

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2023/107680

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
10/02/2025 [REDACTED]	
DATE	SIGNATURE

In the matter between:

HINDUSTAN PRODUCTS SA (PTY) LTD

Applicant

and

EDWARD ROBERT GERTENBACH

First Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Second Respondent

JUDGMENT

KRÜGER AJ:

Summary

Application- claim by judgment creditor of deceased against heir- judgment creditor did not claim against the estate of the deceased- unjustified enrichment- conditio indebitio- non-enrichment- litis contestatio applicable to motion proceedings

Introduction

- [1] The applicant seeks an order against the first respondent for payment in the sum of R 448 621,93 with interest calculated at 11.25% per year from 1 May 2023 together with costs. No relief is claimed against the second respondent, save for costs in the event of it opposing the application. The second respondent did not oppose.
- [2] The applicant is a judgment creditor of one Ms Gertruida Gezina Gertenbach (*"the deceased"*). The first respondent inherited the entire free residue of the deceased's estate to the value of R 548 423,19. The applicant was unaware of the deceased's passing and did not claim against the estate for payment of the judgment debt. According to the applicant, had it done so, the amount the first respondent would have received from the estate would have been less than it was.
- [3] The applicant's claim is founded on unjustified enrichment. In particular, it is framed as being in terms of the *condictio indebiti*.

Background

- [4] The deceased and the first respondent divorced during June 1986 but reconciled soon thereafter. They co-habited until the date of the deceased's death on 20 November 2021.
- [5] On 22 November 2010 the deceased and the applicant purchased Erf 1178 Randhart Extension 2 (*"the property"*). It was registered in their names jointly on 22 November 2011. A mortgage bond was passed over the property in favour of ABSA Bank.
- [6] Prior to the purchase of the property, the applicant instituted action against the deceased during 2009. Protracted proceedings followed. On 19 February 2013 the deceased was ordered to pay R 179 180,00 to the applicant together with interest calculated at 15,5% per year from 1 December 2009 together with costs, including costs that had been reserved on 13 March 2012.

- [7] On 14 April 2014 the sheriff served a writ for execution upon the deceased who was unable to satisfy same. The deceased signed a *nulla bona* return, whilst first respondent deposed to an affidavit that all the movables in their house were his.
- [8] An application was launched to have the deceased's share of the property declared executable. On 21 October 2016 an order was granted accordingly.
- [9] On 26 September 2019 a notice was issued in a Magistrates' Court in terms of section 65(a) of Act 32 of 1944 calling on the deceased to attend a financial enquiry as she failed to satisfy the judgment of this court. The balance of the debt as that time was stated as being R 358 360,00 which is inclusive of interest calculated at the rate of 15,5% per year from 1 December 2009 "...to the maximum amount of R 179 180,00 in terms of the in duplum rule".¹ The deceased deposed to an affidavit declaring her sole asset to be her undivided half share in the property. On 17 January 2020 the financial enquiry was postponed *sine die*.
- [10] On 13 July 2020 the deceased executed her last will and testament. Effectively, the deceased bequeathed her entire estate in to the first respondent. After her death, her half share in the property was transferred to the first defendant on 13 September 2022 in accordance with her last will and testament.
- [11] On 17 January 2023 the applicant's attorneys discovered that the deceased had passed on and that the transfer of the property had occurred. The applicant's attorneys on 26 January 2023 requested the second respondent for a copy of the final liquidation and distribution account as well as the executrix's details. On 7 February 2023 the applicant's attorneys obtained of the executrix from the transferring attorneys. A copy of the final liquidation and distribution account was requested from her. It was refused, but a copy was nevertheless obtained from the second respondent.
- [12] A letter of demand dated 9 March 2023 was addressed to the first respondent for payment in the sum of R 448 621,93 on the basis that he had been

¹ Notice to Appear in terms of Section 65A(1); Founding Affidavit, Annexure "JM9", CL01-55

unjustifiably enriched at the applicant's expense in that he had received in value a greater inheritance than he would have received if the applicant's claim had been settled by the estate. No reply was forthcoming. On 18 October 2023 the application herein was issued.

Applicant's case

- [13] In essence, the applicant's case is that after an executor of an estate has distributed its assets, a creditor who has not made any claim against the estate has no claim against other creditors of the estate and may not recover anything from the executor *de bonis propriis*. The available remedy is the *condictio indebiti* which lies against any person, legatee or heir who has received more than it should have received from a deceased's assets.
- [14] The liquidation and distribution account records assets in the deceased's estate in the amount of R 1 250 000, it being 50% of the stated value of the property. This consists entirely of the deceased's undivided half-share in the property. Total liabilities is R 665 576,81 which consists of the mortgage loan in the sum of R532 976,69 and administration expenses of R R132 600,12. The distribution account records the balance brought forward from the liquidation account as being R 584 423,91. The cash shortfall in the estate is R 665 576,81 which is deducted from R 1 250 000,00 which is the value of the 50% share in the property. This leaves a free residue of R 584 423,19.
- [15] The applicant was unaware the deceased passed away and in consequence did not institute a claim against the deceased's estate. It is contended that in terms of the liquidation and distribution account the first respondent inherited the entire free residue of the estate to the value of R 584 423,19. Had the applicant's claim of R 448 621,93 been settled by the estate, the liabilities in the estate would have been R 1 114 198,74 and not R 665 576,81. In the result the balance that would have been available for distribution would have been reduced from R 584 423,19 as recorded in the liquidation and distribution account to R 135 801,26. The applicant concludes that the first respondent had received a value of R 448 621,93 more than he would have, had the applicant's claim been settled by the estate. The applicant seeks payment R 448 621,93

plus interest on the basis that the first respondent had been enriched at the expense of the applicant to that extent.

The first respondent's case

[16] The applicant's claim is *ad pecuniam solvendam*.² According to the first respondent, it is common cause he inherited the deceased's 50% undivided share in the property. The applicant's case is not that the first respondent had inherited money, but that his inheritance resulted in "...a net benefit of R 584 423,19 as per the...[liquidation and distribution account]...and which amount should by rights have been utilized to settle the Applicant's claim against the deceased..."³

[17] The first respondent does not dispute the *condictio indebiti* is available to a creditor to recover money from an heir. It is contended the *condictio indebiti* is a legal process in action proceedings and that the date of determining enrichment is *litis contestatio* which is at the close of pleadings. As this is motion proceedings, there is no closing of pleadings. In consequence, enrichment cannot be determined by way of motion proceedings. The claim should not have been brought by way of motion proceedings and stands to be dismissed.

[18] In the alternative, it is submitted that the issue of whether enrichment occurred and if so, what the extent thereof is, cannot be determined on the papers. According to the first respondent it is factually as well as legally incorrect that his inheritance resulted in a net benefit to him. Enrichment occurs when there is an increase in the assets of a defendant which would not have occurred but for the transfer by virtue of the enriching fact, or by a non-increase in the defendant's assets which would have occurred but for the enriching fact at the expense of the impoverished claimant. In order to acquire the first respondent's 50% undivided share in the property, he had to effect payment of certain monies and had to settle to the outstanding mortgage bond. This is indicative of non-enrichment. The first respondent seeks to distinguish this case from matters where an heir inherits money. In the latter, there exists *prima facie*

² Sounding in money

³ Replying affidavit, par 6, CL01-108 to 109

enrichment. In this matter, it is the first respondent's inheritance of the 50% undivided share in the property that forms the basis of the applicant's claim. On these grounds, the first respondent seeks the matter to be referred to trial.

[19] The first respondent further alleges that he was not enriched at the expense of the applicant. Several grounds are set out in an attempt at substantiating the f allegation of non-enrichment.

[20] Firstly, the point is taken that the executor took the municipal value of the property in the sum of R 2,5 million in assessing the value of the deceased's undivided half share of the of the property to arrive at the amount of R 1, 25 million. The first respondent's alleges that the latter amount is incorrect because it is *"...virtually impossible to do an assessment of 50% undivided share in an immovable property. It does not have commercial value. Nobody will be interested to purchase a 50% share in a property. Without the other 50% undivided share, the deceased's portion would be virtually nothing."*

[21] Secondly, the first respondent was allegedly obliged to settle the deceased's half of the bond by paying R 532 976,69 to the estate. This was done by the first respondent obtaining a bond against the property registered after the deceased's 50% share was transferred to him. According to the first respondent, this meant that he took over the deceased's liability in the amount of R 532 976,69.

[22] Thirdly, the first respondent is alleged to have transferred R 600 000,00 as well as R 120 000,00 to the estate due to a cash shortfall in the estate. Unless he paid these amounts, the estate would not have been wound up in the manner it was. Following upon these payments, an amount of R 13 884,74 was paid to the first respondent. A copy of the first respondent's bank statements annexed to his answering affidavit records an amount of R 120 000,00 having been transferred electronically on 12 April 2022, and R 600 000,00 electronically transferred on 13 April 2022.

[23] Fourthly, the first respondent avers that the sum of R 13 884,74 which was paid to him did not enrich him, as he had made several payments in favour of the deceased after her death.

[24] Lastly, it is alleged the first respondent made numerous payments to the deceased whilst she was alive consisting, amongst others, of her water and electricity account and rates and taxes as well as towards maintenance of the property. It consists of R 519 800,00 towards payment of electricity, water, rates and taxes in respect of the property as well as R 350 000,00 for maintenance and upkeep of the property. The total comes to R 869 800,00. These amounts are acknowledged by the first respondent to be a rough guesstimate.

Analysis and consideration

[25] The first respondent did not pursue the defence raised in his answering affidavit that the deponent to the founding affidavit was not duly authorised to bring the application having regard to “...*the allegations set out in the founding affidavit.*” This was in any event fully dealt with by counsel for the applicant in heads of argument. In the result I do not need adjudicate upon it. In any event, I found the argument advanced by the applicant in this regard to be compelling.

[26] No authority or precedent were advanced on behalf of the first respondent substantiating the submission advanced that the *condictio indebiti* is a process in action proceedings. It appears the argument is that the time at which it must be determined whether or not enrichment is *litis contestatio* which is at the close of pleadings, which does not occur in motion proceedings. It follows that enrichment cannot be determined and thus the application stands to be dismissed. I disagree. The concept of *litis contestatio* and its application is not limited to action procedure. I found no authority that it applies only to action procedure. In several cases motions were dealt with as if closing of pleadings and *litis contestatio* are applicable.⁴ In the result, I find that it does apply to motion procedure.

[27] In so far as it is proposed that a claim in terms of the *condictio indebiti* cannot be brought on motion, no authority or precedent were advanced on behalf of

⁴ *Antonie v Noble Land (Pty) Ltd* 2014 (5) SA 307 (GJ) at [5]. An applicant, after an order for security for costs was granted, ceded the claim to another. It was common cause that the cession occurred after *litis contestatio*. See also *Cell C Service Provider (Pty) Ltd v MEC: Provincial Government: Department of Treasury* [2019] 3 All SA 80 (FB) at [48]-[59]

the first respondent in support thereof other than the statement in *Unjustified Enrichment in South Africa*⁵ to enrichment as an action in which the focus is upon the extent of a defendant's enrichment. In my view such a statement is not authority for the first respondent's proposition. There are a multitude of cases in which relief was sought by way of motion based on the *condictio indebiti*, the most recent I found being the judgment on 2 October 2024 in *Wamjay Holding Investments (Pty) Ltd V Auckland Park Theological Seminary*.⁶ I agree with the submission advanced by the applicants counsel that the question as to whether motion or action procedure are to be followed is dependent upon the existence of *bona fide* and material disputes that cannot be resolved on affidavit unless specifically prescribed by statute, public policy so dictates as decided by a court, or due to practical considerations.⁷

[28] I now turn to the essential dispute between the parties on the merits, namely whether the first respondent gained a financial benefit by the claim of the judgment creditor not having been taken into account in the administration of the deceased's estate and its consequent distribution and if so, the extent thereof as well as whether the disputes are capable of resolution on affidavit. If not, the matter is to be referred to trial.

[29] In *Nortje v Pool*⁸ the majority in the Appellate Division rejected the existence of a general enrichment action at common law in South Africa. Recognising the difficulties resulting for a plaintiff having to frame a claim for unjustified enrichment within the confines of the common law *condictiones* the court expressed its preference for an incremental development of *condictiones* over time. Since *Nortje* I daresay development of the *condictiones* have become less

⁵ Prof J C Sonnekus, at pp27-28

⁶ 2024 (3) SA 614 (GJ); See also *Randcoal Services Ltd and others v Randgold and Exploration Co Ltd* 1998 (4) SA 825 (SCA) where a counterclaim for a *condictio indebiti* was instituted in motion proceedings

⁷ See cases referred to by applicant's counsel: *BR v TM* 2016 (3) SA 417 (GJ) AT 425A-B, *Malema v Rawula* (139/2021 [2021] ZASCA 88 (23 June 2021); *NBC Holdings (Pty) Ltd v Arkani Retirement Fund Administrators 9Pty) Ltd* [2021] 4 All SA 626 (SCA) at [21]

⁸ 1966 (3) SA 96 (A)

apparent than real in that the courts have latterly been increasingly compliance with general requirements of a general enrichment action.⁹

[30] It is a view held by academics that a claim for enrichment is always framed under one of the existing common law *condictiones* and by “...pleading the requirements of a specific action, the plaintiff will usually succeed in indicating that the general requirements of enrichment liability have been met.”¹⁰

Enrichment occurs when a defendant is enriched at the expense of a plaintiff correspondingly impoverished in the absence of any legal cause upon which it might have occurred. When these elements are present, an obligation arises by operation of law whereby the defendant is obliged to restore its enrichment to the plaintiff up to the level of the plaintiff’s impoverishment.¹¹

[31] In calculating enrichment, the first respondent’s obligation to return what has been obtained *sine causa* is what remains of the value received. In consequence, the totality of the first respondent’s assets and liabilities after enrichment occurred must be compared with what it was prior thereto. A *recipiens*’s liability is confined to the amount of actual enrichment at the time of the commencement of the action or motion.¹²

[32] In assessing if a defendant has been enriched, account must be taken of any performance by the defendant which was juridically connected with the receipt of the benefit.¹³

[33] The onus of proving every element required for a claim based on the *condictio indebiti* generally lies upon a claimant.¹⁴ In civil cases the incidence of onus is determined largely by considerations of policy and fairness *inter partes*.¹⁵ The

⁹ See Visser’s succinct exposition of the present state of South African Law in this regard: LAWSA Volume 17 3rd edition par 207

¹⁰ LAWSA *supra* par 209

¹¹ LAWSA *supra* at 206; *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at [17]; *McCarthy Retail v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA at [15])ff

¹² *African Diamond Exporters (pty) ITd v Barclays Bank International Ltd* 1978 (3) SA 699 at 709Hff; also see *Kudu* and LAWSA *supra* at 209 and 215 and the authorities there quoted

¹³ *McCarthy* at 290 [16] confirming *Govender v Standard Bank of South Africa Ltd* 1984 (4) SA 392 (C) at 404D

¹⁴ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1002 (4) SA 202 (A) at 224 with reference to *Mabaso v Felix* 1981 (3) SA 865 A at 872H

onus of proving non-enrichment lies with the *recipiens*.¹⁶ I am not persuaded of any unfairness or consideration of policy or practice allows for the present matter to be distinguished from the law as it stands. The facts indicating whether non-enrichment is indicated generally lies within the knowledge of *recipiens*. In my view it is for that reason that it bears the onus of not having been enriched.

[34] According the recapitulation statement as well as the executor's notes in liquidation and distribution account, the cash shortfall of R 665 576,81, consisting of R 532 976,69 towards the bond and R 132 600,12 towards administrative expenses, was to be paid by the first respondent. A copy of the first respondent's bank statement indicates that an amount of R 120 000,00 was electronically transferred on 12 April 2022. It also reflects R 600 000,00 having been electronically transferred on 13 April 2022, though it is not clear whence.

[35] In the capital account on the credit side it is recorded that R 120 000,00 towards the cash shortfall had been received from the first respondent. It also records that the first respondent had applied for and was approved for bond substitution. The amount of the bond is credited. On the debit side is recorded, in addition to the shortfall, municipal clearances of R 10 134,78, as well as R 115,00 for bespoke executor services and R 3 900,00 towards the Master's correspondence fee. An amount of R 5 000,00 is recorded towards bond cancellation costs with reference to the bond substitution the first respondent obtained. The balance carried forward to summary is R 12 462,03.

[36] Having regard to the above, it is clear the executor was placed in a position to complete the administration of the estate by the estate having being credited as set out above, in particular in that the first respondent had caused the payment of R 120 000,00 and by having been substituted in respect of the bond. The estate had the benefit of the substitution by the first respondent in that the debt owing to ABSA could be credited. In consequence it is clear that the first respondent had effected performance which was juridically connected with the

¹⁶ *Kudu supra* at [21]

receipt of the benefit, at least in this respect. No doubt it entailed various other concomitant expenses to have been incurred.

[37] In my view the first respondent on a balance of probability indicated there has been at least a measure of non-enrichment. Having regard to the substantial disputes between the parties it is my view that the calculation of enrichment cannot be determined on these papers. The exact nature and extent thereof fall to be determined by a trial court upon discovery and other processes such as the provision of further particulars and *viva voce* evidence.

Conclusion

[38] I have considered each of the arguments raised by the applicant's counsel pertaining to the first respondent's case, some of which I found compelling. I do not express any finding on them as it falls to the trial court to do so.

Order

[39] I make an order as follows:

1. The matter is referred to trial;
2. The application stands as summons;
3. The applicant shall file a declaration within 30 days from the date of this order;
4. The Uniform Rules of Court in respect of trial and rules to pleadings will apply;
5. Costs of the application are reserved for determination by the trial court.


N. S. KRÜGER
NAME OF JUDGE

ACTING JUDGE OF THE HIGH COURT

Electronically submitted

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **10 February 2025** .

For the applicant:	Adv M W Verster instructed by BMW Attorneys
For the respondent:	Adv A P Bruwer instructed by Du Plessis, De Heus, Van Wyk & Chiba Attorneys
Date of hearing and argument:	11 November 2024
Date of judgment:	10 February 2025

