IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 29117/2014

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

5 July 2016 DATE

SIGNATURE

5/7/2016

In the matter between:

MEDSHIELD MEDICAL SCHEME **PLAINTIFF**

AND

YARONA HEALTHCARE NETWORK (PTY) LTD **DEFENDANT**

Coram : Molefe J

Heard : **19,20,21,22 April and 4 May 2016**

Handed down : **5 July 2016**

Summary : **Condictio indebiti – mistake – excusability – payments made by Medshield Medical Scheme to Yarona Health Care Network – reasonableness of mistake**

JUDGMENT

MOLEFE J

[1] The plaintiff, Medshield Medical Scheme ("Medshield") claims payment of the sum of R6 110 236,67 from the defendant, Yarona Healthcare Network (Pty) Ltd ("Yarona") on the basis of unjust enrichment. The claim relates to and is based on 20 separate payments effected to the defendant over a two year period, from 6 August 2007 to 17 July 2009.

[2] Medshield is a medical scheme duly registered as such in terms of Section 24 of the Medical Schemes Act 131 of 1998 ("the MSA").

[3] Yarona is a registered company involved in the business of network management of health care providers. Having set up its networks, Yarona then offers its services to medical schemes and medical scheme administrators with the promise that in collaboration, they will be able to reduce the financial burden on the scheme concerned.

[4] It is common cause that from August 2007 to July 2009, Medshield made 20 electronic payments totaling R6 110 236, 67 to Yarona. Each of the payments was made in the *bona fide* and reasonable, but mistaken belief that each such amount was owed to the defendant. It is further common cause that there was no legal basis for the payments (excluding the one payment of R15 091, 67). Yarona admits that it was not entitled in law to any of the payments.

Background

[5] Medshield issued summons on 24 May 2011. Yarona initially in their plea disputed that the payments were made *sine causa*, contending that the payments were made in terms of a service agreement concluded between it and Medshield

during or about June 2007 and that it had performed all the services stipulated in terms of the agreement.

[6] After a number of interlocutory applications, the matter was set down for trial on 2 March 2015 to determine whether a service agreement had in fact been concluded between the parties during or about June 2007. On 26 February 2015, Yarona conceded that no valid and binding contract was concluded between it and Medshield, either as pleaded or at all.

[7] During the opening address of Medshield's counsel[1] at the first day of the trial on 19 April 2016, the following three issues were raised as remaining to be adjudicated:

7.1 whether Medshield's mistake in making payments to Yarona is excusable;

7.2 whether Yarona was unjustifiably enriched in the amount of each payment at the expense of Medshield, ie. whether Yarona had performed services entitling it to payments in the amounts paid; and

7.3 whether Medshield's claims in respect of the payments made before 8 June 2008 had prescribed.

[8] Yarona's counsel[2] during the opening address, announced that the only issues for trial are whether Medshield's mistake is excusable and whether part of Medshield's claim had prescribed. Counsel made the concession recorded as follows:

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[1] Advocate D Berger SC
[2] Advocate M Maritz SC

"Following upon the conclusion that no valid and binding agreement had been concluded between the plaintiff and the defendant, the defendant:

(i) accepts that all the payments save for the payment recorded in paragraph 3.7 of the particulars of claim, were made in debite;

(ii) does not contend that it was entitled in law to any of the payments (save for the payment reflected in paragraph 3.7)".

Due to the concession, Medshield's counsel argued that Yarona has conceded that it did not perform any work for which it would be entitled to payment and that it was accordingly unjustifiably enriched.

Despite this concession, Yarona refused to admit that it had not performed any work for Medshield. It's defences are now based on that Medshield's error in making the payments is not excusable and on prescription.

The legal position

[9] Although a general enrichment action has not yet been accepted into our law, there are nevertheless certain general requirements for any action based on enrichment[3]:

9.1 the defendant must be enriched;

9.2 the plaintiff must be impoverished;

9.3 the defendant's enrichment must be at the plaintiff's expense; and

9.4 the defendant's enrichment must be unjustified.

[3] The law of South Africa vol 9, second edition at par 209

In other words, the enrichment must be without legal cause or *sine causa.*

[10] The object of the *condictio indebiti* is to recover money or other property transferred in intended payment or performance of a non-existent debt[4]. In addition to the general requirements for an enrichment action, the *condictio indebiti* requires that:

10.1 it is only available where ownership of money or other property had been transferred by the act of the parties;

10.2 the payment or transfer must have been effected in the mistaken belief that the debt was due;

10.3 the mistake must be excusable. The *onus* of proving this rests on the plaintiff[5].

[11] Medshield led evidence of Lebo Matlala, Melane Coetsee and Angela Blackburn to establish that Yarona did not perform any services, either as pleaded or at all. This is due to the fact that despite Yarona's concession that the payments were made in *debite* it refused to admit that it did not perform any work. The two witnesses, Ms Matlala and Ms Coetsee were the trustees in Medshield office at the time. Medshield's counsel submitted that a finding in this regard is important as is central to the issue of unjust enrichment and whether Medshield's mistake is excusable.

11.1 **Ms Lebo Matlala** testified that she is an optometrist by profession and a former trustee of Medshield having served in that capacity on the Board of

[4] The Law of South Africa vol 9, second edition at par. 211
[5] Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A) at 224 H-225 A

Trustees from 2005 until 2010. She was a member of the Board's Clinical Risk Committee ("CRC") and its Operations Committee. She was the Chairperson of the CRC from 2005 and in 2009 she was appointed Chairperson of the Operations Committee. The CRC dealt with all clinical aspects of the scheme, including benefit designs, claims, proposals for managed care and network services.

11.2 Potential service providers were required to present their proposals to the CRC, which would assess the proposal. The CRC would, if the proposal fitted in with the scheme's strategic direction, recommend the potential service provider to the Board's Executive Committee ("EXCO"). Only the Board could decide whether or not to conclude a contract with a potential service provider and would then mandate a member of the relevant committee and the scheme's Principal Officer ("PO") to sign the contract on behalf of the scheme.

11.3 Yarona did not make a presentation to the CRC in respect of managed healthcare services for Medshield's three classic options (the Mediplus, Medibonus and MediValue options) and no contract was signed with Yarona in this regard. There was therefore no contractual relationship with Calabash Health Solutions (Pty) Ltd ("Calabash"). In 2006, Medshield concluded a capitation agreement with Calabash in respect of Medshield's Access option, with effect from 1 January 2006, for a period of three years and the access option terminated at the end of October 2008.

11.4 Calabash had subcontracted the provisions of a GP network to Yarona and Yarona was to provide network management services to Calabash. The

contract between Calabash and Yarona was independent of Calabash's contractual arrangement with Medshield.

11.5 Ms Matlala explained that service providers were required to submit monthly written reports to the CRC on the work they had done for the scheme and also required to attend the monthly meetings of the CRC to report on their work. She confirmed that Yarona had never submitted any reports to the CRC during her tenure. She was also referred to various minutes of the CRC in Bundle B of the record, none of which contain references to Yarona. She confirmed that the Yarona strut cards were never presented to or approved by the CRC[6].

[12] Ms Matlala's evidence was not challenged in cross-examination. It was not even suggested to her that the documents relied upon by Yarona as proof of it having performed servies for Medshield, were presented to any other committee or person at Medshield. She accepted under cross-examination that the BOT had the responsibility to oversee the proper governance of the medical scheme and to ensure compliance with the MSA and the Scheme Rules and that the BOT had the duty to ensure that proper internal system of control was in place.

[13] **Ms Angela Blackburn**, currently Medshield's Chief Operations Officer, testified that she started working at Medshield on 1 October 2008. Before then, she was claims manager at Old Mutual Health Care ("OMHC") based in Randburg. Medshield had an administration agreement with OMHC from 1 April 2007 until the end of February 2009. Ms Blackburn attended a workshop on 22 and 23 May 2007, which was attended by representatives of Yarona for OMHC. The workshop

[6] Bundle A, pp 540-554

considered the establishment of a GP network by Yarona for OMHC and no Medshield representatives attended the workshop. The purpose of the workshop was to plan a network by Yarona of medical practitioners (GPs) to negotiate discounted rates that would be loaded onto the scheme called "baskets". Pursuant thereto, such discounted rates were loaded onto the OMHC platform as part of baskets for Yarona.

[14] OMHC was then 10 months later, instructed by Medshield's PO, Mr Clinton Alley to load the Yarona baskets onto OMHC's administration platforms, with effect from 1 April 2008. At that time OMHC was still Medshield's administrator. The baskets were loaded as instructed. This resulted in OMHC paying doctors on Yarona network according to the basket tariffs when they treated Medshield beneficiaries between 1 April 2008 and 31 December 2008. It was only during March 2008 that Yarona informed the doctors on its network that the baskets circulated during 2007, would also apply to members of Medshield's Mediplus, MediBonus and MediValue options with effect from 1 April 2008.

[15] During January 2009, Ms Blackburn asked Ms Melani Coetsee, the then newly appointed Chief Operations Officer ("COO") of Medshield, whether she should reload the Yarona baskets for the 2009 benefit year. Ms Coetsee said she did not know what the baskets were about and instructed her not to load them.

[16] Under cross-examination, Ms Blackburn stated that as a claims manager she would have processed a large number of claims that fell under the Yarona "basket" and effected payments to the doctors under the Yarona discounted "basket" rates over a period of time.

[17] **Ms Melane Coetsee** testified that Medshield self-administration commenced on 1 March 2009 and in preparation for self-administration, Medshield employed her from 1 January 2009. She had served as Medshield trustee from July 2007 to November 2008. In January 2009, Mr Alley was still Medshield PO and remained PO until his suspension at the end of September 2009.

During her time as a trustee, she and the other trustees were non-executive and were not involved in the day-to-day operations of the scheme. Mr Alley was the one who managed the day-to-day affairs of the scheme.

[18] Ms Coetsee testified that she signed invoice number 0238 dated 31 October 2008, on 16 April 2009[7] and explained that she was requested by Mr Alley to sign the invoice as it was an outstanding invoice for Calabash. Ms Coetsee explained in her testimony that she knew that Calabash had done work for Medshield in terms of the capitation agreement. She also knew that Calabash had not been trading since the termination of the capitation agreement and that Yarona and Calabash were closely related, being part of the Bathabile Group. She signed the invoice in good faith believing what Mr Alley told her. She also signed the EFT requisition related to the payment and Mr Alley also signed the invoice and the EFT requisition.

[19] Ms Coetsee also signed an EFT requisition on 26 June 2009 in respect of a payment of R229 845,00 with the suppliers name being "Calabash Health Solutions[8]. The description of the services was *"August 2008 fees"*. She explained that Mr Alley had again approached her to sign the requisition as Medshield had reneged on its obligations to Calabash in terms of the winding-down agreement between them. She knew that Medshield and Calabash had concluded a winding-down agreement

[7] Bundle C, page 38
[8] Bundle C, p 37

after the termination of the capitation agreement. Calabash was required to perform certain services, for which they would be paid. She also knew that Calabash had done some work but not properly. Mr Alley agreed with Ms Coetsee that Calabash should be paid 50% of what had been agreed. Ms Coetsee testified that she accepted Mr Alley's explanation and signed the requisition in good faith. A note in Mr Alley's handwriting , signed by Mr Alley on 26 June 2009 appears on the related invoice number 0264[9]. The note reads : *"only pay 50% ie. R229 845, as per agreement with Martin Rimmer. Balance payable on receipt of member and provider statements"* Mr Rimmer was at the time the Managing Director of Calabash.

[20] Ms Coetsee was criticized during cross-examination because she signed the invoice and the EFT requisition and the criticism was that she had authorized the payments without establishing that the payments were valid, and conceded that any invoice presented would have had to be checked against a signed contract.

[21] Ms Coetsee further testified that during September 2009, Ms Rekha Lalla, the General Manager: Finance came to see her and informed Ms Coetsee that she had picked up suspicious payments on behalf of Mr Alley whilst preparing reconcialition statements of Medshield income and expenditure. There were *inter alia* payments made from Medshield banking account to Discovery Health and life insurance policies for Mr Alley. This led to Mr Alley's suspension in September 2009 and Mr Clive Stuart was appointed by the board of trustees as acting PO.

[22] During October 2009 Mr Stuart asked Ms Coetsee if she was aware of any payments that were due to Yarona as he had been contacted by Mr Soll who insisted that Yarona had a valid binding contract with Medshield and that Medshield owed

[9] Bundle C, p 37

money to Yarona. As Ms Coetsee was not aware of any existing relationship between Yarona and Medshield she informed Mr Stuart that Medshield had a contract with Calabash which terminated at the end of October 2008. Ms Coetsee then began investigating Yarona's claim and requested Ms Laka to produce a schedule of all payments made to Yarona.

[23] **Ms Nawaal Ballim**, Medshield's bookkeeper testified that she was formerly employed at OMHC as a bookkeeper and later as an accountant. She started working at OMHC in September 2007 and moved to Medshield in April 2009 just after the scheme had commenced self-administration. Ms Ballim gave evidence on the process in terms of which Medshield expenses were authorized and paid. At that time, Medshield only had two employees, Mr Alley and his PA, Ms Jocelyn Baatjies. She testified that the process was as follows:

23.1 Service providers would submit their invoices to Medshield for payment. Payment instructions came from Mr Alley after he had approved a payment. Ms Baatjies would enter the invoice details into a payment instruction book. Mr Alley would then sign the payment instruction.

23.2 The invoices, together with the payment instructions were sent, on a daily basis, to Ms Ballim at the OMHC Randburg office. This procedure applied to all payments approved by Mr Alley, including payments to Yarona.

23.3 On receipt of the invoices and signed payment instructions, Ms Ballim would confirm that the details on the invoice corresponded with the details on the relevant payment instructions. She would then complete an EFT requisition. She or another administrative employee of OMHC in the finance

department would capture the necessary information onto the requisition. Once Ms Ballim was satisfied that the information captured on the requisition was accurate, she would sign it off and capture the invoice details on the Nedbank system, ready for payment.

23.4 Invoices were captured on the Nedbank banking system and paid in batches of various payment and not limited to Yarona payments. Once a payment batch was ready, she would inform the authorized signatories and if satisfied, the signatories would sign the requisition forms and release the payments on the system.

[24] Ms Ballim testified that she recorded Yarona payments as marketing expenses in Medshield's books of account as every invoice issued by Yarona had the same narration: "*Healthcare Provider Research & Geo Mapping*", which was similar to another service provider of Medshield providing marketing services.

[25] During cross-examination, Ms Ballim was referred to various EFT requisitions that were either unsigned, not fully signed or otherwise incomplete and she conceded that this was irregular.

[26] Plaintiff's counsel submitted that the failure of EFT signatories to sign each and every requisition does not constitute a material irregularity in Medshield's payment processes nor is it evidence of inadequate oversight by the trustees over the financial administration of Medshield.

[27] It is evident from Ms Ballim's testimony that she relied entirely on Mr Alley's payment instruction and authorization of the payments to Yarona and she had no reason to question his instructions and the validity of the payment.

[28] The common cause and crisp issues in *casu* are the following:

28.1 Medshield has paid to Yarona a total sum of R6 110 236, 67;

28.2 No legal basis existed for Medshields' payments to Yarona; the payments were accordingly made *in debiti;*

28.3 Yarona was unjustifiably enriched by the payments and Medshield accordingly impoverished in the sum of R6 110 236, 67;

28.4 Yarona refuses to pay back the money to Medshield as it contends that Medshield's error in making the payments is not excusable and that some of the claims have prescribed.

[29] There is no exhaustive definition of when a mistake is excusable in our law. Harms JA in **Bowman, De Wet and Du Plessis NNO v Fidelity Bank Ltd 1997 (2) SA 35 (A) at 44 C – E**, described the position as follows:

"It is a general requirement for the condictio indebiti that the error that gave rise to the payment must not have been an inexcusable error, that is inexcusable in the circumstances of the case. (Willis Faber at 223 H – 224 H*). There have been many attempts to lay down the rules or formulations in this regard in order to circumscribe what is excusable and what is not (see for example* Mc Ewan J in Barclays Bank International Ltd v Africa Diamond Exporters (Pty) Ltd 1977 (1) SA 298 (W) at 305*). Since one is concerned with the exercise of a value judgment, it seems inappropriate to refine the test of whether judicial exculpation is justified".*

[30] Earlier, in **Willis Faber Euthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A) at 224 E – H**, Hefer JA cautioned against defining the circumstaces in which an error of law or fact could be said to be excusable, or supplying a *"compendium of instances where it is not"*.

> *". . . All that need to be said is that, if the payer's conduct is so slack that he does not in the court's view deserve the protection of the law, he should, as a matter of policy, not receive it. There can obviously be no rules of thumb; conduct regarded as inexcusably slack in one case need not necessarily be regarded in others, and vice versa. Much will depend on the relationship between the parties; on the conduct of the defendant who may or may not have been aware that there was no debitum and whose conduct may or may not have been contributed to the plaintiff's decision to pay; and on the plaintiffs state of mind and the culpability of his ignorance in making the payment. . ."*

Did Yarona perform any services?

[31] It is difficult for me to understand Yarona's refusal to make the admission that it did not perform any services to Medshield despite having conceded that Medshield's payments to Yarona were made *in debiti* and that Yarona does not contend that it was entitled in law to any of the payments (except the payment of R15 091, 67). Yarona did not adduce any evidence to prove that it performed services for which it was entitled to be paid by Medshield. Medshield's evidence by contrast, established that Yarona did not perform any services.

[32] The only evidence of any interaction between Yarona and Medshield, beyond the Calabash capitation agreement, is the fact that Yarona's GP baskets were loaded onto the administration platforms of Old Mutual Health Care as from 1 April 2008.

[33] The evidence of Ms Matlala and Ms Blackburn proves that Yarona did not provide any services to Medshield for which it was entitled to be paid. Although Yarona bore the *onus* of proving the opposite[10], it failed to adduce any evidence to the contrary but it still refused to admit that it had performed no work.

I am satisfied that Yarona did not perform any work in terms of the alleged agreement that it eventually, on 2 March 2015 conceded did not exist.

Is Medshield's mistake inexcusable?

[34] As already mentioned, Yarona did not lead any witness of its own. Yarona's counsel, in cross-examination of Medshield's witnesses, intimated that the mistake in making payments to Yarona arose due to inadequate corporate governance controls and insufficient oversight on the part of OMHC and Medshield's trutees. Mr Maritz under cross-examination of Ms Coetsee and Ms Ballim, suggested that they ought to have verified that there was a valid contract between Medshield and Yarona before they authorized and/or processed the payments.

[35] I agree with both counsels' submissions that a proper consideration of the role and conduct of the trustees, in the context of the payments to Medshield, must take account of the Medical Scheme Act, which prescribes the general governance and

[10] ABSA Bank Ltd v Standard Bank of SA Ltd 1998 (1) SA 242 (SCA): The *onus* of proving a defence of non-enrichment rests on the defendant

financial regulatory framework in terms of which the affairs of a medical scheme must be regulated.

Section 57 of the MSA provides:

(1) Every medical scheme shall have a board of trustees consisting of persons who are fit and proper to manage the business contemplated by the medical scheme in accordance with the applicable laws and the rules of such medical scheme.

Section 57 (4) provides:

(4) The duties of the board of trustees shall be to –

(a) appoint a principal officer who is a fit and proper person to hold such office. . .

(h) ensure that the rules, operation and administration of the medical scheme comply with the provisions of this Act and shall all other applicable laws.

Section 57 (6) further provides:

(6) The board of trustees shall –

(a) take all reasonable steps to ensure that the interests of the beneficiaries in terms of the rules of the medical scheme and the provisions of this Act are protected at all times;

(b) act with due care, diligence, skill and good faith;

(iv) Section 29 (1) provides:

(1) The registrar shall not register a medical scheme under section 24, and no medical scheme shall carry on any business, unless provision is made in its rules for the following matters:

(a) The appointment or election of a board of trustees consisting of persons who are fit and proper to manage the business contemplated by the medical scheme.

(b) The appointment of a principal officer by the board of trustees who is a fit and proper person to hold such office.

[36] Clause 19 of the MSA lists the duties of the Board of Trustees and the following are relevant:

> 19.1 The Board is responsible for the proper and sound management of the scheme, in terms of these Rules.
>
> 19.2 The Board shall act with due care, diligence, skill and in good faith. . .
>
> 19.4 The Board shall apply sound business principles and ensure the financial soundness of the scheme. . .
>
> 19.7 The Board shall cause to be kept such minutes, accounts, registers and records as are essential for the proper functioning of the scheme.
>
> 19.8 The Board shall ensure proper control systems are employed by and on behalf of the scheme . . .
>
> 19.12 The Board shall obtain expert advice on legal, accounting and business matters as required, or on any other matter of which the member of the Board may lack sufficient expertise. . .
>
> 19.15 The Board shall approve all valid disbursements but may delegate its authority to any member of the Board or any other persons nominated by the Board to effect disbursements on behalf of the scheme.

[37] In addition, a board of trustees is responsible for:

> 37.1 appointing an audit committee and at least one auditor, approved by the Registrar[11].

[11] Sections 36 (1); (2) and (10)

37.2 ensuring that annual financial statements are prepared. Within four months after end of the financial year the board must furnish copies of the annual financial statements, together with the report of the board to the Registrar[12].

[38] The provisions in the MSA dealing with governance and financial management put in place different levels of accountability, with each level exercising oversight over the other. The scheme appoints the board of trustees. The board appoints a Principal Officer and an audit committee, both of whom report to the board. The board also appoints an external auditor who prepares annual financial statements, with or without qualifications for the board. It is the duty of the auditor to bring any financial irregularities to the attention of the board and to the Registrar.

[39] Medshield's counsel submitted that Medshield's trustees did everything reasonably required of them under the MSA to ensure proper financial controls:

39.1 The board appointed Mr Alley, apparently a fit and proper person as PO of the scheme with effect from July 2007. Mr Alley had previously been a trustee of Medshield and the chairperson of the marketing committee;

39.2 The board established several committees in terms of the MSA including the audit committee;

39.3 The board appointed Price Waterhouse Coopers (PWC) as its external auditors;

[12] Section 37 (1)

39.4 The board ensured that annual financial statements prepared by PWC were produced[13];

39.5 OMHC prepared monthly management accounts for the board[14].

[40] Counsel for Medshield submits that Medshield's mistake of payments to Yarona over a two-year period totaling R6 110 236, 67 was not due to inadequate financial controls, either on the part of the board or the administrator.

[41] Yarona's counsel criticized Ms Coetsee's testimony that she conceded under cross-examination that she was unable to say whether there was any system specifically in place in regard to the payment of invoices. The criticism is, in my view unfair as Ms Coetsee had no direct evidence of the payments of invoices. She was also criticized that she made it clear that the board of trustees placed their reliance and trust on the PO, which in my view is reasonable as the duty was in terms of the MSA delegated to the PO on a day to day basis. Mr Alley was delegated and nominated by the board of trustees to effect disbursements on behalf of the Scheme.

[42] Yarona's counsel contends that neither Ms Matlala nor Ms Coetzee presented any evidence of:

42.1 any formal BOT approved policy procedure that was in place in regard to the payment of invoices during the relevant period;

42.2 what was required of the BOT in terms of the scheme Rules during the relevant period;

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[13] Bundle C, pp 75-80 (Income Statement for the year ended 31 December 2007) pp 81-86 (Income Statement for the year ended 31 December 2008)
[14] Bundle C pp 87-119 (Management Accounts Dec 2008)

42.3 what measures the BOT had put in place to ensure that no irregular payments would be made; and

42.4 what systems of internal control and/or checks and balances had been put in place by the BOT to ensure that payments were correctly made.

It is on this basis that Yarona's counsel concluded that the MSA and the Scheme Rules were breached in material respects and that the BOT and the Finance Committee simply abdicated their responsibilities and left everything in the hands of the PO in the absence of proper procedure policy or system in place. Counsel submitted that the conduct of the BOT in this regard must be labelled as completely cavalier and reckless.

[43] It is appropriate that I should at this point, deal with the relationship between Mr Alley and Mr Soll who at that time was Yarona's managing director. Email correspondence between Mr Alley and Mr Soll, obtained from Mr Alley's computer after his suspension in September 2009, revealed the extent to which Mr Alley and Mr Soll handled and processed payments to Yarona;

43.1 A letter dated 31 May 2007 on a Medshield letterhead and which appears to have been signed by Mr Welcome Mboniso, Medshield's PO before Mr Alley[15], was sent to Dr Martin de Villiers of OMHC. It advised Dr de Villiers that Medshield had requested Yarona "*to perform and undertake an exercise on their Risk Sharing Models and Reimbursed Strategies*". Medshield disputed the authenticity of the letter. Mr Mboniso testified that he was not the author of the letter and that he did not sign it. As evidenced by a

[15] Bundle A p311

series of emails between Mr Soll, Mr Alley (then a trustee), Ms Baartjies and Ms Ncube[16] Mr Soll determined the contents of the letter using his wording[17].

43.2 On 1 June 2009, Mr Alley sent an email to Mr Soll and another person at Yarona, promising that payment would be made despite the fact that no contract existed between Medshield and Yarona: *"Bradley at this stage please do not advise anyone of this, either at Medshield or elsewhere, as I am doing these payments outside of a contract and can create problems for me".*

43.3 Correspondence between Mr Alley and Mr Soll between 10 and 29 September 2009 repeated that on 10 September 2009, Mr Soll was still trying to conclude a contract with Medshield[18]. On 17 September 2009, Mr Soll provided Mr Alley with a new bank account for Yarona. On 22 September 2009 Mr Alley confirmed that R350 000 had been paid into an account and assured Mr Soll that he could confirm that *"Medshield stands good for that amount".* On 24 September 2009, Mr Alley informed Mr Soll that he had paid the first payment from his own account and would pay a further R150 000 the following day as it was the best he could do "*coming out of my bond".* By 29 September 2009, Mr Soll was complaining that none of the money had cleared in his account[19]. The next day Mr Alley was suspended. The promised payment of R350 000 and R150 000 are not recorded in any of the discovered documents.

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[16] Bundle A, pp 315.1 – 315.6
[17] Bundle A, p315.5
[18] Bundle A, p764.30A
[19] Bundle A, p764 – 30 E

[44] I agree with the submissions made by Medshield's counsel that the following conclusions can be drawn from the above-mentioned email correspondence between Mr Soll and Mr Alley:

44.1 Both Mr Alley and Mr Soll knew at all material times that no contract had been concluded between Medshield and Yarona. Despite this, Mr Soll sent regular invoices, usually in the amount of R279 300,00 to Medshield for payment;

44.2 The narration on every invoice was for *"healthcare provider research and geo-mapping"* and this resulted in the payments being categorized as marketing and advertising expenses and not managed healthcare expenses, avoiding the scrutiny that the latter would provoke.

44.3 Mr Alley and Mr Soll knew that Yarona had not provided any services to Medshield and certainly not "*healthcare provider research and geo-mapping*". The narration on the invoices was deliberately misleading and designed to escape any scrutiny of the administrators and the external auditors. Despite this, Mr Alley authorized the payments from Medshield to Yarona and perpetrated the deception by agreeing with Ms Ballim's categorization of the expenses.

[45] Regulation 15A of the Regulations promulgated in terms of the MSA reads as follows:

"15A Prerequisites for managed health care arrangements

(1) If a medical scheme provides benefits to its beneficiaries by means of a managed health care arrangement with another person –

(a) the terms of that arrangement must be clearly set out in a written contract between the parties:

(b) - - - -

(c) - - - - "

[46] It is evident that, had the payments to Yarona been captured against managed health care services as they would have been if the narration on the invoices had been for "*network management services*" and "*network maintenance services*", Medshield's board of trustees and the audit committee would have raised an audit query due to the absence of a contract as prescribed by Regulation 15A above. By contrast, there is no statutory requirement that the contracts between a medical scheme and a service provider for marketing and advertising must be in writing. As a result, payments to Yarona went undetected and the Yarona payments recorded in Medshield's monthly management accounts raised no suspicions and the Principal Officer approved them all as valid.

[47] In my opinion, the conduct of Mr Alley and Mr Soll is central to an assessment as to whether or not Medshield's mistaken payments are excusable. The trustees could not reasonably have known that the Principal Officer, the accounting officer of the scheme and its only executive, would conspire with a managing director of a potential service provider to impoverish the scheme. Medshield's internal financial management could not have anticipated and countered the fact that Mr Alley and Mr Soll actively deceived Medshield's administrators and board of trustees. Furthermore, the internal payment process would have been scrutinized by

Medshield's external auditors, PWC annually. PWC would also have had access to the monthly management accounts prepared by OMHC. If any process was deemed to be irregular PWC would have highlighted this to Medshield.

In the circumstances, I find that Medshield has discharged the *onus* of proving that its mistake in making payments to Yarona was an excusable error in the circumstances. It was simply not possible for Medshield to have known that payments were made *sine causa*. The error *in casu* was induced by the PO acting in collaboration with the payee.

[48] It was argued on behalf of Yarona that on the available evidence, the plaintiff received substantial value for the payments made by it to Yarona over the relevant period. This value, it was contended by Yarona's counsel, consisted of being provided with Yarona network of medical practitioners with whom Yarona had negotiated discounted rates. In my view, this argument had not merit at all as there was no evidence led during the trial of such value or any savings received by the plaintiff from Yarona network. The *onus* is on the defendant to proof any reduction of enrichment and the defendant failed to discharge that *onus*.

[49] Yarona's counsel further argued that as a result of the plaintiff's failure to quantify the extent of the value benefit it received, no evidence was adduced by the plaintiff to demonstrate that it had not reclaimed the VAT component paid in regard to every payment made in respect of particular invoices. On this basis, counsel contends that plaintiff failed to properly quantify its claim and that the claim is to be dismissed on this ground.

In my view, there is no basis in law for this argument. The plaintiff is a Medical Scheme. Medical Schemes registered under the Medical Schemes Act are exempt

from VAT as they fall within the definition of a *"benefit fund"* as defined in Section 1 of the Income Tax Act 58 of 1962, which in turn is listed in Section 10 (1) (d) (ii) of the Act[20].

[50] I now turn to consider the submission made by Medshield Counsel that should the Court find that Medshield has not proved circumstances in which its mistake can be said to be excusable, that this requirement of the common law should not be applied against Medshield as this requirement does not apply to payments made on behalf of others. Counsel in this regard relied on **Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd 1997 (2) SA 35 (A) at 44 G – 45A**, wherein Harms JA stated:

> *"Does the general rule relating to excusability of the error relate to claims such as the present? Wessels (op cit para 999) submitted not:*
>
> *'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' ".*

[51] It was counsel's submission that there is no reason why the exception should not apply to representatives such as trustees of a medical scheme who have a duty under the MSA to ensure that the interests of the beneficiaries of the scheme are protected at all times.

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[20] Section 1 provides the definition of benefit fund as follows:

(a) ....

(b) Any medical scheme registered under the Provisions of the Medical Scheme Act 131 of 1998

In view of my conclusion that the mistake of Medshield in making payment to Yarona was excusable, it is not necessary to deal with these submissions.

[52] It was further submitted on Medshield's behalf that the common law requirement of excusability constitutes an unreasonable and unjustifiable limitation of Medshield's right not to be arbitrarily deprived of its property in terms of section 25 (1) of the Constitution. This section protects against arbitrary deprivation of property. It was argued that the excusability requirement of the *condictio indebiti* permits a defendant who has been enriched *sine causa* to retain its enrichment if the plaintiff is unable to establish that its mistake in making payment is excusable. It is on this basis that Medshield submits that this Court ought to develop the common law in terms of section 39 (2) of the Constitution, by removing the requirement of the *condictio indebiti* that the mistake must be excusable.

[53] I agree with Yarona's counsel that this argument relating to the development of common law under section 39 (2) of the Constitution is not competent as it was not pleaded at all.

In **Everfresh Market & Virginia v Shoprite Checkers 2012 (1) SA 256 (CC)**, Moseneke DCJ, speaking for the majority of the Court, held the following:

> *"[51] This court set out the test for proper pleading in Prince v President, Cape Law Society, and Others. Ngcobo J wrote:*
>
> *'Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to*

the issue of justification. I would emphasise that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as to allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. . . . .' ".

[54] I agree that litigants who seek to invoke provisions of section 39(2) must plead their case in order to warn the other party of the case it will have to meet, which *in casu* was not done by the plaintiff. It is therefore not open to plaintiff to raise this argument relating to the development and/or amendment to the common law.

Prescription

[55] Yarona contends that the payments made by Medshield to it between 6 August and 6 April 2008 have prescribed[21] as Medshield knew or ought reasonably have known that payments to it were made *sine causa.*

[56] Section 12 of the Prescription Act provides as follows:

"(1) subject to the provisions of subsection (2) and (3), prescription shall commence to run as soon as the debt is due. . .

(2) . . . .

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises;

[21] Pleadings Bundle, Defendants special plea, pp 7 – 8; par 2A.1

provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care".

[57] Yarona's counsel submitted that an undue payment is, provided all the requirements for the *condictio indebiti* are met, immediately due and thus quantifies as a debt under section 12 (1) of the Prescription Act. It is argued that on the supposition that all the requirements for the cause of action are met, each payment fell due as a debt on the same day that it was erroneously paid, based on the provisions of section 12 (3) of the Prescription Act. Counsel submitted that all the payments falling outside the three-year period prior to the institution of this action, therefore became prescribed.

[58] Evidence of Meshield witnesses established that Ms Coetsee, the acting PO and the trustees first became aware that the payments to Yarona were made *sine causa* during the period September to November 2009[22]. Medshield's last payment to Yarona was on 17 July 2009 and at that time Mr Alley was still the only person at Medshield who knew that the payments were made *sine causa*. He was suspended during September 2009. Medshield therefore, did not have knowledge of the facts from which the debt arose until in September 2009.

[59] The first question that arises is whether Mr Alley's knowledge of the payments made *sine causa* could be deemed to be constructive knowledge by the trustees and the scheme that payments were made without cause. I do not agree. It is settled law that where an agent acts to deceive its principal, the fiction of constructive knowledge on the part of the principal does not apply[23].

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[22] Bundle A, pp 764.31 – 764.33

[23] Rand Bank Bpk v Santam Versekeringsmaatskappy Bpk [1965] 4 All SA 337 (A) at 341, also at 1965 (4) SA 363 (A)

[60] The second question is whether Medshield and the trustees exercised reasonable care to uncover the fact that the payments were being made *sine causa.* To determine this, Medshield's conduct must be tested by reference to the steps that a reasonable person in the position of the trustees would have taken to acquire knowledge of Mr Alley's deception[24].

[61] I am satisfied that based on the testimony of Medshield witnesses, a reasonable person on the trustees position would not have acquired the knowledge earlier than it did that the payments to Yarona were without cause and therefore the prescription defence must fail.

Interest

[62] Counsel for Yarona submitted that it is impermissible in law for the plaintiff to claim interest on the amount of the full payment from the actual date of the payment and in this regard relied on **Kudu Granite Operations (Pty) Ltd v Caterna Limited 2003 (5) SA 193 (SCA) at par 28** where the SCA reaffirmed the principle that interest is not recoverable under the *condictio indebiti* prior to a proper demand or summons, whichever date being the earlier. I agree with this submission.

[63] In the premises, the following order is made against the defendant;

1) *Payment in the sum of R6 110 236.67 a collective payment made up as follows:*

   1.1 payment of the sum of R279 300.00;

   1.2 payment of the sum of R279 300.00;

   1.3 payment of the sum of R279 300.00;

[24] Leketi v Tladi NO [2010] 3 All SA 519 (SCA) at par. 18

1.4 payment of the sum of R279 300.00;

1.5 payment of the sum of R558 600.00;

1.6 payment of the sum of R279 300.00;

1.7 payment of the sum of R15 091.67;

1.8 payment of the sum of R279 300.00;

1.9 payment of the sum of R279 300.00;

1.10 payment of the sum of R279 300.00;

1.11 payment of the sum of R279 300.00;

1.12 payment of the sum of R279 300.00;

1.13 payment of the sum of R558 600.00;

1.14 payment of the sum of R279 300.00;

1.15 payment of the sum of R279 300.00;

1.16 payment of the sum of R558 600.00;

1.17 payment of the sum of R279 300.00;

1.18 payment of the sum of R279 300.00;

1.19 payment of the sum of R229 845.00;

1.20 payment of the sum of R279 300.00;

2) *Interest at the rate of 15,5% per annum calculated from date of summons to date of payment;*

3) *Costs of the action, including costs of two counsels.*

D S MOLEFE

JUDGE OF THE HIGH COURT

APPEARANCES

Counsel on behalf of Plaintiff	:	**Adv. D Berger SC et Adv. K Millard**
Instructed by	:	**Hogan Lovells**
Counsel on behalf of Defendant	:	**Adv. M Maritz SC et Adv. D van Zyl**
Instructed by	:	**Gildenhuys Malatji INC.**