Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 61708/2011

31/1/2019

In the matter between:

PIETER CHRISJAN HUMAN Plaintiff

and

HM HAYNES First Defendant

EB OSMERS Second Defendant

JUDGMENT

TEFFO, J:

[1] The plaintiff sued the defendant for payment of the sum of R546 000,00 based on a written loan agreement, alternatively, he claims payment on the basis of unjustified enrichment. According to the plaintiff, the terms of the loan agreement were that he would lend and advance to the defendants jointly and severally, a capital amount of R546 000,00. The loan amount would bear interest at a rate of 15% per annum, compounded monthly. It would be repayable by the defendants by effecting payment of the amount of R376 000,00 on the date of registration of a mortgage bond over the property situated at [….] (the property).

The outstanding amount of R170 000,00 would be payable by the end of June 2009.

[2] In their plea the defendants denied that they, or any of their corporate entities, were obliged to repay the amount claimed. They pleaded that the loan agreement relied upon by the plaintiff was simulated. The true agreement between the parties was an oral agreement in terms of which the plaintiff would refinance their 4 (four) corporate entities referred to in the plea. In exchange thereof he would acquire the right to participate in the management of their businesses. It was further alleged that the defendants would in terms thereof not be entitled to the proceeds of the refinancing but the proceeds would be utilised solely to pay the creditors of the said entities.

[3] The defendants pleaded that the loan agreement violates the National Credit Act, 34 of 2005 *("the NGA")* and is void in terms of the provisions of sections 89(2)(d), 89(5)(a) and 89(5)(c) of the NCA.

[4] As regards the alternative claim of unjustified enrichment, the defendants denied that they had received any portion of the monies allegedly lent and advanced by the plaintiff to them and that their estates were enriched at all.

[5] The issues for determination in respect of the main claim are:

5.1 Whether the loan agreement concluded between the parties was simulated and formed part of a larger business arrangement between the parties.

5.2 Whether an oral agreement was concluded.

5.3 Was the plaintiff obliged to register as a credit provider, prior to entering into the credit agreement with the defendants, and the consequences thereof, if it is found that he was obliged to register and was not so registered.

[6] In respect of the alternative claim of unjustified enrichment, the issue to be determined is:

6.1 Whether payment of the amount of R546 000,00 was made to the first defendant. If so, whether the plaintiff was impoverished and the first defendant enriched as a result of the payment.

The evidence

[7] The plaintiff testified on his own behalf without calling witnesses. Documentary evidence which consisted of the written loan agreement and the so-called chicken agreement also formed part of the record.

[8] Mr Pieter Chrisjan Human, the plaintiff, testified that the loan agreement was concluded by the parties and signed by the defendants on 30 April 2009 in Phalaborwa and by him on 1 May 2009 in Sedgefield, where he was on holiday. The first defendant flew down from Phalaborwa to Sedgefield to have the loan agreement signed and for her to collect the cheque for the loan amount from the plaintiff.

[9] Prior to concluding the loan agreement, the defendants telephonically told him about the job they had to do at Phalaborwa Mine, which required them to buy electric cables. They needed money to buy the cables and requested a loan. As he was already in partnership with the defendants in the chicken business, he granted them the loan.

[10] The first defendant collected the cheque for the sum of R546 000,00 from him.

[11] He explained that the parties agreed that the amount of R376 000,00 would be repaid on the date of registration of a bond over the property, as the defendants had told him that they were in the process of registering a bond which would take two months and that the repayment would be done once the bond was registered. The repayment of the remaining amount of R170 000,00 was agreed upon, after the defendants had indicated that the mine would pay them 60 days after they had completed the cables' job.

[12] He testified that the purpose of the loan agreement was to enable the borrowers or their nominee to settle various debts owed by Genex Power Services (Genex) and Amoret Trading (Amoret). Genex was the defendants' business entity that did work for Phalaborwa Mining. It needed money to buy electrical cables. He had no business with Genex. He knew nothing about Amoret. He did not acquire any interest in Amoret and had never participated in

the management of the two business entities.

[13] The defendants have not repaid the amounts, as agreed. The bond over the property was only registered with Absa Bank in 2011.

[14] After the due date of the agreed repayment date, he phoned the first defendant several times inquiring about payment. She then told him that they owed him nothing.

[15] Prior to concluding the loan agreement with the defendants, he had a joint business venture with them in the chicken business and their relationship was bad. He wanted to know what was going on in their books of account. He did not get any answers. Eventually the venture in the chicken business was liquidated. The two business entities, Win a Way and Quality Times, which were involved, were both liquidated. He suspected that the defendants had been mismanaging and misusing the funds in the two business entities. He had 50% shares in the chicken business and the other 50% shares was owned by the first defendant. After he had brought the liquidation application, the assets of the entities were sold. He bought them through one of his business entities.

[16] The loan agreement was drawn by his former wife, who was an attorney. He was not advised about the provisions of the NCA when the loan agreement was concluded. He was not aware of the requirements for the lenders at the time. He is not in the business of borrowing people money. He only lent the defendants the sum of R546 000,00, being their business partner.

[17] A certificate of balance had been attached to the plaintiffs documents to prove the defendants' indebtedness to him.

[18] He testified that, in terms of the chicken agreement that he had concluded with the defendants in March 2009, he held a loan account of R2 m in the property company and the defendants held R4 m. Further that the defendants had to finance the equipment in the amount of R2,5 m. The first defendant ran the chicken business at the farm on behalf of Quality Times. In terms of the agreement she would get a salary of R25 000,00 per month, which was supposed to come from the working capital. Although that was what was agreed upon, the deal changed as the properties had not been registered in the names

of the defendants. Some of the monies had to be used to pay the bonds and to transfer the properties to Win a Way. He estimated that he could have contributed about R2,3 m working capital to the business.

[19] He denied the first defendant's evidence that she did not receive a salary as agreed because there was no money. He was adamant that he paid an amount of R2,3 m in the business account. He contended that the business was a running business which received cash throughout. He testified that from 2009 to 201O when the business was liquidated, he never checked the bank statements of the business. He was not allowed to do so and that was where the problems started. He did not have access to the bank account of the business. He could not recall when the properties were registered in Win a Way Investments, but admitted that he had stopped the working capital as the amounts he had paid exceeded the amount that was agreed upon and all the cash that had been received by the business, was not accounted for.

[20] There was no discussion with the defendants about who was going to pay the salaries, feed the chickens and pay the other expenses.

[21] He conceded that he liquidated the chicken business and that the defendants were never paid any money for the farms, as he had to pay for the bonds on the properties. When told that the defendants were never paid any money for the farms, he replied that if they did not take the money that was there for the sale of the chickens, there would have been money for everyone. He conceded that he cannot prove that the defendants took the money as he testified.

[22] He was referred to the tables on pages 25 and 26 of the trial bundle, which set out how the sum of R546 000,00 was utilised after he lent it to the defendants. It was put to him that the first defendant would admit receipt of the money, but contends that she used the money to finance the various business entities of the defendants because he refused to pay her salary. The various companies financed Quality Times. His response was that he did not know. He was seeing the tables for the first time. He testified that he did not know the correctness of the statement as at the time he loaned the defendants money, he

had not been told that the defendants could not finance the chicken business. He was adamant that they should have told him and questioned why the information only came when the matter was on trial.

[23] He was further referred to pages 29 to 64 of the trial bundle and told that the first defendant would testify that on the aforesaid pages, there was proof of the amounts that she had to pay to the various entities, because he had stopped the working capital and she had to use the monies to run the chicken business. He reiterated that he was seeing the documents for the first time. He testified that it appeared from the documents that the payments were made after the due date of the repayment of the loan amount. It was put to him that the first defendant used the loan to pay for the expenses to keep the business going and tie replied that it was the first time he heard that.

[24] He admitted that when Quality Times and Win a Way got liquidated, he bought their assets for R2,3 m. He denied that he received money from the liquidation. He testified that his lawyers were still busy with the liquidators and according to the information he received, the process of liquidation could not be finalised because the defendants have instituted claims against the entities that have been liquidated.

[25] He further testified that, although he had heard of the NCA, he does not know what it entailed. When asked if he had tried to establish from the defendants if they could repay the loan, his answer was that he would not have granted them a loan if he had known they could not repay him. Further, he never asked them for the income and expenditure statements, and he did not do a credit check on them.

[26] He denied the first defendant's evidence that she flew to Sedgefield for the chicken business. He denied that the contract was not signed, but that she had left with the cheque and came back with the unsigned contract. He denied that the contract was null and void.

[27] Regarding the claim based on unjustified enrichment, he testified that the money he lent to the defendants, was not paid to the second defendant but contended that the two defendants had traded together. He conceded that if the first defendant did not give the money to the second defendant, she was not

enriched. He denied that after he had paid the loan to the first defendant, the money was paid to Quality Times where he earned 50% interest.

[28] He denied that the first defendant told him when he enquired about the money, that she could not run the business because he had stopped the cash flow.

[29] He admitted that his former wife was a qualified attorney, she drew the loan agreement and on her advice he signed it. He further admitted that Quality Times had an account with FNB which was in his personal name. The first defendant only used the account via internet. He did not have the password to enable him to access the account. He conceded that he could go to the bank with his identity document and ask to have access. However, he never interfered with the business's bank account because once he interfered, it no longer became one person's responsibility.

[30] When told that his former wife had full access to other account, which was with Nedbank, that the account had her profile and she could elect beneficiaries on it while the first defendant only had internet access to it, he testified that he does not know about that. He has not allowed his former wife to run the business accounts as that would have been done through his accountants.

[31] He denied the version of the first defendant that after three months of running the chicken business, he insisted on the profits and that was the reason why he cut on the working capital. When asked why he had cut the cash flow on the business after three months, he replied that he cannot recall doing that and that if he had done it, it means there were irregularities in the business entities. He further denied that he caused more expenses by requesting the first defendant to open a shop in town for selling chicken. The shop in town was opened as a result of the instigation by the second defendant. He paid the capital to open the shop in town.

[32] He testified that he had paid more than what he was supposed to pay in terms of the agreement for the chicken business. According to him, if the money that he had paid did not go to the trading companies, it went to pay for the mortgage bonds over the properties. Further evidence was that the first

defendant had to keep the records of the chickens sold. He asked for the records and problems started between him and the defendants. As regards the liquidation of the two entities. he testified that he was the only creditor who proved his claim against them at the meeting of creditors. He was not aware of the claims that were proved by the defendants against the liquidated entities. That concluded the plaintiff's case.

[33] Only the first defendant testified in defence of the defendants' case. Ms Hazel Martha Haynes, the first defendant, testified that she met the plaintiff a few years before she and the second defendant went into business with him. They were friends and the plaintiff became interested in the properties mentioned in the chicken agreement. He wanted to buy them for himself. He signed the agreement. However, the deal did not go through, because he could not get the loan for the purchase price. Sometime thereafter she and the second defendant concluded the chicken agreement with the plaintiff.

[34] The value of the properties at the time was R6 m but they were only selling them for R4 m. The chicken agreement was concluded and the defendants had a R4 m loan account and the plaintiff had to bring in R2 m capital. The plaintiff paid the capital sum of R2 m over a few months. The capital amount was enough to start the business and not to run it. This led to financial problems. She had to put more money from her company, Genex. The company assisted with vehicles and the people she had to pay. She was also supposed to get a salary of R25 000,00 per month. She did not get it as there were other expenses which she thought were more important to get the business running. She worked for more than 12 months without a salary.

[35] She testified that she made various payments from herself and her companies to various companies (reference was made to pages 5, 13, 17, 29 to 64 of the trial bundle.) Some of the payments were done in March 2009 prior to the conclusion of the loan agreement and the others were done long after the loan agreement had been concluded. The purpose of the loan was, in terms of the agreement, to pay the suppliers of the various companies to the chicken business as per the table on pages 25 and 26 of the trial bundle. She was in business with the plaintiff and he stopped the finances in the chicken business.

She continued financing the chicken business from her own pocket and her business entities. The bond to repay the loan was only approved in 2011. She could not repay the loan in 2009 because she did not get a bond in 2009. The income she had in 2009 and the capital amount was used to fund the chicken business. The monies were never recovered or paid back.

[36] She lost ± R600 000,00 to R700 000,00 which she had used to fund the chicken business· excluding the amount of the properties. She also lost ± R4 m worth of properties.

[37] The second defendant never received a cent from the R546 000,00 that was loaned from the plaintiff. Although she and the second defendant traded together, they were different entities.

[38] The plaintiff requested them to repay the amount loaned from him end of June 2009 as per the loan agreement. She told him that he had stopped funding the chicken business and the chicken business needed funding for the expenses. He was very unhappy and no agreement was reached regarding the repayment of the loan. She could not repay the loan as the plaintiff liquidated her two entities. She did not get anything from the liquidation of the two entities.

[39] She testified that if she had obtained a bond in 2009 and the plaintiff did not liquidate her business entities, she would have repaid the loan because she had an obligation to do so in terms of the loan agreement. When told that the agreement is therefore not simulated as it had been pleaded in the defendants' plea, she was adamant that with the liquidation, the loan agreement was simulated. It was put to her that the liquidation only happened in 2010 and the loan agreement was concluded in 2009, at that time the agreement was not simulated. She was referred to paragraph 2.2 of the defendants' plea and she could not explain the meaning of *" simulated".* She admitted that because the loan agreement was concluded in 2009 and the liquidation happened in 2010, the agreement could not have been simulated at the time it was entered into. The chickens had to get food and medicines and the plaintiff withdrew the funding, according to her.

[40] She conceded that it was not the plaintiff's fault that she did not get the bond to repay the loan and that cannot be held against him. She admitted that the plaintiff had launched an urgent application against her and the second defendant and they opposed it. A provisional liquidation order was granted with a return date and on the return date the order was made final. In so far as the payment of the capital amount in the chicken business is concerned, she reiterated that the plaintiff paid what he was supposed to pay in terms of the chicken agreement but that, according to her, was not enough to run the business. They opened a shop in town and it also had expenses. She conceded that the plaintiff did not have further obligations to fund the chicken business. She did not comment when told that all the three reasons she gave for not repaying the loan were extraneous and she could not, as a result thereof, decide not to repay the loan.

[41] She was asked why she had denied in the defendants' plea that she had received the loan amount and later admitted in her evidence that she had received it. Her reply was that she had denied in the plea that the defendants had not been enriched as a result of the payment of the loan to them and not that she had received the loan. The money had been paid into her account and had been utilised to pay the different entities. It had not been received by the defendants personally. She was adamant that as per the loan agreement, the loan had been agreed upon for a reason and the reason was to pay the different companies. When told that if that was the case, she should have pleaded that she had received the money and had paid it to the different companies. She replied that she relied on her legal team. She is not a legal person. She is a farmer. She does not know why her legal team did not do that.

[42] She admitted that the companies mentioned in paragraph 3.2 of loan agreement, namely, Genex and Amoret, were her companies. She further admitted that as testified by the plaintiff, Genex, had a contract with Phalaborwa Mining to do electrical work for it at the time and that she had required money to assist the company to comply with its obligations under the contract it had with Phalaborwa Mining.

[43] She conceded that by lending money to one of her companies, Genex,

she became a creditor of that company. However, Genex had loaned money to Quality Times (the chicken business) and it was her loss when the money was lost. When told that Quality Times had not been enriched because it had an obligation to pay Genex, she replied that Quality Times did not pay Genex and she remained with the loss. She testified that further payments were made to Genex and to Quality Times and the money was never repaid to her. She was still in business but did no longer run Genex. Her further evidence was that the reason for the loan was as per paragraph 3.2 of the loan agreement. It was never meant for her. It was the plaintiff's tactics. She and
the second defendant were not enriched. The plaintiff had many tricks which she had been aware of from the beginning. The loan agreement should have been concluded between t le plaintiff and her two companies, namely, Genex and Quality Times. She could not recall if she had told her lawyers that.

[44] Her further evidence was that in terms of the oral agreement the four companies mentioned in the plea, namely, Phalapower CC, Genex, Amoret and Katewa Trading 107, were the borrowers of the money. When asked to explain why she was changing her evidence, she replied that Genex was supposed to repay the loan with the money it had received from Phalaborwa Mine and she was supposed to get the bond to pay the balance. She testified that according to her, the borrowers were only Genex and her and the loan agreement was therefore simulated because the second defendant was not the borrower. When asked why she had so many explanations, she testified that she did not understand the word *" simulated".*

[45] The oral agreement was concluded in Sedgefield by her and the plaintiff before the written loan agreement was signed. She flew to Sedgefield where she took the loan agreement along to Phalaborwa to be signed and later emailed it to the plaintiff. When told that her evidence contradicts her plea, she testified that that could have been a mistake as the oral agreement could not have been concluded on the same dates of the signing of the written loan agreement.

[46] It was put to her that her evidence contradicts the defendant's pleaded case in that according to the defendant's plea, the oral agreement between the parties was that the plaintiff would refinance her business and in exchange

thereof he would have the right to participate in the businesses of the defendants and there was therefore no obligation on the part of the defendants to repay the loan. She replied that the plea was not drawn by her and that it seems her counsel let her down. She concluded many agreements with the plaintiff and her evidence in court was the truth. She realised while she was testifying that the version as contained in the plea was false. She was referred to her founding affidavit in the application for rescission of the default judgment that was granted against the defendants in the matter wherein the same allegations as referred to in the defendants' plea had been made. She changed and said she did not say the whole plea was false. It was put to her that in her application for rescission of the default judgment, she never mentioned that she and Genex would repay the loan as she had testified. She replied that she was not certain if that was in the loan agreement or the rescission application. It was put to her that what she was saying was not mentioned in the loan agreement and she replied that paragraph 4.2.2 of the loan agreement confirmed her evidence.

[47] She conceded that from the invoices attached to the defendants' papers, certain payments were made to institutions.

Evaluation of the evidence

[48] The plaintiff made a good impression on the court. His evidence was straight to the point. He stuck to his version under cross-examination . His evidence, which to some extent was corroborated by the first defendant, was credible and consistent with his pleadings.

[49] The defendant gave a long story about how things unfolded between her and the plaintiff. Much reliance was placed on the chicken business, which according to her, was where a certain portion of the loan went.

[50] The loan agreement contains a non-variation clause. According to the first defendant's evidence, the oral agreement was concluded before the signing of the loan agreement. This evidence stands to be rejected as false because her evidence about the date of the conclusion of the oral agreement contradicted the defendants' plea. What has been pleaded in the defendants' plea is that the oral

agreement was concluded on the same dates of concluding the written agreement (30 April and 1 May 2009). This version is not probable in that the written agreement was signed on 30 April 2009 by the defendants and on 1 May 2009 at different places. It is strange that if the oral agreement was concluded prior to the signing of the written loan agreement, their terms differed. Why was it necessary to enter into a written agreement which had different terms as the oral agreement and then include a non- variation clause in it?

[51] Further the first defendant's evidence about the oral agreement differed with what has been pleaded. It is not my intention to repeat her evidence but the fact of the matter is that in terms of the defendants' plea, the terms of the oral agreement were to refinance the defendants' four business entities and in exchange thereof the plaintiff would participate in various other business entities of the defendants. Nothing has been said about the loan and the repayment thereof as mentioned in the written loan agreement.

[52] The versions of the defendants were so contradictory, that the court has to reject them. They will only be accepted in so far as they corroborate the plaintiff's version and the written loan agreement. I am therefore not persuaded given the contradictory versions to accept that an oral agreement as testified was concluded between the parties.

[53] I find that the loan agreement was not simulated. It did not, in my view, form part of a larger business arrangement between the parties.

[54] It is common cause that the agreement in question is a credit agreement. The relevant part of section 8 of the NCA reads:

> *"(1) Subject to subsection (2); an agreement constitutes a credit agreement for the purposes of this Act if it is -*
>
> *(b) a credit transaction as described in subsection (4)."*

Section 8(4) of the NCA provides:

"An agreement irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a *credit transaction if it is-*

(f) *any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of -*

(i) *the agreement, or*

(ii) *the amount that has been deferred."*

[55] Having accepted that the agreement was a credit agreement, it follows that the plaintiff was a credit provider as defined in section 1(h) of the NCA. The section provides that a credit provider is *"the party who advances money or credit to another under any other credit agreement".*

[56] At issue was whether the plaintiff was obliged to register as a credit provider. Section 40(1) of the NCA provides:

" A person must apply to be registered as *a credit provider if -*

(a) *that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental credit agreements ;or*

(b) *the total principal debt owed to that credit provider under all outstanding credit agreements, exceeds the threshold prescribed in terms of section A2(1)."*

The Minister set the threshold at R500 000,00 in Government Gazette No 28893 on 1 June 2006.

[57] It was submitted on behalf of the plaintiff that while the total principal debt owed to him under the outstanding credit agreement exceeds R500 000,00, he was not obliged to register under section 40(1) because he is not a person who frequently provides credit. The transaction was a single agreement. Further that he was not appraised of the provisions of the NCA when he concluded the loan agreement with the defendants.

[58] The submission was based on the unreported decision of a full court of

this division in *Friend v Sendal*[1] in which Legodi J held that section 40(1)(b) of the NCA *"must be seen* as *having been directed at those who are in the credit market or industry or at those who intend to participate in the credit market and/or industry'.*

[59] At paragraph [12] of his judgment in *Van Heerden v Nolte*[2] Murphy J said: *"While I appreciate the paradigm of the underlying idea that it may be socially and economically imprudent to regulate lending to the extent that all loans above R500 000,00 will be illegal unless the lender is registered, the interpretation, in my respectful opinion, is strained. The intention and purpose of section 40(1) of the NCA is to require credit providers, who make more than 100 loans or who lend more than R500 000,00, to register. The intention of the legislature appears from the plain and unambiguous language of section 40(1)(b). In terms of that provision, it is the total amount of the principal debt which is relevant. The reference to "all outstanding agreements" does not evince an intention to exclude a single agreement in excess of R500 000,00. It is linguistically permissible to consider an amount owing under* a *single agreement as being the principal debt owed under "all outstanding agreements". If there is only one transaction then it will constitute "all" of the outstanding agreements. Section 40(1)(a) regulates the position from the perspective of the number of agreements, while section 40(1)(b) is intended to govern the position with regard to the total capital advanced by any credit provider."*

[60] In *Van Heerden v Nolte*[3] the court found that the *ratio decidendi* in *Friend*[4] was inconsistent with the approach taken by the Constitutional Court in *National Credit Regulator v Opperman and Others.*[5] Similarly, in *Potgieter v Olivier and Another,*[6] although the court held that it was bound by *Friend,*[7] it differed with its finding on the grounds that the tenents of interpretation of statutes do not permit

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[1] 2015 (1) SA 395 (GP)
[2] 2014 (4) SA 584 (GP)
[3] *Supra* para **[14]**
[4] Supra
[5] 2013 (2) SA 1 (CC)
[6] 2016 (1) SA 272 GP paras [28] and [30H33]
[7] Supra

such a meaning.[8]

[60] The Supreme Court of Appeal in *Du Bryn*[9] held that the requirement to register as a credit provider is applicable to all credit agreements once the prescribed threshold is reached, irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement is a once-off transaction. It follows on the basis of the decision in *Du Bryn*[10] that the plaintiff was obliged to register as a credit provider.

[61] It is common cause between the parties that the plaintiff was not registered as a credit provider when the credit agreement was entered into. In terms of the NCA. the plaintiff was 11ot supposed to offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.[11] The credit agreement entered into by the plaintiff is therefore unlawful and void to the extent provided for in section 89.[12]

[62] It therefore follows that when an unregistered credit provider who is required to be registered, lends money to a consumer, he or she will have no contractual cause of action. He will be obliged to sue the consumer under the law of unjust enrichment, by means of the *condictio ob turpem vet iniustam* causa, to recover the money.[13]

[63] The next point at issue is whether the plaintiff is entitled to the alternative claim based on unjustified enrichment.

[64 To succeed with a claim based on undue enrichment, the following prerequisites should be met: First the defendant must be enriched. Secondly the plaintiff must be impoverished. Thirdly, the enrichment of the defendant must be at the plaintiff's expense and finally the defendant's enrichment must be unjustified.[14]

[65] It is common cause between the parties that the money that was paid in

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[8] See also *Naude and Another v Wright* [2017] ZAGPPHC 646 para [26] where the court held that it was bound by *Friend.*
[9] (929/2017) [2018] ZASCA 143
[10] Supra
[11] Section 40 of the NCA
[12] Sections 40(4), 89(2)(d), ae(5)(d) of the NCA
[13] *Van Heerden v Nolte supra*
[14] Jacques Du Plessis, *The South African Law of Unjustified Enrichment* (2012) page 24 at para 2.1. See LAWSA, vol 9 at para 76 by Lotz revised by Horak and also *Bowman De Wet Du Plessis*

terms of the loan agreement was never received by the second defendant. Although he contended that the two defendants traded together, the plaintiff conceded that if the first defendant did not give the money to the second defendant, the second defendant was not enriched. It is my view, based on the evidence, that the above essential requirements to be complied with before a claim under unjustified enrichment can succeed, have not been established against the second defendant. It therefore follows that the claim against the second defendant on this basis, should fail.

[66] The evidence proves that the first defendant received the money and utilised it. The money was never repaid as agreed. It was also not utilised as agreed.

[67] It was argued on behalf of the first defendant that the plaintiff did not prove on a balance of probabilities that he was free of turpitude and that his claim against the first defendant should be dismissed. Reliance in this regard was placed in the Constitutional Court decision of *Chevron SA (Pty) Ltd v Wilson t/a Wilson Transport and Others*[15] where the following was said:

> *"In order to be successful, ordinarily the party who claims on the basis of unjust enrichment must be free of turpitude and should show that he has not acted dishonourably. If the Credit Provider* is *not free of turpitude, the par delictum rule stipulates that the law should not come to her aid."*

[68] Further submissions were that the plaintiff conceded that he stopped the cash flow of the business which forced the first defendant to fund the chicken business on their behalf. He liquidated the companies which led her to lose all her properties were valued more than R4 million. She was never paid a salary as agreed between the parties and has lost about R300 000,00. She funded the business with more than R700 000,00. The plaintiff caused a deadlock by not supporting the business.

[69] The evidence of the plaintiff speaks for itself. He testified that he had paid more than what he had agreed to pay in terms of the chicken agreement and that

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NNO and Others v Fidelity Bank Ltd 1997 (2) SA 35 (A) at 43D-F

[15] 2015(10) BCLR 1158 **(CC)** (5 June 2015)

all the cash that came into the business was not accounted for. The first defendant conceded that the plaintiff had paid the amount of R2,3m which was agreed upon when he stopped the cash flow of the chicken business. The plaintiff denied the first defendant's evidence that she did not receive her salary which had been agreed upon because there was no money. According to him, the money that he had paid into the business was to cater for all that and the business was a running business which reduced cash all the time. He always suspected that the chicken business was not run properly. He never checked the bank statements of the business to ascertain if it was properly run because he was not allowed to do so. I have analysed the evidence of the first defendant about how she funded the chicken business above and I do not intend to repeat it here. I therefore do not agree that based on the above concessions of the plaintiff, it can be concluded that the plaintiff did not prove on a balance of probabilities that he was free of turpitude.

[70] In my view the first defendant was enriched in that she had received the money. The money had not been utilised as agreed. She used it to pay for her other business entities which had nothing to do with the purpose of the loan agreement and the plaintiff. The plaintiff was impoverished in that the money was never repaid to him and the first defendant was unjustifiably enriched.

[71] I could not find any evidence that there was some form of turpitude or dishonourable conduct on the part of the plaintiff when he did business with the first defendant. It is my view that the plaintiff was free of turpitude and he has shown that he has not acted dishonourably. It therefore follows that the plaintiff’s alternative claim based on unjustified enrichment must succeed.

[72] Consequently I grant judgment against the first defendant for:

1. Payment of the capital amount of R546 000,00;
2. Interest on the aforesaid amount calculated at the applicable *mora* interest rate, which interests shall commence running from 5 May 2009 until date of payment;
3. Costs of suit;
4. The claim against the second defendant is dismissed with costs.

M J TEFFO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA