IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA (JOHANNESBURG)

Case No: A5066/2012

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED	
_____	_____
DATE	SIGNATURE

In the matter between:

GRANT THORNTON CAPITAL UMBRELLA FUND Appellant/Plaintiff

And

DA SILVA, EGIDIO Respondent/Defendant

JUDGMENT

C. J. CLAASSEN J:

INTRODUCTION

[1] This is an appeal with the necessary leave of the court below, being Kathree-Setiloane J. This judgment will follow the precedent set by both counsel in their heads of argument to refer to the appellant and respondent as "the Plaintiff" and "the Defendant" respectively.

[2] Prior to dealing with the appeal, it is necessary to traverse an application by the plaintiff to condone the failure to serve a complete appeal record timeously on the defendant. The plaintiff in its notice of motion requested that the costs of such application be costs in the appeal alternatively in the event of the defendant

opposing the application, that the defendant be ordered to pay the costs of the condonation application.

[3] In response to the aforesaid application for condonation, the defendant filed a counter-application seeking an order to declare the plaintiff's appeal to have lapsed and costs on the attorney and own client scale. I propose to deal with both the application and the counter-application simultaneously.

CONDONATION AND COUNTER-APPLICATIONS

[4] It is common cause that two copies of the transcript of proceedings were served by the plaintiff on 13 December 2012. The defendant's complaint, amounts to the following:

1. In terms of Rule 49(7)(a) of the Uniform Rules of Court, the plaintiff at the same time as filing an application for a date for the hearing of an appeal, must file three copies of the record of appeal with the registrar and furnish two copies thereof to the defendant.

2. The plaintiff, when it served its application for a date for the hearing of an appeal on 13 December 2013, did not furnish two copies of the record of appeal to the defendant as envisaged in the aforesaid rule.

3. Accordingly the defendant counter-applied in terms of Rule 49(7)(d) of the Uniform Rules of Court for a declarator that the appeal has lapsed in as much as no copies of the record of appeal were filed within forty days after the acceptance by the registrar of the application for a date for the hearing of the appeal.

[5] The appeal record which was eventually filed by the plaintiff did not comply with the Rules of Court and the practice manual, more particularly in that:

1. The plaintiff did not securely bind the appeal record in volumes of no more than 120 pages.

2. The plaintiff included in the appeal record certain documents which were not essential for the determination of the appeal and which the defendant did not consent to.

[6] In the plaintiff's application for condonation it set out in great detail the difficulties encountered with the preparation of the appeal record and the service thereof on the defendant. These allegations are supported by all the necessary correspondence and I do not find it necessary to traverse the same. Suffice to mention that the defendant's complaint in reality raises a deficiency in the prosecution of the appeal and not a material delay or failure to take the necessary steps to prosecute the appeal.[1]

[7] It is trite that a court has a discretion when considering applications for condonation that is to be exercised judiciously upon a consideration of all the facts. In essence it is a question of fairness to both sides.[2] During argument counsel for the defendant was not able to point to any **material** prejudice suffered by the defendant in prosecuting his defence to this appeal. When asked whether or not he persisted in the counter-application, counsel simply said: "It is still there." With due respect, that is not an indication of a serious attempt to convince the court that fairness requires the appeal to be declared lapsed. I am satisfied that the plaintiff made out a proper case for the condonation of the previously mentioned shortcoming in the appeal record and that the defendant made out no case at all for the appeal to be declared lapsed.

[8] I propose that the following order should be made:

a. Plaintiff's condonation application is granted with costs.

[1] See **Fortman v SAR & H** (2) 1947 (3) SA 505 (N) at 509; **Palmer v Goldberg** 1961 (3) SA 692 (N) at 701H
[2] See **United Plant Hire (Pty) Ltd v Hills and Others** 1976 (1) SA 717 (A) at 720E – F

b. Defendant's counter-application is dismissed with costs.

c. In both instances the costs will include the costs occasioned by the Plaintiff's employment of two counsel, where applicable.

THE MERITS OF THE APPEAL

[9] The plaintiff claimed payment of R360 417.97 and *mora* interest. The cause of action was pleaded as a *condictio indebiti*. The court *a quo* non-suited the plaintiff because, so it held, the plaintiff had not proved that the defendant was liable, more particularly in the following terms:

> "[27] No case has been made out by the plaintiff, which would enable me in terms of s3(1)(c)(i) to (vii) to admit the hearsay evidence of Mr Otto and Ms Beligan as being in the interest of justice. The hearsay evidence of Ms Beligan and Mr Otto is accordingly inadmissible. I am, consequently, of the view that the plaintiff has failed to prove on a balance of probabilities that the defendant is liable for payment to it of the amount of R360 417,97, which it paid to the defendant in the reasonable and bona fide, but mistaken, belief that it was owing."

[10] In order to understand the disputes in this matter it is necessary to refer to the pleadings. The plaintiff alleged in its particulars of claim that it is a provident fund and registered in terms of the Pensions Fund Act 24 of 1956. The defendant was a member as defined in section 1 of the Act of the plaintiff by virtue of his employment by Aucor, who was also a participating employer in the plaintiff, as defined by section 1 of the Act. The cause of action is thereafter pleaded in the following terms:

> "5. On or about the 1st October 2004 the benefits attributable to the Defendant were transferred from the Plaintiff to the Corporate Section Retirement Fund No 2 administered by Liberty Life.
>
> 6. On or about the 31st October 2007, when the Defendant left the employ of Aucor, the Defendant submitted a withdrawal notification to Liberty Life for the release of all the benefits due to the Defendant. A copy of the withdrawal notification is annexed hereto marked 'A'.
>
> 7. During or about the 31st October 2007 payment of R684 550-27 was made to the Defendant by Liberty Life of the total benefit due to him/her at that time ('the first payment').

8. During or about the 27 March 2008 and notwithstanding having received payment as aforesaid, the Defendant also submitted the aforesaid withdrawal notification to the Plaintiff.

9. On or about the 14 May 2008 the Plaintiff made a payment to the Defendant of the sum of R360 417-97 based on receipt of the aforesaid withdrawal notification.

10. The aforesaid second payment to the Defendant was made in the bona fide and reasonable, but mistaken belief that same was owing to the Defendant by the Plaintiff.

11. The amount which made up the payment by the Plaintiff to the Defendant was not owing to the Defendant, but the Defendant has nevertheless appropriated the monies.

12. In the circumstances, Plaintiff is entitled to reclaim the sum of R360 417-97 from the Defendant."

[11] In response, the defendant raised a special plea which has become irrelevant. He firther pleaded over on the merits as follows:

"5 AD PARAGRAPHS 4, 5, 6 AND 7

5.1 The Defendant, by virtue of his employment with a number of companies in the Aucor Group of Companies (Aucor) and his being a director of a number of such companies, was a member of a Provident Fund.

5.2 During or about **December 2007**, the Defendant resigned as a Director of a number of Aucor Companies and sold his shareholding, which was 25% in the Holding Company, Aucor (Pty) Ltd.

5.3 At the time that he exited Aucor, he was entitled to receive his Provident Fund Benefits, with the balance, if any, to be transferred to a new Provident Fund.

5.4 Forms were provided to him by Aucor and he duly signed same. He did not enquire as to the correctness thereof, but accepted the veracity of the content thereof.

5.5 The Defendant received a payment of **R684 550.27**.

5.6 Save as aforesaid, the allegations herein contained are denied as if specifically traversed."

[12] In paragraph 6 of the plea ad paragraphs 8, 9, 10, 11 and 12 of the plaintiff's particulars of claim the Defendant repeated the same allegations except for

stating in paragraph 6.5 that he had received the second payment of R360 417.97.

[13] On the pleadings it is common cause that the defendant received two pay-outs of pension benefits on the same withdrawal notice. The plaintiff alleged that the first payment was made to the defendant by Liberty Life after a submission of the withdrawal notification being annexure "A" to the particulars of claim. It further alleges that on 14 May 2008 the second payment was made by the plaintiff to the defendant as a result of the withdrawal notification being submitted by the defendant direct to the plaintiff. In essence the plaintiff alleges that the first payment was made to the defendant by Liberty Life in respect of his pension benefits and the second payment made by the plaintiff to the defendant in respect of his pension benefits. It is therefore not in dispute that the defendant received two amounts. The question is therefore whether or not the defendant was entitled to receive the second amount or not. It is common cause that the second amount had not yet been repaid to the plaintiff by the defendant.

THE LAW

[14] It is common cause that the plaintiff's claim is phrased on the principles of the *condictio indebiti*. This is an enrichment claim entitling the payer to reclaim money paid in a *bona fide* and mistaken belief that it was due and owing. In the present case the defendant closed its case without tendering any evidence in rebuttal of the plaintiff's evidence. In this regard it has been held in **Kudu Granite Operations (Pty) Ltd v Caterna Ltd** 2003 (5) SA 193 (SCA) at paragraph [21] on p. 203 as follows:

> "[21] A presumption of enrichment arises when money is paid or goods are delivered. A defendant then bears the onus to prove that he has not been enriched…"

[15] At the very outset it must, therefore, be mentioned that the defendant in failing to call any rebutting evidence, did not discharge any onus which may have rested upon him, more particularly to prove that he was not enriched by the second

payment. Since it is common cause that he received the second payment, the presumption of enrichment arose which he failed to counter. In simple terms, that should be the end of this matter. However, there are further legal implications which bear mentioning in this matter.

[16] It is trite law that the *condictio indebiti* has found wide and varied application in our law. In this regard it was said by Harms JA in **Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd** 1997 (2) SA 35 (AD) in the headnote at p. 36 as follows:

> "The principles underlying the *condictio inbebiti* are not immutable. In principle, a party is entitled to rely upon an analogous application of the *condictio indebiti*. The rules of the *condictio* are not identical for all situations: there is scope for deviation where, for instance, deceased or insolvent estates and the like are involved."

[17] The aforesaid statement of law finds application in the present matter where the plaintiff made payment to the defendant in a representative capacity. When the defendant resigned from Aucor the latter gave notice in 2004 that it intended to terminate its association with and its employees' membership of the plaintiff. Transfer was then affected to Liberty Life, where the defendant's funds grew until 2007. This transfer took place in terms of section 14(1)[3] of the Pensions

[3] "**14. Amalgamations and transfers**. – (1) Subject to subsection (8), no transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund, shall be of any force or effect unless –

(a) the scheme for the proposed transaction, including a copy of every actuarial or other statement taken into account for the purposes of the scheme, has been submitted to the registrar within 180 days of the effective date of the transaction;

(b) the registrar has been furnished with such additional particulars or such special report by a valuator, as he may deem necessary for the purposes of this subsection;

(c) the registrar is satisfied that the scheme referred to in paragraph (a) is reasonable and equitable and accords full recognition –

  (i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable expectations relate to service prior to the date of transfer;

  (ii) to any additional benefits in respect of services prior to the date of transfer, the payment of which has become established practice; and

  (iii) to the payment of minimum benefits referred to in section 14A,

  and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such condition within a period of time deemed by the registrar to be satisfactory;

Fund Act 24 of 1956. Section 14 provides not only formalities, but also the substantive requirements of a valid transfer. When the Registrar of Pension Funds is satisfied that all the requirements of section 14(1) had been met, he/she issues a certificate in terms of section 14(1)(e). Thereafter, and within sixty days of the date of the certificate, the funds are to be transferred to the "receiving fund". Any incorrect or wrongful transfer of funds by the plaintiff would obviously affect its current members detrimentally as the plaintiff also acts as their representative to protect their interest in the making of any payments in terms of section 14 of the Act.

[18] It is also trite law that any payment made by the plaintiff to someone who is **not** entitled to such payment, will in effect be *ultra vires* the provident fund's rules and regulations. Reclaiming such payments by the plaintiff in terms of a *condictio indebiti* or *condictio sine causa* constitutes a prime example of a payment *indebite* as by its very nature it was a payment of something not owing to the payee. This much was held by Harms JA in the **Bowman** case at p. 44 with reliance upon Wessels **The Law of Contract** at paragraph 999 where the learned author stated:

> "'It seems, however, more reasonable to hold that a person who, like an executor, is acting for the benefit of others, and who in that capacity overpays an heir or legatee under a bona fide mistake as to their legal rights, should not suffer for his mistake.'"

[19] Where a debt not owing is paid by somebody who acts in a representative capacity it is also not necessary for the claimant to prove that such payment was not affected in a grossly negligent manner. The principle of "inexcusability" for an overpayment is therefore not applicable where such overpayment is made in error by a person acting in a representative capacity in charge of the rights of others. In this regard Harms JA in **Bowman** at p. 45 held as follows:

(d) the registrar has been furnished with such evidence as he may require that the provisions of the said scheme and the provisions, in so far as they are applicable, of the rules of every registered fund which is a part to the transaction, have been made to carry out such provision at such times as may be required by the said scheme;

(e) the registrar has forwarded a certificate to the principal officer of every such fund to the effect that all requirements of this subsection have been satisfied."

> "Professor D P Visser, an ardent abolitionist of the requirement of excusability, in his comment on *Willis Faber* ((1992) 109 *SALJ* 179 at 183) refers to a case recorded by *Pauw Obs Tum Novae* 613. The facts are fairly reflected in the article and do not require repetition. The salient features for present purposes are that although executors in an estate, over many years, had made inexcusable payments *indebite*, the gross negligence of the executors was not raised as a consideration by any of the Judges in disposing of the claim by the executors. This may be an indication that the excusability of the error was not a common-law requirement of the extended *condictio indebiti*. The same may be said of *Watson's Executor v Watson's Heirs* (1891) 8 SC 283. At the time of payment to the heirs, what they received was due and owing. Because of an external factor, the estate became liable to pay a contribution in respect of shares held by the estate. The executors were held to be able to recover from the heirs. The negligence of the executors arose in another context, but not in the present. De Villiers CJ found (at 286) that, in an action by executors *qua* executors against heirs for recovery of their inheritance, the only question was whether the amount claimed was then due. Error in payment of the inheritance was not required for a successful claim and the absence of any reference to excusability had to follow as a matter of course."

[20] It was also confirmed in **Wilkens en 'n Ander v Bester** 1997 (3) SA 347 (AD) at 357D – F as follows:

> "Hierdie argument hou egter nie rekening met die feit dat ten tye van die betalings die respondent nie geregtig was om enige bedrag as pensioen uit die fonds te ontvang nie, en dat as keersy nóg die bestuurskomitee nóg Eerste Bowring bevoeg was om hom so 'n bedrag te laat toekom. Kortom, die betaling was *ultra vires* die bevoegdhede van die bestuurskomitee. Dit synde so, was die betalings indebite, en het daar **onmiddellik terugvorderingsregte vir die bestuurskomitee teen die respondent ontstaan**." (Emphasis added)

APPLYING THE LAW TO THE FACTS

[21] Mr Otto testified that the error came about because when the section 14 transfer was affected, the system was not updated to show that the defendant did not have a claim. His evidence in this regard is as follows:

> "When the section 14 transfer was made the next step on the administration side that should have happened was that the administration system should have been updated to show clearly that the section 14 payment had been made and that the member had no further value in the fund. That final update did not happen. So the administration record kept on showing that this benefit was due to the member and [inaudible]. So it was really an error of not updating the system at the time. So when he came forward later and claimed the benefit, the people responsible for paying benefits looked on the system and found that it reflected the value due to him and they then proceeded with the process…

> Now the plaintiff fund then paid the amount of R360 417.97 on this occasion that what you said it was not supposed to have been paid. Now whose money is it that, in other words if the fund has paid an amount that it was not supposed to pay somebody has got to lose in that equation, who are the losers in that occasion? --- In reality it is the other members of the fund. When anything is paid out in error it reduces the value of the assets [inaudible] which are shared amongst the members in [inaudible].
>
> So the fund will have less money and that loss is then divided between the other members that are party to the fund? --- That is correct."

[22] It cannot seriously be disputed that it was indeed the plaintiff who in fact made the second payment in the light of the fact that the defendant admitted receiving it. In paragraph 5.4 of defendant's plea it is expressly pleaded that he did not check the correctness of the withdrawal notifications signed by him. There is thus no positive statement by the defendant that the two payments were correctly made. Furthermore the plaintiff's bank statement shows that the defendant received the second payment. In any event it has never been suggested by anyone that any other person made such payment.

THE JUDGMENT OF THE COURT *A QUO*

[23] It would appear as if the court *a quo* did not have regard to the real issue namely: Was the defendant entitled to retain the second payment? The court *a quo* got side-tracked by documents which were essentially neutral. Mr Otto explained that he had discovered the error because there was incorrect information on the system. He gave a reason therefor: It had not been updated to reflect the effect of the first section 14 transfer. This evidence was not hearsay. Mr Otto went to the system and ascertained first-hand that the historical fact that Aucor and his employees had moved to Liberty Life had not been entered on the system. This is a discovery which he made from his own investigations. The Financial Services Board letter dated 2 August 2005 to Liberty Life[4] states the following:

> "**TRANSFER OF BUSINESS FROM THE GRANT THORNTON CAPITAL UMBRELLA PROVIDENT FUND (PARTICIPATING EMPLOYER: AUCOR**

[4] See Record p. 349

(Pty) LTD) TO THE CORPORATE SELECTION RETIREMENT FUND NO 2 (PARTICIPATING EMPLOYER: AUCOR SANDTON (Pty) LTD)

Case number: 106247

1. I refer to your letter dated 31 January 2005 and confirm that the requirements of Section 14(1) of the Pensions Fund Act, Act 24 of 1956 ('the Act'), have been met.

2. The certificate issued in terms of Section 14(1)(e) of the Act is attached.

Yours sincerely

For REGISTRAR OF PENSION FUNDS"

[24] The certificate[5] reads as follows:

"**TO WHOM IT MAY CONCERN**

It is hereby certified in terms of section 14(1)(e) of the Pension Funds Act, No 24 of 1956, that the requirements referred to in paragraph (a) to (d) of the above section with regard to the transfer of business with effect from **01 October 2004** of **121** members from the **GRANT THORNTON CAPITAL UMBRELLA PROVIDENT FUND (PARTICIPATING EMPLOYER: AUCOR SANDTON (Pty) LTD)** to the **CORPORATE SELECTION RETIREMENT FUND NO 2 (PARTICIPATING EMPLOYER: AUCOR SANDTON (Pty) LTD)** have been satisfied.

For REGISTRAR OF PENSIONS FUNDS"

[25] The court *a quo* was faced with one simple question: Was the system updated with the section 14 transfer or not? The evidence of Mr Otto was that no such update took place. There is nothing to gainsay that evidence as the defendant did not provide any proof to the contrary.

[26] Mr Otto established the error and testified thereto. The existence of the error is a fact and is independent of what others may say as to how it came about. It does not matter that other witnesses were not called. It is clear that the error arose from the defective system because it still reflected an amount due to the defendant as a result of which the erroneous pay-out was made. As indicated above a presumption arose that the defendant was enriched by this erroneous

[5] See Record p. 350

pay-out. The defendant should have provided evidence to rebut this presumption, but failed to do so.

[27] In my view the court *a quo* should therefore have found in the plaintiff's favour. However, if I am wrong in this conclusion, there is yet another reason why the plaintiff should have been successful in the court *a quo*.

***ULTRA VIRES* PAYMENT**

[28] In section 13 of the Pensions Fund Act the rules of a registered fund such as the plaintiff are declared binding on the fund and the members and officers thereof and on any person who claims under the rules or whose claim is derived from a person so claiming. In terms of Rule 10.2, a participating employer may give notice to terminate participation in the fund. In terms of Rule 10.2.2 the trustees, in consultation with the departing employer, shall deal with the fund credit of each member in service of the employer by either transferring it to another retirement vehicle or to the member as a lump sum.

[29] Of importance is the provision in Rule 10.2.3[6] which reads:

> "The EMPLOYER shall then cease to be an EMPLOYER in relation to the FUND and its MEMBERS shall cease to be MEMBERS **and shall have no further claim on the FUND in respect of their participation in the FUND in relation to that EMPLOYER."** (Emphasis added)

[30] This rule gives effect to section 14(2)(a) and (b)[7] of the Pension Funds Act: All the assets and liabilities of the participating employer and its employees are transferred to the receiving fund. The employees are henceforth former members who have in law no claim to any fund benefits. The fund is not empowered to

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[6] See Record pp. 390 – 391

[7] Section 14(2)(a) and (b) state: "Whenever a scheme for any transaction referred to in subsection (1) has come into force in accordance with the provisions of this section, the relevant assets and liabilities of the bodies so amalgamated shall respectively vest in and become binding upon the resultant body, or as the case may be, the relevant assets and liabilities of the body transferring its assets and liabilities or any portion thereof shall respectively vest in and become binding upon the body to which they are to be transferred. (b) Any transfer contemplated in paragraph (a) must be effected within 60 days of the date of the certificate issued by the registrar in terms of paragraph (e) of subsection (1)."

confer any benefit on them. On transfer the link between employer, member and the plaintiff, was severed. A former member henceforth had no claims against the plaintiff for retirement benefits.

[31] From what has been set out above, the members, on leaving the fund together with the employer, are not entitled to be paid any amount from the fund. The rules do not authorise payment of any money in addition to that for which specific provision is made. It then follows that payment to the defendant was also *ultra vires* the powers of the plaintiff as a registered pension fund organisation.

[32] As stated above in **Wilkens NO**, the facts in the present matter are actually *a fortiori*. In terms of the plaintiff's rules the defendant has no right to be paid from the plaintiff's assets. As a matter of law the plaintiff may not make payment other than in terms of the Pension Funds Act and its rules. Nowhere in the Pension Funds Act and the rules do we find anything conferring this power on the plaintiff and its management.

[33] It then follows that this case is on all fours with the judgment of Harms JA in **Bowman** *supra*. Money was paid erroneously by a person entrusted with the administration thereof in a representative capacity, namely the plaintiff. The plaintiff is in the same position as for example a liquidator or an executor of a deceased estate. It is the custodian of money earmarked for others. It is not necessary to show more than that there were erroneous payments made, which payments were beyond the powers of the plaintiff and which had the effect of reducing retirement benefits of other members of the plaintiff. The plaintiff therefore, in my view, discharged the onus resting upon it for the repayment of the amount paid in error.

CONCLUSION

[34] For the reasons set out above, I therefore come to the conclusion that the following order should be made:

1. The appeal succeeds with costs, which include the costs occasioned by the employment of two counsel.
2. The order of the court *a quo* is set aside and substituted with the following:

   "Judgment is granted against the defendant in favour of the plaintiff in the following terms:

   (a) Payment of R360 417.97;

   (b) Interest on R360 417.97 at the rate of 15.5% per annum from 14 May 2008 until date of payment.

   (c) Costs of suit."

DATED THE ___ DAY OF _____ 2013 AT JOHANNESBURG

_____
C. J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree

_____
C. LAMONT
JUDGE OF THE HIGH COURT

I agree

_____
K. FOULKES-JONES
ACTING JUDGE OF THE HIGH COURT

It is so ordered.

Counsel for the Appellant: Adv P. Pauw SC
Adv W. Strobl

Counsel for the Respondent: Adv M. Nowitz

Attorney for the Appellant: Dadic Attorneys
Attorney for the Respondent: Nowitz Attorneys

The appeal was argued on 12 September 2013