



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 2020/41706**

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES:NO  
(3) REVISED: NO

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In the matter between:

**NEDBANK LIMITED**

Plaintiff

and

**GERALD HENRY FORBES**

Defendant

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**JUDGMENT**

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*This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 30 May 2022.*

**BALOYI AJ:**

Introduction

[1] This is an application in which the plaintiff seeks summary judgment against the defendant, a former employee, in the amount of R1 030 037.52 (the "*principal sum*"). The amount claimed was paid to the defendant whilst he was an employee of the plaintiff and that it was paid in the period 20 February 2017 until 20 March 2019 as follows (the "*indebiti payments*") -

1.1 R30 005.25 - 20 February 2017;

1.2 R41 582.84 - 20 March 2017;

1.3 R36 132. 57 - 20 April 2017;

1.4 R41 569.11 - 20 May 2017;

1.5 R39 724.95 - 20 June 2017;

1.6 R37 958.35 - 20 July 2017;

1.7 R41 569.08 - 20 August 2017;

1.8 R37 919.59 - 20 September 2017;

1.9 R39 763.71 - 20 October 2017;

1.10 R39 724.95 - 20 November 2017;

- 1.11 R37 958.40 - 20 December 2017;
- 1.12 R41 569.11 - 20 January 2018;
- 1.13 R36 090.71 - 20 February 2018;
- 1.14 R38 442.02 - 20 March 2018;
- 1.15 R38 334.66 - 20 April 2018;
- 1.16 R43 331.12 - 20 May 2018;
- 1.17 R39 609.41 - 20 June 2018;
- 1.18 R41 540.88 - 20 July 2018;
- 1.19 R43 307.95 - 20 August 2018;
- 1.20 R37 842.33 - 20 September 2018;
- 1.21 R46 308.86 - 20 October 2018;
- 1.22 R41 377.40 - 20 November 2018;
- 1.23 R39 774.68 - 20 December 2018;
- 1.24 R43 308.86 - 20 January 2019;
- 1.25 R37 514.46 - 20 February 2019; and

1.26 R37 776.27 - 20 March 2019.<sup>1</sup>

[2] The plaintiff claims interest on each individual amount from the date when the amount was paid to the defendant to date of repayment as follows – (i) interest at the rate of 10.50% per annum on the amounts in paragraphs 1.1 to 1.7; (ii) interest at the rate of 10.25% per annum on the amounts in paragraphs 1.8 to 1.15; (iii) interest at the rate of 10% per annum on the amounts in paragraphs 1.16 to 1.23; and (iv) interest at the rate of 10.25% on the amounts in paragraphs 1.24 to 1.26, these being the rates of interest applicable at the date of each payment respectively.

[3] It is common cause that the *indebiti payments* to the defendant were without a valid *causa* and in error. Whilst the defendant opposes the application (and the action), he does not deny receipt of the *indebiti payments* and that the payments were over and above the salary agreed by the parties and that there was no valid cause for the payments. Neither does he deny that he has not repaid to the plaintiff any part of the principal sum. It is fair to say that the defendant's contestation of the *quantum* claimed from him is that he does not know how the plaintiff determined the deductions made on the gross amounts to arrive at each nett amount paid to him.

[4] In its particulars of claim, the plaintiff provides the following explanation about the payments to the defendant. The defendant was first employed by the plaintiff on a temporary basis from 8 November 2010 to 31 May 2016. He was subsequently employed on a fixed-term contract from 1 June 2016 until 31 August 2016, which

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<sup>1</sup> The *indebiti* amounts are set out in an annexure to the plaintiff's particulars of claim which also reflects the gross amounts and deductions resulting in the nett amounts paid and which make up the *indebiti* payments.

was renewed from 1 September 2016 to 31 December 2016, in which period he was remunerated at five hundred rand (R500.00) per hour. With effect from 1 February 2017, the defendant became employed for an “indefinite period” with an agreed annual salary of R785,644.44, with the employment contract terminable as provided in the contract (a copy of the contract of employment is attached to the particulars of claim). Notwithstanding the defendant’s changed employment status to indefinite employment and payment of the agreed annual salary in terms thereof, he continued to receive payment in terms of the expired fixed-term contract at the hourly rate applicable to that contract for the same work. It is common cause that the defendant did not alert the plaintiff to the fact of double payment for the same work. In March 2019, conducted an investigation into expenditure in the department where the defendant was employed and discovered that the defendant continued to be paid an hourly rate as a fixed-term employee in addition to his annual salary. When questioned about the double payments, the defendant admitted receipt of the double payments and offered an explanation that he had assumed that the plaintiff had decided to increase his agreed salary. The defendant admitted that he was not entitled to the payments and offered to repay the amounts to which he was not entitled, an admission and offer which the plaintiff considers as an acknowledgement of debt. The defendant was subjected to a disciplinary hearing which culminated in his summary dismissal from employment on 13 September 2019 on charges of gross misconduct of dishonesty for not disclosing to the plaintiff that he was being doubly remunerated for doing the same work (I paraphrase the charges for convenience).

[5] The plaintiff relies on three causes of action, in the alternative –

5.1 firstly, a claim based on contract, namely, the defendant's contractual obligation to repay all over-payments made to him; breach of a fiduciary duty and duty to act honestly and in the best interest of the plaintiff;

5.2 secondly, a claim based in delict, in that the defendant wrongfully, intentionally and without cause appropriated the *indebiti* payments and caused pecuniary damage to the plaintiff in the amount of the principal sum; and

5.3 lastly, undue enrichment to the extent of the *indebiti* payments.

[6] The plaintiff pleads that the *indebiti* payments to the defendant were made as a result of a *bona fide* error.

[7] The defendant does not dispute the absence of a valid *causa* for the payments but pleads that the payments were caused by the reckless, negligent and unreasonable conduct of the plaintiff. In the plea and in the affidavit opposing summary judgment, he has raised a number of defences to each alternative cause of action, including 2 special pleas, namely, prescription of at least part of the claim, and lack of cause of action for the claim of interest. I deal with the defences raised by the defendant as necessary later in the judgment.

The case for summary judgment

[8] Uniform Rule 32(1)(b) permits a plaintiff claiming a liquidated amount, after delivery of a plea, to apply for summary judgment on the liquidated amount, together with a claim for interest and costs. The application for summary judgment must be accompanied by an affidavit by a person who, (i) can swear

positively to the facts, (ii) verifies the cause of action and the amount, if any, claimed, (iii) identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and (iv) explain briefly why the defence pleaded by the defendant does not raise any issue for trial. A defendant who wishes to oppose the claim for summary judgment may elect to provide security to the satisfaction of the court for any judgment, including costs (rule 32(3)(a)); or "*satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor*" (rule 32(3)(b)). (my underlining)

[9] The plaintiff's affidavit in support of summary judgment is deposed by Ms Lindi Botha who describes herself as Senior Legal Advisor employed at the plaintiff, who swears positively to the facts, verifies the causes of action and the amounts claimed. Ms Botha has attached to her affidavit "schedule(s) of remuneration" which record the amount of each *indebiti* payment to the defendant. By reference to the relevant paragraphs in the plaintiff's particulars of claim, the affidavit incorporates the factual allegations in the particulars of claim and the legal grounds relied upon by the plaintiff. I am satisfied that the supporting affidavit contains the necessary allegations as required by rule 32(1)(b) and that the amount claimed is a liquidated amount as contemplated therein – see *Colrod Motors (Pty) Ltd v Bhula 1973 (3) SA 836 (W)*. Ms Botha disputes that the defendant has a *bona fide* defence to the claim and sets out the reasons.

[10] In his plea, the defendant has raised 2 special pleas in addition to pleading to the merits. The first special is a plea of prescription of at least part of the claim. With the second special plea, the defendant pleads that the particulars of claim do not disclose a cause of action for the claim for interest. In the plea over, the defendant admits - (i) that he “was not only paid his agreed remuneration in terms of his new employment contract”; (ii) the gross over-payment amounts but states that he has no knowledge how the nett amounts were computed; (iii) that the *indebiti* payments were without causa. He denies that - (i) he had knowledge that he was not entitled to *the indebiti* payments; (ii) he wrongfully and intentionally appropriated the *indebiti* payments; (iii) that the over-payments were made in error because the plaintiff was aware of the expiry of the fixed-term contract and any error was inexcusable, grossly negligent, reckless and unreasonable by failing to take certain specified steps to prevent the payments to the defendant; (iv) he was unduly enriched. Finally, the defendant seeks apportionment in the event I find that he is liable for the amount claimed by the plaintiff. These defences are repeated and expanded upon in the affidavit opposing summary judgment.

[11] Summary judgment has often been described as an extraordinary and drastic remedy in that, if granted, “*it closes the door to a defendant and permits a judgment without a trial*”. And yet in reality, as the Supreme Court of Appeal pointed out in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)*, “(h)aving regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are “drastic” for a defendant who has no defence.” (para [33]), a view I respectfully agree with. The court went on to say that “*The rationale for summary judgment*



*proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. ...” (para [32]). The remedy is in my respectful view correctly explained as one which “seeks to protect a plaintiff from the delay and costs of a full-blown trial where there is no answer to its claim.”*

[12] A defendant opposing summary judgment and who does not offer security in terms of rule 32(3)(b), must satisfy the Court by affidavit that he has *bona fide* defence to the claim. The Appellate Division (as it then was) explained the threshold for a successful opposition to summary judgment in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) as follows:–

*“... Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word “fully”, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence. ... At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading. ...” (at 425G–426E)*

[13]I have already determined that the affidavit deposed to by the plaintiff's Ms Botha

meets the requirements of rule 32(1)(b). It now falls to consider whether the defendant meets the threshold eloquently explained in Maharaj, viz. whether he has *“fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law.*” If I find that the defendant has failed to meet the threshold in respect of anyone of the alternative claims, that should be dispositive of the matter and I must grant summary judgment.

The claim based on the employment contract

[14] The plaintiff firstly relies on the employment contract to assert its claim. In particular, it contends that the defendant had a contractual obligation to act in the best interest of the plaintiff, in good faith and with honesty (the so-called fiduciary duty), to report the irregularity of the payment of the over-payments and to repay to the plaintiff any over-payments to him. The relevant clauses of the employment contract relied upon include,

*“5.1.2 use your best endeavours to protect and promote the interests of the Bank and not do anything harmful to those interests.”*

*“13.1 You acknowledge that your employment with the Bank requires trust and honesty” ...”.*

*“17 you must at all times look after the best interests of the Bank.”*

*“21 When you become aware of any irregularity perpetrated against the Bank, you must immediately ... report this to your manager, or ...”.*

*“30.5 By signing this Agreement, you consent to the Bank deducting any sums owed by you to any member of the group at any time from your remuneration or other payment due to you ... in respect of any overpayment of any kind made to you ... . You also agree, on demand, to pay any sums owed by you to the bank at any time”.*

[15] The defendant's indefinite period contract of employment provided that he will repay to the plaintiff any over-payments made to him by the plaintiff (clause 30.5). This is what the defendant agreed in his contract. The defendant's contractual obligation to repay over-payments is not qualified in any way, in particular, that he is excused from repayment obligations where the over-payments is the result of the plaintiff's own gross negligence, recklessness or unreasonable conduct. The defendant does not assert any such contractual right or other legal basis that excuses him from the contractual obligation to repay the principal sum or why he should not be held to the contract. It follows that his answer that plaintiff's error was inexcusable, grossly negligent, reckless and unreasonable for failing to take steps to prevent the payments to the defendant does not, in my view, make a *bona fide* defence to the claim.

[16] The defendant accepts that the *indebiti* payments were made without valid cause. The payments are over-payments as contemplated in clause 30.5 of the employment contract and the plaintiff is entitled in terms thereof to demand repayment. In terms of clause 30.5 of his contract of employment, the defendant is therefore liable to repay these amounts on demand. None of the defences that the defendant has raised are good in law to answer the plaintiff's contractual claim. The defendant's plea and answer to the claim for summary judgment that he has no knowledge of computation of amounts claimed by the plaintiff does not raise a defence, let alone a *bona fide* defence, to the claim for the *indebiti* payments, these being the amounts claimed from him. The defendant does not deny that he received the *indebiti* payments as appear in the "schedules of remuneration" attached to the plaintiff's affidavit. Only that he does not know how the nett amounts (after deductions) paid to him were

computed. Suffice to say that the defendant is called upon to repay what was in fact paid to him and no more. It is therefore irrelevant what deductions were made by the plaintiff to arrive at the nett amounts paid to him and this does not raise a sustainable defence against the claim.

[17] Thus, the defendant has not pleaded facts or points of law which raise triable issues on the contractual claim. I accordingly find that his answer to the application for summary judgment does not disclose a *bona fide* defence or a defence which is good in law. This in my view is the end of the enquiry about the defendant's contractual obligation and liability to repay the *indebiti* payments.

#### *Special plea of prescription*

[18] The plaintiff instituted the action on 3 December 2020. The defendant pleads that the debt in respect of all payments made before 3 December 2020 has become prescribed in accordance with section 11(d) of the Prescription Act (Act 68 of 1969) after the expiry of 3 years from date of payment. The defence of prescription, if successful, will therefore see the plaintiff unable to recover in the action, and therefore in this application, the amount of three hundred eighty-five nine hundred and fifty rand forty cents (R385 950.40) (amounts in paragraphs 1.1 to 1.10 above) and the plaintiff would accordingly be entitled to recover only the amounts in paragraphs 1.11 to 1.26 above.

[19] Section 11(d) prescribes that a debt shall prescribe after the expiry of 3 years from the date when the debt became due. Section 12(2) prescribes that "*If the debtor wilfully prevents the creditor from coming to know of the existence of the*

*debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.”* It is not contended that section 12(3) is applicable.

[20] The plaintiff states that it became aware of the over-payments to the defendant during March 2019, an allegation denied by the defendant only with a bare denial, and that the defendant concealed from it the fact of the payments when he had the contractual obligation to disclose the payments. Thus, it is alleged, the defendant prevented the plaintiff from finding out about the debt. If I find this to be the case, it follows that prescription did not begin to run until March 2019 when the plaintiff first became aware of the over-payments.

[21] In his affidavit, the defendant states that until he was questioned about the over-payments, he was not aware that he was paid over and above the agreed annual salary and that he assumed that the additional amounts were a result of a salary increase decided by the plaintiff. This explanation of the defendant is not supported by the “schedule(s) of remuneration” attached to the plaintiff’s affidavit which clearly show that he continued to be paid an amount identified as “temp staff pay”. From this, the defendant would have become aware that the payments additional to the agreed annual salary were not paid as a salary increase as he now alleges. The reason he offers for not bringing his unexplained windfall to the attention of the plaintiff is so far-fetched that it can be fairly and must rightly be rejected out of hand. That the defendant did not enquire about his unexpected and unexplained largesse ineluctably must lead to the conclusion that he knew that he was receiving more than was contracted and opportunistically elected to keep his peace with the hope never to be found out. Any other suggestion would defy common sense. I am satisfied that the

defendant wilfully elected to conceal from the plaintiff the facts of the over-payments commencing when the first payment was made to him. It follows that prescription did not commence to run until March 2019 and I find that no part of the debt has become prescribed.

[22] In the light of my conclusion that prescription did not commence to run until March 2019, I do not consider it necessary to decide the question whether the running of prescription was interrupted by what the plaintiff contends was the defendant's an acknowledgement of debt of 25 April 2019 and undertaking to pay of 7 May 2019.

[23] I accordingly find that the plaintiff has made out a case for summary judgment based on the contract of employment to the extent of the amount in paragraphs 1.11 to 1.26 above.

*Special plea of failure to disclose a cause of action*

[24] The special plea relates to the plaintiff's claim for interest on each *indebiti* amount from date of payment to the defendant. Rule 32(1)(b) entitles an applicant for summary judgment to claim interest on the amount claimed. The plaintiff has done so and seeks interest from the date of payment to the defendant of each *indebiti* payment. The plaintiff claims interest from date when the individual sums were paid on the basis that the amounts are liquidated and that as a matter of law, interest began to run from the date at the applicable prescribed rate of interest from the date of each payment, this being the date when the cause of action arose in respect of each payment. The date of each payment has been pleaded and there is no dispute that the amounts claimed

are liquidated amounts – they have been ascertained, alternatively are easily ascertainable and importantly, are not disputed by the defendant.

[25] The claim for interest is not a separate cause of action apart from the claim for each *indebiti* amount. It is consequent upon the payments to the defendant which were without cause at the time they were made. I agree with the plaintiff that there is no requirement in law that the plaintiff should have made a demand for payment of interest before it would be entitled to claim interest on each individual liquidated amount. The defendant became liable to repay the plaintiff as soon as he received payment and became aware of the payments as is apparent from the salary payment schedules attached to the plaintiff's affidavit and interest became due from the date of payment. There is no reason that the plaintiff should not be compensated for the interest that it would have earned on the amounts. The defence, such as it is, has no merit. It follows that it is not a *bona fide* defence to the claim for interest and does not raise a triable issue for determination by a trial court.

[26] If ever there was a case of a plaintiff who has established his claim in the clearest terms, this is the case. Equally, if ever there was a case of a defendant who has raised "sham defences" to delay relief to the plaintiff through a trial and the unavoidable delays that comes with it, the defendant in this matter is such a defendant.

[27] For all the above reasons, I find that the plaintiff has made out a case for summary judgment based on contract. In the light of my conclusion, it is not necessary that I deal with the plaintiff's remaining alternative claims and the

defendant's answers thereto.

[28] With respect to the defendant's claim or plea for apportionment, suffice to say that this does not arise in the claim based on contract, the Apportionment of Damages Act (Act 34 of 1956) being inapplicable to claims based on contract. The plaintiff does not claim damages – it seeks to enforce the contract between the parties.

#### Costs

[29] The plaintiff seeks that the defendant pays costs on the attorney and client scale.

[30] Whilst a successful party is ordinarily entitled to costs in the normal cause, and there is no reason in the present matter to deviate, a party who seeks costs on the punitive scale of attorney and client, such as the plaintiff seeks, must make out a case for such a cost order. The plaintiff has not pleaded any facts why such an order is appropriate. Neither has it, in its written submissions, made submissions in support of the punitive costs order.

[31] The fact that the defendant fails in his opposition of summary judgment does not of itself and without more warrant a punitive cost order such as is sought by the plaintiff. I am not satisfied that a cost order such as sought by the plaintiff is appropriate in the circumstances and propose to grant an order on the ordinary scale.

#### Order



[32] In the result, I make the following order

1. The defendant is to pay to the plaintiff the amount of R1 030 037.52.

2. The defendant is to pay interest on the amount R1 030 037.52 as follows:

2.1 on the amount R30 005.25 - interest at the rate of 10.50% from 20 February 2017 to date of payment'

2.2 on the amount R41 582.84 - interest at the rate of 10.50% from 20 March 2017 to date of payment.

2.3 on the amount R36 132. 57 - interest at the rate of 10.50% from 20 April 2017 to date of payment.

2.4 on the amount R41 569.11 - interest at the rate of 10.50% from 20 May 2017 to date of payment.

2.5 on the amount R39 724.95 - interest at the rate of 10.50% from 20 June 2017 to date of payment.

2.6 on the amount R37 958.35 - interest at the rate of 10.50% from 20 July 2017 to date of payment.

2.7 on the amount R41 569.08 - interest at the rate of 10.50% from 20 August 2017 to date of payment.

2.8 on the amount R37 919.59 - interest at the rate of 10.50% from 20 September 2017 to date of payment.

2.9 on the amount R39 763.71 - interest at the rate of 10.50% from 20 October 2017 to date of payment.

2.10 on the amount R39 724.95 - interest at the rate of 10.50% from 20 November 2017 to date of payment.

2.11 on the amount R37 958.40 – interest at the rate of 10.25% from 20 December 2017 to date of payment.

2.12 on the amount R41 569.11 – interest at the rate of 10.25% from 20 January 2018 to date of payment.

2.13 on the amount R36 090.71 – interest at the rate of 10.25% from 20 February 2018 to date of payment.

2.14 on the amount R38 442.02 – interest at the rate of 10.25% from 20 March 2018 to date of payment.

2.15 on the amount R38 334.66 – interest at the rate of 10.25% from 20 April 2018 to date of payment.

2.16 on the amount R43 331.12 – interest at the rate of 10% from 20 May 2018 to date of payment.

2.17 on the amount R39 609.41 – interest at the rate of 10% from 20 June 2018 to date of payment.

2.18 on the amount R41 540.88 – interest at the rate of 10% from 20 July 2018 to

date of payment.

2.19 on the amount R43 307.95 – interest at the rate of 10% from 20 August 2018 to date of payment.

2.20 on the amount R37 842.33 – interest at the rate of 10% from 20 September 2018 to date of payment.

2.21 on the amount R46 308.86 – interest at the rate of 10% from 20 October 2018 to date of payment.

2.22 on the amount R41 377.40 – interest at the rate of 10% from 20 November 2018 to date of payment.

2.23 on the amount R39 774.68 – interest at the rate of 10% from 20 December 2018 to date of payment.

2.24 on the amount R43 308.86 – interest at the rate of 10.25% from 20 January 2019 to date of payment.

2.25 on the amount R37 514.46 – interest at the rate of 10.25% from 20 February 2019 to date of payment.

2.26 on the amount R37 776.27 – interest at the rate of 10.25% from 20 March 2019 to date of payment.

3. The defendant is to pay costs as between party and party.

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**MS BALOYI  
ACTING JUDGE**

Date of Hearing: 11 November 2021

Judgment Delivered: 30 May 2022

**APPEARANCES:**

For the Plaintiff:

Adv E Kromhout

Instructed by:

Lowndes Dlamini Inc

Attorneys

For the Defendant:

Adv MS Patel

Instructed by:

Ameen Attorneys

