



REPORTABLE

CASE NO: SA 2/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PHILLIP MÜLLER
BRIGITTA MÜLLER

First Appellant
Second Appellant

and

JEAN-MARIE LAUER

Respondent

Coram: SHIVUTE CJ, DAMASEB DCJ and HOFF JA

Heard: 4 March 2024

Delivered: 14 June 2024

Summary: A French national entered into oral agreements with the owner of a lodge in the Kunene Region of Namibia in terms whereof he advance large amounts of Euros to a lodge owner for the construction of a houses, two hunters' bungalow and installation of a solar system on the lodge. The agreement was that the plaintiff would become the owner of the buildings and that the owner of the lodge would cause the transfer of the buildings into his name and also arrange that

the plaintiff and his wife would be admitted to permanent residence in Namibia. The buildings were constructed and the solar installation made. He also advanced a loan to the defendants for the purchase of game to restock the farm.

The transfer of the buildings to the plaintiff never happened and he and his wife never obtained permanent residence in Namibia. The animals were also bought.

The plaintiff then instituted action proceedings in the High Court seeking to reclaim under an enrichment cause of action the money he paid to the defendants. He also claimed repayment of the loan for the purchase of the game. In the alternative he relied on misrepresentation alleging that the defendants knowing that he would not as a foreign national become owner of the buildings wrongly so represented to induce him to pay the money. In addition they also represented, knowing it was not possible, that they would arrange permanent residence for him and his wife.

The defendants opposed the claims, denied the enrichment and asserted that the improvements were a gift. As for the loan for purchase of game they maintained that the agreement was that the loan would be repaid with earnings to be made from hunters to be brought to the lodge by the plaintiff. He failed to do so and therefore waived the right to reclaim the loan.

The High Court held that the defendants were enriched by the improvements and that they failed to rebut the presumption of enrichment. The High Court relied on *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) and *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA). The High Court also held that the defendants had no defence to the claim for the repayment of the loan advanced for the purchase of game.

The High court ordered that each party bear their own costs as they achieved substantial success in equal measure.

On appeal to the Supreme Court,

Held that, the court *a quo* took the view that the pre-trial order did not impose an *onus* on the plaintiff to prove the quantum arising from a finding that the defendants had been enriched at his expense. The plaintiff was, in law, required to prove the nature and extent of his impoverishment because in an enrichment claim, the passing of money or goods from one person to another does not, without more, constitute enrichment of the recipient in the juridical sense. The person who alleges to have been impoverished by such property being transferred to the estate of the recipient must prove all the elements of an enrichment claim, which the plaintiff's failed to do.

Held that, the defendants have no *bona fide* defence to the plaintiff's claim for the repayment of the loan advanced for the purchase of animals to restock the farm. By their own admission the amount was fully repayable. It became due and payable when the plaintiff complied with his obligation to bring the hunters to the farm.

Held that, subsequent to the success of the appeal on the enrichment claims, the issues of interest and payment in foreign currency fall away.

Cross-Appeal

Held that, the cross-appeal against the award of costs became moot, because the plaintiff is not entitled to pursue the cross-appeal without leave, in terms of s 18 of the High Court Act 16 of 1990.

APPEAL JUDGMENT

DAMASEB DCJ (SHIVUTE CJ and HOFF JA concurring):

Introduction

[1] The present appeal is yet another episode in the disturbing saga of foreign nationals entering into schemes with Namibians to acquire interests in agricultural commercial land in Namibia.¹ The ingenuity with which these schemes are devised is matched only by the cruel reality that they inevitably implode under the weight of the primordial human instinct of self-interest.

[2] The scheme giving rise to the appeal now before this Court involves a French businessman (the respondent in the appeal who was the plaintiff *a quo*, hereafter 'the plaintiff') entering into oral agreements with the owner of a lodge and his wife (the appellants in the appeal and who were defendants *a quo*, 'the defendants'). The lodge is located on agricultural commercial land in the Kunene Region of Namibia.

[3] In April 2009, the plaintiff had paid large sums of money in Euros to the defendants for agreed purposes. In November 2009, the plaintiff instituted several claims in the High Court against the defendants to recover that money.

¹ In terms of s 58 of the Agricultural (Commercial) Land Reform Act 6 of 1995 (ACLRA), except with the prior written consent of the Minister of Land, a foreign national is not competent to acquire agricultural land in Namibia.

[4] I can do no better than sum up the essence of the transaction and the resultant fallout in the learned judge *a quo*'s own words:

[4] Sometime in 2008, a French national, and his then consort became enchanted with the farm, Okatara during one of their visits to Namibia. It was then that the plaintiff, who owns three factories in France, became desirous to obtain a tranquil place of his own for re-generation purposes. The idea was borne to build a house and bungalows on farm Okatara so that the plaintiff could, on a regular basis, come to Namibia and enjoy some peace and quiet and so recharge his batteries. Initially a good and hearty relationship prevailed between the plaintiff and his wife and Mr and Mrs Müller. . . [Mr Müller] being the owner of Okatara. It was during these harmonious times that the intended house and two hunters' bungalows were built. In addition the plaintiff invested also in the upgrading of a solar system on the farm, provided funds for the establishment of an olive grove, a long-held dream of the second defendant, and for the purchase of additional game.

[5] Subsequently, and as unfortunately happened, the relationship between the parties soured as a result of which the plaintiff is now claiming the repayment of € 198 019.17 and N\$ 526 322.47 in respect of the house, the bungalows and the solar system, the sum of € 50 000 in relation to some 4000 olive trees which were to be planted and € 21 252 in respect of moneys advanced in regard to the purchase of game intended to repopulate the farm'.

[5] An essential backdrop to the dispute is not only the prohibition under s 58 of the ACLRA, but also the fact that transfer of ownership in the bungalows much-cherished by the plaintiff and his wife, was only possible if the portion of the land on which the structures were built could be subdivided in terms of the Subdivision of Agricultural Land Act 70 of 1970 (SALA)². In other words, for the bungalows built with the plaintiff's money to be transferred to him, both the ACLRA and the

² In terms of s 3 (a) of the SALA, there cannot be subdivision of agricultural land unless the Minister of Agriculture consents in writing thereto.

SALA had to be complied with. Since, as will become clearer below, the agreement relied on by the plaintiff depended for its efficacy on the plaintiff and his wife obtaining permanent residence in Namibia, the last important statutory backdrop are the relevant provisions of the Immigration Control Act 7 of 1993 (ICA).³

Essence of plaintiff's case

[6] The plaintiff relied on a main and alternative claim in respect of the house, bungalows and solar system. In the main, he claimed that he and the defendants entered into an oral agreement in terms of which the defendants agreed to avail land to him on farm Okatare to build a house and bungalows which would then become his property. He alleged that, in addition, it was agreed that the defendants would take steps to transfer the properties thus built into his name. It was also agreed, he said, that the defendants would take steps to secure for him and his consort permanent residence status in Namibia.

[7] According to the plaintiff, he complied with his part of the agreement and made available to the defendants the funds required to build the house, bungalows and installation of the solar system (the improvements). The improvements were made but the defendants failed to take steps to have the property transferred into his name and to secure permanent residence for him and his consort.

[8] As an alternative to the main claim, the plaintiff claimed that the defendants – knowing that as a foreign national he could not become owner of the property

³ Sections 25 and 26.

and that the land on which the bungalows are located could not be subdivided for him to become owner thereof – made material representations to him which he relied upon that they would facilitate his becoming owner of the property built with his money.

[9] He also alleged that, aware of the falsity of those representations, the defendants induced him to enter into the agreement and caused him loss and damage.

[10] The plaintiff further alleged that the defendants misrepresented that they would obtain permanent residence status in Namibia for him and his wife.

[11] Concerning the money for the purchase of game, the plaintiff alleged that at the defendants' request, he lent the claimed amount to them. The animals had been bought and the defendants, contrary to the agreement that they would repay the moneys to him from income earned from hunting (which hunting had taken place), failed to repay the loan.

Essence of defence

[12] The defendants defended the claims and pleaded that the improvements were gifts by the plaintiff to them and therefore not repayable. As regards the moneys for the purchase of game, the defendants claimed that the agreement was that the funds would be repayable by them to the plaintiff from income made from hunters the plaintiff was to bring to Okatara. As the plaintiff had failed to live up to his end of the bargain, he had waived the right to claim those moneys.

[13] The moneys paid for the olive trees were not persisted with *a quo* and nothing further will be mentioned about it in this judgment.

Common cause

[14] It is apparent from the pleaded case and the manner the case was fought in the court *a quo* that there is no dispute between the parties that payment was made by the plaintiff to the defendants in the amounts stated in the particulars of claim. Nor is there any dispute as to the purposes for which the moneys were advanced by the plaintiff to the defendants. The dispute rather is (a) whether it was for altruistic reasons, (b) whether the plaintiff proved all the elements of an enrichment claim and whether, (c) in respect of the loan to buy game, the plaintiff waived the right to claim repayment.

[15] The court *a quo* records in its judgment that on behalf of the defendants it was argued *a quo* that 'the admission' that the amounts were paid by the plaintiff to the defendants was 'not an admission' of the plaintiff's alleged impoverishment and the defendants' corresponding enrichment. The learned judge *a quo* makes clear in the written reasons that the defendants insisted that the plaintiff had to prove his impoverishment 'in accordance with the double ceiling' rule laid down by this Court in *Paschke*.⁴ (The applicable *dicta* are set out in para [69] below).

[16] In other words, the defendants had consistently maintained that the plaintiff was only entitled to recover, by way of enrichment, the extent of his

⁴ *Paschke v Frans* 2015 (3) NR 668 (SC) paras 14-21.

impoverishment and the defendants' corresponding enrichment, whichever is the lesser as at *litis contestatio*. On that authority, the defendants had argued, the plaintiff was not entitled to compensation to the 'fullest extent of his loss'.

[17] It is common cause then that in the court below the defendants had urged the High Court to find that the plaintiff was obliged but failed to present expert evidence of the difference in value of farm Okatare prior to the improvements – and the farm's value afterwards.

[18] Concerning the alternative claim based on misrepresentation, the defendants' case, as recorded by the court *a quo* in its reasons, was that since the alleged misrepresentations by the defendants to the plaintiff are predicated on an undertaking (which had to comply with the ACLRA and SALA) to transfer the buildings constructed with the plaintiff's money into his name and to secure permanent residence status for the plaintiff and his spouse (which was only possible in terms of the ICA), the alleged misrepresentations concern representations of law which cannot be the basis for any relief.

Belated amendment

[19] After the parties' respective cases had closed and their counsel had made submissions on the merits, the plaintiff brought an application for leave to amend his particulars of claim.

[20] The proposed amendment was opposed and was refused by the court *a quo*. Its significance though, as contended on appeal by the defendants, is that the

plaintiff sought to remedy the deficiencies in his originally pleaded case as it did not satisfy the requirements of a cause of action based on unjust enrichment.

The High Court's judgment

[21] The parties led oral evidence in the High Court proceedings. It is common cause that the trial lasted a record-setting 86 days lasting for five years. Although the evidence is prolix and took a very long time to be concluded the issues the court *a quo* eventually had to decide were quite confined.

[22] I do not intend to traverse that evidence in detail as I am satisfied that the issues that have crystallised on appeal are capable of resolution on facts that are largely undisputed or are common cause. Where it becomes necessary I will refer to specific items of evidence (oral and documentary) led on behalf of one or other of the parties.

[23] The defendants testified that they did not gain much value from the improvements and that the facilities are used primarily by the children when they come to visit the lodge.

[24] The High Court found that as a result of the agreement between the parties 'a luxurious house and also two attractive bungalows' were built on farm Okatare; and that the improvements to the farm were made 'with the received funds, at the expense of the plaintiff, through which the plaintiff was clearly impoverished'.

[25] According to the learned judge, 'whether or not there was an existing solar system, for the generation of electricity on the farm, at the time, or whether the

farm's electricity supply was generated by a generator only, is neither here nor there'.

[26] The learned judge added:

'Fact of the matter is that the second defendant agreed. . . to the supply and installation of an upgraded solar system to the tune of N\$ 526 322.47, as offered by the plaintiff, which so became a reality and became available for use and was to the benefit of all on Okatare. Again at the admitted expense and "impoverishment" of the plaintiff.'

[27] The court *a quo* was therefore satisfied that 'all this' 'enriched the defendants'. According to the High Court, the receipt of €198 019,17 and N\$ 526 322,47 'is admitted' and that the plaintiff is 'in principle' entitled to 'lay claim to' that money. And that 'Generally, the liability of the defendants is thus confined to the extent that they continue to remain enriched through the amounts actually . . . admittedly . . . received'.

[28] The learned judge *a quo* held:

'[36] I agree with Mr Mouton. The pre-trial order – and the issues which had been formulated for purposes of trial in such pre-trial order – on the basis of the parties'– trial proposals – did not require the plaintiff to prove the quantum , ie the extent of the defendants' enrichment.'

[29] The High Court took the view that the 'admitted receipt of the amounts . . . created a presumption of enrichment, which thus kicks in also in this case'. The learned judge added that the defendants failed to discharge the onus of disproving

the presumption of enrichment which arose from the common cause fact of receipt of the claimed amounts.

[30] For this conclusion the court *a quo* relied on *dicta* from South Africa⁵ – typically stated in the following terms in *Kudu Granite Operations (Pty) Ltd v Caterna Ltd*⁶:

‘[21] A presumption of enrichment arises when money is paid or goods are delivered. A defendant then bears the onus to prove that he has not been enriched.’

[31] According to the High Court, the defendants made no attempt to discharge the onus ‘because their focus was on showing that the amounts they received for the house and bungalows were a gift’. The judge added: ‘the defendants also never pleaded any reduction or the complete loss of the enrichment’, adding:

‘[49] Fact of the matter is that the defendants, at the end of the day, remain in possession of a beautiful house, 2 hunter’s bungalows and a state-of-the art solar system. The defendants have vehemently denied that they benefit in any way from the use of the house, save, for the occasional use by it, through their children. One only needs to pause here to reflect that the probabilities, of this being true, are absolutely remote. The plaintiff has not set foot on Okatare since 2010. There is absolutely nothing, except for an alleged self-imposed restraint, that prevents the defendants from using and appropriating these improvements at their whim and at any time over many years. The house and bungalows feature prominently in the mentioned brochure and on the website through which the Defendants’ “Okatare Hunting Safaris” are advertised and through which it is held out to the public and the world that such facilities are available for use and enjoyment. Exhibits “Z”, “ZZ” and “VVV” underscore all this. Also the state-of-the-art solar system has ever

⁵ *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A).

⁶ *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA).

since been available for the exclusive use of the defendants, their children and their guests, through which – and I quote – the . . . ensuite bathrooms and all rooms have hot water and daily cleaning and laundry services. . . .

[50] These uncontroverted facts thus strengthen the presumption of enrichment and militate towards the conclusion that the defendants have been enriched and thus – for the moment at least – that such enrichment is unjustified. This is particularly so in circumstances where the defendants refuse to reimburse the plaintiff for these assets in any manner whatsoever, but in respect of which it must also be taken into account, that this refusal would be legitimate if it were to be found that the receipts of the funds through which the said improvements were effected amounted to a gift or donation.’

[32] The High Court then made the following order:

‘1 . . .

Claim 1

2. The first and second defendants are to pay the amounts of € 198 019-17 and N\$ 263 161-23, plus interest on the aforesaid amounts, at the rate of 20% per annum, a tempore morae to date of payment, jointly and severally, the one paying the other to be absolved.

Claim 2

3. This claim is dismissed.

Claim 3

4. The first and second defendants are to pay the amount of € 21 252-00, plus interest on the aforesaid amount at the rate of 20% per annum from 20 April 2009 to date of payment, jointly and severally, the one paying, the other to be absolved.

5. Each party is to pay its own costs.’

[33] The court *a quo* justified the costs order on the basis that the parties had achieved substantial success in equal measure.

The main appeal

Ad order two

[34] The defendants challenge the court *a quo*'s conclusion that the pre-trial order⁷ relieved the plaintiff of the onus that rested on him to prove the extent of his impoverishment and the defendants' corresponding enrichment. An erroneous conclusion, the defendants maintain, that resulted in the plaintiff being allowed 'the fullest possible compensation' in conflict with the 'double ceiling rule' laid down in *Paschke*.

[35] The defendants also complain that the court *a quo* erred in finding on the facts that the presumption of enrichment arose and that they failed to discharge it. Such presumption, it is said, only arises in respect of an enrichment claim based on the *condictio indebiti*: a cause of action not pleaded by the plaintiff.

[36] According to the defendants, the *condictio indebiti* did not avail the plaintiff because the moneys he paid to the defendants were not 'in error or any other ground which may sustain the *condictio indebiti*'.

[37] The grounds of appeal further state that the court *a quo* erred in shifting to the defendants the onus to prove the extent of their alleged enrichment whereas such onus 'at all times' rested on the plaintiff. The argument goes that the value of the alleged enrichment could only have been proved if the plaintiff pleaded and presented evidence of the value of the farm without the improvements made with

⁷ In terms of High Court Rule 26.

the plaintiff's funds and its value after the improvements. According to the defendants, the difference between the two values would be the defendant's enrichment and the plaintiffs' impoverishment.

[38] The defendants state that as no such evidence was presented by the plaintiff the court *a quo* ought to have but failed to find that the plaintiff failed to discharge the onus that rested upon him.

[39] As regards the enrichment claims, the defendants' overarching complaint is that the case found by the court *a quo* to have been proved was not based on the plaintiff's pleaded case nor on the evidence led at the trial. The defendants predicate that complaint on the common cause fact that the plaintiff sought to 'belatedly' amend his particulars of claim at the end of the trial and after the parties made submissions to the court. The amendment – which was refused and is not the subject of a cross-appeal – according to the defendants demonstrates that the plaintiff took them to 'trial on a totally different case than the one he eventually supported in the belated amendment'.

[40] According to the defendants, the court *a quo* should have granted an order of absolution from the instance in respect of claim one (the enrichment claims).

[41] As a fall-back position, the defendants state that the court *a quo* erred in not finding that the moneys paid by the plaintiff for the buildings and the solar panel system represented a gift or donation to them.

Ad order four

[42] The defendants' complaint against the court *a quo*'s order on the loan for the purchase of game is that the court erroneously found that the defendants had earned enough income from hunters brought by the plaintiff when in fact they had raised only €17 280. (It bears mention that the ground of appeal does not suggest that the plaintiff had waived his right to repayment as alleged in the plea).

Interest

[43] In relation to the enrichment claims, the defendants state that the court *a quo* erred in treating the amounts claimed as liquidated amounts and ordering interest on that basis when it should have imposed interest only from the date of judgment.

Damages in foreign currency

[44] Although in the grounds of appeal, no grievance is raised by the defendants against the High Court's order granting damages in Euros, the defendants' counsel in the heads of argument and in oral argument suggested that the court should not have ordered payment in foreign currency.

Cross-appeal

[45] The plaintiff supports the court *a quo*'s judgment and cross-appeals only against the costs order on the basis that the court should have granted him costs because he had achieved substantial success.

[46] The cross-appeal is opposed and the *in limine* objection taken that since it is an appeal against a costs order only, the plaintiff required leave. It is stated on behalf of the defendants that should the main appeal fail, effectively all that would remain is an appeal by the cross-appellant against an award of costs which the plaintiff is not entitled to pursue without leave, in terms of s 18 of the High Court Act 16 of 1990.⁸

Submissions

Appellant

[47] Mr Heathcote submitted on behalf of the defendants that the High Court made no finding as to which type of enrichment action the plaintiff's claim was based. Nor did the plaintiff plead a specific enrichment action. According to counsel, the court *a quo* misdirected itself by shifting the onus to prove the extent of the defendants' enrichment and the plaintiff's corresponding impoverishment. According to counsel, the correct position in law is that the onus rested on the plaintiff to prove the extent of his impoverishment. Counsel added that under our law of unjustified enrichment considered against the present facts, the benefit that the defendants received is not the money paid to them but the construction of the house and installation of a solar system on farm Okatare. In other words, the amount the plaintiff paid for the benefit of the defendant's does not constitute the plaintiff's enrichment.

⁸ *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC).

[48] Mr Heathcote also challenged the correctness of the court *a quo*'s conclusion that the pre-trial order absolved the plaintiff from the obligation to prove the extent of his impoverishment. In addition, counsel submitted that the statement by Mr Brandt which was relied on by the court *a quo* for the conclusion that the enrichment quantum was conceded in context meant nothing more than 'that the amounts were indeed paid . . . Not that the amount equals unjustified enrichment'. He added that the approach that the payment value equals enrichment was disapproved by this Court in *Paschke*.

[49] The defendants' contention is that, in any event, the money advanced to them by the plaintiff for the construction of the bungalows and half-share of the solar system constituted a gift.

Respondents

[50] The centrepiece of the plaintiff's case on appeal is that the defendants' (a) acceptance *a quo* that they had received the moneys from the plaintiff and (b) their counsel's admission to the trial judge that the 'quantum' need not be proved, was a concession that they had been enriched at the plaintiff's expense to the extent of the admitted amounts: Being €198 019,17 (on 28 November 2008) and N\$526 322,47 which was paid as soon as construction commenced.

[51] According to Mr Mouton for the plaintiff, the pre-trial order only required proof (on the plaintiff's part) of the 'enrichment' and not the 'quantum'. According to counsel 'quantum was since the outset of the trial, not a triable issue'. In other words, once the payment value was admitted, a presumption arose that the

amount(s) paid and received represent the unjustified enrichment. My understanding of Mr Mouton's argument is that the only issue placed in dispute in the pre-trial order by the defendants was whether the amounts paid were in furtherance of a donation (claim one) and whether (in respect of claim three) the plaintiff waived the right to claim the loan for the game.

[52] The proposition that the defendants never placed in issue that they were enriched at the expense of the plaintiff does not sit comfortably with the court *a quo's* own statement of what it considered was placed in dispute by the defendants. (*Vide* para [16])

Discussion

[53] The outcome-determinative issue in this appeal is the correctness or otherwise of the court *a quo's* finding – which is now challenged on appeal – that the parties agreed in the pre-trial order that the plaintiff did not have to prove the extent of his impoverishment and the defendants' corresponding enrichment. In addition, the court below in no small measure justified that finding on a statement made by the defendants' counsel of record during the hearing to the effect that the plaintiff need not prove the amounts claimed. Such an agreement is denied by the defendants.

[54] Their case, as I understand it, is that the court's conclusion is based on a wrong interpretation of the pre-trial order – amounting to a misdirection.

[55] The submission on behalf of the defendants is that all that they admitted in the pre-trial order is receiving the money but that they did not thereby relieve the plaintiff of his obligation to prove that their receipt of the money equalled the extent of their enrichment and the plaintiff's corresponding impoverishment.

[56] According to the defendants, the court *a quo's* conclusion is not supported by the fact that the parties engaged in a full-blown trial lasting for five years amongst others on the very question whether the defendants were at all enriched at the plaintiff's expense.

[57] At the heart of the court *a quo's* findings in favour of the plaintiff on the enrichment claim is its interpretation of the pre-trial order and the concession made by Mr Brandt on their behalf. That is an issue of law and calls for a consideration of the Pre-trial order against the backdrop of the pleaded case.

Pre-trial order

[58] The Pre-trial order states the following:

'Questions of fact

Ad claim one

- 1) Whether the parties entered into an oral agreement in terms of which they agreed that Plaintiff would pay for the construction and fitting of a dwelling for Plaintiff and his partner and the construction of two hunters bungalows on the property so as to expand Defendants hunting operations on the property under the conditions pleaded at 4.1 to 4.2 of the Plaintiff's particulars of claim;

- 2) Whether the conditions had been fulfilled;
- 3) Whether the Defendants have been unduly enriched with the improvements to the property;
- 4) Whether the construction of the dwelling and the two bungalows was purely for the use and enjoyment of the Plaintiff, whenever he visited Namibia;
- 5) Whether the construction of the dwelling and the two bungalows was a gift, alternatively donation from Plaintiff to the Defendant's.

Ad alternative claim

- 6) Whether the Defendants made the representations as alleged and whether these representations were made with the intention to induce the Plaintiff to advance the said sums of money to the Defendants;
- 7) Whether the representations were made intentionally or negligently;
- 8) Whether the representations were false;
- 9) Whether the Plaintiff suffered damages as a result of the representations in the amount of €198 019-17 and N\$526 322-47;
- 10) Whether the payment effected was done voluntarily by Plaintiff and whether they constituted a "gift";

Ad claim two

- 11) Whether the amount advanced by Plaintiff constituted a loan to defendants as pleaded pursuant to the terms and conditions pleaded at paragraph 15 of Plaintiff's particulars of claim;
- 12) Whether the amount so advanced was a donation out of pure liberality from the Plaintiff;

Ad claim three

13) What the terms and conditions were of the oral agreement concluded between the parties, relating to the purchase of game;

14) Whether the Plaintiff waived his rights to claim the amount of €21252-00 as alleged by Defendants;

Issues of law

The issues of law are:

(a) Whether the amounts advanced to the Defendants by Plaintiff were advanced out of pure liberality and whether they constituted a donation.' (My underlining for emphasis)

Mr Brandt's concession during the trial

[59] At some stage during the proceedings a disagreement arose during the course of Ms Lauer's testimony as to what amounts they paid to the defendants in furtherance of the agreements between the parties. The trial judge then invited the two counsel representing the respective parties (Mr Mouton and Mr Brandt) to confer and to resolve the disagreement. The two practitioners did so and reported back to the court that they had agreed that the defendants do not dispute receipt from the plaintiff of the moneys referred to in para 14 of the particulars of claim.

[60] Paragraph 14 states: 'As a consequence of the Defendants representations Plaintiff has suffered damages in the amounts of €198 019-17 and N\$ 526 322.47'.

[61] The plea to that allegation is at para 5.1 of the defendants' plea as follows:

'The allegation herein contained is denied and the Plaintiff is put to the proof thereof. In amplification of the denial the Defendants plead the Plaintiff, at its own instant constructed the bungalow and effected payment to the Defendants voluntarily, which he late indicated was a gift.'

[62] My understanding then of the agreement reached during the trial is simply that the receipt of the amounts stated in para 14 of the particulars of claim was not disputed and that the plaintiff did not need to prove that he paid those amounts to the defendants.

[63] The court *a quo* took the view that the pre-trial order did not impose an *onus* on the plaintiff to prove the quantum arising from a finding that the defendants had been enriched at his expense. The implication of this finding is that the undisputed moneys paid by the plaintiff to the defendants necessarily constituted the extent of the plaintiff's impoverishment and the defendants' corresponding enrichment. That conclusion is impugned on appeal.

Was the court *a quo*'s conclusion justified?

[64] It is clear from paras three and nine of the pre-trial order that the defendants put the plaintiff to the proof that they were unjustly enriched. A position articulated further and amplified in submissions to the judge *a quo* as I previously demonstrated. My understanding of the defendants' case is that on the authority of *Paschke* the plaintiff was, in law, required to prove the nature and extent of his enrichment. The said paras three and nine sufficiently put that in issue.

[65] By parity of reasoning, in an enrichment claim, the passing of money or goods from one person to another does not, without more, constitute enrichment

of the recipient in the juridical sense. The person who alleges to have been impoverished by such property being transferred to the estate of the recipient must prove all the elements of an enrichment claim.

Elements of an enrichment cause of action

[66] The first point to be made is that an enrichment claim should be anchored on one of the *conditiones* as set out more fully below. That said, the following are the general requirements for liability in an enrichment claim:

- (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.
- (d) The enrichment must be unjustified; in other words without legal grounds or *sine causa*.⁹

[67] The elements will of course depend on the type of enrichment claim (*conditiones*) that the plaintiff relies on. The consensus of academic opinion¹⁰ and approach of the courts¹¹ is that a general enrichment action has never been applied in our courts and that it is preferable for a plaintiff to anchor an enrichment claim on one or other of the *conditiones*.

⁹ WA Joubert and JA Faris *The Law of South Africa* vol 17, 3 ed para 207 and JC Sonnekus *Unjustified Enrichment in South African Law* 1 ed, para 209.

¹⁰ LAWSA, at 16.

¹¹ *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 (3) SA 482 (SCA); *First National Bank of Southern Africa Ltd v Perry No & others* 2001 (3) SA 960 (SCA); *Afrisure CC & another v Watson NO & another* 2009 (2) SA 127 (SCA).

[68] As the learned authors of LAWSA on Unjust Enrichment correctly sum up the position:

'[T]he enrichment which the defendant is obliged to return is calculated, not on the basis of the value received, but rather on the basis of the value remaining, that is to say the defendant is liable to return the net surviving gain. This means that the totality of the defendant's assets and liabilities after the alleged enrichment occurred must be compared with what it was prior thereto: the defendant's liability is confined to the amount of his or her actual enrichment at the time of the commencement of the action.'¹²

[69] As to onus, Professor Sonnekus states the correct legal position thus:

'All the facts required to establish liability must be determined before the obligation stemming from unfounded or unjustified enrichment can arise. The onus to prove all the facts or elements is on the plaintiff. This implies that the plaintiff must plead enrichment and that his pleadings will clearly raise every element and indicate also that proof of both the enrichment and impoverishment will be provided.'¹³

[70] This resonates with this Court's judgment in *Paschke* where O'Regan AJA wrote thus for a unanimous court:

'[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

¹² LAWSA, at 123.

¹³ *Unjustified Enrichment in South African Law* at 103 para 2.1.3.

entitled to recover the extent of his or her impoverishment, or the extent of the defendant's enrichment, *whichever is the lesser amount*. 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. 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.

...

[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. 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.

[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.

[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*.' (Footnotes omitted).

[71] I had shown that the court *a quo* was put on notice by the defendants that the plaintiff needed to comply with the law as laid down in *Paschke* – an event that occurred after the pre-trial order. On a contextual and reasonable interpretation, the pre-trial order called upon the plaintiff to prove all the constituent elements of the enrichment claim.

[72] It is apparent from its reasoning that the court *a quo* was blind-sided by the defendants' alternative defence that the moneys were paid to them out of the plaintiff's sheer altruism. Proving that the money was not a donation did not translate into proof that the defendants were enriched at the plaintiff's expense in the juridical sense.

[73] The evidence that Mrs Müller gave at the trial is crucial in this respect – evidence which had not and could only have been contradicted by expert evidence. Mrs Müller was asked by the court if the construction of the buildings on the farm enhanced its value.

[74] The exchange between the court and the witness went thus:

'Court: And you think that your, the property the farm has been enhanced in value by structure in, of about in excess of 1.5 million. . . .

No Your Lordship I do not think so.

Court: I see, and why do you would you say something like that? . . .

Your Lordship, we are on the farm it is an agriculture value and an economical value and houses do not do not fall unto economical or agriculture value Your Lordship.

Court: If I have somebody come there to evaluate they, they do not want to see the houses. They want to see the infrastructure of the farm how many water holes, how many (indistinct), how many fences, how many camps.

That is what they are looking for Your Lordship, I agree with you if this building or even a bigger and more impressive building and even an Olympic pool if you want to (indistinct) has been built on our farm, still it would not (indistinct). But if I had the same building Your Lordship here in Windhoek yes, yes it will put a lot of value.

Court: I see . . . But not on the farm. So when one sees adverts in the newspaper that a piece of agricultural land is for sale and lists the boreholes and it lists the camps and the type of fencing and the like, it is not it becomes irrelevant whether it has a dwelling on that piece of agricultural land or not? . . .

Your Lordship I maybe you are misunderstood me I do not say that the dwelling is irrelevant. But what they do (intervention).

Court: You must have many dwellings by the way? . . .

We have many dwellings

Court: And that does not matter to, to when I want for example to sell my farm or to have and it evaluated for some reasons maybe for the bank or for something and they come to evaluate and to have a look.

They do not bother about how and how big the dwellings are Your Lordship.

Court: You mean it is irrelevant whether you have hunting bungalows on your farm, whether you can offer your farm for sale as a hunting operation, whether you are going to offer it as says but this is a piece of agricultural land that suitable for commercial hunting activities. You mean all that is irrelevant? . . .

Your Lordship (intervention).

Court: And, and any evaluator will only look at the agricultural value of the land. And everything else becomes irrelevant and does not impact on any evaluation? . . .

Yes Your Lordship, because I have had an evaluator there and I wanted to show him all the buildings and I do not want to see it let us go to (indistinct). They want to see if it is for hunting if I would sell it for hunting, they want to see how much grass do I have, how much water do I have. Do I have animals on that? And I do not know also so much about the advertising but I can remember I saw once an advertising where they said there are so many kudu, there are so many whatever elephant, giraffes whatever that is important Your Lordship.

Court: No but you know that game has commercial value the evidence before this Court has shown that? . . .

That is so.

Court: Is that not so? . . .

Yah.

Court: Otherwise the animals that were purchased would not have costs such a lot of Euros. . . . That is true they have a value the animals.

Yes. . . . But not the (indistinct).

Court: So they are obviously being taken into account as far as the evaluation is concerned or? . . . If they do evaluation

Your Lordship for the agricultural land and the economical value I do not even know if they would count the animals.

Court: I see. . . . They look at the infrastructure

Your Lordship and it does not matter how big and your how nice and beautiful your houses are and if you have golden taps and whatever (indistinct).

Court: So your farm must be a bargain?'

[75] The issue is not so much whether Mrs Müller was correct. Rather it is that given that the extent of enrichment of the defendants' estate (being the lodge) from the improvements is not possible without valuation, expert evidence is necessary to determine that issue. As a general proposition, in any event, Mrs Müller's assertion that a valuation of a farm is to be treated differently from real estate in a municipal area is not far-fetched.

[76] It is not correct as suggested by the defendants that the then proposed amendment to the enrichment claims would have had a substantial effect on the originally pleaded case, in my view, even if it were allowed the averments necessary to sustain such a claim would still be lacking.

[77] The defect in the plaintiff's pleaded case becomes apparent when one contrasts it with what he should properly have pleaded. It was not enough for the plaintiff to allege the moneys that he paid to the defendants and the purpose for

which payment was made – a purpose that had since become unrealised or unachievable. And that because of the money no longer being applied for his benefit, the defendants stand to benefit at his expense. The plaintiff ought in such pleading to have cast a positive obligation on the defendants to cooperate in the valuation of the lodge's value prior to and after the improvements made with the money he paid. Such evidence to be that of an expert as on the date of close of pleadings – the particulars of claim making clear that the difference between the lodge's value without the improvements and the lodge's value with the improvements – whichever is the lesser – constitutes his impoverishment and the defendants' corresponding enrichment.

[78] The interpretation placed on the pre-trial order and Mr Brandt's concession accords with the *ratio* of this Court in *Paschke* and the manner in which the case was litigated. The contrary view taken by the court *a quo* and supported by Mr Mouton on behalf of the plaintiff on appeal, does not.

[79] It was a misdirection therefore for the court *a quo*, in the absence of proof of the value of the lodge before and after the improvements, to hold that the plaintiff had made out a case for enrichment.

Misdirection on presumption of enrichment

[80] The learned judge *a quo* committed a further misdirection in holding that the presumption of enrichment applied to the facts of this case. The learned judge

relied on *African Diamond Exporters and Kudu Granite* for his conclusion – yet it is common ground between the parties that the plaintiff did not rely on the *condictio indebiti*. *African Diamond* concerned an action based on the *condictio indebiti*.

[81] As Müller JA put it in that case at 713H:

‘I agree with the view stated by Prof De Vos that, where a plaintiff has proved an overpayment recoverable by the *conditio indebiti*, the onus rests on the defendant to show that he was, in fact, not enriched at all or was only enriched as to part of what was received.’

[82] It is trite that the *condictio indebiti* is available to a person that parts with money or other property due to an excusable error and in the mistaken belief that the payment or delivery was owing to the beneficiary.¹⁴ No such case was pleaded by the plaintiff. As Mr Heathcote correctly submits, it is common cause that the payments were made for reasons agreed between the parties.

[83] *Kudu Granite* on the other hand concerned the *condictio ob causam finitam*, also referred to as an off-shoot of the *indebiti*. In that case the agreement between the parties failed without fault on the part of either party and they found themselves in a situation analogous to impossibility of performance as the performance of the contract depended upon the conduct of a third party that was unable or unwilling to perform.

[84] As the Supreme Court of appeal put it at para 15 of *Kudu Granite*:

¹⁴ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another* 1992 (4) SA 202 (A) at 22-23.

'Kudu's first contention is well-founded. There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party . . . and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect. The first-mentioned scenario gives rise to a distinct contractual remedy: . . . and restitution may provide a proper measure or substitute for the innocent party's damages. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjust enrichment, an equitable remedy in which the contractual provisions are largely irrelevant. As Van den Heever J said in *Pucjowski v Johnston's Executors* 1946 WLD 1 at 6:

“The object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was *ab initio* unenforceable or has subsequently become inoperative (*causa non secuta; causa finita*).”

The same principle applies if the contract is void due to a statutory prohibition. . . in which case the *condictio indebiti* applies. There is no reason why contractual and enrichment remedies should be conflated. Caterna's case was one of a lawful agreement which afterwards failed without fault because its terms could not be implemented. The intention of the parties was frustrated. The situation in which the parties found themselves was analogous to impossibility of performance since they had made the fate of their contract dependent upon the conduct of a third party (KPMG) who was unable or unwilling to perform. In such circumstances the legal consequence is the extinction of the contractual nexus . . . The law provides a remedy for that case in the form of the *condictio ob causam finitam*, an offshoot of the *condictio sine causa specialis*.

. . .

[T]he purpose of this remedy is the recovery of property transferred under a valid *causa* which subsequently fell away.

. . .

. . . It is sometimes suggested that the *condictio causa data causa non secuta* is the appropriate remedy. . .

Indeed in *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co* 1923 SC (HL) 105, a case of a contract frustrated by the outbreak of war which made

performance legally impossible, the Judicial Committee after an exhaustive consideration found that that was the remedy.' (Several cited sources omitted).

[85] No case analogous to the facts of Kudu Granite was pleaded by the plaintiff. In fact, it is an understatement that in the present case we do not know which *condictio* the plaintiff's case was anchored on.

[86] The court *a quo* therefore misdirected itself in holding that the presumption of enrichment applied to the facts before it. The appeal against the court *a quo*'s order two should therefore succeed.

[87] In the view that I take of the plaintiff's failure to allege and prove enrichment under claim one, it is unnecessary to decide if the moneys in question amount to a gift.

Claim three (loan to buy game)

[88] It is common cause that the claim in relation to the money advanced for the purchase of game was not part of the enrichment claim but a loan *simpliciter*. The basis of opposition to this claim is rather confusing and seems to have evolved over time. It is said, in the first place, that the agreement between the parties was that the loan was to be repaid with income to be earned from hunters that the plaintiff would bring to the farm but that he failed to do so and therefore waived the right to repayment of the loan.

[89] On the other hand it was suggested that the plaintiff relieved the defendants from the obligation to repay the loan on condition that he and his partner obtain permanent residence in Namibia – which they failed to do in any event.

[90] The confusion is accentuated by the fact that the defences referred to stand in sharp contrast to the contemporaneous correspondence between the parties in which Mr Brandt, on behalf of the defendants, on 24 November 2004 admitted liability for the debt and in fact made an offer to repay.

[91] In his letter of 24 November 2004, Mr Brandt informed the plaintiff that he had written instructions to convey the defendants' position on a host of issues. In para 7 of the written instructions, the following is stated by the defendants:

'7) Animals (black wildebeest): - these animals are fully repayable upon agreement. According to agreement these animals were also to be repaid by means of hunting guests and then these debts were also to be waived as soon as Mr Lauer received the temporary residence. Since Mr Lauer will probably no longer procure any hunters and the temporary residence is still undecided, Mr Müller is prepared to repay these animals to Mr Lauer. Under the above circumstances Mr Müller will undertake to repay these animals without interest at N\$ 2000 per month as from January 2011 into Mr Lauer's existing Bank Windhoek account. Should there be more income in different months, Mr Müller would pay more in such months. Otherwise N\$ 2000 per month.'

[92] The learned judge *a quo* rejected the defence to claim three and was satisfied that the plaintiff had proved the claim on the terms alleged in his particulars of claim. The learned judge relied amongst others on the following considerations. The first is that the reliance by the defendants on email correspondence between the parties allegedly proving that the plaintiff considered

the payment a donation, is not supported by the very terms of that correspondence. Secondly, that the defendants in effect admitted that the debt was repayable and making an offer for repayment terms. In my view, proof of acceptance of liability by the defendants is dispositive coming as it did subsequent to the correspondence which allegedly absolved the defendants.

[93] As Mr Mouton on behalf of the plaintiff correctly pointed out, it was established during the trial that in addition to the four hunters brought by the plaintiff in June 2010 and from whom a total income of €17 260 was realised, the plaintiff also paid €3750 for the accommodation of the hunters. The total amount realised from the plaintiff's exertions therefore almost equalled the loan amount.

[94] In my view, the defendants have no *bona fide* defence to the plaintiff's claim for the repayment of the loan advanced for the purchase of animals to restock the farm. By their own admission the amount was fully repayable. It became due and payable when the plaintiff complied with his obligation to bring the hunters to the farm.

Judgment in foreign currency and interest

Foreign currency

[95] The High Court ordered payment of the loan in Euros being the currency in which the loan was advanced. Although the issue was not raised in the grounds of appeal at least as far as the loan for the animals is concerned, in their heads of argument and in oral argument the defendants impugn that order and ask this court to set it aside and to order payment in Namibian Dollars. They provide no

principled objection to an order sounding in foreign currency. I am not surprised because our courts have made such orders in the past: *Ferrari v Ruch*.¹⁵

‘What the plaintiff is entitled to is repayment of the original loans of 185 790 Swiss francs and 142 790 Swiss francs made in November 1981, which must be satisfied in Namibia by payment of its equivalent in Namibian currency at the rate of conversion applicable at the time of payment. (*Barclays Bank of Swaziland Ltd v Mnyeketi* 1992 (3) SA 425 (W)). . . .’

Interest

[96] The grounds of appeal and the heads of argument devote a lot of time to the alleged impropriety of the court *a quo*'s order on interest in respect of the enrichment claims which that court found proved. That issue falls away with the defendants' success on appeal against the order allowing the enrichment claims.

[97] The claim amount for the animals arose under a loan agreement and is unrelated to the enrichment claim. The court *a quo* had ordered interest to run from 30 April 2009. There is no appeal against that order and therefore nothing further needs to be said.

The alternative claim based on misrepresentation

[98] The High Court expressed no view on this claim – presumably because it found in favour of the plaintiff on the main claim. The alleged misrepresentation claim need not detain us. Two obstacles faced the plaintiff. Had he as a diligent *paterfamilias* made even the most cursory inquiry he would have realised that the scheme he envisioned was only possible if he complied with the ACLRA and the

¹⁵ *Ferrari v Ruch* 1994 NR 287 (SC) at 301-302.

SALA. That is the law of this land. It lies ill in his mouth that as a foreigner he was not aware and that had he known the true facts he would not have entered into the ill-fated transaction. He should have, at the very least, sought and obtained legal advice if he did not genuinely know. He had the opportunity and the means to do so.

[99] The allegation about the permanent residence is even more suspect. That the plaintiff could have been misled by a supposed promise by the defendants of permanent residence for himself and his wife defies all reason. Including what to me is a scandalous allegation that a senior member of the government was to play a part in securing permanent residence for them.

[100] Permanent residence is strictly regulated under the ICA and is granted to persons who meet the requirements of s 26 of the ICA. Persons such as the defendants have no competence to play the role of immigration officer or the Immigration Selection Board to promise permanent residence to a foreigner.

[101] Although the court *a quo* did not deal with the alternative claim, I am satisfied that any reliance by the plaintiff on alleged misrepresentations concerning the ACLRA, SALA and the ICA was not reasonable. As we said in *Denker v Ameib Rhino Sanctuary (Pty) Ltd & others*:¹⁶

[53] As regards Viljoen's alleged misrepresentation as pleaded, it is common cause that it relates, not to fact, but to law. There is scant Namibian authority to provide guidance if a misrepresentation of the law by one party can be prayed in

¹⁶ *Denker v Ameib Rhino Sanctuary (Pty) Ltd & others* 2017 (4) NR 1173 para 53.

aid by the other contracting party. Both parties . . . proceed from what appears to me to be the correct premise that the innocent party's belief must be reasonable. As has famously been put in South Africa if the party alleging a misrepresentation of the law – “is so slack that he does not in the Court's view deserve the protection of the law, he should, as a matter of policy, not receive it”.

[102] The plaintiff was so slack as not to deserve the protection of the law for the alleged damages suffered at the hands of the defendants.

The cross-appeal

[103] Where – as the plaintiff (*a quo*) seeks to do – a party seeks to challenge only a costs order, s 18 of the High Court Act requires that it obtains leave of the court *a quo* and if refused that of this Court. The cross-appeal is opposed by the defendants on the basis that if the main appeal fails, the cross-appeal concerns the question of costs only decided against the defendants and is thus caught by s 18.

[104] The outcome of the appeal in which Müller succeeds in part and Lauer fails in part required revisiting the parties' respective costs liability. The cross-appeal therefore became moot in any event.

Order

1. The appeal succeeds in part. The judgment and order of the High Court are set aside and replaced by the following:

‘The plaintiff's claim on claim one is dismissed, with costs, including costs of instructed counsel where engaged.’

2. The appeal against the High Court's order in respect of claim three (loan for purchase of animals) is dismissed, with costs, consequent upon the employment of one instructing and one instructed counsel.

DAMASEB DCJ

SHIVUTE CJ

HOFF JA

APPEARANCES

APPELLANTS:

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RESPONDENT:

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