REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 23542/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: No
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED
2 June 2017

DATE SIGNATURE

In the matter between:

HURTWITZ, BRNEY PLAINTIFF

AND

NEOFYTOU, DARREN DEFENDANT

JUDGMENT

MOLAHLEHI J

Introduction

[1] The plaintiff instituted these proceedings claiming the sum of R240 000 from the defendant. The complaint concerns the loan which was concluded during April 2012. The plaintiff avers that despite demands the defendant has failed to pay.

[2] The only witness who testified in this matter is the plaintiff. The defendant closed his case without leading any evidence and immediately applied for absolution from the instance.

The case of the plaintiff

[3] Plaintiff testified that he gave the defendant a loan to purchase shares from his brother's company. At the time the defendant was married to the plaintiff's niece. The defendant apparently borrowed the amount to establish himself as the shareholder in his brother's company. Although initially, the parties according to the plaintiff, agreed to reduce the agreement to writing, which never occurred.

[4] The plaintiff further testified in evidence–in-chief that he only demanded payment of the loan after the defendant divorced his niece. He paid the legal fees of the divorce.

During cross-examination the plaintiff conceded to the following:

a. The loan was made in a form of a cheque made out by the Frence Club (Pty) Ltd

b. The cheque was made out in the name of the plaintiff's niece.

c. The cheque was not made to the defendant.

[5] Counsel for the plaintiff in opposing the application for absolution from the instance contended that it was unsustainable because the issues raised by the defendant were not pleaded. He submitted in this respect that the defendant did not say why he said he was not indebted to the plaintiff, this includes the suggestion that the money was paid to his ex-wife.

[6] Counsel for the defendant correctly conceded that the plea was not model plea.

The legal principles

[7] The test to apply in an application of this nature is set out in Gordon Lloyd Page & Associates v Rivera and Another,[1] by Harmse J in the following terms:

[1] (384/98) [2000] ZASCA 33; 2001 (1) SA 88 (SCA); [2000] 4 All SA 241 (A) (31 August 2000)

"[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:

> ". . . 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. (Gascoyne v Paul and Hunter, 1917 T.P.D. 170 at p. 173; Ruto Flour Mills (Pty.) Ltd. v Adelson (2), 1958 (4) SA 307 (T))."

[8] 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 (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) 37G-38A; Schmidt Bewysreg 4th ed 91-92). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt 93). 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" (Gascoyne loc cit) - a test which had it origin in jury trials when the "reasonable man" was a reasonable member of the jury (Ruto Flour Mills). 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. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice."

[9] The issue in an application for absolution from the instances, as would appear from the test set out above, does not concern itself with the defendant's plea. The essential issue which the court has to look at in applying the above test is whether the plaintiff has discharged its onus of showing the existence of a *prima facie* case. The evidence of the plaintiff in the court was clearly at odds with his pleadings. In this respect, in seeking to establish the existence of the loan the plaintiff presented the copy of the cheque amounting to R 240,000, which is drawn out in the name of the French Club (Pty) Ltd and not the plaintiff. There is no evident that the French Club authorised the loan for the defendant.in other words, there is no resolution authorizing the loan to the defendant.

[10] The other important point made to note is that the cheque is not made out to the defendant but rather to his ex-wife, Amanda L Neofytou (Amanda), the niece of the plaintiff. There is no evidence that Amanda deposited the money into the account of the defendant.

Order

For the above reasons the following order was made:

1 Application for absolution from the instances is upheld.

2 The plaintiff is to pay the cost of the defendant.

E MOLAHLEHI

JUDGE OF THE HIGH COURT,

JOHANNESBURG

Appearances:

For the Plaintiff: Adv. G Meyer

Instructed By: Fluxmans Inc.Attorneys

For the Respondent: Adv. L Morland

Instructed By: Jurgens Bekker Attorneys

Heard on: 03 May 2017

Order on: 03 May 2017

Reasons: 2 June 2017