



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 4643/2023

In the matter between:

MOSTHEDI NATHANE

Plaintiff/Applicant

and

LEBATA KHAOTSO

Defendant/Respondent

CORAM: HEFER AJ

HEARD ON: 8 FEBRUARY 2024

DELIVERED ON: 4 APRIL 2024

- [1] The maxim *ex turpi causa non oritur actio* prohibits the enforcement of immoral or illegal contracts.
- [2] The maxim *in pari delicto potior est conditio defendentis*, curtails the right of delinquents to avoid the consequences of their performance or past performance of such contracts.

[3] The *par delictum* maxim has not in modern systems of law been universally invoked to defeat every claim by one of two delinquents to recover what he has delivered under an illegal contract.¹

[4] In the **Jajbhay v Cassim**-matter, Stratford CJ in principle held that the “*public policy*” factor is to play a role in the enforcement of illegal contracts in subsequent claims for recovering of something delivered under such contract (*a restitutio in integrum*).

[5] In this latter regard Stratford CJ, stated as follows:

“... the rule expressed in the maxim in *pari delictio potior conditio defendentis*, is not one that can or ought to be applied in all cases that is subject to exceptions which in each case must be found to exist only in regard to the principle of public policy.”²

[6] The Learned Chief Justice further remark that:

“Public policy should properly take into account the doing of simple justice between man and man”,³

and further:

“... a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment”.⁴

[7] With the above remarks in mind, I now turn to the facts in the present matter in this opposed application for summary judgment.

[8] Plaintiff’s claim is based on a written loan agreement in terms of which Plaintiff loaned an amount of R3,000,000.00 to the Defendant, which amount to incur interests in the amount of a further R3,000,000.00.

¹ Jajbhay v Cassim 1939 AD 537 at 543.

² *supra* p. 544.

³ p. 544.

⁴ p. 545.

- [9] It is common cause that Defendant made repayments to Plaintiff in the total amount of R1,400,000.00, the balance of R1,600,000.00 now being claimed by the Plaintiff.
- [10] It is further common cause, that whereas the agreement between the parties constitute a credit agreement in terms of the National Credit Act 34 of 2005 (“**the NCA**”), Plaintiff was required in terms of Section 40(1) and (2) thereof, to be registered as a credit provider to conclude the credit agreement and extend the loan. The Plaintiff was not registered as such.
- [11] It is not disputed that a credit agreement entered into by a credit provider who is required to be registered in terms of Section 40(1) of the NCA but who is not so registered, is an unlawful agreement and void to the extent as provided for in Section 89 of the NCA.
- [12] Defendant’s defence as contained in his plea is firstly that he was and still is not liable to make any payments or further payments in light of the fact that the credit agreement constitutes an unlawful agreement which is void and that the Plaintiff knew that he did not comply with the peremptory requirements in terms of the NCA to provide credit, the latter fact being denied by the Plaintiff.
- [13] Secondly, according to the Defendant’s plea, whereas the Plaintiff’s claim apparently is based on unjust enrichment, the Plaintiff has failed to make the necessary allegations to sustain a cause of action based on unjustified enrichment.
- [14] The Defendant then also denies that the amount of R1,600,000.00 is payable on any basis

“... as an acquaintance of the Plaintiff, whom the Plaintiff owns an amount of R7,000,000.00, instructed Plaintiff to deduct the amount of R1,600,000.00 which the Plaintiff alleged to be due to him by the Defendant from the amounts the Plaintiff owes his acquaintance”.

The Defendant’s liability towards Plaintiff had therefore been expunged, according to the Defendant.

[15] In opposition to the application for summary judgment, the Defendant contends that the Plaintiff's claim, with reference to Rule 32(9)(a) clearly falls outside the provisions of Rule 32(1) and that the Defendant does not have an unanswerable case.

[16] Defendant contends that he has a good defence to Plaintiff's claim with reference to –

- (i) In terms of the NCA, the agreement is void to the extent provided for in Section 89(5) and the Court should make a just and equitable order;
- (ii) The Plaintiff has not pleaded a cause of action based on unjustified enrichment;
- (iii) The Plaintiff is not entitled to recover anything from the Defendant because Plaintiff knew that he did not comply with the peremptory requirements in terms of the NCA to provide credit; and
- (iv) The Defendant does not owe the Plaintiff the balance, because of arrangement with the acquaintance, referred to above.

[17] The Defendant then further contends that with reference again to the provisions of Section 89(5) of the NCA, the Plaintiff is not entitled to any repayment of the loan or repayment of the outstanding balance on several grounds, which include:

- (i) In addition to the Plaintiff not being registered as a creditor provider, the Plaintiff has failed to make any assessment prior to advancing the credit to the Defendant to determine whether the credit would constitute reckless credit or not which would have rendered the credit agreement unlawful in any event;
- (ii) The interest rate levied on the principal amount, contravened the provisions of Section 105(1) of the NCA; and

- (iii) Part of the payments made included interest.

Discussion:

Unjustified enrichment:

[18] Mr *Naidoo* appearing for the Plaintiff, referred me to several authorities in which it was held that a party who wants to claim restitution of money paid in pursuance of an unlawful agreement cannot do so under the agreement but must make use of an action based on unjustified enrichment.

[19] In **National Credit Regulator v Opperman and Others**⁵, the Constitutional Court confirmed that the enrichment action relevant to a matter, as the present, is the *condictio ob turpem vel iniustam causam* and that the requirements are *inter alia* that ownership must have passed with the transfer and such transfer must have taken place in terms of an unlawful agreement.

[20] In addition to the above, the Plaintiff must allege and prove that the Defendant was unjustly enriched.⁶

[21] I am satisfied that the necessary allegations in respect of the claim based on unjustified enrichment had been made in the Particulars of Claim and that any submissions to the contrary do not hold water.

Summary judgment in enrichment actions:

[22] Mr *Snellenburg SC* appearing on behalf of the Defendant, referred me to the matter of **Leech and Others v Absa Bank Ltd**⁷ in support of his contention that summary judgment is not viable in an enrichment action. However, that matter is distinguishable from the present in that in the **Leech**-matter, with reference to the relevant enrichment actions, it was open to plead and rely on non-enrichment as a defence and which on the facts in that matter needed to be proven at trial.

⁵ 2013 (2) SA 1 (CC)

⁶ *Albertyn v Kumalo* 1946 (WLD) 529 at 535.

⁷ 1997 (3) All SA 308 (B).

[23] In the present matter however, it is common cause that the Defendant has received the amount of R3,000,000.00 from the Plaintiff of which only R1,400,000.00 had been repaid by the Defendant to the Plaintiff. For more than a year prior to the institution of the action, the Defendant simply ceased to make any further payments in terms of the agreement.

[24] As to the remaining R1,600,000.00 it is Defendant's case that the Defendant's purported liability to the Plaintiff has been expunged in that:

“... the acquaintance of the Plaintiff, whom the Plaintiff owes an amount of R7,000,000.00, instructed the Plaintiff to deduct the amount of R1,600,000.00 allegedly to be due to him from the amount the Plaintiff owes the acquaintance.”

[25] It must however be considered whether the Defendant has met the peremptory requirements of Rule 32(3)(b) in showing that the Defendant has a *bona fide* defence to the action and has, through his affidavit, disclosed “*fully the nature and grounds of the defence and the material facts relied upon therefor*”.

[26] Long before the present amended Rule 32(3) came into operation, Milne JP in the matter of **Caltex Oil SA Ltd v Webb and Another**⁸, said as follows:

“What is necessary, if the Court is to refuse summary judgment under the subrule, is that it should be satisfied that there has been presented by the defendant, where the defence is based on facts, all the material facts upon which his defence is founded and that they appear to disclose a *bona fide* defence.”

[27] Binns-Ward J, has had the opportunity as one of the first Courts after the amendments to Rule 32 came into effect during July 2019, to consider the provisions of the “*new*” Rule, in **Tumileng Trading CC v National Security and Fire (Pty) Ltd**⁹. In respect of what is required for a Defendant to meet the requirements of Rule 32(3), he *inter alia* said as follows:

⁸ 1965 (2) SA 912 (NPD) at 916

⁹ 2020 (6) SA 624 (WCC)

“However, our procedure, by contrast, even in its amended form, remains true to that in which summary judgment was originally introduced in the English civil procedure in the mid-19th century. Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a *bona fide* (i.e. an apparently genuinely advanced, as distinct from sham) defence? ... A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence genuine or *bona fide*, summary judgment must be refused.”¹⁰

[28] In respect of the *bona fide* requirement, Binns-Ward J continued as follows:

“The assessment of whether a defence is *bona fide* is made with regard to the manner in which it has been substantiated in the opposing affidavit, viz. upon a consideration of the extent to which the ‘nature and grounds of the defence and the material facts relied upon therefor’ have been canvassed by the deponent. That was the method by which the court traditionally tested, insofar as it was possible on paper, whether the defence described by the defendant was contrived, in other words, not *bona fide*.”¹¹

[29] I can, with respect towards Binns-Ward J, not think of a better description of these principles under discussion.

[30] In the present matter, the defence raised by the Defendant in respect of the alleged expunction of the debt by the agreement with the alleged acquaintance, do not however meet such requirements. It is not supported with material facts relating to the identity of the acquaintance nor the date when such agreement had allegedly been concluded. In fact, the same goes for the Defendant’s purported defence that part of the payments made by the Defendant to the Plaintiff, included interests on the main amount. The affidavit lacks particularity in respect of both the defences as raised by the Defendant. These facts are not even contained in the plea filed by the Defendant.

[31] In that respect, the present matter is distinguishable from the **Leech**-matter in that I am not satisfied that there exists a reasonable likelihood that the

¹⁰ p. 632, par. [13].

¹¹ p. 635, par. [25].

Defendant may be excused from effecting repayment on grounds of non-enrichment.

Section 89(5) of the NCA and the *Par Delictum* Rule:

[32] It is common cause that the loan agreement between the parties is not valid due to the non-fulfilment of the provisions of *inter alia* Section 40(1) and (2) of the NCA. The provisions of Section 89(5) of the NCA then comes into play in terms of which the Court must make an order which is just and equitable, including but not limited to an order that the agreement is void as from the date the agreement was entered into.

[33] I cannot agree with Mr *Snellenburg SC*'s submission that a Court can only make such an order after hearing evidence during trial. It is undisputed that the balance in the amount of R1,600,000.00 had been received by the Defendant from the Plaintiff. The Court is already at this stage in the position to decide which order is just and equitable.

[34] Mr *Snellenburg SC* is however correct in his submission that the Court has a wide unfettered discretion to make such an order that is just and equitable.

[35] In the matter of **Afrisure and Another v Watson and Another**¹², to which Mr *Naidoo inter alia* referred me to, the Supreme Court of Appeal confirmed that the principles enunciated in the **Jajbhay**-matter have been considered and applied in many cases for example, **Visser and Another v Rossouw and Another NNO 1990 (1) SA 139 (A)** and **Klokov v Sullivan 2006 (1) SA 259 (SCA)**.

[36] In a more recent matter relied upon by Mr *Snellenburg SC*, **Blacher v Josephson**¹³, the Court also said the following:

“[35] Thus, just as the *ex turpi* principle serves to defeat a contractual claim arising from, or in terms of, an unlawful contract, the *per delictum* rule may do so in respect of an enrichment action which is resorted to in place thereof. But the

¹² 2009 (1) All SA 1 (SCA)

¹³ 2023 (3) SA 555 (WCC)

important qualification to the operation of the *per delictum* rule in enrichment actions is that pursuant to the decision in *Jajbhay* (*Jajbhay v Cassim* 1939 AD 537 at 545, 547-548) it has been attenuated by the recognition of an equitable discretionary power of the court, so that it may do 'simple justice between man and man'."

- [37] Certain grounds have been advanced in argument on behalf of the Defendant why the Plaintiff is not entitled to any repayment of the outstanding balance.
- [38] The first ground is that the interest rate levied on the principal amount of credit, contravened the provisions of Section 105(1) of the NCA. It was argued that it is the Plaintiff's conduct that is relevant when the Court makes a determination.
- [39] If the interest rate levied was the only basis for the agreement to be unlawful and void, it might then be said that it will not be just and equitable to order restitution of the balance in favour of the Plaintiff. But it is not necessarily so. It might be indicative that the Plaintiff was trying to collect more interest than he was entitled to. But it is also so that the interest which was to be accrued was agreed upon between the Plaintiff and the Defendant. If was to be taken as a determining factor in holding that the Plaintiff is not entitled to restitution, it will effectively mean that the Plaintiff is penalised in not receiving the outstanding balance of the capital loan amount, although interest does not even form part of the present claim.
- [40] As already stated, the Defendant failed to provide any particularity of which amounts of interests allegedly formed part of the payments made. Not in his plea nor in his affidavit in opposition to the summary judgment application.
- [41] The further facts relied upon by the Defendant, namely that the Plaintiff has failed to make any assessment prior to the advancing of the credit, to determine whether the credit would constitute reckless credit, if it is to be accepted to be true, is indeed a factor which the Court should frown upon. But in the same breath the Court should also take into consideration that the Defendant has received a benefit in that he received the loan amount in any

event. The fact remains, the Defendant was enriched at the expense of the Plaintiff.

[42] It can also not be held as contended on behalf of the Defendant, that because the Defendant denies that the Plaintiff was unaware of the provisions of the NCA, the conclusion can be drawn that the Plaintiff intentionally contravened the provisions of the NCA. Of relevance, also in this regard, is the fact that the Defendant has failed in totality to place the material facts before Court in his answering affidavit. The absence of knowledge by the Plaintiff stands as a bare denial.

[43] Taking into consideration as referred to in **Fourlamel (Pty) Ltd v Maddison**¹⁴ as well as **Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd**¹⁵, I have no doubt that the Plaintiff has an unanswerable case against Defendant based on the Defendant being unjustifiably enriched at the expense of the Plaintiff.

[44] Even if it is to be accepted that the Plaintiff was not free from turpitude, in the exercise of my discretion, I find that the relaxation of the *par delictum* rule, as affirmed in the **Jajbhay**-matter, is justified in the present matter in bringing about simple justice between man and man.

Order

In the result I grant summary judgment against Defendant for:

1. Payment of the sum of **R1,600,000.00**.
2. Interest *a tempore morae* on the above amount.
3. Costs of suit.

HEFER AJ

¹⁴ 1977 (1) SA 333 (A)

¹⁵ 2004 (6) SA 29 (SCA)

Appearances on behalf of the Plaintiff:

Instructed by:

Adv K Naidoo

Lovius Block Attorneys

Bloemfontein

On behalf of Defendant:

Instructed by:

Adv N Snellenburg SC

Podbielski Incorporated

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