



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF
THE SPECIAL INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1996**

(REPUBLIC OF SOUTH AFRICA)

CASE NO: GP06/2021

In the exception between:

Special Investigating Unit

First Plaintiff

MEC for the Gauteng Provincial Department of Health

Second Plaintiff

and

Santa Kamogelo Atteridgeville Branch

First Defendant

Busi Carrina Morale

Second Defendant

GTZ Kambane

Third Defendant

JUDGMENT

Opposed exception – whether the plaintiffs’ particulars of claim disclose a cause of action based on the *condictio indebiti* – whether the plaintiffs claim does not have to fit their claim into a particular *condictio* - whether, if the exception is upheld, the plaintiffs’ claim should be dismissed.

Held: the plaintiffs' particulars of action fail to disclose a cause of action based on the *condictio indebiti*.

Held: *First National Bank Southern Africa v Perry N.O and Others* is not authority for the proposition that the plaintiffs' claim does not have to fit their claim into a particular *condictio*

Held: the defendants are not entitled to a dismissal of the plaintiffs' action as the plaintiffs' summons continue to stand as a simple summons. Therefore, the plaintiffs are entitled to leave to amend their summons.

First National Bank Southern Africa v Perry N.O and Others 2001 (3) SA 960 (SCA) at 956 D considered.

Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1991 (3) SA 787 (T) at 791H applied.

MODIBA J:

[1] The defendants have excepted to the plaintiffs' particulars of claim on the basis that they fail to disclose a cause of action. The plaintiffs are opposing the exception. With the parties' agreement, the exception is determined on the basis of the papers filed.

[2] The plaintiffs' claim against the defendants is for a monetary judgment in the amount of R228, 299.19.

[3] The first plaintiff, the Special Investigating Unit (SIU) is a statutory investigative body established in terms of section 2(1)(a)(i) of the Special Investigating Unit and the Special Tribunals Act¹ (the Act). It derives its *locus standi* from section

¹ Act 74 of 1996.

4(1)(c) read with section 5(5) of the Act and Proclamation R23 of 2017.² Section 5(5) read with section 4(1)(c) of the Act authorises the SIU to bring civil proceedings in its own name, in a matter emanating from its investigation as mandated, seeking the relief to which the Department is entitled. The proclamation mandated the SIU to investigate matters relating to the procurement of goods, works and services by the Gauteng Provincial Department of Health (the Department) to entities (such as the first defendant) that provide services to mental health users.

[4] The second plaintiff is the Member of the Executive Council for the Gauteng Provincial Department of Health. He is cited in his capacity as a representative for the Department. It is for convenience that in this judgment, I simply refer to the second plaintiff as the Department.

[5] The first defendant, Santa Kamogelo is a non-profit organization established in terms of the Non-Profit Organization Act.³ The second defendant, Busi Carrina Morale (Ms Morale) and third defendant, cited as GTZ Kambane (Kambane) are its officials. For convenience, I jointly refer to the defendants as such. Where it is necessary to distinguish between them, I refer to the defendants by their respective names.

[6] The plaintiffs allege that on 16 August 2016, the Department concluded a Service Level Agreement (SLA) with Santa Kamogelo. In terms of the SLA, Santa Kamogelo would provide both residential and non-residential mental health care

² The Proclamation was published in Government Gazette No. 41000 dated 24 July 2017.

³ Act 71 of 1997.

services to users with severe psychiatric and/ or profound intellectual disability. The SLA curbed the number of residential mental health care users that Santa Kamogelo would admit to 186 users. The Department would subsidise Santa Kamogelo's costs at the rate of R3,413.00 per mental health care user per month. The subsidy would be reduced on a *pro rata* basis for any number of days in a month in which a user did not utilize Santa Kamogelo's services.

[7] Santa Kamogelo would submit to the Department a claim for the subsidy monthly in arrears, supported by appropriate documents. The subsidy would only permit Santa Kamogelo to break-even without deriving any profit from the services it provides in terms of the SLA. Within 30 days of the end of the financial year (31 March), Santa Kamogelo would repay to the Department any undisbursed funds derived from the subsidy.

[8] The plaintiffs have dissected their claims against the defendants into Claim A and B.

[9] In Claim A, the plaintiffs allege that on or about 30 May 2016, Santa Kamogelo through Ms Morale and Kambane submitted a claim to the Department in the sum of R4,777,037.00 representing the total costs for services rendered in terms of the SLA. Santa Kamogelo admitted 185 mental health care users during the month of May 2016 to whom it provided services in terms of the SLA.

[10] The plaintiffs further allege that when they submitted their claim for May 2016, the defendants were aware that Santa Kamogelo only admitted 185 mental health care users on 12 May 2016 and only took care of them for 20 days. In terms of clause 5.8 of the SLA, the defendants were only entitled to claim on a *pro rata* basis in the month of May 2016. Therefore, they were entitled to claim an amount of R112,298.70 for services rendered to 51 mental health users and R195,467.10 for 133 mental health users. The Department transferred R477,037.00 to Santa Kamogelo's bank account. Thus, the Department overpaid the defendants by an amount of R169,271.19. The plaintiffs allege that the defendants were unduly enriched and the Department suffered loss by this amount.

[11] In Claim B, the plaintiffs allege that during the period May 2016 and March 2017, the defendants submitted claims to the Department in the amount of R5,110,991. For the same period, the Department paid R5,170,019 to Santa Kamogelo, thus, overpaying it by an amount of R59,028.00. They further allege that the defendants have been unjustifiably enriched by this amount.

[12] In their notice of exception, the defendants have only raised one complaint against these two claims. I quote it below:

*"1. The basis of the claims described in the Particulars of Claim, Claim A and B in the Particulars of Claim are for a *condictio indebiti* based on an allegation of unjustified enrichment but lack the averments required to found such a defence."
(sic)*

[13] The defendants seem to have used the word 'defence' in error. The plaintiffs have not taken the point. I assume, having regard to the defendants' complaint raised in the context of an exception that, the defendants intended to use the word 'claim' and not the word 'defence'. I therefore read the ground of exception as such for it to make sense.

[14] Although Tribunal Rule 13(1)⁴ makes provision for the delivery of an exception in response to a summons, Tribunal Rules are silent on the basis for the exception and the procedure under which it is brought. It is for that reason that in terms of Tribunal Rule 28(1),⁵ I invoke Uniform Rule 23(1)⁶ to address this impasse.

[15] In terms of Uniform Rule 23(1) of the Uniform Rules, a party may except or object to any pleading on the basis that it is vague and embarrassing or it fails to disclose a course of action.

⁴ Tribunal Rule 13 (1) provides as follows:

"Action proceedings shall be commenced by issuing out a summons, as near as they may be to Form 3(a) of Form 3 (b), whichever may be applicable, of the First Schedule and addressed to one or more defendants informing them, inter alia, that if he/she or it disputes the claim and wish to defend same, he/she/it shall, within ten days of receipt of the summons, deliver their notice of intention to defend together with a plea (with or without a claim in reconvention) or an exception."

⁵ Tribunal Rule 28 (1) provides as follows:

"If a situation for which these Rules do not provide, arises in proceedings or contemplated proceedings, the Tribunal may adopt any procedure that it deems appropriate in the circumstances, including the invocation of the High Court Rules."

⁶ Uniform Rule 23 (1) provides as follows:

Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.

[16] It is trite that an exception may be taken to irregularities of substance in a pleading. It is also trite that, in order to determine the validity of an exception, I have to accept, for the purpose of the exception, that the allegations in the particulars of claim are true and consider whether, on those allegations, the plaintiffs will succeed in making out a case for the relief that they seek against the defendants. In other words, I have to determine whether the plaintiffs have disclosed a cause of action that entitles them to the relief they seek against the defendants, in the event that they prove their allegations at the trial.

[17] In their heads of arguments, the plaintiffs complain that the defendants did not comply with the *proviso* in Rule 23 (1) in that they failed to give them an opportunity to remove their cause of complaint within 15 days of filing the notice of exception. This complaint lacks merit because:

17.1 the plaintiffs' failed to apply for a declaration of the notice of exception to be an irregular proceeding and to have it set aside in terms of Uniform Rule 30;

17.2 the plaintiffs' failed to have the notice of exception struck out in terms of Uniform Rule 30A for non-compliance with Rule 23(1);

17.3 at the 9 November 2021 case management meeting, the plaintiffs agreed to have the exception determined on the basis of the papers filed.

[18] The defendants contend that the basis for the plaintiffs' action is a *condictio indebiti*. The plaintiffs incorrectly contend on the authority in *Perry*⁷, that they do not have to confine their cause of action based on unjustified enrichment on the

⁷ *First National Bank Southern Africa v Perry N.O and Others* 2001 (3) SA 960 (SCA) at 956 D.

definition of a particular *condictio*. They have relied on an orbiter statement in *Perry*, where the SCA lamented the mistake-laden attempts to categorise enrichment claims according to different *condictio* and suggested that a solution rather lies in the adoption of a general action focused on the requirements of enrichment than on the definition and application of old actions.⁸ Having said that, the SCA nonetheless proceeded to consider the exception in *Perry* on the basis of a specific *condictio* as pleaded in the particulars of claim. Therefore, *Perry* is not authority for the principle postured by the plaintiffs.

[19] The plaintiff's reliance on *Francis*⁹ is also misplaced because the defendants have not raised any grounds of exception concerning the interpretation of the SLA.

[20] As argued in the defendants' heads of argument, the particulars of claim fail to disclose a cause of action because:

20.1 the amount in Claim B is for the period inclusive of the period in claim A. Thus, effectively, claim A is extinguished by the claim in Claim B;

20.2 the basis of the claim in Claim B is not explained. Thus, the cause of action in respect of this claim is not disclosed. Only in their heads of argument¹⁰ do the plaintiffs plead that the payment was *sine causa*, Santa Kamogelo has been enriched and the Department impoverished. Be that as it may, this is an impermissible manner of amending the allegation

⁸ *Perry* at paragraph 23.

⁹ *Francis v Sharp* 2004 (3) SA 230 (C) at 237F-G.

¹⁰ At paragraph 15.

against all the defendants as set out in paragraph 13 of the particulars of claim. For the first time in their heads of argument, the plaintiffs allege that the payment is *sine causa*. This too is impermissible.

20.3 no cause of action is set out in the particulars of claim against Ms Mogale and Kambane who allegedly acted as Santa Kamogelo's agents. The Department made payment to Santa Kamogelo and not to Ms Mogale and Kambane.

[21] For these reasons, I find that the plaintiffs allegations as set out in the particulars of claim will not sustain a cause of action based on the *condictio indebiti* at the trial. Therefore, the exception stands to be upheld with costs.

[22] The defendants seek a dismissal of the plaintiffs' action in the event that the exception is upheld. There is no merit in this request. Upholding an exception to a particulars of claim only justifies the setting aside of the particulars of claim. It does not carry with it the dismissal of the summons or action. Therefore, it is appropriate to grant the plaintiffs leave to amend their particulars of claim.¹¹

[23] In the premises, the order below follows:

ORDER

1. The defendants' exception is upheld.

¹¹ *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1991 (3) SA 787 (T) at 791H

2. The plaintiffs' particulars of claim are set aside.
3. Within 15 days of the date of this judgment, the plaintiffs shall deliver their amended particulars of claim.
4. The defendants shall deliver their plea and/or counter claim or further exception within 10 days of expiry of the period in paragraph 3 of this order.
5. Thereafter, the Clerk of the Presiding Tribunal member shall arrange a Case Management meeting in terms of Tribunal Rule 19 for the further conduct of the action.

JUDGE L. T. MODIBA
MEMBER OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the applicant: Adv. A. Mofokeng assisted by Adv T. Tshifhango

Attorney for the applicants: Ms. N. Sanda, Office of the State Attorney,
Johannesburg

Counsel for the 1st and 2nd respondents: Adv. D. Feldman

Attorney for the 1st and 2nd respondents: Mr D. Ramushu, David C. Feldman
Attorneys

Date of hearing: Not applicable, Application determined on
written submissions.

Last date of filing of heads of argument: 19
November 2021.

Date of Judgment: 18 March 2022

Mode of delivery: *this judgment was handed down electronically by circulation to
the parties' legal representatives by email and uploading on Caselines and Saflii.*

The date and time of delivery is deemed to be 11:15am on Friday 18 March 2022.