TRANSFORMING THE SOUTH AFRICAN LAW OF UNJUSTIFIED ENRICHMENT

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The future development of the South African law of unjustified enrichment is likely to be driven not by forces internal to private law but rather by its interaction with the South African Constitution of 1996, in particular the Bill of Rights. This paper considers three forms which such constitutionally motivated change could take: first, the development of new constitutionally compliant rules of general application; second, ad hoc departures from existing rules in order to produce outcomes which accord with the objective normative value system of the Bill; and finally, the wholesale remaking of unjustified enrichment doctrine in light of constitutional rights and values.

A. INTRODUCTION

The South African law of unjustified enrichment has its origins in the uncodified civil law. Roman law incorporated a number of remedies which South African lawyers now treat as causes of action arising in unjustified enrichment: in particular, the *condictiones* which make up the bulk of Book 12 of Justinian's *Digest*. Unjustified enrichment as an independent category within the civilian law of obligations was first recognised as early as the first half of the seventeenth century by Hugo Grotius.[1] But even Grotius did not do much more than identify the principle against unjustified enrichment itself: the contents of the category remained both fragmentary and dominated by the ancient forms of actions.[2] Indeed, it was only with the publication of Wouter de Vos's *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* in 1958, eight years prior to the first edition of *Goff & Jones*, that the difficult work of systematising the law of enrichment—of reworking the ancient Roman procedural categories into a comprehensive and coherent body of rules—began.[3]

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The following abbreviations are used:

Currie & de Waal: I Currie and J de Waal, *The Bill of Rights Handbook*, 6th ed (Juta, Cape Town, 2013);

Du Plessis: JE du Plessis, *The South African Law of Unjustified Enrichment* (Juta, Cape Town, 2012);

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

Van der Walt: AJ Van der Walt, *Constitutional Property Law*, 3rd ed (Juta, Cape Town, 2011);

Visser: D Visser, *Unjustified Enrichment* (Juta, Cape Town, 2008).

[1] See *eg* R Feenstra, "Grotius' Doctrine of Unjust Enrichment as a Source of Obligation" in EJH Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, 2nd ed (Duncker & Humblot, Berlin, 1999), 197.

[2] See Grotius, *Inleiding*, III.30.

[3] See W De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (Juta, Cape Town, 1958), ch 5, especially 328–329 (hereafter, "De Vos, *Verrykingsaanspreelikheid*").

In Chapter 5 of the first edition of *Verrykingsaanspreeklikheid*, "The Rules of the General Enrichment Action", De Vos identified three such rules or elements: the defendant must be enriched; enrichment must be at the expense of the plaintiff; and the enrichment must be unjustified.[4] He argued that a general enrichment action founded directly on these principles already existed in South African law, although this action was subsidiary in the sense that it would arise only where the case could not be allocated to one of the classical enrichment actions, and where there was no legal rule in existence which precluded it.[5] De Vos's generalising project was partially derailed by the decision of the Appellate Division in *Nortjé v Pool NO*[6] in 1966, in which the existence of any such action was denied. But with the decision in *McCarthy Retail (Pty) Ltd v Shortdistance Carriers CC*[7] in 2001 forward momentum was regained,[8] and the last 16 years have seen not only an upswing in academic interest in the subject[9] but also a pronounced increase in the frequency of litigation.

Admittedly, the historical forms of action inherited from Roman law continue to play a prominent role in modern South African law. Even recent textbooks, however sophisticated their treatment of the subject, tend to preserve these forms of action—unsurprisingly, since the courts continue to refer to them. For example, in *The South African Law of Unjustified Enrichment*, published in 2012, Jacques du Plessis considers in turn: enrichment arising from a transfer that failed to fulfil an obligation (the *condictio indebiti*); enrichment arising from a transfer that failed to achieve a future lawful purpose other than fulfilling an obligation (the *condictio causa data causa non secuta*); enrichment arising from a transfer made for an illegal or immoral purpose (the *condictio ob turpem vel iniustam causam*); and instances of the residual *condictio sine causa specialis*. But the increasing prominence of the German Wilburg/Von Caemmerer taxonomy in South African law has greatly assisted in the work of systematisation. Daniel Visser and Jacques du Plessis recognise super-categories of enrichment by transfer, imposed enrichment, and enrichment by infringement or invasion of another's rights, loosely modelled on the *Leistungskondiktion*, *Verwendungskondiktion, Rückgriffskondiktion,* and *Eingriffskondiktion* of German law. Like De Vos's general principles, these broad categories encourage the rationalisation of the old forms of action as well as the recognition of new instances of liability where required. At the same time, as an intermediate level of analysis between general principles and the individual actions, they minimise the potential for uncontrolled proliferation inherent in the general enrichment action.[10]

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[4] The claim thus arising would lie in respect of either the defendant's enrichment or the plaintiff's impoverishment, whichever was the lesser (see p 180). For recent statements of these principles see *eg Visser*, ch 3; *Du Plessis*, ch 2; H Scott, "Unjustified Enrichment", ch 39 in G Bradfield (ed), *Wille's Principles of South African Law*, 10th ed (Juta, Cape Town, 2018).

[5] In fact De Vos argued for the creation by statute of a "strong" general enrichment action which would replace the common-law actions entirely: see ch 6 in the 1st ed (1958) and ch 8 of the 3rd edition (1987) of De Vos, *Verrykingsaanspreeklikheid* (*supra*, n 3).

[6] 1966 (3) SA 96 (A).

[7] 2001 (3) SA 482 (SCA).

[8] That Schutz JA envisaged a subsidiary or "weak" general enrichment action only appears clearly from [8–10] of the judgment.

[9] See *eg* JC Sonnekus, *Ongegronde Verryking in die Suid-Afrkaanse Reg* (LexisNexis, Durban, 2008); *Visser*; *Du Plessis; Scott*.

[10] *Cf* H Scott, "South Africa" in "Reflections on the Restitution Revolution" (chapter 10) in S Worthington, A Robertson and G Virgo (eds)*, Revolution and Evolution in Private Law* (Hart, Oxford, 2018) 210–18.

With this background in mind, it is possible to identify three key directions in which this systematisation project might or should proceed. First, the most noticeable effect of the historical formalism described above is the fact that the South African *condictio* remains limited, as in Roman law, to claims in respect of deliberate transfers of money or property.[11] Claims can occasionally be raised in respect of the deliberate conferral of services, but only if they can be brought within the scope of one of the other historically-determined actions.[12] Thus many apparently deserving claims fail at the first hurdle.[13] Relying on comparative material, Visser and Du Plessis argue powerfully for the broadening of the *condictio* to comprise also the deliberate conferral of services, as in jurisdictions such as Scotland, England and Germany.[14] However welcome, this development would require much more nuanced thinking around the question of the valuation of enrichment than has previously been necessary in this context.

A second area ripe for reform is the extended action of the *negotiorum gestor*, one of two sub-categories within the class of imposed enrichment. These cases represented a casuistic extension of the original action of the *gestor* (intervenor), according to which he is able to recover his reasonable expenses if incurred in the service of the interests of the *dominus* (principal) and without his authorisation.[15] They include, for example, the mistaken conferral of a benefit by the *gestor* on the *dominus*; the conferral of a benefit on the *dominus* in the service of the *gestor's* own interests; and even the conferral of a benefit against the *dominus's* express wishes.[16] Unlike in the core case, recovery in these analogous cases is limited to the enrichment of the *dominus*. In fact, it is difficult to understand what unifies these cases, or what value is added by the analogy with the core case.[17] Thus Du Plessis has proposed far-reaching changes in this area, arguing that instead of a miscellany of loosely associated claims, this group of cases be understood to express a single coherent cause of action, arising from the unauthorised fulfilment of another's obligation.[18] Again, these proposals draw heavily on German law, in particular the *Rückgriffskondiktion*.[19] Indeed, Du Plessis has proposed fundamental reforms also to the other half of the imposed enrichment category—namely, claims arising from unauthorised improvements to another's property. Here again, he argues that the casuistry that has grown up around different classes of improvers (the *bona fide* possessor, *mala fide* possessor, *bona fide* occupier, *mala fide* occupier etc)[20] ought to be abandoned in favour of a general principle of recovery which distinguishes between different species of improvements (necessary, useful and luxurious),[21] subject to limited exceptions.[22]

Finally, regarding enrichment by invasion or infringement of rights, both Visser and Du Plessis draw attention to the limiting effect of the rule that the plaintiff's claim should

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[11] See in particular *Du Plessis*, 63–64.

[12] *Cf* the position in Scottish law, as described by *eg* R Evans-Jones, *Unjustified Enrichment—Volume 1* (Edinburgh, Thomson/W Green, 2003), especially ch 7.

[13] See *eg* the analysis of *Nortjé v Pool NO* 1966 (3) SA 96 (A) in R Evans-Jones, "Searching for 'Imposed' Enrichment in Improvements" [2008] RLR 1.

[14] *Visser*, 265–268*; Du Plessis*, 64–65.

[15] *Visser*, 136–138; *Du Plessis*, 254–57; 310–312.

[16] *Du Plessis*, 257–260.

[17] *Ibid*, 260–261.

[18] *Ibid*, 262, ch 10.

[19] *Ibid*, ch 8.

[20] *Ibid*, 276–277.

[21] *Ibid*, 277–283.

[22] *Ibid*, 283–289.

be restricted to the extent of his impoverishment.[23] They argue that South Africa's embracing of the element of impoverishment is due to historical accident rather than any deliberate normative commitment, and that there is no convincing reason to exclude from the category of enrichment by invasion of rights cases in which the defendant's enrichment happens not to correspond to any impoverishment on the part of the plaintiff.[24] The abrogation of the impoverishment element would give rise to a surge of liability in cases of invasion of rights not previously actionable.[25] However, careful attention to comparative material would permit South Africa to keep such expansion within principled bounds.

Each of these three programmes for reform is driven by imperatives internal to private law: again, these are the rationalisation of historically-determined procedural categories and the controlled expansion of liability according to general principle. But in fact the future development of the South African law of unjustified enrichment is likely to be driven not by forces internal to private law but rather by its interaction with the Constitution of 1996 and in particular the Bill of Rights contained in the Constitution's second chapter. The relationship between unjust or unjustified enrichment and public law is of course not a new subject:[26] there are many ways in which this quintessentially private law subject intersects with public law, although the degree to which that is true differs across jurisdictions.[27] But the South African Bill of Rights is arguably unique among rights instruments in its capacity to shape the development of private law: as interpreted by the Constitutional Court, it has the potential not only to drive local changes to specific rules but also to transform the subject as a whole. It seems that the coming decades will see an acceleration in the marginalisation of private law doctrine which is already evident in South Africa and a corresponding acceleration in the constitutionalisation of private law. It may be that there are lessons to be learnt from the South African experience for enrichment lawyers from other jurisdictions, and perhaps also for private lawyers more generally.

B. THE CONSTITUTIONALISATION OF UNJUSTIFIED ENRICHMENT

According to section 8 of the Constitution:

> "(1) The Bill of Rights applies to all law, and binds the legislature, executive, the judiciary and all organs of state.
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) a court –

[23] *Visser*, 115–16; *Du Plessis*, 44–48. As in *eg* French law: see E Descheemaeker, "The New French Law of Unjustified Enrichment" [2017] RLR XXX.
[24] *Visser*, 114–136, ch 11; *Du Plessis*, 44–48, 331–333.
[25] Such as the facts at issue in *Edwards v Lee's Administrator* 96 Sw 2d 1028 (1936).
[26] In respect of South African law, see *eg* the detailed treatment of this question by *Visser*, 147–155.
[27] See *eg* R Williams, *Unjust Enrichment and Public Law* (Hart, Oxford, 2010); S Elliott, B Häcker and C Mitchell (eds), *Restitution of Overpaid Tax* (Hart, Oxford, 2013) (hereafter, "Elliott, Häcker and Mitchell").

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

According to section 39(2):

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

As appears from these provisions, the Bill of Rights applies to all law, including both statute and common law; it binds not only the state but also private persons, at least in certain circumstances; and it applies both directly and indirectly. As interpreted, section 8(1) envisages the direct application of the Bill to state action such as legislation.[28] The horizontal application of the Bill is regulated by subsections (2) and (3): rights in the Bill can be enforced against private persons to the extent that they are judged to operate horizontally; rights judged to operate horizontally are to be given effect through the common law, to the extent that legislation does not do so; and where the common law is inadequate to give effect to such rights, it must be developed. In practice, however, the horizontal application of the Bill envisaged by sections 8(2) and (3) is rare, perhaps because the courts are unwilling to grapple with the difficult issues of applicability raised by section 8(2). Instead, reliance is placed on section 39(2).[29] As interpreted, this section places South African courts under an obligation to develop the common law in order to promote the spirit, purport and objects of the Bill.[30] Section 39(2) has been applied both in cases where a common-law rule appears to be inconsistent with a particular provision in the Bill[31] and in cases where, although the rights enumerated in the Bill are not obviously implicated by a common-law rule, the rule itself or the outcome which its application produces appears to fall short of or deviate from the Bill's spirit, purport and objects.[32] In this second kind of case, it is said, the common law requires development "so that it grows in harmony with the 'objective normative value system' found in the Constitution".[33] The South African courts are instructed "to infuse all South African law with the spirit of [the Bill's]

[28] This provision has not been construed as imposing an obligation on the courts to apply the Bill of Rights to all private-law disputes before them: see *Currie & De Waal*, 44–45.
[29] As *Currie & De Waal* explain at 45–48, s 8(3) has been rendered near-redundant as a result of the wide interpretation given by the courts to s 39(2). For a detailed and critical analysis of the interpretation of s 8 by the Constitutional Court see S Woolman, "Application Under the Final Constitution: Burdens of the Bill of Rights" in *Constitutional Law of South Africa*, 2nd ed (Juta, Cape Town, 2013), ch 31.4.
[30] The interpretation of s 39(2) given here, which is based *inter alia* on the decisions of the Constitutional Court in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) and *Everfresh Market Virginia (Pty) Ltd Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), is now widely accepted: see *Currie & De Waal*, 60–65. But *cf* A Fagan, "The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development" (2010) 127 SALJ 611.
[31] *Cf S v Thebus and anor* 2003 (6) SA 505 (CC), [28]; *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 13–19.
[32] See again n 31 above.
[33] *Thebus* 2003 (6) SA 505 (CC), [28] (Moseneke J), quoting *Carmichele* 2001 (4) SA 938 (CC), [54].

fundamental values so that the legal system can promote a society based upon human dignity, freedom and equality".[34]

1. Tax unlawfully levied: developing a constitutionally compliant private law rule

One straightforward way in which public law and the law of unjustified enrichment intersect is that a finding that tax was unlawfully levied (for example, because the regulation under which it was exacted was *ultra vires*) often gives rise to a private law enrichment claim. An important subset of this class of cases arises where the levying of tax is found to have been unconstitutional. But remarkably, there has thus far been no attempt to invoke the South African Constitution in this context. Instead, even where the finding that the tax in question was unlawfully levied itself depends on constitutional arguments, the restitution of any payments made is dealt with according to the same rules which govern restitution between private parties.

This phenomenon is illustrated by the decision of the Supreme Court of Appeal in *Shuttleworth v South African Reserve Bank and Ors* ("*Shuttleworth*").[35] Shuttleworth had paid an exit levy of 10% on the value of assets exported from South Africa in 2009. The levy had been imposed by the South African Reserve Bank pursuant to a 2003 circular issued under regulation 10(1)(c) of the Currency Exchange Control Regulations, in turn promulgated in terms of section 9 of the Currency and Exchanges Act 9 of 1933. Having taken legal advice and been informed that the levy was unlawful, Shuttleworth paid the amount in question (approximately R250 475,000) under protest, in such a manner "as to protect my right to challenge any imposition of a 10% exit levy by the first respondent".[36] It was held by Navsa ADP, giving the unanimous judgment of the Supreme Court of Appeal ("SCA"), that the imposition of the 10% levy was inconsistent with sections 75 and 77 of the Constitution and *ultra vires* regulation 10(1)(c).[37] As to whether the amount so paid had to be returned, here the Court relied on the decision of the Appellate Division in 1915 in *Government (Minister of Finance) v Gowar*,[38] in which Innes CJ had observed that:

> "Where goods have been wrongly detained and where the owner has been driven to pay money in order to obtain possession, and where he has done so not voluntarily, as by way of gift or compromise, but with an expressed reservation of his legal rights, payments so made can be recovered back, as having been exacted under duress of goods. The *onus* of showing that the payment had been made involuntarily and that there had been no abandonment of rights would, of course, be upon the person seeking to recover."[39]

According to Wessels AJA in a concurring judgment:

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[34] D Davis, *Democracy and Deliberation: Transformation and the South African Legal Order* (Juta, Cape Town, 1999), 162.

[35] 2015 (1) SA 586 (SCA). The account which follows is based on that given in the regional digest for South Africa in [2015] RLR 255, 258–260, §199.

[36] *Ibid*, [9]. When he first began to move funds out of South Africa in 2008, Shuttleworth had paid the levy in the belief that it was lawfully due. Repayment of this amount does not appear to have been sought.

[37] See the conclusion on this point*, ibid*, [31].

[38] 1915 AD 426 (referred to in *Shuttleworth* 2015 (1) SA 586 (SCA), [33] (Navsa ADP)).

[39] *Ibid*, 433.

> "I think we may well take the further step and hold that a payment is involuntary and, therefore, recoverable, even though it was not made *metus causa* in the Roman law sense, but was made under pressure at the demand of one in authority who had it in his power to withhold the property or to suspend the rights of the person making the payment."[40]

Moreover, in 1990, in *Commissioner for Inland Revenue v First National Industrial Bank Ltd* ("*CIR*"),[41] Nienaber AJA, after referring with approval to this decision, had said:

> "[T]he *condictio indebiti* is not, of course, confined to the recovery of an *indebitum solutum* which was involuntary because it was paid by mistake; it is now also available when the payment (or indeed any performance), although deliberate, perhaps even advised, was nevertheless involuntary because it was effected under pressure and protest."[42]

In *Shuttleworth*, Navsa ADP held that the case fell squarely within the ambit of the principle recognised 100 years previously in the *Gowar* case:[43] Shuttleworth's blocked assets would not have been released until he paid the 10% exit levy; thus he had suffered sufficient duress or pressure to trigger a claim in unjustified enrichment.[44] Further, by paying under protest, Shuttleworth had conveyed that the payment was not a voluntary one and that he reserved the right to seek to reverse that payment, preserving any cause of action arising in unjustified enrichment and negating the inference of acquiescence.[45] Subsequently, in *South African Reserve Bank & Anor v Shuttleworth & Anor*,[46] a majority of the Constitutional Court held that the exit levy had not after all been inconsistent with the Constitution and accordingly upheld the Bank's appeal. The Constitutional Court's judgment contained no discussion of his enrichment claim, since the denial of this claim was assumed to follow automatically from the finding that the levy was not after all unconstitutional and therefore constituted a valid *causa* or basis for the payments.

What is immediately striking about the SCA's decision is the degree to which constitutional and private law arguments are insulated from one another. According to the law as set out by the SCA, one who seeks to recover tax unlawfully levied is obliged to found his claim on either mistake or compulsion, despite its being "in the highest degree inequitable that the Treasury should be permitted to retain what it had no right to claim".[47] Moreover, the threshold for both mistake and compulsion is high: a mistake must

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[40] *Ibid*, 453.

[41] 1990 (3) SA 641 (A).

[42] *Ibid*, 647.

[43] The facts were materially similar to those at issue in the *Gower* case, in which the plaintiff had made the payment in question under protest in order to secure the registration of a usufruct which she was entitled to have registered without charge, but distinguishable from those in *CIR*, in which the duress supposedly experienced by the plaintiff was said by the majority to be :a phantom of its own mind' (there was no question of goods being detained or of rights being withheld—'here, at best for the Bank, there was the prospect of penalties being imposed').

[44] 2015 (1) SA 586 (SCA), [34].

[45] On the function of protest in this context, see further the remarks of Nienaber AJA in *CIR* 1990 (3) SA 641 (A), 649.

[46] 2015 (5) SA 146 (CC).

[47] *Gower* 1915 AD 426, 433 (Innes CJ). Of course, in many instances restitutionary actions to recover payments wrongly exacted by the state have been created by statute: see *Scott*, 127.

be excusable in order to found restitution,[48] and the mere threat of financial penalties is insufficient to constitute compulsion. Admittedly, the *CIR* case recognises also an alternative ground for the restitution of unlawfully levied tax in the existence of a tacit agreement between the parties at the time of the payment that it would be refundable if subsequently found not to have been due. But crucially the interest on such a contractual claim is payable only from the date at which the legal position becomes clear, *ie* by virtue of litigation, rather than from the date of demand, as in an unjustified enrichment claim. Again, it is no easier to recover tax unlawfully levied from the state than it would be to recover a payment extracted by a private individual in a traditional duress of goods case, even where the finding that the tax in question was unlawfully levied itself depends on constitutional arguments.

In fact, the South African regime governing the restitution of unlawfully levied tax appears clearly inconsistent with several general provisions in the Constitution. These comprise, in particular, sections 1(c)—"The Republic of South Africa is one, sovereign, democratic state founded on the following values … Supremacy of the constitution and the rule of law"; section 33(1)—"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair"; and section 41(1)(c)—"All spheres of government and all organs of state within each sphere must … provide effective, transparent, accountable and coherent government for the Republic as a whole".[49] It also seems likely that the unlawful exaction of tax by the state violates the prohibition on the arbitrary deprivation of property set out in section 25(1).[50] These constitutional norms thus clearly require the alteration or development of the existing private law rule.[51] Were such development to occur, it could and should do so within the existing analytical framework of the law of unjustified enrichment, as in the case of the new unjust factor recognised by the House of Lords in *Woolwich Equitable Building Society v Inland Revenue Commissioners.*[52] In other words, the application of constitutional norms to the law of unjustified enrichment in this instance would probably give rise to a new context-specific private law rule, rather than to the wholesale displacement of the private law restitutionary regime.

2. Ad hoc departures from common law rules: the example of *MN v AJ*

It appears that the common law rules regarding the restitution of tax unlawfully levied are inconsistent with several provisions in the South African Constitution and require development by the courts in order to bring them into conformity with the Bill of Rights and the Constitution more broadly. However, as set out in the introduction to this Part, section 39(2) as interpreted admits a further possibility: even in cases where the rights

[48] See, in particular, *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A).
[49] *Scott*, 126–128; *Visser*, 26, 400–402.
[50] *Cf* D Hoffman, "Restitution", ch 14 in D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP, Cambridge, 2011), 321, 324–328 (hereafter "Hoffmann, "Restitution""); N Cleary, "Property, Proportionality and the Change of Position Defence", ch 7 in Elliott, Häcker and Mitchell (*supra*, n 27), especially 140–147; see also (briefly) *Scott*, 128. On the implications of s 25(1) for the law of unjustified enrichment, see further *post*, Part B(3).
[51] The provision of the South African Constitution governing the application of the Bill of Rights in this instance is s 8(1), insofar as it states that the Bill of Rights binds the legislature, executive, the judiciary and all organs of state. In practice, however, the common law would probably be developed in terms of s 39(2), although neither s 1 nor s 41 fall within the Bill of Rights.
[52] [1993] AC 70.

enumerated in the Bill are not directly implicated by a common-law rule, the rule in question may nevertheless require development in order to produce an outcome which accords with the spirit, purport and objects—the "objective normative value system"—of the Bill of Rights.

This possibility is illustrated with respect to the law of unjustified enrichment by a decision of the Cape Town High Court, *MN v AJ,* handed down in 2011.[53] The parties had divorced in 1995; in terms of their divorce order the plaintiff was ordered to pay maintenance in respect of their minor child, N. The plaintiff continued to make maintenance payments until June 2006, when N underwent a paternity test which proved that the plaintiff was not her natural father. Pursuant to an application brought by the plaintiff, in July 2007 the Magistrate's Court issued an order varying the parties' divorce order by the deletion of the plaintiff's maintenance obligations. The plaintiff also brought a successful action against the defendant (his ex-wife) to recover all maintenance paid between 1995 and 2006. It was found by Gamble J, sitting in the Western Cape High Court, that the plaintiff's pleadings lacked several crucial averments, namely that the payments to the defendant had been made without just cause, and that the defendant had been enriched by the payments. Nevertheless, it was clear from the pleadings and from the submissions of counsel that the plaintiff's claim took the form of a *condictio indebiti*, a claim to recover the payment of an amount not owed by mistake. The maintenance payments had indeed been *indebitum* (not owed); the plaintiff had had no legal or natural obligation to maintain the child.[54] Because of the defective nature of the plaintiff's plea, counsel for the defendant had (incorrectly) taken the view that it was unnecessary to deal with the enrichment element of the claim: in particular, he had failed to plead loss of enrichment. However, there was no suggestion in the evidence that the defendant had not utilised the money exclusively for the child's benefit. The question arose, therefore, on whom the burden to produce evidence fell. According to Gamble J, while proof of an overpayment generally constituted prima facie proof of the recipient's enrichment in South African law, and while the recipient then generally bore the onus of showing loss of enrichment,[55] the incidence of onus in civil litigation was the product of considerations of policy, practice and fairness.[56] Public policy in particular had to be viewed "through the prism of constitutionalism": section 39(2) required the Court to promote the spirit, purport and objects of the Bill of Rights when developing the common law, and

> "courts may in the future be wary of recognising claims in circumstances such as the present, which necessitate an inquiry into paternity and which may have the tendency to destroy an otherwise loving and caring parental relationship with a child whose

[53] 2013 (3) SA 26 (WCC) The account which follows is based on that given in the regional digest for South Africa in [2012] RLR 231, 231–233, § 166.

[54] *Ibid*, [54]. But *cf* the remarks of Gamble J, *ibid*, [51]: "The plaintiff's legal obligation to pay the maintenance in respect of N arises directly from an order of this court and was accordingly an obligation he could not avoid".

[55] *Ibid*, [67]. See further *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A); *Senwes Ltd & Ors v Jan van Heerden and Sons CC & Ors* [2007] 3 All SA 24 (SCA).

[56] *Nel v Jonker*, [78–79]

> rights to family and parental care are protected under section 28 of the Constitution."[57]

In the circumstances of the present case, then, the burden was on the plaintiff to show that the defendant's estate has been enriched in the sense that there had been an increase in her assets in consequence of the payments.[58] In the absence of any evidence to this effect, his claim failed.[59]

That the plaintiff was not able to recover the money used to benefit the child may be an intuitively satisfying result. Yet it is difficult to say what the *ratio* of the decision really is—*ie,* on what rule it depends. The Bill of Rights does indeed recognise children's rights in section 28: in particular, subsection (1) provides that, "[e]very child has the right … to family care or parental care …" as well as to "basic nutrition, shelter, basic health care services and social services." However, in the context of Gamble J's judgment this section does not appear to have generated any rule of general application—for example, that in matters of this kind (restitutionary claims in respect of maintenance by putative fathers) the plaintiff must prove that the child's mother did not spend the money received on the child's maintenance. It appears, rather, that for Gamble J the effect of section 39(2) was precisely to compel a particular outcome: recognition of the constitutional rights enjoyed by the child, N, translated directly into a decision in favour of the defendant, her mother. The effect of this interpretation of section 39(2) in other areas of private law has been to introduce a much looser approach to common law rules.[60] Were such an approach to be routinely invoked in the context of the law of unjustified enrichment, indeterminacy would be its likely consequence.

3. Transforming the law of unjustified enrichment

Sections 1 and 2 above discussed the possibility of constitutionally motivated adjustments to particular rules within the law of unjustified enrichment, whether these adjustments take the form of new constitutionally compliant rules of general application or are specific to the facts of the particular case at hand. These are significant possibilities with the potential to effect profound changes to the existing law. However, another, more radical possibility arises: the re-making or re-imagining of the entire content and analytical framework of the law of unjustified enrichment in the light of constitutional rights and principles.

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[57] *Ibid*. In fact, denying a putative father any restitutionary claim in respect of maintenance paid would appear to create a powerful incentive for fathers to seek paternity tests and thus cease maintenance payments sooner rather than later. This judgment may therefore be actively destructive of family life.

[58] *Ibid*, [69] and [80].

[59] This point was technically obiter dictum. The outcome of the case was in fact determined by the character of the plaintiff's mistake: it was held by Gamble J that the plaintiff had not demonstrated that his mistake was excusable, as required by South African law. But it is not clear that the plaintiff was mistaken about his paternity at all, or if he was, it does not seem that this mistake (as opposed to his love for and parental investment in N) really caused him to make the payments. For further details see the regional digest in [2012] RLR 231, 231–233, §166.

[60] This point is forcefully made with respect to a trio of earlier Constitutional Court decisions by S Woolman, "The Amazing, Vanishing Bill of Rights" (2007) 124 SALJ 762, especially his introductory remarks at 762–765. Regarding the implications of this approach for the law of delict, and for vicarious liability in particular, see H Scott, "The Death of Doctrine?—Private-Law Scholarship in South African Today" in J Basedow, H Fleischer and R Zimmermann (eds), *Legislators, Judges, and Professors* (Mohr Siebeck, Tübingen, 2016), 223.

There is no primary right enshrined in the South African Bill of Rights to which the law of unjustified enrichment obviously gives expression and against which its constitutionality can obviously be tested. Thus until recently it was unclear whether the Bill could exercise any systematic influence over the law of unjustified enrichment.[61] In a passage written in late 2012, I argued that to the extent that the law of enrichment by transfer does give expression to any underlying norm, that is the value of personal autonomy implied by the right to human dignity in section 10 and the right to freedom of the person enshrined in section 12 of the Bill of Rights.[62] In particular, I did not then think that section 25(1) (according to which "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property") could have any systematic impact on the law of unjustified enrichment.[63] Shortly after this passage was written, however, the Constitutional Court handed down the decision in *National Credit Regulator v Opperman and Ors*;[64] this was followed in 2015 by *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Ors.*[65] These cases contradicted my earlier belief, in that they accorded a central role to section 25(1) in driving forward the development of the law of unjustified enrichment.

O, the first respondent in *National Credit Regulator v Opperman and Ors* ("*Opperman*"),[66] had lent his friend, B, R7 million for the purpose of property development. O was not a registered credit provider as required by section 40 of the National Credit Act 34 of 2005 ("NCA"). When it appeared that B was unable to meet his obligations, O applied for the sequestration of B's estate in the Western Cape High Court. B raised as a defence to O's claim section 89(5) of the Act, according to which the parties' agreement was unlawful and void, and—according to section 89(5)(c) in particular—O's claim to repayment was either "cancelled" or forfeit to the State:

> "(c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either—
> (i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or
> (ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer."[67]

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[61] See *eg Visser*, 24–26; *Du Plessis*, 17–22.

[62] Under South African law, property passes by virtue of the transferor's intention to confer ownership on the recipient of the transfer and the recipient's corresponding intention to become owner: transfer is thus itself an exercise of the parties' autonomy. But where the intention of the plaintiff in conferring the benefit is impaired, for example because he is mistaken about his liability, that autonomy is only imperfectly expressed; the plaintiff's plans for the distribution of his property have misfired. It is this, I argued—the impairment of the plaintiff's autonomy in deciding to make the transfer—that provides the ethical justification for restitution in such cases. See *Scott*, 210–211, and also *Du Plessis*, 18–19.

[63] "It seemed unclear whether the deliberate conferral of goods or money could ever amount to a "deprivation of property" within the meaning of the provision. More generally, the right to property recognised in s 25(1) appeared to be too broad to assist in the determination of individual rules governing the restitution of enrichment by transfer": *Scott*, 209.

[64] 2013 (2) SA 1 (CC).

[65] [2015] ZACC 15.

[66] 2013 (2) SA 1 (CC). The account which follows is based on that given in the regional digest for South Africa in [2013] RLR 204, 208–211, §179.

[67] The text of s 89(5) prior to amendment is set out in full in [2013] RLR 208–211, §179.

The Court raised concerns about the constitutionality of these provisions and counsel for O subsequently amended his notice of motion to include a challenge to the constitutionality of section 89(5)(c). The matter was subsequently escalated to the Constitutional Court.

Van der Westhuizen J, giving the judgment of the majority, began by reviewing the common law context of section 89(5)(c) of the NCA. The appropriate claim to recover a transfer made in pursuance of an illegal agreement was the *condictio ob turpem vel iniustam causam*, the claim in respect of money or property transferred under an illegal agreement. In order to succeed in this restitutionary claim, the plaintiff must be free of turpitude; this was the *par delictum* rule. However, since *Jajbhay v Cassim*,[68] South African courts had been prepared to relax the *par delictum* rule, in order to prevent injustice or to satisfy the requirements of public policy, by taking into account considerations of fairness. Thus the *par delictum* rule was not an absolute bar to a claim in restitution. Where, as here, a credit provider ignorant of the requirement to register had unknowingly entered into an unlawful credit agreement, there could not be said to be substantial turpitude on his part, and it was very likely that the plaintiff in such a case would be permitted at common law to recover his performance. But there seemed to be little room for such judicial discretion under section 89(5)(c) of the NCA. It appeared to provide that the rights of the credit provider to recover money paid or goods delivered to the consumer must either be "cancelled" or forfeit to the state if the consumer would be unjustly enriched by cancellation, regardless of turpitude or other factors relevant to a fairness or public policy inquiry.[69] This called into question the constitutionality of this provision, and in particular its compatibility with section 25(1) of the Bill of Rights.

It was clear that the deprivation of ownership of corporeal property constituted deprivation for the purposes of section 25, but the Court had not previously held that personal rights arising from contract, delict, or enrichment constituted property for these purposes. In the context of this case, however, it was appropriate to recognise that the right to restitution of money paid arising from unjustified enrichment constituted property under section 25(1). Such recognition would be in accordance with developments in other jurisdictions; intangible property was of primary importance in modern societies, and the concept of property should not be so narrowly interpreted as to diminish the worth of the protection afforded by section 25.

Further, it was clear that the outright denial of O's enrichment claim by statute amounted to an arbitrary deprivation for the purposes of section 25(1). A deprivation would be considered arbitrary when the law failed to provide sufficient reason for it, or when it was procedurally unfair.[70] Whether there was sufficient reason would be determined with reference to the relationship between the means employed and the ends sought by the legislative scheme; the relationship between the purpose of the deprivation and the nature of the property; as well as the extent of the deprivation in respect of that property.[71] The more extensive the deprivation and the stronger the property interest, the more compelling the state's purpose would have to be.[72] Although the Court was

[68] 1939 AD 537.

[69] But *cf* the alternative interpretation of s 89(5)(c) proposed in the judgment of Cameron J (Froneman J and Jafta J concurring).

[70] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Anor; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

[71] *Opperman* 2013 (2) SA 1 (CC), [68]

[72] *Ibid*.

sympathetic to the objects of the provision, namely to protect the public against unscrupulous money-lenders, and specifically to deter unregistered credit providers from advancing credit to consumers outside the regulatory framework, these objects did not provide sufficient reason for the deprivation embodied in section 89(5)(c) of the NCA. Given that the extent of deprivation in this case was far reaching, the purpose should have been stated clearly, and the means chosen to accomplish it narrowly framed. In fact the means chosen were disproportionate to the purpose.[73] The common law regime clearly constituted a less restrictive means of achieving the same ends: in particular, the failure of section 89(5)(c) to distinguish between credit providers who intentionally exploited consumers and those who failed to register because of ignorance, when lending money to a friend, rendered the provision disproportionate.[74]

The decision in *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Ors* ("*Chevron*")[75] in 2015 continued the work begun in *Opperman*, dealing specifically with the constitutionality of section 89(5)(b) of the NCA. Since 1997 Chevron had provided Wilson with diesel. According to the parties' contract, Wilson paid the amount owing to Chevron at the end of each month upon receiving details of the month's purchases; thus Chevron extended credit to Wilson in his purchase of its products. In 2008 a dispute arose between the parties regarding the accuracy of Chevron's billing. In 2010 Chevron brought a claim against Wilson in the Magistrate's Court for payment of his outstanding balance, alleged to be R3,330,977.03. In the run-up to the trial, Chevron accepted that it was required to be registered as a credit provider in terms of section 40 of the NCA but was not so registered. According to section 89(5)(a) inter alia, a credit agreement entered into by an unregistered credit provider was unlawful and void. According to section 89(5)(b) as it then was:

> "(b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated—
> (i) at the rate set out in that agreement; and
> (ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer."

Thus section 89(5)(b) "exposed Chevron to the risk of having to repay Mr Wilson all amounts paid after the NCA came into effect".[76] This was approximately R33 million. By

[73] *Ibid*, [71]

[74] *Ibid*, [76]. It had been argued, further, that even if the denial of O's enrichment claim by section 89(5)(c) of the NCA amounted to an arbitrary deprivation for the purposes of section 25(1) of the Bill of Rights, nevertheless it constituted a permissible limitation of the section 25(1) right. However, it did not seem that an arbitrary deprivation of property could ever constitute a reasonable and justifiable limitation in the context of an open and democratic society, as required by the limitation clause in section 36(1) of the Bill of Rights. Section 36(1)(d) specifically required that attention be given to the relation between the limitation and its purpose—laws impacting on constitutional rights were not permitted to use disproportionate means to achieve their purposes—while section 36(1)(e) required that the availability of less restrictive means be considered. Many of the factors employed in the context of the arbitrariness test yielded the same conclusion in the context of the limitation inquiry. See *Opperman*, [73]–[80].

[75] [2015] ZACC 15. In fact this decision was of limited practical significance: the order confirmed by the Constitutional Court covered only a period of roughly nine months, from the date of judgment in the High Court to the coming into effect of the National Credit Amendment Act 19 of 2014, formulated by the legislature in response to the decision of the Court in the *Opperman* case. The account which follows is based on that given in the regional digest for South Africa in [2016] RLR 297, 298–230, §206.

[76] *Ibid*, [8].

agreement between Chevron and Wilson, the Magistrate granted an order declaring the parties' contract unlawful and void but postponing trial in order to enable Chevron to institute proceedings challenging the constitutionality of the section. Again, the matter was subsequently escalated to the Constitutional Court.

Madlanga J, giving the unanimous judgment of the Court, held as follows. First, money in hand clearly constituted a property interest protected by section 25 of the Constitution: unlike in the *Opperman* case, here Chevron had actually received payment of approximately R33 million, the restitution of which was now at issue. Second, insofar as section 89(5)(b) required a court to direct, in all circumstances, that the credit provider repay to the consumer all amounts paid under the credit agreement with interest, it clearly effected the deprivation of such property. Again, this case appeared stronger than that at issue in *Opperman*: if eliminating a claim in enrichment amounted to deprivation of property, it followed that ordering the refund of money already received must also do so. Third, regarding the arbitrariness requirement, it seemed that the deprivation was clearly arbitrary insofar as it was procedurally unfair. The primary concern here was that the court hearing such a matter was given no discretion when making an order under section 89(5)(b):

> "The court may not take relevant circumstances into account. For example, the deprivation takes place without any consideration being given to: the conduct of the parties to the transaction; their respective financial positions; their levels of business and financial acumen; the possible apportionment of blameworthiness to the parties in relation to the unlawfulness of the agreement; and the extent to which the credit receiver has profited from the transaction."[77]

However, it was argued in reply that such arbitrariness was ameliorated by the availability of an unjustified enrichment claim at the instance of the creditor: this was the common law *condictio ob turpem vel iniustam causam*, initially removed by section 89(5)(c), and subsequently reinstated in *Opperman*.[78] As set out above, although ordinarily the party who brings this *condictio* must be free of turpitude, it has long been recognised in South African law that this rule can be relaxed in order to do justice between the parties. A credit provider hit by section 89(5)(b) of the NCA could thus avail himself of this common law claim. Despite this, Madlanga J held that the possible availability of such a claim was not enough to negate the arbitrariness of the deprivation effected by the section. While the common law *condictio* required to be proved and was subject to judicial discretion, the section 89(5)(b) refund was mandatory.[79] Moreover, even if the creditor's claim were to succeed, the consumer might be insolvent, leaving the creditor with no more than a concurrent claim in his insolvent estate.[80] In short, the availability of a common law unjustified enrichment claim to the creditor did not neutralise the arbitrariness of the deprivation that resulted from section 89(5)(b). Nor could this limitation of the right enshrined in section 25(1) of the Bill of Rights be justified in terms of section 36(1). Clearly, the purpose of section 89(5)(b) was to protect vulnerable consumers, but there were less

[77] *Ibid*, [23].
[78] *Ibid*, [27].
[79] *Ibid*, [28].
[80] *Ibid*, [29].

restrictive means available to achieve that purpose, namely to grant to courts the discretion to make a just and equitable order.[81]

What do these decisions mean for the future of the South African law of unjustified enrichment? On the one hand, the finding of the Constitutional Court in the *Opperman* case has immediate practical implications: it means that all statutes that—like section 89(5)(c) of the NCA—remove existing common law enrichment claims must now be reviewed for compliance with section 25(1). Anecdotally, much litigation around such statutory provisions is currently underway, although the recent decision of the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and Anor*[82] suggests a disappointingly narrow approach.[83]

However, the *Opperman* decision seems also to have important implications for the common law of unjustified enrichment. Again, according to *Opperman*, the concept of property recognised in section 25(1) of the Bill of Rights comprises personal claims, including but not limited to claims arising from unjustified enrichment.[84] This in itself suggests that almost any rule falling within the law of obligations could be held to require development in order to give full expression to the property right contained in section 25(1).[85] Furthermore, the annihilation of a common law enrichment claim by statute constitutes a deprivation of property for the purposes of section 25(1); and section 25(1) stipulates that no such deprivation may be arbitrary. It is conceivable that this analysis could be broadened—perhaps via section 39(2) of the Bill—to include cases in which a prima facie right arising in unjustified enrichment is removed by a common law rule, whether located within the law of unjustified enrichment or outside it. For example, the denial of the *condictio indebiti* through the operation of the common law requirement of excusable mistake might conceivably be construed as a deprivation within the meaning of section 25(1) and scrutinised against the arbitrariness standard.[86] The Court in *Opperman* held that the deprivation of an enrichment claim by statute would be considered arbitrary either where it was found to be procedurally unfair or where the law had failed to provide sufficient reason for it; whether there was sufficient reason would be determined with reference to the relationship between the means employed and the ends sought, as well as the extent of the deprivation. Transposing that reasoning to the deprivation effected by the excusable mistake requirement, it seems likely that this requirement—which extinguishes the plaintiff's claim entirely—would be judged disproportionate relative to its aim—which I take to be the protection of the defendant's reliance on the apparently finality of his receipt[87]—and therefore arbitrary for the purposes of the section.

But in fact the explosive potential of *Chevron* for the common law of unjustified enrichment is greater even than that of *Opperman*. Again, the deprivation at issue in *Opperman* took the form of the annihilation of a common law enrichment claim by the legislature, a relatively straightforward matter insofar as the application of the Bill of Rights was concerned. In the *Chevron* case, on the other hand, the consumer's statutory

[81] *Ibid*, [33].
[82] 2014 (3) SA 474 (CC)
[83] See the account of this case given in the regional digest for South Africa in [2015] RLR 255, 256–258, §198.
[84] On the concept of property in the South African Constitution see *eg Van der Walt*, ch 3, cited with approval in *Opperman* 2013 (2) SA 1 (CC), [63].
[85] See e.g. the argument run by the applicant in *Absa Bank Limited v Moore and Anor* 2017 (1) SA 255 (CC)
[86] *Cf Scott*, 210.
[87] *Cf* H Scott, "The Requirement of Excusable Mistake in the Context of the *Condictio Indebiti*: Scottish and South African Law Compared" (2007) 124 SALJ 827.

enrichment claim was itself found to constitute deprivation of property, in the form of goods or money.[88] In other words, whereas *Opperman* concerned the application of section 25(1) to a statutory provision extinguishing a common law right, in *Chevron* the statutory enrichment claim available to the consumer as against the credit provider was itself tested against the arbitrariness standard set out in section 25(1). Were the analysis adopted in the *Chevron* case to be extended to common law enrichment claims, it would require claims such as the *condictio indebiti* and *condictio ob turpem vel iniustam causam* to be scrutinised in light of this arbitrariness standard. The consequence of such an analysis could be the displacement of the common law rules of unjustified enrichment by new constitutional ways of thinking, drawn from the considerable existing jurisprudence around section 25.[89] For example, placing the onus of proving loss of enrichment on the defendant in a *condictio indebiti* case might be branded arbitrary in the procedural sense because it obliges the defendant to give reasons why she should not be deprived of her constitutionally-protected property interest rather than placing the burden of proof on the party seeking to effect that deprivation.

Alternatively, and more modestly, the *Chevron* decision could be seen as the beginning of the blending or synchronisation of private law and constitutional discourses within the context of unjustified enrichment. Whereas the emphasis in the *Opperman* decision was on the disproportionate nature of the deprivation effected by section 89(5)(c) of the NCA, a distinctively constitutional or—more widely—public law mode of analysis, the Court's concern in *Chevron* was really that subsection 89(5)(b) took no account of the reciprocity of the parties' performances in terms of the unlawful credit agreement: there was no provision made for the necessary relationship between the statutory enrichment claim afforded to the consumer in respect of money paid and any answering claim by the credit provider in respect of performance rendered. This analysis strongly coheres with one of the fundamental principles of the law of unjustified enrichment, whereby restitution of performance rendered under a failed contract will generally be refused where counter-restitution of benefits received has not occurred or is not tendered.[90] Thus there is evidence in the *Chevron* decision of the Court's beginning to grapple with the difficult task of integrating the norms embodied in section 25(1) (and in particular the arbitrariness test as interpreted) with the core principles of the common law of unjustified enrichment. It is here in particular that we get our first glimpse into how the brave new world of a transformed law of unjustified enrichment might look.

C. ADDENDUM

There are a number of other ways in which the South African law of unjustified enrichment might interact with the Constitution over the course of the coming decades. First, it seems both likely and appropriate that the courts will invoke the Constitution and in particular

[88] This is distinct from an analysis which construes enrichment claims as mechanisms for the protection of property rights. *Cf* Hoffman, "Restitution" (*supra*, n 51), 322; C Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP, Oxford, 2016), chs 3 and 4.

[89] See the detailed account of "non-arbitrariness" in *Van der Walt*, 237–288, and in particular the account of "substantive arbitrariness" at 245–64. See also T Roux, 'Is the Law that Provides for the Deprivation Consistent with Section 25(1)?' in *Constitutional Law of South Africa*, 2nd ed (Juta, Cape Town, 2013) ch 46.5.

[90] On the operation of this rule in the context of unlawful contracts in particular see *eg Visser*, 443; *Du Plessis*, 208–209.

the Bill of Rights when giving content to open-ended norms, for example in considering whether to relax the *par delictum* rule.[91] There is a clear parallel to this process in the way in which constitutional values have infused the wrongfulness (duty of care) inquiry in the context of the law of delict.[92] Its application to open-ended standards in the law of unjustified enrichment seems analytically straightforward, although there is admittedly some room for disagreement regarding which norms these are, and in particular whether the "unjustified" inquiry is of such a nature.[93]

On the other hand, it has been suggested that the fundamental principles of unjustified enrichment might provide guidance in developing, interpreting and justifying statutory compensatory remedies in respect of past racially-motivated dispossession: for example, the return of land to the dispossessed as envisaged by section 25(7) of the Bill of Rights has been seen as "public-law restitution within the broad paradigm of enrichment law".[94] Similarly, the law of unjustified enrichment could be employed to formulate a "principled theoretical basis" for the application of the redress measures mandated by section 9(2) of the Bill of Rights:[95]

> "To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

In this way, affirmative action or employment equity policies could be shaped and justified at least in part by reference to the private law principles governing the restitution of benefits unjustifiably conferred. But while it is true, as Jacques du Plessis puts it, that "[a] pronounced feature of the history of South Africa has been the enrichment of individuals and groups by means of exploitation and discrimination that can broadly be termed unjustified,"[96] it is difficult to see how that conception of "unjustified enrichment" could be effectively married with the private law understanding of the subject.[97] This view—that the rules of unjustified enrichment could provide meaningful guidance in designing and implementing programmes of restitution or redress—has also been criticized on the basis that it seeks to "[imprison] land restitution within … the stifling limits of private-law discourse".[98]

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[91] See *Du Plessis*, 19–20, citing *Kylie v Commission for Conciliation, Mediation and Arbitration* 2010 (4) SA 383 (LAC).

[92] See *eg Carmichele* 2001 (4) SA 938 (CC); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

[93] *Cf Du Plessis*, 20.

[94] *Visser*, 152, drawing on D Visser and T Roux, "Giving Back the Country: South Africa's Restitution of Land Rights Act, 1994 in Context" in MR Rwelamira and G Werle (eds), *Confronting Past Injustices: Approaches to Amnesty, Punishment, Reparation and Restitution in South African and Germany* (Butterworths, Durban, 1996) 89 ff; see also *Du Plessis*, 21–22. The legislation referred to here is the Restitution of Land Rights Act 22 of 1994.

[95] See L Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta, Cape Town, 2012), ch 6 (entitled "Restitutionary or Remedial Equality").

[96] *Du Plessis*, 21–22.

[97] *Du Plessis*, 376.

[98] Visser paraphrasing A van der Walt, "Undoing things with words: the colonisation of the public sphere by private-property discourse" [1998] *Acta Juridica* 235, 262 ff.