

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**Case No: HC-MD-CIV-ACT- OTH-2020/02269**

In the matter between:

**DAVID JOHN BRUNI**

**1<sup>ST</sup> PLAINTIFF**

**IAN ROBERT MCLAREN**

**2<sup>ND</sup> PLAINTIFF**

and

**BEATRICE KAHUNDA**

**1<sup>ST</sup> DEFENDANT**

**REBECCA HANGADA**

**2<sup>ND</sup> DEFENDANT**

**DOREEN MATEMBA**

**3<sup>RD</sup> DEFENDANT**

**Neutral Citation:** *Bruni v Kahunda* (HC-MD-CIV-ACT-OTH-2020/02269) [2020]  
NAHCMD 591 (28 October 2020)

**CORAM: PRINSLOO J**

**Heard: 28 October 2020**

**Delivered: 28 October 2020**

**Reasons: 9 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 – 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*

---

## REASONS

---

### Introduction:

[1] On 28 October 2020, having heard and considered counsels' arguments on the on the summary judgment application in respect of the first defendant, the Court made an order in the following terms:

**'Summary judgment is granted in respect of the First Defendant in the following terms:**

1. Payment in the amount of N\$ 300 000;
2. Interest on the amount of N\$ 300 000 at the rate of 20% per annum from date of summons until date of payment;
3. Cost of suit, such cost to include the cost of one instructing and two instructed counsel.

Matter is removed from the roll: Others'

**Third Defendant:** Summons remains unserved.'

[2] Thereafter, the Court received a letter from the first defendant's legal practitioners on 12 November 2020, requesting reasons for the above order.

[3] Herewith the reasons for the court order made on 28 October 2020.

### Background

[4] The plaintiffs who are the duly appointed final liquidators of the Small and Medium Enterprise Bank ('SME Bank') in liquidation moved an application for summary judgment against the first defendant only as the matter became settled between the plaintiff's and the second defendant and the action was withdrawn against her by the plaintiffs. To date the summons could not be served on the third defendant, who apparently left the country. I will therefore limit myself in this ruling to the case against the first defendant only and will not deal with the detail of the particulars of claim that relates to the other defendants in this matter.

[5] In the particulars of claim the plaintiffs endeavor to set out the background in this matter in as much detail as possible. The plaintiffs sketched a situation where certain individuals referred to as the '*dramatis personae*<sup>1</sup>' in conjunction with third party entities perpetrated fraud on a grand scale. The investigations into the said fraudulent schemes led to the uncovering of approximately N\$ 247 545 004 which was misappropriated from the SME Bank. As a result of the theft the SME Bank was forced into liquidation.

[6] The only of the '*dramatis personae*' relevant to the current proceedings is Mr Enock Kamushinda who was the Deputy Chairman of the Board of the SME Bank (11 October 2011 to 29 April 2015 and again 30 April 2015 to 1 September 2015) and the Deputy Chairman of the Board from 2 September 2015 until the Bank of Namibia took over the management of the SME Bank on 1 March 2017.

#### *The fraud perpetrated*

[7] During the investigation in the fraud perpetrated by the '*dramatis personae*' Ms Tania Pearson<sup>2</sup> uncovered the names and bank accounts of entities in South Africa which received the amounts stolen from the SME Bank, as well as the amounts so received by false beneficiaries<sup>3</sup>. One of these false beneficiaries was Asset Movement and Financial Services CC ('AMFS'). The amount of N\$ 78 700 000 was paid over to AMFS via the Treasury Department of the SME Bank.

[8] The plaintiffs plead that the main perpetrators of the money laundering were the '*dramatis personae*' and one George Markides, who received approximately N\$ 64 000 000 in cash from AMFS. Markides worked in close cooperation with the '*dramatis personae*' by laundering stolen money between the beneficiaries in Table 1 of the particulars of claim. Approximately N\$ 250 000 000 was laundered through the bank accounts of false beneficiaries, where after approximately N\$ 50 000 000 was re-laundered back to Namibia and which was handed out to the Namibian participants to the scheme.

---

<sup>1</sup> Messrs Enock Kamushinda, Tawanda Mumvuma, Joseph Banda, Chiedza Goromonzi and Simbarashe Magombeze.

<sup>2</sup> Duly qualified and admitted legal practitioner in Namibia and the SME Bank's in-house lawyer.

<sup>3</sup> Table 1 p 5 of particulars of claim.

### *The payment system*

[9] The payment effected to the false beneficiaries followed its course through the Treasury Department of the Bank and can be briefly set out as follows:

- a) All preparation for payment would go through the Finance Department. Once the Finance Department has checked, verified and authorised the CEO must approve the payment, and once the CEO has approved the payment a document called a "Payment Instruction" will be forwarded to the Treasury Back Office to effect payment;
- b) At the Treasury Back Office, the payment instruction will be dealt with by three persons, namely:
  - i) the Treasury Inputter-being the person who physically loads the payment onto the system for payment to be effected;
  - ii) the Treasury Verifier- being the person who checks whether sufficient funds are available in the SME bank's bank account to meet the payment; and
  - iii) the Treasury Authoriser, the person who physically makes the payment by pressing of a button on the system to effect the actual payment ("the Authorizer")

[10] Any person operating the Treasury Department will only receive a payment instruction indication to whom the payment must be made, the bank account number of the payee and the reason for the payment, all of which is confirmed by the signature of the CEO of the SME Bank or in his absence the Acting CEO. No supporting documents will accompany the payment instructions to the Treasury Department.

### *The facts relevant to the first defendant*

[11] During the period 10 April 2015 to 11 August 2016 the *dramatis personae* made various payments to AMFS and one of these amounts paid over was the amount of N\$ 1 750 000, which was paid over on 14 October 2015.

[12] According to the plaintiffs this transfer is of specific significance as on 16 October 2015 AMFS paid the amount of N\$ 300 000 over to the first defendant.

[13] The plaintiffs pleaded that the AMFS acted as a conduit of and in respect of the SME Bank's stolen funds transferred to the first defendant's bank account as the final recipient.

[14] After the liquidation of the SME Bank this court authorized a Commission of Enquiry into the affairs of the SME Bank in terms of s 423 and 424 of the Companies Act, 28 of 2004.

[15] As a result the first defendant was subpoenaed to testify at the Commission of Enquiry and at the enquiry the first defendant acknowledged having received N\$ 300 000 from Mr Kamushinda, through AMFS, as a gift from Mr Kamushinda. The plaintiffs further plead in this regard that in terms of the first defendant's own testimony she received as last recipient the amount of N\$ 300 000 from the SME Bank through AMFS, acting as conduit of the SME Bank's stolen funds.

#### The claim against first defendant

[16] The plaintiffs issued summons on 17 June 2020 in terms of which they claim from the first defendant payment in the amount of N\$ 300 000 plus interest and costs. The plaintiff base their claim against the first defendant (and by implication against the rest of the defendants as well), on the following:

- a) main claim in terms of s 31 of the Insolvency Act;<sup>4</sup>
- b) alternative main claim in terms of s 26 of the Insolvency Act;
- c) alternatively *condictio indebiti* (unjustified enrichment);
- d) alternatively *conditio ob turpem injustam causam*;

---

<sup>4</sup> Act 24 of 1936.

e) alternatively *condictio furtiva*.

[17] The first defendant defended this matter on 15 July 2020 and the plaintiffs proceeded to file their application for summary judgment in respect of the first defendant which is limited to their claim of alternative claims, ie *condictio indebiti* (unjustified enrichment), alternatively *condictio ob turpem injustam causam*, alternatively *condictio furtiva*.

#### The opposing affidavit

[18] In her answering affidavit the first defendant denies the plaintiffs' averment that she does not have a bona fide defence against the *condictio indebiti*, alternatively *condictio ob turpem injustam causam*, alternatively *condictio furtiva*.

[19] The first defendant stated that she was employed by the SME Bank from around December 2012 but prior to that she was employed by Standard Bank of Namibia as the Business Banking Relationship Manager. Whilst employed by Standard Bank she met Mr Kamushinda as he was a client as she was managing his portfolio. The first defendant stated that she was approached by Mr Kamushinda during the beginning of 2012 with a job offer to join a team of professionals who would attend on the initial phases of setting up the SME Bank, which she accepted. The first defendant proceeded to hand in her resignation but before she was done serving her notice period she was contacted by MD5 Incorporated, an attorney's firm, who informed the defendant that they are acting on instructions of Mr Kamushinda and that her services was needed earlier than anticipated. As a result she only worked a portion of her notice period with Standard Bank which further had the implication that she was liable to Standard Bank for one month salary calculated on a *pro rata* basis a number of expenses. In addition thereto the first defendant stated that she had other obligations to her former employer which included:

- a) The outstanding debt accumulated for academic courses funded by Standard Bank;
- b) Other deductible amounts that was deemed necessary by Standard Bank.

[20] The first defendant stated that she shared her concerns regarding the implications of her resignation with Mr Kamushinda and he assured her that he would refund her for undertaking the deductions and debts due to Standard Bank as a result of her resignation.

[21] The first defendant confirms that she received N\$ 300 000 on 16 October 2015 as a refund for the deductions and debts that she incurred at the beginning of 2012 as well as contributing to her further studies, which she is still pursuing. The first defendant stated that she accepted the funds on the basis that Mr Kamushinda, as head of the interim office responsible for the setup of SME Bank, had refunded her for the deductions, debts and expenditure she incurred

[22] The first defendant further stated that she came to know Mr Kamushinda on a personal level and he became a sort of an uncle to her and he would from time to time assist the defendant by offering either emotional or financial support.

[23] The first defendant denied that she was unjustly enriched by receiving the relevant amount nor was any of her actions the cause for the SME Bank to be impoverished.

#### Arguments on behalf of the parties

##### *On behalf of the plaintiffs*

[24] From the onset Mr Heathcote, acting on behalf of the plaintiffs argued that the first defendant has no *bona fide* defence to the claim of the plaintiffs. Mr Heathcote argued that the plaintiffs should succeed with the alternative claim based on the enrichment claim and that it lies in the fact that the monies stolen from the SME Bank were funneled through AMFS for the benefit of the defendant, being the ultimate recipient without herself giving any value. Counsel argued that the transfer of the SME Bank's money to the defendant *prima facie* establishes the first defendant's enrichment and that proof of the transfer of the money gives rise to a presumption of enrichment and the defendant has the onus to prove loss of enrichment, which she did not do.



[25] Mr Heathcote argued that the transfer of the SME Bank's money to the first defendant *prima facie* establishes the first defendant's enrichment. Counsel further argued that proof of the transfer of the money gives rise to the presumption of enrichment and the first defendant has the onus to prove loss of enrichment which she did not do.

[26] Mr Heathcote argued that the payment on behalf of the plaintiff must be regarded as excusable as the money was paid in *bona fide* but mistaken belief that it was due and that AMFS then proceeded to act as a conduit paying the money over to the first defendant as the final recipient. Mr Heathcote argued that the presumption operating in favour of the plaintiffs is deadly and that the first defendant did not set out any defence in her papers and that the court should grant judgment in favour of the plaintiffs as prayed for.

*On behalf of the first defendant*

[27] On behalf of the Defendant Mr Rukoro argued that the defendant in her opposing affidavit sets out a triable defence. Mr Rukoro argued that the defendant will deny that the N\$ 300 000 received by the defendant is money paid from the SME Bank and that such a fact can only be established by evidence.

[28] Mr Rukoro argued that the purported confession by the first defendant regarding receipt of the money relied upon by the plaintiffs is denied. It was however pointed out by the court that this denial was not contained in the opposing papers.

[29] Mr Rukoro argued that the first defendant raised a *bona fide* defence to the claim of the plaintiffs. Counsel argued that the *bona fide* defence of the first defendant lies in the facts that the first defendant was recruited by Mr Kamushinda, on behalf of the then-new SME Bank, on an urgent basis to assist in the setting of the SME Bank. Counsel argued that she received the N\$ 300 000 on good faith as a refund that she was entitled to, as well as a gift from Mr Kamushinda. He argued that

the first defendant was under the true belief that the money she received was money that she was entitled to. The first defendant was and still is unaware of the actual origin of the money she received nor was she aware that the said money was stolen. Counsel argued that the first defendant did not collude with any of the then SME Bank or AMFS to receive money.

[30] Mr Rukoro argued that considering the facts upon which the first defendant based her defence, it is clear that the plaintiffs are yet to establish and prove that the first defendant received money from the SME Bank and contended that the money she received was from Mr Kamushinda.

[31] Mr Rukoro further argued that apart from the alleged findings in the plaintiff's particulars of claim, there is no proof that the money was indeed transferred as alleged in the plaintiffs' particulars of claim and if the plaintiffs are in the position to prove this fact then it should be brought before court and tested through the normal course of proceedings.

[32] On the alternative claim of *condictio indebiti*, Mr Rukoro argued that the first defendant contends that she was not enriched through the SME Bank and she received the money that was due to her from Mr Kamushinda. Mr Rukoro further contended that the first defendant will not be in the position to attest to the beliefs of the employees who had authority to access or sanction any processes in the Finance Department of the SME Bank, and neither will the plaintiffs as only those employees will be able to attest to their beliefs or apparent mistaken belief- which is the fourth element of *condictio indebiti* that must be proven. Mr Rukoro argued that the plaintiffs are unable to prove the elements of the claim of *condictio indebiti*

[33] When the issue was raised with Mr Rukoro whether the statements made by the first defendant in respect of the debt and obligations that she had towards Standard Bank as no figures are before court Mr Rukoro argued that the issue is not the amounts but how the defendant received the amounts.

#### The applicable legal principles to summary judgment

[34] The principles of the summary judgment is trite and I will only briefly refer to it.

[35] Summary judgment applications are regulated by rule 60 and more specifically rule 60(5), which reads as follows:

- (5) On the hearing of an application for summary judgment the defendant may–
- (a) where applicable give security to the plaintiff to the satisfaction of the registrar for any judgment including interest and costs; or
  - (b) satisfy the court by –
    - (i) affidavit, which must be delivered before 12h00 on the court day but one before the day on which the application is to be heard; or
    - (ii) oral evidence, given with the leave of the court, of himself or herself or of any other person who can swear positively to the fact, that he or she has a bona fide defence to the action and the affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied on.’

[36] In *Radial Truss (Pty) Ltd v Aquatan (Pty) Ltd*<sup>5</sup> the Supreme Court in applying *Maharaj v Barclays National Bank Ltd*, held that, in a summary judgment application, the court is not called upon to decide factual disputes or express any view on the dispute. It is called upon instead to determine firstly whether a defendant has ‘fully’ disclosed the nature and grounds of the defence and the material facts upon which that defence is founded. In the second instance the court is to determine whether on the facts set out by the defendant that it 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 upon these two criteria, the court must refuse summary judgment. This position is confirmed in *Kukuri v Social Security Commission*.<sup>6</sup>

[37] The main issue is whether the plaintiffs succeeded to establish the essential elements for granting summary judgment. Unlike with many of the matters of a similar nature the first defendant did not raise a host of technical objections. She basically maintains that her defence is bona fide and good in law.

<sup>5</sup> Headnote (SA-2017/11) [2019] NASC 6 (10 April 2019).

<sup>6</sup> SA 17/2015 [2016] NASC 29 November 2016 unreported at para 10.

[38] The claim that the plaintiffs wish to enforce is one on *condictio indebiti* and in order to determine whether the plaintiffs can be successful in their summary judgment application it is necessary to discuss the legal requirements for a claim based on *condictio indebiti* and whether the defence raised by the first defendant, if any, is enough to resist the current application.

The applicable legal principles to *condictio indebiti*

[39] In *Van den Dries v The International University of Management*<sup>7</sup> Smuts J set out the principles of *condictio indebiti* as follows:

[27] The plaintiff's claim was brought as a *condictio indebiti*. The essential elements for such an action were recently referred to by this court:<sup>8</sup>

'[143] A *condictio indebiti* is open to the party who has made payment to another due to an excusable error and believed that the payment was owing whereas it was not. That party may then reclaim payment to the extent that the receiver was enriched at the expense of the former party. The *condictio indebiti* may also be open to the party to reclaim performance made in terms of an invalid contract, as would be the *condictio sine causa*. It would seem that the latter action is more frequently be used in those circumstances.

[144] The essential requirements for a *condictio indebiti* are:

- a) the defendant must be enriched;
- b) the plaintiff must be impoverished;
- c) the defendant's enrichment must be at expense of the plaintiff; and
- d) the enrichment must be unjustified in the sense of having been made in a reasonable but mistaken belief that a payment was owing – thus been a reasonable error in the circumstances of the case.<sup>9</sup>

<sup>7</sup> (I 602/2008) [2014] NACHMD 159 (21 May 2014)

<sup>8</sup> *Government of the Republic of Namibia (Ministry of Works, Transport and Communication) v The African Civil Aviation Agency (Pty) Ltd* (I 3298/2009) [2014] NAHCMD 45 (12 February 2014).

<sup>9</sup> *Supra* at pars [143] and [144], footnotes excluded.

[28] In respect of a defence of non-enrichment, as was expressly pleaded in this matter, once a transfer *indebite* has been established, the onus would then shift to the defendant to prove that it was not enriched by the transfer.<sup>10</sup> Where a defendant has disposed of a thing, in order succeed with a defence of non-enrichment, the defendant would invariably be required to establish that the disposal was *bona fide*.<sup>11</sup>

[40] Where does the enrichment claim lie if one has regard to the movement of the money as set out in the plaintiffs' particulars of claim?

[41] Daniel Visser 'Unjustified enrichment'<sup>12</sup>, in dealing with the question of the person or entity against whom an enrichment action lies, says that the person who 'in the eyes of the law received the payment' is liable to return it and that while this is usually 'the person who physically received it . . . it need not be'.

[42] Didcott J in *Phillips v Hughes; Hughes v Maphumulo*<sup>13</sup> set out the position with characteristic clarity. The learned judge stated as follows<sup>14</sup>:

'This means that the *condictio 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. One is not the *recipiens* of a payment, on the other hand, merely because it was intended or happens in the result to benefit one. That, on its own, does not count. All that matters is whether one can appropriately be said to have received the payment in some or other way. Unless one has done so, one is beyond the range of the *condictio indebiti*, for all the payment's auxiliary advantages to one.' (my underlining)

<sup>10</sup> *African Diamond Exporters supra* at 713 H-J.

<sup>11</sup> *Le Riche v Hamman* 1946 AD 648 at 657.

<sup>12</sup> In Francois du Bois (ed) *Wille's Principles of South African Law* (9 ed) at 1059.

<sup>13</sup> 1979 (1) SA 225 (N).

<sup>14</sup> *Supra* at 229B-E. Also see Jacques Du Plessis *The South African Law of Unjustified Enrichment* at 159.

[43] Jaques Du Plessis in his book *The South African Law of Unjustified Enrichment*<sup>15</sup> commented as follows on the issue of identifying the recipient from whom undue transfer may be reclaimed:

‘An undue transfer must be reclaimed from the person ‘who must be considered, in all the circumstances of the case, truly to have received the payment.’

[44] Once the facts show that the money paid or good delivered then a presumption of enrichment arises. A defendant then bears the onus to prove that he/she has not been enriched<sup>16</sup>. In the event that the defendant alleges that he/she was not enriched then it should be properly pleaded and say why he/she was not enriched.

[45] The receiver must prove the circumstances that will relieve it of the obligation to repay. Thus the plaintiff can claim the maximum amount of the enrichment but the defendant can plead that his enrichment has lessened or fallen away, provided that the rules in respect of *mora* are not applicable.

[46] A further requirement of *indictio indebiti* is that the payment on behalf of the plaintiff must be excusable (i.e. paid in the bona fide but mistaken belief that it was due, while it was not. In this regard the court in *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme*<sup>17</sup> stated that:

‘Excusability is concerned with the mistakes made by those persons who actually effected payment,...

[47] In the *Yarona* matter the court went further and was in fact willing to waive the excusable mistake requirement on policy grounds (e.g. to protect the members of the medical aid scheme)

### Application to the facts

<sup>15</sup> 1<sup>st</sup> Ed (re-print 2015) at p 97

<sup>16</sup> De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 2<sup>nd</sup> ed at 183 quoted with approval in *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (A) at 713 G-H

<sup>17</sup> 2018(1) SA 513 (SCA) at para 27.

[48] It is common cause that the money was transferred in the account of AMFS on the payment instructions of the *personae dramatis* and that the Treasury Back Office then transferred the funds in bona fide but mistaken belief that AMFS was a valid payee, as the account number of the payee and the reason for the payment was confirmed by the signature of the CEO or in his absence the acting CEO. This payment procedure and the actual payment made to AMFS was not disputed and the first defendant only stated that she cannot attest to the circumstances under which the payments referred to in plaintiffs' particulars of claim was sanctioned and affected.

[49] On behalf of the first defendant it was argued that it cannot be said that the money received by the first defendant is money from the SME Bank and in effect that she did not know that she received the money *indebite* but that argument flies in the face of as to what the first admitted in her answering papers, or stated differently what the first defendant failed to dispute in her answering papers.

[50] The plaintiffs pleaded pertinently that the first defendant, on her own testimony admitted during the hearing by the Commission of Enquiry, that she received the N\$ 300 000 from Mr Kamushinda, through AMFS as a gift from Mr Kamushinda<sup>18</sup>. The plaintiff further pleaded that in terms of the first defendant's own testimony, she received, as the last recipient the amount of N\$300 000 from the SME Bank through AMFS, acting as a conduit of the SME Bank.<sup>19</sup>

[51] These facts as pleaded by the plaintiff were left undisputed by the first defendant. In fact the first defendant admitted in her answering affidavit the receipt of the funds, stating that she thought it was a gift, serving as a refund for the deductions and debts she undertook when she resigned from the previous employer.

---

<sup>18</sup> Particulars of claim at para 20.

<sup>19</sup> Particulars of claim at para 21.

[52] At this point I just must interpose briefly and point out that Mr Rukoro stated that the 'purported confession' by the first defendant was denied in her answering affidavit and on a question of the court the court was referred to para 6 of the answering affidavit wherein the first defendant allegedly denies this specific allegation. When I checked it appeared that para 6 of the answering affidavit dealt with para 4 of the particulars of claim only. However, para 4 of the particulars of claim deals with the fact that first and second plaintiffs are joint liquidators of the SME Bank and the fact that it was afforded to them by the Master of the High Court to institute the current action. The first defendant's response to para 4 is completely out of context but in any event the response to para 4 set out in para 6 of the answering affidavit does not dispute the allegations pleaded in paras 20 and 21 of the particulars of claim<sup>20</sup>.

[53] In her opposing papers the first defendant does not allege that the amount in question was due to her by the SME Bank. She alleges that the money was due to her as a refund which she received as a gift/refund from Mr Kamushinda, interestingly more than two years after she left the employ of Standard Bank Namibia. The first defendant alleges that she never knowingly received stolen funds and effectively as she was under the impression the funds received was due and owing to her and that she has a bona fide defence.

[54] The first defendant admitted that she received the money from the SME Bank, which passed through AMFS as conduit and there can be no doubt that she is the end receiver of the money.

[55] As a result of the fact that the funds of the SME Bank was transferred to the first defendant for no value results in the first defendant being enriched at the cost of the SME Bank.

---

<sup>20</sup> See discussion in para 15 of this ruling.



[56] The proof that the money was transferred to the first defendant in turn gives rise to the presumption of enrichment and the first defendant has the onus to prove loss of enrichment, which she did not do in her answering papers.

[57] If the first defendant wanted to show that she was not enriched one would expect that the first defendant's papers would set out the details in respect of the *pro rata* payment due to Standard Bank Namibia and also details in respect of the accumulated debts regarding the academic courses funded by Standard Bank. The first defendant makes reference of 'any other deductible amounts' that was deemed necessary by Standard Bank. None of the amounts were set out nor is there any averment that these amounts were indeed paid to Standard Bank or that Standard Bank indeed insisted on the payment. The first defendant also does not give details of the agreement between her and Mr Kamushinda nor did she file a confirmatory affidavit by Mr Kamushinda confirming the facts relating to him as set out in the opposing affidavit. However, whatever was promised to the first defendant by Mr Kamushinda does not affect the *condictio indebiti* as the promise was not made by the SME Bank.

[58] The next issue that leaves a question mark is if the money was promised to the first defendant by Mr Kamushinda, why was the payment made via AMFS into her account. And as I pointed out earlier, if the money was going to be paid by Mr Kamushinda in order to refund the first defendant for what was due and owing to Standard Bank, why was payment only made more than two years later and coincidentally within two days from the date that an amount of N\$ 1 750 000 was paid over from the SME Bank to AMFS.

[59] The opposing affidavit of the first defendant was drafted inadequately and the essentials that the first defendant had to address to make out a defence to the claim of the plaintiffs are glaringly absent. A number of issues were raised in argument which was not canvassed in the opposing papers, for e.g. the denial that the plaintiffs failed to prove their enrichment claim and denouncing the evidence of the first

defendant tendered during the Commission of Enquiry. On this point I must point out that the first defendant's case is confined to her opposing papers and counsel may not adduce evidence from the bar.<sup>21</sup>

[60] The first defendant tried to make out a case that she has never knowingly received funds that were stolen but this mind-set that the first defendant apparently had is not relevant for purposes of the claim for unjust enrichment and does not constitute a defence for purposes of claim based on *condictio indebiti*. What is important is what the mind-set of the officials of the bank was when the payment was authorised.

[61] While it is not incumbent upon the defendant to formulate her opposition to the summary judgment application with the precision that would be required in a plea, nonetheless when she advances her contentions in resistance to the plaintiffs claim she must do so with a sufficient degree of clarity to enable the court to ascertain whether they have deposed to a defence which, if proved at the trial, would constitute a good defence to the action.

[62] The first defendant's affidavit lacks particularity regarding the material facts relied upon and falls short of the requirements of rule 60(5)(iii), this court is unable to assess the first defendant's *bona fides*. In fact having considered the opposing papers I cannot see that there is a factual dispute on the papers. The first defendant has any defence to the plaintiff's claim, on her own version.

### Conclusion

[63] In the *Radial Truss* matter<sup>22</sup> Smuts J stated as follows:

'[21] As to the requirement of 'fully' disclosing the defence, the court in *Maharaj* reiterated that whilst a defendant 'need not deal exhaustively with the facts and evidence relied upon to substantiate them', at the very least it is incumbent upon a

---

<sup>21</sup> *Radial Truss (Pty) Ltd* supra at footnote 5.

<sup>22</sup> Supra footnote 5. Footnotes omitted from quotation.

defendant to disclose its 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. This is not an onerous threshold for a defendant to meet. A plaintiff has no right to reply. Nor is the procedure intended to deprive a defendant with a triable issue or a sustainable defence of its day in court as was correctly stressed by Navsa JA in *Joob Joob*. I agree with Navsa JA that the characterisation of 'extraordinary' or 'drastic' concerning summary judgment would no longer apply after the successful application of this remedy for some 100 years in our courts and that it cannot be stated as weighted against a defendant, given the threshold a defendant is to meet. The remedy is only granted against defendants when it is clear that no defence is raised in response to a claim, thus preventing sham defences from defeating a creditor's rights by delay.

[22] The introduction of judicial case management reinforces the need to disclose the defence and the material facts with sufficient particularity and completeness as it presupposes that parties at an early stage properly disclose their claims and defences to apprise their opponents and the court as to what is in issue in cases and must do so with specificity and not vaguely or evasively. (my underlining)

[63] The current matter is one of those matter that Smuts J in mind. There is clearly no defence raised in response to the plaintiffs claim and this court cannot allow this matter merely on the basis that summary judgment is characterised as an extraordinary or drastic remedy. This is clearly an outdated view to maintain as is evident for Smuts J's remarks above.

[64] Therefore having considered all the facts before me I am of the view that summary judgment must be granted as set out above.

---

J S Prinsloo

APPEARANCES:

PLAINTIFF:

R Heathcote

Instructed by Francios Erasmus and Partners

Windhoek

DEFENDANT:

R Rukoro

ENSAfrica Namibia

Windhoek