IN THE HIGH COURT OF NAMIBIA CASE NO.: I 866/2007

In the matter between:

MIRJAM TAAPOPI PLAINTIFF

and

NICOLAAS NDAFEDIVA DEFENDANT

SUMMARY

Donations - Presumption against - Nature of – Dictum at pages 150A to 153H of *BARKHUIZEN v FORBES* 1998 (1) SA 140 (E) approved and applied –

Presumption founded on strong probability against gratuitous gift of property out of pure liberality - Presumption no more than rebuttable inference of fact founded on common sense and ordinary reasoning and not legal presumption in true sense –

Action for recovery of moneys lent and advanced by plaintiff to defendant - respondent alleging that the payments constituted donations/gifts to/by him.- court holding on the basis of the dicta in *Timoney and King v King* 1920 AD 133 at 139 and *Pillay v Krishna and Another* 1946 AD 946 at 952--3 that where there was an onus on a defendant to prove a special defence that there was no shifting of the onus from plaintiff to defendant - once the plaintiff had discharged the onus on her – which she did in this instance - the defendant became obliged to discharge the onus on him to prove his defence – in the present case this was as a consequence of the nature of the pleadings – which did not simply amount to bare denial – but set up a special defence - there was therefore an onus - in terms of the pleadings - on the defendant to prove that the amounts alleged by him - to have been donations - were in fact donations -

In casu – plaintiff discharging her onus – defendant failing to discharge his onus – court therefore finding that, the amount of N$ 30 000.00, advanced on 19 September 2006, by the plaintiff to defendant, constituting a loan and not a donation.

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and

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CORAM**:** GEIER, J

Heard on: 04; 06 June 2012

Delivered: 22 June 2012

JUDGMENT

GEIER, J: [1] The cause of action pleaded by the plaintiff in this matter arose allegedly on or about the 19th of September 2006 when the plaintiff lent

an advance to the defendant, at the defendant's special instance and request, the amount of N$30 000.00.

[2] It was apparently further agreed between the parties that the defendant would repay the loan on the 30th of September 2006, on which date the said amount would become due, owing and repayable.

[3] Plaintiff duly complied with her obligations and advanced the agreed amount to the defendant on the 19th of September 2006.

[4] The defendant was further alleged to be in breach of the agreement as he failed to make full repayment of the amount which had in the circumstances become due and repayable in that he only made two partial repayments to the tune of N$3600.00.

[5] The plaintiff's claim was thus for the outstanding balance which is to the amount of N$26 400.00, plus interest and costs.

[6] The defendant indeed admitted receiving the amount of N$30 000.00 and that he paid a total amount of N$3600.00 to the plaintiff.

[7] He however denied the loan and that he breached the alleged agreement as the amount of N$30 000.00 was given to him by the plaintiff as

a gift in recognition of financial assistance which the defendant had gratuitously rendered to the plaintiff.

[8] Against this background the parties proceeded to trial.

[9] By agreement between of the parties' legal practitioners they now only requested the court to determine the issue of whether or not the amount of N$30 000.00, as advanced during September 2006, was a loan or a donation.

THE PLAINTIFF'S EVIDENCE

[10] In support of her claim the plaintiff testified that she got to know the defendant during July 2006 and that she got to know him after she came to Windhoek from Noordoewer where she had worked at the Aussenkehr grape company - for some few years - to take up new a new job with the Ministry of Agriculture in Windhoek. On the termination of her employment she had received a pension payout of N$32 000.00, from which funds she loaned N$30 000.00 to the defendant.

[11] She testified further that after she came to Windhoek she got acquainted with the defendant and that a romantic relationship developed during August 2006. On the 19th of September 2006 she paid over the amount of N$30 000.00 to defendant by way of cash cheque. She informed

the defendant apparently that she wanted to buy some bricks for her mother's home, which is situated in the north of the country, and that she had asked the defendant for advice on where to buy such bricks. He informed her that he knew where this could be done. He apparently also informed her that he wanted to buy a bus, that he was short in this regard and whether or not he could borrow some money from the plaintiff. The defendant apparently also agreed to transport the bricks to plaintiff's mother's home.

[12] Plaintiff consented to the loan and it was agreed that the defendant would pay her back at the end of September 2006. When this did not occur she started to demand her money back. It was then that her relationship with the defendant apparently deteriorated almost immediately and ended shortly thereafter in October 2006.

[13] Despite such termination she kept on calling the defendant demanding repayment until, at one point, the defendant agreed to pay the amount of N$2600.00, which he did in 2007. It was agreed to meet at the Windhoek Post Office from where the defendant proceeded to Bank Windhoek to obtain the money, which he drew. On another occasion defendant gave to the plaintiff a further amount of N$1000.00, which repayment occurred at the WIKA Service Station, in Windhoek. As no further payments were forthcoming the plaintiff decided to institute this action.

[14] It needs to be mentioned that the plaintiff also explained that she had bought a Toyota motor vehicle - during the time that she still worked at Aussenkehr - and whilst she did not yet know the defendant. This vehicle was purchased at the end of March 2006 on hire-purchase in respect of which she paid a deposit in the amount of N$20 000.00, which moneys came partly from a performance bonus paid to her by her then employer.

[15] When it was put to her by Mr Erasmus, appearing on her behalf, that the defendant, in his plea, had denied that he had borrowed the money from the plaintiff, the plaintiff denied this and particularly that she did not agree with the defendant's version as she was in possession of a cellphone recording which proved the contrary.

[16] During cross examination by Mr Namandje, who appeared on behalf of the defendant, it was put to her that it was curious that - despite the fact that she did not have much money - she still loaned a substantial amount to the defendant. Plaintiff responded that she had about N$36 000.00 in her account at the time of which she lent N$30 000.00.

[17] It was put to her that she had met the defendant prior to her relocation to Windhoek, which she denied. When it was then put to her that the defendant had, over a period of time, given her various financial gifts/gratuitous amounts totalling approximately N$24 000.00, she responded

that the only gifts, that she had ever received from the defendant, was '*a handbag and one dinner at the Spur Restaurant*'.

[18] When questioned on the precise terms of the transaction the plaintiff now testified that the defendant had also promised *'to add something extra, (money), on top', (of the loan),* an aspect which she had not mentioned before. In this regard she also conceded that she had not mentioned this aspect to her legal practitioner.

[19] Plaintiff also clarified, when questioned on this facet, that the costs of transportation of the bricks, to the north, was not a consideration at the time of the granting of the loan, as she was involved in an intimate relationship with the defendant, who had simply offered to help her out in this regard.

[20] When pushed on the issue of why she had not thought of putting her alleged agreement in writing the plaintiff responded that this was not done as she had trusted the defendant.

[21] A substantial part of cross- examination also focused on when the relationship between the plaintiff and defendant actually ended. The plaintiff was adamant that the relationship soured almost immediately from October 2006 once she started to demand her money back. She testified further in this regard that the plaintiff just vanished and that there was no further communication between them, save for the occasions on which she

demanded her money back, which demands she kept up until April 2007 when summons in this matter was issued.

[22] Mr Namandje put to her that she made such demands because she was out of pocket and that the defendant, in response to such pleas, had gratuitously advanced the two amounts of N$ 2600.00 and N$ 1000.00 to plaintiff. The plaintiff testified that once she realised, that she had nothing in writing, she started to record her conversations with the defendant. It was then put to her that the defendant would come and deny that he had ever admitted that he owed the plaintiff any money *(over the phone)*.

[23] It is apposite to mention here that no transcript of the referred to recording or the recording itself was ever tendered in evidence.

THE DEFENDANT'S EVIDENCE

[24] The defendant on the other hand testified that he is a businessman involved in the transportation and property business and that he got to know the plaintiff towards the end of 2005 while the plaintiff was still staying at Noordoewer. A relationship developed between them in the period December 2005 to January 2006. He denied ever borrowing money from the plaintiff.

[25] He told the court that the plaintiff had given him the N$ 30 000.00 as a gift, as she was grateful, due to the financial assistance that he had rendered

to her in the past. He did assist her in buying the abovementioned vehicle and had even, on occasions, paid for her fuel. While she was renting at Wanaheda, he assisted her whenever she told him that she had no money. When the plaintiff moved to a flat in Pioneerspark in Windhoek he paid the requisite deposit and one month's rent in advance. He recalled that he had also assisted her with the payment when her vehicle was in the garage to be fixed. He thus insisted that the N$30 000.00 was given to him out of gratitude.

[26] He denied further that their relationship ended in October 2006 as alleged by the plaintiff and averred that their relationship deteriorated by the time the plaintiff moved to Pioneerspark, which relationship he decided to end on account of a phone call which, the plaintiff received in his presence, and from which he could deduce that she was talking to somebody *' ... like one who was talking to her boyfriend ... '*. Finally, the defendant insisted that, all in all, *'I gave her around N$25 000.00 – it would be more than N$ 30 000.00 if I ask her'*.

[27] During cross examination it soon became apparent that the defendant had absolutely no proof that he had ever advanced a cent to the plaintiff. He tried to explain this fact away, by explaining that there was no need for him

to do so because he did not want his money back as he viewed all the advances as gifts to his girlfriend.

[28] Mr Erasmus also pointed out to him that the detailed exposition in respect of all the gratuitous financial assistance that the defendant had allegedly rendered the plaintiff was never put to the plaintiff during cross examination. The defendant conceded that he had not instructed his lawyer in this regard.

[29] When questioned on the need of the loan of N$ 30 000.00, the defendant denied that this was so and that he did not purchase any bus during 2006, or that needed to buy one at the time as he already had three buses. He conceded though that he might have mentioned that he wanted to buy a bus, after all he was in the transportation business. He testified further that he made good profit from that business from which he had to repay his loans at the bank, that he had bought buses for more than half a million, which he had paid off and that he could have got N$ 30 000.00 easily from his bank. When it was put to him – *'why did you then take 30 000 from a poor woman – he replied – that he wanted to be clear that he had helped her first until she got payment – and she then thanked him as he had also helped her'.*

[30] He thus insisted that there was no need for him to approach the plaintiff for a loan as, on account of his exceptional relationship with the

bank, he simply could have approached the bank, where he would have obtained financing at any time.

[31] A substantial portion of cross examination also centred around the question of when the relationship between the parties ended. Initially the defendant's evidence was that this was towards the end of 2007 on the occasion of phone call which he was able to witness. He admitted that the plaintiff kept on calling - asking for financial assistance - but that he had no problem with that, as she was his ex-girlfriend.

[32] He then changed his version and testified that he could not recall the date on which the relationship was ended.

[33] When the defendant was confronted with his affidavit which he had deposed to during May 2007 for purposes of warding off the summary judgment application brought by the plaintiff herein, and in which affidavit he had stated that their relationship had ended late in 2006, he had to concede that his initial testimony in this regard had been wrong.

[34] When it was put to him that the plaintiff's evidence, to the effect, that she demanded re-payment of the loan as from October 2006, was never disputed, he replied that he did not hear her testify to that.

[35] Some cross-examination was conducted in respect of the defendant's means. He had stated in his affidavit resisting summary judgment that – at the time of making that affidavit in May 2007 – that – *' ... I – honestly - do not need to borrow money from the plaintiff as loans, as I am a businessman with substantial means ... '.* It was put to him that in spite of this he was embroiled in substantial litigation since May 2007, which litigation was apparently aimed against him and his business.

[36] To this line of questioning defendant's initial response was to refuse to answer such questions as he first wanted to discuss this with his lawyer. When assured that the question was permissible he conceded that he was *' ... in court about his business but not about the loan, as on the business side, things had gone wrong ... '*. It was then put to him that from 2007 until today there were several matters against him in respect of which judgments were granted which he was paying off in instalments. He then agreed that there were cases were he had appeared in court – but – so the defendant added - *'... if I owe anything I will pay, if I am innocent 'how can I pay? ...'*.

[37] It was then put to him that he treated the plaintiff in the same manner as his other creditors, which the defendant denied.

[38] The date of the purchase of the plaintiff's car also became an issue. In this regard the plaintiff had testified that she had purchased it during March 2006 and while she was still residing in Noordoewer. This was initially not

denied. In the affidavit filed in opposition of the summary judgment application the defendant did however allege that he had assisted her in purchasing this vehicle shortly after she started working at the Ministry of Agriculture, which was in Windhoek.

[39] Defendant also contradicted himself in regard to the financial assistance rendered in regard to this vehicle, whereas he had initially testified that he had assisted he in purchasing same he now testified that this was in regard to the tyres and rims and that he had even paid for fuel.

[40] When the court clarified the issue of the two payments with him, the defendant now changed his version to the effect that the second payment of N$ 1000.00 was not made at the WIKA Service Station but at the ENGEN Service Station in Hochlandpark. He also changed his version in regard to when the various other advances – in respect of which the plaintiff, out of gratitude, in return, paid him the N$ 30 000.00. His initial testimony in this regard was that various payments were made to the plaintiff whilst she was still in Noordoewer. In the summary judgment affidavit he however stated that these payment were made ‘ … before the plaintiff resigned at Noordoewer and just shortly after she resumed her employment in Windhoek … ‘. He also stated in that affidavit that *he advanced various amounts totalling not less that N$ 24 000.00 at different occasions … ‘.* When given the opportunity by the court to specify how this amount was made up and arrived at the defendant, as evidenced by Exhibit ‘A’, was merely able to list

5 items, totalling N$ 17 900.00. In this regard it is to be noted further that the defendant did testify in chief that the money he had given the plaintiff was *'around N$ 25 000.00'*. Under cross-examination it was put to plaintiff by Mr Namandje that the defendant had given her *'more than N$ 30 000.00'*.

[41] In argument Mr Erasmus submitted that the Plaintiff's version was inherently more probable than that of the defendant. This submission he based on the following factors :

a) *"Defendant has no proof whatsoever of any or substantial cash donations which he allegedly made to the Plaintiff in the course of their relationship, although he admitted that at the time he had a cheque book;*

b) *On a question by the Court Defendant testified that he did not donate the money to Plaintiff in cash, but paid certain expenses on her behalf. Furthermore he advised the Court that he gave the money to Plaintiff whilst she was in Windhoek. In later questioning he amended this to state that he did give her smaller amounts of cash;*

c) *When asked by the Court to draft a reconciliation of the amounts expended gratuitously on Plaintiff's behalf, Defendant came up with*

expenses of less than N$18 000,00. This exposition was random and he could not add any precision to when he allegedly paid what.

d) *Defendant conceded that he only paid Plaintiffs rental every now and then;*

e) *Yet, in his opposing affidavit to summary judgment proceedings. Defendant stated that he "assisted the Plaintiff when she bought her Toyota sedan vehicle in Windhoek".*

f) *It was however, not disputed by Defendant that Plaintiff bought this vehicle in March 2006, whilst she was still working in Noordoewer and did not even know the Defendant by then;*

g) *Despite Defendant's earlier assertions that he was a businessman of substantial means and would not need to lend money from the Plaintiff, Defendant conceded that since 2007 he has consistently been involved in civil litigation with various creditors, leading to judgments against him and his business and repayment arrangements entered into with his creditors;*

h) *It is submitted that Defendant followed a similar pattern with Plaintiff, asking her to wait and be patient and then only making one or two small and insignificant payments in respect of the loan."*

[42] Mr Erasmus argued further that if one has regard to the defendant's version - taking into account the circumstances against which the defendant alleged that the plaintiff had donated the bulk of her money to him without receiving a real consideration - and as it is not usual for a person to divest him/herself of his/her own property without receiving some real consideration in return - and while there is no presumption in our law against donations[1] - the court should take into account, human nature, being what it is – that people do not ordinarily part with their property for nothing - and whist 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[2] and should be rejected in this instance. This should be the inference of fact dependent on ordinary reasoning and common sense.

[43] The Plaintiff had thus discharged the onus of proving that she had made a loan to Defendant and that the amount of N$26 400.00, together with interest *a tempore morae*, is due to her.

[44] Mr Namandje, on the other hand, pointed out that the court was faced with two mutually destructive versions.[3] There was the evidence of two single witnesses whose evidence could not be verified independently. Even the recording – in which the defendant had allegedly admitted his indebtedness

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[1] *Barkhuizen v Forbes* 1998 (1) SA 400 (E)
[2] *Jordaan & Others NNO v De Villiers* 1991 (4) SA 400 (CPD) at 400F
[3] He referred the court to : *City of Johannesburg Metropolitan Council v Patrick Ngobeni* – unreported judgement of the Supreme Court of Appeal of South Africa in Case No 319/11

to plaintiff - and which the plaintiff had referred to in her evidence - was never produced. From this a negative inference should be drawn.

[45] He pointed out further that the onus of proof remained with the plaintiff and the fact alone, that payments were made did not go far enough to discharge this onus.[4]

[46] He criticised the fact that the plaintiff had not called any witnesses on the relationship issues which could have corroborated the plaintiff's version.

[47] In regard to the inference that should be drawn from the fact that the defendant had been engaged in civil litigation with various creditors, leading to judgments against him and his business and repayment arrangements entered into with his creditors Mr Namandje pointed out that it was never specified how many cases were relied on by the plaintiff. In any event there was not sufficient evidence warranting a finding in favour of the plaintiff based on the 'similar fact evidence rule'.

[48] As it was not improbable that the plaintiff had made the donation alleged by defendant, the plaintiff had not discharged her onus and her claims should thus be dismissed.

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[4] Unreported judgement of the Western Cape High Court – South Africa – Case 67/07 = *Mogudi v Fezi* at [32] – [33]

[49] As indicated above the court was also referred to the very helpful judgment handed down by full bench of the Eastern Cape Division in *Barkhuizen v Forbes*[5] where the court conveniently analysed the case law and set out the resultant applicable legal principles – which I endorse respectfully - as follows:

> *" ... From the authorities it seems to be clear that a donation is never presumed but must be proved by the person alleging it. See Timoney and King v King 1920 AD 133 at 139; Meyer and Others v Rudolph's Executors 1918 AD 70 at 76; Twigger v Starweave B (Pty) Ltd 1969 (4) SA 369 (N) at 375; Kay v Kay 1961 (4) SA 257 (A).*
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> *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. See Twigger v Starweave (Pty) Ltd (supra); Smith's C Trustee v Smith 1927 AD 482 at 486.*
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> *As regards the matter of onus it was held in Avis v Verseput 1943 AD 331 at 345 per Watermeyer ACJ that the onus rests upon the person who alleges a donation to prove it even if it is raised as a defence when sued. For this proposition he relied on a passage from Voet (Krause's translation) 39.5.5 in which the following is stated:*

[5] 1998 (1) SA 400 (E) as endorsed by Van Zyl J in *Mogudi v Fezi op cit* at [32] – [33] See also the judgement by Berman J in *Jordaan & Others NNO v De Villiers* 1991 (4) SA 396 (C) at 400 F-G

'In case of doubt a donation is not presumed as long as any other conjecture or interpretation is possible. And therefore he who alleges a gift - even if it be by way of an exception (when sued) - ought to prove it.'

In the present matter, however, plaintiff alleges that she paid moneys to and on behalf of the respondent under circumstances which constitute loans, whereas the respondent seems to allege in some of the cases that the payments were made as donations to him. Does this mean, in view of the above authorities, that the case is to be decided only upon the basis of whether defendant is able to prove that the payments were donations without any necessity for plaintiff to prove anything save that the moneys were paid? The answer in my view appears from the decisions in Timoney and King v King (supra) and Pillay v Krishna and Another 1946 AD 946. In Timoney's case Innes CJ stated as follows at 139:

'Some argument was addressed to us on the question of onus. Now clearly the onus rested originally upon the plaintiffs; it was for them to establish their claim. But when they put in a statement of account sent to the defendant, and therefore evidence against him, which showed what purported to be advances by the firm, then the onus was shifted. It was shifted by virtue of the general principle that a donation is not

presumed and must be proved by him who relies upon it (Voet 39.5 sec 5; Grotius 3.2.4, etc). There are a few cases in which the law will presume a donation but this is not one of them. So that the plaintiffs, having given prima facie evidence of advances, sufficient with interest to make up the amount of their claim, the onus was transferred to the defendant to make good his contention that the transactions were donations, which he was under no obligation to repay. And the issue of this controversy turns upon whether the onus has been discharged.'

In Pillay's case Davis AJA set out three principles derived from the Roman law, and approved by the Appellate Division in Kunz v Swart and Others 1924 AD 618 at 662--3, which govern the incidence of the onus of proof. They are:

> *(i) 'If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it.' (At 951.)*
>
> *(ii) 'When a person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being a claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.' (At 951--2.)*

(iii) 'He who asserts, proves and not he who denies . . .' or '(t)he onus is on the person who alleges something and not on his opponent who merely denies it.'(At 952.)

At 952--3 Davis AJA proceeds to state as follows:

'But I must make three further observations. The first is that, in my opinion, the only correct use of the word ''onus'' is that which I believe to be its true and original sense (cf D 31.22), namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a prima facie case made by his opponent. The second is that, where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged. The third point is that the onus, in the sense in which I use the word, can never shift from the party upon whom it originally rested. It may have been completely discharged once and for all, not by any evidence which he has led, but by some admission made by his opponent on the pleadings (or even during the course of the case), so that he can never be asked to

do anything more in regard thereto; but the onus which then rests upon his opponent is not one which has been transferred to him: it is an entirely different onus, namely the onus of establishing any special defence which he may have.'

When comparing the above-quoted dicta of Davis AJA with the dictum of Innes CJ in Timoney's case quoted above, there appears to be an inconsistency between them due to the use of the expression by Innes CJ that the onus was 'shifted'. It is clear from the judgment of Davis AJA that in a case where there is an onus on a defendant to prove a special defence there is no shifting of the onus but 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. It is therefore not a question of a shifting of the onus from the one to the other but it is in fact a duty on the defendant to discharge an entirely different onus which rested on him all along. A consideration of the above dictum by Innes CJ, however, shows that, despite the use of the expression that the onus was shifted, there is no real difference in the practical effect of the two judgments.

When the aforegoing is applied to the present situation the position is therefore that in respect of the claims by appellant for payment of amounts which respondent in his plea in effect

alleges to be donations there rested, in terms of the pleadings, an onus on respondent to prove that they were donations.

A further factor to be considered is how the close relationship between the parties may affect the issue of onus. In Smith's Trustee v Smith (supra at 486) it was pointed out that

> '*although apparently no presumption can be based merely upon the close relationship between the parties . . . Mascardus (Idem No 43) points out that there is a presumption of a gift on the grounds of blood or other relationship where no cause appears from which such presumption can be rebutted*'.

In this case the Court was concerned with the relationship between a husband and a wife. In the present case we are not dealing with any blood relationship nor is the relationship anywhere near as close as husband and wife where the parties may make donations in order to protect themselves against various legal problems which may arise. In this case the parties did not even cohabit and, although plaintiff was in love with the respondent, this is not, in my view, sufficient to create a presumption that the amounts now claimed were donations. In any event, and insofar as plaintiff has presented acceptable

evidence that the amounts now claimed were loans, there appears a 'cause' from which any presumption of a donation can be rebutted.

In Thornycroft v Vas 1957 (3) SA 754 (FC) the Court dealt with a case where a plaintiff claimed recovery of a vehicle alleged to have been lent and various amounts of money alleged to have been loaned to his mistress (the defendant) during their association. At 756F--G Clayden FJ opined that the presumption against donation can really be classified rather as an inference than as a rebuttable presumption. He then proceeded to interpret the same passages in Voet and Grotius relied upon by the Appellate Division in South Africa for the proposition that such a presumption exists, to show that the relevant passages substantiate his opinion. At 757C--D he proceeds to state as follows:

> *'It is unnecessary to discuss that further, for the very application of an opposite rule in dealing with donations between husband and wife is the best illustration that the presumption against donations will be used as an aid where it is the probable inference, because the giving away of property is generally unlikely, but should be ignored, and even reversed, where it is an improbable inference.'*

With regard to the onus the learned Judge stated as follows at 757D et seq:

> *'The case of Smith's Trustee v Smith (supra) also explains how these presumptions affect the onus of proof. At 487 De Villiers JA said:*
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> > *"There is no shifting of onus in this case. As was pointed out by Innes CJ in Ohlsson's Cape Breweries 1909 TS 96, in most cases the onus is not shifted; it remains upon the plaintiff but the question always is whether at any stage there is sufficient evidence before the Court to entitle the plaintiff to judgment in the absence of sufficient evidence to the contrary on the part of the defendant.*
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> *In my opinion, having regard to the above considerations, the transfer by the husband into the name of the wife of moneys undoubtedly belonging to him and without any cause or reason appearing, although done many years before insolvency, is sufficient prima facie evidence of donation, and calls for an explanation. . . . ''*

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.'

The learned Judge went on to hold that, if the defendant did not succeed in proving the dispositions to her to be donations but merely succeeded in creating a doubt, she would be entitled to be absolved from the instance because the onus to prove his case lay on the plaintiff.

It would appear that the judgment in Thornycroft is not completely in line with the decisions of the Appellate Division in South Africa referred to above, both as regards the existence of a presumption against donations and as regards the onus of proof. In the case of Smith's Trustee v Smith, on which Clayden FJ relied heavily for his conclusions, it was in fact held by De Villiers JA that the presumption against donations does exist but that it does not apply to the case of a husband and wife for various reasons. The remarks by De Villiers JA

with regard to onus must be viewed in the light of the aforegoing finding as to the existence of the presumption. At 486 De Villiers JA pointed out that his judgment only relates to the position where a husband and wife relationship exists. It would therefore appear that the reliance by Clayden FJ on the Smith's Trustee case as being applicable to cases where donations are alleged in general is not correct. Apart from the fact that it identifies an exception to the rule relating to the presumption against donations with its resultant effect on the onus, the Smith's Trustee case is not in conflict with the South African authorities referred to above by which we are bound.

In respect of the amounts found to have been paid to or on behalf of the respondent and which appellant claims are repayable, the appellant has discharged such onus as rested upon her. This she has done by adducing credible evidence. There therefore remained on the respondent an onus to prove on a preponderance of probabilities that the amounts alleged by him to have been donations were in fact donations. To discharge this onus respondent had to adduce credible evidence. In order to decide whether the evidence adduced by him is credible, it must be weighed up and tested against the general probabilities. If, as the magistrate has found, there are 'insufficient' probabilities to decide whether the balance of probabilities favours the one or the other of the parties, then the respondent could only succeed in his defence if the Court believes him and is satisfied that his

evidence is true and that the appellant's version is false. (National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) at 440 D-G.) In my view, the respondent did not pass this test and therefore failed to discharge the onus upon him because his evidence stands to be rejected where it conflicts with that of the appellant. It follows therefore that, even if the magistrate was correct in his conclusion regarding the probabilities, he should still have found for plaintiff in respect of the relevant items." [6]

[50] It is against this legal background that also the present matter falls to be decided.

[51] It has appeared from the above set out exposition of the evidence given by the plaintiff that she has certainly adduced credible evidence in respect of the loan alleged by her. Although some valid criticism was levelled against her testimony in regard to the aspect of the promised top-up payment, it cannot be said that her evidence, which was also given in a forthright manner, falls to be rejected.

[52] In my view the credibility of plaintiff's evidence was also bolstered by various other factors such as 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. I take into account that

[6] *Barkhuizen v Forbes at p150A – p153H*

the defendant has testified in this regard that the plaintiff had reason to be grateful, but the likelihood of this aspect of his evidence was essentially neutralised by the improbability that the plaintiff would simply for that reason alone part with the lion share of her pension pay out. It must be of some significance in this regard that the relationship between the parties was relatively short – on both versions - and that the parties apparently never lived together as husband and wife. Also this aspect does not favour the defendant. Why would the plaintiff in such circumstances 'cast away her hard earned pension proceeds' – on the 19th September 2006 - and then – a few days later - in the beginning of October 2006 - make an about turn – and – almost immediately - demand repayment of the loan. Plaintiff's version that she continued to demand repayment of the loan – and even succeeded in obtaining partial repayment - until forced to institute action - is in tune with her version.

[53] I therefore find that – all in all – the plaintiff has adduced sufficient credible evidence – in respect of the amount lent and advanced by her and that the balance thereof is repayable by the defendant – to discharge the onus which rested on her.

[54] From the case law set out above - and were it appears – as in this case - that there are several distinct issues – such as a claim and a special defence

- this finding then creates the situation that the defendant here has also attracted an onus to prove, on a preponderance of probabilities, that the amount of N$ 30 000.00 - advanced to him - and the amounts of N$ 2600.00 and N$ 1000.00 - advanced by him - were in indeed gifts or donations.

[55] This situation arises as a consequence of the pleadings[7] were the defendant, in this instance, was not content with a mere denial of the plaintiffs claim, but were he set up a special defence, in respect of which he then is to regarded *quoad* that defence, as being a claimant: for his defence to be upheld he has to satisfy the Court that he is entitled to succeed on it.[8]

[56] With these principles in mind I now turn to consider the defendants case.

[57] It firstly appeared that the general probabilities in this matter did not favour the defendant's version. I have dealt with this aspect in paragraph [52] above.

[58] The defendant's version was also materially weakened by his inability - except for his say so -to produce any documentary proof substantiating that he had ever given one cent to the plaintiff. In this regard it was only common cause that he had paid for the handbag and for one dinner at the Spur. If one takes the detail of the defendant's alleged gratuitous financial support into

[7] Record p 6 para 2
[8] *Pillay v Krishna and Another* 1946 AD 946 at 952

account it seems strange that no documentary evidence whatsoever could be produced. This lack of documentation was - according to defendant - to be ascribed to the fact that all these payments were gratuitous and no records were kept or needed as he did not expect any re-payment from the plaintiff. This explanation, surely, can only partly be accepted as, on the probabilities, one would at least expect some or other documentary record for any one of the major payments to exist such as those made – for example - in respect of the plaintiff's motor vehicle, or in respect of the deposit and first month's rental, made in regard to the Pioneerspark flat. In the latter instance it would also have been a simple matter for the defendant to have called the landlord to testify in this regard or to procure at least a receipt from the landlord ex-post facto or to produce a bank statement corroborating such financial assistance. A negative inference against the defendant should on this account be drawn.

[59] The defendant's version was also not enhanced in its credibility by his inability to provide detail, which factor was compounded by his inability to reconciliate the global amounts which he had allegedly spent gratuitously on plaintiff's behalf or to the plaintiff's benefit. It also emerged during cross-examination that the defendant had not given full instructions to his legal practitioner in this regard, leaving the distinct impression that he might have tailored some of the evidence to suit his case.

[60 The defendant, in my view, was altogether an unsatisfactory witness. Besides the inherent improbabilities in his version he also contradicted himself in the various respects set out above.[9] The defendant was also extremely evasive as illustrated by the lengthy manner in which he endeavoured to answer simple questions in respect of which a simple ‘yes’ or ‘no’ would have sufficed.

[61] All in all I am therefore satisfied that the plaintiff’s evidence is true and that of the defendant is false. Even if I am wrong on this it must be taken into account then that the defendant can only succeed in his defence if the Court believes him and is satisfied that his evidence is true and that the plaintiff's version is false.[10]

[62] In my view, the defendant did not pass this test and accordingly I find that he has failed to discharge his onus because his evidence stands to be rejected at least where it conflicts with that of the plaintiff.

[63] I therefore find that, the amount of N$ 30 000.00, advanced on 19 September 2006, by the plaintiff to defendant, constitutes a loan and not a donation.

[63] Judgment is therefore granted against the defendant for :

a) Payment of the amount of N$ 26 400.00;

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[9] See para’s [31] – [40] supra

[10] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D--G.

b) Interest thereon, at the rate of 20% per annum, *a tempore morae*;

c) Costs of suit.

GEIER, J

ON BEHALF OF THE PLAINTIFF	Mr F.G. Erasmus Francois Erasmus & Partners
ON BEHALF OF THE DEFENDANT	Mr S. Namandje Sisa Namandje & Co. Inc.