

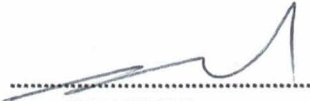
**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**



Case number: 2021/6801

Date of hearing: 10 August 2022

Date delivered: 25 August 2022

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHERS JUDGES: YES /NO	
(3) REVISED	
25/8/22	
DATE	SIGNATURE

In the application between:

WHYTE, GEOFFREY DAVID

Applicant

and

**WK INSURANCE
ASSOCIATES (PTY) LTD
KRUGER, WESLEY
GUTHRIE, BRADBURN
PRETORIUS, RICHARD**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent**

JUDGMENT

SWANEPOEL AJ:

INTRODUCTION

[1] Applicant seeks that respondents be ordered to pay, jointly and severally, the sum of £ 149 451.24 into the bank account of Overseas Trust and Pension Ltd ("OTAP"), alternatively that respondents be ordered to pay the aforesaid amount or its equivalent in South African Rand to applicant. Applicant also seeks interest on the amount at 5.5% per annum, from 1 September 2018 to date of payment, and costs.

THE FACTS

[2] Applicant has made use of fourth respondent's ("Pretorius") services as a financial advisor for a number of years. When Pretorius left the employ of his previous employer, and set up his own business in consultation with first respondent ("WK"), applicant followed him. At that stage applicant believed that Pretorius was employed by WK. Second and third respondents are directors of WK. First to third respondents deny that Pretorius was ever an employee of WK, and say that they entered into a consultancy agreement with him, on a fee-sharing basis. I accept their version.

[3] Towards the beginning of 2018 applicant decided to invest approximately £ 1.9 million in OTAP, and he sought Pretorius' assistance in doing so. Pretorius provided the necessary forms for completion by applicant, whereafter the deal was concluded with OTAP, and the funds were paid over. OTAP was, at all material times, administered by Friends Provident International (FPI).

[4] Unbeknown to second and third respondents Pretorius had agreed with applicant that applicant would pay Pretorius a personal once-off commission of R 75 000.00. It was further agreed between them that, save for a 1% once-off charge, no further fees would be levied by FPI.

[5] Applicant alleges that either Pretorius or WK, or both, failed to convey the terms of the agreement to FPI, which resulted in FPI setting up a fees structure in terms of which 1.111% of the invested funds would be levied annually. First to third respondents deny that they knew anything about the fee arrangement between applicant and Pretorius. Pretorius is adamant that he advised FPI of its terms, and he cannot say why FPI did not abide by the agreement.

[6] Ultimately applicant transferred a total of £ 2 135 017.75 to OTAP. FPI raised fees of £ 149 451.24 on the investment, which it paid over to WK. First to third respondents allege that Pretorius had previously advised them that a large payment would be made to WK as fees on the applicant's investment, and therefore, they were not surprised on 7 September 2018 when WK received the sum of R 2 937 660.90 from

OTAP. In accordance with the fee-sharing agreement between them, WK paid 70% of that amount, being R 2 056 362.63, to Pretorius on 10 September 2018. Also on 10 September 2018, WK disbursed a further R 734 415.23 to a third party as payment for its assistance in sourcing advisors. WK retained the sum of R 146 883.05 of the monies received from OTAP.

[7] Some months later Pretorius approached second and third respondents. He advised them that the fee payment had been made in error, and that the money had to be repaid to applicant. Second and third respondents asked Pretorius how the error had come about, and he told them that FPI had miscalculated the fees. They say that they were surprised that there had been an error, because Pretorius had warned them in advance that approximately R 3 million would be paid to WK as fees on this investment. When applicant demanded repayment of the money on the basis that it had been paid in error, Pretorius paid the sum of R 1 540 000.00 to WK on 28 February 2019. He did so on the understanding that WK would repay the money to OTAP, who would then hold it to applicant's credit.

[8] Second respondent initially admitted to applicant and to applicant's attorneys that WK was liable to repay the money to OTAP. Second and third respondents agreed to sign an acknowledgement of debt on behalf of WK, and they invited applicant to prepare such a document. Ultimately, having taken legal advice, they refused to sign the document. WK never repaid the money that it had received, using the money for its own

purposes instead, including the amount of R 1.54 million that Pretorius had repaid to it.

PRETORIUS' VERSION

[9] Pretorius says that when he received the money from WK, he did not know that it was for payment of fees in respect of applicant's investment. Second and third respondents say that Pretorius specifically warned them in advance that the fees were due to be paid to WK. I find Pretorius' version very hard to believe. Pretorius says that it took him some time to determine that the money was paid to WK as fees on applicant's investment. Even if I reject second and third respondents' version, that Pretorius had warned them in advance that these monies would be paid to WK (which I do not), I believe that Pretorius could easily have ascertained where the money had come from, by simply asking second or third respondents to trace its origin. I find Pretorius' version so unlikely that, even considering the test in *Plascon-Evans* which enjoins me to accept the respondent's version where there is a dispute of fact, I can reject his version on the papers.¹ It is far-fetched and extremely unlikely.

[10] In my view, Pretorius knew from the outset that the money had been paid in error and that it was paid as fees on applicant's investment.

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634 (H)

He accepted a substantial portion thereof, only returning R 1.54 million to WK when applicant demanded repayment.

[11] I accept that second and third respondents did not know, when the monies were first received in their account, that the payment had been made in error. However, Pretorius later told them about the error, repaid R 1 540 000.00 to them, and he also forfeited certain commissions in order to repay the full amount that he had received. At that point, second and third respondents knew that the money was not theirs to keep, and that they were obliged to pay the monies to OTAP, to the credit of the applicant. Despite being possessed of that knowledge, second and third respondents still used the money to pay WK's debts².

THE CAUSE OF ACTION

[12] There was some debate as to applicant's cause of action. Applicant says that it bases its claim on the *conditio furtiva*, which is a delictual claim³, and in the alternative, on either the *conditio ob turpem vel iniustam causa* or the *conditio sine causa*, the latter being claims based on unjustified enrichment. The contention that the *conditio ob turpem vel iniustam causa* may be applicable to this case can be disposed of simply on the basis that it is an action aimed at transactions where the transfer was made for an unlawful purpose. That is not the case in this matter. The transfer was made in pursuance of a legal purpose, albeit

² First to Third respondents' heads of argument par. 20

³ Minister van Verdediging v Van Wyk 1976 (1) SA 397 (t) at 400

mistakenly. The transferor may have been under the misapprehension that the payment was due to WK, but the underlying *causa* of the payment, the payment of fees, was not unlawful.

CONDITIO SINE CAUSA

[13] Applicant says that it relies on the *conditio sine causa*. This is an action aimed at the recovery of a transfer made without just cause, which results in one party being enriched at the expense of another.

[14] In order to prove unjust enrichment, applicant would have to prove that the general requirements for an enrichment claim have been met. They are the following:

[14.1] That respondents were enriched by the transfer of money to them;

[14.2] The respondents' enrichment must be at applicant's expense, and applicant must have been impoverished;

[14.3] The enrichment must have been unjustified.

[15] The first question to be determined is whether respondents were enriched by having received the funds. Respondents' enrichment must be patrimonial in nature.⁴ Enrichment can occur in a number of ways. A party may, for instance, acquire corporeal property, its own property may

⁴ The South African Law of Unjustified Enrichment, Du Plessis, J, page 27

be improved, or its debts may be reduced. In this case WK received funds with which it was able to settle creditors. WK did not have to use its own funds to pay creditors. In my view WK was enriched to the extent of the funds which it received from OTAP.

[16] The second question is whether applicant was impoverished. As with the enrichment enquiry, the plaintiff is only impoverished if his loss is patrimonial in nature. In *Nortjé and another v Pool N.O.*⁵ Rumpff JA explained as follows:

“Die doel van die verrykingsaksie is dus die beskerming van die waarde van die vermoë. Wat die verryking betref, konstateer Bregstein dat ’n materiële identifikasie van die waarde, wat die een vermoë verlaat om in die ander te vestig, nie nodig is nie; nodig is alleen dat ’n waardeelement aan die vermoë onttrek is, terwyl die ander vermoë ’n waardeelement bevat, wat daar nie aanwesig sou wees nie, indien die vermoënsverlies nie sou plaasgevind het nie. Die vermoë bestaan uit ’n aktief en ’n passief. ’n Vermoënsoorgang kan bestaan uit die toevoeging van ’n nuwe aktiewe element, maar ook uit ’n vermindering van die passief.

Wat die verarmingsvereiste betref, wys Bregstein daarop dat die verarming nie alleen bestaan uit effektiewe vermoënsvermindering nie maar ook uit die feit dat die vermoë die bates derf wat volgens heersende maatskaplike opvattinge aan daardie vermoë behoort

⁵ 1966 (3) SA 96 (A) at 115

ten goede te kom. Daartoe behoort in die eerste plek die bates wat die vermoë sou gehad het, indien die verarmende gebeurtenis nie sou ingetree het nie. In die reël sal verarming bestaan uit 'n vermindering van die aktief (bv. gedane uitgaaf); dit kan ook bestaan uit 'n aangegane skuld, dus uit vermeerdering van die passief, of uit 'n nie-vermeerder van die aktief."

[17] Mr. Bishop, acting for first to third respondents argued that applicant had not shown that he was the sole owner of the money, as the money had been paid to OTAP and had become comingled with OTAP's funds. Applicant only had a personal right to claim against OTAP for payment in terms of the investment agreement, he argued, but he was not the owner of the money. Applicant had therefore not demonstrated that he had *locus standi* to institute the claim. It follows further, Mr Bishop argues, that if applicant were not the owner of the money, the loss thereof could not have impoverished him.

[18] In my view, once OTAP had paid the money to WK, the money was no longer comingled with OTAP's funds, and OTAP no longer had any claim thereto. Applicant, however, had a direct interest in the monies, once payment had been effected to WK in error, and he therefore he has *locus standi* in the matter.

[19] When OTAP paid the monies to WK, the applicant's pension interest was reduced by the amount paid out. Instead of those monies accruing to applicant's benefit, they were dissipated by the respondents.

In my view applicant was clearly impoverished by the transfer. WK and Pretorius' enrichment was, in my view, directly at applicant's expense.

[20] The final question is whether there was any legal ground for the enrichment. In more recent writings, the test whether there was a legal ground for enrichment is defined narrowly, and means simply whether there is an absence of a normal ground for retaining the enrichment, such as a contractual or statutory obligation. For instance, in *Mc Carthy Retail Ltd v Shortdistance Carriers CC*⁶ the Court held that the absence of a valid contract rendered the enrichment *sine causa*. The test is an objective one, and does not depend on the parties' state of mind.⁷ In *Willis Faber (supra)* it was held that in the absence of a specific obligation underlying the transfer, the enrichment was *sine causa*.

[21] In this matter the parties are in agreement that there was no legal basis for the payment of fees to WK. The agreement between applicant and Pretorius did not provide for payment of these fees, and WK had no legal ground upon which to receive the monies. The payment was clearly *sine causa*.

[22] I therefore find that, even though first, second and third respondents did not know, at the time when the transfer was received in WK's account, that it was not due to WK, WK was nevertheless enriched

⁶ 2001 (3) SA 482 (SCA)

⁷ See: *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) at 220 J

at applicant's expense, *sine causa*. WK must therefore repay what it has received, which is £149 451.24.

[23] The fact that WK made payment to Pretorius in the sum of R 2 056 362.63 approximately a month after receiving the payment from OTAP, in the mistaken belief that the money was due to him, is of no moment. In my view, the enrichment claim was established the moment the transfer to WK was completed, and it appropriated the money for its own purposes.

THE CONDITIO FURTIVA (ACQUILIAN LIABILITY)

[24] Mr Stockwell, acting for the applicant, argued that respondents were also liable in delict, under the *conditio furtiva*, because they stole applicant's money. I have already found that WK is liable to applicant for repayment of the full amount on the basis of unjustified enrichment. However, respondents are also liable for damages suffered by applicant based on the *conditio furtiva*.

[25] In *Chetty v Italtile Ceramics*⁸ the Court explained the *conditio furtiva* as follows:

"The conditio 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 characterized as a delictual action. It is, of course,

⁸ 2013 (3) SA 374 (SCA)

required that the object involved be stolen before the condition can find application. The law requires for the crime of theft-

'not only that the thing should have been taken without belief that the owner.... Had consented or would have consented to the taking, but also that the taker should have intended to terminate the owner's enjoyment of his rights or, in other words, to deprive him of the whole benefit of his ownership.'⁹

[26] In order for applicant to succeed with a delictual action applicant would have to prove:

[26.1] A wrongful action;

[26.2] Fault on the part of the perpetrator;

[26.3] Patrimonial loss;

[26.4] That the action was causally linked to the patrimonial loss.

[27] As far as Pretorius is concerned, he was clearly aware of the fact that no fees were due to either WK, or to himself. Nonetheless, he accepted payment of a substantial portion of the fees, which he retained for himself until applicant demanded repayment. I have no doubt that Pretorius knew that the money was due to be paid to WK and in respect

⁹ R v Sibiyi 1955 (4) SA 247 (A) at 257 B-D

of which investment it was paid. He knew that the money was not due to WK or to himself, but he allowed the transfer to continue. He received payment of 70% of the money. Receiving monies not due to you, and then using the money for your own purposes, is theft.

[28] The loss to applicant occurred in two stages. The first was when OTAP paid the fees to WK, and WK used the funds, distributing some of it, and appropriating the rest for itself. At that point WK was unjustifiably enriched. The second stage occurred when Pretorius advised first to third respondents that the fee payment had been made incorrectly, and he repaid R 1 540 000.00 to WK with the request that it be paid to OTAP. Pretorius also forfeited commissions due to him in order to make up the balance of what he had received. At that point first to third respondents misappropriated the money.

[29] I accept that when first to third respondents first became aware of the transfer they were under the misapprehension that the money was due to WK. However, Pretorius advised them some months later that the transfer had been made in error. Respondents then reached agreement that Pretorius would repay R 1 540 000.00 to WK, and that WK would repay the money to OTAP. They also agreed that Pretorius would forfeit certain commissions, in order to make up the balance of the funds that he had received. At that stage respondents were all aware of the fact that the money was the applicant's.

[30] Despite knowing that the money was not due to them, first to third respondents used the money to settle WK's debts. That is theft, and applicant is entitled to repayment of what was stolen.

[31] In view of the fact that I have found that Pretorius was aware from the outset that the payment was not due to respondents, but that he nevertheless allowed the monies to be divided between WK and himself, Pretorius is liable for repayment of all the money to applicant.

[32] When first to third respondents became aware of the fact that the money was not due to them, and Pretorius made repayment to them, first to third respondents had already spent R 881 298.28 of the money under the erroneous belief that they were entitled to do so. They did not have any fault in the disbursement of those monies. However, when they became aware of the fact that the money was not due to WK, they nevertheless spent the rest, totalling R 2 056 362.62. First to third respondents are thus liable to applicant, on the basis of the *conditio furtiva* for payment of the sum of R 2 056 362.62.

[33] It is necessary to deal with the remaining contention raised by first to third respondents. They say that the law of Guernsey applies to this case, as the *lex loci contractus* (the place where the contract was concluded), applies. Mr Bishop argued that in terms of the laws of Guernsey the Life Assurance (Compensation of Policyholders) Regulation, 1991 finds application, which precludes applicant from claiming against respondents.

[34] This is not a claim in terms of the investment contract between the parties. OTAP paid out fees in the normal course of business, albeit contrary to the agreement between Pretorius and the applicant. If, for instance, it had been the case that the pension fund had misappropriated the money, then the claim would have been brought against the pension fund in terms of the Guernsey law. In this case the monies were paid out by the pension fund and were received by WK in South Africa. It is in South Africa where the enrichment occurred and where the monies were stolen. In my view this argument is without merit.

COSTS

[35] Applicant has sought costs on the attorney/client scale. Such costs are generally only awarded where there has been improper conduct, and the Court wishes to express its disapproval of such conduct.

[36] It is trite that attorney/client cost orders are not lightly granted. Parties have the right to have their disputes resolved by litigation, and they should not be put off by unnecessary punitive cost orders. However, when there are special circumstances present, such as when there has been dishonesty¹⁰ or fraud, or a party has been malicious, frivolous, reckless or vexatious, a Court will not hesitate to grant a punitive costs order.

¹⁰ Nel v Waterberg Landbouers Ko-Operatiewe Vereeniging 1946 AD 597

[37] Pretorius' conduct merits, in my view, a punitive costs order. I have found that he knew from the outset that the money was not due to either himself, or to WK. First to third respondents knew, a few months after WK had received the money, that the transfer had been made in error. Nonetheless, they did not make good on their undertaking to Pretorius to repay to OTAP the money that Pretorius had repaid to WK. They decided to keep the money for their own purposes.

[38] First to third respondents have known, since they were advised by Pretorius that the transfer had been made in error, and that they were liable to repay the money to applicant. They made numerous promises of repayment, even going as far as to undertake to sign an acknowledgement of debt. Unfortunately, due to the advice given to them, they reneged on the undertaking to sign an acknowledgement of debt. Once they were faced with this application, they raised a number of spurious defences to try and evade liability. In their answering affidavit they disclose that they tendered repayment of £ 130 000.00. They would only have made that offer if they knew that the money was due to applicant. This knowledge did not deter them from litigating the matter to the end. In my view their approach to the matter is vexatious.

[39] First to third respondents have therefore not only been dishonest in taking applicant's money when they knew that it was due to him, they have also been disingenuous and vexatious in their defence. I believe that an order for punitive costs against first to third respondents is also appropriate.

[40] Consequently I make the following order:

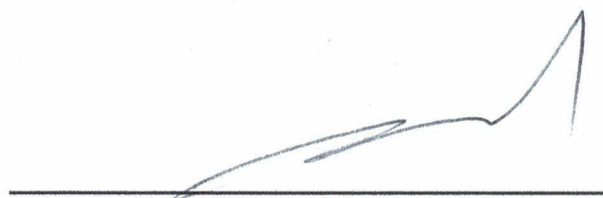
[40.1] First and Fourth respondents are ordered to pay applicant the sum of £ 149 451.24, or the equivalent in South African Rand, to be calculated at the prevailing exchange rate on the date of payment, jointly and severally, the one paying the other to be absolved.

[40.2] First and fourth respondents shall pay interest on the aforesaid sum at the rate of 5.5% per annum, calculated from 1 September 2018 to date of payment.

[40.3] Second and third respondents are ordered to pay applicant R 2 056 362.63, which liability 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.

[40.4] Second and Third respondents shall pay interest on the aforesaid sum at the rate of 5.5% per annum, calculated from 1 September 2018 to date of payment.

[40.5] Respondents shall pay the costs of the application jointly and severally, the one paying the other to be absolved on the attorney/client scale.



SWANEPOEL AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

COUNSEL FOR APPLICANT:	Mr R. Stockwell SC
ATTORNEY FOR APPLICANT:	Rudolph Buys & Associates
COUNSEL FOR FIRST TO THIRD RESPONDENTS:	Mr. A Bishop
ATTORNEYS FOR FIRST TO THIRD RESPONDENTS:	Gittins Attorneys
FOR FOURTH RESPONDENT:	In Person
DATE HEARD:	10 August 2022
DATE OF JUDGMENT:	25 August 2022