Department of Private Law

Unjustified Enrichment Liability and Estoppel

Unjustified Enrichment Liability

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Study guide 1 for
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GENERAL INTRODUCTION

Welcome to the module, Undue Enrichment and Estoppel. We trust that you will enjoy studying this module. This module will enrich your understanding of the scope of private law in general and, more particularly, of the law of obligations. More than most other modules in private law, this module requires you to integrate and apply your knowledge of other modules. The module consists of two distinct parts which are independent of each other. What they have in common is that they are both founded on equity and reasonableness. However, they play an important part in rounding off your knowledge and understanding of private law and comprise topics which will be of great value to you in practice.

You have now reached quite an advanced stage of your law studies, having completed many basic modules and even a few more advanced modules. In your study of the module Undue Enrichment and Estoppel you will be required to integrate some of the knowledge you have gained in other modules such as Law of Property (PVL201T), Law of Contract (PVL301W) and Law of Delict (PVL302X) with the new knowledge and skills that you will learn in this module. As you are moving closer to graduation and professional practice there will also be more emphasis on the practical application of the knowledge and skills acquired in this module. On some topics you will also be required to apply advanced legal reasoning skills in dealing with theoretical and practical problems and approaches to theory.

So when do (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 these subjects.

Example 1

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

A owes B an amount of R10 000. A pays the money to B on 25 June 2004 by way of an electronic funds transfer after an urgent telephonic request by B. On 30 June 2004 X, A's bookkeeper pays the same amount to B by cheque in the mistaken belief that the money is still owing.

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

In fact it cannot be a contractual claim because there is no breach of contract on the part of B and the first payment extinguished the contractual relationship. Nor can the claim be delictual, because there was no unlawful conduct on the part of B. B did not act fraudulently. It is blatantly obvious that it would be unfair for B to keep the money under these circumstances and therefore the law provides a claim under unjustified enrichment law.

Example 2

Estoppel typically comes into play in scenarios like the following:

X wants to buy a car that Y has on offer. Y has assured X that the vehicle has been fully paid for and belongs to him. However, Y still owes two instalment payments to Z, a bank that is the actual owner of the vehicle until such time

as it has been fully paid for. X, being a prudent person, makes inquiries from Z to establish 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 been paid off. Secure in this knowledge, X buys the vehicle from Y. Y then fails to pay the remaining instalment, causing the bank to cancel the contract and reclaim the vehicle. In this 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.*

PURPOSE OF THE MODULE

purpose of this module

The purpose of this module is to equip learners with the knowledge, skills, attitudes and competencies they need to solve basic problems relating to enrichment liability and estoppel, to perform basic research and to acquire reporting skills in these areas of the law.

LEARNING OUTCOMES

Specific outcomes for the LLB

Learners will be required to

- recognise the role of the law in everyday life
- solve multidimensional legal problems
- engage with legal text
- perform basic research tasks in law
- write a basic research report

Specific outcomes of this module

Learners will be required to

- demonstrate that they understand the most pressing and prevalent issues that occur regarding enrichment liability and estoppel in South African law
- use appropriate methods and skills to apply basic knowledge of enrichment liability and estoppel in a variety of contexts typical of the problems set for undergraduate learners
- do research in order to produce critical legal argument and with guidance and support, take responsibility for the legal opinions that they 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 identify 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

- critically analyse different viewpoints on theoretical and practical issues in enrichment liability and estoppel
- find the relevant sources and authorities to solve problems regarding enrichment liability and estoppel

METHOD OF STUDY

study material

There is no prescribed book for this part of the module. Your study material consists of this study guide and a number of cases, extracts from textbooks and journal articles which are listed under the heading "*Prescribed study material*" in the study guide and in Tutorial Letter 101. All of these judgments, extracts and articles, as well as further judgments, may be **discussed** in the study guide itself and therefore also form part of your prescribed study material. Any additional **references** to judgments, journal articles or extracts from textbooks which you may 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 and need not, therefore, be looked up and studied for examination purposes. These references are given to you not only for the sake of completeness but because they may be of tremendous value to you if you want to expand you knowledge and understanding of the subject or if you need to do further research for the purposes of your assignments or future employment. In the course of the year, additional material may be prescribed in further tutorial letters. **We cannot emphasise sufficiently that all the prescribed material is very important. Everything forms an integral part of the module and must be studied intensively for examination purposes.**

examples and self-assessment

The examples that are highlighted throughout the study guide serve to illustrate the content described above. Examples are quite often taken from case law and can appear in examination questions in the same or a slightly different form. The same applies to the self-assessment questions in the text and at the end of each study unit. These questions can be used to determine whether you understand the content and whether you can apply it. The feedback that follows the self-assessment questions can be used as a guideline to help you in this assessment process. If you are unable to complete the self-assessment questions you need to revisit the basic study material and ensure that you understand the content in context.

study journal

You may consider creating a study journal in which you write down your answers to the various activities and self-assessment exercises throughout the study guide. The journal will be a valuable tool in assessing your own understanding and skills in respect of the material as well as your growth in the module. The activities and self-assessment exercises may be reused in exams, but in any event they provide examples of the type of questions you may expect in the exam.

historical development

For a proper and thorough grasp of enrichment liability in our modern law, it is necessary to have some knowledge and a good understanding of the historical development of the various actions based on enrichment. Without a reasonable knowledge of the Roman and Roman-Dutch law of enrichment you will have great difficulty in grasping the currently applicable law. You must therefore study the sections dealing with the Roman and Roman-Dutch law carefully to enable you to follow the development of the specific enrichment actions and also to note the move towards a recognition of a general enrichment action. In

the study of the various enrichment actions you should therefore pay attention to

- the **requirements** in respect of the different actions
- the **field of application** of each of these actions
- the question whether a particular action is an **enrichment action**, that is an action based on **unjustified** enrichment
- the critical assessment of various points of view where there are conflicting decisions or views by authors

EXAMINATION

In preparing for your examination it is important that you have a good grasp and knowledge of the subject matter. You must know the general requirements and the specific requirements and be able to apply the rules to practical scenarios. In the examination you will be asked to deal with three types of questions:

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

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, that is to give a full assessment. ''Critically assess'' does not imply negative criticism only. You must highlight any positive aspects as well. A critical assessment requires more than merely a description of the case or legal position; it requires an assessment with opinions on whether it is good or bad, positive or negative etc.

STUDY UNIT 1

GENERAL OVERVIEW

1.1 INTRODUCTION TO UNJUSTIFIED ENRICHMENT

OVERVIEW

You have already studied two major sources of obligation, namely contract and delict. In this introductory part we will look at unjustified enrichment as 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 a little bit about the history of this part of the law as much of the law still consists of rules and principles dating back to Roman and Roman-Dutch law. There are copious references to these sources in case law.

STUDY 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 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 apply each of them to a given set of facts
- critically analyse and assess the different points of view on the existence of or need for a general enrichment action

RECOMMENDED READING MATERIAL

De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* 3 ed (1987) 304–310 330–331 336–337

Eiselen & Pienaar *Unjustified enrichment: a casebook* 3 ed (2008) 3–9

Lotz "Enrichment" in Joubert WA et al (eds) *The Law of South Africa* vol 9 first reissue (1996) 61–70

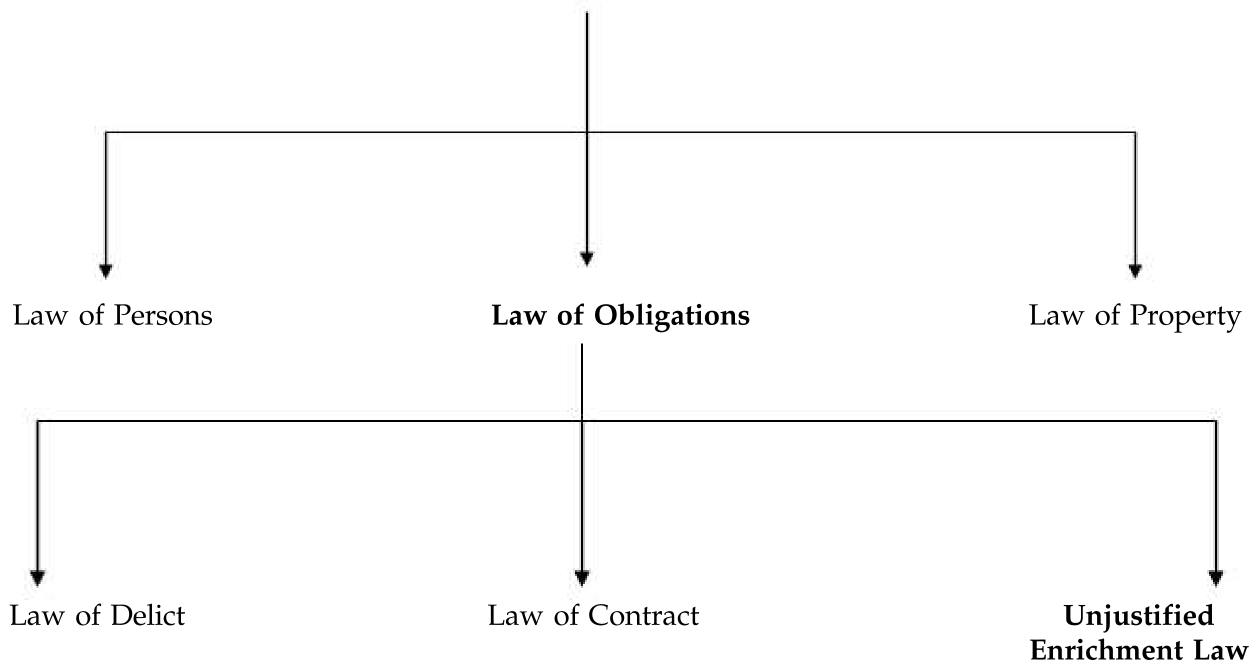
Van Zyl "The general enrichment action is alive and well" 1992 *Acta Juridica* 115–130

Nortjé v Pool 1966 3 SA 96 (A)

1.1.1 Enrichment as a source of obligation

structure of private law

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

The law of obligations is concerned with the relationship between debtors and creditors. There are many sources of obligations in law, but the three main sources consist of the Law of Contract (where obligations are created by agreement), the Law of Delict (where obligations arise by force of law upon damage or personal injury being caused by an unlawful action) and the Law of Unjustified Enrichment (where obligations arise in a number of different situations which fall neither under contract nor under delict).

historical sources of enrichment

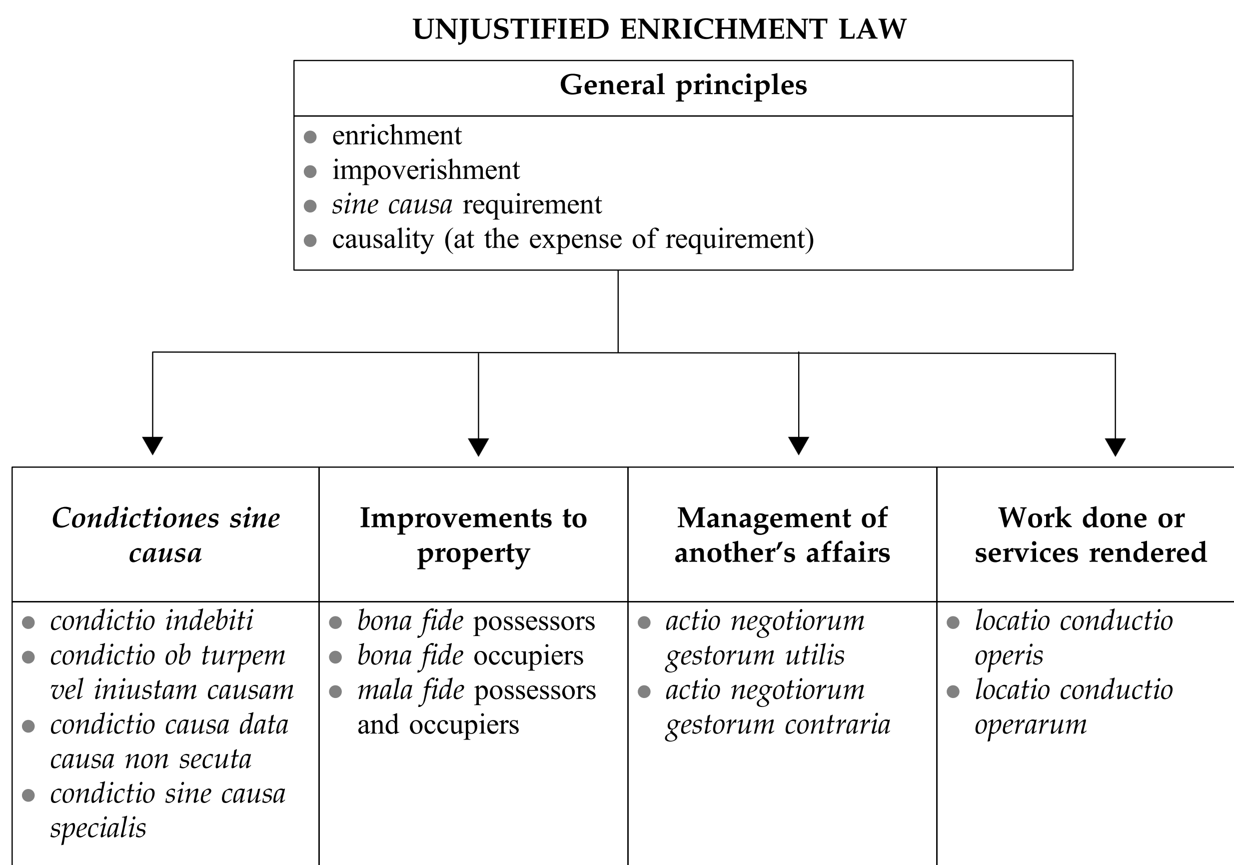
The sources of the Law of Unjustified Enrichment are to be found mainly in Roman and Roman-Dutch law as augmented and developed by the South African courts, as will be evident from your studies. Except for the Alienation of Land Act 68 of 1981 there is no other legislation that directly touches upon this area of the law.

theoretical structure of enrichment

In its structure the Law of 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 liability can ensue, but it also consists of a number of specific remedies each with their own distinct requirements which need to be fulfilled additionally. However, the general principles of the Law of Unjustified Enrichment are not as well developed as those of the Law of Delict and consequently there is much more emphasis on the specific remedies and their requirements. Fortunately the courts are making steady progress in the development of the general principles and there has even been some criticism of the emphasis on the specific remedies.

components

Traditionally the Law of Unjustified Enrichment has been divided into the following components:



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

definitions

The term ''enrichment'' is used to describe the situation which occurs when one person's estate is increased unjustifiably (not unjustly) at the expense of another. The term ''unjustified'' is used to indicate that the enrichment occurred without justification or any legal basis. In other words, the enrichment did not occur owing to an agreement (or contract) or owing to a delict having been committed. As a result of such an increase, in certain circumstances an obligation arises in terms of which the person whose estate has been increased has a duty to restore that which was increased to the person at whose expense the increase occurred, while the last mentioned has a corresponding right to claim that the increase be restored to him.

(By this time you should be well aware of what an obligation is — you have, after all, devoted a whole year of your study of private law to the two other principal sources of obligations, namely contract and delict. Consequently, we do not intend discussing the nature of an obligation here. If you feel you need to refresh your memory you may do so by rereading study unit 1 of the *Study guide on the law of contract* PVL301W.)

1.1.2 The necessity for enrichment liability

There can be no doubt that liability for enrichment is necessary in any developed legal system. There are cases in 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. You can look at the following two examples from South African law:

example 1

One: In accordance with the rules relating to *accessio* anything affixed to the land becomes part of the land and consequently the property of the owner of the land. This means that should the *bona fide* possessor of, for example, a farm build an expensive house and outbuildings on that farm, all the buildings become the property of the owner of the farm and such owner is, of course, entitled to eject the possessor at any time. (You have already dealt with the principles of *accessio* in the law of property PVL201T.) This leaves the occupier out of pocket and the owner with a property which is worth more than it had been before the improvements. There is no legal reason (no contract or delict) for the enrichment of the owner's estate and the impoverishment of that of the occupier that would justify the retention of the enrichment by the owner. Unjustified enrichment liability is aimed at redressing this type of situation.

example 2

Two: As you will recall from your study of the law of property (PVL201T), 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 (*Commissioner of Customs & Excise v Randles Bros & Hudson* 1941 AD 398). This could result in, for example, a seller's transferring ownership of the *merx* to the buyer in the genuine belief that the contract of sale was valid and only later learning that the contract was void and that he or she has no action for the purchase price against the buyer. Again the one party has benefited by the transfer of the property when there was no legal reason for such transfer.

I am sure you will agree that it would be unfair in these examples to leave the *bona fide* possessor and the seller without a remedy. This would mean that they would be impoverished through no fault of their own and that the owner and the buyer would be enriched without any good cause, hence the necessity for liability on the ground of unjustified enrichment.

Here 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 point equally well.

ACTIVITY

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

performance takes place, or where contracts that were initially valid may fall away. Looking at the table of contents for clues would be helpful. Also think of situations such as electronic funds transfers into an incorrect bank account, payment of a cheque which has been stopped, a conditional contract where the occurrence of the uncertain future event terminates the contract.

1.1.3 Historical developments

Roman law

In Roman law there are two texts in particular which usually serve as the starting point for an investigation into the law relating to liability for enrichment. The first is D12.6.14 which reads: *Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem,* and the second is D50.17.206 which reads: *Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem.* They can be translated as follows:

- D12.6.14 Because it is according to natural equity that nobody should be enriched at the expense of another.
- D50.17.206 It is according to the equity of natural law that nobody should profit at the cost of another.

broad principle only

Of course you will immediately realise that the prohibition against enrichment is so broadly stated in these two texts that they cannot possibly provide a basis for liability. What is prohibited here is not only unjustified enrichment but any enrichment whatsoever which is at the expense of another. If you should interpret these texts too literally they 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. There was, in fact, no general liability for enrichment in Roman law. Relief was granted to a plaintiff in certain specific circumstances based on the principles stated in the above two texts. There were certain specific enrichment actions, each with their own requirements, but there was no general liability for unjustified enrichment.

Roman-Dutch law

The enrichment actions of Roman law were received into Roman-Dutch law where, over the years, they were developed and extended. There is, however, no indication in the works of our institutional writers 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 eighteenth century Dutch practice, however, a general enrichment action had apparently developed and was noted in the *Observationes Tumultuariae* of Van Bynkershoek. This issue will be dealt with in more detail in study unit 14 below.

South African law

The enrichment actions of classical Roman-Dutch law are still available to a plaintiff in 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. Having regard to such extensions of enrichment liability, the majority of South African academics had concluded, by 1966, that a general subsidiary enrichment action had developed in South African law which would lie in any case of unjustified enrichment where none of the old actions would lie. 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 bring that action, but if the circumstances of his case fell outside the scope of any of the existing actions he or she could bring 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 which was additional and subsidiary to the existing actions.

In *Mccarthy Retail Ltd v Shortdistance Carriers* CC 2001 (3) SA 482 (SCA) 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' 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 *Nortje 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 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 Nortje'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 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 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 Nortje'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 Nortje's case at 139G–H has been shown by the then largely dormant authority to be clearly wrong.

1.1.4 Development of general principles in South African law

general enrichment action

There was some support in the case law for the view that a general enrichment action had developed, but there were also cases indicating it had not, and there were writers who denied the existence of a general enrichment action, subsidiary or otherwise (see De Vos 304–310 where you will find all the references). It was clear that the problem was going to engage the attention of the Appellate Division at some stage or other and this happened in 1966 in the case of *Nortjé en 'n Ander v Pool* 1966 (3) SA 96 (A) where it was decided that **no general enrichment action existed in South African law** but that there had merely been **ad hoc extensions** of existing actions. The decision in the *Nortjé* case means, of course, that any statement of the South African law of unjustified enrichment must refer to the old enrichment actions of Roman and Roman-Dutch law as applied in modern South African law and to the ad hoc extensions of those actions that have occurred. The decision in the *Nortjé* case did not exclude the possibility that a general enrichment action may yet be recognised in South African law, but emphasised that it would have to be gradually developed by the courts. However, the Supreme Court of Appeal has not yet seen fit in the forty years since the decision in the *Nortjé* case to develop such a general enrichment action.

ACTIVITY

Explain in your own words why unjustified enrichment is required as a

corrective in our law. You answer should not be more than 600 words long (about 2 typewritten pages).

FEEDBACK

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

general principles

The biggest development of the law of unjustified enrichment in South African law by the South African courts and commentators has been the development of a number of general principles or requirements underlying all the various enrichment actions. 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* 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).

We will discuss these general principles in more detail in study unit 2. They provide the foundation for this form of liability, setting it apart as a distinct discipline within the law of obligations. These principles quite clearly distinguish enrichment liability from contractual and delictual liability. As you will remember from your study of contract and delict, there are certain circumstances where contractual and delictual liability may overlap, affording the plaintiff a choice or alternative grounds for his claim. Likewise, there are certain instances where delictual liability and enrichment liability may overlap, affording the plaintiff a choice of remedies. In principle, however, there are no instances 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/she/it has been impoverished or that by which the defendant has been enriched, **whichever is the lesser.** The quantum of enrichment is determined at the time of the institution of the action. This means that the defendant is not liable for benefits

that he or she 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). It also means that where the defendant's enrichment is diminished or lost before action is instituted, his liability is likewise reduced or extinguished (*King v Cohen Benjamin & Co* 1953 (4) SA 641 (W) 648–650; *Govender v Standard Bank Ltd* 1984 4 SA 392 (C); *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 1 SA 242 (SCA) 252F). The onus of proving non-enrichment is on the defendant (*Le Riche v Hamman* 1946 AD 648; *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 1 SA 242 (SCA) 252F), but such reduction or extinction of liability is subject to the following qualifications:

fixing of liability

There are a number of exceptions to the general rule that the enrichment is to be calculated at the time when the claim is lodged. In these cases the enrichment liability is calculated with reference to an earlier date and remains constant from that date onwards. Four such circumstances have been recognised in our law. Enrichment may be calculated

- from the moment the defendant becomes aware that he or she has been unjustifiably enriched at the expense of another
- from an earlier date if the defendant should have realised that the benefit he or she 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 just set out do not apply in the case of a minor who has been enriched by performance to him in terms of an unauthorised contract. The liability of such 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* 1952 (3) SA 1 (A) and De Vos 336–337).

SELF-ASSESSMENT

1 Explain why there is a need for unjustified enrichment liability in any developed system of law.

2 Explain why reference to Roman and Roman-Dutch law is still necessary today when dealing with unjustified enrichment liability.

3 A and B have concluded a contract in terms of which A is selling his 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 fully.

4 A has fraudulently induced B to pay an amount of R20 000 to him which B thought was owing, but was in fact not owing. Does B have an enrichment claim against A?

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 which she has been unable to afford up to now. A is now claiming the money back with an enrichment action. Does B have any defence?

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 unjustified enrichment is still underdeveloped in comparison with contract and delict and therefore remains closer to the original sources?

3. Did you consider the fact that there is a valid contract and that the profit (enrichment) is therefore not unjustified?

4. This question is a little more difficult because in certain circumstances delictual and enrichment liability may overlap, providing the impoverished party with a choice. In this case the claim could be based on delict and damages claimed, or alternatively on enrichment. It would usually be better to resort to the delictual claim because full damages can be claimed, as well as consequential damages which are not too remote, whereas with enrichment only the amount of the enrichment can 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?

GENERAL REQUIREMENTS FOR ENRICHMENT LIABILITY

OVERVIEW

In study unit 1 you obtained an overview on the subject of unjustified enrichment liability. We will now deal with it in more detail. Although South African law does not recognise a general enrichment action of the kind that will be discussed in more detail in study unit 15 (see *Nortjé v Pool* 1966 (3) SA 96 (A)), there are nonetheless certain general requirements for any action based on enrichment which have been recognised in South African law. In this study unit you will study these general requirements.

PRACTICAL SCENARIOS

These examples provide practical scenarios that will be relevant in the discussion and questions in this study unit. You will find this feature throughout your study guide. Think about these scenarios but do not try and answer them in full now. Keep them at the back of your mind while reading through your prescribed material and the study guide. This will make the abstract concepts discussed here easier for you to digest.

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. 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 this period. E's house also seemed to need a fresh coat of paint. Can D claim anything from C or E?

Scenario 3

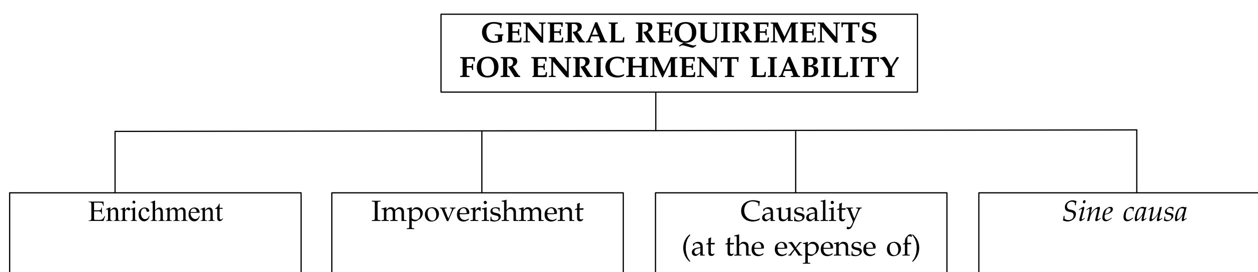
F is renting a farm from G. F has concluded an agreement with H to repair the fences on the farm at a cost of R40 000. H has carried out the repairs. In the mean time F has absconded and is nowhere to be found. Can H claim anything from G?

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 K or M? What would the basis of the claim be?



LEARNING OBJECTIVES

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 Ltd v Knoetze & Sons 1970 (3) SA 264 (A)

  Buzzard Electrical v 158 Jan Smuts Avenue Investments 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 bringing an enrichment action and how the extent of the enrichment claim is calculated
- apply the general principles to practical examples

RECOMMENDED READING MATERIAL

Eiselen & Pienaar 25–36
De Vos "Enrichment at whose expense? A reply" 1969 *SALJ* 227–230
Lotz *LAWSA* 62–64
Brooklyn House Furnishers Ltd v Knoetze & Sons 1970 (3) SA 264 (A)
Buzzard Electrical v 158 Jan Smuts Avenue Investments 1996 (4) SA 19 (A)
Gouws v Jester Pools (Pty) Ltd 1968 (3) SA 63 (T)

ADDITIONAL READING MATERIAL

De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 340–343
Scholtens "Enrichment at whose expense?" 1968 *SALJ* 369–372
Sonnekus "Ongeregverdigde verryking en ongeregverdigde verarming vir kondikering in driepartye-verhoudings" 1996 *TSAR* 1–19
Sonnekus "Ook verrykingsretensieregte behoef bewese ongeregverdigde vermoënsverskuiwing" 1996 *TSAR* 583–591
Van der Walt "Die condictio indebiti as verrykingsaksie" 1966 *THRHR* 220–222
Van Zyl *Die saakwaarnemingsaksie as verrykingsaksie in die Suid-Afrikaanse reg* (1970) 167–169

ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers 1998 (1) SA 929 (C)

Auby and Pastellides (Pty) Ltd v Glen Anil Investments 1960 (4) SA 865 (A)
Dugas v Kempster Sedgwick (Pty) Ltd 1961 (1) SA 784 (D)
Frame v Palmer 1950 (3) SA 340 (C)
Greenhill Producers (Pty) Ltd v Benjamin 1960 (4) SA 188 (EC)
Hubby's Investments (Pty) Ltd v Lifetime Properties (Pty) Ltd 1998 (1) SA 289 (W)
Knoll v SA Flooring Industries Ltd 1951 (1) SA 404 (T)
Odendaal v Van Oudtshoorn 1968 (3) SA 433 (T)
Pretorius v Commercial Union Versekeringsmaatskappy van Suid-Afrika Bpk 1995 (3) SA 778 (O)
Singh v Santam Insurance 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 unjust enrichment is based on a movement of assets whereby the plaintiff is impoverished, the defendant is enriched and there is a legally relevant relationship between the two facts, which is usually expressed in the 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 are present an enrichment claim is recognised unless the law denies the plaintiff his or her claim in a particular case. The amount of the award is calculated according to the enrichment of the defendant or the impoverishment of the plaintiff, whichever is the smaller at the relevant time, which is usually the moment when the action is instituted. 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. It is only in cases where the property cannot be retransferred that the impoverished party is entitled to payment for the value of the enrichment or the impoverishment, whichever is the lesser.

Contract, delict and enrichment

You must make a clear distinction between liability which arises from unjustified enrichment and that arising 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 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 without any valid legal reason underlying or supporting such transfer.

ACTIVITY

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

FEEDBACK

Scenario 1

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

Scenario 2

Is there any agreement between D and E in terms of which E can 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

Is there any contractual relationship between G and H? Has G benefited from the work done by H? What about the contractual relationship between H and F? Must H sue F in contract?

Scenario 4

Is there any reason to conclude from these facts that the contract is void? If not, J should not be able to reclaim anything. He has made a bad bargain but is bound by it.

Scenario 5

K's conduct is clearly unlawful and L would be better advised to sue in delict than with an unjustified enrichment action. Why? Can K use the *actio rei vindicatio* to reclaim his property from M, even though M may have been *bona fide*?

2.2 GENERAL REQUIREMENTS FOR ENRICHMENT LIABILITY

2.2.1 The defendant must be enriched

enrichment

Enrichment may take the form of (1) an increase in the defendant's assets which would not have occurred had the enriching fact not taken place; (2) a non-decrease in his or her assets where a decrease would have taken place but for the enriching fact (*Brooklyn House Furnishers Ltd v Knoetze & Sons* 1970 (3) SA 264 (A)); (3) a decrease in liabilities which would not have taken place (*Guarantee Investment Corporation Ltd v Shaw* 1953 (4) SA 479 (SR)); or (4) a non-increase in liabilities which would have taken place. The enrichment must still exist in the patrimony of the enriched party at the time when the claim is lodged. The enrichment may consist either of the thing or value received, for instance the painting that was transferred or the money that was paid, or of its substitute value where the painting was subsequently sold or the money used to buy something.

example

Assume that A pays B an amount of R2 000 which is not owing, and B uses this amount to buy household necessaries which she consumes within a month. At a later stage A institutes an action against B for R2 000 and the question then is whether B is still enriched by that amount. Now, it is immediately obvious that B's estate at this stage is no bigger than it was before she received the R2 000, in other words that there has been no increase in B's assets. But if B had not received the R2 000 from A she would have had to use R2 000 of her own money to buy the household necessaries; there would, in other words, have been a decrease in B's assets which, in the circumstances, did not take place because of the R2 000 that B received from A, and A should consequently succeed with his action. Here B's enrichment takes the form of expenses saved.

example

Assume that A makes a payment of R50 000 to B which is not owing. B uses R5 000 of this amount to buy household necessaries and with the balance of R45 000 she buys a car which she would not have bought had she not received the R50 000 from A. At a later stage A again institutes an action against B. B is of course again enriched by the R5 000 which she spent on household necessaries, her enrichment again taking the form of expenses saved. The R45 000 that she spent on the car does not, however, constitute saved expenses as she could not have bought the car without the money. Assume at the time of *litis contestatio* the car has a value of R30 000; this

constitutes an increase in B's assets. A should therefore succeed in recouping the amount of R5 000 + R30 000 = R35 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 is not enrichment. Even where the defendant has knowingly neglected to appropriate or acquire a potential advantage he or she is not enriched by that potential benefit that he or she did not acquire. In *Kruger v Navratil* 1952 (4) SA 405 (SWA) it was wrongly accepted that a benefit that the defendant did not acquire could be recovered by an enrichment action (see also *Maseko v Maseko* 1992 (3) SA 190 (W) 198).

In the normal course of events it is not too difficult to determine whether a defendant has been enriched and by how much. However, as in every other field of law there may be some extraordinary facts which make it extremely difficult to decide whether there has been enrichment of the defendant at all, 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. One of the questions which arose for decision was whether the discovery of the clay had enhanced the value of the farm. In the court *a quo* Van Winsen J took the view that it was not the discovery of the clay, but its presence, which determined the value of the farm so that the defendant had not been enriched by the prospectors' efforts (*Nortjé v Boedel Pool* 30 September 1965 (C) unreported). This line of reasoning is not convincing. It is not the mere presence of minerals which enhances the value of land, but **the knowledge of their presence**, and when someone makes such knowledge available an increase in the market value of the land follows economically and juridically from his or her efforts (according to the judgment of Rumpff CJ in *Nortjé en 'n Ander v Pool* 1966 (3) SA 96 (A) 122, 123).

moral benefits: *Tanne v Foggitt*

Another question which has already engaged the attention of a Provincial Division is whether a person's estate can be enriched by "moral" benefits. In *Tanne v Foggitt* 1938 TPD 43 it was held that a minor who had contracted to receive typewriting lessons could not be liable *ex contractu* for the price of all the lessons but could only be liable for benefits (*in casu* the lessons) actually received. In such a case the action against him can be based only on enrichment and the case therefore seems to be authority for the proposition that such "moral" benefits could constitute enrichment. This appears to be wrong. In our view the result of enrichment must be an increased estate and "moral" benefits cannot increase one's estate and cannot therefore constitute enrichment. There is some support for this view in *Edelstein v Edelstein* 1952 (3) SA 1 (A), where 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

Does the use of another's thing constitute enrichment? This question has not 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. The issue remains unsettled, however.

ACTIVITY

Consider practical examples 1–4 at the beginning of this study unit and 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.

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. This means that every enrichment action must embrace an enquiry 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 decrease or non-increase in assets or by an increase or non-decrease in liabilities. The rules that apply in the determination of the defendant's enrichment apply *mutatis mutandis* in the determination of the plaintiff's impoverishment.

favourable and detrimental side-effects

Before we go on to the third requirement for enrichment liability we would like to make one further observation about the first two requirements and it is this: 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 favourable or detrimental side-effects of the enriching fact we wish to indicate effects which increase or decrease the amount of the defendant's actual enrichment or which decrease or increase the amount of the plaintiff's actual impoverishment and which do not flow directly from the enriching fact but are nonetheless connected with it. Such side-effects may take many different forms.

example

Assume that A and B enter into a lease of land with A as the lessor and B as the lessee. Assume further that the contract is void for some reason but that B remains in possession of the land for three years and constructs certain buildings on the land which cost her R80 000 and which enhance the value of the land by R60 000. When A evicts her, B claims compensation for the improvements to the land. This claim by B is, of course, based on enrichment. At first glance it would appear that A has been enriched by R60 000 and B impoverished by R80 000 so that B must succeed in an action for R60 000. Related to the enriching fact, however, are various side-effects. In the first place A lost possession of his land for three years. Let us say the value of his possessory interest for three years was R30 000. This is a detrimental side-effect which reduces A's actual enrichment to R30 000. Secondly B had possession of the land for three years and for that time had the use and

enjoyment of the land. Let us say that the value of such use and enjoyment was R20 000. This is a favourable side-effect which 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 all 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 while some side-effects are taken into account, others are ignored, with the result that these actions cannot be described as fully developed actions at this stage.

Let us now look at the third requirement for enrichment liability.

ACTIVITY

Consider the practical scenarios 1–4 at the beginning of this study unit and 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.

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. There must also be a causal link between the enrichment and the impoverishment and this is expressed by saying that the defendant's enrichment must be at the expense of the plaintiff. Normally this requirement causes little difficulty; in most cases the causal link is obvious. Problems have, however, arisen in what DH Van Zyl refers to in his thesis *Die Saakwaarnemingsaksie as verrykingsaksie in die Suid-Afrikaanse reg* as cases of ''indirect enrichment''. These are cases where 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.

examples

A enters into a contract with B to build a swimming pool for B on a residential stand which A believes to be B's property but which later turns out to be the property of C. Or A contracts with B to repair a car which A believes to be B's but which turns out to be C's. Or A (as the subcontractor) contracts with B to supply the roof of a house which B is building for C. The question in each of these cases is whether C can be said to have been enriched at A's expense if B fails to render performance to A.

De Vos

It is obvious that if B does render performance to A, that is if B pays A for the work, C will be enriched at B's expense and not at A's and it is also obvious that the position must be the same where B has not yet paid A but 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's view

is that the fact that B is a woman of straw cannot affect the juridical position between A and C and that in all our examples C is enriched at B's expense and not at A's, with the result that A cannot bring an enrichment action against C.

Gouws v Jester Pools

This view was endorsed by the Transvaal Provincial Division in *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 653 (T). The facts in this case were that A had built a swimming pool for B in terms of a contract between himself and B and on land which he believed belonged to B but which was in fact the property of C. After B disappeared without paying A for the pool, A brought an enrichment action against C. The action failed, Jansen J holding that C had been enriched at B's expense and not at A's. (An action had previously been refused in analogous circumstances in *Vadas (Pty) Ltd v Philip* 1940 CPD 267; *Frame v Palmer* 1950 (3) SA 340 (C) and *Knoll v SA Flooring Industries Ltd* 1951 (1) SA 404 (T), but the reasoning in these cases was not as clear as that of Jansen J in the *Gouws* case.)

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 have succeeded. Van der Walt's (1966 *THRHR* 220–222) view is that the at-the-expense-of requirement is satisfied once there has been a direct transfer of assets 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 this 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. Assume further that B now engages A to do the work and that A uses his own materials in doing it. The moment that A has built the pool C becomes owner thereof by *accessio* — the ownership of the materials therefore passes directly from A to C and the at-the-expense-of requirement, in Van der Walt's view, is satisfied. In his view, should A now be unable to obtain payment from B, A should succeed in an enrichment action against C. (If B does pay A, A will, of course, not be impoverished and for that reason will not have an 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. Assume further that B now 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 did not pass directly from A to C; they passed, in fact, from A to B and then from B to C so that the at-the-expense-of requirement is not satisfied.

Buzzard Electrical v 158 Jan Smuts Avenue Investments

This problem was addressed by the Appellate Division in *Buzzard Electrical v 158 Jan Smuts Avenue Investments* 1996 (4) SA 19 (A). Even though the case was decided with reference to the third requirement, that is the *sine causa* requirement, the court made a very important distinction between the following two situations: (1) 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 (2) where the owner contracts with B for improvements to his or her property, B subcontracts the job to A and once he has completed the work A sues the owner (with whom he never entered into a contract) on the basis of enrichment liability. According to the Appellate Division, the answer to the above-mentioned problem will depend on 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* case makes it clear that that case deals with the second situation, ie with the subcontractor situation. In the case of the subcontractor, there is no enrichment claim because the various relationships between the owner, the main contractor and the subcontractor are all regulated by contract. The owner is not enriched because it owes a contractual debt to the main contractor for the improvements. The subcontractor is not unjustifiably impoverished because it has a contractual claim against the main contractor. The court did not make a decision on the first type of situation described above. *Buzzard*'s decision cannot, therefore, be used to confirm or reject the *Gouws* decision. (See, however, the decision in *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 (1) SA 929 (C) as discussed in study unit 8.)

right of retention

You will no doubt recall from your study of the law of property (and you will see from the discussion of the right of retention in study unit 11) 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 and at his or her own expense has thereby enriched that other, such person can retain possession of the property until he or she is compensated. He or she is, in other words, granted an enrichment lien (right of retention) which operates against anyone, including the owner. An example of such a case is where a *bona fide* possessor has effected improvements to another's land. One would expect that all the requirements for enrichment liability would have to be present before a defendant can exercise an enrichment lien, that is 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 which would provide the basis for an enrichment lien would have to be exactly the same as those which would provide the basis for an enrichment action in the same circumstances.

Brooklyn House Furnishers v Knoetze

In the very important case of *Brooklyn House Furnishers Ltd v Knoetze and Sons* 1970 (3) SA 264 (A), however, the Appellate Division allowed an enrichment lien in circumstances closely analogous to those in which an enrichment action was refused in the *Gouws* case, without, however, overruling that case but instead distinguishing it on the grounds that the *Gouws* case was concerned with an enrichment action while the *Brooklyn* case was concerned with an enrichment lien. The facts in the *Brooklyn* case were as follows: B bought certain furniture on hire-purchase from C. The contract was a normal hire-purchase contract in which C reserved the ownership of the furniture until the final instalment had been paid. The contract further prohibited B from storing the furniture with anybody but C. B, in breach of this prohibition, entered into a storage contract with A, who stored the furniture in his warehouse. When C subsequently cancelled the hire-purchase contract, he brought a *rei vindicatio* against A to recover his furniture. A contended that he had a lien over the furniture until he had been paid for the storage and this contention was upheld by the Appellate Division.

influence of *Brooklyn* case

All courts are, of course, bound by this judgment of the Appellate Division and the decision in the *Brooklyn* case has been applied in, *inter alia*, *Jot Motors (Edms) Bpk h/a Vaal Datsun v Standard Kredietkorporasie Bpk* 1984 (2) SA 510 (T), and was reaffirmed by the Appellate Division in *Standard Kredietkorporasie v Jot Motors h/a Vaal Datsun* 1986 (1) SA 223 (A) 237H. There are also earlier cases in which A was granted a lien in similar circumstances (*Land Bank v Mans* 1933 CPD 16; *Colonial Cabinet Manufacturing Co v Wiid* 1927 CPD 198 and *Savory v Baldochi* 1907 TS 523). Please note that there could not have been a debtor and creditor

lien which A was exercising against C because there was no contract between A and C. Cases in which the view was taken that in these circumstances A could have exercised a debtor and creditor lien against C (*Ford v Reed Bros* 1922 TPD 266; *Anderson & Co v Pienaar & Co* 1922 TPD 435; *Tyre and Motor Supply Co Ltd v Leibbrandt* 1926 CPD 421) should be regarded as having been wrongly decided.

connection between *Gouws* and *Brooklyn*

If the at-the-expense-of requirement should be regarded as having been satisfied for the purposes of an enrichment lien in the circumstances of the *Brooklyn* case, then it is our view that it should also be regarded as having been satisfied for the purposes of an enrichment action in the circumstances of the *Gouws* case. However, the Appellate Division expressly confined its remarks in the *Brooklyn* case to **rights of retention** and refrained from expressing an opinion on the correctness of the interpretation of the at-the-expense-of requirement for enrichment actions in the *Gouws* case.

Hubby's Investments v Lifetime Properties

The correctness of the decision in the *Gouws* case was again raised in a more recent decision by the Witwatersrand Local Division in the case of *Hubby's Investments (Pty) Ltd v Lifetime Properties (Pty) Ltd* 1998 (1) SA 289 (W). The facts of the case were as follows: Hubby's Investments entered into a written contract with a company, Sentinel, in terms of which it undertook to build factories on immovable property owned by Lifetime Properties, and Sentinel undertook to pay Hubby's for the work. Hubby's built the factories but it turned out that Sentinel was an empty shell, and consequently Hubby's instituted a claim based on unjust enrichment against Lifetime Properties. From the facts it is clear that Hubby's erected the improvements to property belonging to Lifetime Properties in accordance with a contract with Sentinel, and **not** in accordance with a contract with Lifetime Properties.

Hubby's decision: refers to *Buzzard*

In his decision in the *Hubby's* case Cloete J referred to the distinction made in the Appellate Division decision in *Buzzard* between two possible instances of enrichment (see the discussion on the *Buzzard* case above). In the *Buzzard* case a claim based on enrichment was rejected in the second instance (where a subcontractor is involved). In *Hubby's* the facts dealt with the first instance on which *Buzzard* refused to make a decision and *Gouws v Jester Pools* is, therefore, still the authority. Therefore, Cloete J had to decide whether this court would bind itself to the *Gouws* decision or whether the court felt that *Buzzard* could possibly have overturned the decision in *Gouws*. Cloete J interpreted the decision in *Buzzard* as follows: A right of retention cannot exist *in vacuo*, but serves to insure or secure an underlying claim; and to the extent that *Brooklyn House Furnishers* suggests the contrary, it was wrongly decided. After the Appellate Division decided that a right of retention should be acknowledged in the first instance (*Brooklyn House Furnishers*) and after the Appellate Division decided that the distinction between a right of retention and an action is a distinction without a difference (*Buzzard*), it should follow logically that an enrichment action must also be acknowledged in the first instance. Unfortunately, Cloete J added that his court would rather leave the matter to be resolved by the Appellate Division and academic writers. Hence his interpretation can at most be regarded as an *obiter dictum*.

ABSA Bank v Stander

The Cape Provincial Division in *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 (1) SA 929 (C) also expressly rejected the decision in *Gouws v Jester Pools*. The last-mentioned two cases (*Hubby's* and *Stander*) are, however, not binding authority on all courts and the position with regard to the first situation as indicated in *Buzzard*, is, therefore, still uncertain. (See also *Wynland Construction (Pty) Ltd v Ashley-Smith en Andere* 1985 (3) SA 798 (A).)

ACTIVITY

Consider practical scenarios 2 and 3 at the beginning 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

In scenario 2 we are not dealing with a case of indirect enrichment. The painter mistakenly painted the wrong house. How is this different from the facts in the *Gouws* case? See also the feedback at the end of the study unit.

In scenario 3 the facts are quite similar to those in the *Gouws* case. In your answer you must consider the approach taken in the various decided cases, namely *Gouws*, *Buzzard Electrical* and *Hubby's Investments*. However, you must also consider the viewpoints of the different writers before formulating a conclusion of your own.

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

reason for *sine-causa* requirement

If the mere fact that one person was enriched at the expense of another were to form the basis for 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 which he or she has obtained at the expense of another. This limiting factor is the requirement that the enrichment must be unjustified (*sine causa*).

definition by Van der Walt

criticism by De Vos

Van der Walt (1966 *THRHR* 222) offers the following definition of this requirement: Enrichment is in principle *sine causa* 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 assets (own translation). This definition does not satisfy De Vos completely. He contends (at 355) that in so far as 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, it 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 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 and the other person. In neither of these cases 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 gives the following definition of the *sine causa* element (at 353): Enrichment is unjustified when there is no sufficient legal ground for the transfer of value from one estate to the other or for the retention of such value (in the second estate) (own translation). De Vos's definition would cover every possible case.

ACTIVITY

Consider practical examples 1–5 at the beginning of this study unit and explain whether the *sine causa* requirement has been fulfilled in each of these cases.

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 a contract, then the transfer is not *sine causa*. Using your knowledge of the law of contract, delict and property law, decide in each case whether there is an underlying *causa* or not.

Scenarios 1 to 3 provides examples of transfers that were *sine causa*, but scenario 4 does not. In scenario 5 there is no transfer of ownership because the goods were stolen. The *actio rei vindicatio* or a delictual claim would therefore be more appropriate.

Greenhill Producers v Benjamin

Although the *sine causa* requirement does not cause much difficulty in practice, the courts have battled with it on occasion. In *Greenhill Producers (Pty) Ltd v Benjamin* 1960 (4) SA 188 (E), for instance, the facts were the following: 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. At a later date the company demanded that the defendants remove their sheep, 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 the contract ceased to exist until the date of removal of the sheep. Van der Riet J had to decide in effect whether the defendants' enrichment was unjustified (*sine causa*). In this 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 that requirement. Whether enrichment is *sine causa* or not does not depend on subjective factors such as the mistake on the part of the parties; it depends on whether, viewed objectively, there was a legal ground to justify the enrichment. *In casu* there was no such ground since the contract between the parties had fallen away on the provisional winding up of the company and 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 may 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 derive 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* 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 and further provided that in the event of such cancellation A would not be entitled to any compensation for improvements which he might have made to the land. After A had erected certain buildings he fell into arrears with his payments and B cancelled the contract. A then claimed compensation for the buildings. 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. A later case, *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 (T), also shows an appreciation of the true nature of the *sine causa* requirement (see study unit 8 for the facts of this case).

Pretorius v Commercial Union

In *Pretorius v Commercial Union Versekeringsmaatskappy van Suid-Afrika Bpk* 1995 (3) SA 778 (O) 782A-C the court held that even if enrichment had been caused by breach of contract, it could not be regarded as *sine causa* while the contract was still in existence. (In *ABSA Bank Ltd v De Klerk* 1999 (1) SA 861 (W) 866A-B the court held incorrectly that the plaintiff had a choice between a claim based on contract or on enrichment.)

Buzzard Electrical

In the *Buzzard* case the owner had contracted with a developer to make improvements to his or her property. The developer had subcontracted part of the work. After the subcontractor had completed the work, the developer was sequestrated before the subcontractor was paid. The subcontractor instituted a claim against the owner based on unjustified enrichment. The Appellate Division decided that the owner had received nothing more than he or she had contracted for 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 his or her contractual rights against the developer, and if they turned out to be illusory because of the insolvency of the developer, it was an unhappy coincidence which did not render the owner's enrichment unjustified. The subcontractor's claim was denied and therefore he or she could not have had recourse to any action or right of retention against the owner (Sonnekus 1996 *TSAR* 1–19; Sonnekus 1996 *TSAR* 583–591).

Singh v Santam

In *Singh v Santam Insurance Ltd* 1997 (1) SA 293 (A) the court followed the decision in *Buzzard*. In *Singh's* case Santam paid for certain repairs to a damaged vehicle even though the premiums in terms of the risk policy were not paid up to date. It appeared that Santam cancelled the policy by conscious choice only a fortnight after the payment to the panel-beater, so that the payment was made pursuant to the policy. Even if the policy had perished automatically because of non-payment of the premiums, Santam's evidence indicated that it had made payment in the belief that the policy was still alive. Therefore the enrichment was not *sine causa*.

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 such a view is that the true meaning and content of the concept of unjustified *(sine causa)* enrichment

becomes obscured and is replaced by a vague concept like that of unfair enrichment, which has no specific content. For the sake of the future development of our law it is necessary that there should be absolute clarity 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 based on unjustified enrichment is first and foremost a claim to have the specific item, transferred in ownership, or for 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 which applies in South Africa. In terms of the unjustified enrichment claim, ownership is retransferred to the original owner.

Residual value

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

Practical example

If the horse was sold at R50 000 and the contract price had not yet been paid, and the new owner then sold the horse to an innocent third party for R40 000, the original owner will only be able to claim the residual value, namely R40 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*). There are, however, a number of circumstances where the enrichment liability of a party is fixed at an earlier date than the lodging of the claim:

actual knowledge

- From the moment 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 (D12.6.26 and 12.6.65.8; Voet 12.6.12.). He or she must therefore prove that the loss or destruction would have taken place in any event. Where the enriched party is negligent in 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 he or she became aware of such enrichment.

implied knowledge

- If the defendant should have realised that the benefit 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 (De Vos 336–337). 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, there is an onus on the party to preserve the enrichment. His enrichment is again pegged to the date on which he or she should have become aware of the enrichment, that is when a reasonable person would have realised or suspected that he or she might be enriched. Thus, where the impoverished party has given notice

of the unowed performance or has made a demand, there will be actual or implied knowledge of the enrichment on the part of the enriched party.

mora debitoris

- From the moment that the defendant falls into *mora debitoris* his or her liability is reduced or extinguished only if he or she can prove that the event which diminished or extinguished his or her enrichment would also have operated against the plaintiff if performance had been made timeously. This is as a result of the operation of the rule *mora debitoris perpetuat obligationem*. A distinction must be made between *mora* in this 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 retransfer of the thing or repayment of the money or value. 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 there is uncertainty, *mora* does not arise. See *CIR v First National Industrial Bank Ltd* 1999 (3) SA 641 (A).

mala fide conduct

- If the enriched party acted in bad faith *(mala fide)* in relinquishing or reducing the enrichment. This particular instance can probably be subsumed under the first or the second exception.

exception: minors

The qualifications just set out do not apply in the case of a minor who has been enriched by performance to him in terms of an unauthorised contract. The liability of such minor remains restricted to the amount of his or her or her enrichment at the time of *litis contestatio* (D3.5.37pr; 4.4.34pr; Voet 3.5.8; *Edelstein v Edelstein* 1952 (3) SA 1 (A) and De Vos 336–337).

SELF-ASSESSMENT

(1) What does it mean if it is said that enrichment liability is based on a movement of assets from the plaintiff to the defendant?

(2) Can a potential benefit and a moral benefit form part of enrichment for purposes of the law of enrichment? Answer with reference to case law.

(3) Explain, with reference to an example, the importance of favourable and detrimental side-effects for the determining of the extent of the movement of assets.

(4) Name the two instances of indirect enrichment as identified in *Buzzard's* case.

(5) Discuss briefly, with reference to case law, the position of a plaintiff with regard to the first instance identified in *Buzzard's* case.

(6) Discuss briefly, with reference to case law, the position of a plaintiff with regard to the second instance identified in *Buzzard's* case.

(7) Explain briefly the *sine causa* requirement and illustrate its application with reference to case law.

(8) Give an example from case law where the courts incorrectly applied the *sine causa* requirement.

(9) Consider each of the examples at the beginning of this unit and explain

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 in 2.2.1.

(2) See 2.2.1.

(3) See 2.2.2.

(4) **First instance**: where 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. **Second instance**: where the owner contracts with B to improve his or her property, B enters into a subcontract with A to perform the work and after A has done the work he then sues the owner (with whom he never contracted) on the basis of enrichment.

(5) The facts of the *Gouws* case illustrate the first instance. In *Gouws* it was decided that the plaintiff had failed in his or her enrichment claim against the owner because the enrichment of the owner was not at the expense of the plaintiff. In *Brooklyn House Furnishers* the Appellate Division allowed a right of retention in favour of the plaintiff, which was effective against anyone, including the owner. In *Buzzard Electrical* the Appellate Division decided that a right of retention cannot exist *in vacuo* but that it ensures or secures a recognised claim. In *Hubby's Investments* the court decided that in view of the court's decision in *Buzzard's* 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 Furnishers* (both decisions of the Appellate Division) rejected *Gouws v Jester Pools* by implication, but in neither of the two decisions did the judges do it expressly. In *ABSA Bank v Stander* the court expressly rejected the decision in *Gouws v Jester Pools*, but because the last-mentioned decision is not an Appellate Division decision, it seems as if the position is still unclear.

(6) The position with regard to the second instance mentioned in *Buzzard* is quite clear since in *Buzzard* the Appellate Division made an express decision on this matter. The plaintiff's enrichment claim against the owner was not recognised, since the owner received nothing more than he or she had contracted for. 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

Did you consider the fact that the contract was void owing to the impossibility

of the contract? If there is no contract 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 it is money which has been paid, B can 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 is therefore at B's expense. B should be able to claim back the full amount.

Scenario 2

Did you consider the existence of the contractual relationships in this instance and the relevance thereof in respect of the potential claim? Was D impoverished in this instance? If so, at whose expense? Although there is a contract between C and D there is no contract between D and E. D thought he was performing his contract with C, but because he painted the wrong house, he did not fulfil his contractual obligations towards C. There is no contract 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 not certain whether E has been enriched. Did you consider that the house may not have risen in value as a result of the painting, in which case E was not enriched? Or maybe E saved some expenses if he was going to have his house painted anyway?

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 a conclusion, stating your own view point. Pay particular attention to the decision in the *Gouws* case and the *Buzzard Electrical* case. 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

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

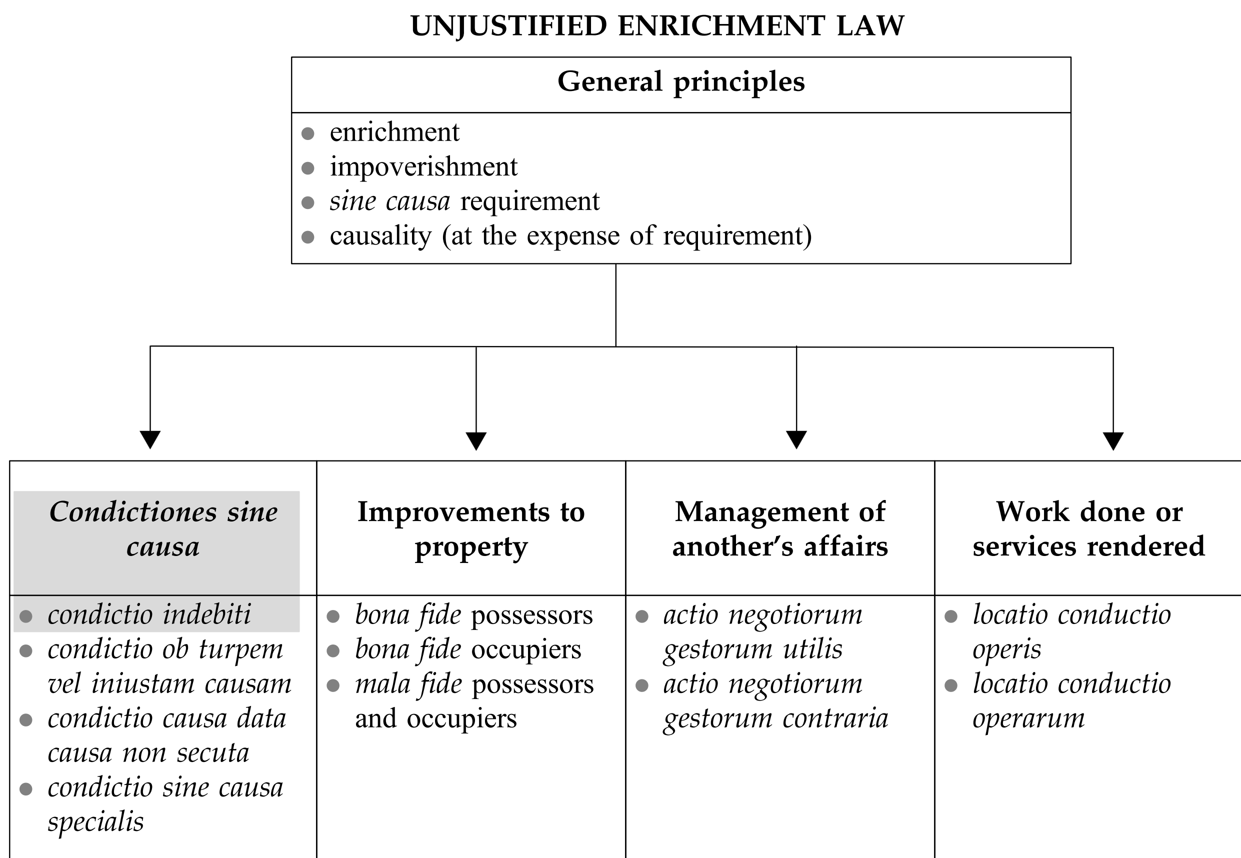
Scenario 5

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,* which he or she should employ rather than an enrichment claim?

STUDY UNIT 3

CONDICTIO INDEBITI: GENERAL REQUIREMENTS

The diagram at the beginning 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 bigger picture or structure of the course. It is important to learn the differences between the various actions, their requirements and the remedies that they provide.



PRACTICAL SCENARIOS

Scenario 1

A instructs its Bank, B, to make an electronic transfer into the account of C at bank D. A gets mixed up with 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 R1 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, it transferred R700 000 to an interest-bearing account with B. A only learns of the mistake two months later when C threatens to sue it for the payment. The money has in the mean time drawn

R14 000 in interest. A wants to know whether it can claim the money back from B, because of the payment of the overdraft and because B holds the money in the savings account or whether it should sue X, who has benefited from the mistaken payment. Advise A.

Scenario 2

A concluded a contract with B for the sale of a stud bull, Spartacus, at R100 000. B paid a deposit of R10 000 at the time of the signing of the contract Unbeknown to both A and B, Spartacus had died on the day before the conclusion of the contract. Can B reclaim the deposit paid with the *condictio indebiti*?

OVERVIEW

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

LEARNING OBJECTIVES

After completing this study unit you should be able to

- describe the requirements of the *condictio indebiti* as it was applied in Roman law
- explain what can be claimed with the *condictio indebiti*
- explain the position of the *mala fide* receiver in Roman law
- explain the application of the *condictio indebiti* in Roman-Dutch law
- critically discuss, with reference to case law, the question whether the value of a *factum* can be reclaimed with the *condictio indebiti* in South African law
- discuss the defence of non-enrichment in the case of the *condictio indebiti* in South African law
- explain the position where the *condictio indebiti* is instituted after money is 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 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 practical examples such as the scenarios above.

RECOMMENDED READING (OPTIONAL)

Lotz *LAWSA* 66–70
Van der Walt ''Die *condictio indebiti* as verrykingsaksie'' 1966 *THRHR* 220–233
Miller and Others v Bellville Municipality 1971 (4) SA 544 (C)
Rahim v Minister of Justice 1964 (4) SA 630 (A)
Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A)

Nissan South Africa (Pty) Ltd v Marnitz No (Stand 186 Aeroport (Pty) Ltd Intervening) 2005 (1) SA 441 (SCA)

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg (1987) 27–28 185–187
Fevrier-Breed ''A perspective on the *justus*-requirement in *justus error*'' 1995 *TSAR* 300–309
African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd 1978 (3) SA 699 (A)
Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd 1977 (1) SA 298 (W)
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 v Herald Industries (Pty) Ltd 1982 (3) SA 600 (D&C)
Visser ''Error of law and mistaken payments: a milestone'' 1992 *SALJ* 177–185

3.1 INTRODUCTION

Where a person has performed under the mistaken belief that such a performance was due, the performance can be reclaimed with 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 this *condictio* in South African law properly, you should, however, be aware of its application in Roman and Roman-Dutch law.

3.2 ROMAN LAW

The requirements for the *condictio indebiti* were as follows:

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 *datio* of money, other *res fungibiles* (replaceable things), 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 normal meaning. Thus even a *res incorporalis* (incorporeal thing) or mere possession could have been reclaimed. A text in the Digest even provides that where *habitatio* (free lodging) had been granted *sine causa* not only could it have been brought to an end, but the amount which would have been due as rent could have been claimed.

second equirement: error

The second requirement was that the payment had to have taken place *solvendi animo per errorem*, that is, under the impression that the performance was owing. A person could not reclaim with the *condictio indebiti* if he was aware that the performance had not been owing. The law regarded this as a donation owing to the construction of the *animus donandi*. Doubt about the existence of the obligation was accepted as an error and then there was no *animus donandi*. Where the party's mistake was an *error iuris*, that is a mistake of law, the party could not, as a general rule, have reclaimed either. Thus, in principle, he could have recovered the performance only if he had performed as a result of an *error facti*, a factual mistake. This was moreover only the case if such *error facti* was a *iustus error*, that is a reasonable mistake. In certain cases of complicated legal questions and where the payer was a woman, soldier or ignorant rustic, an *error iuris* was no bar to the institution of the *condictio indebiti*; in other words, an *error iuris* was accepted as a *iustus error* in specific cases.

third requirement: undue payment

Thirdly, there had to have been no debt at the time of payment or the payment had to have been *sine causa*. A person who had performed in terms of a *naturalis obligatio* (natural or unenforceable obligation) could not have recovered his performance with the *condictio indebiti*, except in the case where a minor performed in terms of a contract he or she had entered into without assistance. Where a debtor performed before the due date, he or she could also not have reclaimed his performance.

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 *impensae necessariae* and *impensae utiles*. He could have enforced his right to such compensation only with the *exceptio doli*. However, interest drawn on money and the value of a *factum* (service rendered) 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 took on a more fixed content when he fell into *mora*, and also if at any stage after the payment, but before *mora,* he became aware of the fact that the payment was not due.

mala fide receiver

Furthermore if the enriched person was aware that the payment was not due when he accepted it he could be held liable with the *condictio furtiva*. In the latter instance ownership would not have passed and the enriched person would have been liable for damage caused to the impoverished person as a result of his or her loss. The enriched party was furthermore also liable for the value of fruits which he or she could have gathered but did not, which presumably also included interest on monies received. The enriched party was not allowed to take any expenses into account but in certain instances was allowed to detach improvements. If the performance was destroyed the party was liable unless he/she/it could show that the thing would have suffered the same fate at the hands of the plaintiff. The *mala fide* receiver was thus in a worse position than the receiver who only discovered the true state of affairs after receiving payment.

undeveloped enrichment action

Just like 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

application and requirements

With a few exceptions, the *condictio indebiti* in Roman-Dutch law was essentially the same as that of Roman law. In Roman-Dutch law the view that a payment *per errorem iuris* could not be recovered continued to exist. However, the preponderance of authority was apparently in favour of the view that a plaintiff could be denied this *condictio* only on considerations of equity.

mala fide receiver

With one important exception, the rules which applied to the receiver's obligation to return were the same as they had been in Roman law, the exception being that the *mala fide* receiver could no longer be held liable with the *condictio furtiva*. Thus it followed that he could no longer be held liable for the fruit he could have gathered but did not, nor could the plaintiff claim any loss suffered as a result of the payment, which was not extinguished by the return of his performance. The *mala fide* receiver could also, just as in the case of a *bona fide* receiver, claim expenses incurred.

obligation to return

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

3.4 APPLICATION IN SOUTH AFRICAN LAW

condictio indebiti as enrichment action

The *condictio indebiti* is a remedy based on unjustified enrichment. A person reclaims performance rendered under an excusable mistake that was not owing *(indebitum)* with this remedy. The unowed performance may in certain circumstances be reclaimed from a party other than the actual recipient thereof. This depends on who the law regards as 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 Co Ltd* 1998 (4) SA 825 (SCA). (Regarding who is the *recipiens* of an undue performance, see *Phillips v Hughes* 1979 (1) SA 225 (N).)

requirements

The three requirements of Roman and Roman-Dutch law still apply in South African law, with minor adjustments in the application of the error requirement (see below). The party must therefore prove the following requirements:

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

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

payment

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

not owing

- that the payment was not owed. The party must prove that there was no debt owing to the enriched party.

an excusable mistake

- that the payment was in 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.

The retention of the *iustus error* requirement in our law is contentious. Visser has argued quite convincingly that this requirement is anachronistic and should be dropped from our law. However, in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) the appellate division refused to jettison this requirement. The courts have not been consistent with the application of this requirement in that they sometimes apply it very strictly, while in other cases are quite lenient in its application.

ACTIVITY

Consider the facts in scenarios 1 and 2 above and apply the principles set out here to them. Advise the respective parties on whether they should use the *condictio indebiti* to reclaim their impoverishment.

FEEDBACK

first scenario

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

second scenario

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 payment was made *sine causa*. Should the excusability requirement come into play in this example?

reclaim the value of a *factum*

In the section 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), however, the court accepted that the value of a *factum* could, in our contemporary law, be reclaimed by this action. Rumpff JA in his minority judgment in *Nortjé v Pool NO* 1966 (3) SA 96 (A) 121 agreed but the majority of the court left the question open (on 134E–G). In *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 63 (T) it was stated that the ''prevalent view appears to be 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.

enriched party's defence of non-enrichment

The enriched party (in accordance with the principle that enrichment liability is limited to the *quantum* of the enriched party's enrichment at the time of the institution of the action), even in the case of a claim based on an undue money performance, can offer the defence of non-enrichment (*King v Cohen, Benjamin and Co* 1953 (4) SA 641 (W)). Once an undue payment has been made, the receiver has to prove the circumstances that will relieve it of the obligation to repay. Thus the plaintiff can claim the maximum amount of the enrichment but the defendant can plead that his enrichment has lessened or has even completely fallen away, provided that the rules in respect of *mora* are not applicable.

receipt of money as enrichment

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/she/it would have been had the payment not taken place, then he cannot be considered to have been enriched and therefore he will no longer be liable. If he is only partly better off after the undue payment then his 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 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). See also *Southern Cape Liquors (Pty) Ltd v Delipcus Beleggings Bk* 1998 (4) SA 494 (C) for the application of the *condictio indebiti* in the context of set-off.)

money exchanged for something else

If the receiver has bought something with the money which he/she/it would have bought in any case or has paid for some other performance which he would in any case have performed, then he is enriched (saved expenses) by the full amount originally received irrespective of the value or fate of his acquisition. If, however, he has done something with the money which he would not otherwise have done then he must be considered as having been enriched only to the extent of the value of the performance which he has thereby obtained. If, for example, he or she uses the money on a luxury holiday which he or she would not otherwise have undertaken he or she is not considered to have been enriched. If he has used the money to buy something which is worth more than he paid he may 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, or, he ought even to be released from liability by delivering the thing itself to the impoverished party. He ought also to have this choice in those cases where the thing is worth more than he paid for it, provided however that he would not have bought it had it not been for the undue payment. 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

impoverishment. These principles apply equally in those circumstances where the receiver donates the undue money to a third party.

defence of non-enrichment fails

There are however certain circumstances where the receiver of an undue payment can be held liable for repayment of the full value of what he has received although the undue payment is no longer in his possession. Thus where he receives the payment knowing that it is not due, or where he later becomes aware of the fact that the payment was not due, or where he should have realised that there was a possibility that the performance could at a later stage prove to be undue, he will be able to raise the defence of lessening or falling away of enrichment only if he can show that this was not his fault. Where he falls into *mora* as regards the repayment of the unowed performance, the defence referred to can only succeed if the enriched party can show that had he performed in time, the same fate would have befallen the thing in the hands of the plaintiff.

ACTIVITY

Consider scenario 1 above. Assume that X, upon finding out about the undue payment, has used R100 000 to go on a world cruise with his wife; and has bought a new sports car for R400 000. Can he raise the defence that he is only enriched to the extent of the money left in his savings account, namely R200 000 (R700 000 minus R100 000, minus R400 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 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 his performance to repay is liable for interest as well. This does not arise because of any enrichment principle but because of the fact that a debtor who falls into *mora* must compensate for the damage caused by *mora*. Where money is involved damages consist of the interest which the creditor could have earned had it been paid in time. The obligation here thus arises from *mora* and not from enrichment, as is the case with a claim under the *condictio indebiti*. 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 whether this interest is earned before or after the enriched party has fallen into *mora*. However, after the enriched party has fallen into *mora* he is liable for *mora* interest.

error of law or error of fact

To be able to succeed in Roman and Roman-Dutch law with the *condictio indebiti*, the party who delivered the unowed performance must **not** have been aware that the performance was not owing. This means that the person performing must have acted under an error or mistake as to the true position. The position was that one could only succeed with the *condictio indebiti* if the relevant error was a mistake of fact *(error facti).* If the plaintiff laboured under a mistake of law *(error iuris),* the action was not at his disposal. The body of law

has grown considerably and today it is impossible to expect the man in the street to be aware of the many detailed rules which flow from statutory sources. Furthermore, legal advice today is expensive to come by, and the significance of many provisions is not even certain until pronounced upon by the courts.

Rooth v The State

According to our case law before 1992, payment *per errorem iuris* excluded a right to repayment. This requirement that the mistake must have been one of fact had its origins in an incorrect interpretation of the decision in *Rooth v The State* (1888) 2 SAR 259 by our courts.

Willis Faber v Receiver

In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 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 a result of an error of law. This company merged with another company, and the new company instituted an action against the defendant to reclaim this money. The action failed in the Transvaal Provincial Division of the Supreme Court because the payments, although not due, were made as a result of an *error iuris*. Thereafter the Appellate Division decided that there is no logic in the distinction which is drawn between errors of fact and errors of law for the purposes of the *condictio indebiti* and it held that either is sufficient to succeed with the *condictio indebiti:*

> What is immediately apparent is that there is no logic in the distinction between mistakes of fact and mistakes of law in the context of the *condictio indebiti*. This *condictio* has since Roman times always been regarded as a remedy *ex aequo et bono* to prevent one person 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 (at 220).

And further

> Bearing in mind that, since this Court's decision in *S v De Blom* 1977 (3) SA 513, ignorance of the law may even provide an excuse for otherwise 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 excusability or reasonableness *(iustus error)* of the error or mistake, there are, however, a whole series of decisions in which the error requirement was set but without any reference to reasonableness (*Recsey v Reiche* 1927 AD 554; *Le Riche v Hamman* 1946 AD 648 656; *Frame v Palmer* 1950 (3) SA 340 (C) 346; *Fund Advisers Ltd v Mendelsohn NO & Another* 1973 (2) SA 475 (W). In *Rahim v Minister of Justice* 1964 (4) SA 630 (A) 635, however, Van Blerk JA found that the messenger's conduct was inexcusably slack and that therefore the *condictio indebiti* could not be invoked. Visser (1992 *SALJ* 177) criticises the requirement of reasonability and is of opinion that it should be discarded because it has never played any role in Roman-Dutch common law with regard to the *condictio indebiti*.

Barclays Bank case on reasonableness

In *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* 1977 (1) SA 298 (W) (and *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A)) the matter of the reasonableness of an *error facti* was raised once more. The question which the court had to answer in this case was whether a plaintiff's mistake could still be reasonable even though such mistake arose wholly through his own negligence. McEwan J answered this question as follows (at 308):

> It seems to me, therefore, that, although in a number of cases the Court has been assisted in making a finding that there was not gross negligence on the part of the plaintiff by the fact that the mistake was induced by the defendant or a third party and the negligence consisted of failure by the plaintiff to check the correctness of the representations (express or implied) made to the plaintiff, the fact that there was no such inducement **does not preclude a finding that the plaintiff was not grossly negligent** (our emphasis).

negligence and unreasonableness

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 also 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.

Van der Walt on error requirement

Van der Walt (1966 *THRHR* 227–228) poses the question whether or not the error requirement (both as regards *error iuris* and the unreasonableness of an *error facti*) is compatible with the *condictio indebiti* as an enrichment action. He is of the opinion that the only possible reason for excluding the *condictio indebiti* in these instances is to hold that the enrichment is not accepted to be *sine causa*. The test to determine whether there has been unjustified enrichment or not is purely objective, and subjective factors, such as error and the nature of the error of the parties, should play no part. The only question should be whether the receiver of the performance, that is the enriched party, has any valid claim to the performance received; if not his enrichment is unjustified. The fact that the impoverished party acted in error is irrelevant. The effect of taking error into consideration is that the impoverished party, because of his faulty legal knowledge or carelessness, is punished by losing his remedy although the facts support all the necessary enrichment requirements. The mistake of the payer thus creates an obligation!

public policy and the error requirement

De Vos (at 185) is of the opinion that a better explanation for the exclusion of the *condictio indebiti* in the circumstances referred to by Van der Walt would be that positive law, on the grounds of legal policy and public interest, denies the impoverished party a claim, although the enrichment of the person who is enriched at his expense is *sine causa*. Furthermore it adds 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 an action despite the presence of the other requirements (namely the *sine causa* enrichment of the defendant at the expense of the plaintiff). It is further submitted (Fevrier-Breed ''A perspective on the *justus*-requirement in *justus error*'' 1995 *TSAR* 307) that the characteristics of the *error* or mistake itself, namely whether the mistake itself is reasonable, should not in isolation determine whether or not a mistake is *justus* or excusable. Considerations of public policy and the interests of third parties are, it is submitted, some of the most important circumstances which should determine whether or not a mistake is *justus*.

criticism against the requirement of unawareness

It is clear that the *ratio* for these proposed extensions is the evasion of the principle that a person who consciously delivers an unowed performance cannot reclaim with the *condictio indebiti*. The question is, however, whether this requirement of the *condictio indebiti*, that is that the plaintiff must have been unaware of the fact that his performance was not owing, is defensible. Just as the principle that a plaintiff who has performed *per errorem iuris* or as a result of an unreasonable factual error cannot reclaim should be rejected, so too should the requirement that the plaintiff must have been unaware that his performance was not owing, also be rejected. The only relevant question regarding the rendering of an undue performance should be whether any enrichment *sine causa* did in fact take place; the intention, knowledge, error, et cetera of the plaintiff should play no part. If a plaintiff who is aware of the voidness of a contract performs nonetheless, and rebuts the presumption that he performed *animo donandi*, his knowledge of the fact that his performance was not owing should be no defence against his *condictio indebiti*. Why should a defendant be enriched *sine causa* at the expense of the plaintiff in such a case? You must remember that, as opposed to criminal law, private law does not aim to punish, but envisages a just balance between the interests of legal subjects.

presumption of *animus donandi*

An irrebuttable presumption that delivery, in the knowledge that performance is not due, constitutes a donation, creates a substantive legal rule which is totally unacceptable, because it is possible to perform knowingly that which is not due **without** the intention to donate. Thus our law allows relief if the undue payment is made under protest but if it is not and the defendant pays to avoid annoyance or litigation although he has already paid but, for example, cannot immediately lay his hands on his receipt, the second payment will be *sine causa*. If at a later stage, however, he is able to prove the first payment, he will not be able to reclaim the second payment, although there was no question of a donation. There is no reason why in those cases where the plaintiff **knowingly** performs an undue performance, the onus of rebutting the presumption of the intention to donate should not be placed on him. If he can rebut the presumption, however, there ought to be no obstacle to a claim for return under the *condictio indebiti*. Our courts accept the fact that it is not the protest as such which founds the claim but the fact that the protest is incompatible with an intention to donate.

SELF-EVALUATION

(1) Discuss the three requirements for the *condictio indebiti* as it was applied in Roman law.

(2) Explain the position of the *mala fide* receiver of an unowed performance in Roman law.

(3) How does the application of the *condictio indebiti* in Roman-Dutch law differ from the application thereof in Roman law? Discuss briefly.

(4) Explain what can be claimed for with the *condictio indebiti*.

(5) Discuss critically, with reference to 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.

(6) Discuss the defence of non-enrichment with the *condictio indebiti* as it is applied in South African law. Provide two practical examples.

(7) Explain the position in South African law where the payment of money forms the basis for the institution of the *condictio indebiti*.

(8) A has received payment of R200 000 which he knows is not owing to him from B. Opportunistically he buys his girlfriend a diamond ring worth R50 000, buys himself a hi-fi set worth R30 000 and uses the rest to pay off part of the bond on his house. On B's demand for repayment, A raised the defence that his enrichment has been extinguished. Advise B on the validity of this defence.

(9) Critically discuss the requirement that the plaintiff should have been unaware that the performance was undue. Also briefly give your own opinion.

FEEDBACK

(1) See 3.2.

(2) See 3.2.

(3) See 3.2.

(4) See 3.3.

(5) See 3.4.

(6) See 3.4.

(7) See 3.4.

(8) You must explain how the rules in respect of the diminishing or extinction of enrichment as a defence operate generally and under what circumstances there is an increased liability for enrichment. See study units 2 and 3.4 above.

(9) See 3.4. Refer under (a) to the decision in *Rooth v The State* and *Miller v Bellville Municipality*. At the discussion of the *Willis Faber* case under (b) you should mention the reasons why the Appellate Division abolished the distinction between an error of fact and an error of law. Regarding (c), you should refer to the decisions in *Barclays Bank* and the *Willis Faber* case. In your discussion of the *Willis Faber* case you should refer to the three grounds mentioned by the court as guidelines for the determination of the question whether the conduct of the plaintiff was so ''inexcusably slack'' that the error cannot be regarded as reasonable or excusable.

FEEDBACK

PRACTICAL SCENARIOS

Scenario 1

The first issue to be determined is whether the general requirements for enrichment liability have been complied with — 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 there is a causal link 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 interest that X earned on the money? When did X fall into *mora?*

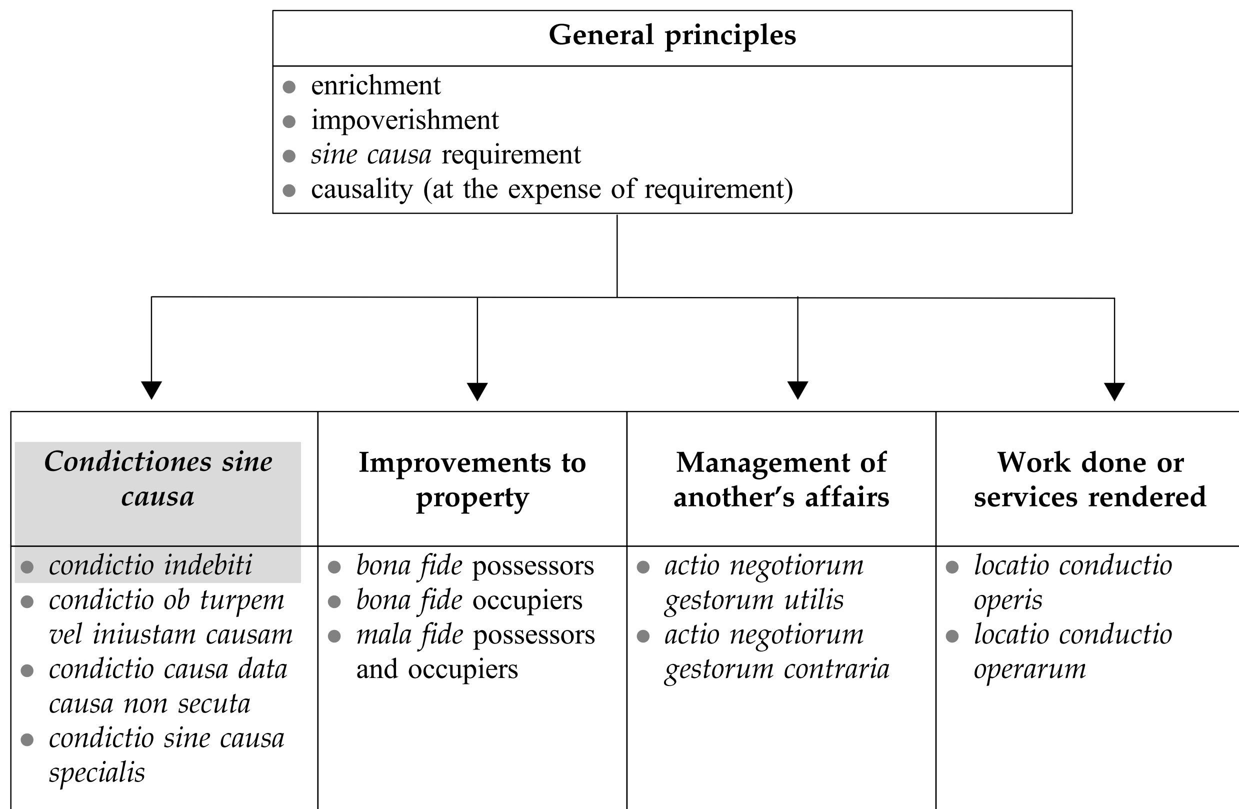
The second question is whether the requirements of the *condictio indebiti* have been satisfied. Consider all three requirements, but especially whether the mistake can be considered a *iustus error*.

Scenario 2

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

STUDY UNIT 4

CONDICTIO INDEBITI: SPECIFIC APPLICATIONS



PRACTICAL SCENARIOS

Scenario 1

A has died leaving an estate worth R2 million net. In his will he has left all his assets to B and C in equal portions. After the winding up of the estate by attorneys KLM, 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. Creditors D (R800 000), E (R200 000) and F (R500 000) were paid in full. Advise X whether he can claim the money from KLM, or B and C, or D, E and F.

Scenario 2

M owns a factory that manufactures glass in a continuous process. Her monthly electricity bill is approximately R100 000. She has now received a letter from the Tshwane City Council threatening to cut off her electricity if her ''overdue bill of R300 000'' is not paid immediately. M knows there must be a mistake because her bills are fully paid, but she is afraid that she will suffer big losses if there should be a cut in electricity. She pays the amount under a letter of protest. Advise M on whether she can reclaim the money paid.

OVERVIEW

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

LEARNING OBJECTIVES

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* in the law of succession with reference to statutory law and criticisms by authors
- explain the application of the *condictio indebiti* in respect of *ultra vires* 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 (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 NO v Fidelity Bank 1997 2 SA 35 (A)
CIR v Visser 1959 (1) SA 452 (A)
Kommissaris van Binnelandse Inkomste v Willers 1994 (3) SA 283 (A)

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos ''What action?'' 1963 *SALJ* 3–6
De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 173–179
Honoré 1958 *Acta Juridica* 125–140
Malan ''Enrichment and countermanded cheques'' 1995 *TSAR* 782–785
Nagel & Roestoff ''Verrykingsaanspraak van bankier na betaling van afgelaste tjek'' 1993 *THRHR* 486–494
Pretorius ''Mistaken payments by a bank on a countermanded or dishonoured cheque'' 1994 *THRHR* 332–338
Pretorius ''Payment by a bank on a countermanded cheque and the *condictio sine causa*'' 1995 *THRHR* 733–744
Pretorius ''Uitbreiding van die toepassingsgebied van die *condictio indebiti* en die ontwikkeling van 'n algemene verrykingsaksie'' 1995 *THRHR* 331–336
Stassen & Oelofse ''Terugvordering van foutiewe wisselbetalings: Geen verrykingsaanspreeklikheid sonder verryking nie'' 1983 *MB* 137–147
Van der Walt ''Die *condictio indebiti* as verrykingsaksie'' 1966 *THRHR* 220–233
Amalgamated Society of Woodworkers of SA v Die 1963–Ambagsaalvereniging (1) 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
CD Development Co (East Rand) (Pty) Ltd v Novick 1979 (2) SA 546 (C)
CIR v First National Industrial bank Ltd 1990 3 SA 641 (A)
Govender v Standard Bank of SA Ltd 1984 (4) SA 392 (C)
John Bell and 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)
Rapp & Maister Holdings Ltd v Rufles Holdings (Pty) Ltd 1972 (3) SA 835 (T)
Saambou Bank Ltd v Essa 1993 (4) SA 62 (N)
Van Zyl v Credit Corporation of SA 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 section 28 of the Alienation of Land Act 68 of 1981, the application of the *condictio indebiti* in insolvency law and 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 these areas legislation has also made an impact.

4.2 STATUTORY ENRICHMENT ACTION: ALIENATION OF LAND ACT

From the reading material you will have gathered that in the area of contracts that are void because of noncompliance with formal requirements, the law relating to condiction developed in a way which was wholly irreconcilable with the principles that you have studied so far. Two instances will be discussed: void contracts for the sale of land and void hire-purchase agreements.

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 thereto. If one or both parties have made performance in terms of such a void contract, he or they ought to be entitled to condiction 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, he ought to be required to prove that he made performance in the erroneous belief that the contract was valid and that his error was reasonable and one of fact or law. Should the plaintiff, on the other hand, admit that he knew at the time of performance that the contract was void (which means that the *condictio indebiti* would not lie at his instance), but contends that he is nevertheless entitled to recover his performance with the *condictio causa data causa non secuta*, he ought to be required to prove that he made performance in the expectation and on the assumption that counter-performance would be made by the other party and that this assumption 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 performance.

Carlis v McCusker

In a long line of decisions, commencing with *Carlis v McCusker* 1904 TS 917, the Transvaal courts took a completely different view of the matter, however. The position, according to these decisions, was as follows:

entitled to restitution in principle

- If a contracting party had made performance in terms of a contract which was void because of non-compliance with the prescribed formalities, he was, in principle, entitled to recover his performance. How it happened that performance was made even though the contract was void was not questioned — in other words, a plaintiff was not required to show that performance was made under circumstances which would found a *condictio indebiti* or *condictio causa data causa non secuta*.

Wilken v Kohler: no restitution where both performed

- Recovery was barred, however, where both parties had made performance in terms of the void contract. In such a case neither party could recover his performance. There was support for this proposition in an *obiter dictum* of the Appellate Division in *Wilken v Kohler* 1913 AD 135 144.

restitution only if no performance from defendant

- Recovery was also barred if the defendant was willing and able to perform in terms of the void contract. This meant that to succeed, a plaintiff had to allege in his particulars of claim that the defendant was unwilling or unable to perform. If he failed to do so, his claim was liable to exception. This rule was not applied in the case of hire-purchase contracts. Where a hire-purchase contract was void on formal grounds, recovery of what had been performed in terms thereof was barred only if both parties had performed in full (*MCC Bazaar v Harris & Jones (Pty) Ltd* 1954 (3) SA 158 (T)).

CD Development v Novick

The Transvaal approach was roundly criticised by almost every academic writer of note (De Vos 187, etc), and 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) this Division refused to follow the Transvaal decisions and the *obiter dictum* in *Wilken v Kohler*. The position in the Cape was then as follows:

for restitution the requirements must be met

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

performance of defendant irrelevant

- Once a plaintiff had proved that he was entitled to a particular *condictio* recovery was not barred 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 was resolved (as far as sales of land are concerned) by the legislature in section 28 of the Alienation of Land Act 68 of 1981. This 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 —

(aa) 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

(bb) 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 similar to the *condictio indebiti* in subsection (1); the provisions of subsection (2) furthermore regulate the position where **both** parties have performed **in full.** (Almost identical provisions are embodied in sections 9(1) and (2) of the Property Time-Sharing Control Act 75 of 1983.)

fully developed enrichment action

The statutory enrichment action created in section 28 of the Act is a fully developed enrichment action because it takes adequate account of all factors increasing or decreasing the enrichment and impoverishment. The provision in section 28(2) goes against general enrichment principles, namely that a party is entitled to reclaim whatever he 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 despite the noncompliance with formalities, but only in situations where both parties have fully performed their respective obligations. There is no fiction here. The contract is fully valid and will therefore also contain the residual rules of the law of sale in so far as the parties have not excluded them.

4.3 THE *CONDICTIO INDEBITI* AND THE LAW OF SUCCESSION

There is one other aspect of the application of the *condictio indebiti* in our law that warrants your particular attention and that is its role in the law of succession; that is, the *condictio indebiti* of executors, creditors and beneficiaries. The application of the *condictio indebiti* in these 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 and there can be no objection to this development.

while executor is in office

While the executor is in office the following applies: If an executor makes an incorrect division, because he has not complied with the provisions of the Administration of Estates Act 66 of 1965, and pays a beneficiary or creditor more than he is entitled to, or if he pays someone who is not entitled to receive anything, then the executor can reclaim his performance. This action is allowed by section 50(b) of the Act but it can also be seen as a *condictio indebiti*. Those prejudiced by the **improper** actions of the executor have a right of recourse against the executor in his **personal** capacity (s 50(a)). Where the executor's actions have **not** been **improper** but he 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), but only in his official capacity and **not in his personal capacity.** The executor claims from the beneficiaries and from those who were not entitled to any payment, with the *condictio indebiti*. However, those creditors who have already been paid cannot be held liable in respect of the belated claims because section 31(b) of the Act provides that a person who does not lodge his claim in time cannot look to another claimant who has already been paid in terms of a valid claim. De Vos (at 173) is of the opinion that in these circumstances the last-mentioned provision also excludes the executor's action.

executor discharged from office

When the executor is discharged from office (this happens after he has discharged all his duties under the Act) he disappears from the scene. He can no longer institute action and he can no longer be held liable for anything done by him during the period of his office **unless** he acted *mala fide* (s 56(2)).

unpaid creditors who lodged claims late

Unpaid creditors who did not lodge their claims in time can now institute the *condictio indebiti* (*Rapp & Maister Holdings Ltd v Ruflex Holdings (Pty) Ltd* 1972 (3) SA 835 (T) 837) themselves against those beneficiaries who received too much because the plaintiff had not been paid and against those who received payment but were not entitled to any payment whatsoever. However, they cannot act against those creditors who have already been paid (s 31(b)).

unpaid creditors who lodged claims on time

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

beneficiaries who did not receive payment

Where beneficiaries have not received payment the executor can be held liable (also in his **personal** capacity) only if he has acted *mala fide*. However, there is no reason why the unpaid beneficiaries should not be granted an action against the other beneficiaries and against those persons who received payment without any valid claim against the estate, and there is no case which denies them one (De Vos 175).

prescription

According to section 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. It will prescribe before this date either if the action that the executor himself could have instituted against the beneficiaries, paid creditors and those not entitled to payment has already prescribed, or if the original claim against the estate has already prescribed. The same rules apply to beneficiaries who have a *condictio indebiti*.

action of unpaid creditors and beneficiaries

De Vos (at 176) is of the opinion that the best construction to place on the *condictio indebiti* of the unpaid creditor and beneficiary is that it is the action of the executor which, when the executor is discharged, accrues to them automatically by subrogation. In other words, they automatically take the place of the executor without cession, and the action accrues to them together with any advantages and disadvantages that may attach to the claim. The running of prescription is a disadvantage which clings to the action. It would be illogical to hold that although their claims against the executor have prescribed, they are now entitled to an extension of the period because of the executor's discharge. The rules set out above in connection with the *condictio indebiti* of executors, creditors and beneficiaries also apply when an administrator has been appointed (ss 68 and 70).

Van der Walt's criticism and De Vos's reaction

Van der Walt (1966 *THRHR* 230–232) has criticised the granting of a *condictio indebiti* to creditors (against beneficiaries) who have not lodged their claims in time. He offers the following five points of criticism:

- The authority relied upon does not support the view of the courts. (De Vos 177–178 does not agree.)
- This is not an instance of an undue payment, but another form of impoverishment, that is the diminishing in value or extinction of a right to performance.
- Although the creditors are impoverished and the beneficiaries are enriched, the enrichment is not *sine causa* if the executor has complied with the provisions of the Act. (De Vos 178 does not agree, because in his view the Act merely prescribes a procedure which the executor must follow and it does not extinguish rights to performance — delay in lodging a claim is not a sufficient *causa* for enrichment, and only the completion of the prescription period can provide such *causa*.)
- Enrichment of the beneficiaries is not at the expense of the creditors because the creditors' impoverishment flows from their own negligence and not from the enrichment of the beneficiaries. (De Vos 179 does not agree and states that if one follows this line of reasoning then the **discharge** of the executor is the cause of the impoverishment, because before that the creditors can hold him liable and he in turn can claim from the beneficiaries.)
- Where the executor has not distributed the estate according to the provisions of the Act and all claims have been lodged in time, the enrichment of the beneficiaries is *sine causa* but in these circumstances the creditors ought not to have an action against the overpaid beneficiaries because section 50(a) **only** allows them to hold the executor liable and section 50(b) allows the executor himself to claim from the beneficiaries. (De Vos 179 agrees that creditors can only claim from the executor while he is still in office but argues that this argument falls away once the executor has been discharged except where he has acted *mala fide*.)

statutory changes

Van der Walt ends his criticism with a plea for legislative amendment because the courts are now bound by past decisions. De Vos (at 179–180) is of the opinion that the decisions of our courts are fully justified and are not in conflict with the rules of the *condictio indebiti*.

conclusion

The position is thus that where certain beneficiaries or creditors have not received what they are entitled to, adjustment can easily take place if the executor is still in office. Once the executor has been discharged from his office he disappears from the scene and the law cannot allow such discharge to bring about an inequitable result. The solution arrived at is satisfactory and the rules

in connection with prescription ensure that the period of liability of those who must repay is not unreasonable.

ACTIVITY

Consider the facts of the first practical scenario above and explain the rights and obligations of the executor, creditors and heirs according to the principles set out above. More particularly, advise X whether he 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 does not exist any more 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 Rufles Holdings on liquidations

In *Rapp and Maister Holdings Ltd v Ruflex Holdings (Pty) Ltd* 1972 (3) SA 835 (T) 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 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 v Willers* 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 these circumstances (Pretorius 1995 *THRHR* 333–334). The approach in the *Willers* case was confirmed in the decision of *Bowman, De Wet and Du Plessis NO v Fidelity Bank* 1997 (2) SA 35 (A).

ACTIVITY

Write a short critical essay (not more than 500 words) comparing the development of enrichment law in respect of the position of creditors in insolvency cases in the *Willers* case with the position in regard to unpaid creditors in the succession cases.

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 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. The essay should also deal with the critical remarks of Van der Walt in respect of the succession cases.

4.5 *ULTRA VIRES* PAYMENTS AND THE *CONDICTIO INDEBITI*

There are many instances 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, provincial government or local government. For a number of years there was considerable uncertainty about whether a payment that was made beyond the powers of these persons, namely an *ultra vires* payment, could be reclaimed with an enrichment action, more particularly the *condictio indebiti*.

In *Bowman, De Wet and Du Plessis NO 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 there is sufficient authority to the effect that an *ultra vires* payment can be reclaimed with the *condictio indebiti* or the *condictio sine causa*. This last qualification was unnecessary as this is clearly a case where the *condictio indebiti* should be applied.

4.6 PAYMENTS UNDER DURESS AND PROTEST

Payments knowingly made

It is one of the requirements of the *condictio indebiti* that a payment should have been made under an excusable mistake and that the payment was owing. However, sometimes situations occur where a party is forced to make a payment that he knows or suspects is not owing as a result of the pressure or duress being exercised on him. This is an exception already recognised in D 12.6.2.

Example

> The decision in *CIR v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) provides a good example. A dispute had arisen between the Commissioner and the FNB on whether a particular card scheme attracted stamp duties or not. The Commissioner insisted that the FNB pay the duties and the latter did so under protest. This is a situation which readily occurs in taxation law as a result of the principle of ''pay now, argue later'' which applies in that area of the law. It was held in the court *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. It was held that on the facts, the threat of penalties was not sufficient to constitute duress and the exception to the *condictio indebiti* could therefore not apply. However, on the facts there was sufficient evidence, according to Nienaber JA, of a tacit

agreement between the parties that the money would be repaid if it turned out that no stamp duties were payable. In our view, there was insufficient justification to rely on a tacit agreement.

Penalties 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 Gowar* 1915 AD 426, it was argued convincingly that where a party knowingly makes a payment which it believes is not owing under some kind of threat (which need not be unlawful), and 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.

Requirements

A plaintiff must therefore satisfy three requirements to rely on the *condictio indebiti* under these circumstances: the payment must be *indebiti*, that is 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

Consider the facts in practical scenario 2 above and explain whether the *condictio indebiti* should be available to reclaim the 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 a result of an excusable error. Where a person pays the money under duress, however, he knows that the money is not owing. The application of the *condictio indebiti* in these circumstances therefore forms an important exception to the general requirements already discussed earlier. In your answer you should explain this exception and the requirements for this exception to come into play. The issue 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, is clearly fulfilled by the letter of protest sent by M.

4.7 CHEQUE PAYMENTS AND THE *CONDICTIO INDEBITI*

This is not the *condictio indebiti*

Where a regular cheque payment is made, there is a three party relationship in terms of which the account holder (drawer) orders the bank (the drawee) to make payment to a third party (the beneficiary or holder). In making payment the bank complies with its contractual obligation as against the drawer, but it also makes payment on behalf of the drawer to the beneficiary or holder. However, sometimes the drawer may countermand the cheque, that is ask the bank not to honour the payment instruction. In that case the bank has no obligation and no authority to make payment on that cheque. It also happens from time to time that cheques are stolen or altered fraudulently. In these cases there is also no valid payment instruction. If the bank should pay under these circumstances it would make payment under the mistaken belief that it was obliged to so, whereas it was not. This would seem to be a straightforward case

for the application of the *condictio indebiti.* However, in *Govender v Standard Bank of South Africa Ltd* 1984 4 SA 392 (C) it was held for some inexplicable reason that this was an instance where the *condictio sine causa specialis* should be applied. This was confirmed in *B&H Engineering v First National Bank of SA* 1995 2 SA 279 (A). Cheque payments will therefore be discussed under that *condictio* in study unit 7 below.

SELF-EVALUATION

(1) A and B have concluded an oral agreement for the sale of A's house at a price of R500 000. B has to pay a deposit of R50 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 he has received a better offer from C. B wants to enforce the agreement, but if that is not possible he wants to reclaim the money paid with interest. Discuss, with reference to case law, how this situation was resolved (i) before 1981; and (ii) after the introduction of the Alienation of Land Act.

(2) Discuss the statutory enrichment action which was created by section 28 of the Alienation of Land Act 68 of 1981. Explain why this provision should be regarded as a ''developed'' enrichment action.

(3) Briefly discuss the application of the *condictio indebiti* in the law of succession.

(4) A, the executor of D's estate, has paid an amount of R150 000 to B as the only heir on 1 June 2002. On 1 December 2002 X, a creditor of D's, finds out that the estate has already been wound up and that his claim which arose on 1 September 2000 has not been paid. When will X's claim against B prescribe?

(5) Briefly discuss De Vos's opinion and that of Van der Walt on the application of the *condictio indebiti* in the law of succession.

(6) Discuss, with reference to case law, the availability of the *condictio indebiti* to unpaid creditors of a liquidated company.

(7) A pays B by cheque. Before B presents the cheque for payment, A countermands the cheque. The bank, FNB, negligently overlooks the countermand and makes payment to B and subsequently debits A's account ... Why can the *condictio indebiti* not be used in these circumstances? Explain who the impoverished party is.

FEEDBACK

(1) See 4.2. Refer in your answer to the decisions in *Carlis v McCusker* 1904 TS 917, *Wilkin v Kohler* 1913 AD 135 and *CD Development v Novick* 1979 (2) SA 546 (C).

(2) See 4.2.

(3) See 4.3

(4) See 4.3.

(5) See 4.3.

(6) See 4.4

(7) See 4.5. In considering who the impoverished party is, it is necessary to take into account the fact that the payment instruction had been cancelled. Was the bank entitled to debit A's account where it had no payment instruction? If it was not entitled to debit A's account, the bank must be the impoverished party, rather than the client.

FEEDBACK ON PRACTICAL SCENARIOS

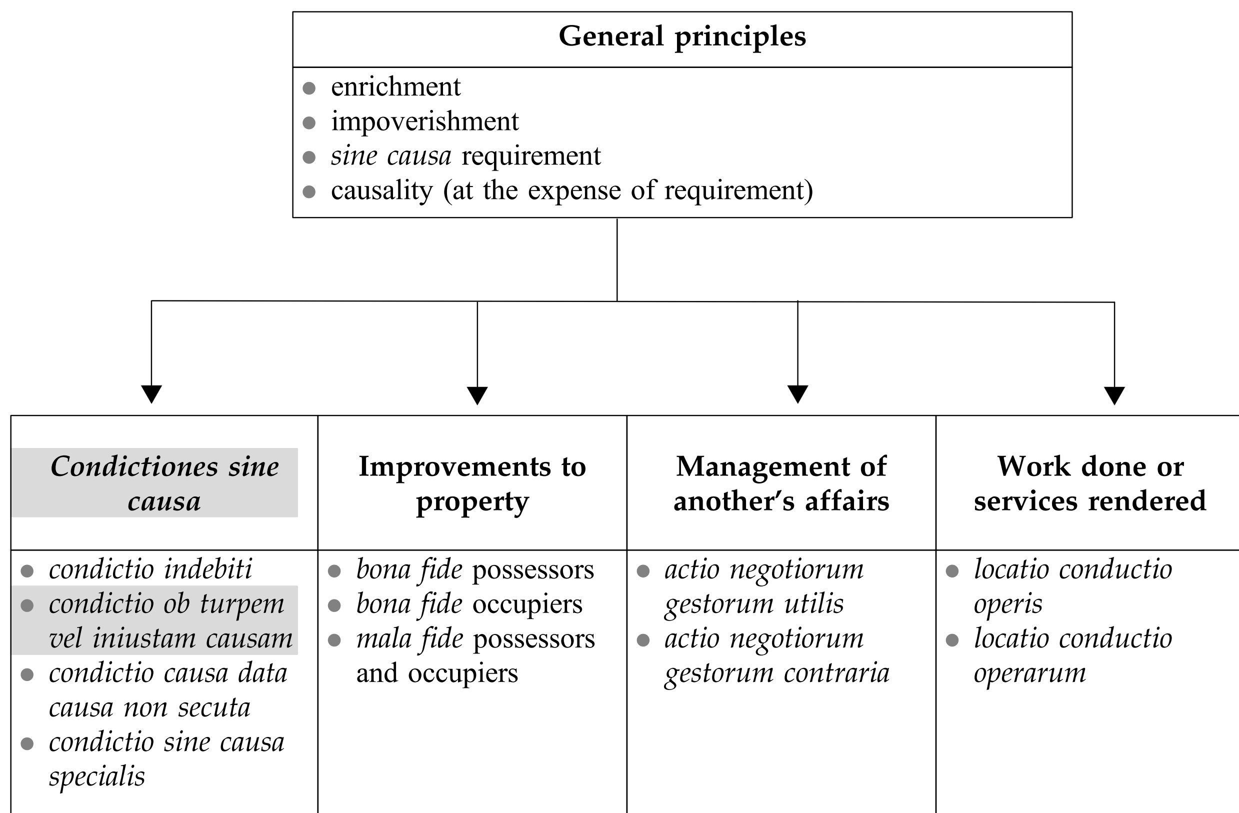
Scenario 1

In your discussion you must 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? Why not the full R3 million?

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?

CONDICTIO OB TURPEM VEL INIUSTAM CAUSAM



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? (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 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 from the bank N?

OVERVIEW

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

LEARNING OBJECTIVES

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 causa*
- briefly explain the application of the *condictio ob turpem vel iniustam causam* in 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*
- describe the test for a *turpis persona* and the consequence of that classification
- explain the importance of the decisions in *Albertyn v Kumalo, MCC Bazaar v Harris & Jones (Pty) Ltd* and *Minister van Justisie v Van Heerden* for the application of the *condictio ob turpem vel iniustam causa*
- 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 (OPTIONAL)

Eiselen ''Stretching the scope of the *condictio ob turpem*'' 2002 *THRHR* 292–298
Lotz *LAWSA* 70–72
Minister van Justisie v Van Heerden 1961 (3) SA 25 (O)
First National Bank of SA Ltd v Perry and Others 2001 3 SA 960 (SCA)

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (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

There is a difference of opinion on whether this constitutes one action or two, namely a *condictio ob turpem causam* and a *condictio ob iniustam causam* in modern South African law. The accepted view today is that there is only one action with

one set of requirements. This action is generally used where performance has taken place in terms of an agreement which is void owing to the illegality of the agreement.

5.2 ROMAN LAW

area of application

It was possible to institute this *condictio* where A had given B money for completion of a transaction which was invalid owing to its immorality or illegality. A could claim his money from B with this *condictio*.

requirements

There were two requirements for the action. In the **first** place there had to have been a transfer of property on the ground of an **illegal agreement** or *causa*. An illegal agreement or *causa* is one which is **prohibited** by law or which is void and invalid because it is contrary to good morals *(boni mores)* or public interest. The **second** requirement was that the plaintiff himself should not have been a *turpis persona*, that is it should not have been shameful for the plaintiff himself to perform. If both were *in turpitudo*, neither could have recovered his performance from the other, since *in pari delicto, potior est conditio defendentis*. Later we find a relaxation of the *par delictum* rule; the claimant, even if he was *in turpitudo*, could have reclaimed if his conduct had been less disgraceful than that of the defendant.

content of claim

The property delivered, plus fixtures, plus fruits, could have been reclaimed with this *condictio*, subject to the defendant's right to compensation for his *impensae necessariae* and *impensae utiles*. As regards *impensae voluptuariae*, the defendant had a *ius tollendi* (right to remove). Interest drawn on money could not have been claimed, neither could the value of a *factum*.

undeveloped enrichment action

A so-called fully developed enrichment action is one where the detrimental side effects of enrichment and the positive side effects of impoverishment are taken into account. The *condictio ob turpem vel iniustam causam* was an undeveloped enrichment action. Its origin was unjustified enrichment, but not all detrimental side effects were taken into account in determining the amount claimable under the action.

5.3 ROMAN-DUTCH LAW

application

There was no essential difference between the Roman *condictio* and the *condictio* of Roman-Dutch law. Note, however, that, unlike in Roman law, the rule *in pari delicto potior est conditio defendentis* was strictly applied. Where the conduct of both the plaintiff and the defendant was shameful, no balancing of the one's *turpitudo* against that of the other's took place. The relaxation of the *par delictum* rule in modern South African law, therefore, is in accordance with Roman law but not with Roman-Dutch law.

5.4 APPLICATION IN SOUTH AFRICAN LAW

requirements in modern SA law

This action has been modified in South African law in some very important respects. The *condictio ob turpem vel iniustam causam* is used to reclaim money or

property which has been transferred in terms of an illegal or unlawful agreement. In this case there is no *causa* because the underlying agreement is void on account of the illegality of the agreement. An agreement may be deemed illegal:

(1) in terms of the common law where either the subject matter of the contract, its object or its conclusion is *contra bonos mores* or against public policy; or

(2) where it is prohibited expressly or by 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/her/its money or property if he is a *turpis persona*, that is where his actions are tainted with turpitude or impropriety. However, since the decision in *Jajbhay v Cassim* 1939 AD 537, the courts have exercised a general discretion to relax the rule if simple justice requires it.

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

application

That which a party has performed in terms of an **unlawful agreement** is 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 the assessment of the unlawfulness or lawfulness 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, we are not dealing with a forbidden or unlawful agreement.

An unlawful agreement is therefore an agreement whose essence and content are forbidden, while an agreement forbidden in a particular form, is not unlawful, although it may be void. For instance, a contract for the sale of land which is not in writing is void for want of compliance with the formal requirements of the Alienation of Land Act, but it is not unlawful. An agreement for the sale of stolen goods is void because of illegality. There are also numerous statutory prohibitions which render contracts void on account of illegality. Refer to your study guide and reading material for the module Law of Contract to refresh you memory on these rules.

example

An agreement that A will pay B R500 to murder C is forbidden and therefore unlawful — the essence of such an agreement is forbidden. The *condictio ob turpem vel iniustam causam* could therefore be applicable in this situation (if no other obstacle is present).

example

A contract of sale of land which is not in writing in terms of section 2 of the Alienation of Land Act 68 of 1981 is not forbidden and therefore not unlawful — a contract of sale of land is not prohibited; it is merely that the form such a contract should take is prescribed. This is an example of a void agreement which 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 be successful 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.

These requirements will now be examined in greater detail.

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

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 *Jajbhay v Cassim* 1939 AD 537 our Appellate Division held, on the authority of Roman law, that the *par delictum* rule is not inflexible, and that the *turpitudo* (shamefulness) of the parties can be weighed up if it is in the public interest. The court approaches the question whether a plaintiff who is a *turpis persona* (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 right to reclaim what he has performed, since he may well succeed if the court finds that ''simple justice between man and man'' so requires (*Rousseau v Visser* 1989 (2) SA 289 (C) and *Visser v Rousseau* 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, namely was the party to the unlawful agreement aware of the unlawfulness of the agreement (*Jajbhay v Cassim* 1939 AD 537). 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 received (unless return is excused) before he can succeed with his action. In *Albertyn v Kumalo* 1946 WPA 529 it was held that the plaintiff had to tender the return of that which he had received from the defendant in terms of the void contract when sueing with the *rei vindicatio* for the return of something which he had delivered. The court decided *obiter* that this also applies to the present *condictio*.

MCC Bazaar confirmed *Albertyn*

In *MCC Bazaar v Harris & Jones (Pty) Ltd* 1954 (3) SA 158 (T), 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, in effect, 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 vel iniustam causam* the plaintiff must, if there was a counterperformance, tender to return what he has received (at 162A).

ACTIVITY

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

Scenario 1

See the feedback at the end of this study unit.

development towards fully developed enrichment action

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

evasion of *par delictum* rule

De Vos realises, however, that this 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 has received, B will be able to recover what he would not have been able to recover had he (B) instituted the action. In order to prevent the evasion of the *par delictum* rule, De Vos is of the opinion that the plaintiff must tender return only if the defendant is not himself precluded by the *par delictum* rule from instituting an action for restitution.

Minister van Justisie v Van Heerden

In *Minister van Justisie v Van Heerden* 1961 (3) SA 25 (O) a police officer in the employ of the plaintiff 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. Defendant'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 that the defendant is. If the plaintiff had to offer to return what he had received (and he had to do so, according to Rumpff J's *obiter dictum* in the *MCC Bazaar* case) the *par delictum* rule would have been evaded. It is not surprising that Potgieter J in the *Van Heerden* case could not subscribe to the view of Rumpff J (at 28–29). Potgieter J therefore rejected this defence because the plaintiff was not affected by the *par delictum* rule while the defendant was affected thereby. Thus this case confirmed De Vos's view that the plaintiff need not tender to return what he has received if the defendant himself would have been precluded from claiming by the *par delictum* rule.

both parties perform

Wille (*Wille's Principles of South African Law* 129) feels that the plaintiff loses this *condictio* where both parties have performed in full. The argument raised by Wille is that in such a case nobody is enriched because the enrichment of the one is neutralised by the impoverishment of the other. According to De Vos (at 165), the court does not look at the relative values of the performances, or even the fact of counterperformance, because set-off operates only between comparable performances, and incomparable performances cannot be set off against each other. Where the one party gave a thing and the other a sum of money, the enrichment of the one is not affected by his impoverishment so as to cancel his enrichment claim. Both parties are therefore impoverished and both can therefore institute separate enrichment actions against the other party that is enriched at the same time.

FNB v Perry

The court in *First National Bank of SA Ltd v Perry and Others* 2001 (3) SA 960 (SCA) was concerned with a situation which is far too common today. A cheque

of the Government of KwaZulu-Natal (KwaZulu-Natal) was stolen and forged by an unknown person. Thereafter it was handed by one Dambha to a firm of stockbrokers, FPV. Dambha held a managed account with FPV and his account was credited with the amount. Both KwaZulu-Natal and FPV held accounts with the appellant FNB. FPV deposited the cheque into their FNB account and the funds were collected by FNB from the KwaZulu-Natal account and 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, and used part of the proceeds to offset the overdraft of the trust. The trust was insolvent at the time when this action was lodged. At the time the claim was lodged Nedbank was still in possession of the funds it had collected on behalf of the trust and was interdicted from dealing with these funds pending the finalisation of the claim.

Arising from these 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 the money has lost its identity as a result

(b) the bank's obligation to a fraudulent accountholder whose account has been credited

(c) the nature of the enrichment action to be used under these circumstances

(d) the requirements for 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

The court accepted that the impoverished party in these circumstances 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. (That was no problem in this case.) 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 it finds out about the tainted nature of funds in the account of a client, that is, has actual knowledge, its contractual obligation to the client also becomes tainted. There is therefore no obligation on 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/her/its criminal conduct.

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

SELF-EVALUATION

(1) Discuss briefly the application of the *condictio ob turpem vel iniustam causam* in Roman law, with specific reference to the requirements set.

(2) What can be claimed with the *condictio ob turpem vel iniustam causam*?

(3) Discuss briefly the application of the *condictio ob turpem vel iniustam causam* in Roman-Dutch law.

(4) Explain the application of the *condictio ob turpem vel iniustam causam* in South African law and refer specifically to the test used to determine whether the agreement is unlawful.

(5) Explain the relaxation of the *par delictum* rule and the test for a *turpis persona* with reference to the decision in *Jajbhay v Cassim*.

(6) Explain the legal position if both parties have performed and one of the parties then institutes the *condictio ob turpem vel iniustam causam* against the other party.

FEEDBACK

(1) See 5.2.

(2) See 5.2.

(3) See 5.3.

(4) See 5.4.

(5) See 5.4.

(6) See 5.4.

FEEDBACK ON PRACTICAL SCENARIOS

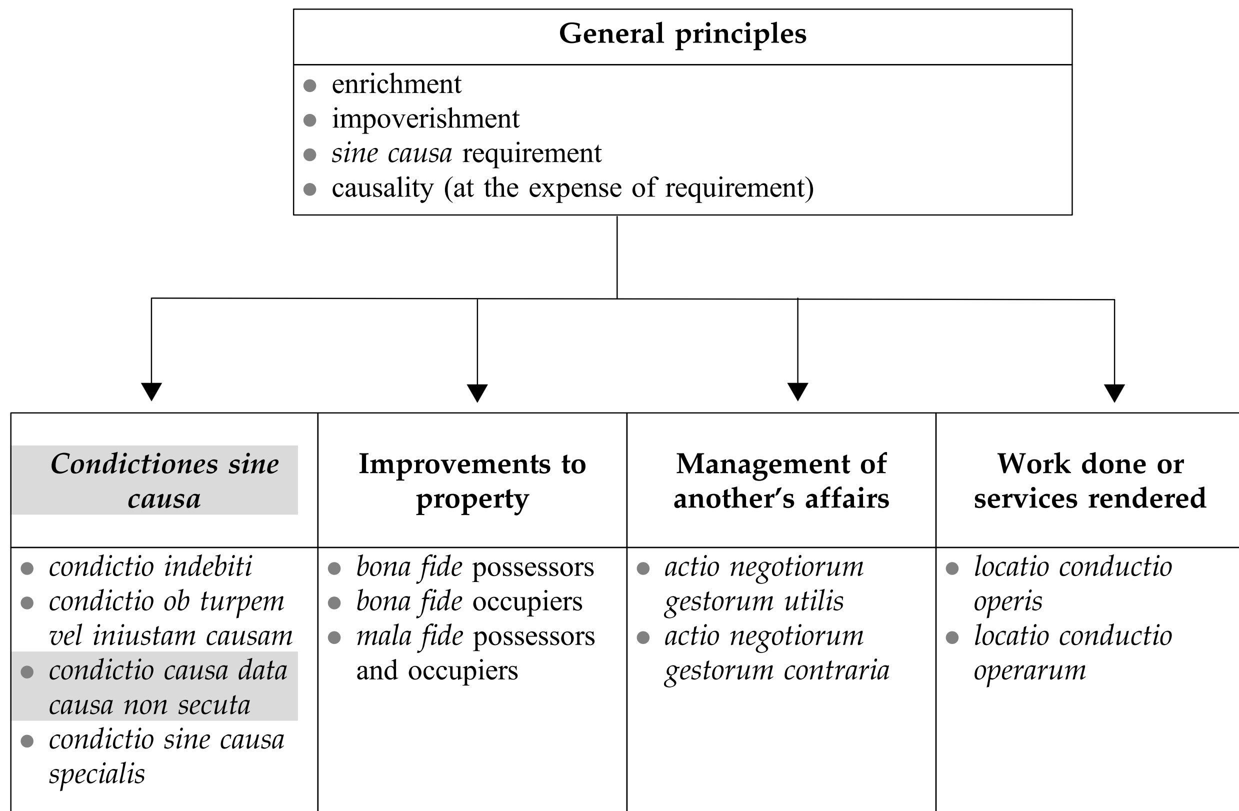
Scenario 1

You must firstly consider the application of the general requirements for the action in this case, and more particularly the application of the *par delictum* rule. The decision in *Minister van Justisie v Van Heerden* 1961 (3) SA 25 (O) will provide valuable clues. 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 was an undercover policeman. Explain why.

Scenario 2

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

CONDICTIO CAUSA DATA CAUSA NON SECUTA



CONDICTIO CAUSA DATA CAUSA NON SECUTA

PRACTICAL SCENARIOS

Scenario 1

A leaves B a piece of land 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 the 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 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 subject to a resolutive condition. F has paid R10 000 to G when the condition realises and the contract is extinguished. Can F claim the money 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 OBJECTIVES

After completing this study unit you should be able to

- briefly explain the application of this *condictio* in Roman law
- briefly explain the application of this *condictio* in Roman-Dutch law
- 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 (OPTIONAL)

Eiselen & Pienaar 141–152
Lotz *Lawsa* 72
Baker v Probert 1985 (3) SA 429 (A)

ADDITIONAL READING MATERIAL (OPTIONAL)

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

6.1 INTRODUCTION

The *condictio causa data causa non secuta* is one of the traditional enrichment actions used to reclaim a performance. This action had a much wider area of application in Roman law than it does in South African law today. The main reason for this is that our law of contract has developed so much that contractual remedies now provide for circumstances where the *condictio causa data causa non secuta* used to be implemented. It is, however, necessary to begin by studying the application of the *condictio causa data causa non secuta* in Roman and Roman-Dutch law, to gain a proper understanding of the area of application of this *condictio* in South African law today.

6.2 ROMAN LAW

area of application

In Roman law the *condictio causa data causa non secuta* was used to reclaim money or things transferred in ownership in the following cases:

ius poenitentiae

- When a party had performed in terms of the forms *do ut des* (I deliver so that you can deliver) or *do ut facias* (I deliver so that you can do) of an innominate real agreement (an agreement that would only be valid and

enforceable once performance had taken place) and thereafter, before counterperformance had taken place, reclaimed the thing delivered in terms of his *ius poenitentiae*. The law gave the party performing the opportunity to reconsider before the other party delivered the counterperformance. This right to rescind in such a case was called the *ius poenitentiae*. Thus it appears that the *ius poenitentiae* of the party who had, for example, delivered the thing in terms of the *do ut des* form of the innominate real agreement, was granted by virtue of the fact that such party had not delivered on the grounds of a valid *causa*, since the contract was **created only by the delivery**. If the person who performed first in terms of the innominate real agreement decided not to continue with the agreement before counterperformance had taken place, he could have relied on his *ius poenitentiae*, rescinded the contract and reclaimed his performance with the *condictio causa data causa non secuta*. The *ius poenitentiae* fell away if counterperformance became impossible owing to an act of God *(vis maior)* or chance.

breach of contract

- When a party delivered a thing in terms of the *do ut des* or *do ut facias* forms of the innominate real agreement, and the other party committed breach of contract by not fulfilling his obligation to render counterperformance. The party who had already performed could then rescind the agreement and recover his performance with this *condictio*.

resolutive condition

- When one party had delivered a thing in terms of a contractual resolutive condition and the uncertain future event took place. (In this case, De Vos 10–11 speaks incorrectly of a supposition *(veronderstelling)*.) As authority for the view that it was possible to institute the *condictio causa data causa non secuta* in this particular case, reference is usually made to the case where a *dos* could be reclaimed from a woman by a man if the proposed marriage did not take place (so-called *donatio propter nuptias*).

content of claim

With this *condictio* either the thing delivered plus fixtures plus fruits, or payment of the value of these things could be claimed. Where money was reclaimed, interest drawn thereon could not be reclaimed. The defendant was probably entitled to compensation for all his *impensae necessariae* (necessary improvements) and *impensae utiles* (useful improvements), but could merely have **removed** *impensae voluptuariae* (luxury improvements). Thus he had the *ius tollendi* (right to remove) here.

action and right of retention

The defendant had no **action** for compensation for improvements, but could, with reliance on the *exceptio doli*, refuse to restore the property until compensation was paid. The defendant's right of retention *(ius retentionis)* therefore formed the basis of his right to compensation. If he lost his *ius retentionis* because he lost possession of the property, he had no means of enforcing his right to compensation for improvements.

not to recover value of *factum*

Note that, in principle, neither this *condictio* nor any other could be invoked to recover the value of a *factum*, that is the value of a service or of labour as such. Thus if A performed in terms of a *facio ut des* agreement and B refused performance, A could not institute the *condictio* against B to recover the value of his *factum*.

undeveloped enrichment action

It is clear that the *condictio causa data causa non secuta* was an undeveloped enrichment action. A so-called fully developed enrichment action is one where detrimental side effects of enrichment and positive side effects of impoverishment are taken into account. The origin of this *condictio* was an unjustified transfer of assets, but because not all detrimental side effects such as

counterperformance were taken into account in determining the amount claimable under the action, it was still an undeveloped enrichment action.

6.3 ROMAN-DUTCH LAW

area of application

In Roman-Dutch law all contracts were consensual and real contracts no longer appeared. The effect was that the *condictio* in question was instituted in the case of consensual contracts *do ut des* and *do ut facias* in the case of (1) cancellation owing to breach of contract by the other party to the contract, and (2) the fulfilment of a resolutive condition. Because all contracts were consensual in Roman-Dutch law, the *ius poenitentiae* of Roman law fell away. Therefore, a party could no longer, after he had performed but before the other party had done so, have changed his mind and reclaimed his performance.

6.4 APPLICATION IN SOUTH AFRICAN LAW

area of application

There is a great deal of uncertainty about the field of application of this action in modern South African law. Upon analysis the common feature of all the examples where this action has been used seems to be cases where transfer of a thing was made or performance 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 has delivered a thing to the defendant by virtue of:

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

6.4.1 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. This is knowledge you have already acquired, but need to refresh. It will also increase your understanding of how the law is integrated throughout its various conceptual divisions and demonstrate that you can never isolate one area from the rest of the law. You must have a clear understanding of the different types of conditions and the difference between conditions, assumptions and *modi*.

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

- Resolutive conditions have the effect of not interfering with the validity or enforceability of contractual or testamentary rights and obligations, but hang like a sword over the head of the parties affected by the contract or testamentary disposition. If the future uncertain event takes place or the condition 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. It is in accordance with its use in Roman and Roman-Dutch law.

- 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 tacit terms. However, if no provision is made in the contract for the repayment, this action would be the appropriate one to use. There is no precedent for its application in these circumstances in common law, but it seems more appropriate than any other enrichment action. Some writers argue that the *condictio sine causa specialis* should be used in these cases, but the issue remains uncertain. See the discussion in Eiselen and Pienaar at 141–142 and 148–149.

6.4.2 Unfulfilled assumptions

nature of assumptions

Despite fairly clear case law on the subject, there is still some controversy over the exact nature of assumptions. De Vos (*Verrykingsaanspeeklikheid* 156) refers to future assumptions. In contract law an assumption or supposition is a fact which the parties elevate to the basis of their contract. It is not a condition or guarantee, but 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 that case the appellate division, in a very clearly stated exposition, albeit *obiter*, distinguished very clearly between assumptions and conditions. An assumption can only relate to the facts of the present or the past, but not 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 a result of a fundamental mistake. In that 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 which relates to the future is no assumption at all but a condition as described above. In most cases it would be a resolutive condition.

6.4.3 A *modus*

nature of *modus*

A *modus* is an obligation which 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 its application 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 not quite certain who would be able to enforce compliance with the *modus*, although it is assumed that the executor or heirs would be entitled to

do so. Where the disposition is revoked owing to noncompliance, the disposition can be reclaimed with this remedy.

6.4.4 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 grounds of breach of contract, but that the innocent party in such a case would make use of contractual remedies. De Vos bases his view on the fact that, for the purposes of rescission on the grounds of breach of contract, a distinction was drawn in Roman-Dutch law between contracts which were innominate real contracts in Roman law (in these contracts the right of rescission was wider and the *condictio* was used) and contracts which were consensual even in Roman law (in these contracts the right of rescission was more limited and a contractual action was used). 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. The Appellate Division confirmed this approach in *Baker v Probert* 1985 (3) SA 429 (A) 438–439.

SELF-EVALUATION

(1) Briefly discuss the application of the *condictio causa data causa non secuta* in Roman law.

(2) Briefly discuss the application of the *condictio causa data causa non secuta* in Roman-Dutch law.

(3) Write a critical analysis of the scope of application of the *condictio causa data causa non secuta* in modern South African law.

(4) Name the three applications of the *condictio causa data causa non secuta* in South African law.

(5) Briefly discuss the importance of the decision in *Baker v Probert* 1985 (3) SA 429 (A) for the application of the *condictio causa data causa non secuta* in South African law.

(6) Consider each of the three practical scenarios at the beginning of this study unit and explain whether this 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) See 6.2.

(2) See 6.3.

(3) In your answer you must consider the uncertainty in respect of the field of application of this action today. Did you consider all the viewpoints of the various writers in the prescribed reading material and decided cases? State your own view and conclusion.

(4) See 6.4

(5) See 6.4.4.

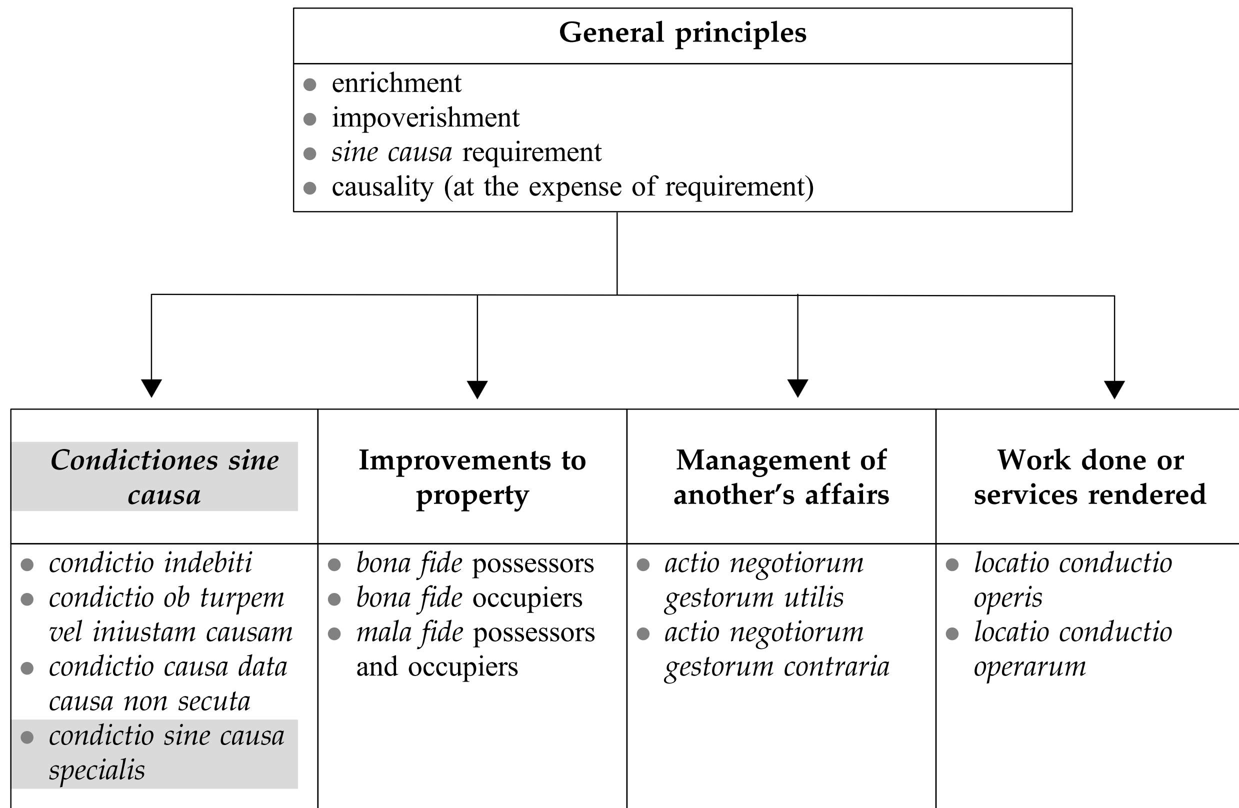
(6) Scenario 1. Did you discuss the uncertainty about the enforcement of *modi* in succession law? Did you consider the historical roots of the action in this context?

Scenario 2. Did you consider the nature of assumptions and the various viewpoints? Is this the correct action to be used? If not, which action would be more appropriate? Is this not a case where the *condictio indebiti* would be more appropriate as a failed assumption causes the agreement to be void? Briefly review the requirements of the *condictio indebiti* again.

Scenario 3. Did you consider the historical roots of this action in respect of conditions, the nature of this condition and whether this is the appropriate action? If it is not the correct action, which one is?

STUDY UNIT 7

CONDICTIO SINE CAUSA SPECIALIS



PRACTICAL SCENARIOS

Scenario 1

A has handed in his television set at B's shop for repair. Two weeks later when A goes to collect his television set, he is informed by B that the set has gone missing and is nowhere to be found. B agrees to pay R1 500 in compensation to A to settle any disputes. A week later B phones A informing him that the television set has been found, and offering to return the set against repayment of the R1 500. A does not want to do this because he wants to buy a new television set anyway. 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 any enrichment claims either of them may 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 OBJECTIVES

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*
- explain the application of the *condictio sine causa specialis* in Roman law
- discuss the role the *negotium* requirement played in Roman and Roman-Dutch law and whether it still forms part of South African law
- 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
- discuss the decision in *Saambou Bank v Essa* with regard to a collecting bank that has paid out a dishonoured cheque
- distinguish, with reference to case law, between the *bona fide* possessor who received the thing *ex causa onerosa* and *ex causa lucrativa*

RECOMMENDED READING (OPTIONAL)

Eiselen & Pienaar 152–164
Lotz *LAWSA* 73–75
Govender v Standard Bank of SA Ltd 1984 (4) SA 392 (C)

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos "What action?" 1963 *SALJ* 3–6
De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 173–179
Honoré 1958 *Acta Juridica* 125–140
Malan "Enrichment and countermanded cheques" 1995 *TSAR* 782–785
Nagel & Roestoff "Verrykingsaanspraak van bankier na betaling van afgelaste tjek" 1993 *THRHR* 486–494
Pretorius "Mistaken payments by a bank on a countermanded or dishonoured cheque" 1994 *THRHR* 332–338
Pretorius "Payment by a bank on a countermanded cheque and the *condictio sine causa*" 1995 *THRHR* 733–744
Pretorius "Uitbreiding van die toepassingsgebied van die *condictio indebiti* en die ontwikkeling van 'n algemene verrykingsaksie" 1995 *THRHR* 331–336
Stassen & Oelofse "Terugvordering van foutiewe wisselbetalings: Geen verrykingsaanspreeklikheid sonder verryking nie" 1983 *MB* 137–147
Van der Walt "Die *condictio indebiti* as verrykingsaksie" 1966 *THRHR* 220–233
Amalgamated Society of Woodworkers of SA v Die 1963-Ambagsaalvereniging (1) 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
CCA Little and Sons v Liquidator R Cumming (Pvt) Ltd 1964 (2) SA 684 (SR)
CD Development Co (East Rand) (Pty) Ltd v Novick 1979 (2) SA 546 (C)
CIR v First National Industrial Bank Ltd 1990 (3) SA 641 (A)
Govender v Standard Bank of SA Ltd 1984 (4) SA 392 (C)
John Bell and 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)
Rapp & Maister Holdings Ltd v Rufles Holdings (Pty) Ltd 1972 (3) SA 835 (T)
Saambou Bank Ltd v Essa 1993 (4) SA 62 (N)
Van Zyl v Credit Corporation of SA Ltd 1960 (4) SA 582 (A)
Van der Westhuizen v MacDonald 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 *condictio sine causa* ***generalis*** was an alternative action to any of the previous three *condictiones*, that is 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 abovementioned three, 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 that of the above-mentioned *condictiones*, it was often used instead of one of these (De Vos 29–30). In the rest of this study unit we will look into the application of the *condictio sine causa specialis*.

7.2 ROMAN LAW

applications

Although it is difficult to determine the field of application of the *condictio sine causa specialis* in Roman law, we are able to distinguish between the following instances according to the exposition given by De Vos (at 30–34):

setting aside a *stipulatio*

- The *condictio sine causa specialis* was used to set aside a *stipulatio* (oral contract) entered into **without** a *iusta causa*.

existing *causa* falling away

- Where property was transferred in ownership on the ground of an existing *causa* and the *causa* later fell away, the goods could be recovered with the *condictio sine causa specialis*. In this form the *condictio sine causa specialis* was sometimes called the *condictio ob finitam causam*.

thing used or sold

- Then there was the case where the owner of a thing transferred possession, but not ownership, to another and the receiver used or sold the thing in good faith. Where the receiver used up the thing, it is clear that the owner was impoverished, but where the thing was sold to someone else he was still not impoverished in principle if he was in a position to recover his property with his *rei vindicatio*. However, if the owner's right of ownership became valueless because the new possessor had used up or destroyed the property, or it had disappeared without a trace, naturally the owner was impoverished and could claim the value of the thing from the seller with the *condictio sine causa specialis*.

other *condictiones* not available

- The *condictio sine causa specialis* was used where the claimant had transferred the ownership of property to another *sine causa* and where the other *condictiones* could not be instituted for one reason or another, for example, where A had delivered something to B on the grounds of a supposition which proved to be false. In such a case A was able to recover his property with the *condictio sine causa specialis*.

not a general enrichment action

It is important to realise that the *condictio sine causa specialis* was not a general enrichment action. It was not possible to use this *condictio* in all cases where the other *condictiones* could not be instituted, since an important prerequisite for this *condictio* was the existence of a *negotium* between the enriched and the impoverished. There had to be a ''vrywillige handeling van gemeenschappelijk overleg'' between the parties, that is the defendant had to have become owner or possessor of the thing because it had been transferred to him by or on behalf of the claimant. You will now see why the defendant who had attached fixtures to the property of another (think of the facts of the *Gouws v Jester Pools* case) could not act with the *condictio sine causa specialis* — there was no *negotium* between the parties. The *negotium* requirement therefore precluded the *condictio sine causa specialis* from being a general enrichment action.

undeveloped enrichment action

However, the *condictio sine causa specialis* was an undeveloped enrichment action; its origin was *sine causa* enrichment, but, as in the case of the other *condictiones*, not all detrimental side effects were taken into account in determining the amount claimable under the action. Neither could the value of a *factum* be claimed with it.

7.3 ROMAN-DUTCH LAW

disappearance of *negotium* requirement

The most important change undergone by the *condictio sine causa specialis* was the disappearance of the *negotium* requirement. Although the disappearance of this requirement gave rise to the presumption that the *condictio sine causa specialis* had become a general enrichment action, this was still not the case, since, even at Roman-Dutch law, it was not possible to recover the value of a *factum* by any of the *condictiones*; only things which had been transferred could be recovered. Thus, contrary to what one would expect, the *bona fide* possessor's action (he acquired an action in Roman-Dutch law) for compensation for improvements was designated as a *utilis actio negotiorum gestorum contraria* (extended management of affairs action — see study unit 9) and not a *condictio sine causa specialis*. As De Vos (at 77) indicates, the reason was apparently that the value of a *factum* could not be recovered with the *condictio sine causa specialis*.

problems where third parties are involved

The disappearance of the *negotium* requirement gave rise to considerable problems where only the possession of a party's property had been transferred to another, and the thing had then been sold or used up. Because of the *negotium* requirement in Roman law, as you know by now, the owner could sue only one person, that is the person to whom he or his representative had handed over the property; the owner could further act with the *condictio* only if his vindicatory claim had been lost. However, the disappearance of the *negotium* requirement meant that it was possible for the owner to sue various people who had handled the property. This poses various questions: Did the owner first have to point out his property, if this was possible? If the owner had recovered the full value of the thing from one person, could he still sue the

others too? If the owner had recovered only part of the value from a defendant, could he sue the other persons? In order to avoid duplication, these questions will be discussed fully in our study of modern South African law below.

7.4 APPLICATION IN SOUTH AFRICAN LAW

application

There remains a lot of uncertainty 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) the court refrained from attempting a definition of the ambit of the *condictio sine causa*.

Under the common law it was used as a catch all for cases which required a remedy but did not fit under the other enrichment actions. (See Lotz *LAWSA First Reissue* (9) 73.) Instead the action developed in a casuistic way where certain general types of application may be distinguished.

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

(i) Where a party performs and performance was due at the time 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*.

(ii) Where the plaintiff's property was alienated or consumed by somebody else.

(iii) Where a bank has made payment under a countermanded or forged cheque.

(iv) 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 lie. The exact scope of this application is unclear. Stated as above it could even encompass the subsidiary general enrichment action advocated by De Vos, but it has found no clear application in any South African court up to date.

bona fide possessors of a thing

We have also seen in Roman law that an owner who had transferred the **possession** of property to another who then consumed or sold this property in good faith could sue the recipient for the value of the property to the extent that it was still in the possession of the recipient. As mentioned above, in Roman-Dutch law the disappearance of the *negotium* requirement created many problems, because it resulted in the owner being able to sue a whole series of *bona fide* possessors of his property.

example

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

bona fide possessor who received *ex causa onerosa*

Where the possessors, as in the above-mentioned example, received the thing *ex causa onerosa* (for value), their actual enrichment is not constituted by the purchase price of the thing, but by their **profit,** because we must bear in mind

that the seller not only receives a purchase price but has himself paid a purchase price. If A cannot sue W *ex delicto* and for one reason or another (eg the thing has been consumed, or has disappeared without trace) cannot institute his *rei vindicatio* and the *bona fide* possessors have all received the thing *ex causa onerosa*, he will be able to sue **only one** of the possessors for the profit he has made, in so far as it is still in that person's possession when the action is instituted. It is true that in such a case A will perhaps be able to recover only a small part of the value of his property, but this is still a more equitable solution than that offered by De Vos (at 76–83 211–212), namely that a *bona fide* possessor who received the thing *ex causa onerosa* cannot be sued at all! 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 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 to A, and also to 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 our law is *Van der Westhuizen v MacDonald and Mundel* 1907 TS 933. The facts are briefly as follows: 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. It is clear that 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 at least for the profit he made in so far as it was still in his hands at the time 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 property with the *rei vindicatio*, the owner must sue the possessor who obtained the thing *ex causa lucrativa*. His claim is, of course, limited to the value of the thing in so far as it is still in the hands of the possessor at the time the action is instituted. If the possessor has consumed the thing, regard must be had to his 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.

7.5 APPLICATION OF THE *CONDICTIO INDEBITI* IN THE LAW OF BILLS OF EXCHANGE

payment not by drawer

Two Appellate Division judgments concerning payments by cheque and the *condictio indebiti* warrant a brief discussion. In *CIR v Visser* 1959 (1) SA 452 (A) we have an interesting set of facts: Z, A's bookkeeper, fraudulently gave him (A) the impression that he (A) owed a certain amount to the Receiver of Revenue. A gave Z a cheque to pay this amount. However, Z paid 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. 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 *John Bell and Co Ltd v Esselen* 1954 (1) SA 147 (A). The facts of this case are substantially the same as those of the *Visser* case (Stassen & Oelofse 1983 *MB* 137–147).

criticism of the *Visser* and *Esselen* cases

Honoré's (1958 *Acta Juridica* 125–140) criticism of the *Esselen* case is therefore also applicable 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 his 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 therefore should have succeeded with the *condictio indebiti*.

mistaken payments by drawee bank

As to the position of a drawee bank which erroneously pays out a cheque whose payment has been countermanded by the drawer, three cases are of importance: *Govender v Standard Bank of SA Ltd* 1984 (4) SA 392 (C), *First National Bank of SA Ltd v B & H Engineering* 1993 (2) SA 41 (T) and *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A) (Pretorius 1995 *THRHR* 733–744; Nagel & Roestoff 1993 *THRHR* 486–494; Malan 1995 *TSAR* 782–785).

Govender v Standard Bank

The basis of this case is whether a bank may recover from the payee of a cheque drawn upon the bank the amount which the bank paid to the payee on the cheque even if payment of the cheque had been countermanded by the drawer. The facts of the case were as follows: A Mr Saaiman hired a bus from Mr Govender (appellant) and paid in advance by cheque. One of the passengers, however, arranged for cheaper transport, whereupon Saaiman 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. Govender went ahead and deposited the cheque and it was later paid out by Standard Bank (respondent) in spite of the fact that the cheque had been stopped by Saaiman. When Saaiman queried the payment of the cheque, the bank reversed the debit on Saaiman's account, in spite of the indemnification signed by Saaiman at the time when he countermanded the cheque. The bank sued Govender for the amount of the cheque. The court *a quo* upheld the claim and Govender appealed to the Cape Provincial Division.

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

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

> ... 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.

And further (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 upon which the matter can be decided, and this ground is common to both the *condictio indebiti* and 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, regard should have been had to any performance rendered by Govender which 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 these considerations. Firstly, the payment of the cheque was not payment *sine causa*, and secondly, Govender had performed, or held himself ready and willing to perform, and was therefore not *prima facie* unjustifiably enriched by the receipt of a payment, since the value of his performance could have been regarded as being equal to the amount he had received (in any case until the contrary could be proved).

FNB v B & H Engineering

The decision in the *Govender* case was rejected by Preiss J in *First National Bank v B & H Engineering* 1993 (2) SA 44 (T). The facts of the *B & H* case were similar to the facts of the *Govender* case. In this case, Sapco (a client of FNB's) drew a cheque in favour of B & H as payment for certain goods which it had ordered from B & H. After delivery of the cheque to B & H, Sapco countermanded payment of the cheque at its bank. Owing to a mistake made by an employee of the bank, the cheque was paid out by the bank, upon which the bank sued B & H for repayment of the amount on the cheque. Contrary to what was decided in the *Govender* case, Preiss J allowed the claim and held that the plaintiff (FNB) had met all the requirements for the *condictio sine causa* and specifically that the defendant (B & H) had been unjustifiably enriched at the expense of the bank (at 48F).

Nagel and Roestoff's evaluation on *B & H*

According to Nagel and Roestoff (1993 *THRHR* 492), the following principles may be derived from the *B & H* case: A bank which pays a cheque in spite of a countermanding notice may in principle institute the *condictio sine causa* to reclaim the paid amount from the receiver. Such a bank is *solvens* in its own name and is not acting as an agent for its client (the drawer). The payment by the bank is, therefore, *sine causa*. Keeping this in mind, the payment by the bank

has no bearing on the underlying relationship between the drawer and the receiver; in other words, the obligation to perform by the drawer is not abolished and neither is the right to performance by the beneficiary. Any performance by the beneficiary in terms of the underlying agreement is not legally relevant to the receipt of payment by the bank — it cannot therefore be seen as a negative side effect of any enrichment at the expense of the bank that must be accounted for against the enrichment. The logical consequence of the above is that the beneficiary, who must compensate the bank, merely acts on the merits in respect of payment to the drawer in terms of the underlying agreement.

B & H compared to *Govender*

The Transvaal decision in *B & H* contradicts the Cape decision in *Govender*. In the *B & H* case the decision of Preiss J was the exact opposite of that of Rose-Innes J in the *Govender* case, and all his arguments contradicted what had been decided in the earlier Cape decision. The *B & H* case was, however, taken on appeal and the decision in the Appellate Division gave welcome clarity on these two divergent decisions.

B & H Engineering v FNB (A)

In *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A) Groskopf AJ held that the bank's claim under the *condictio sine causa specialis* should not have succeeded in the court *a quo*, and the appeal was therefore allowed. Groskopf AJ followed the decision in *Govender*'s case and held that where the parties had agreed to make and accept payment of a debt by cheque, the debt was extinguished when the bank paid the cheque to the payee (creditor), whether or not the payment had been authorised by the drawer (debtor) at that stage (at 292D-E). Groskopf AJ (at 294I-J) 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*. The position on the payment of countermanded cheques has now been settled in South African law, because this 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 that since the bank has inadvertently and through its own doing become indirectly involved in the dispute between the drawer and payee, it would not only expedite the matter but make it far simpler to resolve, if the bank were removed from the equation by granting it an enrichment claim against the payee and then leaving it to the parties to sort out their contractual dispute.

Saambou Bank v Essa

Saambou Bank Ltd v Essa 1993 (4) SA 62 (N) deals with the position of a collecting bank which pays out to its client on a cheque that has been dishonoured. In this case, the bank had a 14-day waiting period before the funds of a deposited cheque could be made available. After the 14-day waiting period, the defendant withdrew the full amount on the deposited cheque and it was more than a month later that the same cheque was dishonoured. The position of the collecting bank in this case differs from the position of the banks in the *Govender* and *B & H* cases, in that here the defendant was a client of the plaintiff bank and therefore a bank-client relationship was involved. The bank based its claim on the *condictio sine causa* rather than the *condictio indebiti*. The court held *obiter* that in any case the plaintiff would not have succeeded if its claim had been based on the *condictio indebiti*, since the error or mistake on the part of the bank, namely that there were sufficient funds in the client's account, was inexcusable (at 68E-F):

> Reverting to the facts of the present case, I would have had little hesitation in branding plaintiff's conduct as inexcusable. It relied on the 14-day period and had no system in place to check whether or not the cheque had been honoured. It took a calculated risk, unilaterally and without any conduct on defendant's part inducing it.

condictio sine causa not an alternative to *condictio indebiti*

The court confirmed the distinction between the *condictio indebiti* and the *condictio sine causa* as expounded in the *Govender* case. The court applied those principles to the facts of this case and came to the conclusion (at 68B-C) that the plaintiff bank had believed that it was obliged to pay and that there was a *debitum* (debt), and therefore it had paid. If a *debitum* had been relevant the case would have fallen within the application of the *condictio indebiti* and one cannot fall back on the *condictio sine causa*. As already indicated this *condictio* can be applied only if no other *condictiones* can find application. For this reason the court in *Saambou v Essa* came to the conclusion that any claim the plaintiff might have had was under the *condictio indebiti*, and that therefore the plaintiff's claim did not fall within the limits of the *condictio sine causa* (Pretorius 1994 *THRHR* 332–338).

SELF-EVALUATION

(1) Distinguish between the application of the *condictio sine causa generalis* and the *condictio sine causa specialis* in Roman law.

(2) Explain the role the *negotium* requirement played in the application of the *condictio sine causa specialis* in Roman law.

(3) Explain the influence the disappearance of the *negotium* requirement had on the *condictio sine causa specialis* in Roman-Dutch law.

(4) Discuss the distinction between the application of the *condictio indebiti* and the *condictio sine causa specialis* as expounded in the *Govender* case.

(5) Distinguish, with reference to case law, between *bona fide* possessors who received the thing *ex causa onerosa* and *ex causa lucrativa*.

FEEDBACK

(1) See 7.2.

(2) See 7.2.

(3) See 7.3.

(4) See 7.4.

(5) See 7.4. Refer in your answer to the decision in *Van der Westhuizen v MacDonald and Mundel* 1907 TS 933.

FEEDBACK ON PRACTICAL SCENARIOS

Scenario 1

This situation is provided as one of the classical examples of the field of application of the *condictio sine causa specialis*. Upon proper analysis, however,

this 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. It must then also be deemed that A has abandoned his ownership of the TV set, which now belongs to B.

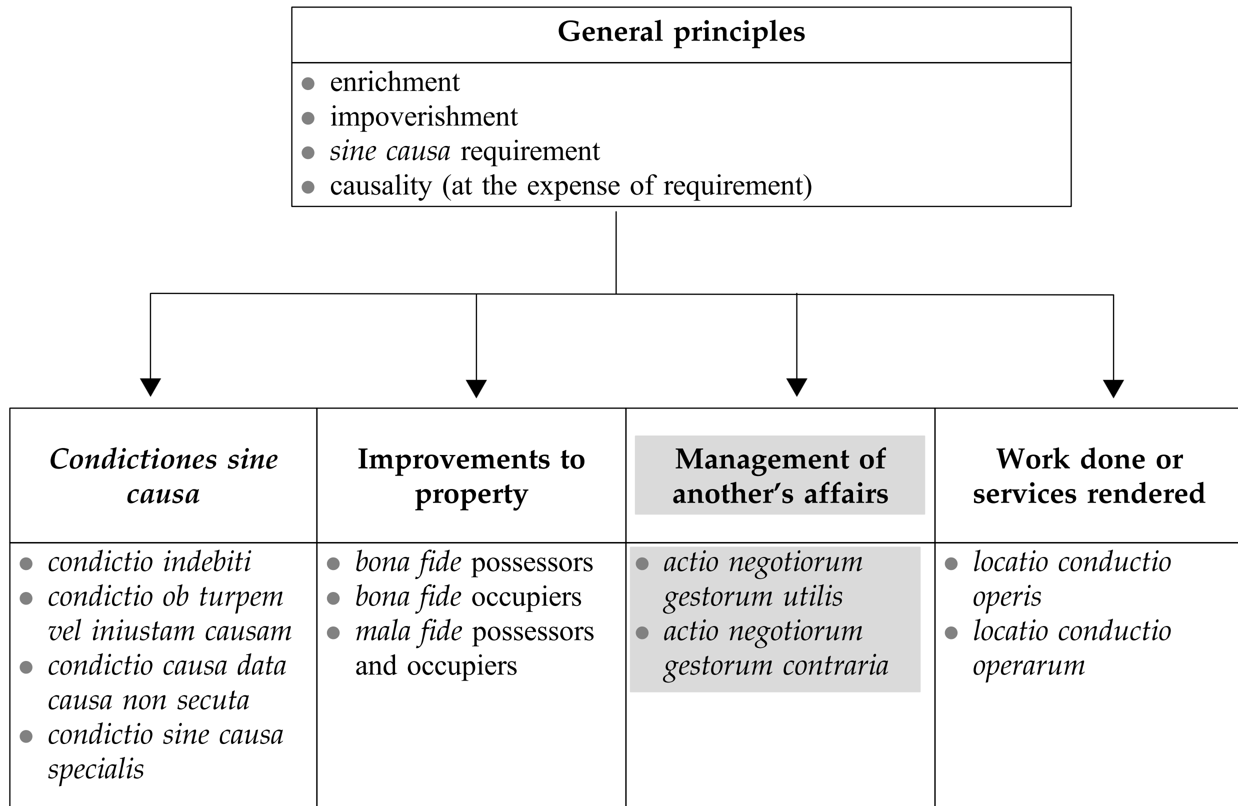
(b) Alternatively, it can be argued that the agreement between A and B was concluded on the assumption that the TV set was lost, and that the agreement is therefore void because it was based on a false assumption. This is a more satisfactory explanation. In that event, however, the *condictio indebiti* would be the more appropriate action as the payment was not due when it was made.

Scenario 2

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

STUDY UNIT 8

NEGOTIORUM GESTIO



OVERVIEW

In this study unit you will study the *actio negotiorum gestio* or the so-called action for management of affairs. This 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: management of the affairs of another which gives rise to the *actio negotiorum gestorum contraria* (or true management) and management of the affairs of another which gives rise to the *actio negotiorum gestorum utilis* (an extended form of the *contraria* action, but based on enrichment).

PRACTICAL SCENARIOS

Practical scenario 1

A notices that the prize stud bull of his neighbour B is in serious distress. He 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 R3 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?

Practical 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 be successful? Would it make any difference to your answer if the reason why D did not pay E was a dispute between D and E about R10 000 of that amount?

LEARNING OBJECTIVES

After completing this study unit you should be able to

- discuss the requirements set in Roman law for the true management of affairs action
- discuss the two changes that took place in the application of the *negotiorum gestio* in Roman-Dutch law
- discuss the requirements for the true *actio negotiorum gestorum* in 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 in *ABSA Bank v Stander* for the extended *actio negotiorum gestorum*

RECOMMENDED READING (OPTIONAL)

Eiselen & Pienaar 181–182
Lotz *Lawsa* 75–76
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 (OPTIONAL)

De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 41–42 79 83 85 191–193 213–218
Leech ''Enrichment at whose expense? A postscript'' 1994 *THRHR* 695–703
Rubin *Unauthorised administration in South Africa* (1958) 38 45
Sonnekus ''Goedgelowige paneelklopper beloon met verrykingseis teen derde'' 1997 *TSAR* 383–390
Van Zyl *Die saakwaarnemingsaksie as verrykingsaksie in die Suid-Afrikaanse reg* (1970) 28 97–98 148–169 175
Bouwer v Saambou Bank Bpk 1993 (4) SA 492 (T)
Colonial Government v Smith & Co (1901) 18 SC 380
Gouws v Jester Pools 1968 (3) SA 563 (T)
Harman's Estate v Bartholomew 1955 (2) SA 302 (N)
Herbert Erking (Pty) Ltd v Nolan 1965 (2) PH 38 (T)
Knoll v SA Flooring Industries Ltd 1951 (1) SA 404 (T)
Klug and Klug v Perkin 1932 CPD 402
New Club Garage v Milborrow and Son 1931 GWL 86
Nortjé en 'n Ander v Pool NO 1966 (3) SA 96 (A)

Pretorius v Van Zyl 1927 OPD 226
Shaw v Kirby 1924 GWL 33
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

It can happen that someone incurs expenses or loses income while he is taking care of the affairs of another or is furthering the interests of another. This 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 impoverishment or the enrichment of the *dominus*, whichever is the smallest. The distinction between these two actions will become clear once you have studied the rest of this study unit.

8.2 ROMAN LAW

application

In Roman law where one person, the *gestor*, acted in the interests of another, the *dominus*, without instructions to do so, a quasi-contractual relationship was established between the parties. The *dominus* was obliged, in consequence of the service rendered, to compensate the *gestor* for expenses incurred in respect of his interests; and the *dominus* was also granted an action against the manager of his affairs to account for whatever was owed to the *dominus* as well as for damages for negligence.

requirements for true management of affairs action

The requirements for the *gestor*'s *actio negotiorum gestorum contraria* were the following:

in the interests of the *dominus* without mandate

- The *gestor* had to have acted in the interests of the *dominus* without instructions to that effect.
- The *gestor* must have acted without a mandate and in a manner that was not contrary to an instruction of the *dominus*. It was not necessary that the *gestor* should have known that he was acting without a mandate and, if he acted believing that he was doing something he was authorised to do, he still had an action based on management of affairs.

gestor must act reasonably

- The *gestor*'s action had to be reasonable, that is *utiliter coeptum*. The *gestor*'s action would be reasonable if the *dominus* had benefited by the action and if the *dominus* himself would probably have acted in the same way.

gestor had to act *animo negotia aliena gerendi*

- The *gestor* had to act *animo negotia aliena gerendi*, that is with the intention of acting in another's interests. If someone acts with the intention of promoting his own interests but his act result in the interests of another being served, he is nevertheless not the manager of affairs and he enjoys no right of action to recover his costs. This requirement explains why the *bona fide possessor* in Roman law had no claim for improvements on the

grounds of *negotiorum gestio* — he acted with the intention of promoting his own interests.

gestor should not act *animo donandi*

- The *gestor* should not have acted *animo donandi*, that is with the intention of rendering services free of charge.

undeveloped enrichment action

According to De Vos (at 41–42), the *gestor*'s action was not an enrichment action, since the basis of the obligation of the *dominus* was not unjustified enrichment, but the fact that the *gestor* had been **impoverished** in the interests of the *dominus*. Whether the owner was in fact enriched or not was not considered. It was therefore not a true enrichment action. In view of the requirement that the action of the *gestor* had to be reasonable, and the fact that his conduct was reasonable, *inter alia*, if the *dominus* himself would probably have acted in the same way, it would appear as if we are dealing with unjustified enrichment, that is to say, enrichment by way of expenses saved. If the *dominus* would probably have acted exactly as the *gestor* did, then one could argue that there was enrichment in the form of expenses saved, even if the *gestor*'s action in no way increased the value of the property, interests or estate of the *dominus*. Whether or not the *actio negotiorum gestorum contraria* was in fact an undeveloped enrichment action is a point of contention.

two exceptions

There were, however, two instances acknowledged as enrichment actions where the claim of the *gestor* was limited to the extent of the enrichment of the *dominus*, that is where a minor's interests were promoted and where the *gestor* acted with his own interests in mind. Van Zyl (at 28) describes these latter two instances as falling within an extended *negotiorum gestio*, an enrichment action with the same functions and effect as any of the other well-known enrichment actions.

8.3 ROMAN-DUTCH LAW

Roman law became Roman-Dutch law with only a few changes. The following two changes in particular need to be mentioned:

first: *gestor* acting against prohibition

- At Roman law the *gestor* had no action for compensation if he acted against a prohibition by the *dominus*. At Roman-Dutch law there was a difference of opinion: writers such as Huber and Van der Keessel followed Roman law, but Groenewegen and Voet held the view that the *gestor* in such a case had an action for his *impensae necessariae* and *impensae utiles*.

second: *gestor* believes he is acting in his own interests

- The Romans denied an action to a person who managed the affairs of another while under the belief that he was busy managing his own affairs, but the Roman-Dutch writers did give him an action. This was an enrichment action which made its appearance under the name of an action for the management of affairs. This second change needs further clarification.

bona fide and *mala fide gestor*

The *bona fide* possessor's claim for compensation was seen as an *actio negotiorum gestorum utilis*, (or what Van Zyl calls an ''uitgebreide saakwaarnemingsaksie''). Although one would expect that, as a result of the disappearance of the *negotium* requirement, the *bona fide* possessor would have been able to invoke the *condictio sine causa specialis*, this was not the case, presumably because the *condictio* could not be instituted in order to recover the value of a *factum* (De Vos 85). Van Zyl (at 97–98) states that the most familiar forms of the ''uitgebreide saakwaarnemingsaksie'' (extended *actio negotiorum gestorum*) were the actions of the *mala fide gestor* who acted in his own interests and the actions of the *bona fide gestor* who promoted the interests of another, thinking that he was acting in

his own interests. In all the phases of development investigated by Van Zyl, this action was used to compensate a **possessor** who had effected improvements on another person's land — not only the *bona fide possessor* but also the possessor who had acted in bad faith.

indirect enrichment

The *actio negotiorum gestorum* was extended to cases of indirect enrichment, that is where the *gestor* and a third party created an obligation which would benefit the *dominus* and where performance by the *gestor* to the third party did not take place. in the above-mentioned instance the third party was allowed to act directly against the enriched *dominus*. Here the third party had no intention of benefiting the *dominus*, so that there could be no question of a contract in favour of the *dominus*. In Van Zyl's opinion the ideal remedy in these circumstances would be the extended *actio negotiorum gestorum*, that is the third party would simply be looked upon as a *gestor* who acted in the interests of another, thinking that he was acting in his own interests, which was an instance in which this action was always available. Van Zyl concludes his discussion by stating that the extended *actio negotiorum gestorum* developed into an independent enrichment action during the Middle Ages.

8.4 APPLICATION IN SOUTH AFRICAN LAW

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 that other person's interests in a reasonable manner without the *animus donandi*, and without being forbidden to manage the interests of the person (the *dominus*) on behalf of whom he is acting.

8.4.1 True management of affairs action *(actio negotiorum gestorum contraria)*

requirements

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

- The *gestor* must perform the service without an instruction; if he acts on the instructions of the *dominus* he would be a mandatory.
- The *gestor* must act *utiliter coeptum* — reasonably, in the interests of the *dominus*.
- The *gestor* must have the intention to act in the interests of the *dominus*, that is the *animus negotia aliena gerendi*. This means that if the *gestor* thinks he is doing something in his own interests he is not a *gestor*.
- The *gestor* must not have intended to act free of charge; that is not *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 expenses, even if the *dominus* did not benefit thereby, that is was not enriched. Generally, because the expense is *utiliter coeptum* it may well also be a necessary expense and therefore an expense saved, and in this sense (not overlooking the fact that the *quantum* of

enrichment is assessed at the time when an enrichment action is instituted) it may coincide with the amount that could be claimed in 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 he has commenced
- to exercise the necessary care in his management
- to account for anything that he acquires by virtue of the management of affairs for the *dominus*
- to surrender to the *dominus* all that the latter is entitled to

rights of the *gestor*

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

- The *gestor* is entitled to compensation for all expenses and disbursements properly made for the purposes of the management of affairs. This will include amounts paid for the purchasing of materials required for the management of affairs as well as the remuneration he paid for the services and work performed by others in carrying out the task assumed by him. Today, it is also argued that the *gestor* also has a right to recover the loss of income he suffered as a result of the management of affairs (ie the income he could have earned had he 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 has incurred in the management of the affairs and that have not yet settled, or he can claim that the *dominus* pay them directly to the creditors, or otherwise give him 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 an enrichment action only in exceptional circumstances (De Vos 213–218). These exceptional circumstances form the subject of Van Zyl's thesis. They are also important in respect of the further development of our law of enrichment liability, since they have been relied on in recent cases in circumstances where no action would previously have lain. These cases are discussed below. However, before these exceptional circumstances are discussed, it is important to distinguish clearly the basic differences between the normal or true *actio negotiorum gestorum contraria* and the exceptional circumstances which give rise to enrichment actions. These differences can be explained as follows:

extent of claim

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

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

in whose interest did he act

- One of the necessary requirements for the true *negotiorum gestio* is the *animus negotia aliena gerendi*. This requirement automatically creates a category of unusual instances where this intention of the *gesto*r is absent; it is here that the enrichment concept comes to the fore. In this regard De Vos (at 41 79 191–193) states that it has been demonstrated that where someone is managing the affairs of another but only in his own interest, he will have an action, but it will be restricted to the true enrichment.

common law

In this respect D 3 5 6 3 is relevant (Munro's translation):

> We may add that if a man has managed my affairs with no thought of me, but for the sake of gain to himself, then, as we are told by Labeo, he managed his own affair rather than mine (and, no doubt, a man who intervenes with a predatory object aims at his own profit and not at my advantage): but nonetheless, indeed all the more, will such a one too be liable to the action on *negotia gesta*. Should he himself have gone to any expense in connection with my affairs, he will have a right of action against me, not to the extent to which he is out of pocket, seeing that he meddled in my business without authority, but to the extent to which I am enriched.

ACTIVITY

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

FEEDBACK

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

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

Van Zyl (at 148–169) discusses four exceptional circumstances where the true *negotiorum gestio* is not applicable, but nevertheless an enrichment action is allowed. He calls it the extended management of affairs action and discusses it in full under the following headings:

- *The liability of a minor*

liability of a minor

Where the *gestor* has managed the affairs of a minor, the minor is liable only to the extent of his enrichment (*Pretorius v Van Zyl* 1927 OPD 226 230). This rule has been criticised by De Vos (at 214), because he argues

that the *gestor* must enjoy his full right of recourse also where the *dominus* is a minor.

- *The gestor acts against the prohibition of the dominus*

gestor acts against prohibition

Until recently there was some doubt about whether our courts today would grant a right of recovery to an impoverished person who had enriched another against that other's expressed 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 there is uncertainty 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 and stored them in a safer place. The plaintiff claimed the expenses incurred in connection with the removal and storage of the defendants' explosives. *In casu* the plaintiff was not a *negotiorum gestor*, having acted contrary to the prohibition of the defendants. The court, however, following 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 Oudtshoorn

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

Standard Bank v Taylam

During 1979 the 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) and after a very thorough examination of the authorities, the court came to the conclusion that the fact that a *gestor* had acted contrary to the expressed wishes of the *dominus* did not, under all circumstances, constitute a bar to an enrichment action by the *gestor*. The court was at pains, however, to stress (on 392) 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 has acted against the expressed wishes of the *dominus* will have to show that there was some **just cause** for disregarding those wishes. This decision in the *Taylam* case should be followed rather than the *obiter dictum* in the *Odendaal* case.

- *The gestor who bona fide administers the affairs of another, thinking he is acting in his own interests*

thinks *bona fide* he is acting in own interest

According to Rubin (at 38), the principle of enrichment is clearly applicable in these cases. It is submitted, therefore, that our law would permit a *gestor* in these circumstances to recover on the basis that the *dominus* has been unjustly enriched at his expense. In *Klug and Klug v Penkin* 1932 CPD 402 this action was successful, although it was not expressly called an extended *negotiorum gestio*.

- *The gestor who mala fide acts in his own interest*

acts *mala fide* in own interest

Van Zyl (at 153–159) points out that our modern writers and our case law are divided on the question whether or not the extended *negotiorum gestio* is available in our present-day law where a *mala fide gestor* acts in his own interest.

Shaw v Kirby

In *Shaw v Kirby* 1924 GWL 33 36 the plaintiff, without instruction and with the intention of benefiting himself, discharged certain of a debtor's debts. Later he claimed these expenses from the debtor. Mainly in reliance on English decisions, the court dismissed the claim on the ground of the absence of any agreement between the plaintiff and the debtor that the plaintiff would discharge the debts and that the debtor would later compensate him. Thus without any further investigation the court apparently accepted that, in the absence of such an agreement, no other possible ground of recovery, for example unjustified enrichment, could exist.

Harman's Estate v Bartholomew

In *Harman's Estate v Bartholomew* 1955 (2) SA 302 (N) as well, the court refused to grant a third party who had discharged the debt of another a right of recovery against the released debtor on the ground of undue enrichment. Milne J stated (on 308):

> But I do not think that a simple unauthorised payment by B of a debt owed by A to C is a case which is contemplated by the authorities relied upon. If the position is that the debt is, as a result of such payment, merely owed by A to B instead of to C, there is no necessary change for the better in the situation of A, the debtor; *prima facie* he has not gained at all.

Van Staden v Pretorius

In *Van Staden v Pretorius* 1965 (1) SA 852 (T) an interesting case presented itself. X bought a plot from Y and paid the purchase price. The land was not yet registered in X's name. Y's creditors threatened to have the land sold in execution of Y's debts. X, fearing that the land would be sold, paid Y's creditors. Then he claimed from Y. The court decided that X could not succeed in his claim, because there was no *mandatum* in terms of which he had paid, and he was not a *gestor* (he had acted in his own interests). Y's enrichment as a result of the discharge of his obligations was in itself no ground for a claim. The judge supported his argument by, *inter alia*, the judgment in *Shaw v Kirby*.

criticism of *Shaw*, *Bartholomew* and *Van Staden* cases

This argument, it seems, puts the cart before the horse! What it amounts to is that if an enrichment action against an enriched person is granted, he is no longer enriched and if a person is not enriched, he cannot be held liable on the ground of undue enrichment! The purpose of an enrichment action is precisely to wipe out the enriched person's undue enrichment, and when an action has this very effect it cannot be said that the action should not be granted precisely for this reason. In the example given by the judge in the *Bartholomew* case it is clear that A has been enriched by B's actions (A's obligation to C has been discharged), that B has been impoverished and that the enrichment and impoverishment are unjustified. B should be able to succeed in an enrichment action against A.

discharging a debt

The true *negotiorum gestio* may take the form of the discharging of the debt of the *dominus* by the *gestor*. We already know from our study of the law of obligations that a debtor's obligations can validly be fulfilled by a third party, even though the debtor has no knowledge of the fulfilment. The question which arises immediately is whether the third party in his turn has a right of recovery against the former debtor whom he has benefited. This will depend on the relationship between the third party and the debtor. The third party may have paid at the request of the debtor; in this case he will be able to act against the debtor for compensation on the grounds of the *mandatum*. The third party may possibly also recover from the debtor on the grounds of *negotiorum gestio* or, if his action does not meet all the requirements for *negotiorum gestio*, on the

grounds of undue enrichment. (Bear in mind that in practice it may make a great difference whether someone institutes an action on the grounds of *negotiorum gestio* or on the grounds of undue enrichment, which Van Zyl calls the extended management of affairs action.) When a third party, with the primary aim of promoting a debtor's interests (the requirement of *animus negotia aliena gerendi*), without having been instructed by the debtor and without the debtor's knowledge, pays the debt, he may recover the amount he has paid (ie his expenses) from the debtor on the ground of *negotiorum gestio*.

example

A good example is the case of a surety who pays a debtor's debts. Even though he does not obtain a cession of the creditor's claim against the debtor, he can act against the debtor on the grounds of *negotiorum gestio*, provided he accepted his obligations as surety without the debtor's consent. If he accepted the obligation of suretyship with the debtor's consent, he can act against the debtor with the *actio mandati*. In practice, however, it is desirable for the surety to obtain a cession of the creditor's claim against the debtor. If there is more than one surety, the surety who pays the debtor's debt has a right of recovery against the other surety or sureties, even though he has not obtained a cession of the creditor's claim. Since the surety who pays did not accept his obligations as surety or pay the debtor's debts primarily in the interests of the co-sureties, he therefore cannot be regarded as a *negotiorum gestor* for the co-sureties. According to our case law, the source of the surety's right of recovery is simply those principles of the law of obligations which relate to suretyship; he has the right of recovery *de iure*.

discharges debt in own interests

What is the position, however, if some person who, unlike a surety, is under absolutely no obligation to pay a debtor's debt, nevertheless goes and discharges the debt in his own interests or against the will of the debtor? In the first place, it is clear that he cannot have acted on the grounds of *negotiorum gestio*; a person who benefits another in his own interests or against the will of the other cannot be acting on the grounds 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 was held (other than in *Shaw v Kirby*, *Harman's Estate v Bartholomew* and *Van Staden v Pretorius* referred to above) that in such cases the impoverished person can sue the enriched person on the grounds of enrichment. The underlying idea was that the impoverished person cannot recover his expenses as a *gestor*, but can recover the (possibly) lesser amount of the enriched person's enrichment. Voet (3 5 11) is in favour of an enrichment action in a case where the impoverished person cannot institute an action on the grounds of *negotiorum gestio* because he acted in opposition to the prohibition of the enriched person:

> But since it seems unfair that one person should be enriched to the loss of another, it seems that at the present day it ought rather to be admitted that recovery is allowed at least so far as the principal was enriched thereby — on the analogy of one who incurred expenses when he was a *mala fide possessor* ... (Gane's translation).

improper motive involved

We have already stated that where the plaintiff, with the primary aim of promoting his own interests, has discharged the defendant's debt, he ought in principle to be able to sue the defendant on the grounds of undue enrichment. Suppose, however, that the plaintiff paid the defendant's debt with the motive of making the defendant, who was possibly in financial difficulties at the time, his debtor, and of making his life miserable by insisting on compensation. One feels that it is fair that a plaintiff who has acted with such improper motives should have no action. One may argue that in a case where one person with improper motives enriches another, the enrichment is not unjustified.

enriched person must accept enrichment

If the enriched person states that he accepts the enrichment, however, the impoverished person should be able to act against him. In a case in which one person enriches another against his will, it should be accepted that such a person is acting at his own risk, unless the enriched person accepts his enrichment. In *Nortjé v Pool* 1966 (3) SA 96 (A) Rumpff J stated that a person enriched against his will is liable only if he accepts his enrichment. The nonliability may be explained by accepting that in such a case the enrichment is **justified.** If one person has enriched another by his actions without having acted against the will of the enriched person or without any improper motives, the enriched person ought to be liable, no matter how unwelcome or unpleasant the enrichment may be to him. In *Herbert Erking (Pty) Ltd v Nolan* 1965 (2) PH 38 (T) Steyn J stated that if A has for some reason erected, say, a statue on B's land, thereby enriching B, B will not be liable to A on the ground of unjustified enrichment. We can agree that if A has acted with improper motives or against B's will and B has rejected his enrichment, B's enrichment is justified. If this were not the case, however, B ought to be liable. In such a case, of course, he could discharge his liability by permitting A to remove the statue. If, however, it is not possible for B to give up his enrichment (A has, for example, carved out a statue on a rocky hill), B should be liable. Such cases occur very seldom in practice, however.

Odendaal v Van Oudtshoorn

A forefront decision on the topic of acknowledging the extended *negotiorum gestorum* as an independent enrichment action in South African law is the important judgment of *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 (T) which was decided on exception. Here we find a welcome divergence from the view held in our positive law that the person who meets another's personal obligation in **his own interests** has no right of recourse against the other party. In this 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, A's aim was to further his own interests. A reclaimed from B the amount paid to C. If A had paid under instructions from B, he would have been able to claim the amount on the grounds 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 expenses from B on the grounds of *negotiorum gestio*. However, what is the position where A pays B's debt without instructions to do so, and in order to further his own interests? The court, rejecting *Shaw v Kirby* and *Van Staden v Pretorius*, held that A can in fact claim from B on the grounds 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 this positive authority, the judgment must be welcomed from the point of view of sound legal theory as well. *In casu* A's case met all the requirements for a claim for undue enrichment: B was enriched at the expense of A by the extinction of his debt to C, A was impoverished in consequence of the payment, and B's enrichment was *sine causa*. Therefore there should be no reason why an action based on undue enrichment should be refused.

reasonable in the light of surrounding circumstances

The court touched on the question whether it is sound legal policy to grant an action to a person acting in his own interests. An interfering person could perhaps place a debtor in an invidious position (on 442). However, the court held, quite rightly, that every individual 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 is inspired by evil motives), the court will probably find that the enrichment was not undue and thus refuse to grant an action. The court also held the view that the matter should probably be settled by means of legislation. With respect, this 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 it is justified.

ACTIVITY

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

FEEDBACK

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

8.4.3 True nature of the extended action

occupiers and holders

Van Zyl (at 160–161) is of the opinion that the extended *actio negotiorum gestorum* is in fact the action which is granted to occupiers of land and that this action should likewise logically apply to the *detentor* or holder of another's thing. He finds support for his view in the decision of *Gouws v Jester Pools* 1968 (3) SA 563 (T), where one of the questions which arose was whether the plaintiff could rely on the action of the *bona fide* possessor. In this connection Jansen J (on 575) decided that because of the *Nortjé* decision, the action of the occupier must now be seen merely as a modern extension of the specific action given to the *bona fide* possessor in Roman-Dutch law, which in turn could be construed as an extended *actio negotiorum gestorum* (therefore based on *quasi negotiorum gestio*, in the terminology originally adopted above). The court further acknowledged that this action was also available to the *bona fide detentor*.

extended *negotiorum gestio* not for all instances

We must guard against trying to use the extended *negotiorum gestio* for all instances where the enrichment requirements are present but where our law does not always acknowledge a specific action. This would be a short-sighted policy, since new instances will continually arise in the future where doubts about the availability of an action will exist until such time as a court may decide that an extended *actio negotiorum gestorum* will indeed lie in the circumstances. Furthermore, not only would extending the *actio negotiorum gestorum* further fail to solve all of the current problems in our law relating to liability for enrichment, but it might also inhibit the logical and much-needed development towards the recognition of a general enrichment action.

The instances of so-called indirect enrichment

indirect enrichment

Under this head the following factual complex is discussed by Van Zyl (at 163–169): B and C conclude a contract as a result of which A is enriched, but there is no question of a contract in favour of a third party or any similar relationship. For some or other reason (eg because of insolvency) B cannot fulfil his obligations to C. The question is whether or not C can act directly against A, who benefited as a result of the obligation (or rather, as a result of a performance flowing from the obligation) between B and C. If C can act, which action is at his disposal?

case law

In our South African law there are a number of decisions where the extended *actio negotiorum gestorum* was applied in similar circumstances, or ought to have been applied. Some of these cases have already been discussed or mentioned in study unit 2 under the at-the-expense-of requirement: *New Club Garage v Milborrow & Son* 1931 GWL 86; *Williams' Estate v Molenschoot & Schep (Pty) Ltd* 1939 CPD 360; *Knoll v SA Flooring Industries Ltd* 1951 (2) SA 404 (T); *Gouws v Jester Pools* 1968 (3) SA 563 (T); and *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 (1) SA 939 (C).

New Club Garage v Milborrow

In *New Club Garage v Milborrow & Son* 1931 GWL 86 the facts were as follows: S rented a vehicle from the defendant to go on a journey. The vehicle broke down on the way and S gave the plaintiff instructions to repair the vehicle. The plaintiff did certain repairs and built certain parts into the vehicle. The plaintiff acted in the *bona fide* but mistaken belief that S was the owner of the vehicle. The defendant requested the plaintiff to return the car, but the plaintiff was willing to do so only after payment of the account. The defendant refused to pay the account, whereupon the plaintiff issued summons against the defendant based upon the *negotiorum gestio*. The court held that the plaintiff had a right to recover his necessary and useful expenses as *bona fide* and innocent possessor of the vehicle.

Williams' Estate v Molenschoot

In *Williams' Estate v Molenschoot & Schep (Pty) Ltd* 1939 CPD 360 the plaintiff entered into a contract with an heir of a deceased estate, to do certain repairs to a house which formed part of the estate. The defendant claimed his expenses for the necessary repairs to the house from the executor of the estate. The plaintiff averred that he had contracted with the heir under the *bona fide* but mistaken belief that the heir had the authority to conclude the contract. The court decided that the repairs had been made without the consent of the executor, but that the plaintiff had acted as *negotiorum gestor* and he could be reimbursed for his expenses.

criticism of *Milborrow* and *Williams' Estate*

The action which was allowed in the *Milborrow* and *Williams' Estate* cases was the *actio negotiorum gestorum contraria*, the true management of affairs action. One of the requirements to succeed with this action is the *animus negotia aliena gerendi*; the intention to act in the interests of the *dominus*, and not in your own interests. It is clear from the facts of both cases that the plaintiff acted in terms of a contract (although the contract was void in the *Williams' Estate* case) with the intention of making a profit from his services. The correct action in both cases should rather have been the *actio negotiorum gestorum utilis* (extended management of affairs action) based on indirect enrichment. Because this action is an enrichment action, the plaintiff would only have succeeded with the amount by which the defendant was enriched. This might possibly have been the same amount, but it would not necessarily have been.

Knoll v SA Flooring

In *Knoll v SA Flooring Industries Ltd* 1951 (1) SA 404 (T) the decision in *Williams'*

Estate was criticised. De Villiers J (on 408A–C) held that the plaintiff in the *Williams' Estate* case should have claimed compensation on the basis of enrichment *(actio negotiorum gestorum utilis)* and not with the true management of affairs action. In the *Knoll* case the plaintiff's claim on the basis of enrichment failed because the plaintiff was a subcontractor and could not prove that the defendant had in fact been enriched.

Gouws v Jester Pools

In *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T) A contracted with B to build a swimming pool which A believed to be on B's property. B disappeared and A sued C, the true owner of the property (and the swimming pool). Jansen J (on 571A–572H) referred to all the above cases and then came to the conclusion that A's conduct in terms of the contract with B did not create a true *negotiorum gestio* against C, since A's intention could not be described as *animus negotia aliena gerendi*. Jansen J (on 573A–H) then referred to the possibility that A could sue C on the basis of enrichment. With reference to the decision in *Knoll v SA Flooring* and academic writings, Jansen J (on 573H–574H) decided:

> There is, therefore, ample authority for holding that, in the problem as stated, A would not have an action against C on the basis of enrichment if C were bound to B under contract, and A was a sub-contractor having contracted with B. Whether A knew that he was a sub-contractor or not would be immaterial: an action for enrichment would be excluded on the basis that C's enrichment flowed from his contract with B and was, therefore, not without cause ... On this basis A, in the statement of the problem, has no action based on enrichment against C. C is enriched, not at the expense of A, but at the expense of B.

ABSA Bank v Stander: facts

ABSA Bank t/a Bankfin v Stander t/a CAW Paneelkloppers 1998 (1) SA 939 (C) is the latest decision on the relevance of the extended *actio negotiorum gestorum*. Sonnekus (1997 *TSAR* 383–390) finds the decision strange in the light of the Appellate Division decisions in the *Buzzard* and *Singh* cases (see study unit 2). In *ABSA Bank* the facts were as follows: K purchased a vehicle on instalments. The instalment sales agreement provided that ownership would not pass to K before the full amount had been paid. The seller of the vehicle ceded its 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 (Stander) for repair. Stander was under the impression at all relevant times that B was the owner of the vehicle and that he would pay for the repairs. B disappeared and Stander retained possession of the vehicle. Bankfin instituted an action for *rei vindicatio* against Stander and Stander instituted a counterclaim for the cost of the repairs to the vehicle. He averred that the cost was reasonable, necessary and useful and had increased the value of the vehicle by the same amount. Stander therefore averred that Bankfin had been unjustifiably enriched at his 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.

ABSA Bank v Stander: influence of insolvency

Van Zyl J studied the common law in his decision as well as the opinion of many writers on this point. He referred (on 954G–955C) to De Vos's main objection against allowing an action in cases of indirect enrichment (which is relevant *in casu*), namely that it would have been in conflict with the principle of *paritas creditorum* if B were to become insolvent and A were to have a choice between contractually suing the insolvent estate of B or suing C on the basis of

unjustified enrichment. In the first case he would only have had a concurrent claim against the insolvent estate, whereas in the second he would have been able to claim the full amount owing on an enrichment basis. If he 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. Although Van Zyl J accepted the merits of this argument, B was not insolvent *in casu*, he had merely disappeared without a trace. Van Zyl J added, 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. It would have been wrong, according to Van Zyl J, to apply the *paritas creditorum* rule rigidly and without qualification (Leech 1994 *THRHR* 701).

ABSA Bank v Stander: actio negotiorum gestorum

Van Zyl J then come to the following conclusion (on 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.

And further (on 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 to recover the amount by which ABSA has been unjustifiably enriched at his expense.

Van Zyl on extended *negotiorum gestio*

Van Zyl (at 175) makes the following suggestion 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 unjust enrichment cannot, in my opinion, be recommended at the present stage.

development of extended *negotiorum gestio*

Van Zyl's conclusion does not offer a solution to the problems and uncertainty resulting from the *Nortjé* decision. At most it is a temporary aid in certain circumstances, and it cannot be seen as opening the door which was closed by the Appellate Division in the *Nortjé* case. Legislation is likewise no solution, as this would lead to inflexibility in a field where flexibility is most necessary. It is to be hoped that what was being developed before the *Nortjé* case was decided will be resumed after a brief pause, in which time the requirements for enrichment liability can crystallise and provide more certainty. It is felt that this development should be continued by our courts' re-examining the particular requirements which apply in specific instances, with the eventual result that these requirements are discarded.

Bouwer v Saambou

For the sake of convenience, we may refer here to the decision in *Bouwer v Saambou Bank Bpk* 1993 (4) SA 492 (T), where the court found that there is a general exception, according to common law, to the rule that a debtor is discharged only if he makes payment to his own creditor. This will be the case where a debtor has an acceptable reason for believing that a particular act, even though it has not actually been authorised by his creditor, will amount to a discharge of his obligation towards his creditor, and he acts *bona fide* in this belief and his creditor's estate is enriched thereby, which discharges the debtor to the extent that the creditor's estate is in fact enriched. Even though this exception seems to be related to the extended *negotiorum gestio*, its true basis is unclear.

SELF-EVALUATION

(1) Discuss the requirements set in Roman law for the true *actio negotiorum gestorum*.

(2) Discuss the two changes that took place in the application of the *negotiorum gestio* in Roman-Dutch law.

(3) Discuss the requirements for the true *actio negotiorum gestorum* in South African law.

(4) Name the duties and rights of the *gestor* in the application of management of affairs.

(5) Distinguish between the true *actio negotiorum gestorum* and the enrichment action of the manager of affairs.

(6) Discuss, with reference to case law, the four instances where the extended *actio negotiorum gestorum* finds application.

(7) Discuss in detail the discharging of someone else's debt as a form of management of affairs with reference to the decision in *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 (T).

(8) Discuss in detail the importance of the decision in *ABSA Bank v Stander* 1998 (1) SA 939 (C) in respect of the application of the extended *actio negotiorum gestorum* in South African law.

(9) What is the true nature of the claim of *bona fide* possessors and occupiers for improvements to the property of others?

FEEDBACK

(1) See 8.2.

(2) See 8.3.

(3) See 8.4.1.

(4) See 8.4.1

(5) See 8.4.1. Refer in your answer to the extent of the various claims and the parties in whose interest action has been taken.

(6) See 8.4.2. 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 v Van Oudtshoorn*; *New Club Garage v Milborrow*; *Williams' Estate v Molenschoot*; *Knoll v SA Flooring*; *Gouws v Jester Pools*; and *ABSA Bank v Stander*.

(7) See 8.4.2.

(8) See 8.4.2. Refer specifically in your answer to the test that should be applied, according to Van Zyl J, in each case.

(9) In this answer you must discuss Van Zyl's viewpoint critically. He regards those actions as part of the *utilis* action. Do you agree with him? Formulate your own viewpoint.

FEEDBACK ON THE PRACTICAL SCENARIOS

Practical scenario 1

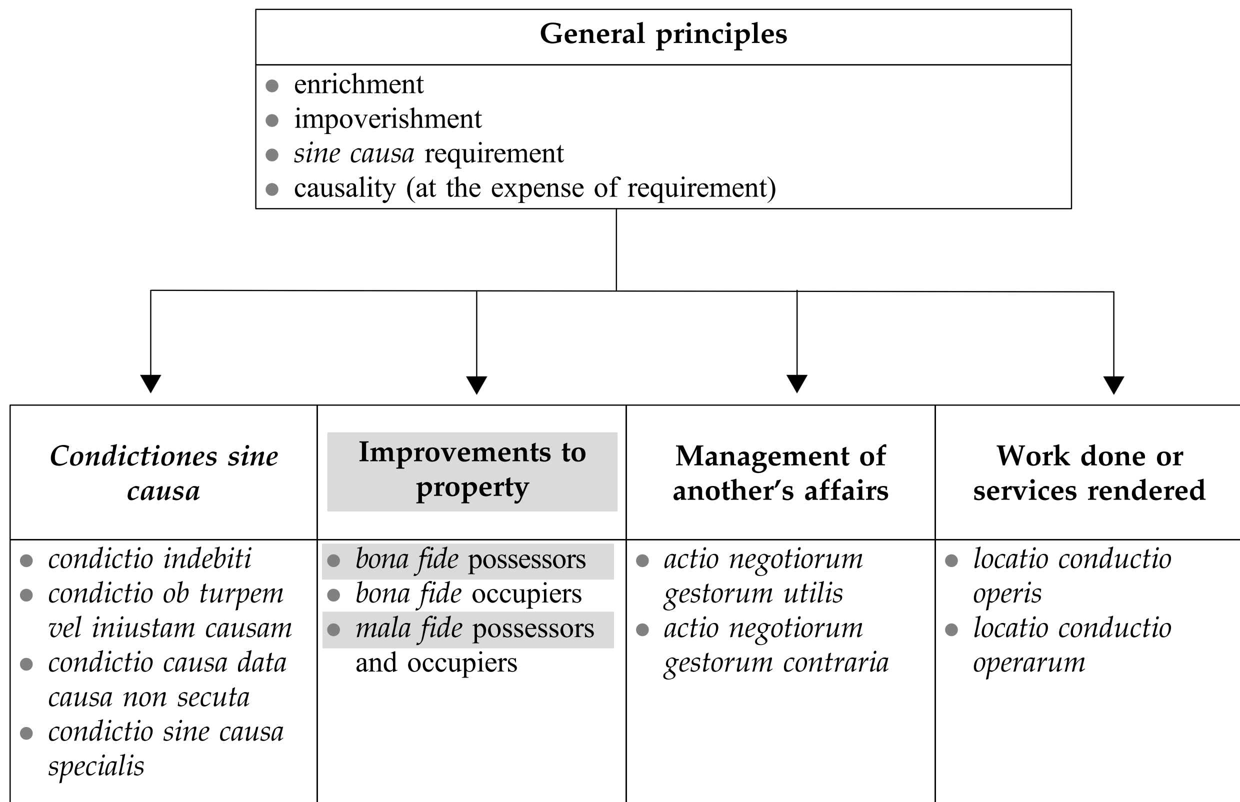
The important factor to consider in this case is the fact that A is not acting in his own interests but out of concern for the interests of his neighbour. This would clearly fall into the field of application of the *contraria* action, provided that the other requirements are also met. These requirements 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 full expenses, whether his actions were successful or not. You must be able to explain why this is so.

Practical scenario 2

This is clearly a case where the *utilis* action would be used because the party acted in his **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 that case 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 before the dispute has been resolved? And 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 there is a dispute 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 in order to be successful with the full claim. Because the dispute only affected part of the claim, there is no doubt that the defendant has been enriched by at least R40 000.

ENRICHMENT BY MEANS OF IMPROVEMENTS AND ATTACHMENTS *(ACCESSIO)*

UNJUSTIFIED ENRICHMENT LAW



OVERVIEW

In this study unit we will discuss enrichment by means of improvements and attachments *(accessio)* in common law, as well as *accessio* by possessors in modern South African law.

These are the actions Van Zyl believes to be part of the *actio negotiorum gestorum utilis*, discussed in study unit 8. However, in case law and other treatises on the law of things, these actions have always been treated as separate actions. Nothing turns on this and we will follow the accepted exposition.

PRACTICAL SCENARIOS

Scenario 1

A owns a farm in the Thabazimbi district. He bought the farm 4 years ago. There is a fence between A's farm and B's neighbouring farm which had been erected 20 years before. Both A and B are unaware of the fact that the fence was put in

the wrong place and apparently included a piece of B's land in A's farm. A has built a hunting lodge at an expense of R1.5 million on this piece of land. He has also built a dam (at a cost of R50 000) and a borehole (R20 000) on this piece of land. He has repaired the house on the property at a cost of R25 000. At the entrance to the property he erected a lavish gate (R30 000). B has now found out that the land on which all of these improvements have been effected actually belongs to him and has lodged an *actio rei vindicatio* for the return of the land. A has had two crops from the land realising a net profit of R240 000. A third crop is standing ready to be harvested (estimated value R140 000; costs involved in planting and managing the crop: R30 000). Advise A on whether he can reclaim any of his expenses and on any defences he may 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 travelling in the Northern Cape, the vehicle broke down in the town of Springbok. D requested Springbok Motors to repair the vehicle. Springbok Motors indicated that the repair costs would be R9 000. After 3 days of waiting, D rented another vehicle and 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. 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: repartitioning of offices — R40 000; painting offices — R30 000; upgrading bathrooms — R20 000; new carpeting throughout — R30 000; repair of the roof which was leaking — R25 000; installation of new air-conditioning units — R35 000. Shortly after all of these costs were incurred, F terminated the lease with three months' notice as he is entitled to do under the contract. Advise E 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 OBJECTIVES

After completing this study unit you should be able to

- distinguish between cases where movable things are attached to other movable things, and cases where movable things are attached to immovable things
- discuss the various positions in Roman law of the *bona fide* and *mala fide* possessor after attachment
- explain the position of the following persons in respect of *accessio* in Roman-Dutch law:
  - — the *bona fide* possessor
  - — the *mala fide* possessor
  - — the *fiduciarius*
  - — usufructuary
  - — occupiers
  - — lessees of land
- briefly state how the South African law on *accessio* developed from our common law
- describe the *bona fide* and *mala fide* possessor

- explain in detail, with reference to 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 (OPTIONAL)

Eiselen & Pienaar 211–212
Lotz *LAWSA* 77–84
Bellingham v Bloommetje 1874 Buch 36
Lechoana v Cloete and Others 1925 AD 536
Weilbach v Grobler 1982 (2) SA 15 (O)

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 49–56 85 98–103 105–106 225–226 230–233 236–238 247
Van Warmelo *'n Inleiding tot die studie van die Romeinse reg* (1957) par 384
Acton v Motau 1909 TS 841
Boikhutsong Business Undertakings (Pty) Ltd v Grobler NO 1988 (2) SA 676 (BA)
Brunsdon's Estate v Brunsdon's Estate and Others 1920 CPD 159
De Beers Consolidated Mines v London and SA Exploration Co (1893) 10 SC 359
Ex parte Estate Borland 1961 (1) SA 6 (SR)
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)
Meyer's Trustee v Malan 1911 TPD 559
Minister van Wet en Orde v Erasmus 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 & Others v Rademeyer and Others 1968 (3) SA 1 (C)
Standard Kredietkorporasie v JOT Motors h/a Vaal Datsun 1986 (1) SA 223 (A)
Van Wezel v Van Wezel's Trustee 1924 AD 409

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 is whether the owner of the property who has lost his ownership is entitled to claim anything from the owner of the whole. The most obvious possibility is an enrichment claim. In common law, these improvements and attachments *(accessio)* were (and still are today) 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 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 possesses them with the *animus domini*. The common characteristic shared by the *mala fide* and the *bona fide* possessor is that both of them possess with the *animus domini*. Where someone possesses a thing without this mindset, for example where he acknowledges the right of another to the goods, he cannot be a possessor, only an occupier or holder at will, depending upon the circumstances. The position of occupiers and holders at will in South African law will be discussed in study unit 10 below.

9.2 ROMAN LAW

movable to movable

First of all, we must note the case where one movable was attached to another. The owner of the main article, the *maior species*, acquired ownership of the ancillary article as well. After severance of the attachment, that is if the ancillary article was again detached from the main article, the original owner's ownership did not revive. Thus he could not recover his property with the *rei vindicatio*. The owner of the lost ancillary article did have a right to compensation, which was, however, subject to complicated rules. We may accept that his claim for compensation was based on unjustified enrichment, but that this was an undeveloped enrichment action.

movable to immovable

Secondly, we must note the case where a movable was attached to an immovable such as land or a house. The question about where the ownership vested gave rise to many difficulties at Roman law. According to De Vos (at 49), it appears that the owner of the immovable became owner of the attachment, building or structure, but that the owner of the attached material still retained his right of ownership over the attached or built-in material. If the attachment was severed, the owner could recover his material with the *rei vindicatio*. According to Van Warmelo (in par 384), the land and the attachment were regarded as one unit, the owner of which was the owner of the land. Thus the owner of the material lost his right of ownership, but it revived if a severance took place; his ownership was, as it were, suspended for as long as the attachment remained. Without going too deeply into Roman law we may, for the purposes of this module, accept Van Warmelo's view as correct.

right to compensation

As regards the impoverished party's right to compensation in the case of the attachment of a movable to an immovable, we must distinguish between the following two cases, that is (1) where A built with B's materials on A's land, and (2) where A built with his own materials on B's land:

- *A built with B's materials on A's land*

A is *mala fide*
A is *bona fide*

If *A* had effected the attachment *mala fide* B could recover twice the value of his materials with the *actio de tigno iuncto* and he could also vindicate the materials after the attachment had been severed. If A had effected the attachment *bona fide*, B could either institute the *actio de tigno iuncto* or vindicate the materials after severance.

- *A built with his own materials on B's land*

A is *bona fide*

The *bona fide* possessor had no **action** to enforce his claim for compensation against B, but could resist his eviction from B's land with the *exceptio doli* until

such time as B compensated him. Thus A had a *ius retentionis*. However, if A was no longer in possession of the property and had therefore lost his *ius retentionis*, he had in principle no way of enforcing his claim for compensation; as already explained, he could not succeed with the *condictio sine causa specialis*, since there had been no *negotium*; neither could he succeed on the ground of *negotiorum gestio*, since, as already explained, he did not act *animo negotia aliena gerendi*. The *bona fide* possessor's claim for compensation was for his *impensae necessariae*, and for either his *impensae utiles* or the increase in the value of the land, whichever of the two was the lesser. As regards useful improvements, the possessor had the *ius tollendi* (right of removal) if B did not want to reimburse him. A had no right to compensation for *impensae voluptuariae* but only the *ius tollendi*. If the owner of the land was, however, willing to reimburse the possessor for the luxury improvements, A lost his *ius tollendi*. The value of fruits used by the possessor during his possession, minus the costs of production, was subtracted from his claim for compensation for improvements. The value of such fruits was a favourable circumstance which lessened A's impoverishment. The *bona fide* possessor who had already received compensation could still vindicate his materials after severance of the attachment (De Vos 49–54).

bona fide possessor had no action

It is important to remember the following: the *bona fide* possessor had no **action** with which to enforce his right to compensation for improvements but had to enforce it by means of the *exceptio doli* and his *ius retentionis*. The determination of the scope of his claim was subject to complicated and sometimes casuistic rules. Uniformity was still lacking to a great extent.

A is *mala fide*

As regards the *mala fide* possessor, it is by no means clear what his position was. In classical Roman law (+ AD 100–250) he had neither the *ius retentionis* nor the *ius tollendi*. Nor was he a *negotiorum gestor*, and, like the *bona fide* possessor, he could not use the *condictio sine causa specialis*. We may accept with reasonable certainty that the *mala fide* possessor acquired both a *ius retentionis* and a *ius tollendi* in postclassical Roman law. Apparently the general development tended to equate the position of the *mala fide* possessor more and more with that of the *bona fide* possessor as far as compensation for improvements was concerned. The difference between these two categories only becomes clear when we consider liability for fruits. Where the *bona fide* possessor only had to account (deduct from his claim) for the fruits actually enjoyed by him, the *mala fide* possessor also had to account for the fruits he could have enjoyed. However, it is extremely difficult to determine exactly what the legal position of the *mala fide* possessor was (De Vos 55–56).

9.3 ROMAN-DUTCH LAW

bona fide possessor

In Roman-Dutch law, just as in Roman law, the *bona fide* possessor who had effected improvements to another's land, had a *ius retentionis* to enforce his right to compensation. He was entitled to reimbursement for all his *impensae necessariae* and/or either his *impensae utiles* or the increase in the value of the thing, whichever amount was the lesser. If the owner would not reimburse him for his *impensae utiles*, he could exercise his *ius tollendi*. As regards *impensae voluptuariae*, he had a right to compensation only if the owner wished to sell the land and the *impensae voluptuariae* had increased its value. If the owner was willing to pay him the value the attachments would have if they were separated, the *bona fide* possessor could not exercise his *ius tollendi*. If removal of

the fixtures would damage the land, the *bona fide* possessor also could not exercise his *ius tollendi*. Whether the owner had to pay compensation in such a case is not clear.

bona fide possessor and fruits

The value of fruits collected by the *bona fide* possessor before *litis contestatio*, minus the costs of production, had to be subtracted from his claim for compensation, but not the value of fruits gained from the improvements themselves. In our view, the value of collected fruits should be regarded as a favourable circumstance, that is a factor which lessened the *bona fide* possessor's impoverishment. The costs of production, on the other hand, constituted a factor which increased his impoverishment.

distinction between Roman and Roman-Dutch law

It appears that Roman-Dutch law followed Roman law faithfully. In one important aspect, however, there was a difference: in Roman law the *bona fide possessor* had no **action** with which to enforce his right to compensation, but in Roman-Dutch law he had an **action.** The exact basis of this action is not clear, but, as we have already indicated, it may perhaps be regarded as an *actio negotiorum gestorum utilis*. Other than in Roman law, the *ius retentionis* of the *bona fide possessor* in Roman-Dutch law did not form the basis of his right to compensation. Even if he could no longer exercise his *ius retentionis* (ie where he was no longer in possession) he could always institute an action for compensation (De Vos 98–100).

mala fide possessor

As in Roman law, there was a good deal of uncertainty about the position of the *mala fide* possessor in Roman-Dutch law. The preponderance of authority was apparently of the opinion that, like the *bona fide* possessor, he was entitled to compensation for improvements and that he could enforce his right both with an action and with a *ius retentionis*. Here we again observe the tendency to treat the *mala fide* and *bona fide* possessor in the same way (De Vos 101–102). The difference between the two categories only becomes clear when we consider liability for fruits.

fiduciarius

The *fiduciarius* was treated as a *bona fide possessor* as regards reimbursement for improvements, except that he could not claim compensation for everyday repairs *(modicae refectiones)* and that the value of the fruits he used was not taken into account against his claim for compensation. The fiduciary also had a right of retention with which to enforce his right to compensation against the *fideicommissarius*.

usufructuary

In Roman-Dutch law the usufructuary had a duty of maintenance and not a duty to effect improvements, that is he was obliged to do everyday repairs *(modicae refectiones)* in order to ensure the temporary upkeep of the thing. This does not mean that the usufructuary had no right to compensation for improvements. The difference between *modicae refectiones* and necessary improvements lies in the fact that *modicae refectiones* relate to the **temporary** maintenance of the thing and necessary improvements to its **permanent** maintenance. Naturally, the usufructuary could not claim any compensation for *modicae refectiones*. With respect, the court's view in *Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159 (as confirmed in *Ex parte Estate Borland* 1961 (1) SA 6 (SR)) that the usufructuary has no right to compensation for useful improvements according to our common law, is wrong.

occupiers

According to the common law, some classes of legal occupiers could claim compensation for certain expenses incurred for the thing in their possession. These include the buyers of movable property who had already received possession but not ownership (because they would receive ownership only

after payment of the last instalment), or buyers of land who had received possession but not transfer. If they had instituted the *actio redhibitoria* and cancelled the agreement, they could claim certain expenses incurred from the sellers. The same should have applied where the *actio empti* was instituted in the same circumstances or where *restitutio in integrum* was claimed. One gets the idea, however, that some of these actions were contractual remedies rather than enrichment claims. Today they would be regarded as enrichment claims enforced by rights of retention (De Vos 247).

lessees of land

The position of lessees of land was governed in Roman-Dutch law — and still is in our modern law — by two old Placaats (26 September 1658 and 24 February 1696). In general, the provisions of these Placaats amount to the following: During the lease, the lessee may remove all fixtures except necessary improvements, provided he does not leave the land in a worse condition than before. The lessee may claim compensation for all fixtures effected with the consent of the lessor. The lessee's claim for compensation is restricted to the actual cost of the materials, excluding the costs of cement, lime and labour. Fixtures effected without the lessor's permission become the property of the lessor without payment of compensation if the lessee does not remove them before the expiry of the lease. The lessee may also claim for trees only if they were planted with the lessor's permission. He may claim only the value of the trees as at the time they were planted. If there are still crops on the lands after the expiry of the lease, the lessee may not go onto the lands to harvest the crops, but may claim from the lessor the costs of the seed, sowing and cultivation. The lessee has no *ius retentionis*. If we bear in mind that, before the Placaats, the lessee was treated like a *bona fide* possessor and that the lessee could therefore enforce his claim for compensation with his *ius retentionis*, and that the malpractices which arose from this were the *ratio* for the promulgation of the Placaats, it becomes clear why the lessee had no right of retention in terms of the Placaats.

undeveloped enrichment action

The *actio de tigno iuncto* of Roman law, according to which a person could recover twice the value of his material which was attached by another person to his (the other's) immovable property, no longer existed in Roman-Dutch law. In Roman-Dutch law the person who had lost his material could recover the value thereof from the person who had attached it. According to De Vos (at 105–106), this was not an enrichment action, but a surrogate for vindication. In view of the fact that the *rei vindicatio,* and therefore also a surrogate thereof, was always directed at the protection of the **right of ownership,** the action *in casu* cannot be regarded as a surrogate for vindication, but should rather be seen as an undeveloped enrichment action. In such a case, the person had lost his ownership of the attached material and thus there could be no question of the protection of ownership. It was an undeveloped enrichment action because the value of the attachment did not reflect the actual enrichment of the party enriched.

loss of thing due to *specificatio*

Other than in Roman law, a person who lost his property as a result of *specificatio* (creation of a thing) could institute an action for the value of the thing lost. Therefore, for the same reasons mentioned above, De Vos's view (at 105–106) that this action was also a surrogate for vindication is unacceptable. Once again we have an undeveloped action for enrichment.

9.4 SOUTH AFRICAN LAW

9.4.1 General

Roman law

In Roman law there were a number of undeveloped enrichment actions which could be instituted only under specific circumstances. There was no general enrichment action. Thus, if an impoverished party could not bring the facts of his case within the ambit of one of the recognised actions, he had no legal remedy.

Roman-Dutch law

As regards classical Roman-Dutch law, our writers do not indicate any major changes in this field of law. The practice of the eighteenth century went further, however, and recognised a general enrichment action.

extensions in SA law

In South African law, the old actions of the common law continue to exist. 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 in circumstances in which the common law did not grant a remedy. This was not done by interpreting the common-law authority to extend existing actions to the cases in question, but by allowing an action using the analogy of the existing actions and under the influence of public policy against unjust enrichment.

De Vos on extensions

According to De Vos, our courts did in fact acknowledge a general enrichment action which existed side by side with the old actions; that is, the additional circumstances in which enrichment liability was recognised in our law were not separate actions but were manifestations of general enrichment liability. This contention was rejected in the *Nortjé* case and it is therefore necessary to look upon these extensions of enrichment liability as separate specific actions.

various categories of persons

Various categories of persons can be identified who could qualify for compensatory actions after improvements and attachments have been made to someone else's property. The developments in South African law will be discussed hereunder with regard to these categories of persons (occupiers and holders at will) in study unit 10.

9.4.2 *Bona fide* possessor

description

First of all, we deal with the position of the *bona fide* possessor. A *bona fide* possessor is a person who has possession *(possessio)* of a thing in the mistaken belief that he has ownership of the thing. However, our case law requires not only that the possessor must **in fact** believe that he is the owner, but that his mistake must also be reasonable. This requirement that a possessor's mistaken belief that he is the owner of a thing must be reasonable cannot be accepted. The only relevant question should be whether the possessor did **in fact** believe that he was the owner (a subjective test, therefore!). Whether his mistake is reasonable or unreasonable in no way affects his subjective state of mind. This does not mean that the reasonableness or unreasonableness of a possessor's mistake is wholly irrelevant; the reasonableness or unreasonableness of the possessor's mistake may, by itself or taken together with other factors, be of the greatest importance in the law of evidence, since it may indicate strongly whether or not the possessor did in fact believe that he was owner of the thing. To sum up: the requirement that a possessor's mistake must be reasonable for him to be a *bona fide* possessor is untenable in substantive law, although the

reasonableness or unreasonableness may be of value as evidence in answering the question whether the possessor did in fact make a mistake.

loose ownership

The *bona fide* possessor is no longer the owner of his attached material, since the owner of the immovable to which it is attached has acquired the ownership by *accessio*. In *De Beer's Consolidated Mines v The London and South African Exploration Co* (1893) 10 SC 359 372, however, Lord de Villiers stated the following: ''A *bona fide possessor* retains his ownership in materials affixed by him to the land until he has parted with possession.'' We believe this view to be wholly incorrect; **the *bona fide* possessor loses his ownership by *accessio*** (De Vos 225).

right of recourse

The owner of the ancillary thing who lost his 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. The obvious action available to the *bona fide* possessor is the *actio negotiorum gestorum utilis* (the extended action for management of affairs) (*Weilbach en 'n Ander v Grobler* 1982 (2) SA 15 (O) 27A-B; De Vos 85). This action is an enrichment action and the *bona fide* possessor can therefore only claim for his impoverishment or the enriched party's enrichment, whichever is the lesser.

ius tollendi

The *bona fide possessor* can remove any improvements or attachments (*ius tollendi*), while still in possession of the property. The *ius tollendi* of the *possessor* is not an indication that ownership of the attached materials did not pass to the owner of the immovable thing (*Van Wezel v Van Wezel's Trustee* 1924 AD 409 417–418). Eiselen and Pienaar (at 215) submit that the *ius tollendi* is a personal right to remove the attached materials without damage to the immovable, which may only be exercised reasonably according to equitable principles.

time for removal or compensation

The *bona fide* possessor may remove his improvements at any time before the true owner claims the land. After the true owner has made his claim, however, he may not remove the improvements unless the owner is unwilling to compensate him. In *Meyer's Trustee v Malan* 1911 TPD 559 569, the court implied that a *bona fide* possessor can claim compensation only if the true owner takes steps to evict him. Such a view is unjustified; the *bona fide* possessor may claim compensation at any time after he discovers that he is not the owner of the land (De Vos 226). The view expressed in the *Meyer's Trustee* case was rejected by Ogilvie Thompson and Rumpff JA in *Nortjé en 'n Ander v Pool NO* 1966 (3) SA 96 (A) and by Van Zyl J in *Rademeyer and Others v Rademeyer and Others* 1968 (3) SA 1 (C).

extent of compensation

Compensation can only be claimed for expended money or materials, but not for the *bona fide* possessor's labour or the interest on his expenses. He has, however, a claim for lost income resulting from the expenditure of his labour (Eiselen & Pienaar 219). In general, the *bona fide* possessor is entitled to compensation for all his improvements 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 (*Lechoana v Cloete and Others* 1925 AD 536 547):

- Necessary expenses

  The *bona fide possessor* can claim for all his expenses in respect of the preservation or protection of the property of another *(impensae necessariae)* if his efforts were successful. The owner's enrichment is in saved expenses (Eiselen & Pienaar 219).

- Useful expenses

  In the case of useful expenses *(impensae utiles)*, the *bona fide* possessor can claim for all his expenses or to the amount by which the value of the property has been enhanced, whichever is the least (*Rademeyer and Others v Rademeyer and Others* 1967 (2) SA 702 (C) 706–707).

- Luxurious expenses

  Luxurious expenses *(impensae voluptuariae)* are expenses for decorations which are neither necessary nor useful (although they may increase the value of the property) and normally cannot be claimed, 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 *(ius tollendi)* if the owner does not wish to compensate him, except where removal will severally damage the property of the owner.

right of retention

The *bona fide* possessor can enforce his right to compensation with his *ius retentionis* (*Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd* 1960 (3) SA 642 (A)). He may therefore refuse to leave the land until the owner has reimbursed him for his improvements. There are two requirements for obtaining or keeping a right of retention, namely (1) that the possessor must be in control of the property, and (2) that the owner of the property must be unjustifiably enriched at the expense of the possessor (Eiselen & Pienaar 232–233). If the possessor has voluntarily given up effective control over the thing, the right of retention is lost and cannot revive if effective control is regained by the possessor. In the instance of attachment and removal of the thing by a third person (under protest by the lien holder) or the loss of effective control owing to force, fraud or undue means, the lien revives if the effective control is regained (*Erasmus en 'n Ander v Minister van Wet en Orde* 1991 (1) SA 453 (O), as affirmed in *Minister van Wet en Orde v Erasmus* 1992 (3) SA 819 (A)). However, this does not mean that the possessor loses his **right to compensation**; if he has already surrendered possession of the land or other property, he loses only his right of retention. Such a *ius retentionis* is a real right which may be enforced against every successive buyer of the land. Note that as De Vos (at 230–233) points out, in the case where the owner sells the land, the former owner is the person enriched in certain instances (and he must therefore be sued by the *bona fide* possessor) but in other instances it is the new owner who is enriched. There is, further, no reason why a new owner who cannot take possession of the thing bought because a *bona fide* possessor is exercising a *ius retentionis*, cannot sue the seller for breach of contract.

example

> A, a *bona fide* possessor, erects buildings on B's land. B sells the land to C without paying A any compensation for his improvements. A exercises his lien. If B has not taken any of the fixtures into account in the agreement between himself and C, C is the party who is enriched by the buildings. Therefore C cannot complain if he has to compensate A. If, however, B has taken the value of the buildings into account in his agreement with C and furthermore does not inform C that A had a right to compensation, B is the person enriched, and A will have to sue him. However, if C wants possession of the land he will be compelled to fulfil A's claim for compensation. If C does fulfil A's claim (remember that A cannot hold C liable, since C is not the party enriched) in order to terminate A's exercise of his *ius retentionis*, C will be able to turn to B and hold him liable for breach of contract.

fruits

The value of the fruit gathered before the moment of awareness that the possession is unlawful, less production costs, can be set off against the *bona fide* possessor's claim for compensation for useful improvements as a factor 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 are applicable, except where the possessor exercises a right of retention, in which case he becomes a lawful occupier or holder (Eiselen & Pienaar 226–227). Fruit includes natural fruits *(fructus naturales)* as well as the rent which the possessor received by leasing the property *(fructus civiles)*, but not interest on the expenses. Further, it does not include fruit yielded by the improvements themselves. The possessor obtains ownership of all fruit gathered before the time of awareness that the possession is unlawful and the owner does not have any action against the possessor for the value of such fruit gathered, but can only deduct the value of such fruit from the possessor's claim for compensation (*Rademeyer and Others v Rademeyer and Others* 1967 (2) SA 702 (C); Eiselen & Pienaar 226–227). If the value of the fruit gathered by the *bona fide* possessor exceeds the enrichment of the owner, no compensation will be awarded to the possessor (*Boikhutsong Business Undertakings (Pty) Ltd v Grobler NO* 1988 (2) SA 676 (BA) 683E–H).

use and enjoyment of property

Because a *bona fide* possessor thinks that he is the owner of the property and he does not envisage that he will have to compensate the owner for his occupation, his use and enjoyment of the property cannot be set off against his claim for compensation for improvements (Eiselen & Pienaar 226–227).

remedies of *bona fide* possessor

To summarise: The following remedies are available to the *bona fide* possessor who used money or material to protect or improve someone else's property (*Nortjé en 'n Ander v Pool NO* 1966 (3) SA 96 (A) 126):

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

ACTIVITY

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

FEEDBACK

Why does only scenario 1 deal with the position of *bona fide* possessor? You must carefully distinguish between owners, *bona fide* possessors and *male fide* possessors. Refer to the feedback at the end of this study unit as well.

In respect of the improvements, you must consider each type of improvement

and determine whether it is necessary, useful or luxurious and explain the relevance of that distinction. Did you consider the enrichment lien at the disposal of A? What about the value of the fruits drawn (harvests) and the value of his occupation over the past four years? How should the enrichment claim of the crop still standing on the land be calculated?

9.4.3 *Mala fide* possessor

uncertain position

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

description

A mala fide possessor is a person who is in possession of someone else's property and who, although he knows that he is not the owner thereof, still *de facto* exercises the powers of an owner over the thing. The possession of the *mala fide* possessor is therefore unlawful.

extent of right of recourse

It appears from the old decision of Lord de Villiers in *Bellingham v Bloommetje* 1874 Buchanan 36 that the judge was prepared to grant the *mala fide* possessor compensation for improvements which had added to the value of the land: ''It would follow that, ... as a *mala fide possessor*, he 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.'' The ''eminent authority'' referred to by the judge was Groenewegen (Ad Inst 2 1 30), Voet (6 1 36) and Van Leeuwen (cf 1 2 11 7 and 8). In *De Beers Consolidated Mines v London and SA Exploration Co* (1893) 10 SC 372 the same Lord de Villiers restricted the *mala fide* possessor's claim for compensation for improvements to necessary improvements, except where the true owner was aware of the *mala fide* possessor's activities and remained silent, in which case the *mala fide* possessor had the same rights as a *bona fide* possessor. In *Lechoana v Cloete and Others* 1925 AD 536 it was said in an *obiter dictum* that a *mala fide* possessor can also claim for useful expenses, but not in the case of a *mala fide* possessor of a movable thing (a thief) (Eiselen & Pienaar 243–245; De Vos 102–103). The view held by Lord de Villiers in the *Bellingham* case is to be preferred, since it tends to steer the liability of the true owner towards the *mala fide* possessor on an enrichment basis; if the *mala fide* possessor can claim compensation only for necessary improvements, it means that the owner remains unduly enriched as a result of the useful improvements which the *mala fide* possessor has brought about. You may perhaps argue that the bad faith of the *mala fide* possessor is sufficient to deny him a right to compensation for useful improvements, but you must remember that it is not private law's function to punish bad faith, but rather to ensure a fair balance between the interests of the parties. Therefore, the *mala fide* possessor should, in our opinion, be in exactly the same position as the *bona fide* possessor, and the right to compensation of both should be based purely on enrichment (*Nortjé v Pool* 1966 (3) SA 96 (A) 129–130).

right of retention

There is also no unanimity about the question whether a *mala fide* possessor has a *ius retentionis*. In the *Bellingham* case, Lord de Villiers did not express a view on this, but the fact that he quotes Groenewegen, the only old writer who expressly grants the *mala fide* possessor a *ius retentionis*, with approval, may perhaps be interpreted as an acknowledgement that the *mala fide* possessor does have a *ius retentionis*. In the *De Beers* case, however, Lord de Villiers expressly denied the *mala fide* possessor a *ius retentionis*, except where the owner was aware of the *mala fide* possessor's activities and remained silent. From the case of *Acton v Motau* 1909 TS 841, it seems that he does have a lien, but in the

following judgments the opposite view was taken: *United Building Society v Smookler's Trustees* 1906 TS 623; *Rencken v Snyman* 1946 NPD 551; *Louw v Riekert* 1957 (4) SA 170 (T).

JOT Motors v Standard

In *JOT Motors (Edms) Bpk h/a Vaal Datsun v Standard Kredietkorporasie Bpk* 1984 (2) SA 510 (T), on the other hand, it was unequivocally decided that a *mala fide* possessor (*in casu*, a *mala fide* occupier) does have a right of retention. This part of the decision was not, however, upheld by the Appellate Division, which decided that the possessor in this instance (*in casu* actually a *detentor* or occupier) had acquired possession of the vehicle in a lawful manner (he had acquired it from a lawful occupier). His possession thereafter remained lawful since *mala fides* could not be imputed to him, and as lawful possessor he had a right of retention or lien against the true owner — *Standard Kredietkorporasie v JOT Motors h/a Vaal Datsun* 1986 (1) SA 223 (A) 235H–I, 236C–E and 237E. In this respect our law is in a state of confusion. We can only hope that our Appellate Division will soon give a final decision, granting the *mala fide* possessor a *ius retentionis*. In our view there are no grounds for not giving the *mala fide* possessor this remedy with which to enforce his 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 a wide discretion to allow the owner to waive his enrichment or the *mala fide* possessor to remove the attachments *(ius tollendi)*. Several factors will be taken into consideration in this regard, for example 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 244–245).

fruits

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

remedies of *mala fide* possessor

To summarise: The following remedies are available to the *mala fide* possessor who used money or material to protect or improve someone else's property:

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

distinguish between *bona fide* and *mala fide* possessors

There is plenty of authority upon which one could rely to equate the position of the *mala fide* possessor to that of the *bona fide* possessor (Groenewegen *Ad Inst* 2 1 30; *Lechoana v Cloete* 1925 AD 536 547–548; *Nortjé v Pool* 1966 (3) SA 96 (A) 129–130; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 425F). However, note the following distinctions and similarities:

- A *bona fide* possessor mistakenly thinks that he is the owner of the thing or property; the *mala fide* possessor knows that he is not the owner.
- A *bona fide* possessor definitely has a right of recourse against the owner for all his necessary and useful expenses, and in certain circumstances also for luxurious expenses; a *mala fide* possessor definitely has a right of recourse against the owner for his necessary expenses, and perhaps for his useful expenses (except in the case of a thief), but definitely not for luxurious expenses.
- A *bona fide* possessor has a right of retention to secure his right of recourse against the owner; there is some uncertainty whether a *mala fide* possessor has a right of retention.
- Both the *bona fide* possessor and the *mala fide* possessor have a *ius tollendi*.
- The *bona fide* possessor becomes the owner of all fruit gathered before awareness and the owner of the property has no claim for the value of such fruit, but the value of such fruit can be set off against the *bona fide* possessor's claim for compensation; the *mala fide* possessor has no right to the fruit gathered by him, 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

Consider the facts in practical scenario 1 at the beginning 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 that affect your answer? In the latter case explain whether he has a claim for the improvements rendered and any amounts that should be added or subtracted from such a claim. Also consider other defences available. Render your answer in the form of an opinion 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 which A may have? In respect of the improvements you must once again consider each type of improvement and determine whether it is necessary, useful or luxurious and explain the relevance of that distinction. Did you consider whether there is an enrichment lien at the disposal of A? What about the value of the fruits drawn (harvests) and the value of his occupation over the past four years? Also see the feedback at the end of this study unit.

SELF-EVALUATION

(1) Briefly discuss the position of the *bona fide* and the *mala fide* possessor after attachment in Roman law.

(2) Briefly discuss the position of the *bona fide* and the *mala fide* possessor after attachment in Roman-Dutch law.

(3) Briefly discuss the position of the *fiduciarius* and the usufructuary after attachment in Roman-Dutch law.

(4) Explain the application of the two old Placaats in Roman-Dutch law.

(5) Discuss in detail, with reference to case law and the opinion of writers, the remedies available to the *bona fide* possessor in current South African law.

(6) Discuss in detail, with reference to case law and the opinion of writers, the remedies available to the *mala fide* possessor in current South African law.

(7) Consider practical example 1 at the beginning of this unit and answer the question in full.

FEEDBACK

(1) See 9.2.

(2) See 9.3.

(3) See 9.3.

(4) See 9.3.

(5) See 9.4.3.

(6) See 9.4.2.

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 were the owner thereof in the honest belief that he was the owner. If he knew that he was not the owner, he is a *mala fide* possessor (acting as if he were the owner, possibly with a view to obtaining the land by prescription). You must 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 in enrichment for either the cost of the expense or the value of the improvement in the hands of the true owner. You must also consider the extent and purpose of the enrichment lien at his 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.

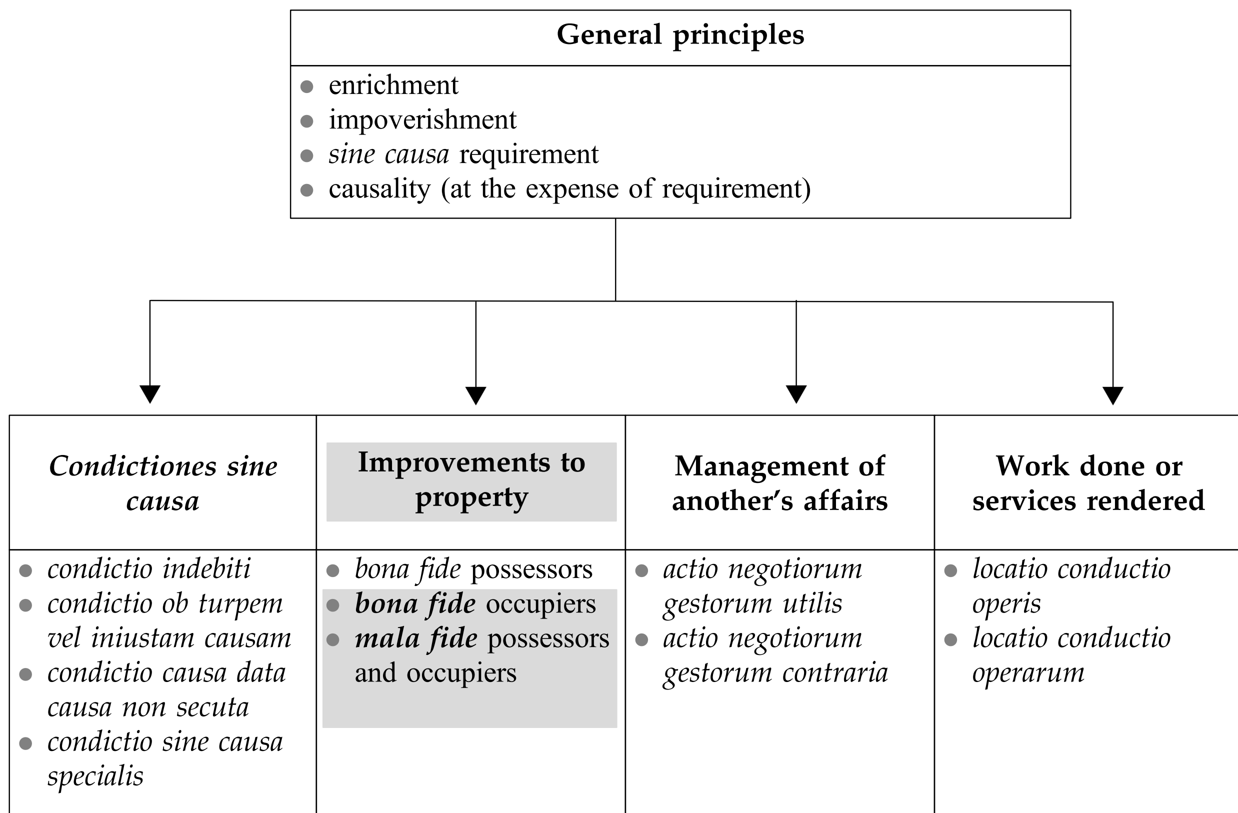
Scenario 2

In this case we are dealing with a lawful holder and not 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. You studied the provisions of the Dutch Placaaten in the law of property which is relevant here. These enactments still apply, but their practical implications in South African law today will only be considered in the next study unit.

ENRICHMENT BY MEANS OF IMPROVEMENTS AND ATTACHMENTS *(ACCESSIO)* — CONTINUED



OVERVIEW

In this study unit we continue with our study of enrichment by means of improvements and attachments *(accessio)* by occupiers and holders at will in modern South African law. You must 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 there are important differences in their rights and obligations.

PRACTICAL SCENARIOS

Scenario 1

A is leasing a farm to B for a rental of R300 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 R400 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 (R25 000), and erected a new shed for the storage of his implements (R50 000). He has also repainted the house (R15 000) because he did not like the colour it was. In the first two years of occupation, he has harvested maize, making a net profit of R500 000. He has sunk a borehole (R10 000) and sold some of the water to a neighbour (R5 000). There is a maize crop standing on the land (estimated value R250 000, cost of planting and tending R100 000). A has now cancelled the lease with B because of his breach of contract and is claiming the ejectment of C. Advise C about any claims he may have against A as well as any defences against the ejectment claim.

Scenario 2

D, a German tourist, has rented a car from Avis in Johannesburg. Unbeknown to both parties the rental contract is void. While D was travelling in the Northern Cape, the vehicle broke down in the town of Springbok. D requested Springbok Motors to repair the vehicle. Springbok Motors indicated that the repair costs would be R9 000. After 3 days of waiting, D rented another vehicle and 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. 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: repartioning of offices — R40 000; painting offices — R30 000; upgrading bathrooms — R20 000; new carpeting throughout — R30 000; repair of the roof which was leaking — R25 000; installation of new air-conditioning units — R35 000. Shortly after all of these costs were incurred, F terminated the lease with three months' notice, as he is entitled to do under the 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 OBJECTIVES

After completing this study unit you should be able to

- distinguish the three types of occupiers
- 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
- explain briefly 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 (OPTIONAL)

Eiselen & Pienaar 250–293
Lotz *LAWSA* 80–84
Fletcher and Fletcher v Bulawayo Waterworks Co Ltd 1915 AD 636
Lydenburg Prop v Minister of Community Development 1963 (1) SA 167 (T)
Rubin v Botha 1911 AD 568

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 103 251–252 258–259 272 274
Van der Walt ''Uitsettingsbevele en die huurder se vergoedingseis vir verbeterings aan die huursaak'' 1989 *THRHR* 590–599
Acton v Motau 1909 TS 841
Bellingham v Bloommetje 1874 Buch 36
Boikhutsong Business Undertakings (Pty) Ltd v Grobler NO 1988 (2) SA 676 (BA)
Brown v Brown 1929 NPA 41
Brunsdon's Estate v Brunsdon's Estate and Others 1920 CPD 159
De Beers Consolidated Mines v London and SA Exploration Co (1893) 10 SC 359
Kumalo v Piet Retief Village Council 1931 TPD 165
Lechoana v Cloete and Others 1925 AD 536
Lubbe v Volkskas Bpk 1991 (1) SA 398 (O)
Malan v Nabygelegen Estates 1946 AD 562
Nortjé en 'n Ander v Pool NO 1966 (3) SA 96 (A)
Palaborwa Mining Co Ltd v Coetzer 1993 (3) SA 306 (T)
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)
Rada v Ngoma 1913 EDL 469
Standard Kredietkorporasie v JOT Motors h/a Vaal Datsun 1986 (1) SA 223 (A)
Syfrets Participation Bond Managers Bpk v Estate and Cooperative Wine Distributors (Edms) Bpk 1989 (1) SA 106 (W)
Urtel v Jacobs 1920 CPD 487
Van Wezel v Van Wezel's Trustee 1924 AD 409
Wynland Construction (Pty) Ltd v Ashley-Smith en Andere 1985 (3) SA 798 (A)

10.1 INTRODUCTION

Where the *animus domini* is absent, that is 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 (1) lawful occupiers and holders, (2) *bona fide* occupiers and holders and (3) *mala fide* occupiers and holders. A lawful occupier or holder is a person who has the lawful occupation of an immovable or physical control over a movable for a certain period or until a specific event takes place, or until a certain goal is achieved. The lessee, pledgee, usufructuary etc are all lawful occupiers. A *bona fide* occupier or holder is a person who is under the mistaken impression that he is a lawful occupier or holder, while a *mala fide* occupier or holder is a person who *de facto* exercises the powers of a lawful occupier although he knows he is not one. 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 in certain exceptional cases, the occupier or holder could not, according to our common law, claim compensation from the owner for improvements he had brought about. However, our courts have not relied solely on the incomplete liability for enrichment of our common law, but have created law and have in fact given the occupier an action for compensation. Hence 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 a right of recourse for the recovery of their expenses in connection with the property occupied by them. Among them we find the lessee, the pledgee and the usufructuary (with certain limitations). There are also other cases where the courts have given legal occupier/holders a right of recourse. In *Brown v Brown* 1929 NPD 41 land had been sold under a contract in terms of which the price was to be paid in instalments and, although the buyer was placed in possession immediately, he was only to receive transfer after payment of the full price. Before payment of the full price the contract was cancelled by the parties. The question was whether the buyer could recover compensation for attachments he had made. According to the analysis above, he 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 280), no additional deduction for 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 if all the requirements for the *negotiorum gestio* are present. Where a person has promoted his own interests while managing someone else's affairs, he will have an enrichment action (the *actio negotiorum gestorum utilis*), but only to the extent of the owner's enrichment (Eiselen & Pienaar 280; *Nortjé v Pool* 1966 (3) SA 96 (A) 130). Factors 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 (right of retention) is available to the lawful occupier/holder for all his necessary expenses as well as 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 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, then the occupier does not have any right to the continued possession of the land and the occupier therefore also looses his right of retention (*Peens v Botha-Odendaal* 1980 (2) SA 381 (O) 389).

Lydenburg case

In the case of *Lydenburg Prop v Minister of Community Development* 1963 (1) SA 167 (T) (as confirmed by appeal in 1964 (2) SA 729 (A)) the court refused to grant a plaintiff an action for improvements effected on land after he had been

permitted by the defendant to remain in possession of the latter's land for a specific period. Galgut J held that the plaintiff was not a *bona fide* possessor and concluded that "the petitioner erected the new buildings at his own peril" (at 172–173). This, however, it is respectfully submitted, is a point of view which is diametrically contrary to the general principle that no-one may be enriched *sine causa* at the expense of another. The plaintiff in this case was a **lawful occupier** and should have been reimbursed for the increase in the value of the defendant's land as a result of the erection of the new buildings.

Standard v JOT Motors

In *Standard Kredietkorporasie v JOT Motors h/a Vaal Datsun* 1986 (1) SA 223 (A), the Appellate Division decided that a person who *in casu* was a lawful holder had a lien against the owner of the thing for compensation for improvements made by him (the holder). The decision refers throughout to the **lawful possession** of the person effecting the improvements, and the court did not find it necessary to consider whether *in casu* that person was not a possessor (235H–J).

Placaats

Regarding the leasing of farmland, the Placaats of 26 September 1658 and 24 February 1696 are still applicable. The purpose of the Placaats was mainly to protect an owner against a lessee 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, in which event the lessee could remain in occupation of the property in terms of an enrichment lien (right of retention). According to Eiselen and Pienaar (at 300), the Placaats mean the following:

- The lessee may remove all structures, except necessary improvements, during the existence of the lease provided that he does not leave the property in a worse condition than it was when he received it. The lessee is also entitled to remove anything he has planted or sowed.
- Anything attached to the property which the lessee does not remove becomes the property of the owner when the lease expires and may not be removed afterwards. Before the lease expires the lessor and the lessee may agree on compensation for 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, ploughing, tilling and sowing of any crops left behind by him.
- 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. This decision is criticised by, *inter alia*, De Vos (at 103) because such a measure was not allowed according to the Placaats.
- The lessee does not have a *ius retentionis*.
- According to the decision in *De Beers Consolidated Mines v London and SA Exploration Co* (1893) 10 SC 359 369, the compensation in terms of the Placaats is restricted to useful improvements, and compensation for necessary improvements is awarded in terms of the general principles applicable to *bona fide* possessors. With respect, this view is incorrect. In view of the fact that the Placaats do not distinguish between different types of improvements, the grounds for contending that necessary improvements are not affected by the Placaats are unclear.
- The lessee can claim compensation only when the lease expires.

- The Placaats do not apply when the lease is terminated by breach of contract or by insolvency of the lessor, but only when the lease expires by termination of the period of lease or the lessee commits breach of contract (*Lubbe v Volkskas Bpk* 1991 (1) SA 398 (O) 405I–406C).

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 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 is, however, that the lessee is in a position to arrange his affairs and remain in control of the property until the lease expires, which is not the case with a *bona fide* possessor or occupier.

lessees of property other than land

The Placaats apply only to leases of **land.** The view held by Lord de Villiers in the *De Beers Consolidated Mines* case that the Placaats also apply to the lease of houses is incorrect. Nevertheless, the same view was voiced by the Witwatersrand Local Division in *Syfrets Participation Bond Managers Ltd v Estate and Cooperative Wine Distributors (Pty) Ltd* 1989 (1) SA 106 (W), and recently by the Transvaal Provincial Division in *Phalaborwa Mining Co Ltd v Coetzer* 1993 (3) SA 306 (T). According to case law, the position in South African law seems to be that the Placaats are also applicable to urban property. However, Van der Walt 1989 *THRHR* 596) is of the opinion that the application of the Placaats could be done away with altogether and that the criterion should be whether the owner has been enriched in circumstances where it is reasonable to expect him to compensate the lessee.

usufructuary

A *usufructuary (usufructuarius)* has a duty to maintain the property without any claim for compensation. Special expenses which cannot be regarded as normal maintenance costs can be claimed, however. In *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159 172–177 the position of the usufructuary is expounded 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. He may, therefore, not alter, connect, or separate the rooms of a house, or remove doors, nor can he change a pleasure ground into an orchard or kitchen garden. He 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 *(graviores 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 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 be unwilling to do so, there is no right of compensation.

remedies of usufructuary

To summarise: The usufructuary may not claim for necessary expenses (it is part of his maintenance duty), and only in special circumstances may he claim for useful or luxurious improvements, in which case fruits gathered may not be set off against the claim for compensation against the owner. The usufructuary has a limited *ius tollendi*, but no right of retention. The position of the usufructuary can therefore be compared to the position of the lessee in terms of the Placaats (Eiselen & Pienaar 308).

fiduciarius

In *Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159 171 it was confirmed that a fiduciary is entitled to compensation for improvements to the same extent as a *bona fide* possessor. However, he is not entitled to compensation for expenses for the normal maintenance of the property and the value of fruit gathered cannot be set off against his 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 has a claim for compensation (Eiselen & Pienaar 308; *Du Plessis and Others v Estate Meyer and Others* 1913 CPD 1006).

ACTIVITY

1 Consider the practical scenarios at the beginning 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 disposal.

FEEDBACK

Feedback question 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 the owner, is there a contract or permission or other legal ground such as a usufruct underlying the right to possession? If so the occupation/holding is lawful. If not then it is unlawful. The next step if the occupation/holding is unlawful is to consider whether the person was *bona* or *mala fide*. NB Although a person may be *bona fide* his possession/physical control is still unlawful. See also the feedback at the end of this study unit.

Feedback question 2

Only the lessee in scenario 3 is a lawful occupier. Explain why. In considering his rights and obligations, did you consider the effects of the Dutch Placaaten? Is the fact that the land is an urban tenement relevant? Can he 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.

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 is entitled to do so, because he is unaware of the fact that he has no legal ground for controlling the property. Thus his physical control over the thing is unlawful. The occupier's belief does not have to be reasonable (Eiselen & Pienaar 249–250). A *bona fide* holder is someone who exercises physical control over the movable property of another in the *bona fide* but mistaken belief that he is entitled to do so, whereas in fact there is no legal basis for his physical detention of the goods.

Bellingham v Bloommetje

The old case of *Bellingham v Bloommetje* 1874 Buch 36 is a good example 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 lease, and therefore he was a *bona fide detentor* as regards this piece of ground. The court granted the *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 that 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 which dealt with the position of the *bona fide detentor* was *Rubin v Botha* 1911 AD 568. The facts of the case were as follows: The appellant and respondent entered into an agreement of lease under which the appellant was to have the use and occupation of a portion of the respondent's farm for ten years without payment of rent. In exchange for this the appellant would erect certain buildings on the property which would become the property of the respondent upon expiry of the lease. After the appellant had erected the buildings and occupied the farm for three years, the respondent gave him notice to vacate it within three months on the grounds that the agreement was null and void. The appellant accepted the eviction provided that he was compensated for the costs of the buildings erected. Lord de Villiers acknowledged that the plaintiff was a *bona fide detentor* and granted him an action for compensation (at 576). He 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 a 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* is 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.

Rubin v Botha

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 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. According to these principles, the value of the occupation of the property by the occcupier must be deducted from the enrichment of the owner or the impoverishment of the occupier as a diminishing factor. On the other hand, 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.

action for compensation

The enrichment action for compensation by the *bona fide* occupier is not based on Roman or Roman-Dutch law, but is an *ad hoc* extension of the common-law principles regarding possessors. The correct action is therefore the extended *negotiorum gestio* as an enrichment action, namely the *actio negotiorum gestorum utilis* (Eiselen & Pienaar 260–261).

Fletcher v Bulawayo Waterworks

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. In this case, as a result of a mistake about the boundaries of the leased property, the company lessee of the land drilled a borehole on the plaintiff's land and sold the water drawn from it. The plaintiff subsequently claimed ejectment of the defendant. The defendant claimed a *ius retentionis* until he was compensated for the increase in the value of the plaintiff's land. Innes J held that the judgment in *Rubin v Botha* 1911 AD 568 had the effect of placing *bona fide* possessors and *bona fide detentors* on an equal footing, and that therefore there was no reason for denying the *bona fide detentor* a *ius retentionis*. Only in one respect does the position of the *bona fide* possessor differ from that of the *bona fide detentor* as regards compensation for improvements: in the case of the *bona fide detentor*, in certain circumstances (as in the *Rubin* case) an equitable amount for the use of the ground by the *detentor* may be subtracted from the amount with which the value of the ground has been increased, while in the case of the *bona fide* possessor only the value of fruits actually gathered (minus the production costs) can be brought into account against his expenses (at 647). The court also held (at 650–651), particularly on the authority of Voet (6 1 39), that the value of gathered fruits obtained from the improvements themselves cannot be included in the calculations; *in casu* 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 not the fruit of the property itself. Eiselen and Pienaar (at 256) 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

1 Consider the practical scenarios at the beginning 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 disposal.

FEEDBACK

Feedback question 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 the owner, is their a contract or permission or other legal ground such as a usufruct underlying the right to possession? If so the occupation/holding is lawful. If not then it is unlawful. The next step if the occupation/holding is unlawful is to consider whether the person was *bona* or *mala fide*. NB Although a person may be *bona fide* his possession/physical control is still unlawful. See also the feedback at the end of this study unit.

Feedback question 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 that of a lessee who is in lawful occupation? In your answer you must pay particular attention to the position in respect of the value of occupation, fruits gathered and liens. Remember to refer to the relevant case law. See also the feedback at the end of this study unit.

10.2.3 *Mala fide* occupiers/holders

description

A *mala fide* occupier is an occupier of immovable property who knows that there is no legal ground for his occupation, but nevertheless controls the property for his own benefit. He is therefore unlawfully in physical control of the thing (Eiselen & Pienaar 270). A *mala fide* holder is someone who exercises physical control over a movable thing in the knowledge that his physical control is unlawful.

action for compensation

In *Acton v Motau* 1909 TS 841 and *Rada v Ngoma* 1913 EDL 469 the court worked with a *mala fide* occupier, but throughout referred to a *mala fide* possessor. In both cases the court was prepared to allow an enrichment claim, but these decisions cannot be accepted as clear authority on the position of *mala fide* occupiers. In *Urtel v Jacobs* 1920 CPD 487 such an action for the *mala fide* occupier was refused. In *Peens v Botha-Odendaal* 1980 (2) SA 381 (O) it was held in an *obiter dictum* that the *mala fide* occupier could institute an action for his averred expenses. It seems as if the right of recourse of the *bona fide* occupier was extended to the *mala fide* occupier in *Grobler NO v Boikhutsong Business Undertakings (Pty) Ltd* 1987 (2) SA 547 (B). In appeal (*Boikhutsong Business Undertakings (Pty) Ltd v Grobler NO* 1988 (2) SA 676 (BA) 683E–F), no right of recourse was allowed, since the profit of the occupier (value of the fruits) was higher than the owner's enrichment through improvements. Therefore, whether a claim for compensation could be given to a *mala fide* occupier has still not been decisively determined in our law (Eiselen & Pienaar 270–272).

right of retention

In no decision has a right of retention ever expressly been given to a *mala fide* occupier. In *Quarrying Enterprises (Pvt) Ltd v John Viol (Pvt) Ltd and Others* 1985 (3) SA 572 (Z) the court declared that the rights of a *mala fide* occupier are the same as those of a *mala fide* possessor. In the light of the uncertain authority regarding the right of retention of a *mala fide* occupier, the statement by the court can be criticised since it is not based on existing authority (Eiselen & Pienaar 275). De Vos (at 258–259) is, however, of the opinion that the *ad hoc* extension of a right of retention and the action which the *mala fide* possessor possessed under Roman-Dutch law, should be extended to the *mala fide* 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, but the value of the fruits can be used in the alternative only if the value of the occupation cannot be determined (*Rubin v Botha* 1911 AD 568–583; *Fletcher and Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636–650).

ACTIVITY

1. Consider the practical scenarios at the beginning 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 knew that the sublease was void?

2. Consider scenario 1 on the assumption that the sublessee knew that the sub-lease was void; advise the impoverished party on any claims and defences at his disposal.

FEEDBACK

Feedback question 1

See the feedback on the previous two activities.

Feedback question 2

In this case the knowledge that the sublease is void turns our sublessee into a *mala fide* occupier. In this answer you must 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 or *precario habens* is a person who is in occupation of another's property ''until revocation'', that is his occupation is based on consent which 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''. 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 *Lechoana v Cloete and Others* 1925 AD 536, 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 grounds 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 if the courts have acknowledged that the *Lechoana* case held that the holder at will has a right of recourse. It is clear, therefore, that there is a strong tendency in our contemporary law to grant the holder at will an action to claim compensation, but the matter has not yet been finally settled, since the *Lechoana* case, on which these later cases depend, did

not hold that the holder at will has such a right. It is desirable that an authoritative decision on this issue be made (De Vos 272).

right of retention

In *Lechoana v Cloete* 1925 AD 536 550 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 the occupier, unless the owner of the property has forbidden him to make any improvements, and there is no reason why he should not have a *ius retentionis* (De Vos 272).

fruits and other advantages

The advantage the holder at will has derived from his occupation should be deducted from his 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 of the occupation. However, the owner of the property should not deduct the advantages he has lost from his enrichment, because the owner has willingly renounced them. We believe that the impoverishment of the owner is not *sine causa*. It should therefore be ignored in the calculations (De Vos 274).

SELF-EVALUATION

(1) Distinguish between the three types of occupiers and holders.

(2) Discuss in detail, with reference to case law, the remedies available to the various legal occupiers and holders in South African law.

(3) Discuss in detail, with reference to case law, the remedies available to the *bona fide* occupier or holder.

(4) Discuss in detail, with reference to case law, the remedies available to the *mala fide* occupier or holder.

(5) Discuss the position of the occupier or holder at will in South African law with reference to the decision in *Lechoana v Cloete* 1925 AD 536.

(6) Consider the facts of Scenario 2 at the beginning of the study unit. Advise Avis.

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 the impoverished party in this scenario? Did you consider the principles applicable to three party or 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

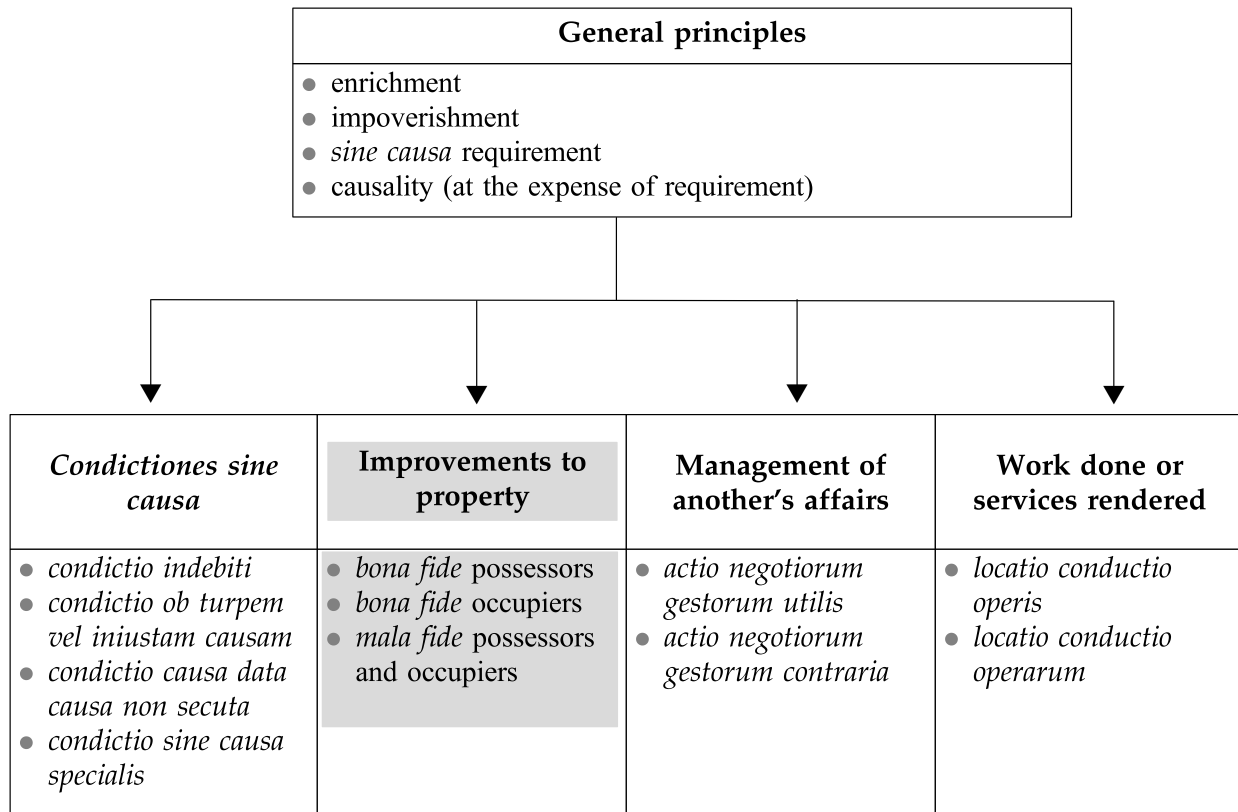
In this case B is an unlawful occupier — the sublease is void — but he is a *bona fide* occupier because he believes that his occupation is lawful. The *bona fide* occupier is in much the same position as the *bona fide* possessor in South African law in respect of an enrichment claim for improvements. In what respects does his position differ though? Give particular attention to the question of the value of occupation and fruits. Have the uncertainties been finally resolved by our courts yet? 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. Don't forget about possible liens.

Scenario 3

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

STUDY UNIT 11

RIGHTS OF RETENTION AND LIENS



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 a bit more detail in this study unit.

PRACTICAL SCENARIOS

Scenario 1

A is leasing a farm to B for a rental of R300 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 R400 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 (R25 000), and erected a new shed for the storage of his implements (R50 000). He has also repainted the house (R15 000) because he did not like the colour it was. He has sunk a borehole (R10 000). There is a maize crop standing on the land (estimated value R250 000, cost of planting and tending R100 000). A has now cancelled the lease with B because of his breach of contract and is claiming

ejectment of C. Advise C about any defences he may have against the ejectment claim.

Scenario 2

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

D, a German tourist, has rented a car from Avis in Johannesburg. Unbeknown to both parties the rental contract is void. While D was travelling in the Northern Cape, the vehicle broke down in the town of Springbok. D requested Springbok Motors to repair the vehicle. Springbok Motors indicated that the repair costs would be R9 000. After 3 days of waiting, D rented another vehicle and 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. Advise Avis on whether Springbok Motors is entitled retain the vehicle in this manner.

LEARNING OBJECTIVES

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 to describe each of them

RECOMMENDED READING (OPTIONAL)

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

ADDITIONAL READING MATERIAL (OPTIONAL)

De Vos ''No enrichment action for improvements to movables?'' 1974 *THRHR* 308–314
De Vos ''Retensieregte weens verryking'' 1970 *THRHR* 355—368
De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 54 98 228–229 252
Nathan ''Enrichment liability and the ius retentionis'' 1974 *THRHR* 101–106
Wille *The law of mortgage and pledge in South Africa* (1987) 85
Assurity Private Ltd v Truck Sales Ltd 1960 (2) SA 686 (SR)
Beetge v Drenha Investments (Pty) Ltd 1964 (4) SA 62 (W)
D Glazer & Sons (Pty) Ltd v The Master 1979 (4) SA 780 (C)
Fletcher and Fletcher v Bulawayo Waterworks Ltd 1915 AD 636
Gazide v Nelspruit Town Council 1949 (4) SA 48 (T)
Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (A)
Lechoana v Cloete 1925 AD 536
Rubin v Botha 1911 AD 568
Van Niekerk v Van den Berg 1965 (2) SA 525 (O)
United Building Society v Smookler's Trustees 1906 TS 623
Wynland Construction (Pty) Ltd v Ashley-Smith 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 has expended money or labour, of retaining possession of the property until he has been duly compensated.'' In *Ploughall (Edms) Bpk v Rae* 1971 (1) SA 887 (T) 890 it was said that '' 'n *ius retentionis* is die reg wat die besitter van 'n saak van iemand anders, waaraan hy geld of arbeid bestee het, verkry om die saak in sy besit te hou totdat ... (hy) vergoed is''.

distinction between debtor-creditor liens and enrichment liens

Both these definitions are 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. A debtor-creditor lien serves as security for a **contractual claim**. If A has expended his money or labour on B's property in terms of a contract with B, he is entitled to retain possession of the property until B has paid the contract price. A debtor and creditor lien operates **only against the other party to the contract**. It provides no defence against the owner's *rei vindicatio* where the owner was not that other party to the contract. In other words, if B took C's property to A for repair, A cannot raise his debtor-creditor lien against C to secure payment of the contract price — he can do so only against B. A debtor-creditor lien is therefore not a real right. An enrichment (salvage and improvement) lien, on the other hand, is a real right. It serves to secure a **claim based on enrichment** and it operates against all the world, including the owner of the property. In this study unit we are concerned with enrichment liens. (For a discussion of the difference between debtor and creditor liens and enrichment liens, see *D Glazer & Sons (Pty) Ltd v The Master* 1979 (4) SA 780 (C).)

Roman law

The enrichment liens (right of retention) had their origin in Roman law. In Roman law, in fact, the impoverished person in certain circumstances had a *ius retentionis* even where he did not have an action. The Roman *bona fide* possessor who had effected improvements to another's property could not bring an action against the owner; the only way in which he could obtain compensation was by retaining possession of the property and raising the *exceptio doli* against the owner's *rei vindicatio*. Once he had lost possession this possibility fell away and he was left without remedy (De Vos 54).

Roman-Dutch law

In Roman-Dutch law the *bona fide* possessor retained his right of retention, but he now also had an enrichment action (De Vos 98). This means that even if he did not exercise his *ius retentionis*, he could still institute an action against the owner and in that way obtain compensation. The *ius retentionis* now served as security for his claim.

function of an enrichment lien

In South African law, it is my view that the only function of an enrichment lien is to provide security for a claim based on enrichment; that in every case where there is a right of retention there is also an action; and that where there is no action there can be no right of retention. This would mean that where the right of retention is lost, the impoverished person is not left without remedy; he still has a (now) unsecured claim which he can enforce by way of action. This view is confirmed, to some extent, by the decision in *Wynland Construction (Pty) Ltd v Ashley-Smith* 1985 (1) SA 534 (C); 1985 (3) SA 798 (A). This decision holds that before an impoverished possessor (or occupier) can rely on an enrichment lien against an owner, the owner must, in fact, have been enriched.

Brooklyn and Gouws on rights of retention

Brooklyn House Furnishers v Knoetze and Sons 1970 (3) SA 264 (A) (discussed in study unit 2), of course, also implied that there could be a *ius retentionis* without an action in so far as it recognised the existence of a *ius retentionis* in circumstances where an action was refused such as in the circumstances in *Gouws v Jester Pools* 1968 (3) SA 563 (T) without, however, overruling the *Gouws* case but distinguishing it specifically on the ground that in that case an enrichment action and not a *ius retentionis* had been involved. (Go back and revise the discussion of the *Brooklyn House Furnishers* case in study unit 2.)

correct view

According to our view, either the *Brooklyn* case or the *Gouws* case must be regarded as having been wrongly decided. If there is a *ius retentionis* in the circumstances of the *Brooklyn* case there must also be an action and if there is an action in those circumstances there must also be an action in the analogous circumstances of the *Gouws* case. Conversely, if there is no action in the circumstances of the *Gouws* case there ought not to be an action in the analogous circumstances of the *Brooklyn* case and if there is no action there ought not to be a *ius retentionis*. As indicated in study unit 2, the matter will not be finally settled until the question that was raised in the *Gouws* case is expressly answered by the Supreme Court of Appeal. The position was made somewhat clearer in *Buzzard Electrical v 158 Jan Smuts Avenue Investments* 1996 (4) SA 19 (A) in so far as the position of subcontractors was resolved, but the *Gouws* position was left open.

improvements to another's property

Whether improvements that were effected to another's property will 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. **Who** may exercise a *ius retentionis* (or bring an action) has emerged from the discussion of the specific enrichment actions in study units 3–8; which improvements will base a *ius retentionis* (or action) will be discussed here.

various enrichment liens

Traditionally the expenses which 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 these only *impensae necessariae* and *impensae utiles* can found an enrichment action and serve as a basis for a *ius retentionis*; on the ground of *impensae voluptuariae* no enrichment action can be brought and no *ius retentionis* arises (*Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) 85).

11.2 *IMPENSAE NECESSARIAE*

definition and requirements

These are expenses that are necessary for the preservation or protection of the property; in other words, they are expenses which the owner himself would have incurred to preserve or protect his property. Here one therefore has enrichment of the owner through expenses saved, and provided that the amount expended is reasonable and 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 expended and 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 (the impoverished person), the *quantum* of enrichment and impoverishment coincide. Whether the value of the property is increased is irrelevant in this case.

11.3 *IMPENSAE UTILES*

definition and requirements

These are expenses which are not necessary for the preservation or protection of the property, but which are useful and which enhance its market value. In this case, obviously, the amount of the enrichment need not coincide with the amount of the impoverishment. A possessor may, for example, erect a building on the land at a cost of R5 000 but which enhances the market value of the land by only R3 000, or 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 *quantum* of 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 lies for this amount and the *ius retentionis* serves as security for the payment of this amount (*Lechoana v Cloete* 1925 AD 536 at 547; *Fletcher and Fletcher v Bulawayo Waterworks Ltd* 1915 AD 636 at 648 and 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 (a leading case on the *ius retentionis*), *impensae voluptuariae* were defined as expenses which neither preserve the property nor increase its market value but which merely satisfy the caprice or fancy of a particular individual. One must agree with De Vos (228–229) that this 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 may enhance the value of the property. One must consequently look at the nature of the improvement before one can decide whether an expense is useful or merely luxurious.

no enrichment

Nevertheless, *impensae voluptuariae* do not constitute enrichment of the owner of the property. No enrichment action lies on the ground of such expenses and there is no *ius retentionis*.

physical control as a requirement

Please note in conclusion that a right of retention depends on the physical control of a thing, and that the content of the right is the power to retain that physical control until the debt (claim) which 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 v Nelspruit Town Council* 1949 (4) SA 48 (T); *Van Niekerk v Van den Berg* 1965 (2) SA 525 (O)). However, if the holder of the right of retention is deprived of his physical control over the thing unlawfully or against his will, he can claim that the thing be restored to his control, in which case his right of retention revives (*Assurity Private Ltd v Truck Sales Ltd* 1960 (2) SA 686 (SR); *Beetge v Drenha Investments (Pty) Ltd* 1964 (4) SA 62 (W)).

SELF-EVALUATION

(1) Distinguish between the two types of rights of retention by defining them and stating their requirements.

(2) Distinguish between a right of retention and a right to institute a claim based on enrichment. What is the connection between these concepts?

(3) Consider the practical scenarios at the beginning of this study unit. Explain, in respect of each type of improvement mentioned there, whether the improvement was necessary, useful or luxurious. Write your explanation in the form of an opinion to the owner of the goods.

FEEDBACK

(1) See 11.2 to 11.4.

(2) A **right of retention** over property is a right to retain the property concerned, and is conferred by operation of law on an impoverished person in certain circumstances. A right of retention allows the possessor to retain the property until compensated. Its effect is to afford security for payment. This is a real right and operates against everybody. A **right (claim) to performance** arises out of the obligation created by the fact of enrichment. This is a personal right enforceable by action against the enriched party. The performance (payment of compensation) which is the object of this personal right is secured by 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 those requirements. Remember, these definitions are fairly flexible and classification may depend on a variety of factors and surrounding circumstances — refer to those. Consider whether each of the improvements would entitle the impoverished party to exercise a lien or not, and if so, what type of lien.

STUDY UNIT 12

ENRICHMENT ACTION AGAINST AND BY MINORS

The diagrams used in the previous study units to provide a perspective on which parts of the enrichment law we were dealing with 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 the need to protect them. In this study unit we will study the enrichment actions available to a minor, as well as the enrichment actions which can be instituted against a minor.

PRACTICAL SCENARIO

A is 19 years old and has concluded an instalment sales contract with B for the purchase of a motorcycle for the amount of R20 000. A did not obtain the permission of his parents to conclude this contract. A has paid a deposit of R6 000 and has to pay 24 instalments of R1 000 per month in terms of the contract.

(a) A refuses to pay any of the instalments, but likewise refuses to return the motorcycle. Advise B.

(b) Assume that after A has paid 12 instalments the motor cycle is written off in an accident. A's father has now cancelled the contract and is claiming back all the monies paid. Advise B on whether the contract can be cancelled, and if so whether he has any defences against A's claim.

LEARNING OBJECTIVES

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 (OPTIONAL)

Eiselen & Pienaar 167–179

ADDITIONAL READING (OPTIONAL)

De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 95–96, 219–224

12.1 INTRODUCTION

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

12.2 ROMAN AND ROMAN-DUTCH LAW

application

A minor who received a performance in terms of an agreement which he entered into without assistance was liable, not contractually, but for unjustified enrichment. If the minor used the performance to buy necessaries, for example food, he was liable for this amount as well, on the ground of enrichment in the form of expenses saved. The extent of the minor's liability was always determined according to what it was at *litis contestatio*.

De Vos criticises the time of calculation

De Vos (at 95–96) argues that this is unfair towards the plaintiff, since, if performance is demanded from the minor and he refuses, he knows that from that time he is enriched at the expense of the plaintiff and if he then culpably causes his enrichment to fall away or decrease, the plaintiff's claim for enrichment is reduced to the extent of the minor's enrichment as it was at the moment of *litis contestatio*.

evaluation of De Vos's criticism

De Vos's criticism is not wholly convincing. We must distinguish strictly between delictual liability and liability for enrichment. In the case of a disappearance of or decrease in enrichment before *litis contestatio* owing to a fault on the minor's part, the plaintiff may claim, firstly, on the ground of undue enrichment, the extent of the minor's enrichment at the time of *litis contestatio*, and (possibly) secondly the enrichment which has been lost as **delictual** damages. Thus we reach the conclusion that the determination of the scope of the action for unjustified enrichment as it is at *litis contestatio* is in no way unjust. In any case, a true enrichment action requires that, in principle, only the extent of the enrichment at the time when the action was instituted may be recovered.

12.3 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 not enforceable from the point of view of the other party, and therefore he cannot enforce or rescind the contract. The minor can (with the necessary assistance) exercise various options. If his guardians ratify the contract, he can enforce the contract and perform in terms of it. He 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 (*Edelstein v Edelstein NO and Others* 1952 (3) SA 1 (A), as explained hereunder:

minor rescinds contract

- 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 and ownership therefore 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 that the other party has been enriched.

which enrichment action?

According to Eiselen and Pienaar (at 172–173), the *condictio indebiti* is not the correct enrichment action, since the performance was due by the minor at the time (although not enforceable), while the *condictio indebiti* can be applied only where performance was not due at that 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 to him against the minor for the minor's enrichment owing to his performance. This is a separate enrichment action and the other party's performance therefore cannot be used as a negative side-effect to his enrichment or a positive side-effect to the minor's impoverishment (Eiselen & Pienaar 172–173).

minor refrains from acting

- 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. It is, however, unclear which enrichment action is applicable, since such a situation has never been presented in our courts. The *condictio sine causa specialis* is not applicable, since the *causa* for the performance has not yet fallen away (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*. This 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, only time will tell (Eiselen & Pienaar 172–173).

enrichment claim

If an enrichment action is given, the moment from which 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 not be held liable for property lost or money spent before *litis contestatio*, except money spent on necessaries of life as this constitutes enrichment by saved expenses (Eiselen & Pienaar 173).

SELF-EVALUATION

(1) Discuss the application of enrichment liability against a minor in the common law.

(2) Critically discuss the time for calculating enrichment liability against a minor.

(3) Discuss the extent of enrichment liability against a minor.

(4) What is the position if the minor (with the necessary assistance) rescinds the voidable contract? Discuss briefly.

(5) Consider the facts in the practical scenario at the beginning of this study unit and answer the questions posed there.

FEEDBACK

(1) See 12.2.

(2) See 12.2.

(3) See 12.2.

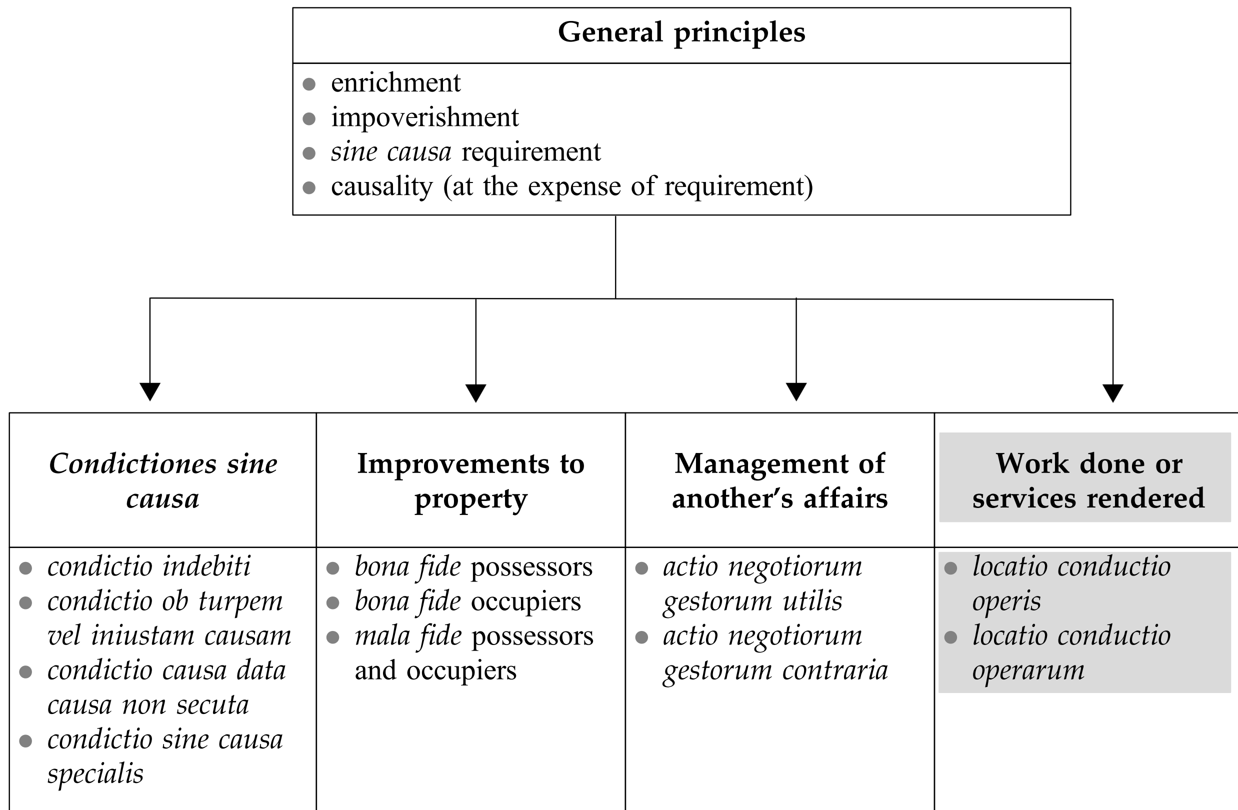
(4) See 12.3.

(5) (a) This contract is known as a ''limping contract'' — it is unenforceable against the minor. Because it is unenforceable, B cannot force A to make payment, nor can he cancel the contract for breach of contract. B can, however take practical steps to either enforce the contract or bring it to an end by informing A's guardian (either parent) of the agreement. The guardian is then forced to make an election, and either approve the agreement or cancel it. In the latter instance, the minor is entitled to claim any performance rendered and must tender any enrichment still in his possession, ie the motorcycle, in whatever condition it is at that stage.

(b) In this case the guardian is entitled to cancel the agreement because A, being a minor, did not have 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 is only obliged to restitute whatever is left of the other party's performance, which in this case would be the scrap metal.

STUDY UNIT 13

COMPENSATION FOR WORK DONE AND SERVICES RENDERED



OVERVIEW

You will remember that 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 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 workman 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 R40 000. G delivered the moulds, but it turns out that the moulds had not been correctly made. E then took the moulds to H, who reengineered the moulds to the correct tolerances at a

price of R8 000. E now refuses to pay G. Is E entitled to refuse payment? If so, on what ground? Is G without remedy under these circumstances?

Scenario 2

C is an employee of D's who is paid a monthly salary of R24 000 at the end of each month. During September 2004 he is caught stealing from D and after a disciplinary hearing his 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 his salary for September?

Scenario 3

A is an employee of B's who is paid a monthly salary of R20 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 OBJECTIVES

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 for 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 (OPTIONAL)

Eiselen & Pienaar 315–337
BK Tooling (Edms) Bpk v Scope Precision (Edms) Bpk 1978 (1) SA 391 (A)
Spencer v Gostelow 1920 AD 617

ADDITIONAL READING (OPTIONAL)

De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (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 of *locatio conductio operis* and *locatio conductio operarum* are cancelled on the ground of the contractor's or servant's breach, that part of the performance which may already have been rendered cannot, of course, be restored to the contractor or servant — one cannot return a partly completed building or the services which a servant might have rendered before his dismissal for misconduct. This means that an employer or master might derive considerable benefit from the partly performed contract without himself incurring any (contractual) liability towards the contractor or servant — the contract has, after all, been cancelled. In such circumstances our law allows the guilty contractor or servant an enrichment action. What he 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 or master has actually been enriched at his expense or the amount by which he himself 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)*. It is therefore important to return to the distinction between these two types of contracts. The distinction can be very clearly found in *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 61:

> 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 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). He may accordingly avail himself of the labour or services of other workmen as assistants or employees to perform the work or to assist him 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 own discretion decide whether or not he 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. He is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him by prescribing to him what work he 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 contract, not by the orders of the latter. He is not under the supervision or control of the *locator operis*. Nor is he 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 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 CONTRACT FOR WORK

basis for enrichment claim

The general principle is that the workman *(conductor operis)* under a contract for work *(locatio conductio operis)* is only entitled to his remuneration after the acceptance of the work by the employer *(locator operis).* If the workman does not perform fully or properly, then he cannot claim his remuneration on the contract since the employer would be able to defend himself successfully with the *exceptio non adimpleti contractus*. The question is then whether the employer should be allowed to retain the incomplete or faulty performance without making any payment whatsoever, and whether the workman who cannot recover his remuneration, may not be entitled to some compensation, on a ground other than contract. The courts have discussed this problem on several occasions and 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 N undertook to do certain building work for H for £60. He did not do the work properly and it appeared that it would cost £10 to complete the work as the contract required. Because N did not complete the contract as agreed, the court held that he could not recover the contract price. Since H had accepted and used the work done, he had been enriched thereby. The court held H liable for the contract price minus the cost necessary to complete the work properly. There were several judgments and according to the one by Lord de Villiers (at 298) the *ratio* was 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 follows approach

This approach was followed in other cases and the practice was thus that the workman could not recover anything on the basis of the contract, but that on the basis of enrichment he could recover the contract price less the costs of supplementation or completion. The main point of criticism against this 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 compensation.

BK Tooling v Scope Precision

The Appellate Division had occasion to reconsider the matter in *BK Tooling (Edms) Bpk v Scope Precision (Edms) Bpk* 1978 (1) SA 391 (A) and a new approach was formulated. Jansen JA analysed the judgments of the judges in the previous cases and came to the conclusion that where the plaintiff was held to be entitled to claim the contract price less the costs necessary to complete the work, he would actually be allowed to institute an action on the grounds of contract and

not on the grounds of enrichment. The court should analyse the facts of the particular case and then 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 the court would apply the *exceptio non adimpleti contractus* or not. Jansen JA held that the court has a discretion whether to apply the defence or not. Among the relevant factors which the court should consider when exercising its discretion are the use of the performance by the employer and the extent of the shortcomings. If the court decides not to allow the *exceptio* then the plaintiff has a contractual claim and the workman is 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 necessary is something within his own sphere of knowledge and that is why the *onus* to prove the extent of these costs rests on the workman. 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 is therefore that enrichment liability is 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 there was substantial performance and that it could be raised when the defect in performance was substantial. The court has a discretion and the substantiality of performance is only one of the factors which the court takes into account. The plaintiff who claims under the contract must allege that he has performed properly or otherwise contend that there are reasons why the court should exercise its discretion in his favour and set out the necessary facts that would justify this. Otherwise he will only have a claim on the basis of enrichment.

ACTIVITY

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

FEEDBACK

Is this a service contract or a contract for work and what is the relevance of that issue? Did you consider the effects of the *exceptio non adimpleti contractus* in these 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 this a 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 remuneration for his services only upon completion of the term of his contract of service. If he has not rendered his services for the full term of the contract, he is not entitled to his full agreed remuneration unless the contract so determines. The question arises

whether he can claim a portion of his remuneration on the contract or, otherwise, whether he has a claim against the employer *(conductor operarum)* on some other basis. Here we also find the approach that the employee cannot claim on the contract because his claim will be defeated by the *exceptio non adimpleti contractus* so that he is compelled to claim on the ground of unjustified enrichment.

Spencer v Gostelow

The *locus classicus* is *Spencer v Gostelow* 1920 AD 617. *In casu*, the employer 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. Notwithstanding contrary *dicta* in older cases, it was held that the employer cannot enjoy the services of the employee without compensating him for them. The court based his duty to pay some remuneration on 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. The court awarded the employee a *pro rata* portion of his remuneration according to the length of time actually served. This amounts to the following: The plaintiff claimed the amount the employer saved because it was not necessary to employ another employee for the period the plaintiff worked, and this amount would normally be the plaintiff's *pro rata* remuneration. The plaintiff must also prove his impoverishment and this is normally the remuneration he could have earned during the period when he was working for the employer. Innes JA remarked (at 631):

> The measure of the master'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 abovementioned ruling applies where the employee does not work the full period as a result of illness or some other factor which prevents him from working, or as a result of a termination of the contract of service for a valid reason such as 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 job, he loses his claim on the grounds of enrichment against his employer (De Vos 297).

criticism

The question can be asked whether this common-law solution should not be replaced by a new approach. It is difficult to see why a difference should be made between termination of the contract of employment for one form of breach of contract and not for *de facto* termination of the contract because of desertion. We must naturally bear in mind the fact that the rule may be one adopted in the public interest in order to discourage desertion, but then it is difficult to understand why it applies only to some employees and not to all of them. The inclusion of the one category with those allowed a claim justifies the inclusion of the other.

ACTIVITY

Consider practical scenarios 2 and 3 at the beginning of this study unit. Advise the employee in each case. Write the advice in the form of an opinion.

FEEDBACK

Is there a difference in law between these two situations? Do the principles of the *exceptio non adimpleti contractus* come into play in these situations? Are these claims based on enrichment or contract?

SELF-EVALUATION

(1) Distinguish between *locatio conductio operis* and *locatio conductio operarum.*

(2) Discuss, with reference to case law, the basis for the enrichment claim of the workman whose performance was defective.

(3) Critically discuss, with reference to case law, the basis for the enrichment claim of the employee whose performance was defective.

FEEDBACK

(1) See 13.1. Refer in your answer to the distinction as formulated in *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

(2) See 13.2. Refer in your answer to *Hauman v Nortjé* 1914 AD 293 and *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1978 (1) SA 391 (A).

(3) See 13.3. Refer in your answer to *Spencer v Gostelow* 1920 AD 617.

GENERAL ENRICHMENT ACTION

OVERVIEW

You will remember that at the outset we said that although general principles for enrichment liability had developed in South African law, the existence of a general enrichment action was rejected in *Nortjé v Pool*. The case left the possible development of such an action open, however. In this study unit we will study the possible recognition of a general enrichment action in South African law in future.

LEARNING OBJECTIVES

After completing this study unit you should be able to

- briefly discuss the position in our common law regarding a general enrichment action
- critically discuss the decision in *Nortjé v Pool*
- briefly state the effect of the decision in *Nortjé v Pool* on the law of enrichment in South Africa
- discuss the influence of the decisions in *Kommissaris van Binnelandse Inkomste v Willers* and *Blesbok Eiendomsagentskap v Contamessa* on a general enrichment action in South African law
- discuss the manner in which a general enrichment action would find application in South African law

RECOMMENDED READING (OPTIONAL)

Eiselen & Pienaar 9–25
Blesbok Eiendomsagentskap v Contamessa 1991 (2) SA 717 (T)
First National Bank of Southern Africa Ltd v Perry NO And Others 2001 (3) SA 960 (SCA)
Kommissaris van Binnelandse Inkomste v Willers 1994 (3) SA 283 (A)
Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 (5) SA 193 (SCA)
Nortjé v Pool 1966 (3) SA 96 (A)
McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA)

ADDITIONAL READING (OPTIONAL)

De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 311–329
Hahlo & Kahn *The South African legal system and its background* (1968) 559
Pretorius ''Uitbreiding van die toepassingsgebied van die *condictio indebiti* en die ontwikkeling van 'n algemene verrykingsaksie'' 1995 *THRHR* 331–336

Van Zyl *Die saakwaarnemingsaksie as verrykingsaksie in die Suid-Afrikaanse reg* (1970) 171–172
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 which existed side by side with the old classical actions and which covered instances not covered by the old classical actions. It was hoped that a subsidiary general enrichment action would develop into an all-embracing general action, that is an action which would not exist in addition to various individual actions, but which would cover the whole field of unjustified enrichment. This could have been achieved by 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 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 (*Pretorius v Van Zyl* 1927 OPD 226 229; *Knoll v SA Flooring Industries Ltd* 1951 (1) SA 404 (T)), 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 *Nortjé v Pool* 1966 (3) SA 96 (A) 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 his first edition investigated the very broad definitions of enrichment given by De Groot and Huber, but found that these 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 also answered this question in the affirmative, because he could find only one instance where the Hooge Raad had granted an action simply *ex aequitate*, because the case could not be brought within any of the recognised actions, one doubtful case, and a third case which negated a finding that such an action existed.

new research

In his second edition he changes his view because of information regarding developments of Roman-Dutch practice which had become generally available since 1958 (De Vos 101). Scholtens (1966 *SALJ* 391) brought to our notice two further decisions of the Hooge Raad reported by Van Bynkershoek (*Obs Tum* 277 and 2751) and the first volume of the *Observationes Tumultuariae Novae* of Willem Pauw in which several decisions of the Hooge Raad on unjustified

enrichment are reported. Unfortunately, these decisions were not brought to the attention of the court in the *Nortjé* case. Hahlo and Kahn (at 559) state that ''[i]t an be confidently expected that more and more use will be made of them (ie the *Obs Tum* and *Nov*) in legal argument in South Africa''.

Obs Tum

Because of the importance of these publications, especially as regards private law, it will not be out of place to digress and briefly discuss the background to the *Obs Tum*, so that you can fully appreciate why they are important to both the legal student and the legal practitioner. The members of the Hooge Raad met regularly in order to discuss and decide outstanding cases. Van Bynkershoek and Pauw reported the deliberations and the decisions so taken. Van Bynkershoek's (1673–1743) greatest contribution to Roman-Dutch law was his *Obs Tum*. He was a member and later president of the Hooge Raad. Every night he would jot down the decisions taken by the court during the day, adding an account of the discussions in chambers and his own views. His son-in-law Willem Pauw (1712–1787), also a member and later president of the Hooge Raad, continued the series under the title *Obs Tum Nov*. Van Bynkershoek bequeathed his manuscripts to Pauw, and on the latter's death they went to his grandson, who died childless. Although there were no males in the direct line, the manuscripts were kept in the family. In 1889 they found their way into the storerooms of an auctioneer and twenty-five years later were traced there by EM Meijers. Both Van Bynkershoek and Pauw had forbidden publication of their manuscripts, but the reasons advanced (that they had not been revised for style and that disclosure of what happened behind the scenes was undesirable) had long since fallen away.

publication

Meijers and De Blécourt (of Leiden University) and Bodenstein HDJ (then professor at Amsterdam University) began preparing the manuscripts for publication. Volumes I–IV were published during the years 1926–1962. In 1964, the first volume of Pauw's *Obs Tum Nov*, containing decisions of the Hooge Raad from 1743–1755 (*Obs* 1–570), was published. In 1967, Volume II, covering 1756–1770 (*Obs* 571–1136), was published. The importance of the *Observationes* lies in the fact that they provide reasons for the judgments they describe. The two sets of *Observationes* thus round off the picture of the law of Holland in its heyday, a period poor in institutional works.

information confirmed

Over and above the notes of Van Bynkershoek and Pauw, minutes of the meetings of the members of the Hooge Raad were drawn up by the *Griffier* of the court. These minutes substantiate the *Observationes* in that they show that we are not dealing simply with the opinions or views of these two jurists alone. Usually nine judges would sit on a case. One of the judges *(rapporteur)* in the case would give an exposition of the facts and state his opinion on the decision to be taken. Thereafter each judge would give his own opinion. Further discussion might take place and the decision of the court would be taken on a majority vote. Since the Dutch courts did not give reasons for their decisions, the views expressed by the judges remained secret. Nowadays the minutes of the meetings of the Hooge Raad are kept in the State Archives at The Hague. The keeper of the State Archives supplied Prof Scholtens with a photostat copy of the minutes of the meeting in which the case which forms the subject of Pauw's *Ob Tum Nov* No 12 was discussed.

When looking at 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.

14.3 *NORTJE v POOL*

facts

The facts of the *Nortjé* case, in so far 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. It was agreed that if kaolin was discovered in payable quantities, 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. A carried out the prospecting work and this led to the discovery of kaolin in payable quantities. A and B were, however, unaware that their agreement was null and void because of noncompliance with section 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. He alleged that B had been enriched by an amount of at least R15 000 by the discovery but that his impoverishment amounted to only R4 557. A accordingly claimed the lesser amount.

exception

B's executor took exception to the claim and alleged that A had no cause of action for the following reasons: (1) the claim did not fall within the confines of any one of the recognised enrichment actions; (2) it did not appear from the claim that the deceased estate had in fact been enriched; (3) it did not appear that the deceased estate had been enriched unlawfully; and (4) it did not appear that the plaintiffs were in the ''bedrywighede kragtens die gemelde nietige kontrak verstoor nie''. In the court *a quo*, Van Winsen J upheld the exception. He held that no general enrichment action existed in our law, but only *ad hoc* extensions, in certain circumstances, of the existing actions. He was of the opinion 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 there. He stated further that even had the land increased in value because of the activities of the prospectors, there was still no question of the landowner benefiting unless the latter intended to sell the property. A appealed against this decision.

majority judgment

The majority judgment in the Appellate Division, delivered by Botha JA (Williamson and Wessels JJA concurring) upheld the exception. It was held that the action which a *bona fide* possessor has always had to claim compensation for improvements, which had been extended to occupiers, lay only for **visible or tangible** improvements such as a building or a well. If A were to have an action because he had enriched B by disclosing qualities in B's land which had always existed, but which were unknown, it would have to be a general enrichment action. Botha JA then examined our law in this respect and concluded that it had not yet reached the stage where a general enrichment action was recognised, although such a development might still take place.

no general enrichment liability

The following *dictum* (at 139–140) 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 undeveloped enrichment actions of the Roman and classical Roman-Dutch law, and in the development of enrichment liability also in circumstances which could not be brought under the head of one of the recognised actions. The development of enrichment liability in such circumstances was completely

> casuistic in the particular circumstances, and 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 particular circumstances.

The *dictum* was concluded with the following words (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, something not yet achieved, it would be a blatant discretionary remedy which would cause uncertainty.

minority decisions

Two individual minority judgments were delivered and they must be given the same detailed study as the majority judgment.

Ogilvie Thompson JA

Ogilvie Thompson JA held that it was unnecessary to determine whether our law in fact recognised a general enrichment action, since he felt that those cases in which, in the past, occupiers had been given an action were clearly wide enough to cover a case such as the present one. The exact way in which enrichment came about, whether by way of accretion to the land or by way of an increase in the market value of the land by discovering hitherto unknown qualities, was of no relevance. He therefore rejected the exception.

Rumpff JA

Rumpff JA also found it unnecessary to determine whether our modern law recognised a general enrichment action, but he leaves us in no doubt that he believed a strong case could be made out for such a proposition, namely that our law does in fact recognise such an action. In his view the *condictio indebiti* of modern law was wide enough to cover the facts *in casu*. He, too, believed that an action should lie even where the enrichment had come about as it did in this case. He rejected the exception.

De Vos

De Vos (at 322) agrees with the majority judgment, namely that if A were to have an action it would have to be a general enrichment action, because his claim did not fall within the boundaries of one of the specific enrichment actions. De Vos is obviously of the opinion that such a general enrichment action already existed in the common law and that it should therefore be applied in South African law. The majority decision did not share De Vos's point of view. Until such time as the views of our Appellate Division change, the majority decision in the *Nortjé* case will reflect our law in this respect.

effect of *Nortjé* decision

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. These *ad hoc* extensions are available only in specific circumstances.
- These *ad hoc* extensions of enrichment liability are developed enrichment actions (whereas the old actions are not) in so far as detrimental side effects of the enrichment (and presumably also 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 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 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, with the addition in each instance of a further vague requirement that specific circumstances must be present.
- A general enrichment action is not recognised as forming part of our law.

14.4 *KOMMISSARIS VAN BINNELANDSE INKOMSTE v WILLERS*

facts

In *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A) the facts were as follows: The appellants alleged that the liquidator of a company made certain payments to the respondents (shareholders in the company) in the *bona fide*, but erroneous, belief that the respondents were entitled to receive the full amount of those payments; that those payments in fact included the amount which the company owed to the appellant for unpaid income tax which was included in the payments to them; and that the respondents had been unjustifiably enriched as against the appellant to that extent. The respondents excepted to this claim on the ground that the claim was based on the *condictio indebiti*, or alternatively enrichment, and that no common-law action was available to an unpaid creditor of a company against a shareholder who had received more from the dissolution of the company than he would have received had the creditor been duly paid. In appeal the court did not overrule the decision in *Nortjé v Pool* but did hold that a court is not precluded from accepting liability for undue enrichment in a particular case merely because liability has not previously been recognised in the same, or even similar, circumstances (at 333). The appeal against the upholding of the exception was allowed.

Pretorius on *Willers*

Pretorius (1995 *THRHR* 336) states that the judgment by Botha JA can at least be seen as encouragement towards an extension of enrichment liability where the need exists. This approach can be welcomed because the legislature has not done anything to draft a statutory general enrichment action since the decision in *Nortjé v Pool* and the courts therefore will have to make law and not just apply it in the field of enrichment liability. However, Pretorius also feels that the *Willers* decision should be criticised for the fact that it did not do anything to lessen the effect of the decision in *Nortjé v Pool*. Instead of acknowledging a subsidiary general enrichment action and as a result rejecting the *Nortjé* decision on this point, the court held only that *Nortjé* did not exclude further developments and thus that the court still has the power to extend enrichment liability in appropriate cases. The courts are, however, slow to bring about legal reform. The decision, therefore, creates some uncertainty since a subsidiary general enrichment action is not acknowledged — as a matter of fact the opposite seems to be true because the *Nortjé* decision is not rejected on this point — but the extension of enrichment liability is nevertheless encouraged considering precedents and the opinions of academic writers regarding general principles to establish and limit liability.

14.5 *BLESBOK EIENDOMSAGENTSKAP v CONTAMESSA*

acknowledged general enrichment action

In *Blesbok Eiendomsagentskap v Contamessa* 1991 (2) SA 712 (T) 719 Van Zyl J held that in Roman law there was already a general doctrine against unjust enrichment and that the time had come to recognise a general enrichment action. According to him, it was artificial to limit the action to certain circumstances, and there was a need to extend the action. He added that mere extension of the action to new circumstances was in itself a recognition of a general enrichment action. According to Van Zyl J, common-law research, both before and after the *Nortjé* decision, undoubtedly indicated the existence of a general enrichment action. By acknowledging a general enrichment action, it would no longer be necessary to become fixated on the name of the action that applied in specific circumstances. He noted that as long as the defendant had been unjustifiably enriched at the expense of the plaintiff, a reliance on a general enrichment action should be successful.

current position in our law

The *Contamessa* decision that expressly acknowledges the existence of a general enrichment action is a Transvaal decision and therefore cannot overrule the *Nortjé* decision. Although the decision in the *Willers* case is a Appellate Division decision, the court did not overrule the *Nortjé* decision. The *Nortjé* case is therefore still our highest authority on this point.

14.6 WAY FORWARD: THREE RECENT SUPREME COURT OF APPEAL CASES

(a) *McCarthy Retail Ltd v Shortdistance Carriers cc*

In the first of three important cases, *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA), Schutz JA had the following to say about the 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 Nortje'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 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 Nortje'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 Nortje'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 of Southern Africa Ltd v Perry No

In another case in that same year 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

This 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) where Navsa JA and Heher AJA dealt with this 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 v Probert* 1985 (3) SA 429 (A), 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. 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 unjust enrichment, an equitable remedy in which the contractual provisions are largely irrelevant. As Van den Heever J said in *Pucjlowski 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; *Pucjlowski 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.'

[16] 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 unjust enrichment.

[17] 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 here it would seem that there will be a growing tendency to pay less attention to the identification of

the specific enrichment action and that the emphasis will in future be more on the general requirements. This creates a certain dilemma for litigants, as the various *condictiones* still have their own requirements that need to be fulfilled. For instance, when relying on the *condictio indebiti,* 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 the *condictio sine causa specialis*.

It is also evident that with the extension of the current *condictiones* and the scope for development, there will be very few new instances where a general enrichment action can play a role in addition to the current actions. It is also clear that the Supreme Court of Appeal now 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 would not replace them.

14.7 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 a general enrichment action. Owing to the casuistic approach to enrichment at Roman law, it is conceivable that a party had no action in certain circumstances; just think of the fact that the value of a *factum* could not be recovered, that a person who had lost his property as a result of *bona fide specificatio* had no action, that *detentores*, such as the holder at will *(precario habens)* and the *bona fide detentor*, apparently had no right to compensation, et cetera.

Roman-Dutch law

In the previous study units we gave you a glimpse of the various actions of Roman-Dutch law as propounded by our old writers. In some respects the actions of this period show an improvement in comparison with Roman law, and the striving for equitable results is clearly discernible. Furthermore, a few obvious gaps were filled, 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 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*. It is also doubtful whether a *bona fide* occupier or a precarious holder would have had a claim for compensation for improvements brought about at his expense and which enured to the benefit of the owner of a thing.

development

A few comments must be made on how satisfactory or unsatisfactory the present position is in our law of enrichment. The retention of the old actions is wholly unnecessary and gives rise to a casuistic approach. As regards the future development of our law of enrichment, the obvious basis is the absorption of the old actions by a general enrichment action. Questions asked at present, such as the nature of the enrichment and the form which it took, ought not be asked. The only question should be whether or not there was unjustified enrichment at the expense of the impoverished party. However, the latest approach of the Supreme Court of Appeal does not seem to favour this approach.

general requirements

In practice it would amount to this: In the case of enrichment there would be no distinction between the action of the *bona fide* possessor, *bona fide detentor*,

usufructuary, *precario habens*, and so on, but the relationship between the impoverished person and the thing which he had improved and between this person and the owner of the thing would be wholly disregarded, and the following questions would simply be asked: (1) Was the defendant **enriched**? (2) Was the plaintiff **impoverished**? (3) Was the enrichment **at the expense of** the person impoverished? (4) Was the enrichment **undue**? If the answers to these questions were in the affirmative, the impoverished person should succeed with his enrichment action. According to De Vos (at 328–329), the requirements for a general enrichment action should be the following: (1) The defendant must be enriched; (2) the enrichment must be at the expense of the plaintiff; (3) the enrichment must be *sine causa*; (4) the instance must not fall under one of the classical enrichment actions; and (5) no legal rule must exist that, in spite of the presence of the requirements (1) to (4), would prevent the impoverished party from instituting an action.

general enrichment action

We therefore call for an all-embracing general enrichment action that would not only free our law from today's casuistic approach to enrichment, but would also bring new flexibility, simplicity and life to our law of enrichment. The Appeal Court's doubts and objections regarding a general action are not convincing. If our law does gradually develop towards a comprehensive general enrichment action, this would not imply by any means that we would necessarily have to dispense with the names of the old actions, but merely that we would have to dispense with particular requirements for particular forms of enrichment. The *condictio indebiti*, the action of the *precario habens*, that of a contractor for work, et cetera would still be available in the case of specific forms of enrichment, such as undue payment, improvements by a *precario habens*, incomplete performance by a contractor for work, et cetera, but the requirements for all these particular forms of enrichment should be the same, that is the **requirements** of a general enrichment action.

case law or legislation

How should an all-embracing, general enrichment action be created — by the courts or by the legislature? Van Zyl (at 171–172) believes that the extended *actio negotiorum gestorum* can serve a useful function in this regard. De Vos (at 378) holds the view that such a general enrichment action can be created only by the necessary legislation. In our opinion, however, our courts themselves can develop such a general enrichment action without much trouble, by gradually dispensing with the specific requirements of the old actions (without necessarily rejecting the names of the old actions) and by accepting uniform requirements for liability for enrichment. We have already indicated what these requirements should be, and we can only hope that in the process of the development of our law of enrichment our courts will forsake the casuistic approach, which has unfortunately become customary, and will seek guidance from the continental legal systems, which in general recognise a developed general enrichment action, either as a product of the legislature or as a product of their case law (De Vos 120–152). Note that these legal systems generally lay down the following requirements for liability for enrichment, sometimes retaining the nomenclature of the old classical actions: (1) **enrichment** of the defendant; (2) **impoverishment** of the plaintiff; (3) enrichment **at the expense** of the plaintiff; and (4) undue ***(sine causa)*** enrichment.

SELF-EVALUATION

(1) Briefly discuss the position in our common law regarding a general enrichment action.

(2) Critically discuss the majority and minority decisions in *Nortjé v Pool* 1966 (3) SA 96 (A) 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.

(3) Discuss the effect of two recent decisions, namely *First National Bank of Southern Africa Ltd v Perry NO And Others* 2001 (3) SA 960 (SCA) and *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.

(4) Discuss the manner in which a general enrichment action may find application in future South African law.

FEEDBACK

(1) See 14.2.

(2) See 14.3.

(3) See 14.6.

(4) See 14.6 and 14.7.