THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 752/2012
Reportable

In the matter between:

CAPRICORN BEACH HOME OWNERS ASSOCIATION **APPELLANT**

and

H.E.S. POTGIETER t/a NILANDS **FIRST RESPONDENT**

PINCUS MATZ MARQUARD ATTORNEYS **SECOND RESPONDENT**

Neutral citation: *Capricorn Home Owners v Potgieter* (752/2012) [2013] ZASCA 116 (19 September 2013)

Coram: Mthiyane AP, Maya, Wallis JJA, Van der Merwe and Swain AJJA

Heard: **2 September 2013**
Delivered: **19 September 2013**

Summary: Attorney erroneously transferring money ─ recipient refusing to refund it ─ relying on set-off ─ parties not mutually indebted to each other ─ funds drawn on trust account ─ attorney operating trust account acts as principal not as agent ─ entitled to recover erroneously transferred funds with *condictio indebiti*.

ORDER

On appeal from: Western Cape High Court, Cape Town (Gangen AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

MTHIYANE AP (MAYA, WALLIS JJA, VAN DER MERWE AND SWAIN AJJA CONCURRING):

[1] This is an appeal against a judgment and order of the Western Cape High Court (Gangen AJ) in which the appellant, Capricorn Beach Home Owners Association, was ordered to repay the first respondent, H.E.S Potgieter t/a Nilands, an amount of R451 614.03, being a portion of the amount which the first respondent erroneously paid to the appellant from his (first respondent's) trust account. The appeal is before us with leave of this court.

[2] In August 2006 the first respondent was instructed by his client, Capricorn Beach Joint Venture, which is not a party to these proceedings, to attend to the transfer of Erf 2323 Capricorn (the property) from itself, as seller, to Mr Maregesi Ben Manyama, as purchaser. Mr Manyama, too, is not a party to these proceedings. The transfer of the property was duly registered in the Deeds Office at Cape Town on 15 July 2008.

[3] It is standard practice in a property transfer such as this for the conveyancer to pay the proceeds of the sale to the seller simultaneously with the registration of transfer. This is what was required of the first respondent. The first respondent's bookkeeper, Ms Lizelle du Toit, unfortunately, on 16 July 2008 erroneously paid the proceeds of the sale amounting to R735 859.15, to the appellant instead of to the first respondent's client. The appellant does not dispute this payment and the fact that it was made erroneously.

[4] The erroneous payment arose in the following circumstances. Ms du Toit had previously made a number of payments to the appellant, on the instruction of the first respondent's client, in respect of levies due to the appellant from time to time. At the relevant time the first respondent's client owned certain residential units at Capricorn Beach and was consequently periodically liable to the appellant for the payment of levies.

[5] In terms of the payment system used in the first respondent's office, Ms du Toit, effected payments electronically and loaded beneficiaries onto the payment system to facilitate such payments. The respective account names, the payment details of the appellant (Capricorn Beach Levies Account) and those of the first respondent's client (Capricorn Beach Joint Venture) are similar. When generating an electronic payment, Ms du Toit was required to select a payment beneficiary by identifying and logging in the correct account name. In this particular instance she erroneously selected the incorrect account name and paid the proceeds of the Manyama sale transaction to the Capricorn Beach Levies Account, and therefore incorrectly credited the appellant instead of the Capricorn Beach Joint Venture account.

[6] On being informed of the erroneous transfer, the first respondent contacted the appellant by e-mail on 21 July 2008, advised it of the mistake and requested an immediate refund. The relevant portion of the e-mail sent by Mr Potgieter, to the appellant drew attention to the problem as follows:

'Please be advised that we have erroneously made payment into the account of Capricorn Beach Levies account in the sum of R735 859.15 on the 16th instant. This amount should in fact have been credited to Capricorn Beach Joint Venture being proceeds of a sale of Erf 2323 Capricorn. Please would you be so kind as to refund us the said payment so that same may be correctly allocated.'

[7] The first respondent also telephonically contacted a trustee of the appellant, Mr Vincent Rutherford on 23 July 2008 in an effort to obtain repayment of these funds.

[8] At that stage Mr Rutherford informed the first respondent that the appellant was not able to attend to the repayment that day as it was in the process of changing its managing agents and the signatories on the appellant's banking accounts which would, as the first respondent understood, facilitate payment of the refund to the first respondent, and that such refund would be finalised either on that day or the following day.

[9] Mr Rutherford gave the first respondent to understand that the appellant would make payment to the first respondent once the signatories to the appellant's banking account had been loaded onto the payment system by its bankers. Mr Rutherford confirmed the appellant's intention to pay in an e-mail to Mr Potgieter dated 24 July 2008, the relevant portion of which reads as follows:

'As discussed with Mr Potgieter yesterday, we are currently changing Managing agents and bank signatories and will finalise today or tomorrow.
At this stage we can not make any payments until our bank loads new signatories.
I apologise for the delay, unfortunately bad timing.'

[10] At this stage it seemed that there was no question that the erroneously transferred funds would be refunded. However, subsequently the appellant refused to refund the funds, alleging that the first respondent's client, Capricorn Beach Joint Venture, was indebted to it in the sum of R451 614.03 for arrear levies, water, rates and taxes. It did repay the balance of R284 245.12.

[11] The second respondent, Pincus Matz Marquard Attorneys, acting on the appellant's behalf subsequently came into the picture and advised the first respondent that the appellant was exercising its rights of set-off with respect to the arrear amounts due by the first respondent's client to the appellant. The relevant portion of the letter of the second respondent dated 29 July 2008, addressed to the first respondent reads as follows:

'We confirm that our client is presently holding the amount which your offices representing the Capricorn Beach Joint Venture, transferred into their [the appellant's] banking account.
We have advised our client that it is entitled, with respect to those monies, to exercise its rights of set-off against several amounts owed by your client to ours arising from non-payment of levy contributions, water charges, rates and taxes.
Our client will, in the course of the day, furnish us with the exact amount which it contends is due by your client to it. This amount, we propose, should be received into our Trust Account and immediately invested in an interest bearing account pursuant to the provisions of Section 78(2A) of the Attorneys Act pending ultimate determination of the dispute/s whether by agreement or Order of Court.
Our client undertakes to repay the balance of the amount to your offices immediately.'

[12] The appellant's alleged entitlement to retain the payment made in error is founded on two propositions. First, it is premised on the fact that the proceeds of the sale erroneously paid by the first respondent into the appellant's bank account may be set-off against a debt owed to the appellant by the first respondent's client, the Capricorn Beach Joint Venture. The second basis relied upon by the appellant is that there was an agreement between the appellant and the first respondent that the erroneously transferred funds would be retained by the appellant until the dispute concerning the liability of Capricorn Beach Joint Venture to the appellant in respect of levies and other charges had been resolved either by agreement or an order of court.

[13] I deal first with the appellant's defence based on set-off. The appellant's claim to set-off the client's debt against the erroneous payment made by the first respondent is ill-conceived. The appellant and the first respondent are not mutually indebted to each other. Set-off operates only where two persons reciprocally owe each other something in their own right. *Wille's Principles of South African Law* 9 ed (2007) at 1834. In *Schierhout v Union Government (Minister of Justice)* 1926 AD 286 at 289, Innes CJ commented as follows with regard to set-off:

'The doctrine of set-off with us is not derived from statute and regulated by rule of court, as in England. It is a recognised principle of our common law. *When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation.* The one debt extinguishes the other *pro tanto* as effectually as if payment had been made.' (Emphasis added.)

[14] In the present matter the appellant and the first respondent are not mutually indebted to each other. The appellant knew that the payment was made in error and was therefore not entitled to appropriate the

erroneously transferred funds. See *Nissan South Africa (Pty) Ltd v Marnitz NO & others* 2005 (1) SA 441 (SCA) para 24. Even on the appellant's own version no grounds exist for set-off to operate against the first respondent.

[15] Counsel for the appellant attempted to meet this point by submitting that in transferring the money, the first respondent acted as an agent of its client, Capricorn Beach Joint Venture, which was indebted to the appellant for arrear levies, water, rates and taxes. It followed therefore, so the argument went, that the appellant was entitled to set the amount of the debt off against the payment transferred to it in error.

[16] This argument however flounders in the face of the weight of authority of this court against it. First, it is at odds with the judgment of this court in *Wypkema v Lubbe* 2007 (5) SA 138 (SCA) para 7. That case held that, when an attorney draws a cheque on his trust account, he exercises his right to dispose of the amounts standing to the credit of that account and does so as principal and not in a representative capacity. In my view that puts paid to the submission that the first respondent, a duly admitted attorney, notary and conveyancer, was acting as an agent when through his bookkeeper, he made the erroneous transfer of money to the appellant. It is true that in this case we are not concerned with the drawing of a trust cheque but in principle it makes no difference that the payment was made in the modern way by electronic transfer. The account from which the erroneous payment was drawn, was a trust account controlled by the first respondent. Therefore the principle laid down in *Wypkema* applies.

[17] The second reason for rejecting the argument that the first respondent acted as an agent is evident from the facts of the case themselves. Payment to the appellant was made in error. There is nothing to show that the first respondent had the authority from his client, Capricorn Beach Joint Venture, to make the payment. As an attorney, the first respondent is obliged to keep proper accounting records, containing particulars and information of any money received, held or paid by him for or on account of any person. See s 78(4) of the Attorneys Act 53 of 1979. The first respondent was therefore under an obligation to account to his clients concerning the proceeds of the sale, namely R735 859.15, received from the purchaser in respect of the sale of the property. Any failure on the first respondent's part to do so would certainly have resulted in a violation of the rules and regulations applicable to attorneys.

[18] It follows that the appellant's refusal to refund the money transferred in error, based on the defence of set-off, is without merit and falls to be rejected.

[19] Turning to appellant's defence that there was an agreement between itself and the first respondent to retain the erroneously paid funds, the correspondence exchanged between the parties clearly shows that no such agreement was concluded between the parties. In the letter of 29 July 2008, which has already been referred to above, the second respondent acting on the appellant's behalf 'proposed' that an amount of R451 614.03 be retained in their trust account and invested pursuant to s 78(2A) of the Attorneys Act, pending resolution of the dispute in respect of levies and other charges said to be owed to the appellant by Capricorn Beach Joint Venture. There is no evidence that this proposal was accepted. In his reply by e-mail addressed to Mr Rutherford, the first

respondent made it clear that the appellant was not entitled to keep the money and threatened to bring an application to court for the recovery of the aforesaid amount. The first respondent emphasised that the payment to the appellant was a bona fide mistake which did not entitle the appellant to keep the money. On this ground the appellant must also fail.

[20] This brings me to the question of enrichment which was said by counsel for the first respondent to be the ground upon which reliance is placed by his client for the recovery of the erroneous payment. The general requirements underlying all enrichment actions are that (a) the defendant must be enriched; (b) the plaintiff must be impoverished; (c) the defendant's enrichment must be at the expense of the plaintiff and (d) the enrichment must be without cause (*sine* causa) ie unjustified. See *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 496E. There can be no question that the appellant in this case has been enriched. The first respondent has been impoverished. The appellant's estate has been increased by the amount erroneously transferred and this increase has been at the expense of the first respondent. No justification for it has been established. Someone who has paid a sum of money or transferred property to another erroneously believing that it was due to that person, when in fact it was not due, is entitled to recover the sum of money or the property, see *Wille's Principles of South African Law* 9 ed (2007) at 1058.

[21] The *condictio indebiti* is available provided that the mistake (whether of fact or law) was excusable. (See *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) at 203H; *ABSA Bank Ltd v Leech & others NNO* 2001 (4) SA 132 (SCA) para 8.) The question whether the mistake on the part of the bookkeeper is excusable did not

arise. It was not suggested at any stage during the hearing of the appeal that the first respondent's bookkeeper had been slack in effecting the erroneous transfer. In any event there was, in my view, no slackness on her part. In the founding affidavit, Mr Potgieter averred that such an error had never occurred before and that it was extremely unfortunate that despite every diligence the error occurred. If one has regard to the similarities of the account names listed as beneficiaries in the first respondent's electronic payment system, the erroneous allocation is understandable and excusable. In my view the first respondent's claim for the recovery of the erroneously transferred money, based on the *indebiti*, should be upheld.

[22] It is clear that the appellant has failed to show any justification for the retention of the money paid into its account by the first respondent's bookkeeper. Accordingly the third essential element of enrichment liability has been established by the first respondent and with that the appellant's appeal must fail.

[23] During the preparation of this judgment counsel for the appellant, without seeking this court's leave to do so, filed supplementary heads of argument which do not add anything to the debate. They are speculative and miss the point completely.

[24] In the result the following order is made:
The appeal is dismissed with costs.

_____
K K MTHIYANE
ACTING PRESIDENT

APPEARANCES

For Appellant:	C H J Maree
	Instructed by:
	Paul Weber Attorney, Cape Town
	Naudes, Bloemfontein
For First Respondent:	R J Howie
	Instructed by:
	Randall Titus & Associates, Cape Town
	Webbers, Bloemfontein