

Unjustified Enrichment in South Africa Law

By JC Sonnekus (English translation
by JE Rhoodie)
LexisNexis (2008)

vii & 421 pages

Soft cover

The year 2008 was a bountiful one for the law of unjustified enrichment in South Africa. It saw the birth of textbooks by two leading academics in the field: *Unjustified Enrichment* by Daniel Visser and *Unjustified Enrichment in South African law* by JC Sonnekus. The former was reviewed by Adv Alfred Cockrell in the April 2009 edition of this publication. In reviewing Sonnekus' contribution, one is inevitably drawn into comparing it with Visser's work.

The late Professor Peter Birks stirred the hornets' nest in English law by suggesting a novel taxonomy or structure for unjust enrichment or restitution in that legal system. Such was the force of Birks' ideas and personality that he, almost single-handedly, sparked an international academic revolution in unjustified enrichment, until then the poor cousin to contract and delict in the law of obligations. Conferences, textbooks, numerous collections of essays and a plethora of articles ensued in mainstream civilian and common law legal systems. The arguments became increasingly complex and the exchanges heated. The stakes were high. The result was a significant improvement in rationalisation of the often disconnected laws of unjustified enrichment.

Visser was an active participant in this international dialogue and his seminal work draws heavily, and profitably, on the lessons learned there. Those unfamiliar with the intricacies of the debates will find the structure of Visser's work foreign. For many practitioners who find the world of the *condictiones* confusing and inaccessible, Visser's work, for all its erudition and learning, can be a daunting starting point. It is here that Sonnekus' work fills the gap.

Sonnekus' contribution has a familiar feel to it. In title, structure and content, Sonnekus' book draws on De Vos' groundbreaking *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg*. To his credit, Sonnekus acknowledges the influence.

Sonnekus correctly points out that the Supreme Court of Appeal has over the last decade increasingly focussed on the need for the presence of the general requirements of enrichment liability to found a claim in unjustified enrichment. He, equally correctly, states that our law has not yet finally severed ties with the arcane *condictiones*. Practitioners would thus be wise to heed Sonnekus' salutary warning that all claims based on unjustified enrichment should, for considerations of safety, be pursued under one of the specific *condictiones* recognised in South African law.

Accordingly, it is apt that Sonnekus first surveys the general requirements for liability in South African law. Thereafter, he dedicates a chapter to each of the common law *condictiones*. These chapters follow a similar pattern. Sonnekus sets out the Roman law foundation of the *condictio* under review, its expansion, if any, in Roman Dutch law and the modern South African law. There are helpful illustrative examples and an analysis of the leading cases. The work is also punctuated with detailed footnotes that provide useful references to comparative and historical sources.

In general, Sonnekus handles his topic with the skill that has justified his frequent citation by our courts at all levels. While Sonnekus' work is less ambitious and narrower in scope than Visser's book, practitioners will generally find it a useful and practical point of reference when faced with questions of enrichment law.

Saul Miller, Cape Bar

The Pensions Funds Act: A Commentary on the Act, Regulations, Selected Notices, Directives and Circulars (The law is as at November 2009.)

By Rosemary Hunter, Johan Esterhuizen, Tashia Jithoo and Sandile Khumalo

Published by Hunter Employee Benefits Law (Pty) Ltd, PO Box 52531, Saxonwold 2132 Johannesburg

805 pages

R1881,00 (VAT incl)

The authors are directors of Hunter Employee Benefits Law (Pty) Ltd. Rosemary Hunter and Johan Esterhuizen are practising attorneys whilst Tashia Jithoo and Sandile Khumalo have experience as legal practitioners. At the outset I disclose having worked on brief with both Rosemary Hunter and Johan Esterhuizen.

The Pensions Funds Act 24 of 1956 (PFA) as amended in 2001 has been a boon to practising lawyers because it was in many respects poorly drafted. Actuaries make poor lawyers and lawyers make poor actuaries. The arranged marriage between actuarial and legal concepts in the PFA has not always been a happy one, but has provided pension lawyers with challenging questions of interpretation.

The authors have clearly wrestled with these problems in the course of advising their clients, which enhances the authority with which they write. The authors have admirably combined their practical experience of the PFA with a high standard of academic writing.

The bulk of the book is devoted to a section-by-section commentary on the PFA. It is written in the style of a reference work. The reader is able to locate the specific section of the PFA on which commentary is sought via the detailed table of contents. The index at the back of the book provides references according to topics for those who may not instinctively or otherwise know where different subjects are dealt with in the PFA.

Publications purporting to provide detailed commentary on a statute frequently do little more than paraphrase the sections of the Act, with little useful commentary or reference to case law. This book devotes 784 pages to its commentary on the PFA. Board notices, directives and pension fund circulars are dealt with in conjunction with the sections of the PFA to which they relate. This is an extremely useful feature because the reader does not have to undertake a separate enquiry as to whether these additional regulatory devices must be observed in addition to the provisions of the PFA. There is a separate index dealing with them at pages 749 to 750 of the book.

The disadvantage of a reference work devoted to section-by-section commentary is that it does not provide a coherent discussion of the statute and the common law context in which it applies. The authors have largely neutralised this problem by providing a bird's eye view summary of the seven chapters of the PFA and a '*Brief History of, and Guide to, the Pension Funds Act.*'

Commentary on the sections of the PFA includes, where appropriate, case law dealing with statutory interpretation and substantive common-law principles which apply in tandem with the statutory provisions. A fine example of this is the comprehensive commentary of section 7C(2) dealing with the general duties of boards, a discussion of particular relevance to trustees of pension funds which covers 32 pages of the book and includes references to trust law and company law.

It is astonishing that a legal topic which affects virtually everyone has not been the subject of a thorough exposition prior to the appearance of this book. Its importance to the industry can scarcely be over-emphasised. The relative dearth of case law on the PFA means that the authors' thoughtful discussions are likely to influence legal arguments and judicial decisions in years to come. The authors have already promised future editions which will deal with anticipated new legislation and new judicial precedent.

Craig Watt-Pringle SC, Johannesburg Bar

The Law Arbitration South African and International Arbitration

By Peter Ramsden

Juta Law (2009)

Ixii and 334 pages

Soft cover R425 (VAT incl)

The author's stated aim is to cover not only the South African law pertaining to domestic arbitration but to include best practice international commercial arbitration law.

The topic is covered with admirable breadth of scope. All aspects of the arbitration process are reviewed from the conclusion of the arbitration agreement to proceedings for the recognition and enforcement of an award, as well as the setting aside of an award, remittal to the arbitrator and prescription of awards.

The busy practitioner will be pleased with the short, subject-specific chapters, divided into titled sub-chapters, dealing with the various procedural issues in a clearly defined, logical order. The indexes to subjects, cases and legislative sources are equally well-arranged.

There are some useful practical guidelines, such as the checklist for the topics to be covered at pre-arbitration meetings. Reference is made in most chapters to the relevant Roman-Dutch common law principles, and relevant provisions of the Arbitration Act 42 of 1965 and the Uncitral model law on International Commercial Arbitration. There is also an abundance of case authority, both South African and international.

The book includes contact details for South Africa arbitration institutions. The appendices include legislative sources, and the AASA rules, but unfortunately not the AFSA commercial arbitration rules.

The author's style of writing is sparse and if you are looking for in-depth critical analysis of a subject or detailed commentary on a case you will not find it. In each chapter there is a brief explanation of the principles, followed by illustrative examples supported by case authority. This is an advantage in some respects, in that several answers to a particular procedural problem can be quickly reviewed.

The draw-back is that the reader has no insight into the particular factors or circumstances which may have prompted a decision. In the result, quite often one encounters a statement authoritatively made, with reference to one decision, only to find a few pages or chapters on, a seemingly contradictory statement, referring to a decision in a different jurisdiction. Sometimes the author notes and comments on the contradiction. At other times a closer re-reading suggested a reconciliation of the two propositions. However this was not always the case.

In the result, I think the book would have benefited from additional discursive treatment of some subjects. As a novice to the area of international arbitration, the value as precedent of the many international cases cited was not readily apparent. For example, a Hong Kong decision was cited as authority for the incorporation of standard trading terms referred to on the face of a document, where the terms on the reverse were never faxed. *Prima facie* that decision stands at odds with South African case law (see *Cape Group Construction t/a Forbes Waterproofing v Government of the United Kingdom* [2003] All SA 496 (SCA)).

In the chapter on Sources of Arbitration Law, under the topic Case Law, the author quotes an intriguing statement by Lord Wilberforce in Hansard that arbitration is to be regarded '*subject to statutory guidelines, as a freestanding system, free to settle its own procedure and free to develop its own substantive law.*'

However this statement is not explored further, and it would be useful perhaps to the layperson and less experienced practitioner to include more detailed commentary on these areas.

Overall however the book is a comprehensive and user-friendly guideline, which does achieve its intention of giving the reader a good feel for both domestic and international arbitration law and the interplay between these spheres.

D Donnelly, Durban Bar 

JOINT PRESS RELEASE BY THE LAW SOCIETY OF SA AND THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA

Legal profession in SA calls on Zimbabwean Executive to encourage citizens to respect the judiciary and court decisions

The General Council of the Bar (GCB) of South Africa and the Law Society of South Africa (LSSA) have learnt with shock and dismay that it has been reported that a Zimbabwean Minister of State has been encouraging villagers to disobey a court order they are not in agreement with.

The GCB, representing South African advocates, and the LSSA, representing attorneys in South Africa, call on the Government of Zimbabwe to investigate the reports and to take any corrective action to avoid a total collapse of one of the best judicial systems in the Southern African region.

Litigants, including villagers, are entitled to challenge any court order they do not believe is just. However, disobeying a court order is not the right way to challenge it. The Zimbabwean system of justice allows litigants to appeal when not satisfied with the outcome of any dispute.

It is the duty of the Government of Zimbabwe and its Ministers rather to encourage citizens to obey the law and to follow the constitutionally recognised methods for resolving disputes. Encouraging villagers and citizens to disobey the law undermines the judiciary and the judicial system. It will ultimately erode any confidence the people have in the system. Where courts cannot be used to resolve disputes, the only method left will be violence and war.

Issued on behalf of the chairman of the General Council of the Bar, Patric Mtshaulana SC and the co-chairpersons of the Law Society of South Africa, Max Boqwana and Peter Horn – 15 June 2010

Unjustified Enrichment - edited by David Johnston April 2002. The purpose of this contribution is to examine how the law of unjustified enrichment in certain civil-law systems deals with this duty to provide restitution. Particular attention will be paid to the position in German, Dutch and South African law, although comparisons will at times be made with the position in the common law. The reason for the choice of these systems is that they represent quite distinct lines of development within the civilian tradition. Both German and Dutch law show how codification impacted on the development of the civil law. In the case of German law, the recognition of Disgorgement Profits South Africa law Illegal conduct Wrong Gain Unjustified enrichment. This is a preview of subscription content, log in to check access. Bibliography. Ackermann, L. 2013. Human dignity: Lodestar for equality in South Africa. Cape Town: Juta. Google Scholar. Beale, H., et al. 2010. Cases, materials and text on contract law, 2nd ed. Oxford: Hart. Google Scholar. Blackie, J., and I. Farlam. 2004. Enrichment by act of the party enriched. In Mixed legal systems in comparative perspective, ed. R. Zimmermann, D. Visser, and K. Reid. The South African law of unjustified enrichment. Cape Town: Juta. Google Scholar. Edelman, J. 2002. Start by marking "Unjust Enrichment in South African Law: Rethinking Enrichment by Transfer" as Want to Read: Want to Read saving. Furthermore, it explores the reasons for the rise of unjust factors in South African law, attributing this development in part to the influence of the Roman Dutch *restitutio in integrum*, an extraordinary, equitable remedy that has historically operated independently of the established enrichment remedies of the civilian tradition and which even now remains imperfectly integrated into the substantive law of unjustified enrichment. Finally, the book defends in principled terms the mixed approach to enrichment by transfer (namely unjust factors and absence of legal ground) which appears to charac