**Reportable**
Case No: 1392/2018

In the matter between:

**JOHANNES THEOBALT HATTINGH VAN NIEKERK** **Appellant**

and

**LIBERTY GROUP LIMITED** **Respondent**

**Neutral citation:** *Johannes TH van Niekerk v Liberty Group Limited* (1392/18) [2020] ZASCA 65 (15 June 2020)

**Coram:** NAVSA, ZONDI, MOCUMIE, SCHIPPERS AND DLODLO JJA

**Heard:** 14 May 2020

**Delivered:** This judgment was handed down electronically via e-mail to the parties' legal representatives on 15 June 2020 It has been published on the Supreme Court of Appeal website.

**Summary:** Unjustified enrichment – *condictio indebiti* – overpayment of benefit under insurance policy – written cession of portion of benefit by beneficiary to secure debt – cession registered with insurer – debt still unpaid – full benefit paid to beneficiary – insurer paid under bona fide but mistaken belief – amount of benefit ceded paid to cessionary – debt still unpaid – overpayment to beneficiary excusable error – *indebite* – overpayment recoverable.

## ORDER

**On appeal from:** Limpopo Division of the High Court, Polokwane (Phatudi J sitting as court of first instance):
The appeal is dismissed with costs.

## JUDGMENT

**Schippers JA (Navsa, Zondi, Mocumie and Dlodlo JJA concurring):**

[1] This appeal, with the leave of the Limpopo Division of the High Court, Polokwane, essentially concerns the application of the principles of the *condictio indebiti*. The central question is this. Was the conduct of the respondent, Liberty Group Limited (Liberty), in making an erroneous payment in the sum of R470 000 under an insurance policy to the appellant, inexcusably slack, that disentitled it to recovery of that amount in terms of the *condictio indebiti*?

[2] The facts are uncontroversial. In March 1996 the appellant, Mr Johannes van Niekerk, took out a life insurance policy with Liberty (the policy) on the life of his mother, Mrs Hester van Niekerk. The appellant was the beneficiary under the policy and paid the premiums or 'contributions', as they are referred to in the policy. The guaranteed benefit in terms of the policy was R1 808 263.68.

[3] On 13 June 2013 the appellant ceded to his brother, Mr Daniel Johannes van Niekerk (the cessionary), a portion of the benefit under the policy in the sum of R470 000, as security for monies lent and advanced by the cessionary. The

cession was facilitated by the cessionary's insurance broker, Ms Katrien Neethling. She submitted the completed cession form to Liberty which recorded the cession on its system, known as 'Blueprint', in accordance with the terms of the policy.

[4] The appellant, as cedent, signed a collateral cession ('aanvullende sessie'), described in the cession form as follows:

'2. **Aanvullende sessie**

- Die regte op die polis word as sekuriteit aan 'n derde oorgedra.
- Die sedent bly egter die poliseienaar maar kan nie by die polis baat nie tensy die sessie gekanseller word. Terwyl die sessie bestaan kan die sessionaris die polis sonder die eienaar se toestemming in kontant omskep.
- Die sedent bly egter verantwoordelik vir die premies op die polis.'[1]

The appellant and the cessionary did not however agree to the terms indicated by the second bullet describing the collateral cession. That provision was crossed out on the cession form, rendering it inoperative.

The form states the following under the heading 'POLISBESONDERHEDE':

'**Aanvullend:** tydelike oordrag van eienaarskap as sekuriteit vir 'n skuld R470 000.'[2]

[5] Clause 9 of the General Conditions of the policy reads:

'SETTLEMENT OF CLAIM

Any benefits due will be paid to the Owner or his estate, provided that:

– if a Beneficiary has been appointed and the contract is not ceded, payment will be made to the Beneficiary

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[1] Translation:

'2. **Collateral cession**

- The rights under the policy are transferred to a third party as security.
- The cedent remains the owner of the policy but cannot derive any benefit from the policy unless the cession is cancelled. While the cession is in existence, the cessionary cannot convert the policy into cash without the owner's consent.
- The cedent however remains responsible for the premiums in respect of the policy.

[2] Translation:

'**Collateral:** temporary transfer of ownership as security for a debt R470 000.'

– if the contract is ceded, payment will be made to the Cessionary, or any Beneficiary nominated by the Cessionary as Owner.'

[6] Mrs Van Niekerk died on 18 August 2015. The appellant completed a form with the following heading: 'Claimant's Statement for Death Claim', and claimed the full benefit under the policy, which he requested Liberty to deposit directly into his bank account. On 24 August 2015 Ms. Elizna Smith, the appellant's broker, submitted the claim form to Liberty on his behalf. On 10 September 2015 Liberty paid the full benefit under the policy, ie R1 808 263.68 to the appellant.

[7] Subsequent to payment of the full benefit of the policy to the appellant, Ms Neethling inquired of Liberty why the cessionary had not, in terms of the policy, been paid the amount of R470 000, secured by the cession. According to the evidence, at the time of payment to the appellant, Liberty was not in possession of the cession form and subsequently obtained a copy of it from Ms Neethling. Liberty then discovered that it had mistakenly paid the appellant the full benefit of the policy. On 25 September 2015 Liberty paid the sum of R470 000 to the cessionary.

[8] In the interim, Liberty tried to recover the R470 000 from the appellant. Pursuant to a telephonic discussion with him, by letter dated 22 September 2015, Liberty advised the appellant that he had been overpaid, requested him to repay R470 000, and furnished its bank details for him to do so. The appellant refused to repay the money. On 1 October 2015 Liberty again wrote to the appellant, requesting repayment and apologising for any inconvenience caused. The letter was accompanied by a small gift (a fruit basket). Still, the appellant refused to repay the funds.

[9] In January 2016 Liberty instituted action against the appellant for recovery of the money. The particulars of claim stated the following. Liberty paid the

appellant the amount of R1 808 263.68 in the bona fide but mistaken belief that such payment was due and payable, and without taking into account the cession of R470 000, which had been overlooked. The appellant was entitled to payment of only R1 338 263.68. He was unjustifiably enriched and Liberty impoverished, in the sum of R470 000.

[10] Following on a notice of intention to defend by the appellant, Liberty applied for summary judgment. In his opposing affidavit, the appellant stated that Liberty had caused its own impoverishment by paying the cessionary the amount of R470 000, as it had no obligation to do so. The cession, he said, was one *in securitatem debiti* to provide temporary security for his debt to the cessionary, which 'lapsed' when Liberty paid the full benefit under the policy to the appellant. He denied that he had been enriched as he was, in his words, 'the owner of all the funds'. He also denied that Liberty had been impoverished, since it 'had no entitlement to pay the funds' to the cessionary, or that Liberty's error was reasonable. Summary judgment was refused and the appellant was granted leave to defend the action.

[11] The appellant's plea was essentially a repetition of the allegations in his affidavit opposing summary judgment. He denied that he had ceded ownership of R470 000 of the benefit under the policy to the cessionary. He alleged that it was his intention to retain ownership of the whole of the policy and to cede only limited rights to the cessionary as security for the fulfilment of his obligations under the agreement between them; that the debt secured by the policy was not yet due; and consequently that the cession was unenforceable. The appellant denied that the payment of R470 000 was made erroneously because he was entitled to receive the full benefit under the policy – the cessionary was not entitled to payment at all.

[12] At the trial only Liberty tendered evidence, by four witnesses. The appellant chose not to testify, called no witnesses and closed his case. The cessionary was subpoenaed by Liberty but failed to appear at court. Whilst a warrant for his arrest was being issued by the court, the parties received a medical certificate stating that he was suffering from a contagious illness. Liberty subsequently dispensed with his evidence.

[13] The evidence was largely common ground, not seriously disputed and certainly not contradicted. Ms Neethling testified that the appellant and the cessionary had agreed that a portion of the benefit under the policy in the sum of R470 000, would be ceded to the cessionary for a debt owed to him by the appellant. When the cession was signed, the debt was already R470 000. Ms Neethling had written that amount on the cession form prior to its signature by the appellant. She said that in the event of the appellant not settling the debt or any part of it, the debt had to be settled on the death of Mrs Van Niekerk. Pursuant to the conclusion of the cession, she sent the form by email to Liberty. After the death of Mrs Van Niekerk, Ms Neethling also submitted a claim form to Liberty on behalf of the cessionary, as she put it, 'just for notice' of the cession.

[14] Ms Emily Weideman, a claims assessor at Liberty, together with Ms Linah Mngoma, the team leader for death claims, took the decision to pay the proceeds of the policy to the appellant. Ms Weideman testified that prior to making payment, she had looked for the cession on the Blueprint system, which indicated that there was a cession against the policy in the name of the cessionary, but she could not find it. According to the system, no cession form had been submitted. Neither had the form been included with the documents required to effect payment of the policy. Ms Mngoma essentially confirmed Ms Weideman's evidence and said that they could not find the cession form on the Blueprint system because it had been recorded by another department within Liberty. It will

be recalled that the appellant had submitted a claim for payment of the full amount due in terms of the policy.

[15] As already stated, the overpayment to the appellant was discovered when the cessionary claimed payment of R470 000. On 16 September 2015 Ms Weideman and Ms Mngoma telephoned the appellant regarding repayment of that amount but he told them that he would discuss the matter with his broker, Ms Smith. Subsequently Ms Smith dealt with the matter on the appellant's behalf when the letters of 22 September and 1 October 2015 were sent to him, requesting repayment.

[16] In her evidence, Ms Smith confirmed that she had submitted the claim form (which the appellant completed) together with supporting documentation to Liberty. She said that the cession was still in existence when the overpayment was made. She accepted that the debt secured by the cession remained extant, and said that the appellant was very upset by Liberty's mistake. Ms Smith testified that she had asked Ms Mngoma a few times not to proceed with legal action against the appellant as she was, in her words, 'trying to get the situation sorted'. This however, to no avail.

[17] On 15 October 2015 Ms Smith advised Liberty that the appellant was not willing to refund the R470 000, for the following reasons. In 2013 he had encountered difficulty in getting the policy reinstated, after Liberty informed him that it had lapsed due to system errors on its part. Thereafter it had taken the appellant months to obtain confirmation from Liberty that the cession had been registered for the correct amount, ie for not more than R470 000 and then, after all the paperwork had been done, Liberty still made the mistake of overpayment. It is clear from her evidence that at that stage, both parties knew that the payment to the appellant was erroneous.

[18] The high court, after referring to the decision of this court in *Grobler v Oosthuizen*[3] at paras 23 and 24, held as follows:

'In view of [the] express provisions, there is no room for the alleged pledge or a re-cession agreement as contended for on behalf of the defendant. I find therefore that the nature of the cession was one *in securitatem debiti*, irrespective of whether it is structured as an out-and-out cession subject to a *pactum fiduciae*, and should for purposes of the debtor, be deemed to all intents and purposes, as an out-and-out cession.'

[19] The court concluded that the overpayment to the appellant was made without lawful cause, and that it resulted in his unjustified enrichment and Liberty's impoverishment. The appellant was therefore ordered to repay Liberty the sum of R470 000, together with interest and costs.

[20] The high court's view referred to in paragraph 18 above is confusing and appears to be based on a misreading of *Grobler*. Earlier in that case Brand JA stated that an out-and-out cession meant that a cedent would have divested him or herself of the right in question. In that case too it was the right to the proceeds of a policy that was in question,[4] and the dispute was whether the relevant cession was an out-and-out cession or one *in securitatem debiti*.[5] In *Grobler* this Court said that even where the cession document describes the cession as an 'out-and-out' cession, that is not always decisive, and one should be careful to differentiate between form and substance.[6]

[21] This Court in *Grobler* affirmed the pledge theory as the doctrinal basis of a cession *in securitatem debiti*, as opposed to the theory of an outright or out-and-out cession coupled with a *pactum fiduciae*.[7] Brand JA said:

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[3] *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA).
[4] *Grobler* fn 3 para 8.
[5] *Grobler* fn 3 para 10.
[6] *Ibid*.
[7] In terms of this theory, a cession *in securitatem debiti* is an outright or out-and-out cession on which an undertaking (*pactum fiduciae*) is superimposed that the cessionary will re-cede the principal debt to the cedent on satisfaction of the secured debt. The right which is ceded vests in the cessionary and the cedent is left with a mere

'In accordance with this theory, the effect of a cession *in securitatem debiti* is that the principal debt is "pledged" to the cessionary while the cedent retains what has variously been described as the "bare dominium" or a "reversionary interest" in the claim against the principal debtor (See eg *Land- en Landboubank van Suid Afrika v Die Meester* 1991 (2) SA 761 (A) at 771C-G; *Development Bank of Southern Africa Ltd v Van Rensburg* 2002 (5) SA 425 (SCA) para 50).

…

[D]espite the doctrinal differences arising from the pledge theory, this court has in its latest series of decisions – primarily for pragmatic reasons – accepted that theory in preference to the outright session/*pactum fiduciae* construction (see eg *Leyds NO v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk* 1985 (2) SA 769 (A) at 780E-G; *Bank of Lisbon and South Africa Ltd v The Master (supra)* at 291H-294H; *Incledon (Welkom) (Pty) Ltd v Qwa Qwa Development Corporation Ltd* 1990 (4) SA 798 (A) at 804F-J; *Millman NO v Twiggs* 1995 (3) SA 674 (A) at 676H; *Development Bank of Southern Africa Ltd v Van Rensburg (supra)* para 50). In the light of these decisions the doctrinal debate must, in my view, be regarded as settled in favour of the pledge theory.'

[22] A claim ceded *in securitatem debiti* automatically reverts to the cedent once the secured debt is extinguished. In such event a re-cession by the cessionary is not required.[8] In *Development Bank of Southern Africa Ltd v Van Rensburg NO and Others*,[9] Nienaber JA described the cedent's reversionary interest as follows: 'This reversionary interest, properly understood, refers to the cedent's interest in the debtor's performance (ie satisfaction of principal debt by the debtor) rather than to his interest in the cessionary's performance (ie re-cession of the principal debt on satisfaction of the secured debt – which is a right *ex contractu* against the cessionary).'[10]

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personal right against the cessionary, arising from the agreement creating the obligation, to reclaim it once the secured debt has been redeemed (2 *Lawsa* 2 ed Part 2 at 47 para 53; *Grobler* fn 3 para 17).

[8] *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235 at 246-247; *Grobler* fn 3 para 20.

[9] *Development Bank of Southern Africa Ltd v Van Rensburg NO and Others* 2002 (5) SA 425 (SCA) para 50.

[10] Cited in *Grobler* fn 3 para 22.

[23] The true character and consequences of a cession *in securitatem debiti* depends on the intention of the parties as embodied in their agreement.[11] In the present case it is clear from the cession form that the parties entered into a collateral cession ('aanvullende sessie') as envisaged in that form, save that they did not incorporate into their agreement the provision in terms of which the cedent would remain owner of the policy but could not derive any benefit from it unless the cession was cancelled, and which authorised the cessionary to convert the policy to cash without the owner's consent.

[24] In my view, there can be no doubt that the cession is one *in securitatem debiti*, founded on the pledge theory. The appellant ceded or 'pledged' the right to payment of R470 000 by Liberty to his own creditor (the cessionary), as security for a debt owed to the latter.[12] This is consistent with both the cession form and the context. The form states, in terms, that the cedent transfers the rights to the policy to the cessionary named in the form; and that it constitutes a temporary transfer of ownership as security for a debt in the sum of R470 000. The right was to be retained by the cessionary until the secured debt had been paid. Indeed, that was the evidence: the appellant continued with payment of contributions in respect of the policy and the secured debt of R470 000 had to be settled in full upon the death of Mrs Van Niekerk, when he became entitled to the benefit of the policy. The appellant, as cedent, retained a reversionary interest (satisfaction of the principal debt by Liberty) and had he settled the secured debt, the ceded right would automatically have reverted to him. That did not happen because the debt was still unpaid when the appellant claimed, and received, the full benefit of the policy from Liberty.

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[11] *Grobler* fn 3 paras 11 and 17; *PG Bison Ltd and Others v The Master of the High Court, Grahamstown and Another* [2001] 1 All SA 363; 2000 (1) SA 859 (SCA).
[12] *Lawsa* fn 7 at 46 para 52.

[25] In terms of clause 9 of the policy conditions, payment of the benefit due under the policy would be made to the beneficiary if the contract was not ceded, but if it was, payment would be made to the cessionary. It follows from this provision and the cession form that where, as in this case, a portion of the benefit was ceded, the owner of the policy, the appellant, was not entitled to payment from Liberty in the sum of R470 000 when he received it, nor at any relevant time.

[26] Whatever the nature of the cession, the appellant's allegation that he was entitled to the full benefit of the policy and thus had not been enriched, because he was the owner of all the funds, is simply wrong. His debt had been extinguished and he received the same amount in cash from Liberty. The submission by his counsel that Liberty did not prove that the secured debt of R470 000 was payable to the cessionary is without substance. The appellant admitted to his broker, Ms Smith, that the sum of R470 000 was payable to the cessionary, when he instructed her to ensure that no higher amount would be paid to the former. And before us his counsel conceded that there was no evidence on record to show that the appellant had paid the secured debt.

[27] What remains is whether Liberty met the requirements of the *condictio indebiti*. These are that generally, the action is only available where ownership of money or other property is transferred by the act (*negotium*) of the parties; the action lies only against the recipient of the *indebitum*; the transfer of money must have taken place *indebiti* in the widest sense, ie there must have been no legal or natural obligation to make it; the payment or transfer must have been made in the bona fide and reasonable, but mistaken, belief that the debt was owing; and the mistake must be excusable.[13]

[13] See 9 *Lawsa* 2 ed (2005) at 116 para 212 and the authorities there cited.

[28] The only requirement in issue in this case is whether Liberty's mistake in paying the full benefit of the policy to the appellant, is excusable, in respect of which it bears the onus.[14] The requirement that the mistake must be neither slack nor studied has been criticised by academic writers.[15] In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another*,[16] Hefer JA, alive to the criticism by Prof Visser,[17] said:

'But the historic nature of the remedy as one granted *ex aequo et bono* should be preserved and care should be taken to avoid it being turned into a tool of injustice to the receiver of money paid *indebite*. As Tindall J (as he then was) warned in *Trahair v Webb & Co* 1924 WLD 227 at 235 "Where a plaintiff bases his claim for relief on an equitable doctrine the court must be careful that, in a desire to do justice to the plaintiff, an injustice is not done to the defendant". '

[29] Having concluded that no distinction should be drawn in the application of the *condictio indebiti* between a mistake of law and mistake of fact, Hefer JA went on to say:

'It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need be said is that if the payer's conduct is so slack that he does not in the court's view deserve the protection of the law he should, as a matter of policy, not receive it. There can obviously be no rules of thumb; conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others and vice versa. *Much will depend on the relationship between the parties; on the conduct of the defendant who may or may not have been aware that there was no* debitum *and whose conduct may or may not have contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment*.'[18]

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[14] *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A).
[15] See in in this regard 9 *Lawsa fn 13* at 118 fn 24.
[16] *Willis Faber* fn 14 at 224E-H.
[17] D Visser *Unjustified Enrichment* (2008) at 171-182.
[18] *Willis Faber* fn 14 para 42. (Emphasis added.); *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme* 2018 (1) SA 513 (SCA) para 23.

[30] In *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd*,[19] this Court considered that it was inappropriate to refine the above approach, and held that the determination of what is an excusable error and what is not in the circumstances of the case, involves the exercise of a value judgment.[20]

[31] Ms Weideman testified that the cession form had not been provided by the appellant and that she tried, unsuccessfully, to find it on the Blueprint system, which reflected only the name of the cessionary and the type of cession as 'collateral'. Ms Weideman and Ms Mngoma became aware of the terms of the cession and the amount ceded, when they received a copy of the cession form from Ms Neethling. The cession had been registered on the Blueprint system by another department within Liberty. At best for the appellant, Ms Weideman or Ms Mngoma should have taken steps to establish the true state of affairs from that department, before paying out the full benefit of the policy. For this reason, Liberty's counsel conceded that there was a degree of slackness on its part.

[32] At some point before the death of his mother the appellant had been informed by Liberty that the full benefit would be paid to the cessionary, and as stated earlier, asked Ms Smith to ensure that only R470 000 would be paid in terms of the cession. In an email on 1 June 2015 she informed the appellant as follows:

'Die sessie se bedrag is nooit verander nie alhoewel dit voorkom asof iemand probeer het om dit te verander. *Daar is nog steeds 'n kollaterale sessie op die polis.*

Ons is nog besig om te kyk wat hier aangegaan het en ek sal in verbinding wees sodra ek antwoorde het. *Op hierdie stadium kan jy rustig wees dat die res van die versekerde bedrag nog steeds aan jou sal uitbetaal [word].*'[21]

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[19] *Bowman, De Wet and Du Plessis NNO v Fidelity Bank Ltd* 1997 (2) SA 35 (A).
[20] Bowman fn 19 at 44C-E.
[21] Emphasis added. Translation:
'The amount of the cession has never been changed although it appears that somebody has tried to change it. There is still only a collateral cession on the policy.

[33] It took Ms Smith some two months to get the relevant information from Liberty. On 13 July 2015 she forwarded an email that she had received from Liberty to the appellant, to which the cession form was attached, and confirmed that the amount ceded was R470 000. The appellant thanked Ms Smith in an email on 15 July 2015, stating that the issue had been one of grave concern to him. At all material times he knew that he was not entitled to the full proceeds of the policy, and never disputed that the sum of R470 000 was the amount of the secured debt.

[34] Thus, when the appellant completed the claim form, he was fully aware of the following facts: the cession was still in existence; he had not paid the secured debt; and he was not entitled to payment of the full benefit of the policy. This is underscored by Ms Smith's evidence that when she discussed repayment of the R470 000 with the appellant, it was clear that he knew that the amount paid to him was incorrect. What is more, in claiming the full benefit, he declared, inter alia, that what was stated in the claim form was true, and that he had not withheld any material fact from Liberty. Ms Weideman said that she had read that declaration, the appellant did not submit the cession form and the full benefit was paid to him. This conduct by the appellant, in my judgment, directly contributed to the decision to pay him the full benefit of the policy. Given the particular circumstances of this case, the overpayment by Liberty, is in my view excusable.

[35] Finally, there is the submission by the appellant's counsel that he should not be held liable for the costs of the appeal. The appellant had ample opportunity to repay the money but refused to do so. He defended the action on the unfounded basis that the cessionary was not entitled to payment. His reasons for not repaying

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We are busy with an investigation to see what precisely happened here and I will be in touch as soon as I have answers. At this stage you can rest assured that the remainder of the insured amount will still be paid to you.'

the money were unrelated to the action. There is no reason why costs should not follow the result.

[36] The following order is made:

The appeal is dismissed with costs.

A Schippers
Judge of Appeal

Appearances:

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|---|---|
| For Appellant: | Morne Coetzee |
| Instructed by: | Morne Coetzee Attorneys, Pretoria |
| | Lovius Block Inc, Bloemfontein |
| For Respondent: | J F Steyn |
| Instructed by: | Gerings Attorneys, Johannesburg |
| | Rossouws Attorneys, Bloemfontein |