Lectures 3 to 4

1st Classical Enrichment Action

Condictio Indebiti

Objectives to be reached:
The student is expected to

☑ determine which requirements are essential to succeed with the most well-known of all the classical enrichment actions

☑ explain what the purpose of the conductio indebiti is

☑ analyse the contents of the requirements of datio and indebite and apply it to practical situations

☑ systemise different views on reasonable mistake, compare it with the positive law and come to a reasoned conclusion.
LECTURE 3

CONDIRCTIO INDEBITI

REQUIREMENTS:

- TRANSFER OF OWNERSHIP (DATIO)
- INDEBITE PERFORMANCE
- PERFORMANCE UNDER MISTAKE (ERROR)

STUDY (IN GENERAL):

Lotz/Brand LAWSA "Enrichment" pars 211 & 212

Sonnekus “Unjustified Enrichment” 234-238

OR Daniel Visser “Enrichment” 271-331

Casebook Enrichment(3) 99-130 (take special note of the “notes” at the end of the prescribed cases)

Van der Walt JC “Die condictio indebiti as verrykingsaksie” 1966 THRHR 220: 220
REMARK:

With the most well-known *sine causa* enrichment action of all, the impoverishee endeavours to restore undue payments (of money) made or property transferred without it being owed (*indebite*). See the examples furnished by Sonnekus ("*Unjustified Enrichment*" 239-242) to demonstrate the possible applications of the *indebiti*. Daniel Visser says this is the most common enrichment claim under the rubric of "enrichment by transfer", which by his structure will also include the transfer of services ("*Enrichment*": 274, 265ff and 222)

The restoration of the *indebite* performance can also be seen as the intentional full payment of a debt not due (*solvendi animo errorem*) which indebtedness is indeed a figment of the imagination. Sonnekus ("*Unjustified Enrichment*" 235-236) sees this as an independant (additional) requirement of the *condictio indebiti*, but it is clear that the Latin phraseology has elements of both the *sine causa* and *error* requirements and is treated accordingly. Daniel Visser has a logical explanation for this. He sees the mistake (or illegality or compulsion, for that matter), not strictly speaking, as a requirement for the particular enrichment action, but rather as an explanation why the retention of a benefit without title will be held to be unjustified ("*Enrichment*": 269 line 21 ff). (See in addition *Lotz/Brand LAWSA* "*Enrichment*" par 211; *Le Riche v Hamman* 1946 AD 648: 656; *ABSA Bank Ltd v Leech and Others NNO* 2001 4 SA 132(SCA)).

The failure to achieve the object of performance (viewed from the perspective of both the recipient and performer) is considered to be the basis of the existence of the *condictio indebiti* (*Sonnekus* "*Unjustified Enrichment*" 242 and 243; *Daniel Visser* "*Enrichment*" 229-253 and 274 line 27 - 275). The purpose of the transfer is *not a requirement*, but mostly an explanatory tool. For instance, if the objective purpose of a payment is achieved, there is no reason to allow recovery ("*Enrichment*": 275).

Basically three (3) requirements (which are according to *Lotz/Brand LAWSA* "*Enrichment*" par 212 fn 1 not immutable) are set for the *condictio indebiti*:

1. Ownership must have passed from the impoverishee to the enrichee, in other words, there must have been a *datio* of money or goods.
2. The transfer must have taken place *indebte*, that is payment without the money being owed (*solutio indebiti*), in its broadest sense – without it being justified by means of a civil or natural agreement (*Nkosi v Totalizator Agency Board (Tvl)* 1980 1 SA 122 (T)).

3. Transfer must have taken place in the mistaken belief that the money was due (*Rulten NO v Herald Industries* 1982 3 SA 600(D & CLD) 607C-E; *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202(A); *ABSA Bank Ltd v Leech and Others NNO* 2001 4 SA 132(SCA)).

Sonnekus (“*Unjustified Enrichment*” 253-256) emphasises that if the undue payment resulted from the slackness of the performer, then the *condictio sine causa specialis* (as catch all action) is not available as the easy out alternative to steer away from the unique and more rigorous requirement of the *condictio indebiti*, namely excusable mistake. This viewpoint is not generally held (*Sonnekus* 254-255 fn130 & 131 for authority).

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**CONDICTIO INDEBITI REQUIREMENT (1)**

**TRANSFER OF OWNERSHIP (DATIO)**

**STUDY:**

*Lotz/Brand LAWSA "Enrichment"* par 212 (a)

*Klein NO v South African Transport Services* 1992 3 SA 509 (W) 518D-E next

**OPTIONAL READING MATERIAL**

*Casebook Enrichment(3)* 100-103

*De Vos 1987*: 23-24, 70, 191-192
REMARK:

1 The first requirement of the *condictio indebiti* is the transfer of ownership in money, movable property (specific thing), and *res fungibles*. The concept *datio* is utilized to depict the act of transfer. It has a broader meaning now than was anticipated earlier and even *res incorporales* and *habitatio* fall under the auspices of the term. Thus, if *habitatio* would have been given unduly, the impoverished party could terminate the stay and claim the amount of rent which the inhabitant would have paid for the lease of such a dwelling. The relaxed interpretation of the concept (*datio*) is even better illustrated when it is clear that the “possession” of immovable property can be reclaimed by the non-owner (ie *possessor*, occupant or *detentor*) with the *condictio indebiti* (also known as the *condictio possessiones*) ([De Vos 1987](#) 191-192) whenever possession was unduly given. The owner would in these circumstances utilize his *rei vindicatio* to restore his *res* (see [Casebook Enrichment(2)](#) 108 note (d)). Even the *use* of property may result in the enrichment of the user (*possessor*) or occupier and the value of such use and enjoyment may be claimed with the *condictio* ([Hefer v Van Greuning](#) 1979 4 SA 952(A); see also [Sonnekus “Unjustified Enrichment”](#) 235 fn25).

2 In some cases (like *Frame v Palmer* 1950 3 SA 340(C): 340-341 (for the facts), 346A-347B [discussed in [Casebook Enrichment(3)](#) 100-102], and the minority decision by Rumpff J in *Nortjé v Pool* 1966 3 SA 96(A): 121) it is suggested that the *datio* of a *factum* could be claimed (in value) with the *condictio indebiti* if it was unduly rendered (see Daniel Visser “Enrichment”: 267-268). There is authority to the contrary though. See in this connection: *Gouws v Jester Pools* 1968 3 SA 563(T): 573B-H and 575A; *De Vos 1987*: 198-199; cf Van Zyl DH 1985 *Negotiorum Gestio in South African Law* 115 116 (for criticism of the *Gouws* case). To generalise, none of the classical *condictiones sine causa* could be employed to restore the value of a *factum* (*Nortjé v Pool* (supra) 134E-F). Cf [Casebook Enrichment(3)](#) 101 note (c) where it is argued that the value of an undue *factum* rendered need not be claimed via the *ad hoc* extensions, but should
rather be resolved within the extended field of the *condictio indebiti*’s application (see also Lotz/Brand “Enrichment” par 212 (a) fn6).

3 In the case of **Klein** the question was asked whether the bank (notwithstanding a mandate from the client to do so) could pay over money to the “creditor” who had a guarantee for payment from the bank’s client, but the latter (client) had in the meantime been sequestrated. **In casu,** the curator of the insolvent estate never issued such a mandate to the bank – in fact, the curator specifically instructed the bank not to pay. The court (*per* Zulman J) decided that the bank would be able to claim the money paid by means of the *condictio indebiti* (516A of the report), but that neither the curator nor the insolvent could do so (517D-E) – neither of them performed whatsoever. The latter parties never transferred anything nor commanded something to be transferred (they were not impoverished). Neither did the bank act as an agent for the curator or insolvent, nor (even if such a mandate could be fabricated) could the bank exercise the mandate after insolvency, because the latter event would have terminated such a mandate instantly. The short and the long of the story is that the bank made the payment from its own funds and by its own volition (518D-E). The bank was impoverished and could possibly institute the *condictio indebiti* to restore the shift in patrimony. The bank’s position was not really in contention. Sonnekus ("Unjustified Enrichment" 246 fn81) suggests that the bank might have had a contractual claim (based on the guarantee) against SATS, but no enrichment claim. According to him mistake was absent at the time of the performance and wouldn’t have played much of a role (contrary to what the judge found) in this case(517E-518A), Had the bank performed well aware that the money wasn’t due, the inference can be drawn that the bank bestowed a gift with the *animo donandi.* Read more on the intention to grant a benefit in Sonnekus "Unjustified Enrichment" 244.

4 Money becomes the property of the receiver by way of *commixtio.* The question to be answered is whether the receiver is enriched whenever the money received *sine causa* is expended on necessities, or (otherwise) on luxuries (for some remarks, see Van der Walt JC 1966 *THRHR* 220: 225-226; *De Vos 1987:* 201-206).

5 **Res fungibiles** is of importance to determine the extent of enrichment. How will consumed goods be restored?
ACTIVITY TO ASSESS YOUR UNDERSTANDING OF THE DATIO CONCEPT

1 Suppose Trust Bank in the case of *Klein* (and not Klein NO itself) instituted a *condictio indebiti* enrichment action against the South African Transport Services (SATS) to recoup the undue payment. Indicate which defences could be raised by SATS? Explain your answer. (2)

3 General Insurance Co issued a vehicle insurance policy to Ismail. The latter was involved in a collision with B and General paid the damages caused by Ismail to B. At the time of payment General was unaware of circumstances which excluded their liability in terms of the policy. General wanted to claim the undue payment from Ismail by way of the *condictio indebiti*, but Ismail excepted to the claim on the ground that the amount in question had not been paid to him.

What advice would you give to General? Explain your solution. (5)

**CONDICTIO INDEBITI REQUIREMENT (2)**

**INDEBITE PERFORMANCE (SINE CAUSA)**

STUDY:

*Lotz/Brand LAWSA "Enrichment":* par 212 (d)

*Nkosi v Totalizator Agency Board* 1988 1 SA 122(T): 122-3 (head note), 126-129A-B and G

OPTIONAL READING MATERIAL:

*Casebook Enrichment(3)* 103-107

*De Vos 1987*: 24, 69
REMARK:

1 Transfer must have taken place *indebite* (take note that it is not *indebiti*), in other words, “undue” in the mistaken belief that it was indeed due. The *sine causa* performance must be interpreted in its broadest sense, namely there must have been no civil (enforceable) or natural (unenforceable) legal ground for performance between the alleged party obliged to render performance and the one claiming performance. Performance must not only be *sine causa*, but must also have been made *solvendi animo per errorem* (that is, with the intention to fully extinguish a debt *vis-à-vis* the claimant in the mistaken belief that it is in existence [*ob causam praesentem*] and due).

2 In the case of *Nkosi v Totalizator Agency Board*, a punter, Nkosi, presented a so-called “winning ticket” to the clerk of the Totalizator Agency for payment. Purporting to pay out a ticket having the correct sequence, she paid Nkosi. After tracing the mistake, the Totalizator Agency successfully claimed the undue payment from Nkosi. The finding was confirmed on appeal. The question remains whether there was a legal cause for the money payment or not. Betting on horses is permitted by the law, but these kind of actions are not enforceable in law (so-called natural agreements). In view of this, the payment was made *cum causa* leaving no room for the successful application of the *condictio indebiti*. Nevertheless, the court allowed the Totalizator Agency to recover the money with the *condictio indebiti*. The only explanation is that the obligation to pay comes into existence as soon as a ticket with the correct sequence is presented for payment. Nkosi presented a ticket, but the ticket he presented did not contain the winning sequence. As a consequence, no natural agreement (and thus no real debt) came into existence between the parties concerned. The payment was made without it being due. In the former revised edition of *Lotz/Brand LAWSA “Enrichment”* at par 79 fn 6 Horak remarked that the *condictio indebiti* becomes an independent cause of action whenever payments are made unduly in betting agreements. As such it is not limited by the unenforceability of the contract.
It is to be expected that when a person with limited capacity to act (e.g., a minor) concludes a contract without the necessary assistance (similarly when a contract is concluded subject to a suspensive condition [see the recent cases of *Melamed and Another v BP Southern Africa (Pty) Ltd* 2000 2 SA 611(W) and *Wilkens v Bester* 1997 3 SA 347(SCA): 357H-J. *Casebook: Enrichment(3)* 104 n(b & c) is of the opinion that the *Wilkens* case was wrongly decided, because the conditional debt was a debt indeed and if the suspensive condition was not fulfilled, then the performance should have been restored with the *secuta*, and performs in terms of the contract, would be unable to seek reparation by means of the *condictio indebiti*, because such a deficiency will not render the contract void, but at the most unenforceable being a natural agreement (in other words a *cum causa* performance). This is however not the legal position. As an exception to the *indebita* requirement, *inter alia* minors are allowed to claim redress with the *condictio indebiti* (see also *Sonnekus “Unjustified Enrichment”* 231 fn10, 235 fn24, 237 and 247)). Even juristic persons may claim reparation with the *condictio indebiti* whenever they performed unduly in terms of a natural agreement (see for instance *Wilkens v Bester* supra 357E-F/G). The trustee of the liquidated estate of Rulten (in the case of *Rulten NO v Herald Industries* (1982 3 SA 600 (D & CLD)) acted *ultra vires* by paying out the full amount owed to the creditor (as it had existed before the liquidation) in the mistaken belief that the latter enjoyed preference. This was not the case and the creditor actually received more than he was supposed to in terms of the legal dividend declared and contained in the final liquidation account. Notwithstanding the existence of an unenforceable (natural) debt, the curator was allowed to claim the excess payment over and above the dividend declared by means of the *condictio indebiti*. (See also the recently reported case of *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 2 SA 35(SCA) [discussed by *Casebook Enrichment(3)* 126-130; *Daniel Visser “Enrichment”*: 287-289]).

In similar vein, contracts subject to a suspensive condition, even though “*cum causa*”, do not bar relief being sought (in appropriate circumstances) in terms of the *condictio indebiti* (see for confirmation the recently decided case of *Wilkens NO v Bester* 1997 3 SA 347(SCA) 357H-J. *Casebook Enrichment(3)* 148 note (b) is of the opinion that this case resorted to the wrong *condictio*. They argue that
a debt subject to a suspensive condition remains a real debt nonetheless (there cannot be just “nothing” in the meantime), and whenever the suspensive condition (causa futura) is not fulfilled, relief ought to be sought in terms of the condictio causa data causa non secuta and not the condictio indebiti.

5 It speaks for itself that the condictio indebiti will be available whenever no liability had existed (or had been extinguished) before payment was rendered. In contrast, a prescribed debt can be settled (section 10(3) of the Prescription Act 68 of 1969) ousting the condictio indebiti as a means to seek reparation (Daniel Visser “Enrichment”: 289).

6 When a debt is being paid well-knowing that it is not due then there is an onus to discharge on the plaintiff to prove that no gift was made, or that the payment was made under duress and protest. If the plaintiff is unable to discharge the onus, then it is presumed that a gift is bestowed. Such a payment cannot be refunded by means of the condictio indebiti (see infra and Sonnekus “Unjustified Enrichment” 244).

ACTIVITIES PERTAINING TO THE INDEBITE REQUIREMENT

1 When will a transfer be sine causa? [2]
2 How do you explain the pronouncement of the Nkosi case? [5]
3 Does the case of Rulten make sense to you? Explain the outcome and reasoning in your own words. [5]
5 Does the intentional payment of an undue debt result in a gift? Why would you (or not) support a “yes” to this question. [2]
6 It was confirmed in Wilkens v Bester 1997 3 SA 347(SCA) that a performance made under a suspensive condition (which was not fulfilled) may be restored with the condictio indebiti. Eiselen & Pienaar [Casebook: Enrichment (3):148 note (b)] criticise the court’s decision. What is the criticism and what is your viewpoint on the issue? What
superficial remark was made in this connection in Kudu Granite Operations v Caterna 2003 5 SA 193(SCA) at 202 [par 16]? [5]

**CONDUCTIO INDEBITE** REQUIREMENT (3)
PERFORMANCE UNDER A MISTAKEN BELIEF (ERROR)

STUDY:

*Lotz/Brand LAWSA “Enrichment”: par 212 (e)*

*Sonnekus “Unjustified Enrichment” 245-273*

*Willis Faber Enthoven v Receiver of Revenue 1992 4 SA 202(A)*
[discussion by Visser DP 1992 *SALJ* 177-185; *Casebook Enrichment(3)* 110-117]

OR  *Daniel Visser “Enrichment” 290-331*

**OPTIONAL READING MATERIAL**

*Scott H “The requirement of excusable mistake in the context of the condictio indebiti: Scottish and South African Law compared” 2007 (124.4) *SALJ* 827-866 [this is an excellent article about the development of the error requirement and a possible solution]*

*De Vos 1987: 24-26, 69-70, 182-191 & 192-196*

**REMARK:**
1. The third requirement for the *condictio indebiti* is that performance (transfer of property or payment of money) needs to be made in the mistaken belief that it is due. If there were no mistake pertaining to the dueness of the performance, then the *condictio indebiti* would not be available. The *solvens* must have paid a debt voluntarily (and deliberately) in the mistaken belief that the debt was due, whilst in reality it was not (see the case of *ABSA Bank Ltd v De Klerk* 1999 1 SA 861(W): 865C-D). It does not really matter whether the mistaken belief held turned out to be some other *error* not contemplated initially (*contra* Sonnekus “Unjustified Enrichment” 246 sentence 2 from the top – indicating that the error must be the same as contemplated initially) (see the case of *ABSA Bank Ltd v Leech and Others NNO* 2001 4 SA 132 (SCA) (and the discussion by Sonnekus “Unjustified Enrichment” 246 fn83 and 321-322)). This is the so-called requirement of *error*.

2. Instead of requiring mistake as one of the elements to succeed with the *condictio indebiti*, one can view the mistake of the enrichment claimant as a qualification allowing a redress of the increase because it would be fair in the eyes of the convictions of the community to do so (see Sonnekus “Unjustified Enrichment” 245; Daniel Visser “Enrichment” 269 lines 20-32). This approach will be more in line with the generic requirements style of development in recent times.

3. If the *solvens* paid willingly, but (a) involuntary under duress and protest, or (b) had limited capacity to act, the *condictio indebiti* remains the applicable action to seek reparation (see, for complete treatment of payments made under compulsion, Daniel Visser “Enrichment” 383-394).

(a) Since the Appeal Court’s decision in *Union Government (Minister of Finance) v Gowar* (1915), performance under duress and protest manifests a new development in the form of an exception to the *error* requirement. Under these circumstances the performance has never been done in the mistaken belief that it was due. The payment was made because there was no other way out, well aware that it was not due. The reason underlying the exception is probably that the performance was made unwillingly (although certainly with the knowledge and firm belief that it was not due) to which the duress and protest is a testimony. Proof of both duress and protest is needed to
support the exception allowing the *condictio indebiti* to be successfully instituted. This is questioned by Glover G in the article “‘Methinks he doth protest too much’? Recovering unjustified payments made under duress and protest” 2006 *TSAR* 1: 135-151. See also Glover G “Duress and enrichment claims: a review article” *Speculum Juris* 20.1: 17. The onus to discharge whether the performance was made unwillingly rests with the *solvens* and he can only discharge the onus by proving that he had no other choice, and that he protested or that he made “an unequivocal statement of objection” when affecting payment [case of *Gower* 434]. See also the reported case of *Commissioner of Inland Revenue v First Industrial Bank Ltd* 1990 3 SA 641(A) [discussion by *Casebook Enrichment*(3) 117-126; Sonnekus “Unjustified Enrichment” 268-273; and Daniel Visser “Enrichment” 395-396] where the majority conservatively required a great measure of duress and protest, allowing the repayment on the basis of a (highly artificial basis of a) tacit agreement instead of the *condictio indebiti*. The minority, on the other hand, emphasized the unwillingness to pay. In Roman law performance under duress was claimed with either the *restitutio in integrum* or the *condictio ob turpem*.

(b) If ownership passed to the *recipiens*, the *solvens* with limited capacity may at his heart’s desire reclaim performance in terms of an unauthorised contract with the *condictio indebiti*. If ownership remained with the *solvens*, his *rei vindicatio* is available to restore the property transferred. A case in point is *Amalgamated Society of Woodworkers of SA v Die 1963 Ambagsaalvereniging* (1967 1 SA 586(T)). *In casu* a juristic person succeeded in claiming a performance made *ultra vires* (unauthorised). The juristic person (presumably) bestowed a gift in the mistaken (legal) belief that management had the capacity to do so or (according to Visser) in the mistaken belief that performance was due. The juristic person suffered from a lack of capacity to act, but (analogous to the position of the minor) had no difficulty to restore the gift with the *condictio indebiti*. See the decision of *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 2 SA 35(A) [discussed by *Casebook Enrichment*(3) 126-130] for a confirmation of *Rulken* and *Willers* pertaining to the representative who wishes to (in fact, is able to) restore *ultra vires* payments with the *condictio indebiti*. See also Daniel Visser “Enrichment” 396-413, referring to the recovery of wrongly extracted taxes.
3 A more contentious issue (see inter alia Van der Walt 1966 _THRHR_ 220: 226-230; Visser 1988 _THRHR_ 492: 504-507; Horak 1989 _De Rebus_ 77-78) had been whether the third element of the _condictio indebiti_, namely payment in the mistaken belief, was limited to an _error_ of law or _error_ of fact. Until the case of _Willis Faber Enthoven v Receiver of Revenue_ (1992 4 SA 202 (A) [discussion by Casebook Enrichment(3) 110-117], confirmed in _Minister van Justisie v Jaffer_ 1995 1 SA 273(A) at 279), it had been consistently held (due to the influence of the German Pandectists and also a misleading headnote in _Rooth v The State_ ((1888)2 SAR 259), that only a mistake of fact (_error facti_) would allow the _solvens_ to avail himself of the _condictio indebiti_. A mistake of law (_error iuris_) excluded the operation of the _condictio indebiti_. As a consequence, many exceptions had developed to bypass the strict application of the rule (see _Sonnekus “Ounjustified Enrichment”_ 260-266; _Daniel Visser “Enrichment”_ 290-301):

[Note. The following exceptions (3.1 to 3.3) have become redundant for purposes of the _error_ requirement, because the Supreme Court of Appeal decided in _Willis Faber_ (1992) to abandon the distinction between errors of law and fact, and may thus be ignored. Paragraphs 3.4 & 3.5 remain valid and can be read once again]

3 1 In _Carlis v McCusker_ (1904 (TS)), for example, the court decided that when transfer took place in terms of a contract for sale, and it turned out that the contract was void because the formalities were not complied with, reparation could nevertheless be claimed with the _condictio indebiti_. Without determining whether the _solvens_ was aware of the invalidity of the contract and that he performed in _error_ of law, the relief was granted. All that was required from the _solvens_ to claim relief was to argue in his pleadings that the _recipiens_ was “unwilling and unable” to perform. The case had lead to much debate, but fortunately the legislator came to the rescue by enacting the Alienation of Land Act 68 of 1981. A statutory enrichment action is created by section 28(1) of the Act to assist the “buyer” and “seller” of immovable property who performed partially or fully in terms of an agreement of sale which lacks the necessary formalities. This is a developed enrichment action, because
damaging and beneficial side-effects, like interest, compensation for occupation and use, improvements and damages caused, are taken into account in assessing the amount of enrichment. When the parties to the contract have performed fully in terms of the void contract lacking the necessary formalities, section 28(2) stipulates that the contract is considered to be fully completed and that no enrichment action will vest. See discussion on this topic by Casebook Enrichment(3) 140-141 making the remark (p 141 note (b)) that the rule in Carlis v McCusker (as it had been confirmed in an obiter judgment in Wilken v Kohler 1913 AD 135) might not have been laid to rest by the statute, because it was recently resurrected by a minority of Judges of Appeal in Wilkens NO v Bester 1997 3 SA 347(SCA) at 362D-H.

32 Another exception is illustrated by the case of Amalgamated which deals with the ultra vires conduct of an organ (representative) of a juristic person. For a discussion of the case, see Casebook Enrichment(2) 41-44.

33 Further, in the case of Heydenryck v Standard Bank (1924 CPD) the court came to the conclusion that the misrepresentation by the receiver (recipients) of the shift in patrimony leading to the mistaken belief in law of the solvens would not exclude the latter’s condictio indebiti.

34 It was decided in Rulten (supra) [discussed by Casebook Enrichment(3) 152-153] that the curator of an insolvent estate making a payment to a third party incorrectly because of an error in law, could still claim the undue payment with the condictio indebiti (see Sonnekus “Unjustified Enrichment” 260-266). In contrast to the above, when the executor of a deceased estate pays out money wrongly, because he was mistaken as to the legal position, the condictio indebiti would not be available. Recently confirmed in Bowman, De Wet and Du Plessis NNO v Fidelity Bank Ltd 1997 2 SA 35(A) [discussed by Casebook Enrichment(3) 126-130]. See infra.

35 When a mistake pertains to both the law and the facts, the mistaken belief will often so not be considered as an error in fact and the undue performance could be claimed with the condictio
indebiti. For support, see *Vluvo Investments v Bezri* 1985 4 SA 367(T) at 370H.

In 1992 the Supreme Court of Appeal brought an end to the distinction between the *error facti* and the *error iuris* in the case of *Willis Faber Enthoven* [see 224B-C of the law report]. Either a mistake of law or a mistake of fact pertaining to the indebtedness of performance makes the *condictio indebiti* applicable to redress the undue performance. Hefer JA makes it clear [220H of the law report] that

(a) there is no logic in the distinction between an error of law and an error of fact. From times long past, the *condictio indebiti* has been a remedy *ex aequo et bono* preventing the enrichment of one to another. The *condictio* is available when a performance is made *indebitum* (that is, without a natural or civil cause, or, *sine causa*) and if it is additionally made under a mistaken belief (*error*), it is only fair that reparation should take place without inquiring what the nature of the error is.

(b) Further, it is beyond any reason why the *recipiens* who received money due to an error of law should be in a better position than the one who received the same due to an error of fact. Such a situation does not result in “simple justice between man and man” and works unfairly towards the *solvens* as well [221A-B of the law report].

(c) Thirdly, ignorance of the law has long been recognised as a defense in both private law and criminal law. The recognition of this adage, especially in criminal law (after *S v De Blom*), has not resulted in any negative side-effects. It defeats reason to argue that legal policy opposes the removal of the distinction between the dual kind of errors [223E-G].

(d) In fact, “[t]aking account ... of the complexities of contemporary legal and commercial practices ... I would accordingly rule that the fact that money was unduly paid in error of law is not by itself a bar to its recovery by way of the *condictio indebiti*” [223H].

It should be emphasized straight away that an error (mistake of law or fact) in itself is not sufficient to ensure the success of the *condictio indebiti*. The error has to be “excusable” as well – it has to be a *iustus error* (see Sonnekus “Unjustified Enrichment” 247 ff; Daniel Visser “Enrichment” 301-331; *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* [2008] ZASCA 127). In *Van Aartsen v Van Aartsen*
(2006 4 SA 131(T)) the court interpreted *justus error* in the contractual setting by weighing up all the interests involved. In the past, the courts had constantly applied a similar qualification to a mistake of fact. In the case of *Rahim v Minister of Justice* 1964 4 SA 630(A) it was reiterated that a reasonable error of fact could never be "inexcusably slack" [635E-F]. According to Voet "the ignorance of fact should appear to be neither slack or studied (*nec supina nec affectata*)". In *Union Government v National Bank* 1921 AD 121 at 126 this phrase from Voet was used with acclamation. In the same case Innes CJ also mentioned another criterion to establish excusability, namely "neither heedless or far-fetched". De Villiers CJ translated the words of Voet in the case of *Aliwal North Divisional Council v De Wet* 7 SC 232 [discussion by *Casebook Enrichment(3)* 107-109] in the following manner: "neither negligent nor stupid". According to (the former revision of) *Lotz/Brand LAWSA “Enrichment”* (par 79 p 68 vn 16) a mistake of fact is *supina* (reckless) *aut affectata* (feigned) when there is ignorance pertaining to the affairs of somebody else generally known to almost anyone, or ignorance about one’s own affairs. Mullins J suggested in *Rane Finance v Queenstown Municipality* (1988 4 SA 193(ECD): 199H-I [discussion by *Casebook Enrichment(3)* 109-110]) that an excusable error of fact would be one that is not reckless. Hefer JA is of the opinion in *Willis Faber Enthoven* [224A-B] that an error of law also has to be reasonable (excusable) to qualify as the third requirement of the *condictio indebiti*. The Judge of Appeal did not want to commit him to define the circumstances whereby the error would be excusable or not [224E]. All that the Judge dare say is that when the conduct of the *solvens* is so **"slack"** that he deserves no protection in the opinion of the court, no such relief will be extended by the court [224E-F]. The Honourable Judge reiterates that the excusability of the error would differ from case to case. Much depends on (1) the relationship between the parties, (2) the conduct of the *recipients* who may have had knowledge of the *debitum* or not, (3) the conduct of the *recipients* that could have convinced the *solvens* to pay, and (4) the *solvens*’ frame of mind and having only himself to blame for paying in ignorance [224F-G]. *Sonnekus suggests the the degree of negligence (reckless or gross) of the *solvens* could help to determine the excusability of the mistake and should be kept as a further restriction on mistake as special requirement of the *condictio indebiti* in terms of which the community will be convinced that it would be unfair to allow the *solvens* to rely on its own slackness to recover
losses brought upon itself ("Unjustified Enrichment" 248-253 & 257-
258 and Willis Faber 1992 4 SA 202(A); contra Bowman 1997 2 SA 35(A): 45B-C, De Klerk 1999 1 SA 861(W), and Perry 2001 3 SA 960(HHA)).

6 Hefer JA’s pronouncement as to mistake was broadly welcomed
(Visser 1992 SALJ 177: 181; Horak 1993 De Rebus 162), but his
retention of the excusability qualification was less favourably received
(Casebook Enrichment(3) 116 note (b) to 117 note (e); Visser 1992
SALJ 177: 182 next). Rightly the question can be asked whether
subjective elements, like sense of judgment, knowledge, measure of
care-taking(negligence?), and blameworthiness for ignorance,
inclination, etcetera (of the solvens specifically), need to be infused
into enrichment as a remedy of fairness – which norm should be
equally applicable to all. In a recent article ("The conflation of
wrongfulness and negligence: is it always such a bad thing for the law
of delict?" 2006 (123.2) SALJ 204) Neethling propagates (after he has
analysed Supreme Court of Appeal cases) the conflation of the
objectiveness in wrongfulness and the subjective elements in fault as
not such a bad thing. If this is true, then much of the gist of the
criticism of Eiselen and Visser (and others) is removed. Van der Walt
(1966 THRHR 220: 227) opines that the only reason why the
solvens is unable to claim redress for enrichment which took place at
his expense, is because enrichment occurred cum causa. It can
never be because the solvens is “punished” for his ignorance, or that
it provides an independent causa for the increase in patrimony. De
Vos 1987 (185) suggests that the applicability of an enrichment action
should be dependent on the legal policy or public policy. This is why
the solvens is barred by the par delictum to institute action
whenever he partook in dishonourable behaviour relating to illegal
contracts. In similar vein, the thief will not be compensated for
improvements effected to another person’s property. Visser (1992
SALJ 177: 185) is critical about utilizing “excusability” to limit the
scope of the condictio indebiti and in so doing allow policy
considerations to slip in unnoticed. It could easily have been said that
the retention of performance by the recipiens will only be sine causa
in cases where policy decisions do not point to the contrary. The
meaning of “public policy” as a term nowadays is found to derive
much from the constitutional values of human dignity (autonomy),
achievement of equality, advancement of human rights, and
freedoms, non-racialism and non-sexism (see Napier v Barkhuizen
2006 4 SA 1 (SCA)). This will also have to be true of the term applied by Visser (even De Vos) on so frequent a basis. Sonnekus ("Unjustified Enrichment" 249 fn96) associates himself to some extent with De Vos and view the unreasonableness of the mistake due to the slackness/carelessness of the plaintiff to be a “bykomstige kwalifikasie wat die gemeenskapsbelang stel om die verhaal van die prestasie in die omstandighede te belet”. In this sense (similar to the common law [Sonnekus 251 fn111] and the Law of the Netherlands) it is about the objective qualification of the increase in patrimony as unreasonable/unfair, and not about the subjective motive for the decrease in the patrimony of the impoverishee (249). If the negligent/reckless conduct of the solvens is constructed as a defence for the recipiens, then it takes on the form of Estoppel. The solvens would then be held to its misrepresentation, and prevented to rely on its impoverishment. The recipiens would then be considered not to be enriched (253).

In support of Van der Walt and Horak, and in view of enrichment as a remedy to achieve fairness, together with an objective approach to the sine causa shift in patrimony, Visser strives for the removal of mistake being a subjective element retained in the condictio indebiti. His solution focuses on the absence of a causa retinendi, because the object of the performance failed (for a discussion of Visser’s viewpoint, see Casebook Enrichment(3) 117 note (d)). The failure to reach the object of performance is also the reason for the existence of enrichment liability according to Visser and he is convinced that defenses like non-enrichment and estoppel will be more than enough to limit the scope of enrichment liability. See Eiselen and Pienaar for a summary of the controversial issue in Casebook Enrichment(3) 116 note (b) to 117 note (e). See in addition Sonnekus “Unjustified Enrichment” 252. Susan Scott (2007 SALJ 827-866) sides with Visser and rejects the (excusable) error requirement for the condictio indebiti. In her research, she endeavours to show that there is a threefold application of mistake. Firstly, inexcusable error can function as a defence at the disposal of the enrichee to be raised by the same. Secondly, excusable mistake can be a positive requirement to be proved by the claimant. And thirdly, the court may in its discretion decide on the excusability of the mistake. According to Scott, none of these possibilities should find application in the South African law.
SELF-EVALUATION

What is the test promoted by Hefer JA in *Willis Faber Enthoven v Receiver of Revenue* 1992 4 SA 202(A) to determine excusable *error*? What criticism is leveled at the retention of the “excusable” *error* requirement? Refer to writers and case law and come to a reasoned solution. [10]

CONDICTION INDEBITI

EXTENT OF DEFENDANT’S LIABILITY

STUDY:

*Lotz/Brand LAWSA “Enrichment”: par 213*

OR  
*Daniel Visser “Enrichment”: 161-164 and 289-290*

OPTIONAL READING MATERIAL

*De Vos 1987: 26-29, 70, 200-208*

*Van der Walt JC 1966 *THRHR* 220: 224-226*
In principle the primary purpose of an enrichment action is to restore property which had been transferred *sine causa*, whilst the owner’s *rei vindicatio* does not find application. With the abstract system of ownership in South Africa it is relatively easy to lose ownership without there being an objective cause for the transfer of ownership. Would it be impossible or unreasonable to restore the property (for instance in cases of *accessio*, *commixtio* or where it is consumed), its surrogate or value may be recovered from the enrichee.

As a point of departure, the *recipients* having received property or money unduly is obliged to return or repay it in terms of the *condictio indebiti*.

The *recipients* must restore the transferred property itself or in the case of *res fungibles*, an equivalent quantity of the thing.

Where the property itself is returned by the *recipients*, its fruits (less production costs) and improvements (less expenditure) must be returned with it to the *solvens*.

Interest which the *recipients* may have received on a sum of money paid to him without it being owed to him, is not considered to be fruit and needs not be restored. See *Baliol Investment Co (Pty) Ltd v Jacobs* 1946 TPD 269: 272-274. This kind of interest should be distinguished from interest *a tempore morae*. The basis of recouperation by the latter is not enrichment, but reparation to the plaintiff, because the latter could not earn interest on the money from the time it became due and payable. For more information, see *Casebook: Enrichment(3)* 55-58; *ABSA Bank v De Klerk* 1999 1 SA 861(W). In the case of *Mndi v Malgas* 2006 2 SA 182(E) the debtor (Malgas) had discharged his debt at a usurious (30% per month) rate enriching the creditor unjustly. In this case the question was not about the merits, but the *quantum* of the claim *mero motu* raised by the provincial division on appeal. The court found the excess to be the difference between the interest charged in the unenforceable loan contract and the legal rate of 15%.

Would it be money or *res fungibles*, the *recipients* must return an equivalent quantity of it to the *solvens*.
4 When the *recipiens* is unable to restore the thing itself or its equivalent, then he must return a surrogate or the value of the performance. When the *recipiens* sold the thing (for instance), he must return the purchase price (that be the amount he is still enriched with at the time of the institution of the action).

5.1 The *condictio indebiti* being an enrichment action, the *recipiens* (defendant) may tender the thing in the condition it is at the time of the institution of the action. The same rules apply to the amount the *recipiens* is still enriched at the time of the action.

5.2 Where the *recipiens* has lost or disposed of the thing, his liability is likewise restricted to the amount of his enrichment at the time of the action, except for instances of increased liability.

5.3 These instances are where the *recipiens* knew he was enriched, where he foresaw the possibility of his enrichment, and when he is *in mora*.

5.4 Loss of enrichment (or diminished enrichment) is a good defence against the *solvens’* claim for the full value of the transferred property (see Sonnekus “Unjustified Enrichment” 304-305; Daniel Visser “Enrichment”: 702ff). Liability for enrichment lies to the extent of the enrichment, never more. The onus to prove loss of enrichment vests in the *recipiens*/defendant. Failure to prove loss of enrichment results in liability for the full value of the property.

In the case of *King v Cohen Benjamin and Co* (1953 4 SA 641(W) [see discussion by Casebook Enrichment(2) 37-38]) King had drawn a cheque in favour of Benjamin intending it to be kept in trust by the latter (firm of auditors) for a property/leasing project. Benjamin was well-aware of the project, but distanced itself from it (not having the desire to become involved). Under false pretences that he (Pabst) was the actual beneficiary, Benjamin was moved to endorse the cheque in his favour. In doing so, Benjamin *bona fide* paid the amount of the cheque to Pabst. King instituted the *condictio indebiti* against Benjamin endeavouring to recover the amount being paid not owing. Benjamin raised non-enrichment and succeeded with the defence.

In another case, *African Diamond Exporters v Barclays Bank* 1978 3 SA 699(A) at 709D-712A(see discussion by Sonnekus “Unjustified Enrichment” 316-318; Daniel Visser “Enrichment” 733ff), the
The appellant (African Diamond with Bonner as director) raised decrease or extinction of enrichment as defence and succeeded partially. In casu the respondent (Barclays Bank) “by accident” paid out more money than mandated for ($188 601 instead of $18 860) a shipment of diamonds dispatched by African Diamond to a Californian company, Antwerp Distributing (with Ku etgens as director). African Diamond repaid part of the excess mistaken payment ($100 000) and retained the rest ($55 000) as payment for another shipment of diamonds to follow shortly. Ku etgens in the meantime disappeared with the repayment and the shipment of diamonds, leaving the bank with the loss. Barclays Bank instituted the condictio indebiti against African Diamonds to secure repayment of the undue overpayment to the latter. When sued for the amount not owing, African Diamonds relied inter alia on non-enrichment as a defence. The court a quo granted the claim of Barclays Bank leading to the appeal by African Diamond. Muller JA came to the conclusion [714B-C] that African Diamond was enriched to the amount of their profit on the most recent shipment of diamonds. Because Bronner refused to tell what the profit was, African Diamond could not prove the decreased amount of their enrichment [714G], resulting in the judge finding that their enrichment amounted to the total value of the last shipment of diamonds. The judge felt [714H] sorry for “punishing” African Diamond by ordering them to give up the full amount, but ascribed it to the conduct of Bronner. In any case, the amount to be paid was substantially less than the one ordered by the Court of first instance. Consequently African Diamond’s appeal succeeded with costs.

Besides the defence of decrease and extinction of enrichment, the recipiens/defendant may claim compensation for improvements to the thing received unduly. The extent of expenses incurred for improvements is limited to impensae necessariae and impensae utilis, or its value for the solvens upon restoration. Whenever the recipiens/defendant has already counterperformed, he is entitled to the return of his performance. Where the solvens/plaintiff is no longer in possession of the property, or it consisted of a factum, its value has to be returned by the recipiens.

The enrichee could distance himself from his enrichment in an effort to rid himself of the increase. This is known as abandonment and should
be distinguished from rejection (see Sonnekus “Unjustified Enrichment” 306-307).

Finally, the *recipients*/defendant may refuse to restore until the *solvens*/plaintiff tenders restoration on his side. This is substantiated by case law, e.g. *Bushney v Joliffe* 1953 4 SA 373 (W). This and other cases pertain to ejectments under void contracts of sale and did not deal with *condictiones indebiti*. Nevertheless, the idea is supported that the *recipients* can resist the action until the plaintiff tenders to restore. The *solvens* / plaintiff does not have to tender restoration to have his pleadings in order.

**CONDUCTIO INDEBITI**

PERSONS AT WHOSE INSTANCE THE INDEBITE ACTION LIES

STUDY:

*Lotz/Brand LAWSA “Enrichment”: par 212 (b) & (c)*

**OR**  
*Daniel Visser “Enrichment”: 282-285 and 275-282*

OPTIONAL READING MATERIAL

*Minister van Justisie v Jaffer* 1995 1 SA 273(A) (see the remark by Sonnekus “Unjustified Enrichment” p298 par 8.3.10; *Daniel Visser “Enrichment”: 282-283*)

**REMARK**
Normaliter it is the person having been impoverished by the shift in patrimony (transfer of property) at whose instance the *condictio indebiti* lies. Such a person is called the *solvens* or transferor. In some cases property ought to have been transferred to a certain person, but was transferred to another (see Sonnekus “Unjustified Enrichment” 320-321 discussing *Besselaar v Registrar Durban and Coast Local Division* 2002 1 SA 191(D)). In this case, the person who ought to have received the transfer, is impoverished and he would be able to claim with the *condictio indebiti* to extinguish his loss. Sonnekus (“*Unjustified Enrichment*” 307-308) discusses the case *Firststrand Bank Ltd v ABSA Bank Ltd* (2001 1 SA 803(W)) as an example under the heading “Enrichment and impoverishment”. The overpayment of a creditor or legatee/heir by the executor is another example of this. The remainder of creditors or legatees/heirs received less than what they were supposed to and are able to claim their impoverishment. See more on this: Van der Walt 1966 *THRHR* 220: 230-232; *De Vos 1987*: 172-180.

### CONDICTIO INDEBITI

**PRESCRIPTION**

**STUDY:**

Sonnekus “*Unjustified Enrichment*”: 300-303

**OPTIONAL READING MATERIAL**

*Casebook Enrichment*(3) 73-77

*De Vos 1987*: 208-209

**REMARK**
A claim in terms of the *condictio indebiti* prescribes after 3 years. In terms of the Prescription Act 68 of 1969 (which came into operation on the 1st December 1970) rights are extinguished when the action prescribes, whilst *remedies* had merely become unenforceable under the old 1943 Act. The operation of the 1969 Act has, therefore, a “strong” prescriptive operation. Nevertheless, a debt may still be validly settled after it has prescribed – both in terms of the old and new act. Even though the 1969 Act does not have retrospective operation, debts originating before 1/12/70 and be governed by the 1943 Act will be negligible. Consequently, remarks made will be focused on the provisions of the 1969 Act.

Generally a debt is due the moment the debtor is under an obligation to render performance and the creditor has a right to claim performance. In the case of *Truter and Another v Deysel*, 2006 4 SA 168 (SCA), the Court held that prescription starts to run as soon as the creditor acquires a complete cause of action, that is, when the entire set of facts upon which the creditor relies to prove his claim is present – especially when the creditor sustains harm. In *Eskom v Bojanala Platinum District Municipality* (2005 4 SA 31 (HHA)) prescription started to run as soon as Escom had become aware (when they solicited a legal opinion) of the undueness of a levy payment to the municipality (case discussed by *Sonnekus “Unjustified Enrichment”* 303). Secured expert opinion about whether the debtor’s conduct amounts to negligence is not a constituting fact, but evidence. A debt, which is based on unjustified enrichment, becomes due as soon as unjustified enrichment has taken place. Thus, the cause of action is present whenever the undue performance has been rendered and on that very moment prescription starts to run as well. The difficulty with prescription in enrichment cases is the fact that the enrichee and impoverishee is seldom aware when the enrichment debt is due.

The very fact brings the provision of section 12(3) of the Prescription Act of 1969 into play. The section stipulates that the debt will only be deemed due once the creditor has become aware of the identity of the debtor or of the facts from which the debt arose. This may further create uncertainty as to the very moment the debt is due. Besides the qualification that knowledge of the facts could have been acquired by reasonable care by the creditor, only the circumstances of the individual case and the application of the reasonableness requirement of section 12(3) by the court will help to determine the very moment...
prescription starts to run. In *Ditedu v Tayob* (2006 2 SA 176(W): ) an attorney negligently furnished his client with an erroneous opinion about the settlement offer by the Road Accident’s Fund and the attorney failed to prove that his client having limited education and degree of sophistication acted unreasonably by not having acquired knowledge of the attorney’s negligence at an earlier stage. Accordingly, in the action for damages for the negligence of the attorney, prescription started to run when the client had acquired the said knowledge in accordance with section 12(3) and that the client’s claim had not expired. See also *Minister of Finance v Gore NO* [2006] SCA 97 (RSA) commenting on the knowledge being justified, a true belief.
LECTURE 4

CONDICTION INDEBITI

SPECIFIC FIELDS OF APPLICATION

APPLICATION: CONDICTION INDEBITI

(1) SUCCESSION: LEGAL POSITION OF EXECUTOR

STUDY:

Sonnekus “Ongegronde Verryking” 273-280

Van Zyl v Serfontein 1989 4 SA 475(C)

OR Daniel Visser “Enrichment”: 331-334

OPTIONAL READING MATERIAL

Casebook: Enrichment(3): 130-135

Van der Walt JC 1966 THRHR 220: 230-232
REMARK

Position of the executor during the administration process

1. From the point of view of most commentators, section 50(b) of the Administration of Estates Act 66 of 1965 is a codification of the *condictio indebiti* under the circumstances of the section (see *De Vos 1987*: 172-173; *Els NO v Jacobs* 1989 4 SA 622(SWA) at 629B). In terms of section 50(b) the executor has a statutory enrichment claim during the course of the administration of the deceased estate to recover any overpayment or undue payment made properly in accordance with section 34 (to creditors) and section 35 (to beneficiaries) of the said Act.

2. When the executor makes a distribution on non-compliance with the said provisions (that is, wrongly), the creditors and beneficiaries will have a personal claim against the executor in terms of section 50(a) of the Administration of Estates Act to recover their sustained losses.

3. Whenever the executor paid all the other creditors, legatees and the heirs in accordance with the provisions of the Administration of Estates Act, but one other creditor had failed to lodge a claim in time, the executor will still be able to claim the overpayment from beneficiaries (namely, the residual heirs first of all, then legatees) and non-entitled ones with the statutory *condictio indebiti*. The creditor lodging his claim at
so late a stage will still have a claim against the executor, but this time in the latter’s official capacity. Note that section 31(b) of the Administration of Estates Act protects creditors already paid by the executor against any claims by the latter to recover payment from them.

**Position of the executor after being released (discharged)**

1. The executor is discharged as soon as the administration of the deceased estate is fully completed.

2. Creditors and beneficiaries still to be paid subsequent to the executor being released, have no claim whatsoever against the former executor. In cases where the former executor had acted fraudulently while in office, he will be held liable in his personal capacity (section 56(2) of the Administration of Estates Act) whenever sued by unpaid creditors and beneficiaries.

3. After the release of the executor, the creditors or beneficiaries who haven’t lodged their claims in time, will be able to recover their money from persons not entitled to it, e.g. heirs or legatees (in this sequence), themselves. They can do so, because they fill the position of the discharged executor by way of automatic subrogation. Thus, they are entitled to the (statutory) *condictio indebiti* as well. No claim exists, however, against a duly paid creditor (section 31(b) of the Administration of Estates Act; see also *Mosam v De Kamper* 1964 3 SA 794(T) at 797). *Contra* De Vos (1987: 174-175) arguing that creditors and beneficiaries not being paid at the time of the release of the executor ought to succeed with the *condictio indebiti* recouping money overpaid...
to other creditors, legatees and heirs (this view being supported by *Casebook*(3) 134 note (b)).

4 The statutory enrichment action of the creditors and beneficiaries will become prescribed three years from the date upon which the action arose. According to *Roy Evans v Cramer* (1961 3 SA 857(T): 860C) the original claim of the company, Roy Evans, against the estate of the late David was not related to the subsequent claim against Rae Jowell and the even more removed claim against Cramer – prescription starts all over afresh for each and every claim; they are all independent actions. Ensuing claims will only prescribe long past the prescription of the original claim. The opposite view was promoted in the case of *Mosam and Another v De Kamper* (1964 3 SA 794(T): 800 [discussion by *Casebook Enrichment*(3) 130-134]). In *Mosam v De Kamper* it was held that the subrogated claim of the unpaid persons was only the continuation of the original claim by the executor. Once the original claim had become prescribed, the ensuing claim would follow suit. De Vos (1987: 175-176; and *Casebook Enrichment*(3) 134 note (a)) opines the *Mosam* case to be more acceptable than the *Roy Evans* decision.

5 Van der Walt (1966 *THRHR* 220: 230-232) is very critical about this legislative measure (in the form of the statutory *condictio indebiti*) at the disposal of creditors who failed to lodge their claims in time. According to him the legislature ought to have restricted the application of the *condictio indebiti* under these circumstances. In the final analysis, the creditor has only himself to blame for his slackness to submit his claim promptly and his consequential loss of his personal right. He submits
(232) that only stern action by the legislature would remedy the situation at this point in time. DeVos (1987: 177-180) disagrees with Van der Walt and argues convincingly for the retention of the status quo. He is of the opinion that the statute regulates a procedural matter only and could as such not alter or destroy existing rights. The legislator has not taken any steps to restrict the application of the condictio indebiti under these circumstances.

The pronouncement of Foxcroft J in Van Zyl v Serfontein 1989 4 SA 475(C) is a fine example of the statutory condictio indebiti employed by the “creditor” against the overpaid heir after the executor had been released (see discussion of the case by Sonnekus “Unjustified Enrichment” 314). In this case Van Zyl pleaded that the sole heir (Samuel Serfontein) of the testator received more than he was entitled to. Her claim was for the maintenance of her extra-marital child being fathered by the testator. Initially, the claim (in the absence of proof of paternity) was rejected by the executor, leaving the testator’s son as the only heir. Van Zyl did not oppose the final distribution. After the release of the executor, Van Zyl instituted her claim against the heir. The latter made it easier for her acknowledging that his late father was also the natural father of Van Zyl’s child [476B]. The judge came to the following conclusion: notwithstanding the fact that the heir was the only beneficiary; that Van Zyl did not formally object to the full bequest being paid out to the heir, that overpayment resulted and that it could be recouped by way of the condictio indebiti. In view of the fact that the quantum was not proved, he ordered absolution from the instance [479F].
In *Els NO v Jacobs* (see discussion of the case by Sonnekus “Unjustified Enrichment” 313-314) Strydom J decided that an amount “wrongly” paid to the creditor (Jacobs) could not be recouped by the executor (Els) with the *condictio indebiti* in terms of section 50(b) of the Administration of Estates Act [630H-I]. After the amount had been paid in accordance with the liquidation and distribution account, the widow of the deceased successfully objected to the payment. A new account (excluding the creditor’s claim) was compiled and accepted by the Master. The executor failed to succeed with a claim to recoup the overpayment, because the personal right of the creditor is based on a contractual relationship with the deceased and not on the Administration of Estates Act [630G]. *In casu* the creditor was paid what was contractually owed to him. No overpayment occurred and as such enrichment is absent.

**ACTIVITIES TO REINFORCE THIS APPLICATION OF THE CONDICTIO INDEBITI**

X commissioned an attorney (Y) (who was the sole proprietor of his firm) to institute a third party claim on her behalf. This was properly done, and the full amount of compensation (R200 000) was paid into the attorney’s bank account. Y, however, had died before having had the opportunity to pay the amount over to X. Y’s estate was administered and fully distributed. X has never instituted a claim against Y’s estate (or anyone else for that matter) mainly due to unanswered inquiries and ignorance. Y’s surviving spouse was his only heir. X approaches you for advice. Advise her.  

[5]
APPLICATION: **CONDUCTIO INDEBITI**

(2) CHEQUE PAYMENTS

STUDY:

Sonnekus “Unjustified Enrichment”: 291-296

First National Bank of SA Ltd v B & H Engineering 1993 2 SA 41(T); appeal 1995 2 SA 279 (A)[discussed in Casebook Enrichment(3) 156-160; Sonnekus “Unjustified Enrichment”: 55 and 322-324]

OR Daniel Visser “Enrichment”: 335-380

OPTIONAL READING MATERIAL

Casebook Enrichment(2): 176-180

Govender v Standard Bank 1984 4 SA 392(K) [Sonnekus “Unjustified Enrichment”: 309-310]

ABSA Bank Ltd v Standard Bank 1998 1 SA 242(SCA)

Saambou Bank Ltd v Essa 1993 4 SA 62(N)

De Vos 1987: 180-182

Van der Walt JC 1966 THRHR 220: 232-233

REMARK

1 The recovery of payments wrongly made by means of negotiable instruments has become of the most difficult and intricate issues in unjustified enrichment (**Casebook: Enrichment(3)**: 157 note (a)). Several factors contributed to the controversy, namely a number of
conflicting decisions, different viewpoints in regard to the correct analysis of the issues and the introduction of foreign solutions. In the past decade there had already been a trilogy of cases having expressed divergent views (see the cases to be read supra), until the issue “seems” to have been finally settled by the B & H Engineering case.

2 De Vos (1987: 180-181) is scratching the surface of the problematic topic by discussing two Supreme Court of Appeal cases, namely *John Bell and Co Ltd v Esselen* (1954 1 SA 147(A)) and *CIR v Visser* (1959 1 SA 452(A)). Broadly speaking the cases dealt with instances where A drew a cheque and handed it over to B to pay a specific debt. B, however, used the cheque to effect payment of his own debt to D or that of C to D. A failed to recover the money paid to D with the *condictio indebiti*. In both cases (*John Bell* and *Visser*) the opinion of the Court was that it was actually B (and not A) who paid the real and existing debt – therefore, it was no *indebitum*. In any case, a third party may very well pay another person’s debt. In addition it was argued in the case of *John Bell* that the drawer (A) had not consciously paid a debt believed to be due. The company could, therefore, not succeed with the *condictio indebiti*. De Vos (1987: 181) and Van der Walt (1966 *THRHR* 220: 232) reject the argument that payment was in effect made by B and not by A. De Vos (1987: 181 and Honoré AM “Condictio and payment” 1958 *Acta Juridica* 135-140) continu(es) on to say that in the case of *John Bell* a general mandate authorised the officials to sign cheques and A’s ignorance of the specific cheque payment is negligible. Payment in terms of the general mandate, was in reality “conscious” payment by A of a debt due. Besides this correct interpretation of “payment”, Eiselen & Pienaar (in their *Casebook: Enrichment*(3) (158 note (d)-159)) support the decision by the court, but for other reasons, *inter alia* that
the cheque was either consumed by D (leaving him non-enriched by the payment), or (in accordance with the viewpoint of Scholtens JE (1959 Annual Survey of SA Law 112)), because A was estopped from denying “conscious payment of an existing debt” and A could not, therefore, institute the *condictio indebiti* against D.

Even considering the case of *Visser*, it becomes evident that the different relationships amongst the drawer, bank and drawee need to be cleared up (see the recent case of *Di Giulio v FNB* 2002 6 SA 281(C)).

(i) If the bank had only been a conduit (*nuntius*) for instance, then the drawer (A) made the payment and it would certainly have been an *indebite* payment. In these circumstances, A would have had the *condictio indebiti* to recoup performance, except when D would have been able to prove non-enrichment, eg that he used the cheque to pay the debt of C.

(ii) Would the bank have been authorised (by way of a *mandatum*) by the drawer (A) to effect payment on the cheque in favour of D, then the bank would have performed in terms of a contract of work, whilst at the same time reduced its indebtedness to the drawer (A), and discharged A’s debt to the drawee. In this case, the bank made the payment from its own funds, but for the sake of A. If no mandate would have existed, then the bank would have consciously paid out a debt not due and the *condictio indebiti* would not have been available [for confirmation hereof, see *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 1 SA 242 (SCA): 252F-G]. Would the mandate have existed, A’s debt would have been wiped out, and if the
debt had not existed at all, the *condictio* would have lain in favour of A to reclaim the undue payment.

(iii) The bank could also have acted in a representative capacity on behalf of A. In this case, the principal would in effect have made the payment himself, and if the debt were non-existent, A would have been able to recoup the undue payment with the *condictio indebiti*.

3 Another problematic side of recouping payments (with the *condictio indebiti* or even the *condictio sine causa specialis*) made by way of wrongly paid cheques, is encountered when the bank negligently honours countermanded cheques. Three cases are in point, namely *Govender, FNB v B&H Engineering* and *Saambou Bank v Essa*. Without delving deeper into the subject, you are referred to authority quoted in *Casebook Enrichment(3)* 157 note (a), especially the discussion by C-J Pretorius in the 1994 *THRHR* on pp 332-338. Much background insight can also be gained from the article by Stassen JC en Oelofse AN “Terugvordering van foutiewe wisselbetalings: geen verrykingsaanspreeklikheid sonder verryking nie” 1983 *Modern Business Law* 137-147. See also subsequently *Nedcor Bank Ltd v ABSA Bank Ltd* 1995 4 SA 727(W), *Commissioner of Customs v Bank of Lisbon International Ltd* 1999 1 SA 205(N), and *Kunneke v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1997 3 SA 300(T): 313E-F. In the latter case, the existence of a contract of mandate (between the bank and drawer) excluded the application of the *negotiorum gestorum utilis* (313 I-J).

4 The whole intricate and confusing issue of the negligent (wrongful) payment of countermanded cheques in unjustified enrichment law “seems” to have been settle by the Appellate Division in *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 [see
discussion in *Casebook Enrichment*(3) 156-160]. In this case Grosskopf JA not only picked the *condictio sine causa specialis* as the appropriate action for the so-called “bank” cases, but also found that the drawee (B & H Engineering) could not have been enriched. The character of the validly issued cheque being stopped before payment had never been changed and remained a valid instrument of payment between the drawer (Sapco) and the drawee (B & H). The countermand certainly changed the contractual relationship between the drawer (Sapco) and the bank (FNB) on whom the cheque was drawn. When B & H received payment in terms of the unauthorised conduct of the bank, the original debt (of R16 048) between the creditor (B & H) and debtor (Sapco) was discharged. The payment wiped out the original claim to performance having the effect that the creditor (drawee), known as B & H Engineering, remained in the same net position – no enrichment. Consequently, the appeal succeeded depriving the bank of a claim based on the *condictio sine causa specialis* against the drawee (B & H). [In the case of *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 1 SA 242 (SCA) it was confirmed that the bank paying out could institute the *condictio sine causa specialis* against the collecting bank who presented a cheque with forged signatures on it for payment].

Although it would seem farfetched to deprive the payer bank of an enrichment action against the drawee who received payment from the neutral functionary who made the payment consciously, but without it being owed, from own funds. The Court, nevertheless, remarked *obiter* that the bank would *prima facie* have the *negotiorum gestio* against the drawer. See also *Lotz/Brand LAWSA “Enrichment”* at par 220 (c) fn 11; *cf* on this *Kunneke v ENB van Suidelike Afrika Bpk* 1997 3 SA 300 (T): 313 I - J.
ACTIVITY PERTAINING TO THE PAYMENT OF COUNTERMANDED CHEQUES

1. O drew a cheque on NPS (drawee) bank in favour of P for agreeing to transport funeral attendees at a future date. In the meantime, O concluded a contract for cheaper transport with another company and duly countermanded payment to P. Totally ignorant about this, P performed as promised on the due date, but O and the others never showed. Nevertheless, P, upon presentation of the cheque, obtained payment from an employee of NPS (who had done so negligently). O refuses to be debited with the amount of the cheque and P denies any liability.

You are called upon to advise NPS, O and P. Advise them as completely as possible. [10]

2. Steel Engineering Works (hereinafter SEW) was commissioned by Johns (hereinafter J) to manufacture goods. J drew a cheque on Lisbon Bank (hereinafter LB) in favour of SEW. SEW performed fully in terms of the piece job. SEW had presented the cheque for payment to LB and was paid out. Before presentment, however, J had countermanded payment. Although this was not timeously done, LB accepted the countermand and endeavoured to recoup their losses from SEW. Comment critically (referring to relevant authority if possible) on the following assertions: [5]

2 1 LB should have instituted the condictio indebiti against SEW. (2 X ½=1)

2 2 LB should have instituted the condictio sine causa specialis against SEW, because the countermand by J voided all subsequent transactions. (5 X ½=2½)

2 3 LB should have instituted the negotiorum gestorum utilis against J. (½)

2 4 LB had no claim whatsoever. (1)