

SOUTH AFRICA / JUDGMENT

PRASA Corporate Real Estate Solutions v Community Property Company Ltd and Another (384/2023) [2024] ZASCA 35 (28 March 2024) [2024] ZASCA 35

COURT

Supreme Court of Appeal

BEFORE

Gorven, Matojane, Goosen

CASE / FILE NUMBER

384/2023

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 384/2023

In the matter between:

PRASA CORPORATE REAL ESTATE

SOLUTIONS (CRES) APPELLANT

and

COMMUNITY PROPERTY COMPANY

(PTY) LTD FIRST

RESPONDENT

ETHEKWINI MUNICIPALITY

SECOND RESPONDENT

Neutral citation: PRASA v Community Property Company (Pty) Ltd and Another (384/2023) [2024] ZASCA 35 (28 March 2024)

Coram: GORVEN, MATOJANE and GOOSEN JJA

Heard: 7 March 2024

Delivered: 28 March 2024

Summary: Contractual claim for payment of amount paid to settle outstanding electricity consumption charges levied by municipality –

no contractual relationship established – alternative claim based on unjustified enrichment – essential elements of

enrichment claim not established – appeal upheld.

ORDER

On appeal from: The KwaZulu-Natal Division of the High Court, Durban (Sibiya J, sitting as a court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following order:

‘The application is dismissed with costs.’

Goosen JA (Gorven and Matojane JJA concurring):

- [1] The Community Property Company (Pty) Ltd (CPC), brought an application in the KwaZulu-Natal Division of the High Court, Durban (the high court) in which it claimed reimbursement by the Passenger Rail Agency of South Africa (PRASA), of approximately R3,2 million CPC had paid to settle amounts due to the eThekwin Municipality (eThekwin) for electricity consumed by PRASA.[1] The claim was based on an alleged contract between CPC and PRASA. In an alternative claim, CPC relied upon the unjustified enrichment of PRASA at CPC’s expense.
- [2] The high court, per Sibiya J, found in favour of CPC on its contractual claim. It found, however, that the claim for the amounts accrued between October 2013 and June 2014 had prescribed. It ordered PRASA to pay an amount of R2 607 472.05, together with interest and 75% of CPC’s costs. The appeal is with the leave of the high court.

Background

- [3] During 2007, Crowie Projects (Pty) Ltd (Crowie Projects), a property development company, entered into a joint venture agreement with eThekwin to develop a tract of land, owned by eThekwin, in the northern part of Durban. The land was situated approximately 17 kilometres from the Durban City Centre, opposite an industrial area and adjacent to the KwaMashu Highway.
- [4] The development envisaged the construction of an underground railway station, a retail shopping centre, residential apartments and a bus and taxi rank, in what was to be known as the Bridge City precinct. The shopping centre was to be constructed above the underground

railway station and the residential apartments above the shopping centre. It was envisaged that the bus and taxi rank would be constructed adjacent to the shopping centre. The development was to take place in phases as a sectional title scheme registered under the Sectional Titles Act, 95 of 1996.

- [5] Crowie Projects purchased two portions of the land from eThekweni. These portions were consolidated as Portion 121 of Erf 8, Bridge City and Crowie Projects took transfer of the property on 1 November 2007. On 14 December 2007, Crowie Projects entered into the Railway Co-ordination and Operation Agreement (the Co-ordination Agreement) with the erstwhile South African Rail Commuter Corporation, to which PRASA is the successor. The agreement regulated the construction and operation of an underground railway station and the business of the shopping centre at Bridge City. Crowie Projects undertook to construct a 'void' (essentially an underground chamber) beneath the shopping centre. Upon completion of the void and concourse area, PRASA would take transfer of the railway component, construct the railway station within the void and fit out the concourse for its purposes.
- [6] A key element of the Co-ordination Agreement concerned the interrelationship between the different components of the development scheme. Crowie Projects and PRASA recognised that the operation of a railway station with ready access to the shopping centre via the concourse, would positively enhance trade in the shopping centre. It was therefore agreed that PRASA would be entitled to share in potential 'upside income', namely the additional income generated from the shopping centre because of the development of the railway station. A formula by which this additional income would be calculated was agreed.
- [7] On 12 September 2008, Crowie Projects, and CPC entered into a sale of business agreement (the SOB),[2] in which Crowie Projects sold the Bridge City shopping centre business to CPC for a purchase consideration of approximately R738

million. The Bridge City shopping centre business consisted of the rental income to be derived from tenants occupying units within the shopping centre. At the time of the conclusion of the SOB, the shopping centre had not yet been constructed. It was anticipated that construction would be completed, and transfer given by 2 November

2009. Provision was, however, made for potential delays in which event the last trading commencement date would be 30 April

2010. Registration of transfer of sections 2, 3, 4 and 5 (which

comprised the shopping centre unit) of the Terminus[3] sectional title scheme occurred on 31 March 2010. The circumstances giving rise to the claim made by CPC against PRASA, suggest that PRASA operations commenced in 2013.

The claim

[8] The dispute arose in July 2017 when CPC presented an invoice to PRASA for payment of R3 413 539.53 for consumption charges for electricity from October 2013. This was met by the suggestion that the amount should be set-off against the 'upside income' due to PRASA, which was then the subject of negotiations. CPC objected to this on the basis that the agreement made no provision for set-off. Extensive email correspondence followed until, on 28 February 2018, a meeting was held to attempt to resolve the dispute. An agreement was reached. The agreement was, however, subsequently cancelled.

[9] CPC initiated its claim against PRASA by notice of motion on 1 April

2019. It claimed payment of the amount it alleged was due and, if payment was not made, an order entitling it to disconnect the electricity supply to the PRASA section 'situated within the...shopping centre'. This latter claim was not

pursued. CPC founded its claim upon the SOB agreement and clause 17 of the Co-ordination Agreement. It averred it had concluded

a service agreement with eThekwinini to supply electricity to the shopping centre. Electricity was supplied to the portion occupied by PRASA via a sub-meter. PRASA was obliged, in terms of clause 17, to pay for service consumption charges and since those had been paid by CPC it was entitled to recover the amount from PRASA. In its founding affidavit, CPC expressly disavowed any reliance upon the subsequently cancelled agreement to settle the dispute and an acknowledgement of debt as causes of action.

[10] Its alternative claim was premised on the allegation that PRASA was unjustifiably enriched at the expense of CPC because of its consumption of electricity without payment. CPC was impoverished to the extent that it had paid eThekwinini. On this basis, CPC claimed that it was entitled to be compensated by PRASA for the cost of the electricity consumed by PRASA over the period.

[11] PRASA raised the following defences.[4] The first was that clause 17 of the Co-ordination Agreement was a term of agreement between Crowie Projects and PRASA. CPC therefore

did not, in the absence of a cession, have any contractual right to claim the money from PRASA. It alleged that, in any event, since the claim related to charges raised since October 2013, a substantial portion of it had become prescribed. Secondly, on the merits of the claim, PRASA asserted that it had paid all amounts due to eThekwinini and that it was not in arrears. Finally, in relation to the alleged enrichment claim, it averred that any such claim lay against eThekwinini.

The appeal

[12] Only two issues arise for consideration in this appeal. The first is whether CPC has a claim in contract to recover the costs of electricity consumed by PRASA for which CPC had paid. The second, is whether CPC has an alternative claim founded on unjustified enrichment. PRASA's pleaded reliance upon prescription remained alive until the hearing. However, counsel for PRASA correctly accepted that a claim based on clause 17 of the Co-ordination

Agreement, could only have arisen when CPC paid eThekwini and presented to PRASA its invoice for payment. The facts indicate that payment was made to eThekwini in 2018.

Prescription therefore simply did not arise. The same applied in relation to the alternative enrichment claim.

The contractual claim

[13] Clause 17 of the Co-ordination Agreement reads as follows:

‘17.1 [PRASA] shall pay for –

17.1.1 all electricity and water used by it in or on the [PRASA] component;

17.1.2 all refuse removal fees and special refuse removal fees relating to the [PRASA] component;

17.1.3 any other consumable item or service which [PRASA] may use.

17.2 As the amounts payable in terms of clause 17.1 will be levied or assessed by a separate meter or a separate sub-meter in respect of the [PRASA] component only, the liability of [PRASA] shall be to pay the amount so levied or assessed.

17.3 If [PRASA] fails to pay any costs referred to in clause 17.1 and 17.2 within 7 days of due date, then, without prejudice to any other rights Crowie may have, Crowie shall be entitled to pay such charges and recover them from [PRASA] provide that Crowie’s claims will be supported by invoices (if available) in respect of the charges so paid.’

[14] CPC relied upon clause 17.3. It contended that the SOB and Co-ordination Agreement properly understood conferred upon it the rights set out in clause 17. Counsel for CPC accepted that there had been no cession, assignment, or delegation of rights by Crowie Projects, save those rights and obligations which had specifically been ceded in terms of the SOB. Its case was, therefore, not based on any form of cession. It was, rather, that upon a construction of the SOB and Co-ordination Agreement, the rights conferred by clause 17 formed part of the business sold to it.

[15] Clause 3.4 of the SOB referred to the development and operation of the railway station as provided in the Co-ordination Agreement. It provided in relevant part that:

‘3.4.2 Certain of [Crowie Projects’] rights and obligations contained in the [Co-ordination Agreement] will be ceded (as an out-and-out cession), transferred and made over to [CPC], whilst [Crowie Projects] will retain certain other rights and obligations.’

[16] The only out and out cessions contained in the SOB, were those provided for in clauses 30 and 31. Clause 30 concerned the cession of Crowie Projects’ rights to all lease agreements and any other contracts of lease and tenancy in respect of the shopping centre. Clause 31 provided for the cession of rights to builder’s liens, guarantees and warranties and rights accrued in cleaning and security agreements concluded by Crowie Projects.

[17] Clause 3.4.3 of the SOB envisaged that CPC, as the pending owner of the shopping centre, and PRASA, as the pending owner of the void and railway station, would 'need to enter into agreements to govern and regulate the development and operation of the Void and Railway Station'. Clause 3.4.7, in turn, envisaged a tripartite agreement between Crowie Projects, CPC and PRASA which would regulate the operation of the railway station and would cover the 'costs and expenses relating thereto.'[5]

[18] Clause 25.15 states:

'It is recorded that [CPC] and [PRASA] may agree to a cession (out-and-out), assignment, delegation and transfer to [CPC] of the

rights and obligations of [Crowie Projects] and [PRASA] as contained in the [Co-ordination Agreement]. In such event [CPC] hereby agrees and undertakes to consent to and to sign all such agreements and documents as may be necessary to give effect to the cession

contemplated in this clause 25.15...'

[19] Clause 25.16 stipulates that:

'The agreement/s referred to in 25.13[6] above between [Crowie Projects], [CPC] and [PRASA] shall be tripartite agreement/s that shall specify inter alia –

25.16.1 which rights and obligations [CPC] shall take cession, assignment, and delegation of;

25.16.2 which rights and obligations [Crowie Projects] shall remain liable for, to [PRASA]; and

25.16.3 the manner in which the rights and obligations referred to in 25.16.1 and 25.16.2 shall be executed.'

[20] In light of these clear and unequivocal provisions of the SOB, there is no scope for a construction of the agreement as having necessarily encompassed the acquisition of the rights conferred by clause 17. It was common ground that none of the envisaged agreements and deeds of cession were executed. CPC did not seek to suggest that there existed an oral or, despite its argument, a tacit cession of the rights conferred by clause 17 of the Co-ordination Agreement. The non-variation clauses 62 and 63 of the SOB would militate against any oral agreement by which the terms were varied.[7]

[21] The clauses of the SOB dealing with the envisaged cession of rights make it clear that the parties contemplated one or more cessions, to facilitate the effective implementation of the agreement. The existence of such intention is not sufficient. The parties agreed that the cession/s would take place in a specified form to ensure that the subject of the cession was properly identified, and its effect clarified.[8] They were bound to act in accordance with that agreement. There is therefore no scope for reliance upon any tacit cession.

[22] Clause 17 was a term of agreement between Crowie Projects and PRASA. It follows that CPC was not entitled to rely on it to claim any amount from PRASA. The high court's finding to the contrary cannot stand.

The enrichment claim

[23] The enrichment claim was framed in the broadest of terms. Apart from the assertion that PRASA had been enriched by its consumption of electricity without payment from 2013 to 2017, and that CPC in turn had been impoverished to the extent of its payment of the costs of such consumption to eThekweni, the founding affidavit made no attempt to address the elements of enrichment liability. Counsel for CPC submitted that it was unnecessary to formulate the claim within the framework of the recognised *condictiones*, since this Court had recognised 'a general enrichment claim'.

[24] This Court has accepted, in principle, that there may be scope for the recognition of enrichment liability which may not fall within the strict ambit of specific *condiction* actions. This much is clear from the judgments in *McCarthy Retail Ltd v Shortdistance Carriers CC (McCarthy)*,^[9] and *First National Bank of Southern Africa Ltd v Perry NO and Others (Perry)*.^[10] It is, however, appropriate to highlight what was said in these cases. Schutz JA, who authored both judgments, observed in *McCarthy*:

'However, if this Court is ever to adopt a general action into modern law, it would be wiser, in my opinion, to wait for that rare case to arise which cannot be accommodated within the existing framework and which compels such recognition. If once a general action is accepted much less energy, hopefully, will be devoted to the correct identification of a *condictio* or an action than at present and more time to the identification of the elements of enrichment. This does not mean, however, that the old structure's

relatively few distinctive rules applying only to particular forms of action, such as the requirement in the *condictio indebiti* that the mistake should be reasonable, will disappear.'

^[11]

[25] *Perry* was decided upon exception. First National Bank had paid out on a forged cheque. It sought to recover from several parties on various

causes of action. As against Nedbank, the receiving bank, it relied upon an enrichment-based claim. The central question on appeal was whether the turpitude of a defendant in a claim based on the *condictio ob turpem vel iniustam causa* was to be established at the time of transfer. Schutz JA referred to the desirability of a more general focus upon the elements of enrichment. [12] However, Schutz JA found support in several old authorities for the conclusion that knowledge of the illegality of the transaction, which is acquired after the transfer, may found the *condictio*. The learned judge held that to the extent that these authorities did not go far enough, an extension of the *condictio* to cover such situation would be appropriate.^[13] Since the excipient bore the onus to establish that the particulars did not disclose a cause of action upon any interpretation, the exception ought to have been dismissed.^[14]

[26] These judgments are therefore not authority for the proposition that a plaintiff is now entitled to rely upon general assertions to support a claim for unjustified enrichment. They recognise the need, where necessary, to focus attention on the essential elements which may give rise to liability. They by no means excuse a plaintiff from pleading and establishing a proper basis upon which enrichment liability made be founded. That is the approach adopted in several cases which have come before this Court. In each instance it has considered whether the requirements of one or other of the established conditiones, upon which reliance was placed, were met, or could be met by extension.[15]

[27] Enrichment liability is premised upon four essential elements: the defendant must be enriched; the plaintiff must be impoverished; the defendant's enrichment must be at the expense of the plaintiff; and the enrichment must be without cause (*sine causa*).[16] What is the essence of the claim advanced by CPC against PRASA? It is this: CPC supplied PRASA with electricity for which CPC was obliged to pay in terms of a service agreement it had concluded with eThekwin. PRASA's failure to pay what CPC for the electricity

it consumed, caused it to be enriched at the expense of CPC when CPC paid what it was obliged to pay to eThekwin.

[28] Nothing is known about the basis upon which CPC supplied electricity to PRASA. That conduct is inconsistent with clause 17, to the extent that clause 17 envisaged that PRASA would contract with eThekwin directly. What is known is that it was anticipated that agreements would be concluded between CPC and PRASA to address the situation which has now arisen. For reasons which are unknown, those agreements were not concluded despite the lapse of more than a decade since the factual necessity arose in 2013. Facts which explain the circumstances in which and the reasons for the underlying transfer

sine causa, would, in my view, need to be considered in order to determine whether enrichment liability is established. In this case there are none. But even if it was accepted that, notionally, a case has been made out that PRASA's retention of the benefit of

the supply of electricity without payment means that it was enriched *sine causa*, CPC's reliance upon a species of enrichment must fail at the level of the failure to prove that it was impoverished.

[29] The SOB included an indemnity provided by Crowie Projects to CPC in relation to costs or expenses incurred by CPC in consequence of the operation of the railway station by PRASA. I have referred to clauses

3.4.3 and 3.4.7 of the Co-ordination Agreement which envisaged the conclusion of agreements between CPC and PRASA to regulate the

operation of the railway station, including costs and expenses. The SOB records that it was initially intended that these agreements be concluded before the SOB took effect and that they would serve as suspensive conditions. The agreement records, however, that CPC waived the requirement. In recognition that by so doing, CPC had exposed itself to risk if agreement was not reached with PRASA,

clause 3.4.6 provided that:

‘[Crowie Projects] has agreed to be liable to [CPC] for certain agreed expenses (such as those in clause 3.4.8), that may have to be incurred in respect of matters upon which [CPC] and [PRASA] are unable to agree on, in the manner contemplated in this Agreement.’

[30] The matters referred to in clause 3.4.8 are ‘all cleaning, operational and security expenses that are incurred and which are directly or indirectly attributable to the Void’.[17] It is not necessary to conclude definitively that the expenses incurred by CPC in defraying the costs of electricity consumed by

PRASA, would fall within the ambit of the liability undertaken by Crowie Projects. No obvious impediment suggests itself. That, however, is not the point. In the context of seeking to establish a claim based upon enrichment, the onus to establish the elements of liability rested upon CPC. In the light of the contractual indemnity provided by Crowie Projects, CPC was required to establish that such claim was not available to it. In the absence of such averment or proof, it cannot be found that CPC has been impoverished.

[31] It follows that even if this Court was inclined to countenance CPC’s claim as one of enrichment (which we do not hold), it could not succeed. In the circumstances the appeal must be upheld.

[32] The following order will issue:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following order:

G GOOSEN

JUDGE OF APPEAL

Appearances

For the appellants: D J Saks

Instructed by: Woodhead Bigby Attorneys Incorporated, La Lucia

Lovius Block Inc, Bloemfontein

For the first respondent: M C Erasmus SC, N J Khooe and A Efstratiou-Jooste

Instructed by: Mark Efstratiou Incorporated, Pretoria

Phatshoane Henney Attorneys, Bloemfontein.

- [1] The claim was brought against the PRASA Corporate Real Estate Solutions (PRASA Cres), which was described as a division of PRASA.

The case was, however, conducted on the basis that the contractual relationships were with PRASA and that PRASA had consumed the electricity for which payment was sought. The difference in corporate identity was not raised by PRASA Cres as a defence. In the circumstances, nothing turns upon any distinction that there may be between PRASA Cres and PRASA.

- [2] The agreement included a third party, namely Azarin Properties 9 (Pty) Ltd (Azarin), a wholly owned subsidiary of Crowie Projects.

Azarin's participation in the agreement related to the potential acquisition of a minority share in the shopping centre business, CPC agreed to sell 20% of the shopping centre business to Azarin, which sale would take effect on the date of transfer of the sections. The sale of 20% of the business to Azarin was subject to a suspensive condition requiring the provision of an irrevocable bank guarantee 30 days before the date of transfer. In the event of a failure to deliver the guarantee, the sale of the share would lapse and the purchase price for the shopping centre business would reduce by R20 million. It appears from the deed of transfer that the purchase price was in fact reduced. Azarin therefore did not acquire a share of the business.

- [3] Whereas the Co-ordination Agreement referred to the envisaged sectional title scheme as the Bridge City scheme, the scheme was in fact registered as The Terminus. The deed of transfer indicates that the purchase price was R718 million, indicating that the purchase of a share of the business by Azarin did not proceed.

- [4] One other defence pleaded in limine was based upon an obvious error in the founding affidavit. CPC had stated that the SOB was concluded on 12 September 2018, whereas it was plainly concluded on 12 September 2008. PRASA nevertheless framed a challenge to CPC's locus standi to institute a claim which had arisen prior to 2018. It was not pursued before the high court.

- [5] Clause 25.13 of the SOB specified the matters to be dealt with in the envisaged tripartite agreement/s. These included an agreement on the operational aspects that affect or impact both the shopping centre and the railway station, and agreement on the financial

aspects that affect both, including possible pro rata cost sharing.

- [6] The reference to clause 25.13 appears in context to be an error and may have been intended to be a reference to clause 25.15.

- [7] See Yarram Trading CC t/a Tijuana Spur v Absa Bank Limited

[2006] ZASCA 132; 2007 (2) SA 570 (SCA) para 24.

- [8] See *Lief NO v Dettman* 1964 (2) SA 252 (A) at 275D-E where Wessels JA said: ‘In my opinion, however, it is not sufficient to show that the parties contemplated a cession; it must be shown that they effected a cession. It must appear that the parties took legally effective steps, where such are required, to transfer the subject matter of the cession from the cedent to the cessionary, so that the former is divested of his rights, which thereafter vest exclusively in the cessionary.’ (Emphasis added).
- [8] See *Lief NO v Dettman* 1964 (2) SA 252 (A) at 275D-E where Wessels JA said:
- ‘In my opinion, however, it is not sufficient to show that the parties contemplated a cession; it must be shown that they effected a cession. It must appear that the parties took legally effective steps, where such are required, to transfer the subject matter of the cession from the cedent to the cessionary, so that the former is divested of his rights, which thereafter vest exclusively in the cessionary.’ (Emphasis added).
- [9] *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA).
- [10] *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA).
- [11] *McCarthy* para 10.
- [12] *Perry* para 23.
- [13] *Ibid* para 28.
- [14] *Ibid* paras 6 and 30.
- [15] See *Afrisure CC and Another v Watson NO and Another*
- [2008] ZASCA 89; 2009 (2) SA 127 (SCA) para 4; *Capricorn Beach Home Owners Association v Potgieter t/a Nilands and Another* [2013] ZASCA 116; 2014 (1) SA 46 (SCA) para 20 – 21 (*Capricorn Beach*); *Van Niekerk v Liberty Group Limited*
- [2020] ZASCA 65 para 28 – 31.
- [16] *McCarthy* (per Harms JA para 2) at 496E; *Capricorn Beach* para 20.
- [17] My emphasis.

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