Case No 71/90

TPD

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

WILLIS FABER ENTHOVEN (EDMS) BPK .....APPELLANT

and

THE RECEIVER OF REVENUE .....FIRST RESPONDENT

THE REGISTRAR OF INSURANCE .....SECOND RESPONDENT

CORAM :JOUBERT, HEFER, NIENABER, VAN DEN HEEVER JJA et KRIEGLER AJJ

HEARD :6 SEPTEMBER 1991.

DELIVERED :26 NOVEMBER 1991.

J U D G M E N T

HEFER /

HEFER JA:

In terms of sec 5 of the Insurance Act 27 of 1943 as amended ("the Act") no one is allowed to carry on "insurance business" in the Republic unless he is registered as an insurer. Although "insurance business" is defined in sec 1 as "any transaction in connection with any business defined in this section" (such as "life business", "fire business", "marine business" and various other forms of insurance) certain transactions are deemed not to amount to insurance business. Among these are

> "the activities of persons transacting business in the Republic underwritten by underwriters at Lloyds, but subject to the provisions of section 60."

Sec 60 has two sub-sections. Sub-sec (1) appears under the heading "Requirements in respect of business underwritten by underwriters at Lloyds". The introductory part reads as follows:

> "(1) The following provisions shall apply in connection with business underwritten by underwriters at Lloyds and any person who does any act in the Republic relating to the receiving of applications for policies or the issue of policies or the collection of premiums in respect of such business; and any such person shall, for the purposes of this section, be deemed to be carrying on insurance business in the Republic; and any expression used in this section shall accordingly bear the meaning assigned to it in section 1, notwithstanding the provisions of paragraph (g) in the definition of the expression 'insurance business' in section 1 contained: ... "

(The importance of the words that I emphasized will soon emerge.)

The"following provisions" mentioned in the introduction are listed in twenty separate paragraphs. Par (f) reads as follows:

> "(f) Any person who carries on such insurance business in the Republic shall within a period of two months as from the expiration of each calendar year or within such further period as the registrar may allow, pay to the receiver of revenue referred to in paragraph (e) a sum

equal to two and a half per cent. of the aggregate of all premiums paid during the preceding calendar year on policies which were effected through his agency in terms of this section."

Sec 60(2) is in the following terms:

" (2) Except with the prior written approval of the registrar, applied for as prescribed by regulation, no person who is deemed for the purposes of subsection (1) to be carrying on insurance business in the Republic shall effect or renew any insurance business (other than reinsurance business) through a broker at Lloyds which is not underwritten by an underwriter at Lloyds."

The first question in the present appeal is whether the tax imposed in terms of sec 60(1)(f) is payable, not only in respect of policies underwritten by underwriters at Lloyds, but also in respect of policies not so underwritten but effected or renewed through a broker at Lloyds in terms of sub-sec (2). How this question arose appears from what follows.

Until December 1985 two companies - Willis Faber and Company (Pty) Limited ("Willis Faber") and Robert

Enthoven and Company (Pty) Limited ("Robert Enthoven") traded separately as insurance brokers in the Republic. Part of their business fell squarely within the ambit of sec 60(1); but, presumably with the registrar's approval, they also effected and renewed insurance business (other than reinsurance) through a broker at Lloyds which was not underwritten by an underwriter at Lloyds. In the belief that the latter type of business also attracted the tax payable under sec 60(1)(f) they paid certain amounts to first respondent.

During December 1985 Willis Faber and Robert Enthoven merged and became the present appellant who subsequently instituted action in the Transvaal Provincial Division to recover the payments made in respect of 1984 and 1985 from first respondent. Second respondent (the registrar of insurance) was joined as co-defendant by reason of the interest that he might have in the matter. The pertinent averments in the particulars of claim were the

following:

"10. The said payments referred to in paragraphs 6 to 9 above were paid under the bona fide and reasonable but mistaken belief that the said amounts were due and payable to the First Defendant whereas in law and in fact the said monies were not due nor payable to the First Defendant at all.

11. In the premises the First Defendant has been unjustly enriched at the expense of the Plaintiff in the aggregate sum of R209 627,15. "

(The payments mentioned in para 10 were those made in respect of policies not underwritten at Lloyds.)

In his plea first respondent denied these allegations and pleaded that the amounts paid "were due and owing in terms of the provisions of section 60(1) and section 60(2) of the Act".

The matter eventually came to trial before SPOELSTRA J on the following issues:

(a) Whether the payments in question were due in terms of sec 60(1((f) of the Act and, if not,

(b) whether the appellant was entitled to recover

them.

Respondents' case on the second issue was that the mistake on which the plaintiff relied, was one of law and that this entailed that the payments were not recoverable. SPOELSTRA J decided the first issue in appellant's favour but upheld respondents' argument on the second issue and dismissed the claim. Subsequently he granted the appellant leave to appeal.

At the hearing of the appeal appellant's counsel argued in limine that, in the absence of a cross-appeal, the first issue must be taken to have been finally disposed of in favour of his client. But he is plainly wrong since there is no judgment or order as envisaged in sec 20(1) of the Supreme Court Act 59 of 1959, as amended, read with Rule 5(3) of the rules of this court, against which the respondents could appeal. As explained in Publications Control Board v Central News Agency Ltd 1977(1) SA 717 (A) at 745 A

> "(t)he terms 'judgment' and 'order' in the statute and Rule of Court do not embrace every decision or ruling of a court. These terms are confined to decisions granting 'definite and distinct relief'."

(See also Van Streepen and Germs (Pty) Ltd v Transvaal Provincial Administration 1987(4) SA 569 (A) at 580 D-F.) In the present case there is only a ruling that the wording of sec 60(1)(f) of the Act "excludes section 60(2) business from tax". No relief having been sought or granted on the first issue there is nothing against which the respondents could appeal. Not unlike the respondents in the Publications Control Board case (vid 748 A-B of the report) they are seeking to resist the appeal on a ground raised but rejected in the trial court; and precisely like the respondents in that case they are entitled to do so even though they did not cross-appeal.

I turn to consider the provisions of sec 60 of the Act. (To avoid unnecessary repetition I shall refer to business underwritten by underwriters at Lloyds

as "Lloyds business"; to business not so underwritten but effected through brokers at Lloyds as "other business"; and to a person who does any of the acts mentioned in the introductory part of sec 60(1) in respect of Lloyds business as a "Lloyds agent".) By way of introduction to his argument that the tax imposed in sec 60(1)(f) is payable in respect of both types of business respondents' counsel rightly stressed (1) that a person who is entitled to carry on Lloyds business in terms of sub-sec (1) may, with the registrar's approval, transact other business in terms of sub-sec (2) as well; (2) that sec 60(1)(f) thus relates to a person whose business may consist partly of Lloyds business and partly of other business and (3) that the tax is levied on "the aggregate of all premiums paid during the preceding calendar year on policies which were effected through his agency in terms of this section". His argument proceeded as follows: policies effected through a broker at Lloyds in terms of sub-sec (2) are also "effected

through his agency" and are so effected "in terms of this section" since "this section" means the entire section 60 including sec 60(2); and therefore the tax is payable in respect of such policies as well. This result is achieved, he submitted, by applying the plain language which the legislature used and which brooks no departure.

If we were to look only at par (f) and sub-sec (2) the argument is undoubtedly a strong one. But this is not how the question of the interpretation of par (f) should be approached since an examination of the other provisions of the Act may reveal that the words used do not mean what at first blush they appear to convey. This does not entail a departure from their ordinary meaning; it is a quest for the intention behind the words in the context in which they were used. And when this is done the shortcomings in the contention begin to appear.

The argument depends entirely on the correct interpretation of the words "policies which were effected

through his agency in terms of this section". Seeing that par (f) forms part of sub-sec (1) the first question is whether "this section" means the entire sec 60 or whether it means sec 60(1) only. In support of his contention that it means the entire section respondents' counsel submitted in his written heads of argument that "the legislature also carefully distinguishes between sections and sub-sections" and referred by way of example to secs 57 A(2), 56(1), 60(1)(f) and 60(2) of the Act. But an examination of the Act as a whole reveals that there is no consistency in the references to sections and sub-sections: some of the provisions do reveal the careful distinction mentioned by counsel, but there is an equally large number of examples of the indiscriminate use of the word "section". A striking illustration is afforded by sec 60 itself. In terms of sub-sec (1) a Lloyds agent shall "for the purpose of <u>this section</u>" be deemed to be carrying on insurance business in the Republic. In sec 60(2) it is expressly stated,

however, that the deeming is for the purposes of sub-sec (1) only. Whatever certainty one might otherwise have had about the meaning of the expression in sec 60(1)(f) is, to say the least, seriously eroded by its inconsistent use elsewhere in the Act and particularly in sec 60 itself. Then there is the expression "policies effected through his agency". In parr (b) and (c) "a policy effected through the agency of the depositor" is mentioned (the"depositor" being a Lloyds agent) and in par (d) "a policy which was effected through the agency of the said person" (again a Lloyds agent). "A policy" may mean "any policy" but in every instance it is abundantly clear from the context that a Lloyds policy only is intended. Bearing in mind that these paragraphs, precisely like par (f), relate to a Lloyds agent who may be conducting other business as well, it is not unnatural to ask: why should the same expression in par (f) be construed differently so as to include other business? There is no discernible reason either in par (f)

or in any of the other provisions. It will be noticed that the delimitation in the introductory part of sec 60(1) of the operation of the succeeding paragraphs is in two parts - the one relating to a group of persons (Lloyds agents) and the other to a type of business (Lloyds business). It does not emerge from the introduction whether they were intended to operate in respect of Lloyds agents in relation to Lloyds business only or to other business as well. But all the succeeding paragraphs - leaving aside par (f) for the moment - have this in common that they regulate the manner in which Lloyds business is to be conducted. Many of them relate moreover to Lloyds agents who, plainly to the knowledge of the legislature, may conduct other business as well. Again it is not unnatural to ask: can it reasonably be accepted that the legislature would in par (f) interpose a provision aimed at other business too? The answer is obvious particularly if par (f) is recognised for what it is - a provision

purely and simply for the imposition of a tax. Had this been the intention one would have expected it to be expressed in much clearer terms than those appearing in par (f).

In my judgment, on the correct interpretation of par (f), the tax is not payable in respect of other business. The provision is in any event at least reasonably capable of such a construction and, being one in which a burden is imposed, it must be construed in the way more favourable to the subject (Israelsohn v Commissioner for Inland Revenue 1952(3) SA 529 (A) at 540 F-H, Glen Anil Development Corporation Ltd v Secretary for Inland Revenue 1975(4) SA 715 (A) at 727 F-G).

This brings me to the second issue which, it will be recalled, was decided against the appellant on the ground that the tax was paid to first respondent as a result of an error of law. The trial judge regarded himself bound by the decisions of the full court of the

erstwhile South African Republic in Rooth v The State (1888) 2 SAR 259 and of this court in Benning v Union Government (Minister of Finance) 1914 AD 420 to the effect that such an error is as a rule a bar to the condictio indebiti. In this court appellant's counsel argued that the mistake was not one of law but a mistake of fact or of mixed law and fact. He submitted further that the decisions just referred to should in any event not be followed.

The submission that the mistake was not one of law is plainly wrong. How it came about that the payments were made will be discussed later. At this stage it is sufficient to say that Willis Faber and Robert Enthoven paid the tax because they laboured under the mistaken impression that they were legally obliged to do so. There was no misconception of any fact and the mistake was purely one of law. What remains to be considered is therefore, firstly, whether a mistake of law is indeed

as a rule a bar to the condictio and if not, secondly, whether the appellant is in the circumstances of the case entitled to recover the amounts paid. I will deal with each question in turn.

More than two centuries ago Schomaker (Cons et Resp Jur 6.163) wrote that the effect of an error of law on the condictio indebiti was "tussen de Rechtsgeleerden niet uitgemaakt, maar tot heden toe gebleven, en zal altoos wel blyven een grote twisappel onder dezelve, zo lang het Jus Civile Romanum eenige meerdere ofte mindere auctoriteit in de dagelykshe vierscharen blyft behouden". The dispute to which Schomaker refers stemmed from Justinian's adoption of certain principles of classical Roman law in the Corpus Juris which at the same time extended and amended certain others. To keep the judgment within reasonable bounds I will not deal with this aspect of the matter, or with the development of the dispute to which it led, in great detail. It is in any

event unnecessary to do so in view of the extensive research conducted, not only in Rooth's case, but in recent years by academics like prof W de Vos and prof D P Visser. A full account will be found in the former's "Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg" 3rd ed at 23-26 and 70-71 and in prof Visser's thesis "Die rol van Dwaling by die Condictio Indebiti" (1986) at 31-60 and 144-176. My own researches have revealed nothing new. For present purposes a brief résumé of the main texts in the Corpus Juris and how they were applied by the jurists of the sixteenth and seventeenth century will suffice.

The condictio indebiti was dealt with under its own title in D 12.6 and C 4.5. According to D 12.6.1

> "Et quidem, si quis indebitum ignorans solvit, per hanc actionem condicere potest; sed sciens se non debere solvit, cessat repetitio."

According to C 4.5.1

> "Pecuniae indebiti, per errorem, non ex causa judicati solutae, esse repetitionem, non ambigatur."

No distiction is drawn in these texts between ignorance or mistake of fact and ignorance or mistake of law but according to D 22.6.9

> "regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere."

And in C 1.18.10 it is explicitly stated that

> "cum quis jus ignorans, indebitam pecuniam solverit: cessat repetitio ."

The fact that the texts dealing specifically with the condictio indebiti speak generally of "ignorans" or "per errorem" and do not limit the remedy to cases where payment was made as a result of an error of fact later became one of the arguments in the debate. But there were more material points of difference arising from other texts which were either irreconcilable or susceptible to different interpretations and from which an almost random selection could be made according to each writer's personal preferences. From the time of the Glossators the jurists were never in agreement on the effect

of an error of law and after the reception of the Roman law in Western Europe two very distinct schools of thought developed. On the one hand there were writers like Cujacius, Donellus, Noodt, and Johannes Voet who were of the opinion that the payment of an indebitum made in errorem juris was as a rule not recoverable. But there were others who took the opposite view. Among these were Grotius, Vinnius, Huber, Van Leeuwen and Van der Keessel. (I mention only a few of the better known writers; each side had many other supporters, not only in Holland and the other Dutch provinces, but also in France and Germany. In France eg Pothier and D'Aguesseau entered the arena and in Germany Carpzovius, Muhlenbrüch, Brunnemann and Leyser (and later Glück, Von Savigny and Windscheid).

Amidst the dissension in the ranks of the jurists the Dutch courts remained unaccountably silent. Researchers have been able to find only one case (it is mentioned

in Pauw's Observationes Tumultuariae Novae No 1134) that is of some relevance although it is of little assistance since only two of the judges of the Hoge Raad upheld the claim on the ground that "errorem juris, certe moribus, non excludere indebiti condictionem". (The majority decided the case on other grounds.) It is difficult to understand why the words "certe moribus" were used because more than a hundred years later Van der Keessel still said (Praelectiones 3.30.6) by way of commentary on De Groot's Inleidinge 3.30.6:

> "6. dwaalde of twyfelde aan't recht. By die Romeinse Reg stel ek dit gewoonlik so dat die condictio indebiti nie beskikbaar gestel word t.a.v. wat in regsdwaling betaal is nie. Maar De Groot verkondig hier die teendeel, vermoedelik eerder o.g.v. sy opvatting van die Romeinse Reg as van sake wat by ons uitgewys of deur die hofgebruik goedgekeur is; want Groenewegen het ook in aant. 19 niks uit die reg van Holland aangevoer om De Groot se leer te staaf nie, en tot steun van die teenoorgestelde standpunt het hy niks anders aangevoer nie behalwe fragmente uit die Corpus Juris en gesaghebbende verklarings van skrywers oor die Romeinse Reg. En sover my wete strek, is daar deur diegene

> wat die gewysdes van Holland uiteengesit het, geen enkele beslissing van een van die twee howe in die een of die ander rigting aangevoer nie. En vir sover ek weet, het Groenewegen in sy Tractatus de Legibus Abrogatis by die wette wat die kwessie raak, niks aangemerk i.v.m. wat daar in die hedendaagse reg aangaande hierdie strydvraag erkenning verkry of verdien het nie. Daarenteen getuig Van Leeuwen i.v.m. ons hedendaagse reg dat die condictio indebiti wel beskikbaar gestel word t.a.v. wat in regsdwaling betaal is, terwyl hy hom veral op hierdie passasie in De Groot beroep. Maar Voet is van mening dat daar geen rede bestaan waarom ons in die howe van die suiwerder standpunt van die Romeinse Reg sou afwyk nie waar dit die condictio nie toestaan nie; maar hy voer self ook niks uit die reg van Holland tot steun van sy leer aan nie. In 'n konsultasie waar daar 'n treffende geval i.v.m. 'n regsdwaling voorkom, staan ook 'n gesiene regsgeleerde op grond van dieselfde dwaling die geleentheid vir terugvordering voor, hoewel ook hy nie kans sien om hom op die gebruik van die howe te beroep nie."

(The translation is that of Gonin et al.)

This is how the law in South Africa stood when the question came up for decision in Rooth v The State (supra) before a court of three judges presided over by KOTZE CJ. Since we have been urged

not to follow the court's judgment I am obliged to cite extensive portions thereof.

After mentioning the difference of opinion among the commentators, KOTZE CJ proceeded as follows (at 263-4):

> Vinnius and D'Aguesseau have on their side discussed the matter very fully, and their opinion is chiefly based on considerations of natural equity. They say that the condictio indebiti is founded ex aequo et bono, and no one is allowed to enrich himself through the loss of another, which would be the case if anyone who has paid in error of law is not allowed to recover back what he has so unjustly paid. They also urge that in the title de condictione indebiti no distinction is drawn between mistake in law and mistake of fact. These arguments appear to me sufficiently refuted by Voet, Glück, and Savigny, who observe that where the leges are clear and specially lay down as a well-recognised rule (or, as Windscheid puts it, axiom) of law, that in case of error juris the condictio indebiti does not lie (vid. cod.,1, 18, 10; Dig. 22, 6, 9, pr.), there can be no question of natural equity; and that although in the chapter

de condictione indebiti no distinction is made between error juris and error facti, it is plain that where this chapter merely treats the subject in general it cannot impair the force of other and later passages in the corpus juris, where such distinction is specially drawn..... D'Aguesseau also strongly relies on the lex 7 and 8, Dig. 22, 6, where Papinian says: 'Ignorance of the law is of no avail to those who seek to acquire (something); nor does it prejudice those who seek their own (suum petentibus) .... but ignorance of the law never prejudices in averting a loss of one's own.' Now it is quite useless to investigate whether the explanation of this passage given by Cujacius or that given by D'Aguesseau be the correct one, for even if it be granted that (as D'Aguesseau wishes it) the words suum petentibus indicate that Papinian was of opinion that the condictio indebiti ought to be allowed in case of a mistake in law, inasmuch as he who has unjustly paid what is not due seeks but to recover back his own, such opinion cannot prevail against the later and express language of the lex. 10, cod. 1, 18, where we read: 'Whenever anyone has in ignorance of the law paid a sum of money, the action to recover it back ceases; for you are aware that the right to recover back what has been unduly paid is only allowed by reason of a mistake of fact,' and this (as Glück has pointed out) is supported by the lex. 9, Dig. 22, 6, where

> Paulus says: 'It is indeed a rule that ignorance of the law prejudices, but not also ignorance of fact.' (Et vid. per Paulus d. 1, 9, par. 5; per Ulpian, 1. 29 par 1, Dig. 17,2; per Papinian 1, 48; pr. Dig 46.1.)"

Having thus rejected the view of Vinnius and D'Aguesseau and accepted that propounded inter alia by Voet, KOTZE CJ proceeded as follows (at 265):

> "It appears to me, however, that the jurists of our own time, regard being had to these exceptions, are more or less inclined to adopt a middle view, and (as Glück expresses it) discard the distinction between mistake of law and mistake of fact, and simply consider if the error, whether juris or facti, be excusable (verzeilich, entschuldbar) or not. (Cf. Thibaut, par. 29, and Savigny l.c. note (a) thereon; Mackeldey, Lehrbuch, edit. 1862, pars. 165 and 467; Goudsmit, par. 52; Modderman, par. 79; Windscheid par. 79a, and par. 426, n. 3.) Whether, according to the strict interpretation of the Roman law, we are justified in adopting this view of the modern school as correct, is a question upon which I need not enter; for even admitting the correctness of that view, there exists no element of excusability in the present case."

In the course of the discussion which then follows of

the "element of excusability" the following was said

> " I can discover no equity in favour of the applicants, but rather the reverse; and here I wish to point out that the rule 'ignorance of law is no excuse,' and the disallowing of an action for the recovery of that which has been unduly paid, do not conflict with the principles of the aequum et bonum, and in support of this reference may be made to what Story says in his Equity Jurisprudence (par 111):'It is a well-known maxim that ignorance of the law will not furnish an excuse for any person either for a breach or for an omission of duty; ignorantia legis neminem excusat; and this maxim is equally as much respected in equity as in law.....' "

In an article "Daedalus in the supreme court - the common law today" published in Vol 49 (1986) T H R H R 127 at 136 prof Visser critisized the judgment in Rooth's case on the following grounds:

> "If the court in Rooth v The State had adopted the historical method it might obviously have been swayed by the fact that the view of those who bar the condictio if error of law is present, was essentially based on an inappropriate application of the Aristotelian principle, an application which did not take account of the true basis of the condictio indebiti. Had it further regarded only Roman-

> Dutch writers as authoritive, it would have found (although the position in Roman-Dutch law is unclear as well) that the majority see it as no bar to the condictio. "

These considerations, although plainly relevant, do not bring about that the decision should not be followed. The fact of the matter is that the court was faced with a situation where the Roman-Dutch writers whom we usually turn to for an exposition of the law were not in agreement. As VAN DEN HEEVER JA explained in Tjollo Ateljees (Eins) Bpk v Small 1949(1) SA 856 (A) at 874, in such a situation "we may choose to rely upon those opinions which appear to us to be more comformable to reason" (and, I would add, more in conformance with the law and requirements of our time). In Rooth's case the court, probably as a matter of legal policy, elected to follow Voet.

Moreover we cannot overlook the fact that in Benning's case (supra) this court in effect confirmed the

decision albeit without specific reference thereto. Admittedly the court did not consider the question afresh - all that appears in the judgment is a terse statement that "there is ample authority for holding that (ignorance of the law) by itself affords no sufficient ground for the claim". It nevertheless remains a decision of this court which was acted upon in later cases such as Miller & Others v Bellville Municipality 1973(1) SA 914 (C) at 919 A-C and Barker v Bentley 1978(4) SA 204 (N) at 206 F-G. This also applies, of course, to Rooth v The State which has stood for more than a century and has also been consistently followed in the provincial courts - although, in some cases, with an obvious measure of reluctance. In short we must face the fact that it has generally come to be accepted that these two decisions reflect the current state of the law in this country (vid De Vos, op cit at 182 and the cases cited there; Joubert, The Law of South Africa Vol 9 p 50).

On the other hand we must bear in mind Lord Tomlin's famous words in Pearl Assurance Company Limited v Government of the Union of South Africa 1934 AC 570 at 579 (which were cited with approval eg in Feldman (Pty) Ltd v Mall 1945 AD 733 at 789) that the Roman-Dutch law is

> ".....a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society."

This being the nature of our system the courts should not hesitate to adapt a principle which is found not to be in line with present-day developments in the particular branch or other branches of the law. As INNES CJ aptly said in Blower v Van Noorden 1909 TS 890 at 905:

> "There comes a time in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions.

> And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the legislature."

It is with this in mind that one has to look at the judgment in Rooth v The State again.

What is immediately apparent is that there is no logic in the distinction between mistakes of fact and mistakes of law in the context of the condictio indebiti. This condictio has since Roman times always been regarded as a remedy ex aequo et bono to prevent one person being unjustifiably enriched at the expense of another. (Even those favouring the distinction concede that this is so.) Bearing in mind that the remedy lies in respect of the payment of an indebitum (ie a payment, without any underlying civil or natural obligation) it is clear that, where such a payment is made in error, it matters not whether the error is one of fact or of law: in either case it remains the payment of an indebitum and, if not repaid, the receiver remains enriched.

The nature of the error thus has no bearing either on the indebitum or on the enrichment. The same result is achieved when the condictio indebiti is viewed (as it often is) as one of the condictiones sine causa. Again it matters not whether the error is one of fact or law for in both cases the payment is made sine causa (Cf J C Van der Walt, "Die Condictio indebiti as verrykkingsaksie" Vol 29 (1966) T H R H R 220 at 227).

It is equally plain that a strict application of the distinction will often, if indeed not in the majority of cases, work an injustice on the payer. Considered as a matter of simple justice between man and man there is no conceivable reason why the receiver of money paid in error of fact should in the eyes of the law be in a better position than one who has received money paid in error of law. It is not inappropriate to quote again from INNES CJ's judgment in Blower v Van Noorden (supra) at 900 where he indicated that "we should be slow to

perpetuate a form of legal remedy which may work hardship, if it can be modified so as to do away with that possibility".

The inequity to the payer that the disallowance of the remedy in the case of an error of law may entail, did not sway the judges in Rooth v The State. Their reasoning appears from the passage at 266 of the report cited earlier and is to the effect that the disallowance of the remedy does not conflict with the principles of aequum et bonum since the ignorantia juris rule also applies in equity. The court plainly regarded this rule as the determining consideration overriding all others; this is why Voet's view was preferred to that of De Groot and the latter's supporters. (Voet actually goes the length of saying - in 12.6.7 of his commentary - that "to penalize the person who is ignorant of the law, the law has denied every action, personal suit or right to reclaim....." (Gane's translation)). What

we must decide is whether an error of law still deserves this censure.

An important consideration in seeking an answer to this question is that there is no evidence of a general application of the ignorantia juris rule in South African civil law. On the contrary there are many cases in which it was not applied. The law relating to the renunciation of rights is a good example. As early as 1891 DE VILLIERS CJ said in Watson v Burchell 9 SC 2 at 5 that "no doctrine is better settled in our law than that a person cannot be held to have renounced his legal rights by acquiescence unless it is clear that he had full knowledge of his rights and intended to part with them". The reason is plain for, as DE VILLIERS J remarked in Tighy v Putter 1949(1)SA 1087 (T) at 1095, rights cannot be renounced unless the person concerned "knew what those rights were both in fact and in law". Save for a somewhat discordant note sounded in Schwarzer v John Roderick's

Motors (Pty) Ltd 1940 OPD 170 at 185 this has always been and still is our law (Laws v Rutherford 1924 AD 261 at 263; Martin v De Kock 1948(2) SA 719 (A) at 733; Feinstein v Niggli and Another 1981(2) SA 684 (A) at 698 F-G where an election to rescind or affirm an agreement received similar treatment).

Ignorance of rights is often the ground on which restitutio in integrum is granted. In Stewart's Assignee v Wall's Trustee and Others (1885) 3 SC 243 DE VILLIERS CJ indicated on the authority of Voet 4.6.9 that the question in such a case is whether "a just cause is alleged in the declaration to exist" and added at 246:

> "In deciding this question, our Courts would not be bound by the strict rules of the Civil Law, but would take for their guidance the more liberal principles which guided the Dutch courts."

After citing this dictum Sir John KOTZE - who had by then become the Judge-President of the Eastern Districts Court - said in Umhlebi v Estate Umhlebi and Fina Umhlebi 1905

EDC 237 at 249:

> " The equitable spirit of our own Roman-Dutch law, to a large extent due to the influence of the Canon law, is indeed one of its leading features. Hence ignorance of one's right, if it be a just and probable ignorance, is a good ground for restitution or relief according to the practice adopted in the Netherlands, as appears from an examination of the authorities....."

The effect of the judgment was to release the widow Umhlebi from a renunciation of her right to half of her late husband's assets by virtue of their marriage in community of property on grounds which were stated as follows at 248:

> "Upon every principle of law and equity the plaintiff is entitled to the relief which she asks. If we regard the case as one of mutual mistake, we find that both the plaintiff and her son Zachariah, at the time of the application to the Supreme Court in 1892, were under the impression that native law and custom applied to the land and regulated the succession thereto. They were both of them in ignorance of the plaintiff's right arising from the marriage in community and its effect upon the succession of the land."

These pronouncements cleared the way for relief

in a number of subsequent cases where parties had acted in ignorance of their rights. A practice developed eg whereby parties to ante-nuptial contracts were allowed to depart from the terms of their agreements. It was described as follows in Ex Parte Joannou et Uxor 1942 TPD 193 at 195-6:

> ".....there are numerous cases in which the Court has come to the assistance of applicants who have been mistaken or ignorant as to the law. The practice in the Transvaal has gone so far as to assist applicants ignorant of the law in cases where there was no agreement but the parties were under a wrong impression of the law and believed that community of property would be excluded, and entered into the marriage upon that understanding.....Ignorance of one's right, if it be a just and probable ignorance is a good ground for the relief according to our law, see Umhlebi v Estate Umhlebi (19 E.D.C. 237)."

Another area of the law that developed along similar lines involves the exercise by an heir of his right to adiate or to repudiate the terms of a will. One case deserving special mention is Van Wyk v Van Wyk's Estate 1943 OPD

117 concerning a widow who had performed acts which could be construed as tantamount to adiating under a joint will in the mistaken belief that she was irrevocably bound by its terms. At 126 of the report FISCHER JP said:

> "However that may be, I think it must be accepted that the Courts of South Africa have regarded it as a natural extension of the rule of equity that the strict rule of law - that ignorance of law affords no excuse - is not or may not be applicable to a case where the fact in issue is whether an election has been made or not."

Relying inter alia on this dictum relief was granted in Ex Parte Estate Van Rensburg 1965(3) SA 251 (C) to an heir who had repudiated a will in ignorance of the legal consequences of his act.

All the cases referred to thus far related to ignorance of the parties' rights - their so-called private rights. I mention this because there is a reference in some of the cases (eg in Putter v Tighy,supra) to the decision of the House of Lords in Cooper v Phibbs (1867) LR 2 HL 149 to the effect that the

ignorantia juris rule has no application to private rights.

In Putter's case at 1102 ROPER J said:

> "The rule that a man cannot be held to waive rights of which he is ignorant does not in my view apply where the ignorance relied upon is simple igno ance of a rule of law; in such a case the maxim errorem juris cuique nocere is applicable. It arises when owing to mistake or ignorance of law the party is unaware of his rights."

Only Cooper v Phibbs and other English authorities are cited to support this proposition. With respect, I am unable to follow ROPER J's reasoning and particularly the distinction between "simple ignorance of a rule of law" and ignorance of one's rights "owing to mistake or ignorance of law". The learned judge acknowledged at 1103 that "in a sense .....almost any mistake as to, or ignorance of, a rule of law involves mistake or ignorance of private rights...." The converse is also true: a mistake of law as to a private right is hardly conceivable except in the context of a mistake as to, or ignorance of, a general rule of law. In the

cases referred to (and many others that I did not mention) the parties' ignorance of their rights stemmed from their ignorance of the general law. These cases are thus a clear indication that the ignorantia juris rule has for quite a considerable period of time not been of general application in South African civil law.

Bearing in mind that, since this court's decision in S v De Blom 1977(3) SA 513, ignorance of the law may even provide an excuse for otherwise criminal behaviour, we have to ask ourselves whether there is any reason for retaining the age old distinction between errors of law and fact in claims for the repayment of money unduly paid in error. I can conceive of none. In the sixth (1957) edition of Gardiner & Lansdown's South African Criminal Law and Procedure Vol 1 at 60 it is stated that "if ignorance of law were generally admitted as a valid ground of excuse for unlawful conduct, the administration of law would become impracticable". But the administration of law suffered

no ill effects as a result of the decision in De Blom's case; and it cannot seriously be suggested that it would if the distinction between errors of law and fact were to be abolished for purposes of the condictio indebiti which affects no one but the payer and payee. Nor can legal policy stand in the way of its abolition; on the contrary, legal policy would seem to demand rather than preclude the abolition of a principle that is manifestly unjust in the majority of cases. Taking account further of the complexities of contemporary legal and commercial practices which differ toto caelo from those followed in earlier times, I would accordingly rule that the fact that money was unduly paid in error of law is not by itself a bar to its recovery by way of the condictio indebiti.

It does not follow, however, that any error of law would be sufficient ground for a succesful condiction. In Rahim v Minister of Justice 1964(4) SA 630 this court

held that an amount of money paid indebite in mistake of fact could not be recovered by means of the condictio indebiti where the conduct of the payer was found to have been "inexcusably slack" (635 E-F). As appears from 634 A-C of the report the court adopted the view of Glück and Leyser that, to quote Leyser, crassus et inexcusabilis error condictionem indebiti impedit; and Voet's statement that "the ignorance of fact should appear to be neither slack nor studied (nec supina nec affectata)", which was approved of in Union Government v National Bank of South Africa Ltd 1921 AD 121 at 126. (See also Miller & Others v Bellville Municipality supra at 919 F-G; Rulten NO v Herald Industries (Pty) Ltd 1982(3) SA 600 (D & CDL) at 607 C-E.) Mistakes of law should be treated in similar fashion so that the assimilation between the two kinds of error be complete.

Accordingly in my judgment our law is to be adapted in such a manner as to allow no distinction to be

drawn in the application of the condictio indebiti between mistake in law (error juris) and mistake of fact (error facti). It follows that an indebitum paid as a result of a mistake of law may be recovered provided that the mistake is found to be excusable in the circumstances of the particular case.

I am not unmindful of the criticism against such an approach inter alia by prof Visser; nor of the fact that the retention of an element of excusability will not entirely rid the condictio indebiti of its illogical character. But the historic nature of the remedy as one granted ex aequo et bono should be preserved and care should be taken to avoid it being turned into a tool of injustice to the receiver of money paid indebite. As TINDALL J (as he then was) warned in Trahair v Webb & Co 1924 WLD 227 at 235 "where the plaintiff bases his claim for relief on an equitable doctrine the Court must be careful that, in a desire to do justice to the plaintiff, an injustice is not done

to the defendant".

It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need 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 so 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 contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment. (Consider eg the case of a person who, whilst in doubt as to whether money is legally due, pays it not caring

whether it is and without bothering to find out.) These are only a few considerations that come to mind; others will no doubt manifest themselves with the passage of time as claims for the recovery of money paid in error of law come before the courts.

There is also the question of the onus of proof. In Recsey v Reiche 1927 AD 554 at 556 it was said that the onus in an action based on the condictio indebiti "lies throughout the whole case" on the plaintiff. This remark was obviously intended to refer to every element constituting the plaintiff's cause of action. This includes the excusability of the error. As was pointed out in Mabaso v Felix 1981(3) SA 865 (A) at 872 H considerations of policy, practice and fairness inter partes largely determine the incidence of the onus in civil cases; and I can conceive of nothing unfair in, and of no consideration of policy or practice militating against, expecting of a plaintiff who alleges that he paid an amount of money in mistake of law to prove

sufficient facts to justify a finding that his error is excusable. The rule otherwise would in the majority of cases require the defendant to produce proof of matters of which he has not the slightest knowledge (Mabaso v Felix at 873 D-E).

What finally remains to be examined is the excusability of the error in the present case.

The information presented to the trial court about the circumstances in which the tax had been paid took the form of a statement of agreed facts and the evidence of a single witness called by the appellant - Mr C F H Vaux, the financial manager of Robert Enthoven from 1980 to 1984. Mr Vaux's evidence is to the effect that when he assumed duty with the company he found in its files a circular (Exh A) issued by the office of the registrar of insurance. Exh A is dated November 1972 and bears the heading "Requirements to be complied with by

agents for brokers at Lloyds". It contains certain administrative directives and the following information about "taxation".

> "4. Taxation
>
> (a) A tax equal to $2\frac{1}{2}\%$ of premiums paid on policies effected through the licencee's agency is payable annually. The tax is payable before the end of February each year on premiums paid during the preceding calendar year in respect of -
>
> (i) Business (including reinsurance business) placed with underwriters at Lloyds's under section 60(1) of the Insurance Act, and
>
> (ii) business placed outside the Lloyds's market, with the Registrar's approval, in terms of section 60(2) of the Insurance Act. "

Because he found the provisions of the Act to be unclear Vaux at one stage telephoned the registrar's office and enquired whether the tax was indeed payable on other business. As far as he could recollect he spoke to an assistant registrar who referred him to Exh A. He could

not remember whether he consulted the company's attorneys. He continued paying the tax since he was "reasonably satisfied" that it was payable "after having cleared the matter up with the registrar". It was apparently only after the merger of the two companies that the matter received further attention.

In the statement of agreed facts the parties agreed that the two companies paid a total amount of R179 607,60 to first respondent as they "believed in the circumstances (they were) obliged to in terms of section 60(1)(f) of the Act, in respect of section 60(2) business carried on by (them) for the calendar years 1984 and 1985 respectively". In a supplementary agreement they recorded the following:

> "The parties are in agreement that since Section 60 of Act 27 of 1943 was amended in 1966 the Defendants consistently took the attitude that business in terms of Section 60(2) attracts tax in terms of Section 60(1)(f), and brokers registered to do business in terms of Section 60(1) accepted

this and paid the tax until approximately 1986 when it was for the first time disputed that such tax is payable by various brokers in South Africa, including the Plaintiff, which brokers either refuse to pay the tax or pay it under protest. Other brokers still pay the tax without protest."

I have no doubt that the error on Robert Enthoven's part was excusable. The company was faced with Exh A. Initially the directives therein were followed and when Vaux questioned their validity he was assured that the tax was indeed payable. He cannot be blamed for turning to, or for accepting the ruling of, the official to whom the administration of the Act has been entrusted and to whom members of the public would naturally turn for guidance. As Vaux said in his evidence he accepted the registrar's view as the most authoritative. It was not a view that could be dismissed as patently wrong; respondent's counsel supported it with confidence and great conviction even in this court. Moreover the registrar's view was not only shared by the

Receiver of Revenue, but accepted and acted upon without demur for many years by every broker registered to do Lloyds' business. Bearing in mind that failure to pay the tax carries a criminal sanction it comes as no surprise that Robert Enthoven followed suit. It is idle to suggest that it could and should have been paid under protest - an expedient usually resorted to when a person is confronted with a demand for money that he believes not to be due. This is not what Vaux believed.

Willis Faber's position is not as clear since there is no direct evidence of the circumstances in which it paid the tax. We know from the statement of agreed facts that the company paid it in the belief that it was legally obliged to do so but, apart from such inferences as may be drawn from the common cause or proved facts, there is no information on which the excusability of the error can be determined. There is no evidence disclosing the source of the error for, even assuming that the company

received Ex A, it cannot be inferred as a matter of probability that it was this directive that engendered the belief that the tax was payable. Nor is there evidence of any enquiries made or other steps taken to explore the position and ascertain the extent of the company's liability. In short, how the belief came to be entertained and what steps were taken to verify it are simply not known. In my view there is insufficient information to justify a finding that the mistake is excusable.

The result is that the appellant is entitled to recover the amount unduly paid by Robert Enthoven only - R165 278,00 according to the statement of agreed facts.

The appeal is accordingly upheld with costs including the costs of two counsel. The order of the court a quo is set aside. Substituted for it is the following order:

"Judgment is granted in favour of the plaintiff for

(1) payment of an amount of R165 278,00;

(2) interest a tempore morae on the amount of R165 278,00 at the rate of 12% per annum;

(3) costs of suit including the costs of two counsel."

J J F HEFER JA.

JOUBERT JA)
NIENABER JA) CONCUR.
KRIEGLER AJA)

CG CASE NUMBER: 71/90

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WILLIS FABER ENTHOVEN (EDMS) BPK Appellant

and

RECEIVER OF REVENUE First Respondent

THE REGISTRAR OF INSURANCE Second Respondent

CORAM: **JOUBERT, HEFER, NIENABER, VAN DEN HEEVER JJA et KRIEGLER AJA**

HEARD ON: **6 SEPTEMBER 1991**

DELIVERED ON: **26 NOVEMBER 1991**

J U D G M E N T

VAN DEN HEEVER JA

I respectfully agree with the conclusions of law arrived at by Hefer JA and that the claim based on payments by Willis Faber should fail. I, equally respectfully, disagree with the finding that Robert Enthoven's error was shown to have been excusable.

We are not dealing with a situation where the mistake relied on is one affecting only the rights of individual immediate parties to a relationship. What is in issue is the interpretation of a statute. One of the parties is the state, not in a one-to-one - say, for example, contractual - relationship with appellant, but the state in its more customary authoritarian guise applying a general law. The matter accordingly has a far more general dimension and affects both the state itself and large numbers of others who arrange or have arranged their affairs on a certain view of that law.

The citizen in his relationship with the state, though no longer expected to be legally omniscient, has a

duty to acquaint himself with the various laws or regulations applicable to the particular occupation in which he engages (per Friedman J in S v SAYED 1981 (1) SA 982 (C) at 990).

Although the test applied in the criminal law in assessing the culpability of a citizen's ignorance has refinements not relevant to the present matter, the cases following on R v DE BLOM 1977 (3) SA 513 (A) are instructive. The duty to take reasonable steps to discover the law is a real one. Mere casual enquiry will not suffice to excuse ignorance. (Cf S v LEHMBECKERS TRANSPORT (EDMS) BPK EN 'n ANDER 1989 (2) SA 53 (A).) The interests of the community as a whole require there to be certainty as to the law. I can think of no reason why the citizen should have a more onerous duty when his liberty is at stake than when it is merely his money that matters.

In my view telephonic enquiry from an unnamed

assistant registrar who referred Mr Vaux back to the 1972 circular, did not discharge appellant's duty where Mr Vaux was aware of the ambiguity in the Act and that the circular "was in my opinion not quite what the Act said". What, in all honesty, could any agent expect an official administering the law to say, other than that his view, shared and applied by his colleagues and predecessors for decades, is the correct one? To my mind the reasoning adopted in MILLER AND OTHERS v BELLVILLE MUNICIPALITY 1973 (1) SA 914 (C) at 919 H is realistic.

Nor does the fact recorded in the supplementary agreement, that brokers accepted the state's view for many years, take the matter any further. In the first instance we do not know why this was so. Was it easier and cheaper to pay up and shut up than to challenge that view - particularly since failure to pay might result in a criminal sanction? In any event the fact recorded in that supplementary agreement cannot assist appellant

where it did not influence Vaux and through him the company:

> "I think I did think about contacting other agents, but I do not think I ever got round to it. After speaking to the Registrar" - it should of course be "an assistant registrar" - "to me that was good enough.
> Q: So you would not know what the attitude of the other agents would have been during the same time? - I do not know, I have no idea."

I would dismiss the appeal with costs.

L VAN DEN HEEVER JA