

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Date of hearings:

9 and 10 November 2016: trial

31 March 2017: Interlocutory application

Case number: 2015/21192

Reportable

Of interest to other judges

Revised.

25/4/2017

In the matter between:

SILVASALE EVENTS AND CATERING CC

Plaintiff

and

IDEAL DRIVE PRE-OWNED CARS CC

Defendant

JUDGMENT

BRENNER AJ

1. The trial in this matter involved claims by the plaintiff, Silvasale Events and Catering CC ("Silvasale"), against the defendant, Ideal Drive Pre-Owned Cars CC ("Ideal Drive"), based on alternative causes of action, in the first instance, based on the law of contract, and in the alternative, based on the law of unjust

enrichment.

2. An analysis of the pleadings is warranted, to provide the context against which the claims were brought, and to clarify the material issues in casu.
3. Silvasale contends as follows. In or about July 2014, and at Pretoria, Silvasale, represented by *"a duly authorised person"*, purchased a 2013 white Mercedes Benz 63 AMG model, with registration number JBK [...] NW ("the Mercedes Benz"), from Ideal Drive, for a purchase price of R903 900,00, including Vat. Silvasale attaches an invoice issued by Ideal Drive dated 8 July 2014, which identifies the purchaser as Silvasale and the delivery address as that of Silvasale. Silvasale avers that it made a part payment to Ideal Drive of R746 000,00 on 4 July 2014.
4. Silvasale tenders payment of the balance of the purchase price, of R157 900,00 on delivery of the Mercedes Benz by Ideal Drive. In the alternative to this, *"in the event of the Defendant failing to deliver the motor vehicle to the Plaintiff"*, Silvasale avers that Ideal Drive has been enriched in the amount of R746 000,00, that the enrichment occurred at the expense of Silvasale, such enrichment was unjustified, and at no time was Silvasale indebted to Ideal Drive in the amount of R746 000,00, nor did Silvasale have any obligation to pay such amount to Ideal Drive.
5. In the result, Silvasale claims, as against Ideal Drive, either the delivery of the Mercedes Benz against payment of the balance of R157 900,00. Its prayers did not mention the tender to pay, but this was clarified at the hearing. Alternatively, it claims repayment of the sum of R746 000,00. In both instances, costs orders on the attorney and client scale are sought.
6. Ideal Drive's defence, which incorporated *facta probantia*, (which nevertheless served to assist with a proper analysis of the issues), is as follows. The grounds for the claims of Silvasale, founded on an agreement of sale, alternatively, unjust enrichment, are denied in general terms.
7. Without derogating from the generality hereof, however, Ideal Drive made specific allegations in justification hereof. Ideal Drive conducted business as a pre-owned motor vehicle dealer. During or about May 2014, one Nico Kruger ("Kruger"), instructed Ideal Drive, represented by M Schmidt ("Schmidt"), to source a Range Rover Evoque motor vehicle ("the Evoque") for Kruger, which he wanted to acquire for his fiancée, Angela Slabbert ("Slabbert").

8. Ideal Drive found an Evoque and, on the instruction of Kruger, issued a cash invoice on 27 June 2014, for delivery of the Evoque to Kruger. Hereafter, on Kruger's instruction, the invoice dated 27 June 2014 was cancelled on about 1 July 2014, and a new invoice issued to a company styled "No 4 Distributors (pty) Ltd" (this company is referred to as "No 4 Distributors" or "No 4 Distributors (Pty) Ltd", depending on context). This invoice contained details of a deposit for R38 651,67, representing the trade in value of Slabbert's old car, a Mini Cooper.
9. On 4 July 2014, again on the instruction of Kruger, the invoice dated 1 July 2014 was cancelled and substituted with an invoice issued to Slabbert for delivery to Slabbert. On the same date, being 4 July 2014, Ideal Drive received payment by EFT of the amount of R746 000,00. This amount exceeded the balance owing for the Evoque, which was R696 648,33.
10. When Ideal Drive made an enquiry as to why the amount paid failed to accord with what was in fact payable, Kruger explained that such overpayment constituted an error and that the overpaid amount should be refunded to the bank account of Slabbert. Ideal Drive acted on such instructions and duly paid the credit to Slabbert. To summarise, therefore, Ideal Drive received and accepted payment of the sum of R746 000,00 as payment for the purchase of the Evoque.
11. Concerning the Mercedes Benz, Ideal Drive asserted as follows. On 25 June 2014, Kruger instructed Ideal Drive to source a Mercedes Benz C63 AMG motor vehicle for Kruger. He informed Ideal Drive that this vehicle would be exported to New Zealand for a renowned All Blacks rugby player, one Dann Carter. On 25 June 2014, Ideal Drive successfully sourced a Mercedes Benz from Struben Street Motors and informed Kruger accordingly.
12. On 27 June 2014, on instructions from Kruger, Ideal Drive issued an invoice to No 4 Distributors for the Mercedes Benz. Hereafter, this invoice was cancelled and substituted on 8 July 2014 with an invoice made out to "Silva Sale Events", with the Mercedes Benz being deliverable to the address of Silva Sale Events, based on a copy of a business card of one Marco Sale ("Sale") of Silva Sale Events, which Kruger had sent to Ideal Drive. The invoice dated 8 July 2014 for the Mercedes Benz was created on 8 July 2014, four days after payment by Silva Sale by EFT of the sum of R746 000,00, accepted by Ideal Drive as payment for the Evoque. The invoice is for a total price of R903 900,00. It does

not reflect the deposit of R746 000,00 which Silvasale had paid on 4 July 2014.

13. Following enquiries by Ideal Drive to Kruger concerning payment of the Mercedes Benz, on 9 July 2014, 11 July 2014, 15 July 2014, 18 July 2014 and 28 July 2014, Ideal Drive cancelled the invoice to Silvasale for the Mercedes Benz and notified Struben Street Motors of the cancellation of the transaction.
14. At inception of proceedings, I was informed that Silvasale's locus standi to sue was no longer in issue. It was confirmed that the parties had agreed that discovered documents would serve as evidence of what they purported to be, and letters, emails and faxes would be regarded as having been sent and received by the addresser and addressee, without the veracity of the content of the documents being admitted.
15. In my perusal of the pretrial documents, I noted the admission by Silvasale in its response to Ideal Drive's enquiries in terms of rule 37(4)(b), dated 3 May 2016, that Silvasale *"does not allege any agreement of sale"*, between the plaintiff and the defendant, this in respect of the sale of the Mercedes Benz. Silvasale also alleged in the same response that *"Nico Kruger acted as an independent marketer/consultant to the Plaintiff during the period from or about May 2014 - October 2014."*
16. The answer of Silvasale to Ideal Drive's question as to the grounds upon which Silvasale sought attorney and client costs, and grounds for why such an order should not be granted against Silvasale, if Ideal Drive was successful in its defence to the action, are inciteful:
"Based on the dishonesty of the defendant and/ or the lack of any proper defense (sic) pleaded by the Defendant and/ or the defendant's receipt of R746 000.00 and it's (sic) refusal to repay same to Plaintiff and/ or Defendant's negligence in paying amount to an unauthorised person and/ or Defendant's negligence in ascertaining from whom it received a payment of R746 000.00 and/ or Defendant's negligence in properly ascertaining the locus standi and financial capabilities of Kruger and Slabbert and any relationship they might have with Plaintiff."
17. Silvasale denied that an attorney and client costs order against it was justified because it had
"acted bona fide in this matter unlike the behaviour of the Defendant."
18. On 10 November 2016, after the parties had closed their cases, I reserved

judgment subject to the parties serving heads of argument by 25 November 2016.

19. On this date, Ideal Drive filed heads of argument but Silvasale failed to do so. Instead, Silvasale served a notice to amend its claims by introducing two further alternative claims. These claims were the following, namely:

- i. If the Court found against Silvasale on the sale of the Mercedes Benz and on the claim for unjust enrichment, then it contended that, on or about 4 July 2014, it paid for and purchased a Land Rover Evoque from Ideal Drive for R746 000,00, and Ideal Drive failed to deliver this vehicle to it;
- ii. If the Court found that the above purchase did not occur, then Silvasale made a payment to Ideal Drive on 4 July 2014 of the sum of R746 000,00 for the purchase of the motor vehicle, that Ideal Drive unlawfully misappropriated this amount towards the purchase of the Land Rover Evoque by Angela Slabbert and/or Nico Kruger, and paid R49 351,67 to Slabbert; Ideal Drive acted "*negligently alternatively fraudulently*" in using the sum of R696 648,33 for the purchase of the Land Rover Evoque and paying R49 351,67 to Slabbert when it was aware or should reasonably have been aware that the R746 000,00 was paid by Silvasale.

20. Ideal Drive objected to the proposed amendment and this necessitated a substantive application for leave to amend Silvasale's particulars of claim. Heads of argument were filed by both parties on 24 March 2017. The application was argued before me on 31 March 2017. I dismissed the application, with costs on the attorney and client scale. My reasons herefor appear below. Silvasale was directed to serve its heads of argument in the main action by 7 April 2017 and it duly did so.

21. I will proceed to traverse the evidence in the trial proceedings in November 2016 and will thereafter deal with the amendment application.

22. Silvasale led the evidence of three witnesses, namely, Pedro Maria de Magalhaes E Silva ("Silva"), Silva's son, Jean Michel Silva ("Jean Michel"), and Carol Ann Dell ("Dell"). Ideal Drive adduced the evidence of Kruger and Melande Schmidt ("Schmidt").

23. I have analysed the witnesses' evidence insofar as it pertains to the material issues as raised by the pleadings. I have kept to a chronological sequence of events for purposes of coherence, so that, in the main, the summary of evidence

integrates questions posed in chief, under cross-examination, and in re-examination.

24. Silva testified that he was currently the sole member of the plaintiff, Silvasale. Previously, he and Marco Sale ("Sale") were equal members of the corporation, as at July 2014. The core business of Silvasale was to provide catering services to the Wanderers Old Boys' Club.
25. Silva said he had met Kruger through a friend, one Enrico, (it later transpired from Kruger's evidence that his surname was "da Foncio"), (who was a friend of Sale's), who had vouched for Kruger. In 2014, Kruger approached him with a business proposition, which was to acquire motor vehicles in South Africa for export to New Zealand, on the basis that Silvasale and Kruger would split the profits equally. Kruger told him that a rugby player, Richie McCall, ("McCall"), was looking for a Mercedes Benz C63, and that this could constitute their first transaction. Silvasale had never been involved before in business of this nature.
26. In early July 2014, Kruger told Silva that he had found the Mercedes Benz that McCall was looking for, and that Silva had to make payment of a deposit of R746 000,00, urgently, to secure the vehicle. Kruger said that the balance of the purchase price could be paid once he had received a call to confirm that the vehicle was ready for delivery. Kruger gave Silva the bank account details of the car dealer who would supply the vehicle. Silva testified that, on 4 July 2014, in good faith, Silvasale made such payment, by electronic funds transfer, to the bank account given by Kruger. He made the payment without an invoice from Ideal Drive. Silva was shown a payment advice produced by the bank of Ideal Drive, namely Absa, containing a payment reference which Silva could not dispute having made. The payment notification expressly notes a payment reference as being:
"SILVASALE NO 4 DISTRIBUTERS PTY".
27. He said he had asked Silvasale's bookkeeper, Dell, to obtain an invoice for the Mercedes Benz. He recalled receiving the invoice for the vehicle on 8 July 2014. In cross-examination, Silva conceded that maybe the invoice had been obtained by Kruger and Kruger had given it to Dell on 8 July 2014. It is noteworthy that this invoice provided no credit for the amount already paid by Silvasale.
28. Moreover, there is no client signature on this invoice even though provision is made therefor. Silva did not suggest that Silvasale had signed the invoice of 8

July 2014, in acceptance of its terms, with any understanding that, thereby, a contract came into place.

29. He was referred to the communications between Kruger and Schmidt which proved that Carol (Dell) made a call to Ideal Drive on 20 October 2014. According to the whatsapp transcript before Court, on 20 October 2014, Schmidt had told Kruger that Kruger's bookkeeper (Dell) had asked for stuff from Schmidt concerning the purchase of a Mercedes Benz. The gist of Kruger's reply was that Dell was "*deurmekaar*" and that Schmidt should tell Dell to liaise with him, because he was her boss, and that Dell was about to lose her job and was trying by all means to keep it. Schmidt appeared from the transcript to accept Kruger's word, and said she would arrange to tell Dell to deal directly with Kruger. Silva could only reply that he had no knowledge of these goings-on behind his back, but persisted in his stance that he had seen Ideal Drive's invoice by 7 July 2014.
30. Silva confirmed that the authorised agent of Silvasale for the purchase of the Mercedes Benz for McCall was Kruger. He had no idea of the identity of the person who had represented Ideal Drive in this transaction. He had never spoken to any person at Ideal Drive. He had made the payment on the "*say-so*" of Kruger. Silva conceded that he "*did not think that Kruger represented Ideal Drive*" in the transaction. Kruger had never told him that he did.
31. Silva mentioned some other bad experiences with Kruger: Silvasale had paid for the hire of a private plane to transport the Eastern Province rugby union to Kimberley, but the rugby union had paid the cost of some R450 000,00 for the trip, to Kruger, instead of Silvasale. Silva had entrusted his watch to Kruger who had promised to arrange for it to be repaired by someone he knew, but it was never returned. Silva had preferred a theft charge against Kruger for this. Silva never testified about the sequence in which the business dealings with Kruger had transpired. An incident on 4 October 2014 had resulted in a breakdown in the relationship, after Silvasale had arranged for the use of his hospitality services, at the behest of Kruger, for the New Zealand/South Africa rugby match at Ellis Park, after receiving a purchase order from "*Business Connection for R1,8 million*". Silvasale had spent about R1,2 million on hospitality services and when it looked to Business Connection for payment, the latter informed Silva that the original order was false and forged, and refused to pay Silvasale.
32. After paying the sum of R746 000,00 on 4 July 2014, Silva said that he made

several phone calls to Kruger, who kept stalling him, mainly on the pretext that the transaction was being delayed due to export requirements. Silva never contacted Ideal Drive directly between July 2014 and the time that his son, Jean Michel, went to the premises of Ideal Drive.

33. Under cross-examination, he was shown documents and whatsapp communications between Kruger and Schmidt of Ideal Drive, between 17 May 2014 and 6 November 2014, from which it was apparent that Kruger had told Schmidt that the payment of R746 000,00 was for an Evoque acquired for Kruger's fiancée. On the same day of Silvasale's payment, being 4 July 2014, Schmidt had clarified with Kruger that the payment was for the Evoque, that the money had come from overseas funds and Schmidt had assumed that currency fluctuations had resulted in the overpayment.
34. The amount overpaid was credited on the same day, 4 July 2014, to the account designated by No 4 Distributors (Pty) Ltd in writing, namely, that of Slabbert. All Silva could say in reply was that he had no knowledge of these communications, or of what Silvasale's agent, Kruger, was telling Ideal Drive at the time. Silva was constrained to admit that the evidence revealed that what Silvasale's agent, Kruger, had told Silva about the R746 000,00 being a deposit for the Mercedes Benz was contrary to what Kruger had told Schmidt, namely, that the money was paid to acquire the Evoque for Slabbert. Silva conceded that, from the perspective of Ideal Drive, Ideal Drive had no intention of selling the Mercedes Benz to Silvasale and using the payment of R746 000,00 as a deposit on its purchase price.
35. According to Silva, Kruger *"disappeared around September or October 2014"*. He said that his son, Jean Michel, had gone to the premises of Ideal Drive to find out what had happened to the Mercedes Benz. Jean Michel reported back that the person to whom he had spoken, who Silva thought was the bookkeeper, had refused to divulge information about the transaction without a warrant. Jean Michel had, however, managed to establish from Ideal Drive that the money paid by Silvasale was used to buy the Evoque.
36. Counsel for Ideal Drive had asked Silva if Silvasale had any other relationship with Kruger. Silva answered that, apart from the vehicle deal, the hospitality contract at Ellis Park, the private charter for the eastern Province match, and his entrusting his watch to Kruger, this constituted the essence of the relationship. It

was then put to Silva that Kruger would come to testify that the sum of R746 000,00 was owing by Silvasale to him for monies owed from business dealings with Silvasale, and that Silva had agreed that the payment would be made to settle the debt to Kruger. Silva denied that Silvasale had ever owed money to Kruger in all its business dealings with Kruger.

37. Counsel for Silvasale objected to the question as this so-called "set-off" of liabilities to pay for the Evoque was not previously raised in the pleadings, nor when Silva was first cross-examined about the relationship with Kruger. No prejudice was suffered by Silvasale owing to this omission. He was afforded the opportunity to deny that monies were owed to Kruger by Silvasale. Moreover, on Silvasale's own version, (evidenced by its pretrial admission), Kruger was a marketer/consultant for Silvasale, from which the inference may be drawn that he may have had a claim to payment of monies from Silvasale.

38. Jean Michel testified that his father asked him in September/October 2014 to make enquiries about the purchase of the Mercedes Benz directly from Ideal Drive. Silva showed Jean Michel a copy of the invoice dated 8 October 2014 for the Mercedes Benz. When Jean Michel arrived at the premises of Ideal Drive in Pretoria, he first spoke to the receptionist, and was told he should speak to the owner. He reached Schmidt on her phone and advised her of the situation. Schmidt told him that the R746 000,00 payment was used for the Evoque and not the Mercedes Benz. Jean Michel asked Schmidt for the documents for the purchase of the Evoque. Schmidt refused because she said she had to receive a warrant before making any disclosures. On 6 November 2014, Jean Michel confirmed that he had sent a message to Schmidt asking for the invoice for the Evoque. In his message, he told Schmidt that she could hold onto correspondence between her and Kruger until the issue of a subpoena. He testified that Schmidt did not reply, whether by phone or email, and the matter was thereafter referred to Silvasale's attorneys. It was put to him that Ideal Drive responded to his message. He denied this.

39. In cross-examination, it was put to Jean Michel that he had told Schmidt that Kruger had defrauded Silvasale by millions of rands. This was not denied. It was put to him that Schmidt had told him the only transaction involving Kruger which had materialised was the one for the purchase of the Evoque. Jean Michel could not recall whether this occurred. He conceded that his message to Schmidt of 6

November 2014 might have occurred on the same day that he went to visit Ideal Drive in Pretoria.

40. Dell testified that she had been the financial manager of Silvasale since 2006 and remained so. Kruger was introduced to her by Silva and Sale as a person who would bring them more business. She said she had been told by Silva that Kruger had the original invoice, and, according to Silva, Kruger had apparently shown it to Silva in June or July 2014. Dell said she had never received the original invoice.
41. According to Dell, Silva had only asked her to obtain the invoice for the Mercedes Benz in September/October 2014, and the reason for this was for Silvasale to account for Vat. She made a phone call to Ideal Drive and, without clarifying, thought she had spoken to *"the owner"* to ask for it. She was told that this would be done. When it was not done, she phoned again, only to be told that it could not be released without Kruger's permission. But when Dell phoned on the third occasion, the invoice for the Mercedes Benz was released, by email from Ideal Drive. In cross-examination, Dell conceded that her conversations may have taken place with Jackie Lightfoot, ("Lightfoot"), a secretary employed by Ideal Drive, and not the owner. It was put to her that Schmidt had just suffered a miscarriage and was not in the office at the time. Dell could not deny this.
42. The plaintiff, Silvasale, proceeded to close its case.
43. Ideal Drive's first witness was Kruger. I interpose to mention that he was interrogated at length in cross-examination by Counsel for Silvasale on issues which were, at best, peripheral and collateral, and toto caelo irrelevant to the material issues between the parties. A modicum of latitude was extended in this regard, insofar as a credibility finding was also of value in my assessment of Kruger's testimony. In the process, moreover, the questions posed to him about his overall relationship with Silvasale and purported business dealings with it, which allegedly gave rise to Silvasale supposedly owing Kruger money, fortified my resolve in the conclusions drawn by me concerning whether Silvasale had chosen to sue the correct defendant. Of which, more later.
44. Kruger testified that he was served with a subpoena for the prior hearing on 5 May 2016, and thereafter, indicated his willingness to Ideal Drive's attorneys to testify voluntarily in Court. He had had two consultations with Ideal Drive's attorneys but was not asked to produce any documents for the trial.

45. He said he was a CA (SA), and had an MBA from Edinburgh University and was formerly the CEO of Namaqua Diamonds. He never practised as a chartered accountant or became registered as such. From 2011 until early 2016 he said he had worked as a fulltime consultant, and was currently employed by Imperial Holdings as its CEO in *"logistics, mining, and industrial supplies"*.
46. When working as a consultant, he said he performed assessments on *"financial restraints, governance, growth, turnarounds"*. To this end, he worked for two companies. The first company, No 4 Distributors (Pty) Ltd, ("No 4 Distributors"), specialised in hospitality and tourism. But he was neither a director nor shareholder of No 4 Distributors. According to a CIPRO search placed before Court, the directors of this company were Werner Adolph du Plessis ("du Plessis"), and Madumetja Edward Motale ("Motale"), According to Kruger, they were the only shareholders. Kruger said he could not become a shareholder until he had *"added value"*. The company was registered on 30 June 2014, which was the date on which du Plessis and Motale became directors.
47. From 2013 to 2015, Kruger said he was an employee of No 4 Distributors, but had not signed a written employment contract. He performed consultancy services for it. His hourly rate as an employee of No 4 Distributors was not fixed. He gave No 4 Distributors advice on corporate finance and potential projects in leisure and hospitality. Another company, N&JR Brands ZA (Pty) Ltd, had a wider scope in general consulting to listed companies including Imperial and Foschini. (This company did not feature in this case).
48. He said he had been introduced to Sale by Enrico da Foncio in the latter part of 2013, the purpose being to help Silvasale as a financial consultant with growing its business. Kruger said that when he met Silva and Sale, whom he understood to be 50% members of their corporation, they talked about the expansion and restructuring of Silvasale beyond the scope of catering for the Wanderers Club.
49. He admitted that no written agreement was concluded with Silvasale to confirm the terms of the consultancy services to be rendered by him. He spoke of preparing a business plan but said it was not reduced to writing. Silvasale allegedly agreed to pay him for his time and to reimburse him for expenses. But no hourly rate was agreed and he did not keep timesheets. He asserted that any payments for services performed and expenses incurred by him were payable by Silvasale to No 4 Distributors. There was talk of his taking a one third stake in

Silvasale as a third member once he had *"added value"*. Silvasale had also allegedly *"seconded"* him to talk to a lawyer, du Plessis, (one of the directors of No 4 Distributors), to provide legal advice, for which there were *"many consultations"*. The consultations related to the *"restructuring of the business, capital financing, and new projects."*

50. Kruger said he tried to involve Silvasale in a number of new projects including "aquaculture". Kruger said he introduced Silva to IP partners but admitted that the project was never implemented. He said he brought Fedex to Silvasale but could not assert that anything came of this. He said he had the invoices for the services rendered and disbursements incurred by him. When asked about the business opportunity presented to Silvasale to export cars to New Zealand, Kruger could not explain why the project was not taken up by the company he worked for, namely, No 4 Distributors. It was put to Kruger that it was obvious that he had no funds to pay for either the Evoque or the Mercedes Benz, to which he replied that he could have accessed the funds from a foundation which held money via an overseas based company called *"Gladeus."* He said he might have also traded in his existing vehicle, a CLSOO Mercedes Benz.
51. Kruger said that it turned out that he and Silvasale had different views about growth, and that the relationship *"fizzled out"*. He said he raised invoices for services and was paid in full by Silvasale. If any business had developed, he was promised an equity stake in Silvasale by Silva and Sale. He said he never received any equity interest because the relationship *"did not pan out"*. When probed further under cross-examination, he asserted that his arrangement with Silvasale was that he would receive both equity and fees.
52. Kruger subsequently changed his version and went so far as to say that he and Slabbert and/or a nominee appointed by either or both of them would have taken up an equity interest in Silvasale. This change of version occurred when it was pointed out that Slabbert had, after the purchase of the Evoque, applied for finance through Ideal Drive to acquire a 2011 Mercedes Benz S63 AMG. In her application to MFC, signed by her on 2 August 2014, her total net monthly income from Silvasale was stated as *"R300 000,00"*. Kruger was forced to admit that this purported income of Slabbert's did not emanate from Silvasale, and ventured to say that she still maintained her self-diet clinic from which income was received, and that the sum of R300 000,00 was comprised of components

and was not a *"straight salary"* from Silvasale.

53. Kruger was asked who the "shareholders" (or members) of Silvasale were on 2 August 2014, (the date when Slabbert signed the MFC form), to which he yet again changed his version and said that they were *"Pedro and Marco and either me and/ or my wife and/ or nominee."* In the MFC form, Slabbert had described herself as self-employed at Silvasale Events and as a *"shareholder"* of Silva sale, having been so employed for the past five years. She also described her spouse as self-employed at Silvasale and as a *"shareholder"*. It merits mention that the papers revealed that Slabbert's applications for finance to MFC, Wesbank, Barclays and Absa were all declined. The comment in the MFC refusal form is enlightening:

"Information at hand indicates unacceptable high risk Non supportive trade references".

54. A special condition on the Wesbank refusal form mentioned that a valid current payslip verified as original was required to confirm Slabbert's net monthly income.

55. On the subject of the payment of R746 000,00 to Ideal Drive, Kruger said that he had raised an invoice for work done for Silvasale in this amount, in the name of No 4 Distributors (Pty) Ltd. He had performed services for Silvasale from the beginning of 2014 until around "September/October/November 2014" and had worked during the week and over weekends on its business. He could not explain how the sum of R746 000,00 was calculated. He was asked if the amount represented his one third share of the profits of Silvasale, in answer to which he replied: *'It was from whatever.'*

56. Kruger could not explain how No 4 Distributors could have performed services for Silvasale in four days, from its incorporation on 30 June 2014, to 4 July 2014, (the date when Silvasale paid Ideal Drive), to justify a debt of R746 000,00. He said he might still have a copy of the invoice for this sum on his system. When probed under cross-examination, Kruger said that the R746 000,00 was owing to himself or his "nominee". He did not know when he gave the invoice for the sum of R746 000,00 to Silvasale. When probed, Kruger could not identify a single business opportunity brought by him to Silvasale which had materialised.

57. He had confirmed that the entity which had raised the invoice to Silvasale for consultancy services was No 4 Distributors (Pty) Ltd. When asked if he had

received permission from the directors of No 4 Distributors to divert money payable to it, on Kruger's version, to buy a vehicle for Slabbert, Kruger said he had received oral permission from them, after No 4 Distributors had been registered on 30 June 2014. (It merits mention that the Evoque was ordered from Ideal Drive on 27 June 2014, three days before No 4 Distributors was formed.)

58. Kruger said he had met Melande Schmidt of Ideal Drive through a friend of his fiancée's, Slabbert. This was in April/May 2014. He contacted Schmidt with the purpose of acquiring a Landrover Evoque for Slabbert, against the trade-in of her Mini Cooper. He said he had married Slabbert on 14 February 2014. The Evoque was paid for by Silvasale, by agreement with Silva, in discharge of Silvasale's liability to him for consultancy services rendered. The Evoque was registered in Slabbert's name as the owner.

59. Kruger was referred to the whatsapp transcript dated 4 July 2014, between him and Schmidt. In a message to Schmidt, Kruger told her that the sum of R746 000,00 would be paid to Ideal Drive. It was uncontested that Schmidt, as an aide memoire, had labelled Kruger in her cell phone by correlating his name with the vehicle that he was interested in.

60. The transcript reads as follows:

"04 Jul, 11:42 - Melande Schmidt: Ok. Why such weird amount? More than evoque but less than C63?"

04 Jul, 11:47 - Nico Kruger Evoque: That's what the transfer came in from overseas. you can just pay me the diff. It's for the evoque.

04 Jul, 11:47 - Melande Schmidt: Ok.

04 Jul, 11:48 - Melande Schmidt: when will C63 be happening.

04 Jul, 12:01 - Nico Kruger Evoque: Tmrw."

61. When asked why he had told Schmidt that the funds came from overseas, Kruger explained that this was meant to *"keep Melande calm."* The overpayment was paid into Slabbert's savings account on 4 July 2014. The Evoque was delivered to Slabbert on 5 July 2014 at the Brooklyn Mall.

62. Kruger confirmed having been mandated by Silva and Sale to source the Mercedes Benz for export to New Zealand. Kruger stated that he had asked Schmidt to raise an invoice for the Mercedes Benz as he presumed at the time that the project would proceed. Both Silva and Sale had confirmed to him that Ideal Drive could raise the invoice. The Vat number of Silvasale was given to him

by either Silva or Sale, and Sale had given him his business card.

63. Kruger testified that, when he first asked Schmidt to source the Mercedes Benz, he had asked for the invoice to be made out to cash with delivery to No 4 Distributors (Pty) Ltd. This took place on 27 June 2014. He later asked her to change the invoice to reflect the addressee as Silvasale and delivery to Silvasale. His reason being that, in the interim, Silvasale had accepted the project. He said he physically handed over this invoice dated 8 July 2014 to the financial controller of Silvasale, Dell, as he regularly visited Silvasale's offices.

64. The case was adjourned to the following day while Kruger was under cross-examination. He was called upon by the Court to use his best endeavours to procure the following documents, namely:

- i. All invoices raised by Kruger and/or No 4 Distributors (Pty) Ltd to Silvasale for services rendered during 2013 and 2014;
- ii. The most recent annual financial statements of No 4 Distributors (Pty) Ltd, if the directors permitted this;
- iii. Kruger's personal bank statements for all bank accounts conducted by him, including those at Capitec and RMB, from February 2014 to December 2014;
- iv. Kruger's personal income tax returns and assessments for the tax years to February 2014 and February 2015.

65. On his return to Court, Kruger brought none of these documents, save for a bank statement dated 4 November 2016 from RMB showing a debit balance of R3 042 285,47, and a miscellany of degree and other certificates indicating that he had received a B.Comm degree in 1994, a certificate in the theory of accounting in 1996, and was a member of the Institute of Chartered Accountants (SA) in 2001. His excuse for not bringing any of the documents called for was that he had been unable to access them in the time made available to him.

66. Schmidt was the last witness for Ideal Drive. She testified that she and her husband, Philip, were equal members of the corporation. Its business was to buy and sell used vehicles, 70% of the business being with franchisees and 30% with members of the public.

67. Schmidt had met Kruger in May 2014 through some close friends of her and her husband's in their complex. Her contact with Kruger extended from 17 May 2014 until 6 November 2014. During this period, she met him only twice. The rest of

the time she communicated with him via whatsapp. Kruger discussed the purchase of several vehicles with Schmidt but only one sale materialised, the one for the Evoque. She testified that in all her dealings concerning the purchase of vehicles from Ideal Drive's dealership, she had had no contact with Silvasale, whether represented by Sale or Silva, until the phone call from Dell on 20 October 2014.

68. The whatsapp conversations with Kruger started on 24 May 2014 over the purchase of an Evoque for a birthday present for Kruger's "girlfriend", Kruger insisting that the car should be black. Several Evoques were sourced but were not palatable to Kruger. When she asked Kruger on 19 June 2014 whether it was to be financed, he answered in the negative.
69. On 25 June 2014, Kruger brought up the subject of the Mercedes Benz C63 AMG, four door, with less than 20 000 km on the clock, any year from 2010 upwards. Schmidt said she would try to find one. On the same day, Schmidt found a 2013 Mercedes Benz C63 AMG diesel with 2 000 km on the clock, for R899 000,00, and duly notified Kruger. This fact is corroborated by an invoice issued to Ideal Drive by Struben Street Motors, dated 26 June 2016, for the sale of a C63 for R850 000,01.
70. On 26 June 2014, Schmidt asked Kruger if she was to invoice the Mercedes in his name and the Evoque in Slabbert's name, to which Kruger said that the Evoque was to be registered in Slabbert's name, and the Mercedes in someone else's name, for immediate export.
71. On 27 June 2014, after receiving instructions from Kruger in a whatsapp on 26 June 2014, Schmidt testified that Ideal Drive issued an invoice for the Mercedes Benz to cash, in the name of No 4 Distributors (Pty) Ltd.
72. On 26 June 2014, Schmidt found a brand new Evoque from Land Rover Waterford, through an established connection. Ideal Drive paid Waterford a holding non refundable deposit of R10 000,00 on the Evoque to secure it. This deposit would be set off against the trade in value of Slabbert's Mini Cooper, which was collected from Slabbert's home on 28 June 2014. Kruger confirmed that he was happy with this Evoque.
73. The first invoice issued by Ideal Drive on 27 June 2014, for the Evoque, was for cash, with delivery to Kruger at his address in Waterkloof Heights. Then it was substituted, on Kruger's instructions, on 1 July 2014, to cash, with delivery to No

4 Distributors (Pty) Ltd, at 833 Stanza Bopape Street, Arcadia. The trade in value of the Mini was included in this invoice.

74. Between 27 June 2014 and 4 July 2014, Kruger failed to come up with payment for either the Mercedes Benz or the Evoque, and Schmidt resolved to put pressure on him. Kruger's pretext for late payment in a whatsapp dated 28 June 2014, was that the EFT was *"from Switzerland to SA"*. Also on 28 June 2014, he informed Schmidt that the *"NZ business will be continuing because all the players including Ritchie Mccaw, Sonny Bill Williams and Ma'a Nonu have enquired about second hand demos"*.
75. On 29 June 2014, Schmidt told Kruger that the price for the Evoque would increase by R25 000,00 the following day. She admitted that this was a sales tactic to expedite payment. She said she also had to preserve her business credibility with Waterford. On 2 July 2014, Schmidt suggested that Kruger should at least send her proof of transfer of the funds into Kruger's account and she would say it was from a company or it was her money, commenting *"I hate this lying."*
76. Eventually, on 4 July 2014, Kruger told Schmidt the money would be paid that day. He asked her for the amount and Schmidt replied that it was R696 648,33 for the Evoque and R903 900,00 for the Mercedes Benz. She initially gave a total figure for both cars, being under the impression that the funds coming from overseas would pay for both the Evoque and the Mercedes. On the same day, Kruger informed her that R746 000,00 would be paid, and she was told that the figure was incorrect because the money came from overseas.
77. At 12:46 on 4 July 2014, Schmidt said that she received a message from her bank, Absa, to inform her of the payment of R746 000,00 by EFT. The reference on the sms was quoted as "SILVASALEN04DISTRIBUTERSP1Y". At the hearing, a printout of the payment produced by Absa corroborated this assertion. She testified that this confirmed to her that the money was intended for the purchase of the Evoque.
78. An invoice for the Evoque to No 4 Distributors (Pty) Ltd had been issued by Ideal Drive on 1 July 2014. Because of this, before making the refund of the overpayment, Schmidt had insisted that she receive a written instruction from No 4 Distributors (Pty) Ltd to pay the credit balance of R49 351,67 into the savings account of Slabbert.

79. This is corroborated by a document signed by Kruger on behalf of the aforesaid company.
80. A bank statement of Ideal Drive was referred to by Schmidt in regard to which she confirmed the following transactions on 4 July 2014, namely:
- i. Payment of the sum of R746 000,00 to Ideal Drive;
 - ii. Payment of the sum of R665 000,00 from Ideal Drive to Land Rover Waterford;
 - iii. Payment of the sum of R49 351,67 to Slabbert's bank account.
81. Kruger then asked Schmidt to change the Evoque invoice, for the third time, to reflect the sale to Slabbert and the delivery address to Slabbert. Schmidt testified that it was not unusual for a customer to ask her to change the details of the purchaser and/or owner of the vehicle. This invoice, dated 4 July 2014, was signed by Slabbert, together with a written offer to purchase, when the Evoque was delivered to her on 5 July 2014. This was standard procedure for Ideal Drive.
82. On 7 July 2014, Schmidt informed Kruger that she was *"getting pressure regarding C63"*. Kruger replied that he was *"getting export paperwork ready"*, but the transfer would be done in the next day or two. He asked Schmidt to issue the invoice to the entity described in a business card sent to her, and provided a Vat number. The business card was Marco Sale's card with the name of "Silva Sale Events" on it. When Schmidt asked whether she should email the invoice to Marco, (that is, Sale), Kruger told her to rather send it to him instead.
83. An invoice dated 8 July 2014 was made out to Silva Sale Events with delivery to Silva Sale Events, for the purchase of the C63 AMG Mercedes Benz for R903 900,00. At this juncture, Schmidt testified that she was led to believe by Kruger that he was a partner in the business of Silvasale. She had no reason to disbelieve him.
84. On 29 July 2014, Kruger maintained that he was *"still serious"* about buying both the C63 and S63 Mercedes Benz vehicles, but that he had had *"issues bringing more money in"*.
85. In late July 2014, Kruger asked Schmidt to source a Mercedes Benz S63 for purchase in Slabbert's name, on the basis that this purchase would be financed. On 2 August 2014, Slabbert had completed the credit application form and submitted same to Ideal Drive. It is plain from the papers that, by 6 August 2014,

Slabbert's applications for finance on the purchase of the S63 Mercedes Benz had been declined.

86. Further communications between Schmidt and Kruger went dead on 15 August 2014, when it became apparent to Schmidt that the purchase of the C63 and S63 was not going to happen. A letter dated 12 December 2014 from Struben Street Motors was produced to confirm that the sale of the Mercedes C63 AMG registration number JBK [...] NW was never completed.
87. Then, on 20 October 2014, Schmidt said that Ideal Drive's bookkeeper, Lightfoot, received a phone call from Silvasale's bookkeeper, (Dell), to ask for the invoice for the Mercedes Benz C63.
88. In a whatsapp on this date, Schmidt told Kruger that Kruger's bookkeeper had asked for "*stuff*" from Schmidt concerning the purchase of a "*Mercedes Benz*". The gist of Kruger's reply was that Dell was "*deurmekaar*" and that Schmidt should tell Dell to liaise with him, because Kruger was "her boss", and that Dell was about to lose her job and was trying by all means to keep it. Schmidt accepted Kruger's word, and said she would arrange to tell Dell to deal directly with Kruger.
89. On 6 November 2014, Jean Michel Silva arrived at the premises of Ideal Drive and spoke to Lightfoot, who gave him Schmidt's phone number, because Schmidt was out of office. Schmidt said she told Jean Michel that only the Evoque had been sold and that she could not disclose any documents to him as the transaction was with Slabbert. She said that Jean Michel informed her that Kruger was a "*skelm*" and that in six months, Kruger had stolen about R3,9 million from Silvasale.
90. On the same day, at 14:41, Jean Michel sent Schmidt a message to ask for the invoice for the Evoque, saying that SilvaSale had a right to this, and that correspondence between Kruger and Ideal Drive would be obtained under subpoena. At 04: 54pm on 6 November 2014, Lightfoot of deal Drive sent a copy of the invoice for the Evoque to the email address given by Jean Michel.
91. On 1 December 2014, attorney Andreas Kyprianou ("Kyprianou") sent a letter of demand to Ideal Drive to demand delivery of the Mercedes Benz C63, attaching Ideal Drive's invoice dated 8 July 2014 for R903 900,00. It mistakenly asserts that the full amount of the invoice had been paid by Silvasale.
92. On 2 December 2014, whatsapp communications took place between Schmidt

and Slabbert, whom Schmidt had labelled "Angie Evoque" on her phone. The conversations are quoted below:

"02 Dec 08:11 - Melande Schmidt: Hi Angie. I need to speak to you privately asap. When can I phone you when you are alone? Melande

(other messages omitted)

02 Dec 09:28 - Angie Evoque: It's embarrassing as it is for me now.

02 Dec 10:57 - Melande Schmidt: I need to know before 13:30. Im sitting with lawyers then.

02 Dec 11:01 - Angie Evoque: Werner du Plessis. vcf (file attached)

02 Dec 11:02 - Angie Evoque: I am with my lawyer now. Please discuss anything further with him. He has instructed me not to discuss this matter with anyone. Werner du Plessis. Thanks. This matter I have no clue whats gone on. Werner du Plessis. vcf(file attached)

02 Dec 11:03 - Melande Schmidt: Ok will give his details to them.

11 Dec 17:57 - Melande Schmidt: Hi, Have you given any thought about evoque and giving it to silvasale that paid for it? Plse let me know otherwise a fraud case will be opened on top of all the other things. Plse let me know. Melande

11 Dec 18:02 - Angie Evoque: Hi. It's in the hands of the lawyers."

93. Schmidt said that, on receipt of the demand, she contacted one Dieter Ehlers ("Ehlers") of the independent Dealers Association ("the IDA"), to ask him to help her, and to ask Silvasale for proof of payment for the Mercedes Benz. Ehlers wrote to Kyprianou on 2 December 2014 to request proof of payment. Ehlers' email asserts, inter alia, that:

"We acknowledge that Ideal Drive has issued an invoice dated 8-7-2014 to Silva Sale Events for a 2013 Mercedes-Benz C63 AMG on the instruction of Mr Nico Kruger, who had introduced himself to said Dealer as the owner of Silva Sale Events."

94. On 2 December 2014, Kyprianou sent Ehlers proof of payment, but on Silvasale's own version, this could only have been for R746 000,00. Ultimately, on 15 January 2015, deal Drive's attorneys, Day Inc, replied to Kyprianou's demand and denied that any agreement was concluded between Silvasale and Ideal Drive. In cross-examination, Schmidt confirmed that it was only on 2 December 2014, when Kyprianou sent proof of payment to Ehlers and copied Ideal Drive, that she became aware that it was Silvasale that had paid the sum of

R746 000,00 to Ideal Drive. Schmidt repeated that the sms received by her on 4 July 2014 for payment of this amount had mentioned "*Silvasale No4 Distributors*". It was in December 2014 that it became apparent that Kruger had been "*the mastermind*" behind the deception of Silvasale into believing that the latter was acquiring a Mercedes Benz C63. Schmidt testified that she had never been involved in a court case of this nature before.

95. Schmidt was referred to complaints made against Ideal Drive. On 8 July 2015, Kyprianou wrote a letter of complaint against Ideal Drive to the FSB, the Motor Industry Ombudsman, the SA Consumer Complaints, the Retail Motor Industry, the SABS, and the IDA, alleging, inter alia, that Ideal Drive was unlawfully and fraudulently using an FSP number. On 9 July 2015, Kyprianou wrote to the SABS, South African Consumer Complaints and Deloitte Tip-Offs Anonymous to complain about the sale of the Mercedes Benz itself, alleging that deal Drive's conduct was "*unfair and unethical and may well be fraudulent and unlawful.*"
96. Schmidt testified that nothing came of the above complaints and that deal Drive was authorised to use the FSP number in question. When interrogated in cross-examination about the sequential numbers on invoices raised by Ideal Drive, which suggested that for Vat purposes these invoices were regarded as enforceable, Schmidt explained that deal Drive seldom issued pro forma invoices. She had installed a dedicated software programme which created a monthly "DIS report". This served to reconcile paid invoices against invoices which did not result in completed sales. This regularised the amount actually payable to SARS for Vat. She mentioned that most prospective purchasers were unwilling to accept or act on pro forma invoices.
97. In her view, a credit note on an issued invoice was superfluous as an issued invoice did not constitute a completed sale. A completed sale materialised when the invoice was signed together with Ideal Drive's standard offer to purchase, as against prior payment of the purchase price and delivery of the vehicle. She confirmed that this is exactly what had occurred with the sale of the Evoque.
98. It was put to Schmidt by Counsel for Silvasale that Schmidt had a "*tendency to lie in the whatsapp conversations*". On objection from Counsel for Ideal Drive, Counsel was instructed by this Court to withdraw this sweeping statement as being without foundation. She denied this in any event.
99. Counsel for Silvasale yet again suggested to Schmidt that she was "*selectively*

truthful" in her evidence, to which she responded that most of her evidence was capable of being corroborated by the paper trail which formed part of the various bundles before Court.

100. Schmidt emphasised that she had never had any communication with or from Silva or Sale, other than the phone call on 20 October 2014 from Dell to Lightfoot and the phone call on 6 November 2014 with Jean Michel, followed by his sms and Lightfoot's email of the same date to which the invoice for the Evoque was attached.
101. An attempt was made by Counsel for Silvasale to force Schmidt to concede that there was no legal basis for Silvasale to have paid Ideal Drive on 4 July 2014, and that Ideal Drive had been enriched at the expense of Silvasale. Schmidt replied that, with knowledge of the facts which had only come to light in December 2014, after the sale of the Evoque, this might be the case. In re-examination, she confirmed that the profit made by Ideal Drive from the Evoque transaction was about R28 000,00.
102. I turn to an assessment of the evidence.
103. Silva presented as an honest, naive, trusting and vulnerable witness, who had an unclear recollection of dates. His lack of business-savvy and susceptibility to chicanery are adequately demonstrated by his making a substantial payment to an entity with which he had had no prior dealings or communications, entrusting the transaction instead to Kruger, a person whom he had only recently met. His payment of the money without receipt of a prior invoice is also proof positive of his naivete.
104. His adamantness about receiving Ideal Drive's invoice on 8 July 2014 exacerbates his case, since the invoice does not reflect the payment of R746 000,00 as a down-payment or deposit on the Mercedes Benz, even though the pre-printed format makes provision for a deposit. This ought to have been cause for suspicion already as far back as July 2014, on the version given by Silva. His failure to make any effort to independently follow up on the transaction with the beneficiary of the money, Ideal Drive, for over three months, is further cause for circumspection concerning his irresponsible conduct. He did not even ask Ideal Drive for a receipt or any written confirmation of receipt, following payment on 4 July 2014.
105. He relied implicitly on the Information fed to him from time to time by

Kruger, whom he admitted was at all times the authorised agent of Silvasale in the purchase of the Mercedes Benz. He continued to do business with Kruger right up until 4 October 2014, exactly three months after the payment of the deposit, when his contract to provide hospitality services for an Ellis Park match, introduced to him by Kruger, went awry. He confirmed that he was misled by Kruger on at least four occasions and, in the result, lost millions of rands. Silva could not dispute that, from the whatsapp communications between Schmidt and Kruger, Ideal Drive had reason to rely on Kruger's assertions to it that the R746 000,00 was for the purchase of an Evoque and not the Mercedes Benz.

106. The evidence of Silva's son, Jean Michel, indicated that, in the light of the documentary evidence shown to him, that it was probably on 6 November 2014 that he went to the premises of Ideal Drive to enquire about the Mercedes Benz. Jean Michel did not deny having told Schmidt that Kruger had defrauded Silvasale of millions of rands.

107. The evidence of bookkeeper, Dell, corroborated Silva's version to the extent that she confirmed that Silva had told her that Kruger had shown Silva the invoice dated 8 July 2014, for the Mercedes Benz, in July 2014. Dell testified that Silva only asked her to obtain a copy of the invoice directly from Ideal Drive in "September/October 2014", for Vat purposes. The whatsapp transcript indicated that Dell's call took place on 20 October 2014 and Schmidt's evidence made it plain that Dell spoke to Lightfoot, not Schmidt.

108. Kruger proved to be dishonest, evasive, expedient, and fraudulent. As and when documentary evidence was shown to him, he adjusted his evidence and changed versions accordingly. He demonstrated a distinct aptitude for evading direct answers to pertinent questions. He was unreliable and patently deceptive. His excuse that he was unable to produce any of the highly relevant documents called for by the Court, certain of which should have been readily accessible, namely, lack of time, was inherently improbable, and redounded adversely against his credibility.

109. This notwithstanding, based on the proven and objective facts, borne out by, inter alia, the documents before Court, and corroborated by the vive voce evidence of Messrs Silva, Jean Michel, Dell, and Schmidt, Kruger's evidence confirmed that:

- i. he was authorised by Silva, acting for Silvasale, to acquire the Mercedes

Benz from Ideal Drive, on behalf of Silvasale;

- ii. he led Schmidt to believe that he was an authorised agent for both No 4 Distributors (Pty) Ltd and Silvasale, (and the communications between him and Schmidt were consistent with his assertions);
 - iii. he led Schmidt to believe that the payment of the sum of R746 000,00 emanated from No 4 Distributors (Pty) Ltd, (and the payment reference received by Schmidt mentioned No 4 Distributors);
 - iv. he viewed the payment of R746 000,00 by Silvasale as a payment to him and/or No 4 Distributors (Pty) Ltd for services rendered and/or disbursements incurred, and this gave him the basis for using the money to acquire the Evoque for Slabbert, albeit that he could not justify this claim against Silvasale;
 - v. he led Schmidt to believe that he was acquiring the Evoque for Slabbert, via a payment from No 4 Distributors (Pty) Ltd, duly represented by him;
 - vi. he led Schmidt to believe that the Mercedes Benz was being acquired by Silvasale, duly represented by him;
 - vii. objectively, his unlawful and fraudulent conduct successfully misled Schmidt into believing that the payment of R746 000,00 was intended for the purchase of the Evoque, and that the contract of sale for this vehicle was between Ideal Drive and Slabbert.
110. Schmidt presented as a witness of integrity. She was credible, reliable and meticulous in all material respects. Her memory of all events of importance was impeccable. Her integrity and moral rectitude was revealed by evidence other than her testimony before Court. When the wrong amount was paid for the Evoque, she immediately queried this. She insisted on a written instruction from No 4 Distributors to pay the overpaid amount to Slabbert, consistent with her understanding that the payment came from No 4 Distributors (and not Silvasale).
111. When Lightfoot received a call from Dell asking for the invoice for the Mercedes Benz, Schmidt immediately asked Kruger about this, on 20 October 2014, and believed him when he told her that he would deal with Dell about the query. On 6 November 2014, when Jean Michel asked for the invoice for the Evoque, she sent it to him. After receiving Kyprianou's letter of demand on 1 December 2014, Schmidt communicated with Slabbert, and even had the decency to suggest that the Evoque should be given to Silvasale, after she had

found out that Silvasale had effectively paid for it.

112. It was plain that Schmidt believed the representations made to her by Kruger, and that she had no cause to disbelieve him. The contrary may have been the case had Silvasale been less supine about matters and contacted her within a day or two after its payment to Ideal Drive, and thereby, alerted her to the true purpose of the payment. She relied on the submission to her of a business card of Silvasale and its Vat number, by Kruger, when generating the invoice dated 8 July 2014, and had no cause to suspect Kruger or his authority when he instructed her to send the invoice to him.
113. In advancing her evidence, as she quite correctly pointed out, there was objective documentary proof to corroborate her version in most respects. When she suggested that she should lie about something, so as to satisfy her supplier that the Evoque deal would go through, she said: *"I hate this lying."* These are not the words of an unadulterated liar. This may be contrasted with Kruger, who never admitted to lying about anything, in the face of patent lies, such as the alleged debt of R746 000,00 owed to him or his nominee by Silvasale. He had associated himself with the fraudulent misrepresentations in Slabert's credit application form that she had been employed by Silvasale for five years, and was a shareholder, and earned a net monthly salary of R300 000,00.
114. I refer to the claim based on contract. This is legally untenable for a miscellany of reasons. In the pretrial documents, Silvasale admitted in its response to Ideal Drive's enquiries in terms of rule 37(4)(b), that Silvasale *"does not allege any agreement of sale"*, between the plaintiff and the defendant, in respect of the sale of the Mercedes Benz.
115. In any event, on its own version, Silvasale was bound by the conduct of its agent, Kruger. Its own agent performed a volte face, breaching his mandate qua agent, and held himself out to an unsuspecting third party, who had no knowledge of the terms of his mandate with Silvasale, as representing himself and/or another entity, No 4 Distributors, in the purchase of the Evoque.
116. No contract of sale can be concluded between a principal whose agent misrepresents to an innocent third party that he acts for another principal, (or personally), and the innocent third party, when the latter has no knowledge of the terms of the agent's true mandate, or the identity of the agent's true principal. Ideal Drive had every right to rely on the ipse dixit of Kruger when he informed

Schmidt that the payment of R746 000,00 was for the Evoque, that the payment came from No 4 Distributors (Pty) Ltd, and that the purchaser of this car was Slabbert. On signature of the invoice and standard offer to purchase of deal Drive by Slabbert, a contract of sale between Ideal Drive and Slabbert was consummated. This was Ideal Drive's standard *modus operandi*. In the result, Slabbert was in fact and in law the purchaser of the Evoque.

117. The fact that the monies paid to Ideal Drive by Silva Sale were unlawfully misappropriated by its agent, Kruger, for the purchase of an entirely different car, for the benefit of another person, Slabbert, militates against there being grounds for a contractual cause of action. There was no consensus ad idem between Silva Sale and Ideal Drive on the essentialia for a contract of sale, namely, on the *merx*, (the vehicle), the price, and the transfer of ownership of the *merx* to the purchaser.
118. Counsel for Silva Sale asserts in his heads of argument in the trial action that it is common cause that Silva Sale was "an undisclosed principal." This is at variance with the evidence advanced by Silva Sale's witnesses, and is inconsistent with its own pleadings.
119. The alternative claim appears to be based on the *condictio indebiti*. The starting point is that there is no general action based on enrichment in South African law. But there are four general requirements (per **LAWSA Volume 9 p111 paragraph 209**);
- i. The defendant must be enriched;
 - ii. The plaintiff must be impoverished;
 - iii. The defendant's enrichment must be at the expense of the plaintiff;
 - iv. The enrichment must be unjustified, that is, *sine causa*.
120. The *condictio* is available to a claimant to recover money or other property transferred in intended payment or performance of a non-existent debt. Vide **Le Riche v Hamman 1946 AD 648**.
121. The following are the established requirements for the *condictio indebiti* per **LAWSA Volume 9 p116 paragraph 212**;
- i. Ownership of money or other property has been transferred by the act of the parties, as a general principle;
 - ii. The *condictio* lies only against the *recipiens* of the *indebitum*;
 - iii. Generally, the claimant or plaintiff must be the one who is considered in

law to have made the payment;

- iv. The transfer of money or property must have taken place indebite in the widest sense, meaning that there must have been no legal or natural obligation to give it;
- v. The payment or transfer must have been effected solvendi animo per errorem, in the mistaken belief that the debt was due;
- vi. For a mistake of fact or law to give rise to a *condictio indebiti* the mistake must be excusable; the ignorance must not be *supina aut affectata*.

122. Silvasale failed to discharge its onus of proving the requirements for the *condictio indebiti*.

123. On the evidence, it was Slabbert who, as a result of Kruger's misappropriation of Silvasale's money, was enriched, and who was the actual recipients of Silvasale's money, and consequently, the Evoque and the cash component of about RSO 000,00. Ideal Drive was purely the conduit for the payment, while retaining a small commission of some R28 000,00, to which it was entitled, based on the facts as known by it on 4 July 2014, and the representations made to it by Silvasale's agent, Kruger.

124. These facts, simpliciter, vitiate the claim in its entirety. Additionally, on the evidence, Silvasale had potential claims against Kruger based, on, inter alia, his misappropriation of its monies and/or the breach of his mandate with it.

125. Secondly, the mistake made by Silvasale was not an excusable one, its ignorance being *supina aut affecta*. The determination of this requirement entails a value judgment.

126. The ratio in the case of **Willis Farber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 A at paragraphs 42 et sequitur**, serves of assistance, my emphasis included:

"42. It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need be said is that if the payer's conduct is so slack that it does not in the Court's view deserve the protection of the law, he should, as a matter of policy, not receive it. There can obviously be no rules of thumb; conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others, and vice versa. Much will depend on the relationship between the parties; on the conduct of the defendant

who may or may not have been aware that there was no debitum and whose conduct may or may not have contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment.

43.(Consider eg the case of a person who, whilst in doubt as to whether money is legally due, pays it not caring whether it is and without bothering to find out.) These are only a few considerations that come to mind; others will no doubt manifest themselves with the passage of time as claims for the recovery of money paid in error of law come before the courts. There is also the question of the onus of proof. In *Recsey v Reiche* 1927 AD 554 at 556 it was said that the onus in an action based on the *condictio indebiti* "lies throughout the whole case" on the plaintiff. This includes the excusability of the error.....I can conceive of nothing unfair in. and of no consideration of policy or practice militating against expecting of a plaintiff who alleges that he paid an amount of money in mistake of law to prove sufficient facts to justify a finding that his error is excusable. "

127. The case of **Affirmative Portfolios CC v Transnet Ltd trading as Metrorail 2009 (1) SA 196 SCA. at paragraphs 31 and 32,** is also instructive in the enquiry, my emphasis included:

"31. The Court has been reluctant to lay down formulations in order to circumscribe what is excusable and what is not.....One is however able to discern certain general principles that have emerged from the decided cases. Grossly negligent conduct or inexcusable slackness in the conduct of one's own affairs is generally (but not necessarily) regarded as inexcusable conduct. This has been derived from the statement of Voet 16.2.7 that the ignorance of fact should appear to be 'neither slack nor studied' (nec supine nec affectata) or of a fact concerning the plaintiff's own affairs.

32. Whether the defendant had induced the mistake in the plaintiff has often played an important part in the court's view of what constitutes an excusable error. See for example the facts in *Willis Faber and Bowman*."

128. The conduct of Silva in this case was supine and inexcusably slack. He made a substantial payment of R746 000,00 on the "say-so" of a person with whom he was not well acquainted. Yet he mandated this person (Kruger) to represent Silvasale in a transaction involving a substantial sum of money.

129. He made the payment before he had received any independent documents to verify the transaction. He made no effort to obtain documentary proof of receipt of the monies from the recipient of the monies, or confirmation that the recipient, Ideal Drive, had credited the correct transaction.
130. He said that he received Ideal Drive's invoice on 8 July 2014. Dell testified that Silva had told her that Silva had seen the original invoice in June or July 2014.
131. The invoice placed before Court and on which Silvasale relies does not reflect the payment of R746 000,00 (paid on 4 July 2014) as a down- payment or deposit on the Mercedes Benz, even though the pre-printed format of the invoice makes provision for a deposit.
132. The invoice is dated 8 July 2014, four days after the payment of R746 000,00 was made. Silva failed to query this. This ought to have been cause for suspicion already as far back as July 2014, on the version given by Silva.
133. On his version, Silva waited for over three months and two weeks after the EFT payment on 4 July 2014, (that is, until 20 October 2014), before he and his son made independent enquiries about the transaction with Ideal Drive or before he asked for a copy of the invoice directly from Ideal Drive.
134. Silva's ignorance of fact arose in part from the fraudulent intentions of Silvasale's own duly authorised agent, Kruger. There is no legal basis for Silvasale laying accountability for Kruger's fraudulent conduct at the door of Ideal Drive, an innocent unsuspecting party which was, on the objective facts, also misled by Silvasale's authorised agent.
135. For the reasons outlined above, Silvasale failed to discharge its onus of proving the *condictio indebiti* and securing the protection of the law. Ideal Drive was not unjustly enriched at its expense, or without legal cause.
136. Silvasale has argued that its cause of action is based on the *condictio sine causa*. It refers to the case of **Govender v Standard Bank of South Africa Limited 1984 (4) SA 392 C.** in which the Court stated:
- "In the case of a condictio sine causa, money which has come into the hands or possession of another for no justifiable cause, that is to say, not by gift, payment discharging a debt, or in terms of a promise, or some other obligation or lawful ground for the passing of money to the recipient, may be recovered to the extent that the recipient has been enriched at the expense of the person whose money*

it was. "

137. At page 400 of this judgment:

"....but a conditio sine causa lies whether the money is in the hands of the defendant without cause, whether due to mistake of the plaintiff or not.....no error need be proved, whether reasonable or unreasonable."

138. For the reasons set out above, absent an enquiry as to whether Silvasales erred in making the payment, on the proven facts outlined above, Ideal Drive was not enriched at Silvasale's expense, and without just cause. Silvasale failed to discharge its onus of proving the conditio sine causa against Ideal Drive.

139. I refer to the amendment application. It is competent in terms of Uniform Rule 28(10) for the Court to amend any pleading at any stage before judgment.

140. The oft-quoted dictum of Caney J, in **Trans-Drakensberg Bank Limited (Under Judicial Management) v Combined Engineering (Pty) Ltd and another 1967(3) SA 632 p at 641A**, approved by a plethora of subsequent cases, serves as a useful starting point, my emphasis included:

"Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on record an issue for which he has no supporting evidence. or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable."

141. In casu, the proposed amendments were controverted in material respects by the facta probantia adduced in evidence at the trial, and, in the result, may be described as mala fide.

142. The genesis of the entire dispute arose from Kruger's unlawful breach of his agency mandate with Silvasale, and from his unlawful misappropriation of monies from Silvasale, to which neither he nor Slabbert was entitled.

143. It was consistently the version of Silva, corroborated by his son, Jean Michel, that Silvasale intended to make the payment towards the purchase of a Mercedes Benz and not an Evoque. Moreover, Silva had no knowledge of the use of Silvasale's monies for the Evoque until circa October 2014, long after it had been sold to Slabbert at the behest of Kruger.

144. It was owing to the material breach of Kruger's mandate with Silvasale

that no consensus ad idem arose between Silvasale and Ideal Drive on the identity of the merx, the purchase price, and the identity of the purchaser. The evidence revealed that, owing to Kruger's breach of mandate, Silvasale and Ideal Drive were never ad idem on these essentialia, whether in respect of the Mercedes Benz or the Evoque.

145. Silvasale's alternative claims based on contracts for the purchase of either the Mercedes Benz or the Evoque must fail on these grounds simpliciter. This is supported by the evidence adduced at the trial.

146. It was established by the evidence, and overwhelmingly so, that it was Kruger who had unlawfully misappropriated Silvasale's funds for his own use, that is, to acquire the Evoque for his partner, Slabbert.

147. Ideal Drive played no role in this conduct, being impervious to the terms of the mandate given to Kruger by Silvasale, having had no contact with Silvasale directly, and therefore having been reliant solely on the information imparted to it by Kruger, Silvasale's duly authorised agent.

148. Concerning the claim based on misappropriation, the evidence established that the party who misappropriated Silvasale's money was Kruger, and not Ideal Drive. Ideal Drive had no cause to suspect that the money was paid for the purchase by Silvasale of the Mercedes Benz because Silvasale's own authorised agent, Kruger, told Ideal Drive otherwise. Kruger misappropriated the money for his and/or Slabbert's own personal gain, in material breach of his mandate of agency.

149. In the premises, the re-opening of the trial to attempt to advance evidence to support further claims against Ideal Drive, which evidence has already been contradicted by Silvasale's own witnesses and Ideal Drive's witnesses, would have been an exercise in futility, grossly prejudicial to Ideal Drive, and would have constituted a waste of legal costs and time.

150. Moreover, Silvasale was apprised of the nature of the chicanery perpetrated by Kruger in the plea raised by Ideal Drive, and this was filed a long time before the case came to trial.

151. I refer to the question of costs. An order for costs on the attorney and client scale in the trial was warranted under the given circumstances.

152. This is for, inter alia, the following reasons, namely:

- i. from inception, Silvasale enjoyed no cause of action against Ideal Drive

arising from Kruger's misappropriation of its funds; the detailed explanation of the sequence of events in communications between Kruger and Schmidt provided in the plea substantiated this fact, and discovery would have provided further such evidence; this notwithstanding, Silvasale persisted with its claim and sought costs on the attorney and client scale;

- ii. in July 2015, following the issue of Summons in March 2015, Silvasale went out of its way to cause trouble for Ideal Drive and to harm its reputation, by making unfounded complaints against it to various regulatory bodies; there was no evidence before Court that any of the complaints had been taken seriously by any of these bodies, or that Ideal Drive was sanctioned in any way as a result of such complaints;
- iii. Silvasale persisted in its vexatious conduct towards Ideal Drive by asserting, in May 2016, in its reply to pretrial enquiries concerning the question of Ideal Drive's right to attorney and client costs, (if successful in its defence), that Ideal Drive was "dishonest", lacked a proper defence, was "negligent" and was "not bona fide" in the matter.

153. An order for costs in the amendment application on the attorney and client scale in the trial was also warranted, as this application was not bona fide and lacked any factual foundation to sustain the amendments sought.

154. The following order is granted:

- i. the plaintiff's action against the defendant is dismissed;
- ii. the plaintiff is directed to pay the defendant's costs of the action on the attorney and client scale, including the wasted costs occasioned by the postponed hearing on 5 May 2016.

T BRENNER

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

20 April 2017

Appearances

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Instructed by:	Attorneys Day Inc