they are to be applied in our law. It is especially unclear why the fact that a transfer was not owed, i.e. that it failed to achieve the purpose of fulfilling an obligation, cannot feature prominently as a reason for restitution in cases of enrichment by transfer in South African law. Arguments that may warrant denying it such status in English law do not apply to South African law. Conversely, certain structural features of English law may explain why mistake enjoys prominence in deciding whether to award restitution in that system, but these features are not shared by South African law. And it is hardly clear what South African law stands to benefit from resorting to English terminology such as that "failure of consideration" is a reason for restitution.

It has been argued here that we may have much to gain by remaining faithful to the more clearly-established bases for differentiating between the various cases of enrichment by transfer. The various *condictiones* can easily be explained as means to obtain restitution in various cases where a transfer failed to achieve the purpose for which it was made. On this approach, the distinctive feature of the *condictio indebiti* is that it is used to reclaim a transfer that was made to fulfil an obligation, but failed to do so. It is perfectly possible to recognise that, within this category, further considerations such as mistake and duress influence the determination whether to award restitution without having to resort to the loaded language of unjust factors.

Finally, it is also unnecessary to subscribe to analyses based on unjust factors to support proposals for reform such as abolishing the requirement that a mistake as to liability has to be excusable, or the requirement that a protest must have accompanied an undue transfer made under duress. These proposals can easily be supported without having to commit to a particular approach to structuring enrichment liability.

*Jacques du Plessis**

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Rationalising the South African Law of Enrichment†

A. ENRICHMENT LIABILITY IN SOUTH AFRICA: A SHORT INTRODUCTION

Roman law recognised various claims which we would now regard as arising from the enrichment of the defendant: these included (but were not limited to) the

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† The word "enrichment" is left unqualified in order to avoid committing to the theoretical positions inherent in the terms "unjust" and "unjustified".

condictio indebiti; *condictio causa data causa non secuta; condictio ob turpem vel iniustam causam*; *condictio sine causa specialis* (including the *condictio ob causam finitam*); the claim against a person having limited legal capacity to act; the *actio de in rem verso*; the claim to recover the value of labour and materials in case of mistaken improvement to another's property; and the claim modelled on the action of the *negotiorum gestor* (necessitous intervener) in respect of his expenses. But, as is well known, there was no such thing as a law of enrichment in Roman law. Gaius recognised that obligations could arise from contracts, from delict and "from various types of causes";[1] Pomponius stated that, "by the law of nature it is fair that no-one become richer by the loss and injury of another";[2] and Justinian grouped together in his *Institutes* various miscellaneous causes of action as obligations arising *quasi ex-contractu* (as if upon a contract).[3] But at no point in Roman law was enrichment recognised as a substantive category alongside contract and delict.

This breakthrough occurred only in the seventeenth century, in the work of Hugo Grotius. Indeed, even Grotius did not do much more than identify the principle against unjustified enrichment; the contents of the conceptual unity which he recognised were still essentially Roman, i.e. both fragmentary and dominated by the ancient forms of actions. This was the position in South African law well into the twentieth century. Indeed, it was only with the publication of Wouter de Vos's *Verrykingsaanspreeklikheid* in 1958 that the difficult work of systematising the law of enrichment – of rationalising the ancient Roman procedural categories in terms of substantive causes of action, organised according to principle – began.[4] The decision of Schutz JA in the Supreme Court of Appeal in *McCarthy Retail Ltd v Shortdistance Carriers CC*[5] in 2001 represented an invitation and a challenge to South African enrichment lawyers: to lead the way in seeking out new causes of action not previously identified in South African law; and, perhaps more importantly, to attempt the rationalisation of existing causes of action, in order to free them of the shackles imposed by the ancient actional categories.[6] According to the approach adopted by Schutz JA, South African law recognises four general principles of enrichment liability: the defendant must be enriched; the plaintiff must be impoverished; the defendant's enrichment must be at the plaintiff's expense, i.e. there must be an appropriate causal link between the defendant's enrichment and the plaintiff's impoverishment; and the defendant's enrichment must be unsupported by any legal ground/unjustified.[7] Self-evidently, it is the last of these four – the absence of legal

1 D 44.7.1 pr.

2 D 12.6.14.

3 J Inst 3.27.

4 See W De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg*, 3rd edn (1987) ch 7, especially 328-29.

5 *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] (3) SA 482 (SCA).

6 *McCarthy Retail v Shortdistance Carriers* at paras 8 and 10. On the nature of the general enrichment action recognised in the *McCarthy* case, and on its relationship to the decision of the Inner House of the Court of Session in *Shilliday v Smith* 1998 SC 725, see N Whitty and D Visser, "Unjustified Enrichment" in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) at 405-406.

7 See D Visser, *Unjustified Enrichment* (2008) especially ch 3; J du Plessis, *The South African Law of Unjustified Enrichment* (2012) especially ch 2. De Vos did not list the impoverishment of the plaintiff as

ground principle – which gives shape and coherence to the subject.[8] But the bare identification of these principles is only the first step in the rationalisation project. Far more important and difficult is the task of giving expression to these principles at a lower level of generality.

B. THE WILBURG-VON CAEMMERER TAXONOMY

Paragraph 812 of the German Civil Code (BGB) begins with a general enrichment action. According to the first sentence of paragraph 812(1), a person who, through the performance of another or in some other way, acquires something at the expense of that other without any legal ground is bound to return it. The "big idea" which holds the subject together is the absence of any legal ground for the defendant's enrichment. Yet the provision also distinguishes between different species of enrichment claim according to the manner in which the enrichment was acquired. In modern German law this distinction is further refined through the so-called Wilburg-Von Caemmerer taxonomy, which distinguishes four species of enrichment claim in respect of:

1. enrichment by transfer or deliberate conferral (*Leistungskondiktion*);
2. enrichment arising from the defendant's unauthorised encroachment on or interference with the plaintiff's rights (*Eingriffskondiktion*);
3. enrichment arising from the plaintiff's unauthorised improvement of the defendant's property (*Verwendungskondiktion*); and
4. enrichment arising from the plaintiff's discharge of the defendant's debt or fulfilment of his obligation (*Rückgriffskondiktion*).

Following the sea-change in *McCarthy*, the Wilburg-Von Caemmerer taxonomy has exercised enormous influence over South African enrichment lawyers, having been adopted first by Danie Visser in his *Unjustified Enrichment*[9] and now by Jacques du Plessis in *The South African Law of Unjustified Enrichment*.[10] Visser distinguishes between enrichment by transfer; imposed enrichment (enrichment due to unauthorised expenditure); and enrichment by invasion of rights (or by act of the party enriched). Du Plessis's book is principally divided into sections on enrichment arising from a transfer made to another or "giving"; enrichment imposed on another, which is further divided into sections on the unauthorised improvement of another's property and the unauthorised fulfilment of another's obligation; and enrichment by taking from another or infringement of another's rights. The Wilburg-Von Caemmerer taxonomy has been similarly influential among writers in Scotland.[11]

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one of the requirements of liability, but he did recognise the existence of a "loss-cap": the plaintiff could claim either his enrichment or his impoverishment, whichever was the lesser.

8 See e.g. J du Plessis, "Towards a rational structure of liability for unjustified enrichment: thoughts from two mixed jurisdictions" (2005) 122 SALJ 142 at 143.

9 See n 7 above; foreshadowed by Whitty & Visser (n 6).

10 See n 7 above.

11 See e.g. the division of enrichment "in another way" adopted by Robin Evans-Jones in *Unjustified Enrichment Vol II, Enrichment Acquired in any Other Manner* (2013). See also H L MacQueen's

Again, this development – the analysis of the Scottish law of enrichment according to the manner in which the enrichment was acquired, following German law – appears to have been stimulated in large part by a single judicial decision: in this case the decision of Lord President Rodger (as he then was) in *Shilliday v Smith*.[12]

The adoption of the German taxonomy matters enormously when it comes to enrichment "in another way". The analysis of enrichment according to the manner in which it is acquired permits the systematisation of existing claims and the recognition of new ones in areas of law which are seldom litigated. An example of such systematisation in the South African context can be found in du Plessis's innovative treatment of the action modelled on the claim of the *negotiorum gestor* for his expenses.[13] As for the recognition of new claims, here one may refer to Visser and du Plessis' proposals for a South African *Eingriffskondiktion*, a claim in respect of enrichment arising from the defendant's unauthorised encroachment on or interference with the plaintiff's rights.[14] Yet there is in truth little coherence between these different claims: the plaintiff's cause of action arises by virtue of the fact that she can bring her claim within a particular type of case, whether the *Eingriffskondiktion*, *Verwendungskondiktion* or *Rückgriffskondiktion*. To use Martin Hogg's language, this is an "unjustified if" approach.[15] Of course the classification is not without an anchor, in that it is made by reference to the primary criterion of the nature of the mode of enrichment.[16] But the "unjustified" nature of the defendant's enrichment is of relatively little importance in this context. Even in German law, in which the absence of legal ground approach to enrichment is most fully realised, no general concept can be formulated which captures the meaning of "legal ground" across all these cases, in the sense that its absence furnishes the central reason for restitution.

In the context of enrichment by transfer or deliberate conferral, on the other hand, German law accords the legal ground concept a relatively precise meaning: contractual and statutory obligations; gifts and other transfers made gratuitously; transfers made *ob rem*, i.e. against an agreed non-contractual reciprocation or other future event; contracts unenforceable for lack of form; gambling debts, prescribed debts, etc.[17] The absence of a legal ground in this sense forms part of a general rule for resolving individual cases. In other words, the fact that the defendant has been enriched through the performance of another without any legal ground in this narrow sense is a sufficient reason why restitution of that enrichment should follow. This does

division of the subject into "transfer", "imposition" and "taking", in *Unjustified Enrichment*, 3rd edn (2013) 17, referred to (in an earlier edition) by M Hogg, "Unjustified enrichment in Scots law" (2006) 14 RLR 1 at 11-14.

12 1998 SC 725. On the impact of this decision see e.g. R Evan-Jones, *Unjustified Enrichment Vol I, Enrichment by Deliberate Conferral: Condictio* (2003) 19-24.

13 Du Plessis, *Unjustified Enrichment* (n 7) ch 10. See further my review of his book: (2013) 24 Stell LR 638 at 641-642.

14 Visser, *Unjustified Enrichment* (n 7) ch 11; Du Plessis, *Unjustified Enrichment* (n 7) ch 11 and 12.

15 Hogg (n 11) 11-14.

16 Hogg (n 11) 12.

17 See, e.g., G Dannemann, *The German Law of Unjustified Enrichment and Restitution* (2009) 37-44, 45-49.

not mean that no defences are possible: for example, if the recipient of an *indebitum*, a payment not owed, knows that the plaintiff paid it in the belief that it was owing, his claim is barred (paragraph 814 BGB). Some distinguish, therefore, between a legal title in this narrow sense and a wider legal ground concept which encompasses also "a number of other issues surrounding the justified or otherwise nature of the retention."[18] Nevertheless, in principle at least, restitution is "automatic" in the absence of a legal ground in the narrow sense; Hogg calls this the "unjustified unless" approach.[19] It follows that the adoption by South Africa (or Scotland) of the substance of the German *Leistungskondiktion* would be far more radical than the adoption of the Wilburg-Von Caemmerer taxonomy itself. To what extent should South African law approach the German position in this respect?

C. ENRICHMENT BY TRANSFER

I began by emphasising the degree to which the South African law of enrichment adheres to its Roman-law roots. This is true, equally, of the law of enrichment by transfer in particular. This area remains dominated by the enrichment *condictiones* of the late Roman tradition. These are the *condictio indebiti*, the *condictio causa data causa non secuta*, the *condictio ob turpem vel iniustam causam*, and the *condictio sine causa specialis*, which includes the *condictio ob causam finitam*. This is perhaps no different to what we would expect in an uncodified Civil Law system like Scotland or South Africa. But in truth, to speak of a *condictio* in the context of any legal system other than the Roman one is nonsense. The *condictio* was one of the forms of action of the Roman formulary system: an abstract debt action applied to effect the restitution of money and goods on grounds now identified as contract, delict and enrichment.[20] The *condictio* survived the demise of the Roman actional system only as a convenient label to designate various substantive causes of action, and it is in this guise that the *condictiones* passed into Medieval and early modern legal usage and from there into South African and Scottish law. Nevertheless, in Visser's words, "In South African law... it is not so much a question of the forms of action ruling us from their graves, but that they have never died."[21] The best illustration of this point – fuller investigation of which lies outside the scope of this paper – is that the *condictio* of modern South African law, like that of the Roman formulary system, remains limited to the recovery of money and goods transferred: it does not extend to the deliberate conferral of services.[22] Again, it is only in the decade since the *McCarthy* case that the rationalisation of the *condictiones* has been systematically undertaken, in the

18 Hogg (n 11) 11. See generally du Plessis (n 8).

19 Hogg (n 11) 8-15.

20 See H F Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law* 3rd edn (1972) 214-215.

21 Visser, *Unjustified Enrichment* (n 7) 4.

22 This is to be contrasted with the position in Scotland after *Shilliday v Smith*. See, e.g., Evans-Jones, *Unjustified Enrichment Vol I* (n 12) 19 ff.

work of Visser and du Plessis, and most recently in my own book.[23] Important questions remain.

First, what are the substantive causes of action described by the labels *condictio indebiti,* etc: what does it mean when the courts classify a particular cause of action as an instance of the *condictio indebiti* rather than the *condictio causa data causa non secuta*? Second, are these truly independent causes of action which remain distinct from one another, or rather only typical fact complexes all of which can be subordinated to a single principle, namely a version of the absence of legal ground approach? And third, do the *condictiones* exhaust the entire field of enrichment by transfer? If not, what lies outside them?

(1) Rationalising enrichment by transfer: Visser and du Plessis

Du Plessis's treatment of enrichment by transfer is structured around the traditional enrichment *condictiones*. He treats, in order, enrichment arising from a transfer that failed to fulfil an obligation (the *condictio indebiti*); enrichment arising from a transfer that failed to achieve a future lawful purpose other than fulfilling an obligation (the *condictio causa data causa non secuta*); enrichment arising from a transfer made for an illegal or immoral purpose (the *condictio ob turpem vel iniustam causam*); and finally instances of the residual *condictio sine causa specialis*. This is his answer to the first question posed above. Visser's approach departs more radically from the traditional account. He subsumes all three principal *condictiones* within a single substantive category, "reversing an undue transfer". This category is then further divided as follows:

1. transfer of money or property to fulfil a putative obligation ("mistaken payment");
2. transfer of money or property under compulsion;
3. transfer of money or property in terms of an illegal agreement;
4. knowing transfer of money or property not to fulfil an obligation but to achieve a specific purpose.

Of these subdivisions, the first two correspond to the *condictio indebiti*, the third to the *condictio ob turpem vel iniustam causam* and the last to the *condictio causa data causa non secuta*. Their accounts differ also in that Visser recognises a further major category within enrichment by transfer, "reversing transfers in the context of failed contracts", whereas du Plessis excludes these cases, preferring to assign them to contract itself.[24] Thus, du Plessis draws the boundaries of enrichment by transfer

23 H Scott, *Unjust Enrichment in South African Law*: *Rethinking Enrichment by Transfer* (2013)

24 Thus, du Plessis excludes the restitution of transfers made in performance of contracts which subsequently fail for impossibility (i.e. frustration); the restitution of performance in terms of voidable contracts subsequently rescinded; the restitution of transfers in terms of a contract subject to an uncertain event (a condition which does not materialise or a modus which remains unfulfilled); the restitution of performance in terms of an inchoate (void) agreement with a minor; the claim in respect of work done or services rendered imperfectly in terms of a contract subsequently cancelled; and a few other residual instances. Both authors deal with certain instances of the residual *condictio sine*

significantly more narrowly than Visser. Yet in certain essential respects their analyses of the three nominate *condictiones* – the core of enrichment by transfer – are similar.

For Visser, the failure of the purpose of the plaintiff's transfer serves as a species of algorithm or thinking-tool, both in this narrow context and throughout enrichment by transfer. The failure of the plaintiff's purpose does not provide a conclusive reason for restitution in itself, but it does render the transfer at least prima facie unjustified in the broad sense.[25] In the same way, Du Plessis advocates a general approach to the *condictiones* based on the failure of the purpose of the plaintiff's transfer, although he, too, expresses some scepticism as to the universal explanatory power of such an approach.[26] Thus it is evident that both authors incline towards the German *Leistungskondiktion* in their analysis, and more precisely to a version of that claim according to which it is the failure of the plaintiff's purpose in performing which triggers restitution.[27] This is clear, in particular, from their treatment of the *condictio indebiti*, literally "the claim to recover something not owed", the most widely used and wide-ranging of the enrichment *condictiones*. For Visser, because most transfers are made in order to discharge a liability, the absence of a relationship of indebtedness between the parties will generally give rise to restitution without more.[28] Subjective considerations such as mistake or duress on the part of the transferor might well form part of the overall explanation as to why enrichment ought to be restored: indeed, mistake is often the reason why the plaintiff's attempt to discharge an obligation has failed.[29] But as I understand Visser's account, such primary facts are not to be treated as elements of a successful action, to be proved by the plaintiff in every case; it remains open to the plaintiff to adduce alternative reasons why the enrichment is unjustified in the particular context.[30] Similarly, in the context of his treatment of the *condictio indebiti*, du Plessis acknowledges the importance of primary facts such as mistake and duress. Yet the focus of his analysis falls squarely on different species of invalidity; that is, on different fact scenarios in which transfers are made which fail to fulfil obligations and which accordingly lack any legal ground to support them.[31]

Thus, to turn to the second question posed above, it seems that both Visser and du Plessis regard the traditional enrichment *condictiones* as labels describing typical fact complexes all of which can be subordinated to a single general principle, the failure of the plaintiff's purpose. This is particularly evident in the case of the *condictio indebiti*, which has a strong claim to constitute a general action based on the absence of relationship of indebtedness between the parties to the transfer.

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causa specialis outside the scope of enrichment by transfer entirely, i.e. in the context of enrichment by invasion of rights.

25 Visser, *Unjustified Enrichment* (n 7) 252-53.

26 Du Plessis, *Unjustified Enrichment* (n 7) 67.

27 Regarding the objective and subjective versions of the *Leistungskondiktion*, see, e.g., Scott, *Unjust Enrichment* (n 23) at 170-172.

28 This is the thinking behind his choice of "reversing an undue transfer" as the over-arching category which comprises all three nominate *condictiones*: Visser, *Unjustified Enrichment* (n 7) 274-275.

29 Visser, *Unjustified Enrichment* (n 7)187.

30 Ibid.

31 Du Plessis, *Unjustified Enrichment* (n 7) 103-129.

They do, admittedly, acknowledge the role played by primary facts like mistake in justifying judicial decisions. Yet that role is, at its strongest, a subsidiary one. They do not regard primary facts such as mistake as playing a key role in explaining restitution.

(2) Rationalising enrichment by transfer: unjust enrichment in South African law

My central argument in *Unjust Enrichment in South African Law* is that the analyses proposed by Danie Visser and Jacques du Plessis do not accurately reflect the true analytical structure of the modern South African law of enrichment. In fact I differ with them regarding the answers to all three of the questions set out in the introduction to this section. Regarding the question whether the *condictiones* stand for separate causes of action distinct from one another, or rather only typical fact complexes all of which can be subordinated to a single principle, I prefer the first alternative. Regarding the identification of the substantive causes of action described by the labels *condictio ob turpem vel iniustam causam*, *condictio causa data causa non secuta*, and (centrally) *condictio indebiti*, I argue that these should be analysed at least partly in terms of unjust factors, such as those applied in English law. Finally, I argue that far from exhausting the entire field of enrichment by transfer, the *condictiones* have historically been supplemented and indeed challenged by another remedy of the uncodified Civil Law, the extraordinary, equitable remedy of *restitutio in integrum*, and that it is largely due to the influence of this remedy that unjust factors figure so prominently in modern South African law.

(a) Unjust factors and the condictiones

We can deal briefly with the *conditio causa data causa non secuta* and *condictio ob turpem vel iniustam causam.* If it be accepted that these labels denote independent causes of action – the claim arising from a transfer made to achieve a future purpose which has failed (other than the fulfilment of an obligation);[32] the claim arising from a transfer made for an illegal or immoral purpose – then it is clear that those causes of action correspond to the unjust factors of failure of consideration and illegality respectively, as set out in Burrows' *Restatement of the English Law of Unjust Enrichment* at sections 15 and 20.[33] The first of these is an instance of qualified intent, part of Birks's major category of vitiated voluntariness, described in section 3(2)(a) of the *Restatement* as that class in which "the claimant's consent to the defendant's enrichment was impaired, qualified or absent". The second forms part of Birks's category of policy-motivated unjust factors, described in section 3(2)(b) of the *Restatement* as that class of cases in which "even though the claimant consented to the defendant's enrichment, there is a valid reason why the enrichment is unjust".

32 According to orthodoxy, the restitution of contractual performance is excluded from the scope of the *condictio causa data causa non secuta* in both Scottish and South African law.

33 A Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012)

By contrast, the *condictio indebiti* in its "pure" form implies no unjust factor within the standard common-law taxonomy. It resembles rather the claim triggered by "absence of consideration" recognised by the English Court of Appeal in *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council*.[34] Yet, here too, it is possible to assert the analytical importance of unjust factors. In short, I argue in my book that the *condictio indebiti* arises not only from the absence of any liability on the part of the plaintiff to make the transfer, but also from the existence of a specific reason for restitution: so far the list of such unjust factors includes mistake,[35] compulsion[36] and incapacity,[37] comprising both minority and certain forms of juristic incapacity, but a case can be made for failure of consideration here too.[38] Thus it appears that unjust factors furnish an important part of the explanation – both doctrinal and purely normative – for the restitution of transfers in South African law. It is a law of unjust as well as unjustified enrichment.

Again, the parallels with the English law of unjust enrichment are close. Mistake, compulsion and minority feature prominently in the list of unjust factors set out in the *Restatement of the English Law of Unjust Enrichment* – in section 10 (mistake); section 11 (duress); and section 14 (incapacity of the individual) – while unlawful conferral of a benefit by a public authority (section 21) appears to overlap partially with juristic incapacity: see especially section 21(4).[39] Mistake, compulsion and minority correspond roughly to Birks's original sub-category of impaired intent, which, as already discussed, forms part of the major category of factors vitiating voluntariness;[40] in the language of section 3(2)(a) of the *Restatement* they are class-one cases. Juristic incapacity, on the other hand, is better explained as an instance of policy-motivated restitution;[41] in the *Restatement*, a class-two case. Moreover, it is highly significant that the *Restatement* treats the absence of a relationship of

34 *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215.

35 Scott, *Unjust Enrichment* (n 23) chs 2 and 3.

36 Scott, *Unjust Enrichment* ch 4, especially 121-122 and 125-128.

37 Scott, *Unjust Enrichment* ch 5, especially 149-151 and 160-161.

38 See *Legator McKenna Inc v Shea* 2010 (1) SA 35 (SCA) and the discussion of that case and its context in Scott, *Unjust Enrichment* (n 23)184-87.

39 See generally Burrows, *Restatement* (n 33). As for the scope and content of these unjust factors, here too there is considerable overlap between English and South African law. Compare, for example, the definition of duress offered in ss 11(1)-(3) of the *Restatement* with the position regarding the restitution of compelled transfers in modern South African law, summarised at 121-122 of Scott, *Unjust Enrichment*. Nevertheless, there remain significant differences. For example, whereas the English unjust factor of mistake includes misrepresentation (see e.g. s 3(7) of the *Restatement*), the restitution of performance under a contract voidable for misrepresentation is not typically regarded as part of the law of enrichment in South Africa. The same is true of performance under a contract voidable for duress. See further C(1) above and C(2)(c) below.

40 Regarding mistake see, e.g., P Birks, *An Introduction to the Law of Restitution,* revised edn (1989) 146-173; G Virgo, *The Principles of the Law of Restitution*, 2nd edn (2006) ch 8; A Burrows, *The Law of Restitution*, 3rd edn (2011) ch 9. Regarding compulsion, see Birks, *Introduction* 173-203; Virgo, *Restitution* ch 9; Burrows, *Restitution* ch 10. Regarding minority, see Birks, *Introduction* 216-218 (part of the wider category of personal disadvantage, which in turn forms part of inequality); Burrows, *Restitution* 311-314 (part of the wider category of human incapacity); cf Virgo, *Restitution* 387.

41 Regarding juristic incapacity, see Burrows, *Restitution* (n 40) 517-520.

indebtedness between the parties as an element in these restitutionary claims. This is evident, first, from the general provision in section 3(6) – "In general, an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation" – as well as the formulation of that rule at the level of the individual unjust factors of mistake, duress and incapacity in sections 10(6), 11(6) and 14(4).[42]

Thus factoring in not only the *condictio indebiti* but also the *condictio causa data causa non secuta* and *condictio ob turpem vel iniustam causam,* a provisional list of unjust factors at work in the South African law of enrichment by transfer might look like this:

1. mistake;
2. compulsion;
3. minority;
4. juristic incapacity;
5. failure of consideration;
6. illegality.

In all cases, as in section 3(6) of the English *Restatement*, it would be a necessary condition for recovery that the transfer was unjustified in the sense that it was unsupported by a valid contractual, statutory or other legal obligation. In the context of the first four unjust factors in particular this would have to be independently demonstrated, as in sections 10(6), 11(6) and 14(4) of the *Restatement*.

(b) Illustrations from the cases

It is not possible to reproduce in full here the evidence adduced in my book in support of the central propositions set out above. However, the analytical significance of mistake in particular can be demonstrated with reference to the decisions in two important cases: *Willis Faber Enthoven (Pty) Limited v Receiver of Revenue*[43] and *Affirmative Portfolios CC v Transnet t/a Metrorail*.[44]

Willis Faber Enthoven (Pty) Ltd, a company formed in 1985 when two separate companies trading as insurance brokers merged, had instituted action in respect of certain payments made by those companies to the Receiver of Revenue. The companies, Willis Faber and Robert Enthoven, had believed that they were liable to

42 Cf R Stevens, "Is there a Law of Unjust Enrichment?" in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (2008); G Virgo, "Demolishing the Pyramid: the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment" in A Robertson and T H Wu (eds), *The Goals of Private Law* (2009) 477; C Mitchell et al (eds), *Goff and Jones: the Law of Unjust Enrichment*, 8th edn (2011) para 1-09 and the discussion of justification grounds in ch 2 and 3; Burrows, *Restitution* (n 40) 88-91 and now "Is There a Defence of Good Consideration?" in C Mitchell and W Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment* (2013) ch 7.

43 *Willis Faber Enthoven (Pty) Limited v Receiver of Revenue* 1992 (4) SA 202 (A). See Scott, *Unjust Enrichment* (n 23) 62-66 for details.

44 *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA). See Scott, *Unjust Enrichment* 67 for details.

pay the taxes in question under a statutory provision. Willis Faber Enthoven alleged that no such liability had existed, and that having paid in the "reasonable but mistaken belief" that the payments were owed, it was entitled to recover them. Regarding the first point at issue, whether or not the two companies had been liable to make the payments, it was decided both by the court of first instance and by the Appellate Division that the payments had not in fact been owed. However, it was held by the court *a quo* that, although there had been no liability to make the payments, they could nevertheless not be recovered because they had been paid under a mistake of law. Thus, it fell to the Appellate Division to consider whether the longstanding rule barring recovery for mistakes of law under the *condictio indebiti* should be abrogated.

In fact, it was unanimously held by the Appellate Division that there ought to be no distinction, for the purposes of the *condictio indebiti*, between mistakes of law and mistakes of fact. However, a further issue then arose for decision, namely, whether mistake of law, like mistake of fact, should be subject to the excusability requirement. Having reviewed certain recent decisions in which the requirement of excusable mistake of fact had been discussed and approved, Hefer JA concluded that mistakes of law ought to be subjected to the same requirement:

> so that the assimilation between the two kinds of error might be complete … It follows that an *indebitum* paid as a result of a mistake of law may be recovered, provided that the mistake is found to be excusable in the circumstances of the particular case.[45]

Concerning the question of onus, Hefer JA confirmed that, as with the other elements of the *condictio indebiti*, the burden of proof rested on the plaintiff throughout.

Applying these principles to the facts, Hefer JA concluded that the mistake made by the first company, Robert Enthoven, had indeed been an excusable one. The incorrect belief as to the company's liability to pay the tax had been induced in the mind of Robert Enthoven's agent by a circular distributed by the Registrar of Insurance; this belief was cemented by a conversation with the Assistant Registrar of Insurance, whom Robert Enthoven's agent had consulted after he found the provisions of the relevant statute to be unclear. However, concerning the second company, Willis Faber, here there was no direct evidence concerning the circumstances of the payment. In particular, there was no evidence to show that it was the Registrar's circular that had induced it, or that Willis Faber had made inquiries on the point. Thus, there was insufficient information to justify a finding that the mistake was excusable. Willis Faber failed to recover. In her minority judgment concerning Robert Enthoven's claim, Van den Heever JA went still further. She held that in a case like this one, taxpayers were under a duty to take reasonable steps to establish the true legal position: "[m]ere casual enquiry will not suffice to excuse ignorance". Thus, the fact that Robert Enthoven's agent had made positive inquiries as to the meaning of the circular, and that the Assistant Registrar had misrepresented to him the true legal position, was not sufficient to discharge that duty.

As for *Affirmative Portfolios v Transnet*, here a labour broker had entered into a contract with Metrorail to supply access controllers for deployment on

45 *Willis Faber* 224.

station platforms. According to their agreement, which contained a non-variation clause entrenching the pricing provisions against oral or tacit variation, the broker, Affirmative Portfolios, was to be paid a fixed monthly rate, but even prior to the signing of the agreement it increased the rate, and Metrorail paid without complaint for six months. At that point, however, Metrorail notified Affirmative Portfolios that it had been charging in excess of what was permitted in terms of the agreement and reverted to the lower rate. Affirmative Portfolios ultimately terminated the agreement for breach and instituted a contractual claim for the difference between the higher and lower rates in respect of the later payments; Metrorail in turn instituted a counterclaim in the form of a *condictio indebiti* in respect of the alleged six months' overpayment.

Regarding the contractual claim, Boruchowitz AJA held that, even if there had been an oral variation of the contractual terms, both the parol evidence rule and the presence of a non-variation clause in the contract meant that Affirmative Portfolios was unable to hold Metrorail to the higher rate. As for the *condictio indebiti* in respect of the payments already made, this required Metrorail to prove not only that the transfers had been made in the mistaken belief that they were owing but also that this mistake had been an excusable one, as laid down in the *Willis Faber* case. Thus, in paragraph 24, Boruchowitz AJA observed that:

> The central requirement of the *condictio indebiti* is that the payment or transfer must have been effected in the mistaken belief that the debt was due. It is also an established requirement that the mistake, whether of fact or law, must be excusable: *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another*.[46]

Turning to the facts of the case, Boruchowitz AJA held that, while there had been no obligation on Metrorail to pay the amounts claimed, and while the overpayments had clearly been made in error, the reason for this error was unclear. The *Willis Faber* case had established that a plaintiff seeking to invoke the *condictio indebiti* must prove sufficient facts to justify a finding that the error giving rise to the payment was excusable, but Metrorail had failed to provide any explanation as to why the mistake had occurred. It appeared that Metrorail's officials' failure to detect the increase could only be attributed to extreme slackness or negligence. In particular, there was no evidence that Affirmative Portfolios had induced the mistake. The respondent's *condictio indebiti* accordingly failed.

Clearly, the absence of any relationship of indebtedness between the parties was treated as a key part of the explanation for restitution in these cases, although this point emerges more clearly from the *Willis Faber* case than from the *Affirmative Portfolios* case. Yet, in my view these decisions put the centrality of mistake as an element in the plaintiffs' claims beyond question. In fact, for Metrorail in *Affirmative Portfolios* and Willis Faber in *Willis Faber*, even genuine mistake was insufficient.

46 This passage may be contrasted with the proposition advanced by du Plessis in "Labels and meaning: unjust factors, failure of purpose and enrichment by transfer" (2014) 18 EdinLR 416 at 420, supported with reference to *Salandia (Pty) Ltd v Vredenburg-Saldanha Municipality* 1988 (1) SA 523 (A) 535, that "the fact that the transfer was not due is the "prime requirement" of the *condictio indebiti*."

It was held to be fatal that their mistakes had not been shown to be excusable in the specific sense required. I will discuss in the next subsection the origins and implications of this exceptionally restrictive excusability requirement. For present purposes, it is sufficient to note that these decisions, in their insistence on mistake, and excusable mistake in particular, are simply incompatible with any analysis which does not accord a central role to mistake in justifying restitution. In fact, it is impossible to explain the *outcomes* in these cases unless the central role of mistake is acknowledged.

(c) The role of restitutio in integrum

That leaves only the third question posed at the beginning of this section, namely whether the *condictiones* exhaust the entire field of enrichment by transfer. Much of my book is devoted to arguing that the presence of the unjust factors of mistake, compulsion and minority in South African law is in large part attributable to the influence of the Roman-Dutch remedy of *restitutio in integrum*.[47] In modern South African law the term *restitutio in integrum* is generally confined to contract, that is, to the avoidance of and restitution of performance rendered under a contract tainted by misrepresentation, compulsion, etc.[48] However, the *restitutio in integrum* of the Civilian tradition appears to have been of a different character.

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

These characteristics had important implications for the scope of *restitutio in integrum* in Roman-Dutch law. First, as in Roman law, it was understood by most old authorities to include a wide range of responses; the restitution of money and goods was one of its primary applications. Thus its potential to act as a technique for reversing enrichment is clear. As for the grounds on which it was granted, as in the Roman sources, fear (*metus*), fraud (*dolus*), minority, and absence received

47 For details and further references see Scott, *Unjust Enrichment* (n 23) ch 1 sec V.

48 See, e.g., Du Plessis, *Unjustified Enrichment* (n 7) 69 and the authorities cited in n 67.

by far the fullest treatment, but several Roman-Dutch writers included also *iustus error* (reasonable mistake) as a nominate ground in this list. Thus, to the extent that the *restitutio in integrum* of Roman-Dutch law served to effect the restitution of transfers, the substantive claims embodied in the remedy appeared to arise from unjust factors.

Restitutio in integrum in this form was received into South African private law and widely employed as a mechanism for reversing unjust enrichment during the nineteenth and early twentieth centuries. For example, *White Brothers v Treasurer-General*, decided by the Cape Supreme Court in 1883, concerned a claim to recover the payment of tax alleged to have been incorrectly levied, on grounds of either mistake or compulsion.[49] *Restitutio in integrum* was identified as the appropriate remedy to reverse these payments, and the grounds on which it might be granted said to include "*metus* [fear], *dolus* [fraud], *minor aetas* [minority] ... and *justus error* [reasonable mistake]".[50] As late as 1950, Lee and Honoré in their *South African Law of Obligations* maintained that, "the difference between claims for the return of property, based on *condictio* and *restitutio in integrum* respectively, is mainly historical".[51] However, in 1949 Van den Heever JA held in *Tjollo Ateljees (Eins) Bpk v Small* that

> we do not petition for *restitutio in integrum* to relieve us from the obligations induced by fear, force or fraud ... [but] raise these negations of free volition as direct defences or causes of action.[52]

Thus he rejected the Roman-Dutch conception of *restitutio in integrum* as a free-standing equitable remedy, confining it to the context of contract only.

Van den Heever JA was of course correct. There is no separate equitable jurisdiction in modern South African law, comprising equitable forms of action. All surviving instances of *restitutio in integrum* must therefore be rationalised in terms of substantive causes of action. Yet there has so far been no systematic attempt to investigate the causes of action inherent in its application outside the sphere of contract, as in the *White Brothers* case. In particular, there has been no attempt to integrate these causes of action with those embodied in the *condictiones* in order to produce a single substantive law of enrichment.[53] Even if it be accepted that the obligation to restore contractual performance consequent upon avoidance arises from the contract itself,[54] self-evidently this explanation is unavailable in wholly extra-contractual cases or in cases where a contract is void *ab initio* rather than voidable.

49 *White Brothers v Treasurer-General* (1883) 2 SC 322.

50 Voet, *Commentarius Ad Pandectas* 4.1 n 26, quoted in *White Brothers* 349 (per De Villiers CJ).

51 R W Lee and A M Honoré, *The South African Law of Obligations* (1950) para 681.

52 *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) 871-72.

53 In his *Verrykingsaanspreeklikheid*, first published in 1958, De Vos dismissed outright the idea that *restitutio in integrum* might be brought within the fold of enrichment liability along with the *condictiones*, serving as an "enrichment action": see De Vos, *Verrykingsaanspreeklikheid* (n 4) 158-159.

54 On this question see Visser, *Unjustified Enrichment* (n 7) 90-113, drawing on the work of P Hellwege, *Die Rückabwicklung gegenseitiger Verträge als einheitliches Problem* (2004); S Miller, "Unjustified Enrichment and Failed Contracts" in Zimmermann, Visser and Reid (eds), *Mixed Legal Systems in*

Again, the substantive claims embodied in the remedy of *restitutio in integrum* appear to arise from unjust factors rather than from the absence of a legal ground.

Furthermore, the impact of *restitutio in integrum* on modern law is not limited to the emergence of certain wholly new unjust factors, such as compulsion. It has also profoundly influenced the character of those unjust factors which have historically been associated with the *condictio indebiti*, namely mistake and (to a lesser extent) minority.[55] This influence is best illustrated by the requirement that an error be excusable or *iustus* in order to trigger the restitution of benefits mistakenly transferred, applied in the *Willis Faber* and *Affirmative Portfolios* cases. It appears that the origins of this *iustus error* requirement lie in *restitutio in integrum*, which served in turn as a conduit for the application of nineteenth-century English doctrines of Equitable mistake in contract.[56] This idiosyncratic history explains why the requirement is unique to South Africa. Insofar as a requirement of excusable mistake exists in Scottish law it is far weaker and less restrictive of restitution.[57]

As for modern South African law, in my book I argue that the contemporary excusable mistake requirement stems from a particular conception of the plaintiff's restitutionary claim which is derived in turn from *restitutio in integrum*: that the claim is imagined as a plea for extraordinary judicial intervention on equitable grounds. Thus a mistaken plaintiff can recover only where she can demonstrate that she deserves such extraordinary assistance; that it would be unconscionable for the defendant – the recipient of the transfer – to retain the benefit, because the defendant himself induced the plaintiff's error or knew of it at the time it was made.[58] I argue that, seen in this light, the excusable mistake requirement – along with certain other

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Comparative Perspective: Property and Obligations in Scotland and South Africa (n 6) 437; Du Plessis, *Unjustified Enrichment* (n 7) 74-75.

55 Regarding mistake in particular, even in classical Roman law the *condictio indebiti* was denied in cases where the payer knew that the sum paid was not owing (e.g. D 12.6.1.1). It has been argued that the classical error requirement was a "negative" one, in the sense that it was for the defendant to prove knowledge once the plaintiff had shown that the transfer which he had made had, in fact, not been owing: see, e.g., R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1992) 849-851. On other hand, certain other texts in the *Digest* suggest that proof of mistake was positively required in order to found recovery: e.g. D 22.3.25 pr. At least by the time of Justinian, mistake had certainly come to be regarded as one of the elements of liability under what was now labelled the *condictio indebiti*, an element requiring to be positively proved by the plaintiff in each case. As a result, throughout the European *ius commune* the *condictio indebiti* has been understood to require positive proof of mistake: e.g. D Visser, *Die Rol van Dwaling by die condictio indebiti: 'n Regshistoriese Perspektief met 'n Regsvergelykende Ekskursus* (Dr iur thesis, University of Leiden, 1985) ch 2 and 3.

56 For full details see Scott, *Unjust Enrichment* (n 23) ch 2, especially 34-54.

57 Regarding English law, see *Kelly v Solari* (1841) 9 M&W 54, a rule reflected in Burrows, *Restatement* (n 33) at section 10(3). Regarding Scottish law, see *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151, discussed by, e.g., Evans-Jones, *Unjustified Enrichment Vol I* (n 12) 87-95.

58 See, e.g., *Divisional Council of Aliwal North v De Wet* (1890) 7 SC 232; *Willis Faber Enthoven v Receiver of Revenue* 1992 (4) SA 202 (A) and *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA). But cf the recent decision of the Supreme Court of Appeal in *Nelson Mandela Metropolitan Municipality v Ngonyama Okpanum Hewitt-Coleman and others* [2012] ZASCA 11.

historically-determined requirements, such as the inflexible protest requirement associated with compulsion[59] – is indefensible and ought to be abrogated. According to the analysis of enrichment by transfer proposed here, the plaintiff's mistake is the central element in a claim arising from the unjust enrichment of the defendant, not a trigger for equitable intervention. Having made out a mistake, the plaintiff succeeds by right. Adopting an unjust-factors approach to these cases thus makes it possible to retain the mistake-centred analysis preferred by the courts while discarding the indefensible excusability requirement.[60] By contrast, a proponent of the absence of legal ground analysis is obliged to reject both.

D. A MIXED APPROACH

Terminology coined specifically with reference to English law should be applied with caution to another legal system, particularly a legal system of Civilian origin.[61] Yet it appears that South African law does recognise "unjust factors" insofar as it accords primary facts such as mistake the role of reasons for restitution in transfer cases. This is true even of claims comprised within the *condictio indebiti*, the *condictio* which most closely approaches a general action based directly on the absence of a legal ground. Mistake is a key element of the species of claim at issue in leading cases such as *Willis Faber*: if the plaintiff is to succeed, it must be pleaded and proved.[62]

In the context of the South African law of enrichment by transfer, unjust factors such as mistake and compulsion are not defences in disguise: their role is not simply to preclude any inference of voluntariness. If it were, we would see a greater degree of flexibility in the courts' approach to the pleading and proving of such unjust factors.[63] In fact, we see far less flexibility than in English law: for example, in the South African courts' refusal to recognise a *Woolwich*-style claim for wrongly exacted tax.[64] Nor does South African law contain any equivalent to the swaps cases (in particular *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council*[65] and *Kleinwort Benson Ltd v Lincoln City Council*[66]) which prompted Peter Birks to renounce unjust factors.[67]

Admittedly, in the context of the *condictio indebiti* in particular, both an unjust factor such as mistake and the absence of a relationship of indebtedness between

59 For details regarding this protest requirement see Scott, *Unjust Enrichment* (n 23) ch 4 and in particular 121-128.

60 It is difficult to justify retaining the excusable mistake requirement even in some more moderate form: the requirement does not appear to be capable of performing any useful work not already done by the defence of loss of enrichment.

61 Du Plessis, "Comparison and evaluation: lessons from enrichment law" (2012) 76 Rabels Zeitschrift 947 at 962-963; du Plessis (n 46) 419ff.

62 Cf the claim in du Plessis (n 46) 430.

63 For a full discussion of this issue in the context of compulsion see Scott, *Unjust Enrichment* (n 23) ch 4, and in particular the analysis at 121-128.

64 Scott, *Unjust Enrichment* 126-128.

65 *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215.

66 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

67 For details see Scott, *Unjust Enrichment* 184-187.

the parties are key elements in the plaintiff's claim, each requiring to be specifically demonstrated. Further, the absence of a relationship of indebtedness is a necessary condition for recovery throughout the law of enrichment by transfer, even if not explicit in the plaintiff's cause of action. Indeed, I think it is right to concede that in South African law, as in German law, the "big idea" which holds the entire law of enrichment together is the absence of a legal ground for the enrichment. But, as I argued in section B above, although it may be a big idea, it is also rather a thin one. In truth there is little coherence between the various claims comprised within the Wilburg-Von Caemmerer taxonomy. Even in German law, in which the absence of legal ground approach to enrichment is most fully realised, no general concept can be formulated which captures the meaning of "legal ground" across all cases. Thus it should not disturb us if South African law combines the Wilburg-Von Caemmerer taxonomy of unjustified enrichment as a whole with an unjust factors analysis of enrichment by transfer in particular.

Indeed, it seems that there might be compelling arguments in favour of such an approach, that is one which combines the Wilburg-Von Caemmerer taxonomy of unjustified enrichment as a whole with an unjust-factors analysis of enrichment by transfer. As we have seen, the normative force of most of the unjust factors recognised in South African law lies in the fact that they vitiate the will or voluntariness of the plaintiff. The transparent character of such reasons for restitution – their ready intelligibility to the layperson – in itself constitutes an important argument in favour of unjust factors, an argument originally made by Peter Birks himself, although apparently not accepted by du Plessis.[68] But an analysis which treats factors vitiating voluntariness as primary reasons for restitution also seems particularly appropriate in the context of enrichment by transfer. The basis for the transfer category – the deliberate conferral of a benefit by the plaintiff on the defendant – coheres closely with the character of particular reasons for restitution such as mistake, compulsion and minority. Whereas the deliberate conferral of the benefit justifies the defendant's retention of it in the first instance, providing a prima facie argument in favour of retention, an unjust factor such as mistake, in showing that the plaintiff's intention to confer the benefit was impaired, serves to rebut this prima facie case.

Finally, it seems that a mixed analysis of enrichment by transfer may also be a desirable one in principle.[69] While such a mixed analysis has often been said to be untenable,[70] in truth it is a "pure" approach to enrichment by transfer that is an impossibility: every legal system can and does mix the two approaches.[71] Indeed, the mixed approach has the great advantage of flexibility. In a legal system which

68 Du Plessis (n 61) at 949-951.

69 See further Scott, *Unjust Enrichment* 201-203.

70 Birks argued, with respect to *Kelly v Solari* that, "it would be absurd to suggest … that by demonstrating two approaches applicable to that case that we have revealed the presence of two different causes of action": see *Unjust Enrichment* (2005) 114. Similarly, for Andrew Burrows, Birks was "absolutely correct that mixing the two is a recipe for confusion and inconsistency": see "Absence of Basis: The New Birksian Scheme" in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (2006) 33 at 48.

71 L Smith, "Demystifying Juristic Reasons" (2007) 45 Canadian Bus LJ 281 at 304.

embraces such a mixed approach it is possible to switch between the two analyses as necessary; to emphasise elements of the unjust factor and absence of legal ground approaches where appropriate while de-emphasising others. It is striking that English law appears to have moved towards just such a mixed approach over the course of recent decades.

E. CONCLUSION

The fact that a particular body of legal rules, such as the South African law of enrichment, has its roots in the uncodified Civil Law and shares certain important features with other Civil Law systems does not mean that it is bound to develop or have developed along orderly Civilian lines, in sync with those other systems.[72] This must be particularly true of a legal system like South Africa's, which is a common law system, in that its constituent rules derive their authority almost entirely from judicial decisions insofar as these are consistent with the rights and values embodied in the South African Bill of Rights. Whatever the deeper origins of the South African law of enrichment, the fact remains that the courts of South Africa have waywardly been pursuing their own line for some 130 years. The reasons for this are difficult to determine.[73] But, as I have tried to demonstrate, in the context of the *condictio indebiti* in particular, the courts have committed themselves firmly to unjust factors in the form of mistake, compulsion, and incapacity (comprising both minority and juristic incapacity), in combination with the absence of a relationship of indebtedness between the parties to the transaction. According to the cases, both are key elements

72 Cf du Plessis (n 61) 963: "Ultimately, when seeking inspiration from foreign models, it appears more desirable for South African law to recognise the historical links it shares with the modern civilian approach. . . .".

73 As explained in section C(2)(c) above, in my book I argue that the *condictiones* have historically been supplemented and indeed challenged by another remedy of the uncodified Civil Law, the extraordinary, equitable remedy of *restitutio in integrum*, and that it is largely due to the influence of this remedy that unjust factors figure so prominently in modern South African law. But that explanation leaves unanswered the question of why unjust factors have proved so attractive to South African courts, and why the germs of the unjust factors approach inherent in *restitutio in integrum* have taken root so thoroughly. In fact I do not argue that this phenomenon is due to the direct influence of the English enrichment law (if I may use that term) at some key point during the late nineteenth or early twentieth century: cf du Plessis (n 61) 962-963, where he seems to suggest that I view this as an instance of borrowing from the English common law. Rather, I advance a number of different explanations, some only rather tentative. One of these is that, in offering positive justifications for restitution, the unjust factors approach alleviates judicial anxiety about reasoned intervention in the context of a legal system which treats judicial decisions as authoritative: full details of this argument can be found in Scott, *Unjust Enrichment* (n 23) 198-201. Furthermore, looking to the future, a justification for the restitution of transfers located in the impairment of the plaintiff's voluntariness can be directly linked to the value of personal autonomy. Thus, it appears that an approach which takes some account of unjust factors complies more fully with the injunction in s 39(2) of the South African Constitution to promote the spirit, purport and objects of the Bill of Rights than a pure absence of legal ground analysis does. See further, Scott, *Unjust Enrichment* 208-211.

in the plaintiff's restitutionary claim. Both must be pleaded and proved. Enrichment must be both unjustified and unjust.[74]

Thus academics in South Africa are faced with a choice. In attempting to rationalise the *condictiones* of South African law we can insist on the logic of a "pure"[75] Civilian analysis, whether in an objective form (the absence of a relationship of indebtedness between the parties) or a subjective one (the failure of the plaintiff's purpose in making the transfer).[76] Du Plessis in particular has argued that the best course would be to attempt to draw the courts back into the Civilian fold using the lure of failure of purpose of the transfer. Or we can choose to adopt an analysis which engages closely with the cases, and with the reality of everyday pleading in high courts around the country, in that it incorporates the unjust factors I have identified. Such an analysis would have the obvious virtue of meeting the courts where they are. We as enrichment lawyers could then set about encouraging them into certain relatively modest reforms: most importantly, the abrogation of the excusability requirement in the context of mistake and of the protest requirement in the context of compulsion. This is a casuistic approach; it may not make the law any more beautiful or orderly; the courts will continue to "stumble along" the path they have chosen.[77] But it will spare many litigants much injustice. And it is at least achievable within the framework of a common-law system.

Helen Scott[*]

74 The observations of van der Westerhuizen J on the subject of the labels "unjust" and "unjustified" in the recent case of *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 23-24 hardly constitute a knock-out blow to a theory of unjust enrichment; cf du Plessis (n 46) 423.

75 The quotation marks are important.

76 Du Plessis (n 46) at 426-432. For a detailed analysis of the failure of purpose approach, see Scott, *Unjust Enrichment* (n 23) 191-195.

77 Du Plessis (n 61) 963.

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