IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA

Of interest
Case no. CA 32/2025

In the matter between:

ELDOFOX (PTY) LTD First appellant
ELDOCRETE (PTY) LTD Second appellant

and

AMATHOLE DISTRICT MUNICIPALITY Respondent

JUDGMENT

LOWE J

Introduction

1. I have had the opportunity of reading the judgment of Laing J, ("the concurring minority judgment"). Whilst Laing J and I are in agreement as to the order to be given, we arrive at that point by a somewhat different route, hence this judgment accordingly.[1]

2. I am grateful to be able to adopt, in general terms, the background to the matter as set out in the concurring minority judgment in paragraphs 25, 26 and 27, and

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[1] The delay in delivering this judgment is to be regretted, being occasioned primarily by the difference of view, as expressed in the main judgment and the concurring minority judgment. Laing J was originally the scribe designated, but in the end was the author of the concurring minority judgment.

in general terms, the summary of the proceedings in the court *a quo* in paragraphs 28 – 33 of the said judgment.

3. The concurring minority judgment dismisses the appeal with costs, with which order I agree, but I prefer to do so on a more focused and shorter basis, to the extent set out below.

<u>The relevant background facts</u>

4. I point out that the judgment in the court *a quo*, per Zilwa J, sets out precisely and accurately the issues as they came before that court, many of which were common cause, as set out in a list of common cause facts handed up which effectively arose from the pleadings.

5. In summary, the first and second appellants were the suppliers, in terms of written suppliers agreements concluded with the Blue Nightingale Trading 397 (Pty) Ltd trading as the Siyenza Group ("Siyenza"), in respect of the delivery of all top and bottom structures of VIP toilets to be allocated to sites in the district of the respondent ("the supplier agreements").

6. The need for the supply of these VIP toilets was pursuant to the respondent and Siyenza having purportedly concluded an agreement ("the municipal agreement") in terms of which Siyenza undertook to supply and install the VIP toilets in designated areas within respondent's area of jurisdiction.

7. In due course, and as set out in the concurring minority judgment, the municipal agreement, between Siyenza and respondent, was set aside by court order.

8. Simultaneously with the conclusion of the supplier agreements, between first and second appellants and Siyenza, written cession agreements were concluded between Siyenza, first appellant, second appellant and respondent as set out in the annexures to plaintiff's particulars of claim. The crux of the cession agreements was that Siyenza ceded, transferred and made over to appellants its right, title and interest in, and to, any amount due and owing to Siyenza by respondent, in terms of the municipal agreement, to the extent that such amount did not exceed the sub-contractual debt in terms of the supplier agreements.

9. Subsequent to the municipal agreement being set aside, as having been void *ab initio*, it was common cause that appellants had delivered the components of the VIP toilets, and that these had been transferred (delivered) *sine causa*.

10. To summarise, appellants had delivered the VIP toilets, as referred to in the delivery notes relevant, to the areas identified in the delivery notes, each of which were situate within respondent's area of jurisdiction, and the items had been received by the persons whose names appeared at the bottom of each delivery note at the time and on the dates reflected thereon. The crux of the action is that appellants were not paid by Siyenza, for the VIP toilets that were delivered, being an enrichment action against respondent for the recovery of the amounts, in respect of which appellants contended that the respondent was enriched at their expense.

<u>The causes of action</u>

11. The causes of action, upon which appellants relied, were the *condictio ob causam finitam*,[2] alternatively the *condictio indebiti*.

12. As pointed out in the concurring minority judgment, the former cause of action is available to recover money or property transferred under a valid causa which subsequently fell away, whilst the latter is available when the transfer of money or property was motivated by a mistaken belief relating to the validity, or existence, of the underlying agreement.[3]

<u>The recipiens issue</u>

13. I preferred to deal with the matter on a limited basis relevant to the dismissal of the appeal, this turning on one single issue primarily being that in both causes of action these operate only against the *recipiens* of the *indebitum.* Put differently the cause of action is against the primary entity which physically received the transfer of money, or property relied upon. The defendant must be the *true recipiens* of the money or property, the subject matter of the action.[4]

14. In both, there must be a transfer of money or property, and in both, the transfer must be to the *true recipiens* thereof against whom the action lies. I pause to state that the entity which physically received the money or property is not necessarily regarded as the *true recipiens* as that entity may have been a conduit for, or an agent of, the *true recipiens*.

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[2] This is an offshoot of the condictio sine causa specialis LAWSA vol 17 3rd Ed para 222.

[3] **Kudu Granite Operations (Pty) Ltd v Caterna Ltd** 2003 (5) SA 193 (SCA) [12] – [18]; **Legator McKenna Inc and another v Shea and others** 2010 (1) SA 35 (SCA).

[4] **Licenses and General Insurance Company v Ismay** 1951 (2) SA 456 (E); **Phillips v Hughes**; **Hughes v Maphumulo** 1979 (1) SA 225 (N) at 228 – 229; **Minister van Justisie v Jaffer** 1995 (1) SA 273 (A) at 280 – 281; **Randcoal Services Ltd v Randgold and Exploration Company Ltd** 1984 (4) SA 825 (SCA) at 842 – 843 LAWSA vol 17 3rd Ed para 214 (a) and (b).

15. Fundamentally then, the principal issue in this matter, and the issue which the court a quo found appellants had failed to establish, was that the respondent was the *true recipiens* of the VIP latrines delivered to the allocated sites.

16. On the basis of the evidence before the court a quo, and as correctly summarised by that court:

    16.1 Siyenza had contracted with respondent to carry out the VIP toilets supply and installation project;

    16.2 Siyenza had approached appellants for quotations for the supply of the VIP latrines essential to the project;

    16.3 These quotations were duly submitted by appellants to Siyenza;

    16.4 The agreement for the delivery and assembly of the components of the VIP toilets was between appellants and Siyenza;

    16.5 Siyenza appointed agents that received the components at the various villages within respondent's area of jurisdiction on behalf of Siyenza;

    16.6 The respondent had at no time ordered any material from any of the appellants, being orders placed by Siyenza in terms of its contractual obligation to supply these;

    16.7 It was only the cession agreements relevant to payment to be made to appellant directly, by respondent, which bought respondent into the picture at all in the relationship between Siyenza and appellants.

17. In my view the court a quo correctly concluded, on the evidence and the facts, that the *true recipiens* of the components of the VIP toilets, delivered, but not installed, was Siyenza through its various authorized nominees. In this regard respondent played no role whatsoever as to the delivery, or receipt, of the components in issue, this being within the responsibility and contractual obligations of Siyenza.[5] The agreements of cession are effectively irrelevant in

[5] The involvement of Ms. Mjo, a ward councilor, in identifying the beneficiary in question and that Ms. Mjo had provided Siyenza's representatives with the details of the beneficiary, or the community representatives,

this context, and are not such as to bear upon the *recipiens* issue in any way at all.

18. The court a quo correctly concluded, accordingly, that there was no enrichment cause of action accruing against respondent in respect of appellants, respondent not being the *true recipiens* of the components, delivered to Siyenza which was the *true recipiens*.

19. That being so, that was the end of the matter insofar as appellants relied upon enrichment claims against respondent, on either basis referred to above.

20. Put differently, the first fundamental requirement of both condictio's was that this lay only against the *true recipiens* of the *indebitum* which was unequivocally demonstrated not to be respondent. Thus, contrary to the concurring minority judgment, I find unequivocally, that respondent was not the *true recipiens* of the VIP toilets, and that this is determinative of the matter.

21. Whether or not the remaining requirements of both condictio's were present becomes irrelevant accordingly.

22. It suffices to say that I agree with the subsequent analysis, in any event, of the court a quo in this regard, that court having found, correctly in my opinion, that for the various reasons expressed therein the remaining requirements for both

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to whom the components should be delivered, is not such as to disturb the conclusion reached as to the *true recipiens*. The court a quo's misunderstanding of her evidence that Siyenza's representatives would inform Ms. Mjo about the imminent driver of the components and indicate to her "*names of the persons who had been appointed by Siyenza to receive the deliveries*" is by the way.

condictios were entirely absent. It is worth repeating the court a quo's finding that the ownership, or even possession of the VIP toilets, at no time vested in the respondent at any stage and accordingly the presumption of enrichment did not arise.[6]

23. It follows that the appeal must accordingly be dismissed with costs.

The order

24. For the above reasons, I order as follows:

1. The appeal is dismissed.
2. The appellants are to pay respondent's costs of appeal including:
    - 2.1. The costs of the application for leave to appeal in both the court a quo and the Supreme Court of Appeal;
    - 2.2. The costs of two counsel, where utilised, on scale C and B respectively.

M.J. LOWE
JUDGE OF THE HIGH COURT

I agree,

[6] **Kudu Granite Operations** (*supra*) [21].

G APPELS
ACTING JUDGE OF THE HIGH COURT

LAING J

25. This is an appeal against the dismissal of the appellants' claim for enrichment in relation to the supply of VIP latrines[7] to rural villages in the Eastern Cape. The facts are mostly common cause.

Background

26. The appellants are private companies that manufacture and supply precast concrete products. The respondent ('the ADM') is a district municipality, as defined in terms of section 1 of the Local Government: Municipal Systems Act 32 of 2000 ('MSA').[8] The ADM previously concluded a contract with Blue Nightingale Trading 397 (Pty) Ltd, trading as the Siyenza Group ('Siyenza'), for the supply and installation of VIP latrines at various locations falling within the former's municipal boundaries. Pursuant thereto, Siyenza concluded sub-contracts with the appellants on 5 March 2015. The appellants were required to deliver top and bottom structures for the VIP latrines to certain designated sites

[7] The abbreviation stands for 'ventilated improved pit' latrines.
[8] Section 1 defines a district municipality as a category C municipality, as envisaged under section 155 (1) *(c)* of the Constitution.

and to train and supervise workers in the assembly thereof. At the same time, Siyenza concluded cession agreements, ceding to the appellants the right to any amount owed by the ADM in terms of the main contract, to the extent that it did not exceed the sub-contractual debt.

27. Consequently, the appellants delivered the components in question. The information contained in the delivery notes regarding dates, times, locations, quantities, and persons receiving, was common cause. A dispute arose between the ADM and Siyenza, culminating in an order that declared the main contract unconstitutional, invalid, and unenforceable. This was reported as **Blue Nightingale 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality**.[9] The ADM made no further payments to the appellants after 10 June 2015. The parties agreed that the appellants' performance, ie the delivery of the components, was made *sine causa*.

In the court *a quo*

28. At trial, the second appellant's managing director, Mr Werner Viljoen, testified that the company had sent a quotation to Siyenza for the goods and services required. The terms and conditions included a provision that 'all concrete panels and accessories remain the property of Eldocrete (Pty) Ltd [ie the second appellant] until full and final payment.' Siyenza provided the appellants with details of where the components were to be delivered, the quantities required, and the contact person. The appellants sent tax invoices by email and

[9] 2017 (1) SA 172 (ECG).

by hand to Siyenza, together with the corresponding delivery notes. Mr Viljoen confirmed that the second appellant had retained ownership of the components until it received payment. It played no part in the assembly of the VIP latrines, which was Siyenza's responsibility.

29. The first appellant's witness, Mr Scott Burmeister, testified along similar lines. He confirmed that the same reservation of ownership -provision had appeared in the quotation that his company sent to Siyenza. He added that the components were extremely durable and could last a lifetime.

30. Other witnesses included an employee of a transport contractor, Mr Moegamat Markus, who testified that he had delivered the components to the sites to which he was directed. Siyenza's representatives allocated them in turn to specific beneficiaries. A ward councillor, Ms Thobeka Mjo, testified that she had been required to identify the beneficiaries in question. She attended a meeting at which municipal officials explained that the ADM had appointed Siyenza to implement its on-site sanitation programme and that the appellants would provide the components required. Siyenza contacted Ms Mjo in due course about delivery and provided her with details of its on-site representatives.

31. The court *a quo* found that the ADM had contracted Siyenza to carry out the project and that the latter had reached an agreement with the appellants regarding the supply and delivery of the components. Siyenza appointed representatives to accept delivery on its behalf. The ADM never ordered the components from the appellants and would have had nothing to do with them

but for the cession agreements. In the circumstances, the court *a quo* held that the true *recipiens* of the components was Siyenza, via its representatives. The ADM played no role in the delivery thereof. It had been for Siyenza to decide how to implement the programme; the ADM's duty to make payment arose only after Siyenza had secured a so-called 'happy letter.'[10]

32. Regarding enrichment, the court *a quo* pointed out that the appellants had reserved ownership in the components until full and final payment. It had always been an option for the appellants to have collected the components after cancellation of the sub-contracts with Siyenza. Ownership never vested in the ADM. This would have occurred only if it had purchased the components from the appellants, which it never did. It was irrelevant that the ADM may well have had the funds at the time to have made such a purchase, and that it was constitutionally and statutorily obliged to have provided sanitation services to the communities falling under its jurisdiction.

33. The court *a quo* decided, in the end, that the ADM had never been enriched at the expense of the appellants. It had never acquired ownership or used the components. The appellants failed to satisfy the requirements for the *condictio indebiti*, which would otherwise have been available against the ADM if the latter had been the true *recipiens*. The claim was dismissed with costs.

On appeal

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[10] This is understood as a reference to written confirmation that a VIP latrine had been successfully assembled for the designated beneficiary.

34. There are several grounds of appeal. The appellants argued, inter alia, that the court *a quo* had erred in relying on the underlying contractual relationships amongst the parties to find that the true *recipiens* of the components was Siyenza. The appellants had brought an enrichment action, based on the *condictio ob causam finitam*, alternatively the *condictio indebiti*. The underlying contractual provisions were irrelevant. For the same reason, no reliance could have been placed on the reservation of ownership clause to find that the ADM had not been enriched. The court *a quo* ignored the ADM's previous undertakings to pay for the components that had been delivered, which would have obviated the need for the appellants to have collected the items.

35. The ADM had a constitutional obligation, said the appellants, to provide sanitation services to the communities within its jurisdiction. The delivery of the components had disposed of the obligation, notwithstanding that the ADM had never acquired ownership. The items remained available for assembly and use, enabling the ADM to avoid the cost of purchasing them at present day values. The appellants contended further that the court *a quo* had erred in finding that, because ownership of the components never vested in the ADM, the presumption of enrichment never arose. The passing of ownership was not a requirement to trigger the presumption. It arose once it was proved that the items had been supplied.

36. At the commencement of appeal proceedings, the issues relating to the total unpaid value of the components and the compensation to which the appellants would be entitled, if successful, remained common cause. The issues for

determination were reduced to the following: (a) who was the true *recipiens* of the components; and (b) have the appellants been impoverished and the ADM enriched at their expense? It is necessary, at this stage, to explore and outline the legal principles that inform the dispute.

Legal framework

37. The appellants' claim is based on the remedies available for unjustified enrichment. In this regard, Du Plessis comments that:

> 'Unjustified enrichment, like contract and delict, is a source of obligations. But unlike contract, unjustified enrichment creates obligations by force of law, and not by virtue of the actual or deemed consent of the parties. And unlike delict, the purpose of imposing liability is not to balance out a loss with an award of damages, but to correct a gain by obliging the defendant to return or surrender enrichment to the plaintiff. Put more simply, unjustified enrichment gives rise to an obligation to provide restitution.'[11]

38. It is trite that there is no general action based on enrichment in our law.[12] A plaintiff must rely on one or more of the available remedies (ie the *condictiones*). Du Plessis remarks as follows:

> 'The most prominent situation giving rise to enrichment liability is where one person enriches another by transferring or deliberately giving something to him, but no legal ground supports retention of the enrichment. Enrichment actions called the *condictiones* may then be used to obtain restitution.'[13]

39. The learned writer continues:

[11] Jacques du Plessis *The South African Law of Unjustified Enrichment* (2012) at 1. Footnotes omitted.
[12] See DP Visser's title on 'Enrichment' in 17 *Lawsa* 3 ed para 209.
[13] Du Plessis, at 60.

‘South African law of unjustified enrichment traditionally distinguishes between the following types of transfer, each giving rise to a specific *condictio*:

1. the transfer that fails to fulfil an obligation (the domain of the *condictio indebiti*); a typical example is the overpayment;
2. the transfer that fails to achieve a lawful purpose other than fulfilling an enforceable obligation (the domain of the *condictio causa data causa non secuta* or *condictio ob rem*); a typical example is the transfer that fails to achieve the purpose of ensuring that the transferor’s spouse does not leave him or her;
3. the transfer made for an unlawful purpose (the domain of the *condictio ob turpem vel iniustam causam*); a typical example is the transfer made in fulfilment of an illegal agreement; and
4. other transfers made without legal ground (the domain of the *condictio sine causa specialis*); a typical example is the transfer supported by a legal ground that fell away after it was made.

It is unnecessary to plead the name of a specific *condictio*. What matters is meeting the substantive requirements for relief relating to certain fact patterns associated with specific *condictiones*.’[14]

40. Having pleaded the facts that gave rise to a specific *condictio*, a claimant must also demonstrate to the court that he or she has satisfied the general requirements for enrichment liability.[15] The Supreme Court of Appeal, in **McCarthy Retail Ltd v Shortdistance Carriers CC**,[16] set out the requirements as follows: (a) the defendant must be enriched; (b) the plaintiff must be impoverished; (c) the defendant’s enrichment must be at the expense of the plaintiff; and (d) the enrichment must be unjustified.[17]

[14] Ibid.
[15] Du Plessis, at 2–3. See, too, **PRASA Corporate Real Estate Solutions v Community Property Company Ltd and Another** (384/2023) [2024] ZASCA 35 (28 March 2024), paras 24 to 27.
[16] 2001 (3) SA 482 (SCA).
[17] Para 15. See, too, **Mhlari NO and Others v Nedbank Limited** (251/2023) [2024] ZASCA 39 (4 April 2024), para 17; and Visser, n 12 above. Interestingly, the learned writer refers to three, not four, requirements in his seminal work, *Unjustified Enrichment* (2008) at 157. These are: (a) enrichment of the defendant, (b) at the expense of the plaintiff, which is (c) unjustified.

41. In the present matter, the appellants have relied on the *condictio ob causam finitam*, alternatively the *condictio indebiti*. The Supreme Court of Appeal confirmed, in **Kudu Granite Operations (Pty) Ltd v Caterna Ltd**,[18] that the *condictio ob causam finitam* is available to recover money or property transferred under a valid *causa* which subsequently fell away.[19] The *condictio* is regarded as an 'offshoot' of the *condictio sine causa specialis*.[20] In **Legator McKenna Inc and Another v Shea and Others,**[21] the court held that the *condictio indebiti* is available when the transfer of money or property was motivated by a mistaken belief relating to the validity or existence of the underlying agreement.[22] In other words, the transfer was not due or owed.[23]

42. There is no dispute about whether the appellants have relied on the correct *condictiones*. Considering the evidence, it is apparent that either the *condictio ob causam finitam* or the *condictio indebiti* finds application. The focus of the appeal is chiefly on the identity of the true *recipiens* of the components; if it was the ADM, as the appellants contend, then it must still be decided whether the appellants were impoverished — and the ADM enriched at their expense. Overall, the court must determine whether the appellants have satisfied the general requirements for enrichment liability before this can be imputed to the ADM.

The true *recipiens*

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[18] 2003 (5) SA 193 (SCA).
[19] Para 15. See, too, Visser, para 222, n 12 above.
[20] Ibid.
[21] 2010 (1) SA 35 (SCA).
[22] Para 28.
[23] Du Plessis, at 97.

43. A necessary condition for enrichment is the transfer or delivery of property. The parties agreed that delivery of the components took place, but the question was: to whom? The issue is important because it determines where the onus lies for demonstrating that enrichment occurred— or, conversely, that there was no enrichment at all. In **Kudu Granite**, the Supreme Court of Appeal held that:

> 'A presumption of enrichment arises when money is paid or goods are delivered. A defendant then bears the onus to prove that he has not been enriched.'[24]

44. The court *a quo*, with which the main judgment agrees, found that the true *recipiens* had been Siyenza, via its representatives. The ADM played no part in the delivery of the components; Siyenza had been both the factual and legal recipient, the latter by virtue of the appellants' fulfilment of their sub-contractual obligations. Much was made in argument, however, of the court *a quo's* interpretation of the testimony of Ms Mjo, who had been a ward councillor at the time and who had assisted the ADM by identifying beneficiary households for installation of the VIP latrines. It appears that the court *a quo* understood her evidence to have been that Siyenza's representatives would inform her about the imminent arrival of the components and indicate to her 'the names of the persons who had been appointed by Siyenza to receive the deliveries'.[25] The record indicates, nevertheless, that it was in fact Ms Mjo who provided Siyenza's representatives with the details of the beneficiaries or the community

[24] **Kudu Granite**, para 21.
[25] **Eldofox (Pty) Ltd and Another v Amathole District Municipality** (unreported, case no. EL 1182/2017, ECD 2682/2017, East London Circuit Local Division, 22 August 2024), para 12.

representatives to whom the components should be delivered. The question that arises is the extent to which the court *a quo's* error in this regard had any impact on the identity of the true *recipiens*.

45. The present matter involves a multi-party situation, which can, as Visser notes, prove notoriously intractable.[26] In **Phillips v Hughes; Hughes v Maphumulo**,[27] Didcott J considered the subject within the context of a cause of action based on the *condictio indebiti*, finding that:

> 'The *condictio indebiti* does not entitle the *solvens* to pursue what was mistakenly paid, wherever it goes. The recovery of the undue payment from its *recipiens* is the action's sole objective . . .'[28]

46. The learned judge continued:

> 'This means that the *condictio indebiti* is enforceable against the *recipiens* of the undue payment, but nobody else. The *recipiens* is not necessarily the person into whose hands the money was actually put when it was paid. He is the one who must be considered, in all the circumstances of the case, truly to have received payment. Whenever a payment is made to an agent with authority to accept it, for instance, the *recipiens* is the principal, not the agent. A conduit through whom payment passes is likewise not its *recipiens*. Instead he who obtains payment by such means is. One is not the *recipiens* of a payment, on the other hand, merely because it was intended or happens in the result to benefit one. That, on its own, does not count. All that matters is whether one can appropriately be said to have received the payment in some or other way.

[26] See Visser's chapter on 'Unjustified Enrichment' in F du Bois (et al) *Wille's Principles of South African Law* 9 ed (2007) at 1083–1087.
[27] 1979 (1) SA 225 (NPD).
[28] At 228H–229A.

Unless one has done so, one is beyond the range of the *condictio indebiti*, for all the payment's auxiliary advantages to one.'[29]

47. The legal nuances of a multi-party situation are not immediately obvious but must be recognized for a better understanding of where the claim lies. The subject is illustrated in **Minister van Justisie v Jaffer**,[30] where a certain H had deposited R 30 000 as bail, pending the outcome of his brother's appeal proceedings in relation to the latter's conviction of dealing in drugs. The respondent had previously lent R 30 000 to H's brother. When the appeal was dismissed, H claimed a refund of the bail from the registrar but endorsed the receipt to the effect that payment should be made to the respondent. The registrar paid accordingly, only to discover that the money had been wrongfully refunded because H's brother was still at liberty. The appellant brought a claim against the respondent, based on the *condictio indebiti*. In answer to the question against whom the claim ought to have been brought, the erstwhile Appellate Division referred to the following extract from Pothier's work on the subject:

> 'The *condictio indebiti* is given against him to whom the payment has been made. . . . The payment is deemed to have been made to me whether it was made to myself or to another at my instruction . . . That is why . . . it is not against the one to whom the sum which was erroneously believed to be due to me, was paid at my instruction, that the *condictio indebiti* must be given, but it is against me.'[31]

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[29] At 229B–D.
[30] 1995 (1) SA 273 (A).
[31] At 280D–F. The court referred to Pothier *Treatise on the Quasi-Contract called Promutuum and on the Condictio Indebiti* para 167 (translated by Hosten et al, at 25).

48. In **Randcoal Services Ltd and Others v Randgold and Exploration Co Ltd**,[32] the Supreme Court of Appeal confirmed that a claim for unjustified enrichment, based on the *condictio indebiti*, lay against the person who in law is considered to have received payment, rather than a third party who was the factual recipient.[33] The court emphasised, however, that it was necessary for the defendant to have instructed the claimant to have made payment to the third party before the claim could be brought.[34]

49. Visser summarises the position as follows:

> 'The *condictio indebiti* lies only against the *recipiens* of the *indebitum*. Of course, the person who physically received the money or property is not necessarily in law regarded as the *recipiens*. So, for example, the person who physically received the transfer could be a mere conduit or an agent of the *recipiens*. Such person can also be someone nominated by the *recipiens* as the one to whom payment should be made. On the other hand, one is not the *recipiens* of a payment merely because it was intended or happens in the result to benefit one. In every case the action lies against the *true recipiens*.'[35]

50. The appellants contended that the ADM was the true *recipiens*. This is not completely without merit; it was the ADM that needed the components in the first place. From the testimonies of both Ms Mjo and a general manager in the ADM's engineering services directorate, Ms Nompucuko Badi, the present matter seems to have given rise to a multi-party situation like those described

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[32] 1998 (4) SA 825 (SCA).
[33] At 843A–E. The court cited, in this regard, the decision in **Licences and General Insurance Co v Ismay** 1951 (2) SA 456 (E).
[34] At 843F–G. See, too, **Besselaar v Registrar, Durban and Coast Local Division, and Others** 2002 (1) SA 191 (D), at 197I–198C.
[35] Visser, para 214 (*b*), n 12 above.

in the authorities mentioned earlier. Siyenza concluded a contract with the ADM for the supply and installation of VIP latrines; it concluded, at the same time, sub-contracts with the appellants for the delivery of the components because it was unable to supply the goods on its own. The appellants performed as required. It could well be said that the appellants' delivery of the components to rural communities in the Eastern Cape was done upon the instruction of the ADM via the conduit or agency of Siyenza's representatives, alternatively Ms Mjo. Once the contract between the ADM and Siyenza was declared invalid and unenforceable, the appellants' performance was rendered *sine causa*. The appropriate legal remedies were indeed either the *condictio ob causam finitam* or the *condictio indebiti*, but the appellants would have to have demonstrated that the ADM had been enriched— and that is, as I shall discuss further, where the problem lies. The ADM benefitted to the extent that the delivery of the components assisted in addressing the municipality's statutory duty to provide water and sanitation services. To say, however, that this amounted to enrichment sits uncomfortably within the context of the matter.

Whether the defendant was enriched

51. Enrichment must be understood as the acquisition of an economic benefit.[36] The usual approach for deciding how enrichment may be constituted is to evaluate whether there was: (a) an increase in the defendant's assets which would not have taken place but for the enriching fact; (b) a non-decrease in his or her assets which would have taken place but for that fact; (c) a decrease of

[36] Visser *Unjustified Enrichment* at 158, n 17 above.

liabilities which would not have taken place; or (d) a non-increase of liabilities which would have taken place.[37]

52. The ADM is required, in terms of section 152 (2) of the Constitution, to strive to achieve the objects of local government. These include ensuring the provision of services to communities in a sustainable manner, and the promotion of social and economic development. Under section 156 (1) *(a)* of the Constitution, the ADM has executive authority and the right to administer the local government matters listed in Part B of Schedule 4, such as water and sanitation services, but limited to potable water supply systems and domestic wastewater and sewage disposal systems. The provisions of section 84 (1) *(d)* of the Local Government: Municipal Structures Act 117 of 1998 ('MStr') grant functions and powers to a district municipality in this regard. Furthermore, as both a water services authority and a water services provider under the Water Services Act 108 of 1997 ('WSA'),[38] the ADM has a duty to ensure access to[39] and to provide water services. The term refers to both water supply services and sanitation services.[40] The latter is defined as:

> ' . . . the collection, removal, disposal or purification of human excreta, domestic wastewater, sewage, and effluent resulting from the use of water for commercial purposes.'[41]

[37] Visser, para 209, n 12 above.
[38] This was confirmed by Ms Badi during her testimony.
[39] Section 11 (1) of the Water Services Act 108 of 1997 provides that '[E]very water services authority has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.'
[40] Section 1.
[41] Ibid.

53. Although the parties seemed to agree that the supply and installation of VIP latrines came within the ambit of the WSA, it would be accurate to say that this fell under the more general description attached to the relevant local government matter listed in Part B of Schedule 4 of the Constitution and section 84 (1) *(d)* of the MStr.[42] In other words, it comprised a sewage disposal system, nothing more.

54. A general manager in the ADM's budget and treasury office, Ms Sonia Kieck, testified that the project had its origins in the municipality's integrated development plan ('IDP'). The budget for the project was funded by a municipal infrastructure grant ('MIG') from the National Treasury, accompanied by certain conditions, including the stipulation that the funds be spent only on the project, as finally approved. It was an accelerated project, said Ms Kieck, meaning that the ADM required its completion within 12 months at most. To avoid the delay in waiting for payment from the National Treasury, the ADM secured an arrangement with the Development Bank of South Africa ('DBSA') to 'frontload' the project; in other words, the DBSA extended a loan for the prompt payment of the goods and services required, which the ADM would eventually repay from the MIG. The project proceeded accordingly. Ms Badi testified that the ADM cancelled the contract with Siyenza on or about 10 June 2015 after identifying irregularities in its appointment.[43] No further work was done. She indicated that the ADM had been willing, at the time, to accommodate suppliers such as the appellants but only if additional funding could be obtained. This

[42] There was no evidence to the effect that the supply and installation of VIP latrines also entailed 'the collection, removal, disposal or purification of human excreta,' in accordance with the definition of sanitation services under section 1 of the WSA.
[43] The background is set out in **Blue Nightingale Trading 397 (Pty) Ltd v Amathole District Municipality** 2017 (1) SA 172 (ECG).

never materialised and the project was abandoned. Ms Badi went on to say that the ADM could not simply allocate to the unfinished project a portion of the annual grant that it continued to receive for water and sanitation services from the National Treasury. The funds had already been allocated to other projects, as approved.

55. Even if, in the circumstances, the court *a quo* had been wrong in finding that Siyenza was the true *recipiens* of the components, then it remains difficult to contend that the ADM was enriched. This is so for the following reasons.

Ownership

56. Firstly (and foremostly), there is the aspect of ownership. The quotations and delivery notes stated unambiguously that the components remained the property of the appellants until the latter had received full and final payment. There was extensive debate about the impact of the reservation of ownership provisions, with counsel contending that these were enforceable only between the parties to the sub-contracts; they had nothing to do with the ADM. In any event, said counsel, the Supreme Court of Appeal had held, in **Kudu Granite**, that the remedies available for an action based on unjustified enrichment were equitable in nature and 'the [underlying] contractual provisions are largely irrelevant.'[44]

[44] **Kudu Granite**, para 15. See S Eiselen 'Quantifying Unjustified Enrichment Claims' *THRHR* 2004 (67) 524 at 526, where the writer remarked that the contractual provisions are wholly irrelevant and should be ignored.

57. The concept of ownership gives rise to what is regarded as the widest right that a person can have in relation to a corporeal thing.[45] As Van der Merwe remarks:

> 'In principle, ownership entitles the owner to deal with his or her thing as he or she pleases within the limits allowed by law.'[46]

58. In the present matter, the evidence of Mr Viljoen and Mr Burmeister cannot be ignored. Both admitted that the appellants could have collected the components at any time. The appellants declined to do so in the hope of resolving the matter, especially after the ADM displayed a willingness to purchase the components if further funding became available. Whereas any effort made to retrieve the items would have encountered formidable logistical and financial hurdles, there was no evidence that the components had ever been abandoned. In any event, the appellants never pleaded *res derelictae*. It was also clear that the ADM never viewed the owners as anyone other than the appellants; Ms Badi testified that the ADM had attempted to obtain further funding from the National Treasury, alternatively the Department of Water and Sanitation, to purchase the unpaid-for components. Counsel conceded, in the end, that ownership remained vested in the appellants.

Possession

59. Secondly, there is the aspect of possession. Counsel submitted that there was no duty on the part of a plaintiff to demonstrate that the transfer of ownership

[45] See CG van der Merwe's title on 'Things' in 27 Lawsa 2 ed, para 134.
[46] Ibid. See, too, **Regal v African Superslate (Pty) Ltd** 1963 (1) SA 102 (A), at 106H.

had taken place. In that regard, **King v Cohen Benjamin & Co**[47] was authority for the principle that an enrichment claim can succeed even against a bona fide possessor, provided that the latter has been enriched.[48] Whether the ADM was placed in possession of the components, however, is another matter altogether. In this regard, Van der Merwe observes that:

> 'It is trite law that possession consists of both an objective and subjective element, namely the objective or physical element (*corpus*, *detentio*) and the subjective or mental element (*animus*). . . . Literally, a possessor must control the article with both body and mind. The physical element consists in the factual control exercised over the article. The mental element concerns the state of mind of the possessor. Whereas a minimum of factual control is required for these classes of possession, the content of the state of mind required for possession differs according to the function served by possession in a particular case.'[49]

60. The unpaid-for components were never assembled; they were never integrated into a sewage disposal system. There was, moreover, no indication that the ADM ever moved the components to a depot, fenced them off, stationed security personnel on site, or attempted in any other way to secure control over them. The components lie scattered across various rural locations in the Eastern Cape. There is nothing to demonstrate that the ADM ever regarded itself as a possessor.

61. In the absence of the transfer of either ownership or possession, it cannot be said, with reference to the usual approach for deciding enrichment, that there has been any increase (or, conversely, a non-decrease) in the ADM's assets.

[47] 1953 (4) SA 641 (WLD).
[48] At 649B–E.
[49] Van der Merwe, para 74, n 45 above.

Benefit derived

62. Thirdly, the evidence of the ADM's witnesses was that the components were not simply there for the taking. They cannot be put to immediate use. Ms Badi conceded that the ADM could appoint another contractor to assemble the components, but she qualified her concession by stating that funding would have to be available for such purposes. The project has been abandoned. After a considerable period of dormancy, any attempt to complete it would undoubtedly require provision to that effect in the IDP, an appropriate budget, and the approval of the National Treasury accompanied by the necessary funding. It would, of course, also be necessary for the ADM to implement its supply chain management policy for the appointment of a suitable contractor for the services required. This would entail further costs and delay.

63. The testimony of the expert witness, Mr Ian Pearson, was that the price at which the appellants had sold the components to Siyenza was below market value. To say, however, that the delivery thereof resulted in a decrease (or, conversely, a non-increase) in the ADM's liabilities is without merit. The ADM's constitutional obligation to achieve the objects of local government, including the provision of water and sanitation services, is ongoing. It can discharge such obligation in any number of ways, including but not limited to the supply and installation of VIP latrines. There was no suggestion that the ADM has resolved to complete the project or to embark upon a fresh undertaking, using the components in question. The items may — or may not — be required. In that

regard, the project may well be affected by future ministerial authorizations to local municipalities regarding the exercise and performance of powers and functions in relation to sewage disposal systems; these could include the removal of the obligation from the ADM altogether or at least the adjustment of its extent.[50] There are too many uncertainties, too many contingencies, to allow for a finding that the ADM has obtained any financial advantage from the delivery of the components. The evidence, as presented by the ADM, demonstrates that it was not enriched. The authorities indicate unambiguously that the *condictiones* available to the appellants are to correct a gain, already secured, by obliging the defendant to make restitution.[51] The remedies do not extend to possible unjustified enrichment in the future.

The remaining general requirements

64. If the ADM has not been enriched, then that ought to be the end of the matter, but if I am wrong, then the appellants face further obstacles. While they remain the owners of the components it is far from easy to assert that they have been impoverished. Retrieval may not be an available option for practical reasons, yet there seems to be nothing in law that would prevent the appellants from collecting their property from wherever it may be found, barring the possible application of spoliation principles or similar where members of the relevant communities have already taken the components into their possession. The picture of gross inequity painted by the appellants would look quite different

[50] Section 84 (3) *(a)* of the MStr.

[51] See, in general, *McCarthy Retail*, paras 15–16 and 19–20; *Kudu Granite*, para 15; and *Legator McKenna*, para 28.

where, for example, the appellants had delivered a single truckload of cement blocks to an urban development. Retrieval would have been more straightforward. That it is otherwise in the circumstances of the present matter should not be made the problem of the ADM.

65. Consequently, the remaining issue identified by the parties can be determined. It cannot be said that the appellants have been impoverished and the ADM enriched at their expense. There is no need to consider the last and final of the general requirements, ie whether any enrichment on the part of the ADM was unjustified.

Relief and order

66. Even if the court *a quo* had been wrong in deciding that Siyenza was the true *recipiens* of the components, then I am nevertheless satisfied that the ADM has discharged the onus of proving that it was not enriched. Neither ownership nor possession of the components was transferred. It cannot be said, moreover, that the ADM derived any financial advantage from the delivery thereof other than to assist it in the fulfilment of its local government obligations. It did not equate to the acquisition of an economic benefit; the assets and liabilities of the ADM remained unchanged. As inequitable as the situation seems to appear, the remedies chosen by the appellants cannot succeed where the ADM has demonstrated that it was not enriched. There is no reason to interfere with the decision of the court *a quo*.

67. Regarding costs, there is no reason why the general rule should not be applied. Considering the complexity of the matter, the value of the claim, and the importance to the parties of the relief sought, the order in this regard must incorporate the appropriate scale.

68. Consequently, I agree with the order in the main judgment.

JGA LAING
JUDGE OF THE HIGH COURT

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