NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 10978/2012

In the matter between:

V. K. **1ST PLAINTIFF**

G. K. **2ND PLAINTIFF**

and

R. N. **DEFENDANT**

J U D G M E N T

Delivered on : TUESDAY, 11 OCTOBER 2016

OLSEN J

[1] The first and second plaintiffs in this action are Mr and Mrs K. married in community of property. Mr K. was the principal player in the events which give rise to this action, and for the sake of convenience I will refer to him as the "plaintiff".

[2] The plaintiff sues the defendant for repayment of certain loans he says he made to the defendant. At the outset of the trial, before evidence was led, the defendant admitted all save one of the payments claimed to have been made by the plaintiff to or on behalf of the defendant. To avoid cluttering the

trial with evidence to unravel the dispute over the small amount not thus admitted, the plaintiff abandoned that claim. The sum of the claims remaining is R600 000,00, an amount which is comprised of six payments made to or on behalf of the defendant by the plaintiff between September 2011 and January 2012. The plaintiff claims that repayment is due on demand, which has been made.

[3] The defendant pleads that save for one of the payments (an amount of R40 000,00 paid to his former wife on 12 January 2012) all of the payments to him were donations. Whether that is so is the central issue in this case, nothing having been pleaded or raised in evidence or argument by way of an alternative defence that if the monies were paid as loans, such are not now repayable.

[4] I propose to deal last with the payment of R40 000,00 which is not said to have been a donation. That payment aside, the payments made can be divided into two tranches, namely

(a) payments of R90 000,00 and R10 000,00 made on 23 September 2011; and

(b) payments of R340 000,00, R110 000,00 and R10 000,00 made respectively on 11, 12 and 25 January 2012.

[5] A chronology of events will assist in unravelling this case and the disputed issues. The main players are the plaintiff, his daughter Cheryl K. and the defendant, all of who gave evidence.

(a) As at the beginning of 2008 the defendant was married and owned a house in Lynfield Park. (The state of the defendant's marriage at that time was not explained in evidence, but it was presumably not good because a divorce followed.)

(b) The defendant, Ms K. and the plaintiff met early in 2008. At Christmas 2008 Ms K. and the defendant disclosed to the plaintiff and his family that a relationship had developed between the two of them.

(c) Early in 2009 Ms K. left the plaintiff's home with her young son to live with the defendant at Lynfield Park. This caused problems in the relationship between the plaintiff and the defendant. In fact it seems clear that there was a complete breakdown in the relationship between them as a result of this occurrence.

(d) In 2010 the plaintiff and the defendant met at a funeral, and apparently deciding that life was too short to be carrying on as they had, they renewed their friendship.

(e) Ms K. continued to reside with the defendant who was still a married man, at Lynfield Park, and that was the state of matters when in July 2011 the plaintiff won the lotto. His winnings were a considerable sum.

(f) It seems that by this time the divorce proceedings between the defendant and his wife were well advanced.

(g) In October 2011 the defendant needed money (R90 000,00) to pay into his bond, and R10 000,00 to bring his arrear debt with the municipality up to date. That is when the first tranche of payments was made.

(h) In October 2011 the defendant's divorce went through. It is common cause that in consequence presumably of a divorce settlement agreement the defendant still had to pay his former wife R40 000,00; and that he had to clear the bond on the Lynfield Park house in order to take transfer of her half share of the property into his name.

(i) As a result of this, in January 2012 the plaintiff paid R40 000,00 to the defendant's former wife, and R460 000,00 to the attorneys handling the cancellation of the bond.

(j) At some stage the defendant, Ms K. the defendant's mother and the defendant's son had moved in with the plaintiff at Howick. It appears that this was after Christmas 2011. The intention was that the defendant and Ms K. would be married in due course, and the plaintiff and the defendant would go into business together.

(k) The plaintiff had a son who was 11 years of age at this time. The defendant's son was 9 years old. An issue arose between the boys in April 2012 as a result of which the defendant, his mother and his son moved back to Lynfield Park. However this did not disturb the relationship between the plaintiff, the defendant and Ms K.. The defendant visited and stayed over at the plaintiff's house on what appears to have been a regular basis.

(l) In July 2012 a family meeting took place at which the question as to when the defendant and Ms K. were to get married was discussed. According to the plaintiff this was a discussion, and not an argument. It is not perfectly clear to me whether the defendant disputes that this meeting (in July) took place.

(m) On 12 August 2012 a family meeting did take place. This brought the relationship between the plaintiff and the defendant to an end; and shortly thereafter the breakup of the relationship between Ms K. and the defendant followed. According to the plaintiff and his daughter the fracas occurred because the defendant revealed that he had transferred into his own name an expensive Mercedes Benz motor vehicle which had originally been registered in the name of the plaintiff. The plaintiff regarded this as fraud or theft. According to the defendant the fracas occurred when and because he and Ms K. announced that they were to be married at the end of the year, and the plaintiff was upset as he wanted them to be married forthwith.

(n) To complete the account of the facts, a demand for repayment of the monies advanced on behalf of the defendant was made, and the summons commencing this action was issued on 29 November 2012. The plaintiff also lodged a complaint with the police concerning the Mercedes Benz, and that resulted in criminal proceedings being commenced against the defendant.

[6] According to the plaintiff both tranches of money paid by him on behalf and for the benefit of the defendant were to be repaid in due course. Given the relationship between Ms K. and the defendant that does not strike me as an improbably loose arrangement. The plaintiff suggested that the defendant would be able to make repayments out of his share of the profits which would

be earned from their proposed joint business venture. According to both Ms K. and the plaintiff a discussion took place at which such repayment was discussed, the plaintiff's evidence being that it took place in November 2011; i.e., just after the defendant's divorce went through. This was a family arrangement of some complexity, given the history of the plaintiff's initial disapproval of and subsequent reconciliation to the relationship between his daughter and the defendant. The plaintiff himself said that he had an idea that if his daughter and the defendant did marry, and the marriage lasted, he might come to regard the money he had paid to discharge the bond over the Lynfield Park property as a gift to his daughter. The defendant denied that any discussion concerning repayment of the monies occurred. That was because, he said, the money had been donated to him.

[7] It is the defendant's own version that the ultimate collapse in the relationship occurred because of the delay in the proposed marriage. Whilst that is disputed, it does seem clear that there must at least have been some anxiety on the plaintiff's part concerning the relationship between his daughter and the defendant, especially considering its history. Given this, I consider it improbable that the plaintiff would have committed himself to the gifts of money which the defendant says he did. The dispute over the Mercedes Benz makes the defendant's contentions more improbable. He contends that the car was bought for him. That would lift the plaintiff's generosity to the defendant to an even higher level; to well clear of R1 million.

[8] The dispute over the Mercedes Benz took up some time in evidence. The following is however clear.

(a) When it was bought the car was registered in the plaintiff's name.

(b) The defendant pointed out that its number plate was a version of his name; that signifying the intention that he was its true owner. When cross-examined on this Ms K. replied immediately that the reason for that was that her name was going to be put on the number plate, but it turned out that it was already taken.

(c) According to Ms K. the car was intended as a gift to her, a proposition I find more probable than the proposition that it was a gift to the defendant. However plaintiff insisted that the car was his.

(d) In the end the car was re-registered in the plaintiff's name, the defendant proclaiming that as it had been gifted to him, it was being gifted back. This, said the defendant, was a product of his religious conviction. But he did not explain why his conviction did not extend to returning the money claimed in this action.

(e) Insofar as the registration of the Mercedes Benz into the defendant's name is concerned, it was put to the plaintiff in cross-examination that it had been effected on transfer forms signed by the plaintiff himself. He denied that, and I find it difficult to believe that the plaintiff would have instituted and pursued the prosecution of the defendant over this issue if he knew that he had signed such a form. It was only revealed by the defendant when he gave evidence that it was allegedly on the very day that the Mercedes Benz had been bought that the plaintiff had signed such a form so that the transfer of the car could be effected after the defendant's divorce went through. The plaintiff was not given the opportunity to deal with this allegation.

[9] Two important pieces of documentary evidence were produced as part of the plaintiff's case. The first was a printout of the plaintiff's current account out of which the first tranche of payments had been made. It was perfectly obvious to me, having observed both the plaintiff and the defendant giving evidence, that the plaintiff is a far less modern and sophisticated man than the defendant. The plaintiff's lack of modernity is reflected in his ability to use his internet banking. It was done for him by the defendant.

[10] The legends entered by the defendant for the payments making up the first tranche are "Loan RN". That, according to the plaintiff, reflects the true nature of the transaction. The defendant says that the entries were made in that form to disguise the true nature of the transaction. He explains that he had accompanied the plaintiff to a meeting with the lotto authorities in advance of payment of the plaintiff's winnings, where advice was given to the plaintiff. At that meeting the plaintiff was advised to guard against donations

as they attracted tax. According to the defendant the advice was that if a donation should be made it must be disguised as a loan, which can then be written off at a rate of R100 000,00 per year in successive exempt donations. It was to disguise the nature of the transaction, said the defendant, that he reflected the payment as loan. I will revert to this explanation shortly.

[11] The second piece of documentary evidence is a form which the defendant was required to sign when the bond on his property was to be cancelled and transfer thereof registered in his name exclusively. It was proved by the evidence of a Ms M., a conveyancing paralegal employed by the conveyancing attorneys. She remembers that the defendant attended her offices in the company of the plaintiff when the documents were signed. The form in question had to be signed in compliance with the Financial Intelligence Centre Act, 2001. The defendant had to state the source of his funds, and he himself wrote the word “loan” in the space provided. Ms M. was not cross-examined. When he gave his evidence the defendant said that he had told Ms M. that it really was not a loan. In my view that evidence may be safely rejected as an invention made on the spur of the moment when the defendant was giving evidence. It is inexplicable, if it is true, that this was not put to Ms M..

[12] The defendant’s theme throughout is that the true nature of the transactions between him and the plaintiff had to be hidden, prior to his divorce to hide his windfalls from his wife and also from the tax authorities, and thereafter to escape tax. As to the latter, he claimed to know the difference between avoiding and evading tax, by which I understood him to be conveying that he had acted lawfully, and caused the plaintiff to act lawfully, throughout. What the defendant overlooked was that if he had conducted himself lawfully, then the payments would initially have been loans (although it is not clear why the first tranche of R90 000,00 had to be disguised as such from a tax perspective), and that annual donations would have been required to reduce the amounts he had borrowed from the plaintiff. There is no evidence of that having happened at any stage. It was not put to the plaintiff that a promise of such further successive donations had been made. (If such a promise had been made orally then it would not in any event have been enforceable, given the provisions of s5 of Act 50 of 1956.)

[13] There were serious shortcomings, inexcusable in my view, in the manner in which the defendant's case was put to the plaintiff and Ms K.. (I noted during the course of the trial, and it was mentioned by plaintiff's counsel during argument, who had also noticed it, that save when he was himself giving evidence, the defendant sat throughout alongside the attorney who conducted his case, giving instructions and notes, and so on.) When they were cross-examined it was put to the plaintiff and Ms K. that the defendant denied discussions concerning repayments, and that he asserted that the monies were paid as donations, and not as loans. It was the defendant's case that such generosity sprung from some help he had given to the plaintiff before he won the lotto, rescuing, he said, the plaintiff's house from foreclosure on one occasion. But nothing was put regarding any specific exchange, either between the plaintiff and the defendant or between the defendant and Ms K. where the plaintiff verbalised his donatory intent, or Ms K. acknowledged its existence. The court was left quite in the dark as to any exchange during which the donatory intent was expressed and accepted.

[14] When the defendant gave evidence his version emerged for the first time as follows. On the very night that his lotto winnings were confirmed, the plaintiff promised to buy the defendant a car and free the defendant's house from its bond. According to the defendant, neither when the first tranche of payments was made about two months later, nor when the second tranche of payments was made six months later, was a word spoken about the payments being donations. According to the defendant he did not say words to the effect of "remember that gift you promised me". Neither did he suggest that there were any expressions of gratitude made by him for the donations when the payments were made. In the result his case rests exclusively on the promise made on the night the lotto was won, the existence of which promise was not put to the plaintiff.

[15] I accept that a winner of the lotto may say unwise things, and make silly promises, on the night of learning of his or her windfall. Whether they may have enforceable content depends on the full context. Here that could not be explored or investigated because this crucial element of the defendant's case was not put to the plaintiff or his daughter

[16] My understanding of the defendant's own version is that it amounts to this. He snatched at the statement made by the plaintiff on the night the lotto was won, and then, when he asked for money, kept quiet concerning the basis on which he was asking for it; with it in mind, presumably, to spring it on the plaintiff that in fact the monies were donated if he should ever need to do so, as he has done in this action. This version does the defendant no credit, and I reject it. I find that the first and second tranches of payments were in fact loans.

[17] As to the sum of R40 000,00 paid to the defendant's former wife, it is common cause that he owed it to her. The defendant's case is that an older son of the plaintiff owed the defendant R45 000,00, being the balance outstanding of the price of a car sold by the defendant to the plaintiff's son. He said that the plaintiff paid his (defendant's) wife the sum of R40 000,00 on behalf of the defendant in order thereby to discharge the plaintiff's son's debt. The plaintiff denied that arrangement, and any intention thus to assist his son. Details of when, where and in what context such an arrangement was discussed were absent from the defendant's account of the transaction. The plaintiff's version is that he was not involved in the transaction between his son and the defendant, and that he certainly did not settle his son's debt.

[18] I prefer the plaintiff's evidence above that of the defendant, and find that the sum of R40 000,00 paid on behalf of the defendant to discharge his debt to his former wife was also a loan by the plaintiff to the defendant

[19] Oral argument was delivered on behalf of the parties when the defendant's case had closed. Once that was done I indicated that written argument could be delivered on an issue on which the legal representatives had not had an opportunity to prepare, namely the question as to the onus of proof in a case like this (where a donation is alleged to have been made) in the light of the majority view in *Barkhuizen v Forbes* 1998 (1) SA 140 (E). Only Ms Van Jaarsveld, plaintiff's counsel, responded. Whilst I am grateful for her assistance, as it turns out I find no need to enter into the question myself. I am satisfied that the plaintiffs' case has been proved on a balance of

probability, accepting when I reach that conclusion that a full onus of proof rested on the plaintiffs throughout.

I accordingly grant judgment in favour of the first and second plaintiffs against the defendant for

(a) Payment of the sum of R600 000,00;

(b) Interest on the sum of R600 000,00 at the rate of 15.5% per annum from 19 January 2013 to date of payment;

(c) Costs of suit.

OLSEN J

Date of Hearing:	WEDNESDAY, 31 AUGUST 2016 & THURSDAY, 01 SEPTEMBER 2016
Date of Judgment:	TUESDAY, 11 OCTOBER 2016
For the Plaintiffs:	Ms M E VAN JAARSVELD
Instructed by:	VENNS ATTORNEYS PLAINTIFFS' ATTORNEYS 281 PIETERMARITZBURG STREET PIETERMARITZBURG (Ref.: N Jooste/bi/35159908) (Tel No.: 033 – 355 3120)
For the Defendant:	MR T PILLAY
Instructed by:	THEASEN PILLAY & ASSOCIATES DEFENDANT'S ATTORNEY SUITE 11, 1ST FLOOR PROTEA HOTEL 14 PALM BOULEVARD UMHLANGA RIDGE (Ref.: Umhlanga/vn/n589) (Tel.: 031 - 566 6743)