Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Saakno / Case number:	**1451/2010**
Datum aangehoor / Date Heard:	**18 / 04 / 2016**
Datum gelewer/Date delivered:	**29 / 07 / 2016**

In the matter between:

SUPERKOLONG (PTY) LTD Appellant

and

GEMCORE (PTY) LTD Respondent

Coram: Kgomo, JP *et* Williams, J *et* Erasmus, AJ

JUDGMENT

WILLIAMS, J *et* ERASMUS, AJ

INTRODUCTION

[1] This is an appeal against the judgment of Pakati J, with leave of the Supreme Court of Appeal to the Full Bench of this Division.

[2] Gemcore (Pty) Ltd, the respondent, instituted action against Superkolong (Pty) Ltd, the appellant and Gemrock Resources Ltd (In Liquidation) ("Gemrock"). In terms of Claim 1, the respondent sought rectification of a Memorandum of Understanding ("MOU"), signed on behalf of the parties on 3 October 2008. The second claim was founded on such rectified contract and in the alternative to Claims 1 and 2, unjustified enrichment, in respect of monies paid to the appellant before 15 October 2008. The third claim was founded upon unjust enrichment, based on payments made to appellant after 15 October 2008.

[3] Pakati J dismissed the contractual claims and granted judgment in favour of the respondent on the alternative claim to Claims 1 and 2, as well as Claim 3 (the enrichment claims). The appellant was ordered to pay to the respondent the amounts of R2,942,677.48 and R1,486,164.79, plus interest and costs.

THE ISSUE ON APPEAL

[4] The issue to be decided in this appeal is whether the Court *a quo* correctly found in favour of the respondent in respect of the claims based on enrichment. The history of the case is relevant in deciding this issue and it is

therefore necessary to set out the chronology of the events leading up to the claims by the respondent.

THE FACTS

[5] It is common cause between the parties that three Memoranda of Understanding are relevant, to wit:

5.1 The MOU dated 11 August 2008 concluded between Gemrock and Kimcor Diamonds PLC (“Kimcor”);

5.2 The MOU dated 2 September 2008 negotiated and prepared by the representatives of Gemrock and the respondent for signature by Gemrock, Kimcor and the appellant and signed on behalf of Gemrock and the respondent only and not the appellant;

5.3 The MOU of 3 October 2008 entered into by and between Gemrock, the respondent and the appellant.

[6] The purpose of the August 2008 MOU was to provide for a complete takeover of Kimcor by Gemrock, alternatively the acquisition of Kimcor’s entire assets by Gemrock. Gemrock agreed to assist Kimcor with bridging finance in the form of a non-interest bearing secured loan to be advanced to Kimcor’s South African operating subsidiaries on dates and intervals as agreed by the parties. Bridging finance in the amount of at least

R5 million was envisaged and Gemrock would take over the management and control of Kimcor's assets.

[7] Gemrock itself could not afford the R5 million in bridging finance which led to one of its directors, Mr Johan Buys, approaching the respondent for financial assistance. The subsequent agreement reached between Gemrock and the respondent was in short that the respondent would advance R4 million to Gemrock in return for a 40% shareholding in the appellant, one of the subsidiaries of Kimcor.

[8] The September 2008 MOU was negotiated and drafted by Mr Jan Lombard (a director of the respondent) and Mr Buys (a director of Gemrock and by then also the acting managing director of Kimcor) in an attempt (in part) to put into writing the agreement reached between Gemrock and the respondent. Although the appellant was reflected as a party to this MOU, it did not sign the memorandum, the reason apparently being that the appellant could not sell its shares without first offering it to its existing shareholders.

[9] However, the respondent had already, at the time of the drafting of the September MOU, made payments of

R1,250,140.03 as part-payment of the R4 million advance agreed upon between it and Gemrock.

[10] The broad terms of the September 2008 MOU were the following:

10.1 The respondent would assume management of the appellant's Small Miners Initiative dumps (SMI/4) and would report directly to the board of directors of Kimcor;

10.2 The respondent would make a capital investment of R4 million by no later than 30 September for a 40 % profit share in SMI/4;

10.3 As security for the R4 million investment the respondent would be entitled to a covering notarial bond and/or a cession of the diamonds recovered;

10.4 It was a condition precedent that the boards of all the parties reflected in the written document, approved it.

[11] This September 2008 MOU contained a "*no claim*" clause in terms of which the parties agreed that if:

"a) The date for satisfaction of the conditions precedent is not extended by agreement in writing by the parties; and

b) The conditions precedent are not satisfied or waived by the relevant date, or the transaction does not proceed, *Then this MOU shall terminate, each party will bear its own expenses in connection with all negotiations and documentation, and neither party will have any claim against the other for any matter arising from the transactions contemplated by this MOU.*"

[12] It was common cause between the parties that neither the appellant nor the respondent were parties to the August 2008 MOU and that the September 2008 MOU was never accepted or signed by the appellant.

[13] The October 2008 MOU was then entered into. It was signed by the representatives of the appellant, the respondent and Gemrock. It provided for the following:

13.1 The proposed operational management by the respondent in respect of SMI/4;

13.2 Convertible loan funding by the respondent to Gemrock in the amount of R4 million which could increase to R8 million to achieve the production output of 120 000 tonnes per month at SMI/4;

13.3 The conversion of a loan to Kimcor into shares once a reverse listing had been done. It was then recorded that:

13.3.1 The appellant had approached the respondent to manage the SMI/4 dumps and provided for a management agreement in terms of which a management fee was envisaged, payable by the appellant to the respondent;

13.3.2 Gemrock had approached the respondent to lend R4 million to Gemrock which would then on-lend this money on a shareholders loan basis to the appellant;

13.3.3 The respondent had paid up to 3 October 2008 an amount R3,274,571.19 as part-payment to Gemrock who on-lent the amount to the appellant.

[14] Under the heading "*Conditions Precedent*" it was recorded that the following were required:

14.1 Approval of the boards of the parties to the agreement;

14.2 Payment of an amount of R4 million by no later than 15 October 2008;

14.3 Operating capabilities of 120 tonnes per month by April 2009.

[15] The “no claim” clause referred to earlier, as reflected in the September 2008 MOU, was also included in the October 2008 MOU.

[16] It is common cause that the conditions precedent were not met in that the amount of R4 million was not paid on or before 15 October 2008; the operational capabilities had not increased to 120 tonnes per month by April 2009 and the boards of the respective companies never approved the agreement.

[17] In fact the whole arrangement between the various entities was dealt a death blow by the recession of 2008. The reverse listing and takeover of Kimcor by Gemrock never materialised. A certain Mr Chris Kimber purchased the Kimcor group (including the appellant) at the end of November 2008. Gemrock was provisionally liquidated on 15 February 2009, which order was made final on 20 March 2009. During June 2009 Mr Kimber intimated that

he considered the October 2008 MOU to be of no force and effect and that the parties did not have any claim against each other.

[18] The respondent brought the contractual claim as cessionary, alternatively in its own name. A deed of cession was entered into on 23 July 2010 between the liquidators of Gemrock and the respondent.

[19] It was recorded in the introductory part of the deed of cession that Gemrock had a claim for R4,850,512.98 against the appellant for monies lent and advanced in terms of a written agreement between Gemrock, the appellant and the respondent. The details of the written agreement are not recorded but it can only refer to the October 2008 MOU. It was also recorded that the respondent had a claim against Gemrock in the amount of R4,850,512.98 for “monies lent and advanced” in terms of the written agreement.

[20] From the record it appears that:

20.1 The August 2008 MOU (between Gemrock and Kimcor) was never cancelled and no evidence was tendered in respect of the actions taken by the liquidators of Gemrock relating to this MOU;

20.2 This August 2008 MOU was valid and of full force and effect at all relevant times until the final liquidation of Gemrock;

20.3 The September 2008 MOU never became binding on the parties because it was neither signed on behalf of the appellant nor had it been approved by the boards of the appellant and/or Kimcor;

20.4 The "no claim" clause contained in the October 2008 MOU was not rectified;

THE ARGUMENTS

[21] Mr Bergenthuin SC, for the appellant, submitted that Pakati J correctly rejected the claim for rectification but should have found that the relationship between the parties to the October 2008 MOU was regulated by the "*no claim*" clause. According to him this "*no claim*" clause does not leave any doubt as to the intention of the parties. It stipulates that neither party will have any claim against the other party for any matter arising from the transactions contemplated in the MOU. The reference

to "**any claim**" necessarily includes a claim founded upon enrichment. As the claim for rectification was dismissed the respondent had no claim against the appellant by virtue of the fact that the respondent had waived any claim for restitution, including a claim founded upon enrichment.

[22] Mr Bergenthuin also submitted that the respondent had not proved any claim based on unjustified enrichment, as the payments made by the respondent were not made *sine causa.* Counsel further contended that the respondent had not proved that it was impoverished:

22.1 In particular because of payments made to the appellant as the respondent had a claim against Gemrock for payments made to the appellant;

22.2 Any impoverishment was caused by the liquidation; and

22.3 Payments made for the creditors of the appellant were made in terms of an agreement between the respondent and Gemrock.

[23] It was further argued on behalf of the appellant that :

23.1 There could not have been any issue of enrichment because a legal liability was discharged when the respondent made payments to the appellant's creditors;

23.2 Payments were made in terms of a valid cause of action, to wit the August 2008 agreement entered into between Gemrock and Kimcor; and

23.4 The respondent had not proved that the amounts reflected in the invoices were actually paid to or on behalf of the appellant and that those amounts represent enrichment of the appellant.

[24] Mr Zietsman SC, for the respondent, submitted that the Court *a quo* correctly found that the October 2008 MOU did not have any legal effect in that the conditions contained therein were not met. He submitted further that the Court *a quo* correctly found that the payments by the respondent could not have been made in terms of the October 2008 MOU since the respondent started making payments during August 2008.

[25] Mr Zietsman further contended that the Court *a quo* correctly found that the August 2008 MOU did not constitute the cause in terms of which advances were made to the appellant as neither the appellant nor the respondent were party to the said agreement and that the respondent was probably not even aware of the said MOU. The payments were made directly to the appellant, consequently the appellant was enriched and the respondent impoverished. The payments were made *sine causa* and therefore the claims based on enrichment had to succeed, the submission went.

THE LEGAL POSITION

[26] The effect of a suspensive condition in a contract is to postpone enforceability of a right until the happening of future uncertain events. If the suspensive condition is not fulfilled the agreement or the part thereof which was suspended does not take effect and anything which has been paid or delivered in expectation of fulfilment of the condition must be returned **unless the contract provides otherwise**.[1]

[27] *In casu* the "no claim" clause (which was not rectified) in the October 2008 MOU regulated the position the parties

[1] Naidu v Naidoo, 1976 (2) SA 222 NPD at 266 A to G

were to be placed in should the conditions precedent not be fulfilled as follows:

> "*neither party will have any claim against the other party for any matter arising from the transactions contemplated by this MOU.*"

[28] In our view the court *a quo* should therefore have found, based on the "no claim" clause and also on the case made out by the respondent i.e. that the monies were advanced to the appellant based on the *bona fide* albeit mistaken belief that the October 2008 MOU was binding, that the respondent had no claim against the appellant, even one based on unjust enrichment.

[29] Be that as it may, the requirements for a claim based on enrichment are now trite: (i) the defendant must be enriched; (ii) the plaintiff must be impoverished; (iii) the defendant's enrichment must be at the expense of the plaintiff; and (iv) the enrichment of the defendant must be unjustified or *sine causa*. It is also trite that the burden of proof in respect of all elements of enrichment lies with the plaintiff.

[30] The court *a quo* found, based solely on the payments made by the respondent to or on behalf of the appellant, that the first three requirements for an enrichment claim

have been met. The court *a quo* also found in essence that the appellant's enrichment was *sine causa* since: a) the September 2008 MOU never came into existence; b) the October 2008 MOU had no legal effect due to the suspensive conditions not being met; and c) the payments made by the respondent could not have been made in terms of the August 2008 MOU since neither the appellant nor the respondent were party to that MOU and on the probabilities were not even aware of the August 2008 MOU.

[31] The court *a quo* was correct in finding that neither the September 2008 MOU nor the October 2008 MOU could be the source of the respondent's enrichment. The August 2008 MOU however cannot so easily be disregarded. In the first instance, and although of little importance as far as the issue of enrichment liability is concerned, it can hardly be said that the probabilities are against the appellant and respondent not being aware of the August 2008 MOU. In fact, the probabilities are quite the opposite. It should be remembered that Mr Buys on behalf of Gemrock, approached the respondent for financial assistance shortly after Gemrock entered into the August 2008 MOU with Kimcor, which made provision for the take-over of Kimcor by Gemrock. The agreement reached between the respondent and Gemrock at that stage, that the respondent advance R4 million in return

for 40% shareholding in the appellant, would make no sense had the respondent not been aware of the envisaged take-over of Kimcor (including the appellant) by Gemrock. Likewise the appellant, not only by reason of its being a subsidiary of Kimcor, but also by its acceptance without question of monies on-lent by Gemrock as early as 19 August 2008, must have been aware of the August 2008 MOU. In any event, Mr Buys testified that all the entities involved in the various agreements were aware of the situation.

[32] Secondly, the fact that neither the appellant nor the respondent was party to the August 2008 MOU has little bearing on the issue of enrichment liability. The situation is akin to that in **BUZZARD ELECTRICAL (PTY) LTD v 158 JAN SMUTS AVENUE INVESTMENT (PTY) LTD AND ANOTHER**[2]. In that case the owner C contracted with B to develop his property. B subcontracted the electrical works to A. A completed the work but before he could be paid B was liquidated. A then sought to hold C liable for payment on the basis of unjust enrichment. The court held that the performance of the work by A could be traced to the agreement between C and B in terms whereof the electrical work was to be performed by B. The court held that neither a direct nor an indirect enrichment liability had arisen. That it would be unfair

[2] 1996 (4) SA 19 (A)

for the owner C who contracted on a specific basis with B, for his counter-performance, if any, to increase in effect or that he should incur an obligation which did not arise out of his contract with B, simply because B engaged A to comply with his contractual obligations. There was no contractual relationship between A and C and when A performed the work he complied with his obligations towards B. At the same time though, A gave effect to B's obligation toward C and therefor also performed indirectly with respect to C. The agreement between C and B was the primary source of the performance of the work and any possible enrichment of C. The owner C received no more as a result of A's performance than that he had contracted for with B. For that reason the enrichment was not *sine causa*. On the contrary, the agreement with B was the cause of C's enrichment. A could enforce his contractual rights against B and if it turned out to be illusory due to B's insolvency, it was an unhappy coincidence which did not render C's enrichment unjustified.

[33] If one equates the circumstances in Buzzard *supra*, to those in *casu* the respondent would be in the position of the subconctractor A, Gemrock would be in the position of the contractor B and the appellant (in fact Kimcor) would be in the position of the owner C. The evidence was that not only did the respondent make payment for

and on behalf of the appellant, but that other subsidiaries of Kimcor also received payment from the respondent. This fact was recognised by the court *a quo* who stated in her judgment that:

"*It is undisputed that Gemcore Sampling advanced amounts of R2,949,677.48 and R2,486,164.79, suitably adjusted, on behalf of Kimcor Diamonds PLC and/or its subsidiaries which include Superkolong's employees, creditors and/or suppliers.*"

[34] This factor, as well as the fact that payment had commenced as early as 19 August 2008, should have alerted the court *a quo* to the fact that the respondent made payment to the appellant in fulfilment of Gemrock's obligation to Kimcor in terms of the August 2008 MOU.

[35] The fact that payment was made directly to the respondent and/or its creditors and not *via* Gemrock does not alter the position that the primary source of such performance arose from the August 2008 MOU and as such cannot be *sine causa*.

[36] The respondent's claim therefore lies against Gemrock and it is Gemrock's liquidation which is the cause of its impoverishment. The result is that the appeal must succeed.

The following order is made:

a) THE APPEAL IS UPHELD WITH COSTS.

b) THE ORDER OF THE COURT A QUO IS SET ASIDE AND SUBSTITUTED WITH THE FOLLOWING:

"*THE PLAINTIFF'S CLAIMS ARE DISMISSED WITH COSTS.*"

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WILLIAMS, CC **ERASMUS, SL**

JUDGE **ACTING JUDGE**

I agree.

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KGOMO, F DIALE

JUDGE-PRESIDENT

On behalf of the Appellant:	**Adv. Bergenthuin SC (oio Van de Wall & Partners)**
On behalf of the Respondent:	**Adv. Zietsman SC (oio Engelsman, Magabane Inc.)**