

SOUTH AFRICA / JUDGMENT

H.W and Another v R.S (18246/2019) [2023] ZAGPJHC 1354 (24 November 2023)

[2023] ZAGPJHC 1354

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

18246/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
JOHANNESBURG)

Case

No. 18246/2019

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

24/11/23

In the matter between:

HW
First
Plaintiff
SJW
Second
Plaintiff
And
RS
Defendant

JUDGMENT**WILSON J:**

1 The first plaintiff, HW, is married in community of property to the second plaintiff, SJW. In or around 2015, HW began an extramarital affair with the defendant, RS. During that affair, on 30 January, 1 February and 3 February 2017, HW made three withdrawals from an investment account in his name which amounted together to just over R850 000 in cash. HW's evidence before me was that he did this to prevent SJW from obtaining it in the divorce proceedings he was at that time intending to pursue against her. Some of the cash was stored in RS's bedroom. HW took the rest of it away himself.

2 In the weeks following the cash withdrawals, HW gave R610 000 of the cash to RS. The question at the centre of this case is whether

that amount was advanced as a loan to help RS with her personal expenses, or whether it was instead a gift to RS from a man who was intent on leaving his wife to join her.

3 HW says that it was a loan, advanced in two amounts – one of R210 000 and another of R400 000 – which was repayable on demand. RS says that it was a donation to help her wind up her close corporation, which was at the time struggling to pay its debts. RS wanted to close the business and return to work as a salaried employee. She found running a business stressful, and wanted to be free of the myriad concerns that tend to occupy the thoughts of a small business owner.

4 It is clear from RS's evidence that she also expected HW to follow through on his promise to divorce SJW, and that RS considered that the money had been given to her in the expectation that HW would leave his wife and devote himself exclusively to RS. HW's evidence was decidedly cooler on that score. He said that he did intend to leave his wife, but he had not finally decided whether to enter a permanent and exclusive relationship with RS. In his own words he wanted to "wait and see" what happened

with the divorce.

5 As time went on, RS began to doubt whether HW really intended to divorce SJW. The evidence suggests that towards the end of 2017

and at the beginning of 2018, HW's and RS's relationship became turbulent, and in December 2017, HW first demanded repayment of what he said was the loan. Ultimately HW decided not to go through with the divorce. On 3 June 2018 he made clear to RS that he intended to remain married to SJW, and the affair ended.

6 HW now sues for repayment of the money he gave RS. RS resists the claim on the basis that the money was not a loan to her, but a

donation to her close corporation. Before evaluating those contentions, it is first necessary to address a special plea of prescription raised on RS's behalf.

Prescription

7 An ordinary debt prescribes three years after the plaintiff acquires knowledge of the facts on which it can be claimed. In their

original form, HW's particulars of claim call for the repayment of a R710 000 debt, which was said to have been advanced to RS in one go, during February 2017. HW began to demand repayment of that amount in December 2017, which is when prescription started running. The summons and the particulars of claim in their original form were served on 4 June 2019 – well in time to interrupt prescription. However, on 10 February 2022, HW amended his particulars to allege that two amounts – one of R210 000 and one of R400 000 – were in fact advanced to RS in February and March 2017 respectively.

8 Mr. van der Merwe, who appeared for RS before me, argued that the amendment fundamentally altered HW's cause of action, such

that a completely new claim had been introduced by way of the February 2022 amendment, at a time when that claim had plainly prescribed.

9 Section 15 (1) of the Prescription Act 68 of 1969 provides that prescription is “interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt”. The word “debt” in section 15 bears “a ‘wide and general meaning’. It does not have the technical meaning given to the phrase ‘cause of action’ when used in the context of pleadings” (see *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at 628A and the cases cited there). It follows that HW's amended claim had prescribed if, and only if, the “debt” adverted to in the amended particulars was not the “debt” referred to in the particulars in their original form.

10 On the facts, I fail to see how there is any real difference between the debts claimed in the two sets of particulars. It is true

that the amounts are different and the times at which those amounts were alleged to have been advanced are also different, but they are not so different as to support the conclusion that the second set of particulars actually refers to a completely different transaction, wholly unrelated to the transaction set out in the first set of particulars. HW was plainly referring to the same debt in both the original and amended particulars. The mere fact that he amended his version about the time, amount and manner of payment does not, in my view, transform the nature of the debt he claims.

11 The special plea of prescription must accordingly be dismissed.

Did HW loan or donate his money to RS?

12 HW and RS were each the only witnesses to testify in support of their cases. Their evidence, a record of the WhatsApps exchanged

between them from January 2018 to January 2019, and a small quantity of documentation connected with HW's investment account and RS's close corporation was the only material placed before me on which I must decide whether the money that passed between them was a loan or a donation.

13 That material is sparse indeed, and it is HW who bears the risk of failing to persuade me that the more probable inference from that material is that the amounts he advanced to RS constituted a loan. If I am persuaded that there was a loan, then I must give

judgment for HW. If I am persuaded that there was a donation, then I must dismiss HW's claim. However, if I am persuaded that neither party has demonstrated, on a balance of probabilities, that the transaction had the character they ascribed to it in their pleadings and evidence, then I must absolve RS from the instance.

14 On a conspectus of all the evidence, I am not persuaded of either party's case. I say so for the following reasons.

15 HW's evidence was very poor. But, despite what Mr. van der Merwe rightly said was an inconsistent and somewhat shaky quality

to his evidence, HW just about managed to put up a prima facie case. He said that the two amounts of R210 000 and R400 000 were advanced as a loan to RS. He took me through the cash withdrawals he made from his account. He set out how these amounts were dealt with, including the extent to which they were handed over to RS. He established the version that he considered them a loan. He took me through a WhatsApp exchange between him and RS

which spanned many months, in which he demanded repayment of the money, and RS consistently failed to deny that the amount advanced

was in fact a loan. He denied RS's version that his intent was to donate the money to her close corporation rather than to loan the money to her. Given these essential features of his evidence, and the extent to which they found support in contemporaneous documents, I was bound to refuse RS's application absolve her from the instance at the end of HW's case.

16 However, while HW got out the bare bones of his case, he did so in a way that left me with serious doubts about his credibility and reliability. Underpinning his entire case was an act of dishonesty: a scheme to spirit money away from his wife. I was not convinced that this was all there was to it. All he needed to do to achieve that result was move the money to a secret account, or into an undisclosed investment. That would have been no less dishonest than what he actually did. What he actually did, though, implied a motive beyond merely depriving his wife of the money. He gave it to RS, who, if nothing had been said, would plainly have formed the reasonable impression that it was meant to free her from her business so that they could start a new life together after HW's divorce.

17 In the absence of the documentary evidence to which I shall shortly turn, it would have been impossible to credit HW's claims that his intent, at the time he advanced the money to RS, was merely to lend it to her, and that he would have demanded repayment

whether or not he ultimately decided to continue his relationship with her after his divorce from SJW. It beggars belief that HW would place so much money in RS's hands if, at the time, his intent was not to share it with her.

18 The idea that he could seriously have meant the amounts he gave her out of the cash he left in her bedroom to be a loan repayable on demand seems risible. HW could not say what the loan was for – beyond RS's "personal expenses". He made no contemporaneous notes to record the fact of the loan. He told no-one about it. There are no contemporaneous letters or emails that refer to the existence of a loan. There were no witnesses to the transaction.

19 HW insisted that he knew nothing about RS's business, but, given the nature of their relationship, I find that impossible to credit. RS must have talked to him about her business. And, if RS's clear, consistent and credible evidence on this point is accepted, she was very unhappy as a businesswoman. Her close corporation was failing, and she wanted a way out. I fail to see how any reasonable person would lend money to someone in these circumstances, and expect them to repay the loan on demand. HW's

evidence was at its poorest when he was trying to explain that contradiction.

20 RS, on the other hand, was an impressive witness. She said that HW donated the money to her business. The intent was to help her

wind it up. She clearly understood the winding-up of her business as a prelude to a life together with HW. Whether or not HW described it as a loan, and whether or not she outwardly agreed that it was, she plainly did not see the transaction as having any commercial quality. She perceived it as a downpayment on her future with HW.

21 Had my task been limited to choosing who to believe, in the absence of any documentary evidence, I would have had little hesitation in giving judgment for RS. However, her version is undercut by two critical pieces of evidence, on which Mr. West, who appeared for HW, placed a great deal of emphasis. The first was a transcript of a WhatsApp conversation between HW and RS that spanned from January 2018 to January 2019. For the whole of that year, HW persistently asked RS when she would give him his money back (for example: at 17h31 on 12 Jun 2018: "wanner kan jy die geld betaal asb[?]"). RS's response was either to say nothing at all, or to make vague promises to pay. At one point, at 10am on 13 January 2019, RS seems to raise the issue herself, and promises to pay when she is back "on her feet" ("op my voete").

22 RS's consistent failure to deny that the money HW gave her was a loan counts against her version. In her evidence, she explained this failure as an attempt to avoid conflict. The WhatsApp conversation spans the period during which, and immediately after, RS's relationship with HW broke down. In that context, RS said that she understood HW's sudden assertion of the existence of a

loan as an act of spite with which she was not prepared to engage. It is also possible that, whether or not there was a loan, HW's

entreaties for repayment were all that remained of a relationship of which RS clearly had some difficulty letting go. I cannot form a firm view either way.

23 Mr. West relied upon the decision of *McWilliams v First Consolidated Holdings* 1982 (2) SA 1 (A) to press the inference that RS's silence ought to be taken as an admission that she and HW had in fact made a loan agreement. In that decision, relying on a long line of cases concerning when silence constitutes an admission, Miller JA held that, although "a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth . . . in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute" (see p10E-G).

24 While I accept that general principle, I do not think that it applies to this case. HW and RS were plainly not engaged in "ordinary

commercial practice". They were engaged in a romantic relationship. I cannot say what constitutes a reasonable "human

expectation" in that context, but it seems plain to me that the promises made between romantic partners cannot fairly be assessed by reference to the rules of lawyerly engagement. In any event, while I am not entirely convinced by the reasons RS gives for not denying HW's assertions that she owed him a debt, I can find no basis, in the context of this litigation, to discount them either.

25 A further piece of documentary evidence that counts against RS is the entry in her close corporation's books against the deposit of HW's money into the business's account. There were two deposits: one of R210 000 on 2 March 2017, the other of R400 000 on 27 March 2017. Against each entry appear the words "Loan H [W]". RS explains that the use of the word "loan" was a ruse to avoid paying tax on the income. She denied Mr. West's suggestion that this was either an act of intentional dishonesty aimed at defrauding the Receiver of Revenue, or a frank admission of the truth of HW's claim. RS said that she merely acted on her bookkeeper's advice to describe the income as a loan in order to avoid tax, without thinking too much about whether or not that might constitute fraud.

26 Whether or not RS's version can be relied upon, the entries on the close corporation's account are no smoking gun. The very fact that the amounts were deposited into RS's business account rather than into her personal account sits uncomfortably with HW's version that he did not intend the money to go anywhere near the close corporation, and that the amounts were purely for RS's personal expenses. That the money ended up in the close corporation's account tends to corroborate RS's

version that the amounts were really donations to the close corporation, meant to pay its debts, and to free RS of the burden the

business placed on her.

27 In the end, I am left with the mutually destructive versions of two witnesses. One of the witnesses gave substantially uncreditworthy evidence that was bolstered in some respects by contemporaneous documents. The other gave clear and consistent evidence that was reliable on its face, but which required reconciliation with contemporaneous documents which ultimately neither supported it nor reliably disproved it.

Order

28 The only conclusion available on these facts is that neither party has proved their case. The onus being on HW, an order of absolution from the instance is the only proper outcome.

29 For all these reasons –

29.1 the special plea is dismissed; and

29.2 the defendant is absolved from the instance with costs.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 24 November 2023.

HEARD ON: 14 and 15 November 2023

DECIDED ON: 24 November 2023

For the Plaintiffs: HP West

Instructed by Lindeque Van Heerden Attorneys

For the Defendant: B van der Merwe

Instructed by GJ Brits Attorneys

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