CG CASE NUMBER: 381/88

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION

In the matter between:

THE COMMISSIONER FOR INLAND REVENUE Appellant

and

FIRST NATIONAL INDUSTRIAL BANK LIMITED Respondent

CORAM: **CORBETT CJ, BOTHA, KUMLEBEN JJA, NICHOLAS et NIENABER AJJA**

HEARD ON: **15 MARCH 1990**

DELIVERED ON: **18 MAY 1990**

J U D G M E N T

NIENABER AJA

What was essentially a secondary point in the Court below - whether and from when mora interest is to run - has become the principal one in this Court. In the Court below the principal issue between the Commissioner for Inland Revenue (the appellant in this Court but the respondent in the Court below) and the First National Industrial Bank Ltd (the applicant in the Court below and the respondent in this one) was whether a certain autocard scheme administered by the Bank between 1984 and 1986 constituted a "credit card scheme" (as it was then defined in section 1 of the Limitation and Disclosure of Finance Charges Act 73 of 1968, now called, in terms of section 9 of Act 42 of 1986, the Usury Act) and as such attracted stamp duty in terms of section 3 read with Schedule 1 of the Stamp Duties Act 77 of 1968. (That issue, incidentally, is no longer a live one: the Usury Act has been amended to cater for it.)

The Bank throughout contended that its scheme

did not attract stamp duty. But when the Commissioner, notwithstanding representations to the contrary, insisted that it did, the Bank resolved to pay the duty (amounting in all to R488 353,80) "under protest". Each payment was made under cover of a letter (annexure "I") containing this formula:

> "As we have not yet finalized this matter with the authorities, in order to avoid any penalty in terms of the new section 19 of the Stamp Duties Act, 1968 (as inserted by section 8 of the Revenue Laws Amendment Act, 1984), we hereby make payment, under protest, of stamp duty in respect of the ... debit entries to our Auto Card holders."

Having made such payments during the period from the 21st of August 1984 to the 20th of May 1986 the Bank, on the 11th of August 1986, formally claimed repayment of all the amounts thus paid. When this was refused it launched an application for such repayment, with interest **a tempore morae**, in the Witwatersrand Local Division, which was served on the Commissioner on the

26th March 1987.

Two issues were debated before the Court **a quo**:

(1) the primary one whether stamp duty was properly chargeable and accordingly whether the Commissioner was obliged to repay the capital sums paid to his office; and

(2) if so, the secondary one whether the Commissioner was bound, in addition, to pay interest on the capital sums that had to be repaid, from the respective dates on which each payment was made by the Bank to the Commissioner.

The Court **a quo** decided both questions in favour of the Bank and accordingly granted judgment in the following terms:

> "Judgment is given against the respondent in favour of the applicant for:
> (1) payment of an amount of R488 353,80;
> (2) interest on the amounts from the dates and at the rates set out in annexure X to the draft order handed in;
> (3) costs of suit including the costs of two

counsel."

Annexure X is a schedule setting out the date and the amount of each payment made by the Bank to the Commissioner and the legal rate of interest appropriate to it.

The Commissioner accepted the decision of the Court **a quo** on the first but not on the second issue. Hence the present appeal, brought with leave of the Court **a quo**,

> "against paragraph 2 of the judgment and order in terms of which the respondent was awarded interest on the amounts from the dates and at the rates set out in annexure X to the draft order, given by the above Honourable Court on the 28th of April 1988".

The issue before this Court is therefore a comparatively narrow one, namely, whether, and if so from which date, the Commissioner is obliged to pay "interest **a tempore morae**" on stamp duties he collected when he should not have done so and which were paid to him "under

protest".

When the Bank initially applied for a refund in its letter of the 11th August 1986, it did so in terms of section 32(1)(a) of the Stamp Duties Act 1968. In its application before the Court below the Bank broadened the base of its claim by stating:

> "In the premises, I submit that the Respondent is legally obliged to exercise the discretion conferred upon him in terms of Section 32(1)(a) of the Stamp Duties Act, and to make a refund to Applicant of the amount of R488 353,80 representing stamp duties overpaid. I submit further and in any event that the said amount was paid by the Applicant to the Respondent under protest, as appears from Annexure 'I', and that the Respondent is obliged to repay the said amount to the Applicant with interest a **tempore morae.**"

The Court a **quo** held that section 32(1)(a) was not applicable to the Bank's claim for a refund and that the legal relationship between the Commissioner and the Bank was what the Court described as an "ordinary common law legal relationship flowing from unjust enrichment".

Counsel for the Commissioner, on the other hand, contended in this Court that section 32(1)(a) not only applies but that "it is the only possible legal and factual basis" for a refund; and since the section does not expressly provide for interest, no interest is recoverable. Counsel for the Bank, in turn, submitted that the Bank's true claim is either the **condictio indebiti** or one under contract, and that the Bank's initial reliance on section 32(1)(a) did not prejudice its claim under either head.

Even though the claim for a refund has been conceded it thus becomes necessary to examine section 32(1)(a) more closely. It reads:

> "1. The Commissioner may make, or authorise to be made, a refund in respect of:
> (a) the amount of any overpayment of the duty or any penalty properly chargeable in respect of any instrument, if application for the refund is made within two years after the date of such overpayment."

"The present claim", so it was stated by the

Court below,

> "does not, in my view, fall under the provisions of section 32 of Act 77 of 1968. This section authorises the Commissioner to make or authorise to be made a refund in respect of any overpayment of the duty properly chargeable in respect of any instrument. In this case there was not an overpayment of duties payable. There was a payment of duties not payable".

I agree with these remarks. What the section contemplates is a payment made in respect of duties rightly chargeable but wrongly calculated. To the extent of any excess there would be an "overpayment" and it would be an overpayment of duties "properly chargeable". The taxpayer could then claim, and the Commissioner would be empowered to authorise, a repayment in terms of the section without recourse to the technicalities of a common law **condictio.** But this was not such a case. Here the Court **a quo** found that the payments were made by the Bank and accepted by the Commissioner in respect of "an instrument" which did not, in reality, attract duty

at all. This was not, therefore, a case where the Bank paid in excess of what it should have paid; this was a case where it should not have paid anything at all. Hence there was no overpayment of duties "properly chargeable". Section 32(1)(a) accordingly did not apply.

That being so I cannot agree with the main submission of counsel for the Commissioner that section 32(1)(a) was conclusive of the entire issue and that, since the section was silent on interest, no interest was payable at all. (Contrast, CIR v NCR CORPORATION OF SA (PTY) LTD 1988 (2) SA 765 (A) at 775 E-H). Section 32(1)(a), moreover, is not the sole and exclusive vehicle for claiming repayment. The section does not, either in terms or context, purport to create a comprehensive remedy. What it does is to empower the Commissioner, in particular circumstances, to make or approve a refund. But that does not mean that an aggrieved party is precluded from advancing a claim for repayment on a

different basis, or that the section precludes a claim for **mora** interest where the overpayment is legally recoverable at common law. The fact that the Bank in its initial letter of demand may have misconceived its remedy, and that its main ground for redress in the application was not the appropriate one, is not in itself, therefore, fatal to its case.

Having correctly concluded that section 32 was not applicable the Court a quo went on to say:

> "Since the applicant's payment was made not in error but under protest the **condictio indebiti** does not seem to be applicable to the present set of facts."

and again,

> "The legal relationship between the commissioner and the applicant is an ordinary common law legal relationship flowing from unjust enrichment. It is not a relationship created by any statutory provisions."

The assertion that the **condictio indebiti** is inapplicable simply because the payment in question was

not made in error is, with respect, something of an oversimplification. Whatever may have been the position in Roman-Dutch law (cf. DE VOS, VERRYKINGSAANSPREEKLIKHEID IN DIE SUID-AFRIKAANSE REG, 3rd ed 172), our present law appears to have assimilated the basic notion of English law with regard to "payments made under duress of goods". Thus it was stated by Innes CJ in UNION GOVERNMENT (MINISTER OF FINANCE) v GOWAR 1915 AD 426 at 433-4:

> "It would be in the highest degree inequitable that the Treasury should be permitted to retain what it had no right to claim; and the question is whether the law will allow it to take up such a position ... . It seems to me that money wrongly exacted by the possessor of goods from the true owner as a condition precedent to their delivery, and paid by the latter not as a gift, but in order to obtain possession of his own property and with a reservation of his rights would be recoverable by a **condictio** ... . Where goods have been wrongly detained and where the owner has been driven to pay money in order to obtain possession, and where he has done so not voluntarily, as by way of gift or compromise, but with an expressed reservation of his legal rights, payments so made can be recovered back, as having been exacted under duress of goods. The onus of showing that the payment had been made involuntarily

> and that there had been no abandonment of rights would, of course, be upon the person seeking to recover."

Wessels Actg AJA, in a concurring judgment, stated at 453:

> "I think we may well take the further step and hold that a payment is involuntary and, therefore, recoverable, even though it was not made **metus causa** in the Roman law sense, but was made under pressure at the demand of one in authority who had it in his power to withhold the property or to suspend the rights of the person making the payment."

De Villiers AJA was the only member of that Court to label the action the **condictio indebiti.** In this he has been followed by several modern writers. DE VOS, **op cit.** 172 puts it thus:

> "Ons hedendaagse praktyk verleen 'n **condictio indebiti** aan iemand wat onder dwang en protes bewustelik 'n onverskuldigde betaling gemaak het."

(See, too, JOUBERT, LAW OF SOUTH AFRICA, vol 9, par 67; VAN HUYSSTEEN, ONBEHOORLIKE BEÏNVLOEDING EN MISBRUIK VAN OMSTANDIGHEDE IN DIE SUID-AFRIKAANSE VERBINTENISREG, 123 and following; VISSER, DIE ROL VAN DWALING BY DIE **CONDICTIO INDEBITI**, 229 and following.) If that classification is correct the **condictio indebiti** is not, of course, confined to the

recovery of an **indebitum solutum** which was involuntary because it was paid by mistake; it is now also available when the payment, (or indeed any performance), although deliberate, perhaps even advised, was nevertheless involuntary because it was effected under pressure and protest. (These are not, of course, the only instances where the **condictio indebiti** may be invoked - cf. DE VOS, op cit. 173 and following.)

For present purposes it is not important whether this form of action is correctly described as an extension, and hence as a sub-species, of the **condictio indebiti**, or as a category all on its own; or indeed what its precise range or requirements are. Nor is there any need to consider whether the emphasis properly falls on the wrongfulness of the duress, on the involuntary nature of the performance, or on the protest as an index to the one or the other or as an element in its own right. There is no need to do so for the present case is not, on the facts, a true case of "duress of goods" at all; the payments, though expressed to be under protest, were made voluntarily; and

there was no question (in the language of GOWAR'S case, quoted above, and assuming the doctrine to be thus limited) of goods being detained or of rights being withheld - here, at best for the Bank, there was the prospect of penalties being imposed. I say so for the following reasons.

The dispute between the parties first surfaced when certain representations about the matter were made on behalf of the Bank and others to an official of the Department of Finance - Inland Revenue. This was in May 1984, prior to the introduction (on 1 July 1984) of a new Item 6 of Schedule 1 to the Stamp Duties Act 1968, whereby every debit entry posted to an account in terms of a credit card scheme would henceforth attract a duty of five cents; the penalty for non-payment, in terms of a new section 19, would be 10% per month. The Commissioner responded as follows in June 1984:

> "It is therefore suggested that you and the other interested parties approach the Registrar of Financial Institutions under whose administration the Limitation and Disclosure of Finance Charges Act falls, for a ruling in this regard."

The Bank duly pursued this suggestion only to receive the following reply, on the 15th August 1984, from the Registrar of Financial Institutions:

> "In the circumstances the Office is of the opinion that the auto card scheme falls within the definition of 'credit card scheme' and that the stamp duty in question is therefore payable in respect of the relevant debit entries."

It was then that the Bank decided, firstly, to pay the required stamp duty "under protest", which it commenced doing on the 21st August 1984 and, secondly, two years later, to claim a refund from the Receiver of Revenue, which it did on the 11th of August 1986. It was that demand which precipitated the present proceedings.

Nowhere in the correspondence or the affidavits is there any suggestion that the Commissioner threatened to exact, in terms of section 19, or recover, in terms of section 30 of the Stamp Duties Act 1968, any penalties if payment was not made in accordance with the views expressed by the Commissioner and the

Registrar of Financial Institutions. The decision to effect payment under protest in order to avoid the risk of penalties being exacted from the Bank was one taken by the Bank purely on its own initiative. The imposition of penalties, as appears from the wording of section 19 of the Stamp Duties Act would not, however, have followed as a matter of course: the Commissioner, in terms of the proviso to that section,

> "may, having regard to the circumstances of the case, remit the whole or any part of that penalty".

This is not, therefore, a case where an unjustified demand for payment, braced by inevitable statutory penalties, constitutes duress by implication. No case is made out that the Bank approached the Commissioner for a suspension of the payment of stamp duty or a remission of penalties until such time as the dispute between them had been resolved, and that the Commissioner had refused such a request. In those circumstances it cannot be said that improper pressure was exerted on the Bank to effect the payment timeously and in terms of the statute. I accordingly

agree with counsel for the Commissioner that the payments were voluntarily made. In the words of Stratford J (as he then was) in LILIENFIELD AND COMPANY v BOURKE 1921 TPD 365 at 371-2:

"The duress was the phantom of their own minds."

(See, too, the remarks of Muller AJA in PORT ELIZABETH MUNICIPALITY v UITENHAGE MUNICIPALITY 1971 (1) SA 724 (A) at 741 D-E.)

In short, the claim for a refund cannot be accommodated under either the classical **condictio indebiti**, based on error, or on its extended form, based on duress. No other basis (except contract) was suggested either in the papers or during argument.

And because all the payments were made with the fixed intention of discharging existing (albeit disputed) debts in order to deflect the possible imposition of penalties, it cannot be said, for the purpose of an action on enrichment, that the payments, **qua** payments, were without due cause.

I do not, accordingly, agree with counsel for the

Commissioner that the proper basis for awarding a refund was section (1)(a) of the Stamp Duties Act 1968, nor with the Court a quo that, simpliciter, it was undue enrichment.

Finally, on this part of the case, I do not think that there is any substance in two subsidiary arguments advanced on behalf of the Commissioner.

The first was that the **condictio indebiti** did not lie against him since he was merely the officer responsible for carrying out the provisions of the Stamp Duties Act 1968, and no cause of action based on unjustified enrichment could lie against such an officer in respect of funds channelled into the Consolidated Revenue Fund (section 30(3)). The Commissioner was the authority to whom payment had to be made and, once the other requirements of the **condictio indebiti** had been satisfied, he was the obvious party from whom payment had to be recovered, whatever the ultimate administrative destination of the payments might be. It is not, in my opinion, legitimate to differentiate for this purpose between various functionaries and departments of State.

The second point was that the fiscus is not liable to pay **mora** interest. For this proposition counsel relied on VOET 49.14.2. To the extent that VOET suggests that the Treasury is not liable for the payment of interest he is either discussing an exception of the Roman law or, if not, the rule has become obsolete in ours (cf. GROENEWEGEN De Leg. Abr. 22.1.17.5). The frequently quoted remarks of Centlivres CJ in LINTON v CORSER 1952 (3) SA 685 (A) at 695H are not inapposite:

> "The old authorities regarded interest **a tempore morae** as 'poenaal ende odieus', vide UTRECHTSCHE CONSULTATIEN, 3, 63, p.288. Such interest is not in these modern times regarded in that light. To-day interest is the life-blood of finance, and there is no reason to distinguish between interest **ex contracu** and interest **ex mora**. MILNER'S case is, as far as I have been able to ascertain, the only case which applied the old authorities ..."

Counsel for the Bank submitted that it was immaterial whether the claim for the recovery of the payments was perceived to be one founded on the **condictio indebiti** or on contract.

The notion of recovery in terms of a contract stems from the fact that each payment was expressly declared to be made

"under protest". Such a stipulation, so it was contended, means that it was in effect agreed between the parties that each payment was tendered by the Bank on account of stamp duties payable, and accepted by the Commissioner on the basis that it would be recoverable if found not to be due, i.e. that, subject to extraneous defences such as set-off or prescription, it would in due course be refunded.

The addition of the words "under protest" when a payment is tendered can, so it seems, fulfil one or more of several functions:

(i) The phrase can serve as confirmation that, in the broad sense, the payment was not a voluntary one or, in the narrower sense, that it was due to duress. The failure so to stipulate could support an inference that the payment was voluntary or that in truth there was no duress.

(ii) It can serve to anticipate or negate an inference of acquiescence, lest it be thought that, by paying without protest, the solvens conceded the validity or the legality of the debt, or

his liability to pay it, or the correctness of the amount claimed. The object is to reserve the right to seek to reverse the payment. The effect is not to create a new cause of action but to preserve and protect an existing one - namely, that the payment was an **indebitum solutum** which is recoverable in law e.g. by means of the **condictio indebiti** or in terms of section 32(1)(a) of the Stamp Duties Act, 1968.

(iii) It could serve as the basis for an agreement between the parties on what should happen if the contested issue is tested and resolved in favour of the solvens. Such an agreement would indeed create a new and independent cause of action.

In the instant case (i) is not applicable because the payment was a voluntary one, not due to duress; and (ii) is not applicable because, in the absence of mistake, duress or any other recognized ground for invoking the **condictio indebiti**, there was no independent cause of action to preserve or protect. Hence the real question is whether (iii) applies.

Counsel for the Bank contended that it did. There is

support for this approach.

In PORT ELIZABETH MUNICIPALITY v UITENHAGE MUNICIPALITY, supra, at 741E Muller AJA stated as follows:

> "But, as I am of the opinion that the moneys paid in the instant case are indeed recoverable on the alternative basis - namely, as moneys paid on condition that the same should be recoverable if found not to be due - it is unnecessary to decide whether the payments in question can be regarded as having been made under duress. In UNION GOVERNMENT v GOWAR, supra at p 446, De Villiers, AJA., after referring to Roman and Roman-Dutch authorties, stated:
>
> > 'But if he pays under protest he is entitled to recover, for the protest is inconsistent either with the idea of a gift or of a compromise between the parties. The other party was not bound to accept money so paid, but if he accepts it he must be considered to have agreed that it should be recoverable if not due; in the language of the DIGEST, the **negotium** between the parties is a **contractus** (Donellus, lib. 14. c. 14, 3).'
>
> The above passage was referred to by Wessels JP. in LILIENFELD & CO v BOURKE, 1921 T.P.D. 365 at p 370, where the learned Judge explained as follows as to what De Villiers, AJA., meant by payment 'under protest':
>
> > 'I do not think the learned Judge

> meant to lay down the general rule that a protest always makes a payment made under it an involuntary payment. The learned Judge shows clearly when dealing with the passages quoted from the DIGEST that what was meant was that if a person says 'I will pay you now subject to the condition that if it is afterwards found that this payment was not due, then we will consider it as if no payment had been made.' If the word protest is used as an abbreviation of that form of expression, if it is used to mean a payment under the condition that if it is afterwards found that the payment was not due, it must be handed back, I have no quarrel with what was said by the learned Judge. But if he meant that any payment made which is accompanied by words protesting against the payment is sufficient to enable the **solvens** to get the money back again, I do not agree with such a view. I do not think that if a person pays money simply saying that he pays it under protest, that that is equivalent to payment under pressure.'

The above seems to me, and I say so with due respect, to be a correct statement of the law.

In the present case the Municipality of Uitenhage paid the charges levied pursuant to

> the 5 per cent tariff increase, but, not only did it deny liability and protest against paying it, it also, by express stipulation, reserved the right to recover the moneys paid if such were found not to be due. I can hardly see what else the Municipality of Uitenhage could have done to protect its interests. The Municipality of Port Elizabeth, in accepting payment, noted the reservations
>
> > 'under which you are paying the electricty accounts submitted',
>
> and, while it indicated that accounts would continue to be rendered in accordance with the increased tariff, raised no objection to the reservations made by the Municipality of Uitenhage. It must, therefore, I think, be regarded as having by implication agreed to accept the moneys subject to the reservations made. That being so, there can, in my view, be no question but that the moneys paid in excess of what was legally due can be recovered. A declaration as prayed for by the Municipality of Uitenhage with respect to such moneys should, therefore, have been made by the Court **a quo.**"

To create a true alternative cause of action, as was stated by Wessels JP in the LILIENFELD case referred to in the **dictum** quoted above, the understanding between the parties would have to be that the creditor undertakes to repay the money if it is eventually

determined not to have been due. In such a case the creditor's promise to repay would be conditional on the finding that the debtor's prior payment to him was wrongly made. Where it is stated in GLUCKMAN v JAGGER 1929 CPD 44 at 47, in a passage frequently referred to:

> "As a general rule this action [the **condictio indebiti**] is available whenever a man pays money which is not due if he pays it by mistake or under duress or when it is made a condition of the payment that if it is found not to be due it is to be returned ...",

the portion underlined is open to two fundamental objections: firstly, the cause of action is no longer the **condictio**, it is an agreement; and secondly, the condition ("if it is found not to be due") does not attach to the debtor's payment but to the creditor's promise to make restitution.

Whether such an agreement was concluded will, of course, be a question of interpretation of the exchanges between the parties. By merely adding the

words "under protest" to a payment a debtor cannot unilaterally foist an agreement to repay on his creditor. From the creditor's point of view, what he is accepting may simply be payment of a valid debt - and not an offer to make restitution; and the words "under protest" merely serve to record the debtor's attitude as described in (ii) above. Otherwise, if the creditor was put to an election, as is suggested in UNION GOVERNMENT v GOWAR, supra, in the **dictum** quoted earlier ("The other party was not bound to accept the money so paid, but if he accepts it he must be considered to have agreed that it should be recoverable if not due."), every payment under protest implies a contingent promise to repay - and that, as Wessels JP was at pains to point out in the LILIENFELD case (in the passage quoted and approved by this Court in the PORT ELIZABETH MUNICIPALITY case, supra, at 742 A), is simply not the law. In this respect a payment under protest differs markedly from a tender of payment in full

and final settlement. Such a tender, made **animo contrahendi**, the creditor may reject with impunity (HARRIS v PIETERS 1920 AD 644; VAN BREUKELEN EN 'n ANDER v VAN BREUKELEN 1966 (2) SA 285 (A)); a payment, made **animo solvendi**, whether under cover of the words "in full and final settlement" or "under protest", he may not, lest he finds himself in **mora creditoris**. And the reason is that the words "under protest", unlike the words "in full and final settlement" when attached to a tender, refer not to the balance of the debt or the payment as such but, as stated earlier, to its subsequent recovery. Here the payments in question were undoubtedly made **animo solvendi**, with the express purpose of protecting the Bank against penalties. That purpose would have been defeated, leading to an impasse, if the Commissioner were at liberty to reject each payment because it was accompanied by the words "under protest".

In the PORT ELIZABETH MUNICIPALITY case, **supra**,

it was the manner in which the payee responded to the payment, tendered under protest and with express reservation of the right to recover, which reinforced the inference that the payee had agreed in advance to refund the payments made to it, should it afterwards be established that such payments had never been due. In the instant case the Bank did not expressly reserve its right to recover the sums paid, nor did it expressly invite the Commissioner to agree to a suggestion that the sums be repaid if the dispute should be resolved in its favour. But there are other features supporting the contention of counsel for the Bank that it was in effect agreed between the parties, because the payments were made under protest, that the Commissioner would be obliged to repay the sums so paid should it be determined that the duties had never been due: thus the payments were made during the course of a continuing and genuine debate between them about the correct interpretation of

the statute governing such payments; the Commissioner, who insisted on payment in accordance with his own view, consequently knew that the phrase "under protest" accompanying each payment was not just an empty gesture; the Commissioner was the public official entrusted with the administration of that very statute (section 2(1)); since he derived his authority from the statute itself, it follows that if his reading of it should prove to be wrong he would not be empowered to retain, and hence would be obliged to refund, what was wrongly paid to him.

Where, as in this case, a public official demands payment in terms of a statutory provision, and payment is thereupon effected "under protest" because the liability (or the sum) is disputed, it is more likely than not (cf. JOEL MELAMED AND HURWITZ v CLEVELAND ESTATES (PTY) LTD 1984 (3) SA 155 (A) at 164G-165G) that it was tacitly understood between the parties that the sum so paid would be refunded if the official view should

subsequently prove to be the wrong one; such would certainly have been the taxpayer's intention and since the official, bound as he is by the statute, would have had no statutory justification to retain what he should never have claimed, he can scarcely have held a contrary view. In those circumstances one would be on safe ground, I think, in inferring a tacit agreement between the parties along the lines suggested by counsel for the Bank. But it is not necessary to come to a firm conclusion on the issue. One can readily assume, in favour of the Bank, that the parties had reached such an agreement.

It was on that very postulate (that the Commissioner assumed the contractual duty to effect repayment if the decision should go against him) that counsel for the Bank sought to develop the further submission that the Commissioner was in **mora**, and hence liable to pay **mora** interest, from the moment each

payment was accepted by him. (The amount involved, computed on that premise, was R223 671,29.)

I have to disagree. To be in mora there must be a debt and the debt must be enforceable. (STEYN : MORA DEBITORIS VOLGENS DIE HEDENDAAGSE ROMEINS-HOLLANDSE REG, p 40; DE WET AND YEATS : KONTRAKTEREG EN HANDELSREG, 4th ed, 147; JOUBERT : LAW OF SOUTH AFRICA, vol 5, par 203.) The Commissioner could not be in mora as regards repayment until such time as it was decided that a duty to repay existed. That was the very point of their understanding: that the money would only be refundable once it has been established (by a tribunal or by compromise) that the Commissioner misconstrued the statute and was obliged to repay the money. Any claim by the Bank for repayment to be made prior to the determination of the dispute could be met by the Commissioner with the defence that such a claim would be premature and might yet prove to be idle.

That, in my view, is the short and simple answer to the Bank's contention: the Commissioner was not in mora and so cannot be liable for interest a **tempore morae.**

It does not really assist the Bank to contend, as its counsel did, that the order of the Court below did not create the Commissioner's obligation to return the money to the Bank but that it merely declared and gave effect to that obligation. That may well be so, once the order was granted. But that does not mean, as counsel suggested, that his obligation to repay did not remain in abeyance pending the judgment, and consequently that it was forthwith enforceable, even before judgment. It was not, and the Bank itself never understood it to be, immediately repayable. In the various letters accompanying the payments the Bank on each occasion stated:

"As we have not yet finalized this matter with

> the authorities, in order to avoid any penalty ... we hereby make payment under protest ..."

Judging from these letters the Bank's attitude was that a ruling would still have to be obtained before the issue was resolved. There is no mention in them of any recovery of payments, let alone any immediate repayments; quite plainly these letters never purported to serve as letters of demand. It would indeed have been contrary to the Bank's own understanding of the position at the time, as evidenced by these letters, to have expected the Commissioner first to accept payment (to enable the Bank to avoid paying penalties) and then to restore payment (to enable the Commissioner to avoid paying mora interest), all at the same time. And if that was not the Bank's understanding it most certainly would never have been the Commissioner's.

The situation might have been different if there had been a separate cause of action, independent of

the tacit agreement, entitling the Bank to demand repayment; for in that event **mora** interest may well have been payable from the date stipulated in a proper demand. That would have been so, for instance, if the payments in question had been made under duress and protest. But that, for the reasons stated earlier, is not the case.

The Bank, confident of the validity of its views, should either have refused to pay such duties or, if it was anxious to avoid paying penalties yet keen to recover lost interest on the sums paid to the Commissioner, it should have stipulated for such interest in its letters accompanying payment, in the hope, firstly, that the Commissioner would agree to the suggestion, and, secondly, that its views on the merits of the main point would ultimately prevail. That such a suggestion, if acceded to, would have had distinct advantages for both sides, as counsel stressed in argument, does not, however, mean that it was

incorporated into their agreement as a matter of course. In my view there is no call for assuming that it was, and in fairness to him counsel for the Bank never contended that interest was thus claimable **ex contractu**, as distinct from a **tempore morae**.

Counsel for the Bank did not address any argument in support of the approach adopted by the Court **a quo** on this part of its order. According to the Court **a quo** the Bank was entitled to interest at the legal rate in respect of each payment from the moment such payment was received by the Commissioner.

> "By accepting such a payment it deprived the applicant of the benefit and the fruits of the money from the date of payment. On the principles discussed in AMALGAMATED SOCIETY OF WOODWORKERS OF SOUTH AFRICA AND ANOTHER v DIE 1963 AMBAGSAALVERENIGING 1968 (1) SA 283 (T) the applicant is entitled to interest and it should run from the date of payment."

With respect, I am unable to agree with this line of reasoning if it is suggested thereby that, because the

payee was enriched at the expense of the taxpayer, interest is due on and should run from the date of receipt of the money. I am not aware of any principle of law which entitles one party to demand interest at the legal rate from another simply because the former has been deprived of the benefits and fruits of the money which he had paid to the latter. BALIOL INVESTMENT CO (PTY) LTD v JACOBS 1946 TPD 269 suggests the opposite: that interest is not **ipso facto** recoverable; it would be payable only if the parties had so agreed or if the payee was in **mora**. In any event there was neither allegation nor proof that the Commissioner, by utilising the money paid, was enriched at the expense of the Bank. And, finally, the judgment in AMALGAMATED SOCIETY OF WOODWORKERS OF SOUTH AFRICA AND ANOTHER v DIE 1963 AMBAGSAALVERENIGING 1968 (1) SA 283 (T) does not, with respect, support the proposition on which the Court a quo appears to rely, namely, that interest runs from the date

of receipt of the money. Leaving aside other perhaps contentious aspects of that judgment (cf. DE VOS, 1968 THR-HR 111), one principle it does reaffirm is that mora interest in respect of a liquidated money debt would run from the date when payment was duly demanded (cf. 285 D-G, 287B). But that, of course, presupposes a debt which, at the time, was enforceable - which is the very feature lacking in this case.

In the result I am of the view that no interest was recoverable by the Bank from the Commissioner prior to the decision of the Court **a quo** that no stamp duties were payable. Only then would interest become payable. Such interest on the capital sum awarded, so we have been informed from the bar, has indeed been paid.

The appeal succeeds with costs, which are to include the costs of two counsel. The order of the Court **a quo** is altered by deleting paragraph 2 thereof.

P M NIENABER AJA

CORBETT CJ
BOTHA JA
KUMLEBEN JA

Case No.381/88

E du P

IN THE SUPREME COURT OF SOUTH-AFRICA

(APPELLATE DIVISION)

In the matter between:

THE COMMISSIONER FOR INLAND REVENUE Appellant

and

FIRST NATIONAL INDUSTRIAL BANK LIMITED Respondent

Coram: CORBETT CJ, BOTHA, KUMLEBEN JJA, NICHOLAS et

NIENABER AJJA

Heard:	Delivered:
15 March 1990.	18 May 1990

J U D G M E N T

NICHOLAS AJA:

I have had the privilege of reading the judgment of **NIENABER AJA** in draft. With certain of his views I am in respectful agreement, viz -

(i) that s. 32(1)(a) of the Stamp Duties Act 77 of 1968 does not apply in this case;

(ii) that the **condictio indebiti** can lie against the Commissioner for Inland Revenue ; and

(iii) that the fiscus is not immune to a claim for **mora** interest.

On other points, however, I respectfully disagree with my learned colleague. These are:-

(a) His view that the cause of action of First National and Industrial Bank Ltd ("the Bank") is not the **condictio indebiti** ;

(b) The assumption which he made that the Bank's claim was based on a new and independent cause of action; and that consequently

(c) **Mora** interest could not run prior to the date of the judgment of the court **a quo.**

As a result I do not agree that the appeal should be upheld.

In what follows I deal in turn with each of the points of disagreement.

(a) Condictio indebiti:-

The condictio indebiti has its roots in Roman Law. The fons et origo is D. 12.6 de condictione indebiti. In terms of leges 1 and 2:

> "1. ULPIANUS. nunc videndum de indebito soluto. Et quidem si quis indebitum ignorans solvit, per hanc actionem condicere potest: sed si sciens se non debere solvit, cessat repetitio.
>
> 2. IDEM. siquis sic solverit, ut, si apparuisset esse indebitum vel Falcidia emerserit, reddatur, repetitio locum habebit: negotium enim contractum est inter eos:..."

Monro, The Digest of Justinian Vol II, p 306, gives this translation:

> "1 PAPINIANUS (sic) .... We will now consider the case of the payment of money that was not due. 1. To begin with, where a man pays what he does not owe, in ignorance of the fact, he can sue to recover it by this action; but if he paid knowing that he did not owe it, there is no right of action for the return of it.
> 2. THE SAME ... If a man pays on the understanding that if it should prove not to be

> due, or it should turn out to be a case where the lex Falcidia applies, the money should be returned, an action for the return will be in place, as there is a contract concluded between the parties..."

An aspect of the **condictio indebiti** which is relevant to this case was considered by **DE VILLIERS AJA** in **Union Government (Minister of Finance v Gowar** 1915 AD 426. (The other members of the court did not refer to his views, but based their decisions on various other grounds.) At 445-446 **DE VILLIERS AJA** made a detailed examination of the old authorities, in the course of which he cited the Digest, Donellus, Voet, Gothofredus, Glück and Pothier. The reference to Glück is of particular interest. He says (**Ausführliche Erläuterung der Pandecten**, Vol. 13 sec 834) that the **condictio indebiti** falls away if the payment of the **indebitum** occurs **scienter** and voluntarily, because anyone who gives what is not owing **scienter** and voluntarily, renounces entirely his rights and property therein. (In a

footnote to this passage he gives a number of citations to the Corpus Juris, saying that in all these laws it is stated: Indebitum solutum sciens non recte repetit.) Later in sec 834 Glück says (pp. 124-125) that the general rule is subject to exceptions, including:

> "2. if the payment of the indebitum occurs under such circumstances as to exclude the presumption that the payer desires to make a gift, including
> .....
> (b) if someone when making a payment protested that he desires to retain his right if he pays something indebite."

(My translation). Here he refers to Voet 12.6.6 who, citing D 12.6.2, says (Gane's Translation, vol II, p. 838) -

> "Hence also it was sometimes provided by express covenant that if the payment should be shown not to have been due it should be returned."

After his survey of the old authorities, **DE VILLIERS AJA** concluded (p 445 in fin to p 446):

> "The result of the old authorities therefore is ... if a person pays a debt not due knowingly and voluntarily he is not able to recover. But if he pays under protest he is entitled to recover, for the protest is inconsistent with the idea of a gift or a compromise between the parties. The other

> party was not bound to accept money so paid, but if he accepts it he must be considered to have agreed that it should be recoverable if not due; in the language of the Digest, the **negotium** between the parties is a **contractus.** .."

Sir HENRY JUTA (who was a member of the court which decided **Gowar**'s case) was sitting as Judge President of the Cape Provincial Division when he referred in **Wilken v Holloway** 1915 CPD 418 at 421-422 to the proposition formulated by **DE VILLIERS JA**, namely, that the **condictio indebiti** lies where a person has protested, on payment, that he retains the right to recover, if he has paid anything that was not due. He quoted D.12.6.2 and said, "This seems to be based on the principle that by accepting the money so paid an agreement is contracted, i.e., that the person accepting the money does so on the understanding that it will be repaid if not due." He said that "for the decision of this case only," he was prepared to accept the law as laid down by **DE VILLIERS AJA**, and continued:-

> "The basis, as I have said, seems to me to be

> that a tacit agreement arises between the person paying under protest and the person receiving the money, that it can be recovered if not due: for if the creditor does not wish to agree to this, he has only to refuse the money. But what is the position of the creditor who had begun legal proceedings if he refuses to accept the money offered under protest and proceeds with his action?"

In such a case, he decided, the principle did not apply.

In **Lilienfeld & Co v Bourke** 1921 TPD 365, Sir JOHN WESSELS (who was also a member of the court which decided Gowar's case (supra)) was sitting as Judge-President of the Transvaal Provincial Division. He dealt with an argument by counsel which relied on dicta by **DE VILLIERS AJA IN** Gowar's case. He said that he did not think that **DE VILLIERS AJA** meant to lay down the general rule that a protest always makes a payment under protest an involuntary payment. He said:

> "The learned Judge shows clearly when dealing with the passage quoted from the Digest that what was meant was that if a person says 'I will pay you now subject to the condition that if it is afterwards found that this payment was not due, then we will

> consider it as if no payment had been made.' If the word protest is used as an abbreviation of that form of expression, if it is used to mean a payment under the condition that if it is afterwards found that the payment was not due, it must be handed back, I have no quarrel with what was said by the learned Judge. But if he meant that any payment made which is accompanied by words protesting against the payment is sufficient to enable the solvens to get the money back again, I do not agree with such a view. I do not think that if a person pays money simply saying that he pays it under protest, that that is equivalent to payment under pressure."

In delivering the judgment of this court in **Port Elizabeth Municipality v Uitenhage Municipality** 1971(1) SA 724(A) **MULLER JA** said at 742 A that this seemed to him to be a correct statement of the law.

The phrase "under protest" is not a term of art. LORD LANGDALE MR discussed it in **Re Massey** (1845) 8 Bea 462; 50 ER 181:

> "These words have no distinct meaning by themselves, and amount to nothing unless explained by the proceedings and circumstances."

To the circumstances of the present case I now

turn. In May 1984 the Bank's representatives had discussions with the Department of Inland Revenue in the course of which they raised the question of the Bank's liability to pay stamp duty on debit entries relating to transactions under its "Barnib Auto Cardholder Agreement". On 30 May 1984 it submitted a letter containing representations in this regard. With reference to the letter, the Commissioner for Inland Revenue wrote to the Chief Manager of Barclays Auto Division (Barclays being the former name of First National Bank): —

> Dear Mr Joubert
>
> STAMP DUTY ON DEBIT ENTRIES
>
> I write with reference to your letter dated 30 May 1984 and have to advise you that unless this office can be satisfied that the operations of the corporate vehicle fleet management systems fall outside of the scope of the Limitations and Disclosure of Finance Charges Act, the debit entries made in respect of the transactions concluded within such systems will be liable for the abovementioned duty.
>
> It is therefore suggested that you and the other interested parties approach the Registrar of Financial Institutions under whose administration

the Limitations and Disclosure of Finance Charges Act falls, for a ruling in this regard.

Yours faithfully

FOR COMMISSIONER FOR INLAND REVENUE

Acting on this suggestion, the Bank did approach the Registrar of Financial Institutions on 27 July 1984. The Registrar wrote on 15 August 1984 expressing the opinion that stamp duty was payable.

In the light of this opinion, and because of the Commissioner's attitude, and apprehending that it would become liable to severe penalties if its view as to liability turned out to be wrong, the Bank paid to Inland Revenue from time to time stamp duties on all debit entries made in respect of Autocard transactions during the period 21 November 1984 to 20 May 1986. Each payment was made under cover of a form letter (Annexure "I") which was in the following terms:

The Receiver of Revenue
Department of Finance
1 Rissik Street
JOHANNESBURG
BY HAND

Dear Sir

STAMP DUTY: DEBIT ENTRIES IN RESPECT OF AUTO CARD SCHEME

We refer to our previous correspondence regarding this matter.

As we have not yet finalized this matter with the authorities, in order to avoid any penalty in terms of the new section 19 of the Stamp Duties Act, 1968, (as inserted by section 8 of the Revenue Laws Amendment Act, 1984), we hereby make payment, under protest, of stamp duty in respect of the _____ debit entries to our Auto Card holders.

Yours faithfully
GS MENASHE
Chief Manager

In Annexure "I" the Bank stated that it was making payment "as we have not yet finalized the matter with authorities" (and hence not because it admitted payment to be owing), and it did so in order to avoid the punitive

penalties which would be payable if it did not pay and its view as to liability for stamp duty turned out to be wrong. It was tendering payment under protest, by which clearly it meant with reservation of its right to institute an action for repayment (**condicere**; **repetere**). The Commissioner by accepting payment subject to that reservation, must be taken to have agreed thereto. In the words of D.12.6.2. **negotium enim contractum est inter eos**. But for such a contract, the Bank could, if it sued for repayment, have been met with an exception of no cause of action because **si sciens se non debere, cessat repetitio**, whereas, a contract having been concluded, **repetitio locum habebit**.

In my opinion therefore the Bank's true cause of action is the **condictio indebiti** and it falls squarely within the principle of D.12.6.2.

(b) INDEPENDENT CONTRACT?

An alternative argument advanced on behalf of the Bank was that there had been established a tacit independent

contract - independent in the sense that the Bank could sue on it without having to rely on the condictio indebiti.

In his judgment **NIENABER AJA** considers that one would be on safe ground in inferring a tacit agreement between the parties. Although he does not consider it necessary to come to a firm conclusion on the question, he is prepared to readily assume, in favour of the Bank, that the parties did reach such an agreement.

It is suggested that the agreement between the parties was that the Commissioner undertook to repay the money if it was eventually determined not to have been due; in other words, that the Commissioner made a promise to repay conditionally on a finding that the Bank's payments were wrongly made.

There are dicta in some of the cases which superficially seem to offer support for a finding that that is the agreement in the case of the receipt of a payment under protest. (See Gluckman v Jagger 1929 CPD 44 at 47, and

the passage in **Lilienfeld**'s case which is quoted **supra**.) In my respectful opinion however there is no room on the facts of this case for an implication that the Commissioner, by accepting payment, undertook to do anything, or made any promise to repay. The contract which was made was not independent, but was ancillary or subsidiary to the **condictio indebiti**: it did not create a substantive right but recognized that the Bank had the procedural right to seek a **condictio** (or **repetitio**) despite the fact that the **solutio** was being made voluntarily and with knowledge that it was made **indebite.**

(c) INTEREST.

On the assumption that the Bank's claim was based on an independent contract, **NIENABER AJA** holds that because the condition in that contract was not fulfilled until judgment was given in the court **a quo**, the Commissioner was not liable to pay interest prior to the date of the judgment.

Since in my opinion the Bank's true claim was the

condictio indebiti, the question of **mora** interest is here considered on that basis.

The general rule of the Roman-Dutch law is that interest is not payable unless there is an agreement to pay it or there is default or **mora** on the part of the defendant. (**Baliol Investment Co (Pty) Ltd v Jacobs** 1946 TPD 269 at 272.) The weight of authority in Roman-Dutch law is in favour of the view that interest is not recoverable under the **condictio indebiti** as such (**ibid** at 274). The question is, therefore, whether the Commissioner was placed **in mora**, and if so from what date.

It is settled and uniform practice that a defendant is regarded as being **in mora** upon failure to discharge his obligation after receipt of the letter of demand (**West Rand Estates Limited v New Zealand Insurance Company Limited** 1926 AD 173).

Counsel for the Bank submitted that the Commissioner was **in mora**, either from the dates of the

respective payments, or from 11 August 1986, or from 26 March 1987 (being the date of service of the notice of motion).

In support of the first submission it was argued that there was implicit in each payment under protest a simultaneous demand for repayment. I do not agree. The purpose of the payments was to avoid penalties and that required that the amounts concerned should remain with the Commissioner pending agreement or the outcome of proceedings instituted to compel repayment. The implication was not that the Bank was demanding immediate repayment but that it was reserving its rights to claim repayment at a later stage.

The argument that 11 August 1986 was the relevant date was based on Annexure "K" to the Bank's founding affidavit. This is headed "Claim for Refund out of Revenue" and is on form Rev. 16 which was completed by the Bank. It was accompanied by a letter setting out the history of the matter and was delivered to the Revenue Department by hand

on 11 August 1986. The claim was for a refund of R488 353,80, and purported to be a claim under s. 32(1)(a) of the Stamp Duties Act, 77 of 1968. This provides that the Commissioner may make, or authorize to be made a refund in respect of the amount of any overpayment of the duty properly chargeable in respect of an instrument if application for the refund is made within 2 years after the date of such overpayment. The language of the provision suggests that the Commissioner has a discretion, but it is clear in my opinion that what it does is to confer upon him a power coupled with a duty to exercise the power when the conditions prescribed have been satisfied. (Cf **SAR & H v Transvaal Consolidated Land and Exploration Co Ltd** 1961(2) SA 467(A) at 502 C-F.) Annexure "K" was a claim for a definite sum of money and was a "demand" or **interpellatio** as those terms are understood in the law. It matters not that the reference to s. 32(1)(a) was misconceived. There was attached "a typical letter of protest which accompanied each payment" - this was presumably

the same as Annexure "I" - and it was submitted that the Bank was not obliged to pay the stamp duties from 21 August 1984 to 20 May 1986. Consequently the claim contained all the information which could possibly be required to be contained in a letter of demand.

In my opinion, therefore, the Commissioner was placed in mora on 11 August 1986.

CONCLUSION.

Paragraph 2 of the order which is appealed against reads:

> "2. interest on the amounts from the dates and at the rates set out in Annexure "X" to the draft order handed in."

Annexure "X" is headed "Schedule of Prescribed Interest Rates" and sets out in three columns the dates of each payment of duty, the respective amounts of duty paid, and the rate of interest applicable thereto. The first date is 21 August 1984 and the last is 20 May 1986. In view of the conclusion under paragraph (c) above, it is clear that the order was incorrect - interest can run only from 11 August

1986

The quantum of interest was not an issue in this appeal. That is made clear in the appellant's heads of argument:

> "If it is held that the Commissioner is obliged to pay interest to the Respondent, then the Commissioner concedes that interest should be awarded as set out in Annexure "X" to the judgment."

Nor was the quantum of interest in issue in the court a quo, where it was common cause that if interest was payable by the Commissioner, it was payable in the terms recorded in paragraph 2 of the order. In this court, the question only arose only as a result of questions from the Bench.

Mr Welsh, leading counsel for the Bank, readily agreed that if paragraph 2 of the order was incorrect, it should not be allowed to stand but should be appropriately ammended. In the circumstances, an amendment should not affect the costs of appeal.

Subject to an appropriate amendment of paragraph 2 of the order, I would dismiss the appeal with costs, including the costs of two counsel.

H C NICHOLAS AJA