IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. D11087/2014

In the matter between:

MARCO ROSARIO ACCOLLA **APPLICANT**

and

ROSANNE NOELLA NARANDAS **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representative by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 03 June 2020.

ORDER

The following order is issued:

1. The applicant's application is granted.
2. The respondent's counter-application is dismissed.
3. The respondent is ordered to pay the applicant's costs, such costs to include all of the costs in the application and the hearing under the above case number as well as the costs of senior counsel, where so employed.

JUDGMENT

Steyn J:

[1] On 17 September 2015, the parties brought an application[1] and counter-application[2] before my brother Sishi J. After hearing the opposed applications, Sishi J referred the matter for the hearing of oral evidence based on the material disputes of fact.

[2] The following issues were referred:

(a) Whether the respondent made any loan to the applicant, and if so, the amount thereof.

(b) In the event of a loan having been made to the applicant, what were the terms of repayment and the interest charged on the loan.

[3] On the day of the hearing of oral evidence, both parties agreed that the burden of proof rested on the respondent to prove the existence of the loan agreement as well as the terms of the agreement, be that express, implied or tacit.

[4] The issues to be decided will be decided with reference to all of the affidavits filed by the parties, their oral evidence and the documentary evidence before this court.[3]

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[1] The applicant sought the following relief:
"1. That the partnership between the Applicant and the Respondent be and is hereby dissolved.
2. That the immovable property described as Unit 24, 355 Musgrave Road, Durban (hereinafter referred to as "the property") be sold by public auction to the highest bidder, subject to a reserve price as determined by an independent appraiser.
3. That the applicant be directed to appoint an Auctioneer for the purposes of giving effect to the terms of paragraph 2 above, within 5 days of the grant of this order.
4. That the Auctioneer appointed by the Applicant, be hereby authorised and directed to put the property up for sale, within 60 days of date of grant of this order.
5. That the net proceeds of the sale of the property be distributed equally between the Applicant and the Respondent, with payments to be effected into the Trust account of the Applicant's attorney and to any account nominated by the Respondent for that purpose.
6. An order directing that the Costs of this application to be paid out of the Respondent's share of the proceeds from the sale of the property.
7. Further and or alternative."

[2] In the counter application the respondent sought in her notice the following relief:
"1. That the partnership between the Applicant and Respondent be and is hereby dissolved.
2. That the Applicant be directed to do all things necessary to pass transfer of the property described as Unit 902, 355 Musgrave Road, Durban to the Respondent upon payment by the Respondent of an amount of R1 016 250.00 (one million and sixteen thousand, two hundred and fifty rand) to the Applicant.
3. That the Applicant be directed to pay the costs of this application.
4. Further and/ or alternative relief."

[3] The documentary evidence placed before this court was:
A - Pre-trial minutes.
B and B1 - Applicant and Respondent's discovery bundles.
C - Mediation proposal.

The parties

[5] The applicant, a single businessman, met the respondent when she purchased a 50 per cent interest in a nightclub that he co-owned. Soon after they had become business partners they also became romantically involved. In 2008, the couple formed Noella and Rosario CC ('N&R'). Each of them owned a 50 per cent interest in N&R. The respondent is a married woman with 30 years' experience in the clothing industry. She entered the business world in 1979 and opened a clothing store called Ooh-La-La. Over the years she has owned various clothing stores. It is clear from the facts that the parties have been successful in their businesses for some time.

[6] Their personal relationship however degenerated round about 2014 to the point that they no longer stayed together. The irretrievable breakdown in their personal relationship also led to a breakdown in their business relationship. The dispute between the parties relates to the property that they acquired in 2008.

Background

[7] On 21 August 2008, the parties decided to purchase the immovable property described as Unit 902, 355 Musgrave Road, Durban ('the unit'). At the time of the purchase, the unit was still under construction and incomplete. It is common cause that the parties intended to purchase the unit jointly and had desired to own it jointly. The unit is registered in both of their names.

[8] In as much as the applicant elected to testify first, I shall firstly deal with the respondent's version since she had to discharge the onus that there was an existing loan agreement and that the terms were:

(a) That the loan was for an amount of R1,5 million.

(b) That the loan would attract interest of 15,5 per cent per annum.

(c) That the capital would be repaid when a bond could be registered over the unit.[4]

D - Pleadings bundle.

[4] See para 9 at 20 of pleadings bundle that reads:

"It was envisaged that 50% thereof in the amount of R1.5 million would be a loan advanced by myself to the Applicant which would attract interest to be repayable monthly and the capital repaid when a bond could be registered over the property."

[9] It is trite that a party who bears the onus has to discharge the onus of proof. The approach to be adopted when dealing with the question of onus has been succinctly stated by Eksteen AJP in *National Employers' General Insurance Co Ltd v Jagers:*[5]

'It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'[6]

(My emphasis).

Respondent's evidence

[10] In support of the counter-claim that was lodged by the respondent, she deposed to an affidavit on 10 October 2014 and stated that the unit was purchased at an amount of R4,2 million.[7] According to her affidavit, the purchase was funded with each party contributing an amount of R600 000 (six hundred thousand rand) towards a deposit and obtaining a mortgage bond for the balance of the purchase price in the amount of R3 million.[8]

[11] She explained the agreement between them as follows:

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[5] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E).
[6] At 440D-H.
[7] See para 5 at 19 of pleadings bundle.
[8] See para 6 at 19 of pleadings bundle.

'It was envisaged that 50% thereof the amount of R1.5 million would be a loan advanced by myself to the applicant which would attract interest to be repayable monthly and the capital repaid when a bond could be registered over the property.'[9]
(My emphasis).

[12] Later in the same affidavit she avers:
'The applicant has made no payment to me in respect of the interest. The agreement between us was that the rate of interest would be calculated at 15.5% per annum…'[10]
(My emphasis).

[13] A few paragraphs on in the same affidavit, she states:
'44.1 We each contributed an amount of R600 000 (six hundred thousand rand) towards the deposit.
44.2 The balance of the purchase price was paid by myself from my personal investments as evidenced earlier herein; and not from our joint business.
44.3 The balance of the purchase price was originally intended to be financed through a mortgage bond, but we were unable to secure one for the reasons set out earlier herein.'[11]
(My emphasis).

[14] When the respondent testified she affirmed that she was a 50 per cent member in N&R up until 2010 whereafter the applicant became the sole member. She explained that in 2008 Calvitrading CC ('Calvitrading') was registered and that her son was the sole member of it. She managed the business for him.[12] Calvitrading was the supplier of stock to the stores owned by N&R. According to the respondent, the Ooh-La-La stores of N&R did not pay upfront for the stock held in the stores. In her evidence-in-chief, she confirmed that the certificates prepared by the applicant, as per the discovery bundle, are correct. Also that the certificates reflect the cash payments received by her.[13] She denied however that the cash collected by her was in part moneys due to her and the applicant or that it had to be invested for them. According to her, the applicant had no right or claim to the moneys since it was collected on behalf of Calvitrading and had to be used in the interest of Calvitrading.

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[9] See para 9 at 20 of pleadings bundle.
[10] See para 11 at 21 of pleadings bundle.
[11] See para 44 at 29 of pleadings bundle.
[12] Her son passed away in 2014 whereafter she became the member of Calvitrading.
[13] See bundle B at 79 to 145.

[15] When she was asked in evidence-in-chief to clarify the averment in her affidavit[14] where she stated that the purchase price of the unit was R4,2 million, she responded by saying that the figure includes an amount of R350 000 for outstanding levies and also an amount for renovations. She further stated in her evidence-in-chief that the developer did not charge any occupational rent. It will become clear later in this judgment that a different version was given in cross-examination regarding the occupational rent. Asked to clarify the discrepancy in her affidavit and her oral testimony regarding the purchase price, she said that when she deposed to the affidavit she firmly believed that the purchase price was R4,2 million. She also believed that they had paid a deposit of R1,2 million. She never conceded that she was ever wrong regarding the averments made by her in her affidavit. During her viva voce evidence, she expressed doubt that they had paid a deposit of R1,2 million. It is important to note on this issue that on 25 February 2015, the respondent filed a supplementary affidavit wherein she repeated that a deposit was paid.[15] It is fair to assume that in 2015 the facts relating to the unit would have been far more fresh in her memory than in 2020.

[16] Regarding the interest claimed as per her affidavit, the respondent at first testified that she could not remember any discussion regarding any interest that should be paid. Later during her testimony, she suggested that her previous counsel, Mr *Naidoo*, suggested the percentage interest as stated in her affidavit and that is why she averred that 15,5 per cent should be paid.

[17] In cross-examination she was asked to clarify her contention of the purchase price being R4,2 million as opposed to R3,65 million as per the sale agreement.[16] Her response was that she added to the amount of R3,65 million an amount of R550 000 for levies, R200 000 for renovations and also an amount for occupational rent. When confronted with the calculation of the sum of R550 000 plus R200 000 giving R750 000 and if that is added to R3,65 million then it results in R4,2 million which means that she is mistaken about any occupational rent being charged, she

[14] See para 5 at 19 of pleadings bundle.
[15] See para 9.3 at 86 of pleadings bundle.
[16] See bundle B at 1 to 18.

changed tactic and said that she had not been privy to the discussions of the costs since it took place between the applicant and the developer. She simply digressed and never clarified the contradiction.

[18] When cross-examined she was not prepared to concede that she was either wrong or misguided in making certain averments under oath. She remained insistent that what she had averred in the affidavits was what she believed at the time. She was asked to clarify para 9 of her affidavit[17] where she claimed that annexure 'RNN2'[18] is proof of the developer calling for the purchase price. She responded by saying the paragraph was perhaps not correctly constructed. When pushed for clarification she was not prepared to say it was misleading or wrong.

[19] Importantly, when she was asked to explain how she could state that she and the applicant had an agreement that the interest rate for the loan would be 15,5 per cent per annum whilst she knew it was not true, she denied that she falsely stated the interest rate was agreed on or that it was 15,5 per cent. Instead, she answered that she now has new proof that the interest rate was in fact 7.5 per cent. Once more she insisted that the content as per her affidavit was not wrong.

[20] She admitted during her evidence that she had never asked the applicant to pay interest to her. In as much as she confirmed during evidence-in-chief that the certificates reflect all of the cash payments that were made to her, she disputed during cross-examination that all the payments were made in cash. She finally conceded that it is easy to evade tax obligations if deals are done in cash.

[21] The respondent called Mr Robert to testify in support of her case. Mr Robert's evidence was that he was a financial broker and became involved in a series of discussions between the parties to resolve their disputes. According to him he tried to mediate and resolve the issues that existed between them. He was not aware of the fact that they had a personal relationship. According to Mr Robert, his role was that of a mediator, not a lawyer. His evidence was that he drafted minutes after the

[17] See para 9 at 20 of pleadings bundle.
[18] See 35 of pleading bundle.

meetings and forwarded these minutes to both of the parties. This concluded the evidence tendered on behalf of the respondent.

Applicant's evidence

[22] The applicant testified that he entrusted the respondent with their moneys since they were living together as husband and wife. The unit co-owned by them, was maintained by N&R of which he was the sole member for a long time. In his replying affidavit he stated the following:

'Each and every amount in respect of the living costs from date of inception in 2008 till January 2014 that includes rates, levies, lights, water, general maintenance, security, etc. was paid for by Noella and Rosario CC.'[19]

[23] His version was that they decided to buy the unit. They paid R1,2 million deposit for it and the purchase price of the unit was R3,65 million. N&R paid R650 000 of the price and R3 million was sourced from the investment account that the respondent had in her name with Investec Bank.

[24] His evidence was that when he and the respondent were a couple, he assumed that the cash he was paying over to the respondent would be invested on their behalf. According to him the certificates put up by him, as per the discovery bundle,[20] served only one purpose, namely to record how much cash was handed over to the respondent. In fact, his version was that 35 per cent of the amount was for stock received but the balance of the money was their profit. In hindsight he realised that he was very naïve to trust the respondent in the way he did.

[25] He vehemently denied that there was ever a loan agreement entered into by him for the purchase of the unit or that he would have paid the respondent any interest. According to the applicant, he was financially sound and most certainly had sufficient resources to pay for the unit. In cross-examination he denied the assertion made by the respondent that R350 000 was for arrear levies, R200 000 renovations an amount for occupational interest.

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[19] See para 16(g) at 56 and 57 of pleadings bundle.
[20] See bundle B at 79 to 145.

[26] He conceded that Mr Robert was involved in settlement negotiations between him and the respondent. It was put to him that he was the author of a settlement document in which he stated the agreement and the interest rate. His response was that the document referred to by counsel (which was not shown to him nor handed in when he testified) was not authored by him nor did it constitute an agreement. It was a proposal that was made by Mr Robert during the negotiations when they were trying to broker a settlement.

[27] He was confronted in cross-examination with annexure 'RNN1',[21] an email to FNB, wherein he stated that he would prefer to fund the property via the respondent and that he would rather pay her monthly interest than FNB. He immediately confirmed the email but denied that the content proves funding by the respondent. According to the applicant, he was frustrated and wanted to vent his anger since the bank wasted his time. It was never his intention to borrow money from the respondent.

Evaluation

[28] It is appropriate to evaluate the credibility of the witnesses that testified before I make a final determination on the issues. The respondent did not impress as a credible witness in the witness stand. She tendered various versions relating to the existence of the loan agreement and the terms of the agreement. The respondent could not give any detail as to when and where it was concluded and how the loan would be repaid. The respondent on her own version is an astute businesswoman who decided to lend her partner R1,5 million to be used towards a joint business venture but failed to secure the repayment of the money. This conduct is not in accordance with an experienced businesswoman who knows how to protect her business interest.

[29] Her credibility was seriously undermined by the contradictions between her affidavits and the viva voce evidence tendered by her. She seems to think that her assertions can be based on her beliefs as opposed to what is factually true and correct. She not only contradicted herself in what was stated in her evidence-in-chief,

[21] See annexure 'RNN1' at 34 of pleadings bundle.

but also with what she had stated in cross-examination, for example whether the certificates reflected all the cash payments received by her.

[30] Her version of the loan agreement and the terms of the agreement varied throughout her testimony. If there was a loan agreement and if there had to be a repayment of the loan, then the facts would be easily demonstrated and proved. It is only probable that if she was owed money that she would have claimed it from the applicant and in the very least asked that she receives the interest.

[31] On the other end of the scale is the evidence of the applicant. His evidence remained consistent with what he had stated in his affidavits. He conceded under cross-examination when necessary and did not contradict himself. He made a good impression in the witness stand and did not waiver under cross-examination. In my view, the applicant's version is not only more probable, but is more reliable and credible than the version tendered by the respondent.

[32] The evidence of Mr Robert was straightforward namely, that he mediated between the two parties and that he minuted the meetings. In addition, the e-mails filed at pages 52 to 61, which are not in a chronological date order, at best serve as proof that the parties were trying to negotiate a settlement and that proposals were made. It was not discovered prior to the hearing and it certainly does not tip the scale in favour of the respondent in proving any loan agreement. A proposal[22] to settle a dispute, during a mediation process, does not constitute an agreement.

[33] Accordingly, I conclude that the respondent has failed to discharge the onus on both issues referred to oral argument.

[34] I was invited by the parties to issue an order which they had agreed to. The proposed order, in my view, deals with issues that are not defined in the pleadings and for that reason I will not accede to the request. I consider it however important to

[22] See Exh 'C' the agreement reached between the parties.

quote it in detail since it reflects the wishes of the parties to inter alia not sell the unit by public auction.[23]

Order

[35] In the result, the following order is issued:

1. The applicant's application is granted.
2. The respondent's counter-application is dismissed.
3. The respondent is ordered to pay the applicant's costs, such costs to include all of the costs in the application and the hearing under the above case number as well as the costs of senior counsel, where so employed.

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Steyn J

[23] Proposed order:

"1. …
2. …
3. …
4. The respondent shall purchase the applicant's 50% share in the immovable property known as Unit 902, 355 Musgrave Road, Durban, 50% of the value of the property (which is agreed at R6 million), after deducting all levies (including interest thereon), that were due or which may become due prior to the 30th June 2020, having been deducted from the sum of R6 million.
5. The amount in paragraph 4 shall be paid by the respondent to the applicant by no later than 30 June 2020.
6. Upon payment if the amount referred in paragraph 4 into the trust account of Pat Naidoo Attorneys, the applicant is directed to sign all and any necessary transfer documentation to give effect to the transfer of the property into the sole name of the respondent.
7.The respondent shall pay all associated costs with such transfer to the conveyancing attorney, who shall be nominated by the applicant.
8. Pending payment of the amount in paragraphs 4 and 7 above, the parties are interdicted and restrained from alienating or encumbering their equal undivided half shares in the property.
9. In the event of the respondent failing to pay the amount due by 30th June 2020, then the applicant is given leave to set the matter down, on the same papers supplemented insofar as may be necessary for judgment against the respondent in accordance with the order.
10. Pending finalisation of the matter, including all appeal process if applicable, the respondent shall pay into the trust account of her attorneys' MB Pedersen and Associates, the sum of R2 700 000.00 as security for the purchase price referred to in 4 above, to be paid on or before 30 April 2020."

APPEARANCES

Counsel for the applicant	:	Adv GR Thatcher
Instructed by	:	K. Maharaj Incorporated Suite 301, 3rd Floor 40 Masonic Grove Durban Email: maharajr@kmaharajinc.co.za REF: RM/ad/ACC2/0003
Counsel for the respondent	:	Adv SM Alberts
Instructed by	:	MB Perderson Suite 1C 1st Floor Linconln House 30 Dullah Omar Grove Email: admin@durban-law.co.za REF:MB Pedersen
Date of Hearing	:	16, 17 and 18 March 2020
Date of Judgment	:	03 June 2020