

THE *CONDUCTIO QUASI INDEBITI*

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1 Introduction

This essay focuses on something called the *conductio quasi indebiti*. This *conductio* is not well-known in South African law. In fact, it features only twice in the law reports: first, almost a century ago, in a judgment of De Villiers JP in *Van Wijk's Trustee v African Banking Corporation*,¹ and then, more recently, in a judgment of Harms JA in *Bowman, De Wet and Du Plessis NNO v Fidelity Bank Ltd*.² Something this rare may either be so precious that it deserves to be saved from obscurity, or it may be so insignificant that it deserves to be consigned to the past. The challenge is then to determine whether there is indeed any need for recognising such a *conductio* in modern South African law. In furtherance of a methodology favoured by the *Jubilar*, the perspective adopted here will be historical, taking Roman sources as the point of departure, and then enquiring whether these sources provide insights that are useful for modern purposes.

2 Conceptual background: *conductio indebiti*, *quasi indebitum*, *conductio quasi indebiti*

It is well-known that in classical Roman law a remedy called the *conductio* could be used in a variety of circumstances to obtain restitution of a specific amount of money or a specific thing that was transferred without legal ground (*sine causa*). In due course, certain typical situations when the *conductio* fulfilled this function were identified. In

1 1912 TPD 44 52-53.

2 1997 (2) SA 35 (A) 41, 45.

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post-classical Roman law, the *conductio* was fragmented into four specific *condictiones* which related to these typical cases of transfers *sine causa*.³

The most important of these *condictiones* was the *conductio indebiti*. Its distinctive elements were traditionally (1) a transfer (*datio*), (2) of a specific thing or a specific amount (*certum*), (3) which was not due (an *indebitum*). It is further often said that the transfer had to be made in error as to liability. However, it may well be that in classical Roman law, as in some modern civilian systems, error as to liability was not a positive requirement for the *conductio indebiti* and that it was rather up to the defendant to raise the defence that the undue transfer was made in the knowledge that it was not due.⁴ Another of the *condictiones* which is relevant for present purposes, is the *conductio sine causa specialis*. It functioned as a residual claim, accommodating a variety of cases of transfers without legal ground that did not fit into the established nominate claims.⁵ This function of the *conductio sine causa specialis* is also recognised in modern South African law.⁶

Quasi is often translated with “as if”.⁷ An *indebitum* is something which is not due. This implies that a *quasi indebitum* is something which is to be treated as if it is not due; something deemed, pretended or theorised to be not due. A *conductio quasi indebiti* could then in turn be a “*conductio* in respect of a *quasi indebitum*”, or rendered more freely, a “*conductio* in respect of something which actually is due, but is treated as if it were not due”.⁸ Sometimes, though, the word *quasi* does not mean “as if”, but rather “as” or “since” (*als* or *weil* in German).⁹ When used in this sense in conjunction with *indebitum*, it could mean “as something undue” or “because it is undue”. *Quasi* then actually indicates why the *indebitum* requirement of the *conductio indebiti* is met.

Thus far the focus was on *quasi* in relation to meeting the third requirement for the *conductio indebiti*, namely that of an *indebitum*. If other requirements of the *conductio indebiti* have not been met, but are deemed to have been met, it would be somewhat odd to refer to a *conductio quasi indebiti*. After all, *quasi* no longer specifically relates to the *indebitum* requirement. In these circumstances, *quasi* rather indicates an analogous application of the *conductio indebiti*. To avoid confusion, one could somewhat inelegantly

3 See Zimmermann *The Law of Obligations – Roman Foundations of the Civilian Tradition* (1990) 834ff.

4 *Idem* 837-838, 848-851, 870-871.

5 *Idem* 854-857, 871-873.

6 See *Nortje v Pool NO* 1966 (3) SA 96 (A) 134; *B & H Engineering v First National Bank Ltd* 1995 (2) SA 279 (A) 284-285.

7 *Sv “quasi”* in Berger *Encyclopedic Dictionary of Roman Law* (1953).

8 See Von Koschimbahr-Lyskowski *Die Conductio als Bereicherungsklage im klassischen römischen Recht* Vol 2 (1907) 161. The term “*quasi*” was also used in the context of other *condictiones* (see, eg, *D* 12 4 44 on the *conductio causa data causa non secuta*, and *D* 23 3 50pr; *D* 12 7 2 on the *conductio sine causa*. Cf, too, Von Koschimbahr-Lyskowski (*supra*) 142.

9 See Schwarz *Die Grundlage der Conductio im klassischen römischen Recht* (1952) 76, 200-201; also see part 3 3 *infra* on *D* 19 2 19 6 and part 3 5 *infra* on *D* 12 6 26 13. Further see *D* 12 4 6pr where it is said that someone who gives with a view to marriage, which does not take place, can use the *conductio* “as” the expected state of affairs did not materialise (*quasi causa non secuta*; cf Schwarz *supra* 76 n 10).

have called this remedy a *quasi condictio indebiti*, but such a concept was unknown to the Romans.¹⁰

3 Potential fields of application of a *condictio quasi indebiti*

Against this conceptual background, certain civil-law texts will now be examined. These texts deal with a variety of situations where it was not possible to award a *condictio* on the basis that an undue transfer had been made and it had to be determined whether restitutionary relief could be awarded on some other, comparable ground.

3.1 The transfer made by a person who was able to effect set-off

According to *Digest* 16 2 10 1 (Ulpian, *Edict*, book 63), a *condictio* is available to someone who pays while being able to effect set-off.¹¹ The text deals with set-off in the context of *venditio bonorum*, a mechanism used to execute judgments by selling a bankrupt's estate to a buyer who then undertakes to pay creditors a certain percentage of their claims.¹² If a creditor is also a debtor of the bankrupt and the purchaser of the estate claimed payment from the creditor, then the creditor could demand that the purchaser's claim be reduced to the extent of the bankrupt's debt. A creditor who was ignorant of this right and paid a debt to the bankrupt while failing to exercise this right, was thereupon granted a *condictio*.¹³ Thus, if A and B owed each other 100, and A paid B 100, A could reclaim 100. If this were not the case, B would have retained the 100, and in the event of B's bankruptcy, A would only have had a concurrent claim, which could have been worthless, against B.

For present purposes, the basis of the claim is significant. It is said that the creditor can reclaim "*quasi indebitum soluto*", which may be translated with "as if he made a payment which was not due".¹⁴ It can be said that the creditor did not really owe the transfer because he was entitled to raise the defence that the purchaser's claim could be reduced. This claim was never called a *condictio quasi indebiti*, though; it was accepted that this was an application of the *condictio indebiti*.¹⁵

10 See Von Koschembahr-Lyskowski (n 8) 142, 162.

11 "Si quis igitur compensare potens solverit, condicere poterit quasi indebitum soluto."

12 See Pichonnaz "The retroactive effect of set-off (*compensatio*) – A journey through Roman law to the New Dutch Civil Code" 2000 68(4) *The Legal History Review* 554-556.

13 See Von Koschembahr-Lyskowski (n 8) 145; Naber "*Observatiunculae de iure Romano*" 1893 (21) part XXXII *Mnemosyne (Pensatae Pecuniae Condictio Triboniano Restituitur)* 48.

14 The Birks translation in Watson (ed) *The Digest of Justinian* Vol 2 at 9 states that he can bring the *condictio* "as if what was not owing has been paid".

15 *D* 12 6 30 rules out the *condictio indebiti* in cases where set-off is not applicable. This implies that the *condictio indebiti* would be available if the transferor could rely on set-off; further see Zimmermann *Comparative Foundations of a European Law of Set-off and Prescription* (2002) 38 n 97; Zimmermann "Aufrechnung" in Schmoeckel, Rückert & Zimmermann (eds) *Historisch-kritischer Kommentar zum BGB* Vol 2 (2007) 2204ff.

The approach set out above has by and large been adopted in modern South African law in *Southern Cape Liquors (Pty) Ltd v Delipcus Beleggings BK*.¹⁶ A landlord claimed that a tenant was in arrears, cancelled the agreement of lease and claimed damages. The tenant then transferred an amount equal to the arrear rental to the landlord, but subsequently alleged that at the time when the rental was in arrears, the landlord owed the tenant an even larger amount for liquor purchased from it. According to the tenant, it was entitled to rely on set-off, and consequently was not in *mora* or default. Van Zyl J held that the tenant did not waive the right to rely on set-off and had a *bona fide* defence against the landlord's application for summary judgment. He then expressly confirmed that where a transfer is made in ignorance as to the right to rely on set-off, it could be reclaimed as an undue transfer with the *condictio indebiti*.

[I]ndien die skuldenaar sy skuld op 'n ander wyse sou vereffen, sonder om te besef dat hy hom op skuldvergelyking mag beroep, sou hy die betaling wat hy aldus gemaak het kon terugvorder as 'n onverskuldigde betaling. Dit is wat Ulpianus bedoel wanneer hy in D 16.2.10.1 sê dat, indien iemand 'n betaling gemaak het terwyl hy skuldvergelyking kon toegepas het, kan hy die betaling met die *condictio indebiti* terugeis asof dit 'n onverskuldigde betaling was.¹⁷

Whether it is indeed desirable, as a matter of policy, for a transferor to be given the choice to undo the consequences of his actions in this manner is debatable. Thus, it may well be asked why the tenant, who did not invoke set-off at the time when the rental was clearly due, should now be able to do so retrospectively.¹⁸ But these are matters that have to be settled in the context of the laws of set-off and payment as modes of the fulfilment of obligations. They are not primarily the concern of the law of unjustified enrichment. The point here is that an obligation which has terminated because the conditions for the operation of set-off have been fulfilled, cannot subsequently be performed.¹⁹ Such a transfer is undue from the perspective of the law of unjustified enrichment and is recoverable with the *condictio indebiti*.²⁰ There is no need to resort to separate categories of enrichment claims such as a *condictio quasi indebiti*.

16 1998 (4) SA 494 (C).

17 *Idem* at 501. Presumably, the statement only relates to that part of the transfer which need not have been transferred had the transferor relied on set-off. Thus, if A owed and paid B 120, and B owed A 100, it is not clear why A should be entitled to reclaim the full 120. He would have had to pay 20 in any event, and to allow him to reclaim it would violate the basic principle that it is not proper to claim something which must be returned in any event (*dolo facit qui petit quod redditurus est* – see D 44 4 8; D 50 17 173; *Gerber v Wolson* 1955 (1) SA 158 (A) 171E; *Ntai v Vereeniging Town Council* 1953 (4) SA 579 (A) 588G-H).

18 See Zimmermann “*Comparative Foundations*” (n 15) 41.

19 Further see the judgment of Van den Heever JA in *Dickinson Motors (Pty) Ltd v Oberholzer* 1952 (1) SA 443 (A) 451H-452 which contains a rather cryptic reference to D 16 2 10 1, apparently in support of a general principle that restitution can be sought by a person who could have raised a defence against a claim for payment, but nevertheless paid. As to the possibility of awarding the *condictio indebiti* in that case, see the judgment of Harms JA in *Van Reenen Steel (Pty) Ltd v Smith* NO 2002 (4) SA 264 (SCA) para [16].

20 Some systems follow a different approach. After much dispute, the dominant view in modern German law is that the transferor who was unaware of the right to effect set-off is not entitled to an enrichment

3.2 The transfer made without exercising a right of retention or deduction

We now turn to texts that deal with a problem related to that of set-off, namely a failure to withhold part or whole of a performance.²¹ However, unlike set-off, this right does not arise from an entitlement to a counter-performance, but from other sources.

D 30 60 (Julian, *Digest*, book 39) concerns an heir who incurs expenditures on a house subject to a *fideicommissum* and then delivers it to the estate without making any deduction for those expenditures. The *fideicommissum* presumably also covered some funds from which this deduction could have been made.²² A *condictio*²³ is then awarded to the heir “as if” he had paid more than was due (*quasi plus debito solverit*).²⁴ Clearly a *condictio indebiti* could not lie: there was no transfer aimed at discharging a debt.

This text may be contrasted with *D* 12 6 39 (Marcian, *Institutes*, book 8): An heir (fiduciary), in terms of a *fideicommissum*, passed on the inheritance to the ultimate beneficiary (fideicommissary), but without requiring that the fideicommissary gave him a *cautio* (essentially an indemnity or security). It is then said that the heir could reclaim any amount paid in excess of his liability “*quasi indebitum*”. This text has been translated as “on the theory of payments not owed”.²⁵ Unlike the previous text, however, it is less clear whether an analogous application of the *condictio indebiti* is involved: there is a transfer, and it does exceed that which the heir was obliged to transfer. It may then be more appropriate to translate *quasi* with “as”, which means the transferor could reclaim the excess “as” something not due, and was in fact awarded a *condictio indebiti*.²⁶

What, then, is the relevance of these texts from a modern perspective? The answer, in short, is not much. As far as reimbursement for unauthorised improvements is concerned, Roman law was less developed than modern South African law which essentially equates the fiduciary to a *bona fide possessor*, and provides him with an enrichment claim for certain improvements to the assets under his control.²⁷ There is no need for awarding a *condictio* based on some deemed undue transfer. And from a modern perspective there

claim; the transfer is regarded as a valid act of fulfilment despite the existence of such a right (see Zimmermann “*Comparative Foundations*” (n 15) 38-39 esp n 98; Zimmermann “*Aufrechnung*” (n 15) 2204-2205).

- 21 Apart from the texts below, see further *D* 19 1 30pr (Africanus, *Questions*, book 8), which is less relevant from a modern perspective, but also illustrates how a deemed overpayment may be reclaimed with a *condictio*; the remedy has been called a *condictio quasi plus debito solvere*, or, more simply, a *condictio quasi indebiti* (see Farner *Logik der Kommunikation, Rationalität des Rechts, Kalkül der Macht* (2008) 75).
- 22 Von Koschimbahr-Lyskowski *Die Condictio als Bereicherungsklage im klassischen römischen Recht* Vol 1 (1903) 98.
- 23 As to the dispute whether the *condictio* related to the cost of the repairs or to the return of the house itself, see Von Koschimbahr-Lyskowski Vol 1 (n 22) 99 and Vol 2 (n 8) 221ff; Von Mayr *Die Condictio des römischen Privatrechts* (1900) 186.
- 24 Further Francke *Civilistische Abhandlungen* (1826) Zweite Abhandlung 92-93.
- 25 The translation is by Birks in Watson (ed) *The Digest of Justinian* Vol 1 (rev ed 1998).
- 26 See part 2 *supra* on the various meanings of “*quasi*”.
- 27 Voet *Commentarius ad Pandectas* (Paris, 1829) 36 1 61; *Ex parte van Zyl* 1948 (2) SA 210 (C) 213-214; the enrichment claim is secured by a right of retention.

can be no objection in principle to awarding a *conductio indebiti* if more was transferred to an heir than he was entitled to. Matters are somewhat more complicated, though, when creditors with valid claims against estates are paid contrary to the rules governing the distribution of the assets. To this point we return later.²⁸

3.3 The transfer made in fulfilment of a contract that had terminated due to supervening impossibility or frustration

A tenant rents a property for a year and pays the full rental in advance. After six months, the premises are destroyed. The tenant now seeks repayment of the rental for the remaining period. According to *D 19 2 19 6* (Ulpian, *Edict*, book 32)²⁹ the tenant should reclaim payment for the remaining period with an action on hire (*actio conducti*).³⁰ Ulpian expressly rejects the possibility of awarding a *conductio* “as if” (or perhaps “as”) the money was not owed” (*quasi indebitum*).³¹ The reason provided is that an overpayment was not made by mistake as to liability,³² but to gain an advantage in concluding the hire.³³ It would have been quite different, he adds, if a tenant would have hired for ten but paid fifteen – then the *conductio* could be used, “for there is considerable difference between a person paying by mistake and one who prepays his entire rental payment”.

From a modern perspective, it is notable that the text only regards a contractual claim as an alternative to the *conductio indebiti*. No other *conductio* is considered – not even a *conductio* on the basis that a transfer was made under a valid legal ground which then subsequently fell away. This is the traditional field of application of the *conductio ob causam finitam* which falls under the *conductio sine causa specialis*. In modern South African law, one of the fields of application of this *conductio* is indeed to obtain the restitution of transfers made in fulfilment of a contract that terminated due to supervening impossibility.³⁴ This enrichment claim is distinct from the *conductio indebiti* as well as

28 See *infra* at part 3 6.

29 See Zimmermann (n 3) 347; Rainer & Filip-Fröschl *Texte zum Römischen Recht* (1998) 197-198. On the disputes as to the integrity of the text see Schwarz (n 9) 76; Litewski “Die Zahlung bei der Sachmiete (Vor oder nach Ablauf der Mietzeit) im Römischen Recht” 2002 (70) *The Legal History Review* 229, 242.

30 According to Von Mayr (n 23) at 346 the reason for awarding a contractual claim is that this type of eventuality is to be expected within the contractual domain. His argument that the contract could be rescinded in the event of a mistaken payment is not convincing.

31 The context is not conclusive. Frier in Watson (ed) *The Digest of Justinian* Vol 2 translates “*quasi*” as “on the theory that the money was not owed”, which is similar to “as if the money was not owed”, while Schwarz (n 9) 75-76, esp n 10 favours the more direct translation of “*quasi*” with “as” (*als*) as opposed to “as if”; as to these differences, see part 2 *supra*.

32 It is rather fanciful to regard the tenant who paid in advance as being mistaken in the sense that he failed to contemplate the possibility of destruction of the premises prior to the expiry of the lease (see Schwarz’s criticism at (n 9) 75 of Solazzi *L’errore nella conductio indebiti* Vol 1 (1939) 38).

33 The advantage of paying up-front is presumably to ensure or “secure” that he enjoys the benefits of the lease (see Litewski (n 29) 229, 248).

34 See Voet (n 27) 12 7 1; *Hughes v Levy* 1907 TS 276; *Wiley NO v Mundinch and Co* (1902) 19 SC 447 452; *Holtshausen v Minnaar* (1905) 10 HCG 50; further cf *Kudu Granite Operations (Pty) Ltd v*

from any contractual remedy aimed at restitution. Again, therefore, no need exists for introducing a *condictio quasi indebiti*.

3.4 The transfer made in fulfilment of a gambling agreement

Roman law strongly disapproved of gambling. *Digest* 11 5 4 (Paul, *Edict*, book 19) deals with remedies aimed at undoing the consequences of contravening these restrictions in the context of gambling by a slave or a son-in-power. Mention is then made in *Digest* 11 5 4 2 of an *actio utilis* that could be directed by the losing party against patrons and parents to recover gambling losses.³⁵ Although the remedy is clearly not a *condictio*, the sixteenth-century humanist Cujacius in a comment on this text refers to a “*condictio, quasi indebiti*”.³⁶ The argument apparently is that even though the transfer of the losing party was made in fulfilment of an agreement, it should be regarded as if it was not due.

Again, however, we find that subsequent developments have undermined any need for resorting to the notion that a *condictio* should be awarded in respect of a *quasi indebitum*. In Roman-Dutch law, gambling was viewed with less disapproval³⁷ although there was still some support for allowing losing parties rights of restitution.³⁸ To the extent that gambling is not in any event legalised by statute,³⁹ the South African common law generally accepts that transfers made in fulfilment of gambling agreements cannot be reclaimed. Although gambling agreements do not give rise to typical natural obligations,⁴⁰ there is no scope for the application of an enrichment action to reclaim gambling losses – especially not the *condictio ob turpem vel iniustam causam*, which traditionally applies in the context of illegal transactions, and is tempered by the *in pari delicto* rule, which generally excludes a claim when both parties’ conduct is tainted by turpitude. In these circumstances there is also no place for a *condictio quasi indebiti* aimed at ensuring restitution to the losing party on the basis that it is “as if” a transfer was not due.

Caterna Ltd 2003 (5) SA 193 (SCA) 201-202.

- 35 The losing party who was granted the *actio utilis* was presumably a son or liberated slave who incurred losses in gambling with a parent or patron (see Glück *Pandekten* Vol 2 Book 5 Tit para 758 at 333).
- 36 *Paratit. C. De Aleatoribus*: “Et est non leve crimen si quis vetita luserit alea, cujus odio multa singulariter recepta sunt: ut condictio, quasi indebiti competat ei qui victus alea sciens ultro solvit, id quod in alea amisit” (= *Cujacii Operarum – Tomus Secundus* (1722) 185). For comment see *Cour de Cassation – Audience de Rentré du 4 novembre 1861 – Discours Prononcé par M A Blanche, Avocat Général, De La Loi Commerciale* (Paris, 1861), 40; his version of the Cujacius text is not identical to the one quoted above; for example, it contains no comma between “*condictio*” and “*quasi indebiti*”.
- 37 See Gane “The Roman-Dutch law in relation to gambling and wagering” 1906 *SALJ* 21 25ff.
- 38 See Dovring, Fischer & Meijers (eds) *Grotius. Inleiding tot de Hollandsche Rechtsgeleerdheid* 3 3 48-49 (1965).
- 39 The National Gambling Act 7 of 2004 regulates the consequences of certain gambling activities; s 16 specifically deals with the enforceability of gambling debts.
- 40 See *Gibson v van der Walt* 1952 (1) SA 262 (A) 267-268.

3.5 The transfer that only partially fulfils an alternative obligation

According to *Digest* 12 6 26 13 (Ulpian, *Edict*, book 26), if a person is obliged either to pay an amount of money or to deliver a thing and then pays part of the money, only to deliver the thing later on, the partial payment may be recovered “*quasi indebita*”. Where *quasi* means “as if”, the words *quasi indebita* then imply that the payment is due but must be treated “as if” it is not due or deemed to be not due. It is not clear from the context, though, why it is necessary to deem the payment to be undue. If the obligation is either to pay in full or to transfer an object, partial payment gives rise to a state of uncertainty as to whether the transfer is due or not; it cannot then be decided whether or not the transfer is *sine causa*. However, once the object is transferred, the uncertainty is over. It is then established that the payment cannot serve to fulfil an obligation. The transfer can thereupon be reclaimed “as something not due” or “on the basis that it is not due”.⁴¹ The appropriate remedy is then indeed the *condictio indebiti*.

This interpretation also accords with the related example which Pothier, in a discussion of the *condictio indebiti*, provides of a debtor “in our colonies” who was obliged to pay ten crowns or deliver the slave Jacques, and then initially only paid five crowns. If the debtor subsequently paid the remaining five crowns, the payment of the first five crowns would turn out to be due; but if the slave Jacques was delivered, the initial payment of five crowns would turn out not to be due and would be recoverable with the *condictio indebiti*.⁴²

In modern South African law, a transferor who has exercised the choice to pay rather than deliver the object, and then paid in part, would not be able to change his mind and subsequently deliver the object. The partial transfer would be due and cannot be reclaimed. The recipient would be entitled to specific performance of the obligation to pay the balance.⁴³ However, as indicated above, if the transferor has made a partial payment without exercising a final choice, the position remains in abeyance until the choice is made. It is too early to determine whether restitution should be awarded. If the choice ultimately is rather to transfer the object, it would simultaneously be established that the partial payment is not due. The appropriate claim with which to reclaim the partial payment would be the *condictio indebiti*. There is no need to award a *condictio* on the basis that such a payment should be deemed not to be due.

41 See part 2 *supra* on “*quasi*” being translated with “as”.

42 Hosten (ed) and Hosten & Van Soelen (trls) *Treatise on the Quasi-contract called Promutuum and on the Condictio Indebiti* (1987) para 155). See *D* 46 3 34. Further see *Licences and General Insurance Co v Ismay* 1951 (2) SA 456 (E) 461F-462D on the position where a promise is given to pay an amount to one person or to transfer a thing to another and the former receives full payment, but the latter is also given a share in the thing. The principle is apparently that if the party who received the share only did this on behalf of the party who received full payment, the *condictio indebiti* can be raised against the latter. It is then said to be “as if” he made an undue payment at the latter’s behest.

43 On the operation of alternative obligations see *Dryland Farms (Pty) Ltd v Botha* 1969 (2) SA 617 (GW) 621.

3.6 The *ultra vires* transfer made by a person acting in a representative capacity

Thus far, the focus was primarily on Roman texts. We now turn to the two South African cases that refer to a *condictio quasi indebiti*. Both deal with *ultra vires* transfers made by persons acting in a representative capacity.

In *Van Wijk's Trustee v African Banking Corporation*⁴⁴ an executor improperly paid a creditor whose claim should have been postponed instead of paying a preferent creditor. The assets of the estate were not sufficient to meet the liabilities. The question then arose whether the executor should be entitled to seek restitution of the overpayment. According to De Villiers JP, the payment of a debt by the executor was “in the nature of a *quasi indebitum*”, and “the estate, through the executor or trustee, [should be] given the right to recover what has been improperly paid by way of a *condictio quasi indebiti*”.⁴⁵ But why *quasi indebiti*? There appears to be two possible motivations. One is a concern with whether the transfer may be regarded as undue when it was in fact due from the perspective of the recipient who had a valid claim against the estate.⁴⁶ The other is with whether restitution may be sought by the person who paid in a representative capacity, as opposed to the persons whom he represents.⁴⁷ It will be noted that especially the first of these concerns tie in with some of the Roman texts examined earlier, which likewise relate to transfers that could be regarded as due from the perspective of the recipient but somehow still did not result in valid fulfilment.⁴⁸

However, the seeds of the *condictio quasi indebiti* which De Villiers JP sowed in the *Van Wijk* case did not fall on fertile ground. In due course, the right of the executor in office to recover incorrect distributions became entrenched in a statute,⁴⁹ and in related situations not covered by statute, the courts awarded other remedies. Thus, in *C C A Little & Sons v Liquidator R Cumming (Pvt) Ltd (In Liquidation)*,⁵⁰ it was held that the *condictio sine causa* was the appropriate remedy to reclaim a payment which a judicial manager had made to a creditor with a valid claim but which unlawfully preferred one pre-judicial management creditor over another.⁵¹ The possible application of the *condictio indebiti* was excluded on the ground that an obligation was validly owed.⁵² The purpose of awarding the *condictio sine causa* was then to ensure restitution even though the transfer was due, on the basis that it was unlawful or prohibited by law.⁵³

44 1912 TPD 44 52-53.

45 *Ibid.*

46 *Idem* 51.

47 *Idem* 52-53.

48 See, eg, *D* 16 2 10 1 (the bankrupt had a valid claim for payment); *D* 19 1 30 *pr* (the purchaser was entitled to delivery of the slave); *D* 12 6 39 (the fideicommissary was entitled to the inheritance).

49 S 50(b) of the Administration of Estates Act 66 of 1965.

50 1964 (2) SA 684 (SR).

51 *Idem* 691A-C.

52 *Idem* 691B.

53 *Idem* 691B-C, *inter alia* relying on Voet (n 27) 12 7 2 which recognises that the *condictio sine causa* is awarded when “something is given for a cause which has indeed in truth an existence, but is yet *ipso*

This application of the *condictio sine causa* was endorsed in *Rulten NO v Herald Industries (Pty) Ltd*,⁵⁴ where a trustee of an insolvent estate overpaid a creditor by wrongly treating the claim as preferent. One reason for awarding this *condictio*⁵⁵ was essentially that any *causa* that may have existed at the time of transfer fell away once the dividend was determined. The other reason, which relates to the ground advanced in *Little* above for awarding the *condictio sine causa*, was that the transfer exceeded the lawful authority of the trustee or was *ultra vires*. However, unlike in *Little*, the court in *Rulten* was also willing to award the *condictio indebiti*, essentially on the basis that a trustee who lacked authority could not effect a valid payment to the creditor.⁵⁶ The transfer therefore failed to fulfil an obligation. Ultimately, these cases reveal two possible bases for awarding restitution: either the transfer is due or owed to the creditor, but is still recoverable because it is prohibited or *ultra vires* (the claim is then the *condictio sine causa*); or the transfer is not due or owed to the creditor because he is only entitled to what he can receive lawfully from a person with the capacity to transfer to him (hence the *condictio indebiti*). No need then exists to deem a transfer to be undue or to resort to the notion of a *quasi indebitum*.

The story of the *condictio quasi indebiti* could have ended here, but it did not. One would perhaps have been forgiven for believing that the *condictio quasi indebiti* no longer formed part of South African law at the end of the twentieth century. However, in *Bowman, De Wet and Du Plessis NNO v Fidelity Bank Ltd*,⁵⁷ a case which concerned the related question of the recoverability of *ultra vires* payments by liquidators, Harms JA returned to the *Van Wijk* judgment and its reference to the *condictio quasi indebiti*. He commented as follows:

[In *Watson's Executor v Watson's Heirs* (1891) 8 SC 283] De Villiers CJ found (at 286) that, in an action by executors *qua* executors against heirs for recovery of their inheritance, the only question was whether the amount claimed was then due. Error in payment of the inheritance was not required for a successful claim and the absence of any reference to excusability had to follow as a matter of course. It is therefore understandable why this action has been referred to as a *condictio quasi indebiti* in *Van Wijk*. Once that is understood, it is unnecessary to introduce the complication of the *condictio sine causa* as was done in, for instance, *Little* and *Rulten*.⁵⁸

For present purposes it is crucial that the reason provided for referring to the claim as a *condictio quasi indebiti* is not that there is a deviation from the requirement that an *indebitum* must be transferred. The reason is said to be that another requirement of the *condictio indebiti*, namely an (excusable) error as to liability, had not been met.

jure null” (Gane (trl) *The Selective Voet* Vol 2 (1955) 860).

54 1982 (3) SA 600 (D). See Carey Miller “*Condictio indebiti*: Overpayment by a trustee on insolvency” 1983 *SALJ* 183.

55 1982 (3) SA 600 (D) 610F-G.

56 *Idem* 610D-E.

57 1997 (2) SA 35 (A) 41 45.

58 *Idem* 45D-F.

The notion that the term *condictio quasi indebiti* could be used to describe what essentially amounts to an “errorless” *condictio indebiti* is unfortunately not free from difficulties. First, in dealing with the *condictio quasi indebiti*, the *Van Wijk* judgment reflected no discernible interest in whether error should be required in reclaiming the transfer. As indicated earlier, the reference to *quasi indebitum* should rather be viewed in the context of a concern with whether a transfer may be regarded as undue if it was due from the perspective of the recipient, and with whether restitution may be sought by a person who pays in a representative capacity.⁵⁹ As we have seen, it is also in contexts like these that the concept of the *quasi indebitum* features in the civilian tradition.

This brings us to the second problem. In the light of these concerns, the possible application of the *condictio sine causa* in these circumstances should perhaps not be discounted so easily as Harms JA suggests. As we have seen, there are two possible reasons for awarding restitution in these situations: the one is that a transfer is not owed to the recipient to the extent that it exceeds that which the representative can validly transfer in the scope of his authority (the domain of the *condictio indebiti*); and the other is that a transfer is owed to the recipient, but is not supported by a legal ground due to the lack of authority (the domain of the *condictio sine causa*). It would have simplified matters had the *Rulten* case exercised a clear choice between them. But there appears to be no discernible benefit associated with further introducing the concept of the *condictio quasi indebiti* to describe the claim for restitution in the absence of proof of an error.

Finally, the *dictum* is problematic inasmuch as it suggests that error is a core feature of the *condictio indebiti* proper. As Harms JA himself acknowledged, the requirements of the *condictio indebiti* may be deviated from and it could be applied analogously in new situations.⁶⁰ It is generally accepted that there are other cases where the *condictio indebiti* is awarded without proof of error, but without any need being felt to describe the claim as a *condictio quasi indebiti*. Thus, if an undue transfer is made under duress and protest, the relevant claim is the *condictio indebiti* and not a *condictio quasi indebiti*.⁶¹

4 Conclusions

It does not appear, from a historical perspective at least, that it would be advantageous to recognise an enrichment claim styled the *condictio quasi indebiti* to accommodate cases where the requirements of the classic claim for restitution of undue transfers, the *condictio indebiti*, have not been met. In certain rare cases, Roman law admittedly allowed restitution of a transfer by deeming it not to be due or regarding it as a *quasi indebitum*. However, from the perspective of the modern South African law of unjustified enrichment, these instances generally involve transfers that are actually undue and hence may be brought home under the *condictio indebiti*, or that are already accommodated

59 *Idem* 52-53.

60 See *Bowman, De Wet and Du Plessis NO v Fidelity Bank Ltd* 1997 (2) SA 35 (A) 39J - 40A-B (per Harms JA); *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A), especially 333G-H; *Alphina Investments Ltd v Blacher* 2008 (5) SA 479 (C) par 21.

61 See *Commissioner of Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A).

under other claims: most notably the *condictio sine causa (specialis)*, which traditionally is the residual category accommodating transfers made without legal ground. Finally, to refer to a *condictio quasi indebiti* in situations where an undue transfer is not made in error may not only invite confusion with cases where there is a problem with the requirement that the transfer must be undue or an *indebitum*, but also lacks any clear basis in the civilian tradition.