



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case Number: AR 542/17

In the matter between:

GRANT SCOTT-WILLIAMS

APPELLANT

and

**OLD MUTUAL LIFE ASSURANCE COMPANY
OF SOUTH AFRICA**

RESPONDENT

ORDER

On appeal from: the Durban Regional Court (sitting as court of first instance):

The appeal is dismissed with costs, and such costs to be taxed on Scale B.

JUDGMENT

Z P NKOSI J (CHILI J concurring):

[1] The respondent (as plaintiff in the court below) instituted action against the appellant (defendant in the court below) seeking payment of the sum of R291 274.80 (as

amended) with interest and costs of suit. The appellant defended the action and the trial ensued and judgment was granted against him.

[2] The appellant now appeals against the judgment before this court primarily on the ground that the respondent was non-suited to bring the action as the claim vested in the ICS Pension Fund ("the ICS"). The appeal is opposed by the respondent.

[3] From the pleadings and evidence adduced by the respondent in the trial (as per Messrs Stephen Joseph Sprout and Anton Naude) the respondent administered the ICS pension fund of which the appellant was a beneficiary with reference number 69012/25647. It appears that the appellant was in the employ of the ICS Group for approximately two years and became entitled to receive an amount of R4 395.47 as a surplus apportionment benefit upon exit.

[4] On or about 16 May 2013, the respondent paid a miscalculated amount of R295 670.27 to the appellant being under the bona fide, reasonable but mistaken belief that the surplus benefit was payable to him out of the scheme, whereas, at the time of payment the appellant was not entitled to any surplus benefit over and above an amount of R4 395.47 and the respondent had no legal or natural obligation to make the payment.

[5] The appellant was thus unjustly enriched at the expense of the respondent in the amount of R291 274.80 as the respondent was obliged to refund the ICS, and in fact did so after the error was discovered. In the premises, it was averred that the appellant is indebted to the respondent in the amount of R291 274.80 which amount the appellant failed and/or neglected to pay despite due and proper demand.

[6] At the trial it became an issue that while the respondent made the payment of the refund to the ICS, it had not been pleaded. It also emerged from the testimony of Mr Anton Naude, the legal adviser within the respondent, that at the time summons was issued, the respondent had not yet refunded the ICS for the amount of loss incurred due to the excess payment made to the appellant, but stated that such a loss lies with the respondent, as

the appointed administrator, in terms of clause 20.1.2 of the agreement between the parties and the respondent had to reclaim the amount from the appellant.

[7] The appellant's case was thereafter closed without any evidence being led by the appellant. Thus, the court below accepted the facts as set out by the respondent's two witnesses and found that although the payment was made from the ICS fund account, in reality it was the respondent who erroneously caused the payment to be made to the appellant and had to bear the loss and has thus been impoverished – not the ICS.

[8] The issue in the appeal is whether the court below erred in finding that the respondent had locus standi in the action. And if so, whether the court erred in finding that the appellant had been enriched at the expense of the respondent when the payment was made by the respondent from the funds owned by ICS.

[9] On the main, the appellant contends that, amongst other issues which seem to have become irrelevant for consideration on appeal, the respondent's claim did not satisfy the four general requirements for a claim based on *condictio indebiti*. On the issue of the respondent's plea lacking the necessary averments to sustain a cause of action, I consider that if the appellant held that notion, it was open to him to raise an exception to the summons. He did not do so.

[10] It is a trite principle of law that for an enrichment action based on the *condictio indebiti* to succeed, the following general requirements must be met:¹

- (a) the defendant must be enriched;
- (b) the plaintiff must be impoverished;
- (c) the defendant's enrichment must be at the expense of the plaintiff; and
- (d) the enrichment must be without cause (*sine causa*) i.e. unjustified.

¹ *Capricorn Beach Home Owners Association v Potgieter t/a Nilands and Another* 2014 (1) SA 46 (SCA) para 20; *Glenrand MIB Financial Services (Pty) Ltd and Others v Van den Heever NO and Others* [2013] 1 All SA 511 (SCA) para 15.

[11] From the evidence adduced, it is undisputed that the appellant had been enriched by the payment made to him by the respondent from the ICS funds. He led no evidence to deny that fact in the trial; and importantly, the same was conceded by his counsel in the appeal, and correctly so.

[12] The next question should be whether the appellant's enrichment was at the expense of the respondent as the court below found. It was the court's findings that although the payment was made from the ICS fund, in reality it was the respondent who ultimately suffered loss.

[13] Mr *Tucker* appearing for the appellant holds the view that the respondent has pursued a wrong action, by way of *condictio indebiti*, to reclaim the amount erroneously paid to the appellant instead of an action based, amongst others, in *negotiorum gestio*² or to have sought cession of the action from the ICS because the appellant's enrichment was not at the expense of the respondent but the ICS.

[14] This submission seems to elevate form over substance and ignores legal dynamism. In *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd*³ it was held that:

'...the principles underlying the *condictio* are not immutable...The rules of the *condictio* are also not identical for all situations and there is scope for deviation, for instance where deceased or insolvent estates and the like are concerned.'

It was further held:⁴

'Sight was lost of the fact that the first plaintiffs, both in relation to the overpayment and to the claim for a refund, were and are acting in a representative capacity.'.

[15] It was further held that:⁵

'although it was a general requirement for the *condictio indebiti* that the error which gave rise to the payment must not have been an inexcusable error in the circumstances of the case, a person

² *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 (T).

³ *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (A) at 40A-B.

⁴ *Ibid* at 42G-H.

⁵ *Ibid* at 37D-E.

acting for the benefit of others and who in that capacity overpays someone under a *bona fide* mistake as to such persons legal rights should not be made to suffer for his mistake (Wessels Law of Contract in South Africa, 2nd ed paragraph 999).'

In *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme*⁶ the protection recognised in *Bowman* was extended to a medical scheme on the basis that:⁷

'...the scheme exists for the benefit of its members, often vulnerable people and is administered by persons who owe a fiduciary duty to them. In that sense persons charged with the administration of the scheme can be viewed as representatives standing in a similar position to executors, trustees and liquidators.'

[16] In this instance, the respondent administered the pension fund for members and beneficiaries. In that sense, it acted in a representative and fiduciary capacity similar to executors, liquidators and trustees.

[17] It seems to me that the enrichment action lies with the respondent and the facts as pleaded entitled it (as representative) to recover the overpayment from the appellant.⁸ The respondent's pleaded case was the *condictio indebiti*. The respondent incurred liability to repay the overpayment to the ICS and its patrimony was thus reduced by that liability.⁹

[18] The payment made by the respondent to the appellant was said to have been made in the mistaken belief that it was owing. Not every mistake entitles the mistaken party to recover payment and in the normal course the onus rests on the claimant to prove the excusability of an error.¹⁰ Is the respondent's error excusable in this case?

[19] A person acting for the benefit of others and who in that capacity overpays someone under a *bona fide* mistake as to such person's rights should not be made to

⁶ *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme* 2018 (1) SA 513 (SCA).

⁷ *Ibid* para 44.

⁸ *Bowman* above fn 3 at 43D.

⁹ See *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) para 23.

¹⁰ *Yarona* above fn 6 para 24.

suffer for his mistake.¹¹ It seems more reasonable to hold that the excusability of error extended to executors, liquidators, trustees and administrators of a medical fund ought to be extended to the respondent as administrator of the pension fund on the reasoning set forth in *Yarona*.

[20] I therefore conclude that:

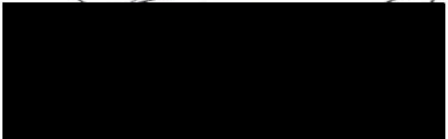
- (a) the respondent as administrator of the fund, acting in a fiduciary capacity had locus standi to institute proceedings to recover that which was paid to the appellant *indebiti*. It may be gleaned from its pleadings and evidence led in the trial that the respondent was claiming the overpayment in that capacity as the refund to the ICS was only paid later; and
- (b) the respondent, as administrator, was impoverished to the full extent of the overpayment and the respondent in that capacity is entitled to recover that which was lost to the scheme.

Order

[21] In the result, I make the following order:

The appeal is dismissed with costs, such costs to be taxed on Scale B.


Z P NKOSI J


CHILI J

¹¹ *Bowman* above fn 3 at 44C-D, 44H and 45F.

CASE INFORMATION

DATE OF HEARING : 14 JUNE 2024

DATE OF JUDGMENT : 16 AUGUST 2024

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