THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 539/03

In the matter between :

THE AGRICULTURAL RESEARCH COUNCIL	Appellant
and	
GABRIEL STEPHANUS BREDELL	First Respondent
RAYMOND THERON NAUDÉ	Second Respondent
ANDRIES PETRUS FOURIE BEZUIDENHOUT	Third Respondent
JOHANNES HENDRIK TERBLANCHÉ	Fourth Respondent

Before:	**STREICHER, NAVSA, NUGENT, HEHER JJA & ERASMUS AJA**
Heard:	**2 NOVEMBER 2004**
Delivered:	**2 DECEMBER 2004**
Summary:	Rule 17.7 of Agricultural Research Council Pension Fund - increase of gratuity by employer – obligation to pay the Fund and not the member – unauthorised payment not recoverable from member.

J U D G M E N T

(Dissenting pp 12-30)
(Concurring pp 30-32)
The order appears at paragraph 25

STREICHER JA

STREICHER JA:

[1] The appellant instituted action against the respondents in the Transvaal Provincial Division for the repayment of amounts received by them from the Agricultural Research Council Pension Fund ('the Fund'). The appellant contended that it is considered in law to have made the payments, that it had no power to make such payments, that the payments had in any event not been authorised and that each of the respondents was unjustly enriched by the payment received by him. The court *a quo* dismissed the action and with its leave the appellant now appeals against such dismissal.

[2] The appellant was established in terms of s 2 of the Agricultural Research Council Act 86 of 1990 ('the Act'). The Fund is a pension fund established by the appellant under the Pension Funds Act 24 of 1956 in terms of the provisions of s 19(1)(g) of the Act.

[3] After the appellant had been established 12 research institutes were transferred to it from the Department of Agriculture. Most of the employees of those institutes, including the respondents were, by agreement, transferred to the appellant. As employees of the appellant the respondents became members of the Fund.

[4] During 1997 and 1998 the respondents' membership of the Fund was terminated. In the case of the first and second respondents the termination occurred in terms of rule 4.3(3) of the rules of the Fund and in the case of

the third and fourth respondents it occurred in terms of rule 4.7. Each of the respondents exercised the option provided for in rule 7.4, which rule reads as follows:

'If a Member's membership of the Fund is terminated in terms of Rules 4.1 to 4.4, 4.7, 5.1 to 5.4, 5.7 or 6.2(2), he may request the Board, before his Pension benefit becomes payable, rather to treat his Pension benefit as follows:

(1) Pay the Member a Gratuity equal to a maximum of one third of the value of his Pension benefit in terms of the Rules, which value the Board shall determine in consultation with the Actuary; in which case the balance of the Member's Pension benefit shall be transferred to an Insurer or an Approved Retirement Fund, excluding such Provident Fund, for the purchase of a pension with that Insurer or Approved Retirement Fund. Once such transfer is complete, the Fund shall have no further obligation in respect of the Member.

(2) Transfer the full value of the Member's Pension benefit in (1) above, in which case the conditions of (1) shall apply mutatis mutandis.

(3) Apply the member's Gratuity to secure for the Member an additional Pension from the Fund. In such a case the Board, in consultation with the Actuary, shall determine the amount and the conditions of payment.'

[5] Rule 7.17 provides for an increase of gratuities payable in terms of rules 4.1 to 4.7 and 5.1 to 5.7 to compensate for income tax payable on such gratuities. The basis for the increase and the degree to which a member is compensated is to be agreed between the member and the employer. The rule reads as follows:

'(1) Notwithstanding any other conditions of the Rules, the Board shall deduct from the Beneficiary's Pension benefit any amount from such benefit due in terms of the Income Tax Act, before the benefit is paid to the Beneficiary.

(2) The Employer increases a Gratuity payable to an A-member or his Beneficiary (as the case may be) and to a B-member or his Beneficiary (as the case may be) to compensate for any income tax payable by such Member or Beneficiary in terms of Annexure 2 to the Income Tax Act, in respect of a Gratuity in terms of Rules 4.1 to 4.7 and 5.1 to 5.7 respectively.

(3) The basis for the increase of the Gratuity in terms of (2) above, and the degree to which a Member or his Beneficiary is compensated is agreed upon by the Member and the Employer. Such compensation is however only payable for as long as, and to the degree that corresponding Gratuity benefits payable to a member of a Previous State Fund are exempt of the provisions of Annexure 2 of the Income Tax Act.'

[6] On 20 November 1992 the Executive Management Committee of the appellant ('the EMC') accepted a 'Hoofbestuursmemorandum' to the effect that no increase in a gratuity was payable to any member whose membership had been terminated in terms of rules 4.1-4.4, 4.7, 5.1-5.4, 5.7 or 6.2(2) and who exercised the option provided for in rule 7.4.

[7] A member who exercised the option provided for in rule 7.4 is entitled to a gratuity in terms of that rule and not to a gratuity payable in terms of rules 4.1 to 4.7 or 5.1 to 5.7. But, only gratuities payable in terms of rules 4.1 to 4.7 or 5.1 to 5.7 are to be increased in terms of rule 7.17. It

follows that insofar as rule 7.17 is concerned the memorandum merely confirmed what was stated in that rule.

[8] On 23 May 1997 the EMC took the following decision ('the decision of 23 May 1997):

'1 Die LNR[1] die gratifikasievoordeel bedoel in reël 7.17(2) saamgelees met reël 7.4 van die Reglement van die LNRPF[2] sal verhoog om te vergoed vir enige inkomstebelasting wat op die volle gratifikasievoordeel of gedeelte daarvan volgens die keuse van die lid betaalbaar mag wees.

2. Sodanige vergoeding slegs betaalbaar sal wees vir solank as wat die gratifikasievoordele in die staat nie belasbaar is nie.

3. Die maatreël met ingang van 1 Junie 1997 van toepassing is op alle uitbetalings van gratifikasievoordele vanaf 1 Junie 1997 ongeag die datum van uitdienstrede.'

[9] The EMC is a committee established in terms of s 16 of the Act, which, subject to the directives and control of the appellant, is responsible for the management of the affairs of the appellant in accordance with the objects and policy of the appellant. During 1997 when the EMC made the decision the fourth appellant was the president and the other respondents were members of the EMC.

[10] In the case of the first respondent the gratuity payable in terms of rule 7.4 amounted to R962 067,17. The appellant paid an amount of R530 961,93 to the fund in order to increase the gratuity to an amount

[1] The appellant.
[2] The Fund.

which would after deduction of the income tax payable by the fund in respect of the gratuity equal the amount of R962 067,17. In a letter by the Fund to the appellant preceding the payment the Fund requested payment thereof on the basis that in terms of rule 7.17 the amount was payable (verskuldig) by the appellant to the Fund. In the event the Fund only paid R456 441,17 income tax in respect of the gratuity. It paid R1 036 307,18 being the gratuity of R962 067,17 plus the difference between R530 961,93 and R456 441,17 (R74 520,76) less arrear taxes in an amount of R280,75 to the first respondent.

[11] In the case of the second respondent the gratuity payable in terms of rule 7.4 amounted to R763 068,40. The appellant paid an amount of R422 221,95 to the Fund in order to increase the gratuity to an amount that would after deduction of the income tax payable by the Fund in respect of the gratuity equal the amount of R763 068,40. As in the case of the first respondent the payment was preceded by a letter by the Fund to the appellant in which the Fund requested payment thereof on the basis that in terms of rule 7.17 the amount was payable by the appellant to the Fund. In the event the Fund only paid R349 044,17 income tax in respect of the gratuity. The Fund paid the total gratuity of R763 177,78 plus the difference between R422 221,95 and R349 044,77 being R73 177,78 to the second respondent.

[12] In the case of the third respondent the gratuity payable in terms of rule 7.4 amounted to R614 275,90. The appellant paid an amount of R265 635,55 to the Fund in order to increase the gratuity to an amount that would after deduction of the income tax payable by the fund in respect of the gratuity equal the amount of R614 275,90. Again, the payment was preceded by a letter by the Fund to the appellant in which the fund requested payment thereof on the basis that, in terms of rule 7.17, the amount was payable by the appellant to the Fund. In the event the Fund paid R267 582,80 income tax in respect of the gratuity. The difference between R265 635,55 and R267 582,80 being R1 947,25 constituted an overpayment by the fund to the South African Revenue Service ('SARS'). The Fund paid a sum of R621 338,52 being the total gratuity of R614 275,90 plus interest to the third respondent.

[13] In the case of the fourth respondent the gratuity payable in terms of rule 7.4 amounted to R1 638 820,91. The appellant paid an amount of R1 189 898,25 to the Fund in order to increase the gratuity to an amount that would after deduction of the income tax payable by the Fund in respect of the gratuity equal the amount of R1 638 820,91. Once again the payment was preceded by a letter by the Fund to the appellant in which the Fund requested payment thereof on the basis that, in terms of rule 7.17, the amount was payable by the appellant to the Fund. The Fund paid the

amount of R1 189 898,20 to SARS and the total gratuity of R1 638 820,91 to the fourth respondent.

[14] The appellant submitted that in law the payments of the amounts of R530 961,93, R422 221,95, R265 635,55 and R1 189 898,25 by the appellant to the Fund constituted payments to the respondents and that the Fund was merely used as a convenient conduit. It was submitted, furthermore, that the appellant did not have the power to make such payments and that even if it had the power it had not delegated authority to the EMC to take the decision of 23 May 1997. On that basis, relying on the *condictio indebiti* alternatively the *condictio sine causa*, the appellant claimed repayment by the respondents of the amounts paid to the Fund and in turn paid by the Fund to them. The respondents contended that the payments were made to the Fund and not to them. They were made, so the argument went, in order to enable the Fund to pay an increased gratuity to each of the respondents. They contended in the alternative that the payments were *intra vires* and properly authorised.

[15] The court *a quo* held that the appellant had the power to make the payments and that it had lawfully delegated that power to the EMC. Having arrived at this conclusion the court *a quo* did not consider it necessary to deal with the other arguments raised by the parties.

[16] As the parties did in argument before us I shall deal with the issue of whether the payments by the appellant to the Fund are in law considered to

be payments by the appellant to the respondents. If they were not, any claim the appellant might have is against the Fund and not against the respondents. For purposes of this argument I shall assume that the payments had not been duly authorised and that they were therefore *indebite*.

[17] Each of the payments was made in response to a statement by the Fund that the amount was payable ('verskuldig') in terms of rule 7.17 and a request that payment be effected to the Fund as soon as possible. It is, therefore, in the absence of any evidence to the contrary, probable that the appellant intended to make the payments and the Fund intended to receive the payments in terms of rule 7.17.

[18] Rule 7.17 provides that the employer is liable to increase the gratuities payable to certain employees. The extent of that liability is to be determined by agreement between the employee and the employer but once agreed is a liability in terms of the rules of the Fund. The Fund is registered as a pension fund in accordance with the provisions of s 4 of the Pension Funds Act (Act 24 of 1956). Section 13A(1) of that Act provides that the employer of any member of a fund registered in terms of s 4 shall pay to the fund in full 'any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration and any contribution for which the employer is liable in terms of those rules'.

[19] The employer's liability to increase the gratuity is therefore a liability to pay the amount required to increase the gratuity to the Fund. It follows that it is probable that the appellant intended to make the payments and the Fund intended to receive the payments in discharge of the appellant's statutory liability to make the payments to the Fund. That is so even though the liability to pay the Fund is a liability towards the employee.

[20] Counsel for the appellant relied on the fact that it is common cause between the parties that payment by the appellant in terms of rule 7.17 amounts to the payment of a remuneration, alternatively an allowance, alternatively a subsidy, alternatively a benefit to the employee concerned. They submitted that it followed that the payments were made in order to discharge perceived obligations owed by the appellant to the respondents. Therefore, so the argument went, the payments to the Fund constituted payments to the respondents.

[21] I accept that when A is liable to B to pay an amount to C (as *solutionis causa adjectus*[3]), payment by A to C in discharge of his obligation to B is considered to be a payment by A to B. It does, however not follow that if A in his own name make payment to C erroneously believing that he owes B an obligation to do so, that such payment would be considered to be a payment by A to B.

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[3] *Kopman and Another v Benjamin* 1951 (1) SA 882 (WLD) on 886E

[22] I also accept the correctness of the decisions in *Licences and General Insurance Co v Ismay* 1951 (2) SA 456 (EDL) at 462B; and *Vorster v Marine & Trade Versekeringsmaatskappy Bpk* 1968 (1) SA 130 (O) at 132H-132G to the effect that where A, at the request or order of B and on his behalf, paid an amount to C erroneously believing that he was indebted to B in that amount, such payment is considered to be a payment by A to B.

[23] In the present case the position is quite different:

(a) I assumed in favour of the appellant that the payments had not been duly authorised. The appellant, therefore, did not owe the respondents an obligation to pay the amounts to the Fund;

(b) The appellant paid the amounts erroneously believing that it was obliged to do so and not at the request or order of the respondents;

(c) The appellant paid the amounts in its own name and not on behalf of the respondents;

(d) The appellant paid the amounts to the Fund in order to enable the Fund to pay increased gratuities to the respondents.

In these circumstances there is in my view no basis for considering the payments by the appellant to be payments by the appellant to the respondents. None of the authorities referred to by the appellant supported the appellant's contention to the contrary and I am not aware of any authority to that effect.

[24] It was not contended that there was, in the event of it being held that the payments were in law not to be considered to be payments by the appellant to the Fund, another basis on which the appellant could succeed. I do, therefore, not consider it necessary to deal with the other arguments raised by the appellant. If follows that the appeal should be dismissed.

[25] The appeal is dismissed with costs including the costs of two counsel.

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P E STREICHER
JUDGE OF APPEAL

ERASMUS AJA) CONCUR

NAVSA and HEHER JJA:

[26] We have read the judgment of Streicher JA. For the reasons which follow we are unable to agree with his conclusion that the payments by the appellant were not to the respondents but to the fund.

[27] In the second part of this judgment we will deal with that question and the issues identified by Streicher J and the bases of the conclusions reached by him. For the sake of convenience and because we consider it appropriate we intend to deal first with the question of whether the payments were properly authorised. We proceed to deal with that question.

[28] In terms of s 8 of the Act the affairs of the appellant are managed by a council (the Council) which determines policy and objectives and exercises control over the performance of its functions and the execution of its duties. In terms of s 16 of the Act the appellant is obliged to appoint an executive management committee (in the present case the EMC) which is responsible for the management of its affairs in accordance with its objects and policy. That committee does not *ipso facto* or *ipso jure* have power to make the determination which the appellant is empowered by s 19(1)(b) to make.

[29] The appellant's case was that the decision to increase the gratuity, taken on the 23 May 1997 by the EMC, was unauthorised. After hearing evidence the court below held that the EMC, in deciding to increase the gratuity in question, had acted on authority properly delegated to it by the appellant. A consideration of the evidence leads us to disagree with this finding for the reasons which follow.

[30] The fourth respondent, Dr Johannes Hendrik Terblanche (Terblanche), was the only witness to testify. He and the other respondents were all members of the EMC. He accepted that the appellant was responsible for setting policy and the EMC was responsible for its execution and implementation. The court below accepted his evidence that there was a general delegation to the EMC by the Council and that at his behest it was expanded over time. The court concluded that nobody was

better qualified than the fourth respondent to testify about the level of co-operation between the appellant and the EMC – he had been president of the appellant and a member of the EMC.

[31] The court below found support for the fourth respondent's evidence, that the EMC had acted on delegated authority in the fact that the Council received his annual report, in which there was reference to the increased gratuity, with acclamation and applause. (We should note, in this regard, that not only was ratification not pleaded by the respondents but reliance on it was expressly disavowed by their counsel.)

[32] The court below did not find it troubling that no minute of a resolution relating to the claimed delegation was forthcoming. The learned judge recorded that it was common cause that not all of the appellant's resolutions were presented to him.

[33] However, towards the end of his evidence in-chief, the fourth respondent was asked pertinently about how the Council delegated authority to the EMC. His response was vague and evasive. Under cross-examination he was asked how the delegation took place. He responded by saying that it did not take place as a result of ''n raadsbesluit as sodanig nie, maar 'n voorlegging wat ek aan die raad gemaak het en dit is om die fine tuning te doen ten opsigte van hierdie delegasies'. But the documentation presented to the Council by the fourth respondent did not support his evidence that a delegation took place. The transparencies he

used during his presentation merely showed how the appellant functioned; that it was the Council's function to determine remuneration, subsidies and other benefits in accordance with a system approved by the responsible Minister with the consent of the Minister of Finance.

[34] When asked by counsel for the appellant whether it was correct that there had been no resolution by the Council approving the EMC's decision to increase the gratuity in question, the fourth respondent replied in the affirmative, stating that the decision had been taken in terms of an existing general delegation. Pressed to produce it, he could not locate the delegation on which he relied.

[35] When it was put to the fourth respondent, once again, that there had been no resolution by the Council conferring upon the EMC the power to make the decision in question, he replied in the affirmative. Later, when questioned by the court, he sought to rely on a verbal delegation but did so, once again, in vague and unsubstantiated terms.

[36] The fourth respondent's evidence must be seen against the statutory provisions regulating the manner in which the Council operates. We have already referred to ss 8 and 16 of the Act.

[37] Section 13(4) of the Act provides:

> 'A decision of the Council shall be taken by resolution of the majority of the members present at any meeting of the Council and, in the event of an equality of votes on any matter, the person presiding at the meeting in question shall have a casting vote in addition to his deliberative vote as a member of the Council.'

Section 13(6) of the Act provides:

'Minutes shall be kept of the proceedings of every meeting of the Council, and shall as soon as possible be confirmed at a subsequent meeting of the Council.'

[38] Importantly, in terms of s 19(1)(b) of the Act it is for the appellant to determine the remuneration, allowances, subsidies and other benefits of the employees and then only in accordance with a system approved by two Ministers. Terblanche was aware of this as the transparencies that he used in his presentation showed.

[39] A delegation must be clearly proved. See: *Kasiyamhuru v Minister of Home Affairs* 1999 (1) SA 643 (W) at 651 D. In our view, the respondents failed to prove the delegated authority upon which they relied. It follows that the court below erred in concluding that the decision in question had been authorised. Having reached this conclusion it becomes unnecessary to consider the submissions on behalf of the appellant that whatever decision may have led to the amendment of the rules was not taken in accordance with a system approved by the Minister of Agriculture in concurrence with the Minister of Finance as envisaged in s 19(1)(b) of the Act.

[40] The payments were made by the appellant to each of the respondents. In this part of the judgment we deal with the question whether the payments made by the appellant to the Fund in purported satisfaction of obligations arising under Rule 7.17 of the Rules were payments received by the Fund or the respondents.

[41] The importance of the distinction in the present context is made clear in the following extract from *Phillips v Hughes*; *Hughes v Maphumulo* 1979 (1) SA 225 (N) at 228H-229 (per Didcott J, Hefer J concurring):

'The *condictio indebiti* does not entitle the *solvens* to pursue what was mistakenly paid, wherever it goes. The recovery of the undue payment from its *recipiens* is the action's sole objective. Wessels explained this in his *Law of Contract in South Africa* 2nd ed. He wrote (vol 2 paras 3712, 3713 and 3716 at 952-3):

"Even though a thing is paid in error, the *solvens* intends at the moment he makes the payment to pass the ownership to the *recipiens*. There is no error as regards the thing which is handed over – the error lies in the *causa solvendi* . . . It is the fault of the *solvens* if he is under the impression that a thing is due when it is not; and if through his act in delivering the thing to the *recipiens* a third party acquires rights in that thing, the *solvens* has only himself to blame. Hence in strict law, as the *recipiens* becomes the owner in so far that he can give title by transfer or delivery, the *solvens* cannot vindicate the thing in the hands of a third party . . . The right to bring the *condictio* does not attach to the thing, nor does there exist any privity between the *solvens* and the third party."

This means that the *condictio indebiti* is enforceable against the *recipiens* of the undue payment, but nobody else. The *recipiens* is not necessarily the person into whose hands the money was actually put when it was paid. He is the one who must be considered, in all the circumstances of the case, truly to have received the payment. Whenever a payment is made to an agent with authority to accept it, for instance, the *recipiens* is the principal, not the agent. A conduit through whom payment passes is likewise not its *recipiens*. Instead he who obtains payment by such means is. One is not the *recipiens* of a payment, on the other hand, merely because it was intended or happens in the result to benefit one. That, on its own, does not count. All that matters is whether one can appropriately be said to have received the payment in some or other way. Unless one

has done so, one is beyond the range of the *condictio indebiti*, for all the payment's auxiliary advantages to one. (See *Grotius* 3.30.5 (*Maasdorp's* trans at 305); *Voet* 12.6.11 (*Gane's* trans vol 2 at 844-5); *Huber* 3.35.7 (*Gane's* trans vol 1 at 569); *Wessels* (*op cit*) vol 2 paras 3635, 3697, 3714 at 940, 949-50, 952; *Licences and General Insurance Co v Ismay* 1951 (2) SA 456 (E) at 461F; *Vorster v Marine & Trade Versekeringsmaatskappy Bpk* 1968 (1) SA 130 (O) at 131H-132A; *Glasson v Peace Real Estate (Pty) Ltd* (*supra* at 118H).)'

The same principles, we would venture, apply to the *condictio sine causa*.

[42] We begin to answer this question by pointing out, as recorded by Streicher JA, that the parties were *ad idem* that the payment, if authorised in law, was one made pursuant to the provisions of s 19(1)(b) of the Agricultural Research Act 86 of 1990. This provides as follows:

'The ARC shall pay to its employees such remuneration, allowances, subsidies and other benefits as the Council may determine, in accordance with a system approved from time to time by the Minister, with the concurrence of the Minister of Finance.'

The compensation was either a subsidy or other benefit within the meaning of the section. Whether or not it was authorized, the payment therefore purported to be one made to the employee respondents.

[43] The rules of the Fund, are in our view, helpful in discovering the underlying truth. Rule 7.17 provides as follows:

'(1) Notwithstanding any other conditions of the Rules, the Board shall deduct from the Beneficiary's Pension benefit any amount from such benefit due in terms of the Income Tax Act, before the benefit is paid to the beneficiary.

(2) The Employer increases a Gratuity payable to an A-member or his Beneficiary (as the case may be) and to a B-member or his Beneficiary (as the case may be) to *compensate* for any income tax payable by such Member or Beneficiary in terms of Annexure 2 to the Income Tax Act, in respect of a Gratuity in terms of Rules 4.1 to 4.7 and 5.1 to 5.7 respectively.

(3) *The basis for the increase of the Gratuity in terms of (2) above, and the degree to which a Member or his Beneficiary is compensated is agreed upon by the Member and the Employer*. Such compensation is however only payable for as long as, and to the degree that corresponding Gratuity benefits payable to a member of a Previous State Fund are exempt of the provisions of Annexure 2 of the Income Tax Act.'

(Emphasis added.)

A 'pension benefit' is defined in Rule 2.2 as 'a Gratuity and/or a Pension as the case may be'. 'Gratuity' means 'a single lump sum amount payable in terms of the Rules'.

[44] All the respondents became entitled to payment of pension benefits by reason of Rule 4.7 the relevant provisions of which provide as follows:

'(1) If an A-member's services are terminated by his employer due to his post being abolished, or due to re-organisation of activities by the Employer, the following benefits shall be paid to the Member:

(i) . . .

(ii) If such Member's period of Pensionable Service is ten years or more, the benefits in terms of Rule 4.4(1) . . .

(2) In the case of (1) (ii) above, the Employer shall compensate the Fund in respect of any additional liability placed upon the Fund in this process, in a manner

agreed upon by the Fund and the Employer. This additional liability shall be determined by the Actuary.

(3) Should the Employer terminate the services of an A-member in terms of this rule, the Board may, with the member's approval arrange the transfer of the Member's benefit to an Approved Retirement Fund, after which the Fund's obligation in respect of the Member shall cease.'

Rule 4.4(1) provides, in so far as material hereto, that an A-member may retire with benefits in terms of Rule 4.1 which, in turn, identifies the following pension benefits:

(1) A gratuity of 6,72 percent of his Pensionable Emoluments on the last day of his period of Pensionable Service, multiplied by the period of his Pensionable Service.

(2) A Pension . . .'

[45] The actual procedure adopted by the administrators of the Fund, prior to the purported amendment of the appellant's policy which gave rise to the present dispute, and the procedure which it proposed to follow in consequence of the amendment, is set out in a letter sent by the administrators to the Fund on 30 June 1997 as follows:

'1. AGTERGROND

Reël 7.17(2) bepaal dat die Werkgewer die gratifikasie voordeel betaalbaar aan 'n A-lid of B-lid of hul voordeelgeregtigde verhoog om te vergoed vir inkomstebelasting wat deur sodanige lid of voordeelgeregtigde betaalbaar mag wees.

Reël 7.17(3) bepaal dat die basis van sodanige verhoging deur die lid en die werkgewer ooreengekom word.

2. HUIDIGE PROSEDURE

Die LNR se hoofbestuur het op 20 November 1992 besluit dat die voordeel slegs van toepassing is indien die lid ‘n pensioentrekker word. (Die besluit is onlangs verander.) Sover my kennis strek, is die basis van vergoeding, reël 7.17(3). nog nooit deur ‘n spesifieke lid en die werkgewer onderhandel nie, en is daar ook nie ‘n bestuursbesluit oor die metode wat gebruik moet word nie.

Sodanige verhoging in voordeel word deur Ou Mutual as die administrateur bepaal en aan die lid betaal. Die volgende prosedure was in plek:

- Met uitdienstrede word ‘n belastingaanwysing van die Ontvanger aangevra.
- Die belastingbedrag soos aangedui in die belastingwysing word van die lid se voordeel verhaal.

Indien die lid ‘n pensioentrekker van die Fonds word, word die belasting wat van die lid se voordeel verhaal is, deur Ou Mutual as die administrateur van die LNR aangevra en aan die lid terugbetaal. Ons kan egter geen enkelbedragvoordeel uitbetaal sonder om ‘n belastingaanwysing te verkry nie. Dit beteken die Ontvanger gaan vanaf die tweede betaling ook belasting verhaal.Indien die LNR dus slegs die belastingsbedrag aan die Fonds terugbetaal, gaan die lid minder as die belastingbedrag ontvang.

Ten einde die probleem te oorkom, beraam Ou Mutual die belasting wat die Ontvanger vanaf die tweede bedrag gaan aanvra, en vra dan die LNR om die verhoogde bedrag aan die Fonds te betaal. Die gemiddelde koers wat die Ontvanger met die eerste aanslag gebruik het, word in die berekening gebruik. Sien Bylaag 1 vir ‘n voorbeeld van die berekening. Daar word rente bygevoeg tot datum van betaling. (Die koers wat gebruik word, is ‘rente op laat betaling’ soos deur die Trustees bepaal.)

- Wanneer die betrokke bedrag vanaf die LNR ontvang word, word ‘n belastingaanwysing op die tweede betaling aangevra.

- Wanneer die belastingaanwysing ontvang word, word die belasting van die tweede betaling verhaal en word die balans aan die lid uitbetaal.

3. UITBREIDING VAN VOORDEEL

Die LNR se hoofbestuurskomitee het op sy vergadering van 23 Mei 1997 besluit om die aangeleentheid as volg te verander:

- Die voordeel is van toepassing op alle uidienstredes (behalwe bedankings) waar die enkelbedrag na 1 Junie 1997 uitbetaaal word. Die vereiste dat die lid 'n pensioentrekker moet word, verval dus.
- Die LNR staan in vir die belasting op die volle enkelbedrag wat die lid neem, en nie net op die gratifikasie in terme van die reëls nie. (Indien die lid se voordele in terme van reël 7.4 uitbetaal word, is 'n groter enkelbedragvoordeel beskikbaar, soos geïllustreer met die voorbeeld in Bylaag 1 en Bylaag 2.)

Dit beteken dus dat die LNR in meer gevalle instaan vir die belasting, en dat die belastingsbedrag hoër kan wees as wat onder die ou bedeling in die LNR gegeld het. Die lede ontvang ook dus 'n belastingvoordeel wat ruimer is as onder die RDPF, aangesien die enkelbedrag onder reël 7.4 groter kan wees as onder die RDPF.

Die prosedure wat gevolg gaan word, sal soortgelyk wees as wat in die vorige afdeling bespreek is.'

(Emphasis added.)

[46] Finally, regard should be had to the manner in which the parties actually implemented the terms of rule 7.17. The dealings between the appellant and the third respondent may be taken as representative in this regard.

[47] On 16 May 1997 the third respondent wrote to the fourth respondent in the latter's capacity as President of the Council in the following terms:

'Na oorweging van verskeie faktore, insluitend my persoonlike omstandighede, wil ek graag van hierdie geleentheid gebruik maak om aansoek te doen vir 'n vrywillige skeidingspakket ooreenkomstig reel 4.7(1)(ii) van die Reglement van die Landbounavorsingsraadpensioenfonds (LNRPF). Die pakket soos hieronder voorgestel is in ooreenstemming met die huidige LNR beleid in hierdie verband.

SKEIDINGSVOORDELE

A. PENSIOEN:

Uitdienstrede volgens reel 4.7(1)(ii) van die Reglement van die LNRPF. In terme van hierdie reël is die volgende voordele betaalbaar:

(i) 'n Gratifikasie van R389 922 (Die LNR staan in vir die belasting)

(ii) 'n Jaargeld van R105 858

of

(iii) 'n Oordragwaarde van R1 842 827. Die bedrag moet oorgedra word na 'n versekeraar vir die aankoop van 'n pensioen en tot een derde mag in kontant geneem word.

B. SKEIDINGSPAKKET:

(i)	Diensbonus – pro rata gedeelte	R 9 345.93
(ii)	Verlof – Staat (433 dae)	R 177 393.57
	- LNR (13 dae)	R 7 743.60
(iii)	Byvoordele	
	(a) Medies (een maand se werkgewer bydrae)	R 350.00
	(b) Behuising	Geen
	(c) Motorlening	R 82 478.88
(iv)	Skeidingsgelde (1 week se salaries vir elke voltooide jaar diens)	R 92 327.61
	TOTAAL	R 369 639.59

Tesame met bogenoemde versoek ek verder dat die onderstaande toegewings, soos reeds per geleentheid toegepas, oorweeg word:

(i) Dat die LNR, indien nodig, sal instaan vir die belasting op ‘n gratifikasiebedrag gelyk aan R 389 922 indien ek die keuse sou uitoefen om die volle oordragwaarde uit die pensioenfonds te neem.

(ii) Dat die LNR sal instaan vir die werkgewerbydra tot lidmaatskap van Medihelp.

Daar word vertrou dat hierdie versoek u gunstige oorweging sal geniet.’

[48] The letter was endorsed by the fourth respondent on 21 May 1997 as follows:

‘Mnr Bezuidenhout,

Ek het kennis geneem van u besluit om met ‘n pakket uit diens te tree, met ingang 1 Junie 1997. Die samestelling van die pakket is aanvaarbaar en in lyn met LNR diensvoorwaardes.

J H TERBLANCHE’

This exchange manifested an agreement of the kind envisaged by rule 7.17(3).

[49] In due course SARS issued an ‘Employees Tax Deduction Directive’ to the Fund in respect of each respondent in which the amount of tax and the amount of the lump sum payment concerned was stated.

[50] The Fund then wrote to each of the respondents notifying them that ‘LNR staan in vir die belasting wat afgetrek is van u gratifikasie’, advising each of the gratuity benefit, the amount of tax, accrued interest (where

applicable), the total amount of the gratuity after deduction of tax, and drawing attention to the payee's bank statement on a given future date.

[51] The Fund apparently paid SARS the tax owed on the gratuity and the top-up, paid the employee the after-tax amount of the gratuity, called on the appellant to pay to it a cheque equivalent to the top-up under 7.17 and, on receipt thereof, paid an amount equivalent to the tax deducted to the employee. In this regard a letter dated 26 November 1998 from the Fund Administrators to the representatives of the appellant seems to reflect the practice:

'LANDBOUNAVORSINGSRAADPENSIOENFONDS: 53495

TOEPASSING VAN REëL 7.17: VERHALING VAN BELASTING

LID NAAM: JH Terblanche

VERWYSING NR: 47013305

Ons verwys na dokumente ontvang ten opsigte van bogenoemde lid se aftrede uit fonds op 30/11/1998

In terme van reel 7.17 is die bedrag van: R1195766.24

Deur die LNR aan die Pensioenfonds verskuldig.

(Sien aangehegte bylae)

Die nodige belastingaanwysing op bogenoemde bedrag is reeds aangevra vanaf die Ontvanger van Inkomste. Met ontvangs van bogenoemde tjek sal die aanvanklike belasting aan die lid terugbetaal word.

Dit sal waardeer word indien u die gevraagde tjek so gou as moontlik aan ons kan voorsien.'

In this and other similar letters from the Fund the amount by which the gratuity is increased is said to be due ('verskuldig') to the Fund by the appellant. That however, in context, means no more than that the Fund required payment by the appellant in order to enable it to carry out the arrangement.

[52] We disagree with Streicher JA that amounts paid to increase a gratuity under rule 7.17 fall within the ambit of s 13A of the Pension Funds Act 24 of 1956. Such increases are neither a contribution which is to be deducted from a member's remuneration (s 13A(1)(a)) nor a contribution for which an employer is liable in terms of the rules of the Fund (s 13A(1)(b). In the last-mentioned regard, although increase in an employee's gratuity by the employer is provided for in the rules, the employer is not liable in terms of the rules for such a payment. Rule 7.17(3) makes it clear that liability to pay depends upon and arises from the agreement of employer and employee *dehors* the rules. Rule 7.17 does no more than furnish a mechanism to give effect to such an agreement. This case provides an illustration: although the four respondents were at all material times members of the Fund and entitled to the benefits provided by the rules, their success or failure in this application depends on whether their employer validly undertook to extend the benefits of Rule 7.17 to their situation. We disagree therefore that the employer intended to make the

payments or that the Fund intended to receive them in discharge of a statutory obligation on the employer.

[53] The conclusions which in our view may fairly be drawn from the rules and the parties' implementation of them are the following:

(i) The payment by the employer under rule 7.17 was not the payment of a gratuity, ie a lump sum payable in terms of the rules. It was an amount paid by agreement between employer and employee which compensated the employee for the reduction in the amount of the gratuity caused by the deduction of his tax liability. The effect was an increase in the gratuity.

(ii) The contractual obligation to pay the compensatory amount to the employee was that of the employer. The Fund was never under a duty in terms of the rules or by contract to pay an increased gratuity to the employee. The Fund did not intend to meet its own obligations by paying the respondents and, therefore, could not have recovered such payments from them by way of condiction.

(iii) As a matter of practical convenience the Fund calculated and paid all the tax owed by the employee (ie on the gratuity and on the top-up) to SARS. It also paid the employee the gratuity which it was obliged under the rules to pay and, after it had received the equivalent amount from the employer, the top-up also.

(iv) The Fund had no interest in the receipt of the top-up except as a conduit for onward transmission to the employee.

(v) All the parties co-operated to achieve the desired result within the framework of the Fund rules.

(vi) The employer and employees could have effected the same arrangement outside of the rules of the Fund. In the circumstances rule 7.17 should properly be construed as merely recording the arrangement between employer and the Fund for the benefit of an employee who chooses to rely on its provisions.

[54] The evidence proves that

(i) the employer undertook to pay each of the employees;

(ii) the employer intended that its payments to the Fund should be transmitted to the employees (in several cases with interest included);

(iii) the Fund had no intention of receiving the top-up or the interest as a pension fund contribution (or as its own) but intended to pass it on to the employees and in fact did so in each case. As counsel put it, the net effect of the transactions upon the Fund was nil.

[55] For these reasons we are satisfied that the payments were made to and received by the employees and the role of the fund was merely one of facilitation and transmission.

[56] In the result the payments to the employee respondents to increase their gratuities were made by the appellant under a mistaken belief that such payments were authorised, and that it was obliged to make them. The members of the appellant's Executive Committee seem to have laboured under a genuine misapprehension that they were authorised by the Council to extend the employee benefits as they did. The fourth respondent was chairman of the Committee as well as president of the Council and there were other common members as well. In the circumstances the appellant's mistake was excusable. The *condictio indebiti* was therefore available to it.

[57] The appeal should accordingly succeed with costs including the costs of two counsel. The order of the Court *a quo* should be set aside and replaced with the following:

1. The defendants are ordered to pay the following amounts to the plaintiff-

    1.1 the first defendant: R530 961,93;

    1.2 the second defendant: R422 221,95;

    1.3 the third defendant: R265 635,55;

    1.4 the fourth defendant: 1 189 898,25.

2. Each of the said amounts bears interest *a tempore morae* at 15,5% per annum from the date of service of the summons on the defendant concerned until date of payment.

3. The defendants are to pay the costs of suit including the costs attendant upon the employment of two counsel.

M S NAVSA
JUDGE OF APPEAL

J A HEHER
JUDGE OF APPEAL

NUGENT JA:

[58] I agree with the order that is proposed by Streicher J. Payment being a bilateral juristic act,[4] the question whether the payments were made to and received by the Fund as principal (or merely as agent for the respondents) depends upon what the parties intended. That is in turn a question of fact upon which the appellant bore the burden of proof.

[59] The appellant led no evidence to establish that the payment was intended to be made to and received by the Fund as agent for the respondents and that was also not expressly dealt with in the agreed facts. Counsel for the appellant referred us to the paragraph of the agreed facts in which the parties agreed that the payments 'amount[ed] to the payment of remuneration, alternatively an allowance, alternatively a subsidy, alternatively a benefit as contemplated by s 19 of the Act' (that section

[4] *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) 993A-C; *Volkskas Bank v Bankorp Bpk (h/a Trust Bank)* 1991 (3) SA 605 (A) 612C-E; *Pfeiffer v First National Bank of First National Bank of SA Ltd* 1998 (3) SA 1018 (A) 1025I-J.

authorises the appellant to make payments of that kind 'to its employees') but clearly that was intended to be no more than an admission that the payments fell within the authority conferred upon the appellant by the statute, and it does not follow that the payments were in fact made to the respondents directly (represented by an agent). It is quite apparent that notwithstanding that agreement it remained in issue whether the payments were in fact made to the respondents, or whether they were made to the Fund.

[60] No doubt the existence or otherwise of obligations between the parties allows for inferences to be drawn in appropriate cases as to what was intended when a payment was made. I agree with Streicher JA that in the present case the rules cast an obligation upon the appellant, enforceable by the respondents, to pay the relevant amounts to the Fund, and that once that was done the Fund became liable to pay the increased gratuity to the respondents. But even if that construction of the rules is not correct that is nevertheless how the appellant and the Fund appear to have understood them, for according to the agreed facts '[the appellant] caused the Fund to increase the gratuity payable to the [respondents] … and [the appellant] paid the certain amounts to the Fund in respect of each of the [respondents].' Moreover, the correspondence from the Fund to the appellant is consistent with that understanding of the nature of the obligations. And if that was the understanding of the appellant and the

Fund I see no reason not to infer that they acted in accordance with that understanding.

[61] I find nothing in any of the facts that have been placed before us, whether in the agreed facts or in the evidence, from which to infer that the appellant and the Fund had a contrary intention when the moneys were paid. On the contrary the appellant itself alleged in its particulars of claim that it 'caused the Fund to increase the gratuity payable to [the respondents]' and that it in turn 'paid the Fund' the relevant amounts. Its case against the respondents was founded on no more than the bald assertion in the particulars of claim that 'in the premises' the payments were made to the respondents, but there are no facts to support that leap. In my view it is probable that both the appellant and the Fund intended the payments to be made to and received by the Fund as principal and accordingly the claim must fail.

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R W NUGENT
JUDGE OF APPEAL

ERASMUS AJA) CONCUR