

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Not Reportable**

Case no: 251/2023

In the matter between:

**PORTIA KHENSANI MHLARI NO** **FIRST APPELLANT/  
FIRST RESPONDENT IN CROSS-APPEAL**

**PATRICK JEALOUSY MALABELA NO** **SECOND APPELLANT/  
SECOND RESPONDENT IN CROSS-APPEAL**

**PORTIA KHENSANI MHLARI** **THIRD APPELLANT/  
THIRD RESPONDENT IN CROSS-APPEAL**

**PATRICK JEALOUSY MALABELA** **FOURTH APPELLANT/  
FOURTH RESPONDENT IN CROSS-APPEAL**

**LULAMA BUSINESS ENTERPRISES CC** **FIFTH APPELLANT/  
FIFTH RESPONDENT IN CROSS-APPEAL**

**MAMPEPU PROJECTS CC** **SIXTH APPELLANT/  
SIXTH RESPONDENT IN CROSS-APPEAL**

**PATIENCE LETHABO MLENGANA NO** **SEVENTH APPELLANT/  
SEVENTH RESPONDENT IN CROSS-APPEAL**

and

**NEDBANK LIMITED****RESPONDENT/APPELLANT IN CROSS-APPEAL**

**Neutral citation:** *Mhlari NO and Others v Nedbank Limited* (251/2023) [2024]  
ZASCA 39 (4 April 2024)

**Coram:** GORVEN and MATOJANE JJA, COPPIN, SMITH and KEIGHTLEY  
AJJA

**Heard:** 27 February 2024

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 4 April 2024.

**Summary:** Unjust enrichment – *conditio indebiti* and *conditio sine causa specialis* – when available – not required to plead reliance on one to the exclusion of the other – where the pleading puts the claim in the ambit of the *conditio indebiti* to the exclusion of the *conditio sine causa*, not entitled to an election – the requirements of the pleaded *conditio* must be proved to succeed.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Johannesburg (Mdalana-Mayisela J sitting as court of first instance):

1. The appeal is upheld.
2. The cross-appeal is upheld with costs, including the costs of two counsel where so employed.
3. The order of the High Court is set aside and is substituted by the following order:
  - '(1) The trustees of the PATRICK MALABELA FAMILY TRUST are ordered to pay the amount of R5 436 347.57 to the plaintiff, together with mora interest thereon, calculated from 12 September 2019 to date of final payment, both days inclusive.
  - (2) The plaintiff is directed to take such steps as may be necessary for the cancellation of the covering mortgage bond executed in its favour and registered with the Registrar of Deeds, Pretoria, with registration number B[...].
  - (3) In the event of the plaintiff failing to comply with paragraph (2) within 30 days from the date of this order, the sheriff is hereby authorized to sign and execute all such documents, and do all such things as may be necessary, for the implementation of paragraph (2).
  - (4) The trustees of the PATRICK MALABELA FAMILY TRUST are ordered to pay the plaintiff's costs of suit.'

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## JUDGMENT

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**Smith AJA (Gorven and Matojane JJA, Coppin and Keightley AJJA concurring):**

### Introduction

[1] The appellants appeal against the judgment of the Gauteng Division of the High Court in terms of which they were, *inter alia*, ordered to pay the respondent, Nedbank Limited (Nedbank) the sum of R12 316 632,37. The order also declared

specially executable an immovable property owned by the trustees of the Patrick Malabela Family Trust (the Trust), situated in Sandton, Johannesburg. The respondent has filed a conditional cross-appeal against the dismissal of its alternative claim based on unjust enrichment. Both appeals are with the leave of the High Court. The appellants will be referred to as in the main appeal.

[2] The first, second and seventh appellants are trustees of the Trust, and the third to sixth appellants were cited as sureties for and co-principal debtors with the Trust for the due performance of its contractual obligations *vis-a-vis* Nedbank.

[3] Nedbank is a duly registered and incorporated public company with limited liability. It trades as a deposit-taking institution in terms of the Banks Act 94 of 1990, and is a credit provider duly registered in terms of the National Credit Act 34 of 2005.

#### **The common cause facts**

[4] The following material facts are common cause. On 7 May 2013, Nedbank and the Trust, represented by the second appellant, purportedly concluded a loan agreement in terms of which the former lent R14 million to the Trust. As security for the loan, a covering mortgage bond was registered over the Trust's immovable property and the third to sixth appellants bound themselves as sureties for, and co-principal debtors with, the Trust.

[5] After the registration of the bond, Nedbank duly paid the sum of R14 million to the Trust in accordance with the terms of the loan agreement. The Trust initially made regular payments by way of debit order but subsequently defaulted, with the last payment having been made on 23 June 2018. Nedbank consequently instituted civil action against the Trust and the appellants on 12 October 2018, claiming the sum of R12 316 632,37, an order declaring the mortgaged immovable property specially executable, and other ancillary relief (the contractual claim).

[6] In their plea, the appellants disputed that the Trust had the requisite capacity to conclude the agreement. They averred that the trust deed required that there should be no fewer than three and no more than five trustees in office at any time. One of the trustees had resigned in October 2010, leaving only the first and second

appellants as trustees. However, it was only on 4 October 2018 that the Master issued the certificate appointing a third trustee, namely the seventh appellant. Thus, when the loan agreement was concluded on 7 May 2013, there were an insufficient number of trustees in office to bind the Trust legally. The appellants asserted that the loan agreement and the mortgage bond registered in pursuance of the invalid loan agreement were consequently also null and void.

[7] Nedbank thereafter successfully applied to join the seventh appellant in her capacity as the third trustee. It also amended its particulars of claim to introduce an alternative claim based on unjust enrichment (the unjust enrichment claim).

[8] In response, the appellants filed a counter-claim for the cancellation of the mortgage bond and amended their plea, averring that Nedbank's alternative claim had become prescribed. They asserted furthermore that by the exercise of reasonable care, Nedbank could have ascertained more than three years prior to 12 September 2019 (when it filed its unjust enrichment claim) that the Trust did not have the requisite number of trustees at the time of contracting. In terms of s 12(b) of the Prescription Act 68 of 1969 (the Prescription Act), it is consequently deemed to have had knowledge of that fact when the loan agreement was concluded. The appellants contended for this reason that Nedbank's alternative claim had prescribed.

### **Proceedings in the High Court**

[9] At the trial, Nedbank called only one witness, namely Mr Perie Kemp, who was employed in its Paarl recoveries division. Mr Kemp confirmed that: (a) the capital sum was duly advanced to the Trust in terms of the loan agreement; (b) the Trust had made various payments by way of debit order; and (c) the Trust had defaulted on its contractual obligations and no further payments were made after 23 June 2023.

[10] Certificates of Indebtedness, issued in terms of the loan agreement and reflecting an outstanding amount of R5 436 347.57, were also admitted into evidence. The appellants did not dispute any aspect of Mr Kemp's testimony and closed their case without calling any witnesses.

[11] In respect of the contractual claim, Nedbank relied on ostensible authority and estoppel as defences to the appellants' contention that the loan agreement was null and void. The High Court upheld Nedbank's argument that the Trust should be estopped from relying on the invalidity of the loan agreement. The Court found that there was no 'legitimate basis upon which it can be asserted that these defences [ostensible authority and estoppel] cannot be invoked in the case of the action of the Trust, where the other party was lured to believe that informal (sic) formalities were complied with when in fact it was not so.' The Court therefore concluded that the agreement was enforceable against the Trust and the sureties. In the light of that finding, the Court declined to pronounce on Nedbank's unjust enrichment claim or the first, second and seventh appellants' counter-claim. And, having found that the appellants were in material breach of their contractual obligations, the Court granted the order prayed for by Nedbank.

[12] Nedbank has conceded in its written argument that the loan agreement is null and void because at the material time there were an insufficient number of trustees in office to legally bind the Trust.<sup>1</sup> This concession was correctly made and nothing further needs to be said about that issue. Nedbank has consequently also conceded that the main appeal should succeed, the agreement must be set aside, and the mortgage bond cancelled. It follows that Nedbank's claim against the third and fourth appellants, as sureties, shares the same fate.

[13] Thus, only the appellants' special plea regarding prescription and Nedbank's alternative claim based on enrichment remain for consideration.

#### **Did Nedbank's unjust enrichment claim become prescribed?**

[14] Because the High Court found for Nedbank on the issue of the Trust's capacity, it declined to decide the prescription issue. Nonetheless, that defence can be dismissed out of hand. Section 12(3) of the Prescription Act provides that '[a] debt

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<sup>1</sup> *Land and Agricultural Development Bank of SA v Parker and Others* [2004] ZASCA 56; 2005 (2) SA 77 (SCA); [2004] 4 All SA 261 (SCA) para 11, where Cameron JA said that: 'It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.'

shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and 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.' The first and second appellants represented to Nedbank that they were duly authorised to bind the Trust and that the latter had the requisite capacity to conclude the loan agreement. They also provided Nedbank with the necessary resolutions and other relevant written instruments in support of those representations.

[15] Furthermore, it is common cause that the appellants had, at least until June 2018, acquiesced in the implementation of the loan agreement. The Trust made regular payments in terms thereof and had by that date repaid more than half of the capital amount.

[16] There was, in my view, therefore nothing that could have alerted Nedbank to the fact that the loan agreement was invalid, until the appellants raised the point in their plea. The onus was on the appellants to adduce evidence in support of their contention that Nedbank could have become aware of that fact 'by exercising reasonable care.'<sup>2</sup> They have failed to do so, and the prescription defence must accordingly fail.

### **The unjust enrichment claim**

[17] The requirements for a claim based on unjust enrichment are that the defendant must be enriched, the plaintiff must be impoverished, the enrichment must be at the expense of the plaintiff, and the enrichment must have been unjustified (*sine causa*). Although there is no unified general enrichment action, these are requirements common to all enrichment actions.<sup>3</sup>

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<sup>2</sup> *McLeod v Kweyiya* [2013] ZASCA 28; 2013 (6) SA 1 (SCA).

<sup>3</sup> *McCarthy Retail Ltd v Short-distance Carriers CC* [2001] ZASCA 14; [2001] 3 All SA 236 (A) paras 8-10; *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* [2003] ZASCA 64; 2003 (5) SA 193 (SCA).

[18] A person who pays money (or delivers a thing) to another because of a reasonable error of fact or law in the belief that the money is owing, whereas it is not, has a claim for repayment in terms of the *condictio indebiti*, to the extent that the person who received the payment has been enriched at his or her expense.<sup>4</sup> The *condictio sine causa specialis* lies where the money is in the hands of the defendant without cause, whether due to the plaintiff's mistake or not. Therefore, a defendant may raise as a defence to the *condictio indebiti* that the mistake was unreasonable and negligent, but in a claim based on the *condictio sine causa specialis* that consideration is irrelevant.

[19] In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*,<sup>5</sup> this court held that the *condictio indebiti* is an equitable remedy and its object is to prevent one person being unjustifiably enriched at the expense of another. The principles underlying the *condictiones* are not immutable but are constantly evolving to accommodate new circumstances.<sup>6</sup>

[20] In its written argument, Nedbank relied on the *condictio sine causa specialis* and in the alternative, on the *condictio indebiti*. Nedbank's purported reliance on the *condictio sine causa specialis* is understandable. As mentioned, if the unjust enrichment claim were to be decided based on the *condictio sine causa specialis*, any negligence on Nedbank's part is irrelevant. If, however, it were to be determined according to the principles applicable to the *condictio indebiti*, Nedbank's negligence, if proved, may preclude reliance on that *condictio*.

[21] Before us, counsel for Nedbank argued that notwithstanding the factual matrix pleaded in its counterclaim, which brings its enrichment claim within the ambit of the *condictio indebiti*, Nedbank is not precluded from relying on the *condictio sine causa*

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<sup>4</sup> *Govender v Standard Bank of South Africa Limited* 1984 (4) SA 392 (C) at 400 (*Govender*).

<sup>5</sup> *Willis Faber Enthoven (Edms) Bpk v Receiver of Revenue and Another* [1991] ZASCA 163; 1992 (4) SA 202 (A) (*Willis Faber*).

<sup>6</sup> *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (AD), at page 40A-C, where Harmse JA said that the principles underlying the *condictio* are not immutable and that, in principle, a party is entitled to rely "op die analogiese aanwending van die *condictio indebiti*..."



*specialis*. He submitted that in circumstances where the underlying *causa* for the payment was an invalid contract, the latter *condictio* is the correct remedy. In such a case the payment was not made *indebiti* because Nedbank was not settling a debt when making the payment to the Trust but was purportedly performing in terms of a void contract. There was consequently no *causa* for the payment, and Nedbank's counterclaim must accordingly be decided in terms of the legal principles applicable to the *condictio sine causa specialis*. The issue regarding the reasonableness of its mistake therefore does not arise, or so he argued.

[22] In my view, even though that submission is legally sound as a general proposition, the facts pleaded in this matter bring the enrichment claim squarely within the ambit of the *condictio indebiti*. Although it is not necessary for a claimant to commit in its pleadings to either *condictiones* to the exclusion of the other,<sup>7</sup> Nedbank has firmly nailed its colours to the mast of the *condictio indebiti*. It has pleaded, *inter alia*, that the payment was made 'in the reasonable, but mistaken, belief that it was owing in terms of the loan agreement.' And furthermore, that the payment was made '*indebiti*,' in that there was no legal obligation to make it. It is furthermore common cause that Nedbank made the payment to the Trust in the mistaken belief that the underlying agreement was valid and enforceable. Nedbank's counterclaim must accordingly be decided based on the legal principles applicable to the *condictio indebiti*.<sup>8</sup> In any event, for reasons that follow below, holding Nedbank to its pleaded cause of action makes no difference to the outcome of the case.

[23] That the trust has been enriched at Nedbank's expense is manifest and incontrovertible. On the common cause facts, the Trust has been enriched in the sum of R5 436 347,57, being the original loan amount advanced to it in terms of the invalid agreement, less the payments it made from time to time. It is also not disputed that, apart from the issue whether Nedbank's mistake was reasonable and

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<sup>7</sup> *Govender* at 396C-D, cited with approval in *B & H Engineering v First National Bank of SA Ltd* 1995 (2) 279 (A). See also: *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 60 (SCA) at para [23].

<sup>8</sup> In *Kudu* (*supra*), at 201G-H, this court dealt with a void contract, albeit when void due to statutory prohibition. The court held that the *condictio* applies if the contract which gave rise to the transfer of property was *ab initio* unenforceable or has subsequently become unenforceable. And that '[t]he same principle applies if the contract is void due to a statutory prohibition (*Wilken v Kohler* 1913 AD 135 at 149-50), in which case the *condictio indebiti* applies.'

thus excusable, all the other requisites for a claim based on enrichment have been established. The only issue that thus remains for determination is whether Nedbank's mistake was reasonable and excusable.

### **Was Nedbank's mistake reasonable?**

[24] The reasonableness of Nedbank's mistake depends on the facts, on which the Court must exercise a value judgment. In this regard the Court must consider the relationship between the parties, the conduct of the Trust, whether the trustees were aware of the mistake, whether their conduct contributed to the mistake, Nedbank's state of mind, and the culpability of its ignorance in making the payment.<sup>9</sup> It is trite that Nedbank bears the onus of proving that its conduct was not so slack that it is undeserving of the Court's protection.

[25] In my view, it would be unreasonable to ascribe negligence to Nedbank's failure to perform a due diligence exercise to verify the Trust's capacity beyond its reliance on the documents provided by the trustees. Before the conclusion of the loan agreement, Nedbank was provided with a Trust resolution indicating that the first and second appellants had been duly authorized to conclude the agreement on its behalf. In addition, in terms of the loan agreement the first and second appellants warranted the correctness of the information provided to Nedbank and declared that 'no information that may affect Nedbank's decision to approve the loan has been withheld.' The first and second appellants also provided Nedbank with a certificate confirming that the loan agreement was for the benefit of the Trust beneficiaries and proof that the agreement has been duly authorized in terms of a resolution adopted by the Trust. In addition, the loan was secured by a covering mortgage bond, as well as by suretyships.

[26] While it is possible that the first and second appellants initially acted in the bona fide but mistaken belief that their actions conformed to the trust deed, as trustees they nevertheless bore the primary responsibility of ensuring that the Trust complied with all its internal formalities before concluding the contact.<sup>10</sup> The Trust acquiesced in the implementation of the loan agreement for some five years and

<sup>9</sup> *Willis Faber* at 224G-226A.

<sup>10</sup> *Land and Agricultural Bank of South Africa v Parker & Others* 2005 (2) SA 77 (SCA).

purported to perform its contractual obligations in terms thereof. It is common cause that it continued to pay the monthly instalments and had in fact paid about 60 instalments, amounting to more than R11 million. It also went so far as to mortgage its immovable property as security. Thus, the undisputed evidence regarding the appellants' conduct, both before and after the conclusion of the loan agreement, significantly attenuates Nedbank's culpability and renders its mistake excusable.

[27] In conclusion then, I find that Nedbank's reliance on the first and second appellants' representations regarding the capacity of the Trust was reasonable in the circumstances. Nedbank's failure to undertake a due diligence exercise in respect of the trust deed under these circumstances was therefore understandable and, in my view, did not constitute inexcusable slackness. Its mistake was therefore reasonable and excusable, and the counterclaim must consequently succeed.

### **Costs**

[28] There can be little doubt that Nedbank was substantially successful and is therefore entitled to its costs, including the costs of two counsel. There are, however, different considerations in respect of the main appeal. In concluding the loan, the first and second appellants purported to act on behalf of the Trust and in the process made extensive representations to Nedbank regarding the Trust's capacity. They did so in circumstances where they ought to have been aware of the trust deed terms and should have known that the Trust had been incapacitated because there were an insufficient number of trustees in office at the material time. It is therefore only fair that they should bear their own costs in respect of the main appeal.

### **Order**

[29] In the result the following order issues:

1. The appeal is upheld.
2. The cross-appeal is upheld with costs, including the costs of two counsel where so employed.
3. The order of the High Court is set aside and is substituted by the following order:

- (1) The trustees of the PATRICK MALABELA FAMILY TRUST are ordered to pay the amount of R5 436 347.57 to the plaintiff, together with mora interest thereon, calculated from 12 September 2019 to date of final payment, both days inclusive.
- (2) The plaintiff is directed to take such steps as may be necessary for the cancellation of the covering mortgage bond executed in its favour and registered with the Registrar of Deeds, Pretoria, with registration number B[...].
- (3) In the event of the plaintiff failing to comply with paragraph (2) within 30 days from the date of this order, the sheriff is hereby authorized to sign and execute all such documents, and do all such things as may be necessary, for the implementation of paragraph (2).
- (4) The trustees of the PATRICK MALABELA FAMILY TRUST are ordered to pay the plaintiff's costs of suit.'

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J E

SMITH  
ACTING JUDGE OF APPEAL

## Appearances

For the appellants: L Hollander  
Instructed by: Faber Goërtz Ellis Austen Inc, Bryanston  
Lovius Block Inc, Bloemfontein

For the respondent: JG Wasserman SC and JM Kilian  
Instructed by: O'Connell Attorneys, Bryanston  
Honey & Partners Inc, Bloemfontein