LECTURE 2

GENERAL ENRICHMENT ACTION

DEVELOPMENT OF

OBJECTIVES TO BE REACHED:

The student is expected to

- determine why the Supreme Court of Appeal found in *Nortjé v Pool* that there is no general enrichment action and whether the criticism of the Court in that case has been answered

- analyse what the courts decided in *Blesbok, Willers, McCarthy Retail, FNB v Perry NO, Kudu Granite*, and *Normkow Administrators* as to the existence of a general enrichment action and compare it with *Nortjé v Pool*

- comment critically on the requirements and limitations of a general enrichment action and indicate whether the recent development of generic requirements is a sensible solution

- systematically expose the positive law pertaining to the general enrichment action.
STUDY:

Lotz "Enrichment"(2) par 208

Sonnekus “Unjustified Enrichment” 16-19, 32-39, 94-96 en 352 ev

OR Daniel Visser “Enrichment” 4-7 and 27-54 (especially 46-54)

Nortjé v Pool 1966 3 SA 96(A) [discussion by De Vos 1987 311-329; Casebook Enrichment(3) 10-20]

McCarthy Retail Ltd v Shortdistance Carriers CC 2001 3 SA 482 (SCA) 487-488 [8] [discussion by Sonnekus “Unjustified Enrichment” 352 ff and Sonnekus in 2001 TSAR 575-596; Visser & Purchase 2002 SALJ 260-270; and Casebook Enrichment(3) 20-23]

Casebook Enrichment(3) 9-72 (take special note of the “notes” at the end of the cases)

OPTIONAL READING:

Blesbok Eiendomsagentskap v Cantamessa 1991 2 SA 712 (T) [Eiselen 1992 THRHR 124-8; Sonnekus 1992 THRHR 301-9]

Kommissaris van Binnelandse Inkomste v Willers 1994 3 SA 283 (A) [discussion Casebook Enrichment(3) 135-140; Pretorius 1995 THRHR 331-337; Visser 1994 TSAR 825-831]


Normkow Administrators (Pty) Ltd v Fedsure Health Medical Scheme 2005 1 SA 80(W)


St Helena Primary School v MEC, Department of Education, Free State Province 2007 4 SA 16(O) [discussed by Sonnekus and Schlemmer 2007 TSAR 803; and 2009 TSAR 406-414; Visser 2007 Annual Survey of South African Law 1183-1186]

De Vos 1987: 328-366

* Van Zyl DH 1992. "The general enrichment action is alive and well" in Unjustified Enrichment Cape Town: Juta 115-130

REMARK:

Although many voices had promoted the extension of the old classical enrichment actions, the majority of the Judge Appellants in the 1966 case of Nortjé v Pool refused to recognize the existence of a general enrichment action, but expressed them in favour of the ad hoc extensions of enrichment. At the same time the majority (under the leadership of Botha JA) did not exclude the possibility of a need to and the development in future of such a general enrichment action in the South African law. Eiselen (1992 THRHR 124 125) is of opinion that the grounds mentioned in Nortjé to put a lid on the general enrichment action, namely absence of common law and positive law authority supporting such an action, and the absence of properly developed requirements (see Casebook Enrichment(3) 25-72 for a discussion of the general requirements), are no longer hurdles to the recognition of a general enrichment action. It is therefore not surprising that recent cases (like Blesbok Eiendomsagentskap v Cantamessa 1991(T), Kommissaris van...
Binnelandse Inkomste v Willers 1994 (A); McCarthy Retail 2001(SCA); and FNB v Perry 2001(SCA)) showed strong strides (although obiter and hesitant) in the direction of recognising general enrichment liability. On these developments see the writings of Van Zyl DH 1992 “The general enrichment action is alive and well” in Unjustified Enrichment Cape Town: Juta 115-130 and Visser DP “Not the general enrichment action” 1994 TSAR 825-831 [discussion of Kommissaris van Binnelandse Inkomste v Willers 1994 3 SA 283(A)]. The Supreme Court of Appeal (1999 3 SA 19) decided on the merits of the case between the Commissioner of Inland Revenue (on the one hand) and Willers and other shareholders (and the former trustee) of the liquidated Bergbies (Pty) Ltd (on the other hand). The actions instituted by the Commissioner varied from the actio Pauliana (see also the recent case of Commissioner, SA Revenue Service v ABSA Bank Ltd 2003 2 SA 96(W)), unlawful appropriation (theft) to unjustified enrichment (especially the condictio indebiti and the condictio sine causa), but to no avail – none of them succeeded. In this appeal there was no trace of the general enrichment action (the full reference is KBI v Willers 1999 3 SA 19(SCA)). See, however, obiter remarks by Schutz JA in both the McCarthy and FNB v Perry cases promoting some form of general enrichment action. Daniel Visser considers these cases representing a watershed in the South African law of unjustified enrichment (“Enrichment”: 7 line 6).

Eiselen (above and Casebook Enrichment(3) 20 note (e)) is convinced that the question to be answered ought not to be whether there should be a general enrichment action, but rather whether the general enrichment action ought to be subsidiary to the existing classical enrichment actions or whether it should replace the classical actions completely. The latter radical viewpoint is also held by Van Zyl J in the Cantamessa case and it would seem like by Schutz JA in FNB v Perry NO 2001 3 SA 960 (SCA) at 969H ff [23] (seemingly contrary to his remark in McCarthy Retail 2001 3 SA 482 (SCA): 487F-488D at [8] where he supported a subsidiary general enrichment action replacing the ad hoc extensions) as well. See also O’Brien P [“A general applicable condictio sine causa for South African Law?” 2000 TSAR 752-760] arguing in favour of a single Leistungskondiktion, replacing the classical enrichment actions co-existing with yet other specific enrichment actions where performance of another is not in view and need not be undone by way of enrichment (see Daniel Visser “Enrichment”: 72ff). It would appear (at first sight) that Navsa and Heher JJA in Kudu Granite Operations v Caterna (2003 5 SA 193(SCA) at 202 [par 16] want to do away with the classical enrichment actions by saying that “the identification of the cause of action is not of importance since there appears to be no difference in the
requirements of proof of the two condictiones" (namely the ob finitam and the secuta), as long as the 4 requirements (mentioned in LAWSA) are complied with to succeed with a condictio (in general).

Due to the hesitant and uncertain development of the general enrichment action by the courts, the viewpoint has been voiced (inter alia by Sonnekus “Unjustified Enrichment” 36-37) that the whole issue should be codified by the legislator. The relatively simple wording of the Civil Code of the Netherlands (article 212) serves as an example: “A person who has been unjustifiably enriched at the expense of another must, to the extent that this is reasonable, make reparation for the damage suffered by that other person up to the amount of his enrichment”. The South African Law Commission investigated and reported on the matter in 1996 and recommended that no legislation should be enacted to regulate the position, but to leave the development of a general enrichment action over to the courts. Daniel Visser (“Enrichment”: 59 from line 18) also rejects the notion of a codified law of enrichment.

In research done in 2002 (“The general enrichment action cometh” in SALJ 260) the writers, Visser and Purchase, distinguish between those who want to expand their horizons and those who want to keep to the status quo. They speculate whether the first group may dawn the full force of their growing general approach on the heads of litigants and courts alike. They then weigh Schutz JA’s approach in McCarthy Retail and found it to be quite conservative and on par with De Vos’ initial subsidiary approach. According to them this is probably the more sensible approach, because “the notion of subsidiarity brings definition to the ambit of a general action” (2002 SALJ 260 op 268,”Enrichment”: 58-59; see also Sonnekus “Unjustified Enrichment” 95). In addition they figure that the sine causa requirement for unjustified enrichment needs to be extended to the end the too “exact parameters laid down in the recognized condictiones and other actions” (269; also “Enrichment”: 56 and 171 ff). As such, the general principles/requirements of enrichment liability can serve as a mechanism to control rampand enrichment liability. In the third place, the scope of a general enrichment action can be limited whenever the plaintiff carries the onus of proving new incidents of enrichment liability (269). Such an approach will be in line with world wide trends (noticeably the English “law of restitution”).
In a relatively recent case on the topic, *Normkow Administrators (Pty) Ltd v Fedsure Health Medical Scheme* 2005 1 SA 80(W), Goldstein J granted leave to appeal to the Supreme Court of Appeal because there was a reasonable prospect of success on appeal considering that the SCA may reconsider the 1966 decision of *Nortjé v Pool* where a general claim for enrichment was rejected. The SCA heard the case, but did not even consider the optimistic suggestion by Goldstein J.

Sonnekus ("*Unjustified Enrichment*" 19) opines that the pattern of development noticeable since the Middle Ages and that has been propounded by the Supreme Court of Appeal (*inter alia* in *McCarthy, Perry* and *Kudu Granite*) and followed by the other divisions of the High Court (for instance in *Normkow* 2005 (W); *Mndi v Malgas* 2006 2 SA 182(OK): 188B-C and *St Helena Primary School v MEC, Department of Education, Free State Province* 2007 4 SA 16(O)) the recent pasts) results in the "generieke vereistes vir enige verrykingsvordering dermate gevorderd is dat die gemeenregtelike *condicione* nie meer as enigste vertrekpunt hoef te dien nie". Superficially viewed it seems that the 4 generic requirements general to all enrichment actions need to be proved as a minimum to succeed, but that it would seem the safer option to fit (if possible) the enrichment claim under one of the classical enrichment actions, until the SCA "die knoop ondubbelsinnig deurhak en verklaar dat dit nie meer nodig is nie" (Sonnekus 33 and 95-96).

**ACTIVITIES PERTAINING TO A GENERAL ACTION**

1. X concluded an oral agreement with P to prospect for diamonds on his (P’s) farm. At this point in time the market-price of the farm was R8 million. X expended R100 000 (on material to drill holes R80 000; and labour R20 000) in the process and located "rich pipes" of diamonds. This find elevated the market value of the farm to approximately R50 million. The prospecting contract was void because it had not been in writing and notarially executed. P intends continuing farming with cattle as he has done up to now. P waives whatever enrichment he might have received. X wants to retain control of the farm until reimbursement.
X wants to institute a general enrichment action. What advice would you give X? Would X be able to institute an *ad hoc* enrichment action in view of *Nortjé v Pool*? Explain.

2 The recent Supreme Court of Appeal cases have emphasized generic requirements for general enrichment liability. Why then is *Nortjé v Pool* still the *locus classicus* denying the existence of a general enrichment action? Explain briefly. (2)