



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 28867/2019

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 04 NOVEMBER 2024

SIGNATURE

In the matter between:

DISTEDU HOLDINGS (PTY) LTD

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

Respondent

Summary: *Plaintiff seeking to recover proceeds of moneys erroneously paid to incorrect recipient – moneys constituting municipal infrastructure grants of some R183 million – recipient, via its attorney, inter alia paid the 13th defendant R26 million of these funds – 13th defendant dissipating funds, some even after knowledge of its tainted source – plaintiff claims in terms of *condictio ob turpem vel iniustam causa**

or general enrichment claim – exceptions taken – pleadings not vague and embarrassing and can be pleaded to - at pleading stage, case for possible acknowledgement of general enrichment claim made out – exceptions dismissed.

ORDER

The exception is dismissed with costs, such costs to include the costs of two counsel, where employed.

JUDGMENT

The matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected herein. Judgment was handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing-down is deemed to be 04 November 2024.

DAVIS, J

Introduction

[1] The plaintiff, being the Minister of Cooperative Governance and Traditional Affairs (the Minister) erroneously paid some R183 million to the Greater Sekhukhune Secondary Cooperative Ltd (the Coop) instead of to the

Greater Sekhukhune Municipality. The amount paid over constituted municipal infrastructure grants to which the Coop had no right.

[2] The Coop, via its attorney, repaid some of the money, but paid the rest out to various entities, including the 13th defendant, Distedu Holdings (Pty) Ltd (Distedu).

[3] When the Minister sought to recover the R26 million paid to Distedu, the latter excepted to the Minister's particulars of claim.

The pleaded claim against Distedu

[4] It is trite that, at an exception stage, a court and the parties are bound to the factual allegations contained in the pleading excepted against¹.

[5] These facts have been pleaded as follows: during July and August 2018 the plaintiff erroneously made two payments totaling R 183 450 000.00 into the bank account of the Coop². Of this amount the Coop transferred R130 million to Boshoff Attorneys³.

[6] Pursuant to the Coop and Boshoff Attorneys having been informed that the payments had been made in error by the plaintiff, R50 million was recovered by a reversal of payment by FNB and R29 402 836.41 had been repaid by Boshoff Attorneys⁴.

[7] In the meantime however, the Coop had instructed Boshoff Attorneys to transfer R38 163 109, 54 of the erroneously received funds to Distedu⁵.

¹ Joubert (rea), LOTWSA, Vol 4 3d Edition at 193.

² Par 10 of the Particulars of Claim.

³ Par 12 of the Particulars of Claim.

⁴ Par 15 of the Particulars of Claim.

⁵ Par 68 of the Particulars of Claim.

[8] The transfer to Distedu was made “pursuant to the unlawful acts and/or unlawful instructions” of the Coop⁶.

[9] In addition, the plaintiff had pleaded that “the said payment by the Cooperative to Distedu was without legal cause”⁷.

[10] During December 2018 the plaintiff had obtained a court order in an attempt to recover the unlawfully dissipated funds and it pleaded that Distedu had, at the latest become aware hereof a 11 January 2019⁸. By that time, however, Distedu only had R649 044,70 of the money left⁹.

[11] Relying on the *condiction ob turpem vel iniustam causa* (a claim based upon a “wicked” or unlawful cause) alternatively a general enrichment claim, the plaintiff pleaded that Distedu had been unjustifiably enriched by the amounts it had received and that the plaintiff had been impoverished by the same amounts¹⁰.

The exception

[12] Exception was taken on the basis that the plaintiff’s particulars of claim was vague and embarrassing, alternatively that it did not disclose a cause of action against Distedu.

[13] The grounds of the exception have been formulated thus:

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⁶ Par 69 of the Particulars of Claim.

⁷ Par 70 of the Particulars of Claim.

⁸ Par 71 of the Particulars of Claim.

⁹ Par 72 of the Particulars of Claim.

¹⁰ Par 37 of the Particulars of Claim.

Plaintiff, in order to substantiate its claim against the 13th defendant, based on the action pleaded, nowhere alleges:

- 3.1 That the payment was not made in the bona fide and reasonable, but mistaken belief that monies were not owed to the 13th defendant.*
- 3.2 That the error in making the payment was not reasonable.*
- 3.3 That the monies the 1st defendant paid to the 13th defendant was no due and/or not payable.*
- 3.4 That the moneys were paid in respect of or consequent upon an illegal or void or immoral agreement.*
- 3.5 That no valid agreement existed or exists between the 1st and the 13th defendants alternatively that any agreement, if it existed, was void or immoral.*
- 3.6 That the 13th defendant was enriched at the expense of the plaintiff or*
- 3.7 That the plaintiff was impoverished.*

As a consequence, it is not possible for [the 13th] defendant to plead to the plaintiff's particulars of claim".

Evaluation

[14] At the outset, one can dispense with the complaints contained in the above quoted paragraphs 3.5, 3.6 and 3.7. These complaints were simply unfounded:

the absence of a valid agreement between the Coop and Distedu had expressly been pleaded¹¹ and so had the enrichment and impoverishment¹².

[15] The exposition of the facts could hardly have been pleaded clearer and the complaint of vagueness and embarrassment is equally unfounded. I find that, on a reading of the plaintiff's particulars of claim, all the allegations against Distedu can be pleaded to without embarrassment.

[16] If there may be any doubt on this score, Distedu's sole director had, in an affidavit delivered in support of Distedu's application for condonation for the late delivery of its heads of argument, already disclosed Distedu's primary defence. It is this: the moneys paid by the Coop to Distedu was partial payment of the manufacturing and commissioning costs of a plant designed to utilise marula fruit and manufacture products therefrom, which work had been done at the instance of the Coop. There is accordingly no discernable reason why Distedu cannot deliver a plea to this effect. Whether such a defence would, in view of the circumstances of the case, if proven, be sufficient, would be for the trial court to decide.

[17] Incidentally, and in the interest of reaching finality in this interlocutory matter the condonation sought by Distedu is granted.

[18] This leaves one with the consideration of the rest of the grounds of exception. The fact that the payments to the Coop had been made in error, had expressly been pleaded¹³. The complaints made in quoted paragraphs 3.1, 3.2 and 3.3. of the exception all pertain to elements of the *condictio indebiti* (which

¹¹ Par 70 of the Particulars of Claim.

¹² Par 73 of the Particulars of Claim.

¹³ Par 10 of the Particulars of Claim.

is a claim for recovery of a prior a payment made in the *bona fide* and reasonable, but mistaken belief that it was owing)¹⁴.

[19] The facts of the matter however, closely resemble those in *First National Bank of South Africa v Perry NO and Others*¹⁵ (*Perry*). In that matter the appellant had instituted action for the recovery of the proceeds of a forged cheque, not only from the forger, but also from those in whose hands the proceeds ended up.

[20] The summary of the facts and claims in *Perry* is to the found in paras [3] and [4] of the judgment as follows: “*Briefly stated, FNB’s case is that after the forged cheque was laundered through the bank of a stockbroker, the latter issued three cheques on Dhamba’s instructions, which were paid, directly or indirectly, to Nedbank, Standard and NRB to the credit of either Dhamba, the trust or Repsta ... The relief sought against the banks, Nedbank, Standard and NRB was payment of such stolen funds as were traced to each of them ...*”.

[21] The court then went on to explain that the *condictio indebiti* is based on the factual absence of a cause for the transfer of funds, in the first instance, simply because there is none and in the second instance, because of a mistaken belief that there is one. By contrast, in the case of the *condictio ob turpem vel iniustam causa*, there is a cause, but it is an unlawful one. The law does not recognize it as a valid means of conferring title.

[22] It appears that this distinction also applies to the pleadings in this matter. In the present case, the Minister similarly relies on the *condictio indebiti* for its claim against the Coop for moneys erroneously paid to it, and relies on the “unjust cause” upon which the Coop had distributed and laundered funds to which it had

¹⁴ *Iscor Pension Fund v Jerling* 1978 (3) SA 858 (T) and *Rahim v Minister of Justice* 1964 (4) SA 630 (A) at 634.

¹⁵ 2001 (3) SA 960 (SCA).

no claim via its attorneys to Distedu. It is on this basis that the plaintiff claims from the Distedu the R649 044, 70 referred to in paragraph [10] above.

[23] It was in similar circumstances as these that the Supreme Court of Appeal in *Perry* further concluded at [29] that in the same fashion whereby a *rei vindicatio* seeks to recover identified stolen money, “*there is a not dissimilar rule affecting the enriched possessor of stolen goods who parts with them with the knowledge of the owner’s claim ... this rule that the enriched party may not with impunity part with the goods after learning of the impoverished party’s claim, supports the conclusion reached earlier that once he gains such knowledge, he is liable to the extent of his enrichment*”. On that basis, the court found that a cause of action had been made out against the receivers of funds. In my view, the same applies to the claim against Distedu.

[24] Distedu’s complaints referred to earlier might therefore have been applicable to the pleaded case based on the *condictio indebiti*, had it been the in a similar position as the Coop. Those complaints cannot be applicable to the pleaded case that the Coop had, with knowledge of the fact that it had no claim to the monies, misappropriated it and laundered it through its attorneys to Distedu. Turpitude then not only attached to those who laundered the funds but also to those who received it once they had knowledge of the turpitude.

[25] I consequently find that the formulation of the claim as against Distedu, does not suffer from the complaints based on a different and inapplicable cause of action.

[26] In addition to this, the Minister’s claim against Distedu is also for recovery of the rest of the funds received, based on a general enrichment claim. Notably, although it had been referred to during argument, exception had not been taken against the particulars of claim insofar as it envisaged this reliance on a general

enrichment claim and perhaps wisely so. While it is trite that no such claim has been generally accepted as yet in South Africa, it has often been held that perhaps the time has come to do so¹⁶.

[27] In this regard, it is equally notable that the plaintiff has pleaded that “... *it is just and equitable and/or in the interest of justice and/or in the public interest* ...” that Distedu be held liable for the total amount of tainted funds which it had received. That, however, is a matter for the trial court to decide.

[28] In the premises, I find that none of the grounds of exception are valid. The exception should therefore fail in its entirety.

Costs

[29] I had considered whether the costs of the exception should be ordered to be costs in the cause, but in view of the fact that the grounds of exception were so materially misplaced and that it appeared that Distedu could very well have pleaded to the particulars of claim, I find that the exception had merely resulted in an unnecessary delay of the action. This has been exacerbated by Distedu’s dilatoriness in proceeding with its exception, as evinced by the late delivery of its heads of argument, despite having been compelled to do so. Considering this, together with the lack of success of the exception, I find, in the exercise of the court’s discretion, that costs should follow the event.

Order

[30] Consequently, the following order is made:

¹⁶ *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA), referring inter alia to *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 483 (SCA) at par [8].

The exception is dismissed with costs, such costs to include the costs of two counsel, where employed.


N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 30 October 2024

Judgment delivered: 04 November 2024

APPEARANCES:

For the Plaintiff: Adv A J Lapan
Attorney for the Plaintiff: State Attorneys, Pretoria

For the Defendant: Adv H. F Geyer
Attorney for the Defendant: Becker Attorneys, Polokwane
c/o Phillip Venter Attorneys, Pretoria