THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 516/2008

In the matter between:

TSHIDISO ISAAC LEEUW **APPELLANT**

and

FIRST NATIONAL BANK **RESPONDENT**

Neutral citation: *Leeuw v First National Bank* (516/2008) [2009] ZASCA 161 (30 November 2009)

CORAM: **Streicher, Heher, Snyders, Malan JJA and Leach AJA**

HEARD: **13 November 2009**

DELIVERED: **30 November 2009**

SUMMARY: Estoppel – negligent misrepresentation

ORDER

On appeal from: The Bloemfontein High Court (Beckley and Van Zyl JJ, sitting as court of appeal).

Order:

The appeal is dismissed with costs.

JUDGMENT

SNYDERS JA: (Streicher, Heher, Malan JJA and Leach AJA concurring)

[1] The respondent sued its customer, the appellant, in the Thaba' Nchu Magistrate's Court for the recovery of an amount of R48 000 withdrawn from the appellant's account with the respondent after the deposit of a cheque in the amount of R48 598.69 into that account and before it was discovered that the signatures on the cheque were forged. The appellant not only defended the claim, but instituted a counterclaim for the amount of R89 000. A cheque for R89 000 was deposited into the same account, but the respondent reversed the credit in the appellant's account upon discovering that the signatures on the cheque were forged. The decision by the magistrate to dismiss the respondent's claim and to grant the appellant's counterclaim, both with costs, was appealed by the respondent to the Bloemfontein High Court. The appeal was upheld and the respondent was awarded its claim of R48 000 with interest and costs, whereas an order for absolution from the instance was made on the appellant's counterclaim. It is with the leave of the court below that the matter is on appeal.

[2] The appellant persisted in this court with an argument that the respondent's initial notice of appeal was fatally defective as it did not comply with Magistrates' courts rule 51(7)(b) which requires an appellant to state 'the grounds of appeal, specifying the findings of fact or rulings of law appealed against'. The rule is peremptory and non-compliance has been held to render the notice invalid.[1] The object of rule 51(7) is to enable the magistrate to

[1] *Himunchol v Moharom* 1947 (4) SA 778 (N) at 780; *Tzouras v SA Wimpy (Pty) Ltd* 1978 (3) SA 204 (W) at 205E-F.

frame his reasons for judgment under rule 51(8) and, insofar as this had not already been done, to inform the respondent of the case he has to meet and to notify the appeal court of the points to be raised.[2] In 1987 the Uniform rules of the high court were amended to provide, for the first time, for the delivery, prior to the hearing, of 'a concise and succinct statement of the main points. . . which [a party] intends to argue on appeal' – so-called heads of argument.[3] It can be said that since then, the object of the notice of appeal to inform the respondent and the court was also achieved by the heads of argument, and it has almost become the rule that a full judgment is given after a trial in the magistrates' courts which is rarely added to in terms of rule 51(8), as also occurred in this case.

[3] The grounds in the notice of appeal that are attacked by the appellant relate only to the counterclaim. It was contended that the magistrate should have found that both cheques were forged, that the respondent was entitled to reverse the credit entries in the appellant's account after it was discovered that the cheques were forged and that the respondent's witnesses, especially Motaung, gave credible evidence which had to be preferred to that of the appellant. These points, though not a model of eloquence, clarity and compliance, set out the only point in the appeal on the counterclaim, namely that if Motaung's evidence was accepted, the trial court should have concluded that there was no misrepresentation by the respondent in relation to the R89 000 cheque. This simple point reflected the entire appeal on the counterclaim and achieved the objects of rule 51(7) in the circumstances.[4]

[4] The court a quo decided the matter on an acceptance of Motaung's evidence, as the notice urged it to do, and reversed the magistrate's decision in this regard. It does not appear from the judgment that the representative of the respondent had any difficulty dealing with the relevant issue on appeal. On the contrary, the court below had the impression that the point relating to the notice of appeal had not been pursued and did not refer to it in its judgment. Only after judgment and in response to a letter from the appellant's

[2] *Kilian v Geregsbode, Uitenhage* 1980 (1) SA 808 (A) at 815C-D.
[3] Regulations R2164, GG10958, 2 October 1987.
[4] *Gaffoor v Mvelase* 1938 NPD 429 at 431.

attorneys, did it respond by furnishing additional reasons pertaining to the point and concluded that the grounds of appeal were not too general or too vague.

[5] In this court it is not required that grounds of appeal be stated in the notice of appeal.[5] The nature of the proceedings is such that this court is entitled to make findings in relation to 'any matter flowing fairly from the record'.[6] The parties in their written and oral arguments have dealt with all the issues relevant to the appeal and the appellant has not pointed to anything that has been overlooked. The point, apart from being bad, has long lost its significance.

[6] Many of the facts in this matter are common cause. The appellant, the proprietor of a liquor outlet, the Love and Happiness Tavern, sold liquor to Thabo Mofokeng. The latter tendered payment by way of a cheque in the amount of R48 598.69 drawn by General Food Industries Limited on the respondent in favour of Mofokeng, or bearer. The appellant accepted the cheque as payment for the liquor bought and on 14 May 1999 deposited it into his bank account with the respondent. The circumstances that lead to the appellant accepting the cheque as payment are in dispute and I shall revert to that later. On 17 May 1999 the respondent allowed the appellant to utilise R48 000 of the proceeds of this cheque in order to pay for liquor bought for his business. On 21 May 1999 the appellant again sold liquor to Mofokeng, this time for R89 000 and again accepted a cheque in that amount, made out as before, in payment. This cheque was also deposited into the same account. On 24 May 1999 the respondent was notified by General Food Industries Limited that each of the two signatures on the cheques was forged. The respondent immediately reversed the credits in the appellant's account brought about by the deposit of the two cheques and passed debits in the

[5] SCA rule 7(3): 'Every notice of appeal and cross-appeal shall – (a) state what part of the judgment or order is appealed against; (b) state the particular respect in which the variation of the judgment or order is sought; and (c) be accompanied by a certified copy of the order (if any) granting leave to appeal or to cross-appeal.'

[6] *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) para 7: 'The Court is entitled to base its judgment and to make findings in relation to any matter flowing fairly from the record, the judgment, the heads of argument or the oral argument itself.'

same amounts. Because the respondent utilised an amount of R48 000 from the account before the debits were passed, the respondent instituted action to recover that amount.

[7] The respondent's claim was based on the *condictio indebiti*. It alleged that the appellant was enriched at the expense of the respondent in the amount of R48 000. The appellant denied that the *condictio indebiti* was available to the respondent as a bank, denied that he was enriched and pleaded that the respondent was estopped from relying on the forgery of the cheque. In support of the defence of estoppel he pleaded that prior to the appellant accepting the cheque as payment for liquor supplied, the respondent represented to him that the cheque was good for the money, and the appellant relied on the correctness of this representation when he decided to accept the cheque as payment for the liquor sold to Mofokeng. In his counterclaim the appellant pleaded that the respondent negligently represented that the cheque of R89 000 was good for the money before he accepted it as payment for the liquor bought by Mofokeng; he relied on this alleged misrepresentation and supplied liquor to Mofokeng for that value and consequently suffered damages.

[8] The magistrate accepted that the *condictio indebiti* was 'not available' to a bank and found that the respondent, in any event, failed to prove the facts founding the *condictio indebiti* that it relied upon. On appeal the court below, the appellant and the respondent again accepted that the *condictio indebiti* was not the respondent's 'proper cause of action'. The respondent argued in the court below that the *condictio sine causa* was the appropriate remedy. The court below found that although that was not pleaded, its requirements were fully canvassed during the trial, the particulars of claim clearly based the respondent's claim on enrichment and the evidence required to prove the one would have sufficed to prove the other. These findings and an absence of prejudice to the appellant, led the court below to conclude that the respondent should not fail for having pleaded the 'incorrect *condictio*'.

[9] In this court the question whether the respondent's appropriate remedy is the *condictio indebiti* or the *condictio sine causa* is no longer alive as the appellant's counsel conceded, rightly in my view, that if the appellant is to fail on his defence of estoppel, the respondent was entitled to judgment in the amount of R48 000.

[10] However, to avoid future confusion it needs to be stated that there is no principle that the *condictio indebiti* is not available to a bank. In *ABSA Bank Ltd v De Klerk* 1999 (1) SA 861 (W), on similar facts, it was held, in my view correctly, that the *condictio indebiti* was the appropriate remedy for the bank to have relied upon.[7] In *Saambou Bank Ltd v Essa* 1993 (4) SA 62 (N) a thorough comparative analysis was made of facts that would give rise to a bank being entitled to rely on the *condictio indebiti* as opposed to the *condictio sine causa*. It was held that if a bank believed it was obliged to pay 'on demand any withdrawal sought by [its customer] up to the amount of the credit standing in his account' the *condictio indebiti* was the appropriate remedy. *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A), mentioned by the court below as if it entertained another view, dealt with the different scenario of a bank paying the amount of a cheque to a payee not realising that the cheque had been countermanded. There was no question in *B & H* of the bank performing vis-à-vis the payee. Hence the *condictio indebiti* did not arise.

[11] The only issue to be decided in relation to the respondent's R48 000 claim is whether the appellant proved his defence of estoppel.[8] Estoppel presupposes a representation made by words or conduct relating to a certain factual position.[9]

[12] According to the evidence of the appellant and Mr Abram Motaung, a clerk employed by the respondent at the enquiries desk, the appellant approached him during May 1999 with the cheque of R48 598.69. Motaung testified that the appellant:

[7] At 864H-I.
[8] *ABSA Bank Ltd v I W Blumberg & Wilkinson* 1997 (3) SA 669 (SCA) at 677G-H.
[9] *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at paras 27 and 29.

'came to [him] with a cheque and asked [him] if the cheque was good. [He] then had to check if the cheque was not post-dated and if the amounts correspond with figures. [He] then checked in the computer if there was not stop payment on the cheque. [He] confirmed that the cheque was ok. [He] was not asked to check if there were funds in the account. [He] did not check if the signatures on the cheque corresponded'.

Far from this evidence being disputed by the appellant several features of his evidence support this version. He says that when Motaung came back with the cheque he said 'the cheque was genuine and [the appellant] could deposit the cheque'. This answer indicates that Motaung was verifying that the cheque was, on the face of it, acceptable for deposit. This was no different from what Motaung had done for the appellant numerous times before. The appellant, on his own version, visited the Thaba' Nchu branch of the respondent three to four times a week, depending on the state of his business. He knew Motaung well. He also testified that as he was 'not learned', whenever he made a deposit of cheques at the bank, he would ask for assistance at the enquiries desk with the completion of the deposit slip before he went to the tellers to make the deposit. In relation to the cheque for R48 598.69 Motaung did the same thing he was requested to do by the appellant numerous times before – to see whether the cheque was acceptable for deposit and to complete the deposit slip and send the appellant to the tellers.

[13] In view of the appellant's self proclaimed habit to ask Motaung to complete the deposit slips relating to cheque deposits made by him, it was for the appellant to show that his request on this occasion was different from those on other occasions in that he required a guarantee that the cheque was as good as cash.

[14] The appellant said, rather obliquely, that Mofokeng was with him when he explained to Motaung that Mofokeng wanted to buy liquor from him and offered the cheque in payment. He wanted to be sure that he 'was not going to lose money'. He wanted the respondent to give him the assurance that the cheque was as good as cash and consequently that there was no risk for him

in delivering liquor to Mofokeng. When Motaung was cross-examined he said he could not remember whether the appellant told him why he wanted to know that the cheque was good. If Motaung was aware of the presence of Mofokeng and the reasons for this, he would have had a better idea of what it was that the appellant wanted assurances on. Despite his lapse of memory it was not put to Motaung that Mofokeng, the purchaser and payee, was present and that the request concerning the cheque was aimed at obtaining assurances for the purposes of the sale transaction between them. When the appellant was cross-examined about the failure by his attorney to put this evidence to Motaung, he was unsure whether he told his attorney about it. In view of the failure to explore this aspect during Motaung's evidence, it cannot be concluded that the appellant's request in relation to the R48 598.69 cheque was any different from his previous requests.

[15] As far as the respondent is concerned it never furnished the appellant with a guarantee that the cheque would be paid. This is supported by Motaung's evidence that the appellant telephoned him two to three days after the cheque was deposited and told him that he was busy buying liquor from a supplier and needed to make payment of an amount of R48 000. He wanted to draw against the cheque that had been deposited by way of a shoppa card which apparently operates like a debit card. The appellant denied that he ever made such a phonecall or had such a conversation with Motaung. Motaung's evidence is corroborated by the appellant's bank statement that reflects that on 17 May 1999, three days after the cheque was deposited, his shoppa card was loaded with the amount of R48 000, the exact amount that the appellant wanted to make his purchase for. Upon receiving this phonecall Motaung went to the manager of the respondent to obtain authorisation for the withdrawal of funds before the cheque was cleared. This authorisation was given. If the cheque was guaranteed earlier there was no need for the appellant to have made this telephonic request or for Motaung to have sought this authorisation from the manager.

[16] The further question is whether the facts would have made a reasonable person in the position of the appellant believe that the respondent

was guaranteeing the funds represented by the cheque.[10] The appellant's own evidence shows why the answer has to be in the negative. If it was a matter of the respondent issuing a guarantee, there was no understandable basis why the funds would not have been available straight away and why the appellant – on his own version - would have been told that it would take seven days for the funds to be available. Likewise there would have been no need for the appellant to have phoned to make the arrangement that the money be available for his purchase of stock before the expiry of the seven day period.

[17] Counsel's contention that the appellant was under the impression that the funds would, as a mere formality, take seven days to become available cannot be sustained. When the appellant was told about the seven day clearing period he was not enquiring about the availability of the funds, but, according to him, whether the cheque was as good as cash. If the funds were guaranteed there and then there was no conceivable basis on which it would have taken time for the funds to become available.

[18] The court below was correct in concluding that the defence of estoppel was not proven.

[19] The appellant's claim for R89 000 is based on similar allegations, that Motaung made the same representation to him. Motaung denied that he was approached by the appellant with the R89 000 cheque. His denial is supported by the fact that the deposit slip for the cheque was not completed by him and does not bear his signature as in the case of the cheque for R48 598.69. It was common cause that Motaung had a colleague, Motlhatlhedi, whom the appellant knew as well as Motaung. Motaung suggested that it could have been Motlhatlhedi who assisted the appellant with the R89 000 cheque.

[20] Counsel for the appellant argued that the respondent had a duty to call Motlhatlhedi as a witness to meet the allegation that the respondent made a

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[10] *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (3) SA 274 (A) at 292E-F.

representation to the appellant in relation to the R89 000 cheque and argued that its failure to do so warrants the adverse inference that the misrepresentation alleged by the appellant was made. This submission not only fails in logic, but also in law. Such an inference does not follow of necessity, but is dependant on the circumstances of the case.[11] The allegation the respondent had to meet was that Motaung made the alleged representation in relation to the R89 000 cheque. He was called as a witness and denied the allegation. Nothing in the appellant's case obliged the respondent to meet a case that was not pleaded by calling witnesses that were not alleged to have had anything to do with the alleged representation and were therefore irrelevant. In addition, before an adverse inference is to be drawn against a party for not calling a relevant witness, it would have had to be shown that the witness was available to be called.[12] Although Motaung, still employed by the respondent at the time of his evidence, referred to Motlhatlhedi as his 'former colleague', the question whether Motlhatlhedi was available to give evidence was never explored during the trial.

[21] The court below was correct in concluding that the appellant did not prove his counterclaim at the trial and in granting an order of absolution.

[22] The appeal is dismissed with costs.

S SNYDERS
Judge of Appeal

Appearances:

[11] *Webranchek v L K Jacobs & Co Ltd* 1948 (4) SA 671 (A); *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 624.
[12] *Elgin Fireclays Limited v Webb* 1947 (4) SA 744 (A) at 750; *R v Phiri* 1958 (3) SA 161 (A) at 164H-165A.

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