LECTURE 7

4th CLASSICAL ENRICHMENT ACTION

CONDUCTIO SINE CAUSA SPECIALIS

(1st PART OF LECTURE 7)

STUDY:

Lotz/Brand LAWSA “Enrichment”: par 219-221

Sonnekus “Unjustified Enrichment” 329-379, 121-128

Van der Westhuizen v McDonald and Mundel 1907 TS 933: 936-944 [discussion by Casebook: Enrichment(3): 160-163]

Snyman v Pretoria Hypotheek Maatschappij 1916 OPD 263 [discussion by Casebook: Enrichment(3): 154]

OR Daniel Visser “Enrichment”: 478ff; 486-501; 559-561; 655-660 and 665

OPTIONAL READING
**REMARK:**

The *condictio sine causa* has two appearances, namely the *generalis* and the *specialis* (*Sonnekus “Unjustified Enrichment”* 335). The *condictio sine causa generalis* may very well be ignored for purposes of your studies, because it could (under the common law) be instituted in any of the circumstances in which the other classical enrichment actions could fit (see *Note below)*. Would any of the others lie, so would the *generalis*; if not, similarly the *generalis*.

In contrast to the above, the *condictio sine causa specialis* may be instituted (see examples by *Sonnekus “Unjustified Enrichment”* 333-335) under the following circumstances (developed in a casuistic way), namely

- Where the defendant/handler alienated or consumed in good faith (*bona fide*) the property of the plaintiff/owner, when the former acquired (a) possession/control thereof by way of a *negotium* between him and the owner (eg case of *Greenhills*; and also *Sonnekus “Unjustified Enrichment”* 342 ff), or (b) without a *negotium* gained possession/control of the owner’s property (whether money or goods) *ex causa lucrativa* (eg case of *Van der Westhuizen*).
• In the form of the so-called *condictio ob causam finitam* (*Sonnekus “Unjustified Enrichment”* 121-128), when the defendant/owner acquired goods on the basis of a valid *causa* which *causa* later on fell away by way of supervening impossibility (eg the cases of *Kudu Granite Operations v Caterna* 2003 5 SA 193(SCA), *Pretoria Hypothee*, and *Jacquesson v Minister of Finance* 2006 3 SA 334 (SCA)).

In the latter case (341) money was attached and declared forfeited to the State in view of fraud relating to the exportation of money [see discussion *Sonnekus “Unjustified Enrichment”* 106-110; Otto 2009 *TSAR* 417: 426-427] contravention of Exchange Control Regulations. After the convicted had been released from prison he was granted amnesty and the setting aside of all his convictions. He then sued the State to recover the forfeited money that had been transferred in terms of a valid *causa* that had since fallen away. Ponnan JA found that the *condictio ob causam finitam* should fail, because the appellant failed to show that the *causa* had indeed fallen away.

• Where the ownership of property is transferred *sine causa* (not based on a promise or gift) to the other party, but the circumstances are such that none of the other classical enrichment actions would lie *Sonnekus* (*“Unjustified Enrichment”* 335 and 253-256) reiterates that if the increase came about by way of mistake, then the *condictio sine causa* could not be instituted – the *condictio indebiti* would then be the appropriate action (see the case of *Govender*: 396H-397G). This qualification is, however, not consistently followed by the courts (see, for instance, *ABSA Bank Ltd v IW Blumberg and Wilkenson* 1997 3 SA
669(HHA)). The *specialis* has, nevertheless, a broader application. Under this so-called catch all banner the

(a) “bank” cases (where the bank has made payment under a countermand or forged cheque, eg *Govender*; *B & H Engineering v First National Bank*[see discussion *Sonnekus “Unjustified Enrichment”* 347-350]; *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 1 SA 242 (SCA) 252F-G [see discussion *Sonnekus “Unjustified Enrichment”* 338-340; 350-352]) are placed, as well as

(b) performances rendered subject to a unilateral assumption (pertaining to facts from the present or past, but is not based on a term in an agreement known as a “real” assumption), but the assumption turned out to be false.

With reference to the first instance (above) several cases found that the *bona fide* handler of property (eg money) could in effect not act in a wrongful way and that the value of the thing could not be claimed from him (see *Wolf v Richards* (1884), *Smit v Bester* (1904) and *Leal v Williams* (1906)). The first case in point relating to this issue in particular, was *Van der Westhuizen v McDonald & Mundel* (1907). In this case it was decided that when the handler acquired the thing by way of counter-performance (*ex causa onerosa*) and thereafter alienates or consumes it in good faith, then the *condictio sine causa specialis* would *not* lie. It is uncertain whether a similar finding will be made when the handler acquired the thing without performing himself (*ex causa lucrativa*) and then disposes of or consumes it in good faith (see *Sonnekus “Unjustified Enrichment”* 340-341). The *specialis* will definitely be available when *money* is acquired *ex causa lucrativa* and then alienated and consumed in a *bona fide* way. De Vos submits that it ought to be available when *property* as such is the object (*De
Vos 1987: 212). Although it is possible to deal with mala fide alienation and consumption in similar fashion, the appropriate actions ought rather be the actio ad exhibendum (for recent cases on this topic, see Frankel Pollak Vinderine Inc v Stanton NO 2000 1 SA 425(W) op 429A), or condictio furtiva (see First National Bank of Southern Africa Ltd v East Coast Design CC and Others 2000 4 SA 137(D) [see discussion Sonnekus “Unjustified Enrichment” 149-152]), or actio legis Aquiliae.

Sometimes instances of the condictio ob causam finitam (see Sonnekus “Unjustified Enrichment” 121-128) become problematic for the courts, because the courts do not reckon with how the contract is terminated. When breach of contract (Baker v Probert, and cancellation (Ace Motors (537F-H of the report)) are in view, or when the contract is rescinded due to misrepresentation/ duress/ undue influence, then it has nothing to do with this case of enrichment (see Sonnekus “Unjustified Enrichment” 336). Cancellation by agreement or breach of contract avail itself of contractual remedies, while rescinding the contract due to misrepresentation (and the other instances) leads to the appropriate remedy of restitutio in integrum.

Only cases where the contract is extinguished by supervening impossibility (eg superior force) call the condictio ob causam finitam into action.

The scope of the “catch all” cases is unclear and they have developed in a casuistic way. In the normal course of things it is seen to be cases where property has been transferred without it being based on a gift, payment, or promise – thus, without there being a legal ground (or sine causa (Govender 1984 4 SA 392(C): 396H-397G; Parkin v Smit)) for the shift in patrimony. Put in this way, it could easily be seen as a general enrichment action, but it is certainly not. It was not available in cases of a factum and earlier when a negotium was absent. In any case the courts have never applied (and will never apply) it as such (see Sonnekus “Unjustified Enrichment” 332 and 333). In Rulten (610E-G of the report) the court was
confronted with an *ultra vires* money loan transaction to a partnership; in *Govender* (396E-397G, 400C-H, 403C, 404A-B, 404 G-H and 405A-B) the court dealt with a bank erroneously paying out a “countermanded” cheque. In both cases the court applied the *specialis*. Another example of the *specialis* is the classic case of a gift donated to someone unilaterally assuming it to be the cousin of the donor, but the assumption turned out to be false. The donor will be able to recover the gift with the *condictio sine causa specialis*.

**ACTIVITIES PERTAINING TO THE SPECIALIS**

1. What is the difference between the *condictio indebiti* and the *condictio sine causa specialis* and why would you prefer the latter action to the former? Is the *sine causa specialis* subsidiary in nature?  
   
2. What is the legal position of a bank negligently paying out a cheque being properly countermanded by the drawer?  

3. Explain what is understood by the *condictio ob causam finitam* (a *species* of the *specialis*) and indicate why this type of enrichment action sometimes proves to be problematical for the courts.  

4. What is the cardinal difference (pertaining to the *causa*) between the *condictio causa data causa non secuta* and the *condictio sine causa specialis*?  

5. With B’s consent A buys a DVD at FurnishOK on B’s account. This is a credit agreement and FurnishOK retained ownership until the last payment is to be made. A has paid a R1000 faithfully, but then looses his job, and completely fails to make the other instalments. B takes possession of the DVD and has continued paying the monthly
instalments since. A is convinced that B is being enriched with the thousand rand he paid. Advise him as to his legal position.

AD HOC EXTENSIONS

ACTIO NEGO TJORUM GESTORUM UTILIS
(2nd PART OF LECTURE 7)

STUDY:

Sonnekus “Unjustified Enrichment” 153 ff

Lotz/Brand LAWSA “Enrichment”: par 222-224


Klug and Klug v Penkin 1932 CPD 401 [discussion by Casebook: Enrichment(3): 203-204]

Absa Bank Ltd t/a Bankfin v CB Stander t/a CAW Paneelkloppers 1998 1 SA 939(C) [discussion by Sonnekus 1997 TSAR 383-390; Casebook: Enrichment(3) 182-192]

Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd 1996 4 SA 19(A) [discussed by Casebook: Enrichment(3) 65-71]
OPTIONAL READING

De Vos 1987: 39-43 (read superficially), 83-86 (read superficially) en 213-219 (study)

Williams’ Estate v Molenschoot & Schep (Pty) Ltd 1939

Knoll v SA Flooring Industries Ltd 1951 1 SA 404(T) [De Vos 1987: 301-302]

Singh v Santam Insurance Ltd 1997 1 SA 291(A) [see discussion by court a quo, Santam Insurance Ltd v Devi 1994 3 SA 763(T) by Kritzinger KM in 1995 SALJ 221-227]

New Club Garage v Milborrow and Son 1931 GWL 86 [Casebook:Enrichment(3): 186-187]

REMARK:

Distinguish between the “ordinary” action for the administration of another’s affairs (the so-called actio negotiorum gestorum contraria) which is classified as a quasi-contractual action (or sui generis – an appellation preferred by Casebook: Enrichment(3) 181-182); and die abnormal administration action (the so-called actio negotiorum gestorum utilis). The former is not an enrichment action, because the gestor may claim all his necessary and useful expenses incurred reasonably on behalf and in the interest of the dominus (see Nodada Funeral Service CC v The Master & Others 2003 4 SA 422(Tk) on the existence of a so-called actio funeraria). The claim will be sustained even though the gestor failed to administer successfully. In contrast, the utilis action is an enrichment action, because
the gestor’s claim will be limited to the extent of the enrichment of the dominus at the time of the institution of the action. To be successful with the contraria, the gestor must prove several requirements, whilst circumstances will dictate when the utilis will lie (see Sonnekus “Unjustified Enrichment” 167-183 and 192-218 for a discussion of these circumstances).

Diagrammatically the differences can be expressed as follows:

<table>
<thead>
<tr>
<th>Actio negotiorum gestorum contraria (Normal administration action)</th>
<th>Actio negotiorum gestorum utilis (Abnormal administration action)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Gestor acts on behalf of the dominus without any authorization or ratification.</td>
<td>1 Where the gestor administers the interests of a minor. Pretorius v Van Zyl 1927 OPD 226</td>
</tr>
<tr>
<td>2 The management of the dominus’ interests must be on his behalf and in his interest and reasonable (utiliter coeptum) (the question is not whether the effort was successful, but whether the bonus paterfamilias would have incurred the same expenses).</td>
<td>2 Where the gestor acted against the express wishes of the die dominus. Standard Bank Financial Services Ltd v Taylam (Pty) Ltd 1979 2 SA 383(C)</td>
</tr>
<tr>
<td>3 The gestor must have acted with the intention to further the other person’s interests (animus negotia aliena gerendi). The gestor may not even have to know who the other person is or what his identity is. The gestor may, however, not act in his own interests, like the bona fide possessor. The gestor will also be entitled to the action if he was under the impression that he had received authorization, while there had been no such authorization.</td>
<td>3 Where the gestor acted mala fide in his own interest. Odendaal v Van Oudtshoorn 1968 3 SA 433(T)</td>
</tr>
<tr>
<td>4 The gestor must not act with the animus donandi</td>
<td>4 Where the gestor administered the affairs of another in the bona fide belief that they were his own. Klug and Klug v Penkin 1932 CPD 401</td>
</tr>
<tr>
<td>5 The gestor must not act against the express wishes of the dominus</td>
<td>5 In cases of indirect enrichment. ABSA Bank t/a Bankfin v Stander t/a CAW Paneelkloppers 1998 1 SA 939(C) Buzzard Electrical v 158 Jan Smuts Avenue Investments 1996 4 SA 19(A)</td>
</tr>
</tbody>
</table>

Retention rights (see Sonnekus “Unjustified Enrichment” 218-227) co-exist with the topic under discussion. They are “powers to withhold” acquired by the person (retentor) expending money, material, and labour to improve or to preserve/administer someone else’s property (with or without consent). These “rights” are actually entitlements vested in the retentor to withhold the use and enjoyment of the property from the owner until the former has been reimbursed for his expenditure. The retentor can’t sell the property to defray a
debt due (see Sonnekus 2009 *TSAR* 353-366). In other words the *retentor* retains (in his physical control) an object with substantial value to “compell” the debtor to pay a debt of relative small value. It is a form of security for the payment of expenditure for necessary and useful improvements effected. It is, however, never a cause of action. The retention right is accessory in nature and can’t exist without an underlying cause of action (*Buzzard* case), for example a contract (and then the retention right is known as a creditor/debtor lien), or an enrichment action (known as an enrichment lien) (*Brooklyn House Furnishers*). The former being personal and the latter entrenched in case law as limited real rights. See *Casebook Enrichment*(3): 206.

One of the instances where the *actio negotiorum gestorum utilis* as an enrichment action can be instituted is when indirect enrichment ensues (pertaining to this, see Sonnekus “*Unjustified Enrichment*” 58, 61, 84, 85, 86-87, 192-211 and 218). Normally (where only the enriched and impoverished parties are involved) the requirements of *sine causa* and “at the expense of” present little difficulty, but they do lead to controversy and uncertainty where a third party is introduced – the so-called indirect enrichment cases of which *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 1 SA 939(C) is an excellent example (see Sonnekus “*Unjustified Enrichment*” 178-179). For a discussion of the case, see *Casebook Enrichment*(3): 182-192 and *Lotz/Brand Enrichment*: par 209. For a comparative perspective, see Martinek M “Unjust enrichment issues in triangular situations of defective cashless payments – the German approach in comparative perspective” 2003 *TSAR* 94..

This case represents one kind of indirect enrichment, namely (called the “type one” enrichment in the *Buzzard* case [see discussion by Sonnekus “*Unjustified Enrichment*” 202-207]) where A, the impoverished party effects necessary or useful improvements to the property of O, the owner in terms of a contract with B, the third party. The Supreme Court of Appeal (in
Buzzard) left open the question of indirect enrichment in the “first type” cases. Some of the writers (like Sonnekus 1996 TSAR 581-590 and 1997 TSAR 386-389) is of the view that even this type does not pass the *sine causa* requirement, because the impoverishment is the result of a *contract* between the impoverished party and the third party and is therefore *cum causa*. This is the conclusion drawn by the SCA in the “type two” enrichment cases (*Buzzard* in point), namely where A, the sub-contractor, makes necessary or useful improvements to the property of O, the owner, in terms of a sub-contract with B, the main contractor. In this instance, however, the improvements are effected as a result of the main contract between O and B and enrichment won’t ensue.

Some other writers (*Casebook Enrichment* (3): 70-1 note (d)) opine that in the “type one” enrichment cases (even the “type two” as well (Visser & Miller 2000 *SALJ* 594 at 605)), the focus should shift from the impoverished party (and the *iusta causa transferendi*) to whether the enriched party should retain (*iusta causa retinendi*) the enrichment or not. If there is no reason for the enriched party to retain the enrichment, then the impoverished may institute an enrichment claim against him. In this instance the agreement between the impoverished and the third (commissioning) party becomes *res inter alios acta*, because it cannot be enforced effectively, either because the third party disappeared or became insolvent. In the words of Van Zyl J in *ABSA v Stander*, it would be “unfair” for the enriched party to benefit from the improvements to his property, while the impoverished party expended money, material and labour to effect these improvements, but is stranded in having a useless claim against the third party.

O’Brien (2005 *TSAR* 1-17) suggests 3 possible solutions for the complex problem of indirect enrichment. In view of *Buzzard* (the so-called type 2 situations) he recommends the abstract model in terms of which indirect enrichment is on policy grounds excluded, notwithstanding the merits of the individual case (pp 11-12). For the type 1 cases (where the SCA has
expressed favour for the application of indirect enrichment (see p 2 of O’Brien’s article) he promotes the concrete model subject to subsidiarity (pp 12-16). According to this model, the plaintiff has to enforce the contractual claim against the other contracting party upfront, but may in the individual concrete situation (considering the relevant policy considerations) institute an enrichment action against the owner. In this case, policy based considerations do not discourage the application of indirect enrichment per se. The third model is not subject to subsidiarity and is aptly called the concrete approach. This third model will certainly not (according to O’Brien) quench fears of unwanted and unlimited indirect enrichment liability.

This shift in the contents of the sine causa requirement (from the rigid “reason in law” to the flexible “reasonableness and fairness”) is in line with the growing emphasis on the concepts of reasonableness and fairness propounded in the Constitution (but see the critical comments by Sonnekus “Unjustified Enrichment” 207 ff).

Legal causation in the context of “at the expense of” requirement is progressively played (see Sonnekus “Unjustified Enrichment” 89 and 198) down as a factor limiting indirect enrichment liability in favour of the “unsophisticated justice” idea (McCarthy Retail v Shortdistance Carriers 2001 3 SA 482 (SCA) at 493B-H).

**ACTIVITIES ON THE UTILIS**

1. Distinguish between the actio negotiorum gestorum contraria and the actio negotiorum gestorum utilis. Indicate the instances when the latter will find application and make it clear why the utilis is an enrichment action.  

   [1]  

   [Make use of Casebook Enrichment(3): 181-182 to answer the question]
2 Compare the cases of *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd* 1996 4 SA 19 (A) and *ABSA Bank Ltd t/a BANKFIN v Stander t/a CAW Paneelkloppers* 1998 1 SA 939(C) and tabulate the differences / resemblances. [10]


3 K bought a vehicle in terms of a credit transaction. Ownership was retained by Bankfin (the finance corporation). K then loaned the vehicle to Bez. Bez was involved in a car accident and damaged the borrowed vehicle. Bez took the vehicle to be repaired by S, a panel-beater. Bez had never disclosed that he was not the owner of the vehicle. The vehicle was properly repaired, but Bez disappeared without trace. S is still in possession of the car and wants to recover the repair costs from K (the “registered” owner). K refuses to pay because S concluded an agreement of work with Bez. Bankfin (as the “substantive” owner) wants to vindicate their property from S. S is convinced that Bankfin as owner has been enriched and that he (S) acted as *negotiorum gestor* to manage the affairs of Bankfin and should therefore be refunded for expenses incurred, but that he would at least have a retention right.

3.1 Does S have an enrichment action *cum* retention right? [5]

3.2 What defences will Bankfin be able to raise? [2]

3.3 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(K). [3]
4 The survivor (L) concluded a contract with the undertaker (B) to provide the coffin and the funeral service for the deceased (E) amounting to R3000. Both L and B “looked towards” the deceased estate for payment. Shortly after the funeral B lodged a contractual claim against the estate for R4000. The Master only issued the letter of L’s appointment as executor three months after the funeral had taken place. L (as executor) refused to acknowledge B’s inflated claim and offered R3000 as full and final settlement. B refused the offer and instituted proceedings in court (based on contract as cause of action against the executor). L’s defence was that the estate could not be liable contractually because he had no capacity to act as executor at the time of the conclusion of the contract.

What advice relating to the cause of action and amount can be afforded to B? (Clue: what about the possibility of indirect enrichment?)

[10]

[For assistance to solve the problem, see *Williams’ Estate v Molenschoot & Schep (Pty) Ltd* 1939 CPD 360: 367 and 376 (discussed in *Casebook: Enrichment*(3): 187)]