

Tutorial Letter 201/2/2013

Undue Enrichment and Estoppel

PVL3704

Semester 2

Department of Private Law

This tutorial letter contains important information about your module.

Bar code

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Dear Student

1 COMMENTARY ON THE ASSIGNMENTS

This tutorial letter contains the memorandum, as well as a discussion, of the answers to the two assignments.

1.1 ANSWERS TO ASSIGNMENT 1

Question 1

Discuss in general (without reference to a specific enrichment action) how the extent of enrichment liability (or the *quantum* of the enrichment claim) will be calculated. (10)

Answer

In principle the plaintiff is allowed to claim the amount he has been impoverished, or the amount the defendant has been enriched, whichever is the lesser. (1) See Study Guide 1, par 1.1.4 and 2.3. The *quantum* of the enrichment claim is calculated at the time the claim is instituted. (1) That means that the defendant is not liable for benefits that he due to his enrichment could have gained, but didn't. (1) If the defendant's enrichment has been reduced or extinguished before the claim has been instituted, his liability will also be reduced or extinguished. (1) The onus to prove non-enrichment lies with the defendant. (1) In four instances the *quantum* will be calculated sooner, meaning before the date of institution of the action: (a) at the moment the defendant becomes aware of enrichment (1); (b) at an earlier stage if the defendant should have known that the benefit wasn't justified (1); (c) when the defendant fell into *mora* (1); and an earlier date if the defendant acted *mala fide* (1). These exceptions do not apply in the case of minors. (1)

In quantifying the claim all positive and negative side-effects should be taken into account. (1) Interest earned on money in the hands of the defendant before *litis contestatio* cannot be claimed by the plaintiff, (1) but after *mora* the plaintiff can claim *mora* interest. (1) See Study Guide 1, par 3.4. If the defendant spent the money on something he would not have done if it wasn't for the enrichment, he can raise the defence of non-enrichment. (1) However, if all or part of what he spent the money on (eg goods) is still of value and in his hands, he must offer the goods or the value of the goods to the plaintiff. (1) If the goods are more valuable than the impoverishment, the difference should be paid to the defendant. (1)

[max 10]

Question 2

A owns a factory manufacturing steel in a continuous process. His monthly electricity bill averages R100 000. He just received a letter from the Johannesburg Municipality in which they threaten to cut his electricity if he doesn't immediately pay his "arrear account of R300 000". A knows that there must be a mistake, because his account is paid in full, but also knows that if there is a disruption in his electricity supply he will suffer severe losses. He pays the amount immediately and sends a letter of complaint with. Advise A whether he will be able to reclaim the R300 000 he paid, and with which remedy? In your answer discuss the requirements for this remedy. (10)

Answer

If you receive a similar type of question in the exams, you should follow the following steps in answering the question:

- (a) You first need to identify the correct unjustified enrichment action. If necessary explain why another enrichment claim cannot be used. (2)
- (b) Then discuss the relevant requirements for a successful claim under the action and any defences against such claim. (5)
- (c) Apply the requirements of the claim to the facts provided. (2)
- (d) Make a definite conclusion on the question asked. (1)

(a) Identifying the correct action

The correct action to be instituted by A is the *condictio indebiti*. (1) This action is available in instances where a debt not owing was paid. (1) No unlawful, *ultra vires* or void contract is relevant here and therefore it seems as if no other *condictiones* could be applicable.

(b) Requirements for the action and defences against it

See Study guide 1, par 3.4 for the requirements. State each of the requirements:

- (i) Transfer of ownership in the form of payment of money or delivery of a specific object (1)
- (ii) Payment has to take place under the mistaken belief that the performance was owing. (1)
- (iii) The mistake, either a legal or factual mistake, must have been reasonable in the circumstances (*iustus error*). (1)

In general a party cannot reclaim performance with the *condictio indebiti* if he was aware that the performance wasn't owing. (1) Such conduct will be regarded as a donation, unless it was made under threat or protest. (1) (See Study guide 1, par 4.6 and *CIR v First National Industrial Bank Ltd* 1990 3 SA 641 (A).)

(c) Applying the requirements to the facts

A made a payment knowingly that the debt wasn't owing. For A to succeed with the *condictio indebiti* against the Johannesburg Municipality in these circumstances he, firstly, had to prove that he didn't owe the Municipality the R300 000. (1) Secondly, that the payment was made involuntarily under the threat that the electricity supply will be suspended if payment wasn't made. (1) Thirdly, that A protested against the amount to be paid at the time of payment by sending a letter of complaint with. (1)

(d) Conclusion

A will be able to prove all three requirements under this exception and will therefore be successful with this enrichment action against the Johannesburg Municipality. (1)

[max 10]

1.2 ANSWERS TO ASSIGNMENT 2

The correct answer to each of the questions below is the one that is blocked. Brief explanations are given as to why each choice is right or wrong. Revert back to that part of the Study Guide if you still do not understand why a certain choice is right and the others wrong.

Choose the most correct option in every instance. If there is more than one correct option, choose the appropriate combined option.

The following facts relate to questions 1 and 2.

A, an American tourist, has leased a vehicle from B. While travelling in the Northern Cape, the vehicle breaks down. A contracts with C, a garage in Springbok, to repair the vehicle at a cost of R12,000. After two days A leases another vehicle from X and completes his trip. He departs for America. C wants to claim the R12,000 from B.

*This set of facts relates to indirect enrichment. Please note that there is a contractual relationship between A and B, as well as between A and C and eventually also between A and X. Last-mentioned contract is not relevant for this set of facts. Also take note that there is no contractual relationship between B and C. Look again at the decisions in *Gouws v Jester Pools* and the *Buzzard Electrical*-case.*

Question 1

Which statement best explains whether C has a claim against B and the authority on which it is based?

1. In terms of the decision in *Gouws v Jester Pools (Pty) Ltd* 1968 3 SA 63 (T) it was held that C has no claim against B because B had not been enriched.
2. In terms of the decision in *Gouws v Jester Pools (Pty) Ltd* 1968 3 SA 63 (T) it was held that C has no claim against B because B has not been enriched at C's expense.
3. The decision in the *Gouws* case was confirmed in *Buzzard Electrical v 158 Jan Smuts Avenue Investments* 1996 4 SA 19 (A)
4. The decision in the *Gouws* case was rejected in *Buzzard Electrical v 158 Jan Smuts Avenue Investments* 1996 4 SA 19 (A)
5. The decision in the *Gouws* case was overruled in *Brooklyn House Furnishers Ltd V Knoetze & Sons* 1970 3 SA 264 (A)

Answer: *In the Gouws case it was decided that C had a contractual claim and indeed against A. C did not have an enrichment action against the owner, B. B's enrichment wasn't at the expense of C, but rather at the expense of A (who was contractually obligated to pay). In the Buzzard case the Appellate Division left open this issue. Brooklyn House Furnishers dealt with rights of retention and not with enrichment actions, and therefore it did not refer to the Gouws case.*

Question 2

Which statement best explains whether C has a retention right or whether he can exercise it?

1. C can exercise a retention right over the vehicle against B until such time as it has been paid for its necessary expenses.
2. C can exercise a retention right over the vehicle against B until it has been paid the full contract price.
3. In terms of the decision in *Buzzard Electrical v 158 Jan Smuts Avenue Investments* 1996 4 SA 19 (A) C has no retention right because it has no enrichment claim against B.
4. An enrichment retention right is a personal right and can therefore be exercised only against the creditor.
5. C has no retention right under these circumstances.

Answer: A right of retention is applicable against the whole world, including the owner. In the *Brooklyn House Furnishers* case the court acknowledged a right of retention in similar circumstances. The right of retention is not linked to a contract with the owner. In the *Buzzard* case the court did not make a decision on rights of retention.

Question 3

In which one of the following circumstances can the *condictio indebiti* be used?

1. Where a person has made a payment in terms of a contract subject to a suspensive condition, and the contract has now been extinguished due to the condition being fulfilled.
2. Where a person has made a payment in terms of a contract subject to a resolutive condition, and the contract has now been extinguished due to the condition being fulfilled.
3. Where an undue payment has been made in circumstances where the mistake is not excusable.
4. Where an executor who is now *functus officio* has made a payment to heirs which were not due because a creditor had lodged its claim too late.
5. Where a bank has made payment in terms of a forged cheque.

Answer: In the case of option 1 the *condictio causa dat causa non secuta* should be instituted. In option 2 an incorrect statement is made – if the condition is fulfilled the contract comes into being. In the case of the *condictio indebiti* the mistake must be excusable and therefore option 3 is incorrect. Option 4 is correct – see par 4.3 p 46 of Study Guide 1 and in the case of option 5 the relevant remedy is the *condictio sine causa specialis* – see par 7.4 p 72 of Study Guide 1.

Question 4

Which of the following is/are (a) prerequisite(s) for a claim in terms of the *condictio indebiti*?

1. The enrichment was unlawful.
 2. The defendant was unjustifiably enriched.
 3. There was a causal link between the enrichment and impoverishment
 4. The mistake must have been excusable
5. 2 and 3 and 4 are correct

Answer: Take note that the general requirements for enrichment liability must be proven in the case of all enrichment actions. Unlawfulness is a requirement with the *condictio ob turpem vel iniustam causam*.

Question 5

A has sold uncut diamonds to B for an amount of R100,000 in contravention of statutory law. B has paid the amount but before the diamonds could be delivered, it was confiscated by the police during a raid of A's house. Which statement best explains the nature of the claim against A?

1. In circumstances like these a court may exercise an equitable judicial discretion to relax the *par delictum* rule, depending on the relative turpitude of the parties' conduct.
2. B has a claim for damages against A due to a breach of contract.
 3. B has a claim against A in terms of the *condictio ob turpem vel iniustam causam* because it is unfair that he should lose his money and get nothing.
 4. B has a claim against A in terms of the *condictio sine causa specialis* because there is no other enrichment action at his disposal.
 5. B has a claim for damages against A based on delict.

Answer: The transaction between A and B is unlawful and therefore void. Breach of contract and delict are not relevant here. The applicable action is the *condictio ob turpem vel iniustam causam*. Fairness is not the main consideration with this remedy. B will not have a claim according to the strict application of the *par delictum* rule, but in *Jajhbay v Cassim* the Appellate Division held that the rule should be relaxed if required to do "simple justice between man and man".

Question 6

In which one of the following circumstances can the *condictio sine causa specialis* be used?

1. As a general enrichment action.
2. Where property is transferred on the grounds of a valid cause which later falls away.
3. Where a contract is terminated due to a resolutive condition.
4. Where property has been transferred in terms of an illegal agreement.
5. Where undue payment was made due to an excusable error.

Answer: See Study Guide 1 par 7.4 p 72.

The following facts are relevant for questions 7-9.

K is the owner of a farm adjacent to that of L. Unbeknown to K and L, K has been occupying part of L's land due to a fence that was mistakenly put up 10 years ago. K has effected the following improvements on that part of the farm: (a) built a dam at a cost of R30,000; (b) a luxury little lapa on the edge of the dam at a cost of R100,000; (c) a borehole at a cost of R20,000; (d) planted fruit trees at a cost of R15,000 (e) planted mealies which are almost ready to harvest at a cost of R60,000 (value R120,000). During his tenure of the land he has harvested mealies worth R300,000 (production cost R250,000) and fruit from the fruit trees sold at R55,000. L has now become aware of the true situation and demands that K leaves the land.

Question 7

Which statement best explains the nature of K's possession or occupation of the land?

1. K is a *bona fide occupier* of the land.
2. K is a *mala fide* occupier of the land.
3. K is a *bona fide possessor* of the land.

4. K is a lawful occupier of the land.
5. K is a lawful possessor of the land.

Answer: See Study Guide 1 par 9.4.2 p 103.

Question 8

Which statement best explains the nature and extent of K's claim(s), if any?

1. K has an enrichment action for all of the expenses that he has incurred on the improvement of L's land.
2. K has an enrichment action for the full amount of all the necessary and useful expenses he has incurred.
3. K has a choice to claim either the amount of his expenses incurred or the value by which L's land has been increased, whichever is more.

4. K has an enrichment action for the useful and necessary expenses he has incurred to the extent that those expenses have increased the value of L's land.

5. K has no claim for the mealies which have not been harvested yet as they now belong to L.

Answer: K cannot institute the true manager of affairs action (*actio negotiorum gestorum contraria*) because he never had the intention to act on behalf of someone else. He was under the mistaken belief that he was acting in his own interest as owner of the land. He would therefore at best have at his disposal the extended manager of affairs action (*actio negotiorum gestorum utilis*), which is an enrichment action. This means that he can only claim for enrichment or impoverishment, whichever is the lesser. See Study Guide 1 par 8.4.1-8.4.2 p 83-90.

Question 9

Which statement best explains the amounts that may be brought into account against K's claim, if any?

1. L is not entitled to subtract anything from K's enrichment claim.
2. L is entitled to reduce the enrichment claim against him by subtracting the value of K's occupation of the land.
3. L is entitled to reduce the enrichment claim against him by subtracting the value of the mealies and fruit harvested by K and the value of K's occupation of the land.
4. L is entitled to reduce the enrichment claim against him by subtracting the value of the mealies harvested by K and the value of K's occupation of the land.

5. L is entitled to reduce the enrichment claim against him by subtracting the value of the mealies harvested by K minus the production costs.

Answer: See Study Guide 1 par 9.4.2 p 106 (fruits).

Question 10

Which statement best explains the legal position on the recognition of a general enrichment action in South African law?

1. In *Nortje v Pool* 1966 3 SA 96 (A) the Appellate Division recognised the existence of a general enrichment action in South Africa without any qualifications.
2. In *Nortje v Pool* 1966 3 SA 96 (A) the Appellate Division recognised the existence of a general enrichment action in South Africa, but with certain qualifications.
3. In *Kommissaris van Binnelandse Inkomste v Willers* 1994 3 SA 283 (A) the Appellate Division recognised the existence of a general enrichment action in South Africa.

4. In *Kommissaris van Binnelandse Inkomste v Willers* 1994 3 SA 283 (A) the Appellate Division rejected the existence of a general enrichment action in South Africa but recognised that courts can extend enrichment liability to circumstances where it is deemed necessary.

5. In *Kommissaris van Binnelandse Inkomste v Willers* 1994 3 SA 283 (A) the Appellate Division rejected the existence of a general enrichment action in South Africa and also rejected the idea that courts can extend enrichment liability to circumstances where it is deemed necessary.

Answer: In *Nortje v Pool* the Appellate Division rejected the existence of a general enrichment action in the SA law. In the *Willers* case the Appellate Division also rejected the existence of a general enrichment action, but held that in appropriate circumstances enrichment liability should be extended. See Study Guide 1 par 14.3 and 14.4 p 144-146.

2 COMMENTS ON THE EXAMINATION

At the end of the semester you will write **one two-hour paper** on this module. The paper counts 100 marks. The paper will consist of 50 per cent multiple choice questions and 50 per cent essay type questions. To pass you need to obtain at least 40 percent for the paper and a final mark of at least 50 per cent after your year mark has been taken into account.

The examination paper is divided up as follows:

- Estoppel: 10 multiple choice questions (2 marks each), 2 direct essay type questions (10 marks and 5 marks respectively) and 1 problem essay type question (10 marks) (total 45%).
- Unjustified Enrichment: 15 multiple choice questions (2 marks each), 2 problem essay type questions (10 marks and 5 marks respectively) and 1 direct essay type question (10 marks) (total 55%).

NB: Herewith a set of facts that appear in the examination in the multiple choice section. Acquaint yourself thoroughly with them. There are 5 multiple choice questions in regard thereto (10 marks).

“A has sold his painting by artist X to B for R20 000,00. The contract stipulates that ownership will only pass to B after the last instalment of R2000,00 has been paid. A has given a letter to B stating the following: “Herewith I, A, confirm that I have sold a painting by artist X to B.” After a period of six months and payment of R12 000,00, B gives the painting to C, a dealer in art. B wants to sell the painting when he has paid for it. He requests C to obtain possible offers for the painting from the public which must be referred to B for consideration. B also shows C the letter from A. C sells the painting to D without B’s consent for R 15 000,00 after telling D that he (C) is the owner. Thereafter, B fails to make any further payments to A and C is sequestrated. A wants to claim the painting from D.”

Use the mark allocation at each question to determine how much time you may spend on that question.

For the examination you will need a thorough knowledge of Study Guides 1 and 2 and the relevant cases contained in the study guides and tutorial letters.

The essay part of the examination paper is a so-called fill in paper, in other words you must answer all those questions on the examination paper itself, and then hand in the completed paper. Space for your answer is supplied directly below each question. Short as well as longer questions may be asked. **The answers to the multiple choice questions must be completed on the mark reading sheet that will be provided to you and which you must also hand in after completion.** See further point 8 of Tutorial Letter 101/3 in this regard.

Please note that it is your responsibility to find out whether you have gained examination admission and on which day the examination will take place.

NB: Please note further that you will not directly be questioned on Roman and Roman-Dutch Law.

3 AMENDMENT TO THE STUDY MATERIAL

Study Guide 1 Enrichment Liability

Insert the following at the end of page 59:

“Recently in *ABSA Bank Ltd v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA) the court dealt with the situation whether a bank may appropriate stolen funds received from its client to discharge the debts of the client toward the bank. A fraudster misappropriated money from her employer (the plaintiff) and used some of it to discharge her indebtedness toward two banks (the defendants) on home loan, current and credit card accounts. The court *a quo* allowed the enrichment claim (*condictio ob turpem vel iniustam causam*) of the employer against the banks, but on appeal the Supreme Court of Appeal reversed the decision and found that a bank was not unjustifiably enriched when it in good faith (that is without knowledge of the fraud) retained money to discharge the debts of its client toward it, even though the client had obtained the funds through fraud.

In *Trustees, Estate Whitehead v Dumas and Another* 2013 (3) SA 331 (SCA) one Dumas was misled by fraudulent misrepresentation to invest in an illegal pyramid scheme with a fraudster (Whitehead). Consequently, Dumas paid R3 million into the fraudster’s bank account. Subsequently, the fraudster was arrested and his estate sequestered. When Dumas attempted to claim his money on the basis that he had been defrauded, the court found that the agreement nevertheless constituted a *causa* for the transfer and held that the funds fell within the insolvent estate of the fraudster. However, it should be noted that if the scheme was illegal, then the agreement to invest in it would have been illegal as well, and therefore neither the fraudster nor his insolvent estate were entitled to the money. Very possibly then the innocent party, Dumas, should have been allowed to claim the money with the *condictio ob turpem vel iniustam causam*.”

4 EXAMPLES OF PREVIOUS EXAMINATION QUESTIONS

The questions in the assignments are similar to the types of questions that you may expect in the exam. Below you will find some more examples of the type of questions that may be asked in the examination, drawn from previous exam papers. Use these questions as a final test to evaluate your preparation after you have studied the material. If you can answer these questions correctly and with confidence, you should have no problems in sitting the exam.

QUESTION 1

John leaves his broken vacuum cleaner at the ABC Store for repairs. The store specialises in electrical repairs, but also sells second-hand electrical appliances. After being repaired, John's vacuum cleaner is displayed by the dealer among the goods for sale in the store by mistake and the vacuum cleaner is sold to Peter. When John discovers this, he claims his vacuum cleaner from Peter with the *rei vindicatio*, but Peter raises estoppel against John's claim.

- 1.1 Does John's conduct in this case amount to a misrepresentation? Explain with reference to case law. **(15)**
- 1.2 Is fault a requirement for a successful reliance on estoppel by Peter? Explain with reference to case law. **(10)**

QUESTION 2

Discuss the requirement that the reliance on estoppel must be allowed by law. **(10)**

QUESTION 3

Can estoppel play a role in the conclusion of a contract. Discuss with reference to case law. **(10)**

QUESTION 4

- 4.1 Can a person's estate be enriched by moral benefits? Discuss. **(5)**
- 4.2 Discuss *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) in regard to the *condictio indebiti*. **(5)**
- 4.3 Briefly discuss the *condictio ob turpem vel iniustam causam* with reference to *Minister van Justisie v Van Heerden* 1961 3 SA 25 (O). **(5)**
- 4.4 Briefly discuss the *sine causa* requirement for enrichment liability. **(5)**

QUESTION 5

Discuss with reference to case law whether a general enrichment action exists in the South African law **(15)**

QUESTION 6

Peter leases a car from John to travel to Cape Town. The lease contract stipulates that in the event of a breakdown Peter must immediately contact John and not arrange for a third party to repair the vehicle. On the way to Cape Town the car breaks down and Peter leaves it with Wasim to repair. Wasim believes that the vehicle belongs to Peter. Peter does not return to collect the car. When John claims his car from Wasim, Wasim refuses to hand it over until compensated for the repairs he has effected to the vehicle. At whose expense has John been enriched? Discuss with reference to case law. **(15)**

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