REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Appeal No: A 5060/10

Date:24/02/2012

In the matter between:

ELEANOR MARY DUNCAN t/a INYATI FINANCIAL SERVICES Appellant

and

BENSURE FINANCIAL CONSULTANTS (PTY) LTD Respondent

JUDGMENT

MEYER, J

[1] The respondent instituted action against the appellant in this Division for the repayment to it of an amount of R250, 000.00, which, it is common cause, was received by her on 28 January 2008. The court *a quo* granted judgment in favour of the respondent and with its leave the appellant now appeals.

[2] The respondent forms part of the Bensure group of companies. Bensure Holdings Ltd ('Holdings') is the holding company. Bensure Insurance Underwriters Ltd

('BIU') is *inter alia* a short-term health insurance underwriter. One of its insurance products is known as Medplus health insurance ('Medplus'), which is a so-called 'top-up' health insurance. Bensure Management Service (Pty) Ltd (BMS) is a management company, which attended to all the administration work of BIU until Zenith Group (Pty) Ltd (Zenith) took it over. The shareholding of BMS was held by Holdings and that of BIU and of the respondent by BMS. BIU operates its medical insurance business through the appointment of independent intermediaries or brokers. BMS, and later on Zenith, *inter alia*, on behalf of BIU made payment to the intermediaries or brokers, including the appellant, of the commission that they had earned.

[3] It is convenient at the outset to refer to the witnesses who testified in the court *a quo*. The appellant testified and she called as witnesses Messrs Gavin Wagenaar, Robert Duncan, James Potgieter, Brent Navias, and Misses Christine Miller and Dawn Davids. Mr Wagenaar was a director of BIU from 1 November 2001 until 29 November 2007, of BMS from 27 June 2005 until 1 March 2008, and of the respondent from sometime during 2005 until 1 March 2008. He was the managing director of BMS at all times relevant to the present dispute between the parties. Mr Robert Duncan occupied various positions during the twelve year period that he had been involved with the Bensure group of companies, *inter alia* as executive director of BMS and as executive and later on managing director of BIU. His position was that of financial consultant to the Bensure group of companies during the period presently relevant and he was, *inter alia*, responsible for legal, technical and actuarial matters. It appears from the unchallenged evidence of Mr Wagenaar that Mr Duncan was also in charge of overseeing the services rendered to the Parmed Medical Scheme ('Parmed') members.

Medplus was marketed to the members of Parmed. Mr James Potgieter, who is a chartered accountant registered with the South African Institute for Chartered Accountants and with the Independent Board of Auditors, was appointed by BMS as a financial consultant to the Bensure group of companies during 2006 or 2007, and such position was occupied by him throughout the period which is presently relevant. He was at all material times the group accountant. Mr Brent Navias has been employed by BMS since 2001. His evidence does not assist in the determination of the issues between the parties and nothing more need to be said about him. The appellant acted as intermediary or broker for BIU from 1 February 2007 until 30 January 2009. Ms Christine Miller acted as intermediary or broker for BIU from 1 March 2007 until 31 January 2008, except for the period 1 until about 19 September 2007. Ms Dawn Davids has been the Principal Officer of Parmed since January 2006. The only witness called by the respondent is Mr Nicholas Cunningham-Moorat. He was '… tasked in late 2007 to start looking into the affairs of the (Bensure) group of companies'. He became a director of Zenith.

[4] It is common cause that BIU appointed Ms Christine Miller from 1 March 2007 'for an initial period of six months' to manage the Parmed members at a servicing commission of R7, 500.00 per month in terms of a written independent intermediary agreement that had been concluded between her and BIU on 23 February 2007. This position entailed the management of Medplus members who were also Parmed members ('Parmed / Medplus members'). It is also common cause in terms of the pleadings as read with the exchange of trial particulars and admissions recorded in the pre-trial minute that BIU appointed the appellant as an intermediary to market its health

insurance products and that she rendered such intermediary services to BIU pursuant to a written agreement that was concluded between her and BIU on 23 February 2007, which agreement was deemed to have commenced on 1 February 2007 and of six months' duration, and a further written agreement that they concluded on 17 August 2007, which agreement was deemed to have commenced on 1 August 2007 and terminable *inter alia* upon thirty days written notice given by either party to the other ('the written agreement dated 17 August 2007').

[5] It is also undisputed in terms of the pleadings as read with the exchange of trial particulars and admissions recorded in the pre-trial minute that the written agreement dated 17 August 2007 was subsequently amended by means of a written addendum in terms whereof BIU additionally appointed the appellant to manage all Parmed / Medplus members and in terms whereof it was agreed that the appellant would receive all commissions due in relation to those members ('Parmed commission'). The written addendum on which the appellant relies (annexure 'B' to her plea) records its effective date as 1 August 2007. The one admitted by the respondent is identical to the one on which the appellant relies, except for its effective date, which is recorded as 1 December 2007, and the witnesses who witnessed the signatures of the parties.

[6] The respondent's claim as formulated in its particulars of claim is that the payment by the respondent '… was unuathorised and ultra vires …', that the sum of R250 000.00 was neither due nor owing to the appellant, and that the appellant was enriched unjustly by the amount of the payment at the expense of the respondent. The appellant, in terms of her plea as amplified by her trial particulars, denied that the sum of R250 000.00 was not due or owing to her. She averred that she had become entitled

to the payment of Parmed commission for all the services rendered by her to the Parmed / Medplus members during the period 1 August 2007 to January 2008, pursuant to the agreement dated 17 August 2007 and the addendum thereto. She averred that the payment of the Parmed commission earned by her during that period was in arrears and that the payment of R250, 000.00, which was made to her on 28 January 2008, constituted a single payment of such arrear Parmed commission that had been due and owing to her. In her trial particulars the appellant averred that she had requested a breakdown from the respondent of how the amount of R250, 000.00 was calculated, but that such was not provided.

[7] The trial judge held that the addendum on which the appellant relied '… for the payment made to her, was created by her and her husband in order to find a basis for the claim in her plea that she was entitled to the R250, 000.' It was also held that the respondent '… was used to perpetuate a fraud…' and that the 'R250, 000.00 that it would have otherwise paid to BMS was misappropriated.' A consideration of the totality of the evidence leads me to disagree with these findings for the reasons that follow.

[8] It is trite that a party wishing to rely on fraud must plead it and prove it clearly and distinctly. See: *Courtney-Clarke v Bassingthwaighte* 1991 (1) SA 684 (Nm), at 689. The respondent did not raise fraud by way of replication. The trial judge held that the issue of fraud was fully canvassed at the trial. I am unable to agree with this finding. Notably, while Mr Wagenaar was cross-examined about the various aspects, which the respondent's counsel put to him point to the fraud that he, the appellant and her husband, Mr Duncan, had perpetrated '… to defraud these companies out of the sum of R250, 000.00 …', he *inter alia* responded by saying that counsel was making '…

allegations about fraudulent transactions that was not [his] understanding what the case was about' and that '…no request was made to [him] to produce evidence or emails substantiating what [he] was saying.' There is, in my view, no reason to doubt the correctness of his evidence in this regard. The case as pleaded by the plaintiff is not based on fraud. The respondent *inter alia* relied on a selection of e-mail correspondence and the construction placed by Mr Cunningham-Moorat on the contents thereof in support of the respondent's averments of the commission of fraud by the appellant, Mr Duncan, and Mr Wagenaar.

[9] The perpetration of fraud was, in my view, in any event not proved clearly and distinctly. An important issue which the court *a quo* was required to decide is whether, in terms of the written agreement dated 17 August 2007 as amended by the applicable addendum, the services of the appellant had been engaged to manage the Parmed / Medplus members from 1 August 2007, or only from 1 December 2007. Central to the respondent's contentions that the appellant, Mr Wagenaar, and Mr Duncan defrauded BMS of the sum of R250, 000.00, is the respondent's contention, as appears from the evidence of Mr Cunningham-Moorat, that the initial period of Ms Miller's appointment to manage the Parmed / Medplus members was renewed and that the transition of their management from Ms Christine Miller to the appellant only occurred in February 2008 as contended for by the respondent, and not during August 2007, as contended for by the appellant. The evidence of Ms Dawn Davids is important. She was the only independent witness not embroiled in the personal conflicts inherent in this matter. I have mentioned that she has been the Principal Officer of Parmed since January 2006. Her evidence, as will be seen below, corroborates that of the appellant, Ms Miller, Mr

Wagenaar, and Mr Duncan in material respects and is consistent with the employment of the appellant to manage the Parmed / Medplus members with effect from 1 August 2007. The evidence of the appellant and her witnesses does not correspond in all respects, and it would be surprising if it did. In broad outline, however, they corroborate each other in material respects. Inferences drawn by the trial judge and findings made about the probabilities and improbabilities do not take account of all the evidence and by necessary implication involved a rejection of material parts of the evidence of Ms Davids and of other pieces of duly corroborated evidence without it being clear why such evidence was rejected. See: *Louwrens v Oldwage* 2006 (2) SA 161 (SCA), para [14].

[10] It is, in my view, also clear from a reading of the record of the proceedings that the evidence of Mr Cunningham-Moorat was not satisfactory and reliable in various material respects. He, as I have mentioned, was '… tasked in late 2007 to start looking into the affairs of the group of companies'. He was not a director of BIU or of BMS during the period relevant to these proceedings nor was he involved in the appellant's appointment or re-appointment as an intermediary for BIU or in the expansion of her duties insofar as the Parmed / Medplus members were concerned or in the discussions relating to the payment in issue. He became a director of BIU on 1 May 2008. His evidence on certain material aspects is based on supposition or conjecture and in some material respects in conflict with admitted facts and even self-contradictory. One detects a bias on his part to establish the respondent's contentions of fraud. Documents that are inconsistent with the respondent's contentions of fraud – particularly the addenda in issue; a letter dated 21 August 2007 that confirms the

appellant's appointment to service or manage the Parmed / Medplus members as from 1 August 2007; and a letter dated 30 August 2007 from Ms Miller to Mr Duncan and to the appellant - were dismissed by Mr Cunningham-Moorat as fraudulent or as highly suspicious on grounds that, in my view, do not justify any such inference within the context of the totality of the evidence and the general probabilities.

[11] I now propose to elucidate my findings and to discuss the probabilities with reference to the chronology of pertinent events that unfolded during the relevant period. See: *Stellenbosch Farmers' Winery Group Ltd and Another v Martell at Cie and Others* 2003 (1) SA 11 (SCA), paras [5] – [7].

[12] It appears from the unchallenged evidence of Ms Davids, of Mr Wagenaar and of Mr Fourie that the previous Principal Officer of Parmed, Mr Solly Fourie, was removed from that office when it came to light that he also acted as broker in respect of Medplus and that he received commission from BMS. Ms Davids was appointed in his stead during January 2006. Mr Fourie's appointment as broker in charge of servicing or managing the Parmed / Medplus members was also summarily terminated and Ms Christine Miller was initially appointed in his stead.

[13] Ms Davids testified that Parmed had a responsibility to ensure the continued servicing of Parmed members as far as Medplus was concerned since it was initially introduced to them through its former Principal Officer. She was concerned about the continued servicing to the Parmed / Medplus members, but she received assurances from Mr Duncan '… that Bensure was still committed to providing services to Parmed members and … that they would have a broker or consultant that would be able to

assist in terms of servicing and that was … how (she) got to meet Ms Christine Miller. Mr Duncan confirmed that discussions were held between him and Ms Davids at the beginning of 2007 '… as a result of an improper arrangement that existed between Bensure and the then Principal Officer of Parmed Medical Scheme who received commissions from Bensure which arrangement came to an end in 2006.'

[14] Ms Christine Miller testified that she had been appointed by BIU for an initial period of six months as from 1 March 2007 until 31 August 2007 to manage the Parmed / Medplus members as a part-time function since she had at that time been full-time employed by a company called Blue Zone in the capacity of its Western Cape Regional Manager. The duties which she performed in connection with the Parmed / Medplus members at the time were '…to service existing clients …' in the Western Cape area. The appellant testified that she initially served in a sales function in marketing Medplus. She also assisted her sister, Ms Christine Miller, who was appointed 'part-time' to service and maintain existing Parmed / Medplus members in the Western Cape, in Gauteng since Ms Miller lived in Cape Town and was unable to travel to Johannesburg. Ms Davids testified that she had gone on maternity leave from 1 July until 1 September 2007. Prior to her going on maternity leave Ms Christine Miller was the key contact person insofar as the servicing or management of the Parmed / Medplus Scheme members was concerned in the Western Cape. Ms Davids and Ms Miller had two meetings and they also spoke telephonically during 2007 before Ms Davids had gone on maternity leave. Ms Davids testified that the appellant played a mere secondary role during this period.

[15] Mr Wagenaar testified that during about May 2007 he was alerted to the fact that Ms Christine Miller was not performing the functions that were required of her in terms of servicing the Parmed / Medplus members. She did not have sufficient time or resources to service them. The matter was discussed between him and Mr Duncan. A decision was made to appoint the appellant in the stead of Ms Christine Miller. Mr Duncan testified that due to a reduction in the number of Medplus policy holders who were members of the Parmed Medical Scheme and the little or no service or attention they were receiving from Bensure at the time, it was decided to appoint a dedicated experienced person to sustain and conserve the policy holder base and attempt at the same time to increase the number of Parmed / Medplus policy holders, which decision resulted in the appointment of the appellant in August 2007. The appellant testified that she was approached by Messrs Wagenaar and Duncan to service Parmed on a fulltime basis. She was issued with the letter dated 21 August 2007, which confirmed her appointment as from 1 August 2007. Her evidence in this regard is corroborated by that of Mr Wagenaar, who testified that the letter was written to the appellant in order to advise her that she had been appointed to service the Parmed / Medplus members.

[16] The letter dated 21 August 2007 is from BMS and it was signed by its managing director, Mr Wagenaar. Reference is made to recent discussions between them and to an agreement that BMS had appointed the appellant 'to service existing and future Medplus members who are current or past members of Parmed Medical Scheme' and for the appellant 'to receive full commission due in respect of these members.' Mr Cunningham-Moorat *inter alia* testified that this letter was blatantly fraudulent and an *ex post facto* attempt at validating the addenda and the payment of the amount of R250

000.00, '…a flagrant attempt to justify what was done.' Mr Cunningham-Moorat supported the respondent's contentions of fraud by testifying, and this is common cause, that the letterhead used had been withdrawn from circulation in late January 2007 at the direction of Mr Wagenaar, because it was incorrect. The company registration number reflected on it had an error and the letterhead reflected Mr James Potgieter, who at the time was no longer a director, as one. Mr Cunningham-Moorat further supported the respondent's contentions of fraud by referring to two identical letters with only the signature of Mr Wagenaar differently positioned on each. Apart from the explanations proffered by Mr Wagenaar when he testified being plausible - that there were about 20 000 of the incorrect letterheads in circulation and his conclusion was accordingly that the letters under consideration had been typed on letterheads that had not been withdrawn in accordance with his instructions, and that each of the two letters might have been originally signed by him in order to retain one for record purposes and to furnish one to the recipient thereof – it is, in my view, incomprehensible how two identical letters on incorrect letterheads and each one originally signed by Mr. Wagenaar, can support the respondent's contentions of fraud.

[17] When Mr Cunningham-Moorat testified he pointed out that the appointment in terms of this letter was between BMS and the appellant whereas the appointment in terms of the addenda was between BIU and the appellant. BMS, according to Mr Cunningham-Moorat, had no authority 'to bind BIU in any way' or 'to contract on behalf of BIU.' It is, however, stated in the letter that the appellant's appointment was in accordance with the Medplus Master Policy issued to BMS by BIU and that '[i]n terms of this Policy BMS allocates servicing resources to Medplus members insured under the

Policy.' The contention made by Mr Cunningham-Moorat on behalf of the respondent has no value without first having insight into the terms of the Medplus Master Policy. The existence of the Medplus Master Policy, however, was questioned when Mr Wagenaar was cross-examined. He, however, insisted that it existed. He testified that it was issued by BIU to BMS as the administrator of its Medplus product range and that it, to the best of his recollection, *inter alia* '… provided for the administration and recruiting of brokers and payment of commission to brokers …'. The evidence of Mr Duncan is that he personally assisted in the drafting of the Master Policy and that it existed. He testified that in terms thereof BMS was appointed the administrator on behalf of BIU for premium collections, claims payment and all administrative operational functions. BMS received an administration fee for performing these functions as well as a 20% commission for health and personal accident products insured by BIU and administered by it. He testified that BIU and BMS had subsequently also concluded an administration agreement which *inter alia* governed the management of funds, such as premiums collected, investments and various other operational issues.

[18] I am of the view that the letter dated 21 August 2007 supports the appellant's version, and that of Messrs Wagenaar and Duncan, that she was appointed to manage the Parmed / Medplus members from 1 August 2007, even if Mr Wagenaar's reliance in the letter on the terms of the Master Policy were incorrect, which is a finding that cannot be made in the absence of perusing the terms thereof. If this letter was an *ex post facto* attempt at validating the addendum with effective date 1 August 2007, as was testified by Mr Cunningham-Moorat, one would have expected the letter to have mirrored the parties to the addendum.

[19] Ms Christine Miller testified that the appellant had told her during approximately late July 2007 about her appointment as from 1 August 2007, and that the appellant took over the whole Parmed base on 1 August 2007. Ms Christine Miller testified that her six month intermediary contract with BIU terminated at the end of August 2007. Blue Zone was not willing to permit her to also work for Bensure. She accordingly, by letter dated 30 August 2007, addressed to Mr Duncan and to the appellant, advised them that she would '… no longer be able to assist …' the appellant and she requested that her details be removed from the Bensure 'representative list'. I interpolate to mention that her reference to assisting the appellant in this letter is entirely consistent with her evidence that the appellant took over the whole Parmed base as from 1 August 2007.

[20] A disciplinary hearing was settled between Ms Miller and Blue Zone during the middle of September 2007, pursuant to which settlement she resigned her employment with Blue Zone. It is accordingly not surprising that Mr Cunningham-Moorat could not refer to any document that evidences the renewal of Ms Miller's initial six month appointment to manage the Parmed / Medplus members beyond the termination date 31 August 2007. Mr Nicholas Cunningham-Moorat found Ms Miller's letter dated 30 August 2007 'highly suspicious', a sentiment which I do not share with reference to the totality of the evidence and the general probabilities.

[21] Ms Davids testified that shortly after her return to work from maternity leave, which was on 1 September 2007, she had a meeting with Messrs Duncan and Wagenaar, when they *inter alia* again discussed '…the way going forward.' Ms Davids testified that she knew that they were looking at '…expanding the brand of Medplus.'

The ‘unfortunate situation’ with regard to Parmed’s previous Principal Officer was discussed as well as the stance of the Parmed Board of Trustees, which was that Parmed had a responsibility towards its members to ensure that they receive proper service insofar as Medplus was concerned. Ms Davids testified that members did not know who to contact and who the broker was at the time. She testified that Mr Duncan advised that the appellant would be taking over the role of broker for the Parmed members. In this regard Ms Davids said the following when she testified:

> ‘I think Christine had another job or something to that effect. I am not quite sure of the details but I know that she was no longer capable or able to in actual fact service the members and that Mary Duncan would in actual fact be taking over that particular role on a fulltime basis.’

Mr Wagenaar and Mr Duncan confirmed that a meeting between them and Ms Davids was held, although they estimated the date of the meeting as having been around August 2007. Mr Wagenaar testified that the appellant’s appointment was discussed at that meeting and that she would be the broker who would be liaising with Ms Davids on behalf of the Bensure group.

[22] Ms Christine Miller testified that she had a meeting with Messrs Wagenaar and Duncan on 19 September 2007, when she explained to them that she had lost her position at Blue Zone and they then agreed that she could continue as before to service the Parmed / Medplus members in the Western Cape. Mr Duncan also testified about a meeting in Cape Town that was attended to by Ms Christine Miller, Mr Wagenaar and him at a time when she did not have full-time employment. He testified that she asked whether she could continue to service the Parmed / Medplus members in the Western Cape and that Mr Wagenaar made the decision that she could continue to be involved.

The appellant, in the words of Ms Miller, '… was the leader in running the business.' Ms Miller took up fulltime employment at Old Mutual as an investment consultant on 1 February 2008, and it is undisputed that her involvement in servicing the Parmed / Medplus members then finally ended.

[23] The duties and responsibilities that the plaintiff testified she had carried out since August 2007 were not challenged when she was cross-examined and support the appellant's version of her having managed the Parmed / Medplus members during the disputed period. Her evidence about the management services rendered by her in respect of the Parmed / Medplus members is also in material respects corroborated by that of Ms Davids. Ms Davids testified that the appellant *inter alia* flew down to Cape Town to meet her, maintained regular contact with her as 'the corporate client', kept her informed and provided her with information regarding Medplus, of communications that were going out to members and communications between the appellant and Parmed members, provided her during November 2007 with a Medplus brochure with the appellant's contact details for inclusion in the Parmed's annual newsletter. Ms Davids described the services that the appellant had rendered to Parmed members as 'marketing', 'servicing' and 'maintaining a relationship' with her. In an e-mail that Ms Davids had sent to the appellant on 7 November 2007, she *inter alia* commented to her that she was '… glad that members are finally getting the service that they need …' Ms Davids testified that as far as she was concerned '…it was obviously Mary Duncan …' who was rendering the service and that 'Christine Miller was not part of it at that point in time.'

[24] The trial judge found that:

> 'It is improbable that the plaintiff would appoint the defendant to manage the Parmed base in August 2007 at a time when Miller was rendering such a service at a substantially lower commission (approximately R7 500.00 as compared to the defendant who was being paid approximately R40 000.00). This occurred at a time when the Bensure Companies were suffering a cash flow crisis. This further begs the question why the plaintiff would reinstate Christine Miller's contract in September 2007 at a time when defendant had been purportedly contracted to service the Parmed base.'

The trial judge also reached the following conclusions:

> 'The fact that Miller continued to receive the R7 500,00 per month commission for servicing the Parmed base throughout 2007 and until February 2008 coupled with the fact that Defendant did not enquire as to or demand payment of commission until February 2008 points to the likelihood that Miller was the only person contracted by BIU during the period August 2007 to February 2008 to service the Parmed base. It is highly improbable that the defendant's contract to the service the Parmed base started in August 2007 as alleged by her.'

[25] I return to the finding of the trial judge about the fact that the appellant did not enquire or demand the monthly payment of commission to her until February 2008. I disagree with the findings of the trial judge relating to the probabilities. They ignore the evidence. Ms Miller was not '… contracted by BIU during the period August 2007 to February 2008 to service the Parmed base'. The evidence establishes that she was appointed on a part-time basis to service the Parmed / Medplus members from 1 March until 31 August 2007. Ms Miller was again appointed on the same part-time basis from 19 September 2007 until 1 February 2008. The appellant was appointed on a full-time basis from 1 August 2007 to service or manage the Parmed / Medplus members until her employment was terminated on 30 January 2009. The fact that Ms Miller was accommodated and re-instated in a part-time position at a nominal monthly remuneration in comparison to that which the appellant earned, does not, in my view, in any way detract from the account of the appellant and her witnesses on the disputed

issues and does not establish any probability in favour of the respondent's contentions. It is – especially in the light of the importance of the Parmed business to BIU and BMS, which is a fact that also filters through the evidence of Mr Cunningham-Moorat, and the assurances that had been given to Ms Davids relating to the management of the Parmed / Medplus members - improbable that the position of managing the Parmed / Medplus members would have been left vacant for an indefinite period from 1 September 2007 when Ms Miller's initial six month intermediary contract had ended, and probable that the appellant had already been appointed in the position of Ms Miller as from 1 August 2007. The evidence also fully explains the discrepancy between the rate of commission paid to Ms Miller and that paid to the appellant. Ms Miller was appointed part-time. The level and quality of management services rendered by her made it necessary to appoint the appellant, who was appointed full-time, and who turned out to render excellent services. BIU continued to employ the appellant in that position at the same rate of commission until 30 January 2009.

[26] The appellant testified that she had not been paid the Parmed commission that had been due to her since August 2007. She had been aware that Bensure experienced financial shortages or difficulties at the time. The financial difficulties experienced by particularly BMS at the time are undisputed. Mr Fourie testified that there were '…critical cash flow shortages…'. Commissions owed to brokers had not been paid on time. Also, it is undisputed that the services of Mr Fourie as Financial Consultant were *inter alia* obtained to assist with the cash flow situation. Mr Cunningham-Moorat also testified that BMS '… was in a cash flow crisis as was the group as a whole.' Mr Wagenaar testified that although commission was due to the

appellant by virtue of the agreement with her, she had not been paid only for the reason that the Bensure group of companies was experiencing significant cash flow difficulties at the time.

[27] The trial judge referred to the fact that the appellant did not make reference to the Parmed commission for a period of 4 to 5 months, and that it was first raised by her in an e-mail dated 12 December 2007, addressed to Mr Moodley, who was the financial manager at the time, and which she also copied to Messrs Wagenaar and Duncan. She records in that e-mail that she has been servicing Parmed with Ms Christine Miller over the past six months and she states that due to a level of commitment from Ms Davids and '…her willingness for Inyathi to represent and service Medplus members within Parmed … I feel that this commitment on Dawn David's behalf *should* entitle Inyathi Financial Services to the Parmed commission, bearing in mind that no remuneration has been paid to date.' The trial judge found that

> 'This is certainly not a letter indicative of an existing contract which would of itself entitle the defendant to be paid in terms of the contract but rather seems to be a motivation as to why she should be paid for the Parmed work.'

[28] I am of the view that the contents of this e-mail do not in any way detract from the appellant's version of a contractual entitlement to remuneration when it is considered within the context of the events as they unfolded at the time. She also specifically refers to the fact that '…no remuneration has been paid to date.' It is, in my view, probable that the only reason why the appellant had not been paid and the only reason why she had not demanded the Parmed commission due to her was because of the cash flow

crisis experienced by the Bensure group of companies, and particularly BMS, at the time.

[29] Mr Wagenaar testified that it had been brought to his attention that the appellant was extremely unhappy about the fact that she had not been paid commission for a period of four or five months and that she had a 'very close relationship' with Ms Davids. Mr Fourie testified that the issue of arrear commission owed to the appellant had been reported in management meetings that he attended. Mr Wagenaar was of the view that the appellant should be paid the arrear Parmed commission that was owing to her as soon as possible. Mr Duncan testified that it was decided to pay the five or six months' arrear commission to the appellant since BMS was able to conserve the number of Parmed members through the excellent services that the appellant was rendering.

[30] Mr Wagenaar testified that an executive or management meeting was held when he consulted Mr Duncan, Mr Potgieter and Mr Sivvy Moodley, who were the only available executives at the time, about the matter of the arrear commission due to the appellant. Mr Wagenaar's evidence relating to this meeting is corroborated in material respects by that of Mr Potgieter and of Mr Duncan. It is undisputed that BMS was entitled to payment of an amount of R500, 000.00, which was held in trust by its attorneys who collected the money on its behalf. BMS's bank account, which was held at Nedbank, was overdrawn to such an extent that monies credited to it would have been absorbed by its debit balance. Funds to enable BMS to pay the appellant the arrear commission that was owed to her would accordingly not have been available to BMS if the amount of R500, 000.00 was credited to its overdrawn Nedbank account. Mr Potgieter testified that Mr Wagenaar sought his advice on whether the respondent's

FNB account could be used 'as a conduit' to receive the funds to which BMS were entitled in order for the money not to be swallowed up by its Nedbank overdrawn account. His advice was that the FNB account could be used as a conduit as long as the balance credited to that account was paid into the BMS account after 'the creditor' had been settled. Mr Wagenaar testified that it was decided that the most viable way of resolving the problem of paying the appellant her arrear Parmed commission was to instruct BMS's attorneys to pay the money into the respondent's FNB account, which was the only non-Nedbank account, and to pay the appellant the amount that was due to her on a rough calculation and to reconcile the payment to her at a later stage. Mr Duncan testified that Mr Wagenaar requested him to arrange for the funds to be paid into the respondent's account. Effect was given to the instruction of Mr Wagenaar and the sum of R500, 000.00, to which BMS was entitled, was credited to the FNB account of the respondent on 24 January 2008. On 28 January 2008, Mr Wagenaar caused the sum of R250, 000.00 to be electronically transferred from the respondent's FNB account and credited to the respondent's bank account. The balance in the sum of R250, 000.00 was transferred from the respondent's FNB account and credited to BMS's Nedbank account on 7 February 2008.

[31] I disagree with the finding of the trial judge that '… Wagenaar and Duncan could not satisfactorily explain why BMS' attorney was instructed to pay the R500, 000.00 to the [respondent].' The evidence of Messrs Wagenaar, Duncan and Potgieter on this aspect is clear and convincing and I have mentioned that they corroborated each other in material respects. It is probable that the payment of the Parmed commission owing to the appellant would have become a priority, especially in view of the fact that it had

mounted to just about six months in arrears, the excellent services that the appellant had rendered in connection with the Parmed / Medplus members, and the perceived potential harm which she could have caused to the business of BIU and of BMS by virtue of the business relationship which she had built up with Ms Davids. The unorthodox method of paying the arrear Parmed commission to the appellant does not in any way support the respondent's contentions of fraud in the light of the undisputed prevailing financial circumstances at the time.

[32] The appellant testified that when the sum of R250, 000.00 was paid into her bank account with reference 'Bensure Parmed com.', she accepted that it represented six months' Parmed commission, which she worked out was '… more or less right.' The appellant testified that she had requested the reconciliation of the lump sum payment that had been made to her, but she never received one. Her evidence in this regard is corroborated by that of Mr Duncan. Her assumption about the lump sum payment that had been made to her is supported by the payments listed in the pre-trial minute, which the respondent admitted were made to her by the companies that attended to BIU's administration on behalf of BIU, and the evidence of Mr Cunningham-Moorat and that of Mr Duncan. During his evidence in chief Mr Cunningham-Moorat testified that the appellant, in terms of the contractual arrangement between her and BIU, received between R40 000.00 and R42 000.00 a month from February 2008 for managing the Parmed/Medplus members. Mr Duncan testified that the commission that was due and payable to the appellant was an amount '… of 20% of the total premium paid which is an industry standard …' and it approximated to about R45, 000.00 per month on a simple calculation.

[33] The trial judge also found that Mr Wagenaar '… had no authority to make the electronic transfer that effected payment to the [appellant].' I disagree with this finding. The respondent in terms of the admissions recorded in the pre-trial minute admitted that a list of payments that had been made to the appellant during the period 9 March 2007 until 13 January 2009, which list included the payment in issue, had been made by '… duly authorised representatives of Bensure Management Services (Pty) Ltd and Zenith Administration Services (Pty) Ltd. When he testified, Mr Cunningham-Moorat sought to exclude the payment in issue from the respondent's pre-trial admission on the basis that he had no confirmation of authority for the payment of R250, 000.00 to the appellant. He, however, also testified that Mr Wagenaar was the only person authorised as a director at the time to be able to make transactions in that account.' The account he referred to was that of the respondent. It is common cause that Mr Wagenaar was the managing director of BMS and a director of the respondent when he caused the payment to be effected to the appellant. No other grounds, apart from the fraud upon which the respondent relied, were advanced in support of the respondent's challenge of the authority of Mr Wagenaar in both his capacities to have caused the payment to be effected to the appellant.

[34] The appellant testified that she was required to sign an addendum. Mr Wagenaar's response to the appellant's e-mail dated 12 December 2007 in which she made an appeal to be paid the Parmed commission *inter alia* reads as follows:

> 'I have discussed this at length with Rob. My suggestion is to do an addendum to the current broking contract for the appointment of Inyathi as brokers to Parmed. I don't see this as a major stumbling block but will advise should any problems arise. The current

position is that Rob will be drawing up the addendum for signature on my return on 10th of January.'

The reference to Rob in this quotation is a reference to Mr Duncan. The trial judge held that Mr Wagenaar '… was unable to proffer an explanation as to why he would suggest that an addendum be concluded if he had already addressed a valid letter of appointment to the defendant on 21 August 2007.' The inability of Mr Wagenaar to have proffered an explanation in the witness stand or to have supported the evidence of Mr Duncan on these aspects are, in my view, plausible when account is taken of their respective positions at the time. Mr Duncan testified that despite the appellant's appointment in writing during August 2007, he '… as part of an audit process to ensure that documentation and addendums or addenda to agreements were in place' was requested to prepare an addendum to the standard broker contract that had been issued to the appellant that confirmed her appointment. The addendum came into being '…as a function of the KPMG audit.'

[35] The appellant testified that she signed an addendum without properly reading it early in January 2008, after Mr Wagenaar had returned from leave. She later realised that its effective date, which was 1 December 2007, was incorrect. Upon her insistence the error was corrected and a new addendum with effective date 1 August 2007 was prepared. Mr Wagenaar also testified that the effective date 1 December 2007 was incorrect and should have been 1 August 2007, because that was the date of the appellant's appointment as the broker for the Parmed / Medplus members. Mr Duncan testified that he was responsible for the preparation of the addenda and that the effective date 1 December 2007 was incorrect and that the addendum was accordingly

redone with the correct effective date of 1 August 2007. He testified that the addendum is an addendum to the initial agreement which followed the appellant's letter of appointment dated 21 August 2007, in terms whereof she was appointed as a representative for the Parmed/Medplus members.

[36] Mr Wagenaar testified that he had signed each addendum on behalf of BIU during January 2008. He did not date his signature and the signature date 30 November 2007 was written in the handwriting of Mr Duncan, which Mr Duncan confirmed when he testified. The explanation proffered by the appellant and by Mr Duncan for the backdating of Mr Wagenaar's signature date to 30 November 2007 is that it was done at the insistence of the appellant to coincide with the date 30 November 2007, which was the date of the Medplus brochure or letter that referred to the appellant's contact details as the Parmed / Medplus broker and which brochure was included in Parmed's annual newsletter to its members. The appellant testified that she signed the addendum with effective date 1 August 2007 during January 2008, and she dated her signature 1 December 2007, which was the same date that she had dated her signature on the addendum with effective date 1 December 2007. It was an arbitrary date.

[37] I have mentioned that the appellant continued to render services as an intermediary and to manage the Parmed / Medplus members until 30 January 2009. It was common cause before the trial commenced that the contractual relationship between BIU and the appellant was initially governed by the written contract dated 23 February 2007, and thereafter by the written contract dated 17 August 2007. It was also common cause that the written contract dated 17 August 2007 was amended in terms of

an addendum that extended the appointment of the appellant also to the management of the Parmed / Medplus members. The appellant relied on the validity of the addendum that was effective from 1 August 2007, and the respondent on the one that was effective from 1 December 2007. The respondent also made the pre-trial admission that the appellant rendered services pursuant to the written agreements concluded on 23 February 2007 and 17 August 2007 and the written addendum which was effective from 1 December 2007. When he was cross-examined, Mr Cunningham-Moorat contradicted these facts and also his earlier evidence. He then maintained that both addenda were fraudulent and neither formed the contractual basis upon which the appellant managed the Parmed / Medplus members since February 2008. He testified that the appellant was paid for such services since February 2008, because of an '… ethical responsibility as a business to pay for services rendered …' and he also contradicted this contradictory evidence by testifying that the payments were made to her, because '… there was a tacit agreement in place …'

[38] The common cause fact that the signature dates of both addenda were backdated is, in my view, immaterial and does not support the respondent's initial contention that the one was fraudulent and the other one not since both were backdated to the same dates. The backdating of the addendum effective from 1 August 2007 does not support any inference or conclusion that it was done to fit into any fraudulent scheme even if it is accepted, and I make no finding in this regard, that plausible reasons for the backdating were not given by the appellant and by Mr Duncan. One would have expected the signature dates on that addendum to have been backdated to August 2007, or even a date prior to that, if it was backdated as part of a fraudulent

scheme '… to channel R250, 000.00 to [the appellant] …' as is contended for on behalf of the respondent.

[39] The trial judge also held that the appellant

> '… cannot in any event rely on the addendum because it was signed by Wagenaar at the time when he knew that he was not a director of BIU and therefore not authorised to sign.'

I disagree with these findings. It is not the prerogative of the respondent to avoid an agreement that was concluded between BMS and the appellant. Nevertheless, these issues have not been raised on the pleadings nor can it be found that they were fully canvassed at the trial. It also does not follow from the fact that Mr Wagenaar was no longer a director at the time when the addendum was concluded that he was 'therefore not authorised to sign.' The following passage in Blackman Jooste Everingham *Commentary on the Companies Act* Vol I, at p 4 – 125, elucidates the point:

> 'The power to conduct and manage the affairs of a company are vested in the first place in the members in general meeting, the directors and the managing director. Their function and powers are to be found in the articles and the Companies Act. In addition certain persons may be employed by the company in terms of service contracts to manage certain aspects of the company's affairs and these persons may also by virtue of contracts of agency be empowered to enter into certain transactions on behalf of the company. When these persons enter into transactions that fall within the scope of their powers, the company is bound.'

Furthermore, the mere fact that Mr Wagenaar knew that he was not a director of BIU at the time when he signed the addendum does not preclude the appellant to rely thereon. On the contrary, she may establish that BIU is estopped from relying on any lack of authority which Mr Wagenaar might have had at the time of concluding the addendum.

[40] The fact that the appellant did not request payment of the Parmed commission due to her on a monthly basis 'until after February 2008' must also not be considered in

isolation but with reference to the evidence of the events as they unfolded during the relevant period of time. The evidence establishes that the appellant was not paid the Parmed commission that was due to her as a result of the cash flow problems experienced by the Bensure group of companies and particularly that of BMS at the time. The estimated commission that was due to her for the six month period from August 2007 until January 2008 was paid to her on 28 January 2008. On 21 February 2008, the appellant forwarded the following e-mail to Mr Wagenaar:

> 'Hi Gavin, thank you for sorting out the Parmed broker contract and commission *due* to Inyathi Financial Services. Can I now assume the commission will be paid into Inyathi's account *on a monthly basis*.' (My emphasis)

The reference to the 'commission due' to the appellant that had been sorted out by Mr Wagenaar is probably a reference to the payment of R250, 000.00 that had been made to her on 28 January 2008. The appellant's expectation to hence forth receive her commission 'on a monthly basis' appears clearly from this communication, which she had forwarded to the then managing director of BMS. Her commission earned during February 2008 had not been paid, and it is accordingly not surprising that she, during March 2008, sent various e-mail communications in which she requested payment of the Parmed commission that was due to her in respect of the month of February 2008. I disagree with the finding of the trial judge that the fact that the appellant '… did not enquire as to or demand payment of commission until February 2008 points to the likelihood that Miller was the only person contracted by BIU during the period August 2007 to February 2008 to service the Parmed base.' The requests or demands made by the appellant for the monthly payment of the Parmed commission earned by her since February 2008 followed upon her e-mail communication of 21 February 2008 and

rather indicates that she was no longer prepared to await the payment thereof for months.

[41] In response to one such request for payment by the appellant during March 2008, Mr Wagenaar sent an e-mail to Messrs Sivi Moodley, Duncan, and Potgieter in which he states:

> 'I seem to recall a letter to Mary whereby Inyathi's appointment to Parmed was from December 2007. Rob, could you please help with this as a matter of urgency?'

Mr Duncan responded in stating:

> 'Yes, quite correct. Sivi has a copy of the contract.'

The trial judge found that:

> 'This was clearly a reference to the contract commencing on 1 December 2007. It is inconceivable that in March 2008, a mere two months after drafting an addendum which, on his version reflected the incorrect date, that Duncan did not remember that the contract had been backdated to 1 August 2007.'

Mr Wagenaar was unable to recall what he was referring to in this e-mail when he testified. He said that he might have been confused and that his reference to a letter was 'more likely' the letter of the appellant's appointment dated 21 August 2007. Mr Duncan also testified that he was confused at the time of responding to Mr Wagenaar's e-mail about the date of the appellant's appointment. Mr Wagenaar, in his e-mail, referred to a letter that he recalled and Mr Duncan, in his reply, to a contract. The words 'I seem to recall …' used by Mr Wagenaar in his e-mail support the probability of confusion on his part. I consider mere confusion on their part at the time of the exchange of these e-mails as to the date of the appellant's appointment to service the Parmed / Medplus members to be the more probable explanation in the light of all the proven facts.

[42] The person with the right of action to recover with the *condictio indebiti*, '… is he who is considered in law to have made the payment'. *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A), at 713A – C. See also: *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (AD), at 42G – J. 'A conduit through whom payment passes is … not its *recipiens*. Instead he who obtains payment by such means is.' *Per* Didcott J, Hefer J concurring, in *Phillips v Hughes; Hughes v Maphumulo* 1979 (1) SA 225 (N), at 228H – 229. These principles should equally apply to the *condictio sine causa*. See: *Agricultural Research Council v Bredell & Ors* [2005] 1 All SA 515(SCA), para [41]. Payment is a bilateral juristic act and it is a question of fact what was intended when it was made. See: *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A), 993A-C; *Volkskas Bank v Bankiorp Bpk (h/a Trust bank)* 1991 (3) SA 605 (A), 612C-E; *Pfeiffer v First National Bank of SA Ltd* 1998 (3) SA 1018 (A), 1025I-J; *Agricultural Research Council (supra)* paras [58] – [60].

[43] The evidence establishes that the respondent acted as agent of BMS or as a mere conduit through which the payment passed and BMS is to be considered in law as the person that made the payment (the *solvens*) and the appellant as the person who received the payment (the *recipiens*). BMS was responsible for the administration of BIU and under a duty in terms of the contract between it and BIU to pay commissions to the brokers or intermediaries, and also the Parmed commission to the appellant. The respondent was not under any duty to pay commission to the appellant. BMS was entitled to payment of the amount of R500, 000.00, which was held in trust by its attorneys. The respondent had no interest in the receipt of the money except as a

conduit *inter alia* for onward transmission to the appellant. BMS intended that the amount of R250, 000.00 of its payment to the respondent should be onward transmitted to the appellant and the respondent intended to pass it on to the appellant and in fact did so. The right of action to recover the payment in issue was accordingly not available to the respondent.

[44] I disagree with the finding of the trial judge that '… neither the evidence before [her] nor the authorities referred to, support the contention that the [respondent] was acting as an agent or conduit of BMS.' This finding seems to be based on an acceptance of Mr Moorat's speculative suggestion that the respondent's FNB account '… was used because it was the only account where there was limited financial oversight' and a rejection of essentially undisputed evidence, which are fully supported by the probabilities to which I have referred.

[45] I nevertheless consider whether the general enrichment requirements for any action based on enrichment are present. They are: (i) the appellant must be enriched; (ii) the respondent must be impoverished; (iii) the appellant's enrichment must be at the expense of the respondent; and (iv) the enrichment must be unjustified. *The Law of South Africa* vol 9 (2nd reissue) para 209.

[46] The appellant was not enriched. The factual situation is that BMS owed her about R250, 000.00. The payment received by her served to discharge BMS's debt and she lost her claim for that amount against BMS. Her net position accordingly remained the same. See: *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (AD), 285D – E.

[47] The respondent was not impoverished. The receipt by it of the money and onward transmission thereof to the appellant did not reduce its patrimony. I disagree with the trial judge's finding that the 'effect of the payment' was that the respondent owed BMS R500, 000.00 and that it still owes R250, 000.00 of that amount to BMS. The intention of BMS and that of the respondent was not the conclusion of a loan agreement between them and the payment to the respondent and onward transmission of R250, 000.00 to the appellant did not give effect to any loan agreement. Mr Cunningham-Moorat testified that a loan transaction was also not raised in the financial records of the respondent at the time when the payments were made. He testified that it was only when this 'transaction' was 'uncovered' that it was 'entered into the books' as a loan in the amount of R500, 000.00, of which R250, 000.00 had been repaid and the balance in the sum of R250, 000.00 'still outstanding'. If a promise to pay can be inferred from these accounting entries, and I make no finding in this regard, then the respondent incurred a liability towards BMS as a result of such *ex post facto* entries and not arising from the receipt and onward transmission by it of the money to the appellant. In other words, there is no causal link between the payment received by the appellant and any such impoverishment of the respondent. It follows that the requirement that a defendant's enrichment must be at the expense of the plaintiff has also not been satisfied.

[48] The payment was made to the appellant in discharge of a debt that was owed to her. The requirement that the enrichment must be unjustified or without cause has therefore not been met. In *Govender v Standard Bank of SA Ltd* 1984 (4) SA 392

(CPD), at p 404, Rose-Innes, J said the following about the situation where a person is enriched by a payment that he or she received as consideration for services:

> 'The fact that he made a bargain and a profit and has been enriched in the sense of gaining by the transaction, obviously does not give rise to the *condictio sine causa*, or any *condictio* since his enrichment is contractual and justified and no obligation arises from justifiable enrichment. In this obvious case there is no *condictio sine causa* because there is justifiable cause for the enrichment, namely the contract.'

[49] In the result the following order is made:

1. The appeal succeeds.
2. The order of the court *a quo* is set aside and replaced with the following:

   The plaintiff's claim is dismissed with costs.
3. The costs of the appeal are to be paid by the respondent.

TSOKA, J

[50] I agree with my brother Meyer, J.

KATHREE-SETILOANE, J

[51] I agree with my brother Meyer, J.

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M.P. TSOKA
JUDGE OF THE HIGH COURT

_____

P.A. MEYER
JUDGE OF THE HIGH COURT

_____

F. KATHREE-SETILOANE
JUDGE OF THE HIGH COURT