

# Interference without ownership: the theft of incorporeal money in the South African law of unjustified enrichment

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## I. PREFACE

I first met Dale Hutchison – or rather Professor Hutchison – when I studied the law of contract at the University of Cape Town in 1997. He was one of our most popular lecturers, regarded with real warmth and affection by the class. But we also revered him for the clarity and elegance with which he taught the subject; for his ability to make even difficult, technical law seem accessible. It was in 1997 too that I first read his seminal essay on the twentieth-century history of the *lex Aquilia*, a piece that I have returned to many times over the course of the last twenty-four years, each time learning more from it. Later, as a colleague in the Department of Private Law, I came to look forward to his departmental seminars. These were always unshowy and workmanlike, a practical guide to a tricky case or line of cases, but at the same time they seemed to embody the particular genius of the doctrinal private lawyer: clarity and brevity of exposition, acute awareness of social and commercial context, and the instinct for coherence that keeps a case-based system in balance between inflexibility and chaos.

The subject of the chapter that follows is the law of unjust or unjustified rather than the law of contract, and its focus is the least contractual part of unjustified enrichment, what I have called enrichment arising from non-consensual shifts in wealth. Nevertheless, it falls squarely within the theme of this volume insofar as I seek to show, first, that the theft of incorporeal money is handled by South African law not within the framework of the law of property but rather in terms of an exclusively obligatory model, and, second, that only an analysis that focuses primarily on the parties' contractual relationships – on their contractual rights and duties, actual and putative – can explain the South African law in this respect. In writing it, I have tried to pay tribute to Dale by putting into practice the intellectual virtues he exemplifies. If I have fallen short, that only serves to show how difficult it is to do doctrinal law well, however easy Dale may make it look.

## II. THE THEFT OF INCORPOREAL MONEY

If middle-class anecdote is to be believed, financial crime is a growth industry in South Africa. Despite the best efforts of individual banks and regulatory bodies, the theft of money out of bank accounts is increasingly common, and it falls largely to traditional private law to provide relief to victims.<sup>1</sup> When such crime occurs, the victim of the theft always has a personal claim against the thief arising from his wrongdoing. But such a personal claim is generally useless in practice, because thieves are often insolvent. What the victim wants in this situation is to be able to follow the money.. But this is very difficult to achieve in South African law. Notes and coins can in theory be vindicated; the credit in bank accounts – incorporeal money – cannot. The Bills of Exchange Act and associated common-law rules

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<sup>1</sup> See B Wessels 'Reconsidering the state's liability for harm arising from crime: the potential development of the law of delict' (2019) 30 Stellenbosch L Rev 361, 380–83 on the compensatory provisions contained in section 300 of the Criminal Procedure Act 51 of 1977 and on the potential for compensation of the victims of crime in terms of the Prevention of Organised Crime Act 121 of 1998.

offer at least some protection to the victim of cheque fraud, forbidding their bank to debit their account if it has paid out on a forged cheque,<sup>2</sup> and in their nature cheques preclude many of the mistakes that are possible when making an electronic funds transfers (EFT), but the cheque has largely fallen out of use in South Africa, and in November 2020 the South African Reserve Bank announced that cheques would be discontinued from 1 January 2021. So what hope is there for the victims of financial crime? Are they obliged to take their place in the queue of concurrent creditors in the thief's insolvent estate?

Over the course of the last twenty years South African law has evolved to meet this difficulty. The decisions of the Supreme Court of Appeal in *First National Bank of Southern Africa v Perry*,<sup>3</sup> *Nissan South Africa v Marnitz NO*,<sup>4</sup> *Absa Bank v Lombard Insurance*,<sup>5</sup> and *Trustees, Estate Whitehead v*

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<sup>2</sup> FR Malan, JM Pretorius and SF du Toit, *Malan On Bills of Exchange, Cheques and Promissory Notes*, 5<sup>th</sup> ed (LexisNexis 2009) at p 300–304.

<sup>3</sup> *First National Bank of Southern Africa Ltd v Perry* 2001 (3) SA 960 (SCA). First National Bank had paid out on a cheque for almost R5 900 000 purportedly issued by the KwaZulu-Natal provincial government; in fact, the cheque had been forged by the thief, Dambha. FNB had credited the amount to the account of its customer, the provincial government, as it was required to do in terms of their banking relationship. It then took cession of the claim of FPV, the thief's broker, into the account of which at FNB the thief had transferred the stolen funds and which had paid them over by cheque into a number of bank accounts, including the thief's personal bank account and the account of a trust of which he was trustee, both held at Nedbank, in the mistaken belief that it was obliged by its contract with the thief to do so. The matter was argued on exception before Magid J in the Durban and Coast Local Division, the defendants (whose number included not only Nedbank but also Dambha himself, both in his personal capacity and as trustee) having argued that the plaintiff's particulars of claim disclosed no cause of action. This exception was largely upheld at first instance but appealed by FNB. The estates of both Dambha and the trust having by now been sequestrated, the appeal was resisted by the trustees on insolvency of the trust. Upholding the appeal, Schutz JA held that in the absence of any duty to account to its customer in respect of those funds, Nedbank was enriched by their receipt and came under a duty to restore them to FNB.

<sup>4</sup> *Nissan South Africa (Pty) Ltd v Marnitz NO and others* 2005 (1) SA 441 (SCA). Almost R13 million had been transferred from Nissan's bank account at First National Bank to the account of Maple Freight CC (of which the sole member was one Stanley), held at Standard Bank. Nissan had intended to pay its creditor, TSW Manufacturing, but had provided the incorrect account number to FNB. The plaintiff did not owe Maple any amount and had no intention to pay Maple (see the judgment of Streicher JA at [2]) Stanley, the sole member of Maple, transferred the funds out of the Standard Bank account into a series of accounts in the name of Maple at First National Bank, a course of conduct held by Streicher JA to amount to theft: see [24] to [26]. Maple then went into liquidation. It was common cause between the parties that, in the event of its being found that the liquidators of Maple were not entitled to the funds, Nissan was entitled to them: see [27]. The litigation took the form of an application to the Witwatersrand Local Division for an order declaring that the amount of R9 750 000 which remained in Maple's account at FNB did not form part of Maple's insolvent estate and directing the first and second respondents, the liquidators of Maple, to release that amount to Nissan. Mailula J dismissed the application, holding that Nissan was a mere concurrent creditor in Maple's insolvent estate. On appeal to the Supreme Court of Appeal Nissan argued successfully that at least that portion of the funds remaining in Maple's payments account at FNB that could be traced to the amount originally transferred from Nissan's account to Maple's account at Standard Bank did not form part of the insolvent estate, Maple having no entitlement to them as against FNB: see [23] to [26].

<sup>5</sup> *Absa Bank Ltd v Lombard Insurance Co Ltd; Firststrand Bank Ltd v Lombard Insurance Company Ltd* 2012 (6) SA 569 (SCA). The applicant was Lombard Insurance, the employer of the thief, Manickum, a financial accountant. Manickum stole money from Lombard's bank account by forging a letter purporting to be a request by a customer for repayment of cash deposited as security. By means of this fraud Manickum caused approximately R2 115 000 to be transferred into her current account with FNB, the appellant in one of two appeals heard together, which was at that time substantially overdrawn. The other appellant was Absa bank, into a current account (also overdrawn) at which Manickum had transferred part of the stolen funds. Meyer J in the South Gauteng High Court upheld L's claims. Both FNB and Absa successfully appealed to the Supreme Court of

*Dumas*,<sup>6</sup> and the decision of the Constitutional Court in *Absa Bank v Moore*,<sup>7</sup> together amount to a concerted attempt on the part of the courts to provide victims of the theft of incorporeal money with appropriate redress in private law, insofar as they allow them to pursue the proceeds of stolen funds even into the hands of good-faith third parties. But while it is initially attractive, and receives some judicial support in these and earlier cases, a model organised around the extension of the *vindicatio* to incorporeal money is in fact incapable of explaining contemporary South African law. Instead, having considered briefly a second possibility, namely the introduction into South African law of the English<sup>8</sup> constructive trust, this chapter advances an exclusively obligatory approach to the recovery of stolen money, one that attempts to analyse the plaintiff's claim solely in terms of the non-consensual enrichment (that is, enrichment other than by deliberate conferral) of the defendant at their expense, without reference to any right of ownership in the stolen money. Such an approach is preferable not only because of its superior ability to explain the existing law but also on account of the blueprint for future development that it offers. In particular, it opens the way to the recognition of a secured claim in the case in which the proceeds of stolen money have been used to discharge the thief's pre-existing secured debts: the English doctrine of subrogation to extinguished rights. Finally, this chapter considers the implications of these conclusions for wider debates about the proper size and shape of the law of unjust or unjustified enrichment. The conclusions reached here suggest that South African law cannot do without unjustified enrichment 'in another way', a conclusion that seems to contradict contemporary attempts to restrict the scope of the subject to a law of deliberate conferral or performance, or to deny its existence entirely.

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Appeal: it was held that Lombard had no valid claim in respect of the amounts used to settle the overdrafts on Manickum's current accounts at the two banks; in respect of the amounts paid into credit card accounts held at both banks; and in respect of the amount paid into her home loan account held at FNB. The correctness of the High Court's order to the effect that Lombard was entitled to the sum remaining in credit in Manickum's current account at Absa at the time when the theft was detected and her accounts frozen was conceded by Absa. This amount had been transferred into an Absa account held in the name of the trustees of Ms Manickum and her husband's insolvent estate.

<sup>6</sup> *Trustees, Estate Whitehead v Dumas and another* (2013) 3 SA 331 (SCA). The applicant, Dumas, instructed his bank, FNB, to pay R3 million into the account of the respondent, Whitehead, held at Absa, in anticipation of participating in an illegal Ponzi scheme. Dumas was the victim of a fraudulent misrepresentation by an agent of Whitehead, believing that the scheme was legitimate. Whitehead had in fact already been arrested for fraud in the UK. D instituted a 'vindicatory application' for the return of the R3 million, i.e. he claimed to be owner of the funds deposited in W's bank account; subsequently he altered the legal basis of his claim to a *condictio ob turpem vel iniustam causam* against Absa, the trustees of W opposing the application. Makgoba J in the North Gauteng High Court upheld D's claim (see passage quoted at [12] of the SCA judgment): the money fell outside W's estate and was not subject to the *concurso creditorum*. However, the SCA upheld the trustees' appeal. The foundation of the High Court's decision to uphold D's claim was the decision of the SCA in the *Nissan* case. However, the facts of the *Nissan* case and of were significantly different from those at issue here: both *Nissan* and *Commissioner of Customs and Excise v Bank of Lisbon International Ltd* 1994 (1) SA 205 (N) were concerned with theft or fraud outside of the contractual context (see [22]-[23]). In fact, 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. It followed that Absa was not enriched as a result of its receipt of the funds; D had only a delictual claim against W arising from the fraudulent misrepresentation, and on the latter's sequestration, a claim against the trustees [24].

<sup>7</sup> *Absa Bank Ltd v Moore and another* 2017 (1) SA 255 (CC). The facts of this case are set out in the body of the text in section VI below.

<sup>8</sup> I have used the qualifier 'English' in order to avoid the ambiguity inherent in the term 'common law'; I of course intend to refer also to the law of Wales, as well as the wider family of common-law jurisdictions including (but not limited to) Australia, New Zealand, Canada, Singapore and Hong Kong. For reasons of brevity I have treated the law of England and Wales as typical or representative of this legal family.

### III. MODEL 1: VINDICATION AND QUASI-VINDICATION

The remedies arising from the theft of physical money in South African law are relatively straightforward. While the thief acquires possession of the notes and coins, ownership remains with the victim of the theft, at least insofar as those notes and coins remain identifiable.<sup>9</sup> In this respect the rules are the same as those that govern the theft of other movable property. However, the victim's ownership of the physical money is extinguished by the mixing of that money with notes and coins not belonging to him.<sup>10</sup> Moreover, ownership of the money seems also to be extinguished when the money is 'consumed': that is, when it is paid to the thief's creditor in discharge of his pre-existing debts or handed over to a good-faith third party in payment for goods (and presumably also services).<sup>11</sup> Where a third party who acquires title to the victim's money through mixing with other money belonging to him has received the notes and coins *ex causa lucrativa*, gratuitously, he is liable to a personal action arising in unjust enrichment, usually labelled a *condictio sine causa specialis*.<sup>12</sup> This claim does not assume wrongdoing on the part of the third party. It is said to arise by virtue of his interference with or encroachment on the victim's right of ownership.<sup>13</sup> However, where a third party receives money *ex causa onerosa*, for valuable consideration, no such enrichment action arises. Thus the rules on the ownership of money and on claims arising in unjust enrichment move in lockstep.

It is in truth impossible to translate the civilian concept of ownership recognised in South African law from the world of physical money – the world of the first-year-Roman-law problem question – to the world of bank accounts.<sup>14</sup> In particular, it is impossible to claim as a matter of South African property law that the holder of a bank account from which money is stolen (or acquired as a result of fundamental mistake, such as a mistake as to the identity of the payee) remains owner of that money until the point at which it is paid into the thief's bank account; that title to that money is, however, lost when it is mixed with other money owned by the bank; and that it then becomes the property of the receiving bank by virtue of that mixture.<sup>15</sup> Still less can it be said that the victim of such

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<sup>9</sup> Cf the remarks of Schutz JA at [17] in *Perry*.

<sup>10</sup> On the effect of mixing on the ownership of money in South African law see CG van der Merwe and Anne Pope, 'Ownership' in Francois du Bois et al (eds) *Wille's Principles of South African Law* 9<sup>th</sup> ed (2007) 508, relying on Justinian's *Digest* 46.3.78.

<sup>11</sup> This is at least a plausible reading of Voet *Commentarius ad Pandectas* 6.1. n 8, received into South African law in *Woodhead Plant & Co v Gunn* 1894 (11) SC 4, relied on by Malan JA in the *Lombard* case (see text to n 35 below). Cf *Miller v Race* (1758) 1 Burr 452, which appears to have introduced substantially the same rule to the common law. For an account of the law governing the case in which a good faith third party receives movable property (apart from money) belonging to the plaintiff, see Visser *Unjustified Enrichment* 658. Since mixing in the hands of the third party is almost inevitable, the rule has limited practical application.

<sup>12</sup> See *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); see also Daniel Visser, *Unjustified Enrichment* (Juta 2008) 659; Jacques du Plessis 'The cause of action in *Nissan South African (Pty) Ltd v Marnitz NO*' in H Mostert & MJ de Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 14–17.

<sup>13</sup> Hence this rule features in Visser's discussion of 'Invasion of the Rights of another to Physical Property' in the context of his chapter on 'Enrichment by Invasion of Rights', ch 11 in *Unjustified Enrichment*.

<sup>14</sup> See e.g. G Muller, R Brits, J Pienaar and Z Boggenpoel (eds), *Silberberg & Schoeman's Law of Property* 6<sup>th</sup> ed (2019). cf also DM Fox, 'Defective payments of incorporeal money in South African and English law' TSAR [2009] 638 at 640–45 and especially 643 and K Reid, 'Obligations and property: exploring the border' *Acta Juridica* [1997] 225.

<sup>15</sup> But see contra the following passage from the judgment of Thirion J in *Commissioner of Customs and Excise v Bank of Lisbon* at p 208: 'There are however cases where the fraud is of such a fundamental nature and where it occurs outside of contractual context or consensus and where consequently it vitiates the consent

a theft remains owner of the money throughout and can vindicate it from anyone possessing it.<sup>16</sup> The question arises, however, whether incorporeal money could be treated as analogous to physical money.<sup>17</sup> In other words, whether the plaintiff's claim might be understood as an unjust enrichment claim based on encroachment – a quasi-*vindicatio*<sup>18</sup> if you like – that arises from the mixing of his (incorporeal) money with that of the bank,<sup>19</sup> or – the courts' preferred option – whether the plaintiff's claim to money stolen out of his bank account could be treated as analogous to a *vindicatio*,<sup>20</sup> thus explaining how it is that he is able to pursue the stolen money into the hands of good-faith third parties.

In fact there are several difficulties with such an approach. First, it is not clear what its basis is. What could justify treating a personal right – a customer's contractual claim against her bank – in the same way as the real right which the owner of physical money enjoys? Is it coherent for a legal system to decline to admit the ownership of incorporeal money while nevertheless extending *vindicatio*-like protection to the holder of such a personal right? We might point to the English doctrine of tracing

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and does not have the effect that delivery results in the passing of ownership [reference to *S v Graham* 1975 (3) SA 569 (A) at p 573]. In the present case the circumstances under which Reob obtained the moneys by fraud from the Commissioner were such as to deprive delivery to Reob of any legal effect... I am therefore satisfied that counsel's concession that the sum of R210745,09 was the property of the Commissioner at the time when it was paid into Reob's bank account, was correctly made. It seems equally clear however that when the money was paid by Reob into its bank account with the Bank of Lisbon, ownership of the money passed to the Bank. The money being *res fungibiles* and the Bank having received it without reason to believe that it had been stolen by Reob or obtained by fraud, ownership of the money passed to the Bank when Reob paid it into its account with the Bank.' See also Schutz JA in *Perry* at [16]: 'It might seem a simple thing to recover stolen money from one found in possession of it. But the matter is complicated by the rule in our law, an inevitable rule it seems to me, flowing from physical reality, that once money is mixed with other money without the owner's consent, ownership in it passes by operation of law. Thus when payment was made by FPV's bank of the two cheques payable to Dambha and the Trust, ownership of the money passed to Nedbank... Accordingly a *rei vindicatio*, which is an assertion of ownership, does not lie.' cf also Cachalia JA in *Whitehead* at [10], [13] to [15], where money held in bank accounts is said to belong exclusively to banks, as well as the decisions of Du Plessis J in *Roestoff v Cliffe Dekker Hofmeyr Inc* 2013 (1) SA 12 (GNP) [45]–[46] and *FirstRand Bank Limited v The Spar Group Limited* [2021] ZASCA 20 at [63]–[64].

<sup>16</sup> But see Malan JA in *Lombard* at [14], where the claimant was described as the 'owner' of the funds held in the thief's bank accounts.

<sup>17</sup> cf Thirion J in the *Bank of Lisbon* case at p 213, citing *S v Kotze* 1965 (1) SA 118 (A) 125: '[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.'

<sup>18</sup> But cf *FirstRand Bank Limited v The Spar Group Limited* [2021] ZASCA 20 at [64].

<sup>19</sup> On the identification of the personal claim available to the claimant see *Perry* at [20]–[30] and *Lombard* at [7] and [11], where the claim is said to be an instance of the *condictio ob turpem vel iniustam causam*, the action arising from a transfer made for an immoral or illegal purpose. But cf *Bank of Lisbon*, where the claim is said to be an instance of the *condictio sine causa specialis*, and further Du Plessis *Essays Van der Merwe* at pp 14–17. See most recently *FirstRand Bank Limited v The Spar Group Limited* [2021] ZASCA 20 at [63]: 'It must be acknowledged, as *Perry NO*'s case illustrates, that there is no small measure of difficulty in determining what *condictio* would be of application.'

<sup>20</sup> The construction of the plaintiff's claim as analogous to a vindication receives support from certain passages in the *Perry* judgment in particular: according to Schutz JA, the bank was in a position 'analogous to the hitherto bona fide possessor who is confronted by the owner bringing a *rei vindicatio*' (at [22]). See also [29]: 'In order to complete the comparison between the case of identified stolen money being pursued by means of the *rei vindicatio* and its unidentified counterpart pursued under the *condictio*...' See further Nissan at [24]–[25], where Streicher JA, relying on *S v Graham* 1975(3) SA 569 (A), seemed to suggest that title to incorporeal money would remain with the victim of the theft throughout. And see finally *Roestoff v Cliffe Dekker Hofmeyr Inc* 2013 (1) SA 12 (GNP) [51]–[53].

title through an unauthorised substitution (or series of substitutions) as a way of bolstering the analogy: seen in this light, the victim of the theft of incorporeal money might be understood to be asserting a species of pre-existing title to the substitute asset held in the thief's bank account.<sup>21</sup> But this conception of tracing through substitutes as vindication – as the assertion of a pre-existing property right – is not universally supported.<sup>22</sup> And indeed it is difficult to see how the victim of theft could be said to retain any pre-existing title to an asset that is in truth created only when the stolen money is paid into the thief's bank account.

The second, more parochial objection to the analogy is that it is incapable of explaining South African law. It is a key feature of the regime developed in the *Perry*, *Nissan* and *Lombard* cases that the claim to the credit balance in the thief's bank account lies against the bank rather than the thief herself. According to the rule first clearly set down in *Nissan*, a thief has no contractual entitlement as against his bank to stolen money apparently standing to his credit in his bank account.<sup>23</sup> This rule flows naturally from the vindicatory model deployed in the *Perry* and *Nissan* cases:<sup>24</sup> if, owing to theft or fundamental mistake, the victim of the theft remains in some sense the owner of the money, or if the bank becomes owner of the money through *commixtio*, not by virtue of a payment in by its customer, there is no reason why the bank should be obliged to account to its customer in respect of that amount.<sup>25</sup> In the absence of any indebtedness to its client, his bank is enriched by the receipt of the funds.<sup>26</sup> Thus the successful claim in *Perry* lay against Nedbank, the bank into an account at which the

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<sup>21</sup> Re. legal title, see *Lipkin Gorman v Karpnale* [1991] 2 AC 548, as discussed by e.g. David Fox *Property Rights in Money* (OUP 2008) 192–99, especially 197–98; Graham Virgo *The Principles of the Law of Restitution*, 3<sup>rd</sup> ed (OUP 2015) 642–43. *Foskett v McKeown* [2001] 1 AC 102 is understood by these authors to give expression to the same idea in equity, i.e. to involve the assertion of a pre-existing equitable property right: see Fox *Property Rights in Money* 191–92; Virgo *Principles of Restitution* 632–34. This is distinct from the conception of tracing through unauthorised substitutes as a technique for establishing the 'at the expense of' requirement for the purposes of a claim arising in unjust enrichment: cf principally P Birks *Unjust Enrichment*, 2<sup>nd</sup> ed (Clarendon Press 2005) 93–98; A Burrows *The Law of Restitution* (OUP 2011) ch 16, especially 403–408. Note, however, that common-law tracing is unlikely to be possible on the facts of cases like *Perry*, *Nissan* and *Lombard*: see *Agip (Africa) Ltd v Jackson* [1990] EWCA Civ 2.

<sup>22</sup> Cf e.g. Burrows *Law of Restitution* 169–71; C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9<sup>th</sup> ed Sweet & Maxwell 2016) ch 8, 232–38.

<sup>23</sup> The point is assumed in *Perry* (see [19]) but is explicit in *Nissan* at [26]. In fact, the rule had its genesis in the judgment of Thirion J (Wilson J concurring) in *Commissioner of Customs and Excise v Bank of Lisbon* at 208. This decision was criticised in the 4<sup>th</sup> edition of *Malan on Bills of Exchange, Cheques and Promissory Notes* at p 337–41. On p 341 in particular the authors emphasise that 'the respondent bank is obliged, in terms of the bank and customer contract subsisting between it and the company, to pay cheques of the company drawn on it or repay the amount standing to the credit on the account to the company on demand.' See also *Commissioner, South African Revenue Service, and Another v Absa Bank Ltd and Another* 2003 (2) SA 96 (W) at 129E to 131G, in which the *Lisbon* decision is criticised. But this criticism was explicitly rejected by Streicher JA in the *Nissan* case: see [12] to [16]. Rather, 'the submission by first and second respondents' counsel that, once a bank has unconditionally credited a customer's account with an amount received, the bank is required to pay the amount to the customer on demand, even where the customer came by such money by way of fraud or theft, is not correct. If stolen money is paid into a bank account to the credit of the 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.' See now the discussion of the *Nissan* case at pp 348–50 in the fifth edition of *Malan on Bills of Exchange, Cheques and Promissory Notes* (LexisNexis 2009).

<sup>24</sup> Cf note 20 above.

<sup>25</sup> Cf note 53 below.

<sup>26</sup> *Perry* at [19] and [32]. The parties in *Nissan* had agreed that if Maple was found not to be 'entitled' to the money then it should be restored to Nissan. This concession means that the Court was not obliged to give a full explanation of the basis of Nissan's personal claim to the money as against FNB: see *Nissan* at [27]. In

thief had instructed his broker to pay the traceable proceeds of the stolen funds.<sup>27</sup> Similarly, in *Nissan* it was held that an amount standing to credit of the thief at First National Bank that could be traced back to the funds mistakenly paid by Nissan into the thief's account at Standard Bank<sup>28</sup> should be returned to *Nissan* by the liquidators of Maple and that it did not form part of Maple's insolvent estate.<sup>29</sup> The banks were analogised to the possessors of physical money belonging to the plaintiff,<sup>30</sup> liable to its original owner in unjust enrichment.

But this conception of the claim is wholly at odds with another key feature of South African law in this respect, and with the reasoning and outcome in the *Lombard* case in particular. So strongly did the court of first instance in that case emphasise the vindicatory nature of the plaintiff's claim to the money that it upheld even its claims in respect of the amounts used by the thief to discharge pre-existing debts owed to the two banks at which she held accounts and into which she had moved the stolen money, debts which included overdrafts and credit card debts at both banks as well as a home loan account at FNB.<sup>31</sup> But the Supreme Court of Appeal overturned the court of first instance on this point, holding that the thief's debts to the banks had been validly discharged by the payments and that therefore no claim arose in respect of those funds (as opposed to the amounts standing to the thief's credit in her current accounts).<sup>32</sup> In particular, she had been able validly to discharge her pre-existing debts to First National Bank and Absa by paying money into her home loan account at FNB and into her credit card accounts at both banks.<sup>33</sup> Thus the discharge of the thief's debts to the two banks was conceptualised as analogous to the case in which a thief uses physical money belonging to the victim to discharge his (the thief's) own debts,<sup>34</sup> Malan JA quoting Voet's *Commentary on the Pandects* to the effect that:

[t]his power of vindicating stolen property from a third party possessing in good faith fails nevertheless when stolen money has been paid by a thief to a creditor of his who receives it in good faith, or has been counted out by way of price for a thing sold, and has been either used up or mixed with other money; for cash is regarded as used up by the latter process; moreover cash of another which has been used up in good faith by a creditor can neither be vindicated nor claimed in a personal action.<sup>35</sup>

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*Lombard* liability in respect of the amount standing to the thief's credit at Absa was conceded on appeal and thus the point was not argued before the SCA. However, dicta at [14] suggest that Malan JA regarded FNB in *Nissan* as having been enriched by receipt of the stolen funds: 'The effect of Nissan is that where a thief deposits stolen money into his account any instruction disposing of the funds is unenforceable. Hence, there is no obligation on the bank to account to the customer. Consequently, the bank retaining the funds could well be enriched because it is not liable to account to its customer, but retains the funds.'

<sup>27</sup> On tracing see *Perry* at [18]: 'What an applicant must do in such a case is to trace the money back to the stolen money, to identify it as a "fund" of stolen money in the defendant's hands.' Note that FNB, the claimant in the *Perry* case, had taken cession of the broker's claim, having indemnified its client, the KwaZulu-Natal Provincial Government, against the original theft of its cheque(s?) by the thief, Dhamba.

<sup>28</sup> As argued by counsel for the appellant: see [9] in the *Nissan* case.

<sup>29</sup> Again, the parties in *Nissan* had agreed that if Maple was found not to be 'entitled' to the money then it should be restored to Nissan, a concession which meant that the Court was not obliged to give a full explanation of the basis of Nissan's claim to the money as against FNB.

<sup>30</sup> See *Lombard* at [14].

<sup>31</sup> See the passage from the judgment of Meyer quoted by Malan JA in the *Lombard* case at [10].

<sup>32</sup> Relying inter alia on *B&H Engineering v First National Bank of South Africa Ltd* 1995 (2) SA 279 (A) and on *Absa Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA), cited at [19].

<sup>33</sup> According to the thief's contracts with the two banks, payment into her overdrawn current accounts was automatically applied to discharge those overdrafts: see *Lombard* at [19].

<sup>34</sup> See text to n 11 above, as well as n 11 itself.

<sup>35</sup> Voet *Ad Pandectas* 6.1 n 8 (Gane's translation), quoted by Malan JA in the *Lombard* case at [17].

It was the thief, rather than the bank, who was analogised to the possessor of stolen money. Once again, this decision is impossible to reconcile with the conception of the claim set out in the previous paragraph. If indeed she had no entitlement to the stolen money as against the banks – if indeed it was the banks rather than the thief herself who ‘possessed’ it – how could the thief deal with it (as in the case of the payments into her home loan and credit card accounts) and how could the terms of her contracts with the banks be relied upon to order to determine whether or not her overdrafts had been validly discharged through the payment of funds into her current accounts?<sup>36</sup> It was this conflict or tension that led the Supreme Court of Appeal to hold recently<sup>37</sup> that where the holder of an account was not entitled to money deposited into it, the bank at which the account was held could not deploy that money in order to discharge its customer’s overdraft.<sup>38</sup> Thus it seems that a model that attempts to explain the bank’s liability purely by reference to an analogy with the possession of physical money, without reference to the contractual relationship between the bank and its client, is unworkable.<sup>39</sup> We must look elsewhere for answers.

#### IV. MODEL 2: CONSTRUCTIVE TRUST

A possible alternative to the vindicatory model considered and rejected above appears in the unlikely form of English equity’s constructive trust.<sup>40</sup> At first glance, the constructive appears to civilian eyes to be a technique for asserting pre-existing title to an asset in circumstances that the common-law concept of title is too inflexible to accommodate. But in fact the constructive trust bears no relationship to the *rei vindicatio*: it entails the creation of new property rights in response to an event in the law of obligations.<sup>41</sup> Unlike an express trust, the constructive trust is imposed by operation of law, in response to either wrongdoing or unjustified enrichment.<sup>42</sup> It places the trustee under a duty to use the money held in trust exclusively for the benefit of the beneficiary. Importantly for our purposes, it removes trust assets from the estate of the trustee, with the effect that the beneficiary is able to avoid the effects of the trustee’s insolvency.

Can the constructive trust model satisfactorily account for contemporary South African law? It appears that a constructive trust arises in English law both in respect of money (or its traceable proceeds) obtained through the fraudulent breach of a fiduciary duty (as appears to have been the case in *Lombard*)<sup>43</sup> and in respect of money paid by mistake, at least from the moment when the

<sup>36</sup> See *Lombard* at [18] and [19].

<sup>37</sup> In *FirstRand Bank Limited v The Spar Group Limited* [2021] ZASCA 20.

<sup>38</sup> The plaintiff was powerless to prevent the proceeds of the business it was running from being paid into the account; in that respect the facts were materially similar to those at issue in the *Perry* and *Nissan* cases (see [47] and [48]). The bank was, however, aware that its customer was not entitled to the money at the time at which it purported to discharge the overdraft: see *inter alia* [49] and [83](1). Thus while Sutherland and Unterhalter AJJA expressed themselves in general terms – see in particular [49]–[50] – it seems that the authority of the decision cannot extend beyond those facts, especially since *Lombard* was not considered.

<sup>39</sup> As concluded also by JE du Plessis in respect of the *Nissan* case: see *Essays van der Merwe* at p 16 and 18.

<sup>40</sup> Cf DM Fox ‘Defective payments of incorporeal money in South African and English law’ TSAR [2009] 638, 652–54.

<sup>41</sup> See e.g. A Burrows, *The Law of Restitution*, 3<sup>rd</sup> ed (OUP 2011) chapter 8 and 168–69 in particular.

<sup>42</sup> C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9<sup>th</sup> ed Sweet & Maxwell 2016) ch 38 section 5.

<sup>43</sup> See e.g. Ben McFarlane and Charles Mitchell *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies*, 14<sup>th</sup> ed (Sweet & Maxwell 2015) 584–86. On enrichment arising from the breach of a fiduciary duty in South African law, and on the breach of the fiduciary duties of employees in particular, see Du Plessis *The South African Law of Unjustified Enrichment* 365–68.



recipient realises the mistake (as in *Nissan*).<sup>44</sup> Dicta in the leading case also support the idea that where stolen money is paid into a bank account, the money will be held by on trust for the victim of the theft (as in *Perry* and indeed *Lombard* too).<sup>45</sup> More specifically, the thief in whose account the money or its traceable proceeds is held is treated as a constructive trustee; the thief holds his contractual right against the bank (arising from the deposit of the money) on trust for the victim of the theft, the beneficiary of the trust.<sup>46</sup> Furthermore, insofar as the existence of a trust in favour of the claimant protects the beneficiary against the effects of the trustee's insolvency, the constructive trust appears to be the functional equivalent of the South African rule that the victim of fraud or theft can proceed against the bank at which the wrongdoer's account is held, rather than the wrongdoer himself. It is arguable, at least, that what really happened in the *Perry*, *Nissan* and *Lombard* cases was that the claimant 'collapsed the trust'<sup>47</sup> and asserted its right to have that portion of the stolen money (or rather its traceable proceeds) remaining in the wrongdoer's bank account transferred to it.

But although he owes extensive duties to the beneficiary, it is clear that the trustee under a constructive trust is able to deal effectively with third parties.<sup>48</sup> This explains how it was that the thief in the *Lombard* case was able validly to discharge her debts to the banks using trust moneys. At the same time, the constructive trust model is able to accommodate the fact that no claim was possible in respect of those funds: a constructive trust is capable of being enforced against the trustee's successors in title, but the claimant's equitable proprietary rights in the money can be defeated by a good faith purchaser for value without notice.<sup>49</sup> Analysis of the *Perry*, *Nissan* and *Lombard* cases in terms of constructive trust also has the advantage of offering a ready explanation for why it is that the victim is said to 'trace' into the proceeds of the stolen money through a series of bank accounts, terminology not otherwise easily explained in South African law.<sup>50</sup>

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<sup>44</sup> In *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, Chase Manhattan was instructed to pay \$2 million to the Israel-British Bank but paid the sum twice by mistake. The Israel-British Bank subsequently became insolvent, and Chase Manhattan successfully argued that the overpaid sum was held on trust and that it therefore did not fall into the defendant's insolvent estate. Subsequent dicta of Lord Browne-Wilkinson *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at p 715 suggest that such a trust will arise only once the recipient's conscience is affected, i.e. once he becomes aware of the claimant's mistake. For detailed discussion of this rule in the South African context and its application to the facts of *Nissan* in particular see Fox 'Defective payments' at 653–54.

<sup>45</sup> See Lord Browne-Wilkinson's speech in *Westdeutsche* at 715–16.

<sup>46</sup> See e.g. *Hayton and Mitchell* 707–708.

<sup>47</sup> According to the rule in *Saunders v Vautier* (1841) 4 Beav 115.

<sup>48</sup> See e.g. *Hayton and Mitchell* 26–27.

<sup>49</sup> See e.g. *Hayton and Mitchell* 545–50. *Goff & Jones* ch 29, especially 817–19. It is possible, however, that the plaintiff in *Lombard* would have been able to trace into the immoveable property over which the thief's mortgage – discharged using stolen money – had been held. This seems an attractive outcome. Cf the arguments in favour of subrogation offered in section VI below.

<sup>50</sup> See text to notes 27 to 28 above, as well as the notes themselves. Indeed there are some hints of *Westdeutsche*-style reasoning in *Perry* itself: see e.g. [29] where Schutz JA said, 'This rule that the enriched party may not with impunity part with the goods after learning of the impoverished party's claim supports the conclusion reached earlier that once he gains such knowledge he is liable to the extent of his enrichment, that he thereafter, so to speak, holds for the benefit of the original owner.' [PBH] Berks [sic] and [WJ] Swadling 'Restitution' in *The All England Law Reports Annual Review* [1996] 366 – in which the *Westdeutsche* case was extensively discussed – had been cited to the court by counsel (see p 963 of the report). See also *Nissan* at [24]: 'Where A hands over money to B, mistakenly believing that the money is due to B, B, if he is aware of the mistake, is not entitled to appropriate the money. Ownership of the money does not pass from A to B.'

However, the difficulties with such a constructive trust model are themselves considerable. First, there is no suggestion that the constructive trust has been received into South African law; indeed, it has been forcefully argued by South Africa's leading trusts lawyers that South African has no need of such a device.<sup>51</sup> Second, the imposition of a constructive trust in cases of spontaneous mistake (as in *Nissan*) rests on slim authority even in English law.<sup>52</sup> Lacking a firm doctrinal foundation in its home jurisdiction, it is unclear whether this institution is suitable for export, especially to a jurisdiction which operates a civilian law of property. Finally, whatever functional equivalence can be drawn between the two approaches, the trusts analysis offered above is simply incompatible with the unambiguous finding in *Perry*, *Nissan* and *Lombard* that it is the bank, not the thief, that is enriched by the receipt of stolen funds and is therefore under a duty to restore the traceable proceeds of the stolen money to the plaintiff. It appears that an explanation for the claim recognised in the cases set out in section II above cannot be found in the English constructive trust either.

## V. MODEL 3: ENRICHMENT ARISING FROM NON-CONSENSUAL SHIFTS IN WEALTH

The true point of the analogy with the theft of physical money relied on by the courts in the *Perry*, *Nissan* and *Lombard* cases is not the fact that the money belonged to someone else and had been received (and retained) by the defendant, from whom it could be vindicated. Nor is the fact that the money had been stolen a necessary feature of the plaintiff's cause of action, although it is theft or fundamental mistake that explains the absence of any contractual entitlement as against his bank to the money apparently standing to the client's credit in his bank account and the bank's corresponding enrichment by virtue of the receipt of the funds.<sup>53</sup> Why theft and fundamental mistake matter, fundamentally, is that they show that the plaintiff's money left his bank account without his consent, in the absence of any intention on his part to confer a benefit on another. Interference with the plaintiff's assets by virtue of an unintentional shift of wealth certainly does occur when physical money is stolen. But ownership of the money on the part of the plaintiff is not necessary to constitute his claim. It arises rather from the unjustified enrichment of the defendant at the plaintiff's expense without his consent.

In the *Perry*, *Nissan* and *Lombard* cases, such a non-consensual shift of wealth from the plaintiff's bank account into that of the thief<sup>54</sup> occurred either through theft by the account holder (as in *Perry* and *Lombard*) or through fundamental mistake on the part of the plaintiff (*Nissan*). In the

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<sup>51</sup> See e.g. Edwin Cameron, 'Constructive trusts in South African law: the legacy refused' *Edinburgh Law Review* 3 (1999) 341, as well as Edwin Cameron, Marius de Waal and Peter Solomon *Honoré's South African Law of Trusts* 6<sup>th</sup> edn (Juta 2018) 152–54.

<sup>52</sup> See e.g. Burrows *Law of Restitution* 180–81, as well as the authorities collected in *Hayton and Mitchell* 707 n 316.

<sup>53</sup> cf text to nn 23 and 24 above, as well as n 23 itself. That the role of theft in precluding any entitlement to the money on the part of the thief as against his bank is independent of its role in precluding a valid transfer of funds from the plaintiff's account is suggested by certain passages in the judgment of Streicher JA in the *Nissan* case: here, theft of the money mistakenly paid into Maple's account occurred only when Maple began to deal with that money: see *Nissan* at [24] and [25]. Dicta at [26], however, suggest that it was Nissan's fundamental mistake as to the identity of the payee and the consequent ineffectiveness of the payment to Maple that precluded any entitlement to the money on its part. See also *Whitehead* at [22], referring to the judgment of Thirion in *Bank of Lisbon* at p 208.

<sup>54</sup> In referring to the parties simply as 'plaintiff' and 'defendant' in each case I have considerably simplified matters. For details of the facts and history of the litigation in each case, see nn 2, 3, and 4 above. Note in particular that FNB, the plaintiff in the *Perry* case, had taken cession of the claim of an intermediate party, FPV.

*Whitehead* case,<sup>55</sup> on the other hand, although the investment transaction between the plaintiff and the defendant was voidable, having been induced by the defendant's fraudulent misrepresentation, nevertheless the fraud was not sufficiently fundamental to render the shift in wealth non-consensual.<sup>56</sup> Although the plaintiff's intention was undoubtedly vitiated, this was nevertheless a case involving the deliberate conferral of the money by the plaintiff on the defendant.

Greater difficulty arises, however, in accounting for the identity of the defendants in the *Perry*, *Nissan* and *Lombard* cases. In *Perry*, the stolen funds paid by the thief, Dambha, into the account of his broker, FPV, were then paid by FPV into a number of bank accounts, including the thief's personal bank account and the account of a family trust, both held at Nedbank.<sup>57</sup> In *Nissan*, Stanley, the sole member of Maple, transferred the funds paid into his account at Standard Bank out of that account into a series of accounts in the name of Maple at First National Bank. In *Lombard*, the thief, Manickum, transferred most of the money paid into her current account at First National Bank into a series of other accounts held at FNB and at Absa, not only discharging a number of pre-existing debts owed by her to the banks but also leaving a substantial credit balance in her account at Absa. In each case, the defendant was not the immediately recipient of the stolen/mistakenly transferred funds, but had received the funds via a series of intervening transfers. How, then, are we to explain the finding that Nedbank, First National Bank and Absa were enriched at the expense of the plaintiffs and could therefore be sued directly in unjustified enrichment?

The answer lies in paying careful attention to all the parties' contractual duties, both actual and putative. Imagine that A, the victim of theft by X, has a claim against B, a bank, in respect of stolen funds apparently standing to X's credit in an account held at B, transfer of the funds from A's account to X's account having been procured by X. If B pays the money so received over to C<sup>58</sup>, under the influence of a mistake as to its contractual duties to X, its customer, B will be able to defend itself against A's claim by pleading loss of enrichment.<sup>59</sup> This is true whether or not the payment to C discharges any pre-existing indebtedness. If the payment to C does not have that effect, C will be enriched by virtue of its receipt. In theory, B has a claim against C in respect of that enrichment, arising from its mistaken belief that it was performing its obligations to its customer. B's reliance on loss of enrichment with respect to A necessarily precludes any such claim by B against C.<sup>60</sup> However, A can

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<sup>55</sup> See n 6 above.

<sup>56</sup> It followed that the defendant was entitled to the money as against the receiving bank, and that the only claim available to the plaintiff was a personal one against the defendant himself. See *Whitehead* at [24]. This claim was said to have been a delictual one.

<sup>57</sup> Note again that FNB had taken cession of FPV's claim: see note 2 above.

<sup>58</sup> In the *Perry* and *Nissan* cases C was a bank, at which the thief was likewise a customer. In each case this bank received the money in the mistaken belief that it was receiving on behalf of its customer, whereas it was not, because it was not obliged to account to them.

<sup>59</sup> See e.g. *Perry* at [31], as well as *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) and *Absa Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA) at 252, as well as the discussion of the scope of the South African defence of loss of enrichment in Visser *Unjustified Enrichment* at pp 732–36 and Du Plessis *South African Law of Unjust Enrichment* 381–83. Almost all South African authority deals with the case where the loss of enrichment takes the form of the payment over of money received or its proceeds. It is conceivable that a legal system could take up the position that the availability of a claim to B against C bars any loss of enrichment defence by B against A, perhaps on the basis that B's transfer to C is reversible, or that, having a claim against C, B remains enriched. In that event the claim argued for here – by A against the remote recipient C – would fall away.

<sup>60</sup> In the *Perry* case, FNB had credited its customer, the KwaZulu-Natal Provincial Government – A in my example – with the amount of the forged cheque, and debited the amount of the thief's broker, FPV, also its

sue C directly in respect of the proceeds of the original shift in wealth from A to B. This claim arises from C's enrichment at A's expense, 'enrichment' here denoting the receipt of wealth in the absence of any entitlement to it or liability to account to another in respect of it.

This argument seems flawed in that it appears to disregard the requirement of a *negotium* (transaction or dealing) between the parties, normally imposed in cases involving the *condictiones*;<sup>61</sup> to ignore the requirement of a direct transfer of value;<sup>62</sup> to disregard what Peter Birks called the prohibition on leapfrogging.<sup>63</sup> But in fact the element of directness characteristic of and necessary to many claims in unjustified enrichment does not apply to claims involving a non-consensual shift of wealth. Where the plaintiff has deliberately conferred money on another, any right to restitution enjoyed by her can arise only in respect of that other. It is with the recipient that the plaintiff has chosen to transact; more pragmatically, the plaintiff has assumed the risk of her insolvency.<sup>64</sup> Any further shift in wealth – for example, a gift to a third party in reliance on the receipt, or indeed in the form of the very same coins received – can give the plaintiff no rights against that remote recipient (although it might well give rise to a defence on the part of the immediate recipient to the plaintiff's claim).<sup>65</sup> In our case, however, the liability of B and C to A stems not from the deliberate conferral on them of a benefit by A, or even from their acceptance of any performance for them by A,<sup>66</sup> but rather from the fact of their enrichment itself. In these circumstances – essentially the configuration in the *Perry* and *Nissan* cases – it is consistent with the normative basis of C's liability to allow A to sue C directly. Unlike the deliberate conferral of the money on the fraudster by the applicant in the *Whitehead* case, the shift of wealth from A to C involves no distribution of the risk of insolvency: as

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customer, in the corresponding amount. It thereafter took cession of the claim of FPV – B in my example – as against Nedbank – C in my example. However, if the argument made in this paragraph is correct, this cession was unnecessary. It would have been sufficient for the purposes of a successful suit against Nedbank for FNB to stand in the shoes of its customer, the provincial government, the original victim of the theft.

<sup>61</sup> This limitation – a direct transaction or dealing between the parties – is inherent in the *condictio indebiti*, *condictio causa data causa non secuta* and *condictio ob turpem vel iniustam causam*, but not in the *condictio sine causa specialis*, at least in some of its incarnations: cf Visser *Unjustified Enrichment* 341–43; 655–59; Du Plessis *SA Law of Unjustified Enrichment* 355–57.

<sup>62</sup> A Burrows *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 44–55; Goff & Jones chapter 6; *Investment Trust Companies (In Liquidation) v Revenue and Customs Commissioners* [2018] AC 275 (SC) at [43] and [46].

<sup>63</sup> See P Birks *Unjust Enrichment* (2<sup>nd</sup> ed, Clarendon Press, Oxford, 2005) 89–98. In fact Birks would not regard the prohibition as operating in this case. See note 68 below.

<sup>64</sup> This view is controversial. Cf in particular the debate regarding the availability of proprietary restitution in English law: here, one who mistakenly confers a benefit on another (e.g. in discharge of a debt he has already paid) is not regarded as not having assumed the risk of the recipient's insolvency. See e.g. Burrows *Law of Restitution* 176–79; Goff & Jones ch 37 section 2. But just as all deliberate conferrals entail a purpose, usually the discharge of liability, so one who deliberately confers a benefit on another necessarily accepts that that purpose might fail, an event (usually referred to as mistake) that triggers restitution of the benefit.

<sup>65</sup> But cf Birks *Unjust Enrichment* 89–98. According to Birks, leapfrogging is permitted even following deliberate conferral, provided that the benefit was not initially conferred in pursuance of a valid contract. Similarly, according to § 822 BGB, 'If the recipient bestows the gains on a third person at no charge, then that third person is obliged to make restitution as if he had received the disposition from the creditor without legal grounds, to the extent that as a result of the bestowal the duty of the recipient to make restitution is excluded.' Translation is that provided by G Dannemann and R Schulze (eds), *German Civil Code Vol 1* (CH Beck 2020). But note that § 822 is primarily concerned with the situation where the recipient has passed on to the third party the very asset he has received: see B Häcker *Consequences of Impaired Consent Transfers* (Hart 2013) 225–26.

<sup>66</sup> Cf R Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574.

the victim of theft (or fundamental mistake, i.e. as to the identity of the payee), A cannot be understood to have assumed any such risk.<sup>67</sup> Nor should the fact that this conception of the claim apparently requires A to 'trace' the proceeds of the stolen money into the hands of C<sup>68</sup> mislead us into thinking that this is a species of proprietary claim. In truth, the necessary relationship is causal, in the sense described in the previous paragraph. The fact that B is able to raise a loss of enrichment defence in respect of the funds received from A shows that C's gain was at A's expense.<sup>69</sup>

What if B, having paid the money over to C in the mistaken belief that it is obliged by its banking contract with X to do so, has effectively discharged a debt owed by X to C? Once again, B will be able to raise a defence of loss of enrichment in response to A's claim to recover the money. Once again, B itself has a valid claim in unjustified enrichment. This time, however, that claim lies not against C – it is barred by C's entitlement to the money – but against X: it arises from the valid discharge by B of X's debt in the mistaken belief that X was entitled to the funds,<sup>70</sup> a species of 'imposed enrichment'<sup>71</sup> rather than enrichment through interference. Again, logically, the fact that B has a defence to A's claim (because he has paid over the money to C) is the same reason why A must be able to sue X directly in the amount of the debt. The availability of the loss of enrichment defence to B in respect of A's claim itself demonstrates the causal relationship between the original non-consensual shift in wealth between A and B and the discharge of X's debt to C by B.

This was essentially the configuration in the *Lombard* case.<sup>72</sup> In reaching the conclusion that the thief's debts had been successfully discharged with the proceeds of the stolen money, Malan JA invoked a passage drawn from Digest 12.6 which sets out the defence of *suum recipit*: 'there is no restitution from him who received what is due to him, even though it was given as payment by someone other than the true debtor'<sup>73</sup> as well as another passage from Book 12 Title 6 of Voet's *Commentary*, 'On the *condictio indebiti*', in which this rule is elaborated:

Generally if a person has paid what he did not himself owe but another owed, then if indeed he paid in his own name as though he were himself the debtor, he rightfully employs this action. But if he paid in the name of the debtor this action falls away and the debtor will have release from the creditor, who has

<sup>67</sup> Cf the remarks of Cachalia JA in *Whitehead* at [25].

<sup>68</sup> Cf text to n 27 and 28 above.

<sup>69</sup> Cf again 822 BGB, above n 68. According to Dannemann and Schulze, 'The purpose of § 822 is to extend the range of defendants where the recipient of an enrichment can rely on the defence of disenrichment in § 818(3).' (p 1596)

<sup>70</sup> See the obiter dictum to this effect at p 295 of the judgment of EM Grosskopf JA in *B&H Engineering v First National Bank of South Africa Ltd* 1995 (2) SA 279 (A). cf the position in English law, in terms of which an attempt by a bank to discharge its customer's debt is ineffectual in the absence of valid authorisation: see *Barclays Bank Ltd v WJ Simms & Son Ltd* [1980] QB 677.

<sup>71</sup> See Visser *Unjustified Enrichment* chapter 10, especially 565–90; Du Plessis *The SA Law of Unjustified Enrichment* chapter 10.

<sup>72</sup> FNB and Absa received as the thief's banks (B in my example) and paid themselves (C in my example) in discharge of the thief's overdraft, credit-card debts and home loan, in the mistaken belief that the thief was entitled to the money. However, the case would be essentially the same if C were not the thief's bank, but rather a good-faith third party to whom the thief sought to pay a debt. What if the thief sought to confer a gift on C? In one sense, such a transfer would be supported by a valid legal ground, a gift. But it would seem an absurd outcome if the victim of theft were unable to pursue into the hands of a good-faith third party a transfer causally related to the theft and gratuitous in the sense that it was not made for good consideration but rather *lucrative causa*. In such a case, the appropriate rule would seem to be a version of that articulated by Voet in 6.1. n 8 of his *Commentary* or in *Miller v Race* (1758) 1 Burr 452: see text to notes 11 and 12 above, as well as the content of the notes themselves.

<sup>73</sup> D 12.6.44. The translation given here is that provided by Malan JA in the *Lombard* case itself at [16].

gotten back his own; and the debtor will start to be bound to the payor for a refund in the judicial proceeding on management of affairs or other like proceeding.<sup>74</sup>

The hypothetical case set out in the previous paragraph demonstrates that an analysis that focuses on the parties' contractual relationships – on their actual and putative rights and duties in contract – is better able to explain the outcome in the *Lombard* case than one that treats the plaintiff's claim as vindicatory in nature.<sup>75</sup> However, it also illuminates the important further point that in addition to any delictual claim, Lombard, the plaintiff, had an unjust enrichment against the thief, Manickum, in respect of her enrichment by virtue of the effective discharge of her debts to the banks using the proceeds of the stolen money.<sup>76</sup>

Of course awareness of this claim would have been of little use to Lombard. Like Dambha in *Perry* and Maple in *Nissan*, Manickum was insolvent. But what of the fact that at least one of the debts discharged using the proceeds of the stolen funds was a secured one? R1 000 000 of the funds stolen from Lombard by Manickum – almost half the total amount – was paid by her into her home loan account at FNB, thus significantly reducing the amount owing on her mortgage bond. Surely the fact that the proceeds of money originating in Lombard's account had been used to discharge Manickum's secured debt, effectively substituting Lombard for FNB as her creditor, justified conferring at least equivalent security on Lombard to that which FNB itself had enjoyed? Here it is worth remembering that it is the urgent need to provide the victim of the theft of incorporeal money with a better remedy than that of a concurrent creditor in the thief's insolvent estate that underpins this line of cases.<sup>77</sup> This could have been achieved through reliance on the English equitable doctrine of subrogation to extinguished rights: in particular, through the subrogation of Lombard to that portion of Manickum's secured indebtedness to FNB that had been discharged using the proceeds of the stolen funds.<sup>78</sup>

## VI. MODEL 3+: SUBROGATION TO EXTINGUISHED RIGHTS

This argument runs into an immediate and serious obstacle: as observed in section IV above, the very concept of a proprietary response – as opposed to a real right – is foreign to South African law.<sup>79</sup> Several of the arguments against the reception of the constructive trust into South African law reviewed in section IV above apply equally to subrogation. At the same time, allowing FNB and Absa to benefit from Manickum's theft of Lombard's assets – to immunise themselves against the risk of

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<sup>74</sup> Voet *Ad Pandectas* 12.6 n 9, in Gane's translation: see the *Lombard* case at [17].

<sup>75</sup> Cf section III above.

<sup>76</sup> Cf *Lombard* at [19]: 'Where the effect of the transfer is that there is no credit because the entire amount transferred was used to extinguish the debt on the account, the customer acquires no claim against his bank. However, he is enriched to the extent that the debt to the bank is no longer due. It follows that it was Ms Manickum who was enriched when the debit balances on her accounts were extinguished.' This statement appears to overlook the fact that according to *Perry* and *Nissan*, Manickum had no claim against Absa even in respect of the amount standing to her credit in her current account.

<sup>77</sup> See Thirion J in *Bank of Lisbon* at p 209, endorsed in *Nissan* at [16].

<sup>78</sup> For an overview of subrogation to extinguished rights as a remedy in unjust enrichment, see Burrows *Law of Restitution* chapter 7, especially 148–60; Goff & Jones chapter 39. The leading case is now *Menelaou v Bank of Cyprus* [2016] AC 176 (SC), in which a bank that had mistakenly supplied funds for the purchase of certain immovable property (Great Oak Court) without obtaining a charge over that property was held to be subrogated to the unpaid vendor's lien over it. But cf note 109 below. A full account of the case can be found in chapter 7 of Goff & Jones at pp 195–99.

<sup>79</sup> The limited scope of subrogation in contemporary South African law is set out by Du Plessis *South African Law of Unjustified Enrichment* 324–27. On the differences between the English and South African conceptions of property, see Fox 'Defective payments' at 640–45.

her insolvency using stolen funds – has struck several commentators as deeply unfair.<sup>80</sup> The decision in *Lombard* to treat the good-faith discharge of pre-existing debts with the proceeds of stolen money as effective makes this outcome unavoidable. But insofar as it offers at least some scope for ameliorating the harsh impact of this decision on future litigants, subrogation is surely attractive. The analysis of *Lombard*’s unjustified enrichment claim against Manickum in terms of the discharge of her debt to the banks using the traceable proceeds of the stolen money enables and indeed invites the subrogation construction advanced here.

However, there is the further, considerable objection to this proposal, namely that the possibility of subrogation to extinguished rights as a response to unjustified enrichment in South African law was considered and rejected by the Constitutional Court in *Absa Bank v Moore* in 2016.<sup>81</sup> The case involved an apparently widespread scam: the fraudsters, having obtained title deeds to the homes of unwitting participants, entered into mortgage agreements with banks whereby they borrowed large amounts against the security of the participants’ property. Some of the proceeds of these secured loans were paid over to the participants, who understood the scam to be a form of debt-management scheme; most were appropriated by the fraudsters. In *Absa v Moore* itself the pre-existing mortgage bonds of the Moores, who were found to have been innocent of any wrongdoing, had been discharged<sup>82</sup> by one of the fraudsters in furtherance of the scam; on the security of a further mortgage bond over the same property, the plaintiff bank, Absa, lent a substantial sum to one of the fraudsters, Kabini, who subsequently absconded.<sup>83</sup> Coincidentally Absa had also been the holder of the Moores’ original mortgage bonds. It was argued by counsel for the bank – relying on English authority<sup>84</sup> – that it should be subrogated to its own extinguished rights against the Moores. Specifically, it was argued that the Moores’ discharged mortgage bonds should be reinstated in the bank’s favour, since the loan of the money used to discharge the debt secured by those bonds was subject to the condition that it retained security over the property, and it never intended to expose itself to debt, whether that of the fraudster or that of the Moores, without security.<sup>85</sup>

This argument was rejected by Cameron J, giving the unanimous judgment of the Court, for three reasons. First, the mortgage bonds had been discharged pursuant to a valid contractual relationship between the Moores and another fraudster, Brusson, in terms of which the Moores incurred considerable liability, and their discharge therefore did not enrich the Moores in the sense identified above (the receipt of wealth in the absence of any contractual liability to account to another

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<sup>80</sup> There may also be sound commercial arguments in favour of such an approach: see *Lombard* at [18]. But cf D Visser ‘Unjustified enrichment in the context of the fraudulent manipulation of bank accounts: principle, pragmatism, and equality before the law’ in Coenraad Visser, JT Pretorius and MM Koekemoer *Essays in Honour of Frans Malan* (LexisNexis 2014) 359. And see now *FirstRand Bank Limited v The Spar Group Limited* [2021] ZASCA 20.

<sup>81</sup> *Absa Bank Ltd v Moore and another* 2017 (1) SA 255 (CC).

<sup>82</sup> Cameron J held this discharge to be effective, relying on the decision in the *Lombard* case: see *Moore* at [32]–[33]. I offer some tentative criticism of this view in see H Scott ‘Unjustified Enrichment’ in *Annual Survey of South African Law* [2017] 8 at p 15.

<sup>83</sup> For a full account of the judgment, as well as the judgments in the High Court and Supreme Court of Appeal, see Scott ‘Unjustified Enrichment’ in *ASSAL* [2017].

<sup>84</sup> *Brocklesby v Temperance Permanent Building Society* [1895] AC 173 (HL); *Butler v Rice* [1910] 2 Ch 277; and *Ghana Commercial Bank v Chandiram* 19601 AC 732 (PC).

<sup>85</sup> Cameron J summarised the bank’s argument in these terms at [41] to [42].

in respect of that wealth).<sup>86</sup> Even if these contracts were to be avoided (i.e. for fraud),<sup>87</sup> the Moores might nevertheless be obliged to the fraudster who had discharged their original mortgage bonds in unjustified enrichment.<sup>88</sup> But even if the Moores were enriched, there was a further obstacle, namely that the bank was not impoverished: it retained its valid claim for repayment in terms of its loan contract with Kabini, a contract that it had elected to uphold.<sup>89</sup> It was obliged to pursue that route, participating in the fraudster's insolvency as a concurrent creditor.<sup>90</sup>

Second, although '[i]t doesn't seem unlikely that Mr Kabini used the R480 000 his fraud extracted from the Bank to pay...R145 000 to the Bank to settle the Moores' mortgage debt',<sup>91</sup> the bank had failed to prove this, and had thus failed to demonstrate that the Moores' enrichment had occurred at its expense.<sup>92</sup> There was a broad causal relationship between the discharge of the Moores' debts and money paid by the bank to Kabini, in the sense that these were part of the same fraudulent scheme, but this causal relationship was not regarded as strong enough to satisfy the 'at the expense of' requirement.

Third, and most fundamentally,<sup>93</sup> subrogating the bank to its own extinguished rights against the Moores involved accepting as a matter of principle that the same remedy would have been available if the original mortgagee had been a different bank, rather than (coincidentally) Absa itself.<sup>94</sup> This proposition was said to create 'an insuperable problem' for the bank, insofar as it involved imposing on the party whose debt had been discharged a new contract in favour of a second lender, on what terms it was not clear.<sup>95</sup> 'Must the court exercise a general equitable jurisdiction to determine these contractual terms itself?'<sup>96</sup> Cameron J held that the Supreme Court of Appeal had been entirely correct to conclude that the court 'cannot make a contract between the Bank and the Moores'.<sup>97</sup>

These arguments are powerful.<sup>98</sup> There are, however, important differences between the facts of *Moore* and those of *Lombard*, differences that justify a more optimistic conclusion on the subrogation issue in the latter case and indeed in future cases with similar facts.

First, as we have seen, Manickum had no entitlement to the funds paid into her account at FNB; rather, FNB was enriched by their receipt, and acted on its own account in applying the funds paid into her home-loan account to the satisfaction of this debt, although it did not realise this. This meant that Manickum certainly was enriched by the satisfaction of her bond debt. Nor could the original shift

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<sup>86</sup> *Moore* at [45]–[48].

<sup>87</sup> *Moore* at [46].

<sup>88</sup> *Moore* at [47]–[48].

<sup>89</sup> *Moore* at [51].

<sup>90</sup> At [49].

<sup>91</sup> *Moore* at n 37.

<sup>92</sup> *Moore* at [52]–[55].

<sup>93</sup> In fact Cameron J discussed this point ahead of the other two.

<sup>94</sup> *Moore* at [43].

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> Judgment of the SCA (per Lewis JA) at [42], quoted by Cameron J at [44] of the Constitutional Court judgment: '...this court cannot make a contract between the Bank and the Moores. We cannot order that the Moores pay an amount that they did not owe to the Bank, nor that they register a bond over their property in favour of the Bank. There is no longer any contractual nexus between these parties.'

<sup>98</sup> And perhaps more powerful than I had previously appreciated: cf Scott 'Unjustified Enrichment' in *ASSAL* [2017] at pp 16–18.



of wealth from Lombard's bank account to Manickum's current account at FNB be said to have occurred in accordance with a valid or voidable contract: Lombard certainly was impoverished.

Second, there was no difficulty in showing that the funds paid into Manickum's home-loan account were the proceeds of funds originally stolen from Lombard. This makes the facts of *Lombard* very different from the construction placed on the facts of *Moore* by Cameron J. According to this construction, *Absa v Moore* was a case of deliberate conferral, like *Whitehead*,<sup>99</sup> not a case involving a non-consensual shift of wealth.<sup>100</sup> On this view, Kabini was indeed entitled as against his bank to the funds paid over by Absa in pursuance of their loan agreement. Even if it had been possible to link the funds used to discharge the Moores' mortgage bonds to the original loan made by Absa to Kabini,<sup>101</sup> and even if there had been no contractual relationship between the Moores and the fraudsters in terms of which their debt was discharged, it was – again, on the view of the case taken by Cameron J – impossible to say that the Moores had been enriched at Absa's expense. Rather, they were enriched at the expense of the fraudster (either Brusson or Kabini) who had discharged their mortgage bonds. This means that the argument for subrogation was much weaker on the facts of *Moore* than it would have been in *Lombard*.

Finally, in *Moore* the five mortgage bonds previously registered over the Moores' property were discharged in full by the fraudster's payments to the bank. In *Lombard*, however it appears that the mortgage bond persisted, Manickum having paid a round R1 million into it in order to reduce rather than extinguish her indebtedness. Furthermore, Manickum was insolvent at the time of the litigation, trustees on insolvency already having been appointed. Subrogation would not, therefore, have required the creation of a new loan contract between Lombard and Manickum, on terms to be determined by the Court, as would have been the case in *Moore* if the original and subsequent mortgagees had been different banks. Rather, Lombard would have been seeking the priority on Manickum's actual insolvency that a mortgage bond in its favour would have conferred: in other words, repayment of the R1 million in full. There would have been no need for the Court to fashion a loan contract between the parties, nor would there have been any need to register a new bond over Manickum's immovable property. The principled objections to subrogation raised by Lewis JA in the Supreme Court of Appeal and by Cameron J in the Constitutional Court therefore do not arise on facts such as those at issue in the *Lombard* case.

## VII. THE WIDER CONTEXT

The view that subrogation to extinguished rights constitutes a valid technique for reversing (or preventing) unjustified enrichment is under attack in its jurisdiction of origin.<sup>102</sup> In particular, the decision of the Supreme Court in *Menelaou v Bank of Cyprus*<sup>103</sup> has been heavily criticised both for the way in which the doctrine of subrogation to extinguished rights was interpreted and applied<sup>104</sup> and for

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<sup>99</sup> *Whitehead* at [22]–[23].

<sup>100</sup> I am sceptical of this interpretation of the facts at issue in *Moore*: see Scott 'Unjustified Enrichment' in ASSAL [2017] at pp 17–18.

<sup>101</sup> As I argue in 'Unjustified Enrichment' ASSAL [2017] at p 18.

<sup>102</sup> See e.g. Stevens 'Disaster' at p 598–99; R Gregson, 'Is subrogation a remedy for unjust enrichment?' (2020) 136 *Law Quarterly Review* 481.

<sup>103</sup> [2016] AC 176 (SC).

<sup>104</sup> Lord Clarke in particular seemed to assume that tracing was unnecessary in order to establish that enrichment had occurred at the expense of the claimant for the purposes of subrogation. See the critical remarks offered by the authors of *Goff & Jones* in Chapter 7 at pp 195–99.

the unsustainably wide meaning accorded to the ‘at the expense of’ requirement in unjust enrichment in general.<sup>105</sup> In proposing that courts in South Africa – a jurisdiction with no tradition of proprietary restitution – embrace subrogation as a remedy for unjustified enrichment, this chapter is therefore swimming against a strong outgoing tide.

Indeed, the same is true of the model of unjustified enrichment advanced in section V above, namely, there is no way to explain the outcomes in the *Perry*, *Nissan* and *Lombard* cases – to justify the protection accorded to the victims of theft against thieves’ insolvency evolved by South African law over the course of the last twenty years – other than through an account organised around non-consensual shifts in wealth. This argument not only assumes a rather broader understanding of the ‘at the expense of’ requirement than is now generally accepted<sup>106</sup> but also runs directly contrary to the view – now widely held – that the unjust or unjustified enrichment of the defendant at the claimant’s expense does not after all generate any cause of action in itself, and that, to the extent that the law of ‘unjust enrichment’ survives, it does so in the much more limited form of a law of performances or failed transactions.<sup>107</sup> As such, it has important implications for the way in which unjustified enrichment as a whole is regarded. Indeed, it presents a tantalising alternative to the current orthodoxy, namely that it is the non-consensual shift of wealth from plaintiff to defendant rather than deliberate conferral on or performance to the defendant that lies at the heart of the subject.

This conception of unjustified enrichment – enrichment by virtue of a non-consensual shift in wealth – may seem vulnerable to an obvious criticism: surely the plaintiff is after all asserting a species of pre-existing title to the money, this analysis merely concealing some version of the vindictory or quasi-vindictory model considered and rejected in section III? But in truth the interference suffered by the plaintiff need not take the form of infringement of a real right in order to render the shift in wealth to the defendant unjustified. The norms underlying the *vindicatio* – that no-one should lose ownership without his consent, and that therefore title does not pass through theft or fundamental mistake – are the same as those underlying this enrichment claim. It is this common normative foundation that accounts for its real character.

As is so often the case, this important insight is already evident in the writing of the late-classical Roman jurist Ulpian. In Digest 47.2, the title dealing with the Roman delict of theft (*furtum*), he gives the following case:

I wish to lend money to a respectable Titius and you present to me a penniless Titius, as if he were opulent, and then share the money with him; you will be liable for theft since theft is committed through your help and advice [*ope consilio*]; Titius will also be liable for theft.<sup>108</sup>

By contrast, in a text elsewhere in the title also attributed to Ulpian it is said that,

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<sup>105</sup> See again the speech of Lord Clarke at [23]–[27] and especially at [27]: ‘The question in each case is whether there is a sufficient causal connection, in the sense of a sufficient nexus or link, between the loss to the Bank and the benefit received by the defendant...’ In fact, the claimant bank did not technically supply any funds at all. (cf note 77 above). Rather, the release of its existing charge enabled the proceeds of sale of Rush Green Hall, which the Bank could otherwise have demanded in satisfaction of its owners’ liabilities, to be used to purchase Great Oak Court in the defendant’s name.

<sup>106</sup> cf n 65 above.

<sup>107</sup> E.g. Stevens ‘Disaster’; L Smith, ‘Restitution: A New Start?’ in P Devonshire & R Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Oxford, Hart, 2019) 91.

<sup>108</sup> D 47.2.52.21.

If a man does not lie with respect to his identity but does use words misleadingly, he is a fraud not a thief; for example, he says that he is wealthy or that he intends to put the money he receives into trade or that he will provide suitable verbal guarantors or that he will make speedy repayment of the money.<sup>109</sup>

It is tempting to make this distinction turn on the presence or otherwise of a successful *traditio*, a transfer of ownership. If ownership of the money is successfully transferred from A to B, then there can be no *contrectatio*<sup>110</sup> and therefore no theft of that money by B – the delict is fraud (*dolus*). If, on the other hand, A's fraudulently-induced mistake is too fundamental to permit the passage of ownership, as in the first text, ownership remains with A, B's receipt of the money amounts to *contrectatio*, and theft is committed. But this is not what Ulpian says. In truth, the wrongful taking at the heart of the Roman delict of *furtum* did not entail that the thing taken was owned by the plaintiff,<sup>111</sup> or even that it was capable of ownership.<sup>112</sup> It was enough that it was taken (or received) from the plaintiff without his consent.<sup>113</sup> Of course Ulpian was concerned with obligations arising from wrongdoing, but his point applies equally to unjustified enrichment. Fundamental mistake and theft are two factors that preclude the passing of ownership, but equally they have the effect of rendering non-consensual the shift of other kinds of wealth. What matters is that the plaintiff had no intention to confer the benefit on another. There can be interference without ownership.

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<sup>109</sup> D 47.2.43.3.

<sup>110</sup> Wrongful handling (*contrectatio*) of the plaintiff's property was necessary for *furtum* to occur, as is clear from Paul's famous definition in D 47.2.1.3

<sup>111</sup> The thing stolen was not necessarily the object of the *contrectatio*: see e.g. D 47.2.52.20 and 23.

<sup>112</sup> I use 'thing' here in the wide sense embraced by Gaius in his *Institutes* at II.12–14. See again D 47.2.52.20 and 23 and cf Fox 'Defective payments' 640–41.

<sup>113</sup> Cf D 47.2.43.1.