RAHIM v MINISTER OF JUSTICE
[1964] 4 All SA 370 (A)

Division:	Appellate Division
Judgment Date:	1 September 1964
Case No:	not recorded
Before:	Steyn CJ, Van Blerk JA, Botha JA, Van Wyk JA and Hoexter AJA
Parallel Citation:	1964 (4) SA 630 (A)

• Keywords • Cases referred to • Judgment •

Keywords

Agency - Knowledge - Imputed to principal - Information obtained in performance of mandate - Duty on agent to impart knowledge to principal

Condictio indebiti - Ignorance of fact - Inexcusable slackness resulting in payment by mistake

Enrichment - Alternative remedy - Condictio indebiti - Inexcusable error

Magistrate's Court - Attachment - Goods not in possession of judgment debtor - Messenger acting at his own risk

Magistrate's Court - Sheriff - Negligence - Double attachment of same property

Cases referred to:

Hauman v Nortje 1914 AD 293 - Referred to

Union Government v National Bank of South Africa Ltd 1921 AD 121 - Applied

Weinerlein v Goch Buildings Ltd 1925 AD 282 - Considered

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Judgment

VAN BLERK, J.A.: This appeal concerns a claim for a refund of money paid in error by the messenger of the court, Durban, to the appellant in respect of a judgment debt due to him by one Hoosen.

In 1957 Hoosen acquired an International Lorry on the hire-purchase system and had it registered in his name. In terms of the hire-purchase agreement the ownership in the vehicle vested in the seller, to whom Hoosen had to pay monthly instalments in respect of the purchase price. The hire-purchase agreement was ceded to the Trans-Drakensberg

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Bank, Ltd. (for convenience sake referred to as the Bank) which by reason of the cession became the owner of the vehicle and entitled to payment of instalments falling due under the agreement. In October, 1958, the Bank instituted proceedings in the Magistrate's Court, Durban, against Hoosen in respect of arrear instalments. Judgment was obtained and Hoosen's right, title and interest in the vehicle were attached, and sold in execution by the messenger of the court, Durban, to the Bank for one shilling. Van den Bergh, a temporary deputy messenger, effected the attachment without seeing the vehicle, and Lombard, the senior deputy messenger, also without seeing the vehicle, conducted the sale in execution on about 18th February,

1959. As a result of these proceedings the vehicle was removed from the possession of Hoosen and the Bank became the full owner of it. A few days after the sale Lombard in his capacity as messenger by a formal cession ceded Hoosen's right, title and interest in the vehicle to the Bank in order to enable it to take delivery. But apparently the Bank never removed the vehicle. Thereafter van den Bergh in pursuance of a warrant of execution lodged with him by the appellant attached the same vehicle where it was in the Central Garage in Durban. The warrant was issued in respect of a judgment debt due by Hoosen to the appellant. After the attachment the vehicle was removed from the Central Garage to the messenger's store room where it was sold in execution by Lombard, on about 8th April. Allowing for the 14 days provided for in Rule 38 (10) of the Magistrates' Courts Act, it was attached not later than 25th March. That is about five weeks after he had sold Hoosen's right, title and interest in the vehicle to the Bank. Although at the time of the attachment the vehicle was still registered in Hoosen's name it was in fact the property of the Bank. And that was the case when it was sold in execution. Of the proceeds of the sale the messenger paid to the appellant R84.25, the amount awarded to him in terms of a distribution account which had to be drawn as there were other judgment creditors of Hoosen who were entitled to share in the proceeds.

On 23rd April the messenger ascertained that the vehicle was the property of the Bank, who successfully claimed from the Minister of Justice, the respondent in this appeal, the value of the vehicle. The latter thereupon instituted proceedings in the magistrate's court against the appellant for a refund of the sum of R84.25. The action is based on the *condictio indebiti.* In the particulars of claim it is alleged that the amount of R84.25, not being the proceeds of property owned by Hoosen, was not due to the appellant and that the messenger when he sold the vehicle laboured under the reasonable but mistaken impression that it was the property of Hoosen. In the alternative the claim is based on unjust enrichment. In his plea the appellant specifically denies that respondent is entitled to avail himself of either of the two grounds upon which he bases his claim.

The magistrate rightly held that an *indebitum* was proved as there was no money owing by the messenger to the appellant. The appellant could not compel the messenger to pay over to him proceeds of the sale of property belonging to the Bank. It is also clear on the evidence that the money had been paid in the erroneous belief that it was part of

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the proceeds of property of the judgment debtor. And it is equally clear that the appellant received the money *bona fide* as owing.

Apparently the magistrate in giving judgment in favour of the respondent considered a mere mistake of fact in the absence of a *debitum* sufficient to ground the *condictio indebiti.* It is, however, not every ignorance of fact which gives rise to the *condictio indebiti. Glück*, 12.6.827, states that the payment should have been made as the result of an excusable error, and says further in para. 834 that the error should not be based on gross ignorance. He refers *inter alia* to *Voet*, 12.6.7, where it is stated that the ignorance of fact should appear to be neither slack nor studied; (*neo supina nec affectata*). This latter passage was approved of by INNES, C.J., in *Union Government* v. *National Bank of South Africa, Ltd*, 1921 A.D. 121 at p. 126. I may also add the statement by Leyser, *Meditat. Ad Pandect.* cxlviii para. iv. *crassus et inexcusabilis error condictionem indebiti impedit.*

In defining *ignorantia supina et affectata, Voet*, 12.6.7, explains that the ignorance should not be of a fact concerning the plaintiff's own affairs or of a fact which, although concerning the affairs of others, is known to everybody except to a few solitary individuals. The present enquiry is concerned with the ignorance of the messenger in regard to his own affairs. He had the means of knowledge and the opportunity to ascertain the true facts. He was not led into the mistake by somebody else. The question is whether in the circumstances of this case the messenger fell into the error as the result of inexcusable ignorance on his part.

In dismissing an appeal to the Natal Provincial Division, KENNEDY, J., and FRIEDMAN, A.J., were, however, of opinion that there is nothing which suggests that Lombard was not diligent in his conduct and that van den Bergh completed his duties in a satisfactory manner.

As Lombard was merely doing the auctioneering his ignorance might be excusable. As regards van den Bergh there might have been no quarrel with the view expressed by the Court *a quo* if he had attached the vehicle while in the possession of Hoosen. But according to the evidence it was attached at the Central Garage, the place where in those days the messenger used to store vehicles attached by him. It seems that the evidence on this point was misread by the Court *a quo*, where KENNEDY, J., says

> ". . . it would seem that the writ was delivered at the residence of the debtor. The chain of evidence suggest that thereafter the vehicle was towed away . . .".

As I understand KENNEDY, J., the warrant referred to here is the warrant issued in respect of the appellant's judgment debt.

It is not clear from the record at what stage the vehicle was taken to the Central Garage and who brought it there. Mrs. Smith, a clerk in the employ of the Bank, says that in October, 1958, the Bank took action against Hoosen and the result of the action was that "the vehicle was taken back again". This fits in with Hoosen's evidence that the messenger removed the vehicle out of his possession. But it does not appear from his evidence when this happened. What is clear, however, is that van den Bergh in pursuance of the warrant issued at the instance of the appellant attached the vehicle not in the possession of the judgment debtor.

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A messenger who attaches goods not in the possession of the judgment debtor does so at the obvious risk that the goods may not be the property of the judgment debtor. The messenger, upon receiving a warrant authorising him to levy execution, is directed to repair to the house or place of business of the execution debtor and there require the debtor to point out property belonging to him. (Rule 38 of the Magistrates' Courts Act). If he is in doubt as to the validity of any attachment or contemplated attachment, he may require that the judgment creditor shall give security to indemnify him. (Rule 35).

As he did not find the goods in the possession of the owner the messenger ought to have been on his guard. On his own showing van den Bergh harboured a doubt, for he telephoned the licensing authorities with a view to ascertaining whether the vehicle was still registered in the name of Hoosen. As the reply was in the affirmative, and as he had no knowledge of the sale to the Bank, he assumed that Hoosen was the owner. He says he did not enquire whether Hoosen's title might have been subject to a hire-purchase agreement. It is notorious that these days motor vehicles are sold subject to hire-purchase agreements, but even this fact did not prompt him to make enquiries from Hoosen in this regard. His failure to make enquiries to this end is evidence of slackness on his part to ascertain the true position. As it happened, all the required information about this vehicle could easily have been obtained from the readily available documents in the messenger's office in Durban, a reference to which would have revealed that barely seven weeks before Hoosen's right to the vehicle had been sold in execution in consequence of an attachment made by him personally. Hoosen, who resided in the Overport area which was assigned to van den Bergh, was no stranger to him. He personally attached Hoosen's right to the vehicle and after that attached the vehicle itself on five or six occasions, under several warrants. In my opinion van den Bergh's conduct was on his own evidence in the circumstances inexcusably slack. He was by no means justified in assuming after a futile enquiry that the vehicle was the property of Hoosen. The respondent could not therefore have availed himself of the *condictio indebiti.* But it was argued on his behalf that he was entitled to recover under the general action based on unjust enrichment.

In his attempt to show that the principle, that a man was not to enrich himself at the cost of another, has an extended application so as to afford an alternative remedy in the instant case, respondent's counsel referred *inter alia* to *Grotius*, 3.30.18. In this chapter *Grotius* mentions, first, the *condictio indebiti;* second, the *condictio promissi sine causa*; third the *condictio sine causa*; and fourth, in para. 18 he says:

> "Ten vierde, weder-eissching van alle 't gunt andersins zonder geheven, betalen ofte belooven, aen iemand is gekomen uit eens anders goed buiten rechtelicke oorzake: als by voorbeeld, iemand heeft ghemeent geld te ontfanghen van een derde, ende mijn geld is hem aengetelt. Hier en is gheen overkoming van leening: want de dwalinge sulcks belet: nochtans is het redelick dat het gunt een ander door het mijne is ghebaet, my werde vergoedet."

Professor Lee in his *Commentary on Grotius* (*ad. Grot*, 3.30.18) remarks that *Grotius* perhaps generalises the

specific instances to be found in the Roman law and in so doing enlarges the scope of the remedy.

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That our Courts have also recognised a development of the doctrine of equity in our law admits of no doubt. For instance, in *Weinerlein* v. *Goch Buildings Ltd.*, 1925 A.D. 282 at p. 296, KOTZE, J.A., says:

> "It (the doctrine of equity) continued to develop; and as no man was allowed to enrich or benefit himself at the expense of another, an equitable remedy of recovering back or of restitution was afforded, where money had been paid which was not due, and the like, as we may gather from the various *condictiones* treated of in the *Digest* (12 *tit.* 4 to *tit.* 7), and of which we find a concise summary given by Grotius in his *Introduction*, Bk. 3 Ch. 30. Equity was even further recognised in the law, for the remedy by a *condictio* was extended, so that besides the recovery of property or money already delivered or paid, an obligation itself could be *condicted*, as Ulpian tells us in *Digest* 12.7.1."

It would appear that the development did not result in a substitution of, or alternative relief to, the remedies afforded by the established and recognised *condictiones* by allowing a general action. The development, so it seems, provided for relief in respect of situations not covered by the existing *condictiones*, of which the case of *Hauman* v. *Nortje*, 1914 A.D. 293, relied upon by respondent in support of his contention, may serve as an example.

Should respondent's contention be upheld then on the facts of this case this general action would be available even if the error was inexcusable. Whatever the scope of the general action visualised by the respondent might be, the argument seems to me wholly untenable. If the respondent could in the circumstances of this case obtain relief by means of the general action based on unjust enrichment then the *condictio indebiti* would thereby be rendered entirely nugatory.

In my opinion, if the species of relief by virtue of the doctrine of unjust enrichment known as the *condictio indebiti* cannot be invoked in respect of the set of facts existing in this case, then the alternative remedy sought to be relied upon is not available to the respondent.

In view of the above conclusion in appellant's favour it is not necessary to pursue the point raised by the Bench whether the money, which came into possession of the messenger as a public officer and executor of the law and which he paid over to the appellant, was the money of the Minister of Justice and, if not, whether the Minister had *locus standi* in the matter.

The appeal is allowed with costs and the order of the Provincial Division is altered to one allowing the appeal to that Division with costs and the judgment of the magistrate is altered to read "judgment for the defendant with costs".

STEYN, C.J., BOTHA, J.A., and VAN WYK, J.A., concurred in the above judgment.

HOEXTER, A.J.A.: The facts appear from the judgment of my Brother VAN BLERK. For the purposes of my judgment it is necessary to add that, when the vehicle in question was attached in execution of a writ issued by the Bank, it was attached in the possession of Hoosen at his residence. That was the only occasion on which the vehicle was attached in the possession of Hoosen, and on that occasion he informed the deputy messenger who executed the writ that the vehicle was subject to a hire-purchase agreement. Hoosen was unable to identify the deputy messenger concerned, but it is not necessary to establish

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his identity, because in any case he was acting as the agent of the messenger of the court, and his knowledge, which was obtained in the performance of his mandate and which it was his duty to impart to his principal, must be imputed to the messenger himself. In these circumstances the respondent has failed to prove what he alleged in his summons, viz., that the messenger laboured under the mistaken impression that the vehicle in question was owned by Hoosen. Whatever van den Bergh and Lombard may have known in fact, in law the messenger must be held to have known that the vehicle was held by Hoosen on a hire-purchase

agreement and was therefore not owned by him.

Approaching the case on the basis that the messenger knew that the vehicle did not belong to Hoosen, it appears that, when he made the challenged payment, the messenger intended to pay a debt which he knew was payable by Hoosen to the appellant and not one which he believed to be payable by himself. And if that was the intention of the messenger, the appellant can justify the payment as being, to the extent thereof, a valid discharge of Hoosen's debt. In these circumstances the respondent cannot rely either on the *condictio indebiti* or on any general form of action based on the maxim that no one may be unjustly enriched at the expense of another.

For these reasons I agree with the order proposed by my Brother VAN BLERK.

BOTHA, J.A., concurred.

Appearances

CMS Brink - Advocate/s for the Appellant/s

DD Will , SC and JH Niehaus - Advocate/s for the Respondent/s

Findlay and Sullivan, Durban; RTomlinson, Francis and Company, Pietermaritzburg; GA Hill, Bloemfontein - Attorney/s for the Appellant/s

Deputy State Attorney, Durban; Deputy State Attorney (OFS), Bloemfontein - Attorney/s for the Respondent/s