

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
18/11/2024	
DATE	SIGNATURE

Case No: 2021/59310

In the matter between:

DAVID JOHN BRUNI N.O.

First Plaintiff

IAN ROBERT McLAREN N.O.

Second Plaintiff

and

DAYTONA GROUP HOLDINGS (PTY) LIMITED

First Defendant

DAYTONA (PTY) LIMITED

Second Defendant

JUSTIN DIVARIS

Third Defendant

JUDGMENT

This judgment is deemed to be handed down upon distribution to the parties or uploading by the Registrar to the electronic court file, whichever occurs first.

Gilbert AJ:

1. The first and second defendants have excepted to one of the claims advanced by the plaintiffs against them on the basis that the claim lacks the necessary averments to sustain an action. Although there was a second ground of exception, that was taken to a claim advanced against the third defendant. The plaintiffs have since withdrawn their claim against the third defendant and so only the first ground of exception remains.
2. The plaintiffs plead that:
 - 2.1. they are the joint liquidators of the Small and Medium Enterprises Bank Limited (“the SME Bank”), a company that was placed under liquidation by the High Court of Namibia and that they have since been recognised as liquidators in South Africa;
 - 2.2. their various investigations uncovered what they describe as a grand scheme of fraud perpetrated against the SME Bank by what is described as *“the dramatis personae in conjunction with a number of third party persons and entities”* by way of manipulating the payment system of SME Bank;
 - 2.3. *“by design of the perpetrators of the fraud and theft, unravelling the layers of persons and entities through which the stolen money*

was laundered and the money trail disguised has been and is an arduous process”;

- 2.4. nonetheless investigations have established that in excess of R253 million was misappropriated from SME Bank;
 - 2.5. various identified persons and entities received the stolen money, directly from the SME Bank as the first recipients. A tabulated list of these first recipients together with the amounts they received is pleaded;
 - 2.6. *“as the investigation continues, the plaintiffs have discovered further instances of theft and fraud perpetrated against the SME Bank, in particular where the money has been remitted and laundered between [the first recipients] and further recipients of the SME Bank’s stolen monies”.*
3. The plaintiffs then and more particularly in relation to their claim against the first and second defendants plead that:
 - 3.1. an amount of R79.8 million of the monies stolen from the SME Bank was received by and laundered through an entity known as AMFS. This entity appears amongst the tabulated first recipients;
 - 3.2. a portion of the stolen monies received by AMFS was on-paid to the first defendant on 27 February 2015 in an amount of R1 021 500.00 and various amounts totalling R10 275 500.00

were on-paid to the second defendant by way of various specified pleaded amounts over the period July 2015 to November 2015;

3.3. “[u]pon becoming aware of the above payments from AMFS to [the first and second defendants], the plaintiffs sought information from the defendants regarding the payments” and that the defendants were subpoenaed to attend an insolvency enquiry.

4. The plaintiffs go on to plead that:

4.1. “[t]he information provided and explanation given by the defendants’ representatives at the inquiry was that the payments were received in the ordinary course of the defendants’ business pursuant to a number of vehicle sale transactions with their customers (the ‘Vehicle Recipients’);”

4.2. “[i]n light of this information, the plaintiffs believed that the Vehicle Recipients were the beneficiaries of the stolen money and so instituted action proceedings (under case number 1612/2020) against them”;

4.3. “[i]n the course of the litigation under case number 1612/2020, the Vehicle Recipients:

- deny being beneficiaries of the monies stolen from the SME Bank;

- *allege that they themselves paid in full for the vehicles received by them; and*
- *allege that they have no knowledge of the transactions referred to in [paragraph 3.2 above]”;*

4.4. *“[i]n light of the defences raised by the Vehicle Recipients, the plaintiffs sought an explanation from [the third defendant], as representative of [the first and second defendants]. On a number of occasions [the third defendant] was subpoenaed to explain the discrepancies between the version proffered by the defendants initially and the explanation of the Vehicle Recipients”;*

4.5. *“[t]o date, [the defendants]:*

- *have not provided any explanation for [the first and second defendants’] receipt of the monies referred to in [paragraph 3.2 above];*
- *have not provided any proof that the monies referred to in [paragraph 3.2 above] were received in payment from or on behalf of the Vehicle Recipients; and*
- *have not provided an explanation in respect of the discrepancies between their version and those of the Vehicle Recipients”;*

- 4.6. “[u]ntil the plaintiffs received the Vehicle Recipients’ version, after instituting proceedings against them under case number 1612/2020, they were unaware that the defendants had any role in the fraud perpetrated on the SME Bank”;
- 4.7. “[i]n the circumstances, the plaintiffs issued summons with the intention of consolidating this action with the action under case number 1612/2020, so that the court may determine who, in fact, benefited from the monies stolen from the SME Bank”;
5. I have set out at some length the averments in the particulars of claim as it does inform my approach to the exception.
6. The plaintiffs then advance various causes of action against the defendants in relation to what they have alleged is the stolen money received by the first and second defendant . One of the claims pleaded, in the alternative, is based upon the *condictio furtiva*. It is to this cause of action that the first and second defendants have taken exception.
7. The pleaded paragraphs in the particulars of claim that relate to this cause of action, which are set out under the heading “*Condictio furtiva*” are as follows:

“38. At all material times hereto the SME Bank was the owner of the monies which were:

38.1 *stolen from it as reflected in [the tabulated list of first recipients];*

38.2 *laundered through the conduit entities pleaded above, and AMFS in particular; and*

38.3 *transferred to [the first and second defendants].*

39. *[the first and second defendants] received the monies in a reckless manner, knowing that the monies were not due to them and in receiving, and by appropriating the monies, the defendants took the risk that the monies were not legally due to them and, by shutting their eyes to the consequence of appropriating the monies in the circumstances, acted with dolus eventualis”.*

8. As the exception is that the particulars of claim lack averments necessary to sustain an action based upon the *condictio furtiva*, it is useful to state what that cause of action is. Malan JA in *Chetty v Italtile Ceramics Ltd* 2013 (3) SA 374 (SCA) at paragraph 10¹ describes the remedy as follows:

“The condictio furtiva is a remedy the owner of, or someone with an interest in, a thing has against a thief and his heirs for damages. It is generally characterised as a delictual action. It is, of course, required that the object involved be stolen before the condictio can find application. The law requires for the crime of theft –

¹ Some footnotes excluded.

'not only that the thing should have been taken without belief that the owner ... had consented or would have consented to the taking, but also that the taker should have intended to terminate the owner's enjoyment of his rights or, in other words, to deprive him of the whole benefit of his ownership'.²

However, at common law 'theft' has a wider meaning and includes furtum usus, or the appropriation of the use of another's thing. Theft of the use of another person's thing is no longer a crime. The condictio furtiva lies in all cases of theft – 'whether the theft wreaked was one of proprietorship or of use or possession ... makes no difference to the possibility of the action being available'. In Clifford v Farinha [1988 (4) SA 315 (W)] it was stated with regard to the condictio furtiva:³

"(T)he benemer – to use the term of De Groot 3.37.3 – does something which he is not permitted by law to do, namely, to arrogate to himself the power to deal with another's property. Thereby he incurs an obligation of the thief immediately to undo what he has done. Whether the obligation of the thief immediately to restore what he has stolen is classified as part of the mora doctrine ... or as simply arising from the delict ... the thief is ... regarded as being in default ... and the obligation to restore – is perpetuated ...'.

The intention to appropriate the thing permanently, as in the case of criminal theft, is not a requirement of the condictio where furtum usus is concerned. The condictio furtiva will be available where, for example, the defendant withdraws the thing from the possession of another, or 'takes' it, and uses it while intending to restore possession after use. The condictio entitles the owner to

² *R v Sibiya* 1955 (4) SA 247 (A) at 257B – D; and see *S v Van Coller* 1970 (1) SA 417 (A) at 424G – F.

³ At 321F – H.

the highest value of the thing between the time it was stolen and litis contestatio. The rei vindicatio and the condictio furtiva are alternative remedies. Where the thing stolen was lost or destroyed the condictio is the owner's only remedy."

9. What is clear is that the *condictio furtiva* is available where there has been a theft in that it is against the thief or his heirs that it is available. It is not available against a person who comes into possession of the stolen property and who does not by dealing in or retaining the property have the requisite intent to arrogate for himself the right to deal in that property. The focus on this intent of a defendant distinguishes the *condictio furtiva* from the *rei vindicatio* that would be available against whosoever is in possession of the stolen property, whatever the intent of that person. It also distinguishes the *condictio furtiva* from the *actio ad exhibendum*, which focuses on whether the defendant, either intentionally or negligently, disposed of, consumed or destroyed the property with knowledge of the plaintiff's title or claim, and which does not concern itself with whether the defendant intended arrogating for himself the right to deal in that property. Knowledge of the plaintiff's title or claim to the property is not necessarily synonymous with an intent to appropriate i.e. an intent 'to take'.⁴

⁴ Although it may be that the two may overlap in particular instances, as pointed out at p 337 in by J du Plessis in his discussion of the remedy in *The South African Law of Unjustified Enrichment* (Juta) 2012, at pp 336 to 339. *Clifford* above is an example where the two did not overlap, and where the *condictio furtiva* was available but not the *actio ad exhibendum* (see 320G/H).

10. To put it plainly, the *condictio furtiva* is available against a ‘thief’,⁵ that is someone who with the requisite intent ‘takes’ the stolen property.⁶

11. It is in this respect that the defendants have taken exception.

12. The defendants state in their exception that:

“The plaintiffs are required to allege and prove a contractatio or appropriation of the stolen funds by the first and second defendants with the knowledge that funds were, in fact, stolen”.

13. For present purposes, this averment can be accepted as correct. Neither party had any difficulty with this legal proposition as set out in the exception, and which is consistent with legal authority.⁷

14. What then follows is the heart of the exception, namely that:

“The plaintiffs, however, do not allege that the first and second defendants were party to the theft of the stolen funds”.

15. For purposes of this exception, I accept that it is necessary for the first and second defendants to be party to the theft of the stolen funds. I further

⁵ And his heirs.

⁶ See Blackie & Farlam at p 488 in Zimmermann *et al Mixed Legal Systems in Comparative Perspective* (2004) Oxford University Press.

⁷ Such as *Chetty* above and the authorities cited therein.

accept for purposes of the exception that the first and second defendants must be 'takers' of the funds in the sense that they dealt in those funds.⁸

16. What I have to decide for purposes of this exception is whether sufficient averments have been made in the particulars of claim that the first and second defendants are 'takers' of the stolen monies that are alleged to have been received by them.
17. For purposes of the exception, the facts as pleaded by the plaintiffs must be accepted as correct and that a benevolent interpretation of those accepted facts must be adopted, and particularly as the exception is one of no cause of action rather than that the pleadings are vague and embarrassing.⁹ I therefore accept as correct that the monies received by the first and second defendants into their bank accounts by way of electronic transfers ultimately originate from the SME Bank, that the defendants have not offered an explanation for receipt of those funds other than the explanation that the funds were monies received from customers to whom they had sold vehicles, and which explanation has been refuted by those customers and without the defendants offering further explanation.

⁸ As distinguished from someone who assists the 'taker' from misappropriating the stolen property but without physically handling the stolen property, as was the situation in *Minister van Verdediging v Van Wyk en Andere* 1976 (1) SA 397 (T).

⁹ *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) at 972J to 973A.

18. What then is the averment made by the plaintiffs in their particulars of claim as to the defendants being 'takers', i.e. having participated in the requisite fashion in the theft of the stolen monies?
19. The plaintiffs submit that paragraph 39 of their particulars of claim is sufficient, in the context of the other pleaded averments - which must be accepted as correct - of the monies having been stolen from the SME Bank and then laundered through various conduit entities (the first recipients, including AMFS) and with certain of those stolen monies ending up in the bank accounts of the first and second defendants.
20. To repeat, what the plaintiffs allege in paragraph 39 of their particulars of claim, and with my emphasis, is that:

*"[the first and second defendants] received the monies in a reckless manner, **knowing that the monies were not due to them** and in receiving, and **by appropriating the monies**, the defendants took the risk that the monies were not legally due to them and, by shutting their eyes to the consequence of appropriating the monies in the circumstances, acted with dolus eventualis".*

21. I agree that this averment is sufficient.
22. The plaintiff has specifically plead that the first and second defendants,
 - 22.1. knowing that the monies were not due to them,
 - 22.2. nevertheless 'appropriated' those monies;

22.3. and did so intentionally, albeit by way of *dolus eventualis*;

and this brings the first and second defendants within the reach of the *condictio furtiva*.

23. The submission by the first and second defendants is that the receipt by them of the monies does not sufficiently constitute them having appropriated the monies with the requisite intent that would make them ‘takers’ of the stolen monies. Accordingly, they submit, there has been no pleaded *contractatio* – appropriation – by them of the funds. They submit that they have not ‘handled’ the stolen funds, in the sense of having taken from the SME Bank, as owner, whether physically or even by way of ‘taking’ electronic credits.
24. The plaintiffs submit that the first and second defendants have appropriated the monies, in the same fashion effectively as that in *Nissan SA (Pty) Ltd v Marnitz NO (Stand 186 Aeroport (Pty) Ltd intervening)* 2005 (1) SA 441 (SCA):¹⁰

“Where A hands over money to B, mistakenly believing that the money is due to B, B, if he is aware of the mistake, is not entitled to appropriate the money. Ownership of the money does not pass from A to B. Should B, in these circumstances, appropriate the money, such appropriation would constitute theft (R v Oelsen 1950 (2) PH H198; and S v Graham 1975 (3) SA 569 (A) at 573E – H). In S v Graham, it was held that, if A, mistakenly thinking that an amount is due to B, gives B a cheque in payment of that amount

¹⁰ Para 24 and 25. My emphasis.

and B, knowing that the amount is not due, deposits the cheque, B commits theft of money although he has not appropriated money in the corporeal sense. It is B's claim to be entitled to be credited with the amount of the cheque that constitutes the theft. This Court was aware that its decision may not be strictly according to Roman-Dutch law but stated that the Roman-Dutch law was a living system adaptable to modern conditions. As a result of the fact that ownership in specific coins no longer exists where resort is made to the modern system of banking and paying by cheque or kindred process, this Court came to regard money as being stolen even where it is not corporeal cash but is represented by a credit entry in books of account.

The position can be no different where A, instead of paying by cheque, deposits the amount into the bank account of B. Just as B is not entitled to claim entitlement to be credited with the proceed of a cheque mistakenly handed to him, he is not entitled to claim entitlement to a credit because of an amount mistakenly transferred to his bank account. Should he appropriate the amount so transferred, ie should he withdraw the amount so credited, not repay it to the transferor but to use it for his own purposes, well knowing that it is not due to him, he is equally guilty of theft."

25. Accepting that, as I must for purposes of exception, that, as alleged in paragraph 39 of the particulars of claim,:

25.1. the first and second defendants received the stolen monies
"knowing that the monies were not due to them"; and

25.2. *"in receiving, and by appropriating the monies, the defendants took the risk that the monies were not legally due to them";*

the plaintiffs have sufficiently pleaded that the first and second defendants have appropriated the monies, i.e. that a *contractatio* has taken place.

26. That no averment has been made in the particulars of claim that the stolen monies received into the first and second defendants' bank accounts may have been spent or otherwise used by the defendants does not in my view detract from a *contractatio* having been sufficiently pleaded. The first and second defendants' failure to return the monies in the circumstances described in the particulars of claim constitutes, at least for purposes of deciding the exception, the requisite deprivation by the first and second defendants of those monies from SME Bank.¹¹
27. Of course, the mere receipt by a third person of stolen monies does not make them party to the theft of those monies, whether in the criminal sense or civilly for purposes of the *condictio furtiva*. The requisite intent to deprive is still required before the recipient can be said to have participated in the *contractatio*.
28. In this instance, the plaintiffs specifically plead in paragraph 39 that the defendants "[b]y shutting their eyes to the consequence of appropriating the monies in the circumstances, acted with *dolus eventualis*". As the plaintiffs' counsel argued, a basis for asserting such *dolus eventualis* appears from the pleaded facts, which again I must accept as being

¹¹ See Du Plessis above, at p337, 338, citing Nissan above: "The broad definition of a thief may presumably also include a third party who receives from the thief knowing that he is not entitled to appropriate the stolen property, and even the recipient of an undue payment, who appropriates it instead of returning it to the transferor".

correct. These include the failure of the defendants to give a satisfactory explanation for the first and second defendants' receipt of the proceeds in the circumstances as described in the particulars of claim.

29. The plaintiffs rely *inter alia* on the decision of Snyders JA in *Crots v Pretorius* 2010 (6) SA 512 (SCA). Snyders JA found that *dolus eventualis* satisfied the requirements of theft for purposes of the *condictio furtiva*.¹² Snyders JA held that knowledge in the form of *dolus eventualis* is present if all the objective, factual circumstances justify the inference on a balance of probabilities that the defendant actually and subjectively foresaw that someone else had title to the property that the defendant received¹³ and that where the defendant deliberately shut his eyes to the real and growing possibility that he was facilitating the theft, he reconciled himself to that risk, took that risk and so participated in the theft.¹⁴
30. In my view there are sufficient averments in the particulars of claim to enable the plaintiffs to seek to prove at trial that the first and second defendants have the requisite *dolus eventualis* in participated in the *contractatio*.
31. Defendants' counsel sought to distinguish *Crots* on the basis that the defendant in that matter had 'physically handled' the stolen property, in the form of cattle, and so rendered himself liable as a 'taker'. This was

¹² At para 8.

¹³ At para 9.

¹⁴ At para 12.

different, defendants' counsel argued, to the conduct of the first and second defendants in the present instance as the present defendants had not physically handled the stolen monies. I have already found that on the pleaded facts, if accepted as correct, the defendants' retention of the funds, particularly with reference to *Nissan*¹⁵, is sufficient to have made the defendants 'takers' and to have participated in the *contractatio*.

32. The first and second defendants have also sought to make something of them not having directly received the stolen monies but did so via AMFS. The submission is that as money is a fungible, and as the stolen monies passed through the bank accounts of AMFS and potentially co-mingled with other monies in the bank accounts, those funds have lost their character as stolen monies.¹⁶ And so, the submission continues, the first and second defendants cannot be said to have participated in the theft of those funds because the funds that they received can no longer be characterised as stolen funds.

33. I accept that monies are fungibles and that strictly speaking it may be the various banks giving effect to the banking transactions become the 'owners' of the funds but that does not detract from the victim of theft of

¹⁵ Above.

¹⁶ Once the property has lost its character as property belonging to the plaintiff concerned, the property cannot be recovered by under the *condictio furtiva*. See *S Polwarth & Co (Pvt) Ltd v Zanombairi and Others* 1972 (2) SA 688 (R) where the defendant has accepted a car as a gift, knowing that it was bought with monies stolen from the plaintiff, and where the *condictio furtiva* was found at 693A not to be available as the defendant had not actually received stolen property.

monies from its bank account being able to follow-up on those monies in appropriate circumstances.¹⁷

34. The plaintiffs have averred that AMFS is a launderer of the funds, that AMFS as a launderer was a 'conduit entity' (see paragraph 38.2 of the particulars of claim) and that the monies claimed from the first and second defendants are traced back to the stolen monies stolen in the first instance from the SME Bank. In my view, these averments are sufficient that whether or not they suffice for the monies received by the first and second defendants to retain their character as stolen monies is to be ventilated at trial, rather than a dispositive finding made at this stage that even if these averments are proven, the monies have lost that character.
35. A second leg to the exception, advanced during argument on behalf of the first and second defendants, was that the monies as received by the first and second defendants was not the property of the SME Bank, particularly because they had passed through the hands of AMFS, potentially co-mingled with other monies and given the fungible nature of monies in bank accounts. Effectively, the exception is that, accepting that the averments in the particulars of claim are true, monies that were laundered and received in the fashion described in the particulars of claim nonetheless lost their character as property 'belonging' to SME Bank and therefore are incapable as a matter of law to sustain a claim by way of the *condictio furtiva*.

¹⁷ See, for example, the discussion in *Nissan* above at para 16 to 23.

36. I raised with both counsel that this ground of exception did not appear, at least clearly, from the notice of exception. Defendants' counsel submitted that the exception as drafted was sufficiently wide to explore this issue as in considering whether there has been a *contractatio* in which the first and second defendants had participated, regard would have to be had to the nature of the funds received by them and particularly whether those funds on the pleaded averments constituted stolen property 'belonging' to the SME Bank.
37. Plaintiffs' counsel submitted that the notice of exception was not wide enough but that in any event the exception would not be well-founded.
38. In *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA), the court held:¹⁸

"It is trite that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law."

39. In *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* (2) 1976 (1) SA 100 (W),¹⁹ the court stated that in considering an

¹⁸ Para 7.

¹⁹ At 107D.

exception the court's main concern always is to ensure that no injustice is done between the parties.

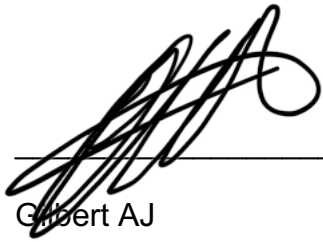
40. In the present instance, I am unable to find on the pleaded facts, which I must accept as correct and which in any event must be benevolently interpreted in favour of the plaintiffs, that the plaintiffs' claim *is* (not may be) bad in law or that no injustice will be done in upholding the exception that the pleadings lack averments which are necessary to sustain an action based upon the *condictio furtiva*.
41. This is especially so in the context of the present matter where the *condictio furtiva* is relied upon as a cause of action where a victim of theft seeks to recover monies that were stolen from it. Reliance upon the *condictio furtiva* is not an altogether common occurrence and its contours are best explored at trial rather than premature determinations made on exception.
42. Interestingly, J C Sonnekus in *Unjustified Enrichment in South African Law*²⁰ published in 2008 concluded in his short chapter on the *condictio furtiva* that “[i]t may well be that a would-be pioneering legal practitioner will from time to time attempt to wipe the dust off this opaque remedy in the drafting of his client's pleadings, but there is nothing in the law reports to suggest that he will succeed”. The subsequent successful reliance

²⁰ LexisNexis, at pp 147 – 150.

upon the *condictio furtiva* before the Supreme Court of Appeal in *Crots*²¹ shows otherwise.

43. In my view, the plaintiffs have pleaded sufficient averments that if proven at trial may establish that the first and second defendants participated in the theft in such manner as may render them liable under the *condictio furtiva*.
44. Both the plaintiffs and the first and second defendants proceeded on the basis that costs should follow the result, including the costs of two counsel where so employed on scale C.
45. An order is made:
 - 45.1. dismissing the first and second defendants' exception;
 - 45.2. that the first and second defendants, jointly and severally, are to pay the costs of the plaintiffs, including the costs of two counsel where so employed on Scale C.

²¹ Above.



Gilbert AJ

Date of hearing:

17 October 2024

Date of judgment:

18 November 2024

Counsel for the excipients

(first and second defendants):

A Sawma SC with JM Hoffman

Instructed by:

Alan Allschwang & Associates Inc
Johannesburg

Counsel for the plaintiffs:

M J Cooke (heads of argument
prepared by R Heathcote SC &
MJ Cooke)

Instructed by:

Bowmans Gilfillan Inc
Johannesburg