<u>IN THE HIGH COURT OF SOUTH AFRICA</u>
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 6453/2007

In the case between:-

<u>LEIGH DERRYL JEPSON N.O.</u> Plaintiff/Applicant

and

<u>NEVILLE DUDLEY LEZAR</u> Defendant/Respondent

<u>HEARD ON:</u> 23 JANUARY 2009

<u>JUDGMENT BY:</u> RAMPAI, J

<u>DELIVERED ON:</u> 9 APRIL 2009

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[1] The matter came before this court by way of action proceedings. The plaintiff instituted this action against the defendant for the payment of the capital amount of R300 000,00 and ancillary relief. She acted in her representative capacity as the executrix of the deceased estate of the late Donald Keith Thomson. She contend that the defendant was truly and lawfully indebted to the deceased estate in terms of

the loan agreement concluded between the defendant and Thomson, now deceased.

[2] The defendant confessed that he received the money from Thomson but emphatically denied that it was advanced and received as a loan. Contrary to the plaintiff's material allegation, he specifically averred that Thomson gave and not loaned the money to him.

[3] That in a nutshell was the conflicting stance of the parties according to the pleadings. At the hearing, the version of the plaintiff was narrated by two witnesses, namely: Dr. Debra Anne Lees and Mr Reginald Cyril Lezar. The version of the defendant was narrated by one witnesses only, Mr Neville Dudley Lezar, the defendant himself. Besides the oral testimonies, documentary evidence was also tendered. I shall describe the four exhibits later in the course of this judgment.

[4] On the strength of the evidence as a whole Mr Pillay, counsel for the plaintiff, urged met to reject the defendant's version and

find in favour of the plaintiff. However, Mr Greyling, counsel for the defendant, disagreed. He urged me to reject the plaintiff's version and find in favour of the defendant.

[5] The issue in the case is whether the transfer of the money from Thomson to the defendant was intended and understood by the transferor and the transferee to be a gift and thus unrefundable or a loan and thus repayable.

[6] The undisputed factual matrix needs to be told. The late Donald Keith Thomson was of British origin. He emigrated from England in the late 1960's and settled in this country. Here he met Patricia Colleen Lezar. Later the couple married. Two children were born of their marriage, namely: Deborah Anne, a girl and Shaun Alan a boy. He worked for Rainbow Chickens for many years.

[7] He cared a great deal about the welfare of the children in general and his in particular. He placed a high premium on the education of children. He educated his daughter. She studied

medicine. She qualified as a general practitioner. Dr D A Lees now practices medicine at New Castle in the United Kingdom. She is a mother of three dependent minor children: Patricia, Lees and Brown. Greg Lees is her husband.

[8] Thomson's son, Shaun did not enjoy good health from his early childhood. He suffered from a severe mental disability. He spent most of his life from the age of 12 years as an inmate of St Luke's Home of Healing at Stanger. Eventually he died on 2 April 2004 at the age of 30. He was survived by his father, mother and sister.

[9] Thomson's wife, Ms P C Thomson (ex Lezar) had siblings. Among them, two sisters, Veronica Spindler and Elder Genis and two brothers, namely Neville Dudley Lezar, the defendant, and Reginald Cyril Lezar, the plaintiff's witness. The defendant was a businessman at Bethlehem. His business enterprise was known as Oos Vrystaat Skale BK. The fortunes of this business enterprise drastically changed for the worse in 2006. He was in such desperate financial situation that he could no

longer afford to service his home loan account. When his first business enterprise went under he embarked upon a new business enterprise called Agriway CC. It was not easy for this new business to take off from the ground. His wife, Trish, was seriously suffering from cancer. Her condition exacerbated the financial crises. He also had four dependent minor children, Dominique, Charnel, Nicole and Genevieve also known as Punki. All of them adored their uncle, Thomson.

[10] It was against this background that Thomson step forward with a rescue plan. He heard about the plight of his brother-in-law. Concerned about the hopelessness of the deepening crisis, he and his wife drove from their residence at Pinetown to the defendant's residence at Bethlehem. There he delivered plenty of groceries to the family in crisis. Besides such a gesture of goodwill he also had discussion with the defendant about his financial dilemma. They made a deal which was aimed at bailing the defendant out, or shall I rather say, alleviating the defendant's contractual obligations concerning his mortgage bond.

[11] Subsequent to the Bethlehem meeting which appears to have been held on 22 October 2006, the Thomson's returned to Pinetown. From there the funds were later transferred from Thomson's bank account to Lezar's. To this effect three or so emails were exchanged. In one of those Lezar acknowledged receipt of the funds and the concept agreement.

[12] The two gentlemen met again at Bethlehem over the Easter Long Weekend which started on Good Friday, the 6th April 2007 and ended on Easter Monday the 9th April 2007. The Thomson's were invited over by the Lezar's. It was the first meeting between them since the transfer of the money. What really transpired between them during the discussion they had about the money is a hotly contested issue. After the long weekend the Thomsons returned to Pinetown. Still during April 2007 Thomson took ill. Shortly after their arrival back home, his condition apparently deteriorated very rapidly. He singed a will at Pinetown on Monday 16 April 2007. See exhibit "D". On Monday the 30 April 2007 he was admitted to Westville

Hospital. He apparently had a cardiac condition. The Lezar's drove down from Bethlehem to Pinetown to see him. However, he died before they arrived.

[13] The defendant and his family attended the funeral service of the late Thomson. During May 2007 the defendant and his wife visited his widowed sister, Patricia Colleen Thomson, at Pinetown. What the widow is alleged to have said to her brother about the money is also in dispute.

[14] Soon after her husband's death, the widow decided to emigrate from the country. Her aim was to settle in England where her daughter lived. In anticipation of the permanent move, she started alienating her assets. But she was not a healthy woman. Seemingly the death of her husband aggravated her psychiatric condition. Her condition rapidly worsened. Her plan to leave the country was put on hold. Her mission was never accomplished. She died on 1 July 2007, two months after her husband had died.

[15] Her only surviving child, Dr Lees, flew back into the country to bury her mother. After the cremation of her mother, she and her uncle, Neville Dudley Lezar, had a private discussion, at Circus-Circus Restaurant, Musgrave in Durban where they were having lunch. The discussion revolved around the repayment of the money she considered to be a loan to her uncle by her late father.

[16] Before returning to her place abroad, Dr Lees met Ms Leigh Derryl Jepson, an associated attorney of the lawfirm, Knight Turner in Durban who was and still is the executrix and administrator of the deceased estate of her father. Seeing that her mother had also died, she stepped into her shoes to deal with her father’s deceased estate. The estate with two components, one RSA component and another UK component was worth over R3m. The overseas component has since been finalised. The domestic component has not yet been finalised on account of this litigation.

[17] On the 18 July 2007 the plaintiff addressed a letter to the defendant on behalf of the Dr D A Lees in connection with the deceased estate of the late D K Thomson. The relevant paragraph 2 thereof reads:

> "We have been informed that you are agreeable to registering a bond over your immovable property in favour of Deborah Anne Lees to secure the sum of R300 000,00 loaned to you by the deceased."

Vide p. 8 exhibit "a".

[18] The defendant respondent to the aforegoing letter on 10 Augustus 2007 through his attorney, Mr H. Meades of the law firm Schroeder & Meades of Bethlehem. The relevant portion thereof reads:

> "It is our instructions that the amount of R300 000,00 was a gift from Mr Thomson to Mr ND Lezar.
>
> There was no agreement towards a loan or the repayment of the amount given to Mr Lezar."

Vide p. 9 exhibit “a”.

[19] It was the aforegoing response by the defendant which triggered these proceedings off. The plaintiff initiated these proceedings on 28 November 2007 alleging that the money was a loan. The defendant filed his plea on 29 February 2008 alleging that the money was a gift and not a loan.

[20] It is our law and it has always being our law that a donation is never presumed. On the contrary, there is a presumption against donation. **MYERS v LESCH** 1954 (2) SA 487 (T).

[21] The only issue in the case, as I have already pointed out, is whether the money was advanced as a loan or a gift.

[22] The onus of proving that a property belonging to one was transferred to another as a donation rests on he or she who raises donation as a defence against the claim for the retransfer of the property in question. In **TIMONEY AND KING v KING**

1920 AD 133 on p. 139 Innes CJ cited the following passage from the authoritative legal work of Voet (39.5.5):

> "*'In dubio autem donatio non praesumitur quamdiu alia conjecture capi potest adeoque qui eam allegat licet in exceptione probare debet,'*"

Also see Grotius (3.2.4).

[23] Twenty three years later the same principle was re-affirmed in **<u>AVIS v VERSEPUT</u>** 1943 AD 331 on p. 345 the court held per Watermeyer ACJ that the onus always rests upon a person who alleges a donation to prove it. The famous authority, Voet (39.5.5) says:

> "In any case 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 he is sued) ought to prove it because no-one is likely believed to desire to throw away his property. For to give is nothing else than to throw away and to lose."

[24] It is incumbent upon a party alleging a contract to prove its terms, be they explicit or tacit, of the agreement he or she seeks to enforce. **McWILLIAMS v FIRST CONSOLIDATED HOLDINGS (PTY) LTD** 1982 (2) SA 1 (AD).

[25] In **AFRICA SOLAR (PTY) LTD v DIVWATT (PTY) LTD** 2002 (4) SA 681 (SCA) the court held that proving the terms of the contract also entailed proof of the anterior question of whether both parties had the requisite animus contrahendi.

[26] In a case where a disputed loan agreement is, through evidence, proved to have indeed existed as the plaintiff has averred it did, then, in such a case, the defendant's prior denial thereof constitutes a repudiation of that agreement. **TUCKERS LAND AND DEVELOPMENT CORPORATION (PTY) LTD v HOVIS** 1980 (1) SA 645 (AD).

[27] Hearsay evidence can only be received as admissible evidence in these civil proceedings if, firstly, the party against whom it is tendered agrees; or secondly, the original source or declarent

of the information also testifies; or thirdly, the interest of justice dictates that such unconfirmed second-hand information be allowed notwithstanding the absence of the positive agreement by the affected party as envisaged in the first scenario above and in the absence of the first-hand testimony by the original declarent – as envisaged in the second scenario above. Section 3, Law of Evidence Amendment Act, No. 45 of 1988. The purpose of this legislation is to broaden and not to narrow the ambit for the admission of hearsay.

[28] The legal writers, Zeffert and others in their work: **The South African Law of Evidence**, 2003 edition deal with hearsay principles at length:

On p. 378 they deal with the general shortcomings of hearsay;

On p. 373 the potential dangers of hearsay; and on

On p. 373/4 the reliable safeguards for its admission.

[29] Dr Lees was an impressive witness. No serious critique could be levelled against her evidence. She testified in a logical, consistent, chronological and systematic manner. Her

testimony was not blemished by any contradictions. Besides certain hearsay aspects of her testimony, there was virtually no attack launched against her credibility – not during the course of her cross-examination or in the defendant's heads of argument. Nothing of unfavourable significance was unearthed by her cross-examination. My belief in the witness remained unshaken even after her cross-examination. Or two or so occasions during her stay in the witness box she was so emotionally hurt that tears started rolling down her cheeks. I had, to adjourn the proceedings to enable her to calm down and regain control over her emotions. Apart from such emotional episodes which were perfectly natural and understandable, her demeanour in the witness box was as comfortable and confident as that of a reasonably relaxed and candid witness. Certainly I did not get the impression that she was actuated by any malice or greed to wrestle a genuine gift away from her uncle now that her casing father had departed from this lower valley of tears. In the circumstances I have no hesitation whatsoever in accepting her testimony as an honest, credible and reliable evidence.

[30] Her younger uncle, Mr Reginald Cyril Lezar, also struck me as a good, trustworthy and objective witness. There was no serious attack on his credibility or reliability. It was obliquely suggested that he had an ulterior motive to testify for his niece, Dr Lees, against his brother, Mr Neville Dudley Lezar. However he denied the suggestion that he had inherited anything from the estate. The will of the late Thomson verified that no legacy was bequeathed to him. He projected himself well in the witness box. His demeanour depicted him as a comfortable, confident, frank and positive witness. His testimony as a whole was consistent, logical and trustworthy. No discrepancies let alone contradictions surfaced in his testimony. On the whole no meaningful critique can be levelled against him. In brief he was also an impressive witness who gave a credible and reliable account. The cross-examination of this witness didn't take away anything from his testimony.

[31] The same cannot be said about the defendant. He failed to impress as a witness. His testimony was suspect. His

demeanour portrayed him as a pathetic soul deeply troubled and struggling to speak with confidence. He made telling concessions. His testimony fortified the plaintiff's case and watered down his. He admitted, contrary to the letter from his lawyers and his plea, that the money was advanced as a loan but averred that six months later the original loan transaction was, through novation, converted by his generous brother-in-law, now deceased, into a donation and subsequently endorsed by his sister, also now deceased. In my view this novation version, which is also hearsay, is very incredible and unrealiable.

[32] Now that I have evaluated the witnesses, I proceed to examine the evidence. Perhaps, at this juncture I need to deal with the hearsay aspect relied upon. The hearsay provisionally adduced and allowed in favour of the plaintiff's case was attributed to the late D K Thomson. Such hearsay concerned communications verbal and written, allegedly between Dr Lees and her father prior and subsequent to the transfer of the funds. Similarly the hearsay adduced and provisionally allowed in

favour of the defendant's case was primarily attributed to the same declarent, the late D K Thomson and to his widow as well.

[33] Before the plaintiff's case was closed, I was obliged to have given a final ruling in respect of the hearsay provisionally allowed in favour of the plaintiff – **S v NDHLOVU AND OTHERS** 2002 (2) SACR 325 SCA Cameron JA. I failed to so. Similarly, and this is implicit in the same decision, before the defendant's case was closed, I was also supposed to have given a final ruling in respect of the hearsay provisionally allowed in favour of the defendant. Again I did not. Instead I invited the two counsels to address the hearsay issues in their respective written heads of argument. Counsel for the plaintiff presented his *ex tempore* oral argument but reserved the right to beef it up with written heads later. Procedurally the approach I adopted was flawed. See **S v NDHLOVU & OTHERS**, *supra* as to what makes it wrong.

[34] The hearsay aspects of the plaintiff's case formed part of Dr Lees' testimony. She testifies that she had very close and affectionate family ties with her parents – especially her father. She maintained regular contact with her parents – initially by telephone communications, I should imagine, and later by email communications. During October 2006 and before the transfer of the funds she and her parents orally discussed the matter. Her parents differed. Her father wanted to lend money to her older uncle, the defendant. Her mother was against the whole idea. She, Dr Lees, adopted a *via media.* She advised her father to be cautious about granting a loan to her uncle. Her further evidence was that on the Friday before her father's death, she spoke to him. On that occasion, Friday the 27 April 2008, he once again confirmed that he had lent the money to her uncle. These statements about the nature of the transactions were of course, hearsay evidence, plain and simple, since the original declarent, the transferor and his wife did not testify. This then was the first aspect of Dr Lees' hearsay.

[35] The second aspect of Dr Lees' hearsay concerned email communications she received from her father. Her testimony was that after her father had installed email, she regularly communicated with him by email. In particular she referred to an email which, as she asserted, she received from her father dated Thursday the 26 October 2007 at 10:25am. The email purported to have come from Don Thomson and to have been sent to Debbie Lees. The relevant portion thereof reads:

> "I have sent Neville R300 000,00 to be used on paying off his mortgage bond and he has signed an agreement that he pays me prime less 4% every month. That way he saves a couple of k's and I get about the same as I would if the money was in the bank."

She explained that ever since she received this email, it has remained in its original form on her laptop which she proffered for inspection then and there to the defendant's counsel. The offer was not taken up. Obviously, this written communication was also hearsay because the author of the email did not testify.

[36] It has to be mentioned that apart from the hearsay aspects of the plaintiff's case, she also relied in the first place, on direct oral communications her first witness, Dr Lees had with her uncle, the defendant – vide paragraph 15, *supra*. The crux of such discussion concerned the securing of the repayment of the capital. She specifically stressed that the defendant did not deny the nature of the transaction as being a loan agreement. On this point her testimony was corroborated by the defendant himself.

[37] In the second place the plaintiff's case also depended on direct email communication between her first witness, Dr Lees, and her second witness, Mr R C Lezar, the defendant's brother. On 23 August 2007, Mr R C Lezar emailed his niece, Dr Lees, in connection with the defendant's reaction towards the lawyers claim that the money was a gift – vide paragraph 19, *supra*.

[38] The relevant portion of the email reads:

> "Hi Debs,
>
> I had a chat to Neville on Monday regarding your call on the weekend, and as expected, he knew nothing about the lawyer's letter. When I mentioned it to him he was totally dumbstruck. So he went home and had it out with Trish, all hell broke loose and they are not speaking at the moment. Neville, says that after my call he has been so stressed out he can hardly function properly. I believe he knew nothing of it, and has requested I chat to you to make it clear that it was (sic) not originated him and that Trish went behind his back and saw a lawyer."

[39] From the aforegoing passage extracted from the email, it is clear that the defendant expressed shock at the letter supposedly written on his instructions. Put it differently, the defendant's brother informed his niece that the defendant distanced himself from the claim that the money was a gift – vide item 10, p. 17, exhibit "a". Mr R C Lezar confirmed the defendant's reaction, believed the defendant's attitude was that the money was indeed a loan and conveyed the defendant's specific apology to Dr Lees. The defendant did not dispute all this.

[40] About two weeks later, on 5 September 2007 to be precise, the same brother of the defendant once again emailed his niece, Dr Lees. He wrote:

> "... he mentioned that the discussion he had with you at your mom's funeral never involved taking out a new bond on his house to repay the debt."

Once against the defendant acknowledged to his brother that the money was a repayable debt. He merely raised the above side issue but not the real issue about the true nature of the transaction.

[41] It is crystally clear from those two emails that Mr R C Lezar, after the discussions he had with his elder brother on those two occasions, had no illusions as to the true nature of the *causa* which underlined the transfer of the funds. He was well aware that a loan agreement had been concluded by the two gentlemen – his elder brother and his brother-in-law. He was also aware that the defendant knew and acknowledges that he was obliged to repay such debt. He put it in this way:

> "I stand under correction, but I thought that as long as the money is not lost when the house is sold or tied into an estate, and that the proceeds are still due to you, ..."

[42] In the third place the plaintiff's case also depended on direct communications between the two Lezar brothers. The essence of such oral discussions was contained in the aforesaid two emails relayed to Dr Lees. During such communications the defendant failed to denied the loan, hardly mentioned the conversion of such loan into a donation; left his your brother with no other impression save that the money was transferred and received on the mutual understanding that it was indeed a loan and that such debt was owing and repayable in due course.

According to Mr R C Lezar, the defendant was not only alarmed but dismayed by the letter written by his attorney to the executrix. To the defendant, the description of the money by his lawyer as a gift was news. He was so amazed and shocked by such a patently false claim that he specifically asked his brother to inform his niece that such a false claim did not originate from him.

[43] The aforegoing analysis of the triangular forms of communications, demonstrates quite clearly that the plaintiff's case primarily rests on direct evidence of discussions between Dr Lees and the defendant, between Mr R C Lezar and the defendant and also between Mr R C Lezar and Mr N D Lezar, the defendant. All of these firsthand evidence tends to give credence to the plaintiff's case. The crux thereof is that the money was transferred as a loan.

[44] It follows from the aforegoing that the hearsay evidence tendered in favour of the plaintiff's case by Dr Lees, was only a secondary anchor thereof. Herein lays the critical distinction between the defendant's hearsay and the plaintiff's. Whereas the defendant's hearsay was tendered as the primary foundation of his case the plaintiff's case was not. The primary foundation of the plaintiff's case rest on three solid rocks already outlined.

[45] The quality of such direct evidence increases the probative value of the hearsay tendered as a secondary support for the plaintiff's case. Moreover, there is a strong connective tissue between the plaintiff's direct evidence and indirect hearsay evidence. This harmony is an important factor which reduces the potential prejudice to the defendant. The plaintiff's hearsay is not hanging in the air. It draws its evidential value from the direct evidence which as shown, was significantly strengthened by the deadly omission. He hopelessly neglected to timeously disclose the alleged novation or substitution of a donation for a loan agreement to the people who mattered the most at the earliest possible opportunity. Such failure on the part of the defendant not only diminishes the hearsay evidence he so entirely depends on – but also reduces the prejudice which might flow from its exclusions.

[46] The defendant like the plaintiff, also relied on email communications he had with the late D K Thomson. There is no sound reason why emails from one and the same author

should be allowed as admissible evidence in favour of the one party but disallowed as inadmissible evidence in respect of the other. The defendant's objection is clearly unprincipled. It is a sword with double edges. If emails of the late D K Thomson to his daughter Dr Lees must be excluded on the grounds that the original declarent who allegedly authored such emails did not testify – so must the emails from the same declarent, the late D K Thomson, to the defendant also be excluded on precisely the same ground. As they say, you cannot eat your cake and still have it. Therefore, I am inclined to rule in favour of the admission of emails from the late DK Thomson to his daughter, Dr Lees, as admissible evidence. Similarly, the emails between the late DK Thomson and his brother-in-law are also finally allowed as admissible evidence.

[47] The defendant testified and put up the defence that the original loan advanced on or about Wednesday, 25 October 2006 ceased to be a loan and became a donation on or about Good Friday 6 April 2007 – Easter Monday 9 April 2007. According to him the subsequent novation was verbal and the original loan

was written but unsigned. He did not call anyone as a witness. This, despite the evidence that his wife, Ms Trish Lezar was present during the novation negotiations. Since the alleged gift is an issue, one would have expected the defendant to have called the lady to corroborate his testimony. His failure to call her was amazing and rather suspect, particularly because she was apparently in attendance at the hearing and no reason was advanced as to why she was not called. About the party's failure to call a witness, see **S v TEIXEIRA** 1980 (3) SA 755 (AD) at 764 A – B where Wessels JA said, among others:

> "In my opinion, the failure by the State to call Tshabalala to testify as a witness justifies the inference that in counsel's opinion his evidence might possibly give rise to contradictions which could reflect adversely on Sarah's credibility and reliability as a witness."

[48] To some extent the version of the defendant was at odds with the suggestions put by his counsel to the plaintiff's witnesses. He confirmed that the loan was indeed concluded between himself and Mr Thomson in October 2006. Despite his denial of

a written agreement he confirmed that an agreement had been reached in terms of which monies had been loaned to him and which loan had to be repaid with interest. Therefore his version shifted to either the allegation of the cancellation of the loan agreement or the allegation that the loan agreement was varied to that of a *donatio.* In the circumstances the defendant thereby drew a direct onus to show either the variation of the loan agreement or its cancellation and substitution with a *donatio*. In all respect he failed to demonstrate any evidence in support thereof. His only evidence was in regard to a conversation which he claimed he had with D K Thomson not long before his demise during which conversation DK Thomson is alleged to have changed his mind and gave the money to him by stating:

> "Don't worry about the money."

These words, if D K Thomson ever uttered them at all, might as well have meant that the defendant should not be troubled by his failure to remit R2 000 per month interest and not that he should not repay the capital or pay such interest when his situation had improved.

[49] The aforegoing statement attributed to DK Thomson is inadmissible as hearsay. Not merely because the declarent was not called to testify but because there is virtually nothing to support the hearsay statement attributed to him. Not one piece of correspondence or any other document whatsoever exist in support thereof. Indeed an email communication later proffered by the defendant and in spite of the defendant having disavowed any knowledge about written communications to that end when requested to provide or to discover in pre-trial conference - clearly demonstrated that DK Thomson loaned the defendant the money when he did not immediately need such money for any specific and personal use. In an email addressed to the defendant, D K Thomson made it clear that he could do without the money for the time being. But instead of investing the funds in the money market portfolio in accordance with his original plan he rechanneled such funds towards a compassionate course of helping his brother-in-law.

[50] When the defendant was asked as to why he did not mentioned the gift to Dr Lees, he gave a rather flimsy excuse that he was too embarrassed to tell her about it. This explanation is wholly untenable in the circumstance. What makes it particularly untenable is that he could give virtually no explanation as why he had not mentioned the gift to his brother, Mr R C Lezar, a person so close and dear to him. Certainly there are some worrying and suspicious aspects in the defendant's case. But the general probabilities are in favour of the view that a loan agreement, nothing else, was concluded. Indeed the defendant himself admitted that such an agreement was reached. There is no other independent and objective evidence to support the defendant's version. He, for reasons best known to him, decided not to call a witness who could possibly have corroborated his version. It is not unfair to draw an adverse inference from his omission – **S v TEIXEIRA** *supra*.

[51] Among the factors which strongly militate against the defendant's hearsay evidence that money was a gift, are the

following. Firstly, the late DK Thomson led a very humble lifestyle although he was a millionaire. The plaintiff's two witnesses corroborated each other and their evidence was unrefuted that the millionaire was a frugal man not given to acts of charity. His daughter made an example of his simple lifestyle by referring to three things. Firstly her parents used a very old microwave for as long as she could remember from her early childhood. Secondly the carpet in the house was very old and dilapidated but notwithstanding her specific request her father did not find it necessary to replace the carpet. Thirdly, although her father could afford any sleek and luxurious motor vehicle and although he apparently liked the BMW he was not driving a 7 series or 5 series or even 3 series for that matter. He was driving a 1 series sedan of the prestigious brand. Moreover, he loved his daughter, educated her until she became a doctor, but still demanded, as a matter of principle and financial discipline, that she pay him back.

[52] The late D K Thomson did not bequeath any legacy to any member of his immediate family apart from his wife and yet the

defendant wants the world to believe that such a thrifty millionaire benevolently gave him a substantial amount of money, threefold the biggest bequest he made in his will, as a donation without any strings attached. Dr Lees's testimony was that her mother was dead against the idea of her husband lending money to her brother. Her uncle, Mr R C Lezar, corroborated this version that after D K Thomson's death the widow was deeply concerned about the repayment of the money by the defendant. Such evidence of this very credible and reliable witness does not tally with that of the defendant's at all. D K Thomson made and signed his will at Pinetown on the 16 April 2007 about a week or so after, he as the defendant alleged, gave him the money as a gift. Yet, he did not include such a gift as a bequest in his will. It is not unthinkable to guess that if he indeed intended to give the money to the defendant as a gift, that was his last opportunity to have it put beyond any doubt in the light that he had not given the defendant any written document to that effect.

The most generous bequest according to exhibit “d” was R100 000,00 which he bequeathed to St Luke’s Home of Healing in memory of his late son. Besides his wife and possibly his daughter no other person received a legacy of that magnitude.

[53] The aforegoing factors clearly underline the improbabilities of the defendant’s unconvincing version. His version, in my view, is highly improbable. It has no merits of being consistent with the probabilities. Therefore it will not be in the interest of justice to admit the defendant’s hearsay evidence as admissible evidence in these civil proceedings - section 3(1)(c) of Act No. 45 of 1988. None of the various factors outlined in 35(1)(c) can singularly or cumulatively considered justify its admission.

[54] Counsel for the defendant contended that the admission of the hearsay attributed to the late D K Thomson in favour of the plaintiff entailed great prejudice to the defendant because, as he argued, the declarent of such hearsay was insincere and therefore unreliable. Now, the insincerity on the part of the

absent declarent or actor is one of the recognised dangers of the hearsay evidence – Zeffert, *supra*, p. 373.

[55] Mr Greyling, at paragraph 4.2(vi) of the defendant's heads of argument contended or insinuated that the danger of insincerity in this case was to be found in two contradictory statements made by the late D K Thomson. This is how he articulated his argument:

> "(vi) The hearsay declarent (the late Mr **Thomson**) made two contradicting statements regarding the existence of signed agreement between himself and the defendant, the one favouring the plaintiff's case and the other favouring the defendant's case. To Dr **Lees**, the forwarded an email indicating that a written agreement between himself and the dead existed. In an email addressed to the defendant, he however attached a concept agreement indicating that such agreement will be finalised (and signed) during December 2006."

[56] Mr Greyling then went on to make the following submission based on the perceived danger of contradiction or insincerity attributed to D K Thomson:

> "(vii) The only possible witness to clarify abovementioned contradiction, would have been the late Mr **Thomson.** To allow the hearsay evidence, would therefore be to tremendous prejudice towards (sic) the defendant. If the late Mrs **Thomson** was able to testify, there would have been a possibility that the court could have find in favour of the defendant regarding abovementioned contradicting versions which, of course, would have influenced the outcome of this case dramatically."

[57] The first statement is contained in an email from D K Thomson to N D Lezar – exhibit "c". I shall revert to this email shortly: I want to go back a little to the defendant's evidence.

[58] The evidence was that the Thomson's visited the Lezars at Bethlehem about the third weekend in October 2006. The calendar shows that the last weekend before the email, exhibit

“c” came into existence, ended on Sunday 22 October 2006. It can be accepted that it was over this weekend that the Thomson’s were visiting the Lezars to ascertain the real extent of the defendant’s financial crisis and how D K Thomson could help. After this visit and before Thursday 26 October 2006 the hearsay declarent obviously sent a crucial email to the defendant. That email encompassed a draft loan agreement – see annexure b to the summons. Dr Lees’s evidence was that she found this draft loan agreement on her late father’s laptop.

[59] On Thursday 26 October 2006 at 08:04am the defendant answered the first email from D K Thomson after the weekend visit. He acknowledged with gratitude receipt of the email with the agreement. He said:

> “I received you (sic) email with the agreement, thank you very much. We really appreciate the help that you and Pat are offering to us. What I would like to suggest is that I take out an insurance policy for cover of the full amount of the loan with a ceding to you and or your heirs and successors in the even of my death which I feel only fair to you.

> As with all my other personal documentation I will have the agreement placed with my lawyer for safekeeping."

[60] He was so grateful that he volunteered to have the full capital loan of R300 000,00 insured in order to safeguard the interest of the helpful lender. Moreover, he also saw it fit and prudent to have the loan agreement entrusted to his lawyer for safekeeping. As was the case with all his personal documents, I would imagine that he also intended delivering the proposed insurance policy contract to his trusted lawyer for safekeeping in order to protect the kind money lender in the event of his death before repayment of the capital loan.

[61] The defendant said nothing, in exhibit "c" as to whether he had signed the loan agreement or not. What is clear is that he received a draft agreement by email; that he unconditionally accepted its terms and conditions in toto; that there were no further negotiations necessary about the terms or conditions thereof. Hardly three hours later, on the same day, Thursday 26 October 2006 at 10:25am D K Thomson emailed his

daughter, Dr Lees. It is very probable he did this after receiving the defendant's earlier email probably after a telephone conversation as well. The email from father to daughter reads:

> ""I have sent Neville R300 000,00 to be used on paying off his mortgage bond **and he has signed an agreement** that he pays me prime less 4% every month. That way he saves a couple of k's and I get about the same as I would if the money was in the bank. I am not too sure if he will be able to repay the capital but if he sells his house **he has to repay the capital**."

[62] The very next day, on Friday 27 October 2006 D K Thomson emailed his brother-in-law, the defendant, and stated:

> "I am glad we are able to help you out until your situation improves. I will transfer the funds to your Nedbank account on Monday. This will help to reduce your monthly payments. If you are unable to repay the monthly interest, rather skip a payment rather than not pay some or other account. I had intended to put these funds into a money market account for a rainy day, so we can survive without them for the time being. U feel you want to cover this agreement perhaps then that is fine with me but whole

> life assurance for this amount might be expensive. If you are happy with the details of the agreement perhaps **we can complete all the signing over Christmas when you visit.”**

[63] The highlighted portions, it was contended, were contradictory statements. I don’t think so. In exhibit “a” D K Thomson informed his daughter that her uncle had signed the loan agreement. It is important to realise that he emailed her about the signing very shortly after the defendant had emailed him. Although the defendant’s email, exhibit “c” was silent on the point, it seems quite probable judging by the defendant’s great relief and excitement when he received the email with the agreement, that he could have telephonically informed D K Thomson that he, for his part, had already signed the loan agreement. Apart from the possible telephone conversation, it is also very probable again judging by the defendant’s obvious unconditional acceptance of the draft agreement, that he had instantly signed it.

[64] The aforegoing opinion is further fortified by the declarent’s reply to the defendant on 27 October 2006. His choice of

words is significant. He said all the signing could be completed over the Christmas summer holiday during which the defendant's family was expected to spend at Pinetown. He said:

> "... we can **complete** all the signing..."

He did not say:

> "... we can do all the signing ..."

The way he expressed himself clearly suggests that the loan agreement had already been partially signed and that the unfinished signing business would be finalised later in December. Implicit in this suggestion was the suggestion or that as on Friday 27 October 2006 D K Thomson, as the money-lender, and his witnesses still had to sign the loan agreement whereas the defendant and perhaps his witnesses had probably already signed. The defendant's failure to discover the email with the draft agreement suggest that there might well have been something unfavourable to his case which he sought to cover-up. By his very own say-so he is a very meticulous businessman. All his important documents are filed with his lawyer. The late D K Thomson was also a very meticulous man; he had a filing cabinet in his study where he kept meticulous records of his personal affairs, such as loans to the defendant's daughter, Dominique. As I see it, such two very meticulous men who had exchanged such substantial cash for a specific *causa* would probably not have annulled the original *causa* by a simple word of mouth:

> "Don't worry about the money."

[65] In my view an integrated reading of the two statements as set out in the aforesaid emails reveals no irreconcilable contradictions to justify the rejection of the D K Thomson's hearsay in favour of the plain on the ground of the alleged insincerity on his part.

[66] Mr. Greyling also argued that there was no binding loan agreement, in its final form, which was concluded between the defendant and D K Thomson, which was intended to be a binding contract and which still existed at the time D K

Thomson died. The answer to all this must undoubtedly be against the defendant. I am unable to uphold this contention. The two gentlemen negotiated the terms and conditions of the loan agreement at Bethlehem on Saturday, 21 October 2006 because it would appeared that on Sunday, 22 October 2006 D K Thomson spent most of the morning playing with the two youngest children of the defendant, namely Nicole and Genevieve – vide item 12, p. 35, exhibit "a".

[67] On or about Wednesday, 25 October 2006 D K Thomson emailed a loan agreement to the defendant. The next day on Thursday, 26 October 2006 the defendant accepted the offer. On Friday, 27 October 2006 D K Thomson replied. In his reply he suggested that if the defendant was happy with the details of the agreement perhaps the signing could be completed later on in December 2006. Nowhere in the email communications or *viva voce* evidence did it emerge that the defendant was unhappy with the details of the exceptionally favourable terms and conditions of the draft loan agreement. There is no evidence whatsoever to support the contention that there were

any outstanding material terms or conditions which the defendant had reserved unto himself for further negotiations at any later stage. It is clear that the only outstanding issue was signing so that the defendant could deliver the loan agreement to his lawyer for safekeeping.

[68] I get the impression that D K Thomson was in effect not saying that the defendant was unhappy. It is abundantly clear that the defendant was extremely happy. In turn D K Thomson negatively acknowledged that while he in effect meant that seeing the defendant was happy with the loan there was really no need to rush things by having the loan contract mailed or couriered back to Pinetown for him to sign. It is as if I can hear him saying to the defendant:

> "Neville,
>
> Don't worry about my signature now. We can attend to that later in December when you come down for the summer holiday. But because you need help now, I will not delay the release of the funds pending my signing of the loan agreement then. Today is

> Friday, 27 October 2006, right! I will transfer the funds to your Nedbank account on Monday, 30 October 2006."

It is not unthinkable that D K Thomson thought along these lines.

[69] In my view the defendant's contention that the plaintiff had failed to establish that a loan agreement in its final form was concluded between the two men and that the plaintiff had also failed to established that a binding contract was subsequently concluded and that it was still in existent at the time of D K Thomson died on the 30 April 2007 – has no substance. A binding contract of loan was effectively concluded when the defendant accepted the offer as evidenced by his email to D K Thomson on Thursday, 26 October 2006. Pursuant to that contract D K Thomson performed his obligation four days later, on Monaday, 30 October 2006. However, the defendant failed to pay monthly rent to D K Thomson in terms of that agreement. It was never the contention of the defendant that no binding agreement would come into existence between the lender and

the borrower unless the written form thereof was signed by both. The agreement was reduced to writing and had to be signed by the parties merely as proof of the oral agreement and not as an act of validating such agreement.

[70] The defendant's contention that the plaintiff relied on three different agreements but failed to prove any is a hollow argument. The argument goes that in the particulars of claim the plaintiff referred to a written but unsigned agreement, annexure b; that in her testimony Dr Lees referred to a written and signed agreement and that in her testimony Dr Lees also referred to a verbal agreement reached between herself and her uncle.

[71] The evidence Dr Lees gave about what counsel for the defendant called the second agreement was tendered on the strength of D K Thomson's email to her on Thursday, 26 October 2006 wherein he specifically advised her that the defendant had signed. She then went on to say how meticulous her father was. She believed that a signed loan

agreement existed although she never saw it and that she suspected it was somehow removed, with stealth, from the cabinet where it was filed in the study. The defendant's family was accommodated in the study when they were at Pinetown for her father's funeral.

[72] There is no evidence to support the conclusive finding as to whether a loan agreement signed by both parties was in fact existent or not. However, the defendant's failure to produce the draft loan agreement strengthens the suspicion that such an agreement did exist. Right from the outset D K Thomson demonstrated his prudence by seeking to have the transaction recorded in a written form and by keeping a copy of the draft loan agreement on his laptop. It does seem unlikely that such a meticulous person would simply have sat back and relaxed for almost six months after the cancellation of the meeting that was scheduled for December 25, 2006. We can speculate about this point. However, one thing is certain, such evidence was tendered to prove that there was a loan agreement. That much the defendant has admitted. Therefore whether it was

eventually signed or not is of no consequence. It was not tendered to establish a new course of action.

[73] The evidence which Dr Lees gave about the direct discussions she and the defendant had at Musgrave in July 2007 which counsel for the defendant called the third agreement, was adduced to refute the defendant's claim of a gift and not as a disingenuous bid to rely on an unpleaded new cause of action. It was, first and foremost, a direct attack on or response to the defendant's plea. Of course, in the second place, it was also indirectly tendered to bolster the plaintiff's case that the transaction was, right from the outset, a loan, and that it remained as such until the demise of the lender.

[74] On the evidence as a whole I have come to the conclusion that the plaintiff has established, on balance of probabilities, that a binding loan agreement was indeed concluded; that undoubtedly such an agreement was mutually intended to be a binding contract – **DILOKONG CHROME MINES (EDMS) BPK v DIRECTOR-GENERAL, DEPARTMENT VAN HANDEL EN**

NYWERHEDE 1992 (4) SA 1 AD, **GOVERNMENT OF THE SELF-GOVERNING TERRITORY OF KWAZULU v MAHLANGU AND ANOTHER** 1994 (1) SA 626 (T).

[75] In his plea and prior to litigation the defendant denied that such an agreement existed. Such denial constituted an outright repudiation of what turned out to be a genuine and valid contract. **TUCKER'S-**case *supra*. The plaintiff, after fruitless efforts to prevail upon the defendant to reconsider his stance, eventually notified the defendant's attorney that, as the executrix, she accepted the defendent's repudiation of the agreement; that she thereby terminated the agreement and that she was proceeding to sue the defendant for the recovery of the entire debt - see annexure "d" to the particulars of claim.

[76] At the stage he pleaded, the defendant specifically disavowed any loan agreement. During the cross-examination of the plaintiff's witnesses suggestions consistent with such denial were put to the opposite witnesses. When he later presented his version, he still maintained the same stance that no loan

agreement was ever finally concluded. His written plea, his counsel's suggestions to the opposite witnesses as well as his oral testimony were proved to be untrue during his brief but incisive cross-examination.

[77] In the circumstances I have come to the conclusion that the version of the defendant was incredible and unreliable. The fallacy of his case also lies in his self-destructive argument. The legal concept of novation presupposes the prior existence of a perfectly valid contract. If there was no valid agreement, in its final form, as the defendant contends, it follows that any talk of a novation from a legal vacuum is illogical and absurd. Therefore, the defendant cannot, after repudiating a valid contract, which has since been cancelled on account of his repudiation, and which no longer exists, be heard to say that the action is premature because the loan is not due and payable. He is now precluded from relying on the terms and conditions of the original contract. That contract, thanks to him, is no more. That is one of the legal consequences flowing from his explicit repudiation.

[78] This is not the case where the onus of proving the terms of a disputed agreement also entails proving the negative as the court held in **KRIEGLER v MINITZER AND ANOTHER** 1949 (4) SA 821 (AD). There the parties agreed that there was an agreement but disagreed on an additional term as alleged by the defendant. In the instant case the defendant denied that there was ever any finality reached on the terms of the loan agreement. Accordingly no onus rested on the plan to proof anything negative.

[79] The defendant admitted in the end that a loan agreement had indeed been concluded between himself and D K Thomson and well in October 2006. Despite his persistent denial of the existence of a written loan agreement he confirmed that in terms of an agreement reached, the money had been lent to him and that he was obliged to repay the capital loan with interest. His version shifted from a denial of a loan agreement to either cancellation of such a loan agreement or variation thereof, call it novation if you will – to that of donation. Mr

Pillay's submission that the defendant has failed to demonstrate any evidence in support of either the loan agreement or its subsequent variation and substitution by that of *donatio* is one I do not hesitate to uphold. Therefore I am inclined to find for the plaintiff.

[80] The question of costs is an important consideration in this case particularly in the light of the great expense of Dr Lees. She had to travel from New Castle in the United Kingdom to Durban and from there together with her counsel, attorney and the witness, Mr R C Lezar to Bloemfontein. The conduct of the defendant in putting his niece, whose father had on compassionate grounds helped him, through the emotional hardship of testifying against him, is a relevant consideration. She did not have to travel so far to reclaim the money which her caring father had lent to her uncle. His conduct deserves a punitive sanction. I have a feeling, and it is a very strong feeling, that the defendant was manipulated to adopt the attitude he did. Because he apparently allowed himself to be manipulated, he brought all this upon himself.

[81] Accordingly I make the following order:

81.1 Judgment is granted in favour of the plaintiff for the payment of the capital amount of R300 000,00.

81.2 The defendant is directed to pay interest thereon at the rate of 8% per annum from the 30 October 2006 to the date of final payment.

81.3 The costs hereof shall be born and paid by the defendant on the scale as between attorney and client.

81.4 The travelling expenses of the plaintiff's witnesses, Dr D A Lees and Mr R C Lezar from Durban to Bloemfontein and back shall be included in such costs.

81.5 The travelling expenses of the plaintiff's counsel, Adv. I Pillay and the instructing lawyer, Attorney B Hansjee from Durban to Bloemfontein and back shall likewise be included in such costs.

81.6 The travelling expense of Dr D A Lees shall, in addition, include her expenses from New Castle in the UK to Durban in the RSA.

81.7 The accommodation costs of plaintiff's witnesses counsel and attorney in Bloemfontein for the duration of this trial shall also be born and paid by the defendant.

M. H. RAMPAI, J

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Matsepes
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