THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 505/2016

In the matter between:

NMB BANK LIMITED **APPELLANT**

and

DAVID CAPSOPOULOS **FIRST RESPONDENT**
LINDSAY JOAN DENT CAPSOPOULOS **SECOND RESPONDENT**

Neutral citation: *NMB Bank Ltd v Capsopoulos* (505/2016) [2017] ZASCA 94 (15 June 2017)

Coram: Shongwe ADP, Ponnan and Leach JJA, Molemela and Gorven AJJA

Heard: 9 May 2017

Delivered: 15 June 2017

Summary: Exchange control; illegal payments of US dollars made by a bank by reason of a fraud: recipient aware that payments made due to a false misrepresentation and would not otherwise have been made: recipients resultantly complicit in the fraud: amounts paid to be refunded to the bank.

ORDER

On appeal from: KwaZulu-Natal Local Division, Durban (Thatcher AJ sitting as court of first instance):

1 The appeal succeeds with costs, such costs to include the costs of two counsel where employed.

2 The order of the court a quo is set aside and is replaced with the following:

'The defendants are ordered to pay the plaintiff, jointly and severally, the one paying the other to be absolved:

(a) $6 230 329.01 or the equivalent in South African Rand as at the date of payment.

(b) Interest on each of the sums totalling $6 230 329.01 set out in Annexure 'D' to the plaintiff's Particulars of Claim calculated at the prescribed rate a tempore morae from the date each sum was paid out of the plaintiff's Nostro account to date of payment.

(c) The plaintiff's costs of suit.'

JUDGMENT

Leach JA (Shongwe ADP, Ponnan JA, Molemela and Gorven AJJA concurring)

[1] The appellant, a company which conducts business as a bank in Zimbabwe, instituted action against the respondents claiming payment of a sum in excess of $6.2 million.[1] This sum it alleged had been misappropriated from it in the years 2005 to 2007 under a scheme to which the respondents were parties. The matter came to trial in the KwaZulu-Natal Local Division, Durban which dismissed the appellant's claim, having concluded that although the payments had been illegal under Zimbabwe's exchange control laws the respondents had not been shown to have been complicit in the fraudulent scheme under which the payments had been made to them. The appeal to this court against that order is with leave of the court a quo.

[2] The respondents, a married couple, who at the time of the events giving rise to the appellant's claim were living in Zimbabwe, the country of their birth, had relocated to Durban by the time the action was instituted. Whilst living in Zimbabwe, they had conducted business as purveyors of kitchen equipment and furniture, as well as importers of goods and materials such as timber, glass, carpeting and chemicals which they supplied to hardware stores. The vehicle the respondents used to conduct this business was a private company, Haus (Pty) Ltd (Haus), of which they were the sole shareholders and directors.

[1] This is a reference to United States dollars.

[3] Haus was not the only commercial entity in which the respondents had an interest. In November 2004 they incorporated a limited liability company in Cheyenne, in the State of Wyoming, United States of America. Known as Cardinal Finance LLC (Cardinal), they used this company to receive payments in foreign currency sourced in Zimbabwe which, on their instructions, were used to pay not only Haus's suppliers but also certain of their personal expenses, including a family holiday to Disneyland. Be that as it may, in terms of Cardinal's articles of association, two Swiss companies, Baobab Nominees Ltd and Baobab Trustees Ltd, both of which appeared to have traded under the name of IAP Investment & Trust Services AG of Zürich, Switzerland, were appointed managers of Cardinal.

[4] Subsequently, in February 2006, the respondents gave a written mandate to another Baobab company, Baobab Trust & Corporate Services Ltd, a company registered in Charlestown, Nevis, West Indies (that was also administered by IAP Investment &Trust Services AG) to establish a trust. The standard form mandate given by the respondents in that regard reflects, in manuscript, the name of the trust as being 'Danam Trust/Cardinal Finance Ltd'. Despite this anomaly, one can accept that the trust was created simply under the name of Danam Trust (the Trust), the evidence of the first respondent being that the word Danam was derived from the names of the respondent's two children, Daniel and Amy.

[5] It is impossible from the evidence on record to unravel the web between the various Baobab companies and IAP Investment & Trust Services AG. But nothing turns on that for present purposes as the matter was conducted on the basis that, individually or collectively, they constituted an entity referred to as 'Baobab' which administered Cardinal's day to day affairs. What is of importance, however, is that from 2005 to 2007, the period relevant to the

appellant’s claim, the beneficiaries of the Trust were the respondents and their children and that the Trust was the sole holder of the shares in Cardinal. As will appear more fully below, the respondents used Cardinal in order to receive payments of US dollars and to pay Haus’s foreign suppliers. The respondents therefore accept that all amounts paid to Cardinal in fact accrued to their personal benefit.

[6] Turning to the dispute, the evidence establishes that during the period 2000 to 2009, the economy of Zimbabwe was in turmoil. It was a time of hyper-inflation when the value of the Zimbabwean dollar (Zim dollar) was in free-fall against international currencies. Although the official exchange rate fluctuated around 250 Zim dollars to one US dollar this was wholly unrealistic and a single US dollar in fact became worth billions or even trillions of Zim dollars. Effectively the Zim dollar became worthless as a monetary unit and, consequently, it became virtually impossible to buy US dollars in Zimbabwe, even for the plaintiff, a registered bank and an authorised currency dealer.

[7] The undisputed evidence of Dr N Kereke, who during the period 2005 to 2007 was employed by the Reserve Bank of Zimbabwe as an adviser to its Governor, was that from 2003 the Central Bank of the country had in its coffers about $301 million whilst the country’s national payment requirements were some $3.5 billion. Putting it bluntly, Zimbabwe was bankrupt. In this situation, the Zimbabwean fiscal authorities found it necessary to exercise tight control over foreign currency. Through the country’s Exchange Control Act and regulations promulgated thereunder, various extraordinary measures were introduced in an attempt to bolster foreign reserves.

[8] First, specific requirements were prescribed for any person who wished to access foreign currency to pay a foreign debt. For example, importers like Haus

who wished to pay a supplier in foreign currency would have to go to their bankers, submit all the requisite documents including invoices or the like, before the bank could apply to the Reserve Bank on those papers for permission to effect the requested payment. If approved, the payment of the foreign currency would be made not to the person who had applied for it, but by their bank directly to the foreign supplier.

[9] Secondly, on 12 January 2004 the Reserve Bank introduced a controlled auction system of foreign currency. This was a mechanism to rationalise what little foreign currency there was available by attempting to place all the capital resources that came into the country onto a platform where the government, through the Central Bank, could allocate what was available for use to best meet national priorities. The auction system worked as follows. Importers or other persons seeking foreign currency would apply through authorised dealers such as the appellant, declaring the purpose for which the foreign currency was needed and the price they were prepared to pay for the foreign currency they needed. Acting on their client's behalf, the authorised dealers would then place a bid and the necessary documentation before the Central Bank for consideration. Auctions were held twice a week. The Central Bank would go through all the bids that had been placed in order to determine those which were of high priority and those which should be regarded as being superfluous given the pressures of the time. In prioritising the various bids, the Central Bank placed great emphasis on the nature of imports to which the bids related. Thus, for example, fuel and other imports likely to promote production in the agricultural and mining sectors, all of which were likely to prop up the prospects of an economic recovery, were afforded high priority. Imported white goods like the household and electronic appliances imported by Haus, were ranked much lower on the scale of importance. This reflected the desire of government to support local industry and not to import goods fashioned

elsewhere. Once all of this was taken into account, together with the amount that was offered and the quantity of foreign funds available, a bid would either be approved or rejected.

[10] As a further measure, the Reserve Bank set up a system of strict control over receipts of foreign currency. On receipt by a bank of a payment in foreign currency received by an exporter in payment of an exported commodity, the bank was required to immediately sell 40% of the sum to the Reserve Bank at the official exchange rate, with the proceeds being paid in Zim dollars into the exporter's local bank account. The remaining balance of 60% of the foreign payment was retained by the bank in a so-called 'FCA account' for a limited time for the exporter to use, solely to meet its own import requirements during that period. The intention of this was to assist exporters to import raw materials to use in their own production processes. On 20 May 2005, the Divisional Chief of the Reserve Bank's exchange control department gave notice to the country's banks that the foreign currency retention period, which until then had been 30 days, was reduced with immediate effect to 21 days.

[11] This did not mean that exporters had a free hand to deal with these retained foreign funds. They could only be used to purchase goods and materials needed for their own production and, even then, subject to exchange control approval being obtained and their suppliers being paid directly by their bank. This required an explicit declaration by the exporter of the purpose for which the requested payments were to be made, and approval would only be forthcoming if the funds were to be used to sustain production to the benefit of the economy. In the event of exporters not using their retention funds during the short retention period, they had to be liquidated by the banks holding them on the Reserve Bank's auction. In the case of the appellant bank, it had a Nostro account with American Express (Amex) in New York in which it retained its

clients' US dollars either until they were used by its clients with Reserve Bank approval or until they had to be liquidated on the auction.

[12] The auction process was applied not only to funds held by exporters in retention accounts, but also to so-called 'free funds' being other foreign receipts such as payments for labour rendered abroad. These funds, too, could not just be sold by their holders to persons of their choice but had to be liquidated through an authorised dealer by way of the auction process. All of this shows just how important and valuable foreign currency had become, and how closely regulated it was by the fiscus.

[13] Of course, all of this caused great problems for importers in the position of the respondents or, more strictly, their company, Haus. The Zim dollar became so devoid of value that foreign suppliers refused to accept it in payment of their goods and insisted upon being paid both in another currency and in advance before dispatching their wares to an importer in Zimbabwe. This put the respondents under pressure to obtain US dollars, the common denomination of international trade, both to finance the survival of their business and to maintain their lifestyle. But it was almost impossible for the respondents to source foreign funds from the Reserve Bank. As they required foreign currency to pay for the importation of goods that were afforded such low priority, most of their applications for foreign currency submitted through their bank, Stanbic, were refused.

[14] In order to obtain the necessary funds, the respondents consequently turned to the parallel or black market – as did many others in their position. Of the two of them, only the first respondent testified in the court a quo. He described how, by way of a willing seller - willing buyer process, US dollars changed hands for Zimbabwe dollars between persons who were able to agree

on a rate. Thus, for example, a foreign-based church that wished to make a payment in United States dollars to its congregants in Zimbabwe agreed to allow the respondents to make payment in Zim dollars to the persons they wished to benefit in Zimbabwe, and then paid the agreed US dollars equivalent to Cardinal.

[15] In 2005, the first respondent had a conversation with Mr Edward Tome, an acquaintance of some ten years but, according to the first respondent, certainly not a close friend. He testified that Mr Tome informed him that he had surplus United States dollars and asked if he would be interested in purchasing currency from him. The first respondent was aware of the system by which 40% of payments for exports had to be surrendered to the Reserve Bank with the exporter's bank retaining the balance, and said that he understood that this would be the source of the funds Mr Tome was offering to sell to him. According to him, Mr Tome did not explain the details of how he would go about freeing up his surplus United States dollars in exchange for Zim dollars. All he was told was that he should furnish Mr Tome with the orders that had been placed with Haus by clients in Zimbabwe in order to obtain sufficient US dollars to purchase those items abroad. Mr Tome would then inform him of the rate of exchange he would require and, if he agreed to it, he would pay the required sum in Zimbabwe dollars to whomsoever Mr Tome identified.

[16] The first respondent agreed to this plan with alacrity. Pursuant thereto he provided the required order forms from time to time and, in due course, was told by Mr Tome whom he should pay and how much in Zim dollars. The majority of these payments were deposited into what purported to be a Reserve Bank account at the appellant bank, although some were made to a company of Mr Tome's known as Fourfort Enterprises and a few to other individuals. The appellant would then pay the desired funds in US dollars to Cardinal and,

pursuant to this, proof of such payment would be provided by Mr Tome to the respondents by way of what is known as a swift form. This the respondents would send on to Baobab, the administrators of Cardinal, for administration purposes in order for them to verify that the funds had been received by Cardinal in its Swiss bank account. When that had been done, Baobab would be instructed to make payments on behalf of Cardinal to Haus's suppliers.

[17] The respondents' case initially, was that they were doing no more than buying Mr Tome's surplus funds. During cross-examination of the first respondent, this morphed into them buying foreign currency from whoever Mr Tome identified, although the latter was responsible for arranging with the appellant to have the US dollars that the respondents needed and paid for in Zim dollars transferred to Cardinal's Swiss bank account. The first respondent, however, denied all knowledge of the protocols of the bank and precisely how this was being done.

[18] The keystone of the respondents' case was that they did not think it had been unlawful for Mr Tome to sell them his, or anyone else's, surplus funds. The first respondent, who gave this evidence, is an obviously astute businessman. In 2007, he closed the Cardinal account with AKB in Zürich and switched the funds that had been held in that account to another Swiss bank, Bank Safra, in an account in the name of Execulink 55; and thereafter from there to another Safra Bank account held in the name of Triumph SA, that being a company registered in Panama of whom the respondents and their children are the beneficial owners. After that Cardinal was dissolved in September 2007. In 2008 an account was opened at Bank Safra in the name of Trade Plus Holdings Inc, another company incorporated in Panama of which the beneficial owners are the respondents and their children. And for a while the respondents had a banking account with HSBC in Jersey to which certain payments were made by

Cardinal. All of this shows that the first respondent is a man of the world having wide commercial experience and interests. He is certainly not a naïve individual unversed in the operation of foreign exchange and international finance.

[19] The undisputed evidence of Dr Kereke was that the directives issued by the Central Bank relating to foreign exchange were widely published on multiple platforms, including both television, and radio and in the popular press. Authorised dealers, such as the banks in Zimbabwe, on receiving these directives were obliged to circulate them to their individual and corporate clients. All of this evidence was unchallenged by the respondents. The daily business of the respondents involved the importation of goods and the concomitant necessity to deal with foreign exchange. In the light of the financial plight of the country, they must have been acutely aware of the restrictions relating to the use of foreign currency.

[20] Moreover, if the respondents had thought that the whole process was legal they would hardly have embarked on the secret method of communicating with Cardinal about the funds that were paid out. The instructions they sent to Switzerland were sent in the form of a code in which payments were referred to as 'shipments', invoices were referred to as 'pictures', and US dollars were referred to as 'roses' or 'flowers'. The first respondent explained that this was done as 'US dollars was a very sensitive subject or topic so it was basically a way we communicated with the administrators regarding the US dollars'. Sensitive though the issue of US dollars may have been, the necessity to encode their instructions to the administrators of Cardinal speaks of only one thing – that the respondents knew the payments of the money they had allegedly 'bought' from Mr Tome and others, had been unlawful.

[21] The inevitable conclusion that has to be drawn from all of this is that the respondents must have been aware that the 60% surplus funds which an exporter was paid but which were held by its bank, had to be used by that exporter for the furtherance of its business and could not be sold to other persons for their use. In the light of this, the first respondent's explanation that he thought that Mr Tome was legally free to deal with his surplus just cannot be accepted.

[22] It was argued on behalf of the respondents that even if they appreciated that their purchase of US dollars from Mr Tome was unlawful, this does not mean that they also knew either that the appellant was being defrauded or that it was suffering a loss in the process. The precise methodology of how the various payments in US dollars came to be made to Cardinal does not need to be analysed in any undue detail for present purposes. It suffices for purposes of this judgement to record that central to the internal fraud perpetrated upon the appellant was a forged Reserve Bank letter purporting to authorise the transfer of US dollars in repayment of a fictitious loan made to the Reserve Bank. Use was also made of the order forms provided by the respondents which appear to have been falsified so as to reflect that the goods therein reflected had been exported rather than imported. These fictitious export transactions were supported by various other forged documents, including deposit confirmations, dealer tickets and Swift instructions. It was on the strength of this false documentation that the appellant made the payments to Cardinal. This it did by way of transfers from its Nostra account held in New York with American express to the credit of Cardinal's account with AKB Bank. Arising out of 85 different transactions conducted in this way, the appellant came to transfer a total in excess of six million US dollars to Cardinal's account in Switzerland.

[23] Of course, to achieve all of this needed the complicity of a number of bank officials to either actively prepare false information or to turn a blind eye on improper regulatory procedures. The principal offender appears to have been a Mr Mandara who was Mr Tome's contact at the appellant. Subsequent investigations revealed that at least another 16 bank officials were in on the scheme. In any event, both Mr Mandara and Mr Tome took to their heels when the wrongdoing was uncovered and their whereabouts were unknown at the time the present case came to trial.

[24] The first respondent, when he testified, attempted to make out that he knew nothing of any illegalities that occurred at the bank. He alleged that he had not even heard of Mr Mandara, let alone met him or any other bank official that acted in the furtherance of the fraud. That may well be so, but counsel for the appellant argued that the evidence as a whole showed that the respondents knew that Mr Tome could not have lawfully obtained foreign exchange to be transferred to Cardinal and that they must therefore have known that the appellant's 'internal processes were being corrupted to affect the transfers'.[2] In the court a quo a similar contention was rejected, with the court finding that although there were unsatisfactory elements about the first respondent's evidence, these could be 'attributed to his hesitancy about confessing that he had embarked upon the foreign exchange laws of Zimbabwe by dealing in foreign exchange with someone who was not an authorised foreign exchange dealer'.

[25] In my view, the trial court was being unduly charitable in this regard. The first respondent was on many aspects an unsatisfactory witness who became evasive whenever the shoe began to pinch. I accept that he may not have known all the precise details of the bank's processes or the actions taken within the

[2] I quote the heads of argument.

walls of the appellant’s bank, but he must have known that the US dollars were being paid by the appellant to Cardinal solely as a result of improper procedures.

[26] In regard to this latter issue, it is highly improbable that the respondents, experienced business people, would have entrusted Mr Tome who, on their own evidence, was just an acquaintance and not a friend, with the huge amounts of money that they did without having an idea as to how he meant to go about using them to procure foreign currency on their behalf. For the reasons already given, they could not have believed that he was merely selling his surplus or that he was lawfully entitled to do so. Moreover, the first respondent admitted that he knew that in order for payments to a foreign supplier to be made in US dollars by a bank in Zimbabwe, approval from the Reserve Bank was required; he also knew that the Reserve Bank had refused to give its approval to most of Haus’s applications for US dollars to pay its suppliers; and he knew that the direct payment by a bank of foreign currency to Cardinal would be irregular and in contravention on the foreign exchange regulations. In the light of all of this, he must have known that there had to have been a misrepresentation regarding the nature of the payments that were being requested or a corruption of procedures required to lawfully obtain foreign currency, for Mr Tome to obtain what purported to be Reserve Bank approval to pay Haus’s suppliers. Had the appellant or the Reserve Bank not been misinformed, any application for US dollars would have been refused as in the past.

[27] As I have already indicated, crucial to the success of the fraudulent scheme perpetrated upon the appellant was the fictitious loan by Cardinal to the Reserve Bank. This ‘loan’ was reflected on fraudulently created documentation and led the appellant to use its scarce forex reserves to repay it in instalments on the strength that the Reserve Bank had authorised such payments. At the outset,

the first respondent stated that he personally had no knowledge that part of the scheme had involved this fictitious loan. He remained steadfast in this, despite it having been pointed out to him that it was recorded on the swift return MT 299 forms, forwarded to him when each payment was made, that the funds were being transferred 'for further credit to Cardinal Finance LLC A/C 1670169034 Ref RBZ Loan to 516'. When this was put to him, he became extremely evasive about whether he had ever seen the documents in question although he clearly must have done – they were the very same documents he had sent on to Cardinal in order to verify that the amounts paid had been received in Switzerland. Finally he was driven to concede that he may well have seen the documents, but stated that he had not seen any reference to the loan on them. As 83 of the 85 swift advices had the loan reference emblazoned on them, and were received by him over an extended period of time, this cannot be believed.

[28] The court a quo held that even if the first respondent had seen the references to a loan, this did not point towards him knowing that the US dollars he was purchasing were in effect stolen from the bank. I disagree. The reference to the loan which he knew did not exist pointed squarely towards skulduggery within the appellant bank and that the representations on which the bank had relied were false. The first respondent knew that the appellant would not have paid had it known the truth and that the reason given for the payment as reflected on the swift form, was false. Even if he did not know precisely how this had come about, if he had seen the reference to the repayment of the loan, as he must have done, he would have known that the payments were being made on the strength of a false pretence. He was therefore complicit in the fraud upon the appellant.

[29] This is all the more so when one takes into account the fact that a number of the Zim dollar payments made by the first respondent on behalf of Haus went

neither to the appellant nor Mr Tome's company, Fourthfort, but to officials in the appellant bank or third parties on their behalf . Certain of these amounts were not insubstantial: in one instance sufficient to purchase a house; in another to buy a motor vehicle. The inference is inevitable that these payments were made to grease the palms of the bank officials concerned in order to facilitate the fraud upon the bank. The first respondent attempted to avoid this by stating that all he did was pay the persons Mr Tome told him to pay, and that he did not know that the payments were being made to or on behalf of any employees of the appellant. In the overall scheme of things, this is highly improbable. It is most unlikely that the first respondent would not have inquired why such substantial payments were to be made to persons who at first blush had nothing to do with Mr Tome or his business. These obviously suspicious payments and the first respondent's unsatisfactory explanation as to why he made them point squarely to them being designed to ensure the operation of a clearly unlawful scheme to have the appellant part with its precious US dollars.

[30] It is unnecessary to analyse the evidence, especially that of the first respondent, in any greater detail. In all the circumstances I have mentioned, the respondents must have known that the payments that were made had to have been a product of a scheme that was not above board and that the appellant must have been persuaded to make them on the basis of false information. The payments made to Cardinal were not only unlawful in that they offended Zimbabwe's forex laws, but they were made pursuant to a fraud upon the appellant to which the respondents were complicit, even if they were not aware of the finer details of how the appellant's processes had been corrupted.

[31] In these circumstances, I can see no reason why the respondents should not repay the US dollars which the appellant was fraudulently induced to pay to Cardinal and in respect of which they personally derived the benefit. In *Nissan*

South Africa (Pty) Ltd v Marnitz NO & others (Stand 186 Aeroport (Pty) Ltd Intervening) 2005 (1) SA 441 (SCA) the appellant, Nissan, was a customer of a bank that due to a clerical error had incorrectly paid a sum in excess of R12 million to a third party, Maple Freight CC (Maple). Maple realised that the sum had been paid to it by mistake but, instead of returning it, transferred it into a call account in order to earn interest for itself until it received a demand for repayment. However, by the time the mistake was discovered, Maple had used a not insubstantial portion of funds. Maple also went into liquidation before it repaid Nissan. At the time of its liquidation, Maple's account was in credit in an amount of approximately R10.5 million of which some R9.75 million could be traced to the funds paid in error. Maple's liquidators contended that the entire R10.5 million formed part of the insolvent estate and was subject to a *concursus creditorum* for distribution amongst creditors. Nissan, on the other hand, sought an order declaring that the sum of R9.75 million did not fall into the insolvent estate and should be paid to it.

[32] In considering these opposing contentions, this Court relied upon its earlier decision in *First National Bank of Southern Africa Ltd v Perry NO & others* 2001 (3) SA 960 (SCA). In that case it was held that a thief who deposited a stolen amount into a banking account was not entitled to claim the stolen amount from that bank; and further that, despite the rule that once money is mixed with other money without an owner's consent, ownership passes by operation of law, the stolen funds could be recovered from the bank by way of an enrichment action brought by the person from whom they had been stolen. In the light of this, Streicher JA in *Nissan* said the following:[3]

'Payment is a bilateral juristic act requiring the meeting of two minds . . . 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

[3] *Nissan* paras 24-25.

A to B. Should B in these circumstances appropriate the money such appropriation would constitute theft . . . 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.

…

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.'

[33] In the light of the principles laid down in these cases, the mere fact that the payments to Cardinal were unlawful in that they were in breach of the statutory provisions of foreign exchange, may in itself have been sufficient for the appellant's claim to succeed. But that is not necessary to decide as not only did the respondents know that the payments were illegal, as the first respondent eventually conceded in the court a quo, but they were transferred as part of a fraudulent scheme designed to mislead and to which they were complicit. Even if the respondents did not know the precise details of how the fraud was being committed, they must have known that the Reserve Bank would never have authorised the payments if it had known the truth (in fact the fiscus was not defrauded – the false documents reflecting Reserve Bank approval which had not been obtained were used to induce the appellant to pay Cardinal) and that the funds were therefore being paid as part of a scheme designed to circumvent the country's foreign exchange provisions. No less importantly, they must also have known that the appellant was only paying the amounts it did on the strength of false information and that the appellant was therefore the victim of a

fraud to which they were party. In these circumstances, the respondents had no right to the US dollars that were paid by the appellant into Cardinal's account and were not entitled to appropriate those funds for their own purposes. The appellant is entitled to be repaid those amounts, and the court a quo erred in reaching the contrary conclusion.

[34] It was suggested both in earlier proceedings and in the court a quo that as the respondents had paid the then current price in Zim dollars for the US dollars transferred to Cardinal, the appellant could not be said to have suffered loss. The answer to this is, of course, that the Zim dollars became worthless almost overnight. In proceedings brought by the appellant in Switzerland to attach and freeze the credit balances of certain bank accounts of the respondents as security for its claim in the present proceedings, the Supreme Court of the Canton of Zürich, in its judgment of 25 May 2012 granting the appellant such relief, said:

'The loss on which the alleged attachment claim is based therefore consists . . . in the alleged unlawful debiting of the attaching creditor's USD account. From this perspective, the attaching creditor's representation is both conclusive and sufficiently substantiated.

One way or another, on the basis of the undisputed facts it is to be assumed that over a period of two years USD amounts totalling over 6 million (USD 6,230,329) were credited to Cardinal by the attaching creditor, and that these amounts could not have been purchased in Zimbabwe legally. In light of the extreme inflation in Zimbabwe, which reached unimaginable proportions during the relevant period in spite of the devaluation, the attaching creditor's standpoint that a loss arose for the attaching creditor in the sum of the USD which were withdrawn from its nostro account is credible. On any objective (summary) view, the attaching creditor did not receive anything like economically equivalent counter-performance but only a currency which already at that time was economically meaningless, and which the attaching creditor as a bank licensed to operate in Zimbabwe was not able to convert back into USD. The loss can therefore neither be removed or reduced by the ZWD which were paid by Haus.'[4]

[4] The references to USD and ZWD are of course to US dollars and Zim dollars respectively.

[35] This reasoning is unassailable and, in this Court, the respondents accepted both its correctness and that their payment of Zim dollars to the appellant is no bar to the relief being sought. They also accepted that the amount claimed, namely USD6 230 329.01 million is the total that the appellant transferred to Cardinal pursuant to the fraudulent scheme. In the light of this, counsel for the respondents accepted, quite correctly, that if the appeal succeeded in respect of the merits of the claim, which for the reasons given it must, the appellant would be entitled to judgment against the respondents in that sum.

[36] Attached to the plaintiff's particulars of claim as annexure D is a schedule in which the various payments making up the sum of $6 230 329.01 are reflected, detailing the amount of each payment and the date it was made. The appellant claimed interest at the prescribed rate *a tempore morae* on those individual amounts calculated from the date each had been paid out of the appellant's Nostro account to date of repayment in full. No objection was made to such an order which seems to me to be appropriate in the circumstances. It will be set out in the order below.

[37] The appellant was represented by two counsel, at least for part of the appeal proceedings. The employment of two counsel was a wise and reasonable precaution given the nature and importance of this matter and the sum at stake. I have no difficulty in allowing the cost of two counsel where so employed.

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

1 The appeal succeeds with costs, such costs to include the costs of two counsel where employed.

2 The order of the court a quo is set aside and is replaced with the following:

‘The defendants are ordered to pay the plaintiff, jointly and severally, the one paying the other to be absolved:

(a) $6 230 329.01 or the equivalent in South African Rand as at the date of payment.

(b) Interest on each of the sums totalling $6 230 329.01 set out in Annexure ‘D’ to the plaintiff’s Particulars of Claim calculated at the prescribed rate a tempore morae from the date each sum was paid out of the plaintiff’s Nostro account to date of payment.

(c) The plaintiff’s costs of suit.’

LE Leach

Judge of Appeal

Appearances:

For the Appellant:	M J Fitzgerald SC (with him K Spottiswoode)
Instructed by:	Werksmans, Cape Town
	Webbers, Bloemfontein
For the Respondent:	A Annandale SC
Instructed by:	Kenny Verhage & Associates, Umhlanga
	Claude Reid Inc, Bloemfontein