Bowman NO and others v Fidelity Bank Limited
[1997] 1 All SA 317 (A)

Division:	Appellate Division
Date:	28 November 1996
Case No:	144/95
Before:	Van Heerden, Eksteen, Nienaber, Harms and Zulman JJA
Sourced by:	JJF Hefer and I Potgieter
Parallel Citation:	1997 (2) SA 35 (A)

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Contract – Condictio Indebiti – General rule relating to the excusability of the error which gave rise to a payment/overpayment is not applicable in cases where liquidators, trustees, receivers and executors act in a representative capacity for the benefit of others – These persons should not be denied an action under the condictio indebiti from recovering what has been paid/overpaid as a result of a bona fide mistake.

Contract – Condictio Indebiti – Persons acting in legally appointed representative capacities are entitled to reclaim an ultra vires payment/overpayment with the condictio indebiti.

Contract – Payment/Overpayment ultra vires enabling legislation can be reclaimed by condictio indebiti, or at the very least, the condictio sine causa.

Editor's Summary

Mabula Investments (Pty) Ltd ("the company"), the owner of a game farm and hotel called "Mabula Lodge" experienced financial difficulties in 1991. This consequently led to the liquidation of the company and the sequestration of two individuals, the sureties of the company. The 1st Appellants were appointed joint liquidators of the company. The 2nd and 3rd Appellants were appointed trustees in the estates of the two sureties. The liquidators and the trustees realised that it would be in the best interests of the creditors of the company to sell Mabula Lodge as an entity. They obtained the consent of the Master of the Supreme Court on condition that the creditors, especially the Respondent, consented thereto. The Respondent was a secured creditor of the company and the sureties. An agreement was reached between the 1st, 2nd and 3rd Appellants and the Respondent whereby it was agreed that the Respondent would be paid a net quantified dividend, the sum total of its secured claims, upon the receipt of the purchase price for Mabula Lodge. The net amount owing to the Respondent for its secured claims was determined to be R640 000,00.

Mabula Lodge was sold after some delay in June 1991 and the Respondent became impatient about further delays in the transfer of Mabula Lodge. To allay some of the Respondent's fears, the Appellants paid the Respondent R10 000,00 in August 1991. In September 1991, the Respondent's attorneys wrote to the Appellants and claimed that R950 000,00 was due to their client and that the Respondent was suffering financial damages as a result of the delay in transferring Mabula Lodge to the new owners. When the transfer was effected, a payment of R950 000,00 was made to the Respondent.

Upon the realisation in October 1991 of the overpayment in the sum of R320 000,00 the Appellants requested a refund from the Respondent. The Respondent only refunded R100 000,00. The Appellants accordingly sued the Respondent in the court *a quo* for the balance of the overpayment by way of a *condictio indebiti*. The court *a quo* found that the Appellants had failed to make

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out a *prima facie* case and granted absolution-from-the-instance at the close of the Appellants' case. Leave to appeal was granted.

Held – The Court held that the rules of the *condictio indebiti* were not identical for all situations and that there was scope for deviation, for instance, where deceased or insolvent estates and the like were concerned.

Section 113(3) of the Insolvency Act 24 of 1936 provided that a trustee could only distribute an estate after the confirmation of the estate account. Section 409 of the Companies Act 61 of 1973 had a similar provision for companies in liquidation. *In casu*, the payments were made before any accounts had been confirmed. In fact, they had not even been drawn up. The Court, for the sake of convenience, assumed that the agreement and the payment/overpayment pursuant thereto were *ultra vires* the Insolvency and Companies Acts. This therefore meant that the Court had to consider the question whether or not an *ultra vires* payment/overpayment could be reclaimed with the *condictio indebiti*. After referring to various cases on the issue, the Court held that an *ultra vires* payment/overpayment could be reclaimed with a *condictio indebiti*, or at the very least, the *condictio sine causa*.

The Respondent submitted that a party acting in a representative capacity could not recover what he paid on behalf of another, hence the Plaintiffs could not use the *condictio indebiti*. The Court, following Ulpian in *Digest 12.6.5*, stated that there was nothing new about one person recovering with the *condictio indebiti* what another has paid. In any event, the case of *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) held that the person who was entitled to bring the action (*condictio indebiti*) was "he who is considered in law to have made the payment." Accordingly, since the Appellants were acting in their legally appointed representative capacities, they were entitled to reclaim the overpayment with the *condictio indebiti*.

The Respondent also submitted that the Appellants had failed to show in the court *a quo* that the amount paid was an *indebitum* (not owing to the Respondent). The Court held that there was no confirmation of the liquidators' and trustees' accounts and that this meant that the debt (secured claims) was made subject to a suspensive condition. The jurists Voet, Pothier and others were in agreement that a debt subject to a suspensive condition was, also for the purposes of a *condictio indebiti*, regarded as an *indebitum*. Furthermore, since no evidence was led to show that more than the agreed R640 000,00 was owing, and the fact that the Respondent might not receive anything for its concurrent claims against the estates of the sureties after the confirmation of the trustees' accounts, the Court concluded that R220 000,00 was not owing to the Respondent. The Appellants had paid the Respondent R950 000,00 but they had earlier already paid R10 000,00 while the agreement stated an amount of R640 000,00. This meant that R320 000,00 had been overpaid. Since the Respondent had refunded R100 000,00, it was liable to refund the Appellants for R220 000,00.

The Court *a quo* had also ruled against the Appellants because it felt that they were grossly negligent and inexcusably slack. It was a general requirement of the *condictio indebiti* that the error which gave rise to the payment should not be inexcusable. The Court held that this finding was not justified. The overpayment was, at least in part, induced by the misleading letter by the Respondent's attorneys, and the accompanying threat of a claim for damages. The Appellants might have been negligent in not checking the amount in the letter but it was not inexcusable. Nevertheless, the Court held that the general rule relating to

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excusability should not have been applied to a claim such as *in casu*, by the liquidators of a company and the trustees of natural persons' estates. A liquidator /trustee/ receiver/ executor acting in a representative capacity for the benefit of others should not suffer by being denied an action to reclaim an overpayment resulting from a *bona fide* mistake.

The appeal was upheld with costs.

Notes

For Contract generally, see *LAWSA* Re-issue (Vol 5(1))

For the Companies Act 61 of 1973, see *Butterworths Statutes of South Africa* 1996 (Vol 2)

For the Insolvency Act 24 of 1936, see *Butterworths Statutes of South Africa* 1996 (Vol 2)

Cases referred to in judgment

("**C**" means confirmed; "**F**" means followed and "**R**" means reversed.)

African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd 1978 (3) SA 699 (A) – **F**

Amalgamated Society of Woodworkers of SA and another v Die 1963 Ambagsaalvereniging 1967 (1) SA 586 (T)

Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd 1977 (1) SA 298 (W)

Brand NO v Volkskas Bpk and another 1959 (1) SA 494 (T)

Estate Delponte v Barnes and another 1910 CPD 118 – **R**

Gascoyne v Paul and Hunter 1917 TPD 170 – **C**

Govender v Standard Bank of South Africa Ltd 1984 (4) SA 392 (C)

John Bell & Co Ltd v Esselen 1954 (1) SA 147 (AD)

Kommissaris van Binnelandse Inkomste en 'n ander v Willers en andere 1994 (3) SA 283 (A) – **C**

Leal & Co v Williams 1906 TS 554

Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A)

Rapp and Maister Holdings Ltd v Ruflex Holdings (Pty) Ltd 1972 (3) SA 835 (T)

Rulten NO v Herald Industries (Pty) Ltd 1982 (3) SA 600 (D)

Van Wijk's Trustee v African Banking Corporation 1912 TPD 44

Volkskas Beleggingskorporasie Bpk v Oranje Benefit Society 1978 (1) SA 45 (A)

Watson's Executor v Watson's Heirs (1891) 8 SC 283

Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and another 1992 (4) SA 202 (A) – **F**

WP Koöperatief Bpk v Louw 1995 (4) SA 978 (C)

Zimbabwe

CCA Little & Sons v Liquidator R Cumming (Pvt) Ltd (In liquidation) 1964 (2) SA 684 (SR)

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Judgment

HARMS JA

This appeal concerns the application of the principles of the *condictio indebiti*. Absolution from the instance with costs was decreed against the appellants, the plaintiffs, after the close of their case and before the respondent, Fidelity Bank Ltd ("Fidelity") had presented or closed its case. The trial judge in

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the Witwatersrand Local Division, Roux J, subsequently granted leave to appeal to this Court. Whether the appellants will ultimately be entitled to judgment is not the issue, but only whether there was evidence before the court below upon which a court might reasonably have found for them (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; cf. *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) 37H *et seq*. *per* Jansen JA). Accordingly, the facts set out in this judgment do not represent final factual findings, but rather agreed facts or those that have been established *prima facie* by the plaintiffs.

Mabula Lodge was a game farm, hotel and shareblock concern and it experienced financial difficulties at the beginning of 1991. This led to the liquidation of Mabula Investments (Pty) Ltd ("the company"), and to the sequestration of the estates of Messrs Joubert Snr and Jnr, seemingly the driving forces behind the enterprise. The assets of Mabula Lodge belonged to these three parties and to some others and the liquidation of the

three estates, for practical reasons, had to be dealt with as one. The first plaintiffs, three professional liquidators, were appointed as the joint liquidators of the company and they were (at the time of the alleged overpayment – the subject of the claim) still acting in that capacity. Subsequently, a scheme of arrangement was sanctioned and the company was discharged from liquidation. The first plaintiffs were released from their aforesaid appointment and were instead appointed as the joint receivers of the company. In this new capacity they instituted the present proceedings as first plaintiffs. The second and third plaintiffs are professional trustees and are the trustees of, respectively, Joubert Snr and Jnr. The company, discharged from liquidation, is the fourth plaintiff.

The liquidators and trustees realised at an early stage that it was in the best interest of the different bodies of creditors to attempt to sell Mabula Lodge as an entity. For this they obtained the consent of the Master of the Supreme Court who granted it subject to the agreement of, among others, Fidelity. The reason for the condition was that Fidelity was a secured creditor of the company and the Jouberts. Fidelity was, however, only prepared to consent if it had certainty about what it would receive for its securities from such a sale. For that reason an agreement was concluded between the first, second and third plaintiffs (all acting as either provisional liquidators or as provisional trustees), on the one side,

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and Fidelity on the other. These plaintiffs therein undertook to pay, in the event of a sale of Mabula Lodge, a net sum in respect of each secured claim. That means that the agreement determined in advance what Fidelity's secured dividend would be, and the plaintiffs were obliged to pay a net value, without the deduction of any administration expenses, upon receipt of the purchase price for Mabula Lodge. This agreement, entered into on or about 17 June 1991, enabled the trustees and liquidators to determine the minimum price against which they could sell the concern.

The secured indebtedness of the company to Fidelity was R197 344,21 and the amount payable to Fidelity for the security was agreed upon as R150 000. As far as Joubert Snr is concerned, the corresponding figures were R298 101,53 and R245 000, and in relation to Joubert Jnr, R277 243,93 and R245 000. Fidelity was thus entitled to what the parties called a "net cheque value" of R640 000,00 in respect of its three secured claims. Apart therefrom Fidelity remained a concurrent creditor of the estates of both Jouberts. The cause of those claims was suretyship creating joint and several liability. The same amount, namely R453 925,34, was accordingly proved against each of their estates in relation thereto.

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Mabula Lodge was sold after some delay and Fidelity became impatient about yet further delays relating to transfer of the assets to the purchaser and the payment therefor. To allay Fidelity's irritation, a sum of R10 000,00 was paid on 13 August 1991. It did not have the desired effect. On 13 September Fidelity's attorneys wrote a letter in these terms to the liquidators and trustees:

"We have been advised by our client, Fidelity Bank, to record that:

1. An amount of *approximately R950 000,00* [italics added] is due to it from the proceeds of the transfer of the company in liquidation.

2. The transfer has been unduly delayed and our client has suffered damages and is still suffering damages on a daily basis.

3. Our client intends recovering the aforesaid damages from the liquidator should the proceeds not be sufficient to settle the damages as well ... ."

The origin or composition of the higher amount has to date not been explained, not in the pleadings nor during the course of cross-examination. The letter had more than the desired effect. A cheque for the claimed amount was immediately requisitioned and prepared and when transfer was effected on 20 September the payment of R950 000,00 was made. Taking into account the earlier payment of R10 000,00, it represented an overpayment *on the agreement* of R320 000,00. Upon the realisation during October of the overpayment, a repayment was requested. This was initially refused but without any sensible explanation a sum of R100 000,00 was refunded by Fidelity on 31 January 1992.

Roux J found, on a number of counts, that the plaintiffs had failed to make out a *prima facie* case entitling them to the balance of the overpayment, namely R220 000,00, by way of the *condictio indebiti*. Counsel for Fidelity, in argument, supported the judgment and I turn then to consider the correctness or otherwise of these findings and submissions.

There has been more than one attempt to state or restate the requirements of the *condictio indebiti*, but these formulations were more

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often than not concerned with the problems of the specific case and have to be read in that limited context. This case, in particular, does not require a similar exercise. I do wish, however, to point out at the outset that the principles underlying the *condictio* are not immutable and that, in principle, a party is entitled to rely "op die analogiese aanwending van die *condictio indebiti*" (*Kommissaris van Binnelandse Inkomste en 'n ander v Willers en andere* 1994 (3) SA 283 (A) especially at 333G-H). The rules of the *condictio* are also not identical for all situations and there is scope for deviation, for instance where the deceased or insolvent estates and the like are concerned (*ibid.* at 330A-H).

Section 113(3) of the Insolvency Act 24 of 1936 provides that immediately after the confirmation of a trustee's account in terms of section 112, the trustee "shall in accordance therewith distribute the estate". To a similar effect is section 409 of the Companies Act 61 of 1973 in relation to companies in liquidation. The payments in this case were made before any accounts had been confirmed; in fact, at the time of the trial they had not even been drawn (something that is relevant in a later context). Because of this, as I understand the judgment, Roux J held that the payment or overpayment to Fidelity had been *ultra vires*. He further held that such an *ultra vires* payment cannot be reclaimed with the *condictio indebiti*. For the sake of convenience I am prepared to assume in favour of Fidelity that the agreement was *ultra vires*, and that both

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the payment in terms thereof as well as the overpayment were *ultra vires*. That leaves for consideration the question of whether a payment so made can be reclaimed with the *condictio indebiti*.

No authority was quoted for the finding that an *ultra vires* payment cannot be reclaimed with this or a related enrichment action. Reference was made to the catch-phrase "on a frolic of his own" in order to describe the act of the plaintiffs in making an overpayment, but I assume that the learned judge did not thereby intend to adjudge an enrichment claim with a delictual yardstick. The point was also made that the creditors of such estates have claims for damages for maladministration against trustees and the like. Whether offered as a soporific or as a substantive reason, is not clear. If the latter, I fear that I do not understand it. This action is not concerned with the relationship between, say, liquidators and unpaid creditors, but between liquidators and overpaid creditors.

I would have thought that an *ultra vires* payment represents a prime example of a payment *indebite*. Such payments are, by their very nature, payments of something not owing ("onverskuldig") by the payee. Sir John Wessels was of a like mind: in *Law of Contract in South Africa*, 2nd ed, para 3642, he said that a payment is considered not to be due if a claim was thought to exist but which, after payment, is discovered to have been null and void. The point is in any event not a novel one and has been the subject of a number of judgments. In *Van Wijk's Trustee v African Banking Corporation* 1912 TPD 44 the full bench was concerned with an analogous problem. De Villiers JP said the following:

> "If in violation of his duty an heir or executor pays a creditor whose claim should have been postponed, it does not appear to me to be contrary to any principle of our law if under such circumstances the estate, through the executor or the trustee, is given the right to recover back what has been improperly paid

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> by way of a *condictio quasi indebiti*. It is clear law that the person on whose behalf the payment was made has the *condictio indebiti* ... , and there can be no doubt that in this case the payment of a debt which at all events was in the

nature of a *quasi-indebitum* was made by the executrix in her capacity as such." (At 52-53.)

He went on to state (also at 53) that if that is the law, it is unnecessary to consider whether the executor is in that case also personally liable for having made an improper payment. Curlewis J expressed similar sentiments in his concurring judgment and found that the result accorded with English law (at 58).

CCA Little & Sons v Liquidator R Cumming (Pvt) Ltd (In liquidation) 1964 (2) SA 684 (SR) is an instance where the court found that a payment had been made during the course of a judicial management in respect of an obligation validly owed, although at the time payment took place, it was prohibited by law. Without concerning myself with the correctness of the judgment in all its respects, I wish merely to point out that, although the court found that the *condictio* applicable was the *condictio sine causa*, it did not find that an enrichment claim was, in the circumstances, not competent (see especially at 691A-D). In *Amalgamated Society of Woodworkers of SA and another v Die 1963 Ambagsaalvereniging* 1967 (1) SA 586 (T) the second plaintiff, a so-called common law body corporate, had made an *ultra vires* donation to the defendant (see 595C). In spite of this, the court held that the money donated could be reclaimed with the *condictio indebiti*, relying by way of analogy on the common law rule that entitled a minor to reclaim what had been paid in terms of a void transaction (at 596E-597C).

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The same conclusion was recently reached, albeit without much by way of motivation, in *WP Koöperatief Bpk v Louw* 1995 (4) SA 978 (C) 988F-H, a case where a co-operative society had made loans (or "voorskotte") which were presumed to be *ultra vires* its statutory powers and its memorandum of association. It was nevertheless held to be entitled to reclaim the amount of those loans. That on this assumption the judgment was in this respect correct, appears clearly from a judgment of this Court: *Volkskas Beleggingskorporasie Bpk v Oranje Benefit Society* 1978 (1) SA 45 (A) at 59A-C. Lastly, there is *Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600 (D), a judgment of Booysen J. The trustee of an insolvent estate had made an overpayment to a creditor. The defence to the claim based upon the *condictio indebiti* was that the error had been one of law and not one of fact. (That was before the decision of this Court in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and another* 1992 (4) SA 202 (A) which held that errors both of fact and law can found such a claim.) In an attempt to circumvent this perceived impediment to the claim, the learned judge equated a trustee of an insolvent estate with a person with limited legal capacity – persons who under the old regime could have claimed even if having paid due to an error of law (at 610C-E). Whether this comparison is correct need not detain me because, as an alternative, Booysen J followed the *Little* judgment and held that the claim was competent and found that the *condictio sine causa* was, in any event, available (at 610E-G). (See the comment on this case by DL Carey Miller 1983 *SALJ* 183 at 186.)

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There is thus sufficient authority to the effect that an *ultra vires* payment can be reclaimed with the *condictio indebiti* or, at the very least, the *condictio sine causa*. There is nothing to the contrary and there is no reason to overrule the quoted cases. They make in this regard good sense.

Another ground on which the plaintiffs were non-suited was so formulated by the trial judge:

"I am not aware of any principle entitling A to recover money from C which B, exceeding his authority, paid to C. I refer to, for example, *Leal & Co v Williams* 1906 TS 554; and *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (AD)."

The significance of the two authorities escapes me. *Leal* was concerned with a vindicatory claim (or, perhaps, the *actio ad exhibendum*) and held that the doctrine of conversion was not part of our law. The question was whether the true owner of a stolen bank draft could recover its proceeds from an intermediate possessor of the draft who had innocently cashed it. The court held that he could not. Enrichment was not an issue, nor was unauthorised payment. In *John Bell* two officers of the plaintiff company obtained a cheque under false pretences from the company. It was used by them to pay a debt which one of them duly owed to the (innocent) defendant. The company argued that it was entitled to claim the value of the cheque from the defendant on the basis of conversion. This Court confirmed the correctness of the principle laid down in *Leal* and rejected the argument (at 152B-153E). An alternative argument was based upon the *condictio indebiti* and in that connection it was held on the facts that the payment had been made by the officer in his personal

capacity and not by the company and since the payment was in respect of his own debt, the *condictio* did not lie (at 151C-E).

As far as the facts of this case are concerned, the reference to A claiming from C that which B had paid to C, was not explained in the judgment. Counsel for Fidelity submitted, if I understood him correctly, that it referred to the fact that

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the first plaintiffs had made the payment of R950 000,00 from the bank account named "Kaap Vaal – Mabula Investments (Pty) Ltd In Liquidation" whereas the other plaintiffs have also joined in the action.

Sight was lost of the fact that the first plaintiffs, both in relation to the overpayment and to the claim for a refund, were and are acting in a representative capacity. In any event, as Ulpian is alleged to have said, there is nothing new about one person recovering with the *condictio indebiti* what another has paid (Digest 12.6.5). Quoting Wessels (*op. cit.* para 3693) and others, this Court held that the person who is entitled to bring the action "is he who is considered in law to have made the payment" (*African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) 713A-C). A practical application of these principles is to be found in *Van Wijk*, referred to earlier. An executor in a deceased estate made an overpayment to a creditor. Thereafter the estate was declared insolvent and the court held that the trustee in the insolvent estate was entitled to reclaim the overpayment. I have already quoted the salient passage from the judgment of De Villiers JP.

Somewhat similar were the facts of *Brand NO v Volkskas Bpk and another* 1959 (1) SA 494 (T), another full bench decision. The estate of the

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deceased had been liquidated by the executor testamentary and the residue awarded and delivered to the respondent, the testamentary administrator. Thereafter, allegedly, another and later will was found. The question arose whether the executor appointed therein was entitled to reclaim the goods handed to the respondent. The court held that the appropriate action of the new executor would "not be vindicatory but in the nature of a *condictio indebiti* or *condictio sine causa*" (at 498E-G).

There is also the well-known rule in terms of which an unpaid or underpaid creditor of a deceased estate is entitled to recover from overpaid heirs or legatees, even though the payment had been made by the executor (see *Willers* at 330A-H). Recently this Court (*per* Botha JA) was prepared to extend the rule in order to enable a creditor of a dissolved company to claim an overpayment from a shareholder who had received more than he was entitled to, thereby (at 330H-J) overruling *Rapp and Maister Holdings Ltd v Ruflex Holdings (Pty) Ltd* 1972 (3) SA 835 (T).

That changes the algebraic equation: depending on the circumstances of the case, A may claim from B that which C has overpaid, especially if C was acting in a representative or fiduciary capacity. At the same time it disposes of the finding (and argument) that the court below could not allocate the overpayment among the different plaintiffs: it was not necessary to have made any allocation since the first plaintiffs, as the parties who paid, made the overpayment, on their own and on behalf of others. They, in their capacity as joint liquidators were impoverished to the full extent of the overpayment; because of the scheme of arrangement they, in their capacity as joint receivers, became entitled to recover what was lost to the creditors, and that would include any other party to the scheme whose money had been used to pay Fidelity.

A related argument on behalf of Fidelity, not dealt with in the judgment of Roux J, was that the plaintiffs had not shown that the amount paid included an *indebitum*. There can be hardly any doubt that the agreement between the parties provided for payment of R640 000,00 in respect of Fidelity's secured claims, and nothing more or less. That is what the documents reflecting the agreement state, it is common cause on the pleadings and the pre-trial minute, and accords with the evidence presented on behalf of the plaintiffs. Fidelity relied in its plea on "further express or implied terms" of the agreement. The

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effect of these was that if payment did not take place within seven days of the agreement, Fidelity would have been entitled to certain unquantified additional payments. There was so far no evidence to support the plea and there was no allegation which required of the plaintiffs to disprove some unknown and unidentified indebtedness. The agreement alleged by Fidelity is in any event *prima facie* inconsistent with Fidelity's letter of 13 November 1991 where it relied upon equitable grounds for these additional sums to be retained by it.

Counsel further argued in this context that because the amount of the dividend, if any, payable in respect of Fidelity's unsecured claims had not been established, it had not been shown *prima facie* that the amount claimed was an *indebitum* – the amount overpaid might eventually be the same or less than the dividend. Dividends, if any, in an insolvent estate

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are, as I have discussed earlier, only due upon the confirmation of the accounts. Confirmation is thus in the nature of a suspensive condition. It is furthermore uncertain whether, upon confirmation, anything will be due to any or a particular creditor. In terms of the scheme of arrangement, similar provisions applied. A debt subject to a suspensive condition is, also for purposes of the *condictio indebiti*, regarded as an *indebitum* and may be recovered thereby (Digest 12.6.15; Voet 12.6.3; Pothier, *Treatise on the Quasi-Contract called Promutuum and on the Condictio Indebiti* (translation by Professor Hosten), para 150; Glück, *Ausführliche Erläuterungen des Pandektenrechts*, vol 13, para 828). Concluding this part of the judgment, there was sufficient evidence before the trial court to have justified a finding that the R220 000,00 claimed, was an amount not owing to Fidelity.

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 223H-224H). There have been many attempts to lay down rules or formulations in this regard in order to circumscribe what is excusable and what is not (see e.g. McEwan J in *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* 1977 (1) SA 298 (W) 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 (cf. Glück, vol 13, para 827 and 834).

Roux J, additionally, non-suited the plaintiffs on this ground, finding gross negligence and inexcusable slackness on their part. In the light of the view that I take of the matter, it is unnecessary to consider fully the facts relating to the error in making the overpayment, but I wish to say that I believe that the learned judge's remarks were not justified. The overpayment was, at least in part, induced by the misleading letter from the attorneys, and the accompanying threat of a claim for damages. The failure of Van den Heever (the person who had arranged for the payment on behalf of the first plaintiffs) to check the amount claimed in the letter against his records, was negligent but hardly so inexcusable as to be unworthy of protection by the courts.

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."

Booysen J quoted this passage with approval in *Rulten* (at 608B-C). The suggestion seems eminently sensible. (See further the similar views of Eiselen &

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Pienaar, *Unjustified Enrichment: A Casebook*, p 92.) Consider the case of a deceased estate. The executor makes an improper payment to an heir. It has never been held that in such a case the creditor who institutes the *condictio indebiti* against the heir for something that is rightfully his, has to prove that the executor was not "negligent". If that is not required, there appears to be no reason why the executor, who reclaims *qua*

executor, and indirectly on behalf of the creditor, has to

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discharge such an onus (cf. the reasoning, albeit not directly in point, in *Govender v Standard Bank of South Africa Ltd* 1984 (4) SA 392 (C) at 400D-G).

Professor DP Visser, an ardent abolitionist of the requirement of excusability, in his comment on Willis Faber (1992 *SALJ* 179 at 183) refers to a case recorded by Pauw, *Obs Tum Novae*, no 613. The facts are fairly reflected in the article and do not require repetition. The salient features for present purposes are that although executors in an estate, over many years, had made inexcusable payments *indebite*, the gross negligence of the executors was not raised as a consideration by any of the judges in disposing of the claim by the executors. This may be an indication that the excusability of the error was not a common law requirement of the extended *condictio indebiti*. The same may be said of *Watson's Executor v Watson's Heirs* (1891) 8 SC 283. At the time of payment to the heirs, what they received was due and owing. Because of an external factor, the estate became liable to pay a contribution in respect of shares held by the estate. The executors were held to be able to recover from the heirs. The negligence of the executors arose in another context, but not in the present. De Villiers CJ found (at 286) that in an action by executors *qua* executors against heirs for recovery of their inheritance, the only question was whether the amount claimed was then due. Error in payment of the inheritance was not required for a successful claim, and the absence of any reference to excusability had to follow as a matter of course. It is therefore understandable why this action has been referred to as a *condictio quasi indebiti* in *Van Wijk*. Once that is understood, it is unnecessary to introduce the complication of the *condictio sine causa* as was done in, for instance, *Little* and *Rulten*. I therefore hold that the views of Wessels (para 999) quoted earlier correctly reflect our law. It follows that the statement in *Estate Delponte v Barnes and another* 1910 CPD 118 at 126 that in questions relating to the *condictio indebiti* an executor should stand in exactly the same position as any other person, as a general proposition, is unsound.

Since the learned trial judge in my judgment erred also in this last respect, the appeal must succeed and the order is as follows:

> The appeal succeeds with costs. The order of the court below is replaced with an order dismissing the application for absolution from the instance with costs.

(Van Heerden, Eksteen, Nienaber and Zulman JJA concurred in the judgment of Harms JA.)

For the appellants:

S van Nieuwenhuizen SC instructed by *Hofmeyr Van der Merwe Incorporated*, Braamfontein, and *Naudes*, Bloemfontein

For the respondent:

M Basslian instructed by *Salomon-Friedman*, Johannesburg, and *Lovius-Block*, Bloemfontein