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CASE NO: 2006/20062

JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED ✓
04/03/2008 **S Symon**
Date **Signature**

In the matter between:

INZALO COMMUNICATIONS & EVENT MANAGEMENT (PTY) LIMED Plaintiff

and

ECONOMIC VALUE ACCELERATORS (PTY) LIMITED Defendant

JUDGMENT

SYMON AJ:

INTRODUCTION

[1] The Plaintiff instituted action against the Defendant. The latter

pleaded to the Plaintiff's claim, and delivered a counterclaim. The issue before me is an exception taken by the Plaintiff to the Defendant's counterclaim, and which is opposed. For ease of reference, the parties are referred to as in the action.

THE PLEADINGS

[2] The Plaintiff claims an amount of R123 519,00 together with interest thereupon *a tempore morae* and ancillary relief. In its declaration the Plaintiff formulates its cause of action as follows:

> "3. During or about April 2005, and at Johannesburg, the Plaintiff and the Defendant, duly represented, entered into an oral agreement, in terms of which the Plaintiff would assist the Defendant with the implementation of its communications strategy ('the agreement').
>
> 4. The material, express alternatively implied, further alternatively tacit terms of the agreement were inter alia as follows:
>
> 4.1 The Plaintiff would provide public and media relations expertise to assist the Defendant in developing its profile and attracting new business within the Defendant's target markets ('the consultancy service').
>
> 4.2 The Defendant would pay the Plaintiff a monthly retainer fee of R20 000,00, excluding VAT and other sundry expenses, for the consultancy service.
>
> 4.3 The monthly retainer fee was payable in advance upon

presentation by the Plaintiff of its tax invoice.

4.4 Each party was entitled to cancel the agreement at its election, by giving the other party one month's notice in writing of its intention to do so.

5. During the period October 2005 to February 2006:

5.1 the Plaintiff provided alternatively tendered to provide, the consultancy service to the Defendant; and

5.2 invoiced the Defendant for an amount of R123 519,00, the details of which are set out in the schedule which is annexed marked 'A". [As is evident from annexure 'A' to the declaration, the said amount is computed by reference to invoices submitted for the months of October 2005 to February 2006.]

6. On or about 2 February 2006, the Defendant gave the Plaintiff notice of its intention to cancel the agreement.

7. Notwithstanding demand, the Defendant has failed and/or refused to pay the Plaintiff an amount of R123 519,00 or any part thereof."

[3] In its plea, the Defendant denied the debt. The salient portions of the plea read as follows:

"PARAGRAPHS 3 AND 4

3. In and during April 2005, and at Johannesburg, the Plaintiff, represented by Bridget von Holdt, and the Defendant, represented by Gert Botha, entered into an oral agreement, the material and express, alternatively implied, further alternatively tacit terms whereof were as set out below, namely:

3.1 The Plaintiff agreed to provide the following services to the Defendant, namely, to develop a profile in the market in which the Defendant operated so as to attract new business, and, to this end, to implement strategic planning, media relations, event management, stakeholder relation programs and public affairs, and investor and financial communications;

3.2 The plaintiff warranted to the Defendant that, as a consequence of the services to be performed by the Plaintiff for the Defendant, the Defendant would experience increased business from existing clients within its network, new business from outside the network, improved relations with all target markets, improved media and publicity profile, a wider client base, and improved bottom line results;

3.3 The Defendant agreed to pay the Plaintiff a monthly retainer of R20 000 plus VAT per month, with effect from April 2005;

3.4 The agreement was terminable by either party on one month's notice ('the agreement').

4. To the extent to which the allegations set out in the Plaintiff's declaration are at variance with the terms of the above paragraphs, same are denied.

PARAGRAPH 5

5. Whilst admitting that the Plaintiff invoiced the Defendant for the amounts in question, the Defendant alleges that, during the period from April 2005 to February 2006, in breach of material terms of the agreement, the Plaintiff failed to perform the services which it had contracted to perform, whether properly or at all.

6. In particular, without derogating from the generality of the aforegoing, the Plaintiff failed, whether properly or at all, to develop a profile in the market in which the Defendant operated so as to attract new business and, to this end, to implement strategic planning, media relations, event management, stakeholder relation programmes and public affairs, and investor and financial communications.

7. As a consequence of the aforegoing, the Defendant did not experience increased business from existing clients within its network, new business from outside the network, improved relations with all target markets, improved media and publicity profile, a wider client base, nor improved bottom line results.

PARAGRAPH 6

8. As it was entitled to do, the Defendant terminated the agreement in and during February 2006.

PARAGRAPHS 6 AND 7

9. In the premises, the Defendant is not liable for payment of the sum of R123 519, or any amount at all.

10. The defendant admits demand, but, for the reasons set out above, denies that it is liable to pay such sum to the Plaintiff, or any amount at all."

[4] The Defendant's counterclaim echoes the essential averments in the plea. The Defendant formulated the counterclaim as follows:

"12. The Defendant repeats the allegations made in paragraphs 3 to 8 inclusive of its plea and prays that same be read as if specifically incorporated herein.

13. In the *bona fide*, but mistaken belief that the Defendant was liable to the Plaintiff for the services purportedly rendered by it for the Defendant from April 2005 to September 2005, the Defendant effected payment to the Plaintiff of the aggregate sum of R144 438 to the Plaintiff. The calculation of this amount is annexed hereto marked "A". (As appears from "A" to the counterclaim, the sum of R144 438 claimed in the prayers to the counterclaim represents the retainer fees paid for the period from April 2005 to September 2005 inclusive.)

14. Arising from the Plaintiff's material breach of its obligations under the agreement described above, the Defendant was not liable to pay such amount to the Plaintiff, or any amount at all, and is accordingly entitled to repayment of the above sum from the Plaintiff."

[5] The exception is directed at the allegations made in paragraphs 13 and 14 of the counterclaim, and particularly the assertion that the payments which are sought to be recovered were made "in the *bona fide*, but mistaken belief that the Defendant was liable to the Plaintiff" in respect thereof. The language employed in paragraph 13 of the counterclaim is readily recognisable as that employed to sustain a claim for unjust enrichment.

THE EXCEPTION

[6] The Plaintiff considered the counterclaim to be vague and

embarrassing, alternatively, to fail to disclose a cause of action. Hence, it delivered a notice in terms of Rule 23(1) affording the Defendant a period of 15 days within which to remedy three specific grounds of complaint identified therein.

[7] The first ground of complaint was that on the allegations made in the counterclaim and notwithstanding the Plaintiff's ongoing breach of the agreement for the period April 2005 to September 2005, the Defendant effected payment to the Plaintiff of the aggregate sum of R144 438. The Plaintiff alleged that the Defendant had failed to alleged that the "errors" in making payments to the Plaintiff for the period April 2005 to September 2005 were excusable in the circumstances. The Plaintiff contended that this was a necessary allegation to sustain the counterclaim.

[8] The second ground of complaint was that the said payments were made notwithstanding the Plaintiff's ongoing breach of the agreement in failing, whether properly or at all, to develop a profile in the market in which the Defendant operated so as to

attract new business, and to this end, to implement strategic planning, media relations, event management, stakeholder relation programmes and public affairs, and investor and financial communications. The complaint is that on the facts as pleaded by the Defendant, the payments to the Plaintiff were not (and could not have been) made in the *bona fide* but mistaken belief that such payments were owing. In such circumstances, it was contended that the Defendant had made no case.

[9] The third complaint was that the Defendant had alleged an ongoing breach of the agreement by the Plaintiff, but did not claim damages arising therefrom. On the contrary, the Defendant relied on enrichment, as a separate cause of action, to claim the repayment of the payments made by it to the Plaintiff during the alleged ongoing breach. The complaint was that even if the enrichment had been caused by breach of the agreement, as alleged by the Defendant, it could not be regarded as *sine causa* whilst the agreement still continued. Moreover, any such enrichment could not be unjustified because the agreement provided the *causa* or legal ground for the enrichment,

notwithstanding the subsequent termination thereof. Hence, it was contended that the counterclaim disclosed no cause of action.

[10] The Defendant did not remedy the cause of complaint, and the Plaintiff excepted to the counterclaim on the basis that it was vague and embarrassing, alternatively, did not disclose a cause of action in terms of Rule 23(1) and on the grounds set out in the notice. In the prayers to the exception, the Plaintiff seeks to strike out the Defendant's counterclaim, with costs.

THE ARGUMENT

[11] Ms Bailey, who appeared for the Defendant, conceded (correctly in my view) that in the event that the counterclaim was construed as one based on unjust enrichment, the exception should succeed.

[12] Indeed, each of the grounds of complaint in the exception were justified by Mr Bitter, who appeared for the Plaintiff, by reference to carefully directed authority.

[13] As regards the first complaint, it is trite that the error which founds a *condictio* must be excusable. In <u>*Rahim v Minister of Justice*</u> **1964 (4) SA 630 (A), 634A-C**, the court held that:

> "Apparently, the magistrate in giving judgment in favour of the respondent considered a mere mistake of fact in the absence of a *debitum* sufficient to ground the *condictio indebiti*. It is, however, not every ignorance of fact which gives rise to the *condictio indebiti*. Gluck 12.6.827 states that the payment should have been made as a result of an excusable error, and further says in paragraph 8.3.4 that the error should not be based on gross ignorance. He refers, *inter alia*, to Voet 12.6.7 where it is stated that the ignorance of fact should appear to be neither slack nor studied (*neo supina nec affectata*) and this latter passage was approved of in *Union Government v National Bank of SA Ltd* 1921 AD 121 at p126. …
>
> In defining *ignorantio supina et affecta*, Voet 12.6.7 explains that the ignorance should not be of a fact concerning the plaintiff's own affairs or of a fact which, although concerning the affairs of others, is known to everybody except to a few solitary individuals. …"

In casu, no allegation has been made that the error was excusable in the circumstances, or even reasonable. Hence, the first complaint was well-founded, if the claim was based on unjust enrichment.

[14] As regards the second complaint, it is equally clear that the *condictio indebiti* is unavailable if there was no mistaken belief

that the amount was owing. As was held in *ABSA Bank Ltd v Leech and Others NNO* **2001 (4) SA 132 (SCA) at p139**:

> "[8] From the aforegoing it is clear that the respondent's claim is based on the *condictio indebiti*. In order to succeed the respondents had to prove that a payment was made in the mistaken belief that it was owing (Voet 12.6.6; *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 445; *Union Government v National Bank of SA Ltd* 1921 AD 120 at 140; *Recsey v Reich* 1927 AD 554 at 577; Joubert (id)The Law of South Africa, 1st Reissue Vol. 9 p79; De Vos, Verrykingsaanspreeklikheid in die Suid-Afrikaansereg, 3rd ed at 23; *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A).) They alleged and therefore had to prove that the trust, i.e. the trustees of the trust, believed that the amount of R4,125 million was owing in terms of the first agreement but they were mistaken, in that, by virtue of the operation of the *in duplum* rule, a portion of the amount paid was not owing."

[15] *In casu*, and on the allegations made by the Defendant, there were no services rendered during the relevant period of the counterclaim, or such services were inadequate. Moreover, the warranty of performance was on the version pleaded by the Defendant known to it. The Defendant must also have had knowledge of the breach thereof as and when (or shortly after) each payment was made on the allegations made in the plea. Accordingly, the Defendant could not have believed that the

monthly amounts were due when they were paid. The second complaint accordingly also has merit, if the counterclaim is one for unjust enrichment.

[16] Indeed, the cogency of both the first and second grounds of complaint is evident from the following passage in *Iscor Pension Fund v Jerling and Others* **1978 (3) SA 858 (T),** where Margo J held (at **p861**):

> "Now as I understand the law in regard to the right to recover money paid which was not owing, the *condictio indebiti* lies at the suit of the party seeking to recover the payment if he shows that it was made by him under a reasonable but mistaken belief (*iustus error*) that it was due and payable. If, however, he made the payment voluntarily, knowing that it was not owing, it is regard as a donation and is not recoverable. See *Union Government (Minister of Finance) v Gowar* 1915 AD 426 per De Villiers JA at 445-6; *Recsey v Reich* 1927 AD 554 per Wessels JA at 556; *Schoen v Cutting* 1904 TH 87 per Bristowe J at 90-91."

[17] As to the third ground of complaint, it is well established that no *condictio sine causa* is available in respect of performance of an agreement while the agreement still subsists.

[18] In **De Vos**, **Verrykingsaanspreeklikheid in die Suid-**

Afrikaanse Reg, 3rd ed. the learned author explained (at **355-6**) the following:

> "… Selfs wanneer daar as gevolg van kontrakbreek op 'n gegewe tydstip verryking bestaan, kan die nie as *sine causa* beskou word so lank die kontrak nog voortduur nie. Ons neem as voorbeeld die geval waar A volkome presteer, maar B nie presteer nie of sy prestasie gebrekig is. Hier is B ongetwyfeld verryk ten koste van A maar sy verryking is nie *sine causa* nie, en daarom kan die wedesydseregte en verpligtinge van die partye nie deur die reëls van onregverdige verryking beheer word nie."

[19] This analysis by the learned author justifies the third complaint. The view of **De Vos** was approved in *Pretorius v Commercial Union Versekeringsmaatskappy van Suid-Afrika Bpk* **1995 (3) SA 778 (O),** and it was pointed out therein that this passage had been quoted with approval in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* **1979 (1) SA 391 (A), 424D-G**. This approach is also commensurate with that adopted in *McCarthy Retail Ltd v Short Distance Carriers CC* **2001 (3) SA 482 (SCA)**. It is not necessary in the circumstances set out below for me to determine precisely which *condictio* was sought to be invoked in the claim.

[20] No doubt recognising the difficulties in countering the complaints raised in the notice, Ms Bailey submitted that the counterclaim was not based on enrichment at all. This, notwithstanding that it had been specifically alleged in the counterclaim that the payments in issue were made in the *bona fide* belief that they were owing.

[21] Ms Bailey's argument was that on a proper construction of the counterclaim, the cause of action embodied therein was one for what she termed "restitutionary damages". She submitted that the exception should fail as being directed to an irrelevancy *viz*. the missing elements of an enrichment claim upon which the claim in reconvention was not based.

[22] If I may paraphrase Ms Bailey's argument, it amounts to this. The Defendant has the conceptual right of way in formulating the basis of the counterclaim. If the Plaintiff has misconstrued the claim by a mischaracterization thereof, then an exception based upon the missing elements of a misconstrued claim must automatically fail as being misdirected. In short, if no case has

been sought to be made it will not matter if the enrichment case has not been properly made.

[23] I should add in this regard that Ms Bailey relied upon the case of *Callender-Easby v Grahamstown Municipality* **1981 (2) SA 810 (E), 812H-813A**, to make her point. This case is authority for the proposition that where the wording of a claim is ungrammatical and ambiguous (i.e. capable of more than one meaning), the uncertainty attaching to the pleader's intention cannot avail an excipient unless he shows that on either construction of the ambiguous claim it is excipiable. (See also *Klerck NO v Van Zyl and Maritz NNO and Another and Related Cases* **1989 (4) SA 263 (SE**). Her submission was therefore that in order to succeed the Plaintiff as excipient would have to demonstrate *in casu* that on both possible constructions of the counterclaim as pleaded, *viz.* enrichment and "restitutionary damages", the counterclaim was excipiable.

[24] It is of course somewhat unfair to the Plaintiff to have expected it to have discerned that the pleader of the counterclaim may have

had in mind some other cause of action notwithstanding the clear invocation of a *condictio* in the counterclaim as evidenced by the language used, and particularly in respect of an alleged *bona fide* error in the making of the payments. But be this as it may, if the Plaintiff was not astute enough to have discerned the real cause of action, so Ms Bailey argued, then the exception should fail if another plausible cause of action had been made out.

[25] I should point out in this regard that in the *Callender* case, Howie J (as he then was) suggested that prior to the taking of the exception it would have been incumbent upon the excipient to seek clarification of the intention of the pleader of an ambiguous pleading, either by way of an appropriate request for particulars or a notice referred to in the proviso to Rule 23(1) concerning vague and embarrassing pleadings. As is set out above, the Plaintiff gave notice to remove of complaint, albeit that it was directed to establishing whether the elements of an enrichment claim had been pleaded. Had the Defendant not intended to rely upon an enrichment action, it could have pointed this out. Instead, it remained silent.

[26] In any event, at best for the Defendant, the *Callender* case simply requires an excipient when faced with an ambiguity as to the other pleader's intention to show that on either construction the claim is excipiable. To this extent at least Ms Bailey's argument follows the usual principles of determining an exception on any reasonable construction of the pleading in issue, and is not objectionable.

[27] As I have already pointed out above, the counterclaim is plainly excipiable in so far as concerns any possible claim based on enrichment. But Ms Bailey construed the issue before me as being whether the counterclaim could be sustained (notwithstanding the allegations suggestive of an enrichment action) on the alternative basis that when properly construed, the counterclaim was one for "restitutionary damages" with its own elements, and whether or not superfluous allegations had been made relating to a non-existent cause of action in enrichment were irrelevant.

[28] I do not quite agree with counsel's characterization of the issue.

The question is not whether the counterclaim as pleaded could in theory support a claim for "restitutionary damages" (as one of the alternative constructions to the pleading), but rather whether the imperfect allegations relating to enrichment form any part of the counterclaim made on any reasonable interpretation thereof, i.e. either enrichment or restitution. If not, the allegations in respect of which the exception has been taken are on any interpretation of the pleading either unnecessarily burdensome on the papers (and the evidence to be led at trial) or simply insufficient to sustain a claim on any reasonable interpretation thereof. In either such event, they fall to be struck out.

[29] After all, the exception is not directed at whether a claim could in theory lie for "restitutionary damages" or not, and I am therefore not called upon to decide this point. The problem with which I am confronted is rather the role to be played by the allegations made in the counterclaim pertaining to the law of enrichment, and whether they disclose (or assist in making) any cause of action on the papers in the context of the exception as formulated, i.e. in either enrichment or restitution. As I have said,

there has been no proper enrichment claim.

[30] In support of the argument that upon a proper interpretation of the counterclaim the Defendant was merely seeking "restitutional damages" as a result of the Plaintiff's breach of contract and that the counterclaim on this basis was sustainable notwithstanding the allegations pertaining to enrichment, Ms Bailey referred to a number of cases. The cases to which she referred do indeed demonstrate that in certain circumstances an aggrieved party may claim restitution against a defaulting co-contracting party post-cancellation.

[31] Ms Bailey referred for example to *Baker v Probert* **1985 (3) SA 429 (A),** where the purchaser of a shareblock in a company made payment to the seller's agent in anticipation of the transfer thereof by the seller. The seller failed to deliver the share certificates, and the purchaser cancelled the contract on the ground of the Defendant's breach. The seller's agent was placed in liquidation, and the purchaser claimed repayment of the purchase price from the seller.

[32] The Appellate Division in *Probert* accepted that the purchaser was entitled to repayment of the purchase price from the seller and that it was appropriate to classify the case as one for restitution. That case may be distinguishable from the facts *in casu* because it pertained to a single purchase price in respect of a shareblock which was never delivered. *In casu*, there were a series of payments made in respect to discrete monthly services supposedly rendered. As I have said, I am not called upon to decide whether a restitutionary claim lies herein, and do not do so.

[33] Rather, and more importantly for present purposes and in dealing with this exception, the Appellate Division in *Probert* determined that a claim for restitution in this context (if it lies in principle) was specifically not one in enrichment. The court held (at **p438**) that:

> "… It is not open to doubt that a purchaser, who has validly cancelled a contract of sale on the ground of the seller's breach of it, is entitled in principle to claim repayment of the purchase price, paid to the seller in terms of the contract prior to its cancellation. The purchaser's right to claim repayment obviously exists also where payment of the purchase price was made, not to the seller in

> person, but to his duly authorized agent, since payment to an agent is equivalent in law to payment to the principal. In this situation the purchaser's right to claim repayment from the seller is unaffected by the failure or inability of the agent to pay over the purchase price to the seller. Although statements can be found in cases and in textbooks suggesting that the latter's liability is based on enrichment, I agree with the view, and the reasons for it, expressed by De Vos Verrykings Aanspreeklikheid in die Suid-Afrikaansereg, 2nd ed at 141-143, that a claim for restitution of performance following upon cancellation of a contract for breach is not a *condictio* (*Cf Landau v City Auction Mart* 1940 AD 284 at 292-4 and *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) at 198C-D), and I agree with Nienaber J (at 233C of the report) that the claim is to be regarded as a distinct contractual remedy (*cf SWJ van der Merwe and MFB Reyneke* in 1984 TSAR 85 at 86). Whether or not the remedy can happily be described as a claim for *restitutio in integrum* (see the report at 233B and AJ Kerr in 1984 THR-HR at 460) need not be discussed in this judgment, although it might be noted in passing that it would seem to be advisable to distinguish between the non-technical concept of restitution in the sense of "restoration" or "return" and the technical concept or *restitutio in integrum* as dealt with in the common law authorities (see De Vos (*op cit* at 143-144))."

[34] The significance of this quotation from *Probert* for present purposes is that a claim for restitution in this context is not (and cannot be) one for enrichment. Hence, based on this authority, a claim for restitution could not be based on any allegations made in respect of a *condictio*. Therefore, the allegation that the Defendant harboured under the *bona fide* but mistaken belief that

it was obliged to make payment *in casu* in respect of the deficient monthly services rendered would be incompatible with a claim for restitution. I should respectfully caution against the use of the term "restitutionary damages". The Appellate Division (at best for the Defendant) merely spoke of restitution in the technical and non-technical sense as set out above, and not of "restitutionary damages".

[35] Ms Bailey also referred me to *Tweedie and Another v Park Travel Agency (Pty) Limited t/a Park Tours* **1998 (4) SA 802 (W)**, being a Full Bench decision of this division. In that case the appellants had entered into an agreement with the respondent whereby the latter was to transport them to England to watch a rugby test match. The appellants had been informed by the respondent that they would receive their tickets at the hotel in London where they would spend the night before the match. The tickets were never forthcoming. They were forced to watch the match on television and on returning to Johannesburg claimed repayment of the tour price and expenses they had incurred to go on tour. The court held that the appellants were entitled to cancel

the contract and to claim repayment of the price of the tour without adjustment, as they had received no value for what they had paid and reimbursement of their expenses in so far as they were necessary and reasonable, and would not have been incurred but for the tour booking, and were wasted were recoverable (at **806I-807A**).

[36] This case also establishes an entitlement to restitution pursuant to defective contractual performance post-cancellation, and to this extent provides some support for Ms Bailey's argument. The case is perhaps also distinguishable on the facts from that *in casu* because it concerns a single purchase price payment as opposed to a series of discrete payments for services rendered monthly. However, more relevant for present purposes, in *Tweedie* Cloete J (as he then was) held that:

> "So far as the refund of the tour price is concerned, a claim for restitution of performance upon cancellation of a contract for breach is a distinct contractual remedy: *Baker v Probert* 1985 (3) SA 429 (A) at 438I-439B. The vexed question whether the duty to restore the performance of a party as a consequence of the cancellation of a contract due to a breach is a contractual remedy or an enrichment action, which had its roots in the divergent views of the Sabinians and the Proculians in the Roman law and persisted in

> the Roman-Dutch law (*cf C. van der Walt* 1985 THR-HR5) were settled by that case. … The court (at 437I) categorized the claim as 'plainly a claim for repayment of the purchase price, i.e. for restitution of the plaintiff's performance, pursuant to the cancellation of the contract' and granted the relief sought. There cannot be any doubt that the appellants are entitled to the remedy in this case. The appellants' right to restitution and the obligation to make restitution of the benefits they had received, are co-extensive with the rights and obligations of an aggrieved party who seeks rescission of a contract for fraud or under the *actio redhibitoria*: *Bonne Fortune Beleggings v Kalahari Salt Works (Pty) Limited en Andere* 1974 (1) SA 414 (NC) at 426C-H; but it must be borne in mind that restitution in the non-technical sense in matters such as the present is not co-extensive with the technical concept of *restitutio in integrum* as dealt with in the common law authorities: *Baker v Probert (supra)* at 439B-C). In my view the appellants are not obliged to restore anything. The plea averred, and the respondent's counsel argued, that the appellants should recover only the amount of the cost of the entrance ticket to the rugby ground (about £32, on Meyer's evidence). On the facts of this case such an approach would be wrong because the appellants received no value for what they had paid …"

[37] Accordingly, it is also plain from the *Tweedie* case that language suggestive of a *condictio* would be misplaced in a claim for restitutionary relief in this context. The claim here is for repayment of an amount paid in respect of defective or non-existent service, or a deficiency of performance in breach of a contractual warranty. No question of condiction does or could theoretically arise.

[38] Ms Bailey then referred to *Masters v Thain t/a Inhaca Safaris* **2000 (1) SA 467 (W)**, also a Full Bench decision. This case is not dissimilar to that of *Tweedie*. The appellant had booked a holiday with the respondent for his family on an island, with the express purpose scuba diving with his daughter. When they arrived on the island, it was discovered that they would not be able to scuba dive unless they paid an amount for a boat which was disproportionately greater than agreed with the respondent. The appellant contacted the respondent and informed her that he wished to return home forthwith. On his return he instituted action for the recovery of the amount he paid the respondent for the holiday. The appellant succeeded in his claim. The case is again an instance of a quest for restitution pursuant to cancellation of a contract. To the extent that the case is used as authority for the proposition that restitution of performance is a competent claim in principle, the reliance thereupon by Ms Bailey may be well-founded. It is of course also a case of a single contractual payment in respect of a holiday package, and may operate differently from the facts *in casu* in regard to the series of discrete payments for monthly services rendered.

[39] But the court in *Masters* held per Horwitz AJ that:

> "In *Probert v Baker* 1983 (3) SA 229 (D) at 233 Nienaber J (as he then was) held that a claim by a plaintiff for recovery of his own performance consequent upon the cancellation of a contract to be regarded as a distinct and peculiar contractual remedy and that the description of the claim is one for *restitutio in integrum* was to be eschewed. In the appeal from the judgment (reported as *Baker v Probert* 1985 (3) SA 429 (A)) Botha JA at 439A-B expressed his agreement with Nienaber J that such claim was to be regarded as a distinct contractual remedy. In principle, therefore, the plaintiff's claim falls squarely within the parameters of such claim. See also *Tweedie and Another v Park Travel Agency (Pty) Limited t/a Park Tours* 1998 (4) SA 802 (W) at 804-808B (at 471D-F)."

Accordingly, the *Masters* case takes this matter no further. There is no suggestion in *Masters* that any allegation as to enrichment is required or is even appropriate in regard to a restitutionary claim. On the contrary, a claim of this nature cannot lie in enrichment.

[40] Indeed, the distinction between a restitutionary claim and one in enrichment was trenchantly illustrated in the case of *Kudu Granite Operations (Pty) Limited v Caterna Ltd* **2003 (5) SA 193 (SCA)** to which Ms Bailey also referred. In that case, the Supreme Court of Appeal held:

> "… There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in *Baker v Probert* 1985 (3) SA 429 (A), a judgment relied on by the Court *a quo*) and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect. The first-mentioned scenario gives rise to a distinct contractual remedy: *Baker* at 439A, and restitution may provide a proper measure or substitute for the innocent party's damages. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjust enrichment, an equitable remedy in which the contractual provisions are largely irrelevant. …" (**p201 [15]**)

[41] This case graphically illustrates that not only would reliance upon a *condictio* (or language suggestive thereof) be misplaced in regard to a restitutionary claim (in the non-technical sense identified in *Probert*), but it would be incorrect. Contractual remedies (including restitution) lie where the contract is the source of the claim. It is only where the purported contract had no legal effect that the claim could be founded in an enrichment action.

[42] Whether the counterclaim *in casu* falls to be classified as one for positive *interesse* or negative *interesse* is not the subject matter of this exception. Hence, there is no necessity for me to make

any comment in respect of the complex juridical debate surrounding this issue. (see *Hamer v Wall* **1993 (1) SA 235 (T)**; *Main Line Carriers (Pty) Limited v Jaad Investments CC* **1998 (2) SA 468 (C)**), or even whether a sufficient case has been made for a restitutionary claim *in casu*. My only concern in regard thereto, as expressed above, is whether allegations suggestive of a *condictio* (at which the exception is directed) are in any sense compatible therewith. In the event that the Plaintiff excepts to the counterclaim on the basis that it cannot sustain a restitutionary remedy on its alleged facts, then that exception will follow its course and I cannot (and do not) deal with it herein.

[43] My enquiry into the nature of the Plaintiff's counterclaim has merely been to ascertain whether the allegations (albeit imperfect in the respects mentioned in the exception) which are suggestive of an enrichment claim form any part of the restitutionary counterclaim as asserted by Ms Bailey. In my opinion, the cases relied upon by the Plaintiff in support of the claim for restitution establish not only that such claims could lie in certain circumstances, but also that allegations of enrichment do not

form any part thereof and indeed are inimical thereto, and incompatible therewith.

[44] Hence, the exception is well taken in so far as concerns not only the counterclaim based on unjust enrichment, but also in so far as the allegations made relate to the alternative interpretation sought to be placed on the counterclaim as lying in restitution. In the latter event, the allegations suggestive of an enrichment claim are not only surplusage thereto, but positively contradict it. Applying the test of dealing with an ambiguous pleading as set out in the *Callender* case (and relied upon by Ms Bailey) the allegations as to the making of a *bona fide* but mistaken error in making the payment do not sustain either cause of action and in consequence render the pleadings excipiable.

[45] Hence, it is appropriate in the circumstances for me strike out the offensive portions of the counterclaim as not to do so would not only lead to a lack of clarity as to the cause of action, but also to the leading of unnecessary evidence at trial. (see *Barclays National Bank Ltd v Thompson* **1989 (1) SA 547 (A), 553F**;

Dharumpal Transport (Pty) Limited v Dharumpal **1956 (1) SA 700 (A), 706**.) I therefore intend to strike out the words *"in the bona fide, but mistaken belief that the Defendant was liable to the Plaintiff for the services purportedly rendered by it for the Defendant from April 2005 to September 2005"* in paragraph 13 of the counterclaim on the basis that they render the counterclaim excipiable as disclosing no cause of action, and have no place in the counterclaim.

[46] In the result, I make the following order:

1. The exception is upheld.

2. The words *"in the bona fide, but mistaken belief that the Defendant was liable to the Plaintiff for the services purportedly rendered by it for the Defendant from April 2005 to September 2005"* in paragraph 13 of the Defendant's counterclaim are struck out.

3. The Defendant is afforded a period of 15 days from

the date of delivery of this judgment within which to amend its claim in reconvention, and particularly paragraph 13 thereof should it so wish.

4. The costs of exception are awarded to the Plaintiff.

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S. SYMON, AJ
ACTING JUDGE OF THE HIGH COURT

Counsel for the Plaintiff:	Advocate Bitter
Instructed by:	Christelis Artimedes
Counsel for the Defendant:	Advocate Bailey
Instructed by:	Tanya Brenner
Date of Hearing:	22 June 2007
Date of Judgment:	05 March 2008