Unjust Enrichment in South African Law Rethinking Enrichment by Transfer

Helen Scott



CONTENTS

Aci	know	ledgements	v		
Та	ble oj	^c Cases	xi		
Та	ble of	Legislation	ix		
1	Inti	Introduction			
	I	Enrichment Liability in the Civilian Tradition	1		
	Π	Enrichment Liability in South African Law	4		
	III	A Law of Unjustified Enrichment?	7		
	IV	Unjust Enrichment: the Reanalysis of Enrichment by Transfer	9		
	V	Beyond the Condictiones	15		
	VI	Plan of Action	19		
Pai	t I M	listake	21		
2	Mistake: Nineteenth Century				
	I	Introduction	23		
	Π	Condictio Indebiti	25		
		A The Civilian Tradition	25		
		B Nineteenth-century South African Law	28		
		(i) Rooth v The State	28		
		(ii) Divisional Council of Aliwal North v De Wet	30		
		C Conclusion	33		
	III	Restitutio in Integrum on Grounds of Iustus Error	34		
		A The Civilian Tradition	34		
		B Nineteenth-century South African Law	36		
	IV	Restitution of Contractual Performance on Grounds of Iustus Error	39		
		A The Civilian Tradition	39		
		B Nineteenth-century English Law	41		
		(i) Mistake at Common Law	42		
		(ii) Mistake in Equity	43		
		C Nineteenth-century South African Law	46		
		(i) Restitutio in Integrum on Grounds of Iustus Error	46		
		(ii) Substantive Iustus Error Doctrine	51		
		D Modern South African Law	52		
	V	Conclusion	54		

Contents

3	Mistake Continued: Twentieth Century and Beyond		
	I	Introduction	56
	II	Twentieth Century: Excusable Mistake of Fact	57
		A 'Neither Negligent nor Studied' as a Rule of Evidence	57
		B 'Neither Negligent nor Studied' as a Substantive Requirement	59
		C Conclusion	62
	III	Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue	62
		A Abolition of the Mistake of Law Rule	63
		B Recognition of a Universal Excusable Mistake Requirement	64
	IV	Twenty-first Century: Excusable Mistake	66
	V	Analysis: Excusable Mistake in South African Law	68
		A Excusable Mistake and Iustus Error	68
		B Two Senses of Equity	69
		C A Defence of Careless Mistake	72
Pa	rt II	Compulsion and Incapacity	77
		roduction: Taking Stock	79
		-	02
4		pulsion	83
	I	Introduction	83 84
	II	Historical Background	
		A Restitution of Compelled Transfers in Roman Law	84
		(i) Praetorian Remedies for <i>Metus</i> : <i>Restitutio in Integrum</i>	84
		(ii) Condictio	87
		B Restitution of Compelled Transfers in Roman-Dutch Law	89
		(i) Restitutio in Integrum	89
		(ii) Condictio Indebiti and Condictio ob Turpem vel Iniustam	0.1
		Causam	91
	III	Restitution of Compelled Transfers: Nineteenth Century	92
		A White Bros v Treasurer-General	93
		B 1883–1915	97
		(i) Clarification of the Compulsion and Protest Requirements	97
		(ii) <i>Restitutio in Integrum</i> of Contractual Performance:	00
		a Unified Approach	99
	IV	Restitution of Compelled Transfers: Twentieth Century	101
		A Union Government v Gowar	101
		(i) Wessels AJA	102
		(ii) Innes CJ	103
		(iii) De Villiers AJA	105
		(iv) Conclusion	107
		C Impact of Union Government v Gowar	108

viii

	D Mid-twentieth Century	112
	E Commissioner for Inland Revenue v First National Industrial	
	Bank Ltd	115
	(i) Nienaber AJA	116
	(ii) Nicholas AJA	118
	F Restitution of Performance Tendered under Compelled	
	Contracts	119
V	Analysis	121
	A Modern Position	121
	B Influence of Restitutio in Integrum	122
	C Unjust Factors and Legal Grounds	125
5 Incap	acity: Minority and the Doctrine of Ultra Vires	129
I	Introduction	129
II	Historical background	131
	A Introduction	131
	B Restitution of Minors' Transfers in Roman Law	133
	C Restitution of Minors' Transfers in Roman-Dutch Law	135
	D Benefit Theory	137
III	Restitution of Minors' Transfers in South African Law	141
	A Restitution of Performance Rendered under Voidable Contracts	141
	B Restitution of Performance Rendered under Void Contracts	142
	C Analysis	149
IV	Restitution of Ultra Vires Transfers	151
	A Introduction	151
	B Twentieth Century	151
	(i) Obligation Invalid Because Ultra Vires, Transfer Effective	151
	(ii) Obligation Valid, Transfer Ineffective Because Ultra Vires	153
	C Bowman, De Wet and Du Plessis NNO v Fidelity Bank Ltd	156
	D Analysis	160
V	Conclusion	160
Part III	Theory	163
	ry: Unjust Factors or Absence of Legal Ground?	165
I	Introduction	165
II	Unjust Factors Analysis in English Law	166
III	Absence of Legal Ground Analysis	170
	A German Law	170
	B Professor Birks' Analysis	172
IV	Civilian Critique of the Unjust Factors Analysis	176
	A Contractual Performance	176

ix

Contents

	B Ex	tra-contractual Transfers	180	
	(i)	Unjust Factors Analysis Does Not Reflect the True Reasons		
		for Restitution	180	
	(ii) Duplication of Grounds of Invalidity by Unjust Factors is		
		Uneconomical and Unnecessary	183	
V	The (Case for Unjust Factors	184	
	A Co	ontractual Performance	184	
	B Ex	tra-contractual Transfers	188	
	(i)	Deficiencies in the Objective Analysis of the		
		Leistungskondiktion	188	
	(ii) Deficiencies in the Subjective Analysis of the		
		Leistungskondiktion	191	
	(ii	i) Substantiation of the <i>Leistungskondiktion</i> Necessarily		
	<i>.</i> .	Relies on Unjust Factors	195	
		v) Grounds of Invalidity and Unjust Factors Can Co-exist	196	
		st Factors and the Common Law Method	198	
VII	A Mi	xed Approach	201	
7 Conc	lusior	L	204	
Ι	Unju	st Enrichment in South African Law	204	
	A M	listake	204	
	ВC	ompulsion	205	
	C In	capacity	206	
	DT	he Importance of Unjust Factors	206	
II	In D	efence of the Unjust Factors Analysis	207	
III	Unju	ist Enrichment: the Future	208	
Principa	Principal Pre-Nineteenth Century Sources			
Bibliography				
Index				

x