# *THE SUPREME COURT OF APPEAL OF SOUTH AFRICA*

Case number: 522/2007

In the matter between:

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| **AFRISURE CC** | **FIRST APPELLANT** |
| **ETTIENNE DE VILLIERS** | **SECOND APPELLANT** |
| **and** | |
| **BRIAN JAMES WATSON NO** | **FIRST RESPONDENT** |
| **PUBLISERVE HEALTHCARE SCHEME (IN LIQUIDATION)** | **SECOND RESPONDENT** |

Neutral citation: *Afrisure v Watson* (522/07) [2008] ZASCA 89 (11 September 2008)

**CORAM:** **MPATI P, BRAND, LEWIS, COMBRINCK JJA *et* BORUCHOWITZ AJA**

**HEARD:** **18 AUGUST 2008**

**DELIVERED:** **11 SEPTEMBER 2008**

**CORRECTED:**

**SUMMARY** : Claim against first appellant based on unjustified enrichment – *condictio ob turpem vel iniustam causam* – whether payments reclaimed were illegally made because they were *in fraudem legis* – relaxation of *par delictum* rule – whether counter-performance by defendant a defence where payments reclaimed were illegally made – claim against second appellant for damages suffered through same illegal payments based on breach of fiduciary duty as trustee.

## *ORDER*

**On appeal from** : High Court, Cape Town
(Fourie J sitting as court of first instance.)

1 The appeals by both appellants are dismissed.
2 The appellants are ordered, jointly and severally, to pay the respondents' costs, including the costs occasioned by the employment of two counsel.

## *JUDGMENT*

BRAND JA (Mpati P, Lewis JA, Combrinck JA and Boruchowitz AJA concurring)

[1] Until 30 May 2001, the second respondent, Publiserve Healthcare Scheme (in liquidation) ('Publiserve'), conducted business as a medical scheme under the Medical Schemes Act 131 of 1998. On that date it was provisionally wound up on application of its own board of trustees. After confirmation of the provisional order at a later date, the first respondent, Mr Brian Watson ('Watson'), was appointed as the liquidator of Publiserve. The first appellant, Afrisure CC ('Afrisure'), is a close corporation. At all times relevant hereto, it conducted business as an insurance broker. Since a large part of its business consisted of introducing prospective members to medical schemes, it was an ‘accredited broker’ under the Medical Schemes Act. Although obviously a separate legal person, Afrisure was in effect no more than the alter ego of its only member, Mr Ettienne de Villiers ('De Villiers'), who is the second appellant in these proceedings. As from 25 August 2000 De Villiers was also a member of Publiserve's board of trustees, a position from which he resigned on 28 May 2001, ie two days prior to the winding-up of the scheme.

[2] Over the period 26 October 2000 until 31 January 2001, Publiserve made five individual payments to Afrisure in a total sum of R5 454 636.50. After his appointment as liquidator, Watson instituted action against Afrisure and De Villiers, jointly and severally, for repayment of that amount. I shall soon return to the exact nature of, and the basis for these, claims. Broadly stated, however, the claim against Afrisure rested on two grounds, pleaded in the alternative. The main claim was based on unjustified enrichment, founded on the allegations, firstly, that the payments constituted contraventions of the Medical Schemes Act read with the regulations promulgated under that Act and, secondly, because these payments were, in any event, made by mistake. The alternative claim against Afrisure was for the lesser amount of R3 759 114.50, representing the aggregate of those of the five payments that were made during the six months immediately preceding Publiserve's winding-up, on the basis that they constituted voidable preferences under s 29 of the Insolvency Act 24 of 1936. The claim against De Villiers was again formulated on alternative grounds. The main claim rested on the contention that De Villiers had breached his fiduciary duty as trustee of Publiserve by causing or allowing the five payments to be made to Afrisure. The alternative claim against him was formulated with reference to the provisions of s 424 of the Companies Act 61 of 1973, on the premise that De Villiers was knowingly party to the carrying on of the business of Publiserve in a reckless manner, as contemplated by that section.

[3] In the event, the court a quo upheld the appellants' main

claims against both Afrisure and De Villiers. In consequence it granted judgment against them, jointly and severally, for payment of the amount of R5 454 636.50, together with interest and costs. That judgment has since been reported as *Watson NO and another v Shaw NO and others* 2008 (1) SA 350 (C). The reason why Mr Shaw was the first defendant in the court quo and how it happened that he fell out of the picture, is explained in the judgment of the court a quo (para 2). In like manner the judgment explains how it came about that, although evidence in the matter was heard by Knoll J, it was eventually decided by Fourie J, pursuant to an agreement between the parties, because of the untimely death of Knoll J before she was able to hand down her judgment in the matter (paras 2 and 3). The present appeal against the judgment of Fourie J is with his leave.

ENRICHMENT CLAIM AGAINST AFRISURE

[4] I shall first deal with the main claim against Afrisure, based on unjustified enrichment. In this court, as in the court a quo, argument for the respondents started with the proposition that 'there is a clear movement heralded by the Supreme Court of Appeal, away from the maintenance of a distinction between the various *condictiones* underlying the actions of unjustified enrichment in our law'. Relying on *obiter dicta* by Schutz JA in *McCarthy Retail Ltd v Short Distance Carriers CC* 2001 (3) SA 482 (SCA) paras 8-10 and *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) para 23, the court a quo not only acknowledged, but also expressed its support for this movement (paras 7-10). In my view it would, however, be unwise to enter into that debate. This is clearly not the case to decide whether we should grasp the nettle of a general enrichment action. The respondents did not rely on a general enrichment action or, for that matter, even on an extension of any recognised *condictio* (cf eg *Bowman, De Wet & Du Plessis NNO v Fidelity Bank Ltd* 1997 (2) SA 35 (A) at 40A-B). They sought to bring their claim within the framework of either the *condictio ob turpem vel iniustam causam*

or the *condictio indebiti.* Whether they have succeeded in doing so is the question we have to decide.

THE *CONDICTIO OB TURPEM VEL INIUSTAM CAUSAM*

[5] The central requirement of the *condictio ob turpem vel iniustam causam,* is that the amount claimed must have been transferred pursuant to an agreement that is void and unenforceable because it is illegal, ie because it is prohibited by law (see eg *FNB v Perry NO (supra)* para 22; Daniël Visser *Unjustified Enrichment* (2008) p 425). The main reason advanced by the respondents as to why the payments they reclaim were illegally made, was that, on a proper analysis of the facts, all these payments constituted 'broker's commission' and therefore contravened s 65 of the Medical Schemes Act read with reg 28 of the Regulations promulgated under the Act. Alternatively they contended that, in as much as part of the amounts reclaimed may not have represented broker's commission, they were 'administration fees' paid in contravention of s 58 of the same Act

LEGISLATIVE MATRIX

[6] The pertinent provisions of s 65 of the Act, as it stood at the relevant time, ie prior to amendments since 2001, read as follows:

'**Brokers services and commission**

(1) A medical scheme may compensate any person in cash or otherwise, in accordance with its rules, for the introduction or admission of a member to that medical scheme.

(2) The Minister [of Health] may prescribe the amount of the compensation which, the category of persons to whom, the conditions upon which, and any other circumstances under which, a medical scheme may compensate any person in terms of subsection 1.'

The provisions of Reg 28 relied upon, read as follows:

'(1) A medical scheme must not compensate any person in terms of s 65 for acting as a broker unless such person –

(a) has been accredited by the Council [for Medical Schemes] to act as a broker or apprentice broker;

. . .

(d) enters into a prior written agreement with the medical scheme concerned, and the nature and compensation payable to such person must be fully disclosed

in the financial statements of the medical scheme concerned;

. . .

(m) complies with the code of ethics for appropriate behaviour provided for in the accreditation requirements;

(2) A maximum amount payable in a given year in respect of the performance of services relating to the introduction of a member to a medical scheme by any number of brokers shall not exceed 3% plus value added tax (VAT) of the contributions payable in respect of members introduced by such broker during that year.'

[7] Section 58, which deals with the administration of the medical scheme, inter alia provides (in terms of subsec 1) that 'no person shall administer a medical scheme as an intermediary unless the Council has, in a particular case or in general, granted accreditation to such a person.'

[8] To complete the legislative matrix, there is s 66 of the Medical Schemes Act which deals with ‘offences and penalties’. Under this rubric s 66(1)(a) then declares that 'any person who contravenes any provision of this Act [which, by definition, includes the Regulations] or fails to comply therewith . . . shall . . . be guilty of an offence'. Specifically with reference to broker's commission, s 66(1)(f) (which has since been deleted from the Act by s 27(a) of Act 55 of 2001) declared that 'any person who . . . compensates or causes to be compensated, any person for the introduction or admission of a member other than in terms of section 65 or the consenting to keep a member in a medical scheme shall . . . be guilty of an offence. Section 66(1) further provides that, upon conviction of an offence under the section the offender will be liable ‘to a fine or to imprisonment for a period not exceeding five years or both a fine and imprisonment.'

[9] Against this legislative background, the central theme

advanced by the respondents as to why the payment of the amounts they reclaim was illegal and, in fact, constituted a criminal offence under s 66(1) of the Act, can be summarised thus:

(a) In as much as these payments represented ‘broker's commission’, they were made in contravention of s 65 and reg 28, firstly, because no prior written agreement for payment of commission had been concluded between Publiserve and Afrisure and, secondly, because these payments, in aggregate, exceeded the three per cent restriction imposed by the Minister in terms of reg 28(2).

(b) On the supposition that part of these payments represented compensation for administrative services they were made in contravention of s 58 of the Act, because Publiserve was not an accredited administrator.

BACKGROUND FACTS

[10] The exact nature of the contentions relied upon by the respondents as well as the various defences that were raised by the appellants, will best be understood in the light of the factual background that follows. Cooperation between Publiserve and Afrisure started during July 2000. At the time, Publiserve was troubled by financial difficulties. It was registered as a medical scheme in 1995 to provide for the needs of the Public and Allied Workers Union ('PAWUSA'). Though PAWUSA had about 20 000 members, only 3 000 of them became members of Publiserve, which by all accounts was not enough for a viable medical scheme. Publiserve's board of trustees were members of PAWUSA who were not properly qualified to control the affairs of the medical scheme. The scheme had no offices and it employed no staff,

apart from its ‘principal officer’, required by the Medical Schemes Act. For its administration it was entirely dependent on an accredited administrator, Metropolitan Health (Pty) Ltd, commonly referred to as Methealth, with whom it entered into a formal administration agreement. In terms of the agreement Methealth took responsibility for the registration of members, the collection of their contributions, the payment of their claims, the establishment and maintenance of financial records, the preparation of financial statements, the provision of the board of trustees with actuarial, statistical and other advice, and so forth.

[11] During 1997, Publiserve suffered a financial setback from which it never recovered. Because of an operational loss it had experienced during that year, it became technically and commercially insolvent. Though disputed by the respondents at the trial, it can at this stage be accepted with confidence that the position of insolvency, which arose during 1997, was one from which Publiserve never recovered until it was wound-up in May 2001. At the time of its liquidation, so Watson testified, its liabilities exceeded its assets by about R11m.

[12] Publiserve's precarious financial position attracted the special attention of the Council for Medical Schemes. It also led to the dismissal of its then principal officer and the appointment of Mr J J N du Preez ('Du Preez') to that position towards the end of 1998. Shortly prior to his appointment, Du Preez had retired as chief executive officer of another, fairly large, medical scheme after having been involved in the same field since about 1980. At the time of Du Preez’s appointment the Council for Medical Schemes,

through its registrar, insisted on a business plan that made provision for the financial recovery of Publiserve. One of Du Preez's first assignments on his appointment was to prepare such a plan.

[13] The business plan prepared by Du Preez and presented to the registrar of Medical Schemes towards the end of 1999, predicted that Publiserve could recover from insolvency by mid-2000. But according to the plan, this favourable outcome was pertinently made subject to certain preconditions. One of them is of relevance: that a marketing campaign be launched successfully so as to increase the membership of Publiserve from about 3 000 to about 6 200.

[14] It appears that the Council for Medical Schemes was not particularly optimistic about the prospect that an increase in the Publiserve membership of more than double could be attained. In consequence, it expressed its scepticism about the feasibility of the whole business plan. Undoubtedly Publiserve's board of trustees must therefore have breathed a collective sigh of relief when, at their meeting of 24 March 2000, the Methealth representative, Mr A J Delport, informed them – as minuted – 'about advanced negotiations with a large brokerage who expressed interest in Metropolitan Health to accommodate their client base of more than 9 000 members'. Not surprisingly, the trustees, immediately after receiving this news, according to the same minutes, 'mandated the Principal Officer to negotiate with the brokerage re potential Publiserve membership'.

[15] It is common cause that the 'large brokerage' referred to by Delport was De Villiers in the form of his alter ego, Afrisure. Turning to the background of De Villiers, it appears that he started out his business career as a life insurance broker. During about 1993, so he testified, he identified a market for selling medical aid to civil servants in rural areas, especially in the former homelands

of the Mpumalanga province. As appears from the evidence, different options are provided for by medical schemes, offering differentiated contribution rates, or different benefit scales, or both. At the time, so De Villiers testified, he approached a medical scheme known as Visimed with an option best suited for his niche market, which became known as the Afrisure option. According to De Villiers, he then proceeded to market this option, eg by making presentations in remote rural areas. Moreover, he said, he provided his clients with after sales service, for example, by assisting them in their registration as members, in lodging their benefit claims and in dealing with their queries of various kinds. His efforts proved to be successful. Eventually, about 6 000 of Visimed's members were clients of Afrisure.

[16] In January 1998 De Villiers moved the Afrisure option and all its clients from Visimed to another medical scheme, Meddent. As in the case of Visimed, Afrisure received broker's commission for introducing its clients to their new scheme. Apart from what was termed ‘broker’s commission’, Meddent paid Afrisure an additional amount of R50 per month for every client while that client remained a member of the scheme. The relationship between Meddent and Afrisure lasted for about two years. Over this period, the Afrisure client base increased to more than 8 000 members. The reason why De Villiers caused the Afrisure clients to leave Meddent is a matter of some dispute. According to Meddent it was because the Afrisure option had caused it to suffer a considerable financial loss during 1999 and a further loss of R4,6 million during the first three months of 2000.

[17] De Villiers took the position that Meddent's calculations were wrong, but his attempts to bring the Meddent board round to his view were unsuccessful. In consequence, Meddent insisted on a 57 per cent increase in the contributions of Afrisure's clients as from 1 May 2000. As a result, De Villiers decided to rekindle his earlier negotiations with Delport for the takeover of the Afrisure option by Methealth. This is how it came about that Delport could inform the Publiserve board, at its meeting of 24 March 2000, as we know from the minutes of that meeting, that a large brokerage was looking for a medical scheme to accommodate its client base of 'more than 9 000'. As we also know from the same minute, the Publiserve board mandated its principal officer, Du Preez, to negotiate with this broker with a view to acquire its large number of clients for the financially limping Publiserve. It appears to be common cause that, during the negotiations that followed, Du Preez was never informed of the allegations by Meddent that the Afrisure option had caused it to suffer a severe financial loss during the immediately preceding 15 months.

[18] The negotiations between De Villiers, Du Preez, and various officials of Methealth that followed led De Villiers to prepare a written proposal on behalf of Afrisure, dated 27 April 2000, which was presented to the Publiserve board at its meeting on the following day. As will become apparent, this written proposal, read with the minutes of the board meeting of 28 April 2000, were destined to play a central role in the present litigation. The material part of the proposal reads as follows:

'Afrisure members

The management of Afrisure have agreed in principle to move the Afrisure members

to the Publiserve Healthcare Scheme, administered by Methealth subject to the following conditions and requirements.

1. An option to be registered under the Publiserve scheme for the current Afrisure members and future members.
2. Marketing rights for this option are owned by Afrisure CC and any broker wishing to market this product must contract to Afrisure CC . . .
3. The marketing fee to be R225 per member plus VAT payable within 30 days after receipt of first contribution.
4. An ongoing service fee to be paid to Afrisure CC of R100 plus VAT per month per member after receipt of first contribution for as long as the member remains a member of the option. This applies to existing members as well. See Annexure A for details.
5. A placement fee of R250 per member plus VAT be paid after 90 days of inception to Afrisure CC on the placement of the members with Publiserve.

. . .

14. 1 That Afrisure members are offered one seat on the Publiserve board of trustees for the period up to the 2001 AGM.'

[19] According to the minutes of the meeting of 28 April 2000, the Publiserve board of trustees took the following decision with reference to this proposal:

'Afrisure proposal

. . . The proposal was discussed in detail and approved in principle subject to the following:

[Then follow three qualifications] . . .

The Principal Officer was mandated by the Trustees to negotiate draft agreements on behalf of the Board of Trustees which are to be submitted for final approval and signing to the Board of Trustees.'

[20] With reference to the contents of the proposal, it was understood by all concerned that the R250 'placement fee', referred to in para 5, constituted a broker's commission pertaining to existing clients of Afrisure that were to become members of Publiserve, while the R225 in para 3 would be the broker's

commission levied for new clients that were introduced as members to the Afrisure option at a later stage. As to these amounts it was common cause that the R250 represented three per cent of every member's annual contribution, which is the maximum rate of broker's commission prescribed by reg 28(2), while the R225 would, of course, be slightly less than that maximum. The ongoing fee of R100 per member per month for existing and new members, proposed in para 4, attracted a number of labels during the course of the trial, such as a 'co-administration fee', a 'recurring fee', a ‘service fee’ and an 'ongoing service fee'. Finally, by way of illuminating the proposal, 'annexure A' referred to in para 4, contained a list of the services that Afrisure undertook to render in return for this ongoing fee.

[21] The three qualifications to Afrisure's proposal that appear from the minutes of the board meeting of 28 April 2000 were soon thereafter acceded to by De Villiers on behalf of Afrisure. Subsequent to that, everybody concerned accepted that they had an agreement. But Du Preez, who was deputed to reduce this agreement to writing, did not get round to doing so. De Villiers became concerned. At a management meeting on 8 August 2000 where both he and Du Preez were present, De Villiers expressed his concern. According to the minutes of the meeting it was then agreed that Du Preez would provide De Villiers with a signed copy of the minutes of Publiserve's board meeting of 28 April 2000, where the Afrisure proposal was accepted in principle, and that these signed minutes would 'serve as a contract for the time being'. It is common cause that De Villiers later received a signed copy of the minutes from Du Preez.

[22] From July 2000, Afrisure's clients started moving over to Publiserve. In the end, about 6 750 Afrisure clients joined the move. For introducing them, Afrisure received the total sum of R1 881 028 from Publiserve in the form of 'marketing fees' and 'placement fees' pursuant to paras 3 and 5 of the 27 April 2000 proposal. In addition, it received the balance of the amount of R5 454 636.50 claimed by the respondents, ie R3 573 608.50, in the form of 'service fees' or 'recurring fees' in terms of para 4 of the proposal. Pursuant to para 14.1 of the proposal, De Villiers became a member of the Publiserve board on 25 August 2000. On 28 May 2001, ie two days prior to the liquidation of Publiserve, De Villiers resigned as a trustee. At the same time he again moved all Afrisure's clients to another medical scheme from whom Afrisure again received payment of broker's commission.

[23] With reference to the amount of R1 881 028, which by all accounts constituted broker's commission, the main dispute considered by the court a quo resulted from the respondents' contention that these payments were both illegal and unenforceable because they were not made pursuant to a written agreement between Publiserve and Afrisure. In answer, the appellants essentially relied on the agreement between De Villiers and Du Preez at the management meeting of 8 August 2000, that a signed copy of the minutes of the 28 April 2000 meeting of the Publiserve board would 'serve as a contract for the time being'. Eventually the court a quo decided this issue against the appellants (paras 25-28). But before considering the correctness of that conclusion, I find it appropriate first to deal with an issue of a

more fundamental nature in that its outcome will have a more far-reaching effect on the end result in this appeal.

[24] This fundamental issue arises from the respondents' further contention – which was in fact its main contention – that the recurring fee of R100 per member per month received by Afrisure, which in aggregate amounted to R3 573 608.50, was not 'a service fee', as proclaimed in para 4 of the Afrisure proposal, but that it served a dual purpose. In the first place, so the respondents contended, it constituted additional broker's commission. In this respect the reason for the disguise as a 'service fee' was in order to evade or circumvent the limitation of three per cent of members' annual contributions, imposed on broker's commission by reg 28(2). The second purpose of the so-called 'service fee', according to the respondents, was to serve as an incentive to prevent Afrisure from moving its clients to another scheme. According to the respondents, the camouflage of a 'service fee' in this instance was necessary to conceal a criminal offence under s 66(1)(f) of the Medical Schemes Act, namely, the payment of compensation to 'any person for consenting to keep a member in a medical scheme'. What these contentions by the respondents amounted to, in short, was that the way in which Afrisure's remuneration was formulated and eventually agreed upon, was aimed at evading the provisions of the law, a manoeuvre which is *in fraudem legis.*

[25] These contentions were supported by the direct evidence of Du Preez. According to his testimony, the R100 recurring fee was indeed made to serve the twofold purpose of an additional broker's commission and as an incentive to deter Afrisure from moving its clients to another scheme. De Villiers, on the other hand, insisted that the R100 fee constituted compensation for additional services rendered by Afrisure over and above its obligations as a broker and that it was therefore genuinely and accurately described as a 'service fee'. In corroboration of his version, De Villiers referred to

the lengthy list of obligations that Afrisure undertook to perform towards its clients in terms of its agreement with Publiserve, as appears from annexure A to its written proposal of 27 April 2000. What is more, so De Villiers pointed out, these obligations had indeed been performed by Afrisure towards its clients as long as they remained members of Publiserve.

[26] The flaw in the picture presented by De Villiers is, in my view, that on a proper analysis of annexure A, most – if not all –the obligations listed therein would in any event be part of Afrisure's duties as a broker. Fundamental to De Villiers's denial that this is so was his thesis that, in principle, once a broker had successfully introduced a client to a medical scheme, he or she has no further obligations, qua broker, to either the client or the scheme. Departing from this premise, his proposition was that every obligation referred to in annexure A which came after the introduction of the client to the scheme, should be classified as an additional service for which Afrisure was entitled to additional remuneration, over and above the three per cent brokerage. It seems to me, however, that the underlying thesis is unsustainable because it is at variance with the Brokers' Code of Conduct issued by the Council for Medical Services, to which Afrisure was bound to subscribe by reg 28(1)(m). Under the heading 'Minimum Service Levels' the Code inter alia states:

'The minimum level of services to be provided by a broker in exchange for the fee permitted in terms of the regulations to the Medical Schemes Act [ie the brokerage allowed by regulation 28] . . . shall be as follows:

. . .

3. The broker shall at all times facilitate the relationship between his or her client and the medical scheme to which the broker has referred the client and shall:

(a) make all reasonable efforts to resolve any problem which the client

experiences with his/her/its dealings with the medical scheme promptly and efficiently to the best of the broker's ability;

. . .

(c) make him or herself available to attend at least one meeting per year, at the request of the client, between the client and representative of the medical scheme or its administrators . . . .'

[27] On my reading of the Broker's Code of Conduct, it leaves no doubt, firstly, that the duties of a broker towards his clients and the scheme do not terminate upon the introduction of the member to the scheme and, secondly, that the broker's remuneration for these surviving duties is included in the commission of three per cent maximum that he or she receives. Moreover, in the unlikely event that some of the services undertaken and rendered by Afrisure to its clients did in fact exceed the minimum level of obligations required from it as a broker, sight should not be lost of the fact that it was in the interest of Afrisure itself to keep its client base satisfied. In this regard De Villiers conceded that, in his perception, Afrisure had something akin to a proprietary interest in its client base, which it could inter alia transfer from one medical scheme to the other and, for which transfer it could, of course, demand broker's commission on each occasion. In short, the fact that Afrisure had reason to be a good broker did not take its services out of the ambit of brokerage. For these reasons it follows that unlike the court a quo (para 43), I am left unpersuaded that the 'additional services' argument relied upon by De Villiers, supports the appellants' case.

[28] In any event, the 'additional services' argument should not, in my view, be seen in isolation. De Villiers's fervent denial that the

‘service fees’ were a sham, is reminiscent of the Parisian cripple suspected of being a German spy in disguise, about whom Davis J said the following in *Lawson and Kirk v South African Discount and Acceptance Corporation (Pty) Ltd* 1938 CPD 273 at 282:

'[T]hat he [ie the Parisian cripple] habitually speaks French and limps on two sticks matters not at all: that he was once heard speaking fluent German and was seen to run may well be conclusive.'

[29] As I see it, an evaluation of De Villiers's evidence on this aspect reveals a number of instances where the proverbial Parisian spy slipped up. One of these was his inability to explain the stark contrast between the amount of R100 per member per month received by Afrisure for the additional services – if any – it had rendered, apart from its obligation as a broker, and the R58 per member per month levied by Methealth for conducting, what was, in essence, the whole of Publiserve’s business. It will be remembered that the services rendered by Methealth included the collection of contributions, the assessment and processing of claims, the preparation of monthly and annual financial statements, the performance of actuarial assessments, etc, while the additional services rendered by Afrisure are difficult to discover. Another anomaly De Villiers was unable to explain was why Afrisure demanded R100 from Publiserve for performing a service which was less than what it did for Meddent, from whom it levied only R50 per member per month.

[30] A further intriguing aspect of De Villiers’s evidence was that he could give no account whatsoever of how the amount of R100 was calculated and arrived at. If the amount genuinely constituted remuneration for services rendered, I think one would have found

some reference, eg, to the costs of these services and the anticipated profit in the calculation of the amount. But De Villiers could give no such explanation. Eventually he fell back on the argument that the determination of the amount of R100 resulted from a proposal made by Afrisure to which Publiserve agreed without demur. Normally the willingness on the part of the Publiserve board to pay the additional R100 per month would, of course, be an indication that the board regarded the services offered by Afrisure as representing value for money. The flaw in the argument lies, however, in the fact that at the time the Publiserve board was desperate to meet the demands of Afrisure, because they saw the financial salvation of the scheme in the prospect of the large number of new members that Afrisure was offering. In my view, the objective facts therefore support Du Preez's version, namely, that the Publiserve board was prepared to pay the R100 per month demanded by Afrisure, not because they were interested in the alleged additional services offered by Afrisure, or because they thought that the R100 represented fair value for money, but in order to procure and retain the large number of prospective members.

[31] But the most prominent slip-up by the proverbial Parisian cripple, I think, was the statement by De Villiers at the meeting of the Publiserve board of trustees which was held on 25 April 2001, ie shortly prior to the liquidation of the scheme. According to the minutes of the meeting, the context of the statement was that the board had been confronted at that meeting with a formal notification by the auditors of Publiserve of their misgivings that the scheme was recklessly trading in insolvent circumstances, coupled with an invitation to the board to dispel that fear. The response suggested to the meeting, was based on a rescue plan proposed by a firm of actuaries, Fifth

Quadrant. Part of the rescue plan was the proposal of a drastic reduction in ongoing payments to brokers which, in the view of the actuaries, were bleeding Publiserve dry. Someone present at the meeting then expressed the concern that, unless the brokers could be persuaded to ‘buy into’ the rescue plan, Publiserve would lose its members.

[32] According to the minutes of the meeting, the discussion thereupon proceeded as follows:

'It was noted that if the Publiserve membership figure drops below 6 000 members, the Scheme will be shut down. Mr De Villiers reasoned that he would not, from a broker's point of view, buy into the Fifth Quadrant report and conditions stipulated therein. Mr De Villiers is of the opinion that a 3% commission payable to the brokers is not acceptable, that the brokers will move their members, and that this will result in liquidation of the Scheme. He admitted that this is not an easy problem to address, but that membership will be lost with a commission recommendation of only 3%.'

[33] In my view, the reported statement by De Villiers is capable of only one realistic and sensible interpretation, namely, that unless Publiserve was prepared to continue their payment of *broker’s commission in excess of three per cent,* Afrisure would move its clients to another medical scheme. As a matter of language and logic, this corroborates Du Preez’s evidence that at the time, Publiserve was paying broker’s commission in excess of the three per cent of members’ contributions imposed by statute, as an incentive to Afrisure not to remove its clients. The attempt by De Villiers during cross-examination to interpret his recorded comments as a reference to ‘service fees’ did him no credit. The comments simply do not support that meaning. Moreover, that interpretation proved to be in direct conflict with De Villiers’s testimony at an earlier insolvency enquiry.

[34] Hence follows the inevitable conclusion, in my view, that the amount of R3 573 608.50 described as a 'service fee' or 'co-administration fee' was in reality a broker's fee in disguise. This leads to the equally inevitable conclusion that the agreement supporting these payments was illegal. The court a quo also arrived at the conclusion that this agreement was illegal, (paras 42-48), but for a different reason, namely that it was an agreement to pay ‘administration’ fees to a non-accredited administrator. I do not agree. In my view the agreement was illegal because it was *in fraudum legis* and because it imposed an obligation on Publiserve to pay broker’s commission in excess of the limit imposed by reg 28(2).

[35] The next question is this: how does this finding of an agreement *in fraudem legis* impact on the balance of the amount claimed – ie R1 881 028 – which, by all accounts, was genuinely paid as broker’s commission within the bounds of the three per cent statutory limitation? Otherwise stated: can Afrisure insist that we reject the bad and nonetheless retain the good in the agreement underlying both payments? The answer, I think, depends on whether the illegal part of the agreement can be severed so as to leave the remainder, which may in itself be unobjectionable, enforceable. The ‘fundamental and governing principle’ with regard to severability, so Smalberger JA accepted in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 16A, is ‘to have regard to the probable intention of the parties as it appears in, or can be inferred from, the terms of the contract as a whole’.

[36] Counsel for the appellants contended that, on the application

of that test to the agreement under consideration, the good can indeed be severed from the bad in that the agreement itself drew a clear distinction between Publiserve's obligation to pay an excess brokerage under the guise of service fees – which was found to be bad – and its obligation to pay brokerage of three per cent – which is good. The problem is, however, that I have already found that that very expression of divisibility was a sham. The proper approach, in my view, is to ask whether in all the circumstances De Villiers would have been prepared to enter into the agreement on behalf of Afrisure if its broker's commission was limited to – the good part – ie three per cent. On the probabilities, I think the answer to this question can only be a resounding 'no'. But we do not even have to resort to the probabilities. At the meeting of the Publiserve board, held on 25 April 2001, De Villiers gave a direct answer to the question posed when he said 'that a three per cent commission payable to brokers would not be acceptable'. It follows that, in my view, Publiserve's obligations under the agreement are not severable and that the payment of R1 881 028 was illegal too.

[37] The court a quo also concluded that the payment of R1 881 028 was illegal, but again for different reasons, namely, that there was no prior written agreement – as required by reg 28(1)(d) – in existence at the time (paras 25-28). In this court, the appellants' answer to that finding was, in essence, based on the contention that, even if the agreement giving rise to the payment of R1 881 028 was illegal for non-compliance with reg 28(2), such non-compliance did not render the agreement invalid and unenforceable. In support of this contention, they relied on the well-settled principle that, although an agreement in contravention

of a statutory provision is usually invalid and unenforceable, it is not necessarily so, unless, of course, the statute contains an express declaration to that effect. Absent such express declaration, the question in every case is whether, on a proper interpretation of the statutory provision concerned, the legislature can be said to have intended that an agreement prohibited by the provision should be visited with invalidity or whether, perhaps, it was intended that a criminal sanction would suffice (see eg *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) para 4; *Geue v Van der Lith* 2004 (3) SA 333 (SCA) para 18).

[38] But since I have found the whole agreement to pay broker's commission illegal because it was concluded *in fraudem legis*, it is not necessary to embark upon the rather intricate enquiry whether, on a proper interpretation, reg 28(1)(d) renders a contravening agreement both illegal and unenforceable or only illegal and punishable by criminal sanction. I did not understand appellants' counsel to contend that even an agreement found to be *in fraudem legis* could notionally be valid and enforceable. In any event, I do not think such contention could ever be sustained. After all, as Lord Diplock so aptly stated in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1982] 2 All ER 720 (HL) 725h:

' "[F]raud unravels all." The courts will not allow their process to be used by a dishonest person to carry out a fraud.'

THE *PAR DELICTUM* RULE

[39] This leads me to consider the appellants' reliance on the rule of our law, that the *condictio ob turpem vel iniustam causam* can in

principle only be successfully instituted by a plaintiff whose own conduct was free from turpitude, ie who did not act dishonourably (see eg Daniël Visser *op cit* ; J C Sonnekus *Ongegronde Verryking in die Suid-Afrikaanse Reg*(2007) 139). This rule is expressed in the maxim taken from Roman and Roman Dutch Law: *in pari delicto potior est conditio defendentis* and thus became known as the *par delictum* rule. The principle underlying the *par delictum* rule is that, because the law should discourage illegality, it would be contrary to public policy to render assistance to those who defy the law. Prior to the judgment in *Jajbhay v Cassim* 1939 AD 537, the *par delictum* rule found strict and consistent application in our courts (see eg *Brandt v Bergstedt* 1917 CPD 344). But in *Jajbhay* this court – while affirming the considerations of public policy underlying the rule – decided that it should be relaxed, as Stratford CJ put it (at 544), in those instances where 'public policy should properly take into account the doing of simple justice between man and man'. Since then the principles enunciated in *Jajbhay* have been considered and applied in many cases (see eg the decisions of this court in *Visser v Rousseau & andere NNO* 1990 (1) 139 (A) and *Klokow v Sullivan* 2006 (1) SA 259 (SCA)). No definite criteria have, however, been laid down to decide whether the rule should be relaxed or not. The reason, I think, is plain. The issue of relaxation may arise in such an infinite variety of circumstances that it would be unwise for the courts to shackle their own discretion by predetermined rules or even guidelines as to when relaxation of the *par delictum* rule will be allowed.

[40] But the keystone to the *par delictum* defence is that the plaintiff has rendered performance dishonourably or with turpitude. Absent turpitude on the part of the plaintiff, the *par delictum* defence is simply not available. Where payment, even though illegal, was not dishonourable, the plaintiff must succeed (see eg J C Sonnekus *op cit* 134; ‘Enrichment’ 9 *LAWSA* (2ed) para 215). In order to meet this threshold requirement, the appellants relied on the admission by Publiserve's principal officer, Du Preez, that, to his knowledge the agreement underlying the payments reclaimed had specifically been couched in a way that would evade the prohibitions of the law; ie *in fraudem legis.* In response, various

answers were raised on behalf of the respondents. First amongst these was the contention that dishonourable conduct on the part of Du Preez cannot be held against the real plaintiff, Watson, in his capacity as liquidator of Publiserve.

[41] I am, however, not persuaded by this answer. To my way of thinking, it would be in conflict with the general rule accepted in matters of insolvency, that the liquidator cannot acquire rights greater than the insolvent entity ever had (see eg *Peterson and Another NNO v Claassen* 2006 (5) SA 191 (C) para 37; cf also *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) para 14). Moreover, though this issue was not raised nor pertinently decided in *Visser v Rousseau (supra)*, the respondents' contention would be contrary to the whole tenor of this court's judgment in that case (eg at 153E-154D). As I see it, the nub of the decision in the *Visser* case was that the *par delictum* defence could in principle be raised against the liquidators of a company where, on the facts of that case, the dishonourable conduct at issue was clearly not attributable to the liquidators themselves, but to the former director of the company. In support of their argument, the respondents sought to rely on the rather terse statement by Kuper J in *De Klerk NO v Mahomed* 1957 (1) SA 416 (T) at 429E-F, which can be understood to mean that, although the *par delictum* defence might have been available against the insolvent in that case, it could not be raised against her trustee, because the trustee could not be said to be party to an illegal agreement. If that is the true meaning of the statement, it would lend support to the respondents' argument. But, for the reasons I have given, I would be unable to agree with a statement to that effect.

[42] The respondents' further answer to the *par delictum* defence was that dishonourable conduct on the part of Du Preez cannot be attributed to Publiserve, because the directing mind of Publiserve, in law, resided with its board of trustees and not with Du Preez. Again I cannot agree with this answer. The relevant legal principles, I think, are those stated by Trollip J in *Connock's (SA) Motor Co Ltd v Sentraal Westelike Koöperatiewe Maatskappy Bpk* 1964 (2) SA 47 (T) at 53G-H. According to this statement, knowledge of facts that will be imputed to a company 'would, therefore, include the knowledge of any of its agents or servants possessed and acquired by him in the course of his employment under such circumstances and being of such a nature that it was his duty to communicate it to the proper authority in the company (*Barberton Town Council v Ocean Accident & Guarantee Corporation Ltd* 1945 TPD 306)'. Departing from this premise, I have no doubt that Du Preez was under a duty to tell Publiserve's board that the agreement they had entered into with Afrisure constituted an attempt to evade the relevant statutory provisions and was therefore illegal. Moreover, on my reading of the minutes of the board meetings, I gain the clear impression that Du Preez did in fact convey this information to the trustees.

[43] Lastly, the respondents argued that, in any event, the appellants had failed to make out a case of dishonourable conduct on the part of Du Preez. In support of this argument they relied on the evidence of Du Preez that the payments were made in good faith, which evidence, so they pointed out, was never challenged at the trial. The court a quo seems to have been persuaded by this

argument (para 30). But, though the factual foundation of the argument cannot be faulted, I am unable to share the court a quo's conclusion. Du Preez did indeed testify that the payments were made in good faith. Likewise it is true that this evidence remained uncontested by the appellants. Nonetheless I find it unacceptable that Du Preez could have made these payments in good faith despite his knowledge that the underlying agreement was deliberately aimed at evading the law. As to the appellants' failure to dispute Du Preez's assertion of good faith, sight should not be lost of the fact that such dispute would fly in the face of what was central to the appellants' whole case, namely, that as a fact, none of the payments under consideration were illegal. What Du Preez meant by 'good faith', I think, is that although he knew that the payments were illegal, he thought they were for the greater good of Publiserve. Thus understood, these payments were nonetheless dishonourable, because, in law, the honourable end obviously did not justify the illegal means.

[44] Hence it must, in my view, be accepted in sum that:

(a) Du Preez's knowledge, that the agreement giving rise to the payment to Afrisure was made in contravention of statutory provisions and formulated in a way so as to hide this contravention, must be attributed to Publiserve.

(b) In consequence, it must be accepted that these payments were made by Publiserve with knowledge that they were *in fraudem legis,* and that Publiserve must therefore be regarded as having acted dishonourably and with turpitude when it made the payments it now reclaims.

[45] By the same token it is clear that Afrisure, as represented by De Villiers, acted with at least equal turpitude when it demanded and accepted the illegal payments. De Villiers was an experienced broker with expert knowledge in the sphere of medical schemes. And, while Du Preez was obviously motivated by what he – mistakenly – thought to be in the best interest of Publiserve, De Villiers was driven by sheer avarice. In the circumstances, the appellants' counsel, rightly in my view, did not contend for the absence of any turpitude on the part of their clients. Nor did they contend that we should embark upon a weighing up of the parties' respective moral turpitude, even if this were to be permissible (cf *Visser v Rousseau supra* at 153D-E). Their argument was that in the circumstances of this case the decisive considerations are to be found in the following statement by Stratford CJ in *Jajhbay v Cassim* (at 544):

'. . . [O]ne might say, speaking generally, that restitution will be granted in cases where the illegal contract has not been substantially carried out, and not in those cases where the contract has been substantially performed. But such a rule, though affording us some guidance, must be subordinated to the overriding consideration of public policy (which I repeat does not disregard the claims of justice between man and man).'

[46] I do not believe anyone can disagree with the concept that in a case where both parties have performed their reciprocal obligations under an illegal contract, simple justice between man and man will usually dictate that, in order to avoid an undue benefit to the plaintiff, both parties should retain whatever they received. This must particularly be so in a situation where the defendant's performance, received by the plaintiff, consisted of a *factum* that can no longer be returned or where such performance would, in

any event, upon restoration, be of no value to the defendant.

[47] But, of real relevance in this instance, in my view, is the exception to the general rule that appears at the end of the Chief Justice's statement referred to, namely that it 'must be subordinated to the overriding consideration of public policy'. In my view the statutory provisions that have been contravened by the payments at issue were aimed at the protection of the members of the medical scheme. Strict application of the *par delictum* rule in these circumstances will deprive them of that statutory protection. Thus understood, public policy, in my view, dictates in this case that the *par delictum* rule be relaxed in favour of the respondents.

THE WILKEN AND KOHLER DEFENCE

[48] Based on the fact that Afrisure has rendered full performance of its obligations in terms of its agreement with Publiserve, the appellants also sought to rely on a 'rule' that has its origin in an *obiter dictum* by Innes J in *Wilken v Kohler* 1913 AD 134. In *Wilken* Innes J was dealing with performance under sales of land that were invalid for want of compliance with a statute requiring the contract to be in writing. In the course of his judgment he then stated (at 144), *obiter*, as it turned out, that:

'It by no means follows that because a court cannot enforce a contract which the law says shall have no force, it would therefore be bound to upset the result of such a contract which the parties had carried through in accordance with its terms. Suppose, for example, an . . . [oral] agreement of sale of fixed property . . ., a payment of the purchase price and due transfer of the land. Neither party would be able to upset the concluded transaction on the mere ground that . . . it was in reality an agreement to sell, invalid and unenforceable in law, but which both seller and purchaser proposed to carry out.'

[49] This *obiter* statement had been criticised by academic

authors as a departure from the accepted approach to enrichment liability (see eg De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (3 ed) 189; De Wet & Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (5 ed) Vol 1 326). Nonetheless it was referred to with apparent approval by this court in *Wilkens NO v Bester* 1997 (3) SA 347 (SCA) at 362F and endorsed by the legislature, specifically with reference to contracts for the sale of land, in s 28(2) of the Alienation of Land Act 68 of 1981. But, outside the sphere of cases concerning the sale of land, the debate whether the rule in *Wilken v Kohler* represents good law, continues (see eg Visser *op cit* 468; Eiselen en Pienaar, *Unjustified enrichment – A Casebook,* 2ed at 157).

[50] The court a quo dismissed the defence relying on the rule in *Wilken v Kohler* (in paras 53-55 of its judgment) essentially on the basis that it had been rejected by a full bench of the Cape High Court in *CD Development Co (East Rand) (Pty) Ltd v Novick* 1979 (2) SA 546 (C) at 550F-553G which, of course, was binding on the court a quo. I find it unnecessary, however, to enter into the debate concerning the validity of the *Wilken v Kohler* rule outside the realm of the *condictio ob turpem vel iniustam causam*, with which we are concerned. I say that because it is clear to me that the rule can never apply where the performance was not only rendered in terms of an agreement that was void, but was in fact prohibited by law. This is so, because, as explained by Rumpff J in *MCC Bazaar v Harris & Jones (Pty) Ltd* 1954 (3) SA 158 (T) at 162F, the law cannot preserve a transfer which it has prohibited. Stated somewhat differently: those who support the rule in *Wilken v Kohler* find justification for its existence in the consideration that

where both parties have performed in accordance with the provisions of an agreement, albeit unenforceable, the purpose of the transaction has been achieved and that there is therefore no reason to interfere with the existing state of affairs (see eg Helen Scott, *Unjust Enrichment by Transfer in South African Law: Unjust Factors or Absence of Legal Ground?* (Doctoral thesis) Oxford 2005 296 *et seq*; J C Sonnekus '*Is die Ongegronde van Afgesproke Prestasie Steeds Verryking?'* 2008 *TSAR* 605 at 611-613). The 'achieved purpose' analysis consideration cannot apply, however, where the purpose of the transaction is prohibited by law (see eg Visser *op cit* 415 note 1; Reinhard Zimmermann and Jacques du Plessis *'Basic Features of the German Law of Unjustified Enrichment'* [1994] RLR 14 at 19). The fact of performance by the defendant may have a significant role to play in deciding whether or not to relax the *par delictum* rule, as appears from my earlier discussion under that heading. To that extent, performance by the defendant cannot be said to be irrelevant in the context of the *condictio ob turpem vel iniustam causam*. What I do say, however, is that such performance cannot be a complete answer to a claim based on that *condictio*.

CLAIM AGAINST AFRISURE – MATTERS OUTSTANDING

[51] The court a quo found that the respondents' claim against Afrisure could also succeed on the basis of the *condictio indebiti* (paras 35-41 and 49). But on the factual findings I have made, there is no room for reliance on that *condictio.* The essential element of the *condictio indebiti* lies in the absence of *causa.* Here I found that there was a *causa*, albeit illegal (see eg *FNB v Perry (supra)* at para 22). All that therefore remains under the rubric of

the respondents' enrichment claim against Afrisure, is to point out that the other defences raised by the appellants in the court a quo, such as non-enrichment on the part of Afrisure (paras 58-61) and non-impoverishment on the part of Publiserve (para 61) were not persisted in on appeal.

[52] In the circumstances, the only one of these defences which requires some comment, without elaboration and solely to avoid future confusion, is the defence of non-enrichment. With regard to this defence reference is made by the court a quo (para 59) to a statement by De Villiers that the total expenses incurred by Afrisure in relation to the payments received from Publiserve amounted to R3 667 528.37. It is clear, in my view, that had this statement been substantiated by reliable evidence it would indeed have established a *pro tanto* non-enrichment defence. But the simple fact is that there was no such evidence. On the contrary, such evidence as was presented indicated that the expenses incurred by Afrisure as a result of its agreement with Publiserve did not even come close to the amount stated. Once payment on the basis of an illegal *causa* had been established, the onus was on Afrisure to prove either that it was not enriched or that it was enriched only as to part of what had been received (see eg *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713H-*in fine*). Since Afrisure had clearly failed to discharge this onus, the defence of non-enrichment was rightly not persisted in on appeal.

[53] Lastly, a special defence had been raised by both the appellants. I find it convenient to deal with that defence at the end

of this judgment. Save for the outcome of that defence, it follows from what I have said that, in my view, Afrisure's appeal cannot succeed.

THE CLAIM AGAINST DE VILLIERS

[54] This brings me to the respondents' claim for damages against De Villiers, based on an alleged breach of his fiduciary duties as a trustee of Publiserve. Claims of this nature have been described as *sui generis,* in that they are based neither in contract nor in delict. They find application primarily with reference to the relationship between directors and their companies (see eg *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 242; *Cohen NO v Segal* 1970 (3) SA 702 (W) at 706B-F; *Du Plessis v Phelps* 1995 (4) SA 165 (C) at 171). But no reason has been suggested, and I can think of none, why De Villiers would owe Publiserve a lesser fiduciary duty than a director would owe to his or her company.

[55] Central to the dispute with regard to this claim was the allegation by the respondents that De Villiers had breached his fiduciary duty when he caused, or allowed Publiserve to make, the five payments to Afrisure in the total amount of R5 454 636,50. In response to this allegation, De Villiers did not deny that he was a trustee of Publiserve at the time of these payments. Nor could he deny that he allowed these payments to be made, in the sense that he did nothing to prevent them while it was in his power to do so. He did deny, however, that this constituted a breach of his fiduciary duty as trustee.

[56] The content of the fiduciary duty owed by the director of a

company – and thus also by De Villiers as trustee – is succinctly summarised by Prof M S Blackman under four headings, as appears from the following statement ('Companies' 4(2) *LAWSA* para 116):

'Directors may not: (a) exceed their powers; (b) exercise their powers for an improper or collateral purpose; (c) fetter their discretion; or (d) place themselves in a position in which their personal interests conflict, or may possibly conflict, with their duties to the company.'

[57] In considering the claim against Afrisure I have already made the following findings of fact:

(a) In terms of the proposal made by De Villiers on behalf of Afrisure, which was accepted by Publiserve, the remuneration payable to Afrisure was specifically formulated with a view to evade the limitation imposed on broker's commission by the regulations under the Medical Schemes Act.
(b) De Villiers, who was an experienced broker and an expert in the field of medical schemes, was essentially the architect of this agreement *in fraudem legis*.

[58] These findings, in my view, inevitably lead to the conclusion that De Villiers acted in breach of his duty towards Publiserve when he allowed the five payments of R5 454 636,50 in aggregate to be made to his alter ego, Afrisure. In fact, I view this conclusion to be so self-evident that it matters not which of the four facets of the fiduciary duty distilled by Prof Blackman is used as the starting point of the enquiry. So it can be said that De Villiers: (a) exceeded his powers as a trustee by allowing Publiserve to make illegal payments; (b) exercised his permissive powers to allow payment for an improper purpose, ie in order to obtain a personal advantage; (c) failed to exercise an independent discretion as trustee against his personal interest; (d) placed himself in a

position where his personal interest to receive payment was in conflict with his duty as a trustee to prevent an illegal payment.

[59] Equally self-evident, in my view, is the fact that if De Villiers had taken steps to prevent these payments to Afrisure, they would not have been made. I therefore agree with the court a quo's conclusion (para 78) that a clear causal link had been established between De Villiers's breach of his fiduciary duty and Publiserve's loss, represented by the five payments that were illegally made.

SPECIAL DEFENCE RAISED BY BOTH APPELLANTS

[60] The special defence which was taken up by both appellants as a last resort in this court, was based on a guarantee for R10m obtained by Watson from Methealth after the liquidation of Publiserve. Broadly stated, the following background to this guarantee appears from the evidence of Watson. As liquidator Watson believed that Publiserve could have a potential claim based on maladministration against Methealth, which would include a claim for improper and unauthorised payments of brokers' fees to Afrisure and another. He intended to investigate this potential claim during an enquiry under the Insolvency Act. At the commencement of the enquiry he was, however, approached by the senior management of Methealth who were concerned, so Watson suspected, about the bad publicity that Methealth might receive from the proceedings, which were held in public. In consequence, negotiations between Watson and the management of Methealth ensued. The end result of these negotiations was the R10m guarantee. In terms of the guarantee Methealth undertook, without any admission of liability, to be responsible for the shortfall

in Publiserve's liquidated assets to meet the proved claims against it, as reflected in the liquidation and distribution account, to a maximum of R10m. At the time of the trial, Watson's estimate was that this shortfall would amount to about R11m, including over R7m in members' claims. But at that stage, so Watson testified, Methealth had made no payment whatsoever under the guarantee.

[61] With reference to the guarantee, the argument advanced by the appellants was, in essence, the following: the claims which Publiserve raises against the appellants are also claims which it would potentially have against Methealth, since each of the payments to Afrisure relied upon was made with the knowledge and consent of Methealth as administrator of the scheme. By providing the R10m guarantee, so the argument went, Methealth had indemnified Publiserve from any loss it might have sustained as a result of these payments and in consequence Publiserve has suffered no actual loss.

[62] This argument is unsustainable. In my view it has already been answered by this court in *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* 2002 (5) SA 649 (SCA) paras 18-25. What the answer amounts to is this. In so far as Methealth was not a proved wrongdoer against Publiserve and the guarantee may have been given, not to avoid any existing liability, but in order to protect the reputation of Methealth, any payment under the guarantee would be regarded as *res inter alios acta* (see eg *Japmoco* para 24; *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) 150D). In the event, such payments would in law not be deductible from the amount owing by the

appellants. But even if Methealth could be regarded as a joint wrongdoer against Publiserve and therefore liable *in solidum* with the appellants, the guarantee in itself would still not entitle the appellants to any credit. It is true that Methealth's obligation under the guarantee constitutes an asset in the Publiserve estate. Nonetheless, that asset, unaccompanied by actual payment, cannot, as a matter of principle, be taken into account in determining the liability of the appellants. Only actual payments would perform this function (see eg *Japmoco* para 21). The underlying reason for this principle appears from the following statement by Scott JA in *Nedcor Bank Ltd t/a Nedbank v Lloyd-Grey Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA) at 921E-G:

'Assuming the bank and the thief to have been jointly and severally liable, the plaintiff would have been entitled to sue either wrongdoer for the full amount. . . . [I]f for the purpose of determining the plaintiff's loss his right of recovery against the other wrongdoer had to be taken into account, it would follow that, if both had financial means, each when sued could point to the plaintiff's right to recover from the other so that the plaintiff could recover from neither. Quite clearly, once it is accepted that the full amount is recoverable from any one wrongdoer, the plaintiff's right to sue any other wrongdoer must be disregarded when determining his loss.'

[63] For these reasons I hold that:

(1) The appeals by both appellants are dismissed.
(2) The appellants are ordered, jointly and severally, to pay the respondents' costs, including the costs occasioned by the employment of two counsel.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

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|---|---|
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