UNJUSTIFIED ENRICHMENT

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LEGISLATION

There was no legislation relevant to unjustified enrichment during the period under review.

CASE LAW

Nel v Jonker [2011] ZAWCHC 5 (17 February 2011) an unreported judgment discussed in 2011 *Annual Survey* 1257 and which dealt with maintenance paid in respect of a child which was later shown to be unrelated to the plaintiff, and the *condictio indebiti* , has in fact now been reported as *MN v AJ* 2013 (3) SA 26 (WCC).

CLAIM IN RESPECT OF MONEY OR PROPERTY TRANSFERRED UNDER AN ILLEGAL AGREEMENT (*CONDICTIO OB TURPEM VEL INIUSTAM CAUSAM*)

Whether a claim in unjustified enrichment constitutes property for the purposes of section 25(1) of the Constitution of the Republic of South Africa, 1996

National Credit Regulator v Opperman and Others 2013 (2) SA 1 (CC) is the first decision of the Constitutional Court to deal with the law of enrichment. Its finding that the concept of property recognised in section 25(1) of the Bill of Rights also encompasses personal claims, including claims arising in enrichment, has profound implications for this area of law.

O, the first respondent, was a Namibian farmer. In 2009 he lent his friend, B, the second respondent, R7 million for the purpose of property development in Cape Town. O was not a registered credit provider as required by section 40 read with section 42(1) of the National Credit Act 34 of 2005 ('NCA'). When it appeared that B was unable to meet his obligations, O applied for the sequestration of B's estate in the Western Cape High Court at Cape Town. The court raised concerns about the applicable provisions of the NCA and counsel for O subsequently amended

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his notice of motion to include a challenge to the constitutionality of section 89(5). This resulted in the joinder of the National Credit Regulator (applicant), the Minister of Finance (the third respondent) and the Minister of Trade and Industry (the fourth respondent) as parties to the proceedings.

According to section 89(5) of the NCA,

> If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that —
> *(a)* the credit agreement is void as from the date the agreement was entered into;
> *(b)* the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated —
> (i) at the rate set out in that agreement; and
> (ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and
> *(c)* all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either —
> (i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or
> (ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.

The High Court found that section 89(5)*(c)* was inconsistent with the rights recognised in section 25(1) of the Constitution, according to which: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.' This was because it denied an unregistered credit provider the right to restitution of money lent without affording a court the discretion to consider whether restitution would be just and equitable. Accordingly, the High Court declared the provision to be constitutionally invalid. The National Credit Regulator ('NCR') appealed against the declaration.

The Constitutional Court (per Van der Westhuizen J; Mogoeng CJ, Moseneke DCJ, Khampepe J, Nkabinde J and Skweyiya J concurring) confirmed the High Court's order. Van der Westhuizen J began by reviewing the common-law context of section 89(5)*(c)*. The appropriate claim to recover a transfer made in pursuance of an illegal agreement was the *condictio ob turpem vel iniustam causam*. In order to succeed in this restitutionary

claim, the plaintiff must be free of turpitude and show that he had not acted dishonourably; this was the *par delictum* rule. However, since *Jajbhay v Cassim* 1939 AD 537 the courts have been prepared to relax the *par delictum* rule, in order to prevent injustice or to satisfy the requirements of public policy, by taking into account considerations of fairness. The rule was thus not an absolute bar to a claim in restitution.

Where, as in this case, a credit provider, ignorant of the requirement to register, unwittingly entered into an unlawful credit agreement, there could not be said to be substantial (if any) turpitude on his part. Therefore, according to the common law, a plaintiff in such a case would be permitted to recover his performance. But there seemed to be little room for judicial discretion under section 89(5)*(c)*. It appeared to provide that the rights of the credit provider to recover money paid or goods delivered to the consumer must either be 'cancelled' or forfeited to the state if the consumer would be unjustly enriched by cancellation, regardless of turpitude or other factors relevant to a fairness or public-policy inquiry.

In fact, several alternative interpretations of section 89(5)*(c)* had been proposed. It had been argued on behalf of the NCR that section 89(5)*(c)*(ii) did not automatically come into operation if the court concluded that cancellation of the credit provider's right to restitution would unjustly enrich the consumer, and that the provision could be construed as giving the court a discretion to refrain from cancelling the right — for example in light of the level of turpitude or blameworthiness on the part of the credit provider. On the other hand, it was the view of Cameron J that the phrase 'rights . . . under that credit agreement' in section 89(5)*(c)* was critical; that since the credit provider's enrichment claim did not arise from the credit agreement, it was not comprised within the provision; indeed, the provision was meaningless and without effect. These interpretations were attractive in that they avoided a finding of constitutional invalidity. But the interpretation proposed by the NCR was not reasonably permitted by the 'either . . . or' wording of section 89(5)*(c)*. Nor was the interpretation proposed by Cameron J a plausible one; indeed, read in that way, the provision would constitute a patent drafting error.

> Before constitutional compliance can be evaluated, a court must attribute a meaning to a provision. If more than one meaning is reasonably plausible, the one resulting in constitutional compliance must be chosen. But if the interpretation that emerges from the

wording and context results in constitutional invalidity a court has to make a finding of unconstitutionality' (para [42]).

Despite the unclear and inaccurate language of section 89(5)*(c)*, it was not so vague as to be unconstitutional on that basis alone. The most plausible interpretation of the provision remained that attributed to it by the High Court: it accorded with what were clearly the aims of the provision; took account of the context of the problematic phrase 'under that credit agreement', especially the words 'to recover any money paid or goods delivered' and the repeated phrase 'unjustly enrich' in section 89(5)*(c)*(i) and (ii); and did not unduly strain its wording.

However, that conclusion meant that the provision might after all be found to be inconsistent with the Constitution. The next question to arise was whether section 89(5)*(c)* dealt with property for the purposes of section 25(1). Constitutional jurisprudence accepted that deprivation of ownership of corporeal property constituted deprivation for the purposes of section 25(1), but the court had not specifically found that personal rights emanating from contract, delict or enrichment constituted property for the purposes of that section. In the context of this case it was logical and realistic to recognise the right to restitution of money paid arising from unjustified enrichment as property under section 25(1). Such recognition would be in accordance with developments in other jurisdictions. Intangible property was of primary importance in modern-day society, and the concept of property should not be so narrowly interpreted as to diminish the worth of the protection given by section 25.

Further, it was clear that the outright denial of O's enrichment claim by statute amounted to an arbitrary deprivation for the purposes of section 25(1). A deprivation was considered arbitrary when the law failed to provide sufficient reason for it, or when it was procedurally unfair: *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC). Whether there was sufficient reason would be determined with reference to: the relationship between the means employed and the ends sought by the legislative scheme; the relationship between the purpose of the deprivation and the nature of the property; as well as the extent of the deprivation in respect of that property. Whereas it had been argued that the requirement of procedural fairness was satisfied in this case by virtue of the possibility of adjudication by a court, this argument

was defeated by the fact that the court was denied any discretion to determine a just and equitable order: cf *Mohunram & another v National Director of Public Prosecutions & another (Law Review Project as Amicus curiae)* 2007 (4) SA 222 (CC). Although the court was sympathetic to the objects of the provision, namely to protect the public against unscrupulous money lenders, and specifically to deter unregistered credit providers from advancing credit to consumers outside the regulatory framework, these objects did not provide sufficient reason for the deprivation embodied in this provision. Given that the extent of deprivation in this case was far reaching, the purpose should have been clearly stated, and the means chosen to accomplish it narrowly framed. In fact the means chosen were disproportionate to the purpose.

It had been argued that even if the denial of O's enrichment claim by section 89(5)*(c)* of the NCA amounted to an arbitrary deprivation for the purposes of section 25(1) of the Constitution, nevertheless it constituted a permissible limitation of the section 25(1) right. However, it was unclear whether an arbitrary deprivation of property could ever constitute a reasonable and justifiable limitation in the context of an open and democratic society, as required by the limitation clause in section 36(1). Many of the factors employed in the context of the arbitrariness test yielded the same conclusion in the context of the limitation inquiry. Section 36(1)*(d)* specifically required that attention be given to the relation between the limitation and its purpose: laws impacting on constitutional rights were not permitted to use disproportionate means to achieve their purposes. Furthermore, section 36(1)*(e)* required that the availability of less restrictive means be considered. The common-law regime clearly constituted a less restrictive means of achieving the same ends: in particular, the failure of section 89(5)*(c)* to distinguish between credit providers who intentionally exploited consumers and those who failed to register because of ignorance, lending money to a friend, was disproportionate. Section 136 of the NCA also made provision for a consumer to bring a complaint to the NCR, which could in turn refer the complaint to the National Consumer Tribunal, a body empowered to impose fines on credit providers. The foregoing of interest due under an unlawful credit agreement was yet another means of achieving the aims of the NCA less restrictive than that employed by section 89(5)*(c)*. Therefore, section 89(5)*(c)* of the NCA was inconsistent with section 25(1) of the Constitution and consequently invalid. No suspension of the order of invalidity was

necessary, nor would reading-in be appropriate. It was preferable for the legislature to address this problematic provision comprehensively. In the meantime, the common-law position regarding unlawful contracts prevails.

Cameron J (Froneman J and Jafta J concurring) dissented from this conclusion, declining to confirm the High Court's order of invalidity.

> The route the main judgment takes lies along a path that requires the Court to ignore plain words in the provision that are central to it. In my view, it is simpler, and truer to our task of interpretation, not to ignore the words, but to take them to mean what they say (para [93]).
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> If one takes the language the legislator has enacted seriously, as we must, the plain meaning of the provision is that the unregistered credit provider's purported rights under the credit agreement to recover what has been transferred to the borrower must either be cancelled or forfeited. On its own terms, this is not incoherent. . . . The difficulty, of course, is that the statute itself ordains that the credit agreement is void from the moment it was concluded. So, by the legislator's own logic, there cannot be any rights of recovery under the agreement (para [102]).
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> This case, in my respectful view, signals the limits of cooperative effort in giving meaning to ill-chosen words. To virtually ignore the wording of the provision, and then find it constitutionally bad, seems to me an unnecessary dissonance. . . . There is then no particular constitutional imperative to squeeze a meaning from the provision. Rather, we must accept the words of the provision for what they say, even at the cost of accepting that the provision is ineffectual. It is better, in my view, to acknowledge the drafting error, and to leave Parliament to correct it (para [105]).

National Credit Regulator v Opperman & others constitutes a watershed moment in the evolution of the South African law of enrichment. In terms of section 8(3) of the Constitution: 'When applying a provision of the Bill of Rights to a natural or juristic person . . . a court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).' In terms of section 39(2): 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights': see *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *S v Thebus* 2003 (6) SA 505 (CC) paras [23]–[32]; Anton Fagan 'The secondary role of the spirit, purport and objects of the

Bill of Rights in the common law's development' (2010) 127 *South African Law Journal* 611. However, until now the implications of the Bill of Rights for the law of enrichment have been unclear, at least insofar as its potential for broad, systematic impact is concerned: see eg Daniel Visser *Unjustified Enrichment* (2008) 24–26; Jacques du Plessis *The South African Law of Unjustified Enrichment* (2012) 17–22. Unlike other areas of South African private law such as property and delict, there is no primary right enshrined in the Bill of Rights to which the law of enrichment obviously gives expression and against which its constitutionality can obviously be tested. Consequently, the finding of the Constitutional Court that the concept of property recognised in section 25(1) also embodies personal claims, including claims arising in enrichment, has profound implications for this area of law. On the concept of property in the Constitution see, eg AJ Van der Walt *Constitutional Property Law* 3 ed (2011) chapter 3, cited with approval in the judgment (para [63]).

Also worthy of note is the brief discussion of the difference between the terms 'unjust enrichment' and 'unjustified enrichment' in the judgment of Van der Westhuizen J (paras [23], [24]). 'Linguistically there appears to be some difference between ''unjust'' and ''unjustified''. The first refers to the concept of justice, or fairness, whereas the second normally means the absence of justification, in this case legal justification for the enrichment.' Here Van der Westhuizen J cited Francesco Giglio 'A systematic approach to ''unjust'' and ''unjustified'' enrichment' (2003) 23 *Oxford Journal of Legal Studies* 455. However, Van der Westhuizen J concluded that the two terms appeared to be used synonymously in South African law. The choice of terminology in the Act ('unjust enrichment') was therefore not significant.

Claim in respect of money transferred under an unlawful and fraudulent investment scheme

In *Trustees, Estate Whitehead v Dumas & another* 2013 (3) SA 331 (SCA), D, the applicant at first instance, was the victim of an unlawful and fraudulent Ponzi scheme operated by W. Acting on the strength of a misrepresentation by an agent of W, D instructed his bank, First National Bank, to pay R3 million into W's account at Absa Bank. D understood from the agent that the money would remain his property until he concluded a contract with W a few days later. However, W had in fact already been arrested for fraud in the United Kingdom, and so the planned meeting between D

and W never took place. On learning of W's arrest five days later, D instructed his bank to reverse the transfer. Acting on his instructions, FNB wrote to Absa requesting that the money be put on hold, and no transactions were made from the account thereafter. The account had a balance of approximately R3,3 million, while a second account, also held by W at ABSA, had a balance of almost R5 million. However, a few days after that W's estate had been provisionally sequestrated, and pursuant to an order of court, the money in both accounts was transferred into the trust account of C, a firm of attorneys, pending the appointment of trustees. In due course trustees were appointed and the money was paid over to a trust account operated by them. On the following day D instituted a vindicatory application for the return of the money. Subsequently he altered the legal basis of his claim from a *vindicatio* to one premised on enrichment: more specifically, a *condictio ob turpem vel iniustam causam*, 'a remedy available to a plaintiff who innocently transfers money to a defendant under an agreement which, to the knowledge of the defendant, is illegal' (para [10]). He sought to enforce this claim directly against Absa, W's bank. In the event, of the seven respondents only the trustees of W opposed D's application.

The High Court, per Makgoba J, upheld D's claim: because D's transfer of money into W's account had been elicited 'through a fraud and theft perpetrated on him by W, W had no entitlement, and thus no claim against Absa, to the money' (para [12]). Accordingly, Makgoba J concluded, the money fell outside W's estate and was not subject to the *concursus creditorum*; Absa, which would be enriched if it retained the money, was obliged to repay it to D. W's trustees appealed.

The Supreme Court of Appeal upheld the appeal (per Cachalia JA; Lewis JA, Ponnan JA, Theron JA and Petse JA concurring). In his original affidavits D had claimed to be owner of the funds deposited into W's bank account. However, 'formulated in these terms, the claim was bad because when money is paid into a bank account that money becomes the property of the bank' (para [20]). The *rei vindicatio* was therefore not available to D. Where, as in this case, A caused the transfer of money from his bank account to the account of B, no personal rights were transferred from A to B; what occurred was that A's personal claim to the funds held against his bank was extinguished and a new personal right created between B and his bank. Ownership of the money — insofar as money *in specie* was involved — was

transferred from the transferring bank to the collecting bank, which was obliged to account to B in accordance with their bank–customer contractual relationship. If B were subsequently sequestrated, then A's claim would lie against B's insolvent estate. Therefore the inquiry in this case turned on whether W had indeed acquired any personal right to the credit (i e against Absa) when D caused the money to be transferred. If so, it followed that the funds had accrued to W's estate upon sequestration. If not, the funds would then 'remain the property of the bank, with W's estate having no claim to its payment' (para [16]). The bank would be unjustly enriched at D's expense.

The foundation of the High Court's decision to uphold D's claim was the decision of the Supreme Court of Appeal in *Nissan South Africa (Pty) Ltd v Marnitz & others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA). According to Streicher JA (para [23]) in that case: 'If stolen money is paid into a bank account to the credit of a thief, the thief has as little entitlement to the credit representing the money so paid into the bank account as he would have had in respect of the actual notes and coins paid into the bank account.' Thus neither the payee nor the liquidators of the payee's insolvent estate had any claim to the stolen money, and because the bank was enriched by its receipt, 'it had to release what was left in the payee's account' (para [19]).

However, the facts of the *Nissan* case were significantly different from those at issue here. In the *Nissan* case, the payee had stolen the money: cf the recent comment on that case by Malan JA in *Absa Bank Ltd v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA) para [14]. The same was true in *Commissioner of Customs and Excise v Bank of Lisbon International Ltd* 1994 (1) SA 205 (N). In the words of Thirion J, giving judgment in the second case, 'the circumstances under which [the thief] obtained the money . . . were such as to deprive the delivery of its legal effect' (208 of the *Bank of Lisbon* judgment, quoted by Cachalia JA para [22]). It followed that the bank acquired ownership of the money without a corresponding obligation to account to its customer. Therefore, both *Nissan* and *Bank of Lisbon* were concerned with theft or fraud outside of the contractual context, i e in the absence of any deliberate conferral by the plaintiff on the thief. 'By contrast the investment transaction between D and W, though tainted by fraud, nevertheless constituted the causa for the payment. D intended to pay W and voluntarily made the

payment into W's account; it is immaterial that the payment was solicited through W's misrepresentation and fraud' (para [23]). It followed that W acquired an enforceable right against Absa as soon as the money arrived in his bank account, despite the absence of a valid underlying agreement. Absa was not enriched as a result of its receipt of the funds, and no enrichment claim lay against it. 'D had only a delictual claim against W arising from the fraudulent misrepresentation, which induced the transfer of the money, and on the latter's sequestration a claim against the trustees' (para [24]).

Finally, regarding the concern expressed by Streicher JA in the *Nissan* case that the usual remedies open to a creditor (interdicts and attachments to prevent the debtor's disposing of his assets) might not be adequate in the event of a thief's insolvency, and that the law was therefore bound to provide a remedy for the recovery of stolen money directly from the bank in these circumstances (para [16] of the *Nissan* judgment), it appeared from the distinction drawn above that there were different considerations at work in the present case.

Admittedly, Cachalia JA's description in paragraph [24] of D's claim against W as exclusively delictual, is unfortunate. Although a delictual claim against W did indeed arise, the judgment would have been clearer had the court accepted that D also had a restitutionary claim arising in enrichment available against W, namely the *condictio ob turpem vel iniustam causam* already pleaded: see eg, *Afrisure CC & another v Watson NO & another* 2009 (2) SA 127 (SCA). The court appeared to accept that D, however foolish, was an innocent victim of W's unlawful scheme. But even if a different conclusion had been reached on that point, this was surely a case in which the *par delictum* rule would have been relaxed in favour of the plaintiff and restitution awarded: see eg *Visser en 'n Ander v Roussouw en Andere NNO* 1990 (1) SA 139 (A).

That reservation aside, this judgment is to be welcomed insofar as it greatly clarifies the juristic basis and wider implications of the Supreme Court of Appeal's decision in *Nissan South Africa (Pty) Ltd v Marnitz & others (Stand 186 Aeroport (Pty) Ltd Intervening).* In particular, the court was clearly right to draw a fundamental distinction between cases of giving or deliberate conferral such as this one ('D intended to pay W and voluntarily made the payment into W's account; it is immaterial that the payment was solicited through W's misrepresentation and

fraud'), and cases such as *Commissioner of Customs and Excise v Bank of Lisbon International Ltd*, the *Nissan* case, and *Absa Bank Ltd v Lombard Insurance Co Ltd*, which involved taking, ie the invasion or infringement of the plaintiff's right to the money by the thief. In the first kind of case, the recipient of the payment remains entitled to the money as against his bank, and this personal claim falls into the recipient's insolvent estate, leaving the defrauded transferor a mere concurrent creditor. In the latter group of cases, the thief acquires no right to the stolen money as against his own bank, and the victim can recover the money in the hands of the bank by means of the *condictio sine causa* recognised by Thirion J in the *Bank of Lisbon* case (220), bypassing the thief's insolvency.

Finally, Cachalia JA hints at an important normative justification for this distinction (para [25]). However innocent of fraud, in deliberately conferring money on another the victim of a Ponzi scheme tacitly assumes the risk of that other's insolvency, in that he chooses to deal with him. The same cannot be said of the victim of a theft, who is of course wholly passive. It is this point that explains the different results reached in these two groups of cases. As one who has voluntarily conferred his assets on another, albeit in the hope of a lucrative return on his investment, it is just that the victim of a fraudulent investment scheme share in the fraudster's insolvency, whereas the victim of theft is protected.

Claim in Respect of Stolen Money against Innocent Recipient (*Condictio Sine Causa Specialis*)

Recovery of identifiable fund remaining in innocent third party's bank account

Like the *Whitehead* decision discussed above, *Roestoff v Cliffe Dekker Hofmeyr Inc* 2013 (1) SA 12 (GNP) has helped to clarify the effect of the Supreme Court of Appeal's decisions in *First National Bank of Southern Africa Ltd v Perry NO & others* 2001 (3) SA 960 (SCA) and *Nissan South Africa (Pty) Ltd v Marnitz & others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA). R had been the victim of an internet phishing scam as a result of which R350 000 had been removed from his bank account. R200 000 of this was subsequently transferred into the trust account of the defendant firm, CDH, itself innocent of any fraud. CDH then transferred the resulting credit (minus a handling fee of

R5 831, 60) to a third party, again without any knowledge of its true source. R instituted a claim against CDH for R200 000 on several alternative grounds, one of which was that CDH retained the amount of R200 000 in its trust account and was obliged to restore the money to him as its owner.

Du Plessis J dismissed R's claim. R's assertion — that he was the owner of R200 000 in CDH's trust account and was therefore entitled to recover it — amounted to a species of *rei vindicatio* (vindicatory claim). However, the application of the principles of the *vindicatio* in this context was problematic. Although coins and notes, as movable property, are susceptible to ownership, and thus in principle recoverable by means of the *vindicatio*, ownership in stolen money is lost as soon as it is mixed with that of another. The same is true of stolen money paid into a bank account: it becomes the property of the bank by operation of law, and the *vindicatio* of the original owner falls away. Thus the weight of authority is in favour of the view that where a thief deposits money in the bank account of an innocent third party, the victim's remedy is not a vindicatory one but arises rather from the defendant's enrichment *sine causa* (without basis): see *Absa Bank Ltd v Standard Bank of South Africa Ltd* 1998 (1) SA 242 (SCA); *First National Bank v Perry* (above). Nevertheless, it was accepted for these purposes (although not held) that the plaintiff could have succeeded by means of a species of *vindicatio* if he could have shown that his money was still identifiable as such in the defendant's bank account, at least when action was instituted. However, at this point the sum of approximately R194 168,40 which remained after deduction of the defendant's fee had long since been paid out of the account, while the fee itself had been transferred to the defendant's business account. The R200 000 received by the defendant was no longer in an identifiable fund which could be identified with the plaintiff's stolen money. As to whether the defendant could be said to have been enriched in the amount of R5 831,60 (the fee), this had not been pleaded, nor had it been investigated during the course of the trial, and under the circumstances it would be unjust to attempt to decide the matter on the basis of enrichment.

This decision constitutes an important addition to the growing body of case law concerning the enrichment claim of the victim of theft against the recipient of stolen money. According to civilian orthodoxy, the owner of goods, including money, may in principle vindicate them wherever he finds them, whether from the thief

himself, or indeed from a good-faith remote recipient. This vindicatory claim fails, however, where the victim of theft ceases to be owner of the stolen goods, as a result of consumption, specification or mixture (in the case of money). It does not seem that the victim of theft out of a bank account can be said to be owner of the stolen money at any point after it has been deposited into another account (see *Commissioner of Customs and Excise v Bank of Lisbon International* 213, relied on by Cachalia JA para [13] of *Trustees, Estate Whitehead v Dumas & another* 2013 (3) SA 331 (SCA), discussed above). However, it has long been established in South African law that the original owner of stolen money is at least permitted to proceed against such a remote recipient even after the *vindicatio* has fallen away by means of an enrichment action — in particular, the residual *condictio sine causa specialis* — provided that the recipient received the stolen money *ex causa lucrativa*, gratuitously (*Trahair v Webb & Co* 1924 WLD 227; *Govender v Standard Bank of South Africa Ltd* 1984 (4) SA 392 (C); *Commissioner of Customs and Excise v Bank of Lisbon International Ltd* 1994 (1) SA 205 (N)). Although not identified as instances of the *condictio sine causa specialis*, the claims at issue in *Nissan v Marnitz* (above) and *Absa Bank v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA) appear to have been of this kind.

In fact, it is difficult to speak of 'ownership' of money held in a bank account at all, since the account holder acquires only personal rights to the funds against his bank (cf again *Trustees, Estate Whitehead v Dumas & another* paras [13], [15]). Nevertheless, in the words of Thirion J in the *Bank of Lisbon* case, '[a]lthough the relationship between banker and customer is that of debtor and creditor, the customer has a ''special property or interest'' in the money in his bank account' (see further *S v Kotze* 1965 (1) SA 118 (A) 125). It is the invasion of or interference with this 'special interest' by the thief that gives rise to the plaintiff's claim in a case such as this one — in the words of Du Plessis J, it is 'a species of a *rei vindicatio*' or substitute *vindicatio* — and enables him to pursue 'his' money into an identifiable fund (see Visser *Unjustified Enrichment* 657–59). Thus where it remains possible to identify a particular sum currently held to the credit of the defendant as the proceeds of the sum stolen from the plaintiff, the plaintiff has a *condictio sine causa specialis* against the defendant for its recovery.

Restitution of Performance under Void Sale of Land

Improvement lien of a bona fide *purchaser in respect of necessary and useful expenses; effect of failure to tender return of purchase price on seller's* vindicatio

In *Rhoode v De Kock & another* 2013 (3) SA 123 (SCA), Mr and Mrs D, the applicants at first instance, had sold residential property to R, the respondent. The deed of sale contained a suspensive condition that a loan for the full purchase price, to be secured by a mortgage bond over the property, would be obtained by R within a year of the date of signature. R took possession of the property but the loan was never obtained. Following the expiry of the one-year period the parties twice sought to extend the term of the contract by substituting new dates for the original date of signature. R paid the applicants R400 000 towards the purchase price. However, the amendments to the deed were initialled only by Mr D, not by Mrs D. Eventually, some three and a half years after the original sale, Mr D sent an email to R demanding a guarantee for the purchase price and threatening to cancel the contract if one were not produced. R responded with an attorneys' letter in which it was alleged that because the suspensive condition had not been fulfilled, the sale had lapsed; that the parties' attempts to extend it had been void due to lack of compliance with both the Matrimonial Property Act 88 of 1984 and the Alienation of Land Act 68 of 1981, in that Mrs D, who was co-owner of the property, had not signed the amended deed; that R was entitled to recover the R400 000 paid towards the purchase price; and that he reserved the right to claim the amount by which the value of the property had been increased by virtue of improvements made by him. He continued in occupation.

Three months later the applicants applied for an order in the magistrate's court ejecting R from the property. In an affidavit accompanying the application it was alleged that R had no right to occupy the property, and that while R's claim for R400 000 was conceded, the applicants would counterclaim against him for the value of his occupation of the property. The improvements to the property alleged by R were denied, inter alia, on the basis that they had been effected without permission from the local authority.

In his answering affidavit R alleged that he was lawfully entitled to remain in possession of the property by virtue of an improve-

ment lien. He alleged that he had made improvements to the property in the belief that the contract was binding and that he would shortly become owner of the property, ie as a *bona fide* possessor, or at least a *bona fide* occupier. He attached an estimate, provided by a local builder, of what the improvements would cost at current market prices. The total assessment amounted to R1 046 319,97, of which approximately R600 000 represented materials and the rest, labour. Finally, R alleged that the improvements had 'substantially increased' the value of the property, and that a provisional assessment by a professional valuer estimated that increase at approximately R500 000. He denied that the failure to secure advance planning permission detracted from the value of the improvements, alleging that the retrospective approval of the local authority would be obtained in due course.

The application for an order of ejectment was granted. R appealed to the Western Cape High Court but the appeal was dismissed by Allie J (Samela J concurring). R then appealed to the Supreme Court of Appeal.

Cloete JA (Cachalia JA, Bosielo JA, Wallis JA and Pillay JA concurring) dismissed the appeal. Aside from whether the matter should be remitted to the magistrate to receive a further set of affidavits, two issues arose for decision on appeal: first, whether R had indeed established an improvement lien; and, second, whether it was fatal to the applicants' *rei vindicatio* that they had not repaid or tendered the repayment of the R400 000 paid by R towards the purchase price. Regarding the lien, R claimed the rights of a *bona fide* purchaser and therefore claimed to be entitled to recover both necessary and useful expenses. In the case of necessary expenses, R would be entitled to reimbursement for expenditure of money or materials on the preservation of the property (*Harrison v Marchant* 1941 WLD 16). In the case of useful expenses, the amount of compensation was limited to the amount by which the value of the property had been increased, or the amount of the expenditure incurred, whichever was the lesser (Justinian *Digest* 6.1.38; Johannes Voet *Ad Pandectas* 6.1 n 36; *Meyer's Trustee v Malan* 1911 TPD 559; *Fletcher & Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636). However, in neither case had R established that he had actually expended anything. Nor had he demonstrated satisfactorily that the value of the property had in fact increased (as was required in the case of useful improvements). Indeed, there was not even a

prima facie case for the applicants to meet. To enforce a lien in these circumstances would be to allow an abuse of the process of the court.

As for the question of whether the applicants' failure to tender restitution of the R400 000 was fatal to their *vindicatio*, here counsel for R had argued that, 'it is an elementary principle of justice that someone who demands restitution of what he has performed under a contract, which has been cancelled or has otherwise failed, must himself restore, or at least tender to restore, what he received thereunder' (passage from counsel's heads of argument quoted at [20]) and that the applicants' failure to make such a tender meant that their cause of action was not complete: see *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd en Andere* 1974 (1) SA 414 (NC). It was argued, further, with reference to *Patel v Adam* 1977 (2) SA 653 (A), that although the respondents' claim was couched in the form of a *vindicatio*, they had, as a matter of fact, parted with possession of the property in terms of a void contract of sale, and that to avoid an illogical development in the law, they should be required to tender restitution of what they had received. However, insofar as the *Bonne Fortune* case concerned a claim for restitution, it was distinguishable. In some cases, where there had been full performance under a void contract, a party would have no option but to sue for restitution and tender restitution of what she had received: for example, where money has been paid, or where the plaintiff is no longer the owner of an article delivered by her under the contract. But where the *vindicatio* is available, relief should not be denied simply because there was another cause of action available to the respondent or defendant. The mere fact that R had a claim for the repayment of R400 000 in unjust enrichment, did not mean that he was entitled to resist ejectment until that amount had been repaid or tendered: a tender to repay was not a necessary ingredient in the applicants' claim. Admittedly, in the words of Botha J in *Vogel NO v Volkersz* 1977 (1) SA 537 (T), '[i]f the point is raised by the purchaser, or by the Court *mero motu*, the Court will obviously make its order against the purchaser to restore possession to the seller conditional upon the seller refunding to the purchaser whatever the latter has paid in respect of the purchase price of the property, but it is not necessary for the seller to tender such a refund' (quoted para [23]). However, R had already instituted a claim in the High Court for repayment of the R400 000, while the respondents had asserted a counter-

claim for the period of R's occupation, and it was more appropriate for the applicants' liability to be decided in that context.

Apart from its helpful restatement of the rules regarding necessary and useful improvements to another's property by a *bona fide* occupier (see eg du Plessis *Unjustified Enrichment in South African Law* 274–82), this decision is valuable for its clear insistence on the distinction between the *rei vindicatio* and a personal claim arising from enrichment in the context of a void contract. Generally speaking, when a party to a contract avoided for improperly obtained consensus or cancelled due to breach, seeks restitution of what he has performed, he must restore the other party to his former position. In other words, it is a precondition for restitution that the plaintiff restore or tender restitution of what he has obtained under the contract: see eg Du Plessis *Unjustified Enrichment in South African Law* 69–70. This process of mutual restitution is traditionally referred to as *restitutio in integrum*. But where conveyance of the item sold has not yet occurred, the seller retains ownership of it. His real right can be asserted prior to any personal right enjoyed by the other party, without reference to the bilateral context.