Chapter 19
Disgorgement of Profits in South African Law

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Abstract Various branches of South African law could apply when illegal conduct or a wrong has resulted in a profit, gain, benefit or enrichment on the side of the defendant, and it has to be established to what extent such a profit must be surrendered or 'disgorged'. In this report the focus is mainly on private and commercial law, and especially on the role the laws of delict and unjustified enrichment could play in ensuring the disgorgement of illegal profits. The first part of the report sets out relevant principles of private law, and especially of the laws of delict and unjustified enrichment, while the second part focuses on specific fact patterns or cases that are potentially concerned with such disgorgement. The concluding section evaluates the current position and potential directions South African law could take.

Keywords Disgorgement • Profits • South Africa law • Illegal conduct • Wrong • Gain • Unjustified enrichment

Introduction: Definition of Theme; Branches of Law Applicable

The central theme of this report is how South African law deals with situations where illegal conduct or a wrong (often amounting to a delict or tort) has resulted in a profit, gain, benefit or enrichment on the side of the defendant, and especially to what extent such a profit must be surrendered or 'disgorged'. As the General Reporter's Questionnaire points out, various branches of law and instruments could apply in these situations. South African law amply illustrates this proposition. In the

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context of public law, for example, provisions of criminal law and administrative law may impose a variety of sanctions or punishments, leading effectively to the neutralisation of the illegal profit.[1] But here the focus will mainly be on private and commercial law, and especially on the role the laws of delict and unjustified enrichment (but also certain statutory provisions that cannot specifically be classified) could play in ensuring the disgorgement of illegal profits.

The South African experience bears out the general observation in the Questionnaire that the relevant remedies are generally latent, in the sense that it is not readily apparent that they could be applied to cases of profiting as a consequence of illegal conduct. More specifically, South African law has not adopted the conceptual apparatus, favoured by some in the common-law context,[2] whereby a strong distinction is drawn between the term 'compensatory' damages, which is aimed at making good a loss, and 'gain-based' damages (or some functionally equivalent term), which focuses on the defendant's gain. South African law does use the concept 'restitutionary damages', but only in limited contexts. These include cases where contractual consent has been obtained in an improper manner[3] or where there has been breach of contract,[4] and the award of 'restitutionary' damages is aimed at restoring the parties in their previous positions. It would further be rather confusing in the South African context to refer to a remedy primarily aimed at disgorging profits as a remedy of "disgorgement damages", given the traditionally close association the word "damages" has to compensating a loss, rather than disgorging a gain.

The report is divided into two parts. The first part sets out some general principles of private law, and especially of the laws of delict and unjustified enrichment, in regard to the disgorgement of illegal profits. The second part in turn focuses on specific fact patterns or cases that are potentially concerned with such disgorgement. Against the background of these overviews, the concluding section evaluates the current position and potential directions South African law could take.

[1] See e.g. section 18 of the Prevention of Organised Crime Act 121 of 1998 on confiscation orders aimed at ensuring that persons cannot benefit from their wrongdoing; section 300 of the Criminal Procedure Act 51 of 1977 on orders compelling criminals to compensate victims of crime; and section 8 of the Promotion of Administrative Justice Act 3 of 2000 on orders to make restitution where a person has gained from unauthorised administrative action; du Plessis (2012), 15–116.

[2] See Edelman (2002).

[3] See section "Breach of Contract" below; Mkhwanazi v Quartermark Investments (Pty) Ltd 2013 (2) SA 549 (GSJ) para. [61] (upheld on appeal in Quartermark Investments (Pty) Ltd v Mkhwanazi 2014 (3) SA 96 (SCA)); further see Davidson v Bonafede 1981 (2) SA 501 (C).

[4] See Mainline Carriers (Pty) Ltd v Jaad Investments CC 1998 (2) SA 468 (C).

General Principles of the Laws of Delict and Unjustified Enrichment

Often, when a legal problem lies at the periphery of two or more established fields of law, its solution is hampered by the uncertainty of which area provides its true home and by the fact that 'the core assumptions of the dogmatic structure of each field can be expected to begin to show their imperfections more clearly the further one moves from the centre'.[5] Hugh Collins has remarked that when courts or legislators create practical solutions to problems that do not fall within established legal doctrine, jurists typically 'seek ways to refine or revise the rules of subsystems in order to restore formal rationality'.[6] In South Africa, parliament and the courts (applying and interpreting the common law) have indeed produced disgorgement responses or the functional equivalent to certain instances of improper profit-taking. However, insufficient doctrinal analysis has been devoted to the issue, and thus there is as yet no generally accepted theoretical map of this area of our law. But there is also a further problem: many instances that would be the subject of a surrender order in other legal systems escape this sanction in our system simply because the South African courts have been immobilised by doctrinal uncertainty. This means that the purpose of scholarly analysis of this issue in South Africa should be both to bring doctrinal order and to provide guidance on whether the gaps should be filled, and if so, how this should happen.

As will appear from the discussion below of the specific instances that involve disgorgement of profits, South African law has developed remedies that in effect erase improper profits mostly by way of statutory interventions[7] or in the law of delict,[8] while the law of unjustified enrichment has contributed little in this area, although it has the greatest potential to do so if the courts were to be sufficiently bold in reworking certain fundamental principles.

Two signposts send those looking for the home of the disgorgement of illegal profits in South Africa into no-man's-land: on the one hand, the law of delict in South Africa rests on the fundamental precept, as formulated in *Montres Rolex SA v Kleynhans*[9] 'that the commission of a delictual act entitles the injured party [only] to compensation from the wrongdoer for calculable pecuniary loss actually sustained or likely to be sustained in consequence of the wrong'.[10] In other words,

[5] Visser (1997), at v.

[6] 'Productive learning from the collision between the doctrinal subsystems of contract and tort'; Collins (1997), 55.

[7] See the sections on "Infringing Intellectual Property Rights" and "Breach of Fiduciary Duties" below.

[8] See the sections on "Profiting by Using Property", "Profiting by Consuming Property", "Profiting by Disposing of Property" and "Infringing Personality Rights" below.

[9] 1985 (1) SA 55 (C) at 66 per Seligson AJ.

[10] Montres Rolex SA v Kleynhans 1985 (1) SA 55 (C); and see also Cadac (Pty) Ltd v Weber-Stephen Products Co 2011 (3) SA 570 (SCA).

the South African law of delict is able to remedy improper gains that also involve a loss on the part of the plaintiff (as the discussion of the *actio ad exhibendum* and the *condictio furtiva* below will show),[11] but it does not contemplate the annulment of improper gains that do not involve loss on the part of the plaintiff.[12] On the other hand, the law of unjustified enrichment has as one of its most basic principles that an enrichment claim can neither exceed the defendant's enrichment nor the plaintiff's impoverishment – the so-called 'double-cap' or 'double-ceiling' rule. Therefore, if the plaintiff has suffered no impoverishment, as is often the case where illegal profits are made, the law of enrichment cannot provide a remedy.[13] In both areas of law the real issue is the requirement of a loss.

There has been nothing in this country as vigorous as the English-law debate which has resulted in the now-dominant view that draws a firm distinction between restitution of an unjust enrichment and restitution of a wrong,[14] nor is there the even older certainty of German law that the reversal of a profit resulting from an *Eingriff* (invasion) of another's rights is part of the law of unjustified enrichment.[15] There is, however, some awareness of the fact that the different sections of South African law that deal with (or could deal with) disgorgements of profits are insufficiently co-ordinated to allow a principled approach to when and how illegal profits should be reversed. Thus, already in *Montres Rolex SA v Kleynhans*[16] Seligson AJ, while denying the remedy of account of profits as being contrary to the basic principles of our law of delict, acknowledged that it is unsatisfactory that there is no remedy available to deal with the problem:

> All this is not to say that the policy of preventing the unjust enrichment of the infringer at the expense of the trade mark proprietor has nothing to commend it. On the contrary, it would be an inequitable result if the deliberate infringer is able to retain the profits made from the unlawful use of the plaintiff's trade mark in circumstances where such profits do not represent the plaintiff's actual loss.

He held that there should be an 'innovative fashioning of a remedy in our law to deal with the situation where an infringer clinches, by filching the trade marks of another, sales which the latter would probably not have made', but he did not see himself able to refashion the law to accommodate such a remedy.[17]

Since this case there has been some academic analysis of the problem in *Montres Rolex* and similar situations. Mr Justice Deon van Zyl, commenting on the case,

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[11] See the section on "Infringing the Right to Use, Dispose of or Consume Corporeal Property".

[12] See Du Bois (2007), 109 et seq.

[13] See Visser (2008), 161 and du Plessis (2012), 41 et seq.

[14] See Burrows (2011), 9–12.

[15] See Dannemann (2009), 102. South African law, like German law (see the report of Tobias Helms in this volume), recognises that a person who manages another's affairs in his own interests may be required to account for profits earned while doing so. But, as in German law, these cases of *quasi negotiorum gestio* are of virtually no importance in practice.

[16] 1985 (1) SA 55 (C) at 68.

[17] For more detail, see the section on "Breach of Fiduciary Duties" below.

thought that the law of delict was a more promising site for the development of this kind of remedy than the law of unjustified enrichment:

> There is certainly a need for an equitable remedy to enable a plaintiff to claim benefits unjustly acquired by a defendant, without the plaintiff having been impoverished or having otherwise suffered damages as a result of such acquisition. Pauw has suggested (in (1980) 97 *SALJ* 221 at 224.) that Aquilian liability may be extended to provide for the recovery of wrongfully acquired benefits. The action would be delictual, although it would closely approach an enrichment action directed at the recovery of unjustly acquired benefits.[18]

The law of delict can confidently be described as one of the most dynamic parts of South African law and it has time and again proved itself to be adaptable to the circumstances of the day. Over time, English law, Scots law, German law and modern Dutch law have all been used to mould the received Roman-Dutch law of delict into a modern, flexible and progressive system. Why judges are more activist in certain areas of the law and not others is a difficult question to answer, but there can be no doubt that South African judges have consistently been bold in developing the law of delict. The law of delict therefore appears to be the area where our law is most likely to come up with an answer to the present conundrum. However, the problem is that for the law of delict to reverse improper gains would require, on the one hand, the abandonment of one of its most basic tenets, namely that it is aimed at making good harm suffered by the plaintiff,[19] and, on the other, an investigation into fault on the part of the defendant, which is not appropriate to this kind of claim.[20]

Others have thought that the law of unjustified enrichment can and should be adapted, by relaxing the double-cap/ceiling rule to allow the reversal of improperly acquired benefits by taking from another or by invading the rights of others.[21] Unlike the law of delict, change in the law of unjustified enrichment in South Africa has happened only in small, incremental steps. Even the creation of the conceptual apparatus for a general enrichment action in *McCarthy Retail v Shortdistance Carriers*[22] has not brought anything along the lines of the dramatic advances that we have become accustomed to see in the law of delict. So no-one would say that the odds are in favour of the desired remedy being fashioned in this area of the law. Yet, ironically, since the very business of the law of unjustified enrichment is to strip away benefits that are being unjustifiably retained, this is precisely where the remedy should be created.[23] It is true that the double-ceiling rule is a long-standing rule in the law of enrichment, but it is a pragmatic rule, the relaxation of which would not do any violence to the fundamental precepts of this area of law. Relaxing the double-ceiling rule would merely require that appropriate rules

[18] Van Zyl (2000), 329 at 334.

[19] See generally Midgley and Van der Walt (2005), para. 143.

[20] du Plessis (2012), 47.

[21] See du Plessis (2012), 45; Visser (2008), 116 et seq. See also the various possible developments suggested by Blackie and Farlam (2004), 469 et seq. See Visser and Kleyn (2000), 300.

[22] 2001 (3) SA 482 (SCA).

[23] du Plessis (2012), 47.

would have to be fashioned to determine the quantum of the enrichment in these cases[24] – and this would not be too difficult, as the experience in many other legal systems demonstrates. At present, because the law requires both the defendant to have been enriched and the plaintiff to have been impoverished, the measure of enrichment across the board is stated simply as being the defendant's enrichment or the plaintiff's impoverishment, whichever is the lesser. This would still remain the case outside of enrichment through invasion of rights, but in the latter case one could make use of devices such as reasonable rental fees and other market-related standards to determine the measure by which the defendant has been enriched.[25]

It is clear that any private-law remedy (be it in delict or in enrichment) should not amount to punishment. Thus Midgley and Van der Walt[26] remark that 'people who face the prospect of punishment are accorded certain procedural safeguards ... [and therefore] punitive damages in delict may very well be unconstitutional'. That would also be true of any enrichment remedy that purports to punish. But the mere fact that a particular remedy strips away a profit does not place it in the category of punishment. On the contrary, for a private-law system to have an appropriate set of remedies to reverse profits obtained through the invasion of the rights of others contributes to its ability to fulfil its role of dispensing corrective justice. Thus Jules Coleman states in an early contribution:

> In my view, corrective or compensatory justice is concerned with the category of wrongful gains and losses. Rectification, in this view, is a matter of justice when it is necessary to protect a distribution of holdings (or entitlements) from distortions which arise from unjust enrichments and wrongful losses. The principle of corrective justice requires the annulments of both wrongful gains and losses.[27]

The law of unjustified enrichment is not entirely explicable in terms of corrective justice, but there can be little doubt that this concept lies at the heart of this area of South African law, and that enrichment law should accordingly be developed in such a way by the courts that it achieves compensatory justice as perfectly as possible. This means that whenever a court identifies an instance where a gain is unjustified – as it did in *Montres Rolex* – it has a duty to fashion a remedy to restore equality; it is not good enough to identify that which must be corrected without also creating a remedy where none exists. After all, South African law does not proceed, as Roman law did, from the position of *ubi remedium, ibi ius*; rather its stance is *ubi ius, ibi remedium*.

Any private-law remedy for reversing an unjustified gain that results from invading the right of another should be such that it ensures that both plaintiff and defendant receive what they deserve – there must be, in Hanoch Dagan's words – 'correlativity between the defendant's liability and the plaintiffs entitlement, as well

[24] du Plessis (2012), 39 et seq. and 44 et seq.

[25] du Plessis (2012), 39 et seq. and 44 et seq.

[26] Midgley and Van der Walt (2005), para. 143.

[27] Coleman (1988), 185.

as between the plaintiff's entitlement and the remedy'.[28] The basic principle of correlativity in corrective justice insists that the defendant should not have to give up more than that by which he or she has been enriched; but at the same time it also insists that the plaintiff should not receive more than the injustice suffered requires. In instances of enrichment other than those induced by wrongdoing, the imbalances that have arisen are appropriately corrected by ordering the economic loss, the impoverishment that the plaintiff has actually suffered, to be repaid. But where the injustice is embodied in someone being enriched by, for example, arrogating to him- or herself the right to use another's property without permission, or by publishing private information about that other person, the resulting imbalance cannot be restored by using this measure, since the plaintiff would not necessarily have suffered any economic loss. To determine what exactly the plaintiff is entitled to claim necessitates a consideration of the social values that the law wishes to advance in the particular situation.

In some cases, ordering the disgorgement of the whole profit will be necessary to repair the disturbed equilibrium. Thus, in a case of the unauthorized publication for gain of private information concerning a celebrity, only an order to pay to the wronged party the whole profit that emanated from that publication will be appropriate – anything less would effectively mean that the publisher could give itself a licence to exploit the publicity value of the celebrity at a discount rate.[29] In other cases it would not be appropriate to order the whole profit to be disgorged. For instance, in cases where there is exploitation of a resource in circumstances where it is likely that that permission would have been given if it had been sought, a reasonable licence fee (fair market value) would restore the balance between the parties,

Dagan comments as follows on these two measures:

> The profits measure reflects and reverses a breach of the plaintiff's entitlement to control the resource, while the fair market value reflects and reverses a breach of her entitlement to the well-being embodied by the resource. The claims to control and well-being … entail the applicable measures of recovery in the very strict way the correlativity thesis requires. Thus, in order for control to be respected, the resource holder must be entitled to the infringer's profits. (Deterrence is thus an entailment of the entitlement to control, which is intrinsic, rather than extrinsic, to the parties' relationship.) And once an infringement has occurred, nothing but the restitution of profits can rectify it. On the other hand, where the only legitimate claim of the plaintiff respecting the resource is to the well-being which it embodies, she is entitled to the fair market value of its use or alienation, and even an intentional circumvention of the market should not trigger any additional recovery.[30]

The precise ambit of the remedies that should be available can be determined only in the context of the situations where they are or might be required. We will

[28] 'The distributive foundation of corrective justice' (Dagan (1999), 138 at 143). 'This correlativity', says Dagan (at 151) 'between the two parties is what distinguishes private law from regulation, whereby individuals are penalized for harms committed against society.'

[29] Visser (2008), 683.

[30] Dagan (1999), 138 at 152.

now proceed to consider the specific instances in which disgorgement of profits is recognised or could be recognised in South African law.

Specific Cases Potentially Involving Disgorgement of Profits

Infringing the Right to Use, Consume or Dispose of Corporeal Property

It is well-established in South African law that a broad range of rights may be held with respect to corporeal property. These include the right to use, consume or dispose of it. Where another person gains by infringing such a right, the holder of the right is provided with a variety of remedies, some of which could directly or indirectly oblige the infringing party to surrender these gains.

Profiting by Using Property[31]

Certain special cases of gaining through use of property could give rise to statutory relief. For example, legislation imposing formal requirements for the sale of land allows the seller under a formally invalid contract to recover reasonable compensation for the occupation, use or enjoyment the purchaser may have had of the land.[32] The statutory relief also concerns cases where the use may have been lawful at the time, but subsequently has to be accounted for. Thus, where a consumer exercises a statutory right to return the goods, consumer legislation entitles the supplier to charge a reasonable amount for the use of the goods.[33]

Under the South African common law, infringing the right to use may entitle the holder of the right to a delictual claim for damages arising from not being able to use the property.[34] Such a claim is aimed at compensating for the plaintiff's loss, rather than at disgorging the defendant's actual gain (although the amount may often be the same, for example if the defendant's gain was not paying the same rental which the owner would have earned).

South African law awards other remedies aimed at making the defendant account for his gain, but generally these remedies operate 'indirectly', by way of deducting or setting-off an amount for use from an enrichment claim that the defendant in turn has against the plaintiff. For example, an owner whose property has been

[31] See Visser (2008), 665–678; du Plessis (2012), 346–349.

[32] See section 28(1)(b)(i) of the Alienation of Land Act 68 of 1981. Also see section 18(1)(b) of the Share Blocks Control Act 59 of 1980; Van Staden v Fourie 1989 (3) SA 200 (A).

[33] See section 20(6)(b)(i) of the Consumer Protection Act 68 of 2008.

[34] See Hefer v Van Greuning 1979 (4) SA 952 (A).

improved without authorisation may deduct an amount for use from the improver's enrichment claim.[35] And when a transfer is made in fulfillment of an invalid sale, the seller may set off the enrichment of the purchaser through the use of the *merx* against the purchaser's claim for repayment.[36] It is only rarely that a 'direct', independent enrichment claim is awarded, for example where property is occupied after termination of a lease with the previous landlord, and no agreement has been concluded with the new owner.[37]

However, there are some indications that South African law may in future develop to be more willing to award an enrichment claim if a person's property is used by another who has no right to do so.[38] Such a claim would have to meet the general requirements for enrichment liability, and would have to be quantified in accordance with the principles governing the measure of enrichment claims. As mentioned above in the section on "General Principles of the Laws of Delict and Unjustified Enrichment", it may be necessary to reconsider whether to adhere to the general requirement that the plaintiff had to be impoverished, and whether the claim should be measured by applying the double ceiling rule, which limits its ambit to the lesser of the plaintiff's impoverishment and the defendant's enrichment. The classic example is the situation where a person is enriched by staying for free in another's house without permission, and thereby infringes the owner's right to occupy the house, but the owner cannot prove that he suffered impoverishment or loss. It especially remains to be resolved when the defendant's enrichment should be measured in terms of a reasonable rental, and when the defendant might be obliged to disgorge actual gains derived from using the property. As indicated in the section on "General Principles of the Laws of Delict and Unjustified Enrichment" above, a reasonable rental might be the more appropriate measure to adopt in this instance.

Profiting by Consuming Property[39]

The main forms of relief when gains are obtained by infringing the right to consume property are also delictual in nature. If someone wrongfully and culpably consumes another's property in the knowledge of the owner's title or claim, the owner

[35] See du Plessis (2012), 282–283. Occupiers and holders (ie improvers who do not intend to hold as owners) must account for their use. Improvers who in good faith intend to hold as owners do not have to account for enrichment by enjoying use and occupation.

[36] Lodge v Modern Motors Ltd 1957 (4) SA 103 (SR) 122E–123B; further see Portion 29 Golden Highway (Pty) Ltd v Patel [2010] 4 All SA 219 (GSJ).

[37] See Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd 1961 (1) SA 704 (C).

[38] See the obiter dictum of Jansen J in Hefer v Van Greuning 1979 (4) SA 952 (A) 959C–D. For support by academic commentators, see Visser (2008), 671–672; Sonnekus (2008), 47–48; du Plessis (2012), 348.

[39] See Visser (2008), 655–680; du Plessis (2012), 357–363.

may claim delictual damages with the *actio ad exhibendum*.[40] If the person who consumed the property obtained it through theft, the owner could be entitled to the *condictio furtiva*, which is also regarded as a delictual remedy in South African law (despite a name which suggests it is an enrichment claim), but the measure is more generous, since it is the highest value of the property since the theft.[41]

These delictual claims are only available if the enriched was at fault. If the plaintiff is unable to establish fault, an enrichment remedy could be awarded even if the defendant was enriched by consuming another's property without being entitled to do so; the appropriate enrichment action is the *condictio sine causa specialis*.[42] This action was for example awarded in *Greenhills Producers (Pty) Ltd (in Liquidation) v Benjamin,*[43] where the plaintiff gave the defendants possession of farm land for grazing in terms of a joint venture agreement and the agreement was subsequently terminated, but the defendants remained in occupation in good faith, and were enriched through continuing to use the land for grazing. The enrichment claim is not available where property was received in good faith and for value, and was then consumed.[44] It has been expressly held that South African law has not received the doctrine of conversion of English law, whereby even the innocent 'consumer' for value could be liable.[45]

Profiting by Disposing of Property[46]

The delictual remedies considered above in the context of illegal consumption are also relevant to illegal disposal of property: the *actio ad exhibendum* applies when one person knowingly disposes of another's property,[47] whereas a thief who

[40] See S Polwarth & Co (Pvt) Ltd v Zanombairi 1972 (2) SA 688 (R) 691–692; Philip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd 1975 (2) SA 420 (A); Clifford v Farinha 1988 (4) SA 315 (W) 319; Frankel Pollak Vinderine Inc v Stanton NO 2000 (1) SA 425 (W) 429G–430B.

[41] See Minister van Verdediging v Van Wyk 1976 (1) SA 397 (T) 400D; Krueger v Navratil 1952 (4) SA 405 (SWA).

[42] As to its exact requirements, and especially to what extent the property had to be obtained through 'dealings' (a negotium) with the owner, see Lotz (2005), para. 220(b); Visser (2008), 655; du Plessis (2012), 355–357. Where property is 'consumed' through being attached to or joined with other property, so as to deprive the original owner of ownership, the claim to account for the benefit is presumably also based on unjustified enrichment (see du Plessis (2012), 357; Van Leeuwen (1741), 2 5 3; Van der Merwe (1989), 231, 243, 246, 256, 262).

[43] 1960 (4) SA 188 (E).

[44] Lotz (2005), para. 220(b) no. 10. Strictly speaking, the rule has only been applied to property in the form of money, but presumably other forms of corporeal property are also covered.

[45] See Leal & Co v Williams 1906 TS 554; Van der Westhuizen v McDonald & Mundel 1907 TS 933; Lotz (2005), para. 220.

[46] See Visser (2008), 655–680; du Plessis (2012), 357–363.

[47] Visser (2008), 660–661; du Plessis (2012), 363.

disposes of another's property (and a complicit third party),[48] may also have to face the *condictio furtiva*.[49] These remedies could indirectly serve to compel a party who profited by disposing of the property to surrender these gains to pay the damages claim.

However, a delictual claim would fail in the absence of fault. It may again be convenient to resort to a remedy based on unjustified enrichment (presumably the *condictio sine causa specialis*) to strip the defendant of his gain, even if there was no fault on his side.[50] For example, in *Union Government (Minister of Agriculture) v Lombard,*[51] government employees took buchu from Lombard's farm, and sold it in good faith to a third party; it was held that the government was liable to the extent to which it had benefited, and that it could not be allowed to enrich itself at Lombard's expense. Unfortunately, the application of such an enrichment claim is quite complex: it requires differentiation between a variety of defendants, whose positions vary depending on whether they were given possession by the owner, took possession from the owner, or obtained it from a third party, and whether they gave value in return.[52] This is one of the areas in which the uncodified, civil-law based South African law of unjustified enrichment is least developed.

Infringing Intellectual Property Rights[53]

South African law recognises various statutory remedies that arise from illegally infringing intellectual property rights, such as trademarks, copyright, patents or designs. These include statutory claims for damages or for a reasonable royalty in lieu of damages,[54] but not for the disgorgement of actual profits. At best, there

[48] See S Polwarth & Co (Pvt) Ltd v Zanombairi 1972 (2) SA 688 (R) 691; Van der Westhuizen v McDonald and Mundel 1907 TS 933 at 945.

[49] Visser (2008), 661–665; du Plessis (2012), 363.

[50] Lotz (2005), para. 220 no. 9; Visser (2008), 341, 665. It may simplify matters if the enrichment claim is described as being based on taking through unauthorised disposal of another's property and if the label of the *condictio sine causa* is avoided – see du Plessis (2012), 350.

[51] 1926 CPD 150.

[52] See Van der Westhuizen v McDonald and Mundel 1907 TS 933. Military personnel unlawfully, but apparently in good faith, requisitioned tobacco which belonged to Van der Westhuizen, and sold it at a bargain price to McDonald and Mundel. Acting in good faith, they in turn resold part of it at a profit. It was held that McDonald and Mundel were not liable to pay Van der Westhuizen the value of the tobacco, or even the profit. Support exists for awarding an enrichment claim against a third party who gratuitously obtained property from another and disposed of it for value (see Voet (1829), 6 1 10; Van der Westhuizen v McDonald and Mundel 1907 TS 933 at 941–943).

[53] See generally Visser (2008), 685–689; du Plessis (2012), 364–365; Blackie and Farlam (2004), 469 at 485–486, 490.

[54] Where a trade mark registered in terms of the Trade Marks Act 194 of 1993 has been infringed, section 34(3) provides that any High Court having jurisdiction may grant the proprietor certain

may be an indirect 'skimming off' of profits to pay these claims. It is only in cases of copyright infringement that courts are statutorily empowered to award a claim which could target the defendant's actual profits. This is an exceptional claim for additional damages, which courts may award as they may deem fit; they have to be satisfied that effective relief would not otherwise be available to the plaintiff, having regard, in addition to all other material considerations, to the flagrancy of the infringement and 'any benefit shown to have accrued to the defendant by reason of the infringement'.[55] The quoted part of the provision indicates that the claim for additional damages could achieve the effect of forcing the disgorgement of the defendant's actual profits.

It is a matter of statutory interpretation to determine to what extent further common-law remedies are available beyond these statutory sources of relief in cases of infringing intellectual property rights. As mentioned in the introduction, South African courts have refused to recognise the English practice of allowing a plaintiff in an action for infringement of a trade mark (or passing-off) to choose between asking for 'an inquiry as to damages' or 'an account of profits'.[56] This refusal is not a problem as long as the statutory protection against infringement is adequate. Often the plaintiff would be satisfied with a claim for damages or a reasonable royalty in lieu of damages.

However, if the plaintiff seeks to strip the enriched of actual profits, the only statutory protection, as indicated above, is provided in cases of copyright infringement. In other cases of infringement of intellectual property rights, the plaintiff would have to rely on the common law, but the options are not promising. The law of delict would be inappropriate inasmuch as it is aimed at compensating actual losses, rather than disgorging profits.[57] The law of unjustified enrichment is, in principle, more appropriate for this goal, but it presents the plaintiff with the formidable obstacles outlined in the section on "General Principles of the Laws of Delict and Unjustified Enrichment". First, there is the double-celing rule, which limits or caps any enrichment claim for the defendant's actual enrichment to the plaintiff's impoverishment. Secondly, such a claim would be novel and the plaintiff would have to convince the courts to impose enrichment liability outside the scope

forms of relief. These include a) an interdict, b) an order of removal, c) damages and 'd) in lieu of damages, at the option of the proprietor, a reasonable royalty which would have been payable by a licensee for the use of the trade mark concerned …' Comparable provisions on paying a reasonable royalty in lieu of damages are contained in section 35(3)(d) of the Designs Act 195 of 1993, section 65(6) of the Patents Act 57 of 1978, and section 24(1A) of the Copyright Act 98 of 1978.

[55] Section 24(3) of the Copyright Act 98 of 1978.

[56] See Klimax Manufacturing Ltd v Van Rensburg 2005 (4) SA 445 (O) para. 60–61; Montres Rolex SA v Kleynhans 1985 (1) SA 55 (C). An 'account of profits' is only available in South African law if specifically provided for by contract, statute or a fiduciary relationship.

[57] See the section on "General Principles of the Laws of Delict and Unjustified Enrichment" above and Visser (2008), 686 on problems with awarding (punitive) damages claims that are actually aimed at preventing unjustified enrichment.

of the existing specific enrichment actions – and, as we have already observed, this may be quite challenging.[58] It would probably be inappropriate to award such a claim in cases of infringement where the defendant independently and innocently profited from an invention that happened to infringe a patent. As outlined above, the defendant's actions do not threaten the right-holder's entitlement to control the resource.[59]

Infringing Personality Rights[60]

South African law does not traditionally recognise claims that are directly aimed at disgorging profits obtained by infringing another's personality rights, such as the rights to bodily integrity (*corpus*), dignity or sense of self-worth (*dignitas*), and reputation (*fama*).[61] The preferred form of relief is to award a common-law delictual claim for damages by way of the *actio iniuriarum.* The action can be used to claim general damages to compensate the plaintiff for the injured feelings and for the hurt to his or her dignity and reputation,[62] and special damages to compensate for actual patrimonial loss. South African courts are not in favour of awarding exemplary or punitive damages in cases of defamation.[63]

The inability of the *actio iniuriarum* to ensure that the defendant disgorges profits earned as a consequence of infringement of personality rights is understandable, given the traditional compensatory nature of this remedy. However, there are South African cases involving unauthorised publication of personal information where for the reasons outlined in the section on "General Principles of the Laws of Delict and Unjustified Enrichment", it may be more appropriate to order the defendant to disgorge profits, rather than to award damages.[64] The preferred instrument to achieve this goal could be a claim based on unjustified enrichment, which is aimed at balancing out unacceptable gains.[65] Again, we find the well-known obstacles in

[58] See Kommissaris van Binnelandse Inkomste v Willers 1994 (3) SA 283 (A); McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA).

[59] See Visser (2008), 690 on the desirability of ordering an infringer of copyright to surrender profits, but allowing the (innocent) infringer of a patent to retain them.

[60] See Visser (2008), 680–683; du Plessis (2012), 365.

[61] See generally Zimmermann (1990), 1050–1094.

[62] Kinghorn (2005), para. 260.

[63] See Fose v Minister of Safety & Security 1997 (3) SA 786 (CC).

[64] See Visser (2008), 682–683, referring to National Media Ltd v Jooste 1996 (3) SA 262 (A); O'Keeffe v Argus Printing and Publishing Co Ltd 1954 (3) SA 244 (C); also see du Plessis (2012), 365.

[65] See Blackie and Farlam (2004), 469 at 490–491; Visser (2008), 680–683; du Plessis (2012), 365. Whether the gain is unacceptable depends on how the requirement that the enrichment is without legal ground is to be defined. For example, where profits are made through research that uses a

the plaintiff's way; the plaintiff must prove impoverishment, and the 'double celing' rule would limit or cap any enrichment claim aimed at disgorging the defendant's actual enrichment to the plaintiff's impoverishment; The plaintiff would further have to convince the courts to impose enrichment liability outside the scope of the existing specific enrichment actions. However, the unauthorised publication of private facts implicate the right to human dignity protected in section 10 of the Constitution of the Republic of South Africa, 1996, and the courts may be obliged to develop the common law to give effect to the rights contained in the Bill of Rights. A definite lacuna in the protection of dignity has been identified and the mechanism for eliminating it through expanding the law of unjustified enrichment has been created.[66] It is suggested that this places strong pressure on our courts to develop such an enrichment claim.

Breach of Contract[67]

A party in breach of contract is liable to pay the amount of contractual damages required to place the other party in the position it would have been in, had there been no breach.[68] The purpose of the contractual claim for damages is to compensate the other party, and not to strip the party in breach of his profits, although this could of course happen indirectly, inasmuch as the party in breach would use these profits to pay the damages claim. A party in breach could further be awarded a reduced contract price, in the courts discretion, if the other party utilised the incomplete performance. Through reducing the price, the courts could in effect prevent the party in breach from profiting by it. For example, if the party in breach saved certain expenses by not performing in full, these expenses could be deducted from the contract price. The reduction in price could have the effect of stripping the party in breach of the savings he made by not performing in full.[69]

Comparative studies reveal that obtaining disgorgement of profits arising from breach of contract could be desirable if the normal compensatory claim for damages based on a loss on the side of the other party is inadequate, for example in certain

person's body parts without his consent, there may have been an infringement of his personality rights, but this cannot give rise to a duty to pay him the profits, since he could never have consented to the profitable use of his body parts in any event. Donors may not receive any reward beyond their reasonable costs for use of certain body parts (see chapter 8 of the National Health Act 61 of 2003, especially section 60(4)).

[66] See Kommissaris van Binnelandse Inkomste v Willers 1994 (3) SA 283 (A); McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA).

[67] Visser (2008), 692; du Plessis (2012), 368–371.

[68] See Novick v Benjamin 1972 (2) SA 842 (A) 857; Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A) 687; Katzenellenbogen Ltd v Mullin 1977 (4) SA 855 (A) 875.

[69] See BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A).

cases of breach of confidentiality clauses or 'skimped performance'. At present, the scope for developing the South African common law to provide such relief is very limited.

First, within the law of contract, a major obstacle is that contractual damages claims are limited to patrimonial loss.[70] It is therefore not possible to 'compensate' a party who has been deprived of his bargain, but who has not suffered patrimonial loss, by compelling the party in breach to pay him an amount that makes good his 'loss of amenity', or inconvenience. Awarding such a claim for non-patrimonial losses could conceivably indirectly force the party in breach to surrender his profits. South African law therefore would not assist the owner in the classic case where a builder profited by saving expenses in building a slightly shallower pool than the contract provided for, but the owner cannot prove actual patrimonial loss.[71]

Secondly, any claim based on unjustified enrichment would also face some difficulties. The courts would have to recognise that this is one of the occasions where the impoverishment requirement must be relaxed. The defendant's enrichment further has to be unjustified, which may be difficult to prove, given that there is a valid contract in place between the parties. It may be possible, though, to find that the enrichment is nonetheless unjustified, inasmuch as the profit has been obtained as a consequence of infringing these rights. However, local commentators favouring such a development are mindful of the importance of making it an exceptional remedy, and accept that it may at times be preferable to award general damages for non-patrimonial loss.[72]

Breach of Fiduciary duties[73]

In a famous passage in *Robinson v Randfontein Estates Gold Mining Co Ltd,* Chief Justice Innes stated that

> Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As was pointed out in The Aberdeen Railway Company v Blaikie Bros (1 Macq 461 at 474), the doctrine is to be found in the civil law (Digest 18.1.34.7), and must of necessity form part of every civilised system of jurisprudence. It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he

[70] See Administrator Natal v Edouard 1990 (3) SA 581 (A); some support for awarding (contemplated) damages based on inconvenience, though not hurt feelings, can be found in earlier cases like Jockie v Meyer 1945 AD 354 at 363.

[71] See Beale et al. (2010), 856 et seq., 862 et seq.

[72] See Blackie and Farlam (2004), 469, 493; Visser (2008), 696–697; du Plessis (2012), 371.

[73] Visser (2008), 690–692; du Plessis (2012), 365–368.

> cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. ... Whether a fiduciary relationship is established will depend upon the circumstances of each case (...).[74]

There is indeed no limited number of cases where a fiduciary relationship is established.[75] In addition to the examples Innes CJ mentions of guardians, legal practitioners, and agents,[76] they include trustees, employees,[77] company directors and company officers.[78]

South African law has never properly explored the exact legal nature of the duty not to make a secret profit, and of the remedies that arise from breach of this duty. In the context of company law, it has for example simply been said that the action based on breach of trust by company directors is *sui generis,*[79] but without properly exploring potential doctrinal niches within the law of obligations.

One possibility is to regard breach of the duty as wrongful, and to base the liability in delict. However, such an analysis faces the familiar obstacles that the person bound by the duty does not necessarily have to be at fault,[80] and that the person to whom the duty is owed traditionally need not suffer a loss.[81] If the fiduciary duty happens to originate in contract, its violation could constitute breach of contract, but then the typical remedy is again a contractual damages claim, which may not necessarily be appropriate for disgorging profits.[82]

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[74] Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 177–178. Further see Phillips v Fieldstone Africa (Pty) Ltd 2004 (3) SA 465 (SCA) para. [30]; Dorbyl Ltd v Vorster 2011 (5) SA 575 (GSJ) para. [25].

[75] See Volvo (Southern Africa) (Pty) Ltd v Yssel 2009 (6) SA 531 (SCA) para. [16].

[76] Further see Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 177; Phillips v Fieldstone Africa (Pty) Ltd 2004 (3) SA 465 (SCA) para. [30]; Jowell v Bramwell-Jones 2000 (3) SA 274 (SCA) para. [14].

[77] See Phillips v Fieldstone Africa (Pty) Ltd 2004 (3) SA 465 (SCA) especially paras [29] sqq; Ganes v Telecom Namibia Ltd 2004 (3) SA 615 (SCA).

[78] Section 77(2)(a) of the Companies Act 71 of 2008.

[79] See Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 242; Cohen NO v Segal 1970 (3) SA 702 (W) 706G.

[80] See du Plessis v Phelps 1995 (4) SA 165 (C) 170D.

[81] See Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 177–178, 241; Symington v Pretoria-Oos Hospitaal Bedryfs (Pty) Ltd 2005 (5) SA 550 (SCA) para. [24]. The South African common law traditionally recognised a claim for disgorgement of profits obtained by a director in breach of a fiduciary duty. However, section 77(2)(a) of the Companies Act 71 of 2008 provides that 'a director of a company may be held liable (a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76(2) or 76(3)(a) or (b)' (own italics). The fact that reference is only made to 'loss, damages or costs' renders it uncertain whether the legislature (inadvertently) abolished the common-law claim for disgorgement of profits (see Havenga (2013), 257 at 267).

[82] The same conduct could give rise to two responses: if an employee takes a bribe, he could be accountable for breach of contract or for breach of a fiduciary duty.

The possibility has been raised of locating claims for disgorging profits obtained as a consequence of breach of fiduciary duties within the law of unjustified enrichment, or at least to regard them as aimed at redressing or undoing such enrichment.[83] In this regard it is of interest that earlier case law which introduced the *sui generis* claim described the remedy as one of 'account of profits and payment over', which (as indicated earlier) clearly reflects the influence of the English common law. In South African law, which traditionally has a much stronger awareness of unjustified enrichment as source of liability, there is growing appreciation that enrichment by infringing another's rights should enjoy greater prominence as a distinct source of enrichment liability. It therefore appears worthwhile to explore whether breach of fiduciary duties could be regarded as an example of such an infringement.

However, such a development would, once again, require some adjustment to existing principles. First, it would be essential to relax the requirement that the plaintiff must prove actual impoverishment. Otherwise the plaintiff may have to prove that its assets would have increased, had it not been for the breach of the duty, whereas it is traditionally not required that the plaintiff suffers a loss when laying claim to profits obtained in violation of fiduciary duties.[84] Secondly, it may be necessary for policy reasons not to allow the defendant to raise the defence of loss of enrichment. This defence would in any event not be available where he knew or ought to have known that he is not entitled to the profit, but it might be desirable to deprive him of the defence even in cases where he was 'innocently' enriched.[85] If the remedy were to be classified as an enrichment action, the social value of deterrence would provide the basis for saying that in this instance giving up the whole profit to the plaintiff satisfies the correlativity requirement of corrective justice.

Unfair and Anti-competitive Commercial Practices[86]

South African law provides a variety of remedies that could apply when a person profits from unfair commercial practices. Some of these remedies may have the effect of directly or indirectly compelling the disgorgement of illegal profits.

In the field of competition law, if a firm engages in certain prohibited practices or if it breaches the provisions on mergers, the Competition Act 89 of 1998 empowers the Competition Tribunal to impose penalties payable to the State. Unlike private law remedies, there is no reason why public-law legislative measures of this kind should not have a punitive intention and effect. These penalties may not exceed 10 % of the firm's annual turnover. In determining an appropriate penalty, the Competition Tribunal must consider a variety of factors, including the level of profit derived from

[83] See Blackie and Farlam (2004), 469 at 492; du Plessis (2012), 368; Visser (2008), 692.

[84] Further see Visser (2008), 692; du Plessis (2012), 367–368.

[85] Compare the discussion in Visser (2008), 692 and du Plessis (2012), 368.

[86] See du Plessis (2012), 372–373.

the contravention.[87] The firm may therefore in effect be obliged to disgorge the profit through having to pay the penalty. The Consumer Protection Act 68 of 2008 in turn provides consumers with various rights against suppliers, such as the right to fair and responsible marketing, to fair and honest dealing, to fair terms, and to fair value, good quality and safety. Infringing these rights could give rise to a host of statutory remedies. These include an administrative fine in respect of prohibited or required conduct, which may not exceed the greater of 10 % of the respondent's annual turnover during the preceding financial year or R1,000,000. When determining an appropriate administrative fine, the Tribunal must consider a variety of factors, which again includes the level of profit derived from the contravention.[88]

The South African common law further recognises that unlawful competition, and more specifically unlawful interference with another's trade or business, may amount to a delict.[89] As indicated earlier, delictual claims for damages are determined with reference to the defendant's loss, and not the plaintiff's gain. It has thus far not been recognised that a plaintiff could rely on the law of unjustified enrichment to lay claim to profits made as a consequence of unlawful infringement of his right to carry on his trade without unlawful interference. It has been argued that in principle such a claim could be recognised, and that (as in the context of certain intellectual property rights) it may be especially desirable in flagrant cases of infringement.[90] However, for the proper application of such a remedy it may again be necessary to relax the operation of the 'double-ceiling' rule, which otherwise would limit disgorgement to the plaintiff's actual impoverishment.

Profiting as a Consequence of Unfair Discrimination[91]

Many South Africans have been severely disadvantaged as a consequence of unfair discrimination and many have benefited from it. It is a complex matter to determine between whom and how the law should correct or balance out these gains. The difficulty is that the gains often were obtained lawfully, for example due to legislation that enabled the expropriation of land to promote racial segregation, or that reserved certain forms of employment or access to social benefits to particular racial groups. The general approach in post-apartheid South Africa has been to accept that existing gains remained in place, but to ensure some form of redress by way of large-scale programmes aimed at social upliftment and economic empowerment. It is only in limited cases where those who were disadvantaged as a

[87] Section 59(3)(e) of the Competition Act 89 of 1998.

[88] Section 112(3)(2) of the Consumer Protection Act 68 of 2008.

[89] See Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968 (1) SA 209 (C) 216; Geary & Son (Pty) Ltd v Gove 1964 (1) SA 434 (A).

[90] See du Plessis (2012), 372–373.

[91] See Visser (2008), 147–155; du Plessis (2012), 374.

consequence of unfair discrimination were allowed more direct relief. In this regard the Restitution of Land Rights Act 22 of 1994 allows for restitution of land which persons were dispossessed of, or for equitable redress in the form of compensation or the award of state land.[92] Persons from whom the land is reclaimed could in turn be entitled to compensation by the State. Some provision has been made for limited reparation by way of the truth and reconciliation process, but again the relief is provided by the State, and not by individuals who may have gained from political injustice. Outside South Africa, victims of apartheid have brought class actions under American law in terms of the Alien Tort Claims Act[93] against large corporations that supported the apartheid government by providing the police and military with equipment, and by financing these activities. Some claims were settled, but US courts thus far have maintained that this statute does not apply extraterritorially.[94]

It is generally accepted that the private-law rules of unjustified enrichment are ill-equipped to address profiting as a consequence of unfair discrimination. This is mainly because of difficulties with proving that the particular plaintiff was impoverished, that the particular defendant was enriched without legal ground, that the enrichment was at the plaintiff's expense, and the likelihood than any claim may in any event have prescribed.[95] However, it has been argued that the law of unjustified enrichment could be relevant in the public sphere in at least two contexts.

First, support has been expressed for the view that it may be productive to explain the statutory land-reform processes referred to above in terms of unjustified enrichment, and more specifically, to link these processes with other instances of profiting by wrongdoing or invasion of another's rights.[96] It is conceded that the traditional (private-law) rules of the law of unjustified enrichment are ill-equipped to assist in correcting systematic enrichment of one group at the expense of another,[97] but the point is essentially that the underlying private-law values, rather than the

[92] Further see section 25(7) of the Constitution of the Republic of South Africa, 1996: 'A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.'

[93] 28 U.S.C. §1350 (2007).

[94] See the judgment of 21 August 2013 of the US Court of Appeals for the Second Circuit in Balintulo v. Daimler AG 2778-cv(L) (accessible at http://hrp.law.harvard.edu/wp-content/uploads/2013/09/130821-Apartheid-09-2778_opn-2d-Cir.pdf).

[95] See sections 10–16 of the Prescription Act 68 of 1969. The cut-off date for land reform is 19 June 1913, when the Black Land Act of 1913 commenced operation; see Richtersveld Community v Alexkor Ltd 2003 (6) SA 104 (SCA); Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).

[96] See Visser (2008), 152; Visser and Roux (1996), 89–111. In re former Highlands Residents: Sonny and others v Department of Land Affairs 2000 (2) SA 351 (LCC) 361 the court left it open whether these arguments are convincing.

[97] Also see du Plessis (2012), 21–22.

rules themselves are relevant, and that these values may also underlie public-law remedies provided by land reform legislation.

The second view applies this type of thinking on an even broader front. Section 9(2) of the Constitution permits taking legislative and other measures to protect or advance persons or categories of persons disadvantaged by unfair discrimination. A typical example is legislation mandating 'affirmative action' in the employment context.[98] The possibility has been raised of developing a public-law enrichment remedy which could also fulfill this function, and give effect to what Mr Justice Laurie Ackermann calls 'restitutionary or remedial equality'[99] envisaged by section 9(2).[100] The argument essentially is that private-law principles of unjustified enrichment are relevant in a public-law context, and that these principles could be used as a basis and rationale for fashioning a public-law enrichment remedy, or for interpreting and applying an existing one.[101] Such a public-law remedy would be analogous to the private-law remedy, the crucial link being that in both the duty of restitution arises from the defendant's unjustified enrichment, and not from proof of guilt or fault. Thus conceived, such a remedy would be one through which the beneficiaries of apartheid 'bear the negative effects of the restitution made to those previously disadvantaged, *not* because the former wrongfully and culpably harmed the latter, but because they were *unjustifiably enriched* at the expense of the latter'.[102]

Conclusions

Thus far there has been limited attention to the treatment of disgorgement of profits as a general theme in South African law. The lack of a comprehensive, holistic treatment of this phenomenon, based on a proper understanding of the relevant underlying values and principles, comes at a price. The 'fragmented' practice of only focussing on specific problems in certain areas of law gives rise to inconsistency. The restitutionary response is also clearly inadequate in some cases where a gain has been obtained through infringing another's rights, but that person cannot prove actual loss or impoverishment.[103] However, even if it is accepted that it is desirable to order disgorgement of profits in these cases, it remains unclear where such a development is to be located. It is suggested that rather than expanding the law of delict so that the plaintiff does not have to suffer a loss, it may be preferable

[98] The land reform provisions relate to section 25 of the Constitution, rather than to section 9(2).

[99] See Ackermann (2013), 342 et seq.

[100] Ackermann (2013), 147–148 and 153.

[101] Ackermann (2013), 345.

[102] Ackermann (2013), 345–346.

[103] See the section on "Profiting by Using Property" on the holiday house case and section "Breach of Contract" above on skimping profits.

to develop the law of unjustified enrichment so that it deprives the defendant of the profit without requiring that the plaintiff has to be impoverished.

Bibliography

Ackermann, L. 2013. *Human dignity: Lodestar for equality in South Africa*. Cape Town: Juta.
Beale, H., et al. 2010. *Cases, materials and text on contract law*, 2nd ed. Oxford: Hart.
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. Oxford: Oxford University Press. 469 et seq.
Burrows, A. 2011. *The law of restitution*, 3rd ed. Oxford: Oxford University Press.
Coleman, J. 1988. *Markets, morals and the law*. Oxford: Oxford University Press.
Collins, H. 1997. Productive learning from the collision between the doctrinal subsystems of contract and tort. *Acta Juridica*: 55 et seq.
Dagan, H. 1999. The distributive foundation of corrective justice. *Michigan LR* 98: 138 et seq.
Dannemann, G. 2009. *The German law of unjustified enrichment and restitution: A comparative introduction*. Oxford: Oxford University Press.
Du Bois, F. (ed.). 2007. *Wille's principles of South African law*, 9th ed. Cape Town: Juta.
du Plessis, J. 2012. *The South African law of unjustified enrichment*. Cape Town: Juta.
Edelman, J. 2002. *Gain-based damages – contract, tort, equity and intellectual property*. Oxford: Hart.
Havenga, M. 2013. Directors' exploitation of corporate opportunities and the Companies Act 71 of 2008. *Tydskrif vir die Suid-Afrikaanse Reg*: 257 et seq.
Kinghorn, C. 2005. Defamation. In *The law of South Africa* (updated by F.D.J. Brand), vol. 7, 2nd ed, ed. W.A. Joubert. Durban: LexisNexis Butterworths.
Lotz, J.G. 2005. Enrichment. In *The law of South Africa* (updated by F.D.J. Brand), vol 9, 2nd ed, ed. W.A. Joubert. Durban: LexisNexis Butterworths.
Midgley, J.R., and J.C. Van der Walt. 2005 Delict. In *The law of South Africa*, vol 8(1), 2nd ed, ed. W.A. Joubert. Durban: LexisNexis Butterworths.
Sonnekus, J. 2008. *Unjustified enrichment in South African law*. Durban: LexisNexis Butterworths.
Van Bynkershoek, C. 1927. *Observationes tumultuariae*, vol. 1, ed. E.M. Meijers, A.S. de Blécourt, and H.D.J. Bodenstein. Haarlem: Tjeenk Willink.
Van der Merwe, C.G. 1989. *Sakereg*, 2nd ed. Durban: Butterworths.
Van Leeuwen, S. 1741. *Censura forensis theoretico-practica*, 4th ed. Leiden: S. Luchtmans and C. Haak.
Van Zyl DH (2000) Negotiorum gestio and wrongs. *Acta Juridica*: 329 et seq.
Visser, D. (ed.). 1997. *The limits of the law of obligations*. Cape Town: Juta.
Visser, D. 2008. *Unjustified enrichment*. Cape Town: Juta.
Visser, D. and D. Kleyn. 2000. The borderline between delict and unjustified enrichment. Acta Juridica: 300 et seq.
Visser, D., and T. Roux. 1996. Giving back the country: South Africa's Restitution of Land Rights Act, 1994 in context. In *Confronting past injustices – approaches to amnesty, punishment, reparation and restitution in South Africa and Germany*, ed. M.R. Rwelamira and G. Werle. Durban: Butterworth. pp. 90 et seq.
Voet, J. 1829. *Commentarius ad Pandectas*. Paris: Ganthics.
Zimmermann, R. 1990. *The law of obligations – Roman foundations of the civilian tradition*. Cape Town: Juta.

List of Cases

South Africa
Administrator Natal v Edouard 1990 (3) SA 581 (A)
Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC)
BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A)
Cadac (Pty) Ltd v Weber-Stephen Products Co 2011 (3) SA 570 (SCA)
Clifford v Farinha 1988 (4) SA 315 (W)
Cohen NO v Segal 1970 (3) SA 702 (W)
Davidson v Bonafede 1981 (2) SA 501 (C)
Dorbyl Ltd v Vorster 2011 (5) SA 575 (GSJ)
du Plessis NO v Phelps 1995 (4) SA 165 (C)
Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968 (1) SA 209 (C)
Fose v Minister of Safety & Security 1997 (3) SA 786 (CC)
Frankel Pollak Vinderine Inc v Stanton NO 2000 (1) SA 425 (W)
Ganes v Telecom Namibia Ltd 2004 (3) SA 615 (SCA)
Geary & Son (Pty) Ltd v Gove 1964 (1) SA 434 (A)
Greenhills Producers (Pty) Ltd (in Liquidation) v Benjamin 1960 (4) SA 188 (E)
Hefer v Van Greuning 1979 (4) SA 952 (A)
Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A)
In re former Highlands Residents: Sonny v Department of Land Affairs 2000 (2) SA 351 (LCC)
Jockie v Meyer 1945 AD 354
Jowell v Bramwell-Jones 2000 (3) SA 274 (SCA)
Katzenellenbogen Ltd v Mullin 1977 (4) SA 855 (A)
Klimax Manufacturing Ltd v Van Rensburg 2005 (4) SA 445 (O)
Kommissaris van Binnelandse Inkomste v Willers 1994 (3) SA 283 (A)
Krueger v Navratil 1952 (4) SA 405 (SWA)
Leal & Co v Williams 1906 TS 554
Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd 1961 (1) SA 704 (C)
Lodge v Modern Motors Ltd 1957 (4) SA 103 (SR)
Mainline Carriers (Pty) Ltd v Jaad Investments CC 1998 (2) SA 468 (C)
McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA)
Minister van Verdediging v Van Wyk 1976 (1) SA 397 (T)
Mkhwanazi v Quartermark Investments (Pty) Ltd 2013 (2) SA 549 (GSJ)
Montres Rolex SA v Kleynhans 1985 (1) SA 55 (C)
National Media Ltd v Jooste 1996 (3) SA 262 (A)
Novick v Benjamin 1972 (2) SA 842 (A)
O'Keeffe v Argus Printing and Publishing Co Ltd 1954 (3) SA 244 (C)
Philip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd 1975 (2) SA 420 (A)
Phillips v Fieldstone Africa (Pty) Ltd 2004 (3) SA 465 (SCA)
Portion 29 Golden Highway (Pty) Ltd v Patel [2010] 4 All SA 219 (GSJ)
Quartermark Investments (Pty) Ltd v Mkhwanazi 2014 (3) SA 96 (SCA)
Richtersveld Community v Alexkor Ltd 2003 (6) SA 104 (SCA)
Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168
S Polwarth & Co (Pvt) Ltd v Zanombairi 1972 (2) SA 688 (R)
Symington v Pretoria-Oos Hospitaal Bedryfs (Pty) Ltd 2005 (5) SA 550 (SCA)
Van der Westhuizen v McDonald & Mundel 1907 TS 933
Volvo (Southern Africa) (Pty) Ltd v Yssel 2009 (6) SA 531 (SCA)

United States of America
Balintulo v Daimler AG 2778-cv (L)

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