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

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISON, PRETORIA)

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

……..……..... **……**

SIGNATURE **DATE**

Case: 2022/047685

In the MATTER between:

DBM PROPERTY INVESTMENTS (PTY) LTD **APPLICANT**

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **RESPONDENT**

JUDGEMENT

KHOLONG AJ

Introduction

1. This is an opposed application wherein DBM Property Investments (Pty) Ltd ('Applicant') whose main place of business is Pretoria, seeks payment from the respondent for a sum of R466 247.54 plus interest. The respondent is The City of Johannesburg Metropolitan Municipality, a municipality established in terms of Section 12 of the Local Government Municipal Structures Act 117 of 1998 with its head office in Johannesburg.

2. Applicant seeks payment of money predicated as it submits on an error it made of paying to respondents amounts it alleges were not due. The contention therefore is that the money was not owing and claims repayment to the extent that the respondent was enriched at their expense. They aver that no contractual relationship of whatsoever nature ever existed between them and respondent. A point which on the record is common cause. That applicant had agreed separately with its clients (the executor of a deceased estate 'the Executor'), who is a third party in this matter and not joined to these proceedings, to breach certain amounts outstanding to the respondent. They argue that they are only liable to the extent of their contractual obligation to their clients, the executor.

Background

3. The factual matrix leading to the application can be summarized briefly as follows: On 19 November 2012 Mr. Joao Daniel Calado Ribeiro dos Santos passed away. He was a registered owner of a stand liable for municipal rates and taxes in Johannesburg, the municipal area of respondent and in which respondent had legislated authority in terms of the Municipal Property Rates Act and the Municipal Systems Act to levy municipal rates and taxes. Mustafa Mohamed was

subsequently appointed executor of the estate. On 12 September 2019 Vezi and De Beer Incorporated, evidently acting for the executor, and following sale of the property under executorship, requested clearance figures being the outstanding rates and taxes on the property. The clearance figures are necessary to ensure that rates and taxes on the property are paid to respondent in order to allow transfer in terms of section 118 of the Local Government: Municipal Systems Act[1]('Systems Act'). These amounts in terms of Section 118 are limited to a two year period preceding the application for certificate.

4. Applicants aver that following some prodding to the respondent for this figures, it was only in May 2021 that respondent provided clearance figures as requested. These figures reflected the total amount outstanding as R801 068, 25 which amount included R335 109,91 being the Section 118(1)(b) part of outstanding amount in terms of Municipal Systems Act.

5. The Executor was liable to pay the S.118(1)(b) costs in the amount of R335 109,91 in order to obtain the necessary municipal clearance certificate. The Executor approached applicant for bridging finance to provide funds to pay the costs of the section 118 certificate. They aver that upon agreement on bridging finance they settled a bridging agreement with executor. Following this, using Vezi Incorporated internal systems, which held their funds in trust, they requested payment be made to respondent. A payment requisition was made by Miss du Plessis for the amount of R335 109.91 to be paid out. Upon receipt of this requisition, Miss Prinsloo the bookkeeper at Vezi Incorporated, erroneously made payment of R801 357.45 instead of the requisitioned R335 109.91. Applicants allege R801 357.45 was the full amount outstanding and not the Section 118(1)(b) payment per agreement with executor. Prinsloo only realized after payment that she had made the error which was not in keeping with the agreement they allegedly entered into with executor.

[1] Local Government: Municipal Systems Act, No 32 of 2000.

6. Applicants aver that following this payment, when it became apparent that the sale could not be proceeded with due to non-performance by a third party purchaser, the sale agreement which gave rise to the S.118 clearance matter was cancelled. Having made the concession on the papers and in argument not to go for the full amount despite initial demand thereof they consequently sought repayment of what they deem excess amounts not due for purposes of Section 118 clearance.

The Supplementary Affidavit and Condonation Applications for late filing of answer and reply.

7. Before dealing with the merits of this matter, this Court is called upon to express itself on preliminary matters relating to late filing of affidavits by the parties variously, and to consider whether the evidence brought thereby should be condoned and admitted. The first point to deal with is the supplementary affidavit filed by respondents. This application was not opposed by applicant in the main matter. Applicant simply gave their own proper complexion of the facts to this Court as they see them and submitted that these new facts brought by respondents do not change the merits of their claim. Respondents submitted that these new facts were relevant to this Court's consideration of this matter in this respect: the immovable property belonging to dos Santos estate has now been sold by the executor; the consumer account numbers belonging to the estate have consequently been closed; There are no services whatsoever provided by respondent to the property nor consumer agreements; Further that there was credit at the time of closing these accounts.

8. Respondents put to this Court that they only became aware after pleadings had closed of these new set of facts. That these facts may be relevant on who in their view may be the true beneficiary of the payments made by applicant and the status of the dos Santos estate. Courts have held that a party seeking indulgence of the Court must provide an explanation which is sufficient to mitigate any concern that the application is mala fide or a result of some inexcusable remissness of the

party concerned[2]. This Court concurs with the view held in **Khunou and Others**[3] that the rules of Court are in a sense a refinement of the general rule of civil procedure. That rules of Court are designed to ensure that Courts dispense justice uniformly and fairly, and that the true issues are clarified and tried in a just manner. This court thus considers the explanation by respondents adequate and thus in exercising its discretion in the interest of justice, and in line with rule 6(5)(e) of this Court, allows this supplementary affidavit.

9. The Court also had to determine a condonation application from respondents for belated filing of the answering affidavit, which was filed 1 day late. The applicant also requests condonation for the late filing of the replying affidavit, which was filed 3 days late. The Court in its discretion, and having considered the submissions of the parties in the interest of justice condones the late filing of the answering affidavit by respondents and replying affidavit by applicant.

The Facts

10. Applicants contend that they and respondent have never at any time entered into any form of agreement in respect of payment of any amount. That applicant only had obligation to the executor to pay an amount of R335 109, 91 hence bridging finance agreement with executor. They contend that not even this amount creates an obligation between applicant and respondent. That at no time was the executor responsible for anything other than payment of R335 109, 91. That the mistake was excusable and bona fide. They argue that respondent was enriched by a payment of an amount that exceeded the amount necessary to obtain the clearance certificate.

11. It appears numerous demands were made by applicants for repayment of originally the full amount. These demands included demand per letter dated 18 December 2021 demanding repayment of full amount of R801 357,45. Respondent responded on 21 December 2021 addressing itself to Vezi

[2] Bangtoo Bros and others v National Transport Commission and others 1973 (4)SA 667 (N).
[3] Khunou and Others v Fihnrer and Son 1982 (3) SA 353 (W).

Incorporated and addressed as ‘dear valued customer’ and indicating in the correspondence that payments made for clearance certificates is not refundable. That refunds happen only where there has been credit balance following full payments. Applicants then proceeded to institute action on 21 January 2022.

12. Applicants contend that due to the error they are out of pocket to the amount of R466 247, 54 and seek relief as set out in the notice of motion.

13. The respondent opposed the application. The affidavit of Tuwani Ngwana, a legal advisor of respondent was used in opposition to the relief sought by applicants. Respondent contend that the clearance certificate consisted of section 118(1)(b) amount of R335 109,91 and the amount owed for consumed services. That the executor had a choice to pay the full amount i.e. R801 357.45 or the section 118 amount of R335 109.91. That they elected to pay the full amount. That it was therefore misplaced for them to turn around and argue that they paid in error. Respondent holds as common cause that applicant had no contractual relationship with respondent but that executor and applicant concluded an agreement for payment of amount provided in clearance certificate. That upon conclusion of the agreement, applicant on behalf of executor paid R801 357.45. In summary they hold that there was no error in executor paying the entire outstanding amount and that applicants made a choice with respect to which sum to pay and that they did so in agency to the executor.

14. They put to this Court that contrary to demands originally made to the municipality with regard to repayment in full, applicant now in their notice of motion seek payment of R466 247.54. That the property owners account remains indebted to the municipality. That the amount paid was as reflected in the clearance figures. In the result, they argued that applicants could therefore not contend that respondents were enriched as the total amount outstanding was in any event R801 068.25.

15. Counsel for respondent in argument contended that taking action without Executor renders application defective as executor aught to have been joined in the application. They stated that the agreement between applicant and executor is an illustration that the amount paid by applicant was not paid by applicant in its own accord nor flowing from the agreement applicants might have had with the municipality. That correspondence evinces that applicants were due to pay the stated amounts to respondents on behalf of the executor. That therefore the payment of full amount was not an error but payment of amounts due to the municipality. They put to this Court that their policy is that there would be no refund to a consumer who still held a consumer account with the municipality.

16. Respondents denied that applicants are entitled to a refund of the full amount; lesser amount as claimed nor any amount at all paid into the accounts of respondents for the services rendered. In reply applicants put to this Court that they simply seek refund of amounts outside the mandate of the applicant. They argued that payment to municipality was only premised on the bridging finance agreement. That having regard to the factual matrix, the Court should consider that applicants have a negative net position of R801 357.45. That in terms of the bridging finance agreement it will only be able to recover R335 109.91 from the deceased estate. That respondent is thus rendered impoverished to the amount of R466 247.54 which was paid to respondent in circumstances where there was no legal mandate nor contractual obligation to the applicant to pay this additional amount.

17. They put to this Court that in the light of the fact that the deceased estate was insolvent, the provisions of Section 89 of the Insolvency Act must be taken into consideration. That the enrichment of the respondent means that whilst its claim may take precedence over other creditors they take cents in the rand. But that the effect of this enrichment means that they receive 100 cents in the rand for the additional excess amount due to payment by applicant herein. That should applicants succeed the municipality will regain its claim in the queue of the

insolvent deceased estate and that the administration process will determine what the quantum of this claim will be.

18. Applicants in argument denied existence of an agency relationship and submitted that the only agency relationship that existed was between the executor and Vezi and de Beer Inc. That applicant is not the executor of the deceased estate and therefore not liable for any consumption charges in respect of the property. Applicants deny that payment of any amount above the section 118 figures was made in line with agreement nor on agreement between applicant and executor.

The Law

19. The claim for repayment is premised on condictio indebiti. This contention was also advanced in oral argument by Counsel for the applicants. This principle thus warrants some examination. Condictio is a Roman law term simply connoting a personal action in which the contention is that some property should be conveyed, and as I see it be reconveyed. Condictio indebiti obtains as an action where a person has mistakenly paid money or handed over property to another, thinking that the receiver was entitled thereto when in fact such was not the case, then he is entitled to recover same by means of condictio indebiti[4].

20. It has also been noted in our law that money paid under a mistake of law cannot in some instances be recovered[5]. Harms JA[6] noted that there had been more than one attempt to state or restate the requirements of the condictio indebiti, but that these formulations were more often than not concerned with the problems of the specific case and have to be read in that limited context. That the rules of the condictio are also not identical for all situations and there is scope for deviation, for instance where the deceased or insolvent estates and the like are concerned. On the facts of that case the Court held that an ultra vires payment can be

[4] Union Government v National Bank, 1921 AD 125, 140.
[5] Port Elizabeth Divisional Council v Uitenhage Divisional Council, 1868 Buch 223.
[6] Bowman NO and others v Fidelity Bank Limited [1997] 1 All SA 317 (A) at 321f.

reclaimed with condictio indebiti or at the very least condictio sine causa as such payments are by their nature payments of something not owing.

21. Streicher JA[7] observed that in a claim for condictio indebiti, in order to succeed litigants had to prove that a payment was made in the mistaken belief that it was owing. It appears from this judgement that claimant in order to succeed, they must discharge the onus of proving that the payment in excess was made:

    (i) bona fide and (ii) in a reasonable, but (iii) mistaken belief that it was owing. Evidently, in this Court's view, the Court would have to consider inter alia whether one party is poorer as a result and other richer as a result thereof.

22. Whilst this Court agrees that the evidence presented by the clearance figures reflects both the total amount outstanding and the Section 118 figures, it cannot agree with respondents that it must simply dismiss the evidence presented by applicants without any plausible acceptable explanation by respondents on what lay behind the payment of the full amount of R801 357,45. Put differently, is there extrinsic evidence pointing to an intention by applicant to pay the full amount on the record before this Court? I would think not. The evidence before this Court which is not rebutted by respondents is the existence of a bridging finance agreement. This agreement for whatever it is worth, spells out the intention of both the applicants and the Executor with respect to the transaction in question. Which is to provide and pay bridging finance of R335 109.91 on what exhibit DBM12 bridging agreement titles 'transfer: Dos Santos/Alams Erf […] Rosettenville'.

23. Much can be said by this Court about this agreement and circumstances bringing it to life such as the fact that Mustafa Mohamed is not only executor but also director of applicants, DBM property Investments, the lender of bridging finance. These factors despite not being taken up by respondents helps this Court

[7] Absa Bank LTD v Leech and Others NNO 2001 (4) SA 132 at 139.

understand the relationships and train of events that includes the now sale of the property and conundrum respondent now finds itself in as the consumer contractual relationship with executor or the insolvent estate may now have been extinguished. This conundrum faced by respondents, doesn't however respond to the fundamentals of the case put by applicants before this Court.

24. The clearance figures remitted by respondent have two figures. The first is the full amount and how it is computed. It also clearly stipulates the Section 118(1)b figures in the amount of R335 109.91. If one looks at this evidence together with the bridging agreement, confirmatory affidavits of three witnesses relevant to this transaction and in the absence of any other evidence, this Court must conclude that the Executor settled the bridging agreement to pay not the full amount but the section 118(1)b figures. That therefore applicants, as third parties could reasonably not be held to have intended to pay the full amount. The evidence of Eduan de Beer on behalf of applicants corroborated by the executor, Mustafa Mohammed and du Plessis the conveyancer and Prinsloo, the bookkeeper is that the intention was to pay R335 109.91 and not R801 068.25. They put to this Court that the payment in excess was made in error and without mandate. This Court accepts this evidence.

25. Evidently payment in excess of R335 109.91 was made without mandate if one has regard to the bridging agreement. This Court can therefore not accept the argument advanced on behalf of respondents that this error corroborated on evidence should simply be dismissed as a choice the applicants had in terms of the clearance figures and that for the fact that they elected to pay the full amount they could now not turn around and contend otherwise. There is no evidence before this Court that applicants or the executor for that matter even having been presented with a choice as contended by respondent's Counsel could be said to have had an intention to pay anything other than the Section 118 figures. The contention of respondents on this score thus falls to be rejected on the evidence.

26. What follows is whether having had the intention to pay the section 118 figures, the error by Prinsloo is excusable and bona fide. On the evidence this Court finds that there is sufficient explanation for the error by Prisloo the effect of which is that respondent was paid money in excess of R335 109.91. This leaving applicants poorer in the amount of R466 247,54.

27. It is common cause that applicants have and never had any contractual relationship with respondents. The mandate was to pay R335 109.91. The amount in excess of that was clearly ultra vires and in as far as applicants are concerned without just cause and in error. Respondents have R466 247.54 in excess of the amount required for the section 118(1)b clearance figures to the prejudice of applicants. That the property has now been sold and respondent is in a conundrum forced to stand in the queue, whilst having preference in terms of the Insolvency Act, on an insolvent estate is not a defence which in this Court's view turns anything on a claim grounded on condictio indebiti.

Non-joinder of the Executor

28. Much was made about the non-joinder of executor as a defence raised by respondents. It was observed by Brand JA in Bowring[8] that the enquiry related to non-joinder remains one of substance rather than the form of the claim[9]. The substantial test is thus whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgement of the Court in the proceedings concerned. It would appear therefore that the test is that legal interest of a party not joined could be prejudicially affected by the decision of the Court.

29. On the facts admitted by both parties it would appear that the legal relationship between applicants and executor on the evidence is limited to the bridging finance agreement. This evidence is corroborated by the executor himself in the

[8] Bowring NO v Vrededorp Properties cc and Another 2007 (5) SA 391 at 398F.
[9] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 657.

confirmatory affidavit who respondents claim aught to have been joined. The executor on the evidence having regard to his confirmatory affidavit concurs with the facts as stated by de Beer and finds no prejudice. Whilst this Court may sympathize with conundrum now faced by respondents it had and remains with legal avenues available to it for whatever it considers due to it in levies. It is however a stretch too far to draw in a completely different legal person, who is a third party in that battle. This Court concurs that to the extent that there may have been an agency relationship, that agency is limited to the terms of the bridging finance agreement which is R335 109.91.

30. It was open to respondents to consider legal remedies available to them and the prejudice which they, as respondents would suffer if this matter were to be determined without any counter-claims or joinder of any other third party. The applicant thus had no obligation in an effort to recover excess amounts it considers paid to respondent, when it has no legal relationship with respondent to join executor in prosecution of its rights. As contended by applicant's Counsel it elected to exercise the options opened to it and go to respondents to recover excess amounts. On this basis the point taken by respondents on this score is found to be without merit and dismissed.

. **Conclusion**

31. This court thus concludes that applicants on the evidence have made out a case for condictio indebiti and the Court, after due consideration, is satisfied that the elements thereof are met. In any event even if they were not this Court would still have found that applicants are entitled to their claim on condictio indebiti on the strength of payment made ultra vires[10]. This, however, the Court considers not necessary

32. Applicants are therefore entitled to the relief that they seek in the notice of motion and respondent is to pay back a sum of R466 247.54 to applicants.

[10] Bowmans, op cit.

Costs

33. In argument respondents advanced argument that they are entitled to costs on a punitive scale for having been forced to make a substantive application to file supplementary affidavits. Considering that this step was taken after pleadings had closed and that applicants in the main matter didn't oppose this application, this Court finds this contention, with respect, misplaced. It makes no order as to costs with respect to filing of supplementary papers.

34. On the main matter, it is trite that costs follow the results

Order

Having heard Counsel, read the documents filed by the parties and having considered the matter, the following is made an order of Court:

IT IS ORDERED THAT:

(1) Respondent is to pay Applicant a sum in the amount of R466 247.54 (Four Hundred and Sixty-Six Thousand Two Hundred and Forty Seven Rand and Fifty-Four Cents).

(2) Interest on the aforesaid amount at a rate of 10.5% per annum a tempora morae to date of final payment.

(3) Costs of this application to be paid by the Respondent.

SST KHOLONG
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG DIVISION,
PRETORIA

Appearances:

For the Applicant:	Adv: CGVO Sevenster
Instructed by:	Vezi and de Beer Attorneys
For the Respondent:	Adv: E Sithole
Instructed by:	Majang Inc. Attorneys
Date Heard:	23 January 2024
Date Judgement delivered:	14 March 2024