PART 3

STUDY MANUAL: CAPITA SELECTA

UNJUSTIFIED ENRICHMENT
LECTURE 1

INTRODUCTORY LECTURE (1)
BIRD’S EYE VIEW OF ENRICHMENT
VALUE OF ESTOPPEL
ADMINISTRATIVE ISSUES

(FIRST HALF OF LECTURE 1)

OBJECTIVES TO BE REACHED:
The student is expected to

☑ master the legal jargon of enrichment law, like unjustified (sine causa), enrichment, causality, different condictiones, ad hoc extensions.

☑ seek a basis to categorise the different enrichment actions, identify one simple characteristic to distinguish, relate and define them, and,

☑ find, explain and incorporate examples to reinforce your understanding of this casuistic field.
STUDY AND COMPREHEND (before the first lecture):

Lotz/Brand LAWSA "Enrichment": par 207-244

(remark: this updated version by Justice Brand of Lotz’s original contribution is short and sweet, but is excellent to give one a bird’s eye view of the casuistry of enrichment and will come in handy as a taxonomy of enrichment as a whole).

REMARK:

Enrichment and Estoppel are concepts that are not foreign to you. In fact, you have encountered these concepts in your first year of legal studies resulting in many headaches for the lecturers being so brave to mention it – for this overzealous act will haunt them for the years to come. ...And to the exhilaration of students who could now furnish solutions (via Enrichment and Estoppel) to any problem put to them without blinking an eye! (See Sonnekus “Unjustified Enrichment” calling the indiscriminate application of enrichment “mental laziness” and a lack of legal knowledge [p6 fn30].) If there is one earthly sin that can be committed by a lecturer, it is to tell first year students that Enrichment is the panacea whenever nothing else helps (Schutz JA describes Enrichment in Trojan Exploration v Rustenburg Platinum Mines 1996 4 SA 499(AD): 527F as “about the last arrow in the quiver of remedies”). And that Estoppel is a ground of defense available to the defendant when the plaintiff relies on his own misrepresentation to advance his claim. It is even worse if this is said without further shedding light on it.

For the lecturer, it is this “ghost” of Enrichment and Estoppel that is lurking round every corner – it will haunt him or her for their lecturer’s life ahead! If nothing else gives a solution, then the sui generis application of Enrichment and Estoppel will surface unexpectedly, but without doubt.

The application of Enrichment as a cause of action is gaining momentum. Sonnekus (Unjustified Enrichment 10 ff) refers to the Law of Enrichment as the “breech piece” of the Law of Obligations. In the past, few enrichment cases had appeared in the law reports, but the tide has turned, indicating an increased occurrence of these cases in our courts. The inestimable value of Enrichment as academic course is seen in the growth it brings about in the LLB student. Enrichment compels the law student to broaden its thinking and to
integrate accumulated legal knowledge (especially gained in the private law courses). In the normal course of things law students associate the legal course with the lecturer teaching it, whilst the enrichment student is impelled to link, distinguish, define and compare legal concepts; apply legal concepts across course borders; think much more encompassing; and to relate these concepts. This is precisely what will be expected from you in practice ... without these legal tools you will not be properly equipped and of service in the community. This course does not only open up new knowledge, but it also teaches you to use the “spanners” in the legal “trade” to further other people’s interests and to colour your attitude positively towards the legal profession.

I submit that Estoppel is one of the most helpful and powerful defences thinkable at the disposal of the defendant. It would be a total loss for the formation of the future to be lawyer if it is ignored or dealt with superficially. To leave it out would create a lacuna in your training and eventually in the preparation of your client’s case. Estoppel gives one another angle to solve a legal problem and it is certainly worth your while to know and understand it.

ACTIVITIES ALIGNED WITH THE OBJECTIVES IN LECTURE 1

1. What is unjustified enrichment? (5)

2. Is there general enrichment liability in the South African law? (5)

3. Which classical enrichment actions can you identify? Acquaint yourselves with the Latin names (4)

4. Distinguish the different classical enrichment actions by way of one crucial characteristic only. (5)

5. Which ad hoc extensions exist in the South African law? Name the instances. Why do these instances differ from the classical ones? (10)

6. What do you understand by general enrichment liability? Use recent case law and writers to demonstrate your understanding. (10)
INTRODUCTORY LECTURE (2)

MEANING AND DEFINITION OF UNJUSTIFIED ENRICHMENT
PLACE IN THE LEGAL SYSTEM
NEED FOR (BASIS OF) ENRICHMENT CONCEPTUALIZATION
ORIGIN OF ENRICHMENT TERMINOLOGY

*(SECOND HALF OF LECTURE 1)*

OBJECTIVES TO BE REACHED:
The student is expected to

✔️ be able to define unjustified enrichment; indicate its limitations; and list the circumstances of increased liability

✔️ explain why enrichment is a source of obligations and why it resorts under private law

✔️ show clearly what the rationale for enrichment liability is

✔️ explain the legal terminology applicable

STUDY INTENSELY (before the first lecture):

Lotz/Brand LAWSA "Enrichment": par 207-244

(remark: this updated version by Justice Brand of Lotz’s original contribution is short and sweet, but is excellent to give one an bird’s eye view of the casuistry of enrichment and will come in handy in systematizing and organizing the year’s work).
MEANING OF LIABILITY FOR UNJUSTIFIED ENRICHMENT AND A DEFINITION OF ENRICHMENT

In Roman law there are two texts (D 12.6.14 and D 50.17.206) placing a prohibition on enrichment in such broad terms that it is impossible to found rubrics of general enrichment liability on them. Nevertheless, protagonists of a general enrichment action [like Van Zyl J in Absa Bank Ltd t/a Bankfin v CB Stander t/a CAW Paneelkloppers 1998 1 SA 939(C) at 943; Daniel Visser “Enrichment”: 27-36] find these texts convenient to support their case. In certain specific circumstances, however, relief was extended to the plaintiff whenever enrichment ensued at the expense of another. What is clear, however, is that the concept of enrichment in Roman law was no independent and coherent source of obligations with definite general requirements and had not, as a consequence, resulted in a general cause of action. These specific enrichment actions in Roman law were received into Roman Dutch law and had been extended and developed over a period of time. Still, nothing from the writings of the old writers could be gleaned to support the existence of a general enrichment action in the classical Roman Dutch law. In the Dutch practice of the eighteenth century (with reference to Pauw’s Observationes Tumultuariae Novae which contains a number of Hooge Raad cases reporting on a general enrichment action), however, there are some indications that general enrichment liability had developed (Lotz/Brand LAWSA “Enrichment” par 208 fn7; Daniel Visser “Enrichment”: 27-36) although Sonnekus (“Unjustified Enrichment” 16 fn83) views this to be insufficient “to serve as a proper basis for a developed general enrichment action”.

Enrichment is not considered to be a general cause of action in the modern South African positive law. Nevertheless, unjustified enrichment in the form of different classical enrichment actions and ad hoc extensions (including the negotiorum gestorum utilis and the improvement of another’s property)
(emphasized in Nortjé v Pool [discussed in Casebook Enrichment(3) 10-20]) is part and parcel of our law today. Lotz/Brand LAWSA "Enrichment" (par 208 – especially fn 12) reiterates the non-existence of a general enrichment action in the South African law, but points out (par 209) that four “general requirements” are commonly found. It has to be stressed that these requirements are general to all the classical enrichment actions as well. This approach was confirmed by Navsa and Heher JJA in the case of Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 5 SA 193(SCA) at 202 [par 16] following the watershed cases of McCarthy and Perry (see Daniel Visser “Enrichment”: 6 (line 22 ff) – 7).

According to Lotz/Brand LAWSA

(a) the defendant had to be enriched and

(b) the plaintiff impoverished. (For example, Wynland Construction (Pty) Ltd v Ashley-Smith & Andere 1985 3 SA 798(A) [discussion in Casebook Enrichment(3) 285-287].) See Sonnekus “Unjustified Enrichment” 42ff [par 2.1] for a discussion of (a) and (b) (this section includes remarks on “physical improvements” [2.1.1.2], “usage” [2.1.1.3] and triparty relationships [2.1.2.4] valued in the context of the sum-formula as a measure to assess damage). Cf (however) the remarks by Daniel Visser (“Enrichment”: 7-9) indicating that general enrichment liability may even in future incorporate restitutio in integrum and cover pure enrichment without reference to the impoverishment limitation cap – especially in cases of “invasion of rights” (“Enrichment”: 130-136; and 158-164 for a discussion of (a) and (b)).

(c) at the expense of the plaintiff – thus a causal connection between the enrichment and the impoverishment. (For example Gouws v Jester Pools 1968 3 SA 563(T) [discussion of “indirect enrichment” in Casebook Enrichment(3) 29 note (c), 65-72, 184-192 AND 204-205], De Vos 1987 350-351, and Lotz/Brand LAWSA "Enrichment" (par 209 (c)). The controversy surrounding “indirect enrichment” is emphasized in the decisions contradicting each other in case law. Contra the finding in Gouws are (inter alia) Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons 1970 3 SA 264(A) at 271E-F and, more recently, Hubby’s Investments (Pty) Ltd v Lifetime Properties (Pty) Ltd 1998 1 SA 295(W) [discussion by Douvelos GI “’Cut through the sophistry’ – an advocate’s submission, a judge’s dictum, but a student’s plea in unjustified enrichment law” 1999 vol 24(1) TRW 94-102] and ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers 1998 1 SA 939(C), and obiter hints in
McCarthy Retail Ltd v Shortdistance Carriers CC 2001 3 SA 482(SCA) at [21] (pp 492E-I) and [23] (pp 493B-H) [discussed by Sonnekus J in 2001 TSAR 575-596]. For a discussion of the generic requirements, see Sonnekus “Unjustified Enrichment” 69-76 [par 2.2]. In his discussion it is clear that Sonnekus distance himself from legal causality as a means to limit enrichment liability. As far as he is concerned, the case of Gouws and the question of indirect enrichment pertain to enrichment and impoverishment as such coupled with sine causa enrichment. Daniel Visser (on the other hand) favours a flexible approach to both factual and legal causation (including rules about “tracing”) (“Enrichment”: 165-171).

And,

(d) fourthly, enrichment must have taken place unjustifiably (sine causa), meaning that there was no reason in law for the shift in patrimony (Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd 1996 4 SA 19(A) [discussion in Casebook Enrichment(3) 65-71] and Singh v Santam Insurance Ltd 1997 1 SA 291(A)). According to Visser and Purchase [“The general enrichment action cometh” 2002 SALJ 260 at 269] this one element has not been well delineated, because it has been confined to the exact parameters of recognized condictiones, but the advent of general enrichment liability may very well “flesh out” this element (see also Daniel Visser “Enrichment”: 56; 171-193). Sonnekus considers this requirement to be the key element of enrichment liability (“Unjustified Enrichment” p2 ff [par 1.2] and 76 [par 2.3]). Sine causa should, however, not be confused with automatic unfairness (“injustice”) referred to in the texts of the Digesta (Sonnekus 26). Unfairness in this context does not reflect the preceding judge’s sense of justice, nor is it the founding block of enrichment liability. It is no doubt the result achieved when the interests of both the impoverishee and enrichee is weighed culminating in a successful enrichment claim (Sonnekus 20 & 26).

These four facta probanda (called “generic requirements” by Sonnekus (Unjustified Enrichment” p41 ff) form the basis for the enrichment action (Sonnekus “Unjustified Enrichment” 2). [For a distinction between “action” (requiring the facta probanda to be proved to succeed) and “remedy” (relief sought from the court), see fn 2 of DP Visser’s article (“Rethinking unjustified enrichment ...” in Unjustified Enrichment - Essays in Honour of Wouter de Vos 203).]
According to De Vos 1987 (2) liability for unjustified enrichment is a liability or obligation which occurs when one person’s estate (the enrichee) is increased at the expense of another (the impoverishee) without there being a reason in law (sine causa) for such a shift in or retention of patrimony (or continuation thereof). From the fact of such increase an obligation arises in certain circumstances in terms of which the enrichee has a duty to restore the increase to the person at whose expense the increase has taken place. (The definition was reverberated by Rumpff JA of the Supreme Court of Appeal in the case of Nortjé v Pool 1966 3 SA 96(A) 114-115 [discussion in Casebook Enrichment(3) 10 ff]; see also Sonnekus “Unjustified Enrichment” 1). This definition emphasizes both that the shift in patrimony took place in the absence of a sufficient reason in law for the transfer (causa dandi) by the impoverishee and for the retention of the performance (causa retinendi) by the enrichee. In the context of the condicio indebiti, Visser (“Unjustified enrichment” in Hutchinson D (ed) Wille’s Principles of South African Law 8th ed 1991 Juta: Cape Town 630 at 634) puts emphasis on the absence of the causa retinendi as the founding block of unjustified enrichment [with approval discussed in Casebook Enrichment(3) 8-9 note (c), 25 note (d) and 28-29 notes (a) & (b)]. According to him it would result in actionable enrichment if the enrichee retains the performance without being justified in law to do so resulting in a failure to reach the object of the performance (Daniel Visser “Enrichment”: middle 81ff; 171-175). Such an approach explaining the basis of enrichment makes sense to him in that it is supported by the common law and accommodates policy decisions (and therefore fairness) in cases of “indirect enrichment” with greater ease (“Enrichment”: 193ff). This was confirmed in the Supreme Court of Appeal’s case of Kudu Granite Operations v Caterna (above) 204 [25].

The generally accepted definition of Enrichment, it must be said, can be misleading without the following qualification. The qualification does not question enrichment as a source of obligation, but relates to the extent of liability. (See Van der Walt JC 1966 THRHR 220 221). As a general rule, the impoverishee will only have a right to performance against the enrichee for the property, its value or the amount of money available at the time of the institution of the claim (at litis contestatio [King v Cohen Benjamin & Co 1953 4 SA 641(W) at 650-651]; [Daniel Visser mentions 3 limitations on the quantum, namely “double cap”, specific object and value remaining at litis contestation “Enrichment”: 161-164]). The exception to the rule is called “increased liability”. See also Sonnekus “Unjustified Enrichment” 14-16.
Increased liability (up to the full original value of the thing or the full amount of money) will take place whenever (Lotz/Brand "Enrichment" par 209 (a)):

(i) the defendant (enrichee) becomes aware that he has been enriched *sine causa* at the expense of another and the diminution or loss of his enrichment was due to his fault;

(According to Lotz/Brand a continuation of (i), but actually a next circumstance) the defendant (enrichee) should have allowed for the possibility that the benefit he received might later prove to constitute an unjustified enrichment, but nevertheless guiltily caused the diminution or loss of such enrichment; and

(ii) the defendant (enrichee) is *in mora* the rule *mora debitoris perpetuat obligationem* applies. From that moment his liability would be “increased” if he is unable to prove that the event which diminished or extinguished his enrichment would also have operated against the plaintiff if performance had been made timeously.

[For a more in depth discussion of this type of “increased liability”, see De Vos 1987 336-337 and the contribution by Visser DP with the title, "Responsibility to return lost enrichment", to Unjustified Enrichment - Essays in Honour of Wouter de Vos 1992 Cape Town: Juta 175: 197-202 (originally published in the 1992 Acta Juridica). If you want to read more on the defense of *diminution or loss of enrichment*, see the remarks made by DP Visser in 1992(4) THRHR 662: 665-668 (the English case of Lipkin Gorman v Karpnale [1991]3 WLR 10(HL) is also discussed in this article)] and see the *locus classicus* on this topic, namely African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd 1978 3 SA 699(A) at 711H [see also Visser’s remark in the 1992 Acta Juridica 175 above]. The onus to prove non-enrichment rests with the defendant (Le Riche v Hamman 1946 AD 648). Increased liability is not applicable to the minor who has been enriched by an agreement concluded without parental consent (Edelstein v Edelstein 1952 3 SA 1(A)).
THE PLACE OF UNJUSTIFIED ENRICHMENT IN THE LEGAL SYSTEM

READ (SUPERFICIALLY TO BROADEN YOUR OWN BACKGROUND – NOT FOR EXAM PURPOSES):

Daniel Visser “Enrichment”: 63-84 and 185-155
(systematizing the enrichment material internally according to the neo-civilian approach, and in relation to other areas of law and public law)


Van Zyl FJ en Van der Vyver JD Inleiding tot die regswetenskap 1982 2nd ed 360.


REMARK:

The fact of the shift in patrimony creates a legal bond between legal subjects under certain circumstances. In terms of the legal bond so created the enrichee is obliged to restore the increase to the impoverished party and the impoverishee acquires a right to performance amounting to the value of the enrichment at the time of the institution of the claim. Enrichment is as a consequence a source of obligations (obligatio).

The most well-known sources of obligations are ex contractu and ex delicto. Gaius (Institutiones 3.88) enumerates four sources of obligations, namely ex contractu, ex delicto, quasi ex contractu and quasi ex delicto. Although the latter two had never been specific categories of enrichment actions, it was nevertheless grouped by the Digesta (44.7.1 pr) under the heterogeneous name of ex variis causarum figuris. In addition to enrichment, obligations arising ex lege form part of this classification.
Enrichment liability has to be distinguished from other facts creating obligations founded on either consensus or blameworthy conduct. In this scenario enrichment liability is subsidiary coming into play in the absence of any other obligation (see Sonnekus “Unjustified Enrichment” 24-29; Daniel Visser “Enrichment”: 4-10, 56-57, 85ff). Obligations ex lege nowadays fall under the same heading.

Enrichment liability stems from a sine causa shift in patrimony at the expense of the impoverishee and it gives origin to the right and duty to perform. Consequently it is a source of obligations forming part of patrimonial law fitting into Private Law.

**NEED FOR (BASIS OF) UNJUSTIFIED ENRICHMENT**

**READ ONE OF THE TWO HIGHLIGHTED SOURCES ONLY:**

Sonnekus “Unjustified Enrichment”: 10-12 en 23-27

OR

Daniel Visser “Enrichment”: 16-26; 229-253

**FURTHER OPTIONAL READING FOR OWN EDIFICATION:**

Van der Walt JC "Die condictio indebiti as verykingsaksie" 1966 *THRHR* 220: 224


*De Vos 1987*: 2-3, 307-309 and 354
REMARK (WHICH YOU WILL HAVE TO STUDY):

Students tend to have difficulty answering a question on why enrichment is needed (Sonnekus “Unjustified Enrichment” 10). The new direction depicted in recent cases is to emphasize the equitable basis of enrichment (starting with the *natura aequum* of the *Digesta* texts 12.6.14 and 50.17.206). Some prefer to call it policy considerations, others refer to *boni mores*, the convictions of the community, and fairness and reasonableness. The latter concepts are infused in the new Constitution exerting a profound influence on the horizontal level (in private law relationships – see the recent *Charmichele* case in the Constitutional Court on the “development” of the common law). This leads to an almost abandonment of legal principle in favour of an “unsophisticated justice” (see the *obiter* phraseology used by Schutz JA in another context in *McCarthy Retail* (above) [commented on by Visser DP and Purchase A in 2002 *SALJ* 260-270 “The general enrichment action cometh”]; *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 3 SA 960(SCA) [discussed by Sonnekus J in 2001 *TRW* 99-124]. Sonnekus (“Unjustified Enrichment” 25-27) is critical of a naturalistic idea of fairness underlying enrichment liability (see also 76-77). This kind of “bereicherungsrechtlichen Leitmaxime” (p25) is too vague to be usable. *Sine causa* enrichment expresses (according to Sonnekus) neither the preciding judge’s sense of fairness, nor is it the thoughtless application of some kind of automatic law of fairness. Fairness is not the founding block of unjustified enrichment, but should rather be the result of a successful redress of the unjustified shift in patrimony (imbalance) between the enrichee and the impoverishee (especially on p26).

Daniel Visser argues that in many instances policy reasons (ie scepticism about limitless liability; commercial convenience) underly unjustified enrichment. But at the core even deeper values (which are not always patent) may influence choices. “Corrective justice” is emphasized as such a value. In this way injustice between individuals are eliminated by the removal of inequalities. Compensation may thus correct inequality based on “baet-trekking” wrongdoing, restoring justice between the impoverished and the enrichee. Visser is, however, quick to explain corrective justice in autonomous unjust enrichment not in terms of the theory of wrongdoing, but rather on its own terms, namely “… that the defendant have been enriched,
that the plaintiff have suffered a corresponding deprivation, and that there be
some reason why restitution should be ordered” (“Enrichment”: 16-21). According to De Vos 1987 (3) it would be unfair, unjust, contrary to trade and commerce, and the public interest to allow the enrichee to retain his unjustified enrichment. De Vos’s argument would be a fallacy and futile according to Bregstein (see De Vos 1987: 307-308) because fairness and justice are integral parts of the law as a whole and are supposed to underlie enrichment as a matter of course as well (see also Sonnekus in the previous paragraph). Bregstein argues that enrichment is nothing else than a personal action (a personal right to performance) whereby the value of an object is claimed. As such it is analogous to the rei vindicatio of the owner with which he can claim his property. Bregstein rests his argument on a passage from De Groot (3.30.3). (For some critical remarks, see De Vos 1987: 307-308 and Sonnekus “Unjustified Enrichment” 23).

Van der Walt (1966 THRHR 224) submits that each and every transaction is based on an agreement to create obligations. If such a foundation is absent, but property was transferred or payment made, it results in unjustified enrichment. De Vos (1987: 355) and Sonnekus (“Unjustified Enrichment” 82 [par 2.3.4]) criticize this viewpoint. They state that such an explanation is too narrow and does not provide for payments in terms of a court order, prescription, original acquisition of ownership, justified competition, indirect passing off, and a gift made without prior promise.) (According to Sonnekus [“Unjustified Enrichment” 20 and 243] the shift in patrimony caused by the original acquisition of ownership happens without an underlying obligation and proprietary agreement; when a res nullius is appropriated, impoverishment is not in the picture; in terms of accession, manufacture, and prescription the predecessor in title loses his patrimonial right in the absence of a proprietary agreement. All these instances complicate the rather simple explanation of the existence of enrichment liability by Van der Walt.)

Visser (“Enrichment”: 229ff; 1988 THRHR 492: 503-507 and others, like Sonnekus “Unjustified Enrichment” 243) justifies the existence of unjustified enrichment on the basis of failure to achieve the object of the performance. In doing so, he focuses not so much on the giving of performance (causa dandi) as in earlier times, but on the retention of performance (causa retinendi). Thus, if the performance is retained, but the object of the performance (eg payment of a “debt”) fails, then the retention becomes unjustified and the receiver unjustifiably enriched [see Visser DP “Unjustified enrichment” in Hutchinson D (ed) Wille’s Principles of South African Law 8th ed 1991 Juta: Cape Town 630 at 634 and Casebook
Enrichment(2) 9-10 and 27-28]. The emphasis on the *causa retinendi* instead of the *causa dandi* as the basis of the *sine causa* requirement makes good sense and is supported by the common law (according to Sonnekus, “Unjustified Enrichment” p26, only until the 19th century, but since then the modern enrichment law has been subject to fairness to both the recipient and the transferor (also p86 and p243 fn66)) and gives some leeway to achieve fairness whenever policy decisions are to be made. [On the topic of policy decisions, see Visser DP “The role of judicial policy in setting the limits of a general enrichment action” in Kahn E (ed) The Quest for Justice: Essays in Honour of Michael McGregor Corbett, Chief Justice of the Supreme Court of South Africa 1995 Juta: Cape Town 342-365 and “Enrichment”: 10-16]. Unjustified enrichment exists according to Visser whenever the shift in patrimony is retained by the enrichee without there being a sufficient reason (valid title) in the law to do so. The retention of performance is not justified because the object of performance failed. (Sonnekus [*Unjustified Enrichment*] p3 fn11, p86 and p243) agrees with this wording, but is of the opinion that failure to achieve the object of performance (in other words, improper performance) should rather be treated as contractual breach (see p78 from the 6th sentence.)

GENERAL REMARK *RE JC VAN DER WALT’S BASIS OF ENRICHMENT, NAMELY THE CREATION OF OBLIGATIONS*

It is indispensable for a developed legal system to have enrichment liability based on an unjustified shift in patrimony. *De Vos 1987* (2-3) is of the opinion that enrichment comes into play when the legal rules and circumstances of the case do recognize the transfer of ownership, whilst the reason (*causa*) for such transfer ceased to exist. For example, the seller of a *merx* may have the intention to transfer ownership to the buyer who in turn has the intention to become owner. The seller performs, honestly thinking that the contract of sale is a valid one, only to realise afterwards that the contract is void. If the seller would be unable to claim the transferred thing (or its value) under these circumstances from the purchaser, the continued retention of the shift in patrimony would be utterly unfair. De Vos (3) mentions that other needs for the existence of enrichment may very well be identified, but for purposes of the discussion, are ignored.)
To clear things up, it is important to distinguish between the once unknown (in Roman law times), but nowadays useful, agreements creating obligations and proprietary agreements. Proprietary agreements bring about the transfer of real rights (e.g., ownership and possession). These agreements are created as soon as the transferor and transferee have congruent intentions (namely, the *animus transferendi domini* and *animus accipiendi domini*). This is also known as the *iusta causa* of the transfer of property. Whether ownership has passed, is a question of fact; a subjective consideration of the circumstances. (See, in this connection: *Commissioner of Customs and Excise v Randles Bros & Hudson* 1941 AD 369, 385 and 398; *Pahad v Director of Food Supplies and Distribution* 1949 3 SA 695(A) 707.)

Contrary to the above, agreements to create obligations give origin to personal rights (e.g., right to performance in terms of a contract of sale). Only the fulfilment of the *essentialia* being prescribed by the positive law will lead to validly created agreements. In other words, the existence or not of such contracts is an issue that will be answered objectively.

There is no doubt about it, the requirements necessary for the creation of the abovementioned agreements differ substantially. As a consequence, the validity of obligatory agreements testifies to the fact that the parties to the proprietary agreement are *ad idem*. The opposite is not always true, because a valid proprietary agreement can come into existence without there being a validly created obligation. This can be credited to our abstract system of property transfer (see the recent case of *Kriel v Terblanche* 2002 6 SA 132(NC) : 144C-D and *Sonnekus “Unjustified Enrichment”* 22-23. This position in law is by implication challenged by Justice Streicher in *Nissan South Africa (Pty) Ltd v Marnitz NO* 2005(1) SA 441(SCA) where it was found that the stain attached to the underlying obligation was projected to the *bona fide* receiver of stolen money resulting in the bank not acquiring legal ownership to the transferred money). This is precisely what enrichment endeavours to remedy. No one should be enriched when there is a shift in patrimony without a reason in law (without there being a validly created obligation). See *MCC Bazaar v Harris & Jones* 1954 3SA 158(T) and *Casebook Enrichment(3)* 8-9 note (c) providing support.)

Liability for enrichment, it must be emphasized, is not limited to the transfer or delivery of property *sine causa*. It also becomes applicable *inter alia* when money is paid without indebtedness, improvement or storage of another’s property by a *bona fide possessor*, and work done and services rendered.
without compensation to the party in breach. In short, in cases where the retention of the increase by the enrichee would be unfair. No one is justified to be enriched *sine causa* at the expense of another who is impoverished.

**Delineation of Concepts and the Origin of Enrichment Terminology**

**Enrichment** - This concept is used to describe the circumstances whereby one person’s estate (his patrimony) is increased at the expense of another person without there being a reason in law to justify the retention of the increase. Under certain circumstances, the very fact of the increase in patrimony creates an obligation in terms of which the enrichee has a duty to restore the increase and the impoverishee has the right to such performance. Accordingly not every instance of enrichment ought to be parted with – that would jeopardize trade and commerce - only "unjustified" enrichment must be restored.

**Unjustified Enrichment** - This indicates a shift in patrimony without there being a sufficient legal ground (e.g., a contract of sale) for the retention of such increase (with reference to Visser DP "Unjustified Enrichment" in Hutchison D (ed) *Wille’s Principles of South African Law* 8th ed 1991 Cape Town: Juta 630 at 631-635), coupled with a causal link between the enrichment and impoverishment.

Take note that concepts like “wrongful/unlawful”, “unjust” and “unfair” rather ought to be ignored – because by using it one is apt to replace the *sine causa* requirement with “unfairness” and “unreasonableness” and to infuse delictual jargon (e.g., “unlawfulness/wrongfulness”) into the field of enrichment. A clear example of such confusion is to be found in the so-called “increased” liability to restore whenever the *condictio causa data* of the Roman Dutch Law was applied in cases of *contractus innominati ex re* (De Vos 1987: 65). See also De Vos 1987: 310 and Sonnekus “Unjustified Enrichment” 29-30 and 77 fn202.. The concept *unjustified* enrichment does not pertain to delictual wrongfulness or purely unfairness or injustice, but gives expression to the shift in patrimony which came about without a sufficient legal ground (that is, *sine causa*), leaving the enrichee without any other choice than to return the goods received or to restore the increased value to the impoverishee (see also Sonnekus “Ongegronde Verryking” 26-27 and 77 fn...
202). The preferred terminology was used in the cases of *Nortjé v Pool* (133F) and *Cantamessa* (717H), but deviated from in other cases, like *Visser v Rousseau* (148H) and *ABSA Insurance Brokers (Pty) Ltd v Luttig* 1997 4 SA 229(SCA). The latter deviation finds more and more favour with the SCA and writers alike, especially dealing with cases of indirect enrichment. See also *Casebook Enrichment*(3) 5 note (a) and Daniel Visser “Enrichment”: 4 fn 1.

**CONDUCTIO** - Round about 250 BC the Romans used the procedure, known as *legis actio*, to conduct legal proceedings. According to Gaius (4.11) the *legis actio* was a procedure before a *praetor* in a case (*in iure*) whereby certain words of a *lex* were strictly uttered (almost like a ritual). These formal words were grouped in 5 categories according to the wrong caused. One of the categories was *condictio*. Gaius (4.18) explains that this actually meant *denuntiatio*, in other words, the defendant was denounced or summoned (*condicere*) by the plaintiff to appear before the *praetor* within 30 days to appoint a *iudex*. The *legis actio per condictionem* part of the ritual was made applicable to a certain amount of money (*certa pecunia*) by the Lex Silia. Later on the Lex Calpurnia extended it to a specified thing (*certa res*). In summary, up to this moment the *condictio* formed part of a formal ritual (relating to a fixed amount of money or a specified thing) calling on the opposition to appoint an *iudex* within a given period of time. (See *Buckland A Text-Book* 609-610, 617; *Lotz/Brand LAWSA* “Enrichment” par 210).

The *legis actiones* litigation process was too formalistic and had been replaced during the Classical Period by a more flexible system - the formulary process. The phases of litigation were still the same. First of all, the claim was heard by the *praetor*, formulated in his court (*in iure*) and finally referred to another tribunal (*iudex*) for adjudication. But the content thereof had changed. In stead of the traditional formal words, the *praetor* submitted the action to the *iudex* by way of a written formula or instruction. The name *condictio* was retained and pointed to actions based on *formulae* without *demonstrationes*. In other words, personal civil law actions relating to *certae* in terms of which no cause of action is mentioned in the formulas. Consequently, the *condictio* was no longer used to summon or challenge the opposite party, but merely indicated which *certae* could be claimed, without mentioning the nature of the circumstances underlying the claim. Based on the specific object to be claimed, the following *condictiones* were identified: *condictio certa pecunia, condictio certa re (triticaria)*. The
latter *condictio* was the substance (that of grain) in which the *certum* could be claimed as opposed to a sum of money. (See *De Vos 1987* 7; *Buckland A Text-Book* 627-629).

With the passing of time the need developed for the creditor to claim less or more than a specific thing or amount. This had previously not been possible under the *condictio certum* and would have resulted in a loss of action had it been the case. This development pioneered the development of the *condictio incerti* (probably during the post Classical period) and resulted in the extension of the field of application of the *condictio* to an actio in personam with which the value (being moved sine causa from the plaintiff’s patrimony to that of the enrichee) could be reclaimed. Previously this could only have happened in terms of the *ius strictum* when a certae was claimed. But now, these claims were in accordance with the *ius civile* and the *ius gentium*, and available for both *negotia bonae fidei* and *negotia stricti iuris.* (See *De Vos 1987* 7-8 and 9).

With this development the *condictio* deviated from its original nature, but retained its appellation (according to *De Vos 1987* (8)). Not only has it become an unlimited action in personam, but the traditional name points to one sole *condictio* which could be applied in various circumstances claiming several different objects. (Compare *De Vos 1987* 8-9). Depending on the object to be claimed, it could be either the *condictio certa pecunia*, *condictio certa re* (triticaria), or *condictio incerta*. According to the circumstances in which the *condictio* could be applied, distinction is drawn between the *condictio indebiti, condictio causa data causa non secuta, condictio ob turpem vel iniustam causam, condictio furtiva, condictio sine causa* and *condictio ex lege*. Besides the heretobeforementioned, there is also actionable enrichment flowing from the *negotiorum gestio*. (De Vos (1987 9) opines that the latter does not form part of the *condictiones*).

According to Hiemstra and Gonin (*Drietalige Regewoordenboek* Cape Town: Juta 1986 2nd ed 177) the

* *condictio* / “kondiksie” is an "action to restore what has been acquired from the plaintiff without cause, or by mistake, or by illegality or contra bonos mores”;

* *condictio causa data causa non secuta* is a claim to restore whenever there was a refusal or refrainment to counterperform;
* **condictio ex lege** is a claim to restore that which is statutorily forbidden enrichment;

* **condictio furtiva** is a claim to restore stolen property;

* **condictio indebiti** is a claim to restore a payment not owed;

* **condictio ob turpem vel iniustam causam** is a claim to restore a payment made either *contra bonos mores* or illegally; and

* **condictio sine causa** is a claim to restore a payment which had been done without legal cause.

**OBLIGATIO QUASI EX CONTRACTU** - For reasons of fairness and policy considerations the positive law will recognise and enforce obligations not being contracts or delicts. These type of obligations (depicted by Gaius as *ex variis causarum figuris*) imitate contracts because they contain a *negotium* (and are known as *quasi contractus*). These facts creating an obligation are lawful legal acts with a monetary value, but do not come into existence by way of *consensus*. Van Warmelo (*'n Inleiding tot die studie van die Romeinse reg* Cape Town 1965 par 937 p 324) considers “all those legal acts giving origin to a claim prescribed by law as *quasi contractus*”. Five *quasi* contracts are mentioned by Justinianus (*Inst 3.27*), namely *negotium gestio*, *tutelae administratio*, *communio incidens*, *hereditatis aditio*, and *indebiti solutio*. Civilists (after Justinianus) had extended the list considerably. (See on *quasi contractus*: Wessels JW 1937 *The law of contract in South Africa* Vol II Johannesburg par 3541 ev; Buckland *A Text-Book* 536 next). *De Vos 1987* (7) is of opinion that *quasi* contractual actions do not have a common characteristic which could therefore also fit it in under “a specific category of enrichment actions”.

**CAUSA** - The word “causa” has a number of meanings in the law. In connection with enrichment *causa* has two meanings. When it appears in the name of a specific enrichment action, it means “event”/“performance”/“goods”. With this in mind, the *condictio causa data causa non secuta* is sometimes called the *condictio ob rem dati re non secuta*. When, however, *causa futura* is talked about, “causa” implies the “objective legal ground” for the transferal. (See *De Vos 1987* 12-13). Van
der Walt (1966 THRHR 220 222) sees the sine causa requirement of enrichment as the absence of a “promissory (obligationary) relationship” between the enrichee and impoverishee according to which the enrichee has no claim to the shift in patrimony. As such, the causa of the shift in patrimony is objective in nature and is separated from subjective elements such as knowledge, state of mind, mistaken beliefs, etceteras. Sonnekus ( “Algemene vordering gebaseer op ongeregverdigde verryking in heroorweging” 1992 THRHR 301: 304-309; see also Casebook Enrichment(3) 29 note (b)) views the approach of Van der Walt (namely that all cases of enrichment are linked to the absence of a obligationary relationship) as too limiting in scope (what about a court order and prescription bringing about a shift in patrimony) and endeavours to give more content to the concept of sine causa transfers/ payments causing unjustified enrichment.

**SUBSIDIARITY**- this concept carries a dual meaning in the law of enrichment. On the one side it means “next to” or “in addition to” the classical enrichment actions, there can also be a “general” enrichment action. Secondly, that enrichment as extraordinary cause of liability can only find application in the absence of (but never in competition with) other obligatory actions (like contract and delict). See Sonnekus “Unjustified Enrichment” p94 fn305. Daniel Visser identifies a third meaning, see “Enrichment”: 56-57

**NOTE PERTAINING TO THE STUDYING OF THE ENRICHMENT MATERIAL**

At this stage you certainly have adequate background to enrichment to study the individual enrichment actions all by yourself. The idea is that you come prepared to class (know the prescribed material for the particular session) and in class a problem situation (based on the rules that you have mastered) will be presented and a solution seeked from individuals or groups. The lecture will be concluded with a recapture of the basic principles.

Note to reinforce the broad enrichment picture. Before 1966, a number of cases had supported the extension of the old classical enrichment actions, but the majority of judges of appeal in the case of Nortjé v Pool slammed the door on a general enrichment action and expressed themselves in favour of ad hoc extensions in addition to the four existing enrichment actions. It must be said though that the case left room for further development whenever the
elements of a general enrichment action will have been developed properly. Recently, cases (like *Blesbok Eiendomsagentskap v Cantamessa* 1991(T); *Kommissaris van Binnelandse Inkomste v Willers* 1994 (A); *McCarthy Retail* (above) at [8] (pp 487F-488D); *First National Bank v Perry NO* (above) at [23] (pp 969H-970A)), *Kudu Granite Operations v Caterna* 2003 5 SA 193 (SCA), and the *a quo* decision of Goldstein J in *Normkow Administrators (Pty) Ltd v Fedsure Health Medical Scheme* 2005 1 SA 80(W) at 82-83, emphasized developments in the direction of a general enrichment action or at least 4 generic requirements, but in all the cases these remarks were made *obiter*. See Van Zyl’s (the judge in *Cantamessa*’s case) section in *Unjustified Enrichment* 1992 Cape Town: Juta 115-130 [entitled: “The general enrichment action is alive and well”], and the article by Visser DP “Not the general enrichment action” 1994 *TSAR* 825-831 [discussion of *Kommissaris van Binnelandse Inkomste v Willers* 1994 3 SA 283(A)] and *Lotz/Brand “Enrichment”* par 208 fn 17.

Although the name of the specific enrichment action needs not be mentioned in the pleadings during the initial stages of litigation, it is of the utmost importance for the legal representative to identify the specific enrichment action as to include the *facta probanda* (or circumstances) of the specific action in the pleadings. It would appear that the Supreme Court of Appeal in *Kudu Granite Operations v Caterna* 2003 5 SA 193 deviated from the former approach by saying that the name of the particular action is not that important as long as there is enrichment judged by the 4 generic requirements enumerated in *LAWSA* (see p 202 [par 16] of the law report) (and discussed by Sonnekus “*Unjustified Enrichment*” 41-96). With respect the writer of this study program wants to differ from that. Over the years a voluminous body of material has been accumulated reinforcing the distinctions among the classical enrichment actions. Each of these *condictiones* has something distinguishing the one from the other and, unless the *Kudu* case promotes a general enrichment action (which is not clearly indicated), the differences cannot be ignored willy-nilly. Therefore, the different actions are certainly going to be identified by name in the Study Manual. See furthermore Sonnekus “*Unjustified Enrichment*” 17-19 (note fn90) and 32-39 in support.

In studying the prescribed material, you have to determine at the hand of the *circumstances/requirements* as well as the *extent of liability* whether enrichment is applicable and which action is the appropriate one. At the same time it is helpful to determine whether the particular action is fully developed or not.
Since 1987 (after the last version of the 1956 published dissertation of De Vos) there is once again a textbook on the law of enrichment. Sonnekus has captured with this publication in 2007 the recent developments in the South African law of enrichment (as well as the comparative position in other legal systems) and filled a void in doing so. Use this book to broaden your insights in the intricacies of enrichment.

Shortly after Sonnekus’ book had been published, Daniel Visser’s book on *Unjustified Enrichment* (Juta 2008) made its appearance. With this book Daniel Visser proposes a reclassification of enrichment, not organized around actions (*condictiones* and the rest) as has been the case over the past 900 years since the *Corpus Iuris Civilis* (see p 65), but in line with the “neo-Civilian approach”. This new taxonomy (imitating that of Germany) consists of basically 3 kinds of enrichment, namely enrichment by transfer; enrichment by invasion of rights; and enrichment as a result of outlays (see pp 81-84). Although this fresh systematization of enrichment is pleasing and makes room for the expansion of enrichment, this study guide sticks with the traditional structure. This book is, however, an excellent expose of the complexities of enrichment liability experienced in a number of legal systems and reflects the author’s immense knowledge in this (and other) fields of law. This book may be used as an alternative to that of Sonnekus, but is not available in Afrikaans and will not serve as the primary textbook for our treatment of the law of enrichment.

Study the prescribed sections in the cases, especially pertaining to

* the application of a specific enrichment action
* improving clarity on concepts
* substantiation of legal rules
* developing your skills reading cases and absorbing the crux of it

Finally, it is expected from you to identify problematic areas, to know what the courts found on it (if applicable), and to add the comments of writers to it in an effort to clarify your uncertainty and apply such acquired knowledge to the wider context of the law.

Your attitude throughout should be to question the given factual and legal position. Ask constantly: Why? Look for your own answer/solution and substantiate it!
ACTIVITIES AS FORMATIVE ASSESSMENT
OF THIS PORTION OF THE LECTURE

1 When unjustified enrichment is scrutinized, what is understood by the requirements “sine causa” and “at the expense of”? Explain briefly with reference to the viewpoints of writers and recent cases. (10)

2 Define unjustified enrichment. Which element is emphasized by DP Visser and why does he do it? (5)

3 What criticism is leveled at the different viewpoints of writers explaining the rationale for the existence of unjustified enrichment? (10)

4 What is understood by the concept “causa”? (3)

5 Discuss critically the ratio of enrichment exposed, along with other views, in ABSA Bank Ltd t/a Bankfin v CB Stander t/a CAW Paneelkloppers 1998 1 SA 939(C). (10)

6 What is understood by the phrase “increased liability” in the context of enrichment? (5)

7 What is meant by “condictio”? Explain the whole historical development. (5)

8 What is meant by subsidiarity in enrichment law? Give 3 possible meanings. (3)

9 McCarthy Retail v Shortdistance Carriers is a typical instance of necessary and useful improvements made to the owner’s vehicle without a contract between the repairer and the owner. The owner was in terms of an insurance policy properly indemnified against such damage. At a very late stage (when the repair work had already been done) the insurer repudiated coverage in terms of the policy. The repairer effected these repairs in the mistaken belief that the insurer had instructed them. Please answer the following questions: (12)
9.1 Do these factors play a role in the assessment of the requirement of *sine causa* when the possible liability of the owner is considered, and what is the content of *sine causa*? (3)

9.2 What role do these factors play in the determination of factual and legal causality, and what role does causality play in enrichment liability? (3)

9.3 What influence has this case exerted on the development of a general enrichment action? (4)