THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1108/2016

In the matter between

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

and

MEDSHIELD MEDICAL SCHEME **RESPONDENT**

Neutral Citation: *Yarona Heathcare Network v Medshield* (1108/2016) [2017] ZASCA 116 (22 September 2017)

Coram: Navsa ADP, Petse & Mathopo JJA & Mbatha & Rogers AJJA

Heard: 29 August 2017

Delivered: 22 September 2017

Summary: Condictio indebiti: respondent's mistakes in making payments inexcusably slack: excusability not a requirement where claimant a medical scheme: respondent proved its impoverishment: if respondent enriched by services provided by appellant, latter should have counterclaimed with condictio indebiti.

Prescription: actual or constructive knowledge necessary for prescription to start running that of board of trustees: appellant failed to prove that board had actual or constructive knowledge by relevant date.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Molefe J sitting as court of first instance).

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

JUDGMENT

Rogers AJA (Navsa ADP, Mathopo and Petse JJA & Mbatha AJA concurring)

Introduction

[1] The appellant (Yarona) and the respondent (Medshield) were the defendant and plaintiff respectively in the court a quo. Medshield, a medical scheme registered in terms of the Medical Schemes Act 131 of 1998 (the Act), sued Yarona for R6 110 237, being the sum of various payments made to Yarona over the period 6 August 2007 to 17 July 2009. Medshield alleged that the payments were made in the bona fide and reasonable but mistaken belief that they were owing, whereas in truth they were not, and that Yarona was unjustifiably enriched by the payments and Medshield correspondingly impoverished. The summons was served on 9 June 2011.

[2] Yarona defended the action, pleading that the payments were made for services rendered in terms of an agreement concluded during June 2007. Yarona counterclaimed for additional amounts allegedly owing under the agreement. There was also a special plea of prescription in respect of the payments made prior to 7 June 2008 – Yarona alleged that Medshield had the requisite knowledge, or could, by exercising reasonable care, have acquired the requisite knowledge, by the date

of each payment, alternatively by 7 June 2008 at the latest. In its replication Medshield denied the existence of the alleged agreement.

[3] A separation order was made for the determination, in advance of other issues, of the question whether the service agreement had been concluded. The separated issue was enrolled for trial on 2 March 2015. On 26 February 2015 Yarona's attorneys wrote to Medshield's attorneys stating that during their client's trial preparation it had become evident that Yarona would not be able to prove that the persons who purported to represent Medshield in concluding the agreement had the authority to do so and that Yarona thus conceded the separated issue. An order to this effect, including a dismissal of Yarona's counterclaim, was made.

[4] The trial of the remaining issues was conducted before Molefe J in April 2016. Prior to the commencement of evidence Yarona's counsel clarified that Yarona's concession that no valid service agreement was concluded did not entail an admission that Yarona had not performed work for Medshield's benefit or that such work could be left out of account in assessing Medshield's claim of unjustified enrichment. Apart from this reservation, the main issues were whether recovery was barred because of inexcusable slackness on Medshield's part and the date by which Medshield could, through the exercise of reasonable care, have acquired knowledge of the facts giving rise to Yarona's alleged indebtedness.

[5] Medshield called five witnesses. Yarona closed its case without adducing evidence. On 5 July 2016 Molefe J granted judgment in Medshield's favour. She gave leave to appeal to this court.

Factual background

[6] In what follows I shall, after their first mention, refer to individuals by their surnames. Medshield had four benefit options, the Access, Bonus, Value and Plus options. In 2006 Medshield concluded an agreement with Calabash Health Solutions (Pty) Ltd (Calabash) in terms of which Calabash was to provide managed care services in relation to the Access option for which it was entitled to a capitation fee (ie a specified amount per member subscribing to the Access option). Yarona in turn had an agreement with Calabash for the supply of network management services,

namely the establishment and maintenance of networks of health practitioners who agreed to render services at negotiated rates. According to Ms Melani Coetsee, one of Medshield's witnesses, there was a corporate connection between Calabash and Yarona - they both formed part of what she called the Bathabile group of companies.

[7] With effect from 1 April 2007 Old Mutual Healthcare (Pty) Ltd (OMHC) replaced Medscheme as Medshield's administrator. OMHC had an office in Randburg dedicated to Medshield's administration. Medshield's only employees at that time were its principal officer and his secretary. Until mid-2007 the principal officer was Mr Welcome Mboniso. When he resigned on account of ill-health he was replaced by Mr Clinton Alley. There was a short period of overlap between them. Alley's secretary was Ms Joselyn Baatjies.

[8] Yarona, which had an indirect involvement in Medshield's Access option via its contract with Calabash, wanted to extend its involvement to Medshield's other benefit options. There were discussions along these lines with representatives of OMHC, including a workshop in late May 2007. Yarona's managing director was Mr Bradley Soll. Alley, who was at this time a trustee and the principal officer in-waiting, was aware of the discussions. At Soll's request, Alley facilitated the obtaining of a letter dated 31 May 2007, purportedly signed by Mboniso, in which Medshield requested OMHC to provide Yarona with such information as Yarona needed to undertake 'an exercise on their risk sharing models and reimbursement strategies'. Mboniso testified that he had not signed or known about this letter but said that his secretary and Baatjies had access to his electronic signature for urgent documents.

[9] For its contention that there was a binding agreement, Yarona relied on this letter and on a draft service agreement with an effective date of 1 June 2007. Yarona's case (until it conceded the issue) was that Medshield had accepted the terms in the draft. The draft, which purported to have been signed by Soll on Yarona's behalf on 1 June 2007, made provision for Medshield to pay Yarona a monthly fee of R250 000 plus VAT. In fact, the draft agreement was not submitted to Medshield's board of trustees for approval and Medshield did not conclude a contract with Yarona.

[10] Notwithstanding this state of affairs, Medshield began to make monthly payments to Yarona. The first was on 6 August 2007 in the amount of R279 300 (R245 000 plus VAT). Although Medshield could not locate any documents relating to the first four payments, Yarona's documentation shows that it began invoicing Medshield in June 2007. Since the first payment for which Medshield had records was for an invoice in respect of services supposedly rendered in November 2007, the first four payments probably related to invoices covering July to October 2007. Yarona continued to issue monthly invoices well into 2009. Each invoice was for R279 300. Over the period 6 August 2007 to 17 July 2009 Medshield made 20 payments in this amount or multiples thereof. According to Medshield's records, these covered monthly invoices up to January 2009. There was no payment for April 2008 but the invoice for June 2008 was paid twice and the invoice for August 2008 thrice. In each invoice the services rendered were described as 'healthcare provider research and geo-mapping'.

[11] Medshield also paid Yarona an amount of R15 092 on 27 March 2008. According to Yarona's invoice, this was for flights and accommodation for Soll and Alley in respect of a 'Medshield roadshow' in March 2008. Furthermore, on 26 June 2009 Medshield paid Yarona an amount of R229 845 which, if it was owing at all, was due to Calabash, not Yarona. These further payments, together with the payments in respect of the monthly invoices, make up Medshield's claim of R6 110 237.

[12] In April 2008, and despite the absence of valid contracts, Ms Angela Blackburn, at that time employed by OMHC at the Randburg office as the Medshield claims manager, loaded Yarona 'baskets' onto OMHC's system in respect of the Value, Bonus and Plus options. These 'baskets' contained details of Yarona's health practitioner networks. Claims for services provided to Medshield members by health practitioners belonging to these networks were paid at the rates negotiated by Yarona. Blackburn testified that she loaded the baskets on Alley's instructions. She said that April 2008 was when 'we went live with the Yarona network'. This accords with internal Yarona documents stating that the implementation date of the 'reimbursement model' for Medshield's Bonus, Plus and Value options was 1 April 2008. The Yarona baskets were operative for the rest of the year. Blackburn

accepted in cross-examination that over the period April to December 2008 OMHC processed thousands of Medshield claims for these options, some of which were from practitioners on the Yarona network who would have been remunerated in accordance with Yarona's discounted rates.

[13] During May 2008 Calabash defaulted on its obligations in respect of the Access option. After May 2008 Medshield paid Access claims directly. The Calabash agreement formally terminated in October 2008, though for several months there was a winding-down period during which Calabash performed certain administrative functions for which it was paid an administration fee of around R230 000 per month.

[14] During August 2008 Medshield's board decided to terminate its administration agreement with OMHC. Preparation for self-administration took some months. In anticipation of self-administration, Blackburn resigned from OMHC and began employment with Medshield as from 1 October 2008 as General Manager: Operations. Ms Melani Coetsee, who served as a trustee from July 2007 to November 2008, was engaged as Medshield's Chief Operating Officer as from January 2009. By 1 March 2009, when self-administration began, Medshield had over a hundred employees. One of these was Ms Nawaal Davids, a former OMHC accountant who was appointed as Medshield's bookkeeper.

[15] In early January 2009 Blackburn asked Coetsee whether she should load the Yarona baskets for 2009. Coetsee testified that she did not know what Blackburn was talking about. She was aware of Yarona's involvement with the Access option via the Calabash agreement but knew that the Calabash agreement had terminated in October 2008. Coetsee instructed Blackburn not to load the Yarona baskets.

[16] I have mentioned that Medshield's last payment to Yarona was on 17 July 2009 (a delayed but duplicate payment for services supposedly rendered in June 2008) and that the last month of purported services for which payment was made was January 2009 (this payment was made on 20 February 2009).

[17] During September 2009 Medshield's financial department detected suspicious payments made from Medshield's bank account, apparently for Alley's personal benefit. Following preliminary investigation Alley was suspended. Soll, in the meanwhile, was claiming that Yarona had a valid contract with Medshield and was demanding ongoing payment. When Mr Clive Stuart, Medshield's acting principal officer, asked Coetsee whether she knew anything about payments due to Yarona, she told him that Medshield's contract with Calabash had ended in 2008 and that there was no contract with Yarona. Subsequent investigation revealed the payments which became the subject of Medshield's claim. Coetsee testified that Alley had instructed OMHC to allocate the payments to 'marketing fees', a single globular amount in the accounts which included payments to other service providers as well, with the result that the monthly payments to Yarona were not detected. Coetsee testified that it was only in January 2010 that Medshield discovered the full extent of the unlawful payments to Yarona. Following a disciplinary hearing in January 2010 Alley was dismissed. Neither Alley nor Soll testified.

The payment procedure in general

[18] Coetsee, who was a trustee from July 2007 to November 2008 and thereafter Medshield's Chief Operating Officer, testified that only the board could authorise the conclusion of contracts. There was no delegated authority. Once a contract was duly concluded, the principal officer was responsible for authorising payment in terms of the contract. She said that there was a procurement policy in place but could not recall its content. No such document was produced by Medshield in discovery.

[19] From the evidence of Coetsee and Davids it emerges that the procedure for payment during the Alley era was as follows: Alley received the invoice and approved or declined it. If he approved it, he signed it. He gave the approved invoice to Baatjies who wrote it in her payment instruction book. Alley signed the instruction. Every few days an OMHC driver collected documents from Medshield, including invoices and accompanying payment instructions. On receipt of these documents, Davids checked that the instruction accorded with the invoice (both of which were meant to bear Alley's signature) and asked a clerk to prepare an electronic funds transfer (EFT) requisition. If the EFT requisition accorded with the invoice, Davids authorised it. The payment instruction was then loaded onto the electronic banking

system. Davids thereafter sought a payment release authority from two of the signatories authorised to operate on Medshield's bank account. Usually the signatories would be Alley and an OMHC manager. Coetsee testified that a senior OMHC manager could sign in place of the principal officer. Normally, the authorised EFT signatories were presented with batches of EFT requisitions for signature. Davids testified that she never queried an instruction to pay, whether to Yarona or anyone else. Her role was limited to checking that the payment instruction and EFT requisition accorded with the invoice.

[20] It seems that when Medshield began self-administration in March 2009 the payment procedure carried on as before, save that the roles previously played by the OMHC employees were now performed by corresponding Medshield employees.

The payment documentation in this case

[21] As I have said, Medshield was not able to locate any documentation relating to the first four payments (relating to the July-October 2007 invoices). One thus does not know to what extent the procedure described by Coetsee and Davids was faithfully observed. In respect of the November and December 2007 invoices, Medshield located the EFT requisition but not the invoices and payment instructions. The EFT requisition for the payment of these two invoices bears Alley's signature, though not in the place provided for the signature of the EFT signatories. The requisition was not signed by a second signatory. In respect of all but one of the subsequent payments there are payment instructions bearing Alley's signature. Where Medshield was able to locate the invoices, they generally bore Alley's signature though again there are exceptions. The EFT requisitions routinely contained the signature of only one authorised EFT signatory, presumably that of an authorised OMHC manager. Alley did not sign them. No EFT requisitions were discovered in respect of the payments of 27 March 2008 (R15 091,67 for the 'roadshow'), 12 February 2009 (R279 300 for Yarona's July 2008 invoice) and 20 February 2009 (R558 600 for Yarona's December 2008 and January 2009 invoices) and the related invoices did not bear Alley's signature (which may be because the copies in the record are Yarona's file copies).

[22] In respect of the four payments made to Yarona after self-administration began in March 2009, two of the EFT requisitions were signed by two authorised signatories, being Alley and Coetsee. In the case of the other two payments the EFT requisitions in the record only contain Alley's signature.

Error and excusability

[23] Medshield's pleaded case was the condictio indebiti. The payments were said to have been made in the reasonable but mistaken belief that they were owing. It is not every mistake which entitles the mistaken party to recover payment. Our courts have approved statements in the old authorities to the effect that the mistake should have been 'neither heedless nor far-fetched'; that it should not have been based on 'gross ignorance'; that it should have been 'neither slack nor studied'.[1] In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another*[2] Hefer JA said the following:

'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.'

Although this passage is formulated with reference to errors of law, it is equally applicable to errors of fact. As Hefer JA observed at an earlier point in his judgment,[3] there is no logic in the distinction between mistake of fact and mistakes of law in the context of the condictio indebiti.

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[1] *Union Government v National Bank of South Africa Ltd* 1921 AD 121 at 126; *Rahim v Minister of Justice* 1964 (4) SA 630 (A) at 634A-C; *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another* 1992 (4) SA 202 (A) at 223I-224B.
[2] See previous fn, at 224E-G.
[3] At 220H.

[24] The onus rests on the claimant to prove the excusability of the error.[4] In *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail*[5] a contractor implemented an increase in the rates payable for its services. The court found that the contractor had not been entitled to charge the increased rates. The employer, Transnet, sought to recover the amounts overpaid over a six-month period. The trial court found that Transnet's mistake was excusable but this court disagreed. Boruchowitz AJA said that although the nature of Transnet's mistake was clear the reason for the mistake was not. Transnet failed to explain why the mistake occurred and why it occurred repeatedly over a six-month period. The written agreement was readily accessible to its officials. Their failure to detect the unauthorized increase and to check the rates stipulated in the invoices against the agreement could only be attributed to extreme slackness or negligence on their part.[6]

[25] In the present case Medshield submitted that the trial judge was right to find that the payments were made as a result of excusable error. In the alternative it argued that this court should hold that in the circumstances of this case excusability was not a requirement. We were asked to build on the exception recognised in relation to executors in Wessels *The Law of Contract*[7] and extended by analogy to liquidators and trustees in *Bowman, De Wet and Du Plessis NNO & others v Fidelity Bank Ltd.*[8]

Payments pre-dating self-administration

[26] I start with the payments which occurred before Medshield's self-administration began in March 2009. Because a medical scheme is a corporate body,[9] it is necessary – in order to assess excusability – to identify the individuals who represented Medshield in making the payments. Medshield did not plead their identity. The evidence was that there were several authorised signatories on the bank account and that an EFT had to be authorised by two of them. The two

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[4] *Willis Faber* fn 2 above at 224I-225A; *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA) para 29.
[5] See previous fn.
[6] Paras 34-35.
[7] 2 Ed para 999.
[8] *Bowman, De Wet and Du Plessis NNO & others v Fidelity Bank Ltd* 1997 (2) SA 35 (A) at 44H-45G.
[9] Section 26 of the Act.

signatories would thus be the persons who represented Medshield in respect of any particular payment.

[27] Both sides focused their submissions on the responsibilities of the board of trustees and finance committee. In my view those submissions were misdirected. The board and finance committee were not involved in making the payments. The question is not whether these bodies were slack in failing to detect that unlawful payments had been made (though this may be relevant to prescription). Excusability is concerned with the mistakes made by those persons who actually effected payment, in this case the authorised signatories. It may be that if the board had established better systems of control, OMHC's authorised signatories would have been more careful. There is insufficient evidence to make a finding to this effect but I do not think it matters. The fact remains that the board was ignorant of, and thus not privy to, the making of the payments. The board was not the functionary which mistakenly made the payments and it thus makes no sense to enquire whether the board's 'mistake' was excusable.

[28] As I have said, the EFT requisitions generally bore the signature of only one person, being an OMHC manager. They should also have been signed by Alley or by a second senior OMHC manager. Since Alley's signature usually appeared on one or both of the payment instruction and invoice, it may be that OMHC, not unreasonably, regarded this as a sufficient signed authority from him to proceed with the payment without obtaining his separate signature on the EFT requisitions. On that basis, excusability would on the face of it need to focus on the conduct of Alley and the relevant OMHC signatory.

[29] Medshield's case was conducted on the basis that Alley knew that the payments were not owing to Yarona. It is difficult to avoid that conclusion. Medshield's counsel argued (albeit in relation to prescription) that Alley's knowledge should not be attributed to Medshield, invoking the rule that where an agent in the course of his employment defrauds his principal the latter is not charged with constructive knowledge of the transaction.[10] If Alley had acted alone in causing

[10] As to this principle, see *R v Kritzinger* 1971 (2) SA 57 (A) at 59H-60D; *NBS Bank Ltd v Cape Produce Company (Pty Ltd & others* [2002] 2 All SA 262 (A) para 34.

Medshield to make the payments, Medshield could not have brought its enrichment claim as a condictio indebiti because Alley did not mistakenly believe that the money was owing.[11] However Alley did not act alone. In such circumstances I consider (and the contrary was not argued) that the condictio indebiti is available if the second person, without whose participation the payment could not have been made, mistakenly believed the money was owing, provided of course the mistake was excusable.

[30] The difficulty confronting Medshield is that there is no evidence as to who signed the EFT requisitions as authorised EFT signatories or what their thinking was. Davids testified that the authorised OMHC signatories were Ms Nikita Sigaba and Mr Regan van Heerden. For eight of the payments which occurred before self-administration, no signed EFT requisitions were located so one does not know which OMHC official authorised them. For one payment the EFT requisition does not contain an OMHC signature. For the other nine payments the OMHC signatures are indecipherable but appear to come from three different people. Assuming two of them were Sigaba and Van Heerden, the identity of the third is unknown. Sigaba and Van Heerden did not testify. One thus does not know what went on in their minds when they authorised the EFTs or what steps, if any, they took to satisfy themselves that the payments were owing.

[31] In the absence of evidence, the furthest one might go in making assumptions in favour of the OMHC signatories is that they relied, without more, on Alley's approval for the payment of the invoices. In my view this was inexcusably slack. OMHC was a professional administrator. In accordance with good corporate governance, Medshield's rules required the board to ensure that proper control systems were employed and expressly specified that payments from its bank account had to be authorised under the joint signature of at least two persons authorised by the board. In order to obtain accreditation as an administrator, OMHC would have had to satisfy the Registrar that its own systems of financial control were adequate.[12] The OMHC signatories must have known that the purpose of requiring

[11] *Absa Bank Ltd v Leech & others NNO* 2001 (4) SA 132 (SCA) para 8.
[12] Regulation 17(2)(d) of the regulations promulgated in terms of the Act (GNR 1262, 20 October 1999, as amended).

two signatories was to neutralise as far as possible the dangers inherent in reposing complete confidence in one person. The advantage of the second signatory would entirely disappear if such signatory could rely solely on representations made by the first signatory. One has no evidence as to what knowledge the OMHC signatories had of Alley's credentials. One knows that the payments started very shortly after he assumed office. The payments were substantial and took place virtually every month. As administrator OMHC could be expected to have been placed in possession of all material contracts concluded by Medshield. If not, OMHC ought to have demanded that they be made available. As a most basic precaution, the OMHC signatories should, when the payments started, have ascertained whether they were in accordance with a contract concluded by Medshield. One does not know that they even asked Alley or anyone else whether a contract existed.[13]

[32] In the passage quoted earlier from *Willis Faber* Hefer JA said that relevant considerations in assessing excusability included whether the defendant's conduct induced the plaintiff's mistake and whether the defendant knew that the money was not owing. Medshield argued that there was an improper relationship between Alley and Soll. In their heads of argument Medshield's counsel submitted that Alley and Soll actively deceived OMHC and Medshield's board. I do not think it is open to Medshield to advance that case insofar as Soll and Yarona are concerned. During the course of the trial Yarona's counsel objected to evidence designed to show that Yarona acted fraudulently and on the second occasion on which this occurred the judge disallowed the line of questioning. Yarona's counsel, in motivating the objection, submitted that fraud should be pleaded, an established principle recently reiterated by this court in *Home Talk Developments (Pty) Ltd & others v Ekurhuleni Metropolitan Municipality*.[14]

[33] If Medshield wanted to prove that Yarona acted in cahoots with Alley, the obvious claim would been one based on fraud or theft. I do not say that in such circumstances the condictio indebiti would not have been available as an

[13] See *Greyling v ISCOR* [1984] ZASCA 156 (unreported judgment in Case 233/83) where the defendant's counter-claim based on the condictio indebiti failed because the defendant failed to adduce evidence from the official or officials who caused payment of unowed sick leave to be paid to the plaintiff.

[14] *Home Talk Developments (Pty) Ltd & others v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; [2017] 3 All SA 382 (SCA) paras 29-31.

alternative.[15] But if Medshield wished to rely on Yarona's alleged fraud as a factor excusing Medshield's mistake, it was required to plead it. Yarona's concession that no valid agreement existed was not a concession that it knew there was no agreement when it invoiced Medshield and received the payments. Although there are emails between Alley and Soll which might be thought suspicious, it is difficult to assess their import in the absence of evidence from Alley and Soll. If Medshield had pleaded fraud, Yarona might have been constrained to call Soll as a witness. For the rest it seems to me that the OMHC signatories probably relied not on Yarona's conduct in issuing the invoices but, improperly, on Alley's conduct in approving them.

Payments post-dating self-administration

[34] Coetsee co-signed two of the four EFT requisitions post-dating self-administration. The first was a payment of R279 300 on 17 April 2009 for Yarona's October 2008 invoice. Coetsee appended her signature to the invoice and EFT requisition on 16 April 2009, about a month and a half after self-administration began. She testified that Alley came to her office and told her that Medshield had reneged on its agreement with Calabash in respect of the Access option, that the outstanding invoice related to Access services rendered for October 2008 and that if Medshield did not pay it might be taken to court. She did not find it strange that the invoice was in Yarona's name – she saw Calabash and Yarona as the same thing and assumed Medshield would be making payment in terms of its agreement with Calabash. Although the Calabash agreement had terminated, Alley told her that the invoice related to October 2008. She knew that Calabash was entitled to a wind-down fee until the end of 2008. She continued:

'We were still in the process of setting, or starting the self-administration and he actually misled me into believing this was an outstanding payment which it was not. I did not have the ability to check the financials or question Mr Alley because he is the accounting officer of the scheme and he would have known what we had paid and not paid, he had been the accounting officer since 2007 so I did not question him. I trusted him and I signed the invoice.'

[15] Cf *Diamond Fields Advertiser v Colonial Government* Buch App Cases (1910-1911) 8.

[35] Coetsee's view that Alley could not be questioned was unreasonable. It was also unacceptable for her to assume that it made no difference whether the recipient of the payment was Calabash or Yarona. Her co-signing of this EFT requisition was inexcusably slack.

[36] The second payment which Coetsee authorised was an amount of R229 845 on 26 June 2009. Unlike the first payment, this was in fact a payment arising from Medshield's contractual relationship with Calabash. Coetsee testified that Alley approached her to say that there was still a balance owing to Calabash in respect of the period ending December 2008. She was shown a spreadsheet listing all invoices and payments. The figures on the spreadsheet are not fully legible. Be that as it may, Alley's proposal was that Medshield settle with Calabash by paying 50 per cent of the allegedly outstanding amount. Alley told her he had confirmed with Calabash's managing director, Mr Martin Rimmer, that this would be acceptable. Coetsee understood that 50 percent totalled R229 845. It was on this basis that she co-signed the EFT requisition. The requisition reflected Calabash as the supplier but contained Yarona's bank details. There is nothing to show that the money was not in fact owed to Calabash. Coetsee's error was to sign a requisition which resulted in the money going to Yarona instead of Calabash. She may not even have noticed that the bank details were those of Yarona. I think her explanation in this instance just passes muster though in the light of what follows this is not a matter of great moment.

[37] In respect of the other two payments made after self-administration began, the EFT requisitions do not contain Coetsee's signature. And only one of them contains Alley's signature. The one payment was a third payment of Yarona's August 2008 invoice and the other a second payment of Yarona's June 2008 invoice. In the absence of evidence as to who (apart from Alley) caused these payments to be made, Medshield did not discharge the onus of proving excusable error.

Is excusability a requirement in this case?

[38] In his work *The Law Of Contract*[16] Sir John Wessels dealt with the question whether an executor who paid heirs or legatees with full knowledge of the facts but under a mistaken belief as to their legal rights could recover the money by way of the condictio indebiti. After observing that the decision in *Rooth v The State*[17] stood in the way of such a conclusion, he continued (citation of authority omitted):

'It seems, however, more reasonable to hold that a person who, like an executor, is acting for the benefit of others, and who in that capacity overpays an heir or legatee under a bona fide mistake as to their legal rights, should not suffer for his mistake . . . .'

[39] Although the focus of this passage was whether the executor could, contrary to the general rule then prevailing, rely on an error of law, this court in *Bowman*[18] understood Wessel's proposal as entailing the further proposition that excusability was not a requirement in the circumstances contemplated by the author.[19] In that case Harms JA said that Wessels' proposal seemed 'eminently sensible'. In support of this view Harms JA said that a creditor could by way of the condictio indebiti recover from an heir money improperly paid to him by the executor without having to prove that the executor's mistake was excusable. That being so, there was no reason why, if the executor himself instituted the condictio, he had to prove that his mistake was excusable. In *Bowman* this view was applied by analogy to liquidators and trustees who had paid more than was owing to a secured creditor. Their error, I should add, was one of fact.

[40] Medshield's counsel argued that we should extend this exception to errors made in the administration of a medical scheme's affairs. While recognising that a medical scheme is a separate juristic person, Medshield submitted that the Act requires medical schemes to be administered in the interests of members and beneficiaries and that those charged with its administration can be seen to be acting in a representative capacity similar to executors, liquidators and trustees.

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[16] Fn 7 above.
[17] *Rooth v The State* (1888) 2 SAR 259.
[18] *Bowman* Fn 8 above.
[19] 44H-45G.

[41] Yarona's counsel argued that the rationale for the exception recognised in *Bowman* was the undesirability of holding the representative liable to the heir or creditor for his mistake. That did not apply here where the medical scheme itself as a corporate body made the payments. The members of the scheme would not have a claim against the medical scheme for negligent payments. There might be a claim for negligence against the trustees or principal officer but there was no reason in policy why they should not bear the consequences of their inexcusable slackness.

[42] Wessel's justification for the exception is unconvincing, at least under our modern system for administering deceased and insolvent estates. In insolvency cases, and in many deceased estates, the persons appointed as liquidators, trustees and executors are professionals who earn substantial fees and carry professional indemnity insurance. There is no compelling reason of policy from their perspective to make an exception to the excusability requirement. In *Bowman* Harms JA appears to have been swayed not so much by the need to protect executors and insolvency practitioners but by authority supporting the view that where an heir or creditor proceeds directly against the recipient of an unowed payment, the heir or creditor need not prove that the executor's mistake was excusable. It would be illogical in those circumstances to say that if the claim was instituted by the executor or liquidator rather than heir or creditor, the executor or liquidator has to prove excusable error.

[43] In my opinion, the more powerful considerations of policy (and policy is a relevant factor, as the passage I earlier quoted from *Wills Faber* shows) are those which focus on the persons in whose interests the representative is meant to act. For purposes of the present decision it is unnecessary to go beyond the case of a medical scheme. Healthcare is a matter of fundamental importance to everyone. Medical schemes provide a way of ensuring as far as possible that people have access to adequate healthcare, often by a system in which contributions are made by members from their earnings and by employers for the benefit of members. Medical schemes are closely regulated to ensure that their assets are prudently administered for the attainment of the sole object of conducting the medical scheme business. One of the primary duties of a scheme's board is to take all reasonable steps to ensure that the interests of beneficiaries in terms of the rules and the Act

are protected at all times.[20] The board must consist of persons who are fit and proper to manage the scheme's business.[21] Members of medical schemes are particularly vulnerable to abuse. Many of them earn modestly. If the funds which should be administered for their benefit are abused, they stand not only to lose moneys deducted from their earnings but to have their access to health care jeopardised.

[44] In deciding whether to extend the protection recognised in *Bowman*, I do not think it matters that a medical scheme is a juristic person. The important feature is that the scheme exists for the benefit of its members, often vulnerable people, and is administered by persons who owe a fiduciary duty to them. In that sense the persons charged with the administration of the scheme can be viewed as representatives standing in a similar position to executors, trustees and liquidators. Indeed, in the case of a company in liquidation its assets and liabilities do not vest in the liquidator. The liquidator succeeds to the administration of the company in the place of its directors.[22] A similar view was taken by a full court in *Grant Thornton Capital Umbrella Fund v Da Silva*[23] where the condictio was brought by a provident fund (also a juristic person). While it is unnecessary to decide whether the requirement of excusability should be relaxed in the case of provident funds, the full court was right not to regard the juristic personality of the fund as a bar to extending *Bowman* by analogy to other situations.

[45] In regard to Yarona's contention that there is no reason to shield a scheme's board and principal officer from liability for their negligence, I have already indicated that in my view the focus should be on the vulnerability of the members rather than the need to protect the office bearers. This said, there are important differences between the trustees of a medical scheme on the one hand and executors and insolvency practitioners on the other. At least half of a scheme's board must be elected from among members of the scheme.[24] Often a fund's rules require (as in Medshield's case) that the remaining members of the board are to be elected from

[20] Section 57(6)(a).
[21] Section 57(1).
[22] *Leigh v Nungu Trading 353 (Pty) Ltd & another* 2008 (2) SA 1 (SCA).
[23] *Grant Thornton Capital Umbrella Fund v Da Silva* [2013] ZAGPJHC 231.
[24] Section 57(2).

persons nominated by the employers. The trustees are not professional administrators. Furthermore, a remedy against them may be inadequate. They may not have the resources to meet claims. Litigation against them might be costly and protracted. An exception to the excusability requirement would not, I must emphasise, take away any rights which the scheme or members might have against delinquent office bearers; it would simply mean that the scheme can, in the interests of members, recover unowed payments even though its office bearers acted with inexcusable slackness. That said, I cannot stress enough that this is not an invitation to slackness on the part of office bearers who might face other sanctions for such conduct.

[46] I thus conclude that although Medshield has failed, in respect of all but one of the payments, to prove that such payments were made as a result of excusable error, Medshield's right to recover them by way of the condictio indebiti is not barred.

Impoverishment

[47] Yarona contends that Medshield was required to prove not only that Yarona was enriched by the amounts claimed but also that such enrichment occurred at Medshield's expense, ie that Medshield was impoverished by the amounts claimed.[25] Since Yarona received unowed moneys, its enrichment was presumed and it bore the onus to plead and prove loss of enrichment which it did not do.[26] Yarona argued, however, that Medshield failed to prove its impoverishment. This argument was based on Blackburn's evidence that the Yarona baskets were loaded onto Medshield's system in April 2008 and were used in meeting claims over the period April to December 2008. Simply put, the argument is that Medshield received value from the use of the baskets.

[48] I do not think that this argument can be upheld. It is as well to begin by emphasising that Medshield's claim was not a claim for restitutio in integrum. That is a special remedy accorded by our law where voidable contracts are rescinded on

[25] For this requirement, see *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) para 19 per Schutz JA and para 2 per Harms JA; *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) para 17.
[26] *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713 in fine.

certain recognised grounds. A party seeking rescission and restitutio in integrum must generally be willing and able to restore what he has received and should tender such restoration when claiming.[27] Restitutio in integrum does not find application in a case such as the present, where no contract came into existence. Medshield's claim was thus correctly the condictio indebiti. In *Davidson v Bonafede* Marais J referred with approval to Prof de Vos' warning against the tendency to confuse restitutio in integrum, which is not an enrichment action, with the condictiones.[28]

[49] There is no clear authority that a party who institutes a condictio indebiti in respect of performance made under a putative contract must tender to return what he received from the defendant;[29] still less that he must prove the value of what he received. Prof de Vos' view is that no such tender is needed.[30] He also makes the point[31] that even in cases of restitutio in integrum the plaintiff need not make a tender where what he received was a factum (a service).[32]

[50] The authors of the chapter on enrichment in *Lawsa*[33] state that a party who uses the condictio indebiti to recover a transfer of value made under an unenforceable contract must tender to restore what he received. They cite four cases,[34] all dealing with unenforceable oral agreements for the sale of land. The first three (*Wepener*, *Van der Berg* and *Bushney)* were rei vindicationes by sellers. *Wepener* and *Van der Berg* do not support the proposition. Although *Bushney* does, the court incorrectly based its statement on the two earlier case and incorrectly described the plaintiff's claim as one for restitutio in integrum. The fourth case, *Mattheus*, was a condictio by the purchaser and does not deal with the question of

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[27] *Feinstein v Niggli & another* 1981 (2) SA 684 (A) at 700F-701C; *Davidson v Bonafede* 1981 (2) SA 501 (C) at 509D-511H. Cf Van der Merwe et al *Contract: General Principles* 4 ed at 116-118.
[28] Fn 27 above, at 510B, with reference to De Vos *Verrykingsaanspreeklikheid* 2 ed at 144.
[29] See Du Plessis *The South African Law of Unjustified Enrichment* (2012) at 161; Visser *Unjustified Enrichment* (2008) at 164 and fn 30.
[30] De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3 ed at 166-167.
[31] Loc cit.
[32] See, eg, *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) at 830G-831C.
[33] Lotz & Brand *Lawsa* 2 ed vol 9 para 213 and fn 12.
[34] *Wepener v Schraader* 1903 TS 629; *Van der Berg v Shaw NO* 1933 TPD 242; *Bushney v Joliffe* 1953 (4) SA 273 (W) at 276H-277A; *Mattheus v Stratford & another* 1946 TPD 498.

tender. In regard to the seller's rei vindicatio, there is more recent authority that no tender is required by the seller in such cases.[35]

[51] This is not to deny that the seller is legally obliged to repay the purchase price. To say that no tender is needed merely acknowledges that the seller's rei vindicatio is independent of any claim which the buyer may have against him for unjustified enrichment. The purchaser's condictio indebiti could be adjudicated simultaneously with the buyer's rei vindicatio, which is what this court envisaged in *Menqa & another v Markom & another*.[36]

[52] To return to Yarona's contention that Medshield failed to prove its impoverishment, the requirement of impoverishment in the condictio indebiti is concerned with whether the plaintiff suffered a loss in the act of making the payment or performance giving rise to the condictio. Issues of non-impoverishment typically arise in tripartite situations where on analysis it emerges that the loss was in truth suffered by a third party or where the claimant was shielded from loss by an indemnity or the like.[37]

[53] In the present case there were no circumstances prevailing at the time of each payment which would justify a conclusion that Yarona's enrichment did not occur at Medshield's expense and cause an immediate corresponding impoverishment. Medshield did not have a contractual arrangement with a third party which shielded it from the impoverishment. Whatever Yarona may have thought, there was in fact no contract between Medshield and Yarona. A non-existent contract cannot be used to forge a causal link between one or more of the unowed payments which Medshield made to Yarona and the benefit which Yarona supposedly conferred on Medshield by way of the loaded baskets.

[54] I have no quibble with the proposition that in cases of bilateral performances by P and D under non-existent or unenforceable contracts our law of unjustified enrichment would be lacking if the end result were not, at least generally, a netting-

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[35] See *Vogel NO v Volkersz* 1977 (1) SA 537 (T), a full court judgment, at 554H-555C; *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK & andere* 2002 (3) SA 653 (NC) at 663I-664H.
[36] *Menqa & another v Markom & others* 2008 (2) SA 120 (SCA) para 25.
[37] See, eg, Visser op cit (fn 27 above) at 360 and 366; *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T). And cf *Kudu Granite* fn 25 above para 23.

off of gains but the question is how one reaches this result. The correct solution in my view is that P and D should each use the condictio indebiti to recover from each other. If this were done in the same proceedings, the end result would be set-off pursuant to the procedure provided for in rule 22(4) of the Uniform Rules. The party with the higher enrichment liability would have to pay the difference to the party with the lower enrichment liability.

[55] It might be argued that there is another solution, one which flows from the rebuttable presumption of enrichment which arises when an indebitum is transferred and the related right of the recipient to plead loss of enrichment as a defence.[38] The fallacy in this argument, so it seems to me, is the assumption that D's transfer of value to P results in an irreversible diminution of D's patrimony (ie a loss of enrichment). If D has the right to recover what he has transferred, a defence of loss of enrichment is not available. In the case of a putative contract, D has the same right which P has to reclaim, by the condictio indebiti, his unowed transfers of value.

[56] The defence of loss of enrichment is also unsatisfactory in bilateral cases for other reasons. Other than in a simultaneous exchange of performances, D would usually have transferred value to P because of a mistaken belief that he had a contractual obligation to do so rather than because of any particular payment received from P. Furthermore the rules which determine whether and in what amount D has a condictio against P are not the same as the rules which determine whether D can raise loss of enrichment as a defence and the quantum of the permissible reduction. In a condictio by way of counterclaim, D would be limited to the lower of P's enrichment and D's impoverishment whereas a defence of loss of enrichment would entitle D to deduct the full extent of his own impoverishment, even though P may have derived no benefit from D's performance.

[57] I do not wish to be understood as elevating formality above substance. If a defendant were to plead loss of enrichment in circumstances where a condictio indebiti by way of counterclaim was technically the correct remedy, a court would not be precluded from awarding the plaintiff a net amount if all the issues relevant to

[38] *African Diamond Exporters* fn 26 above.

a pleaded counterclaim had been canvassed at the trial. However the net position should be the one flowing from reciprocal condictiones indebiti.

[58] It is surprising that this situation is not the subject of clear authority. The question how to unwind void mutual contracts has engendered lively academic discussion.[39] Prof Visser and Prof Sonnekus in their respective works on unjustified enrichment[40] appear to approve the solution I have proposed – they do so with reference to this court's decision in *Rubin v Botha*[41] though the procedural methodology was not worked out in that case. In *Dugas*[42] the applicant sued for the return of payments he had made under an invalid hire-purchase agreement for the purchase of a car. The respondent contended that it would be unjust to allow the applicant to recover his payments without taking into account the benefit he had enjoyed by having the use of the car for 21 months. Without discussing the procedural aspects, Henochsberg J said that it was for the respondent to establish the applicant's unjustified enrichment.[43] This was also the view of the appeal court in the Scottish case of *Haggarty.*[44]

[59] In German law[45] the initial approach to the problem was the one I have proposed, known in German as the *Zweikondiktionentheorie* (the two-claims theory). This theory was subsequently thought to produce potentially unfair results where one of the parties but not the other was able to raise a defence of loss of enrichment. This led to the emergence of the *Saldotheorie* (the balance theory). In terms of this approach P's claim is reduced by the amount of any enrichment that he has lost, even if the loss of enrichment was without fault on his part. Even so,

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[39] See, eg, Peter Birks 'No Consideration: Restitution after Void Contracts' (1993) 23 *Western Australian Law Review* 195-234; Phillip Hellwege 'Unwinding Mutual Contracts: Restitutio in Integrum v. the Defence of Change of Position' in *Unjustified Enrichment: Key Issues in Comparative Perspective* Eds David Johnston and Reinhard Zimmermann (Cambridge University Press, 2012) pp 243-286; Sonja Meier 'Unwinding Failed Contracts: New European Developments' (2017) 21 *Edinburgh Law Review* 1-29.

[40] Visser op cit (fn 27 above) at 612 and fn 264; Sonnekus *Unjustified Enrichment in South African Law* (2008) at 50-51 and fn 40.

[41] *Rubin v Botha* 1911 AD 568.

[42] *Dugas v Kempster Sedgwick (Pty) Ltd* 1961 (1) SA 784 (D).

[43] At 793A. I express no opinion on the learned judge's further statement that use of the vehicle could not constitute unjust enrichment within the meaning of the law (793B).

[44] *Haggarty v Scottish TGWU* [1954] ScotCS CSIH 6; 1955 SC 109.

[45] As to which, see Visser op cit (fn 27 above) at 102-106 and 498-501; Du Plessis op cit (fn 27 above) at 387-388.

German law still used the two-claims theory in certain cases of voidable contracts – for example where the recipient was in bad faith or the contract was voidable by reason of fraud, duress or immorality. The balance theory has also been thought to have its weaknesses with the result that the *modifizierte Zweikondiktionentheorie* (the modified two-claims theory) has gained traction. In terms of this theory P and D should each sue each other by way of the condictio but neither can plead loss of enrichment.

[60] It is unnecessary in this case to decide what modifications if any to the normal rules should be made where parties to a putative or void contract make cross-claims for enrichment against each other. They are best worked out on the facts of specific cases. The simple point is that Yarona did not institute a condictio against Medshield by way of a counterclaim and did not raise Medshield's supposed enrichment or its own impoverishment in any other way on the pleadings.

Prescription

[61] The final issue is prescription. The onus rested on Yarona to establish the date by which Medshield acquired, or could by exercising reasonable care have acquired, knowledge of the facts giving rise to the claim.[46] In the absence of evidence that the authority to litigate was delegated, the requisite actual or constructive knowledge would have to be that of the board of trustees.[47]

[62] Yarona pleaded that Medshield had or could have acquired the requisite knowledge by the date of each payment and at any rate by not later than 7 June 2008 (ie three years before service of summons). There is no evidence that the board had actual knowledge before January 2010 or that the board by 7 June 2008 had knowledge of circumstances which should have caused it to investigate. The board was entitled, in the absence of warning signs, to assume that the principal officer and OMHC were administering the scheme properly and in accordance with concluded contracts.

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[46] *Gericke v Sack* 1978 (1) SA 821 (A) at 826B-828C.
[47] Cf *PricewaterhouseCoopers Inc & others v National Potato Cooperative Ltd & another* [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) paras 148-149.

[63] Medshield's financial year-end was 31 December. Coetsee testified that the board would receive the audited financial statements for approval the following April. It may thus be assumed that as at 7 June 2008 the board had seen the financial statements for the year ended 31 December 2007. Those financial statements mentioned the contract with Calabash but made no reference to Yarona. The investigations undertaken in the latter part of 2009 revealed that the payments to Yarona were included in the line item 'marketing fees' which was in turn part of 'administration expenses'. For the year ended 31 December 2007 the administration expenses were R191 465 000 and the marketing fees R14 467 000. The latter figure probably included R1 396 500 in respect of payments to Yarona (being the payments for Yarona's invoices for July to December 2007) but this would not have been apparent to a reader of the financial statements.

[64] Included in the trial bundle were the management accounts for December 2008. According to Coetsee the monthly management accounts were prepared by OMHC and considered by the finance committee. The December 2008 accounts run to 31 pages and contain fairly dense financial information. Page 6 contained the income statement. The line item 'Marketing Fees and Promotions' was R1 555 023 as against a budgeted figure of R850 996. On page 7 a breakdown was provided of administration costs per line item. In regard to 'Marketing Fees and Promotions', the expenditure was said to comprise inter alia a marketing research fee of R1 275 261 and 'R279 300 Healthcare provider Research & Geo mapping supplied by Yarona Network'. It was noted that an identical amount had been paid to Yarona in the preceding month. Coetsee testified that the finance committee, whose members were drawn from the board, submitted reports to the board.

[65] If the above information had been reported to the board, there can be little doubt that the board could by the exercise of reasonable care have ascertained that unowed payments were being made. The board members would have known that they had not approved a contract with Yarona. The difficulty is that there is no evidence that the management accounts for earlier periods contained the same references to Yarona. One might expect that they would, but there is no explanation as to why, if that were so, the earlier management accounts were not adduced to support a contention that the finance committee, and potentially by implication the

board, knew or could reasonably have ascertained that unowed payments were being made. When Coetsee was asked whether other management accounts contained a similar breakdown of administration expenses, she said she did not know because she was not a member of the finance committee. There was also no explanation as to why the finance committee's reports to the board were not adduced. Coetsee was not asked in cross-examination what, if anything, those reports said regarding Yarona. It was not put to her that, as a trustee, she knew of the payments to Yarona.

[66] I do not think we would be justified, in the circumstances, in finding on a balance of probability that the management accounts which served before the finance committee prior to June 2008 explicitly referred to payments made to Yarona. In the circumstances it is unnecessary to decide whether, if it had been proved that the finance committee had the requisite knowledge by June 2008, such knowledge could have been imputed to the board.

Conclusion

[67] The following order is made:

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

OL Rogers
Acting Judge of Appeal

Appearances

For the Appellant	Mr MC Maritz SC (and with him Mr DR van Zyl Instructed by Gildenhuys Malatji Inc, Pretoria, c/o Honey Attorneys, Bloemfontein
For the Respondent	Mr D Berger SC (with him Ms K Millard) Instructed by Hogan Lovells, Sandton, c/o McIntyre van der Post, Bloemfontein