IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 73443/2014

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED: YES/~~NO~~

17/11/2014
DATE

SIGNATURE

In the matter between:

OLD MUTUAL LIFE ASSURANCE COMPANY	Applicant
and	
M T MULAUDZI	First Respondent
MMI GROUP LTD	Second Respondent
ABSA BANK LTD	Third Respondent

JUDGEMENT

DE VOS J:

[1] This matter was brought before me as an urgent application. The application was set down for hearing on 4 November 2014. Adv M C Maritz SC assisted by Adv Cronjé appear on behalf of the Applicant. Adv Ngalwana SC assisted by Mr Khulu appear on behalf of the First Respondent. The application was brought for relief in two parts. Part A of the Notice of Motion is aimed at obtaining interim relief pending the adjudication of final relief under Part B. The interim relief is interdictory by nature and is in the form of an anti-dissipation order aimed at preventing any

dealings by First Respondent with two investment policies by First Respondent with the Applicant and with one investment policy by First Respondent with Second Respondent. The relief was originally also aimed at preventing any dealings by the First Respondent in regard to an investment by First Respondent at Third Respondent (ABSA), but it transpired that such investment with ABSA had already been paid out prior to the drawings of the present application.

[2] The relief sought in Part A was brought as an urgent application set down for the 4th November 2014 with a liberal time period afforded to the First Respondent to file his answering affidavit. The application was served on the First Respondent on 3 October 2014. The First Respondent's answering affidavit was filed on 23 October 2014. At the hearing of this matter the First Respondent sought relief to file a further affidavit. However, the Applicant did not proceed with this application.

[3] The interdictory relief sought in Part A was sought to operate *pendente lite* pending the final determination of relief in Part B. The relief in Part B is for final judgment in the sum of some R48 million which constituted the proceeds of a policy paid to the First Respondent by the Applicant on 6 June 2014. In terms of the Notice of Motion the interim relief sought in Part B was to stand over and to be dealt with on 2 December 2014 in the event of there being no opposition. In the course of correspondence both the Applicant and the First Respondent agreed that both Part A and Part B could be dealt with simultaneously during the hearing on the 4th November 2014.

[4] Before I deal with the issues between the parties it is necessary to set out the background to this application.

It is common cause that on or about 26 May 2009 the First Respondent invested R33 500 000 in a Fairbairn Capital Investment Frontiers policy with number 015715207 (the policy), being a five year fixed bond policy underwritten by Old Mutual and with a maturity date of 1 June 2014. The maturity value of this policy was R48 163 098,55. The full maturity value was paid to the First Respondent by the Applicant on 6 June 2014. It is also common cause that after receipt of this money the First Respondent invested part of the proceeds of the policy in the policies/investments identified in Part A of the Notice of Motion. The investments mentioned under prayer 2 (a),(b) and (c) of Part A of the Notice of Motion are accordingly directly linked to the payment of R48 million. Clause 4 of the policy expressly recorded that the First Respondent would only be entitled to effect "*one loan and one disinvestment ... during the first five years of the policy*". The restriction on disinvestments is governed by the regulations issued in terms of **s. *54 of the Long Term Insurance Act, 52 of 1998.*** During December 2009 the First Respondent effected a loan of R791 851,03 against this policy and a partial disinvestment in the amount of R1 million during January 2010. The First Respondent subsequently applied for and was consequently refused further disinvestments.

[5] During March 2010 Nedbank furnished Old Mutual with a cession *in securitatem debiti* in favour of Nedbank in respect of *inter alia* policy 015715207, for "*any indebtedness incurred or to be incurred ...*" by the First Respondent up to an amount of R3 500 000. A copy of this cession annexed as "JD16" was duly recorded in Old Mutual's records. First Respondent subsequently lodged a complaint with the Financial Services Board against Nedbank Financial Planning, a division of Nedbank Limited, alleging that he was apparently not advised of the s.

54 limitation on disinvestments from the policy. First Respondent's complaint was settled on the basis that Nedbank Financial Planning (NFP) would buy the policy from First Respondent, i.e; take an outright cession thereof. The proposed agreement was outlined in the following terms:

> *"1. We will pay Business Banking the debt obligations owed to it by you in accounts provided to us by them. Business Banking will immediately cancel all the cessions (sic) with Old Mutual and send us a copy of the original policy. Old Mutual will also have to confirm with us that the cessions (sic) have been removed and that no other cessions (sic) exist against the policy.*
>
> *2. We will send then (sic) cession to Old Mutual and have the policy endorsed in our favour.*
>
> *3. We will pay the balance to you into an account supplied to us by him (sic).*
>
> *4. Matter closed we wait for maturity".*

[6] After raising some concerns, the First Respondent on the 24th March 2011 concurred in a written agreement with NFP in terms of which he ceded outright to NFP all rights, title and interest in and to the Investment Frontiers Capital Portfolio policy no. 015715207, as consideration for payments made by NFP to and on his behalf in the amount of R37 562 986,38. Clause 4.1 of the session agreement records and provides that:

> *"The cedant hereby pledges and cedes to the cessionary and the cessionary hereby accepts the cession of all rights, title and interest in and to the claims as a consideration for the payments made by the cessionary to and on behalf of the cedent…".*

This cession constitutes an outright cession. The cession document was duly signed by the First Respondent as appears from Annexure "JD18" attached to Applicant's founding papers.

[7] On 13th April 2011 Nedbank Financial Planning sent Old Mutual an email, which reads as follows:

> *"Please find the deed of cession in respect of contract 15715207: MT Mulaudzi. The policy was previously ceded to Business Banking. The enclosed letter was sent to you yesterday to cancel that cession and to make way for our cession. Please send us confirmation that the policy has now been endorsed with this cession in favour of Nedbank Financial Planning".*

[8] Due to an error on the part of an Old Mutual employee, Old Mutual failed to substitute NFP as the owner of policy no. 015715207 in the place of Mulaudzi on its computer systems. An employee of Old Mutual, Veronica Hirryjitha, explained in some detail that this error set in motion a sequence of further errors by Old Mutual employees, which according to the Applicant, the Respondent was ultimately able to exploit to Old Mutual's detriment by holding out that he was the owner of the policy and claiming payment of the policy value upon its maturity in June 2014.

[9] As a consequence of the failure to code the change of ownership on Old Mutual's systems, Old Mutual records reflected Mulaudzi as the owner of the policy. One of the consequences of this was that the Respondent continued to receive automatically generated quarterly statements and notifications in respect of the policy. The Applicant surmises that the First Respondent realised from these statements that Old Mutual's records continue to regard him as the owner of the policy despite his having ceded it outright to NFP.

The First Respondent was, however, well aware of the fact that the NFP was the lawful owner of the policy. On the 9th August 2012, the First Respondent sent an email to Nedbank requesting the cancellation of the cession. In the email, dated 9th

August 2012, sent to an employee of Nedbank, one Mdluli, the First Respondent stated: *"I wrote to you the other day. I want us to cancel the cession, so I pay you and you return my investment documents"*. A proposed buy-back agreement was signed by the First Respondent and sent to the Applicant. Nedbank declined the offer and retained all his rights in and to the policy. The First Respondent failed to deal with his proposed buy-back agreement in his answering affidavit. He does not deal with this proposed buy-back agreement at all. The Applicant contends that the First Respondent, as can be inferred from this letter, was well aware of the consequences of the outright cession concluded with NFP.

[10] On 3rd December 2013, the First Respondent, notwithstanding his knowledge that he ceded all rights, title and interest to the policy to NFP as a result of the outright cession on 24 March 2011, applied for a disinvestment from the policy in the sum of R8 million. The First Respondent attached an investment statement, furnished to him in October 2013, to the application form.

On the 22nd January 2014 the First Respondent phoned Old Mutual's call centre and enquired whether the policy was in a restriction period. He was advised that the policy was indeed still in the restriction period and that no further disinvestment requests could be processed as he had already exhausted his liquidity options. He thereupon advised the call centre consultant, Mr Lucan Gopal, that: *"Now I need money urgently and I have approached the bank. Um, and they want to offer me some money but they think they're finding it difficult, I don't know how it works. They want to note a cession but I'm not sure where this note is"*. As appears from the transcription, Mr Gopal confirmed to the First Respondent that the cession received from Nedbank in 2011, had been cancelled and advised the First

Respondent that he could cede the policy to a bank as security for a loan. It appears from the affidavit of Hurryjith, read with the confirmatory affidavit of Mr Gopal, that Mr Gopal did so because he, unlike the First Respondent, had no knowledge of the outright cession or the "no-dealings" marker that should have been placed on the system in respect thereof.

The First Respondent was subsequently provided with a copy of the "release of cession" document by Mr Gopal. This letter emanated from Nedbank Business Banking Division and pertained to the security cession furnished to them and not to the outright cession to Nedbank's Financial Planning Division. The Applicant contends that it must have been evident to the Respondent that the cancellation letter refers to a different policy concluded between the Respondent and Nedbank. The Respondent, relying on the documents obtained from Old Mutual, confirming that he is the owner of the policy and that there are no cessions registered against the policy, obtained a loan against the policy (which was already ceded to Nedbank Financial Planning Division) from ABSA who subsequently furnished Old Mutual with a cession in *securitatem debiti* issued in its favour by the Respondent. The Applicant contends that the First Respondent ceded the policy to ABSA as security even though he knew that he was no longer the owner of the policy because he had ceded it outright to NFP. It is contended that the First Respondent thereby committed fraud against ABSA.

[11] On 2nd June 2014 the First Respondent submitted to Old Mutual an "*Investment Frontiers Disinvestment/Loan (non-interest-bearing) Application Form*" in respect of the policy in which he requested a full disinvestment to the value of R48 143 038. On the 6th June 2014, Old Mutual erroneously paid the full maturity value of the

policy i.e. R48 163 098.55 into the ABSA account nominated by the First Respondent. The Applicant contends that this was done in the *bona fide* and reasonable, but mistaken belief that the First Respondent was the owner of the policy. The Applicant further contends that the First Respondent was dishonest when he submitted the disinvestment loan application form on the 2nd June 2014 because he knew, full well, that NFP and not himself, was the owner of the policy.

[12] On the 28th July 2014 NFP notified Old Mutual that it wished to be paid the proceeds of the policy. Old Mutual's investigations then revealed that it had been given notice of the outright cession during 2011 and that it was obliged to effect payment of the policy proceeds to NFP. On 8th August 2014, Old Mutual paid NFP the amount of R48 524 307,54, due in terms of the outright cession concluded between First Respondent and Old Mutual on 24th March 2011.

[13] On the 5th August 2014 and after realising that the First Respondent was not entitled to the payment made to him on the 6th June, Mrs Ross van Wyk, an operations manager employed by the Applicant, telephoned the First Respondent. He was advised that the amount of the policy, being the proceeds of policy 15715207, which was paid into his ABSA Bank account on the 6th June 2014 was not due to him, as he had ceded the policy to NFP during March 2011. First Respondent's response was that he was the owner of the policy and did not have an agreement with NFP. First Respondent requested that he be sent proof of the cession agreement in Old Mutual's possession.

[14] Subsequent to Van Wyk's conversation, an official of Old Mutual, Soobramoney, sent the First Respondent an email in which she recorded the contents of the

telephone discussion with Van Wyk and the repeated demand for payment. She also furnished him with a copy of the outright cession. The First Respondent had again denied that he has any cession with Nedbank, any of its associates/affiliates, or any other party for that matter in respect of the matured policy. Mulaudzi, according to Soobramoney's affidavit, appeared to take up the attitude that because Old Mutual mistakenly continued to deal with him as if he was the true owner of the policy, he became entitled to the proceeds of the policy.

[15] On the 15th August 2014 Old Mutual lodged a criminal complaint against the First Respondent based on fraud and theft. The NDPP office had a consultation with Mr Smal, an employee of Old Mutual, on the 22nd August 2014 and on the 28th August 2014, the NDPP obtained a provisional restraint order on an *ex parte* basis against the First Respondent. This order was obtained in the Western Cape Division of the High Court. The Application was brought in terms of Act 121 of 1998, The Prevention of Organised Crime Act (POCA), to restrain Mulaudzi's assets to a maximum value of R48 163 098,55 on the basis that he fraudulently induced and/or stole this amount from Old Mutual. The application was supported by affidavits deposed of by Lieutenant-Colonel Carl Johannes Lourens (Lourens), the Investigating Officer in the criminal case, as well as an affidavit deposed of by Ricardo Reginald Rhoda, a senior financial investigator with the Asset Forfeiture Unit of the National Prosecuting Authority, and an affidavit deposed of by Frans Lukas Jooste (Jooste) the Regional Manager: Credit Risk in respect of the aforesaid proceedings. Jooste confirmed that NFP was the lawful owner of the policy when it matured, having purchased same from the Respondent during March 2011 for some R37 million. The provisional order was granted by Acting Justice Weinkove, with the return day returnable on 27th November 2014. In terms of the

restraint order the First Respondent was restrained from dealing with his assets to a maximum value of R48 164 098,55 including assets listed in a schedule annexed to this application marked "JD6".

[16] On the 17th September 2014 the First Respondent anticipated the return day of the rule nisi with 24 hours notice. The matter was set down for hearing on the 18th September 2014. First Respondent sought the discharge of the rule nisi. Alternatively, he sought an order varying the provisional restraint order to specify in a Schedule A, a list of assets declared subject to the restraint order, and in a separate Schedule B, a list of assets declared free from restraint.

The Applicant received a copy of the papers in the application to anticipate the return day of the rule nisi in the course of the day of 17th September 2014. The Applicant contends that to protect his interest in the restraint proceedings, on the morning of the 18th September 2014, Old Mutual sought leave to intervene in the restraint proceedings as being the victim of the First Respondent's fraud and/or theft, on an urgent basis. The Applicant, being the party that suffered loss of property as a result of the alleged offences committed by the First Respondent, within the meaning of Section 13(5) of POCA, intended approaching the High Court in terms of Sections 31(1) read with Section 31(2) of POCA for an order directing that the payment of Old Mutual's claim against Mulaudzi to be made from the proceeds of the assets under restraint before any of it is used to pay the confiscation order sought be the NDPP.

[17] The First Respondent's application to anticipate the return day of the rule nisi in order to apply for the discharge thereof and the Applicant's application to intervene

in the restraint proceedings, were heard together on the morning of the 18th September 2014 by the Honourable Justice Hlope (the Judge President) of the Western Cape. The Applicant, in paragraph 18 of its founding affidavit contends that Old Mutual's application for leave to intervene was handed up from the Bar. After hearing argument from Old Mutual's counsel, First Respondent's counsel and counsel on behalf of the NDPP, Old Mutual was refused leave to intervene in the restraint proceedings and an order was also granted discharging the rule nisi in the restraint proceedings. As a result of the discharge of the rule nisi, all the First Respondent's assets were released from the control of the *curator bonis*. Subsequently to the judgement, Old Mutual has requested reasons for the order made by the Judge President in terms of the provisions of Rule 49(1)(b) of the Uniform Rules of Court. Similar reasons were requested by the NDPP in respect of the restraint proceedings.

[18] It is common cause that according to the statement filed by Rhoda of the Asset Forfeiture Unit in the restraint proceedings, that the investments mentioned in prayer 2(a),(b) and (c) of Part A of the Notice of Motion was acquired directly as a result of the transfer of the R48 163 098.55 by Old Mutual to the First Respondent.

[19] The present application was argued on the 4th and 5th November 2014 before me. After hearing arguments from both Applicant's and First Respondent's counsel, I reserved judgement. In order to protect the interim interest of all the parties involved, I granted an interim order pending judgement, in terms of the provisions of prayer 2(a)(b) and (c) of Part A of the Notice of Motion, prohibiting the First Respondent to deal in any manner with the investments or any part thereof which would remain to his credit pending judgement.

[20] The case advanced in the founding affidavit is that the First Respondent had fraudulently:

20.1 Failed to disclose to Applicant that he was not the owner of the said policy;

20.2 Failed to disclose that he had sold such policy/his rights under such policy to Nedbank on 24th March 2011 in consideration for payment of R37 500 00,00 and pursuant to which he had effected an outright cession to NFP of his rights to the proceeds under such policy;

20.3 Represented to the Applicant in an application form for this investment of the maturity value of the policy (on 2nd June 2014) that he was the owner and entitled to the proceeds of such policy;

20.4 Alternatively, that the First Respondent committed theft; and

20.5 That the First Respondent was unduly enriched and that the Applicant is entitled to recover this money from him in terms of the *condictio indebiti*.

[21] The case advanced in the founding affidavit is that the First Respondent, with full knowledge of the fact that he was not so entitled to the proceeds and with full knowledge of the fact that he had ceded the rights to such policy to NFP, opportunistically exploited an administrative error on the part of the Applicant's employees in that there was a failure to endorse the aforesaid cession in the records of the Applicant in favour of NFP, resulting in the Applicant continuing to provide the First Respondent with information and quarterly statements relating to the said policy, indicating that such policy was not ceded and that the First Respondent was the owner thereof and accordingly entitled to its proceeds on maturity.

It is further Applicant's case that Applicant was compelled, on demand, to pay Nedbank as true owner of the policy, the then full maturity value of some R48 million and that the Applicant had accordingly suffered damages as a result of the First Respondent's fraud and/or theft in an amount equivalent to the amount paid out to the First Respondent. In the alternative, that the payment had been an undue payment and that the Applicant was entitled under the *condictio indebiti* to claim such amount erroneously paid over to the Applicant.

[22] Before I deal with the points *in limine* and the subsequent merits of the matter, it is important to have regard to the following facts:

22.1 On or about 28th July 2014 Nedbank Financial Planning submitted an email confirming that the investment no. 15715207 had matured and requested payment of the proceeds thereof as said before. Attached to the email was an incomplete release of cession dated 4 September 2012, entered into between First Respondent and NFP, but signed only by First Respondent. Both the Nedbank request for payment and the incomplete release of cession are annexed to the Applicant's application marked "BMS29".

22.2 The Applicant subsequently liaised with Nedbank Ltd who confirmed that the incomplete release of cession was in error as appears from an email marked "BMS30".

22.3 On 29th July 2014, Nedbank informed Fairburn Capital in an email, annexed as Annexure "BMS30" that Nedbank Ltd is the outright cessionary of the policy 15715207 and as such the owners of all or any claims in terms thereof and that the cession has not been cancelled and remains valid and in force.

22.4 The email dated 29th July 2014 was sent by Nedbank to the Applicant, notwithstanding the fact that Nedbank had received an email annexed as

Annexure "BMS31" from Mulaudzi on 28th July 2014 stating that his "*records reflect that I have no cession agreement with Nedbank.*"

22.5 On 8th August Old Mutual transferred the amount of some R48 million into Nedbank's account being in respect of its cession agreement with Mulaudzi dated 24 March 2011.

22.6 Before payment was made to Nedbank, and on 5th August 2014, Priya Soobramoney of Fairburn reduced to writing an email to Mulaudzi the contents of a telephone conversation she had with Mulaudzi and which reads as follows:

"As mentioned earlier, two cessions were registered in favour of Nedbank in 2010 and 2011 respectively. The first cession was registered in favour of Nedbank Business Banking in March 2010. In 2011, we received a notification to cancel this security cession and to effect an outright cession in favour of Nedbank Financial Planning. This was in lieu of the misrepresentation complaint lodged against a Nedbank Financial Planner in February 2010. In terms of the underlying cession agreement, hereto attached, Nedbank agreed to make payment to you in amount of R35 million. In return for this you ceded full ownership in contract no. 15715207 to Nedbank and specifically agreed that you no longer held any interest or ownership in that contract.

You are therefore no longer entitled to the proceeds of this contract. Despite this, you requested that we cede this contract to ABSA as security in January 2014. This accordingly happened and at maturity stage, you requested that Fairbairn Capital make payment to you (refer to the disinvestment form attached for ease of reference).

In terms of the agreement with NFP, and the deed of cession signed by you, NFP was to take ownership of this contract. As mentioned as a forensic investigation was done to verify that the proceeds were not due to you, but to NFP.

The purpose of our call to you on Friday afternoon, was to make you aware that you should not have been credited with these funds and to come to an agreement to repay the sum of R48 163 098,55 to Old Mutual.

As requested, I have attached proof of the deed of cession signed and accepted by you and NFP in March 2011, as well as the instruction from Nedbank dated 28th July 2014, requesting the proceeds of the matured contract to be credited to them.

Please advise us with your urgent undertaking to repay the amount of R48 163 098,55 by no later than close of business on Wednesday 6th August 2014 which, if not received, would cause Old Mutual to proceed with urgent legal action to recover this amount".

[23] On 6th August 2014 Mulaudzi responded by email, annexed to the papers marked "BMS34", as follows:

"For the record, I deny that I have any cession with Nedbank, any of its associates/affiliates, or any other party, for that matter, in respect of the said mature policy.

May I take this opportunity to refer you to the following documents, which document I believe are in your possession, and which documents I invite you to produce and attach to your "urgent legal action" (whatever this may mean), you threaten or anticipate when approaching the said court, assuming that this is the route you are taking –

1, various letters authored and signed by you, Ms Priya Soobramoney, in which you confirm that I am the legal owner of the policy;

2, various letters authored and signed by you, Mrs Priya Soobramoney, in which you gave writer hereof a blow-by-blow account of the investment summaries, month-in month-out, and detailed financial advices on what steps to take when the policy matured on 2 June 2014;

3, various letters authored and signed by your various colleagues and you, Ms Priya Soobramoney, in particular, in which you categorically and in no uncertain terms, confirmed, and I quote, "that there is no prior lean over the policy" at the time, for instance, when the ABSA January 2014 cession, amongst others, was noted and subsequently cancelled; even at and up to the time when the payment was made; 4, letters of cancellations in respect of any and all cessions;

5, release of cession and the accompanying subsequent letters of cancellation of any and all cessions;

6, a letter authored and signed by you, Ms Priya Soobramoney, in which you state, "Fairbairn has no record of cession noted... Fairbairrn must be notified of any cession and will in no way be held liable for any benefits paid or transactions effected before written notification of such cessions were received at our offices".

Kindly note that by not responding to each and every allegation contained in your email here below, that should not be construed as an admission of liability to either yourselves or Nedbank. In fact, if anything, all your allegations are denied.

You thus elected to pay Nedbank as suggested by one of your colleagues, at your own peril. I am in fact perturbed that you seem to have taken sides already by the tone of your email as if to pronounce that your supposedly forensic investigation is gospel truth and thus validating what I considered the non-existent cession to the exclusion of my version, something we are yet to test. As indicated above, should you attend approaching the courts, please provide me with a copy of the application or action prior to you approaching court. It is my intention to defend and/or oppose any relief sought in such a court action or application, with costs. I can also confirm that there is no basis, legal or otherwise, for the threatened legal pursuits".

[24] Subsequent to the judgement given by Hlope JP, the Applicant requested reasons for the order made on the 18th September 2014. Reasons were given by Hlope JP on the 21st October 2014. It appears from the stamp on the Notice of Motion in the present instance, that the present application was issued on the 3rd October 2014,

before the reasons were handed down. I do not intend to deal with all the reasons set out but regard it as important to quote what he said in paragraph 10 thereof:

> *"There are no reasonable prospects of a successful prosecution in the matter. This is due to the fact that the Respondent committed no criminal offence in gaining access to these funds. The Fairbairn Capital under policy no. 15715207 was an investment to which he was entitled. At the time the Respondent requested that the value of the investment be made available to him, he was fully entitled to do so and was entitled to the proceeds. Prior to making the funds available, Old Mutual had verified that he was indeed entitled to realise the investment. Having legitimately obtained the R48 163 089,55 to which he was entitled, he was at liberty to apply it in the manner that he saw fit. In meeting his financial commitments and furthering his business interests. In the absence of any misrepresentation the evidence cannot sustain a fraud conviction. There had been no unlawful* contractatio *by Defendant in that these funds were paid over to him on the basis of Fairburn Capital/Old Mutual's authority and their indication that he was entitled to the funds. In the absence of an unlawful* contractatio, *the evidence cannot sustain a conviction of theft. There could be an argument for civil litigation in due course, but if he were to be brought to a criminal trial on these facts, the likelihood would be that of an acquittal. One needs to bear in mind that courts cannot be used a debt collection agent to hold otherwise would be debtors. That would amount to an abuse of the court process".*

[25] During argument I enquired whether Nedbank should not have been joined as a party. Counsel for the First Respondent contended that they should have been joined as they form an integral part of the issues to be determined by the Court. Counsel for the Applicant contends that Nedbank's version was fully placed and set out in the papers and that they support the application of the Applicant and that there is therefore no need to join Nedbank. The real dispute between the Respondent is not with Old Mutual, but between himself and Nedbank. It seems to

me that there is a long history of a dispute between Nedbank and the First Respondent. I will revert to this aspect at a later stage.

[26] Urgency

The First Respondents contends that the application is not urgent and that the reasons advanced do not justify the matter to be heard. It is contended that it is now axiomatic that financial considerations do not constitute valid grounds for urgency, as was held by the Full Bench in ***IL&B Marcow Caterers (Pty) Ltd v Greaterman's SA Ltd & Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd & Another,* 1981(4) SA 109 (C) at 113 e – 1114 c**.

This dictum was also followed in the case of ***Trustees, BKA Besigheidstrust v Enco Produkte en Dienste*, 1999(2) SA 102 (T) at 108 c – f**, where the Court said the following:

> *"In hierdie verband het Mnr Van den Heever gesteun op die Respondent se erkenning dat die Applikant inderdaad as gevolg van die gemelde verskaffing ernstige en onherstelbare finansiële skade ly. Soos tereg deur Mnr Marais, namens die Respondent, betoog, is die blote feit dat onherstelbare skade gely word egter nie genoegsaam om 'n saak vir dringendheid uit te maak nie. Dit mag wel 'n grond daar stel vir 'n aanspraak op 'n interdik, maar die aansoek as sodanig word nie daardeur noodwendig dringend gemaak nie".*

[27] The First Respondent further contends that the Applicant does not explain why it could not bring an urgent application between the 28th July 2014 (when it says it realised that it had erroneously paid R48 million to the First Respondent) and the 28th August 2014 (when the provisional restraint order was granted). A confiscation order might co-exist with a claim by the victim. See in this regard ***NDPP v Rebuzzi,***

2002(2) SA 1 (SCA). On his own version, there was no impediment to the Applicant to obtain interim interdictory relief between the 28th July 2014 when it allegedly discovered the error and the 18th of September 2014 when the provisional restraint order was set aside. It is contended that this application should fall to be dismissed on this ground alone. The Applicant contends that the reason for urgency is that the First Respondent fraudulently and dishonestly obtained payment to which he was not entitled to. The Applicant took steps to join the restraint proceedings before Hlope J. This was done in order to protect its own interest. Part A of the Notice of Motion it in essence an anti-dissipation interdictory proceedings which are per definition urgent. See in this regard ***The Law and Practice of Interdicts*** **by CB Prest SC, 1993** where the learned writer says the following:

> *"As in English Law, the general rule in South African Law was that the Court would not make an order for the attachment of any money belonging to a Respondent in the hands of third parties before judgement has been obtained against him, but would do so where the Respondent was about to leave the jurisdiction with the object of defeating the rights of creditors, for which purpose he was endeavouring to obtain possession of such money, or where the Respondent was endeavouring to dispose of the money in order to defeat a creditor",*

and on page 162:

> *"It follows that where a debtor is conducting himself in such a manner that his creditor will find nothing to execute upon if he gets judgement, the granting of an interdict is in no way a revolution of the practice of the Court; but a confirmation of it and in keeping with the spirit in which the Court has always acted in granting an interdict of this nature".*

[28] The First Respondent conceded before the hearing of this matter that both Part A and B of the Notice of Motion should be heard together on the 4th November 2014.

This entails a concession that if the interim relief referred to in part A is urgent, it automatically follows that the final relief sought in Part B also becomes urgent. The Applicant only brought this application after becoming aware of what the First Respondent had done with the proceeds of the policy. This only came to the Applicant's knowledge when the provisional restraint order and the NDPP's application papers were served on the Applicant some days after the order had been granted on the 28th August 2014. At that stage the facts were merely the investigating officer's allegations and were unsubstantiated. Only when the Applicant's answering affidavit in such proceedings was filed on the 17th September 2014, did it become clear that the investments now sought to be interdicted, were, in fact, made by the First Respondent from the R48 million proceeds of the policy aforesaid. Thereupon the First Respondent brought an urgent application under case no. 77033/2014 on 20 October 2014 and which was set down for hearing on the 24th October 2014 in which he sought orders compelling the Applicant and the Second Respondent to release the proceeds of the very same policies that form the subject matter of the current application (the R10 million investment with ABSA, which had already been paid out by the Third Respondent). The First Respondent's application under case no. 77033/2014 was dismissed by Molefe J with costs awarded to both the Applicant and the Second Respondent in these proceedings on a punitive scale of attorney and own client, which cost included the cost of two counsel. The application was dismissed on the grounds that the First Respondent had failed to make out the case for the degree of urgency contended for and further on the basis that the application constituted a gross abuse of the Court's process.

[29] I have carefully considered the arguments of both the Applicant and the First Respondent's counsels. I also have regard to the practice rules of this Division. In my view this application is urgent and urgency was not self-created. The First Respondent's concession that both Part A and Part B be heard simultaneously, amounts to an acceptance that the matter is indeed urgent. The prejudice the Applicant stands to suffer is so great that it calls for a speedy and urgent determination. The Applicant's claim is based on the criminal as well as delictual acts. Applicant's cause of action is clear and well-defined. In so far as the First Respondent denies these allegations, I will deal with it at a later stage.

[30] Failure to Satisfy Requirements for an Interim Interdict

The Applicant contends that the simultaneous hearing of the relief claimed under Parts A and B as agreed between the parties makes good sense. The crisp and central issue under both parts A and B is whether the First Respondent was entitled to the proceeds of the said policy or not. The two Parts of the Notice of Motion are, accordingly dependant on the same outcome. The simultaneous hearing will avoid a duplicated hearing and will reduce costs and will avoid involving a Court in having to entertain Part B in a separate hearing. The Applicant has demonstrated a clear right and has no alternative satisfactory remedy available. I am satisfied that the Applicant will be severely prejudiced if the interdictory relief already granted is not confirmed.

[31] First Respondent's Entitlement to the Proceeds of the Policy

It is undisputed on the papers, and admitted in argument on behalf of First Respondent, that First Respondent had effected an outright cession of the policy to Nedbank on the 24th March 2011 in consideration for payment of R37 500 000. It is

further uncontested on the evidence that on the 9th August 2012 First Respondent, in an email addressed to Nedbank, requested a cancellation of the cession aforesaid. It is similarly uncontested that the First Respondent on 4 September 2012 attempted to obtain a release of the policy from the cession aforesaid by presenting Nedbank with a duly signed contract of release of cession. In both the founding and supporting affidavits Nedbank declined the purported release. This was not dealt with in the answering affidavit and accordingly not disputed. Accordingly, this can be treated as an uncontested fact. It follows from the aforesaid that First Respondent was fully aware of the fact that he had sold the policy to Nedbank and had effected an outright cession to Nedbank. Such knowledge is fully born out by his attempts aforesaid to reacquire the policy from Nedbank.

[32] In the First Respondent's response to Applicant's demand for repayment, First Respondent stated: *"I deny that I have any cession with Nedbank... in respect of the said matured policy".* First Respondent vaguely referred to letters of cancellation in respect of any and all cessions without any substantiation or particulars provided. Reference is also made in this response to a release of cession again without any substantiation or particulars having been provided. The only document in the papers reflecting a purported release of the cession is a document signed by the First Respondent but not signed by Nedbank and which Nedbank declined. In paragraph 56.1 of the First Respondent's answering affidavit in the restraint proceedings, he alleges *"any and all cessions referred to had been cancelled prior to me claiming payment of the proceeds of policy 15715207".* The answering affidavit in those proceedings provides no particulars and no substantiation whatsoever. If the policy was receded to the Respondent one would

have expected him to attach the necessary documentation in order to prove such recession. The rights transferred in an outright cession do not revert automatically as a result of a purported cancellation of the cession but can only, in law, revert through an effective recession. No such allegation is made by the Respondent. The First Respondent's response in both his answering affidavit in the restraint proceedings as well as First Respondent's answering affidavit in the present proceedings contain merely a bold, vague and unsubstantiated allegation that any and all cessions referred to had been cancelled prior to him claiming payment. Examples of his unsubstantiated bold denials are found in paragraphs 52.2; 54.5; 55.1 and 56.2 of his opposing affidavit in the present proceedings. In paragraph 54.5 he merely says: *"With regard to the cession of the policy to Nedbank, I have provided my version of this dispute at paragraphs 56 – 58 of my answering affidavit in the POCA restraint application... I stand by that version"*. In paragraph 55.1 he says: *"I still deny that there was a valid cession against the Fairburn policy at the realisation of the proceeds"* and in paragraph 56.2 he says: *"I have stated that there was no valid cession at the time of the payment of the proceeds"*.

[33] An analysis of the First Respondent's averments aforesaid, demonstrates the following:

33.1 The original defence raised in the response to the letter of demand was ambiguous in that it was, in the first place, denied that there was any cession with Nedbank and, in the second place, it was vaguely contended that there had been a cancellation with any and all cessions. These averments are obviously contradictory.

33.2 The First Respondent's bold allegation that there was no valid cession at the time of the payment of the proceeds of the policy to him, is ambiguous in that

it is not clear whether he contended that there was no cession at all, or whether there had been a cession which was not valid in law.

33.3 The allegation that any and all cessions had been cancelled is completely lacking in any particularity and completely unsubstantiated.

33.4 An alleged cancellation of an outright cession does not, in law, result in a recession and, as such, does not disclose a defence.

33.5 Nedbank would obviously only have consented to a recession if First Respondent had in a later transaction bought the policy back from Nedbank at its then market value. However, no such allegation is made in the answering affidavit and there is no suggestion in the answering affidavit that the First Respondent had paid Nedbank anything for the alleged cancellation. To this I may add that this would have been the easiest process to provide the necessary documentation to substantiate a recession of the policy. Respondent failed to attach any proof of such a transaction.

33.6 Any suggestion that Nedbank would have consented to such a cancellation or recession without having been paid for it is, of course, absurd.

33.7 The First Respondent has failed to show in what manner and under what circumstances the alleged cancellation had taken place.

33.8 No letter or document reflecting such alleged cancellation or recession is annexed.

33.9 The relevant cession document pertaining to the policy in question appears on p.455 (269) of the papers marked JD18. Clause 12.2 thereof reads as follows:

"No amendment or consensual cancellation of this agreement or any provision or term hereof or of any agreement or other document issued or executed pursuant to or in terms of this agreement and no settlement of any disputes arising under this agreement and extension of time, waver or relaxation or suspension of or agreement

not to enforce or to suspend or postpone the enforcement of any of the provisions or terms of this agreement or of any agreement or other document issued or pursuant to or in terms of this agreement shall be binding unless recorded in a written document signed by the parties..."

Nedbank's version is that there was no cancellation of the said policy and of the cession to Nedbank. The release of cession document appears on p.284 of the papers (439) annexed as Annexure JD20. On page 289 (444) only the signature of the First Respondent appears. This document was not signed by Nedbank and therefore does not constitute a release of cession.

33.10 It follows as a matter of common sense that any alleged subsequent cancellation of the outright cession would only have been valid if contained in a written document signed by both parties. It is self-evident, however, that First Respondent has not only failed to annex such a document in substantiation of his vague defence, but has not even identified or purported to date such document.

[34] When a fact falls particularly within the knowledge of a party, he or she should disclose that fact. It was held in ***Wightman t/a JW Construction v Head Four (Pty) Ltd & Another,* 2008(3) SA 371 (SCA) paragraph 13**:

"When the facts averred are such that the disputing party must necessarily possess knowledge of them, and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the Court will generally have difficulty in finding that the test is satisfied".

The Court further held in **paragraph 13**:

"A real, genuine and bona fide dispute of fact can exist only where the Court is satisfied that the party who purports to raise the dispute has in its affidavit seriously and unambiguously addressed the said fact to be disputed".

[35] In my view the denial by the First Respondent of the fact alleged by the Applicant does not raise a real genuine or *bona fide* dispute of fact. First Respondent's counsel contended that a real dispute has been proved and that the matter should be referred to oral evidence or alternatively be dismissed with costs. I do not agree with this submission. I am satisfied as was held in the case of ***Plascon-Evans Paints v Van Riebeeck Paints*, 1984(3) SA 623 (A)** that:

> *"If the Court is satisfied as to the inherent credibility of the Applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the Applicant is entitled to the final relief which he seeks".*

The same rationale was reaffirmed in ***National Director of Public Prosecutions v Zuma*, 2009(2) SA 277 (SCA) paragraph 26**:

> *"It may be different, if the Respondent's version consists of bold, uncreditworthy denials, raises factitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers".*

On the only available evidence before Court, the First Respondent was not entitled to the proceeds of the policy and any appropriation thereof constituted a fraud. On the evidence there can be no doubt that he was fully aware of the fact that he had effected such outright cession to Nedbank and that he was not entitled to the proceeds himself. He acted solely on the wrong information supplied to him by the Applicant. Being aware of the incorrectness of the facts contained in the quarterly statements pertaining to the absence of a cession supplied by Old Mutual, he was fully aware of the fact that he had effected such outright cession to Nedbank and that he was not entitled to the proceeds himself. When he became aware of Old Mutual's mistake he tried to obtain a recession of the policy to himself which was not accepted by Nedbank. The amount involved was a large amount. There could not have been an innocent mistake on the part of the First Respondent. He applied

for the money to be released on him on the 2nd June 2014. When he completed the form he must have known that he is not entitled to the proceeds of the policy. After receiving the said money he immediately started appropriating this money as if he was the legal owner thereof. The SCA in the case of ***Nissan South Africa (Pty) Ltd v Marnitz,* 2005(1) SA 441 (SCA) in paragraph 25** rightly held that the appropriation of an amount to which a person was not entitled by using it for his own purposes well knowing that it was not due to him, constituted theft. In the present case the First Respondent fraudulently failed to disclose to Old Mutual that he had effected such outright cession and fraudulently represented to the Applicant in the application form that he was the owner of, and entitled to, the proceeds of the policy. This clearly constituted fraud on his part. The only inference that can be drawn is that the First Respondent wilfully, with the necessary intent, misrepresented to Old Mutual that he was entitled to the proceeds of the Policy when he knew that he has ceded his right to title and interest in and to the policy to NFP and that such cession was still binding on the parties thereto.

[36] It follows that the Applicant has fully established its case for judgement under Part B.

[37] During the course of argument, Respondent's counsel also raised a few other issues. It is contended that the judgement by Hlope JP qualifies as *res judicata* because:

37.1 It involves the same parties;

37.2 It is in respect of the same cause of action; and

37.3 It entails basically the same relief.

It is further contended that this Court is bound by the decision of Hlope JP. This submission is in my view, without merit. It is clear that the Applicant was not a party to the proceedings but merely the Complainant whose statement was used during the proceedings. When the Applicant attempted to join the proceedings, his application was refused. Furthermore, the present dispute includes a claim based on delict. The present claim is therefore not in respect of the same cause of action; and lastly, it is not in respect of the same relief. See **Harms, *Amler's Precedents of Pleadings*, 7th ed., p342**. It further follows that the judgement of Hlope JP cannot constitute *res judicata* as the Applicant was never a party to the proceedings.

The position in law is that the reasoning and conclusions arrived at by Hlope JP simply constitute the opinion of such court which is in accordance with the rule in **Holington v Hewthorn** neither relevant nor admissible. See **Hoffmann & Zeffert, *The South African Law of Evidence*, 2nd ed., p340**. Even if it was permissible to have regard to such Court's reasoning, it would at most have persuasive value but only to the extent that it was correct on the evidence and in law, as appears from the reasoning. The only part of the judgement of Hlope JP that is conceivably of relevance is paragraph 10 thereof which I referred to previously. It is to be noted, that this paragraph, with respect, reflects conclusions without any analysis of neither the evidence, nor of the so-called "defence" advanced by the Respondent in those proceedings. It is important further to note that the Court said *"there could be an argument for civil litigation in due course..."*. The Court in those proceedings therefore expressly recorded the possibility of a different result in subsequent civil proceedings.

In my view it is important to note that there is no mention in the written reasons aforesaid of the Nedbank affidavit evidence or of the actual outright cession or of the email communication and attempt by First Respondent to buy back the policy and/or to obtain the release of the policy from the cession. It follows necessarily that either this evidence was not before him, or if it was, he clearly had no regard thereto. In my view, on either approach, the Hlope JP judgement or written reasons thereto can accordingly, have no persuasive value and cannot affect the conclusion arrived at.

[38] First Respondent's counsel further contended that the Applicant has failed to satisfy the requirements for the grant of an interim interdict. I do not agree with this submission. The facts set out in the founding affidavit fully satisfy each and every requirement for the grant of interim relief. Applicant has established an entitlement to a final judgment under Part B and the Applicant has, accordingly, demonstrated a clear right. It is further self-evident that the Applicant has no alternative satisfactory remedy to it and that it will be severely prejudiced if such interdictory relief is not granted in that the First Respondent has already attempted to secure payment to him under the investments/policies identified in Part A.

[39] I have also referred to the non-joinder of Nedbank as a party to the proceedings. I have considered this aspect very carefully. It is clear on the evidence before me that Nedbank supports the application of the Applicant. There is therefore no dispute of fact between the Applicant and Nedbank. There was therefore no need for the Applicant to join Nedbank to the proceedings. The Respondent, on the other hand, could have joined Nedbank if it deemed it fit. First Respondent failed to do that. In my view it is evident that First Respondent's failure to join Nedbank to

substantiate his defence is a clear indication that the First Respondent knew and was fully aware of the fact that the policy was ceded to Nedbank and was not cancelled as alleged. I am satisfied that the non-joinder of Nedbank does not affect the findings made by me.

[40] In conclusion, I am satisfied that the Applicant was successful and is therefore entitled to his costs. It is trite law that fraud ordinarily justifies a punitive of an attorney and client cost order. The fraud has been exacerbated by the First Respondent's subsequent dishonest denials and the spurious defences raised by him.

I THEREFORE MAKE THE FOLLOWING ORDER:

1. First Respondent is ordered to make payment to the Applicant in the amount of R48 162 098,55, together with interest thereon calculated at the prescribed rate as from the date of service of the Notice of Motion on the First Respondent, until date of payment;
2. Pending payment of the judgement amount, the interdictory relief under Part A and referred to in the interim order as 2 (a), (b) and (c) respectively, is to be held in trust by Old Mutual Life Wrapped Investment with Policy Number 17163765 and/or Old Mutual Max Pure Investment with Policy Number 17163709 and/or MMI Group Ltd with Policy Number 211227095 until release in terms of this order is effected;
3. First Respondent is ordered to pay the cost of this application on an attorney-and-client scale including the cost of two counsel.

DE VOS J

JUDGE OF THE GAUTENG

DIVISION OF THE HIGH COURT

Date of Hearing:	5 November 2014
Date of Judgement:	17 November 2014
On behalf of the Appellant:	Adv MC Maritz SC Adv Cronjè
Instructed by:	MacGregor Stanford Kruger Inc c/o Savage Jooste & Adams
On behalf of the First Respondent:	Adv Ngalwana SC Adv Khulu
Instructed by:	Xulu Attorneys Inc c/o Selebogo Inc