

SOUTH AFRICA / JUDGMENT

Alert Steel (Pty) Ltd v Mercantile Bank Ltd

(165/21) [2022] ZASCA 96 (21 June 2022)

[2022] ZASCA 96

COURT

Supreme Court of Appeal

BEFORE

Van der Merwe, Molemela, Schippers, Musi,
Matojane

CASE / FILE NUMBER

165/21

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 165/21

In the matter between:

ALERT STEEL (PTY) LTD

APPELLANT

(in liquidation)

and

MERCANTILE BANK LIMITED

RESPONDENT

Neutral citation: Alert Steel (Pty) Ltd v Mercantile Bank Ltd (case no 165/21)

[2022] ZASCA 96 (21 June 2022)

Coram:

VAN DER MERWE, MOLEMELA and SCHIPPERS JJA and MUSI and MATOJANE AJJA

Heard:

20 May 2022

Delivered: 21 June 2022

Summary: Enrichment – *condictio indebiti* and *condictio sine causa* – company in liquidation – sale of assets – claim for repayment of amount received by secured creditor – on the basis that receipt *ultra vires* – enrichment of creditor and impoverishment of company not proved – appeal dismissed.

ORDER

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

The appeal is dismissed with costs, including the costs of two counsel.

Schippers JA (Van der Merwe and Molemela JJA and Musi and Matojane AJJA concurring)

- [1] The issue in this appeal, which is before us with the leave of the court below, is whether the appellant, Alert Steel (Pty) Ltd (in liquidation) (the company), is entitled to repayment of an amount of R105 226 381.17, together with interest and costs, based on the *condictio indebiti*, alternatively the *condictio sine causa*. The respondent, Mercantile Bank Limited (the bank), a creditor of the company, received the bulk of this amount (R100 million) pursuant to a sale of the company's assets.
- [2] The facts are largely common ground. The company formerly traded as a wholesaler and retailer of steel and hardware products. In March 2014 the bank granted the company overdraft facilities in the sum of R104 million against certain securities, including a registered notarial bond over the company's stock and movable assets, cession of its present and future book debts and cession of its insurance cover with Credit Guarantee Insurance Company Ltd (CGIC).
- [3] On 9 May 2014 the company was placed in voluntary business rescue in terms of a board resolution. On the same day, the bank cancelled the overdraft facilities, demanded repayment of R104 million plus interest, and informed the company that it would exercise its rights under the securities it held.
- [4] On 10 July 2014 a creditor of the company launched an urgent application in the Gauteng Division of the High Court, Johannesburg (the high court), to set aside the resolution placing it in business rescue. CGIC was cited as a respondent in that application. Subsequently, CGIC applied to the high court for the provisional winding-up of the company, which was enrolled for hearing on 15 July 2014. CGIC provided the bank with an unsigned copy of the winding-up application on 14 July 2014, whereupon the bank perfected its notarial bond.
- [5] On 17 July 2014 the high court granted an order that the company be provisionally wound-up as it was unable to pay its debts. A final winding-up order was made on 19 February 2015.

- [6] The provisional liquidators (the liquidators) were appointed on 22 July 2014. That day, West Lake Trade and Investments (Pty) Ltd (West Lake) made a written offer to purchase all the company's assets for R100 million. The assets included stock in trade, fixtures and fittings, and receivable and recoverable debts of the company. All of these assets were subject to the bank's security mentioned above. The next day the liquidators informed the bank of the offer and encouraged the bank to accept it.
- [7] On 31 July 2014 the bank informed the liquidators that it supported West Lake's offer, subject to the condition that should the bank fund the West Lake transaction, there would be no flow of funds to the insolvent estate and the purchase price would be applied to reduce the company's indebtedness to the bank. The bank also imposed a condition that it would retain the cash and funds it had collected from debtors and in the perfection of its notarial bond, to reduce its exposure to the company. The liquidators expressly accepted these conditions.
- [8] On 5 August 2014 the liquidators applied to the Master for an extension of their powers in order to accept the West Lake offer of R100 million. They informed the Master that the bank was the only secured creditor; that it had the right, prior to the second meeting of creditors, to dictate the manner in which its security should be dealt with; and that it was willing to accept the offer. The Master granted the application and extended the liquidators' powers to effect the sale of the assets, and the West Lake offer was accepted. The written agreement that was thus concluded, inter alia, provided:
- '3.1 The Offeror [West Lake] will purchase the Items of Sale for the sum of R100 000 000.00 (ONE HUNDRED MILLION RAND) on acceptance of this Offer to Purchase by the Offeree [the liquidators].
- 3.2 It is agreed between the Offeror and the Offeree that payment as contemplated in 3.1 above shall be effected directly to Mercantile by the Offeror or any of its assigns or affiliates, wherein after the Offeror shall procure that Mercantile forthwith reduces any claims that it may have against the insolvent estate of Alert by the amount contemplated in 3.1 above.'
- [9] Subsequently, the bank financed the purchase by West Lake by lending the R100 million to its nominee. The company's account was credited in the sum of R100 million. Consequently, the company's debt to the bank was reduced from R106 138 295.35 (the initial loan of R104 million plus interest) to R6 138 295.35. The bank released the company's assets from its perfected notarial bond, and the assets were transferred to West Lake.
- [10] The balance of R106 138 295.35 was further reduced by R5 226 381.17, comprising amounts of R3.1 million paid to the bank by the liquidators in respect of book debts collected by them, and R2 126 381.17, collected by the bank pursuant to the perfection of its notarial bond. The sum of R100 million therefore represented the proceeds of the sale of the company's assets, and in effect and in law the company made payment thereof to the bank. In argument in the high court and before us, the parties dealt with the amounts of R3.1 million and R2 126 381.17 on the same basis as the R100 million, and I shall do the same.

- [11] The first meeting of creditors in the company's insolvent estate took place on 1 and 9 December 2015. The second meeting of creditors took place over an extended period of time and closed on 21 February 2017. The bank did not prove a claim against the estate at any of these meetings.
- [12] In June 2017 the bank submitted a claim against the company's insolvent estate, in terms of s 44(4) of the Insolvency Act 24 of 1936 (the Insolvency Act). The affidavit in support of the claim stated that the bank was a secured creditor of the company in the sum of R106 138 295.17 as at 15 July 2014. The bank's attorney requested the liquidators to convene a special meeting, at its cost, for proof of its claim.
- [13] The special meeting of creditors was held on 14 February 2018 at the Master's office in Pretoria. However, at this meeting the bank withdrew its claim. According to the answering affidavit, this was done to preserve the bank's position that its claim against the company had been reduced by R100 million, following West Lake's acquisition of the company's assets, and therefore it was unnecessary to prove a claim in that amount. Had the bank proved a claim in the whole amount (R106 138 295.17), that would have been contrary to its stated position.
- [14] The company's case in the founding affidavit was founded on the following allegations. The bank had directly and indirectly collected amounts totalling R105 226 381.17, in respect of the company's estate (the collected amount). The bank did not prove a claim in the company's estate. The second meeting of creditors closed on 21 February 2017 and three months had passed since the closing of that meeting. Despite demand, the bank failed to pay the company the collected amount or any portion of it.
- [15] The liquidators, with the bank's knowledge, had taken decisions on the basis that the bank was a secured creditor and would prove a claim in the company's estate. Had they known that the bank was not a secured creditor as required by law, they would not have allowed it to collect and retain the collected amount. The liquidators had to finalise the first liquidation and distribution account in the company's estate, and were required to deal with the collected amount. There was no legal basis for the bank to retain the collected amount without having proved a claim in the estate. The liquidators thus initially took the position that the bank had not perfected its security prior to the commencement of the winding-up of the company on 15 July 2014. However, the high court's clear factual finding to the contrary was rightly not challenged before us and the appeal must be determined on the basis that the bank had indeed perfected its security prior to the effective date of the winding-up.
- [16] The company raised two further grounds upon which it claimed to be entitled to payment of the collected amount. The first was based on an alleged breach of an agreement between the parties, namely that in the event of the bank not being a secured creditor, it would pay the collected amount to the company, together with interest. The second ground was delictual. It was alleged that at the date of the concursus creditorum, the bank had wilfully or

negligently represented to the liquidators that it was a secured creditor and would prove its claim in the winding up of the company. This representation was false and induced the company to act to its prejudice by allowing the bank to collect and retain the collected amount. However, the company did not persist with these claims on appeal.

- [17] In the high court, and before us, the case was advanced on the basis that the liquidators had acted ultra vires and the bank was consequently enriched. More specifically, it was submitted on behalf of the company that monies paid by liquidators in error or outside their powers, may be recovered with the *condictio indebiti* or the *condictio sine causa*. It was contended that the acts of the liquidators were inconsistent with s 44 and s 83(10) of the Insolvency Act.
- [19] The finding that the payment to the bank of the proceeds of the sale of the insolvent company's assets, was 'effected outside the estate' with the sanction of the Master, has no basis in the evidence. The Master did no more than authorise the sale of the company's assets. That much is clear from the facts which the liquidators placed before the Master in support of the application for permission to accept the West Lake offer, as well as the terms of the Master's authorisation.
- [20] The liquidators informed the Master that the bank was a secured creditor which had perfected its notarial bond over the assets. The West Lake offer of R100 million was for all the stock and assets of the company at all its branches. The liquidators attached a desktop valuation of the assets showing a forced-sale value of R65 million, and said that acceptance of the offer would benefit all the creditors. The company had some 800 employees and West Lake had undertaken to attend to the labour relations issues. Acceptance of the offer would increase the dividend; avert any auctioneer's commission, advertising costs and the liquidators' administrative expenses; and release the insolvent estate from monthly expenses in respect of rent, insurance and security, which the liquidators would have had to pay until the estate was wound-up. For these reasons, the Master authorised the sale and extended the powers of the liquidators. On the facts, it cannot be suggested that the Master authorised payment of the proceeds of the sale of the company's assets to the bank, outside the estate and the principles of insolvency law.
- [21] Counsel for the company, on the authority of *Bowman*,^[2] submitted that it was entitled to repayment of the collected amount. In *Bowman* this Court approved the judgment in *Van Wijk's Trustee*,^[3] in which it was held that if an heir or executor in violation of his duty pays a creditor whose claim should have been postponed, it is not contrary to any principle of law that the estate through the executor or the trustee is entitled to recover what has been improperly paid, by way of the *condictio indebiti*. Harms JA said that an ultra vires payment 'can be reclaimed with the *condictio indebiti* or, at the very least, the *condictio sine causa*'.^[4]
- [22] The submission is, however, unsound. There was no allegation in the founding affidavit that the bank had been enriched at the expense of the company. The *condictio indebiti* and the *condictio sine causa*, or the respects in which the company had met the requirements of

these enrichment actions, were not pleaded at all. But even if they were, and on the assumption that the payment of the collected amount to the bank was ultra vires the provisions of s 44 of the Insolvency Act because the bank did not prove a claim in the company's estate, an ultra vires payment is not recoverable without more. The company was still required to establish the general elements of an enrichment claim,

namely that (i) the bank was enriched, ie it gained a financial benefit that would otherwise not have taken place; (ii) the company

was impoverished; (iii) the bank's enrichment was at the company's expense;^[5] and (iv) the enrichment was unjustified, ie there was no legal basis to justify the retention of the collected amount.^[6]

[23] The company simply did not meet these requirements. To begin with, the bank was not enriched. To found an enrichment action, the company had to show that the bank had received the collected amount indebite in the widest sense or sine causa:^[7] in other words, that there was an increase in the assets of the bank which would not have taken place, but for the receipt of the

collected amount. The liquidators acknowledged that the company was indebted to the bank in an amount in excess of R100 million. Indeed, the liquidators informed the bank that its claim against the company could be reduced (which they incorrectly referred to as 'set-off') by the proceeds of the sale of the assets to West Lake. What is more, on 22 August 2014 they paid an amount of R3.1 million to the bank as 'provisional dividends', which merely confirmed that the bank was entitled to the collected amount.

[24] The company's reliance on Bowman does not assist it. In that case a creditor, Fidelity Bank Ltd (Fidelity), had secured claims against a company in liquidation in the amount of R640 000. The liquidators of the company entered into an agreement with Fidelity to pay the amount of R640 000 from the proceeds of the sale of the secured assets to Fidelity, prior to the drawing and confirmation of the liquidation and distribution accounts of the insolvent estate. Payment in terms of this agreement was thus ultra vires the powers of the liquidators. However, the liquidators made an overpayment to Fidelity in the sum of R220 000 and sought to

recover it by way of the *condictio indebiti*. The liquidators did not seek to recover the payment of the R640 000 made in respect of the valid underlying debt. This Court held that because the agreement provided for payment of the amount R640 000 in respect of Fidelity's secured claim, nothing more or less, it was only the amount of R220 000 that was an *indebitum*, which could be recovered in terms of the *condictio indebiti*.^[8]

[25] If the bank had not been enriched by the receipt of the collected amount, then the company was not impoverished, since the quantum of a plaintiff's claim is the amount by which it has been impoverished or by which the defendant has been enriched, whichever

is the lesser.[9] In any event, no payment was made at the company's expense: it owed the bank R104 million plus interest, and its debt to the bank was reduced by the collected amount. Only the bank could lay claim to the proceeds of the sale to West Lake.

[26] It follows that the company did not satisfy the requirement of enrichment at its expense. Neither was there any unjustified enrichment. There was a legal basis for the bank's receipt of the collected amount. The founding affidavit stated that the bank 'was a secured creditor in an amount in excess of R104 000 000.00'.

[27] In any event, it would be unjust to require the bank, many years later, to prove its claim in the company's estate. The unchallenged

evidence was that the bank could not be restored to its position as a secured creditor, since the assets were transferred to West Lake many years ago and used in the course of the latter's business. If the bank were ordered to repay the collected amount, all that would happen is that it would have to go through the formality of proving its claim for the initial loan of R104 million plus interest, and then be repaid the amount paid to the estate, less the liquidators' fees. The inevitable conclusion to be drawn from the facts is that the recovery of the liquidators' fees was the sole reason for the claim. As stated in Mars,[10] a trustee (here a liquidator) who pays a creditor before confirmation of a liquidation and distribution account, does so at his own risk.

[28] In the result the appeal is dismissed with costs, including the costs of two counsel.

A SCHIPPERS

JUDGE OF APPEAL

Appearances:

For appellant: M v R Potgieter SC

Instructed by: Smit Sewgoolam Inc, Johannesburg

McIntyre Van der Post, Bloemfontein

For respondent: P Stais SC (with him G D Wickins SC)

Instructed by: Brooks & Braatvedt Inc, Johannesburg

Honey Attorneys Inc, Bloemfontein

[1] Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd

[1996] ZASCA 141; 1997 (2) SA 35 (A) at 42A.

[2] Ibid.

[3] Van Wijk's Trustee v African Bank Corporation 1912 TPD 44 at 52-53.

[4] Bowman fn 1.

- [5] Fletcher & Fletcher v Bulawayo Waterworks Co Ltd, Bulawayo Waterworks Co Ltd v Fletcher & Fletcher 1915 AD 636 at 649.
- [6] 17 Laws 3 ed para 209.
- [7] 17 Laws 3 ed para 214.
- [8] Bowman fn 1 at 43F-G.
- [9] Fletcher & Fletcher fn 5 at 649.
- [10] E Bertelsmann et al (eds) Mars: The Law of Insolvency 10 ed (2019) at 597 para 23.10.2.
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