

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

CASE NO.: HC-MD-CIV-ACT-OTH-2020/02204

In the matter between:

DAVID JOHN BRUNI
IAN ROBERT MCLAREN

1ST APPLICANTS
2ND APPLICANTS

and

YATSUA INVESTMENTS CC
PEARL MBAKO
EASU TWEUTHIGILWA MBAKO

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

Neutral Citation: *Bruni v Yatsua Investments CC* (HC-MD-CIV-ACT-OTH-2020/02204) [2020] NAHCMD 571 (7 December 2020)

Coram: RAKOW, J

Heard: 19 November 2020

Delivered: 07 December 2020

Flynote: Civil law – Law of Delict - *condictio indebiti* – unjust enrichment – Requirements restated - the respondent must be enriched - the applicants must be impoverished - the respondent's enrichment must be at the expense of the applicants - the enrichment must be unjustified - claimant needs to prove an 'excusable' error - Prescription – Prescription Act 68 of 1969 – Section 12(3) – when a debt which does not arise from contract becomes due - Joinder of parties – Summary Judgement.

Summary: This is an application for summary judgment in terms of Rule 60 of the Rules of the High Court brought against the respondents. The applicants instituted action against the respondents for monies owed to the now liquidated SME Bank. The applicants allege that the monies stolen from the SME Bank were funneled through AMFS (acting as conduit), for the benefit of the respondents. AMFS was accordingly the conduit, and the money was so funneled for the benefit of the respondents, being the ultimate recipients. It is the applicants' position that the respondents are therefore the recipients of the monies. The applicants set out the manner in which the money flowed, including the internal procedures of the treasury department of SME Bank.

The third respondent opposed the application for summary judgment. The third respondent did not deny receiving the alleged funds but however stated that same was received as a loan from a certain Mr Kamushinda and that that he had no relationship with SME Bank. The third respondent received different payments, seemingly from SME Bank, which were funneled through from various entities, and a direct payment of N\$60 000 from Mr Kamushinda. The dates of the direct payments were not canvassed in the pleadings.

The applicants based its claim on the *condictio indebiti* alternatively, the *condictio furtive*.

Held that, as part of the requirements of the *condictio indebiti*, a claimant needs to prove that its error is 'excusable'. The payer cannot recover the monies paid to the recipient if the error is not 'excusable', the error must therefore have been reasonable.

Held further that, condictio indebiti is available if, a department responsible for making payments effects payments, with the mistaken belief that the money was owing to the various entities, based on the fraudulent authorities provided on the payment advices.

Held that, a debt which does not arise from contract shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

Held further that, the issue of non-joinder should only be entertained if the with the claim of *condictio indebiti* cannot succeed without the joining of the other entities that form part of the conduit.

Held that, the respondents failed to satisfy court with a bona fide defence to the summary judgement application in respect of the bulk of the monies claimed.

Held further that, the applicants made out a case for the enrichment, for the majority of the claim, of the respondents under the *condictio indebiti* as the respondents were enriched by these payments and the applicants was impoverished, and that the respondents' enrichment was at the expense of the applicants.

Held that, the applicants did not succeed in making out a case under the *condictio indebiti* in relation to the cash advances made directly to the third respondent by Mr. Kamushinda as the applicants did not show that these payments meet the requirements for the *condictio indebiti*. The applicants did not satisfy court as to the dates that these payments were made.

ORDER

1. The respondent's opposition to the summary judgment application for the amount of N\$ 910 000 is dismissed.
2. The respondent is granted leave to defend the claim of N\$60 000 relating to monies received directly from Mr. Kamushinda.
3. The application for summary judgement is therefore granted to the amount of N\$910 000 against the third respondent
4. Interest at the rate of 20% p.a on the following amounts as follows:
 - a. On the amount of N\$35 000 calculated as from 24 September 2015 to date of payment
 - b. On the amount of N\$35 000 calculated as from 26 October 2015 to date of payment
 - c. On the amount of N\$35 000 calculated as from 9 November 2015 to date of payment
 - d. On the amount of N\$35 000 calculated as from 5 February 2016 to date of payment
 - e. On the amount of N\$35 000 calculated as from 23 March 2016 to date of payment
 - f. On the amount of N\$35 000 calculated as from 22 April 2016 to date of payment
 - g. On the amount of N\$65 000 calculated as from 19 May 2016 to date of payment
 - h. On the amount of N\$70 000 calculated as from 4 August 2016 to date of payment
 - i. On the amount of N\$35 000 calculated as from 19 August 2016 to date of payment
 - j. On the amount of N\$35 000 calculated as from 12 April 2017 to date of payment
 - k. On the amount of N\$35 000 calculated as from 13 April 2017 to date of payment
 - l. On the amount of N\$70 000 calculated as from 15 June 2017 to date of payment

- m. On the amount of N\$70 000 calculated as from 3 August 2017 to date of payment
 - n. On the amount of N\$35 000 calculated as from 11 July 2017 to date of payment
 - o. On the amount of N\$170 000 calculated as from 19 May 2017 to date of payment
 - p. On the amount of N\$35 000 calculated as from 29 March 2017 to date of payment
 - q. On the amount of N\$80 000 calculated as from 12 December 2017 to date of payment
5. Costs of summary judgement application, to include the costs of one instructing and two instructed counsel is awarded to the applicant.
6. Matter is postponed to 19 January 2021 at 15h30 for the parties to file a joint case plan on or before 14 January 2021.

JUDGMENT

RAKOW, J:

Introduction

[1] The first and second applicants are major males with full legal capacity and are the joint liquidators of the SME Bank duly appointed as such by virtue of letters of appointment dated 13 January 2020. They have been holding letters of appointment as provisional liquidators as from 11 July 2017. By virtue of their appointment by the Master of the High Court they were afforded certain powers which include the power to institute the current action.

[2] The first respondent is Yatsua Investments CC, a closed corporation registered under the Close Corporations Act, 26 of 1988. The second respondent is Pearl Mbako a major female with full legal capacity and she is the sole member of the first respondent.

The third respondent is Easu Tweuthigilwa Mbako a major male with full legal capacity and residing at the same address as the second respondent although their relationship is not clarified in the documents before court.

[3] The applicants retained the services of a certain Ms. Tania Pearson, a duly qualified legal practitioner in Namibia who used to provide in-house legal services to the SME Bank since 2012. The affidavits of Ms. Pearson supported by affidavits from both the applicants were used in support of the summary judgement application of the applicants and this application is opposed by the third respondent, supported by an affidavit of the second respondent. The s seeks the following order:

- (a) N\$970 000, jointly and severally, the one paying the other to be absolved, alternatively;
- (b) N\$230 000 by the third respondent; (and if relevant);
- (c) N\$380 000 by the first respondent;
- (d) N\$360 000 by the second respondent;

They further seek interest on the amount of N\$970 000, running from the date immediately after the date the specific payment which in the end made up the N\$970 000, was paid and cost of suit including the cost of one instructing and two instructed counsels. During arguments however counsel for the s indicated that they only seek summary judgement against the third respondent for the full amount of N\$970 000.

[4] Initially, the applicants indicated that the causes of action in respect of the claims were based on the *condictia indebiti*, alternatively, the *condiction ob turpem vel injustam causam*, alternatively the *condictio furtive*. During the hearing of the application for summary judgement they only proceeded on the ground of the *condictia indebiti*. The third respondent further acknowledged that he received all of the N\$970 000.

The transactions

[5] To understand the transactions that lead to the alleged debt of the respondents, it is necessary to explain fully how the payment system worked at the SME Bank and how

this system was manipulated, with the result that money flowed through various conduits that eventually ended up with the third Respondent. Ms. Pearson assisted the applicants in the investigation into the matters of the SME Bank and with her investigations uncovered a grand scheme of fraud which in turn was “master minded” by the *Dramatis Personae*, a number of employees and board members of the SME Bank.

[6] How did it work? The payment system at the SME Bank operated in such a manner that all preparations for payments would go through the Finance Department at the SME Bank. This department was responsible to check, verify and authorize a payment, which payment would then be approved by the CEO of the SME Bank. As soon as the CEO approved the payment, a document called Payment Instruction would be forwarded to the Treasury Back Office, who in turn would then effect the specific payment. In this office three persons will deal with the payment instruction, the Treasury Inputter, who physically loads the payment onto the system, the Treasury Verifier who checks whether sufficient funds were available on the SME Bank’s account to meet the payment and the Treasury Authorizer who is the person who physically makes the payment by pressing a button on the computer system which then effected the actual payment. Mr. Heathcote referred to this person aptly as the so called “button pusher”.

[7] During their investigations the applicants together with Ms. Pearson identified the following persons as the *dramatis personae* or the persons responsible for the so called fraudulent acts. They are Enock Kamushinda, the Deputy Chairperson and later Chairperson of the board of the SME bank during the period 11/10/2011 – 1/3/2017 when the Bank of Namibia took over the management of the SME Bank, Tawanda Mumvuma, the Director and CEO of the SME Bank from 2012 – 1/3/2017, Joseph Banda who was the Assistant Accountant initially from 1/8/2012 – 25/2/2013 and then Finance Manager till 1/3/2017, Chiedza Goromonzi who was an Administrative Assistant for Finance from 2012 till 31/3/2017 and also the Personal Assistant of Enock Kamushinda, who served on the board of Directors for the SME Bank (and who was eventually the Chairperson of the Board) and lastly Simbarashe Magobedze an Assistant Finance Manager.

[8] It is further pleaded that any person operating in the Treasury Department will only receive a payment instruction indicating to whom the payment was to be made, the bank account number of the payee and the reason for the payment, which was all confirmed under the signature of the CEO of the SME Bank, or in his absence the acting CEO. They only received the payment instruction without any supporting documents, as seemingly the verification of the payment was already done by the Finance Department and the CEO.

[9] During their investigation as liquidators of the SME bank, the applicants' and Ms. Pearson discovered fraudulent transactions to the amount of at least N\$247 535 004.71 which was misappropriated from the SME Bank. As a result of this theft, the SME Bank was forced into liquidation. A number of South African entities received the misappropriated money and they are listed in the Particulars of Claim of the s together with the amounts they received. One of these entities is a CC with the name Asset Movement and Financial Services (AMFS). This entity received N\$79 800 000 from payments from the SME Bank as part of the fraudulent scheme uncovered during the investigations. These payments were instructed and authorized by the *dramatis personae*, which in turn were made by the Treasury Department upon receipt of the payment instructions from the Finance Department. These payment instructions would contain the name of false service providers but the bank account details of AMFS.

[10] AMFS and the other entities then further paid out the money to other beneficiaries and some of this stolen money found its way back to Namibia. In this matter AMFS paid directly to the first respondent, through a number of payments, N\$380 000, to the second respondent N\$245 000 and to the third respondent N\$170 000. AMFS further paid to Mysen Trading Pty (Ltd) N\$2 880 434 and to Ivana Enterprises Pty (Ltd) N\$600 000 (the transactions are depicted in Namibian dollar but actually happened in South Africa and were done in South African Rand).

[11] The sole shareholders and directors of Mysen Trading (Pty) Ltd were a certain Marx Gouws and Adlai Mackenzie Pazwakavambwa. Ivana Enterprises was owned by a certain Skosana and Pym Tembo, who were both also the directors of the said company.

These two companies also made certain payments to the second respondent, a total amount of N\$80 000 was received from Ivana Enterprises and N\$35 000 from Mysen Trading.

[12] The second and third respondents were called to give evidence at a Commission of Enquiry. During the enquiry the third respondent testified that he received N\$60 000 in cash from Mr. Kamushinda. All the payments were made during the period 23/9/2015 – 19/12/2017 with the exception of the two payments received directly in cash from Mr. Kamushinda as there is not an indication when those were received. The initial payments to AMFS were made during the period 10/4/2015 – 11/8/2016 and then seemingly further distributed from there.

The Respondents version

[13] The third respondent deposed to an affidavit saying that he is opposing the application for summary judgement and he is duly authorized to depose to the opposing affidavit on behalf of the first and second respondents. He proceeded and explained that during 2010 or 2011 Mr. Enoch Kamushinda, in his personal capacity, entered into a loan agreement with him and in terms of that agreement Mr. Kamushinda undertook to financially assist him in monthly installments and he further admits that he received to date the amount of N\$970 000. He further explained that during their discussions Mr. Kamushinda undertook to draw up a contract which would govern the terms of the agreement between the two of them. This contract was to stipulate when the repayment of the loan was to happen, the interest rate applicable and the total what he had to repay.

[14] He at various times enquired from Mr. Kamushinda as to the written contract to which Mr. Kamushinda would reply that he need not to let it worry him, which he took to mean that he does not need to concern himself with repayment of the loan until such time as he is provided with the further details of the terms of his repayment. He had no knowledge wherefrom Mr. Kamushinda would obtain the amounts he advanced to the third respondent or that the monies might have been fraudulently appropriated from the SME Bank where he held the positions of Deputy Chairperson and Chairperson. He only

became aware of the allegations leveled against Mr. Kamushinda when he and the second respondent were summoned to testify in the enquiry.

[15] He sets out the *bona fide* defenses of the respondents to the applicants' claim in his affidavit and then address these more fully. He contends that the facts of this case do not allow for the application of the enrichment claims. Also that the applicants did not join in these proceedings, the entities through which the monies paid to the respondents flowed. He also offers a plea of prescription to the majority of the amounts paid to the respondents and the fact that the respondents raised multiple exceptions against the Particulars of Claim of the applicants.

The arguments put forward

[16] The applicants claim that they are entitled to summary judgement based on the *condictio indebiti* which is an enrichment claim. The money the respondents received was funneled through AMFS, Mysen Trading and Ivana Enterprises. These role players for a lack of a better word, acted as conduits for the benefit of the third respondent, who was the ultimate recipient and which was confirmed under oath by the third respondent. They further argued that they are entitled to proceed against the respondents as they are the ones who eventually received the benefits although the monies were not directly paid to them from the SME Bank. It is their contention that it is indeed the respondents that were enriched, and that proof of the transfer of the money gives rise to the presumption of enrichment. This is in any case not denied by the respondents as they admit receiving the funds and therefore that they were enriched by the receipt of the funds.

[17] They further argued that the payments on behalf of the applicants is excusable as it was paid in the *bona fide* but mistaken belief that it was due, whilst it was not. These payments were authorized by the *dramatis personae* but eventually effected by the Treasury department who believed that they were duly authorized and due. Counsel for the applicants referred the Court to *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme*¹ where Rogers AJA held that 'excusability is concerned with the mistakes

¹ 2018 (1) SA 513 (SCA).

made by those persons who actually effected the payment ...' and in the current matter these persons were the persons in the Treasury department, therefore meeting the excusability requirement of the *condictio indebiti*.

[18] It is the bone fide defence of the respondents is that the monies received by the third respondent were in terms of a loan agreement between Mr. Kamushinda and the third respondent. The counsel for the respondent argued that the applicants did not meet the requirements for the *conditio indebiti* in that the payments which were made, were verified and approved, and the treasury department did not act under any belief as to whether the amounts were due or not and therefore the requirement of reasonable but mistaken belief under the *condictio indebiti* was not met. The Court was referred to *Voster v Marine and Trade Versekeringsmaatskappy*² in which Smit JP quoted from Wessels Law of Contract which reads as follows:

'No doubt if the negligence is so gross that a court can infer from it that the payment was made with an intention to make a gift, or that the money was paid intentionally or with complete indifference whether it was or not, then the *solvens* will be held to have intended to benefit the *accipiens*.'

[19] The argument if understood correctly is therefore that the payments were intentionally affected by the *dramatis personae* and were made with complete indifference on the part of the treasury department. Thus no mistaken payment could have taken place.

[20] The argument is that the applicants failed to meet the requirements of the *Conditio Indebiti* in that they did not proof that the third respondent was paid anything by the SME Bank, and further that they did not proof that the alleged conduits were paid without the monies being due. This could not be decided as these conduits are not parties to the matter. It further cannot be said that the payments were made in error or mistake. The issue of non-joinder of these parties was also raised separately and it is argued that their participation to the action is crucial to the adjudication of the said action. It was argued that if the order which might be made would not be capable of being

² 1968 (1) SA 130 (O).

sustained or carried into effect without prejudicing a party, who has not been joined, then there is non-joinder of a party that has a direct and substantial interest in the matter, referring to *Almalgamated Engineering Union v Minister Labour*.³

The applicable law and legal arguments

The Condictio indebiti

[21] In *Frame v Palmer*⁴ as referred to by Hoff AJ in *Namibia Airports Company Ltd v Conradie*⁵ the requisites for a claim under the *condictio indebiti* were set out as follows:

(a) plaintiff must prove that the property or amount he is reclaiming was transferred or paid by him or his agent to the defendant;

(b) he must prove that such transfer or payment was made *indebite* in the widest sense (ie that there was no legal or natural obligation or any reasonable cause for the payment or transfer);

(c) he must prove that it was transferred or paid by mistake.'

[22] The essential elements or allegations for a *condictio indebiti* are summarized in *Amler's Precedents of Pleadings*⁶ as follows:

(a) The defendant must be enriched

(b) The plaintiff must be impoverished

(c) the defendant's enrichment must be at the expense of the plaintiff; and

(d) the enrichment must be unjustified or *sine causa*.

[23] The *condiction indebiti* is enforceable only against persons because they were the *recipients* of the undue payments. In *Phillips v Hughes* Didcott J explained it as follows, referring to Wessels's explanation in the *Law of Contract in South Africa*⁷:

³ 1949 (3) SA 637 (A).

⁴ 1950 (3) SA 340 (C) at 346D – F.

⁵ 2007 (1) NR 375 (HC).

⁶ 7th edition by LTC Harms 2014, LexisNexis Durban page 100.

⁷ 2nd edition vol 2 paragraphs 3712,3713 and 3716 on pages 952-953.

'This means that the *condiction indebiti* is enforceable against the *recipiens* of the undue payment, but nobody else. The *recipiens* is not necessarily the person into whose hands the money was actually put when it was paid. He is the one who must be considered, in all the circumstances of the case, truly to have received the payment. Whenever a payment is made to an agent with authority to accept it, for instance, the *recipiens* is the principal, not the agent. A conduit through whom payment passes is likewise not its *recipiens*. Instead he who obtains payment by such means is. ... All that matters is whether one can appropriately be said to have received the payment in some or other way.'

[24] The applicants showed that the respondents were indeed recipients of the payments and alleged that it was undue payments. The respondents admitted receiving these payments but argue that they were due to a loan agreement between the third respondent and one Mr. Kamushinda.

[25] Regarding requirement that the payment be made *indebite*, the following was said regarding the meaning of *indebite* in *Bowman, De Wet and Du Plessis NNO and Others v Fidelity F Bank Ltd*:⁸

'I would have thought that an ultra vires payment represents a prime example for a payment *indebite*. Such payments are, by their very nature, payments of something not owing ('onverskuldig') by the payee. Sir John Wessels was of a like mind: in *Law of Contract in South Africa* 2nd ed para 3642, he said that a payment is considered not to be due if a claim was thought to exist but which, after payment, is discovered to have been null and void.'

[26] For the respondents to successfully defend themselves against the *condictio indebiti* in this matter, the respondents had to show or allege that the money they received was due to them. They indeed alleged the said as they plea that these payments were made as part of a loan agreement.

[27] Excusability is still a requirement of the *condictio indebiti* in our law. A claimant needs to prove that its error is 'excusable'. If the error is not 'excusable', the payer cannot recover the monies paid to the recipient. The error must therefore have been reasonable.

⁸ 1997 (2) SA 35 (A) ([1997] 1 All SA 317) at 40H – I.

To determine this, the court must investigate the reasons for and the circumstances in which payments were made. In the current matter the argument was put forward that the so-called errors made by the SME Bank in paying the said monies should have been detected by due care on the side of the SME Bank and that the finance department was the department effecting the payments, it was just a formality for the Treasury department to process the said payments. The error should therefore not be excusable. In *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme*⁹Rogers AJA said the following regarding this question:

‘The question is not whether these bodies were slack in failing to detect that unlawful payments had been made Excusability is concerned with the mistakes made by those persons who actually effected payment, in this case the authorized signatories.’

[28] The argument by the applicants is that payment was effected by the Treasury Department and they based their payment on a payment advice which was actually faulty and not due.

[29] In *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme*¹⁰ the facts were in short that a certain Mr Alley authorized payments not owing to the applicants. The respondents only realized that there might be some undue payments after Mr. Alley was suspended due to a payment made from the respondent’s account to his personal account. They then started to investigate the payments made by Mr. Alley and found that certain payments made to Yarona Healthcare Network were not due. The payment process in Medshield however also involve a further signatory to payment authorizations. In its judgement the court reasoned as follows:

‘Medshield’s case was conducted on the basis that Alley knew that the payments were not owing to Yarona. It is difficult to avoid that conclusion. Medshield’s counsel argued that Alley’s knowledge should not be attributed to Medshield, invoking the rule that where an agent in the course of his employment defrauds his principal the latter is not charged with constructive knowledge of the transaction. If Alley had acted alone in causing Medshield to make the

⁹ 2018 (1) SA 513 (SCA).

¹⁰ Supra.

payments, Medshield could not have brought its enrichment claim as a *condiction indebiti* because Alley did not mistakenly believe that the money was owing. However, Alley did not act alone. In such circumstances I consider that the *condiction indebiti* is available if the second person, without whose participation the payment could not have been made, mistakenly believed the money was owing, providing of course the mistake was excusable.’

[30] It is therefore follows that the *condictio indebiti* is available if, like in the current instance where the Treasury Department effects payments, it then becomes the so-called “second person” without whose participation the payment could not have been made, and it mistakenly believed the money was owing to the various entities it made these payments based on the fraudulent authorities provided on the payment advices.

Defence of Prescription

[31] The respondents further contended that the claim against most of the payments received by them prescribed in terms of section 11 of the Prescription Act, 68 of 1969. The argument is that the serving of the summons on the respondents could not interrupt the prescription period as the respondents are not debtors of the applicants and the SME Bank. Therefore all amounts due to Mr. Kamushinda under their agreement for a period exceeding three years have become prescribed in terms of the Act. The defence of prescription would therefore have been a successful defence if Mr. Kamushinda instituted action in terms of the loan agreement for the repayment of the monies paid over to the respondents and might be applicable to the N\$60 000 received in cash as the court does not know when these two payment were made.

[32] This claim is however not a contractual claim but a delictual claim. The onus is indeed on the party raising the prescription to proof it. The applicable section of the Prescription Act in the current matter is found under section 12 with the heading “When prescription begins to run.”

‘(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt which does not arise from contract shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

[33] In this instance prescription would therefore only start to run when the applicants through their investigation determined that an amount of money has been fraudulently paid out to entities not entitled to receive the said money.

Non-joinder

[34] The non-joinder of the other role-players or conduits was also raised by the Respondents. The issue should only be entertained if the current claim, the one of *condictio indebiti* cannot succeed without the joining of the other entities. If it is possible that a case is indeed made out without the necessity of joining any of the other entities, obviously the non-joinder-of these parties are of no relevance.

[35] It was further submitted that the applicants can choose its wrongdoers and are not obliged to join each and every entity that played a role as a conduit. It is therefore not necessary for the applicants to join these parties as the only allegation to their role is that of conduit. The court finds that the claim of *condiction indebiti* can indeed succeed without the joinder of the conduits.

Summary Judgement

[36] The requirements of rule 60(5)(b) which must be satisfied for a successful opposition to a claim for summary judgment was stated as follows in the *locus classicus Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426A* by Corbett JA with regard to the previous rule 32, dealing with summary judgement applications:

'Accordingly, one of the ways in which the respondent may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the applicants in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

All that the Court enquires into is:

(a) whether the respondent has fully disclosed the nature and the grounds of his defence and the material facts upon which it is founded, and

(b) whether on the facts so disclosed the respondent appears to have, as to either the whole or part of the claim, a defence which is *bona fide and good in law*.

If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word fully, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the respondent need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.'

[37] In general, the approach of the court is as set out by Justice Cheda in *Lofty-Eaton v Ramos* as follows:¹¹

'The general approach of these courts in applications of this nature is that cognisance is taken into account that a summary judgment is an independent, distinctive and a speedy debt collecting mechanism utilized by creditors. It is a tool to use by a applicants where a respondent raises some lame excuse or defence in order to defend a clear claim. These courts, have, therefore, been using this method to justly grant an order to a desperate applicant who without doing so, will continue to endure the frustration mounted by an unscrupulous respondent (s) on the basis of some imagined defence. As remedy available to applicants is an extra-ordinary one and is indeed stringent to the respondent, it should only be availed to a party who has a

¹¹ (I 1386/2013) [2013] NAHCMD 322 (08 November 2013).

watertight case and that there is absolutely no chance of respondent/respondent answering it, see *Standard Bank of Namibia Ltd v Veldsman*.¹² Rule 32 specifically deals with the said applications. Summary Judgment is therefore a simple, but, effective method of disposing of suitable cases without high costs and long delays of trial actions, see *Caston Ltd v Barrigo*.¹³ In that case, Roberts, AJ went further and crystallised the principle as follows:

‘it is confined to claims in respect of which it is alleged and appears to the court that the respondent has no bona fide defence, and that appearance has been entered solely for the purpose of delay.’

[7] Where a summary judgment has been applied for, the respondent is entitled to oppose, if he has a *bona fide* defence and in that opposition he/she must dipose to an affidavit where he/she should positively state and show that he/she has a *bona fide* defence to’s claim. Respondent must not only show, but, must satisfy the court that he/she has a *bona fide* defence. In furtherance of the satisfaction to the court, respondent must at least disclose his defence and material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence, see *Breitenbach v Fiat SA (Edms) BPK*¹⁴ and *Namibia Breweries Ltd v Marina Nenzo Serrao*.¹⁵ This, however, is not to say that he/she should do so by disclosing all the details and particulars as would be the case of proceedings, see *Maharaj v Barclays National Bank Ltd*¹⁶ and *Breitenbach v Fiat SA*.¹⁷

[8] The requirement seems to be relaxed to a certain extent as it is not rigorous *per se*, but, is designed to enable a genuine respondent to defend a claim which otherwise would result in s’ obtaining judgment under circumstances where respondent had a genuine defence. The need for clarity on respondent’s part is designed to avoid the entry of intention to defend an action solely to delay an otherwise just claim by applicants.

[9] For that reason, these courts will always seriously consider the granting of a summary judgment and will only do so where a proper case has been made out by s. The above principle

¹² 1993 NR 391 (HC).

¹³ 1960 (4) SA I at 3H.

¹⁴ 1976 (2) SA 226 (T) at 228 B-C.

¹⁵ (2006) NAHC 37.

¹⁶ 1976 (1) SA 418.

¹⁷ 1976 (2) 226.

has been applied in many cases, see also *Crede v Standard Bank of South Africa Ltd*¹⁸ where Kannemeyer, J remarked:

‘One must bear in mind that the granting of summary judgment is an extraordinary and drastic remedy based upon the supposition that the applicant’s claim is unimpeachable and that the respondent’s defence is bogus or bad in law.’

Findings

[38] The third respondent had to make out a *bona fide* defence against the application brought by the applicants. The third respondent’s *bona fide* defence relates to allegations that the third respondent entered into a loan agreement with a certain Mr. Kamushinda during 2010 – 2011. This was an oral agreement without any contract ever drawn up indicating on what terms this money would be advanced and what the re-payment conditions would be. On the version before court however, only an N\$60 000 payment was received directly from Mr Kamushinda. All the other payments came from entities where Mr Kamushinda had no interest in and the respondents never alleged that Mr. Kamushinda had any interest in these entities. In fact the third respondent could not satisfactorily explain why these payments did not come directly from Mr. Kamushinda or an entity in which Mr. Kamushinda had interests.

[39] It can therefore not be shown by the third respondent that these payments were in fact made under the agreement with Mr. Kamushinda. The agreement between the third respondent and Mr. Kamushinda further originated in 2010 or 2011 and did not involve the first or the second respondent as it is never pleaded that they were parties to this agreement. It is not disclosed by the third respondent how it came that payments expected from Mr. Kamushinda were paid through AMFS, Mysen Trading and Ivana Enterprises and in some instances into accounts held by the first and second respondents.

[40] The defence that the agreement between the third respondent and Mr. Kamushinda, which was concluded in 2010 or 2011 further does not explain why the

¹⁸ 1988 (4) SA 786 at 789 E.

payments received from AMFS to Yatsau investments, the first respondent, only started on 23/9/2015, approximately four to five years after the initial agreement with Mr. Kamushinda. The payments from Mysen Trading and Ivana Enterprises were even at a later date. There is also no confirmatory affidavit filed from Mr. Kamushinda confirming the existence of such an agreement or explaining how it came that money payable to the third respondent under their agreement, came to be paid via these conduits and into the accounts of the first and second respondents.

[41] There is simply no basis put forward by the respondents to show why they believed that the bulk of the monies received, were received under the agreement between the third respondent and Mr Kamushinda. There is also no explanation before court as to why some of the monies received were paid to the first and second respondents and then seemingly paid over to the third respondent as he admits that he received all the money in question.

[42] The pleas of non-joinder and prescription were dealt with above.

[43] The Court is satisfied that the applicants made out a case for the enrichment of the Respondents under the *condictio indebiti* as the respondents was clearly enriched by these payments, the applicants showed that the SME Bank was impoverished and that the respondent's enrichment was at the expense of the applicants. There is further no evidence that shows that payments to the amount of N\$910 000 can be justified and therefore the enrichment was unjustified or *sine causa*.

[44] The Court however finds that a case under the *condictio indebiti* was not made out in relation to the cash advances made to the third respondent by Mr. Kamushinda as the applicants did not show that these payments meet the requirements for the *condictio indebiti* and could not successfully show that it was made from monies belonging the SME Bank, and that the respondent did in fact put up a triable defence regarding the N\$60 000 which the third respondent received directly in cash from Mr. Kamushinda. The dates these payments were made is also unknown.

[45] As the applicants were mostly successful in their application, I will award them the costs of the application to include the costs of one instructing and two instructed counsel.

In the effect the following order is made:

1. The respondent's opposition to the summary judgment application for the amount of N\$ 910 000 is dismissed
2. The respondent is granted leave to defend the claim of N\$60 000 relating to monies received directly from Mr. Kamushinda.
3. The application for summary judgement is therefore granted to the amount of N\$910 000 against the third respondent
4. Interest at the rate of 20% p.a on the following amounts as follows
 - a. On the amount of N\$35 000 calculated as from 24 September 2015 to date of payment.
 - b. On the amount of N\$35 000 calculated as from 26 October 2015 to date of payment.
 - c. On the amount of N\$35 000 calculated as from 9 November 2015 to date of payment.
 - d. On the amount of N\$35 000 calculated as from 5 February 2016 to date of payment
 - e. On the amount of N\$35 000 calculated as from 23 March 2016 to date of payment.
 - f. On the amount of N\$35 000 calculated as from 22 April 2016 to date of payment.
 - g. On the amount of N\$65 000 calculated as from 19 May 2016 to date of payment.
 - h. On the amount of N\$70 000 calculated as from 4 August 2016 to date of payment.
 - i. On the amount of N\$35 000 calculated as from 19 August 2016 to date of payment.
 - j. On the amount of N\$35 000 calculated as from 12 April 2017 to date of payment.

- k. On the amount of N\$35 000 calculated as from 13 April 2017 to date of payment.
 - l. On the amount of N\$70 000 calculated as from 15 June 2017 to date of payment.
 - m. On the amount of N\$70 000 calculated as from 3 August 2017 to date of payment.
 - n. On the amount of N\$35 000 calculated as from 11 July 2017 to date of payment.
 - o. On the amount of N\$170 000 calculated as from 19 May 2017 to date of payment.
 - p. On the amount of N\$35 000 calculated as from 29 March 2017 to date of payment.
 - q. On the amount of N\$80 000 calculated as from 12 December 2017 to date of payment.
5. Costs of summary judgement application, to include the costs of one instructing and two instructed counsel awarded to the applicants.
6. Matter is postponed to 19/1/2021 for the parties to file a joint case plan on or before 14/1/2021.

E RAKOW

Judge

APPEARANCES:

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assisted by Adv J Schickerling
Instructed by Francois Erasmus

Windhoek

RESPONDENTS:

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Instructed Adv. SS Makando Chambers

Windhoek