rentals of property as an adjunct to Plaintiffs estate agency business.

Plaintiff was challenged on her version of the transaction which Defendant contends is a loan. She was asked why Defendant - having deliberately chosen to be married out of community - would impoverish his estate by simply advancing the funds to improve Plaintiffs property. As an answer, Plaintiff relied heavily on

Defendant's past financial problems. She took the attitude that their two children would ultimately reap the benefits of the advance by way of inheritance, and that she did not envisage divorce at the time. She did not see it as an impoverishment of Defendant's estate, rather as a plan for the family to improve its standard of living. It was, to use her phrase, *"all money going towards the family.* For her part, she testified that she treated all available funds as being in a common pool, which were then spent on expenses for the family without differentiation.

Plaintiff was criticised under cross-examination for the impression of Defendant which she sought to create in presenting her evidence. It was put to her that she had gone out of her way to point out Defendant's past failures to meet his financial obligations, and emphasise that he had not been reliable. It was put to her that she had gone out of her way to portray him as a man who evaded his creditors, was fired, should not be trusted and who should be penalised for this conduct. That Plaintiff indeed thinks this of Defendant is evident in her own frank admission - in response to these questions - that counsel for Defendant cross-examining her had *"summed him up pretty well'.*

There is, I must accept, a degree of animosity and hostility which may affect Plaintiffs perception of Defendant, and which may colour the content and presentation of her evidence. I bear this in mind in the assessment of the evidence. There is, however, an indisputable relevance to the evidence which she tendered; it was not simply a gratuitous denigration of Defendant. Defendant's business failures had resulted in a large overdraft which Plaintiff simply accepted as a debt owed by the family. It was paid off in the fullness of time with no claims being made against Defendant in this regard. There was the further instance (which I accept on the

evidence) that Plaintiffs mother paid the sum of R140 000 as the outstanding balance on the purchase of the sunshield business when Defendant could not. Against this background, it is not at all unlikely - notwithstanding the marriage out of community of property -that Defendant should, in fairness and in equity, offer up a portion of the equity in the Rondebosch property towards his family without requiring it to be repaid to him as a loan. Indeed, in the light of his past financial conduct, it may well be regarded as an impertinence to do so, when weighed up against the extent to Plaintiff and her family had tolerated Defendant's financial woes, without seeking repayment.

Against this background, what was Plaintiffs evidence regarding the nature of the transaction? Plaintiff conceded that the renovations had been planned with reference to the availability of bond finance from the three properties. In the inside cover of a book kept by her relating to the common home and its renovations she listed the sum of R585 000 as being available from their Rondebosch property, R215 000 available from the Delft property and

R200 000 from the common home itself. These amounts total R1-million, approximating the amount which was spent during the renovation process.

On the question as to whether it was a loan, Plaintiff described her attitude to the funds available for renovation as being different *"pockets"* which could all be dipped into and provide the renovations to the common home for the benefit of Plaintiff, Defendant, and their two children. She emphasised that, as at 2003, it was the beginning of boom time in the property industry, and the bonding of property in order to renovate the common home was in the nature of a forced saving. Describing the available funds in the bonds as *"pockets of money"* she stated that

the parties were happily married, they were young and they were strong. The discussions between herself and Defendant were that they needed R900 000 to do the renovation, and discussions turned about where they could access those funds. She was adamant that there was never a discussion about repayment.

Against this evaluation of the evidence, it must be observed that Defendant bears the onus of establishing the agreement. The agreement must be established with all its relevant terms including the amount, the triggers for repayment, and the fact that the transaction was a loan. On the quality of the evidence presented, I am unable to make any findings in this regard. Plaintiffs own pleadings are vague in the extreme, and contradictory. The version of the transaction advanced in the counterclaim (namely that the sum was repayable on demand) is relegated - in the further particulars furnished - to being the fourth alternative. His evidence supporting the transaction is vague as to timing, and does not support the primary pleaded case that the loan was repayable on demand. He did not testify that the word "loan" (or any derivative of it) was never used in discussions between him and Plaintiff.

His evidence is generally subject to criticism on this ground of vagueness. It is also subject to criticism in regard to the R140 000 payment made by Plaintiffs mother. Defendant moreover failed to impress during his evidence with repeated answers that he simply did not recall. He did this in regard to matters which one would expect to remain within his knowledge, notwithstanding the passage of time. On the probabilities, I find it extremely unlikely that a contractually enforceable loan would have been entered into between the parties against the background of the financial losses made by Defendant, and the fact that Plaintiff and her family had propped him up financially. Indeed, Plaintiff stated that she was *"gobsmacked"* that he should

suggest that she owes him money in the light of all his financial delinquencies over the years.

Were I to choose between the evidence of the Plaintiff and Defendant, despite valid criticisms on both sides, I would probably prefer that of Plaintiff. I do not, however, need to go that far. Defendant bears the onus of establishing a contract of loan and its material terms. I find myself unable to find on the totality of the evidence that he has established such a contract, and absolution from the instance must accordingly result in regard to the claim reflected in prayer 5 of the claim in reconvention.

It follows that Plaintiff has been successful on the only substantive issue which, in the final analysis, required determination by this Court. She was accordingly successful, and - in principle - entitled to her costs. She was previously represented by Miller Du Toit Cloete Inc, although she was unrepresented by the time of trial. No evidence was presented, and thing else placed before me, to justify a departure from the usual rule that the party who enjoys success at trial is entitled to an order of costs, and I intend in this regard to follow the usual practice.

In the circumstances, the following order is made:

1. A decree of divorce is granted.

2. The parties shall act as co-guardians of their minor child, T C as provided for in sections 18(2)(c), 18(3), 18(4) and 18(5) of the Children's Act, No 38 of 2005 ("the Children's Act").

3. The parties shall be co-holders of parental rights and responsibilities in respect of

the child as referred to in sections 18(2)(a) and 18(2)(fo) of the Children's Act, subject to the provisions set out below.

3.1. The child shall mainly reside with Plaintiff who shall be her primary carer and Defendant shall retain the right to have reasonable contact with her.

3.2. The parties shall make joint decisions about the following aspects of the children's lives:

(a) decisions about her schooling and tertiary education;

(b) major decisions about her religious mental health care and medical care;

(c) major decisions about her religious and spiritual upbringing;

(d) decisions about her residence outside the Cape Peninsula;

(e) decisions affecting contact between her and the children;

(f) decisions which are likely to significantly change the children's living conditions or to have an adverse affect on their wellbeing.

3.3. Decisions effecting the child's everyday care and routine shall be made by the party in whose care she is at the relevant time.

3.4 In the event of any dispute arising between the parties in their decision making concerning the child the parties shall appoint a facilitator to assist them. The facilitators decision shall bind the parties subject to any court order to the contrary. The costs of the facilitator shall be borne by the parties in equal shares.

4. Plaintiff is granted absolution from the instance in regard to prayer 5 of Defendant's claim in reconvention.

5. No orders are made in regard to the balance of the claims in convention or reconvention.

6. Defendant is directed to bear Plaintiffs costs of suit at times when she was legally represented.

S.C. KIRK-COHEN, AJ