IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

Case No: AR497/2018

In the matter between:

FIRSTRAND BANK LIMITED **Appellant**

and

SICELO RICHARD KHOPHO **1st Respondent**
NIKITA NONKONZO KHOPHO **2nd Respondent**

ORDER

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a) The appeal is allowed with costs, such to be paid jointly and severally by the respondents, the one paying the other to be absolved.

b) The order of the court a quo is set aside and substituted with the following order:

'Judgment is entered for the plaintiff as follows:

1 Against the first defendant for:

(a) Payment of the amount of R541 940.00;

(b) Interest on that sum at the rate of 10.25% per annum from 25 January 2018 to date of payment.

2 Against the second defendant for:

(a) Payment of the amount of R320 000.00;

(b) Interest on that sum at the rate of 10.25% per annum from 25 January 2018 to date of payment.

3 The defendants are directed to pay the costs of suit jointly and severally, the one paying the other to be absolved.'

JUDGMENT

Delivered on: 29 March 2019

Gorven J (Seegobin and Bezuidenhout JJ concurring)

[1] The appellant sued the respondents for the following relief:

1 Against the first respondent for:

(a) Payment of the amount of R541 940.00;

(b) Interest on that sum at the rate of 10.25% per annum from date of judgment to date of payment.

2 Against the second respondent for:

(a) Payment of the amount of R320 000.00;

(b) Interest on that sum at the rate of 10.25% per annum from date of judgment to date of payment.

3 Against both respondents jointly and severally, the one paying the other to be absolved, costs of suit on an attorney and client scale.

At the trial, Mngadi AJ absolved the respondents from the instance with costs. He refused an application for leave to appeal but such leave was granted by the Supreme Court of Appeal to the full court of this division.

[2] Much of what gave rise to this action was common cause. The appellant offers the service of remote banking via an application which can be downloaded to a mobile telephone or other electronic device. By this means, using the Internet, a customer is able to remotely perform certain operations on her or his banking account. The first respondent made use of this application and conducted remote banking by this means.

[3] Between November 2011 and March 2013, the banking application malfunctioned. When certain customers transferred monies from their bank accounts to other accounts by that means, those monies were transferred both

from their account and the same amount was transferred from an account of the appellant itself. This resulted in those customers receiving twice the amount they had withdrawn from their account. The additional amount came from the appellant's own account and was not due to those customers. Between 2 October 2012 and 14 March 2013, the amounts claimed by the appellant from the respondents were transferred from the first respondent's account to other accounts of the first and second respondents. This brought about duplicate transfers to the respondents, one being from the appellant's own account. There was no legal basis for the transfers from the appellant's account. As a result, the appellant lost those funds and the respondents gained them.

[4] The action brought by the appellant was accordingly for the unjustified enrichment of the respondents arising from this set of circumstances. In the plea, the respondents denied that there had been a duplication of the amounts transferred and that either of them received monies belonging to the appellant. They further denied having any knowledge of the malfunction of the banking application which gave rise to such duplication. These defences were abandoned at the trial. The respondents acknowledged that, not only did the duplicate transfers take place, the second one of which on each occasion was from the appellant's own account involving its own money, but that the first respondent had been aware of this. He was the one who operated both his and the second respondent's accounts during this period.

[5] The first respondent was the only witness called by the respondents. In his evidence, he claimed to have given certain sums of money in cash to an employee of the appellant, one Mrs Thomas. By the time the matter came to trial, Mrs Thomas had died. The first respondent was unable to say how much money had been handed to her. He could not give dates. He testified that no receipts were requested or given because he trusted Mrs Thomas. None of this

was put to the witnesses of the appellant when they testified. None of this was pleaded.

[6] In *Kudu Granite Operations (Pty) Ltd v Caterna Ltd*,[1] the requirements for the enrichment action in that matter were said to be:

'(i) whether Kudu had been enriched by its nominee's receipt of the granite;

(ii) whether Caterna had been impoverished by procuring that Ruenya deliver the blocks from its stock;

(iii) whether Kudu's enrichment was at the expense of Caterna;

(iv) whether the enrichment was unjustified.'

[7] The plea goes to the first of these. It denies that any payments had been made by the appellant. In other words, all money transferred into the accounts of the respondents emanated from their own accounts and was their own money. It was not pleaded that any of it had been repaid. This would have gone to the second issue. Once the original defence was withdrawn, and in any event on the uncontested evidence of the appellant, it is clear that the two respondents were enriched by the receipt of the monies from the appellant's account. At the time of each transfer, the respondents were so enriched and the appellant impoverished to the extent of the additional duplicate payment. It was also conceded by the respondents, and proved by the appellants, that the enrichment was unjustified, in other words had no legal basis. Put simply, this means that the appellant's case was made out unless the respondents could prove that they had reimbursed the appellant.

[8] Having abandoned their pleaded defences, the respondents had no pleaded basis on which to resist the appellant's claim. As I have indicated, the plea did not raise as a defence that the monies, or any of them, had been repaid.

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[1] *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at para 17.

In a trial, the pleadings define the issues between the parties. They make clear what each side has to prove or defend. When once it was admitted that monies of the appellant had been received by the respondents without a legal basis, the *onus* shifted to the respondents to prove non-enrichment.[2] The reason for this is clear. The four elements mentioned above had been proved in respect of each duplicate payment. This entitled the appellant to judgment. To resist judgment, the *onus* then shifted to the respondents to show that the situation had been rectified. This is a matter peculiarly within the knowledge of the respondents. Such a defence, involving both the facts and the legal conclusion, must be pleaded. This was not done. If it is not pleaded, the other party cannot prepare to meet it and can be taken by surprise at the trial. That should have been the end of the matter. The appellant should have been granted judgment as prayed.

[9] In case I am wrong, I will evaluate the evidence led in support of this version by the first respondent. I shall do so assuming for the purpose of the exercise that the evidence of the first respondent on this issue should have been allowed, even though I have found to the contrary. In those circumstances, can it be said that the respondents discharged the onus on them?

[10] It was not disputed that Mrs Thomas was deceased by the time summons was served. She was the manager of the Kokstad branch of the appellant during the period in question. The first respondent said he had withdrawn some of the duplicate payments from the account into which it was transferred and taken it in cash to her. Because she could not trace the payments as having come from the appellant, she suggested that she keep it in the safe of the bank in case a claim was made. She then entered the amounts given to her by the first respondent into a diary and put the money into a safe. Because the first

[2] *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713H; *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA) at 252F-G.

respondent did not regard it as his money, he did not ask for a receipt. Some of the duplicate payments could not be withdrawn at the ATM machine so not all of the amounts were given to Mrs Thomas.

[11] When he was asked whether, after the action was instituted, he had attempted to obtain the diary, he said that it was two years after the event. In other words, he made no such attempt. On being pressed, he said that he had gone to the bank and spoken to a 'guy who was there at the office, but there was nothing there'. The 'guy' in question was not identified. When asked why this version had not been raised in the plea, he said that his legal advisers told him he could tell his story at court. He then claimed to have raised this version in response to the appellant's request for further particulars. This document remains shrouded in mystery. It never formed part of the pleadings and the first respondent was unable to say what was raised. It appears that a document was shown to the learned trial judge but it was not introduced as a pleading or an exhibit so presumably did not bear out this version. In any event, the plea was still not amended.

[12] When asked why this version had not been put to the appellant's witnesses, as he had been warned to do by the learned trial judge, the first respondent initially claimed to have done so by asking them whether they had contact with their managers. When it was pointed out that this did not convey anything of the sort, he conceded the point. He then said that, contrary to the clear explanation of the trial judge that his version should be put to the appellant's witnesses, he thought he could simply tell his version to court. This explanation can safely be rejected as false and this should have been done by the learned trial judge.

[13] The learned trial judge instead held that the evidence given by the first respondent was credible and not countered by the appellant. He did not deal with the question of the *onus* having shifted to the respondents or their failure to plead this defence. Still less did he recognise that the appellant had not in any way been placed in a position where it could counter the new version. He held that the appellant had not been impoverished by the transfers from its account or the respondents enriched because the respondents had repaid the amounts in question. In my respectful view, in this the learned judge erred. The appellant did fail to counter this version. It could hardly do so when it had not been alerted to the version in the pleadings or even when its witnesses were testifying.

[14] There are several inherent improbabilities in the version of the first respondent which were not taken into account by the learned trial judge. If, in fact, Mrs Thomas had taken cash from the first respondent, no prudent bank manager would have done so without issuing a receipt. If she had not done so and had kept a list of the amounts in a diary, it would have been an official diary and have been kept in a safe place and not destroyed. If the unnamed bank official had been approached by the first respondent after action was instituted, he would have investigated the safe and all documents which might bear on the matter. Any cash kept by a bank against a claim being made would have to be accounted for. A bank manager confronted with the situation described by the first respondent would have taken copies of the bank statements (of other banks) into which the transfers were made and have investigated. All of the duplicates had identical legends in the Capitec account. One payment was described as 'Electronic Deposit in' and the other as 'RTC – ONLINE CREDIT' and all were duplicated within a day of each other.

[15] In addition, a perusal of the cash withdrawals from the account into which the monies were transferred showed that few, if any, withdrawals were made in the amounts of the duplicate transfers. The withdrawals from the accounts were of lesser amounts. The first respondent's version of the same amounts being withdrawn is not borne out by the bank statements. It is further inconceivable that, on receipt of the summons, the respondents would not have immediately raised this defence had the version testified to taken place.

[16] Apart from these inherent improbabilities, the fact that this version was never raised until the first respondent stepped into the witness box, allied to the bank employee Mrs Thomas being deceased, raises more than a question mark as to the veracity of the account. It gives rise to the inference that it was a recent fabrication. The strategy of raising it only at that stage meant that the appellant was not given any opportunity to investigate it, search for documents or cash in the safe or counter the version. As I have mentioned, his version as to why it was not pleaded or put to the appellant's witnesses was inherently improbable and should also have been rejected.

[17] All in all, the learned trial judge erred in accepting this version even if it was appropriate to allow it into evidence. As such, it should have been held that the respondents did not discharge the *onus* on them of proving non-enrichment by way of having paid back the money received by them without cause. On both bases, therefore, the defence of the respondents should have failed.

[18] The learned trial judge ought accordingly to have entered judgment as prayed in favour of the appellant. His judgment was handed down on 25 January 2018 so interest must be made to run from that date. As to the question of costs, no case was made out for a punitive costs order. The appellant initially alleged fraud on the part of the respondents. No such case was made

out. The order of the Supreme Court of Appeal granting leave to appeal made the costs of the dismissal of the application for leave to appeal in the court *a quo* and the costs of the application for leave to appeal in the Supreme Court of Appeal costs in the appeal. As such, no separate costs order is necessary in respect of those costs.

[19] In the result:

a) The appeal is allowed with costs, such to be paid jointly and severally by the respondents, the one paying the other to be absolved.

b) The order of the court a quo is set aside and substituted with the following order:

'Judgment is entered for the plaintiff as follows:

1 Against the first respondent for:

(a) Payment of the amount of R541 940.00;

(b) Interest on that sum at the rate of 10.25% per annum from 25 January 2018 to date of payment.

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(b) Interest on that sum at the rate of 10.25% per annum from 25 January 2018 to date of payment.

3 The defendants are directed to pay the costs of suit jointly and severally, the one paying the other to be absolved.'

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Gorven J

Seegobin J

Bezuidenhout J

Dates of Hearing:	27 March 2019
Date of Judgment:	29 March 2019

Appearances

For the Appellant:	P Bramdhew Instructed by Glover Incorporated. Locally represented by Tatham Wilkes Inc.
For the Respondents:	In person