REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

28/11/2014
DATE

SIGNATURE

CASE NO: A407/2013
2/12/2014

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED **APPELLANT**

And

MORRIS MOKASE
t/a MOKASE ATTORNEYS AND ASSOCIATES **RESPONDENT**

JUDGMENT

MOLEFE J:

[1] The appellant is appealing against the judgment of the Court *a quo* delivered on 7 January 2013. The appellant was the plaintiff in the court *a quo* and the respondent was the defendant. The leave to appeal was granted by the court *a quo*.

[2] The appellant's grounds of appeal are *inter alia* that:

2.1 the plaintiff's case was based on the *condictio sine causa* and not the *condictio indebiti*; and

2.2 the *condictio sine causa* was sufficiently alleged and proved.

The respondent did not oppose the appeal, nor did he file heads of argument. There was no appearance on behalf of the respondent at the hearing of this appeal.

Background

[3] The appellant is a registered commercial bank and respondent is an attorney practicing under the name M.Mokase Attorneys and Associates. On 11 March 2004, the appellant and the respondent entered into a partly written and partly oral agreement in terms of which the appellant opened a business current account in the name of the respondent ("the account"). It is common cause that the account was used by the respondent as an attorney's trust account.

[4] On 16 September 2010 a *"not transferable"* cheque in an amount of R1 115 487,26 was deposited into the account. The cheque was drawn by the City of Tshwane Metropolitan Municipality (Tshwane Metro) in favour of SSS Cornerstone Building and Construction CC (SSS Cornerstone). It later emerged from evidence before the court *a quo* that SSS cornerstone did not receive this cheque nor deposit it in the account. The cheque was fraudulently obtained by someone and deposited into the account despite the cheque being clearly marked *"not transferable"*. Between 17 September 2010 and 11 October 2010, the respondent made various withdrawals and disbursements from the account, thereby using the credit balance despite the funds not being due and payable to the respondent.

[5] The appellant became aware that the account was not the legitimate beneficiary of the credit balance, and effected a reversal of the remaining credit balance in the amount R199 678,00 so as to mitigate further damage. The appellant suffered a loss in the amount of R949 390,20 in that it had to reimburse the Tshwane Metro for the total cheque amount. The appellant demanded repayment of the R949 390,20 from the respondent. The respondent acknowledged receipt of the R1 115 478,26 and counterclaimed in respect of the recovered amount of R199 678,00. The court *a quo* dismissed the appellant's claim and the respondent's counterclaim, both with costs.

[6] The court *a quo* on the merits, found that the appellant failed to allege the essential elements of enrichment or *condictio indebiti* have not been alleged or proved and that the appellant should have taken cession of the claim from the Tshwane Metro if it wanted to base its claim on fraud or theft. The court *a quo* found that the payment of the cheque by the appellant to the respondent was not made in the *bona fide* belief that it was owing to the respondent, nor that the payment was reasonable.

[7] The court *a quo* also made the following findings regarding the respondent's contentions that, the monies belonged to its clients;

7.1 "*alleged clients seem to be more imagined than real*";

7.2 "it is *strange that the three cheques during October 2010 in the amounts of R50 000, R50 000 and R170 000 were made out to a certain JM Mangena or bearer*";

7.3 "*On the probabilities the defendant was involved in a fraudulent scheme*".

[8] On the failure by the respondent despite a clear request to bring to court all his client files relating to the matter, the court remarked that;

> 8.1 "*He failed to do so and had a lame excuse of his motor vehicle having been clamped by Tshwane Metro and towed away*";

The court *a quo* also dismissed the respondent's counterclaim by finding that;

> 8.2 "*the defendant did not prove that he is entitled to the money*".

The court *a quo* also referred its judgment to the Law Society of the Northern Provinces for urgent investigation against the respondent. These, in my view, points to significant negative findings on the credibility of the respondent; tarnished his testimony; thwarted his defences to the claim and should have ordinarily bolstered the prospects of success of the appellant's claim.

[9] The appellant contends on appeal that, the trial court erred in finding that its claim was based on *conditio indebiti* and not *conditio sine causa* and that the essential elements of a *conditio indebiti* were alleged and proved. The ultimate enquiry therefore is whether the appellant had managed to prove that it is entitled to recover the claimed amount from the respondent, despite the deposited cheque not being drawn in favour of the respondent but its imaginary clients.

[10] It is submitted by the appellant's counsel[1] that although there is no general enrichment action, there are nonetheless certain general requirements or elements common to all enrichment actions. These requirements are; a) the enrichment of the defendant; b) the impoverishment of the plaintiff; c) the enrichment must be unjustified; d) the enrichment of the defendant must be at the expense of the plaintiff

[1] Advocate J Raff

and the appellant contends that these allegations were made in its particulars of claim.

Appellant's counsel referred the court to ***B & H Engineering v First National Bank of South Africa LTD***[2] that:

> *"A condictio indebiti lies to recover a payment made in the mistaken belief that there is a debt owing. However, a bank paying a cheque knows that it owes no debt to the payee. Its mistake lies, not in the belief that it owes money to the payee, but in a belief that it has a mandate from the drawer to make payment. In these circumstances the appropriate remedy is not the condictio indebiti but the condictio sine cause".*

It was further held in ***Govender v Standard Bank of South Africa Limited 1984 (4) SA 392 (C) 400*** that:

> *"It is necessary for a condictio indebiti to show reasonable mistake of the plaintiff, but a condictio sine causa lies whether the money is in the hands of the defendant without cause, whether due to mistake of the plaintiff or not. It is therefore a defence to the condictio indebiti that the mistake was not reasonable but negligent, but is would not seem to be a defence to the condition sine cause since no error need be proved, whether reasonable or unreasonable".*

[11] I agree with the appellant's submission that the respondent was enriched by the payment as he did not render any performance juridically connected with the receipt of the money and the appellant was also impoverished by the same amount

[2] 1995 (2) SA 279 (A)

and thereby confirming the causal link between the two situations. The respondent's enrichment was unjustified as there were no sufficient grounds justifying the transfer or retention of the credit amount in his account.

[12] The respondent also failed to produce his clients' record to support his contention that the cheque amount was trust funds when granted an opportunity to do so by the trial court. The irrefutable truth is that the cheque was stolen and the respondent was (or his alleged clients were) not entitled to utilised the funds, as they did. The trial court also found that, the probabilities point to the respondent being part of a fraudulent scheme and dismissed his counterclaim. This in my view can only confirm that the respondent was not entitled to receive the money in the account nor to utilise it as he did. He was therefore enriched at the expense or against impoverishment of the appellant. The appellant ought to be compensated for its loss as claimed. The court *a quo* therefore misdirected itself by dismissing the appellant's claim.

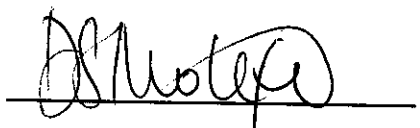
[13] In the premises, I propose that the following order be made:

13.1 the appeal is upheld with costs and the court *a quo's* order is set aside and replaced with the following order:

13.1.1 the defendant shall make payment to the plaintiff in the amount of R949 390,20;

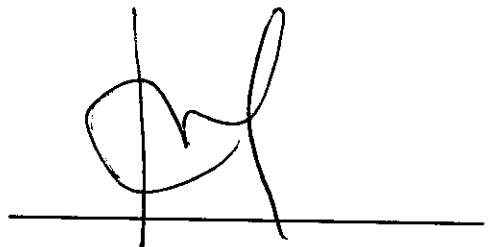
13.1.2 the defendant shall pay interest on the amount of R949 390,20 at the rate of 15,5% per annum from 5 May 2010 to 31 July 2014 and at the rate of 9% per annum from 1 August 2014 to date of final payment;

13.1.3 the defendant shall pay the plaintiff's costs of suit.



D.S. MOLEFE

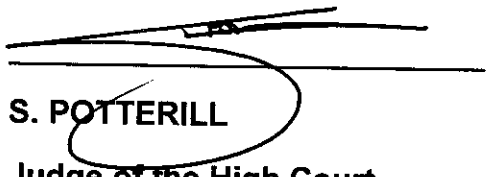
Judge of the High Court



K.M. MANAMELA

Acting Judge of the High Court

I agree



S. POTTERILL

Judge of the High Court

I agree and it is so ordered

APPEARANCES:

Counsel on behalf of Appellant	:	**Adv. J Raff**
Instructed by	:	**Brooks and Luyt** **c/o Stegmanns Inc. (Pretoria)**
Counsel on behalf of Respondent	:	**No appearance and no Heads of Arguments filed.**
Instructed by	:	**M Mokase Attorneys & Associates**
Date Heard	:	**19 November 2014**
Date Delivered	:	~~28 November 2014~~ 2/12/2014