



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: A19/2016

In the matter between:

**MANGAUNG METROPOLITAN
MUNICIPALITY**

Appellant/ Plaintiff

and

MALUTI PLANT HIRE

Respondent/ Defendant

CORAM: MOLEMELA JP, *et* HANCKE J, *et* TSATSI AJ

JUDGMENT BY: TSATSI, AJ

HEARD ON: 14 NOVEMBER 2016

DELIVERED ON: 9 FEBRUARY 2017

INTRODUCTION

[1] This was an appeal against the whole of the judgment and order of Naidoo J, delivered on 26 May 2015. Leave to appeal was granted by the Court a quo on 18 November 2015.

[2] The respondent (plaintiff in the Court a quo) instituted an action against the appellant (defendant in the Court a quo) for payment of the amount of R 2 760 854, 76 for services rendered by the respondent to the appellant. For the sake of convenience the parties will be addressed as appellant and respondent.

[3] The Court a quo granted the following order:

“In the circumstances I am satisfied that plaintiff has established its claim in respect of the alternative and I grant the following order:

5. Payment in the amount of R2 760 854, 76. Interest on the aforesaid amount a tempore morae and costs of suit”.

[4] The notice of appeal reflects *inter alia* the following grounds of appeal:

“1. The learned Judge erred in not dismissing the respondent’s claim, where the respondent had correctly conceded and abandoned the unsustainable contractual claim against an organ of state. Once the respondent abandoned the contractual claim as it was inconsistent with the Construction, Municipal Finance Management Act and supply chain laws and regulations of the appellant, it was not competent of the court to determine the alternative claim of unjust enrichment.

2. *The learned Judge erred in finding that the evidence led by the respondent was sufficient to discharge the onus to succeed on a claim based on unjustified enrichment.*
3. *The Learned Judge erred in finding that the court was not required to engage in the exercise of determining by what amount the Plaintiff was impoverished and by what amount the Defendant was enriched”*

FACTS

[5] It is common cause that:

- 5.1 The respondent instituted an action against the appellant as follows:

Claim one

5.1.1 Payment of R1 257 294, 60 based on the oral agreement entered into between the respondent and the appellant. The appellant was duly represented by Mr Jacob Lourens and the respondent was duly represented by Mr. Drake Kwashie Ahadji.

5.1.2 The oral agreement was for the hire of equipment TLB's, bulldozers, backloaders and landfill compactors.

Claim two

5.2.1 Payment of the amount of R1 257 294, 60 and R1 814 027, 02 on a written service delivery agreement

which was attached to the particulars of claim as annexure “B”.

5.2.2 The written agreement was for the hire of equipment comprising TLB’s, Bulldozers and compactors.

ALTERNATIVE TO CLAIM ONE AND TWO ABOVE

[6] It being found that no valid agreement and/or agreements existed between plaintiff and defendant, plaintiff asked for the payment of the amounts of R1 257 294,60 and R1 814 027,02 based on common law claim of unjustified enrichment.” At the commencement of the proceedings, the latter amount was amended to R1 510 560, 60.

ISSUES

[7] The crux of the matter is whether or not the respondent had established that he was entitled to payment, on the evidence led, of the amount of R 2 760 854,76 against the appellant based on unjustified enrichment. The other issue was whether or not the respondent satisfied its claim despite the fact that the respondent actually abandoned the contract whose legality and validity was a point of dispute.

THE APPELLANT EVIDENCE

- [8] The appellant did not lead evidence in the Court a quo. At the end of the trial the defendant's attorney excused himself. The matter was unopposed.

THE RESPONDENT'S EVIDENCE

- [9] The version of the respondent was narrated by Mr. Drake Kwashie Ahadji, who is the sole member of the respondent. The respondent is Maluti Plant hire CC.
- [10] Mr Ahadji testified as follows: He concluded an oral agreement with Jacob Lawrence, a manager of Solid Waste Department of the appellant ('the manager') around April 2005. It was agreed that the respondent will supply earthmoving machines to Solid Waste department to be used on the landfill site. It was also agreed that the machines would be supplied with operators and timesheets. The representatives of both the appellant and respondent would sign the timesheets every day. The respondent would have to collect the timesheets everyday based on the signatures of both parties. Subsequent to that the respondent will calculate the total hours worked for the month and then issue an invoice to the appellant. The respondent will submit a quotation and then the appellant would issue a written order.
- [11] It was Mr Ahadji's, testimony that the appellant told him ("the respondent") that there was a backlog at the supply chain and the respondent was asked to carry on working due to the fact that the

respondent offered essential service. The respondent was paid for the months of April, May and June 2011. The respondent continued working during July, August and September 2011 but there were no orders coming through. This resulted from the respondent stopping to work on or around 20 September 2011 because it did not receive any orders from the appellant. At this stage the amount outstanding was of work done from July to September 2011 amounting to R1 257 294, 60.

- [12] At the beginning of October 2011, Mr Lawrence the manager for the appellant asked for the quotations from the respondent which he submitted. Around September 2011 a meeting was held between the appellant's Supply Chain Department and the Mechanical Workshop, where Mr Ahadji furnished the manager with all outstanding invoices of which no payment was made. Another meeting was held at the end of September 2011 where Mr Ahadji represented the respondent and the appellant was represented by Mr Leco Mahoko from Solid Waste Department and Mr Willem Pretorius from Mechanical workshop. The discussion at this meeting was that the landfill was piling up and there was fire when the respondent stopped the machine. In addition it was the respondent's testimony that part of the discussion was that the appellant did not have any equipment to stop the fire and clean the place therefore the respondent will have to assist the appellant in that regard. When Mr Ahadji enquired about the R250 000.00 that he was owed he was told that the money will be paid.

[13] He further testified that the appellant asked him to issue quotations for his machines which he did and the appellant provided a written order. The said agreement was attached to the pleadings as annexure "B". The said agreement was signed on 4 October 2016. The respondent was issued with new orders from October 2011 and the respondent was paid for until January 2012. The respondent stopped working in May 2012 because he was not paid the amount of R1 814 027, 02 and the invoices were attached as annexure "C". There was an amount of R303 000, 00 which was not for renting the machinery but for repair work. This amount was to be deducted from the amount claimed. Further testimony was that the ground engaging tools wore out and needed to be replaced. Mr Ahadji testified that the charges reflected in the invoices issued by the respondent were based on the guidelines set out in the Contractors Plant Hire Association (CPHA). The CPHA sets out the average recommended rates. Ground engaging tools are excluded from the prescribed rates of CPHA. As a result the respondent charged more than what was recommended in the CPHA book. This was accepted by the appellant.

[14] Mr Ahadji testified that between 2005 and 2008 the appellant issued tender processes three times but these processes were not finalised. As a result the respondent rendered services to the appellant without tender.

[15] He confirmed his testimony under cross examination. He further testified that the time he issued invoices that formed part of his claim there were no written orders issued by the appellant in respect of the work that was reflected in the invoice. He indicated

that the reason why the respondent continued rendering service despite the fact that there were no orders issued by the appellant was because he was asked to work due to the fact that the appellant had a backlog. Had he known that the respondent could not have been paid for the work done, he would have taken the respondent's machines to other contractors queuing up for the respondent's machines.

- [16] The timesheets were not signed daily as agreed but weekly as the appellant's representatives had a lot of things to do. However he stated that he was never present when the timesheets were signed by either the respondent's operator or by a representative of the appellant. The respondent's contention was that it rendered services to the appellant which entitled it for payment as claimed.

SUBMISSIONS

- [17] Adv. Moerane SC, ("Adv Moerane") submitted on behalf of the appellant that the question of legality and validity of the contract was not dealt with properly. He submitted that the respondent abandoned the contract. According to Adv Moerane this was fatal to the respondent's case. He further submitted that the court a quo should have dealt with the validity and legality of the contract. It was submitted on behalf of the appellant that the respondent's claim should not have been entertained on the further ground that it was based on an unlawful transaction which was in violation of the constitution, the Municipal Finance Management Act and the Supply Chain Management laws and

regulations of the appellant. He argued that the contract should have been set aside. He submitted that the court a quo enforced the unenforceable contract. Adv Moerane relied on the case of **Department of Transport and Others v Tasima (Pty) Limited**¹

[18] It was submitted on behalf of the appellant that the Court *a quo* did not deal with the principles of unjust enrichment. The argument was also that the court a quo did not do the exercise of unjust enrichment to ascertain the respondent's impoverishment and the appellants' enrichment. He submitted that impoverishment meant diminishing of assets whereas enrichment meant increasing of assets. The Court a quo should have established the facts of what was done to impoverish the respondent and also what was done to enrich the appellant. He argued that the fact that the Court a quo included profit in the calculation of the respondent's claim is demonstration that the principles of unjust enrichment were not taken into consideration. Profit should not have been included in the calculations of the respondent's claim.

[19] Adv. Moerane submitted that the onus was on the respondent to prove enrichment. He referred us to Jacques Du Plessis: "The South African Law of Unjustified Enrichment", page 40 paragraph 2.2.7 which states that: "*The burden of proof of enrichment, as with other elements of enrichment liability, rests on the plaintiff.* "..... the Courts have held that the burden of proving the quantum is also on the plaintiff. However the burden of proof regarding the defence of loss of enrichment rests on the defendant". In addition he submitted that the

¹ *Department of Transport and Others v Tasima (Pty) Limited* (CCT5/16) [2016] ZACC 39.

respondent was supposed to have proved that the enrichment was unjustified at his expense. He argued that none of the requirements were proved. His other submission was that even though the respondent testified that contractors were in a queue waiting to use his machines, none of those contractors were ever identified. He submitted that the impoverishment should be patrimonial in nature.

[20] Adv. Moerane submitted that the onus was on the respondent to prove enrichment. He referred us to Jacques Du Plessis: “The South African Law of Unjustified Enrichment”, page 40 paragraph 2.2.7 which states that: *“The burden of proof of enrichment, as with other elements of enrichment liability, rests on the plaintiff.”* the Courts have held that the burden of proving the quantum is also on the plaintiff. However the burden of proof regarding the defence of loss of enrichment rests on the defendant”. In addition he submitted that the respondent was supposed to have proved that the enrichment was unjustified at his expense. He argued that none of the requirements were proved. His other submission was that even though the respondent testified that contractors were in a queue waiting to use his machines, none of those contractors were ever identified. He submitted that the impoverishment should be patrimonial in nature.

[21] Adv. Snyman on behalf of the respondent conceded that the respondent abandoned the contract. He submitted that the respondent was impoverished by way of using his machines and not getting paid. He argued that the fact that there were

contractors who were in a queue to use the respondent's machines was never challenged at trial. He submitted that it was upon the appellant to rebut the impoverishment and enrichment issues. According to Adv. Snyman it was proven that the respondent was impoverished because the respondent could have used his machines somewhere else and earned the same amount of money.

[22] It was submitted on behalf of the respondent that in the respondent's industry the charge is per hour. The charge is nine and half hours whether or not the machines are used. He referred us to the record where it was stated that the charges that the respondent made were in accordance with the tariff except that it included two extra items that was ground engaging equipment and diesel which were excluded from the tariffs set out by the CPHA. The submission was that in the respondent's capacity as an expert in the field he has worked in this field for many years and according to the respondent whether or not it was him doing the work or somebody else the same charge would have accrued.

[23] Adv. Snyman submitted that as the evidence stands the respondent has fulfilled his obligations. The onus of rebuttal rested squarely on the appellant. The appellant should have proved that the respondent's machines did not enrich the appellant. The appellant failed to prove this fact. Adv. Snyman further argued that the principles of enrichment do make provision for profits. The Court a quo was correct when it included profits in its calculations for the respondent's claim. It was submitted on

behalf of the respondent that the respondent has made out a proper case for the amount claimed.

THE LAW

REQUIREMENTS OF UNJUST/UNDUE ENRICHMENT

[24] To succeed with a claim based on undue enrichment the plaintiff must comply with four general requirements: First the plaintiff must be enriched, secondly the defendant must be impoverished, thirdly the defendant's enrichment must be at the plaintiff's expense and finally the defendant's enrichment must be unjustified, which means that it must be without a legal cause.²

[25] In ***Legator McKenna Inc v Shea***³ the court found that a party may reclaim performance made in terms of an invalid contract if invalidity is due to failure to comply with the prescribed formalities. A party performing in terms of the contract which is unenforceable or invalid due to constitutional invalidity, still has a right to claim for performances rendered⁴.

[26] The well-established doctrine of our law is that no man may enrich himself at the expense or to the detriment of another⁵.

[27] In ***Nortje en 'n Ander v Pool NO***⁶, the majority of the court held that there was no general enrichment action in our law, but that

² Jacques Du Plessis, *The South African Law of Unjustified Enrichment* (2012) page 24 at para 2.1. See LAWSA, Vol 9 at para 76 by Lotz revised by Horak and also *Bowman De Wet Du Plessis NNO & Others v Fidelity Bank Ltd* 1997 (2) SA 35 (A) at 43D-F.

³ *Legator McKenna Inc v Shea* [2009] 2 All SA 45 (SCA).

⁴ *Allpay Consolidated Investment Holdings (PTY) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* (2014) (4) SA 179 (CC).

⁵ *Human v Nortje* 1914 AD at 298.

such an action could develop in future. The majority of the court held that there is no general enrichment action, and that there is no evidence of the existence of a general enrichment action under Roman Dutch law.

CONDICTIO SINE CAUSA

[28] A plaintiff will only succeed with the *condictio sine causa* (“*condictio*”) if the general requirements for enrichment are met as discussed above (Jacques Du Plessis) 2012: p218: *ibid*). In order for the *condictio* to succeed a third requirement has to be met which is that the enrichment is unjustified.⁷ Only if the law determines that there is no cause for the retention of the enrichment by the defendant, that is only if the enrichment is unjustified, can the plaintiff succeed with an enrichment claim (**Hutchison et al Wille’s Principles of South African Law 8 ed at 634 -5**).

ONUS OF PROOF

[29] In ***Kudu Granite Operations (Pty) Ltd v Caterna Ltd***⁸ the court found the following:

“[21] *A presumption of enrichment arises when money is paid or goods are delivered. A defendant then bears the onus to prove that he has not been enriched: De Vos (supra 2nd ed at 183), quoted with approval in African*

⁶ *Nortje en ‘n Ander v Pool NO* 1966 (3) SA 96 (A).

⁷ *First National Bank of Southern Africa Ltd v East Coast Design CC* 2000 (4) SA (D) 141I-142C.

⁸ *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) para 2.

Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd 1978 (3) SA 699 (A) at 713G - H..."

The defendant bears the full onus in an enrichment case.⁹

PROFIT

[30] 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.¹⁰ A plaintiff cannot include a profit when calculating his impoverishment¹¹. This is obvious if the plaintiff did not forgo the opportunity of making the profit through dealings with a party¹².

[31] In **BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk**¹³, 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 price¹⁴. Since the contract price will include a profit for the contractor, it

⁹ *Mohamed and Another v Jassiem* 1996 (1) SA 673 (A) at 709H.

¹⁰ *BC v Commissioner of Taxes* 1958 (1) SA 172 (SR) 176 quoted in Jacques Du Plessis above page 396.

¹¹ *Gorfinkel v Miller* 1931 CPD 251 (pointing out that profit would be recoverable if the parties concluded a tacit agreement to this effect) quoted in Jacques Du Plessis above at 42.

¹² For a comparative perspective see the Dutch decision of *Baartman v Huijbers* (HR 11 April 1986, NJ 1986,622) and also Jacques Du Plessis above at page 42.

¹³ *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A).

¹⁴ *Hitchins v Breslin* 1913 TPD 677 at 685. See the reference by Jansen JA at 422.

should not play a part in determining the plaintiff's impoverishment or the defendant's enrichment¹⁵.

[32] In **Hauman v Nortje**¹⁶, Lord De Villiers stated as follows:

"This compensation he must make, not because of any supposed new contract with the contractor, as in certain cases of English Law, but because of the application of the equitable principle of our law that no one shall be unjustly enriched at the expense of another. The mode of enrichment provide against is not the attainment of benefits stipulated for in the contract , but the unjust absorption by the one party of the expenditure or of the fruits of the labour of the other party in a manner not contemplated by the parties to the contract".

APPLICATION OF THE LAW TO THE FACTS

REQUIREMENTS OF UNJUST/UNDUE ENRICHMENT

[33] In my view and in light of the submissions made by counsel for the appellant, it is clear that the appellant's contention herein was based on the fact that the contract between the parties was unenforceable. In addition the contention was based on the fact that the Court a quo did not do an exercise to determine the appellant's enrichment and the respondent's impoverishment. The argument was that the Court a quo enforced the said unenforceable contract. I disagree with the argument that because the contract was unenforceable therefore the respondent was not entitled to payment. My considered view is that the Court a quo based its decision on the principles of unjust enrichment not on an

¹⁵ De Wet and Van Wyk Kontraktereg en Handelsreg 5ed 202.

¹⁶ *Hauman v Nortje* 1914 AD at 298 (supra).

unenforceable contract. Submissions on behalf of the appellant were confusing invalidity with unlawfulness. An unlawful contract could not sustain a claim for enrichment. The action before us could be used to claim performance on an invalid contract as is demonstrated by the authorities above. Even though the contract was invalid, the respondent was still entitled to payment due to the fact that it rendered services.

CONDICTIO SINE CAUSA

[34] The respondent's case was based on *condictio sine causa*. The requirements of *condictio sine causa* are dependent on each other in order to establish liability. The conduct between the appellant and the respondent complies with the requirements of unjust enrichment. According to the authorities cited above, the respondent has made out a case of unjust enrichment and therefore was entitled to payment. The appellant was enriched in that the respondent rendered services to the appellant which the appellant benefitted from but failed to make payment for. The appellant was enriched at the respondent's expense. The enrichment was unjustified in that there was no agreement that the respondent was going to render services for free to the appellant. The agreement was that the appellant was expected to pay for the service which it failed to do. There is authority that a party performing in terms of the contract which is unenforceable or invalid due to constitutional invalidity, still has a right to claim for performance rendered (**see Legator McKenna Inc *supra***). Where an individual is unjustly enriched, the law imposes an obligation upon the recipient to make restitution.

[35] It is acknowledged that a procurement contract concluded in breach of the provisions of section 217 of the Constitution is invalid.¹⁷ The respondent's contention herein was based on the principle of restoration to each party what has been received in an unenforceable contract. In both its amended particulars of claim and in the testimony of Mr Ahadji, the respondent pointed out that after the tender process was not proceeded with; it genuinely believed that the contract entered into with the appellant was validly entered into. It is undisputed that an oral contract previously entered into between the respondent and certain officials of the appellant was, a few years later, reduced to writing and signed by other officials of the appellant. Importantly, the respondent's evidence that after his refusal to render further services he was implored by the appellant's official to continue with the service due to the fact that it was an essential service and that the appellant did not have the necessary equipment to extinguish the fire at the landfill was not disputed at all. All of this must have re-enforced the respondent's belief that the contract was validly entered into. These are factors that must be taken into account.¹⁸

[36] In argument, the appellant's counsel stated that the respondent bore the onus of proving enrichment whereas respondent's counsel stated that the appellant's bore such an onus. There is a body of authorities which confirm that *condictio sine causa*, gives

¹⁷ See *Department of Transport and others v Tasima (Pty) Ltd* (supra) at para 79.

¹⁸ *Jajbhay v Cassim* 1939 AD 537 at 545 and 550, where the following was stated: "And it follows from what I have said above, in cases where public policy is not seriously affected by a grant or refusal of the relief claimed, that a Court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment. ...The principle underlying the general rule is that the courts will discourage illegal transactions, but the exceptions show that when it is necessary to prevent injustice or to promote public policy, it will not readily enforce the general rule."

rise to a duty of rebuttal which rests upon the recipient, in *casu* the appellant. It was the appellant's duty to prove that it was not enriched by the services that the respondent rendered. The appellant failed to discharge such an onus. Since the appellant admittedly produced no evidence whatsoever to prove that it has not been enriched, I am persuaded to rule in the respondent's favour.

PROFIT

[37] 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. On this particular aspect, the following unchallenged evidence has to be taken into account:- firstly, that subsequent to the respondent's refusal to make his machinery and its operator available to the appellant on account of the appellant's non-payment, the appellant's official implored the respondent to carry on with the service, pointing out that such service was regarded as essential service, and also pointing out that due to the fact that the appellant did not have appropriate machinery and equipment, it was unable to extinguish a fire that was raging at the landfill site. Secondly, there were other clients who were queuing for the rental of the respondent's machinery and equipment. Thirdly, the rates charged by the respondent were in line with those set out in the CPHA, which were the recommended tariffs in the construction industry. Under

such circumstances, there is no reason why the amount agreed upon in the contract should not be regarded as reflecting the value of the service which the respondent rendered. Therefore the Court a quo was correct in ruling that the respondent has established its claim in the amount of R 2 760 354, 76.

QUANTUM

[38] The court has to consider whether, on the evidence, the respondent was impoverished by failure of the appellant to make payments that have enriched the appellant and at the same time question whether the alleged enrichment was made at the expense of the respondent.

[39] The amount of R 2 760 354,76 which is said to have constituted the enrichment of the appellant, accrued to the respondent as a result or consequence of having rendered services to the appellant, based on the agreement which failed. Again, looking at the overall picture the appellant was enriched at the expense of the respondent by receiving the benefits of services rendered by the respondent in the belief that there was a valid agreement. That agreement failed, not owing to the respondent's breach, but as a direct result of non-fulfilment of the appellant obligations.

CONCLUSION

[40] Whenever a contract is defective in its incidents, followed by total or partial performance in an honest belief in its validity, is repudiated or found to be unenforceable, there immediately arises

a situation calling for a relief. In any bilateral contract where one party has admittedly partially performed his part and the other party receives a benefit therefrom, the former can sue the latter by a *condictio* on the ground of unjust enrichment. The *condictio* is available only in cases of genuine dispute or misfortune (see Mackeurtan in his work “Sale of goods in South Africa”^{3rd} edition p330 to 333). In *casu* the conduct of both the appellant and respondent complied with the requirements of unjust enrichment, specifically *condictio sine causa*.

[41] In light of the preceding I am satisfied that the respondent had on a balance of probabilities established that he was entitled to payment, on the evidence led, of the amount of R 2,760, 854.76 against the appellant based on unjustified enrichment. I am also satisfied that the respondent satisfied its claim despite the fact that the respondent abandoned the contract whose legality and validity was a point of dispute.

[42] Accordingly the following order is made:

42.1 The appeal is dismissed with costs.

E.K. TSATSI, AJ

M.B. Molemela, JP and S.P.B. Hancke, J concurred with the judgment.

On behalf of appellant: Adv. MTK Moerane SC
With him: Adv L Mfazi
Instructed by:
N W Phalatse and Partners
BLOEMFONTEIN

On behalf of respondent: Adv. C. Snyman
Instructed by:
Matsepes Inc.
BLOEMFONTEIN