IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION,
DURBAN

Case number: 8703/2019

In the matter between

KUSHELA VENKETAS NAIDOO **PLAINTIFF**
(RESPONDENT IN THE EXCEPTION)

and

ALETTA JOHANNA PLOMP **FIRST DEFENDANT**
(EXCIPIENT)

TRIPLO 4 SUSTAINABLE SOLUTIONS (PTY) LTD **SECOND DEFENDANT**

ORDER

The following order is granted:

The exception is dismissed with costs.

JUDGMENT

D. Pillay J

[1] The plaintiff, Kushela Venketas Naidoo claims R553 191.36 for unjust enrichment, plus interest and costs from the defendants. The first defendant is Aletta Johanna Plomp and the second defendant is Triplo 4 Sustainable Solutions (Pty) Ltd. The plaintiff and the first defendant held 48% and 50% of the issued shares in the second defendant. On 13 August 2019, the plaintiff resigned as a director of the second defendant and relinquished his shareholding to the first defendant. He did so allegedly

> 'in the *bona fide*, reasonable but mistaken belief on the part of the plaintiff that he and the first defendant would reach agreement on the terms of the plaintiff's exit from the second defendant'.

[2] The defendant excepted to the particulars of claim on the basis that it did not set out the requirements for the *condictio sine qua non* or for the *condictio indebiti*. More specifically, the particulars do not allege that the transfer of the shares was unjustified which is a prerequisite for an enrichment action.

[3] The plaintiff alleges that his transfer of shares to the first defendant was without obligation and in anticipation that he would reach an agreement with the first defendant at some future date. Such agreement has not been forthcoming. He does not rely on donation, contract or any other cause. He relies on his bona fide but mistaken belief. Consequently, he alleges that there is no legal basis or justification for the first defendant to hold the plaintiff's shares.

[4] The four requirements to satisfy a claim for enrichment are that the defendant must be enriched, the plaintiff must be impoverished, the enrichment must be at the expense of the plaintiff and must be unjustified. Although there is no unified general enrichment action, these are requirements common to all enrichment actions.[1]

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[1] *McCarthy Retail Ltd v Short-distance Carriers CC* (110/99) [2001] ZASCA 14; [2001] 3 All SA 236 (A) (16 March 2001) para 8-10; *Nortje en Ander v Pool, No* 1966 (3) SA 96 (A) but see dissent of Ogilvie Thompson JA for a developmental approach to the common law regarding compensation for non-tangible improvements to property.

[5] In *Govender v Standard Bank of South Africa Limited* 1984 (4) SA 392 (C) 400 the Appellate Division (AD) discouraged a 'formalistic approach' to labelling the cause of enrichment actions:

'It may be an open question whether the action in this case falls to be decided according to the principles governing the *condictio indebiti*, in which event negligence of the plaintiff may preclude the *condictio*, or whether the claim is a *condictio sine causa*, in which event negligence of the plaintiff may be irrelevant. A formalistic approach, of course, should be avoided where possible. In some cases it is necessary to classify the cause of action. In others, where no issue turns upon classification of the cause of action, a plaintiff need not place a label upon this case. If he is able to show that the law entitles him to relief it is not necessary for him to commit himself in advance in his pleadings to one form of action to the exclusion of another. It may, however, in this case be of importance in the issue of negligence to bear in mind that the *condictio indebiti* and the *condictio sine causa* have different requisites, and to determine which is the appropriate action and consequently what are the appropriate requirements which plaintiff must establish in order to succeed.

In the case of the *condictio indebiti*, a person who makes a payment of money (or delivers a thing) to another due to a reasonable error of fact in the belief that the payment is owing, whereas it is not, may claim repayment to the extent that the person who received the payment has been enriched at his expense.'

[6] While discouraging a 'formalistic approach', the AD elucidated the distinction between *condictio indebiti* and *condictio sine causa* further:

'It is necessary for a condictio indebiti to show reasonable mistake of the plaintiff, but a *condictio sine causa* lies whether the money is in the hands of the defendant without cause, whether due to mistake of the plaintiff or not. It is therefore a defence to the *condictio indebiti* that the mistake was not reasonable but negligent, but it would not seem to be a defence to the *condictio sine causa* since no error need be proved, whether reasonable or unreasonable.'

'[I]n the case of a *condictio sine causa*, money which has come into the hands or possession of another for no justifiable cause, that is to say, not by gift, payment discharging a debt, or in terms of a promise, or some other obligation or lawful ground for passing of the money to the recipient, may be recovered to the extent that the recipient has thereby been enriched at the expense of the person whose money it was. The

condictio sine causa, in this special form (*specialis* as opposed to *generalis*) may be brought where the *condictio indebiti* is inappropriate to the case; indeed, it cannot be brought where the *condictio indebiti* applies to the case.'

[7] Approving of *Govender* above in *B & H Engineering v First National Bank of South Africa LTD* [2] the AD illustrated that:

'A *condictio indebiti* lies to recover a payment made in the mistaken belief that there is a debt owing. However, a bank paying a cheque knows that it owes no debt to the payee. Its mistake lies, not in the belief that it owes money to the payee, but in a belief that it has a mandate from the drawer to make payment. In these circumstances the appropriate remedy is not the *condictio indebiti* but the *condictio sine causa*.'

[8] The following unanimous dictum of the Appellate Division in *Bowman De Wet Du Plessis NNO and Others v Fidelity Bank Ltd.* (144/95) [1996] ZASCA 141; 1997 (2) SA 35 (SCA); [1997] 1 All SA 317 (A); (28 November 1996) also applies:

'an ultra vires payment represents a prime example of a payment *indebite*. Such payments are, by their very nature, payments of something not owing ('onverskuldig') by the payee. Sir John Wessels was of a like mind: in Law of Contract in South Africa, 2nd ed, par 3642, he said that a payment is considered not to be due if a claim was thought to exist but which, after payment, is discovered to have been null and void. The point is in any event not a novel one and has been the subject of a number of judgments.'

[9] Both the *condictio indebiti* and *condictio sine causa* are susceptible to development casuistically. As principles of the common law they are not static but ever evolving. They are neither immutable nor inflexible. Their development is foreseeable as they apply to new circumstances. (*Bowman De Wet Du Plessis NNO and Others v Fidelity Bank Ltd* para 40) However, the facts in each case will determine which cause will apply. Both cannot apply simultaneously. The *condictio sine causa* can be a defence to the *condictio indebiti*.

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[2] *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A).

[10] The distinction between this case and the three cited above is that when the plaintiff transferred the shares, he alleges that he did not think she was obliged to do so then but in future, if he concluded of an agreement. This distinction is not material. What is material is whether the mistake was bona fide and reasonable (*condictio indebiti*) or negligent (*condictio sine cause*). The election must be clear from the facts pleaded. Not only does the evidence to establish each cause differ but also by proving negligence the excipient could defeat a claim based on reasonableness. In this case the issue does turn on the classification of the cause of action.

[11] The transfer for the reasons alleged was an *indebiti*, that is, it was without legal or natural obligation. However, the plaintiff cannot hedge his bets between establishing a *condictio indebiti* and *condictio sine cause*. He has to choose. He does. He chooses his alleged bona fide but mistaken belief as the cause. Applying the appellate authorities above, as I am bound to, this brings his claim under the *condictio indebiti*.

[12] Mr Pitman referred me to *MN v AJ* 2013 (3) SA 26 (WCC), a case in which a husband claimed a refund of payments he made to his wife in terms of a divorce order for the maintenance of a child whom he subsequently discovered was not his. The court found that the error of fact rendered the payment of maintenance *indebiti* but she had not been enriched. There was no suggestion that she had used the maintenance for purposes other than the child. *MN* is distinguishable in several respects. Mainly, the claim could not succeed because the beneficiary of the payments was not the plaintiff but a child third party. Children's rights were at stake. Furthermore, the husband was unable to prove that the wife had been enriched. As regards deficiencies in his particulars of claim, she should have excepted timeously if the pleadings were bad in law. Notwithstanding, she was not prejudiced as she was notified of the basis being the *condictio indebiti* during the opening address.

[13] However, in *MN* the court contemplated but came to no conclusion about the public policy underpin of the *condicitio indebiti*. In this case, the evidence will determine the direction of the development, if any, of the common law. Insofar as

the plaintiff contemplates developing the common by proving that a mistaken belief could fall between either *condictio*, it must plead what the development would be from and to what. This is not done. This exception was an invitation for him to do amend his particulars of claim. Instead, he has declined by defending his claim as pleaded.

[14] The principle that an agreement to agree in the future is not binding and is unenforceable,[3] is a factor that would go towards determining the bona fides and reasonableness of the plaintiff's mistake. The defendants have sufficient particularity to plead their defense.

[15] I find that under the *condicitio indebiti* the plaintiff has established a *prima facie* case of enrichment of the first defendant at the expense of the plaintiff. Consequently, the plaintiff claims that he is impoverished by the transfer of his shares. Without a legal basis for the transfer he alleges it is unjustified.

[16] Regarding costs, the usual rule that the costs follow the result applies.

[17] The exception is dismissed with costs.

D. Pillay J

Judge of the High Court of KwaZulu-Natal

[3] *Van Aardt v Galway* (923/10) [2011] ZASCA 201; 2012 (2) SA 312 (SCA); [2012] 2 All SA 78 (SCA) (24 November 2011) para 16.

APPEARANCES

N.B With the consent of the parties the matter was dealt with on the papers.

Date of Hearing	:	09 June 2020
Date of Judgment	:	19 June 2020
Counsel for the Plaintiff	:	Advocate M. Pittman
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