THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 199/2012
Reportable

In the matter between:

GLENRAND MIB FINANCIAL SERVICES (PTY) LTD	First Appellant
DAVID JAMES HARPUR	Second Appellant
ALLAN WALTER MANSFIELD	Third Appellant
AON SOUTH AFRICA (PTY) LTD	Fourth Appellant

and

THEODOR WILHELM VAN DEN HEEVER NO	First Respondent
CHRISTIAAN FREDERIK DE WET NO	Second Respondent
DEIDRE BASSON NO	Third Respondent
PROTECTOR GROUP HOLDINGS (Pty) Ltd	Fourth Respondent

Neutral citation: *Glenrand MIB Financial Services (Pty) Ltd & others v Theodor Wilhelm van den Heever NO & others* (199/2012) [2012] ZASCA 195 (30 November 2012)

Coram: MTHIYANE DP, MHLANTLA and THERON JJA and SWAIN and SALDULKER AJJA

Heard: 12 November 2012

Delivered 30 November 2012

Summary: **Company Directors – misappropriation of company funds – dishonesty and subjective intention to steal not proved**
Breach of fiduciary duty – insufficient evidence to prove dishonesty and collusive dealings
Company - Insolvency - Disposition without value in terms of s 26 of the Insolvency Act 24 of 1936 – after disposition the assets of the company exceeded its liabilities
Contract – written sale of shares agreement – purchaser signed as agent for non-existent principal – agreement not valid
Enrichment – General enrichment action – claimant's funds transferred without legal ground to B – B transferred the funds to C without legal ground – claimant has a claim against C – chain of

causation linking C's enrichment with claimant's impoverishment not broken.

ORDER

On appeal from: South Gauteng High Court, Johannesburg, (Monama J sitting as court of first instance):

1 The appeal of the first appellant is dismissed.

2 The appeal of the second and third appellants is upheld.

3 As against the first, second and third appellant, the judgment of the high court is set aside and replaced with the following:

'(a) The claim against the fourth and fifth defendants is dismissed with costs.

(b) The first defendant is ordered to make payment of the sum of R50 million together with interest at the rate of 15, per cent per annum from 15 March 2004, to date of payment to the plaintiffs.

(c) The first defendant is ordered to pay the plaintiffs' costs.'

4 The respondents are ordered to pay the costs of appeal of the second and third appellants.

5 The first appellant is ordered to pay the costs of appeal of the respondents.

6 The respondents are ordered to pay the costs of appeal of the fourth appellant.

JUDGMENT

THERON JA and SWAIN AJA (MTHIYANE DP, MHLANTLA JJA and SALDULKER AJA concurring):

[1] This is an appeal from the South Gauteng High Court (Monama J) dealing with misappropriation of money, unjust enrichment, setting aside of a disposition under s 26 of the Insolvency Act 24 of 1936 (the Insolvency Act) and a breach by directors of their fiduciary duties. The appellants appeal to this court with the leave of the high court.

[2] The fourth respondent, Protector Group Holdings (Pty) Ltd (In Liquidation), (Protector), was wound up by the high court on 1 December 2004. The application for its winding-up was presented to the high court on 9 July 2004 and this is the date when the winding-up is deemed to have commenced, in terms of s 348 of the Companies Act 61 of 1973 (the Companies Act). Protector was placed in liquidation because it was unable to pay its debts, as contemplated in s 345 of the Companies Act. The Master of the High Court appointed the first, second and third respondents as joint liquidators of Protector, and they act in their official capacity as liquidators in these proceedings.

[3] The first appellant, Glenrand MIB Financial Services (Pty) Ltd, (Financial Services), was a wholly owned subsidiary of Glenrand MIB Ltd (Glenrand MIB). At all relevant times, Financial Services, held 65 per cent of the issued share capital in Protector, while the remaining 35 per cent was held by Protector Group Management Company (Pty) Ltd (PGMC). David Harpur, the second appellant, was a director of Protector, Financial Services and a

director, shareholder and chief executive officer of Glenrand MIB Ltd. Allan Mansfield, the third appellant, was a director of Protector and the chairperson of its board of directors, a director of Financial Services and a director, shareholder and chairperson of the board of Glenrand MIB.

[4] During 2003, the board of Glenrand MIB decided to dispose of its interests in Protector. Marc Seelenbinder and Leon Janse van Rensburg, sixth and seventh defendants in the court a quo respectively, both directors of Protector and PGMC, made offers to purchase Financial Services' 65 per cent shareholding in Protector. On 10 November 2003, the board of directors of Financial Services adopted a resolution to dispose of its 65 per cent shareholding in Protector by entering into an agreement with 'Newco or its nominee'. Pursuant to this resolution, an agreement with 'Newco or its nominee' was signed on 15 December 2003. Financial Services was represented by Harpur and Mansfield while Van Rensburg represented the purchaser. It was later suggested that Freefall Trading 65 (Pty) Ltd (Freefall) was the purchaser. Van Rensburg and Seelenbinder, were, through their family trusts, the sole shareholders of Freefall. PGMC disposed of its 35 per cent shareholding in Protector to Freefall. Protector sold its entire business as a going concern to a new established company New Protector Group Holdings (Pty) Limited, (New Protector), comprising an empowerment partner, Tradeworx, holding 51 per cent of New Protector and Freefall holding 49 per cent. The funding for the transaction was provided by the Industrial Development Corporation (the IDC).

[5] New Protector and the IDC concluded a loan agreement on 4 March 2004 to enable New Protector to acquire the business of Protector as a going concern. The sale of the business by Protector to New Protector was considered and approved at a board meeting of Protector on 2 March 2004. The Financial Services representatives on the board of Protector, including Harpur and

Mansfield, resigned as directors after the approval of the sale of the business. The sale of business agreement was implemented and the business and assets of Protector were transferred to New Protector.

[6] The IDC released the funds to New Protector on 5 March 2004, pursuant to a written request from Seelenbinder dated 3 March 2004. An amount of R69 188 647 was transferred from the IDC into New Protector's bank account held with Nedbank. On 8 March 2004, an amount of R63 382 254 was transferred out of the Nedbank account to an account in the name of Protector held with Standard Bank. The latter account was opened by Seelenbinder and Van Rensburg, who were the only directors of Protector at that stage. On 10 March 2004, and on the instructions of these two directors, an amount of R63 382 254 was transferred out of the Standard Bank account to an account in the name of Fehrsen, Harms & Associates (FHA) in Namibia. On 15 March 2004, from the funds held in the Namibian account, an amount of R50 million was paid into the trust account of Edward Nathan & Friedland (ENF). On 22 June 2004, the amount of R50 997 468.57 was transferred from the said attorneys' trust account to Glenrand MIB's bank account. It was common cause that the R50 million paid by ENF to Glenrand MIB was to settle Freefall's debts to Financial Services in respect of the sale of the latter's shareholding in Protector to Freefall.

[7] The respondents instituted action in the court a quo against Financial Services (first defendant), Glenrand MIB Ltd (second defendant), Freefall (third defendant), Harpur (fourth defendant), Mansfield (fifth defendant), Seelenbinder (sixth defendant) and Janse Van Rensburg (seventh defendant). In the action the respondents claimed, inter alia, payment of various sums of money from the respondents. There were six causes of action pleaded by the respondents, namely: (1) collusive dealings contemplated by s 31 of the

Insolvency Act (claim A); (2) unlawful and intentional misappropriation of funds (claim B); (3) unjust enrichment (claim C); (4) an alleged disposition without value liable to be set aside under s 26 of the Insolvency Act (claim D); (5) a fraud perpetrated on the body of creditors of Protector (claim E); (6) breach by certain directors of Protector, namely Harpur, Mansfield, Seelenbinder and Van Rensburg, of their fiduciary duties owed to the company (claim F).

[8] By the time of the commencement of the trial on 16 February 2011, Freefall had been deregistered, the estate of Seelenbinder sequestrated, resulting in the trial proceeding only against Financial Services, Glenrand MIB, Harpur, Mansfield and Van Rensburg. By arrangement between the respondents and Van Rensburg, the latter did not oppose the matter and testified for the respondents. Judgement was however sought and granted against Van Rensburg. At the conclusion of the trial, claims A and E were abandoned by the respondents and the court was also advised that no relief was sought against Glenrand MIB.

[9] The court a quo upheld claims B (misappropriation of money), C (unjust enrichment), D (setting aside of a disposition without value in terms of s 26 of the Insolvency Act) and F (breach of fiduciary duty). It also found against the appellants on the basis of a contravention of s 38 of the Companies Act. The judge granted judgment against Glenrand MIB, Financial Services, Harpur, Mansfield and Van Rensburg. The appellants appeal against the judgment of the court a quo, with the leave of that court.

[10] Subsequent to the trial and prior to judgment being handed down, Glenrand MIB merged with the fourth appellant, AON South Africa (Pty) Ltd (AON). In terms of this merger AON assumed all property and obligations of

Glenrand MIB. Following the merger, Glenrand MIB was deregistered. AON applied for and was granted leave to intervene in the application for leave to appeal and in the appeal itself, by the high court. Thereafter the respondents abandoned the judgment against Glenrand MIB, leaving only the question of the wasted costs of the application for determination. At the hearing of this appeal, counsel for the respondent could advance no reason why the respondent should not be ordered to pay these costs.

Contravention of s 38

[11] As mentioned above, the high court found against the appellants on the basis of a contravention of s 38 of the Companies Act.[1] This was not a cause of action pleaded or relied upon by the respondents in the action in the high court. It was not an issue that was specifically traversed by the parties during the trial. This was in fact conceded by the respondents on appeal. The finding by the high court, that 'the assistance given to the fourth plaintiff [payment of R50 million] violates the provisions of section 38(1) of Act 61 of 1973' was ill-conceived and cannot stand.

Claim B – misappropriation of money (theft)

[12] The IDC knew that Glenrand MIB was selling its 65 per cent shareholding in Protector and the IDC intended, when its board approved the financing on 25 November 2003, that the proceeds of that loan would be applied towards settling the purchase price of the sale of shares of Glenrand MIB and PGMC. The IDC's recognition that the proceeds of the loan would immediately be applied towards paying for Glenrand MIB's shares in Protector, was in full knowledge of the IDC's decision that ultimately the business of Protector would be located within a new vehicle, which would represent a consortium led by a BEE shareholder.

[1] Section 38 reads: A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up.

[13] There is no evidence to suggest that the IDC, and all the other relevant parties, in agreeing or arranging that the proceeds of the loan should be paid to the shareholders of Protector, intended to defraud the creditors of Protector. The common intention of Glenrand MIB, the IDC, and of Seelenbinder and Van Rensburg, was that the money should be applied to discharge Freefall's indebtedness arising from the sale of shares by Glenrand MIB and PGMC. In the circumstances, the respondents have not made out a case for dishonesty on the part of Harpur and Mansfield. It was not established that, in arranging that part of the proceeds of the IDC loan be paid to Financial Services, they had the subjective intention to steal the money. It follows that the claim of theft cannot be sustained.

Claim F - Breach of Fiduciary Duty

[15] Counsel for the respondents was constrained to concede, and rightfully so, that in the event of the respondents failing to prove the theft claim, then the claim for breach of fiduciary duty must also fail.

Claim C – Unjust Enrichment

[16] The respondents also claim payment of the sum of R50 million from Financial Services on the basis of unjust enrichment. Although there is no general action based on enrichment in our law, it is generally accepted that for enrichment liability to arise there are a minimum of four requirements, namely: (1) the defendant must be enriched; (2) the plaintiff must be impoverished; (3) the defendant's enrichment must be at the expense of the plaintiff and (4) the enrichment of the defendant must be unjustified or sine causa.[2] This was the basis on which the case was argued by both counsel.

[2] 9 *Lawsa* 2 ed para 209.

[16] The third and fourth requirements for enrichment liability can give rise to difficulties where three or more parties are involved. The difficulties arise from the fact that the general requirement for liability is that the defendant's enrichment must be *at the expense of the plaintiff*; and it must be *unjustified*. Where there is the intercession of a third party between the plaintiff and the defendant, and the value is transferred not directly from the plaintiff to the defendant, but from the plaintiff to the third party, and then in turn from the third party to the defendant, the question arises of whether the defendant's enrichment has occurred at the expense of the plaintiff.

[17] In *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd & another* 1996 (4) SA 19 (A) at 25H-26A the court discussed two types of multi-party enrichment claims. The first type of claim arose where A, in terms of an agreement with B, improves the property of a third party, C, and A then seeks to hold the owner C liable on the grounds of unjust enrichment because B has not paid A. The second type of claim applied in a situation where the owner C contracted with B to improve his property and B in turn subcontracted A to do the work. A did the work and later relied on the liability of the owner C on the grounds of unjust enrichment. The second type of enrichment claim was considered by the court in *Buzzard*. The court held that the main difference between the two types of claims was that in the second type of claim, the performance of the work by A could be traced to an agreement between the owner C and B in terms of whereof that specific work had to be performed by B. The court further held that neither a direct nor an indirect enrichment liability could arise in the second type of case. In all cases of the second type of liability the owner C contracted with B on a specific basis, and it would be unfair that his counter-performance, if any, were to increase in effect or that he should incur an obligation which did not arise out of the contract with B, simply because B had engaged A to comply with his contractual obligations. The

reasoning of the court was that there was no contractual relationship between A and the owner C and, when A performed the work, he complied with his obligations towards B. At the same time, however, A also gave effect to B's obligation to the owner C and thus also performed indirectly with respect to the owner. The agreement between the owner C and B was the primary source of the performance of the work and any possible enrichment of the owner; the owner C received no more as a result of A's performance than that which he had contracted for with B. For that reason, the court concluded, the enrichment was not sine causa. On the contrary, his agreement with B was the cause of his enrichment. In *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) Schutz JA, with reference to the reasoning adopted by the court in *Buzzard*, said it may be a question of semantics whether the owner's enrichment had been at the expense of A or B. The learned judge put the matter thus:

'For myself, I think there is much to be said for the justice of the lien cases, an unsophisticated justice though it may be, but with which we have lived for a long time. A improves a car at the instance of B, wrongly believing him to be owner. C claims the car by virtue of his ownership. Is he to get it scot-free? Or is he to first pay A his necessary and reasonable expenses; A's claim being moderated by the increase in market value cap, by the limitation to expenses to the exclusion of the market price and by the operation in the last resort of the *jus tollendi* (the right to compel removal of materials)? The question whether C is enriched at the expense of A or of B in the example given is in any event a matter of semantics (I do not dispute that the manner in which the question is answered can have practical consequences). When A improves C's vehicle the ownership in the improvements passes at once to C's estate by accession and it seems to me to pass there directly from A's estate. Is it not a fiction that it passes through the estate of B, even though A owes a contractual obligation to him to effect the repairs?'[3]

[18] It was argued, on behalf of Financial Services that in this matter there had been no transfer of property from the impoverished party, Protector, to the enriched party (Financial Services). The enrichment, if there was any, was not

[3] Para 23.

at the expense of the claimant (Protector) and for this reason the claim must fail. It has been suggested by the author Jacques Du Plessis *The South African Law of Unjustified Enrichment* (2012) at 300 that the purpose of the 'at the expense of' requirement is to indicate that a sufficiently strong causal link exists between the plaintiff and the defendant's enrichment. The ultimate issue for a court to determine when considering the question of causation or the 'at the expense of 'requirement in a multi-party situation is whether the defendant has been unjustifiably enriched vis-a-vis the claimant.[4]

[19] On the facts of this case, it is clear that not only has Financial Services been unjustifiably enriched, but that such enrichment has been at the expense of the impoverishment of Protector. The funds in the Standard Bank account that had been opened by Van Rensburg and Seelenbinder, was the property of Protector, representing the purchase price paid by New Protector for the sale of Protector's business. The funds remained the property of Protector. There was no legal relationship between Protector and FHA justifying the transfer of the funds to the latter.

[20] It was further contended by the appellants that the fourth requirement had also not been met in that the enrichment of Financial Services was not unjustified (sine causa). The argument advanced was that the proceeds of the IDC loan received by New Protector were applied by Seelenbinder and Van Rensburg for the benefit of Freefall to discharge the liabilities of Freefall. There was a deliberate intention on the part of Freefall to pay a debt that it owed to Financial Services and an acceptance by ENF, on behalf of Financial Services. In these circumstances it cannot be said that Financial Services' enrichment would have been sine causa.

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[4] Daniel Visser *Unjustified Enrichment* (2008) at 215.

[21] In support of this argument, reliance was placed on *Commissioner for Inland Revenue v Visser* 1959 (1) SA 452 (A) and *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (A) where it was held by this court that where a third party (even unlawfully) used money which initially belonged to the plaintiff in order to discharge a true liability owed to the defendant (no matter by whom), and the defendant received that money, bona fide, intending for it to be applied to discharge the liability concerned (whether the liability was that of the third party or another party), then the plaintiff could not recover the funds from the defendant; the defendant's enrichment would not have been sine causa; and it would have not been at the expense of the plaintiff.

[22] Essential to the question of whether the payment by Freefall to Financial Services had been unjustified (sine causa) is a determination of whether the sale of shares agreement between Financial Services and Freefall, in terms of which Financial Services sold its shareholding in Protector to the former with effect from 1 December 2003, for the purchase price of R50 million is valid. If the agreement is valid then the payment made by Freefall was one in discharge of a true liability, it would not be sine causa, and would serve to interrupt the enrichment claim.

[23] We turn now to consider the validity of the sale of shares agreement. Seelenbinder signed the document on behalf of the purchaser and qualified his signature as being 'duly authorised thereto'. He clearly purported to act as an agent. The purchaser was described as 'Newco or its nominee'. According to Van Rensburg, Seelenbinder did not, at the time, act on behalf of Freefall or any company in particular. Van Rensburg was pointedly asked, during his evidence in chief, as to who Seelenbinder had represented when he signed the document and his response was:

'As a minimum he would have represented himself and me at that stage.'

He was later asked to explain the reference to Newco in the document and this is what he said:

'Your Lordship, at that stage we thought that a good name for Newco would have been L&M (Pty) Limited. We tried our best to register a company with that name but we were unsuccessful, but that was part of the process. When we were not successful with that we went to a shelf company which was called Freefall 65 or something in that line. Eventually it became the nominee.'

Harpur agreed that Freefall was not nominated and nothing was done to make Freefall the purchaser.

[24] In *Heathfield v Maqelepo* 2004 (2) SA 636 (SCA) the court recognised that an agreement signed on behalf of a non-existent principal is invalid.[5] It was also noted, with reference to *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) that a court should not lightly hold that an agreement is invalid.[6] Southwood AJA, writing for the court, quoted the following passage from *Burroughs* with approval:

'In so doing I must, I think, have regard to the fact that exh "A" is a commercial document executed by the parties with a clear intention that it should have commercial operation. I must therefore not lightly hold the document to be ineffective. I need not require of it such precision of language as one might expect in a more formal instrument, such as a pleading drafted by counsel. Inelegance, clumsy draftmanship or the loose use of language in a commercial document purporting to be a contract, will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract.'[7]

[25] In *McCullogh v Fernwood Estate Ltd* 1920 AD 204 this court held that a company can by adoption or ratification obtain the benefit of a contract made on its behalf before it came into existence where such contract has been made by a person acting individually and not as agent of the company. Innes CJ stated that

[5] Para 13.
[6] See also *Legator McKenna Inc v Shea* 2010 (1) SA 35 (SCA).
[7] *Heathfield v Maqelepo* 2004 (2) SA 636 (SCA) para 14.

'the rule that there can be no ratification by a principal not in existence at the date of the transaction is recognised by our law as well as by the law of England'.[8] However the situation would be different where the contract is for the benefit of a third party and such benefit is obtained by a party who is acting individually and not as agent for the beneficiary.[9] The court further held that the distinction between a promise made to an agent for his principal and a promise made to a principal for the benefit of a third party, was a real one and ought to be maintained. In *Natal Land & Colonisation Co Ltd v Pauline Colliery and Development Syndicate Ltd* [1904] AC 120 the promisee purported to act as agent for a company to be formed (and was therefore at the time of the contract non-existent) whereas in *McCullogh* although the company was non-existent, the promisee acted as trustee for it and therefore acted as dominus of the relative subject matter. Thus a promisee who purports to contract as principal not as agent, may validly contract for the benefit of a non-existent third party such as a company to be formed.[10]

[26] This distinction was done away with by s 35 of the Companies Act. Section 35 removed the anomaly that a contract made by a trustee for an undisclosed principal was valid (*McCullogh*) while one made by an agent was not (*Natal Land*).[11] In any event, the factual situation in the matter under consideration does not fall within s 35 of the Companies Act in regard to pre-incorporation contracts and the formalities required by that section have not been satisfied.

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[8] At 207.
[9] At 209
[10] See generally R H Christie and G B Bradfield *The Law of Contract* 6 ed (2011) at 272; 1 Lawsa 2 ed paras 185 and 189.
[11] Christie and Bradfield, *supra*, at 272.

[27] The appellants' argument is that the company which was renamed Freefall was in existence at the time because it was registered on 6 May 2002 and consequently the agreement was one where the principal existed but was simply unnamed at the time. The submission is made that the agreement is enforceable on the authority of *Springfield Omnibus Service Durban CC v Peter Maskell Auction CC* 2006 (4) SA 186 (N) at 193A-E which deals with the principal of the undisclosed principal which applies where the one party believes that the other is acting personally, whereas he is acting on behalf of a principal. It also provides that once the party is aware that the other party is acting on behalf of a principal, his intention can only be that he wishes to contract with the principal through the agent.

[28] In this matter, Seelenbinder had qualified his signature and indicated that he had signed the agreement as agent. Seelenbinder acted as agent and not as principal and therefore the doctrine of a contract for the benefit of a third party does not apply. At the time of signature, both Seelenbinder and Van Rensburg were unsure as to the identity of the principal. Seelenbinder purported to act as agent for Newco, which was in existence at the time. Van Rensburg said that Seelenbinder, at a minimum would have been representing the two of them, namely Van Rensburg and Seelenbinder. It is therefore clear that Seelenbinder had no authority to act on behalf of Newco and the principle of the undisclosed principal cannot apply.

[29] It was argued, on behalf of the appellants, that Freefall had, by its conduct adopted or ratified the authority of Seelenbinder. There is no evidence that Seelenbinder and Van Rensburg acting as the sole directors of Freefall ratified Seelenbinder's conduct and retrospectively conferred authority upon Seelenbinder to conclude the agreement. On 4 March 2004, the directors of Freefall adopted a resolution nominating Freefall as purchaser in respect of the

15 December 2003 agreement. In this regard the crucial issue is that the resolution says that Freefall is nominated as the purchaser and contracting party which is the appropriate resolution for the nomination of Freefall by Newco as the purchaser. The terms of the resolution refute any suggestion that up to that stage Freefall had ratified the authority of Seelenbinder. It had nothing to do with the lack of authority of Seelenbinder or the ratification of his conduct, as the first paragraph of the resolution is simply a recital of the provisions of the agreement. In the view we take of the matter, the document signed on 15 December 2003, relating to the sale of Financial Services' shares in Protector, does not constitute a valid agreement and is therefore unenforceable.

[30] We return to the question of unjust enrichment. As has been mentioned in paragraph 19 above, it is clear from the evidence that the funds in the Standard Bank account belonged to Protector. These funds were paid by New Protector to Protector for the sale of the latter's business. The account was opened in the name of Protector by Van Rensburg and Seelenbinder, the only two directors of Protector at that stage. When the funds were moved to FHA it was still the funds of Protector and they were paid over without true liability. Counsel for the appellants conceded, that at that stage, the money still belonged to Protector and that it could, successfully have applied for a rei vindicatio for a return of the money.

[31] It was argued by the respondents that this was not a case of 'indirect enrichment' with Freefall interceding between Protector and Financial Services because there was no valid sale of shares to Freefall and the funds in question did not belong to Freefall, it throughout remained Protector's money. In light of the finding that the sale of shares agreement was invalid, *Visser* and *Esselen* are distinguishable and not applicable to this matter as there was no true liability which Freefall, by paying Financial Services, intended to settle.

[32] It is useful to refer to the writings of the author, Niall R Whitty Indirect Enrichment in Scots Law 1 (1994) 200 *Juridical Review* at 250 where he deals with a scenario where no legal relationship exists between I and T (Protector and Freefall) and T and E (Protector and Financial Services). He writes:

'One would expect that, a fortiori, where I pays T in error and E takes the money from T wrongfully or without T's authority, I has an enrichment claim against E. On one view, since the transactions between I and T and between T and E are vitiated by error and wrongfulness respectively, there is no reason to construe them as juridical acts transferring wealth from I to E.'

There was no legal ground for the money to have been transferred from Protector to Freefall and neither was there a legal ground for it to have been transferred from Freefall to Financial Services. Put differently, in these circumstances the enrichment did not leave Protector's estate in terms of a valid legal ground, nor did it enter Financial Services' estate in terms of a valid legal ground, as the payment to Financial Services was without causa.[12] In the view we take of the matter, the chain of causation linking Financial Services' enrichment with Protector's impoverishment, is not broken.

[33] It was further argued by Financial Services, in the alternative, and in the event of the court finding that all the requirements for enrichment liability are satisfied, that Financial Services had, bona fide, disgorged any enrichment before the action was instituted on 1 March 2007. It was the testimony of Sanet Uys, the group financial director of Glenrand MIB, that Financial Services had expended the proceeds it received, first, by discharging its debt to Glenrand MIB on 22 June 2004 when the money went into Glenrand MIB's bank account, in the amount of R38,1 million; and second, by declaring a dividend on 13 June 2005 in favour of Glenrand MIB for the balance of R11,7 million. For these reasons, it was contended by Financial Services, that this claim should fail.

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[12] J du Plessis *The South African Law of Unjustified Enrichment* (2012) at 305.

[34] Financial Services' liability is confined to the amount of its actual enrichment at the time of the commencement of the action. Enrichment may be constituted by a decrease of liabilities which would otherwise not have taken place.[13] As regards the payment of the loan, the enrichment of Financial Services was still in existence at the time of the action, because of the decrease in its liabilities which would otherwise not have taken place. In respect of the payment of the dividend, on the face of it, it would appear that Financial Services was not enriched at the time of the action, because the payment of the dividend was purely a distribution of profits to shareholders. However, from the moment that Financial Services became aware, or ought to have been aware, that it had been enriched sine causa at the expense of Protector, its liability is reduced or extinguished, only if Financial Services is able to prove that the diminution or loss of its enrichment, was not due to its fault.[14]

[35] Harpur testified that Dr Clarence Mini, a director of Tradeworx, met with him on 23 August 2004 and accused him of stealing the R50 million. As a result Harpur met with Seelenbinder and the latter drew a chart, explaining to Harpur how the money had been transferred. It was then that Harpur questioned Seelenbinder about why the money was transferred via Namibia and

> 'his response was there was some concern that in some of the structure there might have been something that touched on s 38 of the Companies Act, and by structuring this deal through an offshore company outside of South Africa that would have avoided any problems with that particular section.'

[36] Harpur said he did not think there was anything untoward about the flow of the funds that he could remember. He conceded that Protector was entitled to and would own the money it received for the sale of its business. He agreed that Protector was not obliged to pay the R50 million to Financial Services.

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[13] 9 *Lawsa* 2 ed para 209
[14] *ibid.*

Harpur disputed the assertion that after he had met with Seelenbinder he should have been alerted that something was amiss and from that point must have realised that Financial Services was not entitled to retain the money. His answer was that he would have acted if he thought action was required and by the fact that he had not taken action, he did not think it was necessary. Harpur agreed, in the context of the admission made on the pleadings, that in terms of s 38 of the Companies Act, Protector could not directly or indirectly, give financial assistance for the purpose of, or in connection with the purchase of the shares and that Protector could not in any way give assistance to Freefall to pay the R50 million.

[37] Harpur had been the CEO of Glenrand MIB since 1997, which became a listed company on the JSE in June 1998. It is quite clear that Harpur, as an experienced CEO, should have been alerted to a possible contravention of s 38 of the Companies Act. When Seelenbinder pertinently drew Harper's attention to the possibility of a breach of s 38, Harpur should have investigated the validity of Seelenbinder's claim that this had been averted by directing the funds through Namibia. At that stage, Financial Services and Harpur should have been aware that Financial Services had been enriched sine causa at the expense of Protector. Financial Services was accordingly obliged to prove that the loss of the enrichment by payment of the dividend to Glenrand MIB was not due to its fault. It is quite clear however, that Financial Services failed to do this and consequently it is obliged to repay the dividend.

[38] It seems that the appellants' alternative argument is that Financial Services was not enriched, because the assets it owned before the sale of shares agreement was concluded, namely the shares in Protector and indirectly the business of Protector, were without value by the time of the action and the shares were the equivalent in value of the payment made. In other words,

Financial Services was not enriched, because it was not better off financially, after the invalid sale of the shares. This argument is without merit because it seeks to consider whether Financial Services was enriched, in isolation from a consideration of whether Protector was impoverished by the transaction. A plaintiff's claim is the amount by which it has been impoverished, or by which the defendant has been enriched, whichever is the lesser.[15] Every enrichment action must therefore embrace an enquiry not only into the defendant's enrichment, but also into the plaintiff's impoverishment.[16] It is quite clear that Protector was impoverished by the payment of the amount of R50 million and that Financial Services was enriched by this amount. The fact that the assets which Financial Services parted with, in terms of the void agreement for the sale of shares, were valueless at the time of the action is irrelevant. In the circumstances, Protector should be successful in its enrichment claim against Financial Services.

<u>Claim D – Disposition without value in terms of s 26 of the Insolvency Act</u>

[39] It was alleged by the respondents that the payment of R50 million to Financial Services, which payment can be traced back to the banking account of Protector, constitutes a disposition without value within the context of s 26 of the Insolvency Act.[17] The disposition took place within two years before the commencement of Protector's winding-up, which was wound up due to its inability to pay its debts. In the circumstances, Financial Services bore the onus

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[15] 9 *Lawsa* 2 ed para 209.
[16] 9 *Lawsa* 2 ed para 209.
[17] Section 26(1) reads:
(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent-
(a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;
(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:
Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.

to show that, immediately after the disposition was made, the assets of Protector exceeded its liabilities.

[40] The uncontested evidence of the appellants' expert witnesses, Neeraj Shah and Riana Fourie, both chartered accountants, was that at the time of payment of the sum of R50 million into the trust account of ENF on 15 March 2004, the assets of Protector exceeded its liabilities. The guarantees or indemnities furnished by New Protector to Protector against all claims and liabilities did constitute assets of Protector.[18] The court a quo misconstrued Shah's evidence and took into account factors prevailing at a time not material to the enquiry. For these reasons, the finding of the high court in this regard cannot be supported. Counsel conceded, and rightly so, that this claim had not been proved.

[41] The following order is made:

1 The appeal of the first appellant is dismissed.

2. The appeal of the second and third appellants is upheld.

3 As against the first, second and third appellant, the judgment of the high court is set aside and replaced with the following:

'(a) The claim against the fourth and fifth defendants is dismissed with costs.

(b) The first defendant is ordered to make payment of the sum of R50 million together with interest at the rate of 15, 5 per cent per annum from 15 March 2004, to date of payment to the plaintiffs.

(c) The first defendant is ordered to pay the plaintiffs' costs.'

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[18] *Millman & another NNO v Masterbond Participation Bond Trust Managers (Pty) Ltd (Under Curatorship) & others* 1997 (1) SA 113 (C) at 123C-D.

4 The respondents are ordered to pay the costs of appeal of the second and third appellants.

5 The first appellant is ordered to pay the costs of appeal of the respondents.

6 The respondents are ordered to pay the costs of appeal of the fourth appellant.

L V THERON
JUDGE OF APPEAL

K SWAIN
ACTING JUDGE OF APPEAL

Appearances

Appellants:	WG Van Der Linde (with AO Cook) Instructed by: Norton Rose South Africa, Johannesburg Webbers: Bloemfontein
Respondents:	PF Rossouw SC Instructed by: De Vries Incorporated, Johannesburg Matsepes Incorporated: Bloemfontein