IN THE NORTH GAUTENG HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

7/1/2013
DATE SIGNATURE

Case Number: 41816/2011

11/1/2013

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED **PLAINTIFF**

and

MORRIS MOKASE t/a

MOKASE ATTORNEYS AND ASSOCIATES **DEFENDANT**

JUDGMENT

A A LOUW J

[1] The plaintiff is Standard Bank of South African Ltd, a registered commercial bank.

[2] The first defendant is Morris Mokase an attorney. He trades as M Mokase attorneys and associates in Pretorius Street, Pretoria.

[3] The plaintiff pleads that during March 2004 it entered into an agreement with the defendant relating to a business current account. A copy of the written part of the agreement is attached as annexure "B" to the particulars of claim. The reference to a <u>business</u> account is clearly wrong as the whole case relates to money received by the respondent in his <u>trust</u> banking account and how he dealt with that money. Although the defendant admits par 5 of the particulars of claim in which the allegation regarding the opening of the business current account was made, the whole case was conducted on the basis of what happened in his trust banking account and I believe that there will be no prejudice to deal with the case in that way. The allegation in the particulars of claim seems to be a simple mistake. From the first page of annexure "B" it is evident that the account number is 011549882, which is the account number of the defendant's trust account, as appeared from evidence.

[4] The following are common cause facts:

1. A cheque in the amount of R1 115 478, 26 was paid into the defendant's trust account on 16 September 2010.
2. The cheque was drawn by City of Tshwane Metropolitan Municipality in favour of SSS Cornerstone Building and Construction CC (hereinafter "the CC"). The cheque was clearly marked not transferable.
3. The cheque was fraudulently obtained by someone and deposited in the aforesaid trust account.

4. Subsequent to the deposit on 16 September 2010 the defendant dealt with the money as per exhibit "A26". This exhibit also contains instances of reversal of payments made to certain third parties as well as amounts recovered from the defendant himself by reversing bank entries.

5. The plaintiff reimbursed City of Tshwane in the full amount of the stolen cheque.

6. It is common cause on the pleadings that the plaintiff recovered an amount of R199 678 from the defendant and certain third parties.

[5] The plaintiff's whole cause of action appears from par 12 of the particulars of claim which reads as follows:

> *"12. Plaintiff has suffered damage in the amount of* ***R949 390.20 (NINE HUNDRED AND FORTY NINE THOUSAND THREE HUNDRED AND NINETY RAND AND TWENTY CENTS)*** *as a direct result of the First Defendant's conduct, having been the withdrawal of monies which was not due to the First Defendant and which First Defendant was not entitled to, to which the First Defendant has become unduly enriched in the aforementioned amount."*

The references to first defendant are wrong. There is only one defendant.

[6] This paragraph is denied in the plea. It is striking from paragraph 12 that the essential elements of enrichment have not been alleged. Furthermore an action based on enrichment has nothing to do with "damage".

[7] Even if I treat this as an enrichment action, key elements of the *condictio indebiti* have not been alleged or proved, such as:

1. The transfer or payment must have been made in the *bona fide* and reasonable but mistaken belief that it was owing[1].
2. The error must have been reasonable[2].

[8] The cheque made out to the CC is to be found at exhibit "B19" and, as already mentioned is clearly made out to the CC and marked **"Not Transferable".** In the light of this evidence as well as the evidence of ms Pretorius and mr Goliath, employees of the bank in the fraud division, I cannot find that the payment of the amount of this cheque into the trust account, i.e. that this cheque was met and credited to the defendant's trust account, was made in the *bona fide* and reasonable belief that it was owing to the defendant. Neither can I find that the error was reasonable.

[1] See *ABSA Bank Ltd v Leech* 2001 (4) SA 132 (SCA)
[2] *Rahim v Minister of Justice* 1964 (4) SA 630 (A) at 634

[9] The cheque was stolen and fraudulently paid into the Trust Account of the defendant. The plaintiff decided to reimburse Tshwane Metro, which it did.

[10] The defendant counterclaims for the amount of R199 678, being the amount recovered. His defence appears from paragraph 3 of his counterclaim:

> *"3. That on or about the 10th, 13th, 14th and the 18th of September 2010. I consulted with my clients Mr. Ngcobo and his business partner Simon Marithi and took instructions from them. On the 16th of September Mr Ngcobo deposited a cheque in the amount of R1 115 478, 26 (One Million and one Hundred and fifteen Thousand Four Hundred and seventy Eight Rand and Twenty six cents). I was instructed by my clients to dispense with the monies by paying various companies and people and debited my fees."*

For the purposes of this judgment I need not deal with the evidence of the said bank officials who performed certain investigations and got some explanation in respect of all the transactions which appear from exhibit "A26".

[11] The third witness of the plaintiff was mr Simon Mavavasa Marothi. He is 57 years of age and came across as a dignified building contractor and businessman. I accept his evidence unreservedly, especially as the defendant, who represented himself, did not cross-examine Marothi at all.

[12] The essence of Marothi's evidence was that he was contracted to Tshwane Metro to build a clinic in Mamelodi. The payment for his last invoice was due during September 2010. His previous invoices were promptly paid by Tshwane Metro but for this payment he waited 7 months. His invoice was dated 6 August 2010. He testified that he struggled until 11 March 2011 to obtain payment. That is only after he had obtained the services of an attorney to further his claim against Tshwane Metro. His first letter of demand, on behalf of the CC of which he is the only member, is exhibit "B20" and is dated 20 October 2010. He also had conversations with mr Nico Mans at Tshwane Metro who was also helping him to obtain the cheque. Mans then found out and said to him that the amount was paid into a trust account of an attorney. That was the first time he heard about it. He further testified that a CK1 form ("A43") in respect of SSS Cornerstones B and S with registration number 2008/138601/203 is a fraudulent document. First of all it is not his CC registration number. The correct number appears from his letter referred to above. Secondly it is striking that the name on this falsified CK1 is not the same as the name of the CC i.e. the payee of the cheque. Furthermore he testified that the person

mentioned as the only member on the CK1 is not him i.e. the name, although resembling his, is not his and the identity number is wrong. On exhibit "A44" there is a falsified copy of an identity document. The identity number at the top is his but the photograph is not of him.

[13] His further evidence was that a, so-called contract to be found on exhibit "B55-57" has nothing to do with him. The defendant's case is that that is a contract he drafted on behalf of his clients. On the last page of this document the signature purporting to be on behalf of SSS Cornerstone i.e. MS Makhiti is not the same person as he. He concluded his evidence in chief that on the date of the hearing it was the first time that he ever saw the defendant, i.e. in court.

[14] Mokase's evidence was according to the paragraph of his counterclaim which I have quoted above. He however did not call any of the number of witnesses who could have supported his version i.e. the people who were involved in the original negotiations and his clients who instructed him to make the payments.

[15] According to an affidavit he made in regard to answering a request for further documents to be discovered[3] he acted on the instructions of mr Marithi and Ngcobo who were engaged in a R5 000 000 contract with Metsing Industrial Services CC for the transportation route of chrome. This affidavit is remarkable for it vagueness. He did not call mr Abram

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[3] see "B34-37"

Metsing, although he was available. There were a number of meetings, he says, with Marithi and Ngcobo on behalf of SSS Cornerstones. At some of these meetings mr Metsing was also available.

[16] His alleged clients seem to be more imagined than real.

[17] After the first day of the hearing I requested him to bring all his client files relating to this matter as well as all relevant bookkeeping documents. He failed to do so and had a lame excuse of his motor vehicle having been clamped by Tshwane Metro and towed away. One would have expected him to have worked throughout the night to get these documents, if necessary, due to its importance. His evidence was in fact that he had two files relating to this matter.

[18] On the probabilities the defendant was involved in a fraudulent scheme. Somebody from Standard Bank must also have been involved in crediting the defendant's account with this cheque which was obviously not made out to him. Furthermore I find it strange that three cheques during October 2010 in the amounts of R50 0000, R50 000 and R170 000 were made out to a certain J M Mangena <u>or bearer</u>.[4] It is common cause that these cheques were cashed.

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4 Exhibit "B83.84 and 85"

[19] In my view the plaintiff did not prove its case. If the plaintiff wanted to claim on the basis of fraud or theft, it had to take cession of the claim from Tshwane Metro.

[20] As regards the counterclaim of R199 678 the defendant did not prove that he is entitled to the money – see par 18 above. Furthermore some of the recoveries were not from his trust account but from third parties.

[21] This judgment will be referred to the Law Society of the Northern Provinces for their <u>urgent</u> attention.

[22] I therefore made the following orders:

1. The plaintiff's claim is dismissed with costs.
2. The counterclaim is dismissed with costs.

A A LOUW

JUDGE OF THE HIGH COURT