**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

***Reportable***

In the matter between:

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| **LAMBERTUS VON WIELLIGH BESTER N.O.** | First Plaintiff |
| **RYNETTE PIETERS N.O.** | Second Plaintiff |
| **BAREND PETERSEN N.O.** | Third Plaintiff |

and

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| **ABRAHAM JACOBUS STEPHANUS RICHTER** | Defendant |
| | (Case no.: **7596/2015**) |
| **MARLENE NIEWOUDT** | Defendant |
| | (Case no.: **11901/2015**) |
| **GABRIËL ROSSOUW MALHERBE** | Defendant |
| | (Case no.: **11210/2015**) |
| **JACOBUS FREDERICK GELDENHUYS** | Defendant |
| | (Case no.: **11321/2015**) |
| **JACOBUS WILHELMUS CONRADIE** | Defendant |
| | (Case no.: **11229/2015**) |
| **FRANS ALBERTUS KELLERMAN** | Defendant |
| | (Case no.: **11209/2015**) |
| **ROSALIE CONRADIE** | Defendant |
| | (Case no.: **11233/2015**) |
| **HENDRIK JOHANNES VISSER** | Defendant |
| | (Case no.: **11208/2015**) |
| **GERTRUIDA JOHANNA HORN** | Defendant |
| | (Case no.: **11641/2015**) |
| **GESINA MARIA VISSER** | Defendant |
| | (Case no.: **11211/2015**) |

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**JUDGMENT: 06 November 2015**

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**DAVIS J**

**Introduction**

[1] Plaintiffs have applied in ten separate cases for summary judgment against the defendants respectively. Each is based on an identical cause of action. Briefly, plaintiffs are the joint trustees of a sequestrated estate of the RVAF Trust ("the Trust"). The trust was established on 6 March 2004 by agreement between a donor Matt Securities represented by Mr Hermanus Pretorius ("Pretorius") and the first trustees being Pretorius and Eduard Brand ("Brand") in terms of a written Trust Deed which was signed by the parties on 26 March 2004. Clause 7.2 of the Trust Deed provided that there shall always be three trustees. Notwithstanding this provision, on 1 April 2004 the Master appointed Pretorius and Brand as the only trustees of the trust and no further trustees were appointed.

[2] It appears in terms of the particulars of claim that Pretorius controlled all the affairs of the trust, apparently at his sole discretion. The Trust was provisionally sequestrated on 1 August 2012 and the order was made final in the Western Cape High Court on 3 September 2012.

[3] The amounts claimed by plaintiff in each case is the sum representing a difference between the amounts paid by each of the defendant of the trust and the amounts paid by the trust to the defendant in each of the cases. Defendants have resisted summary judgment on grounds which are set out in their opposing

affidavits. Again the opposing affidavits raise the same grounds. It was for this reason that it was agreed that the ten cases be heard simultaneously.

**Plaintiffs' causes of action**

[4] In the period 8 April 2010 to 18 January 2012 each of the defendants received a sum from the bank account of the Trust in excess of the sums which had been paid by that defendant to the trust. For example, in the case of defendant Richter, he received an amount of R 1 382.862 00 in excess of the amounts which he had paid to the trust.

[5] Plaintiffs now claim this amount on the basis of an enrichment action based on the *condictio sine causa*. Several grounds in justification of the *condictio* are pleaded; in particular that the trust lacked authority to make the payments when they were made because there were not three trustees as provided for in the trust deed, that Pretorius had acted unilaterally as the controlling mind of the trust and to the exclusion of Brand, that the trustees had failed to exercise their powers in accordance with the trust deed and that the trust was used by Pretorius as a vehicle through which an unlawful Pyramid or Ponzi type investment scheme was operated.

[6] A Ponzi scheme is one which was named after Charles Ponzi who became notorious for developing a particular fraudulent structure in 1920 namely, that he paid returns to investors from new capital paid to him by further investors rather than from the profits that had been earned from the capital which had been

invested in terms of the scheme. The whole idea of the Ponzi scheme is to entice new investors by offering higher returns than may be earned in other investments. As the “return” to the initial investors is paid out of the investments of new entrants rather than profits, inevitably the scheme collapses.

[7] In the alternative to the enrichment claim ,plaintiffs’ claim relief in respect of payments made in terms of s 26 and 32 of the Insolvency Act of 1936 in that plaintiffs allege that the amounts which the trust paid to defendants was depositions made by the trust without value when its liabilities exceeded its assets. This alternative claim was not pursued by plaintiffs.

**The verifying affidavit**

[8] Second plaintiff deposed to a verifying affidavit in each of these applications. She states that she is an insolvency practitioner and practices as a director at Independent Advisory. She states that she is a trustee of the trust and primarily, at present, the deals with a day-to-day administration of the insolvent trust. In this capacity, she has in her possession and under her control various documents, including bank statements used by the trust since its inception, the files of numerous investors such as those of defendants and other relevant documentary records of the trust.

[9] She states that she is duly authorised to depose to an affidavit on behalf of the plaintiffs’ and that, given her appointment to this position, and the documents to which she has recourse, she has sufficient personal knowledge of the facts referred to in plaintiff’s particulars of claim. She swears positively to the facts and

verifies the cause of action as well as the amounts of the claims as set out in the summons. Accordingly, she makes a standard averment that defendants have in her opinion no bona fide defence to the action and that the notice of intention to defend has been delivered solely to the purpose of delay.

**Defendants' opposition**

[10] Defendants' claim that second plaintiff, as deponent to the affidavit applying for summary judgment has no direct knowledge of the transactions which form the subject matter of plaintiffs' claim, the circumstances under which the initial investments were made by the trust and/or other entities and to whom they were paid. Further second plaintiff has no knowledge of the entity which received the monies invested, where the monies which were paid were further invested, the circumstances under which these investments were realised, the return on these investments, to which entity these funds, that is the realised investments, were paid, and the circumstances under which these realised investments or portion thereof after the deduction of fees were repaid to the trust. Further she has no personal knowledge of the manner in which these funds were repaid to the original investors, including defendants, the contractual relationship between the trust and the other entities in the Pretorius group, the agreements between these entities and the role they played. Accordingly, defendants claimed that second plaintiff is not in a position to "swear positively" to all the facts underlying the plaintiff's cause of action the amounts that were paid in excess of the investment and whether the amounts were impeachable transactions in terms of the Insolvency Act.

[11] Regarding the question of impeachable dispositions defendant makes the following case:

> 'The issue is dependent *inter alia* on whether:
>
> 1. Each one of the dispositions (each one of the separate payments made by the trust) were not made for value;
> 2. Given that such disposition was made by the insolvent within two years of the sequestration of its estate (as is being claimed here with regards to s 26 (1)(b)) whether immediately after each of the dispositions in question were made, this assets of the insolvent exceeded his liabilities;
> 3. If it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded its assets by less than the value of the property disposed of, the disposition should be set aside only to the extent of each excess
>
> These issues are not, I am advised, simply a matter for calculation.'

Defendants also raised the following defence, as reflected in the affidavit of defendant Richter

> 'I was and remain of the view that my money was placed in *bona fide* investments managed by Pretorius and his employees. The trust was one of the entities in his group of businesses through which the investments were made or channelled or administered. The business affairs of the trust, to the best of my knowledge, were conducted not only by Pretorius but also by one Eduard Brandt, who I understand was also a trustee of the trust. The plaintiffs will need to prove to this Honourable Court that the trustees of the trust were not properly authorised to do that which they did. I point out that the trust deed annexed to the particulars of claim has a provision (clause 7.5.4) which provides that the trustees of the trust may delegate any of their powers to "committees" consisting of one or more trustees of the trust.

> Whether this was done or not is something which would need to be determined at the trial.'

[12] Two aspects of the defence need to be qualified in terms of submissions made by plaintiff. In the first place it appears that plaintiffs are not pursuing the alternative claimed on the basis of s 26 of the Insolvency Act. Secondly plaintiffs note that in terms of pre summons affidavits which were annexed to the opposing affidavits, the correctness of the amounts claimed, that is the amounts in access of the investment, were not disputed by the defendants. Accordingly, the quantification of claims has been admitted and is therefore beyond dispute.

[13] I turn to deal with the verifying affidavit and the question of whether it passes legal muster in terms of Rule 32.

**The implications of Rule 32**

[14] Rule 32 of the Uniform Rules of the High Court, to the extent relevant, provides thus:

> 'The whole procedure of summary judgment was created to benefit plaintiffs. At the very least, therefore, it is expected of a plaintiff in presenting his case, to place himself squarely within the four corners of the remedy. Any defects in the presentation of his case which are not merely technical and, for that reason, cannot be condoned, will have as their consequence a refusal of summary judgment, even if no bona fide defence has been disclosed by the defendant. A court will not assist a plaintiff by breathing life into a poorly presented case – on the contrary the court will consider itself bound to the terms in which the plaintiff

has elected to formulate his claim. Should it appear that the plaintiff does have a claim, but not that presented as the cause of action in the summons, the court will refuse summary judgment as it cannot be granted on a cause of action other than that pleaded…'

[15] The meaning and scope of this rule has been the subject of a considerable amount of judicial attention. The leading case remains *Maharaj v Barclays Bank Limited* 1976 (1) SA 418 (A), where Corbett JA (as he then was) said at 423 A-C the following:

> '[The Rule} contemplates the affidavit being made by the plaintiff himself or some other person who can swear positively to the facts. In the latter event, such other person's ability to swear positively to the facts is essential to the effectiveness of the affidavit as a basis for summary judgment; and the court entertaining the application therefore must be satisfied, prima facie, that the deponent is such a person.
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> Generally speaking, before a person can swear positively to facts in legal proceedings they must be within his personal knowledge. For this reason the practice has been adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar rule in the magistrates' courts), of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts stated.'

[16] Corbett JA went on to deal with an affidavit deposed to by the branch manager's assistant of the relevant branch of the bank which was the plaintiff in this case. In finding that the affidavit complied with the legal standard, Corbett JA

cited with approval a *dictum* of Miller J (as he then was) in *Barclays National Bank v Love* 1975 (2) SA 514 (D) at 516 – 517 cited at 424 C to the following effect:

> 'The nature of the deponent's office in itself suggest very strongly that he would in the ordinary of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that the personally would have made every entry in the bank's ledgers or statements of account: indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment. It goes without saying that a manager of a bank who claims to have personal knowledge of the extent to which a client has overdrawn his account needs rely upon the bank records which show the amounts paid into the account and the amounts withdrawn by the client.'

Since the decision in *Maharaj* and, in particular, in recent times there had been a series of cases. See for example, *FirstRand Bank Limited v Huganel Trust* 2012 (3) SA 167 (WCC) at 178 and the contrary position as set out in *Absa Bank v Le Roux* 2014 (1) SA 475 (WCC) at 481 – 482.

[17] In the light of these and other decisions cited in both *Huganel* and *Le Roux*, *supra* it is prudent to adhere to a salutary judicial practice and resist the temptation to enter into an academic exposition of each of these cases rather than concentrate on the latest offering by the Supreme Court of Appeal of the present legal position in *Reese v Investec Bank Limited* 2014 (4) SA 220 (SCA) at para 13 – 14.

[18] In that case a claim for indebtedness arose from one or more loan agreements entered into between the respondent and the principal debtor secured by a mortgage bond. The appellant and the trust who were alleged to be sureties for the indebtedness of the principal debtor in each of the claims. After the appellants gave notice of an intention to defend, respondent launched a summary judgment proceedings against the appellants. The application for summary judgment was supported by an affidavit of a recoveries officer of the bank. The primary contention in resisting summary judgment was that the recovery officer was not a person who could "swear positively to the facts" as envisaged in Rule 32 (2). After setting out the principles in *Maharaj, supra,* Saldulker JA at para 13-14 said the following:

> 'Here Investec had issued a combined summons annexed to which was a comprehensive particulars of claim setting out the cause of action against the appellants, supported by written agreements concluded with the principal debtors in each instance and suretyship agreements concluded with sureties on the terms set out in the agreements. Investec thus had either obtained judgment against the principal debtor or the principal debtor had been wound up at the instance of Mr Rees. Those occurrences operated as the trigger for Investec to proceed on the suretyship agreements against the appellants. Moreover, the suretyships provided for a certificate of balance to be issued by the relevant bank manager of Investec, which would either serve as a liquid document or constitute prima facie proof of the sureties' indebtedness. It is against that backdrop that Ms Ackermann's affidavit must be viewed.
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> Ms Ackermann relied on the information at her disposal which she obtained in the course of her duties as the bank's recoveries officer, to swear positively to the contents of her affidavit. It is not in dispute that in the discharge of her duties as such she would have had access to the documents in question and upon a perusal of those documents she would acquire the necessary knowledge of the facts to which she deposed in her affidavit on behalf of Investec. Prior to the institution of the action Ms Ackermann had been corresponding with the

> appellants' attorney in regard to the principal debtors' delinquent accounts and had also addressed letters of demand to them, receiving letters in response which canvassed the appellants' defences. She could thus 'swear positively to the facts', 'verify the cause of action and the amount claimed' and assert that in her opinion the appellants did 'not have a *bona fide* defence to the action' and had entered an appearance to defend 'solely for the purposes of delay'. These factors show that the requirements set out in *Mahara*j are met.'

[19] This approach appeared to follow that of Corbett JA in *Maharaj,* namely that excessive formalism in procedural matters should be eschewed (*Maharaj* at 423 E-F). Hence, whatever defect may arise in the affidavit, it can be cured by reference to other documents relating to the proceedings and which are properly before the court; that is the court examines all the documents that are properly before it. (*Maharaj* at 423 H)

[20] On this basis it appears that the following guidelines can be set out with some confidence;

1. It is not strictly necessary that the deponent's personal knowledge should be direct or immediate, in the sense that the deponent to the affidavit has personal involvement in the various transactions underlying the cause of action. Documents and other evidence which might be under the deponent's control may, depending on the nature thereof and the context of the transaction, be sufficient to establish personal knowledge as required by Rule 32 (3).
2. The court should examine the relevant material, as set out above and which is placed before it properly in terms of the relevant summary judgment application, including the issues which have been raised by

the defendants in their opposing affidavits, which relate to the merits of the opposition, to assess whether summary judgment should be granted.

**Application of these principles to the present dispute**

[21] Mr Stelzner, who appeared together with Mr Rabie on behalf of the defendants, submitted that most of the cases which engaged with the principles of Rule 32 dealt with situations where bank managers and other officials, who were in control of records of the bank, deposed to affidavits in support of the summary judgment relying on these official records and by way of explaining their reliance thereon. By contrast, second plaintiff was not a bank manager nor an official of a bank nor did she rely on the type of records banks generally keep, the accuracy of which can generally be accepted. She was a trustee of an insolvent business trust which was formed for the very purpose of eliciting investments from members of the public in exchange, promising returns on their investments. It has been claimed that the former trustee conducted a multi-million rand business over many years extensively without having authority to do so. She was appointed as a trustee long after the various acts which are the subject matter of the claims before this Court had been performed. She clearly had no personal knowledge of the circumstances surrounding the conduct of the trust business or of payment by the then trustees of returns on investments which had been made and which were placed either with the trust or through the agency of the trust.

[22] In short, Mr Stelzner contended that the intrinsic nature of this dispute and, in particular, the claims and the defences were such that the plaintiffs, and second plaintiff in particular, could not have personal knowledge thereof. Others such as

Brand, the fellow trustee, the Master of the High Court who issued the letters of authority, the relevant FNB bank manager or some other official who opened the trust bank accounts and permitted Pretorius to operate these had direct knowledge of what had transpired and clearly their evidence could well be material to the disposition of the case. See in this regard *Mowschens and Mowschens v Mercantile Acceptance Corporation of SA Limited* 1959 (3) SA 326 (W) where the uncontroverted affidavit of the defendant company showed that the plaintiff's attorney who deposed to an affidavit in support of summary judgment had no dealings with the defendants company in regard to the transactions upon which the claim was based. Accordingly his verification of the claim could only be hearsay.

[23] In this case Marais J based his finding in the premise that summary judgment is an extraordinary remedy as well as a very stringent one. This approach was rejected by Navsa JA in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at para 32-33.

[24] In a case decided after *Joob Joob, supra,* namely *Absa Bank Limited v Le Roux* 2014 (1) SA 475 (WCC) at 10, it was held that none of the cases went so far as to say that a deponent to an affidavit in support of an application for summary judgment could claim to have personal knowledge of the matter when they relied exclusively on the perusal of the available records and documents in order to verify the cause of action.

[25] By contrast, Mr Van der Merwe, who appeared on behalf of the plaintiffs, submitted that reports of the joint trustees of the insolvent estate, which were annexed to defendants' affidavits, and which constituted material which was properly before the court, showed that detailed investigations had been conducted by the joint trustees, including second plaintiff, and an examination of these documents revealed the extent of her knowledge of the affairs of the trust at various stages of the litigation. For this reason, second plaintiff in this case had acquired an extensive personal knowledge of the affairs of the trust, given the investigations of which she was a part.

**Evaluation**

[26] Correctly, Mr Stelzner pointed to the particulars of claim which were central to plaintiff's case to justify the enrichment action, namely that in clause 7.2 of the trust deed it was provided that there shall always be three trustees who shall exercise control jointly. When the relevant payments were made, Pretorius and Brand were the only trustees of the trust. It was averred that Pretorius acted unilaterally as the controlling mind and performed as a trustee to the exclusion of Brand in making the relevant payments. The trust was operated by Pretorius as part of an unlawful fraudulent Ponzi type investment scheme. As Mr Stelzner noted, the key question was whether all these elements were in the personal knowledge of second plaintiff so that she could justify her conclusion that there was no bona fide defence.

[27] It was common cause that on 1 April 2004 the Master of the High Court issued letters of authority in terms of s 6 (1) of the Trust Property Control Act 57 of 1988 and certified that Pretorius and Brand were authorised to act as trustees of the trust. Unquestionably this letter of authority runs contrary to clause 7.2.1 of the Trust Deed.

[28] However, the fact that there is such an authorisation by the Master compounds the difficulties raised in this case. In *Land and Agricultural Bank of South Africa v Parker and others* 2005 (2) SA 77 SCA at paras 10 ff Cameron JA (as he then was) dealt with the question of a subminimum of trustees and whether they could bind the trust. In particular, he held:

> 'It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office the trust suffers from an incapacity that precludes action on its behalf.' para 11

[29] But critically the learned judge of appeal went on to say the following:

> 'This is not to say that the trust ceases to exist. Nor is it to say that the trust obligation falls away. Counsel for the bank cited passages from Honoré establishing that a trust will not be allowed to fail for want of a trustee, and that the administration of a trust proceeds even when not all the trustees can be appointed in the precise manner envisaged in the trust deed. This is to confuse the existence of the rights and obligations that constitute the trust estate with the question whether and in what manner the trust estate can be bound. It is axiomatic that the trust obligation exists even when there is no trustee to carry it

> out. The Court or the Master will where necessary appoint a trustee to perform the trust. But it does not follow that a sub-minimum of trustees can bind a trust.' (at para 12)

[30] A further question arose in *Parker* as to whether a third party is entitled to assume that the formalities relating to the trust were observed on the basis of a principle which has long been part of company law, and was initially formulated in *Royal British Bank v Turquand* (1856) 119 ER 886 (Exch). Cameron JA noted that, in an earlier decision of *Nieuwoudt and another NNV v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) at para 9, the court had left open the question whether and in what circumstances the *Turquand* rule could be applied to a trust, notwithstanding that the judgment had pointed to certain difficulties in the application thereof. Cameron JA then said:

> 'Within its scope the rule may well in suitable cases have a useful role to play in securing the position of outsiders who deal in good faith with trusts that conclude business transactions. This case does not provide the opportunity for considering its application, however since the bank's case was never that it thought or was entitled to think that the Parker's were authorised by the son to conclude the last loan agreement.' (para 18)

[31] Mr Van der Merwe sought to resist the argument of a potential application of the *Turquand* rule by reference to a number of case. He cited, for example, the judgment in *Lupacchini NO v Minister of Safety and Security* 2010 (6) SA 457 (SCA). In this case, Nugent JA was concerned with trustees who had not been authorised by the Master of the High Court to act as such in terms of s 6 (1) of the Trust Property Control Act. Accordingly, Nugent JA noted:

> 'I regret that I can find no indications that legal proceedings commenced by unauthorised trustees were intended to be valid. On the contrary the indications seem to me all to point the other way. Unless it were to be the case that all transactions performed in conflict with the section are to be treated as valid – which clearly cannot be the case, because otherwise the Act would be all together ineffective – then I find nothing to distinguish its effect on legal proceedings.' (para 22)

[32] Mr Van der Merwe also referred to *Van der Merwe v Hydraberg Hydraulics* 2010 (5) SA 555 (WCC) para 16 and paras 27-31. In this case, Binns-Ward J canvassed the question of whether the *Turquand* rule applies to a trust. The learned judge stated at paras 27-28:

> 'I have some difficulty with the proposition in the absence of evidence of actual constructive knowledge by the third party of whether the provisions of the trust instrument. In *MAN Truck*, Buys J proceeded on the understanding that, when a third party deals with a trust, it is deemed to be aware of the content of the instrument. I am not aware of any such legal fiction and counsel did not refer to any reasoned authority which might support it. There is no public record identifying at which of the several officers of the Master throughout the country a particular trust instrument is lodged and even then the Master must decide whether any person seeking access to it should be permitted to inspect it.
>
> In my judgment the *Turquand* rule in any event could not avail the applicants in the current matter. The trust instrument does not provide a power to the trustees to authorise one or more of their number to make decisions on the trustees, behalf or to act as principals in respect of the Trust's affairs, otherwise than jointly with all

the trustees. Even if it did, the applicants would not have been entitled to assume that such authorisation had been granted.'

[33] In essence, the *Turquand* rule provides that a person who contracts with a company and deals with it in good faith may assume that acts which fall within its constitutional powers have been properly and legally performed and the person is not bound to enquire whether the acts of internal management have been regular.

[34] How the *Turquand* rule applies to a trust and whether that rule should be extended to take account of a certificate provided by the Master authorising the trustees to so act has been left open by Cameron J in the *Parker's* case. Even if Binns-Ward J is correct in his jurisprudential doubt about the application of the *Turquand* rule to a trust in principle, his own formulation is relevant to the present case and is cited again for emphasis, namely:

> 'I have some difficulty with the proposition in the absence of evidence of actual unconstructive knowledge by the third party with the provisions of the trust instrument.' para 27

Hence, the question arises as to whether the defendants had any knowledge of the authority which the Master had purported to give Brand together with Pretorius. That is not a matter that can be decided on these papers. Furthermore, it may well be, after a full conspectus of the evidence, that our law is developed to ensure that the *Turquand* rule does apply in certain circumstances as to the conduct and acts of a trust and, particularly, in this particular case depending on all the facts which are revealed at trial.

Furthermore, there does not seems to be any suggestion that any of the defendants have acted mala fide and that the payments which they received were not in terms of an investment contract into which they had entered. Accordingly, on the argument before me and in the papers presented to me I am not entirely certain what form of *condictio sine causa* is being relied upon by the plaintiff. It appears that it is in a form of an action for the recovery of what was paid without cause. The defendants appear to contend that there was payment in terms of a contract which plaintiff submits is illegal and hence the payment was made without cause. For a discussion of this *condictio* see Visser Enrichment Action (2008) at 486 ff.

[35] I do not wish to engage in a comprehensive examination of the basis of this enrichment claim. Suffice to say that again this is an issue which cannot entirely be decided upon these papers. I accept readily the description of summary judgment provided by Navsa JA in *Joob Joob Investments v Stocks Mavundla ZEK* 2009 (5) SA 1 (SCA) at para 33 to which I have made earlier reference that:

> ‘Summary judgment proceedings only hold terrors and are “drastic” for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate on the proper application of the rule as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case.’

[36] In the final analysis, a court however does hold an overriding discretion to refuse summary judgment. *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at 34-35. In the present case,

there does appear, on defendant's version, to be sufficient of an issue raised to fall within the ambit of a bona fide defence and which justifies that the disputes ventilated in these papers should be finally decided by way of an action.

**Costs**

[37] Mr Stelzner contended that the various summary judgment applications had been brought in order to pressurise investors to settle claims which had been made even after the filing of the defendant's extensive affidavit opposing summary judgment. The plaintiffs nevertheless continued with their summary judgment applications and should be subject to an adverse costs order.

[38] In my view, the trial judge will be in a far better position to determine the issue of costs and I prefer to exercise a discretion to leave this issue over for decision by the trial court.

**Conclusion**

[39] In the result the following order is made:

1. The application for summary judgment under case numbers 11229/2015,11901/2015,7596/2015,11641/2015,11208/2015,11211/2015, 11210/2015, 11233/2015, 11209/2015 and 11321/2015 are refused.
2. The defendants are granted leave to defend the actions instituted against them under these case numbers.

3. The costs of the application for summary judgment are left over for decision by the trial Court.

**DAVIS J**