

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO. I3113/2015

In the matter between:

HEINRICH WILLEM KURTZ

PLAINTIFF

and

HERNANDEZ ROSELL MERCEDEZ

DEFENDANT

Neutral citation: *Kurtz v Mercedesz (I 3113/2015) [2017] NAHCMD 108 (17 February 2017)*

Coram: Prinsloo, AJ

Heard: 13th, 14th, 15th and 17th February

Delivered: 17 February 2017

ORDER

1. The application for absolution from the instance is granted.
2. Plaintiff is to pay the cost of the defendant, on a scale as between party and party.

JUDGMENT

Prinsloo, AJ;

Introduction

[1] The plaintiff instituted action against the defendant for the recovery of a sum of money in the amount of N\$192 365.95 either loaned and advanced by plaintiff to the defendant or disbursed by him to the defendant at the latter's instance and request plus interest thereon and costs of suit.

[2] The plaintiff's cause of action is based on an oral agreement between himself and the defendant concluded prior and during their marriage, however failed to state in his pleadings the terms of such contract, besides the allegation that he advanced the plaintiff N\$192 365.95.

[3] In the particulars of claim, all the plaintiff said was, quoting –

'I met the Defendant long before our marriage on the 3rd of August 2013 and we entered into a verbal contractual agreement that we would get married. The following were the express alternatively tacit and further alternatively implied terms of the agreement before marriage.'

[4] The plaintiff failed to state or allege the expressed terms of the agreement between him and the defendant or how it was tacitly or implied to him.

[5] It is then alleged that the defendant failed to repay the said amount of N\$ 192 365.95, thus breached the contract.

[6] In the defendant's plea, she denied that the plaintiff lend or advanced the sum of N\$ 192 365.95 to her and pleaded that the plaintiff by implication, waived his rights to and in respect of the obligations by the defendant by virtue of the divorce settlement agreement between the parties.

Brief Background

[7] The plaintiff and the defendant got married out of community of property with an ante nuptial contract, on 03 August 2013 after a courtship of a few months. The defendant in this matter is a Cuban national who, at the time when the couple met, was working at the Ministry of Local Government and Rural Development by virtue of a joint agreement between the respective governments. The contract of the defendant lapsed in December 2013, shortly after their marriage and she travelled back to Cuba. Plaintiff went to visit the defendant in Cuba during her absence from Namibia. Defendant returned to Namibia during April 2014, she secured employment at the University of Namibia during July 2014

and shortly thereafter problems arose in the couple's relationship. During September 2014 the plaintiff issued summons for divorce and same was served on the defendant. On 16 February 2015, a settlement agreement was signed by the plaintiff in Walvis Bay at the office of his legal representative and the defendant signed the agreement in Windhoek on 18 February 2015. The divorce was finalized on 10 June 2015 in this court, and the settlement agreement was made an order of court during the final divorce proceedings.

[8] The term of the settlement agreement relevant to the current Court proceedings is clause 4 which reads as follows:

4. DEBTS AND INDEMNITY

Other than what is contained in this agreement, no party shall have any further claim against the other. Neither party shall be liable for any debts of the other party which were contracted during the course of the marriage and indemnifies the other party totally in respect thereof.'

Pre- trial proceedings:

[9] In the joint pre-trial report that was adopted and made an order of court on 21 July 2016, the parties agreed that the issues of fact that need to be resolved by this Court during the trial are the following:

'1.1 Whether or not the plaintiff and the defendant entered into a verbal agreement after their marriage in terms of which the defendant borrowed the money from the plaintiff in the sum of N\$ 192 364. 95.

1.2 Whether or not the plaintiff and defendant on 16 February 2015 at Walvis Bay, concluded a divorce settlement agreement in terms of which the plaintiff agreed that no party shall have any further claims against each other.

1.3 In the event the Court finds that the parties concluded a verbal agreement as per paragraph 1.1 hereof, whether or not the plaintiff by implication, waived his rights to and in respect of obligations by defendant to repay the aforesaid sum to plaintiff.'

The evidence submitted in Court

[10] The plaintiff testified that the defendant enticed him into marrying her specifically to enable her to remain in Namibia. He repeatedly referred to the marriage as a fraudulent one on the part of the defendant and stated that she insisted that they get married in 2013 before her contract with the Namibian government lapsed. Plaintiff testified that he was hesitant to get married so soon, as he was recently divorced from his previous wife, but stated that he loved the defendant and wanted to start a life with her. The couple got married at Out of Africa in Otjiwarongo. Prior to the wedding he purchased rings at Galaxy and Co at a cost of N\$ 8 000 and paid the cost of the reception which was approximately N\$ 12 000.00. Things went well for the couple a few months until around July 2014 when their relationship deteriorated to the point that the defendant told the plaintiff that she did not want to see him or have contact with him. Plaintiff testified that after certain incidences, which are not relevant for these proceedings, he concluded that the defendant was just using him. He approached Home Affairs regarding the status of the defendant and reported to them that he was of the opinion that she did not enter their marriage in good faith.

[11] The plaintiff testified that his financial position was rather precarious and he proceeded to apply for an overdraft facility and also a Revolving Credit Plan (RCR). The monies advanced by virtue of the RCR were paid out to the Plaintiff and these monies

were used to pay for whatever needs the couples had. The Plaintiff was the breadwinner at all material times as the defendant earned a small salary when she was employed but was unemployed from January 2014 to July 2014. On the insistence of the plaintiff, the defendant also did not renew her contract with the Namibian government.

[12] During 2013, the plaintiff also purchased a house and stated that the loan was approved in January 2014. Although it is the plaintiff that applied for the home loan, the defendant was reflected as a second borrower and the deed was registered in both their names. During the transfer of the property, fees were paid to Lorentz Angula Inc. and Du Pisani Legal Practitioners in the amounts of N\$ 16 579.50 and N\$ 16 507.50 respectively.

[13] According to the plaintiff, the defendant loaned monies from him during the course of their marriage with the promise to repay the monies once she gets employment. The plaintiff specifically referred to the following amounts:

13.1 An amount of N\$ 9 500 for payment of an airplane ticket to return to Namibia;

13.2 An amount of N\$ 20 000 that he lend to the Defendant on her request to assist in the repairing of the sewerage system and to erect a boundary wall at the house of her mother in Cuba. Said funds were transferred to the Defendant on 14 February 2014 by electronic funds transfer.

[14] The plaintiff confirmed that there was a settlement agreement reached in this matter and that he signed it out of his own volition. At the time of concluding the said agreement he was legally represented by Mr. Metcalf. Prior to the conclusion of the settlement agreement he was represented by one, Mr. Tjituri. Plaintiff stated that he explained to his legal representative at the time that he wished to pursue the issue of the

monies due and payable to him by the defendant but cannot recall if he informed his subsequent council, Mr. Metcalf of this issue. Plaintiff stated that he was in a very emotional state at the time because of the divorce and did not really take note of what he signed, and added that the settlement agreement was not fully explained to him. He, however, just wanted the divorce to be finalized as soon as possible. He was apparently also instructed by Home Affairs to provide them with a copy of the divorce order in order to consider the status of the defendant.

[15] The Plaintiff testified that the break-down of his claim of N\$ 192 364. 95 consist of the following, it must however be noted that they were not alleged in the pleadings, all the plaintiff stated in the particulars of claim is that the defendant owes him N\$192 364.95:

1. *N\$ 20 000.00-The expenses paid for the wedding reception and the wedding rings;*
2. *N\$ 119 503.44-Bond payments in respect of the fixed property in the amount of N\$ 9958.62 calculated over period of 12 months;*
3. *N\$ 27555.24-Revolving Credit plan (RCR) installments of N\$2293.27 calculated over period of 12 months;*
4. *N\$ 16 579.50- Transfer costs in respect of fixed property paid to Messrs Lorentz Angula Inc.*
5. *N\$ 16 507.50- Transfer costs in respect of fixed property paid to Du Pisanie Legal Practitioners;*
6. *N\$ 9500.00- in respect of air plane ticket for Defendant from Cuba;*
7. *N\$ 20 000- monies paid to assist in the reparation to the house of Defendant's mother in Cuba.*

[16] During cross-examination each of these expenses were canvassed by the council for the defence.

[17] When questioned on the issue of the wedding reception the plaintiff stated that he willingly paid for everything but included the full expenses in his claim as the defendant misled him and her intention was never pure when they got married.

[18] It was confirmed during cross-examination at that the time of the purchase of the fixed property the defendant was unemployed and the plaintiff was the one who applied for the home loan and would also be the person responsible to pay the monthly installments on the bond. Plaintiff conceded that there was no express agreement by the defendant to pay the monthly installments on the bond nor was there an express agreement by the defendant to pay the RCR. Plaintiff also conceded that defendant is not liable for the transfer costs of the fixed property. However, defendant apparently told the plaintiff that he should not worry and when she return to Namibia and secure employment as engineer she will assist him in paying.

[19] It was put to the plaintiff that as they were still newly-weds the plaintiff gave the N\$ 20 000 to the defendant as a Valentines Gift. The Plaintiff vehemently denied this proposition and insisted that it was to affect the repair work to the house of defendant's mother. The plaintiff confirmed he paid for the airplane ticket to get his wife back to Namibia but states that she promised that as soon as she got employment she would repay him and he believed her and he therefore regarded both these monies advanced as loans.

[20] This concluded the plaintiff's case. Mr Coetzee, counsel for the defendant indicated that he was instructed to move an application for absolution from the instance.

The application for Absolution from the instance

[21] In the written argument advanced on behalf of the defendant, it was submitted that plaintiff did not place sufficient evidence before this court upon which a reasonable court might give judgment in favor of the plaintiff. It was argued that the plaintiff admitted that he signed the settlement agreement containing clause 4 (supra) and when he did so he initialed every page with a full signature on the last page thereof. In doing so the *caveat subscriptor* rule applies and his signature signifies that he assented to the contents of the document. It was argued that the emotional stress plaintiff testified about does not qualify as an exception to the *caveat subscriptor* rule. In conclusion it was stated that plaintiff produced no evidence to prove his claim.

[22] In his written reply to the application for absolution from the instance, the plaintiff reiterated that the defendant entered into a verbal agreement to borrow the monies and undertook to repay same. Plaintiff refers to an admission that the defendant made to the National Intelligence Agency that she indeed borrowed the money from him but stated as a lay person he did not discover any evidence with regards to the money lend to the defendant. (This is with reference to par 3.3 of plaintiff's replication)

The law applicable to application for absolution from the Instance

[23] The test which the court applies for such applications has been authoritatively stated in various judgments of the courts of South Africa and adopted by this court and our Supreme Court¹. The leading case in this regard is ***Claude Neon Lights (SA) Ltd v Danie²*** where Miller AJA set out the applicable test in the following terms —

¹Stier and Another v Henke 2012 (1) NR 370 (SC)

² 1976 (4) SA 403 (A) at 409G – H.

'when absolution from the instance is sought at the close of plaintiff's case, the test to be applied *is not whether the evidence led by plaintiff establishes what would finally be required to be established*, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, *could or might (not should nor ought to) find for the plaintiff*. (My emphasize)

[24] In the matter of ***Gordon Lloyd Page & Associates v Rivera and Another***³, Harms JA, after quoting from the Claude Neon Lights judgment above, stated the following at 92G – J:

'This implies that a plaintiff has to make out a prima facie case — in the sense that there is evidence relating to all the elements of the claim — to survive absolution because without such evidence no court could find for the plaintiff. . . . As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is evidence upon which a reasonable man might find for the plaintiff" . . . a test which had its origin in jury trials when the reasonable man was a reasonable member of the jury. . . . Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another reasonable person or court.'

[25] This Court is in agreement that the formulation of the test that has previously been applied and will adopt the test as set out by Harms JA in the Claude Neon Lights case *supra* and for exactly the same reasons.

[26] Keeping the aforementioned test in mind I now proceed to consider the evidence placed before me.

³ 2001 (1) SA 88 (SCA)

[27] There are two issues to be considered in this matter, i.e.:

27.1. Whether or not the plaintiff and the defendant had an agreement during the subsistence of their marriage in terms of which the defendant borrowed the money from the plaintiff in the sum of N\$ 192 364. 95; and

27.2. Whether or not the plaintiff waived his rights to and in respect of obligations by defendant by virtue of the divorce settlement agreement in terms of which the plaintiff agreed that no party shall have any further claims against each other.

Alleged loan agreement between spouses:

[28] The plaintiff pleaded a contract of loan and that the loan was not repaid. Applying normal principles, that is what he needed to prove to succeed in his claim. Plaintiff therefore carries the 'overall onus', or 'the duty of finally satisfying' the Court that he was entitled to succeed in his claim.

[29] The parties were married out of community of property and there was thus nothing to preclude the spouses from contracting with each other. However, one of the legal consequence of marriage, whether in or out of community of property is that the spouses owe each other a reciprocal duty of maintenance according to their means. The reciprocal duty which exists upon both husband and wife to contribute towards the support of the marriage means that both husband and wife must do as much as lies in their power to enable the way of life which the spouses have decided to follow or do in fact follow, to

continue. In this context 'to contribute according to their means' does not mean according 'to their financial means' but means according to their 'respective ability'.⁴

[30] Although the duty to support is reciprocal in modern law and husband and wife are legally in the same position in practice, the duty rest primarily on the husband. In many instances the husband is the main, if not sole money earner. He has to provide matrimonial home. To support his wife and family, he must use (where the marriage is out of community of property), whatever income and if need be, capital assets he controls.⁵

[31] As already pointed out, the defendant was unemployed from end of December 2013 until July 2014 during which period plaintiff had to provide for the common home by which ever means necessary. Plaintiff conceded that the defendant cannot be held liable for his RCR and overdraft facilities or the bond payment for that matter. This concession also applies to the transfer fees which were paid by plaintiff.

[32] The only issue remaining is then the cash monies that plaintiff paid over to the defendant.

[33] It is indeed so that spouses advance each other money from time to time. Such transactions can be regarded as pure money-lending with the result that a spouse can institute a claim against the other for repayment of such a loan as part of the divorce proceedings. Plaintiff cannot explain why this issue of the loans was not addressed during the divorce proceedings, nor pleaded in the pleadings. Plaintiff can also not explain to court why proof of these loans was not handed over to his erstwhile legal representative,

⁴Plotkin v Western Assurance Co LTD And Another 1955 (2) SA 385 (W) at 386 B

⁵Halho and Khan: The South African law of Husband and Wife, 5 edition pg. 135

Mr. Metcalfe. The whole issue of the so-called loans are noticeably absent from the settlement agreement.

[34] In order for this court to enforce an agreement between spouses at this stage the court would want to be convinced that a binding contract existed and that it was not only a domestic arrangement that was intended. The defendant does not deny receiving the monies however there is a dispute as to the nature of the 'transaction' and the plaintiff bears the onus to prove that it was a loan and not a gift/donation as the defendant alleges. The issue of the gift or donation was not specifically pleaded as the combined summons of the plaintiff did not set out a breakdown of the amount in his claim. It was however repeatedly put to the plaintiff that these monies were not a loan but a gift or donation given to the defendant during the course of their marriage.

[35] There is a general rule of logic, founded on common sense and ordinary reasoning that donations are not lightly to be inferred⁶. This approach is, in terms of the authorities, based on the strong probability against the gratuitous giving away of property out of pure liberality and because no one is presumed to throw away or squander his property.⁷ However, the court cannot lose sight of the unique position that a husband and wife find themselves in.

[36] The Plaintiff's own evidence was not of such a nature to discharge the overall onus resting on him to prove that he made loans to the defendant. The improbability of making donations (the rationale for the presumption against donations) was, in this court's

⁶Support for this conclusion may be found in the judgment of Schreiner J (as he then was) in *Stern v Kuper* 1941 WLD 223 at 228 where it was remarked in obiter that: 'I find the statement that donation is not presumed a difficult one to give effect to, because the same thing, I imagine, can be said of any contract. Whoever sets up a particular form of transaction in litigation must prove it. I do not think that the maxim means that there is a legal presumption against donation, but only that the Courts should incline to the assumption that the parties do not act from mere liberality. (There is apparently no similar disinclination to hold that they act from avarice or miserliness.) The weight that must be given to the maxim must obviously vary with the relation of the parties and the circumstances of the case. . . .'

⁷See *Twigger v Starweave (Pty) Ltd* (supra); *Smith's C Trustee v Smith* 1927 AD 482 at 486

opinion, countered by the fact of the intimate, personal relationship which existed between plaintiff and the defendant which made the making of donations more probable⁸.

[37] On the issue of the expenses claimed in respect of the wedding reception and the rings this court must find that it have no merits. The evidence and arguments of the Plaintiff in this regard is clearly that of a lover scorned. Plaintiff's reasoning for including these expenses in his claim was clearly unreasonable.

[38] Moreover, on the issue of the settlement agreement between the parties, the plaintiff is bound by the ordinary meaning of the content of the settlement agreement that he signed on 16/02/2014 and as per the said settlement agreement, plaintiff can advance no further claims against the defendant arising from their marriage.

[39] As is evident, the particulars of claim do not allege how the defendant is liable to the amount of N\$ 192 365.95 or how the plaintiff got to that amount or rather failed to quantify such amount. The particulars of claim further fail to adduce what the expressed terms of the oral agreement between the parties were and failed to state the necessary facts on which he relies for his claim.

[40] I must also emphasize Rule 45(5) which applies to all pleadings and echo its importance. Litigation is not a game where a party may seek some or other tactical advantage by concealing matters within his knowledge only to, ultimately, just run up extra costs.⁹ Rule 45(5) reads as follows:

⁸ As was found in *Barkhuizen v Forbes* 1998 (1) SA 140 (E) on pg.157- Majority decision – Froneman J

⁹*Makono v Nguvauva* 2003 NR 138 (HC).

'(5) Every pleading must be divided into paragraphs, including subparagraphs, which must be consecutively numerically numbered and must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply and in particular set out –

(a) the nature of the claim, including the cause of action; or

(b) the nature of the defence; and

(c) such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet.

[41] What is apparent from the pleadings is that the oral agreement entered into by the parties is that of marriage, quoting from the particulars of claim "I met the defendant long before our marriage on the 3rd of August 2013 and we entered into a verbal contractual agreement that we would get married." nothing before me shows that the parties entered into a contract to which the defendant will pay money to the plaintiff.

[42] The evidence led by the plaintiff does not prove that there was an agreement between the parties in terms of which the defendant will pay money or reimburse the plaintiff, as the pleadings before me do not say anything to validate or rather prove that there was an agreement to that effect and what were the specific or clear terms of it.

Costs:

[43] It was strenuously argued on behalf of the defendant that the plaintiff should be saddled with costs in this matter. It was further argued that the trial, which was scheduled to commence on Monday 12 February 2017, had to be postponed at the instance of the

plaintiff, as the plaintiff's trial bundles did not comply with rule 131(6)¹⁰ and had to be corrected and thus the plaintiff should pay the wasted cost for the day.

[44] In this regard the Court need to point that, in the instance of a plaintiff who is a lay litigant, and said litigant fails to comply with rule 131(8)¹¹, Practice Direction 48(2)¹² places a duty on the legal representative for the defendant to see to it that the rules are complied with in this regard. Wasted cost will thus not be considered.

[45] The general principle regarding the award of costs is well settled. It is entirely a matter for the discretion of the court, which is to be exercised judicially upon a consideration of the facts of each case, and in essence it is a matter of fairness to both sides¹³.

[46] The Plaintiff set out his current financial position to the court, however this court can find no reason to depart from the ordinary costs rule that stipulates that successful litigants should recover his/her costs.

¹⁰(6) Despite any rule to the contrary, a civil or labour cause or matter will not be heard unless and only if all the papers filed of record in that matter are indexed before the hearing, which indexing should be in compliance with the time periods and format set out in the practice directions.

¹¹(8) A legal practitioner representing the plaintiff or applicant or if plaintiff or applicant is representing himself or herself, the plaintiff or applicant must see to it that the requirements in subrule (6) are complied with.

¹²(2) Where a legal practitioner for a plaintiff or an applicant or a plaintiff or applicant representing himself or herself, fails to comply with rule 131(8) of the rules, the legal practitioner for the defendant or respondent or the defendant or respondent representing himself of herself, must attend to the indexing, pagination and binding of all papers filed of record not more than three days before the pre-trial conference, and in all other cases not more than three days before the filing of the first heads of argument is due, except where the plaintiff or applicant is unrepresented, the court may direct the legal practitioner of the defendant or respondent to do all that is required in terms of paragraph (1). (my underlining)

¹³cf Gelb v Hawkins 1960 (3) SA 687 (A) at 694A

[47] For all the reasons set out above I make the following orders:

1. The application for absolution from the instance is granted.
2. Plaintiff is to pay the cost of the defendant, on a scale as between party and party.

JS Prinsloo, AJ

APPEARANCES:

On behalf of the Plaintiff:

Mr. H.W. Kurtz

IN PERSON, Windhoek

On behalf of the Defendant:

Mr. E. Coetzee

Of:

Tjitemisa& Associates, Windhoek