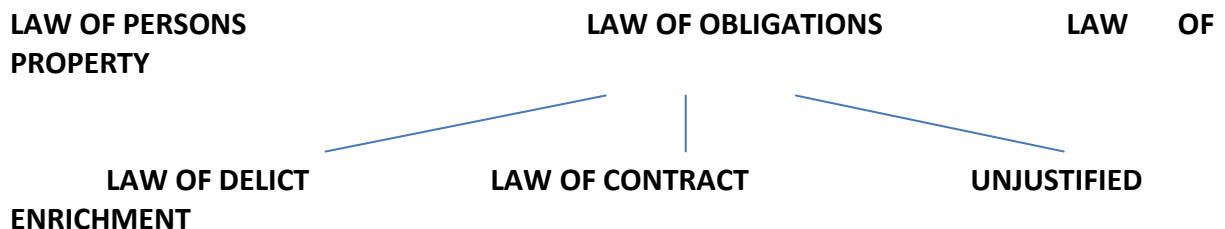


UNJUSTIFIED ENRICHMENT LIABILITY AND ESTOPPEL

DEFINITION

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

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



COMPONENTS/ GENERAL PRINCIPLES / REQUIREMENTS

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

VARIOUS ENRICHMENT CLAIMS AVAILABLE

| <i>Conditiones sine causa</i> | Improvements to Property | Management of another's affairs | Work done or service rendered |
|--|--|---|--|
| <ul style="list-style-type: none"> • <i>Condictio indebiti</i> • <i>Condictio ab turpem vel iniustam causam</i> • <i>Condictio causa data causa non secuta</i> • <i>Condictio sine cause specialis</i> | <ul style="list-style-type: none"> • <i>Bona fide</i> possessor • <i>Bona fide</i> occupier • <i>Mala fide</i> possessor • <i>Mala fide</i> occupier | <ul style="list-style-type: none"> • <i>actio negotiorum gestorum utilis</i> • <i>actio negotiorum gestorum contraria</i> | <ul style="list-style-type: none"> • <i>locatio conductio operis</i> • <i>locatio conductio operarum</i> |

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

CONDUCTIO INDEBITI: GENERAL REQUIREMENTS

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

| <u>Roman Law</u> | <u>Roman-Dutch Law</u> | <u>SA Law</u> |
|---|--|---|
| <ul style="list-style-type: none"> • Thing had to be transferred in ownership • Error (<i>solvendi animo per errorem</i> – under impression performance was owing • Undue payment: no debt at time of payment/<i>sine causa</i> • Receiver had to restore the thing + fixtures + fruits <u>minus</u> production expenses • Receiver entitled to <i>impensae necessariae</i> + <i>impensae utiles</i> enforced with <i>exception doli</i> • Interest drawn on money and value of <i>factum</i> (services rendered) could not be recovered • <u>Mala fide receiver</u>: Held liable with <i>condictio furtive</i>. Liable for damage to plaintiff + interest on monies received. Not allowed any expenses (sometimes allowed to detach improvements). If performance destroyed – | <ul style="list-style-type: none"> • Requirements essentially the same. • Payment <i>per errorem iuris</i> could not be recovered (mistake of law) • Only denied this <i>condictio</i> on considerations of equity • <u>Mala fide receiver</u>: One exception: could no longer be held liable with <i>condictio furtiva</i> – 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 <i>mora</i> where usual rules are applied. | <ul style="list-style-type: none"> • Reclaims performance under excusable mistake • The 3 requirements of Roman and Roman-Dutch law applies with minor adjustments • Party must prove: <ol style="list-style-type: none"> 1. Transferred something in ownership to another 2. Must have taken place as result of mistake 3. Mistake must be reasonable • Exception recognised: Payment made under protest or duress. Party must prove: <ol style="list-style-type: none"> 1. Payment was made in broad sense above 2. Payment was not owed 3. Payment = excusable mistake • Value of <i>factum</i> (services rendered) could be reclaimed. |

| | | |
|--|--|--|
| liable unless show thing would have suffered same fate at hands of plaintiff • Undeveloped enrichment action – not all detrimental side-effects taken into account. | | |
|--|--|--|

MONEY EXCHANGED FOR SOMETHING ELSE

- 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.

Note:

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 done 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.

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

- 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.

INTEREST DUE TO MORA

- 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.

CONDUCTIO 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.
- S2(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*.

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

| <u>Roman Law</u> | <u>Roman-Dutch Law</u> | <u>SA Law</u> |
|--|--|---|
| <ul style="list-style-type: none"> • A pays B money in terms of invalid transaction. A could claim • Requirements: <ol style="list-style-type: none"> (1) Transfer of property i.t.o. illegal agreement (prohibited by law) (2) Plaintiff himself not a <i>turpis persona</i> (shameful) • If both parties in <i>turpitude</i> – no claim, since the <i>par delictum</i> rule – later relaxed. Could claim if conduct less disgraceful than defendant's. • Claim: <ul style="list-style-type: none"> - Property delivered + fixtures + fruits minus defendant's <i>impensae necessariae</i> + <i>impensae utiles</i> - Right to remove <i>impensae voluptuariae</i> - Interest drawn not reclaimed - Value of <i>factum</i> not claimed - Undeveloped | <ul style="list-style-type: none"> • No essential difference • <i>Par delictum</i> rule strictly applied | <ul style="list-style-type: none"> • No <i>causa</i> because underlying agreement is void. • Requirements: <ol style="list-style-type: none"> (1) Perform i.t.o. illegal agreement (2) Other party enriched at expense of plaintiff (who was impoverished) (3) Tender made to return performance received by plaintiff (4) Plaintiff not <i>turpis persona</i> or good reason not to apply <i>par delictum</i> rule strictly. • <i>Turpis persona</i> 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 <i>par delictum</i> rule. |

CONDICTIO CAUSA DATA CAUSA NON SECUTU

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)

| <u>Roman Law</u> | <u>Roman-Dutch Law</u> | <u>SA Law</u> |
|--|--|---|
| <ul style="list-style-type: none"> • Used to reclaim money and things in ff cases: <ol style="list-style-type: none"> (1) <i>ius poenitentiae</i> | <ul style="list-style-type: none"> • All contracts consensual – no real contracts appeared. • Instituted in cases of | <ul style="list-style-type: none"> • Uncertainty • Where transfer of thing made and performance |

| | | |
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| <p>right to rescind – claim before counter-perform.</p> <p>(2) <u>breach of contract</u> other party not fulfil obligation to counterclaim – rescind with <i>condictio</i>.</p> <p>(3) <u>resolutive condition</u> One party delivered thing i.t.o. contractual resolutive condition and uncertain future event took place.</p> <ul style="list-style-type: none"> 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. <i>Exception doli</i> – refuse to restore until compensated. No claim to recover value of <i>factum</i> Undeveloped. | <p>consensual contracts <i>do ut des and do ut facias</i> in case of</p> <p>(1) Cancellation owing to breach</p> <p>(2) Fulfilment of resolutive condition</p> <ul style="list-style-type: none"> <i>lus poenitentiae</i> fell away – no longer reclaim performance before other party counter-performed (change his mind). | <p>rendered on basis of future event taking place or not taking place.</p> <ul style="list-style-type: none"> Claim if delivered thing to defendant by virtue of: <ul style="list-style-type: none"> (1) Resolutive condition (fulfilled) (2) Suspensive condition (not fulfilled) (3) Modus disregarded (4) 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.

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 |
|---|---|---|
| <ul style="list-style-type: none"> • Set aside <i>stipulation</i> (oral contract) if entered into without a <i>iusta causa</i>. • Existing <i>causa</i> falls away – goods can be recovered • Owner transfers possession – receiver used/sold <i>bona fide</i>. 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 <i>negotium</i> between parties (enriched / impoverished) • <i>Negotium</i> requirement precludes this <i>condictio</i> from being a general enrichment claim. • Not all detrimental side-effects • <i>Factum</i> not claimed • Undeveloped. | <ul style="list-style-type: none"> • <i>Negotium</i> requirement disappear. • Still not general – value of <i>factum</i> not claimed – only things that had been transferred. • <i>Bona fide</i> possessor’s action designated as a <i>utilis action negotiorum gestorum contraria</i> (extended management of affairs action) | <ul style="list-style-type: none"> • See; <u>Govender v Std Bank of SA</u> • <u>Used under 4 circumstances</u> <ol style="list-style-type: none"> (1) Where party performs – performance was due – but <i>causa</i> for performance has fallen away (<i>condictio ob causam finitam</i>) (2) Plaintiff’s property consumed/alienated by someone else (3) Bank made payment under countermanded/forged cheque (4) Ownership transferred <i>sine causa</i> – where none of the other <i>condictiones</i> would lie. • Where possessor receives thing <i>ex causa onerosa</i> (for value) their enrichment is constituted by the profit of the thing • A con only sue one of the <i>bona fide</i> possessors for profit • The <i>bona fide</i> possessor may then sue any of his predecessors in title again for the profit. |

NEGOTIORUM GESTIO (Management of another’s affairs)

1. *Actio negotiorum gestorum contraria* (true management)
2. *Actio negotiorum gestorum utilis* (extended form based on enrichment)

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)

| <u>Roman Law</u> | <u>Roman-Dutch Law</u> | <u>SA Law</u> |
|---|--|---|
| <ul style="list-style-type: none"> • <i>Dominus</i> obliged to compensate for expenses • <i>Dominus</i> granted an action to account for whatever is owed and damage for negligence. • Requirements <ul style="list-style-type: none"> - Gestor acts in interest of <i>dominus</i> 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 (<i>animus donandi</i>) • 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 <ul style="list-style-type: none"> - where minor’s interests protected - where gestor acted with own interests in mind | <ul style="list-style-type: none"> • Only few changes: • Gestor no action if acted against prohibition by <i>dominus</i> • Romans denied action where gestor managed affairs of another believing he was busy managing his own affairs (<i>bona fide</i>). • Roman-Dutch granted action • Used to compensate possessor who effected improvements on another person’s land (<i>bona fide and mala fide</i> 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 <i>dominus</i>. • Third party no intention of benefiting <i>dominus</i> – acts in interests of another thinking he was acting in his own interests (action available) | <ul style="list-style-type: none"> • 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 <i>animus donandi</i> and without being forbidden to manage those interests. • <u>Requirements (true management)</u> <ol style="list-style-type: none"> (1) Gestor must perform without instruction (2) Must act reasonably (3) Must have intention to act in interests of <i>dominus</i> (4) Must not have acted free of charge (5) May not act contra express prohibition of <i>dominus</i>. • All requirements – claim full extent of expenses even if <i>dominus</i> did not benefit. May be necessary expense – expenses saved. • <u>Duties of gestor</u> <ol style="list-style-type: none"> (1) Complete that which he has commenced (2) Exercise necessary care (3) Account for anything he acquires (4) Surrender to <i>dominus</i> all the latter is entitled to. • <u>Rights of Gestor</u> <ol style="list-style-type: none"> (1) Entitled to compensation for expenses and |

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| | | disbursements. (2) Gestor can claim (by novation) that <i>dominus</i> 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 <i>negotiorum gestio</i> | Enrichment |
|---|--|
| <ul style="list-style-type: none"> • True gestor recover all reasonable expenses at time expenditure was made. | <ul style="list-style-type: none"> • Recovers only the lesser of the two amounts (Impoverishment v Enrichment) |
| <ul style="list-style-type: none"> • Right to recover unaffected by fact that improvement was destroyed later or by diminished value | <ul style="list-style-type: none"> • Only if thing still in existence at the time can action be instituted. |
| <ul style="list-style-type: none"> • Content fixed and remains unchanged. | <ul style="list-style-type: none"> • Diminished value or destruction will affect impoverished party's claim – variable content. |

In whose interests did he act? In his 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*.

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.

| <u>Roman Law</u> | <u>Roman-Dutch Law</u> |
|---|---|
| <ul style="list-style-type: none"> • Movable to movable Owner of main article acquired ownership if detached original owner loses ownership – cannot recover with <i>rei vindication</i>. Only unjustified enrichment – undeveloped. • Movable to immovable Owner of immovable became owner. If severed owner could recover with <i>rei vindication</i>. Right of compensation – distinguish: <ul style="list-style-type: none"> - A built with B’s materials on A’s land - A built with own materials on B’s land. <p><u>A built with B’s materials on A’s land</u></p> <ul style="list-style-type: none"> • <i>Mala fide</i>: B recover twice value of his materials and vindicate materials after attachment severed. • <i>Bona fide</i>: B institute action to vindicate materials after severance or institute <i>action de figno iuncto</i> <p><u>A built with own materials on B’s land</u></p> <ul style="list-style-type: none"> • <i>Bona Fide</i> <ul style="list-style-type: none"> - No action. Could eviction with <i>exception</i> | <ul style="list-style-type: none"> • Same as Roman law • Could claim <i>impensae voluptuariae</i> 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 <i>Bona fide</i> possessor had an action – may be <i>action negotiorum gestorum utilis</i> (not clear) Could institute even if no longer in possession. <p><u><i>Mala fide</i></u> Treated the same way as <i>bona fide</i></p> <p><u><i>Fiduciarius (bona fide)</i></u></p> <ul style="list-style-type: none"> • Could not claim for everyday repairs. • Value of fruits not taken into account. • Right of retention. <p><u><i>Usufructuary</i></u></p> <ul style="list-style-type: none"> • Duty of maintenance not to effect improvements • Could claim for necessary improvements |

| | |
|--|---|
| <p><i>doli</i> until compensated. A = <i>ius retentionis</i>. If a lost possession no <i>ius retentionis</i>.</p> <ul style="list-style-type: none"> - Cannot use <i>condictio sine causa specialis</i> – no <i>negotium</i>. - Cannot use <i>negotiorum gestio</i> – did not act <i>animo negotia aliena gerendi</i> - Claim was for <i>impensae necessariae</i> or <i>impensae utilis</i> or increase in value of land (whichever is the least) - Could remove useful improvements – if B did not want to reimburse - No right to <i>impensae voluptuariae</i>. 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. • <i>Mala Fide</i> <ul style="list-style-type: none"> - <i>ius retentionis</i> or <i>ius tollendi</i> (right of removal) - Equated to <i>bona fide</i> possessor except for fruits - Must account for fruits he could have enjoyed and actually enjoyed (<i>bona fide</i> – only fruits actually enjoyed) | <p><u>Occupiers</u></p> <ul style="list-style-type: none"> • Buyers of movable property received but not ownership • Buyers of land – possession not transfer • Institute <i>action redhibitoria</i> – cancel agreement – claim expenses incurred from sellers • Institute <i>action empty / restitution in integrum</i>. <p><u>Lessees</u></p> <ul style="list-style-type: none"> • 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 <i>ius retentionis</i> <p><u>Specificatio (creation of a thing)</u></p> <ul style="list-style-type: none"> • 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:

| <i>Bona fide</i> | <i>Mala fide</i> |
|---|--|
| <ul style="list-style-type: none"> ● Mistakenly thinks he is owner | <ul style="list-style-type: none"> ● Knows he is not the owner |
| <ul style="list-style-type: none"> ● Becomes owner of all fruits gathered before becoming aware | <ul style="list-style-type: none"> ● No right to fruits gathered by him |
| <ul style="list-style-type: none"> ● Owner has no claim to value of fruits gathered before becoming aware. Cannot be set off against claim for compensation. | <ul style="list-style-type: none"> ● Owner has a claim for compensation for fruits consumed / disposed of / value of fruit that could have been gathered. |

Similarities:

| <i>Bona fide</i> | <i>Mala fide</i> |
|--|--|
| <ul style="list-style-type: none"> ● Right of recourse for all useful and necessary and sometimes luxury expenses | <ul style="list-style-type: none"> ● Right of recourse for necessary, perhaps for useful (except where thief) – definitely not luxurious. |

| | |
|----------------------|--------------------------------------|
| • Right of retention | • Not certain if right of retention. |
|----------------------|--------------------------------------|

ACCESSIO – CONTINUED

- 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:
 - Lessee 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 plaacaats.
- 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*.

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 |
|---|--|
| <ul style="list-style-type: none"> • Had origin here • Impoverished person had <i>ius retentionis</i> even where he did not have an action • Raise <i>exception doli</i> against <i>rei vindicatio</i> • Once possession lost – no remedy | <ul style="list-style-type: none"> • <i>ius retentionis</i> 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.

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 necessities – 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.

COMPENSATION: WORK DONE AND SERVICES RENDERED

Locatio conductio operis - contractor / contract of work

Locatio conductio operarum – employee / contract of service

- Performance by contractor or employee cannot be restored
- Enrichment action allowed
- Action for *quantum meruit*
- Amount by which employer actually enriched or employee impoverished whichever the lesser.

MANNER IN WHICH LIABILITY DETERMINED DIFFERS

Locatio conductio operarum

1. Render personal services to employer. Labour object of contract
2. Employee at beck and call of employer
3. Services to be rendered in terms of contract of service at disposal of employer
4. Employee subordinate to employer
5. Contract of service terminated by death of employer
6. Contract of service terminated on expiration of period of services rendered.

Locatio conductio operis

1. Object: performance of certain specified work
2. Stands in independent position. Not obliged to perform work himself
3. Must perform within specified time stipulated in contract or reasonably
4. Equal footing with *locator operis*. Not under obligation to obey order.
5. Not necessarily terminated by death of parties
6. Terminates on completion of work.

CONTRACT FOR WORK

- General principle – workman only claim after acceptance of work by employer – if not perform fully or properly – no claim on contract. Employer could defend with *exceptio non adimpleti contractus*
- Can employer retain faulty performance without paying? Enrichment action available.

See; Human v Nortje

Recover contract price less cost of supplementation or completion.

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?

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

Remark: 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.