
SOUTH AFRICA / JUDGMENT

Standard Bank of Namibia v Schmidt and Another (979/12) [2014] ZAECPEHC 26 (15 April 2014) [2014] ZAECPEHC 26

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Plasket

CASE / FILE NUMBER

979/12

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION – PORT ELIZABETH)

Case

No: 979/12

Dates

heard: 11, 12 and 14/2/14

(Additional

heads filed on 9/4/14)

Date

delivered: 15/4/14

Not

reportable

In

the matter between:

STANDARD
BANK OF
NAMIBIA.....
Plaintiff
and
BRIAN
ALISTAIR
SCHMIDT.....First
Defendant
ALPHA
CREST TRADING
CC.....Second
Defendant
Unjustified
enrichment – *condictio sine causa* – funds
fraudulently transferred from two accounts in Namibia to the
defendants' accounts – funds disbursed by
second
defendant in fulfilment of obligations as paymaster in commodity deal
– commodity deal a sham but defendants not aware
of this –
second defendant a conduit for the transmission of funds to true
recipients – second defendant not enriched
– action
dismissed with costs, including costs of two counsel.

JUDGMENT

PLASKET, J:

- [1] The parties to this litigation, namely the Standard Bank of Namibia which is the plaintiff, Mr Brian Schmidt (Schmidt) and the close corporation through which he traded, Alpha Crest Trading CC (Alpha Crest), the first and second defendants respectively, are all victims of a fraudulent scheme that appears to have been orchestrated by one Barkhuizen who is, I am told, in custody awaiting his trial for fraud. The issue that has to be decided, when boiled down to its basics, is whether the loss occasioned by the fraud must be borne by the bank or by Schmidt and Alpha Crest.
- [2] The bank's cause of action against Schmidt and Alpha Crest is based on unjustified enrichment in the form of the *condictio sine causa*, the *condictio* 'traditionally used to effect restitution in a variety of cases where a person is enriched at the expense of another without legal ground, but no other specific enrichment action is available'.^[1]

- [3] Visser states that the function of the law of enrichment is to ‘restore economic benefits, for the retention of which there is no legal justification, to the person or institution at whose expense they were obtained’ and that it is essentially concerned with corrective justice in the sense that ‘it aims to restore the position that existed before the enriching fact took place, by removing a benefit from the patrimony of the enrichment debtor’.[2]

The

facts

- [4] The facts tell a sorry tale of duplicity and dishonesty that caused a great deal of prejudice to a number of parties within both South Africa and Namibia.
- [5] The story starts with the relationship between Schmidt and Barkhuizen. Schmidt had worked for Barkhuizen for a number of years.

When Barkhuizen’s business was in decline Schmidt lent him a substantial amount of money. Barkhuizen did not repay him but promised to do so on a number of occasions. Barkhuizen was sequestrated and his business entity was wound up.

- [6] A few years later, in early January 2011, Barkhuizen contacted Schmidt. He said that he was involved in brokering a commodity deal in Namibia in terms of which an entity called Sugar Creek 108 (Pty) Ltd would be selling large quantities of diesel to an entity called Tobelo & Sons (Pty) Ltd.
- [7] Barkhuizen wanted Schmidt to act as paymaster in this scheme. Schmidt said that he knew that Barkhuizen had been involved in this type of undertaking before and had used an attorneys firm in Pretoria as paymaster. He agreed to Barkhuizen’s offer, sweetened by the fact that Barkhuizen was prepared to pay Schmidt R20 000 per paymaster transaction from what was due to him to repay the loan he had taken from Schmidt a number of years before.
- [8] The workings of the scheme were reduced to writing by Schmidt albeit after the transfer of the money that is in issue in this matter. In an e-mail dated 8 January 2011 and addressed to Barkhuizen, he said:

‘Herewith to confirm in writing our telephonic discussion(s) of yesterday and today regarding the modus operandi of the subject matter.

You have requested that Alpha Crest Trading CC act as Paymaster in the commodity deal concluded between Sugar Creek Trading (Seller) and Tobelo & Sons (Buyer) of which transaction you and others act as commissioned agents.

...

Funds will be transferred into the banking account of Alpha Crest Trading by the purchaser of the commodity (Tobelo & Sons)

The agreed purchase price of the commodity will be transferred into the banking account of the Seller (Sugar Creek Trading) and all commissions accrued will be paid to the accounts of the respective commissioned agents responsible for concluding the deal.

In addition, the transporter of the product will be remunerated for delivery of the commodity.

A portion of the proceeds will be retained within Alpha Crest to cover

(a) remuneration of administrative services rendered amounting to 1.5% of the gross transaction value and (b) the commencement of repayment of the loan concluded between you and I in terms of the agreement stipulated therein. As agreed telephonically, this will amount to R20,000 per transaction.'

[9] This e-mail was sent because, on 7 January 2011, an amount of R396 540.80 was transferred from Standard Bank of Namibia and credited to Schmidt's personal bank account held at Standard Bank (South Africa) in Port Elizabeth. On the same day an amount of R324 678.40 was transferred from Standard Bank of Namibia and credited to Alpha Crest's account held at Standard Bank (South Africa) in Port Elizabeth.

[10] The e-mail continued as follows:

'I can herewith confirm that two separate payments have been received in respect of this commodity transaction.

1. an amount of R396 540.80

above amount deposited in error into my private banking a/c held with Standard Bank on 7/1/11

this amount has been reallocated to the business account of Alpha Crest also held with Standard Bank

transfer of funds between accounts conducted on 8/1/11 by Analien Conradie of Standard Bank these funds are reflected as cleared in the bank account.

2. an amount of R 324 678.40

above amount deposited into the business a/c of Alpha Crest Trading held with Standard Bank on 7/1/11

these funds are reflected as uncleared in the bank account.

Analien Conradie has committed to investigate the reason for the non-clearance next week and revert.'

[11] Schmidt then listed various people and entities and the amounts they were to be paid. They were G Barkhuizen (Barkhuizen's mother) to whom R71 000 would be paid; J Vlok, to whom R33 000.00 would be paid; S B Mitchell to whom R10 000.00 would be paid; Lubanzi Contractors to whom R10 000.00 would be paid and Sugar Creek Trading to whom R566 400.91 would be paid. Alpha Crest would hold R10 818.29, being its commission for the

paymaster function, and R20 000.00 would be paid into 'the account of choice of B A Schmidt', this amount being the first instalment of the loan repayment.

[12] Schmidt explained that Barkhuizen had requested payment of his commission into his mother's account because he was an

unrehabilitated insolvent. Vlok and Mitchell, he was told were commissioned agents. Lubanzi Contractors had, he was told, transported the diesel and Sugar Creek was the seller.

[13] Barkhuizen responded to the e-mail on the same day. His response was: 'It is 100% correct.'

[14] Schmidt instructed his business banker, Ms Annalene Conradie, to transfer the money credited to his personal account into Alpha

Crest's account, which was done. On the same day he began to make payments to those he had been instructed to pay.

[15] One problem that Schmidt had experienced was that the funds credited to the account of Alpha Crest were uncleared. He asked Conradie to help him clear the funds. While he was in Johannesburg (where he had an office) he went to a branch of Standard Bank to fill in the necessary forms but when he spoke to Conradie she told him that she had received notification from Namibia that the funds had been cleared.

[16] The transactions in terms of which the two amounts were credited to the accounts of Schmidt and Alpha Crest did not reflect the name of the payer. Schmidt assumed that the purchaser of the diesel had paid what was due, for him to disburse in accordance with his mandate.

[17] He was wrong. N\$396 540.80 (the equivalent of R396 540.80) was fraudulently transferred into Schmidt's account from the trust account of A Davids & Co, a firm of attorneys from Otjiwarongo, Namibia. N\$324 678.40 (the equivalent of R324 678.40) was fraudulently and without authority transferred into Alpha Crest's account from the account of the Oshana Regional Council from Oshakati, Namibia.

[18] Worse still, the entire enterprise was a sham. Neither Sugar Creek nor Tobelo & Sons existed. Schmidt knew of Vlok (who is now dead) and Mitchell but the nature of their involvement is unknown. It would appear that the entire scheme was the brainchild of Barkhuizen and that it was intended to launder money fraudulently transferred by dishonest bank officials from clients of Standard Bank of Namibia for his benefit.

[19] Standard Bank of Namibia paid A Davids & Co and Oshana Regional Council the amounts that had been unlawfully transferred from their accounts and this matter is the sequel to that: Standard Bank of Namibia seeks to recover by way of an action for unjustified

enrichment (based on the *condictio sine causa*) the amounts by which it claims to have been impoverished and Schmidt and Alpha Crest have been enriched.

The

issues

- [20] The general requirements that have to be established in a claim based on unjustified enrichment are that: (a) the defendant is enriched;
- (b) the plaintiff is impoverished; (c) the defendant's enrichment must be at the expense of the plaintiff; and
- (d) the defendant's enrichment must be unjustified.[3]
- [21] In their plea, the defendants pleaded, among other defences, that Alpha Crest, represented by Schmidt, 'was appointed by a firm, Sugar Creek . . . to act as paymaster on a diesel commodity deal concluded between buyers in Namibia and sellers in South Africa'; that Alpha Crest 'would receive the purchase price of the transaction into its banking account . . . and was obliged to effect payments from the funds so received, to the seller, commissioned agents and transporters of the product in accordance with the instructions of Sugar Creek'; and that Alpha Crest 'performed its paymaster function by transferring funds to such beneficiaries as it was instructed to do'.
- [22] These allegations were proved by the evidence of Schmidt, the only witness to testify. He struck me as an honest and truthful witness. From his evidence there can be no suggestion that he was complicit in any way in Barkhuizen's fraud. On the contrary, on the evidence before me, he acted in good faith at all times. This conclusion is confirmed by the fact that in his dealings with Standard Bank (South Africa), in particular, he was open at all times, both before and after the fraudulent scheme was discovered, and by the documentary trail that he left.
- [23] Various points were raised by Mr Swanepoel who, together with Mr Nepgen, appeared for the defendants. In my view, it is not necessary to deal with most of them because of the view I take of the matter.
- [24] I commence with the position of Schmidt. When the first payment was deposited into his account, he took immediate steps to transfer the money into Alpha Crest's account in the belief, confirmed by Barhuizen, that the deposit concerned the paymaster function of Alpha Crest – and that consequently, the deposit into his account had been made in error. On these facts, he has clearly not been enriched in the sense that, leaving aside the loan repayment for a moment, his assets were not increased, his liabilities were not decreased, no decrease in his assets was avoided and his liabilities did not increase as would otherwise have happened.[4]
- [25] I turn now to the position of Alpha Creek. Visser, in dealing with the question of the person or entity against whom an enrichment

action lies, says that the defendant must be the person who ‘in the eyes of the law received the transfer’ and that while this is usually ‘the person who physically received it . . . it need not be’.[5] He then refers to Didcott J’s judgment in *Phillips v Hughes*; *Hughes v Maphumulo*[6] in which the position is set out with characteristic clarity. The learned judge stated:[7]

‘This means that the *condictio indebiti* is enforceable against the *recipiens* of the undue payment, but nobody else. The *recipiens* is not necessarily the person into whose hands the money was actually put when it was paid. He is the one who must be considered, in all the circumstances of the case, truly to have received the payment. Whenever a payment is made to an agent with authority to accept it, for instance, the *recipiens* is the principal, not the agent. A conduit through whom payment passes is likewise not its *recipiens*. Instead he who obtains payment by such means is. One is not the *recipiens* of a payment, on the other hand, merely because it was intended or happens in the result to benefit one. That, on its own, does not count. All that matters is whether one can appropriately be said to have received the payment in some or other way. Unless one has done so, one is beyond the range of the *condictio indebiti*, for all the payment's auxiliary advantages to one.’

[26] While the *Phillips* case concerned the *condictio indebiti*, in the above passage Didcott J was, it seems to me, merely applying a general principle of agency within the context of an unjust enrichment claim. I can therefore see no reason why the same idea should not apply to the *condictio sine causa*.

[27] The evidence of Schmidt establishes that Alpha Crest was no more than a conduit: it received funds (ostensibly from Tobelo & Sons) and disbursed them in accordance with its mandate. (I leave aside for the moment, its own commission.) In these circumstances it cannot be said to be the true recipient of the payment. The true recipients were those to whom the funds were disbursed, including Schmidt in relation to the loan repayment. Put otherwise, as the funds were not intended for Alpha Creek and were transferred to the true recipients in accordance with the mandate given to Alpha Creek, its estate was not enriched.

[28] I turn now to Alpha Creek’s commission (R10 818.29) and the loan repayment to Schmidt (R20 000). In both instances, the payments were made in terms of an agreement. They were not therefore made *sine causa*. Consequently, the *condictio sine causa* is not open to the bank for the recovery of these amounts from the defendants.

Costs

[29] Shortly before the completion of this judgment, Mr Beyleveld, who appeared for Standard Bank of Namibia, informed both me and the defendants’ counsel that it had, since the end of the trial, come to light that Standard Bank of Namibia and Standard Bank (South Africa) had shared the loss suffered by the former: Standard Bank (South Africa) had paid Standard Bank of Namibia N\$349 468.10. His e-mail said further that ‘the bank states that it would appear there had been an unfortunate breakdown in communication within the bank and that this information was not shared with the staff members of the bank who were dealing

with the recovery of the money involved, and that the bank regrets this oversight and tenders its apology to all concerned . . .’.

[30] Heads of argument were filed by Mr Swanepoel and Mr Nepgen in response to this e-mail in which they argue for an award of attorney

and client costs against the bank. I have considered their submissions but am of the view that such an award is not warranted. I shall award costs on the party and party scale. I am of the view that the costs of two counsel are warranted.

The order

[31] I make the following order.

The plaintiff’s action is dismissed with costs, including the costs of two counsel.

C Plasket

Judge of the High Court

APPEARANCES

For the plaintiff: A Beyleveld SC, instructed by McWilliams & Elliot Inc

For the defendants: M Swanepoel SC and J Nepgen, instructed by Danny Vorster & Associates

[1] Jacques Du Plessis *The South African Law of Unjustified Enrichment* at 216.

[2] Daniel Visser ‘Unjustified enrichment’ in Francois du Bois (ed) *Wille’s Principles of South African Law* (9 ed) at 1043.

[3] Du Plessis at 24. See too Daniel Visser *Unjustified Enrichment* at 157 who lists three rather than four elements of enrichment liability. They are enrichment of the defendant at the expense of the plaintiff which is unjustified. He appears to assume the ‘causation’ element – Du Plessis’ third

element – within his first and second elements.

[4] Du Plessis at 25-27.

[5] Visser at 282.

[6] *Phillips v Hughes; Hughes v Maphumulo* 1979 (1) SA 225 (N).

[7] At 229B-E. See too *Minister van Justisie v Jaffer*

[1994] ZASCA 102; 1995 (1) SA 273 (A) at 280C-H; Du Plessis at 159.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECPHC/2014/26.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/standard-bank-of-namibia-v-schmidt-and-others-unknown-topic-aecphc-2014>

Prepared on 13 October 2026 · Esheria