"REPORTABLE"

REPUBLIC OF NAMIBIA

CASE NO. 1548/2005

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

In the matter between:

LOTTA FRANS	**PLAINTIFF**
and	
INGE PASCHKE	**1ST DEFENDANT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**2ND DEFENDANT**
THE MASTER OF THE HIGH COURT	**3RD DEFENDANT**
MR. C HATTINGH	**4TH DEFENDANT**

CORAM: DAMASEB, JP

Heard: 14 JUNE 2012

Delivered: 25 JUNE 2012

JUDGMENT

DAMASEB, JP: [1] This is a stated case. It is stated as follows:

> 'The plaintiff is the biological child of the late Jurgen Eichhorn (the deceased) who died intestate on 30 May 1991 and the

> first defendant is the sister of the deceased. On the date of death, the plaintiff could not inherit from the estate of the deceased due to the common law principle excluding illegitimate minor children from inheriting intestate from their fathers. This principle was declared unconstitutional by the High Court on 11 July 2007 and the plaintiff instituted an action by way of summons on 13 July 2005 for 50% of the value of the deceased estate. The legal basis for plaintiff's claim is that the first defendant had been 'unjustly enriched'.
>
> The issue to be determined on the stated case is whether the amount or value by which the first defendant is alleged to be enriched is to be determined as at the date of issue of summons or as at the date of judgment.'

[2] It is stating the obvious that for a determination of the stated case the Court must assume that the plaintiff had established his claim for unjust enrichment. I therefore assume that to be the case, without deciding, as the merits of the claim for unjust enrichment is yet to be adjudicated. The facts that form the basis for the stated case are not in dispute. The plaintiff is the biological child of a man who died intestate on 30 May 1991 and his estate was reported as estate no 300/91 to the fourth defendant. The estate was finally distributed in terms of a Final Liquidation and Distribution Account (L & D) dated 14 April 1994. In tandem with the common law as stated in the statement of agreed facts, the first defendant as the only legitimate issue of the deceased inherited the entire estate involving, principally, two farms, which, it is common cause, appreciated in value.

[3] The plaintiff was born out of wedlock to the deceased with plaintiff's mother, Ms. Christina Frans, with whom the deceased had a relationship. In terms of the common law as it stood at the time, the plaintiff was not entitled to inherit intestate from the deceased. That common law rule was declared unconstitutional by this Court on 11 July 2007 in *Frans v Pascke & Others*[1] . Because of that declaration of unconstitutionality, the legal position is that the implicated common law rule did not exist at the time[2] the L & D account was filed and the defendant inherited the deceased's estate. The first defendant was therefore 'unjustly enriched' to the plaintiff's impoverishment from that date. Therefore, in the eyes of the law, and on the assumption that the plaintiff had proved unjustified enrichment, first defendant (at plaintiff's expense) received a benefit which she should not have.

[4] It is common cause that summons was issued on 13 July 2005 and the unjustified enrichment claim is yet to be adjudicated. The plaintiff's case is that the value of the enrichment must be determined as 'at date of judgment'; while the defendant maintains that it should be as 'at the date of summons'.

[1] 2007 (2) NR 520(HC).
[2] Frans, Ibid, at 529D; Myburgh v Commercial Bank of Namibia 2000 NR 255 (SC) at 263E-I.

[5] In the view that I take of the matter, I do not need to decide the issue raised at some length by Mr. Tjombe for the plaintiff whether the South African case of *Kudu Granite Operations (Pty) Ltd v Caterna Ltd*[3] was properly decided, to the extent that it held that in cases of 'unjustified enrichment' what the plaintiff is entitled to is not the thing itself but its value. In the *Kudu Granite* case, the South African Supreme Court of Appeal reversed the settled rule of our common law that in cases of unjustified enrichment the plaintiff is entitled to the thing and not only its value. In the first place, that decision, as Visser observes in his treatise *Unjustified Enrichment*,[4] unsettled a long-established principle of our common law. The *Kudu Granite decision post*-dates Namibia's independence and is therefore not binding on this Court. The common law position in Namibia is therefore the pre-*Kudu Granite* one. But that is not really the issue I am being called upon to decide.

[6] What I must decide is whether the value of the enrichment must be determined as at the date of summons, or as at the date of judgment. In my view, *that* question does not require me to decide if *Kudu Granite* was correctly decided and should be followed by this Court. If it be found that such a decision was

[3] 2003 (5) SA 193 (SCA)
[4] Visser D. 2008. Unjustified Enrichment. Cape Town: Juta, page 265.

necessary, I reiterate that I am bound by the pre-*Kudu* Granite position and see no basis for departure therefrom.

[7] The main reason, as I understand it, advanced by Mr. Vaatz for the first defendant, for the approach that the value of the enrichment (or the estate) must be the date of summons, is that it is *that* date on which the defendant has notice of the plaintiff's claim. He therefore locates his argument on the generally accepted position in contract that a defendant must be in *mora* as a precursor to a claim for damages for breach of contract.[5] Mr. Tjombe counters that Mr. Vaatz's approach has the effect that the unjustly enriched defendant would benefit from his unjustly-earned benefits at the expense of the plaintiff. He states in his written heads, para 10:

> "Should the first defendant in the instance matter be permitted only to pay the plaintiff the value of the things transferred to her and that value is determined at the date of commencement of the action, the first defendant would continue to retain the improved or increased value of the thing after that date. If the retention of the thing is unjustified, so should the retention of any increased value be unjustified."

Conditio sine causa distinguished from contract or delict

[8] The plaintiff's claim is founded on the c*onditio sine causa specialis*. The cause of action is *sui generis* and although it

[5] See generally, Christie, The Law of Contract, and 5th Edn, page 495-505.

intersects with the law of contact, delict and property it does not fit neatly into either and covers the human transactional field falling outside the jurisprudential niche of those three branches of our law.[6] The specific principles applicable to measuring damages in either contract or delict must therefore be approached with great caution. The difference between damages in contract and delict has been stated as follows by Van den Heever JA in *Trotman v Edwick*[7]:

> "A litigant who sues on contact sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him."

[9] When in contract the market value of the thing is involved, such value is to be determined at the time of breach of contract.[8] The ratio being that the plaintiff should be placed in the position he would have occupied if there was no breach of contract at that stage. Therefore, if a seller is in *mora* regarding delivery of the *merx*, damages are computed with reference to the time at which delivery should have taken place.[9] If the buyer rescinds the contract at that stage, he has to act

[6] Visser. (2008), page 7-9.
[7] 1951 (1) SA 443(A) 449B-C.
[8] PJ. Visser et al.1993. Law of Damages. Cape Town: Juta & Co, p 76.
[9] Visser (1993), page 281.

reasonably and purchase from another source what he requires in order to mitigate his damage.[10]

[10] In delict, the date of commission of a delict is generally the decisive moment for determining damages. However, exceptions to this rule include loss of income caused by bodily injuries (loss of earning capacity) where damage continues into the future well after the time of commission of the delict[11]; in an action for the vindicatory action for cattle the value of the beasts was determined as at date of trial[12]; cases where the defendant only became aware of the wrong at a later date or in cases where the amount in damages may have been increased by the amount of additional interest accrued. [13] These special categories in delictual claims approximate the situation facing the Court in the present case. The common denominator being, in my view, the recognition that confining compensation to the date of the damage-causing event does not achieve the object of compensation to the fullest extent possible.

[11] In my view, the matter is best approached having regard to the underlying principles for the award of damages. The primary object of an award of damages is “the fullest possible

[10] Ibid.
[11] General Accident Ins Co SA Ltd v Summers and Others 1987 (3) SA 577 (A) 612
[12] Muller v Government of the RSA 1980 (3) SA 970 (T) at 974-5.
[13] Vissers, Law of Damages p. 76, note 134.

compensation of the plaintiff's damages."[14] The authors Visser *et al* go on to suggest that for that reason, "the relevant time of assessment should be the latest stage in the lawsuit when new evidence may be submitted."[15] This implies that the damages may be assessed at the time when the court commences with its judgment.

[12] In *Seatle v Protea Assurance Co Ltd*[16], the court refused to receive evidence handed in after judgment was reserved and only made available after its judgment was formulated and based the award of damages on the evidence received at the trial. In my view this approach does not support Mr Tjombe's suggestion that the value of the enrichment must be determined as at the date of judgment. The reality being that the Court normally takes time before rendering a decision and the value of the enrichment might well have changed in the meantime.[17] To determine the value on the date of judgment can therefore lead to a lot of uncertainty about on what basis it is to be determined if circumstances change between the date judgment is reserved and when it is handed down. In argument, Mr. Tjombe conceded the point and agreed that the proper cut - off point is the date on which,

[14] Ibid, page 75.
[15] Visser, at p 76.
[16] 1984 (2) SA 537 (C)
[17] Compare the approach suggested by Koch in his article Aguilian damages for personal injury and death, 1989 THRRHR vol.52, 66 at 69.

having received the evidence of the parties, the court reserves judgment.

[13] In an unjustified enrichment situation, the damage to the plaintiff is not completed until the object of unjust enrichment is restored to him. His damages continue to run for as long as the defendant remains benefiting from his retention or possession of that which properly belongs to the plaintiff.

[14] It is common cause that in the present case we are not concerned with the return of a thing but the quantum of the defendant's enrichment to the plaintiff's impoverishment. I agree with the view expressed by Visser in his work *Unjustified Enrichment* that[18]:

> "In computing the quantum of the defendant's enrichment it is accepted that in certain cases the defendant's enrichment might possibly have been increased by the fruits of property or money transferred to him. In such a case the plaintiff is also entitled to such fruits (or their value). But it must also be remembered that the defendant might have had expenses in regard to such property, and therefore he or she is entitled to have the production costs of any fruits deducted when the measure of enrichment is determined."

[15] In the present case, to determine the value of the enrichment as at the date of summons would not achieve the object

[18] Visser (2008) page 163-4.

of damages which is to recompense the plaintiff to the ‘fullest possible extent of his damage’ and will have the result that the first defendant benefits from her unjustified enrichment to the plaintiff’s detriment.

[16] I come to the conclusion that the date on which the value of the enrichment is to be determined is the date on which the court, after having heard the evidence as to that value, reserves judgment.

[17] I would accordingly answer the question raised in the stated case as follows:

THE ORDER:

A. **STATED CASE**:

1. The value of the enrichment to first defendant from the estate of the deceased, Jurgen Eichhorn, to the plaintiff’s impoverishment, is to be determined as at the date the court (having received the parties’ evidence on the issue) reserves judgment to determine

   i) either whether or not the claim for unjust enrichment has been proved, or, if that liability is admitted and the only question in issue is the estate’s value,

ii) which party's value must prevail.

2. The parties have agreed that costs be in the cause.

B. **CASE MANAGEMENT ORDER:**

1. The parties are directed to convene a parties' conference no later than 10 days from the date of this judgment for the purpose of preparing a joint report setting out the balance of the issues remaining for adjudication, which joint proposal shall form the basis of a pre-trial order.

2. The parties are directed to set out the areas of disagreement between their experts on the value of the estate and to propose ways in which such differences may be narrowed, including the appointment of a neutral joint expert for the purpose.

3. The case is hereby set down for pre-Trial before the managing judge on 10 July 2012 at 8H30 and for the purpose of setting a trial date for the balance of the issues determined in B.1.

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DAMASEB, JP

COUNSEL ON BEHALF OF THE PLAINTIFF: **MR. N. TJOMBE**

OF: **TJOMBE-ELAGO LAW FIRM**

COUNSEL ON BEHALF OF THE DEFENDANT: **MR. A VAATZ**

OF: **ANDREAS VAATS & PARTNERS**