REFLECTIONS ON THE SINE CAUSA REQUIREMENT AND THE CONDICTIONES IN SOUTH AFRICAN LAW*

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1 Introduction

Much of the modern work on unjustified enrichment around the world strives to determine how, in a taxonomic sense, we should find, describe and classify cases of enrichment. As we have moved into the twenty-first century, South Africa’s enrichment law has found itself at the point where it has important choices to make in this regard. For some time there was a widely held view that the enrichment actions inherited from classical Roman-Dutch law, and which had defined South Africa’s enrichment law from an organisational perspective in the twentieth century, were simply to be tolerated until a general enrichment action could be recognised, and South Africa’s law of unjustified enrichment could be described and developed in a more principled and generalised fashion. But the Supreme Court of Appeal in McCarthy Retail Ltd v Shortdistance Carriers CC1 inclined itself to a more cautious approach. By finding that a general enrichment action (when it is eventually recognised) should be subsidiary to the traditional enrichment actions, the Supreme Court of Appeal indicated firmly that the traditional actions would remain important to how parties classify and plead claims based on enrichment.2 As far as this article is concerned, this has meant that some serious thought needs to be given to the nature and role of the condictiones:

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the institutionalised forms of action\(^3\) which are applied in our law to deal with most cases of enrichment by transfer. The *condictiones* present interesting and difficult challenges of classification for the modern South African jurist. They have deep historical roots, but they have also evolved in a piecemeal fashion to meet modern commercial realities. Their development and application replicates (and exemplifies) the casuistic and ad hoc trajectory of enrichment law in South Africa from misunderstood quasi-contractual oddity to a separate and legitimate branch of the law of obligations, but one that is still finding its feet. It is therefore fitting that the colloquium on the future of the law of unjustified enrichment in South Africa should coincide with the 300\(^{\text{th}}\) anniversary of the birth of the father of modern taxonomy, the Swedish botanist, physician and zoologist Carl Linnaeus.\(^4\) In this spirit, this article will review the current landscape, and consider the possible futures of the *condictiones* in modern South African law.

2 The traditional position

South Africa’s law of unjustified enrichment has traditionally been characterised by the formal dominance of the various enrichment actions inherited from Roman and Roman-Dutch law. The result, as Schutz JA pointed out in *McCarthy*, was that “[u]nlike other branches of our law, the rich Roman source material has not led to an unqualified judicial recognition … of a general principle of unjustified enrichment, from which solutions to particular instances may be derived”.\(^5\) Instead, enrichment law was understood and explained almost exclusively through the windows created by these actions. As Visser states:

> “The territory of enrichment law was (and for the moment remains) demarcated principally in terms of the Roman *condictiones* and a few other related actions. Although some of these actions were created by the South African courts, most of them are firmly rooted in the *Corpus Iuris Civilis* (or at least in the medieval extension of its principles). In South African law, therefore, it is not so much a question of the forms of action ruling us from their graves, but that they have never died – causing us to continue thinking, quite primitively in terms of ‘actions’ instead of principle.”\(^6\)

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\(^3\) The various ways in which cases based upon enrichment can be brought before the courts are consistently referred to as actions. See generally Brand “Enrichment” in *LAWSA* Vol 9 2 ed (2005) para 210; Visser *Unjustified Enrichment* 5. This includes the various types of *condictio ob causam (rem) dati* which developed in the post-classical era, and which were absorbed into South African law via Roman-Dutch law.


\(^5\) *McCarthy* para 8. The existence of a general action was denied in *Nortjé v Pool* 1966 3 SA 96 (A).

\(^6\) Visser *Unjustified Enrichment* 4.
The result was that instances of enrichment liability were generally explained and applied in a narrow, positivistic, technical way; in much the same way, perhaps, as the various specific torts of English law have traditionally been described and understood. Treatises and textbooks have generally followed suit: their structure has been based around the traditional actions, and they have explained, one-by-one, the minutiae of these actions. In the absence of a general enrichment action, the best that a litigant could hope for in a new or unusual case was to argue for an incremental extension to an existing enrichment action.

The condictiones are a classic case in point. There has been a good deal of academic and judicial analysis of the condictiones in South African law. The result has been an unusual combination of a relatively settled general picture of the nature of these condictiones, and the situations to which they are generally understood apply, at one level. But this level masks an underlying degree of debate about what these various condictiones do, or should do, and whether the point which we have reached with regard to the judicial application of the condictiones is actually suitable and coherent, at a second level.

Exemplifying this curious combination is the case of the condicito indebiti, the most well-known and most liberally employed enrichment action in South African law. It is the action that (as currently defined) allows a plaintiff to reclaim either money or property that had been handed over in error, when the transfer was in fact not due, and there was no obligation to make it at all. Transfer in error means that the money or property must have been transferred solvendi animo per errorem – in other words, because of an erroneous belief that the property or money was due or payable. Since the much-maligned rule that the mistake had to be one of fact and not law was eliminated from South African law in Willis Faber

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7 I use the word “generally” advisedly. There were of course some (one thinks particularly of Professors de Vos and Scholtens, and later Professors Zimmermann and Visser) who had more visionary inclinations.
8 See generally De Vos Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg 3 ed (1987); LAWSA Vol 9 para 208; Visser “Unjustified Enrichment” in Zimmermann and Visser (eds) Southern Cross: Civil Law and Common Law in South Africa (1996) 521, Wille’s Principles 1055, Unjustified Enrichment 5; Eiselen and Pienaar Unjustified Enrichment: A Casebook 3 ed (2008); Sonnekus Unjustified Enrichment ch 3-6. Note that the condictiones do not have to be pleaded specifically by name, though.
9 For a comprehensive analysis of the condicito indebiti, its origins, development and current applications, see De Vos Verrykingsaanspreeklikheid 171; Visser Die Rol van Dwaling by die Condictio Indebiti: ’n Regshistoriese Onderzoek met ’n Regsvergelikeende Ekskursus (doctoral thesis, Leyden, 1985); Van der Walt “Die condicito indebiti as verrykingsaksie” 1966 THRHR 220; Sonnekus Unjustified Enrichment 227ff; Eiselen and Pienaar Unjustified Enrichment 99ff; LAWSA Vol 9 para 212.
10 See La Riche v Hamman 1946 AD 648 656. See too Frame v Palmer 1950 3 SA 340 (C) 346.
11 Union Government v National Bank of South Africa Ltd 1921 AD 121; Recsey v Riche 1927 AD 554 556; Eiselen and Pienaar Unjustified Enrichment 107ff.
Enthoven (Edms) Bpk v Receiver of Revenue, the remaining fundamental qualification to the mistake element is that the mistake must be excusable, meaning that the payment should thus neither have been made in a careless or foolish manner, nor voluntarily in the belief or knowledge that the transfer was not due.

So far, so good. But scratch at the surface, and a litany of doubts and difficulties are exposed. First, there is the question whether the element of mistake ought to be a pre-requisite at all. Numerous commentators have questioned whether this requirement is appropriate or necessary, arguing that it obfuscates the true inquiry as to whether the transfer was an indebitum. Secondly, there is a host of literature that lambasts the requirement that the error must have been excusable. Despite this, the court in Willis’s case specifically refused to avail itself of the opportunity to expunge it from our law, and therefore it notionally remains an important facet of a successful claim under the *condictio indebiti* in South Africa: something not replicated in any other modern system of enrichment law. There has been one concession to the excusability requirement – in Bowman, De Wet and Du Plessis NNO v Fidelity Bank Ltd, it was held that the excusability requirement does not apply where a person makes a payment in a representative capacity while acting for the benefit of another. But subsequent courts have made no real effort to test the possibilities suggested by this decision, and the exception seems to have been confined to its particular facts.

Thirdly, despite the element of excusable error notionally being essential to the claim, the courts in South Africa have in fact extended the application of the *condictio indebiti* to a number of situations which do not fit seamlessly into the category of mistaken transfers at all. The first of these is where an undue transfer has been made because of compulsion or duress,

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13 Divisional Council of Aliwal North v De Wet 1890 7 SC 232 234; Union Government v National Bank of Southern Africa Ltd 1921 AD 121 125; Rahim v Minister of Justice 1964 4 SA 630 (A).
14 Union Government (Minister of Finance) v Gowar 1915 AD 426 445; CIR v First National Bank Ltd 1990 3 SA 641 (A) 655.
17 1997 2 SA 35 (A) 44.
18 For example, the excusability requirement continued to be applied in Firstrand Bank Ltd (formerly First National Bank of SA Ltd) v ABSA Bank Ltd 2001 1 SA 803 (W).
19 See Glover “The *condictio indebiti* and unjust factors (1)” 2006 THRHR 419 422ff; Sonnekus *Unjustified Enrichment* 265ff.
which, so the courts have said, renders the transfer “involuntary”. This is an extension that has generally been attributed to the decision in *Union Government (Minister of Finance) v Gowar.* The second (possible) extension is that a *condictio indebiti* may lie where a disputed transfer is made under protest (but without compulsion). Here the transfer is made with the intention that the transferor reserves his or her rights to reclaim the transfer should it subsequently be found to have been undue. The roots of this extension lie in the minority opinion of De Villiers AJA in the *Gowar* case, and came to full flower in *Port Elizabeth Municipality v Uitenhage Municipality.*

In addition to these extensions, the *condictio indebiti* can also apply to various situations where contracts have failed. Hence, it has been decided that the *condictio indebiti* will be the appropriate enrichment action in a situation where a contract is void for want of compliance with statutory formalities, or where a transfer has occurred in terms of a suspensive condition in a contract, but which cannot be fulfilled – although some argue that the *condictio causa data causa non secuta* is the correct action in the latter situation. Equally controversial is the applicability of this *condictio* to the situation where a person of full capacity wishes to recover a transfer that had been made pursuant to a contract concluded with a person of limited capacity. There seems to be no problem with this *condictio* applying to cases where the person of limited capacity is insane, or did not have requisite consent in a marriage in community of property. But where the person of limited capacity is a minor or a prodigal, and

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20 See, for example, *White Brothers v Treasurer-General* 1883 2 SC 322-351; *Union Government (Minister of Finance) v Gowar* 1915 AD 426-443; *Caterers Ltd v Bell and Anders* 1915 AD 698-704; *Port Elizabeth Municipality v Uitenhage Municipality* 1971 1 SA 724 (A) 741D; *CIR v First National Industrial Bank Ltd* 1990 3 SA 641 (A) 647D-F.

21 1915 AD 426. See further *CIR v First National Industrial Bank Ltd* 1990 3 SA 641 (A) 646-647; *De Vos Verrykingsaanspreklikheid* 172; *Wille’s Principles* 1061; Eiselen and Pienaar *Unjustified Enrichment* 125-126.

22 For a full discussion of the circuitous nature of this development, see *Glover 2006 THRHR* 424-427; *Sonnekus Unjustified Enrichment* 266-268.

23 *Gowar* 444.

24 1971 1 SA 724 (A) 741-742. With respect, the view expressed by the majority in *CIR v First National Industrial Bank Ltd* 1990 3 SA 641 (A) 649 that the cause of action here lies in contract, not in enrichment law, should not be supported. See Eiselen and Pienaar *Unjustified Enrichment* 126(c); *Du Plessis Compulsion and Restitution. A historical and comparative study of the treatment of compulsion in Scottish private law with particular relevance to the law of restitution or unjustified enrichment* (doctoral thesis, Aberdeen, 1997) 139; *Visser Unjustified Enrichment* 395-396; *Glover ‘“Methinks he doth protest too much!” Recovering unjustified payments made under duress and protest” 2006 TSAR* 135 142.

25 Subject to the qualification in *Carlisle v McCusker* 1904 TS 917 and *Wilken v Kohler* 1913 AD 135 that if the agreement had been fully performed, there could be no recovery. This rule was confirmed for all situations in *Legator McKenna Inc v Shea* [2008] ZASCA 144 (27 November 2008).

26 *Wilken NO v Bester* 1997 3 SA 347 (A).


28 Visser in *Wille’s Principles* 1072 suggests very baldly that this is so.
the contract is not void ab initio, there is dispute about whether the condictio indebiti or the condictio sine causa specialis should apply.\textsuperscript{29} Leaving such debates aside for the moment, arguing that these situations all constitute forms of transfer “by mistake” would appear to stretch the definition of mistake (qua element) beyond its elastic limits. Such situations thus tend to be understood again as extensions or variations of the “standard” province of the condictio indebiti.\textsuperscript{30}

The second of the condictiones, the condictio causa data causa non secuta, brings with it similar issues. This condictio has a restricted ambit, currently applying where something has been transferred where there was a valid legal ground subject to a causa futura, which is then not fulfilled. Two situations are considered to exemplify this: (i) where the transfer was subject to a modus, and the modus is then disregarded or frustrated; and (ii) where the transfer occurred on the basis of an assumption that a particular event will take place in the future, and that event does not take place. The range of application of this condictio has also been controversial, though: as mentioned above, it has been argued that in cases where recovery of a transfer is sought where a condition cannot be fulfilled, this perhaps ought to be the appropriate action, not the condictio indebiti.\textsuperscript{31} As regards modus, where the basis of the transfer was a contract, it is unclear why the remedy should not be dictated by the law of contract, rather than enrichment law.\textsuperscript{32} Finally, there is a long-standing debate as to whether it is in fact possible to conceive of an assumption about a future event – for is this not, by definition, a condition?\textsuperscript{33}

The most stable of the condictiones, the condictio ob turpem vel iniustam causam, lies to recover money or property that has been transferred in terms of an illegal agreement. The agreement may have been illegal because it violated a statutory provision, or because it fell foul of the common law dictates of public policy. It also applies where the defendant, having acquired the thing in good faith, subsequently discovers the illegality of the transaction by which he acquired it.\textsuperscript{34} The scope and application of this condictio has not been especially

\textsuperscript{29} See especially Eiselen and Pienaar Unjustified Enrichment 167ff.
\textsuperscript{30} Bowman, De Wet and Du Plessis v Fidelity Bank Ltd 1997 2 SA 35 (A) 40.
\textsuperscript{31} See specifically Eiselen and Pienaar Unjustified Enrichment 141.
\textsuperscript{32} This was indeed the argument proposed in Benoni Town Council v Minister of Agricultural Credit and Land Tenure 1978 1 SA 978 (T). See Eiselen and Pienaar Unjustified Enrichment 144-145.
\textsuperscript{33} In Williams v Evans 1978 1 SA 1170 (C), following De Vos 1976 TSAR 79, the view was proposed that there can be an assumption or supposition about a future event. This was rejected by De Wet and Van Wyk Die Suid-Afrikaanse Kontraktereg en Handelsreg 5 ed (1992) 154, who argued that assumptions concern present or past facts alone. The latter view has the support of the Supreme Court of Appeal. See Fourie v CDMO Homes 1982 1 SA 21 (A) 26-7. See also Sonnekus 2006 THRHR 657. But Hutchison 2008 SALJ 441 has recently resuscitated the debate by indicating support for the Williams decision.
\textsuperscript{34} See First National Industrial Bank of Southern Africa Ltd v Perry NO 2001 3 SA 960 (SCA) para 24-25 and 28. This was not so much an extension of its application, but rather a confirmation of the rule to this end enunciated in D 12.5.6.
problematic in South African law, barring the vexed question of the application of the *par delictum* rule, which makes its operation less certain than one might initially believe.

The final enrichment *condictio*, the *condictio sine causa specialis*, operates as a catch-all, and at best can be described as providing an action in cases of enrichment by transfer not covered specifically by the other *condictiones*. The courts have expressly refrained from attempting to define its ambit in any specific way thus far.\(^{35}\) Hence, its range of application must be extrapolated from examples of situations where the courts have utilised it. Four general situations can be discerned:\(^{36}\) (i) in the form of the *condictio ob causam finitam*, the action applies where a transfer occurred in terms of a valid *causa* which was due at the time, but which later fell away (eg where a contract is invalidated for supervening impossibility of performance\(^ {37}\)); (ii) where a bank has made payment under a countermanded or forged cheque; (iii) against a defendant who has *bona fide* disposed of or consumed the plaintiff’s property if he or she acquired it either through a *negotium* with the plaintiff or gratuitously; (iv) in any other situation where ownership of property is transferred *sine causa*, but the other *condictiones* do not lie.

### 3 The revision of how enrichment liability is understood

By the end of the twentieth century, the critique about the *condictiones* in the instrumental sense described above had largely reached a point of stalemate. This process, as can be seen from the review above, had focused on questioning specific issues of concern regarding detail or classification, and indicated a level of uncertainty (and occasionally, frustration) about the way in which the various *condictiones* had been defined and developed, both historically and in the twentieth century. Despite the critique, the courts had shown no inclination to tamper with the *condictiones* in any structural way – although, of course, piecemeal extensions had extended their reach. Instead, the analysis was moving into a new phase. There was renewed hope for the recognition of a general action, motivated both by the work of academics and by certain judges. Most significant of the latter movement were the

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\(^{36}\) See generally *LAWSA* Vol 9 para 220; *Eiselen and Pienaar Unjustified Enrichment* 152; *Sonnekus Unjustified Enrichment* Chs 4 and 9.

\(^{37}\) Although Evans-Jones has argued that the *condictio causa data causa non secuta* should apply to cases of impossibility. See “The claim to recover what was transferred for a lawful purpose outwith contract (*condictio causa data causa non secuta*)” 1997 *Acta Juridica* 139.
comments by Van Zyl J in the case of Blesbok Eiendomsagentskap v Cantamessa\(^{38}\) that the \textit{ad hoc} extensions of the common law enrichment actions had reached such a developed stage that the whole system would now best be served by the recognition and introduction of a general action. Following the pioneering work of De Vos, the focus had hence shifted to developing and refining general principles of enrichment liability, as opposed to dissecting and quibbling about the old actions. The four general requirements of enrichment liability (the defendant must be enriched; there must be a mirror impoverishment; the enrichment must be at the expense of the plaintiff; the enrichment must be \textit{sine causa}) have now become cornerstones of South Africa’s enrichment law. In anticipation of a shift to a more generalised form of enrichment law, the resigned perception was that the old actions, warts and all, would just have to do in the interim.

Obviously though, questions remained about what the role of the old actions might be if and when the shift to a more general approach occurred. Were they to be abandoned or to be accommodated? De Vos initially felt it was likely that they should be accommodated, and that a general action should probably have a subsidiary character.\(^{39}\) However, by the time of the third edition of his \textit{Verrykingsaanspreeklikheid}, he pleaded for a general action not to have a subsidiary character, and that “the classical actions must be displaced”.\(^{40}\) His reasons were because a subsidiary action would maintain an “unnecessary multiplication of actions [coupled with] an unnecessary casuistry, which sometimes requires a punctilious, literalist classification”,\(^{41}\) and because the specific actions had developed such flaws and problems that South African law would be best served by their abolition in favour of a modern general action.

The decision in \textit{McCarthy} to favour subsidiarity, and to endorse the view that the traditional actions should live on if and when a general action was recognised, was thus a significant development, even if it was unexpected, or even unwelcome, in some quarters. It was Schutz JA who articulated the view of the Supreme Court of Appeal, stating:

> “Are the detailed rules to go and new ones to be derived from a broadly stated principle? Or are the old ones to stand, and be supplemented by a general enrichment action which will fill the gaps? The correct answers to these questions are not obvious. But I would support the second solution. In a rare case where even an extension of an old action would not suffice I would favour the recognition of a general action.”\(^{42}\)

\(^{38}\) 1991 2 SA 712 (T) 719. See too Sonnekus \textit{Unjustified Enrichment} 34.

\(^{39}\) \textit{Verrykingsaanspreeklikheid} 1 ed (1958) 180. Rumpff JA in his dissenting opinion in \textit{Nortjé} at 119 approved of this.

\(^{40}\) \textit{Verrykingsaanspreeklikheid} 3 ed (1987) 372 (Visser’s translation at 58 of his \textit{Unjustified Enrichment}).

\(^{41}\) At 371 (Visser’s translation at 58-9 of his \textit{Unjustified Enrichment}).

\(^{42}\) \textit{McCarthy} para 8.
One possible reaction from the courts and the writers to the decision in *McCarthy* might have been phase two of the critical examination of the traditional actions and their scope of application. But since then there has been a slightly different approach, both as far as the courts and the work of the academic commentators are concerned.

### 3.1 The Courts

In the first decade of this century, the courts’ approach to enrichment cases has become quite robust, and has seen judges being increasingly enamoured with the more fulsome use and application of the general principles or requirements of enrichment liability. Despite the support given to the old actions in *McCarthy*, the trend has been to resist the temptation to be burdened by their technical intricacies, in favour of an approach that promotes the general principles and the promotion of restorative justice as an equitable desirability. Funnily enough, the inspiration came largely from two statements made by Schutz JA himself, one towards the end of his discussion in *McCarthy* about the foundations of our enrichment law, and one in *First National Bank v Perry*. In para 10 of *McCarthy*, he said: “If once a general action is accepted much less energy, hopefully, will be devoted to the correct identification of a *condictio* or an *actio* than at present and more time to the identification of the elements of enrichment.” And in para 23 of *Perry*, he said:

“This difference of approach as to the correct *condictio* [on the facts of that case] again underlines the point which I made in *McCarthy* ... that we spend too much of our time identifying the correct *condictio* or *actio*. Counsel frequently errs. The academics say that the Courts, including this Court, frequently err. And to judge by the difference of opinion in *McCarthy*’s case, some of the academics sometimes err too. The suggestion, in that case, adopted by two of my Brethren, was that the adoption of a general action might help remedy this situation, by fixing attention on the requirements of enrichment rather than on the definition and application of the old actions.”

The first swathe of decisions took these comments about an overly-technical approach to the traditional enrichment actions firmly to heart, even though the Supreme Court of Appeal has not yet actually taken the stipulated causal step of recognising a general action. Significant

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43 2001 3 SA 960 (SCA) para 23.
in this regard are the decisions in *Kudu Granite Operations (Pty) Ltd v Caterna (Ltd)*,\(^{44}\) *Mndi v Malgas*,\(^{45}\) *St Helena Primary School v MEC, Department of Education, Free State Province*\(^{46}\) and *Watson NO v Shaw NO*.\(^{47}\)

In the *Kudu Granite* case, the appellants sought the restitution of certain granite blocks as well as the restitution of various amounts as a result of the collapse of a contract because of supervening impossibility of performance. Although the Supreme Court of Appeal (per Navsa JA et Heher AJA) indicated that a claim of this nature would normally be dealt with in terms of the specific requirements of the *condictio sine causa specialis (ob causam finitam)*, the court indicated that “it is sometimes suggested that the *condictio causa data causa non secuta* is the appropriate remedy”.\(^{48}\) However, the court then proceeded to say, in the next paragraph, that this debate did not really matter:

> “Except that the *condictio causa data causa non secuta* appears to apply to cases where a suspensive condition or the like was not fulfilled, the identification of the cause of action is not of importance since there appears to be no difference in the requirements of proof of the two *condictiones*. The essential point is that Caterna’s claim is covered by one or the other remedy for unjust enrichment.”\(^{49}\)

I do not wish, for the moment, to interrogate the problematic statement that there is no difference between these two *condictiones*. What is more significant for the moment is the tenor of the statement: that the specific identification of the relevant action was not really important. What was important was that the appellant was entitled to a remedy, and (so the court went on to say) that this was to be explained primarily by the application of the general requirements of enrichment liability, and not by the requirements of a specifically labelled action.

This approach was soon taken a step further by the Eastern Cape Division in *Mndi v Malgas*. In this case, there had been an overpayment of interest by Malgas to Mndi, which Mndi sought to recover. Plasket J came to the conclusion that a portion of what had been paid could be recovered, but did so exclusively by interrogating the four general requirements of

\(^{44}\) 2003 5 SA 193 (SCA) 202.
\(^{45}\) 2006 2 SA 182 (E) 188.
\(^{46}\) 2007 4 SA 16 (O) 21.
\(^{47}\) 2008 1 SA 356 (C) 355-356. See also *Financial Services Board v De Wet NO* 2002 3 SA 525 (C) 622; *IPF Nominees (Pty) Ltd v Nedcor Bank Ltd* 2002 5 SA 101 (W) 113.
\(^{48}\) *Kudu Granite* para 15.
\(^{49}\) *Kudu Granite* para 16.
enrichment liability. At no point at all in the judgment did the court consider which enrichment action was applicable, or what this might have meant for the claim.\(^{50}\)

Shortly after, in the *St Helena Primary School* case, the court stated with reference to the *Kudu Granite* case that despite there being no general enrichment action yet recognised in South African law, it is sufficient that the plaintiff demonstrates compliance with the four general requirements of an enrichment claim to succeed in their case.\(^{51}\)

Lastly, in the case of *Watson NO v Shaw NO*, Fourie J found much sympathy with the view expressed by counsel for the plaintiff that “there is a clear movement, heralded by the Supreme Court of Appeal, away from the maintenance of a strict distinction between the various *condictiones*”,\(^{52}\) and that it was entirely possible for the parties to “move between”\(^{53}\) the various *condictiones* in order to resolve the case. Ultimately, Fourie J held that the transfer in that case was *sine causa* both from the perspective of the *condictio indebiti* and the *condictio ob turpem vel iniustam causam*.

These decisions indicate the sense of judicial frustration with the casuistic nature of the sources and authorities, and the impression that too much energy had generally been wasted in the past on the formal exercise of determining which *condictio* is appropriate to which problem, to the detriment of establishing whether or not there was enrichment that was unjustified.

As a consequence of these decisions, both Eiselen and Sonnekus have perceived a trend (one largely supported by Eiselen, but not by Sonnekus) that runs counter to the position advocated in *McCarthy* about the old actions. That is, that there is a developing judicial attitude that mere proof of the general requirements for enrichment liability would be sufficient to sustain an enrichment claim. Specific reference to the requirements of the *condictiones* or the other actions was evidently becoming less and less important, and in practice (certainly from the viewpoint of some judges), a form of general enrichment action was now virtually in existence already.\(^{54}\) There is, though, one difficulty associated with the sort of approach adopted in some of the decisions above. That is, it is extremely difficult to determine when enrichment is indeed *sine causa* without having some mechanism or context to determine more clearly what exactly this entails. Indeed, all four of the cases mentioned above have been at the

\(^{50}\) The claim would have been one in terms of the *condictio indebiti*.

\(^{51}\) *St Helena* 21.

\(^{52}\) 2008 1 SA 350 (C) para 8.

\(^{53}\) *Watson* para 10.

\(^{54}\) See Eiselen and Pienaar *Unjustified Enrichment* 24-25; Eiselen “Quantifying unjustified enrichment claims” 2004 *THIRHR* 524; Sonnekus *Unjustified Enrichment* 32-34. Sonnekus states that it is appropriate to continue to classify claims – where possible – under one of the specific enrichment actions in the light of *McCarthy*. See *Unjustified Enrichment* 18 and 94-96. Indeed, the classificatory nature of his book is based on a consideration of the actions.
sharp end of some critical literature, some of it specifically bemoaning the deleterious effects of the courts not considering the specific requirements of the relevant enrichment action. It is the thorny matter of how we in South Africa should understand and explain the *sine causa* requirement of our law of unjustified enrichment that has become a significant focus of the academic or jurisprudential work in this field.

3.2 The *sine causa* requirement: Academic developments

Particularly in the last decade, the work of leading South African academics has turned away from a narrow, casuistic technical analysis of the enrichment actions and, mirroring the work being done in other jurisdictions, has focused instead on wrestling with broader imperatives of principle and taxonomy. The felt necessity has been to map out and to explain, in a holistic fashion, the organisational matrix of enrichment liability, and how cases of enrichment ought to be decided, on a principled basis. And although all of the general requirements for enrichment liability have received attention, the most significant debates have tended to concentrate on articulating the nature of the requirement that the enrichment must be *sine causa* to support an action.

There now seems to be a developing consensus that the Wilburg/Von Caemmerer typology, which was developed to bring some substance to the *sine causa* requirement under the German general enrichment action, now constitutes a suitable way of conceptualising basic forms of *sine causa* enrichment in South African law. But how much further should the classificatory form of South African enrichment law should go beyond dividing cases of unjustified enrichment into situations arising out of enrichment by transfer, enrichment by the invasion of the rights of others, and enrichment as a result of unauthorised expenditure? As South African law currently stands, what would be required is the satisfaction of the requirements of the specific enrichment action under which the claim is being brought. Visser makes the following comment in this regard:

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56 In the last few years the spotlight has shifted towards the impoverishment requirement, and the double-cap rule. But it is still fair to say that the bulk of the work has been about the *sine causa* requirement.
“Since there is no general enrichment action in South African law, there is also no single, all-encompassing criterion to determine whether enrichment is justified or not. The matter is determined separately in respect of each enrichment action: if the particular elements of a specific enrichment action have been satisfied, the enrichment is *sine causa*, but if an essential element is absent, it cannot be said that the retention of the enrichment is without cause. Thus the elements of the particular *condictio* … taken together determine whether the enrichment is without cause.”\(^{57}\)

This comment is amplified, specifically with respect to the *condictio indebiti*, by Du Plessis, who describes the current situation as follows:

“South African law, which has retained the *condictio indebiti* in uncodified form, does not only require proof of an undue transfer, but also further factors such as excusable error or certain forms of compulsion.”\(^{58}\)

Scott, in turn, says:

“[A] mixed approach to enrichment by transfer has emerged in modern South African law, one in terms of which the claimant must typically demonstrate both the presence of a specific unjust factor and the absence of any underlying relationship of indebtedness.”\(^{59}\)

What this means for our structural understanding of South African enrichment liability – and indeed whether this situation is remotely suitable, or not – is a matter of some debate. And, without in any way wishing to ignore the work done by other enrichment scholars, it is really the three authors named above who mark out the boundaries of the debate in this country.

Du Plessis, in a significant piece of work published in the 2005 *South African Law Journal*, has argued passionately and persuasively for our law to shift away from this patchwork, action-based treatment of the *sine causa* requirement to an approach modelled along similar lines to the German position. He points out the logical difficulty of requiring both the absence of legal title to the enrichment (such as a contract, court order, or some other statutory or common law provision), as well as certain specific elemental requirements as to found the general *sine causa* requirement. The result of doing so, to use an example of

\(^{57}\) *Wille’s Principles* 1054-1055.


\(^{59}\) Scott “Restitution of Extra-Contractual Transfers: Limits of the Absence of Legal Ground Analysis” 2006 *RLR* 93.
enrichment by transfer, is that if the transfer had occurred due to an unexcusable error (under the *condictio indebiti*) or where the plaintiff was tainted by illegality (under the *condictio ob turpem vel iniustam causam*) the elements of the claim are not satisfied. The result is that transfer would be *cum causa*, and hence, justified, which seems inappropriate. However, he recognises that simply requiring the absence of a legal title on its own does not go far enough, either in principle or on grounds of policy, in determining when a claim is legitimate, and when it is not, and further considerations need to be drawn into the mix.\textsuperscript{60} He encapsulates the difficulty of choice between these two approaches as follows:

>“Of crucial concern in this context is whether certain specific factors such as mistake should positively be formulated as requirements for a claim, or whether it is preferable to regard enrichments without title as recoverable in principle, and only restrict their availability with certain defences.”\textsuperscript{61}

Du Plessis is particularly critical of the former option, which he describes as a “Trojan horse”\textsuperscript{62} – effectively, the English approach of unjust factors hidden under the guise of the civilian *sine causa* requirement.\textsuperscript{63} Instead, Du Plessis prefers the option indicated in German law, where the concept of “absence of legal title” is given greater substance simply by the identification of certain claims that govern typical situations of enrichment liability. Where such a situation emerges, this approach argues for the in-principle recognition of an enrichment claim, subject only to certain forms of defence. The four typologies recognised in German law are the *Leistungskondiktion* (enrichment by transfer), the *Eingriffskondiktion* (enrichment by invasion of the rights of another), the *Verwendungskondiktion* (enrichment as a result of unauthorised expenditure) and the *Rückgriffskondiktion* (enrichment as a result of the payment of one’s debt by another). Of these typologies, the most significant for this article is the *Leistungskondiktion*. The *Leistungskondiktion* operates as a generalised *condictio sine causa*, effectively absorbing the function of all the separate *condictiones* in South African law as far as cases of enrichment by transfer are concerned. There is some dispute about the appropriate way of understanding the operation of the *Leistungskondiktion*. According to the more

\textsuperscript{60} Du Plessis 2005 *SALJ* 150-2.

\textsuperscript{61} Ibid at 159.

\textsuperscript{62} Ibid at 162.

\textsuperscript{63} For similar criticism of the English approach of unjust factors from within the English system, see Peter Birks’s converted views in his *Unjust Enrichment* 2 ed (2005) 101ff and, generally, Burrows and Rodger *Mapping the Law: Essays in Honour of Peter Birks* (2006).
orthodox subjective view of the *Leistungskondiktion*, the absence of legal ground requirement for the retention of a benefit transferred is the absence of legal title to the benefit, manifested in the fact that the benefit was conferred for a specific purpose, which failed – for example, that the transferor believed he or she was fulfilling a legitimate obligation, when in fact no such obligation existed at all. An alternative, more objective approach to the *Leistungskondiktion* is to argue that a benefit will be unjustifiably retained if there is no objectively determined relationship of indebtedness (e.g., a contract) to support the retention of the benefit. It is not my intention to review this debate in this article. For present purposes, the fact that the plaintiff can make out a claim either in the subjective or objective sense will not entitle them to an absolute claim. To ensure that the action does not operate beyond suitable bounds, the claim is subject to certain defences: in terms of § 814 BGB, where a claim is barred if the transferor knew that there was no obligation to make the transfer; in terms of § 817(2) BGB, where the plaintiff has infringed a statutory duty or the *boni mores*; or in terms of § 242 BGB, where the transfer was made in good faith, with the intention that the defendant should have it. These defences have taken the place of any reference to subjective factors that will determine whether the transfer occurred *sine causa*. Du Plessis (along with Zimmermann) believes firmly that this more streamlined conception is the most suitable basis for the development of the South African law concerning enrichment by transfer. As a result, he argues that the various elemental factors that currently define the application of the *condictiones* (notably the requirement of error as an element of the *condictio indebiti*) should be dispensed with.

On the other hand, Scott, whose work focuses specifically on cases of enrichment by transfer, adopts a different view. Whilst she concedes that the German approach generally has clarity and elegance on its side, and accepts that South African enrichment law has a civilian heritage, she argues that when the claim involves a situation where there is an extra-contractual transfer of some kind, the *Leistungskondiktion*, understood in either its subjective or its objective forms, cannot readily provide an answer to the question why the transfer was indeed *sine causa*. She argues that the identification of some factual basis that explains why the transfer is *sine causa* is logically and practically essential in many circumstances where

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64 The orthodox view, proposed by Reuter and Martinek in their work *Ungerechtvertigte Bereicherung* (1983) is thoroughly discussed by Du Plessis in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* 206, and 2005 *SALJ* 172ff.
65 For a comprehensive discussion, see Scott 2006 *RLR* 98-103.
enrichment by transfer is at issue – especially in the absence of a failed contract – and that even the Germans have to resort to this sort of reasoning, either directly or indirectly, to explain cases where the benefit is to be transferred back to the plaintiff. Classic examples include the paradigmatic cases of a mistaken or compelled payment, but where this has not occurred in a situation where there was a putative contractual relationship between the parties, which turns out to be void. Scott argues that since the Leistungskondiktion cannot, in such instances, point to a contractual failure out of which a failure of the purpose of the transfer can be inferred, the only way that recovery can be explained is by pointing to the specific reason why recovery should be allowed: because the payment was made by mistake, or was compelled, for example. She therefore indicates her general support for the current form in which the sine causa element is articulated in South Africa; one in which “the absence of legal ground approach relies on a covert unjust factors approach in order to function”.68

Visser, in turn, has come up with what he terms a “third way”69 of understanding and explaining the sine causa requirement. He has argued that a lead can be found for a “third way” in his reading of developments in another legal system – that of Scotland – and especially the approach he interpolates from the decision of Lord President Rodger in the leading case of Shilliday v Smith.70 Visser’s full analysis (which, it bears mentioning, is not the view of all71) may be found in his newly published Unjustified Enrichment,72 but the core features can be described as follows.

First, Lord President Rodger endorsed the general Roman principle that the core reason for granting an enrichment action is that the enrichment occurred sine causa: “a person may be said to be unjustly enriched at another’s expense when he has obtained a benefit from the other’s actings or expenditure, without there being a legal ground which would justify him retaining that benefit.”73 However, he did not go on to embrace the generalised German approach holus bolus. Instead, he argued that it is important, in determining whether or not the enrichment is sine causa, to consider how the enrichment came about, or to identify situations

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68 2006 RLR 105.
70 1998 SC 725.
73 Shilliday 727.
“in which it is appropriate for the court to declare the retention to be unjustified in the broad sense”\textsuperscript{74}. The \textit{condictiones} provide loose examples of common situations that have been recognised as deserving of a remedy based on enrichment in the past, as long as it is recognised that the role of these situations or “factors” is subordinated to the general principle. In Lord President Rodger’s words: “The person framing the pleadings must consider \textit{how the defender’s enrichment has come about} and then search among the usual range of remedies which will achieve his purpose of having that enrichment reversed.”\textsuperscript{75}

The result, then, is that the various factors are not requirements or elements of a particular claim in terms of a particular \textit{condictio}. Rather, they are factors that form “part of the explanation as to why the enrichment, which is without legal ground in the narrow sense, is also without legal ground in the sense of there not being an overall justification for the retention”.\textsuperscript{76} Mistake (to take the classic example) would no longer be an elemental requirement of a claim in terms of the \textit{condictio indebiti} – rather, the fact that the transfer occurred because of a mistake constitutes a form of typical explanation as to why the transfer was an \textit{indebitum}, and was thus made \textit{sine causa}.

\section{The future(s) of the \textit{condictiones}}

What is the effect of all these debates (both judicial and academic) on the future of the classical enrichment actions in general, and, in the context of this article, the \textit{condictiones} in particular? The intellectual shift has been from the rigid dominance of form and action to a re-casting of the landscape in terms of substance and principle. But one question remains, which has not been given a great deal of prominence in the context of the discussions described above: what role (if any) do the \textit{condictiones} actually have in a modernised re-conception of South Africa’s \textit{sine causa} requirement?

Since the debate about the \textit{sine causa} element and how we should conceive it cannot be considered to be over, one must inevitably postulate a number of potential futures for the \textit{condictiones} in South African law. The first possibility is, of course, that we throw in our lot entirely with one general enrichment action, in which case all the traditional actions (including the \textit{condictiones}) and forms of enrichment liability will be drawn under one general action a la

\textsuperscript{74} Visser Unjustified Enrichment 184.
\textsuperscript{75} Shilliday 727 (my emphasis).
\textsuperscript{76} Visser Unjustified Enrichment 187.
§ 812(I) BGB, subject to a Von Caemmerer-style division of broad typologies of claim. The difficulty with this approach, as the Germans themselves have conceded, is that the generalised enrichment action is highly abstract, and can be difficult to work with. Whether South Africa’s context suits this model is debatable. Indeed, in the light of the firm comments in McCarthy about subsidiarity, it would appear highly unlikely that the Supreme Court of Appeal would go back on itself and take this sort of major plunge at this stage. Harms JA’s comments in his opinion in McCarthy that “this area of law should develop incrementally and not in leaps and bounds” encapsulate pithily the general attitude that our judiciary conforms to the judicial model of the “interstitial legislator”, one which is prepared to make incremental legal developments, but normally leaves major shifts to the elected legislature. So, whilst this possibility cannot entirely be discounted in the long term, for the sake of argument I intend to put it aside as being unlikely at this stage. As Visser has shown, since South African law already recognises, albeit in a more rudimentary sense, actions classified loosely according to claims based on transfer, invasion of rights and because of unauthorised expenditure, the likelihood is that we will continue to work contextually with these broad classifications and their antecedent actions, rather than to abandon them and replace them with one general action.

What is left, then, for the condictiones specifically, seems to be an effective choice of two options. The options are first, to streamline the condictiones, or secondly, broadly to retain the status quo.

4.1 Streamlining


79 McCarthy at 496C.

80 See Bell Policy Arguments in Judicial Decisions (1983) 31; Visser Unjustified Enrichment 12. The Constitutional Court in Du Plessis v De Klerk 1996 3 SA 850 (CC) para 61 adopted this attitude by citing with approval the statement in the Canadian case of R v Salituro 1991 3 SCR 654 that “[i]n a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. … The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with a dynamic and evolving fabric of our society.”

81 It is worth remembering that the possibility of codifying our enrichment law was considered (Project 97 of the South African Law Commission), but was shelved. See South African Law Commission 24th Annual Report 21.
A first possible option would be to heed de Vos’s warnings about the entrenched technical difficulties of retaining the *condictiones* in their present form, and to try to streamline them to avoid the very real problem of having to distinguish which particular *condictio* applies in a case of enrichment by transfer. This would amount to collapsing the *condictiones* into one form of enrichment action for all transfers that are, in a general sense “undue”; or, to put it in another way, as a more broadly conceived or generalised *condictio sine causa*, as is the position with the *Leistungskondiktion* in German law, or the Dutch action based on *onverschuldige betaling*. This would be a judicial leap, but the tenor of the more recent judicial decisions discussed above indicates that there would probably be broad sympathy for such an approach, if it could prevent the technical wrestling about demarcation that can bedevil claims brought in terms of the traditional *condictiones*. Indeed, as both Visser and O’Brien have indicated, this approach would reflect the over-arching trend in the development of our law of obligations from the particularity of a Roman law system of remedies and actions to a modern system of general requirements for liability. A streamlining of the *condictiones* would mean that enrichment law would be moving more closely towards the structure of our modern law of contract and delict.

There has been academic support for such an approach, although it must be indicated that some of it has suggested, largely in reaction to the continuing legacy of Nortjé, that the *condictio sine causa specialis* could be “inspanned” in an extended form (to use Schutz JA’s metaphor in *McCarthy*) to operate as a form of overarching general enrichment action for all forms of enrichment liability, albeit one with the appropriate historical roots. With respect, the developments in the last ten years or so suggest that conscripting the *condictio sine causa* in this way is not likely to be a suitable option. It has been proposed for some time now without success, and the move to recognising broad types of situations in which enrichment may be *sine causa* indicates that the legacy of the *condictiones* is likely to be confined to cases of

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83 *Unjustified Enrichment* 27ff.

84 O’Brien 2000 *TSAR* 752-3.


86 *McCarthy* para 14.

87 See, for example, Scholtens “Enrichment at whose expense?” 1968 *SALJ* 371 374.
enrichment by transfer, rather than being expanded to cover the entire modern spectrum of enrichment law in South Africa.

Were this move to streamline the *condicio* to be adopted, there remains a difficult problem. What is then to become of the elemental requirements of the traditional *condicio*? One approach is to argue that the German *Leistungskondiktion* should become the model for developments in this regard, as Du Plessis and Zimmermann do. This would mean that the elemental requirements should be dropped entirely in favour of either a subjective or objective approach to determining why the enrichment should be restored (ie that the purpose of the transfer has failed, or that there is no relationship of indebtedness to justify the transfer). In principle, if the relevant criterion were satisfied, recovery should be awarded, barring the existence of a defence such as knowledge or illegality or the intention to make a donation. The solution is elegant and simple, and operates smoothly in the context of failed contracts, although, as Scott has indicated, faces difficulties in the context of extra-contractual transfers. The question South Africa faces, then, is whether this model is not too abstract for a system that has relied for so long on more evidence, rather than less, to justify an enrichment claim? Would a paradigm-shift to such an approach be a bridge too far for the South African milieu?

The alternative, then, which reflects more closely the current approach to dealing with cases of enrichment by transfer, would be to require, in addition to absence of title in some broad sense, some additional assertion about the absence of a justification for the retention of the benefit; ie some form of explanation as to why the plaintiff is entitled to recovery. This would require the plaintiff to indicate more specifically why the enrichment was *sine causa*, which seems practically appealing if one were to imagine how a case might play itself out in court. Intuitively, if a plaintiff asserts that enrichment has occurred *sine causa* because there is no legal title, or because the purpose of the transaction failed, or because there is no relationship of indebtedness, one imagines that a judge would want to know more specifically “why?”. The justification would explain why – “because …”. It expects the plaintiff not simply to rely on a broad principle of law alone, but to back it up with a substantive, policy-based explanation, based in fact and evidence.88

What sort of typical explanations would suffice? Visser has indicated the following broad categories: (a) transfers to fulfil a putative obligation (“mistaken transfers”); (b) transfers

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88 The plaintiff would merely need to provide “an” appropriate explanation in the circumstances, without facing the problems of delimitation (ie having to force an explanation into a specific mould) that choke the English approach. On delimitation, see Zimmermann 1995 OJLS 416; Glover “The *condicio indebiti* and unjust factors (2)” 2006 THRHR 561. As to the fact that such explanations would be reflective of legal policy, see O’Brien 200 TSAR 759-60.
under compulsion; (c) transfers in terms of an illegal agreement; (d) transfers in terms of a void (but not illegal) contract contemplated to achieve a specific purpose; and (e) a variety of situations where legitimate contracts have failed. This ought not to be understood as inappropriate mixing of jurisdictional approaches, or of an insidious influence of the English approach of unjust factors. It broadly reflects the way in which the civilian tradition understood enrichment claims prior to codification in Europe.

It is submitted that if the various \textit{condictiones} were to be collapsed into one, it is very likely that this is the way in which our system of enrichment law, understood in its particular context, could manage the change: by retaining this intermediary step of requiring an explanation as to why, specifically, the benefit that was transferred is being retained \textit{sine causa}, and should be returned.

### 4.2 Retaining the status quo

There is another possibility, though: that is for our law to adopt the more conservative path of by and large retaining the status quo, and leaving the \textit{condictiones} intact, while at the same time taking appropriate cognisance of the advances in understanding about the \textit{sine causa} requirement. This is the path largely projected by McCarthy. Indeed, it is also the approach that Visser has adopted in his \textit{Unjustified Enrichment}. The way in which Visser identifies his common explanatory justifications for why a transfer is unjustified is by extracting these descriptions from the typical applications of the various \textit{condictiones} inherited from Roman-Dutch law. And so, if the \textit{condictiones} have served us thus far, why not retain them as useful ways (or labels) of encapsulating standard situations where legal title to retain a benefit is absent? As Du Plessis himself has indicated,

\begin{quote}
“German works still make use of the terminology of the \textit{condictiones} to describe certain basic fields of application of the claim based on transfer, but they are used as labels to describe standard situations where legal title is absent. These include the attempted performance that was not supported by an obligation (the \textit{condictio indebiti} [albeit] stripped of subjective factors like error), transfers made to achieve other purposes which did not materialize (the \textit{condictio ob rem} or \textit{condictio causa data causa non secuta}), transfers of which the legal ground fell away after they were made (the \textit{condictio ob causam}

\end{quote}

\textsuperscript{89} Visser \textit{Unjustified Enrichment} 270. This includes claims in terms of the action for work done and services rendered (which has traditionally been viewed as a sui generis enrichment action) and could be considered to include claims for restitution where a voidable contract has been rescinded, which is commonly understood as a contractual action.

\textsuperscript{90} Visser \textit{Unjustified Enrichment} 269.
finitam, which could be regarded as falling under a condictio sine causa specialis), and (in extremely limited cases involving an illegality) a condictio ob turpem vel iniustam causam.”

But how, then, would we break with the old-fashioned (and disparaged) legis actio-style structure of South African enrichment law, where the named condictio has been the first port of call in pleading and deciding a case? It is here that Visser adopts a seemingly obvious, but highly significant, shift in emphasis. He broke with tradition, and structured his book around the typical forms of enrichment claim, “in preference to the traditional remedy-based classification”. The result of this is that the condictiones (and indeed the other traditional enrichment actions) are neither de-constructed nor referred to as a primary method of analysis. The focus is on the substance, not the form, of the claim, and so the condictiones are not referred to with a deliberate sense of ceremony in his works. But he argues that the identification of the relevant action is important in the light of McCarthy, and in view of the fact that it is, in his view, necessary to show some broad explanation for why the retention of the enrichment was sine causa. So, he remains loyal to the classical enrichment actions, but he reverses their priority, so that the identification of the relevant enrichment action closes off the classificatory process. Rather than starting with the relevant action and working from there, as the traditional texts might suggest, the (more logical) distillation process works as follows: having found that there is enrichment at the expense of the plaintiff, one needs to determine whether it is sine causa in the broad sense (ie what broad form of enrichment is at issue; for our purposes, transfer). Thereafter, the enquiry moves to consider what explains why the enrichment should not be retained in the narrow sense (let us say, because the transfer occurred pursuant to a purported contract that was void for illegality). It is only at this point that we identify the relevant action (the condictio ob turpem vel iniustam causam). In this sense, then, the identification of the relevant condictio becomes (in Du Plessis’s words in the passage cited above) a “label” to describe the sorts of situations where a claim for recovery of the benefit may be recognised.

The most recent case law indicates that this might very well be the path that our law will adopt for the foreseeable future. In 2008 the Supreme Court of Appeal, in handing down judgment in the case of Afrisure CC v Watson NO, referred with disapproval to the statements

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91 Du Plessis 2005 SALJ 177 (footnotes omitted). These labels do not accord entirely with the operation of the South African condictiones.
92 Wille’s Principles 1057.
93 2009 2 SA 127 (SCA).
made in the court a quo (see Watson NO v Shaw NO94) and the other cases discussed above that “there is a clear movement … away from the maintenance of a distinction between the various condictiones underlying the actions of unjustified enrichment in our law”.95 Instead, Brand JA undertook a very thorough analysis of which condicio was applicable to the dispute. The court rejected the view articulated in the original judgment that in some cases, a range of the condictiones could potentially apply to a fact-complex, and that the litigants could effectively “move between” these condictiones in making out a case. Brand JA ultimately held that the court a quo had technically erred in describing the matter as one to be dealt with under the auspices of the condicio indebiti, and instead found that the matter was one to be decided in terms of the condicio ob turpem vel iniustam causam.96 The message was quite clear, and in sharp contradistinction to cases like Mndi, Kudu Granite and St Helena Primary School: litigants must still endeavour to identify and argue the correct enrichment action to facilitate the resolution of the dispute. Mere recourse to the general principles governing enrichment liability will not be good enough. The condictiones and the other enrichment actions serve a legitimate taxonomic purpose, and remain important in describing the nature and scope of enrichment liability.

If I postulate, for the sake of argument, that the status quo could well remain in the foreseeable future, and the condictiones will probably retain their individual roles, a word of caution needs to be expressed. This would not mean that the work is over. Difficult choices still would still need to be made. Ironically, we end up almost right back where we started. How could we better explain the operation of the condictiones, to take advantage of the hard work that has been done on the sine causa requirement? Each condictio will require some reconsideration, to see whether there is a more suitable way of dealing with how we understand its role, and how we determine in which circumstances a particular condictio ought to apply. In addition, it will be necessary to consider how forms of claim that have not traditionally been understood as claims based in enrichment, either at all (restitution in the context of voidable contracts rescinded97), or as enrichment claims based on transfer (the action for work done and services rendered98), are to be classified. A holistic investigation of this nature goes beyond the

94 2008 1 SA 356 (C) 355-356.
95 Afrisure para 4.
96 Afrisure para 51.
scope of this article. But, just to indulge one example, the intricacies of the exercise that would
remain are epitomised by the case of the *condictio indebiti*, and especially the role of excusable
error as a facet of such a claim.

5  *Quo vadis the condictio indebiti?*

Considering that the *condictio indebiti* can already be claimed *de facto* in a number of
various circumstances, adopting the sort of approach indicated above may in practical terms
mean no more than re-configuring the theoretical understanding of the action to reflect its true
practical mode of operation. This would be the least invasive conception for South African law.
What this would require is that the elements of the action as described in *La Riche v Hamman*
would have to be re-formulated. Instead of:

“The *condictio indebiti* is a personal action by which the *solvens* recovers *quod indebiti solutum est*... In
order to succeed in that claim, the plaintiff has to prove —
(1) that the property which he is reclaiming was transferred to the defendant;
(2) that such transfer was given *indebit* in the widest sense (i.e., that there was no legal or
natural obligation to give it);
(3) that it had been transferred by mistake.”

the plaintiff will instead have to prove:

(1) that the money or property was transferred to the defendant;
(2) that the transfer is being retained *indebit* BECAUSE … [of some appropriate explanation which justifies the return of the benefit].

The result is that the lodestar of the *condictio indebiti* will be the fact that the transfer
was not supported by an obligation, which explicates the general *sine causa* requirement. But,
in addition, the plaintiff will have to point to a reason which explains why the transfer was
*indebit*, and which supports a claim for re-transfer. Gone is the “essential element” of mistake,
which has sucked up most of the attention like a black hole, and which (*qua* element) has been

99  *La Riche v Hamman* 1946 AD 648 656.
100  This change will reflect the common opinion that enrichment is measured in terms of an absence of a *causa retinendi*, rather than the absence of a *causa dandi* – see Visser *Unjustified Enrichment* 174; *First National Bank of Southern Africa Ltd v East Coast Design CC* 2000 4 SA 137 (D).
unable to cope logically with explaining piecemeal extensions of the application of the condictio indebiti to situations that only obliquely resemble a mistake. A liability mistake is reduced to just one of a range of possible factual explanations as to why the benefit is being retained indebite, and hence, sine causa.

The next question is: what typical circumstances could a plaintiff point to as justification for why the transfer is an indebitum? Again, if one were to adopt the least invasive approach, one would simply say “those factual situations which have become recognised over the years as supporting a recovery based on the condictio indebiti”. At the moment, these would be: excusable error, compulsion, the reservation of rights to recover a transfer if it is subsequently found to be undue, and various circumstances emerging from failed contracts.

Superficially, this seems attractive. But even at this stage of the inquiry there is debate about how we should actually conceptualise and make use of these various forms of justification. The obvious example is the excusable error justification, which currently requires proof that a transferor mistakenly, but without negligence, made the transfer, thinking it was due. Should this position remain, or should it change?

I do not wish to traverse all the arguments about the history of the excusable error requirement; these are comprehensively dealt with elsewhere. Instead, I wish to consider what the way forward might be, if the courts accept the legion of work which argues that the status quo cannot remain. First, Visser argues not only that the excusability requirement must go, but also that error should no longer be classified as a reason that a plaintiff would (in the appropriate circumstances) have to show in explanation of his or her claim for recovery. Instead, he sees the error playing an indirect role through the guise of a knowledge defence, as is the case in German law. He hence re-conceptualises the description of this justification from “mistaken transfer” to a “transfer to fulfil a putative obligation”. He says:

“It would be entirely appropriate for the courts to rule

(a) that the role of error should be to provide a reason why, in addition to the fact that the benefit is being retained sine causa (in the sense of the defendant having no legal title to it), the retention of the performance should be branded as unjustified; and

(b) that the best way in which to accord it this role will be not to make it a positive requirement (where it might function as an obstacle to, or at the very least cast doubt upon, many deserving claims) but

102  Visser Unjustified Enrichment 316-318.
rather to give it an indirect role by allowing the defendant to resist claims for undue payments by citing the fact that the plaintiff was aware that she was transferring something which was not due.”

Alternatively, the second possible route to follow, which diverges from what Visser proposes above, is the approach that is currently applicable in Scotland. In *Morgan Guaranty Trust Company of New York v Lothian Regional Council*, the Court of Session held that in Scotland it remained for the plaintiff to demonstrate that there had been a transfer in error to support an argument that the transfer was *indebite*. However, it held that “it is not part of the law of Scotland that the error must be shown to be excusable”. Excusability, though, remains a relevant factor to take into account in determining whether the transfer should be returned or not; but it was up to the defendant to raise and show that the error was inexcusable.

Reverting to South African law, applying the Scots approach would mean the retention of the need (in appropriate circumstances) for the plaintiff to show a liability mistake, but there would no longer be a need for the plaintiff to show that the error was excusable. Instead, this would become a shield in the hands of the defendant. Scott, in her extremely comprehensive recent discussion of the excusability requirement, indicates that this approach (what she describes as the equitable “defence of careless mistake”) is the one that accords most closely with Roman and some Roman-Dutch sources, and also the views of the German Pandectists. She argues that adopting this approach would (if it were to be adopted) be “compatible with the principles underlying the *condictio indebiti* in South African law”. This approach also seems to have the support of Sonnekus.

However, Scott goes further and argues that there may in fact be no legitimate reason, either in policy or equity, for recognising such a defence – like others have done before here, she argues that it is not the task of enrichment law to “judge” and sanction carelessness. But while she argues against excusability being an appropriate issue to be considered in favour of the retention of the benefit by the defendant, it does not appear as if she is prepared to go as far as Visser, and to argue that error should be abandoned in favour of a Germanic defence of

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103 Visser *Unjustified Enrichment* 330 (author’s emphasis). Cf *Die Rol van Dwaling* 288ff and Du Plessis *SALJ* 163ff.
104 1995 SCC 151.
105 *Morgan Guaranty* 166.
106 *Morgan Guaranty* 166 (Lord Hope), 173 (Lord Clive), 175 (Lord Cullen).
107 Scott *SALJ* 852.
108 2007 *SALJ* 855.
109 Sonnekus *Unjustified Enrichment* 247.
110 2007 *SALJ* 858. Cf Visser *Die Rol van Dwaling* 288-298; Eiselen and Pienaar *Unjustified Enrichment* 116; De Vos *Verrykingsaanspreeklikheid* 184-185.
knowledge.\textsuperscript{111} So, in sum, three possibilities for change exist: (i) the excusability criterion could be eliminated completely, but the plaintiff would still have to prove a liability mistake; or (ii) the plaintiff would still have to show a liability mistake, and the defendant could rebut the claim by brandishing a defence that the mistake was inexcusable, and the transfer should therefore not be reversed; or (iii) excusable error should be replaced completely by a defence of knowledge.

Which approach the courts might adopt is uncertain at this point, but I will stick my neck out here and suggest that the courts may not necessarily go as far as to wipe out the mistake explanation completely, in favour of a defence of knowledge. The need for a plaintiff to indicate a liability mistake in appropriate circumstances may just be too ingrained in the fabric of our enrichment law to undergo such a transmogrification. But if I am right in suggesting that a liability mistake may remain something that a plaintiff would have to show to justify their claim for a return of an undue transfer, I do think that the Supreme Court of Appeal might be prepared, in the spirit of its decision in \textit{Bowman, De Wet and Du Plessis NNO v Fidelity Bank Ltd}, either to eliminate the excusability requirement completely, as has occurred in other jurisdictions, or to shift the burden to the defendant to show that the mistake on the part of the plaintiff was an inexcusable one. Indications that this might be possible in the future appear from the Supreme Court of Appeal decision in \textit{Affirmative Portfolios v Transnet},\textsuperscript{112} where the court acknowledged the extensive criticism of the excusability requirement, but ultimately would not decide the matter on the basis that the question had not been thoroughly canvassed in argument before it.\textsuperscript{113} If the courts are cautious about the issue, as the conservative approach in \textit{Affirmative Portfolios} indicates, it is likely that when the matter comes squarely before it, the Supreme Court of Appeal might retain excusability in the guise of an equitable factor that could be raised by the defence, and which could justify a finding that the transfer should be retained, rather than jettisoning it altogether.

Although space precludes further analysis, similar difficult and detailed issues of internal classification affect claims under the \textit{condictio indebiti} based on compulsion,\textsuperscript{114} on reservation of rights,\textsuperscript{115} and in the context of failed contracts. Fortunately, there are already penetrating analyses available in the new literature on these matters.\textsuperscript{116} Lastly, there is also the

\textsuperscript{111} Cf the views she expresses in 2006 \textit{RLR} 93.
\textsuperscript{112} [2008] ZASCA 127 (30 September 2008).
\textsuperscript{113} Paras 29 and 30.
\textsuperscript{114} On which, see Du Plessis \textit{Compulsion and Restitution} 146, and in Johnston and Zimmermann (eds) \textit{Unjustified Enrichment: Key Issues in Comparative Perspective} 207-208; Visser \textit{Unjustified Enrichment} 383.
\textsuperscript{115} The matter is discussed in Glover 2006 \textit{THRHR} 561 571; Visser \textit{Unjustified Enrichment} 395.
\textsuperscript{116} The work already done by Visser and Sonnekus in their recent books.
question of the *condictio indebiti*’s external relationship with the other *condictiones*. The German experience has shown that a broader conception of the *condictio indebiti* can lead to the marginalisation of the other *condictiones*, which is grist for the mill of those who argue for the suitability of streamlining the actions for enrichment based on transfer.

6 Conclusion

If we accept that McCarthy’s case continues to light the path for the future of our enrichment law, and if we accept that the *sine causa* requirement cannot simply operate in splendid isolation, some clear role needs to be articulated for the traditional enrichment actions, exemplified by the *condictiones*. There are arguments in favour of either collapsing the *condictiones* into one action for cases of enrichment based on transfer, or retaining the status quo, where the *condictiones* remain differentiated. Both of these options bring their own complexities, and the debates about the appropriate conceptions to be adopted will be lively, no matter which direction the South African legal system ultimately takes. It is likely, in the short term, that the conservative attitude that has generally imbued the South African law of unjustified enrichment could well result in the *condictiones* retaining their individual roles. In this event, further steps will need to be taken to explain the role and application of each of them more clearly. If the difficulties inherent in this sort of exercise cannot be satisfactorily overcome, this could possibly result in a move to streamline the *condictiones* in the longer term.

To close, the future of South Africa’s law of unjustified enrichment by transfer faces an uncertain future. But this is not necessarily a bad thing. The opportunity exists to improve and develop the law, and in the process to allow South African scholars to reflect on the wealth of ideas emerging from other jurisdictions. Professor Birks encapsulated this point most famously in a piece to be found on the cover of his seminal *Introduction to the Law of Restitution*. Suitably amended for South African purposes, the piece reads:

“[Unjustified enrichment] is an area of law no smaller and no less important than, say, Contract [or Delict]. A series of intellectual and historical accidents has, however, scattered its raw material to the fringes of other subjects … Dispersed in this way, [unjustified enrichment] has escaped the revolution in legal learning which has happened over the past century. It has been the age of the textbook. Successive editions have settled the case law of other subjects into well-tried and now familiar patterns. [Unjustified enrichment] remains disorganised: its textbooks have only just begun to be written … It is the last major
area to be mapped and in some sense the most exciting subject in the modern canon. There is everything to play for.”