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## Introduction

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### I Enrichment Liability in the Civilian Tradition

Roman law admitted a range of actions that we would today recognise as actions arising from enrichment, central among which was the *condictio*. In its classical form, the *condictio* was a debt action which formed part of the older, more formal *ius civile* rather than the newer, more flexible *ius honorarium*. As a debt action, it was used to effect the restitution of money or goods which had come into the property of the defendant from that of the plaintiff and which it appeared he ought to restore: ‘si paret eum dare oportere’.<sup>1</sup> On the other hand, it was abstract in the sense that the written formula did not specify the *causa debendi*, the reason for the indebtedness, but merely the fact of the debt. It was this abstractness which enabled the *condictio* to be extended beyond its core applications to other ‘comparable forms of indebtedness’.<sup>2</sup> In its contractual incarnations, the *condictio* was used to secure the repayment of a loan – the unilateral, real contract of *mutuum* – or to enforce a promise – the unilateral, verbal contract of *stipulatio*. However, the *condictio* was applied also in situations analogous to these: for example, where the plaintiff had mistakenly attempted to discharge a debt which did not in fact exist: here, the plaintiff did not intend to make a loan (*mutuum*) but to repay one.<sup>3</sup> Thus, in classical law it was used to enforce a range of obligations, whether arising from contract, from a wrong, or indeed ‘by some special right from various types of causes’.<sup>4</sup> No attempt appears to have been made to further delimit this third, miscellaneous category of obligations.<sup>5</sup>

In Justinian’s *Digest* the classical applications of the *condictio* were particularised as a number of specific actions, according to the substantive reasons for

<sup>1</sup> Gaius, *Institutes* 3.91.

<sup>2</sup> D Liebs, ‘The Roman *Condictio*’ in N MacCormick and P Birks (eds), *The Legal Mind: Essays for Tony Honoré* (Oxford, Clarendon Press, 1986) 165 ff.

<sup>3</sup> G 3.91.

<sup>4</sup> Justinian, *Digest* 44.7.1 pr (Gaius, *Golden Words*, Book 2) (Watson’s translation).

<sup>5</sup> For a recent account in English of contemporary German scholarship regarding the classical Roman *condictiones*, see DP Visser, *Unjustified Enrichment* (Cape Town, Juta, 2008) 230–46. Although certain German scholars of the mid-twentieth century took the view that a unifying concept could be found in the absence of a *causa* (cause, reason, ground or basis) for the retention of the benefit in question, this view has recently been called into question by Susanne Hähnchen, *Die causa condictionis - Ein Beitrag zum klassischen römischen Kondiktionenrecht* (Berlin, Duncker & Humblot, 2003) 99 ff. As she points out, the classical jurists did not typically engage in abstract reasoning of this kind.

liability.<sup>6</sup> These included the *condictio indebiti*, to recover a transfer not owed;<sup>7</sup> the *condictio causa data causa non secuta*, to recover a transfer made in order to achieve a specific future purpose that failed;<sup>8</sup> the *condictio ob turpem vel iniustam causam*, to recover transfers made for an immoral or illegal purpose;<sup>9</sup> and the residual *condictio sine causa (specialis)*, which lay in a range of circumstances, for example, where a fuller had paid compensation to a customer for lost clothes which subsequently turned up.<sup>10</sup> Justinian included some of these *condictiones* along with a number of other actions in his category of *obligationes quasi ex contractu*, ‘obligations arising as if upon a contract’.<sup>11</sup> Although some of the actions identified by Justinian as arising ‘as if upon a contract’ were based on what would later be recognised as unjustified enrichment, this category was essentially a miscellany of heterogeneous cases.<sup>12</sup> On the other hand, this category did not include other cases, such as the defence provided to the mistaken improver of property against the owner’s *vindicatio* for the cost of materials and labour,<sup>13</sup> which would now be classified as arising from unjustified enrichment. As early as the second century AD, the classical jurist Pomponius had stated that, ‘by the law of nature it is fair that no-one become richer by the loss and injury of another’.<sup>14</sup> But no attempt appears to have been made to connect this broad moral precept with Justinian’s category of quasi-contract, or indeed with the individual *condictiones*.

In fact, a general doctrine of enrichment liability emerged only in the seventeenth century, in the writings of Hugo Grotius.<sup>15</sup> It was Grotius who for the first time recognised enrichment – ‘*baet-trecking*’ – as a distinct cause of action within the law of obligations.<sup>16</sup> According to Grotius, such obligations arose where someone derived a benefit from another’s property ‘without legal title’ (*zonder vorige recht-gunninge*), that is, ‘without antecedent gift or other

<sup>6</sup> See generally R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town, Juta, 1993) 238–51.

<sup>7</sup> D 12.6.

<sup>8</sup> D 12.4.

<sup>9</sup> D 12.5.

<sup>10</sup> D 12.7. The case of the fuller is discussed at D 12.7.2 (Ulpian, *On the Edict*, Book 32).

<sup>11</sup> See Justinian, *Institutes* 3.27.1–6 and D 44.7.5 pr–3 (Gaius, *Golden Words*, Book 3).

<sup>12</sup> It included actions arising from *negotiorum gestio*, guardianship (reciprocal claims between tutor and pupil), common ownership and co-inheritance (specifically the claim of a co-heir or legatee against the heir), as well as the claim to recover an amount not owed (the *condictio indebiti*).

<sup>13</sup> eg J II.1.30.

<sup>14</sup> D 12.6.14 (Pomponius, *On Sabinus*, Book 21) and D.50.17.206 (Pomponius, *Various Readings*, Book 9) (Watson’s translation).

<sup>15</sup> J Scholtens, ‘The General Enrichment Action That Was’ (1966) 83 *South African Law Journal* 391, 394–95; W De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg*, 3rd edn (Cape Town, Juta, 1987) 72–74; Zimmermann, *Law of Obligations*, n 6 above, 885–86; Robert Feenstra, ‘Grotius’s Doctrine of Unjust Enrichment as a Source of Obligations: Its Origin and its Influence in Roman-Dutch Law’ in E Schrage (ed), *Unjust Enrichment: the Comparative Legal History of the Law of Restitution*, 2nd edn (Berlin, Duncker and Humblot, 1999) 197, esp 200–7; J Du Plessis, ‘Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from Two Mixed Jurisdictions’ (2005) 122 *South African Law Journal* 142, 143–46; Visser, *Unjustified Enrichment*, n 5 above, 27–33.

<sup>16</sup> Hugo Grotius, *Inleydinge tot de Hollandsche Rechtsgeleertheit* 3.30.

contract'.<sup>17</sup> According to this general principle, an action lay to recover what had unwittingly been paid as a debt when in fact there was none: the *condictio indebiti*.<sup>18</sup> Similarly, an action lay to recover something given 'without lawful cause' (*zonder rechtelike oorzaak*), for example, where something was given in expectation of a marriage and the marriage did not take place: the stock example of the *condictio causa data causa non secuta*.<sup>19</sup> Thus, for Grotius, it seems that the individual *condictiones* at least could be understood as expressions of the 'without legal title' principle. In fact, there are some indications that Grotius recognised also a species of general enrichment action organised around the wider 'lawful cause' concept.<sup>20</sup> However, he does not appear to have attempted to give any specific content to this wider concept.

Nor did the other Roman-Dutch Institutional writers take the matter much further. Although they discussed the discrete enrichment actions of the Roman law, many of which were subject to incremental development, they did not attempt to systematise these rules.<sup>21</sup> Typically, the account of these actions given by Johannes Voet in his *Commentarius Ad Pandectas* is much fuller than that of Grotius, but it tracks very closely the structure and content of Justinian's *Digest*; Voet did not explicitly recognise the existence of a discrete body of rules dealing with the reversal of unjustified enrichment, nor did he offer any definition of enrichment liability. On the other hand, there is evidence that during the seventeenth and eighteenth centuries, the Hoge Raad (Supreme Court) of the provinces of Holland and Zeeland applied a species of general enrichment action similar to that hinted at by Grotius in his *Inleiding*.<sup>22</sup> Reports of these decisions were collected by the judge Cornelius van Bijkershoek in his *Observationes Tumultuariarum*, and later by Willem Pauw (*Observationes Tumultuariarum Novae*), but these works were published only during the course of the twentieth century, too late substantially to influence the development of the South African law.

<sup>17</sup> *ibid* 3.30.1 and 2 (Lee's translation).

<sup>18</sup> *ibid* 3.30.4.

<sup>19</sup> *ibid* 3.30.15 and 16. Grotius records also a third application of the general principle, the *condictio promissi sine causa* or claim to recover that promised 'without lawful cause', 'that is without gift or other contract'. See *ibid* 3.30.12.

<sup>20</sup> *ibid* 3.30.18. Scholtens, Feenstra and Visser argue that Roman-Dutch law admitted a species of general enrichment action, subsidiary to existing instances of liability but available to give effect to the general principle in cases where the plaintiff would otherwise have been left without a remedy: Scholtens, 'The General Enrichment Action That Was', n 15 above, 395; Feenstra, 'Grotius's Doctrine of Unjust Enrichment as a Source of Obligations', n 15 above; Visser, *Unjustified Enrichment*, n 5 above, 28–33. De Vos, however, argues that Grotius is simply referring in 3.30.18 to the *condictio sine causa* in its specialised form: De Vos, *Verrykingsaanspreeklikheid*, n 15 above, 71–74.

<sup>21</sup> Feenstra draws attention to the exception of Ulrik Huber who, like Grotius, attempted to frame a general enrichment action: Feenstra, 'Grotius's Doctrine of Unjust Enrichment as a Source of Obligations', n 15 above, 222–28. For an overview of the Roman-Dutch law of enrichment, see De Vos, *Verrykingsaanspreeklikheid*, n 15 above, ch II.

<sup>22</sup> Feenstra, 'Grotius's Doctrine of Unjust Enrichment as a Source of Obligations', n 15 above, 228–35.

## II Enrichment Liability in South African Law

The South African law of enrichment evolved directly from this Roman-Dutch substrate. Although the nineteenth and early twentieth centuries saw considerable further development in the individual enrichment actions of the *ius commune*, the first attempt at a systematic treatment of the subject came only in 1958, when Wouter De Vos published the first edition of *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (*Enrichment Liability in South African Law*).<sup>23</sup> Under the influence of the German and Swiss civil codes,<sup>24</sup> he argued that the general principles of enrichment liability could be stated as follows: (i) the defendant must be enriched; (ii) this enrichment must be at the expense of the plaintiff; (iii) the enrichment must be unjustified (*ongeregverdig*) or *sine causa*.<sup>25</sup> According to De Vos's account, where these requirements were satisfied an enrichment claim would lie: either one of the traditional enrichment actions or, failing that, a subsidiary general action, provided that no additional rule of law precluded it.<sup>26</sup>

As will be discussed further below, De Vos's theorisation of the subject was clearly incomplete. Apart from anything else, his concept of 'unjustified' enrichment lacked sufficient content to act as a controlling generalisation in novel cases. Nevertheless, De Vos's work undoubtedly had the potential to trigger a more critical, expansive approach to the subject than had previously prevailed. Regrettably, the publication of the first edition of *Verrykingsaanspreeklikheid* was followed less than a decade later by the decision of the Appellate Division in *Nortjé en 'n ander v Pool NO*, in which the existence of any general enrichment action was denied.<sup>27</sup> Although this decision appears to have been driven by relatively specific fears regarding the dangers of uncontrolled liability rather than by scepticism as to the very existence of a general principle against unjustified enrichment, nevertheless it gave rise to a period of stagnation in the South African law. The judicial conviction that enrichment liability was limited to existing *ius commune* claims, even if subject to incremental development, tended to discourage attempts at systematisation also. However, the decision of the Supreme Court of Appeal in *McCarthy Retail Ltd v Shortdistance Carriers CC* in 2001 has largely reversed this conservative stance.<sup>28</sup> Although the case was decided under the rubric of the bona fide

<sup>23</sup> W De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (Cape Town, Juta, 1958).

<sup>24</sup> Du Plessis, 'Towards a Rational Structure of Liability for Unjustified Enrichment', n 15 above, 150 n 41.

<sup>25</sup> De Vos, *Verrykingsaanspreeklikheid*, n 15 above, ch VII, esp 328–29. De Vos did not list the impoverishment of the plaintiff as one of the requirements of liability, but he did recognise the existence of a 'loss-cap': the plaintiff could claim either his enrichment or his impoverishment, whichever was the lesser.

<sup>26</sup> A further principle required that if the plaintiff's cause of action was comprised within one of the existing actions he was obliged to proceed under that head. Thus, the plaintiff could not evade the effect of any additional rules regulating these existing actions by proceeding under the subsidiary general action. De Vos, *Verrykingsaanspreeklikheid*, n 15 above, 358–61.

<sup>27</sup> *Nortjé en 'n ander v Pool NO* 1966 (3) SA 96 (A).

<sup>28</sup> *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] ZASCA 14, 2001 (3) SA 482 (SCA).

occupier's claim for improvements, Schutz JA, who delivered the main judgment, both explicitly recognised the general principles formulated by De Vos and made it clear that when next a deserving case arose which could not be accommodated under one of the existing enrichment actions, a subsidiary general action would be recognised.<sup>29</sup> Thus, the *McCarthy* judgment has created an environment in which theorists of enrichment liability can debate not only the extension of liability to new cases but also the rationalisation of existing rules according to the fundamental principles underlying the subject.

This implicit challenge has been taken up by Daniël Visser in *Unjustified Enrichment*, published in 2008, and more recently by Jacques Du Plessis in *The South African Law of Unjustified Enrichment*.<sup>30</sup> Probably the most significant feature of these accounts is their proposal for the South African law of enrichment of an internal structure essentially modelled on the Wilburg/Von Caemmerer taxonomy of German law:<sup>31</sup> claims are divided between those in respect of enrichment by transfer (modelled on the German *Leistungskondiktion*);<sup>32</sup> those in respect of imposed enrichment, comprising enrichment through expenditure on another's property and enrichment through expenditure as a result of managing the affairs of another;<sup>33</sup> and those in respect of enrichment by invasion of rights.<sup>34</sup> This neo-civilian approach is an appropriate one for South African law, given that German and South African law share a common historical root: the principal distinction between enrichment by transfer and enrichment 'in another way' which informs the Wilburg/Von Caemmerer model broadly reflects the traditional civilian distinction between the *condictiones* and other enrichment claims. Once such a taxonomy is adopted, it becomes possible to move beyond the patchwork of the uncodified *ius commune*; to introduce a degree of abstraction and systematisation into South African law without seeking to suppress its complexities.

However, the particular actions of the Roman and Roman-Dutch law remain at the centre of the modern South African law of enrichment.<sup>35</sup> Of course, it is the causes of action epitomised by these claims which survive, rather than the original Roman forms of action themselves: the *condictiones* comprise the most commonly occurring and therefore the primary causes of action in the civilian law of enrichment, both ancient and modern.<sup>36</sup> Nevertheless, in Visser's words, 'In South African law . . . it is not so much a question of the forms of action ruling us from their graves, but that they have never died'.<sup>37</sup> For example, Visser argues

<sup>29</sup> *ibid* paras [8]–[10] (Schutz JA).

<sup>30</sup> J Du Plessis, *The South African Law of Unjustified Enrichment* (Cape Town, Juta, 2012).

<sup>31</sup> See, eg, Visser, *Unjustified Enrichment*, n 5 above, 64–85.

<sup>32</sup> *ibid* chs 4–9; Du Plessis, *The South African Law of Unjustified Enrichment*, n 30 above, chs 3–7.

<sup>33</sup> Visser, *Unjustified Enrichment*, n 5 above, ch 10; Du Plessis, *The South African Law of Unjustified Enrichment*, n 30 above, chs 8–10.

<sup>34</sup> Visser, *Unjustified Enrichment*, n 5 above, ch 11; Du Plessis, *The South African Law of Unjustified Enrichment*, n 30 above, chs 11–12.

<sup>35</sup> *McCarthy Retail v Shortdistance Carriers*, n 28 above, paras [8]–[10].

<sup>36</sup> R Evans-Jones, *Unjustified Enrichment*, vol 1, *Enrichment by Deliberate Conferral: Condictio* (Edinburgh, W Green & Son, 2003) para 1.03.

<sup>37</sup> Visser, *Unjustified Enrichment*, n 5 above, 4.

that enrichment by transfer should comprise not only the deliberate conferral of money or goods by one person on another but also the deliberate conferral of services.<sup>38</sup> This view is compelling, supported as it is both by comparative law and by arguments of principle. Yet the *condictiones* have since classical Roman law been limited to the transfer of money and goods and this limitation, associated with the original Roman form of action, persists in modern South African law.<sup>39</sup>

Thus, the nominate *condictiones* of Justinian's *Digest* continue to serve as the principal means by which enrichment by transfer is reversed in modern South African law. There is the *condictio ob turpem vel iniustam causam*, for recovering money or property conferred for an illegal or immoral purpose;<sup>40</sup> the *condictio causa data causa non secuta*, for recovering a transfer of money or property made in order to achieve a specific future purpose that has failed;<sup>41</sup> and the residual *condictio sine causa specialis*, which lies in a range of cases: on the one hand, to accommodate difficult three-party cases where the other *condictiones* are inappropriate, such as mistaken payments by banks to customers' payees;<sup>42</sup> on the other hand, its most important application, the *condictio ob causam finitam*, lies in modern law to recover performance rendered under a contract which fails for supervening impossibility.<sup>43</sup> To these ancient transfer actions South African law has added various more modern innovations: for example, the action for work done or services rendered imperfectly in terms of a contract which is subsequently cancelled.<sup>44</sup> There is also debate among contemporary enrichment theorists regarding the classification of certain other claims: whereas some regard the claim to recover performance rendered under a contract voidable for misrepresentation, compulsion, undue influence or minority as a contractual action, Visser at least argues that these are instances of enrichment liability.<sup>45</sup> However, it is undoubtedly the

<sup>38</sup> Visser, *Unjustified Enrichment*, n 5 above, 222–25; Du Plessis, *The South African Law of Unjustified Enrichment*, n 30 above, 63–65.

<sup>39</sup> Visser, *Unjustified Enrichment*, n 5 above, 223; Du Plessis, *The South African Law of Unjustified Enrichment*, n 30 above, 62–63. South African law has since the early twentieth century taken an abstract approach to the transfer of ownership, in the sense that the transfer of ownership occurs independently of the validity of the transaction in pursuance of which that transfer takes place. See, eg, PJ Badenhorst, JM Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property*, 5th edn (Durban, LexisNexis Butterworths, 2006) 74–76; H Mostert and A Pope (eds), *The Principles of the Law of Property in South Africa* (Cape Town, Oxford University Press, 2010) 192–94.

<sup>40</sup> Visser, *Unjustified Enrichment*, n 5 above, ch 7; Du Plessis, *The South African Law of Unjustified Enrichment*, n 30 above, ch 6.

<sup>41</sup> Visser, *Unjustified Enrichment*, n 5 above, ch 8; Du Plessis, *The South African Law of Unjustified Enrichment*, n 30 above, ch 5.

<sup>42</sup> Visser, *Unjustified Enrichment*, n 5 above, 335–80; Du Plessis, *The South African Law of Unjustified Enrichment*, n 30 above, 229–36. See *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A).

<sup>43</sup> Visser, *Unjustified Enrichment*, n 5 above, 478–501; Du Plessis, *The South African Law of Unjustified Enrichment*, n 30 above, 224–25. See *Kudu Granite Operations (Pty) Ltd v Caterina Ltd* 2003 (5) SA 193 (SCA).

<sup>44</sup> Visser, *Unjustified Enrichment*, n 5 above, 552–59.

<sup>45</sup> *ibid* 101–13, drawing on arguments initially presented in 'Rethinking Unjustified Enrichment' [1992] *Acta Juridica* 203, 211–25. Against: S Miller, 'Unjustified Enrichment and Failed Contracts' in R Zimmermann, DP Visser and K Reid, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford, Oxford University Press, 2004) 437, 460–66. Similar

*condictio indebiti*, literally ‘the claim to recover something not owed’, that is the most significant of the actions that lie to recover enrichment by transfer. Whereas the others are specific, dedicated to particular factual complexes, the *condictio indebiti* is general: it is triggered by the absence of indebtedness per se. Indebtedness itself arises from several determinate causes, contract and statute being the most prominent. It follows that an action founded on the absence of indebtedness has a very wide potential range indeed. Indeed, it is the closest approximation to the German *Leistungskondiktion* to be recognised within the uncodified civilian tradition.

### III A Law of Unjustified Enrichment?

My account thus far has evaded a key analytical question, one which still remains to be resolved in South African law. This pertains to the meaning of De Vos’s third requirement, that the enrichment of the defendant be unjustified or *sine causa*. According to De Vos himself, enrichment is in general unjustified where there is no conclusive legal justification for the displacement of value or the continuation of such displacement from one estate to the other.<sup>46</sup> He doubts whether it is possible to formulate the absence of legal ground requirement any more precisely than that.<sup>47</sup> More recently, Visser has put forward the view that all the elements of the enrichment action applicable in a given situation together determine whether that enrichment is unjustified. Each new instance of liability requires a fresh judgement of value or policy.<sup>48</sup> There is no single, all-encompassing criterion to determine whether enrichment is justified or not.<sup>49</sup>

However the position is different when it comes to enrichment by transfer in particular. In an influential article published in 1966, JC van der Walt proposed a more specific conception of the legal ground concept, at least insofar as the *condictio indebiti* is concerned, maintaining that ‘enrichment is in principle *sine causa* if there is no obligatory relationship [*verbintenisregtelike verhouding*] between the enriched and impoverished parties on the basis of which the enriched party could claim the transfer of the benefit’.<sup>50</sup> This view may have been too narrowly formulated: as De Vos himself pointed out, it excludes a range of other kinds of legal grounds in the

arguments have been raised concerning the restitution of performance rendered under contracts cancelled due to breach. See now also Du Plessis, *The South African Law of Unjustified Enrichment*, n 30 above, 68–94.

<sup>46</sup> De Vos, *Verrykingsaanspreeklikheid*, n 15 above, 353. See also JC Sonnekus, *Unjustified Enrichment in South African Law*, JE Rhoadie (trans) (Durban, LexisNexis, 2008) 76–92, who appears to follow the analysis of De Vos.

<sup>47</sup> De Vos, *Verrykingsaanspreeklikheid*, n 15 above, 355.

<sup>48</sup> Visser, *Unjustified Enrichment*, n 5 above, 174–75, drawing on ‘When is Enrichment Justified’ in C Nagel (ed), *Gedenkbundel vir JMT Labuschagne* (Durban, LexisNexis Butterworths, 2006) 163.

<sup>49</sup> Visser, *Unjustified Enrichment*, n 5 above, 174.

<sup>50</sup> JC Van der Walt, ‘Die Condictio Indebiti as Verrykingsaksie’ (1966) 29 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 220, 222 (my translation).

form of grounds provided by law, such as valid wills, court orders, and certain forms of original acquisition of ownership, or the removal of liability through extinctive prescription.<sup>51</sup> Yet a revised version of this argument has been put forward more recently by Jacques Du Plessis: whatever it means to describe enrichment in general as unjustified or without legal ground, in the context of enrichment by transfer in particular, the term ‘legal ground’ refers to the existence of an objectively-determined relationship of indebtedness between the parties, and the absence of such a ground renders a transfer recoverable in principle without more.<sup>52</sup> Other requirements for recovery may of course be imposed over and above the absence of a legal ground in this sense: for example, the requirement that the plaintiff in a *condictio ob turpem vel iniustam causam* must not be tainted with illegality, or that the plaintiff in a *condictio indebiti* was genuinely mistaken. Specific factors of this kind are, however, extrinsic to the question whether the enrichment is unjustified or not.<sup>53</sup>

Visser, on the other hand, has proposed a more nuanced approach to the ‘unjustified’ concept in the context of enrichment by transfer: in keeping with his understanding of the wider meaning of the concept. In his early work he argued that the true basis of liability under the *condictio indebiti* was *prestasiedoelmislukking* or ‘failure of the purpose of the performance’.<sup>54</sup> Where the plaintiff had transferred a benefit to the defendant for a particular purpose, for example to pay a debt, and that purpose had failed, the benefit was for this reason recoverable.<sup>55</sup> In *Unjustified Enrichment*, Visser builds on this idea in proposing ‘failure of the purpose of the transfer’ as a species of algorithm or thinking-tool for use throughout the law of enrichment by transfer. The failure of the purpose of the transfer does not provide a conclusive reason for restitution in itself,<sup>56</sup> but it does render the transfer at least *prima facie* unjustified in the broader sense identified above.<sup>57</sup> In other words, the failure of the purpose of the plaintiff’s performance is not an invariable requirement for recovery, but it does offer a useful tool or technique for generating preliminary conclusions. Most transfers are made in discharge of

<sup>51</sup> De Vos, *Verrykingsaanspreeklikheid*, n 15 above, 355. See also Du Plessis, ‘Towards a Rational Structure of Liability for Unjustified Enrichment’, n 15 above, 150; *The South African Law of Unjustified Enrichment*, n 30 above, 56.

<sup>52</sup> Du Plessis, ‘Towards a Rational Structure of Liability for Unjustified Enrichment’, n 15 above, 150–52, 176–77.

<sup>53</sup> See generally Van der Walt, ‘Die Condictio Indebiti as Verrykingsaksie’, n 50 above, 227–28; Du Plessis, ‘Towards a Rational Structure of Liability for Unjustified Enrichment’, n 15 above, 159, 177, as well as the more cautious view expressed in *The South African Law of Unjustified Enrichment*, n 30 above, 53–54, 65–66; Sonnekus, *Unjustified Enrichment*, n 46 above, 77–80. See also the fifth requirement for liability under the subsidiary general enrichment action proposed by De Vos, namely, that there must be no additional rule of law precluding recovery: *Verrykingsaanspreeklikheid*, n 15 above, 355.

<sup>54</sup> DP Visser, *Die Rol van Dwaling by die condictio indebiti: ’n Regshistoriese Perspektief met ’n Regsvergelykende Ekskursus* (Dr iur thesis, University of Leiden, 1985); ‘Die Grondslag van die Condictio Indebiti’ (1988) 51 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 492.

<sup>55</sup> This argument is based on German Roman law scholarship of the mid-twentieth century, and on the work of Fritz Schwarz in particular: *Die Grundlage der condictio im klassischen römischen Recht* (Munster, Bahlau, 1952). See Visser, *Die Rol van Dwaling*, n 54 above, ch 1; ‘Die Grondslag van die Condictio Indebiti’, n 54 above, 493–98; *Unjustified Enrichment*, n 5 above, 230–41.

<sup>56</sup> Visser, *Unjustified Enrichment*, n 5 above, 230, 252–53.

<sup>57</sup> *ibid* 229–53, especially 252.

liability, although Visser acknowledges also a range of other purposes, as in the context of the *condictio causa data causa non secuta*. This means that the absence of a relationship of indebtedness between the parties will generally give rise to restitution without more.<sup>58</sup> On the other hand, considerations such as causative mistake on the part of the transferor might form part of the overall explanation as to why enrichment ought to be restored (indeed, mistake is often the reason why the plaintiff's attempt to discharge his liability has failed). But once again, such factors are not to be treated as requirements for liability. Rather, it remains open to the plaintiff to adduce alternative reasons to mistake as to why the enrichment of the defendant is unjustified in the broader sense.<sup>59</sup>

According to Du Plessis's preferred approach, purely subjective factors such as mistake are intrinsically irrelevant to this inquiry. Whenever a transfer is made in discharge of liability, then as the name of the action itself suggests, the mere absence of a valid contract or other legal obligation or relationship of indebtedness underlying the transfer renders it recoverable in principle. According to Visser's algorithm, on the other hand, such factors may have a continuing role to play as alternative or secondary explanations for the cause of action triggered in the first instance by the failure of the purpose of the transfer. But that role is at best a subsidiary one: Visser does not regard subjective factors as analytically significant in themselves.<sup>60</sup> Analyses of this kind hold out much attraction to South African lawyers as a means of rationalising the restitution of enrichment by transfer in general and the *condictio indebiti* in particular. However, as this book seeks to demonstrate, the analyses proposed by Du Plessis and Visser do not accurately reflect the true analytical structure of the modern South African law of enrichment. Even Visser's flexible analysis does not go far enough. This is because these analyses simply do not take sufficient account of specific reasons for the restitution of transfers.

## IV Unjust Enrichment: the Reanalysis of Enrichment by Transfer

Even in classical Roman law, the *condictio indebiti* was denied in cases where the payer knew that the sum paid was not owing.<sup>61</sup> It has been argued that the classical

<sup>58</sup> *ibid* 274–75.

<sup>59</sup> See *ibid* 187, where this point is explicitly spelt out.

<sup>60</sup> Visser explicitly acknowledges that, 'to restructure this part of South African enrichment law [enrichment by transfer] completely on the basis of failure of purpose is perhaps a bridge too far'. See Visser, *Unjustified Enrichment*, n 5 above, 230. He does, however, argue that the mistake requirement which currently dominates the *condictio indebiti* should be abandoned: Visser, *Unjustified Enrichment*, n 5 above, 324–31.

<sup>61</sup> eg D 12.6.1.1 (Ulpian, *On the Edict*, Book 26): 'If someone mistakenly pays what is not owed he can recover by this *condictio*, but if he pays knowing that the money is not owed, the payment is not recoverable.'

error requirement was a 'negative' one, in the sense that it was for the defendant to prove knowledge once the plaintiff had shown that the transfer which he had made had in fact not been owing.<sup>62</sup> On other hand, certain other texts in the *Digest* suggest that proof of mistake was positively required in order to found recovery.<sup>63</sup> At least by the time of Justinian mistake had certainly come to be regarded as one of the elements of liability under what was now labelled the *condictio indebiti*, an element requiring to be positively proved by the plaintiff in each case.<sup>64</sup> As a result, throughout the European *ius commune* the *condictio indebiti* has been understood to require positive proof of mistake.<sup>65</sup> This positive mistake requirement having been universally acknowledged in Roman-Dutch law,<sup>66</sup> it was applied by the various colonial courts of Southern Africa during the nineteenth century,<sup>67</sup> and remains a requirement for success in modern South African law.<sup>68</sup> For example, in *ABSA Bank Ltd v Leech and others NNO*, the Supreme Court of Appeal held that, 'in order to succeed [in the *condictio indebiti*] the respondents had to prove that a payment was made in the mistaken belief that it was owing'.<sup>69</sup> In fact, the reception of this requirement into South African law appears clearly from the additional requirements that the mistake be one of fact rather than law,<sup>70</sup> and that it be excusable.<sup>71</sup> In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*,<sup>72</sup> decided by the Appellate Division in 1992, the mistake of law rule was abrogated but the excusability requirement affirmed in respect of mistakes of both fact and law.<sup>73</sup>

Thus, it appears that mistake, at least, constitutes a positive requirement for recovery under the South African *condictio indebiti*. Not only is the plaintiff's mistake part of the chain of events leading to a transfer unsupported by a relationship of indebtedness (Du Plessis), or the failure of the purpose of his transfer, namely to discharge a liability (Visser); according to South African law, it is one of the necessary ingredients for a claim in restitution. Moreover, as I will seek to demon-

<sup>62</sup> See eg Zimmermann, *Law of Obligations*, n 6 above, 849–51.

<sup>63</sup> eg D 22.3.25 pr. (Paul, *Questions*, Book 3): 'He who alleges that he has paid an *indebitum* must prove that he paid it through fraud on the part of the recipient or some just cause of ignorance, and unless he show this, he cannot recover.'

<sup>64</sup> eg Zimmermann, *Law of Obligations*, n 6 above, 849–51.

<sup>65</sup> Visser, *Die Rol van Dwaling*, n 54 above, chs 2 and 3. See also G Dannemann, *The German Law of Unjustified Enrichment and Restitution: a Comparative Introduction* (Oxford, Oxford University Press, 2009) 171–72 on the requirements of the *condictio indebiti*.

<sup>66</sup> eg Grotius, *Inleydinge*, n 16 above, 3.30.6; Johannes Voet, *Ad Pandectas* 12.6 n 6. See De Vos, *Verrykingsaanspreeklikheid*, n 15 above, 69–71; Visser, *Die Rol van Dwaling*, n 54 above, ch 4.

<sup>67</sup> *Port Elizabeth Divisional Council v Uitenhage Divisional Council* (1868) 1 Buch 221, a decision of the Cape Supreme Court, appears to be the earliest example.

<sup>68</sup> See eg De Vos, *Verrykingsaanspreeklikheid*, n 15 above, 171–209; Visser, *Unjustified Enrichment*, n 5 above, 290–95; JG Lotz (updated FDJ Brand), 'Enrichment' in *The Law of South Africa*, vol 9, 2nd edn (Durban, LexisNexis Butterworths, 2005) para [212].

<sup>69</sup> *ABSA Bank Ltd v Leech and others NNO* [2001] ZASCA 65, 2001 (4) SA 132 (SCA) para [8] (Streicher JA).

<sup>70</sup> See eg *Rooth v State* (1888) 2 SAR 259. See further Chapter 2 at II(B)(i).

<sup>71</sup> See eg *Divisional Council of Aliwal North v De Wet* (1890) 7 SC 232. See further Chapter 2 at II(B)(ii).

<sup>72</sup> *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) 224 (Hefer JA).

<sup>73</sup> See further Chapter 3 at III.

strate in the chapters that follow, South African law recognises a number of other applications of the *condictio indebiti* where another factor or reason takes the place of mistake. First, the *condictio indebiti* has been explicitly applied to cases where the transfer was made with full knowledge of the facts but under some form of compulsion. Secondly, there is a body of case law in which the *condictio indebiti* lies to recover transfers made by minors and other persons of limited capacity, regardless of mistake. It appears that all these factors – mistake, compulsion and minority together with certain other forms of incapacity – are treated by the South African courts as positive requirements for restitution, in addition to the absence of a relationship of indebtedness between the parties.

How are these specific factors explained by proponents of the absence of legal ground approach? In fact, none of the theorists discussed above denies them. The role of compulsion as an alternative ground for the *condictio indebiti* in addition to mistake is explicitly acknowledged by De Vos.<sup>74</sup> All three factors are acknowledged by Sieg Eiselen and Gerrit Pienaar in their casebook.<sup>75</sup> Visser, who treats both mistake and compulsion in detail under the rubric of the *condictio indebiti*<sup>76</sup> and deals with the restitution of minors' transfers in the context of his account of failed contracts, is at pains to deny any attempt to replace the South African law with German law, or 'implant German concepts into our law'.<sup>77</sup> Similarly, Du Plessis has said of the absence of legal ground approach which he proposes that, 'it has to be admitted that this type of analysis is not descriptive of the current law, which, due to its uncodified civilian background, and some common law influence, still regards error and compulsion as positive considerations influencing the success of the *condictio indebiti*'.<sup>78</sup> The *condictio indebiti* is discussed by him under the general heading, 'Enrichment Arising from a Transfer that Failed to Fulfil an Obligation', with mistake and compulsion featuring in one of the subsections. Nevertheless, as we have seen, all share a common assumption that the law would be improved if these factors were to be abandoned or relegated to mere background circumstances. However, this book poses the question whether the South African law of enrichment by transfer might not be better explained by an analysis which takes seriously the phenomena described in the previous paragraphs. So far, the only explanation offered by enrichment theorists to the courts and to students of enrichment has been to regard the positive mistake, compulsion and incapacity requirements as mere accidents, casualties of an uncodified legal system which are extrinsic to the true basis of liability.<sup>79</sup> But another choice is open to us: that is, to adopt a different

<sup>74</sup> De Vos, *Verrykingsaanspreeklikheid*, n 15 above, 172.

<sup>75</sup> S Eiselen and G Pienaar, *Unjustified Enrichment: a Casebook*, 3rd edn (Durban, LexisNexis, 2008) 107–30.

<sup>76</sup> Visser, *Unjustified Enrichment*, n 5 above, chs 5 and 6 and 546–51.

<sup>77</sup> *ibid* 229.

<sup>78</sup> Du Plessis, 'Towards a Rational Structure of Liability for Unjustified Enrichment', n 15 above, 170–71. See also Du Plessis, *The South African Law of Unjustified Enrichment*, n 30 above, 129–51.

<sup>79</sup> eg Du Plessis, 'Towards a Rational Structure of Liability for Unjustified Enrichment', n 15 above, 165–66 and now *The South African Law of Unjustified Enrichment*, n 30 above, 168–74; Visser, *Unjustified Enrichment*, n 5 above, 330. Similar criticisms have been made of the mistake requirement

analysis, one organised at least in part around positive reasons for restitution. Such an analysis would treat these factors as part of the explanation for restitution; as a reason, if not the reason, for recovery.

The restitution of unjust enrichment in modern English law is founded on just such an analysis. According to the prevailing consensus, the principle against unjust enrichment finds expression at a lower level of generality in four ‘questions’: Has the defendant been benefited or enriched? Was the enrichment at the claimant’s expense? Was the enrichment unjust? Are there any defences upon which the defendant can rely?<sup>80</sup> The question then arises as to the content of these various elements, particularly the notion of ‘unjust’. Even if one separates restitution for wrongs out from the law of unjust enrichment, leaving only the ‘autonomous’ unjust enrichment which roughly corresponds to the civilian category,<sup>81</sup> the principle against unjust enrichment is still one that operates at an exceedingly high level of generality. In 1985, Peter Birks proposed a taxonomy in terms of which each individual ground or ‘unjust factor’ is assigned to one of a number of categories according to the nature of the reason for restitution upon which it relies.<sup>82</sup> The secondary principles inherent in these categories are capable of mediating the very broad idea of unjust enrichment in that they restate that idea at a lower level of generality. According to Birks’ original thesis, there were three categories of unjust factors.<sup>83</sup> Of these categories, two survived in the mature theory:<sup>84</sup> factors vitiating voluntariness and policy-motivated factors.<sup>85</sup>

recognised in the context of the Scottish *condictio indebiti*: see, eg, R Evans-Jones, ‘Some Reflections on the *condictio indebiti* in a Mixed Legal System’ (1994) 110 *South African Law Journal* 759, and now *Unjustified Enrichment*, n 36 above, vol 1 71–75.

<sup>80</sup> See, eg, G Virgo, *The Principles of the Law of Restitution*, 2nd edn (Oxford, Oxford University Press, 2006) 9; A Burrows, E McKendrick and J Edelman, *Cases and Materials on the Law of Restitution* (Oxford, Oxford University Press, 2007) 71; Lord Goff of Chieveley and G Jones, *The Law of Restitution*, 7th edn (London, Sweet & Maxwell, 2007) 16–17; A Burrows, *The Law of Restitution*, 3rd edn (Oxford, Oxford University Press, 2011) 27. See also the judicial recognition of these ‘questions’ in *Banque Financière de la Cîte v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 227 (Lord Steyn) and in subsequent cases. But cf the revised structure adopted in C Mitchell *et al* (eds), *Goff and Jones: the Law of Unjust Enrichment*, 8th edn (London, Sweet & Maxwell, 2011) para 1–09 and the justifying grounds listed in chs 2 and 3.

<sup>81</sup> As argued by Peter Birks, ‘Misnomer’ in W Cornish *et al* (eds), *Restitution: Past, Present and Future* (Oxford, Hart Publishing, 1998) 1 and later in *Unjust Enrichment*, 2nd edn (Oxford, Oxford University Press, 2005).

<sup>82</sup> P Birks, *An Introduction to the Law of Restitution*, revised edn (Oxford, Clarendon Press, 1989).

<sup>83</sup> *ibid* ch 4.

<sup>84</sup> The second category looked to the ‘unconscientious receipt’ of the benefit by the defendant, and it follows that the first two categories were, respectively, claimant- and defendant-sided. However, the defendant-sided unity later collapsed, following the demise of Birks’ theory of free acceptance. See in particular the criticisms advanced by A Burrows, ‘Free Acceptance and the Law of Restitution’ (1988) 104 *LQR* 576 and *The Law of Restitution*, n 80 above, 334–37. Also Virgo, *The Principles of the Law of Restitution*, n 80 above, 121–24.

<sup>85</sup> This principal division continues to be recognised by exponents of the unjust factors analysis: see, eg, Virgo, *The Principles of the Law of Restitution*, n 80 above, ch 6; Burrows, *The Law of Restitution*, n 80 above, 86.

The first category reflects the idea that the impoverished party did not mean to transfer the benefit in question: that its conferral was in some sense involuntary. Mistake occupies a central position within this family of unjust factors. According to Birks' approach, mistake is itself the plaintiff's cause of action: the vitiation of his intent in making the transfer is the reason why it must be returned.<sup>86</sup> The presence of a valid contract, statutory obligation or other relationship of indebtedness, such as a judgment debt, has the effect of blocking restitution.<sup>87</sup> However, according to prevailing orthodoxy, this is simply a defence (or a range of defences) by means of which the recipient can defeat this prima facie claim. It enjoys no analytical significance in itself.<sup>88</sup> Other unjust factors falling within the sub-category of 'impaired' or 'vitiating' intent are compulsion and, for Birks and Andrew Burrows, personal disadvantage or human incapacity, categories which include minority.<sup>89</sup> Here too, it is the compulsion or disadvantage itself which furnishes the reason for the restitution of the benefit. In Birks' characteristic phrase, at its simplest the plaintiff is saying, by way of establishing a claim to an enrichment received by the defendant, 'I did not mean you to have it'.<sup>90</sup> Subsequent accounts separate out also cases of 'no intent' or absence of intention within the first category of unjust factors: for Graham Virgo and Burrows the unjust factor of ignorance belongs here,<sup>91</sup> as arguably does juristic incapacity.<sup>92</sup> Finally, there is 'qualified' intent: this sub-category contains the unjust factor of failure of consideration, which refers primarily to the failure of a promised counter-performance in return for the rendering of a benefit to the recipient, but comprises also the failure of a non-promissory condition as to the future.<sup>93</sup> By

<sup>86</sup> Birks, *An Introduction to the Law of Restitution*, n 82 above, 146–73; Virgo, *The Principles of the Law of Restitution*, n 80 above, ch 8; Burrows, *The Law of Restitution*, n 80 above, ch 9.

<sup>87</sup> The seminal decision in this respect is *Barclays Bank Ltd v WJ Simms Son and Cooke (Southern) Ltd* [1980] 1 QB 677, 695. See, more recently, *Test Claimants in the Franked Investment Income Litigation v Revenue and Customs Commissioners* [2010] EWCA Civ 103, paras [175]–[184], and generally Virgo, *The Principles of the Law of Restitution*, n 80 above, 172–76, 667–72. But cf *Deutsche Morgan Grenfell plc v IRC* [2006] UKHL 49, [2007] 1 AC 558.

<sup>88</sup> But cf Burrows, *The Law of Restitution*, n 80 above, 88–91; R Stevens, 'Is there a Law of Unjust Enrichment?' in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Sydney, Thomson Reuters, 2008); G Virgo, 'Demolishing the Pyramid: the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment' in A Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Oxford/Portland, OR, Hart Publishing, 2009); C Mitchell *et al*, *Goff and Jones: the Law of Unjust Enrichment*, n 80 above, para 1–09 and the discussion of justification grounds in chs 2 and 3.

<sup>89</sup> Regarding compulsion, see Birks, *An Introduction to the Law of Restitution*, n 82 above, 173–203; Virgo, *The Principles of the Law of Restitution*, n 80 above, ch 9. Regarding minority, see Birks, *An Introduction to the Law of Restitution*, n 82 above, 216–18 (part of the wider category of personal disadvantage, which in turn forms part of inequality); Burrows, *The Law of Restitution*, n 80 above, 311–14 (part of the wider category of human incapacity). cf Virgo, *The Principles of the Law of Restitution*, 387.

<sup>90</sup> Birks, *An Introduction to the Law of Restitution*, n 82 above, 140.

<sup>91</sup> Virgo, *The Principles of the Law of Restitution*, n 80 above, ch 7; Burrows, *The Law of Restitution*, n 80 above, ch 10.

<sup>92</sup> Virgo, *The Principles of the Law of Restitution*, n 80 above, 387, 397–99.

<sup>93</sup> Birks, *An Introduction to the Law of Restitution*, n 82 above, ch 7; Virgo, *The Principles of the Law of Restitution*, n 80 above, ch 12; Burrows, *The Law of Restitution*, n 80 above, ch 14.

contrast, the third category – policy-motivated unjust factors – contains those cases where restitution is independent of any involuntariness on the part of the claimant: ‘where the law judges that a given policy objective is best pursued by ensuring that there is restitution of the value in question’.<sup>94</sup> This category comprises illegality as well as the exaction of money *ultra vires*, recognised as a new unjust factor in *Woolwich Equitable Building Society v Inland Revenue Commissioners*:<sup>95</sup> the principle of legality itself required that money exacted *ultra vires* be restored.<sup>96</sup> Burrows assigns also *ultra vires* payments by a public authority (a species of juristic incapacity) to this category.<sup>97</sup> The policies underlying restitution in this case will be explored further in Chapter 5.

It is my purpose here to subject the *condictio indebiti* of South African law to the analysis outlined above: an analysis based on unjust factors. Once again, the pattern of application of this *condictio* in modern law suggests three principal unjust factors: mistake, compulsion and incapacity (comprising both minority and other forms of juristic incapacity), a series roughly corresponding to Birks’ original sub-category of vitiated or impaired intent. As we have seen, South African orthodoxy teaches that the absence of a relationship of indebtedness between the parties is in principle the reason for the restitution of transfers. I argue instead that while the absence of a relationship of indebtedness is indeed a necessary condition for the restitution of enrichment by transfer, it is not a sufficient one. It follows that this is a book about the consequences of invalidity, or perhaps more broadly non-liability, within the South African law of enrichment by transfer.

It must be emphasised that in dealing with those cases classified as instances of the *condictio indebiti*, this book takes as its focus those cases in which the invalidity thesis is strongest. It does not deal in any detail with easy cases of enrichment by transfer, where the requirements of a particular *condictio* or other enrichment claim clearly point to an unjust factor. Thus, it is not directly concerned with the restitution of performance rendered under contracts voidable for misrepresentation, compulsion, undue influence or minority. This is because it is clear that the unjust factors triggering the restitution of performance in those cases are mistake, compulsion, undue influence and minority, respectively.<sup>98</sup> In other words, the reasons for invalidity and restitution are the same. Nor does it deal with contracts void due to illegality (the province of the *condictio ob turpem vel iniustam causam*). Here again, it is the illegality of the plaintiff’s purpose, a category-three unjust factor, which provides the reason for restitution, provided that restitution is not blocked by the operation of the *par delictum* rule. Thirdly, it does not deal explicitly with the *condictio causa data causa non secuta*, the claim to recover money or goods transferred

<sup>94</sup> P Birks and R Chambers, *The Restitution Research Resource* (Oxford, Mansfield Press, 1994) vi–vii.

<sup>95</sup> *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL).

<sup>96</sup> Burrows, *The Law of Restitution*, n 80 above, ch 20.

<sup>97</sup> *ibid* 517–20. Virgo, *The Principles of the Law of Restitution*, 387–88 considers also the possibility that minority belongs in this category.

<sup>98</sup> See Chapter 6 at V(A).

in order to achieve a specific future purpose, or with the restitution of performance rendered under a contract which fails due to supervening impossibility (the province of the *condictio ob causam finitam*). In both cases the reason for restitution is located in what a common lawyer would recognise as failure of consideration: in the plaintiff's misprediction regarding the coming into existence of a future state of affairs, or the capacity of a present state of affairs to sustain itself, leading to the qualification of his intention.<sup>99</sup> By contrast, the *condictio indebiti* in its pure form implies no unjust factor within the standard common law taxonomy. It resembles rather the claim triggered by 'absence of consideration' recognised by the English Court of Appeal in *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council*.<sup>100</sup> Thus, it is clear that any attempt to assert the analytical significance of unjust factors within the South African law of enrichment by transfer must take the *condictio indebiti* as its focus.

## V Beyond the *Conditiones*

However, the reanalysis of those instances where the *condictio indebiti* is expressly applied is only one of the goals of this book. According to orthodoxy, with minor exceptions the *conditiones* are the only mechanisms available to effect the restitution of enrichment by transfer in modern South African law: the identification between form of action and cause of action is almost complete. Furthermore an orthodox account of the South African law of unjustified enrichment naturally focuses on the *conditiones*, since these have historically been closely identified with the absence of legal ground analysis. On the other hand, an analysis explicitly founded on unjust factors breaks the link between the restitution of enrichment by transfer and the *conditiones*. By focusing on the role of mistake, compulsion and incapacity as reasons for restitution, it invites consideration of other instances where restitution of money and goods is effected on these grounds. Thus, it permits the ambit of the category of enrichment by transfer to be extended beyond the *conditiones* to include also other species of restitutionary claim. In particular, it invites analysis of those instances where restitution has been effected by means of the remedy of *restitutio in integrum*.

The term *restitutio in integrum* appears to carry at least two distinct meanings in modern South African law. First, it may refer to the substantive grounds upon which a valid contract may be avoided, in the case of contracts induced by misrepresentation, compulsion and undue influence. Thus, the avoidance of contracts on

<sup>99</sup> Birks, *An Introduction to the Law of Restitution*, n 82 above, 223.

<sup>100</sup> *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215. It was this case, together with a number of other decisions involving void interest swaps, especially *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL), which induced Prof Birks to abandon his unjust factors taxonomy in favour of a civilian analysis founded on absence of basis. See Birks, *Unjust Enrichment*, n 81 above, ch 5.

these grounds is sometimes referred to as an instance of *restitutio in integrum*.<sup>101</sup> Bound up with this first meaning are the conditions for the restitution of performance rendered under such an avoided contract. Both – conditions of avoidance or grounds of invalidity and conditions of restitution or unjust factors – are generally regarded as part of the law of contract. On the other hand, the term *restitutio in integrum* can refer also to a particular species of bilateral restitutionary response with certain characteristic features, chief among which is the rule that restitution of a party's performance is dependent on counter-restitution of performance received.<sup>102</sup> Again, in modern South African law use of the term in this sense is generally confined to contract, that is to the restitution of performance rendered under a contract avoided for misrepresentation, compulsion, etc.<sup>103</sup> However, the *restitutio in integrum* of the civilian tradition appears to have been of a different character again.<sup>104</sup>

It is generally thought that the *restitutio in integrum* of Roman law was one of a range of remedies by means of which the Praetor mitigated the harshness of the old civil law, the *ius civile*.<sup>105</sup> Although more recently this view has been challenged – it is argued that in classical Roman law the term *restitutio in integrum* referred to the restitutionary response only, as opposed to an independent remedy – in the *ius commune*, *restitutio in integrum* does indeed appear to have been regarded as an equitable remedy in its own right. Although the procedural distinction between the *ius civile* and the Praetorian *ius honorarium* had long lost its significance, *restitutio in integrum* continued to be regarded as an extraordinary remedy, designed to provide relief where the *ius civile* was silent. Moreover, and consequent on this extraordinary nature, it was regarded as a flexible remedy, in the sense that relief might take whatever form equity appeared to demand. Finally, unlike a conventional action in terms of which relief is available under specific conditions as of right, the *restitutio in integrum* of the *ius commune* was discretionary, in the sense that it could be granted in any circumstances at all, provided the court felt that there was a reasonable cause (*iusta causa*) for restitution.

These key characteristics had important implications for the scope of *restitutio in integrum* in Roman-Dutch law. First, as in Roman law, it was understood by most old authorities to include a wide range of responses, applicable to a wide range of human actions: these responses extended even to the granting of clemency in criminal cases, but the restitution of money and goods remained one of

<sup>101</sup> eg *Davidson v Bonafede* 1981 (2) SA 501 (C) 509–10; D Hutchison *et al*, *The Law of Contract in South Africa* (Cape Town, Oxford University Press Southern Africa, 2009) 114.

<sup>102</sup> See, eg, S Van der Merwe *et al*, *Contract: General Principles*, 3rd edn (Cape Town, Juta, 2007) 136–40. Other textbooks refer simply to 'restitution' or 'restitutionary damages': see, eg, AJ Kerr, *The Principles of the Law of Contract*, 6th edn (Durban, Butterworths, 2002) 329–33.

<sup>103</sup> *Johnson v Jainodien* 1982 (4) SA 599 (C) 605. See also *Probert v Baker* 1983 (3) SA 229 (D) 233; *Baker v Probert* [1985] ZASCA 22, 1985 (3) SA 429 (A) 438–439 (regarding cancellation for breach of contract). See also Van der Merwe *et al*, *Contract: General Principles*, n 102 above, 136–40.

<sup>104</sup> The historical character of *restitutio in integrum* is considered in detail in Chapter 2 at III(A) and Chapter 4 at II(A) and (B).

<sup>105</sup> For full sources refer to Chapter 2 at III(A) and Chapter 4 at II(A) and (B).

the primary applications of *restitutio in integrum*. Thus, its potential to act as a technique for reversing enrichment by transfer is clear. Secondly, the *restitutio in integrum* of Roman-Dutch law was granted on a wide (and presumably unlimited) range of equitable grounds. As in the Roman sources, fear (*metus*), fraud (*dolus*), minority and absence received by far the fullest treatment, but several Roman-Dutch writers include also *iustus error* (reasonable mistake) as a nominate ground in this list. Thus, to the extent that *restitutio in integrum* served to effect the restitution of transfers, the claim embodied in the remedy arose from unjust factors – reasons for restitution – rather than from the absence of a legal ground.

The *restitutio in integrum* of nineteenth-century South African law appears to have retained in large measure its original Roman-Dutch character.<sup>106</sup> *White Brothers v Treasurer-General*, decided by the Cape Supreme Court in 1883, concerned a claim to recover the payment of tax alleged to have been incorrectly levied, on grounds of either mistake or compulsion.<sup>107</sup> *Restitutio in integrum* was identified as the appropriate remedy to reverse these payments, and the grounds on which it might be granted were listed as, ‘*metus* [fear], *dolus* [fraud], *minor aetas* [minority], *Capitis diminutio* [loss of civil status], *absentia* [absence], *alienatio iudicii mutandi causa* [alienation with the object of frustrating a judicial proceeding], and *justus error* [reasonable mistake]’.<sup>108</sup> As late as 1950, Lee and Honoré in their *South African Law of Obligations* maintained that, ‘the difference between claims for the return of property, based on *condictio* and *restitutio in integrum* respectively, is mainly historical’.<sup>109</sup> However, in 1949 Van den Heever JA held in *Tjollo Ateljees (Eins) Bpk v Small* that, ‘we do not petition for *restitutio in integrum* to relieve us from the obligations induced by fear, force of fraud . . . [but] raise these negations of free volition as direct defences or causes of action’. Thus he rejected the Roman-Dutch conception of *restitutio in integrum* as a free-standing restitutionary remedy.<sup>110</sup> Van den Heever JA was correct. There is of course no separate equitable jurisdiction in modern South African law, comprising equitable forms of action, as there was in classical Roman law and in Roman-Dutch law. All surviving instances of *restitutio in integrum* must therefore be rationalised in terms of substantive causes of action. Yet there has so far been no systematic attempt to investigate the causes of action inherent in its application outside the sphere of contract. In his *Verrykingsaanspreeklikheid*, first published in 1958, De Vos dismissed outright the idea that *restitutio in integrum* might be brought within the fold of enrichment liability along with the *conditiones*, serving as an ‘enrichment action’.<sup>111</sup> As we have seen, in modern South African law *restitutio in*

<sup>106</sup> See Chapter 2 at III(B).

<sup>107</sup> *White Brothers v Treasurer-General* (1883) 2 SC 322.

<sup>108</sup> Voet, *Ad Pandectas* 4.1 n 26, quoted *ibid* 349 (De Villiers CJ).

<sup>109</sup> RW Lee and AM Honoré, *The South African Law of Obligations* (Durban, Butterworths & Co, 1950) para [681].

<sup>110</sup> *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) 871–72.

<sup>111</sup> De Vos, *Verrykingsaanspreeklikeheid*, n 15 above, 158–59.

*integrum* has come to be regarded solely as a contractual remedy. However, as this book will argue, *restitutio in integrum* still figures in modern South African law as a restitutionary remedy triggered by the enrichment of the recipient. Even if it is accepted that the obligation to restore contractual performance consequent upon avoidance arises from the contract itself, self-evidently this explanation is unavailable in wholly extra-contractual cases or in cases where a contract is void ab initio rather than voidable. On the other hand, although historically *dolus* (fraud) and *metus* (fear) have sometimes been regarded as delicts, it does not appear to be possible to explain the restitution of transfers in cases of mistake, compulsion and minority as arising from a wrong: mistake and minority at least are wholly plaintiff-sided. It is also significant that the response in such cases is exclusively restitutionary, rather than compensatory.

As for the second aspect of the claim that *restitutio in integrum* is a wholly contractual remedy, namely, that it is a species of restitutionary response reserved for the restitution of performance under contracts avoided for misrepresentation, compulsion, etc, here again questions arise. De Vos's reasons for denying that *restitutio in integrum* was an enrichment action were, first, that it appeared to recognise no defence of change of position or disenrichment; and secondly, that interest on sums recovered by means of this remedy was calculated retrospectively rather than prospectively.<sup>112</sup> More recently, however, Visser has sought to refute these arguments.<sup>113</sup> The absence of a defence of disenrichment should not in itself be regarded as fatal, while the position regarding interest has itself been dictated by the classification of the remedy.<sup>114</sup> Speaking more generally, comparative scholarship suggests that *restitutio in integrum* is in truth a relatively sophisticated technique for reversing enrichment in the context of reciprocal transfers:<sup>115</sup> whereas the traditional enrichment *condictiones* are designed to effect the restitution of unilateral transfers, *restitutio in integrum* is much better adapted to the restitution of bilateral performances. In fact it seems that it does not matter whether *restitutio in integrum* is labelled a contractual or an enrichment remedy, as long as the difficult problems associated with the winding up of failed contracts are treated consistently across South African law.<sup>116</sup>

<sup>112</sup> *ibid* 158–59. On the other hand, Michael Lambiris takes the view that *restitutio in integrum* cannot be an 'enrichment action' because it does not merely restore the parties to their former position, but also constitutes the instrument by means of which the contract is avoided. M Lambiris, *Orders of Specific Performance and Restitutio in Integrum in South African Law* (Durban, Butterworths, 1989) 181, 198–200, 319 n 7.

<sup>113</sup> See generally Visser, 'Rethinking Unjustified Enrichment', n 45 above, 211–25; *Unjustified Enrichment*, n 5 above, 101–13, 517–26.

<sup>114</sup> Visser, 'Rethinking Unjustified Enrichment', n 45 above, 218–19; *Unjustified Enrichment*, n 5 above, 111–12.

<sup>115</sup> Visser, *Unjustified Enrichment*, n 5 above, 101–13, especially 112–13, 517–26.

<sup>116</sup> Visser, *Unjustified Enrichment*, n 5 above, 90–113, drawing on the work of Phillip Hellwege, *Die Rückabwicklung gegenseitiger Verträge als einheitliches Problem* (Tübingen, Mohr Siebeck, 2004). But see S Miller, 'Unjustified Enrichment and Failed Contracts' in R Zimmermann, DP Visser and K Reid, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford, Oxford University Press, 2004) 437, and see now analysis of this question in Du Plessis, *The South African Law of Unjustified Enrichment*, n 30 above, 74–75.

## VI Plan of Action

In Chapters 2, 3, 4 and 5, I will begin by subjecting the *condictio indebiti* of South African law to an analysis based on unjust factors. Once again, the pattern of application of this *condictio* in modern law suggests three principal unjust factors: mistake (Part I), compulsion and incapacity (Part II). However, I will consider also the role played by *restitutio in integrum* as a mechanism for effecting the restitution of transfers on these grounds. While the South African courts adopt an explicitly 'mixed' approach to the restitution of enrichment by transfer by means of the *condictio indebiti*, where the restitutionary remedy applied has been *restitutio in integrum* they have generally favoured a pure unjust factors approach. In addition, I will consider the historical interaction between *restitutio in integrum* and the *condictio indebiti*: in particular, I will attempt to show that many of the characteristics of the modern *condictio indebiti* are explicable only when the influence of *restitutio in integrum* is appreciated. It follows that once De Vos's identification of form of action with cause of action is abandoned, an unjust factors approach to the restitution of enrichment by transfer may well turn out to have far greater explanatory power than one founded on the absence of a legal ground. Only once the role played by unjust factors in South African law is accorded proper recognition does it become possible to describe accurately, evaluate and if necessary reform the modern law.

However, even if it turns out that the dominant approach applied by the South African courts to the restitution of enrichment by transfer is indeed one founded on unjust factors, the question remains whether the absence of legal ground approach is not in some sense inherently superior. Would it not then be preferable for the South African courts to retreat from the position which the law has reached and attempt instead to bring it into line with an analysis based purely on the absence of a legal ground? This question is particularly pressing in light of recent developments in English law. Within the last decade it has been forcefully argued in the common law context that the unjust factors approach is internally incoherent, and that it has poor explanatory power in certain important cases of enrichment by transfer. If these arguments turn out to be compelling, then despite the evidence accumulated in Parts I and II there would be powerful reasons for a change of direction in South African law. Thus, Chapter 6, Part III, will be concerned with the assessment of the most compelling criticisms levelled against the unjust factors approach to enrichment by transfer in general, and mistaken transfers in particular.