

IN THE HIGH COURT OF NAMIBIA

Case Title: DAVID JOHN BRUNI & ANOTHER vs MARVIN NGUTJIWA HENGARI	Case No: HC-MD-CIV-ACT-OTH-2020/02194-
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: TOMMASI, J	Date of hearing: 28 January 2021
	Date of order: 28 January 2021 Reasons: 23 February 2021
Neutral citation: <i>Bruni v Hengari</i> (HC-MD-CIV-ACT-OTH– 2020/02194) [2021] NAHCMD 83 (23 February 2021)	
Results on merits:	
<p>The order:</p> <p>Having heard ADV HEATHCOTE on behalf of the Plaintiff(s) and MARVIN NGUTJIWA HENGARI the Defendant in person and having read the Application for HC-MD-CIV-ACT- OTH– 2020-02194 and other documents filed of record:</p> <p>IT IS HEREBY ORDERED THAT:</p> <p>THE COURT GRANTS SUMMARY JUDGEMENT IN FAVOUR OF THE PLAINTIFS AGAINST THE DEFENDANT IN THE FOLLOWING TERMS</p> <ol style="list-style-type: none"> 1. Payment in the amount of N\$3 900 000.00; 2. Interest on the amount of N\$3 900 000.00 at the rate of 20% per annum from 17 September 2015 to date of payment; 3. Costs of suit. 4. Matter is removed from the roll: Case Finalised. 	
Reasons for orders:	

[1] The court granted Summary Judgment in favour of the Plaintiffs against the defendant. What follows are the reasons for this order. I shall refer to the parties as they appear in the main action.

[2] The plaintiffs applied for Summary Judgment in respect of their action based on the claims of *condictio indebiti*, alternatively the *condictio ob turpem vel injustam causam*, alternatively *condictio furtiva*. The plaintiffs are the joint liquidators of the Small and Medium Enterprises bank.

[3] Plaintiffs' case in summary is as follows: certain *dramatis personae* holding positions in the SME bank as Deputy Chairman of the Board, CEO and Director, Assistant Accountant, Administrative Assistant and Assistant Finance Manager in conjunction with third parties such as the defendant, stole the money from SME bank.

[4] On 14 September 2015 payment in the sum of N\$4 200 000 was approved by the CEO after going through the various departments where it was signed off by the other *dramatis persona*. This amount was transferred to the bank account of AMFS. On 16 September 2015 AMFS paid the amount of N\$3 900 000 into the trust account of Koep & Partners, referenced "Quatro Investments Thirty Two CC". This was to fund the purchase of the aforesaid Close Corporation by the defendant. AMFS retained N\$300 000 as commission.

[5] The plaintiff avers that the Authoriser within the treasury department of the SME bank made the payment in the *bona fide* and reasonable but mistaken belief that the amount was due, owing and payable by the SME bank to AMFS. AMFS and Koep & Partners were agents with the defendant as the final recipient of the money. The payment was however not due and payable to the defendant who nevertheless appropriated the monies. The plaintiff claims that the defendant was unjustly enriched whilst the SME bank was unjustly impoverished.

[6] The defendant in his affidavit resisting the application for summary judgment, states that he is the owner of two close corporations which mainly do business in transport. During 2013 he obtained fleet vehicle finance from Bank Windhoek in order to start a business transporting passengers and goods to Zimbabwe.

[7] He entered into verbal agreements with some Zimbabwean Nationals and some individuals

listed as *dramatis personae* in plaintiff's particulars of claim. He leased his vehicles, bought goods for resale in Zimbabwe and in this way made profits to the tune of N\$20 million which were deposited into both his individual and business accounts over the years. He admitted that he received payments from some individuals referred to as *dramatis personae* but stated that these payments were not made by mistake but it was in fact due and payable to him. He refers to three payments totaling N\$ 394 797.90 received during 2013 which he received from Zimbabwean Nationals and some individuals referred to as *dramatis personae*. He also confirmed that he received payments of close to N\$500 000 from one individual referred to as a *dramatis personae* which was in fact payment for money owed to him for having leased his fleet of busses and the investment he made in the resale of goods.

[8] The following is the explanation by the defendant for the payment he received in the sum of N\$3 900 000:

“The payment made of N\$3 900 000 to Koep & Partners referenced as Quatro Investment Thirty Two CC, facilitated by AMFS.(sic)That payment was done in normal course of business by Zimbabwean nationals and *dramatis personae*, based on business relationship that commenced in 2013.

The Small Medium Enterprises Bank liquidators are inquisitive of one particular transaction of N\$3 900 000. At the commission of enquiry into Small Medium Enterprises Bank affairs I explain my position in chronological order to liquidator's legal advisors. (sic) At the commission of enquiry into Small Medium Enterprises

Bank affairs liquidator's legal advisors advised me to tell the enquiry that I was consultant for Small Medium Enterprises Bank.(sic) legal advisors. (sic) At the commission of enquiry into Small Medium Enterprises Bank affairs liquidator's legal advisors advised me to tell the enquiry that I was consultant for Small Medium Enterprises Bank.(sic)

[9] Mr Heathcote, counsel for the plaintiff, submits, that the last beneficial recipient (without giving value) of the SME bank's stolen money is the defendant, that it is not necessarily the person into whose hands the money was actually put but the one who, in all circumstances of the case truly to have received the payment.¹ In this case, although the money was “funneled” through AMFS, it was for the benefit of the defendant, without himself giving value. Under these circumstances the

¹ Phillips v Hughes; Hughes v Maphumalo 1979 (1) SA 225 (N)

condictio indebiti lies.

[10] He submitted that in the alternative, the claim for *condictio furtiva* should also succeed in that the defendant received the benefit of the stolen money in a *mala fide* manner. It is not a defense that the defendant did not know that the money was stolen as long as he has the requisite *dolus eventualis*.

[11] He further argued that the defendant does not deny that he received the money and even if he acted *bona fide* in receiving the money, the *condictio indebiti* lies and if he acted *mala fide* and with *dolus eventualis*, the *condictio indebiti* still applies as it is not a requirement of the *condictio indebiti* that the recipient must be *bona fide*. It is the person who represents the plaintiff in transferring the money who must be *bona fide*. He submitted that this aspect is not disputed by the defendant and that proof of the transfer of money gives rise to a presumption of enrichment. He argued that the defendant has the onus to prove loss of enrichment which the defendant failed to do.

[12] The defendant appeared in person after his legal practitioner withdrew. He in essence submitted to the court that he has not been enriched as this payment was paid to him by Zimbabwean Nationals and the *dramatis personae* based on the business he had established since 2013. He submitted that that he did not keep a written record as the transport business is very informal.

[13] Rule 60(5) provides that on the hearing of an application for summary judgment the defendant may satisfy the court on affidavit that he has a *bona fide* defense to the action and the affidavit must disclose fully the nature and grounds of the defense and the material facts relied on. The relief sought by the plaintiffs, is a drastic one and the defendant is called upon to comply with the provisions of the rule.

[14] In *Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426B – D*, Corbett JA stated the following:

'All that the Court enquires into is: (a) whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be. The word fully, as used in the context of the

Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.²

[15] The first enquiry is therefore whether or not the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded. If the defendant's case is that he received the amount from Zimbabwean

nationals and *dramatis persona* in the normal course of business, then, he disputes that he is the true recipient of the money. In *Phillips v Hughes; Hughes v Maphumalo*,^{supra} Didcott J stated the following:

'The *condictio indebiti* does not entitle the *solvens* to pursue what was mistakenly paid, wherever it goes. The recovery of the undue payment from its recipients is the action's sole objective. Wessels explained this in his Law of Contract in South Africa 2nd ed. He wrote (vol 2 paras 'a thing is due when it is not; and if through his act in delivering the thing to the recipients a third party acquires rights in that thing, the solvens has only himself to blame. Hence in strict law, as the recipients becomes the owner in so far that he can give title by transfer or delivery, the solvens cannot vindicate the thing in the hands of a third party. The right to bring the *condictio* does not attach to the thing, nor does there exist any privity between the solvens and the third party."

This means that the *condictio indebiti* is enforceable against the recipients of the undue payment, but nobody else. The recipient 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 recipient is the principal, not the agent. A conduit through whom payment passes is likewise not its recipient. Instead he who obtains payment by such means is. One is not the recipient 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

² SOMAEB v STANDARD BANK NAMIBIA LTD 2017 (1) NR 248 (SC) where this matter is discussed;

one.'[my emphasis]

[16] It is the plaintiff's case that the defendant is the true recipient of the payment albeit funneled through other accounts. It is not disputed that the defendant received the money and that it was paid in error. The defendant admitted that he had no

business dealings with the SME bank save for having a bank account with it. He therefore gave no value to the SME bank and no payment was due to him by the SME bank.

[17] The defendant's claim is that he received the money from the *dramatis personae* and other Zimbabwean National is not rule compliant. The material facts which support this defense are absent. There is no indication who the Zimbabwe Nationals or the *dramatis personae* are. Throughout his affidavit the identity of the

Zimbabwean Nationals and the *dramatis persona* is not disclosed. Furthermore there are no details of the agreements verbal or otherwise which gave rise to the payment which was made. The explanation that the payment was based on a business relationship that commenced in 2013 is almost deliberately vague. The claim is for a specific amount paid in a lump sum. The defendant does not disclose how various persons with whom he did business came to make a single payment extinguishing a debt which existed. A general reference to "business" is made with no particulars of the transaction(s) which justifies payment in the sum of N\$3 900 000. The bank account statements attached to the defendant's affidavit are equally unhelpful as no reference is made to the particular entries which supports the existence of debt between the defendant and the other unidentified parties warranting payment of N\$3 900 000. The defendant stated that he gave a chronological account to the Commission of Enquiry but completely failed to do the same in this court.

[18] The defendant was, under the circumstances, required to set out the material facts upon which his defense is based with sufficient particularity and completeness to enable this court to decide whether he has a *bona fide* defense. This he failed to do. The vagueness of the nature of his defense and of the material facts which supports the defense led to this court's conclusion that the defendant does not have a defense which is *bona fide* and good in law.

[19] It is for these reasons that the court granted the plaintiffs Summary Judgment in the terms set out in the order above.

Judge's signature	Note to the parties:
TOMMASI, J	Not applicable
Counsel:	
Applicant	Respondent
Francois Erasmus Of Francois Erasmus and Partners	Felicitas Gaes Of Uanivi Gaes Inc.