



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

(1) REPORTABLE: YES/NO

(2) OF INTEREST OF OTHER JUDGES: YES/NO

(3) REVISED

DATE

SIGNATURE

Case no: 2022/9895

In the matter between:

WAMJAY HOLDING INVESTMENTS (PTY) LTD

Applicant

and

AUCKLAND PARK THEOLOGICAL SEMINARY

Respondent

JUDGMENT

FRIEDMAN AJ:

1 This is the next instalment in the dispute which led to the decision of the Constitutional Court in *University of Johannesburg*.¹ The judgment is probably best known for its contribution to the modern, rich jurisprudence on the interpretation of documents, which was initiated by the famous remarks of Wallis JA in *Endumeni*.² But, for the parties involved, it now raises the question of what is to be done with the R6 500 000.00 which Wamjay Holding Investments (Pty) Ltd (“**Wamjay**”) paid to the Auckland Park Theological Seminary (“**ATS**”) to take over its rights under a long lease which ATS concluded with the University of Johannesburg (“**the University**”). This question arises in the light of the finding of the Constitutional Court that the University lawfully cancelled the lease agreement.

2 The dispute relates to an 8000sqm piece of land owned by the University, situated in Richmond Avenue, Auckland Park. Once the University emerged victorious in the Constitutional Court it dropped out of the picture. The Constitutional Court held that ATS’s cession of its rights under the lease agreement to Wamjay justified the University’s decision to cancel the lease. Since the reasons for this are not relevant to my task in this case, and are clearly spelled out in the Constitutional Court’s judgment, there is no reason to dwell on them here. In short, the starting point of our law is that rights under a lease agreement (but this principle applies to most agreements and not only lease agreements) may be ceded to a third party by the lessee without the lessor’s permission; unless there is a clause in the agreement which prevents this. But, even in the absence of such a clause, cession is impermissible where the contract involves a *delectus personae*. In essence, this means that the lessor intended to lease the premises

¹ *University of Johannesburg v Auckland Park Theological Seminary and another* 2021 (6) SA 1 (CC).

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

to the specific lessee – ie, the identity of the lessee was a material term of the agreement, properly interpreted – which carries the implication that the consent of the lessor is a pre-condition to the lawful cession of the lessee’s rights to a third party. Because the Constitutional Court concluded that the agreement between the University and ATS involved a *delectus personae*, it held that the University was entitled to cancel the lease in the face of ATS’s decision to cede its rights to Wamjay.

- 3 The reason why this case is now before me is because Wamjay has sued ATS, basing its cause of action on the law of unjustified enrichment, to recover the R6.5 million which it paid to ATS to take over its rights under the long lease with the University. The dispute between the parties (with ATS and Wamjay on the same side, at that stage) leading up to the decision of the Constitutional Court involved (a) the initial judgment of a single judge (Victor J) in this division, in which the University’s right to cancel the lease was confirmed in a trial action launched by the University (b) a full bench decision of this division, dismissing an appeal against Victor J’s judgment (c) an appeal to the Supreme Court of Appeal (“SCA”) which upheld the appeal and set aside Victor J’s order and (d) the successful appeal to the Constitutional Court, which I have already described. As a result of the Constitutional Court’s decision, the initial order of Victor J was revived. This was to the effect that both ATS and Wamjay should be evicted from the premises and the registration of the long lease concluded between ATS and the University should be cancelled.
- 4 In these proceedings, Wamjay has pleaded its case in simple terms. It says that it has paid R6.5 million to ATS but does not have possession of the land which was the legal cause of this payment. It therefore says that ATS has been unjustifiably enriched and must repay the R6.5 million to it. ATS, for its part, says that any claim which Wamjay

might have prescribed. It also denies that Wamjay has satisfied the requirements to succeed in a claim based on unjustified enrichment.

THE ARGUMENTS OF THE PARTIES

5 The underlying facts of this matter are not complicated and are common cause. On 28 March 2011, ATS and Wamjay concluded the cession agreement in which ATS ceded its rights under the long lease with the University to Wamjay. On 13 October 2011, representatives of ATS and Wamjay executed a written notarial deed of cession. Pursuant to these agreements, Wamjay paid the R6.5 million to ATS and took possession of the premises. After Wamjay took possession of the premises – it says that it intended to build a school on the vacant land and began the process of preparing the grounds for construction – the University cancelled the lease and the litigation described above commenced.

6 Wamjay, in the founding affidavit in the proceedings before me, adopts the following stance:

6.1 Wamjay says that, when it concluded the cession agreement with ATS, it believed that the cession was lawful. Both parties (ie, ATS and Wamjay) took separate legal advice, which confirmed that this was so. It therefore paid the R6.5 million to ATS in the bona fide belief that it was obliged to make that payment in terms of a valid agreement which would give it occupation of the premises.

6.2 I agree with the deponent to ATS's answering affidavit that Wamjay clearly was alive to the potential prescription problem when it launched the enrichment

application. This is because, although it never spelt this out expressly in the founding affidavit, it implied that its enrichment claim only became perfected when the Constitutional Court handed down its judgment on 11 June 2021. It implied this by rendering the date of the Constitutional Court's decision in bold font, and by saying that it only knew that the money paid to ATS would have to be refunded as of the date of the Constitutional Court's judgment.

6.3 Other than the facts described above, Wamjay explains in its founding affidavit that, after the Constitutional Court's judgment was handed down, it engaged with ATS to facilitate the repayment of the R6.5 million. It points to email correspondence in which ATS acknowledged Wamjay's bona fides, expressed regret at its predicament but took the view that, at most, it had a moral but not legal obligation to contribute to Wamjay's loss. In that correspondence, however, ATS explained that, even if it decided on moral grounds to contribute to Wamjay's loss, it could not "do anything now or in the near future". Wamjay says in its founding affidavit that ATS has a legal, not moral, obligation to repay the money and that (a) it has considerable assets far in excess of the claim and (b) it should have, as a matter of caution (and despite having, at all times in the litigation taken the position that the University had no right to cancel the lease), put money aside to enable it to refund Wamjay, if necessary.

6.4 Although Wamjay did not, in its founding affidavit, seek to characterise its claim as a claim under the *condictio indebiti*, this seems to have been its intention. This is because it uses terminology in the founding affidavit which appears to have been chosen to bring it within the parameters of that cause of action – ie, by referring to its bona fide but mistaken belief that it was required

to pay the R6.5 million to ATS. (I return to discuss the *condictio indebiti*, and its requirements, when dealing with the merits of the enrichment claim below.)

7 The next pleading to discuss is, of course, ATS's answering affidavit:

7.1 In the answering affidavit, as I foreshadowed above, ATS refers to Wamjay's apparent attempt to pre-empt a plea of prescription. ATS correctly, as I have noted, interprets the founding affidavit as implying that Wamjay could have brought its enrichment claim no earlier than 11 June 2021, the day on which the Constitutional Court judgment was handed down. Reasoning from that premise, ATS says that Wamjay is incorrect and that its claim has prescribed. It says that Wamjay's cause of action does not stem from the decision of the Constitutional Court. ATS says that the cause of action stems from "a set of primary facts, all of which existed and were known to [Wamjay] as far back as October 2012, which facts were enough to enable the applicant to institute action against [ATS]."

7.2 In its answering affidavit, ATS understandably takes the stance, which it also advanced in argument, that there is a long line of authorities which have made the following clear: prescription begins to run when the claimant has knowledge of all of the facts relevant to its cause of action. It does not begin to run only when the claimant acquires legal certainty as to its entitlement to claim. On this basis, ATS says that the period of prescription began to run from the date on which Wamjay acquired knowledge that the University had cancelled the lease with ATS. This is because, from that moment, Wamjay knew (a) that it had concluded the agreements (being a reference to the underlying contractual agreement between ATS and Wamjay and the

registration of the deed of cession) with ATS (b) it had performed in terms of the agreements and (c) the legal cause for its payment to ATS of the R6.5 million had fallen away because of the “unenforceability of the agreements”. ATS says that those facts were known to Wamjay as of 5 October 2012, when the University’s attorneys sent a detailed letter to the parties to explain the basis on which it had decided to cancel the long lease, and so that is when prescription began to run. In the alternative, it says that the latest date on which prescription could be found to have started to run was when Victor J handed down her judgment, upholding the University’s position, on 10 March 2017. It says that, at least from this date, Wamjay would have had “knowledge of the minimum facts it needed to claim repayment”.

7.3 It is instructive to have regard to ATS’s responses to Wamjay’s allegations relevant to the merits of its claim. These responses assume some importance in my ultimate conclusion on the merits.

7.3.1 In its founding affidavit, Wamjay alleged that (a) neither Wamjay nor ATS is now in possession of the premises (b) ATS is, however, in possession of the R6.5 million. It made these allegations as part of making out its cause of action. In response to these two allegations, ATS says that it denies “that [ATS] is still in possession of the money”.

7.3.2 Wamjay said in its founding affidavit that ATS is unable to perform in terms of the invalid agreement but has retained Wamjay’s R6.5 million. In response to these allegations, ATS says that it “did not

retain the money pending the outcome of the various legal matters referred to above” because it had “no legal obligation to do so”.

7.3.3 I have referred, in my explanation of Wamjay’s pleaded case, to its contentions that (a) ATS was wrong to describe its obligation to Wamjay as merely a moral obligation and (b) ATS should have made a plan, out of caution, to enable it to refund the R6.5 million if this became necessary (see paragraph above). In the answering affidavit, ATS addresses these allegations together. It says that it was correct to deny a legal obligation to refund Wamjay and that, in any event, by the time at which the correspondence about moral versus legal obligations was exchanged, Wamjay’s claim had already prescribed. It then says that the “remaining allegations contained herein are denied”.

7.3.4 In the founding affidavit, Wamjay pleaded that ATS “has plainly been enriched by the sum of R6 500 000.00, and [Wamjay] impoverished”. In response to this, ATS says that Wamjay made payment to ATS “in terms of an invalid and illegal agreement”. It says that Wamjay “provides no facts or circumstances in the founding affidavit, justifying restitution” and then reiterates that, in its view, the claim has in any event prescribed.

8 I have explained above that Wamjay foreshadowed the possibility of ATS raising a prescription defence in its founding affidavit but did not expressly address the issue. It was entitled, indeed wise, not to do so because prescription must be pleaded as a

defence and does not arise unless pleaded.³ Wamjay was entitled, as it did, to address the issue in its replying affidavit. In that affidavit, it said the following:

8.1 ATS's decision to plead prescription is remarkable because from October 2012 to June 2021 ATS and Wamjay, "acting in lockstep", challenged the lawfulness of the University's cancellation.

8.2 The fact that the cession agreement "had become inoperable" was only known to both parties when the Constitutional Court judgment was handed down. This is because, before that date, both parties held the view that the University's cancellation was unlawful. As evidence of this, Wamjay points to the plea which was jointly filed by ATS and Wamjay in response to the University's claim (ie, the claim for cancellation and ejection which was upheld by Victor J) in which both ATS and Wamjay pleaded that the University's cancellation was invalid. Wamjay also relies on particulars of claim, again filed jointly on behalf of Wamjay and ATS in a counterclaim in the same proceedings, in which Wamjay and ATS sought a declaratory order that (a) the long lease between the University and ATS remained valid and (b) the cession agreement between Wamjay and ATS remained valid.

8.3 Wamjay then refers to the fact that, even after Victor J handed down her judgment, both Wamjay and ATS took the view that the University's position was wrong, which is what motivated their joint appeal to a full bench of this division and, thereafter, to the SCA. It refers to the answering affidavit in the application for leave to appeal to the Constitutional Court, filed jointly on behalf of Wamjay and ATS, in which the deponent (the representative of ATS,

³ See section 17 of the Prescription Act 68 of 1969 and Khan v Shaik 2020 (6) SA 375 (SCA) at para 23.

who also deposed to its answering affidavit in the litigation before me) said that the University was “incorrect” about the legal position which it thought justified its decision to cancel the long lease.

8.4 Wamjay then says that these documents reveal that both ATS and Wamjay, acting together, held the view that the cession agreement was operable and that they intended to perform in terms of it. Importantly, Wamjay then says that “[i]t also makes clear that if the Constitutional Court found that the Cession Agreement was inoperable, then Wamjay and ATS had agreed that Wamjay would reclaim the sum it paid”. It says that this stance was “recapitulated” in the Constitutional Court’s decision – in paragraph 37 of the judgment, Khampepe J refers to the fact that, in that Court, Wamjay and ATS submitted that “Wamjay would reclaim this amount if it were found that the rights were incapable of cession, and this would prejudice ATS. Therefore, even if this Court finds the rights to have been personal to ATS, [the University] should be estopped from relying on this.”

8.5 Wamjay then says that the consequence of everything summarised above is that the inoperable nature of the cession agreement was only ascertained when the Constitutional Court handed down its judgment because, before then, both parties held the view that the cession agreement was operable. Wajmay says that the “operability” of the cession agreement was not a legal conclusion, but a fact which only “crystallised” once the Constitutional Court handed down its judgment. It says that it “was only at this point that Wamjay’s cause of action against ATS became complete, because it was only on this date that the last of such facts [necessary to disclose a cause of action] occurred.”

8.6 Also of importance, Wamjay says that, even if the cession agreement had become inoperable before the Constitutional Court's decision:

“Wamjay did not know, or could not reasonably have known that this was the case, as both Wamjay and ATS – the parties to the Cession Agreement – implied through conduct (that being their joint position in the UJ litigation) that the Cession Agreement would only become inoperable once the UJ litigation was finally decided. This is what sets this matter apart from typical adversarial litigation, where the two disputing parties adopt different stances”.

8.7 Wamjay says that it, “acting reasonably”, would not have known that ATS viewed the cession agreement as being inoperable before the outcome of the litigation “since ATS fought tooth-and-nail, alongside Wamjay, in disputing this fact from the High Court up until the Constitutional Court” and that Wamjay therefore only “learned of its claim against ATS in June 2021, after the Constitutional Court's judgment”.

8.8 Wamjay then adds further layers to its arguments summarised above.

8.8.1 First, it says that, if this Court were to interpret section 12(3) of the Prescription Act 68 of 1969 (“**the Prescription Act**”) in a way which results in Wamjay's claim having prescribed, “then the interpretation is unconstitutional because it limits Wamjay's right of access to court under section 34 of the Constitution”.

8.8.2 Secondly, it says that ATS's submission before the Constitutional Court that, if the University's position was vindicated, Wamjay would reclaim the R6.5 million “amounted to an interruption of the running of prescription”.

8.8.3 Thirdly, it says that, if this Court is against Wamjay on the issues summarised above, ATS is estopped from raising the plea of prescription because it represented to Wamjay that it considered the cession agreement to be valid and Wamjay, in reliance on this representation, decided not to pursue a claim against ATS. It says that ATS's attempt to recant the stance it took in the Constitutional Court – ie, that it would be prejudiced if the University's claim was upheld because Wamjay would reclaim the money – shows that it is not acting in good faith. Wamjay says that this strengthens its estoppel argument, because estoppel is a "remedy of equity".

- 9 ATS did not seek leave to file a further affidavit to deal with any of the allegations summarised above. It chose instead to address them in argument. It is the stance of the parties in argument to which I now turn. In doing so, I hope to avoid a turgid recitation of what each party said in its heads of argument. Rather, I shall focus on ways in which the arguments summarised above were presented differently – to the extent relevant – to what I have set out above.
- 10 In its heads of argument, Wamjay takes the stance that ATS's only defence to the claim to the return of the funds is a defence of prescription. In other words, Wamjay interprets ATS's stance as disclosing no defence on the merits, if the prescription defence is dismissed. As I mention again below, this has some significance, particularly when it comes to the defence of non-enrichment.
- 11 On the issue of prescription, Wamjay's focus in its heads of argument is mainly (a) on its contention that the University's contestation of "a notarially registered long lease (which is a real right)" is a question of fact, not law and (b) until the registration of the

deed of cession was set aside by a court, ATS had no rights over the premises but Wamjay did. In other words, Wamjay takes the view in its heads of argument that it could only have brought a claim for the return of the money once the registration was set aside. Since this was only finally effective pursuant to the Constitutional Court's decision, the date of that decision is when prescription began to run.

12 Wamjay places emphasis, in its heads of argument, on the question of when it could be said to have had a complete cause of action. Taking as its premise that prescription only begins to run when the cause of action of the plaintiff/applicant is complete, it says that it could not have sued ATS when the University purported to cancel the lease agreement in 2012. This is because the “notarially registered deed of lease . . . [remained] intact despite the attempt” of the University to cancel it. In support of this argument, Wamjay says that a notarially registered long lease gives the holder of the right protection against all third parties, including the owner of the land. It says that a duly registered long lease gives the lessee a contractual real right “which only ceases at the termination of the lease, or by order of court, as in this case.” It says that, “as a question of fact”, Wamjay was the registered lessee until the Constitutional Court handed down its judgment.

13 The arguments summarised above were clearly intended, at least in part, to meet ATS's contention in its answering affidavit that knowledge (or lack thereof) of legal rights and/or the correct legal position is irrelevant to the question of when prescription starts to run. But Wamjay also makes a point which is subtly different. It says that its cause of action was not complete until the Constitutional Court gave its order because, had it tried to bring this claim before then, it would have been met with an exception or defence to the effect that ATS had performed in terms of the cession agreement as

evidenced by the registration of that cession in the deeds office. Relying on authority to the effect that a perfected cause of action requires a cause of action which is “immediately” claimable, Wamjay says that this requires (a) that the creditor is in a position to claim payment “forthwith” and (b) the debtor does not have a defence to the claim for immediate payment. It refers to authorities for the proposition that the cause of action must be complete, in the sense just described, when the summons is issued and served.

- 14 With reference to various normative values – including section 34 of the Constitution but also the underlying purposes of the rules of prescription – Wamjay says that section 12(3) of the Prescription Act must be interpreted narrowly. I do not describe these arguments in detail here, but they have some relevance to what I say below.
- 15 Wamjay persists in its heads of argument in its contention that prescription was interrupted. But it explains its position a little more clearly than in its affidavits. It relies on section 14(1) of the Prescription Act, which provides that an “express or tacit” acknowledgment of liability interrupts prescription. It says that ATS’s statement in the Constitutional Court that, if the University was successful, Wamjay would reclaim the money and that it would accordingly be prejudiced, was a tacit acknowledgment of liability. Wamjay, in reliance on section 14(2), says that prescription was interrupted by this acknowledgment but began to run again from the date of the hearing at the Constitutional Court.
- 16 Lastly, on the issue of prescription, Wamjay persists in relying, as an alternative to everything said above, on estoppel. Since I have already explained (see paragraph above) the basis of Wamjay’s contentions in this regard, it is unnecessary to address the

topic here. I return to it below, when addressing the availability of the prescription defence to ATS.

- 17 On the merits, Wamjay explains in its heads of argument that it relies on two enrichment claims: the *condictio ob causam finitam* and the *condictio indebiti*. Wamjay says that it satisfies all of the elements of each of these enrichment claims and that ATS has conceded all of the facts which make up these elements. It also reiterates its view that, in the answering affidavit, ATS makes clear that its only defence to the claim is based on prescription. The implication of this being that, if the defence of prescription is dismissed, ATS has no defence on the merits.
- 18 In its heads of argument, ATS says that it did not concede the merits of Wamjay's claim. It says that Wamjay has failed to allege and prove the essentialia of the enrichment claims on which it relies and that, in any event, there are material disputes of fact on the papers which preclude Wamjay from being granted the relief which it seeks.
- 19 To deal first with its defences on the merits, only because this is a convenient place to do so: ATS says that, while it does not necessarily agree with Wamjay about which specific enrichment claims apply, Wamjay has a bigger difficulty. In all enrichment claims, there are four requirements which must be satisfied. I deal with these more fully below. It points to the decision in *Kudu Granite*⁴ as authority for the proposition that, if a claimant satisfies the four requirements of an enrichment claim (plus the additional requirements of the particular condictio), the court will award the lesser between the claimant's enrichment and the defendant's impoverishment. It says that there is insufficient evidence before the court to establish, on motion, the quantum of ATS's

⁴ Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 (5) SA 193 (SCA).

continued enrichment. It refers to the evidence in the answering affidavit that (a) ATS did not retain the money paid to it by Wamjay (b) had no obligation to do so and (c) even if it had a moral obligation to repay the money, it was unable to do so. It says that Wamjay's allegation that ATS has "retained" the R6.5 million, in the sense of being "in possession" of it, is a bald assertion unsupported by primary facts and that, in the absence of primary facts, Wamjay's conclusion does not constitute evidentiary material and should be ignored. It says that, at best for Wamjay, there is an irresolvable dispute of fact on the issue of ATS's enrichment – which is to be assessed at the date on which the enrichment claim was instituted.

20 With reference, again, to *Kudu Granite*, ATS says that this feature – that a plaintiff is only entitled to the lesser of its impoverishment and the defendant's retained enrichment at the commencement of the claim – distinguishes enrichment claims from claims for restitution under the law of contract. It says that the only exception to the rule that only retained enrichment is actionable is where the defendant parts with its enrichment in bad faith – ie, where it knows, or ought to have been aware, that it had been enriched *sine causa*. ATS says that there is no evidence before this Court that ATS parted with the R6.5 million in bad faith. It says that, on the contrary, both parties honestly believed that the amount was lawfully owing by Wamjay.

21 ATS's main focus in its heads of argument is on the issue of prescription. In my view, a fair summary of its position is the following:

21.1 With reference to various authorities, including the seminal decision of the Constitutional Court in *Mtokonya*,⁵ ATS argues that the invalidity of the cession agreement is not a fact falling within the contemplation of section 12(3)

⁵ *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC).

of the Prescription Act. ATS says that the question whether an agreement is invalid is, on the settled authorities, a question of law. It says that the premise of Wamjay's argument is that the cession agreement was valid until the Constitutional Court rendered it invalid. It says that the correct position, rather, is that the Constitutional Court confirmed that it was invalid from the time of its conclusion. ATS persists in its alternative argument that, at the latest, prescription began to run when Victor J handed down her judgment.

- 21.2 ATS says that Wamjay's argument about the implications of the registration of the long lease (see paragraph above) is new (ie, in the sense of not having been pleaded) but responds to it (albeit reluctantly) anyway. ATS argues that Victor J's order (which was revived by the Constitutional Court on appeal against the decision of the SCA) that the Registrar had to cancel the registration of the long lease flowed simply from the underlying conclusion that the University's decision to cancel the lease in October 2012 was lawful. The simple point which ATS seeks to make is that Wamjay acquired its rights from the cession agreement, which in turn relied on the validity of the underlying lease agreement. Registration did not, and could not, confer any rights over and above these rights – as ATS puts it, the Registrar of Deeds “cannot, by the mere endorsement of a lease agreement [a reference to the endorsement on the long lease of the deed of cession], transfer rights from one person to another where rights are incapable of transfer”. This carries the necessary implication that, once the lease agreement was validly cancelled, Wamjay's cause of action was perfected. Since the lease was validly cancelled in October 2012, that is when the cause of action arose.

21.3 On Wamjay's argument that there was a tacit acknowledgment of liability on the part of ATS (see paragraph above), a simple summary of ATS's position is that Wamjay has failed to plead sufficient facts to make out such a case. It has two main difficulties with Wamjay's reliance on ATS's stance in the proceedings before the Constitutional Court. First, it says that there is insufficient identification of an actual representative of ATS who gave the apparent acknowledgment of liability. Secondly, it says that a statement by ATS that Wamjay would reclaim the money is not the same as an acknowledgment of liability because that would require proof of a subjective intention on the part of a representative of ATS to concede the merits of the claim.

21.4 On the issue of estoppel: having seemingly criticised Wamjay for raising the issue for the first time in reply, ATS says that, even if Wamjay can overcome the problem that it has failed to plead any primary facts to support the contention that ATS represented that the rights in the lease agreement were capable of cession, it has a bigger problem. ATS says that even if such a representation was made, it was an opinion of law and not a representation of fact. Furthermore, it says that, even on Wamjay's version, no representation was made because the parties acted together; in other words, the parties jointly decided to defend the litigation and neither made a representation to the other. It says that, in litigating for all of these years, Wamjay did not rely on any representation by ATS, but rather on its own view that the University had no right to cancel the lease. There is therefore no case, based on primary evidence, that there was any causal connection between anything which ATS said and Wamjay's prejudice. Lastly, it says that Wamjay has failed to provide any

primary evidence to support its contention that its reliance on ATS's representation was reasonable. It says that since any such reliance would be prima facie unreasonable, that is a further fatal obstacle to the reliance by Wamjay on estoppel.

THE ISSUES

- 22 I have set out the arguments of the parties in some detail because it is important, in my view, to be careful about identifying the true issues in this case. The parties at times have spoken past each other, as a result, it is not in my view necessary for me to resolve many of their arguments to determine the appropriate order to make.
- 23 I was initially, as I conveyed to the parties in oral argument, quite interested in the submission of *Mr Alli*, who appeared for Wamjay, about the consequences of registration. However, none of the authorities cited by either of the parties authoritatively deals with the precise legal consequences of registration. We all know that a long lease is a real right, but what precisely does that mean in the context of a case like this?
- 24 Having considered the issue in more detail, and having found what authorities I could, I agree with *Mr Both* (who appeared together with *Mr Louw* for ATS) that the issue of registration is a red herring (if I may be forgiven some liberal paraphrasing). It seems to me that the purpose of registration – and indeed, the distinction between personal and real rights – is to put third parties on notice about rights which transcend mere personal rights. For example, a bank may have been interested in knowing (let us say, in 2010) that the University's land was encumbered by a long lease, because this might have been relevant to its capacity to serve as security for a loan. Or a potential purchaser of

the premises might have been interested in knowing about the existence of the long lease because it would have had major implications for how it could deal with the property. But I agree with *Mr Both* that the mere act of registration cannot serve to determine the underlying validity of an agreement between parties.

- 25 The best way of looking at this, in my view, is to consider two separate situations. The first situation is one such as the one arising in the present case, where an entity seeks to cancel a long lease agreement because it says that its counterparty has repudiated it. That argument goes to the underlying validity of the agreement itself; and, if the argument succeeds, it will follow as a matter of course that the long lease's registration should be cancelled. No independent argument would have to be advanced about the validity or otherwise of the registration – the fate of registration would flow axiomatically from the conclusion about the validity (or invalidity) of the underlying agreement. On the other hand, if a party contended that a right had been invalidly registered because of some non-compliance with formalities – or even, especially taking into account our modern administrative law, some sort of reviewable error as to the substantive requirements of registration – there would be a separate cause of action relating to the validity of registration. It would have to be assessed on its merits and might well (but not necessarily so) have nothing to do with the validity of the underlying agreement. In the former case, it seems to me that the fact of registration is not relevant to the validity of the underlying cause of action; which carries the corollary that the fact of registration is not an obstacle to a claim based on the underlying invalidity of an agreement.

- 26 I also agree with *Mr Both* that Wamjay has pleaded insufficient facts to make out a defence of estoppel or a claim that prescription was interrupted by an acknowledgment

of liability. Unlike ATS, I have no difficulty with Wamjay raising the issue in reply for the reasons I have already given (see paragraph above). So, had Wamjay made out a case for estoppel in the replying affidavit, which was strong enough to call for a response, the appropriate course of action would have been for ATS to seek leave to file a further affidavit to deal with the issue. In that situation, its failure to do so would have caused prima facie evidence to be transformed into uncontroverted evidence,⁶ resulting in the estoppel defence succeeding.

27 In this case, however, I agree with *Mr Both* that Wamjay did not plead sufficient primary facts to make out a case of estoppel. Viewing the case from an aerial view, and taking into account ATS's stance from the beginning of the litigation, there may well have been sufficient facts to make out such a case. However, I am limited to what was adduced in evidence before me.

28 In its replying affidavit, Wamjay does not allege that ATS represented to it that it would not take the prescription point in due course. It characterises ATS's representation as being that the cession agreement was "operable". But in order to make out a case of estoppel in relation to the prescription defence, Wamjay had to allege and prove that ATS represented to it (even by conduct, if not expressly) that it would not pursue a prescription defence in due course and that Wamjay acted to its detriment by not instituting a claim timeously based on this representation. Wamjay does not make these allegations.

29 To the extent that its replying affidavit may be construed very generously to have made these allegations, they are not supported by evidence of any representation made by ATS. The high watermark of the evidence is that ATS said to the Constitutional Court

⁶ Ex Parte Minister of Justice: In re R v Jacobson and Levy 1931 AD 466 at 478.

that, if the University's *delectus personae* argument succeeded, Wamjay would reclaim the money paid.

30 Wamjay has annexed the affidavit filed by ATS and Wamjay jointly in the Constitutional Court, and deposed to by the same deponent as ATS's affidavit in this court, to its replying affidavit. I have read that affidavit and nowhere in it does the deponent refer to this consideration⁷ – ie, that Wamjay would be able to reclaim the R6.5 million in due course. So, it would seem to have been an argument advanced by counsel. More evidence would have been required to attribute this contention to ATS itself, and more still to substantiate the contention that ATS represented to Wamjay – at the material time (which would have been, on ATS's version, in 2012) – that it would not pursue a prescription defence if the cession agreement was ever shown to be a nullity. Even if ATS had made such a representation in the answering affidavit in the Constitutional Court, it would have been too late to found an estoppel argument – that affidavit was prepared and signed in 2020, long after the claim would have prescribed. No evidence of any representations made at the material time – ie, within 3 years of the notification by the University of its decision to cancel – is before me. These evidentiary gaps are also fatal to Wamjay's argument that there was an acknowledgment of liability interrupting prescription.

31 For reasons which will hopefully become apparent shortly, I do not see any merit in focusing on whether the unenforceability of the cession agreement was a fact, or a conclusion of law. It seems relatively clear that it was the latter, but the entire issue is not helpful in determining whether to uphold the prescription defence. I agree with *Mr Alli* that the remaining relevant question to determine, when it comes to prescription, is

⁷ It appears that there are some pages missing from the version of the affidavit annexed to Wamjay's replying affidavit. Nothing turns on this because, as I note in this paragraph, even if a representation had been made in that affidavit, it would have been too late to be used against ATS in an estoppel argument.

when Wamjay's cause of action was perfected. In other words, when was the moment at which ATS's alleged debt to Wamjay was "immediately claimable"? Since the estoppel argument and the contention that prescription was interrupted must fail, the issue of prescription turns solely on this issue.

- 32 When it comes to the merits, there is no real dispute about which specific enrichment cause of action applies, although I should address that very briefly. The main issue is whether Wamjay has established that ATS was enriched; and the corollary of this, which is whether the defence of non-enrichment is applicable.

PRESCRIPTION

- 33 ATS argues that, generally in claims under the *condictio indebiti*, prescription begins to run from the date on which the plaintiff made the erroneous payment.⁸ This precise date is not on the papers, but as ATS points out, it would have been during or before October 2011, because that is when the notarial deed of cession was registered.

- 34 Despite the general rule on which ATS relies (ie, as described in paragraph above), there will be cases in which prescription begins to run on a later date. There are cases in which everything turns on the application of section 12(3) of the Prescription Act. It provides:

“A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”

⁸ Relying on *Mosam v De Kamper* 1964 (3) SA 794 (T) at 798C-G and *Van Staden v Fourie* 1989 (3) SA 200 (A) at 215.

- 35 The parties focused almost exclusively on this provision, and the debate largely centred on the question whether the Constitutional Court’s order confirmed a pre-existing legal conclusion (that the cession was a nullity because the long lease was lawfully cancelled) or determined a factual matter (that the registration of the long lease should be set aside).
- 36 However, it seems to me that section 12(1) of the Prescription Act is the provision which is more appropriately considered in the light of the parties’ arguments. Wamjay argues that prescription only begins to run when a debt is “immediately claimable”. Section 12(1) provides that prescription begins to run “as soon as the debt is due”. In *Njongi*, the Constitutional Court made clear that the principle that a debt must be “immediately claimable”, before prescription begins to run, flows from this provision.⁹ Therefore, everything turns on when ATS’s debt to Wamjay should be considered to have been immediately claimable (as envisaged by section 12(1)) and not on whether Wamjay knew, or ought to have known, all of the facts underlying its claim by a particular date (as envisaged by section 12(3)).
- 37 It seems to me that, despite the authorities on which ATS relies (see paragraph above and the references in the footnote in that paragraph), it cannot be concluded without more that a debt under the *condictio indebiti* always falls due from the moment when the erroneous payment was made. It is therefore necessary to consider in more detail the date on which Wamjay could have instituted proceedings against ATS to recover the R6.5 million on the basis that, when instituting this claim, Wamjay would have been able to contend that ATS was obliged to repay the money immediately. Put differently, prescription began to run when Wamjay’s cause of action was complete. I

⁹ *Njongi v MEC Department of Welfare Eastern Cape* 2008 (4) SA 237 (CC) at paras 41 to 43.

am mindful of the authorities which remind us that section 12(1) of the Prescription Act is concerned with “debts” and not “causes of action”.¹⁰ However, it seems to me to be useful to see the issue in this way – ie, to consider when the cause of action would have been complete – because a debt cannot be “immediately claimable” if the plaintiff’s cause of action is incomplete in any way.

38 As I have noted above, the issue of registration seems to me to be a red herring. The main issue is to determine the underlying legal relationships. In particular, the contractual relationship between the University and ATS, on the one hand, and ATS and Wamjay, on the other.

39 As far as I can tell, the legal issue relating to prescription directly raised by this case is novel. However, the multi-party relationship arising in this case is not uncommon at all. This is especially true in the context of the law of sale and lease. In this regard, it is illuminating to see how our courts have dealt with the issue of when a debt is claimable in cases involving these types of relationship. The decisions which I discuss below all were determined under the law of contract, and not unjustified enrichment. But, for reasons I explain below, they are of considerable assistance in resolving the prescription issue arising in this case.

40 Before discussing the cases, it might be helpful for me to explain precisely what I mean by “multi-party relationships”. It happens often in disputes with a setting in contracts of sale or lease, that the validity and enforceability of a contract between A and B is implicated by the rights of a third party. Sale offers the best example, in many respects, because the true owner of property has an uncontroversial right to vindicate it. So, it

¹⁰ See *Unilever Bestfoods Robertson's (Pty) Ltd v Soomar* 2007 (2) SA 347 (SCA) at para 18 and the authorities cited there.

might happen that X, a thief, steals F's car and sells it to a dealer A. The dealer A may or may not know that the car is stolen, but nothing turns on this. A sells the car to B, also a dealer in cars, who unquestionably has no idea that the car was stolen. B sells the car to C who also unquestionably does not know that the car was stolen. Sometime after C buys the car, the extensive investigations of the police determine its location. F immediately asks C to return his car, and C understandably refuses because she says that she bought it in good faith. F then brings a *rei vindicatio* to reclaim the car. After F succeeds (either because C, seeing the writing on the wall, concedes or because the court grants the relief), C wishes to claim damages from B for breach of their contract of sale.

41 The same problems arise in the law of lease – whether in relation to movable or immovable property, although there are important differences – as the present case demonstrates. It will often happen – perhaps most commonly in the case of sub-leases of commercial property – that the fulfilment of the purpose of a contract of lease between A and B is dependent on the validity of a contract between B and C. So, our courts have been required to develop detailed principles, in the context of the law of lease, to determine A's rights when the underlying relationship between B and C comes to an end.

42 All contracts of sale have an implied (I use the word advisedly because it arises by operation of law) warranty against eviction, unless excluded expressly by agreement for some or other reason.¹¹ This simply means that, when B sells a car to C, B warrants (whether the agreement provides for this or not) that C will be given undisturbed possession of the property. This is because one of the immutable features of ownership

¹¹ See, for example, *Van Zyl v Standard Bank of SA Limited* 2013 JDR 1914 (GSJ) at para 26.

is the right to deal with the property as the owner deems fit (subject, of course, to the plethora of modern regulations which limit the right of ownership) and to possess the property at the expense of the rest of the world. If the subject of a contract of sale (ie, the *merx*, as it is often described especially in the earlier cases, given the Roman Law provenance of these principles) does not in fact belong to the seller, then he or she cannot ensure that the buyer will be given this undisturbed, unlimited right of possession. This is why the simple statement in a contract that B is the owner of a thing which she wishes to sell to C carries an implied warranty that no one will take the property from C. In the earlier cases especially, this (ie, taking the property away) was described as “eviction”. Because of the development of language this term is potentially confusing these days – most modern students of the law probably understand the term in the narrower sense of the act of a landlord in expelling its tenant from its property.

- 43 The precise question which interests me, because it unlocks the answer to the “immediately claimable” question in this case is: if either a buyer or a lessee is dispossessed of the subject of the underlying agreement, then at what stage may he or she sue the seller or lessor?
- 44 The original approach, inherited from Roman and Roman Dutch law, was commendable in its simplicity. The concept “warranty against eviction” was taken literally, with the corollary that a bona fide possessor or occupier of property who was the victim of a breach of the warranty could only sue when actually evicted. This led to a development of the principle during the 20th Century, in which the exigencies of modern life prompted certain qualifications to this simple rule.¹² The main issue, which the courts had to address, was the potential inconvenience or unfairness in requiring the

¹² This development is discussed briefly in *Lammers and Lammers v Giovannoni* [1955] 4 All SA 59 (A) at 60-1 and in more detail in *Olivier v van der Bergh* 1956 (1) SA 802 (C) at 804-5.

innocent possessor to wait for actual loss of possession before attempting to vindicate his or her rights.

45 Under the modern law of sale, the approach appears to be that a bona fide purchaser who is faced with a claim from a third party cannot, on mere receipt of the claim, sue the seller based on a breach of the warranty against eviction. However, he or she is also no longer required to wait for actual eviction. If the purchaser, in addition to alleging and proving that a demand has been made, proves both that the third party's title is legally unassailable and that he - the purchaser - has duly admitted the demand and legally bound himself to comply with it, he may bring a claim "even though he has not yet actually complied with the demand made upon him by the third party."¹³

46 When it comes to lease, it seems that the position is not, under the modern law, significantly different. But this is not entirely clear because there is much less caselaw concerning leases in this context. While this initially surprised me, it does, on reflection, make sense. When a *merx* is removed from a buyer, there is almost always quantifiable loss. When a tenant is forced to move on because of the invalidity of the landlord's tenure, it will often be possible for it to mitigate its loss by finding alternative premises – and such loss that it could prove would often not be worth the hassle and expense of litigation. In any event, even if the modern law of sale and lease has largely converged, there are some important differences which are relevant to the question of when a debt in this context is "immediately claimable".

47 In *Donniger v Thorpe*,¹⁴ the respondent (T) concluded an agreement with the appellant (D) in terms of which T let his farm to D for a period of five years, with an option to

¹³ See, for example, *Olivier v van der Bergh* (supra) at 805.

¹⁴ 1930 TPD 839.

renew the lease for a further four years and eleven months. Unbeknown to D, when he concluded the agreement, the farm was bonded to both the Land Bank and Standard Bank and T was in arrears. At first, it seemed that the Land Bank was intent on selling the farm in execution – in those days it was able to do so without judicial intervention. But after D’s attorney wrote to the Land Bank to ask it to recognise the lease agreement – ie, sell the property subject to the lease – the Bank agreed to hold off on the sale in execution. It was willing to do so subject to certain conditions, one of which (that the land was “beneficially occupied and worked by a European”) was a regrettable feature of the times, to put the point somewhat blandly.¹⁵ The material conditions, for our purposes, were that (a) T paid the necessary instalments promptly and (b) that the lease was subservient to the bond so that if it were ever necessary to sell the property in execution in the future, it would be sold free of the lease.

48 Despite the Land Bank’s willingness to accommodate D, D decided to vacate the property. T sued D for non-payment of rent and, in due course, supplemented his claim with a claim for damages. For our purposes, the defence pleaded by D which is relevant is that T had fraudulently leased the premises to D while knowing that it was a condition of the bond that T obtain the written consent of the mortgagor. This, according to D, justified the cancellation of the lease agreement.

¹⁵ I only mention this condition at all because it always strikes me as somewhat surreal to read old cases in which the attitude of the judges hearing the matters, and of course the litigants, was so different to what is expected today. On the one hand, I see no point in getting unduly exercised by the attitudes often reflected in the pre-1994 caselaw, or to judge them by today’s lights. On the other hand, I think it is important to be upfront in identifying unpalatable features of the historic caselaw. This is because, for better or for worse, a deliberate decision was made during our transition to retain but, if necessary, develop our common law. Once that is so, then it seems to me that we should be clear about which parts of the old cases retain some value and which do not. If we simply cite these cases without comment, then we might be understood to treat the anachronistic characteristics as unimportant. If, on the other hand, we become so outraged about the attitudes reflected in them that we cannot derive any value because of our distaste, then much of the old jurisprudence would become unusable. As the present case demonstrates, that would be unfortunate because there is a lot to be gained from the old cases, especially when it comes to areas of law heavily influenced by our Roman and Roman Dutch law tradition – which is a major chunk of our common law.

49 Although it has become unfashionable to engage in detailed discussions of the old authorities in judgments of our courts, I find it helpful to quote *Donninger's* discussion of those authorities because it demonstrates an important difference between sale and lease. In dealing with the question whether D was entitled to cancel the lease, the court said the following:

“Counsel relied on a passage in Wille's *Landlord and Tenant* (2nd ed., p. 136) where the author was of the opinion that the landlord's guarantee against legitimate disturbances lay if the tenant were dispossessed of or disturbed in the enjoyment of the property leased by a judicial decree, or if it was inevitable that he would be dispossessed or disturbed. The author pointed out that while there was little authority relating to the landlord's guarantee, *Voet* was of the opinion that a tenant who had been evicted could sue the landlord for damages in the same way as a purchaser could sue the vendor, the reason being that *locatio* rests on the same rules of law as sale. The author proceeds to point out that Pothier is the only writer to develop the subject of the landlord's guarantee independently of sale. While Pothier's treatment of the two subjects, as the author points out, closely corresponds, Pothier does draw a distinction. Pothier, in his *Contrat de Louage*, sec. 91, says: "This action of guarantee *ex conducto* differs from the action of the guarantee *ex empto*, in that the latter is available as soon as the purchaser is summoned to quit: whereas the *actio ex conducto* is not available until the lessee has been compelled to quit his enjoyment, or his enjoyment has suffered some damage. This distinction results from the difference between a purchaser and a lessee or tenant.

The reason is then given that the purchaser is in possession and any action is directed against him. He defends the action either himself, or through the seller, who is considered under the guarantee to be obliged to undertake the defence --- see *Nunan v Meyer* (22 SC 203). The lessee, on the other hand, says Pothier, does not properly acquire possession, but only the right of use and enjoyment, and any action would be against the lessor.”¹⁶

50 This summary might not capture the full nuance when it comes to sale. In particular, it might be somewhat simplistic to say that, in the law of sale, the innocent purchaser could sue the seller as soon as a third party instituted a claim for restitution. This is not to say that the court in *Donniger* expressed the position incorrectly – it is that there is some complexity in determining what is meant by the term “eviction”, in so far as it

¹⁶ See *Donniger* (supra) at 843.

was understood by the Roman Dutch law authorities.¹⁷ But, in any event, the extract helpfully demonstrates an important distinction between sale and lease. It is that, in lease, the lessee does not enjoy possession in the legal sense. Possession and the right to use and enjoyment are different things. Even in the case of a long lease – which creates a type of real right – the lessee’s rights are far more dependent on the position of the lessor than the rights of a buyer of property. Taking into account modern practicalities – which largely has led to the development of this area of law over time – it makes sense that the courts are much readier to recognise the right of a buyer to institute a claim early on. The seller may long-since have departed the scene, and it would not be practical to require the buyer, in all cases, to look first to the seller to defend any claim from a third party. This is not the case in the context of lease, where the lessor generally remains in the picture – even, although sometimes perhaps less so, in cases involving long leases.

51 In any event, the Court in *Donniger*, having made the remarks which I have quoted above, responded to an argument advanced by D that, even though the sale initiated by the Bank was cancelled, the Bank’s steps in initiating the sale were sufficient to qualify as “judicial eviction”. The Court rejected the argument, pointing out that D’s “enjoyment, however, had not been disturbed, and without such disturbance or eviction the passage from Pothier shows that the lessee is not entitled to damages, nor inferentially to vacate”.¹⁸ Despite saying this, the Court appears to have been willing to accept that, even if possession (and, hence, enjoyment) had not been disturbed, D might have been entitled to cancel the lease if dispossession was inevitable. But it found on the facts that dispossession was not inevitable, and so held that D had not been entitled

¹⁷ See the detailed discussion in *Olivier v Van der Bergh* (supra) at 805.

¹⁸ See *Donniger* (supra) at 843-4.

to cancel the lease. This conclusion, as the short extract which I have just quoted in this paragraph makes clear, would apply with equal force to the question of whether D would have been able to sue T for damages arising from breach of the lease agreement at the time when he elected, instead, to cancel and vacate.

52 The judgment of Didcott J in *Garden City Motors*,¹⁹ casts more light on the concept of “eviction” in the context of the warranty against eviction in contracts of sale. For our purposes, though, it is most helpful in the distinction which it draws between the application of the warranty against eviction in sale cases and in lease cases. Didcott J explained the difference as follows:

“The warranty against eviction is a feature of leases, to be sure, as well as sales. But eviction does not bear an identical meaning in both settings. Nothing less will do, when it comes to a lease, than interference with the lessee’s use of the property itself. That was decided in *Donniger v. Thorpe* 1930 T.P.D. 839.”²⁰

53 *Donniger* appears to have been uniformly interpreted as holding that a tenant must be actually evicted before being entitled to sue the lessor for breach of the warranty against eviction.²¹ As I noted briefly above, the Court in *Donniger* appears to have been open to the idea that a tenant could sue a lessor for breach of the warranty when eviction was “inevitable”. If that is so, then it would bring the law of lease much closer to the law of sale. But is unclear, at least to me, whether the court in *Donniger* was actually willing to go that far. It rejected the argument of inevitability on the facts, which means that it may have simply been willing to assume that inevitability was sufficient.

54 If one were to read only *Donniger* and *Garden City Motors*, one would probably conclude that, when it comes to lease, the lessee may only sue the lessor for damages

¹⁹ *Garden City Motors (Pty) Ltd v Bank of the Orange Free State* 1983 (2) SA 104 (N).

²⁰ See *Garden City Motors* (supra) at 109.

²¹ In addition to the statement in *Garden City Motors* (supra), see LAWSA Lease 3 ed at para 87.

on actual eviction. However, *LAWSA*, when dealing with the position in the law of lease as opposed to sale, says the following:²²

“The lessor is in breach of the obligation only if the lessee is actually evicted. If the lessee is threatened with eviction he or she should remain in possession, or occupation, of the property let, and take reasonable steps to notify the lessor of the threatened eviction to allow the lessor the opportunity to discharge his or her obligation to protect the lessee in possession or occupation. If, having been given due notice, the lessor fails to come to the lessee’s assistance, the lessee must nevertheless mount a strong defence (*virilis defensio*) to protect his or her possession. If the lessee fails to notify the lessor of the threatened eviction, or, if, despite receiving such notice, the lessor fails to defend the lessee against the threat, the lessee’s failure to defend himself or herself against the threat, will impose on the lessee a burden of proving that the third party’s claim was indefeasible to succeed in an action against the lessor for recovery of damages.”

55 This summary, if correct, suggests that the law of sale and the law of lease are almost identical when it comes to the warranty against eviction. Glover, the author of the 4th edition of *Kerr’s Sale and Lease* says as much.²³ But there is a special emphasis in the law of lease. The underlying principle, as is uncontroversial in our modern law, is that the lessor does not have to be the owner of the property in question to conclude a lease agreement. The contract of lease (in the absence of an express or implied agreement to the contrary) confers a right of undisturbed use and enjoyment on the lessee of identified property. The warranty against eviction is simply a way of describing the proposition that the lessor has an obligation to ensure that this right is actually conferred. The reason why there has to be actual eviction is because it is only on actual eviction that this right is lost.

56 But the special emphasis, as I have put it, in the law of lease is that, because a lessee’s damages arise only if he or she loses his or her use and enjoyment of the property, a lessee is under no obligation to defend a claim of a third party to the property. The

²² See *LAWSA Lease* at para 87.

²³ See Glover *Kerr’s Sale and Lease* 4 ed (2014) para 18.5 p 413.

lessee is perfectly entitled to leave it to the lessor to do so. If the lessor then fails to take adequate steps to avoid the loss of the lessee's possession – by failing to defend the claim (or, as the obligation used to be described more commonly, by failing to put up a *virilis defensio*) – then the lessee has a claim in damages against him or her. The corollary of this is that, as Glover explains, “the lessee should give the lessor the best opportunity to avoid becoming liable for damages, which in turn means that the lessee should take all reasonable steps to notify the lessor of the institution of action. . . . A lessor who, having been notified, does not or cannot contest the claim, is liable to the lessee in damages.”²⁴ Glover relies on the decision of the CPD, as it then was, in *Loubser v Vorster and Vorster*²⁵ as authority for this proposition. I respectfully agree that *Loubser*, and perhaps to be more precise, *Loubser* read together with *Donniger*, is authority for this proposition.

57 Even though these principles were developed in terms of the law of contract, they have clear relevance to enrichment claims. This is because the underlying rationale of the principles discussed above applies with equal force to the notion in enrichment claims that the cause of action only arises when the plaintiff is enriched and the defendant is impoverished. What do I mean by the “underlying rationale”? I mean that, in the contract cases I have discussed above, the idea is that the plaintiff only suffers loss when it is clear that it has to part with the *merx* (in the case of sale) or the leased property (in the case of lease). This evolved from an initial approach in which actual eviction had to take place, to an approach in which the courts will treat a perfected claim as actual eviction (a proposition which is firmly established in the law of sale but which has shakier foundations in the law of lease, as shown above).

²⁴ See Glover Kerr's Sale and Lease op cit p 414.

²⁵ 1944 CPD 380 at 386.

58 But, of course, the important issue is that a perfected claim, in these specific multi-party contexts, only arises where it is clear that the defendant has no basis to resist the claim of the third-party to the return of the property. The defendant has a responsibility to raise every plausible defence to the third-party's claim. Our courts now, correctly, do not take such a technical view of this duty that they insist on allowing damages claims for the innocent possessor/lessee only after the defendant has tried and failed to raise these defences. They are willing to look at the relationships robustly to determine whether any plausible defences were, in theory, available to the defendant when determining whether a plaintiff's cause of action was perfected. But the premise remains that the plaintiff is only taken to have suffered loss once there are no defences available to the defendant to resist the third-party's claim for restoration of the property. Which, in the law of lease, means that there has to be actual or, arguably, inevitable eviction before a damages claim will arise. For essentially the same reasons, there could be no enrichment claim until the lessee is actually evicted (whether in the true sense or in the sense understood in the modern caselaw described above).

59 I appreciate that there is a fundamental difference between a contractual and enrichment cause of action. Wanjay's claim is necessarily based on the premise that the cession agreement is a nullity, even if it does not use this terminology in its founding affidavit. *Mr Both*, correctly in my view, pointed out that the main difference between contractual and enrichment causes of action in settings similar to the present case is that, in the latter, there are by definition no contractual terms to enforce.²⁶ On *Mr Both's* argument, none of the cases discussed above would be relevant to this case because, if an agreement such as the cession agreement in this case is a nullity from the outset, the warranty against eviction was never given. I return to this issue shortly.

²⁶ See *Kudu Granite* (supra) at para 15 and the authorities cited there.

60 I have described the present case as novel because I have been unable to find, and was not referred in argument to, any case in which the issue of prescription has arisen in the context of facts similar to those of this case. As I mentioned above, I agree with *Mr Alli* that the main issue, when it comes to prescription, is when Wamjay's claim against ATS could be said to have been "immediately claimable". In my view, it follows from my discussion of the caselaw above that the answer is this:

60.1 Most of the caselaw, especially in the context of sale (because there are far more cases on sale than on lease), focuses on when a party such as Wamjay is allowed to sue a party such as ATS. They mostly arise in a context where the Wamjay-like party has either sued for damages, arguably prematurely, or has vacated property, again arguably prematurely. And the debate then is whether, notwithstanding that it perhaps acted precipitously, it still has a defensible legal position (either as a claimant for damages or as a respondent/defendant in a claim for breach of contract).

60.2 But, what should not be overlooked is that, in the law of lease, there is clearly a duty on a party such as ATS to defend its right to possess the property. As I hope I have already made clear, this flows from the warranty against eviction.

60.3 When a third party (in the lease context it is most likely to be the owner, such as the University in this case, and in the sale context it could be the owner or, in modern life, it could equally likely be the authorities, such as the South African Revenue Service) claims possession of the property, an entity such as ATS must make an assessment of the strength of the legal claim. Unless the claim is "unassailable", the party such as ATS has an obligation to put up a *virilis defensio*. If it fails to do so, then it will be exposed to a damages claim.

In the law of sale this is subject to the qualification that the party such as Wamjay must first defend the claim itself, or demonstrate that it is unassailable. It is not at all clear that this obligation applies to the law of lease. But, either way, both options stem from the fact that, in principle, the party such as Wamjay only has a claim when actually evicted – the modern developments in the law having come about for reasons of practicality and based on an acceptance that it would often be unfair to require the Wamjay-like party to wait for actual eviction before protecting itself (either by claiming damages or vacating).

60.4 So far, so good. But conceptual difficulties arise from the “unassailable claim” component of the principles set out above. If the correct legal position is objective – which flows from *Mtokonya* and the other cases which adopt the same position – then it might be suggested that the question of unassailability is objectively determinable at the outset. This would carry the implication that an entity such as Wamjay is not only allowed, but obliged, to conduct an upfront assessment of whether its eviction is inevitable. And, if it concludes that it is, then it should not waste its time trying to persuade the party such as ATS to put up a *virilis defensio* – or itself try to put one up – and just proceed straight to its damage claim.

60.5 It must be recalled that *Mtokonya* was concerned with the proper interpretation of section 12(3) of the Prescription Act. Its conclusion is entirely understandable and, respectfully, unassailable because section 12(3) clearly refers to “knowledge of . . . the facts”. It would, in that context, be quite difficult to interpret section 12(3) to allow a claimant to await a determination

of a legal entitlement to bring a claim. In *Mtokonya*, the Constitutional Court did not concern itself at all with the question of what is meant in section 12(1) by the phrase “debt is due”.

60.6 In order for me to find that ATS’s debt to Wamjay arose, as envisaged by section 12(1) of the Prescription Act, in October 2012 when the University cancelled the long lease, I would need to find as follows: despite the duty of ATS to ensure undisturbed occupation (ie, use and enjoyment) of the premises, and despite the fact that this carried a further duty to take all reasonable steps to prevent interference from a third party, and despite the fact that our law only gives Wamjay a claim when it is actually evicted, it was necessary for Wamjay to make an upfront determination that it and ATS had no prospect of defending themselves against the University’s claim and proceed immediately to assert its rights against ATS.

60.7 In my view, to adopt such an approach would be inconsistent with the principles underlying both our law of lease and the Prescription Act itself. The caselaw makes clear that a party such as ATS is entitled to attempt to protect itself from a damages claim by trying to repel a third party which may prevent it from complying with its obligations to a party such as Wamjay. It cannot be correct that a party in that position should avail itself of this opportunity but then, when it fails, turn around and say “you should have sued me from the beginning”.

60.8 There is an unavoidable tension between the proposition that all questions of law are objective – and that, to take the present case as an example, the Constitutional Court in *University of Johannesburg* was merely confirming that

the cession was void from the outset, rather than determining it for the first time when giving its judgment – and the proposition that a lessor such as ATS is obliged to defend, vigorously, a claim which might disturb the lessee's use and enjoyment of the property. It seems to me that, at least when it comes to prescription, this tension must be resolved in favour of a party such as Wamjay in a case such as this. To hold otherwise would make it practically impossible for parties such as Wamjay to decide how best to protect their rights in the face of a claim such as the claim of the University in this case. At the very least, it would put them on the horns of a dilemma on which they – as the innocent parties with rights of occupation flowing from their agreements with their landlords – should not be placed.

60.9 This should also make clear why the fact that this is an enrichment claim, rather than a contractual claim, does not alter my findings when it comes to the issue of prescription. It strikes me as somewhat circular – at least when it comes to prescription – to suggest that a party such as ATS does not have to defend the warranty against eviction when the agreement is a nullity. It begs the question of whether there was a basis for the party in the position of ATS to resist the notion that the agreement was a nullity, and therefore could lawfully be cancelled.

60.10 To put the issue as plainly as I can. Not all enrichment claims arise in a contractual setting. However, we are concerned here only with those which do. The simple position is this: if the contract is valid and enforceable, the party such as Wamjay locates its rights there. If the contract is a nullity from the outset, it cannot confer rights, and so the party such as Wamjay is limited to an

enrichment claim. But the ultimate issue, when it comes to claims of innocent tenants under the law of lease, is whether the landlord has a plausible basis to defend the right of occupation. It seems to me that this approach must be applied in all cases – this regardless whether the ultimate legal conclusion, resulting from the failure of the landlord to do so, would be that the agreement between landlord and tenant was a nullity from the outset, or simply had been breached by the landlord. And, if it is indeed applied equally in all cases, the only real question is if there is some plausible basis for the landlord to defend the right of occupation. If there is, there can be no “actual eviction” until that attempt has been made, and has failed.

60.11 To the extent that there is any doubt about what I have said above, it seems to me that it must be resolved in Wamjay’s favour.

60.12 In *Makate*, the Constitutional Court made clear that the word “debt” in section 12(1) of the Prescription Act must be interpreted in a manner which is least restrictive of the right of access to court.²⁷ I recoil slightly at the notion that the answer to the question of when a debt is due could be a moving target, to be interpreted restrictively on the facts of each case. But, in the context of contractual damages, the point has been made that there cannot be an “all-encompassing answer as to when prescription begins to run . . . since the circumstances of each case will play a determinative role”.²⁸ This is undoubtedly sensible because the question of whether a debt was “immediately claimable” will unavoidably have to turn, at least to some extent, on the facts

²⁷ *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paras 90-91.

²⁸ *Burnett v Deloitte and Touche* 2010 (5) SA 259 (WCC) at para 27.

prevailing at the time when the party pleading prescription says that the debt arose.

60.13 Here we have a situation where:

60.13.1 The law of lease obliged ATS to put up a vigorous defence to the University's claim to avoid breaching the warranty against eviction.

60.13.2 The law obliged Wamjay to give ATS a chance to put up this defence before suing it. The only exception being, arguably (in the law of lease), if the University's claim was unassailable.

60.13.3 The proposition that the University's claim was unassailable is open to serious doubt in a context in which the SCA and Constitutional Court took different views on the issue. In this regard, I place particular emphasis on the Constitutional Court's reliance on evidence led as to the context as the basis of its decision. The Constitutional Court, in an endearingly self-deprecating way, tried to make out that there was nothing novel about its approach to interpretation.²⁹ However, the notion that interpretation is a unitary exercise in which language, context and purpose have equal weight is a new development, and the approach to the admission of evidence to interpret a contract,³⁰ newer still. Since the context played such a large role in the Constitutional Court's decision, it cannot be said to have been axiomatic from the outset that the University would be held to have been entitled to cancel the lease.

²⁹ See University of Johannesburg (supra) at para 63.

³⁰ See University of Johannesburg (supra) at para 67.

60.13.4 (I should note, as an aside, that in their answering affidavit in the Constitutional Court, ATS and Wamjay took the view that there was nothing novel in the case. They did so because they were clearly (I have not seen the University's application to the Constitutional Court but this is an inference which it is reasonable to draw) trying to cut-off the University's attempts to persuade the Constitutional Court to take up the case. However, it seems to me that the divergent approaches of the SCA and the Constitutional Court, and the way in which *University of Johannesburg* has been dissected in its aftermath,³¹ suggest that the outcome of that litigation was by no means inevitable.)

60.13.5 ATS, unlike the lessors and sellers in the cases I have mentioned above, stepped up to its responsibilities and vigorously defended the University's claim. ATS forcefully argued that the University had no right to cancel the lease. In doing so, it was attempting to discharge its obligation to put up a *virilis defensio* and to make good the warranty against eviction.

60.13.6 ATS could have taken the position, from the outset, that the agreement was a nullity and that putting up a *virilis defensio* would have been an exercise in futility. Had it done so, certain consequences would have necessarily followed. Wamjay would have had to make an independent assessment of whether this was correct and decide, in the light of this assessment, what path to follow. But,

³¹ See, for example, the excellent (if I may say so) unanimous judgment of Unterhalter AJA in *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd 2022 (1) SA 100 (SCA)*.

since ATS took the opposite position, it would be artificial to view the position with the full benefit of hindsight and find that, since the agreement was a nullity from the outset, Wamjay should have disregarded ATS's stance entirely.

60.14 In the light of these factors, I cannot find that ATS's debt to Wamjay was due at any time before the *virilis defensio* failed and Wamjay was "actually evicted". That has to be when the Constitutional Court handed down its judgment.

60.15 Lest I be accused of ignoring the provisions of the Prescription Act, I make clear again that my finding in paragraph above is based on my reading of section 12(1) of the Prescription Act and the question of when ATS's debt to Wamjay became due. It has nothing to do with the correct interpretation of section 12(3).

61 It follows that, for all of the reasons just given, the defence of prescription pleaded by ATS must fail.

ENRICHMENT

62 Having rejected ATS's prescription defence, it is necessary for me to consider the merits of Wamjay's unjustified enrichment claim.

63 The requirements which must be alleged and proved by a plaintiff in every enrichment claim are (a) that the plaintiff was impoverished (b) that the defendant was enriched (c) that the enrichment of the defendant was at the plaintiff's expense and (d) that the defendant's enrichment was without legal cause (or *sine causa*, to use the Latin). As is

well-known, our law of unjustified enrichment is made up of various actions, inherited from Roman law, described as *condictiones* or conditions. Each of these *condictiones* has elements which have to be established on top of the general requirements.

64 The view has often been expressed that there is no sense in retaining the *condictiones* and that a plaintiff should succeed in a claim based on unjustified enrichment if he or she can establish each of the four elements of the general claim.³² The philosophical premise of the argument, as I understand it, is that there is unlikely to be an appropriate circumstance in which the four requirements of the general action are satisfied but the plaintiff should be non-suited. This is because our courts have, anyway, essentially shown themselves to be willing to adapt the *condictiones* to every conceivable commercial situation in which enrichment might apply. However, as recently as last year, the SCA once again confirmed that there is no general enrichment action in our law.³³ Therefore, for Wamjay to succeed in an enrichment claim, it has to bring itself within the parameters of one of the *condictiones* on which it relies.

65 ATS did not advance much argument to the effect that the *condictiones* on which Wamjay relies are inapplicable. As already shown (see paragraph above), ATS did make clear in its heads of argument that it does not necessarily accept that Wamjay has relied on the correct *condictiones*. But it did not elaborate on this contention and focused its attention, instead, on the issue of non-enrichment, to which I return shortly.

66 For the sake of completeness, I should point out that I agree with Wamjay that the *condictio indebiti* is applicable to this case. The *condictio indebiti* applies when a

³² The most well-known judicial expression of this sentiment may be seen in the obiter remarks of Schutz JA in *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 (3) SA 482 (SCA) at paras 8-10. It should be said, though, that Schutz JA did not argue for the simple abandonment of the *condictiones*, but rather a more nuanced approach in which the general claim would serve as a backstop if the *condictiones* did not apply for some reason.

³³ See *Greater Tzaneen Municipality v Bravospan* 252 CC 2022 JDR 3191 (SCA) at para 15.

payment is made in the reasonable, but mistaken, belief that it is due. Although initially limited to reasonable mistakes of fact, the Appellate Division eventually made clear that reasonable mistakes of law also may found a claim.³⁴ The SCA has held that the *condictio indebiti* applies in cases where money is transferred in terms of a contract which is *void ab initio*³⁵ (provided that all of the requirements are met, of course). Wamjay has characterised this as being a case involving a transfer of money where there was a legal ground for the transfer when it was made which subsequently fell away. ATS, on the other hand, says that the cession agreement was *void ab initio*. This seems to me to be correct. Had this been an ordinary lease agreement, I would have had my doubts that the agreement was *void ab initio* – the cancelation of the agreement between owner and tenant would not automatically invalidate the agreement between tenant and sub-tenant. But since the agreement purported to cede rights which could not, objectively, be ceded, it seems that the agreement was invalid from the outset. Therefore, the *condictio indebiti* is the applicable condiction.

67 The real dispute between the parties, on the merits, relates to one of the requirements of the general action – ie, that the defendant must have been enriched.

68 ATS's arguments are, in summary, the following:

68.1 *Kudu Granite* held that a plaintiff is entitled to the lesser of the plaintiff's enrichment and the defendant's impoverishment.

68.2 There is insufficient evidence before court to establish, on motion, the quantum of ATS's continued enrichment.

³⁴ See *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A); *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA) at para 24.

³⁵ See *ST v CT* 2018 (5) SA 479 (SCA) at para 115.

- 68.3 ATS refers to the defence of non-enrichment, relying on the academic writing of Professor Daniel Visser, probably the leading expert on unjustified enrichment in South Africa, and the decision of the Appellate Division in *African Diamond Exporters*.³⁶ It says that if, at the time when the application or action is launched the defendant's enrichment has extinguished, it is not obliged to restore anything to the plaintiff. ATS points out that Wamjay alleges that ATS has retained all of the R6.5 million which Wamjay paid to it in terms of the cession agreement, while ATS says that it retains none of it. On the ordinary approach to disputes of fact, this disagreement should, according to ATS, be decided on ATS's version.
- 68.4 ATS accepts that there is an exception to the non-enrichment defence: a defendant cannot rely on the defence if it parted with the money mala fide; ie, when it knew that the money was paid without legal cause. But it says that there is no evidence that ATS parted with the money in bad faith as defined in this way. On the contrary, says ATS, both parties honestly believed that the amount was lawfully owing by Wamjay to ATS.
- 69 The full scope of the non-enrichment defence is by no means clear. As framed by ATS, it simply means that, as a complete defence to an enrichment claim (and leaving bad faith aside), the defendant can allege and prove that it had spent all the money which it received by the time that the claim was launched. It is by no means clear to me that this is the proper characterisation of the defence. In *Geach*,³⁷ Wallis JA characterised the defence, in a minority judgment, as being available when "the recipient of the payment can show that, if the payment had not taken place, it would have been in no worse

³⁶ *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A).

³⁷ *General Council of the Bar of South Africa v Geach* 2013 (2) SA 52 (SCA) at para 201.

position than it was as a result of the payment”. Although this characterisation was made in a minority judgment, Wallis JA relied on *African Diamond Exporters* as authority for this proposition and quoted directly from the judgment – which says the same thing – in the footnote.

70 Admittedly, in *Affirmative Portfolios CC*,³⁸ the SCA expressed the principle far more broadly as being that “where the receiver has lost or disposed of part of that which has been paid to him, he will only be liable for what remains in his hands at the time when the action is instituted”. But, in stating the proposition, the SCA relied again on *African Diamond Exporters*. And, on the facts, the non-enrichment in *Affirmative Portfolios CC* would have fallen within the *African Diamond* formulation because the defendant (appellant) was a labour broker which retained very little of what it was paid under the invalid contract. This was because most of the money it received had to be paid to employees and regulatory authorities and it was entitled to receive only a small administrative fee. This is very different to a situation, as we have in this case, in which the defendant essentially says: yes, I received the money and spent it for my own benefit, but I have not been enriched because the money is all gone now.

71 It also seems to me that the mala-fide exclusion has not been sufficiently fleshed out in the caselaw to support ATS’s framing of how it works. Interestingly, ATS, in its heads of argument, frames the bad-faith rule as being that an enrichment claim is “not available to a defendant who has parted with the enrichment in bad faith, ie where he was aware or should have been aware, at the time of parting therewith, that he had been enriched sine causa” (my emphasis). This framing is interesting, because no final decision has been made by our courts as to the role which negligence plays in this

³⁸ *Affirmative Portfolios CC* (supra) at para 38.

enquiry. ATS's framing would suggest that even if it subjectively acted in good faith, it could fail in its defence if its conduct was unreasonable. I am not sure whether this was its intention, because elsewhere in its heads of argument it says that it "honestly believed" that the University had no case – which suggests a purely subjective enquiry.

72 The issue which is squarely raised by the present case is: can the recipient of money raise the defence of non-enrichment where it spends the money it received genuinely believing itself entitled to do so, but where it ought to have realised that it had been unjustifiably enriched? A related, but subtly different way of framing the same question is to ask: can the recipient of money raise the defence of non-enrichment where it spends the money it received genuinely believing itself entitled to do so, but where it ought to have realised that it might face a claim to repay the money?

73 In *African Diamond Exporters*, Muller JA inclined to the view that the answer to these questions would be no (although he did not draw the distinction which I have drawn by posing these two questions separately), but held that it was unnecessary to decide the issue in that case.³⁹ In *McCarthy Retail v Shortdistance*, in what appears to be an obiter dictum, Schutz JA clearly favoured an approach which would answer both of the questions which I have posed in paragraph above in the negative.⁴⁰

74 I have considerable discomfort with the notion that a party such as ATS could be held entitled to raise the defence of non-enrichment where (a) it knew from the outset that the University took the view that it could cancel the lease agreement (b) it vigorously opposed the University's claim while, on its version, spending the money which it received from Wamjay and (c) when its defence against the University's claim failed, it

³⁹ See *African Diamond Exporters* (supra) at 711-712

⁴⁰ See *McCarthy Retail v Shortdistance* (supra) at para 18

turns around and says that it has spent the money and so cannot be held responsible for Wamjay's loss. This is not something which, as far I have been able to tell, has ever directly arisen in our caselaw. But, as I have noted above, the dicta in *African Diamond Exporters* and *McCarthy Retailers* are directly relevant to this issue.

75 At least at the level of principle, it seems deeply problematic to me that a party in this position should be able to resist an enrichment claim on the basis of non-enrichment. One need not conclude that such a party acted in bad faith, in the true sense, to disentitle it to this defence. It seems to me that mere knowledge of the fact that the validity of the underlying agreement was hotly contested, in a case with facts similar to the present, should be enough to put a defendant on notice not to dissipate the money paid to it in terms of the agreement which it concluded with the plaintiff. Professor Visser addresses this issue in his excellent book, *Unjustified Enrichment*. He takes the view that negligent dispersal of received money should not be treated exactly the same as money spent in bad faith. He prefers an approach in which negligence is one of the factors to be taken into account by a court assessing a defence of non-enrichment and that it should cut both ways – ie, the negligence of both parties would be relevant.⁴¹ I would respectfully agree with his assessment.

76 On the facts of this case, I would have grave difficulty in finding that ATS could rely on a defence of non-enrichment, even if it was not mala fide in the true sense. It must have anticipated that the University's claim could succeed and, at the very least, ought to have anticipated it. To spend the money in those circumstances, strikes me as inappropriately cavalier. It could be said that Wamjay should equally have anticipated this eventuality. But that is, at best, only relevant to prescription (already disposed of

⁴¹ Visser *Unjustified Enrichment* (2008) p 739-740

above) and there is certainly no contributory negligence on its part, which I can see, which is relevant to the issue of non-enrichment. This sets this case apart from, for instance, *African Diamond Exporters*.⁴²

77 Even if I am wrong in what I have said above, there is another reason why the defence of non-enrichment cannot succeed on the facts of this case. In *Kudu Granite*, the SCA held that there is a presumption of enrichment which arises when money is paid. A defendant who receives money therefore bears the onus to prove that he or she has not been enriched.⁴³ This was recently confirmed by the Constitutional Court in *Mongwaketse*.⁴⁴

78 ATS says that, on *Plascon-Evans*,⁴⁵ disputes of fact must be decided in its favour. It says that since there is a genuine dispute of fact on the question whether ATS was enriched, Wamjay's claim must fail.

79 I had cause, in certain recent judgments, to map out how it should be determined whether there are genuine disputes of fact in a particular case.⁴⁶ It is not necessary for me to repeat my views yet again. I simply emphasise that, just because a matter is ventilated in motion court, does not mean that a dispute of fact exists whenever a respondent contests the applicant's version. Much will depend on the nature of the contestation. It may be that the applicant relies on facts which are outside of the respondent's knowledge. In that situation, the respondent may well wish to dispute the version and require the applicant to substantiate it with detailed evidence. Whether it is

⁴² See Visser op cit at p 740

⁴³ See *Kudu Granite* (supra) at para 21.

⁴⁴ *Municipal Employees Pension Fund v Mongwaketse* 2022 (6) SA 1 (CC) at para 62.

⁴⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5.

⁴⁶ See, for example, *Engen Petroleum Limited v Scheepers* 2023 JDR 0990 (GJ) at paras 22-25.

able to do so in motion court will, again, depend on the nature of the facts. It will often be possible for an applicant to establish facts with documentary evidence in a manner which cannot be disputed. And, of course, equally often it will not. In the latter case, it is appropriate, as a matter of judicial philosophy, to dismiss an application which ought really to have been launched as an action.

80 In this case, the simple position is that, in my view, ATS has not adduced any facts to support a defence of non-enrichment. It cannot, simply because this case was launched on motion, say next to nothing and then try to rely on *Plascon-Evans* as an escape valve. The authorities are clear that a defendant relying on non-enrichment must establish clearly the facts on which the defence is based.⁴⁷ In this case, the only way in which ATS addressed this issue at all was to say in its answering affidavit that it did not retain the money paid to it by Wamjay because it had no obligation to do so. No further detail was provided. In argument, ATS attempts to rely on the letter in which its representative said that ATS had, at best, a moral obligation to repay the money. As I explained before, in the same letter, it said that it could not refund the money at that stage. But this is not the same as substantiating the claim of non-enrichment with actual evidence relating to how it was said no longer to be enriched.

81 It is also not of much assistance to its cause for ATS to accuse Wamjay of failing to adduce primary facts to support its claim that ATS was enriched. It is hard to conceive of what facts, within Wamjay's knowledge, it could have proved beyond saying that it paid the R6.5 million to ATS.

82 In this regard, the most important mechanism to determine the outcome of Wamjay's claim is the presumption of enrichment which I have mentioned above. ATS's

⁴⁷ See *Kudu Granite* (supra) at para 21.

somewhat terse response to Wamjay's claim seems to have largely been influenced by its strong view that the claim had prescribed. Whatever the reason, it declined to provide any detail to substantiate its bald allegation that it had not retained the money claimed by Wamjay. In the face of the presumption of enrichment which applies in a case such as this, its response was inadequate to make out a defence.

83 Before concluding my discussion of the merits, I wish to say this: if one reads ATS's argument in its strongest light, one might conclude that it had no obligation to say anything more than what it said in its answering affidavit. On its understanding of the law, all it had to say was that it did not retain the money to make out a case of non-enrichment. If that is the argument, then I respectfully disagree. In the light of the presumption of enrichment, it seems to me that ATS had to explain, comprehensively, at least the following: (a) What precisely did it do with the money? (b) If the money was spent to its benefit, how could it claim not to have been enriched? (c) Why did it not retain the money when it knew that the University took the view that there was no *causa* for the cession agreement? Its failure to do so, converts the presumption into a positive finding of enrichment.

84 It follows that, in my view, Wamjay's enrichment claim must succeed.

CONCLUSION AND ORDER

85 For the reasons given above, Wamjay is entitled to the relief which it seeks in the notice of motion. Since ATS was represented by both senior and junior counsel, there might have been a debate on costs had ATS been successful. But the issue does not arise because Wamjay was represented by only one counsel. The appropriate order to make is therefore simply to direct ATS to repay the R6.5 million to Wamjay, with costs.

86 There was no argument on the issue as to when interest should be held to have begun to run – ie, on the specific issue, contemplated by section 2A of the Prescribed Rate of Interest Act 55 of 1975, of whether a demand was made earlier than when the application was launched. It seems to me that everything said by the SCA in paragraph 28 of *Kudu Granite* could be applied equally to the present case.⁴⁸ The only slight tweak which I would make here is that there is some evidence of an attempt by Wamjay to reclaim the money in 2021, after the judgment of the Constitutional Court was handed down. However, Wamjay has not sought to characterise it as a formal demand. It follows that interest must be held to run from the date on which this application was launched – ie, 11 March 2022.

87 I accordingly make the following order:

- 1. The respondent is to pay to the applicant the sum of R6 500 000.00.**
- 2. The respondent is to pay the applicant's costs in this application.**
- 3. The respondent is to pay interest on the sum described in paragraph 1 of this order, at the rate of 7%, calculated from 11 March 2022 to date of payment.**

⁴⁸ Paragraph 28 of *Kudu Granite* reads as follows:

“The learned Judge made no order in respect of the payment of interest. In *Baliol Investment Co (Pty) Ltd v Jacobs* 1946 TPD 269 the Court held, after a consideration of the common law, that interest is not recoverable under the *condictio causa data causa non secuta* or under the *condictio indebiti* unless the subject of agreement or the debtor is in default or has been placed in *mora*. See also *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 654C - D, 659A - B. The matter is now regulated by statute: s 2A of the Prescribed Rate of Interest Act 55 of 1975 provides that the amount of every unliquidated debt as determined by a court of law shall bear interest as contemplated in s 1, ie at the rate prescribed. Section 2A(2) (a) further provides that, subject to any other agreement between the parties, the interest on an unliquidated debt determined by a court of law shall run from the date on which payment of the debt is claimed by service on the debtor of a demand or summons, whichever date is the earlier. In the present case there was no evidence of a demand, but the summons was served on 6 January 1999.”

**ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines and by release to SAFLII. The date for hand down is deemed to be 2 October 2023.

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Date of hearing: 13 March 2023

Date of judgment: 2 October 2023