.IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No A67/07

In the matter between:

PATRICK MOLEFE MOGUDI Appellant

and

FIKISWA FEZI Respondent

JUDGMENT: 28 AUGUST 2007

VAN ZYL J:

INTRODUCTION

[1] This is an appeal against the judgment of Le Grange AJ in terms of which he dismissed the appellant's action with costs. The present proceedings are with the leave of the learned judge. Mr M A Baynham appeared for the appellant and Mr E S Grobbelaar for the respondent. The court expresses its appreciation to them for their respective presentations in this matter.

[2] The action arose from an intimate relationship between the parties during which the appellant undertook to take over the respondent's obligations relating to her purchase of a certain motor vehicle from ABSA Bank, trading as Bankfin, the owner of the vehicle. In accordance with such undertaking the respondent was to retain possession and use of the vehicle. The relationship soured, however, and the appellant, alleging that he was the owner of the vehicle, instituted an action against the respondent for the delivery thereof, alternatively for its fair and reasonable market value. In addition he claimed the amount of R164 259,00 on the basis of a loan to the respondent relating to the purchase of the said vehicle. He also claimed the amounts of R5 400,00 and R13 124,44 paid by him, allegedly at the request of the respondent, for repairs and insurance premiums in respect of such vehicle.

[3] In her plea the respondent averred that the aforesaid bank remained the owner of the vehicle until the full purchase price had been paid. She hence denied that the appellant at any stage acquired ownership of the vehicle. In any event she was not in possession of the vehicle. She likewise denied that she had entered into any loan agreement with the appellant and averred that he had made a donation to her of the

amount claimed. For the rest she denied any liability to him for the amounts claimed for repairs to and insurance of the vehicle.

[4] At the commencement of the hearing the parties agreed that the only issues to be addressed were whether the appellant or the respondent was the owner of the vehicle at the relevant time and whether their agreement was one of loan or donation. Only in the event of the court holding that the agreement was a loan, would the amounts claimed for repairs to and insurance on the vehicle come into issue.

THE EVIDENCE

[5] The gist of the appellant's rather circuitous evidence was that, at the time he met the respondent, he was estranged from his wife, to whom he was married in community of property. He was instantly attracted to the respondent and within a short while developed an intimate relationship with her. When he realised that she was in financial difficulties and unable to pay the instalments on her vehicle, he offered to take over her obligations to the bank. The bank was prepared to accept him as a surrogate debtor, provided he paid the arrears of some R27 000,00 and signed a deed of suretyship in the amount of R50 000,00 for the balance. The appellant complied with these requirements after managing to persuade his wife to counter-sign the deed of suretyship as required by the bank.

[6] On the nature of his agreement with the respondent, the appellant was extremely vague. According to him their understanding was that the respondent would reimburse him when she was financially able to do so. If she should be unable to do so, he would become the owner of the vehicle. In this regard he placed strong reliance on a hand-written note inserted by him and signed by the respondent at the foot of a letter from the bank to the respondent concerning her outstanding obligations in respect of the vehicle. The note read:

I, Fikiswa V. Fesi hereby transfer ownership of the above-mentioned car - reg no CA 328833 to Patrick M. Mogudi with effect from 01 November 2001.

[7] The appellant regarded this note as "a short form" of what they had "discussed verbally". He added that it was "virtually to cover" himself, because it "all of a sudden dawned" on him that he did not have "even one document of commitment from Ms Fesi to repay" him. He subsequently explained this as "something to cling on if

anything goes wrong".

[8] In her evidence the respondent confirmed that she and the appellant had developed an intimate relationship soon after meeting each other. He had brought her under the impression that he planned to divorce his estranged wife and then marry her (the respondent). When he became aware of her financial difficulties and the possibility that she might lose her vehicle, he undertook spontaneously to take over her obligations on the vehicle and, in addition, to help settle her credit card debt. In return she slept with him, kept house and cooked for him, did his laundry and cared for his two children. There was no suggestion that she would have to repay the amounts disbursed by him on her behalf. On the contrary, he created the impression that he was a man of means who wished to demonstrate his generosity by such a noble gesture. His attitude was that he would not allow her to struggle financially and that no woman of his would be without a car.

[9] The respondent made it clear that she would never have agreed to borrow money from the appellant to comply with her obligations to the bank. Having had no income at that stage, she would have been quite unable to repay a loan. In any event one Ronaldo Mazibuko had already indicated to her that he wished to acquire the vehicle for his wife. The logical solution to her problem would have been simply to sell the vehicle to him. The appellant, however, had insisted on coming to her assistance in salvaging the vehicle. As she put it: "Ronaldo definitely had the opportunity, but Lemmy [the appellant] jumped in and sort of muscled Ronaldo out".

[10] The respondent admitted that she had signed the hand-written note aforesaid, but had done so at the appellant's request because of his estranged wife's lack of co-operation. He had wanted to give his wife the impression that he was acquiring the vehicle for her. The respondent fully realised, however, that in signing the note she was not transferring the vehicle to the appellant.

THE JUDGMENT OF THE COURT *A QUO*

[11] In his judgment Le Grange AJ dealt with the evidence on the basis that he had two mutually destructive versions before him. In comparing the credibility of the parties he could not find that either of them was an unreliable witness. There were, in his view, no inherent improbabilities or inconsistencies in their respective versions.
[12] With a view to resolving this *impasse* the learned judge accepted that it was highly unlikely that a person would "squander or gratuitously give away money, particularly to a stranger". It was, however, "a question of common sense that the closer the relationship between the parties the more likely is a donation." It was in fact "hardly unlikely that two persons so intimately connected will not make donations to each other." On the totality of the evidence and on the balance of probabilities the learned judge hence held that he could not find the respondent's version to be less probable than that of the appellant. He was accordingly not satisfied that the appellant had discharged the *onus* resting upon him and dismissed the action with costs.

THE MAIN SUBMISSIONS ON BEHALF OF THE PARTIES

[13] In his argument on behalf of the appellant, Mr Baynham submitted that the appellant had been an excellent witness, as opposed to the respondent, whose testimony he described as "appalling". In addition he suggested that the probabilities favoured the appellant, more particularly inasmuch as it was common cause that he had initially attempted to arrange that he substitute himself as purchaser in respect of the respondent's vehicle financing agreement with the bank. Because there was insufficient time for him to complete the relevant administrative process for such substitution, however, he had simply arranged with the bank that he would comply with the respondent's obligations in terms of her agreement with it. In accordance with this arrangement he had then paid the arrears of R27 000,00 and furnished security in the amount of R50 000,00.

[14] Mr Baynham conceded that the hand-written note drafted by the appellant and signed by the respondent did not constitute an agreement, or the written part of an agreement, between them. It was simply relied on, Mr Baynham submitted, to refute the respondent's version that the payments made by the appellant on her behalf were

in the form of a donation.

[15] In his argument on behalf of the respondent, Mr Grobbelaar submitted that the appellant bore the *onus* to prove, firstly, that he was the owner of the vehicle and, secondly, that he had concluded an agreement of loan with the respondent. He argued that, although it might be accepted that people would not ordinarily part with their property without expecting some or other *quid pro quo*, there was no presumption against donations in our law. The burden of proof remained unaffected by a plea of donation, he submitted, although it might be expected that such plea would be carefully scrutinised.

[16] As for the hand-written note, Mr Grobbelaar rejected the suggestion that it lent credence to the appellant's version. It was significant, he submitted, that the note made absolutely no mention of a loan or of the allegation that, on non-payment thereof, ownership of the vehicle would be transferred to the appellant. On the contrary, the note suggested that transfer of ownership of the vehicle had in fact already taken place on 1 November 2001. In this regard, Mr Grobbelaar suggested, the appellant's evidence should be rejected and that of the respondent, who had made a good impression as a witness, should be accepted.

THE ISSUES

[17] At the outset it would appear that the issue relating to the ownership of the vehicle was a non-issue in that it was abundantly clear that, at all relevant times, the bank was the owner of the vehicle and not the appellant or respondent. This may be the reason why Le Grange AJA did not, in his judgment, deal with the question of ownership of the vehicle or make any finding relating thereto. Consequently the only issue requiring consideration was whether or not the appellant made a loan or a donation to the respondent. If it was a loan, of course, the further question, which would inevitably have to be considered, is what the terms of such loan were.

THE RELEVANT LEGAL PRINCIPLES

THE CONTRACT OF LOAN

[18] The contract of loan may occur in one of two forms, namely a loan for consumption (*mutuum* or "verbruikleen") and a loan for use (*commodatum* or "bruikleen"). For present purposes the former is relevant.

[19] A contract of loan for consumption comes into existence when the parties agree that the lender will deliver to the borrower a quantity of consumable or fungible things for consumption by use, subject thereto that the borrower will return the same quantity thereof at some future time. See Van Leeuwen *Censura forensis* 1.4.4.2; idem *Het Roomsch-Hollandsch Recht* 4.6.1; Voet *Commentarius ad pandectas* 12.1.1; *Moser v Meiring* 1931 OPD 74 at 77; *Woodburn Mansions (Pty) Ltd v Dowell* 1961 (3) SA 893 (D).

[20] In the case of money the parties may also agree, expressly or tacitly, that interest will be payable on the amount of the loan. See Van Leeuwen *Censura forensis* 1.4.4.5; idem *Roomsch-Hollandsch Recht* 4.6.6; Voet *Commentarius ad pandectas* 12.1.18; Van der Keessel *Praelectiones juris hodierni ad Hugonis Grotii Introductionem ad jurisprudentiam hollandicam* 3.10.8; *Standard Bank of South Africa Ltd v Lotze* 1950 (2) SA 698 (C). See also the general discussion in *LAWSA* volume 15 (first reissue 1999) par 277-283 (p159-162).

THE CONTRACT OF DONATION

[21] As in the case of a loan, the contract of donation may occur in two basic forms, namely the donation "among the living" (*donatio inter vivos*) and the donation "with a view to death" (*donatio mortis causa*). For present purposes only the former, to which I shall refer simply as "a donation", is relevant.

[22] A donation may be defined as an agreement in terms of which one party (the donor) undertakes, gratuitously and without obligation, by virtue of liberality, generosity or benevolence, to give something to another (the donee) with the intention of enriching or otherwise benefiting the donee. See *Digesta* 39.5.1, where the Roman jurist Julian observes that a gift made with the intention that it should forthwith become the property of the recipient and will not be returned under any circumstances, is properly called a donation, provided it is made out of liberality (*liberalitas*) and generosity (*munificentia*). See also De Groot (Grotius) *Inleidinge tot de hollandsche rechtsgeleerdheid* (2nd ed by Dovring, Fischer and Meijers 1965) 3.2 and Voet *Commentarius ad pandectas* 39.5.

[23] In *Avis v Verseput* 1943 AD 331 at 348, Watermeyer ACJ briefly summarised Von Savigny's approach to donation (in his *System des heutigen römischen Rechts* par 142 sqq) in the following words:

He [Von Savigny] says … that a donation is a transaction *inter vivos* between donor

and donee whereby the donee is enriched and the donor correspondingly impoverished, such transaction being accompanied by an intention on the part of the donor at his expense to enrich the donee. He points out that an essential element is a disinterested *voluntas* on the part of the donor who must have in mind only the *utilitas* or *commodum* of the donee and not his own advantage.

See also the judgments of Tindall JA at 366-367 and Fischer AJA at 382-383.

[24] Reference may be made in this regard to *De Jager v Grunder* 1964 (1) SA 446 (A) at 463D-G and 465A-D, and to the following passage in the case of *Ovenstone v Secretary for Inland Revenue* 1980 (2) SA 721 (A) at 763H-737A (*per* Trollip JA):

In a donation the donor disposes of the property gratuitously out of liberality or generosity, the donee being thereby enriched and the donor correspondingly being impoverished, so much that, if the donee gives any consideration at all therefor, it is not a donation.

See also *Commissioner for Inland Revenue v Estate Hulett* 1990 (2) SA 786 (A) at 794I-J, where Friedman AJA observed that the word "donation" in our law has acquired the meaning of "a gratuitous disposal of property prompted by motives of sheer liberality or disinterested benevolence". This passage was cited with approval in *Estate Welch v Commissioner for SARS* [2004] 2 All SA 586 (SCA) par [26] at 592*g*.

[25] Inasmuch as donation constitutes an agreement between the donor and donee, it must, of course, comply with all legal requirements for a valid contract. Apart from the essential of *consensus* regarding the nature and ambit of the donation and the contractual capacity of the parties, it is clear that the donation must be accepted, expressly or tacitly, by the donee. Furthermore, in line with the authorities cited above, the donor must, without the expectation of any counter-performance or benefit accruing to him in return, intend to enrich the donee by making him a gift out of his assets. Such assets will then be diminished in the amount, or to the value, of the gift, leaving the donor correspondingly impoverished. See in general the useful discussion in *LAWSA* volume 8 part 1 (2nd edition 2005) par 305-309 (p372-379).

[26] An early case addressing the question of *onus* where, as in the present case, donation was raised as a defence, was that of *Timoney and King v King* 1920 AD 133 at 139. There Innes CJ stated that, although the plaintiffs had to prove their claim, once they had adduced evidence supporting such claim, the *onus* of proof shifted to the defendant. This occurred "by virtue of the general legal principle that a donation is not presumed and must be proved by him who relies on it". In this regard the learned Chief Justice relied on common law authorities such as Grotius *Inleidinge tot de hollandsche rechtsgeleerdheid* 3.2.4 and Voet *Commentarius ad pandectas* 39.5.5.

[27] The same approach was followed in other cases such as *Avis v Verseput* (*supra* at 345 and 377), *Myers v Lesch* 1954 (2) SA 487 (C) at 490A-C and De Jager v Grunder (*supra*) at 463A-C. More recently, in *Estate Welch v Commissioner for SARS* (*supra* par [22] at 592*a*), it was simply stated that "there is a presumption against donations in our law."

[28] A qualification was introduced in *Smith's Trustee v Smith* 1927 AD 482 at 486, where De Villiers JA distinguished cases of donations between spouses:

> It is true that there is a strong presumption in law against gifts as nobody is presumed to throw away or squander his property. But it hardly applies to persons so intimately connected as husband and wife, where donations are often made for the purpose of preventing the property from leaving the family and falling into the hands of creditors. Then there is the natural affection between husband and wife which also points in the direction of donation, and must be taken into consideration in coming to a conclusion.

[29] Schreiner J went a step further in *Stern v Kuper* 1941 WLD 223 at 228, where he questioned the justification for a presumption against donations:

> I do not think that the maxim [ie that donations are not presumed] 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.

[30] In *Thornycroft v Vas* 1957 (3) SA 754 (FC) at 756A-757G Clayden FJ considered these and other authorities before coming to his conclusion (at 757B) that "the so-called presumption is no more than an expression of the inference which will normally be drawn." The learned judge pointed out that, in the passage from Voet *Commentarius ad pandectas* 39.5.5 relied on in the *Avis v Verseput* case (*supra*), Voet simply stated: *In dubio autem donatio non praesumitur, quamdiu alia conjectura capi potest* ("In cases of doubt a donation is not presumed, as long as another inference can be drawn"). With reference to *Smith's Trustee v Smith* (*supra* at 487) where De Villiers JA observed that there was "no shifting of *onus* in this case", Clayden FJ stated (at 757F-G):

> It is in this sense in my view that the passage from *Voet* applies. It does not create an artificial position in which, once receipt of the money and goods is shown, there must be judgment for the plaintiff unless the defendant succeeds in proving that they were received by way of donation. The application of the inference against donations, drawn from the fact that persons do not cast away their possessions, would show a probability against a giving of these things and he would succeed if there was no more to the case.

[31] This approach was endorsed by Berman J in *Jordaan and Others NNO v De Villiers* 1991 (4) SA 396 (C) at 400F-G:

Moreover, whilst there is no presumption in our law against donations, the Court is entitled to take into account that, human nature being what it is, people do not ordinarily part with their property for nothing … Thus, whilst the incidence of the burden of proof remains unaffected, the evidence of the party contending for a donation in his favour calls for careful scrutiny.

[32] In *Barkhuizen v Forbes* 1998 (1) SA 140 (E) at 150A-151H, Liebenberg J accepted that there was no shifting of *onus* in a case such as the present. He opined, however (at 151G), that "once the plaintiff has discharged the *onus* upon him, then there is a duty upon the defendant to discharge the *onus* upon him to prove his defence." In his concurring, but distinguishing, judgment, Froneman J stated (at 156B-D) that the presumption against donations was at most "a rebuttable presumption of fact" which could affect only the evidentiary burden and never place the primary *onus* on the party against whom the presumption was made. It was, he suggested, better to describe it merely as "an inference that may in certain circumstances be drawn, depending on the facts of each particular case." A similar approach was adopted by Leach J in his judgment concurring with that of Liebenberg J. He suggested (at 158A-D) that the so-called presumption against donations was founded upon the extremely unlikely event that a person would "squander or give away his property gratuitously or out of pure liberality." It was, indeed, no more than "an inference of fact dependent upon ordinary reasoning and common sense" and, as such, "a general rule of logic."

[33] I must respectfully associate myself with the views expressed by Berman J in the *Jordaan* matter (*supra*) and by Froneman and Leach JJ in the *Barkhuizen* case (*supra*). When a defendant raises a defence of donation against any claim, the burden of proof remains throughout on the plaintiff. At most the defendant has a burden of rebuttal against a *prima facie* case established by the plaintiff.

CONSIDERATION OF THE FACTS IN THE PRESENT MATTER

[34] When these principles are applied to the facts in the present matter it is quite clear that the appellant came nowhere near establishing a *prima facie* case that he made a loan to the respondent. His undertaking to take upon himself the respondent's obligations to the bank in respect of the vehicle (and, indeed, her credit card) clearly arose from their intimate relationship. At no stage was there the slightest suggestion that he was making a loan to her, which he would expect her to repay at some indeterminate time in the future, with or without interest. His conduct was, rather, indicative of an attempt to impress her as a man of means who would not allow his wife or partner to suffer financial hardship. At best for him it reflected a gratuitous act of generosity, liberality and benevolence. This had the effect of conferring on her a financial benefit in return for which he expected, and received, a close physical relationship, home comforts and a willingness to care for his children.

[35] The hand-written note in terms of which the respondent purportedly transferred ownership of the vehicle to the appellant, was no more than a ploy intended to mislead his estranged wife into co-signing a deed of suretyship required by the bank. It certainly could not have been intended to serve as proof of a loan by the appellant to the respondent. His evidence in this regard was contradictory, nonsensical and anything but credible. It should, in my respectful view, have been rejected outright by the trial court.

[36] From this it appears that the appellant never got beyond first base. He was unable to produce a vestige of evidence that he had made a loan to the respondent in any amount. And even if he had managed, by the skin of his teeth, to have produced sufficient to establish a *prima facie* case (which he clearly failed to do), the probabilities that he intended to donate it to the respondent are overwhelming. Her evidence was logical, credible and consistent with the probabilities. It would have been an act of lunacy on her part if she had borrowed money from the appellant at a time when she was totally unable to make any repayment to him and when she had a purchaser of the vehicle in the pipeline. At no time did she regard the financial assistance of the appellant as anything but an act of generosity and benevolence. She

clearly accepted his donation tacitly and both she and the appellant, at all relevant times, had contractual capacity to come to such tacit agreement. It follows that, if she had at any stage been faced with a burden of rebuttal in regard to her defence of a donation, she would have discharged it without any difficulty.

[37] There is hence no merit in the appeal and it should be dismissed with costs.

D H VAN ZYL

Judge of the High Court

I agree.

P B FOURIE

Judge of the High Court

I agree.

P GOLIATH

Judge of the High Court