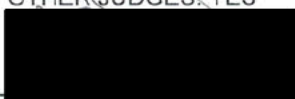


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: A2023-037275

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
14/03/2024	
DATE	SIGNATURE

In the matter between:

WK INSURANCE (PTY) LTD

First Appellant

WESLEY KRUGER

Second Appellant

BRADBURN GUTHRIE

Third Appellant

and

GEOFFREY DAVID WHYTE

First Respondent

RICHARD PRETORIUS

Second Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be **14 March 2024**

JUDGMENT

CARRIM AJ:

INTRODUCTION

- [1] This is an appeal against the judgment of Swanepoel AJ in which he upheld first respondent's claim for payment of an amount of £149 451.25.
- [2] In his judgment Swanepoel AJ upheld the claim for £149 451.25 against the first appellant ("WKI") and second respondent ("Pretorius"). He also ordered the second ("Kruger") and third ("Guthrie") appellants to make payment to Whyte in a reduced amount of R2 056 362.63.
- [3] Pretorius did not file an appeal against the judgment and is cited here as the second respondent.

BACKGROUND

- [4] The facts in the matter are largely common cause. WKI is in the business of providing financial advice, medical aid, and short-term insurance. Kruger and Guthrie were directors of the firm at all relevant times. Pretorius is a financial advisor who according to the appellants was a consultant (not an employee) of WKI at the time.
- [5] Whyte's investments were previously managed by deVere Acuma ("deVere"), a large international financial advisory firm. Pretorius was an employee of deVere and rendered financial advice to Whyte for several years. Pretorius left the employment of deVere and joined WKI. Whyte followed him and was under the impression that Pretorius was employed by WKI. During 2018, Whyte wished to make a further international transfer into his investments and approached Pretorius for assistance. Whyte was dissatisfied with the services of deVere and on the advice of Pretorius agreed to transfer his investments to the Overseas Trust and Pension ("OTAP").
- [6] OTAP was established in 2008 and offers international retirement solutions to its clients. OTAP is an offshore entity based in Guernsey but has a South African office which is regulated by the Financial Services Commission

Authority in South Africa¹ ("FSCA"). Friends Provident International ("FPI") is the manager of the fund for OTAP. OTAP invests clients' funds into products such as the OPES International Retirement and Savings Plan. The funds in these products would in turn be invested in a variety of other products which in turn would invest in different classes of assets.

- [7] Whyte, agreed with Pretorius to transfer his investments to OTAP, via FPI, with Pretorius earning a once off fee of R75 000, FPI a once-off establishment fee of 1% and WKI would earn 0% commission.² WKI was the licensed financial broker through whom the transaction was processed. At the time the investment value was £1.9m but was slightly higher at the time of transfer.
- [8] Whyte signed all the necessary forms including a change of advisor form in favour of WKI and the funds were transferred. The mechanism through which the funds were transferred – whether through an asset swap or a cash withdrawals and deposits - is not material to these proceedings nor is it relevant which assets were held by OPES. It suffices that in August 2018 the value of Whyte's assets transferred from the previous investment account into the OPES pension plan was £2 135 017.75.
- [9] WKI had a 70/30% fee sharing arrangement with Pretorius in terms of which WKI would retain 30% and pay over the 70% to him of any commission earned by him.
- [10] As it happens FPI on 7 August 2018 transferred £149 451.25 into the account of WKI being seven percent (7%) of £2 135 017.75. This amounted to R 2 937 660.90 at the relevant exchange rate. WKI then transferred an amount of R2 056 362.63 to Pretorius and retained the balance of R881 298.28.
- [11] FPI, in the meantime started deducting this 7% commission from Whyte's capital on a quarterly basis with interest. Whyte's capital (and his investment) was accordingly reduced by an amount which included interest charges. At the

¹ Now known as the Financial Sector Conduct Authority ("FSCA").

² It was also agreed there would be no other recurring fees or charges. See FA para 13.

time of hearing, it appears that FPI was still doing this and would not cease until it had been repaid the £149 451.25 or any outstanding portion thereof.

- [12] When Whyte discovered this, he raised it with Pretorius. Pretorius then advised WKI that his agreement with Whyte was that no commission was payable on the investment and that the amount of £149 451.25 should be refunded to FPI. In his answering affidavit he alleges that he refunded the money to WKI and relinquished commission on other investments to make up the amount that was owing but doesn't provide any figures.
- [13] WKI, upon receiving this information started engagements with Whyte. Kruger, the main deponent in these proceedings, says that they were "sick to their stomach" when they heard this and embarked on finding a way to resolve it. The parties engaged in negotiations which reached a point where Kruger and Guthrie had agreed to sign an acknowledgement of debt ("AOD") for the whole amount. The AOD was drafted by Whyte's attorneys and sent to Kruger and Guthrie. It was at this point that the tenor of the discussions took a turn for the worse. The AOD was not signed by Kruger and Guthrie and Whyte eventually sued for the money.
- [14] An offer of £130 000 was subsequently made with prejudice by WKI.³ Kruger also alleges that R2 million has been set aside for this in their attorney's trust fund.
- [15] In the court a *quo* there was some debate about Whyte's cause of action. The applicant, Whyte, had sought all four respondents liable based on the *condictio furtiva* which is a delictual claim and in the alternative on either the *condictio sine causa* which is based on unjust enrichment or the *condictio ob turpem vel inustum causa*.
- [16] Swanepoel AJ found that Pretorius and WKI had been unjustly enriched by receiving the undue payment of £149 451.24 and were liable to repay this to Whyte.

³ Annexure AA9 12-106

- [17] In relation to Kruger and Guthrie he found that they were liable to repay R2 056 362.63, jointly and severally with Pretorius and WKI, to Whyte based on the *condictio furtiva*.

GROUNDS OF APPEAL

- [18] As discussed earlier it is common cause that the appellants and Pretorius received the £149 451.24 *sine causa*. Pretorius confirms in his answering affidavit that the amounts were not due to him and WKI. The appellants have admitted that they received an undue payment, they have offered to repay £130 000 a considerable portion of it and have set aside R2million in their attorneys' fees trust account. Against this background one is constrained to ask why the appellants have not deposited the amount into Whyte's or his attorney's trust account pending a resolution of a dispute on the balance.
- [19] Nevertheless, the appellants persisted with the appeal. Mr Bishop, during argument foregrounded three issues namely that the court a quo had impermissibly relied upon without prejudice documents, the lack of Whyte's *locus standi* and that Guernsey law was applicable to the transaction. I deal with these in turn and then deal with the different causes of action.

Applicable Law

- [20] It was argued by the appellants that because the FPI forms dated 27 and 28 June 2018 as well as the OTAP form completed on or about 6 May 2018 were signed in Guernsey the *lex loci contractus* was the law of Guernsey. Furthermore, because a provision in the OTAP additional contribution form provides that all policyholders are protected by the Life Assurance (Compensation of Policyholders) Regulation 1991 of the Isle of Man, wherever their place of residence and each policy is governed by and shall be construed in accordance with the law of Isle of Man, the *lex loci solutionis* (law of the place where the relevant performance occurs) was the law of the Isle of Man.
- [21] The laws and regulations relied on by the appellants relate to the investment of a policyholder managed by OTAP, not the contract between the investor and his financial advisor. The relevant transaction we are concerned with is not the

investment contract between the parties or a misappropriation of the pension fund but the contract between Whyte and WKI represented by Pretorius. This contract was concluded in South Africa. The amount was paid to WKI in South Africa by FPI. The money was received in South Africa and the enrichment occurred in South Africa. Hence, the applicable law here is the law of South Africa and this ground of appeal is devoid of any merit.

Without prejudice correspondence

- [22] This ground of appeal is directed to Annexures K, L, M and N to Whyte's founding affidavit and are letters exchanged between Whyte's attorney, Buys and Gittins, attorneys for the appellants marked as 'without prejudice'. The appellants argued that these annexures should be inadmissible/struck out. They had raised an objection to it in the court a *quo* and the appeal should succeed solely because Swanepoel AJ impermissibly relied on these communications.
- [23] The general rule in the law of evidence is that without prejudice settlement communications between parties should be inadmissible. The rule is underpinned by sound public policy considerations.⁴ Parties should be encouraged to engage in frank and amicable talks to avoid the inconvenience, costs, and delays of litigation without fear that if negotiations fail any admissions made by them during these discussions will be used against them in ensuing litigation.⁵ However, whether the communications, labelled 'without prejudice' were indeed so, depends on the contents thereof. The test is an objective one.⁶ In *Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1964 (4) SA 722 (T) the court was able to distinguish a clear admission by a motor vehicle insurer from the without prejudice negotiations that followed as to the quantum.
- [24] In this case, the appellants had already admitted liability in earlier correspondence. In an email dated 2 October 2019, addressed to Toby Austin of FPI, Pretorius confirmed the agreement with Whyte namely that only 1% upfront establishment fee was payable (not over 8 years) and 0% ongoing

⁴ LAWSA Vol 18 3rd ed 2023

⁵Per Trollip JA in *Naidoo v Marine & Trade Insurance Co Ltd* 1978 4 All SA 208 (A); 1978 3 SA 666 (A) 677

⁶ *Naidoo* supra

advisory fee. In that email he 'insisted that FPI provide WKI with the relevant bank details in order for them to transfer back to the payment you erroneously made to them and immediately upon receipt thereof to adjust the charges associated with the last tranche.'⁷

- [25] Whyte alleges that Kruger at a later stage entered discussions with himself and mooted the possibility of a repayment being made to him directly as an alternative to payment being made to FPI/OTAP.⁸
- [26] During December 2019 Kruger engaged with Nicole Theron, a representative of OTAP. According to Whyte Kruger had confirmed to her that unearned commission had been paid to WKI and the money would be refunded. Ms Theron had provided the relevant banking details to Kruger. In an email dated 16 January 2020, Kruger advised her that lump sum payments would be made, and proof thereof would be sent to her as and when these payments were made.⁹ Kruger does not specifically deny this in his answering affidavit, says he can't recall but focuses instead on the amount that must be repaid namely 6% and not 7%.¹⁰
- [27] On 23 March 2020, Kruger again confirms to Ms Theron that WKI is in the process of collecting the funds that will be transferred to FPI and this might take a few weeks. He records that Whyte has been updated with the process. This email was copied to Toby Austin and Whyte.¹¹
- [28] A subsequent meeting was held on 29 June 2020 between Whyte and Kruger, with Whyte's attorney Mr Buys in attendance. According to Whyte Kruger agreed and undertook on behalf of himself, WKI and Guthrie to enter into and sign an acknowledgement of debt. The AOD would provide for the repayment of the money that WKI had wrongfully received. On 2 July 2020 Kruger requested that the AOD be prepared and sent to them.¹² Mr Buys prepared the AOD which was sent to Kruger. Kruger does not deny this but explains that the reason why the AOD was not signed was because it was far more detailed than either he or

⁷ Annexure D1 to the FA 0066

⁸ FA para 22.

⁹ FA para 23 01-32. Annexures C1 and C2 at 01-81 and 01-82.

¹⁰ AA para 9.18 000144

¹¹ Annexure E 01-86.

¹² FA para 2, Annexure G 01-105, Annexure F 01-87.

Guthrie could deal with, and it was at this point that they appointed Mr Ashley Gittins their attorney.¹³

[29] From the above sequence of events, it is abundantly clear that both Pretorius and Kruger had admitted liability to repay the amount to Whyte, prior to Gittins coming on brief. Kruger had in fact admitted this to Ms Theron from OTAP, albeit arguing for a smaller percentage. To divert for a moment, Kruger relies on this email to argue that only 6% was repayable to FPI because she refers to a 6%.¹⁴ Pretorius however confirms Whyte's version that his agreement was that WKI would get 0% commission. Whyte confirms that 7% had been deducted and paid over to WKI. Seven percent (7%) of £2 135 017.75 is £149 451.24. Hence there is no basis whatsoever for Kruger to maintain the position that 1% was due to WKI.

[30] Annexures K, L, M and N revolve around the mode of repayment (in instalments or lump sum), which amounts should be included or calculated (interest and the relevant exchange rate) and the financial constraints of WKI. I find it unnecessary to deal with them in any further detail save to say that the correspondence revolved around how, not if, WKI would repay the money. The merits had been conceded by then already. It can hardly be said that any discussions between the parties as to the mode of repayment could constitute '*admissions that might prejudice them if negotiations failed*' and worthy of protection by the rule.¹⁵

[31] It is important to highlight here that the dispute between the parties in this matter is not about damages where liability or apportionment must still be decided. Nor is it about speculative losses based on assumptions made in actuarial calculations. This dispute relates to a specific amount of money that was transferred *sine causa* to the appellants. At the time of the without prejudice correspondence, WKI had already conceded the merits i.e. that it was liable to repay it in earlier correspondence.

¹³ AA para 9.34 000147

¹⁴ Annexure C1 01-81.

¹⁵ See also *AD and another v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC)

- [32] It appears that the objection is really aimed at Swanepoel AJ mentioning a figure of R1 540 000.00 (R1.54m) contained in annexure L dated 2 September 2020 during the proceedings. The way that this correspondence had come about was that Buys had requested financial information from WKI, some of which was provided. In annexure L, Gittins provides the information. The information records transactions (deals) that WKI is busy concluding, progress on a sale of immovable property and details of how the £149 451.24 (R2 937 660.90) received from FPI was allocated amongst the respondents and an offer of a monthly repayment amount. However, importantly it also contains the amount and the date when Pretorius repaid the money to WKI. It is recorded here that Pretorius had repaid the amount of R1 540 000.00 (R1.54m) on 28 February 2019, barely within 5 months of receiving the money.
- [33] Pretorius had already under oath stated that he had repaid some of the money. Given this, the information – which also belongs to Pretorius - can hardly be said to be information that deserves the protection of the without prejudice rule.
- [34] Even if it is assumed for the sake of argument that any privilege applied to this information, that protection has been lifted by the appellants themselves in the court *a quo*. During the hearing both Mr Stockwell and the judge at several times refer to the figure of R1.5m. Mr Stockwell during his submissions stated that Pretorius had repaid R1.5m. The judge himself refers to the figure of R1.54m.¹⁶ During his submissions, Mr Bishop, although saying he couldn't find the figure of R1.5m- and he is sure that his learned friend will find the reference - ironically relies on it to argue that this figure should not form part of Whyte's claim under the unjustified enrichment claim.¹⁷ Pretorius himself confirms during the hearing that he had repaid something close to R1.6m.¹⁸ Swanepoel AJ was accordingly entitled to rely on this information.
- [35] The issue of *locus standi* is dealt with under each cause of action

¹⁶ Record of Hearing 10 Aug 2022 page 6 line 14 and 17.

¹⁷ *Id* pages 49-50 line 10 onwards.

¹⁸ *Id* page 68 line 2.

Unjust Enrichment

- [36] Unlike in contract unjustified enrichment creates obligations by force of law and not by virtue of the consent of the parties. Unlike in delict, where liability is imposed to balance out a loss with an award of damages, unjustified enrichment serves to correct a gain by obliging the defendant to return or surrender enrichment to the plaintiff.¹⁹ Put more simply it is an equitable remedy which encapsulates the principle that no person may enrich himself at the expense or detriment of another.²⁰
- [37] The four requirements or elements of unjustified enrichment have over time become settled through the cases:
- a. first it must be shown that the plaintiff was impoverished;
 - b. secondly, that the defendant was enriched;
 - c. thirdly, that the defendant was enriched at the plaintiff's expense; and
 - d. fourthly, that there is no legal ground or justification for the retention of enrichment.²¹
- [38] Although many judgments and scholars have remarked on the feasibility of developing a general action for unjust enrichment,²² courts have been reluctant to develop the common law of unjustified enrichment.
- [39] A general enrichment action would no doubt have benefits for private claimants in the modern global commerce with ever increasing complexities underpinned by digital technologies. Such a general enrichment action would also be beneficial in promoting public-law compensatory remedies when there has been enrichment of individuals or groups by means of exploitation or corrupt manipulation of procurement processes, that can broadly be termed unjustified.

¹⁹Du Plessis, *The South African Law of Unjustified Enrichment* (Juta & Co Ltd 2012) at 1.

²⁰ *Id* at 2 fn 7. Also, *Legator McKenna Inc v Shea* [2009] 2 All SA 45 (SCA).

²¹ Du Plessis above n 17 at 2.

²² *Id* at 21.

[40] In *McCarthy Retail Ltd v Shortdistance Carriers CC*²³ the SCA discussed the importance of developing such a general action but declined to do so on the facts of that case and fell back on the traditional *condictiones*.

[41] In the absence of a general action for unjust enrichment, plaintiffs are required to fall back on established enrichment actions such as the *condictio indebiti* or the *condictio sine causa*. It is not necessary to plead the specific action by name, but the plaintiff must plead its requirements.

[42] Notwithstanding the requirement to fall back on established enrichment actions, in *Govender v Standard Bank of South Africa Limited*²⁴ the court took a dim view to the formalistic approach of 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 the 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 on the classification of the cause of action, a plaintiff need not place a label upon his 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.”

[43] The appellants argue that Whyte lacks *locus standi* to sue for the money because the funds that were invested by Whyte into OPES belong to OTAP. The money paid to WKI were those of OTAP. At best Whyte would have a joint right to these funds. Whyte cannot sue on his own without OTAP as joint applicant, alternatively without a cession from OTAP whether his claim is based

²³ *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) para 12 and 13. See also *Greater Tzaneen Municipality v Bravospan* 252 CC 2022 JDR 3191 (SCA).

²⁴ 1984(4) SA 392 (C) at 396.

on unjust enrichment or *condictio furtiva*. Whyte therefore only had a personal claim against OTAP. Because he was not the owner of the money the loss thereof could not have impoverished him.

[44] This argument was rejected by Swanepoel AJ and correctly so in my view.

[45] In multiparty situations, our courts have made it clear that only a party who is considered in law to have made the undue transfer may reclaim it. However, a party considered in law need not be the person whose property was used in effecting the transfer.²⁵

[46] In *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd*²⁶ the Court stated:

“The person who is entitled to bring the action (*condictio indebiti*) is he who is considered in law to have made the payment. It makes no difference, therefore, whether the money has been actually paid by the plaintiff or by his agent or by any other person who was in control of the property: he is always entitled to bring the action.”

[47] In *Bowman De Wet Du Plessis NNO and Others v Fidelity Bank Ltd*.²⁷ the Court held that-

“As far as the facts of this case are concerned, the reference to A claiming from C that which B had paid to C, was not explained in the judgment. Counsel for Fidelity submitted, if I understood him correctly, that it referred to the fact that the first plaintiffs had made the payment of R950 000,00 from the bank account named ‘KaaP Vaal -Mabula Investments (Pty) Ltd In Liquidation’ whereas the other plaintiffs have also joined in the action.

Sight was lost of the fact that the first plaintiffs, both in relation to the overpayment and to the claim for a refund, were and are acting in a representative capacity. In any event, as *Ulpian* is alleged to have said, there is nothing new about one person recovering with the *condictio indebiti* what another has paid (*Digest* 12.6.5). Quoting *Wessels* (op cit par 3693)

²⁵ Du Plessis above n 17 at 152.

²⁶ 1978 (3) SA 699 (A) at 713A-B.

²⁷ 1997 (2) SA 35 (A) at 42F-H.

and others, this Court held that the person who is entitled to bring the action 'is he who is considered in law to have made the payment' (*African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) 713A-C)." (my emphasis)

- [48] The same can be said about the *condictio sine causa*. Whyte is an interested party with a direct and substantial interest because the money that has been paid to the appellants and Pretorius is money that is being deducted by FPI from the capital of his investment. There can be no question about his *locus standi* in the matter.
- [49] Turning now to consider the merits of the matter.
- [50] In cases where the plaintiff can prove that the defendant received a transfer of money or other property,²⁸ the plaintiff's burden of proof of enrichment is facilitated by a rebuttable presumption that the defendant was enriched.²⁹ The presumption will apply even if the enrichment has entered the defendant's estate by way of transfer by a third party.³⁰
- [51] On the facts of this case, the applicant Whyte has shown that the £149 451.25 was transferred to WKI. He has also shown that this money was transferred without cause. Pretorius has confirmed this. Both the appellants and Pretorius have conceded that the money was received *sine causa*. Hence, there is a presumption that the appellants and Pretorius have been enriched.
- [52] Once the presumption kicks in, the defendant must prove that he has not been enriched. This is a full onus requiring the defendant to produce such proof on a balance of probabilities.³¹ A failure to adduce such proof gives rise to a duty to restore the full value.³² There can be no loss of enrichment if for example WKI spent the overpayment on necessities that it nonetheless would have bought.³³

²⁸ This type of case is distinguished from enrichment through improvements to property and the like

²⁹ Du Plessis above n 17 at 381.

³⁰ *First National Bank of Southern Africa Ltd v Perry NO And Others* 2001 (3) SA 960 (SCA) para 31.

³¹ Du Plessis above n 17 at 382 and the cases listed at fn 27.

³² *African Diamond Exporters (Pty) Ltd* above n 26.

³³ Du Plessis above n 17 at 383.

- [53] WKI utilised the R881 298.27 it received in the business. In other words this is what WKI would have spent on, nonetheless. Hence there is no proof of loss of enrichment.
- [54] Pretorius on the other hand says that he repaid R1.54m to WKI and ceded future commissions to WKI make up the total. WKI did not put up any proof of loss of enrichment of this amount.
- [55] As to whether any future commission has been ceded by Pretorius and by how much, no proof thereof was put up by either Pretorius or the appellants. He continued to utilise the balance for his own needs. Hence, Pretorius did not put up any proof of loss of enrichment for the balance.
- [56] Swanepoel AJ was therefore correct in finding that both Pretorius and WKI were enriched by the full amount of £149 451.24.

Condictio Furtiva

- [57] Unlike the unjustified enrichment action, the *condictio furtiva* is a personal claim in delict which has its roots in the Roman law of protection of ownership.³⁴ When a theft occurs, the victim of theft may bring this action against the thief or his heirs to recover the stolen property/thing, together with its fruits or its highest value since the commission of the theft. The *condictio furtiva* is awarded in the absence of the *rei vindicatio* hence they are alternatives. Unlike in the *rei vindicatio* the *condictio furtiva* is available even though the stolen object has been destroyed or damaged.³⁵
- [58] Prior to *Clifford v Farinha*³⁶ it was uncertain who was entitled to rely on the *condictio furtiva*.³⁷ It is now accepted that the victim need not be the owner but may also be another “interested party”.³⁸ This could be a lessee under a hire purchase agreement or a person who holds the object in safekeeping and is

³⁴ Silberberg & Schoeman, *The Law of Property* 6th ed (LexisNexis, 2019) at 296.

³⁵ Du Plessis above n 17 at 336.

³⁶ 1988 (4) SA 315 (W).

³⁷ Du Plessis above n 17 at 337.

³⁸ *Clifford v Farinha* above n 36 at 324.

responsible to the owner, a person who holds an object in pledge and a purchaser to whom risk has passed in an object which was stolen.³⁹

[59] The concept of theft bears a broader meaning than in modern South African criminal law and encompasses knowingly using another's property without the owner's permission or theft through use (*furtum usus*). The broad definition of thief may include a third party who receives from the thief knowing that he is not entitled to appropriate the stolen property. In relation to the degree of fault *dolus eventualis* is sufficient.⁴⁰

[60] The requirements of the *condictio furtiva* can be summarised as follows:

- a. The applicant (plaintiff) would have to prove a wrongful action;
- b. Fault on the part of the perpetrator;
- c. Patrimonial loss; and
- d. That the action was causally linked to the patrimonial loss.

[61] During argument, much emphasis was placed by the appellants that the person bringing the action must *own the thing*. In other words, only the *owner* had a claim and only if the *thing* in question was corporeal in nature. Since money once transferred to WKI became commingled with other money, ownership passed, and Whyte had no right to the money as a corporeal thing.

[62] As discussed earlier it is now accepted that a person other than an owner who has an interest is entitled to bring the *condictio* (*Clifford v Farinha*) and that the *condictio furtiva* applies to persons who knowingly use another's property without the owner's permission, which is considered to be theft through use or *furtum usus*.

[63] In *Chetty v Italtile Ceramics*⁴¹ the court made it clear that the notion of theft is wider at common law –

³⁹ Du Plessis above n 17 at 337.

⁴⁰ *Id.*

⁴¹ 2013 (3) SA 374 (SCA).

"The *condictio furtiva* is a remedy the owner of, or someone with an interest in, a thing has against a thief and his heirs for damages. It is generally characterised as a delictual action. It is, of course, required that the object involved be stolen before the *condictio* can find application. The law requires for the crime of theft -

.....

However, at common law 'theft' has a wider meaning and includes *furtum usus*, or the appropriation of the use of another's thing. Theft of the use of another person's thing is no longer a crime. The *condictio furtiva* lies in all cases of theft - 'whether the theft wreaked was one of proprietorship or of use or possession ... makes no difference to the possibility of the action being available'."

- [64] Turning now to consider the nature of the thing (*res*) or nature of money, in *Nissan South Africa (Pty) Ltd. v Marnitz NO and Others*⁴² (*Stand 186 Aeroport (Pty) Ltd. Intervening*) the court in considering the nature of money in modern times held –

"[24]...Where A hands over money to B mistakenly believing that the money is due to B, B, if he is aware of the mistake, is not entitled to appropriate the money. Ownership of the money does not pass from A to B. Should B in these circumstances appropriate the money such appropriation would constitute theft (*R v Oelsen* 1950 (2) PH H198; and *S v Graham* 1975 (3) SA 569 (A) at 573E-H). In *S v Graham*, it was held that, if A, mistakenly thinking that an amount is due to B, gives B a cheque in payment of that amount and B, knowing that the amount is not due, deposits the cheque, B commits theft of money although he has not appropriated money in the corporeal sense. It is B's claim to be entitled to be credited with the amount of the cheque that constitutes the theft. This court was aware that its decision may not be strictly according to Roman-Dutch law but stated that the Roman-Dutch law was a living system adaptable to modern conditions. As a result of the fact that ownership in specific coins no longer exists where resort is made to the modern system of banking and paying by cheque or kindred process, this Court came to

⁴² 2005 (1) SA 441 (SCA).

regard money as being stolen even where it is not corporeal cash but is represented by a credit entry in books of account.

[25] The position can be no different where A, instead of paying by cheque, deposits the amount into the bank account of B. Just as B is not entitled to claim entitlement to be credited with the proceeds of a cheque mistakenly handed to him, he is not entitled to claim entitlement to a credit because of an amount mistakenly transferred to his bank account. Should he appropriate the amount so transferred, ie should he withdraw the amount so credited, not to repay it to the transferor but to use it for his own purposes, well knowing that it is not due to him, he is equally guilty of theft." (my emphasis).

- [65] Hence, unlike in Roman times, ownership in specific coins used as currency no longer exists.⁴³ In modern times where payments are made by cheque (fast becoming obsolete), or electronic transfer, money may be represented by a credit entry in the books of account of a person. Such books may include physical ledgers⁴⁴ or virtual bank accounts.
- [66] The *condictio furtiva* is therefore available to Whyte, as someone with an interest, where money represented by a credit entry in the transferee's bank account, paid by FPI and which is then deducted from him as a debit entry on his investment account.
- [67] A transfer to WKI by FPI of money which is then deducted from Whyte's investment capital amounts to patrimonial loss for him.
- [68] Swanepoel AJ found that Kruger and Guthrie were liable for the amount of R2 056 362.63. His conclusions were based on accepting the *bona fides* of Kruger and Guthrie and making a credibility finding against Pretorius. In other words, on his analysis Pretorius acted wrongfully by misrepresenting to FPI that WKI was entitled to a 7% commission. Kruger and Guthrie acted wrongfully only in relation to the R2 056 362.62 because when they spent the R881 298.28 they were under the erroneous belief that they were entitled to do so. They did not have any fault in the disbursement of the 30%. However, when they became

⁴³ Digital cryptocurrency represents new forms of currency in a rapidly changing global economy

⁴⁴ These are rapidly becoming electronic such as Pastel, SAGE and the like.

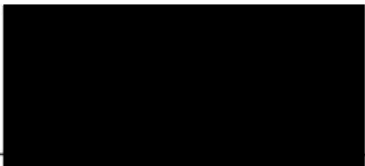
aware of the fact that the money was not due to WKI they nevertheless spent the rest being R2 056 362.62.

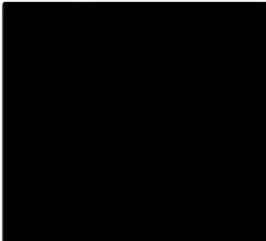
- [69] Of the R2 056 362.62 we now know that Pretorius had already refunded the amount of R1 540 000.00 by 28 February 2019.
- [70] By the time they received the R1 54m from Pretorius on 28 February 2019, Kruger and Guthrie knew without a doubt that they were not entitled to use the money. They nevertheless intentionally and wrongfully retained and used the money.
- [71] Kruger and Guthrie are the controlling minds of WKI. As directors of WKI they were in control and possession of the finances of the juristic *persona* and by all accounts still are. To date, even with the offer of £130 000 on the table they continue to '*possess and use*' the money. They have admitted that the money was used by them to pay creditors and the like. This is not only a benefit to the shareholders but also to them as directors.
- [72] Given that there is no evidence what happened to the balance of the R2 056 362.62 Kruger and Guthrie can only be held liable under the *condictio furtiva* for R1.54 million, an amount that they knew without any doubt that they were not entitled to use or possess.

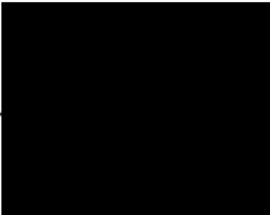
ORDER

[73] Accordingly, –

- a. The appeal is dismissed
- b. The order of the court *a quo* in para [40.3] is replaced with the following:
 - i. "Second and third respondents are ordered to pay applicant R1 540 000.00, which shall be joint and several with one another and with the liability of first and fourth respondents in terms of paragraph 40.1 above, the one respondent paying the others to be absolved."
- c. Appellants to pay the costs of the appeal.


Y CARRIM
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG


I agree
MA MAKUME
JUDGE OF THE HIGH COURT
JOHANNESBURG


I agree
JE DLAMINI
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 31 January 2024

Date of judgment: 14 March 2024

For the Appellants: Adv. A Bishop
instructed by Rudolf Buys and
Associates

For the First Respondent: Adv. R Stockwell SC instructed by
Gittins Attorneys