Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: A73/2023

In the matter between:

D[redacted] H[redacted]	First Appellant
S[redacted] H[redacted]	Second Appellant

and

L[redacted] H[redacted]	Respondent

CORAM: **MHLAMBI, J *et* LOUBSER, J *et* CHESIWE, J**

HEARD ON: **6 OCTOBER 2023**

DELIVERED ON: **26 MARCH 2024**

JUDGMENT BY: **CHESIWE, J**

Introduction

[1] The appellants are before the Full Court with leave to appeal having been granted by the Supreme Court of Appeal (SCA) on 28 February 2023 against the whole judgment granted on 29 June 2022.

[2] The appellants filed an application for condonation for the late filing of the appeal application. The condonation application was granted in court with no objection from Counsel on behalf of the Respondent.

[3] The appellants' main grounds of appeal are that the Court *a quo* erred in not finding that the money was a loan and that there was no evidence of the existence of a verbal loan agreement between the First Appellant and the Respondent.

[4] The Court *a quo* dismissed the Appellants' claim with costs. Therefore, the Appellants seek that the Full Court upholds the appeal and find in favour of the Plaintiff.

Background

[5] The First Appellant is the father to the Second Appellant and the Respondent. During 2018, the Respondent was involved in a divorce action with her husband. The Respondent, in not wanting to lose her house, approached the First Appellant for an amount of money which was equivalent to half the value of the property in order to buy out the husband.

[6] The First Appellant, with the assistance of the Second Appellant, advanced an amount of R536 000,00 (five hundred and thirty-six thousand rands) to the Respondent on 18 June 2018.

[7] The Respondent in her plea, pleaded that she received an amount of R300 000, 00 (three hundred thousand rands) from the First Appellant and R240 000, 00 (two hundred and forty thousand rands) from the Second Appellant.

However, she denied that the amounts were a loan advanced to her by the Appellants.

[8] Counsel on behalf of the Appellants, Adv. Bahlekazi, conceded in oral arguments as well as in the written heads of argument that the parties, as father and daughter, did not specify when and how the loan must be repaid. Further that the Court *a quo* only considered that there was no indication between the parties as to when the money was to be paid back. Counsel submitted that the Respondent knew that the money was a loan and was to be repaid. Furthermore, the Court *a quo's* judgment did not consider the probabilities of the Appellants having given the Respondent such huge sums of money and not expecting it to be paid back.

[9] Counsel on behalf of the Respondent, Adv. Van der Merwe, submitted in oral argument as well as in the written heads of argument that the Appellants' case that there was a verbal loan agreement between a father and daughter was not pleaded by the Appellants. Further that the date on which the agreement was reached was not specifically pleaded. Moreover, Counsel submitted that the Appellants' particulars of claim were vague, nor did the Appellants seek any amendment to their particulars of claim. Counsel submitted that the Appellants failed to prove their case before the Court *a quo*, therefore the appeal ought to be dismissed with costs.

Issues for determination

[10] The issues for determination by this Court are whether the trial Court erred in dismissing the Appellants' claim and not making a finding whether the money advanced was a loan.

[11] The Appellants' contention is that the money was loaned to the Respondent with the agreement that the money would be used by the Respondent to buy her husband out of his share of the property. Further that the First Appellant is the Respondent's father and the parties did not enter into written loan agreement.

[12] Respondent's contention is that there was no loan agreement. The first payment made was for an upgrade to the Respondent's vehicle, however, this changed to having to buy the husband out of his share of the communal immovable property.

[13] The trial Court's findings[1] are as follows:

> "It is apparent from the particulars of claim that the First Plaintiff did not plead the existence of either a written, oral, or tacit loan agreement. Further the date on which the alleged loan agreement was reached and the place where the agreement was reached was not pleaded. It was merely pleaded as highlighted in this Judgment that the Defendant approached the First Plaintiff for a loan in 2018 and that amount was advanced to her on 18 June 2018.
>
> No material terms and conditions of the alleged loan agreement were pleaded. In particular, the date or time period for repayment of the alleged loan amount and consequent breach of the alleged loan amount by virtue of the Defendant's failure to make repayment on an agreed date or time period has not been pleaded."

[14] With reference to **Petzer v Dixon,**[2] the First Appellant and Respondent did not deal with each other at arm's length when the money was advanced. And true to form, the advancement was not dealt with as would have been in terms of the National Credit Act 34 of 2005.

[15] Based on the burden of proof by the First Appellant and proof on the balance of probabilities, the Court *a quo* found that failure by the Appellants to produce sufficient evidence to establish *prima facie* that the Respondent had *animus contrahendi* and that the monies advanced and accepted by the Respondent and purported as a loan to be repaid, stood to be dismissed.

[16] The Court *a quo* placed undue weight on the pleadings *ex facie*, the existence of a loan agreement and the terms thereof being in dispute. And for this

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[1] At para 13 and 14, page 300
[2] (A07/2023) [2023] ZAWCHC 63 (24 March 2023)

reason, one *"takes from these dicta then the cue that where versions collide, probability must be examined."* [3]

[17] Applying the common-sense approach, Respondent before the money was advanced to her by the First Appellant, had sought a loan from a financial institution. Respondent had approached Capitec Bank for a loan with the following noted [4]:

> "MR BAHLEKAZI: ...I just want to take, maybe [sic], is you said went to Capitec to make a loan?
>
> MS L[redacted] H[redacted]: Yes
>
> MR BAHLEKAZI: When did you go to Capitec to make a loan?
>
> MS L[redacted] H[redacted]: It was prior, in June, before, not prior. It was after, because I can remember during that, that is when I knew, because I thought my husband would be lenient and say we are having kids, you can take the house. So we were fighting for the house. So I made the loan after I actually knew the value of the house, spoke to my father and then."

[18] At trial, First Appellant testified that he and Respondent are in a familial relationship and that the Respondent came to him asking for the money as she was divorcing her husband and needed to buy the husband out of his share of the property. The Respondent's case as pleaded was predicated on an admission of receipt of R300 000, 00 (three hundred thousand rands) from the First Appellant and R240 000, 00 (two hundred and forty thousand rands) from the Second Appellant. However, she denies that these amounts were advanced as a loan.

[19] It was put to the First Appellant during cross examination that he informed the Respondent that he would "pay her back for groceries and household expenses."[5]

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[3] South African Bank of Athens v 24 Hour Cash CC (A3027/2016) [2016] ZAGPJHC 217 (11 August 2016)
[4] Page 264, line 18 – 25 of the transcribed record.
[5] Page 48, line 20 of the transcribed record.

[20] In view of the above, the First and Second Appellants were called upon to prove the loan agreement and its terms and conditions on a balance of probabilities.

[21] There are challenges in proving the existence of an agreement between parties, more so proving tacitly the terms and conditions without it being written.

[22] Respondent acknowledges having received the money, though denies that it was a loan. Instead, the Respondent pleaded that it was for an upgrade for her vehicle. However, the version of the Respondent that the First Appellant gave her the money for buying the husband out of the property is more probable as that was achieved and the Respondent retained the house.

[23] The evidence demonstrated, at least, on a balance of probabilities, First Appellant as a pensioner would have not advanced to the Respondent such a huge sum of money as acknowledgment of the assistance received for household expenses and not expect it to be paid back. The First Appellant saw it as an opportunity for the Respondent not to be homeless and therefore advanced the money to her as his financial position at the time allowed.

[24] Initially, to advance the monies, in the context of familial relationships, a father and daughter would not in the slightest moment have thought to go with a formalistic approach of drafting a contract with terms and conditions. The probabilities in this regard favour the First Appellant.

[25] It is not in dispute that monies were given to and received by the Respondent and indeed secured her the property she needed from the divorce. The Respondent may deny that the money was a loan, but amounts were advanced. Further that, having approached the Capitec Bank after the valuation of the property, the loan was declined, and with the First Appellant having been in a position to initially only advance R300 000, 00 (three hundred thousand rands), an inference is drawn that the total sum of R540 000, 00 (five hundred and forty thousand rands) advanced to the Respondent was a loan.[6]

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[6] (See page 189 – Loan was declined by Capitec due to affordability)

[26] In the particulars of claim, [7] the First Appellant pleaded to having advanced on 18 June 2018 an amount of R536 000, 00 (five hundred and thirty-six thousand rands) to the Respondent. During examination in chief at the trial,[8] and further as noted by the trial Court,[9] the Respondent testified having asked if she could not borrow (my emphasis) the full amount. A transfer of R4 000, 00 (four thousand rands) and R536 000, 00 (five hundred thirty-six thousand rands) was made to the Respondent.[10]

[27] In **City of Cape Town v Mtyido** [11], the Court held as follows:

> "A court of appeal will generally not interfere with findings of credibility made by a trial court, because the trial court would have had the benefit of observing the witnesses when testifying unless those findings are clearly wrong. Similarly, an appeal court will not lightly interfere with the factual findings made by a trial court."

[28] Even if the First Appellant did not plead the existence of a written or oral or tacit agreement, nor did the Respondent plead that the particulars of claim were vague and did not disclose a cause of action.

[29] Adv. Bahlekazi, indicates in the written heads of argument that the Court *a quo* did not deal with the probabilities in the evaluation of the case when it is clear that *prima facie* evidence was presented to show that in the least, a sum of R536 000, 00 (five hundred thirty-six thousand rand) was paid over and accepted by the Respondent for consumption. On her own admission, Respondent stated that she managed to utilize the money to buy her husband out of his share of the property.

[30] Indeed, no implied nor tacit terms exist that have conditions of a contract,[12] however upon evidence led by the First Appellant, and the Respondent equivocated between various versions why the money was 'advanced', the strength of the Respondent's evidence as against whether the First Appellant

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[7] Plaintiff's Particulars of Claim, page 7, para 5.
[8] Page 185 of the transcribed record.
[9] Page 303 of the papers
[10] Annexure "A": Copy of bank statement dated 24 February 2020, page 10 of the Index to Appeal Record.
[11] (1272/2022) [2023] ZASCA 163 (1 December 2023)
[12](See South African Maritime Safety Authority v Fafie Fortune Mckenzie, 2010 ZASCA (2))

has succeeded in discharging the onus on a preponderance of probabilities of the existence of a verbal loan agreement was not achieved. [13]

[31] The evidence demonstrated that the First Appellant and the Respondent are in a familial relationship. The Respondent gave as evidence, the initial reason why the First Appellant was to advance monies to her, which later changed to the version not in dispute, this being the ability for the Respondent to buy her husband out of his share of the property.

[32] The First Appellant is adamant that the sum of R536 000, 00 (five hundred and thirty-six rands) was a loan which the Responded denies. The findings by the Court *a quo* are that the First Appellant did not prove the existence of a loan agreement, its terms and consequent breach thereof on a balance of probabilities.

[33] In **National Employers' General Insurance Co Ltd v Jagers**,[14] the Court said the following:

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any

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[13] South African Maritime Safety Authority v McKenzie (017/09) [2010] ZASCA 2; 2010 (3) SA 601 (SCA); [2010] 3 All SA 1 (SCA); (2010) 31 ILJ 529 (SCA); [2010] 5 BLLR 488 (SCA) (15 February 2010)

[14] 1984(4) 437 (ECD) 440 D-G. See *also Stellenbosch Farmers' Winery Group Ltd. and Others v Martell & Cie and Others* 2003 (1) SA 11 (SCA) at para 5.

more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[34] I am inclined not to agree with the Court *a quo* as this was not a normal commercial contract and should not have been treated as such. However, the Court *a quo* in weighing up and with the test of the First Appellant's allegations against the general probabilities, and in finding in favour of the version of the Respondent and in accepting it, was a misdirection on the part of the trial court.

[35] The argument by Mr. Van der Merwe that no mention was made that the money be returned, and that this was not a loan, cannot stand. Fact remains and as per Annexure "A" [15], R536 000, 00 (five hundred and thirty-six thousand rands) was transferred to the Respondent. This was the amount which the First Appellant evidenced to have given to the Respondent.

[36] The Respondent in her own words indicated that she approached the First Appellant and asked if she could borrow the whole amount of R540 000, 00 (five hundred and forty thousand rands), however, she disputed this during cross-examination. It is therefore my opinion that the Court *a quo* misdirected itself in not finding that the Respondent, by her own evidence, had *animus contrahendi*.

[37] There was a factual issue before the Court *a quo*, and one on appeal before this Court, the existence of a loan agreement on a balance of probabilities, which brings into question the approach to assessing the evidence as noted in the case of **The South African Bank of Athens v 24 Hour Cash CC**. [16]

[38] In my view, the version of the First Appellant is more probable. Therefore, the appeal against the judgment of the trial Court ought to succeed.

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[15] Index to Appeal Record, page 11.

[16] (A3027/2016) [2016] ZAGPJHC 217 (11 August 2016)

Costs

[39] There is the general rule that costs should follow the event. In this instance, I see no reason to grant costs in favour of the Appellants, including costs of the petition to the SCA.

[40] In the circumstances, the following order is made:

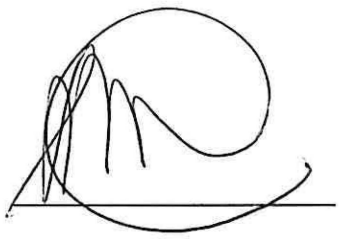
1. The appeal succeeds with costs, including the costs of the application for leave to appeal to the SCA.

2. The order of the trial court is set aside and replaced with the following:

   2.1 An order directing the Defendant to pay the amount of R536 000, 00 (five hundred and thirty-six thousand rands) to the First Plaintiff;

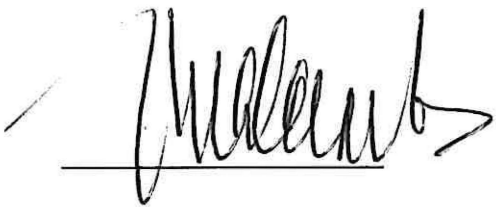
   2.2 No interest will be payable.

3. The Defendant is to pay the costs of suit.



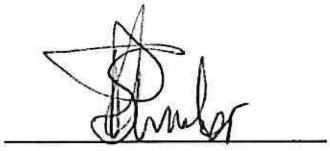
S CHESIWE, J

I concur



J MHLAMBI, J

I concur



P LOUBSER, J

On behalf of the Appellant:	Adv. NM Bahlekazi
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On behalf of the Respondent:	Adv. HJ Van der Merwe
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