IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 5544/2018

In the matter between

IMBANI HOLDINGS (PTY) LTD	**APPLICANT**
and	
HOMSEK (PTY) LTD	**FIRST RESPONDENT**
HOMSEK ULTRA (PTY) LTD	**SECOND RESPONDENT**
ANTON HOMSEK FAMILY TRUST	**THIRD RESPONDENT**
HOPEFIELD TRUST	**FOURHT RESPONDENT**
ANNA'S RUST TRUST	**FIFTH RESPONDENT**
BELLE VACHE TRUST	**SIXTH RESPONDENT**
PRINSPAN TRUST	**SEVENTH RESPONDENT**
ANTON HOMSEK	**EIGHTH RESPONDENT**
IMBANI HOMSEK FARMING (PTY) LTD	**NINTH RESPONDENT**
IMBANI HOMSEK HOLDINGS (PTY) LTD	**TENTH RESPONDENT**
IMBANI HOMSEK PROPERTIES (PTY) LTD	**ELEVENTH RESPONDENT**
IMBANI HOMSEK TRADING (PTY) LTD	**TWELFTH RESPONDENT**

Neutral Citation: *Imbani Holdings (Pty) Ltd v Homsek (Pty) Ltd and Others* (5544/2018) [2025] ZAFSHC 205 (4 July 2025)

Coram: Van Rhyn J

Heard: 17 April 2025

Delivered: 4 July 2025

Summary: Application for amendment – objection on basis that 'dual claims', on basis of unjustified enrichment and contractual claim are mutually exclusive and must be pleaded in the alternative. *Condictio indebiti* is a claim at securing the return of a mistaken transfer of money which was not owed at all – payment claimed in consequence of breach of contract is distinctly contractual remedy – particulars of claim – if amended – would be excipiable. Amendment refused.

ORDER

The application to amend is dismissed with costs, which costs shall include costs of counsel on Scale B.

JUDGMENT

Van Rhyn J

[1] This is an interlocutory application by the plaintiff, being the applicant in this matter, to amend its particulars of claim in accordance with a notice of intention to amend dated 14 January 2025 and for a costs order on attorney and client scale. This application follows upon an objection raised by the defendants, cited as the respondents in this matter, against such contemplated amendments. For ease of reference, I shall refer to the parties herein as they were referred to in the plaintiff's notice of intention to amend and in the defendants' notice of objection.

[2] The plaintiff, Imbani Holdings (Pty) Ltd, is a company with limited liability registered as such in accordance with the company laws of the Republic of South Africa, having its registered office, alternatively its principal place of business at Bloemfontein. The first, second, ninth, tenth, eleventh and twelfth defendants are private companies, all with their principal place of business, alternatively registered address at the Farm Newlands 31A, Bloemfontein. The third, fourth, fifth, sixth and seventh defendants are trusts, duly registered and represented by the trustees as described in the plaintiff's particulars of claim. The eighth defendant is Anton Homsek ('Mr Homsek'), an adult male farmer and business man of the Farm Newlands 31A, Bloemfontein.

[3] On 2 November 2018 the plaintiff issued summons against the defendants in terms of which the plaintiff alleged that on 5 April 2012 at Rosebank, the plaintiff, represented by Briss Mathabane, and the first to eighth defendants, represented by Mr Homsek, concluded

a written agreement referred to as the Memorandum of Understanding ('MOU'). It is common cause that the MOU included seven suspensive conditions that were to be fulfilled in order for the terms of the MOU to come into force and effect. Due to the non-fulfilment of a number of suspensive conditions, the MOU did not come into force and effect. However, regardless of the non-fulfilment of the suspensive conditions, the plaintiff made payment of an amount R31 608 214.97 to the first to eighth defendants.

[4] By virtue of the fact that the MOU was void, the payment made by the plaintiff was made *sine causa*. The plaintiff alleges that on 7 July 2015 Mr Homsek undertook to make payment to the plaintiff in the amount of R28 000 000 by way of structured instalments during the period from 30 July 2015 to 30 July 2020. It is alleged that both the defendants' indebtedness and the undertaking to pay are evident from correspondence appended to the particulars of claim as annexures 'POC2', 'POC3' and 'POC4'. In accordance with the undertaking to pay, an amount of R10 000 000 was due and payable on 30 July 2015. However, payment in the amount of R10 000 000 was only made on 3 September 2015. The plaintiff contends that the defendants remain indebted to the plaintiff in the sum of R18 000 000.

[5] In the plea, the defendants denied the undertaking to pay and also denied that payment in the amount of R10 000 000 was made on 3 September 2015, as alleged by the plaintiff. On 26 June 2019 the plaintiff delivered and filed its notice of amendment in terms of rule 28(1) and inserted the following heading and claim:

'ALTERNATIVE CLAIM FOR UNJUSTIFIED ENRICHMENT. Alternatively to the foregoing, in the event that the Honourable Court does not find in favour of the plaintiff in relation to the undertaking to effect payment, the plaintiff pleads as more fully set out hereunder." The remainder of the amendment deals with the allegations in support of the claim based on unjustified enrichment, pleaded as a *condictio indebiti.* It is alleged that the payments made by the plaintiff was made in the mistaken or bona fide and reasonable belief that the MOU was of full force and effect or, alternatively made in error. Payments were made in the absence of a valid causa for receipt and were neither due nor owing to the first to eight defendants. In the prayer the plaintiff sought payment based upon the undertaking to effect payment in the sum of R12 000 000 and in respect of the enrichment claim in the amount of R21 608 214.97.

[6] The first amendment was not opposed by the defendants. In its plea to the first amendment (dated 5 August 2019), the defendants raised a special plea of prescription to the alternative claim for unjustified enrichment. On 21 June 2022 the plaintiff filed and delivered its notice of amendment in terms of rule 28(1), being its second amendment. Again, this amendment was not opposed by the defendants. The plaintiff deleted the entire claim referred to above labelled 'the undertaking to effect payment' as well as most of the allegations in support of the alternative claim for unjustified enrichment. The previous alternative claim for unjustified enrichment became the main claim. The plaintiff pleaded that on 26 August 2016, the eighth defendant (Mr Homsek) acknowledged that payment was made by the plaintiff in circumstances where the MOU was void and agreed to repay the plaintiff, jointly and severally with the first to seventh defendants, the full amount of R30 663 258.28 in annual instalments commencing during September 2015.

[7] The three annexures that set out the alleged undertaking to pay and acknowledgement of indebtedness, annexures 'POC2', 'POC3' and 'POC4', do not form part of the plaintiff's case subsequent to the amendment being effected. In its plea to the second amendment, the defendants denied the existence of any agreement to repay the amount claimed and raised a special plea that insofar as such an alleged agreement was concluded, such claim has prescribed.

[8] Regarding the third amendment dated 14 January 2025, which forms the subject of this judgment, the objection raised by the defendants is only in respect of paras 3 and 4 of the notice of amendment, which reads as follows:

'3. By adding in the following words at the end of paragraph 14 of the particulars of claim, after the last words of the existing paragraph which read ("September 2015") and before the full stop, to read as follows ("agreement to repay").

4. By adding in the following paragraphs, after the existing paragraph 14 of the particulars of claim, to be numbered as the new paragraphs 14.1, 14.2, 14.3, 14.3.1 and 14.3.2, and which will read as follows:

"[14.1] In addition to having a duty to repay the plaintiff pursuant to being unjustifiably enriched, the first to eighth defendants acknowledged their liability to repay the plaintiff, and agreed to restore the plaintiff to its position prior to having made payments as set out in paragraph 10 supra;

[14.2] The agreement to repay that was concluded by the plaintiff represented by Malemaduje Mathabathe and Gavin Brett, and the eighth defendant in his personal capacity, and as a duly authorised representative of the first to seventh defendants.

[14.3] The agreement to repay was partially verbal and partially in writing;

[14.1.3] the material written portion of the agreement to repay is encapsulated in various e-mail correspondence between the plaintiff and the first to eighth defendants between the period of November 2014 to September 2015. The e-mail correspondence comprising the written portion of the agreement to repay is annexed hereto as annexure "POC3".

[14.1.4] the material verbal portions of the agreement to repay were that the first to eighth defendants would repay the plaintiff in tranches, commencing with a payment of R10 million by 31 August 2015, and the remaining amount, in the sum of R20 663 258,28 to be repaid in annual tranches, on or before the 30th of July 2020."'

[9] For purposes hereof it is accepted that the reference to paras 14.1.3 and 14.1.4 are typographical errors and that these should read 14.3.1 and 14.3.2. The defendants contend that the current cause of action pleaded in the plaintiff's particulars of claim is one of unjustified enrichment. The crux of paras 3 and 4 (including sub-paragraphs) of the proposed amendment is to introduce a partially verbal, partially written agreement (labelled as 'the agreement to repay') allegedly concluded between the plaintiff and the first to eighth defendants, in terms of which the first to eighth defendants allegedly acknowledged their liability and agreed to repay the plaintiff the amount of R20 663 258.28.

[10] The defendants contend that in para 4 of the proposed amendment, the plaintiff seeks the introduction of a new para 14 with sub-paras and it is now alleged, for the first time, that the material written portion of the agreement to repay is encapsulated in various email correspondences between the plaintiff and the first to eighth defendants between the period November 2014 to September 2015. Reference is made to annexure 'POC3' which is comprised of at least nine emails. Except for one, the other eight emails have not been referred to previously and have not formed part of the plaintiffs claim. On behalf of the defendants it is contended that what was previously a single line pleaded in para 14 of the plaintiff's second amendment, which read as follows: 'During or about 15 July 2015, the Eight Defendant acknowledged that payment by the Plaintiff in circumstances where the MOU was void, and agreed to repay the Plaintiff. . .' has transformed into something altogether different when considering para 4 of the plaintiff's third amendment.

[11] The defendants object to the proposed amendment set out in paras 3 and 4 of the notice of amendment on the basis that the plaintiff has advanced only one claim based on unjustified enrichment and that the proposed amendment is vague and embarrassing and causes prejudice to the defendants. The defendants' objection is that:

(a) It is unclear whether or not the agreement to pay constitutes a new claim, or, whether the allegations made in paras 14.1 to 14.3, including the sub-paras, serve as evidence pleaded in support of the claim for enrichment;

(b) In the event that the proposed amendment is allowed, the defendants will be prejudiced as there is no allegation made that the newly introduced agreement to pay is pleaded as an alternative to the enrichment action; and

(c) as the agreement to pay is not pleaded in the alternative to the enrichment claim, it is excipiable as an enrichment claim and a contractual claim are contradictory and cannot co-exist as a single cause of action.

[12] The plaintiff contends that, in its current form, the plaintiff's case rests on two concurrent causes of action arising from different but related facts, both aimed at recovery of the same amount: one based on unjustified enrichment and the second based on a subsequent repayment agreement. All that the proposed amendment seeks to do is to comply with the provisions of rule 18(4) and rule 18(6) of the Uniform Rules of Court, which the plaintiff omitted to do. According to the plaintiff, the concurrent existence of these causes of action cannot form the basis of a valid objection as the defendants have already responded to both causes – together – in their current plea. The proposed amendment simply provides factual context to the already pleaded causes of action and includes allegations required in terms of, *inter alia*, the aforesaid rule 18. It does not introduce a new claim. It is argued on behalf of the plaintiff that there is no need for a party to plead in the alternative when the causes of action arise from different set of facts that are chronologically apart in time, one arising from a void contract and giving rise to an enrichment claim and the other, some two years later arising from an agreement (partially verbal and partially written) to repay concluded between the parties. Therefore, the plaintiff contends that the objection to the proposed amendment has no merit.

[13] The court has a discretion to grant or refuse an amendment to the pleadings.[1] Various principles inform a court's discretion whether to grant or refuse an amendment. These include the following:[2]

(a) It is trite that a litigant may amend his or her pleading at any stage of the proceedings before judgment;

(b) The general approach to amendments is that they should be allowed, unless the amendment application is made in bad faith and would cause an injustice to the other side which cannot be compensated with a cost order;

(c) An amendment requires some explanation, including a reasonably satisfactory account for any delay, and should not be refused simply to punish the applicant for neglect. An amendment that would render the particulars of claim excipiable is impermissible;[3]

(d) The applicant must show that prima facie the amendment 'has something deserving of consideration, a triable issue'. No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a bona fide mistake;

(e) The modern tendency is in favour of an amendment if this will facilitate the proper ventilation of the dispute between the parties. The court must then weigh the reasons or explanation given by the applicant for the amendment against the objections raised by the opponent, and where the proposed amendment will prejudice the opponent or would be excipiable, the amendment should be refused.

[14] The purpose of pleadings is to define the issues for the other parties and the court, which may include the trial court and any court of appeal. It is the duty of the court to adjudicate upon the disputes and those disputes only. A party must define its cause of action and defence in the appropriate pleading, to inform the other parties to the matter of the case they must meet and of the relief sought against them in the court of first instance. This is a fundamental principle of fairness in the conduct of litigation, which promotes the parties' rights to a fair hearing guaranteed by s 34 of the Constitution.[4] Every pleading must contain a clear and concise statement of the material facts upon which the pleader relies for the

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[1] *Robinson v Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168 at 243.

[2] *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876A – D; *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (TK) at 77F-I; *Media 24 (Pty) Ltd v Nhleko & Another* [2023] ZASCA 77 paras 16-19.

[3] *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at 363B.

[4] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (10) BCLR 1195 (CC) para 202.

claim, defence or answer, with sufficient particularity to enable the opposite party to reply thereto.

[15] The general rule regarding pleadings is that pleadings must be drafted in a lucid, logical and intelligible manner. The cause of action or defence must appear clearly from the factual allegations made. In *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23 a very succinct definition of what constitutes a 'cause of action' was held to be as follows: '. . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved'. A cause of action is ordinarily used to describe the factual basis that begets the plaintiff's legal right of action.

[16] A claim must set out the following:

(a) the nature of the plaintiff's claim;

(b) a clear and concise statement of the material facts on which the plaintiff relies for the claim;

(c) the conclusions of law which the plaintiff is entitled to deduce from the facts stated; and

(d) a prayer for the relief claimed. [5]

[17] Distinct claims founded upon separate and distinct facts must be separately and distinctly stated. Although there is authority that recognises a general enrichment action, the general enrichment action has never found application. South African Law acknowledges three major sources of obligations, ie contract, delict and unjustified enrichment. Unjustified enrichment is primarily concerned with corrective justice and its aim is to restore the position that existed before the enriching fact took place, by removing a benefit from the patrimony of the enrichment debtor. By contrast, the law of delict, while also aimed at restoring the status *quo ante*, does this not by taking away a benefit, but by compensating for harm suffered. The law of contract is generally speaking not aimed at restoring the status *quo ante*, but at achieving the objectives contemplated by the contract, either in a real sense or by delivering the economic equivalent.

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[5] *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O).

[18] The essence of enrichment liability exists where a party's estate is increased at the expense of another without legal cause. This is on the face of it, a very widely formulated basis for liability, however not broader than the adagium '*pacta sunt servanda*' or the notion that all harm that is wrongly and culpably caused must be compensated. The core principle of enrichment liability is kept in check by a number of limiting factors, namely the notion of subsidiarity and the fact that three basic elements have to be present before there can be liability. The notion of subsidiarity can be used to mean different things, namely to indicate (a) that a claim based on a general principle against unjustified enrichment should be subsidiary to specific existing actions;

(b) that, in case of a concurrence contractual and enrichment actions the latter should be seen as a last resort; and

(c) that, if the nature of the concurrence takes the form of the claimant having a claim in contract against his contractual partner and a claim in enrichment against the third party, the claim in contract takes precedence.[6]

[19] In *Absa Bank Ltd v De Klerk* 1999 (1) SA 861 (W) the court held that the South African law proceeds from the basis of alternativity ie it allows the claimant to choose when there is a concurrence of contractual and enrichment remedies. The law of unjustified enrichment, amongst others, acknowledges the *condictio indebiti*, a claim aimed at securing the return of a mistaken transfer of money which was not owed at all, for instance where someone makes a payment in terms of a void contract while thinking that it is valid. A payment claimed in consequence of the breach of a contract is a distinctly contractual remedy and is not an enrichment action. In *Baker v Probert* 1985 (3) SA 429 (A) it was held that a purchaser who has validly cancelled a contract of sale on the ground of the seller's breach of it, is entitled in principle to claim repayment of the purchase price, paid to the seller in terms of the contract prior to its cancellation. It is a distinct contractual remedy.[7] Contractual remedies lie where the contract is the source of the claim and it is only where the purported contract had no legal effect that the claim can be founded in an enrichment action.

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[6] F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) at 1045-1046.
[7] *Baker v Probert* 1985 (3) SA 429 (A) at 438G-439B.

[20] The facts in *Inzalo Communications & Event Management (Pty) Ltd v Economic Value Accelerators (Pty) Ltd*[8] (*Inzalo*) were the following: the plaintiff had instituted an action for payment of an amount of money representing a monthly retainer fee for the period October 2005 to February 2006 for assisting the defendant with its communications strategy. In its plea the defendant averred that, in breach of material terms of the agreement, the plaintiff had failed to perform the services which it had contracted to perform, whether properly or at all and that it had terminated the agreement. In a counterclaim the defendant repeated the allegations contained in the plea and averred that, in the bona fide but mistaken belief that the defendant was liable to the plaintiff for the services purportedly rendered by it for the defendant from April 2005 to September 2005, the defendant effected payment to the plaintiff of the aggregate sum of R144 438 and that arising from the plaintiff's material breach of its obligations under the agreement, the defendant was not liable to pay such amount to the plaintiff or any amount at all. The defendant is therefore entitled to repayment of the sum from the plaintiff. The plaintiff excepted to the counterclaim on the grounds that it was vague and embarrassing, alternatively that it failed to disclose a cause of action.

[21] The plaintiff's complaints in *Inzalo* against the counterclaim were, firstly that the defendant had not alleged that the error had been excusable or even reasonable, which was an essential averment in an action based on the *condictio indebiti*. Secondly, although it was clear that the *condictio indebiti* was not available if there was no mistaken belief that the amount paid was owing, the defendant could not, on the facts alleged in the counterclaim, have believed that the monthly amounts were due when they were paid. Thirdly, the defendant had alleged an ongoing breach of the agreement by the plaintiff, but did not claim damages arising therefrom, and had relied on enrichment, as a separate cause of action, to claim the repayment of the payments made by it to the plaintiff during the alleged ongoing breach. With reference to *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) Symon AJ held as follows:

'[41] This case graphically illustrates that not only would reliance upon a *condictio* (or language suggestive thereof) be misplaced in regard to a restitutionary claim (in the non-technical sense identified in Probert), but it would be incorrect. Contractual remedies (including restitution) lie where the contract is the source of the claim. It is only where the purported contract had no legal effect that the claim could be founded in an enrichment action.'

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[8] *Inzalo Communications & Event Management (Pty) Ltd v Economic Value Accelerators (Pty) Ltd* [2008] ZAGPHC 81; 2008 (6) SA 87 (WLD).

[22] In terms of the common law, any number of separate causes of action may be joined together between the same plaintiff on the one hand and the same defendant on the other; provided that inconsistent causes of action could not be joined. The Uniform Rules of Court specifically provide that a plaintiff may join several causes of action in the same action.[9] In *Beck's Theory and Principles of Pleadings in Civil Actions*[10] it is stated that: 'Although inconsistent causes of action should not be joined it is usually not bad in law to claim such in the alternative.'

[23] A concurrence of actions can exist only where it can be established that any relevant contract does not create a causa for the enrichment. The *condictio indebiti* may be used to reclaim payment made in terms of an invalid contract if the invalidity was due to failure to comply with the prescribed formalities.[11] South African law proceeds from the basis of alternativity, ie it allows the claimant to choose when there is a concurrence of contractual and enrichment remedies.[12] Consequently, there is no conceivable basis in law how an enrichment claim can form part of a claim that is premised on contract. An enrichment claim, as in the matter at hand, accepts that the payment made by the plaintiff was not made in terms of a contract. As such, the enrichment claim cannot form part of a claim in terms of which a contractual provision is enforced – in that respect an enrichment action and a claim in terms of a contract are diametrically opposed.

[24] I am in agreement with the contention by the defendants that the claims by the plaintiff are two distinct and individual causes of action that cannot co-exist and must therefore be pleaded in the alternative. Clearly, that is how the plaintiff initially formulated its particulars of claim subsequent to the first amendment, by pleading the enrichment claim as an alternative claim to the 'undertaking to repay' claim.

[25] Having considered the plaintiff's claim in accordance with the manner in which it had been formulated in the notice of amendment, I am in agreement that the plaintiff can pursue both claims simultaneously, but the remedies available under each claim may differ and the court will have to consider the specific circumstances and the evidence presented during

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[9] Rule 10(2).
[10] *Daniels H, Beck's Theory and Principles of Pleadings in Civil Actions, (Sixth Ed)* at 36.
[11] *Legator McKenna Inc v Shea* [2009] 2 All SA 45 (SCA); 2010 (1) SA 35 (SCA).
[12] *Absa Bank v De Klerk* 1999 (1) SA 861 (WLD).

the trial to determine the appropriate outcome. Having regard to the principles enunciated in *Absa Bank v De Klerk* 1999 (1) SA 861 (WLD), it allows the claimant to choose when there is concurrence of contractual and enrichment remedies. The two distinct and individual causes of action must be pleaded in the alternative. I therefore agree that the defendants' objection to the intended amendment is a valid objection in that the plaintiff's particular of claim, if so amended, would be excipiable. In weighing the factors for consideration in the exercise of my discretion, the application to amend should be refused.

[26] I have considered the issue of costs in the light of counsels' submissions. I am satisfied that there is no reason to depart from the usual position that costs follow the event.

Order

[27] The following order is made:

The application to amend is dismissed with costs, which costs shall include costs of counsel on Scale B.

[redacted]

VAN RHYN J

Appearances

For the applicant:	M Cajee with M Peacock
Instructed by:	Van der Merwe & Sorour Attorneys, Bloemfontein
For the respondents:	C Acker
Instructed by:	Muller Gonsior Attorneys, Bloemfontein.