

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

13/6/14

CASE NUMBER:16360/09

In the matter between

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO:	
(3) REVISED.	
13/6/2014	<i>J. H. J.</i>
DATE	SIGNATURE

GRANT MURRAY t/a G-TECH

PLAINTIFF/ RESPONDENT

and

MPUMALANGA ECONOMIC GROWTH

DEFENDANT/EXCIPENT

AGENCY

JUDGMENT

TLHAPI J

[1] The excipient and the respondent entered into an agreement in terms of which the respondent rendered certain goods and services to the excipient. The

excipient neglected to make payment for the services rendered and installations in the amount of R5 150 331.97 for the period October 2006 up to an including December 2008. In its plea the excipient pleaded that the agreement entered into was not enforceable. The respondent proceeded to amended its particulars of claim to include a claim based on unjust enrichment and couched the claim and circumstances of the purported enrichment as follows:

" 12.1 In the alternative to the above-mentioned and in the event that the honourable Court finds that the agreement between the parties does not constitute an enforceable agreement, for whatever reason, the Plaintiff specifically pleads that the defendant was unduly enriched under these circumstances as a result of the following...

12.1.1 The Plaintiff provided the Defendant with information Technology Services and installations which included, but was not limited to the following:

12.1.1.1 The provision of access to and the use of Internet access, backup, disaster recovery and support services on a application service provider basis;

12.1.1.2 Maintenance and support solutions comprising of the provision of access to and the use of Internet access, backup, disaster recovery and support services on an application service provider basis;

12.1.1.3 The hosting and support services received"

The respondent pleaded that the excipient '*has been enriched*'; that the respondent '*has been impoverished*'; that the services and installations were

rendered whilst the respondent held the bona fide belief that the respondent was to receive payment ..in terms of the agreement'.

[2] The exception raised is on the basis that the alternative claim based on unjust enrichment does not sustain a cause of action. The excipient argued that the respondent was confined to raise its claim under the *conditiones*, recognised in South African Law, which included the '*Conditio indebiti*'; the '*Conditio ob turpem vel iniustam causam*'; the '*Conditio causa data causa non secuta*' and, the "*Conditio sine causa (specialis)*". According to the excipient there was no transfer of property, which was a requirement for all claims based on the recognized *conditiones*, rather the respondent's claim was based on what it claimed was a delivery of services to the excipient, that is, the delivery of the value of a *factum*.

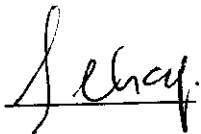
The excipient further argued that this was not a case that warranted the extension of the *conditiones*, as this would be at 'odds and frustrate the objects of section 217 of the Constitution of the Republic of South Africa Act, 1996' in as far as it related to principles and procedures governing procurement.

[3] The respondent has argued that the time was ripe for this area of the law to be developed and be expanded to include situations as presented themselves in this action, and that the claim as pleaded in the alternative should be accepted as a claim under the *conditio indebiti*. In order to achieve this, there was need for a proper ventilation on the issues, as canvassed in *Fidelity Supercare Services Group (Pty) Ltd v Johannesburg Metropolitan Police Department* (Case 7209/2009 NGD delivered 16/01/23). The facts of this matter were not envisaged under the Roman Dutch Law, it is therefore not only the objects of section 217 of the Constitution that should be observed, holistically the interests of justice would be served as espoused in section 173 of the said Constitution if the issues were properly ventilated.

It was trite that the court was duty bound to consider first an exception taken to a pleading. The issues presented in this matter call for a deviation. In my view it is only when the merits are determined when a court could be in a position to make a finding whether it was appropriate in these modern times to expand the application of the *conditiones*, rather than close the door to the litigant on exception. In my view while not dismissing the exception raised, this is a proper case in the interests of justice to order the postponement of the hearing of the exception to be argued together with the merits of the case.

[4] In the result the following order is given:

1. That the exception be argued at trial.
2. Costs are reserved.



TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	26 MARCH 2014
JUDGMENT RESERVED ON	:	26 MARCH 2014
ATTORNEYS FOR THE PLAINTIFF	:	MALAN KRUGER INC
ATTORNEYS FOR THE DEFENDANT	:	KT MOKOENA ATT