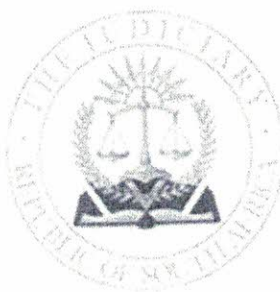



IN THE REPUBLIC OF SOUTH AFRICA



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

|     |  |
|-----|--|
| (1) | REPORTABLE: NO   |
| (2) | OF INTEREST TO OTHER JUDGES: NO  |
| (3) | REVISED. YES   |
|     | 13/06/2019.....<br>DATE  |
|     | <br>SIGNATURE |

CASE NO: 74266/17

OMNIA GROUP PROPRIETARY LIMITED t/a OMNIA FERTILIZER

APPLICANT/EXCEPTION

And

FOSKOR PROPRIETARY LIMITED

RESPONDENT

---

JUDGEMENT

---

KHUMALO J

[1] This is an Exception raised by Omnia Group (Pty) Ltd ("Omnia"), the Excipient, Plaintiff in the main matter, against a conditional counterclaim delivered by Foskor (Pty) Ltd

("Foskor"), the defendant (now the Respondent), together with its Plea in defence to a summons issued by Omnia claiming payment of money it alleges to have overpaid for Phosphoric acid that Foskor supplied to it in terms of various sale agreements.

[2] Foskor is the only local producer of phosphate rock concentrate in South Africa, from which it also produces phosphoric acid for export and local markets. Its facility is located in Richards's Bay. It is the only supplier to the local market and its main export market is India.

[3] Omnia manufactures and retails fertilizers like Nitrogen (N), Phosphate [P] and Potassium in granular and liquid form that is derived from, inter alia, phosphate rock, phosphoric acid, MAP and DAP purchased from Foskor. It is the largest purchaser of Foskor's phosphoric acid in the country.

[4] On 28 February 2011, pursuant to a complaint that was lodged with the Competition Commission about Foskor's excessive pricing of phosphoric acid, that it was in breach of s 8 (a) of the **Competition Act, 1998**, the Commission and Foskor concluded a **consent agreement**, which was approved by the Competition Tribunal ("the Tribunal") subject to a number of amendments (included in the addenda).

[5] The relevant portion of that agreement reads:

"Foskor **undertakes** not to revert to its past pricing policy for the sale of phosphoric acid, phosphoric rock, MAP and DAP. This policy comprised of import parity benchmark for phosphoric acid which included **national freight charges to India. Henceforth, Foskor will charge a price based on the FOB Richards Bay Port in respect of phosphoric acid.** (*my emphasis*)

[6] A price based on FOB Richards Bay Port is determined by taking the CFR (Cost and Freight) India price and **deducting freight charges to that destination.**

[7] The High Court confirmed on 16 October 2015 in a judgment and order handed down in a matter between Omnia and Foskor that the Tribunal Order requires Foskor to charge local customers, like Omnia, a price for its phosphoric acid that is based on the **FOB Richards Bay port price, a price equivalent to the export price or the CFR India price less freight charges.**

[8] For the period September 2014 to date, Omnia bought, **pursuant to separate monthly sale agreements concluded partly orally and partly in writing**, phosphoric acid from Foskor on an ad hoc basis.

[9] Omnia alleges that it was an implied term, alternatively a tacit term, in each of the monthly sale agreements that **in the event of the price charged by Foskor exceeding the price which the Tribunal Order required Foskor to charge domestic customers for its phosphoric acid, which is the FOB Richards Bay port price (or the CFR India price less freight), the price would subsequently be adjusted once the difference had been confirmed, and any overpayment by Omnia would be remedied by way of a reimbursement by Foskor of the amount by which its price exceeded that permitted by the Tribunal Order.**

[10] According to Omnia since September 2014, Foskor has not complied with the price mandated by the Tribunal Order, instead charged Omnia a considerably higher price. In the case of all those sales agreement concluded from September 2014 to date, that had a price



higher than the export price, i.e. greater than the FOB Richards Bay port price, **there was a variance between the prices Foskor actually charged local customers and the prices the Tribunal Order permitted it to charge them.**

[11] The total difference between the amount which Foskor was permitted to charge Omnia for its phosphoric acid, pursuant to the Tribunal Order, and the amount which Foskor required Omnia to pay, and which Omnia accordingly paid, from September 2014 to date amounts to R175 538,056.00 according to Omnia.

[12] **A formal protest** that the prices which Foskor was demanding for phosphoric acid in that month was higher than **the price permitted by the Tribunal Order was on 5 September 2014 and 19 February 2015 registered by Omnia**, indicating that payment was made under protest and with full reservation of its rights to reclaim and recover all amounts in excess of the FOB Richards Bay port price. **Foskor disputed that its prices were in contravention of the Tribunal Order** and insisted that Omnia pay the price set.

[13] **It says in the light of Foskor's monopoly** of the local phosphoric acid market and its control of the only import terminal and Omnia's dependence on Foskor's phosphoric acid **Omnia had no option other than to purchase from Foskor** at the price demanded by Foskor.

[14] Omnia points out that in terms of the implied or tacit term, Foskor is obliged to repay Omnia the amount of R175 538 056.00, an amount by which Foskor's prices from the period September 2014 exceeded the prices permitted by the tribunal order.

[15] **It pleaded in the alternative that** in the event the court holding that the monthly sale agreements did not contain an implied or tacit term as pleaded, that Foskor could not lawfully charge its local customers such as Omnia a higher price than the Tribunal Order. **Those agreements were accordingly illegal and prohibited and accordingly void, and alternatively invalid and unenforceable. Omnia involuntarily paid the amounts demanded by Foskor under protest.**

[16] Furthermore Omnia points out that the difference between the prices Foskor charged it for phosphoric acid from September 2014 and the amounts permitted by the Tribunal Order was not due and owing to Foskor. **Foskor was enriched at Omnia's expense and Omnia was commensurately impoverished from September 2014 to date in the total amount of R175 538,056.00.**

[17] Omnia therefore seeks an order declaring void alternatively unenforceable, and setting aside each agreement between Omnia and Foskor from September 2014 to date, in which Foskor charged Omnia a price in excess of the price that the Tribunal Order permits Foskor to charge local customers.

[18] It thereby prays for the Payment of the amount, and to the extent necessary an order declaring each of the agreements between Omnia and Foskor void alternatively unenforceable and setting them aside.

#### The Plea

[19] Foskor has in its Plea pleaded prescription in respect of the claim for September 2014.

[20] On the remainder of the claim Foskor has pointed out that clause 5.4. of the original consent agreement was by virtue of the unsigned addendum only applicable for three years post the granting of the Tribunal Order; and the fact that Omnia's purchase order expressly record that "All prices on the order are firm and not subject to change" that being the basis upon which Foskor supplied the phosphoric acid to Omnia.

[21] Foskor denies that PC3 forms part of the entirety of the three monthly agreements for phosphoric acid ordered in October to December 2015. **Also that it was under any obligation to charge Omnia the FOB Richards Bay Port price. In the alternative, Foskor pleads that it was entitled to charge Omnia a price reasonably related to the economic value of its goods.**

[22] In the further alternative, Foskor alleges that, to the extent that it was not entitled to charge the Plaintiff a price reasonably related to the economic value of its goods, by supplying its goods to the Plaintiff at the FOB Richards Bay price, **Omnia was enriched at the expense of Foskor who was impoverished, as such price was below its costs of production during the period September 2014 to date. In respect of each of the month of September to August 2017 Foskor's cost of production was in excess of the FOB Richards Bay price in Rands per ton.**

[23] To the extent that it is found that the Defendant was obliged to charge Omnia for phosphoric acid at FOB Richard's Bay Port prices during September 2014 to date, which it is denied, Foskor denies that it was enriched by having charged Omnia prices in excess thereof, stating that instead Omnia would have been enriched had it received the phosphoric acid it purchased at the FOB Richards Bay port price, as Foskor's costs of production exceeded such prices for each and every month concerned, or in fact at any price less than Foskor's cost of production.

[24] It also denies that PC5 reflects the amount of R175 538,056.

[25] Foskor's counterclaim is conditional upon the court finding that Foskor is indeed liable to make payments to Omnia of any amounts it charged for phosphoric acid in excess of the FOB Richards Bay port price for the period September 2014 to August 2017, alleging that:

[25.1] For each and every month over the period November 2014 to October 2017, **Foskor's cost of production was in excess of the FOB Richards Bay port price;**

[25.2] For the months November 2014 to September 2015, November and December 2015, May to September 2016 and the month of February 2017, **Foskor's cost of production was in excess of the amount it charged Omnia for the phosphoric acid it purchased.**

[25.3] **In the event Omnia's claim is upheld, Foskor will have been impoverished by being ordered to make payment to Omnia** in an amount which will result in it having made a loss over the period November 2014 to October 2017, which would be to Omnia's benefit.

[25.4] Omnia will accordingly be **enriched unjustly**, having received goods for a price lower than their cost.



[25.5] Attached marked "DP3" is a copy of a table, setting out Foskor's loss per ton over the period November 2014 to October 2017 based on its costs of production as against the price it invoiced the Plaintiff as well as compared to the FOB Richards Bay price.

[25.6] Foskor's total loss per month over the period November 2014 to October 2017 based on its costs of production as against the price it invoiced Omnia, amount to a total of R122, 182,023.11 over the period.

[25.7] Omnia has been enriched by the total amount of R122, 182,023.11 at Foskor's expense.

[26] Omnia excepts to the counterclaim on three grounds, on the basis that Foskor's counterclaim fails to disclose a proper cause of action, arguing that:

#### **First Exception:**

[26.1] in these circumstances, in a situation where the court would have found that Foskor is obliged to reimburse Omnia in terms of contract or upon the basis of it having been unjustifiably enriched, then both as a matter of logic and of law, **Foskor could not have a cognisable claim against Omnia for unjustified enrichment pursuant to that reimbursement on the very same facts.**

[26.2] Foskor also cannot advance cognisable claim for unjustified enrichment, as it seeks to do, by pleading that it "will have been impoverished by being ordered to make a payment to Omnia in an amount which will result in it having made a loss over the period November 2014 to October 2017, which would be to Omnia's benefit." **Foskor cannot claim to have been unjustifiably impoverished pursuant to a court order, let alone a court order that redresses unjustified enrichment of (Foskor) Foskor as against (the Plaintiff) Omnia.**

#### **Second Exception:**

[26.3] There **exists a numerous *clausus* of enrichment *condictiones*, and Foskor is accordingly required to bring its unjustified enrichment claim within the parameter of one of these in order for the claim to be sustainable in law.** Foskor has however failed to plead its claim in reconvention in a manner that meets the requirements of any of the recognised *condictiones*.

#### **Third Exception:**

[26.4] Foskor contends that for every month between November 2014 and October 2017, its costs of production were in excess of the FOB Richards Bay port price. Omnia will accordingly be enriched unjustly, having received goods for a price lower than their cost, Foskor will be impoverished by paying to Omnia an amount (based on the FOB Richards Bay port price) that will result in it having made a loss over that period.

[26.5] **Foskor however is restricted by an order of the Competition Tribunal, confirmed by two orders of the High Court, to charge local customers (like Omnia) the FOB Richards Bay port price for its phosphoric acid, and thus the export price of phosphoric acid ex Richards Bay.**

[26.6] Insofar as Foskop contends that the Tribunal Order was applicable for only three years from the date upon which it was granted, that is incompatible with the judgments and orders of the High Court under case no: 14554/2015 and A203/16 and is accordingly, unsustainable as a matter of law.

[26.7] Whatever the costs are alleged to be, **Foskop could thus not, as a matter of law, be unjustly impoverished by being compelled to charge Omnia the only price for phosphoric acid that it could legally charge;** and Omnia could not, as a matter of law, be unjustly enriched by paying Foskop the price that Foskop was legally obliged to charge local customer.

[27] For this reason, Omnia submits that the **conditional claim in reconvention is unsustainable as a matter of law** and prays for the conditional counterclaim to be struck out *in toto*.

## LEGAL FRAMEWORK

[28] In order to succeed with an exception that a pleading fails to disclose a proper cause of action, the excipient must show that **on every possible interpretation that can reasonably be attached to the pleading (which in this instance is the counterclaim) and the further facts, no cause of action or defence is disclosed;** see *Coronel v Gordon Estate Gold Mining Co. Ltd* 1902 T.S. at p.115; *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183D-F; *Pete's Warehousing and Sales CC V Bowsink Investments CC* 2000 (3) SA 833 (E).

[29] The test of a valid exception is therefore, that it must go to the root of the entire pleading excepted to, **the allegations of which are assumed to be true for the purposes of the exception.** It must also assert or imply that the pleading to which the objection is taken is on the face of it insufficient as a whole, therefore legally invalid for its purpose (raising a point of law)

[30] Omnia's 1<sup>st</sup> Exception is that Foskop cannot claim to have been unjustifiably impoverished pursuant to a court order decided upon on the same facts, let alone a court order that redresses unjustified enrichment of (Foskop) Foskop as against (the Plaintiff) Omnia.

[31] Omnia argues that Foskop, **reliant on the same facts** upon which the court would have found for Omnia (Plaintiff), seeks the court to in turn find against the Plaintiff. The facts Foskop relies upon are that the amount settled upon as the price to be charged, which would have also been confirmed by an order of court, is less than its production costs. Alleging that it would be making a loss rather than a profit charging on that price. As a result, Omnia will be enriched by the judgment that the court would have made, that Foskop pay back the R175 000 000.00 an amount allegedly Omnia paid in excess of the legal price as fixed (in consensus with it) by the Tribunal. In this instance the court would have also decided whether or not indeed it is so, the onus being upon Foskop to prove if indeed its production costs factually exceeds the fixed price as per Tribunal and court order, and if so, (i) whether even so Foskop has to pay back the over payment and (ii) **if such a loss can be legally regarded to be unjust when it arises as a result of a court decision or legal act?**



[32] The facts to be proven by Foskop are the same as the facts it had raised in its Plea in defending the Plaintiff's claim in the summons. They arise out of the same transaction and further involves the alleged Foskop's loss (production costs) and Omnia's alleged benefit raised in the Plea which from that perspective, would have been considered when deciding Omnia's claim. An Excipient, for the purposes of an exception, is bound by the pleading to which he excepts and is taken to admit its correctness, the facts therefore taken as true; see *Riversdale Estate Ltd v Mcdonald Briers N.O. and Another* 1934 S.R. 51. It will therefore have to be admitted that Foskop's production costs are in excess of the FOB Richards Bay Tribunal port price that Foskop is allowed to charge, and that the amount that would be paid back to Omnia as per court's order will result in Omnia paying less than Foskop's production costs, thus hypothetically resulting in Foskop suffering a loss. The question would therefore be as indicated whether Foskop can thereby legally claim back from Omnia (the money it has been ordered to pay by the court to Omnia) its alleged loss also on the basis of an allegation that Omnia would unduly/ unjustifiably be enriched by Foskop's repayment of the excess payments which Foskop would have already raised in its Plea and adjudicated upon by the court.

[33] The circumstances are analogous to cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him (cf **Welgemoed en Andere v Sauer** 1974 (4) SA 1 (A)),

[34] Omnia says that it is not only unsound but illegal to raise the unjustified enrichment claim on the same facts. The issue of production costs is raised by Foskop in its Plea and therefore in deciding the matter as per Omnia's action, the court would have also considered the question of unjustified enrichment as raised by Omnia from the perspective of Foskop's alleged production costs. The conditional counterclaim would thus constitute consideration of same facts. **Foskop therefore's attempt to then decline immediate repayment as per the court's order merely by advancing a counterclaim not capable of compensation is definitely illogical and not valid in law.**

[35] Once a court has decreed Foskop's enrichment at the expense of Omnia, to be unjustified on those facts, another court cannot be asked to abrogate the order and instead award Foskop an enrichment order on the same facts. The exception of *res judicata* did not apply only (a) where a subsequent action related to an unclaimed item by virtue of facts unknown to the claimant at the time of the first action and (b) where it would benefit the party against whom the judgment was rendered.

## Second Exception

[36] The crisp of the question being whether the Defendant can raise a claim on the basis of unjustified enrichment against a reimbursement order granted to the Plaintiff by the court? In *Glenrand MIB Financial Services (Pty) Ltd & Others v Theodor Wilhelm van der Heever NO & Others* [2013] 1 All SA 511 (SCA) by Theron JA and Swain AJA citing with approval the authors of the Law of South Africa that:



“Although there is no general action based in 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*.”

[37] It is argued on behalf of Omnia that Foskor fails to make out a cognisable unjustified enrichment claim even on these four standard requirements. Omnia alleges that Foskor if seeking redress for an unjustified enrichment must aver and prove at least each of those four requirements, subject, to the specific requirements of the *condictio* in question. It argues that:

[37.1] Omnia would not have been enriched by being granted a judgment in its favour by obtaining restitution of an anterior loss proven to the satisfaction of the court. Consequently absent enrichment, Foskor has no claim of unjustified enrichment.

[37.2] Even if accepted that there was impoverishment, whatever correlative enrichment there was, would not have been unjustified or *sine causa*. A *causa* being the court’s judgment in question. It argues that **Foskor’s actual production costs cannot affect this analysis.**

[38] Foskor argues that one of the *condictiones* applicable to the facts, is its impoverishment, therefore the matter ought to be determined at trial and it would be premature to reject Foskor’s conditional counterclaim of hand when an enrichment is capable of being determined at trial.

[39] The matter as this stage is not concerned about the merits of the case but the pleading excepted to, as it stands. The facts in the pleading are admitted as correct for the purposes of an Exception. The Excipient is bound by the pleading to which it excepts and taken to admit those facts. Therefore Omnia’s Counsel’s argument that the actual production costs cannot affect the analysis is wide of the mark. What Omnia must prove is that the facts notwithstanding being admitted, do not in law establish any sufficient factual basis to sustain a cause of action or defence as the case may be. It is therefore accepted that Foskor factually would suffer a loss due to its production costs being higher than the amount it is to legally charge for the phosphoric acid as a result of the judgment that it pays back the amount Omnia was illegally charged in excess of the FOB Richards Bay export port price. Does this give rise to a valid conditional counterclaim on unjustified enrichment? Can as a matter of law such a loss which is alleged to arise due to a court order on the basis of illegality of agreement or unjustified enrichment be recoverable on the grounds of enrichment (benefit) that is unjustifiable and without a just cause.

[40] Besides the argument that the same facts would have been considered already (the counterclaim being conditional on the court’s finding), the court cannot abrogate its own decision on the same facts in favour of the offending litigant. Generally as well, **the court has no power to relieve parties from the consequences of an unreasonable contract or one that, due perhaps to unforeseen circumstances has turned out more onerous than expected**, it will take such matters into account in deciding whether to order specific performance.



[41] In *Haynes v Kingwilliamstorm Municipality* 1951 (2) SA 371 (A) 378H-9A De Villiers AJA gave as examples of good and sufficient grounds for refusing specific performance:

“Where it would operate unreasonably hardly on the Defendant or where the agreement giving rise to the claim is unreasonable, **or where the decree would produce injustice, or would be inequitable under all circumstances.**

[42] It is not every illegal contract which necessarily entails the rigid penalty that a party to it, is unable to obtain any relief whatever from the court. The courts will come to the rescue of one of the parties where such a course is necessary in order to prevent an injustice, or to satisfy the requirement of public policy.... But public policy does not rest upon the evidence of any party. It exists as a fact just as much does the air which man breathes; see *Klokow v Sullivan* 2006 (1) SA 259.

[43] The implication of the order of court would be that Foskor illegally charged Omnia in excess of the legal price that has already been confirmed by the court of law in 2015 to be the legal price that Foskor should charge. In essence it would be finding Foskor to be in contempt of the court order. As a result thereof the sale agreements charging more would have been set aside by the court in ordering that the Tribunal price be applicable and Omnia be reimbursed the excessive payment it made, finding Foskor to have been delinquent notwithstanding Foskor's alleged loss. **The sale agreements accordingly illegal and prohibited and thus void, or alternatively invalid and unenforceable.** In order to challenge the alleged inequitable consequences arising from the court's order setting aside of the agreements, Foskor should not be coming to court with dirty hands or it should conversely prove Omnia to be equally guilty (in delicto); see *Jajbhay v Cassim* 1939 AD 537 where it was concluded that ‘a party seeking to extricate himself from the consequences of an illegal immoral contract had to demonstrate that he had come to court with clean hands.’ The courts implored to discourage illegal transactions.

[44] The principle to relax the rule to prevent inequities has been mooted where it is necessary to prevent an injustice or to promote public policy; see Christie “The Law of Contract in South Africa 4<sup>th</sup> edition at 459-465, recognising that its strict enforcement may sometimes cause inequitable results. One such instance would be where the Defendant would be unjustly enriched at the Plaintiff's expense. Further in *Jajbhay* as per STRATFORD CJ at 545, it was explained that “Where public policy is not foreseeable affected by a grant or refusal of the relief claimed,...a Court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment. But this can only be in the instance where both parties are equally guilty. Whereupon once Foskor has alleged and proved that Omnia is also in *delicto*, it is then for Foskor to allege and prove facts that will enable the court to come to its assistance because justice and public policy so require.

[45] However in this case the parties' conduct has not been portrayed as to be equally morally or otherwise reprehensible. Foskor had in contempt of an order of the Tribunal it consented to and of the court in 2015, also besides the protestation by Omnia continued to charge the prohibited price. In addition, as it would have been found by the court, that a claim that would result in a charge in excess of the FOB Richards Bay port price would be illegal and or unjustifiably enrich Foskor entitling Omnia to be reimbursed. Therefore the court would then have declared the sale agreements invalid or Omnia entitled to repayment of what it has overpaid as per the tacit or implied term which Foskor would have been found to have

breached. The court would have found that it is due to Foskop's reprehensible conduct that the sale agreements are invalid. In that instance the cause based on an injustice of Foskop suffering a loss or on the basis of public policy or inequitable consequences would not be open to Foskop.

[46] Foskop is legally prohibited from charging any other price as the court would have found and decided upon the correct legal price to be charged notwithstanding the alleged loss. Any demand for any price higher would be in deviation from the ordered price and unlawful. It therefore would not have a sustainable unjustified enrichment counterclaim if judgement is granted against it.

[47] Omnia had succeeded in showing that the Foskop had failed to disclose a sustainable cause of action.

[48] Under the circumstances

1. The exception is upheld.
2. The Respondent's Counterclaim is struck out in *toto* with costs, such costs to include the costs of two counsel as per relief sought.



N V KHUMALO J

JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

**For the Plaintiff/Excipient:**

**Instructed by**

PBJ FARLAM SC  
JJ MEIRING  
FALCON & HUME INCORPORATED  
C/O FRIEDLAND HART SOLOMON & NICOLSON  
Tel: 012 424 0200  
Ref: Gerhard Painter

**For the Defendant/Respondent:**

**Instructed by :**

ANTON KATZ S.C  
SANDRA FREESE  
SHAHEEM SAMSODIEN ATTORNEYS  
Ref: Samsodien  
C/O SAVAGE JOOSTE & ADAMA



**Tel: (012) 452- 8200**  
**Fax: (012) 452 8201**  
**Email: [fillorettes@savage.co.za](mailto:fillorettes@savage.co.za)**