Case No: 442/98

In the matter between:

ABSA BANK LIMITED	Appellant
and	
LEECH, SHEILA FRANCES	1st Respondent
CREASE, GRAHAM	2nd Respondent
GISHEN, MARTIN CHARLES	3rd Respondent

Coram: Vivier, Zulman, Streicher, Cameron and Navsa, JJ A

Heard: 4 May 2001
Delivered: 23 May 2001

Condictio indebiti – mistaken belief that amount paid was owing not established.

J U D G M E N T

STREICHER J A:

[1] The respondents are the trustees of the Kon Leech Trust ("the Trust"). The Trust paid an amount of R4,125m to the appellant. Thereafter the respondents instituted action against the appellant in the Witwatersrand Local Division for the repayment of a portion of that amount on the basis that it had been paid by the Trust in the mistaken belief that it was owing. The court *a quo* found that R1 762 931 had been paid by the Trust in the mistaken belief that it was owing, dismissed the defences raised by the appellant and granted judgment in favour of the respondents in that amount. With the leave of the court *a quo* the appellant appeals against the court *a quo*'s judgment.

[2] The events which led to the payment of the amount of R4,125m were the following. During April 1993 and under case number 11257/1993 the appellant launched an application in the Witwatersrand Local Division against the trustees of the Trust and Konrad Leech in his personal capacity, in terms of which it claimed, against the Trust and Leech jointly and severally, payment of R2 956 231,86 plus interest at a rate of 21,25% p.a. from 22 May 1992 to date of payment. In addition the appellant asked for an order against the Trust that the immovable property, known as Remaining Extent of Portion 23 (a portion of portion 9) of the Farm Witkoppen ("the Remaining Extent of Portion 23"), be declared executable. In the founding affidavit the appellant alleged that the amount was due by virtue of a credit facility, payable on demand, granted by the appellant to the Trust; that the

Trust had, as security for the debt, registered two mortgage bonds over the Remaining Extent of Portion 23; and that Leech had bound himself as surety and co-principal debtor in respect of the Trust's indebtedness. The Trust and Leech opposed the application. On 13 August 1993 the appellant withdrew the application. By agreement each of the parties to the application was to pay its own costs.

[3] During the period May to October 1993 there were ongoing discussions between the Trust and various companies represented by Leech, on the one hand and the appellant on the other hand. The discussions resulted in an agreement ("the second agreement") being concluded on 7 October 1993 between the appellant and the trustees of the Trust; Konsheil (Pty) Ltd, Needwood (Pty) Ltd, TFC Cruise Lines (Pty) Ltd, Growth Equity (Pty) Ltd, Leonard Mansions (Pty) Ltd, Dashwood Wild Coast CC (all represented by Leech); Singin (Pty) Ltd represented by Leech's wife ("Mrs Leech"), who, in her capacity as trustee of the Trust, is the first respondent; Leech and Mrs Leech in their personal capacities. The companies and the close corporation are hereinafter referred to as Konsheil, Needwood, TFC, Growth Equity, Leonard Mansions, Dashwood and Singin respectively. From the second agreement it appears that the Trust was the owner of the Remaining Extent of Portion 23 and that Konsheil was the owner of Portion 180 of that farm; that there were three mortgage bonds registered over the

Remaining Extent of Portion 23 of which two were in favour of the appellant and one in favour of Nedcor Bank Ltd ("Nedcor"); that there was a mortgage bond registered in favour of the appellant over Portion 180; that the parties agreed that the Trust would purchase Portion 180 from Konsheil, consolidate it with the Remaining Extent of Portion 23 into the proposed Portion 297, re-subdivide Portion 297, sell the Remaining Extent of Portion 297 to Needwood and retain the other portion of Portion 297 which was to be known as Portion 298. It appears furthermore that the house occupied by Leech stood on the proposed Portion 298 and that Needwood wished to develop the Remaining Extent of Portion 297 as Needwood Village, a cluster housing development.

[4] In terms of the second agreement the appellant agreed to lend to Needwood an amount of R5,7m ("the loan") together with certain transfer costs to pay an amount of R5,7m to the Trust on account of the purchase price of the Remaining Extent of Portion 297. The full amount of R5,7m was to be retained by the appellant as payment of debts owing to the appellant by the Trust, Dashwood, Growth Equity, Leonard Mansions, TFC and also as payment of the amount owing by the Trust to Nedcor in terms of its mortgage bond over the Remaining Extent of Portion 23. Against payment of these amounts the mortgage bonds over the Remaining Extent of Portion 23 were to be cancelled. In addition the appellant undertook to lend to Needwood the balance of the purchase price in respect of the

Remaining Extent of Portion 297, being R1,3m, and to grant to Needwood a loan facility for an amount of R7,5m (“the development loan”) to enable Needwood to procure, construct and install all the services for the purpose of constructing the Needwood Village on the Remaining Extent of Portion 297. The capital amount of the loan and development loan to Needwood was to be repaid from the proceeds of the sale of stands in Needwood Village.

[5] In regard to the payment of the debt owing by the Trust to the appellant, clause 9.2 of the second agreement provided that the appellant was to retain an amount of R4,125m as a payment by Needwood to the Trust on account of the purchase price of R/E Portion 23 and in turn, a payment by the Trust to Absa in full and final settlement of the claim by Absa’s Trust Bank Division against the Trust and Kon Leech (as surety for the Trust), in terms of case number 11257/1993 in the Witwatersrand Local Division of the Supreme Court of South Africa. The reference to R/E Portion 23 is wrong. It should have been R/E Portion 297.

[6] The appellant advanced R5,7m to Needwood by, *inter alia*, retaining R4,125m as payment by the Trust to the appellant in full and final settlement of the aforesaid claim, as agreed. It is that payment that gave rise to the action in the court *a quo*. In their particulars of claim, as amended, the respondents alleged that the R4,125m was to be paid in full and final settlement of the appellant’s

claim against the Trust in terms of a previous agreement ("the first agreement") concluded on 7 October 1987. In terms of that agreement Trust Bank, whose assets and liabilities were subsequently taken over by the appellant, lent and advanced R468 000 to the Trust, and the Trust undertook to furnish suretyships in favour of Trust Bank in respect of the indebtedness of Konsheil to Trust Bank in the sum of R152 000,00 and the indebtedness of Leech to Trust Bank in the sum of R230 000,00. The sum of these amounts is R850 000. The respondents alleged furthermore:

"8. In terms of the *in duplum* rule interest on the loan made by the Trust Bank to the Trust and on the capital amounts due by Konsheil and Leech under the first agreement and the suretyships signed in respect of such indebtedness by the Trust ceased running once the unpaid interest was equal to the unpaid capital amounts thereof.

12. Accordingly, the maximum amount of the indebtedness of the Trust to Trust Bank was limited to the sum of R1 700 000,00.

13. In the mistaken and *bona fide* belief that in terms of the first agreement the indebtedness of the Trust in respect of the loan and the amounts for which the Trust had bound itself as surety for Konsheil and Leech with interest was the sum of R4 125 000,00, the Trust paid the said amount to the Defendant as provided for in the second agreement.

11. In consequence of the aforegoing, the Trust has overpaid the Defendant the sum of R2 425 000,00 being the difference between the payment of R4 125 000,00 under the Second Agreement and the amount of R1 700 000,00 referred to in paragraph 9 above.

12. In the premises the Defendant is indebted to the Trust in the sum of R2 425 000,00 and despite demand fails, refuses and/or neglects to repay the said sum or any part thereof."

[7] The appellant pleaded that in terms of the first agreement the Trust became indebted to the Trust Bank in an amount of R850 000,00 together with interest thereon at the Trust Bank's prime lending rate from 1 October 1987 to date of payment. It alleged that the indebtedness of the Trust to the appellant, in October 1993, arose out of an oral agreement of novation concluded during or about August 1989 in terms of which it was agreed that the appellant would consolidate the debts in the accounts of Leech (R243 470.92), Krophile Investments (Pty) Ltd (R268 638.29), Konsheil (R202 126.68), the Trust (R637 415.02) and Leech (R129 863.86), a total amount of R1 481 515.77, in one account in the name of the Trust. The appellant denied that the amount of R4 125 000,00 was paid in the belief that, in terms of the first agreement, the indebtedness of the Trust was the sum of R4 125 000 and alleged that it was paid in full and final settlement of the claim by the appellant against the Trust in terms of the aforementioned application. It alleged furthermore that the obligation to pay the sum of R4,125m

was assumed by the Trust in consideration for the appellant conferring on the parties to the second agreement the rights, advantages and benefits defined more fully in the second agreement; that the Trust entered into the second agreement with the full knowledge of the force and effect of the *in duplum* rule; and that the Trust for sound commercial reasons, for a substantial consideration and for the mutual benefit of itself and the other parties to the second agreement waived and renounced the benefits of the *in duplum* rule or compromised or novated its indebtedness. In summary, the appellant denied that the indebtedness of the Trust was limited as alleged; that the Trust was labouring under any mistaken belief when the payment was made; that the payment was made *indebite*; that the appellant had been enriched and that the respondents were entitled, in the absence of a tender of restitution, to succeed in the relief claimed.

[8] From the aforegoing it is clear that the respondents' claim is based on the *condictio indebiti*. In order to succeed the respondents had to prove that a payment was made in the mistaken belief that it was owing (Voet 12.6.6; *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 445; *Union Government v National Bank of South Africa Ltd* 1921 AD 121 at 140; *Recsey v Reiche* 1927 AD 554 at 557; *Lawsa* 1st Reissue Vol 9 para 79; De Vos *Verrykingsaanspreeklikheid in die Suid Afrikaanse Reg* 3rd ed p 23; *Willis*

Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (AD)). They alleged and therefore had to prove that the Trust i.e. the trustees of the Trust, believed that the amount of R4,125m was owing in terms of the first agreement but that they were mistaken, in that, by virtue of the operation of the *in duplum* rule, a portion of the amount paid was not owing.

[9] What has been referred to as the *in duplum* rule is part of our law. It provides that interest stops running when the unpaid interest equals the outstanding capital (see *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 827H). In argument in the court *a quo* respondents' counsel accepted that the capital amount to be utilised in the application of the *in duplum* rule amounted to R1 181 034,33. The appellant contended that the correct capital amount for purposes of the application of the *in duplum* rule was R1 481 515,75. It is therefore common cause that the sum of R4,125m included *ultra duplum* interest.

[10] At the trial in the court *a quo* the respondents tendered the evidence of Gishen, who is the third respondent, Mr Gordon and Leech. Gishen, who is an attorney, Gordon, who is an accountant, and Mrs Leech, as the trustees, at the time, of the Trust, concluded the second agreement with the appellant. Mrs Leech did not give evidence. It is clear from the evidence of Leech, Gishen and Gordon that the Trust did not pay the amount of R4,125m because of any belief on the part of the trustees of the Trust that the amount was due to the appellant in terms of the first agreement. In fact, their evidence was to the opposite effect.

[11] Leech conducted the negotiations on behalf of the Trust. He testified that, in

his view, due to prescription and also to the fact that he believed that the Trust was being overcharged in respect of interest, the Trust owed only R2,3m to the appellant and that he informed the trustees that the amount claimed by the appellant was not due. According to him he did, however, at a later stage accept what Steele, who represented the appellant, said, namely that "R4,1m odd" was owing. Strangely enough, what persuaded him was, *inter alia*, the fact that a deal had been struck and that he believed that the purchase price of the land was a good and a fair price. In the light of this evidence it seems doubtful whether he in fact accepted that the amount of the debt was R4,125m. In any event, on the evidence he never conveyed his acceptance of the correctness of the figure claimed to the trustees.

[12] Gishen testified that there was some dispute with the appellant in relation to the amount owing. He thought the dispute was about an overcharging of interest (not in the sense that *ultra duplum* interest was being charged). The difference, as he recalled it, was in the order of R1,3m. The following are extracts from his evidence:

> "[W]hy did it pay that amount, that full amount that the bank claimed? - - Well it is simple because the bank, we owe the amount, whether it be R3,6m or R4,1m, whatever it may be, we were not in a position to pay it, we stood

> to lose everything we had, and that is the property, that is all the trust had, and this deal would ensure that the bank would be paid and the trust would hold this property basically bond free.”
>
> “What was advantageous to the trust to pay more than was due to the bank? Perhaps R1,3m more than was due to the bank? - - No, no, the bank disputed that amount. Rather than get involved in litigation with the bank, you see if we don’t settle with the bank what happens? If we don’t agree to a figure with the bank? They contend that R4,1 is owing, we say it is less, just say. The bank then say we are not prepared to accept it and we proceed with proceedings against you. What advantage is that to the trust? Rather concede the amount, concede that the amount that they are claiming is due and get right out of the problem. We sell the land, we pay the debt, we are free of any, we have still got that portion of the property that we had left. Very advantageous to the trust.”
>
> “[B]ut assuming that the difference was as high as R1,3m surely the trust wouldn’t just pay that not to have litigation? - - In my view it was still worth it because here we stand to end up with something, otherwise we go to court and if we don’t succeed we end up with nothing, we lose the property.”
>
> “So the trust was prepared to pay what was a disputed debt in order to avoid the problem? - - Definitely.”

[13] Gordon’s evidence was to the same effect. Leech mentioned to him that the amount was a bit too high and that he was not happy with the interest being

charged (once again the challenge to the interest being charged did not relate to *ultra duplum* interest). The following are extracts from his evidence:

> “Yes, so he [that was Leech) was telling you that the trust was not legally obliged to pay that full amount? - - No he claimed that it was a dispute as to the rates.
> Yes. - - But the bank at the time was adamant that that was the balance owing, which we then agreed to accept because it suited the trust to liquidate that loan.”
>
> “So despite the fact that the trust maintained that the interest was too high because the wrong rate might have been used . . . - - Yes.
> It was prepared to pay the full amount because of advantages it foresaw in this agreement? - - Correct.
> …
> . . . we were prepared to pay it even though we believe that the amount was overstated.”
>
> “And then I put to you that it would not be correct to say that the trust would not have paid the amount if it knew that the amount was not correct because in fact it was prepared to pay an incorrect amount? - - Yes.”
>
> “Well did Mr Leech tell you that he contended that only R2,3m was due? - - He did not mention any figures as to the exact amount.”

[14] Notwithstanding this evidence the court *a quo* found that the respondents had "discharged the *onus* resting on them, in proving that the payment in excess of R2 362 068,66 was made in the *bona fide* and reasonable, but mistaken, belief that it was owing". The court *a quo* arrived at this finding on the basis that although the evidence established that the trustees were prepared to go along with the agreement because of the benefits it had for the Trust and although the amount of the debt was disputed, the dispute related to the applicable rate of interest and prescription, not to the application of the *in duplum* rule. In my view the court *a quo* erred in this regard. If an amount is paid although it is considered not to be owing for reason A and at a later stage it becomes apparent that it was not owing for reason B it remains a payment made in the belief that it was not owing.

[15] The evidence established conclusively that the reason the sum of R4,125m was paid was not because of a belief on the part of the trustees of the Trust that it was owing. The trustees agreed to pay that amount and paid the whole of it in order to benefit the Trust. It is true that a portion of the sum of R4,125m was considered to be owing but, on the evidence, it cannot be said that that portion was more than R2 362 068,66, being the amount which, according to the respondents, was the maximum amount which could have been owing by the Trust in view of the operation of the *in duplum* rule. It cannot therefore be said that any portion of the amount in excess of R2 362 068,66 was paid in the belief that it was owing.

[16] The respondents' counsel argued that, had the trustees of the Trust been aware that the amount claimed by the appellant included *ultra duplum* interest, they would not have agreed to pay R4,125m to the appellant. In this regard it was pointed out that both Gishen and Gordon testified to this effect and that this evidence was not challenged in cross-examination. It is not surprising that appellant's counsel never pertinently challenged this evidence. The case which the appellant had to meet was that the payment of R4,125m was made in the belief that it was owing in terms of the first agreement. As I have already indicated both Gishen and Gordon conceded under cross examination that that was not the case. There was no need for appellant's counsel to take the matter any further.

[17] In the light of the aforegoing it is not necessary to deal with the other defences raised by the appellant.

[18] In the result the appeal succeeds with costs including the costs of two counsel. The following order is substituted for the order of the court *a quo*:

> "The plaintiffs' action is dismissed with costs including the costs of two counsel."

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P E Streicher
Judge of Appeal

Vivier,	JA)	
Zulman	JA)	
Cameron	JA)	
Navsa	JA)	Concur