IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A653/2009

In the matter between:

M J N	**Appellant**
and	
A J J	**Respondent**
JUDGE	**P.A.L. GAMBLE**
FOR THE APPELLANT	**Adv. W.P. Coetzee**
INSTRUCTED BY	**Coetzee's Prokureurs**
FOR THE RESPONDENT	**Adv. H.G. McLachlan**
INSTRUCTED BY	**Lombard & Kriek Prokureurs**
DATES OF HEARINGS	**20 August 2010**
DATE OF JUDGMENT	**17 February 2011**

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

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and

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JUDGMENT : 17 FEBRUARY 2011

GAMBLE, J:

INTRODUCTION

[1] This is an appeal from the Magistrates Court. The Appellant (the Defendant in the court a *quo)* and the Respondent (the Plaintiff a *quo)* were married to each other on 25 February 1989. Their union bore a daughter, N, who was born in June 1990. For the sake of convenience I shall refer to the parties as in the court a *quo.*

[2] On 3 February 1995 the parties were divorced by order of this Court and pursuant thereto the Plaintiff was directed to maintain N by effecting payment of the sum of R350,00 per month and to retain her on his medical aid fund.

[3] It was common cause that during the period February 1995 to June 2006 the Plaintiff paid to the Defendant the sum of R50050,00 in respect of maintenance for

N. The said sum included payment of an amount of R1000,00 to the Edgemead Primary School in January 2000.

[4] In June 2006 N underwent a paternity test which showed conclusively that the Plaintiff was not her natural father.

[5] On 30 July 2007, pursuant to an application brought by the Plaintiff, this Court issued an order declaring that he was not the natural father of N and. *inter alia,* varying the divorce order in terms of Section 8 of the Divorce Act, 70 of 1979, by the deletion of the Plaintiff's maintenance obligations towards N.

[6] At the same time the Plaintiff instituted action in the Magistrate s Court for recovery of the sum of R50050.00 His claim was upheld and the Defendant now appeals against the order of the magistrate.

THE CLAIM AS PLEADED

[7] In the court a *quo* the Plaintiff's cause of action was pleaded as follows:

> "9. *Plaintiff paid the maintenance in the bona fide and reasonable belief that he was N's natural father and as such legally obligated to maintain her.*
> *10. In the premise, Defendant is liable to compensate Plaintiff for the maintenance paid in respect of N.*
> *11. Despite due demand. Defendant refuses to pay the amount claimed or any pan thereof."*

[8] The Defendant's plea was crisp and to the point. She stated that she had no knowledge of the allegations made in paragraph 9 and put the Plaintiff to the proof thereof. Paragraph 10 was denied. Paragraph 11 was admitted.

[9] At the trial only the Plaintiff gave evidence. Very little of what he said was material to the issues before that court and not much of his evidence was in any event challenged.

[10] What is important, however, is that at the commencement of the case counsel for the Plaintiff (who also appeared before us) delivered a short opening address in which he made it clear that the claim was predicated on the *condictio indebiti.* He went on to say that -

> *'dan wat blyk in dispuut te wees of waarvan die verweerderes vir die verrigtinge vandag bewys verlang, is die feit dat die eiser die onderhoud betaal net in die bona fide en .. Jonduidelik) geloof dat dit inderdaad betaal*
> *was ..."*

[11] The word marked "onduidelik" was probably "redelikeV The word "betaal" at the end of the passage was probably meant to read "betaalbaar".

[12] It will be noted that no allegation was made in the particulars of claim that the Defendant was enriched by the Plaintiffs payments. Further, the Plaintiff did not plead that the payment was made wrongfully or without just cause.

THE JUDGMENT OF THE COURT *A QUO*

[13] The Magistrate's finding was far reaching. He approached the matter on the basis of the *condictio indebiti and* accepted the argument advanced by the Plaintiff that the parties had laboured under a mutual error. He found that the maintenance order granted by this Court as part of the divorce order was void *ab initio* because it was founded on mutual error. Accordingly, so the magistrate held, the order and the underlying consent of the Plaintiff did not found a valid *causa* upon which the Defendant could rely.

[14] According to the Plaintiff he did not oppose the divorce action because he did not object to the relief which his erstwhile wife was claiming therein. The divorce was accordingly not settled by the conclusion of a consent paper and there can therefore be no question of any "mutual error"' arising in a contractual setting. Rather, the position is that the Plaintiff is taken to have consented to the Defendants claims. Furthermore, the magistrates finding of voidness in regard to the maintenance order is beyond the jurisdiction of that court. In the circumstances the reasoning of the court a *quo* is fundamentally flawed and warrants intervention on appeal.

ELEMENTS OF UNJUSTIFIED ENRICHMENT

[15] In a detailed and most elucidating judgment in McCarthy Retail Ltd v Short Distance Carriers CC[1] , Schutz JA revisited the jurisprudence underlying unjustified enrichment in our law. More recently Professor Daniel Visser has published his magnum opus entitled "Unjustified Enrichmenr [2]. which will now take its place alongside (and will no doubt very soon challenge) the seminal work on the topic, "Verrykingsaanspreeklikheid" by Professor Wouter De Vos.

[16] Professor Visser makes ample reference to McCarthy Retail in his book and concurs with the prophecy of Schutz JA that a pronouncement by the Supreme Court of Appeal regarding a general enrichment action is not far off. Despite delivery of a number of judgments on the law of enrichment by that court since Mc Carthy Retail.[3] no epiphany has emerged. We must therefore approach this matter on the basis of our law as it currently stands and since the Plaintiff presented the claim on the basis of the *condictio indebiti* it is that form of enrichment action which we are bound to consider

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1 **;2001 (3) SA 482 (SCA)**

2 **; 2008 Juta and Co Ltd.**

3 **See, for exampte. ABSA Bank Ltd v Leech 20Q1 (4)SA132 iSCAi; Kudu Granite Operations IPtv) HO v Caterna Lid 2003 (5) SA 193 (SCA; Jacjuesson v Minister of Finance 2006 (3) SA 334 (SCA). Affirmative Portfolios CC v Transne' Ltd t/a Metrorail 2009 (1) SA 196 (SCA): Afrisure v Watson [2000) 1 All SA ' (SCA) Legator Mc Kenne Inc v Shea 2010 (1); SA 35 (SCA); Leeuw v First National Bank Ltd 2010 (3) SA 410 (SCA)**

[17] In McCarthy Retail, the court accepted the four general requirements for an enrichment action suggested by Professor Lotz in Volume 9 of LAWSA - the first reissue of the first edition then having been current Since then the second edition of that volume of LAWSA has emerged and the learned author has been able to bolster his views with the definitive authority of the Supreme Court of Appeal in Mc Carthv Retail. Those requirements are:

(i) The Defendant must be enriched;

(ii) The Plaintiff must be impoverished;

(iii) The Defendant's enrichment must be at the expense of the Plaintiff:

and

(iv) The enrichment must be unjustified *{sine causa).*[4] THE CASE AS PLEADED IN THE COURT *A QUO*

[18] It will be seen from the extract of the pleadings which t have recited above that the Plaintiff failed to make any allegations in his particulars of claim of enrichment on the part of the Defendant or impoverishment on his side. The pleading therefore lacks the most basic averments suggested by Harms in Amler's Precedents of Pleadings.[5]

[19] The purpose of pleadings seems to have escaped both sides in this matter. While the law in regard to pleading is trite, it is perhaps necessary to refer thereto as a reminder of the importance thereof.

[20] In Imprefed (Ptv) Ltd v The National Transport Commission [6] the Court said the following:

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4 **LAWSA Volume 9 (2nd ed) p 111 para 209**
5 **7th ed p 100**
6. **1993 (3) SA 94 (A) at 107 C «r Kumleben and Nienaber JJA**

''At the outset it need hardly be stressed that::

> *The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action, the issues upon which reliance is to be placed.' (Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1082)*

This fundamental principle is similarly stressed in Odaers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22"" ed at 113:

> *'The object of pleading is to ascertain definitely what is the question at issue between the parties: and this object can only be attained when each party states its case with precision.'"*

[21] In Robinson v Randfontein Estates G.M Ltd [7] Innes CJ put it thus:

> *"The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for the pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.'*

[22] In Benson and Simpson v Robinson[8]. Wesseis J reminded litigating parties of what was expected of them in drawing their pleadings

> *The plaintiff must not set out the evidence upon which he relies, but he must state clearly and concisely on what facts he basis his claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet them in court and tender evidence to disprove the plaintiff's allegations "*

[23] The approach to pleadings is well summarised in Beck's Theory and Principles of Pleading in

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7 **1925 AD 173 at 198**
8 **1917WLD 126**

Civil Actions (6th ed)[9]

> *"The fundamental principles which govern all pleadings can be summarised as follows:*
>
> a) *Pleadings must be brief and concise and couched in summary form. They should be as brief as the nature of the case will permit and all prolixity must be avoided...*
>
> b) *Pleadings should state facts and facts only.. That is to say they should not contain statements of either law or the evidence required to establish the facts. Only material facts - and no others - need be alleged in any pleading ...*
>
> *When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he or she shall not do so evasively but shall answer the point of substance.*
>
> *As regards (b) above, it is hardly necessary to enlarge upon the proposition that a pleading must contain facts and not law The pleading of a legal proposition itself is no pleading at all. But the rule means more than that, it implies that the facts must be set out and it is for the court to say on a consideration of the facts proved in evidence whether they will or will not support a particular conclusion in law. Thus a bare allegation that a defendant is indebted to the plaintiff in a sum certain in money, or that he is under an obligation to perform certain acts is not sufficient The facts must be set out which reveal the nature of the transaction and the manner in which the defendant became indebted to the plaintiff or under an obligation to him to perform the duty claimed. The mere statement of indebtedness is a conclusion to be drawn from the facts, and it is a conclusion of law...*
>
> *Unless the facts are set out the opposite party cannot accurately know what case he will be called upon to meet for more conclusions than one can be derived from various sets of facts. Thus a claim for a sum certain in money may inter alia arise out of a loan, or for wages or salary due. or under contract or for special damages arising from delict..."*

[24] While pleadings must be drafted carefully a court should not read them pedantically nor should it over-emphasize precise formalistic requirements: the substance of the allegations should be properly considered [10].

[25] Where a pleading lacks the necessary allegations to substantiate the claim or the defence (as the

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[9] **At pp 47-8**

[10] **S.A. Onderiinqe Brand Ve'seRenngsmaatsKappy Bpk v Van Den Berqh 1976(11 SA 602 (A) at 607 E**

case may be), the opposing party can of course give consideration to noting an exception. In terms of Rule 17(5)(c) of the Magistrates Court Rules a defendant who wishes to raise an exception must first give the plaintiff notice and an opportunity to remove the cause of complaint Further, the magistrate shall not uphold an exception to the particulars of claim unless it is satisfied that the defendant would be prejudiced in the conduct of his/her defence if the summons were to be permitted to stand[11] .

[26] As I have already stated, the Plaintiffs particulars of claim lacked certain material allegations. Not only was there no mention of any enrichment on the part of the Defendant at the expense of the Plaintiff, there was no allegation either that the payments by the Plaintiff to the Defendant were made without just cause (i.e. *sine causa)* and were therefore unjustified.

[27] Notwithstanding this the Defendant elected not to note an exception but seems rather to have sat back somewhat smugly waiting to see whether the Plaintiff would lead any evidence on these points. When the Plaintiff duly failed to do so she argued that his case was fatally defective on the basis that the pleadings failed to make any such allegation.

[28] Neither parties sought further particulars from the other in terms of Magistrate's Rules 15 and 16. But, whatever the pre-trial proceedings and posturingmay have elicited, there could have been no doubt on the part of the Defendant at the commencement of the trial what the Plaintiffs cause of action was. In his opening address counsel for the Plaintiff, in addition to that which I have set out above, told the Court what the legal basis for his clients case was:

> *"Mnr. McLachlin (sc): Edetagbare, u sal merk uit die Besonderhede van Vordering dat eiser se aanspraak teen verweerderes gefundeer word op die condictio indebiti."*

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11. " **Cf Cook and Others v Muller 1973 (2) SA 240 (N) at 243-4**

[29] Although offered an opportunity at the commencement of the plaintiffs case to address the Court more fully on the particularity of the Defendant's defence, counsel for the Defendant declined to do so.

[30] In argument before us counsel for the defendant readily accepted that the *condictio indebiti* was an appropriate cause of action for the factual scenario before the trial court. His complaint however was that the Plaintiff had not properly pleaded that cause of action and that the Defendant was therefore entitled to a dismissal of the claim against her. Counsel relied heavily on the judgment of Howie J (as he then was) in Van Zvl v Serfontein [12] in support of this stance. That case therefore requires some scrutiny.

[31] Van Zyl's case involved a claim by the mother of an illegitimate child (a daughter) against the sole heir (a son) in the estate of the late natural father of the illegitimate child. The son was the deceased's lawful issue. Although the deceased had maintained the daughter during his life time, the mother's claim against thedeceased's estate was rejected by the executor on the basis that there was no proof of paternity. He duly wound up the estate and effected payment to the son of the residue.

[32] The mother did not object to the liquidation and distribution account but instituted action against the son on the basis that he was legally bound to maintain the daughter. The trial court found that the son was not obliged to maintain the illegitimate daughter and held that the only possible cause of action was the *condictio indebiti*. Because the mother had failed to establish the quantum of the alleged overpayment to the son the court granted absolution.

[33] On appeal to the Full Bench the mother argued that a claim had always been based on the *condictio indebiti*, that the son had not raised any defence thereto, that it was competent in law to

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12 **1992 (2)SA 450 *(C)***

recover maintenance payments under the *condictio indebiti* and, finally, that there was in any event insufficient proof of the quantum.

[34] The son argued that the claim had never been brought under the *condictio indebiti*, that he had never been called upon to meet such a claim and that the only basis upon which he had been brought before the court was to answer a claim for maintenance.

[35] Howie J analysed the pleadings, the submissions of counsel and the evidence before the trial court and came to the conclusion that the only cause of action upon which the mother could rely against the son was the *condictio indebiti*. The claim had not been brought on that basis and the defendant had not been in a position to set up a defence thereto. Further, the learned judge held that there was not sufficient evidence before the Full Bench to permit the matter to be reconsidered on appeal.

[36] Against that factual background His Lordship held as follows:[13]

> *"...moet dear in die geval van die condictio indebiti in die onderhawige omstandighede beweer word dat die erfgenaam as gevolg van 'n oorbetaling onregverdig verryk is...Die doel van die pleitstukke is om die geskilpunte te definieer en, onder andere, n verweerder in kennis te stel wat die saak is waarteen hy opgeroep word om 'n verweer te bied. Niks wat op die oorkonde verskyn of wat aan die Hof by die aanhoor van die appel voorgedra is oortuig my dat die partye by die verhoor bedoel net om met die verrykingselement te handel nie. of dat hufle inderdaad daarmee gehandel net...*
>
> *.. .(R)espondent se versuim om nie-venyking te opper [is] geensins verbasend nie in die afwesigheid van 'n bewering dat hy verryk is. Aangesien die bewyslas op n ven/veerder berus om nie-verryking te bewys. sou dit respondent benadeel indien mens op die huidige oorkonde sou moet besiuii of hy horn van daardie bewyslas*

13 **At p456** *A et seq.*

gekwyt het al dan nie."'

[37] The pleadings in Van Zvl's case differed materially from those in the present matter. As I have noted above, the pleadings *in casu* contain some of the customary allegations which a careful pleader would be expected to make when relying on the *condictio indebiti*. However, certain crucial averments were missing.

[38] If a pleading is bad in law, the answer is to except. If it is vague and embarrassing, notice to cure may be given or further particulars may be requested. One may go even further in this case and say that if counsel for the Defendant was genuinely taken by surprise by his opponents reference to the *condictio indebiti* in the opening address, he should have taken the opportunity to say so at the outset and. further, to have objected to the evidence if it did not accord with the pleadings. In my view, what the Defendant could not do was to sit back, say nothing and then complain that the pleading was defective and that she was taken by surprise

[39] In the circumstances, I am of the view that the Plaintiff's case was formulated on the basis of the *condictio indebiti* that the Defendant was alive thereto and that the Defendant was not prejudiced by the poor formulation of the Plaintiff's claim.

DID THE PLAINTIFF ESTABLISH A *PRIMA FACIE* CASE?

[40] In the passage from Van Zyl's case to which I have referred above, Howie J referred briefly to the onus which the person allegedly enriched attracts to establish non-enrichment. This appears to me to refer to an evidential onus only and that the Plaintiff bears the overall onus throughout. In a judgment delivered a couple of months after that in the Van Zyl matter, the Appellate Division[14] dealt extensively with vanous aspects of the *condictio indebiti*. The matter concerned a claim for the

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[14] **Willis Faber Enthoven (Pty) Ltd v Receiver *of* Revenue (1992) (4) SA 202 SA at 225**

recovery of money allegedly paid to the fiscus in error of law. The claim was brought under the *condictio indebiti* and in resisting liability, it was argued by the Receiver of Revenue that the mistake relied upon by the company was a mistake of fact rather than a mistake of law

[41] Delivering the unanimous judgment of the Court, Hefer, JA stressed that the *condictio* has. since Roman times, been regarded as an equitable remedy-

> *"to prevent one person being unjustifiably enriched at the expense of another... Bearing in mind that the remedy lies in respect of the payment of an indebitum (i.e. a payment, without any underlying civil or natural obligation); it is dear that, where such a payment is made in error it matters not whether the error is one of fact or law: in either case it remains the payment of an indebitum, and if not repaid, the receiver remains enriched. The nature of the error thus has no bearing either on the indebitum or on the enrichment."*[15]

I shall revert to this aspect shortly.

[42] Hefer JA then addressed the question of the onus of proof in claims under the *condictio* as follows:

> "*In Recsev v Reiche 1927 AD 554 at 556 it was said that the onus in an action based on the condictio indebiti 'lies throughout the whole case' on the plaintiff. This remark was obviously intended to refer to every element constituting the plaintiff's cause of action. This includes the excusability of the error. As was pointed out in Mabaso v Felix 1981 (3) SA 865 (A) at 872 H considerations of policy, practice and fairness inter partes largely determine the incidence of the onus in civil cases; and I can conceive of nothing unfair in, and of no consideration of policy or practice militating against, expecting a plaintiff who alleges that he paid an amount of money in mistake of law, to prove sufficient facts to justify a finding that his error is excusable. The rule otherwise would in a majority of cases require the defendant to produce proof of*

15 **P220 H-I**

matters of which he has not the slightest knowledge (Mbaso v Felix at 873 D-E)."

[43] In the circumstances I am of the view that the plaintiff bore the onus of establishing the existence of all of the elements of the enrichment action relied upon and to which I have referred above. Importantly for this case, this meant that the Plaintiff had to set up sufficient facts to justify an excusable error on his part in effecting payment of the amounts of maintenance to the Defendant, that the Defendant had been enriched thereby and that his estate had been impoverished in the process.

AN EXCUSABLE ERROR ?

[44] It was common cause that the parties were married on 25 February 1989 and that N was born on 12 June 1990. Assuming a normal pregnancy of nine months, this would mean that the Defendant committed an act of adultery around September/October 1989 during which the child would have been conceived.

[45] We know nothing about the circumstances of this dalliance because there was no evidence put before the magistrate in that regard. The Plaintiff testified that he had always believed that he was the natural father of the girl and that he raised her as such with the Defendant until they were divorced in February 1995.

[46] The Plaintiff further testified that he did not oppose his wife's claims at divorce because he regarded the marriage as irretrievably broken down and because he believed that he was obliged to maintain the child whom he regarded as his daughter.

[47] After the divorce the Plaintiff maintained N for more than ten years. He testified that he later

became resentful about the Defendant's persistent claims for maintenance increases and eventually decided to ask for a paternity test. The

Plaintiff also testified that he was urged by certain family members to go for such tests They evidently had reason to suspect that the Plaintiff was not the father and eventually he succumbed to their entreaties

[48] The Plaintiff concluded by saying that the Defendant never confessed her adultery to him and that his impression was that she never had any idea of who the real father of the child was.

[49] Under cross-examination the Plaintiff accepted that he had defaulted on his maintenance obligations over the years but said that he had then paid up in full from time to time He confirmed that he had paid the maintenance because he was obliged to do so in terms of the divorce order.

[50] As I said earlier, the Defendant did not testify and so one does not know the circumstances surrounding her pregnancy. Importantly, there is no evidence to suggest that she knew that her adultery had resulted in the birth of N and that she intentionally withheld that information from the Plaintiff. Had that been the case her claim in the divorce action for maintenance for the child would have been fraudulent and would have afforded the Plaintiff a different cause of action.

[51] The Plaintiffs legal obligation to pay the maintenance in respect of N arises directly from an order of this Court and was accordingly an obligation he could not avoid. The basis therefor was his assumption that a child born during the subsistence of the marriage was fathered by him. This is in accordance with the rebuttable common law presumption: *pater est quern nuptiae demonstrant.*

[52] While it cannot be contended that the Plaintiff laboured under a mistake of law. the divorce order was underpinned by an erroneous factual assumption, (paternity) either by the parties jointly or, at

least, by the Plaintiff. I have demonstrated above that the Supreme Court of Appeal has disregarded any notional distinction between mistakes of law and fact: the focus is essentially on whether the payment was made *indebitum* i.e. without legal ground. In LAWSA vol 9 [16] Professor Lotz stresses that -

> *"The transfer of money or property must have taken place indebite in the widest sense. It means that there must have been no legal or natural obligation to give it "*

[53] While the parties were still married the Plaintiff maintained the child as a member of the household, believing that she was his child and that he was duty bound to do so. When the Defendant issued the divorce summons and claimed payment of maintenance for the child, the Plaintiff still believed that N was his daughter. As stated, by not contesting the divorce action, he effectively consented to the Defendant's claims, which included claims in compliance with the provisions of Section 6 of the Divorce Act which preclude the granting of a decree of divorce until the Court is satisfied that adequate provision has been made for the care and maintenance of any child born of the marriage

[54) Yet, it was only when the child was about fifteen years old that DNA tests established conclusively that the Plaintiff was not her biological father. Those tests, of course, show that the Plaintiff had neither a "legal or natural obligation" to maintain

the child. In my view there can ultimately be little doubt that there was an error of fact on the part of the Plaintiff which rendered payment of the maintenance *indebite.*

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[16] **Op.cit. P117 para 212 (d); See also Frame v Palmer 1950 (3) SA 340 (c) at 346 D-H. Klein NO v South African Transport Services and Others 1992 (3) SA 509 (W) at 517 E-F**

[55] However, that is not all that the Plaintiff must establish to succeed with the *condictio indebiti*. He must further show that his error in paying the maintenance was reasonable. In Bowman, De Wet and Du Ptessis NNO v Fidelity Bank Ltd[17] Harms JA put it thus:

> *"it is a general requirement for the condictio indebiti that the error that gives rise to the payment must not have been an inexcusable error, that is inexcusable in the circumstances of the case ('Willis Faber at 223H-224H) There have been many attempts to lay down rules or formulations in this regard in order to circumscribe what is excusable and what is not (see, for example. McEwan J in Barclays Bank International Ltd v African Diamond Exporters (Ptv) Ltd 1977 (1) SA 293 (W) at 305). Since one is concerned with the exercise of* a *value judgment, it seems inappropriate to refine the test of whether judicial exculpation is justified (cf. GlUck vol 13 paras 827 and 834)"*

[56] Prof Visser[18] is of the view that -

> *"the fact that excusability of error must be positively established by the Plaintiff places it at odds with the modem trend in alt the jurisdictions that have influenced the South African law of unjustified enrichments in the past"*

He calls in support of this stance, *inter alia.* Prof de Vos in "Verrykingsaanspreeklikheid[r] and Prof Lotz in LAWSA, op ctt. Be that all as it may. the *dictum* of Harms JA in the Bowman case *supra* remains binding authority from which this Court may not digress.

[57] As Harms JA notes in the passage cited in paragraph 55 above, the Court is required to exercise a value judgment when considering the excusability of the error In so doing it is open to the Court to

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[17] 1997 (2) SA 35 (A) at 44c

[18] **Op at at pp 301**

consider *inter alia* the Plaintiff's state of mind, whether he thought that he owed the money and any indifference on his part. [19]

[58] In Vorster's case *supra*, Smit JP[20] quotes the following passage from Section 3690 of Wessels. Law of Contract:

> *"...the essential question for the court to decide is whether the plaintiff thought that he owed the money and whether he paid it in error. The negligence of the payer ought not to be considered as a ground for allowing the receiver to enrich himself at the payers expense. The fact that the payer was careless ought not to preclude him from recovering back his money, provided that his carelessness cannot be construed into an intention that the person who received the money should have it in any event, whether it was really due or not. If the payer had the means of knowledge and carefully refused to avail himself of the means he possessed to determine the true facts, his ianorantia supina aut affectata might welt be construed either into actual knowledge or into such indifference as to whether the money was due or not that he must be held to have intended the payment whether he owed the money or not."*

[59] In Willis Faber *supra*[21] Hefer JA gives some indication of what might constitute an inexcusable error:

> *"It is not possible nor would it be pmdent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need be said is that, if the payer's conduct is so slack that he does not in the court's view deserve the protection of the law, he should, as a matter of policy, not receive it. There can obviously be no rules of thumb: conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others and vice versa Much will depend on the relationship between the parties; on the conduct of the Defendant who may or may not have been aware that there was no debitum and his conduct may or may not have contributed to the Plaintiffs decision to pay. and on the Plaintiffs state of mind and the culpability of his ignorance in making*

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19 **Union Government v National Bank of SA LTD 1921 AD 121: Rahim v Minister of Jusiice 1964 (4) SA 630 (A) : Vorster v Marine and Trace VerseKenngsmaatskappv BpK 1968 (1) SA 130 (O)**

20 **P133D-F**

21 **At p 224 E-G**

the payment."

[60] Perhaps the Plaintiff was understandably reluctant to confront the consequences of a test which could ultimately destroy his relationship with N, but in my view the following passage from his evidence before the magistrate demonstrates why the exercise of the value judgment implicit in this matter should go against him. I quote from the Plaintiffs evidence-in-chief:

> *"Nou het u op 'n stadium dat (sic) vaderskaptoetse ten opsigte van N gedoen moet word, is dit korrek? —Ja, dis korrek.*
> *Kan u kortliks net vir die Hof verduidelik wat het u genoop tot so n drastiese stap?—Tot daardie punt te kom?*
> *Tot so 'n drastiese slap?—Okay Edelagbare, ek was elke jaar, het ek die onderhoud betaal. elke maand en elke jaar wil sy verhoging he. verhoging he en toe raak ek agter met die onderhoud Toe bring ek dit weer op datum en dit. Betaal ek ekstra en dit en die rumours deur n famiiielid. my swaer en my neefs en elke jaar word dieselfde storie gese. hoekom gaan ek nie vir bloedtoetse nie. Hoekom gaan ek nie om honderd persent seker te maak en toe het ek die laaste paar jaar, twee jaar drie jaar terug toe besluit ek nee, ek gaan nou finaal gaan ek nou vir bloedtoetse om honderd persent (sic) te maak.*
> *Verstaan ek u reg en as ons dit net kan opsom. verstaan ek u reg dat wat u genoop het om te versoek dat bloedtoetse ondergaan word, was twecledig*
> *In die eerste plek het u deurentyd gerugte van familielede gehoor?—Gerugte ja*
> *Daar was gepraat dat u me die pa van die kind is nie?—Ja. honderd persent En in die tweede plek het die verweerderes u van jaar tot jaar onderhoudshof toe gebhng—Ja.*
> *Met 'n verhoging?—Verhoging, elke jaar. Van*
> *die onderhoud?— H'm,*
> *En die situasie het toe sodanige geraak dat u ges§ het u wil nou sekerheid he?—Ja. toe raak dit nou te erg. Heeltyd net meer en meer Sy wil net meer geld* fte, *meer geld he. Toe besluit ek ek gaan nou finaal nou vir 'n bloedtoets."*

[61] It is apparent from this passage that had the Defendant not sought an increase in the child's maintenance (which of course was for the daughter's benefit) the Plaintiff would probably have honoured his obligation under the divorce order to maintain N without demur. Further, the fact that he took several years to initiate the paternity test leads one to believe that he was indifferent as to whether the maintenance was due or not, and that it can be inferred that he intended to pay the monthly

maintenance whether he owed it or not.

[62] The issue of prescription was not pleaded by the Defendant nor raised at the trial. If it had been, then the amount which the Plaintiff had endeavoured to recover may have been significantly curtailed and would quite probably have coincided with the period during which the Plaintiff began harbouring serious doubt about his liability, as the passage above shows.

[63] Having regard then to all the relevant circumstances I am not persuaded that the Plaintiff established that his mistake was justified to the extent that it entitles him to "judicial exculpation[1]"

WAS THE DEFENDANT ENRICHED?

[64] In the event that I am wrong on the issue of the reasonableness of the error. I proceed to deal briefly with the question of enrichment. As t noted at the beginning of this judgment, this was an issue which was not pleaded and which both parties studiously avoided in evidence Central to this element of the *condictio indebiti* is the fact that the payment of monthly maintenance to the Defendant was for the benefit of N. From this amount the Plaintiff would have had to provide accommodation, food, clothing, medical benefits, education and the like to the child. There was no suggestion that the Defendant did not utilize these monies to support the child who would have been the primary and the ultimate beneficiary of the maintenance payments. I have some difficulty in understanding, therefore, how it can be said that the Defendant was enriched by these payments.

[65] In short, there is no evidence on the record which deals with this issue. We do not know, for instance, whether the Defendant was employed, what her income was, whether she was in receipt of any child support grant or whether any other family members assisted with the maintenance of the child. One or more of these factors may have assisted one in assessing whether the Defendant had contributed more or less than her *pro rata* share towards the cost of maintaining N

[66] In any event, counsel for the Plaintiff contented himself with the submission that once the Plaintiff had established payment of the agreed sum to the Defendant, the latter drew an onus to show that she had not been enriched thereby. Counsel for the Defendant on the other hand, maintained that, since enrichment had not been

pleaded, it was not necessary for the Defendant to deal with this element of the claim.

[67] While it is correct that, generally, proof of an over-payment by a Plaintiff to a Defendant is *prima facie* proof of enrichment and that the Defendant then attracts an onus to show that she was not enriched, I consider that this cannot be a hard and fast rule. As Hefer JA noted in the Willis Faber case, supra, the incidence of onus in civil litigation is often the product of considerations of policy, practice and fairness.

[68] A review of certain of the case law on this point demonstrates that much turns on the relationship between the parties (i.e. contractual or otherwise) and the circumstances under which payment was made to the Defendant[22]. In the instant case it is common cause that the payments made to the Defendant were for the maintenance of the child. In fact, in one instance, the Plaintiff made payment of N's school fees directly to the school - clearly not an act which would have enriched the Defendant. The Defendant therefore received these payments as a conduit for the child on whom the money was spent.

[69] In such circumstances, I am of the view that the Plaintiff does not establish a *prima facie* case of enrichment by simply proving the payment of money to the Defendant. To succeed in a claim under

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22 **See. i.e Govender v Standard Bank of SA Ltd 1984 (4) SA 392 (C): Wynland Construction (Pty) Ltd y Ashley-Smith 1985 (3): SA 798 (A); B & H Engineering v First National Bank of S.A Ltd 1995 (2} SA 279 (A). Nedcor Bank l.td v Absa Bank 1995 (4) SA 727 (W); Affirmative Portfolios CC v Transnet Ltd t/a Metrorail. supra**

the *condictio endebiti*, the onus is on the Plaintiff to show that the Defendant's estate has been enriched to the extent that there has been an increase in her assets as a consequence of the payments.

[70] Where a recipient has expended the monies received, for example, by remunerating its employees and making payment of statutory levies and the like, and retained a small percentage thereof as an administration fee, it has been said that the recipient's enrichment is minimal[23]. Further, where the recipient has lost or disposed part of that which it has received, it will only be liable for what remains in its hands at the time when the action is instituted[24].

[71] There is no doubt that in cases of over-payment of monies the Defendant attracts an onus to prove either non-enrichment or a partial enrichment[25]. But this case is not about an over-payment. Accordingly, in my view the approach advocated by Hefer JA in the Willis Faber case *supra* [26] and Brand JA in the Senwes case *supra*[27] applies. It was for the Plaintiff to show that the Defendant's estate had been enriched by the receipt of the monthly maintenance payments made in respect of N and. importantly, what the extent of that enrichment was at the time that the summons was issued in the magistrate's court. So, for example, if the Plaintiff could have established that the Defendant had saved the monthly maintenance and held it in a savings account in her name, there may have been an argument regarding enrichment. But where the money has been spent on maintaining a third party whom the recipient is bound to support, there can be no enrichment.

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23 **Affirmative Portfolio's case, supra at P 205 E**

24 **African Diamond Exporters (Pty) Ltd *v* Barclays Bank International Ltd 1978 (3) SA 699 (A) at 713 F-H. Senwes Ltd v Jan van Heerden & Sons CC [2007] 3 All SA 24 (SCA) at p33 d-g**

25 **African Diamond Exporters case *supra* at 713 H.**

26 **At p224 H-I**

27 **At p33 para 35**

[72] As I have shown above, not only did the Plaintiff fail to plead any enrichment, he also omitted to set up a *prima facie* case of enrichment on the part of the Defendant at the commencement of the action.

[73] Lest it be suggested that this approach places an unduly burdensome onus on the Plaintiff, it must be borne in mind that the Plaintiff approached the court *a quo* for relief under an equitable remedy The approach to such a claim was summarised more than eighty years ago by Tindall J in Trahair v Webb & Co[28] when he issued the following caution:

> *'...where the plaintiff bases his claim for relief on an equitable doctrine the court must be careful that in a desire to do justice to the plaintiff, an injustice is not done to the defendant."*

[74] Given the fact that the money that was paid (albeit begrudgingly and somewhat irregularly according to the Plaintiff) for the maintenance of a child (and there is no suggestion that the Defendant did not use it for that purpose), it would not be fair to the Defendant to now order her to restore either the entire amount or a part thereof to the Plaintiff.

CONSIDERATIONS OF PUBLIC POLICY

[75] Finally, I turn briefly to considerations of public policy. Section 39(2) of the Constitution requires a court to promote the spirit, purport and objects of the Bill of Rights when developing the common law. As many of the cases to which I have referred above have demonstrated, the *condictio indebiti* is in essence, an equitableremedy. Prof Visser discusses the cause of action in the context of *"corrective justice"* as follows:

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28 **1924 WLD 227 at 235**

> "On *one hand it must be recognised that the fact that enrichment liability is largely about corrective justice, which normally corrects an unjustified gain which is mirrored by an unjustified loss, does not mean that the mirror loss is an indispensable element. The fact that corrective justice presumes* a *correlative relationship between gain and some form of injustice does not mean that the injustice should consist of economic loss.*[29]

[76] This approach, like the approaches suggested supra by. *inter alia.* Hefer JA and Tindall J. is self-evidently based on value-laden considerations. Indeed, the very terms "unjust" or "unjustified", which are inter-changeably used to describe the enrichment action, also have considerations of equity at their core

[77] In assessing the extent of any *indebitum* in an enrichment claim the courts have traditionally looked at factors such as slackness or unreasonable delay and in that context as the judgment of Hefer JA in Wilbur Ellis shows regard must be had to public policy, too, in formulating such value-iaden decisions.

[78] Considerations of public policy must be viewed through the prism of constitutionalism. In Barkhuizen v Napier [30] Ngcobo J addressed the issue as follows:

> *"Public policy represents the legal convictions of the community: it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties That is no longer the case Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. indeed the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, is* a *cornerstone' of that democracy; 'it enshrines the rights of all people in our country*

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29 **Unjustified Enrichment opcit p82**
30 **2007 (5) SA 323 (CC) at 333 para 28:**

and affirms the democratic [founding] values of human dignity, equality and freedom "

[79] Given the findings which I have made above, it is not necessary to come to a final decision on this aspect of the case. Suffice it to say that courts may in the future be wary of recognising claims in circumstances such as the present which necessitate an enquiry into paternity and which may have the tendency to destroy an otherwise loving and caring parental relationship with a child whose rights to family and parental care are protected under section 28 of the Constitution.

CONCLUSION

[80] In my view. then, the court a *quo* erred in finding that the Plaintiff had established a claim of enrichment. I am of the view that the appeal should therefore be upheld with costs and that the order of the magistrate of the court *a quo* should be varied to read:

"The Plaintiff's claim is dismissed with costs."

P.A.L.GAMBLE, J

I agree.

The appeal is upheld with costs and the order of the magistrate is varied to read **"The Plaintiff's claim is dismissed with costs."**

R. ALLIE, J