FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2762/2012

In the matter between:

GUILLAUME JOHANNES OBERHOLSTER N.O.	1st Applicant
ANDRE JOHAN POSTHUMUS N.O.	2nd Applicant
ANTOINETTE POSTHUMUS N.O.	3rd Applicant

and

ZEPHAN PROPERTIES (PTY) LTD	Respondent

JUDGEMENT:	EBRAHIM, J
HEARD ON:	29 NOVEMBER 2012
DELIVERED ON:	20 DECEMBER 2012

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[1] The applicant, a family trust applies by way of motion proceedings for payment of the sum of R30 million, interest and costs which it claims is due to it by the respondent on the grounds of the latter's non performance of alleged share sale agreements entered into by them. The shares were issued by two companies, Highveld Syndication No 21 Limited, Registration No 2005/027601/06 ("Highveld 21") and Highveld Syndication No 22 Limited, Registration No 2005/027390/06 ("Highveld 22").

[2] The 2 companies, described in their respective prospectuses as loan stock investment holding companies, sought to raise funds through share subscriptions in order to purchase immovable properties. Investors were interested to invest in commercial property, their capital being secured by a guaranteed buy-back agreement it being provided in the prospectuses that the shares would be bought back at the purchase per share price, 5 years from the date of the investment.

[3] The original issue of the share allotment in these two companies was done in terms of prospectuses registered under the Old Companies Act (Act 61/1973) in the Companies Registration Office. The marketing of shares was done by the promoter of the companies, PIC Syndications (Pty) Ltd, ("Pickvest"). When, after the final closing date of the offer for sale of the shares to the public had expired on 10 August 2009 the companies were not fully subscribed, the respondent, at the time known as Zelpy 2095 (Pty) Ltd, took up the remaining shares in Highveld 21 and Highveld 22. Respondent changed its name to Zephan

Properties (Pty) Ltd on 8 June 2010. On the 20 October 2009, the respondent entered into two written agreements to sell its shares in Highveld 21 and Highveld 22. The parties to these agreements were Highveld 21 and Highveld 22, Besain & Visser (Pty) Ltd, PIC Syndications (Pty) Ltd and Zelphy 2095 (Pty) Ltd. In respect of Highveld 21, Zelpy undertook to take up the full outstanding number of shares to the value of R529 964 000,00 (clause 1 of the agreement).

In respect of Highveld 22, Zelpy undertook to take up the full outstanding number of shares to the value of R460 321 000,00 (clause 1 of the agreement).

These two agreements were annexed to respondent's answering affidavit as annexures 5 & 6 thereto.

[4] In terms of these two agreements Pickvest was authorised by respondent ("Zelpy") to market those shares which the respondent held in the 2 companies on the same terms and conditions as set out in the old (initial) prospectuses. Pending the sale, the share certificates of the respondent would be held in escrow (trust safekeeping) by a firm of

attorneys called Eugene Kruger & Co Incorporated ("Eugene Kruger") and would be released to the relevant purchaser on payment of the purchase price. It was also agreed that, on the instructions of Pickvest, Eugene Kruger would pay the nett proceeds of the sale to the respondent. This application concerns four tranches of shares owned by the respondent in these two companies which were sold by Pickvest to the applicant's trust. They form claims 1 – 4 in the notice of motion.

[5] 5.1 J P Mynhardt ("Mynhardt") and J E Kritzinger ("Kritzinger") were part of <u>Pickvest's network of sub-agents</u> whom Pickvest instructed to market the respondent's shares. Mynhardt and Kruger approached the trust. On 29 September 2010, the 1st applicant, in his capacity as trustee, purchased 5 000 shares in Highveld 21 for R5 million which was paid into the trust account of Eugene Kruger on 30 September 2010 – a written quotation was issued by Mynhardt and an application form completed by them – both Mynhardt and the 1st applicant signed the quotation.

5.2 Eugene Kruger paid the money he received to Highveld 21. On 30 September 2010, the 1st applicant purchased for Kritzinger a further 15 000 shares in Highveld 21 for R15 million and 5 000 shares in Highveld 22 for R5 million. Once again written quotations were issued and signed by Kritzinger and the 1st applicant and two accompanying application forms were completed. The purchase price was paid into the trust account of Eugene Kruger on the same day. Eugene Kruger subsequently paid the amount received to Highveld 21 and Highveld 22.

5.3 On 7 October 2010, Kritzinger and the 1st applicant signed a further quotation and completed a corresponding application form for the purchase by the trust of 5 000 shares in Highveld 22 for R5 million which was paid on 8 October 2010 into the trust account of Eugene Kruger who thereafter paid it over to Highveld 22.

[6] From the prospectuses issued, it is clear that there was a substantive difference between the nature of and conditions applicable to an investment in Highveld 21 on the one hand

and Highveld 22 on the other hand. In the case of Highveld 21, investors would earn interest from the date of the investment for a period of 5 years. An investment of R100 000,00 (one hundred thousand rand) would buy shares of 100 cents each and an interest earning loan account of R99 900,00. Investors in Highveld 22 would not earn interest but would buy shares with a view to achieving capital growth. An investment of R100 000,00 would buy 100 unit shares of R1,00 each and a share premium of R999,00 per share.

[7] It is common cause that the trust received interest payments in respect of its R20 million investment in Highveld 21 on a monthly basis from November 2010 until June 2012. In total, interest payments of R853 312,50 was received on the R5 million investment and R2 559 937,50 was received on the R15 million investment. It is the respondent's case that the monies received from the Trust were paid on Pickvests instructions to Highveld 21 and Highveld 22 and that the share certificates in respect of the trust's R5 million investment in Highveld 22 was sent by post to the trust's postal address on 3 January 2011 and received by the trust.

According to the applicants the share certificates were received on 12 January 2011.

[8] On 7 September 2011, Highveld 21 and Highveld 22 were placed under business rescue proceedings in terms of section 129 of the Companies Act, no 71 of 2008 ("the new Act"). A business rescue plan was prepared by the business rescue practitioner and adopted at a general meeting of shareholders and creditors on 14 December 2011, and has thus became binding on all shareholders and creditors of Highveld 21 and Highveld 22. According to the plan the trust is reflected as a creditor of Highveld 21 and a shareholder of Highveld 22. It is the trust's case that having filled in the application forms for the purchase of the shares in Highveld 21 and Highveld 22, it received no notification nor any communication from respondent whereby the trust's offers to purchase shares were accepted and/or that a reasonable time for acceptance of the four offers had lapsed. Consequently no contracts for the sale of those shares had come into existence. Accordingly it was entitled to its money back.

[9] The applicant basis its claim for repayment on 3 broad bases. In the first instance, the applicant relies on contract, in urging that it was a <u>tacit</u> alternatively an <u>implied</u> term of the agreement with Pickvest that, should the trust's offers not be accepted or not be accepted within a reasonable time that the offers would lapse and the moneys would have to be repaid. In addition, the applicant contends that since the respondent had placed the control of the entire process of the marketing and sale of the shares into the hands of Pickvest, who had been represented by Mynhardt and Kritzinger in the negotiations and dealings with the trust, it followed that Mynhardt and Kritzinger were the sub-agents of Pickvest who represented and were the agents of the respondent. Since the respondent had authorised and instructed Pickvest to conclude the agreements with the trust, on its behalf, it must follow that the respondent was liable to refund the trusts money, irrespective of any agreement which it may have had with Pickvest to pay the monies received for the shares directly to the two companies, Highveld 21 and Highveld 22. The applicants thus rely on actual authority. In the second instance, the applicants rely on ostensible authority, that in the event of

this court coming to the conclusion that the respondent had not authorised Pickvest and its sub-agents to conclude the share sale agreements on its behalf. Respondent is estopped from denying its authority because respondent's conduct was such as to lead the applicants into the belief that Pickvest, Mynhardt and Kritzinger had the necessary authority to conclude these agreements on respondent's behalf resulting in the payment of the money by the trust to its detriment and prejudice. The last leg of the applicant's claim rests on the doctrine of Unjust Enrichment; in the event a finding that there was no tacit alternatively implied agreement to refund the money paid by the trust, the latter is entitled to repayment on the basis of the *condictio causa data causa non secuta* alternatively the *condictio sine causa*. (**B & H ENGINEERING v FIRST NATIONAL BANK OF SA LTD** 1995 (2) SA 279 A at 284J and 285A; **KUDU GRANITE OPERATIONS (PTY) LTD v CATERNA LTD** 2003 (5) SA 193 SCA at 201H-J and 202F – G.)

[10] The respondent' case as presented in its answering affidavits is that it wanted to sell all the shares which it had taken up in Highveld 21 and Highveld 22, and to that end it had

authorised Pickvest to market those shares and to take full control and management of the entire process via the latter's network of agents on the same terms and conditions under which it had acquired those shares under the old prospectus. The only act in the entire marketing operation and disposal of its shares which it had reserved to be done by itself was the signature of the sale transfer forms following conclusion of the sale agreements. Respondent accordingly denies liability for repayment to the trust of the R30 million share price paid to Pickvest's agent on the ground chiefly that it did not personally contract with the trust, but that Pickvest had done so, that it personally had not received payment of the purchase price from the trust, but that Eugene Kruger had done so on behalf of Pickvest and had paid those funds to Highveld 21 and Highveld 22 on Pickvest Instructions. Respondent consequently denies Pickvest was acting as its agent and/or that it was Pickvest's principal in regard to the conclusion of the share sale agreements with the trust and denies that it received any money for the shares sold by Pickvest to the trust.

[11] Alternatively, the respondent contends that concerning the R20 million worth of shares sold in Highveld 21, if this court finds in the applicant's favour that respondent was indeed acting as principal and that the sales were conducted on its behalf by Pickvest, then and only in that event, respondent relies on a letter dated 12 April 2012 addressed by Eugene Kruger to the applicants and annexed as annexure "GOB6.1" to the founding affidavit to the effect that:

> "Die verkoper het meer aandele verkoop as wat hy besit het. Die beswaarmakers se remedie lê dus by die verkoper."

as being the crux of its defence viz that Pickvest had exceeded its authority and was liable to refund payment to the applicant. In plain language respondent's case is that it did not sell more shares than the number it actually possessed but that Pickvest, without respondent's knowledge and without authority, proceeded to solicit and obtain investments in excess of the number of shares available and because of this shares could not be issued to the trust in Highveld 21. Respondent submits accordingly that Pickvest was mandated and authorised only to sell shares actually possessed or owned by the respondent and that in selling the shares in Highveld 21 to the trust, it exceeded its mandate, thus clearing the respondent of all or any liability to the trust, as the contract concluded for the purchase of the shares by the trust fell outside the scope of the agents (Pickvest's) mandate. For that reason no contract between the trust and the respondent came into being. In the case of the Highveld 22 shares, respondent referred to the share certificates issued to the trust and received by an employee of the applicant on 12 January 2010 as proof of its performance in terms of the contract and as *prima facie* evidence of the trust's title as shareholder.

[12] The first issue which I must consider in the resolution of this dispute is whether Pickvest and its agents Mynhardt and Kritzinger had authority to act on respondent's behalf. In argument, Advocate Joubert, on behalf of the applicant, contended that it had been expressly agreed between Zephan and Pickvest in terms of their agreements dated 20 October 2009 (clause 6.2 of annexures 5 and 6 to the answering affidavit) that upon receipt of the purchase price for Zelpy's shares by Eugene Kruger, the nett proceeds of

the sale, that is excluding agents commission, were to be paid to Zelpy (the respondent) and it was irrelevant to the issue of authority that the funds had been paid directly to the 2 companies on Pickvest's instructions. I agree and I proceed to consider the matter on the basis of the factual finding which I now make that it was the respondent's money, representing the proceeds from the sale of shares owned by it which Eugene Kruger paid into the bank accounts of Highveld 21 and Highveld 22. That puts paid to the respondent's submission that it never received the purchase price of R30 million from the trust. I find as a fact that the electronic money transfer made by 1st applicant in respect of the shares purchased in Highveld 21 and Highveld 22 to Eugene Kruger was made on behalf of the respondent. Why would Pickvest instruct Eugene Kruger to pay the money to Highveld 21 and Highveld 22 and not to the respondent? Any attempt to answer that would immerse this court in pure speculation and the answer is in any event not relevant to the issue before me save that it points undeniably to the fact that Pickvest, in flagrant disregard of a material term and condition of its agreement with respondent on 20 October decided to embark on a course of unauthorised conduct by instructing Eugene Kruger to pay the proceeds of the sale into the coffers of Highveld 21 and Highveld 22. Be that as it may, that is a private arrangement as Mr Joubert put is between principal and agent.

[13] It is not correct, as contended for by Mr Rossouw for the respondent, that there is an absence of evidence that a contract was concluded between the trust and the respondent merely because the application forms indicated that the parties identified therein were the trust and Mynhardt and/or Kritzinger (Pickvest) and not the respondent. The respondent had <u>expressly</u> mandated Pickvest in terms of clause 6.2 of its agreement with Pickvest dated 20 October 2009, to market its shares in Highveld 21 and Highveld 22 and accordingly Pickvest acting as its duly authorised representative conducted the negotiations with the trust and filled out the documentation in its name on behalf of its principal, the respondent. That is why its name and not the respondents appear on the documentation. It is difficult to see how this process could have eventuated without such a mandate. The respondent conceded that it was shares owned by it which Pickvest had been authorised to sell. It

has also conceded that the authority it granted to Pickvest was wide, including every act which was deemed necessary to find buyers like for example the appointment of a network of sub-agents. But whether a contract of sale was concluded between the parties is another enquiry altogether which I shall address as a different aspect of the case before me in a moment. It matters not the slightest jot deciding the issue of Pickvest's authority, therefore that the respondent was not actually paid the proceeds of the shares it sold in the sum of R30 million, that is a quarrel between the respondent and its agent, Pickvest privately. It does not detract from the fundamental fact that Pickvest sold respondent's shares on full authority from the respondent. This is conceded by the respondent. In these circumstances it is inconceivable that either the respondent or Pickvest or its agents Mynhardt and Kritzinger could have or would have agreed that, in the event of non-acceptance of the trust's offers to purchase, or non-performance of the agreement of sale, were such an agreement have been concluded, that the funds paid by the trust could and would be retained by the respondent as seller of the shares or its nominated and authorised agents (Pickvest). Business efficacy dictates against this occurrence. I find that a tacit agreement that the money would be repaid in such circumstances must have and did come into existence at the time the parties negotiated the sale of the shares to the trust. Alternatively that such a term was implied into the contract by law. (**TECHNI-PAK SALES (PTY) LTD v HALL** 1968 (2) SA 231 (W) at 236 to 237; **VAN DEN BERG v TENNER** 1975 (2) SA 268A at 277D.) I conclude this issue with the finding therefore that Pickvest and its agents Mynhardt and Kritzinger had actual authority from the respondent to sell its shares in Highveld 21 and Highveld 22. That however is not the end of the enquiry.

[14] The next question to be answered is whether a contract of purchase and sale of the respondent's shares in Highveld 21 and Highveld 22 was actually concluded between the respondent and the trust or did Pickvest as contended for by the respondent, exceed the scope of its express mandate as conferred by clause 6.2 of the 2 agreements dated 20 October 2009. English authority in the form of **KEEN v MEAR** (1920) 2 CH 574 at 579 has often been relied upon in support of the proposition that an agent cannot validly bind his principal to any terms which are not expressly stated or

stated by necessary implication in his mandate' even if such terms be more to his advantage as principal than the terms authorised. The contract concluded by the agent must be the contract he was authorised to make. Should he exceed his authority by entering into a contract other than the one authorised for any reason, his principal cannot be bound by its terms as no enforceable contract can be said to have come into existence; its provisions being unauthorised by the principal. (**BALZUN v O'HARA AND OTHERS** 1964 (3) SA 1 WLD.)

[15] Mr Rossouw argued that the respondent disavows liability to the trust because no contract with respondent for the sale of its shares to the trust was concluded since Pickvest went beyond the scope of the express authority conferred by clause 6.2 of the two agreements of 20 October 2009 and canvassed the sale to the trust of investments not owned by the respondent. Put plainly, Mynhardt and Kritzinger sold shares to the trust in excess of the number of shares respondent owned in Highveld 21 and Highveld 22. Because they exceeded their authority, their principal (respondent) is not bound by any juristic acts concluded by them on its

behalf. Mr Joubert sought to counter this argument by pointing to the fact that the failure by the promoters to ensure that the respondent's shares in the two companies were not oversubscribed could not be blamed on nor the consequences of that failure be placed on the applicant. This off-course is so and that the respondent itself was of a similar view is borne out by its attempt to contain the effects of its agents over enthusiasm in marketing its shares by minimising the damage. This is evident from its entry into a further contract on 10 December 2010 with Pickvest that any offers for the sale of shares in excess of the number held by it and available for sale, would be accepted by the issuing of preferential shares in a company called Growealth, a public company established and listed on the Stock Exchange by the respondent. So it is clear that as at December 2010 the respondent and Pickvest were already aware that the trust could not be provided with the shares in Highveld 21. But the moot point is whether it can be said that respondent was aware at the time when the trust made the application to purchase its shares in Highveld 21 and made payment to Eugene Kruger of the purchase price (between 29 September 2010 and 30 September 2010) that, its agent was acting in excess of the authority conferred upon it? I do not think so.

[16] But that does not assist the respondent in my view because the sale of its shares was authorised – Pickvest had been given express authority to sell respondent's shares. The fact that Pickvest chose to appoint a whole network of agents all of whom were tasked with selling the same shares and who did not ensure that oversubscription was avoided is not the applicants problem – while it is true that the authorities favour the principal in instances where the agent exceeds the bounds of his authority (**NEL v S A RAILWAYS AND HARBOURS** 1924 AD 30 AT 36 – 37), it is only to terms which are not expressly stated or cannot be necessarily implied from the mandate itself that the invalidity attaches. I do not agree that the mandate in this case (clause 6.2) necessarily implied that Pickvest should only sell shares owned by the respondent and not sell shares not owned by the respondent, which is the case pleaded on behalf of respondent – it conferred a simple instruction to sell all the shares taken up by Zelpy in the two companies for the price they were originally issued for in terms of the old

prospectuses, nothing more and Pickvest's agents did just that. The fact that each agent got the bit between the teeth and sold the same shares to a number of investors cannot necessarily translate into an excess of authority on the part of Pickvest. That would be absurd for it would mean that in every case where a mandate is conferred to perform some juristic act described therein, it must necessarily follow that it is implied therein that to do otherwise amounts to exceeding the authority granted by the principal. Obviously such a general proposition cannot be countenanced or invoked to support the validity/invalidity of all transactions conducted by an agent on authority granted by his principal. The validity in each case will depend on the particular facts of that case and each case will have to be decided and assessed on its own merits, according to the natural meaning to be assigned to the words incorporating the authority conferred. I find that Pickvest's conduct showed a determination to sell the respondent's shares and obtain investments in the two companies which resulted in more than 1 buyer for the same investment. There was no indication at all in the clear and express instructions in the mandate that implied that to sell more shares than the number actually owned by the respondent was prohibited. That being the case, it follows that it cannot be said that Pickvest and its agents Mynhardt and Kritzinger acted in excess of the authority conferred by the respondent in selling the shares in Highveld 21 to the trust.

[17] The respondent sought to correct the position by issuing shares in its public company, Growealth but as far as the applicant is concerned, the respondent had no reservations that a contract for the sale of its shares in Highveld 21 had in fact been concluded with the trust. This is clear from the fact that interest payments were paid to the trust. The investments were made and the contract concluded, why then could the share certificates not be issued, in respect of the R20 million investments in Highveld 21? There is no evidence in this regard save that all the indications are that a contract for the sale of 20 000 shares in Highveld 21 was concluded by Pickvest on behalf of the respondent and the purchase price of R20 million paid to Eugene Kruger by the trust. In these circumstances, the respondent’s allegations that Pickvest acted in excess of its authority and sold shares not owned by the respondent is clearly untenable and is

rejected as far-fetched and false. (**<u>PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD</u>** 1984 (3) SA 623A at 634E-C; **<u>NATIONAL SCRAP METAL (CAPE TOWN) (PTY) LTD AND ANOTHER v MURRAY AND ROBERTS LTD AND OTHERS</u>** 2012 (5) SA 300 (SCA).)

The fact that the applicants kept the interest payments and raised no concerns regarding their repayment to Highveld 21 at any stage between November 2010 and June 2012 is also indicative of the fact that as far as they were concerned, a contract for the purchase and sale of the shares by the trust had been concluded with the respondent.

[18] On being informed by Kritzinger in October 2011, that the shares in Highveld 21 had been oversubscribed, that the trust's application for the purchase of 15 000 shares would not be met (by Kritzinger) and that the R15 million paid would be refunded, the applicants took no action and this inertia continued until June 2012, notwithstanding that share certificates for the investments it had made in Highveld 22 had been received by the trust on 12 January 2011. Not once during the period between 30 September 2010 (when

the first payments were made) 8 October 2010 (when the last payment was made by the trust) and October 2011, did any of the applicants raise the alarm, either that as far as the trust was concerned its offers had not been accepted <u>alternatively</u> that a reasonable time for their acceptance had elapsed that consequently no contract for the purchase of R30 million worth of shares in Highveld 21 and Highveld 22 had been concluded with respondent. The exact opposite is in fact clear, that the applicants continued to operate having received and kept the share certificates in respect of the R10 million investment in Highveld 22 and the monthly interest payments in respect of the R20 million investment in Highveld 21. Accordingly in regard to Highveld 22, on the respondent's version, there <u>was</u> performance of the contract for the purchase of 10 000 shares for R10 million paid by the trust by the issue of the requisite share certificates to the trust by the respondent. The point raised by Mr Joubert of proper service at the trust's chosen domicilium by registered post is without merit for it is the applicant's own version that the share certificates were actually received by an employee of the trust. I shall refrain from pronouncing upon the soundness of the applicants submissions regard to the respondent's non-compliance of the formalistic statutory requirements in terms of section 135 and section 95 of the Companies Act, no 61 of 1973. In the final analysis then deciding the question of the conclusion of the four contracts on the respondent's version, I conclude that the applicants have discharged the onus of proving on a balance of probabilities that Pickvest and its sub-agents Mynhardt and Kritzinger were authorised by the respondent (a) to conclude contracts on its behalf for the sale of its shares; (b) that in accordance with that authority, contracts came into existence between the applicant's trust and the respondent in performance of which contracts the trust made payment of the amount of R30 million in respect of the purchase of the shares to Eugene Kruger on behalf of the respondent; (c) the respondent made interest payments from Highveld 21 to the trust and signed and delivered share certificates pertaining to Highveld 22 shares to the trust. Accordingly I find no merit in the applicant's contentions that their offers to purchase were not accepted <u>alternatively</u> not accepted with a reasonable time or in the respondent's contention that no contracts were concluded for the purchase of its shares in Highveld 21 with the applicant due to its agents exceeding the scope of their authority.

[19] In light of this, it is not necessary for me to consider the issue of estoppel and Pickvest's ostensible authority to bind the respondent. I shall accordingly move on to the doctrine of Unjust enrichment; public policy, ubuntu and section 39 (2) of the Constitution of the Republic of South Africa, Act no 108 of 1996 which are all aspects argued by Mr Joubert as a basis for the applicant's claim to a refund of its money on the grounds of fairness equity and good faith.

In **POTGIETER v POTGIETER NO** 2012 (1) SA 637 (SCA), Brand JA had occasion to pronounce upon the validity of the variation of a trust deed and in the course of doing so considered the dictum of Ngcobo J in **BARKHUIZEN v NAPIER** 2007 (5) SA 323 (CC) that under our new Constitutional dispensation it is part of our contract law that, as a matter of public policy, courts are entitled to refuse to give effect to the implementation of contractual action provisions which it regards as unreasonable and unfair.

[20] The learned Judge disagreed with this challenge to contractual privity as being at odds with the principle of the law of contract of the law of contract in this country because reasonableness and fairness are not freestanding requirements for the exercise of a contractual right. I agree and Mr Rossouw's argument echoes this stance by questioning the elements which are to be placed into the scale to test if they meet the required standards of the remedy. In support he relies on the judgment of Moseneke DCJ in **EVERFRESH MARKET VIRGINIA (PTY) LTD v SHOPRITE CHECKERS (PTY) LTD** 2012 (1) SA 256 where it was held that a case for the development of common law principles by the infusion of constitutional values has to be properly pleaded in order to be properly considered. Whilst refraining from definitively deciding the issue in regard to contractual obligations he held that contracting parties need to relate to each other in good faith. What does this all means for the parties in the present proceedings for, as Mr Rossouw put it, does it mean that the respondent is obliged out of kindness and fairness to pay back R30 million to the applicants? I agree that this would place an emotional context upon a contractual obligation which is not called for

and wholly inappropriate. Without certainty as to the precise elements of such a remedy, I shall wisely refrain from pronouncing upon it in the context of section 39(2), pubic policy and the concept of ubuntu and apply my mind to the common law concept of enrichment.

[21] The respondent argues that because it never received the money, it can't pay it back, the money was paid to Highveld 21 and Highveld 22. Mr Jouberts submission is that that has nothing to do with the applicants, it was a private arrangement between respondent, Pickvest and Eugene Kruger. For reasons best known to the respondent, monies belonging to it were paid to the two companies contrary to the share sale agreements (annexures 5 and 6 to the answering papers). Consequently respondent has been unjustly enriched at applicant's expense because applicants did not receive value for money paid. No share certificates in Highveld 21 and no returns on their capital investment in Highveld 22, were received. Mr Joubert contends that I should ignore the interest payments made to applicants because they are of no consequence to the present case between the parties as they were paid by a third party

(Highveld 21). The fact that the two companies have been placed under the supervision of a Business Rescue practitioner also has no effect, he argues, on the issue of respondent's enrichment at applicants expense, because the two companies are third parties in the context of the present litigation and the fact that applicant's money was paid by Kruger to the two companies is irrelevant. The applicant's quarrel is with the respondent who has been unjustifiably enriched *sine causa (***B & H ENGINEERING v FIRST NATIONAL BANK OF SA LTD** *supra)* because the monies that were paid to the attorney was the respondent's money, supposedly given for value to be received which never materialised.

[22] What weighs strongly with me is that for each of the four batches of shares, the quotation spelt out specifically:

> "Herverkoop kwotasie:
>
> Highveld Syndication No 21 Bpk h/a Tyger Manor Syndication vir aandele wat gekoop word van Zelpy."

(in the case of Highveld 21) and

> "Herverkoop kwotasie:
>
> Highveld Syndication No 22 Bpk h/a Charles Crescent Syndication vir aandele gekoop van Zelpy."

(in the case of Highveld 22).

So there could be no possible mistake that it was respondent's shares, for the sale of which he was entitled to the proceeds. The fact that those proceeds were paid into the bank accounts of the two companies must have been done with respondent's knowledge and consent and does not detract from the inescapable fact that it was his money paid to him by the applicant's trust. But that in and of itself does not amount to respondent having been unjustly enriched. The crucial issue here is, as I see the case, the reason(s) why the trust made the investments, of what consequence were the shares, what end was intended to be achieved by both the applicants and respondent in regard to the purchase and sale of the investments, and the applicants attitude to the interest bearing loan account in Highveld 21, all of which cannot simply be ignored. What the real reason was for investing R30 million in these two companies and what was intended to be gained by the respective parties is the real issue in these proceedings and will impact on the broader question of whether the respondent was unjustly enriched at the applicant's expense *sine causa* or not.

[23] But this is not an issue which can be resolved on the papers before me nor on probabilities (**<u>ADMINISTRATOR, TRANSVAAL & OTHERS v THELETSANE & OTHERS</u>** 1991 (2) SA 192 A at 196I – J and 197A – B). Neither party has made any reference in their respective affidavits to the historical background to the share sale agreements concluded between them. Mr Joubert chooses to deal with this aspect in a dismissive fashion arguing that this court should regard the interim interest payments received by the trust as payments which need not be explained or rather which <u>are</u> unexplained, as they have nothing to do with the four claims sued upon. Mr Rossouw has taken issue with this on the grounds that the payments ought to have raised significant doubt in the minds of the applicants that something was not quite right about the investment which the trust had made in Highveld 21 especially because no share certificates had been issued to the trust. This was a warning light, he argues, that a dispute was to follow, yet the applicants persisted in bringing proceedings on motion for the recovery of the purchase price of their investment and he has boldly pressed for a dismissal of the entire application

with costs. But I am not so inclined in view of the particular circumstances of this matter which impels me to adopt a robust and common sense approach (**<u>SOFFIANTINI v MOULD</u>** 1956 (4) SA 150 at 154E) to the disputes of fact raised on the affidavits. In my view it is desirable that the whole issue concerning the alleged enrichment of and the alleged unjustified gains made by the respondent in selling its shares (on the applicants version), be referred for the hearing of oral evidence. This will finally determine whether the issuing of share certificates were of any real consequence to the parties and the question of the interest bearing loan account will fully be ventilated and placed in its proper perspective as between the contracting parties.

[24] Accordingly the order I make is the following:

24.1 This matter is referred for the hearing of oral evidence on a date to be arranged with the Registrar, on the question of whether or not the respondent has been unjustly enriched at the expense of the applicants' trust to the extent of R30 million in consequence of the conclusion between them of contracts of purchase and sell in respect of shares owned by the respondent in Highveld 21 and Highveld 22;

24.2 Each party is entitled to call any/or such witnesses as it may consider necessary in order to effectively conduct its case at such hearing;

24.3 Neither party shall be entitled to call any witness unless it has served notice thereof on the other party at least 14 days before the date appointed for the hearing (in the case of the applicant) and at least 10 days before such date (in the case of the respondent) as well as a statement wherein the evidence to be given in chief by such person is set out;

24.4 Each party shall make such discovery as it considers necessary for the conduct of its case in accordance with and within the time limits prescribed by Rules 35(1)(8) and (10) of the Uniform Court Rules.

24.5 The costs of this application to date shall be determined at the hearing of oral evidence.

S. EBRAHIM, J

On behalf of the Plaintiff:	Adv. A. P. Joubert SC with Adv. C. J. Nel Instructed by: Symington & De Kok BLOEMFONTEIN
On behalf of the respondent:	Adv. P. F. Rossouw SC with Adv. N. Snellenburg Instructed by: Honey Attorneys BLOEMFONTEIN

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