IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

COURT *A QUO* CASE NO:	**2230/2014**
APPEAL CASE NO:	**34/2020**
DATE OF HEARING :	**17 JANUARY 2022**
DATE DELIVERED:	**18 MARCH 2022**

In the application of:

SOL PLAATJE MUNICIPALITY Appellant/Defendant

And

TECHNOFIN (PTY) LTD Respondent/Plaintiff

Coram: Mamosebo J *et* Lever J *et* Nxumalo J

JUDGMENT

NXUMALO J:

INTRODUCTION

[1] The appellant in these proceedings is Sol Plaatje Municipality, established in terms of section 12 of the Local Government: Municipal Structures Act, 117 of 1998 ("the Structures Act).[1] The respondent is Technofin, a company with limited liability, incorporated in terms of the laws of the Republic.[2] The appeal, with the leave of the Court *a quo,* is against the whole of the judgment of that Court (*per* Stanton AJ) only with regard to the quantum of the respondent's second claim of enrichment.

BRIEF STATEMENT OF THE RELEVANT FACTUAL BACKGROUND

[2] It is common cause that the parties on 23 April 2009, purportedly entered into a written lease agreement, in terms whereof the appellant leased certain equipment from the respondent which had to be installed at the appellant's premises. The said agreement provided amongst other things that the appellant would lease the said equipment from the respondent for a period of 54 months and that the appellant would pay an amount of R25 850.10, including value-added tax (VAT) *per* month as a rental to the respondent.

[3] It is also common cause that the then municipal manager of the appellant signed the said lease agreement and all the necessary documentation pertaining thereto. The respondent thereafter delivered all the said equipment and same was installed

[1] Defendant in the Court *a quo.*
[2] Plaintiff in the Court *a quo.*

on the premises of the appellant. [3] The appellant acknowledged that it had inspected and received the equipment and that the respondent remained the owner of the equipment at all material times.

[4] The foregoing notwithstanding, the appellant subsequently failed to make any payment for the equipment. The matter was referred to arbitration and the arbitrator ultimately found that the said lease agreement was null and void *ab initio*, for failure to follow certain legislative prescripts relating to the procurement of goods by an organ of state in the local sphere of government.[4] This arbitration award was made on 15 July 2013.[5]

[5] Following the said award, the respondent demanded the return of all the equipment from the appellant. The appellant only returned some of the equipment. The respondent thereupon issued summons out of the Court a *quo*, on 17 December 2014, claiming *inter-alia*; the return of the balance of the equipment and certain monetary damages based on enrichment against the appellant.[6] The merits of the respondent's claim were thereafter adjudicated by the Court *a quo*, *vide* Matlapeng AJ, whose judgment was handed down on 10 February 2017.[7]

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[3] paras 2-4, pp251-252, Vol 3 (Merits Judgment, delivered 10 February 2017, *per* Matlapeng AJ).

[4] Section 217 of the Constitution and The Local Government: Municipal Finance Management Act 56 of 2003, in the main regulate the procurement of goods and services in the local sphere of government.

[5] para 3, p410, Vol 5.

[6] para 4, *ibid*.

[7] pp251-262, Vol 3, Record.

ISSUE FOR DETERMINATION

[6] The appeal impugns the Court *a quo's* conclusion that in respect of the second claim, the appellant was to pay the respondent an amount of R1,682,715.70, with interest, from the date of summons until the date of payment, calculated at *mora* rate. Of significance in this regard is what the Court *a quo*, stated in paragraph 45 of the impugned judgment; to *wit*:

"I take cognisance of the judgment in Lobo Properties (Pty) Ltd and agree that the crux in the Mangaung judgment was whether the respondent was entitled to payment on the basis of unjust enrichment and that the quantum of the enrichment was therefore not in dispute. ***However, in view of the Mangaung judgment, I am persuaded that what accrued to the Defendant [Appellant] was the rendering of the services in the amount as agreed to in the invalid agreement, and that the impoverishment of the Plaintiff [Respondent] and the enrichment of the Defendant [Appellant] are on equal terms, being the amount of R1,731 956.70 (inclusive of VAT).*** *Mr MMW van Zyl conceded that the amount was awarded in claim 1 should be deducted from the amount awarded in respect of claim 2."*[8]

[7] The issue for determination is thus whether in awarding the damages in the amount of R1,682,715.70 to the respondent the trial court was correct in its finding that the impoverishment of the respondent and the concomitant enrichment of the appellant are on equal terms.

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[8] p431, Vol 5, Record. Emphasis supplied.

BRIEF OVERVIEW OF THE EVIDENCE IN THE COURT *A QUO*

[8] The impugned judgment correctly summarised the salient aspects of the evidence presented by both parties during the trial. For purposes of this appeal however, this Court will only refer to the relevant aspects thereof. The Court *a quo* found the following facts which pertain to the second claim to be common cause between the parties.

[9] That the parties agreed on a price based on the equipment that was later removed and replaced by the equipment that formed the subject matter of the impugned lease agreement. That the appellant had the advantage of the use of equipment whilst in possession thereof, at all material times thereto.[9] And that the monthly instalments calculated in annexure CB1,[10] corresponds with the monthly rental amount agreed upon in the impugned lease agreement.[11]

The appellant's evidence

[10] The summary of the evidence that was brought before the Court *a quo* on behalf of the appellant may be gathered from paragraphs 11 to 13 of the impugned judgment as follows.

[11] Mr Thomas who testified for the appellant confirmed that the accurate value of the equipment is of importance in transactions similar to the impugned lease

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[9] Annexure A, p. 14; Judgment par 6.3, Vol 5.
[10] p411 at par 5.2, Vol 5
[11] Record p 298, Vol 3.

agreement.[12] His evidence regarding the value of the equipment is however exclusively premised on the contents of a quotation received from one Mustek Limited, that was provided on 24 May 2018 and that of one Mr Snyman, who also testified on behalf of the appellant in this regard.[13]

[12] Mr Thomas, conceded that he never had access to the original price that Baitsanape, the respondent's supplier, paid for the equipment and could not dispute that the margin applied by the respondent was fair under the circumstances. Since the appellant did not adduce any evidence regarding the calculation and determination of the impugned monthly instalments, the respondent submitted that the Court a *quo* correctly accepted the evidence of Booysen in that regard.

[13] Snyman's evidence was *inter-alia* as follows. The current market value of the equipment, at the time it was returned to the respondent, ranged between zero and twenty percent of its original purchase price. The camera's prices he provided to Thomas were merely estimates without any factual foundation or documentary support. He conceded that he only relied on the figures provided in the said quotation to do his calculations and did not do any comparative study beforehand.[14] In the premise, the Court *a quo* found it could not rely on or accept

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[12] Judgment par 12.5, Vol 5.
[13] Judgment par 12.1, Vol 5.
[14] *Ibid*, para 13.2.

the figures as supplied by Snyman. It was granted that his calculations meant nothing and accordingly fell away.[15]

The respondent's evidence

[14] Ms Booysen testified on behalf of the respondent. According to the respondent, the relevant evidence for purposes of this appeal relates to the value of the services it provided to the appellant and the enrichment that accrued to the latter therefrom. The most important aspect that Ms Booysen referred to was the method of calculation in determining the monthly instalments in terms of the impugned lease agreement. She testified that in determining the monthly rental, it is customary in the industry to make use of factoring sheets.[16]

[15] Whilst she conceded that she never personally compared the purchase price of the equipment with similar products in the market, she nevertheless testified that the pricing thereof was on par with that of other municipalities.[17] She also attested that the factors that the respondent applied in determining the monthly rental in the impugned lease agreement, were reasonable and equal to the norm in the industry.[18]

[16] She concluded that based on the agreed monthly instalments, multiplied by the number of months that the appellant had the equipment in its possession, the total

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[15] para 12.11, p417, Vol 5,
[16] Vol. 2, pp125-128.
[17] Judgment, para 9.1; Record: Booysen p. 137 line 5 to 8, Vol 5.
[18] p129, ll16-25, *ibid*.

monthly rentals, payable calculated as from April 2009 to November 2014, amounted to R1,731 956.70 (including VAT) and R1,519 260.26 (excluding VAT).[19] In the premise, the respondent would have made a profit of R49 241.00, from the impugned lease agreement.[20]

[17] Regard being had to the foregoing, the Court *a quo* then proceeded to summarise the respondent's evidence on quantum in paragraphs 8 to 9 of its judgment *inter alia*, as follows. The fair and reasonable return on investment on finance agreements such as the master rental agreement, is calculated by applying the costs of the equipment as well as the reasonable finance charges at 18. 5%, added to the then prime interest rate of 15.5%. Other factors considered in determining the monthly instalments in terms of the said lease, *inter-alia* included, the purchase price of the equipment; the terms of the lease; the interest rate; and the value of the goods to the client.

BRIEF OVERVIEW OF THE PARTIES' MAIN ARGUMENTS

The appellant's argument

[18] Counsel for the appellant, *Mr Knoetze SC*, submitted that the Court *a quo* erred in granting the impugned order on *inter-alia*, the following grounds. In *Mangaung Metropolitan Municipality v Maluti Plant Hire*[21] (*Mangaung*), it was not held without

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[19] Judgment par. 10.5, Vol 5.
[20] Judgment, par 9.1; Vol 5.
[21] (A19/2026) [2017] ZAFSHC 55 (9 February 2017).

more, that the quantum of the enrichment was equal to the amount agreed to in the unenforceable contract.

[19] The appellant contended that whilst the rates charged by the respondent in *Mangaung*, were in line with those set out in the CPHA, which were the recommended tariffs in the construction industry, there was no reason under such circumstances, why the amount agreed upon in that contract should not have been regarded as reflecting the value of the services, which were rendered. In this case, there was no such.

[20] According to the appellant, *Mangaung* should be distinguished from the present matter on the following grounds. The reasonableness of the impugned charges was in dispute in the Court a *quo*. The appellant therefore argued that the Court *a quo* should not have followed the decision in *Mangaung*.

[21] According to the appellant, *Mangaung* is also no authority for the impugned finding of the Court *a quo*, because Tsatsi AJ, never found that the quantum of the enrichment was, without more, equal to the amount agreed in the unenforceable contract. The Learned Judge, on the contrary, held that the measure of enrichment is the value of the service, which by necessary implication, stood to be determined. The Court *a quo* also ignored the fact that in *Mangaung*, whilst reliance was placed

on, *inter-alia Hitchins v Breslin 1913 TPD 677*, it was held that a plaintiff cannot include profit when calculating his impoverishment.[22]

[22] Counsel for the appellant therefore contended that to the extent that according to normal enrichment principles in our law, the measure of enrichment is the value of services rendered, the contract price cannot be the benchmark of determining to which extent the appellant has been enriched.[23] To the contrary, so he submitted, in *Mangaung*, it was correctly held that the measure of enrichment is the value of the service, which by necessary implication, stood to be determined.

[23] It was also contended for the appellant by Mr Knoetze SC, that by finding that the impoverishment of the respondent and the enrichment of the appellant are on equal terms, the court *a quo* erred, since by making that finding, it in effect added the profits that the respondent built into its rental agreement to the amount that the respondent was awarded as enrichment, which it should not have done. Counsel for the appellant maintained that it is so since it is trite in our law, that a party in a claim for enrichment, cannot include profit when calculating its impoverishment.[24]

[24] According to the appellant, the court *a quo* erred by failing to take cognisance of the evidence that was presented on behalf of the appellant regarding the value of the impugned equipment and based on the said value, what the reasonable

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[22] para 30, *supra*.
[23] para 31, *Mangaung*.
[24] *Hitchins v Breslin* 1913 TPD 677 at 685.

market-related rental of the said equipment should have been, regard being had to what was stated in *Lobo Properties v Express Lift Company* 1961 (1) SA 704 (CPD) at 710A-B - 711A; to *wit*:

"I have pointed out above that in the first type of situation our Courts in the absence of circumstances justifying a different inference, favour a construction whereby the lessee is liable for a fair reasonable amount as rental. In assessing that amount the Court seeks to arrive as nearly as possible at the rental value of the property in the open market. Under the condiction which lies in the second type of situation, the basis of assessment is (save for a possible qualification to be mentioned later) exactly the same. ***The would-be lessee is liable to pay the 'owner a reasonable sum for the use and occupation which he enjoyed': and as is apparent inter-alia from the above passage cited from van den Heever, the rental value of the property in the open market would again be the criterion for assessment of this reasonable sum. It is true that the purpose of the condiction is to prevent undue enrichment of the putative lessee at the expense of the owner.*** *And it may well be that for this reason an enquiry under the condiction ought to be permitted to extend into the wider sphere of the question whether in the particular circumstances of the specific case the putative lessee was in truth enriched at all and if so, whether to the full extent of the rental value.* ***In the large generality of cases the putative tenant would be enriched to the extent of the rental value***

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of the property *(vide van den Heever, supra): it would be in somewhat unusual or exceptional circumstances that would not obtain."*[25]

[25] According to the appellant, both Messrs Thomas and Snyman, who were expert witnesses, testified to the effect that the rental of all the equipment in the open market during the material period would, perforce, depend on the true value thereof and not on the value paid therefore by the respondent to Boitsanape, which purchase price was not necessarily also the reasonable price thereof in the open market.

[26] Regard being had to the expert evidence tendered on behalf of the appellant, based on the true value or price of all the equipment, the reasonable rental for same would have been R2 648.41 per month.[26] Based on the foregoing, the appellant's enrichment for the period in question was R180 091.88, being sixty-eight (68) months at R2 648.41, per month.

[27] In the premise, so the argument went, the appellant's enrichment was in fact less than the total amount of the rental payable in terms of the invalid agreement and the Court *a quo* failed to apply the principle that the quantum of the enrichment is the lesser of either the amount by which the appellant had been enriched or the amount by which the respondent had been impoverished.

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[25] Emphasis supplied.

[26] Annexure D, p319, Vol 3.

[28] Mr Knoetze further submitted that by making the impugned finding, the Court a *quo* failed to apply the guidelines set out in *Lobo Properties* at 710A-B and 710E; *inter-alia* referring *to* the following:

28.1 The fact that the parties agreed to a certain rental *vide* the invalid agreement does not necessarily mean that same corresponded with the rental value in the open market.

28.2 On the contrary, the appellant evinced that the rental agreed to was not market-related.

28.3 By accepting the impugned rental as the amount of the quantum pertaining to the enrichment claim without comparing same to the rental the appellant's expert witnesses testified of, the Court a *quo* failed to consider the reasonableness thereof, which it should have done.

[29] The Court *a quo* erred when it lost sight of the fact that the respondent was not entitled to the profit component of the agreed rental. It failed to apply the trite principle in our law of enrichment that the quantum of the enrichment is always the lesser of either the amount by which the appellant had been enriched or the amount by which the respondent had been impoverished, which should not include the profit. Perforce, the said amounts cannot be equal.

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[30] It was further submitted for the appellant that awarding the respondent the total of the rental amount as per the invalid lease agreement, the Court a *quo* went far beyond the parameters of the wide discretion it has in the assessment of the equitable relief to which the respondent is entitled. It is so since the said discretion does not entitle the Court a *quo* to ignore the guidelines enunciated in *Lobo Properties*.

[31] It is against this backdrop that *Mr Knoetze* submitted that the Court *a quo* erred in finding that what accrued to the appellant was the rendering of services in the amount agreed by the invalid lease agreement. That the *Mangaung Metropolitan Municipality v Maluti Plant Hire*[27], is authority for the finding that what accrued to the appellant, was a rendering of the services in the impugned amount, as agreed to in the invalid agreement. That the impoverishment of the respondent and the attendant enrichment of the appellant are on equal terms.

[32] I am constrained to agree with the appellant because it is trite in our law of enrichment, that the contract price is not the benchmark.[28] It should not play any part in determining the plaintiff's impoverishment or the defendant's enrichment because, logically it would include a profit for the contractor.

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[27] (A19/2016) [2017] ZAFSHC 55.

[28] *Hitchins v Breslin* (*supra*) – also followed in *Mangaung* at para 31, *supra*.

[33] It is so in our law that if a person is enriched as a consequence of services performed by another, the measure of enrichment is the value of the service and nothing more. The fact that profits were earned as a consequence of the service is causally irrelevant. These profits cannot be added to the enrichment claim.[29] In the premise, a plaintiff cannot include profit when calculating his impoverishment in a *condictio sine causa* claim.[30]

The respondent's argument

[34] The respondent, for its own part, sought an order that the appeal be dismissed with costs, for lack of merit. *Mr van Zyl SC*, for the respondent, maintained that the Court a *quo* correctly relied on the applicable case law regarding the *onus* in the event of payment made or goods delivered, without cause. He maintained that the Court *a quo* correctly found that the quantum of enrichment is the lesser of either of the amount by which the party benefitting has been enriched or the amount by which the other party has been impoverished.

[35] According to the respondent, what is of great importance in this appeal is a reference in the impugned judgment to *Rubin v Botha 1911 AD 568 at p 58,* to the effect that the civil law recognised *"a very wide judicial discretion in the assessment of equitable relief in these matters".*[31] *Mr Van Zyl* accordingly submitted that, regard being had to the said *dictum*, our courts are clearly empowered with a wide

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[29] *BC v Commissioner of Taxes* 1958 (1) SA 172 (SR) which was followed in *Mangaung*.
[30] *Gofinkel v Miller* 1931 CPD 251-pointing out that profit would be recoverable only if the parties concluded a tacit agreement to this effect.
[31] p425, para 35, Vol 5.

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discretion to determine and assess the most equitable relief in the circumstances of cases such as in *casu* and that the powers of a court of appeal to interfere with the exercise of such discretion, is limited. He also recognised that it is trite law that the exercise of a discretion can only be set aside on appeal if it was not exercised judicially, in other words, if the court below had exercised it on the basis of incorrect facts or incorrect legal principles – *Valor IT v Premier North West Province & Others 2021 (1) SA 42 (SCA) at p 51, par [26].*

[36] It was further submitted on behalf of the respondent that the Court *a quo* correctly found that what accrued to the appellant was the rendering of the services in the amount as agreed to in the invalid agreement and that the impoverishment of the respondent and the enrichment of the appellant are on equal terms, being the amount of R1,731,956.70 (inclusive of VAT). The respondent furthermore submitted that the *dictum* in *Lobo Properties at 710 A – 711 A*, referred to by the Court a *quo*, in the impugned judgment is a correct summary of the approach to be adopted in matters of this nature and therefore there is no legal basis to interfere therewith.

[37] In my view, the approach of the Court *a quo* was "not on all fours" with *Lobo Properties,* as contended for the respondent. Whilst it is true that the purpose of condiction is to prevent undue enrichment of the putative lessee at the expense of the owner, it is also true that the would-be lessee is only liable to pay the "owner a reasonable sum for the use and occupation which he enjoyed". And as is apparent *inter-alia*, from the above passage recited from van den Heever, the rental value

of the property in the open market would again be the criterion for assessing a reasonable sum.

[38] Against this backdrop it was well observed that it may well be that for this reason, an enquiry under the condiction ought to be permitted to extend into the wider sphere of the question whether in the particular circumstances of a specific case the putative lessee was in truth enriched at all, and if so, whether the full extent is the rental value.[32] It is also against this backdrop, that *Lobo Properties* enjoins that in assessing that amount, the Court must seek to arrive as nearly as possible at the rental value of the property in the open market. It follows from the foregoing that the mere fact that the parties agreed to a certain rental price in the invalid agreement does not necessarily mean that such rental corresponded with the rental value in the open market.

[39] The respondent also submitted that the finding of the Court *a quo* that the value of the service rendered accrued to the appellant, was also aligned with the decision in *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others 2014 (4) SA 179 (CC),* where the Constitutional Court ordered the agreement between the service provider and SASSA invalid, but suspended that order on certain conditions.

[32] *Lobo Properties*, (*supra*) at p710A-C.

[40] The approach adopted by the Constitutional Court in that instance, was that a just and equitable order should be made based on the prevailing circumstances. According to the respondent, a similar approach was adopted in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd, 2018 (2) SA 23 (CC) at p 42, par 54.* The approach adopted by the abovementioned Constitutional Court decisions is a confirmation of the principles laid down in *Lobo Properties (supra).* These cases also support the principle that a court is entrusted with a discretion to make an order that is equitable under the circumstances.

[41] The approach of the appellant in relying on the decision in *Hitchins v Breslin* at 685, is legally unsound and wrong, so it was submitted for the respondent. The said decision is materially distinguishable from this matter for the following reasons, according to the respondent.

41.1 First, the matter concerned a building contract, in which the contractor (as the plaintiff) did not fulfil his obligations in terms of the building contract.

41.2 Secondly, that court found that in some contracts the profit forms a very considerable proportion of the contract price and it would have been unjust to give a contractor who has failed to complete his contract, the profit he has speculated upon.

41.3 In *casu*, the respondent submitted, it is common cause that it fulfilled all its obligations in terms of the tainted lease agreement and the appellant had the full and exclusive use and benefit of the goods supplied, for the total period of the envisaged lease and a short period thereafter.

[42] The respondent also contended that the approach adopted by the appellant will have the result that the Court *a quo* should have ignored the purchase price that was paid for the equipment delivered to the appellant in terms of the lease agreement. It was submitted that it is so as the evidence of Booysen to the effect that the monthly instalments were reasonable and within the norm of the industry was common cause. There were no facts before the Court *a quo* to have made a different finding and, although the relevant lease agreement was tainted, it was the agreed price between the parties. There is further no evidence that the price was inflated or the appellant was in any way misled with regard to the monthly instalments that would have been payable in terms of the lease agreement.

[43] It was also submitted on behalf of the respondent that the Court *a quo* correctly used as a yardstick, the agreed contractual price in the tainted agreement in order to calculate the enrichment and impoverishment of the parties. The finding that it was on equal terms, is thus patently correct. According to the respondent, the finding by the Court *a quo* is also substantiated by the evidence of Ms Booysen, as being the norm in the industry how prices on leases of this nature are determined and should therefore be accepted as correct. That finding is also in line with the full court decision in *Mangaung*, so the argument went.

[44] To the extent that Mr Thomas, who testified on behalf of the appellant, conceded that he did not have access to the original price that Baitsanape, the respondent's supplier, paid for the equipment and could not dispute that the margin applied was fair in the circumstances;[33] and to the extent that it is common cause on the evidence of Mr Thomas that the equipment, when returned to the respondent, was outdated and not available in the market during 2018, as the industry has moved on to digital equipment,[34] the Court correctly found that the quantum of enrichment is the lesser of either the amount by which the party benefitting has been enriched or the amount by which the other party has been impoverished. [35]

[45] The impugned decision is in any way aligned with the decisions in *Allpay v SASSA (supra)* or *SITA v Gijima (supra)*. Whilst it is so that the approach adopted by the Constitutional Court in both cases, was that a just and equitable order should be made based on the prevailing circumstances; the significant distinction between the said cases and the case in *casu* is that in the former cases, the apex Court was acting within the purview of section 172 (1) (b) of the Constitution, following upon declarations of constitutional invalidity. In *casu*, the Court *a quo* was granting an order which is just and equitable in respect of a *condictio sine causa* claim.

[46] Whilst I accept that courts of first instance have *"a very wide judicial discretion in the assessment of equitable relief in these matters"* it should also be accepted that

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[33] *, p194, l20 to p195, l24, Vol. 2*

[34] p194, ll 4-11, ibid

[35] p 424, par 34, Vol. 5,

our courts can only do so in accordance with applicable principles of the law. It is so since equity follows the law. Innes CJ, put it better thus in *Kent v Transvaalsche Bank* 1917 AD 295:

"The Court …has again and again had occasion to point out that it does not administer a system of equity as distinct from a system of law... we are always desirous to administer equity; but we can only do so in accordance with those principles of Roman-Dutch law. ***If we cannot do so in accordance with those principles, we cannot do so at all."*** [36]

[47] To the extent that Technofin is not suing in terms of the invalid agreement, but *condictio sine causa*, the "amount as agreed to in the invalid agreement" cannot without more, be the basis for the proposition that the impoverishment of the respondent and the enrichment of the appellant are on equal terms. Both our law and English cases show that a contractor should not be allowed to claim the contract price with all the profit that entails. A contractor should also not be allowed to obtain a *quantum meruit*, where his suit is based entirely on a refusal to pay the amount stipulated in the contract- *Hitchins v Breslin* (*supra*) at 686.

[48] In *Hitchins v Breslin (supra)* which concerned a contractor who agreed to a lump sum for *inter-alia* installing electric lights in certain houses and supplying materials thereof, it was *inter-alia* held that in an action for *quantum meruit* the plaintiff can

[36] Emphasis supplied.

only claim the price of the material supplied (if any) and a charge on the labour done. The underlying reason being that to the extent that a contract price as a rule includes certain profits, a party would not be entitled to any profits on a *quantum meruit* claim.

[49] The respondent's argument is oblivious of the fact that in our law, in a claim for enrichment, the contract price is not the benchmark.[37] It is so since the contract price usually includes profit, the latter which should not play a part in determining the respondent's impoverishment or the appellant's enrichment. Neither the Court *a quo*, nor the respondent in argument seem to have cognised the fact that the impugned award logically included the respondent's profit. A fact which is evident from Ms Booysen's testimony.

[50] The issue is not whether or not the respondent fulfilled all its obligations in terms of the tainted lease agreement; nor is it whether the price was inflated or whether the appellant was in any way misled with regard to the monthly instalments that would have been payable in terms of the lease agreement. It is a irrefutable fact that the so-called reasonable monthly instalments were necessarily derived from the respondent's calculation of its return on investment, which logically included profit.

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[37] para 31, *supra*.

[51] The approach adopted by the Court *a quo* of accepting the price in the lease agreement as a benchmark lock, stock, and barrel or just on the say-so of witnesses thus has the result of inadvertently factoring the respondent's profit through the back door.

[52] Also in paragraphs 30 – 31, the following was held in *Mangaung*:

> *"If a person is enriched as a consequence of services performed by another, the measure of enrichment is the value of the service.* ***The fact that profits were earned as a consequence of the service is causally irrelevant. These profits are not added to the enrichment claim. A plaintiff cannot include a profit when calculating his impoverishment.*** *This is obvious if the plaintiff did not forgo the opportunity of making the profit through dealings with a party.*
>
> *In* ***BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk****, the Appellant Division did not indicate the criterion for calculating the extent of the defendant's enrichment derived from the contractor's defective performance.* ***It can be inferred that the calculation is to precede according to normal enrichment principles and that the benchmark is not the contract price. Since the contract price will include a profit for the contractor, it should not play a part in determining the plaintiff's impoverishment or the defendant's enrichment."***[38]

[38] Emphasis supplied and footnotes omitted.

[53] In paragraph 37 thereof, the following is then emphasised in *Mangaung*, for the avoidance of doubt:

"The question of profits being included in the enrichment calculations is clarified by the authorities quoted above. The measure of enrichment is the value of the service rendered. ***The fact that profits were earned as a consequence, profits are not added to the enrichment claim. A plaintiff cannot include a profit when calculating his impoverishment."***[39]

[54] The following is clear from the foregoing. The Court *a quo's* finding does not seem to be in line with *Mangaung*. The Court *a quo* incorrectly used as a yardstick, the agreed contractual price in the invalid lease agreement in order to calculate the enrichment and concomitant impoverishment of the parties. The finding that same was on equal terms, must be incorrect simply because, the Court *a quo*, in calculating the respondent's impoverishment did not exclude the profit factor.

[55] It follows from the foregoing that the amount awarded by the Court *a quo* could not have been the lesser of either the amount by which the appellant had been enriched or the amount by which the respondent had been impoverished, which should not include the profit. I therefore find that the impoverishment of the respondent and the enrichment of the appellant are not on equal terms.

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[39] Emphasis supplied.

COSTS

[56] The appellant prays this Court to allow the appeal with costs, including cost of the application for leave to appeal and to substitute the following for paragraphs 3,4 and 5 of the order of the Court *a quo*:

> *"3. In respect of claim 2 – payment of the amount of R180 091.88;*
>
> *4. Interest on the amount of R180 091.88, from the date of summons until the date of payment, calculated at mora rate; and*
>
> *5. the defendant [appellant] is ordered to pay the costs of plaintiff [respondent] until 31 May 2018, on a scale of the Regional Court."*

[57] The respondent for its own part contended that should this Court find in favour of the appellant, costs following the event should nevertheless remain on a high court scale. This is because it maintains that there was no abuse of process on its part to have approached the high court instead of the magistrates' court since at all material times hereto, the *bona fide* amount claimed fell within the jurisdiction of the latter and not the former. The foregoing is emboldened by the finding of the Court *a quo*. In my view this submission is correct and the relevant costs order will be made on this basis.

Appellant's offer to settle in terms of rules 34 (1) and (5)

[58] Though initially subject to some confusion on the date of hearing of this appeal, it is now common cause that the appellant on 31 May 2018, delivered an offer, without prejudice, to settle in terms of rule 34 (1) and (5) of the Uniform Rules. In

terms of the said offer, the appellant tendered, without prejudice of rights, to settle all of the respondent's claims against it as set out in the particulars of claim, in full and final settlement by payment of: (1) the amount of R500 000.00, which is inclusive of any interest claimed by the respondent in respect of the said action; and (2) the respondent's taxed costs as on a party and party scale up and until date of service of the offer, together with the costs of recovering the said costs and qualifying costs, as determined by the Taxing Master regarding the expert witnesses of the respondent.

[59] The said offer was disclosed to this Court by the appellant during virtual oral argument of this appeal on 17 January 2022. A copy of same was then transmitted to this Court *vide* the Registrar of this Court under cover of a letter from the appellant's attorney on 19 January 2022.

[60] The foregoing implicates rule 34 (10) and (11). These rules provide as follows, respectively:

> *"(10) No offer or tender in terms of this rule made* *__without prejudice__* *shall be disclosed to the court at any time before judgment has been given. No reference to such an offer or tender shall appear on any file in the office of the registrar containing the papers in the said case.*

(11) The fact that an offer or tender referred to in this rule has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs."[40]

[61] It is clear from the record of appeal and impugned judgment that the said offer was never brought to the notice of the Court *a quo*. The foregoing notwithstanding, the appellant has requested this Court to take cognisance of the said offer as being relevant to the question of costs in this appeal. It has been well said that offers of settlement and tenders to perform made under rule 34, must comply with the requirements thereof.[41] Thus whilst the court has a discretion in a proper case to condone a breach of the provisions of the rule, the provisions of the sub-rule are so imperative, both in form and substance such that a court cannot willy-nilly grant dispensation in advance from its requirements.[42]

[62] The idea underlying rule 34 (10) is that the court should approach a question of damages unaffected by the knowledge of an offer made by the defendant, thus avoiding the possibility of the court being influenced by such knowledge to award something more than the amount paid in or tendered, in order that the judgment should carry costs. But the question whether or not an offer or tender in terms of

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[40] Emphasis supplied.
[41] *Van der Merwe v First Rand Bank* 2012 (1) SA 480 (ECG) at 483D-E.
[42] *Jacobs v Santum* 1974 (3) SA 455 (C) 462G and 464H.

the rule should be disclosed to a court of appeal was left open in *Bruwer v Joubert* 1966 (3) SA 334 (A) at 339C.[43]

[63] This notwithstanding, I am of the opinion that the injunction in the rule applies with equal force on courts of appeal, especially where such offers have not been disclosed to a Court *a quo*, after judgment. In *casu* the disclosure was however prompted by the denial of the respondent's instructing attorneys to having received the notice for the offer on 31 May 2018 in terms of Rule 34 (1) and (5) to settle the claim. That is why in the e-mail correspondence the writer, Thomas Minnie Attorneys, wrote: *"I have perused my file and can confirm that the attached notice was definitely received by our office and that you may inform the Honourable Court accordingly. Writer further confirms that the date stamps also match the Notice which is in our file. Please accept my apology for not remembering that we received the notice. It was simply a case of not having recollection of receiving it."* I therefore find that whilst the disclosure of the offer to settle came to the appeal Court before this judgment, the reasons thereto were for the appeal court to consider an appropriate costs order.

CONCLUSION

[64] It behoves restatement that whilst it is so that our courts are empowered with discretion to determine and assess the most equitable relief in the circumstances

[43] *See also* HJ Erasmus "*Restrictions on disclosure of without prejudice offers*"2012 (January/February) De Rebus, 30 at 32.

of each case; and whilst it is so that the powers of a court of appeal to interfere with the exercise of such a discretion of a lower court, is limited, it is also trite law that the exercise of a discretion can be set aside on appeal, if it was not exercised judicially or if the court below had exercised it on the basis of incorrect facts or incorrect legal principles.[44]

[65] I am of the view that the Court *a quo* patently misconstrued the import of the implicated legal principles in *Mangaung* and therefore inevitably erred in finding that its decision was in line with same. In view of the foregoing, I am inclined to allow the appeal with costs.

[66] Accordingly, the following order is made:

(a) The appeal is upheld with costs, including the costs of the application for leave to appeal;

(b) The following paragraphs are substituted for paragraphs 3, 4, and 5, of the Court *a quo's* order:

"3. In respect of claim 2 – payment of the amount of R180 091.88;

4. Interest on the amount of R180 091.88, from the date of summons until the date of payment, calculated at mora rate; and

5. The defendant is ordered to pay the costs of the plaintiff."

[44] *Valor v Premier, North West Province* 2021 (1) SA 42 (SCA), at para 26.

[redacted]

APS NXUMALO, J
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION
KIMBERLEY

MAMOSEBO, J and LEVER, J concurs in the judgment by Nxumalo, J

Obo Appellant:	Adv. B. Knoetze SC oio Van de Wall Inc. (OCronjé/Elmarie/J08767)
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