



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

**CASE NO: 21072/2019
REPORTABLE**

In the matter between:-

NICO VAN WYK

Plaintiff

and

WILLEM JOHANNES VENTER NO.

First Defendant

ALETTA SUSARA MAGRIETA VENTER NO.

Second Defendant

SHARL VENTER NO.

Third Defendant

**WILLEM GABRIEL JORDAAN NO.
(in their capacities as trustees of the
VENTER FAMILIE TRUST)**

Fourth Defendant

Coram: MOOSA AJ

Heard: 29 and 30 April 2025; 2 May 2025
Delivered: 12 May 2025 (delivered via email to the respective Counsel)
Summary: claim for monies – unjustified enrichment – *condictio causa data causa non secuta* – applicable principles – oral purchase of share in land – effect of section 2(1) of the Alienation of Land Act 66 of 1981 on enrichment claim – absolution from the instance

ORDER

- (a) The Defendants' application for absolution from the instance succeeds.
- (b) Absolution is granted in respect of both Plaintiffs' claims with costs, such costs to include Counsel's party-and-party fees on Scale C.

JUDGMENT

Moosa AJ

INTRODUCTION

1. This judgment engages the issue whether the Defendants' application for absolution from the instance at the close of the Plaintiff's case ought to succeed in relation to the Plaintiff's twin monetary claims, or either of them.
2. Although the constitutionality of granting absolution was questioned in *Le Foy v Department of Justice and Constitutional Development and others* 2023 (44) ILJ 1733 (LC) paras 19 - 20, it remains a rule of practice engrained in Uniform Rule 39(6). The constitutional validity of granting absolution was not an issue before me. Hence, it is not discussed here, suffice to say that I consider this old rule of litigation practice pre-dating our constitutional era and which is comparable to s 174 of the Criminal Procedure Act 51 of 1977,¹ as serving an

¹ Section 174 reads: 'If, at the close of the case for the prosecution at any trial, the Court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.'

important constitutional purpose. It allows bad cases to be weeded out, thus protecting scarce judicial resources from being spent on cases which do not merit further judicial attention. In this way, absolution serves the interests of justice and promotes the more efficient and effective administration of justice.

3. Absolution from the instance implies that, at the end of a plaintiff's case, there is an insufficiency of cogent evidence, or the absence of adequate testimony, so that no order ought to be made in a plaintiff's favour in respect of a claim.
4. Linguistically, the word 'absolution' means 'an act of freeing from blame and releasing from consequences'. On the other hand, the word 'instance' refers to a particular matter. See *Le Foy v Department of Justice and Constitutional Development* supra para 8. Therefore, what the Defendants in casu seek at this stage of the trial is to be freed from blame in relation to the Plaintiff's claims, one based on unjustified enrichment and another based on a loan agreement, or from either of these twin disputed claims.
5. If granted, absolution would have the effect of dismissing the claim(s) in respect of which it is granted. However, since absolution does not lead to res judicata, the Plaintiff would be able to re-file his claim(s) afresh, presuming there is no legal impediment for him to do so (such as, the operation of prescription).
6. The principles to be applied at absolution stage are trite. The test is not whether the evidence led establishes what would finally be required to be proved at the end of a trial for the Plaintiff to succeed on a balance of probabilities. Rather, at the halfway mark in the trial, the question this Court needs to answer is whether there is evidence which this Court, applying its mind reasonably thereto, 'could or might (not should, or ought to) find for the plaintiff' (*Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409H). This test at the close of a plaintiff's case received our apex court's imprimatur in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 26.
7. To refuse absolution, this Court must be satisfied that the evidence establishes a prima facie case in the sense that all the elements of the Plaintiff's claim(s)

is/are established with sufficient direct evidence or using the technique of drawing reasonable inferences. If a prima facie case (in the sense explained here) is not met, then absolution may be granted in respect of the Plaintiff's claim(s) which suffers from a deficiency of adequate proof. See *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G.

8. Absolution is not granted lightly. A defendant ought not to evade the witness box by exploiting the procedure for absolution in Uniform Rule 39(6). However, this principle ought to yield when absolution serves the interests of justice.
9. Put differently, if the requirements for absolution are met in this case, then absolution ought to be granted if this Court is satisfied that the interests of justice would not be served by obliging the Defendants to answer the deficient case which the Plaintiff would be found to have (in the sense explained above).
10. For the test discussed above to be employed, an evaluation of the evidence adduced by the Plaintiff at the trial is required. I turn to this later in the judgment.

THE PLAINTIFF'S CAUSES OF ACTION AS PLEADED

11. To distil the relevant evidence adduced at the trial, it is necessary to provide a skeletal outline of the Plaintiff's twin causes of action as pleaded. This will assist in determining what facts the Plaintiff was required to establish to substantiate his claims – ie, the facta probanda of his case.
12. On 22 November 2019, the Plaintiff issued a summons against the Defendants nomine officio. Plaintiff's particulars of claim set forth two claims: first, a claim based on unjustified enrichment; secondly, a claim based on a loan agreement.

The Plaintiff's unjustified enrichment claim (as pleaded)

13. The Plaintiff alleges that, 'shortly before 13 July 2017', a tri-partite oral agreement was concluded at [...] C[...] Street, Broadlands, Strand (the Property). The parties thereto are alleged to be the Plaintiff acting in person,

the Trustees for the Venter Familie Trust (the Trust), 'represented by the first and third defendants or one of them', and West Coast Packaging CC (WCP), 'represented by the plaintiff and the first and third defendants or one of them'.

14. The Plaintiff alleges further that the tri-partite oral agreement 'was to the effect that the plaintiff would pay the Venter Familie Trust an amount of R2 million on account of the price of a prospective purchase by the plaintiff from the Trust of a half share of the Property by causing such amount to be paid to WCP as a corresponding loan by the Trust to WCP'.
15. I pause to mention that although I refer to a tri-partite oral agreement, which is consistent with the way in which the Plaintiff's particulars of claim is framed, Plaintiff's Counsel, Adv Rogers, submitted that there was two separate but inter-related agreements: first, an oral sale agreement between the Plaintiff and the Trust for R2 million; and, secondly, a simultaneous loan contract between the Trust and WCP for the on-lending of the R2 million purchase price to WCP.
16. The Plaintiff alleges that, in accordance with the terms of the aforementioned oral sale agreement with the Trust, he advanced R2 million to the trustees via payments from Cape Waste Paper CC (CWP) to WCP 'at the instance of the plaintiff and on his behalf and for his account with CWP'.
17. The Plaintiff alleges that the R2m was paid into WCP's bank account: R500 000,00 on 13 July 2017; R500 000,00 on 22 September 2017; and R1 million on 3 October 2017. At trial, these payments became common cause.
18. The Plaintiff alleges that the 'prospective sale of a half share in the Property by the Trust to the Plaintiff did not eventuate' and that, in these circumstances, 'the Trust has been unjustifiably enriched to the extent of R2 million at the expense of the plaintiff, and the plaintiff has been correspondingly impoverished'.
19. On this basis, the Plaintiff sues the Trust for payment of R2 million. The Defendants' defences to this unjustified enrichment claim as particularised in their amended plea, taken with the contents of Plaintiff's cross-examination are:

- (i) the trustees denies being enriched in the sum of R2 million, whether by of a loan account in WCP or otherwise;
- (ii) the trustees deny that Plaintiff has been impoverished by R2 million;
- (iii) the trustees deny that they concluded the oral sale agreement with the Plaintiff and deny that they concluded the loan agreement with WCP on the terms pleaded by the Plaintiff (or on any other terms for that matter); and
- (iv) the trustees admit that no sale of the Property eventuated but aver that any oral agreement for the sale of a 50% share in the Property to the Plaintiff is void ab initio for lack of compliance with the formalities listed in s 2(1) of the Alienation of Land Act 66 of 1981 (the AOLA, 1981).

The Plaintiff's loan claim (as pleaded)

- 20. The Plaintiff alleges that, in January 2019, a second tri-partite oral agreement was concluded at the Property between himself acting in person, the Trust, 'represented by the first and third defendants or one of them', and WCP, 'represented by the plaintiff and the first and third defendants or one of them'.
- 21. The Plaintiff alleges further that this second oral agreement 'was to the effect that the plaintiff would lend the Trust an amount of R2 million by causing such amount to be paid to WCP as a corresponding loan by the Trust to WCP'.
- 22. I again pause to mention that although I refer to a tri-partite oral agreement, a fact consistent with the manner in which the Plaintiff's particulars of claim is framed, Adv Rogers submitted that there was two separate but inter-related loan agreements: one loan agreement between the Plaintiff and the Trust for R2 million; and a simultaneous loan agreement between the Trust and WCP in terms of which the former on-lent to the latter the same R2 million which it borrowed from the Plaintiff.

23. Plaintiff alleges that, in accordance with the terms of his loan agreement with the Trust, he caused R2 063 733,18 to be paid to WCP by Muir La Morris CC 'on his behalf and for his account' from the proceeds of the sale of certain land.
24. I pause to say that, at the end of Plaintiff's case, it is common cause that Plaintiff caused R2 063 733,18 to be paid as alleged. It is, however, unclear why Plaintiff caused this sum to be paid when the alleged loan sum was only R2 million. However, as nothing turns on this, no more need to be said thereon.
25. The Plaintiff alleges further that 'it was a term of the agreement ... that the Trust would take a re-advance under the Bond [registered over the Property with ABSA Bank] to the extent of the said loan by the Plaintiff to the Trust and repay the Plaintiff the amount of such loan from the proceeds of such re-advance upon such proceeds becoming available'.
26. At the end of the Plaintiff's case, it is common cause that the re-advance under the Bond as alleged in the Plaintiff's particulars of claim never materialised.
27. In his particulars of claim, the Plaintiff alleges that 'ABSA was willing to grant the re-advance mentioned ... but the Trust did not proceed therewith'.
28. Finally, the Plaintiff alleges that '[h]ad the Trust proceeded with such re-advance the proceeds would have become available not later than 31 July 2019'.
29. On this basis, Plaintiff sues the Trust for repayment of the loan in the sum of R2 million and mora interest from 1 August 2019 to date of payment, plus costs.
30. The Defendants' defences to the loan claim as particularised in their amended plea, as taken with the contents of Plaintiff's cross-examination, are: (i) the trustees deny that they concluded any loan agreement with the Plaintiff; (ii) the trustees deny that they concluded the loan agreement with the WCP on the terms alleged (or any other for that matter); (iii) the trustees deny that they received a loan of R2 million from the Plaintiff and that they on-lent the

R2 million to WCP by payments made to WCP on its behalf by the Plaintiff on loan account to the Trust in the books of WCP; (iv) the trustees pleaded that they never applied for a re-advance from ABSA, and deny that they were obliged to do so; and (v) at trial, the trustees deny that ABSA approved a re-advance.

THE ALIENATION OF LAND ACT DEFENCE VIS-À-VIS THE CONDUCTIO CAUSA DATA CAUSA NON SECUTA CLAIM

31. At this juncture, it is necessary that I deal with the defence outlined above in paragraph 19(iv) because, if successful, it would be dispositive of the Plaintiff's enrichment claim for purposes of Uniform Rule 39(6).
32. When adjudicating the defence at hand, I assume in the Plaintiff's favour (without deciding the issue) that the alleged oral sale agreement and the terms pleaded in the Plaintiff's particulars of claim were concluded with the trustees.
33. In this context, it bears reminder that South African law does not recognise a general enrichment action. See *McCarthy Retail Ltd v Short Distance Carriers* CC 2001 (3) SA 482 (SCA) paras 8-10. As a result, a plaintiff should locate an enrichment claim in any of the recognised conditiones (such as, the *condictio causa data causa non secuta*; *condictio indebiti*; or *condictio sine causa*).
34. Although the Plaintiff did not plead reliance on any specific *condictio*, Adv Rogers submitted that, based on the averments above in paragraphs 16 to 18, the Plaintiff's case falls within the *condictio causa data causa non secuta*.
35. W.A. Joubert & J.A. Faris *LAWSA* 3ed volume 17 par 219 explain that this *condictio* is used to claim restoration (*condictio*) of money or other property which was transferred to achieve a future lawful purpose (*causa data*), in circumstances where that goal or purpose is not achieved (*causa non secuta*).
36. In *Shell Company of SA Ltd v Gerrans Garage (Pty) Ltd* 1954 (4) SA 752 (G) at 759, Beyers J affirmed, with reference to certain English law dicta, that the

condictio causa data causa non secuta applies where 'money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance'. Accordingly, this condictio has judicial recognition in our law.

37. While there is a debate in academic circles about the continued utility of the condictio causa data causa non secuta (see *LAWSA* ibid at footnote 1), it is unnecessary to engage with that debate here. The condictio in question has not been discarded - cases of its use are simply rare. Although the SCA held 'that the *condictio causa data causa non secuta* appears to apply to cases where a suspensive condition or the like was not fulfilled' (*Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) para 16), Defendants' Counsel, Adv Bothma, took no issue with Plaintiff's reliance on this condictio. Therefore, the absolution application is determined on the basis that this condictio applies.
38. Even when the condictio causa data causa non secuta is used, as here, the Plaintiff still has to prove the general requirements for an enrichment action, namely: (i) the Defendants were enriched; (ii) the Plaintiff was impoverished; (iii) the Defendants' enrichment was at the Plaintiff's expense; and (iv) the Defendants' enrichment was unjustified in the sense that it is without any legal cause (ie, grounds). Moreover, the Plaintiff bears the onus to prove the quantum of the enrichment. See *J D Botha and Sons Signs (Pty) Limited v Multi Cranes and Platforms (Pty) Limited* 2024 (4) SA 583 (GJ) paras 25 - 26.
39. The Plaintiff's particulars of claim alleges that he caused the R2 million purchase price to be paid to WCP pursuant to the alleged oral property sale agreement being concluded with the Trust. He testified along the same lines.
40. In argument, Adv Rogers was constrained to concede that the underlying oral sale agreement does not comply with s 2(1) of the AOLA, 1981.² Its provisions

² Section 2(1) reads: 'No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

are clear. Therefore, there can be no doubt that the oral property sale agreement relied on by the Plaintiff is void and unenforceable (as distinct from being unlawful). Adv Rogers, however, argued that any invalidity of the underlying sale contract does not affect Plaintiff's unjustified enrichment claim.

41. Adv Bothma disagreed. The nub of his argument is this: as the underlying sale agreement is void, no legal consequences flow therefrom. As a result, so his argument proceeded, the party whose estate is 'impoverished' by the R2 million payment, if any estate is impoverished, is CWP (not the Plaintiff). This argument raises an untested issue in the context of the *condictio causa data causa non secuta*.
42. As there is no case law directly on point, the issue raised is canvassed here. In *Legator McKenna Inc and another v Shea and others* 2010 (1) SA 35 (SCA) paras 28 – 30, it was held, in the context of an enrichment claim under the *condictio indebiti*, that a party may reclaim a payment made pursuant to an invalid contract in circumstances where the invalidity operates by reason of want of compliance with prescribed statutory formalities.
43. The operation of this principle was recently extended in *J D Botha and Sons Signs* supra in the context of the *condictio sine causa*. It was held (at para 27): 'A party performing in terms of the contract which is unenforceable or invalid due to constitutional invalidity, still has a right to claim for performances rendered. In my judgment, the same principle applies to performance by a contracting party, who believes that there is an agreement between such performing party and another person, when in fact and in truth there was no such agreement in place.'
44. As with all enrichment claims, relief under the *condictio causa data causa non secuta* is based on an equitable principle: no one may be unjustifiably enriched at another's expense, or to another's detriment. I can find no reason in principle or logic why the principle in *Legator McKenna Inc* supra and *J D Botha and Sons Signs* supra ought not to apply cases where, as in the present matter, an enrichment claim is founded on the *condictio causa data causa non secuta*.

45. I am fortified in this approach by reason that, contrary to Adv Bothma's contention, our law has long embedded the principle that some legal consequences may flow from invalid acts, including commercial contracts. For eg, a contract that is void may have fiscal consequences. In this regard, see *Engelbrecht v Engelbrecht* 1940 OPD 191 where Van den Heever J (as he then was) acknowledged that a verbal contract for the sale of land is of no legal force or effect, but nevertheless held that the contract may have some consequences in the eyes of the law. To this end, the Learned Judge explained as follows:

'In other directions the contract did have effect. It would have been futile for either party to claim, as against the tax collector, that no sale had taken place or against creditors (supposing that had been the object of the transaction) that no disposition in fraud of creditors had been committed.'

46. For all these reasons, I find that the defence rooted in s 2(1) of the AOLA, 1981 against the claim based on the *condictio causa data causa non secuta* lacks merit. It is rejected. Therefore, I now turn to deal with the evidence led at trial.

THE ADMISSION OF HEARSAY EVIDENCE

47. At the end of his opening address, Adv Rogers stated that he would call four witnesses: (i) Plaintiff; (ii) Mr Nick Van Wyk (Plaintiff's father); (iii) Mr Garth Cox; and (iv) Mr Ethienne Harkers (Harkers), described by Adv Rogers at the time as Plaintiff's relationship executive at ABSA. However, only the Plaintiff testified.
48. During his argument resisting the Defendants' absolution application, and at a time when it seemed that the proverbial 'shoe was pinching', Adv Rogers denied that he ever informed the Court that he intended to call Harkers as a witness. This denial of a fact is most unfortunate.
49. The context of all this is important. Late during the Plaintiff's evidence in chief on trial day one, Adv Bothma objected to certain testimony being adduced by

the Plaintiff. He did so on the grounds that it was hearsay. At that time, the Plaintiff testified about discussions he had with Mr Ethienne Harkers of ABSA.

50. The discussions with Harkers were important. They related to the financing of the Property sale from the Trust to WCP and, later, about the application by the Trust for a R2m re-advance on its Bond with ABSA, as well as ABSA's alleged approval of the re-advance. The question of the re-advance of R2 million is significant in relation to Plaintiff's R2 million loan claim, especially since Defendants expressly pleaded that they never applied for a re-advance.
51. After Adv Bothma motivated his objection, Adv Rogers responded briefly. At no stage during his address did he state that Harkers will not be called to testify, nor did he argue that he intends to request that the Plaintiff's evidence about the information imparted by Harkers be allowed in the interests of justice under s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 (the LOEAA, 1988).
52. Based on the arguments presented, I ruled the evidence to be hearsay and, pursuant to s 3(3) of the LOEAA, 1988, I provisionally admitted it. At 15h50 on trial day one, Plaintiff's Counsel ended his examination in chief of the Plaintiff. Owing to the lateness of the hour, the case was adjourned. On the morning of trial day two, Plaintiff's Counsel led the Plaintiff's evidence briefly again. One of the aspects he dealt with was the efforts which the Plaintiff made to trace Harkers who, the Plaintiff testified, had left his employ with ABSA. This was the first time that I learnt that Harkers was untraceable and may not testify.
53. In terms of s 3(3) of the LOEAA, 1988 the evidence declared to be hearsay and provisionally admitted (namely, the information imparted to the Plaintiff by Harkers as to the financing of the property sale, as well as the Trust's re-advance application and the processing thereof) 'shall be left out of account' if the witness upon whose credibility the evidence depends does not testify (ie, Harkers), unless the hearsay evidence is admitted either in terms of s 3(1)(a) (ie, with the Defendants' consent), or s 3(1)(c) (ie, in the interests of justice).

54. During Adv Rogers' argument resisting the Defendants' absolution application, I enquired from him as to what I ought to make of the fact that Harkers did not testify, despite an earlier indication that he would testify. I also drew to the attention of Plaintiff's Counsel the fact that I provisionally admitted the hearsay evidence. I then called on him to address me on how I ought to treat that evidence for purposes of the absolution application.
55. It is at this point that Adv Rogers made an about-turn. Instead of utilising any of these exceptions catered for in s 3(3), he proceeded to deny that he informed the Court that Harkers would testify. At the same time, he argued that the evidence declared to be hearsay was in fact not hearsay at all. This approach is perplexing, particularly when consideration is given to the definition of 'hearsay' in the LOEAA, 1988.
56. Section 3(4) defines hearsay as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'. In this context, Harkers is vital as a witness.
57. Nevertheless, I have decided that, for the purpose of adjudicating the absolution application, I will admit the hearsay evidence in the interests of justice. I do so based on s 3(3) read with s 3(1)(c) of the LOEAA, 1988.
58. Section 3(3) does not require a formal application or request by a litigant (or his Counsel) for the admission of hearsay into the record. Thus, I do so *mero motu*.
59. When making this decision, I am mindful that the statutory interests of justice test in s 3(1)(c) have a constitutional dimension. While the admission (or non-admission) of hearsay may be so unfair as to violate an accused's fair trial rights in a criminal case (see *Kapa v S* 2023 (1) SACR 583 (CC) paras 4, 78), it may do likewise to a civil litigant's fair hearing rights entrenched in s 34 of the Constitution of the Republic of South Africa, 1996 (the Constitution).³

³ Section 34 reads: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

60. When making the decision to admit the hearsay evidence I am also mindful that justice cannot be administered nor dispensed with blindly, or with blinkers. This applies equally at the stage of absolution from the instance.
61. When courts are called upon to determine if a plaintiff has made out a prima facie case, then a court is enjoined to consider the conspectus of all relevant, reliable evidence led at the trial. Doing otherwise may lead to a failure of justice, a result incongruous with the right to a fair public hearing engrained in s 34 of the Constitution, and inconsistent with the legislative purpose sought to be achieved by s 3(1)(c) setting the normative standard of 'interests of justice'.
62. Section 3(1)(c)⁴ of the LOEAA, 1988 embodies the norms of an objective value system serving as a bulwark against the unregulated admission of hearsay in judicial proceedings. See *S v Ndlovu and others* 2002 (6) SA 305 (SCA) para 16. In this way, s 3(1)(c) safeguards not only the rights of accused persons but also civil litigants, both in application and trial proceedings.
63. When determining that the interests of justice would be better served by admitting the hearsay forming part of the Plaintiff's direct testimony (rather than not to do so), I considered the jurisdictional factors enumerated in section 3(1)(c) holistically and weighed them collectively. See *Kapa v S supra* para 77.
64. I considered that Harkers was untraceable and for that reason not able to testify.
65. The nature of the civil proceeding in casu favours admission (more so than may have been the position if this were a criminal matter). When considering the nature of the hearsay evidence, I considered the extent to which it can be

⁴ The relevant portion of s 3 reads: 'Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless— ... (c) the court, having regard to— (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.'

considered reliable, and I weighed its probative value against its potential prejudicial effect on the Defendants. See *Kapa v S* supra paras 79 - 80.

66. As to the issue of reliability, I took into account that the Plaintiff, who presented the hearsay evidence, has a direct, pecuniary interest in the outcome of this case. I also considered that the Defendants' Counsel cross-examined the Plaintiff and had the opportunity to test the veracity and trustworthiness of the hearsay. In *Savoi v National Director of Public Prosecutions* 2014 (5) SA 317 (CC) para 38, the court explained that the aversion to hearsay stems from its general unreliability owing to it being untested in cross examination.
67. Adv Bothma was able to cross-examine the Plaintiff in relation to the hearsay. Thus, at the argument on absolution, the Defendants were in a position to counter the hearsay and any inferences which Plaintiff seeks to draw therefrom.
68. I also considered the probative value of the evidence. Here, 'probative value' means 'value for purposes of proof. This means not only, "what will the hearsay evidence prove if admitted?", but "will it do so reliably?"' (*S v Ndlovu supra* para 45). In this regard, I took into account that there are various emails in the trial bundle admitted as an exhibit which is contemporaneous to the discussions which the Plaintiff had with Harkers, and about which he testified at the trial.
69. During the Plaintiff's evidence in chief and during his cross-examination, extensive reference was made to the email communications from Harkers. They provide some measure of corroboration for the hearsay, thereby enhancing its reliability. The Defendants' Counsel did not object to the email correspondence from Harkers, nor placed in dispute the correctness of their contents.
70. As for the issue of prejudice, I considered that the hearsay in question is sought to be used at an absolution application. Defendants are seeking to have the Plaintiff's claims totalling R4 million dismissed. This is drastic.
71. I hold the view that the Plaintiff would be significantly more prejudiced if the hearsay is not allowed, than would be the case for the Defendants if the hearsay

were allowed. This is because failure at absolution for the Defendants (if the hearsay is admitted) simply means that the trial proceeds to their case. On the other hand, failure at absolution for the Plaintiff (if the hearsay is ruled out of account) would mean that the Plaintiff loses one or both of his claims.

EVALUATION OF PLAINTIFF'S TESTIMONY RE UNJUST ENRICHMENT CLAIM

A synopsis of the Plaintiff's testimony (in material respects only)

72. During his examination in chief, the Plaintiff testified that he became involved with WCP in about 2007. He acquired a 45% member's interest in the close corporation. It was subsequently converted to a company with registration no. 2018/531892/07. At the time of acquiring his member's interest in 2007, the remaining members were Willem Johannes Venter (Johan) with 5% and his son, Sharl (Sharl), with 50%. Some years later, on an unknown date, the Plaintiff acquired Johan's interest. Then Plaintiff and Sharl held 50% each. This remained the position until WCP was sold in 2019. All this is common cause.
73. With reference to WCP's detailed ledger for the period 1 March 2017 to 28 February 2018, Plaintiff testified that account no. 5[...] is wrongly recorded as a member's loan account for his father, 'Nick van Wyk'. The Plaintiff testified that account no. 5[...] is his personal loan account and should be read as 'Nico Van Wyk'. This evidence was unchallenged. Therefore, it is common cause that account no. 5[...] records the Plaintiff's loan account in WCP.
74. With reference to account no. 5[...] in the abovementioned detailed ledger of WCP, Plaintiff testified that he loaned substantial sums to WCP during the period 2007 to 2017. This was done to provide WCP with working capital. As a result, his loan account balance ballooned to more than R12 million in the 2018 financial year, while that of Sharl was substantially less.
75. Referring to account no. 5[...]2 in the aforementioned detailed ledger, the Plaintiff testified that Sharl's loan account balance at 24 March 2017 was merely

R713 792,95 and was R183 487,01 as at 28 February 2018. This evidence was not disputed in cross-examination. Therefore, it is common cause.

76. Plaintiff testified that in about June 2017, a meeting took place at the Property. In attendance were himself, Johan, and Sharl. At that meeting, they discussed that WCP was in dire need of a R2 million capital injection to fund its on-going operational needs. Johan and Sharl enquired from the Plaintiff whether he could advance a R2 million loan. This evidence too is common cause.
77. Plaintiff testified that after this meeting, he approached his father for a loan of R2 million to fund WCP's operations. The Plaintiff testified that his father was unwilling to assist. This evidence too was not disputed.
78. Plaintiff testified that his father's attitude was that WCP was not in a good state from a business perspective so that it did not make good business sense to lend R2 million to WCP. His father also felt that Sharl ought to fund WCP - his loan balance was very low for a 50% shareholder while Plaintiff's loan was disproportionately higher running into millions (more than R10m at that time in June 2017).
79. Plaintiff testified that a further meeting was then convened with Sharl and Johan at which he informed them that his father was unwilling to advance him the R2 million needed by WCP. Plaintiff testified that it was at this meeting, and in reaction to his father's unwillingness to assist, that Sharl suggested a workaround plan. Plaintiff testified that Sharl suggested to the Plaintiff that, for R2 million, 'we can take an equity stake in the property' (ie, the Property located in Strand which is owned by the Trust and from where WCP operated). All this evidence too was undisputed in cross-examination and it is common cause.
80. It is also common cause that at all material times to the aforementioned meeting, and subsequent thereto, the Trustees of the Trust were Johan, Sharl, Aletta Susara Magrieta Venter, and Willem Gabriel Jordaan.

81. Plaintiff testified that after his second meeting with Sharl and Johan, he again met with his father. He informed his father about Sharl's suggestion (see above in paragraph 79). Plaintiff testified that his father was agreeable to Sharl's suggestion of a 50% share being acquired in the Property for R2 million.
82. Plaintiff testified that during the discussion with his father, they agreed that the Plaintiff would acquire the 50% share for R2 million and that the Plaintiff's father would advance the money from WCP, being his father's company, on a debit loan account to the Plaintiff. The Plaintiff testified that this is how the R2 million was later funded for the acquisition of a 50% equity share in the Property.
83. Although the Plaintiff's father did not testify, there is nothing before me which gainsays the thrust of the discussions with his father. As a result, for purposes of adjudicating the application, I accept that this evidence is true.
84. Plaintiff testified that a third meeting was then held between himself, Johan, and Sharl. At that meeting, Plaintiff informed them that his father was agreeable to Sharl's suggestion of a 50% equity stake being taken in the Property for R2 million. Plaintiff testified that at this third meeting, which occurred at the offices of WCP in Strand, it was orally agreed between himself, Sharl, and Johan that a 50% share in the Property would be acquired for R2 million.
85. Plaintiff testified further that it was agreed between himself, Sharl, and Johan at the same meeting mentioned above in paragraph 84 that the R2 million would be paid immediately so that the Trust can on-loan the R2 million to WCP for its working capital needs. The Plaintiff testified that it was in that context when he was informed that the Trust does not have a bank account and for that reason the R2 million purchase consideration should be paid directly to WCP's bank account. Consistent with the Defendants' plea, all the evidence in this paragraph was disputed during cross-examination.
86. Plaintiff testified that the capital injection to WCP was urgent and could not wait until the transfer of the 50% share in the Property was registered in a month (or more) through the usual conveyancing process. He testified that he had a long-

standing business and personal relationship with Sharl and his father, the latter of whom he affectionately called his 'mentor and uncle'. Plaintiff testified that he trusted that Sharl and Johan would honour the terms of their oral contract.

87. For all these reasons, Plaintiff testified that the R2 million was paid by CWP on his behalf to WCP for the Trust's benefit. Plaintiff testified, rather frankly, that he was 'naïve' to pay R2 million when there was no signed agreement in place, and the nuts and bolts of the contract had not been negotiated to completion.
88. Plaintiff testified that the final contract between himself and the Trust for the sale of a 50% share in the Property never materialised. Thus, no transfer occurred. On this basis, so he testified, the Trust benefitted by R2 million at his expense.

An assessment of the Plaintiff's enrichment claim: is the test for absolution met?

89. I am satisfied that sufficient evidence exists to find that, at absolution, the Plaintiff established prima facie that he was 'impoverished' in the sense that his estate decreased in value by R2 million paid by CWP on his behalf and on a debit loan account in CWP, which R2 million was first credited to the Plaintiff's loan account at WCP during 2017 and later transferred out by way of a debit journal entry dated 28 February 2018 (see account no. 5[...]).
90. The next question to answer is: did Plaintiff establish prima facie that the Trust was enriched at his expense? 'Enrichment' means 'gaining a financial benefit'. See Joubert & Faris *LAWSA* par 209. In this case, enrichment is alleged to take the form of the Trust's assets increasing by way of a credit loan of R2 million in the books of WCP which would not have taken place but for the enriching fact, being payment of R2 million by Plaintiff to WCP pursuant to the oral agreement of purchase and sale related to the 50% share in the Property.
91. At this juncture, it is necessary to deal with the submission by Adv Rogers that in the light of the fact that it is common cause that the Plaintiff paid the R2 million to WCP during 2017 in three payments, it follows that, as a matter of law,

absolution cannot be granted because the Defendants must lead evidence to prove their defence that the Trust was not enriched at the Plaintiff's expense. For the reasons that follow, this argument is misconceived.

92. When an enrichment takes the form of a payment of money or delivery of goods, then a plaintiff is assisted by a presumption that a defendant who is proved to have received the money or goods (as the case may be) was enriched thereby. The defendant in such an instance would be obliged to prove non-enrichment. See *Kudu Granite Operations* supra para 21.
93. In the present case, the Defendants expressly plead that they dispute key elements of the enrichment action, including denying that they were enriched at Plaintiff's expense. This was also their position at trial. This is not a case where the non-enrichment is averred in circumstances where all the elements of the enrichment have been established (see above in paragraph 38).
94. Accordingly, the presumption does not operate against the Defendants upon mere proof that the Plaintiff paid the R2 million to WCP. For the presumption to apply, evidence is needed that the R2 million was received in 2017 by WCP on loan from the Trust who received it from the Plaintiff, as alleged in the particulars of claim (see above in paragraph 14). I now turn to deal with this vexed issue.
95. The Plaintiff's version that there was an agreement with Sharl and Johan about a 50% stake being acquired in the Property for R2 million is supported by the contents of a plethora of correspondence in the trial exhibit bundle.
96. The clearest indication that the R2 million paid to WCP was associated with an intended acquisition of a share in the Property appears from an email sent by Johan to the Plaintiff on 27 September 2017. In relevant part, it reads:

'R2 mil van die geld wat julle hierdie jaar gegee het is dus in verband met die gebou.'

97. This extract quoted from Johan's email was a lynchpin of the Plaintiff's case. His Counsel argued that this extract, read in the light of its broader context, provides support for the existence of an oral agreement to the effect alleged by the Plaintiff, and it evidences that the Plaintiff carried out its terms as agreed.
98. I find that while the extract quoted above, and the email concerned read as a whole, evidences the existence of an agreement related to the sale of a share in the Property, its probative value is not as strong as the Plaintiff's Counsel contends. For eg, he overlooks that the Plaintiff's unequivocal evidence is that, as at 27 September 2017, only R1 million of the intended R2 million had been paid. Yet, the email records that R2 million had already been paid by then.
99. Moreover, the extract quoted does not record that the R2 million was paid by the Plaintiff as alleged. Rather, it records that the monies was paid by 'julle'. Furthermore, the email extract does not state that the monies were paid to WCP on loan by the Trust to WCP. The extract merely records that the monies relate to the purchase of a property share ('in verband met die gebou'). All these considerations demonstrates that the email in question is not destructive of the Defendants' denials as to enrichment at the Plaintiff's expense. As a result, the Plaintiff cannot benefit from the rebuttable presumption referred to above.
100. The highwater mark of the Plaintiff's case on the issue of enrichment is that the R2 million paid to WCP was deposited in its bank account as a loan from the Trust. The Plaintiff's ipse dixit to this effect must be supported by corroborating evidence. It is not. Indeed, I find that there is a multiplicity of documentary and other evidence bearing out the Defendants' denial of an enrichment.
101. First, the detailed ledger of WCP for the 2018 financial year, which was relied on by the Plaintiff for other purposes (see above in paragraphs 73 to 75), shows that the R2 million was credited to the Plaintiff's loan (account no. 5[...]) and not the loan account of the Trust in WCP's books (account no. 5[...])3).

102. Secondly, the same detailed ledger shows that, on 28 February 2018, R2 million was debited to Plaintiff's loan account and that the corresponding credit entry of R2 million was recorded in Johan's loan (account no. 5[...]2).
103. Thirdly, the financial information outlined above is consistent with the signed annual financial statements of WCP for the 2018 financial year (the 2018 AFS). The 2018 AFS was signed by the Plaintiff, Johan, and Sharl on 3 September 2018. The following words appear immediately above their signatures:

'APPROVAL

The financial statements set out on pages 2 to 8 have been approved by the members.'

104. On page 1 of the 2018 AFS, the Accounting Officer of WCP also records that 'these financial statement and the information provided are the responsibility of the members. We have determined that the financial statements are in agreement with the accounting records ...'.
105. The Plaintiff testified that he did not read the 2018 AFS before signing it and that he was not aware that neither it, nor the detailed ledger, did not record the R2 million paid by him for the property as a loan in favour of the Trust to WCP. This is self-serving evidence that cannot assist the Plaintiff for his enrichment claim. The Plaintiff's signature indicating his approval of the 2018 AFS and his acceptance of its correctness cannot be ignored. He must take responsibility for the consequences flowing from his acceptance of the 2018 AFS and the correctness of its information.
106. The Plaintiff is, belatedly, seeking to distance himself from the 2018 AFS. This is motivated by the fact that it does not align with his averment that the Trust was enriched by a R2 million loan in WCP at his expense. The Plaintiff cannot selectively choose to rely on the 2018 AFS when it suits him and dismiss it when it does not. He and Sharl relied on the 2018 AFS when they furnished it to ABSA as part of WCP's loan application to fund its purchase of the Property from the Trust for R6,8 million under a deed of sale dated 22 September 2018.

107. The 2018 AFS as signed off by the Plaintiff was also relied on by him when he and Sharl decided to sell the WCP business and their loan claims against WCP. On 27 June 2019, a contract was signed in terms of which the Plaintiff, Sharl, and Johan ceded their loans to Deer Ventures (Pty) Ltd as part of WCP's sale. That the purchaser, after the sale, raised concerns about aspects of the records as it related to the Trust, that does not alter the Plaintiff's reliance thereon and his use thereof for purposes of the sale when it benefitted him financially.
108. If the 2018 AFS is incorrect in the respects now averred by the Plaintiff, namely, that the R2 million loan was wrongly recorded in Johan's name and not the Trust, then that would indicate that there, potentially, was a misrepresentation of material facts to ABSA Bank and, more importantly, to Deer Ventures (Pty) Ltd who ultimately purchased WCP and the 'Claims' defined in clause 1.3.2 of the sale contract as 'all amounts owing by the Company [WCP] to the Sellers [Sharl and the Plaintiff] and Venter Senior [Johan] on the Effective Date arising out of any cause whatsoever'.
109. The Plaintiff's position is also not supported by other documentary evidence. For eg, on 12 July 2019 at 07:04pm, Plaintiff sent an email to Sharl and Johan with the subject 'The Venter Trust Property'. The relevant part thereof reads:
- 'I'm now a bit concerned after today and our agreements. ...
1. I paid to WC [West Coast] R2M for 50% of the property.
- As per emails, I was under the impression that that I was registered as 50% or otherwise stated a Trustee and beneficiary.
- When we met this week I was told by Mr Johan that he never completed registering me on the trust. ...' (my emphasis added)
110. It is difficult to understand why the Plaintiff wrote that he was under the impression that he was made a trustee and beneficiary of the Trust. He testified about a string of emails sent to him by Johan in November 2017 in which Johan requested certain documents and information which were needed to enable the change of trusteeship and change of beneficiary to be effected. The Plaintiff's

frank testimony is that he ignored Johan's requests because he was advised by his attorney, Ms Dianne Marie-Rauch (Rauch), and his now deceased advisor, Mr Wesley Umpleby (Umpleby), not to go along with Johan's deal structure.

111. Johan's proposal was set forth in emails. He proposed that the Plaintiff acquires beneficial ownership of a 50% in the Property by becoming a trustee and beneficiary of the Trust, and that the Plaintiff and Sharl 'take over' the Trust by each becoming a 50/50 holder of all the beneficial interests in the Trust, including any loan claims held against third-party debtors. Rauch and Umpleby respectively expressed grave concern about the implications of this proposal.
112. What is important for present purposes is that the Plaintiff's email quoted above in paragraph 109 records that he paid the R2 million to WCP (not to the Trust). His email in no way references the alleged on-lending to WCP by the Trust of R2 million. All this is consistent with my view that the convoluted structure of two separate but inter-related contracts is not something Plaintiff contemplated at any time material to the oral sale being discussed with Sharl and Johan.
113. The Plaintiff was forthright when he testified that he lacks legal knowledge and know-how about the structuring of the property transaction. This is consistent with his evidence that it was for this reason that he consulted with, and was guided by, Umpleby, a chief financial officer, and Rauch, an attorney.
114. However, he sought their advice after the alleged inter-related agreements were concluded in June 2017. There is no factual basis on which I can sustain a prima facie finding for absolution purposes, whether by reasonable inference or otherwise, that when the Plaintiff and his father agreed that the former would acquire a 50% share in the Property that they (or the Plaintiff on his own) then conjured the idea that the Plaintiff will conclude an agreement with the Trust for R2 million, and that simultaneously the Trust will conclude a separate but related agreement with WCP, represented by the Plaintiff, Sharl and/or Johan (as alleged in the particulars of claim), for the on-lending of the same R2m because the Plaintiff, allegedly, did not want to loan money directly to WCP.

115. There is nothing in the conspectus of evidence before me indicating that, at any time material to the conclusion of the alleged inter-related agreements, Plaintiff appreciated the significance of this structure, or that he actively bargained for it. Plaintiff had a layperson's understanding of the deal. It was simple: he was, in due course, going to acquire a 50% share in the Property owned by the Trust and would pay R2 million for it; in the interim, he will pay R2 million to WCP which will enable it to continue with its business operations. He did this on trust.
116. After all, the Plaintiff had a significant financial stake in WCP. Immediately before payment of the R500 000,00 on 13 July 2017, his credit loan balance in account 5[...] was R10 586 818,98. He confirmed this during examination in chief. Therefore, the Plaintiff had a lot to lose if WCP failed.
117. To ensure that WCP did not fail, the Plaintiff ensured that the R2 million was paid to WCP. I find that, at all material times to the R2 million payment, the Plaintiff did not have an aversion to funding WCP. Financially, he could not afford it to fail. For this reason, he approached his father for the R2 million loan after the first meeting with Charl and Johan when they discussed WCP's dire financial position. See above in paragraphs 76 to 77.
118. A further indicator that the Plaintiff did not have an aversion to funding WCP is his unequivocal evidence that in December 2018, that is, after paying the R2 million to WCP in 2017, he persuaded his father to loan R1 million to WCP for operational purposes. His father duly loaned R1 million to WCP from CWP. That loan was then credited to the Plaintiff's loan account. This latter R1 million is over and above the sums forming part of the Plaintiff's loan claim discussed in the next rubric. All this is damaging to the argument that the Plaintiff entered into the alleged inter-related agreements because he did not want to invest directly into WCP, and this undermines the veracity of his testimony that the R2 million related to the Property sale was erroneously credited to his loan account.
119. In cross-examination, Adv Bothma put it to the Plaintiff that (i) there was no error in the accounting as regards his loan account; and (ii) but for the Plaintiff's say so, there is no corroborating evidence that two inter-related oral

agreements were concluded on the terms alleged (or any other), nor that the Trust lent R2 million to WCP. Based on documents presented at trial, there is merit in all this.

120. On 31 May 2018, being more than seven months after the final R1 million instalment was paid to WCP on 3 October 2017, Umpleby sent an email to Harkers. The context of that email appears from its contents as follows:

‘Good day Ethienne,

The property West Coast Packaging is currently letting, they wish to purchase out of a family trust (attached).

Will ABSA be willing to mortgage the property?

The property is situated at 2 [...] C[...] Street, Strand

Nico has provided R2m toward the purchase of the property already via his loan account in West Coat Packaging.’ (my emphasis added)

121. Crucially, neither Sharl nor Johan were copied in on this email. Besides Harkers, the only other person copied on this email is the Plaintiff. There is no evidence that, at any time material to this email being sent, the Plaintiff distanced himself from the underlined portion of Umpleby’s email. The fact that the Plaintiff did nothing to contradict Umpleby’s statement speaks volumes about its truth.
122. Umpleby’s statement to Harkers aligns with WCP’s bookkeeping records and its 2018 AFS signed on 3 September 2018. As stated above, the 2018 AFS was used in support of the loan application foreshadowed in Umpleby’s email.
123. Moreover, Umpleby is the chief financial officer of a Group of companies in the stable of Plaintiff and his father. He is not employed by WCP, and his engagement with ABSA was for the Plaintiff’s benefit, particularly as the Plaintiff had already advanced R2 million towards the purchase price for the Property. It also makes little sense that Umpleby would misrepresent material facts to ABSA at a time when there was no dispute between Plaintiff, Sharl and Johan, and when funding was being sought for an important business transaction.

124. The evidence gets worse for the Plaintiff's version of an enrichment by the Trust at his expense by way of him paying R2 million to the Trust in relation to the purchase of 50% of the Property, and the Trust then on-lending the R2 million to WCP. To this end, clause 3 of the signed sale agreement for the Property as concluded between the Trust and WCP is important. In relevant part, it reads:

'3.1 The purchase price for the property is the sum of R6 800 000 ...

3.2 ... It is recorded that R2 720 000 (Two Million Seven Hundred and Twenty Thousand Rand) of the total purchase price has been effected by the members of the Purchaser via their personal loan accounts to the Seller.' (my emphasis)

125. The underlined portion in clause 3.2 is another objective fact which deals a damaging blow to the Plaintiff's case for enrichment. It is common cause that at all material times to this contract being signed on 22 September 2018, the members of WCP were Sharl (50%), Johan (5%), and the Plaintiff (45%).

126. The underlined portion of clause 3.2 unequivocally excludes an interpretation that includes the Trust. Clause 3.2 of the signed contract contradicts the Plaintiff's version that the R2 million he paid to WCP was a loan by the Trust. Rather, clause 3.2 bears out the Defendants' version put to the Plaintiff under cross-examination, namely, that the R2 million paid in 2017 was credited to the Plaintiff's loan account as was intended to be the case, and the Trust was never enriched by a credit loan of R2 million in relation to the Property sale.

127. Recognising the damage of clause 3.2 on the Plaintiff's enrichment claim, his Counsel sought to neutralise its effect by denying that the Plaintiff had any knowledge of the contents of clause 3.2 and asserted that the Plaintiff did not sign it on behalf of WCP. This is disingenuous.

128. On 21 September 2018, a resolution was passed by WCP authorising only the Plaintiff to sign the agreement of sale on its behalf. The trustees authorised

Sharl to sign the contract on their behalf. Plaintiff testified that he recognised Charl's signature on the execution page of the contract above the line marked 'For: Venter Familie Trust'. During his testimony in chief and under cross-examination, the Plaintiff testified that it seems to him that the signature appended 'For: West Coast Packaging CC pp Nico Van Wyk' is his.

129. The Plaintiff's uncertainty stemmed from his signature changing over time. Importantly, the Plaintiff's testimony does not indicate who else, except him, would have signed the contract in the light of the resolution by WCP in his favour alone. Owing to (i) the importance of the document in question, (ii) the purpose for which it was intended to be used, (iii) the WCP resolution authorising only the Plaintiff to sign, (iv) the fact that the Plaintiff had for more than a year since June 2017 been waiting for the processing of the purchase of a share in the Property, and (v) the fact that the Plaintiff testified in chief and under cross-examination that the signature appended on behalf of WCP may well be his, I conclude that it may reasonably be inferred that the Plaintiff signed the contract.
130. Consequently, by his signature, the Plaintiff must be taken to have been aware of the underlined portions in clause 3.2 quoted above in paragraph 124.
131. The undisputed evidence is also that the contract was drafted by Umpleby. At all times, he acted on the Plaintiff's behalf and for Plaintiff's benefit. The provision in clause 3.2 clearly benefitted the Plaintiff at the relevant time as his estate had a R2 million claim against WCP.
132. Plaintiff is now seeking to evade the consequences arising from the fact that, on more than one occasion, and in important documents related to a commercial transaction of a significant value, Umpleby affirmed on his (Plaintiff's) behalf and for his financial benefit that the Plaintiff's loan account in WCP was used to deposit the R2 million now claimed from the Trust, being the Plaintiff's share of the R2 720 000 mentioned in clause 3.2 of the contract.
133. During his examination in chief, and under cross examination, Plaintiff testified that it was never his intention to transfer the 50% share into his own name but

rather to register it in the name of a company. In furtherance of this intention, he testified that, on a date which he cannot recall, Sharl, Johan and he agreed that the Property would be transferred in its entirety out of the Trust and would be registered in West Coast Holdings (Pty) Ltd, a company registered by Umpleby and in which the Plaintiff and Sharl held 50% share each. This transfer never materialised. The Property was then sold to WCP but that too failed.

134. To sum up: Plaintiff bears the onus to establish that the Trust was enriched by way of its assets increasing by R2 million in value via a loan to WCP at the Plaintiff's expense. I find that he failed to discharge this onus, even on the lower prima facie threshold applicable at the stage of absolution.
135. I conclude that, as regards the enrichment claim, the interest of justice favours the granting of absolution from the instance with costs. It will be so ordered.

EVALUATION OF PLAINTIFF'S TESTIMONY RE THE LOAN CLAIM

A synopsis of the Plaintiff's testimony (in material respects only)

136. At the end of the Plaintiff's cross-examination, it was common cause, as testified by him in chief, that the Plaintiff is the sole member of Muir La Morris CC which owned a sectional title unit. It was sold by the close corporation to the Ben Lewis Familie Trust in terms of a sale agreement concluded towards the end of 2018.
137. It is further common cause that transfer of the unit registered during February 2019 and that, on date of transfer, Plaintiff caused Bornman and Hayward Attorneys, being the conveyancing firm, to pay into WCP's bank account the aggregate sum of R2 063 733,18, being monies that it desperately needed to fund its business operations at that time.
138. Plaintiff testified that in December 2018, he persuaded his father to advance R1 million to WCP to hold the company over during its end of year holiday season. This shows that even then Plaintiff was not averse to funding WCP directly.

139. The dispute in this case centres on whether the R2 063 733,18 was advanced by the Plaintiff to WCP on behalf of the Trust as a loan by it to WCP, which the Plaintiff insisted was the position in terms of an oral agreement concluded between himself and the Trust represented by Sharl and/or Johan; or whether the R2 063 733,18 was a personal loan by the Plaintiff to WCP.
140. It is common cause that if the latter is the factual position, then, as a matter of law, the Plaintiff's loan claim against WCP is unenforceable by virtue that it would then have been ceded to Deer Ventures (Pty) Ltd when the business of WCP was sold to it in June 2019. See above in paragraphs 107 to 108.

An assessment of the Plaintiff's loan claim: is the test for absolution met?

141. Consistent with the Plaintiff's particulars of claim, he testified that the R2 063 733,18 was intended to be deposited into WCP's bank account and credited to the Trust's loan account. Again, as with the R2 million dealt with earlier in relation to the enrichment claim, the available accounting records of WCP simply does not bear out the Plaintiff's version as to the oral loan contract.
142. The detailed ledger of WCP for the period 1 March 2018 to 28 February 2019 shows that the R2 063 733,18 was credited to Plaintiff's loan account on 22 February 2019 (account no. 5[...]). There is no evidence showing that this credit entry was ever reversed, or that the funds were transferred out of the Plaintiff's loan account. Thus, by all accounts, it remained in Plaintiff's estate.
143. I find that the evidence before me supports a finding that the R2 063 733,18 remained credited to the Plaintiff's loan account when WCP was sold to Deer Ventures (Pty) Ltd in June 2019 and that the Plaintiff, with knowledge of this fact, freely and voluntarily disposed of his loan account to Deer Ventures (Pty) Ltd by way of an out an out cession, including the claim of R2 063 733,18.
144. Plaintiff testified that he never checked the detailed ledger entries of his loan account no. 5[...] at any time prior to the sale of his loan claims to Deer Ventures

(Pty) Ltd and that, as such, he could not have known that it included the R2 063 733,18 deposited in February 2019 (or that the R2 million he paid to WCP in 2017 for the 50% share in the Property was credited to his loan account as opposed to the Trust's loan account). All this is self-serving evidence which is inconsistent with Plaintiff's testimony and his business-like approach.

145. In paragraph 120 above, reference is made to an email sent by Umpleby on the Plaintiff's behalf in which he records to Harkers that the Plaintiff has financed part of the purchase price for the Property by way of a R2 million deposit into his loan account at WCP. When asked about this statement by Umpleby, the Plaintiff could only venture a speculative answer that has no probative value.
146. Plaintiff was, however, emphatic when he testified that, when Umpleby sent the email in May 2018, the 2018 AFS had not been compiled and Umpleby never had sight of the bookkeeping or account records of WCP. This begs the obvious question: how did Umpleby know that the R2 million paid in 2017 was actually credited to Plaintiff's loan account 5[...] as per the evidence before court?
147. On the facts before me, it is reasonable to infer that Umpleby obtained this information from the Plaintiff. This also makes sense. The Plaintiff is a successful businessman. He did not strike me to be an impulsive or wreckless businessman. He approached his business dealings with caution, always seeking guidance and advice before making key commercial decisions.
148. Immediately before the R2 063 733,18 was credited to the Plaintiff's loan account in the books of WCP, the ledger shows that his credit balance stood at R13 492 369,43. This increased to more than R15,5 million after the R2,063 million was credited. It makes little (if any) business sense that Plaintiff, as a prudent businessman, would blindly consent to the disposal of his loan claims in WCP without having regard to the financial records of WCP, including his loan account balances and their make-up. This would have been a critical part of his decision-making, especially for how the sale proceeds would be divided.

149. Therefore, I agree with Adv Bothma's submission that, on the evidence, it can reasonably be inferred that, at all material times to the disposal of Plaintiff's loan claims against WCP, he knew that it included the R2 063 733,18 and that he sold that claim to Deer Ventures (Pty) Ltd. Thus, he cannot now seek to recover those monies from the Trust on the basis of an alleged oral loan agreement, the existence of which the evidence does not support, even on a prima facie basis.
150. However, there is another fundamental reason for my view that the Plaintiff has failed to prove his loan claim. Consistent with the Plaintiff's particulars of claim, he testified that he orally agreed with the Trust that the R2 million loan would be repayable when ABSA re-advances this sum to the Trust.
151. Plaintiff testified that, as part of ABSA's conditions for the approval of the re-advance, it was necessary that the security bond registered over the Property in favour of Sasol Ltd first be cancelled. Considerable evidence was led on the delays in procuring this cancellation because the title deed went missing. In the end, the evidence is that the Sasol bond was not cancelled.
152. The Sasol bond was not cancelled and Johan terminated the entire re-advance process in or about May 2019. ABSA did not re-advance the R2 million. WCP was then sold in June 2019 - its shareholders could not find capital funding.
153. On Plaintiff's own version, the R2 million would become payable by the Trust to him only once ABSA re-advances this sum to the Trust. That re-advance was, in turn, dependent on ABSA's standard terms and conditions being met.
154. ABSA's pre-condition for approving and processing the re-advance was not met, namely, the prior cancellation of Sasol Ltd's bond over the Property. Of course, Johan's termination of that process meant that the re-advance became an impossibility.
155. In these circumstances, the alleged orally agreed pre-condition for Plaintiff being entitled to enforce re-payment of the alleged loan by the Trust was not met, namely, the Trust did not receive the re-advance of R2 million from ABSA.

156. Consequently, and on the strength of the Plaintiff's own version, he was, as a matter of law, not entitled to sue for the re-payment of the alleged loan based on the terms of the alleged loan agreement.

157. When I raised this issue with Plaintiff's Counsel, he argued that the law can never permit a borrower, namely, the Trust, to evade repayment of a loan lawfully made to it through the borrower taking steps that make it impossible for the lender to enforce repayment. I agree. Indeed, the law does not permit such an undesirable state of affairs. The remedies available in instances of the kind dealt with here were pertinently addressed by the SCA.

158. In *Kudu Granite Operations* supra para 15, the SCA held as follows:

'There is no reason why contractual and enrichment remedies should be conflated. Caterna's case was one of a lawful agreement which afterwards failed without fault because its terms could not be implemented. The intention of the parties was frustrated. The situation in which the parties found themselves was analogous to impossibility of performance since they had made the fate of their contract dependent upon the conduct of a third party (KPMG) who was unable or unwilling to perform. In such circumstances the legal consequence is the extinction of the contractual nexus: see De Wet and Van Wyk, *Kontraktereg en Handelsreg* 5 ed vol 1 172 and the authorities there cited. The law provides a remedy for that case in the form of the *condictio ob causam finitam*, an offshoot of the *condictio sine causa specialis*. According to Lotz, 9 *LAWSA* (1st reissue) para 88, the purpose of this remedy is the recovery of property transferred under a valid *causa* which subsequently fell away. ... It is sometimes suggested that the *condictio causa data causa non secuta* is the appropriate remedy. See para 85 of *LAWSA supra*.'

159. Accordingly, and assuming the Plaintiff can prove the existence of the alleged oral loan agreement with the Trust, then, in view of the impossibility to perform created by Johan's termination of the re-advance process, the Plaintiff's remedy

lay in the law of unjustified enrichment. Without deciding the issue, the Plaintiff may possibly also have claim based on a contract repudiation.

160. For all these reasons, I find that the Defendants are entitled to an order for absolution from the instance in relation to Plaintiff's loan claim. It is not in the interests of justice in these circumstances to permit this claim to proceed further.

COSTS

161. There are no good reasons why costs ought not to follow the result. Accordingly, Plaintiff shall be directed to pay Defendants' party-and-party costs. In making this determination, I had regard to the factors listed in Uniform Rule 67A(2).
162. The High Court tariffs now make provision that when counsel's fees are on a party-and-party scale, then a determination should be made whether Scale A, B, or C applies in respect of work performed by counsel after 12 April 2024.
163. Having regard to the factors listed in Uniform Rule 67A(3)⁵ and the seniority of the counsels on both sides, I find that scale C would allow for a fair measure of compensation which will not leave the Defendants unduly out of pocket. An order to this effect will, thus, be granted.

ORDER

- (a) The Defendants' application for absolution from the instance succeeds.
- (b) Absolution is granted in respect of both Plaintiffs' claims with costs, such costs to include Counsel's party-and-party fees on Scale C.

⁵ Uniform Rule 67A(3)(b) reads: 'In considering the factors to award an appropriate scale of costs, the court may have regard to: (i) the complexity of the matter; and (ii) the value of the claim or importance of the relief sought.'

F MOOSA
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv J. Rogers

Instructed by: Bicarri Bollo Mariano Inc (Mr B Kurtz)

For Defendants: Adv. P-S. Bothma

(first to fourth defendants)

Instructed by: Hannes Pretorious Brock & Bryant (Mr H. Pretorious).