UNJUSTIFIED ENRICHMENT: HAVING A FRIEND WEARING DIFFERENT HATS, WHO NEEDS ENEMIES?

Mndi v Malgas 2006 2 SA 182 (EPD)

1 Introduction

The decision in the present case is important for enrichment law within the context of the confirmation and application of : (a) the general requirements of an enrichment action; and (b) the quantum rule pertaining to an enrichment claim. The identification of the particular enrichment action and the specific requirements thereof did not receive the express attention of the court. It will be shown that the approach of the court of relying only on the general requirements of an enrichment action can only be followed if the specific requirements of the appropriate *condictio* would not have led to a different result. Application of one of the requirements of the *condictio indebiti*, namely that the undue payment must legally be considered to have been paid to the receiver (*recipiens)* of the payment, would have ensured a more just result by the Court. As will be seen in 5 2 below the relevance of the defence of reduction or loss of enrichment in this case has been raised by other academics and will only briefly be referred to as it falls beyond the scope of our case discussion. The decision also dealt with the issue whether the relationship between the enriched person and the other members of the club constituted a separate legal entity. The Court did not consider whether the relationship between the members of the club could have constituted a partnership and that the impoverished person contracted with the enriched person in her capacity as a partner in a partnership.

2 Facts

During January 1998 Malgas (respondent) and Mndi (appellant) entered into an oral agreement in terms of which Mndi agreed to lend Malgas R6 000 at an interest rate of 30% per month. The maximum rate allowed in terms of section 2(1)(a) of the Usury Act 73 of 1968 is 2,67% per month. It was a tacit term of the agreement that Malgas would repay the loan as soon as she was able to do so. On 3 December 1998 Malgas paid Mndi an amount of R34 692,60 being the sum of the capital and R28 692,60 as interest claimed. The circumstances of the loan were such that the profit generated by the loan was equally shared between Mndi and five other members of the Masikhule Club. The club had six members. Each member was required to

contribute funds. These funds were lent to its members, who in turn lent it to third parties at the rate of 30% per month. The money was lent to members for money-lending activities. The members then collected the loans and interest payable and paid it all to the club for division amongst its members at the end of each year. Upon failure of a member to collect and pay over loans and interest, outstanding amounts were deducted from what was otherwise due to that member at the end of the year.

Malgas succeeded in the magistrate's court in a claim based upon unjust enrichment, for repayment by Mndi of the difference between the interest paid at the agreed rate and the interest payable at the legal rate of 15,5% per annum. On appeal to the Provincial Division the court *mero motu* raised the issue of the correctness of the quantum of the magistrate's award.

3 Arguments

The respondent alleged that: (a) in terms of an allegedly implied term in the agreement regarding interest, the appellant was not entitled in terms of the Usury Act to charge interest that exceeded the capital amount of the loan or 2,67% per month (184F-G); (b) the payment was made "in the *bona fide* and reasonable belief that it was owing and payable" (184H); and (c) as a result of the payment, the appellant was enriched by the amount of R26 772.60, alternatively R22 692,60 (184H).

It was submitted on behalf of the respondent that the respondent owed the appellant the amount of R6 000, plus interest at the rate of R2,67% per month, compounded monthly, being the total amount over a period of 11 months of R8 017,27 (capital amount of R6 000 plus interest on the amount of R2 017,27) (187H).

The appellant in essence denied having: (a) concluded the agreement with the respondent in her personal capacity; (b) contravened the Usury Act because the respondent was made aware of the interest charged by the club on loans; or (c) being unjustly enriched because the amount claimed accrued to the Masikhule Club and not to her personally (184I-J).

4 Issues

The issues to be decided by the court were firstly, whether the appellant acted as the agent of the Masikhule Club (or its members) in her dealing with the respondent. Secondly, if the appellant did not act as an agent of the Club, whether she was unjustly enriched at the expense of the respondent and, if so, the extent of unjustified enrichment (186B-C).

5 Decision

5 1 The court accepted on the evidence that the appellant did not act as agent of the club or its members including herself (186F-187D). The court noted that the club had no legal personality. The club had no

written constitution and because it had the express purpose of making a profit the club was prevented from acquiring legal personality through the common law.

5 2 The court found that the loan agreement between the parties was unenforceable only to the extent of the excessive interest. Excessive interest constitutes the interest that exceeds the maximum rate of 2,67% per month permitted in terms of a determination made under section 2(1)(a) of the Usury Act (187D-G). The Court relied on the following formulation of the effect of usurious transactions in *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* (1976 2 SA 856 (W) 861A):

> "It is clear that the provisions of the Limitation Act and its precursor, the Usury Act 37 of 1926, were not intended to render a transaction in which usurious interest is charged *a turpis causa*, with the result that the lender may recover neither his capital nor interest at the permissible rate. He is entitled to judgment for such amounts, but not for the excessive interest."

The court found that the respondent paid interest of R28 629,60 but was only obliged to pay a maximum of R2 017,27 in interest in terms of the Usury Act (189A-B).

The court indicated that in order for the respondent to have succeeded in her claim against the appellant, she must have established the following general requirements for liability based on enrichment (188A-C), namely that:

(a) The appellant has been enriched

The court found that the appellant was (at least) enriched by the amount that the respondent paid to her over and above the amount that she would have paid had the appellant charged the maximum amount permitted in terms of the Usury Act (188C-D). The respondent paid interest of R28 629,60 but was only obliged to pay a maximum of R2 017,27 in interest (189B). This would mean that the enrichment is the difference between the two amounts – an amount of R26 612,33 (the court actually calculated impoverishment). The court also found that the magistrate erred in assuming that the maximum interest rate that the appellant was entitled to and could enforce was the legal rate and not the maximum permitted in terms of a determination made under section 2(1)(a) of the Usury Act (189E).

Although the court never doubted enrichment taking place, the quantum thereof was in issue (188C). As to the quantum of enrichment the court decided:

> "While the full amount of the respondent's impoverishment went into and through the appellant's estate, it would in my view be simplistic and inaccurate to say that she was enriched by that amount. In truth, a portion of it only enriched her: the interest was to be divided equally among the members of the club. Her estate was thus only enriched by one-sixth of the excess interest, an amount of R4 435,40" (189C-D).

The court found that the magistrate erred in assuming that the appellant's estate was enriched by the full amount by which the respondent's estate had been impoverished (189E-F).

Sonnekus ("Wegval of Vermindering van Verryking as Verweer" 2006 *Stell LR* 454 458), construed the above *dictum* of the court as in effect upholding the defence of reduction or loss of enrichment. He contended that this defence gives effect to the enrichment premise that the quantum of an enrichment claim is the lesser of either the amount of enrichment of the defendant or impoverishment of the plaintiff at *litis contestatio* (Sonnekus 2006 *Stell LR* 458). The Court indeed accepted the quantum rule (188G-189A). As indicated before, the Court found that the enrichment of the appellant was only by one-sixth of the excessive interest, namely R4 435,40. Thus, the enrichment claim of the respondent is the lesser of the enrichment (subdivided by six) of the appellant or the impoverishment of the respondent.

Sonnekus (2006 *Stell LR* 458), indicated that exceptions to the quantum rule, however, have been acknowledged in the common law. One of the exceptions mentioned concerns the defendant who had knowledge or implied knowledge of the unjust enrichment. If the enriched party was aware of the unjust enrichment or where such knowledge is imputed to him, he cannot plead reduction of the quantum of enrichment (Sonnekus 2006 *Stell LR* 458-459). Sonnekus convincingly argued that the court neglected to refer to the qualification of the enrichment principle (Sonnekus 2006 *Stell LR* 459-460). He further argued that the appellant should have been aware that the claimed interest rate was illegal and the reception of the money in her account unjustified (Sonnekus 2006 *Stell LR* 459). In other words, because of the said knowledge the appellant should not have been allowed to claim a reduction of the enrichment.

Visser ("Unjustified Enrichment" 2005 *Annual Survey* 291 294) also refers to the above-mentioned failure on the part of the court:

> "According to South African Law, where the defendant knew, or ought to have known, that he or she had been unjustly enriched, he or she has a duty to preserve the enrichment and can, therefore, plead loss of enrichment only if it can be shown that the loss of enrichment was not culpable."

(b) The respondent had been impoverished

According to the court impoverishment of the respondent took place by having paid substantially more interest than she ought to have in terms of the law (188D-E). The court found that the impoverishment of the respondent is the difference between the interest paid (R28 629,60) and the maximum of R2 017,27 being an amount of R26 612,33 (189A-B).

(c) The appellant's enrichment was at the expense of the respondent

The court found that the appellant's enrichment (whatever its quantum) was undoubtedly at the expense of the respondent (188E).

(d) The enrichment was unjustified

According to the court this requirement was also satisfied in that the enrichment was unjustified as it was *sine causa* in the sense that there was "no sufficient ground recognized by law (*causa*) to justify the transfer … of value" from the estate of the respondent to that of the appellant (188E-F). The court seemed to have favoured the approach that an absence of a *causa* for the transfer of value and not retention of the value should be required. (As to the different approaches, see Eiselen and Pienaar *Unjustified Enrichment*: *A Casebook* 2ed (1999) 27-28).

6 Comments

6 1 Once one accepts that the club had no legal personality the question arises whether the relationship between the members of the club could be regarded as a partnership. A partnership is established when the prospective partners conclude a partnership agreement with one another. A partnership can be defined as a legal relationship based on an agreement between two or more persons, who undertake to contribute something *legal* (own emphasis added) to an enterprise which is carried on with the object of making a profit and sharing it with the partners (*Uys v Le Roux* 1906 TS 429 432-433; *Novick v Benjamin* 1972 2 SA 842 (A) 851; and *Gcilitshana v General Accident Insurance Co SA Ltd* 1985 2 SA 376 (C) 370).

A partnership agreement is a contract and will have to comply with the general requirements for a valid contract, namely that parties should have contractual capacity, parties should reach consensus, the agreement must be legal, performance must be possible and contractual formalities (if any) should be complied with (Benade, Henning, Du Plessis, Delport, De Koker, Pretorius *Entrepreneurial Law* 3ed (2003) 18). A contract would be illegal if the conclusion, performance or the purpose of the contract is prohibited by statute or contrary to public morals (Joubert, Faris and Harms "Contract" *LAWSA* Vol 5 Part 1 2ed (2004) 165). Whether the agreement would be regarded as void depends on the intention of the legislature (Joubert *et al* 165 fn 1). To determine whether the legislature intended the agreement to be null and void would require interpretation of the provisions of each statute (Joubert *et al* 166). The court decided that the intention of the legislature was not to render the whole transaction void. The provisions that relate to the charging of excessive interest were regarded as void (187G-H). If one accepts the

court's interpretation then the requirement of legality for a partnership agreement will be complied with.

One of the *naturalia* of a partnership agreement is that each partner has the power to represent the partnership when concluding transactions that fall within the partnership business (Benade *et al* 24). If one accepts that the association of the members is a partnership the appellant would have had the power to bind the partnership in transactions that fall within the scope of the partnership business (Benade *et al* 39). Entering into the loan agreement with the respondent would fall within the scope of the partnership business and the appellant would be correct in arguing that she did not enter into the loan agreement in her personal capacity but that she was acting within her mutual mandate as a partner within the partnership business, which was the lending of money. A third party does not have to prove that the partner had the necessary authority to conclude the agreement on behalf of the partnership, but only has to prove that the particular transaction fell within the ambit of the partnership business (Benade *et al* 40).

However, the intention of the parties in the loan agreement would then determine whether the partnership is a party to the agreement. Where there was an intention that the loan agreement was between the lender and the partnership, one can argue that the "partners", in terms of their mutual mandate, were responsible to collect the payments of capital plus interest from the persons to whom they lent money on behalf of the partnership and pay the proceeds back to the partnership. On this interpretation it can be accepted that the individual partners were enriched by the *pro rata* proportion of the interest which they received from the appellant.

However, if the intention of the appellant and the respondent was that a loan agreement would be entered into between them in their personal capacities, the fact that the interest was shared amongst the members of the club after the loan was repaid should therefore not have had a bearing on the court's decision.

The activity which the club was involved in can also be described as a "stokvel". The court in *Malgas* did not consider whether the club was a stokvel. A detailed discussion of stokvels falls outside the ambit of this case discussion but a couple of introductory comments will nevertheless be made. A stokvel is an association of persons who embark on an enterprise voluntarily and independently to meet their own socio-economic needs. An important feature of a stokvel is the fact that members of the stokvel all participate in the running of the stokvel. On 4 January 1994 the Registrar of Banks issued a government notice that introduced the common bond principle, whereby schemes such as stokvels, credit unions and employees' savings clubs could lawfully conduct their respective operations within South Africa, provided that such schemes are operated within the scope and ambit of the Government Notice. (Illegal banking Report: Report by ESAF to the

Committee of Central Bank Governers in SADC – 22 October 1997). At the end of the same year in which the *Malgas* decision was reported a definition of a stokvel was provided in *GG* 22412 of 2006-12-01. Item 1 of the schedule describes the term stokvel as:

(i) a formal or informal rotating credit scheme with entertainment social and economic functions;

(ii) fundamentally consists of members who have pledged mutual support to each other towards the attainment of specific objectives;

(iii) established a continuous pool of capital by raising funds by means of the subscriptions of members;

(iv) grants credit to and on behalf of members;

(v) provides for members to share in profits and to nominate the management;

(vi) relies on self-imposed regulation to protect the interest of its members.

The court in *Malgas* had the opportunity to examine the legal relationship between the members and the stokvel itself, but this was unfortunately not done. It is accepted that stokvels and the informal savings market are the oldest and biggest forms of self empowerment within the black community (BEE in Stokvels Http://www.stokvelonline.com/asp/content.asp?id=3).

6 2 The court decided the enrichment issue by relying solely in terms of the general requirements for an enrichment action (see also Visser 2005 *Annual Survey* 294; and Sonnekus 2006 *Stell LR* 457). The approach of relying on general principles can be followed unless the distinctive rules applying only to a particular *condictio* still apply (see *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 SA 482 (SCA) 489B-C). According to Visser (2005 *Annual Survey* 294) a departure from the normal rules of the *condictio* can only be justified if such departure is shown to be appropriate in the circumstances of the case. The requirement obviously cannot be ignored completely (Visser 2005 *Annual Survey* 294-295). It therefore seems worthwhile to investigate whether the specific requirements of a *condictio* might have led to another result. The *McCarthy* decision involved a claim for enrichment due to improvement of another person's property. Whether an action for compensation for improvements or preservation of property will lie in a particular case depends on the category to which the possessor or holder/occupier who incurred the expenses belong, and on the circumstances under which the expenses were incurred (Lotz (updated by Brand) "Enrichment" *LAWSA* 2ed Vol 9 (2005) 128). As an enrichment claim, the claim for enrichment due to improvement of another person's property has to meet the general requirements of an enrichment action (see Lotz 111).

The inference can be drawn from the reported facts that the respondent relied on the *condictio indebiti* (mention is made of the

statement of the respondent in the pleadings that the payment was made "in the *bona fide* and reasonable belief that it was owing and payable", which refers to the "reasonable mistake" requirement of the *condictio indebiti* (see also Sonnekus 2006 *Stell LR* 456). The court accepted that charging usurious interest rendered the agreement unenforceable, which acceptance also points towards the *condictio indebiti.* (If argued that the agreement was illegal in so far as the usurious interest only, the agreement would also have been enforceable in this respect and pointing towards application of the *condictio ob turpem vel iniustam causam.*)The *condictio op turpem vel iniustam causam* is, however, not available. Any agreement to charge more than the maximum rate of interest was invalid, though not *turpis* and therefore not subject to the *par delictum* rule (Visser 2005 *Annual Survey* 292). For purposes of this discussion it is therefore accepted that the *condictio indebiti* was *in casu* the most appropriate *condictio.* The specific requirements of the *condictio indebiti in casu* are as follows: (a) payment of money; (b) which has taken place *indebiti* in the widest sense, that is, there must have been no legal or natural obligation to pay the money; (c) payment in the mistaken belief that the debt was due; (d) the mistake must be excusable; and (d) the undue payment must in law be considered to have been paid to the receiver of the payment (see Lotz 116-117).

As to the requirement of the *condictio indebiti*: Visser points out that one would have expected the court to investigate, whether or not the respondent's payment of the excess interest had indeed been "in the *bona fide* and reasonable belief that it was owing and payable", as she had averred in her pleadings that it was. Payment of interest, which was excessive and not due, assumingly took place. It seems as if such payment was made in the mistaken belief that it was due. Payment of excessive interest seems excusable by a person without access to acceptable credit. (As to whether a mistake is reasonable and factors used in making such a determination, see *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) 224C and 224E-H).

The only outstanding requirement of the *condictio indebiti* relates to the question whether the payment has legally been paid to the receiver of the payment. The person who physically received the money or benefited from it is not necessarily in law regarded as the *recipiens* (Lotz 116). The person who physically received the money could be a mere nominee, conduit or agent of the *recipiens* (Lotz 116). It is submitted that the decisions relied upon by Lotz could be of further assistance.

Regarding a nominee of the *recipiens*: In *Licences and General Insurance Co v Ismay* (1951 2 SA 456 (EDLD) 461G-462E), it was held that an insurance company which paid money to a third party under the mistaken belief that it was obliged to compensate the insured against liability against the third party, was entitled to claim from the insured with the *condictio indebiti*. The court relied on Pothier in his edition of the Digest (12.6.40) that says: "I am understood to pay to someone not only when I pay himself but also when I pay another on his order" (*Licences*

and General Insurance Co v Ismay supra 462B). The court found that the defendant required the insurance company to dispose of the claims for damage in terms of the insurance policy (*Licences and General Insurance Co v Ismay supra* 462F). The court further found that the provisions in the policy in regard to the payment to the defendant's car and the settlement in his name of a third party's claim, provide the manner in which the indemnity may be paid (*Licences and General Insurance Co v Ismay supra* 462F-G). The court found that the declaration set out sufficiently what amounts to a mandate to the company and found that payment was made with the knowledge of the defendant (*Licences and General Insurance Co v Ismay supra* 462G). According to the Court there could be no right to recover from the third party as the payment was made on behalf of the insured (*Licences and General Insurance Co v Ismay supra* 461G-H; and see also *Randcoal Services Ltd v Randgold and Exploration Co Ltd* 1998 4 SA 825 (SCA) 843B-D). In the *Randcoal Services Ltd* decision Van Heerden DCJ held that the *Ismay* decision had held that the "*condictio indebiti* lies against the person who in law is considered to have received the money" (*Randcoal Services Ltd v Randgold and Exploration Co Ltd supra* 843C-D). In the *Randcoal* the court found that the *Ismay* decision proceeded from the premise that the insurer had no right to claim from the third party since the payment had been made "on behalf of the insured" (*Randcoal Services Ltd v Randgold and Exploration Co Ltd supra* 843D-E). In *Minister van Justisie v Jaffer* (1995 1 SACR 292 (A) 297F-H), it was held that the principle had been accepted in Roman Dutch law and modern South African law that a payment is made to a person whether it was made to the person personally or to another person at his or her instruction. The *condictio indebiti* is available against the first mentioned person (see also *Randcoal Services Ltd v Randgold and Exploration Co Ltd supra* 843E-G).

Regarding an agent or conduit of a *recipiens*: In *Phillips v Hughes; Hughes v Maphumalo* (1979 1 SA 225 (NPD) 226), a motor carrier certificate had been sold in execution of a magistrate's judgment against a debtor by the messenger of the court. The purchaser of the certificate paid the purchase price to the messenger of the court who divided the residue among five creditors of the debtor. Unknown to everyone involved in the sale in execution, the certificate had already been sold and transferred from the debtor to someone else. A contingency like that had not been envisaged and the terms of the sale had not provided for it. The purchaser claimed payment from some execution creditors to whom payment was made by the messenger of the court with the *condictio indebiti* (*Phillips v Hughes; Hughes v Maphumalo supra* 228G-H). In deciding that the remedy "does not hit" the particular creditor (*Phillips v Hughes; Hughes v Maphumalo supra* 228H), Didcott J reasoned as follows:

> "The *condictio indebiti* does not entitle the *solvens* to pursue what was mistakenly paid, wherever it goes. The recovery of the undue payment

> from its *recipiens* is the action's sole objective …This means that the *condictio indebiti* is enforceable against the *recipiens* of the undue payment, but nobody else. The *recipiens* is not necessarily the person into whose hands the money was actually put when it was paid. He is the one who must be considered, in all the circumstances of the case, truly to have received the payment. Whenever a payment is made to an agent with authority to accept it, for instance, the *recipiens* is the principal and not the agent. A conduit through whom a payment passes is likewise not its *recipiens*. Instead he who obtains payment by such means is. One is not the *recipiens* of a payment, on the other hand, merely because it was intended or happens in the result to benefit one. That, on its own, does not count. All that matters is whether one can appropriately be said to have received the payment in some or other way. Unless one has done so, one is beyond the range of the *condictio indebiti*, for all the payment's auxiliary advantages to one" (*Phillips v Hughes; Hughes v Maphumalo supra* 228-229G).

According to the court when all is said and done, the crux of the matter is as follows:

> "The *condictio indebiti* is aimed at the *recipiens* of the particular payment which was made *indebiti* by or on behalf of the claimant. It cannot be used against the *recipiens* of any other payment, even if such be regarded as a consequence of the one in issue" (*Phillips v Hughes; Hughes v Maphumalo supra* 231B-C).

Didcott J explained:

> "The *recipiens* of a payment is surely, once and for all, the person receiving it at the moment of its receipt" (*Phillips v Hughes; Hughes v Maphumalo supra* 230H).

The court found that the messenger did not act as agent for the creditor or any other individual when he received the payment from the purchaser (*Phillips v Hughes; Hughes v Maphumalo supra* 229G).

The court also draw a distinction between: (a) the payment made by the purchaser to the messenger that resulted from a contract between the purchaser and the messenger; and (b) the messenger's subsequent payments to the execution creditors in terms of the statute and the Rules of Court (*Phillips v Hughes; Hughes v Maphumalo supra* 230C-G). In the words of Didcott J:

> "The transactions, in short, involved different parties, different causes, different purposes and different results. This is no technical appraisal. It strikes me, on the contrary, as the only realistic one" (*Phillips v Hughes; Hughes v Maphumalo supra* 230G-H).

The court found that the messenger of the court was the *recipiens* of the purchaser's payment, whilst the execution creditors were the *recipientes* of the messenger's payments to them (*Phillips v Hughes; Hughes v Maphumalo supra* 231C). Thus, the creditors were not recipients of the purchaser's payment.

To summarise: The following persons are not *recipiens* of an undue payment: (a) a nominee, because payment is made on behalf of a

recipiens or at his or her instruction to a nominee; (b) an agent with authority to accept a payment on behalf of a principal, because of the operation of principles of agency; (c) a conduit, because the payment merely passes through him or her; and (d) a beneficiary, if a benefit results from an undue payment. If there is more than one transaction, a distinction has to be drawn between different transactions involving different parties, causes, purposes and results. Even when different transactions are involved there can be only one moment of payment of an *indebitum.*

Applied to the present case under discussion: If the appellant was a nominee of the club, the club would have been the *recipiens* of R26 612,33. If the appellant was acting as an agent of the club, the club would have been the *recipiens* of R26 612,33. As the appellant was held not be an agent of the club, (and it arguably seems that appellant was not a nominee of the club), the appellant should have been held to be the *recipiens* of R26 612,33 and not a mere R4 435,40. The appellant was not merely a conduit of the club because the R4 435,40 remained with her and did not pass through her. In trying to make sense of such outcomes one has to distinguish between the two transactions: (a) the loan agreement between the appellant and the respondent; and (b) the agreement between the appellant and other creditors. The moment of *indebitum* took place when payment was made to the appellant by the respondent on 3 December 1998.

By implication the Court decided that the appellant was the *recipiens* of R4 435.40, because she did not act as an agent, whilst she was not the *recipiens* of the amount of R26 612, 33 because she was a conduit for that amount which passed through to the club. In other words, she was wearing the hat of a *recipiens* and the hat of a conduit in respect of different amounts of a payment made to her. This result cannot be satisfactorily explained.

7 Conclusion

The court held that the club was not a legal person but did not consider the nature of the legal relationship between the parties. Had the court considered whether the relationship between the members of the club was that of a partnership, the intention of the parties to the loan agreement would determine whether the agreement was entered into between the lender and the partnership or between the lender and the appellant. If the intention was the former one can argue that the “partners” in terms of their mutual mandate were responsible to collect the payments of capital plus interest from the persons to whom they lent money on behalf of the partnership and pay the proceeds back to the partnership. On this interpretation it can be accepted that the individual partners were enriched by the *pro rata* proportion of the interest which they received from the appellant. However, if the intention of the appellant and the respondent was that a loan agreement would be entered into between them in their personal capacities, the fact that the

interest was shared amongst the members of the club after the loan was repaid should not have had a bearing on the Court's decision.

The court in *Malgas* had the opportunity to examine the legal relationship between the members and the stokvel itself, but this was unfortunately not done. It is accepted that stokvels and the informal savings market are the oldest and largest forms of self empowerment within the black community (BEE in Stokvels Http://www.stokvelonline.com/asp/content.asp?id=3).

The approach of the court by deciding the issue of enrichment merely with reference to the general requirements of enrichment liability can only be followed if the specific requirements of an appropriate *condictio* would not have led to a different result. Upon examination of the last requirement of the *condictio indebiti*, namely the undue payment, it must in law be considered to have been paid to the *recipiens* of the payment. It appears that legal rules assist in determining the true *recipiens* of an undue payment at a specific moment, of which the rules would have led to a different result in this decision.

In the decision the appellant, to whom excessive interest in the amount of R26 612,33 was paid by the respondent, was only recognized as a *recipiens* in respect of R4 435,40. Because the Court held that the appellant did not act as an agent of the club, the decision does not provide answers as to the identity of the *recipiens* of the remaining amount of R22 176,93. As argued, the answer lies in the fact that the appellant was only a conduit for the amount of R22 176,93. As it is not made clear whether the club is a *recipiens*, or whether the members instead are *recipientes* of the outstanding R22 176,93, the prospects of being able to recover any enrichment from the five other members of the club with whom she had no agreement are bleak and more cumbersome (for possibly being an instance of indirect enrichment).

Relying only on general principles of enrichment liability in the unconscious quest towards the eventual recognition of a general enrichment action would at times be at the peril of ignoring sound legal principles of our common law. The unexplainable result achieved *in casu* is a case in point.

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