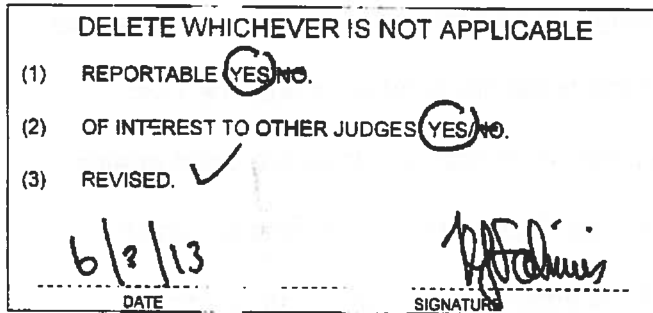
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

Case Number: 1681/08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(1) REPORTABLE YES/NO.

(2) OF INTEREST TO OTHER JUDGES YES/NO.

(3) REVISED.

6/3/13

DATE

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In the matter between:

KIRSTEN AND THOMSON CC t/a NASHUA EAST LONDON	**PLAINTIFF**
and	
THE COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICES	**1st DEFENDANT**
ABSA BANK LIMITED	**2nd DEFENDANT**

JUDGMENT

FABRICIUS J,

1.

Plaintiff's managing owner. Mr. Thomson, was "done-in", as First Defendant's senior counsel put it to him during cross examination. He seeks justice in these proceedings but, in a constitutional state governed by the Rule of Law, justice can only be achieved if a judge applies the law. In order to achieve his aim he relied in the main claim on the *condictio indebiti* against the First Defendant, and at the commencement of the trial withdrew the claim against Second Defendant. The *condictio indebiti*, is an equitable remedy, which, subject to certain conditions. seeks to ensure that no one is unjustifiably enriched at the expense of another. It must however always be remembered be it in this context, or in any other, that a court must do justice not only to a Plaintiff, but also to a Defendant. As will be shown, First Defendant was not paid twice by Plaintiff, and was also not enriched at Plaintiff's expense.

2.

In ***Nortje en 'n Ander v Pool NO 1966 (3) SA 96 (A)***, the majority of the court held that there was no general enrichment action in our law, but that such an action could develop in future. I only intend to deal with this particular topic very briefly, because whether or not the time is now right for the recognition of such an action was not fully argued before me. A wise court does in my view not easily deviate from well established principles or authorities, in the absence of thorough argument, and of course if it is necessary to decide the issues before it I have however read the views of JE Sholtens in this particular context in a number of South African law journals, but more particularly in ***1966 SALJ 393 to 402*** which, according to ***Eiselen and***

Pienaar, in Unjustified Enrichment, a Case Book, 2nd edition, Butterworth Publishers at 22, convincingly proves that a general enrichment action had in fact developed in the Roman-Dutch Law of the 18th century. ***D Visser in Unjustified Enrichment, Juta and Company, 2008 at 12,*** writes that recognising a general enrichment action is clearly a big move. I agree with that view. Apart from Sholtens, Feenstra referred to by Visser at 35 footnote 167 also showed convincingly that a general enrichment claim existed in 18th century practice in Roman-Dutch law. It is in this context somewhat ironic that Hefer JA in ***Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another 1992 (4) SA 202 (A)*** reminded us that the Roman-Dutch Law is "virile living system of law. ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society." The *condictio indebiti,* as I have said, has since Roman times always been regarded as a remedy *ex aequo et bono* to prevent one person being unjustifiable enriched at the expense of another. In that decision the distinction between a payment made in error of law and error of fact was held to be illogical and of no further application in our law. An *indebitum* paid as a result of a mistake of law could therefore be recovered, provided that the mistake was found to be excusable in the circumstances of the particular case.

3.

As I have said the majority judgment in the ***Nortje v Pool supra*** ought to be revisited in the light of all the authorities that convincingly argue in favour of the adoption of the general enrichment action. It is unfortunate that I cannot

do so in these proceedings for the reasons that I have mentioned, but in any event, it would best be the function of the Supreme Court of Appeal itself.

4.

Plaintiff's alternative claim was formulated on the basis that the First Defendant owed Plaintiff a duty of care, relevant to the manner in which it dealt with the first cheque that had been delivered by Plaintiff to its offices. Elements of negligence and wrongfulness had been pleaded within the ambit of what was held to be required in the decision of ***McCarthy Limited/ Budget Rent- a –Car v Sunset Beach Trading 300 CC T/A Harvey World Travel and Another 2012 (6) SA 551 (GNP).***

5.

Plaintiff's first claim based on the *condictio* was formulated as follows in the particulars of claim, and. the factual allegations contained therein were essentially not disputed in these proceedings:

"5. 5.1 On or about 5th April 2007 Plaintiff delivered cheque number 015981 drawn on Plaintiff's Bankers, being the East London branch of First National Bank Limited (hereinafter referred to as "the cheque") to First Defendant's East London branch office.

5.2 The cheque was drawn in favour of First Defendant, was post dated to 25 April 2007, was crossed and marked "not transferable" and was made payable in an amount of R432 375.34.

5.3 A copy of the cheque is attached hereto marked Annexure "A".

5.4 The cheque was hand delivered on behalf of Plaintiff and was signed for in Plaintiff's delivery record by a receptionist acting in the course and scope of his or her employment by First Defendant, one NOX, whose full and further particulars are to Plaintiff unknown.

5.5 The cheque was issued in favour of First Defendant in the discharge of Plaintiff's liability for the payment of VAT arising from Plaintiff's trade activity during February and March 2007.

5.6 Delivery of the cheque in the aforementioned circumstances constituted payment by the Plaintiff to the First Defendant thereby discharging the Plaintiff's obligations to the First Defendant in respect of VAT for the period February/ March 2007.

5.7 On or about 18 May 2007 and in the erroneous but *bona fide* and reasonable belief that it was obligated to do so, Plaintiff provided the First Defendant with a replacement cheque, made out in favour of the First Defendant in the amount of R432 375. 34, which cheque was presented for payment by an authorised employee of First Defendant in due course and the amount of R432375.34 debited from Plaintiff's Bank account.

5.8 The aforesaid second payment constituted a duplication of the first payment for which the Plaintiff was not liable in law.

5.9 The plaintiff has accordingly been impoverished in the aforesaid amount of R432 375.34 and the First Defendant has been unjustly enriched in the aforesaid sum.

5.10 The First Defendant is accordingly liable in the premises to pay to the Plaintiff the aforesaid sum of R432 375.34."

As far as the alternative claim was concerned Mr. Ford SC, on behalf of Plaintiff said in argument that this claim only arose in the event that it being held that the first cheque was indeed delivered to the offices of First Defendant, but not in circumstances establishing that the First Defendant thereby accepted payment, became the true owner of the cheque and bore the risk in respect thereof Before I deal with Plaintiff's first claim, it must be said that Mr. P Louw SC on behalf of First Defendant admitted after Plaintiff's evidence, that the mentioned first cheque had indeed been delivered to First Defendant, and that it had become the "true owner" thereof. Because Plaintiff did not retain ownership of the original first cheque, there was no duty upon First Defendant at all either to Plaintiff or to anyone else in the context of the alternative claim as pleaded, with the result that this claim did not arise for adjudication. Ownership of the relevant cheque passed upon delivery because it is a moveable corporeal. See: ***ABSA Bank Limited v Greyvenstein 2003 (4) SA 537 HHA at 543 par 9***. Mr. P Louw SC did not tell me what a "true owner" was in the present context, and accordingly I did some reading on this topic and found that the word "true" does not serve to qualify the ordinary meaning of "owner" as used in legal parlance. As a matter of proper terminology therefore the word "true" is unnecessary in the given context.

See: ***First National Bank of SA Limited v Quality Tyres (1917) (Pty) Ltd 1995 (3) SA 556 (AD) at 568 A to F***. In this decision the court also held that ownership of a cheque, viewed as a piece of corporeal movable property can

be transferred only in accordance with the general requirements of the law regarding transfer of ownership of corporeal movables. There must be delivery of the thing, i.e. transfer of possession, either actual or constructive, by the transferor to the transferee, and there must be a real agreement (in the sense of "saaklike ooreenkoms") between the transferor and the transferee, constituted by the intention of the former to transfer ownership and the intention of the latter to receive it. (At 568). The evidence tendered by Plaintiff in this context established without any doubt that such transfer of ownership had taken place and Mr. P Louw SC was quite correct in conceding this without any further ado. He is also correct when submitting that as a result the alternative claim did not arise for adjudication. Having become the owner of the first cheque. the First Defendant did not owe a legal duty towards Plaintiff or indeed anyone else, inasmuch that there is nothing to suggest that it acted wrongfully. During argument Plaintiff's counsel referred to First Defendant's affidavit resisting summary judgment, in which it was stated that the cheque was in all probability stolen by one of its employees or by a third party. It was however also denied that such employee would have acted within the course and scope of his employment. There was no evidence before me as to how this cheque was mislaid. misappropriated, or otherwise dealt with. First Defendant had pleaded that it denied, as a matter of law, that delivery of the first cheque discharged the Plaintiff's obligation to pay the relevant VAT. It pleaded that the first cheque was not collected by the ostensible collecting bank i.e. the Second Defendant, that it was not paid by FNB, and that the First Defendant did not receive the proceeds of this cheque. Accordingly it was not paid in fact and in law. It did admit that Plaintiff paid the outstanding VAT on

18 May 2007 by means of the "second cheque". It however denied that this payment was *sine causa* in that it discharged the Plaintiff's indebtedness to First Defendant to pay over the relevant VAT which it, the Plaintiff, had received. It accordingly pleaded that there was no "first payment" as alleged, in that the first cheque was not paid, and that there was also no "second payment" as alleged, in that there was only one payment, namely the payment by means of the second cheque on 18 May 2007. The First Defendant was accordingly not enriched at all, in that the delivery of the first cheque did not discharge the Plaintiff's debt, and because First Defendant also did not receive payment under the first cheque, nor had it been collected or paid. Moreover, it was pleaded that Plaintiff had not been impoverished in that First National Bank (FNB) had no right to debit the Plaintiff's account with the amount of the first cheque under the relevant circumstances.

7.

Plaintiff filed a replication, and pleaded that the first cheque, being crossed generally and drawn on FNB, was paid in good faith without negligence by FNB to ABSA bank after such cheque had come into the hands of the payee thereof, being the First Defendant. The Plaintiff and FNB are, so it was pleaded, in accordance with the provisions of s79 of the Bills of Exchange Act 34 of 1964, entitled to the same rights and to be placed in the same position as if payment of the cheque had been made to the true owner thereof, namely the First Defendant. The fact that the First Defendant may not, in fact, have received payment of the first cheque is accordingly irrelevant to Plaintiff's claims herein. The Plaintiff maintains that, both in fact and in law, the delivery

of the first cheque, which was subsequently paid by FNB to ABSA Bank debited to the Plaintiff's bank account, constituted payment to the First Defendant of Plaintiff's VAT obligation in respect of the relevant period.

8.

Plaintiff's argument:

In general payment by cheque is *prima facie* regarded as immediate payment subject to a condition. The condition is that the cheque be honoured on presentation. When the cheque is so honoured the date of payment of the debt is the giving of the cheque. Conversely, if the cheque is dishonoured there has been no payment.

See: ***Eriksons Motors (Welkom) Limited v Protea Motors Warrenton 1973 (3) 685 (A)***. In this regard it was submitted that a common sense approach was required. There was nothing to suggest that with regard to the fulfilment of the suspensive condition, namely the cheque being honoured on presentation, that there was any requirement that this occur strictly in accordance with normal banking practice or custom. The focus was entirely upon whether the cheque was honoured or dishonoured, and not on the process by which this occurred. It was accordingly submitted that Plaintiff had established on a balance of probabilities that it indeed effected payment of the VAT obligation by delivery of the first cheque. The unjustified enrichment, so I was told, arose upon the payment of the second cheque as a result. In the context of the replication and s79 of the Bills of Exchange Act 34 of 1964 as amended, it was submitted that the incidence of the onus of proof must be determined without regard to matters of practical convenience and fairness,

such as sources of knowledge. In regard to a bank claiming the protection afforded by this section such bank was required to prove that a payment was made in good faith and without negligence.

See: ***Eskom v First National Bank of Southern Africa Limited 1995 (2) SA 386 (A)***.

Plaintiff called a witness. Mr Ries, from FNB. He was a rather reluctant speaker but when cross-examined, he did concede that there was a discrepancy between the date of the cheque and the date of the stamp appearing thereon. Mr. Ford SC submitted that in the absence of any evidence suggesting that payment in those circumstances would have constituted negligence on the part of the drawee bank, the Plaintiff had established its entitlement to rely on the provisions of s79 of the Act. He referred me to the general requirements for liability for enrichment, and submitted that all of them had been established on the evidence. There was nothing to suggest that Mr. Thomson had been inexcusable slack when paying the second cheque. inasmuch as he had been told by a representative of First Defendant that his VAT obligations remained due, and that in order to avoid penalties and interest in the amount of some R 40 000, payment was required. In any event, I do not deem it necessary to deal with this particular requirement any further, inasmuch as any so called slackness in the given context was never put to Mr Thomson on behalf of First Defendant or debated with him. It is therefore not necessary to deal with Mr. Ford SC's invitation that I could abolish the requirement that payment must not be inexcusable. See in this context: ***D Visser, Unjustified Enrichment supra at***

316 to 318, and ***Unjustified Enrichment, Eiselen and Pienaar supra at 143***.

9.

First Defendant's argument:

Mr. P Louw SC referred me to the requirements of all the *condictiones sine causa*, including the *condictio indebiti* as set out in ***Kudu Granite Operations (Pty) Ltd v Caterna Limited 2003 (5) SA 193 SCA.*** These are that the Defendant must be enriched, that the Plaintiff must be impoverished, that there must be a causal connection between the enrichment and the Impoverishment and that the enrichment must be *sine causa*. Over and above these general requirements, the special requirements of the *sine causa* requirement of the *condictio indebiti* are that the Plaintiff paid a sum to the Defendant, that payment was not due under any civil or natural obligation, or any other reasonable cause, and that payment was made as a result of an excusable error. Mr. P Louw SC then submitted that properly analysed, the theory of Plaintiff's claim was that the first cheque was paid because it was delivered and because the drawee bank, FNB, paid the amount of the first cheque to ABSA. Plaintiff then relied on s79 of the Bills of Exchange Act and tried to utilise it in two ways: in the first place it used the section to prove its own impoverishment. In this regard it contended that FNB debited its account with the amount of the first cheque in circumstances covered by the section. In the second place, it used the section as proof of a "deemed" enrichment on the part of SARS. It was then argued that Plaintiff's theory, if one can call it that, or premise underline the first claim, was wrong on a number of

fundamental points. It was accordingly submitted that s79 of the Act had no effect on an enrichment claim. Its primary role and function is limited to regulating the contractual relationship between the drawer and drawee bank where a crossed cheque is lost or stolen and collected by another bank. This section also places a subsidiary role in the delictual relationship between the drawer, as "true owner" of a cheque, and the collecting bank. Chapter II of the Act deals with cheques and sections 75 to 86 deals with crossed cheques. The fundamental policy that underlies these sections is that a crossed cheque is a special instrument with special rules as between drawer and drawee. If a cheque is crossed, it has to be collected by a bank, and the drawee must be the collecting bank (s78(1)). This means, in practice, that where a cheque is crossed the collecting and paying functions of a cheque are split between two banks, the collecting bank and a drawee or paying bank. If a cheque is collected by a bank other than the drawee, the latter has no means of establishing for whom the cheque is collected. The drawee bank's duty is limited to making payment to the collecting bank. This gives rise to two consequences, so it was argued. The first is that the errant collection of a cheque (that is for someone other than the named payee) is a matter for which only the collecting bank can be answerable. The second is that the drawee bank must nevertheless remain vigilant. Section 79 requires it to pay in good faith, the meaning of which is found in s94 of the Act.

<u>Section 79 of the Act and the collecting bank:</u>

It was submitted that the collecting bank is in principle liable for the negligent collection of a crossed cheque for someone other than the named payee.

See: ***Indac Electronics (Pty) Ltd v Volkskas Bank Limited 1992 (1) SA 783 (A)***. The standing ("*locus standi*") of the Plaintiff is determined on the basis of the ownership of the cheque, that is, the piece of paper, not the rights in them. The rule of practice is that if the drawer delivers a cheque to the payee, the ownership is transferred. After delivery the payee can sue the collecting bank for the errant collection, if the cheque is of course lost or stolen and deposited for collection by someone else. Before delivery, the drawer has the necessary *locus standi*, or standing to sue.

See: ***First National Bank of SA Limited v Quality Tyres (1990) (Pty) Ltd (supra) at 568*** but also especially at ***568I***, where, in the context of the definition of "delivery" in the Act, Botha JA held that the transfer of rights flowing from the cheque is inextricably tied up with the transfer of the ownership of the cheque.

The inherent logic of the Act, so the argument continued, in respect of lost or stolen crossed cheques that are deposited for collection by entities other then the named payees (where the cheques are marked "not transferable") is that the drawee bank may debit the drawer's account, and, depending on the delivery, either the drawer or payee can sue the collecting bank. Closely linked to these rules is the common law rule, to which I have referred, that

payment by cheque is timed to take place when it is delivered, but subject to the condition that it be paid by the drawee.

See: ***B + H Engineering v First National Bank of SA Limited 1995 (2) SA 279 (A) 285H to 286C***, Delivery of a crossed cheque marked "not transferable" is not payment. The cheque first has to be deposited for collection, go through the collection process in one bank and then send to the drawee bank, and the later must pay the collecting bank (not negligently and *bona fide*). All this postulates that the cheque collected must be the cheque paid. It is only if it can be proven that the collecting bank collected the very cheque that is in due course paid by the drawee, that the collecting bank has a case to answer. The reason was obvious, if the collecting bank collects a cheque showing its customer to be the payee, then it does not act negligently.

All these rules, Mr Louw SC submitted, primarily concern the law of delict. They show when someone who is not the client of the collecting bank can sue it for something that it did or did not do. These rules amend the first principle of delict, namely that everyone has to bear the loss he or she suffers. Aquilian liability provided an exception to the rule, as is well known.

See: ***Telematrics (Pty) Ltd v ASA 2006 (1) SA 461 (SCA) at par 12***. Mr. P Louw SC contended that the attempt in this case to transport these rules to realm of enrichment was interesting, but doomed to failure. A number of questions first had to be asked and answered.

11.

Payment and the first cheque:

Whether the first cheque was paid is a factual question. Mr. Thomson confirmed that he was liable to pay VAT to SARS for its trading activities for the month of February and March 2007 in the amount of R432 375.34. In order to discharge this liability Plaintiff drew a cheque on 5 April 2007, but it was post-dated to 25 April 2007. It was drawn on the East London branch of FNB. It was made payable to SARS it was crossed and marked "not transferable". This was referred to as the genuine cheque and it was handed in as an exhibit. This cheque was delivered to the East London branch of First Defendant on 5 April 2007. This was conceded after evidence was lead. I have already mentioned, and this was conceded by Mr. P Louw SC, that accordingly SARS became the owner of this cheque on the facts of the case. The genuine cheque was not deposited by SARS, SARS did not receive its proceeds, and it was probably stolen by a person unknown to either Plaintiff or First Defendant. It was contended that from the objective evidence it could not be disputed that it was clear that the unknown person or persons then copied the following particulars of the genuine cheque onto a piece of paper that looked like a cheque, and this was referred to during argument as "the cloned cheque"

11.1 The name of the drawer, K and T;

11.2 the name of the drawee, FNB;

11.3 the name of SARS-branch where K&T account was held, East London;

11.4 the branch code of this branch, 210121

11.5 the account number of K&T's account, 52123947966;

11.6 the date of the genuine cheque, 25 April 2007.

The name of the payee on the cloned cheque was changed from SARS to "Bihlongwa Construction CC". Apart from the constitutive signatures of K&T on the genuine cheque, the name of the payee was probable the only difference between the genuine and cloned cheques.

The objective evidence in this context consisted of the original cheque, and a copy of the ABSA deposit slip which was discovered by Plaintiff. The account opening documentation of the Bihlongwa account was also discovered, and was referred to by Mr. Ries who testified on behalf of Plaintiff. The ABSA statement of Bihlongwa on which the credit of the amount of the first cheque is reflected, was also referred to by Mr. Ries. From these documents it is abundantly clear that the stamp on the original cheque did not correspond with the stamp on the deposit slip. Moreover, on the Plaintiff's bank statement reference number appears that correlates exactly with the account number of Bihlongwa on the deposit slip. Given the evidence of normal banking practice by the ABSA teller who testified, the probabilities are overwhelming that a cloned cheque was created with Bihlongwa as payee, but with all the other information on the cheque the same as on the original cheque. I agree with this argument and I do so in the light of the objective facts that were placed before me in this context. I may just add that Mr. Thomson also testified about the fact that the present matter was similar to other frauds that were reported

in the media and Mr. P Louw SC himself "gave evidence" to the effect that an amount of some R85 000 000 was apparently involved in this scam, if I can call it that.

The cloned cheque was according to the Bihlongwa bank statement, and the stamp on the deposit slip, deposited at ABSA's Atteridgeville branch on 30 April 2007 for the credit of Bihlongwa. ABSA probably provisionally credited the account of Bihlongwa with the amount appearing on the forged cheque. I was referred to authorities which describe the process of collection of cheques in South Africa, amongst others ***Volkskas Bank Bpk v Bank Corp Bpk 1991 (3) SA 605 A,*** and ***Kwamashu Bakery Limited v Standard Bank of South Africa 1995 (1) SA 377 (T) at 382 and 384 to 385***. Plaintiff's witness, Mr. Ries, testified to the collection and paying functions of the bank and said that the following events probably took place:

11.1.1 ABSA forwarded the cloned cheque, as if it were a real cheque, to FNB for presentment and payment probably through an inter-bank collection process;

11.1.2 before the cloned cheque could reach FNB, it was probably removed from the cheque collection process and the genuine cheque was substituted for it (how else would the original cheque have come into the procession of Plaintiff?);

11.1.3 The genuine cheque was physically received by FNB on 30 April 2007. FNB did not return the cheque as unpaid within the prescribed inter-bank clearance period, and the genuine

cheque was consequently, from FNB's point of view, ostensively paid.

12.

Although, as I have said, Plaintiff did not proceed with the claim against ABSA Bank Limited, Mr. P Louw SC made certain submissions as to the liability of ABSA on the mentioned facts. Again, one must have regard to the probabilities he suggested, and I agree therewith. The probabilities were overwhelming that the teller of ABSA who received a cheque for collection undercover of the deposit slip did not handle the original cheque, but a clone that indicated Bihlongwa to be the payee. The ABSA teller who testified in court in this context made this clear inasmuch as the same stamp would be affixed on to the cheque as that which would be affixed to the deposit slip when a deposit for collection is made. One could of course not deny that ABSA might have had a fraudulent teller, but the probabilities of the fraud in this case show that the original cheque probably did not accompany the deposit slip, a fact which was proven by the two different bank stamps. It appears that the cloned cheque was actually taken in at the Atteridgeville branch. The bank stamp on the genuine cheque indicates that it was deposited at Pietersburg, and this bank stamp must be fraudulent. Accordingly Mr. P Louw SC submitted that the probabilities were overwhelming that the teller at the Atteridgeville branch who took in the deposit slip together with the cloned cheque did not act negligently. It thus matters not who would be the true owner of the cheque i.e. Plaintiff or SARS, neither of them would have a viable delictual claim against ABSA. ABSA

simply did not deal with the lost or stolen first, original cheque. As I have said, there is no evidence as to what occurred when the deposit was made at ABSA bank, but a sensible practical approach in the context of established banking practice indicates that on the probabilities, Mr. P Louw SC's argument in this context is sound.

13.

The Drawee Bank (FNB):

Mr. P Louw SC proposed to Mr. Thomson that he ought to have taken action against FNB. Mr. Ries of FNB conceded that the incongruent dates on the cheque i.e. dated 25 April 2007, bearing collecting bank stamp of 20 April 2007, presented for payment on 30 April 2007, should have raised queries. Mr. Louw SC accordingly submitted that payment was *prima facie* negligent in the face of these irregularities, and referred me to ***The Godfather v CIR 1993 (2) SA 426 (N) at 434 to 435*** and ***Eskom v FNB 1995 (2) SA 386 A at 390 to 394*** regarding the requirement of negligence. The topic is also dealt with by ***Malan and Pretorius, Bills of exchange, 5th edition at par 262***. He submitted that if FNB was not entitled to the protection of s79, then it was not entitled to debit Plaintiff's account, and the Plaintiff thus suffered no loss or prejudice. He said that this issue was of importance in so far as the impoverishment requirement of the *condictio* was concerned. Mr. P Louw SC's argument in this context seems to be justified by the facts but, as I mentioned to him during argument, I do not intend to make a finding against a

party that is not represented before me or a party to these proceedings. Having regard to the evidence of Mr. Ries, Mr. P Louw SC's submissions in this context seem to have merit however. In recent years would markets have asked the question "do bankers have a conscience?" Mr. Thomson too, could ask this on the present facts.

Payment in our law:

Having regard to the objective evidence it was submitted that on the probabilities ABSA collected payment of one document and FNB paid another document. This would not constitute payment in our law. Payment is a bilateral juristic act which requires the meeting of two minds and if the payer (drawee bank) intends to pay cheque or debt A, whilst the payee (the collecting bank) intends cheque or debt B to be paid, there is no meeting of minds and therefore no payment.

See: ***Nissan South Africa (Pty) Ltd v Marnitz NO 2005 (1) SA 441 (SCA) par 24 to 27***.

In ***McCarthy Limited v ABSA Bank Limited 2010 (2) SA 321 (SCA) par 20,*** it was held that the collection and payment functions of a cheque are the two sides of the same coin. There cannot be payment unless there is collection. There can thus only be one document that is collected and paid. There can therefore not be consensus where one bank (branch) thinks that it pays one document, and the other thinks it receives payment on another. Put differently: when a bank pays a cheque, as paying or drawee bank, it pays a cheque that is being collected by the collecting bank. But, where the collecting bank has one document on which it seeks to collect payment, whilst the

paying bank has another document which it purports to pay, there are two documents (as in this case, a fraudulent document and a genuine cheque) and the collection function concerns the one and the payment function the other and therefore what is "paid" is not what is "collected". Section 79 of the Act is to the same effect. The Act does not seem to contemplate a situation where a cheque cloned so that there are two documents in the given context. I was referred a decision of this court which "obliquely" deals with the same issue, namely ***Trans-Atlantic Equipment (Pty) Ltd v Minister of Transport 2002 (2) SA167 (T).*** It is clear from this decision that it supports the argument of Mr. P Louw SC that payment is a bilateral juristic act, and that this is an important consideration when one deals, as in the present context, with forged cheques or the "cloning" of certain details. (Mr. Ford SC told me that he did not know what a "cloned cheque" was, but it seems that the word "cloning" made its appearance in this decision in the context of facts similar to those under discussion). Mr Louw SC's conclusion on this topic was therefore that there was no payment in due course of the genuine cheque (see s1 of the Bill of Exchange Act), which meant that the tax debt owing by Plaintiff to First Defendant had not been discharged. He also added that FNB did not pay the instrument collected by ABSA and as a result the precondition for FNB to debit the account of Plaintiff with the amount of the cheque was absent. FNB could thus not lawfully have debited Plaintiff's account. A bank could in any event not unilaterally shift the risk of forgery to its customers, and in the absence of an agreement between the bank and its customer relating to the risk in the case of a fraud cheque, the drawee bank would continue to bear the risk.

See: ***Big Dutchmen SA (Pty) Ltd v Barclays National Bank Limited 1979 (3) SA 627 (W) at 283 to 285.***

In this context Mr. Thomson testified that he had no special agreement with the bank but merely the usual one that a customer would sign.

14.

It was against all of that some what detailed background that the elements of the *condictio indebiti* must be considered.

Impoverishment:

Having regard to Plaintiff's own evidence by way of Mr. Ries, who commented on the clearly visible discrepancies of the dates on the original cheque, he argued that FNB should on the 30th of April have refused to pay the cheque and should have sent it back to ABSA so that it could be referred to drawer. This witness opened the door to a finding of negligence on behalf of FNB, and Plaintiff singularly failed to provide any evidence to the effect that FNB was not negligent. Impoverishment had therefore not been established on the facts.

15.

Enrichment:

It is common cause that First Defendant did not receive payment of the first cheque. As I have pointed out, it was affectively Plaintiff's case that because of the rules concerning the discharge of cheques, the VAT was paid. This is

an erroneous approach, and I agree with Plaintiff's counsel that the rules concerning discharge of cheques do not constitute deeming provisions for enrichment purposes. Were it otherwise, it would be an improper translation from one norm and law complex to another, whilst there is no obvious necessity therefore. Plaintiff had to prove that First Defendant was enriched by the first cheque. This, it could only do, if it could show that First Defendant had a good and viable claim in its state against ABSA which is worth the same as the actual money in its estate. Reference in this context was made to the so called "saldo teorie" that is often used to determine enrichment. See: ***Eiselen and Pienaar supra at p62*** and ***Visser supra at p105 and p717***. It was therefore argued that Plaintiff could not in light of the incongruities on, and between the deposit slip and the cheque prove this requirement. It is for Plaintiff to prove that SARS had received either payment of the first cheque or that it had in its estate an undefeatable claim against ABSA which had the same value as the original cheque. This is a *factum probandum* of Plaintiff's cause of action.

Sine Causa:

This issue can be approached from the perspective of the cause for paying, the cause for receipt or both. SARS clearly had a reason to retain payment of the second cheque; if it were to let it go it would violate its statutory obligation to collect VAT. Plaintiff also clearly had a reason to make the second payment. It simply had to pay the VAT that it had collected. It was never suggested that the position was otherwise, and obviously so. Plaintiff collected the VAT on behalf of First Defendant. The second payment was

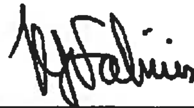
therefore not *sine causa*. I have already mentioned that Mr. Thomson testified that he made the "second payment" because he did not wish to incur penalties, and also because he required a tax clearance certificate for purposes of his business, There was thus no duress exerted on him. The law required that all tax payers pay their taxes and that all taxpayers pay over the VAT collected to SARS if they are registered for that purpose. Mr. Thomson certainly did not make the second payment in error where it was not due as a matter of fact and law. He made the payment as a deliberate act taken for sound business reasons, and because of the law, and he did so without any duress. There are other provisions in the VAT act whereby decisions of First Defendant could be objected to, and steps taken in any given context. It is not necessary to debate this topic, which was apparently not considered by Plaintiff.

16.

The result is that Plaintiff has not proven the requirements for the *condictio indebiti*. He was obliged to pay the VAT collected by him, First Defendant did not receive the amount by way of the first cheque of which he had become the owner. Having regard to Mr. Ford's approach to the alternative claim, and First Defendant's concession that it became the owner of the first cheque the alternative claim does not arise for adjudication. There was in any event no evidence that would support it.

17.

In the result Plaintiff's claim is dismissed with costs including the costs of two counsel.



JUDGE H J FABRICIUS
JUDGE OF THE NORTH GAUTENG HIGH COURT

Case number	: 1681/08
Counsel for the Plaintiff:	Adv E. Ford SC
Instructed by:	Friedland Hart Solomon & Nicolson. Pretoria
Counsel for the First Defendant:	Adv. P Louw SC Adv. A. South
Instructed by:	Adams & Adams Pretoria
Heard on:	20-22 February 2013
Date of Judgment:	6 March 2013