REPUBLIC OF SOUTH AFRICA

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

CASE NO: 39859/2015

9/3/2016

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

08/03/2016
DATE

SIGNATURE

In the matter between:

DENEL SOC LIMITED t/a DENEL AVIATION	FIRST APPLICANT
DENEL AEROSTRUCTURES SOC (PROPRIETARY) LIMITED	SECOND APPLICANT

and

KLAAS MADIMETSA MAFALO	FIRST RESPONDENT
DENEL RETIREMENT FUND	SECOND RESPONDENT

J U D G M E N T

MAJIKI J

[1] The applicants are both companies duly registered in accordance with the South African company laws. The first applicant wholly owned the second applicant as its subsidiary. The first applicant rendered human resources services for the second applicant, such services included the administration of the second applicant's payroll. The second applicant is the former employer of the first respondent. The second respondent worked as an operator for the second applicant from 15 August 2011 until his dismissal on 11 March 2015. The second applicant brought an application seeking an order against the first respondent for the repayment of a sum of R716 533.30, together with interest thereon, which was erroneously paid to the first respondent with his November 2014 salary. The further order is sought against the second respondent. The second respondent is a contribution pension fund to which the first respondent made contributions. The order sought is that the second respondent be authorised to make payment of the first respondent's accumulated benefits as part payment towards settlement of the debt owed by the first respondent. The reference to ***Section 21 3(b) of the Government Employees Pension Fund Law of 1996*** in the notice of motion was corrected to ***section 37 D b(ii) bb of Pension funds Act 24 of 1956.***

[2] The application is opposed by the first respondent on the basis that the applicant failed to make out a case for the order of payment of the sum of R717 533.30 by the first respondent. Furthermore, without admission of liability by the first respondent or judgment in favour of the applicants, the applicants have not provided authority upon which the second respondent can be ordered to make payment to the first applicant.

[3] The following facts are common cause; the first applicant paid the second applicant's money in error to the second respondent with his November salary. An incorrect code was entered by one Ms Kasselman on the first applicant's payroll system (the "system"). As a result thereof the first respondent was not paid the amount of R25 439.25 which he ought to have been paid but the sum of R1 910 129.61 the first respondent was therefore overpaid with a sum of R1 892 690.36. The first applicant ordinarily earned a basic salary of R10 175.27 excluding the 13th cheque, standby, dayshift and overtime allowances, per month. The error was discovered on 08 January 2015. Upon such discovery and on 12 January 2015, the first respondent consented to or volunteered that the balance that remained in his account be transferred to the second applicant. At the time the remaining balance was a sum of R1 141 573.00. He had used the sum of R751 153.35 and he has failed to pay back the same to date. He has accrued pension benefits to the value of R35 115.00 with the second respondent.

[4] It is also common cause that the total amount of the first respondent's salaries in respect of the Months of January to April 2015, in the sum of R34 620.05 was withheld by the second applicant, towards liquidation of the outstanding balance. It seems as if the first respondent had agreed to repay the money that was still outstanding. The parties are not in agreement as to what the terms of the repayment would have been. The outstanding balance after the non-payment of three months' salaries was reduced to R717 533.30. After disciplinary hearing, the first applicant was dismissed on 11 March 2015. The dismissal was confirmed on appeal on 8 April 2015.

[5] The issue for determination is whether the applicants are entitled to reclaim the monies they aver are owed by the first respondent on the basis of *conditio indebiti*

[6] The applicants aver that the payment was a bona fide error. Ms Kasselman erroneously entered the number "6188" against the function "standby allowance". These numbers are what used to be the last digits of the first respondent's employee number at the time, his employee number was 2206188. The system then automatically applied a formula which calculated the first respondent's standby allowance to the tune of R3 126 846.95. The actual number of standby allowance should have been 2 units which would have translated to a sum of R1010.62. A unit of standby represents a week during which the employee was on standby to perform work. From the three R3 126 846.95 the system deducted total deductions of a sum of R1 236 557.47

[7] Upon discovering of the error and upon notification of the first respondent's bank, First National Bank, the bank froze the first respondent's account. When the first respondent was asked to return to work as soon as possible, he refused and stated that he would discuss the issue upon his return on 12 January 2015. He never notified the applicant about the overpayment at any stage. When he availed himself he stated that he used the funds that were no longer in his account for his personal needs. He did not explain further about how he used the said money.

[8] Even though they discussed some options of how he would repay the money, he never came back to finalise the details of repayment. According to the second

applicant's policy, the second applicant acted lawfully by withholding first respondent's salaries. He was charged and found guilty of gross dishonesty, unauthorised use of company funds and unlawful enrichment, in a disciplinary hearing. The second respondent was required to verify his or her payslip. There is an endorsement on employees' payslips that *"any under or over payments will be rectified"*.

[9] Finally, they aver that the applicants are entitled to payment of first respondent's accumulated pension benefits that are held with the second respondent in terms of ***Section 37D (b)(ii) of the Pension Funds Act 24 of 1956.***

[10] The first respondent generally denies, all the facts put up by the applicants except those recorded as being common cause between the parties and puts the applicants to the proof thereof. According to him he received his payslip and the subsequent payment corresponded with what he had seen earlier in the payslip. Had the two not correlated, he would have contacted the second applicant as he would have found no reason for a payment that was different to the one reflected on his payslip. From the time he was contacted by the second applicant about the overpayment, he never withdrew any money from his account. He also cooperated with the representative of the second applicant when they had to transfer the balance that remained in his bank account.

[11] He also agreed to repay the money he had used on condition that the second applicant allowed him to continue with his employment and make deductions from his salary towards the settlement of the amount due to the second applicant. It was

however unlawful for the second applicant to withhold his entire salaries for the months January to April 2015, leaving him without any means of income for his support and that of his family. He never took part in the calculation and payment of the money into his account.

[12] The legal position in as far as the actions for *conditio indebiti* are concerned, is that a person who has paid a sum of money or delivered property to another person believing in error that it was due to such person when in fact it was not due, is entitled to recover the same from the said person. The requirements for a remedy to be available are that:

i) Payment was made by the applicant or his agent;

ii) The payment was made in *debite* in the wildest sense, without obligation;

iii) The error must be excusable.

[13] The first requirement is common cause in the present case. With regard to excusability of the error, in ***Bowman De Wet and Du Plessis NNO v Fidelity Bank 1977(2) SA 35 (SCA),*** the Supreme Court of Appeal held that *conditio indebiti* is available where a person, acting in a representative or fiduciary capacity, had made an overpayment under bona fide mistake as to payee's legal rights. In a nutshell, the Supreme Court of Appeal was of the view that excusability of the error is not always a requirement, for example in claims where third persons act for the benefit of others and in the process commit a bona fide mistake as to the rights of the payees.

[14] In the present case, the first respondent has no version as to how the error was committed. The applicants on the other hand have given full explanation of how the error occurred, the first respondent would like to persuade the court to believe that the issuing of the payslip was an indication that there was intention to make the payment which indeed was subsequently made. In those circumstances, he submits it cannot be said the payment was made in error. In my view, there is no basis for me not to accept that the error happened in the manner that the applicants have explained. I find that the clerical error in the punching of more digits than were supposed to have been punched generated an obligation by the second respondent to pay standby remuneration which otherwise was non-existent. I am therefore satisfied that requirement of the existence of an error was satisfied. I reject the view that because the payslip in the same amount was generated earlier, the payment was not made in error.

[15] In as far as to instances where the payee could validly raise a defence against the claim for repayment of money paid in *debiti*, the payee must show that it was not enriched. With regard to defences, in ***African Diamond Exporters (PTY) LTD v Barclays Bank International LTD 1978(3) SA 699 A,*** it was held that a defence of non-enrichment is available to the person who received money indebite. However, it cannot be open to a defendant who was mala fides. According to the first respondent he was not mala fides. He did not make any further withdrawals after he was notified of the overpayment. He cooperated with the process of transferring the available amount. He was not enriched, the money was no longer available, he had used it. He, the first respondent was absolved because the item was destroyed. In my view, the first respondent cannot succeed in these submissions. He has not been forthcoming

about how he used the money. His non withdrawals after he was notified of the overpayment, could well be due to the fact that the account was frozen, no withdrawals could be possible in those circumstances. He refused to avail himself for discussions about the overpayment before he was due to return to work on 12 January 2015. I am also unable to accept that he honestly believed that the money was his due to the fact that the payment correlated with his payslip. He could have and was supposed to verify the payment of an amount that was considerably much more than his normal earnings.

[16] Mr Tobejane on behalf of the first respondent submitted that the payment was deliberately made by the first applicant. He sought to rely on the decision of ***Klein NO v South African Transport service and Other 1992 (3) SA 509N*** where it was found that Trust Bank had available to it machinery for making enquiries whether it should make a payment or not, but did not use it to do so, but instead proceeded to make a payment. He submitted that similarly the applicants had available resources, sophisticated systems that if they were used or checked, could have made the applicants to realise the mistake, but they failed to use them.

[17] I agree with the submissions made on behalf of the applicants that the facts in the Klein case are distinguishable from those of the present case. In the Klein case the court held that whatever authority the Trust bank might have obtained from the insolvent to make a payment, it terminated when the insolvent was finally sequestrated. When the Trust bank made the payment it was not acting in terms of subsisting mandate. It was therefore not acting as agent for either the trustees or insolvent when it made the payment. These circumstances do not arise in the present

case. The first applicant at all material times was acting based on the continued mandate of its engagement by the second applicant. The circumstances under which the finding about deliberate payment being made by Trust bank, were from a different background. The Trust Bank had advised the insolvent, when requested to issue a guarantee, that the Trust Bank was to be irrevocably authorised *"to pay... in accordance with the guarantee on first demand being made, without any further reference to the debtor and without requiring proof or the debtor's agreement that the amounts so demanded were due and not withstanding that the debtor may dispute the validity of any such demands or payments."*

[18] In my view the applicant satisfied the requirement of a claim founded on *conditio in debiti* accordingly, they are entitled to an order for repayment.

[19] As regards the order sought for payment by the pension fund, it was submitted that the first respondent has not admitted liability and the applicants have no judgment against him. Section 37 D b(ii) bb of Pensions Funds Act 24 of 1956 provides:

> " *a registered fund may deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund in respect of compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or*

misconduct by the member in respect of which Judgment has been obtained against the member in any court, including a Magistrates Court."

[20] In my view, the circumstances on which the money due to be paid to the second applicant by the first respondent are included in the above section. The first respondent was found guilty of gross dishonesty, amongst others, in the second applicant's disciplinary hearing. I find no reason to quarrel with that conclusion for reasons already alluded to, about his conduct after receipt of the money, elsewhere in this Judgment. The feet of clay in the submission on behalf of the applicant is to imagine that the order in terms of this section must be distant in time from when Judgment is obtained. In my view, a proper case has been made for the deduction and payment to be made. Judgment for payment of the amount has been granted. The applicants are therefore entitled to an order for realisation of the judgment.

[21] This brings me to the issue of costs. The applicants seek costs on a punitive scale on the basis that the first respondent's actions amounted to theft or fraud. The submission on behalf of the first respondent in this regard is that he did not participate in the payment of the money into his account, therefore he should not be ordered to pay costs.

[22] It is an established principle that costs follow the results. The applicants are successful in their application. Therefore they are entitled to costs. However, I do not agree with the submission that the liability of the first respondent on *conditio_indebiti* should be extended to include a finding of theft or fraud. He may have acted in a

manner that was less than candid, and was thereby dishonest. Nevertheless, I find no basis for an award of costs on a punitive scale.

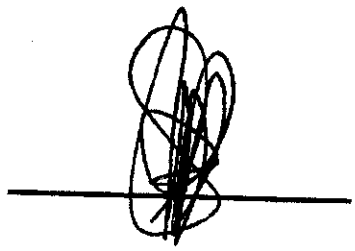
In the result I make the following order:

1. The first respondent is hereby ordered to make payment to the second applicant in the amount of R716 533.30;

2. The first respondent is hereby ordered to make payment to the second applicant of interest on the aforesaid amount at the rate of 9% per annum calculated from 25 November 2014 to date of payment;

3. The second respondent is hereby directed and authorised to make payment of the respondent's accumulated pension benefits in the sum of R35 115.00 or such higher amount as may have accumulated since, which amount shall not exceed the amounts set out in orders 1 and 2 above, to the second applicant in terms of the provisions of section 37D (b)(ii)(bb) of the Pension Funds Act no.24 of 1956 in order to satisfy a portion of the first respondent's indebtedness, as set out in orders 1 and 2 above.

4. The first respondent is hereby ordered to pay the costs of the application



MAJIKI J

JUDGE OF THE HIGH COURT

ACTING IN GAUTENG DIVISION, PRETORIA

Appearances

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Instructed by	:	Messrs. Bowman & Gilfillan 141 Boshoff Street Muew MEUKLENUEK Tel No. : 012 4528200 Ref. Mr M. Rusa / 6146095

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Date of hearing	:	29 February 2016
Date of Judgment	:	09 March 2016