



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1054/2024

In the matter between:

**THE MEMBER OF THE EXECUTIVE COUNCIL
OF THE DEPARTMENT OF HUMAN SETTLEMENTS,
FREE STATE PROVINCE**

APPLICANT

and

NTSU BUILDING MATERIALS (PTY) LTD

RESPONDENT

Neutral citation: *The Member of the Executive Council of the Department of Human Settlements, Free State Province v Ntsu Building Materials (Pty) Ltd* (1054/2024) [2026] ZASCA 41 (1 April 2026)

Coram: SCHIPPERS, MOLEFE and UNTERHALTER JJA and BASSON and MAMOSEBO AJJA

Heard: 5 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 1 April 2026.

Summary: Unjust enrichment – *condictio sine causa specialis* – payments formed part of decisions and agreements set aside on review – effect of public law invalidity upon enrichment claim.

ORDER

On application for special leave to appeal from: Free State Division of the High Court, Bloemfontein (Chesiwe J, Daniso J and Cronje AJ sitting as court of appeal):

- 1 The application for special leave to appeal is granted to the Supreme Court of Appeal.
 - 2 The appeal is dismissed, with costs.
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JUDGMENT

Unterhalter JA (Schippers and Molefe JJA and Basson and Mamosebo AJJA concurring):

Introduction

[1] The applicant, the Member of the Executive Council of the Department of Human Settlements, Free State Province (the Department), instituted an action in the Free State Division of the High Court, Bloemfontein (high court) against the respondent, Ntsu Building Materials (Pty) Limited (Ntsu), and seven other defendants (the seven defendants). The Department made the following averments in its amended claim against Ntsu. In 2010, the Department concluded written building contracts with the seven defendants. They breached these contracts. The Department had made payment of R34 089 179.20 to Ntsu in 2010 and 2011, as an advance on a debt that the Department would owe Ntsu for building material to be supplied by Ntsu to the seven defendants. In 2019, the high court declared unlawful, reviewed, and set aside the agreements and decisions pursuant to which the advanced payments were made. The payments made by the Department were not owing at the time they were made, nor thereafter. The payments were made *sine causa*, as a result of which Ntsu was unjustly enriched, and the Department was

impoverished. The Department claimed payment of R34 089 179.20 from Ntsu. I will refer to this as the ‘enrichment claim’.

[2] Ntsu filed an exception to the Department’s enrichment claim. It complained that the enrichment claim failed to disclose a cause of action. The high court upheld the exception and granted the Department leave to amend its particulars of claim within 30 days of the order. With leave, the Department appealed to the Full Court. The Full Court dismissed the appeal. The Department sought special leave to appeal the judgment and order of the Full Court. This Court referred the application for special leave for oral argument in terms of s 17(2)(d) of the Superior Courts Act.¹

The enrichment claim

[3] I commence with a more detailed consideration of the Department’s enrichment claim. At the heart of the Department’s claim is the averment that there was ‘no legal, moral or natural obligation’ resting upon the Department to make the payment that it did to Ntsu. The payment was made, in advance, on the assumption that a debt would become due to Ntsu, in that building materials would be supplied on behalf of the Department to the seven defendants for the construction of low-cost housing; and that payment in respect of the building material would be payable by the Department to Ntsu. The assumption, it is pleaded, proved to be incorrect and false.

[4] Counsel for the Department made it plain that the Department’s enrichment claim is founded upon the *condictio sine causa* (an action to recover property or money transferred without a legal basis for that transfer). There are two species of this *condictio*: the *condictio sine causa generalis* and the *condictio sine causa*

¹ Superior Courts Act 10 of 2013.

specialis.² The Department appears to rely on the *condictio sine causa specialis*, and in particular, the payment made to Ntsu on the basis of false assumptions made at the time of the payment.³ The central question that arises is whether the Department's enrichment claim meets the requirements of the *condictio sine causa specialis*, and, in particular, the absence of a valid *causa* for the receipt of the payments made to Ntsu.

[5] The Department pleads that the monies paid to Ntsu were not due or owing at the time that the payments were made, nor thereafter. The basis of this averment on the pleadings is two-fold. First, that the Department assumed, incorrectly, that at the time it made the payment of the monies it would become indebted to Ntsu in that Ntsu would in the future supply building material on behalf of the Department to the seven defendants ('the contemporaneous assumption'). Second, that after the payment of the monies was made, the assumption that payment was due was rendered false by reason of the decision of the high court in 2019 to set aside the decisions and agreements, of which the advanced payments to Ntsu formed part (the ex-post assumption). Technically, the ex-post assumption relates to the future and more properly founds a claim under the *condictio causa data causa non secuta* (an action to recover property or money transferred for a specific future purpose which did not materialise), but nothing turns on this distinction.

[6] The contemporaneous assumption and the ex-post assumption rest upon contradictory predicates. The contemporaneous assumption is pleaded to have been false because it was assumed that a debt would arise, which it did not. That is to say, the Department never incurred any liability to pay Ntsu. The ex-post

² *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A) at 284 I – 285 B. The *condictio sine causa generalis* is a general catch-all action for enrichment when other specific *condictiones* do not apply. The *condictio sine causa specialis* applies when the property or money transferred was initially lawful, but the legal basis subsequently fell away.

³ 9 *Lawsa* 2 ed para 220 (d), citing D 12 7 5.

assumption rests upon the proposition that the decisions and agreements that formed the basis of the Department's payment of the monies, as advanced payments, were declared unlawful, reviewed and set aside, and hence the payments came to lack a legal basis. However, the high court could only have set aside decisions and agreements (dating back to 2010) if such decisions and agreements were concluded. Yet the contemporaneous assumption rests upon the proposition that no liability to pay ever came about. If that were so, then there were no decisions and agreements for the high court to set aside. And if there were decisions and agreements that the high court set aside, then it cannot be the case that no liability to pay ever arose, since that liability could only have arisen from these decisions and agreements.

[7] The contradiction is compounded by the holding of this Court in *Oudekraal*.⁴ Until a decision is set aside in court proceedings for judicial review, the decision exists in fact, and may have legal consequences. The issue that arises is whether the acts that followed upon the decisions and agreements that were set aside depend upon the substantive validity of such decisions and agreements. What this means for the enrichment claim is that for some nine years (before the decisions and agreements were set aside by the high court), as a matter of fact, there were agreements that formed the basis of the monies paid to Ntsu. There was hence a factual *causa* for the payments made to Ntsu. And the question then is whether, in the consequence of this factual *causa*, it remains open to the Department to rely upon the *condictio sine causa specialis*.

[8] The pleadings disclose a further difficulty for the Department. In a section of the pleadings that concerns the duties of the seven defendants, the Department avers that it entrusted Ntsu with 'trust monies' to be utilised by the seven defendants for

⁴ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) paras 26-31.

the purpose of performing and completing only housing projects. It then pleads that the Department supplied the seven defendants (as erstwhile contractors) ‘through the services of the first defendant’ (that is Ntsu) ‘. . . with building material to be utilized by the contractors for the purpose of performing and completing the housing projects’. This averment is destructive of the contemporaneous assumption because if Ntsu, on behalf of the Department, supplied the seven defendants with building materials, then the monies paid to Ntsu had a *causa*, being the indebtedness of the Department to pay Ntsu for the building materials supplied by it to the seven defendants. The averment is also destructive of the ex-post assumption, understood in the light of *Oudekraal*. If Ntsu, as averred, supplied building materials to the seven defendants, and did so pursuant to the decisions and agreements that were then factually in place, then the effect of the order to set aside these decisions and agreements by the high court on review in 2019 did not render the payments made by the Department to Ntsu *sine causa*. On the contrary, the payments were made on the basis that Ntsu would supply building materials to the seven defendants – which it did. In addition, Ntsu by supplying the building materials, was not enriched at the Department’s expense – an essential element of an enrichment claim.

The exception

[9] Ntsu excepted to the enrichment claim made by the Department against it. It is common ground that the exception taken by Ntsu is that the pleading does not disclose a cause of action. An exception is itself a pleading. The essential grounds upon which the exception is taken are two-fold. First, the setting aside by the high court of the Department’s decisions to make advanced payments does not suffice to make out a cause of action on the basis of enrichment, absent an averment that the building materials had in fact not been delivered by Ntsu. Second, the pleading does not allege whether the order of the high court to declare unlawful and set aside the decisions and agreements, pursuant to which the Department made payments to

Ntsu, is an order made *ex tunc* (the decisions and agreements were invalid from the outset) or otherwise.

[10] The exception itself could have been more precisely and fully pleaded. However, the first ground of exception squarely raises the issue that the averments in the pleading that the high court reviewed and set aside the agreements and decisions that formed the basis of the payments to Ntsu, do not suffice to make out the cause of action based on unjustified enrichment, and in particular, the *condictio sine causa specialis*.

[11] This complaint is well-founded. As I have explained, *Oudekraal* makes plain that the pronouncement by a court that certain administrative action is invalid does not mean that the consequences of such action are necessarily invalid.⁵ That is so because the validity of the subsequent act may depend on the validity of the administrative action that has been set aside, or it may only depend on the factual existence of the administrative action before it was set aside. In the former case, the subsequent act will be rendered invalid by reason of the invalidity of the administrative action. In the latter case, the subsequent act survives the invalidity of the administrative action.

[12] In the present matter, the difficulty for the Department is this. The pleaded case of the Department is that the payments made by it to Ntsu ‘formed part of the various agreements and or decisions that were reviewed and set aside’. Those agreements and decisions date back to 2010. The high court’s order, although not attached to the pleadings, is pleaded to have been handed down on 26 August 2019. The payments to Ntsu were made in 2010 and 2011. The pleading avers, at least for the purposes of the case based upon the ex-post assumption, that the agreements

⁵ *Oudekraal* paras 31 and 38.

and decisions pursuant to which the payments were made to Ntsu factually existed. How else could they have ultimately been reviewed and set aside by the high court? When the payments were made to Ntsu, there was, accordingly, a factual *causa* for the payments. The legal invalidation of that *causa* many years later, by order of the high court, does not mean that the payments, when made to Ntsu, had no *causa* and constitute unjustified enrichment. On the contrary, the pleadings disclose that Ntsu supplied building materials to the seven defendants, no doubt as a result of the *factual* existence of the decisions and agreements that were in place at the time. Once that is so, there was, on the Department's pleadings, no unjustified enrichment because the payments to Ntsu were made in anticipation of the very event that transpired – the supply of building materials by Ntsu to the seven defendants. In other words, the payments were made for cause, and that cause subsists, whatever declaration of invalidity may have befallen the agreements and decisions in 2019.

[13] Ntsu's exception goes somewhat further and states that the Department was required to plead that Ntsu did not deliver the building material to the seven defendants. I do not need to determine this complaint because it suffices to sustain the exception that the enrichment claim cannot merely rely upon the high court's invalidation of the agreements and decisions. The factual existence of these agreements and decisions, at the relevant time, and the pleaded case that Ntsu did supply building materials to the seven defendants is destructive of the Department's cause of action founded upon the *condictio sine causa specialis*. Put simply, the Department's pleadings do not make out a case that Ntsu was unjustly enriched, even if the payments to Ntsu, as the Department avers, 'formed part of the various agreements and/or decisions which were reviewed and set aside'.

[14] The second ground of Ntsu's exception, to recall, is that the pleading does not allege whether the order of the high court is an order made *ex tunc* or otherwise. This challenge cannot prevail because the pleadings state the following, after the

avertment that the various agreements and/or decisions were reviewed and set aside: ‘The erstwhile building contracts concluded between the Department and the said defendants were thus invalid *ab origine*’. Although this statement does not also refer to the decisions that were set aside by the high court, it is clear enough that the Department’s case is that the effect of the high court’s order was to render the decisions and agreements invalid, as if they never existed. The exception on this ground therefore cannot succeed. But this does not salvage the pleading because, for the reasons given, even if the high court order rendered the agreements and/or decisions invalid *ab origine*, that alone does not make out a case that the payments to Ntsu were *sine causa*, and that Ntsu was unjustifiably enriched.

[15] Counsel for the Department sought to oppose the exception on the basis that the infirmities of the pleadings might render them vague and embarrassing, but that does not suffice because it was common ground that the exception complains that the enrichment claim does not disclose a cause of action. This submission cannot be accepted. Whatever other deficiencies the pleadings may suffer, the first ground of exception, as I have found, warrants the conclusion that the pleadings do not sustain a cause of action. The pleadings are also vitiated by contradictions, as I have endeavoured to show. These contradictions however do not form the basis of the exception that Ntsu has taken, and simply form the backdrop against which Ntsu’s challenge is to be adjudicated.

[16] One further matter was much debated before us. In *Esorfranki*,⁶ the Constitutional Court declined to recognise an action in delict for pure economic loss, following upon the review and setting aside of a tender, in which the State had intentionally breached its duties. The issue raised before us was whether the Department’s enrichment action should suffer the same fate because there is no

⁶ *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2022] ZACC 41; 2023 (2) BCLR 149 (CC); 2023 (2) SA 31 (CC).

reason why the Department's invocation of the public law remedy of self-review to set aside the agreements and decisions, to which it was a party, should also permit it to pursue a private law claim for enrichment. This is an issue of importance. But we must decline the invitation to engage it. It is not the issue raised by Ntsu's exception.

[17] I conclude that the exception was correctly taken. And it is to the question as to what order this Court should make that I now turn.

Special leave

[18] There serves before us an application for special leave to appeal. The standard of application to secure special leave to appeal is demanding and well established.⁷ I am inclined to the view that special leave to appeal should be granted because the exception does raise a question of law of some importance as to how a court order that invalidates agreements and decisions by way of review, and hence as a matter of public law, bears upon a claim for unjust enrichment, in circumstances where the payments in issue were made at a time when the factual existence of these agreements and decisions was in place. In sum, the application of the principles in *Oudekraal* and their engagement with private law is a matter of some difficulty that warranted the consideration of this Court. Neither the Full Court, nor the high court, considered these issues at all. That I have ultimately concluded that Ntsu's exception was correctly upheld by these courts does not detract from my conclusion that the Department enjoyed reasonable prospects of success on appeal, and the appeal raises a point of law of some importance.

[19] The application for special leave to appeal to this Court should thus be granted. However, the appeal, for the reasons given, cannot succeed.

⁷ *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564 G-J.

[20] In the result, the following order is made:

- 1 The application for special leave to appeal is granted to the Supreme Court of Appeal.
- 2 The appeal is dismissed, with costs.

D N UNTERHALTER
JUDGE OF APPEAL

Appearances

For Appellant: N Snellenburg SC with J M C Johnson and
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For Respondent: S Grobler SC

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