UNJUSTIFIED/ UNDUE ENRICHMENT LIABILITY

UNIT 1: GENERAL OVERVIEW

DEFINITION

When one person's estate is increased unjustifiably at the expense of another.

- Enrichment = source of obligation
- Relationship between debtors and creditors

LAW OF PERSONS **LAW OF OBLIGATIONS** **LAW OF PROPERTY**

LAW OF DELICT **LAW OF CONTRACT** **UNJUSTIFIED ENRICHMENT**

ACTIVITY 1: Can you think of any other possible situations where a transfer of property could take place without legal reason, thus giving rise to an enrichment action? Try to provide three more examples. Write them down in your study journal or notes.

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.

ACTIVITY 2: Explain in your own words why unjustified enrichment is required as a corrective in our law.

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 **Four requirements** are:

1. The plaintiff must have been impoverished.
2. The defendant must have been enriched.
3. The enrichment must have been sine causa or without legal cause.
4. Causality — the enrichment must have been at the expense of the impoverished party.

These requirements provide the foundation for this form of liability, setting it apart as a distinct discipline within the law of obligations and distinguishing enrichment liability from contractual and delictual liability. 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(without legal cause)* requirement.

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. It also means that where the defendant's enrichment is diminished or lost before action is instituted; his liability is likewise reduced or extinguished. ***ABSA Bank Ltd v Standard Bank of SA Ltd***

The onus of proving non-enrichment is on the defendant but such reduction or extinction of liability is subject to the following **qualifications**:

1. Enrichment may be calculated from the moment the defendant becomes aware that he or she has been unjustifiably enriched at the expense of another
2. 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
3. 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: in the case of a minor who has been enriched by performance to him in terms of an unauthorised contract where liability is restricted to the amount of the minors enrichment at the time of *litis contestation (*time of the institution of the action)

SELF-ASSESSMENT

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

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.

Example 1: 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 a farm build a house and outbuildings on that farm, all the buildings become the property of the owner of the farm and such owner is entitled to eject the bona fide possessor at any time leaving 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: 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. 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.
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.

2. Explain why reference to Roman law is applicable today with reference to enrichment liability?

Roman law had specific enrichment actions, each with their own requirements, but there was no general liability for unjustified enrichment. Relief was granted to a plaintiff in specific circumstances based on very broad principles stated in two texts which could not possibly provide a basis for liability. The enrichment actions of Roman law were received into Roman-Dutch law where they were developed and extended over time and are still available in South African law. Our courts have also recognised liability for enrichment in a number of circumstances where none of the old actions was applicable; thereby further extending the scope of unjustified enrichment liability in South African law.
In **Mccarthy Retail Ltd v Shortdistance Carriers** the court stated that 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. Having regard to such extensions of enrichment liability, South African academics had concluded 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 that a general action had been developed which was additional and subsidiary to the existing actions. Unjustified enrichment liability is still underdeveloped in comparison with contract and delict and therefore remains closer to Roman and Roman-Dutch law sources from which, it, and the greater part of our private law, including contract and delict is sourced.

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.

Four requirements of enrichment liability are:

1. The plaintiff must have been impoverished.
2. The defendant must have been enriched.
3. The enrichment must have been sine causa or without legal cause.
4. Causality — the enrichment must have been at the expense of the impoverished party.

The profit made was not without legal cause (sine causa) since there is a valid contract justifying such profit.

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?

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. 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?

B has no defence. Although A has an enrichment claim in principle, the enrichment has been extinguished, which is a valid defence against A's claim.

UNIT 2: GENERAL REQUIREMENTS FOR ENRICHMENT LIABILITY

COMPONENTS/ GENERAL PRINCIPLES / REQUIREMENTS

- Enrichment
- Impoverishment
- *Sine causa* requirement (without legal cause)
- Causality (at the expense of)

VARIOUS ENRICHMENT CLAIMS AVAILABLE

Condictiones sine causa	Improvements to Property	Management of another's affairs	Work done or service rendered
Condictio indebiti Condictio ab turpem vel iniustam causam Condictio causa data causa non secuta Condictio sine cause specialis	Bona fide possessor Bona fide occupier Mala fide possessor Mala fide occupier	actio negotiorum gestorum utilis actio negotiorum gestorum contraria	locatio conductio operis locatio conductio operarum

EXAMPLES

- Electronic funds transfer into incorrect bank account
- Payment of cheque which has been stopped

GENERAL ENRICHMENT ACTION

See; ***Nortje v Pool***

No general enrichment action – mere ad hoc extensions of existing actions. Did not exclude possibility of general enrichment action, but emphasized that it would have to be gradually developed by the courts.

EXTENT OF LIABILITY

Entitled (in principle) to the amount by which he has been impoverished or by which defendant has been enriched – whichever is the lesser

Quantum determined at time of institution of action. Defendant therefore not liable for benefits he could have derived but did not obtain. Where enrichment diminishes, so does liability reduced.

EXCEPTIONS

Liability usually fixed – calculated with reference to the date on which enrichment action was lodged. May be fixed at an earlier date under certain circumstances:

From the moment the defendant becomes aware he has been unjustifiably enriched. Liability only reduced if defendant can prove that loss/destruction would have taken place in any event or that it wasn't his fault. Where negligent, he remains liable at time of actual knowledge.

If defendant should have realised that benefit may later prove to constitute unjustified enrichment. Liability reduced or extinguished if he can prove enrichment was not his fault. Liable at time when a reasonable person would have realised he might be enriched.

When defendant falls into mora debitoris. Liability reduced or extinguished only if defendant proves enrichment would have operated against plaintiff if performance had been made timeously. Where there is a doubt about the existence of a claim or a dispute – mora does not arise.

Mala fides – when defendant acts in bad faith.

The above 4 circumstances do not apply to minors. If minor enriched in terms of unauthorised contract claim remains restricted to enrichment at time of litis contestatio.

REQUIREMENTS DISCUSSED

1. **DEFENDANT MUST BE ENRICHED**

- Increase in defendant's assets (which would not have occurred)
- Non-decrease in defendant's assets (which would have occurred)
- Decrease in liabilities (which would not have occurred)
- Non-increase in liabilities (which would have occurred)

Must still exist in patrimony of enriched party at time claim is lodged. Either the thing – or the money received for the thing sold.

Acquisition of a benefit with a monetary value = financial position of estate at relevant time compared to financial position of estate if enrichment did not occur.

Potential benefit not enrichment – unless received as actual benefit.

In appropriate cases invisible or intangible personal benefits may be enrichment.

The use of another's thing? Not yet settled law.

2. **THE PLAINTIFF MUST BE IMPOVERISHED**

- Decrease or non-increase in assets
- Increase or non-decrease in liabilities

In fully developed enrichment action all favourable and detrimental side-effects of the enriching fact ought to be taken into account in determining defendant's enrichment and plaintiff's impoverishment. However some side effects are not always taken into account – thus not fully developed.

3. DEFENDANT'S ENRICHMENT MUST HAVE BEEN AT THE EXPENSE OF THE PLAINTIFF

Must be a causal link between the enrichment and the impoverishment. The enrichment must be at the expense of the plaintiff.

Indirect Enrichment

A and B enter into a contract. A renders performance to B, but benefit of the performance accrues to C.

Example:

A contracts with B to build swimming pool for B.
A builds pool on C's property believing it to be that of B's.

De Vos:

B renders performance to A and B pays A for work. C is enriched at B's expense (not A).
If B has not yet paid A (and he is in a position to pay) – A can enforce contractual action.
If B is insolvent or disappears - A cannot bring enrichment action against C because C is enriched at B's expense – NOT A.
This view was endorsed in *Gouws v Jester Pools*
Problem addressed in:
Buzzard Electrical v 158 Jan Smuts Avenue Investments
Cannot be used to confirm or reject Gouws decision – deals with subcontractor cases.
Enrichment lien – right of retention – operates against anyone, including the owner. Retain possession until compensated. Same requirements satisfied as for enrichment action.
See; ***Brooklyn House Furnishers v Knoetze***

4. ENRICHMENT MUST HAVE BEEN SINE CAUSA (UNJUSTIFIED)

Reason: No one would be able to make a profit at the expense of another if there is no limiting factor – enrichment must be unjustified.

DEFINITION

Enrichment is unjustified when there is not 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).
Does not depend on subjective factors (i.e. mistake on part of parties)
Objectively, whether there is a legal ground to justify enrichment.
Question of fact.
See; Buzzard Electrical

ACTIVITY

Consider the five scenarios and consider whether liability in each case should be based on delict, contract or unjustified enrichment and explain whether the *sine causa* requirement has been fulfilled in each of these cases and explain whether the general requirements for unjustified enrichment liability have been met in each case.

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 provide examples of transfers that were *sine causa*, but scenario 4 does not.

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?

The contract was void owing to the initial impossibility on the existence 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

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? and also formulate your own reasoned point of view in respect of indirect enrichment situations.

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, his 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. This is not a case of indirect enrichment. The painter mistakenly painted the wrong house.

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 4 Did you consider whether there was a valid contract between the parties? If so, is the enrichment *sine causa*?
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 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? And explain which party, if any, has been enriched and impoverished and to what extent.

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*? There is no transfer of ownership because the goods were stolen. The *actio rei vindicatio* or a delictual claim would therefore be more appropriate.

(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?

General requirements for enrichment liability

1. The defendant must be enriched
2. The plaintiff must be impoverished
3. The defendant's enrichment must have been at the expense of the plaintiff
4. The enrichment must have been sine causa (unjustified)

With regard to **requirement (1)** 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
(3) A decrease in liabilities which would not have taken or
(4) A non-increase in liabilities which would have taken place.
The enrichment may consist either of the thing or value received and must still exist in the patrimony of the enriched party at the time when the claim is lodged.

With Regard to **requirement 2**: quantum of the plaintiff's claim is the amount by which he been impoverished or the amount by which the defendant has been enriched, whichever is the lesser. This implies 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. 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 including side effects which flow indirectly from the enriching fact.

Example 1: A pays B an amount of R2 000 which is not owing, and B uses this amount to buy household necessaries which he consumes before A institutes an action against B for R2 000.
At this stage there is no increase in the assets of B's estate, but if B had not received the R2 000 from A he would have had to use R2 000 of his own money causing a decrease in his estate which, in the circumstances, did not take place because of the R2 000 that B received from A. B's enrichment takes the form of **expenses saved** and A should consequently succeed with his action.
Example 2: 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 institutes an action against B. B is enriched by the R5 000 in the form of expenses saved. The R45 000 spent on the car does not, constitute saved expenses as she could not have bought the car without the money. If, 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.

Example 3: In the Nortje´ case the plaintiffs who were prospectors had, through their own efforts, discovered a rich deposit of porcelain clay on the defendant's farm. The question was whether the discovery of the clay had enhanced the value of the farm. The court a quo 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. 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

a. **Potential Benefit**

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. Where the defendant has knowingly neglected to appropriate or acquire a potential advantage he is not enriched by the potential benefit not acquired. In **Kruger v Navratil** it was wrongly accepted that a benefit that the defendant did not acquire could be recovered by an enrichment action.

b. Moral Benefits

Unisa is of the view that the result of enrichment must be an increased estate and ''moral'' benefits cannot increase one's estate and cannot therefore constitute enrichment. According to Unisa the decision in **Tanne v Foggitt** was incorrect where the court 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 (the lessons) actually received. This decision implies that such ''moral'' benefits could constitute enrichment. **De Vos's view**, however, is that in an appropriate case invisible or intangible personal benefits may be regarded as enrichment.

c. Use of a thing

Whether the use of a thing constitutes enrichment is unsettled. In ***Lodge v Modern Motors*** 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.

(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.

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(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.

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 including side effects which flow indirectly from the enriching fact. Such side-effects may take many different forms for example:

A and B enter into a lease of land with A as the lessor and B as the lessee and the contract is void for some reason but B remains in possession of the land for three years and constructs buildings on the land which cost B R80 000 and which enhance the value of the land by R60 000. When A evicts him, B claims compensation based on enrichment for the improvements to the land.

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, and the value of his possessory interest for three years was R30 000. This detrimental side-effect reduces A's actual enrichment to R30 000. Secondly B had possession of the land for three years and thus use and enjoyment of the land. If the value of such use and enjoyment is 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.

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

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

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

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

Reason for sine-causa requirement

If the mere fact that a person was enriched at the expense of another were to form the basis for enrichment action, the concept of liability would be too broad and will limit all commercial transactions making profit at the expense of another. *Sine causa* is the limiting factor required to restrict liability to cases where it would be **inequitable** to allow a person to retain the benefits obtained at the expense of another.

Definition by Van der Walt & criticism by De Vos

Definition by Van der Walt : Enrichment is in principle *sine causa* if there is no existing obligation between the enriched person and the impoverished person in terms of which the enriched person could lay claim to the transfer of assets.

Definition by De Vos: Enrichment is unjustified when there is no sufficient legal ground for the transfer or retention of value from one estate to the other

De Vos's criticism of Van der Walt's definition: 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 or where he becomes owner of another's property through prescription he would have to be regarded as having been unjustifiably enriched at the expense of that other. In neither case is there an obligation between him and the other person and our law does not in such cases view the receiver as having been unjustifiably enriched. In the former the order of court justifies the transfer of the assets and in the latter the rules relating to prescription do.

Greenhill Producers v Benjamin

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 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. The court had to decide whether the defendants' enrichment was unjustified (*sine causa*) and held that prior to 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*

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

The court stated: ''Enrichment of the purchaser as a result of the *bona fide* use of the article of which he has been placed in possession pursuant to an invalid agreement of sale is not unjust enrichment.''

Auby and Patellides v Glen Anil Investments

In this case the *sine causa* requirement was interpreted correctly. In terms of the facts 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. The court correctly held 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.

Pretorius v Commercial Union

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* 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 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 court decided that the owner had received nothing more than he 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 the owners enrichment. The subcontractor's claim was denied and he could not have had recourse to any action or right of retention against the owner.

Singh v Santam

The court followed the decision in *Buzzard*. 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 which has no specific content.

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

Greenhill Producers v Benjamin

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 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. The court had to decide whether the defendants' enrichment was unjustified (*sine causa*) and held that prior to 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*

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.

(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.

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 enrichment claim?

UNIT 3: CONDICTIO INDEBITI: GENERAL REQUIREMENTS

- Most familiar / common action
- When person performed under mistaken belief that such performance was due

Roman Law	Roman-Dutch Law	SA Law
Thing had to be transferred in ownership Error (*solvendi animo per errorem* – under impression performance was owing	Requirements essentially the same. Payment *per errorem iuris* could not be recovered (mistake of law)	Reclaims performance under excusable mistake The 3 requirements of Roman and Roman-Dutch law applies with minor adjustments

Undue payment: no debt at time of payment/*sine causa* Receiver had to restore the thing + fixtures + fruits <u>minus</u> production expenses Receiver entitled to *impensae necessariae + impensae utiles* enforced with *exception doli* Interest drawn on money and value of *factum* (services rendered) could not be recovered <u>*Mala fide* receiver</u>: Held liable with *condictio furtive*. Liable for damage to plaintiff + interest on monies received. Not allowed any expenses (sometimes allowed to detach improvements). If performance destroyed – liable unless show thing would have suffered same fate at hands of plaintiff Undeveloped enrichment action – not all detrimental side-effects taken into account.	Only denied this *condictio* on considerations of equity <u>*Mala fide* receiver</u>: One exception: could no longer be held liable with *condictio furtiva* – no longer liable for fruits he could have gathered, but did not. Expenses incurred by defendant could be claimed Plaintiff cannot claim for loss suffered as result of payment – if not extinguished by return of performance. Obligation to restore as much of value of thing still in estate (if destroyed) – unless in *mora* where usual rules are applied.	Party must prove: Transferred something in ownership to another Must have taken place as result of mistake Mistake must be reasonable Exception recognised: Payment made under protest or duress. Party must prove: Payment was made in broad sense above Payment was not owed Payment = excusable mistake Value of *factum* (services rendered) could be reclaimed.

<u>MONEY EXCHANGED FOR SOMETHING ELSE</u>

- If receiver bought something he would have bought in any case, then he is enriched by the full amount originally received (saved expenses)
- If receiver bought something he would otherwise not have bought, he is enriched only to the extent of the value of performance obtained i.e. luxury holiday – not enriched.
- If he bought something which is worth more than he paid for it, he is liable for full amount of undue payment. If worth less – liable only for lesser amount representing value of thing (or released from liability by delivering the thing to impoverished party)
- Where worth more than amount paid – and chooses to return thing – plaintiff must pay excess value.

Principle: Impoverished party can NEVER receive more than quantum of his impoverishment.

<u>Note:</u>
Where a party receives money which is not due to him, but is unaware of the fact that the money was not owing, he may spend the money on some or other luxurious item. So at the end of the month you find that there is more money left in your account than you thought (because someone had by mistake paid money into it) and you spend the money on a weekend trip which you would not otherwise have done. When the payer of the money seeks to reclaim the undue payment you will suddenly find yourself in a difficult position, because you have in fact spent the money on something which you would not normally have doen and you now further have to pay it back. However, if you were reasonable in believing that the undue money was yours, your defence of non-enrichment could succeed.

<u>Receiver of undue payment liable for full value (although no longer in possession)</u>:

- Knows that money is not due
- Later becomes aware of fact payment was not due.
- Should have realised there is a possibility that performance could later prove to be undue.

Defence (lessening liability / falling away): Only if he can show it was not his fault.
***Mora* re repayment of un-owed performance:** Defence can only succeed if enriched party can show that he performed in time – same fate would have befallen thing in hands of plaintiff.

<u>INTEREST DUE TO MORA</u>

- Liable if falls into *mora* with performance to repay.
- When impoverished party demands payment
- Not because of enrichment principle, but to compensate for damage caused by *mora*.

ERROR OF LAW / ERROR OF FACT

Error of fact: Party who deliver un-owed performance must NOT have been aware that performance was NOT owing. Act under mistake as to true position.

Error of law (*errorem iuris)*: see; Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue.

Further requirement: *iustus error* - Mistake must be reasonable, but there has to be gross negligence on part of plaintiff for his mistake to be deemed unreasonable.

PRESUMPTION OF *ANIMUS DONANDI*

Irrebuttable presumption that delivery in the knowledge that performance is not due constitutes donation is totally unacceptable. It is possible to perform knowingly that which is not due without the intention to donate.

Law allows relief when undue payment is made under protest. Not the protest which founds the claim but fact that protest is incompatible with intention to donate.

SELF – EVALUATION

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

Roman law

The requirements for the *condictio indebiti :*

1. ***Things had to be transferred in ownership; there had to be a datio of money, other replaceable things, or another specific object.***

Even an incorporeal thing, a mere possession or rent which would have been due as a result of free lodging that had been granted sine causa could have been reclaimed.

2. ***Payment had to have taken place 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 unless doubt about the existence of the obligation was accepted as an error. Where the party's mistake was a mistake of law, the party could not, as a general rule, have reclaimed either. The party could have recovered the performance only if he had performed as a result of a factual mistake if it was reasonable.

3. **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 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 could also not have reclaimed his performance.

With regards to the 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) although the receiver was entitled to compensation which right could be enforced. Interest drawn on money and the value of a service rendered could not be recovered.

According **to De Vos** 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.
Furthermore if the enriched person (**mala fide receiver**) 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 loss. The enriched party was also liable for the value of fruits which he 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 could show that the thing would have suffered the same fate at the hands of the plaintiff.

All the detrimental side effects were not taken into account in determining the amount claimable under the action, therefore the *condictio indebiti* was an undeveloped enrichment action.

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

Furthermore if the enriched person (mala fide receiver) 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 loss. The enriched party was also liable for the value of fruits which he 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 could show that the thing would have suffered the same fate at the hands of the plaintiff.

All the detrimental side effects were not taken into account in determining the amount claimable under the action, therefore the *condictio indebiti* was an undeveloped enrichment action.

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

The *condictio indebiti* in Roman-Dutch law was essentially the same as that of Roman law. With a few exceptions:

1. Payment per errorem iuris (mistake of law) could not be recovered
2. The prevailing view was that the plaintiff could be denied the *condictio* only on considerations of equity.
3. Mala fide receiver could no longer be held liable with the condictio furtiva and could also claim expenses incurred.

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 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.

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

The *condictio indebiti* is a remedy based on unjustified enrichment. A person reclaims performance rendered under an excusable mistake that was not owing with this remedy.

Requirements for the *condictio*:

(i) Transfer of ownership in the form of payment of money or delivery of a specific object
(ii) Payment has to take place under the mistaken belief that the performance (corporeal or incorporeal) was due.
(iii) The mistake, either a legal or factual mistake, must have been reasonable in the circumstances (*iustus error*).

An exception in the case where someone renders an undue performance knowingly but under protest and duress whilst under the presumption that it will be reclaimed if it later proves to have been undue.

Then the impoverished party must prove:

1. That it has made a payment to the enriched party.
2. That the payment was not owed
3. That the payment was in mistake that was excusable

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. Except where the payment is made under duress and protest.

(5) Discuss critically, with reference to case law, the question whether the value of a *factum(services rendered)* can be reclaimed with the *condictio indebiti* in South African law. Provide two practical examples.

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*** however, the court accepted that the value of a *factum* could, in our contemporary law, be reclaimed by this action and *Nortje´ v Pool* in a minority judgment agreed but the majority of the court left the question open.
In ***Gouws v Jester Pools*** 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.

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

King v Cohen: 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.
The receiver must 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 fallen away, provided that the rules in respect of mora are not applicable.
In certain circumstances 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.

1. where he receives the payment knowing that it is not due, or
2. where he later becomes aware of the fact that the payment was not due, or
3. 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 undue 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

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

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.

(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.

The enriched party can offer the **defence of non-enrichment** and must prove the circumstances that will relieve it of the obligation to repay provided the rules in respect of *mora* are not applicable.

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*).

Exceptions:

1. **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.

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.

2. **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.

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.

3. ***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.

4. ***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: 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*

Application

A had actual knowledge of the undue payment and will not be able to succeed with the defence of non-enrichment because of negligence in the cause of the loss or destruction and will therefor be liable for the orinal amount with which he was enriched at the time he or she became aware of such enrichment**.**

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

Previously one could only succeed with the condictio indebiti if the relevant error was a mistake of fact, payment made by error of law 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** by our courts.

(Discuss Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 4 SA 202 (A) in regard to the condictio indebiti. (5))

In ***Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*** the Appellate Division abolished the distinction between an error of fact and an error of law. It was 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 the nature of the error thus has no bearing either on the *indebitum* or on the enrichment and it held that either is sufficient to succeed with the *condictio indebiti:*

Regarding the further requirement of excusability or reasonableness of the error it was found in **Rahim v Minister of Justice** that the messenger's conduct was "inexcusably slack" and that therefore the condictio indebiti could not be invoked.

In **Barclays Bank v African Diamond Exporters & Rane Finance v Queenstown Municipality** it was indicated that 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.

In the **Willis Faber** (Supra) the Appellate Division accepted that a factual error, and consequently also an error of law, must be reasonable. The court mentioned three grounds 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.

1. relationship between the parties
2. 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;
3. on the plaintiff's state of mind and the culpability of his ignorance in making the payment

Van der Walt"s opinion is that 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.

Criticism: 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. 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, private law does not aim to punish, but envisages a just balance between the interests of legal subjects.

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.

General requirements for enrichment liability

1. The defendant must be enriched
2. The plaintiff must be impoverished
3. The defendant's enrichment must have been at the expense of the plaintiff
4. The enrichment must have been sine causa (unjustified)

X has been enriched by the undue payment at the expense of A. His assets have increased by R700000 and his liabilities have decreased by R300 000. A has been impoverished by the undue payment and his estate has decreased by R1000000. There is no legal ground for the enrichment.

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 correct action to be instituted by A is the *condictio indebiti* which is available in instances of undue payment.

Requirements for condictio

1. Transfer of ownership in the form of payment of money or delivery of a specific object
2. Payment has to take place under the mistaken belief that the performance (corporeal or incorporeal) was due.
3. The mistake, either a legal or factual mistake, must have been reasonable in the circumstances (iustus error).

In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* the Appellate Division abolished the distinction between an error of fact and an error of law and accepted that such error must be reasonable. The court mentioned three grounds 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.

1. relationship between the parties
2. 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;

3. on the plaintiff's state of mind and the culpability of his ignorance in making the payment

The court will probably grant the condictio if A could provide a reasonable excuse for his state of mind and culpability of his ignorance when the wrong account number was given.

Mora with regard to interest 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 arise

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*?

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?

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.

UNIT 4 *CONDICTIO INDEBITI:* SPECIFIC APPLICATIONS

- Statutory enrichment claim created by S28 of Alienation of Land Act
- Insolvency law and law of Succession
- Payments made under duress and protest
- *Ultra vires* payments

Re: Void contracts for sale of land or void contracts for hire-purchase agreements

Where performance made in terms of void contract – plaintiff should be able to reclaim performance if requirements of *condictio* are present.

Courts – divergent views:

Transvaal approach:

- Entitled to restitution in principle
  Where a contracting party made performance in terms of a void contract because of non-compliance with prescribed formalities – not required to show performance was made under circumstances which would found a *condictio*.
- No restitution where both parties performed
- Restitution only if no performance from defendant
  If defendant willing and able to perform – restitution barred. Not in case of hire-purchase: recovery only barred if both parties performed in full.

CPD approach:

For restitution requirements for *condictio* must be met

Performance of defendant irrelevant once requirements present. Recovery not barred if defendant performed even if willing or able to make performance.

S28 OF THE ALIENATION OF LAND ACT

Resolved the above matter as far as sales of land are concerned

- Creates statutory enrichment action similar to *condictio indebiti* in subsection 1 and regulate position where both parties performed in full in subsection 2.
- Fully developed enrichment action – takes adequate account of all factors increasing / decreasing enrichment / impoverishment.
- SS(2) goes against general enrichment principles – party can reclaim whatever performed in terms of void contract
- Gives effect to subjective intentions of parties despite non-compliance with formalities – where both parties performed fully.

LAW OF SUCCESSION

Executor in office:

- Incorrect division, non-compliance with Administration of Estates Act, executor can reclaim performance.
- Those prejudiced have a right of recourse against the executor in his personal capacity (improper actions), if not improper only claim in his official capacity.
- Executor claims from those not entitled with the *condictio indebiti*.
- Creditors already paid cannot be held liable in respect of belated claims (a person must lodge claims in time) – also excludes executor's action.

Discharged:

- No longer held liable or institute action

Unpaid creditors
(who lodged late):

- Institute *condictio indebiti* against beneficiaries who received too much or those who received payment that were not entitled to it. No action against creditors already paid.

Unpaid creditors
(timeously lodged):

- May claim from paid creditors if claims cannot be satisfied.

Beneficiaries who
Received no
Payment:

- Executor held liable (also in personal capacity) if he acted *mala fide*.
- Also action against other beneficiaries and persons who received money with no valid claim to it

Prescription:

- After 3 years
- *Condictio indebiti* of creditors of deceased estate prescribes 3 years from date it could have been instituted.

THE LAW OF INSOLVENCY

Kommissaris van Binnelandse Inkomste v Willers

Claim against shareholder who received more than he would have if a creditor had been paid – *condictio indebiti* will be available. Confirmed in ***Bowman, De Wet and Du Plessis NO v Fidelity Bank***

***ULTRA VIRES* PAYMENTS**

Example: Representative capacity: Executors of an estate
Liquidators of a company
Directors of a company

In ***Bowman, De Wet and Du Plessis NO v Fidelity Bank*** the AD put an end to uncertainty about whether the *condictio indebiti* could be used to claim money paid without authority.
Held it can be reclaimed with the *condictio indebiti* or *condictio sine causa*. The former is the best option.

PAYMENTS UNDER DURESS AND PROTEST

See; ***CIR v First National Industrial Bank Limited***

Requirements:

- Payment must be not owing
- Made involuntarily or under some kind of threat
- Plaintiff must have protested payment at the time of payment.

CHEQUE PAYMENTS

- 3 party relationship: Drawer – Bank – Holder
- Bank pays in terms of contractual obligation as against drawer.
- Drawer may countermand cheque – bank no obligation or authority to pay
- If bank pays under mistaken belief that it was obliged to whereas it is not – seems *condictio indebiti* should be used to reclaim, but it was confirmed in B & H Engineering v First National Bank it is not – appropriate action is *condictio sine cause specialis*.

SELF – EVAUATION

(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.

Before Alienation of Land Act in Carlis v McCusker the position was as follows:

- If a contracting party had made performance in terms of a void contract he was, in principle, entitled to recover his performance.
- No recovery where both parties had made performance in terms of the void contract. a proposition made obiter in Wilken v Kohler supported this.

- Recovery was also barred if the defendant was willing and able to perform in terms of the void contract except with regards to hire purchase contracts where recovery was only barred if both parties performed in full CD Development v Novick refused to follow the above decisions and the position was as follows:
- all the requirements for one or other of the condictiones must be met to recover performance in terms of a void contract.
- 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.

After the commencement s28 of the Alienation of Land Act the matter was resolved as follows

Section 28 provided for the *Consequences of deeds of alienation which are void or are terminated.*

1. any person who has performed partially or in full in terms of void contract is entitled to recover performance from the other party.
    a) In addition the alienee;
    1) may recover interest on any payment from the date of the payment to the date of recovery
    2) a reasonable compensation for necessary expenditure or any improvement to the land
    3) any improvement with the express or implied consent of the owner which enhances the value of the land
    b) the alienator may recover compensation

1) for the alienee's occupation, use or enjoyment of the land;
2) for any damages to the land

2. if the alienee had performed in full in terms of the void contract and the transfer of the land to the alienee has been effected any alienation of such void or invalid contract will be valid ab initio.

Therefore B cannot enforce the contract but may recover his deposit with interest from the date of payment.

(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.

(A buys B's townhouse for an amount of R1000 000. The parties are in full agreement as to all the aspects of the contract, but A forgets to sign the contractual documents. A pays B a deposit of R100 000 and moves into the townhouse. He also pays B an amount of R5 000 per month as occupational rent pending transfer of the property into his name, as per their agreement. A's children cause damage in the amount of R10 000 to the townhouse while having a party one night. After three months A realises that he will not be able to afford the bond on the property because of rising interest rates and he approaches you for legal advice. The property has not yet been registered in A's name. Advise A on the rights and duties of the parties arising in the circumstances. (10))

1 **Identification**

This question deals with s 28 of the Alienation of Land Act 68 of 1981 which makes provision for a statutory enrichment action where a deed of alienation does not comply with the formal requirements of the Act and is consequently void. (2) (Study Guide 1 44-45)

2 **The law**

Section 28 provided for the *Consequences of deeds of alienation which are void or are terminated.*

1. any person who has performed partially or in full in terms of void contract is entitled to recover performance from the other party.
    a) In addition the alienee;
    1) may recover interest on any payment from the date of the payment to the date of recovery
    2) a reasonable compensation for necessary expenditure or any improvement to the land
    3) any improvement with the express or implied consent of the owner which enhances the value of the land
    b) the alienator may recover compensation

3) for the alienee's occupation, use or enjoyment of the land;
4) for any damages to the land

2. if the alienee had performed in full in terms of the void contract and the transfer of the land to the alienee has been effected any alienation of such void or invalid contract will be valid ab initio.

This section creates a statutory enrichment action similar to the *condictio indebiti* in subsection (1) 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. (1) The provision in section 28(2) gives rise to a fully valid contract which will also also contain the residual rules of the law of sale in so far as the parties have not excluded them. (1)

3 **Application**

The contract between A and B is void due to noncompliance with the Act. S 28 (2) does not apply in the circumstances. A must vacate the townhouse and B must pay A his deposit back with interest. A has already paid B occupational interest for occupation of the premises. A must compensate B for the damage caused to the property. (2) [10]

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

When the executor is in office: If the executor makes an incorrect division and pays a beneficiary/creditor more than he is owed, or pays someone who isn't entitled to receive then executor can reclaim his performance.

Where the executor's actions was not improper but he still made an incorrect payment because a claim wasn't lodged in time – the creditors who lodged the late claim can still claim payment from the executor but only in his professional capacity.

Executor discharged from office:

Once discharged he can no longer institute action or be liable for anything done during his period of office unless he acted mala fide.

Unpaid creditors who lodged late claims:

Can institute the condictio indebiti against beneficiaries who received too much because plaintiff had no yet been paid and against those who received payment but weren't entitled to payment – but they *cannot* act against those creditors who have already been paid.

Unpaid creditors who lodged a claim on time:
Where their claims cannot be satisfied without recourse to paid creditors – De Vos: says S50 allows those creditors to claim from the executor and the executor to claim from creditors already paid.
Beneficiaries who didn't get paid:
the executor can be held liable even in his personal capacity – only if he acted mala fide – there is no reason why the unpaid beneficiaries shouldn't be granted an action against other beneficiaries and against those who got payment without any valid claim against the estate.
Prescription
The condictio indebiti of the creditors or beneficiaries of a deceased estate 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.
Van der Walt offers the following criticism for the granting of a condictio indebiti to creditors (against beneficiaries) who have not lodged their claims in time.

1. **De Vos** view as the authority relied upon does not support the view of the courts.
2. This is not an instance of an undue payment, but another form of impoverishment.
3. The enrichment is not sine causa if the executor has complied with the provisions of the Act. (De Vos 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.)
4. Enrichment of the beneficiaries is not at the expense of the creditors (De Vos 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.)
5. 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 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 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 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.

(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?

The condictio indebiti of the creditors or beneficiaries of a deceased estate 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. In this case the executor could have paid X's money in June 2000 because that when X could have instituted the condictio indebiti

(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.

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.

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

The condictio indebiti and the law of Insolvency

In Rapp v Ruflex Holdings the court rejected the contention that the condictio indebiti (or any other enrichment action) would lie to assist an unpaid creditor of a liquidated company against a shareholder who had received more than he would have received had the creditor been paid.
However, in the Willers case it was decided that such a claim will be available and was confirmed in the Fidelity bank case.

(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.

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).

Condictio indebiti

- Something given or transferred in ownership to another (1). Can consist of corporeal things or incorporeal things, such as rights (1);
- Transfer must have taken place as a result of mistake on the part of the transferor – he or she must have believed that performance was due; and (1)
- The mistake may be one of law or fact (1), but must have been reasonable (*iustus error*) in the circumstances. (1)

Since A had cancelled the payment instruction, the bank which acts in a representative capacity was not entitled to debit A's account. Therefore the bank is the impoverished party and not A. The bank may then use the condictio indebiti to reclaim the undue amount. In Bowman, De Wet and Du Plessis v Fidelity Bank the court held that there is sufficient authority to the effect that an ultra vires payment can be reclaimed with the condictio indebiti. The court stated that such payments are, by their very nature, payments of something not owing by the payee.

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. [check with proff]

The correct action to be instituted by X is the *condictio indebiti* which is available in instances where a debt not owing was paid.

Requirements for condictio

1. Transfer of ownership in the form of payment of money or delivery of a specific object
2. Payment has to take place under the mistaken belief that the performance (corporeal or incorporeal) was due.
3. The mistake, either a legal or factual mistake, must have been reasonable in the circumstances (iustus error).

In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* the Appellate Division abolished the distinction between an error of fact and an error of law and accepted that such error, must be reasonable.

Executor discharged from office:

Once discharged he can no longer institute action or be liable for anything done during his period of office unless he acted mala fide.

Unpaid creditors who lodged late claims:

X Can institute the condictio indebiti against beneficiaries (B and C) who received too much because plaintiff had no yet been paid and against those who received payment but weren't entitled to payment – but they *cannot* act against those creditors who have already been paid.

Prescription

The condictio indebiti of the creditors or beneficiaries of a deceased estate 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.

Van der Walt offers the following criticism for the granting of a condictio indebiti to creditors (against beneficiaries) who have not lodged their claims in time.

1. De Vos view as the authority relied upon does not support the view of the courts.
2. This is not an instance of an undue payment, but another form of impoverishment.
3. the enrichment is not sine causa if the executor has complied with the provisions of the Act. (De Vos 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.)
4. Enrichment of the beneficiaries is not at the expense of the creditors (De Vos 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.)
5. 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 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 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 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.

- Because X's claim exceeds the value of the legacies, claims against the heirs will be reduced to the amount available
- Therefore X cannot claim from KLM because they have they have discharged their duties in a bona fide manner but can claim from B and C.
- X is allowed to claim the amount by which he has been impoverished, or the amount by which the beneficiaries has been enriched, whichever is the lesser. In this case X can claim 2 million which is the amount by which the beneficiaries have been enriched.

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.

(A owns a factory manufacturing steel in a continuous process. His monthly electricity bill averages R100 000. He just received a letter from the Johannesburg Municipality in which it threatens to cut his electricity if he doesn't immediately pay his "arrear account of R300 000". A knows that there must be a mistake, because his account is paid in full, but also knows that if there is a disruption in his electricity supply he will suffer severe losses. He pays the amount immediately and sends a letter of complaint. Advise A whether he will be able to reclaim the R300 000 he paid, and with which remedy? In your answer discuss the requirements for this remedy. (10))

If you receive a similar type of question in the exams, you should follow the following steps in answering the question:

(a) You first need to identify the correct unjustified enrichment action. If necessary explain why another enrichment claim cannot be used. (2)

(b) Then discuss the relevant requirements for a successful claim under the action and any defences against such claim. It is important here to refer to any relevant case law. (6)

(c) Apply the requirements of the claim to the facts provided. (1)

(d) Make a definite conclusion on the question asked. (1)

(a) Identifying the correct action

The correct action to be instituted by A is the ***condictio indebiti***. (1) This action is available in instances where a debt not owing was paid. (1/2) Incidentally no unlawful, *ultra vires* or void contract is relevant here and therefore it seems as if no other *condictiones* could be applicable. (1/2)

(b) Requirements for the action and defences against it

See Study guide 1, par 3.4 for the requirements. State each of the requirements:

(i) Transfer of ownership in the form of payment of money or delivery of a specific object (1/2)

(ii) Payment has to take place under the mistaken belief that the performance was due. (1/2)

(iii) The mistake, either a legal or factual mistake (1/2), must have been reasonable in the circumstances (*iustus error*). (1/2)

In general a party cannot reclaim performance with the *condictio indebiti* if he was aware that the performance wasn't due. (1) Such conduct will be regarded as a donation (1/2), unless it was made under threat or protest. (1/2) (See Study guide 1, par 4.6)

Case law

In ***CIR v First National Industrial Bank Ltd*** **1990 3 SA 641 (A)** (1/2) FNB paid stamp duties to the Commissioner for Inland Revenue which in fact were not due under protest. The court a quo held that the payment could be reclaimed on the basis of unjustified enrichment. (1/2) The appellate division found by majority that the money could be reclaimed on the basis of a tacit contract (1/2), but the minority found that where there is payment in such circumstances, the presumption of a donation falls away. (1/2)

(c) Applying the requirements to the facts

A made a payment under threat and protest, knowing that the debt wasn't due. (1) The requirements for the *conditio indebiti* have thus been complied with.

(For A to succeed with the condictio indebiti against the Johannesburg Municipality in these circumstances he, firstly, had to prove that he didn't owe the Municipality the R300 000.

Secondly, that the payment was made involuntarily under the threat that the electricity supply will be suspended if payment wasn't made. Thirdly, that A protested against the amount to be paid at the time of payment by sending a letter of complaint with.)

(d) Conclusion

A will be able to prove all three requirements under this exception and will therefore be successful with this enrichment action against the Johannesburg Municipality. (1)

UNIT 5 *CONDICTIO OB TURPEM VEL INIUSTAM CAUSAM*

Agreement void owing to illegality of agreement

Contract illegal:

- In terms of common law subject matter of contract, its object or conclusion is *contra bonos mores*
- Prohibited expressly or by necessary implication by statute.
- Objective criterion

Roman Law	Roman-Dutch Law	SA Law
A pays B money in terms of invalid transaction. A could claim Requirements: Transfer of property i.t.o. illegal agreement (prohibited by law) Plaintiff himself not a *turpis persona* (shameful) If both parties in *turpitudo* – no claim, since the *par delictum* rule – later relaxed. Could claim if conduct less disgraceful than defendant's. Claim: Property delivered + fixtures + fruits minus defendant's *impensae necessariae* + *impensae utiles* Right to remove *impensae voluptuariae* Interest drawn not reclaimed Value of *factum* not claimed Undeveloped	No essential difference *Par delictum* rule strictly applied	No *causa* because underlying agreement is void. Requirements: Perform i.t.o. illegal agreement Other party enriched at expense of plaintiff (who was impoverished) Tender made to return performance received by plaintiff Plaintiff not *turpis persona* or good reason not to apply *par delictum* rule strictly. *Turpis persona* tested subjectively. Actual knowledge of illegality required. Plaintiff need not tender to return what he received if defendant would have been precluded from claiming by the *par delictum* rule.

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.

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.

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

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*.

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

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.

(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.

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.

(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*.

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)).

(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.

***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).

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).
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.
In this case the contract between the parties is illegal due to it being contrary to the law. Such a contract is, therefore, void from the outset. When a contract is void *ab initio* two enrichment actions come into play:

1. *condictio indebiti* - if the contract is void for reasons other than illegality
2. *condictio ob turpem vel iniustam causam* - if the contract is void due to illegality.

The latter is relevant in this case and the requirements for the action and defences against it are:

1. **Performance was rendered in terms of an illegal 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.

2. **The other party was enriched at the expense of the plaintiff, who was impoverished by the performance.**
3. **A tender was made to return any performance received by the plaintiff.**

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*.

4. **The plaintiff is not a *turpis persona* or there are cogent reasons why the *par delictum* rule should not be strictly applied.**

The right to institute this *condictio* is restricted by the *par delictum* rule, in terms of which a party is not entitled to reclaim money or property if such a party is a *turpis persona*, that is where his actions are tainted with turpitude or impropriety. 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.
Since the decision in *Jajbhay v Cassim*, the courts have exercised a general discretion to relax the rule if simple justice requires it. In *Jajbhay v Cassim* the Appellate Division held that the *par delictum* rule is not inflexible, and that the 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.

***Turpis persona* tested subjectively**

To determine whether a contract is unlawful, an objective test is used. 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 which implies that actual knowledge of the possible illegality of the transaction is required.

Application to the facts

a) The contract is illegal in terms of statutory law.
b) The other party was enriched at the expense of the plaintiff, who was impoverished by the performance.
c) Both parties are *turpi personae* as they were aware of the illegality of their contract.
d) There is no reason for the court to relax the *par delictum* rule in these circumstances.

A will not be successful with this enrichment action if the *par delictum* rule is strictly applied. However, A may be successful if the court shows leniency and exercises its discretion to relax the rule. However, courts will not be inclined to help a person who acted shamefully, contrary to common law, statutory law, good morals or the public interest.

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?

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

In *FNB v Perry* a forged and stolen cheque from KZN government (KZN) was handed by Dambha to FPV, a stockbroking firm who then credited Dambha's account with the amount. Both KZN 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 KZN 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 in accordance with Dambha's instructions and Nedbank credited the account of the trust.
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.

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.
D would reclaim the money with the condictio ob turpem from the bank holding the funds

UNIT 6 *CONDICTIO CAUSA DATA CAUSA NON SECUTA*

- ***Do ut des***: I deliver so that you can deliver
- ***Do ut facias***: I deliver so that you can do
    - Innominate real agreement (only valid once performance takes place)

Roman Law	Roman-Dutch Law	SA Law
Used to reclaim money and things in ff cases: *ius poenitentiae* right to rescind – claim before counter-perform. *breach of contract* other party not fulfil obligation to counterclaim – rescind with *condictio*. *resolutive condition* One party delivered thing i.t.o. contractual resolutive condition and uncertain future event took place. Content of claim Either thing delivered + fixtures and fruits or payment of value of these things Interest on money not reclaimed Defendant entitled to compensation for necessary and useful improvements. Remove luxury improvements. No action to defendant for compensation for improvements. *Exception doli* – refuse to restore until compensated. No claim to recover value of *factum* Undeveloped.	All contracts consensual – no real contracts appeared. Instituted in cases of consensual contracts *do ut des and do ut facias* in case of Cancellation owing to breach Fulfilment of resolutive condition *Ius poenitentiae* fell away – no longer reclaim performance before other party counter-performed (change his mind.	Uncertainty Where transfer of thing made and performance rendered on basis of future event taking place or not taking place. Claim if delivered thing to defendant by virtue of: Resolutive condition (fulfilled) Suspensive condition (not fulfilled) Modus disregarded Assumption not fulfilled.

SUSPENSIVE AND RESOLUTIVE CONDITIONS

Resolutive: Hang like sword over head of parties affected by contract. Once uncertain event takes place / condition fulfilled – contract comes to an end.

Suspensive: Suspends rights and obligations until occurrence of an uncertain future event.

Unfulfilled Assumptions:

- A fact which the parties elevate to the basis of their contract
- Relates to the facts of the present or past (not the future)

Modus:

- Obligation created in contracts of donations or in wills
- Non-compliance – disposition may be reclaimed by executor or heirs.

Breach of contract:

- *Condictio* no longer plays part.
- Use contractual remedies
- Confirmed in Baker v Probert.

SELF-EVALUATION

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

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.

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

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.

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

Application in South African law

South African law of contract has developed to the point that contractual remedies now provide for circumstances where the condictio causa data causa non secuta used to be implemented This action is used to reclaim performance. There is uncertainty about the field of application of this action in modern South African law. The common feature in case law where this action has been used seems to be 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 the *condictio causa data* when he has delivered a thing to the defendant by virtue of:

1. a resolutive condition which is fulfilled
2. a suspensive condition which is not fulfilled
3. a modus which is disregarded
4. an assumption which is not fulfilled

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

1. Resolutive conditions 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.
2. 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.

B. Unfulfilled assumptions

De Vos refers only to future assumptions in the controversy of the exact nature of the assumptions. In Fourie an obiter statement distinguished 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 in which case the appropriate enrichment action is the *condictio indebiti* because the contract is void from the beginning. An assumption which relates to the future is no assumption but a resolutive condition.

C. Modus

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

Breach of contract

De Vos: is of the opinion that the condictio causa data no longer plays a part in our law in the case of recisission on the ground of breach of contract, but that the innocent party would make use of contractual remedies. AD confimed De Vos view in Baker v Probert.

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

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

(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.

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**

(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.

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.*

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

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.

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

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?

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?

UNIT 7 *CONDICTIO SINE CAUSA SPECIALIS*

- Only applied where no other *condictiones* can find application
- In Roman law distinguish between *condictio sine causa specialis* and *condictio sine causa generalis*.
- The general *condictio* is an alternative to any of the three previous *condictiones*, could be used in the place of any of the three as long as one of them could have been instituted. The formula was less complicated.

Roman Law	Roman-Dutch Law	SA Law
Set aside *stipulation* (oral contract) if entered into without a *iust causa*. Existing *causa* falls away – goods can be recovered Owner transfers possession – receiver used/sold *bona fide*. If thing used up – and impoverished – could be claimed back. A deliver thing to B on grounds of supposition that proves to be false.	*Negotium* requirement disappear. Still not general – value of *factum* not claimed – only things that had been transferred. *Bona fide* possessor's action designated as a *utilis action negotiorum gestorium contraria* (extended management of affairs action)	See; Govender v Std Bank of SA Used under 4 circumstances Where party performs – performance was due – but *causa* for performance has fallen away (*condictio ob causam finitam)* Plaintiff's property consumed/alienated by someone else Bank made payment under

A could recover thing. Required an existence of *negotium* between parties (enriched / impoverished) *Negotium* requirement precludes this *condictio* from being a general enrichment claim. Not all detrimental side-effects *Factum* not claimed Undeveloped.		countermanded/forged cheque Ownership transferred *sine causa* – where none of the other *condictiones* would lie. Where possessor receives thing *ex causa onerosa* (for value) their enrichment is constituted by the profit of the thing A con only sue one of the *bona fide* possessors for profit The *bona fide* possessor may then sue any of his predecessors in title again for the profit.

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?

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

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.

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.

SELF-EVALUATION

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

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

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.

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

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

*In **Govender v Standard Bank*** the distinctions between the condictio indebiti and the condictio sine causa specialis:
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. Such condictio 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 ... the cardinal ground for relief by way of such condictio appears to be lacking in this case.

And further

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.

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

In ***Van der Westhuizen v MacDonald and Mundel 1907 TS 933,*** 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.
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.

UNIT 8 *NEGOTIORUM GESTIO*

(Management of another's affairs)

- *Actio negotiorum gestorum contraria (*true management)
- *Actio negotiorum gestorum utilis* (extended form based on enrichment) ***CONDICTIO SINE CAUSA SPECIALIS***

- Only applied where no other *condictiones* can find application
- In Roman law distinguish between *condictio sine causa specialis* and *condictio sine causa generalis*.
- The general *condictio* is an alternative to any of the three previous *condictiones*, could be used in the place of any of the three as long as one of them could have been instituted. The formula was less complicated.

Roman Law	Roman-Dutch Law	SA Law
Set aside *stipulation* (oral contract) if entered into without a *iust causa*. Existing *causa* falls away – goods can be recovered Owner transfers possession – receiver used/sold *bona fide*. If thing used up – and impoverished – could be claimed back. A deliver thing to B on grounds of supposition that proves to be false. A could recover thing. Required an existence of *negotium* between parties (enriched / impoverished) *Negotium* requirement precludes this *condictio* from being a general enrichment claim. Not all detrimental side-effects *Factum* not claimed Undeveloped.	*Negotium* requirement disappear. Still not general – value of *factum* not claimed – only things that had been transferred. *Bona fide* possessor's action designated as a *utilis action negotiorum gestorium contraria* (extended management of affairs action)	See; Govender v Std Bank of SA Used under 4 circumstances Where party performs – performance was due – but *causa* for performance has fallen away (*condictio ob causam finitam)* Plaintiff's property consumed/alienated by someone else Bank made payment under countermanded/forged cheque Ownership transferred *sine causa* – where none of the other *condictiones* would lie. Where possessor receives thing *ex causa onerosa* (for value) their enrichment is constituted by the profit of the thing A con only sue one of the *bona fide* possessors for profit The *bona fide* possessor may then sue any of his predecessors in title again for the profit.

Distinguish between 1 and 2 above.

- In (1) the gestor can claim all reasonable expenses.
- In (2) the gestor can claim only for impoverishment or enrichment of *dominus* (whichever is the least)

Roman Law	Roman-Dutch Law	SA Law
Dominus obliged to compensate for expenses *Dominus* granted an action to account for whatever is owed and damage for negligence. Requirements - Gestor acts in interest of *dominus*	Only few changes: Gestor no action if acted against prohibition by *dominus* Romans denied action where gestor manag affairs of another believing he was busy managing his own affairs (*bona fide*).	Where a person with intention to act to the benefit of someone else takes charge of that person's interests in a reasonable manner without *animus donandi* and without being forbidden to manage those interests.

without instruction - Gestor acts without mandate - Gestor's actions reasonable (dominus benefited and would have acted in the same way) - Gestor acts with the intention of acting in another's interest - Gestor not act with intention of rendering service free of charge (*animus donandi*) Not true enrichment action. Whether owner enriched not considered only whether gestor had been impoverished. Could be form of enrichment (expenses saved) if gestor would probably act in same way. Exceptions - where minor's interests protected - where gestor acted with own interests in mind	Roman-Dutch granted action Used to compensate possessor who effected improvements on another person's land (*bona fide and mala fide* possessor) Indirect enrichment (extended to) A contracts with B to benefit C Performance by A does not take place. Third party allowed to act directly against enriched *dominus.* Third party no intention of benefiting *dominus* – acts in interests of another thinking he was acting in his own interests (action available)	Requirements (true management) Gestor must perform without instruction Must act reasonably Must have intention to act in interests of *dominus* Must not have acted free of charge May not act contra express prohibition of *dominus*. All requirements – claim full extent of expenses even if *dominus* did not benefit. May be necessary expense – expenses saved. Duties of gestor Complete that which he has commenced Exercise necessary care Account for anything he acquires Surender to *dominus* all the latter is entitled to. Rights of Gestor Entitled to compensation for expenses and disbursements. Gestor can claim (by novation) that *dominus* assume all debts incurred and not yet settled. Or claim that he pays them (creditors) directly or that he gives the gestor money to pay the creditors.

Distinguish between *negotiorum gestio* and enrichment. Only enrichment in exceptional circumstances.

Differences:

True *negotiorum gestio*	**Enrichment**
True gestor recover all reasonable expenses at time expenditure was made.	Recovers only the lesser of the two amounts (Impoverishment v Enrichment
Right to recover unaffected by fact that improvement was destroyed later or by diminished value	Only if thing still in existence at the time can action be instituted.
Content fixed and remains unchanged.	Diminished value or destruction will affect impoverished party's claim – variable content.

In whose interests did he act? I fin own interest, action restricted to true enrichment.

ACTIO NEGOTIORUM GESTORUM UTILIS

- True *negotiorum gestio* not applicable – enrichment action allowed
- Liability of a minor
- Gestor acts against prohibition of *dominus*
- Case: Odendaal v Van Oudtshoorn
- Gestor *bona fide* administers affairs thinking he is acting in own interests
- Gestor who *mala fide* acts in his own interests.

IMPROPER MOTIVE

- Where a person with improper motive enriches another – enrichment not unjustified
- If enriched person accepts enrichment there should be action available to impoverished party
- Where a person enriches another against his will – person is taking own risk (unless enrichment accepted)
- If person enriched another without acting against his will or without improper motive enriched person liable no matter how unwelcome or unpleasant.

TRUE NATURE OF EXTENDED ACTION

Extended to occupiers of land and detentor or holder of a thing.

INDIRECT ENRICHMENT

Example: B and C conclude contract, enriching A
No contract in favour of third party
B cannot fulfil obligation to C.
Can C act directly against A? Which action?
Many cases favour *action negotiorum gestorum*.

PRACTICAL SCENARIOS

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?

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.

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?

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**.**

SELF-EVALUATION

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

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

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

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

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

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

Duties:

1. to complete the management of the affairs he has commenced
2. to exercise the necessary care in his management
3. to account for anything that he acquires by virtue of the management of affairs for the *dominus*
4. to surrender to the *dominus* all that the latter is entitled to

Rights:

1. compensation for all expenses and disbursements properly made for the purposes of the management of affairs
2. 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.

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

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 partycan 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.
One of the necessary requirements for the true negotiorum gestio is the in intention to act in the interests of the dominus (*animus negotia aliena gerendi*). This requirement automatically creates a category of unusual instances where this intention of the gestor is absent.
It is *here* that the enrichment concept comes to the fore. In this regard De Vos 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.

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

Extended management of affairs action – actio negotiorum gestorum utilis:
1. The liability of a minor: If gestor managed affairs of minor, the minor is liable only to the extent of his enrichment.
2. The gestor acts against the prohibition of the dominus: *Odendaal v Van Oudtshoorn:*
There is doubt whether a court would grant an action to a gestor who had acted contrary to an express prohibition of the dominus.
Facts:
A 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 was paid. A paid B's debt without B's knowledge or instructions. In paying A's aim was to further his own interests. A reclaimed the amount paid to C from B. If A had paid under instructions from B, he would have been able to claim the amount on the ground of mandatum. If he had paid with the aim of promoting B's interests but without B's knowledge, A would have been able to reclaim the expenses with the NG. But what if A pays B's debts without instructions to do so and to further his own interests? The court, rejecting Shaw and Van Staden, held that A can in fact claim from B on the ground of undue enrichment.
***Standard Bank v Taylam**:*
The court came to the conclusion that the fact that the gestor acted contrary to the wishes of the dominus did not, under all circumstances, stop an enrichment action. The gestor who acted against the wishes of a dominus will have to show some just cause for disregarding those wishes. Odendall was obiter and UNISA follows Taylam.
3. The gestor who bona fide administers the affairs of another, thinking he is acting in his own interest:
Our law would permit a gestor in these circumstances to recover on the basis that the dominus has been unjustly enriched at his expense
4. The gestor who mala fide acts in his own interest:

Shaw v Kirby:
Facts: 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. The court, using English Law, 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 the debtor will compensate him later. The court thus accepted that in the absence of agreement no possible ground of recovery like unjust enrichment could exist.
***Van Staden v Pretorius**:*
Facts: X bought a plot from Y and paid the purchase price but land 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 mandate in terms of which he had paid and he was not a gestor – he acted in his own interest. Y's enrichment as a result of the discharge of his obligations was, in itself, no ground for a claim. Judge used Kirby to support his judgement.
Criticism of Shaw, Bartholomew and Van Staden:
The argument seems to put 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. 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 action against A.
Improper motive: if the plaintiff paid the defendant's debt with the motive of making the defendant his debtor, and making his life miserable. This plaintiff, with an improper motive, should have no action.

(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).

Odendaal v Van Oudtshoorn: 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, various old writers, 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.

(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 *action negotiorum gestorum* in South African law.

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

***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 vindication* 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).

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

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.

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 *Nortje´* 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 *Nortje´* 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 *Nortje´* 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.

UNIT 9 ENRICHMENT BY MEANS OF IMPROVEMENTS AND ATTACHMENTS *(ACCESSIO)*

- Movable things attached to immovable property becomes part of that immovable property – owner becomes owner of whole.
- If attached to movable – owner of one of the movable things becomes owner of whole (principles of law of property)
- Enrichment action available to party who lost his ownership
- Various categories of persons:
    - Possessor (*bona fide and mala fide)*
    - Occupier (*bona fide and mala fide)*
- *Bona fide* possessor = possesses goods of another in good faith in the belief that they belong to him and possesses with *animus domini*.
- *Mala fide* possessor – possesses goods of another knowing they do not belong to him and possesses them with the *animus domini*.

No action – just right to remove or retain.

Roman Law	Roman-Dutch Law
Movable to movable Owner of main article acquired ownership if detached original owner loses ownership – cannot recover with *rei vindication.* Only unjustified enrichment – undeveloped. **Movable to immovable** Owner of immovable became owner. If severed owner could recover with *rei vindication*. Right of compensation – distinguish: A built with B's materials on A's land A built with own materials on B's land. A built with B's materials on A's land ***Mala fide***: B recover twice value of his materials and vindicate materials after attachment severed. *Bona fide*: B institute action to vindicate materials after severance or institute *action de figno iuncto* A built with own materials on B's land ***Bona Fide*** No action. Could eviction with *exception doli* until compensated. A = *ius retentionis*. If a lost possession no *ius retentionis*. Cannot use *condictio sine causa specialis* – no *negotium.* Cannot use *negotiorum gestio* – did not act *animo negotia aliena gerendi* Claim was for *impensae necessariae or impensae utilis* or increase in value of land (whichever is the least) Could remove useful improvements – if B did not want to reimburse No right to *impensae voluptuariae.* If B willing to reimburse A – A lost right of removal. Value of fruits used by possessor – cost of production – subtracted from claim for compensation for improvements. Could still vindicate his materials after receiving compensation. ***Mala Fide*** *Ius retentionis* or *ius tollendi* (right of removal) Equated to *bona fide* possessor except for fruits Must account for fruits he could have enjoyed and actually enjoyed (*bona fide* – only fruits actually enjoyed)	Same as Roman law Could claim *impensae voluptuariae* if it increased value of land and owner sells. If removal of fixtures would damage land – could not remove Value of fruits – cost of production – subtracted from claim for compensation Differences *Bona fide* possessor had an action – may be *action negotiorum gestorum utilis* (not clear) Could institute even if no longer in possession. *Mala fide* Treated the same way as *bona fide* *Fiduciarius (bona fide)* Could not claim for everyday repairs. Value of fruits not taken into account. Right of retention. *Usufructuary* Duty of maintenance not to effect improvements Could claim for necessary improvements Occupiers Buyers of movable property received but not ownership Buyers of land – possession not transfer Institute *action redhibitoria* – cancel agreement – claim expenses incurred from sellers Institute *action empty / restitution in integrum.* Lessees Remove all fixtures except necessary improvements – not leave land in worse conditions than before Claim all fixtures effected with consent of lessor (actual cost of material excluding cement, lime and labour) Without consent – property of lessor if not removed before expiry of lease. Crops on land – lease expire – may not harvest – claim from lessor cost of seed, sowing, cultivation No *ius retentionis* *Specificatio* (creation of a thing) Institute action for value of thing lost.

SOUTH AFRICAN LAW

Bona fide

- In fact believe he is the owner
- Mistake must be reasonable
- *Bona fide* possessor loses ownership by *accession*.
- Has recourse if owner enriched – *actio negotiorum gestorum utilis*
- *Ius tollendi* (right of removal) – a personal right to remove attached materials without damage to the immovable exercised reasonably according to equitable principles.
- Remove before true owner claims the land – after true owner made claim, may not remove unless true owner refuses to compensate.
- Only claim for expended money or materials – not labour or interest on expenses. May claim for lost income resulting from labour expense.

- **Necessary Expense**
  - Expenses in respect of preservation of property and protection of property if efforts successful (saved expenses)
- **Useful expenses**
  - All expenses v amount by which value is enhances, whichever the lesser amount.
- **Luxurious Expenses**
  - Decorations not necessary or useful – may increase value. Usually not claimed unless property sell for higher value due to improvement. Can be removed if owner does not compensate except where removal will damage the property.
- **Right of Retention**
  - Refuse to leave land until reimbursed.
  - Requirements:
  - Possessor in control of property
  - Owner must be unjustifiably enriched at expense of possessor.
- **Fruits**
  - Value of fruits gathered before awareness that possession unlawful minus production costs = deducted from claim for compensation
  - Includes natural fruits and rent
  - No interest on expenses
  - Not include fruit yielded by improvements
  - If value of fruit gathered exceeds enrichment – no compensation.
  - Use and enjoyment of property not set off against claim: he thinks he is the owner and does not therefore envisage that he will have to compensate for occupation.
- **Remedies (in summary)**
  - Enrichment claim for compensation for necessary and useful improvements (sometimes luxury improvements)
  - *Ius retentionis*
  - *Ius tollendi*
- ***Mala fide* possessor (confusion**)
  - Where true owner aware of *mala fide* possessor's activities and remained silent – same position as *bona fide* possessor
  - Not function in private law to punish – *mala fide* possessor should be in same position as *bona fide* possessor
  - In some cases has a right to retention (JOT Motors v Standard Kredietkorporasie)
  - In certain circumstances a right to remove.

Differences:

Bona fide	**Mala fide**
Mistakenly thinks he is owner	Knows he is not the owner
Becomes owner of all fruits gathered before becoming aware	No right to fruits gathered by him
Owner has no claim to value of fruits gathered before becoming aware. Cannot be set off against claim for compensation.	Owner has a claim for compensation for fruits consumed / disposed of / value of fruit that could have been gathered.

Similarities:

Bona fide	**Mala fide**
Right of recourse for all useful and necessary and sometimes luxury expenses	Right of recourse for necessary, perhaps for useful (except where thief) – definitely not luxurious.
Right of retention	Not certain if right of retention.

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 (R2

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.

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.

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. A is thus a Bona Fide Possessor as he was unaware of the fact that the fenced of area included a piece of B's land. A dealt with the land as if he were the owner thereof in the honest belief that he was the owner.

You must carefully distinguish between owners, *bona fide* possessors and *male fide*possessors

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).

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 ownership by accessio.

1. Enrichment Claim: 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 UE if owner is in fact enriched by the attachment. The action available to bona fide possessor is the extended action for management of affairs (*actio negotiorum gestorum utilis*)

2. Right to remove (Ius tollendi): the BFP may at any time before true owner claims the land remove his improvements. After the owner has made his claim he may only remove the improvements if the owner is unwilling to compensate the BFP and where such removal will cause damage to the property. The BFP may claim compensation at any time after he discovers that he is not the owner.

Extent of compensation: In general, the bona fide possessor is entitled to compensation for all improvements with the *exception* of luxurious improvements.

1. Necessary expenses: can claim for all expenses in respect of the preservation or protection of the property if his efforts were successful. The owner's enrichment is in saved expenses
2. Useful expenses: can claim for all his expenses or to the amount by which the value of the property has been enhanced, whichever is the least
3. Luxurious expenses: 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.

3. The right of retention (enrichment Lien): The BFP can enforce his right to compensation provided the following two requirements for obtaining or keeping a right of retention are met:

1. The possessor must be in control of the property and
2. That the owner of the property must by UE at the expense of the possessor.

Fruits: the Value of fruit gathered before becoming aware that possession is unlawful, less production costs, can be set-off against BFP's claim for compensation for useful improvements as a factor diminishing the owners enrichment or the possessor's impoverishment.

1. Fruit includes natural fruits as well as rent which possessor received by leasing the property but not the interest on the expenses and does not include fruit yielded by the improvements themselves.
2. The possessor obtains ownership of all fruits gathered before (time of awareness that possession unlawful) and owner has no action for this fruit but can deduct value of fruit from possessor's claim for compensation.

Remedies: Nortjie:

1. Enrichment claim for compensation
2. Right of retention while in possession
3. Right to remove

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.

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

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.

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.

SELF-EVALUATION

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

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).

(2) Briefly discuss the position of the *bona fide* and the *mala fide* possessor after attachment in 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 *action 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).

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.

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

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

sufructuary 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.

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

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.

(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.

The following remedies are available to the *bona fide* possessor who used money or material to protect or improve someone else's property (*Nortje´ 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

(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.

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

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

Exam - Distinguish between a *bona fide possessor* and a *mala fide possessor*. (5)

1. 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.
2. 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.
3. 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.
4. Both the *bona fide* possessor and the *mala fide* possessor have a *ius tollendi*.
5. 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.

- Where *animus domini* absent – occupier / holder
- Lawful – lawful occupation for certain period (lessee, pledgee, usufructuary)
- *Bona fide* – mistaken impression he is lawful occupier
- *Mala fide – de facto* exercises powers of lawful occupier – knows he is not.
- Holder at will – person who possesses thing until possession terminated. At common law – no compensation – created law giving occupier action.

Lawful Occupiers

Actio negotiorum gestorum contraria – if all requirements of *negotiorum gestio* present

- *Actio negotiorum gestorum utilis* - where own interests promoted while managing someone else's affairs
- Enrichment lien available (necessary / useful expenses – to extent of enrichment)
- Standard v JOT Motors – lien against holder
- Placaats still applicable : protection to owner if he was not able to compensate lessee for improvements and lessee could remain in occupation.
- Placaats mean the following:
  - Lesse may remove structures – not leave property in worse condition than received in. Entitled to remove anything planted / saved.
  - Anything not removed becomes property of owner at expiry of lease. Before expiry lessor / lessee may agree on compensation.
  - Lessee may claim compensation for that which was not removed and erected with consent of owner. Restricted to value of material used. Not cost of labour. Owner must compensate for cost of seed, ploughing, tiling, sowing.
  - Lessor may elect to compel lessee to remove attachments after lease expires.
  - Lessee does not have right of retention
  - Lessee claim compensation only when lease expires.
  - ***De Beers Consolidated Mines v London and SA Exploration Co***
    Compensation restricted to useful improvements. Necessary improvements awarded in terms of general principles applicable to *bona fide* possessors.
  - Placaats not applicable if lease terminated by breach of contract / insolvency of lessor. Only if lease expires / lessee commits breach of contract.

Distinction between *bona fide* possessor and lessee:

Bona fide lessee restricted in terms of placaats and no enrichment lien.

Lessee in position to arrange his affairs and remain in control until lease expires. Not the case with a *bona fide* possessor.

- Usufructuary
  - Must preserve substantial character
  - May recover unusually heavy expenses
  - *Impensaes voluptuarias* may be removed where it can unless owner prepared to compensate – if unwilling – no right of compensation.
- Remedies
  - No necessary expenses
  - Useful and luxurious only in special circumstances. Fruits not set off against
  - Limited *ius tollendi*
  - No right of retention
  - Compares to position of lessee in terms of placaats.
- Fiduciarius
  - Entitled to compensation for improvements = *bona fide* possessor
  - Not for normal maintenance expenses – value of fruit not set off
  - May institute claim only when *fideicommissum* expires
  - Lien in circumstances where he has a claim for compensation.

***BONA FIDE* OCCUPIERS**

See; ***Rubin v Botha***

See; ***Fletcher v Bulawayo Waterworks*** (leading case re *bona fide detentor*)

***MALA FIDE* OCCUPIER**

- Occupier of immovable property who knows that there is no legal ground for his occupation – unlawfully in physical control of thing
- In ***Grobler NO v Boikhutsong Business Undertakings*** the right of recourse of *bona fide* occupier extended to *mala fide* occupier
- On appeal – no recourse allowed because value of fruits extended claim. Thus not decisively determined as yet.
- *Ius retentionis* not ever expressly given – should be extended to *mala fide* occupier
- Value of fruit gathered by occupier not set off if value of occupation already taken into consideration – only if value of occupation cannot be determined.

OCCUPIERS / HOLDERS AT WILL (*PRECARIO HABENS*) – SQUATTERS

- Someone who exercises control over movable property of another until revocation
- In Lechoana v Cloete and Others – given a right to recourse
- Not finally settled if compensation can be claimed
- No *ius retentionis* (no reason why not if compensation can be claimed)
- Fruits should be deducted from expenses (minus production costs). Owner not deduct advantages he lost from enrichment – willingly renounced them thus not impoverished *sine causa*.

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.

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 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.

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?

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.

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.

SELF-EVALUATION

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

Occupiers and holders may be divided into

(1) Lawful occupiers and holders

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.

(2) *bona fide* occupiers and holders

A person who is under the mistaken impression that he is a lawful occupier or holder

(3) *mala fide* occupiers and holders.

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.

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

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).

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).

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

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.
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).

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

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).

(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.

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).

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

UNIT 11 RIGHTS OF RETENTION AND LIENS

- A right conferred by operation of law on person who is in possession of property of another person, on which he has expended money – retaining possession of property until duly compensated.
- Covers debtor and creditor and enrichment liens
- Enrichment liens is a real right. Secures claim based on enrichment.

Roman law	Roman-Dutch Law
Had origin here Impoverished person had *ius retentionis* even where he did not have an action Raise *exception doli* against *rei vindicatio* Once possession lost – no remedy	*Ius retentionis* and enrichment claim Security for claim (retention) Once possession lost action still available

SOUTH AFRICAN LAW

Ius retentionis security for claim based on enrichment
Where there is a right of retention there is also an action
Where not action – no right of retention
Right of retention lost – still claim (unsecured) for compensation
Therefore before you can have *ius retentionis* the owner must have been enriched.

IMPROVEMENTS

The question whether improvements will ser as basis for *ius retentionis* or for an enrichment claim

Who made the improvements?
Nature of improvements?

EXPENSES WHICH ONE PERSON MAY INCUR

Impensae necessariae
Impensae utiles
Impensae voluptuariae – no enrichment or retention.

REQUIREMENTS

Necessary Expenses

For preservation and protection of property
Owner himself would have incurred – expenses saved
Amount reasonable and act of preserving was successful
Quantum of enrichment and impoverishment exactly the same.

Useful

Not necessary to preserve/protect
Useful and enhances market value
Quantum not necessarily coincide with impoverishment

Luxury

May enhance market value of property
No enrichment action lies – no *ius retentionis*

RIGHT OF RETENTION

Must have physical control
If deprived of physical control unlawfully or against his will he can claim that it be restored to his control – *ius retentionis* revives.

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.

SELF EVALUATION

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

1. **Impensae necessariae**

These are expenses that are necessary for the preservation or protection of the property.
Enrichment is in the form of expenses saved.

Requirements:

1. amount expended is reasonable and
2. 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.

2. **Impensae utiles**

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.
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

Content of both rights is the power to retain 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.

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

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) Consider the practical scenarios below and 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.

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.

UNIT 12 ENRICHMENT ACTIONS AGAINST AND BY MINORS

- Minor entering into contract without guardian's assistance – not liable on contract. Other party is.
- Cannot recover performance or compel minor to perform.
- Can sue minor for undue enrichment.

ROMAN AND ROMAN-DUTCH LAW

- Minor who received performance liable for undue enrichment
- If used to buy necessaries – saved expenses
- Extent of liability always determined at *litis contestatio*.

SA LAW

- Contract entered into with minor enforceable or voidable by minor (with assistance)
- Contract valid from point of view of other party – cannot enforce or rescind
- Minor can exercise various options (with assistance)
- Guardian ratify contract – enforce and perform
- Rescind; refrain from enforcing or rescinding – enrichment liability

MINOR RESCINDS

(Void *ab initio*)
Reclaim property delivered (*rei vindicatio*) – ownership cannot be transferred to another party (money cannot be recovered with *rei vindicatio* – becomes property of other party through *commixtio*). Must reclaim money with *condictio*.

WHICH ACTION?
NOT *condictio indebiti* – can only be used where performance was not due at that stage
Condictio sine causa specialis – where money paid in terms of valid *causa* which later fell away

Also available to other party who has performed. Separate actions. Cannot be used as side-effect.

MINOR REFRAINS FROM ACTING

- Where other party performed in terms of contract and minor refrains from rescinding, he (minor) will be enriched at expense of other party
- Still valid contract so *causa* not fallen away (*condictio sine causa specialis* not applicable)
- Performance was due and still is until contract is rescinded so, *condictio indebiti* also not available
- Praetorian action (in Roman law)
- *Action in quantum locupletior factus est*
- Exception to normal enrichment action – requirement: enrichment must be *sine causa*.

CLAIM

- Determined at time of *litis contestatio*
- Saved expenses (necessaries) determined before this.

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.

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) 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.

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.

SELF-EVALUATION

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

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*.

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

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*.

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

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).

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

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.

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

SEE THE ANSWERS TO PRACTICAL SCENARIO

UNIT 13 COMPENSATION FOR WORK DONE AND SERVICES RENDERED

Criticism: if contract did not offer basis for claim – should not be used to determine compensation.

See; ***BK Tooling v Scope Precision*** – new formulation

- If above approach followed a claim based on contract should be instituted – not enrichment – court has a discretion
- Factors: use of the performance and extent of shortcomings
- If *exceptio* allowed (contractual) – plaintiff prevented from claiming in terms of contract
- If innocent party cancels contract on basis of plaintiffs breach (positive malperformance) plaintiff would have enrichment claim – and not for contract price less costs obtaining proper performance.

Result:
Enrichment liability rejected as basis of claim of plaintiff
Rejects the view that *exceptio* could not be raised if there was substantial performance
Rejects the view that *exceptio* could be raised if there was substantial defect in performance
Plaintiff claiming under contract must allege he performed properly otherwise only claim on basis of enrichment possible.

CONTRACTS FOR SERVICE
Employee entitled to remuneration for services upon completion of term of his contract of service.
If services not rendered for the full term – not entitled to full agreed remuneration / unless contract determines
Compelled to claim on ground of unjustified enrichment because contractual claim will be defeated by *exceptio*.

See; ***Spencer v Gostelow***

- Employer cannot enjoy services of employee without compensation. Court awarded *pro rata* remuneration.
- Saved expense: didn't have to hire other employee for time he worked
- Impoverishment: remuneration could have earned during time he worked there.

Desertion: Loses claim

Criticism:
Why difference between termination of one form of breach and not for *de facto* termination of contract because of desertion?

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?

SELF-EVALUATION

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

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 conduction 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-a`-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-a`-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.

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

In ***Hauman v Nortje´*** **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.

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

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.

UNIT 14 GENERAL ENRICHMENT ACTION

- Existence rejected in Nortje v Pool
- Left possible development open.

In ***Blesbok Eiendomsagentskap v Contamessa***

Court held that Roman law already had general doctrine against unjust enrichment – time had come to recognise general enrichment action. Extension of action to new circumstances already a recognition of a general enrichment action

By acknowledging this action it would no longer be necessary to become fixated on name of enrichment action – as long as defendant had been unjustifiably enriched at expense of plaintiff – reliance on general enrichment action should be successful.

This was a TPD decision and cannot overrule Nortje (which is a CPD decision)

Willers is an AD decision, but Nortje was not overruled here

So, Nortje still highest authority on this point.

Some recent SCA decisions

McCarthy Retail Limited v Shortdistance Carriers CC

Roman source material has not led to unified general principle of unjustified enrichment

Under general action only few actions would succeed, which would not have succeeded under old actions

Support the solution to possibly have old rules stand and supplemented by general action to fill the gaps

In rare occasions where even extension of old action not suffice – general action should be recognised. Rules governing it should not be too difficult to establish.

Wise to wait for rare case to arise to compel such recognition

Once recognised much less time devoted to identification of *condictio* and more time to the identification of the elements of enrichment.

First National Bank of SA v Perry NO

Remarked: too much time spent identifying correct *condictio or actio*

Adoption of general action might help remedy the situation

Fixing attention on requirements of enrichment rather than on definition and application of old actions.

Kudu Granite Operations (Pty) Ltd v Caterna Limited

Need for general enrichment action and their requirements further emphasised.

In general, a general enrichment action would be in addition to current actions, but will not replace them.

SELF-EVALUATION

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

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 *Nortje´* 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''.

(2) Critically discuss the majority and minority decisions in *Nortje´ 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.

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.

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 comp nsation, 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.

(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.

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 actionsand 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**:**

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

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.