THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A5030/2020

COURT *A QUO* CASE NO: 8255/2019

DATE: 26th MARCH 2021

REPORTABLE: ***YES***

OF INTEREST TO OTHER JUDGES: ***YES***

REVISED

Date: **26 March 2021**

In the matter between:

GOLD REEF CITY MINT (PTY) LIMITED	First Appellant
SCHOEMAN, GLEN	Second Appellant

and

BRUNI, DAVID JOHN	First Respondent
McLAREN, IAN ROBERT	Second Respondent

Coram: Molahlehi, Adams JJ *et* Noko AJ

Heard: 24 February 2021 – The 'virtual hearing' of the application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 26 March 2021 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 26 March 2021.

Summary: Application for summary judgment – defence being a denial of particular averment in annexure to the particulars of plaintiff's claim – no denial of averment in the particulars of claim implicating the first defendant – requirements for summary judgment and for defence based on denial of certain facts alleged by plaintiff – the statement of material facts in affidavit resisting summary judgment required to be sufficiently full to constitute a defence to plaintiff's claim – presenting as narrow a front as possible and a blurred one suggests that the defendant dishonestly sought to avoid the dangers inherent in presenting a clearer version of the defence – *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) applied – summary judgment granted.

ORDER

On appeal from: The Gauteng Local Division of the High Court, Johannesburg (Skibi AJ sitting as Court of first instance):

(1) Save to the extent set out in paragraph 2 below, the first appellant's appeal against the order of the court *a quo* is dismissed with costs.

(2) Paragraphs [40.1.1] and [40.1.3] of the order of the court below are amended to read as follows:

'[40.1.1] Payment of the sum of R650 000, together with interest thereon *a tempore morae* at the applicable legal rate of interest of 9% per annum from 5 August 2014 to date of final payment

… … …

[40.1.3] The first defendant shall pay the plaintiffs' costs of suit on the party and party scale.'

(3) The first appellant shall pay the first and second respondents' costs of the appeal, including the costs of the application for leave to appeal.

(4) The second appellant's appeal against the costs order granted against him by the court *a quo* succeeds and is upheld.

(5) The order of the court *a quo* relative to the second appellant – paragraph [4.1.2] of the order of the court *a quo* – is amended and replaced with an order, which reads as follows:

'[4.1.2] The second defendant is granted leave to defend, and the costs of the plaintiffs' application for summary judgment against him shall be in the cause and costs in the main action.'

(6) Each party shall bear his own costs of the second appellant's appeal.

JUDGMENT

Adams J (Molahlehi J concurring):

[1] The first and second respondents are the joint provisional liquidators of the Small and Medium Enterprises Bank Limited ('the SME Bank'), a registered bank in the Republic of Namibia, which was finally liquidated by order of the Namibian High Court on 29 November 2017. The final liquidation order was preceded by a provisional liquidation order, which was granted by the High Court of Namibia on 11 July 2017, on which date the respondents were also issued with letters of appointment as provisional liquidators by the Master of the High Court in Namibia. In their official capacities as joint provisional liquidators of the SME Bank, the respondents sued Gold Reef City Mint (Pty) Limited ('Gold Reef City Mint'), as the first defendant, and Mr Glen Schoeman ('Mr Schoeman'), as the second defendant, for repayment of an amount of R650 000 on the basis of fraud and unjust enrichment. Mr Schoeman is the sole director of Gold Reef City Mint. To avoid confusion, I shall refer to the parties as referred to in the action in the High Court.

[2] The first and second plaintiffs are cited in the summons and the plaintiffs' particulars of claim as having the power to litigate in Namibia and South-Africa, which powers they derive from their letters of appointment and an Order of this Court dated 13 June 2018 under case number 19193/2018, which order duly recognizes the plaintiffs as the joint provisional liquidators of the SME Bank.

[3] The plaintiffs applied for summary judgment against the first and second defendants. This was opposed by the defendants on the basis of a number of points *in limine* and on the ground that in their particulars of claim, the plaintiffs failed to make out a case against the defendants or, for that matter, against either one of the two defendants. The High Court (Skibi AJ) agreed with the defendants that, as regards the second defendant (Mr Schoeman), the plaintiffs did not make out a case for summary judgment against him. However, as regards the first defendant, the Judge rejected the defendants' main defence as well as all of the legal defences raised by them in their opposition to the application for summary judgment. The Judge held that the first defendant had not established a *bona fide* defence to the plaintiffs' claim, and granted summary judgment against it.

[4] In sum, the court *a quo* held that the defendants' affidavit opposing summary judgment, in relation to the first defendant, was not comprehensive enough and fell short of establishing a *bona fide* defence to the plaintiff's claim based on the averment that an amount of R650 000 was erroneously paid into the bank account of the first defendant. All of the preliminary legal points raised by the defendants in their resisting affidavit were also dismissed by the court *a quo*. Summary judgment was accordingly granted against the first defendant and the second defendant was granted leave to defend the main action. Curiously, the court *a quo*, as part of its summary judgment against the first defendant, ordered 'the defendants' to pay the 'plaintiffs' costs of suit for one Counsel'.

[5] The first defendant appeals against the summary judgment granted against it by the court *a quo* and the second defendant appeals against the 'costs of suit' order seemingly granted against him as part of the costs order granted against the first defendant. This appeal is with the leave of the High Court, which was granted by Skibi AJ on 12 March 2020.

[6] The material facts and the issues to be decided in this appeal are as set out in the paragraphs which follow.

[7] On 5 August 2014 an amount of R650 000 was electronically transferred by the SME Bank into account number 504 4007 3810. The name of the beneficiary, as purportedly 'described in Finance', was 'Mamepe Capital Asset Managers', and the actual bank account holder was reported to be 'Gold Reef Limited'. Although the reason for the transfer, presumably as per the accounting records of the SME Bank, purported to be in respect of an 'Investment – Mamepe Capital Asset Managers', the payment of the said sum into the aforesaid bank account number 504 4007 3810 was in fact a fraud perpetrated on the SME Bank and was not for any lawful or valid reason.

[8] In their particulars of claim, the first and second plaintiffs allege that the aforesaid sum of R650 000 was 'paid over into the defendants' bank accounts on the date in question'. The plaintiffs also aver that the said sum was paid by the SME Bank 'in the *bona fide* and reasonable, but mistaken belief that the amount was indeed due, owing and payable to the [above] beneficiary account number 504 4007 3810'. Furthermore, so the particulars of claim conclude, the amount of 'R650 000 was paid to the Defendants on behalf of the SME Bank in the *bona fide* and reasonable, but mistaken belief that the amount was due, owing and payable to the defendants, while it was in fact not the case and the defendants nevertheless appropriated the monies'. (Emphasis added)

[9] Later on in the particulars of claim the further allegation is made that, when the payment was effected, the SME Bank was defrauded. The electronic funds transfer of the amount of R650 000 was processed and the payment 'effected to the defendants' as a fraud perpetrated on the SME Bank. (Emphasis added).

[10] On a number of occasions, the allegation is made by the plaintiffs that the payment of the said sum was received by the defendants. So, for example, the following averment is made in the particulars of claim:

'In receiving and appropriating the amount [of R650 000], the defendants acted wrongfully and negligently for the reasons set out herein.'

[11] Also, as part of the plaintiffs' cause of action based on the Financial Intelligence Centre Act ('FICA'), the plaintiff avers that 'the transfer of the

monies to the defendants had no apparent lawful purpose'. (Again, emphasis added).

[12] In sum, the facts are that an amount of R650 000 was fraudulently paid on behalf of the SME Bank into account number […]. The only issue in dispute is whether that account number belongs to the first defendant. Put another way, the only question to be asked in the application for summary judgment was whether that amount was received by the first defendant.

[13] The first and second defendants entered appearance to defend and the plaintiffs then applied for summary judgment against them. It is interesting and instructive to note how the second defendant in the defendants' affidavit opposing summary judgment deals with the averments in the particulars of claim that the R650 000 was received by the 'defendants' and appropriated by them. In fact, a more accurate and apt way of putting it is that it is instructive that the defendants do not, in their affidavit resisting summary judgment, deal with these incriminating averments unequivocally implicating them in the misappropriation of the R650 000. I will revert to this aspect of the merits of the application for summary judgment later on in the judgment. Suffice at this point to say that the closest the defendants come to denying that they – both or either one of them – received the R650 000, is the following averments in the affidavit resisting summary judgment:

'30 In paragraph 11 of the particulars of claim, the plaintiffs allege that the payment instruction recorded that payment had to be made to "the beneficiary as indicated in column 3 of POC1 for the reason indicated in column 5 of POC1". Only one beneficiary is identified.

31 The beneficiary identified in column 3 of annexure "POC1" is not either of the defendants. It is "Gold Reef Limited". The purpose identified in column 5 of annexure "POC1" is "investment, Mamepe Capital Asset Managers". That is also not one of the defendants. Moreover, it is an apparent reason for the payment which the plaintiffs have not denied and which would eliminate the possibility of the payment having been made *indebiti*.'

[14] The defendants go to great lengths to explain in their answering affidavit that neither one of them – Gold Reef City Mint (Pty) Limited or Mr Schoeman –

is the beneficiary mentioned in the payment instruction, annexed to the particulars of claim as annexure 'PoC1', that being 'Gold Reef Limited'. However, what the defendants conveniently lose sight of is the express allegation made in the particulars of plaintiffs' claim on more than one occasion that the payment supposedly made to 'Gold Reef Limited' was in fact made to 'the defendants'. Moreover, neither the first defendant nor the second defendant deny that they received the payment and appropriated it. Neither do either of them deny that they are the holder of FNB account number […]. This, in my view, is fatal to the cause of the defendants. The real point made and the simple issue raised in the particulars of plaintiffs' claim and verified on affidavit in their application for summary judgment is that the first and second defendants – both or either one of them – received the R650 000, when they had no entitlement to the said amount. This crisp issue the defendants conveniently do not deal with in any way whatsoever – what they do is to dance around it in a very fanciful and whimsical fashion.

[15] Incidentally, in their particulars of claim, the plaintiffs on no less than ten occasions make the allegation that the amount of R650 000 was paid to and received by the defendants. This allegation is coached in different ways, including as an averment that '[the defendants] received the proceeds of unlawful activities'. The defendants' riposte to all of these allegations is a deafening silence. Nowhere in their affidavit resisting summary judgment do the defendants even begin to deny that they – both the defendants or either one of them – received the R650 000, as clearly and unequivocally averred by the plaintiffs in their particulars of claim, and by implication in their application for summary judgment. There is not even a general denial of the contents of the paragraphs which contain these allegations. One would at the very least have expected a denial of these paragraphs and a response thereto as per the retort by Mr Schoeman to some of the allegations by the plaintiffs relating to *the lex aquilae.* The response in that regard by the defendants – quite emphatically and unequivocally – was the following: 'Save for the aforegoing, I deny the allegations in paragraphs 19, 20 and 21'. And also: 'I have no knowledge of the

allegations in paragraphs 22 and 23 of the particulars of claim and do not admit them'. As indicated, I shall revert to this issue in due course.

[16] In his affidavit opposing summary judgment on behalf of both himself and the first defendant, the second defendant states the following:

'3.3 Ms Pearson is not a person contemplated in Rule 32(2) "who can swear positively to the facts verifying the cause of action and the amount, if any, claimed";

3.4 plaintiffs do not disclose any *locus standi* to launch the action herein;

3.5 the particulars of claim do not disclose a cause of action against either the first defendant or me;

3.6 Ms Pearson's affidavit is, in any event, inadmissible because it was signed in Namibia and has not been authenticated in terms of Rule 63;

3.7 the application has been brought in bad faith by *peregrini* of the Republic of South Africa in the face of a demand by the first defendant and me that, before they proceed further in this matter, they establish security for our costs.'

[17] The defendants therefore raised a number of legal points *in limine*, all of which the court *a quo* found to be without merit and rejected. During the hearing of the summary judgment application in the High Court, the point relating to the furnishing of security and the claim that the plaintiffs, by proceeding with the application for summary judgment, was abusing the court processes, were not pursued by the defendants. Before us, Ms Cirone, Counsel for the defendants, advised the court that they were not persisting with the objection to the competence of the Commissioner of Oaths and the regularity of the administration of the oath. The defendants therefore accept, in my view, correctly so, that the commissioning of the plaintiffs' affidavit in support of the application for summary judgment falls within the provisions of the *caveat* created by Uniform Rule of Court 63(1) and that it was properly commissioned.

[18] That then leaves the following legal points: (1) whether the deponent to the plaintiffs' affidavit in support of their application for summary judgment had the requisite knowledge to depose to that affidavit; and (2) the *locus standi in iudicio* of the first and second plaintiffs in their capacities as joint liquidators of the SME Bank. Thirdly, the defendants also contend that the plaintiffs'

particulars of claim are vague and embarrassing and do not disclose a cause of action and are therefore excipiable. I now turn my attention to these issues.

[19] It is the case of the defendants that Ms Pearson, who is the legal advisor of the SME Bank (in liquidation), does not have the requisite knowledge of the matters in issue, despite her say-so to the contrary, and therefore she is not, so the defendants contend, a person as contemplated in Rule 32(2) as she cannot 'swear positively to the facts verifying the cause of action and the amount, if any, claimed'. The defendants also contend that Ms Pearson is not authorised by the plaintiffs to depose to the affidavit.

[20] The starting point as regards this issue is the fact that Ms Pearson, under oath, confirms that she has the necessary knowledge of the issues in this matter. She swears positively to the facts and verify the causes of action of the plaintiffs. In addition, she confirms that she had been mandated by the plaintiffs to depose to the affidavit in support of the application for summary judgment. She corroborates the aforegoing by her statement that she joined the SME Bank on 10 September 2012 before its liquidation. When the bank was placed under provisional liquidation and upon the joint liquidators being appointed, her services were retained.

[21] The defendants, as I indicated, dispute that Ms Pearson is a person with the necessary knowledge of the facts in issue in this matter. Mr Schoeman states the obvious that he had never met Ms Pearson and that he had never heard of her before the application for summary judgment. Secondly, the second defendant states that there were a number of persons, identified by the plaintiffs who were employed by the SME Bank at the time of the transactions in question who were allegedly involved in the transactions, who would have knowledge (or better knowledge) of the facts in the matter and who could have deposed to the affidavit in support of the application for summary judgment.

[22] Moreover, so the second defendant avers in his affidavit, the transaction in question is one which, in the normal course, would have involved a paper trail and a series of persons involved. No part of the paper trail is attached to the particulars of claim and no one involved has deposed to an affidavit in support

of the allegations therein. Mr Schoeman therefore submits that the application for summary judgment should be dismissed on the basis that Ms Pearson has no knowledge of the facts in question. There are other people available to the plaintiffs who do have such knowledge, so Mr Schoeman avers, and accordingly the application has not been properly verified as required in terms of Rule 32(2).

[23] The facts in this case are not dissimilar to the facts in *Kurz v Ainhirn* [1], in which a liquidator made application for summary judgment for repayment of monies that had been misappropriated from a company some two years before his appointment as liquidator. The sole point in the opposing affidavit was that the liquidator could not have knowledge of the facts in question. I can do no better than to quote from the judgment in which Howard JP held as follows:

'In his opposing affidavit the defendant takes one point only: that inasmuch as the alleged causes of action arose out of events which occurred during the period 1990-1991 and the plaintiff had nothing to do with the affairs of the close corporation prior to his appointment as liquidator on 12 January 1994, he is not a person "who can swear positively to the facts" as required by Rule 32(2). He says that under these circumstances he is not obliged to satisfy the Court that he has a *bona fide* defence to the action, and indeed he makes no attempt to do so. He does not even deny the allegation that he misappropriated and stole the amount of R440 000.

... … …

I have to be satisfied that the plaintiff can and does swear positively to the material facts, not that he has complied with a given formula. In this case he not only asserts that he can swear positively to the facts, he does so and indicates the reason why he is able to do so, namely that he is a liquidator of the close corporation, having been duly appointed as such some nine months ago. As such he clearly had both the opportunity and the duty to obtain knowledge of the relevant facts from, *inter alia*, the documentary records of the close corporation and interrogation of the defendant. It is inconceivable that the plaintiff, who is an officer of the Court, would have instituted this action, based on serious allegations of misappropriation and theft of moneys, without establishing the facts through examination of the documentary records under his control and exercising his statutory power to interrogate the defendant and others involved in the transactions

[1] *Kurz v Ainhirn* 1995 (2) SA 408 (D)

in question. Evidence of this nature would be admissible against the defendant and the plaintiff would obviously be able to swear positively to the facts thus established. There are accordingly good grounds for believing that the plaintiff can swear positively to the relevant facts and fully appreciated the meaning of his assertion to that effect in the verifying affidavit.

In his opposing affidavit the defendant states the obvious, that the plaintiff was not a witness to transactions involving the close corporation before liquidation, and draws from that fact alone the inference that the plaintiff cannot swear positively to the relevant facts. He thus excludes one possible source of knowledge which was never open to the plaintiff anyway, but does not even mention, let alone attempt to exclude, the obvious sources from which the plaintiff as liquidator could acquire sufficient knowledge to enable him to swear positively to the facts. This disingenuous affidavit does not serve to cast doubt on the plaintiff's averment that he can swear positively to the facts or his opinion that there is no bona fide defence.

I accordingly grant summary judgment against the defendant ...'

[24] On the basis of this authority, with which I agree, the defendants' first preliminary point stands to be rejected. The point is that *in casu* Ms Pearson not only asserts that she can swear positively to the facts, but also does so and indicates the reason why she is able to do so, namely that she has been the legal advisor of the SME Bank even before it was placed in liquidation. In fact, the plaintiffs' case in this matter is stronger than the plaintiff's case in *Kurz* – Ms Person was involved in the SME Bank even before the liquidators were appointed.

[25] I also agree with the submissions made by Mr Cooke, who appeared on behalf the plaintiffs, that the defendants' reliance on the decision in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 Cc and Another* [2] is misplaced. In *Shackleton* the deponent to the summary judgment affidavit was the applicant's attorney of record, whereas in this matter it is a longstanding employee who was involved in the day to day affairs of the SME Bank when the illicit payment was made. The fact that she has all of the relevant documents in her possession doesn't detract from her institutional knowledge, but only adds to it.

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[2] *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 Cc and Another* 2010 (5) SA 112 (KZP)

[26] Therefore, the first legal point raised by the first and second defendants is devoid of any merit and was rightly rejected by the court *a quo*.

[27] The next point *in limine* relates to the *locus standi* of the plaintiffs. Again, the starting point is the fact that Ms Pearson verifies the plaintiffs' causes of action, and, by implication, she verifies the contents of the particulars of plaintiff's claim in which the following allegations are made expressly, clearly and unequivocally: (1) the first and second plaintiffs are the joint provisional liquidators of the SME Bank and both of them have the power to litigate on behalf of the insolvent company in Namibia and South-Africa; and (2) on 16 June 2018 the Johannesburg High Court under case number 19193/2018 issued an order recognizing the first and second plaintiffs as the joint provisional liquidators of the SME Bank.

[28] These averments are not disputed by the defendants. That, in my judgment, is the end of the defendants' case on this point. What the defendants do say in their affidavit resisting summary judgment is that the plaintiffs have not attached to their particulars of claim the following documents: The Namibian High Court Order liquidating the SME Bank; their letters of appointment by the Master of the Namibian High Court; or the Johannesburg High Court's Order recognising them in South Africa as the joint provisional liquidators of the SME Bank. So what, it can be asked rhetorically.

[29] On the one hand, we have the statement under oath by Ms Pearson that the plaintiffs are the joint liquidators of the SME Bank and that their appointments are recognised by the Johannesburg High Court. These unequivocal assertions on behalf of the plaintiffs are not gainsaid in any way, shape or form by the defendants and they have to be accepted as fact. If it was not so, it would have been the easiest of exercises for the defendants to firstly deny those facts and secondly to disprove them by reference to public documentation, including the Johannesburg High Court Order dated 16 June 2018, which would have been accessible and available, as a public document, to the defendants on 7 May 2019, when the second defendant deposed to the affidavit opposing the application for summary judgment. The simple,

undisputed and unchallenged fact of the matter is that the first and second plaintiffs are the joint provisional liquidators of the SME Bank, with the power and authority to litigate in South Africa on behalf of the insolvent Namibian company.

[30] Faced with the clear and unambiguous averments, confirming the *locus standi* of the plaintiffs, it is wholly inadequate for the second defendant to give a generic answer that he has no knowledge of the liquidation of the SME Bank, the appointment of the plaintiffs as provisional liquidators thereof, the terms upon which they were appointed or of their recognition by the High Court. The defendants are simply blowing hot air.

[31] I find support for this conclusion in *Eskom v Soweto City Council* [3], in which Flemming DJP, where an interlocutory application had been delivered under the name and signature of the respondent's attorney, held that, if the attorney had been authorised to bring the application on the respondent's behalf, then the application was that of the respondent, irrespective of whether the deponent to the supporting affidavit had also been authorised 'to bring this application'. The Court held, further, that the deponent's evidence could not be ignored because he had not been 'authorised': if the attorney had authority to act on the respondent's behalf, then the attorney was entitled to use any witness who, in his opinion, would advance the respondent's case – a witness may testify even if (s)he has no authority to bring, withdraw or otherwise deal with the application itself.

[32] With reference to the denial of authority to act, as *in casu*, Flemming DJP had this to say:

‘It was argued that the respondent's claim that the matter be referred to arbitration depends upon a litigious step (the present interlocutory application) taken by the deponent, Rossouw, whose authority to institute the legal proceedings is not proved. Rossouw states that he was duly authorised 'to make this affidavit'. Counsel argued that that is different from authority 'to bring this application'. Furthermore, there is no resolution in proof of his authority.

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[3] *Eskom v Soweto City Council* 1992 (2) SA 703 (W)

I find the regularity of arguments about the authority of a deponent unnecessary and wasteful.

… … …

The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. (Compare *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 752D-F and the authorities there quoted.)

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.'

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions.' (My underlining and emphasis).

[33] In the present case the application for summary judgment was delivered under the name and signature of the plaintiffs' attorneys, who purportedly did so on behalf of the plaintiffs. If they were authorised to do that, the defendants are bound to accept the application as the application of the plaintiffs. That remains so irrespective of whether the deponent, Ms Pearson, was also authorised to bring the summary judgment application. There is no logical need to insist on proof that the plaintiffs were authorised to institute the proceedings in question.

[34] In sum, the point about the *locus standi* of the plaintiffs is that there is no prescribed mode of proof. It is a factual question whether a particular person holds a specific authority. It may be proved in the same way as any other fact. Adjudication involves consideration of what the credible evidence means and the extent of, quality of and sometimes the absence of contradiction or other

reason to remain unconvinced. There are several decisions wherein this approach is evident. Compare *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Bpk* [4].

[35] The affidavit of Ms Pearson sets out the appropriate facts – by reference to the particulars of claim – and the plaintiff's entitlement to summary judgment against the defendants. That evidence is express and uncontradicted – she is authorised to make the affidavit making the claim that the plaintiffs are the joint liquidators of the SME Bank and have the power to litigate in South Africa on behalf of the liquidated company.

[36] As I indicated, that is the end of the matter. On the basis of the averments made in the application for summary judgment, the plaintiffs have *locus standi* to launch the action as well as the application for summary judgment. The defendants' objection to the *locus standi* therefore should fail and the Honourable Judge *a quo* was correct in dismissing that legal point.

[37] The last legal point raised by the defendants is that the particulars of claim are excipiable, because: (1) no cause of action is disclosed; and (2) the particulars of claim are vague and embarrassing.

[38] The defendants have a number of complaints against all of the plaintiffs' causes of action. I do not however believe it necessary to deal with all the grounds of exception. Suffice to say that, in applying the legal principles applicable to exceptions and the excipiability of pleadings, I find that there is no merit in any of the grounds of exception raised by the defendants in respect of any of the plaintiffs' causes of action – this is what the court *a quo* found, rightly so, in my view.

[39] I am of the view that the plaintiffs should succeed if they are able to prove the sustainability of one cause of action only. And that cause is the plaintiffs' main claim based on the *condictio indebiti* and fraud. In sum, the plaintiffs plead that the SME Bank paid the amount of R650 000 in the *bona fide* and reasonable, but mistaken belief that the amount was indeed due, owing and

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[4] *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Bpk* 1957 (2) SA 347 (C) at 352G

payable to the beneficiary account number […]. Payment of the said sum into this account number, so the plaintiffs allege, was in fact a payment to the defendants on behalf of the SME Bank in the *bona fide* and reasonable, but mistaken belief that the amount was due, owing and payable to the defendants, while it was in fact not the case and the defendants nevertheless appropriated the monies. Furthermore, so the plaintiffs averred, this payment of R650 000 to the defendants was a fraud perpetrated on the SME Bank.

[40] The defendants contend that the plaintiffs' claim, based on the *condictio indebiti*, as pleaded, fails to disclose a cause of action. The essential allegations to be made in a claim based on the *condictio indebiti* are that: (1) the plaintiffs have been impoverished; (2) the defendants have been enriched; and (3) the defendants' enrichment must have been at the expense of the plaintiffs.

[41] The defendants submit that none of these allegations are made by the plaintiffs in their particulars of claim. Therefore, so the defendants contend, there is simply no cause of action established under the *condictio indebiti*, which means that the particulars of claim are excipiable in that they fail to disclose a cause of action against either defendant.

[42] A brief overview of the applicable general principles relating to exceptions may be apposite at this juncture. These general principles, as gleaned from the case law, can be summarised as follows.

[43] An excipient who alleges that a pleading does not disclose a cause of action or a defence must establish that, upon any construction of the pleading, no cause of action or defence is disclosed. An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit. Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained. Minor blemishes and insignificant embarrassments caused by a pleading can and should be cured by further particulars.

[44] Exceptions are to be dealt with sensibly since they provide a useful mechanism to weed out cases without legal merit. As already indicated, an over-technical approach destroys their utility and insofar as interpretational

issues may arise, the mere notional possibility that evidence of surrounding circumstances may influence the issue should not necessarily operate to debar the Court from deciding an issue on exception.

[45] Where, however, an exception is based upon the fact that a pleading is vague and embarrassing, the 'every reasonable interpretation' approach highlighted above does not apply, and an exception may be taken to protect one's self against embarrassment. It is however trite that an exception taken on the basis that the pleading is vague and embarrassing will only be upheld if the excipient alleges and proves that he will be prejudiced by the vague and embarrassing manner in which the other side has pleaded.

[46] With this overview in mind, I now turn to deal with the way in which the plaintiffs plead their cause based on the *condictio indebiti*. The relevant paragraphs of the particulars of claim read as follow:

'15 At all relevant times hereto the Authorizer paid the amount in the *bona fide* and reasonable, but mistaken belief that the amount was indeed due, owing and payable to the beneficiary account number as indicated in column 9 and for the reasons as indicated in column 5 of POC1.

16 Accordingly, the amount of R650 000 was paid to the defendants on behalf of the SME Bank in the *bona fide* and reasonable, but mistaken belief that the amount was due, owing and payable to the defendants, while it was in fact not the case and the defendants nevertheless appropriated the monies.

17 Furthermore and at all relevant times when the Authorizer effected payment, she was defrauded by the two top officials of the SME Bank and other employees in the Finance Department, who either participated in or instructed the Financial Department to prepare the payment instructions in the manner as set out above, in order for the payment to be effected to the Defendants.

18 The two top officials were: Joseph Banda, the Finance Manager who fraudulently authorised all payments, Tawanda Mumvuma, the CEO, who approved all payments and other employees in the Finance Department who participated in the preparation of the fraudulent payment instructions which ended up at Treasury Back Office, causing the Authorizer to effect payment.'

[47] No more than a superficial reading of these paragraphs is required to confirm that the plaintiffs have made all the essential allegations necessary to

sustain a cause of action based on the *condictio indebiti*. Firstly, it is alleged that the SME Bank paid the amount of R650 000, therefore, the plaintiffs, in their capacities as the joint provisional liquidators of the insolvent company, have been impoverished. Secondly, the monies were paid into the account of the defendants – this implies that they have been enriched. And lastly, following from the aforegoing, the enrichment of the defendants (the value of whose estate had been increased by the said sum), was at the expense of the SME Bank, whose estate was diminished by R650 000.

[48] There can therefore be no doubt that the plaintiffs' particulars of claim do make out a case based on the *condictio indebiti.* As rightly submitted by Mr Cooke, it is illogical to require the plaintiffs to specifically use the words 'impoverishment' and 'enrichment'. To insist on the use of precise terminology is artificial and elevates form above substance. The point is that at first blush the allegations made by the plaintiffs in their particulars of claim disclose a cause of action. How then can it ever be suggested that no cause of action is disclosed 'upon any construction of the particulars of claim', which is the test on exception based on the fact that no cause of action is disclosed [5].

[49] This ground of exception is therefore stillborn.

[50] The defendants also allege that the plaintiffs' particulars of claim are vague and embarrassing in that, for example, the plaintiffs allege at some point that a single payment was made to one beneficiary only and later on reference is made to payments (plural) having been made to the defendants. It is also alleged, so the defendants submit, that the defendants (plural) owed duties of care, which were breached by the defendants (plural). This, according to the defendants, make the particulars of claim vague and embarrassing. The defendants make two points in that regard: (1) the plaintiff's particulars of claim contain material contradictory averments – on the one hand a payment was made to the one bank account and, on the other hand, more than one payment

[5] *Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E – F & *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 965C–D

is made to the defendants; and (2) the defendants ask rhetorically, how is it possible for payment of one amount to be made to two recipients?

[51] As for the first ground of objection, my view is that the defendants are adopting an over-technical approach towards the pleadings. There can, in my view, be no better example of a pleading containing 'minor blemishes and insignificant embarrassments', which can and should be cured by further particulars. However, more importantly, and also relevant to the second point, is the fact that it cannot possibly be said that the particulars of claim are so vague and so embarrassing that the defendants would have been prejudiced by such vagueness and embarrassment.

[52] The aforegoing conclusion follows, in my view, from the fact that the particulars of plaintiffs' claim can and should be read as alleging that the R650 000 was paid to the first defendant, alternatively, to the second defendant, further alternatively, to both of them. This would address the supposed vagueness and embarrassment complained of by the defendants. This interpretation is supported by the fact that the plaintiffs, in their particulars of claim, as well as in their application for summary judgment, request judgment against the first and second defendants, jointly and severally. I am therefore of the view that the particulars of claim are not vague and embarrassing. This is what the court *a quo* found, and I agree.

[53] The effect and the sum total of all of the aforegoing is that, in my view, the case of the plaintiffs, as pleaded in the application for summary judgment, was unimpeachable and called for an answer from the defendants. In that regard, it was argued on behalf of the first defendant, relying on inter alia *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd*[6]*,* that the validity of the plaintiffs' application for summary judgment is open to attack, implying that, even in the absence of the defendants demonstrating that they have a *bona fide* defence, they were entitled to leave to defend. It is reasonably possible that the said application, so the defendants contended, is defective and they said so on the basis of all the points alluded to in the

[6] *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W)

aforegoing paragraphs, which entitled them to leave to defend. As I have already indicated, I disagree.

[54] That then brings me to the main issue in the application for summary judgment and the question whether the first defendant, in opposing the said application had demonstrated a *bona fide* defence to the plaintiffs' claim.

[55] Earlier on in this judgment, I dealt in a fair amount of detail with the defence raised by the defendants in opposition to the application for summary judgment. I have already indicated that the case made out on behalf of the first and second plaintiffs is that R650 000 was erroneously paid to the defendants, who misappropriated the said amount. The defendants do not deny this. Instead, they prevaricate around the issue, splitting hairs in the process.

[56] Mr Cooke submitted that it is evident that the SME Bank's money was mistakenly paid into account number […] and appropriated by Gold Reef City Mint without cause or reason. A simple and complete defence to these allegations, so the argument on behalf of the plaintiffs continues, would have been that Gold Reef City Mint is not the holder of account number […] and therefore never received the SME Bank's money.

[57] I find myself in agreement with these submissions. The point is that, faced with the clear and unambiguous allegations that Gold Reef City Mint and Mr Schoeman ('the defendants') received and appropriated the SME Bank's R650 000, one would have expected Mr Schoeman to unequivocally and in no uncertain terms deny that they received the money. When a person is accused of having stolen money, it is not unreasonable to expect of him to vehemently and vociferously deny same so as to leave no doubt that he does not accept any part of the accusation against him. If one does not, the ineluctable inference to be drawn is that he did in fact receive the money.

[58] As recorded earlier, the reliance by the first defendant on the defence raised in the sketchy affidavit as a defence to avoid summary judgment did not succeed in the High Court. It did, however, succeed as a defence on behalf of the second defendant and the High Court refused summary judgment and gave

the second defendant leave to defend the action. The summary judgment granted against the first defendant is the subject of the present appeal.

[59] The remedy of summary judgment has for many years been regarded as an extraordinary and stringent one in that it closes the doors of the court to the defendant and permits a judgement to be given without a trial. However, in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [7], Navsa JA, in holding that the time has perhaps come to discard labels such as 'extraordinary' and 'drastic', stated:

'The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G-426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts on which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are "drastic" for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G-426E.'

[60] One of the ways in which a defendant can avoid summary judgment, is to satisfy the court by affidavit that he or she has a *bona fide* defence to the claim on which summary judgment is being applied for. The word 'satisfy' does not mean 'prove'. What the rule requires is that the defendant must set out in his or her affidavit facts which, if proved at the trial, will constitute an answer to the

[7] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (3) All SA 407 (SCA) par 33

plaintiff's claim. The classic and much-quoted formulation of the approach to an affidavit opposing summary judgment is that set out by Corbett JA in the *Maharaj v Barclays National Bank* [8] as follows:

'Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has "fully" disclosed the nature and ground of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence … At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading.'

[61] As is evident from the extract from second defendant's affidavit set out above, the defendants' defence to the plaintiffs' claim for a refund of the amount stolen from the SME Bank is a narrow one. The defence takes issue with one single allegation made by the plaintiffs in the particulars of claim, that being that the R650 000 was paid into a bank account supposedly in the name of an entity with a name different from that of either one of the two defendants. The defence as set out in the resisting affidavit completely ignores the other allegations to the effect that the monies were paid to the first and second defendants or that the R650 000 was misappropriated by them.

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[8] *Maharaj v Barclays National Bank* 1976 (1) SA 418 (A)

[62] It is clear that the second defendant's affidavit opposing summary judgment has not disclosed a *bona fide* defence on behalf of the first defendant. In the said affidavit, the defendants did not, in my view, 'fully' disclose the nature and ground of their defence and the material facts upon which it is founded, as they were required to do by the AD in *Maharaj* (supra).

[63] In my view, the affidavit resisting summary judgment on behalf of the first defendant fell into that category of affidavits, which the Court in *Breitenbach v Fiat SA (Edms) Bpk* [9] lamented as being the affidavit of '[a] dishonest deponent, [who], if he is wise, will present as narrow a front as possible, and (if it is practicable) a blurred one'. The following conclusion reached by the Full Court in *Breitenbach* is also apt and finds application *in casu*:

'That, in my judgment, is far less than can be expected from a defendant in summary judgment proceedings. It lacks the forthrightness, as well as the particularity, that a candid disclosure of a defence should embody. The impression which one receives is rather that the defendant was being deliberately vague, and was leaving it open to himself to say later, if necessary or convenient, that although he had paid only R7 000, that was all that he had owed. He might, if necessary, have sought to justify that by alleging that the terms of the contract were not as alleged by the plaintiff, or that one or both of the contracts had been cancelled, or that the rent had been reduced by agreement, or that the vehicles were defective, and the plaintiff therefore not entitled to the full contractual rental. Other possible justifications or purported justifications of the defendant's vague averment can be imagined; but there is no point in multiplying instances. Clearly Rule 32 (3) (b) was not complied with.'

[64] This is exactly how I would describe the defence raised on behalf of the first defendant in the affidavit opposing summary judgment – the impression created is that the second defendant, on behalf of the first defendant, was being deliberately vague and the affidavit lacked the forthrightness, as well as the particularity, that a candid disclosure of a defence should embody.

[65] The court *a quo* was therefore correct in its finding that the first defendant has failed to demonstrate that it has a *bona fide* defence to the claim of the plaintiffs.

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[9] *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T)

[66] The remaining issues relate to (1) the *mora* interest payable by the first defendant on the capital amount due; and (2) the costs order granted against the second defendant as part of the summary judgment granted against the first defendant. Clearly, both the orders granted by the court *a quo* in relation to these issues were granted in error. I therefore turn to deal briefly with these issues.

[67] It is trite that a debtor, who owes to his creditor a liquidated debt – like the first defendant *in casu* – is liable for *mora* interest on the liquidated amount of the debt from the date on which the debt becomes due and payable. In this case that date is the 5th of August 2014, that is the date on which the amount of R650 000 was fraudulently paid into the bank account of the first defendant and misappropriated by it. The rate at which the *mora* interest is to be charged is determined in accordance with section 1(2) of the Prescribed Rate of Interest Act, Act 55 of 1975, read with the regulations promulgated in terms thereof. Section 1 (1) of the said Act provides as follows:

'1 **Rate at which interest on debt is calculated in certain circumstances**

(1) If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate contemplated in subsection (2) (a) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.

[68] As and at 5 August 2014 the applicable rate of interest as determined in accordance with s 1(2)(a) and (b) of the said Act was 9% per annum. The *mora* interest payable by the first defendant to the plaintiffs should therefore be 9% per annum, and the court ***a quo's*** judgment providing for a rate of 20% is therefore patently wrong and should be corrected. I intend granting an order to that effect.

[69] As for the costs order granted against the second defendant by the court *a quo*, same is also clearly wrong. The plaintiffs recognised this. Therefore, on the 2nd of April 2020 they caused to be delivered a notice of 'Abandonment of Judgment in terms of Rule 41(2)'. In this notice the plaintiffs formally abandoned that portion of the order 'requiring the second defendant to pay the plaintiffs'

costs of their application for summary judgment'. The plaintiffs also formally tendered in the said notice that the costs of the summary judgment application against the second defendant as costs in the cause.

[70] The second defendant accepted the plaintiffs' abandonment of the costs order against them, but was insistent on the plaintiffs tendering his costs of the summary judgment application. In my judgment, the correct costs order would be one in terms of which costs shall be in the cause and costs in the main action. I say so for the following reasons. Firstly, as argued on behalf of the plaintiffs, the trial court will probably be in the best position to decide on the advisability of the plaintiffs having instituted the summary judgment proceedings against the second defendant. Secondly, the same critique levelled against the affidavit resisting summary judgment against the first defendant applies equally vis-à-vis the defence raised in that affidavit on behalf of the second defendant. The second defendant himself does not deny that he was the owner of the bank account into which the monies was paid, despite the fact the plaintiffs make that averment in their particulars of claim.

[71] The court *a quo* would, in my view, have been justified in granting summary judgment also against the second defendant, because he did not deny that he received and misappropriated the said sum. I understand though why the Judge did not grant such judgment – there may very well have been a hint of a *bona fide* defence in that the name of the entity in whose name the bank account was, bore no resemblance to the name of the second defendant. Additionally, there was evidently only one payment made and it stands to reason that only one of the defendants could have received the said amount and the first defendant seem the mostly likely of the two defendants to have received the payment.

[72] Therefore, in my judgment, the correct costs order would have been an order granting the second defendant leave to defend, with the costs of the application for summary judgment against the second defendant to be in the cause and in the main action.

Costs of Appeal

[73] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*[10].

[74] In the appeal by the first defendant against the summary judgment granted against it, I can think of no reason why I should deviate from this general rule. The first defendant should therefore pay the first and second plaintiffs' costs of the appeal.

[75] As for the second defendant's appeal, whilst he was successful, there was a 'with prejudice' tender made during April 2020 that the costs of the application for summary judgment against him be in the cause and in the main action. That tender, which was rejected by the second defendant, has not been beaten in that, in this appeal, we intend substituting the court ***a quo's*** order with such an order.

[76] That means that the second defendant is entitled to his costs of the appeal up to the 2nd of April 2020. Conversely, the second defendant is liable for the plaintiffs' appeal costs subsequent to the aforesaid date. These two costs orders would, in my view, more or less cancel out each other. Therefore, in the exercise of my discretion, I would order each of the parties in the second defendant's appeal to pay their own costs.

Order

[77] In the result, the following order is made: -

(1) Save to the extent set out in paragraph 2 below, the first appellant's appeal against the order of the court *a quo* is dismissed with costs.

(2) Paragraphs [40.1.1] and [40.1.3] of the order of the court below are amended to read as follows:

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[10] *Myers v Abramson*,1951(3) SA 438 (C) at 455

'[40.1.1] Payment of the sum of R650 000, together with interest thereon *a tempore morae* at the applicable legal rate of interest of 9% per annum from 5 August 2014 to date of final payment

… … …

[40.1.3] The first defendant shall pay the plaintiffs' costs of suit on the party and party scale.'

(3) The first appellant shall pay the first and second respondents' costs of the appeal, including the costs of the application for leave to appeal.

(4) The second appellant's appeal against the costs order granted against him by the court *a quo* succeeds and is upheld.

(5) The order of the court *a quo* relative to the second appellant – paragraph [4.1.2] of the order of the court a quo – is amended and replaced with an order, which reads as follows:

'[4.1.2] The second defendant is granted leave to defend, and the costs of the plaintiffs' application for summary judgment against him shall be in the cause and costs in the main action.'

(6) Each party shall bear his own costs of the second appellant's appeal.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

I agree, and it is so ordered

E M MOLAHLEHI
Judge of the High Court
Gauteng Local Division, Johannesburg

Noko AJ (Dissenting):

[78] I have had the benefit of reading the judgment of my colleague, Adams J, in which he gives an overview of the circumstances in which the respondents' claim in this case arose. He also sets out the issues in this appeal, which were debated before us by Counsel on behalf of the parties. I agree that a costs order should not have been granted against the second appellant, Mr Schoeman, by the court *a quo* and that his appeal against the said order should be upheld. Consequently, I am in agreement with the order proposed by Adams J in relation to the second defendant. I agree too with his reasoning for arriving at the conclusion that the appeal by Mr Schoeman should succeed with no order as to costs.

[79] However, I disagree with Adams J on the outcome of the appeal in relation to the first appellant, Gold Reef City Mint. My reasons for differing from the majority is that, on the pleaded facts, it is clear that the application for summary judgment against Gold Reef City Mint should have been refused and that it should have been granted leave to defend. I also deal with why I disagree with the reasoning of Adams J. In support of my view I set out in this judgment the pleaded facts, which in my opinion clearly show that the application for summary judgment against Gold Reef City Mint should have been refused and that it should have been granted leave to defend.

[80] This is an appeal against the judgment and order of Skibi AJ in terms of which summary judgment in the sum of R650 000 plus costs was granted in favour of the respondents against the first appellant. The second appellant was granted leave to defend and he was ordered to pay the costs. The appeal is with the leave from court *a quo*.

[81] It is common cause that the respondents (plaintiffs in the court *a quo*) sued out papers in the High Court for payment of the amount of R650 000, which is alleged to have been paid through fraudulent means into the bank account of the appellants (the defendants *a quo*). In this judgment, the parties shall be referred to as they were cited in the court *a quo*.

[82] The plaintiffs allege that the Small and Medium Enterprises Bank Limited ('SME Bank') was provisionally liquidated on 11 July 2017 by the High Court in Namibia and the plaintiffs were appointed as provisional liquidators. The order of liquidation was confirmed on 29 November 2017. The plaintiffs further allege that this court granted them an order under case number 19193/2018 in terms of which the plaintiffs are recognised as provisional liquidators of the SME Bank.

[83] The plaintiffs' claim is based on the *condictio indebiti* and the *lex aquilae*. The first defendant is Gold Reef City Mint (Pty) Ltd, a private company incorporated in the Republic of South Africa, and the second defendant is the director of the first defendant. The order prayed for by the plaintiffs in their particulars of claim was that the first and second defendants should pay the aforesaid sum jointly and severally, the one paying the other one to be absolved.

[84] The defendants entered appearance to defend on 29 March 2019. The plaintiffs thereafter filed an application for summary judgment on 9 April 2019. The defendants delivered an affidavit resisting summary judgment and set out therein several defences which were found wanting by the court *a quo.* It was for this reason that summary judgment was granted in favour of the plaintiffs against the first defendant. The second defendant was granted leave to defend and was also, rather curiously, ordered to pay the plaintiffs' costs.

[85] In this appeal, the defendants contend that the court *a quo* erred in dismissing their defences and predicate their appeal on the basis of the following defences: (1) that the plaintiffs do not have *locus standi*, (2) the verifying affidavit by Ms Pearson was not in accordance with Rule 32 of the Uniform Rules, (3) that the commissioner of oath, before whom the deponent to the affidavit in support of the applicants' application for summary judgment signed the affidavit, is not qualified as such in terms of the laws of the Republic of South Africa, (4) that the particulars of claim are vague and embarrassing and do not disclose a cause of action, and (5) that the costs order was erroneously granted against the second defendant. In addition, so Counsel for

the defendants submitted, the court *a quo* erred in refusing leave to defend by the first defendant whereas the second defendant was granted leave, with both having raised the same defences.

[86] Prior to the adjudication of the appeal, the plaintiffs abandoned the judgment relating to the costs granted against the second defendant and tendered that the costs be costs in the cause. The second defendant rejected the tender for costs. Uniform Rule of Court 41(1)(c) provides that once an order is abandoned, but no offer is made to pay the legal costs, the opponent shall be entitled to approach the court on notice for an order as to costs. The first defendant in these papers has rejected the tender on costs and is therefore entitled to approach the court in terms of the rules for a costs order.

[87] It is common cause that the defendants did not prosecute the appeal timeously in accordance with the Uniform Rules of Court. For this reason, they filed an application for condonation, which was not opposed by the plaintiffs. Accordingly, the condonation for the delay in prosecuting the appeal was granted during the hearing of the appeal before us.

[88] The contentions raised by the defendants will be dealt with *ad seriatim* as set out below.

[89] Summary judgments are intended to afford a litigant redress without having to await a normal court process in instances where a clear case has been presented and there are no *bona fide* defences raised by the defendant. Once the summary judgment application has been brought, the defendant may either furnish security for the sum claimed, alternatively, file an affidavit setting out a *bona fide* defence to the claim levelled against such a defendant.

[90] If a defendant elects to file an affidavit, such a defendant should clearly set out facts upon which the court would discern that there is a triable issue, failing which the court may grant the summary judgment. The defendant is not necessarily obliged to set out a defence and is entitled to attack the summons and annexures thereto. However, such a defendant may not have a second bite at the proverbial cherry in the event that such attacks are not sustained. The defendant should not argue technicalities and obvious errors which may not

necessarily be prejudicial to the defendant. The court should be able to make an assessment that there is a case to answer. It is not expected that the presentation of the defendant's defence should be with military precision, but must assist the court to conclude that there is indeed a *bona fide* defence.

[91] In the adjudication of a summary judgment application, the court will consider whether the claim by the plaintiff is unimpeachable and thereafter proceed to assess whether there is a *bona fide* defence as set out in the defendant's affidavit. Corbett JA stated in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 9AD) at 423E-H that:

'[T]he grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and the defendant's defence is bogus or bad in law.'

[92] It therefore follows that once the case is impeachable, summary judgment cannot be granted. It was stated in *Gulf Steel Pty Ltd v Rack-Rite Bop (Pty) Ltd and Another* 1998 (1) SA 679 (OPD) at 683H-684B that there are two requirements, namely that a claim should be clearly established and pleadings should also be technically correct before the court. Once the plaintiff fails to meet these thresholds the application for summary judgment would not be granted even if the defendant fails to put up a defence or a defence which fails to meet the standard required.

[93] The defendants' Counsel contended that the deponent to the affidavit on behalf of the SME Bank (Ms Pearson) failed to state that she has personal knowledge of the claim against the defendants and to this end the affidavit fell short of what is required for a summary judgment application. The said deponent only stated that she has personal knowledge of the contents of the affidavit, but not of the claim against the defendants. It is expected of the deponent to verify the plaintiffs' cause of action, according to her knowledge, and further to swear positively regarding the said cause of action. It should be noted that the use of the words 'personal knowledge' is not a *sine qua non* for the court to make a negative conclusion. '[A]n allegation by the deponent that he does have personal knowledge is, therefore, as dispensable as it is always sufficient, because either personal knowledge may be revealed by other facts asserted, or those facts may rebut the allegation of personal knowledge.' See:

Sekretaris van Landboukrediet en Grondbesit v Loots 1973(3) SA NC 297H. It is to be noted that blind and strict application of the rules may render court proceeding, like a summary judgment application, a farce – also referred to as substance over form reasoning.

[94] Counsel for the plaintiffs retorted that the Ms Pearson was a legal advisor in the employ of the SME Bank – even before its liquidation – and, so he submitted is obviously closer to the issues.

[95] Plaintiffs' counsel referred us to *Kurz v Ainhirn* 1995 (2) SA 408 D. In that case it was held that, although one need not comply with a specific formula, the deponent nevertheless need not only to assert that he can swear positively to the facts, but should also indicate the reasons why he is able to do so. The liquidator in that case, so the court held, was appointed some nine months before and '… had both the opportunity and the duty to obtain knowledge of the relevant facts from, *inter alia*, the documentary records of the close corporation and the interrogation of the defendant'.

[96] With reference to *Kurz*, plaintiffs' Counsel contended that, if the court could accept an affidavit by the liquidators who were not even working for the company in liquidation, the court should readily accept an affidavit from a deponent who was in the employ of the company in liquidation.

[97] Defendants' counsel on the other hand referred to the judgment from the same division decided fifteen years later, of Wallis J in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 115 (KZP), where the court held that the assertion by an attorney on behalf of Absa that he has personal knowledge acquired pursuant to having inspected the source documents, computer generated data, memoranda and correspondence contained in the file and having personally investigated the indebtedness of the defendant, is primarily hearsay and cannot be accepted. The deponent, so the Court held, should not have claimed personal knowledge but only that '… according to the documents from Absa bank, the claims in the present case are well founded'. The court held that it would have been persuasive if the deponent was an employee of the bank who could claim

knowledge acquired in the course of their duties. Such an employee may have had access to and needed to work with the records of the business. In the circumstances, Counsel for the defendants contended that Ms Pearson failed to demonstrate the basis on which she could verify the claim and in fact she did not even state that she has read the documents that were in possession of the liquidators.

[98] Eberson AJ, on the other hand, in *FirstRand Bank Limited v Beyer* 2011 (1) SA 196 (GNP), held that it would not be sufficient for an employee of the bank to state that he acquired knowledge just from the records without specifying which records he had access to and whether such records were complete or not. The learned judge stated that the provisions of the rule require that:

'… the person who deposed to the affidavit was able to swear positively to the facts alleged in the summons and annexures thereto and be able to verify the cause of action and the amount claimed'.

[99] The court further held that:

'… the deponent on behalf of such a company or legal personae has to state unequivocally that the facts were within his personal knowledge and furnish particulars as to how the knowledge was acquired by him so as to enable the court to assess the evidence put before it, and to enable it to make a factual finding regarding the acceptability of the supporting affidavit for summary judgment purposes'.

[100] To this end, Counsel for the defendants submitted that Ms Pearson failed to furnish detailed particulars of how the knowledge was acquired and the court is therefore unable to assess the evidence before it. The court *a quo* having only stated, so the counsel went on, that '… Ms Pearson was an employee of SME Bank … and she had access to all the information at her disposal'.

[101] It is clear from the judgments above that the employee should not only state that she had access to records, but must also detail what records she had access to, so that I can formulate a view as to whether the deponent has a basis to allege knowledge of the facts. Ms Pearson was the legal advisor and without more cannot claim that she had access to records in the financial department as part of her daily job. But it is possible that she may well have

personal knowledge by examining relevant records. However, she needed to specify this to enable me to determine whether she had access to relevant evidence to enable her to formulate an informed view. Mere allegations without details are therefore not sufficient.

[102] In the premises, I conclude that there is merit in this legal point raised on behalf of the defendants.

[103] The plaintiffs allege in the particulars of claim that 'by virtue of a court order issued by this court under case number 19193/2018 they are recognised as joint provisional liquidators of SME Bank'. The defendants' Counsel contended that the plaintiffs, in their capacity as provisional liquidators, do not have *locus standi* to prosecute civil claims in terms of South African legal system. Reference was made to the Companies Act which sets out what the provisional liquidators are empowered to do. The plaintiffs' Counsel confirmed in the heads of argument that the order of provisional liquidation, which was made on 11 July 2017, was confirmed by the High Court of Namibia on 29 November 2017. Notwithstanding the said confirmation, the plaintiffs approached the Gauteng High Court, two years later, in 2019 to commence a civil suit in their capacities as provisional liquidators (underlining added). In contrast, the court order of this court in 2018 under case number 19193/2018 ('the 2018 order') refers to the plaintiffs as joint liquidators and not as provisional liquidators.

[104] I do not intend pronouncing on whether the order under case number 19193/2018 was properly handed up at the hearing of the application for summary judgment. I nevertheless note that the said order refers in para 1.3. to an annexure 'A', which purportedly outlines the powers granted to the plaintiffs. Annexure 'A' is however not attached to the order, which was handed up to the court *a quo* and therefore does not form part of the evidence which was before the court *a quo*. The said powers have been recognised and extended in terms of para 1.6 of the order to apply to the joint liquidators relative to the institution of legal proceedings in the High Court of South Africa or any other competent

jurisdiction in the Republic of South Africa as the plaintiffs may deem necessary.

[105] It therefore follows that the liquidators were at least granted powers to institute civil proceedings on behalf of the SME Bank in the Republic of South Africa. Therefore, the point raised by the defendants that the plaintiffs have no *locus standi* is, subject to what is set out below, unsustainable. I reiterate however that I make no pronouncement on whether or not the powers and rights contained in the annexure 'A' would have an impact on the rights accorded by this court. This appeal court, like the court *a quo*, was not privy to contents of annexure 'A'.

[106] The 2018 court order was handed up at the hearing of the application for summary judgment and defendants' Counsel contended that Uniform Rule 32(4) prohibits any other evidence being submitted at the hearing of the application for summary judgment. Defendants' Counsel contended that the court *a quo* erred by holding that the plaintiffs' affidavit mentioned that the order will be handed up at the hearing and this was not correct since the said affidavit made no reference to the court order and it was mentioned only in the plaintiffs' heads of argument. In addition, the court *a quo* held that the defendants had the opportunity of accessing such order in terms of rule 35(12) and 35(14).

[107] The court *a quo* referred to the judgment of *Shell Zimbabwe (Pty) Ltd v Webb* 1981 (4) SA 752 (Z) relative to the admission of documents at the hearing of the application for summary judgment. At the hearing of the appeal, Counsel for the plaintiffs referred us to *Boyce NO v Bloem and Others* 1960 (3) SA 55 (T), in which it was held that a court is entitled to take judicial notice of another decision of that court. In that case, Roberts AJ stated that 'every judgment is, therefore, conclusive evidence for or against all persons (whether parties, privies or strangers) of its own existence, date and legal effect'. However, even if it were to be admitted as and accepted as evidence, the said orders refer to the powers annexed to the draft orders which were not availed to the trial court.

[108] Defendants' Counsel argued that the principle of judicial notice was misconstrued. The court orders were in this instance submitted to prove that the plaintiffs had *locus standi*. The court should therefore not have accepted same.

[109] In turn, Counsel for the plaintiffs argued that the court order referred to in the particulars of claim – in terms of which the plaintiffs were duly recognized – was good authority to find the basis for *locus standi*, despite the fact that the said order was not attached to the summons. In any event there is no rule which compels the respondent to attach such court orders. The orders are not evidence and just orders of the court. Counsel for the plaintiffs further submitted that in any event the issue of *locus standi* is primarily a matter of law and therefore one would not need to provide for such in the particulars of claim.

[110] The question which needs to be addressed is whether the court orders in this instance were admitted as evidence or not. Plaintiffs' Counsel submitted that any and/or all allegations made by a party in his or her pleading should be accepted and construed as persuasive proof that there is evidence in support of that allegation before the court. If the court should have taken judicial notice of the existence of the orders, then there was no need to submit the order at the hearing of the application for summary judgment and the court could and should have been able to decide without those orders.

[111] My perspective is at variance with this submission. There is no basis for me to assume that an allegation that the Plaintiffs have *locus standi* in accordance with orders made under a certain case number when the said orders are not even attached to the papers. I see no reason either that I should go out to search for the orders so that I should satisfy myself that indeed the plaintiffs have *locus standi*. The handing up of the court order at the hearing of the application for summary judgment was critical as evidence to support the allegations that the plaintiff had *locus standi*. Uniform Rule of Court 34(4) provides that no further document shall be admitted besides what is before the court. Counsel for the defendants referred to *Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) which emphasised at p451 para B that '[R]ule

34(4) limits plaintiff's evidence in summary judgment proceedings to the affidavit supporting the notice of application.'

[112] Judicial notice refers to '…[a] court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact.' It is envisaged that the court will have to accept without the court order being provided that they exist and should therefore conclude that the allegations as stated are correct. The authors of *Schwikkard and Van der Merwe: Principles of Evidence* (2009) at p481-482 state that judicial notice may be taken in two instances, viz: (1) 'where facts are so well known as not to be subject of reasonable dispute (that is, general knowledge which requires no external evidence), or (2) where facts can readily be ascertainable by accurate sources so that evidence to prove them would be completely unnecessary (or even absurd)'.

[113] The learned authors then go on to say:

'… in some instances, a court may take judicial notice of some facts without any enquiry, that is, without consulting any specific source, whereas in other instances judicial notice may only take place with reference to a source of indisputable authority. The distinction between the two is that in the former instance, evidence may generally not be led to refute the facts which have been properly noticed, while in the second instance, evidence may generally be led concerning the disputability or indisputability of the source.'

[114] The question becomes whether I, as a sitting judge, need to satisfy myself that, based on the reference to the case number in the particulars of claim, can conclude that there indeed is a court order and the contents thereof are as stated in the particulars of claim. If I cannot, then the plaintiffs need to avail the orders to me. As is the case in this matter, the court order refers to an annexure 'A' which has not been attached.

[115] The question before the court *a quo* was whether it was satisfied, based on the reference to the 2018 court order and the case number in the particulars of claim, that there was indeed such a court order, which provided as claimed by the plaintiffs in their particulars of claim. If not, then the question was whether the plaintiffs were required to place the orders before the court *a quo*.

As it were, *in casu* matters are complicated by the fact that the 2018 court order refers to an annexure 'A', which was not attached to the said order.

[116] Reyneke AJ, when considering pleadings in terms of rule 18, stated in *Inzinger v Hofmeyer*, a reportable judgement dated 4 November 2010, under case number 7575/2010 that:

'[By] the same token, the demands of lucidity and clarity would not permit references to or reliance on documents or pleadings in other proceedings that are not attached to the pleading, even if such documents and their contents are within the knowledge of the other party. The pleadings also serve to inform the court of the issues.'

[117] It follows ordinarily that the orders should have been attached and the argument that the contents thereof are matters of public knowledge is over-stretched. The contents of the order need not be proved but should form the basis or evidence of the allegations set out in the particulars of claim. *Erasmus: Superior Court Practice* at B1-229 referred to section 5(1) and (2) of the Civil Proceedings Evidence Act 25 of 1965 and state, with reference to any document and/or letter, except a liquid document, provided for in the rule, the court '… take judicial notice of any Government Notice, or any other matter which has been published in the Government gazette.'

[118] Accordingly, I am of the view that the legal point raised by the defendants in this regard has merit.

[119] The defendants contend that it is strange that the court *a quo* granted judgment against the first defendant and leave to defend in respect of the second defendant in an instance where the same defence has been raised by both defendants.

[120] The argument is that the plaintiffs have not provided proof that indeed the defendants have received monies alleged in the particulars of claim. In fact, the particulars of claim clearly state that the payments were made into the account number appearing in column 9 of annexure PoC1. The said PoC1 identified 'Mamepe – Capital Asset Investment' as the ultimate beneficiary. There is also reference in PoC1 under column 4 to 'Gold Reef Limited' as the actual account holder and this is not the first defendant. In principle, so it was

submitted on behalf the first defendant, it need not even have raised any defence as there is no case put up against it. The payment was made to a third party and not to the defendants.

[121] In contrast, Counsel for the plaintiffs retorted that the least the defendants could have done was to deny that the amount was paid to them and further to state that the account does not belong to them. In addition, the defendants could have approached the bank and obtained a certificate confirming that the bank account which is reflected in the particulars of claim is not theirs. Failure to deny, so the plaintiffs contended, was critical to the defendants' defence and their attempt to deal with this issue in the heads of argument cannot avail the defendants.

[122] The plaintiffs' Counsel further argued that the plaintiffs made allegations against the defendants and in accordance with *Maharaj* (supra), the onus shifts to the defendants to disprove the said allegation. Counsel for defendants disputed this submission and contended that the onus still remained with the plaintiffs to prove that the payment was made to the defendants and not only to allege so.

[123] Counsel for the plaintiffs further contended that there was fraud committed against the SME Bank on a high scale of funds in excess of R250 million and the fraudsters would try their best to confuse the tracing of funds. To this end, the entities like Mamepe Capital Investment was just a fictitious name. Strangely the court order obtained in 2018 by the plaintiffs was to be served on Mamepe Capital Investment at its business address in Sandton. When asked whether there is evidence linking the defendants to the account numbers, Counsel answered in the affirmative, indicating that proof thereof was not attached and that it was at the attorneys' offices. Also, so plaintiffs' Counsel advised us, the fraud committed related to huge sums of monies and that it would have been difficult to attach such proof. It is incumbent on the plaintiffs to present evidence to support any allegation made before the court. The plaintiff alleged that payment was made into the account numbers mentioned. There is no allegation that the account number belongs to the defendants and as such

there is no case to be answered by the defendants relative hereto. For some inexplicable or unacceptable reason, the evidence to support allegations that the payment was in actual fact made in favour of the defendant was not placed before the court *a quo*. This, in my view, meant that the argument that evidence is available from the bar is not sufficient to persuade me that such evidence indeed exists. To this end, the plaintiffs shot themselves in the foot.

[124] Defendants' Counsel's further argument is that the particulars of claim were also vague and embarrassing. In this regard reference was made by the defendants' Counsel to the fact that the particulars of claim referred to payments (plural) whereas at the same time there is only one payment made. Similarly, there is reference to payments to defendants' accounts, but there is only one account referred to in annexure PoC1. There is reference to two defendants, but there is no allegation as to which of the two received payment and also there is no indication as to the basis why the second defendant is cited in the suit. In addition, the plaintiffs allege in one part that the payment was made in error and later stated that it was done fraudulently.

[125] Ordinarily the director of a company can be joined for a variety of reasons including but not limited to allegations that the director used the company for fraudulent activities. The particulars of claim do not set out the reason for having joined the second defendant in this *lis*. The fact that it was mentioned in the prayers that the defendants are held liable jointly and severally does not excuse the lack of an allegation in the particulars of plaintiffs' claim as to why the second defendant is cited in the papers. There is also no allegation in the particulars of claim for the court *a quo* to state that the second defendant was joined by virtue of being a director. Besides the fact that this is not alleged anywhere in the papers is still crucial for the particulars of claim to provide the basis why a director should be joined as a defendant for the liability of a company which has limited liability. Notwithstanding the ruling of the court *a quo*, it proceeded to state that there are no reasons why second defendant can be found personally liable for the moneys paid to the first defendant.

[126] The second reason for the court *a quo* to have granted the second defendant leave to defend was that the second defendant's name does not appear on the PoC1, which was relied on by the plaintiffs. In contrast, the same reasoning did not hold for the court *a quo* as the name of the first defendant also does not appear on annexure PoC1. It must be deduced that the court *a quo* concluded that the name of the first defendant appears on PoC1. The court *a quo* however seemed to be indifferent about the difference between names, as the name of the first defendant as it appears in the particulars of claim differs remarkably from the name of Gold Reef Ltd as it appears on annexure PoC1. The confusion can be gleaned from the judgment of the court *a quo* – in para 31 it is stated that money flows from the SME Bank to Gold Reef Limited, who is the account holder and in contrast at para 34 the court refers to Gold Reef City Limited (emphasis added). Both names refer to a public company whereas the first defendant is a private company. The court *a quo* cannot be heard to approbate and reprobate and should have clearly concluded that payment was made in favour of Gold Reef Limited as it appears from annexure PoC1 and not the first defendant as there is no evidence brought forward which draws the link between the first defendant and payment or PoC1.

[127] During arguments, Counsel for the plaintiffs submitted that indeed there is proof that the account number into which payment was effected is that of the defendants and the said proof is at the offices of the plaintiffs' attorneys. The question then becomes on what basis should the court decide when an important document is not presented to court.

[128] Defendants' Counsel persisted with the argument that the particulars of claim disclose no cause of action. Though there is reference by the plaintiffs to the *condictio indebiti*, so the defendants contended, they failed to make fundamental allegations to satisfy the elements of the claim under *condictio indebiti*. The court *a quo* dismissed this argument, because the allegations relative to the elements of *condictio indebiti* need not appear verbatim as the plaintiffs may have wished for, but can clearly be inferred from the allegations made by the plaintiffs. The allegations made by the plaintiffs are that the payment was made from SME Bank's account in error, into the defendants'

account and the latter is unjustly enriched. The court *a quo* concluded that these allegations clearly speak to all elements of the *condictio indebiti*. The question remains whether the mere allegations of those elements and without more *ipso facto* justify the conclusion that a case has been made.

[129] The argument by the defendants that the payments were not made in error cannot be sustained. The authoriser would not have paid had he known that the monies were not due. The plaintiffs' Counsel further contended that defendants did not deny that they received payment and did not disclose a *bona fide* defence. I accept that the payment in this instance, subject to what I say below, cannot be construed as having been made intentionally. Had the person who effected payment known that the instructions to pay was laced with fraud, he would not have paid. To this end the submission by defendants' Counsel that payment was effected with forethought cannot be sustained.

[130] Counsel for the plaintiffs contended further that the SME Bank in liquidation was impoverished because of the said payment and the defendants were unduly enriched. Ordinarily evidence of impoverishment would be supported by proof of payment. If no proof of payment is brought to court, then the plaintiffs would have failed to discharge this requirement. Annexure PoC1 is a document which demonstrates the process to follow before any payment could be effected. It does not present evidence that payment was indeed effected. The requirement of impoverishment in the claim based on the *condictio indebiti* is concerned with whether the plaintiff suffered a loss in the act of making the payment or performance giving rise to the condictio. Counsel for the plaintiffs, when asked about the proof, stated that same is at the attorneys' offices of the plaintiffs and it would have been difficult to attach bulky documents as evidence bearing in mind that there were many transactions involving millions of rand stolen. In this case there was only a once off payment of R650 000 and would not have been cumbersome for such evidence to be attached to the particulars of claim. The plaintiffs' counsel quoted from the judgment of *African Diamond Exporters (Pty) Ltd v Barclays Bank International* 1978 (3) SA 699 (A) at 713H where the court held that:

'… where a plaintiff has proved an overpayment recoverable by the *condictio 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.'

[131] The proof of payment is not brought before court but is at the offices of the plaintiffs' attorneys and the court is invited to exploit its wits in the realm of conjecture to conclude that it is true that such proof exists even though it is not presented before court.

[132] In the absence of proof of payment, it also becomes difficult for the plaintiffs to provide evidence to prove the allegation that the defendants were enriched. The said proof would have demonstrated that the money exchanged hands. Counsel for the plaintiffs further stated that the attorneys acting for the plaintiffs have in their possession proof that the bank account numbers into which payment was effected is the bank account of the defendants. The said proof, so went the counsel's argument, is not attached to the papers because a party is not compelled by any rules to have such documents attached. In the absence of the proof that the account belongs to the defendants, the allegation that the defendant was enriched cannot be substantiated.

[133] It is trite that once it is proven that the defendants received money not owed, enrichment is presumed and the defendants bore the onus to plead and prove loss of enrichment. (See: *Yarona Healthcare Network v Medshield* 2018 (1) SA 513 (SCA) at para 47). Until such time that evidence of impoverishment is presented by the plaintiffs, the onus is not shifted to the defendants to prove anything. It is not sufficient for the plaintiffs to allege that the defendants should have just denied receipt of the money or that the account is not theirs or bring evidence from the bank to prove that the account is not theirs. The plaintiffs' case is that the payment was effected into the account whose details are on annexure PoC1. There is no allegation that the account belongs to the defendants. In fact, the court *a quo* held that the annexure clearly shows the account holder to be Gold Reef Ltd. To the extent that the plaintiffs failed to provide court with proof of payment and documents substantiating the allegation that payment was made to the defendant/s, impoverishment has not been

proved. To this end, it does not matter whether the defendants have clearly demonstrated that they have a *bona fide* defence.

[134] Although attention should be paid to establish whether there is a defence, it is still critical that the plaintiffs should present an unimpeachable and an unanswerable case. The plaintiffs' papers appear to have been prepared in haste and littered with drafting errors. I say this being nevertheless alive to the fact that technicalities should not compromise a just outcome.

[135] The case presented on behalf of the plaintiffs is replete with lingering questions and the court *a quo* was misdirected in deciding as he did. It is noteworthy that all will not be lost for the plaintiffs if their application for summary judgement was dismissed, as the plaintiffs would at trial stage be able to accurately describe the defendants, clearly set out the basis for joining the second defendant and further bring proof to the trial court of payment and proof that the account numbers into which payment was effected is that of the first defendant and not Gold Reef Limited as indicated in the papers before me.

[136] As regard excipiability of the particulars of plaintiffs' claim, it appears to me that the plaintiffs claimed a refund of the R650 000 on the basis of two causes of action. The difficulty, however, is that the separate and distinct causes of action are not pleaded in the alternative. The plaintiffs' case appears to be that moneys were paid to the first defendant and/or to the second defendant (evidence of which is left at the attorney's offices) and/or Gold Reef Ltd (as the court *a quo* found to be the account holder). These numerous seemingly mutually exclusive averments the defendants are required to disprove – this, in my judgment, certainly is an anomaly.

[137] Whilst there may be merit in the argument that the defendants did not present an affidavit which demonstrated that they have a *bona fide* defence to the plaintiffs' claim – which I do not pronounce on – what is clear to me is that the plaintiffs did not present an unanswerable case. In which case, then *cadit quaestio*.

[138] It is trite that the appeal court should be slow in interfering with the judgment of the court *a quo*, except in instances where it appears that there

was a misdirection on the part of the court *a quo*. From what is set out above, interference with the judgment is warranted.

[139] There can be little doubt that the court *a quo* erred in granting interest at the rate of 15,5% where the correct rate in the Republic of South Africa at the time was 9%. Counsel for the plaintiffs conceded that the percentage claimed of 15.5% was made with the plaintiffs' legal representatives being oblivious to the fact that the rate had been changed to 9% and to this end agrees with the defendants' Counsel that the court had erred.

[140] As regards the costs order granted rather curiously against the second defendant, despite him having been granted leave to defend the action against him, Plaintiffs' Counsel referred us to the official court order signed by the registrar, which does not provide for costs against the second defendant. This is at variance with the order granted by Skibi AJ as part of his judgment. Plaintiffs' Counsel nevertheless contended that no appeal should have been lodged by the second defendant because the court order signed by the Registrar correctly reflected the order that ought to have been granted. It is noted that the judgment appears to have ordered the second defendant to pay costs, whereas the order from the registrar makes no such reference.

[141] It is trite that an appeal lies only against the order and not the reasoning of the court. In the event that the appeal court was not in favour of his argument, so plaintiffs' Counsel submitted, it should take cognisance of the fact that the plaintiffs have already abandoned the costs order against the second defendant. In practice, so his submissions continued, the costs in summary judgment application are costs in the cause. The court should have regard to the provisions of rule 32(9) under which case an order of costs would be made.

[142] Defendants' Counsel retorted that this was simply an error on the part of the registrar as the order of the court is clear that the second defendant was ordered to pay the costs. The counsel further undertook to approach the registrar to make sure that the order is rectified accordingly. The submission that it is standard that cost orders are in the cause should not apply and the court is empowered to decide to award costs against the losing party and in this

instance the court *a quo* should have ordered the respondent to pay the legal costs.

[143] As indicated above, I am of the view that the second defendant's appeal against the costs order granted against him should be upheld and, for the reasons mentioned by Adams J, I am of the view that each party should bear their own costs in relation to second defendant's appeal.

[144] In the premises, I would have upheld both the appeals by the first and the second defendants. The first defendant's appeal I would have upheld with costs and the second defendant's appeal I would have upheld with no costs order.

M V NOKO
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	24th February 2021 – in a 'virtual hearing' during a videoconference on the *Microsoft Teams* digital platform.
JUDGMENT DATE:	26th March 2021 – judgment handed down electronically
FOR THE APPELLANTS:	Advocate Paolo Cirone
INSTRUCTED BY:	L Cirone Attorneys
FOR THE RESPONDENTS:	Advocate M J Cooke
INSTRUCTED BY:	Webber Wentzel