

**IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)**

CASE NO.: 145/01

In the matter between:

**THE NELSON MANDELA METROPOLITAN
MUNICIPALITY**

Plaintiff

and

NGONYAMA OKPANUM HEWITT-COLEMAN	1st Defendant
HARLECH-JONES ARCHITECTS	2nd Defendant
RAJ MAHARAJ & ASSOCIATES	3rd Defendant
BHAM TAYOB KHAN MATUNDA	4th Defendant
COTTRELL DAVIES MAZWANA PIERSON	5th Defendant
SCHOOMBIE HARTMAN	6th Defendant
LOUW STRYDOM CONSULTING ENGINEERS	7th Defendant
SKC & NIEMANN CC	8th Defendant
ELDRED BOONZAAIER CONSULTING ENGINEERS	9th Defendant
BERGMAN-INGEROP (PTY) LTD	10th Defendant
MAKALIMA JOHNSTON ASSOCIATES CC	11th Defendant
METROPLAN	12th Defendant
BOPITE ENGINEERING GEOLOGISTS CC	13th Defendant
HEMSLEY MYRDAL	14th Defendant

JUDGMENT

MHLANTLA, J

[1] The plaintiff, the Nelson Mandela Metropolitan Municipality (the municipality), instituted action against a group of professional consultants (the defendants), in which it claimed payment of the sum of R1073 818.41 alternatively an amount of R810 481.19. The claim was based on the *conditio indebiti*.

Background

[2] The municipality owns the Matthew Goniwe Hostel situated in Kwazakhele, Port Elizabeth, which has been overcrowded and in a state of decay for decades. The community pressurised the municipality to address this undesirable state of affairs. The hostel was a costly asset which required a lot of ongoing maintenance. In 1995 the hostel fell under the authority of Mr Alan Zeiss, a qualified attorney, who was appointed by the municipality as a chief estates officer and acting director of the housing department. The Provincial Housing Board, (hereafter referred to as the PHB) provided funds in the form of housing subsidies through a programme known as the Hostel Redevelopment Programme. The Budget and Administration Committee considered the 1994/1995 Operating Budget and resolved that a report on the future of the

hostel be submitted. Mr Zeiss submitted the said report whereafter the committee resolved that a hostel upgrade be conducted and that funds thereof be sourced from the Hostel Redevelopment Programme.

[3] During May 1996 it was established that the municipality did not have the necessary capacity to deal with the process relating to the application of funds and also be involved in the entire process of the hostel upgrade nor would it be able to establish a body known as the Local Negotiating Group (hereafter referred to as the LNG), which would provide community members and the inhabitants of the hostel with an opportunity to express their views on the upgrading process. The executive committee of the council resolved to appoint a managing agent, the H-J Studio Trust, the second defendant in this matter. Mr Elwyn Harlech-Jones was appointed as the principal. Certain professional firms consisting of architects, quantity surveyors, consulting engineers and town-planners were also appointed. The appointment incorporated the upgrade of the hostel as well as the project involving the Greenfields development and the infill of additional land situated at the hostel. The various consultants representing various disciplines were required to and did in fact conclude joint venture agreements relevant to their involvement in the contract. It was agreed that the managing agent would assemble all the parties, the LNG as well as the relevant professionals together, source and obtain funding and co-ordinate and manage the implementation of the upgrading proposals. The municipality undertook to pay the managing agent a fee therefor. The appointment of the managing agent was later approved by the PHB.

[4] Mr Zeiss concluded a client consultant agreement with all the professional consultants and signed these agreements. With his knowledge, the agreements were returned to the various consultants. No reservation for qualification of fees was made. This, according to the consultants, had the effect of varying the initial agreement and exposed the municipality to liability for fees outside the ambit approved by the PHB. The consultants had to initially secure funding from the PHB to pay their fees in compiling a funding application in the manner prescribed in the Implementation Manual of the Hostel Redevelopment Programme. They performed and submitted their claims to the managing agent, who had to satisfy himself that the claims complied with the fee estimate agreed upon. He thereafter submitted the claims to Mr Zeiss and recommended payment, whereupon Mr Zeiss would effect payment to the respective consultants as the case may be.

[5] A dispute arose between the municipality, the managing agent and the consultants about the extent and quality of the work. This led to the termination of the agreement and suspension of the Greenfields redevelopment as well as the hostel upgrade. The municipality discovered that the consultants had charged a rate that was higher than that approved by the PHB and that they had been paid a total sum of R4 305 803.02 for the period 1996 to 1999, whilst they were entitled to payment of R2 667 559.74. It then instituted action against the defendants seeking repayment of the sum of R1073 818.41 alternatively R810 481.19. It contended that its cause of action was based on the *conditio indebiti*.

Pleadings

[6] The municipality pleaded in its Particulars of Claim that the appointment of the consultants incorporated not only the upgrading of the hostel but also the Greenfields development and the infill of additional land situated at the hostel. It further pleaded that the total fees and disbursements payable to the consultants was restricted to such amounts as approved by the PHB as follows:

- (a) 7.5 per cent of the total amount approved and to be made available by the PHB in respect of the Greenfields development and infill sites;
- (b) 9.2 per cent of the total amount approved and to be made available by the PHB in respect of the upgrading of the existing hostel.

[7] The municipality further pleaded that the total amount which was available for payment of fees and disbursements to all the professional consultants was thus restricted to R3 705 384.07 and this had to be divided amongst the defendants. The municipality averred that the payments were made in the bona fide and reasonable belief that the defendants were entitled to such payments. Having regard to the extent and nature of the actual work undertaken and the extent of services provided by the defendants in relation to the agreed ratios as set out in schedule 4 of Annexure POC9, the municipality averred that the work was incomplete and not satisfactory and that the defendants should have been paid the sum of R2 667 559.74 only.

[8] The municipality pleaded in the alternative that even on the assumption that the fees set out in Annexure 1 of the client consultant agreement constituted the basis of the defendants' entitlement to fees, overpayments had even then occurred.

[9] The defendants pleaded that they had submitted 'detailed proposed fee structures' for the additional work set out in the client consultant agreement, and that the managing agent communicated the acceptance of the fee structures in terms of the appointment as contained in the client consultant agreement. In the alternative, the first defendant pleaded that in the event of it being held that the PHB's approval was required, the first defendant was advised at a meeting held on 19 February 1998 that such fee structure had been approved by the PHB, that its appointment in terms of the client consultant agreement was 'subsequently ratified' by Mr Zeiss' signature on the document, the request to render certain services, the acceptance of such services and the payments thereof. It further pleaded that the PHB approval was irrelevant to the rights and obligations of the parties to the agreement aforesaid.

[10] The second defendant pleaded that the contractual relationship between the parties and the fee structure to which it had been entitled were set out in the client consultant agreement. This defendant has since been liquidated. It played a minimal role in these proceedings. The trustees were advised of the trial. They indicated that they had nothing further to add and had no intention to intervene on behalf of the defendant. A written document to that

effect was handed in. The third defendant also relied on the client consultant agreement. It raised a counterclaim but made no attempt to pursue it. The third defendant did not actively participate during the trial.

[11] The fourth, fifth and sixth defendants raised a similar defence to that advanced on behalf of the first defendant. They also pleaded an oral variation of the agreement to the effect that they were instructed to prepare firm bills of quantities for the entire hostel complex as opposed to provisional bills; that this was an oral request by the managing agent and that pursuant to the presentation of the firm bills, the fourth, fifth and sixth defendants' professional fees fell to be reissued. They also pleaded that the approval of PHB was irrelevant.

[12] The seventh defendant essentially relied upon the client consultant agreement and also alleged that the approval of the PHB for its appointment and its fee structure was irrelevant. The same defence was raised on behalf of the eighth defendant which also submitted a counterclaim but did not pursue such claim.

[13] The ninth defendant's defence is similar to the first defendant's. The tenth defendant also relied on the client consultant agreement. It further pleaded that the services rendered by it were in accordance with separate instructions relating, *inter alia*, to emergency electrical intervention and that such work did not form part of the fees outlined in the client consultant agreement. The eleventh defendant similarly relied on the client consultant agreement.

[14] The twelfth defendant also relied upon the client consultant agreement and contended that the approval of the PHB was irrelevant. It further pleaded that pursuant to an invitation by the Local Negotiating Group, the town planning consortium submitted a written quotation to prepare a funding application to the PHB, that the managing agent had orally communicated to the eleventh and twelfth defendants the acceptance of the offer to produce a funding application. It is also alleged that the funding application was subsequently prepared and that the plaintiff ratified and accepted the aforesaid arrangement by paying a fee which was higher than the original quotation. It also denied that it was jointly and severally liable.

[15] The thirteenth defendant played no part in these proceedings. The fourteenth defendant relied on the client consultant agreement. It further pleaded that it was entitled to additional fees by virtue of certain additional work that had to be undertaken and as a result of an increase of the Surveyor-General's fees. It relied on an oral agreement with the managing agent in respect of the additional work.

[16] The plaintiff filed a number of replications and certain rejoinders have been filed on behalf of the defendants.

Evidence

[17] During the trial, Mr *Buchanan* SC assisted by Mr *Ford* SC, represented the municipality. Mr *Van Rooyen* SC and Mr

Ronaasen appeared for all the defendants save the second, third and thirteenth defendants. Three witnesses testified on behalf of the municipality, namely Mr Mzimkhulu Msiwa, who was appointed as a city engineer, Mr Alan Zeiss and Mr Dicky Elliot, a quantity surveyor, who was called as an expert witness. The defendants who actually defended the action, testified in their defence.

[18] Mr Zeiss testified that the appointment of the defendants was subject to the PHB approval and that all the defendants were aware of that condition. According to him the defendants' representatives dealt directly with the Department of Housing and Local Government in negotiating their fees. The PHB required signed client consultant agreements in order to reflect the municipality's approval to the terms and fees set out therein. He stated that he had no authority to sign a binding agreement prior to approval of the relevant terms and fees by the PHB. He had signed these agreements in 1997 prior to the PHB approval.

[19] In regard to payment of fees, Mr Zeiss testified that as the estates department had no expertise to deal with a building contract of that nature, it relied on the managing agent to verify the accounts. Mr Zeiss and Mr Judd, another official, were not in a position to assess whether the fees were reasonable and in accordance with the payment procedure. This was done by the managing agent. The accounts submitted and certified were merely passed to them for payment.

[20] Mr Msiwa, testified about the history of the project. Actual PHB approvals were established through his evidence. It was

clear that the fees set out in Annexure '1' of the client consultant agreement were not approved and that at no stage did the PHB approve fees beyond the 7.5 per cent on the Greenfields development and 9.2 per cent on the hostel project.

[21] Mr Elliot, a qualified quantity surveyor testified that he had conducted some investigations and made his own assessment of the work completed. He later met the defendants in order to clarify those areas where he had been required to make assumptions. His further calculations were based on what was conveyed to him. His conclusions are set out in Exhibits 'M' and 'L' respectively. The crux of his evidence as set out in these reports was that the defendants had been overpaid.

[22] The defendants, save the second, third and thirteenth defendants, testified. Mr Timothy Hewitt-Coleman testified on behalf of the consortium of architects. He had to prove an oral variation of the agreement. He testified that he received the signed agreement in June 1997. In regard to the oral variation, the evidence established that claims for payment of fees were duly submitted and authorised for payment by Messrs Zeiss and Judd. Mr Hewitt-Coleman accepted that their appointment was subject to the PHB approval. He further conceded that they were working at risk pending PHB approval and on occasion had threatened to stop work as a result.

[23] The third defendant's representative, Mr Maharaj, stated that its case was fundamentally the same as that of the first defendant. He closed its case without adducing any evidence.

[24] Mr Thembinkosi Matunda, testified on behalf of the fourth, fifth and sixth defendants. They had pleaded a ratification of the contract. However, no evidence was adduced. Mr Matunda initially contended for an agreement relevant to an altered fee scale. He testified that the managing agent instructed him to prepare firm bills of quantity instead of the provisional bills. It was later established during cross-examination that the quantity surveyors' consortium had in fact claimed and been paid for the full services provided for in services A and B by October 1997. It was established that there was no agreement at all with regard to the scheduling.

[25] Mr Richard Boonzaair, a civil engineer, testified on behalf of the ninth defendant. According to him, the professional team had negotiated with the managing agent. He conceded that their appointment and approval of the professional fees were subject to the PHB approval. They had continued to work whilst awaiting PHB approval. He conceded that they were performing at risk. This concession was, however, not consistent with the defendant's plea. He testified that the fees were fixed but not the disbursements which included the supervision fees of the resident engineer. These were recoverable. He submitted claims in terms of the client consultant agreement and these were approved by Mr Judd.

[26] Mr Peter Du Toit, an electrical engineer, testified on behalf of the tenth defendant. He testified that there were two separate projects, namely, the emergency electrical intervention and the

Greenfields and hostel upgrade. He tendered a specific amount for the emergency electrical intervention. His firm was not involved in the second project. He performed in terms of the contract and was duly paid. He conceded that the fee structure had been submitted to the PHB for its approval, which subsequently decided that the emergency intervention formed part of the overall grant.

[27] Mr Ndabezitha Ndzombane, a townplanner and director of Metroplan, testified on behalf of the eleventh and twelfth defendants. His evidence established that there was no agreement for further work and there was no further funding application. The case pleaded and the evidence adduced were wholly contradictory. Mr Ndzombane was driven to concede that there had in fact been an overpayment in the amount claimed of R33 737.48.

[28] Mr Robert Hemsley, a retired land surveyor, testified on behalf of the fourteenth defendant. He stated that he had been given an estimate of erven and on that bases submitted a quotation to the managing agent. He discovered upon an actual survey that there were more erven. The total erven was 1311 excluding blocks. Due to the actual conditions on the land, the scope of his work changed and that such change was authorised by the managing agent. The Survey-General's fees also increased over the period of the contract. He testified that the municipality had to pay the increased fee because it was the party liable for the payment to get the subdivision approved. Mr Hemsley claimed the fees as disbursements. He conceded that the funds would come from the PHB. The oral agreement contended for in the fourteenth

defendant's pleadings was, however, not established in evidence. The evidence adduced did not establish the requirement for estoppel, which was in any event not properly pleaded.

[29] The issues to be determined are:

- (a) whether the purported agreement concluded by the managing agent and the defendants formed part of the PHB contract (ie parol evidence rule);
- (b) whether the managing agent had the authority to bind the plaintiff in the alleged agreement;
- (c) whether the defendants' reliance on the purported client consultant agreement was reasonable and justified; and
- (d) whether the alleged mistake (over-payment) constitutes justifiable error. Put differently whether the payment made in error is excusable?

I turn to consider each of the issues raised.

Evaluation

[30] In regard to the first issue, it is common cause that the main contract by the PHB was reduced to writing and all the parties concerned were aware thereof and of its contents. A series of meetings were held between the plaintiff, represented by the managing agent and the defendants subsequent to the conclusion of the PHB contract. The purpose of these meetings was to conclude an ancillary agreement. The agreement was not reduced to writing and this triggers the parol evidence rule. This rule was first stated in *Lowrey v Steedman*¹, where the court held:

¹ 1914 AD 532 at 543.

'The rule is that when a contract has once been reduced to writing no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence.'

In *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*², Watermeyer JA said:

'Now this court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence.'

In *Johnston v Leal*³, Corbett JA, stated the following:

'[I]t is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract.... To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered.'

[31] The question to be asked is whether the oral agreement which appears to have the effect of varying the restricted amount set out in the PHB contract is consistent with the PHB contract and whether the defendants should be allowed to adduce extrinsic evidence to prove the oral contract. In my view and having regard to the evidence, the defendants attempted to adduce evidence to prove the existence of an oral agreement which was inconsistent with the PHB contracts. This is prohibited in terms of interpretation of contracts.

[32] In regard to the question whether the managing agent had authority to bind the plaintiff in the alleged agreement, the

² 1941 AD 43 at 47.

³ 1980 (3) SA 927 (A) at 943B-F.

defendants have to prove the following in order to establish the agent's authority:

- (a) a representation was made by the plaintiff and not merely by the managing agent that he had authority to act;
- (b) a representation in a firm that the plaintiff should reasonably have expected that outsiders would act on the strength of it;
- (c) reliance by the defendant on the representation;
- (d) the reasonableness of such reliance; and
- (e) consequent prejudice to the defendants.

[33] The defendants averred that they had relied on the authority displayed by the managing agent and believed that he had authority to contract with them. There is no allegation whether the authority displayed was actual or ostensible. The question to be asked is whether the plaintiff had made certain representation which led them to conclude that the managing agent had authority to change the PHB contract. If not, whether it was reasonable for the defendants to believe that the managing agent had authority to enter into an agreement which is inconsistent with the PHB.

[34] It is trite that the representation of a principal to be derived from the agent's position is limited to the fact that the agent had the usual authority possessed by a person in that position. In *Russo-Chinese Bank v Li Yau Sam*⁴, Lord Atkinson said:

'It is undoubted that a person who deals with an agent, whose authority he knows to be limited, as the plaintiff knew in this case, does so at his peril, in this sense, that should the agent be found to have exceeded his authority his principal cannot be made responsible.'

⁴ [1910] AC 174 at 184.

[35] It is evident that the defendants knew that the managing agent's authority was limited by the PHB contract and that it had no authority to contract outside the parameters of the PHB contract.

[36] In order for the principle of 'holding out' to apply in any given case of agency, the act done by the agent, and relied upon to bind the principal, must be an act of that particular class of acts which the agent is held out as having a general authority on behalf of his principal to do; and, of course the party prejudiced must have believed in the existence of that general authority and thereby been misled. See *Grant v Norway* (1851) 10 CB 665, 138 ER 263; *Ruben v Great Fingall Consolidated* [1906] AC 439.

[37] There is no evidence indicating that the representation by the plaintiff suggested that the managing agent had authority to change the restricted amount reflected in the PHB contract. The defendants did not adduce any evidence to show representation. It is well established that if the agent had been held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because, the authority being represented to be limited, the party prejudiced has notice, and should ascertain whether the act is authorised or not. In this case the managing agent's authority was limited to employing consultants for the project and ensure

that the fees did not exceed the restricted amount as reflected in the PHB contract.

[38] In my view, the defendants at all times were aware of the restrictions placed by the PHB. At no stage did they allege that the plaintiff or the managing agent had represented to them that the managing agent had authority to change the amount.

[39] Regarding the issue whether the defendants' reliance on the purported client consultant agreement was reasonable, it must be borne in mind that the conduct complained of must be of such a nature that could reasonably have been expected by the person responsible for it to mislead. See *Monzali v Smith* 1929 AD 382 at 386 and *Poort Sugar Planters (Pty) Ltd v Ministers of Lands* 1963 (3) SA 352 (A) at 364A-B.

[40] It is not enough that an impression was created as a result of the representation; the defendants should have acted reasonably in forming that impression. The defendants in this case, were unreasonable in assuming that the managing agent had authority. At no stage did the defendants in their pleadings provide concrete evidence that the client consultant agreement was ever approved by the municipality or by the PHB.

[41] Some of the defendants admitted that they had signed the client consultant agreement well knowing that no agreement was thereby brought into existence and that it remained subject to the PHB approval. Most witnesses who testified on behalf of the defendants conceded that in most cases, the work had already

been completed whilst the PHB approval was pending. They further conceded that they were at all times working at risk. None of the witnesses stated that they would have stopped work had they been aware of the PHB's non-approval of fees and none contended for any prejudice.

[42] The evidence adduced clearly indicated that the defendants were appointed subject to the PHB approval both in respect of the terms of appointment as well as the fee structures and fees to be paid to the defendants. The actual approval granted by the PHB was 7.5 per cent in respect of the Greenfields development and 9.2 per cent for the hostel upgrade. This included everything from inception including the preliminary planning, funding applications, emergency electrical intervention and disbursements. It follows therefore that the defendants' reliance on the purported client consultant agreement is misplaced. Their defence has no merit and is accordingly rejected.

[43] I turn to deal with the final issue, that is, whether the alleged mistake by the officials when they made the payments constitutes a justifiable error. It is settled law that money paid in error can be recovered by an action of *conditio indebiti*. See *Nkosi v Totalizator Agency Board (Transvaal)* 1980 (1) SA 122 (T). The critical factor for the recovery of the amount is that it must have been paid as a result of a bona fide mistake. It is not every payment made under a mistake of fact that is recoverable. There must be a *solutio indebiti* (payment of money not owing) and *justus* error (excusable mistake). Payment made in the belief that it was due is not

recoverable if the mistake is one of law or gross negligence or recklessness.⁵

[44] Regarding the meaning of excusable mistake, the court in *Willis Fabel Enthoven (Pty) Ltd v Receiver of Revenue*⁶ said:

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

[45] In *Rane Finance (Pty) Ltd v Queenstown Municipality*,⁷ Ultrasonic Applications & Equipment (Pty) Ltd, (Ultrasonic), supplied certain equipment to the value of R7051.21 on credit to the Queenstown Municipality (the defendant). It subsequently ceded all its book debts to the plaintiff. The plaintiff's attorney advised the defendant of this fact and demanded payment of the sum of R7051.21. In its letter, the plaintiff stated that 'any payment to Ultrasonic would not in law be regarded as a payment in discharge of the defendant's obligations'. The town treasurer ignored the letter and paid money to Ultrasonic's subsequent cessionary, a third party. Ultrasonic was thereafter liquidated. The plaintiff instituted action against the defendant for payment of the debt. The court held that the town treasurer had the means of

⁵ *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA).

⁶ 1992 (4) SA 202(A) at 224 E-F.

⁷ 1988 (4) 193 (E).

knowledge and the opportunity to ascertain the facts but failed to do so; that he had been grossly negligent and the municipality was bound by such conduct. The court dismissed the claim by the municipality under the *conditio indebiti* for repayment of the amounts paid to the third parties. The defendant was ordered to pay the plaintiff the sum of R7051.21.

[46] In *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail supra*, the appellant was a labour broker. It submitted a tender to the respondent for the supply of access controllers to be deployed on station platforms. It charged an hourly rate of R15 for a maximum of 104 hours per month per controller plus an administration fee of 15% (making a total of R17.25). The appellant had already been providing these services since September 1999. The parties concluded a written agreement for the supply of 200 access controllers for a period of 36 months from 1 April 2000 at a monthly rate of R358 800 plus VAT.

[47] The appellant subsequently increased the charge to R17.25 per hour plus the administration fee of 15 per cent with effect from 1 April 2000. Mr Xaba, the sole member of the appellant, contended that the regional manager of the respondent had agreed to the increased fee. Later Mr Xaba was confronted about this and ordered to revert to the original fee. He reluctantly agreed to this but reserved the appellant's right in regard thereto.

[48] The respondent purported to cancel the agreement whereafter the appellant instituted action for damages. The respondent counterclaimed and sought by means of the *conditio*

indebiti to recover payment from the appellant of the amounts that were overpaid.

[49] The high court found that although the defendant's conduct was incompetent and negligent, it could not be characterised as inexcusable as to be unworthy of the protection of the court. It upheld the counterclaim. On appeal, the Supreme Court of Appeal (SCA) held that the nature of the mistake perpetrated by the respondent when each payment was made was clear but not the reason and that the respondent had failed to explain why the mistake occurred and why it occurred repeatedly over a seven month period. The written agreement was readily accessible to the respondent's officials. The failure by its officials to deduct the unauthorised increase and to check the rates stipulated in the appellant's invoices with the written agreement could only be attributed to extreme slackness or negligence on their part.⁸ The SCA thus held that the respondent's conduct was culpable to a degree rendering same inexcusable. It accordingly dismissed the counterclaim.

[50] A plaintiff must prove the following elements in order to succeed:

- (a) the defendant must be enriched;
- (b) the plaintiff must be impoverished;
- (c) the defendant's enrichment must be at the expense of the plaintiff;
- (d) the enrichment must be unjustified or *sine causa*.

⁸ Paras 34-37.

See *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] (3) All SA 236; 2001 (3) SA 482 (SCA).

The burden of proof in respect of these elements is on the plaintiff. Once transfer *indebiti* has been established, the onus shifts to the defendant to prove that the transfer did not in fact enrich it.

[51] In this case, the counsel for the municipality submitted that the overpayment was made in error and that the municipality had relied on its managing agent to audit the work done by the other defendants and satisfy itself that the work was necessary. The agent had a duty to verify the defendants' accounts and ensure that these complied with the PHB tariff and that their fees were reasonable before payment was effected. In the end, the amount paid exceeded the amount approved by the PHB.

[52] It is common cause that the municipality, through its officials, authorised payments to the defendants over the period of the contract. The official entrusted with the plaintiff's finances was also responsible for payment of invoices. It is apparent that the said official did not ascertain that payments did not exceed the limit set by the PHB. The official was negligent. The municipality will not succeed in its claim if gross negligence on the part of its officials is proved.

[53] Most of the payment authorisations (in fact 45) were signed by Mr Judd. Mr Zeiss signed three claims and eight claims were signed by an unidentified official. Of these claims, 22 were accompanied by statements that the claims were made in terms of the client consultant agreements. This occurred after the PHB had

conveyed its decision to the municipality. Some formed part of the preliminary expenditure and others were claimed in terms of the managing agent's instruction. The officials were on different occasions told unequivocally that the claims were not made in terms of the tariff approved by the PHB. Mr Judd and to a certain extent, Mr Zeiss and the unidentified official paid repeatedly, five months after they became aware that the PHB had only granted 7.5 per cent and 9.2 per cent for the projects and not fees based on the client consultant agreement contended by the defendants. If they knew there was no approval or there was a limit, they should have advised the defendants accordingly and rejected the claims which fell outside the ambit of the approved tariff.

[54] Mr Judd who authorised most of the claims as well as the other unknown official did not testify to explain why they had ignored the express statements and why they had paid otherwise than in terms of the PHB approval. At no stage when payments were claimed in terms of the client consultant agreement was it ever suggested that the agreements were not valid and that payment would be in terms of the PHB tariff.

[55] Mr Zeiss, the only witness in this regard, did not explain why the mistakes occurred and why they occurred repeatedly over the duration of the contract, save to state that there was often uncertainty about the actual PHB approvals and that they relied on the managing agent to verify the claims.

[56] The municipality as plaintiff bore the onus to establish that the mistakes were not made negligently and were excusable. In

my view, it has failed to do so. Nothing precluded the officials from ensuring that the payments did not exceed the restricted amount. The Provincial Housing Board document is a public document. The municipality cannot argue that the officials responsible for payment were not aware thereof. They could have perused the document and ascertained the actual approvals. The officials' conduct was grossly negligent and such negligence is attributable to that of the employer (the plaintiff). In my view, the explanation provided is insufficient and the degree of negligence is so gross that it cannot be excused. The plaintiff has accordingly failed to discharge the onus of proof. It cannot succeed on the action based upon the *conditio indebiti*. It follows that the plaintiff's claim falls to be dismissed.

[57] In the result the following order is made:-

The plaintiff's claim is dismissed with costs, including those attendant upon the employment of two counsel.

N. MHLANTLA
JUDGE OF THE HIGH COURT

For the Plaintiff : Adv R Buchanan SC; Adv B Ford SC
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FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ no

PARTIES:

THE NELSON MANDELA METROPOLITAN MUNICIPALITY
AND
NGONYAMA OKPANUM HEWITT-COLEMAN & OTHERS

- Registrar CASE NO: 145/01
- Magistrate: HIGH COURT, PORT ELIZABETH-
EASTERN CAPE LOCAL DIVISION
- Supreme Court of Appeal/Constitutional Court:

DATE HEARD:

DATE DELIVERED: 27 JULY 2010

JUDGE(S): MHLANTLA, J

LEGAL REPRESENTATIVES -

Appearances:

- for the State/**Plaintiff**(s)/Applicant(s)/Appellant(s): ADV R BUCHANAN &
ADV B FORD SC
- for the accused/**defendant**(s)/respondent(s): ADV R VAN ROOYEN SC
& ADV O RONAASEN

Instructing attorneys:

- Plaintiff(s)/Applicant(s)/Appellant(s): RUSHMERE NOACH INC,
PORT ELIZABETH
- Respondent(s)/Defendant(s): PAGDENS ATTORNEYS, PORT ELIZABETH

CASE INFORMATION -

- *Nature of proceedings:* CIVIL MATTER
- *Topic:* DAMAGES