

Study Guide 1
PVL3704

Unjustified Enrichment Liability and Estoppel



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INTRODUCTION

Welcome to the module, Undue Enrichment and Estoppel. We trust that you will enjoy studying the module. The module should enrich your understanding of the scope of private law in general and, more particularly, of the law of obligations. More than is the case with most other modules in private law, the module requires you to integrate and apply your knowledge of other modules. The module consists of two distinct parts that are independent of each other. What they have in common is that they are both founded on the principles of equity and reasonableness that are present in common law. In future, the further development of the parts of the law concerned should also take into account the constitutional values and imperatives involved. Unfortunately, very few cases have been conducted either in the Supreme Court of Appeal, or in the Constitutional Court, in terms of which guidance on the influence of the Constitution of the Republic of South Africa, 1996 could be given. The principle of Ubuntu is bound to play an important role in such a development, as issues of equity and reasonableness, which lie at the heart of the above-mentioned disciplines, commonly arise.

Knowledge of the disciplines involved should play an important part in rounding off your understanding of private law. The disciplines consist of a range of topics, the knowledge of which should be of great value to you in practice.

You have now reached quite an advanced stage in your law studies, having completed many basic modules, and even a few relatively advanced modules. In your study of the module Undue Enrichment and Estoppel, you will be required to integrate some of the knowledge that you have already gained in other such modules as Law of Property (PVL3701), Law of Contract (PVL3702) and Law of Delict (PVL3703) with the new knowledge and skills that you will learn in this module. As you move closer towards graduation and professional practice, an increasing amount of emphasis will be placed on the practical application of the knowledge and skills acquired in this module. In relation to some topics, you will also be required to apply advanced legal reasoning skills when dealing with the theoretical and practical problems and the approaches to theory involved.

So when do the issues of (a) unjustified enrichment, and (b) estoppel find application? The following examples should provide you with an initial understanding of why you are required to study such subjects.

ACTIVITY 1

Unjustified enrichment law typically comes into play in the following type of scenario:

A owes B an amount of R100 000. A pays the amount of money owed to B to him on 25 June 2017 by way of an electronic funds transfer, after an urgent telephonic request by B. On 30 June 2017 X, A's bookkeeper, pays the same amount to B by means of a separate electronic funds transfer, in the mistaken belief that the money is still owing.

What remedies does A have in law to reclaim the money? Is the claim either contractual or delictual? Or is there some other ground on which the amount of money outstanding can be claimed?

The claim concerned cannot be contractual, because no breach of contract has occurred on the part of B, and the first payment extinguished the contractual relationship by payment. Neither can the claim be delictual, because B performed no unlawful conduct. Although B did not act fraudulently, it is quite clear that it would be unfair for B to keep the additional, erroneously made payment under such circumstances. Therefore, the law provides a claim for the above instance under unjustified enrichment law.

ACTIVITY 2

Estoppel typically comes into play in scenarios like the following:

X wants to buy a car that Y has on offer. Y assures X that he has paid for the vehicle in full, and that it belongs to him. However, in reality, Y still owes two instalment payments to Z, the bank that actually owns the vehicle until it has been paid for in full. X, being a prudent person, asks Z whether the car has, in fact, been paid for in full. M, a branch manager at Z, mistakenly informs X, upon inquiry, that the vehicle has indeed been paid off. Deeming himself secure in the above knowledge, X then buys the vehicle from Y. However, Y then fails to pay the remaining instalments, causing the bank to cancel the contract with Y, and to reclaim the vehicle.

Does X have a delictual claim against Z, the bank? Can X use another remedy to fend off Z's claim?

In the above scenario, X, having acted upon the misrepresentation made by Z's employee, can rely on estoppel to fend off Z's claim under the *rei vindicatio*. (Refer back to your studies on the law of property for more particulars on the *rei vindicatio*.) In addition, X might be able to lay a delictual claim against Y, based on negligent misrepresentation, but, in the particular instance mentioned, the estoppel remedy should prove to be more useful.

1.1 PURPOSE OF THE MODULE

1.1.1 Purpose of this module

The purpose of the present module is to equip you with the knowledge, skills, attitudes and competencies you need to solve basic problems relating to enrichment liability and estoppel, to perform basic research, and to acquire reporting skills in the above-mentioned areas of the law.

1.2 LEARNING OUTCOMES

1.2.1 Specific outcomes for the LLB

- You will be required to
- explain the role of the law in everyday life

- solve multidimensional legal problems
- engage with legal text by making notes and inferences
- perform basic research tasks in law
- write a basic research report

1.2.2 Specific outcomes of this module

You will be required to:

- demonstrate that you understand the most pressing and prevalent issues that arise regarding enrichment liability and estoppel in terms of South African law
- use appropriate methods and skills to apply your basic knowledge of enrichment liability and estoppel in a variety of contexts that are typical of the problems set for undergraduate learners
- carry out research to produce a critical legal argument and, with guidance and support, take responsibility for the legal opinions that you advance
- identify problems and issues relating to enrichment liability and estoppel in real or simulated factual scenarios
- interpret and analyse daily occurrences regarding basic areas of enrichment liability and estoppel
- analyse and critically evaluate the relevance and applicability of various legal sources and authorities to identifying problems relating to enrichment liability and estoppel
- provide substantiated responses, based on acquired knowledge
- provide responsible and expert advice on an appropriate course of action to take
- critically analyse different viewpoints on theoretical and practical issues in terms of enrichment liability and estoppel
- find the relevant sources and authorities to solve problems regarding enrichment liability and estoppel

1.3 METHOD OF STUDY

1.3.1 Study material

No prescribed book exists for this part of the module. Your study material consists of this study guide and a number of extracts from cases, textbooks and journal articles, which are listed under the heading *Prescribed study material* in the study guide and in Tutorial Letter 101. All of the judgments, extracts and articles, as well as further judgments, will be discussed in the study guide itself, and they will, therefore, also form part of your prescribed study material. You do not have to acquire said sources independently, but doing so could help you attain a fuller understanding of the specific topic than you might otherwise obtain. All case law and journal articles referred to are available in full text in the e-resources section of the Unisa library website.

Particular cases can be found in Jutastat, LexisNexis, or Saffii (Southern African Legal Information Institute). Most journal articles are also available from the above-mentioned e-resources section. The LexisNexis section also provides access to The Law of South Africa (*LAWSA*), under the section entitled “Reference works”. The multivolume encyclopaedia, *LAWSA*, contains discussions of most parts of the law, including enrichment and estoppel. The work should form a valuable resource not only for the current module, but also for the assignments that you have to complete in other modules, including your research module.

Any additional judgments or journal articles to which reference is made, and the extracts from textbooks that you find in the text, as well as any material mentioned under the heading *Additional reading material*, do not form part of your prescribed study material. You have no need, therefore, to look them up, or to study them for examination purposes. Such references are made not only for the sake of the completeness of your studies, but also because the sources involved might be of tremendous value to you if you want to expand your knowledge and understanding of the subject. They should also prove to be extremely useful if you need to conduct further research into certain topics for your assignments, or in your future employment.

In the course of the year, additional material may be prescribed in further tutorial letters. We cannot emphasise enough that all the prescribed material is very important to you as a student of Private Law. As such sources of information form an integral part of the module, you have to study it intensively for examination purposes.

1.3.2 Activities and self-assessment

The activities that are highlighted throughout the study guide serve to illustrate the content described above. They provide you with an opportunity to assess whether you have an adequate understanding of the theory involved. The examples given, which are quite often taken from case law, can appear in examination questions in either the same, or a slightly different, form.

The above also applies to the self-assessment questions set in the text, and at the end of each study unit. The questions can be used to determine whether you have understood the content of the course, and to see whether you can apply the theory that you have learned. The feedback that follows the self-assessment questions can be used as a guideline to help you in your own self-assessment.

If you find that you are unable to complete the self-assessment questions satisfactorily, you will need to revisit the basic study material. Only by revising it will you then be able to ensure that you understand the content in context.

1.3.3 Study journal

You might consider keeping a study journal, in which you can write down your answers to the various activities, including those allowing for self-assessment, presented throughout the study guide. Such a journal should serve as a valuable tool in assessing your own understanding and skills in respect of the material provided, as well as your own growth throughout the module. The activities, including the self-assessment ones, may be reused in the examinations. In addition, they provide examples of the type of questions that you might expect to be required to answer in the examinations.

1.3.4 Historical development

For a proper and thorough grasp of the meaning of enrichment liability in modern law, it is necessary to have some knowledge, and a good understanding, of the historical development of the various actions based on enrichment. Having reasonable knowledge of the influence of the Roman and Roman-Dutch law of enrichment should facilitate your coming to grips with the law that is currently applicable. You have, therefore, to read the sections dealing with the Roman and Roman-Dutch

law carefully as background material to enable you to follow the development of the specific enrichment actions involved, and also for you to be able to come to an understanding of the move made towards the recognition of a general enrichment action.

The sections on the Roman and Roman-Dutch law, which are not for examination purposes, serve only as background material to enhance your understanding of the subject that you are currently studying.

In studying the various enrichment actions, you should, therefore, pay attention to:

- the **general requirements** for enrichment liability that apply in all circumstances
- the requirements in respect of the different actions
- the field of application of each of the actions
- the question whether a particular action is an enrichment action, meaning an action that is based on unjustified enrichment
- the critical assessment of various points of view, in terms of which the authors concerned make conflicting decisions, or hold diverse views

1.4 EXAMINATION

In preparing for your examination, it is important that you have a good grasp and knowledge of the subject matter involved. You have to know:

- the general requirements for enrichment liability; and
- the specific requirements for each specific enrichment action. You must also be able to apply the existing rules to various practical scenarios.

In the examination, you will be asked to deal with three different types of questions:

- straightforward theoretical questions, in response to which a systematic and critical discussion of aspects of the material is required
- problem-type questions, in which a practical scenario is posed, and you are required to
 - identify the legal issue or question raised (1–2/10)
 - discuss the relevant rules that might be applicable to the facts (3–4/10)
 - apply the rules to the facts (3–4/10)
 - provide a solution to the problem (1–2/10)
- questions requiring critical assessment of a theoretical or practical approach, a specific viewpoint or differences of opinion presented, in response to which you are required to
 - recognise the issue at stake (1–2/10)
 - summarise the different viewpoints given (3–4/10)
 - critically evaluate each viewpoint (3–4/10)
 - provide your own reasoned viewpoint on the issue (1–2/10)

NB: All three types of question may be posed either in the form of multiple-choice questions, or as essay-type questions. Multiple-choice style questions will form the basis for 50% of your assessment in the examination.

It is important to note that, when you are asked to provide a critical assessment, you are expected to evaluate the argument, case or legal position from both a positive and a negative point of view, in other words, to give a full assessment.

Such an assessment requires not only negative criticism, but also positive evaluative comments. Both positive and negative aspects should be highlighted. A critical assessment requires more than merely a description of the case, or legal position, tendered; it requires you to state your opinion on whether you think the argument, case or legal position is well or poorly presented, positively or negatively set, and so on. The differing viewpoints of various academic commentators are often expressed in such questions and answers.

STUDY UNIT 1

GENERAL OVERVIEW

OVERVIEW

You have already studied two major sources of obligation, namely contract and delict. In the introduction to the current module, we will look at unjustified enrichment as being a third major source of obligations. We will also look at the rationale, or reason, for the existence of this part of the law. Finally, it is important that you know somewhat of the history of this part of the law, as much of it still consists of rules and principles dating back to Roman and Roman-Dutch law. Copious references are made to such sources in the case law.

LEARNING OUTCOMES

After completing your study of the introduction to enrichment liability, you should be able to:

- explain why unjustified enrichment is regarded as the third most important source of obligations in South African law
- describe the need for unjustified enrichment law
- explain the sources of South African enrichment law, and the importance of the historical context for the actions in modern law
- describe the five traditional enrichment actions and their specific requirements, and apply each of them to a given set of facts
- critically analyse and assess the different points of view on the existence of, or the need for, the taking of a general enrichment action
- understand the development that needs to take place in the discipline to ensure proper compliance with the principles inherent in the Constitution and in the spirit of Ubuntu.

RECOMMENDED READING MATERIAL

Du Plessis J *The South African law of unjustified enrichment* (Juta Cape Town 2012) 1–17

Eiselen S & Pienaar G *Unjustified enrichment: a casebook* 4th ed (LexisNexis Butterworths Durban 2016) 3–9

Lotz G & Brand FDJ “Enrichment” in Joubert WA et al (eds) *The law of South Africa* Vol 9 2nd ed (LexisNexis Butterworths Durban 2005) paras 207–209

Visser D *Unjustified enrichment* (Juta Cape Town 2008) 3–35

Chevron SA (Pty) Ltd v Wilson t/a Wilson’s Transport and Others 2015 10 BCLR 1158 (CC)

Cool Ideas 1186 CC v Hubbard and Another 2014 4 SA 474 (CC)

McCarthy Retail Ltd v Shortdistance Carriers CC 2001 3 SA 482 (SCA)

National Credit Regulator v Opperman and Others 2013 2 BCLR 170 (CC)

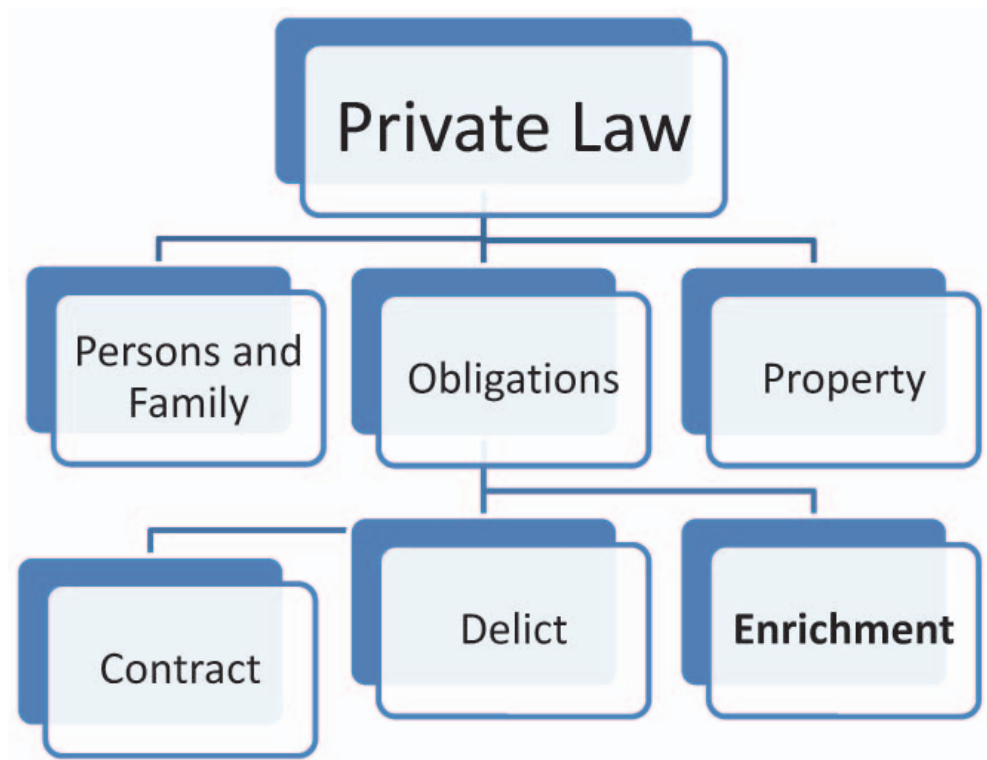


FIGURE 1.1: Structure of private law

1.1 INTRODUCTION TO UNJUSTIFIED ENRICHMENT

1.1.1 Enrichment as a source of obligation

Traditionally, private law, which deals with the legal relationships between private entities other than the state in its public law capacity, has been divided into the following broad categories: sources of obligations, historical sources of enrichment and the theoretical structure of enrichment.

sources of obligations

The law of obligations is concerned with the relationship that exists between the debtor and the creditor. Of the many sources of obligations that exist in the law, the three main sources consist of:

- (a) the law of contract (in terms of which obligations are created by agreement)
- (b) the law of delict (in terms of which obligations arise by force of law, upon damage, or personal injury, being caused by the commission of an unlawful action)
- (c) the law of unjustified enrichment (in terms of which obligations arise in a number of different situations that fall neither under contract, nor under delict)

historical sources of enrichment

The current sources of the law of unjustified enrichment are to be found mainly in Roman and Roman-Dutch law, as augmented and developed by the South African courts, as will already have been made evident in your studies. Apart from the Alienation of Land Act 68 of 1981 and the National Credit Act 34 of 2005, no other legislation directly touches upon this area of the law. However, in our present constitutional era, enrichment law is also subject to the principles and influence of the Constitution. However, to date, neither the Constitution nor the Constitutional Court has had much influence on the development of the discipline.

Most of the development that has occurred over the past two decades has arisen in the Supreme Court of Appeal (SCA). In the Supreme Court, it seems that the emphasis on the requirements of specific actions is declining in a preference for the general requirements for enrichment liability.

theoretical structure of enrichment

In its structure, unjustified enrichment shows many similarities to the law of delict, in that it consists of some general principles or requirements that need to be fulfilled before the dictates of liability can come into play. Such enrichment also consists of a number of specific remedies, each with their own distinct requirements that require fulfilling in addition to the above. However, the general principles of the law of unjustified enrichment are not yet as well developed as are those of the law of delict. The pace of change is increasing, though, with the courts starting to make some significant advances in terms of developing the general principles involved. Some criticism has also been levelled at the emphasis that has, in the past, been placed on the concept of specific remedies.

components

Traditionally, the Law of Unjustified Enrichment has been divided into the components listed below.

UNJUSTIFIED ENRICHMENT LAW			
General principles			
• enrichment • impoverishment • <i>sine causa</i> requirement (without sufficient legal cause) • causality (at the expense of requirement)			
Conditiones sine causa	Improvements to property	Management of another's affairs	Work done, or services rendered
• <i>condictio indebiti</i> • <i>condictio ob turpem vel iniustam causam</i> • <i>condictio causa data causa non secuta</i> • <i>condictio sine causa specialis</i>	• <i>bona fide</i> possessors • <i>bona fide</i> occupiers • <i>mala fide</i> possessors and occupiers	• <i>actio negotiorum gestorum utilis</i> • <i>actio negotiorum gestorum contraria</i>	• <i>locatio conductio operis</i> • <i>locatio conductio operarum</i>

The kind of diagram that appears above will be used throughout the study guide to provide you with an overview of, and a perspective on, where the particular aspect fits into the bigger picture of the module.

definitions

The term “enrichment” is used to describe the situation that occurs when one person’s estate is increased unjustifiably (but not unjustly) at the expense of another. The term “unjustified” is used to indicate that the enrichment occurred without justification for such, or without any legal basis. In other words, the enrichment did not occur owing to a pre-existing agreement (or contract), or due to a delict having

been committed. As a result of such an increase, under certain circumstances an obligation arises in terms of which the person whose estate has been increased has a duty to restore that which was received to the person at whose expense the increase occurred. The impoverished person also has a corresponding right to claim that the increase be restored to him or herself.

(By this time you should be well aware of what the nature of an obligation is – you have, after all, devoted a whole year of your study of private law to the two other principal sources of obligation, namely contract and delict. Consequently, the nature of an obligation is not discussed here.

If you feel you need to refresh your memory, you may do so by rereading study unit 1 of the Study Guide for the module on the Law of Contract (PVL3702)).

1.1.2 The necessity for enrichment liability

Without doubt, allowing for the acknowledgement of liability for enrichment is necessary in terms of any developed legal system. Cases exist in relation to which one person obtains assets belonging to another person in circumstances where there are no grounds for the transfer of such assets, and where there is nothing to justify their retention by the receiver. In the above situation, it is usually regarded as being unfair that the enriched person should keep the goods, money or value with which he or she has been enriched. Consider the following two examples of what occurs within the ambit of South African law:

Example

In accordance with the rules relating to *accessio* (attachment to another's property) anything that is affixed to the land becomes part of the land, and, consequently, the property of the owner of the land. The above means that, should the *bona fide* possessor (the unlawful occupier) of, for example, a farm, build an expensive house and outbuildings on the farm, all the buildings concerned will become the property of the owner of the farm. The owner is, of course, entitled to eject the unlawful occupier at any time. (You have already dealt with the principles of *accessio* in the Law of Property PVL3701.)

The above situation would leave the occupier out of pocket, and the owner with a property that is worth more than it was before the improvements were made. No legal reason (no contract or delict) for the enrichment of the owner's estate and for the impoverishment of that of the occupier would justify the retention of such enrichment by the owner. Unjustified enrichment liability is aimed at redressing the unfairness of such a situation.

Example

As you will recall from your study of the Law of Property (PVL3701), all that is necessary for the transfer of ownership is delivery of a thing (*res*) with the intention on the part of the transferor to transfer ownership, and the intention on the part of the transferee to become the owner thereof (*Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd* 1941 AD 398).

The above type of transfer could result in, for example, a seller transferring the ownership of goods to the buyer, in the genuine belief that the contract of sale was valid. However, only later might the buyer learn that the contract was void, and that he or she might have no possibility of taking action to retrieve the purchase price from the buyer. Again, the one party has benefitted from the transfer of the property when there was no legal reason for such a transfer to have taken place.

The unfairness that is present in the two examples given essentially leaves the *bona fide* possessor, in the first instance, and the seller, in the second instance, without remedy. Doing so would mean that both parties mentioned would be impoverished through no fault of their own, and that the owner and the buyer would be enriched without any good cause. The result is the need for the recognition of liability on the ground of unjustified enrichment.

*constitutional
imperatives*

In terms of s 25 of the Constitution, ownership or property is protected from arbitrary deprivation of such, except for in terms of a law of general application. The widely worded provision concerned provides for deprivation against the payment of compensation in certain circumstances. Although the provision is aimed, firstly, at ensuring the security of tenure of land, the Constitutional Court has assigned a wide meaning to the word “property” to include all assets of a person, and not only their land. “Property”, in the above-mentioned sense, may mean fixed property (land), or intellectual property, and valuable rights, including a right to occupy land. See *National Credit Regulator v Opperman and Others* 2013 2 BCLR 170 (CC), in terms of which the court held that an enrichment claim constituted “property” for the purposes of s 25 of the Constitution.

*Ubuntu, public
policy and good
faith*

The concept of good faith in contract is closely akin to the concept of fairness, generally. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) (hereinafter the *Everfresh Market Virginia* case, the Constitutional Court considered the concept of good faith against the overarching principle of Ubuntu. Ubuntu is regarded as an all-embracing principle affecting all laws, in regard to their interpretation and application. The court decreed that the principle of Ubuntu must work hand in hand with the principles of public policy and good faith, within the context of a constitutionalised legal system. Ubuntu is, therefore, important to consider in the assessment and the development of enrichment law, as well. Yacoob J states the following in regard to Ubuntu and good faith in contract:

[23] The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country places a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.

...

[71] Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the

past this Court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and “carries in it the ideas of humaneness, social justice and fairness” and envelops “the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”.

The above-mentioned description of Ubuntu clearly shows that the underlying values that have given rise to the development of unjustified enrichment liability in the Roman and Roman-Dutch law could, just as well, have been founded on the principles concerned. From a communal perspective and from a perspective of simple fairness, it is imperative that a corrective should exist for when someone has made a mistake, or has inadvertently transferred property without good legal grounds for so doing, that the impoverished party should be compensated for its loss. Of equal importance, however, is the fact that the enriched party should not be left in a worse off position than would have been the case if no enrichment had taken place. The various enrichment requirements and enrichment actions will be assessed in the course of our discussion to establish whether the current law conforms to the basic requirements of Ubuntu.

In the above text, we have given only two examples of unjustified enrichment to illustrate our point that liability for enrichment is very important. When we begin discussing the various enrichment actions, you will, of course, find many other cases of enrichment that will illustrate the above-mentioned point equally well.

ACTIVITY 1.1

Can you think of any other possible situations where a transfer of property could take place without legal reason, thus giving rise to an enrichment action? Try to provide three more examples. Write them down in your study journal, or notes.

FEEDBACK

Think about all the different situations where contracts may be void and where performance takes place, or where contracts that were initially valid might fall away. Looking at the table of contents for clues should help you to devise an appropriate answer. Also, think of such situations as electronic funds transfers into an incorrect bank account, or the case of a conditional contract, where the occurrence of the uncertain future event terminates the contract. Another example might be where someone improves property, believing that it is their own property, but where it, in fact, belongs to another.

1.1.3 Historical development of unjustified enrichment law

The rules of unjustified enrichment law, as applied in South African law today, derive directly from the Roman and the colonial Roman-Dutch law that was imported into South Africa by the Dutch settlers during the 16th and 17th centuries. Of all the private law disciplines, enrichment law still shows the closest connection to such historical roots. It is also the area of private law that has been least affected by the influence of English Common Law, as that legal system, until quite recently, lacked sufficient comparable remedies. In modern English law, similar remedies have now been developed under the broad heading of “restitution law”. For a proper

understanding of our law, it is, therefore, necessary to consider the ancient Roman and Roman-Dutch law and its development.

Roman law

In Roman law, two texts in particular usually serve as the starting point for an investigation into the law relating to liability for enrichment. They are

- D 12 6 14, which reads: *Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiolem*, and
- D 50 17 206, which reads: *Jure naturae aequum est, neminem cum alterius detrimento, et injuria fieri locupletiolem*.
- The two texts can be translated as follows:
- D 12 6 14 Because it is according to natural equity that nobody should be enriched at the expense of another.
- D 50 17 206 It is according to the equity of natural law that nobody should profit at the cost of another.

broad principle only

The prohibition against enrichment quoted in the above-mentioned texts is so broadly stated that it cannot possibly provide a basis for liability. What is prohibited here is not only unjustified enrichment, but also any enrichment whatsoever that occurs at the expense of another. An overly literal interpretation of the texts would also prohibit the making of a legitimate profit at the expense of another in any contractual situation, and would, thus, put a stop to all commercial transactions whatsoever.

No general liability for enrichment was recognised in terms of Roman law. Relief was granted to a plaintiff in certain specific circumstances, based on the principles stated in the above-mentioned two texts. Certain specific enrichment actions, each with their own requirements, were possible, but there was no general liability for unjustified enrichment. Roman law did not, in fact, recognise any general obligations, whether in terms of contract, delict, or enrichment. Roman law was a remedy-based legal system, in terms of which liability only originated if there was an appropriate action to be taken in regard to the law. Some of the actions were akin to modern-day contractual or delictual liability, but there was no general underlying theory of contract or delict. Such theory only developed with the later systemisation of the Roman law during the Middle Ages.

Roman-Dutch law

The enrichment actions of Roman law were received into Roman-Dutch law, in the context of which, over the years, they were developed and extended. The works of our institutional writers, however, contain no indication that a stage was ever reached in classical Roman-Dutch law (ie the Roman-Dutch law of the 17th and 18th centuries) at which a general enrichment action was available. In 18th-century Dutch practice, however, a general enrichment action seems to have developed, with it being noted as such in the *Observationes Tumultuariæ* of Van Bynkershoek. The issue will be dealt with more comprehensively in study unit 14 below.

South African law

The enrichment actions of classical Roman-Dutch law are still available to a plaintiff in current South African law. The South African courts have also recognised liability for enrichment in a number of circumstances where none of the old actions was applicable, thereby extending the scope of unjustified enrichment liability in South African law.

general enrichment action

With regard to such extensions of enrichment liability, the majority of South African academics had, by 1966, concluded that a general subsidiary enrichment action had developed in South African law that would apply in any case of unjustified enrichment where none of the previous actions were available. The view was, therefore, that

where the circumstances of a particular case fell within the scope of one of the existing Roman-Dutch law actions, the plaintiff had to rely on the particular action in question. If, however, the circumstances of his or her case fell outside the scope of any of the existing actions, he or she could rely on the scope of a general enrichment action. Consequently, the view was not that a general enrichment action had been substituted for the existing actions, but that a general action had been developed that was additional, and subsidiary, to the existing actions.

*McCarthy
Retail*

In *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 SA 482 (SCA) (hereinafter the *McCarthy* case), the court states:

[8] Unlike other branches of our law, the rich Roman source material has not led to an unqualified judicial recognition (with a few exceptions) of a unified general principle of unjustified enrichment, from which solutions to particular instances may be derived. Rather there has been an augmentation of the old causes of action, from case to case, usually with reference to rules treated as being of general application. This has led to a more or less unified patchwork (the “lapwerk” [*patchwork*] according to Professor De Vos Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg 3rd ed). And although there has been no unequivocal recognition of a general enrichment action, time and again unjustified enrichment principles have been treated as a source of obligations being the basis for creating a new class or subclass of liability in particular circumstances. No better example of this can be found than the minority judgment of Ogilvie Thompson JA in *Nortjé en 'n Ander v Pool* NO 1966 (3) SA 96 (A) – the majority judgment which is still sometimes held out as having given the final death-blow to a general enrichment action. The question whether such an action should be recognised was passed by in *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere* 1994 (3) SA 283 (A), but Botha JA made it clear that the piecemeal extensions of the old actions, which have been proceeding for over a century in South Africa, have not been impeded by the decision in *Nortjé's* case (at 331B–333E). See also *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 2 SA 35 (A) at 40A–B. One of the restraints upon the acceptance of a general action is the belief, or fear, that a tide of litigation would be let loose. Initially there may be some surge of litigation, particularly under the emotive banner of unjustified enrichment. But it should not last long, once the restrictions even on a general action are appreciated. My opinion is that under a general action only very few actions would succeed which would not have succeeded under one or other of the old forms of action or their continued extensions. For this reason, if it be a good one, the acceptance of a general action may not be as important as is sometimes thought, save, of course, that its denial may lead to occasional individual injustices. A more daunting consequence of acceptance is the possible need for a re-arrangement of old-standing rules. Are the detailed rules to go and new ones to be derived from a broadly stated general principle? Or are the old ones to stand, and be supplemented by a general action which will fill the gaps? The correct answers to these questions are not obvious. But I would support the second solution. In a rare case where even an extension of an old action will not suffice I would favour the recognition of a general action. The rules governing it should not be too difficult to establish – see De Vos chap VII for an outline. We have been applying many of them for a long time.

[9] How we have reached our present state is a matter of history. The Roman law, although containing several general affirmations of liability for unjustified

enrichment, did not evolve a general action. Nor did the mediaeval writers, although there are some who would challenge this statement. But there is a strong, if by no means unanimous, body of academic opinion that Grotius, influenced by Spanish jurists and theologians, had come to accept unjustified enrichment as an independent source of obligations, just as contract or delict were. The case for Grotius is persuasively stated in Feenstra's chapter 'Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: its Origin and its Influence in Roman-Dutch Law', contained in Schrage (ed) *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (1995) vol 15 at 197, in the *Comparative Studies in Continental and Anglo-American Legal History* series. Whether Professors Feenstra and Scholtens are right about Grotius need not be determined, because the latter has demonstrated quite convincingly, in my opinion, that by the 18th century the Hooge Raad had come to accept the existence of what we would call a general enrichment action, although the descriptions of it by individual Judges differed – see Scholtens 'The General Enrichment Action that Was' (1966) 83 *SALJ* 391 Feenstra (*op cit* at 228–35). The main reason why this development did not affect the evolution of Roman-Dutch law in Southern Africa, up to and including *Nortjé's* case, is that the decisions recorded by Bynkershoek and Pauw lay unpublished for two centuries and more. This reveals the weaknesses of a practice (that of Holland at the time) which did not require Judges to give full reasons for their decisions and which lacked systematic law reporting. We now know from the hard print that there is a common-law basis for the acceptance of a general enrichment action, at least one of a subsidiary nature. In this respect the decision of the majority in *Nortjé's* case at 139G–H has been shown by the then largely dormant authority to be clearly wrong.

The above-mentioned statement provides an accurate picture of the modern South African enrichment law:

- No general enrichment action exists, but only general requirements that underlie each specific enrichment act. The general requirements must be met in every case apart from the specific requirements of the individual actions.
- The existing actions can, and have been, extended to cover new situations.
- A general enrichment action may still develop, but only alongside the existing actions.

move away
from specific
actions

However, it is important to note the tendency in case law to move away from specific actions and their requirements, and to focus only on the general requirements involved. Eiselen and Pienaar state (*Unjustified enrichment* 3–4):

In a sense the approach of De Vos and the quest for a general enrichment action has created a mind-set where one is still very much inclined to think in action based terms when thinking about enrichment law. De Vos extracted some generally applicable principles underlying all of the enrichment actions recognised at that time and proposed that these general principles be used as the requirements for the general enrichment action, whether that action replaced the existing actions or merely augmented them. This quest for the general enrichment action however created a false approach to the development of enrichment law. In its sister disciplines, contract and delict, liability had already been transformed from the Roman action based approach to a principle based approach to liability. The real issue therefore is not the need for a general enrichment action but the need for a similar development in enrichment law where the liability will be based on general principles augmented

by more nuanced rules and exceptions to provide for public policy and correctives where needed.

The first steps towards a principled approach were given in Lotz's exposition of the law of unjustified enrichment in the *Law of South Africa* (see the original 1997 edition). For the first time Lotz stated the general principles extracted by De Vos from the various enrichment actions as prerequisites for any enrichment liability. These general principles had been applied by the courts for some time, but it was only with Lotz's exposition that a subtle paradigm shift took place and the focus became more and more directed on the general principles, rather than the specific actions although the latter still remained very much in place. This approach was finally adopted by the Supreme Court of Appeal in *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* [2003] 3 All SA 1 (SCA) par 16 to 17 without much ado. In *Glenrand MIB Financial Services (Pty) Ltd and Others v Van den Heever NO* [2013] 1 All SA 511 (SCA) the Supreme Court of Appeal simply states that that it is generally accepted that there is no general enrichment action but that there are a minimum of four general requirements that have to be met in all cases (par 16).

Although the general enrichment action has still not been recognised as presaged by Visser relying on the *McCarthy* case, two recent decisions of the SCA have raised further questions about general enrichment liability as neither of these cases referred to the requirements for any of the specific enrichment actions despite the courts of first instance doing so (see *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd intervening)* [2006] 4 All SA 120 (SCA) and the *Glenrand* case).

Both Visser and Du Plessis also argue that the scope of enrichment law is too limited at present and needs to be expanded to make provision for encroachment or abuse of rights from which a party has been enriched without necessarily impoverishing the other party.

It might well be the case that the Supreme Court of Appeal and the Constitutional Court will expand the scope of enrichment liability, under the influence of the Constitution and of Ubuntu, to just such situations.

ACTIVITY 1.2

Explain in your own words why unjustified enrichment is required as a corrective in our law. Your answer should not exceed 600 words (about two typewritten pages).

FEEDBACK

Review the differences between the law of contract and the law of delict and the basic requirements for unjustified enrichment. What are the basic underlying differences involved? Provide some practical examples in your discussion.

1.1.4 Development of general principles in South African law

The biggest development of the law of unjustified enrichment in South African law by the South African courts and commentators has been that of a number of general principles or requirements underlying all the various enrichment actions involved. Four requirements that must be met have been identified, namely:

- The plaintiff must have been impoverished.
- The defendant must have been enriched.
- The enrichment must have been *sine causa* or without legal cause.
- Causality – the enrichment must have been at the expense of the impoverished party.

In *St Helena Primary School and Another v MEC: Department of Education, Free State Province and Another* 2007 4 SA 16 (O) the court states:

[15] Although there is no general enrichment liability in our law, there are nonetheless basic requirements that must be met for relief to be granted under any of the recognised actions. These requirements are fully set out in *Lawsa (op cit)* at para 209. See also *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) ([2003] 3 All SA 1) at para [17]; *McCarthy Retail Ltd v Shortdistance Carriers CC* (*supra*) at para [15]. They are the following: (a) the defendant must have been enriched; (b) the plaintiff must have been impoverished; (c) the enrichment of the defendant must be at the expense of the plaintiff; and (d) the enrichment must be unjustified (*sine causa*).

The general principles, which are discussed in greater detail in study unit 2, provide the foundation for the aforesaid form of liability, setting it apart as a distinct discipline within the law of obligations. The principles concerned clearly distinguish enrichment liability from contractual and delictual liability. As you will remember from your study of contract and delict, certain circumstances exist where contractual and delictual liability may overlap, affording the plaintiff a choice or alternative grounds for his or her claim. Likewise, there are certain instances where delictual liability and enrichment liability may overlap, affording the plaintiff a choice of remedies. In principle, however, no instances occur where contractual liability and enrichment liability overlap. Where there is contractual liability, enrichment liability is naturally excluded, as a result of the *sine causa* requirement.

extent of liability

What the extent of a defendant's liability will be in a particular case will emerge from the discussion of the various enrichment actions, which follows later. In principle, the plaintiff is entitled to the amount by which he or she has been impoverished, or to the amount by which the defendant has been enriched, whichever is the lesser. The *quantum*, or extent, of enrichment is determined at the time of the institution of the action.

The above means that the defendant is not liable for benefits that he/she/it could have derived from the enrichment, but did not obtain (Gr 3 30 1 and 3 30 3; Voet 12 1 5; *Dilmitis v Niland* 1965 3 SA 492 (SR); De Vos 330–331).

The above also means that, where the defendant's enrichment is diminished or lost before the action is instituted, his or her liability is likewise reduced, or extinguished (*King v Cohen, Benjamin and Co.* 1953 4 SA 641 (W) 648–650 [hereinafter the *King* case]; *Govender v Standard Bank of South Africa Ltd* 1984 4 SA 392 (C) [hereinafter the *Govender* case]; *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 1 SA 242 (SCA) [252F]).

The defendant has to prove non-enrichment (*Le Riche v Hamman* 1946 AD 648; *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 1 SA 242 (SCA) [252F]). However, such reduction or extinction of liability is subject to the qualifications outlined below.

fixing of liability

A number of exceptions exist to the general rule that the enrichment is to be calculated at the time of lodging of claim. In such cases, the enrichment liability is

calculated with reference to an earlier date, with it remaining constant from that date onwards. Four such circumstances have been recognised in our law. Enrichment may be calculated

- from the moment that the defendant becomes aware of his or her unjustifiable enrichment at the expense of another
- from an earlier date, if the defendant should have realised that the benefit received might later prove to constitute an unjustified enrichment
- from the moment that the defendant falls into *mora debitoris*
- from an earlier date, if the enriched party acted in bad faith (*mala fide*)

**exception:
minors**

The qualifications set out above do not apply in the case of a minor who has been enriched by the performance directed towards him or her in terms of an unauthorised contract. The liability of such a minor remains restricted to the amount of his or her enrichment at the time of *litis contestatio* (D3 5 37pr; 4 4 34pr; Voet 3 5 8; *Edelstein v Edelstein NO and Others* 1952 3 SA 1 (A) [hereinafter the *Edelstein* case]; De Vos *Ongeregverdigde verryking* 336–337).

evaluation

The above-mentioned basic rules clearly show that the purpose of unjustified enrichment law, being to serve as a corrective, and to avoid the unfair and unjust enrichment of another, is compatible with the constitutional requirements of fairness and Ubuntu. The rules and exceptions create a fine balance between the interests of the enriched party and those of the impoverished party, firstly, when establishing if there should be any liability, and, secondly, when determining the extent of the enrichment obtained.

SELF-ASSESSMENT

- 0.1 Explain the need for the recognition of unjustified enrichment liability in any developed system of law.
 - 0.2 Explain why reference to Roman and Roman-Dutch law is still currently necessary when dealing with cases of unjustified enrichment liability.
 - 0.3 A and B have concluded a contract in terms of which A is selling her car to B for R50 000, although the car is only worth R25 000. Does B have an enrichment claim against A? Explain your answer in full.
 - 0.4 A has fraudulently induced B to pay an amount of R20 000 to him or her that B thought was owing, but which, in fact, was not due. Does B have an enrichment claim against A? Does B have any other kind of claim?
 - 0.5 A has paid an amount of R20 000 to B which was not owing. B has used the money to go on a dream holiday that she has, until now, been unable to afford. A is now claiming the money back by instituting an enrichment action against B. Does B have any defence?
 - 0.6 The State Student's Support Scheme has been paying an amount of R1 400 per month towards the subsistence of A, a student who is resident on the campus of University X. In July 2017, the SSSS mistakenly paid an amount of R14 million into A's account.
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FEEDBACK

- (1) See 1.1.2 above. Did you consider the difference of scope between enrichment, contract and delict in your answer? Did you explain the need with reference to practical examples?
 - (2) See 1.1.3 above. Did you consider that Roman and Roman-Dutch law are the sources for the greater part of our private law, including contract and delict? Did you consider the fact that the principle of unjustified enrichment is still underdeveloped in comparison with the principles of contract and delict, and that the former, therefore, remains closer to the original sources than are the latter two?
 - (3) Did you consider the fact that there is a valid contract in play, causing the profit (enrichment) made not to be unjustified?
 - (4) The question is fairly complex, because, under certain circumstances, delictual and enrichment liability may overlap, providing the impoverished party with a choice. In the case provided, the claim could be based on delict and on damages claimed, or, alternatively, on enrichment. Resorting to the delictual claim would usually be preferable, because full damages could be claimed, as well as consequential damages that are not overly remote. In contrast, with enrichment, only the amount of the enrichment could be claimed.
 - (5) Did you consider the fact that, although A has an enrichment claim in principle, the enrichment has been extinguished, which is a valid defence against A's claim?
 - (6) SSSS wants to reclaim the money from A. Do they have a claim, and, if so, for how much? Does the scenario perhaps depict a case of theft by A?
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STUDY UNIT 2

GENERAL REQUIREMENTS FOR ENRICHMENT LIABILITY

GENERAL REQUIREMENTS FOR ENRICHMENT LIABILITY			
Enrichment	Impoverishment	Causality (at the expense of)	<i>Sine causa</i>

OVERVIEW

Study unit 1 gave you an overview of unjustified enrichment liability. We will now deal with the subject in greater detail. Although South African law does not recognise a general enrichment action of the kind that will be discussed in relative detail in study unit 15 (see *Nortjé en 'n Ander v Pool* NO 1966 3 SA 96 (A) [hereinafter the *Nortjé* case]), nonetheless, certain general requirements exist for any action based on enrichment that have been recognised in terms of South African law. In this study unit, you will study such general requirements.

PRACTICAL SCENARIOS

The examples given below provide practical scenarios that will prove relevant in terms of the discussion and questions provided in this study unit. You will find such scenarios throughout your study guide, for you to consider. However, do not try to answer the questions in full as yet. Keep them at the back of your mind while reading through your prescribed material and the study guide. Doing so will make the abstract concepts discussed here fairly easy for you to absorb.

- scenario 1 A concluded a contract with B for the sale of a stud bull, Spartacus, for R100 000. B paid a deposit of R10 000 at the time of the signing of the contract. However, unbeknown to both A and B, Spartacus had died on the day before the conclusion of the contract. Can B reclaim the deposit paid?
- scenario 2 C concluded a contract with D, in terms of which D was to paint the exterior of C's house for R20 000 while C was on holiday. As a result of a mix-up in addresses, D painted the house belonging to E, who was also on holiday during the period. E's house also seemed to require a fresh coat of paint. Can D claim anything in the above regard from either C or E?
- scenario 3 F is renting a farm from G. F has concluded an agreement with H to repair the fences on the farm at a cost of R40 000. H has carried out the repairs. In the meantime, F has absconded and is nowhere to be found. Can H claim anything from G?

- scenario 4 I has concluded an agreement with J for the sale of her second-hand car, at a price of R50 000. The market value of the car is only R30 000. Can J claim the difference from I?
- scenario 5 K has stolen L's laptop computer from his office and has sold it to M for R2 000. Can L claim anything from either K or M? What would the basis of the claim be if such were to be the case?

LEARNING OUTCOMES

After completing this study unit, you should be able to

- indicate, with reference to case law, whether the defendant has been enriched and the plaintiff impoverished
- explain, with reference to an example, what favourable and detrimental side-effects are
- explain, with reference to an example, what "indirect enrichment" means
- briefly discuss the importance of the following decisions in respect of the "at-the-expense-of" requirement:

Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970 3 SA 264 (A)
Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and Another 1996 4 SA 19 (A)
Gouws v Jester Pools (Pty) Ltd 1968 3 SA 63 (T)

- describe the *sine causa* requirement with reference to case law
- explain what the impoverished party is entitled to claim by means of the bringing of an enrichment action, and how the extent of the enrichment claim is calculated
- apply the general principles to practical examples

RECOMMENDED READING MATERIAL

De Vos W "Enrichment at whose expense? A reply" 1969 SALJ 227–230
 Eiselen S & Pienaar G *Unjustified enrichment: a casebook* 4th ed (LexisNexis Butterworths Durban 2016) 29–82
 Lotz G *The law of South Africa* Vol 9 2nd ed (LexisNexis Butterworths Durban 2005) paras 207–209
Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970 3 SA 264 (A)
Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and Another 1996 4 SA 19 (A)
Gouws v Jester Pools (Pty) Ltd 1968 3 SA 63 (T)
Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 3 All SA 1 (SCA)
McCarthy Retail Ltd v Shortdistance Carriers CC 2001 3 SA 482 (SCA)

ADDITIONAL READING MATERIAL

De Vos W *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (Juta Cape Town 1987) 340–343
 Du Plessis J *The South African law of unjustified enrichment* (Juta Cape Town 2012) 151–160
 Scholtens JE "Enrichment at whose expense?" 1968 SALJ 369–372
ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers 1998 1 SA 939 (C)
Auby and Patellides (Pty) Ltd v Glen Anil Investments (Pty) Ltd 1960 4 SA 865 (A)
Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and Another 1996 4 SA 19 (A)
Odendaal v Van Oudtshoorn 1968 3 SA 433 (T)

Singh v Santam Insurance Company Ltd 1997 1 SA 293 (A)
Standard Kredietkorporasie v Jot Motors h/a Vaal Datsun 1986 1 SA 223 (A)
Wynland Construction (Pty) Ltd v Ashley-Smith en Andere 1985 3 SA 798 (A)

2.1 INTRODUCTION

general requirements

Liability for unjustified enrichment is based on a movement of assets, whereby the plaintiff is impoverished, the defendant is enriched, and a legally relevant relationship exists between the two facts. The relationship is usually expressed in the form of a statement that the defendant must have been enriched at the expense of the plaintiff. Furthermore, the enrichment must be unjustified, or *sine causa*.

If the above conditions are present, an enrichment claim is recognised, unless the law denies the plaintiff his or her claim in a particular case.

amount or quantum

The amount of the award is calculated according to the enrichment of the defendant or the impoverishment of the plaintiff, whichever is the smaller enrichment at the relevant time, which is usually the moment when the action is instituted.

retransfer of property

However, where property has been transferred, the impoverished party is entitled to the retransfer of the property if it is still in existence and owned by the enriched party. Only in cases where the property cannot be retransferred is the impoverished party entitled to payment for the value of the enrichment, or the impoverishment, whichever the lesser.

contract, delict and enrichment

You have to distinguish clearly between the liability that arises from unjustified enrichment, and that which arises from contract and delict:

- Where there is a valid and enforceable contract between two parties, the liability to perform has its basis in the agreement made between the parties.
- Where a party has suffered damages as a result of the delictual conduct of another party, the ensuing liability has its origin in the unlawful and guilty conduct of the latter party.
- Unjustified enrichment liability depends neither on agreement, nor on unlawful conduct, but simply on the fact that value has been transferred from the patrimony of one party to that of another. No valid legal reason underlies or supports such transfer.

ACTIVITY 2.1

Consider the five scenarios given above, and consider whether liability in each case should be based on the grounds of delict, contract or unjustified enrichment.

FEEDBACK

scenario 1

What is the consequence of initial impossibility for the existence of a contract? Is there a contract in this case, or is the contract void?

scenario 2

Does any agreement between D and E enable E to claim payment? Must E still perform its contract with C? Is E's house now worth more as a result of the work done by D?

scenario 3	Does a contractual relationship exist between G and H? Has G benefitted from the work done by H? What of the contractual relationship between H and F? Must H sue F in the form of a contract?
scenario 4	Is there any reason for concluding from the facts that the contract is void? If so, J should not be able to reclaim anything. J has made a bad bargain, but he or she is bound by it.
scenario 5	K's conduct is clearly unlawful, and L would be better advised to sue in delict than through attempting to pursue an unjustified enrichment action. Why? Can K use the <i>actio rei vindicatio</i> to reclaim the property from M, even though M might have acted <i>bona fide</i> ?

2.2 GENERAL REQUIREMENTS FOR ENRICHMENT LIABILITY

2.2.1 The defendant must be enriched

enrichment	Enrichment may take the form of: (a) an increase in the defendant's assets that would not have occurred had the enriching fact not taken place; (b) a non-decrease in his or her assets, where a decrease would have taken place, but for the enriching fact (<i>Brooklyn House Furnishers Ltd v Knoetze & Sons</i> 1970 3 SA 264 (A) [hereinafter the <i>Brooklyn House</i> case]); (c) a decrease in the number of liabilities that would not have taken place (<i>Guarantee Investment Corporation Ltd v Shaw</i> 1953 4 SA 479 (SR)); or (d) a non-increase in the liabilities that would have taken place. The enrichment must still exist in the patrimony of the enriched party at the time of lodging of the claim. The enrichment may consist either of the thing or the value received. The thing, for instance, may consist of either the painting that was transferred or the money that was paid. The substitute value may be supplied where the painting was subsequently sold, or where the money was used to buy something else.
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Example

Assume that A pays B an amount of R12 000 that is not owing, and B uses the amount to buy household necessities that she consumes within a month. At a later stage, A institutes an action against B for R12 000. The question then arises as to whether B is still enriched by the amount. It is immediately obvious that B's estate, at this stage, is no bigger than it was before she received the R12 000. In other words, B's assets have not increased. However, if B had not received the R12 000 from A, she would have had to use R12 000 of her own money to buy the household necessities. Clearly, B's assets would then have decreased. Such a decrease did not, however, occur, because of the R12 000 that she received from A. A should, consequently, succeed in her action. In this case, B's enrichment, consequently, takes the form of expenses saved.

Example

Assume that A makes a payment to B of R150 000 that was not owing. B uses R5 000 of the amount to buy household necessities and, with the balance of R145 000, she buys a car that she would not have bought had she not received the R150 000 from A. At a later stage, A institutes an action against B. B is once more enriched by the R5 000 that she spent on household necessities, with her enrichment again taking the form of expenses saved. The R145 000 that she spent on the car does not, however, constitute saved expenses, as she could not have bought the car without the money that she erroneously received. Assume at the time of *litis contestatio* that the car has a value of R120 000, which constitutes an increase in B's assets. A should, therefore, succeed in recovering the amount of $R5\,000 + R120\,000 = R125\,000$.

potential benefit

The examples given above relate to the acquisition of a benefit with a monetary value. The financial position of the estate of the defendant at the relevant time is compared with the financial condition in which the estate would have been at the relevant time, if the fact causing the enrichment had not occurred. Until a potential benefit is received as an actual benefit, it does not constitute enrichment. Even where the defendant has knowingly neglected to appropriate, or to acquire, a potential advantage, he or she is not enriched by the potential benefit that he or she did not acquire.

In the normal course of events, it is relatively easy to determine whether a defendant has been enriched, and by how much. However, as in every other field of law, there might be some extraordinary facts that make it extremely difficult to decide on whether there has been any enrichment at all of the defendant, or what the amount of his or her enrichment was.

Example

Take the facts of the *Nortjé* case, for instance, where the plaintiffs, who were prospectors, had, through their own efforts, discovered a rich deposit of porcelain clay on the defendant's farm. A question that arose for decision was whether the discovery of the clay had enhanced the value of the farm itself. In the court *a quo*, Van Winsen J took the view that it was not the discovery of the clay, but its presence, that determined the value of the farm. Therefore, the defendant had not been enriched by the prospectors' efforts (*Nortjé v Boedel Pool* 30 September 1965 (C) unreported).

The above line of reasoning is unconvincing. The mere presence of the minerals did not enhance the value of land, but the knowledge of their presence did. When someone makes such knowledge available, an increase in the market value of the land follows on, both economically and juridically, from his or her own efforts (according to the judgment of Rumpff CJ in the *Nortjé* case (at 122–123)).

moral benefits: the *Tanne v Foggitt* case

Another question that has already engaged the attention of a Provincial Division is whether a person's estate can be enriched by means of "moral" benefits. In *Tanne v Foggitt* 1938 TPD 43, a minor, who had contracted to receive typewriting lessons, was held not to be liable *ex contractu* for the price of all the lessons concerned, but could only be liable for the benefits (in *casu* the lessons) actually received. In such a case, the action against him was regarded as only being permissible based on enrichment

alone. The case, therefore, seems to serve as authority for the proposition that such “moral” benefits can constitute enrichment.

The above judgment appears to have been wrong. In our view, the result of enrichment must be an increased estate, and as “moral” benefits cannot increase one’s estate, they cannot, therefore, constitute enrichment. Some support for the above view is given in the *Edelstein* case, in terms of which Van den Heever JA expressed the view (at 13) that “no latinist would have used the word (*locuples*) to connote some vague, intangible and imponderable advantage”. De Vos’s view, however, is that, in an appropriate case, invisible or intangible personal benefits may be regarded as enrichment (De Vos 329–330).

use of a
thing

The question as to whether the use of another’s thing constitutes enrichment has not yet been settled in our law. In principle, it should be possible for such use of a thing to constitute enrichment (see De Vos 264–270 and the discussion of the position of occupiers of land in study units 12–13). In *Lodge v Modern Motors Ltd* 1957 4 SA 103(SR), for instance, the court appears to have been willing to allow the value of the use of a vehicle to be taken into account for purposes of calculating the enrichment and impoverishment of the parties concerned. The issue remains unsettled, however.

ACTIVITY 2.2

Consider practical examples 1 to 4 at the start of this study unit. Explain which party, if any, has been enriched, and to what extent.

FEEDBACK

See the feedback at the end of this study unit for a detailed explanation of the above.

2.2.2 The plaintiff must be impoverished

impoverishment

As has already been stated, the *quantum* of the plaintiff’s claim is the amount by which he or she has been impoverished, or the amount by which the defendant has been enriched, whichever is the lesser amount. The above means that every enrichment action must embrace an inquiry not only into the extent of the defendant’s enrichment, but also into the extent of the plaintiff’s impoverishment. Such impoverishment may be constituted by:

- (a) a decrease
- (b) a non-increase in assets
- (c) an increase
- (d) a non-decrease in liabilities

The rules that apply in determining the defendant’s enrichment apply, with the necessary adjustment, in determining the plaintiff’s impoverishment.

favourable and
detrimental
side-effects

Before proceeding to the third requirement for enrichment liability, we would like to make one further observation about the first two requirements above: in a fully developed enrichment action, all favourable and detrimental side-effects of the enriching fact or event ought to be taken into account in determining the defendant’s enrichment and the plaintiff’s impoverishment.

When speaking of the favourable or detrimental side-effects of the enriching fact, we wish to indicate the effects that either increase or decrease the amount of the defendant's actual enrichment, or that decrease or increase the amount of the plaintiff's actual impoverishment. Such side-effects do not flow directly from the enriching fact, but are, nonetheless, connected to it. The side-effects may take many different forms.

Example

A and B enter into a lease of land, with A as the lessor and B as the lessee. Although the agreement is void for some reason, B remains in possession of the land for three years. She constructs certain buildings, costing her R180 000, on the land and they enhance the value of the land by R160 000. When A evicts her from the land, B claims compensation for the improvements that she made to the land. The claim by B is, of course, based on enrichment. At first glance, it would appear that A has been enriched by

R160 000 and B impoverished by R180 000, so that B should succeed in an action for R160 000. Related to the enriching fact, however, are various side-effects. In the first place, A lost possession of her land for three years. If the value of her possessory interest for three years was R130 000, this detrimental side-effect reduces A's actual enrichment to

R30 000. Secondly, B had possession of the land for three years, and, for that period of time, had the use and enjoyment of the land. If the value of such use and enjoyment was R120 000, this is a favourable side-effect that reduces B's impoverishment to R60 000. B should, therefore, succeed in an action for R30 000.

We started off by saying that a fully developed enrichment action should take account of all favourable and detrimental side-effects of the enriching fact. However, when you study the various enrichment actions that exist in South African law, you will find that, whereas some side-effects are taken into account, others are ignored. The result is that the actions cannot be described as fully developed actions at this stage.

Let us now consider the third requirement for enrichment liability.

ACTIVITY 2.3

Consider the practical scenarios 1 to 5 at the start of this study unit. Explain which party, if any, has been impoverished, and to what extent.

FEEDBACK

See the feedback at the end of this study unit for a detailed exposition of the above.

2.2.3 The defendant's enrichment must have been at the expense of the plaintiff

causal link
between
enrichment and
impoverishment

If a defendant is to be held liable for enrichment, it is not sufficient that he or she has been enriched, and that the plaintiff has been impoverished. A causal link must also exist between the enrichment and the impoverishment concerned. The above is expressed by saying that the defendant's enrichment must be at the expense of the plaintiff. Normally, the requirement involved causes little difficulty, as, in most cases, the causal link between the different elements is obvious. Problems have, however, arisen in cases of indirect enrichment. In certain such cases, A and B enter into a contract, in terms of which A renders performance to B, but the benefit of the performance accrues to C.

Example

- (a) A enters into a contract with B to build a swimming pool for B on a residential stand that A believes to be B's property, but which, later, turns out to be the property of C.
- (b) A contracts with B to repair a car that A believes to be B's, but which turns out to be C's.
- (c) A (as the subcontractor) contracts with B to supply the roof of a house that B is building for C.

The question, in each of the above cases, is whether C can be said to have been enriched at A's expense, if B fails to render performance to A.

analysis

Obviously, if B renders performance to A, that is, if B pays A for the work involved, C will be enriched at B's expense, and not at A's. Clearly, in addition, the position must be the same where B has not yet paid A, but where B is able to do so, and A is able to enforce his contractual action against B. Does it make a difference, then, if B becomes insolvent, and is unable to pay A, or if B disappears, so that A is unable to enforce the contract against her?

De Vos

De Vos's view is that the fact that B is a penniless person cannot affect the juridical relationship between A and C, and that, in all our examples, C is enriched at B's expense, and not at A's. The result is that A cannot bring an enrichment action against C.

Gouws v Jester Pools

The above-mentioned view was endorsed by the Transvaal Provincial Division in *Gouws v Jester Pools (Pty) Ltd* 1968 3 SA 653 (T) (hereinafter the *Gouws* case). The facts, in the above case, were that A had built a swimming pool for B in terms of a contract between himself and B, and on land that he believed belonged to B, but which was, in fact, the property of C. After B disappeared from the scene without first having paid A for the building of the pool, A brought an enrichment action against C. The action concerned failed, with Jansen J holding that C had been enriched at B's expense, and not at A's.

criticism of
Gouws

The views expressed by De Vos (and endorsed by the *Gouws* judgment) are not shared by everybody, however. Van der Walt, Scholtens and Van Zyl are all of the view that, in the circumstances of the *Gouws* case, C was, indeed, enriched at the expense of A, and that A's action should, therefore, have succeeded. Van der Walt's (1966 *THRHR* 220–222) view is that the at-the-expense-of requirement is satisfied once assets have

been directly transferred from A's estate to that of C. What Van der Walt means by a "direct transfer" is that the assets pass directly from A to C, and not from A to B, and then from B to C, that is, not via the estate of an intermediary person. Let us illustrate the above situation by means of the following two examples:

Example

Assume that B and C enter into a contract in terms of which B undertakes to build a swimming pool for C. B then engages A to do the work. A uses his own materials to do the work. The moment that A has completed the pool, C becomes owner thereof by *accessio* – the ownership of the materials involved, therefore, passes directly from A to C, satisfying the at-the-expense-of requirement, in Van der Walt's view. In the legal expert's view, should A now be unable to obtain payment from B, A should succeed in an enrichment action levelled against C. (If B does pay A, A will, of course, not be impoverished, and therefore will have no action against C.)

Example

Assume, once again, that B and C enter into a contract, in terms of which B undertakes to build a swimming pool for C. B then orders the materials for the pool from A, who supplies the materials to B. Thereafter, B uses the materials to build the pool. C once again becomes owner of the materials by *accessio*, but, in this case, the materials do not pass directly from A to C. Instead, they pass from A to B, and then from B to C, so that the at-the-expense-of requirement is not satisfied.

Buzzard Electrical

The above-mentioned problem was authoritatively addressed by the Appellate Division in the *Buzzard Electrical* case. Even though the case was decided with reference to the third requirement, being the *sine causa* requirement, the court made a very important distinction between the following two situations:

- (a) where A effects improvements to the property of an owner, not pursuant to a contract with the owner but pursuant to a contract with B and A then sues the owner for enrichment (as was the case in the Gouws case); and
- (b) where the owner contracts with B for improvements to his or her property, and B subcontracts the job to A. Once A has completed the work A sues the owner (with whom she never entered into a contract) on the basis of enrichment liability.

According to the Appellate Division, the answer to the above-mentioned problem depends on the answer to a further question, namely, whether the owner has been unjustifiably enriched. In other words, the third requirement for enrichment liability is then applicable (see 2.2.4 for the rest of the decision).

The court in the *Buzzard Electrical* case makes it clear that the case deals with the second situation, *ie* with the subcontractor situation. In the case of the subcontractor, no enrichment claim exists, because the various relationships between the owner, the main contractor and the subcontractor are all regulated by contract. The owner is not enriched because he or she owes a contractual debt to the main contractor

for the improvements made. The subcontractor is not unjustifiably impoverished, because he or she has a contractual claim against the main contractor.

The court did not decide on the first type of situation described above. The *Buzard Electrical* case decision cannot, therefore, be used either to confirm or to reject the *Goums* case decision. (See, however, the decision made in *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 1 SA 939 (C) [hereinafter the *ABSA Bank v Stander* case], as discussed in study unit 8.)

right of retention

Your study of the law of property clearly showed that, in certain circumstances, where one person has expended his or her money, materials or labour on the preservation, or improvement, of another's property, such person can retain possession of the property, until he or she has been compensated for such. He or she is then granted an enrichment lien (right of retention) that operates against anyone involved, including the owner.

example

An example of such a case is where a *bona fide* possessor has effected improvements to another's land. All the requirements for enrichment liability would be expected to have to be present before a defendant can exercise an enrichment lien, meaning that there would have to have been unjustified enrichment at the expense of the person who is exercising the lien. In other words, one would expect that the requirements that would provide the basis for an enrichment lien would have to be exactly the same as those that would provide the basis for an enrichment action in the same circumstances.

Brooklyn House

In the very important case of the *Brooklyn House* case, however, the Appellate Division allowed for an enrichment lien to have taken place in circumstances closely analogous to those in which an enrichment action was refused in the *Goums* case, without, however, overruling the findings of the latter case. Instead, the court distinguished the case, on the grounds that the *Goums* case was concerned with an enrichment action, whereas the *Brooklyn House* case was concerned with an enrichment lien.

facts

The facts in the *Brooklyn House* case were as follows: B bought certain furniture on hire purchase from C. The contract was a normal hire-purchase contract, in terms of which C reserved the ownership of the furniture until the payment of the final instalment. The contract further prohibited B from storing the furniture with anybody but C. B, in breach of the prohibition, entered into a storage contract with A, who stored the furniture in her warehouse. When C subsequently cancelled the hire-purchase contract, C brought a *rei vindicatio* against A to recover her furniture. A contended that he had a lien over the furniture until he was paid for the storage, which contention was upheld by the Appellate Division.

McCarthy

In the *McCarthy* case, the Supreme Court of Appeal in an *obiter* (non-binding) discussion clearly indicated that it would reject the *Goums* approach in instances of indirect enrichment, and that it would adopt a more pragmatic approach, as contended for in the *Hubby* case.

The court states:

[21] Of more immediate interest are the remarks made in *Buzgard* about the “type one” case, with which the subcontractor “type two” case was contrasted (at 25H–26A and 27D–E). Type one arises (I take the most typical example) when A contracts with B to improve property of another (the owner) and A claims from the owner for his or her enrichment, B having disappeared or gone insolvent. Van Heerden JA found it unnecessary to make a finding on the “type one” situation and assumed for the sake of argument that an action would lie in such a case (*Buzgard* (*supra*) at 27C). A sharp dispute of opinion underlies this assumption. In a long-standing series of decisions in type one or analogous situations, among which may be mentioned *United Building Society v Smookler’s Trustees and Golombick’s Trustee* 1906 TS 623 and *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* 1970 (3) SA 264 (A), it has been held that a type one improver may exercise an enrichment lien against the owner in order to procure payment of his or her necessary and useful expenses. But in *Goums v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T), a Transvaal full bench held that the improver in a comparable situation had no action, because, such was the reasoning, the enrichment of the owner had not been at the expense of A (the plaintiff) but at the expense of B, as the enrichment flowed from the performance by A of a contract with B. This reasoning, of which he was a long-time proponent, was welcomed by De Vos 343 and 350–1.

[22] The result was that the defensive remedy of a lien was available but not its counterpart of action. The attempt in the *Brooklyn House* case (*supra*) to reconcile this anomaly was stigmatised in *Buzgard* at 26I–L as wrong. Neither a lien nor an action can exist without an underlying liability for unjust enrichment, so that they were either both good or both bad (at 26J–27B). See also *Singh v Santam Insurance Ltd* 1997 (1) SA 291 (A) at 297D–E.

[23] Either *Goums v Jester Pools* (*supra*) must go, or many or all of the long list of cases represented by the *United Building Society* case (*supra*) must go, or so it seems to me. De Vos 347, 351 expresses concern that the heresy (as he sees it) embodied in the lien cases may yet contaminate the action cases, leading to the jettisoning of the “at the expense of” requirement in both situations. The case before us does not require us to decide the question [of] which line of approach is to be accepted. De Vos himself expresses disquiet, in at least some situations, in which the improver does work and cannot recover, whilst the owner holds the improved goods without being liable to anyone (351–2). For myself I think there is much to be said for the justice of the lien cases, an unsophisticated justice though it may be, but with which we have lived for a long time. A improves a car at the instance of B, wrongly believing him or her to be owner. C claims the car by virtue of his or her ownership. Is C to get it scot-free? Or is C to first pay A the necessary and reasonable expenses; A’s claim being moderated by the increase in market value cap, by the limitation to expenses to the exclusion of the market price, and by the operation in the last resort of the *jus tollendi* (the right to compel removal of materials)? The question whether C is enriched at the expense of A or of B in the example given, is in any event a matter of semantics (I do not dispute that the manner in which the question is answered can have practical consequences). When A improves C’s vehicle the ownership in the improvements passes at once to C’s estate by accession and it seems to me to pass there directly from A’s estate. Is it not a fiction that it passes through the estate of B, even though A owes a contractual obligation to him or her to effect the repairs? (Cf Bregstein

Ongegronde Vermogensvermeerdering (1927) 218.) Or take a case of necessary expenses – *Acton v Motau* 1909 TS 841. By keeping Motau's donkeys alive and well in putting them to graze on his land, Acton there and then enriched Motau, and had he established that in so doing he had incurred expense, instead of turning them into a field of withered grass which would soon have been burned, he would have established his lien and his right to compensation. Innes CJ and Bristowe J found no difficulty in the fact that there was a B in the case – that Acton had come into possession of the donkeys under a contract of pledge with one Jonas, so that Acton was obliged to look after them. The fact that Acton was *mala fide*, in that he knew that Jonas's title was disputed, does not affect the matter.

ACTIVITY 2.4

Consider practical scenarios 2 and 3 at the start of this study unit, in the light of the principles and differing points of view discussed in this section. Formulate your own reasoned point of view in respect of indirect enrichment situations.

FEEDBACK

scenario 2	This scenario does not deal with a case of indirect enrichment. The painter mistakenly painted the wrong house. How does the scenario differ from the facts in the <i>Gouws</i> case? See also the feedback provided at the end of the study unit.
scenario 3	The propositions presented in this scenario are quite similar to those that were presented in the <i>Gouws</i> case. In your answer, you have to consider the approach taken in the various decided cases, namely in <i>Gouws</i> , <i>Buzzard Electrical</i> and <i>Hubby's Investments</i> . However, you have also to consider the viewpoints of the different writers concerned before formulating a conclusion of your own.

2.2.4 The enrichment must have been *sine causa* (unjustified)

reason for <i>sine causa</i> requirement	If the mere fact that one person was enriched at the expense of another were to form the basis for the taking of an enrichment action, the concept of liability would be so broad as to put a stop to all commercial transactions, because no-one would then be allowed to make a profit at the expense of another. A limiting factor is, therefore, required to restrict liability to cases where it would be inequitable to allow a person to retain the benefits that he or she has obtained at the expense of another. This limiting factor is the requirement that the enrichment must be unjustified (<i>sine causa</i>).
definition by <i>Van der Walt</i>	Van der Walt (1966 <i>THRHR</i> 222) offers the following definition of the requirement: Enrichment is, in principle, <i>sine causa</i> if there is no obligation in existence between the enriched person and the impoverished person in terms of which the enriched person could lay claim to the transfer of the assets concerned (own translation).
criticism by <i>De Vos</i>	The above-mentioned definition does not satisfy De Vos completely, as he contends (at 355) that it implies that the only justification for the enrichment of a person can be the existence of an obligation between that person and the impoverished person. The above would mean that, where a person receives performance from another in terms of an order of court, for example, or where he or she becomes the owner of another's property through prescription, he or she would have to be regarded as

having been unjustifiably enriched at the expense of that other, as in neither case was there an obligation between him or her and the other person. In neither of the cases presented does our law regard the receiver as having been unjustifiably enriched, however – in the one case, the order of court justifies the transfer of the assets, and, in the other case, the rules relating to prescription do so.

definition by
De Vos

De Vos, therefore, defines the *sine causa* element (at 353) as follows: Enrichment is unjustified when there is no sufficient legal ground for the transfer of value from one estate to another, or for the retention of such value (as in the case of the second estate) (own translation). De Vos's definition would seem to cover every possible case.

ACTIVITY 2.5

Consider practical examples 1 to 5 at the start of this study unit, and explain whether the *sine causa* requirement has been fulfilled in each case given.

FEEDBACK

The *sine causa* requirement deals with the underlying legal ground for the transfer of property or value. If there is such a ground, for instance, if there is a contract, prescription or court order in existence, then the transfer is not *sine causa*. Using your knowledge of the law of contract, delict and property law, decide in each case whether or not there is an underlying *causa*.

Scenarios 1 to 3 provide examples of transfers that were *sine causa*, whereas scenario 4 does not. In scenario 5, no transfer of ownership takes place, because the goods involved were stolen. The use of the *actio rei vindicatio*, or of a delictual claim, would, therefore, be more appropriate in such an instance.

2.2.5 Practical examples from case law

*Greenbill
Producers v
Benjamin*

Although the *sine causa* requirement is relatively easy to discern in practice, the courts have, on occasion, battled with the issue. In *Greenbills Producers (Pty) Ltd v Benjamin* 1960 4 SA 188 (E), for instance, the facts were the following:

facts

The plaintiff company had entered into a contract with the defendants, in terms of which the defendants were to buy a number of sheep, which were to be kept on the company's land. The profit from the sale of the sheep was to be divided between the company and the defendants, on a fixed basis. The company was provisionally wound up, upon which the contract between it and the defendants fell away, a fact of which both parties were ignorant at the time.

the claim

At a later date, the company demanded that the defendants remove their sheep from its land, which the defendants did, but only after a considerable lapse of time. The company then brought an enrichment action against the defendants, based on the use of the land by the defendants from the date that the contract ceased to exist until the date of the removal of the sheep.

decision

In the above case, Van der Riet J had to decide, in effect, whether the defendants' enrichment was unjustified (*sine causa*). In the above regard, he held: "Prior to this date [ie the date on which the company demanded that the sheep be removed] any

enrichment which the defendants received was not unjust, but was the natural result of the parties' joint error, and the principle could not apply." In other words, because both parties had been labouring under the mistaken belief that the contract was still valid, the enrichment was not *sine causa*.

**criticism of
*Greenhill***

Van der Riet J's view of the *sine causa* requirement shows a lack of insight into the nature of the requirement. Whether enrichment is *sine causa* or not does not depend on such subjective factors as a mistake being made on the part of the parties concerned; it depends on whether, viewed objectively, there was a legal ground on which to justify the enrichment. In this case, there was no such ground, since the contract between the parties had fallen away on the provisional winding up of the company. Whether or not the parties were aware of this fact was irrelevant. Whether a *causa* exists is a question of fact; it does not depend on what the parties involved might think.

***Dugas v
Kempster
Sedgwick***

In *Dugas v Kempster Sedgwick (Pty) Ltd* 1961 1 SA 784 (D), Henochsberg J made the following statement: "Enrichment of the purchaser as a result of the *bona fide* use of the article of which he or she has been placed in possession pursuant to an invalid agreement of sale is not unjust enrichment." If the contract is invalid, there is, of course, nothing to justify the purchaser's use of the article. The fact that the article was placed in the purchaser's possession can only indicate that possession was not acquired unlawfully; it does not justify the enrichment that the purchaser might have derived from the use of the article.

***Auby and
Patellides v
Glen Anil
Investments***

The *sine causa* requirement was interpreted correctly in *Auby and Patellides (Pty) Ltd v Glen Anil Investments (Pty) Ltd* 1960 4 SA 865 (A). In this case, A had bought some land from B. The contract provided for its cancellation by B, should A fail to pay the instalments promptly. It further provided that, in the event of such a cancellation, A would be entitled to no compensation for any improvements that he might have made to the land.

After A had erected certain buildings, he fell into arrears with his payments, leading to B cancelling the contract. A then claimed compensation for the buildings erected. Schreiner JA held (correctly) that the enrichment was not *sine causa*; the *causa* for the transfer of the buildings was, of course, the contractual provision that B need not pay compensation for improvements in the event of cancellation.

***Buzzard
Electrical***

In the *Buzzard Electrical* case, the owner had contracted with a developer to make improvements to his property. The developer had subcontracted part of the work. After the subcontractor had completed the work, the developer was sequestered prior to the making of the payment. The subcontractor then instituted a claim against the owner, based on unjustified enrichment.

The Appellate Division decided that the owner had received nothing more than that for which he had contracted with the developer. Therefore, in this case, the enrichment of the owner was not *sine causa*; in fact, the contract with the developer was the *causa* for his or her enrichment. The subcontractor could obviously have enforced its contractual rights against the developer, and, if they had turned out to be illusory, due to the insolvency of the developer, it would have been an unhappy coincidence, but one that did not render the owner's enrichment unjustified. The owner, in any event, remained liable to the insolvent estate for payment for the work that had been done, so that it would, therefore, not have been enriched.

terminology

Some of the confusion that has occasionally arisen in connection with the *sine causa* element derives from the fact that unjustified enrichment is sometimes taken to

mean unjust, or unfair, enrichment. The result of the holding of such a view is that the true meaning and content of the concept of unjustified (*sine causa*) enrichment becomes obscured, and is replaced by such a vague concept as unfair enrichment, which has no specific content. For the sake of the future development of our law, absolute clarity is required about the meaning of the basic concepts of the law of enrichment, and, in particular, about the *sine causa* requirement.

2.3 NATURE AND EXTENT OF ENRICHMENT CLAIMS

retransfer of ownership

A claim that is based on unjustified enrichment is, first and foremost, a claim to have the specific item concerned transferred in ownership, or for the occupation or possession to be retransferred to the original owner, occupier or holder. For instance, where a horse is transferred in ownership to another person in terms of an invalid contract, the ownership passes to the supposed buyer, as a result of the operation of the abstract principle of transfer of ownership that applies in South Africa. In terms of the unjustified enrichment claim, ownership is then retransferred to the original owner.

residual value

However, where the new owner has, in turn, sold the horse on to a third party, the ownership of the innocent third party is protected, and no claim may be made against it. In such a case, the enrichment claim is aimed at claiming the value that is still left in the estate, or in the patrimony, of the enriched party.

practical example

If the horse was sold at R150 000, and the contract price had not yet been paid, and the new owner had then sold the horse on to an innocent third party for R140 000, the original owner would only be able to claim the residual value involved, namely R140 000.

increased enrichment liability

In general, the enrichment liability of a party is fixed, or calculated with reference to the date on which the enrichment action was lodged (*at litis contestatio*). A number of circumstances exist, however, where the enrichment liability of a party is fixed at an earlier date than that of the lodging of the claim: actual knowledge; implied knowledge; *mora debitoris* and *mala fide* conduct.

actual knowledge

From the moment that the defendant becomes aware that he or she has been unjustifiably enriched at the expense of another, his or her liability is reduced or extinguished only if he or she can prove that the diminution, or loss, of his or her enrichment was not his or her fault.

He or she must, therefore, prove that the loss or destruction would have taken place in any event. Where the enriched party is negligent as to the cause of the loss or destruction, he or she remains liable for the original amount with which he or she was enriched at the time that he or she became aware of such enrichment.

If the defendant should have realised that the benefit that he or she received might later prove to constitute an unjustified enrichment, his or her liability is once again reduced or extinguished only if he or she can prove that the diminution, or loss, of his or her enrichment was not his or her fault.

If there is reasonable suspicion in the mind of the enriched party that the performance received might not be owing, namely that he or she has been enriched unjustifiably, an onus rests on the party concerned to preserve the enrichment. His or her enrichment is again pegged to the date on which he or she should have become aware of the

**implied
knowledge**

enrichment, that is when a reasonable person would have realised, or suspected, that he or she had been, or might have been, enriched. Thus, where the impoverished party has given notice of the unowed performance, or has made an attendant demand, there will have been actual or implied knowledge of the enrichment on the part of the enriched party.

***mora
debitoris***

From the moment that the defendant falls into default (*mora debitoris*), his or her liability is reduced or extinguished only if he or she can prove that the event that diminished or extinguished his or her enrichment would also have operated against the plaintiff, if the retransfer had been made timeously. The above is so due to the operation of the rule that default perpetuates the obligation.

A distinction must be made between *mora* (default) in the above-mentioned context, where it leads to the actual or implied knowledge of the enrichment on the part of the enriched party, and *mora*, for the purposes of payment of interest. In enrichment cases, a party only falls into *mora* when there has been an actual demand for the retransfer of the thing, or for the repayment of the amount of money, or value, involved.

In the second sense, *mora* only occurs when the debt is liquidated, *ie* when there is no doubt about the existence of the claim, or the enriched party does not have a *bona fide* defence against the claim. If the claim is in dispute, or where uncertainty exists, the issue of *mora* does not arise. See *CIR v First National Industrial Bank Ltd* 1990 3 SA 641 (A) (hereinafter the *CIR* case).

***mala fide
conduct***

If the enriched party acted in bad faith (*mala fide*) in relinquishing or reducing the enrichment, the enrichment liability of a party can be fixed at an earlier date than that of the lodging of the claim. The particular instance concerned can probably be subsumed under the first or second exception.

minors

The qualifications just set out do not apply in the case of a minor who has been enriched by performance to him or her in terms of an unauthorised contract. The liability of such a minor remains restricted to the amount of his or her enrichment at the time of lodging the action (*litis contestatio*). See the *Edelstein* case.

SELF-ASSESSMENT

- 0.1 What does the enrichment liability being based on a movement of assets from the plaintiff to the defendant, in effect, mean?
- 0.2 Can potential and moral benefit form part of enrichment for purposes of the law of enrichment? Answer with reference to case law.
- 0.3 Explain, with reference to an example, the importance of both the favourable and the detrimental side-effects involved for the determining of the extent of the movement of assets.
- 0.4 Name the two instances of indirect enrichment identified in the *Buzgard Electrical* case.
- 0.5 Discuss briefly, with reference to case law, the position of a plaintiff with regard to the first instance identified in the *Buzgard Electrical* case.
- 0.6 Discuss briefly, with reference to case law, the position of a plaintiff with regard to the second instance identified in the *Buzgard Electrical* case.
- 0.7 Explain briefly the *sine causa* requirement, and illustrate its application with reference to case law.
- 0.8 Give an example from the case law where the courts have incorrectly applied the *sine causa* requirement.

- 0.9 Explain, in reference to each of the examples at the start of this unit, whether the general requirements for unjustified enrichment liability have been met in each case.
-

FEEDBACK

- (1) Explain with reference to the information in 2.2.1 and 2.2.2. Make use of the examples given in 2.2.1.
 - (2) See 2.2.1.
 - (3) See 2.2.2.
 - (4) The first instance is when A makes improvements to the property of the owner in terms of a contract with B, and then institutes a claim against the owner on the basis of enrichment. The second instance is when the owner contracts with B to improve his or her property, and B enters into a subcontract with A to perform the work, where, after A has done the work, A then sues the owner (with whom he had not entered into contract) on the basis of the enrichment concerned.
 - (5) The facts of the *Gouws* case illustrate the first instance. In the case, the plaintiff was decided as having failed in his or her enrichment claim against the owner, because the enrichment of the owner did not occur at the expense of the plaintiff. In the *Brooklyn House* case, the Appellate Division allowed for the right of retention in favour of the plaintiff, which was effective against anyone involved, including the owner. In the *Buzzard Electrical* case, the Appellate Division decided that the right of retention cannot exist in a vacuum, but that it ensures, or secures, a recognised claim. In *Hubby's Investments*, the court decided that, in view of the court's decision made in the *Buzzard Electrical* case that the distinction between a right of retention and an action is a distinction without a difference, an action should also be recognised in the first instance. *Buzzard Electrical* and *Brooklyn House* (both decisions of the Appellate Division) rejected the *Gouws* case by implication, albeit not expressly. In the *McCarthy* case, however, the court expressly rejected the decision made in terms of the *Gouws* case, but the discussion concerned was only an *obiter* one, and, therefore, not strictly binding. The argument does have strongly persuasive power, though.
 - (6) The position with regard to the second instance mentioned in the *Buzzard Electrical* case is quite clear, since in the case concerned, the Appellate Division expressly decided on the matter. The plaintiff's enrichment claim against the owner was not recognised, since the owner received nothing more than that for which he or she had contracted. Therefore, the enrichment of the owner was not *sine causa*.
 - (7) See 2.2.4.
 - (8) See 2.2.4.
-

FEEDBACK ON PRACTICAL SCENARIOS

scenario 1

scenario 1 Did you consider the fact that the contract was void owing to its wording? If no contract exists between the parties, there is no underlying reason, or *causa*, for the payment of the deposit. B has been impoverished by the payment of the deposit, and A has been enriched by it. As the issue pertains to an amount of money that has been paid, B may reclaim the full amount, unless A can prove that the enrichment has been diminished, or extinguished. A's enrichment has

been caused by the direct transfer of the money from B, and it has, therefore, occurred at B's expense. B should, therefore, be able to claim back the full amount transferred.

scenario 2

scenario 2 Did you consider the existence of the contractual relationships in the given instance, and the relevance thereof in respect of the potential claim? Was D impoverished in this instance? If so, at whose expense did the impoverishment take place? Although a contract exists between C and D, no contract exists between D and E.

Although D thought he was performing his contract with C, because he painted the wrong house, he did not fulfil his contractual obligations towards C. No contract existed between D and E, and, consequently, D has no contractual claim against E. D has clearly been impoverished by the expenditure of his time, labour and materials, but it is uncertain whether E has, in fact, been enriched.

Did you consider that the house involved might not have risen in value as a result of the painting, in which case E was not enriched? Did you also consider that perhaps E saved some expenses if she was going to have her house painted anyway?

scenario 3

scenario 3 This is clearly a case of indirect enrichment. Consider the facts against the principles discussed in the case law and articles on indirect enrichment, and come to an appropriate conclusion, stating your own viewpoint on the issue. Pay particular attention to the decisions made in the *Gouws*, *Buzzard Electrical* and *McCarthy* cases. Note, also, the differences in the opinions expressed by the various writers: De Vos; Eiselen and Pienaar; Van der Walt; Scholtens and Van Zyl.

scenario 4

scenario 4 Did you consider whether there was a valid contract between the parties concerned? If so, was the enrichment *sine causa*?

scenario 5

scenario 5 Is this a claim under enrichment law, a claim in delict, or a claim based on property law? Does L have any rights or claims in property law, such as the *actio rei vindicatio*, that he or she should employ rather than an enrichment claim?

STUDY UNIT 3

CONDICTIO INDEBITI: GENERAL REQUIREMENTS

The diagram at the start of this study unit serves as an overview to give you some perspective on where the subject under discussion in this study unit fits into the overall structure of the course. It is important to learn the differences between the various actions, as well as their requirements, and the remedies that they provide.

UNJUSTIFIED ENRICHMENT LAW			
General principles			
• enrichment • impoverishment • <i>sine causa</i> requirement • causality (at the expense of requirement)			
<i>Conditiones sine causa</i>	Improvements to property	Management of another's affairs	Work done, or services rendered
• <i>condictio indebiti</i> • <i>condictio ob turpem vel iniustam causam</i> • <i>condictio causa data causa non secuta</i> • <i>condictio sine causa specialis</i>	• <i>bona fide</i> possessors • <i>bona fide</i> occupiers • <i>mala fide</i> possessors and occupiers	• <i>actio negotiorum gestorum utilis</i> • <i>actio negotiorum gestorum contraria</i>	• <i>locatio conductio operis</i> • <i>locatio conductio operarum</i>

PRACTICAL SCENARIOS

scenario 1

A instructs its bank, B, to make an electronic transfer into the account of C at bank D. A confuses the account numbers, and provides B with the account number of X, another of A's creditors. X also holds an account with bank B. An amount of R10 000 000 is duly transferred into the account of X. X's account was overdrawn by an amount of R300 000 prior to the payment. After X learned of the mistaken payment, he or she transferred R9 000 000 to an interest-bearing account with bank B. A only learns of the mistake two months later, when C threatens to sue for the payment. The money has, in the meantime, drawn R140 000 in interest. A wants to know whether it can claim the money back from bank B, because of the payment of the overdraft, and because B holds the money in a savings account, or whether it should sue X, who has benefitted from the erroneous payment. Advise A.

scenario 1

A concluded a contract with B for the sale of a stud bull, at R500 000. B paid a deposit of R50 000 at the time of the signing of the contract. Unbeknown to both A and B, the bull had died on the day before the conclusion of the contract, due to a lightning strike. Can B reclaim the deposit paid, in terms of the *condictio indebiti*?

OVERVIEW

In the following two study units, we shall examine the most familiar and commonly used enrichment claim or *condictio* in our law, namely the *condictio indebiti*. In this study unit, we shall consider the requirements for this *condictio*, and specifically the error (mistake) requirement.

LEARNING OUTCOMES

After completing this study unit, you should be able to

- discuss and apply the requirements for the *condictio indebiti*
- explain what can be claimed in terms of the *condictio indebiti*
- critically discuss, with reference to case law, the question whether the value of a service (*factum*) can be reclaimed by means of employing the *condictio indebiti*
- discuss the defence of non-enrichment, in the case of the *condictio indebiti*
- explain the position that applies where the *condictio indebiti* is instituted after an amount of money has been received
- explain the application of the error requirement in South African law in the case of the *condictio indebiti*, with reference to case law and the opinion of the relevant writers
- critically discuss the position where the plaintiff is aware of the fact that the performance is not due
- apply the relevant principles of the *condictio indebiti* to such practical examples as the scenarios given above

RECOMMENDED READING MATERIAL (OPTIONAL)

Lotz G *The law of South Africa* Vol 9 2nd ed (LexisNexis Butterworths Durban 2005) paras 201–213
 Van der Walt JC “Die *condictio indebiti* as verrykingsaksie” 1966 *THRHR* 220–233
Miller and Others v Bellville Municipality 1971 4 SA 544 (C)
Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening) 2006 4 All SA 120 (SCA)
Rahim v Minister of Justice 1964 4 SA 630 (A)
Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another 1992 4 SA 202 (A)

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos W *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (Juta Cape Town 1987) 27–28 185–187
 Février-Breed P “A perspective on the *justus*-requirement in *justus error*” 1995 *TSAR* 300–309
 Visser D “Error of law and mistaken payments: a milestone” 1992 *SALJ* 177–185
African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd 1978 3 SA 699 (A)
Frame v Palmer 1950 3 SA 340 (C)
King v Cohen, Benjamin and Co. 1953 4 SA 641 (W)
Phillips v Hughes 1979 1 SA 225 (N)

Port Elizabeth Municipality v Uitenhage Municipality 1971 1 SA 724 (A)
Rayne Finance (Edms) Bpk v Queenstown Munisipaliteit 1988 4 SA 193 (EC)
Rooth v The State 1888 2 SAR 259
Rulten NO v Herald Industries (Pty) Ltd 1982 3 SA 600 (D)
Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another 1992 4 SA 202 (A)

3.1 INTRODUCTION

Where a person has performed, under the mistaken belief that such a performance was due, the performance can be reclaimed in terms of the *condictio indebiti*. The requirements and application of the *condictio indebiti* were already laid down in Roman law and, with minor adjustments in Roman-Dutch law, were accepted into South African law. To understand the application of the *condictio* in South African law properly, you should, however, be aware of its application in both Roman and Roman-Dutch law.

3.2 ROMAN LAW

This section, which consists of background reading, is not required to be studied for examination purposes. However, many of the Latin terms encountered in the section are currently used freely in the case law and in academic discussion. You would, therefore, benefit from becoming acquainted with the terms employed.

The requirements for the *condictio indebiti* were as follows: *datio* of money or things; error; and undue payment.

first
requirement:
datio of
money or
things

The first requirement for this action was that things had to be transferred in ownership; there had to be a transfer of money (*datio*), other replaceable things (*res fungibiles*), or another specific object. The *condictio indebiti* was, however, an action with a very wide scope, which deviated from the strict requirement of a *datio* according to its conventional meaning. Thus, even an incorporeal thing (*res incorporalis*), or a mere possession, could have been reclaimed. A text in the Digest even provides that where free lodging (*habitatio*) had been granted *sine causa*, not only could the lodging have been brought to an end, but the amount which would have been due as rent could have been claimed.

second
requirement:
error

The second requirement was that the payment had to have taken place under the impression that the performance was owing (*solvendi animo per errorem*). A person could not reclaim anything in terms of the *condictio indebiti* if he or she was aware that the performance had not been due. The law regarded the payment involved as a donation, owing to the construction of the intention to donate (*animus donandi*). Any doubt about the existence of the obligation was accepted as an error, thus leading to no *animus donandi*. In those cases in which the party's mistake was a mistake of law (an *error iuris*), the party could not, as a general rule, have reclaimed either. Thus, in principle, he or she could have recovered the performance only if he or she had performed as a result of a factual mistake (*error facti*). The above was, moreover, only the case if such *error facti* was a reasonable mistake (*iustus error*).

third
requirement:
undue
payment

Thirdly, there had to have been no debt at the time of payment, or the payment had to have been without cause (*sine causa*). A person who had performed in terms of a natural or unenforceable obligation (*naturalis obligatio*) could not have recovered his or her performance in terms of the *condictio indebiti*. The exception would have been the case where a minor performed in terms of a contract into which he or she had

entered without assistance. Where a debtor performed before the due date, he or she could also not have reclaimed his or her performance in such regard.

quantum of
claim

Where a thing was reclaimed with the *condictio indebiti*, the receiver had to restore the thing plus fixtures plus fruits (less production expenses). As in the previous cases, the receiver was, however, entitled to compensation for his or her necessary expenses (*impensae necessariae*) and useful expenses (*impensae utiles*). However, interest drawn on the money paid for, and the value of, a service (*factum*) could not be recovered with this *condictio*.

awareness
before *mora*

According to De Vos (27–28), the liability of the enriched person was increased, and it took on a more fixed content when he or she fell into default (*mora*), and also if, at any stage after the payment, but before *mora*, he or she had become aware of the fact that the payment was not due.

undeveloped
enrichment
action

Just as with the two previous *condictiones*, the *condictio indebiti* was an undeveloped enrichment action. The origin was a *sine causa* increase in assets, but, since not all the detrimental side-effects were taken into account in determining the amount claimable under the action, it was still an undeveloped enrichment action.

3.3 ROMAN-DUTCH LAW

This section, which consists of background reading, is not required to be studied for examination purposes. However, many of the Latin terms encountered in the section are used freely in the case law and in academic discussion. You would, therefore, benefit from becoming acquainted with the terms employed.

application
and
requirements

With a few exceptions, the *condictio indebiti* in Roman-Dutch law was essentially the same as that which featured in Roman law. In Roman-Dutch law, the view that a payment based on an error of law (*per errorem iuris*) could not be recovered remained in place. However, the preponderance of authority was apparently in favour of the view that a plaintiff could be denied the *condictio* only on considerations of equity.

obligation to
return

The obligation of the receiver to restore the thing was, thus, an obligation to return the thing received, and if this was no longer in his or her possession, then the value thereof. The defendant could, however, raise the defence that he or she had lost or alienated the thing, or that the loss, after he or she became aware of his or her obligation, but before *mora*, was not his or her fault. In such cases, he or she had to restore as much of the value of the thing as still remained in his or her estate. Once in *mora*, however, the usually applicable rules applied.

3.4 APPLICATION IN SOUTH AFRICAN LAW

condictio
indebiti as
enrichment
action

The *condictio indebiti* is a remedy that is based on unjustified enrichment. A person reclaims performance rendered under an excusable mistake that was not owing (*indebitum*) in terms of the remedy. The unowed performance may, in certain circumstances, be reclaimed from a party other than the actual recipient thereof. The reclamation depends on who the law regards as being the actual recipient of the value transferred. For instance, if money is paid to an agent in his capacity as the agent of another, the actual recipient, the agent, is not enriched; it is the principal who is enriched – see *Randcoal Services Ltd and Others v Randgold and Exploration Company Ltd* 1998 4 SA 825 (SCA). The three requirements of Roman and Roman-Dutch law

still apply in terms of South African law, with minor adjustments occurring in the application of the error requirement (see below).

requirements

The party must, therefore, satisfy the following requirements:

- (a) He or she must have given, or transferred, something in ownership to another. Where a non-owner has transferred possession, he or she is entitled to restoration of the possession of the thing. The performance rendered can consist either of corporal things, or of such incorporeal things as rights. Thus, the transfer of copyright or a trademark, or even a claim, can be reclaimed with the *condictio indebiti*.
- (b) The transfer must have taken place as the result of a mistake having been made on the part of the transferor, that is the party concerned must have believed that the performance was due.
- (c) The mistake, whether in law or in fact, must have been a reasonable mistake (*iustus error*) under the circumstances.

**payments
under duress**

South African law also acknowledges an exception in the case where someone renders an undue performance under protest and duress (*CIR v First National Industrial Bank Ltd* 1990 3 SA 641 (A); *Port Elizabeth Municipality v Uitenhage Municipality* 1971 1 SA 724 (A)). Such a performance is rendered under the presumption that the thing will be reclaimed if it later proves to have been undue.

payment

In the above-mentioned cases, the impoverished party must prove:

- that it has made a payment in the broad sense described above to the enriched party. The payment made in such a context must be seen within the broad meaning of “any kind of performance” or “any kind of value transfer”. Accordingly, it includes the transfer of ownership in a thing, the payment of money, the performance of work and services, the transfer of possession, as in the case of a sublease by the lessee, or the transfer of such immaterial property as rights.

not owing

In the above-mentioned cases, the impoverished party must prove that the payment was not owed. The party must prove that no debt was owing to the enriched party.

**an excusable
mistake**

In the above-mentioned cases, the impoverished party must prove that the payment was made by mistake, and that the mistake was an excusable one (*iustus error*). If the impoverished party knew that the payment was not owing, it is assumed that the intention had been to make a donation, and, therefore, the performance cannot be reclaimed. One exception that has already been mentioned is discussed below, namely where the payment is made under duress and protest.

*iustus error
requirement
contentious*

The retention of the *iustus error* requirement in South African law is contentious. Visser has argued quite convincingly that the requirement is anachronistic, and that it should be removed from our law, as it is irrelevant and gives rise to anomalies. Why should a careless party’s enrichment claim be denied when there is no detriment to the enriched party? How can one justify the granting of an enrichment action in cases of unlawful conduct (see below in the discussion of the *condictio ob turpem*), but deny such granting where there is no unlawfulness? The above leads to the unequal treatment of claimants under enrichment law. However, in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 4 SA 202 (A), the Appellate Division refused to jettison the requirement concerned. The courts have not been consistent with the application of this requirement, in that they sometimes apply it very strictly, whereas, in certain other cases, they are quite lenient in its application.

ACTIVITY 3.1

Consider the facts given in scenarios 1 and 2 at the start of this study unit, and apply the principles set out above to them. Advise the respective parties on whether they should use the *condictio indebiti* to reclaim their impoverishment.

Consider whether the constitutional principles of Ubuntu and equality could, or should, be used to remove the *iustus error* requirement in applying the *condictio indebiti*.

FEEDBACK

scenario 1

In this scenario, you have to consider whether the payment was made mistakenly, and whether the mistake was excusable. You should also focus on the *sine causa* requirement. Remember that you must also apply the general requirements to the facts before turning to the specific requirements of the *condictio indebiti*.

scenario 2

In this scenario, you should focus on the question whether the contract is valid or invalid. If it is valid, there is no enrichment, but if it is invalid, the payment was made *sine causa*. Should the excusability requirement come into play in this example?

iustus error

The retention of the *iustus error* requirement is contentious, because it leads to anomalies and unfair results. This is an area where the right to equal treatment and fairness under constitutional principles may be used to develop the law.

reclaim the
value of a
factum

In the sections dealing with the *condictio indebiti* in Roman and Roman-Dutch law, it was stated that the value of a *factum* could not be reclaimed with the *condictio indebiti*. In *Frame v Palmer* 1950 3 SA 340 (C) (hereinafter the *Frame* case), however, the court accepted that the value of a service rendered (*factum*) could, in our contemporary law, be reclaimed by employing such action. Rumpff JA, in his minority judgment in the *Nortjé* case (at 121), agreed to the above, but the majority of the court left the question open (as in 134E–G). In the *Gounis* case, the prevalent view appears to have been that the value of a *factum* cannot be claimed by any of the *condictiones sine causa*.

The last-mentioned view can operate very unfairly, especially where the error is excusable. This is also an area where such constitutional principles as Ubuntu or the *right* to equality may be used to develop the law, as there is, in principle, no reason for the value of the services involved not being claimable where the other party has been enriched by them.

enriched
party's
defence
of non-
enrichment

The enriched party (in accordance with the principle that enrichment liability is limited to the amount [*quantum*] of the enriched party's enrichment at the time of the institution of the action) can offer the defence of non-enrichment (the *King* case). Once an undue payment has been made, the receiver has to prove the circumstances that will relieve him or her of the obligation to repay. Thus, the plaintiff can claim the maximum amount of the enrichment, but the defendant can plead that his or her enrichment has lessened, or has even completely fallen away, provided that the rules in respect of default (*mora*) are not applicable.

receipt of
money as
enrichment

The receipt of money, like the receipt of anything else, creates a presumption of enrichment. If the defendant (taking into account all the surrounding circumstances) is not in a better position than he or she would have been had the payment not taken place, then he or she cannot be considered to have been enriched, and, therefore, will

no longer be liable. If he or she was only partly better off after the undue payment was made, then the enrichment is correspondingly lessened.

In order to succeed with this defence, it is not necessary that the money received be kept separately; in other words, merger of the money with other funds will not damage the defence. (For the position on payments made by cheque into overdrawn accounts, see *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 1 SA 242 (SCA)).

money
exchanged
for
something
else

If the receiver has bought something with the money that they would have bought in any case, or has paid for some other performance which they would, in any case, have performed, then he or she is enriched (saved expenses) by the full amount originally received, irrespective of the value, or fate, of his or her acquisition.

If, however, the receiver has done something with the money that they would not otherwise have done, then they must be considered as having been enriched, but only to the extent of the value of the performance that they have, thereby, obtained.

If, for example, he or she used the money on a luxury holiday that he or she would not otherwise have taken, he or she is not considered to have been enriched. If the receiver has used the money to buy something that was worth more than they paid for it, they might be liable for the full amount of the undue payment; if, however, the thing purchased is worth less than the purchase price, the party will be liable only for the lesser amount representing the value of the thing.

The party may also be released from liability by delivering the thing bought to the impoverished party. The party ought also to be given such a choice in those cases where the thing is worth more than he or she paid for it, provided, however, that he or she would not have bought it, had it not been for the undue payment made.

Where the thing itself is delivered, and it is worth more than the amount paid, the impoverished party must pay the enriched party the amount of the excess value. This accords with the principle that the impoverished party can never receive more than the *quantum* of his or her impoverishment. These principles apply equally in those circumstances where the receiver donates the undue money to a third party.

failure of
defence
of non-
enrichment

Certain circumstances exist, however, where the receiver of an undue payment can be held liable for the repayment of the full value of what was received, although the undue payment is no longer in his or her possession. Thus, where he or she receives the payment:

- knowing that it is not due,
- where he or she later becomes aware of the fact that the payment was not due, or
- where he or she should have realised that there was a possibility that the performance could, at a later stage, prove to be undue,

he or she will be able to raise the defence of the diminishing, or the falling away, of enrichment. The defence can, however, not be raised where the enriched party either intentionally or negligently caused the diminishing of the enrichment concerned.

Where the enriched party falls into default (*mora*) as regards the repayment of the unowed performance made, the defence referred to can only succeed if the enriched party can show that, if he or she had performed in time, the same fate would have befallen the thing in the hands of the plaintiff.

ACTIVITY 3.2

Consider scenario 1 above. Assume that X, upon finding out about the undue payment, has used R200 000 to go on a world cruise with his wife, and has bought a new sports car for R1 000 000. Can he or she raise the defence that he or she has only been enriched to the extent of the money left in his savings account, namely R8 800 000

(R10 000 000 minus R200 000, minus R1 000 000)?

FEEDBACK

In your answer, did you consider the following issues: the value of the sports car still in the patrimony of X; whether the luxury holiday has enriched X by way of saved expenses; and whether the fact that X knew that he or she had been enriched will play any role in respect to the extent of his enrichment liability.

interest due
to *mora*

The party who falls into *mora* with the duty to repay is liable for interest as well. Such a situation does not arise because of any enrichment principle, but because of the fact that any debtor who falls into *mora* must compensate for the damage caused by so doing. Where an amount of money is involved, the damages consist of the interest that the creditor could have earned had the amount been paid in time. The obligation involved here thus arises from the *mora*, and not from the enrichment, as would be the case with a claim made under the *condictio indebiti*.

error of law
or error of
fact

In enrichment claims, the enriched party only falls into *mora* at the time when the impoverished party demands payment from the enriched party. The impoverished party, in line with the position in Roman-Dutch law, is not entitled to claim the interest earned on the money by the enriched party, no matter whether or not the interest was earned either before or after the enriched party had fallen into *mora*. However, after the enriched party has fallen into *mora*, he or she is liable for the payment of *mora* interest. To be able to succeed in Roman and Roman-Dutch law with the *condictio indebiti*, the party that delivered the unowed performance must have been unaware that the performance was not owing. The above means that the person performing must have acted under an error or mistake as to the true factual position of the case. The position is that one can only succeed with the *condictio indebiti* if the relevant error is a mistake of fact (*error facti*). If the plaintiff laboured under a mistake of law (*error iuris*), the action was not available to him or her. With the body of law having grown considerably, currently it is impossible to expect the average person to be aware of the many detailed rules that flow from the statutory sources. Furthermore, legal advice today is expensive to access, and the significance of many provisions might not even be certain until they are pronounced upon by the courts involved.

Rooth v The State

According to South African case law before 1992, payment as the result of an error in law, due either to the payor not knowing the relevant law, or to him or her not understanding the law correctly, excluded the right to repayment. The requirement that the mistake must have been one of fact has its origins in an incorrect interpretation of the decision in *Rooth v The State* 1888 2 SAR 259 (hereinafter the *Rooth* case) by our courts.

In *Willis Faber Entboven (Pty) Ltd v Receiver of Revenue and Another* 1992 4 SA 202 (A), the Appellate Division finally resolved the issue of whether an error of law could form the basis of the *condictio indebiti*.

The facts were as follows: A company had made unowed payments to the defendant, as the result of an error of law. The company concerned merged with another, and the newly merged company instituted an action against the defendant to reclaim the amount of money involved. The action failed in the court of first instance, because the payments, although not due, were made as the result of an *error iuris*.

On appeal, the Appellate Division decided that there was no distinction could logically be drawn between errors of fact and errors of law for the purposes of the *condictio indebiti*. The Division held that either kind of mistake is sufficient for success with the *condictio indebiti*:

What is immediately apparent is that no logical distinction can be drawn between mistakes of fact and mistakes of law in the context of the *condictio indebiti*. The *condictio* has, since Roman times, consistently been regarded as a *remedy ex aequo et bono* to prevent one person from being unjustifiably enriched at the expense of another ... The nature of the error, thus, has no bearing either on the *indebitum* or on the enrichment concerned (at 220).

and further

Bearing in mind that, since the Court's decision in *S v De Blom* 1977 3 SA 513, ignorance of the law may even provide an excuse for what might otherwise have been regarded as criminal behaviour, we have to ask ourselves whether there is any reason for retaining the age-old distinction between errors of law and fact in claims for the repayment of money unduly paid in error (at 223).

excusability
or *iustus*
error

Regarding the further requirement of the excusability, or the reasonableness (*iustus error*), of the error or mistake, a whole series of decisions exist, however, in which the error requirement was set, but without any reference to reasonableness (*Frame v Palmer* 1950 (3) SA 340 (C); *Fund Advisers Ltd v Mendelsohn NO & Another* 1973 2 SA 475 (W); *Le Riche v Hamman* 1946 AD 648 656; *Recsey v Reiche* 1927 AD 554). In *Rahim v Minister of Justice* 1964 4 SA 630 (A) 635, in contrast, Van Blerk JA found that the messenger's conduct had been inexcusably slack, and that, therefore, the *condictio indebiti* could not be invoked.

Visser's
criticism

Visser (1992 *SALJ* 177) criticises the requirement of reasonability, because, historically, it was never a requirement:

In other words, the mistake must be reasonable, but it is also clear that there will have to be gross negligence indeed on the part of a plaintiff before his mistake will be deemed to have been unreasonable (*Rane Finance (Pty) Ltd v Queenstown Municipality* 1988 4 SA 193 (EC)).

*Willis
Faber on
excusability
of error*

In the *Willis Faber* case, the Appellate Division accepted that a factual error, and, consequently, an error of law, must be reasonable (at 224B–G):

... our law is to be adapted in such a manner as to allow no distinction to be drawn in the application of the *condictio indebiti* between mistake in law (*error juris*) and mistake of fact (*error facti*). It follows that an *indebitum* paid as a result of a mistake of law may be recovered provided that the mistake is found to be excusable in the circumstances of the particular case ... 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 it does not in the Court's view deserve the protection of the law, it 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.

**public policy
and the error
requirement**

De Vos (at 185) opines that a better explanation than the above for the exclusion of the *condictio indebiti* would be that positive law, on the grounds of legal policy and public interest, denies the impoverished party the right to make a claim, although the enrichment of the person who is enriched at his or her expense is *sine causa*. Furthermore, the legal expert notes that one must lay down, as one of the rules for enrichment liability, the requirement that there should not be a rule that denies the impoverished party the possibility of instituting an action, despite the presence of the other requirements (namely, the *sine causa* enrichment of the defendant, at the expense of the plaintiff).

Du Plessis

Du Plessis (*Unjustified enrichment* 135 et seq) convincingly argues that the retention of the above-mentioned requirement can no longer be justified. Firstly, the requirement was never part of the Roman-Dutch law, with it having either been introduced from the German law, which has, in the meantime, abandoned the requirement, or from an incautious use of the same principle in contract law. However, no logical reason exists for the *iustus error* requirement in contract law to be required under enrichment law as well. As a result, therefore, no justification exists for retaining such a requirement.

**constitutional
principles**

As indicated above, constitutional principles also exist that may call for the requirement to be removed from our law. The principle of equality requires the putting in place of rules of law that apply equally and fairly to all persons in similar circumstances. Therefore, no justification can exist for retaining the rule concerned, which has tended to give rise to unfair results without good justification. No conceivable public policy interest, as informed by the principle of Ubuntu, accounts for the retention of such a requirement. If the *par delictum* rule could be relaxed in enrichment claims based on unlawful conduct (see the discussion of the *condictio ob turpem* below), then there is no justification for punishing slackness or negligence in the case of the *condictio indebiti*. Such a requirement is in conflict with the very essence of the equitable, or fairness, basis on which unjustified enrichment liability is founded.

SELF-ASSESSMENT

- 0.1 Explain what can be claimed for with the *condictio indebiti*.
- 0.2 Discuss critically, with reference to the relevant case law, the question whether the value of a *factum* can be reclaimed with the *condictio indebiti* in South African law. Provide two practical examples of such.
- 0.3 Discuss the defence of non-enrichment in terms of the *condictio indebiti*, as it is applied in the South African law. Provide two practical examples of such.
- 0.4 Explain the position in South African law where the payment of money forms the basis for the institution of the *condictio indebiti*.
- 0.5 A has received a payment of R200 000, which he knows was not owing to him, from B. Opportunistically, he buys his girlfriend a diamond ring worth R50 000,

and himself a hi-fi set worth R30 000, while he uses the rest to pay off part of the bond on his house. On B's demand for repayment of the erroneously paid amount, A raises the defence that his enrichment has been extinguished. Advise B on the validity of this defence.

- 0.6 Critically discuss the requirement that the plaintiff should have been unaware that the performance was undue. Also, briefly give your own opinion on the case.
-

FEEDBACK

- (1) See 3.4.
 - (2) See 3.4.
 - (3) See 3.4.
 - (4) You should explain how the rules in respect of the diminishing or extinction of enrichment as a defence operate in general, and under what circumstances there is increased liability for enrichment. See study unit 2 and subsection 3.4.
 - (5) See 3.4. Refer under (a) to the decision in the *Rooth* case and *Miller and Others v Bellville Municipality* 1971 4 SA 544 (C). At the discussion of the *Willis Faber* case under (b), you should mention the reasons for the Appellate Division having abolished the distinction between an error of fact and an error of law. Regarding (c), you should refer to the decisions made in the *Barclays Bank* and the *Willis Faber* cases. In your discussion of the *Willis Faber* case, you should refer to the three grounds mentioned by the court as being guidelines for the determination of the question as to whether the conduct of the plaintiff was "so inexcusably slack" that the error cannot be regarded as being either reasonable or excusable.
-

FEEDBACK ON PRACTICAL SCENARIOS

scenario 1

The first issue to be determined is whether compliance with the general requirements for enrichment liability has occurred – see study unit 2. Explain how A has been impoverished, and how, and to what extent, C has been enriched. Explain why the bank has not been enriched by the payment of the overdraft. Discuss whether a causal link exists between A's impoverishment and X's enrichment. Is the fact that X has moved the funds to another account of any relevance? Why can A not claim the amount of interest that X earned on the money? When did X fall into *mora*?

The second question pertains to whether the requirements of the *condictio indebiti* have been satisfied. Consider all three requirements, but especially whether the mistake can be considered a *iustus error*.

scenario 2

Explain why the contract between A and B is void. Consider the general requirements for enrichment liability, but especially the *sine causa* requirement. Secondly, consider the three requirements of the *condictio indebiti* to establish whether the enrichment action is the correct one to use, given the circumstances.

STUDY UNIT 4

CONDICTIO INDEBITI: SPECIFIC APPLICATIONS

UNJUSTIFIED ENRICHMENT LAW			
General principles			
• enrichment • impoverishment • <i>sine causa</i> requirement • causality (at the expense of requirement)			
<i>Conditiones sine causa</i>	Improvements to property	Management of another's affairs	Work done. or services rendered
• <i>condictio indebiti</i> • <i>condictio ob turpem vel iniustam causam</i> • <i>condictio causa data causa non secuta</i> • <i>condictio sine causa specialis</i>	• <i>bona fide</i> possessors • <i>bona fide</i> occupiers • <i>mala fide</i> possessors and occupiers	• <i>actio negotiorum gestorum utilis</i> • <i>actio negotiorum gestorum contraria</i>	• <i>locatio conductio operis</i> • <i>locatio conductio operarum</i>

PRACTICAL SCENARIOS

scenario 1

A has died, leaving an estate worth R2 million net. In her will, she has left all her assets, in equal portions, to B and C. After the winding-up of the estate by attorneys KLM, with B and C having been paid their legacy of R1 million each, it comes to light that X, a creditor of A, had failed to make a claim against the deceased estate for an amount of R3 million. However, creditors D (R800 000), E (R200 000) and F (R500 000) were paid in full. Advise X on whether he or she can claim the money from KLM, from B and C, or from D, E and F.

scenario 2

M owns a factory that manufactures glass by means of a continuous process. Her monthly electricity bill is approximately R200 000. She has now received a letter from the Tshwane City Council threatening to cut off her electricity if her overdue bill of R500 000 is not paid immediately. M knows that there must be a mistake, because her bills are fully paid up, but she is afraid that she will suffer major losses if there should be a cut-off in her electricity supply. She pays the amount, accompanying her payment with a letter of protest. Advise M on whether she can reclaim the amount of money that she felt obliged to pay under the duress of the given circumstances.

OVERVIEW

In this study unit, we will study specific applications of the *condictio indebiti* in terms of South African law.

LEARNING OUTCOMES

After completing this study unit, you should be able to

- apply your knowledge of the principles of statutory enrichment to case studies and scenarios
- apply your knowledge of the principles of *condictio indebiti* in South African case law to case studies and scenarios
- explain how the Legislature created a statutory enrichment action in 1981 to regulate the position with regard to void contracts for the sale of land
- explain the application of the *condictio indebiti* within the ambit of the law of succession, with reference to the relevant statutory law and criticisms by authors
- explain the application of the *condictio indebiti* in respect of *ultra vires*
- in relation to payments, insolvency and payments by minors, explain, with reference to case law, whether the *condictio indebiti* is also available to the unpaid creditors of a liquidated company

RECOMMENDED READING MATERIAL (OPTIONAL)

Administration of Estates Act 66 of 1955 ss 31 and 50

Alienation of Land Act 68 of 1981 ss 2 and 28

Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank 1997 2 SA 35 (A)

Commissioner for Inland Revenue v Visser 1959 1 SA 452 (A)

Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere 1994 3 SA 283 (A)

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos "What action?" 1963 SALJ 3–6

De Vos W *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (Juta Cape Town 1987) 173–179

Pretorius C-J "Payment by a bank on a countermanded cheque and the *condictio sine causa*" 1995 THRHR 733–744

Amalgamated Society of Woodworkers of SA and Another v Die 1963-Ambagsaalvereniging 1967 1 SA 586 (T)

B & H Engineering v First National Bank of SA Ltd 1995 2 SA 279 (A)

Carlis v McCusker 1904 TS 917

CIR v First National Industrial Bank Ltd 1990 3 SA 641 (A)

Govender v Standard Bank of South Africa Ltd 1984 4 SA 392 (C)

John Bell & Co Ltd v Esselen 1954 1 SA 147 (A)

Lottering v SA Motor Acceptance Corporation Ltd 1962 4 SA 1 (E)

MCC Bazaar v Harris & Jones (Pty) Ltd 1954 3 SA 158 (T)

MN v AJ 2013 3 SA 26 (WCC)

Rapp & Maister Holdings Ltd v Reflex Holdings (Pty) Ltd 1972 3 SA 835 (T)

Saambou Bank Ltd v Essa 1993 4 SA 62 (N)

Van Zyl v Credit Corporation of South Africa Ltd 1960 4 SA 582 (A)

Wilken v Kohler 1913 AD 135

4.1 INTRODUCTION

Specific applications of the *condictio indebiti* have developed in South African law. In this study unit, you will look at a number of specific applications, namely the statutory enrichment action created by s 28 of the Alienation of Land Act 68 of 1981, the application of the *condictio indebiti* in insolvency law and in the law of succession, payments made under duress and protest, and *ultra vires* payments. You will build on the knowledge and outcomes of the previous study unit by examining the application of the general principles set out there within a number of specific contexts. You will notice that, in some of the areas concerned, legislation has also made an impact.

4.2 STATUTORY ENRICHMENT ACTION: ALIENATION OF LAND ACT

condictiones
available in
cases of void
contracts

From your study of the law of contract, you will know that, if a contract does not comply with the formal requirements prescribed for its conclusion, it is void and cannot be enforced by either party involved. If one or both parties have made performance in terms of such a void contract, they ought to be entitled to condictio of the performance (to reclaim with a *condictio*) provided all the requirements for one or other of the *condictiones* are present. Thus, if a plaintiff contends that the *condictio indebiti* lies in the particular circumstances in question, he or she ought to be required to prove that he or she performed in the erroneous belief that the contract was valid, and that the error was reasonable, and one of fact or law.

in contrast to the above, the situation might exist where the plaintiff admits that he or she knew at the time of performance that the contract was void (which means that the *condictio indebiti* would not apply in his or her instance), but, nevertheless, contends that he or she is entitled to recover his or her performance with the *condictio causa data causa non secuta*. In such a case, the plaintiff ought to be required to prove that he or she made performance in terms of the expectation, and on the assumption that counter-performance would be made by the other party, and that the assumption made proved to be false. Once a plaintiff has proved all the requirements for a particular *condictio*, however, there should be no further bar to the recovery of his or her performance.

Carlis v McCusker

In the course of a long line of decisions, commencing with *Carlis v McCusker* 1904 TS 917 (hereinafter the *Carlis* case), the Transvaal courts took a completely different view of the above-mentioned matter, however. The position, according to the decisions made, stood as follows:

entitlement
to restitution
in principle

- If a contracting party had made performance in terms of a contract that was void because of non-compliance with the prescribed formalities, he or she was, in principle, entitled to recover his or her performance. How it happened that performance was made, even though the contract was void, was not questioned—in other words, the plaintiff was not required to show that performance was made under circumstances that could serve as grounds for a *condictio indebiti*, or for a *condictio causa data causa non secuta*.
- Recovery was barred, however, where both parties had made performance in terms of the void contract. In such a case, neither party could recover their performance. Support for such a proposition is given in an *obiter dictum* of the Appellate Division in *Wilken v Kobler* 1913 AD 135 144 (hereinafter the *Wilken* case).

the *Wilken v Kobler* case: no restitution where both performed

restitution only if no performance from the defendant

- Recovery was also barred if the defendant was willing and able to perform in terms of the void contract. The above meant that, to succeed, a plaintiff had to allege, in his or her particulars of claim, that the defendant was unwilling, or unable, to perform. If he or she failed to do so, his or her claim was liable to exception.

Meeting the requirements for restitution in the case of *CD Development v Novick*

The Transvaal approach was roundly criticised by almost every academic writer of note (De Vos 187, etc). When the matter came up for decision in the Cape Provincial Division during 1979 in *CD Development Co (East Rand) (Pty) Ltd v Novick* 1979 2 SA 546 (C), the Division refused to follow the Transvaal decisions and the *obiter dictum* in the *Wilken* case. The position in the Cape was then as is described below.

performance of defendant irrelevant

Before a plaintiff, who sought to recover that which he or she had performed in terms of a contract that was void for reason of noncompliance with the prescribed formalities, could succeed, he or she had to show that all the requirements for one or other of the *condictiones* was present.

Once a plaintiff had proved that he or she was entitled to a particular *condictio* recovery, he or she was not barred therefrom if the defendant had also performed, or was willing and able to make performance.

s 28 of the Alienation of Land Act

Before the divergent views of the Cape and Transvaal courts could be submitted to the Appellate Division, the matter relating to the sale of land was resolved by the Legislature in s 28 of the Alienation of Land Act 68 of 1981. The section reads as follows:

28. Consequences of deeds of alienation which are void or are terminated.

- (1) Subject to the provisions of sub-section (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and –
 - (a) the alienee may in addition recover from the alienator –
 - (i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;
 - (ii) a reasonable compensation for –
 - (a) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or
 - (b) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and
 - (b) the alienator may in addition recover from the alienee –
 - (i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;
 - (ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable.
- (2) Any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.

statutory
enrichment
action

This section creates a statutory enrichment action that is similar to the *condictio indebiti* in ss 28(1); the provisions of ss 28(2), furthermore, regulate the position in terms of which both parties have performed in full. (Almost identical provisions are embodied in ss 9(1) and (2) of the Property Time-Sharing Control Act 75 of 1983.)

fully
developed
enrichment
action

The statutory enrichment action created in s 28 of the Alienation of Land Act is a fully developed enrichment action, because it takes adequate account of all factors either increasing or decreasing the extent of enrichment and impoverishment involved. The provision made in ss 28(2) contradicts the general enrichment principles, namely that a party is entitled to reclaim whatever he or she has performed in terms of a void contract.

However, the exception is to be supported, because it gives effect to the subjective intentions of the parties concerned, despite the noncompliance with formalities, but only in situations where both parties have fully performed their respective obligations. There is no fiction here. As the contract is fully valid, it will also contain the residual rules of the law of sale, insofar as the parties have not excluded them.

4.3 THE CONDICTIO INDEBITI AND THE LAW OF SUCCESSION

One other aspect of the application of the *condictio indebiti* in South African law warrants your particular attention, namely its role in the law of succession, that is, the *condictio indebiti* of executors, creditors and beneficiaries. The application of the *condictio indebiti* in such circumstances came about as a result of the reception of the English law executor in South African law. In this case, the rules of the *condictio indebiti* are followed, with it not being possible for there to be any objection to the development.

while the
executor is
in office

While the executor is in office, the following applies:

- (a) If an executor makes an incorrect division of the estate, because he or she has not complied with the provisions of the Administration of Estates Act 66 of 1965, and pays a beneficiary or creditor more than he or she is entitled to, or if he or she pays someone who is not entitled to receive anything, then the executor can reclaim his or her performance. Although this action is allowed in terms of ss 50(b) of the Act, it can also be seen as a *condictio indebiti*.
- (b) Those who are prejudiced by the improper actions of the executor have a right of recourse against the executor in his or her personal capacity (ss 50(a)).
- (c) Where the executor's actions have not been improper, but where he or she has, nevertheless, still made an incorrect payment, because a claim was not lodged in time, the creditors who have been late in lodging their claims can still claim payment from the executor (s 31). Such can only be done in the executor's official capacity, and not in his or her personal capacity.
- (d) The executor, in turn, claims from the beneficiaries, and from those who were not entitled to any payment, in terms of the *condictio indebiti*.
- (e) However, those creditors who have already been paid cannot be held liable in respect of the belated claims, because ss 31(b) of the Act provides that a person who does not lodge his or her claim in time cannot look to another claimant, who has already been paid in terms of a valid claim, for payment.

executor
discharged
from office

When the executor is discharged from office (which happens after he or she has discharged all his or her duties under the Act), he or she effectively disappears from the scene. The executor, who can no longer institute action, can no longer be held

liable for anything done by him or her during the period of his or her office, unless he or she acted in bad faith (ss 56(2)).

unpaid
creditors
who lodged
their claims
late

Unpaid creditors who did not lodge their claims in time can now institute the *condictio indebiti* themselves against those beneficiaries who received too much because the plaintiff had not yet been paid. However, they cannot act against those creditors who have already been paid (ss 31(b)). (See *Rapp & Maister Holdings Ltd v Ruflex Holdings (Pty) Ltd* 1972 3 SA 835 (T) 837 [hereinafter the *Rapp* case].)

unpaid
creditors
who lodged
their claims
on time

Unpaid creditors who lodged their claims, but who, for some reason, did not receive payment, can also institute action. Where their claims cannot be satisfied without recourse to the paid creditors, De Vos (at 174) suggests that the granting of such recourse is possible. In the last-mentioned instance, s 50 of the Act allows the creditors to claim from the executor, and the executor to claim from the creditors who have already been paid. Therefore, there is no reason for the action of the executor not passing to the creditors concerned after the executor's discharge.

beneficiaries
who did
not receive
payment

Where beneficiaries have not received payment, the executor can be held liable (as well as in his or her personal capacity), only if he or she has acted *mala fide*. However, there is no reason for the unpaid beneficiaries not being granted an action against the other beneficiaries.

prescription

According to ss 11(d) of the Prescription Act 68 of 1969, the *condictio indebiti* prescribes after three years. The *condictio indebiti* of the creditors of a deceased estate, therefore, prescribes within three years from the date on which it could have been instituted.

ACTIVITY 4.1

Consider the facts of the first practical scenario given at the start of this study unit, and explain the rights and obligations of the executor, the creditors and the heirs, according to the principles set out above. More particularly, advise X whether he or she still has a claim against the estate, each of the creditors, and the two heirs.

FEEDBACK

Once the estate has been wound up, and the executors of the estate have been relieved of their duties, the estate no longer exists, and no claim can be lodged against the estate. In your answer, did you consider that there is a fundamental difference between the position of the creditors and the heirs and that there is now also no claim against the other creditors? How does the fact that X's claim exceeds the value of the legacies affect X's claims against the heirs? Also, see the feedback on this scenario at the end of this study unit.

4.4

THE CONDICTIO INDEBITI AND THE LAW OF INSOLVENCY

*Rapp v Ruflex
Holdings on
liquidations*

In the *Rapp* case, the court rejected the contention that the *condictio indebiti* (or any other enrichment action) would lie to assist an unpaid creditor of a company (which had been liquidated) against a shareholder who had received more than he or she would have received had the creditor been paid. As the Companies Act afforded no assistance, the creditor was without a remedy.

*Kommissaris
van Binnelandse
Inkomste v
Willers*

The *Rapp* case was, however, not followed in *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere* 1994 3 SA 283 (A). In this case, the court decided, on exception, that, in principle, a claim based on the *condictio indebiti* will be available in such circumstances (Pretorius 1995 *THRHR* 333–334). The approach in the *Willers* case was confirmed in terms of the decision made pertaining to *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank* 1997 2 SA 35 (A).

ACTIVITY 4.2

Write a short critical essay (no longer than 500 words) comparing the development of enrichment law in respect of the position of creditors in insolvency cases in terms of the *Willers* case, with the position in regard to unpaid creditors in the succession cases concerned.

FEEDBACK

In your answer, you should briefly state the uncertainty of the position of creditors in insolvency cases prior to the *Willers* case, and the rationale for the decision made in that case. Your essay should also show how the *Willers* case drew on the principles in the succession cases to develop and improve this part of our enrichment law. Your essay should also deal with the critical remarks made by Van der Walt in respect of the succession cases.

4.5

ULTRA VIRES PAYMENTS AND THE CONDICTIO INDEBITI

representative
capacity

Many instances exist where persons act in a representative capacity. Some examples are the executors of an estate; the liquidators of a company; the directors of a company; the trustees of a trust; the guardian of a minor; an agent; and an employee of the state, or of the provincial or local government. For a number of years, considerable uncertainty existed about whether a payment that was made beyond the powers of such persons, namely an *ultra vires* payment, could be reclaimed with an enrichment action, particularly the *condictio indebiti*.

*Bowman, De
Wet*

In *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank* 1997 2 SA 35 (A), the Appellate Division put an end to the uncertainty about whether the *condictio indebiti* could be used to claim moneys that had been paid without authority, or beyond the powers of the person making the payment in a representative capacity (*ultra vires* payments), by stating the following:

I would have thought that an *ultra vires* payment represents a prime example for a payment *indebiti*. Such payments are, by their very nature, payments of something not owing (“onverskuldig”) by the payee.

The court then went on to hold that sufficient authority exists to the effect that an *ultra vires* payment can be reclaimed with the *condictio indebiti*, or with the *condictio sine causa*. The last qualification was found to be unnecessary, as the above is clearly a case where the *condictio indebiti* should be applied.

4.6 PAYMENTS MADE UNDER DURESS AND PROTEST

payments
knowingly
made

A requirement of the *condictio indebiti* is that a payment should have occurred as an excusable mistake, and that the payment was not owing.

However, sometimes situations occur where a party is forced to make a payment that he or she knows, or suspects, is not owing, as a result of the amount of pressure, or duress, being exercised on him or her. The exception was already recognised in terms of Roman law, in D 12.6.2.

example

The decision in the *CIR* case provides a good example of the above. A dispute had arisen between the Commissioner and the FNB as to whether or not a particular card scheme attracted stamp duties. On the Commissioner insisting that the FNB pay the duties concerned, the latter did so, but only under protest. Such a situation readily occurs in taxation law, as a result of the principle of “pay now, argue later” that applies in that area of the law. In court, it was held *a quo* that no stamp duties were payable, and, consequently, that the moneys paid had to be repaid on the basis of unjustified enrichment. The Appellate Division upheld the result, but was divided on the reason for doing so.

tacit contract

The majority, per Nienaber JA, held that the money was repayable on the basis of a tacit contract that had been concluded between the parties concerned. It was held that, in terms of the facts of the case, the threat of the levying of penalties was not sufficient to constitute duress, and that, consequently, the exception to the *condictio indebiti* could not apply. However, the above applied on the ground of the fact that there was sufficient evidence, according to Nienaber JA, of there being in existence a tacit agreement between the parties concerned that the amount of money involved would be repaid if it turned out that no stamp duties were payable. In our view, there was insufficient justification to rely on the existence of a tacit agreement.

penalties as
a sufficient
threat

The minority decision of Nicholas AJA is to be preferred. Based on the reasoning of De Villiers AJA in *Union Government (Minister of Finance) v Gomar* 1915 AD 426, it was convincingly argued that, where a party knowingly makes a payment that it believes is not owing under some kind of threat (which need not be unlawful), and where it, simultaneously, protests the payment, the presumption of a donation falls away. The protest makes it clear that there was no intention to donate the money, and that the only reason for performance was the threat concerned.

requirements

A plaintiff must, therefore, satisfy three requirements to be able to rely on the *condictio indebiti* under such circumstances:

- the payment must be *indebiti*, meaning not owing,
- the payment must have been made involuntarily under some kind of threat, and
- the plaintiff must have protested the payment at the time of payment.

ACTIVITY 4.3

Consider the facts given in practical scenario 2 given at the start of this study unit, and explain whether the *condictio indebiti* should be available for the reclaiming of the amount of money paid to the Tshwane City Council.

FEEDBACK

One of the common law requirements for the *condictio indebiti* is that the money should have been paid as the result of an excusable error. Where a person pays the money under duress, however, he or she knows that the money is not owing. The application of the *condictio indebiti* in such circumstances therefore forms an important exception to the general requirements discussed earlier. In your answer, you should explain this exception, and the requirements that need to be in place for the exception to come into play. The issue that you should discuss in this answer is whether the threat by the Tshwane City Council can be regarded as duress. The second requirement, namely that the payment should be made under protest, was clearly fulfilled by the letter of protest sent by M.

SELF-EVALUATION

- 0.1 A and B have concluded an oral agreement for the sale of A's house at a price of R1 500 000. B has to pay a deposit of R150 000 at the signing of the agreement. B has paid the deposit. A has, however, failed to sign the agreement, and now refuses to do so, because she has received a better offer from C. B wants to enforce the agreement, but if that is not possible, she wants to reclaim the deposit paid with interest. Discuss, with reference to case law, how this situation was resolved (a) before 1981; and (b) after the introduction of the Alienation of Land Act 68 of 1981.
 - 0.2 Discuss the statutory enrichment action that was created by s 28 of the Act referred to above. Explain why the provision should be regarded as a "developed" enrichment action.
 - 0.3 Briefly discuss the application of the *condictio indebiti* in terms of the law of succession.
 - 0.4 A, the executor of D's estate, has paid an amount of R150 000 to B, as the only heir, on 1 June 2016. On 1 December 2016, X, a creditor of D's, finds out that the estate has already been wound up, and that the claim that arose on 1 September 2015 has not yet been paid. When will X's claim against B prescribe?
 - 0.5 Discuss, with reference to case law, the availability of the *condictio indebiti* to the unpaid creditors of a liquidated company.
-

FEEDBACK

- (1) See 4.2. In your answer, refer to the decisions made in the *Carlis*, *Wilkin* and *CD Development* cases.
 - (2) See 4.2.
 - (3) See 4.3.
 - (4) See 4.3.
 - (5) See 4.3.
-

FEEDBACK ON PRACTICAL SCENARIOS

scenario 1

In your discussion, you have to consider the position of the attorneys KLM first. If they have discharged their duties in a *bona fide* manner, and they have completed their functions as executors, no claim should lie against them. Why not? Secondly,

no claim will lie against the other creditors who have been paid in full. Explain why. X does, however, have a claim against B and C. What will the extent of this claim be? If not the full R3 million, why not?

scenario 2

M knows that she does not owe the money. Why should her action for the *condictio indebiti*, nevertheless, be successful? Explain the exception and its basis in full. What requirements must she prove? Does she meet those requirements?

STUDY UNIT 5

CONDICTIO OB TURPEM VEL INIUSTAM CAUSAM

UNJUSTIFIED ENRICHMENT LAW			
General principles			
• enrichment • impoverishment • <i>sine causa</i> requirement • causality (at the expense of requirement)			
<i>Conditiones sine causa</i>	Improvements to property	Management of another's affairs	Work done, or services rendered
• <i>condictio indebiti</i> • <i>condictio ob turpem vel iniustam causam</i> • <i>condictio causa data causa non secuta</i> • <i>condictio sine causa specialis</i>	• <i>bona fide</i> possessors • <i>bona fide</i> occupiers • <i>mala fide</i> possessors and occupiers	• <i>actio negotiorum gestorum utilis</i> • <i>actio negotiorum gestorum contraria</i>	• <i>locatio conductio operis</i> • <i>locatio conductio operarum</i>

PRACTICAL SCENARIOS

scenario 1

A and B have concluded an agreement, in terms of which A sells uncut diamonds to B at a price of R500 000. The transaction is illegal in terms of statutory law. Both parties are aware of the illegality of the transaction. B has already paid a deposit of R50 000 to A, when A gets arrested, and the diamonds are confiscated by the police. B now wants to reclaim the R50 000 from A. Advise B. Would it make any difference to your answer if B were an undercover policeman acting in a sting operation (as a form of entrapment)?

scenario 2

C has defrauded D by an amount of R400 000. C has paid the money into the bank account of X Company (Pty) Ltd, of which C is the main shareholder and managing director. At the time of the payment, the bank (N) account was overdrawn to the amount of R150 000. D wants to reclaim the money. From whom would he claim the money: from D, X or N?

OVERVIEW

In this study unit, we will study the second traditional enrichment action, namely the *condictio ob turpem vel iniustam causam*.

LEARNING OUTCOMES

After completing this study unit, you should be able to

- discuss the two requirements set in Roman law for the *condictio ob turpem vel iniustam causam*
- state the content of a claim based on the *condictio ob turpem vel iniustam causam*
- briefly explain the application of the *condictio ob turpem vel iniustam causam* in terms of Roman-Dutch law
- describe the measure by which the unlawfulness of the agreement is measured
- explain the relaxation of the *par delictum* rule, with reference to the decision in *Jajbhay v Cassim* 1939 AD 537 (hereinafter the *Jajbhay* case)
- describe the test for a *turpis persona*, and the consequence of such classification
- explain the importance of the decisions made in *Albertyn v Kumalo* 1946 WPA 529, *MCC Bazaar v Harris & Jones (Pty) Ltd* 1954 3 SA 158 (T) (hereinafter the *MCC Bazaar* case) and *Minister van Justisie v Van Heerden* 1961 3 SA 25 (O) (hereinafter the *Minister van Justisie* case) for the application of the *condictio ob turpem vel iniustam causam*
- describe whether the *condictio ob turpem vel iniustam causam* is a fully developed enrichment action
- apply the principles of this action to practical situations
- distinguish between the field of application of this action and that of the *condictio indebiti*

RECOMMENDED READING MATERIAL (OPTIONAL)

Eiselen S “Stretching the scope of the *condictio ob turpem*” 2002 *THRHR* 292–298
Lotz *The law of South Africa* Vol 9 2nd ed (LexisNexis Butterworths Durban 2005) paras 214–216
ABSA Bank Ltd v Lombard Insurance Company Ltd 2012 4 All SA 485 (SCA)
ABSA Bank Limited v Moore and Another 2017 2 BCLR 131 (CC)
Chevron SA (Pty) Ltd v Wilson t/a Wilson’s Transport and Others 2015 10 BCLR 1158 (CC)
Cool Ideas 1186 CC v Hubbard and Another 2014 4 SA 474 (CC)
Minister van Justisie v Van Heerden 1961 3 SA 25 (O)
National Credit Regulator v Opperman and Others 2013 2 BCLR 170 (CC)
Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening) 2006 4 All SA 120 (SCA)
First National Bank of Southern Africa Ltd v Perry NO and Others 2001 3 SA 960 (SCA)

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos W *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (Juta Cape Town 1987) 20–23 164–165
Albertyn v Kumalo 1946 WPA 529
Jajbhay v Cassim 1939 AD 537
MCC Bazaar v Harris & Jones (Pty) Ltd 1954 3 SA 158 (T)

5.1 INTRODUCTION

A difference of opinion exists as to whether, in modern South African law, the *condictio ob turpem vel iniustam causam* constitutes one action or two, with the latter consisting of a *condictio ob turpem causam* and a *condictio ob iniustam causam*. The accepted view

currently is that only one action exists, with one set of requirements. The action is generally used where performance has taken place in terms of an agreement that is void, owing to the illegality of the agreement.

5.2 ROMAN LAW

This section, which consists of background reading, is not required to be studied for examination purposes. However, many of the Latin terms encountered in the section are currently used freely in the case law and in academic discussion. You would, therefore, benefit from becoming acquainted with the terms employed.

area of application	This <i>condictio</i> could be instituted where A had paid B money for the completion of a transaction that was invalid, owing to its immorality or illegality. A could claim the money from B in terms of this <i>condictio</i> .
requirements	Two requirements existed for the action. In the first place, there had to have been a transfer of property on the ground of an illegal agreement or <i>causa</i> . An illegal agreement, or <i>causa</i> , is one that is prohibited by law, or that is void and invalid, due to it being contrary to good morals (<i>boni mores</i>), or public interest. The second requirement was that the plaintiff himself or herself should not have been a <i>turpis persona</i> , that is, it should not have been shameful for the plaintiff himself or herself to perform. If both acted disgracefully (<i>in turpitudine</i>), neither could recover their performance from the other, due to the principle that, where both parties acted equally shamefully, neither could approach the court (<i>in pari delicto, potior est conditio defendentis</i>). Later, the rule (also known as the <i>par delictum</i> rule) is relaxed; the claimant, even if he or she was <i>in turpitudine</i> , could have successfully reclaimed, if his conduct had been less disgraceful than that of the defendant had been.
content of claim	The property delivered, plus fixtures, plus fruits, could have reclaimed in terms of this <i>condictio</i> , subject to the defendant's right to compensation for his or her necessary expenses (<i>impensae necessariae</i>) and useful expenses (<i>impensae utiles</i>). As regards the making of luxurious improvements (<i>impensae voluptuariae</i>), the defendant had a right to remove the improvements (<i>ius tollendi</i>). The interest drawn on money could not be claimed, as neither could the value of a service be (<i>factum</i>).
undeveloped enrichment action	A so-called fully developed enrichment action is one in terms of which the detrimental side-effects of enrichment and the positive side-effects of impoverishment are taken into account. The <i>condictio ob turpem vel iniustam causam</i> was an undeveloped enrichment action. Although its origin was unjustified enrichment, not all the detrimental side-effects were taken into account in determining the amount claimable under the action.

5.3 ROMAN-DUTCH LAW

This section, which consists of background reading, is not required to be studied for examination purposes. However, many of the Latin terms encountered in the section are currently used freely in the case law and in academic discussion. You would, therefore, benefit from becoming acquainted with the terms employed.

application	No essential difference existed between the Roman enrichment action (<i>condictio</i>) and the enrichment action of Roman-Dutch law. Note, however, that, unlike in Roman law, the rule <i>par delictum</i> rule was strictly applied. Where the conduct of both the plaintiff and the defendant was shameful, no balancing of the one's disgracefulness
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(*turpitude*) against that of the other took place. The relaxation of the *par delictum* rule in modern South African law, therefore, is in accordance with Roman law, and not with Roman-Dutch law.

5.4 APPLICATION IN SOUTH AFRICAN LAW

requirements
in modern
South African
law

Application has been modified in South African law in some very important respects. The *condictio ob turpem vel iniustam causam* is used to reclaim the money or property that has been transferred in terms of an illegal, or unlawful, agreement. In such a case, no *causa* exists, because the underlying agreement is void, due to the illegality of the agreement. An agreement may be deemed illegal:

- (a) in terms of the common law, where either the subject matter of the contract, its object, or its conclusion is against public policy (*contra bonos mores*); or
- (b) where it is either expressly prohibited, or where it is prohibited according to necessary implication by statute.

The right to institute this *condictio* is restricted by the *par delictum* rule. In terms of this rule, a party is not entitled to reclaim his or her money or property if he or she is a *turpis persona*, that is, where his or her actions are tainted with turpitude or impropriety. However, since the decision was made in relation to the *Jajbhay* case, the courts have exercised a general discretion to relax the rule if simple justice requires so doing. The early development in the preconstitutional era is in accordance with the constitutional principles that are currently applied, especially in terms of the principles embodied in the concept of Ubuntu.

The party instituting a claim under this action is usually also required to tender the return of anything received from the counterparty.

application

That which a party has performed in terms of an unlawful agreement can be reclaimed with this action. An agreement is unlawful if the conclusion thereof, in itself, or the performance, or the aim of the parties, is contrary to common law, statute law, good morals, or the public interest. In assessing the unlawfulness or lawfulness concerned, an objective criterion must be employed, that is the ignorance of the parties about the unlawfulness is irrelevant (*Reynolds v Kinsey* 1959 4 SA 50 (FC)). Where the conclusion of a contract is not prohibited, but formal requirements are laid down for such an agreement, the agreement involved is neither forbidden nor unlawful. The invalidity of the agreement then gives rise to a claim under the *condictio indebiti* (see the discussion of the Alienation of Land Act in the previous study unit 4 above).

An unlawful agreement is, therefore, an agreement whose essence and content are forbidden, while an agreement that is forbidden in a particular form is not unlawful, although it might be void. For instance, a contract for the sale of land that is not made in writing is void for reason of want of compliance with the formal requirements of the Alienation of Land Act, but it is not unlawful. However, an agreement entered into for the sale of stolen goods is void due to its illegality. In addition, numerous statutory prohibitions render contracts void on account of illegality. Refer to your Study Guide and reading material for the module Law of Contract (PVL3702) to refresh your memory of the appropriate rules.

example

An agreement that A will pay B R50 000 to murder C is forbidden, it is unlawful, due to the essence of such an agreement being forbidden. The *condictio ob turpem vel iniustam causam* could, therefore, be applicable in such a situation (if no other obstacle is present).

example

As a contract of sale of land that is not in writing in terms of s 2 of the Alienation of Land Act 68 of 1981 is not forbidden, it is, therefore, not unlawful. A verbal contract of sale of land is not prohibited, but it is merely that the form that such a contract should take is prescribed. The above is an example of a void agreement that is not unlawful. In this instance, the *condictio indebiti* should be used to reclaim the performance rendered.

prescribed formalities

The inference is, therefore, that noncompliance with prescribed formalities at the conclusion of a contract does not render such a contract unlawful, although it might be void.

requirements

In order to succeed with the *condictio ob turpem vel iniustam causam*, the plaintiff must prove the following requirements:

- Performance was rendered in terms of an illegal agreement.
- The other party was enriched at the expense of the plaintiff, who was impoverished by the performance.
- A tender was made to return any performance received by the plaintiff.
- The plaintiff is not a *turpis persona*, or there are cogent reasons why the *par delictum* rule should not be strictly applied.

The above-listed requirements will now be examined in greater detail.

relaxation of *par delictum* rule: the *Jajbhay v Cassim* case

As we have already pointed out, the relaxation of the *par delictum* rule is in accordance with Roman law, but not with Roman-Dutch law. In the *Jajbhay* case, our Appellate Division held, on the authority of Roman law, that the *par delictum* rule is not inflexible, and that the *turpitude* (shamefulness) of the parties can be weighed up if it is in the public interest.

turpis persona

The court approaches the question of whether a plaintiff who is a *turpis persona* (a person who acted in a shameful manner) can reclaim on the basis of “simple justice between man and man”. The fact that a plaintiff is a *turpis persona*, therefore, does not, *per se*, exclude his or her right to reclaim what he or she has performed, since he or she might well succeed if the court finds that such justice so requires (*Rousseau and Others NNO v Visser and Another* 1989 2 SA 289 (C) and *Visser en 'n Ander v Rousseau en Andere* NNO 1990 1 SA 139 (A)).

turpis persona tested subjectively

To determine whether a contract is unlawful, an objective test is used (see above). To establish whether a party is a *turpis persona*, or has acted shamefully, a subjective test is used: was the party to the unlawful agreement aware of the unlawfulness of the agreement (as in the *Jajbhay* case)? Actual knowledge of the possible illegality of the transaction is required.

tender return:
*Albertyn v
Kumalo*

In our law, the *condictio ob turpem vel iniustam causam* has undergone a second important change, namely, that the plaintiff is required to tender the return of that which he or she received (unless return is excused), before he or she can succeed with the action. In *Albertyn v Kumalo* 1946 WPA 529 it was held that the plaintiff had to tender the return of that which he or she had received from the defendant in terms of the void contract, when suing with the *rei vindicatio* for the return of something that he or she had delivered. The court decided *obiter* that the above also applies to the present *condictio*.

MCC Bazaar

In the *MCC Bazaar* case, A entered into an invalid hire-purchase agreement with B in respect of a cash register. After A had paid the purchase price in full, he reclaimed it, and tendered return of the cash register. Rumpff J held that the invalid contract was not unlawful, and that, therefore, the *condictio ob turpem vel iniustam causam* was not applicable. The judge also held that A had no claim to the *condictio indebiti*, or to *restitutio in integrum* (restitution) (at 163B). What is important, however, is that Rumpff J held *obiter* that, in the case of the *condictio ob turpem*, the plaintiff must, if there was a counter-performance, tender to return what he has received.

ACTIVITY 5.1

Consider the facts of practical scenario 1 above against the principles discussed here, and provide advice to the various parties in respect of possible claims and defences.

FEEDBACK

See the feedback given at the end of this study unit.

development
towards fully
developed
enrichment

The side-effects of enrichment have to be taken into account, and any counter-performance that has been given ought to be considered a negative side-effect of the enrichment. Where the defendant has given a counter-performance, he or she ought to be able to reclaim it, and the best way of accommodating his or her claim is by compelling the plaintiff to return what he or she has received, and to tender the return of that which he or she has received from the defendant. De Vos (at 164) holds the view that such is a beneficial development, because enrichment is not necessarily determined only by what has been received, and notes that the development is a step towards the formation of a developed enrichment action.

evasion of the
par delictum
rule

De Vos realises, however, that such development in the case where A is not prevented by the *par delictum* rule from claiming from B, but where B is precluded from claiming from A, can bring about an evasion of the *par delictum* rule. If, in such a case, A wishes to recover from B, but is required to tender return of what he or she has received, B will be able to recover what he or she would not have been able to recover, had he or she (B) instituted the action. To prevent evading the *par delictum* rule, De Vos opines that the plaintiff must tender return only if the defendant is not himself or herself precluded by the *par delictum* rule from instituting an action for restitution.

*Minister van
Justisie*

In the *Minister van Justisie v Van Heerden* case, an officer in the employ of the Police Force sold and delivered four diamonds to the defendant for R300, with a view to trapping him in the process of illicit diamond dealing. The plaintiff then reclaimed the diamonds.

Van Heerden's defence was that the plaintiff had to offer to return the R300. Here we have the situation mentioned above, namely, that the plaintiff is not a *turpis persona*, but the defendant is. If the plaintiff had to offer to return what he or she had received, the *par delictum* rule would have been evaded.

Potgieter J rejected this defence, because the plaintiff was not affected by the *par delictum* rule, whereas the defendant was. The case confirms De Vos's view that the plaintiff need not tender to return what he or she has received, if the defendant himself or herself has acted in a shameful manner.

FNB v Perry

The court in *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 3 SA 960 (SCA) (hereinafter the *Perry* case) was concerned with a situation that is currently common. A cheque of the Government of KwaZulu-Natal (KwaZulu-Natal) was stolen and forged by an unknown person. Thereafter, it was handed by Dambha to a firm of stockbrokers, FPV. Dambha's managed account with FPV was credited with the amount. Both KwaZulu-Natal and FPV held accounts with the appellant FNB. After FPV had deposited the cheque into their FNB account, the funds were collected by FNB from the KwaZulu-Natal account, and they were credited to the account of FPV.

On instructions from Dambha, FPV made out a cheque in favour of a trust of which Dambha was a trustee, and the funds were deposited with Nedbank Ltd, in accordance with Dambha's instructions. Nedbank credited the account of the trust, using part of the proceeds to offset the overdraft of the trust.

The trust was insolvent at the time when the action was lodged. At the time at which the claim was lodged, Nedbank was still in possession of the funds that it had collected on behalf of the trust, and the bank was interdicted from dealing with the funds concerned, pending the finalisation of the claim.

Arising from the above-mentioned facts, the discussion of the court focused on the following enrichment issues:

- (a) whether it is permissible, or possible, to trace the funds, or what is left of them, in the hands of successive recipients, where those funds have been transferred in ownership as a result of *commixtio*, and where the money has lost its identity as a result
- (b) the bank's obligation to a fraudulent account holder, whose account has been credited
- (c) the nature of the enrichment action to be used under such circumstances
- (d) the requirements for use of the *condictio ob turpem vel iniustam causam*
- (e) whether it can be said that the bank remains enriched where it has credited an account of a third party with fraudulent proceeds

In the above-mentioned case, the court accepted that the impoverished party was FPV, because they ultimately bore the loss of the fraud perpetrated by Dambha. The court held that, where funds are transferred, the impoverished party is entitled to follow the funds as they pass from party to party, as long as they remain an identifiable unit.

The court further held that, although there is no obligation on a bank to enquire about the sources of the funds of its clients, where the bank finds out about the tainted nature of funds in the account of a client, ie has actual knowledge of such, its contractual obligation to the client becomes tainted. Therefore, no obligation rests with the bank to deal with the money in accordance with the instruction of

the client. In fact, to do so would amount to aiding and abetting the client in his or her criminal conduct.

Under such circumstances, it is the bank holding the money that is the enriched party as a result of the illegal transactions entered into. The appropriate action against the bank by the defrauded party would, then, be the *condictio ob turpem*, even though neither the conduct of the bank, nor that of the defrauded party, is tainted by turpitude. The bank remains enriched as long as it holds the funds concerned.

If the bank had paid out the money without knowledge of the fraud, its enrichment would have been diminished. If it had paid the money with knowledge of the fraud, it would have remained liable to the impoverished party.

Lombard Insurance

The decision in *ABSA Bank Ltd v Lombard Insurance Company Ltd, FirstRand Bank Ltd v Lombard Insurance Company* 2012 4 All SA 485 (SCA) provides a good example of the applicable principles.

facts An employee of Lombard Insurance, in perpetrating fraud on the company, had an amount of over R2 million paid into her personal account with FNB. Some of the funds were then transferred to her accounts with ABSA. Her account with FNB was in overdraft at the time of the initial payment, with her debit balance accordingly being changed into a credit balance. She then used the funds that became available to her to pay off the amounts outstanding on her home loan account and credit cards with FNB.

The funds deposited with ABSA similarly discharged her overdraft and left a credit balance. She then also paid off a credit card with ABSA. Some funds were also paid to third parties not involved in the litigation. Both of the banks were unaware of the fraud at the time of the transactions, only becoming aware of the fraud at a later stage. At that time, an amount of R220 392 was still left in her ABSA account.

Lombard Insurance, based on the decisions in the *Perry* and *Nissan* cases, claimed the whole of the amount that had been “stolen” from ABSA and FNB, but excluding the funds that had been paid to the third parties concerned. The banks resisted the claims, arguing that their enrichment had been extinguished, with the exception of the R220 392 left in her ABSA account. The court of first instance then granted the claims in full.

Lombard

Lombard Insurance argued that, because the banks generally had been entitled to reverse a credit entry made, both banks had been in a position to reverse the credit entries that repaid the overdrafts in this case, and that they, therefore, remained enriched at its expense.

SCA decision

The Supreme Court of Appeal rejected the above-mentioned line of reasoning. Malan JA held that *Perry* did not support Lombard’s contention that the bank remained enriched under such circumstances, in which the bank had no knowledge that the funds involved were tainted when they extinguished the overdrafts. The banks were not enriched, because, in exchange for the funds received, they extinguished the claims that they had against the fraudulent employee in good faith. The situation would have been different if the bank had had knowledge of, or a real suspicion about, the unlawfulness of the funds. In the case concerned, Lombard was entitled only to the funds still remaining in the ABSA account, as an amount by which the bank had been enriched. Such enrichment was due to the fraudulent employee having no

claim against the funds due to them being the proceeds of fraud or theft. The rest of the initial enrichment of both banks had fallen away, or had been extinguished.

Nissan

In *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2006 4 All SA 120 (SCA), the plaintiff instructed its bank to make payment of R12.7 million to one of its suppliers, but entered the wrong banking details, namely, those of another supplier, Maple. At the time, Nissan was not indebted to Maple, and the amount paid was accordingly not owed or *indebite*. Maple transferred the amount into other accounts with another bank on receiving legal advice that it was entitled to any interest earned on such funds.

When Nissan became aware of the mistake that it had made, it demanded payment from Maple. Maple, in turn, indicated that it was prepared to repay the amount, but that it would keep any interest earned. In addition, it demanded payment of a 4% administration fee. As a result, Nissan obtained a court order freezing of all Maple's bank accounts, which eventually caused the company to be put into liquidation. The liquidators then asserted that the full remaining amount of R10.5 million formed part of Maple's insolvent estate, and that Nissan was just another unsecured creditor in the insolvent estate.

The court held that, where an amount is paid into a bank account by mistake, the recipient is not entitled to deal with the funds as if those funds belonged to it. Based on the decision made in *S v Graham* 1975 3 SA 569 (A), the appropriation of the funds by the recipient is an act of theft, and the money becomes stolen goods. In this case, Maple, in effect, stole the money when it transferred the money to another account. The funds were, therefore, tainted ones, to which the recipient had no claim. Nissan was, therefore, allowed to claim the funds concerned.

criticisms Visser

The decision in the *Nissan* case is problematic. One would have thought that the facts provided a classic example of where the *condictio indebiti* would be applicable, ie where a non-existent debt is paid by mistake. The court, however, did not consider the nature of the enrichment action on which Nissan relied, but simply granted the claim. Authors differ on the interpretation of this case. Visser (2005 ASSAL 298; *Unjustified enrichment* 373) regards the decision in this case as being another instance of the *condictio sine causa specialis*, relying on the court's approval of the *Perry* case. However, in the latter case, the court quite clearly indicated that it was applying the *condictio ob turpem*.

criticisms Du Plessis

Du Plessis (*Unjustified enrichment*) indicates that the difficulty of deciding which enrichment action should be applicable in instances like the above, leads, probably, to having to choose between the *condictio sine causa specialis* and the *condictio ob turpem*, although the former is favoured. The law researcher also regards the use of the *condictio indebiti* as inappropriate, as it can only be instituted against the person who truly received the payment.

criticisms Eiselen

Eiselen (*Unjustified enrichment* 89) argues that, as the court indicated that the funds became stolen funds, in terms of the rule developed under *S v Graham*, that the appropriate claim is the *condictio ob turpem vel iniustam causam* in the analogous application of the *Perry* case.

What remains unclear, however, is the status of the case if Maple, instead of transferring the money (ie appropriating it), had simply left the money in the account. Would Nissan's claim then have resorted under the *condictio indebiti*, as we submit should be the case on an appropriate application of the relevant principles, including the

excusable error requirement? Alternatively, is it a case where, in terms of the court's reasoning, no payment was made, so that it should have resorted under the *condictio sine causa specialis*, as Du Plessis suggests?

You should make up your own mind on the above issue, and you should be able to provide a reasoned exposition of why you prefer the adoption of a specific approach.

SELF-EVALUATION

- 0.1 Explain the application of the *condictio ob turpem vel iniustam causam* in South African law, referring specifically to the test used to determine whether or not the agreement is unlawful.
 - 0.2 Explain the relaxation of the *par delictum* rule, and the test for a *turpis persona*, with reference to the decision made in the *Jajbhay* case.
 - 0.3 Explain the legal position if both the parties have performed, and one of the parties then institutes the *condictio ob turpem vel iniustam causam* against the other party.
-

FEEDBACK

- (1) See 5.4.
 - (2) See 5.4.
 - (3) See 5.4.
-

FEEDBACK ON PRACTICAL SCENARIOS

scenario 1

You have, firstly, to consider the application of the general requirements to the action in this case, and, more particularly, the application of the *par delictum* rule. The decision made in the *Minister van Justisie* case will provide valuable clues as to how you should approach the scenario. Did you consider the requirement that the plaintiff should tender return of the performance received? Your answer would most certainly be different if the one party were to have been an undercover policeman. Explain why.

scenario 2

See the discussion of the *Perry* case, which is very similar to this set of facts.

STUDY UNIT 6

CONDICTIO CAUSA DATA CAUSA NON SECUTA

UNJUSTIFIED ENRICHMENT LAW			
General principles			
• enrichment • impoverishment • <i>sine causa</i> requirement • causality (at the expense of requirement)			
<i>Conditiones sine causa</i>	Improvements to property	Management of another's affairs	Work done, or services rendered
• <i>condictio indebiti</i> • <i>condictio ob turpem vel iniustam causam</i> • <i>condictio causa data causa non secuta</i> • <i>condictio sine causa specialis</i>	• <i>bona fide</i> possessors • <i>bona fide</i> occupiers • <i>mala fide</i> possessors and occupiers	• <i>actio negotiorum gestorum utilis</i> • <i>actio negotiorum gestorum contraria</i>	• <i>locatio conductio operis</i> • <i>locatio conductio operarum</i>

PRACTICAL SCENARIOS

scenario 1

A leaves B a piece of land in his will that is subject to a *modus* that B must pay for C's university education. B has failed to do so. The other heirs now want to cancel the legacy, because of B's noncompliance with the *modus*.

scenario 2

D and E have concluded a contract for the sale of D's land, on the assumption that the land has access to a certain river, and that it is entitled to pumping rights from the river. It now turns out that no such access or right exists. Both parties erred *bona fide* about the above facts.

scenario 3

F and G have concluded a contract that is subject to a resolutive condition. F has paid R100 000 to G, but, when the condition realises, the contract is extinguished. Can F claim the money involved from G?

OVERVIEW

In this study unit, one of the enrichment actions about which there is a certain amount of uncertainty will be discussed, namely the *condictio causa data causa non secuta*.

LEARNING OUTCOMES

After completing this study unit, you should be able to

- explain, with reference to examples, the application of this *condictio* in South African law
- explain the importance of the decision in *Baker v Probert* for the *condictio causa data causa non secuta*
- apply the requirements of this action to practical examples

RECOMMENDED READING MATERIAL (OPTIONAL)

Eiselen S & Pienaar G *Unjustified enrichment: a casebook* 4th ed (LexisNexis Butterworths Durban 2016) & Pienaar 169–194

Lotz G *The law of South Africa* Vol 9 2nd ed (LexisNexis Butterworths Durban 2005) paras 217–218

Baker v Probert 1985 3 SA 429 (A)

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (Juta Cape Town 1987) 10–20

6.1 INTRODUCTION

The *condictio causa data causa non secuta* is a traditional enrichment action used to reclaim a performance. This action had a much wider area of application in Roman law than it does in current South African law. The main reason for this is that our law of contract has developed so much that contractual remedies now provide for some circumstances where the *condictio causa data causa non secuta* used to be implemented.

6.2 APPLICATION IN SOUTH AFRICAN LAW

area of
application

A great deal of uncertainty exists about the field of application of this action in terms of modern South African law. Upon analysis, the common feature of all the examples where this action has been used seems to be cases where either transfer of a thing was made, or performance was rendered on the basis of some future event taking place, or not taking place (a so-called *causa futura*). When the future event does not happen (or *does* happen in the case of resolutive conditions), the *causa* for the transfer falls away, and the performance rendered is reclaimed with this action. On this basis, the plaintiff may possibly institute this *condictio* when he or she has delivered a thing to the defendant by virtue of:

- a resolutive condition that is fulfilled
- a suspensive condition that is not fulfilled
- a *modus* that is disregarded
- an assumption that is not fulfilled

6.2.1 Suspensive and resolutive conditions types of condition

To understand this part of enrichment law properly, you should begin by reviewing your study material on conditions, as discussed in contract law and succession law. You should already have acquired such knowledge, but you are likely to need to refresh it. The revision will also increase your understanding of how the law is

integrated throughout its various conceptual divisions, as well as demonstrating that you can never isolate one area from the rest of the law. You have to understand the different types of conditions clearly, as well as the difference between conditions, assumptions and *modi*.

Conditions can take one of two forms in contracts and wills:

- (a) Resolutive conditions have the effect of not interfering with the validity or enforceability of contractual or testamentary rights and obligations, but serve as an overarching consideration that the parties affected by the contract, or testamentary disposition, must keep in mind. If the future uncertain event takes place, or the condition involved is fulfilled, it causes the contract to come to an end, or the testamentary disposition to become void. Once again, the fate of anything transferred in terms of such a contract or testament remains uncertain, until it becomes clear that the condition will not be fulfilled. The contract, or testament, may determine what should happen in that event, but, in the absence of such a stipulation, the performance should be claimed with this action. Such consideration is in accordance with the use of the action in Roman and Roman-Dutch law.
- (b) Suspensive conditions have the effect of suspending some, or all of, the rights and obligations under the testament or will, until the occurrence of an uncertain future event. If the uncertain future event does not take place, the contract, or testamentary disposition, becomes void, or falls away. Thus, where one of the parties to the contract has already rendered performance under such a contract, the right to reclaim performance will, firstly, depend on the terms of the contract, including the tacit terms. However, if no provision is made in the contract for the repayment, this action would be the appropriate one to use. No precedent exists for such application under these circumstances in common law, but it seems more appropriate than does any other enrichment action. Some writers argue that the *condictio sine causa specialis* should be used in like cases, but the issue remains uncertain. See the discussion in Eiselen and Pienaar at 175–176 and 181.

6.2.2 Unfulfilled assumptions

nature of assumptions

Despite fairly clear case law on the subject, some controversy still exists on the exact nature of assumptions. De Vos (*Verrykingsaanspeeklikheid* 156) refers to future assumptions. In contract law, an assumption, or supposition, is a fact that the parties concerned elevate on the basis of their contract. The assumption, or supposition, is not a condition, or guarantee, but it is a fact of sufficient importance to allow the contract to stand or fall by it, as was the case in *Fourie v CDMO Homes (Pty) Ltd* 1982 1 SA 21 (A).

In the above-mentioned case, the Appellate Division, in a very clearly stated exposition, albeit *obiter*, clearly distinguished between assumptions and conditions. An assumption can only relate to the facts of the present or the past, but not to those of the future. If the assumption is true, the contract based on it is immediately valid and binding; if it is false, the contract is immediately void, probably as the result of the making of a fundamental mistake. In the above case, the appropriate enrichment action is the *condictio indebiti*, because the contract is void from the beginning. Any performance made is made in the mistaken belief that the contract is valid.

A so-called assumption that relates to the future is no assumption at all, but it is a condition, as described above. In most cases, it would be a resolutive condition.

6.2.3 A *modus*

nature of *modus*

A *modus* is an obligation that is usually created either in contracts of donation, or in testamentary dispositions. In Roman and Roman-Dutch law, *modi* gave rise to a claim with the *condictio causa data causa non secuta*, where the *modus* remained unfulfilled. In modern South African law, the application of the *modus* is restricted to testamentary dispositions, as contractual *modi* are now dealt with as a form of breach of contract – see *Benoni Town Council v Minister of Agricultural Credit and Land Tenure* 1978 1 SA 978 (T).

field of application

Where a testamentary disposition is made subject to a *modus*, there is an obligation on the legatee, or heir, to comply with the provisions of the *modus*. However, it is uncertain who would be able to enforce compliance with the *modus*, although it is assumed that the executor, or the heirs, would be entitled to do so. Where the disposition is revoked owing to noncompliance, the disposition can be reclaimed with this remedy.

6.2.4 Breach of contract cases

contractual remedies after breach of contract

De Vos (156 et seq) holds the view that this *condictio* no longer plays a part in our law in the case of rescission on the ground of breach of contract, but that the innocent party in such a case would then make use of contractual remedies. De Vos bases his view on the fact that, for the purposes of rescission on the ground of breach of contract, a distinction was drawn in Roman-Dutch law between those contracts that were innominate real contracts in Roman law (in these contracts, the right of rescission was relatively broad, and the *condictio* was used) and those contracts that were consensual even in Roman law (in such contracts, the right of rescission was more limited, and a contractual action was used).

De Vos

This distinction, says De Vos, no longer holds in our law, and, consequently, this *condictio* no longer plays a part in regard to cancellation on the ground of breach of contract.

Baker v Probert

The Appellate Division confirmed this approach in *Baker v Probert* 1985 3 SA 429 (A) 438–439 (hereafter the *Baker* case). The court stated:

Although statements can be found in cases and in textbooks suggesting that the seller's liability is based on enrichment, I agree with the view, and the reasons for it, expressed by De Vos Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg 2nd ed at 141–143, that a claim for restitution of performance following upon cancellation of a contract for breach is not a *condictio* (cf [439] *Landau v City Auction Mart* 1940 AD 284 at 292–4 and *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 3 SA 188 (A) at 198C–D), and I agree with Nienaber J (at 233C of the report) that the claim is to be regarded as a distinct contractual remedy (cf SWJ van der Merwe and MFB Reinecke in 1984 TSAR 85 at 86).

SELF-EVALUATION

- 0.1 Write a critical analysis of the scope of application of the *condictio causa data causa non secuta* in modern South African law.
- 0.2 Name the three applications of the *condictio causa data causa non secuta* in South African law.
- 0.3 Briefly discuss the importance of the decision in the *Baker* case for the application of the *condictio causa data causa non secuta* in South African law.

- 0.4 Consider each of the three practical scenarios at the start of this study unit, and explain whether the enrichment action can be employed to reclaim performance rendered in each of the cases. Give your explanation in the form of advice to the possible plaintiff in each case.
-

FEEDBACK

- (1) In your answer, you have to consider the uncertainty in respect of the field of application of this action that pertains to current circumstances. Did you consider all the viewpoints of the various writers in the prescribed reading material and decided cases? State your own view and conclusion.
 - (2) See 6.2.
 - (3) See 6.2.4.
 - (4) See the feedback on practical scenarios provided below.
-

FEEDBACK ON PRACTICAL SCENARIOS

scenario 1	Did you discuss the uncertainty about the enforcement of <i>modi</i> in succession law? Did you consider the historical roots of the action in this context?
scenario 1	Did you consider the nature of assumptions, and the various viewpoints concerned? Is this the correct action to be used? If not, which action would be more appropriate? Is this not a case where the <i>condictio indebiti</i> would be more appropriate, as a failed assumption causes the agreement to be void? Briefly review the requirements of the <i>condictio indebiti</i> .
scenario 1	Did you consider the historical roots of this action in respect of the conditions, the nature of the conditions, and whether this is the appropriate action to take? If it is not the correct action to take, which one is?

STUDY UNIT 7

CONDUCTIO SINE CAUSA SPECIALIS

UNJUSTIFIED ENRICHMENT LAW			
General principles			
• enrichment • impoverishment • <i>sine causa</i> requirement • causality (at the expense of requirement)			
<i>Conditiones sine causa</i>	Improvements to property	Management of another's affairs	Work done, or services rendered
• <i>condictio indebiti</i> • <i>condictio ob turpem vel iniustam causam</i> • <i>condictio causa data causa non secuta</i> • <i>condictio sine causa specialis</i>	• <i>bona fide</i> possessors • <i>bona fide</i> occupiers • <i>mala fide</i> possessors and occupiers	• <i>actio negotiorum gestorum utilis</i> • <i>actio negotiorum gestorum contraria</i>	• <i>locatio conductio operis</i> • <i>locatio conductio operarum</i>

PRACTICAL SCENARIOS

scenario 1

A has handed in a television set at B's shop for repair. Two weeks later, when A goes to collect the television set, A is informed by B that the set has gone missing, and that it is nowhere to be found. B agrees to pay R3 500 in compensation to A to settle any related dispute. A week later, B phones A, informing her that the television set has been found, and offering to return the set, against repayment of the R3 500. A does not want to repay the amount, because she wants to buy a new television set. Advise B about a possible claim against A. Would it make any difference to your answer if A had already bought a new television set?

scenario 2

C has paid D R100 000 by cheque. A day later, C instructs her bank, E, to countermand the cheque. Despite the countermand, E pays out the cheque to D when it is presented, and debits C's cheque account with the amount. C wants the debit reversed. Advise C and E about the validity of the debit, and of any enrichment claims either of them might have against D.

OVERVIEW

In this study unit, we will study the differences between the *condictio sine causa generalis* and the *condictio sine causa specialis*, as well as the requirements for the latter, and the various areas of its application.

LEARNING OUTCOMES

After completing this study unit, you should be able to

- explain which actions are grouped under the *condictio sine causa generalis*
- distinguish between the fields of application of the *condictio sine causa generalis* and the *condictio sine causa specialis*
- discuss the differences between the *condictio indebiti* and the *condictio sine causa specialis*, with reference to the *Govender* case
- discuss, with reference to case law, the position of a drawee bank that has mistakenly paid out a countermanded cheque
- distinguish, with reference to the case law, between the *bona fide* possessor who received a thing *ex causa onerosa* or *ex causa lucrativa*

RECOMMENDED READING MATERIAL (OPTIONAL)

Eiselen S & Pienaar G *Unjustified enrichment: a casebook* 4th ed (LexisNexis Butterworths Durban 2016) 180–194
 Lotz G *The law of South Africa* Vol 9 2nd ed (LexisNexis Butterworths Durban 2005) paras 219–221
Govender v Standard Bank of South Africa Ltd 1984 4 SA 392 (C)

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos W “What action?” 1963 *SALJ* 3–6.
 De Vos W *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (Juta Cape Town 1987) 173–179
 Honoré AM “*Condictio* and payment” 1958 *Acta Juridica* 125–140
 Malan F “Enrichment and countermanded cheques” 1995 *TSAR* 782–785
Amalgamated Society of Woodworkers of SA and Another v Die 1963 Ambagsaalvereniging 1967 1 SA 586 (T)
B & H Engineering v First National Bank of SA Ltd 1995 2 SA 279 (A)
CIR v First National Industrial Bank Ltd 1990 3 SA 641 (A)
Govender v Standard Bank of South Africa Ltd 1984 4 SA 392 (C)
Jacquesson v Minister of Finance 2006 3 SA 334 (SCA)
John Bell and Co Ltd v Esselen 1954 1 SA 147 (A)
MCC Bazaar v Harris & Jones (Pty) Ltd 1954 3 SA 158 (T)
Rulten NO v Herald Industries (Pty) Ltd 1982 3 SA 600 (D)
Snyman v Pretoria Hypotheek Maatschappij 1916 OPD 263
Van der Westhuizen v McDonald and Mundel 1907 TS 933
Wilken v Kohler 1913 AD 135

7.1 INTRODUCTION

In this study unit, we will distinguish between the *condictio sine causa specialis* and the *condictio sine causa generalis*. The latter was an alternative action to any of the previous three *condictiones*, namely the *condictio causa data causa non secuta*, the *condictio ob turpem vel iniustam causam*, and the *condictio indebiti*. In Roman law, it was possible to institute the *condictio sine causa generalis* instead of any of the other three *condictiones* mentioned, as long as the *condictio* being replaced could, itself, have been instituted. Since the formula of the *condictio sine causa generalis* was less complicated than was that of the above-mentioned *condictiones*, it was often used instead of one of the others (De Vos 29–30). In the remainder of this study unit, we will consider the application of the *condictio sine causa specialis*.

7.2 APPLICATION IN SOUTH AFRICAN LAW

application

Much uncertainty exists about the field of application of this enrichment action. In *Govender v Standard Bank of South Africa Ltd* 1984 4 SA 392 (C) [396H], the court stated that “although it has been applied in certain cases ... its scope has not been succinctly formulated”.

In *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A) (hereinafter the *B & H* case), the court refrained from attempting to define the ambit of the *condictio sine causa*.

Under the common law, *condictio sine causa* was used as a catch-all for cases requiring a remedy, but which did not fit under the other enrichment actions. (See Lotz *LAWSA* para 220.) Instead, the action developed in a casuistic way, in terms of which certain general types of application might have been distinguished.

Against this background, it can be said that the *condictio sine causa specialis* may be used under four different sets of circumstances:

- (a) Where a party performs, and performance was due at the time that it was made, but where the *causa* for the performance has fallen away. In this form, the actio is called the *condictio ob causam finitam*.
- (b) Where the plaintiff's property was alienated, or consumed, by somebody else.
- (c) Where a bank has made payment in terms of a countermanded, or forged, cheque.
- (d) Where the ownership of property has been transferred *sine causa* to the other party, but the circumstances are such that none of the other *condictiones sine causa* would apply. The exact scope of such application is unclear. Stated as above, the *condictio sine causa specialis* could even encompass the subsidiary general enrichment action advocated by De Vos, although it has, to date, found no clear application in any South African court.

example

Assume that W steals a thing from A, and then sells it to X, who is *bona fide*. X, in turn sells it to Y, who is *bona fide*. Y sells it to Z, who is *bona fide*, and who, in turn, consumes it. If A cannot sue W in delict for some reason (eg W has disappeared), can he or she sue one or more of the *bona fide* possessors involved?

bona fide possessor who received *ex causa* *onerosa*

Where the possessors, as in the above-mentioned example, received the thing of value (*ex causa onerosa*), their actual enrichment is not constituted by the purchase price of the thing, but by the amount of profit that they made thereby. We have to bear in mind that the seller not only receives a purchase price, but that he or she has, himself or herself, paid a purchase price for the thing. If A cannot sue W in delict and for one or other reason (eg the thing has been consumed, or it has disappeared without trace) cannot institute his or her *rei vindicatio*, and the *bona fide* possessors have all received the thing *ex causa onerosa*, he or she will be able to sue only one of the possessors for the profit that he or she has made. Such suing can be undertaken insofar as the thing is still in that person's possession when the action is instituted.

In such a case, it is true that A will, perhaps, be able to recover only a small part of the value of his or her property. However, the above is still a more equitable solution

than is that which is offered by De Vos (at 76–83 211–212), namely that a *bona fide* possessor who received the thing *ex causa onerosa* can, in no way, be sued.

However, A can sue only one of the *bona fide* possessors, since, if A recovers from one of the possessors, say Y, Y can, in turn, recover from his or her predecessor in title, that is, X, on the ground of eviction. If A were to recover from X as well, it would mean that X would have to pay twice, that is, both A and Y, for eviction. To prevent such an unfair result, the owner's claim must be restricted to the profit of one of the *bona fide* possessors who received the thing *ex causa onerosa*.

Van der Westhuizen v MacDonald and Mundel

The leading case, in such respect, in our law is still *Van der Westhuizen v McDonald and Mundel* 1907 TS 933. The facts are given briefly below. During the Anglo-Boer War, the English military authorities took possession of tobacco belonging to A, the plaintiff. B, thinking, in good faith, that the authorities were the owners of the tobacco, bought it from the military authorities, and sold it at a profit. A claimed the value of the tobacco from B. Clearly, B was a *bona fide* possessor who had obtained the tobacco *ex causa onerosa*. The court held that an owner cannot sue a *bona fide* possessor who acquired the thing *ex causa onerosa*. We do not think that this decision is correct. The defendant was liable for at least the profit that he or she made insofar as it was still in his hands when the action was instituted.

bona fide possessor who received ex causa lucrativa

If one of the *bona fide* possessors obtained the thing *ex causa lucrativa* (without consideration), and, for some reason, the owner can no longer reclaim his or her property with the *rei vindicatio*, the owner must sue the possessor who obtained the thing *ex causa lucrativa*. The owner's claim is, of course, limited to the value of the thing, insofar as it is still in the hands of the possessor when the action is instituted. If the possessor has consumed the thing, regard must be given to his or her enrichment, in the form of expenses saved. Although our courts have not yet decided on the position of the *bona fide* possessor who obtained the thing *ex causa lucrativa*, we may accept that our courts will grant the owner an action against him or her.

7.3 APPLICATION OF THE CONDUCTIO INDEBITI IN CHEQUE LAW

Two Appellate Division judgments dealing with payments by cheque and the *condictio indebiti* warrant a brief discussion.

CIR v Visser
payment not by drawer

In *Commissioner for Inland Revenue v Visser* 1959 1 SA 452 (A), we have an interesting set of facts: Z, A's bookkeeper, fraudulently gave him the impression that he (A) owed a certain amount to the Receiver of Revenue. A gave Z a cheque wherewith to pay the amount. However, Z paid only a part of R's debt to the Receiver of Revenue. Afterwards, Z recovered the money from R's wife, and kept it for himself.

John Bell

A reclaimed the money from the Receiver of Revenue with the *condictio indebiti*. Hoexter JA refused to grant A's *condictio indebiti*. He held that it was not the drawer of the cheque, that is, A, who made the payment, but Z, and that Z, in any case, did not make an undue payment. The court relied, *inter alia*, on the judgment made in *John Bell & Co Ltd v Esselen* 1954 1 SA 147 (A). The facts of this case are substantially the same as those of the *Visser* case.

criticism of the *Visser* and *Esselen* cases

Honoré's (1958 *Acta Juridica* 125–140) criticism of the *Esselen* case also applies to the *Visser* case. With reference to the court's judgment that the drawer of the cheque did not make the payment, Honoré states (at 135): "It seems somewhat surprising that when a payment has been made by a banker from the account of one of its

customers to the payee of a cheque, it should be held that for purposes of *condictio* no payment has been made by the customer.” We, therefore, conclude that, in the *Visser* case, A made the payment of an *indebitum* and, hence, should have succeeded with the *condictio indebiti*.

The basis of the question in this case was whether a bank may recover from the payee of a cheque drawn on the bank, the amount that the bank paid to the payee by means of the cheque, even if the payment of the cheque had been countermanded by the drawer.

Govender

The facts of the case were as follows: Saaiman hired a bus from Govender, paying in advance for such hire by cheque. One of the prospective bus passengers, however, arranged for those concerned to make use of cheaper transport. Saaiman then stopped the cheque at the bank, on the understanding that he would not have a claim against the bank in the event of the cheque being inadvertently paid by the bank. The agreement between Saaiman and Govender was, however, never cancelled, with the result that Govender arrived with the bus at the arranged time.

distinctions
between
*condictio
indebiti* and
*condictio
sine causa
specialis*

Rose-Innes J had to decide whether the claim made by Standard Bank was based on the *condictio indebiti*, or on the *condictio sine causa specialis*, since different requirements had to be met for each. In his decision, he describes the distinctions between the *condictio indebiti* and the *condictio sine causa specialis* (at 398C–399D) as follows:

... the claim of the plaintiff bank for repayment from the payee of a cheque, payment of which had been countermanded, but which was nevertheless paid, does not fit comfortably within the case which a *condictio indebiti* is designed to meet. A *condictio indebiti* lies to recover a payment made in the mistaken belief that there was a debt owing and to be paid, but a bank paying a cheque owes no debt to the payee and knows that it is not indebted to the payee ... The indebtedness on a cheque, or on the underlying cause of a cheque, is that of the drawer, not the bank upon whom the cheque is drawn ... A bank, when paying a cheque drawn upon it knows that it is not a debtor of the payee. A bank, accordingly, when paying a cheque does not make payment in the belief that there is a debt owing by it to the payee. The claim of plaintiff bank is thus not a claim for recovery of a payment under a mistaken belief that the payment was owing upon a debt, whereas there was no debt, so that the cardinal ground for relief by way of a *condictio indebiti* appears to be lacking in this case.

He continues (at 400C–F):

The claim seems more readily to fit the scope of a *condictio sine causa*. Plaintiff is in fact saying that it has paid the cheque to the payee from the bank’s own funds, which is the true position, and has done so for no justifiable cause, since the cheque was stopped and there was no order on the bank and no authority to make the payment, and, as already pointed out, there was no debt, promise or obligation upon the bank to pay the money to the payee, so that the payment was without cause ... The *condictio sine causa* is brought where plaintiff’s money is in defendant’s hands without cause; there need be no erroneous belief that the money was owing to the defendant, as is the case under the *condictio indebiti*.

unjustifiable
enrichment
as
requirement

Rose-Innes J held (at 404C–D) that there is a firmer ground than the above upon which the matter can be decided, with the ground concerned being common to both the *condictio indebiti* and to the *condictio sine causa*. Standard Bank should have indicated that Govender was unjustifiably enriched at the expense of the Bank. In assessing whether Govender had been enriched by the payment of the cheque, due

regard should have been paid to any performance rendered by Govender that was juridically connected with his receipt of the money. From the facts, it is clear that the cheque was handed over by Saaiman to Govender in payment of the agreed charge for the hire of the bus. According to Rose-Innes J (at 406D–G), the receipt of the money by Govender was juridically connected with, and was received in consideration of, his performance of his obligations, in terms of the contract for the hire of the bus. Two consequences flowed from the considerations. Firstly, the payment of the cheque was not payment *sine causa*. Secondly, Govender had performed, or had held himself ready and willing to perform. He was, therefore, not *prima facie* unjustifiably enriched by the receipt of the payment, since the value of his performance could have been regarded as being equal to the amount that he received (in any case, until the contrary could be proved)

*B & H
Engineering
v FNB (A)*

In the *B & H* case, Groskopf AJ followed the decision in the *Govender* case. He held that, where the parties had agreed to make, and accept, payment of a debt by means of cheque, the debt was extinguished when the bank paid the cheque to the payee (creditor). This applied whether or not the payment had been authorised by the drawer (debtor) at that stage (at 292D–E).

Groskopf held, further, that B & H had not been enriched by the payment of the cheque, since its receipt of the amount of the cheque had been balanced by its loss of a claim against Sapco, so that its net financial position had remained unchanged. Therefore, according to the court, it was not necessary to determine whether the payment was *sine causa*.

position on
payment of
countermanded
cheques settled

The position on the payment of countermanded cheques has now been settled in South African law, because the above was an Appellate Division decision. The position now is that the bank will not have an enrichment claim against the beneficiary, as long as an underlying debt was extinguished by the delivery and payment of the cheque. Pretorius (1995 *THRHR* 744) states in the above case that, since the bank had inadvertently, and through its own doing, become indirectly involved in the dispute between the drawer and payee, it would not only have expedited the matter, but it would also have made it far simpler to resolve, if the bank were removed from the equation. Such removal could have been achieved by way of granting it an enrichment claim against the payee, and then leaving it to the parties to sort out their contractual dispute.

SELF-EVALUATION

- 0.1 Discuss the distinction between the application of the *condictio indebiti* and the *condictio sine causa specialis*, as expounded in the *Govender* case.
- 0.2 Distinguish, with reference to case law, between *bona fide* possessors who received the thing *ex causa onerosa* and those who received the thing *ex causa lucrativa*.

FEEDBACK

- (1) See 7.3.
- (2) See 7.3. Refer in your answer to the decision made in *Van der Westhuizen v McDonald and Mundel* 1907 TS 933.

FEEDBACK ON PRACTICAL SCENARIOS

scenario 1

This situation is provided as one of the classic examples in the field of application of the *condictio sine causa specialis*. Upon proper analysis, however, such exemplification must be questioned. The factual situation can be seen as either of the following:

- (a) The agreement between A and B is a compromise, in terms of which any dispute and liability between A and B is resolved. In this case, there is no question of any enrichment action, because of the settlement. In addition, A must then be deemed to have abandoned ownership of the TV set, which now belongs to B.
- (b) Alternatively, the agreement between A and B can be argued as having been concluded on the assumption that the TV set was lost, and that the agreement is, therefore, void because it was based on a false assumption. This is a more satisfactory explanation. In such event, however, the *condictio indebiti* would be the more appropriate action to take, as the payment was not due when it was made.

scenario 2

Although some authors (eg Eiselen & Pienaar) argue that the above is also a case where the *condictio indebiti* should be employed, the position that the *condictio sine causa specialis* is the appropriate action to take in the case of cheque payments is now firmly entrenched in our case law. Your answer should, therefore, refer to the relevant case law.

STUDY UNIT 8

NEGOTIORUM GESTIO

UNJUSTIFIED ENRICHMENT LAW			
General principles			
• enrichment • impoverishment • <i>sine causa</i> requirement • causality (at the expense of requirement)			
<i>Conditiones sine causa</i>	Improvements to property	Management of another's affairs	Work done. or services rendered
• <i>condictio indebiti</i> • <i>condictio ob turpem vel iniustam causam</i> • <i>condictio causa data causa non secuta</i> • <i>condictio sine causa specialis</i>	• <i>bona fide</i> possessors • <i>bona fide</i> occupiers • <i>mala fide</i> possessors and occupiers	• <i>actio negotiorum gestorum utilis</i> • <i>actio negotiorum gestorum contraria</i>	• <i>locatio conductio operis</i> • <i>locatio conductio operarum</i>

OVERVIEW

In this study unit, you will study the *actio negotiorum gestio*, the so-called action for management of affairs. The action deals with enrichment in situations where one party administers the affairs of another without the knowledge, or mandate, of the owner of the property. You will look at two types of situation: the management of the affairs of another that gives rise to the *actio negotiorum gestorum contraria* (or the true management action), and the management of the affairs of another that gives rise to the *actio negotiorum gestorum utilis* (an extended form of the *contraria* action, but one that is based on enrichment).

PRACTICAL SCENARIOS

scenario 1

A notices that the prize stud bull of his neighbour, B, is in serious distress. A cannot reach B anywhere, as B is on holiday in the Seychelles. A calls in a veterinarian to attend to the bull. A has paid R8 000 to the veterinarian. Can A reclaim that money from B? What would the case be if the bull had died in any event, despite the treatment?

scenario 2

C has bought a shop from D. At the time of the sale, D owed R50 000 to E, one of the main suppliers of the shop. E has informed C that they will not supply the shop

until such time as D has paid her debt. C, who urgently needs the supplies, pays the debt, and now wants to claim the money back from D. Which action should C use, and will he or she be successful in his or her claim? Would it make any difference to your answer if the reason for D not paying E was a dispute between D and E about R10 000 of the amount?

LEARNING OUTCOMES

After completing this study unit, you should be able to

- discuss the requirements for the true *actio negotiorum gestorum* in terms of South African law
- name the duties and the rights of the *gestor*
- distinguish between the true *actio negotiorum gestorum* and enrichment actions in South African law
- discuss, with reference to case law, the six instances where the extended *actio negotiorum gestorum* is applied
- discuss, in detail, the importance of the decision made in the *ABSA Bank v Stander* case for the use of the extended *actio negotiorum gestorum*

RECOMMENDED READING MATERIAL (OPTIONAL)

Eiselen & S & Pienaar G *Unjustified enrichment: a casebook* 4th ed (LexisNexis Butterworths Durban 2016) 211–212
 Lotz G *The law of South Africa* Vol 9 2nd ed (LexisNexis Butterworths Durban 2005) paras 222–224
ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers 1998 1 SA 929 (C)
Odendaal v Van Oudtshoorn 1968 3 SA 433 (T)

ADDITIONAL READING MATERIAL (OPTIONAL)

Leech BE “Enrichment at whose expense? A postscript” 1994 *THRHR* 695–703
Gouws v Jester Pools 1968 3 SA 563 (T)
Klug and Klug v Penkin 1932 CPD 402
Knoll v SA Flooring Industries Ltd 1951 1 SA 404 (T)
New Club Garage v Milborrow and Son 1931 GWL 86
Nortjé en ’n Ander v Pool NO 1966 3 SA 96 (A)
Standard Bank Financial Services Ltd v Taylam (Pty) Ltd 1979 2 SA 383 (C)
Van Staden v Pretorius 1965 1 SA 852 (T)
Williams Estate v Molenschoot & Schep (Pty) Ltd 1939 CPD 360

8.1 INTRODUCTION

Someone can incur expenses, or lose income, while he or she is taking care, or is furthering the interests, of another. The loss suffered by the manager of affairs (*gestor*) can then be recovered from the owner (*dominus*) with the *actio negotiorum gestorum contraria*. For the purposes of this study unit, it is important that you understand the distinction between the *actio negotiorum gestorum contraria* (the true management of affairs action) and the *actio negotiorum gestorum utilis* (the extended management of affairs action).

In the case of the true *actio negotiorum gestorum*, the *gestor* can claim for all reasonable expenses, while the extended *actio negotiorum gestorum* is an enrichment action. In other words, the *gestor* can claim only for his or her impoverishment, or for the enrichment

of the *dominus*, whichever is the smaller amount. The distinction between the two actions should become clear once you have studied the rest of this study unit.

8.2 APPLICATION IN SOUTH AFRICAN LAW

nature of application

In South African law, *negotiorum gestio* occurs where a person (the *gestor*), with the intention of acting to another's advantage or benefit, takes charge of the other person's interests in a reasonable manner. Such taking charge of interests occurs without the intention of bestowing a gift (*animus donandi*), and without being forbidden to manage the interests of the person (*dominus*) on behalf of whom the *gestor* acts.

8.2.1 True management of affairs action (actio negotiorum gestorum contraria)

requirements

The requirements for the true *actio negotiorum gestorum* are summarised as follows:

- The *gestor* must perform the service without an instruction; if he or she acts on the instructions of the *dominus*, he or she would be a mandatory.
- The *gestor* must act reasonably in the interests of the *dominus*.
- The *gestor* must have the intention to act in the interests of the *dominus*, meaning that the *animus negotia aliena gerendi* applies. This means that, if the *gestor* thinks that he or she is doing something in his or her own interests, he or she is not a *gestor*.
- The *gestor* must not have intended to act free of charge, which would have meant that it was a case of *animo donandi*.
- The *gestor* may not act in contravention of the express prohibition of the *dominus*.

extent of claim

If all the above requirements are present, the *gestor* has a claim against the *dominus* to the full extent of his or her expenses, even if the *dominus* did not benefit thereby, meaning that he or she was not enriched. Generally, because the expense is *utiliter coeptum*, it may well also be a necessary expense, and, therefore, an expense saved. In such a sense (not overlooking the fact that the *quantum* of enrichment is assessed when an enrichment action is instituted) the extent of claim may coincide with the amount that could be claimed in terms of an enrichment action.

duties of the gestor

The manager of affairs has certain duties towards the *dominus*, namely

- to complete the management of the affairs that he or she has commenced
- to exercise the necessary care in his or her management
- to account for anything that he or she acquires by virtue of the management of affairs for the *dominus*
- to surrender to the *dominus* all of that to which the latter is entitled

rights of the gestor

The manager of affairs has a right of recourse against the *dominus*, flowing from his or her management of affairs. The situation can be explained as follows:

- The *gestor* is entitled to compensation for all expenses and disbursements properly made for the purpose of the management of affairs. The overall amount should include the amounts paid for the purchasing of materials required for the management of affairs, as well as the remuneration that he or she is paid for the services and work performed by others in carrying out the task assumed by himself or herself. Currently, it is also argued that the *gestor* should have the right to recover the loss of income that he or she has suffered as a result of the

management of affairs (ie the income he or she could have earned, had he or she not been busy with the management of the affairs) (De Vos 83 217).

- The *gestor* can claim, by means of novation, that the *dominus* assume all the debts that he or she has incurred in the management of the affairs and that have not yet been settled. Alternatively, the *gestor* can claim that the *dominus* pay the debts directly to the creditors, or otherwise give him or her the money with which to pay them.

distinction
between true
*negotiorum
gestio* and
enrichment
actions

True *negotiorum gestio* is a well-known concept in our law, and, as such, must be distinguished from enrichment actions, because the action of the *negotiorum gestor* is not an enrichment action and can be used only in exceptional circumstances.

I It is important to clearly distinguish the basic differences between the normal or true *actio negotiorum gestorum contraria*, and the exceptional circumstances that give rise to enrichment actions under the extended management of affairs actions discussed below. The differences can be explained as being in terms of the extent of the claim, or in whose interest the action took place.

extent of
claim

- The true *gestor* may recover all reasonable expenses. In deciding what is reasonable, one may visualise the situation at the time at which the expenditure was incurred. The *gestor's* right to recover is unaffected by the fact that the improvement has subsequently been destroyed, or diminished in value. In an enrichment action, in contrast, the impoverished party can recover only the lesser of two amounts, that is, his or her impoverishment, or the enriched party's enrichment. Such recovery can be done only to the extent that the enrichment is in existence at the moment at which the impoverished party institutes his or her action. (Where necessary expenses constitute an expense saved, the enrichment and the impoverishment coincide.) Events, subsequent to the enrichment, that have destroyed, or diminished, the enrichment would deprive the impoverished party, wholly or partially, of his or her claim, even though the improvements were necessary, or useful, when made. The action, thus, can be brought to bear only to the extent of the final benefit of the enriched party.

in whose
interest the
action takes
place

An enrichment claim, thus, has a variable content. In the case of the true *negotiorum gestio*, the content of the claim, which is fixed, remains unchanged.

- A necessary requirement for the true *negotiorum gestio* is the intention to act for the benefit of another (*animus negotia aliena gerendi*). The requirement automatically creates a category of unusual instances where the intention of the *gestor* is absent; it is here that the enrichment concept comes to the fore. In the above regard, De Vos (at 41 79 191–193) states that it has been demonstrated that, where someone manages the affairs of another, but only in his or her own interest, he or she will have the right to an action, but such action will be restricted to the true enrichment involved.

ACTIVITY 8.1

Consider the two practical examples set out at the start of this unit, and explain whether or not they are examples of the true management of affairs action. Explain why the *contraria* action is not considered to be a true enrichment action. Provide your explanation in the form of advice given to the potential plaintiff.

FEEDBACK

In your answer, you have to consider the various requirements for the *actio negotiorum gestorum contraria*, and determine whether it could be used. Pay special attention to the requirement that the *gestor* must not have acted in his or her own interest. Also, consider the fact that the actions taken need not be successful, but merely reasonable. See also the feedback at the end of this study unit in the above regard.

8.2.2 Extended management of affairs action (*actio negotiorum gestorum utilis*)

exceptional
circumstances
under which
enrichment
action allowed

Van Zyl (at 148–169) discusses four exceptional circumstances under which the true *negotiorum gestio* is not applicable, but, nevertheless, an enrichment action is allowed. The four exceptional circumstances are now generally recognised as being instances for the true enrichment action, being the extended management of affairs action.

*The liability of a
minor*

Where the *gestor* has managed the affairs of a minor, the minor is liable only to the extent of his or her own enrichment (*Pretorius v Van Zyl* 1927 OPD 226 230). This rule has been criticised by De Vos (at 214) in terms of the *gestor* having to be able to enjoy his or her full right of recourse, even where the *dominus* is a minor.

*The gestor acts
against the
prohibition of
the dominus*

Until recently, some doubt existed as to whether our courts would currently grant a right of recovery to an impoverished person who had enriched another against the other's express wish. In some of our older cases, the courts took the view in such cases that a *gestor* had a right of recovery to the extent of the *dominus*'s enrichment, but in more recent cases uncertainty has been expressed on this point.

*Colonial
Government v
Smith*

In *Colonial Government v Smith & Co* (1901) 18 SC 380 392–393 the plaintiff, in spite of the protests of the defendants, removed explosives from their storerooms to store them in a safer place. The plaintiff claimed the expenses incurred in connection with the removal and storage of the defendants' explosives. In this case, the plaintiff was not a *negotiorum gestor*, having acted contrary to the express wishes of the defendants. The court, however, following the writings of Voet (3 5 11), granted the plaintiff's claim for its expenses on the ground of the unjustified enrichment of the defendants, in the form of expenses saved.

*Odendaal v Van
Oudtsboorn*

In *Odendaal v Van Oudtsboorn* 1968 3 SA 433 (T) (hereinafter the *Odendaal* case), however, De Kock J, in an *obiter dictum*, expressed strong doubt about whether a court would currently grant an action to a *gestor* who had acted contrary to an express prohibition of the *dominus*.

*Standard Bank
v Taylam*

In 1979, the above matter came up for decision in the Cape Provincial Division in *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* 1979 2 SA 383 (C). After a thorough examination of the authorities, the court came to the conclusion that the fact that a *gestor* had acted contrary to the express wishes of the *dominus* did not, under all circumstances, constitute a bar to the making of an enrichment action by the *gestor*. The court was at pains, however, to stress that there is no unlimited licence to meddle in the affairs of another, and that a *gestor* who seeks to recover on the ground of enrichment, after he or she has acted against the express wishes of the *dominus*, has to show that some just cause existed for disregarding such wishes.

This decision in the *Taylam* case should be followed, in preference to following the *obiter dictum* in the *Odendaal* case.

The gestor who bona fide administers the affairs of another, thinking that he or she is acting in his or her own interests

According to Rubin, the principle of enrichment is clearly applicable in such cases. The submission is, therefore, made that our law would permit a *gestor* in circumstances like the above to recover, on the basis that the *dominus* has been unjustly enriched at his or her expense. In *Klug and Klug v Penkin* 1932 CPD 402, use of the action was successful, although the action was not expressly called an extended *negotiorum gestio* at the time.

The gestor who mala fide acts in his or her own interest

Van Zyl points out that our modern writers and case law are divided on whether or not the extended *negotiorum gestio* is available in our present-day law in cases where a *mala fide gestor* acts in his or her own interest.

discharging of debt in own interest

What is the position if some person discharges the debt in his or her own interest, or against the will of the debtor? In the first place, he or she can, clearly, not have acted on the ground of *negotiorum gestio*; a person who benefits another in his or her own interest, or against the will of the other, cannot be regarded as acting on the ground of *negotiorum gestio*.

In several cases, on the basis of Voet 3 5 8 9 and 11 (see also D 3 5 5 5), the view has been held that the impoverished person can sue the enriched person on the ground of enrichment. The underlying idea has been that the impoverished person cannot recover his or her expenses as a *gestor*, but that he or she can recover the (possibly) lesser amount of the enriched person's enrichment.

Odendaal v Van Oudtsboorn

A leading decision, acknowledging the extended *negotiorum gestorum* as an independent enrichment action in South African law, is that of the *Odendaal* case.

In the above case, the facts were, briefly, the following: A, who took over a business enterprise from B, ordered goods from C. C refused to carry out the order before B's personal debt towards C had been paid. A paid B's debt without B's knowledge, and in the absence of any instructions from B to do so. In paying off the debt, A's aim was to further his or her own interests. A reclaimed from B the amount paid to C.

If A had paid under instructions from B, she would have been able to claim the amount on the ground of *mandatum*. If A had paid with the aim of promoting B's interests, but without B's knowledge, A would have been able to reclaim his or her expenses from B on the ground of *negotiorum gestio*. However, what is the position where A pays B's debt without instructions to do so, and so as to further his or her own interests?

The court, rejecting the decision made in *Shaw v Kirby* and *Van Staden v Pretorius* 1965 1 SA 852 (T), held that A could, in fact, claim from B, on the ground of undue enrichment. To support its finding, the court referred to Roman law (D 3 5 6 3), various old writers (in particular, Voet 3 5 9), modern writers and two judgments of the "Hooge Raad van Holland". Apart from such positive authority, the judgment should also be welcomed from the perspective of sound legal theory.

A's case met all the requirements for a claim for undue enrichment: B was enriched at the expense of A by means of the extinction of his or her debt to C, whereas A was impoverished in consequence of the payment, leaving B's enrichment *sine causa*. Therefore, there should be no reason for the refusal of an action based on undue enrichment.

**reasonableness
in the light of
surrounding
circumstances**

The court touched on the question of whether it is sound legal policy to grant an action to a person acting in his or her own interest. An interfering person could, perhaps, place a debtor in an invidious position (on 442). However, the court held, quite rightly, that each case would have to be examined to establish whether the enrichment was unjustified and improper. If a person who pays the debt of another without being asked to do so has, in the light of all the surrounding circumstances, acted unreasonably (eg if he or she is inspired by evil motives), the court will probably find that the enrichment was not undue, and it will, thus, refuse to grant an action.

**Ubuntu and
fairness**

The court held the view that the matter should probably be settled by means of legislation. With all due respect, such a view cannot be supported: the courts themselves can, in the light of the circumstances, determine fairly easily whether a person's conduct is reasonable, and, consequently, whether or not it is justified.

The approach followed by the court in the above-mentioned case is also sound in the light of our current constitutional principles, more particularly in terms of the principles of Ubuntu and fairness. The principles will also be instructive in those instances where the impoverished party acted with an improper motive, for instance to cause the enriched party harm, as discussed above. In this way, the courts are provided with the necessary tools to do justice in individual cases, without causing too much legal uncertainty.

***ABSA Bank
v Stander:*
the facts**

The decision made in respect of the *ABSA Bank v Stander* case is the latest to be made on the relevance of the extended *actio negotiorum gestorum*.

Facts

In the *ABSA Bank v Stander* case, the facts were as follows: K purchased a vehicle on instalments. The instalment sales agreement provided that the ownership of the vehicle would not pass to K before payment of the full amount had been made. The seller of the vehicle ceded her rights in the agreement to the appellant (Bankfin), which became the owner of the vehicle. K failed to comply with her obligations in terms of the agreement.

While the vehicle was in K's possession, she lent it to B, who was involved in a collision with it. B delivered the vehicle to the respondent (ie Stander) for repair. Stander was under the impression at all relevant times that B was the owner of the vehicle, and that he would have to pay for the repairs. B then disappeared, and Stander retained possession of the vehicle.

Bankfin instituted an action for *rei vindicatio* against Stander, in response to which the latter instituted a counterclaim for the cost of the repairs to the vehicle. Stander averred that the cost was reasonable, necessary and useful, and that the repairs had increased the value of the vehicle by the same amount. Stander, therefore, averred that Bankfin had been unjustifiably enriched at his or her expense to the amount of the cost of repairs. Stander further alleged, in the alternative, that he had acted as the unauthorised manager (*negotiorum gestor*) of Bankfin's affairs, in which regard he had had the intention of managing such affairs, and of being reimbursed for his expenses.

**influence of
insolvency**

Van Zyl J studied the common law in regard to his decision, as well as the opinion of many writers on this point. He referred (in 954G–955C) to De Vos's main objection against allowing an action in cases of indirect enrichment. The objection was that taking such an action would have conflicted with the equality of creditors principle if B were to become insolvent, and A were to have a choice between contractually suing the insolvent estate of B, or else suing C on the basis of unjustified enrichment. In the first case, he or she would have had only a concurrent claim against the insolvent

estate, whereas, in the second case, he or she would have been able to claim the full amount owing, on an enrichment basis. If he or she had been allowed to sue C directly, the creditors of the insolvent estate of B would have been prejudiced, since the estate also had a contractual claim against C, the return on which would have been to the benefit of all creditors concerned.

Although Van Zyl J accepted the merits of the above argument, B was not insolvent in the given instance, but had merely disappeared without a trace. The judge noted, however, that even if B had been insolvent, the facts of each case should be considered carefully to establish whether it would be fair, just, reasonable, and in the public interest to grant an action to A against C. According to the judge, it would have been wrong to apply the *paritas creditorum* rule rigidly and without qualification.

*ABSA v
Stander: actio
negotiorum
gestorum*

Van Zyl J then come to the following conclusion (in 956I–957C):

The facts in the present case have not been complicated by the insolvency of Bezuidenhout, with whom Stander contracted to repair ABSA's vehicle. As in the *Milborrow* case *supra* the person who gave the instructions to repair the vehicle has simply disappeared from the scene and any action which Stander might have against him is quite useless. Stander has clearly been impoverished and ABSA enriched in that it has been saved the expense of having the vehicle repaired. This situation is not affected by the fact that ABSA might have a contractual claim against Kent or a delictual claim against Bezuidenhout for the recovery of such expenditure. As mentioned above, inasmuch as Stander never had the intention to manage ABSA's affairs, he cannot be regarded as an (ordinary) *negotiorum gestor*. His legal position can, however, be construed as that of a *bona fide gestor* who has managed the affairs of the *dominus*, ABSA, in the mistaken belief that he has managed his own affairs in the sense of complying with his obligations in terms of his agreement with Bezuidenhout.

Additionally, he concluded (in 957C–D):

Although a *causa* for his impoverishment existed at the time of his agreement with Bezuidenhout, that *causa* has fallen away or become academic as a result of Bezuidenhout's disappearance. Alternatively, policy dictates that it would be unjust, unfair and unreasonable should Stander be deprived of an action against ABSA. Such action is the extended *actio negotiorum gestorum*, which entitles him or her to recover the amount by which ABSA has been unjustifiably enriched at his expense.

*Van Zyl on
extended
action*

Van Zyl (at 175) suggests the following with regard to the application of the extended *actio negotiorum gestorum*:

From the above, it must be considered as firmly established that the extended *actio negotiorum gestorum* conducts a strong and independent existence as an enrichment action in the South African law of today. I would suggest that it could be applied in many of the cases for which the general enrichment action was advocated before 1966. In view of the probability of further expansion of its application in the future, statutory regulation of the field of unjustified enrichment cannot, in my opinion, be recommended at the present stage.

ACTIVITY 8.2

Consider the practical scenarios at the start of this unit. Explain which of the *contraria* or *utilis* actions should be used in each of the scenarios, and why. Also explain whether or not the *utilis* action is a true enrichment action. Why would you prefer to use the *contraria* action rather than the *utilis* action?

FEEDBACK

In your answer, you have to distinguish between the requirements of the two actions clearly, as well as between their field of application and their application to the scenarios concerned. Pay special attention to the requirement that deals with acting in one's own interest. The important difference between the two actions is the extent of one's claim, which you have to consider properly in your answers. See also the feedback provided at the end of this study unit.

SELF-EVALUATION

- 0.1 Discuss the requirements for the true *actio negotiorum gestorum* in South African law.
 - 0.2 Name the duties and rights of the *gestor* in the application of management of affairs.
 - 0.3 Distinguish between the true *actio negotiorum gestorum* and the enrichment action of the management of affairs.
 - 0.4 Discuss, with reference to case law, the four instances where the extended *actio negotiorum gestorum* finds application.
 - 0.5 Discuss in detail the discharging of someone else's debt as a form of management of affairs, with reference to the decision made in the *Odendaal* case.
 - 0.6 Discuss in detail the importance of the decision made in the *ABSA Bank v Stander* case, in respect of the application of the extended *actio negotiorum gestorum* in terms of South African law.
-

FEEDBACK

- (1) See 8.2.1.
 - (2) See 8.2.1.
 - (3) See 8.2.1. Refer in your answer to the extent of the various claims and the different parties in whose interest action has been taken.
 - (4) See 8.2.2. Refer briefly in your answer to the following cases: *Standard Bank v Taylam*; *Shaw v Kirby*; *Harman's Estate v Bartholomew*; *Van Staden v Pretorius*; *Odendaal*; *New Club Garage v Milborrow*; *Williams Estate v Molenschoot*; *Knoll v SA Flooring*; *Gouws*; and *ABSA Bank v Stander*.
 - (5) See 8.2.2.
 - (6) See 8.2.2. Refer specifically in your answer to the test that should be applied, according to Van Zyl J, in each case.
-

FEEDBACK ON PRACTICAL SCENARIOS

scenario 1

The important factor to consider in this case is the fact that A is not acting in his or her own interests, but out of concern for the interests of his or her neighbour. This would clearly fall into the field of application of the *contraria* action, provided that the other requirements are also met. The following requirements must be considered: Did A act reasonably? Would the owner have acted in the same manner? Were the expenses reasonable? The importance of this action is that A would be entitled to claim his or her full expenses, whether or not his or her actions were successful. You must be able to explain why this is so.

scenario 2

This is clearly a case where the *utilis* action would be used because the party acted in his or her own interests, rather than in those of the third party. Also consider the other requirements set out in case law. Which of the cases bears the closest resemblance to this set of facts? Discuss the case concerned in answering this question. What about the R10 000? If there is a genuine dispute, can it be said that D has been enriched by that amount prior to the resolution of the dispute? What pertains to the R40 000? The last two questions would probably be resolved on proving the enrichment. The onus to prove that the defendant has been enriched, and the extent of the enrichment, lies with the plaintiff. If a dispute exists between the potentially enriched party and the creditor, the plaintiff would have to prove that the dispute would have been decided in favour of the creditor to succeed with the full claim. As the dispute only affected part of the claim, no doubt exists that the defendant has been enriched by at least R40 000.

STUDY UNIT 9

ENRICHMENT BY MEANS OF IMPROVEMENTS AND ATTACHMENTS (ACCESSIO)

UNJUSTIFIED ENRICHMENT LAW			
General principles			
• enrichment • impoverishment • <i>sine causa</i> requirement • causality (at the expense of requirement)			
<i>Conditiones sine causa</i>	Improvements to property	Management of another's affairs	Work done, or services rendered
• <i>condictio indebiti</i> • <i>condictio ob turpem vel iniustam causam</i> • <i>condictio causa data causa non secuta</i> • <i>condictio sine causa specialis</i>	• <i>bona fide</i> possessors • <i>bona fide</i> occupiers • <i>mala fide</i> possessors and occupiers	• <i>actio negotiorum gestorum utilis</i> • <i>actio negotiorum gestorum contraria</i>	• <i>locatio conductio operis</i> • <i>locatio conductio operarum</i>

OVERVIEW

In this study unit, we will discuss enrichment by means of improvements and attachments (*accessio*) by various types of possessors and occupiers, as it is entrenched in modern South African law. As you will have already touched on this subject in your studies of property law, you would benefit from reviewing the material concerned before tackling this study unit.

PRACTICAL SCENARIOS

scenario 1

A owns a farm in the Thabazimbi district that he bought four years ago. A boundary fence erected two decades before lies between A's farm and B's neighbouring farm. Both A and B are unaware of the fact that the fence was erected in the wrong place, so that a piece of B's land has been erroneously incorporated into A's farm. A has built a hunting lodge, at an expense of R10.5 million, on the piece of land concerned. A has also built a dam (at a cost of R500 000) and a borehole (at a cost of R100 000) on the land. A has also repaired the house on the property, at

a cost of R125 000. At the entrance to the property, A, in addition, has erected a lavish gate (at a cost of R50 000). B has now found out that the land on which all of these improvements was effected actually belongs to her, leading her to lodge an *actio rei vindicatio* against A for the return of the piece of land involved. A has, in the meantime, been able to obtain two crops from the land, thereby realising a net profit of R1 240 000. A third crop is standing ready to be harvested (of which the estimated value is R1 140 000, with the costs involved in planting and managing the crop amounting to R330 000). Advise A on whether he can reclaim any of his expenses and on any defences that he might have against B's action.

scenario 2

D, a German tourist, rented a car from Avis in Johannesburg. Unbeknown to both parties, the rental contract was void. While D was travelling in the Northern Cape, the vehicle broke down in the town of Springbok. When D requested Springbok Motors to repair the vehicle, the firm indicated that the repair costs would be R19 000. After three days of waiting, D rented another vehicle to get her back to the city, and she has, meanwhile, flown back to Germany. Avis now wants to claim the vehicle from Springbok Motors, but the latter refuses to release the vehicle, unless its account is paid in full. Advise Avis on whether Springbok Motors is entitled to enforce payment in this manner.

scenario 3

E is renting offices from F. After two years of occupancy, E has now fully refurbished the offices, expending the following amounts: R140 000 on the repartitioning, and R130 000 on the painting, of the offices; R120 000 on the upgrading of the bathrooms; R130 000 on new carpeting throughout; R125 000 on repairing the roof that was leaking; and R135 000 on the installing of new air-conditioning units.

Shortly after all of the above-mentioned costs were incurred, F terminated the lease with three months' notice, as he or she was entitled to do under the existing contract. Advise E on whether she is entitled to claim anything in respect of the expenses incurred. For the purposes of your answer, assume that the lease contract did not address the issue of improvements to the lease property.

LEARNING OUTCOMES

After completing this study unit, you should be able to

- distinguish cases where movable things are attached to other movable things from cases where movable things are attached to immovable things
- briefly state how the South African law on *accessio* developed from our common law
- describe the *bona fide* and the *mala fide* possessor
- explain in detail, with reference to the case law, the remedies of the *bona fide* and the *mala fide* possessor
- explain the difference between the *bona fide* and the *mala fide* possessor in South African law

RECOMMENDED READING MATERIAL (OPTIONAL)

Eiselen S & Pienaar G *Unjustified enrichment: a casebook* 4th ed (LexisNexis Butterworths Durban 2016) 241–242 273

Lotz G *The law of South Africa* Vol 9 2nd ed (LexisNexis Butterworths Durban 2005) paras 227–233

Bellingham v Bloommetje 1874 Buch 36

Lechoana v Cloete 1925 AD 536

Weilbach v Grobler 1982 2 SA 15 (O)

ADDITIONAL READING MATERIAL (OPTIONAL)

Acton v Motau 1909 TS 841

De Beers Consolidated Mines v London and SA Exploration Company (1893) 10 SC 359

JOT Motors (Edms) Bpk h/a Vaal Datsun v Standard Kredietkorporasie Bpk 1984 2 SA 510 (T)

Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd 1960 3 SA 642 (A)

Minister van Wet en Orde v Erasmus en 'n Ander 1992 3 SA 819 (A)

Nortjé en 'n Ander v Pool NO 1966 3 SA 96 (A)

Peens v Botha-Odendaal 1980 2 SA 381 (O)

Rademeyer and Others v Rademeyer and Others 1968 3 SA 1 (C)

Standard Kredietkorporasie v Jot Motors h/a Vaal Datsun 1986 1 SA 223 (A)

9.1 INTRODUCTION

improvements
and
attachments

In this study unit, we will study cases where movable things belonging to one person have been attached to the movable, or immovable, property of another person. If the property to which they have been attached is immovable, then they become part of that immovable property, and the owner thereof becomes the owner of the whole. If the property to which they have been attached is movable, then the owner of one of the movable things becomes owner of the whole, according to certain well-known principles of the law of property. The question that arises as to whether the owner of the property who has lost his or her ownership is entitled to claim anything from the owner of the whole. The most obvious possibility is an enrichment claim. In common law, the improvements and attachments (*accessio*) were (and currently remain) an original means of acquiring ownership.

various
categories of
persons

In the case of improvements and attachments, we can draw a distinction between a possessor and an occupier. According to the authorities, a *bona fide* possessor is someone who unlawfully possesses the goods of another in good faith, in the belief that they belong to him. A *mala fide* possessor is someone who possesses the goods of another, knowing that they do not belong to him, but who possesses them with the intention of being the owner (*animus domini*). The common characteristic that is shared by the *mala fide* and *bona fide* possessors is that both of the possessors possess with the intention of being the owner (*animus domini*).

Where someone possesses a thing without having such a mindset, for example where he or she acknowledges the right of another to the goods, he or she cannot be a possessor, but can only be an occupier or holder at will, depending upon the circumstances concerned. The position of occupiers and holders at will in South African law will be discussed in study unit 10 below.

9.2 SOUTH AFRICAN LAW

9.2.1 General

Roman law

In Roman law, a number of undeveloped enrichment actions existed that could be instituted only under specific circumstances. No general enrichment action was in existence. Thus, if an impoverished party could not bring the facts of his or her case within the ambit of one of the recognised actions, he or she had no recourse to legal remedy in such regard.

Roman-Dutch law	As regards classical Roman-Dutch law, our writers indicate no major change in this field of law. The practice of the 18th century went further, however, to recognise a general enrichment action.
extensions in South African law	In South African law, the old actions of the common law remain extant. Our current law has, however, developed further than the classical Roman-Dutch law, as described by our writers. The courts have recognised a right of recourse in a number of cases brought under circumstances in which the common law did not grant a remedy. The above was not done by means of interpreting the common law authority to extend existing actions to the cases in question, but it was done by means of allowing an action using the analogy of the existing actions, and under the influence of public policy against unjustified enrichment.
De Vos on extensions	According to De Vos, our courts did, in fact, acknowledge a general enrichment action that existed side-by-side with the old actions. The additional circumstances under which enrichment liability was recognised in our law were not separate actions, but they were manifestations of general enrichment liability. As such contention was rejected in the <i>Nortjé</i> case, it is necessary to consider the extensions of enrichment liability as consisting of separate specific actions, however.
various categories of persons	Various categories of persons can be identified who could qualify for the bringing of compensatory actions after the making of improvements and attachments to someone else's property. The developments in South African law will be discussed hereunder with regard to such categories of persons (being the occupiers and holders at will) as are presented in study unit 10.

9.2.2 Bona fide possessor

description	First of all, we deal with the position of the <i>bona fide</i> possessor. A <i>bona fide</i> possessor is a person who has possession (<i>possessio</i>) of a thing in the mistaken belief that he or she has ownership of the thing. However, our case law requires not only that the possessor must, in fact, believe that he or she is the owner, but that his or her mistake must also be reasonable. The requirement that a possessor's mistaken belief that he or she is the owner of a thing must be reasonable is unacceptable. The only relevant question should be whether the possessor did, in fact, believe that he or she was the owner (making this a subjective test). Whether his or her mistake is reasonable or unreasonable in no way affects his or her subjective state of mind. The above does not mean that the reasonableness or unreasonableness of a possessor's mistake is wholly irrelevant; by itself, or taken together with other factors, it may be of the greatest importance in the law of evidence, since it may strongly indicate whether or not the possessor did, in fact, believe that he or she was owner of the thing. To sum up the above, the requirement that a possessor's mistake must be reasonable for him or her to be a <i>bona fide</i> possessor is untenable in substantive law. However, the reasonableness or unreasonableness concerned may be of value as evidence in confirming whether the possessor did, in fact, make a mistake. The <i>bona fide</i> possessor is no longer the owner of his or her attached material, since the owner of the immovable thing to which it is attached has acquired its ownership by <i>accessio</i>.
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right of recourse	The owner of the ancillary thing, who lost his or her ownership after attachment, has a right of recourse against the new owner of the principal thing, or the whole, based on unjustified enrichment, if such owner is, in fact, enriched by the attachment.
<i>ius tollendi</i>	The <i>bona fide possessor</i> can remove any improvements or attachments (<i>ius tollendi</i>), while still in possession of the property. The <i>ius tollendi</i> of the <i>possessor</i> is not an indication that the ownership of the attached materials did not pass to the owner of the immovable thing (<i>Van Wezel v Van Wezel's Trustee</i> 1924 AD 409 417–418). Such a right is a personal right to remove the attached materials without damage to the immovable thing. The <i>ius tollendi</i> may only be exercised reasonably according to equitable principles.
time for removal or compensation	The <i>bona fide possessor</i> may remove his or her improvements at any time prior to the true owner claiming the land. After the true owner has made his or her claim, however, he or she may not remove the improvements, unless the owner is unwilling to compensate him for them. The <i>bona fide possessor</i> may claim compensation at any time after he or she discovers that he or she is not the owner of the land. The view expressed in the <i>Meyer's Trustee</i> case was rejected by Ogilvie Thompson JA and Rumpff CJ in the <i>Nortjé</i> case, and by Van Zyl J in <i>Rademeyer and Others v Rademeyer and Others</i> 1968 3 SA 1 (C).
extent of compensation	Compensation can only be claimed for expended money or materials, but not for the <i>bona fide possessor's</i> labour, or for the interest earned on his or her expenses. The possessor has, however, a claim for lost income resulting from the expenditure of his or her labour (<i>Eiselen & Pienaar</i> 220). In general, the <i>bona fide possessor</i> is entitled to compensation for all of his or her improvements made, with the exception of luxurious improvements. The extent of the compensation can be discussed with reference to the following three forms of expenses, namely necessary expenses, useful expenses and luxurious expenses (<i>Lechoana v Cloete</i> 1925 AD 536 547 [hereinafter the <i>Lechoana</i> case]):
<i>necessary expenses</i>	The <i>bona fide possessor</i> can claim for all his or her expenses in respect of the preservation or protection of the property of another (<i>impensae necessariae</i>) if his or her efforts were successful. The owner's enrichment is in saved expenses.
<i>useful expenses</i>	In the case of useful expenses (<i>impensae utiles</i>), the <i>bona fide possessor</i> can claim for all his or her expenses, or to the amount by which the value of the property has been enhanced, whichever is the least (<i>Rademeyer and Others v Rademeyer and Others</i> 1967 2 SA 702 (C) 706–707).
<i>luxurious expenses</i>	Luxurious expenses (<i>impensae voluptuariae</i>) are the expenses incurred for decorations that are neither necessary nor useful (although they may increase the value of the property). Normally, no claim may be made for them, except where the owner is in the process of selling the property for an increased purchase price, or the yield of the property has been increased, as a result of the expenses. The luxurious improvements can be removed (<i>ius tollendi</i>) if the owner does not wish to compensate him or her for them, except where their removal will severely damage the property of the owner.
right of retention	The <i>bona fide possessor</i> can enforce his or her right to compensation in terms of a retention right (<i>ius retentionis</i>) (<i>Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd</i> 1960 3 SA 642 (A)). He or she may, therefore, refuse to leave the land until the owner has reimbursed him or her for the improvements made. Two requirements exist for obtaining, or keeping, a right of retention, namely (a) that the possessor must be in control of the property, and (b) that the owner of the property must be unjustifiably enriched at the expense of the possessor.

If the possessor has voluntarily given up effective control over the thing, the right of retention is lost. The right cannot be revived again, even if effective control is regained by the possessor. In an instance of the attachment and removal of the thing by a third person (under protest by the lien holder), or of the loss of effective control owing to force, fraud or undue means, the lien, however, revives, if the effective control is regained (*Minister van Wet en Orde v Erasmus en 'n Ander* 1992 3 SA 819 (A)).

However, the above does not mean that the possessor loses his or her right to compensation; if he or she has already surrendered possession of the land or other property, he or she loses only his or her right of retention. Such a retention right is a real right that may be enforced against every successive buyer of the land.

example

A, a *bona fide* possessor, erects buildings on B's land. B sells the land to C without paying A any compensation for her improvements. A then exercises her lien. If B has not taken any of the fixtures into account in the agreement between himself and C, C is the party that is enriched by the buildings concerned.

Therefore, C cannot complain if he or she has to compensate A. If, however, B has taken the value of the buildings into account in her agreement with C, and, furthermore, B does not inform C that A had a right to compensation, B is the person who is enriched, and A will only be able to sue him in the given instance. However, if C wants possession of the land, he or she will be compelled to fulfil A's claim for compensation. If C fulfils A's claim (for which he or she cannot be held liable by A, since he or she is not the party enriched), so as to terminate A's exercise of his or her *ius retentionis*, C will be able to turn to B, and to hold him or her liable for breach of contract.

fruits

The value of the benefits derived (ie the fruit gathered) before the realisation (at the moment of awareness) that the possession is unlawful, less the production costs, can be set off against the *bona fide* possessor's claim for compensation for useful improvements. Such factor can be seen as either diminishing the owner's enrichment, or the possessor's impoverishment.

From the moment of realisation that the possession is unlawful, the possessor becomes a *mala fide* possessor, and different principles apply. The above applies except where the possessor exercises the right of retention, in which case he or she remains the lawful occupier, or holder, for that specific purpose.

Fruit includes natural fruits (*fructus naturales*), as well as the rent that the possessor received from leasing the property (*fructus civiles*), but it does not include the interest received on the expenses. Further, it does not include the fruit yielded by the improvements themselves.

The possessor obtains ownership of all the fruit gathered before the realisation (ie the time of awareness) that the possession is unlawful. The owner lacks any action against the possessor for the value of such fruit gathered, but can only deduct such from the possessor's claim for compensation (*Rademeyer and Others v Rademeyer and Others* 1967 2 SA 702 (C)).

If the value of the fruit gathered by the *bona fide* possessor exceeds the enrichment obtained by the owner, no compensation will be awarded to the possessor (*Boikbutsong Business Undertakings (Pty) Ltd v Grobler NO 1988 2 SA 676 (BA) [683E–H]*).

use and
enjoyment of
property

A *bona fide* possessor thinks that he or she is the owner of the property, and he or she does not envisage that he or she will have to compensate the owner for his or her occupation. Therefore, his or her use and enjoyment of the property cannot be set off against his or her claim for compensation for any improvements made.

remedies
of *bona fide*
possessor

In summary, the following remedies are available to the *bona fide* possessor who used either money or material to protect or improve someone else's property (as in the *Nortjé* case):

- an enrichment claim for compensation for necessary and useful improvements, and also, in certain circumstances, for luxurious improvements
- the right of retention (*ius retentionis*), while in possession of the property, until the compensation is paid
- the right to remove (*ius tollendi*) the attachments, in certain circumstances, while in possession of the property

ACTIVITY 9.1

Consider the facts in practical scenarios 1 to 3 at the start of the study unit. Indicate in each of the three cases whether or not the person effecting the improvements is a *bona fide* possessor, and explain why (not). In the event of any of them being a *bona fide* possessor, explain whether he or she has a claim for the improvements rendered, and for any amounts that should be added, or subtracted, from such a claim. Also indicate whether there might be other defences available. Write your answer out in the form of an opinion to be given to the impoverished party.

FEEDBACK

Of the three scenarios provided, why does only scenario 1 deal with the position of a *bona fide* possessor? You must carefully distinguish between owners, *bona fide* possessors, and *mala fide* possessors. Refer to the feedback at the end of this study unit as well.

In respect of the improvements, you have to consider each type of improvement to determine whether it is necessary, useful or luxurious. Explain the relevance of the distinction drawn. Did you consider the enrichment lien at the disposal of A? What about the value of the fruits drawn (ie the harvest) and the value of the improver's occupation over the past four years? How should the enrichment claim of the crop still standing on the land be calculated?

9.2.3 Mala fide possessor

uncertain
position

A good deal of confusion and doubt exists about the exact position of the *mala fide* possessor in our law. The reason for such a state of affairs is probably the uncertainty about his or her position in our common law.

description	A <i>mala fide</i> possessor is a person who is in possession of someone else's property and who, although he or she knows that he or she is not the owner thereof, in fact still exercises the powers of an owner over the thing. The possession of the <i>mala fide</i> possessor is, therefore, unlawful.
extent of right of recourse	The old decision of Lord de Villiers in <i>Bellingham v Bloometje</i> 1874 Buch 36 seems to infer that the judge concerned was prepared to grant the <i>mala fide</i> possessor compensation for the improvements made that had added to the value of the land: "It would follow that, ... as a <i>mala fide possessor</i>, he or she would still, according to very eminent authority, be entitled to an allowance of all expenses which have enhanced the value of the farm, Dolphus Kraal, so far as such increased value exists." In <i>De Beers Consolidated Mines v London and SA Exploration Company</i> (1893) 10 SC 372 (hereinafter the <i>De Beers</i> case), the same Lord de Villiers restricted the <i>mala fide</i> possessor's claim to compensation for improvements to necessary improvements, except where the true owner, despite being aware of the <i>mala fide</i> possessor's activities, remained silent thereon. In the above-mentioned case, the <i>mala fide</i> possessor had the same rights as a <i>bona fide</i> possessor would have had. The view held by Lord de Villiers in the <i>Bellingham</i> case is to be preferred, since it tends to steer the liability of the true owner towards the <i>mala fide</i> possessor on an enrichment basis. If the <i>mala fide</i> possessor can claim compensation only for necessary improvements, it means that the owner remains unduly enriched as a result of the useful improvements that the <i>mala fide</i> possessor has brought about. The bad faith of the <i>mala fide</i> possessor might be argued as being sufficient to deny him or her a right to compensation for useful improvements, but you have to remember that it is not private law's function to punish bad faith, but, rather, it is its function to ensure a fair balance between the interests of the parties concerned. Therefore, the <i>mala fide</i> possessor should, in our opinion, be in exactly the same position as the <i>bona fide</i> possessor is and the right to compensation of both should be based purely on enrichment (as in the <i>Nortjé</i> case at 129 to 130).
right of retention	In addition to the above, no unanimity exists regarding whether a <i>mala fide</i> possessor has a <i>ius retentionis</i>. In the <i>De Beers</i> case, Lord de Villiers expressly denied the <i>mala fide</i> possessor a retention right, except where the owner, despite being aware of the <i>mala fide</i> possessor's activities, remained silent thereon.
<i>JOT Motors v Standard</i>	In <i>JOT Motors (Edms) Bpk b/a Vaal Datsun v Standard Kredietkorporasie Bpk</i> 1984 SA 510 (T), it was unequivocally decided that a <i>mala fide</i> possessor does have the right of retention. This part of the decision was not, however, confirmed by the Appellate Division, which decided that the possessor, in said instance, had acquired possession of the vehicle in a lawful manner (due to him having acquired it from a lawful occupier). His possession, thereafter, remained lawful, since <i>mala fides</i> could not be imputed to him. As lawful possessor, he or she had the right of retention or lien against the true owner – <i>Standard Kredietkorporasie v Jot Motors b/a Vaal Datsun</i> 1986 1 SA 223 (A) [235H-I 236C-E 237E] (hereinafter the <i>Standard Kredietkorporasie</i> case). Although the courts in this case referred to JOT Motors as a possessor, the term is used loosely here. JOT Motors was, in fact, a holder. In addition, no such thing as a "lawful possessor" exists, as <i>possessio</i> always implies that the physical control is unlawful, whether it is <i>bona fide</i> or <i>mala fide</i>. JOT Motors was, therefore, either a <i>mala fide</i> holder or a lawful holder.

In this respect, our law is in a state of confusion. We can only hope that our highest courts will soon give a final decision, granting the *mala fide* possessor a retention right. In our view, there are no grounds for depriving *mala fide* possessors of the remedy with which they can attempt to enforce their right to compensation. You should always bear in mind that it is not private law's function to punish a person's *mala fides*. *Bona fide* and *mala fide* possessors should receive equal treatment (De Vos 236–238).

ius tollendi

The court has wide discretion to allow the owner to waive his or her enrichment, and to allow the *mala fide* possessor to remove attachments (*ius tollendi*). Several factors will be taken into consideration in this regard, such as the permanence of the attachment and the possibility of removing it without damage to the structure, the cost of the improvement, the usability of the improvement, whether the owner would have effected such an improvement, and so forth (Eiselen & Pienaar 287).

fruits

In *Peens v Botha-Odendaal* 1980 2 SA 381 (O) (hereinafter the *Peens* case), it was decided, in accordance with Roman and Roman-Dutch law, that the *mala fide* possessor does not obtain ownership of the fruit gathered (ie the benefits gained). The owner of the property, thus, has an action to claim compensation, from the possessor, for the fruit consumed or disposed of, or for the value of the fruit that the possessor could have gathered, but did not. The owner is not restricted to set off the value of the fruit against his or her enrichment, or the possessor's impoverishment. Fruit that are still in the hands of a *mala fide* possessor may be vindicated by the owner.

remedies of the *mala fide* possessor

In summary, the following remedies are available to the *mala fide* possessor who used either money or material to protect, or improve, someone else's property:

- an enrichment claim for compensation for necessary, and, most probably, also for useful, improvements
- possibly a right of retention (*ius retentionis*), although there is some uncertainty as to whether such a right is, indeed, available
- in certain circumstances a right to remove (*ius tollendi*) the attachments, while in possession of the property

distinguishing between *bona fide* and *mala fide* possessors

A great deal of authority exists upon which one could rely to equate the position of the *mala fide* possessor with that of the *bona fide* possessor (*BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) [425F] (hereinafter referred to as the *BK Tooling* case); Groenewegen *Ad Inst* 2 1 30; *Lechoana v Cloete and Others* 1925 AD 536 547–548; *Nortjé en 'n Ander v Pool* NO 1966 3 SA 96 (A) 129–130). However, note the following distinctions and similarities:

- A *bona fide* possessor mistakenly thinks that he or she is the owner of the thing or property. In contrast, the *mala fide* possessor knows that he or she is not the owner.
- A *bona fide* possessor definitely has a right of recourse against the owner for all his or her necessary and useful expenses, and, in certain circumstances, also for luxurious expenses. In contrast, a *mala fide* possessor definitely has a right of recourse against the owner for his or her necessary expenses, and perhaps for his or her useful expenses (except in the case of a thief), but definitely not for his or her luxurious expenses.
- A *bona fide* possessor has the right of retention to secure his or her right of recourse against the owner. In contrast, some uncertainty exists as to whether a *mala fide* possessor has the right of retention.
- Both the *bona fide* possessor and the *mala fide* possessor are subject to the *ius tollendi*.
- The *bona fide* possessor becomes the owner of all fruit gathered before the time of awareness, and the owner of the property has no claim to the value of such fruit.

However, the value of such fruit can be set off against the *bona fide* possessor's claim for compensation. In contrast, the *mala fide* possessor has no right to the fruit gathered by himself or herself, and the owner of the property has a claim for compensation for the fruit consumed, or disposed of, or for the value of the fruit that could have been gathered by the *mala fide* possessor.

ACTIVITY 9.2

Consider the facts in practical scenario 1 at the start of the study unit. Indicate whether A is a *bona fide* or *mala fide* possessor, and explain why. Suppose A was aware of the fact that the fence was incorrectly placed, but kept quiet about it. How would such an awareness affect your answer? In the latter case, explain whether he or she can make a claim for the improvements rendered, and whether any amounts should be added, or subtracted, from such a claim. Also consider any other defences available. Give your answer in the form of an opinion to be given to the impoverished party.

FEEDBACK

Why does scenario 1, together with the assumed facts, deal with the position of the *mala fide* possessor? How does this fact impact on the claims and other rights that A might have? In respect of the improvements concerned, you should, once again, consider each type of improvement, determine whether it is necessary, useful or luxurious, and explain the relevance of the distinction. Did you consider whether there is the use of an enrichment lien at the disposal of A? What about the value of the fruits drawn (ie the harvests), and the value of his or her occupation over the past four years? Also see the feedback at the end of this study unit.

SELF-EVALUATION

- 0.1 Discuss in detail, with reference to both case law and the opinion of writers, the remedies available to the *bona fide* possessor in terms of the current South African law.
 - 0.2 Discuss in detail, with reference to both case law and the opinion of writers, the remedies available to the *mala fide* possessor in the current South African law.
 - 0.3 Consider practical example 1 at the start of this unit, and answer the question asked there in full.
-

FEEDBACK

- (1) See 9.2.1.
 - (2) See 9.2.3.
 - (3) See 9.2.2.
-

FEEDBACK ON PRACTICAL SCENARIOS

scenario 1

In this case, one is dealing with a *bona fide* possessor. A dealt with the land as if he or she were the owner thereof, in the honest belief that he or she was the owner. If he or she had known that he or she was not the owner, he or she would have been a *mala fide* possessor (acting as if he or she were the owner, possibly with a view to obtaining the land by prescription). You have to deal with each one of the improvements and expenses, and determine what type of expense it is, and to what extent A is entitled to claim for enrichment in terms either of the cost of the expense, or of the value of the improvement in the hands of the true owner. You have, also, to consider the extent and purpose of the enrichment lien at his or her disposal. Does the true owner have a claim for the occupation value, or, alternatively, the fruits drawn by the possessor, or for both? According to case law, there is no claim, but the value of the fruits drawn may be brought into account when calculating any enrichment claim against the owner.

scenario 2

In this case, we are dealing with a lawful holder, and not with a *bona fide* possessor, whose possession is unlawful. We will discuss this example further in the next study unit.

scenario 3

In this case, we are dealing with a lawful occupier, namely a lessee. The provisions of the Dutch *Plaacaaten* that you studied in terms of the law of property are relevant here. Although such enactments still apply, their practical implications in current South African law will be considered only in the following study unit.

STUDY UNIT 10

ENRICHMENT BY MEANS OF IMPROVEMENTS AND ATTACHMENTS (ACCESSIO) – CONTINUED

UNJUSTIFIED ENRICHMENT LAW			
General principles			
• enrichment • impoverishment • <i>sine causa</i> requirement • causality (at the expense of requirement)			
<i>Conditiones sine causa</i>	Improvements to property	Management of another's affairs	Work done, or services rendered
• <i>condictio indebiti</i> • <i>condictio ob turpem vel iniustam causam</i> • <i>condictio causa data causa non secuta</i> • <i>condictio sine causa specialis</i>	• <i>bona fide</i> possessors • <i>bona fide</i> occupiers • <i>mala fide</i> possessors and occupiers	• <i>actio negotiorum gestorum utilis</i> • <i>actio negotiorum gestorum contraria</i>	• <i>locatio conductio operis</i> • <i>locatio conductio operarum</i>

OVERVIEW

In this study unit, we continue with our study of enrichment by means of improvements and attachments (*accessio*) by the occupiers and holders at will in modern South African law. You have to remember the historical context provided in the previous study unit, as well as the actions of the possessors discussed there. It is important to distinguish between the different types of improvers, as key differences exist in terms of their rights and obligations.

PRACTICAL SCENARIOS

scenario 1

A is leasing a farm to B for a rental of R1 300 000 per year, for a period of 8 years. The contract contains a clause prohibiting any subleasing of the land. B has now sublet the land to C at R1 500 000 per year for five years, without having obtained the permission of A. Accept that the sublease is invalid as a result of the lack of permission granted, but that C is unaware of this fact. In his first year of occupation, C has repaired the fences of the farm (R25 000), and he has erected

a new shed for the storage of his implements (R50 000). C has also repainted the house (R15 000), because he did not like the colour that it was previously painted. In the first two years of occupation, he has harvested maize, making a net profit of R1 500 000. C has sunk a borehole (R100 000), from which he has sold some of the water to a neighbour (R25 000). A maize crop (with an estimated value of R750 000, and with the cost of planting and tending being R200 000) is standing on the land. A has now cancelled the lease with B, due to his breach of contract, and is claiming the ejectment of C. Advise C about any claims that he might have against A, as well as about any defences that he might have against the ejectment claim.

scenario 2

D, a German tourist, rented a car from Avis in Johannesburg. Unbeknown to both parties, the rental contract was void. While D was travelling in the Northern Cape, the vehicle broke down in the town of Springbok. When D requested Springbok Motors to repair the vehicle, the firm indicated that the repair costs would be R19 000. After three days of waiting, D rented another vehicle to get her back to the city, and she has, meanwhile, flown back to Germany. Avis now wants to claim the vehicle from Springbok Motors, but the latter refuses to release the vehicle, unless its account is paid in full. Advise Avis on whether Springbok Motors is entitled to enforce payment in this manner.

scenario 3

E is renting offices from F. After two years of occupancy, E has now fully refurbished the offices, expending the following amounts: R140 000 on the repartitioning, and R130 000 on the painting, of the offices; R120 000 on the upgrading of the bathrooms; R130 000 on new carpeting throughout; R125 000 on repairing the roof that was leaking; and R135 000 on the installing of new air-conditioning units. Shortly after all of the above-mentioned costs were incurred, F terminated the lease with three months' notice, as he or she was entitled to do under the existing contract. Advise E on whether she is entitled to claim anything in respect of the expenses incurred. For the purposes of your answer, assume that the lease contract did not address the issue of improvements to the lease property.

LEARNING OUTCOMES

After completing this study unit, you should be able to

- distinguish the three types of occupiers from one another
- discuss, with reference to case law, the right of recourse and the right of retention of the legal occupier
- discuss the application of the old *Placaaten* in South African law
- distinguish between the different positions of the *bona fide* possessor and the lessee
- explain the remedies available to the usufructuary
- briefly explain the position of the *fiduciarius*
- explain, with reference to case law, the remedies available to the *bona fide* occupier
- explain, with reference to case law, the remedies available to the *mala fide* occupier
- explain, with reference to case law, the position of the holder at will after attachments have been made

RECOMMENDED READING MATERIAL (OPTIONAL)

Eiselen S & Pienaar G *Unjustified enrichment: a casebook* 4th ed (LexisNexis Butterworths Durban 2016) 283–284
Lotz G *The law of South Africa* Vol 9 2nd ed (LexisNexis Butterworths Durban 2005) paras 234–237
Business Aviation Corporation (Pty) Ltd and Another v Rand Airport Holdings (Pty) Ltd 2007 1 All SA 421 (SCA)
Fletcher and Fletcher v Bulawayo Waterworks Co Ltd 1915 AD 636
Lydenburg Properties Ltd v Minister of Community Development 1963 1 SA 167 (T)
Rubin v Botha 1911 AD 568
Von Wulffling-Eybers and Another v Soundprops 2587 Investments CC 1994 2 All SA 461 (C)

ADDITIONAL READING MATERIAL (OPTIONAL)

Boikhutsong Business Undertakings (Pty) Ltd v Grobler NO 1988 2 SA 676 (BA)
De Beers Consolidated Mines v London and SA Exploration Co (1893) 10 SC 359
Earl Jay Holdings (Pty) Ltd v Moldenhauer 1984 3 SA 354 (E)
Lechoana v Cloete and Others 1925 AD 536
Lubbe v Volkskas Bpk 1991 1 SA 398 (O)
Nortjé en 'n Ander v Pool NO 1966 3 SA 96 (A)
Peens v Botha-Odendaal 1980 2 SA 381 (O)
Quarrying Enterprises (Pvt) Ltd v John Viol (Pvt) Ltd and Others 1985 3 SA 572 (Z)
Rademeyer and Others v Rademeyer and Others 1968 3 SA 1 (C)
Standard Kredietkorporasie v Jot Motors h/a Vaal Datsun 1986 1 SA 223 (A)
Syfrete Participation Bond Managers Ltd v Estate and Co-op Wine Distributors (Pty) Ltd 1989 1 SA 106 (W)
Van Wezel v Van Wezel's Trustee 1924 AD 409
Weilbach v Grobler 1982 2 SA 15 (O)
Wynland Construction (Pty) Ltd v Ashley-Smith en Andere 1985 3 SA 798 (A)

10.1 INTRODUCTION

Where the intention to act as owner (*animus domini*) is absent, that is where the possessor acknowledges another's ownership of the thing, one is dealing with an occupier (immovables) or holder (movables). Occupiers and holders may be divided into:

- (a) lawful occupiers and holders
- (b) *bona fide* occupiers and holders
- (c) *mala fide* occupiers and holders

A lawful occupier or holder is a person who has the lawful occupation of an immovable, or the physical control over a movable, for a certain period of time, or until a specific event takes place, or until a certain goal is achieved. The lessee, pledgee and usufructuary etc are all regarded as lawful occupiers.

A *bona fide* occupier or holder is a person who is under the mistaken impression that he or she is a lawful occupier or holder, whereas a *mala fide* occupier or holder is a person who, *de facto*, exercises the powers of a lawful occupier, although he or she knows that he or she is not such.

A holder at will is a person who possesses a thing (without the *animus domini*) until possession is terminated by notice.

10.2 OCCUPIERS AND HOLDERS (DETENTORES)

claim for compensation

Except for in certain exceptional cases, the occupier or holder could not, according to our common law, claim compensation from the owner for improvements that he or she had brought about. However, our courts have not relied solely on the issue of incomplete liability for enrichment of our common law, but they have created specific law in the above regard. In fact, they have given the occupier the right to an action for compensation. Although most of the above-mentioned development took place in the preconstitutional era, extension of the remedies is entirely consistent with the imperative principles of the Constitution, and with the principle of Ubuntu. Therefore, we discuss the following three types of occupiers/holders separately.

10.2.1 Legal occupiers/holders

right of recourse

The common law has already given some legal occupiers the right of recourse for the recovery of their expenses in connection with the property that they occupy. Among them, we find the lessee, the pledgee and the usufructuary (with certain limitations). In addition, other cases exist where the courts have given the legal occupier/holders the right of recourse.

In *Brown v Brown* 1929 NPD 41, land was sold under a contract, in terms of which the price was to be paid in instalments. Although the buyer was immediately placed in possession of the land concerned, he was only to receive transfer of ownership after the payment of the full price. Before the payment of the full price, the contract was cancelled by the parties involved. The question was whether the buyer could recover compensation for the attachments that he had made.

According to the analysis above, the buyer was a legal occupier who had no right of recourse under the common law in respect of his expenses. The court, nevertheless, granted him a sum of money as compensation for his improvements, minus a reasonable amount to compensate the seller for the use of the land.

According to Eiselen and Pienaar (at 312), no additional deduction for the fruit gathered by the occupier while lawfully in occupation should be allowed, except in circumstances where it is impossible to calculate the value of the occupation.

action for compensation

The *actio negotiorum gestorum contraria* can be instituted to claim compensation, provided that all the requirements for the *negotiorum gestio* are present. Where a person has promoted his or her own interests while managing someone else's affairs, he or she will have the right to institute an enrichment action (the *actio negotiorum gestorum utilis*), but only to the extent of the owner's enrichment (*Nortjé en 'n Ander v Pool* NO 1966 3 SA 96 130). Factors either diminishing the owner's enrichment, or the occupier's impoverishment, must be set off against the enrichment or impoverishment, respectively (*Wynland Construction (Pty) Ltd v Ashley-Smith en Andere* 1985 3 SA 798 (A)).

right of retention

An enrichment lien (the right of retention) is available to the lawful occupier/holder to retrieve all the necessary and useful expenses if the owner is enriched at the expense of the occupier/holder, but only to the extent of the enrichment. A right of retention in respect of a thing can, however, only exist if the improvement attached thereto is still part of that thing, or is attached thereto, but not if the improvements have already been removed from the thing.

For example, if a maize crop planted by the occupier has already been harvested, removed and sold, the occupier has no right to the continued possession of the land, and the occupier loses the right of retention (as in the *Peens* case).

*Standard v
Jot Motors*

In the *Standard Kredietkorporasie* case, the Appellate Division decided that a person who was a lawful holder had a lien against the owner of the thing for reason of compensation for improvements made by him (the holder). The decision refers throughout to the lawful possession of the person effecting the improvements, whom the court did not find necessary to consider in terms of whether or not he or she was a possessor (235H–J). The use of the terminology here was inaccurate. The person concerned was a lawful holder, as there is no such thing as “lawful possession”. Possession is always unlawful.

Placaats

Regarding the leasing of farmland, the Placaats of 26 September 1658 and 24 February 1696 are still applicable. The uncertainty as to whether the Placaats applied to urban land, as well as farmland, was settled in *Business Aviation Corporation (Pty) Ltd and Another v Rand Airport Holdings (Pty) Ltd* 2007 1 All SA 421 (SCA) (hereinafter the *Business Aviation* case). The Supreme Court of Appeal held that the Placaats were never intended to apply to urban tenements, so that the normal rules in regard to lawful occupiers apply.

purpose

The purpose of the Placaats was mainly to protect an owner against a lessee of farmland who had improved the property without the consent of the owner to such an extent that the owner was not able to compensate the lessee for the improvements made. Such protection meant that the lessee could remain in occupation of the property in terms of an enrichment lien (the right of retention) indefinitely. According to Eiselen and Pienaar (at 333–334), the stipulations of the Placaats in the above regard mean the following:

- The lessee may remove all structures, except necessary improvements, during the existence of the lease, provided that he or she does not leave the property in a worse condition than it was when he or she took up the lease. The lessee is also entitled to remove anything that he or she has planted or sowed on the land involved.
- Anything that is attached to the property that the lessee does not remove becomes the property of the owner when the lease expires, and may not afterwards be removed. Before the lease expires, the lessor and the lessee may agree on compensation for the improvements left on the property by the lessee.
- The lessee may claim compensation for those attachments which have not been removed when the lease expires, and which were effected with the consent of the owner. Compensation is restricted to the value of the materials used, and the cost of labour cannot be taken into consideration. In addition, the owner must compensate the lessee for the cost of the seed, and for that of the ploughing, tilling and sowing of any crops left behind by him or her.
- According to *Kumalo v Piet Retief Village Council* 1931 TPD 165 168, the lessor may elect to compel the lessee to remove the attachments after the lease expires, in which event the lessee does not have a claim for compensation. The decision has been criticised by, *inter alia*, De Vos (at 103), because such a measure was not allowed according to the Placaats. However, the decision is consistent with the general right of the enriched party to reject the enrichment.
- The lessee does not have a right of retention.
- The lessee can claim compensation only when the lease expires.

- The *Placaaten* do not apply when the lease is terminated by breach of contract or by insolvency of the lessor. They only apply when the lease expires by means of termination of the period of lease, or if the lessee breaches his or her contract (*Lubbe v Volkskas Bpk* 1991 1 SA 398 (O) [405I–406C]).

Rand Airport

In the *Business Aviation* case, Brand JA questions whether the very unfair rules of the *Placaaten* are still required today, as they were introduced to combat a very specific mischief at the time. It might well be that the time has come for the law to be developed, and for the *Placaaten* to be overturned. The above could be done under the constitutional imperatives of equality and Ubuntu. The continued existence of the *Placaaten* creates an unequal position between agricultural lessees and urban lessees that can no longer be justified. In the *Rand Airport* case, the above could not be done, as the court was dealing with an urban tenement.

The position of the lessee, whether rural or urban, should also be remembered as being mostly regulated fairly strictly in terms of the lease agreement. Such agreements tend to exclude the right to any compensation, unless the lessor has given express permission for such improvements.

**distinction
between
bona fide
possessor
and lessee**

The position of a *bona fide* possessor or occupier (eg an occupier in terms of an invalid agreement of lease) is far better than is that of a lessee in terms of a valid agreement of lease, whose compensation is restricted in terms of the *Placaats*, and who does not have an enrichment lien (right of retention) available. The difference between the two is, however, that the lessee is in a position to arrange his or her affairs, and remains in control of the property until the lease expires, which is not the case with a *bona fide* possessor or occupier.

usufructuary

A usufructuary (*usufructuarius*) has a duty to maintain the property without any claim for compensation. However, special expenses that cannot be regarded as normal maintenance costs can be claimed. In *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159 172–177, the position of the usufructuary is explained as follows:

Reference was made, in support of the usufructuary's claim for improvements, to what is said by *Schorer* in his note to *Grotius* (2.39.13), where he writes that the usufructuary will be entitled to a refund for useful and ornamental expenses, subject to the limitation mentioned by him in his note *ad Grot* (2.10.9), viz, that where the improvements exceed the outlay, then to the extent of such outlay, and where the outlay exceeds the actual improvement, to the extent of the latter ... A usufruct is defined to be the right to use the thing of another in such a way as to preserve its substantial character. It is treated as a personal servitude, and hence the right has to be exercised with due regard to the proprietary interests of the owner (*dominus*) or his heir. *Huber* observes that the usufructuary can make no actual change in the character of the thing, even although it be improved thereby. The usufructuary may, therefore, not alter, connect, or separate the rooms of a house, or remove doors, nor can he or she change a pleasure ground into an orchard or kitchen garden. The usufructuary must bear the costs of repair, unless these are heavy or serious, or relate to the permanent use ... *Voet* (6.3.52) already mentioned at an earlier stage, that a usufructuary may recover unusually heavy expenses (*graviore impensas*) spent by him upon the property. I think we may reasonably conclude, from what has been observed, that the usufructuary is not in general entitled to claim for improvements effected by him, in regard to the thing or property of which he or she has the usufruct ... Nowhere is it, however, laid down in the sources that the usufructuary can recover *impensas voluptuarias*. The general rule

with regard to expenses of this nature is that the ornamental additions may be removed, where this can be done, unless the owner is prepared to pay for them, but if he or she be unwilling to do so, there is no right of compensation.

*remedies of
usufructuary*

In summary, usufructuaries may not claim for necessary expenses (as they form part of their maintenance duty), and only in special circumstances may they claim for useful, or luxurious, improvements. In this case, the fruit gathered may not be set off against the claim for compensation against the owner. The usufructuary has a limited right of removal (*ius tollendi*), but he or she has no right of retention.

fiduciarius

In *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159 171, it was confirmed that a fiduciary is entitled to compensation for improvements to the same extent as is a *bona fide* possessor. However, they are not entitled to compensation for expenses for the normal maintenance of the property, and the value of the fruit gathered cannot be set off against their claim for compensation. The *fiduciarius* may institute the claim only once the *fideicommissum* expires. The *fiduciarius* is awarded a lien (right of retention) in circumstances where he or she has a claim for compensation (Eiselen & Pienaar 345–349; *Du Plessis and Others v Estate Meyer and Others* 1913 CPD 1006).

ACTIVITY 10.1

- (1) Consider the practical scenarios at the start of this study unit. Explain, in respect of each scenario, whether the impoverished party is a lawful or unlawful occupier or holder.
- (2) Consider scenario 3, and advise the impoverished party on any claims and defences at his or her disposal.

FEEDBACK

- (1) In respect of any situation dealing with improvers, the first step is to consider whether the person is a lawful occupier or holder or whether he or she is an unlawful possessor, occupier or holder. Consider the source of the impoverished party's physical possession. Is he or she the owner? Does a contract, or permission, or other legal ground, such as a usufruct, underlie the right to possession? If so, the occupation/holding is lawful. If not then it is unlawful. The next step to take, if the occupation/holding is unlawful, is to consider whether the person was *bona* or *mala fide*. Importantly, although a person involved might be *bona fide*, *his or her* possession/physical control is still unlawful. See also the feedback provided at the end of this study unit.
 - (2) Explain why only the lessee in scenario 3 is a lawful occupier. In considering his or her rights and obligations, did you consider the effects of the Dutch *Plaacaaten*? Is the fact that the land is an urban tenement relevant? Can the lessee remove any of the improvements before the expiry of the lease? And afterwards? Would it make any difference if the improvements were made with the knowledge and permission of the lessor? Explain in full. See also the feedback at the end of this study unit.
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10.2.2 Bona fide occupiers/holders

description

A *bona fide* occupier is a person who occupies immovable property in the *bona fide*, but mistaken, belief that he or she is entitled to do so, because he or she is unaware of the fact that he or she has no legal ground for controlling the property. Thus, his or

her physical control over the thing is unlawful. The occupier's belief does not have to be reasonable. A *bona fide* holder is someone who exercises physical control over the movable property of another in the *bona fide*, but in the mistaken belief that he or she is entitled to do so, whereas, in fact, no legal basis exists for his or her physical detention of the goods concerned.

Bellingham v Bloommetje

The old case of *Bellingham v Bloommetje* 1874 Buch 36 is a good example of that of a *bona fide* occupier. The defendant, who was the lessee of a farm, built something on a certain piece of ground, in the mistaken belief that it was also subject to the same lease. He was, therefore, a *bona fide detentor* as regards the piece of land concerned. The court granted him, as a *bona fide detentor*, a *ius retentionis*, and also a right to compensation for improvements. However, in his judgment, Lord de Villiers does not make it clear whether the defendant was a *bona fide detentor*, but speaks of “*bona fide* possessor” and “*bona fide* occupier”, and refers to texts dealing with *bona fide* and *mala fide* possessors.

Rubin v Botha

The second case to deal with the position of the *bona fide detentor*, or occupier, was that of *Rubin v Botha* 1911 AD 568 (hereinafter the *Rubin* case). The facts of the case are given below. The parties entered into an agreement of lease under which Rubin was to have the use and occupation of a portion of the Botha's farm for ten years, without payment of rent. In exchange for the above, Rubin would erect certain buildings on the property that would become the property of Botha upon expiry of the lease.

After Rubin had erected the buildings and occupied the farm for three years, Botha gave him notice to vacate the farm within three months, on the ground that the agreement was null and void.

Rubin accepted the eviction, provided that he be compensated for the costs of the buildings erected. Lord de Villiers acknowledged that the plaintiff was a *bona fide detentor*, or occupier, and granted him an action for compensation (at 576). The aforesaid judge relied on his own judgment in the *Bellingham* case, in which he had granted a *bona fide detentor* compensation, principally on the strength of a text by Groenewegen (Inst 2 1 30). Lord de Villiers held the view that the Groenewegen text was wide enough to provide the *bona fide detentor* with the right to compensation. In contrast, Innes J simply accepted, on the strength of the equitable principles of Roman-Dutch law, that the *bona fide detentor* was entitled to compensation (at 578):

The equitable relief given by Roman-Dutch law, to a person who had made improvements upon the land of another, was the outcome of the modification of the maxim that whatever is affixed to the soil belongs to it, by the further maxim that no man should be allowed to enrich himself at the expense of another.

The two judges did not agree on the basis on which the compensation had to be calculated. Lord de Villiers applied the same principles as in the case of a claim made by a *bona fide* possessor for useful expenses, namely the amount of the useful expenses (the impoverishment of the occupier) or the increase in the value of the property (the enrichment of the owner), whichever was the least amount. According to such principles, the value of the occupation of the property by the occupier had to be deducted from the enrichment of the owner, or from the impoverishment of the occupier, as a diminishing factor.

In contrast, Innes J calculated the owner's enrichment on the basis of the value of the occupation of the property from the date of the eviction of the occupier to the date determined in the contract by the parties on which the occupation (and therefore,

also, the use of the improvements) would be returned to the owner (at 584). De Vos (at 251–252) criticises the approach followed by Innes J, in that he used the invalid agreement to make the calculations. The correct approach is the one followed by Lord de Villiers.

A leading judgment on the position of the *bona fide detentor* is that of *Fletcher and Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636 (hereinafter the *Fletcher* case). In this case, the company lessee of the land drilled a borehole on the plaintiff's land, as the result of a mistake concerning the boundaries of the leased property, and sold the water drawn from it. Fletcher subsequently claimed the ejectment of Bulawayo Waterworks. Bulawayo Waterworks claimed a *ius retentionis*, until it was compensated for the increase in the value of Fletcher's land.

Innes J held that the judgment in the *Rubin* case had the effect of placing *bona fide* possessors and *bona fide detentors* on an equal footing, and that, therefore, no reason existed for denying the *bona fide detentor* a retention right.

Only in one respect does the position of the *bona fide* possessor differ from that of the *bona fide detentor*, namely as regards compensation for improvements. In the case of the *bona fide detentor*, an equitable amount for the use of the land by the *detentor* may be subtracted from the amount with which the value of the land has been increased. However, in the case of the *bona fide* possessor, only the value of the fruit actually gathered (minus the production costs) can be brought into account against its expenses (at 647).

The court also held (at 650–651) that the value of gathered fruit obtained from the improvements themselves cannot be included in the calculations. In this case, the value of the water obtained from the borehole was not brought into the calculations against the increase in the value of the ground, because it was the fruit of the improvement, and it was not the fruit of the property itself.

Eiselen and Pienaar (at 291) submit that the value of the fruit should be taken into consideration as an alternative, in circumstances where the value of occupation cannot be taken into consideration.

ACTIVITY 10.2

- (1) Consider the practical scenarios at the start of this study unit. Explain, in respect of each scenario, whether the impoverished party is a lawful or unlawful occupier or holder.
- (2) Consider scenario 1, and advise the impoverished party on any claims and defences at his or her disposal.

FEEDBACK

- (1) In respect of any situation dealing with improvers, the first step is to consider whether the person is a lawful occupier or holder, or an unlawful possessor, occupier or holder. Consider the source of the impoverished party's physical possession. Is he or she the owner, and does their contract, or permission, or other legal ground, such as a usufruct, underlie the right to possession? If so, the occupation/holding is lawful. If not then it is unlawful. The next step to take, if the occupation/holding is unlawful, is to consider whether the person was *bona* or *mala fide*. Importantly, although a person might be

bona fide, his or her possession / physical control is still unlawful. See also the feedback provided at the end of this study unit.

- (2) Is the impoverished party a *bona fide* or *mala fide* occupier? Why does the position of the *bona fide* occupier appear more favourable than does that of a lessee who is in lawful occupation? In your answer, you have to pay particular attention to the position in respect of the value of occupation, the fruit gathered, and the liens that apply. Remember to refer to the relevant case law. See also the feedback at the end of this study unit.
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10.2.3 Mala fide occupiers/holders

description	<i>Mala fide</i> occupiers are occupiers of immovable property who know that no legal ground exists for their occupation, but, nevertheless, who control the property for their own benefit. The <i>mala fide</i> occupier is, therefore, unlawfully in physical control of the thing. A <i>mala fide</i> holder is someone who exercises physical control over a movable thing, in the knowledge that his or her physical control is unlawful.
action for compensation	Despite some uncertainty being experienced in earlier cases, it seems that the right of recourse of the <i>bona fide</i> occupier was extended to the <i>mala fide</i> occupier in <i>Grobler NO v Boikbutsong Business Undertaking (Pty) Ltd</i> 1987 2 SA 547 (B). In appeal (<i>Boikbutsong Business Undertaking (Pty) Ltd v Grobler NO</i> 1988 2 SA 676 (BA) [683E–F]), no right of recourse was allowed, since the profit of the occupier (the value of the fruits) was higher than was the owner's enrichment attained through the making of improvements. Therefore, whether a claim for compensation could be given to a <i>mala fide</i> occupier has still not been decisively determined in our law (Eiselen & Pienaar 304–305). Pienaar and Mostert, in <i>Silberberg-Schoeman Property</i> 317 and Van der Walt 1986 <i>SALJ</i> 263–264, indicate that the crucial factor should be the owner's enrichment in circumstances where it is reasonable to compensate the occupier, and not the occupier's <i>bona</i> or <i>mala fides</i>. Considering the interests of both parties is necessary, with the court, in such regard, having wide discretion to order the removal of the improvement by the occupier. The court can also allow the owner to waive his or her enrichment, or to disallow a claim for compensation, where separation is impossible, in circumstances where the owner has not benefitted from the improvements made, or where the costs are extravagant in the light of the owner's financial position.
right of retention	In no decision has a right of retention ever expressly been given to a <i>mala fide</i> occupier. In <i>Quarrying Enterprises (Pvt) Ltd v John Viol (Pvt) Ltd and Others</i> 1985 3 SA 572 (Z), the court declared that the rights of a <i>mala fide</i> occupier are the same as those of a <i>mala fide</i> possessor. In the light of the uncertain authority regarding the right of retention of a <i>mala fide</i> occupier, the statement by the court can be criticised, since such right is not based on existing authority (Eiselen & Pienaar 276). De Vos (at 258–259) is, however, of the opinion that the <i>ad hoc</i> extension of a right of retention, and the action that the <i>mala fide</i> possessor possessed under Roman-Dutch law, should be extended to the <i>mala fide</i> occupier.
Fruits	The value of fruits gathered by the occupier cannot be set off against the owner's enrichment, if the value of the occupation has already been taken into consideration.

The value of the fruits can be used in the alternative only if the value of the occupation cannot be determined (as in the *Rubin* and *Fletcher* cases).

ACTIVITY 10.3

- (1) Consider the practical scenarios at the start of this study unit. Explain, in respect of each scenario, whether the impoverished party is a *bona fide* or *mala fide* occupier or holder. Would it make any difference if, in scenario 1, the sublessee were to have known that the sublease was void?
- (2) Consider scenario 1, on the assumption that the sublessee knew that the sublease was void; advise the impoverished party on any claims and defences that are at his or her disposal.

FEEDBACK

- (1) See the feedback given on the previous two activities.
- (2) In this case, the knowledge that the sublease is void turns our sublessee into a *mala fide* occupier. In your answer, you have to consider the difference between the legal position of the *bona fide* and *mala fide* occupier, if any. Pay special attention to the issue of liens or retention rights.

10.3 OCCUPIERS/HOLDERS AT WILL (PRECARIO HABENS)

description

An occupier at will (*precario habens*) is a person who is “in occupation of another’s property until revocation”, that is his or her occupation is based on consent that can be revoked at any time by the *precario dans*. A holder at will is “someone who exercises physical control over the movable property of another until revocation”.

Malan v Nabygelegen Estates

In *Malan v Nabygelegen Estates* 1946 AD 562 573, the *precarium* relationship is defined as follows:

... *precarium* is the legal relationship which exists between parties when one party has the use or occupation of property belonging to the other on sufferance, by the leave and license of the other. Its essential characteristic is that the permission to use or occupy is revocable at the will of the person granting it.

Lechoana v Cloete

In the *Lechoana* case, the leading case on the right of the *precario habens* to claim compensation, a squatter, on being ejected from the ground on which he had effected improvements, claimed compensation. The court granted him compensation, apparently on the ground of a general enrichment principle (at 551):

But, apart from the fact that it seems somewhat anomalous that a tenant at will has to be compensated on a more liberal scale than a lessee, there is no objection in principle to applying the maxim against enrichment in the present case.

right of recourse

In a line of decisions, it seems as though the courts have acknowledged that the *Lechoana* case held that the holder at will did have a right of recourse. Clearly, therefore, there is a strong tendency in our contemporary law to grant the holder at will an action to claim compensation. However, the matter has not yet been finally settled, since the *Lechoana* case, on which the later cases depend, did not hold that

the holder at will had such a right. It is desirable that an authoritative decision on this issue be made (De Vos 272).

right of retention

In the *Lechoana* case (at 550), the court held the view that the *precario habens* has no *ius retentionis*. Judged in accordance with general principles, the claim of the *precario habens* to compensation should be based purely on enrichment, and the holder at will should be entitled to the same compensation as that of the occupier, unless the owner of the property has forbidden him or her to make any improvements, and no reason exists why he or she should not have a *ius retentionis* (De Vos 272).

fruits and other advantages

The advantage that the holder at will has derived from his or her occupation should be deducted from his or her expenses. The impoverishment of the holder at will is reduced by the value of the fruits, minus the production costs, and also by other advantages obtained through the occupation. However, the owner of the property should not deduct the advantages that he or she has lost from his or her enrichment, just because the owner has willingly renounced them. We believe that, as the impoverishment of the owner is not *sine causa*, it should be ignored in the calculations (De Vos 274).

SELF-EVALUATION

- 0.1 Distinguish between the three types of occupiers and holders.
 - 0.2 Discuss in detail, with reference to case law, the remedies available to the various legal occupiers and holders in terms of South African law.
 - 0.3 Discuss in detail, with reference to case law, the remedies available to the *bona fide* occupier or holder.
 - 0.4 Discuss in detail, with reference to case law, the remedies available to the *mala fide* occupier or holder.
 - 0.5 Discuss the position of the occupier or holder at will in South African law, with reference to the decision made in the *Lechoana* case.
 - 0.6 Consider the facts of scenario 2 at the start of the study unit. Advise Avis accordingly.
-

FEEDBACK

- (1) See 10.1.
 - (2) See 10.2.1. Refer in your answer, *inter alia*, to the following legal occupiers: lessees (with reference to the old Placaats), usufructuaries and *fiduciarii*.
 - (3) See 10.2.2.
 - (4) See 10.2.3.
 - (5) See 10.3.
 - (6) Who is the enriched party, and who is the impoverished party, in this scenario? Did you consider the principles that are applicable to all three parties, and the indirect enrichment situations that you studied in study units 2 and 9? What about the fact that there was a contract between D and Springbok Motors? Was Springbok Motors a lawful or unlawful holder?
-

FEEDBACK ON PRACTICAL SCENARIOS

scenario 1

In this case, B is an unlawful occupier, as the sublease is void, but he or she is a *bona fide* occupier, because he or she believes that his or her occupation is lawful. The *bona fide* occupier is in much the same position as is the *bona fide* possessor in South African law, in respect of the making of an enrichment claim for improvements. In what respects does his or her position differ, though? Pay particular attention to the question of the value of occupation and the fruits. Have the uncertainties involved been finally resolved, as yet, by our courts? What is the view of Eiselen and Pienaar in this regard? Deal with each one of the improvements in your answer, and indicate whether a claim will lie or not, and, if so, how that claim should be calculated. Remember to consider all possible liens.

scenario 2

Is E a lawful or an unlawful occupier? Is the fact that she is a lessee of any relevance? Did you consider whether the *Placaaten* applied to urban tenements? If they do, why is the lessee in a worse-off position than an unlawful occupier would be in respect of improvements made to the leased property? Deal with each improvement in your answer, and also indicate whether or not the improvement may be removed.

STUDY UNIT 11

RIGHTS OF RETENTION AND LIENS

UNJUSTIFIED ENRICHMENT LAW			
General principles			
• enrichment • impoverishment • <i>sine causa</i> requirement • causality (at the expense of requirement)			
<i>Condictioes sine causa</i>	Improvements to property	Management of another's affairs	Work done, or services rendered
• <i>condictio indebiti</i> • <i>condictio ob turpem vel iniustam causam</i> • <i>condictio causa data causa non secuta</i> • <i>condictio sine causa specialis</i>	• <i>bona fide</i> possessors • <i>bona fide</i> occupiers • <i>mala fide</i> possessors and occupiers	• <i>actio negotiorum gestorum utilis</i> • <i>actio negotiorum gestorum contraria</i>	• <i>locatio conductio operis</i> • <i>locatio conductio operarum</i>

OVERVIEW

In study units 2, 9 and 10, we referred to rights of retention and liens. Because of their importance in the law of enrichment, it is necessary to elaborate on them in slightly more detail in this study unit.

PRACTICAL SCENARIOS

scenario 1

A is leasing a farm to B for a rental of R1 300 000 per year, for a period of 8 years. The contract contains a clause prohibiting any subleasing of the land. B has now sublet the land to C at R1 400 000 per year for five years, without the permission of A. Accept that the sublease is invalid as a result, but that C is unaware of this fact. In his first year of occupation, C has repaired the fences of the farm (R125 000), and he has erected a new shed for the storage of his implements (R150 000). C has also repainted the house (R115 000), because he did not like the colour that it was painted. C has sunk a borehole (R110 000). A maize crop stands on the land (with an estimated value of R750 000, and with the cost of planting and tending having, up until the present juncture, been R200 000). A has now cancelled the lease with B, due to the breach of contract, and is claiming for the ejectment of C. Advise C about any defences that he or she might have against the ejectment claim.

This scenario was first used in study unit 10, and it is repeated here because the focus on the scenario in this study unit will be on the right of retention. The scenario, therefore, remains relevant for that purpose.

D, a German tourist, has rented a car from Avis in Johannesburg. Unbeknown to both parties, the rental contract was void. While D was travelling in the Northern Cape, the vehicle broke down in the town of Springbok. When D requested Springbok Motors to repair the vehicle, the firm indicated that the repair costs would be R19 000. After three days of waiting, D rented another vehicle to get her back to the city, and she has, meanwhile, flown back to Germany. Avis now wants to claim the vehicle from Springbok Motors, but the latter refuses to release the vehicle, unless its account is paid in full. Advise Avis on whether Springbok Motors is entitled to retain the vehicle in this manner.

LEARNING OUTCOMES

After completing this study unit, you should be able to

- distinguish between debtor-creditor liens and enrichment liens
- describe the function of enrichment liens
- distinguish between *impensae necessariae*, *impensae utiles* and *impensae voluptuariae*, and describe each of them

RECOMMENDED READING MATERIAL (OPTIONAL)

Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970 3 SA 264 (A)
Gouws v Jester Pools 1968 3 SA 563 (T)

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos W “No enrichment action for improvements to movables?” 1974 *THRHR* 308–314
 De Vos W *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (Juta Cape Town 1987) 54 98 228–229 252
 Nathan C “Enrichment liability and the ius retentionis” 1974 *THRHR* 101–106
D Glaser & Sons (Pty) Ltd v The Master 1979 4 SA 780 (C)
Fletcher and Fletcher v Bulawayo Waterworks Ltd 1915 AD 636
Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 1 SA 77 (A)
Lechoana v Cloete and Others 1925 AD 536
Rubin v Botha 1911 AD 568
United Building Society v Smookler’s Trustees and Golombick’s Trustee 1906 TS 623
Wynland Construction (Pty) Ltd v Ashley-Smith en Andere 1985 1 SA 534 (C); 1985 3 SA 798 (A)

11.1 INTRODUCTION

definitions

Wille (at 85) defines a right of retention as follows: “A right of retention, *ius retentionis*, frequently referred to as a lien”, is a right conferred by operation of law on a person who is in possession of the property of another person, on which he or she has expended money or labour, of retaining possession of the property until he or she has been duly compensated.”

debtor-creditor
liens and
enrichment
liens

This definition is wide enough to cover so-called debtor and creditor liens, as well as so-called enrichment liens (salvage and improvement liens). It is necessary to distinguish between the two kinds of liens.

*Goudini
Chrome v MCC
Contracts*

The Appeal Court, in *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) (hereinafter the *Goudini* case), provides a succinct discussion of the difference between debtor-creditor and enrichment liens (Van der Merwe (*op cit* at 717)):

[84J] Rights of retention are broadly classified as enrichment (preservation or improvement) liens or as debtor and creditor liens. The former are real rights, the latter not. An enrichment lien is a form of security for the payment of expenses which were necessarily incurred by one party for the preservation or protection of someone else's property (*impensae necessariae*) or usefully incurred for its improvement, ie the enhancement of its market value (*impensae utiles*) (*United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 at 626–9; *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 (3) SA 264 (A) at 270F–271D; Van der Merwe (*op cit* at 713)). It is immaterial whether the work was done in terms of a contract and, if so, whether the contract was with the owner of the property. The party who did the work may retain possession of the property in respect of which his work was done against the true owner, against his counterpart in contract (if there is one) or against anyone else who claims it from him, until he has been reimbursed for his expenditure or the amount by which the owner has been enriched, whichever figure is the lesser.

For the expenditure incurred in respect of the improvements that were neither necessary nor useful (ie expenses classified as *impensae voluptuariae*), the party concerned will not enjoy a right of retention at all, unless the expenses were incurred in terms of an agreement. In that event, he or she may enjoy a debtor and creditor lien against the other contracting party.

A debtor and creditor lien is available to anyone who, in terms of an agreement, has performed work pertaining to someone else's property, irrespective of whether the work was necessary, useful, enhanced the value of the property concerned, or was trifling (Van der Merwe (*op cit* at 716)). A debtor and creditor lien, being a contractual remedy and not a real right, is maintainable by the one party to a contract against the other who may, or may not, be the owner of the property concerned. Unlike with an enrichment lien, it is not limited in its scope, but it secures the full extent of the agreed remuneration, regardless of his or her own actual expenditure, or the other side's actual enrichment.

Where someone who has effected necessary or useful improvements to the property of another by means of agreement is sued for its return before being compensated for his or her work, he or she may defend his or her possession by either means. The defence may be levelled against his or her contractual counterpart, on the basis of his or her debtor and creditor lien, for his or her agreed remuneration, regardless of the extent of the latter's enrichment, if the owner. Alternatively, the defence may be levelled against the owner who is not the contracting party, on the basis of his or her enrichment lien, for his or her actual expenses, tempered by the owner's enrichment (cf *United Building Society v Smookler's Trustees and Golombick's Trustee supra* at 631; the *Brooklyn House* case [*supra* at 276C]).

function of an
enrichment
lien

In South African law, the only function of an enrichment lien is to provide security for a claim that is based on enrichment. In every case where there is a right of

retention, there must also be an enrichment action. Where there is no action, there can be no right of retention.

Brooklyn and *Gowws* on the rights of retention

The decision made in the *Brooklyn House* case (as discussed in study unit 2), naturally also implied that there could be a *ius retentionis* without an action, insofar as it recognised the existence of a *ius retentionis* in circumstances where an action was refused. Such were in the circumstances in the *Gowws* case. Without overruling the *Gowws* case, it can, nevertheless, be distinguished, specifically on the ground that, in the case concerned, an enrichment action, and not a *ius retentionis*, was involved. (Revise the discussion of the *Brooklyn House* case in study unit 2.)

correct view to hold

In the *Buzgard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and Another* 1996 3 All SA 1 (A) and in *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 3 All SA 236 (A), the Appellate Division confirmed the position that there can be no enrichment lien without an underlying enrichment action. Such confirmation exorcises the uncertainty about the issue that arose in the *Brooklyn House* case.

improvements to another's property

Whether the improvements of another's property may serve as a basis for a *ius retentionis* (or for an enrichment action) in a particular case depends, in the first place, on who made the improvements and, in the second place, on the nature of the improvements made. Who may exercise a *ius retentionis* (or bring an action) has emerged from the discussion of the specific enrichment actions explored in study units 3 to 8. Which improvements may serve as the basis for a *ius retentionis* (or action) will be discussed here.

various enrichment liens

Traditionally, the expenses that one person may incur in connection with the property of another are divided into three classes, namely (1) *impensae necessariae* (necessary expenses); (2) *impensae utiles* (useful expenses); and (3) *impensae voluptuariae* (luxurious expenses). Of the three classes involved, only *impensae necessariae* and *impensae utiles* can serve as the basis for an enrichment action or *ius retentionis*. No enrichment action can be brought on the ground of *impensae voluptuariae*, and no *ius retentionis* can arise therefrom (as in the *Gondini* case).

11.2 IMPENSAE NECESSARIAE

definition and requirements

Certain expenses are necessary for the preservation, or protection, of property. Such expenses are ones that the owner himself or herself would have incurred to preserve, or to protect, his or her property. In such an instance one, therefore, has a case of enrichment of the owner through expenses saved. Provided that the amount expended is reasonable, and that the act of preserving or protecting the property is successful, the person who incurred the expenses (ie the impoverished person) can recover the full amount that he or she expended. He or she has a *ius retentionis* until the full amount has been paid. As the owner would have had to incur exactly the same expenses as the possessor or occupier (ie the impoverished person), the *quantum* of enrichment and impoverishment coincide. Whether the value of the property is increased is irrelevant in such a case.

11.3 IMPENSAE UTILES

definition and requirements

Impensae utiles are expenses that are not necessary for the preservation, or protection, of the property, but which are useful, and which do enhance its market value. In this case, obviously, the amount of the enrichment need not coincide with the amount

of the impoverishment concerned. A possessor might, for example, erect a building on land at a cost of R5 000, but which enhances the market value of the land by only R3 000. Conversely, the possessor might spend R3 000 on improvements to the land, but the value of the land might be increased by R5 000, as a result. The amount of the enrichment in the case of *impensae utiles* is, therefore, the amount by which the market value of the property has been enhanced, or the amount of the expenses incurred, whichever is the lesser. The enrichment action should be for the above-mentioned amount, with the *ius retentionis* serving as security for the payment of the amount (*Lechoana v Cloete and Others* 1925 AD 536 at 547; *Fletcher and Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636 at 648 657; *Rubin v Botha* 1911 AD 568 at 578; De Vos 252).

11.4 IMPENSAE VOLUPTUARIAE

definition

In *United Building Society v Smookler's Trustees* 1906 TS 623 627, *impensae voluptuariae* were defined as expenses that neither preserve the property, nor increase its market value, but which merely satisfy the caprice, or fancy, of a particular individual. We agree with De Vos (228–229) that the definition is not wholly satisfactory. Expenses may be luxurious expenses, even though they enhance the value of the property – the cost of a swimming pool would probably be classed as a luxurious expense, even though the pool might enhance the value of the property. Consequently, considering the nature of the improvement is necessary before one can decide on whether an expense is useful, or merely luxurious.

physical control as a requirement

The right of retention depends on the physical control of a thing. The content of the right is the power to retain the physical control until the debt (claim) that arises from the fact of enrichment (and which is secured by the right of retention) has been satisfied. If the physical control over the thing is lost, the right of retention is lost (*Gazide and Another v Nelspruit Town Council* 1949 4 SA 48 (T); *Van Niekerk v Van der Berg* 1965 2 SA 525 (O)). However, if the holder of the right of retention is deprived of his or her physical control over the thing either unlawfully, or against his or her will, he can claim that the thing be restored to his or her control, in which case the right of retention revives (*Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* 1960 2 SA 686 (SR); *Beetge v Drenha Investments (Pty) Ltd* 1964 4 SA 62 (W)).

SELF-EVALUATION

- 0.1 Distinguish between the two types of rights of retention by means of defining them, and stating their requirements.
- 0.2 Distinguish between a right of retention and a right to institute a claim based on enrichment. What is the connection between the two concepts?
- 0.3 Consider the practical scenarios at the start of this study unit. Explain, in respect of each type of improvement mentioned there, whether the improvement was necessary, useful or luxurious. Write out your explanation in the form of an opinion to give to the owner of the goods.

FEEDBACK ON PRACTICAL SCENARIOS

- (1) See 11.2 to 11.4.
- (2) A right of retention over property is a right to retain the property concerned. The right is conferred by means of the operation of the law on an impoverished person, under certain circumstances. A right of retention allows the possessor

to retain the property until he or she is compensated for it. Its effect is to afford security for payment. The right, which is a real one, operates against all. A right (claim) to performance arises out of the obligation created by means of the fact of enrichment. The right is a personal one that is enforceable by the taking of action against the enriched party. The performance (payment of compensation) that is the object of this personal right is secured by means of exerting the right of retention.

- (3) In your answer, explain the requirements for each type of improvement, and test each of the improvements, in the practical scenario, against the requirements. Remember, as the definitions are fairly flexible, classification may depend on a variety of factors and surrounding circumstances. You should refer to such in your answer. Consider whether or not each of the improvements would entitle the impoverished party to exercise a lien, and, if so, what type of lien should be exercised.
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STUDY UNIT 12

ENRICHMENT ACTION AGAINST AND BY MINORS

The diagrams used in the previous study units to provide a perspective on with which parts of the enrichment law we were dealing are not appropriate here, because this section, which deals with minors, is applicable to unjustified enrichment law as a whole.

OVERVIEW

Minors occupy a special position in private law, because of the limitations to their capacity to act, as well as due to the need to protect them. In this study unit, we will study the enrichment actions that are available to a minor, as well as the enrichment actions that can be instituted against a minor.

PRACTICAL SCENARIO

A, who is 17 years old, has concluded an instalment sales contract with B, for the purchase of a motorcycle to the amount of R120 000. A did not obtain the permission of her parents to conclude the contract. A, who has paid a deposit of R16 000, still has to pay off 24 instalments of R20 000 per month, in terms of the signed contract.

- (a) In addition to refusing to pay any of the instalments, A refuses to return the motorcycle. Advise B on what action to take.
- (b) Assume that, after A has, indeed, paid 12 instalments, the motorcycle is written off in an accident. A's father, who has now cancelled the contract, is claiming back all the monies paid. Advise B on whether or not the contract can be cancelled, and, if so, whether he or she has any defences against A's claim.

LEARNING OUTCOMES

After completing this study unit, you should be able to

- discuss the application of enrichment actions by and against minors in the common law
- critically discuss the moment at which the calculations are made for enrichment liability by a minor
- discuss the enrichment implications where a minor rescinds a contract
- discuss the enrichment implications where a minor refrains from rescinding, or enforcing, a contract

RECOMMENDED READING MATERIAL (OPTIONAL)

Eiselen S & Pienaar G *Unjustified enrichment: a casebook* 4th ed (LexisNexis Butterworths Durban 2016) 195.

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos W *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (Juta Cape Town 1987) 95–96 219–224.

12.1 INTRODUCTION

A minor who enters into a contract without his or her guardian's assistance is not liable in terms of the contract, although the other party is. Where the other contracting party performs in terms of the contract, he or she cannot compel the minor to perform, nor can he or she recover his or her performance. The other contracting party can, however, sue the minor for undue enrichment.

12.2 SOUTH AFRICAN LAW

various legal
consequences

The current position in South African law is that a contract entered into with a minor without the necessary assistance is enforceable or voidable by the minor (with the necessary assistance). The contract can be enforced by the minor (with the necessary assistance, or at emancipation) only if the minor is also willing to perform in full. The contract is valid, but it is not enforceable from the point of view of the other party, and, therefore, he or she can neither enforce, nor rescind the contract.

The minor can (with the necessary assistance) exercise various options. If his or her guardians ratify the contract, he or she can enforce the contract and perform in terms of it. The minor can also rescind the contract, or refrain from enforcing or rescinding it. The last-mentioned two options could lead to an enrichment action being instituted (the *Edelstein* case), as is explained below.

rescinding of
contract by
minor

If the minor (with the necessary assistance) rescinds the contract, the contract becomes *ab initio* void. The minor can reclaim property delivered to the other party with the *rei vindicatio*, since the minor is not capable of alienating his property without assistance. Therefore, ownership cannot be transferred to another party. Money cannot be recovered with the *rei vindicatio*, since it becomes the property of the other party, through *commixtio*. The minor is, therefore, entitled to reclaim the money with a *condictio* to the extent to which the other party has been enriched.

which
enrichment
action to take

According to Eiselen and Pienaar (at 200–201), the *condictio indebiti* is not the correct enrichment action, since the performance was due by the minor at the time (although it was not enforceable), whereas the *condictio indebiti* can be applied only where performance was not due at that particular stage. The correct action with which the minor can claim compensation for the other party's enrichment is the *condictio sine causa specialis*, because the money was paid in terms of a valid *causa*, which later fell away.

Where the other party has performed, the *condictio sine causa specialis* is also available for him or her to use against the minor, for the minor's enrichment, owing to his or her performance. The action involved is a separate enrichment one. Therefore, the other party's performance cannot be used as a negative side-effect to his or her enrichment, or as a positive side-effect to the minor's impoverishment (Eiselen & Pienaar 200–201).

refraining
from acting by
minor

If the minor refrains from enforcing or rescinding the contract, and the other party has already performed in terms of the contract, the minor will be unjustifiably enriched at the expense of the other party. Which enrichment action is applicable is, however, unclear, since such a situation has not yet been presented in our courts.

- The *condictio sine causa specialis* is not applicable, since the *causa* for the performance has not yet fallen away (ie the contract is still valid, although it is not enforceable by the other party).
- The *condictio indebiti* is also not applicable, since the performance was due, and still is, until the contract is rescinded. In Roman law, a praetorian action was given to the other party in a similar situation, namely the *actio in quantum locupletior factus est*. The action was an exception to the normal enrichment action, where it was a requirement that the enrichment be *sine causa*. Whether our courts will also introduce an exceptional enrichment action in similar circumstances, we will only come to know with the passing of time (Eiselen & Pienaar 200–201).

enrichment
claim

If an enrichment action is given, the moment from which the enrichment must be calculated will still be *litis contestatio*, as was the case in the common law. In calculating the extent of enrichment, the minor will be held liable neither for property lost, nor for the amount of money spent before *litis contestatio*. The only exception is money spent on the necessities of life, as such constitutes enrichment by saved expenses (Eiselen & Pienaar 203).

SELF-EVALUATION

- 0.1 Discuss the application of enrichment liability against a minor in the common law.
- 0.2 Critically discuss the factor of time in relation to the calculating of enrichment liability against a minor.
- 0.3 Discuss the extent of enrichment liability that can be brought against a minor.
- 0.4 What is the position if the minor (with the necessary assistance) rescinds the voidable contract? Discuss briefly.
- 0.5 Consider the facts in the practical scenario at the start of this study unit, and answer the questions posed there.

FEEDBACK

- (1) See 12.2.
- (2) See 12.2.
- (3) See 12.2.
- (4) See 12.2.
- (5) (a) This contract is known as a “limping contract”, with it being unenforceable against a minor. Due to its unenforceability, B cannot force A to make payment, nor can he or she cancel the contract for it being breached. B can, however, take practical steps, either to enforce the contract, or to bring it to an end by informing A’s guardian (either parent) of the agreement. The guardian would then be forced to make an election, and either to approve the agreement, or to cancel it. In the latter instance, the minor is entitled to claim any performance rendered, and must tender any enrichment (ie the motorcycle) still

in his or her possession, in whatever condition it is at that particular stage.

- (b) In this case, the guardian is entitled to cancel the agreement because A, being a minor, lacked the necessary capacity to conclude a fully valid and binding contract. Where the agreement is cancelled, the minor is entitled to claim all performance rendered, but he or she is only obliged to restitute whatever is left of the other party's performance, which, in this case, would be the scrap metal concerned.
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STUDY UNIT 13

COMPENSATION FOR WORK DONE AND SERVICES RENDERED

UNJUSTIFIED ENRICHMENT LAW			
General principles			
• enrichment • impoverishment • <i>sine causa</i> requirement • causality (at the expense of requirement)			
<i>Condictioes sine causa</i>	Improvements to property	Management of another's affairs	Work done, or services rendered
• <i>condictio indebiti</i> • <i>condictio ob turpem vel iniustam causam</i> • <i>condictio causa data causa non secuta</i> • <i>condictio sine causa specialis</i>	• <i>bona fide</i> possessors • <i>bona fide</i> occupiers • <i>mala fide</i> possessors and occupiers	• <i>actio negotiorum gestorum utilis</i> • <i>actio negotiorum gestorum contraria</i>	• <i>locatio conductio operis</i> • <i>locatio conductio operarum</i>

OVERVIEW

In study units 1 and 2, it was said that it was an open question whether the value of services (*a factum*) could be claimed with use of the traditional *condictiones*. In South African law, claims for wages have been recognised, but only in certain circumstances. In this study unit, we will study the enrichment action of the worker and the employee who has committed a breach of contract. For the purposes of this study unit, the influence of labour law will not be considered.

PRACTICAL SCENARIOS

scenario 1

E is an engineering company that manufactures plastic motor car parts for F, a motor car manufacturer. E concluded a contract with G to make certain precision moulds necessary for its production plant, at a price of R140 000. G delivered the moulds, but they have turned out to be faulty. E then took the moulds to H, who reengineered the moulds, at a cost of R28 000, to the correct tolerances. E now refuses to pay G. Is E entitled to refuse payment? If so, on what ground? Is G without remedy under such circumstances?

scenario 2

C, who is D's employee, is paid a monthly salary of R44 000 at the end of each month. During September 2004, C is caught stealing from D. After a disciplinary hearing, C's services are summarily terminated on 29 September 2004, in accordance with D's disciplinary code. D refuses to pay C's salary for September. Can C claim a pro rata part of the salary for September?

scenario 3

A, who is an employee of B, is paid a monthly salary of R40 000 at the end of each month. On 15 June 2005, A deserts her employment, and her employment contract is, consequently, terminated by B. Can A claim half of her salary from B for June, even though she has clearly breached her contract?

LEARNING OUTCOMES

After completing this study unit, you should be able to

- distinguish between a contract for work and a service contract
- discuss, with reference to case law, the basis for an enrichment claim in the case of malperformance in terms of a contract of work
- discuss critically, with reference to case law, the basis for an enrichment claim, in the case of malperformance in terms of a service contract
- apply the theoretical principles to practical situations

RECOMMENDED READING MATERIAL (OPTIONAL)

Eiselen S & Pienaar G *Unjustified enrichment: a casebook* 4th ed (LexisNexis Butterworths Durban 2016) 353–354

BK Tooling (Edms) Bpk v Scope Precision (Edms) Bpk 1979 1 SA 391 (A)

Spencer v Gostelow 1920 AD 617

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos W *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (Juta Cape Town 1987) 274–299

Hauman v Nortjé 1914 AD 293

Smit v Workmen's Compensation Commissioner 1979 1 SA 51 (A)

13.1 INTRODUCTION

basis for
enrichment

When contracts for services (*locatio conductio operis*) and employment (*locatio conductio operarum*) are cancelled on the ground of the contractor's or employee's breach, that part of the performance that might already have been rendered cannot, of course, be restored to either the contractor, or the employee. One cannot return a partly completed building, or the services that an employee might have rendered before his or her dismissal for misconduct. The above means that an employer might derive considerable benefit from the partly performed contract without incurring any (contractual) liability towards the contractor or employee – the contract has, after all, been cancelled.

In such circumstances, our law allows the guilty contractor or employee to initiate an enrichment action. What he or she can recover in terms of this action (which is usually referred to as an action for *quantum meruit*) is the amount by which the employer has actually been enriched at his or her expense, or the amount by which he or she himself or herself has been impoverished, whichever is the lesser.

distinction
between
contracts
for work
and service
contracts

The manner in which enrichment liability is determined differs in the case of contracts for work (*locatio conductio operis*) and service contracts (*locatio conductio operarum*). Returning to the distinction between the two types of contracts is, therefore, important. The distinction can clearly be found in *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 61 (hereinafter the *Smit* case):

It is important for you at this stage to recapitulate some of the important legal characteristics of the contract of service (*locatio conductio operarum*) and the contract of work (*locatio conductio operis*):

- (1) The object of the contract of service is the rendering of personal services by the employee (*locator operarum*) to the employer (*conductor operarum*). The services or the labour as such is the object of the contract.
The object of the contract of work is the performance of a certain specified work or the production of a certain specified result. It is the product or the result of the labour which is the object of the contract.
- (2) According to a contract of service the employee (*locator operarum*) is at the beck and call of the employer (*conductor operarum*) to render his or her personal services at the behest of the latter.
By way of contrast the *conductor operis* stands in a more independent position *vis-à-vis* the *locator operis*. The former is not obliged to perform the work himself or produce the result himself (unless otherwise agreed upon). The *conductor operis* may accordingly avail himself of the labour or services of other workmen as assistants or employees to perform the work or to assist him or her in the performance thereof.
- (3) Services to be rendered in terms of a contract of service are at the disposal of the employer who may in his or her own discretion decide whether or not he or she wants to have them rendered.
The *conductor operis* is bound to perform a certain specified work or produce a certain specified result within the time fixed by the contract of work or within reasonable time where no time has been specified.
- (4) The employee is in terms of the contract of service subordinate to the will of the employer. The employee is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him or her by prescribing to him or her what work he or she has to do as well as the manner in which it has to be done.
The *conductor operis*, however, is on a footing of equality with the *locator operis*. The former is bound by his or her contract, not by the orders of the latter. The *conductor operis* is not under the supervision or control of the *locator operis*. Nor is he or she under any obligation to obey any orders of the *locator operis* in regard to the manner in which the work is to be performed. The *conductor operis* is his or her own master being in a position of independence *vis-à-vis* the *locator operis*.
- (5) A contract of service is terminated by the death of the employee whereas the death of the parties to a contract of work does not necessarily terminate it.
- (6) A contract of service also terminates on expiration of the period of service entered into while a contract of work terminates on completion of the specified work or on production of the specified result.

13.2 CONTRACTS FOR WORK

basis for
the making
of an
enrichment
claim

The general principle is that the worker (*conductor operis*) under a contract for work (*locatio conductio operis*) is only entitled to his or her remuneration after the acceptance of the work by the employer (*locator operis*). If the worker does not perform fully or properly, then he or she cannot claim his or her remuneration in terms of the contract, since the employer would be able to defend himself or herself successfully by way of the *exceptio non adimpleti contractus*.

The question, then, is whether the employer should be allowed to retain the incomplete, or faulty, performance without making any payment whatsoever, and whether the worker, who cannot recover his or her remuneration, might be entitled to some compensation, on a ground other than contract. The courts, which have discussed this problem on several occasions, have created the impression that they are prepared to make an award on the basis of enrichment.

Hauman v Nortjé

In *Hauman v Nortjé* 1914 AD 293 (hereinafter the *Hauman* case), N undertook to do certain building work for H for £60. N did not do the work properly, and it appeared that it would cost £10 to complete the work in the manner that the contract required. Because N did not complete the contract as agreed, the court held that he or she could not recover the contract price. Since H had accepted and used the work done, he or she had been enriched thereby. The court held H liable for the contract price, minus the cost necessary to complete the work properly. Several judgments were made, with, according to the judgment made by Lord de Villiers (at 298), the *ratio* being as follows:

This compensation he must make, not because of any supposed new contract with the contractor ... but because of the application of the equitable principle of our law that no one shall be unjustly enriched at the expense of another. The mode of enrichment provided against is not the attainment of benefits stipulated for in the contract, but the unjust absorption by the one party of the expenditure or of the fruits of the labour of the other party in a manner not contemplated by the parties to the contract.

case law
following of
set approach

The above-mentioned approach was followed in other cases, with the practice, thus, becoming that the worker could recover nothing on the basis of the contract. However, on the basis of enrichment he or she could recover the contract price, less the costs of supplementation or completion. The main point of criticism against adopting such an approach was that, if the contract did not offer the basis for the claim, then the contract itself should not be used to determine the relevant compensation.

BK Tooling v Scope Precision

In reconsidering the matter in the *BK Tooling* case, the Appellate Division formulated a new approach. In analysing the judgments made in the previous cases, Jansen JA concluded that, where the plaintiff was held to be entitled to claim the contract price, less the costs necessary to complete the work, he or she would actually be allowed to institute an action on the ground of contract, and not on the ground of enrichment.

The court should analyse the facts of the particular case to determine whether a claim based on contract, or a claim based on enrichment, could be instituted. The result of this analysis would depend on whether or not the court would decide to apply the *exceptio non adimpleti contractus*. Jansen JA held that the court has the discretion as to whether or not to apply the defence. Among the relevant factors that the court should consider when exercising its discretion are the employer's use of the performance, and the extent of the shortcomings involved. If the court

decides not to allow the *exceptio*, the plaintiff has a contractual claim. The worker is then entitled to the contract price, less the costs necessary to eliminate the defect in the performance. Since the plaintiff is usually a skilled artisan, the amount that is necessary is something within his or her own sphere of knowledge, which is why the *onus* to prove the extent of the costs rests with the worker. If the court decides to allow the *exceptio*, then the plaintiff would have an enrichment claim based on the ordinary principles of enrichment liability (enrichment or impoverishment, whichever is the smallest), and not a claim for the contract price, less the costs of obtaining proper performance.

substantial
performance

The result of this judgment was, therefore, that the enrichment liability was rejected as the basis for the claim of the plaintiff. The court also rejected the point of view that the *exceptio* could not be raised if substantial performance had occurred, and that it could be raised if the defect in performance was substantial. The court has the discretion in such a case, with the substantiality of performance being only one of the many factors that the court takes into account. The plaintiff, who claims under the contract, must allege that he or she has performed properly, or otherwise contend that the court has reason to exercise its discretion in his or her favour. He or she should then set out the necessary facts that would justify it so doing. Otherwise, he or she will only have a claim on the basis of enrichment.

ACTIVITY 13.1

Consider the facts in practical scenario 1 above, and advise G accordingly. Write out your advice in the form of an opinion.

FEEDBACK

Is this a service contract, or is it a contract for work, and what is the relevance of the issue? Did you consider the effects of the *exceptio non adimpleti contractus* under such circumstances? What about the fact that E has made it impossible for G to rectify the shortcomings in performance? Does the decision in the *BK Tooling* case assist G in any way? Is the claim based on contract or enrichment? See also the feedback at the end of this study unit.

13.3 CONTRACTS FOR SERVICES

basis for
enrichment

The employee (*locator operarum*) is entitled to his or her remuneration for his or her services only upon completion of the term of his or her contract of service. If he or she has not rendered his or her services for the full term of the contract, he or she is not entitled to his or her full agreed remuneration, unless the contract so determines. The question arises as to whether he or she can claim a portion of his or her remuneration in terms of the contract or, otherwise, whether he or she has a claim against the employer (*conductor operarum*) on some other basis. Here, we also find the approach taken that the employee cannot lodge a claim in terms of the contract, because his or her claim will be defeated by the *exceptio non adimpleti contractus*. He or she is, therefore, compelled to claim on the ground of unjustified enrichment.

*Spencer v
Gostelow*

The leading case in terms of contracts for services is *Spencer v Gostelow* 1920 AD 617. In the case, the employee was summarily dismissed for misconduct (ie the employer cancelled the contract on the ground of a serious breach of contract) before the end

of the period of service had been reached. Notwithstanding the contrary decisions that had been made in older cases, it was held that the employer cannot enjoy the services of the employee without compensating him or her for them.

The court based his or her duty to pay some remuneration on the ground of enrichment liability. Innes JA remarked (at 627):

That liability rests upon the doctrine that no man is allowed to enrich himself at the expense of another.

pro rata
portion of
remuneration

The amount that the plaintiff can claim was calculated with reference to the contractual remuneration involved. The court awarded the employee a *pro rata* portion of his or her remuneration, according to the length of time actually served. The above amounts to the following: The plaintiff claimed the amount that the employer saved, because it was not necessary to employ another employee for the period that the plaintiff worked. Such an amount would normally be the plaintiff's *pro rata* remuneration. The plaintiff must also prove his or her impoverishment, which is normally the amount of remuneration that he or she could have earned during the period when he or she was working for the employer concerned. Innes JA remarked (at 631):

The measure of the employer's benefit will not necessarily but for practical purposes will generally be the rate of the stipulated wage calculated for the period served.

employee
who deserts

The above-mentioned ruling applies where the employee does not work the full period for which he or she was initially employed, as a result of illness or some other factor that prevents him or her from working, or as the result of a termination of the contract of service for a valid reason, like summary dismissal. The law adopts another attitude in respect of desertion by employees belonging to the category "dienskneg, diensbode of *famulus*". If such an employee deserts his or her job, he or she loses his or her claim, on the ground of enrichment against his or her employer (De Vos 297).

criticism

The question can be asked whether the above-mentioned common law solution should not be replaced by a new approach. Why a difference should be made between the termination of the contract of employment for one form of breach of contract and not for the *de facto* termination of the contract because of desertion is difficult to see. We have, naturally, to bear in mind the fact that the rule might be one adopted in the public interest so as to discourage desertion, but, then, it would be difficult to understand why it applies only to some employees, and not to all of them. The inclusion of the one category with those categories allowed a claim justifies the inclusion of the other category, too.

ACTIVITY 13.2

Consider practical scenarios 2 and 3 at the start of this study unit. Advise the employee in each case. Write out the advice in the form of an opinion.

FEEDBACK

Is there a difference in law between the two situations? Do the principles of the *exceptio non adimpleti contractus* come into play in such situations? Are the claims based on enrichment or contract?

SELF-EVALUATION

- 0.1 Distinguish between *locatio conductio operis* and *locatio conductio operarum*.
 - 0.2 Discuss, with reference to case law, the basis for the enrichment claim of the worker whose performance was defective.
 - 0.3 Critically discuss, with reference to case law, the basis for the enrichment claim of the employee whose performance was defective.
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FEEDBACK ON PRACTICAL SCENARIOS

- (1) See 13.1. Refer in your answer to the distinction made, as formulated in the *Smit* case.
 - (2) See 13.2. Refer in your answer to the *Hauman* and *BK Tooling* cases.
 - (3) See 13.3. Refer in your answer to *Spencer v Gostelow* 1920 AD 617.
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STUDY UNIT 14

GENERAL ENRICHMENT ACTION

OVERVIEW

At the outset, we said that, although the general principles for enrichment liability had developed in South African law, the existence of a general enrichment action was rejected in the *Nortjé* case. The case left the possible development of such an action open, however. In this study unit, we shall consider the recognition of a general enrichment action possibly coming into being in South African law in future.

LEARNING OUTCOMES

After completing this study unit, you should be able to

- briefly discuss the position in our common law regarding the taking of a general enrichment action
- critically discuss the decision made in the *Nortjé* case
- briefly state the effect of the decision made in the *Nortjé* case on the law of enrichment in South Africa
- discuss the manner in which a general enrichment action might find application in South African law

RECOMMENDED READING MATERIAL (OPTIONAL)

Eiselen S & Pienaar G *Unjustified enrichment: a casebook* 4th ed (LexisNexis Butterworths Durban 2016) 11–29

Blesbok Eiendomsagentskap v Cantamessa 1991 2 SA 712 (T)

First National Bank of Southern Africa Ltd v Perry NO and Others 2001 3 SA 960 (SCA)

Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere 1994 3 SA 283 (A)

Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 5 SA 193 (SCA) *Nortjé en 'n Ander v Pool* NO 1966 3 SA 96 (A)

McCarthy Retail Ltd v Shortdistance Carriers CC 2001 3 SA 482 (SCA)

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos W *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (Juta Cape Town 1987) 311–329

Hahlo HR & Kahn E *The South African legal system and its background* (Juta Cape Town 1968) 559.

Brunsdon's Estate v Brunsdon's Estate and Others 1920 CPD 159

Knoll v SA Flooring Industries Ltd 1951 1 SA 404 (T)

Muller v Grobbelaar 1946 OPD 272

Pretorius v Van Zyl 1927 OPD 226

14.1 INTRODUCTION

subsidiary enrichment action

Before 1966, the majority of our modern jurists were of the opinion that our law, in fact, recognised a *subsidiary* general enrichment action that existed side by side with the old classical actions, and which covered instances not covered by the old classical actions.

A subsidiary general enrichment action was hoped to develop into an all-embracing general action, that is an action that would not exist in addition to various individual actions, but one that would cover the whole field of unjustified enrichment. The above could have been achieved by means of, first, recognising a subsidiary general action. Once this had been done, the requirements of the specific actions would have become blurred in the course of time, and they would eventually have disappeared, leaving one all-embracing general action.

case law

As regards our case law, a clear and unambiguous answer had never been given to the thorny question: is enrichment a general source of obligation? Some judgments created the impression that the granting of the legal remedy was based on the recognition of a general rule against unjustified enrichment (*Knoll v SA Flooring Industries Ltd* 1951 1 SA 404 (T); *Pretorius v Van Zyl* 1927 OPD 226 229), whereas others indicated the contrary, and even expressly denied the existence of such an action (*Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159 177; *Muller v Grobbelaar* 1946 OPD 272 278). In 1966, the Appellate Division expressly held, in the *Nortjé* case, that our law recognised neither an all-embracing general enrichment action, nor any subsidiary general enrichment action.

14.2 COMMON LAW

De Vos

De Vos, in the first edition of his work, on investigating the very broad definitions of enrichment given by De Groot and Huber, found that they were not broad enough to warrant the conclusion that a general enrichment action existed. De Vos posed the following question: was this also true of the last phases of Roman-Dutch law, as enforced in Holland? He answered in the affirmative, because he could find only one instance where the Hooft Raad had granted an action simply *ex aequitate*, because the case could not be brought within any of the recognised actions, as well as one doubtful case, and a third case that negated the finding that such an action existed.

new research

By the time that De Vos brought out the second edition of his work, he changed his view, because of the information regarding the developments of Roman-Dutch practice that had become generally available since 1958 (De Vos 101). In addition, Scholtens (1966 *SALJ* 391) brought to our notice two further decisions of the Hooft Raad reported by Van Bynkershoek (*Obs Tum* 277 and 2751). The first volume of the *Observationes Tumultuariæ Novæ* of Willem Pauw reports several decisions of the Hooft Raad on unjustified enrichment. Unfortunately, the decisions were not brought to the attention of the court in the *Nortjé* case.

information confirmed

Over and above the notes of Van Bynkershoek and Pauw, minutes of the meetings of the members of the Hooft Raad were drawn up by the *Griffier* of the court. The minutes substantiate the *Observationes*, in that they show that we are not dealing simply with the opinions or views of the above-mentioned two jurists alone.

When considering the older South African decisions, we should, therefore, keep in mind that the above information was not available, or that, as with the *Nortjé* case, it was not brought to the attention of the court in question.

14.3 NORTJÉ V POOL

facts	The facts of the <i>Nortjé</i> case, insofar as they are relevant, were the following: In 1958, A and B concluded a written agreement, in terms of which A acquired the sole right to prospect for kaolin on B's land. If kaolin was discovered in payable quantities, it was agreed that A should have the right to exploit it. A was to have paid B the sum of R50 annually for as long as the deposits were not being exploited, but as soon as he began marketing the kaolin, the annual payment was to be increased to R400. In carrying out the prospecting work, A discovered the presence of kaolin in payable quantities. A and B were, however, unaware that their agreement was null and void, because of its noncompliance with s 3 of Act 50 of 1956, which provided that all such agreements had to be notarially attested. B died in 1962, and the executor of his deceased estate refused to agree to the necessary attestation. A instituted action in the Cape Provincial Division, claiming compensation from the estate. Alleging that B had been enriched by an amount of at least R15 000 by the discovery, A claimed that his impoverishment, however, had amounted to only R4 557. A, accordingly, claimed the lesser amount.
exception	B's executor, in taking exception to the claim, alleged that A had no cause of action, for the following reasons: (a) the claim did not fall within the confines of any of the recognised enrichment actions; (b) it did not appear from the claim that the deceased estate had, in fact, been enriched; (c) it did not appear that the deceased estate had been enriched unlawfully; and (d) it did not appear that the plaintiffs were in the "bedrywighede kragtens die gemelde nietige kontrak verstoort nie".
<i>a quo</i>	In the court <i>a quo</i>, Van Winsen J upheld the exception. The presiding judge held that no general enrichment action existed in our law, but only <i>ad hoc</i> extensions, in certain circumstances, of the existing actions. He opined that the facts before him did not fall within any of the recognised actions, and that the value of the land had not been increased as a result of the prospecting, as the kaolin had always been present there. He stated, further, that even had the land increased in value due to the activities of the prospectors, still no question existed of the landowner benefitting therefrom, unless the latter intended to sell the property. A appealed against the decision.
majority judgment	The majority judgment delivered by Botha JA (Williamson and Wessels JJA concurring) in the Appellate Division upheld the exception. The action that entails a <i>bona fide</i> possessor always having to claim compensation for improvements, which had been extended to occupiers, was held to apply only in the case of such visible or tangible improvements as a building or a well. If A were to be able to institute an action because he or she had enriched B, by means of disclosing qualities in B's land that had always existed, but which were unknown to have existed there, the nature of the action would have had to be that of general enrichment. Botha JA, on examining our law in this respect, concluded that it had not yet reached the stage where a general enrichment action was recognised, although such a development might still take place.
absence of a general enrichment liability	The following <i>dictum</i> (at 139–140), taken from the majority judgment, is most important (own translation): A survey of the decisions shows, in my opinion, nothing more than that the rule against unjustified enrichment was only of decisive influence in the development in our law of the recognised, but previously undeveloped, enrichment

actions of the Roman and classical Roman-Dutch law. The rule was also of decisive influence in the development of enrichment liability in circumstances that could not be brought under the head of one of the recognised actions concerned. The development of enrichment liability in such circumstances was completely casuistic in the particular circumstances. Nowhere was the rule against unjustified enrichment recognised as creating an obligation, independent of the one or other of the recognised actions, and without reference to the particular circumstances involved.

The *dictum* concludes in the following way (own translation):

That our law is capable of developing towards a general enrichment action is possible, but that stage has not yet been reached. Before the bounds of such a general enrichment action have been clearly defined, and the requirements clearly laid down, which is something not yet achieved, it would only be a blatant discretionary remedy that would cause uncertainty.

effect of
decision made
in terms of the
Nortjé case

The effect of this decision can be summarised as follows (De Vos 327):

- The classical Roman-Dutch actions, as set out by the old writers, still apply.
- Our courts have developed *ad hoc* extensions of enrichment liability, and, where appropriate, can recognise further extensions. The *ad hoc* extensions are available only in specific circumstances.
- The *ad hoc* extensions of enrichment liability are developed enrichment actions (whereas the old actions are not), insofar as the detrimental side-effects of the enrichment (and, presumably, also the favourable side-effects of the impoverishment) are taken into account in determining the extent of the enrichment liability.
- The *ad hoc* extensions are available only in those instances where the old actions are not applicable. If a specific instance falls within the ambit of one of the old actions, the old actions must be used. If the rules of an old action exclude a right to compensation, the impoverished party cannot succeed with one of the *ad hoc* actions.
- The rules for a general enrichment action initially set out by De Vos in his first edition, and repeated in his second and third editions, are applicable to the *ad hoc* extensions of enrichment liability. In each instance, a further vague requirement is, however, added that specific circumstances must be present.
- A general enrichment action is not recognised as forming part of our law.

14.4 WAY FORWARD: THREE RECENT SUPREME COURT OF APPEAL CASES

(a) *McCarthy Retail Ltd v Shortdistance Carriers cc*

In the first of three important cases, the *McCarthy* case, Schutz JA had the following to say about the general enrichment action:

Acknowledged
general
enrichment
action

What are the foundations of our enrichment law?

[8] Unlike other branches of our law, the rich Roman source material has not led to an unqualified judicial recognition (with a few exceptions) of a unified general principle of unjustified enrichment, from which solutions to particular instances may be derived. Rather there has been an augmentation of the old causes of action, from case to case, usually with reference to rules treated as being of general application. This has led to a more or less unified patchwork

(the “lapwerk” according to Professor De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3rd ed). And although there has been no unequivocal recognition of a general enrichment action, time and again unjustified enrichment principles have been treated as a source of obligations being the basis for creating a new class or subclass of liability in particular circumstances. No better example of this can be found than the minority judgment of Ogilvie Thompson JA in *Nortjé en 'n Ander v Pool* NO 1966 (3) SA 96 (A) – the majority judgment in which is still sometimes held out as having given the final death-blow to a general enrichment action. The question whether such an action should be recognised was passed by in *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere* 1994 (3) SA 283 (A), but Botha JA I made it clear that the piecemeal extensions of the old actions, which have been proceeding for over a century in South Africa, have not been impeded by the decision in *Nortjé's* case (at 331B–333E). See also *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (A) at 40A–B. One of the restraints upon the acceptance of a general action is the belief, or fear, that a tide of litigation would be let loose. Initially there may be some surge of litigation, particularly under the emotive banner of “unjust enrichment”. But it should not last long, once the restrictions even on a general action are appreciated. My opinion is that under a general action only very few actions would succeed which would not have succeeded under one or other of the old forms of action or their continued extensions. For this reason, if it be a good one, the acceptance of a general action may not be as important as is sometimes thought, save, of course, that its denial may lead to occasional individual injustices. A more daunting consequence of acceptance is the possible need for a re-arrangement of old-standing rules. Are the detailed rules to go and new ones to be derived from a broadly stated general principle? Or are the old ones to stand, and be supplemented by a general action which will fill the gaps? The correct answers to these questions are not obvious. But I would support the second solution. In a rare case where even an extension of an old action will not suffice I would favour the recognition of a general action. The rules governing it should not be too difficult to establish – see De Vos chap D VII for an outline. We have been applying many of them for a long time.

[9] How we have reached our present state is a matter of history. The Roman law, although containing several general affirmations of liability for unjustified enrichment, did not evolve a general action. Nor did the mediaeval writers, although there are some who would challenge this statement. But there is a strong, if by no means unanimous, body of academic opinion that Grotius, influenced by Spanish jurists and theologians, had come to accept unjustified enrichment as an independent source of obligations, just as contract or delict were. The case for Grotius is persuasively stated in Feenstra's chapter Grotius' “Doctrine of Unjust Enrichment as a Source of Obligation: its Origin and its Influence in Roman-Dutch Law”, contained in Scharge (ed) *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (1995) vol 15 at 197, in the *Comparative Studies in Continental and Anglo-American Legal History* series. Whether Professors Feenstra and Scholtens are right about Grotius need not be determined, because the latter has demonstrated quite convincingly, in my opinion, that by the 18th century the Hooge Raad had come to accept the existence of what we would call a general enrichment action, although the descriptions of it by individual Judges differed – see Scholten's “The General Enrichment Action that Was” (1966) 83 *SALJ* 391, Feenstra (*op cit* at 228–235). The main reason why this development did not affect the evolution of Roman-Dutch

law in Southern Africa, up to and including *Nortjé's* case, is that the decisions recorded by Bynkershoek and Pauw lay unpublished for two centuries and more. This reveals the weaknesses of a practice (that of Holland at the time) which did not require Judges to give full reasons for their decisions and which lacked systematic law reporting. We now know from the hard print that there is a common-law basis for the acceptance of a general enrichment action, at least one of a subsidiary nature. In this respect the decision of the majority in *Nortjé's* case at 139G – has been shown by the then largely dormant authority to be clearly wrong.

[10] However, if this Court is ever to adopt a general action into modern law, it would be wiser, in my opinion, to wait for that rare case to arise which cannot be accommodated within the existing framework and which compels such recognition. If once a general action is accepted much less energy, hopefully, will be devoted to the correct identification of a *condictio* or an *actio* than at present and more time to the identification of the elements of enrichment. This does not mean, however, that the old structure's relatively few distinctive rules applying only to particular forms of action, such as the requirement in the *condictio indebiti* that the mistake should be reasonable, will disappear.

(b) *First National Bank v Perry NO*

In another case in 2001, Schutz JA remarked:

[23] This difference of approach as to the appropriate *condictio* again underlines the point which I made in *McCarthy Retail Ltd v Shortdistance Carriers CC (SCA)* 16.03.2001 unreported, that we spend too much of our time identifying the correct *condictio* or *actio*. Counsel frequently err. The academics say that the Courts, including this Court, frequently err. And to judge by the difference of opinion as to the *condictio sine causa* revealed in *I McCarthy's* case, some of the academics sometimes err too. My suggestion, in that case, accepted by two of my Brethren, was that the adoption of a general action might help remedy this situation, by fixing attention on the requirements of enrichment rather than on the definition and application of the old actions.

(c) *Kudu Granite Operations (Pty) Ltd v Caterna Ltd*

The trend towards shifting the focus from the individual enrichment actions and their requirements to the general requirements was further emphasised in *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA). Navsa JA and Heher AJA dealt with the issue as follows:

[12] The learned Judge accepted the general principle that, where an agreement fails without fault on either side after partial performance, each party is entitled to the return of whatever was performed so as to restore the status quo. In his view, however, there is uncertainty about the true cause of action, some authorities favouring a basis of enrichment and others treating it as a distinct contractual remedy. As Smit J understood the divergent opinions, they gave rise to no material difference in approach. From this perspective it was therefore unnecessary to consider whether the elements of an enrichment action had been proved. Kudu was capable of returning only 11 of the 179 blocks of granite delivered pursuant to the agreement. Smit J proceeded to consider and decide the value of all but distinguished between them in the order which he made. (At least half the trial had been spent on the issue of the value of these blocks.) He found that the amount to which Caterna was

entitled was their market value of US\$319 793 at the date of the trial. Despite initial evidence from Kudu's side to the contrary effect, an amount agreed between expert witnesses on both sides during the course of the defendant's case was found to provide the correct measure of that value.

[13] Smit J accordingly ordered Kudu to pay Caterna the sum of US\$319 793 converted into SA rands on the date of payment and to redeliver the remaining blocks of granite or their present-day value in US dollars, likewise converted.

[14] The present appeal against the judgment and orders in the Court below is with the leave of that Court. Before us Kudu's main contentions were:

- (i) The true basis of Caterna's claim was enrichment and the Court below, in deciding the matter on the basis described above, erred by equating the remedies available to an innocent party who cancels a contract with that of a party who relies on the failure of an agreement without fault from the side of either party to it.
- (ii) There was no evidence to prove any of the elements of an enrichment claim.

[15] Kudu's first contention is well-founded. There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in *Baker*; a judgment relied on by the Court *a quo*) and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect.

[16] The first-mentioned scenario gives rise to a distinct contractual remedy: *Baker* at 439A, and restitution may provide a proper measure or substitute for the innocent party's damages. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjustified enrichment, an equitable remedy in which the contractual provisions are largely irrelevant. As Van den Heever J said in *Pucjilowski v Johnston's Executors* 1946 WLD 1 at 6:

The object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was *ab initio* unenforceable or has subsequently become inoperative (*causa non secuta; causa finita*).

The same principle applies if the contract is void due to a statutory prohibition (*Wilken v Kohler* 1913 AD 135 at 149–50), in which case the *condictio indebiti* applies. There is no reason why contractual and enrichment remedies should be conflated. *Caterna's* case was one of a lawful agreement which afterwards failed without fault because its terms could not be implemented. The intention of the parties was frustrated. The situation in which the parties found themselves was analogous to impossibility of performance since they had made the fate of their contract dependent upon the conduct of a third party (KPMG) who was unable or unwilling to perform. In such circumstances the legal consequence is the extinction of the contractual nexus: see De Wet and Van Wyk, *Kontraktereg en Handelsreg* 5th ed vol 1 at 172 and the authorities there cited. The law provides a remedy for that case in the form of the *condictio ob causam finitam*, an offshoot of the *condictio sine causa specialis*. According to Lotz, in Joubert (ed) *The Law of South Africa* vol 9 (1st reissue) para 88, the purpose of this remedy is the recovery of property transferred under a valid *causa* which subsequently fell away. See De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3rd ed at 65–6; cf *Holtshausen v Minnaar* (1905) 10 HCG 50; *Hughes v Levy* 1907 TS 276 at 279; *Snyman v Pretoria*

Hypotheek Maatschappij 1916 OPD 263 at 270–1; *Pucilowski v Johnston's Executors (op cit)*. It is sometimes suggested that the *condictio causa data causa non secuta* is the appropriate remedy. See para 85 of *The Law of South Africa (supra)*. Indeed in *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co* 1923 SC (HL) 105, a case of a contract frustrated by the outbreak of war which made performance legally impossible, the Judicial Committee after an exhaustive consideration found that that was the remedy. Of this conclusion Professor Evans-Jones commented in “The Claim to Recover what was Transferred for a Lawful Purpose Without Contract (*condictio causa data causa non secuta*)” 1997 *Acta Juridica* 139 at 157:

“The unhappy application of the *condictio causa data causa non secuta* in *Cantiere* ... possibly resulted from the fact that the *condictio ob causam finitam* had no profile in Scots law at the time the case arose.”

The last-mentioned writer also notes, in “Unjust Enrichment, Contract and the Third Reception of Roman Law in Scotland” (1993) 109 *LQR* 663 at 668:

“If the impossibility were seen to extinguish the contract from the moment of the impossibility, the remedy would be *condictio ob causam finitam*.”

[17] Except that the *condictio causa data causa non secuta* appears to apply to cases where a suspensive condition or the like was not fulfilled, the identification of the cause of action is not of importance since there appears to be no difference in the requirements of proof of the two *condictiones*. The essential point is that Caterna's claim is covered by one or the other remedy for unjustified enrichment.

[18] It follows that to assess that claim one has to consider whether the following general enrichment elements are present:

- (i) whether Kudu had been enriched by its nominee's receipt of the granite;
- (ii) whether Caterna had been impoverished by procuring that Ruenya deliver the blocks from its stock;
- (iii) whether Kudu's enrichment was at the expense of Caterna;
- (iv) whether the enrichment was unjustified.

The *Law of South Africa* vol 9 (1st reissue) para 76. The *quantum* of Kudu's enrichment claim is the lesser of the amounts of (i) and (ii).

[21] Presumption of enrichment arises when money is paid or goods are delivered. Defendant then bears the onus to prove that he has not been enriched: *De Vos (supra* 2nd ed at 183), quoted with approval in *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 3 SA 699 (A) at 713G–H. In the present case the defendant attempted to discharge that onus by reliance on the fact that its loan account in Ruenya had been debited with the full agreed value of the blocks delivered to its nominee.

new direction

From the latest Supreme Court of Appeal decisions quoted above, there seems to be a growing tendency to pay less attention to the identification of the specific enrichment action, with it being likely that the emphasis will, in future, be more on the general requirements involved. This creates a certain dilemma for the litigants, as the various *condictiones* still have their own requirements that need to be fulfilled. For instance, when relying on the *condictio indebiti*, the plaintiffs must allege that their mistake was an excusable one, whereas no such requirement exists when relying on the *condictio causa data causa non secuta*, or on the *condictio sine causa specialis*.

With the extension of the current *condictiones* and the scope for development, it is also evident that few new instances will exist where a general enrichment action can play a role in addition to the current actions. The Supreme Court of Appeal now clearly favours the approach that a general enrichment action will only be recognised in circumstances where the current actions are not applicable, and that a general action would be in addition to the current actions, but that it would not replace them.

14.5 CONCLUSION

Roman law

From our brief discussion of some of the actions in Roman law, it appears that the idea of liability for unjustified enrichment was not foreign to Roman law. However, none of the actions was a developed enrichment action, nor was there a general enrichment action. As explained previously, the requirement of a *negotium* prevented the *condictio sine causa specialis* from being used as a general enrichment action. Owing to the casuistic approach to enrichment in terms of Roman law, it is conceivable that a party had no action in certain circumstances. Consider, for instance, the fact that the value of a *factum* could not be recovered, and that a person who had lost his or her property as a result of *bona fide specificatio* had no action. Also consider that such *detentores* as the holder at will (*precario habens*) and the *bona fide detentor* apparently had no right to compensation. There are many other similar examples.

Roman-Dutch law

In the previous study units, we gave you a glimpse of the various actions that could be taken in terms of Roman-Dutch law, as propounded by our old writers. In some respects, the actions of this period show improvement over those in Roman law, and the striving for equitable results is clearly discernible in such. Furthermore, a few obvious gaps were filled in, such as doing away with the *negotium* requirement for the *condictio sine causa*, and granting an action to the *bona fide* and *mala fide* possessor, as well as to the person who lost his or her ownership through *bona fide specificatio*. However, small gaps still remained, such as the fact that the value of a *factum* could not be claimed with any of the *condictiones*. Whether a *bona fide* occupier or a precarious holder would have had a claim for compensation for improvements brought about at his or her expense, and which enured to the benefit of the owner of a thing, is also doubtful.

Eiselen

Eiselen opines that it is unlikely that a general enrichment action will be developed in the sense that De Vos envisaged. According to Eiselen, the emphasis that De Vos placed on the enrichment actions, including the general enrichment ones, places too much emphasis on the adoption of an outdated approach. The development that should take place is a development to finally free enrichment law from its Roman action – orientated approach towards the adoption of a principled approach that is similar to the developments in contract and delict. In both of the disciplines concerned, the contractual or delictual liability is founded upon general principles, and on exceptions to such. The same should happen in terms of unjustified enrichment law. Eiselen states:

In a sense the approach of De Vos and the quest for a general enrichment action has created a mindset where one is still very much inclined to think in action based terms when thinking about enrichment law. De Vos extracted some generally applicable principles underlying all of the enrichment actions recognised at that time and proposed that these general principles be used

as the requirements for the general enrichment action, whether that action replaced the existing actions or merely augmented them. This quest for the general enrichment action however created a false approach to the development of enrichment law. In its sister disciplines, contract and delict, liability had already been transformed from the Roman action based approach to a principle based approach to liability. The real issue therefore is not the need for a general enrichment action but the need for a similar development in enrichment law where the liability will be based on general principles augmented by more nuanced rules and exceptions to provide for public policy and correctives where needed.

The first steps towards a principled approach were given in Lotz's exposition of the law of unjustified enrichment in the Law of South Africa (see the original 1979 edition). For the first time Lotz stated the general principles extracted by De Vos from the various enrichment actions as prerequisites for any enrichment liability. Sonnekus refers to the adoption of these principles as requisites as prophetic if over enthusiastic as this paved the way for the courts to do the same (Sonnekus J *Unjustified Enrichment* par 1.7 fn 104). These general principles had been applied by the courts for some time, but it was only with Lotz's exposition that a subtle paradigm shift took place and the focus became more and more directed on the general principles, rather than the specific actions although the latter still remained very much in place. This shift of focus also influenced the approach in this case book. This approach was finally adopted by the Supreme Court of Appeal in [6] *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* [2003] 3 All SA 1 (SCA) par 16 to 17 without much ado. In [8A] *Glenrand MIB Financial Services (Pty) Ltd and Others v Van den Heever NO* [2013] 1 All SA 511 (SCA) the Supreme Court of Appeal simply states that it is generally accepted that there is no general enrichment action but that there are a minimum of four general requirements that have to be met in all cases (par 16).

Although the general enrichment action has still not been recognised as presaged by Visser relying on the *McCarthy* case (Visser *Unjustified Enrichment* 7–8; Visser 2009 Stell LR 454 ff), two recent decisions of the SCA have raised further questions about general enrichment liability as neither of these cases referred to the requirements for any of the specific enrichment actions despite the courts *a quo* doing so (see [38A] *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd intervening)* [2006] 4 All SA 120 (SCA) and the [8A] *Glenrand* case.).

In the development of general enrichment actions, the courts will also have to consider the constitutional values and the general principle of Ubuntu, as indicated in the introduction. In the *Everfresh Market Virginia* case, the Constitutional Court considered the concept of good faith against the overarching principle of Ubuntu. Ubuntu is regarded as an overarching principle affecting all laws, their interpretation and application. Working hand in hand with public policy and good faith, within the context of a constitutionalised legal system, Ubuntu is important to consider in the assessment and development of enrichment law. Yacoob J states the following in regard to Ubuntu and good faith in contract:

[23] The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far

predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country places a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.

...

[71] Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and “carries in it the ideas of humaneness, social justice and fairness” and envelops “the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”.

Clearly, from the description of Ubuntu given above that the underlying values that have given rise to the development of unjustified enrichment liability in the Roman and Roman-Dutch law could, just as well, have been founded on such principles. From the communal perspective, and from the perspective of simple fairness, it is imperative that a corrective should exist in the case where there has been a mistake, or where property has been inadvertently transferred without a good legal ground for so doing. In short, the impoverished party, in the above-mentioned case, should be compensated for its loss. However, of equal importance is the fact that the enriched party should not be left in a position in which they would be worse off than in a case where there has been no enrichment. The various enrichment requirements and actions will be assessed in the course of our discussion to establish whether the current law conforms to the basic requirements of Ubuntu, with the eventual general enrichment action being guided by its principles.

SELF-EVALUATION

- 0.1 Briefly discuss the position in our common law regarding a general enrichment action.
 - 0.2 Critically discuss the majority and minority decisions made in the *Nortjé* case, with reference to the existence of a general enrichment action in South African law. Refer in your answer to De Vos’s summary of the effect of this decision on South African law.
 - 0.3 Discuss the effect of two recent decisions, namely those of the *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 3 SA 960 (SCA) and of *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 5 SA 193 (SCA), on the acknowledgement of a general enrichment action in South African law.
 - 0.4 Discuss the manner in which a general enrichment action may find application in future South African law. Also consider Eiselen’s views on the developments concerned.
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FEEDBACK

- (1) (1) See 14.1.
 - (2) (2) See 14.2.
 - (3) (3) See 14.3
 - (4) (4) See 14.4.
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GLOSSARY OF LATIN TERMS AND THEIR MEANING

<i>Latin</i>	<i>English</i>	<i>Afrikaans</i>
<i>ab initio</i>	from the outset	van die begin af
<i>accessio</i>	attachment	aanhegting
<i>actio</i>	action; claim	aksie; eis
<i>actio de dolo malo</i>	action in terms of which a defrauded person could claim against the defrauder and his heirs who have been enriched by the fraud	aksie ingevolge waarvan die persoon wat bedrieg is kan eis teen die bedrieër en sy erfgename wat deur die bedrog verryk is
<i>actio empti</i>	action based on the contract of purchase and sale	aksie op grond van 'n koopkontrak
<i>actio de tigno iuncto</i>	action in terms of which the owner who builds on his or her own ground with the material of another is liable to the owner of the material	aksie ingevolge waarvan die eienaar wat op sy eie grond met die materiaal van 'n ander bou, teenoor die eienaar van die materiaal aanspreeklik is
<i>actio in quantum locupletior factus est</i>	action for enrichment where a person contracted with a minor and the minor refrains from enforcing or rescinding the contract, and the person has already performed in terms of the contract	aksie vir verryking waar 'n persoon met 'n minderjarige gekontrakteer het, en die minderjarige weerhou hom daarvan om die kontrak af te dwing of tersyde te stel, en die persoon het reeds kragtens die kontrak presteer
<i>actio legis Aquiliae</i>	(Aquilian) delictual action to compensate for patrimonial loss caused by wrongful and culpable conduct	(Aquiliese) deliktuele aksie om te vergoed vir vermoënskade wat deur onregmatige en skuldige gedrag veroorsaak is

<i>actio mandati</i>	action based on mandate	aksie op grond van lasgewing
<i>actio negotiorum gestorum</i>	action for the management of affairs	aksie uit hoofde van saakwaarneming
<i>actio negotiorum gestorum contraria*</i>	true management of affairs action; action for the true management of affairs	egte saakwaarnemingsaksie; aksie om ware saakwaarneming
<i>actio negotiorum gestorum utilis*</i>	extended management of affairs action (based on enrichment)	uitgebreide saakwaarnemingsaksie (gegrond op verryking)
<i>actio redhibitoria</i>	an action available to a purchaser for cancellation of a contract of sale due to a latent defect, or a material false statement, made by the seller to the buyer during the course of negotiations concerning the quality of thing sold, and going beyond mere puffery	'n aksie tot die beskikking van die koper om die koopkontrak te kanselleer op grond van 'n latente gebrek of 'n wesenlike verkeerde verklaring, wat, in die verloop van onderhandelinge deur die verkoper aan die koper, gemaak word met betrekking tot die gehalte van die saak wat verkoop word, en wat meer as blote opvyseling behels
<i>adagium</i>	legal maxim	regspreek
<i>ad hoc</i>	for a specific occasion	vir 'n bepaalde geleentheid
<i>allegata</i>	allegations	bewerings
<i>animus negotii alieni gerendi</i>	intention of acting in another's interest	bedoeling om 'n ander se belange te behartig
<i>animus domini</i>	intention of being the owner	bedoeling om eienaar te wees
<i>animus donandi</i>	intention to donate	bedoeling om te skenk
<i>a priori</i>	from what came before; (reasoning) from cause to effect	van wat vooraf gekom het; (redenasie) van oorsaak tot gevolg
<i>a quo</i>	court <i>a quo</i> – court of first instance	hof <i>a quo</i> – hof van eerste instansie
<i>bona fide</i>	good faith	goeie trou
<i>boni mores</i>	good moral standards; legal convictions of the community	goeie morele standaarde; regsoortuiging van die gemeenskap

<i>cadit quaestio</i>	the question falls away	die vraag verval
<i>carta</i>	record of transfer	oordrag oorkonde
<i>causa</i>	(underlying) reason or cause for a transaction	(onderliggende) rede vir of oorsaak van 'n transaksie
<i>causa finita</i>	cause that ceases to exist	oorzaak wat nie meer bestaan nie
<i>causa futura</i>	future cause	toekomstige oorsaak
<i>causa non secuta</i>	cause that fails to materialise	'n oorsaak wat nie realiseer nie
<i>commixtio</i>	mixing of solids	vermenging van vastestowwe
<i>condicio sine qua non</i>	essential condition (for a specific consequence)	noodsaaklike voorwaarde (vir 'n bepaalde gevolg)
<i>condictio</i> (sg/ev) <i>condictiones</i> (pl/mv)	action based on unjustified enrichment, and which takes a number of specific forms	aksie wat op ongeregverdigde verryking gegrond is, en wat 'n aantal spesifieke vorms aanneem
<i>condictio causa data causa non secuta*</i>	action for reclaiming performance resulting from the failure of counter-performance	aksie vir terugvordering van prestasie weens versuim van teenprestasie
<i>condictio furtiva</i>	action for recovery of stolen property	aksie vir terugvordering van gesteelde goed
<i>condictio indebiti*</i>	action for return of a sum not owing, but paid	aksie vir terugvordering van onverskuldigde betaling
<i>condictio ob finitam causam</i>	see <i>condictio sine causa specialis</i>	sien <i>condictio sine causa specialis</i>
<i>condictio ob turpem vel iniustam causam*</i>	action for repayment of a sum of money paid for an immoral or illegal cause	aksie vir terugvordering van betaling uit onsedelike of onwettige oorsaak
<i>condictio sine causa</i>	action for repayment of a sum of money paid without a (valid) cause	aksie om terugvordering van betaling sonder (geldige) oorsaak gedoen
<i>condictio sine causa generalis*</i>	alternative <i>condictio</i> to the <i>condictio indebiti</i> , the <i>condictio causa data causa non secuta</i> , or the <i>condictio ob turpem vel iniustam causam</i>	alternatiewe <i>condictio</i> tot die <i>condictio indebiti</i> , <i>condictio causa data causa non secuta</i> , of <i>condictio ob turpem vel iniustam causam</i>

<i>condictio sine causa specialis</i> *	the <i>condictio</i> that is used when the facts falls outside the application of the other three <i>condictiones</i> ; however, this <i>condictio</i> is applicable only in certain circumstances sometimes also called the <i>condictio ob finitam causam</i>	die <i>condictio</i> wat aangewend word wanneer die feite buite die toepassing van die ander drie <i>condictiones</i> val, maar hierdie <i>condictio</i> is net van toepassing in bepaalde omstandighede soms ook die <i>condictio ob finitam causam</i> genoem
<i>conductor operarum</i>	employer	werkgewer
<i>conductor operis</i>	worker	werkaannemer
<i>consensus</i>	agreement	wilsooreenstemming
<i>contra bonos mores</i>	contrary to good morals; contrary to the legal convictions of the community	teen die goeie sedes; teenstrydig met die regoortuiging van die gemeenskap
<i>coram lege loci</i>	before the court of the place	voor die hof van die plek
<i>culpa</i>	fault or negligence	skuld of nalatigheid
<i>damnum</i>	damage	skade
<i>datio</i>	transfer	oordrag
<i>debitum</i>	debt	skuld
<i>de facto</i>	in fact	feitlik
<i>de iure</i>	in law	regtens
<i>detentor</i> (sg/ev) <i>detentores</i> (pl/mv)	holder; occupier	houer; okkupeerder
<i>dictum (dicta)</i>	remark(s)	opmerking(s)
<i>dissensus</i>	lack of agreement	gebrek aan wilsooreenstemming
<i>dolo</i>	fraudulently or intentionally	bedreiglik of opsetlik
<i>dolus</i>	fraud or intention	bedrog of opset
<i>dominium</i>	ownership	eiendomsreg
<i>dominus</i>	owner	eienaar
<i>donatio propter nuptias</i>	gift with the view to a marriage	skenking met die oog op 'n huwelik
<i>dos</i>	dowry	bruidskat
<i>do ut des</i>	I deliver, so that you can deliver	ek lewer, sodat jy kan lewer
<i>do ut facias</i>	I deliver, so that you can do	ek lewer, sodat jy kan doen
<i>eo nomine</i>	under or by that name	onder daardie naam

error	error; mistake	dwaling; fout
error facti	error or mistake of fact	feitelike dwaling
error iurus	error or mistake of law	regsdwaling
ex aequitate	according to justice	volgens billikheid
ex aequo et bono	according to what is just and good	volgens wat reg en billik is
ex causa lucrativa	without consideration (ie for free)	sonder teenprestasie (dws verniet)
ex causa onerosa	for value	vir waarde
exceptio doli (mali)	exception or defence of fraud	verweer van bedrog
ne cui dolus suus per occasionem iuris civilis contra naturalem aequitatem prosit	so that nobody benefits from his or her bad faith through the subtleties of the <i>ius civile</i> against the principles of natural justice	sodat niemand deur die subtiliteit van die <i>ius civile</i> teen die voorskrifte van natuurlike billikheid uit sy of haar kwade trou voordeel trek nie
exceptio doli generalis*	general exception or defence against an action instituted fraudulently or in bad faith also known as <i>exceptio doli praesentis</i>	algemene verweer teen 'n aksie wat bedrieglik of ter kwader trou ingestel is ook bekend as <i>exceptio doli praesentis</i>
exceptio doli praesentis	see <i>exceptio doli generalis</i>	sien <i>exceptio doli generalis</i>
exceptio doli praeteriti	see <i>exceptio doli specialis</i>	sien <i>exceptio doli specialis</i>
exceptio doli specialis*	special exception of fraud committed in the past (before instituting the action) also known as <i>exceptio doli praeteriti</i>	spesiale verweer van bedrog in die verlede gepleeg (voor die instel van die aksie) ook bekend as <i>exceptio doli praeteriti</i>
exceptio non adimpleti contractus*	defence available to a party to a reciprocal contract, when sued for performance under the contract that the other party has neither tendered nor made counter-performance (when the latter is obliged to perform first, or simultaneously)	verweer tot die beskikking van 'n party tot 'n wederkerige kontrak, wat vir prestasie ingevolge die kontrak gedagvaar word, dat die ander party nóg teenprestasie aangebied nóg dit gemaak het (wanneer laasgenoemde verplig is om eerste, of gelyktydig, te presteer)
ex contractu	arising from contract	ontstaande uit kontrak

<i>ex delicto</i>	arising from delict	ontstaande uit onregmatige daad (delik)
<i>factum</i>	service rendered	dienslewering
<i>famulus</i>	servant	bediende
<i>fideicommissarius</i>	ultimate beneficiary under <i>fideicommissum</i>	uiteindelijke begunstigde ingevolge <i>fideicommissum</i>
<i>fideicommissum</i>	the granting of property to a person as owner (<i>fiduciarius</i>), subject to a condition that he or she will transfer the property to a third party (<i>fideicommissarius</i>) upon the occurrence of a certain event	die oordra van 'n eiendom aan 'n persoon as eienaar (<i>fiduciarius</i>) onderhewig aan die voorwaarde that hy of sy die eiendom sal oordra aan 'n derde persoon (<i>fideicommissarius</i>) by die plaasvind van 'n sekere gebeurtenis
<i>fiduciarius</i>	person holding a property as owner, subject to its passing to a third party (<i>fideicommissarius</i>) upon the occurrence of a certain event	persoon wat eiendomsreg oor 'n saak hou, onderhewig aan die oordrag daarvan na 'n derde party (<i>fideicommissarius</i>) by die plaasvind van 'n sekere gebeurtenis
<i>fructus civiles</i>	civil fruits (eg rent)	burgerlike vrugte (bv huurgeld)
<i>fructus naturales</i>	natural fruits	natuurlike vrugte
<i>gestor</i>	manager of affairs	saakwaarnemer
<i>graviores impensas</i>	unusually heavy expenses	buitengewone swaar uitgawes
<i>habitatio</i>	free lodging	gratis bewoning
<i>impensae necessariae</i>	necessary expenses or improvements	noodsaaklike uitgawes of verbeteringe
<i>impensae utiles</i>	useful expenses or improvements	nuttige uitgawes of verbeteringe
<i>impensae voluptuariae</i>	luxury expenses or improvements	weelderige uitgawes of verbeteringe
<i>in casu</i>	in the present case	in hierdie geval
<i>indebitum</i>	not owed; not due	onverskuldig
<i>indicia</i>	signs or indications	tekens of aanduidings

<i>in pari delicto, potior est conditio defendentis</i>	in the case of equal wrongful conduct by both parties, the defendant is in the stronger position	waar albei partye ewe onregmatig gehandel het, is die verweerder in die sterker posisie
<i>inter alia</i>	among other things	onder andere
<i>inter partes</i>	between the parties	tussen die partye
<i>in turpitudine</i>	shameful	skandelik
<i>in vacuo</i>	in a vacuum	in 'n vakuum
<i>iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiozem</i>	it is according to the equity of natural law that nobody should profit at the cost of another	dit is ooreenkomstig die billikheid van natuurlike reg dat niemand ten koste van iemand anders moet wins maak nie
<i>ius disponendi</i>	right of alienation	vervreemdingsreg
<i>ius poenitentiae</i>	right to rescind (where party performed in terms of <i>do ut des</i> or <i>do ut facias</i> of an innominate real agreement prior to counter-performance)	reg van terugtrede (waar party ingevolge <i>do ut des</i> of <i>do ut facias</i> van 'n onbenoemde saaklike ooreenkoms presteer het voordat teenprestasie plaasgevind het)
<i>ius retentionis</i>	right of retention	retensiereg
<i>ius strictum</i>	strict law	streng reg; strikte reg
<i>iusta causa</i>	justifiable cause	regverdigbare oorsaak
<i>ius tollendi</i>	right to remove	reg om te verwyder
<i>iustus error</i>	reasonable error or mistake	redelike dwaling
<i>lex commissoria</i>	clause in a contract entitling a party to cancel the contract on account of the other party's breach of contract, in accordance with its provisions	klousule in 'n kontrak wat 'n party daarop geregtig maak om die kontrak in ooreenstemming met die bedinge daarvan op grond van die ander party se kontrakbreuk te kanselleer
<i>litis contestatio</i>	date on which the action was lodged	datum waarop aksie ingestel is
<i>locatio conductio operarum*</i>	employment contract	dienskontrak
<i>locatio conductio operis*</i>	contract of work	aanbesteding van werk
<i>locator operarum</i>	employee	werknemer

<i>locator operis</i>	employer	aanbesteder
<i>locuples</i>	to enrich	verryk
<i>locus classicus</i>	authoritative or leading case	sleutelgesag
<i>lucrum cessans</i>	gain that would have been made, but which is now lost	wins wat gemaak sou word, maar nou verlore is
<i>maior species</i>	main article or thing	hoofsaak
<i>mala fide</i>	bad faith	kwade trou
<i>mandans</i>	principal	lasgewer
<i>mandatarius</i>	mandatory	lashebber
<i>mandatum</i>	contract of mandate; a contract in terms of which one person (the mandatory) is obliged to perform a task for another (the principal)	lasgewingskontrak; 'n kontrak ingevolge waarvan een persoon (die lashebber) verplig is om vir 'n ander (die lasgewer) 'n taak uit te voer
<i>merx</i>	object of sale	voorwerp van verkoop
<i>mobilia non habent sequelam</i>	movables cannot be pursued	roerende sake het geen gevolg nie
<i>modus</i> (sg/ev) <i>modi</i> (pl/mv)	modal clause; provision in a contract or will that burdens the beneficiary with having to do, or not do, something	lasbepaling; bepaling in 'n kontrak of testament wat die begunstigde verplig om iets te doen, of nie te doen nie
<i>modicae refectioes</i>	everyday repairs	alledaagse herstelwerk
<i>mora</i>	default	versuim
<i>mora debitoris</i>	default of the debtor	versuim van die skuldenaar
<i>mora debitoris perpetuat obligationem</i>	default on the part of the debtor perpetuates the obligation	versuim van die skuldenaar laat die verbintenis voortduur
<i>mutatis mutandis</i>	with the necessary changes	met die nodige veranderinge
<i>nam hoc natura aequum est neminem cum alterius detrimento fieri locupletioem</i>	because it is according to natural equity that nobody should be enriched at the expense of another	aangesien dit ooreenkomstig natuurlike billikheid is dat niemand ten koste van iemand anders verryk moet word nie
<i>naturalis obligatio</i>	natural or unenforceable obligation	natuurlike of onafdwingbare verbintenis
<i>negotiorum gestorum</i>	true management of affairs	ware saakwaarneming

<i>negotium</i>	task; juristic act	taak; regshandeling
<i>nemo contra suum factum venire debet</i>	no one can go against his or own act	niemand kan teen sy of haar eie handeling gaan nie
<i>nemo plus iuris (ad alium transferre potest quam ipse haberet)</i>	no person can transfer to another more rights than he or she has	geen persoon kan meer regte aan 'n ander oordra as wat hy of sy het nie
<i>nemo ex suo delictio meliorem conditionem suam facere potest</i>	no one can benefit from his or her own misdeed (delict)	niemand kan uit sy of haar eie onregmatige daad voordeel trek nie
<i>non parit actionem</i>	produces no action	lewer geen aksie
<i>novus actus interveniens</i>	new intervening cause	latere intredende saak
<i>numerus clausus</i>	closed list	geslote lys
<i>nunc petendo</i>	at the time of the action	ten tyde van die eis
<i>obiter</i>	incidental	terloops
<i>obiter dictum</i>	a court's remark in passing (not necessary for the decision of the case)	'n hof se terloopse opmerking (nie noodsaaklik om die saak te beslis nie)
<i>omissio</i>	omission	late
<i>paritas creditorum</i>	parity of creditors	gelykheid van skuldeisers
<i>per errorem iuris</i>	through an error or mistake in law	deur 'n regsdwaling
<i>possessio</i>	possession (with the intention of being the owner)	besit (met die bedoeling as eienaar)
<i>possessor</i>	possessor (with the intention of being the owner)	besitter (met die bedoeling as eienaar)
<i>precario dans</i>	person who has granted the free use of a thing to another (<i>precario habens</i>), on the basis that the use is revocable at the former's will	persoon wat gratis gebruik van 'n saak aan 'n ander (<i>precario habens</i>) gegee het, op die basis dat eersgenoemde die gebruik ter enige tyd kan opsê
<i>precario habens</i>	precarious possessor; possessor on sufferance	prekariis houer; houer ter bede

<i>precarium</i>	the legal relationship created by the possession (loan) of a thing, the use of which has been granted gratuitously, but which is revocable at will	the regsverhouding deur die willekeurige leen van 'n voorwerp wat gratis vir gebruik aan iemand geleen is, en wat te eniger tyd teruggevorder kan word
<i>prima facie</i>	at first sight; on the face of it	op die oog af; volgens uiterlike
<i>pro rata</i>	in proportion	na verhouding
<i>quantum</i>	amount; size	bedrag; omvang
<i>quantum meruit</i>	amount of enrichment	bedrag van verryking
<i>quasi negotiorum gestorum</i>	extended management of affairs	uitgebreide saakwaarneming
<i>ratio</i>	reason	rede
<i>rei vindicatio</i>*	action brought by an owner to recover possession of property	regsgeding deur 'n eienaar om besit van 'n saak te herstel
<i>replicatio</i>	replication	repliek
<i>res</i>	thing	saak
<i>res fungibiles</i>	replaceable things	vervangbare sake
<i>res incorporalis</i>	incorporeal things	onliggaamlike sake
<i>res inter alios acta (alteri nocere non debet)</i>	acts of third parties ought not to prejudice another party	handelinge van derdes behoort 'n ander party nie te benadeel nie
<i>restitutio in integrum</i>*	return to the original position	herstel tot die oorspronklike posisie
<i>sine causa</i>*	without (legal) cause	sonder (regs)oorzaak
<i>sine qua non</i>	indispensable condition	onontbeerlike voorwaarde
<i>solvendi animo per errorem</i>	under the impression that the performance was owing	onder die dwaling dat die prestasie verskuldig was
<i>solvens</i>	debtor	skuldenaar
<i>specificatio</i>	creation of a thing	saakskepping
<i>stipulatio</i>	verbal contract	mondelinge kontrak
<i>sui generis</i>	of its own nature or kind	eiesoortig
<i>supra</i>	above	hierbo
<i>traditio per cartam</i>	delivery of record of transfer	lewering van oorkonde van oordrag
<i>turpis persona</i>*	disgraceful or infamous person	skandelijke persoon

<i>ubi meam rem invenio, ibi vindico</i>	where I find my thing, I claim it	waar ek my saak vind, daar kan ek hom opeis
<i>ubi rem meam invenio ibi eam vindico</i>	wherever I find my property, there I claim it	waar ek my saak aantref, daar eis ek dit op
<i>ultra vires</i>	beyond the scope of (its) powers	buite (sy) bevoegdheid
<i>utilis actio negotiorum gestorum contraria</i>	extended management of affairs action	uitgebreide saakwaarnemingsaksie
<i>utiliter coeptum</i>	useful undertaking	nuttige onderneming
<i>vinculum juris</i>	juristic bond	regsband
<i>vis maior</i>	force <i>majeure</i> ; act of God	oormag; natuurkrag