IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 393/2012 & 4352/2013

In the matter between:-

SSI/TSHEPEGA JOINT VENTURE Plaintiff

and

MEC: FREE STATE PROVINCIAL GOVERNMENT: DEPARTMENT OF POLICE, ROADS AND TRANSPORT Defendant

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JUDGEMENT: MOENG AJ

HEARD ON: 14 NOVEMBER 2014

DELIVERED ON: 29 JANUARY 2015

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[1] This judgment deals with two exceptions that have been raised against the particulars of claim delivered by the plaintiff. The exceptions state that the particulars of claim lack averments that are necessary to sustain a claim of enrichment. I shall for ease of reference refer to the parties as they are referred to in the main action.

[2] On 31 January 2012 plaintiff issued summons under case 393/2012 ("the first summons") against the defendant claiming payment of R 44

779 617,26. Plaintiff alleged in its particulars of claim that on 19 April 2010, it entered into a written agreement with the defendant in which it (plaintiff) was appointed as Program Manager to assist the defendant with the implementation of repairs and rehabilitation programs for the Free State province road networks. Plaintiff alleges that it complied with all its obligations in terms of the agreement but defendant failed to effect payment as agreed. Notwithstanding due demand, defendant refuses to pay the amount.

[3] In response, defendant pleaded that the alleged agreement is illegal, therefore null and void in that the agreement: (a) lacked budgetary allocations under the Public Finance Management Act ("PFMA") and the requisite funds to meet the financial commitments purported to have been made in appointing the plaintiff could not lawfully have been withdrawn from the Provincial Revenue Fund; (b) that the agreement was in contravention of the Medium Term Expenditure Framework since the payment schedule extended over a period of four years, contrary to the prescribed three year period; (c) that the appointment of the relevant road contractors were not made in accordance with the applicable supply chain management and procurement processes; and (d) that the plaintiff was aware of the existence of the illegality of the contracts in that inter alia, during the course of October 2010 plaintiff's representatives were informed of the absence of proper authorization in respect of the contract.

[4] Defendant further pleaded in the alternative that should it be found that the agreement is not null and void, then the agreement is

voidable and it is entitled to cancel same on the basis that plaintiff had knowledge of the contractual irregularities when the contract was concluded.

[5] On 29 October 2013, plaintiff issued a second summons against the defendant under case 4352/2013 ("the second summons") claiming R74 257 315,36 alternatively R44 109 499,81. This amount was claimed on the strength of the agreement entered into on 19 April 2010 (the same agreement as in the first action). Plaintiff now claimed payment for the services it rendered over and above those in the first summons. In the alternative plaintiff pleaded that:

> "In so far as the defendant establishes that the agreement was invalid or had been duly repudiated and plaintiff is not entitled ex contractu to any payments claimed by it, the plaintiff:
>
> 14.1 Had done the services reflected in the said documents "C" and "D" (in conjunction with those in "B") to case 393/2012); and
>
> 14.2 The defendant had accepted and continued to accept such services and benefitted from these; and
>
> 14.3 The defendant was enriched in the amount of such payments as are claimed under the Agreement.
>
> 14.4 The defendant's enrichment amounted to R 74 257 315.36 (giving credit to the defendant's payment under the contract as set out in "C")."

[6] Plaintiff further sought and resultantly amended its particulars of claim in the first action and pleaded as follows:

> "12.2 Pursuant to the defendant alleging that the contract relied upon by the plaintiff is void and illegal, the plaintiff claims the amounts due and owing under the alleged illegal agreement on an enrichment basis.
>
> 12.3 The plaintiff claims monies on this enrichment basis for the works set out in annexure B to this *(sic)* particulars of claim under case number 393/12, as well as those under case number 4352/12.
>
> 13. Should the plaintiff obtain judgment against the defendant on the enrichment basis set out above, and under case 4352/12, such judgment would serve to discharge the defendant's liability towards the plaintiff in this claim."

[7] On 29 May 2014, an order was obtained wherein the actions brought by the plaintiff against the defendant under the two actions were consolidated in one action to be further prosecuted under case number 4352/2013.

[8] Defendant had however on 23 January 2014 under case 4352/2013, prior to the consolidation and amendment of the first summons, excepted to the plaintiff's particulars of claim. The root of the exception being that the alternative cause of action based on enrichment, firstly lacked averments necessary to sustain an action in that the plaintiff failed to allege the essential elements of any applicable or valid *condictio*, and secondly that the plaintiff pleaded an enrichment claim in respect of services which were the subject of a different action under the first summons. This second ground of exception was addressed in the amendment as set out above and was not persisted with.

[9] On 4 June 2014, defendant filed another exception to the amended particulars of claim in the first summons. The complaint being that the particulars lack averments necessary to sustain a claim of enrichment as the plaintiff failed to allege the essential elements of any of the *condictiones*.

[10] Mr. Kemack argued that the plaintiff has not identified the *condictio* upon which it relies and its enrichment claim must relate to the alternative of the defendant establishing that the agreement was invalid as pleaded under paragraph 14 of the second summons. He contended that the enrichment cause of action cannot be premised on the *condictio ob turpem vel iniustam causam* since the plaintiff refers to invalidity rather than illegality, which is required to recover performance under an illegal contract. He further argued that the plaintiff failed to allege the central requirement under this *condictio* which is that the amount is claimed under an agreement which is void and unenforceable because it is illegal, therefore prohibited by law.

[11] He contended that the plaintiff can neither rely on the *condictio indebiti* because there is a cause, albeit a defective one. The plaintiff, so the argument proceeded, has not pleaded the essential requirement that there was no legal obligation for it to perform and that the performance was effected in the mistaken belief that it was due. He argued that the plaintiff's cause of action can also not fall under the *condictio sine causa generalis* or the *condictio* sine *causa*

specialis which applies to specific situations not including performance under an invalid agreement.

[12] Mr. Kemp conversely argued that the general enrichment elements are clearly to be gleaned from the particulars of claim and that it is not incumbent to restrict the particulars to any specific *condictio*. He contended that the enrichment claim is an alternative claim should any of the defendant's defences invalidate the contract that has been pleaded in the main. The enrichment claim is to be read in its context and it covers the eventuality that the defendant demonstrates invalidity in whatever form.

[13] Before dealing with the exception, I find it appropriate to first deal with the substantive law relating to enrichment in determining whether the essential elements to sustain a cause of action have been pleaded. Liability for enrichment is in a nutshell liability for the restitution of an unfounded patrimonial transfer resulting from an obligation created by the increase of one party's estate at the expense of the estate of another without such cause as the law may regard as conclusive for the transfer to the estate of the first party. (See JC Sonnekus **Unjustified Enrichment in South African Law**)

[14] It is generally accepted by our Courts that the identification of the cause of action or the specific *condictio* is not of importance. I find it apposite to refer to what was stated by Schutz JA in **First National Bank of Southern Africa Ltd v Perry NO and Others** 2001 (3) SA 960 (SCA) at para [23]:

> "This difference of approach as to the appropriate condictio again underlines the point which I made in McCarthy Retail Ltd v Shortdistance Carriers CC (SCA) 16.03.2001 unreported, that we spend too much of our time identifying the correct condictio or actio. Counsel frequently err. The academics say that the Courts, including this Court, frequently err. And to judge by the difference of opinion as to the condictio sine causa revealed in McCarthy's case, some of the academics sometimes err too. My suggestion, in that case, accepted by two of my Brethren, was that the adoption of a general action might help remedy this situation, by fixing attention on the requirements of enrichment rather than on the definition and application of the old actions."

[15] Although there is no general action based on enrichment in South African law, there are nonetheless certain generic requirements for any claim based on enrichment, which are that: (a) the defendant must be enriched; (b) the plaintiff must be impoverished; (c) the defendant's enrichment must occur at the expense of the plaintiff's impoverishment; and (d) the enrichment must be unfounded or unjustified (see 9 LAWSA 209). It may therefore be accepted, as stated in **Kudu Granite Operations (Pty) Ltd v Caterna Ltd** 2003 (5) SA 193 (SCA) that the development, subsequent to the recognition of the generic requirements, for any claim in enrichment has progressed to such an extent that the common law *condictiones* need no longer be used as the only point of departure.

[16] As indicated above, the South African law still does not, mainly for fear of an unlimited and unrestricted liability in enrichment, formally

recognise a general action in enrichment. The current situation therefore entails that ad-hoc extensions are utilised in a careful broadening of the actions of the common law, unless the facts of the matter are on all fours with the requirements of a classic action. (See JC Sonnekus **Unjustified Enrichment in South African Law**). Harms advice to pleaders is to formulate any enrichment claim in terms of the different *condictiones*. Pleadings can therefore be framed mindful of the generic requirements for any claim based on enrichment and the prospect of the ad-hoc extensions broadening the actions of the common law.

[17] It is trite that a party who has performed whether in whole or in part in terms of an illegal contract may reclaim performance with the *condictio ob turpem vel iniustam causam*. Such a party must allege and show: (a) a transfer of property or payment of money to the defendant from the plaintiff; (b) that the transaction or its performance was illegal; (c) that the defendant was unjustly enriched. The central requirement of this *condictio* is therefore that the amount claimed must have been transferred pursuant to an agreement that is void and unenforceable because it is illegal, i.e. because it is prohibited by law.

[18] If the contract is invalid but not illegal, the cause of action is the *condictio indebiti*. (See **Legator McKenna Inc v Shea** 2010 (1) SA 35 (SCA). The essential allegations for the *condictio indebiti* are that: (a) The transfer or payment must have been made in the bona fide and reasonable but mistaken belief that it was owing;

(b) The transfer must have been made *sine causa* or *indebite*, there must therefore have been no legal or natural obligation to have made it. (c) The error must have been reasonable, meaning that the mistake must be excusable in the circumstances of the case; (d) the property being reclaimed must in legal terms have been transferred to the defendant. If the claim arises from performance in terms of an invalid contract, the performance is not *indebite* because there is a cause, albeit an illegal one. The claim then lies under the *condictio ob turpem vel iniustam causam* (see Harms at 101 (f) and compare **Afrisure CC and Another v Watson N.O. and Another** 2009 (2) SA 127 (SCA) at para [51] a well as **First National Bank of Southern Africa Ltd v Perry N.O. and Others** supra at para [22].

[19] Returning to the germane issue at hand, it is important to have regard to the test that is employed in deciding exceptions: In order to succeed, it must be borne in mind that the defendant has the duty as excipient to persuade the Court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed. Compare **Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk** 1988 (2) SA 493 (A) at 500E. A charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a generous interpretation. (**First National Bank Southern Africa v Perry NO and Others** *supra*) The court should not look at a pleading "with a magnifying glass of too high power". (**Kahn v Stuart and Others** 1942 CPD 386 at 391). The pleadings must be read as a whole and

no paragraph can be read in isolation. (**Southernport Developments (Pty) Ltd v Transnet Ltd** 2003 (5) SA 665 (W) at 669)

[20] The pleadings in *casu* admittedly followed an unusual course in that plaintiff initially instituted the first action in contract only, without pleading an enrichment claim. The defendant in response pleaded that the agreement on which plaintiff relied is illegal and null and void or in the alternative voidable. It is in reaction to these averments of illegality that the alternative claim under the second summons and the amendment to the first summons was delivered. Quoted verbatim, the plaintiff pleaded in the amended particulars that "pursuant to the defendant alleging that the contract relied upon by the plaintiff is void and illegal, the plaintiff claims the amounts due and owing under the alleged illegal agreement on an enrichment basis". The plaintiff therefore clearly refers to the illegality as opposed to the invalidity of the contract.

[21] The enrichment claim under the alternative to the second summons was clearly also in reaction to the plea in the first summons. Plaintiff raised the enrichment claim in so far as the defendant establishes that the agreement was invalid. Plaintiff indisputably refers to the invalidity rather than the illegality of the contract. This averment should however be read in the context of what is contained in the amended particulars under the first summons that the plaintiff claims monies on enrichment based on the illegality of the contract for the works under both actions. The evidence to be led at the trial can clearly be gleaned from the main action in contract and the alternative will be persisted with should the illegality be proven by the defendant.

If evidence can be led in this regard then the pleadings cannot be excipiable.

[22] The main complaint against the alternative claim is that the plaintiff failed to allege the central requirement under the *condictio ob turpem vel iniustam causam* since it refers to invalidity rather than illegality. This complaint fails to have regard to the pleadings in their context. It is in the main important to note that it is the defendant that raised the illegality of the contract and the alternative claim is aimed at ensuring success for the plaintiff should defendant show that there were irregularities that tarnished the conclusion of the contract. The amended and alternative claims are phrased in such a way that they cover both illegality and invalidity which may be claimed under the *condictio ob turpem* or the *condictio indebiti*. Both are however pleaded in case the defendant is successful in showing the illegality or invalidity of the contract. It is not necessary at this stage to determine whether plaintiff will be successful in proving either of these claims as this will be dealt with at the trial. It is therefore inconceivable that the defendant can argue that it cannot plead to the alternative or amended claim more so that defendant raised the illegality of the contract.

[23] It is however not necessary that the specific *condictio* be identified. What is of importance is that the basic requirements of an enrichment claim are present. When viewed as a whole, the salient facts as gleaned from the pleadings are briefly that the plaintiff was contractually appointed as Program Manager to assist the defendant

with the implementation of road repairs and rehabilitation programs. Plaintiff complied with all its obligations in terms of the agreement by performing the services. The defendant had accepted and continued to accept such services and benefitted from same. The defendant, by having accepted the services of the plaintiff, was enriched in the amount of the payments that it failed to effect as agreed. The defendant alleges that this agreement is either void or voidable as per the plea to the first summons.

[24] These facts fall squarely within the generic requirements for any claim based on enrichment. Plaintiff's claim is based on the *locatio condictio operis* as the defendant allegedly derived benefit from the plaintiff's labour and expertise. It is well established that no man may enrich himself at the expense or to the detriment of another. The fact that plaintiff pleads that defendant accepted and continued to accept its services and benefitted from same satisfies the requirement that the defendant must be enriched whereas the statement that plaintiff complied with all its obligations in terms of the agreement by performing the service qualifies the requirement of impoverishment. As plaintiff has admittedly not been reimbursed for the services, the requirement that the defendant's enrichment occurred at the expense of the plaintiff and that the enrichment was unjustified, has by implication been satisfied.

[25] The general operation of the law of enrichment lies outside the realm of contract, and its most frequent application relates to cases where improvements have been made by a possessor of land. It was

however used in **Rubin v Botha** 1911 AD 568 to prevent enrichment which had its origin not in possession but in an agreement which the parties believed to be binding, but which turned out to be invalid. The plaintiff in the main pleaded that it was under the impression that it acted under a valid contract and relies on the enrichment claim in the alternative and in case defendant successfully raises the illegality or invalidity of the contract.

[26] Both the amended plea and the alternative claim clearly define the issues upon which the plaintiff relies to sustain its cause of action. When viewed in context, the *facta probanda* as appears *ex facie* the pleadings also point to the evidence that will be led to disclose a cause of action during the trial. I am satisfied that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support its right to judgment of the Court has been alleged.

[27] In the result I make the following order:

i. The exception is dismissed.
ii. The defendant is ordered to pay the plaintiff's costs which shall include the costs occasioned by the employment of two Counsel.

L.B.J. MOENG, AJ

On behalf of Excipient/Defendant:	Adv. A. Kemack and V September Instructed by: State Attorney BLOEMFONTEIN
On behalf of Respondent /Plaintiff:	Adv. KJ Kemp SC and S Grobler Instructed by: Peyper Attorneys BLOEMFONTEIN