



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

Appeal number: A116/2015

In the matter between:

ABSA BANK LIMITED

Appellant

and

HEIN BAUMGARTEN N.O.

First Respondent

MARELIZE KOTZE N.O.

Second Respondent

ANNELIZE BLIGNAUT N.O.

Third Respondent

(In their respective capacities as Trustees
Of the Boom Tuin Family Trust IT1340/1999)

CORAM: LEKALE, J *et* REINDERS, J *et* HEFER, AJ

HEARD ON: 5 JUNE 2017

JUDGMENT BY: LEKALE, J

DELIVERED ON: 29 JUNE 2017

SUMMARY: Loan Agreement and Unjust Enrichment- Multi-party enrichment liability: Appellant bank barking up the wrong tree with documentary proof of its claim for repayment of the loan amount effectively being against a Trust other than the respondent Trust. Claim for unjust enrichment not available and competent until and unless loan agreement in respect of which respondents were factual recipients is set aside as void. When such claim available same lies against legal recipient and not factual recipients, in the position of the respondents, where payment was made to them on behalf or instructions of the former. Respondents not unjustifiably enriched at appellant's expense in the absence of a causal link between their alleged enrichment and the appellant. Absent authority on the part of a third party to bind respondent Trust contractually, the latter not enriched where the loan amount applied to settle the debt owed by the third party to the Trust. Appeal dismissed.

- [1] On 5 March 2015 Mbhele AJ, as she then was, sitting in this division as the trial court, dismissed with costs appellant bank's claim for payment of R358 078.81 or R200 000, as the alternative claim, as well as its claim for an order declaring the property known as Erf 473 Bultfontein (the property) to be specially executable. The appellant feels aggrieved by the whole of the judgment so delivered and now approaches us on appeal with leave of the trial court.
- [2] The respondent is Boom Tuin Family Trust IT 1340/1999. On dismissing the action the court below, *inter alia*, found that there existed no legally binding contractual relationship between the appellant and the respondent trust insofar as the loan agreement was between the appellant and Boom Tuin Family Trust IT11340/1999 as opposed to Boom Tuin Family Trust IT1340/1999. The trial court, further, found that it was always the respondents' case that there existed no binding contractual relationship between the appellant and the trust and that such defence was not only raised during the trial.

- [3] In the notice of appeal and argument before us the appellant, through Mr Du Plessis, contends, *inter alia*, that the trial court erred in failing to pay any or sufficient consideration to some undisputed evidence and concessions before her and, further, in allowing the respondents' witnesses to present testimony in respect of versions which were not contained in the respondents' Plea and in circumstances where they did not raise issue with the Trust's *locus standi* in the Plea. It is, further, effectively contended in the alternative that the court below erred in dismissing the appellant's alternative claim for unjust enrichment when evidence clearly indicates that the respondent Trust was unjustifiably enriched at the expense of the appellant bank which was, in turn, impoverished.
- [4] On their part the respondents support the impugned judgment and submit, through Mr Rautenbach, both on the papers and before us, *inter alia*, that the judgment cannot be faulted and that the trial court correctly found that there existed no contractual relationship between the parties. It is, further, contended for the Trust that the trial court correctly admitted evidence on lack of *locus standi* because the issue was fully canvassed by the parties before her. With regard to unjust enrichment the respondents' position is, *inter alia*, that the Trust was not the recipient of the funds and was, as such, not enriched *vis-à-vis* the appellant.
- [5] In the light of the view I have taken of the matter, it is not necessary to deal with all the grounds raised by the appellant in its challenge against the impugned judgment regard being had to salient facts which were common cause between the parties.

LOAN AGREEMENT

- [6] The parties were effectively in agreement before the trial court that on 11 August 2015 the respondent trust, represented by one Martin Singleton Baumgarten, who has since passed away (the deceased), as its sole trustee concluded a Deed of Sale for the purchase of Erf 473 Bultfontein(the property) with its sellers. It was, further, not in dispute that subsequent thereto and on 27 September 2005 Francois Hattingh (Francois), in his capacity as the sole trustee of Boom Tuin Family Trust IT11340/99 concluded a loan agreement with the appellant for an amount of R300 000 on condition that the said Trust, as security, shall pass first mortgage bond over Erf 473 Bultfontein.
- [7] It was, furthermore, effectively undisputed before the trial court that in support of the loan application the said Francois provided the appellant with letters of authority dated 7 September 2005 appointing and authorising him to act as a trustee for Boom Tuin Family Trust IT11340/99 and, further, gave directions authorising the appellant to effect payment of the loan amount to various instances inclusive of a law firm belonging to his brother, one Juan Hattingh(Juan) as well as Oosthuizen Attorneys in respect of the balance of the purchase price for the property. It was, furthermore, common cause between the parties that in their defence the respondents, *inter alia*, on letters of authority bearing the same date viz.7 September 2005 and appointing the deceased, Francois and Juan as the trustees of the said trust.

- [8] It is clear, *ex facie* the power of attorney authorising the passing of the bond over the relevant property, that same was signed by Francois in his capacity as representing Boom Tuin Family Trust IT11340/1999. It is, further, apparent from the mortgage bond in favour of the appellant that the same was authorised by the trustees for the time being of Boom Tuin Family Trust IT11340/1999 and is, as such, registered against the same while the Deed of Transfer, on its part, reflects the trustees for the time being of Boom Tuin Family Trust IT1340/1999 as the registered owners.
- [9] As pointed out above the appellant, in effect, contends that the trial court allowed the respondents to raise a new defence relating to the *locus standi* of the respondent trust, as the defendant, in *medias res* and erred in so doing. A perusal of the respondents' Plea, however, confirms the trial court's findings insofar as the respondents specifically disputed that there existed a valid and binding contract between the appellant and the respondent trust. It is, further, correct that the issue in question was fully canvassed before the court *a quo* insofar as evidence was led with the parties subjecting witnesses to cross examination on the issue. The appellant, thus, had a fair opportunity to deal with the issue. (See **Minister of Safety and Security v Slabbert** [2010] 2 All SA 474(SCA) *par* [12]).
- [10] A look at the appellant's case, as set out in the summons and as presented to the trial court, shows that the appellant was barking up the wrong tree insofar as its case was, in fact, directed at a trust other than the respondent trust regard being had to differing

registration numbers. In law and practice Trusts are distinguishable by their unique individual registration numbers on the same basis as motor vehicles are. It is, as such, possible to register two or more trusts bearing the same name. The foregoing is evident from the fact that at all times material to the conclusion of the loan agreement Francois was acting in his capacity as the sole trustee of the Boom Tuin Family Trust IT11340/1999 as opposed to Boom Tuin Family Trust IT1340/1999. There was, therefore, no case against the respondent trust, before the court below, as far as the loan agreement is concerned for even if IT 11340/1999 were to be regarded as the same as IT1340/1999 it was doubtful as to whether Francois had the sole authority to act for the trust insofar as it is not apparent from the record which of the two letters of authority prevailed. In this regard it is worth reiterating and noting that they bear the same date and they are both titled “**GEWYSIGDE MAGTIGINGSBRIEF**”. The question is, therefore, which letter between the two amended the other. There was, further, no Deed of Trust before the trial court to indicate if, in the case of more than one trustee having been appointed, any one of the trustees was authorised to act alone in the circumstances of the instant matter. The onus was always on the appellant, as the plaintiff, to prove its case.

UNJUST ENRICHMENT

- [11] It is generally accepted in our law that four requirements, at the very least, must be met for enrichment liability to arise. Firstly the defendant must be enriched; secondly the plaintiff must be

impoverished; in the third place the defendant must be enriched at the expense of the plaintiff; and lastly, the defendant's enrichment must be unjustified or *sine causa*. (See **Glenrand MIB (Pty) Ltd & Others v Van den Heever & Others** [2013] 1 All SA 511 (SCA)).

- [12] It is clear from the above requirements that a causal link between the defendant's enrichment and the plaintiff's impoverishment is a *sine qua non* for enrichment liability insofar as

“ The ultimate issue for the court to determine when considering the question of causation or the ‘at the expense of’ requirement in the multi-party situation is whether the defendant has been unjustifiably enriched *vis-à-vis* the claimant” (See **Glenrand MIB (Pty) Ltd** (*supra*) at *par* [18])

- [13] Assuming, in appellant's favour and in spite of the evidence accepted by the trial court, that the respondents were, in fact, enriched, it appears, in my view, that there exists no causal link between the appellant and such enrichment insofar as the source of the same is the loan it, the appellant bank, advanced to a third party *viz.* the Boom Tuin Family Trust IT11340/1999. The enrichment in question was, as such, at the expense of such a third party which gave the appellant directives as to how payment was to be effected and remains, on paper at least, liable to the appellant for repayment of the loan. The respondent trust was not the direct recipient of any funds from the appellant bank. The appellant was, thus, not the proximate cause of such enrichment.

- [14] If the respondents be liable to anyone for unjust enrichment, it would, in my judgment, possibly be only to the third party in question and only in the event of the loan agreement such third party concluded with the appellant being found to be void. In this regard it shall be recalled that the possibility of such an eventuality arising exists in the light of the two letters of authority issued in relation to the relevant trust. As of now the loan agreement in question remains in place as between the appellant and the said third party and, as Mr Du Plessis correctly concedes, the latter remains contractually liable to the appellant until and unless the agreement is set aside. In my view no enrichment liability can validly arise in the face of such an agreement insofar as enrichment must be unjustified or without legal ground for that purpose.
- [15] The trial court accepted oral evidence to the effect that the deceased had placed Juan Hattingh in funds for investment purposes and had, further, instructed him to utilise some of the funds to pay the purchase price of the relevant property in cash. There is nothing before us to demonstrate or show, on adequate grounds, that the trial court was wrong in accepting such evidence. We can, as such, not interfere with her factual findings and conclusions on the evidence in question. (See **S v Francis** 1991 (1) SACR 198 (A)).
- [16] Payment of the loan amount was effected in accordance with the instructions given by Francois in his capacity as the trustee for Boom Tuin Family Trust IT 11340/1999. The reason why such instructions were given is not apparent *ex facie* the record and is,

as such, unknown. It is, however, probable from the evidence accepted by the trial court that part of the loan amount was, in effect, employed to replace the funds received from the deceased insofar as part of the funds was used to settle the purchase price of the property at Francois' instance. If anything the respondent trust was, in my view, just one of the pockets designated and used by Francois, as representative of the Boom Tuin Family Trust IT 11340/1999, for receiving the loan amount. In my judgment the preceding view prevails insofar as where the credit grantor, in the position of the appellant, has effected payment of the loan amount to a party designated by the credit receiver, in the position of Boom Tuin Family Trust IT 11340/1999, and it subsequently turns out that the loan agreement was void, the *condictio indebiti* lies against the legal recipient as **"the person who is in law considered to have received the money"** and not against the factual receiver insofar as payment was made on behalf of such credit receiver. (See **Randcoal Services Ltd v Randgold and Exploration Co. Ltd** 1998 (4) SA 825 (SCA) at 843B-G).

- [17] On the evidence before the trial court it is possible, in the light of the two letters of authority bearing the same date and one of which emanating from the respondents, that the registration number was mistakenly given as IT 11340/1999 instead of IT 1340/1999 and that there was, as such, no third party involved. It is, however, equally possible, in my view, that the deceased had registered a second trust in the same name as the respondent trust regard being had to the said second letter produced and relied upon by the respondents in their plea. Even if it were to be found on the probabilities that there was no second trust involved

and that the additional digit in the registration number of the respondent trust was, in fact, a typographical error or the product of the Hattingh brothers' fraudulent scheme, I am satisfied from the evidence accepted by the trial court with regard to funds advanced to Juan by the deceased for the purchase price of the property that the respondents were, in fact, not enriched insofar as the loan was used to replace the relevant funds that were misappropriated by Juan. In such an eventuality Juan himself was enriched to the extent that the debt he owed to the respondent trust was extinguished. The appellant, thus, did not prove its case for unjust enrichment on preponderance of probabilities.

ORDER

[18] In the result the appeal is dismissed with costs.

L.J. LEKALE, J

I concur

C. REINDERS, J

I concur

J.J.F. HEFER. AJ

On behalf of appellant: Adv. JA Du Plessis

Instructed by: Lovius Block
Bloemfontein

On behalf of respondents: Adv.JS Rautenbach
Instructed by: Stander and Partners
Bloemfontein