REPORTABLE

CASE NO: SA 30/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between

INGE PASCHKE **Appellant**

and

LOTTA FRANS **Respondent**

Coram: SHIVUTE CJ, CHOMBA AJA and O'REGAN AJA

Heard: **5 November 2013**

Delivered: **30 April 2015**

APPEAL JUDGMENT

O'REGAN AJA (SHIVUTE CJ and CHOMBA AJA concurring)

[1] This appeal arises from an order made by the High Court in a matter in which the parties had agreed to place a stated case before the court.

[2] The facts set out in the stated case are as follows. The respondent, Lotta Frans, is the biological child of the late Mr Jürgen Eichhorn (the deceased). The respondent's mother was not married to the deceased, and the respondent was according to the law classified as an 'illegitimate' child. The appellant is the sister of the deceased. The deceased died intestate on 30 May 1991 and his estate was

administered in terms of the law of intestate succession. Because the respondent was classified as an 'illegitimate' child of the deceased, she was not considered eligible to inherit from her father's estate.

[3] Sometime later, the respondent challenged the constitutionality of the common-law rule, in terms of which she had been prohibited from inheriting from her father's estate, and the rule was declared unconstitutional by the High Court on 11 July 2007.[1] The respondent issued summons in April 2005 against the appellant based on the principles of unjustified enrichment. The respondent's claim, as later amended, is for 50% of the value of the deceased estate as at the date of judgment, alternatively transfer of 50% of the property awarded to appellant from the deceased estate. The appellant admits that the respondent is a child of the deceased. The appellant counterclaims for compensation for improvements that she has made to the property she inherited from the deceased.

[4] In the light of these facts, the parties asserted that it would be 'desirable' for the following issue to be determined before the trial: whether the amount or value by which the appellant is alleged to be enriched is to be determined as at the date of issue of summons (11 July 2005) or as at the date of judgment as pleaded by the respondent. According to the stated case, the relevance of determining this issue in advance arose because the value of farms in Namibia has increased between the date of summons and the date of judgment and 'that has a bearing on the valuations obtainable from the experts engaged by the parties as valuators'.

[1]The judgment is reported as *Frans v Paschke and Others* 2007 (2) NR 520 (HC).

[5] After hearing argument, the High Court held that to determine the value of enrichment as at the date of summons would not 'recompense the plaintiff to the fullest possible extent' which would have the result that the appellant would benefit from her unjustified enrichment to the detriment of the respondent.[2] After a consideration of the circumstances, the High Court concluded that the value of the enrichment should be determined on the date on which the court reserves judgment.

[6] The High Court did not consider the question whether the matter was an appropriate matter for determination by way of a stated case in terms of rule 33. In my view, this is an important question that should be addressed first.

[7] Rule 33(1) - (4) of the Rules of the High Court of Namibia provided that[3] –

> '(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.
>
> (2)(a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon, and such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions, and it shall be signed by counsel on behalf of each party or, where a party sues or defends personally, by such party.

[2] The judgment of the High Court is reported as *Frans v Paschke and Others* 2012 (2) NR 560 (HC).
[3] New Rules of the High Court were introduced with effect from 16 April 2014. The equivalent of rule 33 is now rule 63.

(2)(b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.

(2)(c) If a minor or person of unsound mind is a party to such proceedings the court may, before determining the questions of law in dispute, require proof that the statements in such special case so far as concerns the minor or person of unsound mind are true.

(3) At the hearing thereof the court and the parties may refer to the whole of the contents of such documents and the court may draw any inference of fact or of law from the facts and documents as if proved at a trial.

(4) If it appears to the court *mero motu* or on the application of any party that there is, in any pending action, a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the trial of such question in such manner as it may deem fit, and may order that all further proceedings be stayed until such question has been disposed of . . . .'

[8] It is clear from a reading of these rules that they contemplate two different processes. The first, the stated case process, is provided for by rules 33(1) – (3). The second is the 'separation of issues' process governed by rule 33(4). The second process contemplates either the *mero motu* decision of a court, or an application by a party for the separation of issues. The first process, the stated case process, contemplates agreement between the parties as to the facts upon which a stated case will be determined. The High Court did not consider which of the two processes was followed here. The stated case itself does not cite to the relevant rule. Yet its language and structure comports with the rule 33(1) process, as it is clearly based on an agreement between the parties, and contains the necessary agreed facts. Moreover, there does not seem to have been an

application to the court for a separation of issues. Accordingly, it is the view of this court, that the process adopted was a 'stated case' as regulated by rule 33(1).

[9] The Namibian rules in force at the time are in identical terms to the South African rules on stated cases, also numbered rules 33(1) – (3). The view of the South African courts has generally been that a stated case under rule 33(1) should dispose of the litigation, or a significant aspect of the litigation between the parties.[4] The courts have understandably been wary of use of the procedure prescribed in rule 33(1) – (3) for the purpose of parties obtaining 'advice on possibly abstract questions'.[5] Nevertheless, where a court of first instance has permitted use of the rule 33(1) procedure and decided an issue on a stated case, even where the appellate court has reservations as to whether the procedure should have been followed, appellate courts have generally determined the appeal on the merits.[6]

[10] Determination of the question of law posed in the stated case at issue here will not determine finally the dispute between the parties. The respondent's primary claim as set out in the amended particulars of claim was for 'one share' of the deceased estate, alternatively transfer of one half of the property awarded to the appellant from the estate. If the respondent succeeds with her primary claim, the legal question stipulated in the stated case may never arise. A relevant question in this regard is whether the South African decision in *Kudu Granite*

---

[4]See, for example, *Sibeka and Another v Minister of Police and Others* 1984 (1) SA 792 (W) at 795A–C. See also *Bane and Others v D'Ambrosi* 2010 (2) SA 539 (SCA) at 543E–H.

[5]See *Bane and Others v D'Ambrosi*, cited above n 2, at 543 G.

[6]See, for example, *Bane and Others v D'Ambrosi,* cited above n 2, and *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) at 631B–E.

Operations (Pty) Ltd v Caterna Ltd[7] was properly decided. That case held that in a claim based on the principles of unjustified enrichment, a plaintiff is only entitled to claim the value of the unjustified enrichment of the defendant, and not the physical thing.[8] The High Court considered it unnecessary to decide this issue. It is clear that the High Court was correct in deciding that it is not necessary to decide the legal question posed by the stated case whether the decision in the *Kudu Granite Operations* case was correct. Given that it is unnecessary to do so, and given that the High Court did not decide the issue, this Court also refrains from addressing the question of whether the *Kudu Granite* decision is correct.

[11] According to the parties, the reason that it was desirable to obtain a determination of the legal question stipulated in the stated case was that a determination of that question would have 'a bearing on the valuations obtainable from the experts engaged by the parties as valuators' because land in Namibia had increased in value between the date of issue of summons (2005) and the date upon which judgment will be given. Even assuming that the rule 33(1) procedure could be used to provide guidance in relation to issues of evidence as sought here, something we certainly do not decide, it would only be permitted to do so where it was necessary or would result in a significant curtailment of a trial. It may be that property has increased in value in Namibia in the last ten years, but no reason was proffered by the parties as to why expert appraisers could not be asked to provide both the contemporary value of the property and the value of the property as at 2005. Such a task does not seem unduly onerous or challenging.

[7] 2003 (5) SA 193 (SCA).

[8] See for criticism of the SCA decision, D Visser *Unjustified Enrichment* (2008: Juta) at 162–163.

Nor would it have unduly extended the length of their reports or the leading of evidence.

[12] The legal question posed in the stated case here thus neither finally determines any aspect of the litigation, nor makes a significant contribution to accelerating the trial. In the circumstances, there must be grave doubts as to whether it is an appropriate matter for a stated case in terms of rule 33. Be that as it may, now that the High Court determined the question stipulated in the stated case, it would not be appropriate to refer the matter back to the High Court for the trial to take its course without an answer being provided to the stated case.

[13] The issue for decision is whether the amount or value by which the appellant is alleged to be enriched is to be determined as the date of issue of summons or as at the date of judgment. The High Court determined that the appropriate time is the date upon which the court reserves judgment. In reaching its conclusion, the High Court took the view that the remedy in unjustified enrichment should be informed by the principles that underlie awards of damages, and, in particular, the principle that in calculating damages a successful plaintiff should receive 'the fullest possible compensation of the plaintiff's damages'.[9] The High Court then reasoned that determining the quantum of enrichment on the date of judgment would give rise to uncertainty because there is often a delay between reserving judgment and handing down judgment.[10] For these reasons, the High Court decided that the quantum of enrichment should be determined at the date

[9] Para 11 of High Court judgment, cited above n 2.
[10]Id. Para 12.

that the court reserves judgment. The High Court did not cite authority for its conclusions, presumably because none was cited to it.

[14] The High Court's proposition that in calculating damages the principle that a plaintiff should receive 'the fullest compensation' is not a principle that can properly be said to underpin the law of unjustified enrichment. The law of unjustified enrichment in Namibia, and in South Africa, contains a complex web of overlapping remedies. The key general principle is that a plaintiff who asserts that another's estate has been unjustifiably enriched to the detriment of the plaintiff is entitled to recover the extent of his or her impoverishment, or the extent of the defendant's enrichment, *whichever is the lesser amount*.[11] It is clear that, save in certain exceptional circumstances, a plaintiff is not entitled to recovery, even where he or she can demonstrate impoverishment, if the defendant is no longer enriched at the time of the action.[12] Accordingly, the law of unjustified enrichment does not seek to ensure that a plaintiff receives 'the fullest compensation possible', as suggested by the High Court and its reasoning can accordingly not be sustained.

[15] In written argument lodged in this court, counsel for the appellant referred to a passage in a leading South African textbook on unjustified enrichment, as well

---

[11]See D Visser 'Unjustified Enrichment' in Du Bois (ed) *Wille's Principles of South African* Law 9 ed (Juta, 2007) at 1052; JC Sonnekus *Unjustified Enrichment in South African Law* (2008: Lexis Nexis) at 13; and S Eiselen and G Pienaar *Unjustified Enrichment: A Casebook* (1999: Butterworths) at 31.

[12]The exceptions by and large relate to circumstances where the enriched party (ordinarily the defendant) has acted *mala fide*. See S Eiselen and G Pienaar *Unjustified Enrichment: A Casebook,* cited above n 45; JC Sonnekus *Unjustified Enrichment in South African Law,* cited above n 9, at 14 – 15. Reinhard Zimmermann in his magisterial text *The Law of Obligations – Roman Foundations of the Civilian Tradition* (1990: Juta, Cape Town) points out that this rule may best be understood as a pandectist gloss on the Roman Law that was introduced in the 19th century (at 900 – 901). Be that as it may, it is a gloss that has been firmly entrenched in our law.

as the authorities quoted in support thereof, regarding the date upon which the extent of enrichment should be calculated. The quoted passage reads as follows:

> 'When the return of a specific object is not in issue, the quantum of enrichment is calculated with reference to the date of the commencement of the action (*litis contestatio*). If at this date, the defendant's enrichment has been extinguished, he or she is not obliged to restore anything to the plaintiff; if a portion of the enrichment has fallen away, only the remaining enrichment need be restored.'[13]

[16] In support of this statement, the author refers, amongst others, to JG Lotz and F D J Brand who state: 'In an enrichment action the defendant's liability is confined to the amount of his or her actual enrichment at the time of the commencement of the action.'[14] The author also refers to the work of W de Vos who states that the defendant will only be liable to the extent of his enrichment at the time of demand.[15] The author also cites to Eiselen and Pienaar who state that: 'The *quantum* of enrichment is usually determined with reference to the date of the commencement of the action (*litis contestatio*).'[16] I should add that Prof J C Sonnekus asserts firmly that the stage of *litis contestatio* is the appropriate time for determining the quantum of enrichment.[17] His view is consistent with the analysis of the Roman law of obligations as described by Prof Reinhard Zimmerman.[18]

---

[13]See D Visser, cited above n 6, at p 163, a similar statement is to be found at 173. And also in the same author's chapter in Du Bois (ed) *Wille's Principles of South African* Law 9 ed, (Juta, 2007), at 1048–1049.

[14]See 'Enrichment' in *LAWSA* Vol 9 2d edition para 209

[15] See W De Vos *Verrykingsaanspreeklikheid* (Juta, 1987) at 201.

[16]See S Eiselen and G Pienaar *Unjustified Enrichment: A Casebook*, cited above n 9, at 29.

[17]JC Sonnekus *Unjustified Enrichment in South African Law,* cited above n 9, *seriatim,* including at 13 – 15, 27 – 28, 54 - 57.

[18]R Zimmermann *The Law of Obligations* at 896 and 899. Prof Zimmermann cites D46.3.47 as authority.

[17] There is therefore considerable disagreement amongst academic authors as to the date upon which the extent of the enrichment will be calculated. Lotz and Brand suggest it should be the date of the commencement of the action; De Vos suggests it should be the date of demand; Visser, as well as Eiselen and Pienaar, suggest it should be the date of the commencement of the action which (they state) is the stage of *litis contestatio,* and Prof Sonnekus asserts that it should be the stage of *litis contestatio*. None suggests that it should be the date of judgment (as respondent asserted in the court below), or the date upon which the court reserves judgment (as the High Court held). Moreover, a reading of the key texts of the Roman Law suggests different approaches as well.[19]

[18] It will be helpful to define and explain these different dates or stages of litigation. *A*n action is commenced on the date of issue of summons,[20] whilst the stage of *litis contestatio* is reached later in the litigation process when the pleadings are closed, and 'when the issue is crystallised and joined'.[21] As recently explained by the South African Supreme Court of Appeal, the concept of *litis contestatio* has its origins in 'the formulary procedure of the Roman Law in which the litigants appeared before the praetor who formulated the issues that the judge had to decide.'[22] Once the stage of *litis contestatio* is reached, the effect is 'to freeze' the plaintiffs rights at that moment.[23] The date of the commencement of the

[19]Cf, for example, D. 46.3.47 'the time of the proceedings is to be looked at' (tempus quo agitur inspicitur) and D.24.1.7 pr 'the time when issue is joined is the relevant one' (verum est litis contestatae tempus spectari oportere) and fuller discussion in R. Zimmermann, cited above n 10 at 895–901.

[20]See, for example, *Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D.

[21]See *Government of the Republic of South Africa v Ngubane* 1972 (20 SA 601 (A) at 608D–E; and see the fuller discussion in the recent decision of the South African Supreme Court of Appeal, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 14–15.

[22]*Natal Joint Municipal Pension Fund v Endumeni Municipality,* cited above n 11, para 14.

[23]Id. See also *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 608 D–E.

action will thus ordinarily not coincide with the stage of *litis contestatio.* A demand may be made by a plaintiff prior to the commencement of an action, but may not necessarily be made in every case. There may be a difference therefore between the date of demand and the date of issue of summons, but that will depend as to whether a demand is made prior to summons.

[19] The question, then, is whether the appropriate date for quantifying the extent of the defendant's unjustified enrichment is the date of demand, the date of summons or the stage of *litis contestatio*. The question is important, for as Prof de Vos noted the amount of unjustifiable enrichment shifts over time.[24] The shifting quantum of the claim arises because the amount of unjustifiable enrichment recoverable by a plaintiff at any time depends in large part on the extent of enrichment of the defendant. Accordingly, if the defendant is no longer enriched, no claim will lie. Unlike in the law of delict, the focus is not on the plaintiff's loss. It is, in the first place, on the extent of the defendant's enrichment.[25]

[20] In my view, the appropriate date for the determination of the quantum of damages is when the stage of *litis contestatio* is reached, rather than the date action is commenced or a demand is made. This approach is consistent with the view of Prof Sonnekus and also to some extent with the views of Prof Visser, and Profs Eiselen and Pienaar. However, I have not been able to find clear judicial authority for this approach either in Namibia or South Africa. Yet it seems to me that the approach is both practical and principled.

---

[24]It has a 'wisselende inhoud' (shifting content). See De Vos *Verrykingsaanspreeklikheid,* cited above n13, at 335.

[25]See the discussion in JC Sonnekus *Unjustified Enrichment in South African Law,* cited above n 9, at 27–28.

[21] Adopting the approach will have the effect that the question of whether there has been enrichment (and corresponding impoverishment), will be determined once issue has been joined between the parties. At that stage, the defendant will have pleaded and lodged a counterclaim, if any, and the evidence in the trial should be directed at determining whether there was unjustified enrichment (and consequent impoverishment of the plaintiff) at the time pleadings closed. The content of the pleadings lodged by both the plaintiff and defendant will provide direction and content to the evidence to be led in the trial and will enable expert witnesses to prepare reports appropriately. Were the enrichment to be calculated on the basis of the date of issue of summons (or date of demand were that to be earlier), the quantum would be calculated at a time before the defendant has pleaded (and, where appropriate, lodged a counterclaim). Given that in an enrichment claim, the overall purpose is to determine the extent of the defendant's unjustified enrichment, and the plaintiff's consequential impoverishment, the facts pleaded by the defendant in a plea and any counterclaim will be of crucial importance in determining the extent of enrichment. It seems to make good sense, then, that the time when the quantum of enrichment is to be determined is the time when the pleadings close at *litis contestatio*.

[22] The further question as to whether any interest should run in relation to the quantum of enrichment once determined (and the date from which it should run) is a separate and different question, as was correctly pointed out by Nicholas AJA in *Commissioner for Inland Revenue v First National Industrial Bank Ltd*.[26] The

---

[26] 1990 (3) SA 641 (A) at 659 A–C.

question of whether interest will be payable on the amount the court finds to be the amount of unjustified enrichment must be determined according to the principles of *mora*, and the answer to the question will depend on whether there is default or *mora* on the part of the appellant. The question will thus be whether the appellant has been placed in *mora* in relation to the extent of her enrichment by the respondent. This is not a matter that can be determined on the facts agreed in the stated case.

[23] Accordingly, the appeal must be upheld in part. Should the issue arise in these proceedings, the date upon which the quantum of enrichment should be determined is the stage of *litis contestatio*, and the question of whether any interest will be payable on the quantum of enrichment will be determined according to the principles of *mora.*

[24] Counsel for the appellant suggested that if the appellant succeeded on appeal, costs should be awarded to the appellant only in relation to the appearance in this court and not for the preparation of heads. The appellant has succeeded in part, and yet, as indicated in the early paragraphs, this issue may yet not be determinative of the dispute between the parties. Accordingly, it does not seem appropriate to make a costs order on appeal. The costs should rather be costs in the cause of the litigation that will follow.

[25] The following order is made:

1. The appeal succeeds in part.

2. Part A of the order of the High Court is set aside and replaced with the following order: 'The value of the enrichment to the first defendant from the estate of the deceased, Mr Jürgen Eichhorn, to the plaintiff's impoverishment, is to be determined as at the date of *litis contestatio.*'

3. The costs of the appeal shall be costs in the cause.

____
O'REGAN AJA

____
SHIVUTE CJ

____

CHOMBA AJA

APPEARANCES

APPELLANT:	A Vaatz
	Instructed by Andreas Vaatz & Partners
RESPONDENT:	N Tjombe
	Instructed by Tjombe-Elago Law Firm Inc