



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 30848/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED.
- (4) Date: 14 November 2025

Signature: [REDACTED]

In the matter between:

ZAMORI ENGINEERING SERVICES (PTY) LTD
(Registration number: 20031028727107)

Plaintiff

And

AME TELECOMMUNICATIONS (PTY) LTD
(Registration number: 2005/036475/07)

Defendant

JUDGMENT

NYATHI J

INTRODUCTION

- [1] This matter concerns a claim by the plaintiff, Zamori Engineering Services (Pty) Ltd, for repayment of funds transferred to the defendant, AME Telecommunications (Pty) Ltd, under circumstances where the plaintiff alleges no valid contractual obligation existed. The defendant resists the claim and has instituted counterclaims based on three alleged partly written, partly oral agreements.
- [2] The issues for determination are:
- a. Whether the defendant has proven the existence and enforceability of the alleged agreements.
 - b. Whether the plaintiff is entitled to restitution on the basis of unjustified enrichment.
 - c. Whether the defendant's counterclaims should succeed.
- [3] The central issue for determination is therefore whether the defendant has discharged the onus of proving the existence and enforceability of the alleged agreements, and whether the plaintiff is entitled to restitution on the basis of unjustified enrichment.
- [4] It is a fundamental rule of evidence that "*he who alleges must prove*". This was authoritatively stated in *Pillay v Krishna* 1946 AD 946, at 952 to 952 and remains good law to this day as seen in *Merryweather v Scholtz and another* 2024 ZASCA 150, at footnote 12.

PLAINTIFF'S CASE

- [5] The plaintiff contends that the payments made to the defendant were made in error and without legal cause. It relies on the principle of *condictio indebiti*, asserting that the defendant was unjustly enriched at its expense.
- [6] The plaintiff argues that the defendant failed to prove the existence of the three alleged agreements. The defendant's sole witness, Mr. Leon Walles, conceded that the pleaded terms were inaccurate and that he lacked personal knowledge of key events. Crucially, the defendant did not call Mr. Schoeman or Mr. Gouws, who were central to its version of events. The plaintiff submits that this omission warrants an adverse inference.
- [7] The plaintiff further contends that its former director, Mr. Schoonbee, lacked actual or ostensible authority to bind the company. No conduct was shown that could give rise to estoppel or apparent authority.
- [8] The plaintiff claims R21 657 256.80, being the adjusted amount after accounting for certain deductions and corrections. It seeks interest at 7% per annum and costs on scale C.

DEFENDANT'S CASE

- [9] The defendant disputes the plaintiff's claim and asserts that the payments were made pursuant to valid agreements under which it rendered services. It argues that the plaintiff failed to prove the essential elements of *condictio indebiti*, including the existence of an excusable error and actual impoverishment.
- [10] The defendant challenges the credibility of the plaintiff's witness, Mr. Swarts, citing contradictions in his testimony and lack of clarity regarding the plaintiff's internal processes.

- [11] The defendant maintains that Mr. Schoonbee had actual or apparent authority to bind the plaintiff. It relies on the plaintiff's conduct, including allowing Mr. Schoonbee to engage with Ingweguard and receive payments, as creating the impression of authority. The defendant invokes estoppel, asserting that it was induced to contract and perform work based on such representations.
- [12] The defendant brings three counterclaims totalling R5 550 871.44, based on work allegedly performed under Contracts 40, 45, and 65. It contends that the plaintiff benefited from the work and did not dispute the invoices at the time.

DISCUSSION

- [13] The defendant bears the onus of proving the existence and terms of the alleged agreements. This burden is heightened where the agreements are partly oral and partly written, and where the plaintiff denies their existence.
- [14] As was explained in *Pillay v Krishna* (at p.952) that *“(w)here the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it”*
- [15] The plaintiff made several payments to the defendant pursuant to invoices submitted between 2020 and 2021. The plaintiff contends that these payments were made in error, under the mistaken belief that valid agreements governed the transactions.
- [16] The defendant alleges that three partly written, partly oral agreements were concluded between representatives of the parties, which entitled it to the amounts received.
- [17] The defendant's case is materially weakened by the absence of testimony from Mr. Schoeman and Mr. Gouws, who were allegedly involved in the conclusion of the agreements. Their failure to testify, without explanation,

justifies an adverse inference. The only witness called, Mr. Walles, conceded that the pleaded terms were inaccurate and lacked direct knowledge of the March 2020 agreement.

- [18] In *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A), it was held at 749 to 750 that:

"It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. (See Wigmore ss 285 and 286.) But the inference is only a proper one if the evidence is available and if it would elucidate the facts."

- [19] The defendant failed to establish that Mr. Schoonbee had actual or ostensible authority to bind the plaintiff. No conduct on the part of the plaintiff was shown that could give rise to estoppel or apparent authority.

- [20] The defendant's reliance on estoppel and apparent authority is not supported by sufficient evidence. The plaintiff's conduct did not reasonably justify the defendant's belief that Mr. Schoonbee was authorized to bind the company. Authority cannot be inferred merely from the fact that Mr. Schoonbee engaged with third parties or received payments.

- [21] It is settled law that the conduct establishing ostensible authority or estoppel must originate from the principal, not the agent. This doctrine holds a principal liable if their actions create a misleading impression of an agent's authority upon which a third party reasonably relies. In this matter the principals were not even aware of the late Mr. Schoonbee's conduct or interactions with the plaintiffs' Mr Gouws.

- [22] Fairly recently, the principles alluded to above were restated emphatically by the Constitutional Court in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) where the Court held that one of the essential elements of estoppel in the field of

agency is that **the representation (relied upon) must have been made by the principal to the person who raises estoppel (the representee).**¹

[23] The plaintiff's claim under *condictio indebiti* is well-founded. The payments were made under the mistaken belief that valid agreements existed. The plaintiff's internal processes were reasonable, and the error was excusable. The defendant failed to demonstrate that it rendered services or provided value in exchange for the payments.

[24] The plaintiff's claim is based on unjustified enrichment, particularly within the ambit of the *condictio indebiti*.

[25] There are four general requirements to establish a claim for enrichment, stated as follows in *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA), with reference to *The Law of South Africa*, Volume 9, First Reissue, paragraph 76 (LAWSA):

- i. *"The first and fourth requirements in The Law of South Africa are enrichment of the defendant and the lack of a causa for that enrichment"*
- ii. *"The next requirement postulated by The Law of South Africa is that the plaintiff should be impoverished."*
- iii. *"The remaining and sometimes vexed question is whether the owner's (defendant's) enrichment was at the expense of the garage (plaintiff)".* (Referring to the facts of the case concerned, where the owner was the defendant and the garage was the plaintiff.)

¹ Makate v Vodacom Ltd 2016 (4) SA 121 (CC) para [49].

[26] Within the broader scope of of unjustified enrichment, the *condictio indebiti* is a remedy to “recover money or other property transferred in intended payment of performance of a non-existent debt”.²

[27] Fairly recently, in *Mhlari v Nedbank Ltd* 2024 ZASCA 39, the Supreme Court of Appeal summed up the prevailing legal position as follows:

“[18] A person who pays money (or delivers a thing) to another because of a reasonable error of fact or law in the belief that the money is owing, whereas it is not, has a claim for repayment in terms of the *condictio indebiti*, to the extent that the person who received the payment has been enriched at his or her expense. The *condictio sine causa specialis* lies where the money is in the hands of the defendant without cause, whether due to the plaintiff’s mistake or not. Therefore, a defendant may raise as a defence to the *condictio indebiti* that the mistake was unreasonable and negligent, but in a claim based on the *condictio sine causa specialis* that consideration is irrelevant.

[19] In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A), this court held that the *condictio indebiti* is an equitable remedy and its object is to prevent one person being unjustifiably enriched at the expense of another. The principles underlying the *condictiones* are not immutable but are constantly evolving to accommodate new circumstances.”

[28] The defendant’s counterclaims are entirely dependant on the existence of the alleged agreements as pleaded. In the absence of proof thereof, the counterclaims must fail.

[29] The defendant is bound by its pleadings and cannot introduce some other undefined contract that is not raised in the pleadings either as a defence or as a cause of action.

[30] In *Ras v Road Accident Fund* 2022 ZAGPPHC 383 Basson J stated it thus:

² LAWSA, Third Edition, Volume 17, paragraph 213, with reference inter alia to *Kudu Granite Operations (Pty) Ltd v Caterna* 2003 (5) SA 193 (SCA).

"[14] A party is bound by its pleadings. The Constitutional Court in Molusi and others v Voges NO and others (2016 (3) SA 370 (CC) ad para [28]) stated that "[t]he purpose of pleadings is to define the issues for the other party and the court. And it is for the court to adjudicate upon the disputes and those disputes alone." See in similar vein: South African Police Service v Solidarity obo Barnard (2014 (6) SA 123 (CC) ad para [202]) where the Constitutional Court highlighted the trite principles applicable to pleadings:

"[202] This is the context in which the question, whether Ms Barnard may be permitted to raise the new cause of action in this court, must be answered. It is a principle of our law that a party must plead its cause of action in the court of first instance so as to warn other parties of the case they have to meet and the relief sought against them. This is a fundamental principle of fairness in the conduct of litigation. It promotes the parties' rights to a fair hearing which is guaranteed by s 34 of the Constitution."

[15] A litigant is not permitted to plead one case in the pleadings and another in court. See Minister of Safety and Security v Slabbert ([2010] 2 All SA 474 (SCA):

"[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."

[16] It is a trite principle that a litigant must plead a particular case in the pleadings and plead the material facts on which it relies for her claim. It is not permissible to seek to establish a different case at trial (except where the pleadings have been amended)."

COUNTERCLAIMS

[31] The defendant's counterclaims are entirely dependent on the existence of the alleged agreements. In light of the failure to prove such agreements, the counterclaims must fail.

Quantum and Relief

[32] The plaintiff originally claimed R20 943 915.07. After adjustments, including the deduction of R231 434.45 and the addition of R944 776.18, the final amount claimed is R21 657 256.80.

[33] The plaintiff seeks interest at 7% per annum and costs on scale C in terms of Rule 69(7) of the Uniform Rules of Court.

ORDER

[34] In the result, the following order is made:

- a. The defendant is ordered to pay the plaintiff the sum of R21 657 256.80.
- b. Interest on the aforesaid amount at the rate of 7% per annum, calculated from date of demand to date of final payment.
- c. The defendant's counterclaims are dismissed.
- d. The defendant is ordered to pay the plaintiff costs on scale C.



JS NYATHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

LAST HEARD ON:	14 November 2024
JUDGMENT DELIVERED ON:	14 NOVEMBER 2025
COUNSEL FOR THE PLAINTIFF:	ADV. S.D WAGENER SC
INSTRUCTED BY:	WEAVIND & WEAVIND INC; PRETORIA
COUNSEL FOR THE DEFENDANT	ADV. D. PRINSLOO
INSTRUCTED BY:	KLAGSBRUN EDELSTEIN BOSMAN DU PLESSIS INC; PRETORIA