REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 602/2008

In the matter between:

1.1.1.1. **PIETER VAN DEN DRIES**

PLAINTIFF

and

THE INTERNATIONAL UNIVERSITY OF MANAGEMENT **DEFENDANT**

Neutral citation: Van den Dries v The International University of Management (I 602/2008) [2014] NACHMD 159 (21 May 2014)

Coram: SMUTS, J
Heard: 24, 25 and 26 March 2014
Delivered: 21 May 2014

Flynote: *Condictio indebiti*. Requisites restated. Plaintiff establishing receipt of funds *indebiti* by the defendant, having been mistakenly paid over by the plaintiff. Defendant pleading that it had not been enriched. Onus upon it to show that further payment made was not *mala fide*. Defendant discharging that onus. Claim dismissed.

ORDER

The plaintiff's claim is dismissed with costs. These costs include the costs of one instructing and one instructed counsel, where engaged.

JUDGMENT

SMUTS, J

(b) At issue in this enrichment action is whether the defendant can be said to have been enriched at the expense of the plaintiff and, if so, to what extent.

(c)

(d) The plaintiff lives in the Netherlands. He is attached to a donor organisation, engaged in development and welfare assistance in Namibia.

(e) The defendant is a tertiary academic institution, offering degree and other courses to students in Namibia.

The pleadings

(f) In the particulars of claim, the plaintiff alleged that he sponsored a certain Mr Ndihokubwayo Jean Prosper ("Prosper"), a Burundian refugee and a student in a four year course on HIV / Aids Management at the defendant, to pay his tuition fees with the defendant.

(g) On 6 February 2007, the plaintiff transferred the sum of €7290 into the defendant's bank account to pay for Prosper's tuition fees. The tuition fees payable in respect of that year were however only N$7290. Due to an error on the part of the plaintiff, he paid the sum of €7290 to the defendant, resulting in an over payment of €6146, 32.

(h) It was alleged that the plaintiff had no obligation to make this over payment and that the defendant had received this sum without a valid *causa*. It was further alleged that the defendant was thus enriched in the sum of €6,146.32 at the expense of the plaintiff and that the plaintiff was impoverished in that amount. It was thus claimed from the defendant.

(i) The defendant raised certain special pleas which are not relevant for present purposes. The defendant also pleaded over on the merits. It was admitted that the sum of €7290 had been received. The defendant specifically pleaded non-enrichment of the (in the amount of €6146,32) as it had paid over that amount to Prosper in the *bona fide* belief that the latter was entitled to it and that the payment to Prosper had preceded the institution of the action.

The evidence

(j) In the course of case management, witness statements had been filed by the parties in respect of their witnesses. They were taken as read after being confirmed under oath by the respective witnesses. They were thereafter cross-examined on their statements. As was foreshadowed by the pleadings, much of the factual matter in this action turned out to be common cause.

(k) The plaintiff confirmed that he had met Prosper and agreed to pay his tuition fees directly to the defendant's bank account. He had at that stage only intended to pay the tuition fees for the current year (2007) when making his payment on 6 February 2007. The tuition fees for that year amounted to N$7290 but he had mistakenly transferred €7290.

(l) When he noticed the error on 22 February 2007, he sent a telefacsimile to the defendant's erstwhile Vice-Chancellor informing the defendant of the mistake and requesting a refund in respect of the over payment of €6146, 32.

(m) The plaintiff also testified that the then Vice-Chancellor on 19 March 2007 reverted to him and undertook to remit the over payment. But this was not

done. In the meantime Prosper had written to the plaintiff asking for the balance of the over payment to be paid to him in order to assist him with his living expenses.

(n) The defendant however took the position that any amount paid over for the benefit of or to the credit of a student could not be remitted to the source of the funds except with that student's consent. This was in accordance with its procedures. The then Vice-Chancellor informed the plaintiff subsequently on 3 July 2007 that the student had requested "a refund" from the amount standing to his credit with the defendant and that a substantial amount had already then been paid. The student had informed the defendant that there was an understanding between the plaintiff and himself to that effect, namely that he would be entitled to receive tuition fees from the plaintiff as well as living expenses for the duration of his course and that the sum paid by the plaintiff and standing to his credit should be put to that use.

(o) The plaintiff however persisted with his demand for the repayment of the amount overpaid by him. The matter remained unresolved and on 2 August 2007 the plaintiff, in the course of a visit to Namibia, had a meeting with the defendant's management. The meeting had also been attended by the student. At that stage, the excess amount reflected on the account had been reduced to N$ 6331 with the balance having been applied for the further tuition fees of the student (for the entire duration of the course) as well as a series of payments in respect of living expenses paid directly to the student.

(p) The application of those funds was explained to the plaintiff at that meeting.

(q) The plaintiff subsequently instituted his action. He insisted in his evidence that he had not authorised the payment of living expenses to Prosper.

(r) In cross-examination, it was put to him that he had not objected at the meeting on 2 August 2007 to the application of the excess funds for the tuition fees of Prosper. Whilst the plaintiff did not dispute this, he said he had at that

stage only agreed to pay his tuition fees for 1 year and did not agree to pay the full student fees for 4 years of tuition in advance. He accepted that Prosper had completed the studies and had obtained his degree and that his funds had been applied for the tuition fees for the entire course.

(s) At the close of the plaintiff's case, the defendant applied for absolution. Applying the test articulated in *Gordon Lloyd George Page and Associates v Rivera and another*[1] and followed by the Supreme Court[2], the application for absolution was rejected with costs. The defendant thereafter called 4 witnesses, Mr Prosper, the current Vice-Chancellor, its Chief Financial Controller and Mr Usko Shivute who had attended the meeting on 2 August 2007.

(t) Mr Prosper testified that he is a refugee from Burundi and had met the plaintiff at a project sponsored by the organization the plaintiff was attached to. He said that the plaintiff had agreed to pay for the 4 year degree course with the defendant. He had supplied the plaintiff with the details of the course as well as the required fees. He also supplied the plaintiff with the bank details of the defendant. The plaintiff had informed him that he paid over the fees to the defendant. When he however learnt that there was a surplus credited to his student account, he applied to the defendant to receive it, after deduction of the tuition fees. He said that he urgently needed the funds for living expenses and had approached the defendant to release the surplus as payment for them. He informed the defendant that the plaintiff had agreed to sponsor him for his entire course. He also testified that the plaintiff had never requested a repayment from him.

(u) In cross-examination, he explained that certain of the amounts which he withdrew from the amount paid by the plaintiff to his credit with the defendant, were for living expenses. He said that this occurred in accordance with the defendant's rules. He was unable to maintain himself and also needed funds for computers. It was put to him that he was not entitled to the sums paid out to him, but he disputed this by stating that he did become entitled to the surplus once the funds had been paid to his credit with the defendant.

[1]2001(1) SA 88 (SCA).

[2]In *Stier v Henke* 2012(1) NR 370 (SC) at par [4].

(v)

(w) The current Vice Chancellor of the defendant, Mrs V. Namwandi gave evidence. She stated that there was a refund policy as part of the contractual scheme between students and the defendant which meant that funds which had been paid to the credit of a student could be refunded to the student but would not be refunded to a donor except with the student's consent. She explained that there were instances where State bursary funds in excess of the tuition fees were paid over to the defendant and that relatives of students sought to obtain that money for themselves. The defendant had refused to pay such sums to student's relatives but rather utilised the funds for the students' tuition or living expenses.

(x) Mrs Namwandi further testified that the defendant is a non-profit s 21 company. She stated that the funds which had been donated by the plaintiff had been applied to Prosper's tuition fees for the entire course and that the excess amount of some N$ 23704,80 had been paid over to him for his living expenses from the sums paid over by the plaintiff prior to meeting the plaintiff. Mrs Namwandi further testified that the undertaking given by the former Vice Chancellor in March 2007 conflicted with the defendant's refund policy and the overpayment could not be paid over except with the consent of the student in question. The student had not provided his consent for the repayment but had instead convinced the defendant that the excess sums should be applied for his further tuition fees and for his living expenses.

(y) Both the financial controller and Mr Shivute testified as to the meeting of 3 August 2007. They both testified that the plaintiff had not objected to the presentation provided as to the expenditure of the funds made at that meeting. This had included the receipt of the excess amount by the defendant for the further tuition fees payable in respect of that course and the student's living expenses. Instead, they testified, the plaintiff had listened to the explanation provided to him concerning the expenditure of the funds and the fact that there was some N$6331 still unutilized at that stage and that the plaintiff and Mr Prosper had left the meeting together in an amicable manner. They were both under the impression that the matter had thus become resolved after the

explanation was provided to the plaintiff. It was not put to them on behalf of the plaintiff that he had persisted with objections concerning the expenditure of the excess amount in respect of future tuition and other expenditure after the explanation had been given.

The parties' submissions

(z) Mr Z Grobler who represented the plaintiff argued that the plaintiff had met the requisites for an enrichment action and that the defendant had been enriched as a consequence of the mistaken payment in excess of the N$7290.

(aa) Mr Grobler submitted that the refusal to repay the excess amount was in breach of the undertaking given by the erstwhile Vice-Chancellor on 19 March 2007. He submitted that the attitude of the defendant, being in breach of that undertaking, "could only be described as *mala fide*". He referred to *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd*[3] where it was held that a person who has received another person's money or goods and parts with them in bad faith would be liable and could not plead non-enrichment in a claim under the *condictio indebiti*.[4] He submitted that the onus was thus on the defendant to show that it had not been enriched and that its defence could not be a good defence, given the fact that the repayment had been claimed prior to payments made to Prosper and contrary to an undertaking to refund the excess amount. He submitted that the plaintiff had established its claim and sought judgment on this behalf.

(bb) Mr Jacobs on behalf of the defendant submitted that the date for determining enrichment would be either the *litis contestatio statio* or when judgment had been reserved.[5]

(cc) Mr Jacobs further submitted that the evidence had shown that the defendant had not acted in bad faith and that it had in fact acted in good faith and without any ulterior motives in applying the sum for the student's further

[3]1978(3) SA 699 (A) .

[4]*Supra* at 711B.

[5]*Frans v Paschke and others* 2012(2) NR 56- (HC).

tuition fees and for his living expenses after having been approached and been convinced by the student that he was entitled to the surplus pursuant to an arrangement between the plaintiff and himself. This also accorded with its refund policy. The student had convinced the defendant that the plaintiff had agreed to pay his fees for the duration of his course and the funds had been applied to that end with the further amounts being paid in respect of living expenses. He further submitted that the plaintiff had not objected to the defendant receiving the monies for the entire course when he met with the defendant. He submitted that the evidence of that meeting had been clear and that the plaintiff had no longer objected to the application of the surplus in that way. He referred to *King v Cohen Benjamin & Co*[6] and argued that the defendant had not been enriched by the excess payment made in February 2007. He contended that it had received the funds *bona fide* and was not party to any agreement or delict in respect of which an obligation to restore the money arose. He argued that the obligation would not be extended beyond the enrichment of the person who received the payment where it had made the funds over to a third party.

(dd)

Was the defendant enriched for the purpose of an enrichment action?

(ee) The plaintiff's claim was brought as a *condictio indebiti*. The essential elements for such an action were recently referred to by this court:[7]

> '[143] A *condictio indebti* is open to the party who has made payment to another due to an excusable error and believed that the payment was owing whereas it was not. That party may then reclaim payment to the extent that the receiver was enriched at the expense of the former party. The *condictio indebiti* may also be open to the party to reclaim performance made in terms of an invalid contract, as would be the *condictio sine causa*. It would seem that the latter action is more frequently be used in those circumstances.
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> [144] The essential requirements for a *condictio indebiti* are:
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> a) the defendant must be enriched;
>
> b) the plaintiff must be impoverished;

[6]1953(4) SA 641 (W).

[7]*Government of the Republic of Namibia (Ministry of Works, Transport and Communication) v The African Civil Aviation Agency (Pty) Ltd* (I 3298/2009) [2014] NAHCMD 45 (12 February 2014).

c) the defendant's enrichment must be at expense of the plaintiff; and

d) the enrichment must be unjustified in the sense of having been made in a reasonable but mistaken belief that a payment was owing – thus been a reasonable error in the circumstances of the case.'[8]

(ff) In respect of a defence of non-enrichment, as was expressly pleaded in this matter, once a transfer *indebite* has been established, the onus would then shift to the defendant to prove that it was not enriched by the transfer.[9] Where a defendant has disposed of a thing, in order succeed with a defence of non-enrichment, the defendant would invariably be required to establish that the disposal was *bona fide*.[10]

(gg) In *African Diamond Exporters* the court posed the question as to whether the defence of non-enrichment would apply where the recipient of money received *indebite* and who is *bona fide* in parting with the goods or money, but does so in circumstances showing neglect on his part. The court answered this question as follows:

'I am also inclined to the view that the passages cited above from Wessels Law of Contract in South Africa and from *De Vos Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg*, relied upon by counsel for the plaintiff, correctly state the law, namely that a person who receives money or goods, well knowing that what he receives is indebite, cannot deal with such goods quasi rem suam and will be liable in damages for any loss or deterioration caused by his negligence.'[11]

(hh) This statement is however of an *obiter* nature because it was not necessary for the court to determine whether the *condictio indebiti* would be available to someone who had received a sum of money *indebite* while knowing that the receipt was *indebite* but then lost the property without bad faith. After considering the evidence, the court held that there was no negligence on the part of *African Diamond Exporters* in relation to the amount paid over to another entity in Antwerp but that it had been enriched in respect to a smaller amount

[8] *Supra* at pars [143] and [144], footnotes excluded.

[9] *African Diamond Exporters supra* at 713 H-J.

[10] *Le Riche v Hamman* 1946 AD 648 at 657.

[11] *African Diamond Exporters supra* at 711H-712A.

which had been applied by it as part of a profit and found that it was enriched in that amount.[12]

(ii) In this matter, the plaintiff had not replicated by raising negligence on the part of the defendant. That was not the plaintiff's case. It was instead that the payment (to Prosper and applying the money to his fees) was made contrary to an undertaking given by the defendant's then Vice Chancellor and that this amounted to *mala fides* on its part. That undertaking was however explained in evidence as being contrary to the defendant's policies and that the application of the overpayment as well as those policies were explained to the plaintiff at a subsequent meeting where he did not object to the surplus amount being applied to the further tuition fees of the student and his living expenses.

(jj) Although the defendant was incorrect as a matter of law in considering that it was precluded by its policy (even though it formed part of the contractual scheme with its students) in repaying an overpayment mistakenly made, it does not follow that its application of the surplus for future tuition and the balance for living expenses of the student were *mala fide* as contended by Mr Grobler. I am further and in any event satisfied that the defendant established that it was not *mala fide* and that it had *bona fide* applied the surplus amount to the further tuition fees for the entire course in respect of that student and his living expenses in accordance with its understanding of its refund policy. It was not the plaintiff's case that payments of the surplus had been made negligently. It is thus unnecessary for me to canvass the obiter remarks in *African Diamonds* and consider whether a separate delictual claim arises for damages – as would appear to be implied – or whether the defence of non-enrichment would not be established in the event of a negligent further payment by a defendant.

(kk)

(ll) It would follow in the circumstances that the plaintiff has nor established that the defendant in this matter was not in my view enriched for the purpose of the enrichment action. In reaching this conclusion, I am mindful of what was

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[12] *African Diamond Exporters supra* at 714; see generally Visser *Unjustified Enrichment* at 733-735 for the learned author's instructive discussion of the *African Exporters* matter. See also *Enrichment* in LAWSA vol.9 (2 ed) at par 209.

stated by Didcott J in *Phillips v Hughes*[13] where he stated:

> 'The *condictio indebiti*, it is true, was designed for equitable relief. But that does not mean that the Court has a general discretion to uphold it, whenever it is invoked, on what may be thought to be equitable grounds. The remedy is circumscribed by rules of law and, as I understand these, they decree in the present litigation that Hughes has no case against Maphumulo, and likewise none against Phillips.'

(mm) In this matter, the defendant was not enriched by the plaintiff's overpayment in the sense contemplated by the *condictio indebiti* and established that its application of the funds and payment of living expenses to the student was not *mala fide*.

(nn) It follows that the plaintiff's claim is to be dismissed with costs. These costs include the costs of one instructing and one instructed counsel, where engaged.

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D SMUTS

Judge

APPEARANCES

PLAINTIFF:	Mr Z. J Grobler Instructed by Grobler & Co.
DEFENDANT:	Mr J Jacobs Instructed by Nederlof Inc

[13] 1979(1) SA 225 (N) full bench at 231.

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