

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 18246/2019

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES /NO
10 November 2025	_____
DATE	SIGNATURE

In the matter between:

HW

First appellant

SJW

Second appellant

and

RS

Respondent

Heard: 30 July 2025

Delivered: 10 November 2025

Headnote: Contract – Loan or donation – Oral loan agreements – Whether payments made by appellant to respondent constituted loans repayable on demand or donations arising from a romantic relationship – Respondent’s silence in face of repeated demands for repayment – Inference to be drawn from failure to dispute.

Summary: The appellants (plaintiffs in the court *a quo*) claimed repayment of R610 000 advanced to the respondent in two tranches. The first plaintiff contended that the amounts were advanced as loans repayable on request. The respondent admitted receiving the money but alleged that it was a donation made out of generosity and affection during their romantic relationship. The trial court held that neither party had proved their case and granted absolution from the instance.

On appeal, the appellants relied on extensive contemporaneous WhatsApp communications in which the respondent repeatedly acknowledged owing the money and undertook to repay it, as well as on the respondent’s own banking reference describing the transaction as “Loan H Willemsen”. The respondent argued that her silence in those exchanges was to avoid conflict and that the word “loan” was used on her bookkeeper’s advice for tax purposes.

Held – While the trial court found the first plaintiff to be an unimpressive witness, it failed to give proper weight to the objective documentary evidence. Even if the first plaintiff’s motives were mixed, the probabilities supported his version. The respondent’s silence in circumstances where repudiation would be expected justified an adverse inference (*McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10E). Her later denial of indebtedness arose only after the breakdown of the relationship and was motivated by personal resentment rather than factual truth.

The appeal was upheld. The amounts advanced were loans repayable on demand.

Held, further: The order of absolution from the instance was set aside and replaced with judgment in favour of the appellants for R610 000 with interest and costs.

JUDGMENT

WINDELL J (MALINDI and CRUTCHFIELD JJ concurring):

Introduction

[1] This is an appeal against the judgment and order of the court a quo (Wilson J) delivered on 24 November 2023, which absolved the respondent (qua defendant) from the instance with costs. The appeal is with leave of the court a quo.

[2] The appellants (plaintiffs in the court a quo) contend that the court a quo erred both on the facts and in law in concluding that they had failed to discharge the onus of proof. It is submitted that the evidence before the trial court, properly evaluated, established the appellants' case on a balance of probabilities.

[3] For convenience, the parties are referred to as they were referred to in the court a quo.

Factual background

[4] The first and second plaintiffs, who are married in community of property, instituted action against the defendant for payment of an amount of R610 000 together with interest and costs. The claim arose from two oral loan agreements allegedly concluded during February and March 2017, in terms of which the first plaintiff loaned and advanced amounts of R210 000 and R400 000 to the defendant, each repayable upon demand.

[5] It is common cause that the first plaintiff and the defendant were involved in an intimate relationship at the time when the payments were made. The defendant admitted receiving the total amount of R610 000 but contended that the funds were given as a donation to 'her' company, Metalcare (Pty) Ltd ("the company"), motivated by affection and generosity rather than by any contractual obligation.

[6] The plaintiffs maintained that the advances were loans made personally to the defendant, while the defendant's defence was that they were donations made in consequence of the romantic relationship. The issue before the court *a quo*, and now on appeal, is therefore whether the payments constituted loans repayable on demand or gratuitous donations given "out of pure liberality."

[7] After a two-day trial at which only the first plaintiff and the defendant testified, the court *a quo* concluded that neither party had proved their case and, on that basis, granted absolution from the instance with costs. While the court accepted that the first plaintiff had established a *prima facie* case in support of his version, it held that he had failed to discharge the overall onus of proof. At the same time, it found that the defendant had also failed to prove her defence, but because the onus rested on the plaintiffs, absolution was granted.

The appellate approach to factual findings

[8] The principles governing appellate interference with findings of fact are well established. A court of appeal will not lightly disregard a trial court's findings, but it is

entitled and indeed obliged to do so where a material misdirection is shown or where the conclusion reached is clearly wrong.¹

[9] Where a trial court's evaluation of the evidence is tainted by material misdirection or by a failure properly to weigh the probabilities, an appellate court is entitled to reconsider the record and substitute its own findings.²

Summary of the evidence

[10] The first plaintiff and the defendant were romantically involved from about 2015 (the defendant maintained that the relationship began earlier, in 2012). During this period, the first plaintiff and his wife, the second plaintiff, were experiencing marital difficulties and contemplating divorce. Anticipating a division of his estate, the first plaintiff withdrew funds from a bank account held in his name.

[11] According to first plaintiff's evidence, a discussion took place at the defendant's home when she confided in him about her personal financial difficulties and asked to borrow money. He agreed to assist her by advancing R210 000 on condition that the amount would be repaid on request. He testified that the payment was made in cash. He explained that he regarded the arrangement as a loan and believed that the money would remain safe with the defendant until required. He denied any intention to make a donation to her company, emphasising that he had no involvement in its affairs and was aware of disputes between the defendant and her brother concerning the business.

¹ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705–706; *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5.

² *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645E-F.

[12] The defendant later requested a further loan of R400 000 for “her personal use”. The first plaintiff again agreed to advance the funds on the same terms. This second payment was made by electronic transfer into the defendant’s personal bank account. Proof of the transactions was produced at the trial and admitted as exhibits. The first plaintiff reiterated that he would not have loaned money to the company, “because if the company goes bankrupt you’re going to lose your money.”

[13] A record of extensive WhatsApp messages between the parties was admitted without objection. These exchanges, spanning from June 2018 to January 2019, form a substantial part of the evidentiary record. In them, the first plaintiff repeatedly referred to the payments as “money I lent you” and asked, “when will you be able to pay back what you owe me?” The defendant did not dispute these assertions. Instead, she responded with messages such as “I know I owe you,” “I will pay you as soon as I can,” and “please give me time.”

[14] In a message dated 4 June 2018, the defendant said: “Let me first sort out my life and then I will give you back your money.” Similar exchanges followed on 11 and 21 June and again on 10 July 2018, when the defendant undertook to “start paying soon.” On 14 August 2018, after yet another request for repayment, she raised no objection or denial.

[15] Further conversations took place in January 2019. On 10 and 11 January, the first plaintiff again enquired about repayment, to which the defendant offered no denial. On 13 January 2019, she initiated a conversation herself, stating that she had been “thinking about the money” and would pay it back once able to do so. The defendant, across at

least nine separate exchanges, acknowledged owing the money and never suggested that the payments were donations.

[16] The defendant later paid the funds she had received from the first plaintiff into the company's account. The payment reference she recorded was "Loan H Willemsen." This contemporaneous notation, made by the defendant herself, accords with the plaintiffs' version and is inconsistent with her later claim that the funds were donations.

[17] Under cross-examination, the defendant confirmed that the money had been deposited into her personal bank account and conceded that there was no written agreement, company resolution, or tax declaration recording any donation. She admitted that she had never told the first plaintiff that the payments were gifts, explaining instead that she had regarded his assistance as "help out of kindness and affection."

[18] In its judgment, the court *a quo* described the first plaintiff as "not an impressive witness" whose evidence "ought to be treated with circumspection," reasoning that his conduct formed part of an attempt to shield assets from his wife. It found the defendant to be "an impressive witness" who gave clear and consistent testimony and accepted her explanations that her silence during the WhatsApp exchanges was an attempt to avoid conflict and that her reference to "Loan H Willemsen" had been made on her bookkeeper's advice for tax purposes.

[19] The plaintiffs argued that the trial court's credibility findings were based on demeanour rather than substance and that it failed to give proper weight to the objective documentary evidence—the WhatsApp messages and the banking reference—which

corroborated the plaintiffs' version and rendered the defendant's explanations improbable.

Evaluation

[20] While the trial court's scepticism about the first plaintiff's credibility is understandable, it overlooked that documentary evidence may, and often does, outweigh subjective impressions of a witness. When reliable, contemporaneous records exist, they are ordinarily the most trustworthy indicator of the parties' true intentions.

[21] The WhatsApp communications form a contemporaneous and candid record of the parties' dealings. They contain repeated acknowledgments by the defendant that she owed the money and undertakings to repay it. Not once did she deny liability or suggest that the payments were donations. Her silence in circumstances where repudiation would be expected speaks volumes.

[22] As the Appellate Division held in *McWilliams v First Consolidated Holdings (Pty) Ltd*:³

'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 of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities.'

³ 1982 (2) SA 1 (A) at 10E.

[23] The defendant's continued silence in response to repeated demands for repayment, coupled with her contemporaneous description of the transaction as "Loan H Willemsen", constitutes compelling circumstantial evidence that she herself regarded the payments as loans. Her explanation — that she used the term "loan" on her bookkeeper's advice for tax purposes — was unsupported by any evidence and contradicts the body of the evidence before us.

[24] Even if the first plaintiff's motives in 2017 were mixed, the objective documentary record provides independent confirmation of his version. The probabilities overwhelmingly favour the plaintiffs. It is improbable that the first plaintiff, in the context of a strained marriage and a contemplated divorce, would gratuitously donate R610 000 to a company in which he had no financial or proprietary interest. The funds were advanced for the defendant's personal use, paid into her personal account, and treated as repayable by both parties at the time.

[25] The defendant's later denial of indebtedness arose only after the relationship had ended and after the first plaintiff reconciled with his wife. Her statement that she had "wasted five years of [her] life" provides the emotional context for her change of stance — one driven by resentment, not by contractual reality.

[26] On a proper application of the approach in *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie*,⁴ the cumulative effect of credibility, reliability, and probability

⁴ 2003 (1) SA 11 (SCA).

considerations favours the plaintiffs. The WhatsApp messages and the defendant's own banking notation provide clear, objective confirmation of the loan agreements.

Conclusion

[27] On a holistic assessment of the evidence, the plaintiffs discharged the onus of proof. The WhatsApp messages, the defendant's own banking records, and the surrounding circumstances demonstrate that the advances were loans. The defendant's later denial was a product of personal grievance rather than fact.

[28] The order of absolution from the instance must therefore be set aside and substituted with an order granting judgment for the plaintiffs.

[29] In the result the following order is made:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following:
 - (a) Judgment is granted in favour of the first and second plaintiffs.
 - (b) The defendant is ordered to pay the first and second plaintiff the amount of R610 000.
 - (c) The defendant is ordered to pay interest on the aforesaid amount a tempore morae from the date of demand to the date of final payment.
 - (d) The defendant is ordered to pay the costs of suit.

L WINDELL

Judge of the High Court

Gauteng Division, Johannesburg

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 November 2025.

Appearances

For the plaintiff:	HP West
Instructed by:	LVH Attorneys
For the defendants:	B van der Merwe
Instructed by:	GJ Brits Attorneys.
Date of Hearing:	30 July 2025
Date of Judgment:	10 November 2025