IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A251/05

In the appeal between:-

FIRST NATIONAL BANK Appellant

and

TSHIDISO ISAAC LEEUW Respondent

CORAM:	BECKLEY J *et* VAN ZYL J
HEARD ON:	12 MARCH 2007
JUDGMENT BY:	BECKLEY J
DELIVERED ON:	29 MARCH 2007

A Introduction

The appellant, as plaintiff in the court *a quo*, claimed payment of the amount of R48 000,00 from the respondent (defendant in the court *a quo*) in an action based on enrichment, more particularly the *condictio indebiti*. The respondent claimed payment of the amount of R89 000,00 in a counterclaim, based on misrepresentation. The court *a quo*, after hearing evidence,

dismissed the main claim and gave judgment in favour of the respondent on the counterclaim. The appellant now appeals against the aforesaid orders in the court *a quo*.

B The facts

The relevant facts are briefly as follows: The appellant has a branch at Thaba Nchu. One of its clients at that particular branch was General Foods. Two bearer cheques, indicating that the drawer was General Foods, one dated the 13th May 1999 in an amount of R48 598,60, the other dated 21 May 1999 in the amount of R89 000,00, both made payable to Thabo Mofokeng, were deposited in the account of the respondent, who was also a client of the appellant at that particular branch.

It became apparent after the cheques had been deposited, that those cheques had been fraudulently removed from General Foods' cheque books and that the signatures of Mrs. Du Toit and Nel, on behalf of General Foods, had been forged. It was never contradicted that General Foods did not have a creditor by the name of Thabo Mofokeng and that no money was ever owing to such a person, although the witnesses were cross-examined in this regard. It was also not disputed that the deposit slip relating to

the deposit of R48 598,60 was completed by a relieving officer in the employment of the appellant, Abram Motaung, but that the deposit slip relating to the amount of R89 000,00 was not completed by Motaung but by another bank official, one Motlhatlhedi. When the appellant learned of the forgery, it reversed the two deposits insofar as they were reflected in the records relating to the respondent's account.

In the main claim, the appellant claims the amount of R48 000,00 which the respondent had withdrawn after the amount of R48 598,60 had been deposited by means of the fraudulent cheque. In the counterclaim, the respondent claims the amount of R89 000,00 as a result of a misrepresentation made by the said Motaung, which representation, so it is alleged, induced the respondent to sell liquor to one Mofokeng and to accept the cheque as payment therefor. The respondent's defence to the main claim is basically that the *condictio indebiti* was not available to the appellant, being a bank, as the bank "could never be under the mistake that the debt is owing. The bank does not pay out a cheque on the basis of a debt." Furthermore, it is also alleged in the pleadings that the appellant should be estopped from relying on the fact that the cheque had been obtained fraudulently as the appellant

misrepresented via its employees to the respondent that the cheque was a valid cheque.

C The *condictio indebiti*

Regarding the main claim, the first issue that has to be decided, is whether the appellant can rely on the *condictio indebiti*. In **ABSA BANK LTD v DE KLERK** 1999 (1) SA 861 (WLD), Leveson J held in a similar case that the proper cause of action was one of the *condictio indebiti*. (See p. 865 par. A – D.) However, in **B & H ENGINEERING v FIRST NATIONAL BANK OF SA LTD** 1995 (2) SA 279 (A), E M Grosskopf JA held as follows at p. 284 G – I:

> "The Bank's claim is based on unjustified enrichment. In *Natal Bank Ltd v G Roorda* 1903 TH 298 the Court suggested, in a similar case, that the appropriate common-law remedy was the *condictio indebiti* (at 303). This was disapproved in *Govender v Standard Bank of South Africa Ltd* 1984 (4) SA 392 (C) at 398D-E and 400C-D for the following reasons. A *condictio indebiti* lies to recover a payment made in the mistaken belief that there is a debt owing. However, a bank paying a cheque knows that it owes no debt to the payee. Its mistake lies, not in a belief that it owes money to the payee, but in a belief that it has a mandate from the drawer to make payment. In these circumstances the

> appropriate remedy is not the *condictio indebiti* but the *condictio sine causa*. This analysis of the two condictiones was followed in the Court *a quo* (at 44G-H). It also accords with views expressed by academic writers (see the articles quoted by the Court *a quo*, *ubi sup*) and was accepted as well founded (correctly, in my view) by both parties before us."

It was conceded that the proper cause of action *in casu* may well not be the *condictio indebiti*, as pleaded, but the *condictio sine causa*. Mr. Cronje's submission on behalf of the appellant, was that, despite the fact that there was no reference to the *condictio sine causa* in the pleadings, the requirements for the *condictio sine causa* had been fully canvassed in evidence in the course of the trial, and that the appellant is not unsuited, having regard to the following:

(i) The scope of the *condictio indebiti* is to recover money (or other property) transferred in intended payment or performance of a non-existing debt. The *condictio sine causa* (*generalis*) has been held to be the appropriate remedy where, for example, a bank seeks to recover an amount paid to the payee of a cheque after the cheque had been countermanded by the drawer. It would seem as if the

fundamental difference is to be found in the fact that the mistaken belief that there is a debt owing is required to rely on the *condictio indebiti*, whereas such a belief regarding a debt owing is not a requisite for the *condictio sine causa*.

(ii) Both *condictiones* are specimen of actions for enrichment, and both require proof

(a) that the defendant has be enriched, that

(b) the plaintiff has be impoverished, that

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

(d) that the enrichment must be unjustified.

(See LAWSA, Vol. 9 par. 209.)

(iii) In the pleadings, specific reference is made to enrichment.

(iv) The evidence required to prove the *condictio indebiti* also proves the *condictio sine causa*. It is difficult to see in what manner the evidence on behalf of the respondent would have differed, or how the cross-examination would have been affected, if the correct specimen of the *condictio* had been referred to in the pleadings and moreover, as to how

the respondent has been prejudiced by the reference to the incorrect *condictio*.

(v) The dictum of Schuts JA in **McCARTHY RETAIL LTD v SHORTDISTANCE CARRIERS CC** 2001 (3) SA 482 (SCA) at 489 A – C endorses the undesirability of having separate *condictiones*.

Given the similarities between the two respective *condictiones*, I agree with Mr. Cronje that the requirements for the *condictio sine causa* have been fully canvassed in the evidence, that there can be no prejudice to the respondent, and that the appeal should not be dismissed simply because of the reliance on the incorrect *condictio* in the pleadings. I invited Mr. Phalatsi, on behalf of the respondent, to address the Court on any possible prejudice that this may have entailed insofar as the respondent is concerned, and he was unable to refer to any specific prejudice.

Regarding the discrepancy between the pleadings in which it is alleged that the appellant relies on the *condictio indebiti*, and the concession by Mr. Cronje that the correct cause of action would actually be the *condictio sine causa*, Mr. Phalatsi relied on the well

known decision **ROBINSON v RANDFONTEIN ESTATES G.M. CO. LTD.** 1925 AD 173 (A). The court *a quo* correctly referred to this decision, but unfortunately only referred to part of the relevant section. The entire approach of Innes CJ, is clearly set out as follows at 198:

> "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all these circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the appellant has not been as explicit as it might have been."

I therefore hold that the fact that the appellant relies in its pleadings on the *condictio indebiti* is not fatal.

D Estoppel

Regarding estoppel, Mr. Phalatsi submitted that all the elements of estoppel are present and that the appellant should be estopped from recovering the amount of R48 000,00 from the respondent. In the pleadings it is alleged that, prior to a sale of liquor which was sold by the respondent to one Thabo Mofokeng, the respondent had enquired from an employee of the respondent "about veracity of a cheque dated 21 May 1999" and that the employee "represented to defendant that the cheque was good" whereupon the respondent delivered goods to Mofokeng. It is furthermore alleged that the appellant's employee "knew the defendant would act on the assumption that the representation is factually correct". The employee of the appellant, Motaung, testified as follows in this regard:

> "If I remember the owner of the account came to me with a cheque and asked me if the cheque was good. I then had to check if the cheque was not postdated and if the amounts corresponded with figures. I then checked in the computer if there was not stop payment on the cheque. I confirmed that the cheque was ok. I was not asked to check if there were funds in the account. I did not check if the signatures on the cheque corresponded. I did not go and look if there were funds in the

> account of Gen Foods. The document Exhibit A is known to me. When I received the cheque I did not go and look if the Exhibit A if the signatures on the cheque corresponds with those on the Exhibit A."

Later in the course of his testimony, he stated that he never told the respondent that the deposit amount was guaranteed. Motaung also referred to a telephone conversation with the respondent regarding the cheque a few days after the cheque had been deposited, which is denied by the respondent. In the course of this conversation, Motaung, according to his own evidence, advised the respondent that the funds are not available yet.

The respondent's evidence regarding the conversation he had at the bank with Motaung is to the effect that he spoke to Motaung in the presence of Mofokeng and asked him to verify the cheque. His further evidence is as follows:

> "Motaung took the cheque, went to the back. When he came back, he said the cheque was genuine and I could deposit the cheque."

The branch manager of FNB at Thaba Nchu, Mr. Galadamin, testified regarding the procedure that applies in the bank relating to the clearance of cheques. According to his evidence a cheque which is deposited into an account is subject to a clearance period of seven days. The account is provisionally credited upon deposit of a cheque, and the deposit is deemed to be final once the cheque has been cleared. Should the cheque not be cleared, the credit is then reversed. The witness conceded that, if this particular cheque in the amount of R48 000,00 had been cleared within only three days after been deposited, it presupposes that special arrangements were in place in respect of the particular cheque. It was, however, never put to Motaung that such arrangements for special clearance had been made, and that this particular cheque had therefore been cleared in less than the usual period of seven days in terms of such an arrangement. Respondent's evidence, on the other hand, is that the assurance was given to him prior to depositing the cheque, that the cheque was genuine and that he could deposit the cheque.

It must be borne in mind that the respondent was aware of the seven day period that was required for a cheque to be cleared, and that he specifically testified that he never requested anybody

at the bank to clear this particular cheque. It is also important to refer to the specific evidence of Motaung and the respondent in this regard. Motaung testified that he never advised the respondent that the cheque had been cleared or that he guaranteed that the cheque would be paid. In fact, he never cleared the cheque, as he was never required to do so. He satisfied himself that the cheque complied with the requirements for a cheque to be deposited, and it is common cause that that is exactly what he conveyed to the respondent.

In order to succeed with the plea of estoppel, the onus was on the respondent to show that the representation made by Motaung was tantamount to a guarantee. That, to my mind, he failed to prove. In the result, the defence of estoppel fails.

E The Counterclaim

The court *a quo* by implication accepted the evidence of the respondent that he dealt with Motaung and rejected the evidence of Motaung that the had nothing to do with the cheque in the amount of R89 000,00, simply on the basis that the respondent knew Motaung very well and that there is no reason why the respondent should say that he was helped by Motaung whereas

he had been helped by someone else. The court *a quo* considered the fact that it was Motaung who went to look for Mofokeng in Botshabelo as corroboration. It is common cause that Motaung was involved in the first cheque in the amount of R48 000,00 and it is therefore understandable why he was requested to look for Mofokeng. It was never suggested that Motaung's visit to Botshabelo was in connection with the cheque for R89 000,00 only. The court *a quo*, however, did not take other aspects into consideration and failed to apply its mind to other factors in finding that the evidence of the respondent was to be preferred over and above the evidence of Motaung. In this regard, the following aspects were never considered by the magistrate and are certainly relevant:

(i) Whereas Motaung completed the deposit slip in respect of the R48 000,00 cheque, it was common cause between the parties that the handwriting on the deposit slip in respect of the R89 000,00 cheque was not that of Motaung.

(ii) The respondent's credibility is questionable, having regard to the fact that a relevant and important aspect was never put to Motaung during cross-examination, namely that Mofokeng

was present during the discussions at the bank between Motaung and the respondent in respect of both cheques. It is extremely unlikely that Motaung (if such a person actually existed) and who would on all probability know that the cheques were stolen, would accompany the respondent to the bank to deposit the cheques. (The respondent in his evidence actually conceded this.)

(iii) The respondent testified that Motaung actually contacted General Foods telephonically regarding one of the two cheques whilst he was present at the bank and at the occasion when the respondent made certain enquiries regarding the cheque. This was never put to Motaung in the course of cross-examination. Apart from the fact that it was never put to Motaung in cross-examination, as it should have been, it is inconceivable that, as General Foods would have realised that the cheques were stolen, they would not have advised Motaung accordingly. It was likewise never put to the employees of General Foods during cross-examination that such a conversation had ever taken place. The fact that these aspects were never raised in the course of cross-examination, raises questions regarding the credibility of the

respondent, more so when the unconvincing reasons that he furnished for the failure to put these questions are taken into account.

(iv) It is unlikely that Mofokeng would conveniently disappear in a very short period of time after buying liquor for more than R137 000,00 from the respondent and leave no trace of his whereabouts. It is simply not acceptable that the respondent took no steps to get in touch with Mofokeng.

(v) The respondent contradicted his pleadings by testifying that he sold beer to Thabo Mofokeng, whereas the pleadings referred to beer, ciders and liquors; he also contradicted his pleadings by testifying that Thabo Mofokeng stayed at S Section, Botshabelo, whereas the pleadings referred to G Section, Botshabelo.

(vi) The respondent was unable to provide any documentary proof that he sold liquor to Mofokeng in the amount of R137 000,00 within a matter of days, despite the fact that he was challenged in cross-examination to do so. He could at least have provided documentary proof of the fact that he had

purchased stock in excess of that amount prior to 21 may 1999.

Regarding Motaung's evidence, Mr. Phalatsi was invited to refer the court to any unsatisfactory aspects or contradictions in his evidence, but was unable to do so. In the light of the aforementioned unsatisfactory aspects in the respondent's evidence, the court *a quo* erred to my mind in accepting the evidence of respondent.

The versions of Motaung and the respondent are mutually destructive, as to whether the respondent spoke to Motaung regarding the cheque in the amount of R89 000,00. In **NATIONAL EMPLOYERS MUTUAL GENERAL INSURANCE ASSOCIATION v GANY** 1931 AD 187 at 199, Wessels JA correctly, with respect, set out how such a situation is to be resolved:

> "Where there are two stories mutually destructive, before the *onus* is discharged, the Court must be satisfied that the story of the litigant upon whom the *onus* rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the Court of first

> instance that the version of the litigant upon which the *onus* rests is the true version, and that in this case absolute reliance can be placed upon the story as told by A. Gany ..."

In casu it cannot be said that the version of the respondent, on whom the onus rests, is the true version and that absolute reliance can be placed on his story. It follows in my view therefore that the appeal should succeed.

The following order is made:

1. The appeal is upheld with costs, and the judgment of the court *a quo* is ordered to read:

    1.1 In the main claim, judgment is granted in the amount of R48 000,00 together with interest on the amount of R48 000,00 *tempore morae* at the rate of 15,5% per annum as well as costs of suit;

    1.2 In the counterclaim, absolution from the instance is granted with costs.

A.P. BECKLEY, J

I agree.

C. VAN ZYL, J

On behalf of appellant:

On behalf of respondent:

/sp