REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No: 09/35913

In the matter between:

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| LOMBARD INSURANCE COMPANY LIMITED | Applicant |
| and | |
| FIRSTRAND BANK LIMITED | First Respondent |
| ABSA BANK LIMITED | Second Respondent |
| DAWID VAN DER MERWE N.O. | Third Respondent |
| GUNVANTRAI MUGGAN N.O. | Fourth Respondent |

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JUDGMENT

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MEYER, J

[1] The applicant, Lombard Insurance Company Limited ('Lombard') - primarily by means of the *condictio ob turpem vel iniustam causam* – claims payment of certain funds that were transferred to the first respondent, Firstrand Bank Limited ('FNB'), and part of such funds thereafter to the second respondent, ABSA Bank Limited ('ABSA'), and credited to accounts which Lombard's former employee, Ms Kasturi Manickum ('Manickum') held at these banks.

[2] The factual basis of Lombard's claim is essentially common cause or not seriously disputed. Lombard is a registered short-term insurer and licensed financial services and credit provider. Its principal business is the provision of guarantee policies for its clients. This involves Lombard guaranteeing its clients' due performance of contractual obligations to third parties, particularly in the construction industry. On occasion Lombard requires that it receive and hold cash from a client as security for the provision of a guarantee. The cash collateral is held in a designated account and is repayable to the client once the guarantee has served its purpose and there are no outstanding obligations which might be incurred by Lombard in terms thereof. When the client wishes to be repaid the cash collateral, it instructs Lombard in writing to effect an electronic transfer of the funds to a specified account.

[3] On Thursday, 2 August 2007, Manickum, who was a financial accountant and the 'second-in-command' of Lombard's finance department, created a letter purporting to be a request from one of the applicant's clients, KNS, to repay its cash collateral. This she did in circumstances when the repayment thereof was neither requested by nor due to KNS. Manickum prepared a form that is utilised by Lombard for the authorisation and processing of an electronic funds transfer to a client's specified account pursuant to the purported request. She created the signature of a senior underwriter who was required to sign the form and she was able to obtain the other signatures and approvals required for such electronic funds transfer by virtue of her position, level of authority, and the trust placed in her. She created her own FNB cheque account as a payee on Lombard's computer banking system with 'KNS' described as the account holder. She caused an amount of R2, 114, 947.44 to be electronically transferred from Lombard's Standard Bank current account to FNB to

the credit of her FNB cheque account, which credit extinguished its overdrawn debit balance of R57, 013.42 and converted it into a credit balance of R2, 057, 934.02.

[4] Lombard's averment that Manickum *inter alia* committed fraud and theft '... in bringing about the original unlawful electronic transfer of funds from the applicant's bank account into her own bank account ...' is admitted by FNB and not disputed by ABSA.

[5] On Friday and Saturday, 3 and 4 August 2007, Manickum effected a number of further electronic funds transfers from her FNB cheque account to her FNB home loan account, which account was credited with two amounts of R500, 000.00 each; to her FNB credit card account, which account was credited with an amount of R100, 000.00 thereby converting its debit balance of R39, 775.74 into a credit balance of R60, 224.26; to ABSA to the credit of her ABSA cheque account, which account was credited with amounts of R250, 000.00 and of R150, 000.00 thereby converting its overdrawn debit balance of R47, 440.68 into a credit balance of R352, 559.32, and this account was thereafter credited with a further amount of R150, 000.00; and to ABSA to the credit of her ABSA credit card account, which account was credited with an amount of R50, 000.00 thereby converting its debit balance of R43, 275.53 into a credit balance of R6, 724.47. Other electronic funds transfers were also made from her FNB and ABSA cheque accounts that are not presently relevant. The continued use of her FNB and ABSA credit cards soon extinguished the credit balances on those accounts.

[6] Lombard discovered the theft and fraudulent transfer of funds from its Standard Bank current account as well as the various transactions on Manickum's FNB and ABSA accounts on Monday, 6 August 2007. All Manickum's FNB and

ABSA accounts were frozen at Lombard's request during the course of that day. At the time when they were frozen, the credit balance on Manickum's FNB cheque account was R352, 954.45, and on her ABSA cheque account R220, 392.21.

[7] Lombard launched an urgent application for the sequestration of the estate of Manickum and that of her husband on 13 August 2007. It was placed under provisional sequestration by an order of this court on Friday, 17 August 2007, and under final sequestration on 4 December 2007. The third and fourth respondents were appointed as joint trustees in the insolvent estate of Manickum and that of her husband ('the joint trustees'). They opened insolvent estate accounts at ABSA. The amount of R224, 391.38, which was the then credit balance on Manickum's frozen ABSA cheque account, was credited to the ABSA insolvent estate account on 7 November 2007. Also the amount of R354, 063.63, which was the then credit balance on Manickum's frozen FNB cheque account, was transferred to ABSA and credited to the ABSA insolvent estate account on 14 February 2008. These amounts and the interest earned thereon were subsequently credited to interest bearing insolvent estate accounts at ABSA. The insolvent estate accounts are under the control of the joint trustees. They have suspended the winding up of the insolvent estate pending the outcome of this application. The joint trustees filed an answering affidavit in these proceedings in order to assist this court and they abide the decision herein.

[8] Pursuant to a disciplinary enquiry, Manickum was dismissed from Lombard's employ on 21 August 2007. Lombard laid criminal charges against Manickum. It is alleged that she left South Africa and that steps are being taken to trace her in the United Kingdom.

[9] The relief which Lombard seeks against FNB, ABSA, and the trustees in the alternative, is payment of part of its loss of R2, 114, 947.44. It seeks payment of such stolen funds as are traced to each of them. It claims from FNB payment of the amount of R1 million, which is the amount that was credited to Manickum's FNB home loan account, and the amount of R96, 789.16, which was the total of the debit balances on Manickum's FNB cheque and credit card accounts that were extinguished when these accounts were credited with the amounts of R2, 114, 947.44 and R100, 000.00 respectively. It claims from ABSA payment of the amount of R90, 716.21, which was the total of the debit balances on Manickum's ABSA cheque and credit card accounts that were extinguished when these accounts were credited with the amounts of R400, 000.00 and R50, 000.00 respectively. It claims from ABSA, or from the trustees in the alternative, payment of the amount of R573, 346.66, which represents the respective credit balances in the amounts of R352, 954.45 and R220, 392.21 on Manickum's FNB and ABSA cheque accounts on 6 August 2007 after they had been frozen. Lombard does not claim the amounts that were paid out to third parties from Manickum's cheque accounts or through credit card transactions.

[10] The *condictio ob turpem vel iniustam causam* is an enrichment claim. The general requirements for any claim based on enrichment are that the defendant or respondent must be enriched, the plaintiff or applicant must be impoverished, the enrichment of the defendant or respondent must be at the expense of the plaintiff or applicant, and the enrichment must be unjustified or *sine causa*.[1] The distinctive rules applying to the *condictio ob turpem vel iniustam causam* are that the ownership

1 *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482, paras [15] and [20]; *Watson NO & Another v Shaw NO & Others* 2008 (1) SA 350 (C), para [11].

of the property must have passed with its transfer and that the transfer must have taken place under an illegal agreement. Turpitude is required on the part of the defendant or respondent, and the plaintiff or applicant must 'come to court with clean hands', subject thereto that '... participation by the claimant in the alleged turpitude might, in circumstances where justice called for it, be overlooked ...'.[2]

[11] FNB contends in its answering affidavit that the case made out by Lombard is that the misappropriated funds 'belonged' to Lombard's client, KNS, and not to Lombard. This contention is founded on a misinterpretation of the facts. Lombard's case is that the funds in which it's client, KNS, had an interest were held in a separate interest bearing account whilst the money stolen by Manickum came from Lombard's current account at Standard Bank. The fact that Manickum created a document in the name of KNS does not give KNS any interest in the funds that were transferred from Lombard's Standard Bank current account. There is no suggestion on the papers that anyone other than Lombard had an interest in or could assert a claim to the funds that were held in Lombards current account.[3]

[12] Lombard suffered a loss of R2, 114, 947.44 as a result of its Standard Bank current account being debited with that amount in consequence of the wrongful actions of Manickum. When payment of that amount was made to Manickum's bank, ownership of the money passed to FNB, and ownership of part of the money in turn passed from FNB to ABSA when Manickum caused funds to be transferred from her

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2 *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA), paras [19] – [22]; *The Law of South Africa* 'Enrichment' vol 9 2nd Ed para 215.

3 Compare: *Joint Stock Co Varvarinskoye v ABSA Bank Ltd and Others* 2008 (4) SA 287 (SCA), para [31].

FNB current account to her ABSA accounts. Transfer of ownership of the money happened, in the words of Schutz JA in *First National Bank of Southern Africa Ltd v Perry NO and Others*,[4] because of the 'inevitable' rule '... that, once money is mixed with other money without the owner's consent, ownership in it passes by operation of law.' Lombard does not assert ownership of the money in the hands of FNB and ABSA. Instead it has shown that the credits in issue that were effected to Manickum's accounts at FNB and at ABSA emanated from the funds that Manickum caused to be transferred from its Standard Bank current account. In terms of the draft liquidation and distribution account, the relevant funds under the control of the trustees are described by them as '[r]ecovery of stolen monies'. Lombard has succeeded in tracing the money back to the stolen money and to identify it as a 'fund' of stolen money in the hands of FNB, ABSA, and part of the funds under the control of the trustees.[5] This is sufficient for the application of the *condictio ob turpem vel iniustam causam*.

[13] The *causa* of the transfer of the money to FNB and also to ABSA was the unlawful actions and instructions of Manickum. The underlying illegality of the transfers is self-evident. Equally apposite to the facts of this case is the following *dictum* of Schutz JA in *Perry (supra)*:[6]

> 'The *condictiones sine causa specialis* and *indebiti* are both based on the factual absence of a cause, in the first instance simply because there is none, in the second because of a mistaken belief that there is one. By contrast, in the case of the *condictio ob turpem*

4 2001 (3) SA 960 (SCA), para [16].

5 *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA), para [18].

6 Para [23].

> *causam* there is a cause. The trouble with it is that it is unlawful. The law does not recognise it as a valid means of conferring title. In that sense a *causa* is absent in that case too.'

[14] There is no turpitude on the part of Lombard. It came to court with clean hands. FNB's allegations that negligence and recklessness on the part of Lombard and its employees and the lack of proper security mechanisms in place to avoid fraud and theft enabled Manickum to bring about the electronic transfer of funds do not establish dishonourable conduct on Lombard's part. In any event, this is said to be the first instance of its kind in the almost twenty years of Lombard's existence. The 'hindsight' conclusion of Lombard's managing director that '... Manickum took advantage of her senior position in the finance department, the authority level assigned to her in the computer banking system and the trust vested in her, in order to effect the illegal transfer' is supported by the common cause or undisputed facts. 'Misplaced confidence in one person is not synonymous with negligence towards another.'[7]

[15] The requirement of turpitude on the part of a defendant or respondent in the position of FNB and of ABSA was thus formulated by Schutz JA in *Perry (supra)*:

> 'It is not only the person who receives with knowledge of illegality but also one who learns of it while he is still in possession.'[8]

and

> 'Whereas ordinarily the existence of enrichment is judged at the time of institution of action, if the defendant becomes aware that he has been enriched *sine causa* at the expense of another, his liability is reduced or extinguished only if he is able to prove that the diminution or loss of his enrichment was not due to his fault: *The Law of South Africa* vol 9 first

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7 *Per* Steyn JA in *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A), at p 428.

8 Para [25].

> reissue para 76 at 63. This rule that the enriched party may not with impunity part with the goods after learning of the impoverished party's claim supports the conclusion reached earlier that once he gains such knowledge he is liable to the extent of his enrichment, that he thereafter, so to speak, holds for the benefit of the original owner.'[9]

[16] Also relevant is the following *dictum* of Streicher JA in *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening)*:[10]

> 'If the bank, upon the instructions of its customer, without knowledge of the customer's defective title, transfers or pays the amount mistakenly received to a third party, an enrichment action against the bank would not succeed.'[11]

[17] The defence that FNB and ABSA had no knowledge that the funds were stolen at the time when each received the funds and credited Manickum's accounts with the amounts thereof, only reduces their respective liability to the extent that they, upon the instructions of Manickum, transferred or paid out amounts to third parties during the period before they learned of the illegality. Lombard, however, does not seek to hold the respondent banks liable for amounts paid out or transferred by them to third parties before they became aware of the illegality.

[18] FNB and ABSA learned of the illegality on 6 August 2007 while each bank was still in possession of substantial amounts that are traced back to the money that Manickum caused to be transferred from Lombard's Standard Bank current account. Such knowledge acquired by each bank is sufficient to satisfy the requirement of turpitude on each one's part and they are liable to the extent of their enrichment.

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9 Para [29].

10 2005 (1) SA 441 (SCA).

11 *Per* Streicher JA, para [28]

Once it is proven, as it has been in this case, that FNB and ABSA received the stolen money, the *onus* that they were not in the end enriched by the receipts rest on them.[12]

[19] ABSA contends that it received payment as a third party and that it was FNB, and not ABSA, which was enriched at Lombard's expense. This contention is clearly wrong. Before it became aware of the illegality, FNB, upon Manickum's instructions, transferred part of the amount which it received to ABSA to the credit of Manickum's ABSA current and credit card accounts. FNB is not liable to the extent that it so parted with part of the money before it gained knowledge of the illegality. ABSA learned of the illegality while it was in possession of the funds that are claimed from it in these proceedings. Once it gained such knowledge it became liable to the extent of its enrichment. The contention that only the first transfer of stolen funds and not successive transfers between different banks and different accounts can give rise to an enrichment claim defies logic and is irreconcilable with the relevant legal principles to which I have referred.

[20] FNB and ABSA had already credited the relevant accounts and their debit balances were extinguished, and, in the case of the FNB home loan account, reduced, by the time they learned of the illegality. FNB contends that it was not enriched at Lombard's expense to the extent that the transfer of the funds to the credit of Manickum's FNB current account and part thereof later to the credit of her FNB credit card account and FNB home loan account extinguished or reduced the debit balances on these accounts. The contention is that Manickum's indebtedness to FNB was in each instance extinguished as a consequence of the payments

12 *ABSA Bank Ltd v Standard Bank of SA Lyd* 1998 (1) SA 242 (SCA), at p 252F – G; *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA), para [18].

received by it on these accounts, that FNB '... forfeited any claims against Manickum for such amounts', and that the financial position of FNB did not change as a result thereof since the credits were offset against the debits. ABSA also contends that the credits made to Manickum's ABSA accounts discharged her outstanding debts that were owed to ABSA and that it was accordingly not enriched to the extent that the debts owed to ABSA were extinguished.

[21] Counsel referred to *ABSA Bank Ltd v Standard Bank of SA Ltd*[13] where a similar argument was raised before the Supreme Court of Appeal. Payment in that matter was made on a forged cheque to the collecting bank, ABSA, for the credit of a certain Horn's overdrawn account thereby leaving it in credit. The question was whether ABSA had been enriched in the amount by which the payment had extinguished the debit balance that Horn owed it on the overdraft account. Van Heerden, DCJ said this:

> 'The cornerstone of the submission is the premise that the amount of the cheque had been unconditionally allocated to Horn's account. If the premise is unsound, the edifice which counsel endeavoured to construct on it comes tumbling down.'[14]

The Supreme Court of Appeal found that in terms of the agreement between ABSA and Horn the proceeds of the cheque were only provisionally credited to Horn's account on condition that the entry would only become final if it did not transpire within the clearing period that payment had been irregularly made by the respondent. It transpired during the clearing period that the signatures on the cheque had been forged and it was found that the provisional credit never became a final one.[15] Van Heerden, DCJ concluded by saying:

13 1998 (1) SA 242 (SCA), at p 251G – H.

14 At p 252A.

> 'It was rightly common cause that the appellant bore the *onus* of proving that it had not been enriched by the respondent's payment. In my view, the appellant failed to prove that had it sued Horn he could have been heard to say his overdraft had been extinguished as a result of the payment.'

[22] FNB seeks to distinguish the payment or transfer of funds that it received from the payment that was made to ABSA in *ABSA v Standard Bank* on the basis that the crediting of Manickum's FNB accounts were not provisional entries and that they did not arise '... from a cheque handed to the respondent as a collecting banker.' But, an instance where a cheque has been deposited into a client's account and the resultant credit entry treated as provisional subject to a condition such as the one considered in *ABSA v Standard Bank*, is only one of several examples where a credit may validly be reversed. Another example is where the client came by the money by way of fraud or theft.[16] The submission that '... once a bank has unconditionally credited a customer's account with an amount received, the bank is required to pay the amount to the customer on demand, even where the customer came by such money by way of fraud or theft ...' was rejected in *Nissan (supra)* and it was held that:

> 'If stolen money is paid into a bank account to the credit of the thief, the thief has as little entitlement to the credit representing the money so paid into the bank account as he would have had in respect of the actual notes and coins paid into the bank account.'[17]

15 At p 252B – G.

16 *Nedbank v Pestana* 2009 (2) SA 189 (SCA), paras [8] and [9].

17 *Per* Streicher JA, para [23].

[23] Neither FNB nor ABSA has succeeded in establishing that either of them was not in the end enriched by the amounts which are presently claimed from them. Neither bank has set up facts that, had either sued Manickum, she could have been heard to say that her FNB or ABSA overdraft accounts or the debit balances on her FNB and ABSA credit card accounts had been extinguished or that her FNB home loan account had been reduced as a result of the payments. Manickum, on the accepted or undisputed facts, came by the money by way of fraud or theft and she has no entitlement to the amounts credited to her various FNB and ABSA accounts that are presently in issue. The credits under consideration may validly be reversed by FNB and by ABSA, whether or not they reduced or extinguished debit balances or brought about or increased credit balances. The joint trustees to Manickum's insolvent estate did not acquire any greater right to the funds that were credited to the ABSA insolvent estate accounts than Manickum ever had,[18] and she had none. The right to the funds accordingly does not form part of the insolvent estate of Manickum and that of her husband. No one other than Lombard has been shown to be entitled to these funds. The credits to the ABSA insolvent estate accounts may validly be reversed by ABSA.

[24] My conclusion is that the *condictio ob turpem vel iniustam causam* applies. Lombard is entitled to the recovery of the amounts which it claims from FNB and from ABSA in terms of its notice of motion and to interest thereon as was agreed between the parties in the event of Lombard being successful. My conclusion makes it unnecessary to consider Lombard's contentions relating to the provisions of s 4 of the Prevention of Organised Crime Act 121 of 1998.

18 *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA), para 41.

[25] In the result, the following order is made:

1. The first respondent is directed to pay to the applicant the sum of R1, 096, 789.16 together with interest on that sum at the rate of 6% per annum from 15 December 2008 until the date of payment.

2. The second respondent is directed to pay to the applicant the sum of R664, 062.87 together with interest on R90, 716.21 of that sum at the rate of 6% per annum from 15 December 2008 until the date of payment and on the balance of that sum the interest that in fact accrued thereon until the date of payment.

3. The first and second respondents are to pay the applicant's costs of the application.

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P.A. MEYER
JUDGE OF THE HIGH COURT

8 February 2011