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A
STUDY OF
THE NATURE, FUNCTION
and
AVAILABILITY
of
ORDERS OF
RESTITUTIO IN INTEGRUM
and
SPECIFIC PERFORMANCE
AS REMEDIES IN
SOUTH AFRICAN LAW.

THESIS

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ABSTRACT

This study is of two remedies that are available in South African law: orders of *restitutio in integrum*, and specific performance. The study demonstrates that, by treating these remedies as legal topics in their own right, a greater understanding emerges of their inherent characteristics, the role that they play in the law, and of the particular circumstances in which these remedies are available.

An order of *restitutio in integrum* performs an important and unique function in South African law. The fundamental realisation is that it is a remedy in terms of which the courts exercise an extraordinary and discretionary power, and nullify *ab initio* legal transactions, or the legal consequences of events, which were previously perfectly valid and enforceable at law. Because of the extraordinary nature of this remedy, the circumstances in which it is available are limited by the requirement that *iusta causa* must exist to justify nullification. Further, before the remedy is available, the person seeking relief must have suffered loss or prejudice as a result of the event complained of. Finally, a mutual restoration of benefits received by the persons involved is required. The nature and effect of orders of *restitutio in integrum*, and the essential elements which determine the availability of the remedy, enable it to be distinguished from, and contrasted with, other remedies in South African law.

An order of specific performance is available in South African law, at the option of a plaintiff, to enforce the actual performance of contractual undertakings. The remedy is appropriate to enforce positive undertakings, as well as acts of restraint. For the remedy to be available, it is firstly necessary that a contractual obligation be proved to exist. Secondly, performance of that obligation must be due. Thirdly, the performance sought must not in fact have already been rendered. These elements determine the availability of the remedy in particular factual circumstances, such as in cases involving pre-emptive rights. The nature and characteristics of the remedy are determined by principles of South African, and not English law. The remedy is available as of right in South African law, but subject to a discretionary power of a court to refuse to order specific performance.

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CHAPTER ONE.

THE STUDY OF LEGAL REMEDIES AS TOPICS IN THEIR OWN RIGHT.

1.1. THE CONCEPT AND NATURE OF A LEGAL REMEDY.

1.1.1. Introduction.

In Chapter Two and Chapter Three of this work, two legal remedies are analysed and discussed: orders of *restitutio in integrum*, and orders of specific performance. The nature and the role of each of these remedies is explained and discussed, and the essential elements, which determine when each remedy is available, are identified and analysed. However, as a preliminary, something must be said about the concept of a legal remedy as a topic in its own right as the basis of a legal study. Generally, in modern South African law, the legal remedies that are available are dealt with within the conventional divisions of the law, such as the law of contract, the law of delict, and so on. Thus, the notion exists of contractual remedies (remedies in the law of contract), or delictual remedies. There are, of course exceptions to this generalisation. For example, there is the work by T W Price on possessory remedies in Roman-Dutch law,¹ in which the recovery of possession of property

1. T W Price, *The Possessory Remedies in Roman-Dutch Law*, published in 1947.

is dealt with, including spoliation orders, interdicts, the possessory action and the vindicatory action. Also noteworthy is the book by Manfred Nathan and H J Schlossberg on the law of damages in South Africa.² In this book, the learned authors deal with the law of damages, not just in the field of contract, or just in the field of delict, but with the law of damages generally, as a particular form of relief, and as a topic in its own right. The conventional divisions of law are therefore not strictly adhered to. Of course, the conventional divisions of legal topics are useful for many purposes, but, in relation to the topic of remedies, such divisions, if rigidly adhered to, may be a hinderance to a full understanding of the nature and scope of a particular remedy. Another, more recent, work on a particular remedy is the doctoral thesis written by Professor J R Harker entitled "The Nature and Scope of Rescission as a Remedy for Breach of Contract: A Comparative Study".³ In view of the existence of such works, although the idea of legal remedies as a topic for a study may not yet be fully fledged in South African legal writing, the idea of such a study is not without precedent.

Works devoted to legal remedies generally, or to particular remedies, as legal topics in their own right, are more commonly encountered in writings on English law. For example, there is the work by I C F Spry on equitable remedies,⁴ in which the learned author deals with specific performance, injunctions, rectification and awards of damages in equity. Another example is the Australian work by B Kercher and M Noone⁵ in which the remedies dealt with range from debt recovery, to remedies for breach of contract, remedies for consumers and remedies in tort, a selection of remedies which, the authors say, is constructed around the *interests* protected, or compensated, by judicial and non-judicial remedies.⁶ Works such

2. Nathan and Schlosberg, *The Law of Damages in South Africa*. This work was published in 1930.

3. Unpublished thesis, University of Natal, Pietermaritzburg, 1981.

4. I C F Spry, *The Principles of Equitable Remedies*. Also see Goff and Jones, *The Law of Restitution* and McGregor, *McGregor on Damages*; Ogu, *The Law of Damages*, as examples of works on remedies.

5. Kercher and Noone, *Remedies*.

6. Kercher and Noone, *Remedies*, p 4.

as these are useful when considering remedies in South African law, in that they illustrate the extent to which legal remedies may be usefully treated as legal topics in their own right. However, because of fundamental differences between South African and English law,⁷ the concept of what constitutes a legal remedy, and the structure of a systematic treatment of remedies in South African law, cannot simply be borrowed wholesale from such works, merely altering terminology where necessary. Instead, it is necessary to define concepts and structures for a study of remedies in South African law that are thoroughly compatible with the characteristics and principles of South African law. The important questions to address therefore are: what is a remedy in South African law, and what sort of arrangement of subject matter provides a suitable framework for a study of legal remedies?

1.1.2. Describing the Concept of a Remedy.

For the purposes of the present work it is necessary, at the outset, to describe what is meant by the concept of a legal remedy in South African law. It is suggested that a legal remedy may properly be described as consisting of *the particular type of relief which a court has the power to order in favour of a litigant,*⁸ or *the type of relief of which the law allows an aggrieved party to avail himself, without necessarily having recourse to litigation.*⁹ This is a broad

7. For example, in English law, the origins in equity of the remedy of an order of specific performance have resulted in the rule that specific performance will not be ordered if damages are an adequate remedy in the circumstances: Spry, *Equitable Remedies* p 59. In South African law, the availability of an order of specific performance is not limited in this way, because, in South African law, the remedy has different origins. See sections 3.2 and 3.3 below.

8. Examples of such remedies are: an order of *restitutio in integrum*, an order for an award of damages; an order for the specific performance of a contractual obligation; an order requiring the delivery of possession of property on grounds of a real right; an order preventing the interference by one person with another person's legally protected rights; a declaration of legal rights; or an order to enforce legal rights that exist as a result of status, personal relationships, such as between parent and child, or in cases of quasi-contract or rights created directly by statute or the common law.

9. For example, cancellation (rescission), on grounds of breach of contract, of the right of a defaulting party to discharge his outstanding contractual liabilities by means of specific performance. See sections 2.10 and 2.14 below.

description, and one which is proposed, not on the basis of any particular authority, but because it is what the present writer has in mind as the concept with which, in part, it is intended to deal. Because the definition proposed is so broad, something must be said about how it is to be understood. This is done in the sections that follow.

1.1.3. A Remedy Distinguished from a Cause of Action.

The description given, in the previous section, of the concept of a legal remedy is intended to make clear that the legal cause of action, (that is, the legal ground which entitles a plaintiff to ask a court for relief, or avail himself of relief), is *not* an integral part of the broad concept of a remedy.¹⁰ Thus, for example, an award of damages is a *remedy*, in that it is a particular type of relief which a court has the power to order in favour of a litigant. It does not matter, *when broadly defining the concept of a remedy*, whether the claim for damages is founded in contract, or in delict, or any other particular legal basis on which a claim for relief in the form of an award of damages can be sought. What *is* important, for present purposes, is that an award of damages is the *type of relief* that can be awarded by a court to satisfy an aggrieved litigant.

This does not mean to say that it is irrelevant, when an award of damages is sought in a particular case, that the claim arises in contract rather than in delict. Obviously, this is a most important consideration, because it affects what must be proved by the plaintiff in order to sustain his claim for the relief sought.¹¹ The cause of action also determines the appropriate way in which the quantum of damages is to be determined.¹² But while

10. By cause of action is meant the situation which gives rise to a claim for relief, such as a material breach of a term of a contract; or the intentional, or negligent, injury of a person, or his property, which causes loss to that person; or the unlawful interference with another person's legal rights; or an unlawful refusal to surrender property to its owner.

11. Thus, the essential elements which must be alleged and proved to found the action differ, depending on whether the plaintiff's claim is founded in contract, or in delict.

12. See sections 2.14.8 and 2.14.9 below.

this is true, it is also important to realise that the concept of an award of damages, as a form of relief which is available in South African law, is able to be defined, described and analysed in general, and abstract, terms, and not only in the context of the conventional divisions of the law. The value of considering remedies in their more abstract form is that it may be possible to gain further insight into the nature of a particular remedy, the role that it plays in the law, and the legal principles and rules that govern its availability.¹³

1.1.4. A Remedy Distinguished from the Concept of an Action.

Having distinguished the concept of a remedy from the legal cause of action which entitles a litigant to the relief sought, it is now necessary to distinguish the concept of a remedy from the concept of the process by which a legal claim is brought before a court of law. In modern South African law, there are only two procedural alternatives for bringing a claim before a court of law. The aggrieved party proceeds either by way of action, or by way of application.¹⁴ An action is the process by which an aggrieved party brings his claim before a court of law by means of a *summons*. When an application is brought, the aggrieved party proceeds by way of *notice of motion*. The choice between these alternative procedures does not depend on the nature of the relief sought, but on whether the case can be decided without the court being required to resolve major, or difficult, questions of fact. Generally speaking, all the available different types of relief that a court may order can be sought by either form of procedure. There are exceptions to this general statement, such as orders of divorce, which must be sought by bringing an action, and certain proceedings in connection

13. For example, a plaintiff will have to aver and prove the existence of particular essential elements, depending on which of the available remedies he is seeking. Thus, even if a plaintiff's cause of action is a material breach of contract, he may elect to seek either an order of specific performance against the defaulting party, or, alternatively, he may seek an award of compensatory damages in lieu of performance. His choice of remedy will affect what he is required to prove in order to be entitled to one or other remedy.

14. See generally, Nathan, Barnett and Brink, *Uniform Rules of Court*; Herbstein and Van Winsen, *Civil Practice of the Superior Courts*; Jones and Buckle, *Civil Practice of the Magistrates' Courts*.

with insolvency, in which, by statute, motion proceedings are required.¹⁵

In modern South African law, there exists a *general* right to bring a legal claim before a court. From the procedural point of view, therefore, it is not necessary, when contemplating the right of a litigant to bring his claim before a court of law, to distinguish between particular legal actions, as was done in Roman law. There is no need, in principle, for a litigant in a particular case to give his action a particular name, and a plaintiff is not required to name his action in his pleadings. Nevertheless, since the right to bring an action depends on whether or not there exists a cause of action recognised by law, it is necessary for a plaintiff to allege and prove the essential elements of his particular cause of action, and to prove whatever is necessary, in order to be entitled to the particular remedy he seeks.¹⁶ The names given in Roman law to particular actions still serve as a useful reminder of the cause of action involved in each case, and of the essential elements that must be proved in each such case. Accordingly, reference to actions by name is often encountered in modern South African law, in the reports of cases, as well as in textbooks and journals.¹⁷

The danger that exists is that it may sometimes appear, when actions are identified and given names, either that particular actions necessarily involve a particular remedy, or, even worse, that the named actions are themselves remedies.¹⁸ Of course, this is not true. Certainly, there are some named actions, such as the *rei vindicatio*, which clearly involve one particular type of relief alone, but other named actions, such as the *actio empti*, enable a plaintiff to ask for a range of different alternative remedies. For example, in the case of an *actio empti*, the

15. *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 T at 1161; Herbstein and Van Winsen, *Civil Practice of the Superior Courts*, p 61.

16. Section 2.1.6 and section 3.3.5 below.

17. Examples of the names of actions commonly encountered are the *actio empti*, the *actio venditi*, the *rei vindicatio*, the *actio redhibitoria* and *quanti minoris*, and the various *conditiones*. Claims in delict are sometimes referred to as "Aquilian actions".

18. For example, the aedilician actions (*actio redhibitoria* and *actio quanti minoris*) are sometimes referred to as aedilician remedies. See, for example, *Phame v Paizes* 1973 (3) SA 397 A at 417 H; Mackeurtan, *Sale*, 9.5.6; Kerr, *Sale and Lease* p 74. Also see section 2.14.3 of this work.

plaintiff may ask *inter alia* either for an order of specific performance, or for an award of damages in lieu of performance.¹⁹ Accordingly, it is submitted that it is important to distinguish the concept of the remedy sought, from the concept of the procedure by means of which a litigant seeks an order of a court for relief.

It is also noteworthy that legal remedies exist which are available without any need for an order of court, and which are therefore completely independent of the concept of a procedure for bringing a claim before a court. An example is the remedy of cancellation (also termed rescission) on grounds of breach of contract, of which the aggrieved party may avail himself without necessarily approaching a court for an order.²⁰ The existence of such a remedy further demonstrates the distinction between the concept of a remedy and the concept of the action, or application, by which the claim for relief is brought before a court.

1.1.5. Identifying Different Remedies in South African Law.

It is necessary, for practical purposes, to recognise that, while certain remedies share characteristics, and may therefore be broadly grouped under a single description, or classification, it is nevertheless preferable to subdivide these large classes into more particular, individual remedies, when embarking on a detailed study. For example, many remedies have, as their broad objective, the enforcement of legal rights and duties. An order of court which restores an owner to possession of his property has such an objective;²¹ so does an order for an award of damages to compensate an injured person for

19. Section 2.3.5 below.

20. Kerr, *Contract*, p 377:

"If a party to a contract finds that the other party has committed a major breach of the contract he does not necessarily have to go to law. If he is clearly in the right and does not desire to take any action at all he is entitled to disregard the contract."

21. In this case, it is the right of an owner to possession of his property that is enforced.

his injury or loss;²² or an order to compel the specific performance of contractual undertakings. These various forms of relief could therefore all be classified under a single head. However, to attempt to deal simultaneously with all orders of court that have the broad objective of enforcing legal rights and duties, rather than sub-dividing this broad category into less abstract, and more conventionally recognised remedies, would be very unwieldy, and probably too abstract to be practically useful. Accordingly, for the purposes of the present discussion, particular remedies are distinguished on a narrower basis, and the three examples of remedies mentioned in this paragraph, which all involve enforcement of legal rights and duties, are considered to be separate remedies, capable of independent treatment.²³

The objective of this work is not to produce a definitive structure for the classification of remedies generally. It is rather to demonstrate, by means of a study of two specific remedies that are available in South African law, the viability and usefulness of studying individual remedies as legal topics in their own right. It is submitted that such a study provides a greater insight into the legal nature of these remedies, their role and relationships, and their availability, than is possible if remedies are dealt with within the confines of conventional divisions of the law, or as sub-topics within works that concentrate on a broader area of law.²⁴

The remedies selected for this study contrast starkly. The first remedy is an order of

22. The right enforced is the injured person's right to be compensated for injury or loss unlawfully caused.

23. In fact, to understand the nature and role of individual remedies, it is necessary to contrast and compare different remedies, rather than treating them in complete isolation from each other. However, this does not prevent remedies being considered individually as the focal point of a study.

24. For example, a discussion of orders of *restitutio in integrum* not easily confined to the law of contract. Orders of specific performance, although a remedy available to enforce contractual obligations, and thus logically a part of the law of contract, are often dealt with in relatively short space in works that deal with contract law generally. See Christie, *Contract*, p 505 - 514; De Wet and Yeats, *Kontraktereg*, 188 - 193; Joubert, *Contract*, p 222 - 228; Kerr, *Contract*, p 397 - 417.

restitutio in integrum, a remedy which, in current law, is something of a Cinderella, neglected, almost forgotten, easily misunderstood, and thus often banished, with indifference, to the sidelines of legal vocabulary as being an overly technical concept of Roman law, if not altogether obsolete in South African law.²⁵ Here is a remedy in need of a good dusting off, and a serious re-evaluation, since, it will be shown, it has an important role to play in modern South African law. It is a remedy in terms of which existing legal rights are *nullified*, rather than enforced, by means of an exercise of extraordinary power of a court of law, in this way providing relief to an aggrieved litigant.²⁶

The second remedy selected for study is an order of specific performance. By contrast to orders of *restitutio in integrum*, orders of specific performance are almost commonplace in modern law, being frequently sought in, and ordered by, South African courts. Nevertheless, it will be shown that, in a study devoted to such orders as a remedy in their own right, fresh insight can be gained into the nature, and role, of the remedy, and that, despite the frequency with which such orders are made, or refused, important questions remain to be explained, and legal issues to be decided.²⁷

1.1.6. The Need for Reliance where Possible on South African Legal Principles.

In the course of investigating any legal topic, questions are bound to arise that require resolution, and areas of the law are likely to be discovered in which there is insufficient clarity for a full understanding of all the related questions. The issue that arises in such circumstances is, what is the best approach to resolving such questions, and bringing clarity where there is presently none? One approach is to have regard to foreign legal systems, in

25. Section 2.3.1 below.

26. Section 2.3.2 and 2.3.4 below.

27. For example, the role of the remedy in relation to contracts in restraint of trade, and pre-emptive contracts. See sections 3.4 and 3.8. below.

order to discover which principles are there applied, and which solutions are adopted. This approach works very well in some instances, but, it is thought, not when governing principles rooted in Roman and Roman-Dutch law already exist. There is little justification for importing principles of law, or solutions to particular cases, from a foreign legal system, when the direct sources of our own legal system already provide applicable principles, from which to deduce appropriate rules of law, and thus find solutions to practical problems. Nor is it appropriate, it is thought, to ignore questions of fundamental principle altogether, and simply adopt, as part of our law, solutions to particular factual situations which have been arrived at in foreign jurisdictions, which appear to be appropriate solutions in the sense of being just and equitable. It is more appropriate to determine which principles of South African law ought to govern such cases, and to work out just solutions in terms of *those* principles.

This is necessary because, in order for a legal system to remain cohesive and internally consistent, its rules must be derived from, or be consistent with, the fundamental principles that characterise *that system*. Therefore, before legal principles, or solutions to cases, are imported from other legal systems, it should first be ascertained whether or not our own legal system provides applicable principles, even if the original principles require extension and re-interpretation. If such principles can be found, in South African, or Roman-Dutch, or Roman law, it is submitted that these must be preferred to foreign legal examples, as the basis on which to work out necessary rules and solutions. In this regard, the approach of the classical Roman jurists is thought to be just as relevant today as it was in their own day. In particular, analysis and development of South African law ought to be characterised by reference to basic principle, reliance on logic, elegance in the structure and explanation of legal rules, and creative adaptation of the existing law to meet changing circumstances.

It is not intended to suggest that South African law ought not, at any cost, to be influenced by developments in other legal systems. There is no merit in xenophobia. Where our own sources do not provide applicable principles, other legal systems are a necessary and fruitful

source of inspiration.²⁸ However, borrowing from other legal systems is no substitute for developing and extending, and even re-interpreting, the basic principles of South African law where this is possible.

28. South African Company law is an example of an area of law in which developments in other legal systems have been incorporated into South African law. Beuthin, *Company Law*, p 3 says the following:

"Until the enactment of the Companies Act 61 of 1973, it was, in general, legislative policy in South Africa to follow the example set in England. No real assistance was to be derived from the Roman-Dutch law, whereas the English Company law had undergone extensive examination and development.... While South African courts will continue to rely upon English case law whenever this can be conveniently and properly done, in the future English cases...will need to be approached with some circumspection, for our own statute law may not always coincide precisely with that upon which English decisions have been based, and because differing social and economic factors may well tend to give rise to differences between company activities and their underlying concepts in the two countries."

CHAPTER TWO.

ORDERS OF RESTITUTIO IN INTEGRUM.

2.1. INTRODUCTION.

2.1.1. An Outline of the Chapter.

In this chapter, the remedy of an order of *restitutio in integrum* is considered. In the course of what follows, the essential characteristics of an order of *restitutio in integrum* are identified and discussed, and the elements essential for its availability are listed. The origins and function of the remedy in Roman law, and Roman-Dutch law, are reviewed. The role of an order of *restitutio in integrum* in modern South African law is reviewed and explained. There follows a detailed study of the essential elements of the remedy, in which the nature of these elements is analysed, and the circumstances in which they may exist is discussed. Finally, an order of *restitutio in integrum* is contrasted with, and distinguished from, other remedies, and its relationship with other legal remedies is examined.

2.1.2. A Statement of Some Important Questions that Arise.

In the course of the study that follows, many different questions arise. A brief statement of some of the major questions raised may be of assistance, to indicate the nature and scope of what follows to the reader.

1. Of what does the remedy referred to as an order of *restitutio in integrum* consist? What is the nature of the relief afforded by an order of *restitutio in integrum* and what is the function of the remedy in South African law? Is an order of *restitutio in integrum* properly considered to be a unique and distinct remedy?
2. Is it true to say that the remedy known in Roman law as *restitutio in integrum* has become obsolete in South African law, either because it is too formalistic and technical, or simply because it no longer has a useful role to play in a modern legal system?
3. Assuming that the remedy is still a part of South African law, is an order of *restitutio in integrum* properly described as a remedy which is extraordinary, discretionary, and equitable?
4. What are the essential elements that must be shown to exist before an order of *restitutio in integrum* can be said to be available?
5. In what factual circumstances are the various essential elements for an order of *restitutio in integrum* likely to be found to exist? In what sort of cases is an order of *restitutio in integrum* an appropriate remedy?
6. Does South African law recognise either negligent misrepresentation innocent (simple) misrepresentation, or breach of a material term of a contract as being circumstances which give rise to a sufficient equitable ground to justify an order of *restitutio in integrum*?

7. What is the link between the concept of "voidable" transactions, "voidability" and *restitutio in integrum*? Is an order of *restitutio in integrum* necessary before a voidable transaction is made legally void *ab initio*?
8. Is *restitutio in integrum* in the strict sense only properly effected by an order of a Court of law?
9. To what extent is a person who seeks an order of *restitutio in integrum* entitled to be restored to his *status quo ante*? Should damages for wasted costs be able to be claimed in an action for an order of *restitutio in integrum*?
10. Does the right to ask for an order of *restitutio in integrum* prescribe in three years, in terms of the provisions of the Prescription Act?
11. What is the relationship of an order of *restitutio in integrum* with other remedies, such as cancellation (rescission) for breach of contract, the recovery of property on grounds of a real right, an award of damages, an order of specific performance, and with specific actions such as the *actio redhibitoria*, and the *actio quanti minoris*?
12. Does the existence of the remedy of an order of *restitutio in integrum* somehow justify an award of damages for breach of contract with a "restitutionary" objective rather than the usual "compensatory" (substitutional) objective?

These questions are discussed, and answers to them are put forward, in the course of the study that follows.

2.1.3. Use of the Phrase "Restitutio in Integrum" in Modern South African Law.

The phrase *restitutio in integrum* has the double disadvantage of being Latin as well as lengthy. There is therefore a great temptation to translate and shorten it, to something more convenient. The most obvious choice may initially appear to be the single English word "restitution". The disadvantage of using "restitution" in place of *restitutio in integrum* is that the word "restitution" is often used by modern writers on South African law in the general sense of that word, that is, in the sense of "restoration", rather than reserving it to describe the particular remedy now under discussion.¹ The desirability of distinguishing between the general meaning of the English term "restitution" and the more technical legal concept of an order of *restitutio in integrum* is noted by Botha JA in *Baker v Probert*:²

"Whether or not the remedy can aptly be described as a claim for *restitutio in integrum* (see the report at 233B and A J Kerr in 1984 THR-HR at 460) need not be discussed in this judgement, although it might be noted in passing that it would seem to be advisable to distinguish between the non-technical concept of restitution in the sense of "restoration" or "return" and the technical concept of *restitutio in integrum* as dealt with by the common law authorities (see *De Vos (op cit* at 143 - 4))."

Accordingly, to avoid misunderstanding, some word or phrase other than "restitution" ought to be adopted to describe the remedy of an order of *restitutio in integrum*. *Restitutio in integrum* translated literally means "restoration to a former condition or state."³ However, this phrase is too long for general use. An alternative is "plenary restitution",⁴ but

1. For example, Kerr, *Contract*, p 174; p 200; p 396. Collins English Dictionary (1976) define the word "restitute" as "to restore", and "restitution" as:

"...the act of restoring, esp. to the rightful owner; act of making amends; reparation, indemnification; compensation; recompense; atonement; return...."

2. 1985 (3) SA 429 A at 439 B.

3. Lewis and Short's Latin Dictionary; Oxford Latin Dictionary. Percival Gane, *The Selective Voet*, 4.1 (Translator's note) translates the phrase as "restoration to entirety".

4. Nathan, *Common Law of South Africa*, vol 2, Chapter 12, para 845.

this expression has not, in fact, been generally adopted by judges or legal writers and in any event, the phrase contains the word "restitution" which, though qualified by "plenary", may nevertheless be the seed of confusion. It is submitted that, for purposes of clarity, the original Latin phrase *restitutio in integrum* is as well maintained to describe this unique remedy which originated in Roman law.⁵ Because it appears to be necessary⁶ for a person who wishes to have a legal transaction (or the legal consequences of an event) set aside, to ask a court of law for an order to that effect, the remedy is referred to in this work as "an order of *restitutio in integrum*" rather than merely as "*restitutio in integrum*".

2.1.4. An Order of Restitutio in Integrum Described.

Various descriptions of an order of *restitutio in integrum* are found in the Roman, Roman-Dutch and South African law authorities. These descriptions contain valuable information on the nature and characteristics of the remedy.

An order of *restitutio in integrum* is described in Justinian's Digest as follows:⁷

"The usefulness of this title [concerning *restitutio in integrum*] needs no commendation, for it speaks for itself. Under it the praetor in many ways comes to the relief of parties who have made mistakes, or have been cheated, and who, through intimidation, cunning, youth, or absence, have been over-reached."⁸

"Or through a change of condition, or excusable error."⁹

5. In his translation of the Digest of Justinian, C H Monro compromises by using the term "restitution *in integrum*", but it is thought that little is achieved by translating half of the phrase, if the remainder must be rendered in the original language.

6. Section 2.3.2 below. It is submitted in this section that when a legal transaction or the legal consequences of an event are voidable *ab initio* rather than void *ab initio*, an order of a court of law is required to render them void.

7. D.4.1.1 - D.4.1.3.

8. Ulpianus, *On the Edict*, Book 11.

9. Paulus, *Sentences*, Book 1.

"All persons are promised complete restitution by the praetor when proper cause is shown; so that he may examine the justice of the case,¹⁰ and ascertain whether it belongs to that class to which he can afford relief."

De Groot describes the remedy as follows:¹¹

"From these three causes [fear, fraud and minority] arise the remedies for relief, whereby a person is restored to the same position which he occupied before contracting the obligation, provided he restores the other party also to his previous position, and this includes the reciprocal restoration of fruits and profits enjoyed, and compensation for damage. These remedies are with us obtained from the Sovereign, who is represented in this particular by the High Council.... Such relief is effectual against all who have profited by the obligation."

Van Leeuwen says the following of an order of *restitutio in integrum*:¹²

"But if they [obligations] have been entered into with persons, who were not competent to bind themselves; or any other fraud, bad faith, or impropriety exists, the debtor will have his remedy against it and will, upon request to the Supreme Government, be restored to his former position."

Huber describes *restitutio in integrum* thus:¹³

"By *restitutio in integrum* we understand the renewal of a lost right, which, for equitable reasons is restored to its previous condition by a Judge."

Voet describes *restitutio in integrum* as follows:¹⁴

10. Modestinus, *Pandects*, Book 8.

11. De Groot, *Inleydinge*, 3.48.5.

12. Van Leeuwen, *Roomsch-Hollandsch Recht*, 4.42. pr.

13. Huber, *Heedensdaegse Rechtsgeleertheit*, 4.37.6; and at 4.37.8 he continues:

"We say that the case is again restored to its prior condition, that is to say, on both sides just as though nothing has been done, so far as that is practicable...."

14. Voet, *Commentarius*, 4.1.1.

"It is an action for the making whole again of a matter or cause.... It is otherwise described (insofar as it is granted by the magistracy) as a re-setting and restoration of a transaction to its original state; or a making whole again of a cause which has been lost. It is an extraordinary remedy by which the praetor in virtue of his office and jurisdiction, taking the line of natural fairness, puts back injured or cheated persons for just cause into their original state, just as if no damaging transaction had taken place, or at least orders them to be indemnified."

Voet also says:¹⁵

"The effect of *restitutio in integrum* is that all things are put back into their original condition, and that indeed in a single judicial proceeding."

Van der Linden describes *restitutio in integrum* thus:¹⁶

"*Relief*, or *restitutio in integrum*, extinguishes the obligation against which a person is relieved. This is granted by virtue of letters patent, issued by the High Court of Justice (*Mandamenten van Relief*, or *Requesten Civiel*), by the judge of the domicile (lit., *daily*), after a previous action at law and a proper inquiry into the matter: provided there are lawful reasons for this course, which in law are limited to fear or violence, fraud, minority, absence, excusable mistake, suffering damage to the extent of more than half, and further, to all such equitable grounds according to which the transaction ought not to continue to exist."

A review of modern authorities on South African law discloses that orders of *restitutio in integrum* are no longer given substantial treatment as a topic in its own right. The remedy is generally only mentioned within the context of other topics, notably, the law of contract and the law of persons.¹⁷ The emphasis in such works understandably falls on matters other

15. Voet, *Commentarius*, 4.1.21; quoted and followed in *Davidson v Bonafede* 1981 (2) SA 501 C at 509 F.

16. Van der Linden, *Koopmans Handboek*, 1.18.10.

17. The second edition (1978) of Lee and Honoré, *Law of Obligations*, is typical of the lack of emphasis now placed on the remedy of an order of *restitutio in integrum*. The remedy is no longer accorded treatment as a topic on its own, as it was in the first edition (1950) of this work (sections 696 - 703): the reader of the second edition is simply referred, by the index to this work, to the sections in which "restitution" (in the sense of making a restoration) is dealt with. Even in the first edition, the author seems to emphasise only the aspect of mutual restoration in his description of *restitutio in integrum*. He says, in section 696:

"A person entitled to repudiate a transaction for fraud, misrepresentation, duress, undue influence, mistake, *laesio enormis* incapacity, or any other cause, may reclaim from the other party to the transaction, and in certain cases from third persons, any money or other property that he has

than the nature and scope of the remedy generally. Nevertheless, some descriptions can be found. Nathan says the following of an order of *restitutio in integrum*:¹⁸

"It is an equitable remedy for the reinstatement of the person who proves the grounds for restitution in his original position, so that, if he has entered into a contract, he is relieved from any liability thereon, whether in the way of performance or otherwise. In other words, the person seeking restitution, upon obtaining it, is placed in his original legal position. The person who alleges and proves grounds for relief may, however, recover damages instead of being placed in his original legal position. It seems that originally restitution was a prerogative of the Head of the State or the Crown, the task of ascertaining whether there are sufficient grounds for restitution being committed to the Judges; but (*Van der Linden*, 1,18,10; *Juta*, p 172) it is now within the ordinary jurisdiction of the Court, and it is not necessary to report to the Crown."

Hosten *et al.* describe an order of *restitutio in integrum* thus:¹⁹

"This is an extraordinary remedy in terms of which a court orders the former position to be restored; in other words, each party must return to the other whatever he has received in terms of the contract."

De Vos says:²⁰

"Laasgenoemde [*restitutio in integrum*] is die aksie waarmee 'n persoon vra dat 'n vernietigbare kontrak ter syde gestel word, en dat wat hy gegee het, of die waarde daarvan, teruggegee word, terwyl hy ook van sy kant restitueer. Dit is 'n afsonderlike regs middel met 'n eie bestaansreg, en is geen verrykingsaksie nie."

Van der Vyver and Joubert say the following about an action for *restitutio in integrum* in relation to a contract which is binding on a minor:²¹

transferred, or any benefit derived from it, provided he restores, or tenders, to the person from whom he claims, what he has himself received from the transaction."

18. Nathan, *Common Law of South Africa*, vol 2, Chapter 12, para 845. Note that the chapter is headed "Rescission of Agreements", but Nathan states at the outset that he is discussing what was called *restitutio in integrum* in Roman law.

19. Hosten *et al.*, *Introduction to South African Law*, p 293.

20. De Vos, *Verrykingaanspreeklikheid*, p 158.

"Maar as die kontrak by die sluiting daarvan tot die minderjarige se nadeel was, kan hy in sekere omstandighede 'n eis instel vir die kansellasië van die kontrak en herstel van die *status quo ante* die kontrak; dit wil se vir die herstel van die situasie wat sou bestaan het as die kontrak nooit gesluit is nie. Die aksie wat die minderjarige vir die doel aanwend, word *restitutio in integrum* (herstel in die vorige stand) genoem...."

2.1.5. The Characteristics of an Order of Restitutio in Integrum.

It can be seen from the passages quoted in section 2.1.4 above that the various descriptions of an order of *restitutio in integrum* are not identical, and that different authorities emphasize different aspects of the remedy. A comprehensive description of the remedy would therefore be useful, but before attempting a new formulation it is as well to list what appear to be the quintessential ideas that are contained in the descriptions of the authorities reproduced above. Of course, not every point to be listed is found in each of the descriptions, since different authors emphasize different aspects of the remedy. However the points listed are those which, it is submitted, characterise the remedy and which are necessary for an understanding of its nature and scope.

The first important characteristic is that an order of *restitutio in integrum* involves the nullification or making void *ab initio* of a previously valid legal transaction, or of the legal consequences of an event.²²

The second important characteristic is that the nullification of valid legal rights by means of an order of *restitutio in integrum* requires the exercise of an extraordinary power, by either a sovereign body, or by a court of law.²³

21. Van der Vyver and Joubert, *Persone- en Familiereg*, 2.2.1.3.

22. Voet, *Commentarius*, 4.1.1 and 4.1.21; quoted and followed in *Davidson v Bonafede* 1981 (2) SA 501 C at 509 F; Van der Linden, *Koopmans Handboek*, 1.18.10; De Vos, *Verrykingaanspreeklikheid*, p 158; Van der Vyver and Joubert, *Persone- en Familiereg*, 2.2.1.3. Also see section 2.2.1 below.

23. De Groot, *Inteydinge*, 3.48.5; Van Leeuwen, *Roomsch-Hollandsch Recht*, 4.42.pr; Huber,

The third characteristic is that the exercise of this power to nullify valid legal rights must be justified by the existence of good, or just, reason (*iusta causa*).²⁴

Fourthly, there is the characteristic that the nullification of valid legal transactions or the legal consequences of events is ordered to rectify, or to prevent, damage to the interests of the person seeking relief.²⁵

Fifthly, once the original legal transaction or the legal consequences of an event are nullified, it follows that any property or benefits given and received in consequence of the original legal relations must be restored to the person from whom they were received, and that any legal rights lost be restored to the aggrieved party.²⁶

All of the characteristics which have been identified can be combined into a description of an order of *restitutio in integrum*. The following formulation of such a description is suggested.

When an event with legal consequences has occurred, or a transaction has been entered into, which has caused, or which may cause, loss or prejudice to the interests of a person involved therein, then if, on the facts of the case and taking into account what is fair and just, good reason (iusta causa) is shown to exist, the legal consequences of that event, or the transaction itself,

Heedensdaegse Rechtsgeleertheit, 4.37.6; Van der Linden, *Koopmans Handboek*, 1.18.10; Nathan, *Common Law of South Africa*, vol 2, Chapter 12, para 845; Hosten *et al.*, *Introduction to South African Law*, p 293. Section 2.2.1 and 2.2.3 below.

24. D.4.1.3; Huber, *Heedensdaegse Rechtsgeleertheit*, 4.37.6; Voet, *Commentarius*, 4.1.1; Van der Linden, *Koopmans Handboek*, 1.18.10; Nathan, *Common Law of South Africa* vol 2, Chapter 12, para 845. Also see section 2.4 below.

25. D.4.6.27; Buckland, *Text-book* p 720, relying on D.4.1.1-4; Voet, *Commentarius*, 4.1.1; quoted and followed in *Davidson v Bonafede* 1981 (2) SA 501 C at 509 E; Van der Vyver and Joubert, *Persone- en Familiereg*, 2.2.1.3. See section 2.11 below.

26. De Groot, *Inleydinge*, 3.48.5; Voet, *Commentarius*, 4.1.21; Hosten *et al.*, *Introduction to South African Law*, p 293; De Vos, *Verrykingaanspreeklikheid*, p 158.

may be nullified (*made void*) *ab initio* by an order of a court of law, and, as a consequence, the parties restored to their former position by a mutual restoration of any benefits given and received between them, and by a restoration of legal rights previously lost.

2.1.6. The Essential Elements of a Claim for an Order of Restitutio in Integrum.

By comparing and analysing the various descriptions of an order of *restitutio in integrum* given by the authorities cited above, it is possible to identify certain elements without which the remedy cannot be said to be available. It is suggested that there are three elements which it is essential to allege and prove in support of a claim for an order of *restitutio in integrum*.

Firstly, the person seeking an order of *restitutio in integrum* must allege and prove the existence of just reason (*iusta causa*) which, in the discretion of the court, justifies the setting aside of a valid legal transaction or the legal effect of an event.²⁷

Secondly, the person seeking the remedy must allege and prove that he has entered into some transaction or has allowed some event to happen and as a result thereof he has suffered, or may suffer, material (non-trivial) damage to his proprietary interests.²⁸

Thirdly, since an order of *restitutio in integrum* may necessitate a mutual restoration of benefits received, the person seeking *restitutio in integrum* must be willing and able to restore the benefits he has received in terms of the transaction or event which he seeks to have set aside, when asking for the remedy.²⁹

These elements are examined in detail below in this chapter.

27. See sections 2.4 - 2.10 below.

28. Section 2.11 below.

29. Section 2.12 below.

2.2. THE ORIGINS AND NATURE OF AN ORDER OF RESTITUTIO IN INTEGRUM.

2.2.1. The Nature of an Order of Restitutio in Integrum in Roman Law.

The remedy known as *restitutio in integrum* was originally conceived and developed by the praetors of republican Rome.¹ The remedy involved an exercise of the praetor's *imperium*, that is, the sovereign power which praetors shared with the consuls,² as distinct from the praetor's *iurisdictio*, which was the authority relied on by the praetor in the ordinary process of litigation.³ Reliance on *imperium* rather than *iurisdictio* was necessary because of the extraordinary nature and effect of an order of *restitutio in integrum*. In particular, an order of *restitutio in integrum* did not result in the enforcement of existing legal rights and duties,

1. D.4.1.1; D.4.2.1; D.4.3.1.pr; D.4.4.1; D.4.5.2.1; D.4.6.1.

2. Jolowicz and Nicholas, *Historical Introduction*, p 48 - 49:

"The position of the praetor is best understood by thinking of him, in the Roman phrase, as a minor colleague of the consul. He, like the consul, is elected by the *comitia centuriata* and he has full *imperium*, which means that he is in principle capable of all the duties which the consul performs, militarily and administrative as well as judicial. But he is subordinate to the consul..."

3. Jolowicz and Nicholas, *Historical Introduction*, p 226:

"The activity of the magistrate in the ordinary procedure leading to an action is a result of that part of his function known as *iurisdictio*, but with the remedies we have now to discuss [Pretorian stipulations, *Missiones in Possessionem*, *In Integrum restitutiones*, Interdicts] the position is different. Here we have to deal with orders issued by the praetor as a holder of *imperium*."

On the relationship between *imperium* and *iurisdictio* see footnote 9 on page 47 of the same work.

but, it is submitted, rather involved the nullification *ab initio* of Civil law rights and duties which were otherwise perfectly valid and enforceable. Thus, Professor Buckland says the following:⁴

"But *restitutio in integrum* definitely destroyed rights existing at civil law, though they might be based on a statute, even the XII tables."

There are, in fact, relatively few direct references in the Digest to this important characteristic of the remedy. It is submitted that this is because the idea of the nullification of the transaction, or the consequences of an event, was implicit in the term *restitutio in integrum*. However, there are some passages which support the contention that an order of *restitutio in integrum* involved the nullification of existing legal rights. Thus, in D.4.4.24.4, reference is made to the "annulment" of a contract of sale (*ut infirmanda sit*). In D.4.4.49 reference is made to the "rescission" of a contract by means of *restitutio in integrum*. The original text contains the words "*distractio per in integrum restitutio*". The word "*distraho*" literally means "to pull apart", "tear in pieces" or "bring to naught",⁵ and thus has strong connotations of nullification, or making void, *ab initio*. Further, it is submitted that there is a strong implication that *restitutio in integrum* nullifies a transaction *ab initio*, in the following passage, in which it is said that an order of *restitutio in integrum* is not necessary when a transaction is *already* legally void. In other words, it is said that there is no point in interfering with the law when the intended result of so interfering has already been found to exist. Thus:⁶

"It is generally established that where a contract is not valid (*non valet*) the

4. Buckland, *Text-book*, p 719, quoting D.4.1.6 *in fine*; Van Zyl, *Roman Private Law*, p 383. Thomas, *Textbook*, p 113, quoting D.4.1.3. says:

"This [*Restitutio in integrum*] was perhaps the most striking exercise of his *imperium* by the praetor for it involved the nullification of some transaction or state of affairs which was perfectly valid at civil law and was granted by decree after enquiry."

5. Cassell's Latin-English Dictionary.

6. D.4.4.16.3.

praetor should not interfere if this is certain."

In addition to the above, it can be argued that, while many of the passages emphasise the restoration of property, or legal rights, that occurs when *restitutio in integrum* is ordered, the question nevertheless arises: what is the legal basis for such restoration? Clearly, in the circumstances in which *restitutio in integrum* is ordered, no right, or enforceable obligation, exists in law in terms of which restoration of property, or of legal rights, is required. For example, there is no authority for the proposition that, in Civil law, the existence of *dolus* creates a legal right to be restored to a former state, or creates a legal obligation in terms of which the other party is required to make such restoration, and that *restitutio in integrum* is an action to enforce such a right. On the contrary, in terms of the Civil law, and in the circumstances in which an order of *restitutio in integrum* was available, there would clearly be no legal right to restoration, or obligation to make restoration.⁷ It is suggested therefore that the juristic basis of the restoration of the parties involved to their *status quo ante* in circumstances of an order of *restitutio in integrum* is the nullification *ab initio* of the previously valid legal transaction or legal consequences of an event. This is an important realisation, because it explains much about the nature and role of an order of *restitutio in integrum*, not only in Roman and Roman-Dutch law, but also in South African law.

It can be appreciated from the foregoing that an order of *restitutio in integrum* is a substantial interference with ordinary legal relationships. Such interference with the Civil law by the praetor would have been intolerable had it been unlimited and gratuitous. What made an order of *restitutio in integrum* acceptable, within the legal system, was the principle that it should only be available when the circumstances of the case gave rise to sufficient, equitable grounds to justify setting aside an otherwise valid legal transaction, or the legal consequences of an event. The following passage occurs in the Digest:⁸

7. Section 2.2.2.

8. D.4.1.3. Also see D.4.3.1; D.4.6.1; Van Zyl, *Roman Private Law*, p 383.

"All persons are promised complete restitution by the praetor when proper cause is shown; so that he may examine the justice of the case, and ascertain whether it belongs to that class to which he can afford relief."

In other words, the remedy was only available when the justice of the case demanded it. The circumstances in which equitable considerations were likely to be found to exist were cited in the praetor's Edict as follows:⁹

"Under it [the title concerning *restitutio in integrum*] the praetor in many ways comes to the relief of parties who have made mistakes, or have been cheated, and who, through intimidation, cunning, youth or absence, have been over-reached.

Or through a change of condition, or excusable error."

Even when such circumstances were proved to exist, the award of the remedy remained discretionary, so that *restitutio in integrum* would only be ordered if the matter appeared to be sufficiently serious to warrant interference by the praetor, and if it was *necessary* in order to provide relief from injustice.¹⁰ It was not available to remedy trivial hardship, nor if

9. D.4.1.1 and 2. Also see D.4.6.1, which says:

"Moreover, when any other just cause seems to exist, I will grant complete restitution, when this is authorised by the laws, the plebiscites, the decrees of the Senate, or the edicts and the ordinances of the Emperors."

Thomas, *Textbook*, p 113; Buckland, *Text-book*, p 721. In *Allen v Allen* 1951 (3) SA 320 A at 326 G, Van den Heever J A said the following:

"The rules governing this remedy developed out of praetorian relief granted on specific grounds, for example, minority, absence, fraud, fear, etc., and were conceived in the interests of the person obliged, upon whom the letter of the law was incident with harshness."

10. D.4.1.3. Also see D.4.1.4, where Callistratus says:

"I know that it has been held by some authorities that a party who applies for complete restitution shall not be heard where some very insignificant affair or sum is involved, if this would prejudice the hearing of some more important matter, or the collection of a larger sum."

See further D.4.3.9.5 - D.4.3.10, where Paulus says the following:

"The praetor with reason inserts the words "proper cause must be shown", for this action ought not to be granted indiscriminately; for instance, in the first place if the amount involved is insignificant,

That is to say, not over two *aurei*."

another remedy was available. It is submitted that this limitation existed because the nullification *ab initio* of a valid legal relationship is obviously so potentially detrimental to the law, which generally exists to be upheld and enforced. Setting aside a legal transaction, or the legal consequences of an event, was therefore only ordered when it was considered necessary, as well as just, to do so.

In summary, therefore it can be said that, in Roman law, the remedy of an order of *restitutio in integrum* was extraordinary because it involved the exercise of an extraordinary power to nullify *ab initio* a legal transaction, or the legal consequences of an event, as opposed to giving effect to and enforcing legally valid relationships. Further, the remedy was equitable, because an order of *restitutio in integrum* was available on the basis of considerations of what was a just and fair result, rather than by rigidly applying rules of law. Finally, the remedy was discretionary, because the the remedy would be ordered subject to the discretion of the judicial official hearing the case.

A distinction must now be drawn between the ordinary discharge of legally enforceable liabilities, and the effect of an extraordinary nullification *ab initio* of legally valid transactions.

An example will assist in illustrating the differences. In the case of a legally valid contract of sale, the agreement gives rise to legally enforceable obligations between the parties. The duty to perform the terms contractually undertaken, that is, to fulfil the contractual obligations, gives rise to a legally enforceable liability.¹¹ This liability was ordinarily discharged in Roman law, either by performance of the agreed terms, or by the payment of damages for failure to perform as required,¹² or by voluntary abandonment by the creditor

11. Jolowicz and Nicholas, *Historical Introduction*, p 159 - 162. The term "liability" refers to the legal enforceability of the obligations to which the contract gives rise. The learned authors point out that a legally recognised obligation is not necessarily legally enforceable (at page 160). An example of a legally recognised obligation which is unenforceable at law is a contractual obligation against the enforcement of which the defendant is entitled to raise an *exceptio*, such as the *exceptio doli*, or the *exceptio non adimpleti contractus*.

12. Unlike modern South African law, a plaintiff who sued in Roman law to enforce

of his rights. When the all the outstanding contractual obligations have been fulfilled, or when liability has been discharged in some alternative way, such as by paying damages for failure to perform, the contract is considered to be at an end.¹³

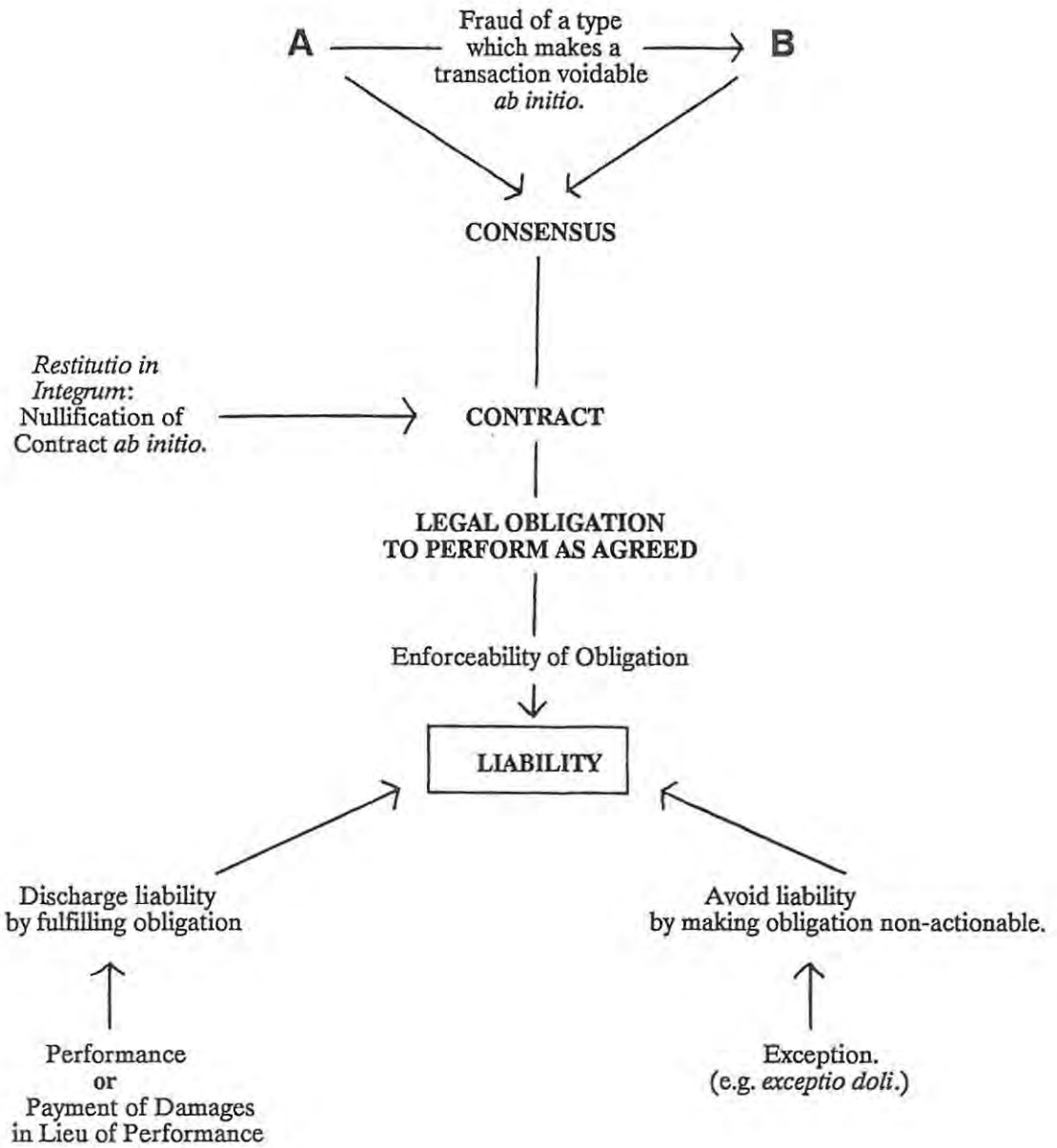
By contrast, when a contract of sale is entered into because of, for example, a fraud practised by one of the contracting parties, and, on the basis of *iusta causa* which may exist in circumstances of *dolus*, *restitutio in integrum* is ordered, the effect of the order is to nullify the transaction *ab initio*, in other words, eradicate the transaction from existence, just as if it had never been created in the first place. The effect of the nullification is to eradicate not only the transaction, but with it, the legal obligations to which it gave rise, and, if performance has not taken place, any liability to render performance. Even if performance *has* already taken place, and the liabilities discharged, so that the contract can be said to be ended, its *existence ab initio* can still be the object of an order of *restitutio in integrum*. When the contract has been nullified *ab initio*, the obligations and the liability to fulfil them also disappears, retroactively. It follows that a mutual restoration of what was given and received in terms of the original obligations is then required. The relationship of the various concepts under discussion can be represented diagrammatically, as is shown on the following page.

It can therefore be seen that the effect of an order of *restitutio in integrum* is quite different from the effect of discharge of legal obligations by performance of the terms thereof, or by the payment of damages, or by voluntary termination of a contractual relationship. Whereas an order of *restitutio in integrum* renders a legal transaction, or the legal consequences of an event, void *ab initio*, the ordinary discharge of liability, for example, by performance, brings

contractual obligations was not entitled to an order of specific performance, but instead had to be satisfied with an award of damages in lieu of such performance. For the historical reasons for this, see Chapter 3 of this work. However, this difference between Roman and South African law does not invalidate the observation that the legal liability that existed when valid contractual obligations were created could be discharged either by performance, or by the payment of damages in lieu of performance.

13. The expression "the contract is at an end" does not mean that the contract has become void *ab initio*. It means rather that, all obligations having been fulfilled, nothing remains to be done, and no further liability in respect of that contract exists.

DIAGRAM A.



an end to the contractual relationship by fulfilment of the terms of the obligations, but it does not operate retroactively to destroy the very existence of the original legal relationship *ab initio*.¹⁴

2.2.2. The Role of an Order of Restitutio in Integrum in Roman Law.

It is important to understand the role played by an order of *restitutio in integrum* in Roman law in relation to other legal remedies and actions that might be available in the same factual situation. In particular, an account of the relationship that existed between an order of *restitutio in integrum* and the *actio doli*, the *actio quod metus causa*, the *exceptio doli* and the *exceptio metus* illustrates that, of these, only an order of *restitutio in integrum* had the effect of making void *ab initio* the legal transaction, or the legal consequences of an event.¹⁵ The other actions and exceptions either gave *effect* to a claim for damages, or set up an *impediment* to the enforcement of existing rights, but did not involve making those legal rights void *ab initio*. This becomes clear from the following account.

In early Roman law, the old, unilateral *stricti iuris* contracts such as *stipulatio*, *dotis dictio* or *iusiurandum liberti* were not affected, in civil law, by *dolus* or *metus*. The existence of either trickery or duress inducing such contracts provided no escape from the obligation to perform.¹⁶ Nor, originally, did *dolus* or *metus* give rise to a claim for damages.¹⁷ However

14. The effect of an order of *restitutio in integrum* in rendering a transaction, or the legal consequences of an event, void *ab initio* is significant in distinguishing this remedy from other remedies that are available in South African law, in particular, cancellation (rescission) for breach of contract. See sections 2.10 and 2.14 below.

15. Buckland, *Text-book*, p 719, footnote 5, suggests that *actiones honorariae* and *exceptiones* might do the same, but it is submitted that the effect of these actions and exceptions was to *avoid* or circumvent (and sometimes supplement) the consequences of civil law rules, rather than to directly nullify civil law relationships *ab initio*.

16. Buckland, *Text-book*, p 415:

"In *stricti iuris* transactions the fraud had, till the time of Cicero, no effect on the liability. Thereafter the *exceptio doli* could always be pleaded in reply to a claim on a contract induced by fraud, and there was an *actio doli* where the matter had been completed."

bona fide contracts, such as *emptio venditio* and *locatio conductio*, gave rise to different considerations. The duty to act in accordance with the dictates of good faith which was embodied in such contracts allowed the existence of *dolus* or *metus* to be raised as a defence to an action to enforce performance, or to enable the aggrieved party to seek redress.¹⁸

In the last century of the Republic, the *actio doli* and the *actio quod metus causa* were introduced and, by using these actions, *dolus* and *metus* became grounds for an action for damages in the context of *stricti iuris* relationships as well as the *bona fide* ones.¹⁹

However, more must be said. The *actio doli* and *actio quod metus causa* were not *contractual* actions. *Dolus* and *metus* were recognised by the praetor as giving rise to *delictual* liability, and, when damages were sought, the actions were, in reality, actions in delict, to recover a penalty.²⁰ The *actio quod metus causa* was brought for four times the value of the harm suffered.²¹ Interestingly, this action was an *actio arbitraria* in terms of which the order to pay a penalty was made conditional, so as to give the defendant the option of making restoration instead, but of course, in such actions, it was entirely up to the defendant to

Thomas, *Textbook*, p 228:

"The two [*metus* and *dolus*] followed a similar pattern in their effects upon contracts. On the old, original unilateral obligations of the civil law they long had no effect."

Van Warmelo, *Roman Civil Law*, sections 593, 695.

17. The actions in delict to recover damages for *dolus* or *metus* were not civil law delicts, but Praetorian delicts, that is to say, were actions provided by the praetor in circumstances where the *ius civile* provided no redress. Thomas, *Textbook*, p 373 - 374; Van Zyl, *Roman Private Law*, p 349; Buckland, *Text-book*, p 593.

18. Thomas, *Textbook*, p 228:

"But the consensual and later real contracts were enforced by *bonae fidei* actions and the expression *ex fide bona* in the *intentio* of the relevant contractual action would enable the aggrieved party to seek redress for or, as defendant, to establish the fraud or duress to which he had been subjected."

19. Buckland, *Text-book*, p 415; Thomas, *Textbook*, p 228.

20. Buckland, *Text-book*, p 593 - 595; Thomas, *Textbook*, p 373 - 375.

21. D.4.2.14.1.

make the choice.²² The *actio doli* was similarly delictual, but was *in simplum*, that is, for a single penalty. It is important to appreciate that neither of these two actions was, in itself, a *defence* to the performance of a contract induced by *metus* or *dolus*, nor were they actions which resulted in the contract itself being set aside as void *ab initio*. The bringing of the delictual action was to recover an award of damages, not to dissolve the contract, and the *actio doli* or *actio quod metus causa* could well be brought *after* the performance of the contract had been rendered, without setting aside of the contract as void. These delictual actions are therefore clearly distinguishable from an order of *restitutio in integrum*, both as regards their objective (damages), and their effect on the contract.

By contrast with the *actio doli* and *actio quod metus causa*, the *exceptio doli* and *exceptio metus* were *defences*, which could be set up to avoid performance of contractual obligations. The defences were available to a person who had been induced into a contract, either by *dolus*, or *metus*, or against whom enforcement of obligations would, in the circumstances of the case, be fraudulent. Once introduced into Roman law, these exceptions were available to avoid performance of both *bona fide* and *stricti iuris* contracts.²³ The effect of raising the exception varied depending on whether the contract involved was *bona fide*, or *stricti iuris*. In the case of *stricti iuris* contracts, the successful raising of the *exceptio* by the aggrieved person defeated the plaintiff's action entirely, so that the defendant was under no obligation at all to perform any portion of the contract. Further, by bringing the action, the plaintiff consumed his right of action. In the case of *bona fide* contracts, it was possible for the *iudex* to merely adjust the *condemnatio*, to take account of the plaintiff's *dolus* or *metus*, diminishing the defendant's obligations, but without wholly relieving him of his obligation to

22. Van Warmelo, *Roman Civil Law*, section 592. The inclusion of a *clausula arbitraria* in a formula is not an instance of an order of *restitutio in integrum*. The objective of such clauses was to encourage the specific performance of contracts, not to set aside a contractual relationship; see D.4.2.14.4.

23. Thomas, *Textbook*, pp 228:

"Thereafter, duress and fraud would affect any contract, though the consequences might differ according as the contract was *bona fide* or *stricti iuris*."

perform.²⁴

These points make it clear that the effect of an *exceptio doli*, or *exceptio metus*, was not to render a contract void *ab initio* but, at most, to set up an impediment to the enforcement of outstanding obligations. Thus the *exceptio doli* or *metus* would be of little help if the obligations in question had already been performed, or if there was a desire to have the contract set aside entirely and made void *ab initio*.²⁵ To achieve that result, an order of *restitutio in integrum* was necessary.²⁶ It should not therefore to be argued, in cases in which either *dolus*, or *metus*, is a factor, that the availability of the *exceptio doli* and the *exceptio quod metus causa* render an order of *restitutio in integrum* superfluous. Furthermore, it should be no surprise to find that, in Roman law, the remedy of an order of *restitutio in integrum* co-existed with and complemented the *actio doli*, the *actio quod metus causa*, the *exceptio doli* and the *exceptio metus*. These actions and defences did not displace *restitutio in integrum*; they had a wholly different function. An order of *restitutio in integrum* remained the only remedy in terms of which, by exercising the extraordinary power of *imperium*, the praetor, because of equitable considerations arising from circumstances involving *dolus*, *metus*, minority or absence, nullified a legally valid transaction, such as a contract, *ab initio*, and made such orders as were necessary to effect a mutual restoration of benefits previously received by the parties.²⁷

24. Buckland, *Text-book*, p 415. D.19.1.41 provides an illustration of the principle.

"In a contract of sale, nothing was stated with reference to the annual payment due for an aqueduct passing under a house at Rome. The buyer being deceived would be entitled to an action on purchase on this ground; and therefore, if he should be sued in an action on sale for the price, the unexpected burden imposed upon him should be taken into consideration."

25. Some texts indicate that *metus* renders a contract void; others that, despite *metus*, the transaction remains valid *iure civili*, subject to a *restitutio in integrum*. See Buckland, *Text-book*, pp 416 - 417. The latter view appears to have prevailed, in Roman-Dutch law at any rate: see Voet, *Commentarius*, 4.2.2.

"Since then consent is present in those acts which are performed in fear, it follows that as a rule they are not *ipso iure* void, but that they hold good until they are set aside and restored to their proper fairness by the magistracy."

26. Thomas, *Textbook*, p 373 - 374; Buckland, *Text-book*, p 416 -417.

2.2.3. Orders of Restitutio in Integrum in Roman-Dutch Law.

It is apparent from the authorities that the remedy of an order of *restitutio in integrum* was received from Roman law into Roman-Dutch law. Voet is the most detailed source on this topic²⁸ but other writers also make important contributions, notably Huber,²⁹ De Groot,³⁰ and Van Leeuwen.³¹

It is submitted that orders of *restitutio in integrum* retained the same fundamental characteristics and role in Roman Dutch law that the remedy had had in Roman law. Certainly, the remedy was recognised as being extraordinary, rather than ordinary.³² The effect of an order of *restitutio in integrum* was recognised as being the nullification *ab initio* of previously valid legal transactions, or the legal consequences of events. This is implicit in the following passages from Voet:

"The effect of restitution is that all things are put back into their original condition, and that indeed in a single judicial proceeding."³³

"Nor should recourse be had to restitution whenever a person is *ipso iure* safe.... The making whole again of a lost cause is invoked in vain when by very law his rights are kept entire and untouched."

27. Thomas, *Textbook*, pp 373 - 374 gives a good description of the relationship between, and the role of, the various remedies and the exceptions discussed above.

28. Voet, *Commentarius*, 4.1 - 4.6.

29. Huber, *Heedendaegse Rechtsgeleertheit*, 4.37. - 4.42.

30. De Groot, *Inleydinge*, 3.48; 3.52.

31. Van Leeuwen, *Roomsch-Hollandsch Recht*, 4.42; *Censura Forensis*, 4.40 - 4.44. Also, Van der Linden, *Koopmans Handboek*, 1.18.10.

32. Huber, *Heedendaegse Rechtsgeleertheit* 4.37.1; Van Leeuwen, *Censura Forensis*, 4.40.9; Voet, *Commentarius*, 4.1.1.

33. Voet, *Commentarius*, 4.1.21.

"Nor have I any doubt that nowadays too when a transaction extra-judicially completed is *ipso iure* null, a person can be safe against it without restitution...."³⁴

Van der Linden is even more explicit:³⁵

"Relief, or *restitutio in integrum*, extinguishes the obligation against which a person is relieved."

Further, it may be observed that, in Roman-Dutch law, the authority of the courts to order *restitutio in integrum* was understood to be a delegation of extraordinary power from the Sovereign. De Groot says the following:³⁶

"These remedies are with us obtained from the Sovereign, who is represented in this particular by the High Council...."

Voet expresses similar ideas:³⁷

"But if on the other hand restitution is to be obtained in respect of some main and finished matter, for instance against contracts, compromises, adiations or rejections of estates, prescription, *res judicata* or other things like them, the better view is that it can only be claimed from the supreme sovereign or from those to whom the sovereign has expressly entrusted such power."

The Roman-Dutch writers also acknowledge the equitable nature of orders of *restitutio in integrum*. There are many references to this,³⁸ an example being the following passage from Voet:³⁹

34. Voet, *Commentarius*, 4.1.13. Also see De Groot, *Inleydinge*, 3.48.1; Huber, *Heedendaegse Rechtsgeleertheit*, 4.37.8 and 11:

"Restitution applies then in all cases, provided that they are cases of importance; for in trivial matters it is not worth the trouble to nullify what is duly founded on the requisites of law."

35. *Koopmans Handboek*, 1.18.10:

36. De Groot, *Inleydinge*, 3.48.5. Van Leeuwen, *Roomsch-Hollandsch Recht*, 4.42.pr. says that the remedy is available "...upon request to the Supreme Government...." Also see Huber, *Heedendaegse Rechtsgeleertheit*, 4.37.9.

37. Voet, *Commentarius*, 4.1.4.

38. For example, Huber, *Heedendaegse Rechtsgeleertheit*, 4.37.6; Van der Linden, *Koopmans*

"Unless there is in it [*restitutio in integrum*] and shines through it that natural fairness which prompts the granting of restitution and makes the case of the opponent an unfair case, it will have to be refused."

Finally, it must be noted that an order of *restitutio in integrum* was considered, in Roman-Dutch law, to be a remedy which was available not as of right, but in the discretion of the Court. Voet explains it thus:⁴⁰

"Nevertheless [*restitutio in integrum*] is not to be vouchsafed at random to anyone claiming it and setting up a cause; but only after cognizance has been taken of the question whether the cause is really genuine, just and sufficiently serious."

"Nor as a rule is room allowed for restitution in cases where some other ordinary and equally fertile remedy is provided by way of indemnity. If one is armed in sheer law with a common relief, an extraordinary relief should not be bestowed on one."

"Nor should recourse be had to restitution whenever a person is *ipso iure* safe - when for instance a contract has been made with a ward without the authority of his guardian, and the ward has not been enriched thereby."

It is therefore submitted that the essential features of *restitutio in integrum* which characterised the remedy in Roman law were preserved in Roman-Dutch law. In the next section, the question is asked whether the same can be said of the remedy in South African law.

Handboek, 1.18.10.

39. Voet, *Commentarius*, 4.1.1.

40. Voet, *Commentarius*, 4.1.11 - 4.1.13.

2.3. ORDERS OF RESTITUTIO IN INTEGRUM IN SOUTH AFRICAN LAW.

2.3.1. Orders of Restitutio in Integrum not Obsolete in South African Law.

In *Tjollo Ateljees (Eins) Bpk v Small*¹ Van den Heever JA raises doubts about the continued existence of an order of *restitutio in integrum* as a remedy in modern South African law. At page 871 of his judgement the learned judge says the following:

"It may be objected that if you eliminate the remedy based on *laesio enormis* you eliminate *restitutio in integrum* altogether; but I am not sure that there is room for *restitutio* in the developed law or that the remedy is useful today. We are inclined to pay lip-service to a quaint expression and an old institute which is meaningless today."

A further passage from the case is important, and is therefore reproduced below in this section, but, in summary, the view expressed by the learned judge is that an order of *restitutio in integrum* was originally a product of the distinction made in Roman law between *ius* (law) and *aequitas* (equity). Van den Heever JA says that, since this distinction no longer persists in South African law, and, because certain procedural technicalities have also disappeared, there is no longer a need, in modern South African law, for orders of *restitutio in integrum*. In South African law, he suggests, a plaintiff may rely on fraud, fear, or force as direct causes of action or as defences to actions, without the need for extraordinary relief. As for unassisted minors, their contracts are recognised in South African law as void, not voidable,

1. 1949 (1) SA 856 A. Also see A Wood Renton, "The Roman-Dutch Law in Ceylon Under the British Regime", (1932) 49 *SALJ* 161 at 180, in which similar doubts are referred to in relation to the law of Ceylon.

and therefore, says Van den Heever JA, an order of *restitutio in integrum* is not required to nullify such a contract.² Of course, there are cases such as those in which minors may enter into disadvantageous contracts with the assistance of a guardian. Such contracts are not void *ab initio* but nevertheless a court will have to grant relief to the minor in appropriate circumstances. Van den Heever JA prefers not to consider this an instance of any extraordinary remedy.

The relevant passage from *Tjollo's* case reads as follows:³

"The notion of restitution is meaningless apart from the Roman dualistic system in which *ius* and *aequitas* could stand poles apart. What is generally overlooked is that, in spite of *restitutio* the two remained poles apart... Gradually the difference between civil and praetorian law vanished. Only in one instance did the praetors retain their free discretion to grant relief, namely in the case of minors (D.4.4.1.1.). In all other cases they were bound by the *album*, and if the facts were covered by the conditions stated in the Edict they had to grant the promised relief (D.4.6.1.1.). There had been a school of thought which considered that the praetor should not grant restitution in respect of a small sum or asset if thereby more important interests could be prejudiced (D.4.1.4.). *Paul* held a contrary view, which was adopted by Justinian (D.4.1.5.) that, where the facts were covered by the conditions set out in the *album*, the praetor had to grant relief, however small the interest involved (*nemo videtur re exclusus*). In this manner the discretion of the praetor hardened into positive law. With reference to this process Savigny observed (*System*, Vol 7, sec 317):

"In the course of time and in various directions restitution became more and more assimilated to ordinary legal remedies, and in this changed form it came down to us as a constituent part of the common law... If we regard the matter without bias, we must admit that this institute of the Roman law has less inherent reason for its continued existence than most others, and that it has less reason for influencing the modern state of law. In modern codes, especially, it has not been observed and adopted."

The author proceeds to show that the *raison d'être* for restitution has disappeared. Goudsmit, *Pandecten-systeem*, pt.1 sec. 109 *in notis* alluding to the change, says:

"En daardoor, en ten gevolge van de veranderde procesorde en de gewijzigde taak des rechters, moest het verschil tussen de gewone rechtsmiddelen en de i.i.r. meer en meer verdwijnen, en had zij inderdaad voor het

2. Since an order of *restitutio in integrum* is a remedy in terms of which a transaction or the legal consequences of an event are nullified *ab initio* by an order of court, there is obviously no reason to order *restitutio in integrum* in respect of a transaction that is already void. Van der Keesel, *Theses Selectae*, 3.48.1.

3. 1949 (1) SA 856 A at 871 - 872.

Justinianeische recht geen reden van bestaan meer."

If that is so the need for this remedy in Roman-Dutch law must be infinitely less. We do not petition for *restitutio in integrum* to relieve us from the obligations induced by fear, force or fraud. We raise these negations of free volition as direct defences or causes of action. The duality of Roman law has ceased to exist. A contract entered into by an unassisted minor is *ipso iure* void and the minor requires no restitution."

Tjollo's case was decided in 1948. Despite the doubts cast by Van den Heever JA, the remedy of an order of *restitutio in integrum* has not disappeared from the minds of South African judges or academic writers. The term, and reference to the concept, occurs frequently in the law reports and journals, although sometimes without much regard for its exact meaning or nature.⁴ At the same time, it seems that the questions raised in *Tjollo's* case have not been forgotten either. There persists a nagging doubt whether an order of *restitutio in integrum* is still a part of South African law or not. The matter is raised, for example, in the article cited in the footnote below.⁵

It is therefore necessary to examine in more detail one of the central points raised in *Tjollo's* case. This is the suggestion that the *raison d'être* of the remedy was the distinction drawn in Roman law between *ius* and *aequitas*.⁶ The distinction referred to here is not the difference between the *ius civile* and the *ius honorarium*. It is rather the distinction between the strict or formal principles and rules of law as opposed to considerations of justice, fairness and equity. In some of the early Roman law contracts the obligations of the parties were determined strictly by the rules of law (and enforced by *actiones stricti iuris*): in other contracts, good faith (*bona fides*) was an element which gave rise to various additional duties, such as the duty to abstain from trickery or deceit. These contracts were enforced by

4. For example, the phrase *restitutio in integrum* and the term "restitution" are often used as synonymous with the remedy sought in terms of an *actio redhibitoria*. The difference between these remedies is discussed in section 2.14.3 below.

5. G Lubbe, "The Assessment of Loss Upon Cancellation for Breach of Contract", (1984) 101 *SALJ* 616 at 634 n 129.

6. *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 A at 871:

"The notion of restitution is meaningless apart from the Roman dualistic system in which *ius* and *aequitas* could stand poles apart."

iudicia bonae fidei.⁷ It is implied in what Van den Heever JA says in *Tjollo's* case (wrongly, it is thought), that an order of *restitutio in integrum* is only necessary when *stricti iuris* actions are distinguished from those in which good faith may be taken into account as an element. However, in Roman law, an order of *restitutio in integrum* was available not only in respect of contracts which gave rise to *actiones stricti iuris* but also in respect of contracts giving rise to *iudicia bonae fidei*. This being so, it is hard to understand the suggestion that once the distinction between transactions in which good faith is an element and those in which it is not falls away, so an order of *restitutio in integrum* becomes obsolete as a remedy.

It has also been suggested that an order of *restitutio in integrum* is not a *necessary* part of South African law. In *Tjollo Ateljees (Eins) Bpk v Small*,⁸ Van den Heever JA says the following:

"We do not petition for *restitutio in integrum* to relieve us from obligations induced by fear, force or fraud. We raise these negations of free volition as direct defences or causes of action. The duality of Roman law has ceased to exist.... Why then retain an antediluvian fossil which has slipped into the ranks of *justae causae* for restitution *per incuriam* and which moreover has no authentic legal justification?"

With respect, the learned judge apparently misses the point that, in Roman law, *dolus* and *metus* could also be directly raised as defences and causes of action, as explained above,⁹ and yet, even so, an order of *restitutio in integrum* remained a distinct and important remedy in Roman law, and Roman-Dutch law.¹⁰ It did so because the effect of an order of *restitutio in integrum* was different from the effect of the other remedies available. An order of *restitutio in integrum* nullified (rendered void *ab initio*) the legal transaction that had existed between the litigants, thus rendering legal obligations non-existent *ab initio*, and therefore

7. Inst. 4.6.28. Buckland, *Text-book*, pp 678 - 679 explains the importance of the distinction.

8. 1949 (1) SA 856 A at 872.

9. Section 2.2.1 and 2.2.2 above.

10. See generally, Huber, *Heedensdaegse Rechtsgeleertheit*, 4.37 and Voet, *Commentarius*, 4.1; and in particular, Voet, *Commentarius*, 4.1.21; Van der Linden, *Koopmans Handboek*, 1.18.10.

requiring a mutual restoration by the parties of any benefits they had received from each other. The other remedies available in Roman law did not have the effect of rendering the entire transaction void *ab initio*. Thus, the delictual actions were brought to enforce a claim for an award of damages, and had no effect on the transaction itself, which was not nullified by the bringing of an *actio doli*, or *actio quod metus causa*.¹¹ So too, the *exceptio doli* and *metus* were defences to actions brought to enforce the transaction, and merely enabled the aggrieved party, if he had not yet performed, to *avoid* performance, in particular, by rendering the obligations unenforceable: but these defences did not have the effect of rendering the contract itself void.¹² If what was desired was the nullification *ab initio* of a legal transaction or the legal consequences of an event which had occurred, then it was necessary in Roman law and Roman-Dutch law to obtain an order of *restitutio in integrum*.

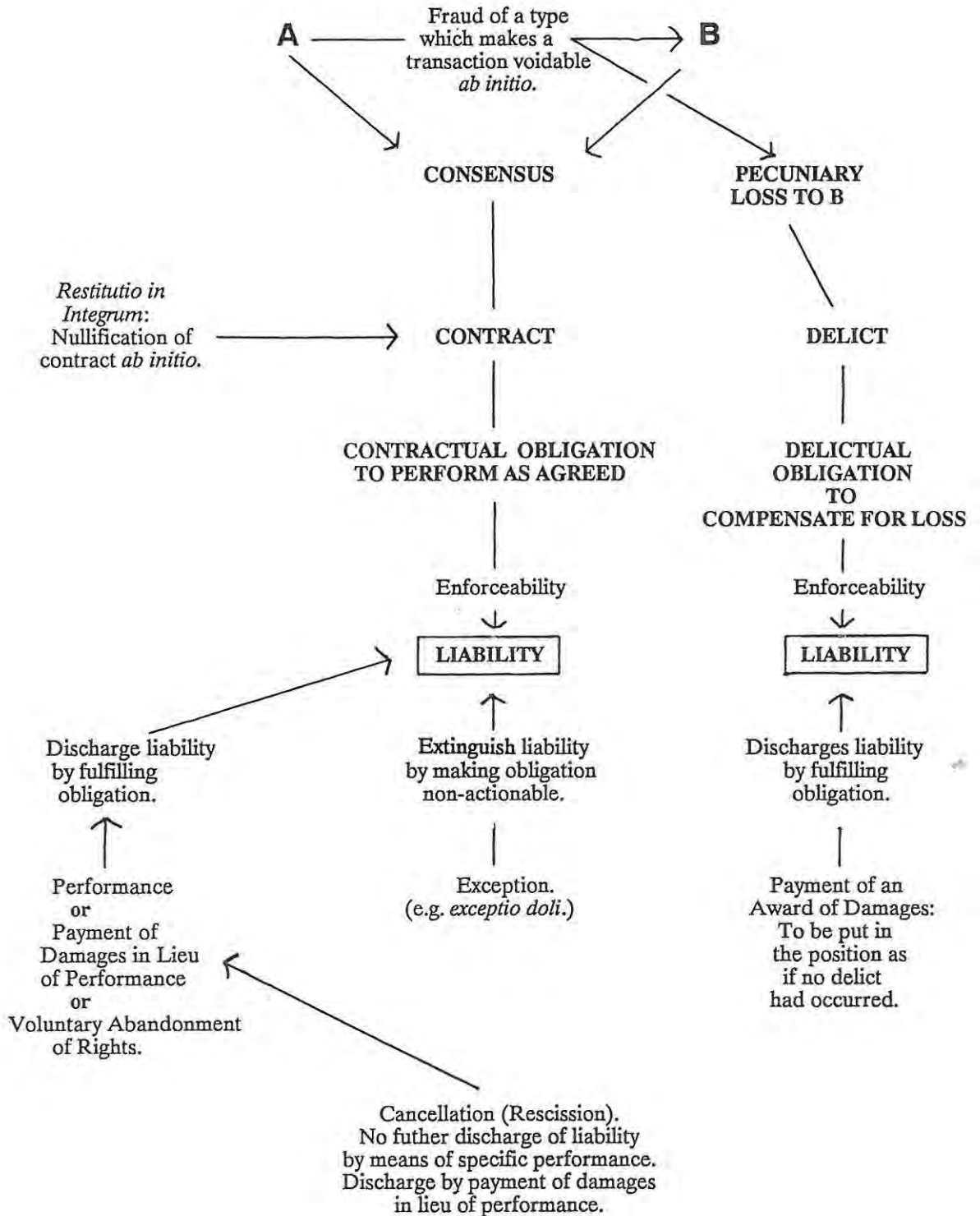
It is suggested that the same basic principles still operate in South African law. *Dolus* and *metus* give rise to a claim for delictual damages. They may also be raised as a defence to an action to enforce the performance of a contract. In addition, it would seem that, in South African law, *dolus* and *metus*, *inter alia*, justify the cancellation (rescission) of a contract by an aggrieved party, by which means he puts an end to the right of the defaulting party to discharge his contractual liability by specifically performing the outstanding obligations.¹³ However it is important to realise that no one of the remedies so far mentioned results in the nullification or destruction *ab initio* of the legal transaction itself. To achieve such a destruction *ab initio* of a legally valid transaction, or of the legal consequences of an event, it is submitted that something more is necessary, as it was in Roman law, and Roman-Dutch law. It is thought that the "something" consists of extraordinary judicial intervention, justified by the existence of *iusta causa*; and that is what is involved in an order of *restitutio in integrum*. The ideas expressed in this section are represented diagrammatically overleaf.¹⁴

11. Section 2.2.1 and 2.2.2 above.

12. Section 2.2.1 and 2.2.2 above.

13. Or to his own liability to fulfil outstanding contractual obligations. For a more detailed discussion of the differences between *restitutio in integrum*, and cancellation for breach of contract, see section 2.10 and 2.14 below.

DIAGRAM B.



It follows from what has been said that, when an aggrieved person alleges the existence of *dolus*, or *metus* (or of any of the other circumstances in which an order of *restitutio in integrum* is justified) and wishes to have a legal transaction, which he has entered into as a result of the *dolus*, or *metus*, nullified *ab initio*, the appropriate remedy is an order of *restitutio in integrum*.¹⁵

2.3.2. The Necessity of Obtaining an Order of Restitutio in Integrum in Order to Nullify a Voidable Transaction.

It must be asked whether it is necessary to obtain a judicial order of *restitutio in integrum*, in order to nullify *ab initio* a legally valid transaction or the legal consequences of an event. The converse possibility is that, if the essential elements which justify *restitutio in integrum* exist, the existence of these elements *ipso facto* enables the legal relations involved to be rendered void *ab initio*, without any need for a judicial order. In other words it must be asked, if the essential elements for *restitutio in integrum* are present, is it nevertheless necessary for the aggrieved party to approach a court, in order to obtain an order setting aside the transaction, or can litigation be avoided by the aggrieved party simply electing to treat the legal relations as void? To illustrate the point with an example, suppose that a contract is entered into as the result of a fraudulent misrepresentation made by one of the contracting parties, and relied on, to his material detriment, by the other. In such circumstances, an order of *restitutio in integrum* is likely to be available as a remedy, but the

14. This diagram is an extension of the one to be found in section 2.2.1. It should be noted that, in South African law, the ordinary way in which liability for contractual obligations is discharged is the specific performance of the contractual terms: subject to the discretion of the court, the aggrieved party has a right to an order of specific performance, but may elect instead to sue for an award of damages in lieu of performance. See Chapter 3. Both specific performance, and the payment of an award of damages in lieu thereof, have the effect of discharging the defendant's contractual liability.

15. See the following section for a discussion on the necessity of obtaining a judicial order for *restitutio in integrum*.

question is, must the aggrieved party bring an action for a judicial order to make the contract void, or can it be made void by the aggrieved party simply electing to treat it as such, without the need for litigation?

To answer this question, it is necessary to make some preliminary distinctions. In the first place, the difference must be observed between circumstances in which legal relations are *ipso facto* void *ab initio*, such as agreements which are contrary to law,¹⁶ as distinct from circumstances in which legal relations are rendered voidable *ab initio*, rather than void *ab initio*, that is to say, they are valid and enforceable until they are set aside.¹⁷ Logically, if legal relations are void *ab initio*, nothing further can be done to invalidate them: they are already of no legal force or effect.¹⁸ Equally logically, voidable legal relations *do* require that something be done before they can be said to be void. Something is necessary to

16. De Groot, *Inleydinge*, 3.1.42 - 3.1.43; Voet, *Commentarius*, 2.14.16:

"All honourable and possible matters may be made the subject of an agreement, but not those contrary to public law nor those which might redound to the public injury... Nor yet things base or shameful, such as clash with good morals or entice to wrongdoing, since all such things are deemed civilly impossible."

Conradie v Rossouw 1919 AD 314 - 315 per De Villiers AJA:

"A promise impossible of performance, *quod in rerum natura non est*, is void (*Inst.*, 3.20.1). So is a promise which is disgraceful or unjust - *Turpis vel iniusta*.... Again, A promises B to commit an illegal act for reward. The obligation on B is void because the ground of the obligation is disgraceful."

Kerr, *Contract*, p 99:

"Examples are agreements which are "contrary to law or morality or public policy" are, *inter alia*, agreements in breach of statutory provisions where the statute expressly or impliedly lays down nullity as the sanction for breach thereof, agreements to escape liability for fraud, champertous agreements, agreements to commit an illegal act for reward, agreements to commit or not commit a crime, agreements entered into in fraud of creditors, agreements whereby the vital interests of his minor children are traded by a parent for money...."

Also see Christie, *Contract*, p 384 ff.

17. Depending on the circumstances, *dolus* may have the effect of rendering a transaction either void *ab initio* or voidable *ab initio*: see section 2.6.2 below.

18. Such as when impossibility renders a legal transaction void *ab initio*. Section 3.5.7 below.

transform them from being merely "voidable" into being "void".

This leads to the second distinction that is important. There is a difference between the power to elect, or choose, between one of two options, and the power to give effect to the option chosen. When an aggrieved person can point to circumstances which make legal relations in which he is involved voidable, he certainly has the right to choose unilaterally between the option of abiding by the existing legal position, and the alternative of choosing to render it void *ab initio*. However, it is submitted that, in order to give effect to the choice of making the legal relations void *ab initio*, and in the absence of agreement between the parties themselves to treat the agreement as void *ab initio* without litigation, something more than unilaterally making the choice (and even communicating the choice to the other party), is necessary. The historical development of *restitutio in integrum* shows that what is required is the exercise of a power, recognised by the state, as effective in nullifying or making void *ab initio* existing legal relations. It is submitted that there is no authority for the proposition that this power has been delegated, in South African law, to the individual aggrieved party. It is a power which is possessed by the courts, derived from the Constitution, statute and the common law, and recognised by the State. Accordingly, the appropriate conclusion is that, given a voidable transaction, and the unilateral decision by the aggrieved party to have the transaction made void *ab initio*, it is necessary to approach the courts for an order which has that effect.¹⁹ Such an order is an order of *restitutio in integrum*.

19. Paton, *Jurisprudence*, 1st ed, (1946) at p 241 says:

"If the juristic act is effective in changing legal relations, but is valid only until a party to it (or another, as the case may be) takes the appropriate steps to have it declared a nullity, it is said to be voidable at the option of the party who can attack its validity."

In the 4th ed (1972) of the same work, the example of marriage is given, at p 319:

"If the marriage is merely voidable, it remains valid until a court avoids it at the instance of one of the parties to the marriage."

It is submitted that the rule remains true whatever the transaction or event with legal consequences: that when valid legal consequences of an event have occurred or a legal relationship has been created, these can only be rendered void in law either by operation of the law itself, or by an order of a judicial body with the legal power to nullify what was previously valid. See C C Turpin, "Void and Voidable Acts", (1955) 72 *SALJ* 58, who relies on Paton, but includes contracts other than marriage, and of the views of A M Honoré,

Of course, the parties to a voidable transaction might avoid litigation by compromise and agreement between themselves. If all the parties involved agree that their transaction should be treated as void *ab initio*, and they are prepared to abandon their legal rights without a formal order of *restitutio in integrum*, and even, if necessary, effect a mutual restoration of anything received from each other, then this is permissible, even desirable. But if there can be no agreement of this kind, then the unilateral decision of the aggrieved party to have the transaction made void *ab initio* cannot be seen as *ipso facto* having the effect of nullification itself, and litigation will be necessary.²⁰

2.3.3. The Authority to Order Restitutio in Integrum in South African Law.

It has been stated above²¹ that, in Roman law, the authority of the praetor to order *restitutio in integrum* derived from his *imperium*, and that in Roman-Dutch law, the Courts

"Degrees of Invalidity", (1958) 75 *SALJ* 32. Honoré speaks as though the parties themselves have the *power* to set aside the voidable transaction, not merely the right of *election* to ask that the transaction be set aside. But he does not really address this question specifically in this article. In Lee and Honoré, *Law of Obligations*, p 41 the following view is expressed:

"A party to a contract may be able to repudiate it or have it set aside (declared void) on the grounds of mistake, misrepresentation, undue influence or duress."

It is submitted that the authors contemplate two remedies in this passage; firstly, cancellation or rescission, which they term repudiation, and secondly, an order of *restitutio in integrum*. If this is so, their view accords with that of the present writer, in that the parties to the transaction may "have it set aside (declared void)" rather than having the power themselves to do this. Even if this interpretation is not correct, the use of the term "repudiation" in context most likely refers to the power of election of the innocent party not to abide by the contract, and not to a power to himself make the contract void.

20. It is possible for legal remedies to be effected without prior recourse to litigation. The best example is cancellation (rescission) for breach of contract. However, this remedy does not involve the nullification of the contractual relationship *ab initio*. It involves rather putting an end to the offending party's right to discharge his liabilities by specifically performing his outstanding obligations, or of the aggrieved party's liability to perform his contractual obligations. This remedy can be effected unilaterally by the aggrieved party without litigation, although if the right to cancel is disputed, a court may be asked to pronounce thereon. See sections 2.10 and 2.14 below.

enjoyed a similar power, delegated from the Sovereign. The question arises, from where do South African courts derive their power to order *restitutio in integrum*?

In South Africa, the administration of justice has been delegated by the State to the Supreme Court by the Constitution.²² The Supreme Court Act of 1959 gives the Supreme Court its jurisdiction, which includes the common law powers of the Court²³ as well as its inherent jurisdiction.²⁴ The Supreme Court has jurisdiction in respect of any civil cause of action arising from the common law. The principles and rules of Roman-Dutch law that are neither obsolete nor disapproved by our courts are part of our common law and therefore give rise to causes of action in our courts.²⁵ It is submitted therefore that the authority of our courts to order *restitutio in integrum* derives from the courts inherent jurisdiction to give effect to the common law of South Africa, of which an order of *restitutio in integrum* is a part.

2.3.4. The Nature of an Order of Restitutio in Integrum in South African Law.

Even if an order of *restitutio in integrum* is not obsolete in South African law, does it still retain the nature and characteristics that it had in Roman and Roman-Dutch law? Or has the incorporation of praetorian law into the *ius civile* and the reception of Roman law and Roman-Dutch law into South African law somehow changed the remedy, so that it now has different characteristics? For example, it has been suggested that, in the course of time, the discretion of the praetor hardened into positive law.²⁶ Accordingly, it may no longer be appropriate to describe the remedy as "discretionary". An order of *restitutio in integrum*

21. Section 2.2.1 above.

22. Section 68, Republic of South Africa Constitution, Act 110 of 1983.

23. Section 19(1)(a); section 19(3) Supreme Court Act, No 59 of 1959.

24. Taitz, pp 8 - 9 distinguishes between statutory jurisdiction, common law jurisdiction and the inherent jurisdiction of the Supreme court.

25. Taitz, p 11.

26. *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 at 871 - 872.

originally seems to have had three distinct characteristics: it has been described as "equitable", "extraordinary" and "discretionary".²⁷ The meaning of each of these terms, as they apply to the original remedy and in modern South African law, must be considered.

Firstly, why has an order of *restitutio in integrum* been described as "equitable"? The reason is that the original basis of granting *restitutio in integrum* was the existence of circumstances that would lead to an unfair or unjust result if rules of law were strictly and logically applied to them. Considerations of equity demanded that an unjust result should be avoided. In Roman law, there existed no civil law mechanism for avoiding the unjust result of strict application of the rules of law, but the praetor could give effect to equity by intervening, and setting aside *ab initio* a civil law transaction, or the legal consequences of the event complained of. This is what is meant when an order of *restitutio in integrum* is described as an equitable remedy: that its existence, or its availability, stems from the desire for a fair or equitable outcome, rather than from any strictly logical application of legal principles or rules.²⁸ An order of *Restitutio in integrum* is not considered to be an equitable remedy merely because it originated in praetorian law. Rather, it originated in praetorian law because, in the civil law, there was no provision for equitable remedies. Its equitable nature was therefore not altered by the absorption of praetorian law into the *ius civile*.²⁹ The basis of an order of *restitutio in integrum* thus remains the need to give effect to what is equitable in the circumstances of a case, notwithstanding what strict interpretation of legal rules might

27. See section 2.2.1 above.

28. Voet, *Commentarius*, 4.1.1:

"*Restitutio in integrum* needs no recommendation, for, by its own fairness it recommends itself enough. Unless there is in it and shines through it that natural fairness which prompts the granting of restitution and makes the case of the opponent an unfair case, it will have to be refused. It is true that the benefit of restitution appears to be vouchsafed outside the special rules of that civil law which is founded on natural reason, rules by which we arrive at a general standard of fairness, so for that reason it is also called an extraordinary remedy."

29. The praetor's edict was formalised and its provisions incorporated into the Civil law by Hadrian, circa AD 125. The provisions of the edict were by and large absorbed intact: Thomas, *Textbook* p 36; Jolowicz, *Introduction*, pp 366 - 367.

require. It is submitted that the remedy can therefore properly be described as equitable, even in modern South African law.

Secondly, it must be asked why the remedy was described as "extraordinary"? The reasons are not hard to find. In Roman law, the praetor had no authority to grant an order of *restitutio in integrum* in terms of his ordinary civil *iurisdictio*. However, a praetor shared Consular *imperium*, as well as having *iurisdictio*, *imperium* being a sovereign power,³⁰ and an order of *restitutio in integrum* was an exercise of this extraordinary power. This is one of the reasons why the remedy itself can be described as extraordinary. Similarly, in Roman-Dutch law in the Netherlands, the power to order *restitutio in integrum* was seen to be an exercise of sovereign power, delegated to the highest courts.³¹

However, it is submitted that there is a more fundamental reason to characterise an order of *restitutio in integrum* as an extraordinary remedy. Ordinary legal remedies have the objective of upholding and enforcing rules of law and legal rights and duties. An order of *Restitutio in integrum* on the other hand has as its objective the nullification of existing legal rights and duties: legally valid transactions or the valid legal consequences of events that have occurred are rendered void *ab initio* and the parties are consequently restored to their *status quo ante* by a mutual return of any benefits which they have received. The *objective* of an order of *restitutio in integrum* therefore characterises it as an extraordinary remedy, distinguishing it from ordinary remedies in terms of which legal rights and duties are upheld and enforced.³² This is true in South African law as well as in Roman and Roman-Dutch law.

The third characteristic of *restitutio in integrum* is said to be the discretionary nature of the

30. Section 2.2.1 above.

31. Voet, *Commentarius*, 4.1.4. Section 2.2.3 above.

32. It is not necessary to argue that an order of *restitutio in integrum* is unique in this regard. Even if it can be shown that there are other remedies which have a similar objective, this does not diminish the extraordinary, rather than the ordinary, nature of *restitutio in integrum*. A remedy does not have to be unique in order to be extraordinary.

remedy. What is meant by this? Relying on his *imperium*, the praetor could use his discretion to order *restitutio in integrum* in appropriate cases. In time, the circumstances in which he would do so were included in the praetorian edict, but of course the practice of indicating in advance the circumstances in which a remedy would be granted did not in any way limit the praetor's *imperium*, nor therefore his discretionary right to order *restitutio in integrum* in other circumstances not previously specified. After the formalisation of the praetor's edict, when its provisions were given the force of law, the discretionary power was then exercised by the Emperor, or his delegates. Even in the compilation of Justinian's digest there was no attempt to lay down, within fixed limits, the circumstances in which the remedy would be available. The circumstances which were well recognised as likely to give rise to equitable considerations sufficient to justify an order of *restitutio in integrum* are certainly listed in the Digest, but there is also a "general clause", in terms of which other equitable circumstances could be recognised as giving rise to *iusta causa*:³³

"Moreover, when any other just cause seems to exist, I will grant complete restitution, when this is authorised by the laws, plebiscites, decrees of the senate or the edicts and ordinances of the Emperors."

As to whether an order of *restitutio in integrum* remains a discretionary remedy in South African law, it is submitted that South African judges should be reluctant to concede the loss of a discretionary power that enables them to provide a just solution in circumstances not otherwise specifically provided for, but in which the demands of equity are clear.³⁴ It is submitted that it would be difficult to argue with any degree of conviction that, in South African law, the circumstances in which a court may find *iusta causa* for an order of *restitutio*

33. D.4.6.1.1. Whether this "general clause" of the edict applies only to cases involving absence as the *iusta causa* or whether it refers to all possible situations in which *iusta causa* might exist has been discussed at length. See *Umhlebi v Estate Umhlebi & Fina Umhlebi* (1905) 19 EDC 237 at 249. The better view seems to be that the clause operates in the wide, not the narrow, context.

34. For example, see *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A, in which the court rejects any suggestion that its discretionary power to order specific performance has been fettered by the laying down of specific circumstances in which specific performance will not be ordered. Although the case is concerned with a different remedy, the principles involved are the same, and it is submitted that the courts would (and should) adopt the same attitude in respect of their discretionary power to order *restitutio in integrum*.

in integrum to exist may no longer be extended, and that our courts are bound to restrict themselves to the instances already recognised. Such an argument ignores existence of the general clause of the praetor's Edict, which clearly allows for recognition of new equitable grounds for an order of *restitutio in integrum* if "any other just cause seems to exist".³⁵ Of course, the exercise of discretion in recognising new circumstances which give rise to *iusta causa* ought always to be marked by caution, and, as in Roman law, only resorted to when necessary to avoid serious injustice or hardship.

In conclusion, therefore, it is submitted that, despite the contrary opinion expressed so forcefully by Van den Heever JA in *Tjollo's* case, an order of *restitutio in integrum* is by no means obsolete in South African law. It is an integral part of South African law, performing a specific and important function, namely, making void *ab initio* an otherwise legally valid transaction or consequences of an event. In addition, the characteristics which marked the remedy in Roman law have survived the changes that occurred in Roman law, as well as the reception of our law through Roman-Dutch law, and it is thought that it is still accurate to describe an order of *restitutio in integrum* as an equitable, discretionary and extraordinary remedy.

2.3.5. An Order of Restitutio in Integrum a Remedy, not an Action.

The phrase "*restitutio in integrum*" and what it refers to is not always clearly distinguished from other Latin phrases which are found not only in Roman law but which are also frequently still encountered in South African law.³⁶ Examples of such phrases are *actio*

35. D.4.6.1.1.

36. For example, see Kerr, *Sale*, pp 55, 67 & 128, who refers to the *actio redhibitoria*, the *actio quanti minoris* and the *actio empti*; and Mackeurtan, *Sale of Goods* pp 123 - 124, who is rather equivocal about the currency of the terms in modern law. For example, Mackeurtan says:

"The remedies of the buyer in these situations are clearly contractual, enforceable, at least historically, by the *actio empti* (or *ex empto*)..."

redhibitoria, *actio quanti minoris*, *actio empti*, *vindicatio rei*, and *condictio indebiti*. There are many more. To the unwary, the use of Latin phrases may obscure the differences that exist between the concepts referred to by these terms. In particular, it is important to draw a clear distinction between the concept of an *action* and the concept of a *remedy*. A legal action consists of the process of bringing a claim before a court of law. The right to bring an action depends on the existence of a cause of action recognised by the law. A remedy is the relief sought by an injured party who succeeds in establishing his cause of action. What must be realised is that giving a name to an action does not necessarily predetermine what remedy (relief) is being sought by the person who brings the action. Giving a name to an action only serves as a reminder as to what the essential elements of a particular cause of action are. The old names given to actions do this by referring to and identifying the legal principles or rules from which a cause of action arises. Thus, the *actio empti* is the action which arises out of a valid contract of sale. More specifically, it is the right of action arising out of a contract of sale and which is available to the buyer of goods to enable him to enforce all the legal rights he has acquired in terms of the contract. By contrast, the *actio depositi directa* was the name given to the right of action which existed between a person who had given his property to another for safekeeping, to enforce the rights acquired in terms of that contract.

An aggrieved person who is able to establish a recognised cause of action may only be entitled, in the circumstances of the particular case, to one remedy. In other cases, however, there may be alternative remedies available, from which the plaintiff is entitled to choose. An example of such an alternative arises when the plaintiff's cause of action is the breach of the terms of a contract of sale. The plaintiff can elect to ask either for an order of specific performance, or he may elect instead to cancel the right of the defendant to specifically perform his outstanding obligations, and claim an award of damages instead.³⁷ Even if he

and

"... which are the special remedies which have evolved from the Aediles' Edict of Roman law and which are, or were, enforced by the *actio redhibitoria*, for redhibition (similar to rescission) or the *actio quanti minoris* (or *aestimatoria*) for a reduction of the purchase price...."

37. *Radiotronics (Pty) Ltd v Scott, Lindberg and Co Ltd* 1951 (1) SA 312 C at 320 A.

does not wish to claim an award of damages, the aggrieved party might approach the court in order to establish beyond doubt his right to cancel. In the case of each of these alternatives, the cause of action is the breach of the terms of the contract of sale, and the action, if one wants to give it a name, is the *actio empti*. Clearly, in such cases, the name given to the action says nothing about the remedy that is being sought by a particular plaintiff.

Even when a named action gives rise to one particular remedy, it is possible to distinguish between the cause of action and the remedy. When one speaks of the *actio redhibitoria*, the name of the action refers to the fact that the plaintiff's cause of action arises from the provisions originally laid down by the Roman aediles in respect of latent defects in a *res vendita*, or breach of a material *dicta promissave*, as distinct from a breach of a term of the contract.³⁸ The *remedy* involved in such circumstances is an order for the reciprocal restoration of the *res vendita* and the *pretium*.³⁹ A cause of action should not be confused with a remedy. Such confusion occurs if the *actio redhibitoria* is referred to as an aedilitian *remedy*. It is, rather, an aedilitian *action*. There is nothing necessarily aedilitian about the concept enforcing an obligation to make a mutual redelivery, which is the relief afforded.⁴⁰

Having distinguished the names given to actions from the remedies that might be sought in terms of these actions, it must now be said that an order of *restitutio in integrum* was conceived as, and has evolved as, a remedy.⁴¹ It is not itself an action, nor a cause of

38. *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 A.

39. See section 2.14.3. The plaintiff can also add a claim for wasted expenses to an *actio redhibitoria*, in order to recover the costs incurred in transporting, installing, preserving or repairing the defective article. See *Seggie v Philip Bros* 1915 CPD 292 at 304; and Kerr, *Contract*, p 200 -201. Professor Kerr refers to damages for wasted costs as "restitutionary" damages.

40. The *actio redhibitoria* and the *actio quanti minoris* are nevertheless fairly often referred to as "remedies". For example, see *Phame v Paizes* 1973 (3) SA 397 A at 417 H; Mackeurtan, *Sale of Goods*, Chapter 9; and Kerr, *Sale and Lease*, p 74. For a further analysis of the nature of the aedilitian actions, see section 2.14.3 and 2.14.4.

41. Huber, *Heedendaegse Rechtsgeleertheit*, 4.37.1.

action. Nor was an order of *restitutio in integrum* generally sought by bringing any one specifically named action, such as the *actio rescissoria*,⁴² which may sound misleadingly appropriate. For example, in Roman-Dutch law, when an order of *restitutio in integrum* was sought in the context of a contract of sale on grounds of *laesio enormis* (a circumstance which no longer gives rise to *iusta causa* in South African law) the appropriate name for the action was apparently the *actio empti*.⁴³ In South African law, there exists a *general* right of action, and no special need exists to give a name in pleadings to an action. What distinguishes an order of *restitutio in integrum* as a remedy specifically identifiable despite the many different contexts in which it may be sought, despite the old variously named actions in terms of which it could be sued for, and despite the existence of other remedies in terms of which the restoration of the parties involved to their *status quo ante* may be required, is, firstly, the relief afforded by means of the nullification *ab initio* of legal transactions or the legal consequences of events that have occurred, and secondly, the particular essential elements which must be present before an order of *restitutio in integrum* is available.⁴⁴

42. Buckland, *Text-book* p 723:

"The damage against which relief might be claimed being of many kinds, the relief itself varied. If a right of action, or of property, had been lost, the remedy was an *actio rescissoria*, with a fiction that the disqualifying event had not occurred. Where an obligation had been incurred, the remedy might be *exceptio* or *denegatio actionis*. Where the relief was against entry on a *hereditas*, it was by refusal of *actiones hereditariae*, both ways. In some cases it was an *actio in factum* or *utilis* of some sort. But all this is by way of procedural machinery. The Praetor's enquiry resulted in a decree of *restitutio*; the further steps under this, apart from *denegatio actionis* were, in general, judicial, not praetorian *cognitiones*."

43. Voet, *Commentarius*, 18.5.4.

44. See sections 2.1.5 and 2.1.6 above.

2.4. THE ELEMENT OF IUSTA CAUSA.

2.4.1. Iusta Causa an Essential Element for an Order of Restitutio in Integrum.

The descriptions of *restitutio in integrum* given by the authorities cited and analysed in section 2.1.4 disclose that *iusta causa* is one of the essential elements which must exist before the remedy can be said to be available.¹ Because it is an essential element of an order of *restitutio in integrum*, it is important that the meaning of the term *iusta causa* in *this context* be properly understood. It is also important that the *nature* of the element is understood. Finally, the various circumstances which give rise to the existence of *iusta causa* for *restitutio in integrum* in South African law must be identified and examined.

2.4.2. The Use of the Phrase "Iusta Causa" to Describe an Essential Element of an Order of Restitutio in Integrum.

The phrase *iusta causa* is probably more familiar to most South African lawyers in the context of the law of contract than in relation to an order of *restitutio in integrum*. However, it must be appreciated that use of the phrase is not necessarily restricted to any particular field of law. For example, it is also encountered in the field of property law, referring to a concept which explains when the delivery of property results in the transfer of ownership

1. Section 2.1.6 above.

from transferor to transferee, and when it does not.² It is outside the scope of a work on the remedy of an order of *restitutio in integrum* to attempt to deal with the role of the concept of *iusta causa* in contract and property law generally. On such questions, the reader is referred to the authorities cited in the footnote below.³ However, certain of the observations made by De Villiers AJA in *Conradie v Rossouw*⁴ provide a useful introduction to an understanding of the concept of *iusta causa* in a wider context than the purely contractual. In particular, the term *iusta causa* is revealed as being capable of a wide as well as a narrow meaning.

De Villiers AJA draws a distinction between the concept of *iusta causa* as a prerequisite for the creation of a legally valid contract (the narrower meaning of the phrase), and the concept of *iusta causa* which exists *because* a legally valid contract exists. Thus, De Villiers AJA says:⁵

"When consensus took the place of the various *causae* which had been required by the Roman law for a valid contract, that is when the rule *ex nudo pacto oritur actio* was formulated, *causa* in the sense of ground of obligation, the *res* in the Real Contracts, the *datio* or the *factum* in the Innominate Contracts disappeared as an element necessary for the validity of any contract together with the rest of the subtleties of the Roman law. It is therefore not necessary any more to refer to the ground of an obligation when discussing the requisites of a valid contract.... The transaction will show whether the defendant entered into the agreement with the intention of binding himself, whether there is any taint of illegality or immorality, and

2. Buckland, *Text-book*, p 228; *Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd* 1941 ad 369; Silberberg and Schoeman, *Property* p 75 ff; Van der Merwe, *Sakereg*, p 203 - 207; 376. It would appear that, in South African law, there has been a move towards the abstract theory of transfer of real rights, away from the causal theory: *Randles's case*, *supra*; *Trust Bank van Suid-Afrika v Western Bank* 1978 (4) SA 281 A; *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 A. However, the term *iusta causa* is still encountered in explanations of the theory of transfer of real rights.

3. *Conradie v Rossouw* 1919 AD 279; *Froman v Robertson* 1971 (1) SA 115 A; *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 A at 990 - 991; *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 A at 1199 G; Kerr, *Contract*, p 98; also see Appendix A of the same work, at p 468; Joubert, *Law of Contract*, p 28 - 30; Christie, *Contract*, p 8 - 12, 80, 91. As regards property law, see the authorities cited in the preceding footnote.

4. 1919 AD 279.

5. At p 321 - 322.

in how far a plaintiff may on that ground be debarred from recovery.... With us the *causa obligandi* has lost its importance, for consent alone is sufficient to give rise to a contract.... The way the matter is looked at from the modern point of view is this. Donation itself within the restrictions imposed by law is a *iusta causa*, a *iustum negotium*, a contract or transaction approved of by the law. And the same must be said of every lawful contract.... Our law may be said to have moved from the *causa obligandi* to the *causa debendi*, from *causa* in the sense of a particular ground or reason which brought the transaction into the charmed circle of contract to *causa* in the sense of a *negotium*.

According to De Villiers AJA therefore, in South African law, a valid contract is created provided that two or more persons seriously and deliberately give their consent to be contractually bound in a lawful undertaking. Once created, the legally valid contract gives rise to *iusta causa debendi*, that is, the legal ground from which arises the duty to render a performance.⁶ Performance carried out in fulfilment of a valid contractual obligation is thus said to be rendered with *iusta causa*: performance made in the absence of a valid contract may, by contrast, be said to have been rendered *sine causa*.⁷

6. In fact, the phrase *iusta causa* in the narrow sense of a good and legitimate reason, or ground, necessary for the creation of a valid contract, is still used by South African judges and writers. For example, in *Froman v Robertson* 1971 (1) SA 115 A at 121 D, Corbett AJA said the following:

"It is not necessary to express any preference in regard to these different meanings [of *iusta causa*] because at all events these authorities clearly establish (i) that the requirement of *iusta causa* or reasonable cause is sufficiently satisfied if the promise is made seriously and deliberately and with the intention that a lawful obligation should be established....and (ii) that in determining whether a promise is founded upon *iusta causa* or reasonable cause the ground or reason for the promise should be examined."

In *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 A, Jansen JA said the following at 991 E:

"In hierdie Hof het die vereiste van redelike oorsaak in ons reg in *Froman v Robertson* tap weer na vore gekom - altans wat die kontrak tussen nemer en trekker van 'n tjek betref (wat as voorbeeld van 'n suiwer eensydige kontrak beskou kan word). Alhoewel die Hof redelike oorsaak nog in terme van *animus contrahendi* omskryf (te 121D en 127D-F), is dit heel duidelik dat "oorsaak" ook aan die onderliggende verhouding gekoppel word (te 121E en 127E-F). Dit sal tot meer helderheid lei as in die toekoms die twee begrippe uitmekaar gehou sou word sodat *animus contrahendi* nie meer die "redelike oorsaak", wat in die onderliggende verhouding gesoek word, oorvleul nie. Aldus sou Hugo de Groot se uiteensetting van die "toezegging" in sy *Inleiding* heel toepaslik word. 'n Toesegging is 'n belofte met *animus contrahendi*...."

Also see Kerr, *Contract*, p 98 ff; Joubert, *Contract*, p 33 - 34.

In the passage quoted above, De Villiers AJA uses the words "ground" and "reason" to translate the word "*causa*" and it is submitted that this is appropriate. Further, since the word "*iustus*" qualifies the word "*causa*", the phrase may be translated as meaning "a lawful ground" or "a ground recognised in law". Thus, in the wider of its recognised meanings, the phrase "*iusta causa*" denotes the existence of an appropriate ground, (not necessarily a contract) recognised in law, for effecting a legal result. In this broad sense, the phrase may be used, not only in the contractual context,⁸ but also to describe generally a recognised legal ground for effecting results which will be legally valid, such as the transfer of rights of ownership.⁹ Of particular importance in the context of the present chapter is the fact that the phrase *iusta causa*, in this wide sense, is used in relation to orders of *restitutio in integrum*.

The term *iusta causa* (or its Dutch equivalent) is used in the context of *restitutio in integrum* to indicate the element of a lawful ground or reason which justifies the order of *restitutio in integrum*. For example, the phrase occurs in the following fragment from the Digest:¹⁰

"...item si qua alia mihi iusta causa esse videbitur..." This fragment occurs in the following sentence:

"Moreover, where any other just cause seems to exist, I will grant complete restitution, when this is authorised by the laws, the plebiscites, the decrees of the senate, or the edicts and the ordinances of the Emperors."

Huber¹¹ uses the Dutch equivalent of the Latin phrase: "...en eindelijk allerhande

7. In which case an action (*condictio*) arises in quasi-contract for the recovery of what was given.

8. That is, to distinguish performance made in terms of a valid contract, from that which is done *sine causa* or *turpis causa* or *iniusta causa*. Any performance made in such circumstances is recoverable by means of a *condictio*, since it was made without *iusta causa* and is therefore not legally effective.

9. In terms of the causal theory of the passing of real rights.

10. D.4.6.1.1. Also see D.4.1.1 - 3.

regtveerdige oorsake...." The full passage, translated, is as follows:

"But the grounds for asking restitution must be particularly considered. Five are stated in the laws: fear, fraud, minority, absence, and finally any just cause which can induce the Judge to grant it."

Van Leeuwen¹² uses this phrase: "*Voorts om al andere reedelijke oorsaken.*" The passage occurs in the following context:

"In what cases and under what circumstances this restitution is afforded is almost unlimited; we will here mention the principal instances. 1st. In the first place, where any one has entered into an obligation or made a promise through great fear or duress.... 2nd. In the next place, where there has been *mala fides* in any transaction.... Even without fraud, where one of the contracting parties suffers loss to a greater extent than half of the true value.... 3rd. Thirdly, where the obligation has been made by or on behalf of a minor.... So likewise, if a person absent abroad has by neglect or otherwise suffered any damage, or sustained some loss.... Further (restitution will be granted) for any other reasonable cause...."

Voet¹³ uses the plural of *iusta causa*, thus: "*Causae iustae restitutionis sunt....*" The full passage, translated, reads:

"The just causes for restitution are fear, fraud, minority, loss of civil status, absence, alienation with the object of frustrating a judicial proceeding and justifiable mistake."

Van der Linden¹⁴ uses the phrase "*wettige redenen*", that is, lawful reasons, to indicate the existence of this element. The context is as follows:

"*Relief*, or *restitutio in integrum*, extinguishes the obligation against which a person is relieved.... provided there are lawful reasons for this course, which in law are limited to fear or violence, fraud, minority, absence, excusable mistake, suffering damage to the extent of more than half, and further, to all such equitable grounds according to which the transaction

11. Huber, *Heedendaegse Rechtsgeleertheit*, 4.37.12.

12. Van Leeuwen, *Roomsch-Hollandsch Recht*, 4.42.4.

13. Voet, *Commentarius*, 4.1.26.

14. Van der Linden, *Koopmans Handboek*, 1.18.10.

ought not to continue to exist."

It is submitted that it is appropriate to retain the phrase *iusta causa* to describe the requirement of a ground recognised by law which justifies the nullification of otherwise valid legal rights. It is thought that the use of the phrase in this way is consistent with the wider meaning of the term in other fields of law, and ought not therefore to cause confusion or misunderstanding. The phrase *iusta causa* is therefore used in this work to denote the element, essential to an order of *restitutio in integrum*, of a legally recognised ground for the nullification of a valid legal relationship *ab initio*.

2.4.3. Drawing a Distinction Between the Concept of Iusta Causa and the Circumstances in which it May Arise.

In the previous section the discussion concerned the use of appropriate terminology. Now it is necessary to distinguish the *concept* of *iusta causa* from the factual circumstances which give rise to its existence. In the passages quoted in the previous section, various specific factual situations are described as constituting *iusta causa* for an order of *restitutio in integrum*. It is important to note that the term *iusta causa* (or its equivalent) is often used as if the the factual circumstances, such as the existence of *dolus* and *metus*, themselves constitute *iusta causa*. The passage of Voet illustrates the point:¹⁵

"The just causes for restitution are fear [*metus*], fraud [*dolus*], minority [*minor aetas*], loss of civil status [*capitis deminutio*], absence [*absentia*], alienation with the object of frustrating a judicial proceeding [*alienatio iudicii mutandi causa*] and justifiable mistake [*justus error*]."

It must be asked whether it is really appropriate, in South African law, to speak, as Voet

15. Voet, *Commentarius*, 4.1.26. Also see the authorities cited and quoted in the previous section. The lists of the factual circumstances giving rise to *iusta causa* differ slightly between the authors. Voet lists all of the particular circumstances that are encountered, although he does omit the "general clause" in this passage, that is to say, equitable grounds that may exist in factual situations not specifically mentioned.

does, of *iustae causae* in the plural? Doing so implies that there is more than one *iusta causa*, and that *iusta causa* consists of specific things such as *dolus* and *metus*. It is suggested that this is not the best way of conceiving *iusta causa*. *Iusta causa* is better conceived as being a singular and more abstract concept. It consists not so much of the particular factual circumstances which may exist in a case, but of something to which those circumstances give rise. In other words, *dolus* ought to be considered to be one of the particular factual circumstances which gives rise to the element of *iusta causa*. *Metus* is likewise a circumstance in which *iusta causa* may arise. The point is that, while the factual circumstances may vary, the concept of *iusta causa* (good or just reason) remains constant. The argument put forward here in reality amounts to no more than a process of abstraction. Instead of listing the concrete, factual situations in which *iusta causa* is normally found to exist, and equating these situations with *iusta causa* itself, as the old authorities appear to do, it is submitted that it is better to abstract the concept of *iusta causa* and separate it from the factual circumstances which give rise to it.¹⁶

This is not merely an academic point. Drawing a distinction between the factual circumstances from which the existence of *iusta causa* may be derived and *iusta causa* itself provides some useful explanations of how the law works. If one does not abstract the fundamental concept of *iusta causa* from the circumstances which give rise to it, and says instead, as Voet does in the passage quoted above,¹⁷ that, for example, minority is itself *iusta causa* for an order of *restitutio in integrum*, then it ought to follow that *iusta causa* for such an order exists provided only that the person seeking *restitutio in integrum* can establish his minority. In fact, this is clearly not the case: if one has regard to the authorities, there are to be found circumstances in which, despite the proof of minority, (or the other recognised factual situations, such as *dolus*, *metus* or absence), *iusta causa* for an order of *restitutio in integrum* is considered to be lacking. This is because, in addition to the mere fact

16. The abstraction of the concept of *iusta causa* in the context of orders of *restitutio in integrum* is thought to be consistent with the broad meaning of the term: see section 2.4.2 above.

17. Voet, *Commentarius*, 4.1.26.

of the age of the minor, there are other relevant factual matters which have a bearing on whether or not *iusta causa* exists in circumstances involving minority. These relevant considerations include whether the youthfulness is accompanied by excusable rashness, impetuosity and lack of judgement: if not, there may be no *iusta causa* despite the fact of minority. Thus Voet says the following:¹⁸

"Having so far treated the thorny subject of minority, it remains for us to treat of the restitution of minors. This should not be bestowed on anyone unless it is clear both that he was a minor and that the damage was caused through the hazards of youth."

It is submitted that the best way to explain such passages is to acknowledge that there is a difference between the general circumstances in which *iusta causa* might be found to exist and the concept of *iusta causa* itself. Thus, minority, *dolus*, *metus*, absence, error and the like, constitute the factual circumstances in which *iusta causa* may be found to exist, but other considerations are relevant and must be taken into account before *iusta causa* can be said to be established. It follows that, while lists of the circumstances in which *iusta causa* is commonly found to exist may be useful, they must not be misunderstood as laying down simple factual requirements as one of the essential elements of an order of *restitutio in integrum* when in fact proof of something more is required. In any given set of circumstances in which an order of *restitutio in integrum* is sought, what must be shown is that, in the circumstances of the case, a legally recognised ground exists sufficient to justify the nullification *ab initio* of existing legal relations. Then, and only then, does the element of *iusta causa* for an order of *restitutio in integrum* exist.

18. Voet, *Commentarius*, 4.4.12. Also see 4.4.28; 4.4.43; 4.4.50; 4.4.51 of the same work, and Huber, *Heedendaegse Rechtsgeleertheit*, 4.40.5:

"The damage must have arisen from imprudence; for catastrophic causes, coming from heaven or from change of time and circumstances, and which cannot be averted by human wisdom, are beyond restitution."

This point is discussed in more detail in the present work in section 2.5.5 (minority). Also see section 2.6.5 (*dolus*); section 2.6.7 (*metus*); section 2.7.1 (absence); and section 2.8.2 (error).

It is thought that this analysis helps to explain why *iusta causa* is likely to be held to exist in circumstances involving, say, *dolus* or *metus*, but not in cases involving breach of a term of a contract.¹⁹ The reason is that all three of the abovementioned circumstances may well involve unlawful acts, but only in the case of situations involving *dolus* or *metus* would the enforcement of the existing legal relations that have been created give rise to an inequitable or unjust result. When a person has been tricked into, or compelled by force to enter into a contract, considerations of what is just or equitable give rise to a ground (*iusta causa*) for *restitutio in integrum*. However, the same is not true when the terms of a contract, freely entered into, are breached. In such a case, although the breach is unlawful, there is no inequity in enforcing the rights of the aggrieved party, either by means of an order of specific performance, or by means of an award of damages to substitute for performance.²⁰ Considerations of equity do not demand that, in cases of breach of contract, the whole legal relationship of the parties be nullified *ab initio*. Put another way, breach of the terms of a contract does not give rise to *iusta causa* for an order of *restitutio in integrum*. Similarly, cases involving negligent or simple (innocent) misrepresentation do not, on the basis of equitable considerations, give rise to sufficient just reason for nullifying a contractual relationship *ab initio*. Although the courts will not enforce the specific performance of a contract induced by a negligent or simple misrepresentation, the absence of deliberate deceit (*dolus*) means that insufficient good reason exists for an order of *restitutio in integrum*.²¹

With the foregoing in mind, a review of the circumstances in which *iusta causa* may be found to exist will serve to illustrate the extent to which an order of *restitutio in integrum* is available as a remedy in South African law.

19. Nor non-fraudulent misrepresentation. See section 2.10 below.

20. See section 2.14.9 below for a discussion of the distinction between an award of damages and an order of *restitutio in integrum*.

21. The question whether negligent misrepresentation or simple misrepresentation give rise to *iusta causa* for an order of *restitutio in integrum* is dealt with in more detail in section 2.10 below.

Of the particular instances cited by the Roman-Dutch authorities in which *iusta causa* for restitutio may arise, *laesio enormis* is obsolete in South African law, having been abolished in 1952.²² *Capitis deminutio*, with its consequent legal effects, is similarly not part of South African law. Furthermore, alienation of property with the object of perverting a judicial proceeding, although perhaps not strictly obsolete, is unlikely in modern law to be considered a separate category of case, and ought to be included with situations involving *dolus* generally.²³ Accordingly, these cases will not be dealt with specifically in this work. The circumstances in which *iusta causa* may arise which are dealt with in the following sections are, therefore, youth, *dolus*, *metus*, absence and error.

22. Section 25 of Act 32 of 1952.

23. On this topic generally in Roman-Dutch law, see Voet, *Commentarius*, 4.7.

2.5. IUSTA CAUSA FOR AN ORDER OF RESTITUTIO IN INTEGRUM IN CASES IN WHICH YOUTH IS A FACTOR.

2.5.1. Youth, not Minority, the Relevant Circumstance.

In *Tjollo Ateljees (Edms) Bpk v Small*¹ Van den Heever JA commented that, in South African law, contracts, and other legal relations requiring full legal capacity, are considered void *ab initio* for lack of capacity when entered into by unassisted minors. It is submitted that this is a correct statement of our law, and that it accords with logic and principle.² It follows from this that an order of *restitutio in integrum* is redundant as a remedy in such cases: there is no need to establish *iusta causa* and set aside a transaction, or the consequence of an event, which is plainly already legally void *ab initio*, because of a minor's lack of capacity. This appears now to be the accepted view of South African law, although divergent views have been expressed in the past.³ It may therefore seem as though, in relation to unassisted minors, the remedy of an order of *restitutio in integrum* is obsolete, as

1. 1949 (1) SA 856 A at 872.

"A contract entered into by an unassisted minor is *ipso iure* void and the minor requires no restitution....Why then retain an antediluvian fossil which slipped into the ranks of *iustae causae* for restitution *per incuriam* and which moreover has no legal justification?"

2. Authority for this proposition is discussed in more detail in section 2.5.3 below.

3. A survey of the historical background is given below in section 2.5.2.

in the case of *laesio enormis*, which has been abolished in South African law by statute.⁴ However, it is submitted that it is possible to argue that a vital point has been overlooked, notwithstanding the correctness of the above statement that, in South African law, legal relations requiring full capacity are void *ab initio* when entered into by unassisted minors. It is also submitted that it is therefore incorrect to treat as obsolete the Roman law principles governing the availability of an order of *restitutio in integrum* in cases involving minors.

Put briefly the argument is this. In Roman law, the term "minor" referred to a person who did *not* lack full legal capacity. On the contrary in Roman law a minor being a person over the age of puberty was considered to have acquired full legal capacity. However the Romans recognised that in most cases, despite such legal capacity, a minor was likely to lack mature judgement. Accordingly, in appropriate cases, the praetor gave relief by setting aside contracts and other transactions, such as the transfer of property which, although valid and enforceable in law, were injurious to and later regretted by the minor.

In South African law, the word "minor" does not describe a person who, despite youth, has full legal capacity, but one who, on account of youth, lacks it.⁵ What seems to have been overlooked by those who would treat an order of *restitutio in integrum* as obsolete in cases involving unassisted minors is that, by increasing the age at which a young person is now considered to achieve majority, and with it legal capacity, one does not necessarily ensure that every young major has maturity of judgement. Just as it can be appreciated how, in Roman law, most minors would lack sufficient judgement at the age of fourteen or

4. Section 25 of Act 32 of 1952.

5. Van der Vyver and Joubert, *Persone- en Familiereg*, p 117 ff; Boberg, *Persons*, p 529 ff. Professor Boberg says at p 534 - 535:

"An *infans*, or child below the age of 7 years, is entirely without the capacity to act. Too young to avail himself of his guardian's assistance, he alters his legal position in this way only when his guardian represents him, acting on his behalf.... A child above the age of 7 years, on the other hand, is commonly said to have limited capacity to act (*beperkte handelingsbevoegdheid*): he may bind himself only with his guardian's assistance."

thereabouts, and, in varying degrees, required the assistance of a *curator* and the protection of the praetor until the age of twenty-five, so too it ought to be apparent that at least some of those who become majors at the age of twenty-one will lack maturity and judgement, and require a measure of protection from the law. It is therefore submitted that it is desirable to stop using the term "minority" to describe one of the circumstances in which *iusta causa* for an order of *restitutio in integrum* might arise, and instead refer to "youth". In this way, it becomes possible to contemplate giving relief, by means of an order of *restitutio in integrum*, to those young persons over the age of twenty-one who, freshly armed with their legal capacity, venture forth innocently and suffer harm to their interests as a result. The same basic principles of Roman law, perhaps too hastily dismissed as obsolete, may, with some modifications made necessary by time and place, be usefully applicable in such circumstances.

2.5.2. Orders of Restitutio in Integrum Involving Minors in Roman and Roman-Dutch Law.

An historical survey allows comparison of some important details. In Roman law, young persons were described either as *infantes* (under the age of seven years), *impuberes* (those ages between seven and fourteen (males) or twelve (females) and *minores* (those between fifteen and twenty-five years old).⁶ Since a person could be *sui iuris* (an independent right and duty bearing legal entity) from birth, there is no need to be concerned, for present purposes, with the complication in Roman law of dependent status (those young people and adults who were *alieni iuris*). The present concern is the capacity of the independent individual to enter into legal relationships, and in particular, the effect of age on that capacity. *Infantes* were wholly without capacity and a *tutor* had complete *administratio* of the

6. Buckland, *Text-book*, p 142 ff; Thomas, *Textbook*, pp 455 - 460; Van Zyl, *Roman Private Law*, p 116 - 117; Van Warmelo, *Roman Civil Law*, section 135; Kaser, *Roman Private Law*, p 81. Buckland suggests that while females had capacity to marry at the age of twelve, the better view is that, as regards contractual capacity, the rules were the same as for males, except that while perpetual *tutela* persisted, women were incapable of binding themselves contractually: see Buckland, *Text-book*, p 420.

infans' legal affairs.⁷ *Impuberes*, who were credited with *intellectus* (awareness) but who lacked *iudicium* (judgement) were generally assisted by a *tutor* in entering legal relations.⁸ Without such assistance, *impuberes* could only acquire beneficial rights, and were not bound by any duties they might purport to undertake.⁹ *Minores* had full legal capacity, and did not require assistance to acquire either rights or liabilities.¹⁰ However, various measures existed to protect young *minores* from their inexperience, lack of maturity or lack of business acumen (*inconsulta facilitas*). Ulpian says the following:¹¹

"The praetor proposed the following Edict in compliance with the principles of natural equity, by which he assumes the protection of minors; for, as is known to every one, the judgement of persons of this age is weak and indecisive, exposed to many snares, and subject to many disadvantages, and therefore the praetor promised them aid by this Edict and relief from deception."

Further, it became increasingly frequent for a *curator* to be appointed to oversee the legal activities of *minores*, ensuring that, in transactions entered into by the *minor*, the *minor* was not over-reached. In cases in which a *minor* was over-reached, or had been taken advantage

7. Kaser, *Roman Private Law*, p 81; C.6.30.18.4.

8. Thomas, *Textbook*, p 459:

"...once the child manifest *intellectus* by utterance, the function of the *tutor* was to supply judgement (*iudicium*) by interposing his approval (*auctoritas interpositio*) in transactions executed by the ward."

Van Warmelo, *Roman Civil Law*, section 135 - 136.

9. C.5.59.1. Inst.1.21:

"The authority of their tutor is, in some cases, necessary for wards, in others not. Thus, if the young stipulate that something be given them, their tutor's authority is not necessary; but it is when the wards make undertakings to others: for the view that established itself was that wards can improve their position without their tutor's authority but can affect it adversely only with such authority."

Generally, also see *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 A.

10. Thomas, *Textbook*, p 466:

"At civil law, once attaining puberty, the young person *sui iuris* was fully *capax*."

11. D.4.4.1.

of, the praetor intervened and ordered *restitutio in integrum*, setting aside the transaction and restoring the *minor* to his *status quo ante*.¹² It is therefore clear that, in Roman law, *iusta causa* for an order of *restitutio in integrum* of *minores* was not related to the lack of full legal capacity of the *minor*, which capacity the *minor* had, but to the relative inexperience and lack of maturity of youth.

In Roman-Dutch law, important changes took place. Only two age groups among young people were distinguished: *infantes* (below the age of seven years who, as in Roman law, were considered to be without *intellectus*) and minors, (above the age of seven years and below the age of twenty-five).¹³ In Roman-Dutch law, minors did not have legal capacity: they were in the care of a guardian, and could only bind themselves with his consent.¹⁴ The guardian additionally had the power to represent the minor. Although, logically, an order of *restitutio in integrum* ought to have been unnecessary to set aside legal relations which a person with insufficient capacity has purported to bring about, since the transaction is already void *ab initio* for lack of capacity, the writers on Roman-Dutch law are, in the words of Professor Boberg, ambivalent about the matter. Professor Boberg says the following:¹⁵

"While on the one hand they declare that restitution is unnecessary in unassisted transactions (Grotius 3.48.10, Van Leeuwen *CF* 1.4.43.2, Voet, *Commentarius*, 4.1.13, 4.4.21, 47, 52, Van der Keessel *Th* 128,877), on the other hand they concede that in practice it is often sought even in such

12. D.4.4; Thomas, *Textbook*, p 467 - 8; Buckland, *Text-book*, pp 168- 169; Van Zyl, *Roman Private Law*, P 122.

13. De Groot, *Inleydinge*, 1.7.3; Voet, *Commentarius*, 4.4.1; Boberg, *Persons*, p 546; De Wet and Yeats, *Kontraktereg*, p 54. The upper limit of twenty-five years before majority varied even in the time of Voet, so that in some countries it was twenty-one years or even eighteen: see Voet, *Commentarius*, 4.4.2.

14. De Groot, *Inleydinge*, 1.8.5; 2.5.3; 2.48.4; 3.1.26; 3.39.11; 3.41.8; Voet, *Commentarius*, 26.8.3; Van Leeuwen, *Roomsch-Hollandsch Recht*, 4.2.3:

"Those, who are prohibited from binding themselves, are....minors, above the age of puberty, who cannot without the knowledge and assistance of their guardians bind themselves."

Boberg, *Persons*, p 546; De wet and Yeats, *Kontraktereg*, p 55.

15. Boberg, *Persons*, p 547, footnote 32.

cases for the sake of greater safety (Voet, *Commentarius*, 4.1.13, Groenewegen *ad Cod* 2.41.14.15, Van der Keessel *Th* 877.... The antimony is explained when one realises that the writers grafted Roman principles on to Roman-Dutch institutions.... It made sense in classical Roman law for the *minor* who had acted without *consensus curatoris* to seek restitution, for the contract was binding upon him until set aside.... But it was not so in Roman-Dutch law."

It is thought, with respect, that Professor Boberg's reasoning is correct, and that logically, the remedy of an order of *restitutio in integrum* is not necessary when purported legal relations are already void *ab initio*.

To be distinguished from cases in which legal relations are void *ab initio* are cases, referred to by writers on Roman-Dutch law, in which a minor is assisted in transacting by a guardian. In such cases, the transactions are not void *ab initio*, and the writers state that an order of *restitutio in integrum* may be available.¹⁶ However, *iusta causa* for setting aside an assisted transaction in such circumstances cannot relate to the minor's own lack of experience and immaturity, since the whole point of having the guardian was to compensate for that. Perhaps the best explanation of such cases is that considerations of equity demand that, if a guardian enter into, or permits a minor to enter, a plainly disadvantageous legal relationship, the minor's interests should not be prejudiced by the unwise act of the person appointed to protect him. If the minor regrets the transaction and wishes to avoid it, the earlier exercise of another person's judgement on the minor's behalf should not obscure the fact that the transaction was, from the point of view of the minor's interests, unwise. The minor is thus protected as though the lack of judgement were his own.¹⁷

16. Van Leeuwen, *Censura Forensis*, 1.4.43.1:

"We come next to the reinstating of minors in their former position, by which, after hearing of the case, a remedy by means of reinstating them in their former position is afforded to minors, whether they have attained puberty or not, who have been injured through contracts which they themselves, with the authority of their guardians or trustees, or otherwise their guardians or trustees alone in their name, have entered into."

17. Voet, *Commentarius*, 4.4.15:

"So long as serious damage is clearly shown, a judge would in the minor's favour rather rescind even his own judgement than leave the minor liable to the damage."

2.5.3. An Order of Restitutio in Integrum Not Necessary in South African Law for Unassisted Minors.

In South African law, the term "minor" generally describes a young person who is under the age of twenty-one, although majority can be conferred at a younger age in certain circumstances.¹⁸ In South African law, as in Roman-Dutch law, a minor lacks *full* legal capacity. This does not mean that he is incapable of acquiring any legal rights at all. He may own property, although he cannot alienate it without assistance, nor can he validly contract to acquire or alienate property. If a gift of property is made to him, and he accepts delivery of it with the intention of becoming owner, he acquires ownership.¹⁹ But he cannot enforce a contract in terms of which a gift has been promised, nor have such a contract enforced against him.²⁰ Another example of a minor's legal capacity, which, although not full, is not non-existent either, is the capacity of a minor over the age of sixteen years to make a valid will, even if unassisted.²¹

18. On the question of when majority can be attained before the age of twenty one years, see the Age of Majority Act, 57 of 1972; and Boberg, *Persons*, p 508 - 510.

19. This is an example of the way in which the abstract theory of the transfer of ownership is independent of the validity of the underlying contractual relationship. Thus, even if the purported contract of gift is void *ab initio*, ownership can nevertheless be transferred to the minor, provided the requisite intention exists. See generally Silberberg and Schoeman, *Law of Property* p 75 ff; Carey Miller, *Ownership*, p 124 ff; Van der Merwe, *Sakereg*, pp 204 - 210. *Trust Bank van Afrika v Western Bank en andere* 1978 (4) SA 281 A at 301 H; *Air Kel h/a Merkel Motors v Bodenstien en 'n ander* 1980 (3) SA 912 A at 922 F and 923 H.

20. This is because an unassisted minor lacks legal capacity, in South African law, to create enforceable contractual relationships: see below in this section.

21. Section 4 of the Wills Act, No 7 of 1953, reads as follows:

"4. Every person of the age of sixteen years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same."

In other instances, a minor clearly lacks the capacity to alter his legal relations without the assistance of his guardian. He cannot effect binding contractual relations without his guardian's assistance, except in certain instances permitted by statute, such as insuring his own life.²² If a minor purports to enter contractual relations with another person, the best view appears to be that, in South African law, such a contract entered into by an unassisted minor is simply void, and of no effect. Since the decision in *Edelstein v Edelstein*,²³ this would appear to include contracts in terms of which the minor benefits, as well as contracts for the purchase of necessaries. *Edelstein's* case involved an ante-nuptial contract entered into by an unassisted minor. Van den Heever JA said the following:²⁴

"Restitution presupposes a binding contract; therefore one concluded by a minor with the assistance of his guardian.... Practically all our authorities...state that, save for certain exceptions and then only to a certain extent, a contract entered into by a minor without the assistance of his guardian is not binding upon the minor."

As regards the suggestion that a minor is bound by a contract if the contract is for the benefit of the minor, Van den Heever JA says:²⁵

"The alleged rule is incapable of practical application unless it means that Courts can review the contracts of unassisted minors and confirm or annul them at discretion. If *communis error facit ius* it must at least give birth to some definable legal rule. That is not the case here and in my opinion the

22. Section 37 of the Insurance Act, No 27 of 1943 reads as follows:

"(1) A minor who has attained the age of eighteen years may, without the consent of his guardian -
 (a) effect a life policy upon his own life;
 (b) pay any premiums due under the policy with money which he has earned or with any other money at his disposal; and
 (c) give an undertaking to maintain the policy for a stipulated period and cede his present or future earnings as security for such undertaking."

See Boberg, *Persons*, pp 569 - 570 for a list of the exceptional cases created by statute in which a minor can bind himself without his guardian's assistance.

23. 1952 (3) SA 1 A.

24. At p 11 A.

25. At p 15 B.

cases to which I have referred were either wrongly decided or decided correctly for the wrong reasons. The object of the law in regarding the contracts of minors as unenforceable is to protect them against their own immaturity of judgement. This object would be frustrated if a minor were bound by his contract whenever the other contracting party has been astute enough to promise or grant some small immediate advantage."

The "alleged rule" (that a contract which is for a minor's benefit is binding on a minor and enforceable against him) may still find the occasional adherent, but the weight of opinion²⁶ seems to favour Van den Heever's approach, which, it is submitted, accords with principle, and is correct.

The payment of money by (or to) an unassisted minor, even if in discharge of a valid obligation, is recoverable by the person who made payment. This is because the minor lacks capacity to make or receive a valid payment²⁷ However, the remedy in such cases is not an order of *restitutio in integrum*, but a *condictio* to enforce the quasi-contractual obligation created *ex lege* for the re-payment of the money.²⁸

Marriage requires special consideration. As regards capacity to marry, a minor requires the

26. Boberg, *Persons*, pp 561, 565 - 566; De Wet and Yeats, *Kontraktereg*, p 57. Cf Van der Vyver and Joubert, *Persone- en Familiereg*, p 131; Donaldson, *Minors*, p 17 ff. Also cf Nestadt J in *Visser v Van Tonder* 1986 (2) SA 500 T at 503 G, who says:

"A contract with a minor is an example of a limping contract..."

and cites *Edelstein's* case as authority for the proposition. However *Edelstein's* case does not support this. At p 12 H of *Edelstein's* case, Van den Heever says:

"There is a long line of decisions in our Courts based on a misunderstanding as to the meaning of the expression *quatenus locupletior factus est*.... These passages in so far as they are relevant are in harmony with the unanimous opinion of our authorities that an unassisted minor is not bound by his contract. They afford no guidance whatsoever as to the meaning of *locupletior*. From the discussion of the meaning of *locuples* by Brissonius (*De Verbor. Significat.*), it is obvious that no latinist would have used that word to connote some vague, intangible and imponderable advantage. It means *quod ad eum pervenit*."

27. Reinecke (1964) 27 THRHR 133; Voet, *Commentarius*, 4.4.21; De Groot, *Inleydinge*, 3.39.11.

28. De Vos, *Verrykingsaanspreeklikheid*, p 95; Boberg, *Persons*, p 586, footnote 23. In particular, the *condictio sine causa* would be appropriate.

consent of his parents, or guardian, or the commissioner of child welfare, or of the court to marry. The question whether an unassisted marriage is to be treated as void *ab initio* or valid is governed by the Marriage Act,²⁹ which provides as follows in section 24A:

"(1) Notwithstanding anything to the contrary contained in any law or the common law a marriage between persons of whom one or both are minors shall not be void merely because the parents or guardian of the minor, or a commissioner of child welfare whose consent is by law required for the entering into of a marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made -

(a) by a parent or guardian of the minor before he attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the marriage; or

(b) by the minor before he attains majority or within three months thereafter.

(2) A court shall not grant an application in terms of subsection (1) unless it is satisfied that the dissolution of the marriage is in the interest of the minor or minors."

The provisions of this section do not appear to involve the nullification of the minor's marriage *ab initio*. The wording of section 24A is that the marriage may be *dissolved*, and this does not imply that the court order has the effect of nullifying the marriage *ab initio*. The word *dissolve* is used in the Divorce Act,³⁰ and means the dissolution of the marriage from the moment the order is made, that is, *ex nunc*.³¹ Accordingly, the provisions of the Marriage Act do not appear to incorporate the concept of *restitutio in integrum*. However the question arises whether, now that marriages involving an unassisted minor are valid in South African law, and not void,³² an order of *restitutio in integrum* is not perhaps an appropriate remedy, if the minor wishes the marriage to be declared void *ab initio*, on

29. Act 25 of 1961 as amended.

30. Section 3, Divorce Act, No 70 of 1979: "A marriage may be dissolved by a court by a decree of divorce....."

31. Hahlo, *Husband and Wife*, p 330:

"Like death, divorce dissolves a marriage. The decree of divorce takes effect, subject to appeal, as from the moment when it is pronounced."

32. There has been much controversy over this point in the past: see Boberg, *Persons*, p 621 - 631.

grounds of his youthful lack of judgement, rather than merely having the marriage dissolved in terms of section 24A of the Marriage Act. The answer to this question is suggested by Voet who says:³³

"Furthermore, restitution on the ground of minority is to be refused against marriage, since it involves lifelong companionship and an indivisible union under the vow of the spouses, and is thus too much an object of favour to be unloosed on the pretext of youth."

It is submitted that the views of Voet are sound, and that a court ought not to contemplate an order of *restitutio in integrum* to nullify a marriage *ab initio* on grounds of youthful immaturity.

2.5.4. An Order of Restitutio in Integrum Available for Assisted Minors and Youthful Majors.

From what has already been said in this section, it is clear that one cannot conclude that an order of *restitutio in integrum* is obsolete in South African law in circumstances involving young persons. An order of *restitutio in integrum* is still an appropriate remedy when the transaction which a minor seeks to have set aside was entered into not by the minor alone, but with the assistance of his guardian, or by the guardian on the minor's behalf.³⁴ As in Roman-Dutch law, *iusta causa* for an order of *restitutio in integrum* may exist in such cases, not because of the minor's own lack of judgement, which is irrelevant if he was assisted, but because a court must, out of regard for the minor's best interests, protect him from the ill considered judgement of the person whose duty it was to look after him.³⁵

33. Voet, *Commentarius*, 4.4.45; Boberg, *Persons*, p 515.

34. *De Wet v Bower* 1919 CPD 43. In this case, a contract for the purchase of land from a minor was held not to be for the benefit of the minor even though the transaction had originally been approved by a judge, because, in obtaining the permission of the court, the full facts of the case were not disclosed, and because the transaction actually entered into was not, in fact, in the interest of the minor. The action for the specific enforcement of the contract against the minor, failed.

35. *Van der Byl & Co v Solomon* 1877 Buch 25 at 27; *Breytenbach v Frankel* 1913 AD 390 at 398; *Du Toit v Lotriet* 1918 O 99 at 109, 116; *Skead v Colonial Banking & Trust Co Ltd* 1924 T

Secondly, it is submitted that just as, in Roman law, even those who had acquired full legal capacity might nevertheless suffer from the inadequacies of youth, so too, in South African law, cognisance ought to be taken of the fact that, even at the age of twenty-one, some young people today are insufficiently experienced or wise to avoid being over-reached by the highly professional and skilled businessmen, dealers and traders that operate in a commercial society. Although there may well be a considerable difference between the maturity of a Roman fourteen year old, and the modern youth of twenty-one, it must not be forgotten that the Romans found it necessary to extend the protection of curatorship to all those below the age of twenty-five. Taking into account the relative sophistication of our own society, as well as the greater length of time which many children spend in the relatively cloistered world of educational institutions, it is not unreasonable to suggest that, among those who have attained majority, there are likely to be some who are just as much in need of the protection of the law as the *minor* of Roman law. It is therefore important that the possible existence of *iusta causa* for an order of *restitutio in integrum* in such cases be recognised, on the basis of youthful lack of judgement, and, despite the legal capacity of the modern young major to enter into legal relationships, that equitable relief be granted when it is appropriate to do so. Exactly when such relief may be appropriate is an important question. In this the old authorities are still of assistance and they are considered in the following section.

2.5.5. *Iusta Causa* in Circumstances of Youth Analysed.

It has already been said that *iusta causa* for an order of *restitutio in integrum* in cases involving youth depends not simply on the young age of the person seeking relief, but on the existence of youthful lack of judgement. Such lack of judgement is easily enough described: it consists of the impetuosity, rashness, immaturity, and inexperience that inevitably

497 at 500; *Fouche v Battenhausen & Co* 1939 CPD 228 at 233; *Tjollo Ateljees (Edms) Bpk v Small* 1949 (1) SA 856 A at 879; Van der Vyver and Joubert, *Persone- en Familiereg* 139; Boberg, *Persons*, p 508.

accompanies youth in varying degrees.³⁶

Before youthful lack of judgement can give rise to *iusta causa*, a link must be shown to exist between the factor of youthful lack of judgement, and the loss occasioned. Put another way, one must not overlook the requirement that the lack of judgement due to youth must really be the *causa* of the loss. If there is no such causal link, then an order of *restitutio in integrum* will not be available. Examples are when the loss is caused by superior force, such as the destruction of property in an earthquake, or by chance, such as the death from illness of an animal purchased. Since such losses are caused by factors other than youthful lack of judgement, and can happen to anybody, the youth of the person who might suffer loss in such cases is immaterial.³⁷

Assuming that a causal link exists, there are further, more difficult questions to resolve: firstly, how is lack of judgement due to youth proved, and secondly, having proved its existence, is it thereafter safe to assume that *iusta causa* for an order of *restitutio in integrum* exists? These questions will be dealt with in turn.

Whether or not a young person lacked judgement, when entering a legal transaction, is a question of fact. There may be many factual indications of lack of judgement, but perhaps the most important way in which good judgement is distinguished from bad is, by asking

36. Voet, *Commentarius*, 4.4.13. quotes Horace:

"At last his guardian shed, the beardless boy
In horses, dogs and sunny turf
takes joy; Twisted to vice like wax, he counsel spurns,
Late to his vantage looks, and money burns."

Also see Voet, *op cit.*, 4.4.14.

37. Huber, *Heedendaegse Rechtsgeleertheit*, 4.40.5:

"The damage must have arisen from imprudence; for catastrophic causes, coming from Heaven or from change of time and circumstances, and which cannot be averted by any human wisdom, are beyond restitution...."

Also see Huber, *op cit.*, 4.40.17; 4.40.18; Voet, *Commentarius*, 4.4.12; 4.4.28; 4.4.43; 4.4.49; 4.4.50; 4.4.51.

whether, in the view of a mature person, the transaction was disadvantageous or not, and if so, whether the disadvantages existed, and were discernible, at the time of transacting. The concept of disadvantage is closely related to the question of the damage, or potential damage, occurring to the young person's *interesse* as a result of the transaction. It is wise to protect one's property rights, foolish to injure them. But it is not possible to deduce lack of judgement simply because a young person has suffered proprietary loss. Firstly, to do so would be to confuse the two essential elements of *iusta causa*, and loss or prejudice. Secondly, many adult persons, with all the wisdom and experience that they can be expected to have, sustain losses and disadvantage from their legal transactions. This disproves any simple relationship between lack of judgement, and proprietary loss, at least in the absence of something further. What is more significant than the mere sustaining of a loss is evidence that the disadvantageous nature of the transaction would have been apparent to a person of judgement, who, by exercising that judgement, would have avoided the loss. Then, and only then, can it be deduced that failure of the young person to regard the disadvantages indicated a lack of judgement.³⁸

It is now necessary to return to the second question posed above. Is it safe to assume that, if a young person enters into a transaction, when a person of mature judgement would have recognised the disadvantages and avoided it, that *iusta causa* for an order of *restitutio in integrum* exists? The answer is no. Youthful lack of judgement does not inevitably give rise to *iusta causa*. The point is illustrated in a situation described by Voet.³⁹ If a young person

38. It would seem that, in applying the test of what a person of mature judgement would have done, the court should not take advantage of the benefit of hindsight, but should take into account only those factors which would have been apparent and taken into account by to a person of mature judgement at the time the transaction was entered into.

39. Voet, *Commentarius*, 4.4.50 - 51. The young jurist in particular gets scant sympathy for mistakes of law. Thus:

"Nevertheless if he has undergone damage through a mistake in law he is not lightly to be admitted to the relief of youth; since to profess skill in the law disagrees entirely with, nay is contrary to the very basis for invoking restitution on the ground of mistake of law; and Mucius said to Servius that "It was a disgrace for a patrician, a noble and a pleader of causes to be ignorant of the law in which he had his being." "

professes to have some special skill knowledge or craft, which in fact he does not have, and suffers loss because of his lack of ability, his youthful lack of judgement will not justify an order of *restitutio in integrum*. A public profession of skill conflicts with a claim for relief that is based on a lack of such skill: and furthermore, in such cases, the young person has over-reached *himself*, rather than having been over-reached by another, more experienced, person. A person who sets up his own downfall cannot claim that there is *iusta causa* for an order of *restitutio in integrum*. The law does not exist to pick up the pieces every time a person suffers loss because of his own stupidity. Similarly, there is no justification for an order of *restitutio in integrum* for a youthful person who commits a crime (such as theft), or a delictual act, such as fraud.⁴⁰

By analogy with the case of the minor in Roman-Dutch law, who was refused an order of *restitutio in integrum* if he had fraudulently misrepresented that he was a major, it may be that, in South African law, *iusta causa* for an order of *restitutio in integrum* will be considered absent in those cases in which a young person has, by deceit, induced another person to contract with him, perhaps by misrepresenting his capacity to fulfil the terms of the agreement, or the seriousness of his intention to do so. In the event of a youth seeking an order of *restitutio in integrum* in such circumstances on the basis that the contract was disadvantageous, a court would have to take into account his deliberate deceit, which surely negatives the *iusta causa* required before relief will be granted.⁴¹

40. D.4.4.9.2; C.9.47.7:

"Immunity for the commission of crime is not conceded on account of age, when anyone is capable of perpetrating the crime of which he is accused."

Voet, *Commentarius*, 4.4.45; Van Leeuwen, *Censura Forensis*, 1.4.43.7; Boberg, *Persons*, p 515.

41. Voet, *Commentarius*, 4.4.43:

"...the laws of the state assist minors who are mistaken indeed, but not those who are deceptive and fraudulent, evil intent in liars making up for age."

Van Leeuwen, *Censura Forensis*, 1.4.43.7; Huber, *Heedendaegse Rechtsgeleertheit*, 4.40.17; *Pleat v Van Staden* 1921 OPD 91 at 97 ff. Although these authorities deal with minors, who, strictly speaking do not require *restitutio in integrum*, since they lack legal capacity, the principle involved is applicable to young majors who, but for the element of deceit or fraud, might have established *iusta causa* for an order of *restitutio in integrum*.

These exceptional cases must be borne in mind when predicting the existence of *iusta causa* in circumstances in which youthful lack of judgement can be proved. However, in the absence of such exceptional circumstances, it is submitted that *iusta causa* is likely to exist when lack of judgement due to youth has resulted in a young person entering into a disadvantageous legal transaction.

2.5.6. Cases involving Minors and Prescription.

Special provisions exist in the Prescription Act⁴² to cater for the special position of minors, and to afford them protection from the extinction of their rights while they lack legal capacity. The Prescription Act provides that, in the case of minors, the normal running of prescription is halted, so that it cannot be completed, depending in the circumstances, before either one⁴³ or three⁴⁴ years after the attainment of the age of majority. The effect of these provisions is not, therefore, to *restore* rights which have been extinguished, but to *preserve* those rights intact until a reasonable period after the attainment of the age of majority. If the availability of an order of *restitutio in integrum* is something which is extinguished by prescription, (a matter which is discussed below),⁴⁵ then a minor who regrets a legal transaction originally entered into with the assistance of a guardian and therefore binding on him, has the prescribed periods after attaining majority in which to ask for relief.

42. Act No 68 of 1969.

43. See sections 13 and 16; *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 852 A.

44. See sections 3 and 16 of Act No 68 of 1969.

45. Section 2.13.5 below. It is argued that the relief available in terms of an order of *restitutio in integrum* cannot be classified as a "debt" within the meaning of the Prescription Act, No 68 of 1969, and that accordingly, the availability of the remedy is not affected by the running of prescription.

Of course, such statutory protection does not extend to youthful and inexperienced majors, against whom prescription runs unchecked. It might be asked, however, whether, in the case of a young major who fails to assert his rights timeously and suffers loss because of the running of prescription, an order of *restitutio in integrum* might nevertheless not be available on the same principles that applied in Roman-Dutch law. It may well be appropriate to argue that, on the basis of the principles explained at length above, the remedy ought to be available if the reason for which the young person failed to take action relates to excusable lack of judgement. As Voet says:⁴⁶

"But if they are of the age of puberty, though minors, usucaption indeed can run and be completed against them, so much so that though hindered by an age below puberty it may be commenced after puberty. But since interruption of it may appear to have been neglected owing to the hazards of youth, it was found fair that the relief of restitution should be ordered."

In summary, it can be said that the underlying principle, in terms of which an order of *restitutio in integrum* is granted in circumstances where youth is a factor, is the justifiable lack of mature judgement which causes the loss or damage to the young person. *Iusta causa* is likely to exist in cases where, because of youth, a young person either does, or fails to do, what a person of mature judgement would do. A justifiable lack of judgement may exist in a wide range of factual circumstances. Even in cases where the young person is a minor assisted by a guardian, an order of *restitutio in integrum* will be available, to set aside a disadvantageous transaction, because of the overriding concern for the protection of young persons in the care of others.

46. Voet, *Commentarius*, 4.4.29.

2.6. IUSTA CAUSA FOR AN ORDER OF RESTITUTIO IN INTEGRUM IN CASES IN WHICH DOLUS IS A FACTOR.

2.6.1. Dolus and Metus Give Rise to Various Remedies.

There can be no doubt that *dolus* and *metus* are both well recognised as instances of factual situations in which *iusta causa* may exist sufficiently to justify an order of *restitutio in integrum*. However, it is essential to stress that *dolus* and *metus* also give rise to other remedies. The fact that one cause of action may give rise to different forms of relief must not be allowed to obscure the difference between the remedies. The point can be illustrated by reference to the situation in Roman law. In Roman law, *dolus* and *metus* gave rise variously to the *actio quod metus causa* and the *actio doli*. Neither of these actions was an action for *restitutio in integrum*. They were, rather, actions in delict for an award of damages.¹ In South African law, *dolus* and *metus* similarly give rise to delictual liability which is enforceable by a claim for an award of damages.²

1. D.4.2.14.1; D.4.2.21.6:

"If, having been forced to do so, I reject an estate, the praetor can come to my relief in two ways; either by granting an equitable action as he would to an heir, or by allowing an action on the ground of duress; and I have the right to select whichever way I choose."

Thomas, *Textbook*, p 373 - 374; Van Zyl, *Roman Private Law*, p 348 ff; Van Warmelo, *Roman Civil Law*, p 261 - 262.

2. The relationship of the *actio quod metus causa*, the *actio doli*, the *exceptio doli* and the *exceptio metus* is discussed in section 2.2.2 above. Also see *Trotman v Edwick* 1951 (1) SA 443 A; E M Burchell, "Measure of Damages for Fraudulent Misrepresentation", (1951) 68 *SALJ* 140; Boberg, *Delict*, p 108; Van der Merwe and Olivier, *Onregmatige Daad*, p 305. *Claasens v Pretorius* 1950 (1) SA 37 OPD at 43; *Heckroodt v Nurick* 1966 (4) SA 76 W at 78. Further, see the Report of the South African Law Commission, "Ondersoek na Deliktuele

To succeed in such a claim, all the ordinary elements for delictual liability must be shown to exist, *dolus*, or *metus*, constituting just one of these. On the other hand, if an order of *restitutio in integrum* is sought in circumstances involving *dolus*, or *metus*, different essential elements have to be established, (that is, those relevant for an order of *restitutio in integrum*)³ the *dolus*, or *metus*, being relevant only as far as the establishment of *iusta causa* is concerned.

Unfortunately, a degree of confusion between distinct remedies is made likely by the fact that certain authorities, notably Voet, do not discuss the remedies separately, but instead concentrate on the common factor (*dolus* or *metus*) which gives rise to the different remedies. To the undiscerning reader, it thus can appear as if an action for the enforcement of delictual liability is an action for an order of *restitutio in integrum*.⁴ This is not so.

2.6.2. The Nature of Dolus as a Factor in Establishing Iusta Causa for an Order of Restitutio in Integrum.

The concept of *dolus* as a factor relevant in establishing the existence of *iusta causa* for an order of *restitutio in integrum* needs some explanation. The term *dolus* is defined by Labeo as follows:⁵

"An artifice, deception, or machination, employed for the purpose of circumventing, duping or cheating, another."

Aanspreeklikheid by Wanvoorstelling", Project 36 of 1983.

3. Section 2.1.6 above.

4. See generally Voet, *Commentarius*, 4.2; and Buckland, pp 593 - 594. Buckland points out that success in a claim for an order of *restitutio in integrum* precluded the recovery of penal damages by the *actio quod metus causa* or the *actio doli*, but this does not diminish the difference between the remedies.

5. D.4.3.1.2.

Huber says this of *dolus*:⁶

"Next comes the second ground for restitution, namely fraud, which word is used in two senses in the laws - first, of any kind of evil design for doing damage to another; and second, of evil simulation or dissimulation, by which damage is brought upon an unwitting person. It is used in the latter sense here."

Voet describes *dolus* thus:⁷

"This purposeful fraud on the other hand when specifically so regarded is a craftiness, duplicity and trickery employed to cheat, dupe or deceive another. It also occurs when with the object of cheating another one thing is done, and another feigned to be done."

The existence of *dolus* may affect a legal transaction, or the legal consequences of an event, in one of two ways. The circumstances may be such that the existence of *dolus* makes the intended legal relations void *ab initio*, in which case there is no need for an order of *restitutio in integrum*. Alternatively, the circumstances in which *dolus* exists may only render the legal relations *voidable ab initio*, that is to say, valid until they are set aside, or nullified.⁸ In this latter case, it is submitted that an order of *restitutio in integrum* is the appropriate means by which such nullification is brought about, and, where appropriate, a mutual restoration of benefits ordered.⁹ For example, if a legal transaction brought about by fraud involves the

6. Huber, *Heedendaegse Rechtsgeleertheit*, 4.39.1.

7. Voet, *Commentarius*, 4.3.1.

8. Voet, *Commentarius*, 4.3.1 - 4.3.6. Voet distinguishes between *stricti iuris* and *bonae fidei* contracts, which distinction is now obsolete, but the point is nevertheless made that, in both cases, *restitutio in integrum* may be required to set aside a transaction brought into existence in circumstances involving *dolus* but nevertheless valid. Kerr, *Contract*, p 162 - 163. *Dalrymple, Frank and Feinstein v Friedman and Another* (1) 1954 (4) SA 642 W at 646 - 647; *Dalrymple, Frank and Feinstein v Friedman and Another* (2) 1954 (4) SA 649 W at 664; *Preller v Jordaan* 1956 (1) SA 483 A at 496 F; *Cornelissen NO v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158 A at 170 F; *Janowski v Fourie* 1978 (3) SA 16 O; *Saambou-Nasionale Bouvereeniging v Friedman* 1979 (3) SA 978 A at 1000 B.

9. Section 2.3.2 above. In this section it is argued that a valid legal transaction, or the valid legal consequences of an event, if voidable, are only rendered void *ab initio* by an order of a court.

loss of possession of property, the legal transaction can be nullified *ab initio* by means of an order of *restitutio in integrum* and, consequently, a restoration of possession of the property to the original possessor ordered.¹⁰

Dolus is a broad concept, and no single English word or phrase seems to fully summarise all its aspects. It is interesting, in order to attempt to appreciate its nature and scope, to list some of the various terms used in connection with *dolus*. All of the following terms have been used: cunning, craft, slyness, artfulness, fraud, *bedrog*, deception, machination, and artifice, dissimulation, and *calliditas*.¹¹ These terms are all specific, however, and some effort at abstracting the concept of *dolus* must be made. It is therefore suggested that it is appropriate to describe *dolus* as consisting of *anything inequitable consciously done contrary to good faith and the law*.¹²

From what has been said above, it becomes clear that there are two possible approaches to determining when, in law, *iusta causa* may be said to exist in situations involving *dolus*. One possible approach is to accept that "fraud" and all the other terms listed above in connection with *dolus* are distinct and separate situations in which *iusta causa* for an order of *restitutio in integrum* may be found to exist. Thus, one might say that *iusta causa* may arise in circumstances involving fraud, or trickery, or dissimulation, and so on. However it is

10. *Dalrymple, Frank and Feinstein v Friedman and Another* (1) 1954 (4) SA 642 W at 647 D.

11. D.4.3.1.2; Huber, *Heedendaegse Rechtsgeleertheit*, 4.39.1; Voet, *Commentarius*, 4.3.1; *Preller and Others v Jordaan* 1956 (1) SA 483 A at 491 A.

12. *Macduff & Co Ltd (in liq.) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573. Kotze JA says the following at 610:

"Savigny does not precisely tell us what is understood by *dolus* as here employed by him, but his meaning seems clear enough. He is using the term *dolus*, not as denoting actual and direct fraud, but in its more extended and general sense as indicating anything which the law does not allow, anything inequitable (*Rechtswidrigkeit, Unredlichkeit*), done with the consciousness that one is acting contrary to the law or good faith (*dem Recht oder der bona fides zuwider*)."

Also see *Preller and Others v Jordaan* 1956 (1) SA 483 A at 491 A - 492.

submitted that a better approach is to acknowledge that *dolus* is a generalised concept that encompasses a whole range of particular factual situations. This means that *dolus* should be understood as a concept within which one may classify many different factual situations, provided that they contain the appropriate characteristic of "something inequitable consciously done contrary to good faith and the law."

2.6.3. Recognised Instances in which Dolus may Exist: Misrepresentations of Fact.

There are certain specific instances in which the existence of *dolus* has been recognised by South African courts. Although the cases do not necessarily involve the remedy of an order of *restitutio in integrum*, these instances serve as useful illustrations of when *iusta causa* for such an order may arise. However, it must be appreciated that *iusta causa* in circumstances of *dolus* may arise in factual situations other than those listed below.

The first recognised instance of the existence of *dolus* is a misrepresentation of fact,¹³ made knowingly or recklessly,¹⁴ that is, a falsehood, which was intended to be acted upon by those to whom it was addressed.¹⁵

13. As distinct from "puffing" or expressions of mere opinion: *Mazza and Another v Jones* 1973 (2) SA 740 RAD. Beadle CJ said at 744 B:

"It seems to me that a statement which goes no further than "I cannot afford it" is "vague and indefinite in its nature and terms". It is not precise enough, in my opinion, in itself to found a claim for damages for false representation."

Feinstein v Niggli and Another 1981 (2) SA 684 A at 695 B *per* Trollip JA:

"Now a representation, in order to found a cause of action for rescinding a contract for fraud, must relate to a matter of present or past fact. Hence, a statement of opinion about the future prospects of a business may for that reason not amount *per se* to an actionable representation if it turns out to be wrong."

14. *Davidson v Bonafede* 1981 (2) SA 501 C at 503 D.

15. *Tait v Wicht & Others* (1890) 7 SC 158 at 164 *per* De Villiers CJ:

"A mere lie, which is foolishly acted upon by others to whom it is addressed, does not constitute a fraud, in the legal sense of the term, unless the utterer intended or must, from the mode and circumstances in which he uttered it, be presumed to have intended that it should be acted upon."

It is important that a distinction be drawn at this point, between the concept of *dolus*, and the idea of a misrepresentation generally. A misrepresentation can be either fraudulent, negligent or simple (innocent).¹⁶ It is necessary to draw this distinction, since it is easily mistakenly assumed that, because *iusta causa* for *restitutio in integrum* may arise in circumstances involving *fraudulent* misrepresentation, so too it ought to arise in any circumstance involving a misrepresentation, even a non-fraudulent one. For example, the following passage appears in Christie, *The Law of Contract in South Africa*:¹⁷

"In our modern law it is not necessary to prove that a misrepresentation was fraudulent in order to invalidate the contract, and the innocent party is equally entitled to repudiate whether the misrepresentation was fraudulent or innocent. The reason is that, once it has been discovered that the representation was incorrect it is against good faith for the party who made it to continue to hold the innocent party to a contract so obtained."

It is submitted that, despite the use of the phrase "invalidate the contract", Professor Christie does not mean that a contract can justifiably be nullified *ab initio* in circumstances of non-fraudulent misrepresentations. Instead, it is believed, Professor Christie has in mind that, in situations of both fraudulent and non-fraudulent misrepresentations, the aggrieved party will be entitled to *avoid* performance of the contractual obligations induced.¹⁸

Vereeniging Consolidated Mills Ltd v Newman & Others 1958 (2) SA 20 C. A misrepresentation of fact may be by conduct, such as payment of a sum owed by means of a cheque drawn on an account which is out of funds: *S v Volschenk* 1970 (3) SA 502 T. The misrepresentation may also relate to future intentions: *Donner's Motors v Kufinya* 1968 (1) SA 434 RAD.

16. E M Burchell, "Honest Misrepresentation and Damages", (1950) 67 SALJ 121; *Overdale Estates (Pty) Ltd v Harvey Greenacre & Co Ltd* 1962 (3) SA 767 D at 769 C; Kerr, *Contract*, p 158.

17. Christie, *Contract*, p 267.

18. The cases cited by Professor Christie in support of his statement do not lay down that non-fraudulent misrepresentations give rise to *iusta causa* for an order of *restitutio in integrum*. In *Parke v Hamman* 1907 TS 47 at 52, Solomon J is talking of *rescission* (cancellation), and not an order of *restitutio in integrum*. In *Lamb v Walters* 1926 AD 358 at 364, the court said that a non-fraudulent misrepresentation would entitle the aggrieved party to "repudiate" the contract in question. *Sampson v Union and Rhodesia Wholesale Ltd* 1929 AD 468 at 480 the Wessels JA mentions the *exceptio doli* as being available in circumstances of non-fraudulent misrepresentation to the innocent party to terminate (i.e. cancel or rescind) the contract and resist an action to enforce its performance. *Harper v Webster* 1956

The question whether an order of *restitutio in integrum* ought to be available as a remedy in cases involving negligent or simple misrepresentations is dealt with in more detail below.¹⁹

In this section, the discussion concentrates on *dolus* as the circumstance from which *iusta causa* for *restitutio in integrum* may arise.

2.6.4. Recognised Instances in which Dolus may Exist: Non-Disclosure of Material Facts.

Another recognised instance in which *dolus* may exist is the non-disclosure of relevant facts, which are known to only one of the parties to a transaction, in circumstances which require disclosure.²⁰ There has been some discussion on the question whether mere non-disclosure of facts not known to one party is itself sufficient to constitute *dolus*, or whether something additional is necessary, for example, the existence of a duty, such as that arising from the dictates of good faith, before non-disclosure of facts constitutes *dolus*. Some early cases indicate that non-disclosure on its own is sufficient:²¹ The better view, however, appears to be that *dolus* exists when non-disclosure is coupled with a duty to make disclosure.²²

(2) SA 495 FC is an instance of fraudulent misrepresentation, and therefore no authority for the suggestion that an order of *restitutio in integrum* is available in the case of a non-fraudulent misrepresentation. In *Pretorius v Natal South Sea Investment Trust Ltd* 1965 (3) SA 410 W at 415 H the remedy under discussion is rescission (cancellation), not an order of *restitutio in integrum*. This is confirmed by the fact that the authorities relied on in the judgement also appear to deal with rescission (cancellation) rather than *restitutio in integrum*, namely, Wessels, *Contract*, vol 1 para 1020, and *Sampson's case*, *supra*.

19. Section 2.10 below.

20. Voet, *Commentarius*, 48.10.4; *Stainer and Others v Palmer-Pilgrim* 1982 (4) SA 205 O at 211 A.

21. *Hadley v Savory* 1916 TPD 385; *Van der Merwe v Culhane* 1952 (3) SA 42 T.

22. *Knight v Trollip* 1948 (3) SA 1009 D; *Forsdick v Youngelson* 1949 (2) PH A 57 N; *Dibley v Furter* 1951 4 SA 73 C at 89 A. In this last-mentioned case the seller of immovable property failed to disclose the existence of a graveyard on the property, which, although not a latent defect sufficient for the *actio redhibitoria*, the seller had a duty, in the circumstances of the case, to disclose to the buyer. *Cloete v Smithfield Hotel (Pty) Ltd* 1955 (2) SA 622 O; *Crawley v Frank Pepper (Pty) Ltd* 1970 (1) SA 29 N at 36 G; *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 A at 872 B. In this last mentioned case, it was held that a seller who failed to disclose a latent defect in the thing sold of which he was aware and of which he knew the buyer was unaware, was guilty of fraudulent conduct. Also see *Stainer and Others v Palmer-*

If this is accepted as the correct principle, it also explains why *dolus* does not arise in circumstances where a seller of goods fails to point out a *patent* (as distinct from a latent) defect or material characteristic of the thing sold, of which the buyer is unaware. Since patent defects or characteristics are, by definition, discoverable by inspection, the seller is under no duty to point them out to a buyer, who has the responsibility of acquainting himself with the thing purchased.²³ Thus, even if the seller of goods knows that the buyer is unaware of a patent defect, and nevertheless fails to point it out, his "deception" does not give rise to *dolus*, since there was no legal duty in these circumstances to make the disclosure. The point is illustrated in *Von Mellenthin v McDonald*.²⁴ In this case, the seller of a horse was held not to have acted unlawfully in failing to point out a vice in the behavior of the animal in question, even though he knew of it, because he was selling the animal to a person who was knowledgeable about such matters, and who did not therefore rely on the seller to make a disclosure of such defects. It must be pointed out that the defect in question was not latent, but *patent*. Theron J said the following:²⁵

"This being the habit in 30 per cent of riding horses, according to Lewis's evidence, we must assume it is a defect mostly well known to those acquainted with horses, and in respect of which it is considered lawful for the seller to deceive the buyer."

This case therefore illustrates the point that not every instance of "artfulness or deceit"

Pilgrim 1982 (4) SA 205 O at 211 A.

23. D.21.1.1.6:

"Where the defect, or the disease of a slave is apparent, as is very frequently the case, where defects are manifest from certain indications, it can be said that the Edict does not apply. Provision should only be made to prevent the purchaser from being deceived."

Also see Van Leeuwen, *Censura Forensis*, 4.19.15.

Voet, *Commentarius*, 21.1.11. Van Leeuwen, *Roomsch-Hollandsch Recht*, 4.18.10; Van Leeuwen, *Censura Forensis*, 4.19.16;

24. 1969 (3) SA 471 TPD.

25. At 476 B.

gives rise to *dolus* and therefore to *iusta causa* for an order of *restitutio in integrum*.

There are other recorded circumstances in which the employment of artfulness or deceit is considered to be justifiable. For example, deceit, artfulness or trickery may not give rise to *dolus* if the deceit or trickery is used to overcome an enemy (in war) or a thief or robber.²⁶

2.6.5. Recognised Instances in Which Dolus may Exist: Abuse of Trust.

A third situation in which *dolus* may be held to exist is the abuse of advantage or trust to induce another person into a damaging transaction.

If the broad description of the concept of *dolus* suggested above²⁷ is accepted, then it can be further suggested that the concept of *dolus* is wide enough to include situations in which one person intentionally, and dishonestly, uses some advantage over another person, in order to mislead, or induce, him into a damaging transaction. This is the situation usually referred to as "undue influence".²⁸ It is of importance to decide whether the factual situation described as "undue influence" falls *within* the concept of *dolus*, as opposed to being a separate and independent concept. This is important because there is some doubt whether undue influence is recognised in South African law as a separate and distinct cause

26. Voet, *Commentarius*, 4.3.1:

"The jurists neatly separated fraud into good fraud and wicked fraud. They gave the name of good fraud to that which is either wholly approved by law, as when artfulness is employed against an enemy or a robber; or which is not indeed approved, but is yet not punished and is tolerated - to which class belongs, as was said by Ulpian, the freedom naturally given to contracting parties to get the better of each other as to price in buying and selling."

It is suggested that, for the sake of clarity, it is better to avoid the term "good fraud" and to state instead that, in specific circumstances, deceit does not constitute *dolus*.

27. Section 2.6.2, in which it is suggested that *dolus* can be described as consisting of anything inequitable consciously done, contrary to good faith and the law.

28. *Preller v Jordaan* 1956 (1) SA 483 A at 490 ff; *Patel v Grobbelaar* 1974 (1) SA 532 A at 533 F.

of action.²⁹ The term "undue influence" appears to originate in English law.³⁰ It is a term that is also encountered in South African law. However, these facts do not mean that the rules of English law relating to undue influence have been adopted in South African law, nor that undue influence therefore constitutes an independent cause of action in South African law.

Even if undue influence is not considered to constitute a separate cause of action in South African law, this does not necessarily mean that it cannot be recognised as a specific instance of *dolus* and as such, give rise to *iusta causa* for an order of *restitutio in integrum*. This is what seems to be suggested in *Preller and Others v Jordaan* by Fagan JA.³¹

"Myns insiens blyk uit die aangehaalde regsbronne dat die gronde vir *restitutio in integrum* in die Romeinse-Hollandse Reg wyd genoeg is om die geval te dek waar een persoon 'n invloed oor 'n ander verkry wat laasgemelde se teenstandsvrmoeg verswak en sy wil plooibaar maak, en waar so 'n persoon sy invloed dan op gewetlose wyse laat geld om die ander te oorreed om toe te stem tot 'n skadelike transaksie wat hy met normale wilsvryheid nie so aangegaan het nie."

29. Christie, *Contract*, p 308; De Wet and Yeats, *Kontraktereg*, p 46 - 49. In *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 A at 427 C - D it was suggested by counsel that undue influence is not a concept of South African Law. This suggestion must be taken to mean that undue influence is not treated as a separate cause of action in South African law, not that the situation in which it exists is necessarily non-actionable in terms of South African law. Other sources have suggested that undue influence is recognised as a cause of action in South African law, notably Wessels, *Contract*, section 1208 ff; *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 (2) SA 528 W; *Mauerberger v Mauerberger* 1948 (4) SA 902 C. Kerr, *Contract* p 196 ff treats undue influence as a topic on its own, which suggests he considers that it has been established as an independent cause of action. However it is submitted that the views of the authorities first mentioned are to be preferred for the reasons given by Christie *op cit*, at p 309:

"There being nothing in our old authorities to suggest that our law contains a principle similar to that contained in English law, an outright adoption of the English principle would be ill advised because some of the relevant relationships are not quite the same in English law as they are in ours, as is evidenced by the different senses in which the two systems refer to trustees and executors. In this connection, *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 (2) SA 528 (W) 541, where (before *Preller v Jordaan*) the English principle was adopted outright, is no longer a safe guide."

30. See the remarks of Steyn J in *Mauerberger v Mauerberger* 1948 (4) SA 902 C at 910.

31. *Preller and Others v Jordaan* 1956 (1) SA 483 A at 492 H. *Patel v Grobbelaar* 1974 (1) SA 532 A at 533 F.

By referring to the circumstances (*gronde*) recognised in Roman-Dutch law which give rise to an order of *restitutio in integrum* as "wide enough to cover" situations described as undue influence, Fagan JA appears to be including undue influence *within* the old recognised grounds, rather than adding a new circumstance (*grond*) to the list. However, it is not made clear, in *Preller v Jordaan*, whether situations which may be described as involving the exercise of undue influence should be considered as instances of *dolus* or, as in English law, *metus*. In order to arrive at a proper answer, some related questions must be examined first, and this is attempted in the following section.

2.6.6. Undue Influence Distinguished from *Metus*.

The question to be answered is whether the the situation which is described by the term "undue influence" is an instance of *dolus* rather than *metus*. In English law, from which the term "undue influence" seems to have originated, undue influence is apparently considered to be an extension of the concept of *metus*.³² English law does not seem to recognise an equivalent of the Roman, Roman-Dutch and South African law concept of *dolus as grounds for setting aside legal relations*.³³ The closest that English law comes to *dolus* in this context is the idea of an "unconscionable bargain"³⁴ but that is a concept which does

32. Goff and Jones, *Restitution*, p 4:

"...equitable relief from undue influence is a rational extension of the limited relief which the common law provides in cases of duress...."

33. Goff & Jones, *Restitution*, p 192:

"The equitable doctrine, [of undue influence] which is limited to the setting aside of transactions *inter vivos*, was created, as Lindley L.J. said in *Allcard v. Skinner*, [(1887) 36 Ch.D. 145, 183.] "to protect people from being forced, tricked or misled in any way by others into parting with their property." "

Such a development would not have been necessary had the concept of *dolus* been recognised in English law alongside the concept of duress (*metus*) as grounds for restitution. Of course, fraud, or deceit, is recognised in English law as giving rise to a claim in tort for damages: see Salmond, *Torts*, p 387 ff; Winfield and Jolowicz, *Tort*, p 212 ff.

34. Goff and Jones, *Restitution*, p 199:

not necessarily involve any element of conscious wrong-doing, which, it is submitted, is necessarily an element of *dolus*. In the absence of *dolus* as a ground for restitution, it is necessary, in English law, that undue influence is treated as a separate type of situation, not quite the same as *metus*, and therefore constituting a distinct category on its own. The same conclusion does not necessarily follow in South African law, since it is submitted, the concept of *dolus* is wide enough to encompass situations in which undue influence exists.

However, another question arises. If *dolus* is defined widely enough to include situations of undue influence, is it possible to maintain a clear distinction between the concepts of *dolus* and *metus*? In particular, how is it possible to distinguish as an instance of either *dolus* or *metus* the situation where one person uses a position of advantage and influence to overcome another persons resistance? The situation that existed in *Preller v Jordaan*,³⁵ where a doctor used his influence with a patient to induce him to alter the provisions of his will, is apparently treated by Fagan JA as an instance of *dolus*. By contrast, a situation in which, for example, a person in an official position, such as a policeman, inspires fear in another, and thereby induces compliance with his wishes, would apparently be classified as an instance of *metus*.³⁶ On the basis of what principle, it must be asked, can such

"The basis of equity's intervention in these cases is very similar to that underlying the relief granted in cases of undue influence. But it is a distinct equitable jurisdiction which does not depend on the existence of any relationship of confidence and trust between the parties or on any proof that the dominant party actually induced the payment through the influence he had unfairly obtained. A bargain may be set aside as unconscionable therefore even though there is no presumed or actual abuse of an existing relationship of confidence. In unconscionable bargains, "there is always fraud presumed or inferred from the circumstances or conditions of the parties contracting: weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain." [per Lord Hardwicke in *Earl of Chesterfield v Janssen* (1751) 2 Ves.Sen. 125, 157.] "

35. *Preller v Jordaan* 1956 (1) SA 483 A.

36. An unlawful threat of internment made by a government official is treated as duress (*metus*) in *Broodryk v Smuts* NO 1942 TPD 47 at 52; in *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 435, the wrongful detention of property in order to obtain payment was held to constitute duress. *Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* 1960 (2) SA 686 SR at 689 H. In this case, the applicants agreed to give up possession of property in the face of urgent and irresistible judicial pressure. It is submitted that this case constitutes an instance of *metus* rather than *dolus*. Quenét J said at 690 E:

similar situations be satisfactorily distinguished as belonging to separate categories?

It is thought that the answer is that, in the true instance of *dolus*, the deceit or the influence which is brought to bear is used not to inspire fear, but, by means of misleading conduct or statements, to win confidence or trust, to lessen ordinary suspicions, or to induce a decision without independent exercise of judgement at all. The effect of *dolus* is that proper judgement is not exercised by the person deceived. In the case of *metus*, the person subjected to the unlawful pressure is presented with a choice between two recognised evils.³⁷ Both alternatives are openly disadvantageous, but the consequences of one alternative is worse, either because of the immediacy of the threat, or because of its content. The person threatened agrees to whatever is demanded, not because he is misled, but because he fears to do otherwise. It follows that a person who uses his position to inspire fear, and thereby induce another's compliance, employs *metus*, whereas a person who falsely wins the trust of a person to induce him to act contrary to his true interests is guilty of *dolus*. It is thus submitted that the facts in *Preller v Jordaan*³⁸ are properly categorised as an instance of *dolus*. The conclusion would be different if a doctor used his position to induce *fear* in a patient, and thereby force him to agree to a transaction. In such a situation, the appropriate concept would be *metus*, not *dolus*.³⁹

"In such a setting there was no room for the exercise of a free choice; Bird yielded unwillingly to the messenger's demand; any other decision would have been visited with a sanction of one kind or another. The vehicle was not removed by an application of physical force - but judicial pressure, urgent and irresistible, was applied...."

37. It does not matter, for the purposes of the present discussion, whether it is correct to consider duress as arising only from threats of harm to the person or threats of harm to property as well. See section 2.7 below for a discussion of *metus*.

38. *Preller v Jordaan* 1956 (1) SA 483 A.

39. Voet, *Commentarius*, 2.14.19. Voet quotes Ulpian, D.50.13.3:

"When a physician, who has been entrusted with the treatment of anyone's eyes, administers drugs which may cause him to lose his eyesight, in order by doing so to force him to sell him his property, while he is ill, contrary to good faith, the Governor of the province must punish the unlawful act, and order the property to be restored."

Of course, as Voet points out *loc. cit.*, in the absence of proof of "such detestable mischief" (which, it is submitted, means the absence of either *dolus* or *metus*), a contract between

It is thus submitted that a situation in which undue influence exists is a species of *dolus*, because it falls within the concept of an act designed to win confidence or trust, and prevent an independent exercise of judgement, rather than being a situation in which a choice is made through fear.⁴⁰ The point can be illustrated. For example, in *Patel v Grobbelaar*,⁴¹ the plaintiff's belief in the supernatural powers of the defendant had the effect of making the plaintiff's will pliable and lessening his power to resist. The reported facts do not suggest that this was necessarily the result of fear inspired by threats. It may simply have been that the plaintiff was induced by the defendant to set aside his ordinary suspicions and place confidence in a person whom he had been led to believe had extraordinary ability. If this were so, the facts would constitute an instance of *dolus* rather than of *metus*. In fact, no particular classification of the facts as falling under either *dolus* or *metus* was made in the judgement: the terms "undue influence" and "onbehoorlike beïnvloeding" are used. However, it is noteworthy that, when setting out what plaintiff had to prove in order to have the transaction set aside, Rabie JA does not refer to any inspiration of fear, but simply to a weakening of resistance and pliability resulting from the influence exercised by the other party.⁴²

In summary, therefore, it is suggested that the cases discussed do not lay down that, in South African law, undue influence is an extension of *metus* as in English law, nor that it is an independent cause of action. Undue influence is best conceived as a factual situation which

doctor and patient is valid in law and "will remain sound".

40. *Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* 1960 (2) SA 686 SR at 690. In this case, the applicant parted with possession of a truck when served with a warrant of execution in circumstances which left the applicant no room for the exercise of free choice, namely, that if he did not surrender possession, he would have been visited with a sanction of one kind or another. Such pressure, if wrongfully brought to bear, constitutes *metus*. There is no trickery or chicanery involved, but because of wrongful application of the pressure, the person affected is deprived of the power of free choice in deciding whether or not to comply with the demands made of him. He chooses the better of two known evils.

41. 1974 (1) SA 532 A.

42. At page 534 A.

is encompassed, in South African law, by the concept of *dolus* and it is on this basis that it gives rise to *iusta causa* for *restitutio in integrum*.⁴³

2.6.7. Recognised Instances in Which Dolus may Exist: Alienation of Property in Fraud of Creditors.

It is beyond doubt that the alienation of property by an insolvent debtor may constitute a fraud on his creditors. The question that arises is whether *dolus* in these circumstances may be treated as giving rise to *iusta causa* for an order of *restitutio in integrum*, or whether that remedy has been superseded in South African law by some other remedy. This question exists because of the cases in which the *actio Pauliana* has been said to be appropriate in the circumstances of a fraudulent alienation of property by an insolvent debtor.⁴⁴ It must be asked whether this action is one which involves an order of *restitutio in integrum*, or whether it exists to enforce some other, different, remedy.

The relief available to a creditor against whose interests a debtor has fraudulently alienated property to a third party is described by Sutton AJ in *Wiener v Estate McKenzie* as follows:⁴⁵

43. Note the views expressed by J E Scholtens, *Undue Influence*, 1960 *Acta Iuridica*, 276 at 288 who says that, in *Preller v Jordaan*, the Appellate Division found its authority in passages concerning *dolus*, not *metus*. Hahlo and Kahn, *South Africa*, p 471 support the view that undue influence in South African law is based on analogy with *dolus*, rather than *metus reverentialis*, although without going so far as to suggest that undue influence is a *species* of *dolus*.

44. *Wiener v Estate McKenzie* 1923 CPD 562 at 579; *Hockey NO v Rixom NO and Smith* 1939 SR 107 at 118; *Fenhalls v Ebrahim and Others* 1956 (4) SA 723 D & C at 727 D.

45. 1923 CPD 562 at 579.

"Under the Roman-Dutch law whenever a debtor entered into a transaction in fraud of and to the detriment of his creditors, it could be set aside by an action at law, and the property disposed of recovered. See *Voet* (48.8); Grotius' *Introduction* (2.5.4.); *Van der Keesel* (Thes. 200); Van Leeuwen's *Roman-Dutch Law* (Kotze's Translation, Vol I., p 195).... Moyle in his *Institutes* (5th edition, p 547) says:.... "So far as can be elicited from the authorities, it seems probable that the creditors had, as against fraudulent alienation by the debtor (including wrongful payment of one or some of them in full, when he was aware of his insolvency), an *actio Pauliana in personam* (D.22.1.38.4.); an *Interdictum fraudatorium*; an *actio in factum* against a *bona fide* alienee (D.42.8.10); and an *in integrum restitutio*. The relation between these remedies and the precise purpose for which they were respectively employed are so variously represented by the commentators, that it is impossible here to go further into the question".

In *Hockey NO v Rixom NO and Smith* the *actio Pauliana* is described as follows:⁴⁶

"The common law on the subject of rescinding alienations made *in fraudem creditoris* is derived from the civil law. One of the actions by which this relief might be sought was the *actio Pauliana*, which is recognised in the Roman-Dutch authorities. Pothier on the *Pandects*, 42.8.2, says: "In order that a transaction may be rescinded under this edict the following factors must be present:

1. That it should be of such a nature that the debtor's assets are diminished thereby (secs. 6 and 7),
2. That the person who receives from the debtor does not receive his own property (secs. 8 to 12),
3. That there should be the intention to defraud (sec. 13 and following),
4. That the fraud should have its effect (sec 22)." "

The *actio Pauliana* is consistently distinguished by the authorities from orders of *restitutio in integrum*.⁴⁷ The *actio Pauliana* is said to be a personal action,⁴⁸ and the effect of it is initially described, in the Digest,⁴⁹ merely as a "revocation". However, in later passages,

46. 1939 SR 107 at 118, *per* Russell CJ.

47. Voet, 42.8.1. indicates that, in the situation of a creditor alienating his property in fraud of creditors, recovery takes place in one of various ways: either the *actio Pauliana*, the *actio rescissoria*, or in terms of the edict, referring to D.42.8.10.pr. Also see the authorities referred to by Sutton AJ in the passage from *Wiener v Estate McKenzie* 1923 CPD 562 at 579 quoted above.

48. Voet, *Commentarius*, 42.8.2.

49. D.42.8.1.1:

it becomes clear that the effect of an *actio Pauliana* was to put everything back into its original state, as if there had been no alienation at all, that is, a nullification *ab initio* of the transaction. The aim, or objective, of the *actio Pauliana* therefore begins to look very like that of an order of *restitutio in integrum*. Thus the following passage from the Digest:⁵⁰

"Moreover, generally speaking, it should be noted that by this action everything should be restored to its former condition, whether it consists of property or of obligations, so that whatever may have been done is set aside, just as if no release had been made."

It is therefore clear that in Roman law (and seemingly in Roman-Dutch law) the *actio Pauliana* was an action which was provided for specific circumstances. But the relief afforded by the bringing of this action was nothing other than the setting aside *ab initio* of the fraudulent alienation and the restoration of the *status quo ante*. The relief afforded therefore seems to be indistinguishable in its nature and effect from an order of *restitutio in integrum*. In support of this contention is the fact that the essential elements for an *actio Pauliana* are the same as would be required for an order of *restitutio in integrum* generally: *iusta causa* arising from the creditor's *dolus*; and the occurrence of an event with legal consequences whereby the person seeking *restitutio in integrum* has suffered damage to his proprietary interests.⁵¹ There does not appear to be any valid reason for suggesting that a specifically named action such as the *Pauliana* implies that the remedy sought thereby is not, in effect, an order of *restitutio in integrum*. It has already been pointed out⁵² that the

"Necessario praetor hoc edictum proposuit, quo edicto consuluit creditoribus revocando ea, quaecumque in fraudem eorum alienata sunt."

Scott's translation (42.9.1.1.) reads as follows:

"The Praetor was compelled to introduce this edict in order to protect the rights of creditors, by revoking any alienations of property which had been made for the purpose of defrauding them."

50. D.42.8.10.22; (Scott, 42.9.10.22).

51. The fact that Pothier, *Pandects*, 42.8.2 sets out the requirements in a slightly expanded form cannot disguise the similarity between what must be alleged and proved for both an order of *restitutio in integrum* and the *actio Pauliana*.

52. Section 2.3.5 above.

relief afforded by an order of *restitutio in integrum* could be sought, in Roman law, by means of a variety of differently named actions, depending on the circumstances in which the dispute arose. The existence of a specifically named action does not, therefore, preclude the conclusion that the *remedy* involved is, in fact, essentially an order of *restitutio in integrum*. Furthermore, it must be appreciated that, in South African law, reference to actions specifically by name is something of an anachronism: the right to bring a legal action no longer depends on the existence of specific, individually named actions, but merely on the existence of recognised causes of action. It is therefore submitted that the fraudulent alienation of property by a creditor should be recognised as one of the factual situations in which *iusta causa* for an order of *restitutio in integrum* may exist in South African law⁵³ and that reference to the *actio Pauliana* of Roman law, as a specific action, is no longer strictly necessary.

53. The availability of the *actio Pauliana* is said to be limited if the third party received the property alienated in good faith, that is, in ignorance of the debtor's fraud. This is entirely consonant with the principles governing orders of *restitutio in integrum*: see *Dalrymple, Frank and Feinstein v Friedman and Another* (1) 1954 (4) SA 642 W at 648 A, *per* Ramsbottom J:

"Unless the *status quo ante* can be restored, restitution cannot be ordered. If, therefore, Brookstone had parted with the shares to the first defendant, an innocent third party, before any claim for restitution had been made, and if he had had no right to recover the shares from the first defendant, restitution would not have been ordered against him."

2.7. IUSTA CAUSA FOR AN ORDER OF RESTITUTIO IN INTEGRUM IN CASES INVOLVING METUS.

2.7.1. The Meaning and Nature of Metus as a Factor in Establishing Iusta Causa for an Order of Restitutio in Integrum.

Metus is clearly recognised as one of the circumstances in which *iusta causa* for *restitutio in integrum* may be found to exist.¹ *Metus* is described in various ways by the old authorities. The Digest contains the following description:²

"The praetor says: "I will not approve anything which has been done through fear." It was formerly stated in the Edict: "What was done through force or fear." Mention was made of force to indicate compulsion imposed against the will, and fear to show trepidation of mind on account of some present or future danger; but afterwards the mention of force was omitted, because whatever is caused by a vehement display of force is held also to have been caused by fear."

De Groot says the following:³

1. D.4.2.1; d.4.2.3; De Groot, *Inleydinge*, 3.48.4; Van Leeuwen, *Roomsch-Hollandsch Recht*, 1.4.41.4 and 5; Voet, *Commentarius*, 4.2.1; Pothier, *Obligations*, para 21.

2. D.4.2.1. Also see D.4.2.5:

"Labeo says that the term "fear" must be understood to mean not any apprehension whatever, but the dread of some extraordinary evil."

3. De Groot, *Inleydinge*, 3.48.6.

"By fear is meant great fear, such as fear of death, dishonor, great pain, illegal imprisonment of one's self or family; for, though an obligation brought about by these means is valid in itself, because consent under compulsion is still consent, it is nevertheless reasonable that suitable remedies should be employed against such compulsory obligations."

Voet describes fear thus:⁴

"Fear is said to be an agitation of the mind because of immediate or future danger; or again a dread of some serious mischief."

The law treats legal relations entered into on account of *metus* as voidable *ab initio*, not void *ab initio*, because, as De Groot says in the passage quoted above, consent under compulsion is still consent.⁵ A transaction, or the legal consequence of an event, which is brought about by *metus* is therefore legally valid until it is nullified, despite the fact that a person who acts because of fear does not consent freely to the transaction, or to the event which he allows to occur, and which has legal consequences. In order for a court to nullify *ab initio* the legal relations that exist in such circumstances, *iusta causa* for an order of *restitutio in integrum* must be present.

Iusta causa for an order of *restitutio in integrum* does not necessarily exist merely because the consent of an aggrieved person was not given entirely freely. There are obviously many circumstances in which the giving of consent to a legal transaction, or an event with legal consequences, is less than wholly free, yet even so, the courts will not interfere. What must be shown, in order to establish *iusta causa* in circumstances involving *metus*, is that duress was applied to win consent, and that the duress was unlawful in the circumstances.⁶ Corbett J said the following in *Arend & Another v Astra Furnishers (Pty) Ltd*:⁷

4. Voet, *Commentarius*, 4.2.1.

5. De Groot, *Inleydinge*, 3.48.6; Van Leeuwen, *Censura Forensis* 1.4.41.5; Voet, *Commentarius*, 4.2.2. For more modern authority on this point, see Kerr, *Contract*, p 192. Professor Kerr, following Hahlo and Kahn, *South Africa*, p 472, points out that, in extreme cases, consent may be lacking altogether, in which case the transaction would be void *ab initio*, and an order of *restitutio in integrum* unnecessary. Voet, *Commentarius*, 4.2.15. *Smith v Smith* 1948 (4) SA 61 N at 68. Also see the report of the South African Law Commission, "Ondersoek na Deliktuele Aanspreeklikheid by Wanvoorstelling", Project 36, 1983, p 141.

6. Voet, *Commentarius*, 4.2.10; *Steiger v Union Government* 1919 NPD 73 at 81, per Dove-

"Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based upon fear, the following elements must be established:

- (i) The fear must be a reasonable one.
- (ii) It must be caused by the threat of some considerable evil to the person concerned or his family.
- (iii) It must be the threat of an imminent or inevitable evil.
- (iv) The threat or intimidation must be unlawful or *contra bonos mores*.
- (v) The moral pressure used must have caused damage. "

Two things must be considered. Firstly, it must be asked what sort of factual situations operate so as to negative the freedom with which consent is given. Secondly, it must be asked when those factual situations are considered unlawful. If this second requirement is not always stressed, it is possibly because the extreme cases, such as those involving physical force or threats of physical harm to the aggrieved person, are so obviously unlawful that the requirement is patently fulfilled. But in other cases, namely, those involving threats to third parties, or threats of an economic nature, the requirement of unlawfulness provides a vital controlling factor, by which the law circumscribes the availability of the remedy. Recognition of this element is therefore important.

2.7.2. Instances in which the Existence of Metus may give Rise to Iusta Causa for an Order of Restitutio in Integrum.

To consider first the question, what circumstances operate to negative freedom of consent, the most extreme cases are the easiest to understand. For example, a person who acts in order to avoid a threat of grave physical harm to himself, or to close members of his family, clearly does not give his consent freely. He agrees to act only to avoid the threatened

Wilson JP:

"On the contrary, it is only where the fear is caused illegally that restitution is competent."

7. 1974 (1) SA 298 C at 306 A.

physical injury. Involuntary consent may also be exacted in situations in which the threat is not made directly against the person who subsequently seeks an order of *restitutio in integrum*, nor against the members of his immediate family, but against members of his extended family, or even against persons outside of his family.⁸ As for unlawfulness in such cases, threats involving grave physical harm to a person, or loss of liberty, are so obviously unlawful, that the existence of unlawfulness may be assumed almost without mention. In less extreme circumstances, the absence of voluntary consent, and the question of the unlawfulness of the threat, may be less clear. In such cases, regard must be had to the circumstances of the particular case, in order to decide whether or not the threats actually made rendered consent involuntary, and if so, whether the threats were unlawful. One particular situation merits mention. This is the case in which threats are made of injury to property. Are such threats sufficient to negative freedom of consent?

The Roman and Roman-Dutch authorities do not specifically include, in their descriptions of *metus*, the example of a threat of injury to *property*, as opposed to the *person*, of the individual threatened, or to a member of his family. Nevertheless, the Appellate Division appears to have extended the law in this regard. In *White Bros v Treasurer General*,⁹ De Villiers CJ said that, as in the case of threats to the person, there is a similar absence of free consent when money is paid for the purpose of obtaining possession of goods which are being wrongfully detained. This development has been approved in *Union Government (Minister of Finance) v Gowar*¹⁰. It has been suggested that, in the light of these

8. For example, threats to kill or injure hostages taken, which hostages are not related to the person of whom demands are made, may nevertheless render the consent of the person of whom the demands are made involuntary. De Wet and Yeats, *Kontraktereg*, p 45; Kerr, *Contract*, p 192:

"With the increasing incidence of the taking of hostages it may well be that our courts will be prepared to review this requirement [that the threat concern the prospective contracting party or his family] and to hold that in certain circumstances threats against others will bring the rules into operation if the other requirements are met."

Also see Christie, *Contract*, p 301 - 302. The proper way to determine where the limitations lie in this sort of case is by applying the principles set out below in this section.

9. 1883 (2) SC 322 at 351.

and other decisions based on them,¹¹ threats of injury to goods or of injury to real rights, such as possession of goods, is sufficient to negate free consent and, provided such threats are unlawful, may accordingly give rise to *iusta causa* for an order of *restitutio in integrum*, to invalidate *ab initio* any act done while under such duress, or the legal consequences of an event which occurred because of *metus*.¹² It is submitted that it is correct to acknowledge unlawful threats to rights in property as falling within the concept of *metus*. Provided that it can be proved that the existence of such threats actually impinged on the freedom with which the consent of the threatened party was given, there does not seem to be any reason to distinguish between threats made to the physical integrity of a person himself, (or members of his family or even unrelated third parties in some circumstances), and threats made to his property rights.

2.7.3. Metus in Circumstances of Threats to Cause Economic Loss.

Whether the idea of a threat to property rights can properly be extended to cover economic interests generally (that is, proprietary rights, by which is meant legal rights which have a value expressible in money terms),¹³ as opposed to real rights, such as ownership, or possession, must now be considered.

The sort of situation contemplated can be illustrated by means of an example. If an employee, in order to force his employer to agree to give him an increase in salary, or a bonus, threatens to resign from his employment at a time which is awkward for his employer,

10. 1915 AD 426 at 434. Also see *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 411 A at 410 C.

11. *De Beers Mining Co v Colonial Government* 1888 (6) SA 155; *Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* 1960 (2) SA 686 SR; *Miller v Bellville Municipality* 1973 (1) SA 914 C at 921 A; *Hendricks v Barnett* 1975 (1) SA 756 N.

12. Christie, *Contract*, p 303; Kerr, *Contract*, p 192.

13. The term is defined thus in Hahlo and Kahn, *Legal System*, p 88.

and which will cause the employer financial loss, is the employer unlawfully deprived of his freedom to with-hold consent? Or is the employee doing no more than exploiting legitimate market forces to extract his due? On the answer to this question depends whether or not *iusta causa* for an order of *restitutio in integrum* may be said to exist in such circumstances?¹⁴

Since it appears generally to be accepted that not only threats of physical injury to a person, but also threats to injure, destroy, or interfere with, property may render consent involuntary, it must be asked whether there exists any valid distinction between a threat to damage property or interfere with rights in property, and a threat to cause proprietary (or economic) loss. It is suggested that no distinction of substance exists: both types of threat relate to an economic interest, and both operate in the same way on the mind of the party threatened, so as to deprive him of his freedom to withhold consent to whatever is demanded of him. It would be artificial to distinguish between economic interests embodied in real rights, and those that are not. If it is accepted that fear of proprietary harm may have the same effect on the freedom with which a person gives his *consensus* as threats of interference with real rights in property, then it must follow that the act of an employee who uses the proprietary consequences of withdrawing his services at an awkward moment as a bargaining lever against his employer may, in certain circumstances, render the employer's consent to the employee's demands involuntary. If, in the circumstances, the threat to cause loss is also unlawful, then *iusta causa* for an order of *restitutio in integrum* may be said to exist, and any agreement entered into nullified *ab initio*.

In cases in which the threatened harm consists of physical harm to person or property, or of

14. This example is based on the facts of *Hendricks v Barnett* 1975 (1) SA 765 NPD. In this case, the manager of a stud farm threatened to leave his employer just before a sale of bloodstock. Leaving his employment in such circumstances was likely to cause financial loss to his employer. The employee used this situation in order to extract an agreement from his employer to pay the employee a generous bonus. The employer sought to have the payment set aside because of the *metus* to which he had been subjected. *Restitutio in integrum* was refused because of the aggrieved party's failure to establish as a fact that he has not consented freely to the payment of the bonus. Also see *Malilang and Others v MV Houda Pearl* 1986 (2) SA 714. In this case, the duress consisted of the threat of blacklisting a shipowner if he refused to comply with the demands of a trade union regarding conditions of employment.

substantial mental anguish, it seems that lack of free consent to the transaction may be deduced from compliance with the threats. However, it would appear that the person who seeks an order of *restitutio in integrum* on grounds of threatened economic loss will be required to actually allege and prove that free consent was lacking at the time of transacting. De Villiers CJ expressed the point thus:¹⁵

"It is sufficient to say that in every case in which the duress of goods has been relied upon as a ground of restitution, the Courts have been careful to require the clearest proof of the involuntary nature of the payment and have considered such proof incomplete without some evidence of some unequivocal protest at the time of payment."

It has been suggested that there is no logical reason for different rules in each of the two cases.¹⁶ It is submitted that one possible reason is that absence of consent can be more safely inferred in the case of threats to the person, or his family, than is possible in the case of threats to property, or proprietary interests. However, if both a threat of proprietary loss, as well as unlawfulness, in the form of unfairly or improperly exploiting the advantage such threatened loss gives, is shown to have existed, it is hard to see why a court should not be entitled to infer lack of free consent, just as in the other cases of threatened harm to the person himself.

In *Malilang and Others v M V Houda Pearl*¹⁷ Corbett JA, applying English law, held that, if the duress is applied by a third party, rather than the person who seeks to enforce a contract entered into as a result of duress, it must be proved, by the person seeking to set aside the

15. *Benning v Union Government (Minister of Finance)*, 1914 A.D. 420 at 423. Also see *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 434; *Lombard v Pongola Sugar Milling Co Ltd* 1963 (4) SA 860 A at 863 E; *Hendricks v Barnett* 1975 (1) SA 765 N at 769 G per per Hoexter J:

"What was required of the defendant was an unequivocal protest. An unexpressed mental reservation does not avail him."

Also see *Kapp v T C Valuta (Pty) Ltd* 1975 (3) SA 283 T at 284.

16. Kerr, *Contract*, p 192 - 193.

17. 1986 (2) SA 714 A at 730 G ff. In this case the Court sat as a Court of Admiralty, and was obliged to apply English law. The case is therefore not authoritative in South African law.

contract, that the other contracting party was aware, when entering the contract, of the duress applied by the third party. It is submitted that, if the fundamental enquiry in South African law relates to the question whether or not consent was freely given, it ought not to matter that the duress was exerted by a third party, even if the other contracting party is ignorant of this fact when contracting. If consent is given to a contract, not freely, but in circumstances that constitute duress, it is submitted that the existence of *iusta causa* for an order of *restitutio in integrum* does not depend on the other contracting party being responsible for, or knowing of, that duress.¹⁸

It does not automatically follow that every case involving the threat of economic loss will give rise to *iusta causa* for an order of *restitutio in integrum*. This is because it is not in every case that the economic pressure applied will be considered improper, or unlawful. Factors which will weigh in the balance are the relative bargaining positions of the parties involved, the extent of the threatened proprietary harm, as well as the apparent reasonableness of the demand made by the employee. Because of these factors, there are many cases in which a resort to bargaining tactics involving the prospect of economic loss for one party will be considered lawful. However there will be also instances where the balance of factors will entitle a court to find that the threats were unlawful, and that therefore *iusta causa* exists for an order of *restitutio in integrum*. In such cases, relief ought to be given to the person seeking *restitutio in integrum* and anything to which he has agreed because of *metus* nullified *ab initio*.

2.7.4. Metus in Modern South African Law Described.

A modern description of what constitutes *metus* must take all the considerations mentioned above into account. It is therefore suggested that, in South African law, *metus* should be

18. It should be noted that no such requirement is stated by Corbett J (as he then was), in *Arend & Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 C at 306 A. The relevant passage appears in section 2.7.1 above.

described as: "unlawfully induced fear, or apprehension of some substantial physical, or proprietary, harm, loss, or anguish." This is not quite the same as the definitions of the old authorities, being somewhat wider, but it aims at being consistent with the old authorities, as well as the more recent decisions of the South African courts. In terms of the suggested description, *iusta causa* for an order of *restitutio in integrum* may arise when a person's consent is rendered involuntary by unlawful threats, which cause physical harm, or acute anguish to a person, either directly, or by threats to members of his family, or to a third person, or by means of threats of damage to property belonging to the person, or by interference with his real rights in property, or by means of threats to cause financial or economic loss to that person. Although the word *metus* can be translated simply as "fear", it is suggested that, because the legal concept of *metus* includes various situations such as improper pressure,¹⁹ duress, and intimidation²⁰ it is preferable to retain the Latin term *metus* to describe the concept, rather than to adopt a translation.

2.7.5. Instances in which the Existence of Metus does not give Rise to Iusta Causa for an Order of Restitutio in Integrum.

There exist a number of recognised instances in which the existence of *metus* does not give rise to *iusta causa* for an order of *restitutio in integrum*. Two principles appear to operate here. The first is that, in some cases, the consent given by the aggrieved party is not in fact vitiated by the fear, even though an unlawful threat of harm was made. The second is that, in some circumstances, the inspiration of fear is considered justifiable, and therefore not unlawful.

The following instances are those in which it has been held that, despite the making of

19. *Smith v Smith* 1948 (4) SA 61 N at 66.

20. *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 433; *Arend & Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 C at 305 - 306.

unlawful threats of harm having been made, freedom of consent is not vitiated by fear.

Firstly, there is the case of fear which, in the circumstances of the case, ought to have been withstood by the person subjected to it. The older authorities put this rule more strongly, referring to an objective standard of firmness of character against which an individual who yields to *metus* should be judged before an order of *restitutio in integrum* is allowed.²¹ Voet says this:²²

"It should be such fear as properly descends even upon a steadfast person. For idle alarm there is no excuse, and it is not enough for one to have been alarmed through the influence of any sort of fright."

On reflection, there is little merit in an overly robust approach.²³ If an individual is unable, on account of, say, immaturity, sex, circumstance, or even a natural timidity, to resist the fear unlawfully excited in him by another, then his free consent to whatever he agreed to do is lacking, whatever may have been the case with a stronger character. However, when it is within the capability of the person concerned to withstand the pressure exerted, he ought to do so. It is submitted that this is what is meant when it is said, in South African law, that the fear "must be a reasonable one."²⁴ If the person threatened succumbs unreasonably to fear, then *iusta causa* for *restitutio in integrum* will not exist.

Secondly, there is the instance of fear that a person excites in himself, either because of what he himself has done,²⁵ or because of his own ill founded suspicions.²⁶ An example of the

21. D.4.2.5 - D.4.2.7.

22. Voet, *Commentarius*, 4.2.11. In 4.2.12. Voet nevertheless acknowledges that account must be taken of the age, sex and standing of the person threatened.

23. *White Bros v Treasurer General* (1883) 2 SC p 322 at 350 - 351; *Smith v Smith* 1948 (4) SA 61 N at 67.

24. *Per Corbett J in Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 C at 306 B.

25. D.4.2.21.pr; Voet, *Commentarius*, 4.2.10.

26. D.4.2.9.pr.; Voet, *Commentarius*, 4.2.13; *Broodryk v Smuts NO* 1942 TPD 47 at 52. The reality and the immediacy of the threat to the particular person or premises governs whether

first mentioned situation would be an employee who, because he has been lazy and unconscientious, fears dismissal and as a result agrees to a reduction of benefits suggested by his employer.²⁷ An example of the second instance is a person who reacts to a threat which, properly considered, is too remote to reasonably excite apprehension.²⁸

Thirdly, there is the case of fear excited by a personal emergency from which rescue is wanted.²⁹ If a person, because of his own circumstances offers a reward for help, there is no ground for an order of *restitutio in integrum*, and the recovery of the reward paid unless the emergency was contrived by another for the purpose of extracting the reward.

Fourthly, there is the case of fear of obviously empty or insubstantial threats.³⁰ The evaluation of the substance behind threats must depend on circumstances. In view of what has been said above, it must be relevant to take into account what the person threatened believed possible. Thus, the threat to do something manifestly impossible might not normally be grounds for *restitutio in integrum*, but such a threat made to a superstitious person, or to an unsophisticated person may appear quite credible to that person, and, in such a case, may give rise to *iusta causa* despite any actual impossibility.³¹

fear of an approaching mob is self induced or not. *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 C at 306 B per Corbett J:

"It must be the threat of an imminent or inevitable evil."

27. Also see Voet, *Commentarius*, 4.2.10, in which he gives the example of a freedman who, having been ungrateful towards his patron, and fearing re-enslavement, promised something to his patron. No *restitutio in integrum* would be allowed in such a case.

28. *Broodryk v Smuts* NO 1942 TPD 47 at 52. Abandoning premises because of fear of an approaching mob is not necessarily an ill-founded suspicion. The suggestion was made in *Industrial & Commercial Worker's Union v Ranch* 1929 NPD 192 at 198 that, even if the actions of such a mob do not constitute an act of unlawful dispossession, such as would entitle the previous occupant to recover possession on the basis of enforcing a real right to possession, some other remedy might be available to recover the abandoned property. The most likely remedy, it is submitted, is *restitutio in integrum*, based on the *iusta causa* arising out of a justifiable fear of harm at the hands of the mob. The remedy would involve the setting aside of the legal consequences of the act of giving up possession, and the restoration of possession to the person induced by fear to relinquish it.

29. Voet, *Commentarius*, 4.2.6.

30. Voet, *Commentarius*, 4.2.12 - 13.

The following instances are those in which the inspiration of *metus* is considered justifiable.

Firstly there is the case of fear induced by a lawful and proper threat of coercion. An example is the threat of bringing a legal action to enforce some existing right.³² However the *improper* use of legal process, such as threats of arrest or imprisonment, are considered sufficiently immoral to give rise to *iusta causa* for *restitutio in integrum*.³³

Secondly there is the case of fear inspired by a lawful duty of obedience, such as that owed by a child to a parent or by an employee to an employer, does not give rise to *iusta causa* for *restitutio in integrum*.³⁴

31. *Patel v Grobbelaar* 1974 (1) SA 532 A. Although this case is treated in the judgement as an instance of undue influence, which, it has been suggested above, is an instance of *dolus* and not *metus*, the case illustrates how an individual's belief in something which, more generally, might be considered ill founded or impossible may nevertheless lead to a person placing reliance on and trust in another. Similarly, a superstitious belief could lead to the inducement of fear sufficient to render consent involuntary.

32. Voet, *Commentarius*, 4.2.10. Wessels, *Contract*, 1186. Cf D.4.2.22 - 23.

33. Huber, *Hedendaegse Rechtsgeleerdheid*, 4.38.8; Wessels, *Contract*, 1187 and 1188; *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 A at 410; *Arend & Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 C at 307; *Ilanga Wholesalers v Ebrahim & Others* 1974 (2) SA 292 D at 297; *Oos-Transvaalse Koöperasie Bpk v Heyns* 1986 (4) SA 1059 O; J A v S d'Oliveira, "Caught Redhanded: Metus and Compounding", (1974) 91 *SALJ* 284. Cf the views in *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 (4) SA 31 T at 34.

34. D.23.2.22; Voet, *Commentarius*, 4.2.11; J E Scholtens, "Undue Influence", 1960 *Acta Iuridica*, 276; D J Joubert, "Some Aspects of Metus Reverentialis", (1970) 87 *SALJ* 94; Kerr, *Contract*, p 195.

2.8. IUSTA CAUSA FOR AN ORDER OF RESTITUTIO IN INTEGRUM IN CASES INVOLVING ABSENCE.

2.8.1. Absence as a Factor in Establishing Iusta Causa for an Order of Restitutio in Integrum.

A person who has been absent from the place where events have occurred may wish the legal consequences of those events to be set aside. For example, an absent person may have failed timeously to defend a legal action, and as a result, may have suffered loss. Or, an absent person may fail to do what is required to secure a legal right, or to discharge a legal duty, and may wish the legal consequences of that failure to be nullified *ab initio*, and the *status quo ante* restored. In such situations involving absence, it is possible that *iusta causa* for an order of *restitutio in integrum* exists, and for the undefended action, or the legal consequences of other events, to be set aside.

The praetor's edict contained provisions in recognition of the fact that situations involving the absence of a person might give rise to *iusta causa* for *restitutio in integrum*.¹

"The following are the terms of the Edict: "Where any portion of the property of a party has been injured while he was under duress, or, without the existence of fraud, absent in the service of the State, or in prison, or in slavery, or in the power of the enemy; or has permitted time to elapse for beginning an action, or where anyone has acquired property by use, or obtained anything and lost it by want of use; or has been released from liability to be sued, because of lapse of time, and, being absent, was not

1. D.4.6.1.

defended; or was in chains; or had made no provision by which he might be sued; or when it was not lawful for him to be brought into court against his will, no defence was offered for him; or when an appeal was made to a magistrate or to someone acting as a magistrate, and his right of action was lost, without fraud on his part; in all these instances I will grant an action within the year during which the party had the right to apply."

Huber also lists absence as a ground for *restitutio in integrum*.²

"The fifth ground or reason for restitution is absence, and by it we are relieved from damage caused by undefended absence."

Voet says the following:³

"Absence is also found counted among just grounds for restitution."

The rules for determining when *iusta causa* might arise in a situation involving absence appear to relate to one basic principle. This principle is that an adult person is expected to look after and manage his affairs, either by being present to deal with them as they require attention, or by making adequate arrangements, and taking proper precautions, to ensure that things do not go awry during absence.⁴ Any deliberate avoidance of the management of one's affairs, or a negligent disregard of the need for such management, will not give rise to *iusta causa* for a subsequent order of *restitutio in integrum*, and restoration to the *status quo ante*, even if both the fact of absence and resulting proprietary loss are proved to exist. *Iusta causa* cannot therefore be presumed in every situation in which absence is a factor: the justifiability of such absence must first be established.

2. Huber, *Heedendaegse Rechtsgeleertheyt*, 4.41.1. Also see Van Leeuwen, *Roomsch-Hollandsch Recht*, 4.42.4; Van der Linden, *Koopmans Handboek*, 1.18.10.

3. Voet, *Commentarius*, 4.6.1.

4. For example, by the appointment of an agent to manage one's affairs during an expected absence. Voet, *Commentarius*, 4.6.4:

"Although as a rule everyone who is going to be absent is bound to leave an attorney at home, yet many cases may happen in which that is prevented.... Clearly if he omitted to put someone else in charge of his affairs at home by manifest negligence and, as it were, contempt, he should evidently not receive restitution, for the reason that not so much his absence as rather his own fault and negligence caused him loss. "

2.8.2. Instances involving Absence When Iusta Causa for an Order of Restitutio in Integrum may Arise.

There are certain cases involving absence in which *iusta causa* for an order of *restitutio in integrum* may be said with some certainty to exist.

Firstly, there are cases of absence in compliance with the demands made by a higher authority or duty. This is what Voet refers to as an "honorable" absence⁵ and it includes absence because of military service or some other state duty. More generally, it would include absence in the pursuit of public service. However, Huber suggests that it is not sufficient, to establish *iusta causa*, merely to have been absent on a mandate from the government, but that the absence must *in addition* have been in pursuit of something in the public interest. Thus:⁶

"That [action] in his favour you must not understand as being for the benefit of all absent persons, but of such as were absent in the interests of the common weal, not merely on a mandate from the public government, but for reasons which are beneficial and valuable to the public, as in the case of a student in foreign parts, whose property or right becomes prescribed in favour of another, and who is thus deprived by that other of his actions in his absence, and who never had any opportunity of pleading his case at law."

In other words, it is not to be implied, from the mere fact that a person is absent on a mandate from Government, that his pursuits are in the common interest: this is an additional fact which must be proved before *iusta causa* for an order of *restitutio in integrum* will be

5. Voet, *Commentarius*, 4.6.3:

"But if the absence was for an honourable reason restitution is granted to those damaged by such sort of absence. Such are soldiers who are on campaign or who are at Rome, but not those also who enjoying furlough at home; doctors and the like who follow the camp in the interest of the troops; so also those sent to conduct drafts of troops out or back or to hold evil persons in check...."

6. Huber, *Heedendaegse Rechtsgeleertheyt*, 4.41.1:

found to exist.

It is also suggested that absence on private business may give rise to *iusta causa* if the business is, in fact, also beneficial and valuable to the public generally. Thus, in the passage quoted above, Huber mentions the case of a student who pursues his studies abroad, and, in the following section of the same work⁷ gives the example of a merchant (businessman), because of the importance of commerce and the advantage which accrues to the general public through commercial activity. It is submitted that the views of Huber are fully applicable in the context of modern South Africa.

It must be noted that, even if a person is absent in pursuit of public service, and for the public good, *iusta causa* will only be found to exist if the circumstances were such as to deprive the absent person of the opportunity to make other arrangements for the management of his affairs. The professional diplomat, politician, or businessman, who knows that travel is a part of his occupation, will be expected to do more than simply leave his private affairs unattended when travelling in the pursuit of public service or his private business affairs.

The second type of case in which *iusta causa* may exist in circumstances of absence is when the absence is caused by superior forces or unexpected events. Under this category may be included absence caused by floods, earthquakes or other accidental and unavoidable disasters.⁸ Voet says the following:

"Instances are when one is absent because terrified with a not insubstantial

7. Huber, *Op cit.*, 4.41.2. Huber says that absence in pursuit of profits which does not yield a public advantage can be distinguished, and will not give rise to *iusta causa*. The same applies to absence for pleasure and enjoyment.

8. Voet, *Commentarius*, 4.6.3. Voet appears to include within this category of cases an absence brought about by fear (*metus*). This may seem questionable. *Metus* is itself a situation in which *iusta causa* for *restitutio in integrum* may exist. However, Voet is referring in 4.6.3. not to fear inspired unlawfully by one person in another, but to fear justifiably inspired by events that are not in the control of anyone.

fear by reason of disease or just apprehension; when one is prevented from attending by stress of storm, or robbers or of the enemy, whether he is merely afraid of them or is kept away by them or others; or when one has been called away to give evidence, or is travelling elsewhere because of a trial or appeal."

Also included in this category of case is absence caused unexpectedly by illness, or similar sudden emergencies, which leave no time for the making of proper arrangements in the normal way.⁹

Thirdly, *iusta causa* may arise in the case of absence caused by a break-down of arrangements. This occurs when a person makes proper arrangements for the conduct of his affairs while he is away voluntarily, but, contrary to expectations, and through no fault of the absent person, the arrangements break down. An example would be the sudden death of an agent appointed by an absent person.¹⁰ The facts in *R v Schonberg*¹¹ illustrate an instance of breakdown in arrangements that resulted in absence, not from the country, but from judicial proceedings. The Attorney-General set down a case for hearing on Monday 1st February 1952. There was, in fact, no such date, the 1st of February being a Friday. As a result of this mistake, the appellant failed to appear in court, was held in to be in default, and the appeal was dismissed. On these facts, the dismissal was set aside. Selke J said:¹²

"It seems to me also to be proper and just that the Court should, where the equities point that way, be able to recall an order it has made, and, by so doing, to allow the merits of an appeal to come before it for investigation, where what has happened previously is that, because of error, the investigation of the merits has been shut out owing to the non-appearance of the appellant."

9. Voet, *Commentarius*, 4.6.3.

10. Voet, *Commentarius*, 4.6.5.

11. 1952 (2) SA 169 NPD at 170.

12. At 171 C. It is submitted that, on the facts of this case, *iusta causa* for setting aside the dismissal of the appeal, and restoring the appellant to his right to appeal, arose from either the absence, or alternatively, the error. The judgement does not make explicit which particular factual circumstance was relied on.

2.8.3. Situations Involving Absence in which Iusta Causa is Lacking.

In some situations, *iusta causa* for an order of *restitutio in integrum* is considered to be lacking despite physical absence which has led to loss of legal rights or proprietary loss. The cases fall into two categories. Firstly, there are situations in which a person negligently omits to organise the proper management of his affairs, in an appropriate way, for the duration of either a voluntary, or an enforced, absence. The fact that the absence is not voluntary does not excuse the absentee from making the necessary arrangements, if he has had the opportunity to do so.¹³

Secondly, there are instances of absence which are due to immoral or unjust causes. Examples are the case of a vagrant,¹⁴ and those who deliberately seek to avoid the management of their affairs. Also included in this category are those who undertake some business, which would normally justify absence, but who do so with the ulterior motive of gaining some unfair advantage from their absence.¹⁵

13. Voet, *Commentarius*, 4.6.3 - 4.6.5.

14. Voet, *Commentarius*, 4.6.5: "In regard to voluntary absence, if indeed it arises from a sheerly unjustifiable cause, as when the absent one is a vagrant, or a deserter to the enemy, or a truant from military service, or is plying highway robbery, or lurks in hiding in order to defraud creditors, or dare not come forward because of a crime committed no reason prompts his being relieved."

15. Voet, *Commentarius*, 4.6.7.

2.9. IUSTA CAUSA FOR AN ORDER OF RESTITUTIO IN INTEGRUM IN CASES INVOLVING ERROR.

2.9.1. Iustus Error as a Factor in Establishing Iusta Causa for an Order of Restitutio in Integrum.

Iustus error is given in the Digest as one of the situations in which *iusta causa* for an order of *restitutio in integrum* may arise.¹

"The usefulness of this title needs no commendation, for it speaks for itself. Under it the praetor in many ways comes to the relief of parties who have made mistakes, or have been cheated (*vel lapsis vel circumscriptis subvenit*)...."

This is echoed by writers on Roman-Dutch law. Huber says this:²

"It is, however, true that just error is counted and regarded as a fifth cause, distinct from absence. I say "just error", so that what was done deliberately, without error, however imprudently, can by no means be annulled."

Iustus error has also been recognised by our courts as a circumstance in which *iusta causa* for an order of *restitutio in integrum* may exist.³

1. D.4.1.1. In D.4.1.2, the phrase "excusable error" (*iustum errorem*) is used in an extract from Paul, *Sentences*, book 1. Also see D.27.6.1.6; D.43.24.15.5.

2. Huber, *Heedendaegse Rechtsgeleertheit*, 4.41.6. Voet, *Commentarius*, 4.1.26 also cites "*iustus error*" as a ground for an order of *restitutio in integrum*. Van der Linden, *Koopmans Handboek*, 1.18.10 refers to "*verschoonlijke vergissing*" - excusable mistake.

3. *Lediker and Sacke v Jordaan* (1898) 5 OR 107 at 111; *Van der Westhuizen v James* (1898) 5 OR 90; *Umhlebi v Estate of Umhlebi and Fina Umhlebi* 19 EDC 237 at 249; *Caithness v*

2.9.2. Distinguishing Different Types of Error.

It is not uncommon to distinguish between the different *types* of error recognised in law, such as mistakes of fact, mistakes of law, common errors, joint errors, mutual errors, and so on. The meaning of such terms needs to be made clear. It appears that the terms commonly encountered in this context can be divided, according to their function, into two groups.

The first group of terms serves to describe the possible combinations in which people involved in a transaction, such as a contract, or an event with legal consequences, can be under a misapprehension. Thus, an error is termed "unilateral" when only one of the parties to a transaction is under a misapprehension of fact while the other is aware of the true facts.⁴ An error is described as "common", "joint" or "mutual" when two (or more) persons are both under the same misapprehension of fact.⁵ In other words, both parties make the same mistake, in relation to the same fact. An error is described as "reciprocal" or "bilateral" if two (or more) persons are at cross-purposes, each being under a *different* misapprehension of fact.⁶ In other words, each of the people involved make a different mistake, rather than their all making identical mistakes.

Fowlds 1910 EDLD 261 at 267; *George v Fairmead* 1958 (2) SA 465 A at 470 - 471. It is submitted that the phrase "entitled to repudiate his apparent consent to a contractual term", which is used in the judgement of Fagan CJ, is used in the sense of "entitled to ask that the transaction to which he assented in error be nullified".

4. An example of unilateral mistake in circumstances which give rise to *iusta causa* for an order of *restitutio in integrum* is *Van Rensburg v Rice* 1914 EDC 217; See also *Trollip v Jordaan* 1961 (1) SA 238 A at 252 and *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 A; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 296 A. Christie, *Contract*, p 313.

5. *Dickenson Motors (Pty) Ltd v Oberholtzer* 1952 (1) SA 443 A; *Tauber v Von Abo* 1984 (4) SA 482 E; *Vulvo Investments (Pty) Ltd v Bezri* 1985 (4) SA 367 T. Christie, *Contract*, p 327; Kerr, *Contract* p 207.

6. *Ocean Cargo Line Ltd v F R Waring (Pty) Ltd* 1963 (4) SA 641 A; *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 D. Christie, *Contract*, p 323 ff.

The second group of terms serves to distinguish different types of error by taking account of the type of fact about which the person concerned is mistaken. Thus, "*error in corpore*" is the term used to describe a misapprehension about the *identity* of whatever particular thing it is that the intended legal transaction involves.⁷ The term "*error in negotio*" describes a mistake as to the type of the intended legal transaction.⁸ For example, one person may offer to lease property, but the person with whom he intends to contract may mistakenly believe that the property is being sold. An "*error in persona*" is a mistake as to the identity of a person with whom one is transacting.⁹ "*Error in substantia*" refers to a mistake as to the quality or nature of the subject matter of a transaction.¹⁰

It is submitted that the two groups of category by which errors may be classified are not necessarily mutually exclusive. Thus, an *error in corpore* may also be classified as either unilateral, reciprocal or joint.¹¹ But an error can only properly belong to one category *in each group*.¹²

7. Although the term is not used in the judgement, *Maritz v Pratley* (1894) 11 SC 345 appears to be an example of *error in corpore*.

8. Kerr, *Contract*, p 22 ff. The term should not be used to describe the situation where the type of transaction is agreed, but there is error as regards the *terms* thereof: see A J Kerr, "Mistakes in Communication of Which a Reasonable Man Would be Aware: Contract or No Contract? Error in Negotio?", (1985) 102 *SALJ* 1 at 6.

9. Pothier, *Obligations* para 19; Kerr, *Contract*, p 26 ff.

10. An example is *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 A, in which, because of the seller's misrepresentation, the buyer was misled about the year of manufacture of the motor vehicle that he purchased. As a result, he thought the vehicle was a more recent model than in fact it was. Also see Kerr, *Contract* p 203 ff.

11. Cf the views of A J Kerr, "Disagreement, Mistake, Rectification, and Exclusion Clauses", (1983) 100 *SALJ* 15. Professor Kerr is of the opinion that, in cases usually described as *error in corpore*, both of the parties are under a misapprehension. One of the parties to the intended contract is mistaken about the identity of the proposed subject matter, and the other is mistaken in that he misapprehends the first party's intentions. The present writer submits that it is only the first of these errors which is necessary to deprive the intended agreement of *consensus* and thus its validity in law, and that therefore an *error in corpore* can be unilateral. Although the other party is also under a misapprehension, as Professor Kerr suggests, this second error is not essential to proving the lack of *consensus* between the parties.

12. See generally P M A Hunt, "Mistake in the Formation of a Contract: the Case of the Careless Clerk", (1964) 81 *SALJ* 153.

However, it can be seen from the above analysis that the terms so far discussed serve to distinguish only between *species* of error, and do not define the *concept* of error itself. This is attempted in the following section.

2.9.3. Defining the concept of "Error" and Analysing Its Legal Effect.

In order to understand when error may give rise to *iusta causa* for an order of *restitutio in integrum* it is necessary to attempt to describe, in abstract terms, the concept and the nature of error generally, and to ascertain what effect error may have on legal relationships.

It is submitted that, broadly speaking, all different types of error can be described as consisting of a misapprehension, or misunderstanding, of the true facts of a situation.¹³ The phrase "true facts" is used here to mean what is objectively true, that is, what a full investigation into, and analysis of, the ascertainable facts of a situation would reveal as the reality. The suggested definition includes not only questions of physical fact, such as whether a coin is made of gold or silver, but also questions of what may have *happened* in a particular situation, such as a sequence of events. Also included as a question of fact is, what was the intention of the parties involved in the situation? Finally, the *meaning of existing rules of law* is also included within the meaning of the phrase "true facts".

Error exists if a person has an inaccurate perception of the objectively true facts of a situation, whatever particular question of fact is under consideration. Thus, if the parties to a contract misunderstand each others' intentions, then they labour under an error as to the true facts of the situation. If only one of the parties misapprehends the true facts of a situation, error nevertheless exists, although it is unilateral rather than bilateral. Thus, it is irrelevant to this *broad* definition of error whether only one, or more, of the parties involved

13. De Groot, *Opinions*, 89.

in the situation involving error were, or are, under the misapprehension regarding the true facts. Similarly, it does not matter, for the purposes of defining error in broad terms, what *type* of fact the misapprehension relates to.

There are two basic possibilities as regards the effect of an error on legal relationships entered into or brought about by a person while under a misapprehension of objective reality. The first is that, if the person who misunderstands the true facts has an insufficient appreciation the reality of the situation, the law considers that he does not bring about a binding change in his legal condition, despite what he purports to do. In such a case, whatever the person purports to do is said to be legally void *ab initio*. For example, in a case of an intended contract, the fact that the one, or both, of the parties fundamentally misunderstood a vital fact of the situation may deprive the transaction of the necessary *consensus*, thus rendering the purported contract void.¹⁴ An example is the situation mentioned in the Digest:

"You sold me a table plated with silver, with the understanding that it was solid, neither of us being aware that it was not. The sale is void, and the money paid on account of it can be recovered."

In such cases, no judicial intervention is necessary to set a legal relationship aside, since no legally valid relationship has come about.¹⁵ Put another way, in cases where error is such as

14. D 18.1.41.1. Also see De Groot, *Opinions*, 89; *Diedericks v Minister of Lands* 1964 (1) SA 49 N at 55 A *per* Miller J:

"The mistake must, therefore, be one which touches the agreement in a material or fundamental respect, for example, in relation to its subject matter."

Trust Bank of Africa v Frysh 1977 (3) SA 562 A at 587 D *per* Corbett JA:

"To have this effect [of *dissensus*] the error must, at least, have played a material role in the decision of the mistaken party to enter into the contract."

15. *Du Toit v Lotriet* 1918 OPD 99 at 116; *Stewart v Zagreb Properties (Pvt) Ltd* 1971 (2) SA 346 RAD at 352. Also see B R Bamford, "Mistake and Contract", (1955) 72 *SALJ* 166 at 296 - 7. A J Kerr, "Disagreement, Mistake, Rectification, and Exclusion Claims", (1983) 100 *SALJ* 15 at 15 - 17.

to render an intended legal transaction, such as a contract, void, or to prevent the usual legal consequences of an event, there is no need for an order of *restitutio in integrum*. The same point has been made previously in relation to cases in which *dolus* and *metus* has been sufficient to deprive acts of any legal efficacy.

The second possible legal consequence of the existence of error is that the party under the misapprehension may, despite his error, be considered to have effected a change in his legal condition, for example, by binding himself in a contract. It may well be that the change effected is one which he would not have elected to make had he not been mistaken as to the true facts, but despite this, the circumstances may be such that his misapprehension of fact is not so fundamental that it deprives the acts performed of their legal validity. Legal relations created in such circumstances are therefore considered valid and binding. As an example of this type of situation, suppose that A buys a painting from B. A thinks, but does not stipulate, that the painting is the work of a particular artist, of whose works alone A is a collector. B does not hold out that this artist painted the picture: he has merely put what he thinks is a fair price on the painting. He does not know why A wants it. It is submitted that, in this situation, despite A's error as to who painted the painting, sufficient *consensus* exists to create a legally valid contract of purchase and sale between A and B.

The explanation of this outcome is that, although A was mistaken, and would not have agreed to the purchase had he known of the true facts, his motive for buying the painting cannot be allowed to outweigh the fact that, to the observer of the transaction, all the essential elements of the contract were present and agreed to.¹⁶ The law must give effect

16. Pothier, *Obligations*, para 18, suggests that:

"Error annuls the agreement, not only when it affects the identity of the subject, but also when it affects that quality of the subject which the parties have principally in contemplation, and which makes the substance of it.

Wessels, *Contract*, following Von Savigny, suggests the following test:

"If then the error is such that the thing would be placed in a different category from that to which it *prima facie* belongs, the error is essential and the contract is vitiated; if not, the error is non-essential and the contracts stands.

to what the parties to a contract actually agree, not to what they might privately have hoped to accomplish. It is submitted that the correct approach in such cases is to acknowledge the creation of a legally binding contract, but to further acknowledge that, in particular cases, *iusta causa* for *restitutio in integrum*, and the nullification of the contract, may exist. In such cases, it is said that the legal relationship is voidable *ab initio* as opposed to never having come into existence at all. Thus, in the case of a contract, a person may enter into a legally binding agreement while under a misapprehension of the true facts which, although it affects his *judgement*, does not entirely vitiate the *consensus* necessary to bring about a binding legal relationship. An order of *restitutio in integrum* is then necessary to nullify that contract.

Similarly, error may give rise to *iusta causa* for an order of *restitutio in integrum* in circumstances other than contract, such as the setting aside of a judicial decision,¹⁷ or a previous transfer of property.

The result would be different if, in the circumstances of the example under discussion, both A and B had been aware of A's reason for making the purchase. In such a case, the identity of the painter might be considered to be vital to the transaction, and even if B shared A's misapprehension of fact, their apparent agreement would be vitiated by the fact that the fundamental assumption made by both of them in regard to a material fact was untrue.¹⁸ In such cases, the purported contract is void *ab initio*.

It is thought that, on both tests, the facts of the example given result in a valid contract of sale of the painting, despite the buyer's error. On Pothier's test, it cannot be said that both parties contemplated a painting by the particular artist. On Wessel's test, the painting is not necessarily put into a different category of thing depending on who painted it.

17. *R v Schonberg* 1952 (2) SA 169 N at 170. A mistake regarding the date of an appeal resulted in the non-appearance of the applicant. An order of *restitutio in integrum* was granted, the dismissal of the appeal being set aside. Of course it might be argued that the *iusta causa* in this case arose out of absence rather than error, and that the relevant considerations of that category of case should have been considered, but the case was dealt with on the basis of error.

18. See D.18.1.41.1, quoted above in this section.

Also see Pothier, *Obligations*, para 18:

"Therefore if, with the intention of buying from you a pair of silver

It may appear to be tempting to try to lay down rules, based on the different *species* of error, to determine the effect of error on the validity *ab initio* of legal transactions. An example of such a rule is: error *in corpore* renders a transaction void *ab initio*, not merely possibly voidable *ab initio*. However, it is submitted that, although such rules may often give the right result, the real extent of the effect of the parties' misapprehension of reality can only be reliably judged in the full circumstances of each case.¹⁹ It is submitted that, in deciding whether a transaction is void, or valid but possibly voidable, generalised rules based on different types of error should be avoided, and the courts ought instead always to ask whether the mistaken party had a sufficient appreciation of the true material facts surrounding the intended transaction to be able to effect a change in his legal condition.²⁰ If so, the contract is legally valid, although possibly voidable *ab initio*, rather than void *ab initio*, and it will be necessary to ascertain whether or not *iusta causa* exists for the

... candlesticks, I buy a pair which are only plated, though you have no intention of deceiving me, being in equal error yourself, the agreement will be void, because my error destroys my consent; for my intention was to buy a pair of silver candlesticks. Those which you offer for sale being plated, it cannot be said that they are what I intended to buy."

It is thought that Pothier, in explaining why the error destroys the *consensus*, puts too much emphasis on the purchaser's own intention. Unless the intention was communicated, and thus made a condition of the sale, or unless it was part of a fundamental assumption made by both parties when agreeing to the sale, it is difficult to see why what one party may have intended to acquire should relieve him of his liability, if he ostensibly agrees to purchase and pay for some other specific thing, without qualification. Such an approach would result in it being far too easy to avoid a contract.

Further, see *Dickinson Motors (Pty) Ltd v Oberholzer* 1952 (1) AD 443 as a modern example of a common error vitiating *consensus*.

19. In *Dickinson Motors (Pty) Ltd v Oberholtzer* 1952 (1) SA 443 A the parties laboured under a common misapprehension as to the identity of a particular motor vehicle, which Schreiner JA found (at p 450 C) was "vital to the transaction and if either of them had been aware of the true position the transaction would not have gone through." Accordingly, it is thought that the contract in this case was void *ab initio*, because of lack of *consensus* occasioned by the error. However, if the identity of the car had not been vital to the transaction, and the seller had believed that the identity of the car was not material, it is submitted that the parties' error would have rendered the sale *voidable* rather than void.

20. The basis of this suggestion is the analysis, in this section, of the nature of error and its legal effect. It is also thought that the enquiry suggested is the fundamental question which determines whether or not, in cases of contract involving error, there is *consensus* or *dissensus*.

nullification of the transaction.

2.9.4. No Iusta Causa for an Order of Restitutio in Integrum if Error due to Aggrieved Party's Fault.

Before the existence of error gives rise to *iusta causa* for an order of *restitutio in integrum*, the error must be considered *iustus* by the law.²¹ In other words, even if an error of a type exists that potentially renders legal relations voidable, the *reason* for the existence of error is relevant to the effect that it may have in law. An error, which is attributable to the fault of the person who seeks to rely on it for relief, is not considered to be *iustus*, and the error is therefore not recognised as giving rise to *iusta causa* for an order of *restitutio in integrum*. Put another way, it can be said that *iusta causa* for an order of *restitutio in integrum* does not arise if an error is attributable to the fault of the person seeking relief.

Some authorities do not express the law relating to error and fault in quite this way. Instead, they distinguish "error" and "iustus error", and say that only "iustus error" renders a contract voidable.²² The disadvantage of expressing things in this way is that it becomes difficult to distinguish *iusta causa* from the factual circumstances (error) from which that *iusta causa* arises. It is submitted that it is preferable to treat *iusta causa* as a concept which is distinct from the factual situations in which it arises²³ (for example, *dolus*, *metus*, absence, error), and that it is therefore better to say that *iusta causa* for an order of *restitutio in integrum* only arises in cases involving error, if the existence of error is not attributable to the

21. *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 A 465 at 471 A; *Du Toit v Atkinson's Motors* 1985 (2) SA 893 A; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 A at 315 - 317; *Nasionale Behuisingskommissie v Greyling* 1986 (4) SA 917 T at 926. Cf the views of W A Ramsden, "Justus Error Reconsidered", (1973) 90 *SALJ* 393.

22. *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 D at 168 A. The phrase "iustus error" is said by De Villiers CJ in *Logan v Beit* (1890) 7 SC 197 at 216 to mean:

"...a mistake which is reasonable and justifiable."

23. Section 2.4.3 above.

fault of the person seeking to rely on it. It is submitted that this interpretation is not inconsistent with the Roman, and Roman-Dutch, authorities cited above. In particular, Huber says this:²⁴

"I say "just error", so that what was done deliberately, without error, however imprudently, can by no means be annulled. Further, the error must be just, nor merely free from duplicity and simulation, but such that the person who says he erred must adduce an actual effective cause outside himself, by which he was entangled in error and a transaction resulting in loss; for mere ignorance is not enough, much less thoughtlessness, even though it was such as might well overtake wise persons."

Whichever way round one might choose to express it, it seems to be well established that the concept of *fault* is what distinguishes errors which do not affect the validity of legal transactions, from those which do. In *George v Fairmead (Pty) Ltd* Fagan CJ said the following:²⁵

"When can an *error* be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself?... If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

Schreiner JA said the following in *National and Overseas Distributors Corp (Pty) Ltd v Potato Board*:²⁶

"Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is

24. Huber, *Heedendaegse Rechtsgeleertheit*, 4.41.6. Also see section 2.4.3 above.

25. *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 A 465 at 471 A; *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 A at 903 - 905; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 A at 315 - 317. Also see R D Sharrock, "Fault and Iustus Error", (1985) 102 *SALJ* 1; A Beck, "Mistake and Fault", (1985) 102 *SALJ* 8.

very narrow, if it exists at all. At least the mistake (*error*) would have to be reasonable (*justus*) and it would have to be pleaded."

The concept of fault can be seen to underlie all those situations which are generally accepted as those in which error does not give rise to *iusta causa* for an order of *restitutio in integrum* of the transaction involved. One example is a mistake that is made because of *wilful* ignorance, that is, a deliberate failure to ascertain the true facts. However, ignorance *per se* is not necessarily attributable to fault.²⁷

Another example of circumstances in which error does not give rise to *iusta causa* for an order of *restitutio in integrum* is error resulting from negligence, or thoughtlessness.²⁸ In

26. *National and Overseas Distributors Corp (Pty) Ltd v Potato Board* 1958 (2) SA 473 A at at 479 G. Also see Wessels, *Contract*, Vol 1 paragraph 957:

"...before the court will apply the rules laid down with regard to essential error, it must be satisfied that the error is real and reasonable or, as the Civilians express it, the mistake must be a *justus error*. "*Non solet stultis succurri sed errantibus*" "

Stewart v Zagreb Properties (Pvt) Ltd 1971 (2) SA 346 RAD at 352 A.

27. Huber, *Heedendaegse Rechtsgeleertheit*, 4.41.6. There are instances of ignorance leading to mistake in which the ignorance is considered justifiable (that is, not due to fault) and which therefore entitles the ignorant person to an order of *restitutio in integrum*: *Umhlebi v Estate of Umhlebi and Fina Umhlebi* (1905) 19 EDC 237 at 249:

"Hence ignorance of one's right, if it be a just and probable ignorance, is a good ground for restitution or relief according to the practice adopted in the Netherlands, as appears from an examination of the authorities (*Coren*, Obs. 22; *Neostadius*, Cur. Holl. Dec. 27 and 39; *Van Zutphen*, Neerl. Prac. p 672, n. 6; *Utrecht. Cons.*, Vol.1, Cons. 112, n. 23 - 25; *Schomaker*, Consul. Vol. 6., Cons. 26, n. 243; *Radelant Dec. Traj.*, Dec. 104, n. 12.)"

Caithness v Fowlds 1910 EDC 261 at 268 - 269.

28. *Van Rensburg v Rice* 1914 EDC 217 at 227; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 A at 473. The failure of a person to read the terms of a document which he knows is a contract cannot be held to say that his ignorance gave rise to *iustus error*. Also see *Osman v Standard Bank National Credit Corporation Ltd* 1985 (2) SA 378 C at 387 B ff, in which the plaintiff was held to have failed to have taken reasonable steps to ascertain the true facts, and his error was therefore not *iustus*. But cf *Groenewald v Gracia (Edms) Bpk* 1985 (3) SA 968 T. In this case, an order of provisional sentence was set aside on grounds *iusta causa* arising from the applicant's misunderstanding of the significance of legal documents, which, in the circumstances, was not due to his fault, and was therefore considered *iustus*. In *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 A, the appellant's failure to read the terms of a written, standard form, contract was not held to render the resultant error as to its terms *iniustus*. Also see *Ex Parte Rosenstein* 1952 (1) SA 324 at 326; *Diedericks v Minister of Lands* 1964 (1) SA 49 N at 56; *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 (3) SA 537 W.

cases such as these, the error is plainly due to fault, and thus does not justify setting aside the transactions undertaken. It is therefore essential that, in order for *iusta causa* to exist in circumstances involving error, the error be proved to originate from circumstances not attributable to the duplicity, thoughtlessness, or imprudence, of the person seeking an order of *restitutio in integrum*.²⁹

It was held in *Nasionale Behuisingskommissie v Greyling*³⁰ that an error may be considered *iniustus* if the error of an offeror in a contract of sale was apparent to the offeree. If the offeror acts unreasonably, in purporting to contract on terms based on the misapprehension, then *consensus* between the parties will not be considered to have been reached. It would appear, with respect, that in the circumstances of this case it is not necessary to use the concept of *iustus error* at all. If the facts of a case are such that the court finds that there cannot have been any reasonable belief that *consensus* had been reached, and, it would appear, that *consensus* had not in fact been reached, then, quite simply, there is no valid contract. Since the notion whether an error is *iustus* or *iniustus* serves to determine whether a *valid* contract can properly be set aside, its introduction into the reasoning in this case appears to be superfluous. Accordingly, the approach in the minority judgement of Heyns J,³¹ which avoids the concept of *iustus error*, is to be preferred. Other criticisms have also been made of the majority judgement in this case.³²

29. Huber, *Heedendaegse Rechtsgeleertheyt*, 4.41.6:

"Further, the error must be just, nor merely free from duplicity and simulation, but such that the person who says he erred must adduce an actual, effective cause outside himself, by which he was entangled in error and a transaction resulting in loss."

Horty Investments v Interior Acoustics 1984 (3) SA 537 WLD at 541 G. In this case, the objective test of a reasonable man was applied, to determine whether the mistake in question was due to fault, or not.

30. 1986 (4) SA 917 T at 927 E. The majority judgement was delivered by Schabert J, with whom Daniels J concurred.

31. At 928 B.

32. A J Kerr, "Uses and Misuses of the Term Iustus Error. Questions Concerning Error in Corpore." (1987) 104 *SALJ*, 377; J S McLennan, "Justus Error, Snatching at Bargains, and Rectification." (1987) 104 *SALJ*, 382.

2.9.5. Error of Law may give Rise to Iusta Causa for an Order of Restitutio in Integrum.

It is necessary to consider whether an error of law, as opposed to an error of fact, gives rise to *iusta causa* for an order of *restitutio in integrum*. An error of law exists when a person apprehends the facts of the matter in question, but not their legal consequences.³³ In strict law, an error of law is generally not considered to be a ground for avoiding legal obligations or the legal consequences of acts carried out.³⁴ This principle is enshrined in the maxim *ignorantia iuris haud excusat*. It is submitted that this principle is certainly applicable insofar as such ignorance does not prevent the valid creation and alteration of legal rights and obligations, for example, when a contract is agreed, or if legal rights are abandoned. Such acts have legal validity even if carried out while the person acting is ignorant of, or mistaken about, the legal consequences thereof. However, there is authority for drawing a distinction between the ineffectiveness of ignorance of the law on the creation, or alteration, of legal rights and obligations, and the possibility of *iusta causa* for *restitutio in integrum* being found to exist, on equitable grounds, in circumstances of ignorance of the law.

Huber points out that an error of law may, in fact, be considered *iusus* in some circumstances, such as in the case of very unsophisticated persons, who are not acting for gain, but who are only trying to avoid loss.³⁵ Furthermore, cases have been decided

33. *White Brothers v Treasurer-General* (1883) 2 SC 322 at 349; *Barker v Bently* 1978 (4) SA 204 N at 206 E; *Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600 D.

34. For example, *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 170.

35. Huber, *Heedendaegse Rechtsgeleertheyt*, 4.41.10:

"Error occasioned by ignorance of law gives no ground for restitution, except in the case of such persons as are permitted not to know the content of the laws, such as soldiers, peasants and other very simple and inexperienced men; when, to wit, they labour to avert loss, and not when they are in search of profit; but not when they have had a good opportunity of certifying themselves as to what the law was."

in South African law in which the question whether error of law can be considered *iustus error*, for the purposes of *restitutio in integrum*, has been considered. In *Miller and Others v Belville Municipality*,³⁶ Van Winsen J pointed out that a court may be justified in exercising an equitable jurisdiction to grant relief in circumstances of an error of law. In *Van der Merwe v Die Meester en 'n Ander*³⁷ Muller J held that if an error of law is justifiable (regverdigbaar) in the circumstances of a case, then *restitutio in integrum* available. It is submitted that this line of reasoning is correct. Any apparent conflict between the maxim *ignorantia iuris haud excusat* and the availability of an order of *restitutio in integrum* is explained by the fact that an order of *restitutio in integrum* is an equitable remedy, based not on the strict application of rules of law, but on considerations of what is a fair and just result in the circumstances of the case.³⁸

2.9.6. Clauses in Contracts Excluding Restitutio in Integrum in Cases involving Error.

Considerable attention has been given to the question whether effect should be given to a clause in a contract, which clause excludes the right of a party to the agreement to seek an order of *restitutio in integrum*, when the contract itself has been entered into in circumstances

36. 1971 (4) SA 544 C at 548 C - 549 A.

37. 1967 (2) SA 714 SWA at 724 C - 725 C. Muller J said at 724 C:

"Dan is daar ook 'n reeks sake waarin die beskouing gevind word dat, nieteenstaande die reël *ignorantia iuris haud excusat*, die Hof in 'n geval van 'n persoon wat van sy regte afstand gesien het weens onkunde van die reg, tegemoetkomend kan wees mits dit bevind word dat die onkunde *justus et probabilis* is; dit wil sê waar die onkunde van so 'n aard is dat dit as waarskynlik aanvaar word en regverdigbaar is, en dus vergewe kan word. Onder sodanige sake is die volgende: *Umhlebi v. Umhlebi's Estate*, [19 E.D.C. 237] *supra* op bl. 249; *van Wyk v. van Wyk's Estate and Another*, 1943 O.P.A. 117 op bl. 125; *Oxenham v. Oxenham's Executor*, 1945 O.P.A. 57 op bl. 63; *Tighy v Putter* [1949 (1) SA 108] *supra* op bl. 1101; *Phillipson v Bahadur*, 1956 (1) SA 83 (S.R.) op bl 95/96; *Ex Parte Nel*, 1965 (3) SA 197 (T); *Ex Parte Estate van Rensburg*, 1965 (3) SA 251 (K). Onder die omstandighede meen ek dat die Hof wel haar onkunde kan vergewe. Daarby kan ek meld dat daar andersins niks in die pad staan tot *restitutio in integrum* nie."

38. Section 2.3.4 above.

Of course, in some cases, the terms of the contract may be evidence of what the external factors were that led to the conclusion of the agreement, and it is not suggested here that the court ought not to look at relevant evidence. However, the fact that a court may examine the terms of an agreement, in an effort to determine the existence of error, and whether or not it gives rise to *iusta causa* for an order of *restitutio in integrum*, should not be taken as meaning that the court ought to *apply* the terms of the agreement in deciding whether or not to order a nullification of the transaction.

That this is an appropriate conclusion is strengthened by the fact that an order of *restitutio in integrum* is an equitable and discretionary remedy which the courts have the power to order if the necessary elements are shown to exist.⁴² The parties to a contract simply do not have the power, by agreement between themselves, to exclude this power of the courts to order relief.⁴³ It is not therefore only in cases involving fraudulent conduct that exclusion clauses will fail to be operative,⁴⁴ but, it is thought, in any case in which *iusta causa* for an order of *restitutio in integrum* is found to exist in the circumstances in which the contract and the exclusion clause came into existence.

42. Section 2.3.2 above.

43. In the case of specific performance, the availability of which remedy is also subject to the courts discretionary power, the Appellate Division has even rejected formulating legal rules which would serve as limitations or restrictions of that power: *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A at 782 - 783. It is hardly likely that the courts will accord to contracting parties the right to exclude the exercise of the power to order *restitutio in integrum* in circumstances where it seems appropriate to the court itself to order relief.

44. *Wells v South African Alumenite Co* 1927 AD 69.

2.10. NO IUSTA CAUSA FOR AN ORDER OF RESTITUTIO IN INTEGRUM IN CIRCUMSTANCES OF BREACH OF CONTRACT, OR IN CASES INVOLVING NON-FRAUDULENT MISREPRESENTATION.

2.10.1. Existence of Iusta Causa Not Confined to Specified Circumstances.

Apart from the particular circumstances already dealt with in which *iusta causa* for *restitutio in integrum* may arise, that is, youth, *dolus*, *metus*, absence, and error, the Digest contains what is sometimes referred to as "the general clause" in which it is said that *restitutio in integrum* will be ordered in any other circumstance in which *iusta causa* is found to exist.¹

"Moreover, where any other just cause seems to exist, I will grant complete restitution, when this is authorised by the laws, the plebiscites, the decrees of the Senate, or the edicts and the ordinances of the Emperors."

An echo of this provision is found in the writings of Huber.²

"But the grounds for asking restitution must be particularly considered. Five are stated in the laws: fear, fraud, minority, absence, and finally any just cause which can induce the judge to grant it."

It follows from these authorities that the circumstances in which *iusta causa* for an order of *restitutio in integrum* may be found to exist are not limited to a closed list, but that additional circumstances may be found to exist in which *iusta causa* arises. An important question,

1. D.4.6.1.

2. Huber, *Heedendaegse Rechtsgeleertheyt*, 4.37.12.

therefore, is whether or not, in South African law, the courts have recognised additional factual situations as giving rise to *iusta causa* for *restitutio in integrum*.³ There are two particular circumstances which must be examined in this regard. The first is the case of a breach of a material term of a contract. The second is a non-fraudulent misrepresentation which induces a contract, that is, either a negligent, or a simple (innocent) misrepresentation. Since each of these situations involves different considerations, they will be dealt with separately.

2.10.2. No *Iusta Causa* for an order of *Restitutio in Integrum* in Circumstances of Breach of Contract.

There does not appear to be any authority in Roman or Roman-Dutch law for suggesting that material breach of contract gives rise to *iusta causa* for an order of *restitutio in integrum*. It is suggested that this is because the effect of an order of *restitutio in integrum* would be the nullification of the contract *ab initio*, which result is not justified in circumstances of breach of a term of a contract.

This is an appropriate conclusion to reach. After all, there is no reason to expect that material breach of contract *ought* to entitle the aggrieved party to ask that the whole contract be nullified *ab initio*, and, as a consequence of such nullification, that he be restored to his pre-contractual position. The whole thrust of contractual relations and obligations is that, once created, they give rise to liabilities which continue to exist until they are discharged.⁴ Breach of the terms of contractual obligations does not affect the *existence* of

3. The opposite is certainly true. In South African law, *laesio enormis* has been abolished by statute, and therefore no longer gives rise to *iusta causa* for *restitutio in integrum*. See section 25 Of Act 32 of 1952. The alienation of property with the object of perverting a judicial proceeding, dealt with by Voet, *Commentarius*, 4.7.1. ff. is probably an instance of the application of the general clause of the edict, but it is questionable whether the circumstance would be recognised in modern South African law as giving rise to *iusta causa* for *restitutio in integrum*: see the remarks of Percival Gane in his introductory note to title 7 of book 4 of the *Commentary*.

4. G Lubbe, "The Assessment of Loss Upon Cancellation for Breach of Contract", (1984)

the obligations. They remain legally binding and enforceable, despite the breach, and the aggrieved party is entitled to ask for an order of specific performance in the terms originally agreed on. Alternatively, he may, on grounds of the breach, reject performance tendered, cancel any further right of the defaulting party to discharge his outstanding liabilities by specifically performing the terms of the contract, and sue for an award of damages in lieu of the actual performance.⁵ Such an award of damages constitutes a substitute for specific performance, and has the effect of discharging the contractual obligations.

Failure by a party to a contract to perform his obligations in the terms agreed does not, therefore, appear to justify nullifying the entire relationship *ab initio*. The remedies of enforcing specific performance, or of extracting damages in lieu of performance, provide a result that accords with the parties' expectations. It therefore seems to accord with basic principles to say that, in South African law, the breach of a material term of a contract does not give rise to *iusta causa* for an order of *restitutio in integrum* and the nullification of the contract *ab initio*.⁶

101 *SALJ* 616 at 636:

"Breach of contract, however, does not bring the autonomy principle into operation in the same way as in cases justifying *restitutio in integrum* or redhibition. Here one is dealing with contracts concluded in circumstances recognised by law or, if originally vitiated, ratified by the election of the party entitled to have it set aside not to do so. There is, therefore, no call in principle for the transaction to be set aside and, in so far as the autonomy principle is relevant, it would appear to require enforcement of the transaction against the contract breaker rather than its being set aside."

Also see Harker, "The role of Contract and the Object of Remedies for Breach of Contract in Contemporary Western Society", (1984) 101 *SALJ* 121.

5. See section 2.10.3 below for a more detailed enquiry into the effect of cancellation on grounds of breach of contract.

6. On the nature and effect of cancellation (rescission) on grounds of breach of contract, see J R Harker, *Rescission as a Remedy for Breach of Contract*. Professor Harker suggests that, in South African Law, cancellation (rescission) does not operate only to put an end to the right of the defaulting party to discharge his future obligations by means of specific performance. In the case of what he refers to as "instantaneous contracts" (that is, contracts in which the terms of the obligations created are not performed over a period of time) Professor Harker's view is that restoration of performance already rendered may be required following on cancellation on grounds of breach of contract. It is submitted that the legal basis of restoration in such cases is, in fact, the right of the aggrieved party to reject performance which does not comply with the agreed terms. The performance tendered and rejected does not, of course, discharge the defaulting party's contractual liability, which fact

2.10.3. Distinguishing the Legal Effect of Cancellation for Breach of Contract from an Order of *Restitutio in Integrum*.

There does not seem to be much likelihood that either an order of specific performance, or an award of compensatory damages, in lieu of specific performance, would be confused with an order of *restitutio in integrum*. However, the concept of *cancellation* (rescission) on grounds of breach of contract, is much more likely to be confused with an order of *restitutio in integrum*. The legal effect of these two remedies must therefore be distinguished.

In order to distinguish the two remedies, the most important question to ask is, of what does the remedy of cancellation for breach of contract consist? What relief is obtained when this remedy is relied on? It is suggested that cancellation for breach of contract is properly described as a remedy in terms of which a party to a contract who is aggrieved by a breach of contract unilaterally puts an end to the right of the defaulting party to discharge his outstanding contractual obligations by specifically performing them. Consequently, the aggrieved party is himself relieved of specifically performing any outstanding reciprocal obligations he undertook to perform.⁷

In the light of this description of the remedy of cancellation for breach of contract, the phrase "cancellation of the contract" which is sometimes encountered is potentially misleading.⁸ For it is not the contract itself which is cancelled, at least, not in the sense in which a contract is extinguished *ab initio* following on a *restitutio in integrum*. Nor are the outstanding contractual obligations themselves extinguished: these continue to exist,

explains the availability of damages in lieu of performance as a remedy *after* cancellation (rescission). See Harker, *Op cit*, p 472 ff. Also see section 2.14 below.

7. It is submitted that the cases cited below support this description of the effect of cancellation. Cf Harker, *Rescission as a Remedy for Breach of Contract*, p 472 ff.

8. Kerr, *Contract*, p 378; Christie, *Contract*, p 520.

and may be enforced by means of a claim for an award damages, provided only that the *quantum* of damages claimed can be proved.⁹

Defining the remedy of cancellation as the ending of the defaulting party's right to fulfil his obligations by means of specific performance finds support in the majority judgement in *Radiotronics (Pty) Ltd v Scott Lindberg & Co Ltd*. Fagan J said the following:¹⁰

"And even if one doubts the generality of the proposition [that rescission applies to the executory portion of a contract], I think that one may still consider that materially defective part performance of a contract may well create a position in which a purported cancellation by one party by reason of the other's material breach, particularly if it is coupled (as in the case now before us) with an intimation that the cancelling party is holding the other "liable for all damages suffered as a result of the said breach", does not mean that the party who gives the notice is calling for a *restitutio in integrum*, but that in effect he is merely saying to the other party:

"your performance to date is so bad that I cannot allow you to continue; I am therefore stopping further performance, and holding you liable for damages suffered by me both by reason of your faulty performance to date and by reason of the cessation of further performance, such cessation, though ordered by me, being attributable to your breach."

If this should include the rejection of some article already received, one may still ask whether such rejection must necessarily imply a rescission of the contract *ab initio*. A claim for return of the price paid for the rejected article may well necessitate a tender to return the article, not because a general *restitutio in integrum* is taking place, but because of the relationship between the article and the price, the one having passed in exchange for the other, and the return of one therefore logically involving the return of the other."

9. Cf De Wet and Yeats, *Kontraktereg*, p 198. The learned authors suggest that the contractual obligations to render performance are dissolved or untied by rescission. Thus:

"Deur terugtrede word die verbintenisse ontbind, met die gevolg dat geeneen van die partye nou meer verplig is om uitvoering aan die oorspronklike verbintenisse te gee nie, en dat, vir sover daar reeds gepresteer is, partye van weerskante moet teruggee wat hulle onder die ooreenkoms ontvang het."

However, it is submitted that it is not really that the contractual *obligations* themselves are dissolved, any more than the contract is nullified. What is ended by cancellation is the right to render specific performance, and thereby to discharge outstanding contractual liability.

10. 1951 (1) SA 312 CPD at 320 A. Also see *Walker's Fruit Farms Ltd v Sumner* 1930 TPD 394; *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 A.

Thus, when an innocent party elects to cancel a contract on grounds of breach of contract, what he really puts a stop to is the *specific performance* of the *outstanding* obligations that exist between himself and the defaulting party.¹¹ Because the contractual relationship is not itself extinguished, it is not necessary that past performance which has been satisfactorily made and accepted, and for which a *quid quo pro* has been given, be set aside: the legal *causa* for such performance (the contract) has not been nullified *ab initio* by the cancellation.¹² Thus Corbett JA says the following in *Nash v Golden Dumps (Pty) Ltd*:¹³

"Where that [repudiation] happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated (see Joubert *Law of South Africa* vol 5 para 226). The consequence of this is that the rights and obligations of the parties in regard to further performance of the contract come to an end, and the only forms of relief available to the party aggrieved are, in appropriate cases, claims for restitution and for damages. Where, however, a right to performance under the contract has accrued to one party prior to rescission, this right is not affected by the rescission, and may be enforced despite rescission."

Corbett JA thus makes it clear that rescission for breach of contract is a cancellation of the specific performance of outstanding contractual obligations, and does not involve the eradication of the contract nor the extinction of the contractual obligations.

11. A J Kerr, (1980) 97 *SALJ* 375 at 378. Also see J R Harker, *Rescission as a Remedy for Breach of Contract*, at p 478, who says that, the effect of rescission:

"...is to put an end to the primary obligations of the parties to perform, and not to the contract itself."

See diagram B in section 2.3.2 above.

12. See the example of a lease, terminated after a period of satisfactory performance on both sides discussed in section 2.10.2 above.

13. 1985 (3) SA 1 A at 22 D.

2.10.4. Circumstances in which Breach of Contract may Result in Cancellation and Restoration, but not Restitutio in Integrum.

Although cancellation on grounds of breach of contract does not involve the nullification of the contract *ab initio*, as does an order of *restitutio in integrum*, there are nevertheless circumstances in which cancellation for breach of contract results in the restoration of a thing, or benefit, given and received in terms of the contract prior to the cancellation.

For example, it may be that a contract involving reciprocal obligations (such as a contract of purchase and sale) is cancelled (rescinded) on grounds of a material breach of contract after only the aggrieved party has performed his obligations. Obviously, the defaulting party, who received the benefit of that performance, is not entitled to retain it, in the absence of his own performance, and, since his right to perform specifically has been cancelled, the aggrieved party is entitled to a restoration of the benefits of his own performance.¹⁴ There is nothing in this example which suggests that the whole transaction is being, or should be, nullified *ab initio*, before restoration of what was given can be ordered. Accordingly, the fact that

14. This seems to have been the basis on which *Geldenhuis v Maree* 1962 (2) SA 511 O was decided. The case involved the cancellation of a sale after a portion of the purchase price had been paid. The buyer was held entitled to claim the return of this money. *Coetzee v Impala Motors (Edms) Bpk* 1962 (3) SA 539 T also involves a contract of sale, but one concluded under Hire Purchase terms. In reviewing "die gemenerereg" at 541 E - F, Boshoff R refers to *Combrink v Maritz* 1952 (3) SA 98 T and *Ace Motors v Barnard* 1958 (2) SA 534 T. In *Combrink's* case, Rumpff J suggests (at page 100) that the remedy of the purchaser who seeks to recover unilateral performance after cancellation is possibly a *condictio sine causa*, that is, a personal action to recover money or property delivered without legally binding reason for delivery. However, it is submitted that the *condictio ob rem dati* (*causa data causa non secuta* in Justinianic terminology: see Thomas *Textbook*, p 327) is the more appropriate category of action, since cancellation of the contract does not make it void *ab initio*, which is implied if the *condictio sine causa* is said to be appropriate. On this basis, unilateral performance of reciprocal obligations is recoverable following the cancellation of any future right of the defaulting party to discharge his obligations by specific performance. *Combrink's* case is approved in the *Ace Motors* case. *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd and Others* 1974 (1) SA 414 NC is also a case of the cancellation of a contract of sale, on grounds of the buyer's failure to pay the full purchase price. It was held that the restoration of the property sold and delivered to the buyer depended on a rejection and restoration of the payment tendered. See the remarks of Hefer AJ at 424 C ff.

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restoration in these circumstances is sometimes termed "restitution" ought not to be interpreted, it is submitted, as meaning that the remedy contemplated is an order of *restitutio in integrum*.

Another example of a situation in which restoration of performance following cancellation for breach of contract may occur, without the nullification of the contract *ab initio*, is when both parties to a contract perform, but the performance tendered by one of the parties is so unsatisfactory that the other party is not obliged to accept the performance tendered as a discharge of the obligation, but may instead reject that performance.¹⁵ In such a case, the aggrieved party, after rejecting the performance, may elect to return the thing delivered, or the value of any benefit actually enjoyed. Any reciprocal performance made would then also be recoverable, as well as a claim to recover damages in lieu of performance for the failure of the defaulting party to perform in the agreed terms.

The result would be different in cases in which there has been mutual and acceptable (substantial) performance by both (or all) of the parties to a contract which entails an ongoing performance, and subsequently, a material breach of contract occurs. An example is the case of a lease of premises for one year. The rent is payable monthly. Suppose that the lessee pays rent and enjoys the use of the premises for six months. Then he fails to pay the rent for a month. Assume that the lessor elects to cancel the lease on grounds of the lessee's

15. *S A Wood Turning Mills Ltd v Price Bros Ltd* 1962 (4) SA 263 T involved the failure of the seller of catalogues substantially to deliver the agreed quantity. Kuper J said at 266 H that the buyer's remedy was to reject the catalogues, cancel the contract and claim damages for the breach. In *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 A Van Winsen AJA said at 470 A, referring to a situation in which the seller of goods under Hire Purchase terms has elected to enforce the agreement:

"Its [plaintiff's] right to claim the alternative relief provided in the agreement thereupon ceased. Despite the cessation of its contractual right to claim rescission, plaintiff would nevertheless under the common law have the right, should the defendant fail to comply with the Court's order enforcing the agreement, to ask the court for an order cancelling the agreement and for damages."

Also see *Radiotronics (Pty) Ltd v Scott, Lindberg & Co Ltd* 1951 (1) SA 312 C at 321 B.

breach of contract. The effect of cancellation is that the lessor puts an end to the further performance of the contract, and is entitled to claim damages for the breach of contract.¹⁶

However, it is submitted that, in these circumstances, there is no general principle or rule in South African law, which, when applied, entitles the party who cancels on grounds of material breach of contract to ask that the performance of the contract over the previous six months be reversed. Until the breach occurred, performance on both sides was satisfactory and was accepted. Both parties therefore had what they bargained for, and the *subsequent* breach of the contract has not affected that. If the breach does not affect the validity of the previous performance, there does not appear to be any reason to require that all the previous performance be reversed, as if no performance had taken place under the contract at all.¹⁷ To allow restoration in such circumstances would be tantamount to ordering *restitutio in integrum*, and nullifying the entire transaction on grounds of *breach of the terms of* a contract. Since breach of the terms of a contract does not give rise to *iusta causa* for such an order, it is submitted that restoration is not, in fact, available in the circumstances under discussion.

To be distinguished from cases involving cancellation (rescission) for breach of a term of a contract are cases in which mutual restoration of the price and goods delivered is claimed in terms of an *actio redhibitoria*. The cause of action in such a case is not a breach of contract, and the action is thus distinguishable from cancellation for breach of contract. The *actio redhibitoria* is also to be distinguished from an order of *restitutio in integrum*.¹⁸

One other case, which involves contracts and the restoration of property, but neither

16. Kerr, *Sale and Lease*, p 234 and 246.

17. Such cases, in which restoration is not appropriate following breach of contract, are not always clearly excepted by the authorities when stating the general rule that restoration of what has been given may be recoverable after cancellation for breach of contract. For example, see Kerr, *Contract* p 396.

18. Section 2.14.3 below. The aedilician actions are also distinguished from cases in which the goods delivered are rejected owing to *patent* defects: *S A Wood Turning Mills Ltd v Price Bros Ltd* 1962 (4) SA 263 T at 266 H.

cancellation for breach of contract, nor an order of *restitutio in integrum*, should be distinguished. This happens when a contract, which is entered into subject to a resolutive condition, is nullified retroactively when the condition is fulfilled, and anything delivered and received in terms of the contract must be restored to its original owner.¹⁹ Although this situation shares with *restitutio in integrum* the characteristics of a relationship becoming void *ab initio* and a consequent mutual restoration of benefits received, there is the distinction that, in the case of the contract subject to the resolutive condition, the contract becomes void by operation of the terms of the agreement, whereas, in the case of *restitutio in integrum*, the contract would continue to be valid if it were not set aside by the court on grounds of equitable considerations.

2.10.5. Distinguishing Use of the Term "Restitution" Following Cancellation for Breach of Contract from an Order of Restitutio in Integrum.

Depending on how the terminology used is understood, it might appear as if certain of the authorities on South African law suggest that an order of *restitutio in integrum* is an available remedy in the event of a breach of a material term of a contract. For example, G A Mulligan says this:²⁰

"In appropriate cases the remedy of rescission and restitution may be given to the victim...of a breach of contract going to the root."

A J Kerr says the following in his chapter on remedies for breach of contract:²¹

"If the aggrieved party decides to take action in court he is not confined to a claim for cancellation. In one and the same action he may claim

19. D.18.3.2; D.18.3.5; D.18.1.6.1.

20. G A Mulligan, "An Unreported Decision on Company Law and on Rescission and Restitution", (1957) 74 *SALJ* 236 at 239.

21. A J Kerr, *Contract*, p 396, citing *Geldenhuis v Maree* 1962 (2) SA 511 O; *Coetzee v Impala Motors (Edms) Bpk* 1962 (3) SA 539 T at 541 E - F; *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd and Others* 1974 (1) SA 414 NC at 424; *Custom Credit Corporation v Shembe* 1972 (3) SA 462 A at 470 C; *S A Wood Turning Mills Ltd v Price Bros Ltd* 1962 (4) SA 263 T at 266 H.

cancellation and restitution of what he has paid over or transferred under the contract. If he does so claim, and if there is no agreement to the contrary, he is bound to restore, and in his pleadings must tender to restore, what he received."

Exactly what such authorities mean depends on how one interprets the word "restitution". It is thought the word is best understood, in the passages quoted, to be used in a general sense, that is, in the sense of the "restoration" or "return" of something given and received. In context, it does not seem as if the more technical meaning of *restitutio in integrum* is to be implied in the word "restitution". This is what R H Christie appears to be saying in the following passage in his chapter on remedies for breach of contract:²²

"It is better to describe the remedy as cancellation than as rescission because rescission is also used in the sense of rescission *ab initio* in cases of *restitutio in integrum* and it is clear that a party who claims cancellation for breach or repudiation is not seeking *restitutio in integrum* and is therefore not obliged to give restitution except to the extent necessary to avoid unjust enrichment."

In conclusion, it is submitted that, despite the occurrence of terminology which may occasionally be misleading, and provided factual situations are carefully distinguished and analysed, there does not appear to be either authority, or reason in principle, for treating breach of contract as a circumstance in which *iusta causa* for an order of *restitutio in integrum* may arise.

22. Christie, *Contract*, p 520, citing *Radiotronics (Pty) v Scott Lindberg & Co Ltd* 1951 (1) SA 312 C at 320 - 1 and *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 D.

2.10.6. Non-Fraudulent Misrepresentation does Not give Rise to Iusta Causa for an Order of Restitutio in Integrum.

Dolus has been identified as one of the circumstances in which *iusta causa* for an order of *restitutio in integrum* may arise.²³ The question that now arises is, if fraudulent misrepresentations may give rise to *iusta causa*, do negligent, and simple (innocent) misrepresentations have the same effect. Despite the sometimes confusing terminology encountered,²⁴ it is submitted that a review of the existing authorities, and the dictates of relevant principle, support the conclusion that the appropriate answer is that non-fraudulent (that is, negligent and simple) misrepresentations do *not* give rise in South African law to *iusta causa* for an order of *restitutio in integrum*. This means that, whatever other remedies *are* available in South African law on the ground of a non-fraudulent misrepresentation, the nullification *ab initio* of the transaction induced thereby is not.

The reasons for this submission may be stated simply. In the first place, neither the Roman nor the Roman-Dutch authorities support the contention that *iusta causa* justifying an order

23. Sections 2.4 and 2.6 above.

24. The terminology encountered in relation to remedies for misrepresentation is often confusing. When, in cases of non-fraudulent misrepresentations, the mutual restoration of performance previously rendered is ordered, both judges and legal writers use a variety of terms to describe what is occurring. For example, Kerr, *Contract*, p 174, speaks of "cancellation and complete restitution". Christie, *Contract*, p 267 uses the term "repudiation" rather than rescission, but later (p 286) introduces the term "*restitutio in integrum*" and "restitution". Cf Joubert, *Contract*, p 91 ff, who only uses the term "rescission" and does not mention "restitution". De Wet and Yeats, *Kontraktereg*, p 198 use the terms "terugtrede" and "teruggee".

Such use of terminology obscures differences between concepts, and may make it easy to assume, without justification, that non-fraudulent misrepresentations have been recognised in South African law as circumstances in which *iusta causa* for *restitutio in integrum* may arise.

of *restitutio in integrum* exists in circumstances of a non-fraudulent misrepresentation.²⁵ In the case of innocent (simple) misrepresentations (that is, when there is neither *dolus* nor *culpa*), there exists no element of *fault* on which to argue the existence of *iusta causa* for an order of *restitutio in integrum*. In cases of simple (innocent) misrepresentations, therefore, the mere fact of the misrepresentation itself would have to be relied on as giving rise to *iusta causa*. Since fraudulent misrepresentations give rise to *iusta causa*, it might be argued, why not *all* misrepresentations? The answer is that, in relation to cases involving *dolus*, it is the existence of the *fraud* which gives rise to *iusta causa*, and not merely the making of a misrepresentation.²⁶ It is submitted that it would therefore be logically unwarranted to ignore the difference between fraudulent and non-fraudulent misrepresentations, and to assume that, because an order of *restitutio in integrum* is available in the case of a fraudulent misrepresentation, so too it should be available in cases involving any kind of misrepresentation.²⁷

25. See the authorities cited in section 2.1.4 and 2.4.2.

26. De Wet and Yeats, *Kontraktereg*, argue against the acceptability of treating a simple misrepresentation as grounds for the setting aside of a contract as void *ab initio*. It is submitted that their view is of substance. The learned authors say the following at page 41:

"By opsetlike misleiding, so word dan geleer, kan die misleide skadevergoeding eis, of hy die ooreenkoms aanveg of nie, maar by onskuldige wanvoorstelling kan hy geen skadevergoeding eis nie, alhoewel hy hom tog op die wanvoorstelling kan beroep om die ooreenkoms aan te veg. Hierdie opvatting is, vir sover dit onskuldige wanvoorstelling betref, nie aanneemlik nie. Die *ratio* vir die aanvegbaarheid van die ooreenkoms is per slot van sake die wangedrag van die ander kontraktant, en waar die wanvoorstelling werklik 'n "onskuldige" wanvoorstelling is, d.w.s. te goeie trou en sonder nalatigheid gemaak, is daar geen grond vir die aanvegting van die ooreenkoms nie."

27. It is thought that the terminology used by Christie, *Contract*, p 267 ff may lead to this sort of error. Professor Christie says:

"In our modern law it is not necessary to prove that a misrepresentation was fraudulent in order to invalidate the contract, and the innocent party is equally entitled to repudiate whether the misrepresentation was fraudulent or innocent."

The phrase "invalidate the contract" suggests that what is occurring is a nullification of the contract *ab initio*, and therefore implies that an order of *restitutio in integrum* is available in circumstances of non-fraudulent misrepresentations.

It might be thought that even if simple (innocent) misrepresentations do not give rise to *iusta causa* for an order of *restitutio in integrum*, negligent misrepresentations are distinguishable: negligent misrepresentations involve *culpa*, and *culpa* might, like *dolus*, give rise to *iusta causa* for the nullification of a transaction induced thereby. However, the existence of *culpa* is simply not mentioned in Roman law, or Roman-Dutch law, as constituting one of the circumstances in which a legally valid transaction can justifiably be nullified *ab initio*. In the absence of such authority, recognition of *culpa*, as a circumstance from which *iusta causa* for an order of *restitutio in integrum* arises, would have to be considered as a modern development in South African law, perhaps as a result of the influence of English law. This possibility is considered in the following section.

2.10.7. Restoration of Mutual Performance in Circumstances of Non-Fraudulent Misrepresentation in South African Law.

It has been suggested that relief in the form of "restitution" in circumstances of non-fraudulent misrepresentation has been introduced into South African law from English law. Thus, Hahlo and Kahn say the following, under the heading "*Innocent (Non-Negligent) Misrepresentation*":²⁸

"Modern South African law, too, allows the representee to set up a

28. Hahlo and Kahn, *South Africa*, p 468 - 9. The learned authors are cited and followed by Kerr, *Contract*, p 174, who says the following:

"When a material simple misrepresentation has been made the contract is voidable at the option of the representee. The representee may raise the *exceptio doli* against an action brought on the contract; or he may claim cancellation and complete restitution; or he may uphold the contract and claim partial restitution."

Professor Kerr says the following in relation to negligent misrepresentations at p 167:

"One point seems clear: if the misrepresentation is material the representee is entitled to cancellation and restitution. If he were not so entitled he would be in a worse position than one to whom a simple misrepresentation is made."

defence, [*exceptio doli*] but is also prepared to go further and permit him to sue for rescission and restitution. How this remedy was introduced is a school example of the casual entry of a rule of English law into the body of South African law unheralded and unsung. Rescission, it appears, was first said to be permissible in 1907, in a decision in which no authority was cited. [*Parke v Hamman*, 1907 TH 47.] The following year it was again stated to be available, [*Wiley v African Realty Trust, Ltd* 1908 TH 104] on the strength of an earlier case which did not deal with the point. [*Viljoen v Hillier* 1904 TS 312] From such a small acorn a sturdy oak has grown; it is now settled case law that from English law has been taken over the remedy of rescission and restitution. [*Bowditch v Peel and Magill* 1921 AD 561 at 572; *Harper v Webster* 1956 (2) SA 495 FC at 501.]

It is submitted that the passage quoted rather over-emphasises the role played by English law in this context. Furthermore, in the passage quoted, the terms "rescission" and "restitution" are used without definition of their precise meaning. This may cause confusion, in particular, by failing to distinguish different remedies. It is thought that, in order to describe a mutual redelivery of whatever has been previously received, in the context of non-fraudulent misrepresentations, the word "restoration" is to be preferred to "rescission". The latter term is likely to be confused with rescission on grounds of breach of contract, which, it is thought, is distinguishable, in nature and effect, from a restoration ordered in circumstances of non-fraudulent misrepresentation.²⁹ The term "restoration" is also preferable to "restitution" which may be misunderstood as referring to an order of *restitutio in integrum*.

With respect to the learned authors, it is submitted that it is a more accurate description of the development of this part of South African law, to say that South African courts, in having to decide cases in which restoration of performance was sought, in circumstances involving non-fraudulent misrepresentation, have discovered principles of South African law which give appropriate, (even similar), results to those found in English law cases. Professor Burchell explains the process in the following passage:³⁰

29. See below in this section.

30. E M Burchell, "Honest Misrepresentation and Damages", (1950) 67 *SALJ*, 121 at 123 - 124. Also see the judgement of De Villiers CJ in *Woodstock, Claremont, Mowbray and Rondebosch Councils v Smith and Another* (1909) 26 SC 681 at 701.

"But...our courts have gone further and have permitted a positive action for rescission of the contract in cases of innocent misrepresentation. Most of these cases could be explained on the ground that the misrepresentation in question led the parties into essential error which precluded the formation of a valid contract by precluding *consensus ad idem* between them. But this is not the principle upon which our courts have allowed actions for the rescission in such cases. The basis for these actions is rather the equitable one that it is against good faith for a man to insist upon retaining the benefit of a contract which he has secured by his own misrepresentation however innocent it may be. This principle was established by the decisions of English courts of equity and, in following it, our courts have indicated that an identical principle obtained in Roman law."

In other words, principles originating in Roman law have been found to exist, which require that, in circumstances involving non-fraudulent misrepresentation, a mutual restoration (sometimes referred to as rescission, or restitution) of what has been given and received by the parties involved may be required. This was stated by De Villiers CJ in *Woodstock, Claremont, Mowbray and Rondebosch Councils v Smith and Another*,³¹ after a survey of Roman law principles. The learned Chief Justice, having reviewed the circumstances in which the *exceptio doli* was available (to avoid outstanding performance), went on to say the following:³²

"It appears to me that it would be equally against good faith for a man to insist upon retaining the benefit of a completed contract for the purpose of securing which he has made a false statement, believing that the knowledge of the truth on the part of the person to whom it was made would form an inducement for him not to enter into it.... Broadly stated, then, I take it to be the law in this Colony that where a person who has entered into a contract discovers that statements made to him by the other party to the contract with the object of inducing him to enter into the contract, or with the object of concealing from him facts the knowledge of which would be calculated to induce him to refrain from entering into the contract were false, and can show that, acting with ordinary prudence and discretion, he would not have entered into the contract if he had known the truth, he is entitled, within a reasonable time, to elect whether he will abide by the contract or claim a rescission thereof.

On behalf of the defendants several English cases have been cited, but they do not appear to me to be in conflict with our own law."

However, although restoration of performance in circumstances of non-fraudulent misrepresentation may be a generally available remedy in South African law, it is submitted,

31. (1909) 26 SC 681 at 701.

32. (1909) 26 SC 681 at 701.

with respect, that the exact legal basis on which the restoration is ordered has not yet been made sufficiently clear. Some of the cases cited in support of the general proposition concern contracts of sale, to which special rules apply.³³ Others involve the *avoidance* of performance which is still outstanding rather than restoration of performance previously rendered.³⁴ In order to ascertain the proper legal basis on which relief in the form of restoration for non-fraudulent misrepresentation is available, and to understand the inter-relationship of the various remedies presently available in circumstances involving a non-fraudulent misrepresentation, (and thereby to distinguish them from an order of *restitutio in integrum*), a review of certain remedies, defences and actions is necessary.

2.10.8. A Review of the Remedies Available in Circumstances of Non-fraudulent Misrepresentation.

The first remedy which is said to be available in situations involving non-fraudulent misrepresentation, is the avoidance of rendering, or accepting, performance due in terms of the contract induced thereby. It is submitted that, in cases in which a non-fraudulent misrepresentation has induced one of the contracting parties to agree to disadvantageous terms, then, provided performance of the contract has not yet taken place, the aggrieved party will not be compelled to accept performance of the agreed terms, or to render counter-performance. This is because, in South African law, it is considered to be contrary to the dictates of good faith for the guilty party to enforce performance of terms agreed in such circumstances. The aggrieved party thus has a defence, sometimes referred to as the *exceptio doli generalis*, which, it appears, is available, not only in cases of deliberate fraud, but to avoid the unconscionable enforcement of a contract when such enforcement is

33. *Woodstock, Claremont, Mowbray and Rondebosch Councils v Smith and Another* (1909) 26 SC 681 concerns a contract for the sale of land. Also see *Parke v Hamman* 1907 TS 47; *Lamb v Walters* 1927 AD 358; *Sampson v Union and Rhodesia Wholesale Ltd* 1929 AD 468; *Pretorius v Natal South Sea Investment Trust Ltd* 1965 (3) SA 410 W.

34. *Viljoen v Hillier* 1904 TS 312 at 315 - 316. This case involved the availability of the *exceptio doli* in cases of non-fraudulent misrepresentations.

contrary to good faith.³⁵

The question what remedies are available is more complicated if performance of a contract induced by non-fraudulent misrepresentations has already taken place. If the view argued above³⁶ is accepted, that is, that an order of *restitutio in integrum* for the nullification of the entire contract *ab initio* is *not* available in these circumstances, because of lack of *iusta causa* justifying such nullification, then, if restoration is desired, some other legal ground must be found for ordering a restoration of what has been given and received.

In the case of contracts of sale, the solution to this problem is found in the provisions of the aediles' edict. If a seller induced a buyer into a contract of sale by means of non-fraudulent representations (*dicta et promissa*),³⁷ which were not included as terms of the contract, and which representations the seller failed to make good, he was obliged, by the provisions of the aediles' edict to take the thing sold back, and, consequently, to restore the price to the

35. *Viljoen v Hillier* 1904 TS 312; *Woodstock, Claremont, Mowbray and Rondebosch Councils v Smith and Another* (1909) 26 SC 681 at 701. *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 T; *Otto en 'n Ander v Heymans* 1971 (4) SA 148 T; *Rashid v Durban City Council* 1975 (3) SA 920 D; *Paddock Motors (Pty) Ltd v Ingesund* 1976 (3) SA 16 A; *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 436 T; *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 425 A; *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 W. The existence of the *exceptio doli generalis* in South African law may not have yet been decisively settled, but it is thought that the best view is that its existence should be accepted.

36. Section 2.10.6 above.

37. It is submitted that the concept of *dictum et promissum* is wide enough to encompass instances of non-fraudulent misrepresentation. Holmes JA says the following in *Phame v Paizes* 1973 (3) SA 397 A at 418 A:

"3. A *dictum et promissum* is a material statement made by the seller to the buyer during the negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation. 4. Whether a statement by the seller goes beyond mere praise or commendation will depend on the circumstances of each case. Relevant considerations could include the following: whether the statement was made in answer to a question from the buyer; its materiality to the known purpose for which the buyer was interested in purchasing; whether the statement was one of fact or of personal opinion; and whether it would be obvious even to the gullible that the seller was merely singing the praises of his wares, as sellers have ever been wont to do.

Also see Holmes JA at p 416 D - H.

buyer.³⁸ The end result of these provisions was a restoration of what had been given and received, that is, a re-exchange of *res vendita* and *pretium*. To this extent, the parties were restored to their former positions, and the effect appears to be very similar to that achieved by an order of *restitutio in integrum*. But, although perhaps similar in effect, an *actio redhibitoria* is not, in fact, an instance of an order of *restitutio in integrum*.³⁹ The effect of the aediles' edict was not to nullify the contract of sale *ab initio*. Rather, the provisions of the edict created, directly, by operation of law, a legal right in favour of the buyer, which he could enforce by bringing an action (the *actio redhibitoria*), against the seller, requiring the seller to take back the thing sold.⁴⁰ This action is thus an instance of the enforcement of a legal right created by law, and does not entail the nullification of the previous legal transaction, that is, the contract of sale.

In Roman and Roman-Dutch law, the provisions of the aediles' edict applied only to contracts of sale. They did not originally create a general right, in cases of *all* contracts, to restoration of performance rendered in circumstances involving a non-fraudulent misrepresentation. However, it will be submitted below, in this section, that it is an extension of the principles underlying the aediles' edict which would best explain the

38. D.21.1.1.1. For a more detailed discussion of the nature of the *actio redhibitoria* and the *actio quanti minoris*, and why these actions do not involve an order of *restitutio in integrum*, see section 2.14.3 and 2.14.4 below.

39. D.21.1.23.7. reads as follows:

"Julianus says that the judgement in an action for the return of property should restore both parties, that is to say the vendor, as well as the purchaser, as if (*quodammodo*) a *restitutio in integrum* were taking place."

This is not the same thing as saying that an *actio redhibitoria* is an actual instance of *restitutio in integrum*. The distinction is echoed by Voet, *Commentarius*, 21.1.4, relying on the passage from the Digest quoted above. Thus:

"The action aims at both purchaser and seller receiving a kind of *restitutio in integrum* (*quodammodo in integrum restituitur*)."

40. The point is made clear by Holmes JA in *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 A at 416 H:

"The seller's obligation and the buyer's right arise by *operation of law*, and not by reference to the intention of the parties."

existence of a general right to restoration, in circumstances where non-fraudulent misrepresentations induce contracts other than sale. Before considering the merits of this suggestion, it is necessary to review the other remedies that may be available in circumstances of non-fraudulent misrepresentation.

It has been said above that non-fraudulent misrepresentation does not give rise to *iusta causa* for an order of *restitutio in integrum*. It must now be pointed out that there *are*, in fact, some cases in which a non-fraudulent misrepresentation *does* give rise, *indirectly*, to *iusta causa* for an order of *restitutio in integrum*. Thus, although non-fraudulent misrepresentations are not recognised as giving rise directly to *iusta causa*, a non-fraudulent misrepresentation may result in error,⁴¹ or absence, and error and absence have already been identified as circumstances in which *iusta causa* may for an order of *restitutio in integrum* exist. For example, error induced by a non-fraudulent misrepresentation is likely to be considered *iusus error*, which is another way of saying that such error gives rise to *iusta causa* for *restitutio in integrum*.⁴² However, such cases are clearly distinguishable from those in which restoration is ordered on grounds of non-fraudulent misrepresentation, *without nullification of the contract itself*. These cases do not, therefore, constitute a basis on which to generalise, and suggest that non-fraudulent misrepresentations ought always to give rise *ipso facto* to *iusta causa* for an order of *restitutio in integrum*.

Finally, in this review of available remedies, the question of a claim for an award of damages in circumstances of non-fraudulent misrepresentation must be considered. Negligent misrepresentations in the contractual context may, like fraudulent misrepresentations, give rise to a delictual liability for damages.⁴³ Innocent (simple) misrepresentations do not

41. *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 A; *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 A; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 A. It is submitted, with respect, that Kerr, *Contract*, p 174 does not make the existence of an intermediate step in the reasoning as clear as is desirable. He may thus easily be misunderstood as indicating that non-fraudulent misrepresentation gives rise directly to *iusta causa* for an order of *restitutio in integrum*.

42. Section 2.9.4 above.

43. The availability of damages to compensate for injury or loss caused by negligent

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create delictual liability for damages.

Like fraudulent misrepresentations, neither negligent, nor simple (innocent), misrepresentations give rise to a claim for damages *for breach of contract*. A representation is not equivalent to a term of the contract, so the making of a misrepresentation is not equivalent to a breach of a term of a contract.

This leads to an important point. The mutual restoration of what has been delivered (given and received), in situations of non-fraudulent misrepresentations, is often referred to as "rescission" or "cancellation".⁴⁴ It is submitted that these terms are potentially misleading. "Cancellation" is a term best reserved to describe the remedy whereby, in circumstances of breach of contract, the aggrieved party puts an end to the defaulting party's right to discharge his outstanding contractual liability by specifically performing the agreed terms.⁴⁵ The cancellation does not discharge, or invalidate these liabilities, which may be enforced after the cancellation, by the aggrieved party claiming an award of damages in lieu of specific performance. This is not the same situation at all as the one in which, *after* the performance of a contract, a restoration of what has been given and received is ordered on grounds of non-fraudulent misrepresentation. In this latter type of case, the relief available does not involve the cancellation of the representor's right to discharge outstanding obligations by means of specific performance thereof, nor a claim by the representee for an award of damages instead of that performance. Indeed, it may well be that, by the time restoration is asked for, on grounds of misrepresentation, there are no longer any contractual obligations outstanding. Accordingly, the restoration ought to be understood as

misrepresentations in a contractual context is a question on which the Appellate Division has still to make a pronouncement, but the indications are that an award of damages will be made in such circumstances: *Kern Trust (Edms) Bpk v Hurter* 1981 (3) SA 607 C; *Pilkington Brothers (SA) (Pty) Ltd v Lillicrap, Wassenaar and Partners* 1983 (2) SA 157 W; *Autorama (Pvt) Ltd v Farm Equipment Auctions (Pvt) Ltd* 1984 (3) SA 480 Z; Kerr, *Contract*, p 167 ff; Joubert, *Contract*, p98 ff; Christie, *Contract*, p 297 ff.

44. See the examples given in section 2.10.6 above.

45. Section 2.10.3 above.

resulting from the enforcement of a common law right⁴⁶ to return what was received, and to recover performance rendered, rather than as the cancellation of future specific performance.

By contrast, if the terms of a contract are not yet performed, the appropriate way to avoid performance, in circumstances of non-fraudulent misrepresentation, is simply to reject performance tendered, and rely of the *exceptio doli generalis*, if sued on the contract. But to avoid performance, or to ask for restoration, and to then contemplate an action for damages in lieu of performance, as allowed in the case of cancellation for breach of contract, would, in circumstances of misrepresentation, be to approbate and reprobate the contract at the same time.

2.10.9. The Legal Basis on which Restoration in Circumstances of Non-fraudulent Misrepresentation is Ordered in South African Law.

The South African courts have indicated that considerations of justice and equity require that, even though there may be no *iusta causa* for nullifying a contract *ab initio*, it may nevertheless be required that the parties to a contract make a mutual restoration of what they have given and received in terms thereof. This general statement does not necessarily appear to be limited to instances of contracts of sale.⁴⁷ However, it must be pointed out that most of the cases cited in support of the general proposition do actually involve contracts of sale.⁴⁸ An example of the application of the rule in circumstances of other contracts is *Wiley v African Realty Trust Ltd.*⁴⁹ In this case, the representee was induced, by

46. Originating in the provisions of the aediles' edict.

47. In cases of sale, restoration for non-fraudulent misrepresentation is explained as an instance of the operation of the provisions of the aediles' edict.

48. For example, *Parke v Hamman* 1907 TS 47; *Woodstock Claremont, Mowbray and Rondebosch Councils v Smith and Another* (1909) 26 SC 681; *Steyn v Davis and Barlow* 1927 TS 651; *Glass v Hyde* 1932 WLD 19; *Fitt v Louw* 1970 (3) SA 73 T; *Reyneke v Botha* 1977 (3) SA 20 T.

the non-fraudulent misrepresentations of the representor, to apply for certain debentures, which were allotted to him, and in terms of which allotment he had paid certain installments to the company. Bristowe J said the following at p 110:

"It is not necessary to prove fraud. Any material misrepresentation of fact is sufficient. What is necessary to prove is that the representations were made for the purpose of inducing the contract, that they were false, and that they were material. If these three points can be established the plaintiff is entitled to have the contract rescinded; see *Viljoen v Hillier* ([1904] TS 312)."⁵⁰

The representee was held entitled to recover the money he had paid.

Since the restoration that is required of what has been given and received in circumstances of non-fraudulent misrepresentation does not appear to be limited to contracts of sale, nor explainable as an instance of *restitutio in integrum*, or of cancellation (rescission) *for breach of contract*, there appears to be a need to articulate the exact legal basis on which the restoration in these circumstances relies. It is submitted that it is the provisions of the aediles' edict, which, *by extension*, provide an appropriate legal basis for the mutual restoration of what has been given and received in circumstances of non-fraudulent (that is, simple, or negligent) misrepresentation inducing a contract.⁵¹ If this is accepted, terminology should be adopted which identifies when the legal basis of restoration ordered is aedilitian, or an extension of aedilitian principles. The phrase "restoration in terms of

49. 1908 TH 104.

50. *Viljoen v Hillier* is a case involving a contract of suretyship, not sale, but the contract had not been performed, and the issue concerned the availability of the *exceptio doli* in circumstances of non-fraudulent misrepresentations, not restoration of performance already rendered. Also see *Sampson v Union and Rhodesia Wholesale Ltd (In Liquidation)* 1929 AD 468.

51. Cf Joubert, *Contract*. Professor Joubert considers that "rescission" of a contract on grounds of non-fraudulent misrepresentation is an importation of English law: see p 97 - 98 of the work cited. He says the following:

"Without any consideration of the issues involved the courts have, however, simply adopted the approach of the English law and developed the doctrine that fault on the part of the misrepresentor does not have to be alleged or proved."

the provisions of the aedilitian edict" is appropriate to describe restoration of what was delivered in circumstances non-fraudulent misrepresentations in contracts of sale. In contracts other than sale, the remedy may be referred to as "mutual restoration on grounds of non-fraudulent misrepresentations". It is suggested that the phrase "an order of *restitutio in integrum*" should be reserved to describe the remedy which involves the nullification of a contract *ab initio* on grounds of recognised *iusta causa*.

It may be asked, if the result is so similar, that is, if restoration takes place between the parties in each of these cases, why it is necessary to distinguish the conceptual basis on which the order of restoration is made. The answer is, firstly, because the essential elements of proof differ, depending on which remedy is sought. Accordingly, if it is accepted that the appropriate legal basis for mutual restoration on grounds of non-fraudulent misrepresentation in contracts other than sale is an extension of the provisions of the aediles' edict, then the essential elements that must be shown to exist before the order will be granted can be derived from that area of the law, and not from the principles governing orders of *restitutio in integrum*, or cancellation for breach of contract, or English law generally.⁵²

Secondly, because, although the restoration of what was delivered and received characterises both an *actio redhibitoria*, and an order of *restitutio in integrum*, the incidental claims which may be added to one or other remedy are not identical. In particular, while wasted expenses are recoverable in an action based on the provisions of the aediles' edict,⁵³ it is submitted that they are not recoverable in the event of an order of *restitutio in integrum*.⁵⁴

Thirdly, if the restoration of performance on grounds of a non-fraudulent misrepresentation

52. For a statement of the principles which govern the availability of relief when a seller of goods fails to make good his *dicta et promissa*, see *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 A at 417 H - 418.

53. *Seggie v Philip Bros* 1915 CPD 292 at 304.

54. Section 2.12 below.

is seen as an extension of the principles of the aediles' edict, and thus distinguished from cancellation (rescission) for breach of contract, it can be seen why a claim for an award of compensatory damages in lieu of specific performance is available after cancellation for breach of contract, but not when restoration is sought on grounds of non-fraudulent misrepresentation. By contrast, if both situations are simply referred to as "rescission", without distinguishing the legal basis on which restoration is available, it is difficult to explain this difference, other than on a casuistic approach, which, of course, is not the characteristic approach of South African law.

Fourthly, if mutual restoration on grounds of non-fraudulent misrepresentation is properly considered to be an extension of the aedile's edict, it is submitted that such restoration ought to be ordered only in relation to performance rendered in relation to *contracts*, but not in relation to the legal consequences of events which have occurred as a result of something other than performance of the terms of a contractual agreement. An example is the failure of the person to whom a non-fraudulent misrepresentation was made to do something which he later regrets failing to do, and as a result of which he suffers loss, or fails to make a gain. Whereas, in appropriate circumstances, an order of *restitutio in integrum* might be available to restore lost rights to the aggrieved person, the restoration of the performance made is clearly inapplicable in such a case.

2.11. THE ELEMENT OF LOSS OR PREJUDICE.

2.11.1. Loss or Prejudice Described.

So far, only one of the essential elements that must be proved to exist, in order to succeed in a claim for an order of *restitutio in integrum*, has been discussed, that of *iusta causa*. The second essential element which must be proved to exist is *loss*, or *prejudice*, arising out of the transaction entered into, or arising as a result of the legal consequences of the event which has occurred.¹ If it is thought that a single term is required to refer to this element, perhaps *damnum* (loss) is the most appropriate, although use of a Latin term is not really necessary.²

1. D.4.2.9.3; D.4.3.1; D.4.4.7; D.4.6.1. Thomas, *Textbook*, says the following:

"*Restitutio* was based on injury to the applicant's proprietary interests resulting from a transaction or event; any injury sufficed, whether an actual loss of property or a commitment incurred so that the nature of the relief might vary."

Buckland, *Text-book*, p 720:

"To base a claim to *restitutio* there must be shewn an *interesse*."

2. Buckland, *Text-book*, p 720 refers to this element as *interesse*, and describes *interesse* as:

"...injury to a man's property rights resulting from a transaction, or an event, such as lapse of time, which has had legal consequences."

The use of this particular term is avoided here because it may mean different things in South African law. For example, the terms "positive *interesse*" and "negative *interesse*" are variously used to distinguish the interest of an owner of stolen property from a custodian of that property (Thomas, *Textbook*, p 356), or to distinguish compensatory damages from restitutory damages (*Probert v Baker* 1983 (3) SA 229 D&C at 234.) Neither of these usages has anything to do with the use of the term to indicate the existence of *damnum*.

Exactly what is necessary to constitute the element of loss or prejudice can be determined by analysing the particular instances which have been recognised as giving rise to this element. By observing the recognised instances, a general principle can be extracted.

The old authorities are a fruitful source of instances in which there exists loss or prejudice sufficient to justify an order of *restitutio in integrum*. Examples of circumstances in which loss or prejudice have been considered to arise include the following: (1) the rash making of admissions, or a rash failure to make admissions, and the consequent incurring of a penalty;³ (2) a disadvantageous change of status;⁴ (3) novations, delegations or the release of a debtor;⁵ (4) the acceptance of a supposed benefit which, in the result, is burdensome;⁶ (5) an agreement to submit a dispute to arbitration;⁷ (6) authorising or accepting an act of agency or mandate,⁸ and (7) failure to register a real right.⁹

Some further specific instances in which loss or prejudice has been considered to arise out of youthful immaturity are usefully outlined in more detail.

(7) The sale by a young person, or by an assisted minor, of his property, if serious damage results from the sale, either because an inadequate price is agreed, or if, because of personal considerations, the young person would not have sold the property at all.¹⁰

3. D.42.2.6.6.; D.4.4.9.2.

4. D.1.7.32. and 33.

5. D.4.4.27, 40 and 50.

6. D.4.4.33.

7. D.4.4.34.1.

8. D.4.4.23 and 24.

9. Voet, *Commentarius*, 4.4.14. Also see Huber, *Heedendaegse Rechtsgeleertheit*, 4.40.3 and 4.41.1.

10. Voet, *Commentarius*, 4.4.15. Onerous terms in a contract, such as a *lex commissoria* do not, in themselves, give rise to *iusta causa* for an order of *restitutio in integrum*. There is no reason why an assisted minor or young major should not be held to a term of the contract which imposes a penalty for late performance or non-performance, unless the person seeking relief can show that, because of his youthful lack of judgement, he agreed to terms

(8) The sale by another person of the property of a minor, or young person, even if in terms of a judicial order, if the young person, or the minor's guardian, fails to raise a timely objection to the sale, because of his lack of experience, or bad judgement.¹¹

(9) Despite possible differences in Roman-Dutch law, there seems to be no valid reason why, in South African law, an order of *restitutio in integrum* should not be available in the case of property pledged by a young person, or assisted minor, and sold by the creditor in terms of an agreement for *parate executie*.¹²

(10) The making of donations, whatever the reason, if the donation is excessive. An excessive donation is one which is beyond the resources or standing of the young person, or a donation which is disproportionate to the service or benefit in consideration of which it is given.¹³

that a mature person, with better judgement, would have been unlikely to agree to. Also see Voet, *Commentarius*, 4.4.30. Cf *Wood v Davies* 1934 CPD 250 at 260, in which case a forfeiture clause was held to be potentially prejudicial to a minor, and was taken into account in ordering *restitutio in integrum*.

11. Voet, *Commentarius*, 4.4.16.

12. Voet, *Commentarius*, 4.4.16; but see *Osry v Hirsch, Loubser and Co Ltd* 1922 CPD 531 at 547. In the case of prejudice arising, relief may be sought "on any ground." Silberberg and Schoeman, *Property*, p 474.

13. Voet, *Commentarius*, 4.4.18 - 4.4.19. Voet distinguishes Roman-Dutch law from Roman law on the question of gifts made in contemplation of marriage, and dowry. However, since in South African law, community of property is not an inevitable consequence of marriage, it may be that the older Roman law rule, which allowed *restitutio in integrum* of such gifts if excessive, is more appropriate to modern circumstances. As to the argument adduced by Voet that, while the marriage subsists, reciprocal restitution is not possible, he perhaps overlooks the point that *donatio* is a contract which does not involve any reciprocal duty of performance from the donee, but consists of a unilateral exercise of generosity by the donor. The acceptance of the gift by the donee is not a reciprocal duty of performance, but merely signifies the intention to receive which is necessary for the transfer of ownership of the thing given to the donee by the donor. If a donation made in contemplation of marriage is nullified, as a consequence of an order of *restitutio in integrum*, the marriage itself ought not to be taken as reciprocal performance of a duty arising from the contract of donation, and *restitutio in integrum* of the donation should therefore be allowed regardless of the subsistence of the marriage, remembering always that it is lack of good judgement, rather than guile or fraud, that is the mainspring of the relief in these circumstances.

(11) Compromise of a lawsuit involving the loss of rights or proprietary loss, or acceptance by the young person or assisted minor of an unfair division of property.¹⁴

(12) The acceptance of a supposed benefit which is, in the result, burdensome; or the rejection of a benefit, which rejection is subsequently regretted by the young person or minor.¹⁵

(13) Thoughtless and over-enthusiastic bidding at an auction sale, resulting in the offer of too high a price by a young person, or assisted minor.¹⁶

It would appear from the foregoing examples that loss or prejudice is considered to exist when a person has suffered some injury, damage, or disadvantage to his proprietary rights.

The term proprietary rights is used in the sense described by H R Hahlo and Ellison Kahn:¹⁷

"Proprietary rights are those which can be evaluated in terms of money. They may be either *in rem* (such as ownership of a motor-car) or *in personam* (such as a claim for payment of money or a right to get delivery of something bought. They may relate to material, corporeal things, or to immaterial, incorporeal things (for instance, shares in companies or "intellectual property" like copyright and patents)."

14. Voet, *Commentarius*, 4.4.20. Voet points out that, in the second of the above instances, *iusta causa* is more difficult to establish in a case against parents of the minor, because of the close inter-family relationships that exist.

15. The instance is derived from Voet, *Commentarius*, 4.4.24 - 4.4.27. These sections deal with the passing over of an inheritance. Despite the simpler rules of succession in South African law, situations may still arise in which the rule stated may be applicable. For example, although not dealt with on this basis, the facts in *Watson v Burchell* (1891) 9 SC 2 at 5 are suggestive of the sort of circumstances in which a person might, on account of lack of judgement due to youth, pass over or reject a benefit to which they were entitled.

16. Voet, *Commentarius*, 4.4.28. Voet distinguishes the case in which the minor regrets not having bid enough to secure an item that is up for auction, and indicates that an order of *restitutio in integrum* should not be granted in such circumstances, unless the case concerns property in which the young person has a personal sentimental interest, such as a family heirloom.

17. Hahlo and Kahn, *The South African Legal System*, p 88.

However, the remedy does not seem to be available in respect of non-proprietary interests, for example, to reverse a change of status.¹⁸

In conclusion, if the requirement of the essential element of loss (*damnum* or *interesse*) is coupled with the description of that loss as consisting of any injury to a person's proprietary interests, it can be said, as a general rule that, unless injury to a person's proprietary interests can be shown to exist, an order of *restitutio in integrum* is not available as a remedy. Voet explains it thus:¹⁹

"For the reason that no damage has been caused to the sufferer from fear by the fear inspired there is no need of restitution when a person has been compelled by the immediate inspiring of a later fear to restore what he himself had shortly before illegally acquired by an excitation of alarm, as was said above on the strength of the law cited below. [D.4.2.12.1.] It is the same when one who was protected by a peremptory exception has compelled his creditor to release him; or when a creditor has inspired fear in a debtor to make him pay what was really due. Since the nature of the action because of fear demands a loss which can be repaired, and in such cases the sufferer from fear has parted with nothing, this edict is not bound to apply."

2.11.2. The Loss or Prejudice Must not be Trivial.

One of the limitations on what constitutes appropriate loss or prejudice is that no account will be taken of loss or prejudice that is trivial.²⁰ To express this as a positive requirement,

18. D.4.4.9.4; Buckland, *Text-book*, p 720; Thomas, *Textbook*, p 113. Boberg, *Persons*, p 509. An order of *restitutio in integrum* is not appropriate, for example, if what is desired is the dissolution of a valid marriage.

19. Voet, *Commentarius*, 4.2.17.

20. Huber, *Heedendaegse Rechtsgeleertheit*, 4.37 11:

"Restitution applies in all cases, provided that they are cases of importance; for in trivial matters it is not worth the trouble to nullify what is duly founded on the requisites of law. Trivial cases in this matter are deemed to be those where the issue is not worth 10 guilders; though sometimes the Judge could dismiss cases of greater importance, if restitution were sought against some affair of very great consequence and weight."

Also see Voet, *Commentarius*, 4.1.11:

it can be said that the loss or prejudice must be substantial, or non-trivial. Whether loss or prejudice is to be considered sufficiently serious or not depends not only on the mathematical quantification of the damage itself but also on the surrounding circumstances of the case. The amount of loss or prejudice must be measured in relation to the size and scope of the transaction, or event, to which it relates. A small loss may thus be taken as more serious in the context of a contract of limited scope, whereas a loss of the same size, in relation to a large financial matter, may be considered trivial. The question is to be weighed according to the discretion of the presiding judge, but the person seeking relief must bear in mind that an order of *restitutio in integrum* will not be granted if, on balance, the interest to be protected by *restitutio in integrum* is insignificant.²¹

2.11.3. Either Immediate or Consequential Loss Sufficient.

It is not necessary, for the purposes of establishing the essential element of loss in an action for an order of *restitutio in integrum*, to draw any distinction between immediate loss (*damnum emergens*) and consequential loss (*lucrum cessans*). Either type of loss is sufficient to satisfy the requirement of the existence of loss. Further, since the recovery of damages (as opposed to a mutual restoration of benefits received), is not part of an order of *restitutio in integrum*, it is submitted that an exact quantification of the loss suffered or contemplated is not necessary. All that is required is that the person seeking an order of *restitutio in integrum* prove that the loss of something formerly had (immediate loss) or the failure to obtain a profit or proprietary advantage (consequential loss) is a non-trivial loss.

"In the first place indeed it ought never to be bestowed if only slight damage has occurred."

21. Huber, *Heedendaegse Rechtsgeleertheit*, 4.37.11; Voet, *Commentarius*, 4.1.11; *Wood v Davies* 1934 CPD 250 at 258; *Estate S Nathan v Estate W Grix* 1911 NPD 262 at 267. In this last mentioned case, a dispute over eighteen shillings was considered to be trivial in relation to the extension of a bond for one thousand five hundred pounds at reduced rates of interest. *Du Toit v Lotriet* 1918 OPD 99 at 116. Also see section 2.11.2 below.

That either immediate or consequential loss is sufficient to satisfy the existence of the element of loss is made clear in the Digest.²²

"And where a person loses something, or fails to obtain a profit, restitution should be granted, even though none of his property was lost."

And in a later passage:²³

"All the acts of minors under twenty five years of age are not invalid, but only those of such as, after investigation, are ascertained to have been overreached; as where they were imposed on by others, or were deceived by their own credulity, or lost something which they formerly had, or failed to obtain some profit which they could have acquired, or subjected themselves to some liability which they ought not to have assumed."

2.11.4. Potential Loss or Prejudice Sufficient.

The object of an order of *restitutio in integrum* is to nullify valid legal relations and to order the mutual restoration of benefits received by both parties. The remedy does not involve monetary compensation for injury caused to a persons proprietary interests, by means of an award of damages. It is therefore submitted that it is not necessary that *actual* loss to the person seeking an order of *restitutio in integrum* need have occurred, but that *potential* loss to that person will also suffice in establishing the essential element of loss. The loss that potentially results from a transaction, or from the legal consequences of an event, as opposed to loss that has actually occurred, constitutes sufficient prejudice to justify the nullification of the legal relations in question. For example, in the case of *Wood v Davies*,²⁴

22. D.4.6.27.

23. D.4.4.44. Also see Buckland, *Text-book*, p 720:

"Any property loss sufficed, either *damnum emergens* or *lucrum cessans*, and it might be either a realised loss, e.g. a transfer of property, or a liability incurred, an obligation undertaken or the like, a distinction reflected in the mode of relief."

24. 1934 CPD 250.

the existence of onerous terms (a *lex commissoria*) in a contract were considered to be potentially prejudicial, and taken into account in deciding to order *restitutio in integrum*, even though the particular terms had not been brought into operation. Sutton J said the following:²⁵

"There was also potential prejudice to the minor in clause 8 of the contract for in the event of the insolvency of the seller he would have lost the property as well as his payments under the contract. There was also potential prejudice to the minor in clause 10 of the contract for it provided that should the purchaser fail to pay one instalment on due date then the seller should have the right to cancel the sale and retain the amounts paid as rent."

It follows that an order of *restitutio in integrum* is possible even before any actual loss is suffered, provided that it can be proved that sufficient potential prejudice exists.

2.11.5. The Causal Link Between Loss and *Iusta Causa*.

In addition to the existence of loss or prejudice, it must be shown that there is a causal link between that loss or prejudice, and the *iusta causa* which the person seeking relief relies on, in seeking to have the transaction, or on the legal consequences of an event, set aside. Unless the loss or prejudice is causally linked to the *iusta causa*, the court will not intervene and set the transaction aside.²⁶ This requirement ensures proper attention to cause and effect. Even if it can be said that *iusta causa* exists, and that loss has been suffered, it is necessary in addition to ensure that the loss suffered is due to the *iusta causa* relied on. If the loss is due to some other factor which is unrelated to the *iusta causa*, then a vital link between the elements of *iusta causa* and loss is missing, and an order of *restitutio in integrum* will be refused.

25. At page 260.

26. D.4.6.44. The example given is loss that is suffered by an absent person in a situation where the loss would not have been avoided even if he were present. In such a case, the loss is not due to the person's justifiable absence, but rather to some other factor or cause, which even his presence would not have counteracted.

Although the establishment of a causal link is essential, indirect causation of loss will suffice as well as a direct causation of loss. For example, if, because of youthful lack of judgement, a right of action is given up, so that the legal right involved cannot be enforced at a later date, and this in turn, causes loss or disadvantage, then a sufficient causal link between the loss and the *iusta causa* exists to justify an order of *restitutio in integrum*.²⁷

27. Voet, *Commentarius*, 4.1.21.

2.12. THE REQUIREMENT OF RECIPROCAL RESTORATION.

2.12.1. Mutual Restoration Intrinsicly Part of an Order of Restitutio in Integrum.

The willingness and ability of a person who seeks an order of *restitutio in integrum*, to himself restore whatever he received in terms of the transaction which is to be nullified *ab initio*, has been identified as one of the essential pre-requisites of the availability of the remedy.¹ This is a logical requirement. Since an order of *restitutio in integrum* makes the original transaction void *ab initio*, and entitles the plaintiff to recover what he himself gave, there no longer exists any legally recognised *causa* which would justify the retention by the plaintiff of what had been received from the defendant. Plaintiff would be unjustly enriched if he recovered what he had given as well as keeping what he received.²

De Groot emphasises the reciprocal nature of an order of *restitutio in integrum* in the following passage:³

"From these three causes arise the remedies for relief, whereby a person is perfectly restored to the position he was in before contracting the obligation, conditionally upon his similarly restoring the other party, which includes reciprocal giving back of fruits and profits enjoyed as well as compensation for damage."

1. Section 2.1.5 and 2.1.6 above.

2. *Feinstein v Niggli and Another* 1981 (2) SA 684 A at 700 G.

3. De Groot, *Inleydinge*, 3.48.5.

Huber says the following about the mutual restoration that occurs as a consequence of an order of *restitutio in integrum*:⁴

"We say that the case is again restored to its prior condition, that is to say, on both sides, just as though nothing had been done, so far that it is practicable; and while the action for restitution is pending everything remains stationary, and no new step can be undertaken."

Voet describes an order of *restitutio in integrum* thus:⁵

"The effect of restitution is that all things are put back into their original condition, and that indeed in a single judicial proceeding."

Although a willingness, and ability, on the part of the plaintiff to himself restore what he received is essential for an order of *restitutio in integrum*, it must be remembered that reciprocal restoration is also required in other situations.⁶ For example, a buyer of goods, who brings an action to enforce his legal rights created by the aedilician edict (an *actio redhibitoria*) is required to restore the thing delivered to him, as well as the seller being required to restore the purchase price. This is an important observation, for two reasons. Firstly, it is a reminder that not every case in which reciprocal restoration is required is an instance of an order of *restitutio in integrum*. Secondly, because the requirement of reciprocal restoration is not confined only to cases of *restitutio in integrum*, it is submitted that cases which illustrate the nature and extent of this requirement need not be confined to cases of *restitutio in integrum*. Thus, cases in which aspects of the requirement of reciprocal restoration have been considered in the context of, say, an *actio redhibitoria*, are useful in relation to the concept of reciprocal restoration generally. This realization is particularly useful in finding cases to illustrate exceptional instances in which a tender of restoration by a plaintiff is dispensed with.⁷

4. Huber, *Heedendaegse Rechtsgeleerdheit*, 4.37.8.

5. Voet, *Commentarius*, 4.1.21.

6. Section 2.10 above.

7. Section 2.12.4 and 2.12.6 below.

In addition to the old authorities quoted above, the requirement of a reciprocal restoration, and the reasons for the requirement, have been re-stated in more recent cases. For example, Trollip JA said the following in *Feinstein v Niggli and Another*:⁸

"It [the rule requiring reciprocal restoration] is founded on equitable considerations. Hence, generally a court will not set aside a contract and grant consequential relief for fraudulent misrepresentation unless the representee is able and willing to restore completely everything that he has received under the contract. The reason is that otherwise, although the representor has been fraudulent, the representee would nevertheless be unjustly enriched by recovering what he had parted with *and* keeping or not restoring what he had in turn received...."

The requirement that the person seeking an order of *restitutio in integrum* must be able, and willing, to restore whatever he has received, is not affected by the specific circumstances which give rise to *iusta causa*. Even in cases involving *dolus*, or *metus*, which perhaps contain an element of reprehensible conduct on the part of the person responsible, *both* parties are nevertheless entitled to restoration.⁹ There is no penal element in *restitutio in integrum*, as there was, for example, in the Roman law *actio quod metus causa*.¹⁰

8. 1981 (2) SA 684 at 700 G. Also see *Slomowitz and Others v Mineworkers Union* 1947 (1) SA 499 WLD at 508; *Caxton Printing Works (Pty) Ltd v Transvaal Advertising Contractors Ltd* 1936 TPD 209 at 212 - 213. In *Bushney v Joliffe* 1953 (4) SA 273 W at 276 H Murray J said the following:

"...the normal position would be that the seller...can only get *restitutio in integrum* if he is also prepared to restore - he cannot recover possession of his fixed property without simultaneously offering to return to the purchaser such portions of the purchase price as has been paid...."

Claassens v Pretorius 1950 (1) SA 37 O at 43; *Vardy v Van der Westhuizen and Another* 1952 (2) SA 345 T at 347 C;

9. Voet, *Commentarius*, 4.1.22.

"But on the other side he too against whom restitution is granted must have his original rights made whole again so far as that can be done, and regard must be paid to his being indemnified, even though restitution is made on the ground of fear or fraud."

In *Davis' Trustee v Gardner & Co* 5 EDC 71 at 74, Barry J says that the reason for this is that:

"...just as the plaintiff restored to his rights is not to be damnified, so neither ought he to be enriched to the detriment of another."

10. See section 2.1.4 above.

2.12.2. A Tender of Restoration not Merely a Technicality.

The willingness and ability of the person seeking an order of *restitutio in integrum* to restore what he has received is more than just a technical matter of pleading, or a mechanical requirement of how the remedy is effected.¹¹ It is a consequence of the fact that, in cases where the court orders *restitutio in integrum*, the legal relationship that existed is set aside, and the *nexus* between the parties destroyed. There is therefore no longer any legal *causa* for retaining property or a benefit that has been transferred and received. The court is logically obliged to order the restoration of everything that was originally received as a consequence of, and in contemplation of, the previously valid transaction or legal consequences of the event now set aside.¹²

This situation can be distinguished from that in which a contractual relationship is cancelled (rescinded), on grounds of breach of contract. In such cases, the contract is not nullified *ab initio*, and even if the plaintiff wants no further performance of outstanding obligations, it is possible that he will be content to retain what he has received, and to claim compensatory damages in lieu of proper performance. In these circumstances, a tender of restoration of what has already been received in terms of the defendant's performance need not be made, but the value of such performance received is taken into account when calculating the

11. *Bonne Fortune Beleggings v Kalahari Salt Works* 1974 (1) SA 414 NC at 427, per Hefer AJ:

"...ek kan, met eerbied, nie insien hoe die versuim om 'n aanbod tot terugbetaaling te maak, as 'n *plus petitio* beskryf kan word nie: 'n eiser wat versuim om dit te doen, eis nie *meer* as waartoe hy geregtig is nie; in die afwesigheid van 'n aanbod, is sy eis ongegrond."

Samuel v Pagadia & Others 1963 (3) SA 45 CPD at 50 H.

12. To allow the person seeking an order of *restitutio in integrum* to retain anything that he has received under a contract means that he would be unjustly enriched (that is, enriched *sine causa*) by recovering what he had parted with while keeping what he had received: *Davis' Trustee v Gardner & Co* 5 EDC 71 at 74 - 75; *Feinstein v Niggli and Another* 1981 (2) SA 684 A at 700.

damages to be awarded.¹³

It follows from what has been said that a court will not be able to grant an order of *restitutio in integrum* if the person seeking the remedy is unwilling to restore what he has received, or if, by his own act carried out after becoming aware of the *iusta causa* for *restitutio in integrum*, he has made it impossible to make restoration. The willingness, and ability, of the person seeking an order of *restitutio in integrum*, to effect a restoration of goods or benefits that he has received, must, therefore, be seen as one of the essential elements that must exist before the remedy is available. It is only in exceptional circumstances that this requirement is dispensed with. These cases are considered in sections 2.12.4 and 2.12.6 below.

2.12.3. A Tender of Restoration and Actual Restoration Distinguished.

A distinction must be drawn between actual restoration and a willingness or ability to effect a restoration. In order to satisfy what is described above as one of the requirements that must exist before an order of *restitutio in integrum* is available, it is sufficient that the person seeking the remedy indicate his willingness, and ability, to make restoration, by tendering such restoration in his pleadings. In particular, the person seeking relief ought to indicate his willingness, and ability, to restore physically any property received, or to restore the value of any benefit, or the retained value, of a thing consumed or disposed of before he became aware of the *iusta causa* on the basis of which relief is sought.¹⁴

13. *Radiotronics (Pty) Ltd v Scott, Lindberg & Co Ltd* 1951 (1) SA 312 CPD at 320 G. Fagan J said the following:

"There is of course, a difference between the legal results flowing from the type of rescission which declared that there has never been a binding contract between the parties and therefore attempts to restore the position they would have been in if they had never purported to contract, and the type in which, after a material breach by one of the parties accepted by the other as putting an end to the contract, the Court must take as its basis for the award of damages the position in which the innocent party would have been if the contract had been duly performed by the other."

14. A person seeking an order of *restitutio in integrum* is not entitled to refrain from tendering such restoration by adding a claim for damages to his claim for an order of

If no such property, benefit, or value is retained, the pleadings should contain an averment to this effect.¹⁵ However, it is not necessary that *actual* restoration be effected before an action for an order of *restitutio in integrum* is initiated, nor need a tender of restoration be made *prior* to the exchange of pleadings. This is because the law requires that restoration is to take place *simul ac semel*,¹⁶ and it would not be logical to require the person seeking an order of *restitutio in integrum* to offer restoration before the court sets the transaction aside, or before the other party is obliged to make restoration.¹⁷

2.12.4. Restoration Not Required if no Enrichment Sine Causa.

The general requirement is that a person seeking an order of *restitutio in integrum* must tender in his pleadings the restoration of whatever benefits he has received.¹⁸ However, no

restitutio in integrum, and then seeking to set this claim off against his duty to tender restoration. Even if the person seeking an order of *restitutio in integrum* has a claim for unliquidated damages against the defendant, he must nevertheless tender the restoration of whatever he received in terms of the legal relationship which he seeks to have set aside. *Bonne Fortune Beleggings v Kalahari Salt Works* 1974 (1) SA 414 NC at 426 H - 428. Hefer JA remarks as follows at 428 D:

"Kan dit, met inageneeming van hierdie gevolge van sy verpligting om betaling van die koopprys aan te bied, nou ooit gesê word dat hy daardie verpligting kan ontduik deur kenne te gee dat hy 'n ander ongelikwiderde eis teen die verweerder het wat nog bereg moet word, en dat hy die koopprys eenvoudig van daardie eis aftrek in stede van aan te bied om dit te betaal? Klaarblyklik nie."

15. *Claassens v Pretorius* 1950 (1) SA 37 OPD at 46.

16. *Bushney v Joliffe* 1953 (4) SA 273 WLD at 276; *Bonne Fortune Beleggings v Kalahari Salt Works* 1974 (1) SA 414 NC at 426 F.

17. *Van Schalkwyk v Griesel* 1948 (1) SA 460 A at 472, *per* Tindall JA:

"...the sentence quoted [from *Marks Ltd v Laughton* 1920 AD 12 at 21] is therefore not authority for the view that a buyer, who has repudiated and is able and willing to make restitution, has no right of action until he has actually tendered restitution."

Also see *Vardy v Van der Westhuizen and Another* 1952 (2) SA 345 TPD at 347 B - G.

18. Section 2.12.1 and 2 above.

duty to effect a mutual restoration arises if nothing has been given or received. For example, the remedy may be sought in cases which do not involve the redelivery of property, but only the restoration of legal rights, such as the revival of a right to bring a legal action which has been lost by discharge or prescription.¹⁹ Such cases are examples of factual situations in which the element of reciprocal restoration does not arise, simply because nothing has been received which ought to be reciprocally restored.

Another instance of a case in which no requirement of reciprocal restoration arises is where an order of *restitutio in integrum* is sought to nullify a transaction before any performance of the obligations has been carried out by either side.²⁰ The nullification of the transaction *ab initio* avoids the future performance of onerous undertakings. In such cases, the remedy consists only of the nullification *ab initio* of the transaction, without any restoration of property or money being required, since the nullification of the transaction is enough, by itself, to restore the parties to their former positions, which, after all, is the objective of the remedy.

The requirement that restoration must be made by *both* parties to the transaction is also affected if performance has been unilateral. For example, if a transfer of property or benefits has been made only by the person *seeking* an order of *restitutio in integrum*, he is under no duty to tender any restoration, since he has received nothing.

It is important to note that there also exist circumstances in which, although property or benefits *have* been delivered and received, no duty of tendering or making mutual

19. Voet, *Commentarius*, 4.1.22; 4.1.23. See section 2.11.1 above for further examples of situations involving loss or prejudice, but not necessarily the mutual or unilateral delivery of property or money.

20. The object of such nullification would be to avoid the possibility of being sued for performance due in terms of the transaction. However, it would probably be technically advantageous for the aggrieved party to wait until he is sued for performance, and then to counter-claim for an order of *restitutio in integrum*. If he does so, the point made above holds good, in that, in his counter-claim, he is not required to tender restoration, since he will not have yet received anything.

restoration exists. This apparent contradiction is explained by the fact that, in some cases, the person who originally received the property or benefit no longer retains any advantage from it, and, in addition, the loss of the thing, or advantage, is not due to his intentional, or negligent, act. An example of this type of situation is the destruction of property shortly after delivery by *vis major*.²¹ In such cases, the person who received the thing cannot be said to have been enriched at all: even if the original transaction is nullified by an order of court, that person retains nothing of what he originally received in terms of that transaction. There can thus be no obligation, in such circumstances, requiring him to tender, or make, restoration of what was originally received, or its value. This conclusion is consistent with the the ordinary rule requiring mutual restoration, that is, to prevent the unjust enrichment of the person who seeks to have the transaction set aside, and recover what he himself gave.²²

The general rule regarding the requirement that the person seeking an order of *restitutio in integrum* be willing, and able, to make restoration, before the remedy is available, must be stated in wide enough terms to take account of such exceptional cases. The authorities who state the rule rather more narrowly must be understood, it is submitted, to be referring to those ideal cases in which, since it remains possible, complete mutual restoration *must* be tendered and, eventually, effected. But it should not be forgotten that what is really required is that restoration must be tendered, and effected, only as far as it remains practically possible,²³ with the principle in mind that neither party is entitled to retain an undue advantage from the transaction, or the legal consequences of the event, which is to be set aside.

Accordingly, even if a complete restoration of goods or benefits is impossible, this does not

21. See section 2.12.6 below, for further examples of situations in which the loss or destruction of property is not attributable to the fault of the person to whom it was delivered.

22. Voet, *Commentarius*, 4.1.22; *Davis' Trustee v Gardner & Co* 5 EDC 71 at 74 - 75; *Feinstein v Niggi and Another* 1981 (2) SA 684 A at 700. Also see section 2.12.2 above.

23. Huber, *Heedendaegse Rechtsgeleertheyt*, 4.37.8.

not mean that an order of *restitutio in integrum* is *ipso facto* not available. The reasons for the impossibility must first be examined, in order to ascertain whether *restitutio in integrum* can nevertheless be ordered, without offending against the principle that neither party should be enriched *sine causa*. Generally speaking, this is possible in cases where the impossibility to restore results from circumstances which are not the fault of the person seeking relief. Because the law takes account of such cases, an order of *restitutio in integrum* continues to be a useful remedy in a wide variety of complex situations, rather than being restricted to cases in which the facts are simple and easily reversed.²⁴

2.12.5. Impossibility of Restoration Due to Fault no Excuse.

If it has become impossible to tender and effect restoration of goods or benefits received, because of events that have occurred which are the result of the plaintiff's own voluntary act, or negligence (fault), then, since nothing justifies dispensing with the requirement that restoration be tendered, an order of *restitutio in integrum* without a tender of restoration is not possible. An example of a voluntary act which renders restoration impossible is when the thing to be restored has been re-sold, not because of any necessity, but as a result of free choice, and in full knowledge of the *causa* subsequently relied on by the person seeking relief.²⁵ An example of inability to restore due to fault is when the thing to be restored has

24. *Wood v Davies* 1934 CPD 250; *Davidson v Bonafede* 1981 (2) SA 501 C at 511 A. Despite this pragmatic approach, it is possible for cases to arise in which a court may feel that the situation is impossible to unscramble, and for this reason, an order of *restitutio in integrum* may be refused. In *Samuel v Pagadia & Others* 1963 (3) SA 45 D&C at 50 - 51 the applicant sought to have the sale in execution of land and a sugar quota set aside. Apart from the fact that the applicant had not tendered restoration of the price received, which had been applied for his benefit, Henning J said:

" It seems to me that the whole situation has reached a stage where it cannot be unscrambled in a manner which would do justice to all concerned."

25. *McLeod & Co v Dunell, Ebdon & Co* 1868 Buch 182 at 201; *Rau v Venter's Executors* 1918 AD 482 at 487 - 488; *Schwarzer v John Rodericks Motors (Pty) Ltd* 1940 OPD 170 at 183. In *Logan v Beit* (1890) 7 SC 197 at 216 it appears as if, had the shares in question been re-sold before discovery of the error, *restitutio in integrum* would not have been precluded.

been badly damaged or destroyed because of the negligence of the plaintiff. The rule is, therefore, that a person who seeks an order of *restitutio in integrum* is not entitled to do anything, either wilfully, or negligently, which is incompatible with the requirement that he be able to make restoration, and thereafter avail himself of the remedy without a tender of restoration.

The harshness of this rule is mitigated, however, by the concept of "substantial" restoration. This means that, if the person seeking an order of *restitutio in integrum* is in a position to *substantially* restore the thing in question, then *restitutio in integrum* will be allowed even if a complete restoration is impossible. This is so, even if the impossibility of complete restoration is due to the wilful act, or negligence of the person concerned. The deficiency in performance is made up by an adjustment in monetary terms, that is, a compensatory payment for the shortfall between substantial and complete restoration.²⁶ This is a very sensible amelioration of a rule which might otherwise prevent *restitutio in integrum* in cases in which, although restoration cannot be perfectly achieved, it is substantially possible.

2.12.6. Impossibility of Restoration Not Due to Fault Excuses.

There are some situations in which restoration of the thing or benefit received by the person seeking relief is rendered impossible because of circumstances or events which are not attributable to his wilful act or negligence. In such cases, an order of *restitutio in integrum* is available without the need for a tender of restoration, although in its place ought to be an averment that the plaintiff retains no property, benefit, or advantage from the transaction or

26. Voet, *Commentarius*, 21.1.4; Pothier, *Sale*, 222; *Harper v Webster* 1956 (2) SA 495 FC at 502 F per Clayden FJ:

"The general rule that the person seeking restitution must himself make restitution always governs, but relief should not be denied when substantially that restitution can be made and, insofar as it falls short of complete restitution, compensation in money can make good the deficiency."

event to be set aside.²⁷

The clearest illustration of this sort of situation is when goods which are bought and sold suffer from a defect which causes them to perish. The result is the same whether the defect causes the goods to perish by themselves, or if they are, of necessity, destroyed because of the defect.²⁸

If the thing is not defective, but is used up, or in some way dissipated, before the discovery by the plaintiff of the grounds on which an order of *restitutio in integrum* is available, and the plaintiff retains no benefit, nor had any use or enjoyment from the use of the thing, then requirement of making restoration is also dispensed with.²⁹

If the thing is neither defective, nor wasted, but perished on account of *casus fortuitus* or *vis major*, restoration will not be required, except to the extent that any remnant survives.³⁰

Circumstances which justify an inability to tender a restoration of the thing or benefit received do not necessarily always consist of the total destruction of the thing in question. It

27. See section 2.12.3 above.

28. *Marks v Laughton* 1920 AD 12 at 21. Eggs bought and sold were condemned as unmarketable. The buyer consented to their destruction, thereby making restoration impossible. Innes CJ said:

"That rule [requiring restoration] however cannot apply where after delivery but without any fault on the part of the purchaser the subject matter of a contract of sale has perished owing to the very defect complained of."

29. *African Organic Fertilizers & Associated Industries Ltd v Sieling* 1949 (2) SA 131 W at 136. Kraal manure bought and sold was not defective, but unfit for the purposes for which the seller knew the buyer required it, which resulted in the manure being wasted, the buyer obtaining no benefit therefrom, and therefore being excused making restoration. The facts in *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400 usefully illustrate a different situation. In this case, the goods supplied (oil) retained a commercial value, even if the oil was not useful to the plaintiff for his specific purposes. It is submitted that restoration would thus be necessary if an order of *restitutio in integrum* was sought, assuming the existence of appropriate grounds, such as fraud, for such an order.

30. *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 D; J S McLennan, "Restitutio in Integrum Minus Restitution", (1969) 86 *SALJ* 11.

may be that the thing in question is only partially diminished. In such cases, of course, the person seeking an order of *restitutio in integrum* must tender the restoration of the remnant.³¹ From this type of case must be distinguished that in which the concept of *substantial* restoration plays a part. In the case of substantial restoration, there is no justification for not making restoration, but the court ignores a slight shortfall in actual restoration, and allows it to be made up by monetary adjustment. In the case of circumstances justifying only a partial restoration, there is no need to make up the shortfall at all, because no benefit is retained in circumstances which are not due to the fault of the plaintiff. The loss of the shortfall in restoration in these cases therefore falls on the person against whom an order of *restitutio in integrum* is ordered.

2.12.7. The Necessity for a Tender of Restoration.

The general rule being that the person seeking an order of *restitutio in integrum* must himself tender, in his pleadings, the restoration of what he received, the question arises, does this rule apply if restoration is wholly, or partially, impossible. It is submitted that there are two possibilities. The first approach is most appropriate if partial restoration is possible, or if inability to make restoration is likely to be in issue. In such cases, the plaintiff should aver, in the pleadings, that he is willing to restore whatever remains of the thing delivered to him, even if complete restoration is, in the circumstances, impossible. This averment should be in general terms, in order to indicate plaintiff's *willingness* to make restoration: the extent to which *actual* restoration is possible, or worthwhile, and whether the inability to restore completely is due to the plaintiff's fault or not, is then left as a question of fact to be resolved

31. *Theron v Africa* 10 SC 246 at 250. In this case, part of a flock of sheep was slaughtered before a defect in the animals was discovered. Restoration could nevertheless be effected by the plaintiff returning the live sheep and paying the price of those slaughtered. It might be argued that the plaintiff ought only to be liable to restore the *value* of the carcasses, rather than the price he agreed to pay for them, since their value represents the benefit that he retains.

by evidence. This approach is suggested by the following *dicta* of Rumpff JA:³²

"Of hy in staat is om terug te gee wat hy ontvang het, of tot watter mate hy nie volledig in staat is nie om terug te gee wat hy ontvang het, ditsy deur eie skuld of andersins, is 'n saak vir getuienis."

On the other hand, a plaintiff who is wholly unable to make restoration of what he has received, should indicate these special circumstances by averring in his pleadings that he is no longer in possession of, nor retains any benefit or advantage from, anything received by him in terms of the transaction which he seeks to have nullified. The circumstances leading to this position can then be adduced in evidence, so that the court can decide whether or not the usual requirement of restoration is justifiably dispensed with. This alternative will appear more appropriate in cases in which nothing at all remains of whatever was received, in which circumstances a tender of willingness to restore is rather artificial.

The *onus* of proving that an inability to effect a reciprocal restoration is due to justifiable circumstances normally lies on the person asserting the fact, that is, the person seeking an order of *restitutio in integrum* who is unable to restore what he received.³³ Thus the onus of proving that the thing in question has been consumed without either benefit or enjoyment in circumstances not due to the fault of the user would lie on the person who has consumed it. This is because it is naturally presumed that a person will preserve, rather than waste, his assets, or at least expend them in a way that is to his own advantage. One possible exception exists. In the case of an order of *restitutio in integrum* in circumstances of youth, there can be no presumption that a young person, whose very immaturity and lack of judgement gives rise to *iusta causa* for an order of *restitutio in integrum*, will have preserved with care or usefully used whatever he has received. On the contrary, on account of youthful lack of judgement, he is likely to have squandered it without benefit.³⁴ It is therefore submitted that, in such

32. *Van Heerden v Sentrale Kunsmis Korporasie Bpk* 1973 (1) SA 17 A at 31 H.

33. *Feinstein v Niggli and Another* 1981 (2) SA 684 A at 702 A.

34. Voet, *Commentarius*, 4.4.36.5.

cases, an onus would rest on the person *against* whom an order of *restitutio in integrum* is sought, and who wants reciprocal restoration from the young person, to prove not only what the young person received, but also that it has been either preserved intact or that it has been usefully expended by the young person. Failing discharge of this onus, a tender of restoration of benefits received should not be required of the young person seeking the order.³⁵

2.12.8. Restoration of the Value of Use and Enjoyment.

In some cases, although the actual thing originally transferred is restored, the person who possessed it in the interim, before the setting aside of the event or transaction in question, may have obtained proprietary benefit or advantage from the use and enjoyment of the thing. This enjoyment may occur over a period of time, which can make the proprietary benefit substantial, such as in the case of a minor, who after some years, seeks an order of *restitutio in integrum* from the purchase of a house bought by his guardian on his behalf, and in which he has been living.³⁶ In such cases, the benefit must be quantified and the value thereof paid over to the person to whom restoration is due, together with the return of the property itself. Otherwise, the person seeking an order of *restitutio in integrum* would retain a benefit from a contractual relationship which had been set aside, and this is contrary to the principles in terms of which the remedy operates. Similarly, the seller of property, who has had the use and enjoyment of the money paid to him until the sale is nullified, and restoration is ordered, will have to restore not only the capital sum, but also interest thereon.³⁷

35. This rule must not be confused with the now discredited notion that a minor is bound by a contract, despite lack of capacity, if enriched thereby. All that is suggested here is that there is no presumption that a young person will apply and use his assets wisely, for his own benefit, and this realisation has the effect of shifting the onus of proof in regard to the requirement of reciprocal restoration.

36. *Wood v Davies* 1934 CPD 250 at 260. Also see *Davidson v Bonafede* 1981 (2) SA 501 C at 511 A.

37. Voet, *Commentarius*, 4.1.22; and 21.1.4. Voet is talking of the *Actio Redhibitoria* in this

Cases also occur in which the property in question has been voluntarily disposed of or consumed, and benefit, or enjoyment, derived therefrom. Obviously, in such circumstances, restoration of the thing itself is then impossible. An example is when the person seeking an order of *restitutio in integrum* from a contract of sale has resold the property delivered to him, to a third party, before discovering the grounds on which *restitutio in integrum* is available. In such cases, the proceeds of the sale must be accounted for, just as if the thing itself was still in the possession of the plaintiff.³⁸ If the thing has been consumed, the value of the benefit, or enjoyment, derived therefrom must be restored to its original owner.

2.12.9. Restoration in Cases of Partial Restitutio in Integrum.

A person seeking an order of *restitutio in integrum* may wish to set aside only a divisible part of a transaction, rather than the whole transaction. An example is the purchase of a tract of land by A which land is jointly owned by B and C. Should C succeed in having the transaction set aside insofar as it concerns him, and provided that A is happy to enter into co-ownership with C, there is no need to set aside the contract so far as it concerns B.³⁹ In such cases of partial *restitutio in integrum*, only partial restoration is required: in the present example, of C's interest.

2.12.10. Reimbursement of Expenses.

Expenses incurred in relation to property can be classified in a number of different ways. Firstly, expenses incurred may be "necessary" expenses, that is, necessary to preserve the

latter passage, but, on the question of interest, uses the analogy of *restitutio in integrum*. *Seggie v Phillip Bros* 1915 CPD 292 at 304; Kerr, *Contract*, 198.

38. The facts of *Logan v Beit* (1890) 7 SC 197 at 216 illustrate this situation. A purchaser of shares, who sought to have the original transaction set aside, but who had since resold the shares, was required to account for the profit he had made on the resale.

39. This example is based on Voet, *Commentarius*, 4.1.22.

property. Secondly, expenses can be termed "useful" or "beneficial", which means that the expenses, while not necessary, nevertheless enhance the market value of the property. Thirdly, expenses can be "luxurious" expenses, which are expenses which go beyond enhancing the value, or normal usefulness, of the property, and are instead merely voluptuary. Finally, expenses may be incurred uselessly, in expectation of the continuance of the transaction which is, in fact, to be set aside: these are termed "wasted" expenses.⁴⁰ In effecting a restoration of the parties to their *status quo ante* the differences between these various types of expenses all have to be considered, in order to determine which are recoverable as a consequence of an order of *restitutio in integrum* and which are not.

There appear to be two principles that have to be observed. The first is that the person receiving back the property on which expenses have been incurred should not acquire a benefit without just cause. In other words, he should not be enriched at the expense of the other party. However, it is also important to remember that a person seeking restitution should not be required to shoulder an undue burden, which he himself might not have undertaken, just because he wants an order of *restitutio in integrum*.⁴¹ It may be unfair to expect him to shoulder expenses which he cannot afford.

The solution to this potential dilemma is based on practical considerations. Necessary expenses must be reimbursed in full. By definition, they are expenses which would have been incurred by whoever had an interest in the continued existence of the thing, and reimbursement of these cannot logically be avoided. Beneficial expenses are also to be reimbursed to the extent of the enhanced market value of the property, unless the expenses actually incurred are less than the increase in market value, in which case actual expenditure only is payable. This is fair, because such expenditure is recoverable (by resale on the market) by whoever shoulders the burden.⁴²

40. Silberberg and Schoeman, *Property*, p 152 ff.

41. D.26.7.32.5; Voet, *Commentarius*, 4.1.22.

42. Because, prior to the order of *restitutio in integrum* the transaction, or the legal consequences of the event, are legally valid, the person against whom the order is sought is

As regards luxurious expenses, the person effecting luxurious improvements may remove them if this is possible without causing damage to the main object of the proceedings, but otherwise, the person recovering the improved property is only required to pay the value of what might have been removed by the improver, that is, the value of the materials after removal.⁴³

The matter of wasted expenses falls to be dealt with rather differently. Properly considered, wasted expenses, that is to say, the expenses which are incurred in reliance on the existence of the validity of the transaction or event which is to be set aside, give rise to a loss, and not to a benefit. By contrast, expenses described above as either necessary, useful or luxurious all give rise to a material advantage to the owner of the property. This is not true of wasted expenses. The question in regard to wasted expenses does not therefore concern the extent to which the person who acquires a *benefit* should pay for it, but rather a question of who should sustain the *loss* of money wasted.

It is submitted that such costs, or losses, are not recoverable by either party in the case of *restitutio in integrum*, but that each party must bear his own losses in respect of wasted expenses. The reason is that there exists no basis for making an award of damages to recover such losses. In particular, there is no breach of contract, no liability in terms of a duty created *ex lege*⁴⁴, no enrichment *sine causa*, and the elements required for delictual liability, in particular wrongfulness, will not always exist.⁴⁵ The recovery of damages is not

in the position of a *bona fide* possessor.

43. Voet, *Commentarius*, 6.1.36; *Barnard v Colonial Government* (1887) 5 SC 122 at 125.

44. Such as are created by the provisions of the aediles' edict. It appears as if wasted expenses are recoverable by a plaintiff who brings an *actio redhibitoria*: *Seggie v Phillip Bros*, 1915 CPD 292 at 304.

45. Delictual liability may exist in cases in which the order of *restitutio in integrum* is made in circumstances of *dolus* or *metus*. In such cases, wasted expenses would be recoverable, in terms of the fraudulent party's delictual liability. Similarly, when restoration of performance is ordered, not because of the nullification of the transaction *ab initio*, but because of a negligent (culpose) misrepresentation, a delictual basis may exist for recovering loss occasioned thereby. By contrast, if the principles presently under discussion are accepted as correct, wasted expenses would not be recoverable in cases where restoration (cf *restitutio in integrum*) was ordered on the ground of an *innocent* (simple) misrepresentation.

an integral part of an order of *restitutio in integrum*, which only operates on the basis of a restoration to the *status quo ante*, insofar as this is achieved by a mutual restoration of benefits received, rather than by the calculation and payment of damages. This result is not inequitable: *somebody* has to bear the loss, and, unless a basis exists in law for shifting it, it must fall on the person who incurred it. Thus, where the circumstances of the case *do* give rise to a claim for the recovery of wasted expenses on say, a delictual basis, because a fraudulent misrepresentation has been made, then the claim for such damages must be seen as distinct and separate from the remedy of an order of *restitutio in integrum*. The point is discussed by Marais AJ in *Davidson v Bonafede*:⁴⁶

"There may be other adjustments necessary to effect a full *restitutio*. Thus in *Berkemeyer v Woolf* 1929 CPD 235 the Court, in awarding *restitutio* to a tenant who had been misled to believe that the premises which he had hired could lawfully be used as a factory, ordered the lessor to repay the rent he had received, together with *mora* interest thereon, and also awarded him the sum of L10 as damages to cover the cost of shifting two machines which had been installed in the premises, and some stationary which had been printed, but was useful only as scrap paper. In a sense, I suppose, it could be said that the award of damages is really only one facet of the entire process, namely the process of restoring the parties to their pre-contractual positions. But it is probably more correct to regard such an award as a separate and distinct claim for damages. In the end, it seems to me to be a question of degree as to whether any particular financial adjustment which falls to be made is one which is an integral element in the granting of *restitutio in integrum*, or is one which is collateral to it, and so should form the subject of a distinct claim for damages."

Because terminology may easily be misleading, it may be thought, despite what has been said above in this section, that some authorities support the idea that wasted expenses can be recovered by a person who seeks an order of *restitutio in integrum*. For example, A J Kerr writes that a person who has a claim for "re-transference" of property is entitled to recover his wasted expenses as "restitutionary damages."⁴⁷ This view is expressed in an excursus

46. *Davidson v Bonafede* 1981 (2) SA 501 CPD at 511 E.

47. Kerr, *Contract*, p 200 - 201. The use of the term "restitutionary damages" to describe damages calculated to compensate for wasted expenditure is only one of the uses to which this term is put. In *Probert v Baker* 1983 (3) SA 229 D&C the same term is used to describe an award of damages which are calculated to put an aggrieved party in the same position as he would have been in had he never entered into the contract in the first place, that is, to restore him to his pre-contractual position. Accordingly, care is needed in distinguishing which particular meaning is ascribed to the term by different writers.

entitled "restitution". However, Professor Kerr appears to be using the word "restitution" to indicate the restoration of property or benefits in a wider, more general context, rather than to indicate an order of *restitutio in integrum* as a strictly defined remedy. The cases cited by Professor Kerr bear out this suggestion. Thus, *Wilcken and Ackermann v Klomfass*⁴⁸ involves an *actio redhibitoria* on grounds of a latent defect, as does *Theron v Africa*⁴⁹ and *Mitchell's Piano Saloons v Theunissen*.⁵⁰ In *Durr v Bam*,⁵¹ De Villiers CJ said *obiter* that wasted expenses would have been recoverable if the seller had made the statement complained of fraudulently, because then the situation would have been a case of *restitutio in integrum* on the ground of the defendant's fraud. However, it is submitted that, in cases involving fraud, the legal basis on which wasted expenses are recoverable is delictual.⁵² The alternative basis for relief considered in this case was the *actio redhibitoria*, although, with respect, the learned Chief Justice appears to have erred in suggesting that this was appropriate in circumstances of breach of warranty, for which the appropriate action is surely an action on the contract (*actio empti*).

As regards the other cases cited, *Dodd v Spitaleri*⁵³ is an instance of an *actio redhibitoria*, as is *Deutschmann v Graham*⁵⁴ and *Neethling v Hendler NO*.⁵⁵ *Marais v Edelman*⁵⁶ is an instance of a claim for damages on grounds of fraud, without cancellation of the contract, not an *actio quanti minoris* or *redhibitoria*. There is certainly no mention of an order of

48. 1904 TH 91.

49. (1893) 10 SC 246.

50. 1919 TPD 392.

51. (1890) 8 SC 22 at 24 - 25.

52. See above in this section.

53. (1910) 27 SC 196.

54. 1912 EDL 214.

55. 1930 GWLD 56.

56. 1934 CPD 212.

restitutio in integrum. *Van der Westhuizen v James*⁵⁷ is a case of a sale of a non-existent thing. The sale was therefore void, not voidable, and an order of *restitutio in integrum* not appropriate. Indeed, that remedy is not mentioned in the report. It is submitted that the case is an instance of a *condictio sine causa*. In *Inhambane Oil and Mineral Development Syndicate Ltd v Mears and Ford*⁵⁸ the action was treated as an *actio redhibitoria*.

It is submitted, therefore, that the cases discussed should not be interpreted as indicating generally that damages for wasted expenses may be claimed by a person who has legal relations nullified by means of an order of *restitutio in integrum*. Further, there does not appear to be additional authority for such a proposition. Of course, it may be argued that, by analogy with the cases discussed, such a claim *ought* to be allowed, but it is thought that, bearing in mind the differences of legal principle, the better view is that damages for wasted expenses are not recoverable by a person who sues for an order of *restitutio in integrum*.

57. (1898) 5 OR 90

58. (1906) 23 SC 250.

2.13. RESTRICTIONS ON THE AVAILABILITY OF AN ORDER OF RESTITUTIO IN INTEGRUM.

2.13.1. Reasons for the Existence of Restrictions.

In some cases, notwithstanding the existence of the elements essential for an order of *restitutio in integrum*; that is, an appropriate *iusta causa*, resultant prejudice or loss, and an ability and willingness on the part of the plaintiff to make restoration of what he has received, *restitutio in integrum* will not be ordered. These instances are explained on the basis that an order of *restitutio in integrum* is an extraordinary remedy.¹ *Restitutio in integrum* operates by nullifying *ab initio* legal relationships, or the legal effect of events, which are otherwise valid and enforceable. Interference of this sort with valid legal relationships is only properly tolerated in a legal system when the interference is seen to be necessary in order to achieve a just result. It ought not to be tolerated when it is not necessary and appropriate. For example, an order of *restitutio in integrum* is said to be unavailable if it is possible for relief to be granted by means of an alternative *ordinary* remedy. The following passage from the Digest makes the point clear:²

"When the case is heard, it also should be taken into consideration whether there is not perhaps some other action available, except the one for complete restitution; for if the party is properly protected by the usual

1. Section 2.2.1, 2.2.3, and 2.3.3 above.

2. D.4.4.16.pr.

remedy and the ordinary law, extraordinary relief ought not to be granted him; as for instance, where a contract has been made with a ward without the authority of his guardian, and he does not become more wealthy in consequence."

Voet echoes the rule:³

"Nor as a rule is room allowed for restitution in cases where some other ordinary and equally fertile remedy is provided in law by way of indemnity. If one is armed in sheer law with a common relief, an extraordinary relief should not be bestowed on one."

However, Voet mentions that, even if an alternative ordinary remedy is available, an order of *restitutio in integrum* will be allowed "if it appears more fertile than the ordinary remedy."⁴

This passage suggests that the courts are entitled to take account, not only of the existence of an alternative remedy, but also of the comparative nature, and extent, of the relief afforded by each alternative remedy. If an ordinary remedy gives the same, or better, relief than an order of *restitutio in integrum*, then in terms of the principle which requires avoidance of unnecessary reliance of an extraordinary remedy, relief in the latter form will be refused.

It must be understood that what is being compared is the nature, and extent, of the relief afforded by the alternative remedies, and not the legal basis of the remedies themselves. Thus, if the relief sought by a plaintiff is merely the restoration of property, it makes no difference to that particular outcome if the restoration is accomplished by means of an order of *restitutio in integrum*, or by means of some other legal remedy, such as an action to enforce a quasi-contractual obligation,⁵ or the enforcement of a right of ownership to recover possession.

Although Voet states the basic principle that an order of *restitutio in integrum* is not to be

3. Voet, *Commentarius*, 4.1.12.

4. Voet, *Commentarius*, 4.1.12.

5. For example, a *condictio sine causa*, if property or money has been delivered in terms of a purported contract which, in fact, is void.

granted if an alternative, and equally effective, ordinary remedy exists, he also lists certain "exceptions" to this rule. Lest these appear to contradict the main principle, they must be examined. Thus:⁶

"If nevertheless both an ordinary action and relief by way of restitution are available against the same person, then it is left to the discretion of the ward whether he claims restitution, or prefers to employ the ordinary action."

Voet relies on D.4.4.16.2. for this passage, but the text does not mention *at whose discretion* the choice of remedies lies. In this instance it is thought, with respect, that Voet is importing more into the passage than is warranted, and the "exception" may be discounted. However Voet mentions further exceptions to the general rule:⁷

"The law is the same if one has repudiated an inheritance when scared through fear; for the praetor assists such a one by a double method, either by granting beneficial actions, that is the beneficial claim for the inheritance, or by affording the action based on fear, an election being given to the person damaged."

This passage is based on D.4.4.21.6 which reads as follows:

"If, having been forced to do so, I reject an estate, the praetor can come to my relief in two ways; either by granting an equitable action as he would to an heir, or by allowing an action on the ground of duress; and I have the right to select whichever way I choose."

It is thought that an explanation for this passage exists, which avoids contradicting the rule that the courts ought not to award an extraordinary remedy when relief by means of an ordinary remedy is available. The explanation depends on drawing a distinction between the right of a plaintiff to choose a particular type of relief, as opposed to the particular legal means by which that relief may be effected. For example, in the circumstances of a contract induced by means of duress, the person who was subjected to the duress has the right to

6. Voet, *Commentarius*, 4.1.12.

7. Voet, *op cit.*

elect between alternative types of relief. He may elect to abide by the transaction, but sue for an award of damages, (in Roman law, by the *actio quod metus causa*). Or he may elect to ignore his contractual liability, and raise a defence, if sued for performance. Or, if he has already performed the terms of the contract, he may wish to obtain a restoration of what he has given or done. It is submitted that the passage from the Digest which is quoted above describes the right of the aggrieved party to make this choice. It would be incorrect, it is submitted, to suggest that, just because the last mentioned type of relief involves an extraordinary legal remedy, that the aggrieved party would not be entitled to seek an order of *restitutio in integrum*, and that the court may instead insist that he select one of the other courses of action.

Once a plaintiff has decided what sort of relief he wants, other considerations surface. If the aggrieved party is concerned only to recover his property, or merely to avoid the performance of legal obligations undertaken, and if this result can be achieved by means of an ordinary remedy rather than an order of *restitutio in integrum*, in circumstances in which no disadvantage accrues to the plaintiff, then the court ought to avoid making an order of *restitutio in integrum*, and award the plaintiff the relief sought in terms of ordinary legal remedies. These, it is submitted, are the circumstances in which the courts properly avoid making an order of *restitutio in integrum*. Further, it is thought that the "exceptions" listed by Voet are not really exceptions to the application of that is thought to be the proper rule, but are examples of circumstances which fall outside of the rule.

2.13.2. No Order of Restitutio in Integrum in Trivial Cases.

Another instance in which, despite the presence of the essential elements, an order of *restitutio in integrum* should not be granted is when the damage or prejudice suffered is too trivial.⁸ The loss, or prejudice, must be sufficient to justify the grant of an extraordinary

8. Huber, *Heedendaegse Rechtsgeleertheyt*, 4.37.11:

remedy, and the setting aside of valid legal relationships. In deciding whether loss or prejudice is trivial, the courts do not use an absolute scale of values, but judge the importance of the loss in relation to the transaction as a whole. In one case, a loss of £200 on a transaction involving the expenditure of £1750 was considered a serious and substantial prejudice to a minor.⁹ By contrast, a dispute over eighteen shillings in relation to transaction involving a sum of £1500 was held to be a minor matter, not vital to the contract, and insufficient to justify an order of *restitutio in integrum*.¹⁰

2.13.3. No Order of Restitutio in Integrum when it is Redundant.

Redundancy also constitutes good reason for refusing to order *restitutio in integrum*. If a transaction is void *ab initio* rather than voidable *ab initio*, such as when a minor enters unassisted into a contractual relationship,¹¹ an order of *restitutio in integrum* is unnecessary, since no legal relationships exist which require to be set aside,¹² and anything done, or

"Restitution applies then in all cases, provided that they are cases of importance; for in trivial matters it is not worth the trouble to nullify what is duly founded on the requisites of law."

Voet, *Commentarius*, 4.1.11. Also see section 2.9.1 above.

9. *Wood v Davies* 1934 CPD 250 at 259.

10. *Estate Nathan v Estate W Grix* 1911 NPD 262 at 266.

11. De Groot, *Inleydinge*, 3.48.10; *Breytenbach v Frankel and Hochstadter* 1913 TPD 300 at 306. In this case, a long lease entered into by a minor with the assistance of his guardian was held to be voidable, rather than void *ab initio*. *Du Toit v Lotriet* 1918 OPD 99 at 109, *per* Maasdorp CJ:

"With respect to the question of *restitutio in integrum* it may be pointed out that it is an equitable remedy and as Voet points out in (4,1,13) there is no need to resort to it for relief against a contract which is invalid in law, as we hold that the present one is."

Edelstein v Edelstein NO 1952 (3) SA 1 A. See section 2.5.3 above for an explanation of this last case.

12. Voet, *Commentarius*, 4.1.13:

"Nor should recourse be had to restitution whenever a person is *ipso iure* safe.... The making whole again of a lost cause is invoked in vain when by very law his rights are kept entire and untouched."

given, can be recovered by means of other, ordinary, remedies.¹³ However, out of a sense of caution, and in order to avoid any excessive reliance of what might be taken as technicalities, (although in fact principles of some importance are involved), the old authorities indicate that the Dutch courts did not generally refuse to make an order of *restitutio in integrum* even if strictly speaking, it was redundant.¹⁴ It is thought that South African courts would show a similar attitude, if only from an abundance of caution.¹⁵ However, a plaintiff who does not require an order of *restitutio in integrum*, because the transaction involved is already void in law, incurs needless expense for himself by suing for that remedy.

2.13.4. Res Iudicata.

Because a claim for an order of *restitutio in integrum* is based on the existence of a specific *iusta causa*, then, following an unsuccessful action for an order of *restitutio in integrum*, a second action may be brought to have the same transaction set aside, provided that, in the second action, different factual circumstances which give rise to *iusta causa* are relied on. The *exceptio res iudicata* which normally precludes a second action is not available if the second action is based on different factual circumstances.¹⁶ A claim for an order of *restitutio in integrum* on the basis of *iusta causa* arising in circumstances of *metus* which fails

13. For example, to recover property or money delivered in the mistaken belief that the transaction was legally valid.

14. Van der Keesel, *Praelectiones*, 3.50.1; Voet, *Commentarius*, 4.1.13, citing Zypaeus, *Conception of Netherlands Law* title *Restitutio in Integrum*, in *pr*; Gudelinus, *Modern Law* Bk 3, ch 14 at end; Groenewegen, *Abrogated Laws*, on rubric to *Code* 2.40.41.

15. *Breytenbach v Frankel & Another* 1913 AD 390 at 398; *Du Toit v Lotriet* 1918 OPD 99 at 116. This last case concerned a contract entered into by the guardian of a minor, the contract to come into operation only after the minor became of age. Although Maasdorp CJ held that, in these circumstances, the contract was void *ab initio*, and no order of *restitutio in integrum* was necessary to nullify it, McGregor J preferred to avoid technicalities and would order *restitutio in integrum* even if not strictly necessary.

16. Voet, *Commentarius*, 4.1.14; *Umhlebi v Estate of Fina Umhlebi and Fina Umhlebi* 19 EDC 237 at 247. The requirements for a successful exception are that the proceedings are between the same persons, concern the same thing and arise out of the same *causa*.

may thus be followed by a later claim in which the existence of *iusta causa* is based on, say, circumstances involving *dolus*. Of course, the facts must support such a second claim.

Apart from the situation discussed above, the principle of *res judicata* applies to an order of *restitutio in integrum* so as to debar a second action on the same factual circumstances.¹⁷

2.13.5. Prescription.

In South African Law, the Prescription Act¹⁸ governs certain matters relating to acquisitive and extinctive prescription.¹⁹ The provisions of the Act relating to acquisitive prescription relate to the acquisition of rights of ownership, and do not concern an order of *restitutio in integrum*.

Before it can be said that the provisions of the Prescription Act relating to extinctive prescription operate against the right to seek an order of *restitutio in integrum*, it must be shown that the remedy falls within the provisions of the act. In particular, this means that some element in cases involving an order of *restitutio in integrum* must be identified as the "debt", which is extinguished by lapse of time. This is because the provisions of the act concerning extinctive prescription all relate to the concept of "debts".²⁰

"(1) Subject to the provisions of this chapter and Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt."

The word "debt" is not defined by the act. It ought therefore to be given a wide, rather

17. *Hassen Mahomed Meter v Ahmed Mahomed Meter* 1896 NLR 73 at 77.

18. Act No 68 of 1969, as amended. Previously, the Prescription Act, No 18 of 1943 applied.

19. On the Prescription Act generally, see Joubert, *LAWSA*, vol 21 pp 63 ff.

20. Section 10 of the Prescription Act No 68 of 1969. It is noteworthy that the wording of this section does not preclude the application of common law periods of prescription in cases not governed by the provisions of the Act.

than a narrow, meaning. One suggested meaning is "whatever is due (debitum) from any obligation."²¹ The use of the term "obligation" in this definition apparently refers to legally enforceable personal rights and duties that exist between individuals as a result of their own actions or undertakings. Legal obligations arise, classically, from contract, or from delictual acts. If this definition is thought to be too narrow, for the purposes of the Prescription Act, the description of a "debt" can be further widened to include "any liability which exists and is enforceable at law." Such a definition allows a greater variety of cases to be included within the operation of the act. An example of a wide definition of "debt" is this passage from *Evins v Shield Insurance Co Ltd*:²²

"The word "debt" in the Prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt for the vindication of property. While this is so "debt" cannot embrace all rights between two persons. In my view, "debt" in ss 10 and 15 (1) of the Prescription Act means an obligation or obligations flowing from a particular right."

It is difficult to understand why an owner's right to recover possession of his property should be conceived as a "debt for the vindication of property". If this is intended to suggest that the right of an owner to recover his property is extinguished, by prescription, after three years, it must be considered wrong. Ownership is a perpetual right, lost only if another person acquires that right by *acquisitive* prescription, after a period of thirty years²³ or in some other legally recognised way.

Whichever definition of the word "debt" is preferred, the essential element of a debt, as far

21. Per Kotze J in *Levitan & Son v De Klerk's Trustee* 1914 CPD 685 at 691. This definition is quoted with approval by Thirion J in *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 N at 909, and by Holmes AJA in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 A at 344 G. Also see *Joint Liquidators of Glen Anil Development Corporation Ltd (In Liquidation) v Hill Samuel (SA) Ltd* 1982 (1) SA 103 A at 110 A ff; *Apex Mines Ltd v Administrator, Transvaal* 1986 (4) SA 581 T at 603. Kerr, *Contract*, p 330, footnote 256.

22. 1979 (3) SA 1136 W at 1141 F per King J.

23. See Chapter 1 of the Prescription Act No 68 of 1969.

as the running of prescription goes, is the existence of a legally enforceable liability. This constitutes the "debt" which is extinguished by the passage of time. For example, in the case of a claim for damages for breach of contract, the breach of contract gives rise *ipso facto* to a liability to pay compensatory damages. This liability to pay damages exists from the time that proper-performance ought to have been made, and is *enforced*, not created, by the bringing of an action. The liability to pay damages is the "debt" which, if not enforced, is extinguished by the lapse of time.²⁴ Clearly, in this example, the liability to pay damages in lieu of performance which arises from the breach of contract is "something due" arising out of a contractual obligation.

In a case involving, say, *dolus*, the existence of *dolus* may give rise to a claim for delictual damages. The liability to pay such damages also arises *ipso facto* from the existence of *dolus* and the other elements of delictual liability. This liability constitutes a "debt" which may be extinguished by prescription.

The existence of *dolus* may also give rise to *iusta causa* on grounds of which a court may order *restitutio in integrum*. It is submitted that *iusta causa* cannot itself be described as a "debt" or "liability". *Iusta causa* is not something which requires to be discharged by a performance. It is something which is said to exist in various circumstances, and which gives rise to a remedy, but it is not itself a debt or liability. Accordingly, *iusta causa* itself is not extinguished by the passage of time in terms of the Prescription Act. Furthermore, neither the mere existence of *dolus* nor *iusta causa* by itself creates a liability on the part of another person to restore what he has received. The liability to make a restoration only arises, and is consequent upon, an act of a court to set aside a transaction which was otherwise valid. Prior to the setting aside of the transaction, no liability to make restoration exists, and therefore, no "debt" exists against which extinctive prescription can run.

24. In terms of section 12 of the Prescription Act, no 68 of 1969, prescription begins to run as soon as the debt is due. However, a debt is not deemed to be due until the creditor has knowledge of the facts from which the debt arises, which, in the instant case, would mean knowledge of the debtor's breach of contract.

What about the plaintiff's right to ask for relief itself? Can it be said that the right of a person to bring an action for an order of *restitutio in integrum* is extinguished by the passage of time? The answer is, no. This right of action is not itself a "debt", nor is it a right of action to enforce an existing debt. At most, it can be described as a right to relief, by the nullification of existing legal relationships, from which nullification proprietary consequences might result. Because it is not a debt, the right to ask for an order of *restitutio in integrum* is not governed by the Prescription Act.²⁵

Cases involving the *actio redhibitoria* can be distinguished. In such cases, the duty to make a restoration of what was received is created by the operation of rules of law (originally contained in the aediles' edict). These rules create a legally enforceable obligation to accept back what was delivered, and to return what was reciprocally received.²⁶ The action brought to enforce this legal obligation is therefore an action to enforce an existing liability, that is, a "debt" within the meaning of the Prescription Act. The Prescription Act therefore applies, and limits the time during which this liability continues to exist. By contrast, in cases in which an order of *restitutio in integrum* is sought, the person who brings the action is doing what is necessary, not to enforce an existing liability, but merely to dismantle, nullify or set aside a legal relationship and achieve a consequent restoration of the *status quo ante*.

Even if the provisions of the Prescription Act are too narrow to encompass an order of *restitutio in integrum*, this does not mean that an order of *restitutio in integrum* is immune to the concept of prescription. Rather, it is necessary to look at the common law. In Roman law, the remedy, being Praetorian, was temporal, and originally available only for a year from the time the cause of action arose. The period in the common law has been extended, and has varied from time to time, but in the end, it appears to have been settled that, in

25. J C De Wet distinguishes the concept of prescription of *actions*, as embodied in the English *Limitation Act* of 1939, from the prescription of *debts*, with which the South African Prescription Act is concerned: see De Wet, *Opuscula Miscellanea*, p 108.

26. See section 2.14.3 below. Also see J C De Wet, *Opuscula Miscellanea*, p 112.

Roman-Dutch law, thirty years had to elapse before the right to ask for an order of *restitutio in integrum* was lost.²⁷ It also appears that, in terms of the common law, prescription in cases of an order of *restitutio in integrum* begins to run from the time that the events giving rise to *iusta causa* occurred, rather than from the time that the person concerned became aware of the facts justifying an order of *restitutio in integrum*.²⁸ This rule is apt enough considering the length of the prescriptive period.

2.13.6. No Restoration Following an Order of Restitutio in Integrum when Third Parties have Acquired Rights in Good Faith.

It is apparent from the decision of the Appellate Division in *Preller and Others v Jordaan*²⁹ that if, before a voidable legal transaction is set aside, a third party acquires legal rights in good faith as a result thereof, these rights will not be interfered with by a court from whom an order of *restitutio in integrum* is sought. For example, suppose that A, by means of a fraudulent misrepresentation, induces B to sell and deliver certain property to him at a very low price.³⁰ Before B discovers the true facts, A re-sells the property to C, and delivers it to him. C takes transfer in good faith. When B discovers the true facts, he wants to recover the property. However, since the contract of sale was still in existence when he transferred

27. Voet, *Commentarius*, 4.1.17 - 4.1.20. In 4.1.20 Voet reaches the following conclusion:

"The better opinion is therefore that those who have been damaged are not to be shut out from obtaining restitution except by a scope of thirty years."

De Groot, *Inleydinge*, 3.46.3; Huber, *Heedendaegse Rechtsgeleertheit*, 4.37.10. Thirty years is also the period of time that was laid down for the extinctive prescription of any "action" (cf debt) not otherwise provided for in the Prescription Act of 1943: see section 3.(2) (e) (iii). The current act makes no such provision.

28. Voet, *Commentarius*, 4.1.19; cf Section 12 of the Prescription Act, No 68 Of 1969. Since the Act only governs the prescription of "debts", section 12 ought not to be applied to cases in which the remedy involved is an order of *restitutio in integrum*, and the common law rule for determining when prescription begins applied.

29. 1956 (1) SA 483 A.

30. Assume for the purposes of the example that the fraud of A renders the contract of sale voidable *ab initio* rather than void *ab initio*.

his ownership to A, the transfer to A, and thereafter to C is legally valid. B's right to a *restitutio in integrum* is accordingly subject to the rights acquired in good faith by the third party.³¹ However, this does not mean that, if the aggrieved party desires an order of *restitutio in integrum*, in order to nullify the transaction, and recover property that is still in the original buyer's possession, that the order will be refused just because part of the property has been transferred to a third party, who received it in good faith. Further, if the third party received the property in *bad faith*, his rights are not protected against recovery, and the original seller may join him in the action against the first buyer in order to recover the property.

Voet³² mentions that, in cases involving *metus* and minority (youth, in modern law) *restitutio in integrum* is sometimes granted against third parties who are "perchance" in possession of something lost, because of the circumstances complained of. In the relevant passage, no mention is made of the third party's good, or bad, faith. Thus:

"Restitution is indeed more commonly granted against those by whom any person has been damaged; yet sometimes too against those who had not occasioned the damage, while perchance they are in possession of something lost through the damage. This latter rule has been adopted in cases of restitution on the ground of fear, and sometimes also of that on the ground of minority."

It is thought that, in view of the approach of the Appellate Division in *Preller v Jordaan*,³³ the existence, or otherwise, of good faith on the part of the third party is likely to be a deciding factor in South African law.

31. *Kopelowitz v West and Others* 1954 (4) SA 296 W at 300 - 301; *Preller and Others v Jordaan* 1956 (1) SA 483 A at 496 - 497.

32. Voet, *Commentarius*, 4.1.10; 4.4.16.

33. 1956 (1) SA 483 A.

**2.14. AN ORDER OF RESTITUTIO IN INTEGRUM DISTINGUISHED FROM OTHER
REMEDIES.**

**2.14.1. An Order of Restitutio in Integrum Distinguished from the Recovery of Property on
Grounds of a Real Right.**

There are many circumstances in which, although a person may wish to effect the recovery of either property delivered, or the amount of money paid, the remedy of an order of *restitutio in integrum* is neither appropriate nor necessary. The most obvious example of such cases is the recovery of possession of property by the owner of that property.¹ An owner's legal right to recover possession of his property is a direct legal consequence of his ownership. In order to succeed in his claim, an owner need only establish, firstly, that he is owner and, secondly, the fact of the other person's possession.² The effect of the order of court thus sought is to restore the owner to possession of his property. In this broad sense, the order may be described as an order of restoration. However, the order is obviously not an instance of *restitutio in integrum* properly so called. In the case of the owner of property recovering possession of his property on grounds of ownership, the court is *enforcing* his legal right to possession. By contrast, an order of *restitutio in integrum* involves the

1. For example, on the termination of a lease, the lessor of property is entitled to rely on his right of ownership in order to recover possession of the leased property from the lessee. Of course the lessor may also have alternative grounds on which to recover possession, such as enforcing contractual obligations. *Graham v Ridley* 1931 TPD 476 at 479; *Pretoria Stadsraad v Ebrahim* 1979 (4) SA 193 T at 195 D - F.

2. *Chetty v Naidoo* 1974 (3) SA 13 A; *Akbar v Patel* 1974 (4) SA 104 T. Silberberg and Schoeman, *Property*, pp 289 -290; Carey Miller, *Ownership*, 11.1.2 and 11.4.1. Also see section 3.1.5 below.

nullification of legal rights, and a consequent restoration of the *status quo ante*. The two remedies are therefore easily distinguished, despite the superficial similarity that both may result in restoration of property to its previous possessor.³

2.14.2. An Order of Restitutio in Integrum Distinguished from the Enforcement of Obligations to Restore Property or the Amount of Money Paid.

There are many cases in which a person may seek to recover property delivered, or the amount of money which has been paid, to another person, not on the basis of nullifying a valid legal transaction or event, but because there never existed any valid legal *causa* for the original transfer in the first place. It is inappropriate to classify the latter type of claim as a claim for an order of *restitutio in integrum*, since the fundamental characteristic of nullifying a valid legal transaction, or the valid legal consequences of an event, *ab initio* is not present.

An example of the sort of case in which the nullification of a valid legal transaction is not a necessary preliminary to effecting a restoration of property, or an amount of money, is the recovery of the amount of money paid by one person to another, which payment was made in error, but received by the payee in good faith, supposedly in discharge of a purported contractual obligation, which, in fact, was legally invalid.⁴ Another example is when property or a sum of money is delivered and transferred by one person to another, subject to a resolutive condition that an event occur, which has not. In cases such as these, quasi-contractual obligations are created, in terms of which the person who has received the property or money is placed under a duty to restore the property or the sum received.⁵

3. The same reasoning would apply in order to distinguish an order of *restitutio in integrum* from the enforcement of a right to recover property on grounds of a possessory right (as distinct from ownership). Generally see Price, *Possessory Remedies*.

4. For example, see *Vluvo Investments (Pty) Ltd v Bezri* 1985 (4) SA 367 T, in which a tenant was held entitled to recover the amount of money paid to the landlord as rental, in excess of the amount allowed by the Rent Control Act, No 80 of 1976.

The enforcement of these quasi-contractual obligations is not an instance of an order of *restitutio in integrum*, despite the fact that the outcome of enforcement is to restore the plaintiff into possession of the thing, or the amount of money, that he had transferred. This is so because no nullification of valid legal rights occurs. Instead, obligations created quasi-contractually are *enforced*. In Roman law, the quasi-contractual obligations of the sort referred to here were enforced by actions named *condictiones*: the *condictio indebiti per errorem solutio*, the *condictio ob rem dati* (also known as *condictio causa data causa non secuta*), the *condictio ob turpem vel iniustam causam*, and the more general *condictio sine causa*.⁶ The name given to each of these actions served to distinguish the precise circumstances in which a quasi-contractual obligation might arise. In South African law, it is no longer necessary to refer to the *condictiones* by name in pleadings, but this does not alter the fact that the cause of action in the sort of factual situation outlined in the examples given above is the existence of quasi-contractual obligations, and that restoration occurs as a result of the enforcement of these obligations, rather than as a result of a nullification of valid legal rights or relationships.⁷

Another situation in which the result is restoration of property, but the basis of which can be distinguished from an order of *restitutio in integrum*, is the enforcement of the terms of a *pactum de retrovendendo*. In this type of agreement the purchaser of property binds himself contractually to re-sell it to the original seller, if certain conditions are met.⁸ This type of

5. Thomas, *Textbook*, p 326:

"[*Condictio indebiti per errorem solutio*] was the only form of that remedy typified as quasi-contractual in the Institutes; but, as will appear hereafter, the principle that really underlay its existence had, by the time of Justinian, brought into being a considerable number of other applications of the *condictio*...".

6. On the origins and development of the *condictiones* generally, see De Vos, *Verrykingsaanspreeklikheid*, and G L Peiris, *Some Aspects of The Law of Unjust Enrichment in South Africa and Ceylon*.

7. De Vos, *Verrykingsaanspreeklikheid* pp 158 - 159 distinguishes *restitutio in integrum* from the *condictiones*, which, with respect, is a proper distinction.

8. Voet, *Commentarius*, 18.3.7. Mackeurtan, *Sale*, 4.3.2:

2.14. RESTITUTIO IN INTEGRUM DISTINGUISHED FROM OTHER REMEDIES. 201

agreement thus creates a contractual obligation to re-transfer the property at a later date. Should that obligation be enforced by the original seller, the remedy involved is an order of specific performance of the terms of the contract, and not the nullification of the original sale by means of an order of *restitutio in integrum*. The same reasoning applies in the case of a landlord who sues on the contract of lease to recover possession of his premises, which he has leased to another, when the tenant has breached a term of his lease.⁹

2.14.3. An Order of Restitutio in Integrum Distinguished from the Actio Redhibitoria.

An *actio redhibitoria* involves restoration, in that property previously delivered to the buyer is restored to the seller, who is required to accept its return, and himself restore to the buyer the amount of the purchase price paid.¹⁰ However, despite the element of restoration that characterises both *restitutio in integrum* and an *actio redhibitoria*, it is submitted that an order of *restitutio in integrum* and the *Actio Redhibitoria* operate on the basis of different principles, and may therefore be distinguished.¹¹ Many differences between *restitutio in*

"Its effect is not that of a resolutive or suspensive condition, but to give the seller the right to compel the purchaser to make a new sale."

and:

"The seller (the new purchaser) may upon due exercise of the option of repurchase sue *ex empto* in the ordinary way."

Pothier, *Sale*, para 396. A *ius retractus* by which a right of repurchase is granted only of the original purchaser wishes to sell similarly gives rise to personal obligations which may be specifically enforced *ex empto*: see Mackeurtan, *Sale*, 4.3.3.

9. De Groot, *Inleydinge*, 3.19.11; Voet, *Commentarius*, 19.2.32; *Manley van Niekerk (Pty) Ltd v Assegaai Safaris and Film Productions (Pty) Ltd* 1977 (2) SA 416 A at 422 H. Kerr, *Sale and Lease*, p 269.

10. D.21.1.1.1; *Phame v Paizes* 1973 (3) SA 397 A.

11. See D.21.1.23.7. and Voet, *Commentarius*, 21.1.4, in which the *actio redhibitoria* is likened to, but not equated with, an order of *restitutio in integrum*. Also see section 2.10.8 above. While similarities in the effect of an *actio redhibitoria* and an order of *restitutio in integrum* certainly exist, it is intended here to take note of the *dissimilarities* which distinguish these legal concepts.

integrum and an *actio redhibitoria* are observable. In the first place, each has different origins, the *actio redhibitoria* in the provisions of the aediles' edict,¹² orders of *restitutio in integrum* the praetorian edict.¹³ Unlike the praetor, the aediles did not share consular *imperium*, and thus lacked the extraordinary power to nullify valid civil law relationships, as occurred when the praetor ordered *restitutio in integrum*. Instead, the aediles enjoyed a power to enforce their own measures,¹⁴ which they promulgated to control activity in the marketplace.¹⁵ The origins of the *actio redhibitoria* thus indicate that it does not originate as an extraordinary exercise of sovereign power, which fact, it is submitted, itself precludes it being properly considered as an instance of an order of *restitutio in integrum*.¹⁶

There is another basis for distinguishing an order of *restitutio in integrum* from the *actio redhibitoria*. An order of *restitutio in integrum* is truly a *remedy*, that is, it is the means by which the court gives relief to an innocent party. By contrast, the *actio redhibitoria* is merely the name of an *action*, the name serving to indicate that the cause of action stems from the provisions originally laid down by the Roman aediles. An action is brought in order to claim relief: it is not itself the relief. The question therefore is, what relief is involved in the bringing of an *actio redhibitoria*? Is it a unique remedy, something peculiar to and intimately involved with the particular action, or is the remedy an instance of, or species of, some other generally recognised remedy, such as an order of *restitutio in integrum*?

The first of these possibilities, that the *actio redhibitoria* involves a unique remedy, is suggested by the use of the word "redhibition" to describe the relief sought by one who brings an *actio redhibitoria*. This is a modern usage that seems to have crept into some cases

12. D.4.1.3. Also see section 2.2.5 above.

13. D.21.1.1.1. On the *actio redhibitoria* in South African law generally, see *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 A.

14. For example, by means of fines.

15. Jolowicz and Nicholas, *Historical Introduction*, p 50; also see *op cit*, footnote 4.

16. Section 2.2 above.

and texts without explanation.¹⁷ The possibility of a unique remedy is lent further credence by the reference in other cases and texts to "aedilician remedies", even though the term "redhibition" is not necessarily used.¹⁸ Despite the occurrence of such terminology, it is submitted that there is insufficient reason to assert that the *actio redhibitoria* involves a unique type of remedy. Although the right of action arises in specific circumstances, it will be submitted below that in fact it is an instance of an action for the enforcement of legal obligations, and thus may be grouped with a wide range of legal actions which share this broad objective.¹⁹

The second possibility mentioned above, that the *actio redhibitoria* is an instance, or species of, *restitutio in integrum*, arises because the *actio redhibitoria* plainly involves the restoration by both buyer and seller of what they have received from each other. However, the exact legal basis on which this restoration takes place is not always made entirely clear. For example, the *actio redhibitoria* has been described as a remedy involving "cancellation of the contract" and "restitution". Thus:²⁰

"The *actio redhibitoria* is an action for the cancellation of the contract and restitution, i.e. the restoration of both parties to their original positions in so far as this is possible."

Although it is not actually said in this passage that the *actio redhibitoria* is an instance of an order of *restitutio in integrum*, it is thought that the terms used may well be misinterpreted in this way, in particular, because the term "cancellation of the contract" possibly suggests the nullification of the contract of sale itself.²¹

17. For example, the term is used in *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 170 at 183 and Mackeurtan, *Sale* 9.5.6.

18. *Phame v Paizes* 1973 (3) SA 397 A at 417 H; Mackeurtan, *Sale* 9.5.6; Kerr, *Sale and Lease* p 74.

19. For example, actions to enforce contractual, delictual or quasi-contractual obligations. Although the circumstances in which such actions are available differ, as does the form of relief available, nevertheless all these actions have the broad objective of enforcing existing legal obligations, rather than nullifying them.

20. Kerr, *Sale and Lease*, p 55.

If, for present purposes, the term "cancellation"(rescission) is restricted to mean cancellation (rescission) on grounds of breach of contract, then it must be pointed out that, in such circumstances, it is not the contract itself which is "cancelled", even in the sense of a voluntary abandonment of the transaction by the parties. Only the defaulting party's right to discharge his outstanding liability by means of specific performance is ended.²² Because neither the existence of latent defects in a thing sold, nor the failure to make good *dicta et promissa* constitute a breach of contract, the employment of the term "cancellation" (as defined) in this context is perhaps best avoided altogether.

It is thought that, far from being an action for the nullification *ab initio* of the contract of sale, the *actio redhibitoria* is an action to enforce an obligation created by law in specific circumstances. The obligation contemplated is that of a seller to accept the return of goods sold, and consequently, to restore the purchase price to the buyer. The rules of law which create this obligation are those originally promulgated in the aediles' edict. Thus:²³

21. Use of the terms "cancellation", "rescission" and "restitution" is problematical, since, unless defined, each of these terms may be used in a general sense, and this obscures difference in principle between remedies. Thus, De Groot, *Inleydinge*, 3.17.1 - 5. uses the term "rescission" in a context in which he is clearly contemplating the extinction of a contract *ab initio*, such as when property which the parties intend to buy and sell is destroyed before a binding agreement is reached. (Also see D.18.1.57.) By contrast, Van der Keesel, *Theses Selectae*, 642 uses the term "rescission" in relation to an action based on the existence of latent defects in a thing sold (presumably an *actio redhibitoria*). Van der Linden, *Koopmans Handboek* 1.15.10. uses rescission to describe the effect on a contract of sale not only of latent defects in the property sold, but also of circumstances which make the contract void *ab initio*, such as *laesio enormis*, and in instances of breach of contract, such as failure of the buyer to pay the agreed price. It is submitted that the terminology encountered in the authorities is not generally a dependable guide to differences between remedies and the concepts on which they are based. It is further thought that analysis of concept and application of principle is likely to be a surer basis for distinguishing remedies than reliance on previous use of terminology.

22. See section 2.10.3 above. J R Harker, *Rescission for Breach of Contract*, p 489; A J Kerr, "Cancellation, Termination, Rescission, or Discharge of Contracts and the Effect Thereof", (1980) 97 *SALJ* 375 at 378 - 379.

23. D.21.1.1.1. It is more accurate to say that the aediles' edict placed the seller under an obligation to take back the defective goods, than to say that he was under an obligation to restore the purchase price. However, since payment of the purchase price was made reciprocally with delivery of the *res vendita*, it follows that, following the return of the *res vendita*, the price too had to be restored.

"The Aediles say: "Those who sell slaves should notify the purchasers if they have any diseases of defects.... If a slave should be sold in violation of this provision, or contrary to what has been said and promised at the time the sale took place, on account of which it may be held that the purchaser and all the parties interested should be indemnified, we will grant an action to compel the vendor to take back the said slave."

Holmes JA refers to the obligation under which the seller is placed, and how it arises in South African law, in the case of *Phame v Paizes*:²⁴

"If there is a latent defect, at the time of the sale *ipso facto* the aedilician remedy is available (unless excluded by agreement). The seller's obligation and the buyer's right arise *by operation of law*, and not by reference to the intention of the parties. It is unnecessary for the buyer to try to fit his resultant right into the concept of a so-called implied warranty against such defects. Nor does the buyer have to aver and prove a breach of a term of the contract...."

The fact that a seller is required to accept redelivery of the *res vendita* because of the existence of an obligation created by operation of law, reveals that the *actio redhibitoria* is indeed an action to *enforce* an existing legal obligation. The action cannot be properly considered to be an instance of *restitutio in integrum*, because no nullification or setting aside of the contract of sale *ab initio*, on grounds of *iusta causa*, occurs.²⁵ The effect of an order of restoration made by a court when an *actio redhibitoria* is sought, is the enforcement of the seller's aedilician liability. It is important to notice that this liability arises, and can be discharged, without any need for litigation, or a court order. The liability arises as soon as the relevant facts are discovered, and is discharged provided that the seller agrees

24. 1973 (3) SA 397 at 416 H. The same reasoning applies in the case of *dicta et promissa*: see p 417 A.

25. The old authorities do not describe the existence of latent defects, or the breach of *dicta promissave* as giving rise to *iusta causa*, which they might if the *actio redhibitoria* was considered to be a true instance of *restitutio in integrum*. Measured against the recognised circumstances in which *iusta causa* for *restitutio in integrum* exists, latent defects in a *res vendita* or failure to make good *dicta promissave* fall short. No element of fraud or negligence need be proved to exist in order for the aedilician actions to be available, either in the case of latent defects, or *dicta promissave*. The seller may have acted entirely innocently and without fault, in which case it can hardly be said that circumstances exist which would justify setting aside the entire legal transaction *ab initio*.

voluntarily to take back the *res vendita*, and restore the purchase price. In particular, it must be pointed out, the seller's aedilician liability to accept restoration does not require the previous nullification of the contract of sale.²⁶ If it did, an order of court *would* be necessary, it is thought, because the actual nullification of a valid contract *ab initio* can only be effected, it is submitted, by a body with appropriate power.²⁷

Finally, if it is accepted that the *actio redhibitoria* and orders of *restitutio in integrum* are distinct remedies, then it may be that the degree to which mutual restoration ought to take place is not necessarily identical in both instances. This potential difference is referred to by van den Heever J in *Schawrzer v John Roderick Motors (Pty) Ltd*:²⁸

"Redhibition is not primarily a *restitutio in integrum*; the Digest bristles with examples of redhibition which fall short of *restitutio in integrum*. Dig. 21.1.23 does not lay down, as is often asserted, that both parties must be put back in the position in which they would be if no sale had taken place, but that neither party is entitled to *more* than he would have had if the sale had not taken place. We call the redhibitory action an action to rescind; actually it is an action on the contract (Kruckmann, *Zeitsch. S. Stift. Rom. Abt.*, vol. 59, p 6)."

2.14.4. An Order of Restitutio in Integrum Distinguished from the Actio Quanti Minoris.

On the basis of the same reasoning that has been applied to the *actio redhibitoria*, it is submitted that the *actio quanti minoris* does not involve the nullification of the contract *ab initio* such as occurs when *restitutio in integrum* is ordered.²⁹ Indeed, it is perfectly clear that

26. By contrast, the requirement of restoration in circumstances of an order of *restitutio in integrum* depends on the previous nullification of the previously existing legal relationship, without which there is no legally recognised reason for such restoration.

27. Section 2.3.2 above.

28. 1940 OPD 170 at 183: *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd and Others* 1974 (1) SA 414 NC.

29. It is submitted that references to the *actio quanti minoris* as involving partial restitution (Kerr, *Contract*, pp 198 - 201) must be interpreted as meaning partial restoration, and not partial *restitutio in integrum*. Nevertheless, it is interesting to note that partial *restitutio in integrum* is considered possible. Voet, *Commentarius*, 4.1.22 mentions that partial restitution

a buyer who elects to seek relief by bringing an *actio quanti minoris* has elected to abide by the contract, and retain the *res vendita*. There can therefore be no question of nullification of the sale *ab initio*. The relief sought involves no more than an assessment of the true value of the thing sold, and the enforcement of the seller's obligation, created by operation of law in the same way as already discussed in relation to the *actio redhibitoria*, to restore an appropriate portion of the price paid.

2.14.5. Laesio Enormis Distinguished from the Actio Quanti Minoris.

Relief involving an assessment of the true value of goods bought and sold immediately brings to mind the now obsolete concept of *laesio enormis*. *Laesio enormis* was recognised in Roman and Roman-Dutch law as one of the circumstances giving rise to *iusta causa* for an order of *restitutio in integrum*.³⁰ The question is, can *laesio enormis* be satisfactorily distinguished from the relief sought in terms of an *actio quanti minoris*? If not, it might be argued that there does indeed exist some ground for considering aedilician relief as a species of *restitutio in integrum*.

The phrase *laesio enormis* means "excessive profit" and describes the situation where, because of unequal bargaining power between buyer and seller, a buyer of land purchased property for less than a half of its true value. In such circumstances, the seller of the land could petition to have the contract of purchase and sale set aside, unless the buyer was prepared to pay more, and make up the full value of the property.³¹ Clearly, it is only the first of these two alternatives that can be described as an instance of *restitutio in integrum*. If

should not have the effect of forcing an unwilling person into co-ownership with another. The possibility of setting aside *ab initio* only part of a divisible transaction is obviously contemplated.

30. C.4.44.2; C.4.44.8; Buckland, *Text-book*, p 486; Thomas, *Textbook*, p 283; Van der Linden, *Koopmans Handboek*, 1.18.10;

31. R W M Dias, *Laesio Enormis: The Roman-Dutch Story*, Studies, p 46.

the buyer declined to pay to the seller the difference between the agreed purchase price and the true value of the land, the existence of the excessive profit (made by the buyer) was recognised as giving rise to *iusta causa* for the nullification of the sale, and a restoration of the parties to their *status quo ante*. On the other hand, if the buyer elected to pay the difference, the contract remained in force, and there was no question of any nullification.

The *actio quanti minoris* involves a different situation and different concepts. In the first place, the question of setting aside the contract of sale does not arise at all in an *actio quanti minoris*, since, by the time he brings the *actio quanti minoris*, the buyer has clearly elected to abide by the sale. Therefore, the alternative choice, in terms of which, under the concept of *laesio enormis*, the seller seeks an order of *restitutio in integrum*, does not exist in an *actio quanti minoris*. Provided the requisite grounds exist, the *actio redhibitoria* may be available as an alternative to an *actio quanti minoris*, but it has already been shown in the previous section that the *actio redhibitoria* is not an instance of an order of *restitutio in integrum*. As for the other possibility available under the concept of *laesio enormis*, that of paying the difference between the value and the price paid, it must be noted that this involves no *restoration* of money already paid, but rather the payment of a sum of money by the *buyer* to the *seller additional* to the price originally agreed. The *actio quanti minoris* is therefore clearly distinguishable from the remedies available in circumstances of *laesio enormis*.

**2.14.6. An Order of Restitutio in Integrum Distinguished from Cancellation (Rescission)
for Breach of Contract.**

Restitutio in integrum has already been described as a remedy in terms of which a valid legal relationship, or the legal consequence of an event, is nullified *ab initio* by a court, and a mutual restoration of benefits ordered, thereby effecting what is sometimes referred to as a restoration of the parties to their *status quo ante*.³² If a contract is taken as the example of

32. Voet, *Commentarius*, 4.1.21:

the legal relationship involved, then the effect of an order of *restitutio in integrum* is that the contract is nullified or extinguished *ab initio*, just as if no contract had ever existed. Because of the nullification of the contract itself, the retention of any thing or benefit previously received in terms of its provisions is no longer legally justified, and it must therefore be restored to the person who gave it.

It is submitted that the remedy of cancellation (rescission) on grounds of breach of contract operates in terms of a wholly different concept.³³ For the purposes of distinguishing the remedy of cancellation on grounds of breach of contract from an order of *restitutio in integrum*, the most important question, for present purposes, is to ascertain what the legal effect is of cancellation for breach of contract. What relief is obtained when this remedy is relied on? This question has been considered above:³⁴ however, the conclusion reached can be conveniently re-stated here. It is suggested that the best view of current South African law is that cancellation for breach of contract is a remedy in terms of which a party to a contract, who is aggrieved by a material breach of contract, unilaterally puts an end to the defaulting party's right to discharge his outstanding contractual liability by means of specific performance.

This description indicates that cancellation is an appropriate remedy only when there exist outstanding contractual obligations to be performed, and the aggrieved party does not wish to allow the defaulting party to discharge them by rendering specific performance. The description does not suggest that the remedy has, as its objective, the recovery of property, or an amount of money, previously delivered. However, there *are* circumstances in which

"The effect of restitution is that all things are put back into their original condition, and that indeed in a single judicial proceeding."

33. Kerr, *Contract*, p 378 and Christie, *Contract*, p 520 prefer the term "cancellation", to describe this remedy, but rescission is one of those terms that just will not go away, however much it may be wished, and the terms are used here as synonymous. Also see A J Kerr, "Cancellation, Termination, Rescission, or Discharge of Contracts and the Effect Thereof", (1980) 97 *SALJ* 375.

34. Section 2.10.3 above.

restoration of property, or an amount of money previously delivered in terms of a valid contract, *are* recoverable following cancellation for breach of contract, even without the entire nullification of the contract *ab initio*.³⁵ For example, if a buyer of goods pays the agreed price to the seller, but the seller does not deliver the agreed thing to the buyer, the buyer is entitled, on grounds of that breach, to cancel any further right of the seller to perform, and sue to recover what he himself gave to the seller.³⁶

It is submitted that the legal basis of this right of recovery is not a nullification of the contract itself, but, simply, the recovery of something given on the condition of receiving reciprocal performance. If that condition (reciprocal performance in the terms agreed) has not been fulfilled, it follows that the person who gave property or money conditionally can recover it.³⁷ This situation is illustrated by the facts in *Baker v Probert*.³⁸ In this case, the buyer purchased a "shareblock" in a company, and paid the agreed price of R17 500 to the seller's agent.³⁹ The seller failed to deliver the share certificate at the agreed time, and after making appropriate demands, the buyer cancelled further performance of the contract. He then sued for the repayment of the purchase price. The claim was plainly one for the recovery of performance, following the cancellation of further specific performance of the contract, no counter performance having been received.⁴⁰ Botha JA said the following:⁴¹

35. Generally see Harker, *Rescission for Breach of Contract*, p 472 ff. Also see section 2.10.4 above.

36. *Baker v Probert* 1985 (3) SA 429 A at 438 I - 439 C. This case is discussed in more detail below.

37. Section 2.10.4 above.

38. 1985 (3) SA 429 A.

39. Payment to the seller's agent was held to be equivalent to paying the seller himself, even though, in this case, the agent did not hand over the money to the seller.

40. At 437 I.

41. At 438 I.

"Although statements can be found in cases and in textbooks suggesting that the seller's liability is based on enrichment, I agree with the view expressed by De Vos *Verykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 2nd ed at 141 - 143, that a claim for restitution of performance following upon cancellation of a contract for breach is not a *condictio* (cf *Landau v City Auction Mart* 1940 AD 284 at 292 - 4 and *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 A at 198 C - D), and I agree with Nienaber J (at 233 C of the report) that the claim is to be regarded as a distinct contractual remedy (cj S W J van der Merwe and M B Reinecke in 1984 *TSAR* 85 at 86). Whether or not the remedy can aptly be described as a claim for *restitutio in integrum* (see the report at 233 B) and A J Kerr in 1984 *THR-HR* at 460) need not be discussed in this judgement, although it might be noted in passing that it would seem to be advisable to distinguish between the non-technical concept of restitution in the sense of "restoration" or "return" and the technical concept of *restitutio in integrum* as dealt with in the common law authorities (see De Vos (*op cit* at 143 - 4))."

The principles remain the same if, instead of non-performance, the seller renders performance, but not in the agreed terms. The seller's malperformance (whenever it is discovered) entitles the buyer to reject what he has been given, and return it to the seller.⁴² Since the general rule is that proper performance must be rendered at the first attempt,⁴³ the defaulting party has no right to a further attempt at specific performance of his obligations after this first attempt. Cancellation is thus, logically speaking, unnecessary as a preliminary to recovering what was given in expectation of a proper counter-performance.⁴⁴ Thus, after rejecting the malperformance tendered, and provided the aggrieved party restores to the seller anything that he has received, he may bring a contractual action to recover whatever he originally gave.

Since cancellation on grounds of breach of contract does not relieve the defaulting party of his contractual liability, but only ends his right to discharge that liability by means of specific performance, the aggrieved party is entitled to bring an action on the contract for an award of compensatory damages, that is, an award of damages calculated to put him in the position he would have been in had performance been carried out, by both parties, in the agreed

42. Mackeurtan, *Sale*, 7.1.1; Section 2.10.4 above.

43. *Holtz v Thurston* 1908 TS 158 at 162.

44. Although possibly redundant, cancellation in these circumstances is certainly not harmful.

terms.⁴⁵ Thus, in the circumstances of *Baker v Probert*,⁴⁶ the buyer could have sued for an award of compensatory damages, to put him in the economic position he would have been in had the shareblock purchased been transferred to him. The quantum of this award would have been calculated as the current market value of the shareblock.⁴⁷ Of course, had the purchaser sued on this basis, he would not have been simultaneously entitled to recover the amount of the purchase price he had paid. He would only be entitled to have the thing sold, or its market value, if he had paid the price agreed. If the price had not yet been paid, the quantum of damages would have to be calculated as the difference between the price agreed and the market value of the thing purchased, since, by this calculation, the objective of compensatory damages is achieved. However, to sue for the value of a thing, *as well as* the return of the price, is to approbate and reprobate the agreement at the same time, which obviously is not allowed.

If, instead of asking for an award of compensatory damages in lieu of specific performance, the aggrieved party sues to recover the property which he delivered, or the amount of money paid prior to the defaulting party's breach of contract, no claim against the defaulting party for an award of compensatory damages in lieu of performance can be entertained, since, once again, that would be to approbate and reprobate the contract simultaneously. However an award of damages to compensate for wasted costs incurred by the party seeking restoration is allowable.⁴⁸

45. Section 2.14.9 and 2.14.10 below.

46. 1985 (3) SA 429 A. Also see *Probert v Baker* 1983 (3) SA 229 D&C. The facts of this case are given above in this section.

47. It must be observed that, in *Probert v Baker* 1983 (3) SA 229 D&C, the remarks of Nienaber J regarding the quantum of compensatory damages appears to have been based on the assumption that payment of the purchase price to the seller had not occurred. Otherwise, it is difficult to understand why the learned judge suggested that the quantum of compensatory damages (he calls them "damages computed on the basis of the so-called "positive *interesse*" but describes them as calculated to put the aggrieved party in the "...hypothetical financial position in which he would have been if no breach had occurred....") is merely the *difference* between the purchase price and the market value of the thing sold, rather than the market value of the thing sold and paid for.

48. Section 2.14.9 and 2.14.10 below. Damages to compensate for wasted costs are clearly distinguishable from an award of compensatory damages made as a substitute for actual performance.

In section 2.14.10 below, the question discussed is whether, in the situation of breach of contract, the aggrieved party is entitled not only to an award of compensatory damages with the objective of putting him in the economic position as if the contract had been performed, but also, as an alternative, whether he is entitled to an award of "restitutional" or "restitutionary" damages, that have as their objective putting the aggrieved party in the economic position he would have been in *had he not entered into the contract in the first place*. However, before addressing that specific question, something must be said about the remedy of an award of damages *generally*.

2.14.7. An Order of Restitutio in Integrum Distinguished from an Award of Damages.

It is submitted that an award of damages, being a way in which a court affords relief to an aggrieved party in a variety of different circumstances, is properly considered to be a distinct remedy in its own right. Before it is possible to distinguish the remedy of an award of damages from the remedy of an order of *restitutio in integrum*, it is necessary to describe *in broad terms* what is meant by the phrase "an award of damages". In fact, there is surprisingly little attention paid to this question by the authorities. Most authorities discuss the remedy of an award of damages, not in *general* terms, but either in relation to the cause of action which gives rise to the claim for an award of damages (for example, damages for breach of contract,⁴⁹ or damages for a delictual act⁵⁰), or in relation to the way in which the quantum of an award of damages is calculated (that is, in relation to various types of loss, such as immediate loss, consequential loss, and so on). Nevertheless, a description of the remedy that does not depend on, or include, mention of the cause of action, or the way in which the award of damages is measured, must be attempted, in order to abstract the concept.

49. Kerr, *Contract* p 417 ff; Christie, *Contract* p 523 ff; De Wet and Yeats, *Kontraktereg* p 200 ff; Joubert, *Contract*, p 246 ff.

50. Boberg, *Delict*, 475 ff; Van der Merwe en Olivier, *Onregmatige Daad*, p 176 ff.

It is suggested that an award of damages can be generally described as a remedy in terms of which a court orders that one person, who, contrary to the law, has caused loss, or harm (injury), to another person, pay a sum of money to the injured party, in order to compensate him for the loss or harm. This definition is thought to be wide enough to include all awards of damages, regardless of the legal context or cause of action, or of the specific objective of a particular award.⁵¹

M Nathan says the following about an award of damages generally.⁵²

"...damages may be defined as the compensation claimable by a party who suffers loss by reason of a breach of duty towards him."

P Q R Boberg says this:⁵³

"The terms "damage" and "damages" are sometimes used incorrectly. "Damage" is the loss suffered by the plaintiff (skade, *damnum*); "damages" is the monetary compensation that the court gives him for it (skadevergoeding). In short, damages are awarded for damage."

An award of damages has the *general* objective of compensating the innocent party, by pecuniary means, for the loss or injury for which the defaulting party is legally liable. The award of damages is therefore a means of giving effect to, or *enforcing*, a legal liability. This

51. Particular types of award of damages are considered in the following sections.

52. Nathan and Schlossberg, *Damages* p 5. Nathan notes that his definition is not comprehensive, since it does not take account of *pauperies* which, he says, does not arise out of a breach of duty.

53. Boberg, *Delict*, p 475. In English law, see McGregor, *Damages*, p 3:

"Damages are the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum which is awarded unconditionally and is expressed in English currency."

Ogus, *Damages*, p 1:

"...an award of damages is...the sum of money payable as compensation for an injury resulting from a tort or breach of contract."

generalisation is true of damages awarded in respect of liability either for breach of contract, or in respect of a delictual act, or for liability which arises in some other way in terms of existing law, such as where liability for loss, or injury, is imposed in the absence of either prior agreement, or any negligent act or omission.⁵⁴

The concept of damages generally has been discussed. It is now necessary to say something about specific types of awards of damages which are available in the context of the law of delict and contract.

2.14.8. The Objective of an Award of Damages for Delictual Wrongs.

The particular (as opposed to the general) objective of an award of damages differs, depending on whether the aggrieved party's loss or injury results from a breach of contract, or a delict. In cases involving a delict, the objective of damages is said to be to put the innocent party in the position he would have been in had the delictual act not been committed. Put another way, the innocent party is, by means of an award of pecuniary compensation, to be restored to the economic position he would have been in had no injury or wrong been done to him.⁵⁵ In a general sense, therefore, the objective of an award of damages in delict can be described as "restorative" since the award has the objective of achieving a sort of economic restoration, the economic equivalent to a previous state of affairs. However an award of damages to compensate an injured person for a delictual

54. For example, the *actio de pauperie*.

55. Boberg, *Delict* p 478:

"The object of awarding damages is to place the plaintiff, as far as a money payment can, in the position in which he would have been had the delict not been committed."

Also see *Union Government v Wameke* 1911 AD 657 at 665; *Oslo Land Co Ltd v Union Government* 1938 AD 584 at 590; *Erasmus v Davis* 1969 (2) SA 1 A at 9 and 17; *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 A at 150; *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 A at 917; *Krugell v Shield Versekeringsmaatskappy Bpk* 1982 (4) SA 95 T at 99. The same principle governs English law: Ogus, *Damages*, p 17.

wrong is obviously not an instance of an order of *restitutio in integrum*, at least, not in South African law.⁵⁶ This distinction is justified because such an award of damages is not based on any notion of nullifying a valid legal transaction, or the legal consequences of an event, *ab initio*. Rather, a delictual act gives rise to an enforceable obligation, and thus to a liability, which is discharged by the guilty party paying a compensating monetary award.⁵⁷

The practical consequences of the distinction drawn between the remedies can be illustrated. Suppose that A enters into a contractual relationship with B, induced thereto on disadvantageous terms by *dolus* on the part of B. When he discovers B's fraud, A may elect to abide by the contract, but may nevertheless sue B for damages, on the basis that the fraud gives rise to a delictual liability. The damages will be calculated to restore A to the position he would have been in had B not perpetrated the fraud, that is, to offset the economic effect of the disadvantageous terms to which, but for the fraud, he would not have agreed.⁵⁸

Since he has elected to abide by the contract, it cannot be said that, but for the fraud, A would not have entered into the contract at all. The quantum of damages is not therefore calculated to put A into the position that he would have been in had he not entered into the contract at all, but to put him into the position he would have enjoyed as if no fraud had been practised.

Of course, on the basis that *dolus* constitutes *iusta causa* for an order of *restitutio in integrum*, A might have opted for that remedy instead of abiding by the contract. In such a case, the position that A would have been in had no fraud been practised would be his pre-

56. English text-book writers commonly refer to an award of damages in tort as being based on the principle of *restitutio in integrum*. Street, p 3; Ogus, p 17; McGregor, p 10. It must be noted that, in English law, the phrase *restitutio in integrum* does not have the same meaning as it does in Roman, Roman-Dutch or South African law, and generally, in English law, appears to be used to indicate "restitution" in the wide sense of "restoration".

57. Section 3.1.6 below.

58. See generally *Trotman v Edwick* 1951 (1) SA 443 A; *Bill Harvey's Investment Trust (Pty) Ltd v Oranjezicht Citrus Estates (Pty) Ltd* 1958 (1) SA 479 A; *Scheepers v Handley* 1960 (3) SA 54 A; *De Jager v Grunder* 1964 (1) SA 446 A; *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 A; *Ranger v Wykerd* 1977 (2) SA 976 A; *Coomers Motor Spares (Pvt) Ltd v Albanis* 1979 (2) SA 623 R; *Davidson v Bonafede* 1981 (2) SA 501 C.

contractual position, and this would be the appropriate way to calculate the quantum of damages, were A to claim delictual damages in addition to an order of *restitutio in integrum*.⁵⁹

2.14.9. The Objective of an Award of Damages for Breach of Contract.

In a case of breach of contract, it has long been trite law that the particular (as opposed to the general) objective of an award of damages is to put the innocent party into the same economic position that he would have been in had the terms of the contract been properly performed.⁶⁰ In other words, the pecuniary award is not calculated with the objective of restoring the innocent party into the position he would have been in if he had never entered into the contract. Rather, the award is calculated so as to place him, economically, in the position he would have been in if the contractual obligations had been performed without material default. This is important, because it makes clear the fact that damages for breach of contract are not aimed at putting the aggrieved party *back* economically into his *pre-contractual* position, but are aimed at substituting a pecuniary award for actual performance of the terms of the agreement. The award of damages is made in lieu of the actual performance of the contractual obligations.

Damages calculated on this latter basis are often described as "compensatory" damages,

59. Although distinguishable, an order of *restitutio in integrum* is not incompatible with a claim for delictual damages. Section 2.2.2 above.

60. Christie, *Contract*, p 523:

"Unlike damages for delict, damages for breach of contract are not intended to recompense the innocent party for his loss, but to put him in the position he would have been in if the contract had been properly performed."

Kerr, *Contract* p 436; De Wet and Yeats, pp 200 - 201; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 A at 687 C; *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 885 A at 875 C.

but of course, as pointed out above,⁶¹ compensation is an inherent characteristic of *all* awards of damages, even those calculated by in cases involving delictual liability. A better descriptive phrase for damages in cases of breach of contract is "substitutional damages", in that the award of damages substitutes for the specific performance of the obligations, rather than restoring the innocent party to his pre-contractual position.⁶² An award of damages calculated on the basis here described has also been referred to as an award calculated on the basis of the aggrieved party's "positive interesse".⁶³

So far, the discussion has concerned only the *objective* of an award of damages for breach of contract. The *extent* to which damages will be awarded in terms of that objective is a distinct question. The extent to which substitutional damages are claimable depends on the circumstances of each case. In general it can be said that the aggrieved party is entitled to claim not only the immediate losses which flow from the breach of contract, but also the consequential losses, which, it is thought, includes any wasted expenses.⁶⁴ However, in

61. Section 2.14.7.

62. The question whether an award of damages for breach of contract can properly be calculated with the objective of restoring the aggrieved party to his pre-contractual position is considered below in this section in section 2.14.10. It is submitted that the better view is that such a calculation of damages in cases of breach of contract is not allowed in South African law.

63. *Probert v Baker* 1983 (3) SA 229 D&C at 223 H. Nienaber J says:

"Damages for breach of contract is usually computed on the basis of so-called positive *interesse*. Broadly speaking, this method involves a comparison between the aggrieved party's actual financial position (now that the breach has occurred) with the hypothetical financial position in which he would have been if no breach had occurred, ie if the contract had been duly performed by the guilty party."

64. Wasted costs, that is, expenditure incurred which is then wasted because of the defaulting party's breach of contract, constitutes a loss which, it is submitted, is seen to flow directly from the breach in question, and which the law presumes the parties contemplated as a probable result of breach of contract, and thus constitute consequential damages. *Evans & Plows v Willis & Co* 1923 CPD 496; *Stowe v Scott* 1929 TPD 450; *Van der Walt v Louw* 1955 (1) SA 690 T at 691 H. It has not yet been authoritatively decided by the Appellate Division whether liability for consequential damages arising in circumstances of breach of contract is better considered to be a delictual or contractual liability: *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 A at 687. Kerr, *Contract*, p 436 ff; Christie, *Contract* p 523 ff; Joubert, *Contract*, p 246 ff. Damages to compensate for wasted expenses are sometimes termed "restitutionary damages": see Kerr, *Contract*, p 200.

order for damages to be claimable, the losses must flow directly from the breach of contract, and must also have been in the contemplation of the parties at the time of contracting.⁶⁵ Further, it must be appreciated that the various types of *loss* (immediate loss, consequential loss, etc.) that can be taken into account to calculate the extent of the pecuniary compensation that is properly awarded does not affect the fundamental rule that the *overall objective* of the award of damages is to place the aggrieved party in the position he would have been in had the terms of the contract been properly performed.

2.14.10. No Restitutio in Integrum in the form of an Award of Damages for Breach of Contract.

The question was raised in *Probert v Baker*⁶⁶ whether an award of damages for breach of contract can be properly calculated not only with the (usual) objective of putting the innocent party in the position he would have been in had the terms of the contract been performed,⁶⁷ but, if the innocent party so chooses, with the alternative objective of putting him in the economic position he would have been in had he never entered into the contract in the first place.⁶⁸ The idea is contained in the following question posed by Nienaber J in *Probert v Baker*.⁶⁹

65. *Dennill v Atkins* 1905 TS 282 at 288; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 A at 687 D - H. Kerr, *Contract*, p 443 ff; Christie, *Contract* p 527 ff; De Wet and Yeats, *Kontraktereg*, p 203; Joubert, *Contract*, p 250 ff.

66. 1983 (3) SA 229 D&C. This case has been discussed by D J Joubert 1983 *De Jure* at p 373; A J Kerr, 1984 *THR-HR* at p 460; J S McLennan, (1984) 101 *SALJ*, at p 616; S W J van der Merwe and F M B Reinecke, 1984 *TSAR* at p 85; and R D Sharrock, (1985) 102 *SALJ*, at p 616.

67. That is, substitutional (compensatory) damages, or, as Nienaber J calls them in *Probert v Baker* at 233 H, damages calculated on the basis of the aggrieved party's "positive *interesse*."

68. That is, "restitutionary" damages, or as Nienaber J calls them in *Probert v Baker* at 234 A, damages calculated on the basis of the aggrieved party's "negative *interesse*." "Restitutionary damages" so defined appear to be indistinguishable from damages awarded in cases of delictual liability. Cf the use of the term "restitutionary damages" by A J Kerr, *Contract*, p 200, to refer to compensation for wasted expenses.

"Can a claim for restitutionary damages be advanced for a breach of contract in contradistinction to, say, fraudulent misrepresentation? In my opinion it can, provided only that the contract has been duly cancelled by the aggrieved party."⁷⁰

It is submitted that there does not seem to be any requirement in principle for allowing such an alternative objective for an award of damages in cases of breach of contract, for the following reasons:

Firstly, it must be said that, in South African law, breach of contract does not in itself constitute a delict,⁷¹ so there is no justification for employing a delictual measure of damages in cases where the cause of action is breach of contract.⁷²

Secondly, although material breach of contract allows the aggrieved party to cancel further performance of outstanding obligations, breach of contract does not give rise to *iusta causa* for an order of *restitutio in integrum*.⁷³ The importance of this distinction is that cancellation of the contract does not result in the nullification *ab initio* of the contractual relationship or the obligations created thereby. These continue to exist after cancellation, and are discharged by alternative means, in particular, by the defaulting party paying damages in lieu of performance. It is submitted that there is no justification in principle for suggesting that a liability to pay damages in lieu of specific performance is, at the election of the party

69. At page 234 D.

70. Authorities relied on by Nienaber J are: *Inhambane Oil and Mineral Development Syndicate Ltd v Mears & Ford* (1906) 23 SC 250; *Clarke v Durban & Coast SPCA* 1959 (4) SA 333 N; *Seggie v Phillip Bros* 1915 CPD 292; *Van der Walt v Louw* 1955 (1) SA 690 T. Also see *Svorinic and Others v Biggs* 1985 (2) SA 573 WLD at 577 F ff.

71. However, a single act may give rise to both delictual and contractual, as well as criminal liability: Boberg, *Delict*, p 1.

72. See section 2.14.8 above. "Restitutionary damages" for breach of contract, as defined by Nienaber J, are calculated with the same objective as an award of delictual damages. It is submitted that such a practice would have the result of blurring important distinctions that exist in South African law between contractual and delictual liability.

73. Section 2.10.

aggrieved by breach of contract, transformed into a liability to pay damages calculated to restore the aggrieved party to his pre-contractual position. An award of damages so calculated suggests a destruction of the contract *ab initio*,⁷⁴ which is not the result of cancellation.

The fact that restoration of property, or an amount of money, previously delivered may be required after cancellation for breach of contract does not provide an acceptable analogy on which to postulate a general contractual liability for damages calculated on a "restitutionary" basis. The restoration of what has been given that may be ordered in such cases is ordered because, without reciprocal performance, there is no justification for allowing the defaulting party to retain property or benefits received. It is not based on the notion of compensation for non-performance.

It is therefore submitted that the applicable principles dictate that the only proper calculation of the quantum of damages awarded as compensation for breach of contract is one based on the concept of substitutional damages (the innocent party's "positive *interesse*"). As yet, it is thought, insufficient reason has been advanced to justify the calculation of an award of damages for breach of contract on the basis of the "negative *interesse*" of the innocent party. The questions raised in *Probert v Baker*⁷⁵ were left undecided by the Appellate Division in *Baker v Probert*,⁷⁶ and must be considered open. However, it must be said that while the results of applying alternative objectives for an award of damages for breach of contract may seem desirable in the circumstances of particular cases, it is submitted that it is preferable to maintain distinctions based on principle, and, in the way demonstrated by the Appellate Division in *Baker v Probert*, find alternative approaches to resolving difficult cases.

74. *Salzwedel v Raath* 1956 (2) SA 160 E at 164 A. Jennett AJP indicates that, in his view, a claim for "restitutionary" damages suggests a destruction of the contract *ab initio*.

75. *Probert v Baker* 1983 (3) SA 229 D&C.

76. 1985 (3) SA 429 A.

CHAPTER 3.

ORDERS OF SPECIFIC PERFORMANCE.

3.1. INTRODUCTION.

3.1.1. An Outline.

In this chapter, the remedy to be examined and discussed is an order of specific performance. This is a remedy which is commonly sought in, and ordered by, South African courts, but nevertheless there are aspects of this remedy which require careful analysis and explanation if its nature, role, and availability are to be fully understood. In the course of this chapter, the nature and origins of an order of specific performance as a remedy will be investigated. Then the elements which must exist before an order of specific performance will be ordered are identified and examined. Thirdly, the existence of limitations on the right to an order of specific performance, and the nature and extent of these limitations are considered. Finally, some particular instances in which an order of specific performance may be appropriate are examined, in particular, pre-emptive agreements and agreements in restraint of trade.

3.1.2. Some Important Questions that Arise.

As may be expected, a new study of any topic is likely to yield fresh insights, and to raise questions that are important in relation to how the topic is viewed and understood. A brief statement of some of the major questions raised and dealt with in this chapter may be useful to indicate the nature of what follows.

1. Is an order of specific performance a remedy which is only appropriate in relation to contractual obligations? Is the remedy appropriate to enforce all different types of legally valid contractual obligation?
2. What distinguishes an order of specific performance from other remedies in South African law which also aim at the enforcement of legal obligations?
3. Is the development of the modern remedy of an order of specific performance in South African law directly traceable to Roman and Roman-Dutch law?
4. Is an order of specific performance appropriate when the performance which it is sought to enforce involves an act of forbearance or restraint, rather than a positive duty of performance?
5. What essential elements must be pleaded and proved to exist before an order of specific performance may be said to be available? In particular, is *breach* of the duty to perform a necessary element?
6. To what extent is it possible to contemplate successfully obtaining an order of specific performance in situations in which either illegality, or impossibility, is an element?
7. What are the effects of co-existent obligations, such as bilateral reciprocal obligations, on

the availability of an order of specific performance?

8. To what extent is substitute performance, as opposed to specific performance, and partial performance, as opposed to complete performance, recognised in South African law as validly discharging obligations to perform?

9. What principles truly govern the discretionary power of a court to refuse an order of specific performance?

10. Is an order of specific performance the appropriate remedy to enforce agreements in restraint of trade?

11. Is it necessary for a plaintiff who seeks an order of specific performance to ask at the same time for an alternative remedy, such as an award of damages?

3.1.3. The Meaning of the Phrase "An Order of Specific Performance" in South African law.

The phrase "an order of specific performance" can be understood in different ways, and its meaning as used in this work must be made clear.

The phrase "an order¹ of specific performance" is used to mean the remedy in terms of which a court orders a person to carry out the actual terms of his contractual obligations. An order of specific performance is considered to be a *remedy*, in that it is a means by which a court affords relief to a plaintiff when a debtor will not voluntarily perform the terms of contractual obligations that he has undertaken. The relief afforded by this remedy is that, armed with the order of court, the creditor can coerce a reluctant debtor to perform the terms of outstanding contractual obligations.

The unqualified phrase "specific performance" is used in this work to mean the voluntary carrying out, by a person, of the actual terms of his contractual obligations. Voluntary specific performance is not a remedy. It is, rather, the ordinary way in which a person who has undertaken a contractual obligation discharges his liability.²

The "enforcement of an order of specific performance" refers to the processes and procedures whereby a court compels a defaulting party to comply with an order of specific performance. As an alternative to compelling the defaulting party to perform himself, the specific performance of contractual obligations can sometimes be accomplished by the court appointing a person, other than the person liable, such as a court official, to carry out the required act in his stead.³

Although the phrase "specific performance" appears to have gained currency in South African law as a result of the influence of the terminology used in English law,⁴ the remedy in terms of which a South African court orders the carrying out of the actual terms of a contractual obligation is thought to have its roots in Roman and Roman-Dutch law, not English law.⁵ This is not to say that English law has been without influence, but the point to be made here is that adoption of the English term to describe the remedy should not be

1. Orders of specific performance have sometimes been referred to as "decrees" of specific performance: see, for example, *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343 at 350; *Pougnat v Ramlakan* 1961 (2) SA 163 at 166; Kerr, *Contract*, p 397. However, Christie, *Contract*, p 505, points out that South African courts issue orders, not decrees, a term which he suggests originates in English equity. The phrase "an order of specific performance" is thus to be preferred in South African law.

2. De Groot, *Inleydinge*, 3.39.7. Voet, *Commentarius*, 46.3.1 says the following:

"Payment sometimes embraces every dissolving and satisfying of an obligation, since he who has done what he promised to do is said to pay. In the same sense an obligation is a bond of law by which we are tied with the need for paying something. But payment properly so called, in so far as it differs from formal release, novation and many other ways of dissolving an obligation, is a physical furnishing of what is due."

Also see *Harrismith Board of Executors v Odendaal* 1923 AD 530 at 539.

3. See sections 3.3.2 - 3.3.4 below on the enforcement of orders of specific performance.

understood as implying that the English law remedy itself has been imported into South African Law.

It is not thought that any need exists to displace the use of the English term "specific performance". De Wet and Yeats⁶ use the term "vervulling *in forma specifica*" and "reële eksekusie" as equivalent to "specific performance". From this example, it might be suggested that either "performance *in forma specifica*", or "actual execution", could perhaps be used as a preferred alternative to "specific performance". However, no advantage stems from adopting a Latin term, or a different English phrase, to replace one that is already accepted and in use. Indeed, since the phrase "performance *in forma specifica*" is sometimes used to distinguish performance in the actual terms agreed, from substitute performance, (performance *per aequipollans*)⁷ the adoption of the Latin phrase to describe the remedy generally may cause confusion.

3.1.4. An Order of Specific Performance Only Appropriate in Relation to Contractual Obligations.

There are various questions which must be considered in order to determine the nature and scope of orders of specific performance. The first question is whether it is appropriate to treat *all* cases involving the enforcement of legal obligations as instances of orders of specific performance, or whether an order of specific performance is only appropriate in relation to

4. Hiemstra and Gonin, *Trilingual Legal Dictionary*, p 123.

"Specific performance *spesifieke nakoming* (het onder invloed van Engels gangbaar geword; *reële eksekusie* is die Romeins-Hollandse uitdrukking); *vervulling/ nakoming in forma specifica*."

5. Section 3.2.1 - 3.2.4 and 3.3.1 below.

6. De Wet and Yeats, *Kontraktereg*, p 188 -190.

7. As instances of this usage, see *Van Diggelen v De Bruin* 1954 (1) SA 188 SW at 192 - 193; Christie, *Contract*, Contract, p 406 - 407.

the enforcement of *contractual* obligations. For example, when a person, who is under a *delictual* liability, is ordered to pay compensation to the person he has injured, or whose property he has damaged, is the order of the court properly considered to be an order of specific performance? Cases exist in which it has been suggested that such orders may indeed be properly conceived as instances of specific performance.⁸ However, it is submitted that to use the phrase "specific performance" to describe the enforcement of delictual obligations, or the enforcement of legal obligations other than contractual obligations, has the effect of broadening the meaning of the term "specific performance" so that it becomes the equivalent of the more general term "enforcement".⁹ If this is done, the usefulness of the term, for describing a remedy which exists in relation to a specific type of legal obligation, that is, contractual obligations, is lost, and it becomes difficult to explain differences in the legal rules which govern the enforcement of the specific performance of contractual obligations, as opposed to enforcing a delictual claim for damages; or a claim for an award of damages in lieu of specific performance following a breach of contract; or to enforce obligations created by law, such as the payment of maintenance by a parent in respect of a child. While all of these different cases, broadly speaking, involve the *enforcement* of legal obligations, it is submitted that the best view is that the term "an order of specific performance" is best reserved to describe the enforcement of contractual obligations only.¹⁰ The reasons for this proposition are discussed in the following sections.

8. *Zinman v Miller* 1956 (3) SA 8 T; *Carpet Contracts v Grobler* 1975 (2) SA 436 T. *Weepner v Kriel* 1977 (4) SA 212 C at 216 - 217. However, it must be pointed out that these cases are concerned with the meaning of the phrase "specific performance" as used in section 46 (2) (c) of the *Magistrates' Court Act*, No 32 of 1944, rather than the meaning of the phrase generally. For an explanation of the meaning of the phrase as used in section 46 of the *Magistrates' Court Act*, see section 3.1.8 below.

9. See below for a discussion of the reasons for restricting the remedy of an order of specific performance to contractual obligations, as distinct from the enforcement of real rights, (section 3.1.5) delictual obligations, (section 3.1.6) obligations arising by quasi-contract and those arising directly by operation of law, such as in circumstances of family relationships (section 3.1.7).

10. *Maisel v Camberleigh Court (Pty) Ltd* 1953 (4) SA 371 (c) at 379; *Olivier v Stoop* 1978 (1) SA 196 T at 202 C. Also see Jones and Buckle, *Civil Practice of the Magistrates Courts*, p 154 - 156.

3.1.5. An Order of Specific Performance not Appropriate to Enforce Real Rights.

It is submitted that there is no doubt that an order of specific performance is a remedy which is not appropriate in relation to the enforcement of a real right. Thus, no authorities suggest that, when a court orders the possessor of property to give possession of that property to its owner, who has sued on grounds of ownership to recover possession, that the order is one of specific performance. Although such an order to transfer possession of the property involves the performance of a specific act, that is, the delivery by the possessor of the property to the owner, the relief sought does not involve the performance of the terms of agreed undertakings. Nor is reference made, in such circumstances, to the performance of any "obligation" to make restoration. The relief available to the owner consists of a direct enforcement of his real right, which entitles him to recover possession of his property from whoever has it.¹¹ Thus, the owner who brings an action (*rei vindicatio*) to recover his property does not have to allege that the possessor is under an *obligation* to make restoration, nor that he (the owner) seeks performance of any such obligation. He need only allege and prove that the defendant is in possession of the property in question, and that he, plaintiff, is the owner thereof, in order for a court to order the delivery of the property to the owner.¹² Thus, although the order of court enforces the owner's rights, it is not, in the conventional sense, an order of specific performance.

11. The same principle applies in relation to the enforcement of real rights other than ownership, such as *iura in re aliena* (servitudes) and rights of possession.

12. Silberberg and Schoeman, *Property*, p 289:

"An owner who institutes the *rei vindicatio* to recover his property is required to allege and prove no more than

a that he is the owner of the thing...

b that it was in the possession of the defendant at the commencement of the action."

Also see Carey Miller, *Ownership*, p 255 - 256.

3.1.6. An Order of Specific Performance not Appropriate to Enforce Delictual Obligations.

In South African law, the law of obligations is conventionally divided into contract law and delict. However separately these topics may be treated in modern legal practice, it ought not to be forgotten that they share a common conceptual background, that is, that the law of both contract and delict is concerned with the creation, enforcement and extinction of personal rights and duties. In Roman law, contracts and delict are treated as subdivisions of the law of obligations generally,¹³ and logically, this arrangement cannot be faulted. The question that arises is, if both contract and delict give rise to obligations, in the Justinianic sense of "a legal bond whereby we are constrained to perform something",¹⁴ on what basis can an order of specific performance be said to be a remedy which is available to enforce contractual but not delictual obligations? What explanation exists for restricting the availability of an order of specific performance to contractual obligations?

It is submitted that the answer lies in the difference in the nature of contractual and delictual obligations. In the case of a contract, legally enforceable obligations are created when, by agreement, the persons involved give serious and deliberate undertakings to do something. It follows naturally from this that *performance* of the agreed terms has the effect of discharging the contractual liability so created. In fact, this was not always the case. In early Roman law, liability arising *ex contractu* was not discharged automatically by the specific performance of the agreed terms, but only by a formal release from the obligation *after* performance.¹⁵ Later, it became recognised that performance itself discharged the

13. Inst. 3.13.pr. - 2. (Translation by J A C Thomas):

"An obligation is a legal bond whereby we are constrained by the need to perform something according to the laws of our state. The principal division of all obligations is into two kinds: for either they are civil or they are praetorian.... There follows a division into four categories: for obligations arise from contract or are quasi-contractual, from delict or are quasi-delictual."

14. See the passage cited in the previous footnote.

contractual liability.¹⁶ Compliance with an *order* of specific performance has the same effect, that is to say, it discharges the outstanding contractual liability. So too, if, instead of being ordered to render specific performance, the defaulting party is ordered to pay damages in lieu of performance, payment of the damages discharges the contractual liability. Specific performance, or the payment of damages in lieu of performance, are thus alternative, and different, ways of discharging contractual liability.¹⁷

In cases of delict, a legal obligation is created by a negligent, or intentional, commission of a wrongful act (sometimes omission to act), which causes loss or injury to another person, or to his property. Originally, in Roman law, the redress available to a person injured physically was physical retaliation (unless the parties could agree on alternative composition). If property was damaged or destroyed, redress consisted of recovery of its value from the person causing the loss.¹⁸ In time, the alternative of foregoing physical retaliation, and instead accepting financial compensation for physical injury, became the accepted rule. Thus, the liability created by a delictual act became a liability to compensate financially for injury, or loss, caused.¹⁹ This liability was, and is, discharged by paying damages. If such damages are not paid voluntarily, a court will give relief in appropriate cases by making an award of damages, the payment of which can then be enforced.

15. Thomas, *Textbook*, p 343. The term used to describe the discharge of liability is *solutio*, which implies freeing the *persona obligata* from his legal liability to render further performance. The *contrarius actus* principle required the contractual relationship to be formally discharged in the same way as it has been created: thus liability created by *nexum* was discharged, after repayment, by release *per aes et libram*.

16. D.46.3; Thomas, *Textbook*, p 343.

17. The choice of which is the preferred alternative lies with the plaintiff rather than the defendant, subject to the discretionary power of the court to refuse to order specific performance.

18. Thomas, *Textbook*, p 364, 369.

19. Thomas, *Textbook*, p 350:

"The progress of the law of delict, then, would seem to have been from self-help to agreement to make satisfaction and thence to the law's requiring proceedings for monetary redress in all cases."

Whereas it has been seen that a contractual liability can be discharged *either* by the specific performance of the terms of the obligation, or, alternatively, by the payment of damages in lieu of performance (the choice of remedy resting with the aggrieved party, subject to the discretion of the court)²⁰ the same alternatives are not available in the case of a delictual liability. There is only one way that a delictual liability is discharged, and that is by the payment of damages. There is no "performance", distinct from the payment of damages, which the aggrieved party can elect to enforce rather than sue for an award of damages. Thus, unless the payment of damages is to be equated with the performance of a voluntary undertaking, it cannot be said that an order of specific performance is an appropriate remedy to enforce a delictual obligation, or that it is an appropriate description of an order to pay damages to compensate for unlawful loss or injury caused negligently or intentionally by one person to another. It is submitted that, on this basis, the restriction of the remedy of an order of specific performance to contractual, as opposed to delictual, obligations is justified.

3.1.7. An order of Specific Performance Not Appropriate for the Enforcement of Rights and Duties Arising in the Law of Persons, Quasi-Contract, or Rights and Duties Created Directly by Law.

There exist further circumstances in which enforceable legal rights and obligations are created, but in which context, it is submitted, the remedy of an order of specific performance is inappropriate.

The first of these instances is legal rights and duties arising directly out of a person's status, and from family relationships. Examples are the rights and duties that arise as a result of citizenship, or the right and corresponding duty of support that exists between husband and wife, or between parent and child.²¹ The second instance is when legal rights and duties

20. Generally see section 3.7 below.

arise in quasi-contract. An example of quasi-contract is *negotiorum gestio*, in which situation one person (the *gestor*) acts to protect the interests of an absent person (the *dominus*), without expectation of remuneration.²² Thirdly, there are cases in which the law creates enforceable rights directly, without reference to the intention of the parties, nor to the concept of quasi-contract. An example is the provisions of the Aediles' edict, which, in the context of contracts of sale, require the seller of goods take back the goods sold if they suffered from material latent defects at the time of the sale, or if the seller failed to make good what he had said and promised at the time of the sale.²³ Another example of the direct creation of enforceable legal rights and liabilities is the creation of enforceable rights by statute, such as the Credit Agreements Act.²⁴

It is submitted that in all of the instances presently under discussion, the enforcement of the existing legal rights and corresponding duties involves the direct enforcement of legal rights and duties, without any reference to the concept of an obligation to carry out the terms of an undertaking. Further, the enforcement of these rights is clearly not subject to the discretionary power of the court, as is the issue of an order of specific performance.²⁵ When a legal duty of support exists between two persons, such as husband and wife, one of whom is unable to support himself, and the other being able to provide support, then there is no

21. Hahlo and Kahn, *South Africa* p 346; Boberg, *Persons*, p 47, 249 ff.

22. Van Zyl, *Negotiorum Gestio*, p 3. The *gestor* is entitled, *inter alia*, to claim reimbursement of all necessary and useful expenses incurred. further important examples of quasi-contract are the specific situations involving unjust enrichment in which the law allows a right of recovery of property or money. *Nortje en 'n ander v Pool* NO 1966 (3) SA 96 A; *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 T; *Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600 D at 606 G - 607 C; *Montres Rolex SA v Kleynhans* 1985 (1) SA 55 C at 68 B; De Vos, *Verrykingsaanspreeklikheid*, 327 ff.

23. *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 A. Also see section 2.14.3 and 2.14.4 above.

24. Act No. 75 of 1980. Section 8 of the Credit Agreements Act requires the credit receiver to furnish certain information to the credit grantor, such as a change of address, or a change of the place where the goods purchased are kept, and section 12 requires the credit grantor to restore goods that have been repossessed, to the credit receiver in certain circumstances.

25. See section 3.7 below on the discretionary power of the court to refuse an order of specific performance, in which cases the aggrieved party must be satisfied with an alternative remedy, such as an award of damages in lieu of performance.

question of a court exercising a discretion against enforcing that duty, and ordering the party liable to pay damages in lieu of paying maintenance. Questions of fact apart, once a legal right to support is found to exist, it is enforceable, and the court is bound to give effect to that right. It is submitted that the same is true when a *gestor* sues a *dominus* to recover expenditure incurred by the *gestor* in looking after the absent *dominus*' affairs.²⁶ In such a case, it is submitted, the court has no discretion to refuse to order the re-imbusement to which the *gestor* is legally entitled, and instead order the payment of damages. The law creates a right entitling the *gestor* to recover necessary and useful expenditure incurred,²⁷ and that right may be directly enforced. So too, in the case of the aedilician actions, the law does not make provision for an award of damages in lieu of restoration, but requires that, given appropriate facts, actual restoration, either of the thing, or of a portion of the purchase price, take place.²⁸ No alternative to these courses of action is available, unless, of course, other grounds exist for an alternative action, say, for breach of contract. Finally, although criminal penalties are provided by the Credit Agreements Act for failure to comply with the positive requirements of the act, it is submitted that these are not an alternative to enforcement, but are additional penalties, and compliance may be required of the defaulting party, notwithstanding the imposition of penalties.²⁹

In view of these considerations, it is submitted that the remedy known as an order of specific performance is not appropriate to enforce legal rights arising from status, family relationships, quasi-contract, the aediles' edict, or otherwise created directly by law. An order of specific performance is, rather, only appropriate to enforce the performance of the terms of contractual obligations created by agreement, whether expressly or impliedly, or residually.³⁰

26. D.3.5.2; Voet, *Commentarius*, 3.5.2 - 3; De Groot, *Inleydinge*, 3.27.3 and 5; *McEwen v Khader* 1969 (4) SA 559 N at 561.

27. Van Zyl, *Negotiorum Gestio*, p 67 ff.

28. D.21.1.1.1. *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 A at p 410 and 417. Also see section 2.14.3 and 2.14.4 above.

29. Section 23 of Act 75 of 1980.

3.1.8. An Order of Specific Performance may be Either an Order Ad Factum Praestandum or Ad Pecuniam Solvendam.

There is a further question that arises. Even if it is accepted that an order of specific performance is appropriate only in relation to contractual obligations, it must be asked whether an order of specific performance is appropriate to enforce *all* possible types of contractual obligation, or only certain of them. Contractual obligations may consist of many different types of undertaking. The law does not impose limits on the type of activity that can be incorporated into a contract, save that undertakings should not be illegal, immoral, contrary to public policy or impossible.³¹ Thus, generally, legally enforceable contractual obligations can be created which require either the performance of an act, such as the rendering of services,³² or the making of a thing,³³ or the delivery of property,³⁴ or the payment of a sum of money,³⁵ or even an undertaking to refrain from doing something, such as competing in business,³⁶ or selling property within a stated period of time.³⁷

In order to decide whether an order of specific performance is an appropriate remedy to enforce all types of legally valid contractual obligation, whatever the particular duty of performance involved,³⁸ it is necessary to take note of the distinction that is drawn between orders of court which require the payment of a sum of money (orders *ad pecuniam solvendam*), and orders of court made to enforce the performance of an act other than the payment of money (orders *ad factum praestandum*). This is an important distinction because of the different methods by which these two types of order may be enforced. Orders *ad factum praestandum* may be enforced, in the last resort, by means of committal of a defaulting debtor for contempt of court.³⁹ Orders *ad pecuniam solvendam*

30. A residual term of a contract is a term which the law provides in the absence of the parties themselves do not make other arrangements in regard to that particular aspect of their agreement. See Kerr, *Contract*, p 5, 213. It is submitted that residual terms are to be treated in the same way as terms expressly or impliedly agreed by the parties.

31. Voet, *Commentarius*, 2.14.16; *Conradie v Rossouw* 1919 AD 275 at 320; Kerr, *Contract*, p 98.

are enforced by attachment and sale in execution of the debtor's property, attachment of his wages, and, in some circumstances, by the debtor's sequestration.⁴⁰

It seems clear that whether or not a court order is an order *ad pecuniam solvendam* does not depend on whether the claim arose out of a contractual, or delictual, or some other legal obligation, but merely on whether the order requires the payment of a sum, or sums, of money. Thus, an order *ad pecuniam solvendam* may be issued as a consequence of a claim for an award of damages, (arising out of either a delictual or a contractual liability) or an order for the payment of maintenance for a wife or child, or an order for the performance of a contractual obligation, such as the payment of the purchase price of property bought and sold.⁴¹

32. For example, contracts of employment.

33. Such as the building of a house, or the making of a movable thing.

34. For example the loan of property, or a pledge.

35. Such as the payment of the purchase price for goods bought and sold.

36. For example, restraint of trade agreements.

37. Such as when an option to purchase is granted.

38. Subject, of course, to the discretionary exercise of the power of the court to refuse an order of specific performance, and the other limitations on the availability of the remedy that may exist. See section 3.7 below.

39. In fact, committal for contempt of court in these circumstances is a rare occurrence. On the topic of enforcing orders of specific performance generally, see sections 3.2.5 - 3.2.6; and 3.3.2 - 3.3.4 below.

40. Herbststein and Van Winsen, *Civil Practice of the Superior Courts*, p 597. Non-compliance with an order *ad pecuniam solvendam* does not amount to contempt of court. Thus the Supreme Court will not take action against a judgement debtor for contempt of court for noncompliance with an order *ad pecuniam solvendam*. *Stellenbosch Farmers Winery (Edms) Bpk v Goldberg* 1968 (2) SA 728 T; *Walpamur Company (Pty) Ltd v September* 1969 (1) SA 643 EC; *Hofmeyer v Fourie* 1975 (2) SA 590 C. The anomaly created by sections 65A and 65M of the Magistrates' Courts Act, No 32 of 1944 as amended, whereby failure to comply with an order *ad pecuniam solvendam* is treated as contempt of court and the defaulting party committed to prison, is the subject of a report of the South African Law Commission, Project 54. The conclusion of the report is that the anomaly should be removed, and that committal in the Magistrates Courts for failure to comply with an order *ad pecuniam solvendam* should be abolished. See section 3.3.4 below.

41. Herbststein and Van Winsen, *Civil Practice of the Superior Courts* p 598.

The question that arises is whether, in relation to contractual obligations, it is appropriate to include both orders *ad factum praestandum* and *ad pecuniam solvendam* within the concept of orders of specific performance, or whether only orders *ad factum praestandum* are properly considered to be orders of specific performance. The answer to this question has been complicated by the provisions which govern the jurisdiction of the Magistrates' Courts, and, in particular, their power to order specific performance of contractual obligations. However, the best view of South African law appears to be that orders to enforce a contractual obligation, whether *ad factum praestandum* or *ad pecuniam solvendam*, are properly considered as orders of specific performance.⁴² In relation to the jurisdiction of magistrates, however, the meaning of an order of specific performance *for the purposes of section 46 of the Magistrates' Court Act* is restricted to include only orders *ad factum praestandum*.⁴³ The reason for this special limitation on the meaning of the term is that the legislature has limited the power of the Magistrates' Courts to order specific performance of a contractual obligation without an alternative of payment of damages. The reason for this was to limit the making of orders which were enforceable by means of committal for contempt of court (that is, orders *ad factum praestandum*) which reason does not apply in relation to orders of specific performance of contractual obligations to pay a sum of money (*ad pecuniam solvendam*). It must be stressed, however, that the exclusion of orders *ad pecuniam solvendam* from the limitations imposed by section 46 (2) (c) of the Magistrates' Court Act is a special circumstance, and should not be interpreted as indicating that, generally, an order of specific performance excludes contractual obligations to pay a sum, or sums, of money.⁴⁴

42. Jones and Buckle, *Civil Practice of the Magistrates' Courts*, p 156. See section 3.3 below on the enforcement of orders of specific performance.

43. *Tuckers Land and Development Corp (Edms) Bpk v Van Zyl* 1977 (3) SA 1041, T at 1050; *Olivier v Stoop* 1978 (1) SA 196 T at 202. Christie, *Contract*, p 505 - 506.

44. Jones and Buckle, *Civil Practice of the Magistrates' Courts*, p 155 - 156.

3.1.9. An Order of Specific Performance Appropriate to Enforce Either "Positive" or "Negative" Duties of Performance.

The concept of a contractual obligation does not necessarily require that the terms of the obligations require the performance of a "positive" act, that is, the active performance of a task or undertaking. The obligation may rather be "negative" or "passive", that is, requiring merely restraint or inaction. An example of a "negative" duty of performance arising from a contract is a restraint clause, whereby an employee binds himself not to work in competition with his employer for a certain period of time after terminating his contract of employment.⁴⁵ This sort of undertaking creates a contractual obligation between the contracting parties that has, fundamentally, the same legal characteristics as any other obligations created by the agreed terms of a contract, save that the act or performance required in relation to this clause is an act of self-restraint.⁴⁶ It is submitted that, provided a valid contractual obligation exists, the fact that it imposes a "negative" duty of performance does not render an order of specific performance unsuitable as a means of enforcing the obligation. There does not seem to be any reason in principle why, merely because the duty of performance involved is "negative" rather than "positive", a court should not order the performance of that duty, that is, order the exercise of the agreed restraint or inaction, and enforce the order, in exactly the same way as in cases of "positive" performance.

45. *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A. In this case, an agent undertook not to enter or engage in any business in competition with his employer for two years after the termination of his agency within a certain area. It was held by Rabie JA at page 904 D that this undertaking gave rise to enforceable obligations. Kerr, *Contract*, p 466, uses the term "negative provisions in a contract" to describe agreements in restraint of trade, and contractual obligations that impose a duty of restraint generally.

46. Another example of a "negative" duty of performance is *Ranch International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City)* 1984 (3) SA 861 W. In this case, the court held that an employer of a builder was under a duty to co-operate with the builder sufficiently to enable the builder to carry out his own obligations under the contract. Specifically, the content of the duty was not to interfere with the work of the builder, that is, a "negative" performance, rather than a "positive" performance: see page 881 C. Coetzee J, at page 881 F, found no reason not to enforce specific performance of that duty of co-operation.

Nevertheless, it would appear as though some distinction *is* drawn. The practice seems to be that, in the case of enforcing a "negative" duty of performance, the courts do not refer to the order issued as an order of specific performance, but refer instead to an *interdict*.⁴⁷ It is submitted, for the reasons given below, that the term "interdict" ought not to be used as synonymous with the phrase "an order of specific performance". Accordingly, the correctness of referring to an order of court, made to enforce the performance of a contractual undertaking involving an act of restraint, as an "interdict" must be questioned.

In the first place, it must be explained that the term "interdict" is properly used to refer to a type of order with objectives that are wholly different from the objectives of an order of specific performance, whether or not the order of specific performance requires the performance of a "positive" act or a "negative" act. The objective of an order of specific performance is the actual performance of the terms of contractual undertakings. By contrast, the granting of a (final) interdict has as its objective the protection of a person's legal rights against unlawful interference by another person.⁴⁸ These are distinctly different objectives. Accordingly, the granting of an interdict involves quite different considerations from those that govern orders of specific performance. Further, it can be pointed out that an order of specific performance is available only to enforce particular types of legal obligation, that is, contractual obligations⁴⁹ (whether "positive" or "negative"). By contrast, an interdict is available to protect a different, and wider, range of legal rights. For

47. For example, the order issued by the court in both *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A and *Ranch International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City)* 1984 (3) SA 861 W, is referred to as an interdict. This practice has been criticised by R H Christie, *Contract*, p 514. Professor Christie makes the suggestion that, if a need is felt to distinguish between orders to enforce "positive" performance and orders to enforce "negative" performance the term "prohibitory order" would be appropriate to describe an order of specific performance made to enforce "negative" performance. This seems a worthwhile suggestion. Interestingly, interdicts themselves may be described as either "prohibitive" or "mandatory", depending on whether they require restraint or positive action: see L T C Harms, *LAWSA*, Vol 11, para 310.

48. A *final* rather than an *interim* interdict is contemplated in this section. An interim interdict is a court order which preserves or restores the *status quo* pending the final determination of the rights of the parties: L T C Harms, *LAWSA*, Vol. 11, para. 321.

49. As opposed to a commercial interest: see *Airoadexpress(Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others* 1984 (4) WA 585 N at 600 H.

example, an interdict may properly be sought to prevent unlawful interference with a real right,⁵⁰ or to prevent threatened delictual harm.⁵¹ However it is submitted that an interdict is not appropriate when the actual performance of contractual undertakings is sought to be enforced, even if the duty of performance to be enforced is "negative" rather than "positive". This is because, in such cases, the circumstances do not involve unlawful interference with a person's legal rights. However, suggestions to the contrary may be found. For example, Professor Kerr suggests⁵² that an interdict is an appropriate means of enforcing negative provisions in a contract, citing two examples. The first example given is that of contracts in restraint of trade. The enforcement of these agreements is dealt with in detail below in this work,⁵³ but it must be said here that there does not appear to be any reason in principle not to treat the enforcement of such agreements as instances of orders of specific performance. Indeed, if the objective of a final interdict and that of an order of specific performance is kept in mind, it is submitted that there is no justification in principle for suggesting that an interdict is the appropriate means of enforcing a "negative" contractual obligation. Perhaps the only explanation for the use of the term "interdict" in this context is that the term is used loosely to mean a negative order of specific performance. This usage is not to be recommended, because it blurs the distinction between orders with different objectives, and different essential requirements.⁵⁴

50. For example, an interdict may be sought to prevent interference with the enjoyment of a servitude, or to forestall a threatened act of unlawful dispossession.

51. For example, *Regal v African Superstate (Pty) Ltd* 1963 (1) SA 102, in which an interdict was sought (but refused) to prevent an alleged nuisance; *Vorster v Stryders Bpk* 1973 (3) SA T 482, in which an interdict was held to be an appropriate remedy to prevent the publication of defamatory matter; *Nordien v Minister of Law and Order* 1986 (2) SA511 C, in which an interdict was granted to prevent the assault of detainees while in custody. Boberg, *Delict*, p 480 points out, correctly it is thought, that allowing the an interdict in circumstances of threatened delictual harm does not imply that the remedy involved is Aquillian. Professor Boberg says:

"Nor does it seem necessary to agonise...over whether damage is a necessary element of a delict (die onregmatige daad) because an interdict can be granted without damage. Surely the answer is to focus on the remedy rather than the wrong. Different remedies have different requirements..."

52. Kerr, *Contract*, p 466 - 467. Also see De Wet and Yeats, *Kontraktereg*, p 193.

53. Section 3.8 below.

The second example given by Professor Kerr is the case of *Pretoria City Council v Kontinentale Films Bpk and Others*⁵⁵, in which an interdict was granted to prevent a breach of a contract of lease by the tenant, who was selling liquor without the consent of the lessor. It is submitted that the provisions of a lease, like any other term of a contract, are generally enforceable by an order of specific performance, even if the provisions require restraint on the part of the tenant, and there is no reason, in such cases, to employ the concept of an interdict.

Thus, in a case in which the aggrieved party seeks to enforce the performance of contractual obligations, such as a contractual undertaking to refrain from competing in business with a former employer, it is submitted that the appropriate order is an order of specific performance. Such an order has the effect of requiring the defaulting party to perform, or do, what he undertook to do.⁵⁶

54. See below in this section. Also see Christie, *Contract*, p 514. It must be stressed again that it is a *final* interdict which is presently under discussion. An interim interdict (*interdict pendente lite*) is of course available in instances of threatened breach of contractual obligations, in order to preserve the plaintiff's rights until he is able to bring an action for an appropriate remedy, for example, an order of specific performance or a claim for an award of damages.

55. 1956 (2) SA 659 T. The term of the contract enforced in this case was an express term which provided that the lessee was not entitled to use the leased premises for any purpose other than that of a drive-in cinema without the lessor's written consent.

56. *Ohlsson's Cape Breweries Ltd v Cossey* 1905 TH 16 at 20 is clearly decided on the basis of enforcing specific performance of a "negative covenant" (not to purchase liquor except from a particular company) although the order is termed an interdict. In *Henriques and Another v Lopes* 1978 (3) SA 356 W at 358 A it was held by King AJ that the application for an interdict restraining the respondent from breaching the restraint provisions of a contract of sale was in fact:

"an endeavour to obtain specific performance of a negative obligation in terms of the contract."

With respect, it is difficult to see any principle behind the statement by King AJ at 357 G that:

"The manner of claiming specific performance of a negative covenant is to obtain an interdict."

It is submitted that if the remedy available is an order of court for specific performance, that is what the order should be called.

One potentially confusing type of case must be distinguished. In a case where a third party interferes with the contractual rights that exist between other people, and an interdict is sought to stop the interference, although the context involves contractual rights, the person requesting the interdict (one of the contracting parties) is not asking for the enforcement of contractual obligations. He simply wants the outside interference with his contractual relationships stopped. In this situation, the person suing is asking that an end be put to unlawful interference with contractual relationships and an interdict is the appropriate relief.⁵⁷

Because an order of specific performance and a final interdict have different objectives, and therefore operate in different circumstances, the essential elements, which must be shown to exist before either remedy will be granted, differ. In particular, special requirements must be satisfied before a final interdict will be granted. Three requisites are laid down that must be satisfied before a final interdict will be granted: firstly, a clear right on the part of the applicant; secondly, an injury actually committed on the part of the person to be interdicted, or a well grounded apprehension that such an injury will be committed by him; and thirdly that there is no other ordinary remedy by which one can be protected with the same result.⁵⁸ These requirements are not all appropriate in the case of an order of specific performance, whether the duty of performance be "positive" or "negative".⁵⁹ In particular, an order of specific performance is an ordinary (as opposed to extra-ordinary)

57. In *De Villiers v Soetsane* 1975 (1) SA 360 EC the applicant alleged that the respondent was interfering with his contractual rights in terms of a concession which entitled him to the sole right to buy the juice of a certain plant from collectors in the Transkei. In these circumstances the appropriate remedy was not an order of specific performance, but an interdict to stop interference by a third party with another's contractual rights. Also see *Nienaber v Stuckey* 1946 AD 1049 at 1053. This case involves interference with a real right (possession) rather than contractual rights, but the analogy is clear.

58. Van der Linden, *Koopmans Handboek*, 3.1.4.7; L T C Harms, *LAWSA*, Vol. 11, paras. 317, 318 and 319.

59. Christie, *Contract*, p 514. In particular, the person seeking an order of specific performance (prohibitory order) is not required to prove that he would suffer injury or loss if the order were not granted, nor that no other remedy is available.

remedy in South African law, and, therefore, it is not necessary to prove that no alternative remedy exists before it can be said to be available, as is necessary in the case of a final interdict. Those who would describe an order of specific performance made to enforce a "negative" duty of performance as an interdict overcome this difficulty, by simply stating that the special requirements necessary for the granting of an interdict do not apply when an interdict is issued in pursuance of specific performance. This method of solving the problem is unsatisfactory. It ignores principle and obscures the difference between distinct remedies. Furthermore, if used in this way, the term "interdict" has more than one meaning, depending on which objective is contemplated, and this is bound to cause confusion.

It is therefore submitted that to refer to an order of court made with the objective of enforcing the specific performance of contractual obligations as an interdict is tantamount to confusing distinct remedies, that is, on one hand, the enforcement of contractual obligations, whether "positive" or "negative" and, on the other hand, the protection of legal rights generally from unlawful interference. Accordingly, in this work, the term "order of specific performance" will be used to describe orders which have as their objective the enforcement of performance of contractual undertakings, whether these undertakings are "positive" or "negative".

3.2. ORIGINS OF THE THE REMEDY OF AN ORDER OF SPECIFIC PERFORMANCE.

3.2.1. The Enforcement of Specific Performance in Early Roman Law.

An order of specific performance is described above¹ as a remedy which exists to enforce the specific performance of contractual obligations. The question arises, when and how did this remedy originate. Unlike *restitutio in integrum*, which has a clear origin in the provisions of the praetor's edict, an order of specific performance as a remedy in South African law has no distinct origins in a specific law or event. To understand its development, something must be said about the way in which contractual obligations developed in Roman law as legally enforceable obligations. For it is only after this type of obligation became recognised as legally enforceable that any reason existed to contemplate an order of specific performance as a remedy.

In Roman law at the time of the XII Tables (around 450 B.C.) the recognition of legally valid obligations arising *ex delicto* and *ex contractu* was in an early stage of development.² Initially, developments in relation to enforceable obligations arising *ex delicto* progressed more quickly than developments in the field of contracts. Accordingly, *furtum*, *iniuria* and many other specific wrongs gave rise to delictual obligations which were enforceable in law,³ but

1. Section 3.1.

2. Jolowicz and Nicholas, *Historical Introduction*, p 161 - 162; Thomas, *Textbook*, p 215.

3. Thomas, *Textbook*, p 349 -350:

"Already under the Twelve Tables, there was no dearth of delicts. Apart from *iniuria* and *furtum* previously mentioned, there were, for instance, the

there were relatively few transactions which gave rise to legally enforceable *contractual* obligations. The most important of these were *sponsio* and *nexum*. Others mentioned are *legatum per damnationem* and *solutio per aes et libram*.⁴ It is difficult, now, when one is used to a developed law of contract, to understand the workings of a society in which so few contractual relationships gave rise to legally enforceable personal obligations. However, it has been pointed out that the law of property and the law of delict gave sufficient support to the relatively limited economic activity of the day.⁵

One advantage of recognising only a few, relatively straightforward agreements as creating legally enforceable personal obligations was the simplicity with which enforcement was achieved. *Nexum* was an agreement whereby a person who was unable to repay a debt became subject to the personal power of the creditor, liable to work for him, and be chastised. It is not clear from surviving texts to what extent *nexum* was an agreement which was created separately from the original debt, repayment of which presumably might have been made binding in law by means of a *sponsio*. But *nexum* appears to have had the advantage of entitling a creditor to proceed directly and seize a debtor who defaulted on repayment, without having to first bring a legal action.⁶ *Nexum* therefore allowed extra-judicial enforcement, and did not necessitate judicial orders of specific performance.

actio rationibus distrahendis for twofold which lay against a *tutor* who embezzled his ward's property, the *actio de arboribus succisis* which lay, for twenty five *asses* per tree, against one who cut down the trees of another, the *actio de pastu pecoris* which lay against the owner of an animal which grazed on another's land and required him to make good the value or hand over the beast and the *actio de tigno iniuncto*, to name but a selection."

Also see Kaser, *Roman Private Law*, p 167.

4. Thomas, *Textbook*, p 215; Jolowicz and Nicholas, *Historical Introduction*, p 162; Kaser, *Roman Private Law*, p 169.

5. Jolowicz and Nicholas, *Historical Introduction* pp 162 - 163 explain how the absolute concept of rights of ownership and the wide concept of *furtum* in Roman law may have been applied to resolve disputes in a society where economic activity occurred without legally enforceable contracts of sale, hire and the like. Kaser, *Roman Private Law*, p 169, mentions how an informal loan of money and liability for eviction after transfer by *mancipatio* gave rise to a delictual liability, which later became transformed into a non-delictual liability.

6. Jolowicz and Nicholas, *Historical Introduction*, p 164 ff; Thomas, *Textbook*, p 216 - 217.

As regards *sponsio*, it has been suggested that, at the time of the XII Tables, *sponsio* only created valid obligations in respect of a certain (fixed) sum of money, (*certa pecunia*) and not in respect of a particular item of property, (*certa res*) nor in respect of an obligation to perform or do anything uncertain (*incertum*).⁷ Accordingly, *solutio* of obligations arising out of *sponsio* at the time of the XII Tables would involve only payment of a fixed sum of money. In effect, the enforcement of the agreed terms of such an obligation would not have been distinguishable from enforcement of an obligation to pay damages arising from a delictual obligation, in circumstances, for example, of *furtum*. The truth of this proposition is reflected in the uniformity of procedure employed to enforce both contractual and delictual obligations by *legis actio*.

3.2.2. Legis Actio, The Formulary Period and the Condemnatio Pecunaria.

Until around 150 BC, litigation in Roman law was governed by the *legis actiones*. The general form of *legis actio* was *per sacramentum*, that is, a procedure in which the litigants undertook by oath to wager a sum of money on the validity of their respective claims. A distinction was drawn, in Roman law, between the procedure for claims *in rem*, (claims to assert a real right, such as when an owner of property sues to recover possession of his property from another person), and claims *in personam*, in which the enforcement of obligations was sought. However, no distinction seems to have been drawn between various actions *in personam*, depending on whether the claim was based on a contractual or delictual obligation. Only the formal words that had to be recited by the litigants indicate the differing grounds of action.⁸ However, despite the similarity in the form of the action, it is

7. Thomas, *Textbook*, p 259:

"The earliest stipulations seem to have been those for a sum of money certain (*certa pecunia*), then for the giving of a specific thing or quantity (*certa res*) and finally for an *incertum* such as following or abstaining from a specified course of conduct...".

8. A claim for damages for *furtum* at the time of the XII Tables was recoverable by means of

apparent that the effect of enforcing a *sponsio* by means of a *legis actio in personam* was that the defaulting party was required to perform his contractual obligation to do what he undertook to do, that is, pay the sum of money agreed upon. Thus, as well as being used to enforce a claim for compensation arising in delict, *legis actio per sacramentum in personam* was also used to enforce the performance of contractual obligations, in particular, the payment of *certa pecunia* as a result of an obligation arising from *sponsio*. It is submitted therefore that a distinction can be made between the general form in which litigation took place, and the relief afforded by bringing such litigation. It would seem that the enforcement of a personal obligation arising from a formal promise to pay a fixed sum of money is in fact an early example of the enforcement by specific performance of a contractual obligation to perform an undertaking *ad pecuniam solvendam*. However, this is not to imply that the remedy of an order of specific performance was actually recognised, and made generally available, in early Roman law. It merely indicates that, in the circumstances outlined, litigation had the same effect that a conscious order of specific performance would have had, even if this was unconsciously done.

In the few hundred years following the compilation of the XII Tables, the development of the Roman law of contracts was spurred by the political, social and economic events of the times. Thomas describes the process thus:⁹

"There is, about the development of the Roman law of obligations, an

legis actio per sacramentum in personam. Kaser, *Roman Private Law*, p 168:

"The plaintiff formally asserted that the defendant had committed the act, whereupon the defendant formally denied ("*aio te mihi furtum ...fecisse*", "*nego me tibi furtum ...fecisse*")."

The same *legis actio per sacramentum in personam* would have been available to enforce a *sponsio*, perhaps using the form of words given by Jolowicz, *Historical Introduction*, p 184: "*Aio te mihi dare oportere*" and possibly adding the ground for the claim. In later law, the *legis actio per iudicis arbitrive postulatio* was available for the enforcement of a *sponsio*, which procedure had the advantage of avoiding the *sacramentum*. Jolowicz, *op cit*, says that the grounds on which the claim was brought had to be stated, thus: "*Ex sponsione te mihi X milia sestertiorum dare oportere aio; id postulo aias as neges*."

9. Thomas, *Textbook*, p 215.

impression of an almost grudging acceptance by the law of this or that situation as worthy of enforcement or redress. So far as contracts are concerned, there were, in existence, at the time of the XII Tables, *sponsio* and *nexum*; in the next couple of centuries there appeared the literal contract while *mutuum* replaced *nexum*; commercial needs, following Rome's victory in the first Punic war, [241 B.C.] led to the emergence of the four consensual contracts [*emptio venditio*, *locatio conductio*, *mandatum* and *societas*] and the looser forms of stipulation; thereafter, apart from the appearance of the three later real contracts, [*mutuum*, *depositum* and *commodatum*] classical development was complete."

In the pre-classical period of Roman law, therefore, many more contracts were accepted as giving rise to legally enforceable contractual obligations. It is important to realise that not only were new types of transaction recognised as giving rise to enforceable legal obligations, but also that the *type* of obligation which was legally enforceable was broadened. Enforceable obligations now included not only obligations in respect of a fixed sum of money, but contractual obligations to perform a wide variety of undertakings. Nor was it necessary that an undertaking be *certum* (fixed): the extent and content of contractual obligations might be either *certum* or *incertum*.¹⁰ The recognition of such a wide range of legally enforceable obligations posed serious problems for an administrative organisation and judicial system that depended on relatively few elected magistrates, (only one *praetor* was elected annually before 242 B.C.)¹¹ assisted by lay judges (*iudices*), who were not specially trained in the law. Also, although some refinements had been introduced, execution of a judgement still relied on *manus iniectio* and the principle of self help. Although an effective form of bringing pressure to bear, *manus iniectio*, enforced by an aggrieved party himself, was a relatively blunt instrument. It would therefore have been desirable, it would seem, for a *iudex* to make a relatively uncomplicated order which could be easily enforced. This would ensure that, after judgement, it could easily be determined if and when compliance with the order had occurred. Possible complications would thus be avoided.

10. See, for example, the development of *stipulatio*. Thomas, *Textbook*, p 259; Jolowicz and Nicholas, *Historical Introduction*, p 279; Kaser, *Roman Private Law*, p 176.

11. Jolowicz and Nicholas, *Historical Introduction*, p 48. The number had increased to six by the end of the Republic, but considering the size of the Empire by then, it was still a small number.

The difficulty that faced a small government administration, of how to enforce legal rights and obligations effectively, was solved in the formulary period in this way: every order of a *iudex* was expressed as an order to pay money (*condemnatio pecunaria*).¹² This meant that the award of the court was reduced to monetary terms, that is, the economic value of the legally enforceable claim. The practice was uniform, without distinction even between actions *in rem* and those *in personam*, let alone the rather less obvious difference between personal obligations arising *ex contractu* to perform or do something, as opposed to liability for damages arising *ex delicto*. Thus, even when the owner of property brought an action on grounds of his real right to recover possession of his property from another person, the *condemnatio* was formulated so as to require the possessor to pay the *value* of the property to the owner, rather than ordering him to restore the property itself.¹³ Similarly, personal obligations to perform or do were quantified in monetary terms, so that, for example, the seller in a contract of sale who was sued *ex empto* for delivery of the *res vendita* would only be condemned to pay the value of the thing to the buyer. He would not be ordered to actually deliver the *res vendita*. In cases involving an *incertum* the *condemnatio* would be expressed in money terms, but the *iudex* would be required to quantify the value of the claim in the light of the evidence heard.¹⁴

12. Gaius, 4.48, 49:

"The *condemnatio*, in all *formulae* containing one, is framed in terms of valuation in money. Accordingly, even where the suit is for a corporeal thing, such as land, a slave, a garment, gold or silver, the *iudex* condemns the defendant not in the actual thing, as was the practice in early days, but in the amount of money at which he values it."

"The *condemnatio* in a *formula* may be in terms of a definite or in an indefinite sum of money."

Also see Buckland, *Text-book*, p 658; Thomas, *Textbook* p 97; Van Zyl, *Roman Law*, p 374.

13. The *formula* for the *rei vindicatio* is given by Lenel, *Das Edictum Perpetuum*, p 185 - 186:

"*Iudex esto. S. p. rem q. d. a. ex iure Quiritium Ai Ai esse neque ea res arbitrio iudicis Ao Ao restituetur, quanti ea res erit, tantam pecuniam iudex Nm Nm Ao Ao c. s. n. p. a.*"

14. The *formula* for the *actio empti* is given by Lenel, *Das Edictum Perpetuum* p 299:

"*Quod As As de No No hominem q. d. a. emit, q. d. r. a., quidquid ob eam*

In view of the expedient of the *condemnatio pecunaria*, it is not surprising that an order of specific performance as a distinct remedy did not progress in this period of the law. However, it must not be thought that, by reducing all judicial orders to monetary terms, a conscious and deliberate policy was adopted in Roman law, in terms of which the discharge of contractual obligations by means of paying compensation for failure to perform was encouraged, rather than the actual performance of the specific terms of the obligation. On the contrary, although the *iudex* himself did not order specific performance, it has been suggested that the *condemnatio pecunaria* encouraged it indirectly.¹⁵ This suggestion follows from the theory that, far from being the easy option, and therefore the preferred alternative, paying the sum of money adjudged in a *condemnatio pecunaria* was *punitive*. This is understandable if it is true that, during the formulary period, currency was a relatively scarce commodity, and a resource which would have been conserved very carefully. When currency is in short supply, the relative value of property or of services becomes depressed.¹⁶ If money was in short supply in the formulary period, then it is apparent that the enforcement of a *condemnatio pecunaria* would have been seen as undesirable from the point of view of the defaulting party, and this would have indirectly encouraged the discharge of contractual obligations by means of voluntary specific performance.¹⁷ The defaulting party could, prior to litigation, weigh his options, and avoid the punitive effect of a *condemnatio pecunaria* by specifically performing his obligations. This is not to

*rem Nm Nm Ao Ao dare facere oportet ex fide bona, eius iudex Nm Nm Ao
Ao c. s. n. p. a."*

15. Kelly, *Litigation*, p 74 ff.

16. Kelly, *Litigation*, p 75, quotes from surviving letters of Cicero in support of this contention: *ad att* 9.9.4; *ad att* 10.11.2; *ad att* 10.14.

17. Kelly, *Litigation*, p 81 ff, considers the political and economic implications of the *condemnatio pecunaria*, suggesting that the advantage that it gave to the wealthy class to further monopolise resources was foreseen and intended. Certainly the economic and political consequences of a general reliance on *condemnatio pecunaria* in times of currency shortage cannot be discounted. However, the explanation that the *condemnatio pecunaria* was a natural solution to the difficulties imposed by the limited judicial and administrative resources of the Roman state, as well as being in accord with the principle that contractual obligations are naturally discharged by specific performance is, it is submitted, logically persuasive.

say that an *order* of specific performance was conceived as an available remedy in this period, which it clearly was not. At most, specific performance was a *voluntary alternative* to risking a *condemnatio pecunaria*, and one which would not have existed after condemnation in litigation. Nevertheless, the theory of the punitive nature of the *condemnatio pecunaria* is valuable in that it provides a basis for suggesting that, even in the formulary period of Roman law, the specific performance of obligations was regarded as the most natural and satisfactory way of discharging contractual obligations.

Other theories which have been advanced to account for the *condemnatio pecunaria* of the formulary period are less satisfactory from this point of view. One such theory is that the general practice of a judgement expressed in money terms is a consequence of the organic development of Roman law, and thus traceable to the earlier *legis actio*.¹⁸ However, this theory overlooks the point that there is some, albeit slight, authority which suggests that, in the *legis actio* period, a possessor of property might be ordered, in an *actio in rem*, to restore the actual thing to the owner, rather than its value.¹⁹ It also overlooks the point that, prior to 338 B.C., Rome is not considered to have developed an economy based on currency. Some place the introduction of coinage even later than 338 B.C..²⁰ This fact makes it difficult to accept that the concept of the *condemnatio pecunaria* extends back to the earlier periods of Roman law.

Another theory is that judgements expressed in money became generalised because of the adoption of the principle that, in Roman law, compensation in money was the preferred alternative to the possibility of seeking retaliation, or restoration *in natura*.²¹ This idea seems to be based on the fact that, in early law, litigation was a voluntary submission to an arbitration by a peer, rather than the aggrieved party resorting to self help. However, this

18. Kelly, *Litigation*, p 72, citing V. Lübtow, 58 ZSS 325.

19. Gaius, 4.48. A dispute surrounds the passage. See F de Zulueta, *Institutes of Gaius*, Part 1, p 252 footnote 10; Kelly, *Litigation*, p 69 - 70.

20. Jolowicz and Nicholas, *Historical Introduction*, p 56 suggest that the appointment of the *tresvires monetales* in 289 B.C. marks the introduction of currency. Cf Kelly, *Litigation*, p 71.

theory may be criticised for not distinguishing sufficiently between contractual obligations to perform the terms of an undertaking, and delictual obligations to pay compensation.²² It appears to imply that specific performance was not considered to be the natural and desirable way in which the first mentioned type of obligation ought to be discharged.

3.2.3. Orders of Specific Performance in Justinianic Law.

In Justinianic law, when formulary procedure had been replaced by *cognitio extraordinaria*, litigation took place in a single proceeding, before a magistrate or his deputy.²³ The manpower resources in this period of government allowed a state official to have a much greater degree of involvement in, and therefore control of, litigation. Accordingly, the assistance of the state being available, reliance on self help in the summons and execution stage of litigation ceased to be necessary.²⁴ It also appears that, in the period of the Dominate,²⁵ currency was a more readily available commodity. In fact inflation, which renders goods more expensive, rather than the depression of the value of goods in monetary terms, characterises the period.²⁶ The punitive effect of a *condemnatio pecunaria* would therefore have been much less than it was in the Principate. The important question, in this context, is whether there is evidence, in Justinianic law, of the emergence of orders of specific performance of contractual obligations.

In *cognitio* proceedings, the *condemnatio pecunaria* was no longer uniformly ordered in all types of cases. Certainly, in cases involving the recovery of property on grounds of a real

21. Kelly, *Litigation*, p 71, citing Wenger, 59 ZSS, 325.

22. See section 3.1.6 above.

23. Thomas, *Textbook*, p 119.

24. Buckland, *Text-book*, p 665 ff.

25. From *circa* 285 A.D.

26. M Cary, *History of Rome*, p 517 ff.

right by the owner thereof, the magistrate would order the restoration of the actual thing, and not merely its value. Thus this passage from the Institutes:²⁷

"In a real action, if he find against the plaintiff, he must absolve the defendant; if he find against the defendant, he must direct him to return the property in issue together with its fruits."

However, it would appear from the authorities that in regard to the enforcement of contractual obligations, the usual practice remained a condemnation in monetary terms, rather than an order of specific performance.²⁸ This is the effect of the following passage from the Digest:²⁹

"When anyone promises that he will prevent the stipulator from sustaining any loss, and he does so, and the stipulator does not suffer any damage, he is considered to have done what he agreed to. If he fails to do this, judgement will be rendered against him for a certain sum of money, for the reason that he did not do what he promised, as happens in all kinds of obligations which relates to the performance of certain acts."

This practice is also confirmed in the Institutes:³⁰

27. Inst.4.17.2. Also see Inst.4.17.3. - 4.17.6.

28. The judgement had to be for a sum certain, rather than uncertain (C.7.46.3; C.7.46.4.) The judgement also had to be unconditional (D.49.4.1.5.)

29. D.42.1.13.1. Also see Jolowicz, *Historical Introduction*, 2nd ed, p 463, and cf Jolowicz and Nicholas, *Historical Introduction* p 444. In the earlier edition, Jolowicz says:

"The rule of *condemnatio pecunaria* is no longer in force, and the judge can therefore order a specific thing to be handed over to the plaintiff. Specific performance of obligations to do something (*facere* as opposed to *dare* or *tradere*) is however not ordered."

In the later edition the distinction between the enforcement of real rights and the enforcement of personal obligations to perform is obscured. Thus:

"The rule of *condemnatio pecunaria* is no longer in force, and orders for specific performance are normal."

Only in the footnote to this statement is it explained that the extent to which the specific performance of an obligation to do something "is not clear." It is submitted that the earlier edition explains the position more accurately than the later.

30. Inst.4.6.32, translated by J A C Thomas.

"The judge must ensure that, at all events, so far as he possibly can, he gives judgement for a specific sum of money or thing even though the issue before him concern an unquantified claim."

However, there exists a passage in the Code which indicates that on occasion, judicial orders might be made which required the performance of a specified act, rather than the payment of the economic value of performance. The example does not involve contractual obligations, but nevertheless illustrates an interesting development in the type of order that a court in this period is prepared to make. The passage reads as follows:³¹

"Where anyone has bequeathed his slave under the condition that the legatee should grant him his freedom, and the heir, acting dishonorably with reference to the legacy, refused to surrender the slave to the legatee, and suit having been brought against him, and the judge having ordered him not only to give up the slave, but also to pay his appraised value, the ancient interpreters of the law were in doubt whether an obstacle was not placed in the way of freedom by a decision of this kind; and when it was decided that freedom must be granted, whether this should be done by the heir or the legatee, and if the heir granted it, whether the legatee would be entitled to retain the amount which he had received as a pecuniary fine, either entirely, partially, or not at all.

We, in disposing of this controversy, are surprised to learn that the judge, who had jurisdiction of the case aforesaid, did not require the heir not [sic] to surrender the slave but only to pay his value, as such a fault offers an occasion for a dispute.³² Wherefore, if such a question should arise, We think that no judge would be so foolish as to render a decision of this description."

Thus it appears as if, in Justinianic law, an order of specific performance of an obligation to perform a specific act had begun to make its appearance. If it is accepted that, in Roman law, the voluntary performance of contractual obligations was considered as the most natural and appropriate way of discharging those obligations, then the emergence of a remedy in terms of which such performance is directly ordered and enforced is a natural and organic

31. C. 7.4.17.

32. It is thought that the original Latin text does not support the double negative used by Scott in translating this sentence. The Latin reads as follows:

"Talem itaque altercationem resecantes miramur, quare iudex, qui praepositus est in praedicta causa, non omnimodo condemnationem in servum, sed in aestimationem eius fecerat, cum ipsius vitium etiam huiusmode altercationi praebuit occasionem."

development. However, it must be said that it is apparent that an order of specific performance of contractual obligations was not recognised in Roman law as generally appropriate and available, at the option of a plaintiff, to enforce the performance of contractual obligations. At most, it is arguable that, with the change of circumstances from those obtaining in the earlier periods of Roman history, it had become possible for a judicial officer to contemplate an order of specific performance as a remedy. Passages such as that quoted above in this section possibly indicate the emergence of this remedy in its earliest stage of development.

3.2.4. Orders of Specific Performance In Roman-Dutch Law.

In Roman-Dutch law, there does not seem to have been any doubt that, in an action to enforce a real right, a person seeking to recover possession of property was entitled to an award of the thing itself, and not merely to an award of its monetary value.³³ This accords with what the situation had been in Justinianic law.

However, the recovery of property on grounds of a real right has been distinguished from the specific performance of contractual obligations, and the willingness of a court to order the handing over of a specific item of property to a person who claims it as owner, or who has been unlawfully dispossessed and who seeks to recover possession, does not necessarily imply that a party who is aggrieved by a failure of another to specifically render a performance due in terms of a contractual obligation is entitled to an order of specific performance.

33. Voet, *Commentarius*, 6.1.31:

"But if after judgement against him the possessor contumaciously refuses to complete the restoration, the property can be taken from him by military force."

Also see Van der Linden, *Koopmans Handboek*, 1.7.3.

It is apparent from the Roman-Dutch authorities³⁴ that the question whether a plaintiff has a right to an order of specific performance to enforce performance of contractual obligations, or whether, by contrast, such obligations should, as a matter of choice, be able to be discharged by the defendant paying its economic value, had not finally been settled.³⁵ The opinions of the writers differ. Those who advocate that personal obligations to perform or do should be able to be discharged by paying the monetary value of performance, and not enforced by an order of specific performance, appear to do so because of Roman law practice. Thus, De Groot says the following, relying on D.42.1.13.1:³⁶

"But, although by natural law a person who has promised to do something is bound to do it, if it is in his power, he may nevertheless by municipal law release himself by paying the other contracting party or acceptor the value of his interest in the same, or the penalty if any has been agreed upon in default of payment."

However, in a later passage, De Groot expresses a view that does not appear to be consistent with the passage quoted above. Thus, in discussing the consequences of a contract of purchase and sale, De Groot says the following:³⁷

"If delivery is delayed by the seller, the purchaser has the option of either claiming the delivery, together with all profits and compensation for loss, or merely compensation to the extent of his interest in the delivery, which frequently is more advantageous for him, for instance, when the property is destroyed or damaged."

Voet appears to favour the position that contractual obligations can be discharged by the payment of damages, if the defaulting party so prefers. It may be argued that Voet is advancing his own ideas on what the law *ought* to be, rather than stating the practice of the day, but his views are uncompromising nevertheless. Thus, in regard to a seller's obligation to deliver the *res vendita*, he says:³⁸

34. See the authorities quoted below in this section.

35. Wessels, *Roman-Dutch Law*, p 612 ff.

36. De Groot, *Inleydinge*, 3.3.41.

37. De Groot, *Inleydinge*, 3.15.6.

"A seller cannot be absolutely forced into delivery of a thing sold, but is freed by making good the damages.

This is firstly because an obligation to deliver is an obligation to do something; but in all obligations to do a thing the rule is that he who does not fulfil the act can discharge his duty by the monetary making good of damages. Secondly it is because no road or method is disclosed in the laws by which he could be stringently constrained to make delivery. Thirdly and lastly it is because in a number of laws the duty of making good of damages is found to be laid upon a seller who refuses in his shamelessness to deliver the thing sold."

Other authorities on Roman-Dutch law propound an alternative view, that contractual obligations are enforceable by means of an order of specific performance. Groenewegen distinguishes the law of Holland from that set out in D.42.1.13.1. thus:³⁹

"A person who is under an obligation to perform certain acts is not discharged from his obligation by paying damages.

Nowadays in all obligations to perform certain acts the promisor can be compelled to render specific performance, if he is in a position to perform, and he is not discharged from his obligation by payment of damages."

Groenewegen makes the following comment on the views of De Groot, *Inleydinge*, 3.3.41, which is quoted above.⁴⁰

"But at the present day he cannot so release himself [by paying the other contracting party the value of his interest] but may be compelled by civil imprisonment to the strict fulfilment of what he has promised...."

Huber says this on the question:⁴¹

38. Voet, *Commentarius*, 19.1.14, citing D.42.1.13.1; Inst. 3.15.7; C.4.49.4; D.19.1.12.

39. Groenewegen, *De Legibus*, 42.1.13.1. Groenewegen cites the following authors in footnote 11 as supporting him: Corasius, *Miscellanea*, lib.2, cap. 3; Vasquius, *Controversiae*, cap. 25, num. 33 *et seqq.*; Bronchorst, *Enantiophanon*, cent. 4, assert. 41; Kinschot, *Responsa*, cons. 95, num. 6, and *De Rescriptis Gratiae*, tract. 4, cap. 8, num. 16; Busius *ad D.* 42.1.13.1.

40. Groenewegen, *ad Grotius*, 3.3.41, footnote 94. Also see footnote 26, *ad Grotius*, 3.15.6.

41. Huber, *Hedendaegse Rechtsgeleertheyt*, 3.2.9 - 10.

"Otherwise the sale is unbreakable as soon as the parties have struck the bargain with each other, the seller having then to deliver the property and the buyer to pay the price, without the seller being able to refuse delivery or free himself by offering to pay the damages which the buyer may have suffered, even though he should tender double the price.

For although we read in the laws that when the property sold is not delivered the buyer may then demand his damages, that nevertheless does not advantage the seller who does not want to keep his word, but it is a right of the buyer, who may avail himself of it if he so decides; but the effect of it is not to prevent him from being able also to insist on the delivery itself, should he so approve and the thing be still wholly in existence."

Van der Keesel expresses similar views:⁴²

"It properly follows from a correct interpretation of the Civil Law, that a person who has promised *to do* an act may be condemned and compelled to perform the same; and it appears to have been so held by the Supreme Court."

Van der Linden also supports the view that an order of specific performance was available in Roman-Dutch law to enforce contractual obligations.⁴³

"The effect of obligations, which a person has contracted, to *do* something, consists in this, that he must perform the act to which he has bound himself, and that, in the case of non-performance he is bound to pay the damages and the interest to the person for whose interest he has bound himself... If the obligation consists in doing something, the creditor can compel the debtor to perform the act or to pay damages and interest."

What explanation can be given for the divergence of views between those authorities who would admit the remedy of an order of specific performance and those who would allow the discharge of obligations to perform by paying damages? Most important, is a question of principle involved? One reason that appears to underlie the reasoning of those authorities who would allow the discharge of contractual obligations by the payment of monetary compensation is that this is sometimes interpreted to have been the approach of Roman law.⁴⁴ However, it is submitted that the discussion of Roman law above in this section

42. Van der Keesel, *Theses Selectae*, 3.3.41. Italics in the original.

43. Van Der Linden, *Koopmans Handboek*, 1.14.7. Italics in the original. Also see Van Leeuwen, *Censura Forensis*, 1.4.19.10.

shows that the general unavailability of an order of specific performance in respect of such obligations existed because of practical considerations, rather than because of principle. Therefore, as these difficulties disappeared, orders of specific performance could be accepted as an available remedy.⁴⁵

Another underlying reason for arguing against an order of specific performance as a remedy for the enforcement of contractual obligations is that, from a practical point of view, such orders may be difficult, if not impossible to enforce,⁴⁶ and a court should not imperil its dignity by making an order to which it cannot compel obedience. Thus, although a relatively sophisticated, well manned and closely administered judicial system existed in Holland, it must be asked what method existed for constraining an unwilling person to perform an act? This is an important question, which is considered in the following section.

3.2.5. Practical Issues Underlying the Enforcement of an Order of Specific Performance.

One of the characteristics of the remedy of an order of specific performance is that it is the *aggrieved party* who has the right to elect to enforce specific performance. In other words, the availability of the remedy presupposes that the defaulting party is not given the option of paying damages in lieu of specific performance rather than performing specifically. Even if the effect of paying damages is punitive for the defaulting party, as it may have been in Republican Rome, allowing the *defaulting* party to choose to discharge his obligation by paying damages has the effect of giving *him* the choice of whether to pay the damages rather than to perform specifically. In order to be able to say that the *aggrieved* party has the *right* to a order of specific performance, a court must be prepared to order such performance *without* giving the defendant the alternative of paying damages instead of performing

44. For example, De Groot, *Inleydinge*, 3.3.41.

45. Section 3.2.3 above. Also see Van der Keesel, *Theses Selectae*, 3.3.41.

46. This argument is one of those adopted in Voet, *Commentarius*, 19.1.14.

specifically, and thereafter, if necessary, enforce the order by making him perform. But this raises the question how a person can be made (that is forced, rather than merely encouraged) to perform the agreed terms of a contractual undertaking to do something?

In some cases, the performance owed is such that it can be made to occur whether or not the person who undertook the obligation is prepared to carry it out or not. An example is an obligation, arising out of a contract of sale, whereby the seller undertakes to deliver specific property. In such a case, even if the defendant remains unco-operative after being ordered to make delivery to the buyer, it is perfectly feasible for the delivery to be effected by the forceful intervention of agents of the court.⁴⁷ Accordingly, a court which has issued an order of specific performance in relation to the delivery of a thing purchased and sold can, practically speaking, order the seizure of the thing by an official of the court and its subsequent delivery to the buyer, together with any formalities which are necessary for the transfer of title. The effect of this is that the thing is put into the possession of the buyer with the right of owner, without either the consent or the co-operation of the seller, and in this way, the buyer enjoys the same result as would have ensued from voluntary specific performance.⁴⁸

The same principle of employing an alternative agency to effect specific performance can be adapted to certain other types of undertaking. For example, a contractual obligation to

47. D.6.1.68. This passage concerns actions *in rem*, but the same method can be used to enforce specific performance of personal obligations to deliver.

48. Voet, *Commentarius*, 19.1.14. argues that a judge ought not to have the power to take a thing from its true owner and transfer it to another person. Voet distinguishes the use of "military force" which is used to restore an owner to possession if his property is not voluntarily restored, from the use of such force to put a purchaser of goods into possession. The first use of such force is justified, argues Voet, but not the second. It is submitted that there is no logic in the argument that an order to enforce a real right should be physically enforced, but not an order of specific performance of a contractual obligation involving the delivery of property. Voet argues that, in Roman law, a judge simply did not have the power to order and effect a transfer of ownership. This may be so, but a court certainly has the power to order a transfer of possession, and to order that formalities, such as registration of transfer, be carried out. Whether the transfer of ownership is conceived as effected directly by the physical enforcement of the courts order, or indirectly, as a result of the operation of rules of law on the new factual situation, is of secondary importance. See Pothier, *Sale*, para 68. See section 3.3.2 below for a discussion of South African law on this topic.

perform work of a general nature, such as repairing a motor car, might be enforced, if the defendant is unco-operative, by allowing the aggrieved party to employ the services of another person to do the work at the cost and risk of the defaulting party. But the limitations of this type of enforcement are easily made apparent. In the first place, it is difficult to distinguish between an award of damages for non-performance, and an order which makes the defendant financially liable for the cost of employing another person to do the work. Secondly, what is to happen in cases where the particular skills or attributes of the defaulting party are considered essential for the proper performance of the obligations as originally bargained for? For example, if a person contracts with one artist for the painting of a portrait, it is not the same thing to have to be satisfied with a portrait painted by another artist, even if the first artist is made liable for the expenses of arranging the alternative painter.⁴⁹

It is submitted, therefore, that, even if appropriate in some circumstances, enforcing an order of specific performance by employing an alternative agency is a method which has limitations. What method of enforcement exists which is applicable to and effective in *all* cases, regardless of the type of performance involved in the discharge of the obligation?

3.2.6. Enforcing An Order of Specific Performance by Means of Civil Imprisonment in Roman-Dutch Law.

In Roman-Dutch law,⁵⁰ an order of specific performance was generally enforceable (that is, regardless of the particular terms of the contractual undertaking) by means of civil imprisonment. Thus, should a defendant refuse to comply with an order of specific performance, proceedings could be instituted in terms of which he would be detained until he was ready to comply with the terms of the order.

49. It does not matter, for the purposes of the example, which artist is considered better at painting portraits. The point is, each has his personal skills, attributes and his own following.

50. See section 3.3.2 below for a discussion of enforcement of orders of specific performance

Enforcement in this way was initiated by *gijzeling*, a procedure which seems to have been adapted from the form of pledge (*gijzel*) whereby a person pledged his person.⁵¹ A defendant was required by a plaintiff to enter into a kind of voluntary confinement at an inn near the place where the dispute had arisen.⁵² This process served as notice of harsher penalties which might follow if the defendant continued to be unco-operative, and gave the defaulting party plenty of time to reflect on the wisdom of his ways. The *gijzeling* would be followed by arrest, and civil imprisonment, which was also the consequence of failing to appear in *gijzeling* at all. That *gijzeling* was available in order to enforce a contractual obligation is made clear by Van der Linden in this passage:⁵³

"In actions in which a person is condemned *to perform some act*: e.g., to render an account - and on the same footing are judgements against any collegiae, tutors, curators, receivers, agents, or others condemned in some particular capacity - execution is levied by way of *gijzeling* (civil imprisonment)."

It may be argued that the ultimate *effect* of this type of enforcement in extreme cases was no different from a punitive award of damages, in that, if a defendant remained unco-operative despite civil imprisonment, then no actual performance would be forthcoming. Voet makes the point in the last paragraph of the section referred to in the footnote below.⁵⁴ He says:

"...if a seller in his shamelessness conquers the boredom of imprisonment and refuses to deliver, it will then at last be open to the purchaser to have the performance of the act assessed by the judge, and to secure its value by the seizure of pledges, the seller being none the less confined in goal until the value has been made up by the selling off of the pledges seized, and the judgement has been discharged."

in South African law.

51. Wessels, *Roman-Dutch Law*, p 588.

52. Price, *Possessory Remedies*, p 50.

53. Van der Linden, *Koopmans Handboek*, 3.9.15. Also see Van der Linden, *op cit.*, 3.9.16; Groenewegen, *ad Grotius*, 3.3.41, footnote 94 and 3.15.6, footnote 26.

54. Voet, *Commentarius*, 19.1.14.

Be this as it may, the consequences of civil imprisonment are very much harsher than the payment of an award of damages. The loss of liberty involved in civil imprisonment is unlikely to be preferable to specifically performing obligations undertaken. There will be very few cases in which a defendant will be so recalcitrant as to prefer to suffer imprisonment in defiance of a court order to render specific performance, especially since, in the end, his obligation to perform will remain undischarged, and, after all the inconvenience of imprisonment, damages will still be recoverable.⁵⁵ In fact, most people can be relied on to do what is reasonable in their own self interest. Thus, the instances in which the power of the court to enforce the terms of its orders is exposed as less than complete are so few as not to constitute a serious threat to the dignity of the courts, or to their authority.

The conclusion to be reached is that, in Roman-Dutch law, everything necessary existed to allow a person aggrieved by non-performance of contractual obligations to sue for an order of specific performance of those obligations, and for the court to order such performance, and enforce the order effectively, without giving the defendant any option of paying damages instead of rendering the required performance. It is submitted that the weight of authority supports the view that this remedy was, in fact, available in Roman-Dutch law. However, the exact limits to the availability of the remedy, and the elements essential for its availability, do not appear to have been fully worked out in Roman-Dutch law, or at least, these topics do not receive comprehensive treatment on their own in the writings of the old authorities.⁵⁶

55. Voet, *Commentarius*, 19.1.14. The exaction of a pecuniary award is facilitated by executing against the defendant's property, which does not require his active co-operation.

56. See generally Wessels, *Roman-Dutch Law*, p 612 ff.

3.3. AN ORDER OF SPECIFIC PERFORMANCE IN SOUTH AFRICAN LAW.

3.3.1. An Order of Specific Performance as a Remedy in South African Law.

Considering the relative lack of development of an order of specific performance as a remedy in Roman law,¹ and the existence of a dispute in Roman-Dutch law as to the availability of the remedy,² it is not surprising that the existence of the remedy in early South African law should have been challenged. Another possible reason for lawyers contesting the availability of the remedy in South African law in the late nineteenth century was that, in this period, many of those practising law in South Africa had a training in, and therefore a knowledge of, English law, and, in English law, an order of specific performance originated as a remedy available in *equity*, not in law. In English law, a plaintiff who seeks an order of specific performance must set out and prove the equitable basis on which he relies in asking for the remedy.³ In particular, in English law an order of specific performance will only be ordered if an award of damages is shown by the plaintiff to be inadequate in the circumstances of the case for a just result. The point is made in the following passage:⁴

1. Section 3.2.1 - 3.2.3 above.

2. Section 3.2.4 above.

3. Spry, *Equitable Remedies*, p 59 ff; Kercher and Noone, *Remedies*, p 127: "Specific Performance is available only if the remedy at law, the award of damages, is inadequate to meet the justice of the case." Benjamin, para 1447; Fry, *Specific Performance*, paras. 7 and 11.

4. Spry, *Equitable Remedies*, p 59. Also see Treitel, *Contract*, p 768:

"The question is not simply whether damages are an "adequate" remedy, but whether specific performance will "do more perfect and complete justice than an award of damages". The point was well put in a case concerned with the analogous question whether an injunction should be granted: "The standard question..., are damages an adequate remedy? might perhaps, in the light of the authorities in recent years, be rewritten: is

"It is not surprising, however, in view of the origins of the Court of Chancery and of the functions that successive Chancellors conceived to be appropriate for it, that it has been said on many occasions that the jurisdiction of courts of equity to enforce contractual obligations in specie is based in the inadequacy of common law remedies and, in particular, on the inadequacy of damages. What is meant by this is merely that courts of equity do not entertain applications for specific performance if legal remedies are regarded as adequate. The precise question that is asked is whether the relegation of the plaintiff to such remedies as he may have in damages will leave him in as favourable a position in all respects as would exist if the obligation in question had been performed in specie."

Since this approach to the availability of an order of specific performance may well have appeared to be consonant with the views of certain of the Roman-Dutch authorities, notably De Groot and Voet,⁵ it may also have seemed reasonable to argue that, in South African law, as well as English law, the proper approach was to treat an award of damages as the "ordinary" way of enforcing contractual obligations to perform an act, with an order of specific performance only being available as an alternative if an award of damages were inadequate to meet the demands of justice.⁶

Happily, a case arose in 1882 in which the issues were as clearly presented as one might wish. This was the case of *Cohen v Shires, McHattie and King*.⁷ In this case, Shires sold certain farms to Cohen. Shires then re-sold the same farms in bad faith to McHattie and King, and transferred the farms to the second buyers, who received transfer in bad faith, that

it just in all circumstances that the plaintiff should be confined to his remedy in damages...?" "

See *Tito v Waddell (No. 2)* [1977] Ch. 106, at 322 and *Evans Marshall & Co Ltd v Bertola S.A.* [1973] 1 WLR 349 at 379.

5. Section 3.2.4 above.

6. In fact, it is well recognised that the differences between South African and English law on the remedy of an order of specific performance are fundamental, and that, consequently, English law is not a safe guide. *Ranch International Pipelines (Tvl) v LMG Construction (City) (Pty) Ltd* 1984 (3) SA 861 W at 879 G; *Benson v SA Mutual Life Assurance* 1986 (1) SA 776 A at 785 A; Kerr, *Contract*, p 399 and Christie, *Contract*, pp 504, 507, 514; Joubert, *Contract*, p 226. Nevertheless, it would appear that English law principles have sometimes crept into judicial thinking in South African decisions, even in more recent times. For example, reference in a South African case to an order of specific performance as an "extraordinary" remedy, rather than an ordinary remedy, may be the result of importing an English law view of the remedy: see *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd* 1953 (1) SA 246 W at 251 C, and cf *Ranch International Pipelines (Tvl) v LMG Construction (City) (Pty) Ltd* 1984 (3) SA 861 at 879 G - H.

is, knowing of the original sale to Cohen. Cohen sued for specific performance of Shire's obligation to deliver the *res vendita* as originally agreed. In particular, he asked that the transfer of the farms to McHattie and King be cancelled by order of the court, and Shires be ordered to then transfer the farms to him. Shires contended that an award of damages would not be a sufficient remedy in the circumstances, and accordingly did not ask for alternative relief in this form. The defendants excepted to plaintiff's claim *inter alia* on the ground that no claim for an award of damages was made as an alternative to the claim for an order of specific performance. The case therefore involved the enforcement of a personal obligation to perform an act, that is, to deliver a *res vendita*, and the enforcement of specific performance was sought expressly without the alternative option of an award of damages. The case also involved certain complications in the enforcement of an order to make delivery as agreed, in that previous transfer of the property to third parties would have to be cancelled.

In dealing with this exception, Kotzé CJ said the following:⁸

"A plaintiff demanding transfer of certain immovable properties is not bound to ask from the Court in his summons the alternative of damages. It may be desirable to make the request in the alternative, but if he chooses to make use of only a portion of his right of action, he cannot be prevented from doing so.... It is enough to observe that a summons, which prays for specific performance, and does not at the same time contain an alternative prayer for damages, is not on that account bad in law."

On the question whether an order of specific performance was available to enforce obligations arising out of a contract of sale in particular, Kotzé CJ reviewed the Roman-Dutch writers and concluded as follows:⁹

"On behalf of McHattie and King it is said that this is a demand for *specific performance* of an agreement of purchase and sale, and according to our law, no such specific remedy exists.... The Roman-Dutch law, ..., clearly recognises the right to a specific performance of a contract; and Van der

7. (1882) 1 SAR 41.

8. At pages 44 - 45.

9. At page 45.

Keesel [*Thes* 512] Van Leeuwen [*Comment.*, vol. 2, chap. 18 s.1] and others also hold that such is the true rule of the civil law. By well established practice of South Africa, agreeing with the Roman-Dutch law, suits for specific performance are matters of daily occurrence."

The exception was accordingly dismissed. Some twelve years later, in 1894, Kotzé CJ decided the case of *Thompson v Pullinger*.¹⁰ In this case, the defendant entered into an agreement with the plaintiff, in terms of which the plaintiff had an option to purchase certain shares at an agreed price. Plaintiff decided to exercise the option, and thereafter sued for an order of specific performance, to enforce the defendant's obligation to transfer the shares, tendering payment of the agreed price. A claim for an award of damages was also made, as an alternative to an order of specific performance should specific performance prove to be impossible. The learned Chief Justice said the following:¹¹

"The right of a plaintiff to the specific performance of a contract, where the defendant is in a position to do so, is beyond all doubt."

The learned Chief Justice went on to observe that, in the case of a plaintiff suing for the specific performance of the delivery of shares which could be obtained on the market without difficulty, the court would only order the payment of damages, and not actual delivery of the shares. In reaching this conclusion, Kotzé CJ relied on English law.¹² The Appellate Division has recently declared that such reliance on English law on the subject of specific performance "was particularly unfortunate", since it had the result that, while the *substance* of the South African law on orders of specific performance was sought and discovered in Roman-Dutch law, "English law became the source of its practical application."¹³ In fact, in *Thompson v Pullinger*, Kotzé CJ found as a matter of fact that the shares in question were not easily obtainable, and went on to say the following:¹⁴

10. (1894) 1 OR 298.

11. At page 301.

12. At page 301 - 302.

13. *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 at 784 G - 785 D.

14. (1894) 1 OR 298 at page 302.

Under our law the option to demand either specific performance, or damages, is left to the plaintiff. (Grotius, 3.15.6; Huber, Heedendaagse Rechtsgeleertheit, 3.2.10.) This is no more than fair, as it may well happen that a plaintiff [*sic*] may find it more advantageous to pay damages than to deliver the thing sold, and in this way may derive advantage from his breach of the contract."

The *dicta* of Kotzé CJ in *Thompson v Pullinger*, that a plaintiff has a right to the specific performance of a contract when the defendant is in a position to perform, was cited with approval by Innes J in the Appellate Division in 1912, in the case of *Farmers' Co-operative Society v Berry*.¹⁵ Innes J said the following:¹⁶

"*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract.... It is true that the Courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money.... The election is rather with the injured party, subject to the discretion of the court."

Ever since the decision in this case, it has been generally accepted that, in South African law, an order of specific performance is a remedy available at the option of the aggrieved party, in order to enforce the specific performance of contractual obligations.¹⁷ Further, the remedy is available as of right, without any necessity for an alternative claim for an award of damages in lieu of an order of specific performance.¹⁸

15. 1912 AD 343 at 350. Also see *Rex v Milne and Erliegh* 1951 (1) SA 791 A at 873 G.

16. At page 350.

17. The recent case of *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 illustrates that availability of the remedy in current law. Also see Hahlo and Kahn, *South Africa* p 498; Kerr, *Contract*, p 397 ff; Christie, *Contract*, p505 ff; De Wet and Yeats, *Kontraktereg*, p 189 ff; Joubert, *Contract*, p 222 ff.

18. See section 3.3.4 and 3.9.2 below for the special statutory rules that apply in the Magistrates' Courts in this regard.

It is also noteworthy that, until the decision in *Farmers' Co-operative Society v Berry*, the only express reservation placed by the courts on the availability of the remedy of an order of specific performance was that a court would not order the actual performance of an act that was impossible for the defaulting party to carry out. Thus, in *Cohen v Shires, McHattie and King*,¹⁹ the order for the specific performance of the undertaking to transfer the farms sold could not have been made if the second buyer had taken transfer in good faith. This is because there would have been no grounds for the court to cancel this transfer, and the seller, being no longer owner or in possession, would not be able to comply with an order to make transfer to the first buyer.²⁰ In *Farmers' Co-operative Society v Berry*, however, a more general reservation on the availability of the remedy was stated to exist. This was the principle that, although an aggrieved party is entitled to ask for an order directing the defaulting party to perform his obligations specifically, the courts have a discretionary power to refuse to issue such an order, notwithstanding that the aggrieved party has alleged and proved all the elements necessary to be *prima facie* entitled to the remedy.

In *Farmers' Co-operative Society v Berry*, Innes J avoided laying down in exact terms the factors or principles which properly justify the exercise of this discretionary power. He speaks only in general terms, thus:

"Now it is not necessary for the purposes of this case to lay down any general rule as to when a court will and when it will not decree the specific performance of a contract. Because it is clear that where, owing to the difficulty of assessing damages or otherwise, it is not possible to do justice by an order for the payment of money, and where it is in the power of a defendant to carry out his undertaking, then such a decree is the only appropriate remedy."

In subsequent cases, notably *Haynes v Kingwilliamstown Municipality*,²¹ and, more recently, *Benson v SA Mutual Life Assurance Society*²² efforts have been made to determine exactly

19. (1882) 1 SAR 41.

20. See section 3.5 below on the enforcement of specific performance in cases involving double sales.

21. At page 350.

what circumstances must exist to justify an exercise of the court's discretionary power to refuse an order of specific performance. However, it is submitted that the courts have not always identified and followed the correct principles in this regard, and a careful analysis of the cases and the law is required in order to bring clarity to this topic.²³ Furthermore, it is submitted that while textbook writers have devoted considerable attention to discussing the exercise of judicial discretion and its effect on the availability of an order of specific performance, insufficient attention has been given to ascertaining what essential elements must exist before an order of specific performance may be sought. It is important to elucidate these elements, since they provide the framework around which a detailed explanation of the operation and scope of the remedy is possible.²⁴

3.3.2. Enforcement of Orders of Specific Performance in South African Law.

If a court issues an order of specific performance, but the person so ordered remains reluctant to carry out the terms of the order, then the question of enforcement arises. It has been pointed out above²⁵ that, if refusal to comply with an order of specific performance resulted merely in a liability to pay damages, the choice of whether or not to perform would effectively lie with the defaulting, rather than the aggrieved, party. This would be inconsistent with the stated principle that an order of specific performance is available to the aggrieved party as of right,²⁶ and that it is not open to the defaulting party to choose whether he would prefer to pay damages in lieu of performance rather than actually perform

22. 1951 (2) SA 371 A.

1986 (1) SA 776

23. See section 3.8 below. Also see A Beck, "The Coming of Age of Specific Performance", (1987) 20 *Comparative and International Law Journal*, p 190.

24. An attempt to identify the essential elements that must be proved to exist before an order of specific performance is made in section 3.3.5 below.

25. Section 3.2.6 above.

26. *Farmers' Co-operative Society v Berry* 1912 AD 343 at 350.

the terms of his undertakings.²⁷ Accordingly, various methods of enforcing orders of specific performance have been devised and are available to compel a reluctant defendant to do what the court has ordered. These methods can be briefly summarised. Firstly, it is possible for a court to authorise a person other than the defendant to carry out the required act, so that the defendant's lack of co-operation is bypassed, and the desired result is achieved without defendant's active participation. Secondly, it is possible for a court to authorise execution against the defendant's property, so that it is attached and sold, and the money thus raised can be used to make payments that have been ordered. Finally, a court can commit a defendant who refuses to comply with an order of court to a period of imprisonment, for contempt of court. The threat of imprisonment coerces a reluctant person to act, because it is likely to be the worse of the two evils faced by a defendant who is told, either perform, or go to prison.²⁸

It is immediately apparent that each of these methods of enforcement has its strengths and weaknesses, and accordingly, each method is more, or less, appropriate depending of the type of order that has been issued.

27. See generally J R Harker, "The Role of Contract and the Object of Remedies for Breach of Contract in Contemporary Western Society", (1984) 101 *SALJ*, 121.

28. Herbstein and Van Winsen, *Civil Practice of the Superior Courts*, p 652:

"The principal object of the proceeding is to compel, by means of personal attachment and committal to goal, the performance of the court's order. For this reason the imprisonment imposed is very often suspended, pending fulfilment by the defaulter of his obligations in such manner as may be ordered by the court imposing imprisonment."

If the defendant remains recalcitrant despite imprisonment, damages in lieu of performance may still be claimed by the aggrieved party after such imprisonment, since the serving of the term of imprisonment imposed for contempt does not have the effect of discharging the contractual obligation.

3.3.3. Enforcement by Authorising an Official to Carry out Formalities in Place of the Defendant.

The first method of enforcement, that of authorising another person to act instead of the defendant himself, is appropriate in cases where the act to be carried out consists of a formality. Thus, in *De Villiers and De Villiers v Meyer's Executrix*²⁹ the executrix of the seller failed to comply with an order to transfer immovable property sold to the buyer by the seller before the seller's death. The court granted an order empowering the Registrar of Deeds to pass transfer of the property to the buyer, without the production of a power of attorney from the executrix. In *Van der Byl v Hanbury*³⁰ the court authorised the sheriff to attach immovable property and transfer it by order of the court to the plaintiff. However, where the performance required involves more than a formality, and, in particular, where the required acts fall outside those which can be carried out by a recognised official, such as the Registrar of Deeds or a Sheriff, then the courts will be reluctant to resort to this method of enforcement. Accordingly, in *Mohr v Kriek*³¹ the court indicated that it would not order "some appropriate official" to sign a promissory note for a fixed sum of money on behalf of the defendant, because the performance required was more than merely a formality. It is submitted that it is indeed appropriate to distinguish cases in which the required

29. 1907 TS 519 at 521.

30. (1882) 2 SC 80 at 81 - 82. De Villiers CJ said at 81:

"Where there is a sale of immovable property, the sheriff passes transfer, and by virtue of the order of the Court, the transfer is good, and the property is vested in the purchaser. I have been looking into some authorities on the point, and it is clear that there may be effectual transfer of property by means of the judgement of the Court. In *Van Leeuwen's Commentaries*, Kotzé's translation (p. 193), I find it stated that sometimes property is transferred (even against the will of the owner) by direction of law: as where the Court decreed transfer to a creditor of the pledge which he had in his keeping, or of some other property of the debtor."

Also see *Bartman v Leonard and Others* 1952 (2) SA 582 C at 598 C. A court which has given judgement against a defendant for recovery of possession of property may enforce its order by authorising the sheriff to eject the defendant from possession.

31. 1953 (3) SA 600 SR at 601.

performance is really a formality, in which case lack of co-operation on the part of the defendant can be easily circumvented, from those in which the defendant's co-operation is an integral part of performance, in which case other methods of enforcement are more effective. In particular, a defendant must not be allowed to escape performing merely by being unco-operative, so that someone else is ordered to perform on his behalf. Taken too far, this practice would deprive the aggrieved party of his right to performance by the person contractually bound.³²

3.3.4. Enforcement by Means of Execution Against Property, and by Committal to Prison for Contempt of Court.

Turning now to the alternative methods of enforcing an order of specific performance, that is, either execution against the defendant's property, or committal to prison for contempt of court, it must be pointed out that the availability of either method depends on two things. Firstly, it must be ascertained whether the order requires the performance of an act other than the payment of a sum of money (referred to as an order *ad factum praestandum*)³³ or whether the order only requires the payment of a sum of money (referred to as an order *ad pecuniam solvendam*). Secondly, it is relevant to take note whether the order is issued by the Supreme Court, or, alternatively, by the Magistrates' Courts. On these two factors (although not necessarily in the way that one might expect) depends the availability of one or other method of enforcing an order of specific performance.

In the Supreme Court, only orders *ad factum praestandum* can be enforced by committal for contempt.³⁴ The reason for this is that failure by a defendant to comply with an order

32. Section 3.2.6 above.

33. See Herbstein and Van Winsen, *Civil Practice of the Superior Courts*, p 653 for examples of orders *ad factum praestandum*.

34. *Metropolitan Industrial Corporation (Pty) Ltd v Hughes* 1969 (1) SA 224 T at 227; *Stellenbosch Farmers' Winery (Edms Bpk v Goldberg* 1968 (2) SA 728 T at 729; *Alison NO v Nicholson* 1970 (1) SA 121 R at 124; *Ferreira v Bezuidenhout* 1970 (1) SA 551 O at 553;

ad pecuniam solvendam is not considered to constitute contempt of court, even if the refusal to pay is wilful.³⁵ Orders *ad pecuniam solvendam* are enforced by means of a writ of execution, whereby a suitable portion of the defendant's property is seized and sold by public sale, and the proceeds used to satisfy the judgement and the costs of execution.³⁶

As regards orders of specific performance of contractual obligations, these may be either orders *ad factum praestandum* or *ad pecuniam solvendam*, depending on the terms of the contractual undertaking which it is sought to enforce. It is thought that an order of specific performance of the seller's duty to deliver property bought and sold would be an order *ad factum praestandum*, and thus enforceable by committal for contempt of court, whereas an order of specific performance of the buyer's duty to pay the agreed price would be an order *ad pecuniam solvendam* and not enforceable by proceedings for contempt. Similarly, an order against a lessor to make leased property available to a lessee, or to repair leased property, would be orders *ad factum praestandum*, whereas an order requiring the lessee to pay the agreed rent, or to pay for damage to the leased property, would be orders *ad pecuniam solvendam*. It is thus apparent that the appropriate method of enforcement of an order of specific performance depends on the nature of the order itself, rather than the fact that it is a contractual obligation that is being enforced, or that a particular type of contract is involved.

At present, something of an anomaly exists in South African law, in that the rules regarding enforcement of orders of specific performance issued in the magistrates' courts allow, in certain circumstances, for committal to prison for failure to comply with an order *ad pecuniam solvendam*.³⁷ Generally, a magistrate's court may commit a defendant who fails

Haddow v Haddow 1974 (2) SA 181 R at 183; *Hofmeyer v Fourie* 1975 (2) SA 590 C. Herbstein and Van Winsen, *Civil Practice of the Superior Courts*, p 653

35. *Slade v Slade* (1884) 4 EDC 243; *Hawkins v Hawkins* (1908) 25 SC 784; *Swanepoel v Bovey* 1926 TPD 457; *Gillies v Gillies* 1944 CPD 157. Herbstein and Van Winsen, *Civil Practice of the Superior Courts*, p 653

36. Herbstein and Van Winsen, *Civil Practice of the Superior Courts*, p 599 ff.

37. Jones and Buckle, *Civil Practice of the Magistrates' Courts*, p 202.

to comply with an order *ad factum praestandum* to prison for contempt of court, as occurs in the Supreme Court. Similarly, execution against property is available in cases where the defendant fails to comply with an order *ad pecuniam solvendam*. However, in terms of sections 65A to 65M of the Magistrates' Courts Act³⁸ a person who fails to comply with an order *ad pecuniam solvendam* may also be committed to prison for contempt of court. This anomaly is unsatisfactory, and the Law Commission has recommended that the position as it was prior to the 1976 amendment to the Magistrates' Court Act, so that committal for failing to comply with an order of specific performance issued in the Magistrates Court would no longer be enforceable by committal.³⁹ This recommendation is to be supported.

3.3.5. Identifying the Essential Elements that Must Exist for an Order of Specific Performance

In order to be able to predict situations in which a court is more likely than not to issue an order of specific performance, it is necessary to identify what elements must exist for the remedy to be available.⁴⁰ It is submitted that these elements can be identified by considering the characteristics of the remedy.

1. The first observable characteristic is that an order of specific performance is a remedy in terms of which the objective is to enforce the actual performance of contractual obligations.⁴¹ The performance which it is sought to enforce may consist of the payment of

38. Act No 32 of 1944, as amended.

39. "Committal to Prison in Respect of Debt", Report of the South African Law Commission, Project 54, May 1986, at pages 22,25, 37.

40. Not all modern writers address this question specifically, or in detail. Christie, *Contract*, p 505 - 514, all but ignores it, merely stating that the remedy is available "...assuming he [plaintiff] makes out a case..." De Wet and Yeats, *Kontraktereg*, p 188 - 191 and Joubert, *Contract*, p 222 - 236 do not address this question directly, and provide no statements, in abstract form, of the fundamental essential elements that must be proved to exist in order to entitle a plaintiff to an order of specific performance. Kerr, *Contract*, p 397 - 417 deals with certain of the essential elements, (for example at p 404), but does not list them all in one place systematically.

money, or the delivery of a thing, or the doing of an act, or the rendering of a service, or even of not doing some specified thing, that is, an act of restraint.⁴² Because an order of specific performance has the objective of enforcing actual performance of the terms of a contractual obligation, it follows that a person who seeks an order of specific performance must allege (and be able to prove) that a contractual obligation exists in terms of which the defending party is liable to render the performance sought. Unless the plaintiff alleges the existence of the contractual obligation in his pleadings, the defendant will be able to raise an exception to plaintiff's declaration, on grounds that it discloses no cause of action. In many cases, proof of the existence of the necessary contractual obligation is a straightforward matter. In other cases, factors such as illegality, immorality, considerations of public policy and the existence of *dolus* (fraud) complicate the question whether or not a legally enforceable obligation exists which can be specifically enforced. These topics are dealt with below.⁴³

2. A second observable characteristic of the remedy in terms of which contractual obligations are enforced is that not every legally valid contractual obligation is necessarily immediately due to be performed. For example, it is perfectly possible for the parties to a contract to agree that performance is due at a future date.⁴⁴ It therefore follows that a court will not require specific performance before that performance is *due*⁴⁵. The person seeking the remedy must allege and prove when performance is due.

41. See sections 3.1.4 - 3.1.9 above.

42. For example, an agreement not to compete in business against a former employer for a certain period of time after ceasing to be employed by him. The enforcement of agreements in restraint of trade is discussed in section 3.9 below.

43. Sections 3.4 below.

44. *West Rand Estates Ltd v New Zealand Insurance Co* 1926 AD 173 at 195.

45. D 50.17.186:

"Nothing can be demanded before the time when it can be delivered, according to the natural course of things; and when the date of payment is inserted into an obligation, it cannot be collected unless the time has come."

Also see section 3.5.1 below.

There are other factors, apart from agreement, which may affect the question whether or not an obligation is due to be performed, such as the existence of reciprocal obligations. For example, performance of some personal obligations may only be due when prior or simultaneous reciprocal performance of some counter-obligation takes place.⁴⁶ An example is the obligation of the seller of goods for cash to deliver the *res vendita*. This obligation is considered to exist reciprocally with the buyer's obligation to pay the agreed price, and performance of both obligations should take place *pari passu*. The buyer cannot sue to enforce specific performance of the seller's duty to deliver unless he tenders performance, averring that he is ready and willing to pay the price.⁴⁷ In other cases, the performance by one party of his obligation is not due until the *prior* performance by the other party of *his* obligation. An example is the case whereby a workman is to be paid for piece-work in accordance with the quantity of his output. In such cases, the contingent obligation is only enforceable after the completion of the performance which is due first. If the specific enforcement of contingent performance is sought, the plaintiff must aver and prove that he has rendered the performance which makes the contingent obligations due.

3. An order of specific performance requires the actual performance of the terms of a contractual obligation. Actual performance of the obligations has the effect of discharging the liability to which a legally enforceable obligation gives rise. It follows that an order of specific performance will not be issued if the performance claimed has already been rendered, so that no outstanding liability remains to be discharged. Accordingly, it is necessary for a person who seeks an order of specific performance to aver in his pleadings, and be able to prove, that the performance he claims has not already been rendered. A person is not entitled to sue for something which he has already received. Once the

46. *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 C at 808; Kerr, *Contract*, p 404; section 3.5.4 below.

47. D.19.1.13.8; *Truter v Joubert's Trustee* 16 SC 375; Mackeurtan, *Sale*, 15A.1.1.

performance which is due in terms of an obligation is properly carried out, the obligation is fulfilled, no further liability in respect thereof exists.⁴⁸

In some cases, the failure of the defendant to have performed will not be in issue, but in others it may well be. For example, the defendant may claim to have substantially performed his obligations, even if performance falls short of being perfect. The relevance of such circumstances to orders of specific performance are discussed below.⁴⁹

In summary, the essential elements for an order of specific performance can be stated as follows:

1. There must exist a legally valid contractual obligation that the defendant carry out the terms of his undertakings.
2. The performance of which enforcement is sought must be due.
3. The performance sought must not have already been rendered.

Each of these elements is considered in more detail in the sections following.⁵⁰

48. It may seem that no difference exists between the requirement mentioned first in this section, that is, that a valid personal obligation exist before an order of specific performance will be ordered, and the requirement that the obligation must not have been previously fulfilled. However, the requirements are distinguishable, since different considerations apply in cases in which the defending party contends that no obligation ever existed, as opposed to those in which the original obligation is admitted, but it is contended that it has since been discharged.

49. Section 3.6.5 below. Also see Kerr, *Contract*, p 405.

50. Sections 3.4; 3.5; and 3.6 below.

3.4. THE ELEMENT OF AN EXISTING CONTRACTUAL OBLIGATION TO PERFORM.

3.4.1. An Existing Contractual Obligation to Perform an Essential Element for an Order of Specific Performance.

No order for the specific performance of a contractual obligation can properly be issued by a court unless there exists such a legally valid and enforceable obligation.¹ This requirement may appear to be too obvious and trite to warrant mention, but, it is submitted, it is fundamentally important, and, unless stated, it is all too easily overlooked as the principle in terms of which certain rules of South African law can be explained. In particular, it is important to distinguish those cases in which the courts refuse an order of specific performance because no enforceable contractual obligation exists at all, from those cases in which the order is refused because the court exercises its discretion against making the order, despite the existence of a legally enforceable obligation. For example, in *Cassimjee v Cassimjee*,² the parties failed to agree on the price for which the defendant's business was to be sold. As a result, the agreement did not give rise to a valid contract of sale, nor, therefore, to enforceable contractual obligations. Accordingly, no order of specific performance could properly be made. By contrast, in *Haynes v Kingwilliamstown Municipality*,³ the court refused an order of specific performance, despite the existence of a valid contractual obligations, because the court chose to exercise its discretionary power

1. The reasons for stipulating this requirement are discussed in section 3.3.5 above.

2. 1947 (3) SA 701.

3. 1951 (2) SA 371 A.

against granting such relief. The obligation in this case arose from a valid contract in terms of which the Municipal Council of Kingwilliamstown was required to release a certain quantity of water from its dam to the appellant. The Appellate Division upheld the decision of the Eastern Cape Division, refusing to order the specific performance of that undertaking in the circumstances of a severe drought.⁴

As regards the general requirements for the creation of contractual obligations, the reader is referred to works on the law of contract such as those cited in the footnote below.⁵

However, certain specific topics are considered in this work, because of the special significance they have in relation to orders of specific performance. The topics dealt with are illegality and impossibility. Agreements which are illegal, or impossible, are generally said not to give rise to legally enforceable contractual obligations. The rule is stated by Voet as follows:⁶

"All honourable and possible matters may be made the subject of an agreement, but not those contrary to public law nor those which may redound to the public injury. Nor yet things impossible, or senseless and silly, such as the carrying with one to the grave of valuable clothes or other adornments. Nor yet things base or shameful, such as clash with good morals or entice wrongdoing, since all such things are deemed civilly impossible. To this class belong such things as have for their object that fraud should not be answered for in future, or by which impunity is secured for future wrongdoings."

De Groot expresses similar views:⁷

"Obligations are void not only whereby anything impossible is promised, as the delivery of an animal which is dead, or something which is forbidden by natural law; but also whereby something is promised which is regarded as dishonorable by municipal law and morality, as to do or omit anything wicked, or to remit the punishment of some crime not yet committed."

4. The discretionary power of the courts to refuse an order of specific performance is dealt with in section 3.7 below.

5. Kerr, *Contract*; Christie, *Contract*; De Wet and Yeats, *Kontraktereg*; Joubert, *Contract*.

6. Voet, *Commentarius*, 2.14.16.

7. De Groot, *Inleydinge*, 3.1.42 - 43.

In like manner, obligations are invalid which arise from some immoral cause or consideration...."

The authorities quoted are expressing what may be called the general rule. In fact, it is submitted that, depending on the definition of terms used, there are circumstances in South African law in which enforceable obligations, and thus the possibility of an order of specific performance, may exist, despite elements of illegality, or of impossibility of performance. In other words, the general rule, that agreements tainted with illegality or impossibility are void *ab initio*, must be somewhat qualified if a proper account is to be given of modern South African law. This task is attempted in the following sections.

3.4.2. The Effect of Illegality on the Existence of an Enforceable Obligation.

An agreement⁸ can be described as illegal if its terms or objectives conflict with a legal principle or rule which expressly or impliedly forbids, or prohibits, that undertaking.⁹

Generally, the rule is that any such agreement is void *ab initio*, and no legally enforceable contractual obligations are created. Voet says the following:¹⁰

8. Only if an agreement or undertaking gives rise to legally enforceable obligations, is it properly referred to as a "contract". Otherwise, it should not be termed a contract, because that term implies the existence of legally enforceable obligations. See Kerr, *Contract*, p 118. The use of the term "agreement" is appropriate to refer to agreements which may not give rise to legally enforceable obligations, while those which do are properly called contracts.

9. *Reynolds v Kinsey* 1959 (4) SA 50 FC; *Karstein v Moribe* 1982 (2) SA 282 T at 290 D per Ackermann J:

"As in the case of any other contract the purpose for which a partnership is formed must be a lawful one and a partnership for an unlawful purpose or contrary to the *boni mores* or against public interest is void."

Also see *Oos-Transvaalse Koöperasie Bpk v Heyns* 1986 (4) SA 1095 O. Cf *Manufacturers Development Co (Pty) Ltd v Diesel & Auto Engineering Co* 1975 (2) SA 776 W in which it was held that a sale was not itself rendered illegal because the seller intended to apply the proceeds of the sale to an illegal purpose. Also cf *Pick 'n Pay Stores Ltd v Trek Petroleum (pty) Ltd* 1976 (2) SA 302 W and *Claasen v African Batignolles Construction (Pty) Ltd* 1954 (1) SA 552.

10. Voet, *Commentarius*, 1.3.16:

"Any action, performance or contract which is against the law is *ipso iure* null, and therefore not to be maintained, even though no menace of nullity was expressly appended to the law."

Examples of agreements which are void in law because of illegality include agreements in breach of a statutory provision which prohibit such agreements,¹¹ agreements injurious to the state, such as agreements with an enemy in times of war, agreements which are harmful to the public service,¹² agreements which are injurious to the administration of justice, for example by attempting to oust the jurisdiction of the courts,¹³ or because collusion is involved,¹⁴ or when an agreement interferes with the *bona fide* disinterest of legal practitioners in litigation, such as *pacta de quota litis*.¹⁵ Agreements which encourage crime, or delictual acts or any other unlawful act are themselves illegal and void, as are agreements injurious to the institution of marriage and *pacta successoria*.¹⁶ It is submitted that it is also possible to include as "illegal" agreements those which fail to comply with positive legal requirements without which the law does not recognise the creation of a valid contract. For example, failure to comply with the positive requirements of the Alienation of Land Act results in the agreement being legally void, and therefore unenforceable.¹⁷

11. *Swart v Smuts* 1971 (1) SA 819 A at 829 c - 830 C; *Lende v Goldberg* 1983 (2) SA 284 C.

12. *Hoch v Scoble* 1916 TPD 642 at 647. Christie, *Contract*, p341 - 2.

13. *Schierhout v Minister of Justice* 1925 AD 417 at 424.

14. *Bevan v Bevan and Ward* 1908 TH 193 at 197.

15. *East London Municipality v Halberd* (1884) 3 SC 140; *Incorporated Law Society v Reid* (1908) 25 SC 612; *Goolam Mahomed v Janion* 1908 NLR 304; *Incorporated Law Society of Natal v Hillier* 1913 NPD 237; *Hitchcock v Raaff* 1920 TPD 366. Christie, *Contract*, p 345 - 346.

16. D.17.2.3.3; D.17.2.57; D.27.3.1.14; D.45.1.123; De Groot, *Inleydinge*, 3.1.42. *Conradie v Rossouw* 1919 AD 279 at 314 - 315; *Couzyn v Laforce* 1955 (2) SA 289 T. Christie, *Contract*, p 347 - 352.

17. Act No 68 of 1981. Section 2 of this act reads as follows:

"2. (1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

It should be noted that a court will not raise questions of capacity to contract, or of

Since, in all the instances of illegality mentioned, no legally enforceable contractual obligations are created, it follows that no order of specific performance can be properly made. It is in this context that the maxim *ex turpi causa non oritur actio* applies. In *Jacobson and Another v Liquidator of M Bulkin & Co Ltd*, Le Grange J said the following:¹⁸

"Although the courts will in certain circumstances order restoration of property or compel restitution in an appropriate manner where such a course is necessary to prevent injustice or to satisfy the requirements of public policy, the Court has no discretion to grant relief where the purpose of the action is not restoration but the enforcement of an illegal obligation...."

3.4.3. Not all Agreements that may be Termed Illegal are Necessarily Void ab Initio.

Having so far determined that, in cases where agreements are rendered legally void because of illegality, an order of specific performance of the terms of that agreement is not available, it must now be stated that there are certain distinctions that must be drawn. This is because, *in some instances*, it is true to say that, although the terms of an agreement are contrary to the provisions of the law, the agreement is not thereby rendered legally void. Boshoff JA explains this proposition, in the case cited below, thus:¹⁹

"As a general rule a contract impliedly prohibited by statute is void and unenforceable but this rule is not inflexible or inexorable. Although a contract is in violation of a statute it will not be declared void unless such was the intention of the Legislature and this is nonetheless the rule in the

compliance with formalities, *mero motu*: see *Gerritsen v Dorpbestuur, Aurora* 1969 (4) SA 556 A. However, this does not alter the fact that the agreement is legally void, and that if the parties choose not to rely on such factors to avoid performance, their performance must, to that extent, be considered voluntary.

18. 1976 (3) SA 781 T at 789 H. Also see *Jajbhay v Cassim*, [1939] AD 537] at pp 544, 547, 554 *et seq.*; *Bobrow v Meyerowitz* 1947 (2) SA 885 T at 890 - 891; *Mathews v Rabinowitz* 1948 (2) SA 876 W at 878; *York Estates v Wareham* 1950 (1) SA 125 R at 128; *Langham, NO and Another v Milne, NO* 1962 (4) SA 574 (N) at p 579. *Rootes (Central Africa) (Pvt) Ltd v Mundawarara* 1973 (2) SA 447 R at 450 B; and *Lende v Goldberg* 1983 (2) SA 284 C at 288 H - 289 B. It is noteworthy that the court also found in this latter case (at 289 C) that no basis for relief on the ground of unjust enrichment had been proved.

case of a contract in violation of a statute which imposes a criminal sanction. The legislative intent not to render void a contract may be inferred from the general rules of interpretation. Each case must be dealt with in the light of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view rather than the other."

This is because, in these instances, a rule of law does not *prohibit*, or *forbid* an act, but merely *penalises* it.²⁰ It is submitted that it is not improper to describe agreements as "illegal" when they contravene the provisions of a law, and attract penalties for such contravention, but without being rendered wholly void. What *is* necessary is to distinguish agreements which are *prohibited* because of considerations of illegality, as opposed to contracts which are only *penalised* because they contravene the law. Thus, in *Pick 'n Pay Stores Ltd v Trek Petroleum (Pty) Ltd* Coetzee J said the following:²¹

"If a retailer so conducts his retail trade as to attract penalties under some of the myriad Acts, Ordinances, regulations and bye-laws which impinge on his particular trade, but which do not directly concern his contracts with his suppliers, the court should be slow to hold that those penalties interfere with the rights and remedies given by the ordinary law of contract in respect of such contracts. The criminal law is always available to prevent breaches of such enactments by the retailer and public policy does not demand that bargains which are not directly or sufficiently closely connected with those breaches should necessarily be nullified. On the contrary, bargains should be carried out. ...

It may be a different matter if the applicant were conducting an unlawful trade altogether, such as, for instance, an unlicensed one. To supply him with petrol for re-sale under such circumstances knowing that he is not entitled to deal lawfully in that commodity would most probably amount to such a degree of facilitation of the illegal purpose as would move one to hold that the respondent is relieved of his contractual obligation."²²

19. *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 A at 188 F.

20. For example, section 23 of the Credit Agreements Act, No 75 of 1980:

"Any person who contravenes or fails to comply with any provision of this Act, shall be guilty of an offence and liable to conviction and to a fine not exceeding R5000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

Also see Joubert, *Contract*, p 131 - 132.

21. 1976 (2) SA 302 W at 306 A.

22. The principles set out in this case do not provide an explanation for the case of *Archbold's (Freightage) Ltd v Spanglett Ltd* 1961 (1) QB 374 (CA); 1961 (1) All ER 417 (CA). In this case, a consignment of goods sent in one of the appellant's vans was stolen owing to the

In summary, therefore, it can be said that if an undertaking is illegal, in that it falls foul of a rule of law which penalises the offending parties, but the law does not make the agreement itself void, then legally enforceable contractual obligations *do* exist despite the illegality. These contractual obligations can be specifically enforced, subject to the exaction of the prescribed penalty. Voet says the following in this regard:²³

"And again things done contrary to the laws, are not *ipso iure* null if the law is content with enacting a penalty against transgression."

3.4.4. Ordering Specific Performance of Contracts that are Independent of, or Severable from, Agreements that are Void Because of Illegality.

If one of two *independent* agreements is void because of illegality, the illegality of the one agreement does not affect the validity, or the enforceability, of the other.²⁴ In cases where agreed undertakings cannot be regarded as independent agreements, and thus independently enforced, it may nevertheless happen that only a *part* of an undertaking is affected by illegality.²⁵ In such cases, the doctrine of severability must be applied to determine whether the illegal portion of the agreement is separable from the remainder, so as to enable the remaining portion to be enforced, or whether, by contrast, the parts of the undertaking are so linked that the affected portion renders the whole undertaking illegal.²⁶

driver's negligence. The required licence for carrying goods for reward had not been obtained, and the appellant relied on the illegality of the contract to avoid paying damages. Damages were awarded. The respondent knew that the vehicle was unlicensed, and therefore that the goods could not be carried lawfully. It is submitted that, because the illegality involved was material to the agreement concluded between the appellant and the respondent, that agreement should have been treated as legally void *ab initio*. It is difficult therefore to see on what basis an award of damages was justified. The decision does not seem to accord with principle. Cf the views of A J Kerr, *Contract*, p 104. Also see Joubert, *Contract*, p 130.

23. Voet, *Commentarius*, 1.3.16. Also see *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274; *Swart v Smuts* 1971 (1) SA 819 A at 829 C; *Dlahamini en 'n Ander v Protea Assurance Co Ltd* 1974 (4) SA 906 A at 913 H.

24. *Saambou Nasionale Bouvereniging v Ligatex (Pty) Ltd* 1976 (1) SA 868 E at 872 B. In *Manufacturers Development Co (Pty) Ltd v Diesel & Auto Engineering Co* 1975 (2) SA 776 W

In *Van Leeuwen Pipe and Tube (Pty) Ltd v Mulroy and Another*²⁷ Nienaber J states the test for severability succinctly.²⁸

"The test for determining whether agreements are integrated, as it is for determining whether terms are severable, remains the intention of the parties concerned. That intention is to be gathered from the permissible material before the court."

An order of specific performance may therefore be available in circumstances involving an illegal agreement if the illegal agreement is either independent of, or severable from, the agreement which it is sought to enforce.

3.4.5. Ordering Specific Performance when Both Legal and Illegal Modes of Performance are Possible.

In some cases, a contractual relationship may be entered into in terms of which the agreed performance is able to be carried out in more than one way, one of which is legal, the other illegal. In such cases, a presumption exists that the parties intend to comply with the law, and performance in the legal manner is enforceable by means of an order of specific performance, unless the defendant is able to rebut the presumption. To do this he must prove that the intention of the parties when contracting was to perform illegally.²⁹ What

it was held that a sale was not itself rendered illegal because the seller intended to apply the proceeds of the sale to an illegal purpose.

25. Or impossibility of performance.

26. *Bal v Van Staden* 1903 TS 70 at 82; *Middleton v Carr* 1949 (2) SA 374 A at 391; *Cameron v Bray Gibb & Co (Pvt) Ltd* 1966 (3) SA 675 R at 676 - 677; *Nash v Golden Dumps* 1985 (3) SA 1 A.

27. 1985 (3) SA 396 D at 399 G.

28. At 399 G:

29. *Comminos and Frangs v Couvaras and Others* 1940 O 54 at 59 - 60; *Claasen v African Batignolles Construction (Pty) Ltd* 1954 (1) SA 552.

this rule means, in effect, is that the mere *possibility* of illegality in the mode of performing an otherwise valid contract is no bar to the creation and enforcement of legal obligations, unless it is clear that the parties intended to act illegally, in which case the contract is void.³⁰ If the plaintiff intended to act legally, and the defendant secretly intended to act illegally, the contract is valid, and the obligations enforceable. In the words of Van den Heever J in *Comminos and Frangs v Couvaras and Others*:³¹

"It seems obvious to me that one party to a contract cannot be non-suited because the other party had unlawful designs locked in his bosom."

It is submitted that the principle behind this statement is that a defendant cannot rely on his own bad faith as a defence in an action for an order of specific performance.

3.4.6. An Illegal Agreement Recognised as *Iusta Causa* for Voluntary Performance.

If an agreement fails to give rise to legally enforceable obligations because it is illegal, this does not mean that, in South African law, voluntary performance of that agreement is necessarily totally without legal effect. It appears that, if the terms of an agreement which is legally void *ab initio*, are voluntarily performed, the illegal agreement may be recognised as constituting sufficient legal *causa*, so that the voluntary performance is not considered to have been carried out *sine causa*. This is illustrated in the case of an agreement concluded without the necessary formalities, and therefore void. Innes CJ said the following in *Wilken v Kohler*:³²

30. It does not matter whether or not the parties *knew* that the way they intended to perform was illegal. It is sufficient that the way they actually intended to perform was illegal for the agreement to be rendered void, even if a lawful way of performing existed. See *Reynolds v Kinsey* 1959 (4) SA 50 FC.

31. 1940 OPD 54 at 65.

32. 1913 AD 135 at 144. An agreement entered into without the prescribed formalities may be termed "illegal" in the sense that it does not comply with the legal requirements necessary to create a legally enforceable contractual obligation. See section 3.4.2 above.

"It by no means follows that because a court cannot enforce a contract which the law says shall have no force, it would therefore be bound to upset the result of such a contract which the parties had carried through in accordance with its terms. Suppose for example, an unconditional underhand agreement of sale of fixed property for a definite price, a payment of the purchase price and due transfer of the land. Neither party would be able to upset the concluded transaction on the mere ground that the *causa* stated in the deed of transfer was called a contract of sale, whereas it was in reality an agreement to sell, invalid and unenforceable in law, but which both seller and purchaser proposed to carry out. No good ground of action could be alleged in such a case; neither in the shape of a *restitutio in integrum*, nor by way of *condictio* could relief be claimed. Neither party could say that he had been enriched at the expense of the other; and the *traditio* duly made with knowledge of all the facts and with the intent to pass *dominium*, and the price duly paid with similar knowledge and with the object of acquiring the *dominium* would bind the respective parties."³³

3.4.7. Distinguishing the Enforcement of Quasi-Contractual Obligations from the Specific Performance of Illegal Agreements.

Suppose that only one of the parties to an agreement which involves reciprocal duties of performance, but which is void because of illegality, performs his undertakings voluntarily. What recourse has such a person if the counter-performance due is not forthcoming? Since the agreement is legally invalid, no order of specific performance may be sought to enforce counter-performance. Nor is a *contractual* action available for the recovery of performance rendered, since no valid contract exists.

However, it is apparent that, in some cases, the courts *will* allow a person who has been party to an agreement that is void because of illegality, to recover either property delivered or the value of performance rendered from the recipient. The question is, on what legal basis is such recovery allowed? The answer is that, in certain circumstances, a *quasi-contractual obligation* arises, requiring the restoration of goods or benefits received.³⁴ Such

33. For a person to seek to recover what he has given when voluntarily performing the terms of a legally void agreement, by bringing either a *condictio* or *rei vindicatio*, is inconsistent with good faith if the other party has performed his related undertakings. The *exceptio doli* is therefore available against such claims. See Kerr, *Contract* p 107 - 8.

34. On quasi-contractual liability in circumstances of unjust enrichment in South African Law, see De Vos, *Verrykingaanspreeklikheid*, p 153 ff.

a quasi-contractual obligation may arise in cases where performance has been rendered voluntarily by one party, but without reciprocation from the other, in terms of an agreement which is legally void because it is illegal. The quasi-contractual obligation is created independently of the validity of the illegal agreement. The quasi-contractual obligation is created if, in particular circumstances, unjust enrichment of one party occurs at the expense of another. The quasi-contractual obligation created requires that, whatever was received by the person who is unjustly enriched, be restored to the person who gave it.³⁵

Thus, while the illegal agreement may be void, and impossible to enforce by means of an order of specific performance, it is nevertheless perfectly possible to enforce the quasi-contractual obligations that may arise if unjust enrichment results from the voluntary performance by one of the parties to the illegal agreement. Allowing the enforcement of quasi-contractual obligations is perfectly consistent with treating a co-existing illegal agreement itself as legally void. In fact, *not* to allow the enforcement of the quasi-contractual obligations would, indirectly, give effect *de facto* to the consequences of the illegal agreement, and this may be undesirable.

Distinguishing the enforcement of quasi-contractual obligations which arise in circumstances of a contract which is void because of illegality, from the specific enforcement of the terms of a legally invalid agreement, provides an explanation of the way different cases are decided. A seller may properly enforce a quasi-contractual obligation to recover a thing delivered, or money paid, in terms of a purported contract which is legally void because it is illegal.³⁶ By contrast, if a buyer and seller agree on a price that exceeds the legally

35. The action brought to enforce a quasi-contractual obligation based on unjust enrichment in cases involving illegality or immorality is generally referred to as a *condictio ob turpem vel iniustam causam*. See De Vos, *Verrykingsaanspreeklikheid*, p 160 ff.

36. *Albertyn v Kumalo* 1946 WLD 529. A seller who sued to recover land illegally sold failed to tender the return of money paid by the buyer. It was held that to eject the buyer without such repayment would unjustly enrich the seller. In *Osman v Reis* 1976 (3) SA 710 C the plaintiff sued to recover money paid as the purchase price for of a half share in a business, which purchase was illegal. The partnership was dissolved. Plaintiff was held entitled to recover the money he had paid, without deduction for the profits made by him during the currency of the illegal agreement, since this profit did not constitute an unjust enrichment.

permitted maximum, and the agreement is therefore void, the seller, who has delivered the *res vendita*, is not permitted to sue for the payment of the legally permissible portion of the purchase price, rather than suing, on the basis of a quasi-contractual obligation, for redelivery of the thing sold.³⁷

The proposition can be further illustrated. In *Wilken v Kohler*,³⁸ the plaintiff purchased a farm from the defendant for two thousand seven hundred pounds, having been induced to buy the farm because of representations made by the seller that twelve morgen of the farm were under irrigation. In fact only seven morgen were irrigated. The buyer sued to recover six hundred pounds, which he alleged was the difference between what he had been induced to expect and what he had received. The legal basis of the claim was not made very clear in the pleadings, but on appeal, Innes CJ found, at page 141, that the action was based on a material breach of the contract of sale. This created a difficulty for the plaintiff, since the contract had been verbally agreed, whereas the applicable law required it to be in writing: otherwise it was void. The fact that the agreement had been partially performed did not validate it, or make its terms specifically enforceable. In the absence of valid contractual obligations, there could be no action for breach of contract. The buyer's claim was therefore refused.³⁹

However, it must be asked whether the result of this case might not have been different had the buyer based his claim on a quasi-contractual obligation, that is, if he had alleged unjust

Watermeyer J said at 713 A:

"To allow the plaintiff to recover his money would not be enforcing the illegal contract in a roundabout way because the contract is at an end and plaintiff is no longer in joint occupation of the premises."

37. *Venter v Vosloo* 1948 (1) SA 631 E.

38. 1913 AD 135.

39. *Restitutio in integrum* is inappropriate in such cases because no legally binding transaction exists to be set aside. Any performance rendered in terms of a non-binding agreement cannot logically be reversed by purporting to nullify something that did not exist in the first place.

enrichment and, in the specific circumstances, the creation of a quasi-contractual obligation requiring the seller to restore money which was paid in expectation of receiving something which was not, in fact, delivered. This possibility was alluded to by Innes CJ in *Wilken v Kohler*.⁴⁰

"And it may be that the object of the pleader who drafted that section was to cast the plaintiff's claim in the form of a *condictio sine causa*. Had the matter proceeded on those lines, the question would have arisen whether in the circumstances proved, it was possible by that form of action to obtain a refund of portion of the money paid while retaining ownership of the farm."

It is submitted that, in principle, there is no need to assume that, merely because the buyer intended to retain the farm purchased, rather than return it and reclaim the full purchase price, that a quasi-contractual obligation might not have existed, in terms of which the seller was required to repay a *portion* of the price paid. The buyer had agreed to pay, and paid, a certain sum for the farm, on the basis that *twelve* morgen were irrigated. If only seven morgen were under irrigation, the attributes for which he agreed to pay were, in part, not delivered, and, to that extent, the buyer paid the price without receiving what he had bargained for. In such circumstances, the seller of the land is, arguably, unjustly enriched at the expense of the buyer, and a quasi-contractual obligation to restore a corresponding portion of the price paid therefore exists.⁴¹ If this legal basis for recovery is available, the plaintiff does not need to rely on the enforcement of the terms of the legally void agreement itself, nor on the enforcement of legal rights that exist only in the circumstances of a valid contract.⁴²

40. 1913 AD 135 at page 140. Also see the remarks of Innes J at page 144.

41. It is thought that the result in *Lende v Goldberg* 1983 (2) SA 284 C might have been different if the plaintiff had proceeded on the basis of a *condictio* to enforce a quasi-contractual obligation, instead of trying to enforce the illegal contract itself. In this case, plaintiff was illegally employed by the defendant. When dismissed without notice or payment of wages in lieu thereof, plaintiff sued for payment in lieu of notice. The contract of employment being void *ab initio*, the claim was dismissed.

42. For example, it is submitted that the provisions of the aediles' edict are applicable only if a valid contract of sale exists. This view is based on the proposition that if particular rules of law apply only when a particular type of contract exists (for example, a contract of sale), then such a contract must be legally in existence before the rules of law can be applied. Of course, the enforcement of the provisions of the aediles' edict are properly distinguished from orders of specific performance of terms of the contract, but even so, it is submitted that

3.4.8. The Operation of the Maxim "In Pari Delicto Potior est Conditio Defendentis".

There is no doubt that, when only a *defendant* is aware of the illegality which makes an agreement legally void, then there is no reason why a quasi-contractual obligation should not be created and enforced, in terms of which the defendant may be ordered to restore what he has received from the plaintiff.⁴³ Such cases present no logical difficulty. However, if *both* the plaintiff and the defendant were aware of these adverse factors when contracting, or if both participate voluntarily in an agreement after learning of such adverse factors, then the considerations change and the maxim *in pari delicto potior est conditio defendentis* is applied.⁴⁴ Broadly speaking, the maxim indicates that, in cases in which both parties have

they are not available to a plaintiff who cannot allege and prove the existence of a legally valid contract at all, because the agreement is void for illegality, even if the illegality comprises of a failure to comply with formalities. Contrast the views of Kerr, *Contract*, 478 ff. Professor Kerr argues that the aedilician actions ought to be available if a purported sale fails to comply with modern formal requirements. With respect, it appears that Professor Kerr's view is based on the view that *mancipatio* was a formality relevant to the creation of a valid contract of sale. Thus, at page 481:

"This means that the [aedilician] edict applied at a time when *mancipatio* was necessary in theory but not always followed in practice; when many sales of slaves were entered into informally, the required formalities being omitted."

While the function of *mancipatio* in early law may have overlapped with the function of contracts in later law, (Watson, *Rome of the XII Tables*, p 135), and probably took the place of contracts of sale in early Roman law, it is submitted that *mancipatio* was not itself a contract, nor did it require the existence of a previously existing legally enforceable contract. The use of the words "*emptus esto*" in the mancipator's declaration does not refer to an independently existing contract of sale: it was an expression denoting a conveyance. (A Pritchard, "Terminology in Mancipatio", (1960) 76 *LQR*, 412.) Further, it is submitted that *mancipatio* was not ever considered to be a formal requirement for the creation, in later law, of a consensual contract of sale. As the concept of the consensual contract of sale emerged, (circa 241 B.C.: Thomas, *Textbook*, p 215), *mancipatio* was relegated to being a formal mode of transfer, necessary for the transfer of quiritary ownership of *res Mancipi*, not only when performing the terms of contracts of sale, but whatever the reason for transfer of ownership. (Thomas, *Textbook*, page 152 ff.) Failure to transfer by *mancipatio* a *res Mancipi* bought and sold did not render the contract of sale invalid: it merely affected the legal title acquired by the purchaser on delivery.

43. Obviously, once the agreement is struck, both parties are *de facto* "involved" in an illegal agreement. However it seems that a valid distinction can be made between cases in which the one party is ignorant of the illegality, and cases in which both parties are aware of it.

44. The maxim is traceable to D.50.17.154:

involved themselves in a transaction, knowing of the illegality which renders the agreement void in law, the plaintiff has no legal right of action to recover what he has given the defendant. The defendant is therefore in the better position.⁴⁵ If the rule embodied in this maxim was applied consistently, it would present little difficulty. The court would simply have to establish whether the plaintiff had knowledge of the adverse factors when entering the agreement, or when performing, and if so, refuse to assist the plaintiff in recovering what he gave when performing his undertakings. However, the Appellate division has indicated that the maxim is *not* to be applied rigidly, and the rule is often relaxed. Accordingly, it happens that, even in cases in which *both* plaintiff and defendant were aware of the illegality when contracting or performing the terms of the illegal agreement, a *condictio* to enforce a quasi-contractual obligation is allowed to the plaintiff, and the defendant is required to restore whatever he received.⁴⁶

Two questions arise. The first is, where is the line drawn between cases in which the courts will render assistance and those in which they will not? The second question is, what legal principle operates in deciding these cases?

The reason why the courts do not wash their hands of *all* cases in which both parties know that their agreement is contrary to law is given by Stratford CJ in *Jajbhay v Cassim*:⁴⁷

"When the parties to a suit are guilty of the same crime, the plaintiff labors under a disadvantage, and the position of the possessor is preferable; as is the case when an exception is filed on account of the fraud of the plaintiff, and a reply is not granted to the latter, even if the defendant committed fraud in the same transaction.

He who is himself not guilty should be permitted to collect a penalty from the other party."

Also see *Aburrow v Wallis* 10 Juta 214; *Wells and Another v Du Preez* (1906) 23 SC 284 at 291; *Jajbhay v Cassim* 1939 AD 537 at 542.

45. The same result would follow if the plaintiff alone were aware of the adverse factor such as illegality, the defendant being innocent.

46. Recovery of property delivered, on grounds of a *real* right, either of ownership, or possession, may also be possible in these circumstances: see Kerr, *Contract*, p 106.

47. 1939 AD 537 at 543 - 544. Also see *Zuravadoka v Franck* 1981 (1) SA 226 ZAD at 228 E ff.

"It may be said that contracts of that nature are more discouraged by leaving the bereft plaintiff unhelped and the doubly delinquent defendant in possession of his ill-gotten gains. I cannot agree with this view, which I think would not so much discourage such transactions but would tend to promote a more reprehensible form of trickery by scoundrels without such honour as even thieves are sometimes supposed to possess, and public policy should properly take into account the doing of simple justice between man and man."

However, these considerations do not outweigh all others. In the same case, Stratford CJ said the following:⁴⁸

"Thus I reach my third conclusion, which is that Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim [*in pari delicto potior conditio defendentis*]. And in this last connection, I think a Court should not disregard the various degrees of turpitude in delictual contracts."

It is therefore clear that a court looks at the *degree* of turpitude involved and decides whether it ought to assist the plaintiff, or whether, in the circumstances of the case, the plaintiff should be without a legal remedy. In some cases, it seems, the illegal agreement is such a flagrant denial of what is lawful and proper that the courts will refuse to assist the plaintiff, and will leave the parties to suffer the consequences of their own reprehensible conduct. It is submitted that here lies the answer to the first of the two questions posed above: that is, the question where to draw the line between cases in which enforcement of an quasi-contractual obligation to make restoration will be made, and those in which it will not. It is thought that the answer depends on the *degree* of turpitude in which *the person seeking relief* is involved. It is submitted that it is only relevant to assess the turpitude of the plaintiff, because the defendant's turpitude is not relevant to the question whether the court ought to assist the plaintiff. Also, it is submitted that the plaintiff's turpitude is to be judged on what may be termed an "absolute" scale, that is, in relation to what conduct a court thinks can be generally condoned or not. The alternative approach is to look at plaintiff's turpitude *in*

48. *Jajbhay v Cassim* 1939 AD 537 at 544.

relation to the defendant's. However, it is submitted that a court should not tolerate excessive turpitude on the part of a plaintiff merely because the defendant's turpitude was even worse. Nor would it be fair if plaintiff were refused assistance, his own turpitude being slight, but defendant's turpitude equally slight.

Professor Kerr suggests that it is the parties' relative turpitude which governs the availability of a remedy.⁴⁹ With respect to Professor Kerr, it seems less relevant to determine the plaintiff's *relative* turpitude, that is, his turpitude in relation to the defendant's, than it is to determine the *absolute* turpitude of what he has been involved in. For it is only if the plaintiff has himself been involved in sufficiently base conduct that the court would be justified in refusing him assistance. If the plaintiff's conduct is not particularly reprehensible, why should it matter that the defendant's conduct was not worse? Relief should be refused to a plaintiff who has himself behaved sufficiently badly, not to one whose bad behavior is pardonable, even if not worse than the defendant's.

But the second question remains to be answered. What principle of law operates so as to deprive a plaintiff of the right to recover performance rendered in terms of an illegal agreement? It is submitted that the answer becomes apparent if it is borne in mind that the legal basis of the remedy involved in such cases is the *enforcement of quasi-contractual obligations*, which are available in specified cases of unjust enrichment. It must be noted that not every instance in which enrichment of one person occurs at the expense of another is considered, in law, to be unjust.⁵⁰ For example, it is considered just, in the sense of being lawful and proper, for one person to be enriched at the expense of another, as the result of

49. Kerr, *Contract*, p 105:

"If both parties are guilty but one is, to a significant degree, less guilty than the other he who is less guilty has a *condictio*.

If both parties are in equal guilt property transferred or money paid over cannot normally be recovered: *in pari delicto potior est conditio defendentis....*"

Also see page 108, paragraph 4.

the performance of the terms of a legally valid contract. The law does not demand that the exchange of exact economic equivalence be the result of performance of a contract.¹⁸

It is suggested that this fact provides an explanation of the legal principle which underlies the maxim *in pari delicto potior est conditio defendentis*. Sometimes this maxim is treated as a principle of law in itself, which of course it is not. It is a phrase which reflects the *result* of applying a legal principle. It is submitted that the underlying principle is that, in circumstances in which the plaintiff suffers a loss by performing the terms of an agreement which he knows is illegal, then, provided that the plaintiff's turpitude was of a sufficient degree, the law will not assist him to recover that loss. D J Joubert says the following:⁵¹

"[The effect of the maxim]...is simply that where the law regards it as scandalous for the performer to have performed it will deny him a remedy and leave the possessor in possession, fully recognizing that he is thereby left enriched at the expense of the performer."

Why, it must be asked, if the defendant is enriched, does no right to relief exist? One possibility is that the court simply refuses to assist a plaintiff whose conduct is disgraceful. The difficulty with this explanation is that it suggests that the courts have a discretion to refuse to enforce a quasi-contractual obligation, even when such obligation exists.⁵²

However, it is possible to suggest an alternative explanation. The suggestion is that, because

50. By "unjust" is meant something that is inequitable, or unfair in the circumstances. However, to be considered "just" in law, enrichment does not have to be "deserved" in the sense that a *quid pro quo* is given in exchange for what was received. Thus, enrichment of a donee at the expense of a donor is not considered legally "unjust", despite the fact that the donee may be entirely undeserving of his good fortune.

18. For example, the result of a donation is to make the donee better off at the expense of the donor. Such enrichment is not considered in law to be unjust: it follows from the performance of a valid agreement. Also, since the concept of *laesio enormis* no longer operates in our law, no legal grounds exist for setting aside a contract in which the seller has sold property at a price that is substantially below the market value of the property, on those grounds alone.

51. Joubert, *Contract*, p 152 - 153. Also see Kerr, *Contract*, p 105, footnote 61.

52. This would be a considerable extension of the generally accepted discretionary power of the courts to refuse to order the specific performance of a contractual obligation. See section 3.7 below. It is thought that generally, the courts are obliged to uphold and enforce legal rights, once they are shown to exist.

the enrichment of the defendant is seen to flow from the plaintiff's own disgraceful conduct, and taking account of the degree of the plaintiff's turpitude, the defendant's enrichment is not considered to be unjustified, or unfair, and therefore no quasi-contractual obligation to make restoration arises.⁵³ In other words, it is suggested that the court is not exercising a *discretion* whether or not to enforce an existing legal quasi-contractual obligation to make restoration, but that, in the circumstances described, no quasi-contractual obligation to make such restoration arises. The fact that the defendant may also be a scoundrel, who is left to enjoy a benefit for which he has given no return, does not alter the correctness of the principle, which, in extreme cases, is beyond dispute. For example, in the case of a person who supplies habit-forming narcotics to a drug addict, the courts could hardly be expected to assist the supplier to recover what he had delivered if his client failed to pay as promised.⁵⁴

A useful illustration is provided by the case of *Padayachey v Lebesé*.⁵⁵ In this case, A sold 25 cases of condensed milk to B. Both A and B knew the milk was stolen property. The contract of sale was therefore void because of the illegality. A delivered cases containing bricks instead of milk, which B discovered only after paying the agreed price. B sued to recover the price paid. The claim was allowed, despite B's knowing involvement in the illegal contract, on the basis that otherwise A would be unjustly enriched at the expense of B. This decision seems to overlook the degree of turpitude in which B was involved, which

53. In the same way, the plaintiff who relies on his own error in bringing the *condictio indebiti per errorem soluti* must show that his error was reasonable, rather than unreasonable. Thus, payment of money knowing it was not due was considered a to be a gift of the money: D.12.6.1.50; 22.6.6; 22.6.9; 50.17.53. De Vos, *Verrykingsaanspreeklikheid*, p 184, says the following:

"Die reël van die Romeinse reg en die opvatting van Voet dat die *condictio indebiti* selfs in die geval van 'n *error facti* uitgesluit is indien die *error* nie 'n *iustus error*, 'n verskoonbare dwaling, was nie, word deur ons praktyk gehandhaaf."

54. This example was suggested by Professor A J Kerr.

was arguably sufficient to render his own loss irrecoverable, despite A's undoubted enrichment. Disallowing B the right of recovering his money could be explained by taking the view that A's enrichment in such circumstances is not considered to have occurred unjustly, but as a result of B's own misconduct.⁵⁶

Accordingly, it is submitted that it should be recognised that the maxim *in pari delicto potior est conditio defendentis* exists as a result of the principle that, where enrichment has occurred at the expense of a plaintiff as a result of his knowing participation in an illegal contract, in circumstances in which the court finds his degree of turpitude to be sufficiently reprehensible, then the plaintiff's loss is held to be a result of own misconduct, and the other party's enrichment does not give rise to a quasi-contractual obligation in terms of which the recipient is to make restoration.

3.4.9. Impossibility of Performance.

To deal generally with impossibility of performance in the law of contract is outside of the scope of the present work, and the reader is referred to the works cited in the footnote below.⁵⁷ However, aspects of impossibility of performance are dealt with in this chapter because it will be submitted that, although, in some circumstances, the effect of such impossibility may be to render contractual obligations void either *ab initio*, or *ex tunc*, in other instances impossibility of performance does not render the contractual obligations void. In such cases, it must be determined whether or not an order of specific performance is an available remedy, and, if not, to ascertain the basis on which that remedy is refused, notwithstanding the existence of enforceable contractual obligations.

55. 1942 TPD 10.

56. Professor Kerr is of the opinion that the decision in *Padayachey v Lebesse* 1942 TPD 10 is not defensible, and should not be followed. See Kerr, *Contract*, p 105 footnote 61.

57. Kerr, *Contract*, pp 99, 145 - 148, 208, 318; Christie, *Contract*, p 82 - 84, 464; De Wet and Yeats, *Kontraktereg*, p 76 - 80, 156 - 159; Joubert, *Contract*, p 124 - 128; Ramsden, *Supervening Impossibility*.

Impossibility of performance is a slippery concept to discuss in abstract terms. It is generally much easier to decide that performance is possible or otherwise in relation to specific factual situations. Accordingly, in order to abstract the considerations that are relevant to determining when performance is impossible, the example is taken whether it is possible or not for a man to fly.

It is submitted that whether or not it is considered possible for a man to fly depends entirely on what circumstances are permitted to be taken into account in answering the question. If flight aided by machines is contemplated, the answer is, yes, flight by a man is presently possible. If flight without the aid of machines is contemplated, then it is submitted that the answer will depend on what is meant by the words "machine" and "flight", and what physical conditions will obtain during the attempt.⁵⁸ It therefore becomes apparent that, in order to determine whether it is possible to perform a particular undertaking, it is firstly necessary to know what the exact terms of the undertaking are, and secondly, it is necessary to determine what circumstances will govern the actual performance of that undertaking. These points will be discussed in turn in what follows.

In order to decide whether an agreed undertaking is impossible to perform or not, the first step is to determine the exact terms of the undertaking. The terms are determined by ascertaining what the parties intended to bind themselves contractually to do. The terms and conditions of the agreement, whether express, or implied, or whether provided by residual rules of law, determine the nature and extent of performance required. Thus, in a contract of sale, the quality of the *res vendita* to be delivered may be determined by express agreement, such as reference to a grade of quality.⁵⁹ Alternatively, the terms of

58. For example, the word "machine" may or may not include a hot air balloon, or a hang-glider. The term "flight" may or may not include uncontrolled flight, such as a primitive rocket launch, or the relatively controlled descent of a parachutist. Physical conditions, such as weightlessness, permit a sort of "flight" which ordinarily is not possible when gravity exerts its force.

59. *Hersman v Shapiro & Co* 1926 TPD 367. In this case the contract was a sale in terms of

performance can be agreed impliedly, perhaps by reference to the purpose for which the seller knew the buyer needed the goods.⁶⁰ Failing express or implied agreement, terms can be created by a residual rule of law, so that, in the absence of other agreed terms, the goods delivered in terms of a contract of sale should be reasonably merchantable.⁶¹ All sorts of specific requirements and limitations can be included in the terms of an undertaking, such as time and place of performance, conditions, and so on.⁶² It is only after ascertaining the exact terms of a particular agreement that it is possible to begin to judge whether performance of those agreed terms is possible or not. The details of specifically agreed terms may make performance impossible, even if a similar undertaking, in which only one term was differently agreed, would be possible. Thus for example, in the case of *Hersman v Shapiro & Co*,⁶³ performance of the seller's duty to deliver the agreed corn would have been rendered impossible by the local drought and resultant local crop failure, if the sale had been for specific local crops, rather than for corn of the specified grain generically.

which the seller undertook to deliver a specified grade of corn to the buyer. The performance of this undertaking was not rendered impossible by local drought, which caused a local crop failure, because the same grade of corn may have been available elsewhere, even if it had to be imported from another country by the seller.

60. *Kroomer v Hess & Co* 1919 AD 204. This case involved the sale of nuts, which the seller knew were required for human consumption. The seller was therefore required to deliver nuts of a quality fit for that purpose, since, by implication, that is what he had undertaken to deliver.

61. *Fergusson v Wood Bros* (1885) 4 SC 111. In the absence of other agreed terms, the quality of oathay bought and sold was required to be of a reasonably merchantable quality. This requirement is the result of the residual rule that applies if no other terms regarding the quality of the thing to be delivered are agreed, expressly or impliedly.

62. In *Ornelas v Andrew's Cafe and Another* 1980 (1) SA 378 W, it was a term of the contract of sale that the sellers give the purchasers occupation of a business which was to include an eating house that could be lawfully occupied by Black diners. In the absence of a permit, which was required for such occupation, performance of the agreed terms was impossible, although the contract of sale was not itself illegal. By contrast, in *Cave t/a The Entertainers and the Record Box v Santam Insurance Co Ltd* 1984 (3) SA 732 W, the insurer failed to prove that the contract of insurance had been varied by stipulations contained in an endorsement to a policy.

63. 1926 TPD 367. Express, implied or residual terms of the contract may determine the circumstances which are necessary for performance. If such terms exist, the absence of such circumstances makes performance in the agreed terms impossible, even if, practically speaking, the end result is still attainable by other means in the different circumstances. Kerr, *Contract*, p 147, gives the example of a contract to transport goods by sea, it being an implied term of the contract that the Suez canal be an available route. Should the canal be unexpectedly closed (perhaps because of an outbreak of war, as occurred in 1956) Professor Kerr suggests that performance of the agreement is considered impossible if transporting the

Once the exact terms of an agreement have been determined, the second question to be addressed is whether actual performance of that particular undertaking is possible or not. This question must be answered by taking account of the existing circumstances in which the performance is required to take place. What is possible or not in the real world is a question of fact, not of law. In answering this question of fact, many factors are relevant, including the physical, technological, scientific, social, political and economic conditions that obtain at any given moment in time in the place at which performance is to occur.⁶⁴

Of course, external circumstances are not necessarily unchanging or unchangeable. Before deciding that performance of a particular undertaking is impossible, it must be asked whether the governing circumstances, which may make performance presently impossible, are changeable.⁶⁵ If so, it must be asked if the required change can occur in time to permit performance in the agreed terms,⁶⁶ and if so, whether the change will occur by itself, and, if not, whether it is within the power of the person who must perform to effect the change and so make the agreed performance possible.⁶⁷ However, if the unalterable circumstances which govern *at the time and place* at which the undertaking is to be performed prevent accomplishment of the particular undertaking, then performance must be considered to be impossible, even if performance of the same undertaking may have been possible under different conditions.

goods by a different route is "vitally different from what should reasonably have been within the contemplation of both the parties when they entered into the contract". See *Tsarkiroglou & Co Ltd v Noble Thorl GmbH* 1962 AC 93 (HL); *British Movietonews Ltd v London and District Cinemas Ltd* 1952 AC 166 (HL).

64. Different factual considerations give rise to the different classifications of impossibility. Thus, reference is made, for example, to initial impossibility, (Kerr, *Contract*, p 312; Christie, *Contract*, p 82); supervening impossibility (Ramsden, *Supervening Impossibility*; Christie, *Contract*, 464); absolute impossibility, and relative impossibility (Joubert *Contract*, 124). It is beyond the scope of this work to review all the factual situations which give rise to one or other type of impossibility. The reader is referred on such matters to the authors cited in the first footnote in this section.

65. For example, extreme weather conditions may make performance of an undertaking temporarily impossible, but not permanently so. Another example of temporary impossibility of performance occurs when the person who is to perform falls sick, or is interned: *Beretta v Rhodesia Railways Ltd* 1947 (2) SA 1075 SR. In *Niemand v Okapi Investments (Edms) Bpk* 1983 (4) SA 762 T, a *caveat* registered against property sold made

3.4.10. Determining the Effect of Impossibility of Performance on the Existence and Enforceability of Contractual Obligations.

Once impossibility of performance is established, it is still necessary to determine the effect of the impossibility on the enforceability of the legal obligations concerned. In the first place, it must be noted that, where substantial performance of the agreed terms is possible, an order of specific performance may be claimed by the person to whom such performance is due.⁶⁸ Where substantial performance is not possible, an example illustrates that there is more than one possible outcome. Suppose that A sells to B, for 100 Rand, a horse belonging to C, C being willing to sell the animal to A, so that A can acquire it and deliver it to B. The agreement between A and B is perfectly lawful, and A is contractually obliged to acquire the horse and deliver it to B for the agreed price.⁶⁹ If A had privately hoped to acquire the horse from C for 90 Rand, and thus make a profit on the re-sale to B, but, in the event, C

transfer thereof to the buyer temporarily impossible. Generally, see Ramsden, *Supervening Impossibility*, p 88 ff.

66. See section 3.5.7 on the enforcement of specific performance of contractual obligations that are overdue.

67. The facts in *Bayley v Harwood* 1954 (3) SA 498 A, provide an example. The lessee of premises was unable to use them for the intended purpose of running a pleasure resort until alterations had been carried out to the building, without which alterations trading licences would not be issued. Such alterations to a building are an example of something which it is within the power of an individual to carry out, and thereby make performance of a dependent agreement possible, rather than impossible.

68. *Wireohms SA (Pty) Ltd v Greenblatt* 1959 (3) SA 909 C. Van Wyk J said at 912 B:

"Where a contracting party is as a result of his own fault unable to perform any terms of his contract, but substantial performance is nonetheless possible, the other party is entitled to demand such substantial performance."

It is submitted that the result ought to be the same even if the impossibility is due to circumstances for which the defendant is not responsible, provided that the performance required is not more onerous, or substantially different, from that which he undertook to do.

69. D.18.1.28; Voet, *Commentarius*, 18.1.14, *Kleynhans Brothers v Wessels' Trustee* 1927 AD 271; *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 A; *Ensor v Kader* 1960 (3) SA 458 D. Kerr, *Sale and Lease*, p 4, 110; Mackeurtan, *Sale*, p 12.

will not sell for less than 110 Rand, so that A will in fact suffer a loss, can it be said that performance of the agreement between A and B is now impossible? The answer is surely, no, for the reason that the price at which A was to acquire the horse was not (in this example) one of the terms of his agreement with B. He could have made it so, but, since he did not, the performance is only rendered unprofitable for A, not impossible.⁷⁰

Assuming the same initial facts, except C's willingness to sell: if C refuses to sell the horse at all, the question must be asked whether C's willingness to sell was one of the express, implied or residual terms included in the agreement between A and B. If it was, the contract is treated as conditional on C's willingness to sell, and no contractual obligations of purchase and sale exist before C consents to sell.⁷¹ If C's willingness to sell was *not* one of the terms of the contract, then, although it is impossible for A to acquire and deliver the horse to B, it would seem as if, in South African law, contractual obligations in terms of the sale *do* exist and must be discharged by A paying damages to B for being unable to do what he undertook unconditionally to do.⁷²

These examples illustrate an important point, that is, that even if impossibility of actual performance of a contractual obligation is proved to exist, the *consequences* in law of that impossibility are not necessarily the same in every case. Sometimes, it appears, the obligations are treated as void *ab initio*. In other cases the obligations are treated as in existence despite the impossibility of performance. If this is indeed the case, then an explanation for the different outcomes must be found.

It is submitted that, depending on the circumstances of the case, decided cases show that there are three alternative outcomes if impossibility of performance is proved to exist.

70. D.45.1.137.4; Joubert, *Contract*, p 124.

71. *Jacobsz v Fall* 1981 (2) SA 863 C. This case involved the substitution of B in place of A as C's debtor. The agreement between A and B could only be binding on C if C himself consented to the substitution.

72. Kerr, *Sale and Lease*, p 4, 110; Mackeurtan, *Sale*, p 12.

These are as follows.

The first possible outcome is that the purported contract is rendered void *ab initio* by impossibility of performance, and that therefore no contractual obligations are brought into existence in the first place. The classic case is found in the Institutes:⁷³

"But if someone stipulate for the giving of something which, in the nature of things, does not or cannot exist, e g Stichus, who is in fact dead but thought to be alive, or a hippocentaur which cannot exist, the stipulation is ineffective."

In other circumstances, a valid contract is created by the agreement of the parties, but the performance undertaken becomes impossible sometime afterwards, either before performance is begun, or before it is complete. In such cases, the second possible consequence of impossibility occurs: that is, the contractual relationship is ended (terminated) *ex nunc* because of the impossibility, by operation of law. Outstanding obligations to perform are therefore also terminated, but the whole contract is not treated as void *ab initio*, and no setting aside of the contractual *nexus* is necessary. Nor is mutual restoration of previous performance required. The effect is the same as if the parties had themselves agreed to terminate a partially performed contract. *Peters, Flamman and Co v Kokstad Municipality*⁷⁴ is an example of such a case. The defendants were prevented from carrying out their contractual obligations to light the town of Kokstad because of an act of State, which constituted *vis major*. Solomon ACJ held, at page 437, that the contract "...was extinguished as soon as it became impossible for the defendants to carry it on...."

⁷³ Inst. 3.19.1. Also see D.50.17.185; Inst.3.19.2; De Groot, *Inleydinge*, 3.1.19, 42; Voet, *Commentarius*, 2.14.16; *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427 at 434; *Macduff & Co Ltd (In Liq) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 600 - 601; *Stansfield v Kuhn* 1940 NPD 238 at 247. In addition, it has been made clear by the Appellate Division that the principle *lex non cogit ad impossibilia* does not only apply in the context of contractual undertakings, but in relation to any legal obligation to perform, for example, one created by statute: *Montsisi v Minister van Polisie* 1984 (1) SA 619 at 636 D.

⁷⁴ 1919 AD 427. Also see *Bekker NO v Duvenhage* 1977 (3) SA 884 EC; *Bischofberger v Van Eyk* 1981 (2) SA 607 W. Ramsden, *Supervening Impossibility*, p 95 ff.

The learned judge distinguishes the reasoning in English law cases from that underlying the Civil law. In English law, the obligations are terminated because of express or implied terms that the contract comes to an end in a situation of impossibility. In the Civil law, the termination of the contract appears to result directly from the operation of a rule of law, without reference to the intention of the parties. Either approach leads to the same result, that is, that the contractual obligations are terminated *ex nunc*.⁷⁵ Neither an order of specific performance nor an award of damages are claimable in such cases by either side, since outstanding obligations cease to exist.⁷⁶ However, if the agreement involved reciprocal undertakings, and one party has performed his obligations, but the other is prevented by impossibility from performing his, then the party who has performed is entitled to recover whatever he gave or the value of what he did.⁷⁷

There is another possible outcome in circumstances when impossibility of performance supervenes after the creation of a legally valid contract. This is that, in the particular circumstances of the case, the contract itself is not ended, nor are the outstanding obligations discharged by the proof of impossibility of performance. However, because actual performance is impossible to accomplish, and since a court will not order a person to do what the court itself has found cannot be done, no order of specific performance will be made.⁷⁸ Instead, compensation for non-performance by means of an award of damages is the available remedy. Innes CJ said the following in *Shakinovsky v Lawson and Smulowitz*:⁷⁹

75. That is, from the moment that performance is rendered impossible, as distinct from cases in the first category mentioned above, in which the agreement is considered to be void *ab initio*.

76. *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427 at 438:

"If there was no breach of contract, however, it follows that no penalty had been incurred, and as has been already pointed out, a contract which has come to an end cannot be broken."

77. *Lediker and Sacke v Jordaan* 1898 CLJ 217. The legal basis of such a claim would be the enforcement of a quasi-contractual obligation for the person who had received the benefit to make restoration. See section 3.4.7 above.

78. *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A at 783 E - F. Also see section 3.7 below for a discussion of the principles which govern the discretionary power of a court to refuse to order the specific performance of an existing contractual obligation.

79. 1904 TS 326 at page 330. Also see Voet, *Commentarius*, 18.1.14, 16; *Coronation Syndicate*

"It [the court] will certainly not decree specific performance where the subject-matter of a contract has been disposed of to a *bona fide* purchaser, or where it is impossible for specific performance where to be effected; in such cases it will allow an alternative of damages."

If it is accepted that the three alternatives set out above are all possible outcomes of cases in which impossibility of performance is proved to exist, the remaining task is to be able to identify when each or any of the alternatives is appropriate in a given case. In accordance with what principle is it possible to deduce whether to treat the contract as void *ab initio*, terminated *ex nunc*, or extant but enforceable only by means of an award of damages?

It is submitted that the following rules reflect South African law:

1. A purported contract is legally void *ab initio* when the impossibility is such that the law does not recognise the capacity of the parties to bind themselves to the performance of such undertakings. Their purported acts are therefore of no legal validity.⁸⁰

2. A legally valid contract is terminated *ex nunc* by impossibility when, although the parties are considered in law to have had the capacity to bind themselves contractually in the undertaking, the outstanding contractual liability comes to an end when the circumstances involving impossibility arise. The facts of *Peters, Flamman and Co v Kokstad Municipality*,⁸¹

79. 1904 TS 326 at page 330. Also see Voet, *Commentarius*, 18.1.14, 16; *Coronation Syndicate Ltd v Lilienfield and the New Fortuna Co Ltd* 1903 TS 489 at 497 *obiter*; *Wheeldon v Moldenhaur* 1910 EDL 97; *Rissik v Pretoria Municipal Council* 1907 TS 1024.

80. D.50.17.185:

"No obligation is binding which is impossible."

An example is an agreement to buy and sell a non-existent thing, such as a particular animal which, unknown to the parties, has ceased to exist. Similarly, an agreement to deliver something which does not and cannot exist is void in law: see Inst. 3.19.1.

Also see the *dicta* of Solomon ACJ in *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427 at 434; *Macduff & Co Ltd (In Liq) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 600 - 601; *Stansfield v Kuhn* 1940 NPD 238 at 247.

81. 1919 AD 427. Also see *Bekker NO v Duvenhage* 1977 (3) SA 884 EC; *Bischofberger v Van*

which have been summarised above in this section, illustrate this type of case. It is thought that, in this type of case, the contractual liability of the parties to render further performance of the contractual obligations is terminated by operation of law, rather than as a result of any express or implied intention of the parties.⁸²

3. A contract remains in existence, and the outstanding contractual liability is enforceable by means of an award of damages, despite the impossibility of actual performance, when the parties are considered to have had the capacity to bind themselves to the type of undertaking involved, and the circumstances are such that there is no express, or implied, agreement that the obligations existing under the contract should be terminated should the circumstances of impossibility complained of arise,⁸³ and further, in the circumstances, the law does not operate so as to extinguish the outstanding liability that exists between the parties. Thus, in *Rissik v Pretoria Municipal Council*⁸⁴ the defendant undertook to supply plaintiff with water of which defendant was not the owner. Wessels J said *obiter*:⁸⁵

"A breach of such a contract might have entitled the plaintiff to a claim for damages against the Pretoria Waterworks Co., but not to specific performance; for the Court will not order A to give B the property of C.... The concessionaire was entitled to make a contract that he would supply water which did not belong to him, and if he failed to do so he might be liable in damages; but no Court can compel him to deliver that which manifestly belongs to another."

It is submitted that it is apparent from the foregoing explanation that the reason why an order of specific performance is refused by the courts notwithstanding the fact that the

Eyk 1981 (2) SA 607 W.

82. This viewpoint is adopted on the basis of the judgement of Solomon ACJ in *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427, at 434 - 437. See the discussion of this case above in this section.

83. *Coronation Syndicate Ltd v Liliensfield and the New Fortuna Co Ltd* 1903 TS 489 at 497; *Shakinovsky v Lawson and Smulowitz* 1904 TS 326; *Wheeldon v Moldenhaur* 1910 EDL 97; *Rissik v Pretoria Municipal Council* 1907 TS 1024. *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A at 783 E - F.

84. 1907 TS 1024.

85. At 1035 - 1036:

which, in the circumstances, cannot be done. However it is important to notice that, in this context, the refusal to issue an order of specific performance is based on the exercise of the courts discretionary power, and not the absence of a legally enforceable obligation. This distinction is alluded to by Hefer JA in *Benson v SA Mutual Life Assurance Society*.⁸⁶ The learned judge of appeal said the following:⁸⁷

"Furthermore, the Court will not decree specific performance where the performance has become impossible. Here a distinction must be drawn between the case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound. It is only the latter type of case that is relevant in the present context, for in the former, the creditor clearly has no legal remedy at all."

It is submitted that, on the basis of the reasoning set out above, the consequences of impossibility of performance can be determined by implementing the following reasoning process:

Firstly, ascertain the exact terms of the performance due. Then, determine whether such performance is possible in the light of the circumstances in which that performance is to take place. If performance is not possible, decide if the parties could legally bind themselves to the undertaking despite the impossibility of performance. If they could not, the agreement is void *ab initio*. If they could so bind themselves, then determine whether the obligations are terminated by operation of law in the circumstances of the impossibility of performance. If so, liability in terms of outstanding obligations is extinguished. If not, determine whether the outstanding obligations give rise to a claim for an award of damages, or some other alternative remedy.

It is thought that this sequence of reasoning leads to results that are consistent with basic principle.

86. 1986 (1) SA 776.

87. At page 783 E.

Finally, it must be noted that, as in the case of illegal contracts,⁸⁸ the concept of divisibility may enable a court to order the specific performance of contractual obligations which are independent of, or severable from, those which are impossible to perform.⁸⁹ In *Bedford v Uys*⁹⁰ Tebbutt AJ said the following:

"Plaintiff is therefore not incorrect in claiming that, in the event of partial impossibility of performance, he is entitled to performance of such part of the contract that defendant is able to perform, i.e. transfer of sucherven as he is able to effect, and a proportionate reduction in the contract price in respect of those which defendant is unable to transfer to him. Plaintiff claims this as a surrogate to performance but the effect is the same."

3.4.11. Specific Performance of Pre-Emptive Agreements.

Pre-emptive agreements give rise to some important questions in relation to the remedy of an order of specific performance. The questions arise because, firstly, it is not always made clear exactly *when* enforceable contractual rights arise from pre-emptive agreements. Secondly, even when legally enforceable rights have arisen, there is sometimes uncertainty over the exact nature and effect of these rights. The availability of an order of specific performance, to enforce contractual obligations created in the circumstances of a pre-emptive right, depends on whether an enforceable contractual obligation exists. Otherwise, one of the elements that is essential for the availability of the remedy will not be able to be satisfied.

The answers to the questions, when do pre-emptive agreements give rise to enforceable obligations, and what is the nature and effect of these obligations, have been considered and discussed by the Appellate Division in the cases cited in the footnote below.⁹¹ However,

88. Section 3.4.4 above.

89. *Acacia Mines Ltd v Boshoff* 1957 (1) SA 93 T; *Bedford v Uys* 1971 (1) SA 549 C.

90. 1971 (1) SA 549 C at 553 G.

91. *Owsianick v African Consolidated Theaters (Pty) Ltd* 1967 (3) SA 310 A; *Bellairs v Hodnett and Another* 1978 (1) SA 1109 A; *Associated S.A. Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 A; *Soteriou v Reico Poyntons (Pty) Ltd* 1985 (2) SA 922 A; *Hirschowitz v Moolman* 1985 (3) SA 739 A; *Krauze v Van Wyk en Andere* 1986

because of differences of opinion between the various judges, as well as different analyses of the authorities, and individual approaches to the issues, the present law is complicated and potentially confusing. A review of relevant key terms and concepts is therefore necessary before attempting to explain the most recent cases. In the following section, the meaning of a variety of terms is considered. These terms are not all in *general* use today, but they are encountered in the context of pre-emptive agreements,⁹² and it is vital that the meaning of each term, and the relationship of the concepts embodied therein, is understood. Otherwise, confusion and misunderstanding is bound to occur.

3.4.12. A Preliminary Discussion of the Meaning of Different Terms that are Encountered in the Context of Pre-Emptive Agreements.

The meaning of the following terms is discussed in this section: *pactum protimeseos*, *ius retractus*, *naastingreg*, pre-emptive agreement, *pactum de retrovendendo*, *lex commissoria*.

Pactum Protimeseos. This was the name given in Roman law to a pact incorporated in a contract as a term thereof, and thus enforceable by a contractual action, the *actio ex vendito*. The pact gave the seller of goods the right to repurchase goods which he had sold in the event of the later re-sale of the goods, at the same price offered by any other bidder.⁹³ This right to purchase is termed a *ius protimeseos* and is a pre-emptive right.⁹⁴ It is also a

(1) SA 159 A. Also see *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd and Another* 1985 (4) SA 615 T.

92. See section 3.4.17 below, and *Associated S.A. Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 A; *Hirschowitz v Moolman* 1985 (3) SA 739 A; *Krauze v Van Wyk en Andere* 1986 (1) SA 159 A.

93. The term *protimeseos* derives from the Greek word for value, or price.

94. D.18.1.75:

"Where anyone sells a tract of land, under the condition that he himself should hold it under lease or payment of a certain sum, or that the purchaser cannot sell it to anyone else but the vendor himself, or where some similar provision is agreed upon; the vendor has a right to bring an action on sale to compel the purchaser to comply with his contract."

personal right, and has no effect *in rem*.⁹⁵

Ius Retractus. This is a right of "retraction" which allows a person to acquire an interest in property by purchase of it, rather than allowing the property to be alienated to a third party. Such a right could arise *ex lege* (by operation of law) called a "legal" *ius retractus*, or *ex conventione* (by agreement) and known as a "conventional" *ius retractus*.⁹⁶ The law gave a person a preferent right to purchase property in which they had a recognised interest. Thus, certain classes of owners of land had a preferent right to purchase the improvements or other rights which an *emphyteuta* wanted to alienate.⁹⁷ So too, members of a family were regarded as having a preferent right to purchase family property which, otherwise, it was intended to sell to a stranger.

This last mentioned type of *ius retractus* was known as *retractus gentilitius*, and was the most important type of *ius retractus* in Roman law.⁹⁸ So well protected was the interest of the family member that any resale of property in conflict with the *ius retractus gentilitius* was considered prohibited by law and therefore void, just as the sale of other classes of goods, such as sacred things (*res sacrae*) or things under a *fideicommissum* were considered

Buckland, *Text-book*, p 495 describes the *ius protimeseos* as a pre-emptive right.

95. This means that the holder of the *ius protimeseos* acquires no real right in the property concerned by virtue of the agreement, and cannot therefore rely on any such right to acquire possession of the property if it is sold to a third party in contravention of the pre-emptive agreement. Buckland, *Text-book*, p 495.

96. Voet, *Commentarius*, 18.3.9:

"The right of retraction, by which one who enjoys it is able on tendering the same price to bar out a stranger buyer and thus to hold the thing as bought for himself, comes very close on many ways, though not all, to the right of buying back which is available by agreement.

Such a right can avail either under a covenant, or under the provisions of common or local law."

97. D.45.1.122.3; C.4.66.3 (at end).

98. "Family" retraction was not uniformly adopted in the Netherlands: Voet, *Commentarius* 18.3.12, 24.

incapable of being bought and sold.⁹⁹ It is not remarkable then, that delivery of property sold to a third party in contravention of a *ius retractus* did not have the effect of transferring real rights to the third party. A person with a *ius retractus gentilitius* who sought to recover property from a third party who had received it in terms of a supposed sale is said by some authorities to have both an action *in rem* and an action *in personam* for the retraction. De Groot, says the following in relation to *naasting*, which, it is submitted, is equivalent in Roman-Dutch law to the Roman *ius retractus gentilitius*:¹⁰⁰

"We have said that *naasting* is a right as well over the property sold as against the seller and purchaser, for the retractor may proceed against the property in order to obtain *naasting* thereof (that is, if the seller is the owner, for otherwise he can have no real claim upon the property), or he may sue the purchaser to bring up the purchase, as already stated, and the seller to allow the same."

Other authorities say that the action available is really only personal, but *couched* in terms suggestive of an action *in rem*.¹⁰¹ This latter view really means that the action is one to enforce a personal right to re-delivery of the property, and is the better opinion. It is submitted that the best interpretation of the authorities is that the *ius retractus gentilitius* does not itself give the preferent purchaser a real right in the property, but that it operates to prevent a third party from acquiring real rights, so that these rights remain with the transferor, despite any delivery to a third party. This is so, whether or not it is proved that the third party had knowledge of the *ius retractus*, since the sale is considered void and

99. Voet, *Commentarius*, 18.3.24.4:

"This right, brought in by law or custom, affects the very properties as though it embraced a prohibition of an alienation which is in prejudice of the cognates of the last possessor; and such prohibitions by the laws, as was said in our title on *The Contract of Purchase* [18.1.15.] run with the property itself."

100. De Groot, *Inleydinge*, 3.16.16; Voet, *Commentarius*, 18.3.24.4.

101. Voet, *Commentarius*, 18.3.24.4 says the following of "family" retraction:

"Thus both an action *in rem* and one *in personam* arise for the retraction; or according to others a personal action but one couched *in rem*."

See footnote 5 to this section of Voet for the authorities referred to.

delivery takes place *sine causa*. If this suggestion seems strange, it must be remembered that the interests of family members in family property was sufficiently well recognised for any prospective purchaser to have been aware of the possibility of the existence of a *ius retractus* when he purchased such property, and he can therefore be taken to have had constructive knowledge thereof.

As already stated above, the *ius retractus* that arose *ex lege* was never generally adopted in the Netherlands,¹⁰² and does not appear to have ever obtained in South African law. However, it is important to understand the term, because it is used for purposes of comparison in discussions on pre-emptive rights.

As well as *ius retractus ex lege*, it was possible for a *ius retractus* to arise not *ex lege* in favour of a class of person, but by agreement (*ex conventione*) between individuals (a "conventional" *ius retractus*). This type of agreement does not appear to be distinguishable from a *ius protimeseos*.¹⁰³ It is important to note that the conventional *ius retractus* and the *ius protimeseos* do not have the effect of rendering a sale in contravention thereof to a third party void. Only the *ius retractus gentilitius* has the effect of taking property outside of the class of things which can be legally bought and sold. Thus, if property is sold in contravention of a conventional *ius retractus*, the sale to the third party is not void *ab initio* but *prima facie* valid: This means that, if the third party was ignorant of the conventional *ius retractus* when purchasing and taking delivery, and is thus *bona fide*, his possession is likewise in good faith and the holder of the pre-emptive right has no legal right to demand delivery of the property from the third person. He merely has a right of action for damages against the

102. Wessels, *History of the Roman Dutch Law*, p 606:

"Inasmuch as this *jus retractus* did not form part of the common law of Holland, it was not taken over into the law of the Cape Colony. The idea, however, was not entirely lost, for there are still many old properties at the Cape burdened with the condition that they may not be sold out of the family, and this condition is nothing more nor less than the ancient *naasting* in a different form."

Also see *South African Breweries Ltd v Francis and Sons* 27 NLR 648 at 658 - 659.

grantor of the *ius retractus*.¹⁰⁴ This was certainly the case if the third party acquired the property in ignorance of the conventional *ius retractus*. On the other hand, if he acquired the property knowing of the *ius retractus*, a different result occurs, namely, that the holder of the pre-emptive right is able to recover the thing sold.¹⁰⁵

Naastingreg. This term appears to be the Dutch equivalent of the Roman law legal *ius retractus*.¹⁰⁶ In Roman-Dutch law, a *naastingreg* arises *ex lege* rather than by agreement, and exists only in relation to immovable property. De Groot says that the holder of the *naastingreg* may proceed directly against the property to enforce his rights, which suggests a real right in the property, or alternatively, he may bring an action against the second purchaser and the seller, which is presumably a personal action.¹⁰⁷ *Naastingreg* is therefore most similar in nature to a *ius retractus gentilitius*. *Naastingreg*, like the *ius retractus ex lege*, has not been received into South African law,¹⁰⁸ However, it is referred to, for comparative purposes, in cases in which an order of specific performance of pre-emptive rights is in issue, and discussed as being broadly analogous to pre-emptive rights. However, whatever

103. Both these terms therefore refer to a pre-emptive right created by agreement. See the passage from Wessels, *History of the Roman Dutch Law*, p 606 quoted in the footnote above. *Owsianick v African Consolidated Theaters (Pty) Ltd* 1967 (3) SA 310 A at 319 F. Mackeurtan, *Sale*, 4.3.3.

104. Voet, *Commentarius*, 18.1.2. Moyle, *Sale*, 176:

"When created by agreement such right, [of pre-emption] being *in personam*, availed only against the first purchaser, and not against any other person to whom notwithstanding the agreement the property might have been sold and delivered...."

105. The legal principles applicable in this situation are discussed below in section 3.4.14.

106. De Groot, *Inleydinge*, 3.16.2:

"*Naasting (ius retractus)* is the right of a person over immovable property, as also against the purchaser and seller thereof, to step into the place of the purchaser whenever the property is sold."

107. De Groot, *Inleydinge*, 3.16.16.

108. *Seaville v Colley* (1891) 9 SC 39. De Villiers CJ said at page 42:

"The law of retraction, as applied to immovable property, was not general throughout Holland, and I take it for granted that it was never introduced in this colony. Certainly no instance can be found of its recognition."

the similarities between *naastingreg* and the general concept of pre-emptive rights, one important point is that, whereas it appears that a *naastingreg* possibly gave rise to real rights in the property concerned, it is distinguishable from a *ius retractus* created by agreement, which clearly gave rise to purely personal rights.¹⁰⁹ It is therefore necessary to bear this distinction in mind when comparing the legal effect of each type of agreement.

Pre-Emptive Agreements. A pre-emptive agreement is a modern term and it embraces a broad concept.¹¹⁰ It refers to any contractual agreement in terms of which a *future* contract of sale is made subject to a suspensive condition. The condition relates to a future uncertain event, usually, whether or not the owner of the property will decide to sell that property. One example of a pre-emptive agreement is when the parties to the pre-emptive agreement agree that, if and when the owner of the property decides to sell, then the other contracting party is entitled to purchase that property, before any third party may purchase.¹¹¹

The concept of a pre-emptive agreement allows for variations in the particular agreed terms. For example, the exact circumstances required for the fulfilment of the condition depend on what is agreed.¹¹² So too, the effect of fulfilment may vary. In some cases, fulfilment of the condition gives rise only to an *option* to purchase, which the holder of the option may then elect to exercise or not.¹¹³ However, in other cases, it may be that the terms of the pre-emptive agreement are such that a perfected sale (that is, an agreement in which all the essential elements for such a contract exist) is brought into existence on the fulfilment of

109. *Associated S.A. Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 A at 905 - 906.

110. The term "*voorcoopsreg*" appears to be equivalent to the term "pre-emptive right". See Van Zutphen, *Nederlandsche Praktyk*, p 784.

111. Kerr, *Sale and Lease*, p 297. Professor Kerr recognises that the pre-emptive agreement is one which incorporates a condition. Also see *Owsianick v African Consolidated Theaters (Pty) Ltd* 1967 (3) SA 310 A at 316 E.

112. For example, the condition may be agreed to be fulfilled as soon as the owner of the property forms an intention to sell at a certain price, or exhibits a willingness to do so; alternatively, it may be agreed that the condition is only fulfilled if the owner of the property finds a third party willing to purchase at an agreed sum. *Owsianick v African Consolidated Theaters (Pty) Ltd* 1967 (3) SA 310 A at 316 - 317.

the original suspensive condition, perhaps subject to a further resolutive condition which enables the purchaser to avoid the sale within a certain period if he renounces it. The fact that the effect of fulfilment of the original suspensive condition varies, depending on the particular agreed terms of each pre-emptive agreement, is important in determining the relative rights of the parties when property is sold to third parties in contravention of a pre-emptive agreement.¹¹⁴

It should be noted that a pre-emptive agreement must itself comply with the requisites for validity, including formal requirements, applicable to the future contract to which the pre-emptive agreement refers. Thus, for example, if the agreement involves the sale of land, the formalities required by the Alienation of Land Act¹¹⁵ must be complied with.¹¹⁶

It is submitted that the modern concept of a pre-emptive agreement is broad enough to encompass the Roman law *pactum protimeseos* as well as a conventional *ius retractus*.

Pactum de Retrovendendo. A *Pactum de retrovendendo* may be defined as an option to re-purchase property sold. It is distinguishable from a pre-emptive right because it is not an agreement which incorporates a condition, but instead creates a binding offer to re-sell at an

113. A pre-emptive agreement and an agreement to create an option to purchase is not itself a contract which is subject to a condition: it is an unconditional contract in terms of which the seller is obliged to keep open an offer to sell, in favour of the purchaser, who may, within the currency of the option, elect to enter this contract or not. If he chooses to exercise the option, he may then enforce performance of this contract. Prior to fulfilment of the condition which it incorporates, a pre-emptive agreement is only enforceable to the extent of preventing interference with its final fulfilment. Until the condition which suspends its operation is fulfilled, the contingent contract (that is, the option to purchase) is not enforceable. *Owsianick v African Consolidated Theaters (Pty) Ltd* 1967 (3) SA 310 A at 316 D. Christie, *Contract*, p 45.

114. See section 3.4.14 below for a discussion of this topic.

115. Act No. 68 of 1981.

116. *Hirschowitz v Moolman* 1985 (3) SA 739 A at 766 D. In this case the intended contract was governed by the Formalities in respect of Contracts of Sale of Land Act, No 71 of 1969, which act preceded the Alienation of Land Act, No 68 of 1981. It was held, at 767 I, that since the contract containing the right of pre-emption was not signed by one of the parties, the agreement did not give rise to enforceable rights.

ascertained or ascertainable price, which option may be exercised at will by the original seller, to repurchase the goods.¹¹⁷ If, by varying the terms of the agreement, the parties make the right of re-purchase conditional on the original buyer agreeing to sell, the agreement becomes a pre-emptive agreement, regardless of the previous relationship between the parties as buyer and seller.

Lex Commissoria. A *lex commissoria* is a term of a contract in which it is provided that the contract may be terminated in the event of failure of one of the parties to perform his obligations, for example, if a buyer of goods fails to pay the agreed price. The condition embodied in such a term is resolutive, so that it does not prevent a contract of sale coming into existence, as would be the case if the condition were suspensive.¹¹⁸ On fulfilment of the resolutive condition, the seller of the property is usually allowed, by the terms of the *lex commissoria* to elect whether to treat the sale as dissolved, or to waive that right, and abide by the contract. This type of agreement is clearly distinguishable from a pre-emptive right.¹¹⁹

117. Buckland, *Text-book*, p 495; Mackeurtan, *Sale*, 4.3.2:

"The first [*pactum de retrovendendo*] is the "option of repurchase", an agreement whereby the seller has the right to repurchase the article sold from the buyer within a fixed time, or at any time, at a price fixed by the parties, or failing this, at the same price as the buyer gave for it."

118. *Corondimas v Badat* 1946 AD 584; *Soja v Tuckers Land & Development Corporation (Pty) Ltd* 1981 (3) SA 314 A; *Tuckers Land & Development Corporation (Pty) Ltd v Strydom* 1984 (1) SA 1 A.

119. Voet, *Commentarius*, 18.3.1 - 6. Mackeurtan, *sale*, 15D.1, 2.

3.4.13. The Effect of a Suspensive Condition in a Pre-Emptive Agreement.

Having reviewed the terminology encountered in some of the cases, it is now necessary to consider what legal rights are created by a pre-emptive agreement in South African law. In view of the foregoing analysis, it is clear that the answer to this question is not straightforward. It must be recalled that, although a pre-emptive agreement contemplates the possibility of a contract of sale in the future, the pre-emptive agreement contains a suspensive condition that, *until its fulfilment*, prevents any such contract of sale from coming into existence.¹²⁰ Although a future contract of sale does not give rise to legally enforceable contractual obligations until it actually comes into existence, the pre-emptive agreement is *itself* a legally valid contractual relationship, even though it is not a contract of sale. The pre-emptive agreement thus gives rise to certain contractual obligations, which it is thought, may be enforced by an order of specific performance.¹²¹ The most obvious of these obligations is that the owner of the property is obliged to refrain from selling the property to a third party, which would contravene the rights of the holder of the pre-emptive right. Specific performance of this contractual obligation is enforceable by means of an order prohibiting any such act.¹²²

120. *Corondimas v Badat* 1946 AD 548; *Soja (Pty) Ltd v Tucker's Land & Development Corporation (Pty) Ltd* 1981 (3) SA 314 A. Cf *Tucker's Land & Development Corporation (Pty) Ltd v Strydom* 1984 (1) SA 1 A in which the logic underlying the decision in *Corondimas*' case is criticised. The effect of a suspensive condition on the existence of a contract of sale may not yet have been finally settled in South African law.

121. *Loe v Loots* 1909 TS 366 at 371 - 373. In this case, a contract which was subject to a suspensive condition was held by Innes CJ to create legally valid rights and duties between the parties and the property concerned, even if the condition prevented the relationship from being a contract of sale prior to the fulfilment of the condition. *Corondimas v Badat* 1946 AD 548 at 558 *per* Feetham AJA:

"Where an agreement of purchase and sale is entered into subject to a suspensive condition, no contract of sale is there and then established, but there is nevertheless created "a very real and definite contractual relationship" which, on fulfilment of the condition, develops into the relationship of seller and purchaser...."

122. As regards an order of specific performance to enforce "negative" obligations, see section 3.1.9 above. In *Hirschowitz v Moolman and Others* 1985 (3) SA 739 A at 760 C, the order

Assuming, for the moment, that the terms of a particular pre-emptive agreement are such that the essential terms of the future sale have been agreed by the parties, and, on fulfilment of the condition, the sale of the property is perfected, then, when the condition is fulfilled, the previously suspended contract of sale is considered to come into existence *retroactively*, so that it is deemed to have existed from the moment of the original pre-emptive agreement.¹²³

The situation is different if a particular pre-emptive agreement does not, on fulfilment, give rise to a perfected sale, but, because of differently agreed terms, gives rise instead only to an *option* to purchase, in favour of the holder of the pre-emptive right. When an option to purchase is created, no contract of sale comes into existence until the holder of the option exercises his right to accept the offer which exists in terms of the option. The contract of sale does not then come into existence *retroactively*, as was the case in the circumstances outlined in the preceding paragraph: the sale only exists from the moment the buyer exercises his rights under the option.¹²⁴ Thereupon, all the rights and duties that exist

issued in such circumstances is described as an interdict. It is submitted that this would be appropriate if the action were brought by the prospective buyer against the third party, in order to prevent any interference by the third party with the prospective buyer's contractual rights under the pre-emptive agreement, or the option to purchase, once this exists. However, in an action against the seller himself, it is suggested that the appropriate order is an order of specific performance.

123. D.20.4.11.1; De Groot, *Inleydinge*, 3.14.29; Wessels, *Contract*, para. 4915; Mackeurtan, *Sale*, 4.1.4; *G & C Investment and Finance Corporation (Pty) Ltd v Kajee & Others* 1962 (2) SA 73 D at 80; *Peri Urban Health Board v Tomaselli and Another* 1962 (3) SA 346 A at 349 - 351; *Cotton Tail Homes (Pty) Ltd v Palm Fifteen (Pty) Ltd* 1977 (1) SA 264 W at 269 G.

124. It is submitted that, in the case of *Associated SA Bakeries (Pty) Ltd v Oryx and Verenigde Bäkereien (Pty) Ltd en Andere* 1982 (3) SA 893 A, the pre-emptive right which existed gave rise to an *option* to purchase, and not to a perfected contract of sale. Thus, Van Heerden AJA says at p 907 F:

"Indien 'n verkoper in stryd met 'n voorkeepsreg 'n koopkontrak met 'n derde aangaan, kan die koper deur 'n eensydige wilsverklaring in die plek van 'n derde tree. 'n Koopkontrak word dan geag aangegaan te gewees het tussen die verkoper en die houer van die voorkeepsreg."

Also see *Hirschowitz v Moolman and Others* 1985 (3) SA 739 A at 754 E, from which it is clear that, on fulfilment of the condition contained in the pre-emptive agreement, an option

between a buyer and seller of property come into existence, and may be enforced by means of an order of specific performance, or any other available remedy. Prior to the buyer's acceptance, however, only the contractual obligations created by the *option* are enforceable.¹²⁵

3.4.14. Alienation to a Third Party in Contravention of a Pre-Emptive Agreement.

Difficult legal questions occur when the conditions on which a pre-emptive right is suspended is fulfilled simultaneously with the alienation of the property in question to a third party, or when the fulfilment of the condition incorporated in a pre-emptive agreement remains unknown to the holder of the pre-emptive right until after the property has been sold to a third party.¹²⁶ In such cases the holder of the pre-emptive rights finds that, although the conditions contained in the pre-emptive agreement have been fulfilled, so that a perfected contract of sale has come into existence retroactively, or, if the pre-emptive agreement contains different terms, that an option now exists in terms of which he is entitled accept an offer to sell, and thus to conclude a contract of sale, the seller may no longer be in possession of the goods. Even if he is, to contemplate enforcement of the specific performance of the seller's duty to deliver the property involves questions of the third party's rights to the property, and the legal relationship between all the parties.

The correct approach in this situation is that, if the property in question has been sold to a third party (whether delivered to him or not), and the holder of the original pre-emptive right also concludes a valid purchase of that same property, then the situation is that of a *double sale*. A double sale occurs when the seller of property sells the same property first to purchase, rather than a perfected sale, came into existence.

125. An option is an enforceable contractual relationship: Christie, *Contract*, p 44 - 45.

126. For example, a pre-emptive right may be suspended until the owner offers the property for sale at a fixed price. Such an offer may be made to, and acted on, by a third party without the knowledge of the holder of the pre-emptive right.

one purchaser and then to another.¹²⁷

It is not possible to resolve the dilemma that arises when the same thing is sold separately to two different people, by simply stating that the holder of the option cannot conclude a valid contract of sale after the sale to the third party, because performance would be impossible. The law does not require that the seller of goods be the owner thereof, or in possession, at the time of the sale. The fact that the seller has done something which makes *specific performance* of his obligations to *both* of the buyers impossible, does not necessarily make it impossible to *create* such legal obligations, and a contractual liability to both buyers. How such liability is to be discharged is another matter. Thus, it is important to realise that the situation is one of a double sale, and to apply appropriate rules of law to resolve the situation.

In cases of a double sale, the important factors are, firstly the time at which each contract of sale was concluded; secondly, who has possession of the *res vendita*; and thirdly, whether or not the second purchaser had knowledge of the prior sale, either when he bought, or when he took delivery. The possibilities are considered in the following sections.

3.4.15. Cases in which the Seller is Still in Possession of the Thing Sold.

If the seller is still in possession of the property, and even if both parties are in good faith (that is, if both parties purchased in ignorance of the other's rights) then the first purchaser in time has the right to demand and enforce specific performance of the seller's duty to

127. *Hirschowitz v Moolman and Others* 1985 (3) SA 739 A at 761 H, *per* Corbett JA, following Van Heerden AJA in *Associated SA Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 A, at 919 C - E.

"The true position is that upon the grantee exercising his rights after the conclusion of a contract of sale with a third party, a new independent contract - and it is not a substitutionary one - comes into existence between the grantor and the grantee and this does not affect the validity of the contract between the grantor and the third party."

deliver the property. This rule is based on the principle *qui prior est tempore potior est iure*, and is a sensible solution to a situation in which otherwise the parties rights and duties are irreconcilable.¹²⁸

An explanation for applying the rule that the first purchaser's rights are to be enforced specifically, while the second purchaser must be content with a claim for damages, is that the first purchaser dealt with a *bona fide* seller, whereas, by the time of the second sale, the second purchaser had the misfortune to deal with a *mala fide* seller.¹²⁹

It must be noted that, if the terms of the pre-emptive agreement were such that, on fulfilment of the suspensive condition, a perfected contract of sale came into effect with retroactive effect, this contract will be deemed to have existed *before* the sale to the third party was agreed, even although the condition was fulfilled simultaneously with, or after, the sale to the third party. This means that, in this particular situation, the purchaser whose contract of sale arose from the pre-emptive agreement will be entitled to delivery, and the third party will have to be satisfied with a claim against the seller for damages in lieu of performance.

By contrast, if the terms of the pre-emptive agreement were such that, on fulfilment of the condition contained in the pre-emptive agreement, an *option* to purchase, rather than a perfected sale, came into existence, and that, after the sale to the third party, the holder of the option exercises his right to conclude a sale, then this contract comes into existence at the time the option is exercised, and therefore *after* the sale to the third party. In this situation, the holder of the original pre-emptive right must be satisfied with a claim for damages in lieu of performance, while the third party will be entitled to delivery.

128. *Krauze v Van Wyk en Andere* 1986 (1) SA 158 A. Mackeurtan, *Sale*, 3.3.1; Kerr, *Contract*, p 375. For a discussion of double sales generally, see R G Mckerron, 1935 SA Law Times, 178; G A Mulligan, "Double Sales and Frustrated Options" (1948) 65 *SALJ* 564; J E Scholtens, "Double Sales" (1953) 70 *SALJ* 22; G A Mulligan, "Double, Double Toil and Trouble" (1954) 71 *SALJ* 169; E M Burchell, "Successive Sales" (1974) 91 *SALJ* 40.

129. See *B P Southern Africa v Dresden Properties and Another* 1964 (2) SA 21 SR at 25 F.

3.4.16. Cases where the Seller has Delivered the Thing Sold to the Third Party.

In cases of a double sale, but when the seller is no longer in possession of the property sold, the considerations change. Thus, when property is sold by A first to B and then to C, and the property is delivered to C, the question of C's good or bad faith has been held decisive in deciding whether B is entitled to delivery of the property, notwithstanding the prior delivery to C. The rule is that, if C purchased and took delivery in ignorance of B's prior right, then C is a *bona fide* possessor, and B is not entitled to recover the property. He must be satisfied with a claim for an award of damages against A.¹³⁰ However, it has been held that if C purchases or took delivery knowing of B's prior rights, then, because C is then a *mala fide* possessor, B is entitled to bring an action either against C, or C and A together, to recover possession.¹³¹

The outcome thus achieved seems appropriate and fair, but, although this sort of case has been the subject of much discussion, no clear answer seems to exist to the question, what is the legal basis of the claim for delivery brought by B either against C alone, or against C and A jointly?¹³² Allied to this is the question of whether C is claiming an order of specific performance of the seller's contractual duty to deliver, or whether he is claiming delivery on the basis of a real right, or whether the action has some other basis in law.

130. *Shakinovsky v Lawson and Smulowicz* 1904 TS 326 at 330 - 331. Mackeurtan, *Sale*, 3.3.1; Kerr, *Contract*, p 376.

131. *Cohen v Shires, McHattie and King* (1882) Kotze's Reports 41 at 46 - 47. Mackeurtan, *Sale*, 3.3.1; Kerr, *Contract*, p 376.

132. R G McKerron; (1935) 4 SA Law Times 180 suggests that the second purchaser has an action against the first purchaser on the basis of the doctrine of "quasi-litigiosity" - that is, on principles similar to the purchase of a *res litigiosa*. A *res litigiosa* is a thing concerning which legal proceedings concerning its ownership have been begun. The institution of a personal action relating to property does not render the property *res litigiosa*, but Professor McKerron suggests that, in the circumstances, the action brought by the second purchaser "infests [the thing] with some of the vices attaching to a *res litigiosa*." E M Burchell endorses this view in his article "Successive Sales" (1974) 91 *SALJ* 40 at 44. With respect to the

It is obvious that no contractual obligations exist between B and C in the situation now under discussion. They may be complete strangers to each other, and there is no basis for constructing any actual or fictional agreement which would render C subject to a contractual (or even a quasi-contractual) obligation.¹³³ Nor do any of the authorities suggest, in relation to double sales, that an obligation between B and C arises *ex lege*, or that the concept of unjust enrichment gives rise to an obligation in terms of which C must restore what he received to B. The explanation must therefore lie elsewhere.

It is also apparent, however, that B may have no real rights in the property delivered by A to C. B may never have had any physical control of the property at all, and, in the absence of any previous possession, or some equivalent, such as registration, it is not possible to ascribe to B a real right in the property on which right his claim for delivery of the property from C might be based.¹³⁴

It may be thought that the answer to these difficulties lies in requiring B to bring the action for delivery of the property not against C directly, but against the seller, A, joining C as a defendant in the action. In the situation under consideration, it is clear that A is under a contractual obligation to deliver the *res vendita* to B. One possibility is that C is joined

learned authors, the reasoning is not convincing. Property cannot be made *res litigiosa* by the bringing of the action of the person who seeks to recover the property on that very ground. To allow this would mean that the cause of action is created by bringing the action, which is questionable. Also, the cause of action does not exist at the time of the purchase by the first purchaser, nor when he takes transfer. The "quasi-litigiosity" must therefore be considered to create the cause of action retroactively, which is unsatisfactory.

133. The authorities often refer to the contractual relationship which exists between the seller and each of the purchasers, but not to any such relationship between the first and second purchasers themselves.

134. The point is illustrated in *Dithaba Platinum v Econovaal Ltd and Another* 1985 (4) SA 615 T at 627. The property (mineral rights) was sold and transferred to a third party contrary to the rights of the holder of a pre-emptive right. The holder of the pre-emptive right sought relief in the form of an order of specific performance, claiming that the third party should transfer the rights to him, or that the original seller obtain re-transfer of the rights and cede them to him. The Court avoided the question of what cause of action exists in such circumstances by merely stating that a pre-emptive right can be enforced by means of an order of specific performance.

because he is in possession.¹³⁵ The difficulty with this approach is that it overlooks the rule that joinder of defendants is only appropriate when sufficient grounds exist to sue each defendant individually.¹³⁶ Joinder is then available to avoid a multiplicity of actions, on the basis that the same proof is relevant to each individual cause of action. Joinder cannot be used to obscure the fact that, in relation to one defendant (the second purchaser, C,) neither a contractual nor a real cause of action appears to exist. One is therefore back at the starting point of this enquiry: what cause of action exists between B and C?

3.4.17. Dolus Considered as the Cause of Action.

It is submitted that the best answer is that the true cause of action between the first and second purchaser, B and C, is the constructive fraud (*dolus*) that exists on the part of the third party when, knowing of B's prior rights to the property, C nevertheless purchases the property or takes delivery thereof. It is contrary to an honest intention for C to purchase or take delivery of property in which he knows B has existing rights, and C's conduct thus amounts to fraud.¹³⁷ Fraud, as a cause of action, entitles the aggrieved party *inter alia* to a *restitutio in integrum*,¹³⁸ in terms of which his legal rights are restored and anything inconsistent which has meanwhile occurred is set aside and the *status quo ante* restored. B is

135. This may be the reasoning behind the statement by E M Burchell, "Successive Sales" (1974) 91 *SALJ* 40 at 44:

"...the practice in South Africa is for B to join A as co-defendant and claim as against him an order cancelling the transfer, and as against C an order to pass transfer into his (B's) name."

136. Nathan *et al.* p 86.

137. *Cohen v Shires, McHattie and King* (1882) Kotzé's Reports 41 at 46 - 47. J E Scholtens, "Double Sales" (1953) 70 *SALJ* 22 says at page 33:

"A purchaser who takes transfer while knowing of a previous sale is *particeps fraudis* with the seller, as he knows that by taking transfer he deprives the first buyer of a valid right."

138. Section 2.6 above. Fraud also gives rise to a claim for an award of damages on delictual grounds.

thus entitled to ask that the property delivered by A to C be re-delivered to A, so that A can perform his obligation to deliver to B.¹³⁹ However, since both the order of *restitutio in integrum* and an order of specific performance of the obligation of A to deliver the property to C depend substantially on the determination of the same questions of fact, the case is appropriate for joinder of the defendants.¹⁴⁰

The relief asked for will usually be delivery of the disputed property to the holder of the pre-emptive right, and may therefore appear to consist simply of a claim for specific performance.¹⁴¹ However, it is submitted that this analysis has shown that in fact both a *restitutio in integrum*, followed by an order of specific performance of the duty to deliver is involved. If the action is brought against the third party only, it would be erroneous to talk of the remedy as an order of specific performance: in such circumstances the remedy is simply *restitutio in integrum* on the basis of the fraud.

3.4.18. An Analysis of an Alternative Approach.

The approach outlined above, in which the remedy of the holder of a pre-emptive right as against a third party who has acquired the property fraudulently is shown to be *restitutio in integrum* rather than an order of specific performance or recovery of property on grounds of a real right, is not the approach adopted in the leading Appellate Division case. In *ASA Bakeries v Oryx & Vereingte Bäkereien (Pty) Ltd en Andere*¹⁴² the majority of the court adopted the following points as definitive:

139. This was the form of relief asked for in the alternative in *Dithaba Platinum v Econovaal Ltd and Another* 1985 (4) SA 615 T at 627, although the court seems to have considered the remedy involved to be an order of specific performance, and not *restitutio in integrum*.

140. Nathan *et al.* p 86.

141. As appears to have been the case in *Dithaba Platinum v Econovaal Ltd and Another* 1985 (4) SA 615 T at 627.

142. 1982 (3) SA 893 A. Also see *Hirschowitz v Moolman and Others* 1985 (3) SA 739 A at 762 C - J.

Firstly, that the holder of a pre-emptive right has a purely personal right.¹⁴³ With respect, this is a correct statement as regards the holder's relationship with the seller of the goods, but it does not adequately or properly describe the holder's relationship with a third party who has purchased and who possesses the goods. The statement does indicate, however, that the pre-emptive right is correctly distinguished from a *ius retractus ex lege* and a *naastingreg*.

Secondly, the Appellate Division has stated that, if the seller sells the property in question to a third party contrary to the rights of pre-emption held by another, the holder of the pre-emptive right can, by unilateral declaration of intent, step into the place of the third party.¹⁴⁴ With respect, this statement is potentially misleading, primarily because it tends to obscure the fact that, in this situation, two contracts of sale have come into existence; not one. If only one sale is seen to exist then the rules for double sales cannot logically be applicable, and other rules must be applied to determine whether the property can be recovered from the third party. This leads to unnecessary difficulties. Accordingly, it would be better to acknowledge that the holder of the pre-emptive right may, by a unilateral declaration of intent, conclude a valid contract of sale with the original seller, notwithstanding the previous sale and delivery to the third party, so that *two* sales, not one, come into existence.¹⁴⁵

143. *Associated S.A. Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 A at 907 E. The holder of a pre-emptive right is said to be indistinguishable from the holder of a *naastingreg (sic)* originating *ex lege* and a *ius retractus* except for the wholly personal nature of the right of the first mentioned category of person.

144. *Associated S.A. Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 A at 907 F. However, this does not mean that the pre-emptive agreement does not have to comply with all the necessary formalities that are required for the later contract: *Hirschowitz v Moolman and Others* 1985 (3) SA 739 at 766 D. Such compliance is essential if the pre-emptive agreement is to create legally enforceable obligations.

145. As was made clear by Corbett JA in *Hirschowitz v Moolman and Others* 1985 (3) SA 739 at 761 H.

Thirdly, the Appellate Division has said that if delivery to the third party has already taken place, the holder of the pre-emptive right only has a right to recover the property from the third party if the third party was aware at the time of taking delivery of the existence of the pre-emptive right.¹⁴⁶ This statement is unexceptionable, but it does not make clear what the basis of the right of recovery is. In an effort to answer this question, the suggestion is made that, on account of the third party's knowledge of the pre-emptive right, the holder's purely personal right is "lent a limited real effect", but only against the third party who had such knowledge. Van Heerden AJA said the following in *Associated S.A. Bakeries (Pty) Ltd v Oryx and Verenigde Bäckereien (Pty) Ltd en Andere*:¹⁴⁷

"Die juiste siening na my mening is dat vanweë die kennisleer aan 'n persoonlike reg beperkte saaklike reg verleen word. Anders as 'n saaklike reg wat teen almal geld omdat oa by wyse van fiksie kennis daarvan aan almal toegeskryf word, het 'n voorkeepsreg dus saaklike werking slegs teen diegene wat daadwerklik daarvan kennis dra (of, moontlik, optree met *dolus eventualis* ten opsigte van die bestaan daarvan."

With respect, this is not a satisfactory account of how basic principles operate. To talk of personal rights with real effects is to confuse basic concepts. It is suggested, with respect, that the notion of real rights arising in circumstances involving pre-emptive rights originates in the *ius retractus gentilitius* of Roman law, and *naastingreg* of Roman-Dutch law. However, the circumstances in which those institutions operated were very different from the modern pre-emptive right, and it is therefore not safe to borrow ideas piecemeal. In any event, it has been shown above that it is unnecessary to use a concept of "personal rights with a limited real effect". It has been pointed out that the existence of knowledge of the pre-emptive right, and the resultant *mala fides* or fraud in taking delivery of the property, gives rise to an action for *restitutio in integrum*. It is therefore not necessary to suggest that the nature of the rights acquired are different from those normally encountered in our legal system.

146. *Associated S.A. Bakeries (Pty) Ltd v Oryx and Verenigde Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 A at 907 G.

147. 1982 (3) SA 893 A at 910 H.

Difficulties result from the suggestion that the basis of the remedy sought by the holder of a pre-emptive right against a third party who has purchased and is in possession of the property is specific performance of a personal right which has been lent a limited "real" effect. This is that, in acknowledging a "real" element in the cause of action, it seems inappropriate to limit the enforcement of that right by subjecting it to the court's overriding discretion, as is the case with an order of specific performance of purely personal obligations.¹⁴⁸ If the court is enforcing a right which has "real" attributes (albeit limited real attributes) then it must be asked on what basis the court has a discretion to refuse the order for delivery of the property to the holder of the pre-emptive right. The question seems to have occurred to Van Heerden AJA:¹⁴⁹

"Daar is ook nog ander oorwegings wat my laat twyfel of die regsposisie met betrekking tot 'n diskresie wat in sake soos die *Haynes*-saak *supra* [1951 (2) SA 371 A at 378] geformuleer is, wel in 'n geval soos die onderhawige toepassing vind. Vanweë die gevolgtrekking waartoe ek hieronder kom, veronderstel ek egter ten gunste van die respondente dat sodanige wye diskresie wel *in casu* uitgeoefen kan word."

The solution to this difficulty lies in recognising that, as against third parties in possession, the cause of action is the fraudulent action of the third party, and the remedy is *restitutio in integrum*. This last mentioned remedy is well recognised as subject to the discretion of the court, and accordingly no difficulty need arise.

In summary, it can be stated that this review of the law governing the remedies available to enforce pre-emptive rights and rights that arise from double sales confirms the principle that an order of specific performance is a remedy that is only available when it is sought to enforce an existing contractual obligation. An order of specific performance is not available in the absence of such a cause of action, and the existence of such an obligation on one

148. *Associated S.A. Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 A at 913 F - G.

149. *Associated S.A. Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 A at 913 G. Also see *Owsianick v African Consolidated Theaters (Pty) Ltd* 1967 (3) SA 310 A at 320 and 325; *Dithaba Platinum v Econovaal Ltd and Another* 1985 (4) SA 615 T at 627.

person does not enable an order of specific performance to be made against another.

3.5. THE REQUIREMENT THAT PERFORMANCE OF THE OBLIGATION
MUST BE DUE.

3.5.1. Performance Must be Due Before An Order of Specific Performance may Properly
be Sought.

It is one thing to allege and prove the existence of an obligation to perform an act, but another to prove that the performance of that obligation is *due* to be performed. This is an important distinction because a court will not require a creditor to render performance before the performance of the obligation is finally due. Authority for this proposition is found in the Digest:¹

"Nothing can be demanded before the time when it can be delivered, according to the natural course of things; and when the date of payment is inserted into an obligation, it cannot be collected unless the time has elapsed."

Thus, for example, it would seem that, if a particular date for performance is agreed, then performance is due on that date. If a period of time is agreed, within which performance must take place, performance is finally due at the end of that period.² However, it is thought that a distinction must be drawn between the situation in which performance is *due*, and that in which it is *overdue*. The term "due" is used to refer to the situation when a specific time agreed for performance to be carried out has finally arrived. By contrast, performance can

1. D.50.17.186.

2. *Goldstein and Wolff v Maison Blanc (Pty) Ltd* 1948 (4) SA 446 C.

be said to be "overdue" when the time agreed or allowed for performance has *expired*. It is one thing to order specific performance when it is due, but another to say that specific performance can only be ordered once performance is *overdue*. It is submitted that there is no authority for the proposition that either *mora*, or breach of contract, is an essential element of an order of specific performance: therefore it is sufficient that the plaintiff aver and prove that the specific performance he asks for is *due*.³

The requirement that performance of an obligation must be due before a creditor can properly be required to perform raises certain important questions. Firstly, how is it to be determined when a particular obligation is finally due to be performed or not? Secondly, is it a rule of South African law that the plaintiff must place the defendant *in mora* extrajudicially, before an order of specific performance may be sought? Thirdly what effect has anticipatory breach on the question whether performance is due or not? Fourthly, does the remedy of an order of specific performance remain appropriate even after the time fixed for performance has expired without performance? These questions are considered below in the sections that follow..

3.5.2. Determining When Performance is Due.

The basic rule is that performance is due when the parties have agreed that it should be carried out.⁴ Failing any such agreement, the law provides residual rules to determine

3. If, on account of late performance, a plaintiff wishes to cancel the contract, and sue for an award of damages, he must aver and prove *inter alia* a breach of a material term of the contract. In such circumstances, the fact that performance is *overdue*, and the materiality of the time of performance, is important. However, the same considerations do not apply if the claim is for an order of specific performance, because, in such a claim, the plaintiff does not have to prove a breach of a material term of the contract, but merely that the time for performance has finally arrived.

This is an important realisation, because it affects the question whether a demand for performance need be made prior to the issue of summons, and whether an action can be brought for specific performance when the time agreed for performance has arrived, even if time of performance was not of the essence: section 3.5.3 below

when performance is due. The time at which performance of a contractual obligation is due is therefore determined by reference either to the express or implied undertakings by the parties or by the application of residual rules of law.⁵

If the parties to a contract expressly or impliedly include as a term of their contract the time at which performance is to take place then that is the time at which performance is due. This is true whether or not the stipulation regarding the time of performance was of the essence. In cases where the parties agree that performance is to be carried out at any time within a period of time, the performance only becomes finally due at the end of the period, and overdue after the expiry of the period⁶

In cases where the parties do not expressly or impliedly agree on the time at which performance is due, performance is considered to be due within a reasonable time of contracting. What is reasonable depends on the circumstances of each case. The Digest lays down a strict rule in this regard:⁷

"In all obligations in which the time of payment is not inserted, the debt is due immediately."

Voet is a little more lenient.⁸ Thus:

"In those [stipulations] which are made unconditionally, that is to say without the attachment of a day or condition, the vesting day and the due day of the obligation arrive at once, so that what has been promised is due

4. Undertakings regarding the time of performance are enforceable in the same way as any other contractual obligation, and thus the courts will give effect to what the parties have agreed. See for example, *West Rand Estates Ltd v New Zealand Insurance Co* 1926 AD 173 at 195.

5. Kerr, *Contract*, p 310; Christie, *Contract*, p 483 ff; De Wet and Yeats, *Kontraktereg*, p 143 ff; Joubert, *Contract*, p 168 ff; Wessels, *Contract*, para 2863.

6. *Goldstein and Wolff v Maison Blanc (Pty) Ltd* 1948 (4) SA 446 C.

7. D.50.17.14.

8. Voet, *Commentarius*, 45.1.19.

on the very day, and can be claimed without delay. This however must be understood with a certain relaxation of the time, for as Paulus says the creditor "ought not to come forward with his moneybag ready."⁸

When a creditor makes a demand for performance, in order to indicate a period within which performance ought to be made, the demand cannot be unreasonable, so as to defeat the objects of the contract, or to allow an insufficient time for compliance.⁹

3.5.3. No Necessity to Place the Defendant in Mora Extra-Judicially if Performance

Already Due.

It has been held that it is not essential for plaintiff who seeks an order of specific performance when performance is due to place the defendant *in mora* extra-judicially before bringing his action. It has been held that a summons is, in itself, a sufficient demand for performance, and no other extra-judicial demand is required.¹⁰ It is thought that the rule is correct, for the following reasons. The purpose of making a demand for performance extra-judicially is either to elicit from the defendant an unequivocal repudiation of his duty to

9. *Mackay v Naylor* 1917 TPD 533 at 537 - 538. In *Breytenbach v Van Wijk* 1923 AD 541 at 549, even although the terms of the contract obliged the seller to deliver without delay (*zonder verzuim*) the parties did not in fact contemplate immediate performance. Performance within a reasonable time was therefore allowed. In *Ridley v Marais* 1939 AD 5 at 7 no specified time was agreed for the repayment of money lent. The Appellate Division appears to have accepted that the repayment was due within a time that was reasonable in the circumstances. In *Fluxman v Brittain* 1941 AD 273 at 293 - 296, it was held that it is not necessary for the creditor to prove that he has allowed a reasonable time to elapse, but rather for the debtor to raise as a defence the fact that no reasonable time for performance has been allowed. What constitutes a reasonable time depends on the circumstances of each case: *Broderick Properties Ltd v Rood* 1964 (2) SA 447 T at 450 ff.

10. *Ridley v Marais* 1939 AD 5 at 8. Watermeyer JA said the following:

"Here the question is whether a declaration in which is claimed a sum of money on the ground that defendant has agreed to his indebtedness for the amount claimed can be excepted to if it does not contain an averment that a demand for the sum claimed has been made. Seeing that a summons is a demand and that a declaration cannot be filed unless a summons has been issued, it is quite unnecessary to allege in a declaration that a demand (in the form of a summons) has been made. Consequently a declaration which omits that averment cannot be excepted to."

Blundell v McCawley 1948 (4) SA 473 W at 474; *Theron v Theron* 1973 (3) SA 667 C at 671 H.

perform, or to indicate the period of time after which performance may reasonably be considered overdue.¹¹ In this way, the plaintiff establishes a breach by the defendant of the contractual obligation to perform. If the time at which performance is due is already determined, for example, by being included as a term of the contract, and if it is accepted that it is not necessary that a plaintiff who seeks an order of specific performance to establish that performance is *overdue*, then no need for an extra-judicial demand for performance exists.¹²

There is, nevertheless, a potential disadvantage for the plaintiff who sues for an order of specific performance of an obligation due (but not overdue) without making an extra-judicial demand for performance. Since the performance sought is not overdue, it is open for the defendant, on receiving the summons, to perform without delay.¹³ In this case, the plaintiff will have incurred the cost of issuing summons, which costs will not be recoverable. This may not be an intolerable price to pay for ensuring timeous performance, but a preliminary extra-judicial demand for performance that is due may be sufficient to ensure performance at lesser cost.

Another potential disadvantage of proceeding without an extra-judicial demand for performance is that, unless he avers and proves a material breach of contract, the plaintiff will not be entitled to ask for an award of damages as an alternative to the order of specific performance. To be entitled to an award of damages as an alternative, the plaintiff must aver and prove all the essential elements for that remedy.

11. Kerr, *Contract*, 372 - 373.

12. The distinction between what is necessary in a claim for an order of specific performance as opposed to a claim for, say, cancellation and an award of damages is referred to in *Ridley v Marais* 1939 AD 5 at 8; *Fluxman v Brittain* 1941 AD 273 at 293 ff; *Blundell v McCawley* 1948 (4) SA 473 W at 477 - 478; *Kangisser and Another v Rieton (Pty) Ltd* 1952 (4) SA 424 T at 428 A; *Theron v Theron* 1973 (3) SA 667 C at 672 G. While it is necessary to place the defaulting party *in mora* if cancellation is sought on grounds of failure to perform, (*Microusticos v Swart* 1949 (3) SA 715 A at 730), it is not the law that a debtor must be placed *in mora* before he may be sued for the specific performance of his duty to pay.

13. *Kangisser and Another v Rieton (Pty) Ltd* 1952 (4) SA 424 T at 428 C; *Theron v Theron* 1973 (3) SA 667 C at 673 B.

3.5.4. The Effect of Co-Existent Obligations on the Time when Performance is Due.

While the intention of the parties is certainly the major factor in determining when performance is due, other factors may also intrude. One such consideration which can affect the time at which performance is due is the existence of other related obligations. In some cases, the duty of one party to perform co-exists with a duty on the other party involved also to perform. This may affect when performance of one or other obligation is due. For example, the time at which performance of one obligation is due may depend on prior or simultaneous performance of the other obligation. It is therefore important to determine the exact relationship of the co-existing obligations. The meaning of certain terms must be clearly understood. In particular, it is important to clarify the meaning and the role in law played by the concepts of unilateral and bilateral duties to perform, independent and reciprocal duties of performance, and consecutive and simultaneous duties of performance.

1. *Unilateral and Bilateral Duties of Performance.* Contractual obligations necessarily involve at least two people, since the essence of such obligations is the performance due by one person in favour of another. However, the involvement of two people in a relationship does not necessarily imply that *both* parties have a duty to render a performance. In some situations, the legally enforceable obligations which exist only require one of the parties involved to perform. For example, in a contract of donation, only the donor has a duty to render a performance, that is, to transfer ownership of the thing given to the donee. In such cases the duty to perform is said to be unilateral.¹⁴ By contrast, relationships may exist in which the two (or more) people involved in the relationship are each under an enforceable

14. Examples of contracts in which unilateral duties of performance are created are most easily identified in Roman law: *stipulatio*, *dotis dictio*, *iusiurandum liberti* and the written contract, *expensilatio*: see generally Thomas, *Textbook*, p 259 - 267. *Mutuum* is also described as giving rise to unilateral obligations: Buckland, *Text-book*, p 463. Hosten *et al.*, 9.1.1, describe the contract itself as unilateral or bilateral, rather than the duty of performance.

obligation to render a performance. An example is a contract of sale, in which the buyer must pay the price and the seller must deliver the goods sold. In such cases, the duties of performance are said to be bilateral or multilateral.¹⁵ Before it can be said whether the existence of bilateral duties of performance affect the time at which performance of some of those duties is due, it must be ascertained whether the bilateral duties are independent of each other or whether they are reciprocal.

2. *Independent and Reciprocal Duties of Performance.* When bilateral or multilateral duties of performance exist, it is essential to determine whether or not performance of these duties is independent of each other or if it is in some way linked. Bilateral duties of performance may be mutually independent, so that performance of the one obligation does not require the prior or simultaneous performance of the other. In other words the performance of some bilateral obligations are not in any way conditional on the performance of each other, and each obligation is enforceable without reference to whether or not the other obligation has been performed.¹⁶ This situation may be illustrated by reference to the case of partners, or that of principals and agents. Such relationships give rise to bilateral obligations, and therefore to bilateral duties of performance. However, to take as an example the duty of a partner or an agent to render an account, it will be seen that the performance of this duty is

15. In Roman law, clear examples of contracts which give rise to bilateral duties of performance are the consensual contracts, that is, *emptio venditio*, *locatio conductio*, *societas* and *mandatum*: Thomas, *Textbook*, p278 ff. *Depositum*, *commodatum* and *pignus* are described as "imperfectly bilateral", in that the agreement created liability to perform rather more heavily on one party. Buckland, *Text-book*, p 467, 469.

16. *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 C at 253 B, per King AJ:

"In a contract whereunder reciprocal obligations are created, the promises of the parties may be dependent on each other in which event neither party may demand performance from the other unless he had himself performed or tendered performance or unless for some reason he is excused from performance; or he promises of the parties may be independent of each other, in which case this rule would not apply. See *Hauman v Nortje* 1914 AD 293 at 300; *Hanomag (SA) (Pty) Ltd v Otto* 1940 CPD 437 at 446; *Arnold v Viljoen* 1954 (3) SA 322 (C) at 331; *Swart v Vosloo* 1965 (1) SA 100 (A) at 117; *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C); *U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd and Another* 1976 (1) SA 137 (D)."

not dependent on the counter-performance of any of the other obligations that may exist between the parties.¹⁷ Thus the duty to perform in terms of this obligation is *independent* and may therefore be enforced without reference to the performance or otherwise of the other obligations which exist bilaterally.¹⁸ To say that "bilateral" duties of performance exist therefore only indicates that both or all of the parties involved in the relationship have a duty to render performance of some sort to each other, but these duties may nevertheless be independent of each other.

In other cases, the performance due by both parties is linked, so that performance by one party depends on performance by the other, and if either party fails to perform, the counter performance is not enforceable. Such duties of performance are described as reciprocal.¹⁹ However, to describe duties of performance as reciprocal only describes the fact that such performance is interdependent. It says nothing about the relative time at which performance is due. In order to establish when, in relation to each other, reciprocal duties of performance are due, it is necessary first to establish whether such performance is required to be simultaneous or consecutive.

3. *Simultaneous and Consecutive Duties of Performance.* If performance of reciprocal duties of performance is required, either by agreement, or by provision of law, to take place at the same time, the performance is said to be required simultaneously, (*pari passu*). An example of reciprocal duties of performance that must be discharged *pari passu* (unless otherwise

17. *Doyle and Another v Fleet Motors P E (Pty) Ltd* 1971 (3) SA 760 A at 762. In an action for an account, the plaintiff must aver firstly, his right to receive an account and the basis of such right, whether by contract, fiduciary relationship or otherwise; secondly, any contractual terms or other circumstances which have a bearing on the account sought; and thirdly, the defendants failure to render such account. Kerr, *Agency*, p 146.

18. It follows that the *exceptio non adimpleti contractus* is not available as a defence to the enforcement of independent obligations, even if bilateral obligations exist which remain unperformed. The exception is available in respect of material non-performance: *BP Foundry Engineers v Cilliers* 1950 (1) SA 257 O at 261.

19. The contract of sale gives rise to reciprocal duties of performance. The duty of the seller to deliver the *res vendita* is reciprocal to the duty of the buyer to pay the purchase price. *Maserowicz v Little* 1911 TPD 1061 at 1065; Moyle, *Sale* p 2 describes the contract as "synallagmatic"; Mackeurtan, *Sale*, p 1 footnote 4.

agreed) is the duty of the seller of goods to deliver the *res vendita* to the buyer and the duty of the buyer to pay the purchase price to the seller.²⁰ By contrast, in other cases, the duties of performance, although reciprocal in the sense of being interdependent, are required to be performed one after the other, rather than simultaneously, and are thus described as "consecutive" duties of performance.²¹ An example of such duties are those that exist between a contractor who is to complete a piece of work, and the person who is to pay for the work on its completion. The obligation to pay the agreed sum is normally only due to be performed after the performance of the duty to complete the work. This is so even although the performance of the duty to pay the price is obviously reciprocal with the duty to perform the work.²²

There is practical significance in the distinction drawn between reciprocal duties of performance due to be carried out simultaneously and those due to be performed consecutively. In the case of the former, an order of specific performance will only be

20. The example given assumes a sale on cash terms, as opposed to a sale on credit terms. Also see Voet, *Commentarius*, 19.1.3; *Maserowicz v Little* 1911 TPD 1061 at 1065; *Eklund v Vorster* 1938 TPD 252 at 255; *Crispette and Candy Co Ltd v Oscar Michaelis NO and Another* 1947 (4) SA 521 at 537; *Andrews v Lidaks and Another* 1971 (1) SA 892 W at 894 E; *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 C at 253 E

21. *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 C at 252 G in which King AJ sets out the following principles:

"(a) Where a contract imposes reciprocal obligations upon the parties, performance and counter-performance should generally take place at the same time, *Nulliah v Harper* 1930 AD 141 at 152 - 3; *Koenig v Johnson & Co Ltd* 1935 AD 262 at 276; *Nortje en 'n Ander v Pool NO* 1966 (3) SA 96 (A) at 137; *Millman NO v Goosen* 1975 (3) SA 141 (O) at 142.

(b) (i) Certain types of contract form an exception to this rule; thus a lessor of property must perform before he can demand rental and an employee must perform before he can claim his emolument; similarly a contractor in a contract of *locatio conductio operis* must himself first perform; see *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (a) at 418 - 419; *Sifris en 'n Ander NO v Vermeulen Broers* 1974 (2) SA 218 (t) at 223;

22. *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 C at 809. Whether performance of obligations is to be simultaneous or consecutive, and indeed, whether performance of co-existing obligations is to be reciprocal or independent depends on what the parties to the contract contemplated. *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 A at 418; *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 C at 253 D.

granted if the person seeking the remedy has either himself performed his duties, or if he indicates in his pleadings that he is willing and able to perform, by tendering performance.²³ If he should fail to tender performance in his plea, the defendant will be able to except to the plea on the grounds that the plaintiff has not himself performed what is due.²⁴ However, it is important to note that the *tender* of performance, as opposed to actual performance, is sufficient to avoid the defendant succeeding in raising this defence, in cases involving reciprocal and simultaneous duties of performance.

In cases in which the duties of performance are to be carried out consecutively, the position is more complicated. The person to whom performance is first due is entitled to enforce specific performance without either actually performing or tendering to perform his own duties of performance. Since he is not yet due to perform, no exception can be taken on that ground, other than in exceptional cases.²⁵ On the other hand, the person who has the duty to perform first may not sue the other party for counter performance until he has actually performed his own undertaking. The mere tender of performance is insufficient in this case,

23. This must be done explicitly, since it is not to be implied from the mere fact that the plaintiff is suing for an order of specific performance. *SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* 1955 (3) SA 541 DC at 543 - 544; *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 C at 253 F:

"A plaintiff claiming performance of contractual obligations must ordinarily allege either - (i) that he has made performance, or (ii) that he is excused from performance by reason of, eg, impossibility or because the promises are not dependent on each other, or (iii) he must tender performance...."

24. The sale of goods on credit terms provides an example. By agreeing to sell goods on credit, the seller relinquishes the advantage of simultaneous performance of the reciprocal obligations and undertakes to deliver the *res vendita* to the buyer before the price is due to be paid. Generally, the seller is not entitled in such cases to with-hold delivery of the thing sold until payment is made. However, if before making delivery, the seller discovers that the buyer is in circumstances of insolvency, and is thus unlikely to be able to pay the price when performance of that obligation falls due, then the seller will not be obliged to deliver the *res vendita*, except against payment, notwithstanding the original credit terms. From this, the general rule may be extracted, that, even if reciprocal obligations are to be performed consecutively, the obligation due first is not enforceable if the person who owes counter-performance is shown to be unwilling or unable to perform in due course. *Truter v Joubert's Trustee* 16 SC 375.

25. Such as when the circumstances demonstrate that the person who owes counter performance will be unable to perform in due course. See the example in the footnote immediately above.

since actual performance is required before the contingent obligation falls due to be performed. If a precipitate claim for performance is made, the defendant may raise the *exceptio non adimpleti contractus*.

3.5.5. Orders of Specific Performance in Circumstances of Anticipatory Breach.

It seems, from the authorities cited above,²⁶ that it is a fundamental principle of South African law that specific performance of a contractual obligation can only be demanded when performance is due in terms of the agreement, or by application of residual rules of law. Taking into account the delay occasioned by litigation, this principle means, in effect, that the plaintiff who sues for specific performance when the performance is already due will have to be satisfied with late performance, if and when the court orders specific performance. This raises the question whether it ought not to be possible for a plaintiff to initiate his action, and obtain his order, *before* performance is finally due, so that performance on due date can be ordered by the court. In fact, there are circumstances in which the law recognises that legal remedies are available before the time originally agreed for the specific performance of contractual obligations has arrived. In particular are cases involving anticipatory breach, and acceleration clauses in contracts. The question now addressed, therefore, is whether, in circumstances of anticipatory breach of contract, a creditor is entitled to an order of specific performance *before* the originally agreed time for performance has arrived.

It is generally accepted that, in South African law anticipatory breach entitles an aggrieved party to *cancel* the contract and sue for *an award of damages* before actual performance is due. Hopley J explains the relevant rule of law.²⁷

26. Section 3.5.1 above.

27. *De Wet v Kuhn* 1910 CPD 263 at 267.

"The principle is now well established that a refusal by one party to a contract to perform it before the date of performance arrives places the other party in a position to elect whether to treat such conduct as a breach of contract, or to persist in the contract and hold his opponent to all its terms when the due date should arrive."

It has also been suggested that an order of specific performance is available as a remedy in circumstances of anticipatory breach.²⁸

"The cause of action being found, there is no reason why the aggrieved party should not have the same choice of remedies that he has when he brings action on an ordinary breach, including a claim for specific performance."

It is thought that the legal basis on which such order is made in these circumstances requires analysis before the suggestion is accepted..

3.5.6. Anticipatory Breach Does not Accelerate the Time at which Performance is Due.

If, before performance of an obligation is due, the party of whom performance is required conducts himself in such a way that a reasonable person would be led to believe that the debtor does not intend to fulfil his obligations, then such conduct amounts to a repudiation of the obligation and constitutes an anticipatory breach of the duty to perform.²⁹

Anticipatory breach of a duty to perform is itself a cause of action. This means that, whether or not any other material breach of a duty to perform an obligation has occurred, the anticipatory breach is sufficient grounds for bringing an action, and it entitles the person

28. Kerr, *Contract*, p.344 - 346.

29. *Inrybelange (Edms) Bpk v Pretorius* 1966 (2) SA 416 A at 427; *Novick v Benjamin* 1972 (2) SA 842 A; *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 A at 387; *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 A at 844 - 846; *Tuckers Land & Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 A at 653. *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 N at 910. Kerr, *Contract* p 333 - 341; Christie, *Contract*, p 500 - 501; De Wet and Yeats, *Kontraktereg*, p 155. In *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 N at 910, Thirion J states that anticipatory breach only becomes a breach of contract if and when the innocent party elects to cancel the contract.

whose rights are prejudiced by the anticipatory breach to a remedy which is founded on breach of a term of the contract, such as cancellation, with or without an award of damages.³⁰

If, instead of a remedy founded on breach of contract, a creditor wishes to sue for specific performance in circumstances of anticipatory breach of contract, one of the essential elements required for this remedy, that is, that performance of the agreed terms must be due, creates a difficulty. This is because, in terms of the original contract, performance is not yet finally due. It must therefore be ascertained whether anticipatory breach of contract somehow accelerates the time at which performance is due. This possibility is implicit in the following passage.³¹

"If the aggrieved party elects to take action on the anticipatory breach he may, it is thought, bring an action for specific performance immediately; but it is as well to do so only when pressing reasons for this choice of remedy can be shown to exist.... There seems to be no South African case where a party aggrieved by an anticipatory breach has claimed immediate specific performance but there is no reason why he should not claim in appropriate circumstances."

If the suggestion made in this passage is accepted, then it would follow that a plaintiff, who could establish an anticipatory breach of a duty to perform, could sue for an order of specific performance *before* that performance was originally due in terms of the contract.

Professor Kerr³² gives the example of a double sale where, having first sold the property in question, but having not yet delivered it, because the time for delivery is contractually postponed, the seller then re-sells the same property to another person, who receives it in bad faith, that is, knowing of the sale to the first purchaser. Professor Kerr suggests that the danger that the second purchaser might dispose of the property to a *bona fide* third party, and thus put it beyond the reach of the original purchaser when the time for delivery under the first contract of sale arrives,³³ is sufficient reason to justify an immediate order of specific

30. In the context of the present discussion, anticipatory breach may exist if, for example, the defendant express his unwillingness to perform, either on time, or at all.

31. Kerr, *Contract*, p 344 - 346.

performance of the first contract of sale, notwithstanding the fact that the time for performance of the obligation, as originally agreed, has not yet arrived.

Desirable as this outcome may appear, substantial questions of legal principle stand in the way of it. In particular, there is the principle that specific performance of a contractual obligation should not be required until that performance is due to be rendered.³⁴ It is difficult to justify the issue of an order to enforce performance when, in terms of the agreement which gives rise to the legal obligation, that performance is not yet due. The courts may be able, practically speaking, to ignore this nicety, and issue any order which appears to give a just result, but it must be acknowledged that there is no generally accepted explanation on which it can be argued that any such practice accords with principle. It is in searching for some such principle that the analogy of an acceleration clause suggests itself.³⁵ It could possibly be argued that, even if the performance sought is not yet due in terms of the original contract, an anticipatory breach entitles the aggrieved party to elect to treat the performance of all outstanding duties as immediately due, on the analogy of an acceleration clause. However there does not appear to be authority for such a general rule. Acceleration clauses in contracts are individually agreed terms, and there would need to be some significant justification for extending the effects of an acceleration clause to all cases of breach of contract where future performance is not yet due.

32. Kerr, *Contract*, p 345 footnote 86. Also see P M Nienaber, "Enkele Beskouings oor Kontraktbreuk in Anticipando" (1963) 26 *THR-HR*, 19.

33. While the property sold is in the hands of the purchaser who took delivery *mala fide*, the courts will order a re-transfer of the property, so that the original purchaser is protected, but the situation is different if the property is delivered to a *bona fide* purchaser, with whose possession the courts will not interfere. The concept of *res litigiosa* does not assist the first purchaser in these circumstances, since his claim is not based on a real right to the property, but only on the enforcement of a personal right to delivery of the property.

34. Section 3.5.1 above.

35. Acceleration clauses are commonly encountered in agreements of sale in which the purchaser is allowed to pay the purchase price in instalments over a period of time. In terms of such clauses, if the purchaser defaults on a payment, then, at the election of the creditor, all future instalments become immediately payable. *Stadler v Hamilton Plase (Edms) Bpk* 1977 (1) SA 211 NC; *SA Bank of Athens Ltd v Solea* 1977 (2) SA 612 W; *Pienaar v Boland Bank and Another* 1986 (4) SA 102 O at 114 H.

Such justification might be said to exist if there was no way, other than acceleration of performance not yet due, by which a court could protect the right of a person in the position of the first purchaser. However, it is apparent that the rights of the first buyer may indeed be protected without accelerating the seller's duty of performance. For example, this may be done by interdicting the second purchaser from disposing of the property, or by ordering the immediate re-delivery of the property to the seller, and ordering him not to transfer the property to anybody except to the first purchaser when performance of that obligation falls due.

Accelerating the time at which performance is due on account of anticipatory breach can lead to absurd results. Suppose, for example,³⁶ that one person sells his house to another person, transfer and payment to take place as soon as the seller reaches the age of sixty years. Before reaching this age, the seller repudiates the contract, by announcing his intention of not fulfilling his promise when he turns sixty. The buyer, without waiting for the appropriate birthday, brings an action to enforce immediate specific performance of the contract of sale. It is thought that it is most unlikely that the performance promised would be enforced *before* the seller's sixtieth birthday. At most, it would be appropriate to prohibit the repudiating party from selling the house to some other person before that time. An order of specific performance of the contract of sale could only properly be sought when the time agreed for performance arrived, that is, on the seller's sixtieth birthday. In this way the rights of the parties are protected without accelerating the time at which performance is due. This example makes clear that to accelerate specific performance would result in the enforcement of something that was never undertaken, that is, transfer of the house before the seller's sixtieth birthday.

Another argument that might be encountered is that, since it is well established that other remedies, such as cancellation of performance of outstanding obligations, or an award of

36. This example is derived from the facts in *Frost v Knight* (1872) LR 7 Ex 111.

damages, can be claimed on grounds of anticipatory breach, even before performance of the obligation in question is due,³⁷ why should an order of specific performance not similarly be available. The answer to this suggestion is that the enforcement of specific performance involves the actual performance of the contractual obligations undertaken, in accordance with the particular terms agreed. By contrast, cancellation (rescission) of future performance puts an end to the right of the defaulting party to discharge his liability by means of specific performance, and an award of damages substitutes the payment of money for actual performance. Provided the damages sought can be quantified, logic does not require that payment of damages in lieu of performance should only be payable when the time for actual performance is due.³⁸ But, it is thought, this does not mean that actual performance can similarly be required before it is due.

In conclusion, therefore, it is submitted that, unless there is an agreement between the parties in terms of which anticipatory breach accelerates the performance of the obligations then outstanding, the innocent party is entitled to nothing more than the performance of the original obligations in the terms agreed, including stipulations as to time of performance. Anticipatory breach does not render future performance immediately due, and the appropriate remedy when this sort of breach occurs is an interdict, if interference with contractual rights is threatened, rather than a premature order of specific performance.

37. Kerr, *Contract*, p 346 - 348. An award of damages is to be assessed in relation to the date on which performance is due, subject to the rules of mitigation of loss, but will be assessed prospectively if the date for performance has not yet arrived: *Novick v Benjamin* 1972 (2) SA 842 A at 858 D

38. As in *Frost v Knight* (1872) LR 7 Ex 111. In particular cases, the quantum of an award of damages may not be able to be assessed prior to the date of performance. In such cases, the action for damages should be postponed. This occasional practical difficulty does not mean that, as a rule, damages should not be claimed until performance is actually due. See Kerr, *Contract*, p 348 and the authorities there cited.

3.5.7. Ordering Specific Performance of Obligations that are Overdue.

Once a duty of performance is overdue, it follows that timeous performance is no longer possible. If specific performance of an obligation is impossible, then, even if the legal obligations involved are not rendered void, a court will not expose itself to ridicule by ordering specific performance of that obligation, and other remedies, such as an award of damages, must be relied on.³⁹ These rules, if applied strictly, would lead to the result that once a duty of performance is overdue, an order of specific performance is no longer an appropriate remedy. However, there are further considerations which must be taken into account. For example, if the time at which, or within which, performance was to take place was not an essential or material part of the undertaking, then, in such cases, the fact that performance is overdue does not render the performance of the material terms impossible. It is considered proper to disregard the impossibility of fulfilling non-material terms of the obligation and ordering the late specific performance of the essential parts of the obligation.⁴⁰

If the time for performance was a material consideration, should the aggrieved party be entitled to overlook this term and insist on the enforcement of late performance? It is submitted that it is quite in order for the innocent party, in whose interest a material term regarding the time of performance exists, to elect to treat that term as non-essential. By so

39. See section 3.4.10 above as to the effect of impossibility on the existence of legal obligations and specific performance.

40. It is interesting to note that the question whether time of performance was a material term or not may dictate whether the appropriate remedy in a particular case is either an order of specific performance or cancellation and a claim for an award of damages. If time of performance was a material term, and it is overdue, then, in terms of the principles here discussed, an order of specific performance is not appropriate, but cancellation and an award of damages is. As to when time of performance is considered to be a material term of a contract or not, see Kerr, *Contract*, p 359 ff. *Benoni Produce and Coal Co Ltd v Grundelfinger* 1918 TPD 453; *Concrete Products Co (Pty) Ltd v Natal Leather Industries* 1946 NPD 377; *Spies v Lombard* 1950 (3) SA 469 A; *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 A. Also see *Young v Land Values Ltd* 1924 WLD 216 at 226; *Stapleford Estates (Pty) Ltd and Another v Wright* 1968 (1) SA 1 E at 3; *Nel v Cloete* 1972 (2) SA 150 A.

doing, he is merely abandoning a part of the performance originally due, and electing to sue instead for the remainder of the performance due.⁴¹ In such cases, the order of specific performance relates to all the particulars of the original obligation except the time of performance. The time allowed by the court for such performance will be such time as appears reasonable to allow for the defaulting party to comply with the order made.

It is important to stress that what is occurring in these circumstances is *partial* performance, not *substitute* performance. While the aggrieved party is entitled to enforce any portion of an outstanding performance, he is not entitled to ask the court to order the defaulting party to perform not the original undertaking, but a substitute in the place thereof. The court can only properly order the performance of what was actually undertaken. If such undertakings are impossible to perform, the court has not the legal right to decide what an equivalent performance would be, and order the performance of the equivalent, in substitution of the original obligation.⁴² Normally, to distinguish instances of actual performance from those of substitute performance, it is necessary to ensure that, for actual performance, the material terms of the original obligation are specifically adhered to. If one or more of the original material terms has become impossible to fulfil, then the creditor is usually entitled to enforce the specific performance of the remaining terms. He is not entitled to substitute new terms for those which have become impossible. Thus, in relation to the time of performance, the creditor could not stipulate a new material time within which late performance must take place. Instead, he may only ask for the performance of the undertaking to take place within a reasonable time. Thus, instead of substituting a new term as regards time, the element of time of performance is reduced to the status of a non-material term, which, like any other non-material term, does not affect the question whether specific performance is possible or not.

41. *Stansfield v Kuhn* 1940 NPD 238 at 246; *Benjamin v Meyers* 1946 CPD 655 at 662. The debtor cannot rely on a self created impossibility to avoid partial performance. *Wireohms SA (Pty) Ltd v Greenblatt and Another* 1959 (3) SA 909 C at 912.

42. Cf *Joubert v Bester* 1977 (4) SA 560 T at 568. In this case, the creditor was held to have the right to elect whether or not to accept partial performance or surrogate (substitute) performance which the debtor tendered. It is submitted that it would be wrong to deduce from this case that the creditor is also entitled to bring an action to force an unwilling debtor

An example⁴³ of the operation of these rules is the case of a building contractor who undertakes to install particular fittings in specified business premises on three particular consecutive days. Assume that either through his own fault (making conflicting arrangements) or not (he may become ill and be unable to work) the agreed performance on those days is not carried out, and that performance is overdue when an action for an order of specific performance is brought. The aggrieved creditor will be entitled to ask for an order for the installation of the same fittings in the same premises on three different days, at a later time, the particulars of which are determined by the court. The court should order specific performance of the obligations at a time that is reasonable, taking into account the builder's other contractual obligations, and so on.⁴⁴ However, the creditor would not be entitled to substitute and insist on performance on three *particular* later days, of his own choosing, or require the builder to perform different work, or install the fittings in different premises. To do so would be to attempt to substitute new terms, instead of opting for partial performance.⁴⁵

into substitute performance if the performance originally agreed has become impossible. The offer and acceptance of substitute performance is, in effect, a new agreement, entered into by mutual consent. Forcing substitute performance on an unwilling debtor is a completely different thing.

43. This example is based on the facts of *Industrial & Mercantile Corporation v Anastassiou Brothers* 1973 (2) SA 601 W.

44. *Bedford v Uys* 1971 (1) SA 549 C at 551. The Court may direct a specified time within which performance is to take place.

45. See section 3.7.5 below.

**3.6. THE REQUIREMENT THAT PERFORMANCE MUST NOT HAVE
ALREADY BEEN RENDERED.**

3.6.1. The Importance of Deciding Whether Performance has been Rendered or not.

Even if a plaintiff is able to prove that a legally enforceable contractual obligation exists, and that the performance of the obligation is due, he will not be granted an order of specific performance if, in fact, that performance has already been rendered. In many cases, the question whether or not performance has been rendered is straightforward and presents no difficulty, and in such cases it is most unlikely that an action for an order of specific performance would be brought after performance had been made. In other cases, however, the question whether performance has been made is complicated by the fact that some attempt has been made to perform, but the performance rendered is not satisfactory for one reason or another. For example, the performance tendered may not be exactly what was agreed, but a substitute; or the first attempt at performance may have fallen short of the standard required; or only one of several duties of performance may have been rendered; or the performance rendered may have not been one hundred per cent satisfactory, but, in the circumstances, as close to perfect as could reasonably be expected. In all such circumstances, the question arises whether the person who owes the duty of performance has discharged his duty to perform or not. If he has, then no order of specific performance will be made. If not, then specific performance may still be enforced. It is therefore

important to be able to decide when, in the type of circumstances described above, performance is considered to have been rendered and when it has not.

3.6.2. Actual Performance Distinguished from Substitute Performance.

The general rule is that in order to discharge contractual obligations, the person liable must do the exact thing or things which he has undertaken to do, or which the law requires him to do in the circumstances.¹ Thus, for example, if specific goods are bought and sold, the seller is required to deliver those particular goods to the buyer in order to discharge the obligation which he has undertaken.² So too, if a particular artist is engaged to paint a portrait, he himself must carry out the work.³ In some cases, the agreed terms of performance undertaken may be defined in such a way that the person liable is allowed a choice in the way in which the contemplated result is to be accomplished. Thus, in a contract of sale, the parties may determine the goods to be delivered by *genus*, rather than by the identification of

1. Huber, *Heedendaegse Rechtsgeleertheit*, 3.38.3:

"Payment is simply causing another to have the very thing which we owe."

The term "payment" is used broadly in this context to include any performance rendered to discharge an obligation, as Voet explains in *Commentarius*, 46.3.1:

"Payment sometimes embraces every dissolving and satisfying of an obligation, since he who has done what he promised to do is said to pay. In the same sense an obligation is a bond of law by which we are tied with the need for paying something. But payment properly so called, in so far as it differs from formal release, novation and many other ways of dissolving an obligation, is a physical furnishing of what is due."

Also see Voet, *Commentarius*, 46.3.8:

"The very thing must be paid which was embraced in the obligation, and in the way and of the amount and quality which was specified."

See Van der Linden, *Institutes*, 1.18.1.

2. Wessels, *Contract*, para. 1337. *Algoa Milling Co Ltd v Arkell and Douglas* 1918 AD 145 at 158. *Ayob and Co. v Clouts* 1925 WLD 199 at 202. In this latter case, specific goods were bought and sold but before delivery the goods were disposed of to a third party. The seller then tendered exactly equivalent goods to the first buyer. The buyer rejected the performance. It was held that the substitution was not a fulfilment of the seller's obligation and that the buyer was not obliged to accept the substitute performance.

specific goods. If so, the seller of the goods is allowed to discharge his obligations by supplying any goods which answer the generic description.⁴ Similarly, a contractor who undertakes to build or repair a building seldom binds himself to carry out all the work himself, and he may therefore perform his undertakings by sub-contracting with other workmen, in order to accomplish the desired result. However, these examples do not detract from the general rule, which requires that, in so far as terms are agreed, the person liable is required to render actual performance of the exact terms of the contractual obligation which exists. If he attempts to substitute some other performance in the place of what was agreed, or is required by the law, then he will not be considered to have rendered performance of the obligation. Accordingly, in such circumstances, the rendering of substitute performance is no bar to an action for an order of specific performance in the agreed terms.

3.6.3. Performance of Alternative Agreed Terms Distinguished from Substitute Performance which has Not been Agreed.

The parties to a transaction may agree, expressly or impliedly, that, if performance in the terms laid down is not possible, or is inconvenient, then alternative performance (that is a performance defined in alternative terms) is acceptable. However in such cases it is

3. Pothier, *Obligations*, para. 207:

"As conditions ought to be accomplished in the manner which the contracting parties intended it becomes a question when the condition consists of some act, whether of the creditor of the debtor or of a third person, whether it can only be accomplished by that particular person or whether it may be done by his heirs, or by any other in the name, and on the behalf of the person imported by the condition. The decision of the question depends on the nature of the act [Evans has "fact" but this appears to be a misprint: see the French], and upon the examination of the intention of the contracting parties. If the act, [Evans again has "fact"] which is the object of the condition, is personal, if it is the act of a particular person, rather than the mere act itself, which the parties had in view, the condition can only be accomplished by that person."

4. Examples of such an agreements are *Fergusson v Wood Bros* (1885) 4 SC 111, and *Kroomer v Hess & Co* 1919 AD 204.

important to note that the terms of the performance required are still ascertained by reference to the actual intention of the parties to the undertaking. It is submitted that this is what Pothier has in mind when he writes that performance *per aequipollens* is permitted when, from the subject matter, it appears that such was probably the intention of the parties.⁵ In order to avoid confusion, it may be preferable to use the phrase "alternative agreed terms" of performance to describe this sort of situation, and to reserve the term "substitute performance" to describe performance in terms *other* than terms actually agreed⁶ or provided residually by law.

It must now be asked whether substitute performance is permitted in cases where the parties involved have *not* agreed on alternative terms of performance. Do circumstances exist in which the law allows a creditor to fulfil his obligations to perform by rendering substitute performance, *without* the consent of the creditor to the substitution?⁷ A situation in which this possibility may appear desirable is one in which the performance originally contemplated has become impossible to accomplish, perhaps because of external and uncontrollable factors. For example, if delivery of certain goods on a date specified as

5. Pothier, *Obligations*, para 206:

"Our principle, that conditions ought to be accomplished in the manner that was probably intended by the parties, serves to decide the question made by the doctors, whether conditions ought to be accomplished literally *in forma specifica*? The answer is, that commonly they ought to be accomplished *in forma specifica*; but they may nevertheless sometimes be accomplished *per aequipollens*, when from the subject matter it appears that such was probably the intention of the parties: and this intention is presumed, when the person, in whose favour the condition is made, has no interest in its being accomplished in one manner rather than in another."

6. Whether expressly or impliedly.

7. Provided the creditor consents to substitute performance, there is no conceptual difficulty in holding that the substitute performance discharges the original obligations, since, by agreement, the substitute performance takes the place of the performance originally contemplated. *Smith v Gessla (Pty) Ltd and Others* 1972 (1) SA 543 D. Similarly, a condition in a contract which is inserted for the benefit of one party only may validly be considered fulfilled by that party if equivalent, rather than actual fulfilment occurs. Thus, in *Van Jaarsveld v Coetzee* 1973 (3) SA 241 A, the purchaser of a farm was entitled to substitute a bank guarantee for a loan from the Land Bank in order to fulfil a condition, inserted for his benefit alone, on which the contract of sale depended. In such cases, the consent of the one party alone is necessary, since the condition is in his favour only, and it makes no difference to the seller what the source of the buyer's finance was.

material is rendered impossible because of a strike by transport workers, is the creditor entitled to discharge his obligations by delivery of the goods at a later date, and to then demand the counter-performance of reciprocal obligations that may exist, such as payment for the goods delivered?⁸ The answer, it is thought, must be "No". If the term of the contract which relates to the time of delivery is, in fact, a material term of the agreement, then fulfilment, by performance, of the obligations created by that agreement can only be accomplished by performance carried out in those specified terms. For a court to attempt to determine, by referring to the overall circumstances of the case, what equivalent performance ought to be an acceptable substitute for the terms originally agreed, would constitute an interference with the contracting parties' autonomy, as has been pointed out by Van Den Heever JA in *Fruer v Maitland*.⁹ This case concerned a sale of immovable property, which sale was made subject to a suspensive condition, in favour of the buyer, that the property be certified by a Government approved entomologist as apparently free of infestation by borer beetle. No certificate as originally required was obtained, but, after the removal of certain infested timber and the treatment of the rest, the seller obtained a "Treatment Certificate" from a firm of contractors which certified the building as apparently free from the infestation. The issue was whether the seller was entitled to discharge his obligation regarding the certificate by means of a substitute to what had originally been agreed. Van den Heever JA said the following:¹⁰

"For the Court to think what equivalent fulfilment of a condition would probably have satisfied the parties and that consequently they probably intended the fulfilment *per aequipollens* of such a putative condition, is a dangerous proceeding which may will result in judicial discretion

8. The example is taken from *Algoa Milling Co Ltd v Arkell and Douglas* 1918 AD 145 at 158. It was held in this case that late performance was not sufficient to discharge the contractual obligations since it did not accord with the express and material terms of the contract.

9. 1954 (3) SA 840 A. Also see *Borstlap v Spangenberg* 1974 (3) SA 695 A, and *Joubert v Bester* 1977 (4) SA 560 T, in which it was held that actual performance having become impossible, the creditor was entitled to choose between accepting substitute performance or cancelling the contract: but he could not be *compelled* to accept the substitute performance, to which he had not initially agreed.

10. At 849 G. Van den Heever JA is in the minority in this case, but it is submitted that his views on this matter are in accordance with principle.

overriding contractual autonomy."

However, Lee and Honoré, say the following:¹¹

"In deciding whether a condition has been satisfied regard is to be had to the express or implied intention of the parties and to what is reasonable in the circumstances."

In support of this proposition Lee and Honoré cite Pothier, *Obligations*, para 206 ff; *Perrin v Potgieter* (1878) Kotzé 61; *Stewart v Le Sueur* (1889) 7 SC 63; *Schuurman v Davey* 1908 TS 664; *Algoa Milling Co v Arkell & Douglas* 1918 AD 145; *Hanomag SA (Pty) Ltd v Otto* 1940 CPD 437 at 443; *Trollip v African Timbers* 1946 AD 1063; *Borstlap v Spangenberg* 1974 (3) SA 695 A. It is submitted that there is, in fact, no direct (and almost no indirect) authority in these cases for the proposition that, in cases in which a court is justified in looking at the surrounding circumstances of a contract, in order to determine the terms of the contract, the duties of performance are determined by what is objectively reasonable, rather than by what the parties themselves intended.¹² It is therefore submitted, with respect, that the learned authors have stated the rule too widely.

In cases in which there is a dispute between the parties over the actual terms of an undertaking, the rule against substitute performance holds good. If the parties disagree over the terms of their contract, and thus over what performance is required in order to discharge the contractual obligations, then the courts determine the terms of the contractual obligations that exist by ascertaining what the intention of the contracting parties was as regards the disputed terms.¹³ Once the terms of the obligation have been determined,

11. *Obligations*, section 92.

12. See *Sassoon Confirming & Acceptance Co (Pty) Ltd v Barclays Bank Ltd* 1974 (1) SA 641 at 646 G to 647 C, and the cases cited in the next footnote below for the rules which determine the correct approach in South African law to resolving a dispute over the agreed terms of a contract.

13. The process by which a court determines what the parties to a contract intended is relatively complex, and is beyond the scope of the present work. See *Worman v Hughes and Others* 1948 (3) SA 495 A at 505; *Joubert v Enslin* 1910 AD 6 at 37 - 38; *Standard Building Society v Cartoulis* 1939 AD 510 at 516 - 517; *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 A; *Van Rensburg en Andere v Taute en Andere* 1975 (1) SA 279 A at 303 D; *List v Jungers*

however, actual performance in those terms is required to discharge contractual liability, and an order of specific performance in those particular terms may be obtained and enforced. In cases in which a court is unable, after considering the appropriate evidence, to ascertain what the intention of the parties was as regards the terms of the contract, the result must be that the parties have failed to reach consensus, and that no enforceable obligation exists.¹⁴ Substitute performance, which may have been tendered, cannot make good a deficiency in the creation of the contractual obligation to perform.

To allow substitute performance, rather than the actual performance of the existing terms, to discharge contractual obligations would create a variety of problems. For example, the concept of impossibility of performance would be substantially affected, since, in many cases, while specific performance of the actual contractual terms that exist may be impossible, an equivalent substitute performance might well be available. This would lead to uncertainty. So too, when literal performance of agreed terms has become expensive or inconvenient for the party required to perform, it will be difficult to draw the line between cases in which performance in the agreed terms is nevertheless required, and those in which equivalent substitution is permissible. It is thought that the fundamental principle therefore ought to be that only actual performance of the contractual terms that exist is sufficient to discharge the legal liability of the debtor. This principle is the bedrock of certainty and consistency without which confusion must surely result. The appropriate conclusion is therefore that, in the absence of consent to substitute performance by the creditor, neither a tender of, nor rendition of, substitute performance is sufficient to discharge a contractual liability to perform, and is therefore no bar to an order of specific performance.

1979 (3) SA 106 A at 120 B; *Société Commerciale de Moteurs v Ackerman* 1981 (3) SA 422 A. See Kerr, *Contract*, pp 242 ff, in which it is argued that a less rigid approach than that set out in *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 A is appropriate. Also see Joubert, *Contract*, p 59 and Christie, *Contract*, p 176 - 180.

14. See, for example, *Sassoon Confirming & Acceptance Co (Pty) Ltd v Barclays Bank Ltd* 1974 (1) SA 641 at 646 G to 647 C.

3.6.4. Failure of Performance at the First Attempt.

In South African law, a person who has an obligation to render a performance to another is generally required to carry out that performance properly on the first attempt.¹⁵ Accordingly, a person who fails to perform properly at the first time is not generally entitled to a second chance, and his failure to perform constitutes a breach of contract for which he may be liable in damages.¹⁶ The question that arises is, after the debtor has made one attempt at performance which does not conform with the agreed undertaking, is the creditor restricted to a claim for damages. In other words, is it appropriate for the creditor to seek an order of specific performance after one attempt at performance has already been made by the debtor?

The answer to this question must be affirmative. If the debtor fails to perform adequately at the first attempt, the obligation is not discharged, and there is no reason why the creditor ought not to bring an action for the proper specific performance of whatever was agreed. To limit the creditor to a claim for damages would be to provide the reluctant debtor, to whom performance had become inconvenient, with a way of avoiding actual performance, and paying damages instead. This would conflict with the principle that the creditor is

15. *Holtz v Thurston and Co* 1908 TS 158. Wessels J said at 162:

"I do not think there is anything in our law which compels a purchaser, who has made a contract to purchase a particular article, to allow the seller to put that article in a state of repair after the date of the contract. It is the duty of the seller to deliver the very article which was bought, and he cannot be heard to say, "The article I delivered to you is not the article that you bought, but if you will allow me to tinker at it for a day or two I will make an article similar to that you bought." "

16. Exceptional cases are those in which the performance required contains an element of tailoring or adjusting some thing in order to make it fit or function in a special environment. Examples are the tailoring of a suit of clothes: *Theunissen v Burns* 21 SC 421; *Wessels v Kemp* 1921 OPD 58 at 60; the making of artificial limbs: *Shiels v Minister of Health* 1974 (3) SA 276 RAD at 279; GRJ Hackwill, "An Opportunity to Tinker", (1975) 92 *RLJ* 8; or manufacturing false teeth. In these cases, complete success at the first attempt is unlikely, and the creditor is required to co-operate in giving the debtor a reasonable opportunity of getting the thing right, before he is entitled to cancel the contract.

generally entitled to actual performance, and does not have to be satisfied with an award of damages as a substitute for actual performance.¹⁷

If the debtor has unwisely undertaken to render a performance which, in fact, he is incapable of rendering, because of lack of skill, expertise or resources, then a court may refuse to issue an order of specific performance, not because inadequate performance discharges the obligation, nor because only one attempt at performance need be rendered, but because the court will not order a person to do something which he is incapable of doing. In such cases, the applicable principles are those which are dealt with under the impossibility of performance.¹⁸

3.6.5. Complete Performance, Substantial Performance, and Partial Performance.

The general rule is that a person who undertakes to perform an act is only discharged from his liability to perform after he has rendered a complete and meticulous performance of everything that he undertook to do.¹⁹ Gregorowski J said the following in *Cedarmont Store v Webster & Co*:²⁰

"When unascertained goods of a certain description are sold as here, it is the duty of the seller to select the goods answering the description and to render delivery to the buyer. He must tender the exact quality and quantity in terms of the contract, He cannot send a larger quantity and throw the burden on the purchaser of selecting the right quantity out of a larger

17. Section 3.3.1 above.

18. Section 3.4.9 above.

19. *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 A, Jansen JA says at 433 D:

"Met enkele uitsonderings (vgl, bv, die geval van die verkoop van 'n bepaalde grondstuk met vermelding van maat, waar soms 'n speling wat grootte betref, toelaatbaar is, met aanpassing van die koopprys: *Welgemoed en Andere v Sauer* 1974 (4) SA 1 A)) is die algemene strekking van ons reg dat verbinténisse stiptelik [strictly, accurately, precisely] (en spesifiek) nagekom moet word."

20. *Cedarmont Store v Webster & Co* 1922 TPD 106 at 113.

quantity. This would not be in compliance with the contract."

A material shortfall in the performance tendered by a debtor constitutes a material breach of contract, which entitles the creditor to reject the performance tendered, and either sue for specific performance, or to cancel the contract and sue for an award of damages in lieu of performance.²¹

If the difference between what was undertaken and what was performed is merely trivial, rather than material, then the performance rendered is sometimes referred to as "substantial"(as opposed to complete, or meticulous). Because of its trivial nature, non-material shortfall in performance does not constitute grounds for cancellation of the contract, or for an award of damages.²²

An important question is whether performance can ever be considered to be "substantial performance" when the shortfall in performance is *more* than merely trivial. This possibility

21. In *Cedarfont Store v Webster & Co* 1922 TPD 106 at 111 - 112, a shortfall of ten per cent in a consignment of mealies was held to be too great to discharge the seller's duty to deliver. The purchaser was held to be entitled to reject the mealies delivered. *B & P Foundry Engineers v Cilliers* 1950 (1) SA 257 O at 261. In *Naran and Another v Pillai NO* 1974 (1) SA 283 D at 285 H, James JP said:

"The plaintiffs were entitled to receive delivery of the property with that special quality and, in my view, the failure to deliver the property with two dwelling houses upon it was a failure to perform a substantial portion of the contract because what was tendered was different in substance from the article bought."

Also see De Wet and Yeats, *Kontraktereg*, p 162 - 163, who, following *Spies v Lombard* 1950 (3) SA 469 A at 486 ff, say the following:

"In weerwil van die verskeidenheid van uitdrukkings, skyn die bedoeling duidelik te wees, nl. dat die skuldeiser mag terugtree indien die kontrakbreuk so ernstig is dat mens nie redelikerwyse van hom kan verwag dat hy hom aan die ooreenkoms sal hou, en met skadevergoeding tevrede sal wees nie."

22. See *Baking Investments (Pty) Ltd v Britz* 1978 (3) SA T 1067 at 1070 F, in which the breach of contract was held to be not sufficiently substantial (material) to justify cancellation of the contract. Similarly, in *Metro-Goldwyn-Mayer (S.A.)(Pty)Ltd v Herman* 1938 TPD 226, the departure by an agent from his instructions was held to be a small (that is, non-material) difference, which did not affect the main outcome of the negotiation he had conducted on behalf of the principal. The agent was therefore entitled to the agreed commission in full.

is suggested by certain passages in the judgement of Wessels JP in *Cedarmont Store v Webster & Co.*²³ In this case, the learned judge put forward the idea that, in particular circumstances, performance may be considered to be substantial, even if the shortfall between what was agreed and what was rendered is more than merely trivial. The idea behind this suggestion appears to be that, in the circumstances of particular cases, difficulties in performing meticulously were contemplated by the parties, and they therefore impliedly agreed to be satisfied with performance such as could reasonably be expected in the circumstances. Wessels JP explains the concept as follows:²⁴

"Now although the law regards a contract to deliver 400 bags of mealies as an entire contract, yet it takes cognizance of the difficulty in commercial matters of meticulously carrying out such an arrangement. All that the law requires therefore is a substantial performance of the contract - such performance as commercial men could have reasonably expected when they entered into the contract. What is a substantial performance of the contract depends in every case upon the surrounding circumstances."

It is thought that there may well be merit in taking account of the fact that, in certain types of contract, notably commercial contracts in which large quantities of goods are involved, the handling, control, and protection of goods is difficult. The parties to such contracts may accordingly intend that, although the extent of performance is expressed in precise terms, no more than a "substantial" performance of the particular expressed terms of their contract is expected, or required. In such cases, the measure of what is "substantial" is not whether the shortfall is trivial, but whether the performance rendered is what could have been reasonably expected in the circumstances that obtained. Thus, even if the performance required is expressed, in the contract, in precise terms, a court may find that, in addition to the express terms, the parties had impliedly agreed to treat meticulous performance as non-essential, and to be satisfied with a degree of performance that it is reasonable to expect in the circumstances. If this is so, a precise performance of the express terms cannot be demanded by the creditor, even if the shortfall in performance rendered is such that it

23. 1922 TPD 106.

24. At p 110.

cannot be dismissed as merely trivial.²⁵

In view of what has been said, it is suggested that, in South African law, the term "substantial performance" may be used in two different situations. Firstly, the term is used to describe performance in cases in which meticulous performance is required by the terms of the contract, but in which, although there is a less than meticulous performance, the shortfall is trivial, and is therefore to be ignored. Secondly, the term may be used to describe cases in which the parties to a contract have agreed, expressly or impliedly, to accept less than meticulous performance of the stated terms, and to be satisfied with a degree of performance that is reasonable to expect in the circumstances.²⁶ In both such cases, substantial performance is considered to discharge the debtor's liability to render performance, although, where the shortfall is greater than trivial, a proportionate reduction in the *quid pro quo* will be allowed.²⁷

It is now necessary to distinguish the concept of *partial* performance from that of substantial performance. Partial performance occurs when the debtor performs only a portion of his indivisible contractual undertakings, and does not contend that he has discharged all of his original liability. For example, if one person buys two horses from another, as a pair, and only one of the horses is delivered, performance may be said to be partial.²⁸ Partial performance thus falls short of complete, and substantial, performance.

25. Section 3.6.3 above. Also see *Gaza v Motor Insurer's Association* 1964 (3) SA 273 D&C, in which it was argued on behalf of the applicant that the terms of the contract, properly construed, required no more than substantial performance. However, *in casu* the applicant's performance did not constitute even substantial performance.

26. It is thought that a court ought not to apply *both* of the concepts of substantial performance cumulatively to one case. For example, if a court finds that, in a particular case, the parties have agreed to be satisfied with a degree of performance that, in the circumstances, commercial men would reasonably have expected, the court should not, after determining the extent of that performance, allow a further shortfall, on the basis that the additional shortfall would, on its own, be trivial. To do this would result in a situation envisaged by neither of the original concepts.

27. Otherwise, the person who has rendered less than complete performance will be unjustly enriched.

28. *Cedarmont Store v Webster & Co* 1922 TPD 106 at 110. Joubert, *Contract*, p 232, uses the term "defective" performance as synonymous with partial performance, and Kerr, *Contract*,

It is suggested that the term "partial performance" ought not to be used to describe the complete (or substantial) performance of only some of existing *divisible* obligations.²⁹ When divisible obligations are performed, the question whether the performance is complete (or substantial) is to be judged in relation to each divisible obligation on its own, and not in relation to the sum of the divisible parts.

Because partial performance falls short of complete, or substantial, performance, which is the degree of performance required by the law in order to discharge the obligation to perform, it follows that it is open to the creditor to whom partial performance has been rendered to avail himself of one of various choices. He may accept the partial performance, and sue for specific performance of the outstanding balance. Or he may reject the performance, and sue for an award of damages for non-performance.³⁰ These alternatives are straightforward. More troublesome are cases in which reciprocal duties of performance are involved, and where partial performance by one of the parties has been rendered. In such cases, it must be asked whether the party who has partially performed is entitled to sue to enforce the partial specific performance of the reciprocal duty of performance.

It appears to be beyond dispute that, in cases of this sort, if the party to whom partial performance has been rendered rejects the performance and retains no benefit therefrom, that no liability exists to render a counter-performance.³¹ However, if the partial performance has benefited the party to whom it was rendered, then the solution is not so easy. On the one hand, the person receiving the benefit has gained an advantage from the partial performance, which advantage cannot be overlooked. On the other hand, his own duty to render performance as agreed is, strictly speaking, contingent on the complete, or

uses the terms "incomplete" or "defective" performance.

29. See section 3.6.6 below on the specific performance of "divisible" obligations.

30. *Cedarmont Store v Webster & Co* 1922 TPD 106 at 111 - 112 and 114 - 115.

substantial, performance of the other party's obligations, and this has not occurred. It is not surprising that, in such cases, the possibility of resolving the difficulty by employing the concept of unjust enrichment has been canvassed. However, the Appellate Division has decided that the correct approach is not based on notions of unjust enrichment, but that, in certain carefully defined circumstances, partial performance of reciprocal obligations can give rise to a right to enforce partial counter-performance in the agreed terms.

An example illustrates the point. Suppose that a contractor undertakes, for a certain price, to erect a building in accordance with certain specifications. Assume also that he erects the structure, but that he fails substantially to meet the required specifications. Finally, assume that, because of the nature of the structure, it is impossible to remedy the shortcomings in performance, or that, in the circumstances, the court would exercise its discretion against ordering performance in accordance with the original specifications. The result, from the point of view of the person for whom the building was erected, is that the building is not what he contracted for. In this situation, it must be asked what basis exists in law which entitles the contractor to sue for the enforcement of specific performance of the reciprocal obligation to pay the agreed price, either wholly or in part.

The stumbling block which stands in the way of an ordinary right to sue for counter-performance is the general rule that, in the case of reciprocal obligations which are contingent, either complete, or substantial, performance of the obligation which is due first is required, before specific performance of the contingent obligations can be enforced.³²

31. If sued for counter-performance, the creditor in these circumstances may avail himself of the *exceptio non adimpleti contractus*. *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 C at 809 H; *National Screenprint (Pty) Ltd v The Campbell-Scott Company (Pty) Ltd* 1979 (4) SA 393 A at 396 H - 397 D.

32. Pothier, *Contrat de Louage*, section 406:

"Subject to any agreement to the contrary, express or implied, the lessee can bring this action [*ex conducto*] only after he has executed the work and delivered it or has placed the lessor *in mora* as to delivery, for in synallagmatic contracts, if there is no agreement to the contrary, a contracting party who has not performed or who is not ready to perform his contractual obligations cannot claim performance from the other party. For example, a seller cannot claim payment of the purchase price if he

The way in which the Appellate Division has chosen to avoid this difficulty is to delineate certain special circumstances, in which the requirement of complete, or substantial, performance being required prior to the enforcement of reciprocal obligations, is relaxed. The circumstances are delineated by the statement of three requirements which must exist before counter-performance may be enforced following partial, rather than complete, or substantial, performance.³³

Firstly, it must be shown that the person to whom partial performance has been rendered has benefited from, or is utilizing, the incomplete or imperfect result of the performance made.

Secondly, it must be shown that circumstances exist in which it is fair for the court to exercise its discretion, and relax the general rule regarding complete, or substantial, performance of reciprocal duties of performance as a pre-requisite of enforcing counter-performance.

Thirdly, the appropriate portion of the performance claimed must be justified, by reference to the cost of rectifying the incomplete or unsatisfactory original performance.

himself has not yet delivered or is not ready to deliver at the same time the thing sold. For the same reason the lessee cannot claim from the lessor payment of the contract price if he himself has not performed."

Also see De Groot, *Inleydinge* 3.19.11; *Hauman v Nortje* 1914 AD 293 at 297 and 303; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 A at 419 C.

33. *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 A at 435 A. Jansen JA said the following:

"...as die ondernemer nie daarin slaag om die Hof te oortuig dat hy sy deel ten volle nagekom het nie, en hy wil dan op 'n verminderde kontrakprys aanspraak maak, sal hy moet bewys: (i) dat die opdraggewer die onvolledige prestasie benut, (ii) dat daar omstandighede bestaan wat dit billik maak dat die Hof sy diskresie ten gunste van hom uitoeven, en (iii) wat die verminderde kontrakprys moet wees, dws wat die koste sal wees om sy prestasie in orde te bring teneinde te bepaal met hoeveel die kontrakprys verminder moet word."

A plaintiff who wishes to enforce reciprocal performance after rendering only partial performance must allege and prove these elements, in order to establish the extraordinary grounds for his claim.³⁴

Following this approach, it is not necessary in cases such as these to resort to the concept of unjust enrichment or a *quantum meruit* in order to achieve an equitable result.³⁵ This is an important point, because it affects the measure of what can be claimed. Because the claim is for partial performance of reciprocal obligations, the measure of what is claimed is not the extent of the enrichment of the recipient of the partial performance, but is determined on the basis of enforcing the original contractual claim for a reduced contract price.³⁶ This means that the originally agreed price is reduced by what it will cost to have the work completed to the original specifications, or by what it will cost to remedy the defects in the performance rendered. If completion or repair is impossible, it is submitted that the appropriate calculation is to subtract from the contract price the amount by which the partial performance rendered is less in value than what was due.

It is thought that the *actio quanti minoris* is an example of an action which is available in

34. *Dalinga Belleggings (Pty) Ltd v Antina (Pty) Ltd* 1979 (2) SA 56 A at 64 A. Christie, *Contract*, p 422 points out that the cases laying down how a *quantum meruit* should be pleaded no longer apply in such cases. Also see Kerr, *Contract*, p 405 ff.

35. A variety of different concepts were applied in three Appellate Division cases which were all decided in 1914: *Hauman v Nortje* 1914 AD 293; *Breslin v Hichens* 1914 AD 312; and *Van Rensburg v Straughan* 1914 AD 317. It emerges from these cases that, in certain circumstances, it is necessary to depart from a strict application of the rule that requires substantial performance in order to give relief to a person who has only rendered partial performance but who wishes to claim performance of reciprocal obligations. However, the cases decided in 1914 do not make clear just what remedy may be available in these circumstances. This is the question addressed in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 A at 421 - 423. On analysis, it is shown that the proper approach to this sort of case is to recognise the claim as one for the enforcement of specific performance of a contractual obligation to pay a reduced contract price, or the appropriate partial performance of whatever the reciprocal obligation consisted of. Accordingly, terms such as *quantum meruit* and "unjust enrichment" are best avoided. The action is not a *condictio* brought to enforce the performance of obligations created quasi-contractually, but the ordinary contractual action to enforce the partial performance of agreed terms and conditions.

36. *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 A.

situations involving the concept of partial performance. In contracts of sale, when the performance of the seller falls short of what was agreed, to an extent which is so great that he cannot be said to have performed substantially, and if the buyer has already paid the full purchase price, the law creates an obligation on the seller to repay to the purchaser a portion of the purchase price which reflects the difference between the value of what was promised and what was in fact delivered.³⁷ A corollary rule that logically must exist, would be that, if the seller has partially performed, and the buyer has not yet paid, but has elected to keep the goods, then the seller is entitled to sue for the payment of the portion of the purchase price which represents the portion he would be entitled to retain in an *actio quanti minoris*. In such an action, the three elements identified in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*³⁸ by Jansen JA are applicable. In fact, on reflection it appears that, in relation to the factual circumstances in which the *actio quanti minoris* would be available had the buyer paid the price, these elements *are* normally present. In particular, the second element, that of circumstances in which it is fair to relax the usual requirement of substantial performance, is met by the fact that neither the existence of latent defects nor the failure to make good *dicta promissave* is attributed to the culpable behaviour of the seller. In such circumstances, it seems, it would be fair to allow the seller to partially enforce the buyer's obligation to pay the agreed price.

In conclusion, it may be said that, provided it is appreciated that to issue an order of specific performance of reciprocal obligations following partial, rather than complete performance of the obligations first due is an exceptional instance of the availability of the remedy, and that accordingly there exist special essential elements which delimit exactly when and to what extent such specific performance will be enforced, the difficulties surrounding this topic are not as real as they may first appear.

37. See section 2.14.4. above. The obligation is created by the provisions of the aediles' edict.

38. 1979 (1) SA 391 A at 435 A. See above in this section.

3.6.6. Specific Performance of "Divisible" Obligations.

What appear to be single contracts or obligations may, on closer examination, turn out to be closely related but independent, and therefore "divisible" and separately enforceable.³⁹

Using the term "divisible" contracts or obligations suggests that what happens in cases of this kind is the division of what was originally one contract into a number of smaller independent contracts. It may be better to conceive of the contracts or obligations as *originally* divided and independent, but having the appearance of unity. It is then more easily appreciated that the task of the court faced with deciding questions of substantial performance is not to divide obligations, but to consider whether there exists only one, or more than one, obligation. The test for determining whether contracts or obligations are "divisible" (that is, having only the *appearance* of unity), depends on what the parties to the contract intended. Thus, in the case of the sale of goods, the suggested test is "whether the goods were bought as a unity in the business sense",⁴⁰ a question which clearly relates to the intention of the parties at the time of contracting, and not to mechanical considerations such as whether the obligations can meaningfully be performed piecemeal. In order to abstract the suggested test so that it is made applicable to contractual obligations generally, and not just to contracts of purchase and sale of goods, it is suggested that the rule ought to be stated thus: that obligations are dependent and indivisible when the parties involved in the creation of those obligations contemplated their performance as an inseparable unity, bearing in mind the purpose and objectives which performance of the undertakings was intended to achieve.

The realisation that what may have appeared to be a single obligation is, in fact, a number of

39. *Vorster Bros v Louw* 1910 TPD 1099 at 1113; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 A at 434 - 435; *Moosa v Robert Shaw & Co Ltd* 1948 (4) SA 914 T at 916; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 A at 433.

40. *Moosa v Robert Shaw & Co Ltd* 1948 (4) SA 914 T. Delivery in instalments of goods purchased, even if the obligation is indivisible, does not necessarily constitute a material breach of contract, entitling the buyer to reject the performance rendered and cancel the contract, but the buyer is not obliged to pay for any instalment piecemeal: the reciprocal obligation to pay the agreed price generally only arises when an indivisible obligation is substantially performed as a whole.

independent obligations affects the right of the creditor to demand performance "in a lump".⁴¹ Since the performance of independent obligations depends on their own individual terms, they are not invariably due to be performed simultaneously, and an order of specific performance cannot be sought to enforce performance before the particular performance is in fact due. For example, if a buyer purchases a table and a horse from the same seller, then, provided the obligations created are properly treated as "divisible" that is, independent of each other, each item need not be delivered simultaneously, but only when agreed, or, failing agreement, within a reasonable time according to the circumstances.⁴² Any reciprocal obligation, for example, to pay the price, becomes enforceable after the performance of each independent obligation, and not only after all outstanding obligations have been discharged, as is the case with indivisible obligations.⁴³

41. De Groot, *Inleydinge*, 3.39.9. The term "partial performance" should not be used to describe the piecemeal performance of "divisible" obligations, since to do so encourages confusion between different situations with different legal consequences. Cf Joubert, *Contract*, p 185.

42. Mackeurtan, *Salè*, 6.4.12.

43. Cf *Moosa v Robert Shaw & Co Ltd* 1948 (4) SA 914 T.

3.7. LIMITATIONS ON THE RIGHT TO AN ORDER OF SPECIFIC PERFORMANCE.

3.7.1. Two Conflicting Principles to be Reconciled.

In relation to the remedy of enforcing the specific performance of a contractual obligation, there are two important principles which apply, but which, if they are too broadly stated, are in conflict with each other. It is therefore necessary to state these principles accurately, and to determine how they co-exist in relation to each other.

The first principle arises from the fact that, in South African law, the enforcement of specific performance is considered to be a natural and ordinary remedy which the plaintiff is entitled to seek simply because it is the remedy which he prefers.¹ In other words, the plaintiff need not *justify* his insistence on enforcing specific performance, rather than asking for an alternative remedy. He is *entitled* to an order of specific performance because, as a general rule, South African law does not allow a defendant the freedom to elect to pay damages rather than to perform his obligations specifically. The choice of remedy therefore lies with the plaintiff, and, being the innocent party, he may choose whichever remedy suits him best.²

1. *Rex v Milne and Erleigh* 1951 (1) SA 791 A at 873 G. Schreiner JA said the following:

"In our law a grant of specific performance does not rest upon any special jurisdiction; it is an ordinary remedy to which in a proper case the plaintiff is entitled."

Also see Joubert, *LAWSA*, Vol 5 para 235, and section 3.3.1 above.

2. *Cohen v Shires, McHattie and King* (1882) 1 SAR 41 at 44 is an early illustration of this principle. In this case the plaintiff sued to enforce specific performance of the defendant's

This means, in effect, that he may seek an order of specific performance even if the defendant is unwilling to perform. Alternatively, assuming for example, that the defendant is in material breach of contract, the plaintiff may elect to cancel the defendant's right to discharge his outstanding obligations by means of specific performance, and instead sue for an award of damages in lieu of performance.³

The second principle, which potentially conflicts with the first, is that the freedom of the plaintiff to choose the enforcement of specific performance as his remedy is subject to one overriding limitation. Because situations arise in which, from the court's point of view, it would be undesirable to order and enforce specific performance, the issue of such orders is considered to be subject to the discretion of the court.⁴ This means that, even if a plaintiff establishes all the requirements that *prima facie* entitle him to an order of specific performance, the courts may nevertheless refuse to issue the order, by exercising its discretionary power to refuse the order. De Villiers AJA expressed the point in *Haynes v King Williamstown Municipality* as follows:⁵

"It is, however, equally settled law with us that although the Court will as

obligation to transfer certain immovable property. It was held that he was entitled to seek this remedy alone if he so chose, and was not required to ask in the alternative for an award of damages. Kotze J said at p 44:

"It may be desirable to make the request in the alternative, but if he chooses to make use of only a portion of his right of action, he cannot be prevented from doing so."

See page 352 above for a fuller quotation of the passage in which this sentence occurs.

3. *Ariefdien v Soeker* 1982 (2) SA 570 C at 579. In this case, the plaintiff was held entitled to treat the defendant's obligations as divisible, so that an order of specific performance was issued in respect of an obligation to deliver property purchased. In addition, an award of damages was made to compensate for the defendant's failure to carry out the specific performance of work which should have been carried out on the property. King AJ held that the plaintiff was entitled to choose to combine his remedies in this way, despite defendant's willingness to perform all the outstanding obligations specifically.

4. *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 A at 378 F; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 A at 433; *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 A at 440.

5. 1951 (2) SA 371 A at 378 G.

far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod interest*."

The potential conflict of principle exists because, on the one hand it is stated that a plaintiff is generally entitled to choose his remedy, including an order of specific performance, while on the other hand, it is said that the courts have a discretion to refuse to issue an order of specific performance. It must be asked where the plaintiff's right to enforce specific performance ends and the Court's right to refuse an order begins. This question has been considered in many cases by the courts. The cases indicate that the courts have been consistently anxious to reserve an unfettered discretion in cases of this type, and have often spoken of their refusal to be bound by rigid and strictly stated rules.⁶ At the same time, perhaps out of a desire to make the law reasonably certain and the outcome of litigation predictable and consistent, the courts have, on many occasions, referred to *types* of cases in which an order of specific performance will normally be refused. For example, it has been said that an order of specific performance will not be ordered in cases involving the enforcement of obligations to perform personal services, such as arise from a contract of employment between master and servant.⁷

The leading example of a case which has been interpreted as laying down that there are *types* of case in which the courts will exercise their discretion and refuse to order specific performance is *Haynes v King Williamstown Municipality*.⁸ In this case, the Appellate

6. *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 A at 378 G; *Diner v Dublin* 1962 (4) SA 36 N at 40 E; *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Others* 1982 (4) SA 151 T at 155 H; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A at 782 F - G.

7. The so called "rule" has been stated unambiguously. In *Pougniet v Ramlakan* 1961 (2) SA 163 at 167 H, Milne J said the following:

"Moreover, I have come to the conclusion...that the courts will refuse to make decrees of specific performance of contracts between master and servant, even in cases where the master and the servant are not likely to come into frequent personal contact."

Cf *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Others* 1982 (4) SA 151 T at 156 H. Also see section 3.7.5 below.

Division, having said that each case must be decided in the circumstances of each case, went on to list five "examples of the grounds on which the courts have exercised their discretion in refusing to order specific performance..."⁹ These are:

"...(a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the Court to enforce its decree; (c) where the thing claimed can readily be bought anywhere; (d) where specific performance entails the rendering of services of a personal nature. To these may be added examples given by Wessels on *Contract* (vol 2, sec. 3119) of good and sufficient grounds for refusing the decree, (e) where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances."

The use of the word "grounds" in this context suggests that the Appellate Division was possibly saying that, in all cases of the type mentioned, grounds exist on which the courts will be justified in refusing to enforce specific performance. This interpretation appears to have had a major influence on the way in which the topic has since been dealt with by modern text-book writers.¹⁰ The learned authors all follow the same basic approach to the question when a court will exercise its discretion to refuse an order of specific performance, that is to say, they all list and explain the particular types of case or the specific circumstances in which they say it appears that the courts will refuse to order the enforcement of specific performance. The way in which the various authors group the cases into categories varies, and the arrangement of the cases within the categories is not uniform, but generally, it seems fair to say that the writers referred to in the footnote following appear to have accepted the proposition that certain types of case or circumstances can be identified, in which it can be predicted with relative certainty, by inference, that the courts will refuse to issue an order of specific performance.¹¹

8. 1951 (2) SA 371 A. For examples of the interpretation of this case, see Kerr, *Contract*, p 397 ff; Christie, *Contract*, p 507 ff; Joubert, *Contract*, p 224 ff. It will be submitted below in this section that this interpretation of *Haynes'* case is not necessarily the only one, and that, in any event, the Appellate Division has since set out the applicable principles more clearly in *Benson & Son (Pty) Ltd v Wolmaranstad Town Council* 1986 (1) SA 776 A. This case is discussed in more detail below.

9. At p 378 H.

10. See the writers referred to in the following footnote.

Taking advantage of the hindsight now provided by *Benson v SA Mutual Life Assurance Society*¹² it must be questioned whether the Appellate Division in *Haynes v King Williamstown Municipality*¹³ ever really intended to lay down the sort of approach described above to the question of when a court would exercise its discretion against ordering the enforcement of specific performance. The major point of *Haynes v Kingwilliamstown Municipality*, it is submitted, was that the court's discretion to refuse an order of specific performance must be free and unfettered, and that each case should be judged individually in the light of its own circumstances. Thus De Villiers AJA said the following:¹⁴

"The discretion which a court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances."

The list of examples which immediately follows this statement as "examples of the grounds on which the Courts have exercised their discretion in refusing to order specific performance" may well have been intended as no more than an illustration of the *variety* of the circumstances in which the discretion to refuse an order of specific performance may operate.¹⁵ Expressing this idea another way, it may be said that the list illustrates the variety of the factual situations in which grounds for refusing an order of specific performance *may* be found to exist. However, it must be conceded that the examples given in *Haynes v*

11. Kerr, *Contract*, p 397 ff; Christie, *Contract* p 507 FF; Joubert, *LAWSA* Vol 5 para 236; Joubert, *Contract*, p 224 ff; Wille and Millin, *Mercantile Law*, p 119 ff. Cf De Wet and Yeats, *Kontraktereg*, p 188 ff, who avoid this approach. Also see A Beck, "The Coming of Age of Specific Performance", (1987) 20 *Comparative and International Law Journal*, 190.

12. 1986 (1) SA 776 A.

13. 1951 (2) SA 371 A.

14. 1951 (2) SA 371 A at page 378 G.

15. This appears to be the interpretation put on *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 A by Davidson J in *Industrial & Mercantile Corporation v Anastassiou Bros* 1973 (2) SA 601 W at 608 E. The learned judge describes the situations listed in *Haynes v*

*Kingwilliamstown Municipality*¹⁶ are described as examples of "grounds" on which the exercise of judicial discretion is justified. This may be taken to imply that such "grounds", if found to exist, are themselves a sufficient basis for refusing an order of specific performance. As stated above, this seems to have been the interpretation of those writers already referred to. However, it must be pointed out that these examples of "grounds" given in *Haynes v Kingwilliamstown Municipality* are expressed in surprisingly broad terms if they are intended to define instances in which refusal to issue an order of specific performance is justified. This is especially so if one keeps in mind the stated principle that the plaintiff is generally considered to be entitled to elect to enforce specific performance of obligations to perform. It is submitted that the broadness with which the examples are stated in *Haynes v Kingwilliamstown Municipality* is inconsistent with maintaining that principle.

A brief analysis shows why this is so. The first "ground" for refusing an order of specific performance mentioned in *Haynes v Kingwilliamstown Municipality* is "where damages would adequately compensate plaintiff."¹⁷ This ground is expressed so widely that it in fact negates the plaintiff's right to choose his remedy.¹⁸ If this "ground" operates as a general rule in all cases, it would be necessary to re-state basic principles, and say, for example, that an order of specific performance is only available if damages are not an adequate remedy. It is submitted that this was never intended by the Appellate Division, which took care to state the principle that plaintiff is indeed entitled to choose to enforce his ordinary remedies.¹⁹ It

Kingwilliamstown Municipality as examples of cases in which an order of specific performance *could* be refused, as distinct from *should* or *will* be refused.

16. 1951 (2) SA 371 A at 378 H.

17. 1951 (2) SA 371 A at p 378 H.

18. This criticism is made in *Swartz & Son (Pty) Ltd v Wolmaranstad Town Council* 1960 (2) SA 1 T at 3; and *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A at 784 C. Hefer JA, in *Benson's* case attributes the origin of the supposed rule to English law.

19. *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 A. De Villiers AJA said the following at 378 D:

"It is correct...that in our law a plaintiff has the right of election whether to hold a defendant to his contract and claim performance by him of precisely what he had bound himself to do, or to claim damages for the breach.... This right of choice a defendant does not enjoy; he cannot claim to be

is therefore suggested that, in *Haynes v Kingwilliamstown Municipality*, De Villiers AJA intended to indicate by reference to this example no more than, in the circumstances of a case, the fact that damages constitute an adequate remedy may be properly taken into account and weighed with some other perceived undesirability which affects the issue of an order of specific performance.

The second example given in *Haynes v Kingwilliamstown Municipality* of a "ground" for refusing an order of specific performance may also be criticised for being so widely expressed that it leaves a plaintiff very little right to choose to enforce specific performance. This ground is "where it would be difficult for the court to enforce its decree."²⁰ If a court is only prepared to order specific performance in cases in which performance is easily enforceable, an order of specific performance ceases to be an available remedy in any case involving complex duties of performance in which the defendant is recalcitrant. It is submitted that this cannot have been the intention of the Appellate Division in *Haynes v Kingwilliamstown Municipality*, since it conflicts in too great a measure with the other important principle stated in that same case as being fundamental, that is, that an order of specific performance is an ordinary remedy available as of right.

The third ground given is equally difficult to equate with a general right of a plaintiff to enforce specific performance by the defendant. This is the ground that "the thing claimed can readily be bought anywhere."²¹ If this circumstance is to be recognised as a justification for refusing to issue an order of specific performance, it constitutes a very substantial inroad into the plaintiff's right to enforce specific performance.²² It may

allowed to pay damages instead of having an order for specific performance entered against him."

20. 1951 (2) SA 371 A at p 378 H.

21. 1951 (2) SA 371 A at p 378 H.

22. This ground for refusing an order of specific performance appears to have been adopted from English law in *Thompson v Pullinger* (1894) 1 OR 298 at 301. Also see the minority judgement of Schreiner JA in *Rex v Milne & Erleigh* 1951 (1) SA 791 A at 873 H. Cf *Shill v Milner* 1937 AD 101 at 110, in which the Appellate Division ordered the specific performance of an obligation to deliver a freely available commodity, that is, maize which

therefore be better to treat the availability of goods from an alternative source as no more than a factor to be weighed in the decision not to order specific performance, rather than treating it as sufficient justification for refusal on its own.

The fourth ground mentioned in *Haynes v Kingwilliamstown Municipality*, is: "where specific performance entails the rendering of services of a personal nature."²³ While it must be conceded that special problems exist in enforcing an order of specific performance when the undertaking entails close personal relationships and mutual trust, it begs the question to assume that there will be insurmountable difficulties in every case involving services of a personal nature. In any event, this ground is so specific (since services of a personal nature are unequivocally identifiable) that it effectively deprives a court of any discretion to allow or refuse an order of specific performance: the order would *have* to be refused if the obligation involved the rendering of personal services. This would contradict the statement in *Haynes v Kingwilliamstown Municipality*, that the discretion to refuse an order of specific performance should not be made subject to any rigid rules.²⁴ Accordingly, it is submitted that it is better to interpret what was said in *Haynes v Kingwilliamstown Municipality*, as an indication that, in cases involving services of a personal nature, circumstances may well be found to exist in which an order of specific performance will be considered undesirable:²⁵ but with the proviso that this is not necessarily so.

In *Haynes v Kingwilliamstown Municipality*²⁶ a fifth example of "good and sufficient grounds" for refusing an order of specific performance was added to the list of

had been bought and sold. The elevation of this ground for refusing to order specific performance to the status of a general rule is criticised in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A at 784 D as inconsistent with South African law, and with the plaintiff's general right to enforce specific performance.

23. 1951 (2) SA 371 A at p 378 H. See, as an example of the application of this rule, *Pougnat v Ramlakan* 1961 (2) SA 163 at 167 H.

24. 1951 (2) SA 371 at 378 G.

25. *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Others* 1982 (4) SA 151 T at 156 H ff, and section 3.7.5 below.

four already mentioned, that is "where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances."²⁷ In fact, as originally phrased, this "ground" is a mixture of example and general principle. The example portion is the reference to cases in which the enforcement would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable.²⁸ To this example is added a statement of general principle which is so fundamental that it in fact constitutes one of the major principles which is common to, and therefore underlies, all of the factual examples so far referred to. It is a principle which also gives coherence to the decided cases, unifying them with a common principle. This principle is contained in the statement that an order of specific performance is justifiably refused if "the decree would produce injustice, or would be inequitable under all the circumstances."

It is submitted that this is one of the basic principles that underlie, and govern, the exercise of the judicial discretion to refuse an order of specific performance.²⁹ It is a broad principle, and it is abstract enough not to constitute a rigid and limiting rule which would circumscribe and fetter the discretion of a court. The principle operates rather as a guide, which enables a court to act rationally and consistently in a wide variety of cases. Recognition of such a principle helps to avoid the pitfalls of two extreme positions. The first

26. 1951 (2) SA 371 A.

27. 1951 (2) SA 371 A at p 378 H - 379.

28. De Villiers AJA cites Wessels, *Contract*, vol 2, sec 3119 as the source of this ground. Wessels himself gives the English Courts of Equity as his source, but suggests that the English cases are in harmony with Roman-Dutch principles. With respect, substantial doubts now seem to have been cast on this assertion by the decision in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A. In particular, it must be remembered that an order of specific performance is not an ordinary remedy in English law, but an equitable remedy, and its availability depends on different principles from those which obtain in Roman-Dutch law. See generally Spry, *Equitable Remedies*, Chapter 3.

29. This was recognised by Hefer JA in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A at 783 D:

"...and the basic principle thus is that the order which the Court makes should not produce an unjust result..."

of these is the undue acceptance of rigid rules which negate the very notion of a discretionary power.³⁰ The other extreme is the exercise of a discretion completely freely, capriciously, without reference to principle, but on the basis of a subjective sense of fairness and common sense. Such an approach is likely to be overly idiosyncratic and unpredictable.³¹ The middle line is to retain a wide discretionary power but to exercise it in accordance with broad but well recognised principles. This preserves the objectives of freedom of discretion as well as assuring consistency of decision.

3.7.2. General Principles which Guide the Courts in the Exercise of Their Discretion to Refuse an Order of Specific Performance.

Recently, in *Benson v SA Mutual Life Assurance Society*³² the Appellate Division reviewed the principles which govern the discretionary power of a court to refuse an order of specific performance. Three principles were identified by Hefer JA which were said to be applicable.

30. Whatever arguments have been adduced in the past in support of defining specific circumstances or cases in which an order of specific performance will be refused, it is submitted that this approach is no longer tenable in the light of *Benson's* case. An alternative approach must therefore be found.

31. The point is made by William Schorer in the introduction to his 1767 edition of De Groot's *Introduction to Dutch Jurisprudence*. Schorer says:

"...a judge who judges [a case] in accordance with his own common sense and sense of equity, and without rules of law, is to be feared more than dogs and snakes."

This meaningful quip is quoted in *Preller v Jordaan* 1956 (1) SA 483 A at 500 G and in *ASA Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en andere* 1982 (3) SA A at 923 B. Similar sentiments are expressed by Hefer JA in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A at 783 C:

"This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle...."

32. 1986 (1) SA 776 A at 783 C.

To begin with, Hefer JA confirms the general rule that a creditor is entitled, as of right, to an order of specific performance to enforce the performance of a legally valid contractual obligation which gives rise to a duty of performance by the debtor.³³ A court only properly exercises its discretion against ordering specific performance if the guiding principles set out below, when applied, indicate that an order of specific performance ought not to be issued. These principles are as follows:

Firstly, an order of specific performance must not have the effect of producing injustice, nor should the order be inequitable in all the circumstances of the case, for example, by operating unduly harshly on the defendant.³⁴ This appears, in fact, to be the major guiding principle that governs the exercise of the discretionary power to refuse an order of specific performance. Hefer JA describes it as "the basic principle".

Secondly, Hefer JA stated that an order of specific performance must not be made in terms that are in conflict with either legal or public policy.³⁵ In South African law, considerations of public policy, to the extent that they are recognised by law, are usually considered to render any contrary agreement void *ab initio*.³⁶ This being so, there would be no need for a

33. At p 782 H ff.

34. *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A at p 783 D.

35. *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A at p 783 E.

36. Voet, *Commentarius*, 2.14.6; De Groot, *Inleydinge*, 3.1.42 - 43. *Eastwood v Shepstone* 1902 TS 294 at 302; *Kuhn v Karp* 1948 (4) SA 825 T at 838 - 840; *Granoth v Granoth* 1983 (4) SA 50 C. In this last-mentioned case, an agreement not to sue in a South African court, which left the plaintiff without legal recourse, was held to be invalid because such an agreement "is against public policy". *Oo's Transvaal Koöperasie Bpk v Heyns* 1986 (4) SA 1095 O. In *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A, it was held that agreements in restraint of trade are not *ipso facto* void, but, to the extent that such agreements are contrary to public policy, they are "onafdwingbaar" (unenforceable). Thus, although, like gambling contracts, such agreements are recognised as *iusta causa* if they are voluntarily performed, they do not give rise to legally enforceable contractual obligations, and a refusal to enforce such agreements is not the result of exercising a discretionary power, but a result of there being no enforceable contractual obligation. (See section 3.8 below.) Cf *Olsen v Standaloft* 1983 (2) SA 688 ZS, in which a marriage brokerage contract was held not to be contrary to public policy. Also see generally, Kerr, *Contract*, pp 99 - 102 and 468 ff; Christie, *Contract*, pp 373 - 378; De Wet and Yeats, *Kontraktereg*, pp 80 - 83; Joubert, *Contract*, pp 132 - 153.

court to exercise a discretionary power to refuse an order of specific performance. Since the agreement itself is legally void, no enforceable contractual obligations exist, and therefore the remedy of an order of specific performance is simply not available.³⁷ However, it must be considered whether the learned judge has in mind some other possibility. It may be that, in particular cases, although considerations of public policy are not such as to render an agreement legally void *ab initio*, such considerations may nevertheless be taken into account by a court, when deciding whether to exercise its discretionary power against ordering specific performance. In considering this possibility, it is interesting, and perhaps significant, that agreements contrary to public policy are not listed in *Haynes v Kingwilliamstown Municipality*³⁸ among the examples of those cases in which an order of specific performance will be refused. The inclusion of considerations of public policy as grounds which justify a refusal to order specific performance of legally valid contractual obligations is a noteworthy development. It means that there are circumstances in which, despite considerations of public policy, and the refusal by a court to order specific performance, valid contractual obligations nevertheless may exist, which can be enforced by some alternative remedy, such as a claim for an award of damages in lieu of performance.

Thirdly, Hefer JA said that an order of specific performance must not require the performance of anything which is beyond the capacity or power of the defendant to do.³⁹ This statement is unexceptional if it is intended to refer only to instances of impossibility of performance which do not have the effect of rendering the legal obligations void. If the obligations are rendered void by impossibility of performance, there is obviously no need to for a court to rely on its discretionary power to refuse an order of specific performance, as Hefer JA himself makes clear in the course of his judgement.⁴⁰

37. Hefer JA makes this same point in relation to cases in which impossibility renders an agreement void *ab initio*.

38. 1951 (2) SA 371 A

39. *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A at p 783 E - F.

40. At page 783 F. See section 3.4.10 above on the effect of impossibility generally on the

In applying these principles in order to decide whether or not to refuse an order of specific performance in a particular case, it is implicit in *Benson's* case that all the relevant circumstances of the case are to be taken into account, and not only the type of contractual obligation, or type of contractual relationship or factual situation concerned.

It is demonstrable, by reference to the decided cases, that whatever the approach of the text-book writers may have been, the courts themselves have never fully given over to the view that specific types of cases can be identified in which an order of specific performance should be refused purely on the grounds of the type or category of case or factual situation involved. For almost every case which attempts to postulate such a general rule arising out of a particular situation, there is another case which disputes the generality of the rule and reaches a different conclusion. In the result, the impression of hopeless confusion is only avoided by recognising that what in fact has served as a guiding light to the courts is the principle that the courts will do everything in their power to preserve the plaintiff's right to choose an order of specific performance as his remedy, *except* issue an order that is unjust or inequitable, or impossible for the debtor to comply with. This guiding light has been kept under a bushel at times, but its glimmer is often discernable in the cases if one is looking out for it.⁴¹

It is necessary, having considered the broad applicable principles, to analyse decided cases. The object of this analysis is to show that, while some of the decided cases are hard to reconcile if the decisions are explained purely on the basis of the *type* of case or factual situation involved, the cases are more easily reconciled if they are explained in terms of the guiding principles set out in the preceding section. In the following sections, although reference is made to different *types*, or category, of case, the purpose of the study is to

creditor's right to an order of specific performance. On the question of the relationship of impossibility and the exercise of the court's discretionary power, see section 3.7.6 below.

41. See below for a discussion of relevant cases.

illustrate the way in which it is the broad principles that determine the question whether to order specific performance, rather than drawing conclusions from the mere fact that a case is categorised in a particular way.

3.7.3. Cases in which Specific Performance Creates Injustice in the form of Undue

Hardship.

There are decided cases which fall easily within the broad principle that the discretion of a court to refuse an order of specific performance is properly exercised if, in the circumstances of the case, the result would be unjust or inequitable. For example, this principle is applicable if the order of specific performance would operate unduly harshly on the defendant.

In *SA Harness Works v SA Publishers*⁴² the defendants unlawfully cancelled a contract which was only partly performed. Plaintiff carried out the rest of the performance against the defendants wishes, and then sued to enforce the specific performance of the defendant's obligation to pay the agreed price. An order of specific performance was refused. The court found that since the defendant had acted in good faith in cancelling the contract, and taking into account all the circumstances of the case, it would be unjust to force on him the consequences of an unwanted performance, from which it appears he derived no benefit.

By contrast, in *Industrial & Mercantile Corporation v Anastassiou Brothers*,⁴³ the defendant

42. 1915 CPD 43 at 46.

43. 1973 (2) SA 601 W at 609 A. Cf *Carpet Contracts (Pty) Ltd v Grobler* 1975 (2) SA 436 T. This case involved an action for the enforcement of specific performance of contractual obligations in terms of which plaintiff was to install carpeting on the defendant's house. The defendant repudiated the contract. An order of specific performance was refused on the basis that it would be difficult to enforce compliance with such an order. With respect, it would seem that the judgement of Davidson J in *Anastassiou's* case is based on a sounder principle. The so-called difficulties of enforcing performance are overcome by the plaintiff bringing proceedings for contempt of court if adequate performance in terms of the court's order is not forthcoming. Thus, in *Ranch International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 (3) SA 861 W at 880 H, Coetzee J says:

repudiated a contract in terms of which plaintiff was to supply and install equipment in his (defendant's) shop. Plaintiff sued for an order of specific performance of the defendant's contractual obligation to pay the purchase price, tendering at the same time to install the equipment. By the time of the hearing, the defendant had already fitted his shop with substitute equipment, and to order specific performance of the original contract would, he alleged, disrupt his trade. Nevertheless, the order for specific performance was issued, on the basis that the difficulties of the defendant were the result of his own arrogant denial of his original commitments. An order of specific performance, even if inconvenient and expensive for the defendant, was therefore not unjust or inequitable in the circumstances.

More recently⁴⁴ it has been pointed out that the facts in *Industrial & Mercantile Corporation v Anastassiou Brothers* are an example of enforcing specific performance in circumstances of *mora creditoris*. An order of specific performance is generally a more familiar remedy in circumstances of *mora debitoris*, but it would be wrong to assume that the remedy is unavailable in situations of *mora creditoris*.⁴⁵ Furthermore, if the performance of the obligations owed to the creditor requires his co-operation, he is under a duty to furnish that co-operation, and the courts are prepared to coerce a reluctant creditor into co-operating if the co-operation is not voluntarily forthcoming.⁴⁶ Withholding co-operation when it is

"I wonder if this so-called difficulty is not grossly over-emphasised. Is it not imaginary rather than real? I could not find a case on record where such a difficulty actually arose in practice and which had to be dealt with by the Court after an order to perform a building contract had been made. Why should there be any difficulty? What is the need of supervision anyway? Does the Court ever supervise the execution of its judgments? Surely not. Orders *ad factum praestandum* are made all the time. There is no supervision thereof and no intervention by the Sheriff. If there is an intentional refusal to perform, contempt proceedings may follow. Why should different considerations then apply to building contracts?"

44. *Ranch International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 (3) SA 861 W. It was held in this case that the employer of a builder is under a duty to co-operate with the builder to enable him to perform his obligations. The duty of co-operation may be enforced specifically, since withholding co-operation is a form of *mora creditoris*.

45. *Ranch International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 (3) SA 861 W at 879 F ff.

46. *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 A at 529; De Wet and Yeats, *Kontraktereg*, p 166.

required to enable the other contracting party to perform his obligations is *mora creditoris* and an order of specific performance is available to compel co-operation.

3.7.4. Cases Involving Performance the Standard of Which is Not Objectively

Ascertainable.

The realisation contained in *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd*,⁴⁷ that specific performance may be ordered even if voluntary compliance with the order seems unlikely, is of utmost importance. It is a reminder that the mechanism of enforcing an order of specific performance depends mainly on the coercive threat, either of civil imprisonment for contempt of court, or of execution against the defaulting party's property.⁴⁸ This means that, once an order of specific performance has been issued, it is for the defendant to comply with the terms of that order adequately to satisfy the court, or to face the consequences, that is, of civil imprisonment. The court need not therefore be involved in any ongoing supervision of the performance which it orders, in order to determine its adequacy. The person in whose favour the order is made is entitled to institute further proceedings if the performance is not rendered either at all or inadequately. In bringing such proceedings, the plaintiff will have to produce evidence of the shortcomings of the performance, or of the non-performance.⁴⁹

This leads to the question whether the courts ought to order specific performance in cases where the adequacy of performance is not objectively ascertainable. An example of such a case is *Keyter v Terblanche*⁵⁰ in which an order of specific performance was sought to

47. 1984 (3) SA 861 W.

48. Section 3.3.4 above.

49. *PE Nightwatchman Patrol (Pty) Ltd v Blignaut* 1979 (2) SA 302 SE. In this case, contempt proceedings were brought on the basis that the respondent was in breach of the terms of an interdict issued by the court. The application for committal was refused because it was found by the court that the respondent was not in breach of the terms stipulated by the court.

enforce an undertaking made by the defendant to withdraw some defamatory remarks that he had made about the plaintiff. The court refused to make the order, because it would have been difficult to ensure that it was properly carried out. An inflection of tone or an added gesture might destroy the sincerity of a verbal public apology. It was not really possible, in relation to undertakings of this sort, for the court to set out the exact parameters with which performance must conform. The true measure of performance in relation to such undertakings is that the creditor is personally satisfied with what is done, that is to say, the adequacy of performance is measured subjectively, not objectively.

Even though objective parameters of performance could not reasonably be set out in every detail by the court in the circumstances of *Keyter v Terblanche*⁵¹ it must be questioned whether this was sufficient grounds for refusing an order of specific performance. Certainly, the act of making a withdrawal as agreed was within the power of the defendant to make. In that case, why not order specific performance to the satisfaction of a named third person? This approach has been adopted in other cases, and it appears to be an entirely workable solution. Thus, in *National Butchery Co v African Merchants*,⁵² the court went to considerable lengths to define parameters for the performance which it ordered. The case involved the specific performance of an obligation to install machinery in accordance with certain specifications in the plaintiff's factory. The matters which were in issue, that is, concerning the plaintiff's co-operation and the defendant's technical approach to the installation were eventually made subject to the approval of an impartial engineer, appointed for this purpose by the court. The involvement of the court in the specifics of performance in this case has been criticised as illustrating how enforcing specific performance of an obligation to perform construction work can "run into trouble" and is thus best avoided.⁵³

50. 1935 EDL 186 at 201.

51. 1935 EDL 186 at 201.

52. 1907 EDL 57. Two further actions were brought by the parties to resolve this case, which are reported in the same volume at p 93 and p 98.

53. Christie, *Contract*, p 512.

However, the better view of the case, it is submitted, is that it is a good example of a court taking the time and trouble to preserve the plaintiff's right to an order of specific performance rather than his being required to settle for something less when that second alternative is not really necessary.

More recently, a similar approach to that adopted in the *National Butchery* case was applied in the granting of an order of specific performance to enforce an obligation "to form and grade" roads in a township "to the satisfaction of" the plaintiff.⁵⁴ The court took the view that the plaintiff, being the interested party, would supervise the work and, if not satisfied with the defendant's performance, could apply for contempt proceedings. The respondents in such proceedings could then question whether or not the applicant had exercised his discretion properly in rejecting the performance rendered. The court thus treated the obligations as enforceable, despite the fact that the exact standard of performance was not able to be stipulated in advance. Instead, the standard of performance, and compliance therewith, would be determinable in the course of contempt proceedings.⁵⁵ The conclusion that can be drawn from these cases is that care must be taken to avoid confusing cases in which the obligations undertaken are so imprecise that they do not give rise to enforceable obligations, and cases in which the obligations are to be determined not by reference to objectively measurable standards, but in terms of the creditor's satisfaction. In the latter type of case, the obligations are enforceable because the creditor must act reasonably in withholding his approval of performance rendered by the debtor. This is determinable by a court after the event.

54. *Sandton Town Council v Original Homes (Pty) Ltd* 1975 (4) SA 150 W at 156. In this case, the court took pains to distinguish the obligations to form and grade the roads from obligations to perform a personal service. However, it is submitted that, since obligations to perform a personal service are now recognised as possibly specifically enforceable, the distinction is no longer as vital as it may have seemed in 1975. See *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Others* 1982 (4) SA 151 T at 158 A.

55. As illustrated by *PE Nightwatchman Patrol (Pty) Ltd v Blignaut* 1979 (2) SA 302 SE.

3.7.5. Cases Involving the Specific Performance of Personal Services or Involving Confidential Relationships.

It had been said more than once that South African courts will not order the specific performance of obligations which entail the performance of personal services, or in which confidential relationships are involved.⁵⁶ In *Pougnat v Ramlakan* for example, Milne J said the following:⁵⁷

"...the courts will refuse to make decrees of specific performance of contracts between master and servant, even in cases where the master and servant are not likely to come into frequent contact."

In this case, an order of specific performance of a contract of employment was refused.

However other cases have shown that it is not necessarily correct to conclude that specific performance will not be ordered in all cases involving personal services or confidential relationships. In *Meyers v Abramson*, Van Winsen J said the following:⁵⁸

"Where one party to the contract had unjustifiably repudiated it the injured party...is entitled to ignore the repudiation and hold the other party to the contract and claim specific performance. It is difficult to see why this general rule should not be equally applicable to contracts of employment."

56. On the background to this question, see M S M Brassey, "Specific Performance - A New Stage for Labour's Lost Love", 1981 *Ind. LJ*, 57.

57. 1961 (2) SA 163 D&C at 167 H. Also see *Schierhout v Minister of Justice* 1926 AD 99 at 107; *Gründling v Beyers and Others* 1976 (2) SA 131 W at 146; *Kubeshka and Another v Imextra (Pty) Ltd* 1975 (4) SA 484 W at 487; *Mabaso and Others v Nel's Melkery (Pty) Ltd* 1979 (4) SA 358 W at 359 H.

58. 1952 (3) SA 121 C at 123 F. Also see *Myberg v Danielskuil Munisipaliteit* 1985 (3) SA 335 C at 346 J, in which it was said that the court had a discretion to order the reinstatement of an employee, although, in the circumstances of that particular case, reinstatement was not ordered because of the irreparable damage to the parties' mutual trust that had been caused. *Consolidated Frame Cotton Corporation Ltd v President of the Industrial Court and Others* 1985 (3) SA 150 N.

In *Diner v Dublin*⁵⁹ the plaintiff sued for an order of specific performance to enforce an agreement in terms of which he would become a minority shareholder and a director in the defendant's company. The performance of the obligation therefore involved a continuous future confidential relationship between the parties. Having considered the circumstances of the case, and in particular the good personal relationship that existed between the parties, the court issued an order of specific performance. In doing so, the court in *Diner v Dublin* distinguished that case from cases involving the enforcement of personal services. However, it is submitted that cases involving confidential relationships and those involving personal services share many features when enforcing specific performance is contemplated.

In *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another*⁶⁰ a similar decision was reached in circumstances involving services of a personal nature. In this case, a trade union sought an order to enforce the right of an member to reinstatement in his job. The court held that employment contracts were not exceptional to the general rule that a plaintiff is entitled to enforce specific performance of contractual obligations. It was held that there is no rule of law which deprives an ordinary servant of his right to enforce specific performance of his employment contract automatically, merely because the obligations he seeks to enforce involve personal service.⁶¹ A court ought only to refuse an order of specific performance in such cases if, on consideration of all the circumstances, the general principles which guide the courts in the exercise of their discretion indicate that a refusal to order specific performance is justified. For example, it must appear that, to order specific performance would lead to injustice, for example, by operating unduly harshly on the defendant.⁶² Thus it may happen that an order of specific performance is refused in some cases in which services of a personal nature are involved, because of the application of

59. 1962 (4) SA 36 N at 40 G ff.

60. 1982 (4) SA 151 T at 156 H - 158. This decision appears to be consistent with *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A. Also see *Myberg v Danielskuil Munisipaliteit* 1985 (3) SA 335 C at 346 J

61. See generally M S M Brassey, "Specific Performance - A New Stage for Labour's Lost Love", 1981 *Ind. LJ*, 57.

the ordinary principles, but this does not mean that it is correct to generalise and say that no contract involving personal services may be specifically enforced.⁶³

3.7.6. Cases Involving Impossibility of Performance.

In the context of enforcing specific performance of personal obligations, it has often been said that a court will refuse to order specific performance if that performance is impossible to carry out.⁶⁴ The use of the word "impossibility" without qualification is potentially misleading. In the law of contract, the effect of impossibility of performance varies. In some cases, the circumstances are such that the impossibility prevents the creation of legally enforceable obligations.⁶⁵ In such cases, there is no need for the courts to exercise any discretion against the ordering of specific performance, since no enforceable obligation exists to be enforced in the first place, and so one of the essential elements of the remedy is missing.

In other cases, the circumstances are such that, despite the impossibility of performing the obligations originally contemplated, enforceable obligations are considered to have been

62. It is perhaps indicative of some judicial doubt regarding the propriety of refusing to order specific performance purely because personal services were involved that the court in *Gründling v Beyers and Others* 1967 (2) SA 131 W at 146 H, having stated that it would not order specific performance of obligations between master and servant, went on to set out why, in the circumstances of the case, an order of specific performance would have been refused even assuming that the court might have been prepared to order specific performance in cases of this type.

63. In terms of this explanation, the cases in which service contracts involving civil servants have been treated as enforceable by means of an order of specific performance need not be classified as exceptional cases, since, it will be seen, they are not contrary to the truly applicable principles. See generally *Schierhout v The Minister of Justice* 1926 AD 99 at 110, 111; *Van Coller v Administrator, Transvaal* 1960 (1) SA 110 T at 115; *Somers v Director of Indian Education and Another* 1979 (4) SA 713 D.

64. Wessels, *Contract* Vol 2, para 3122; Christie, *Contract* p 507; Joubert, *LAWSA* Vol 5, para 236 (a); *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A at 783 E.

65. *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 at 435 and 437. See section 3.4 above.

created and continue to exist.⁶⁶ Examples are when the impossibility is due to the negligence or fault of the debtor, or when the debtor takes the risk of impossibility of performance on himself.⁶⁷ In such cases, although actual specific performance is impossible as a matter of practical fact, the law does not treat the contractual obligation as void, but requires that the debtor discharge his liability by paying damages in lieu of performance. The reason why the courts will not order specific performance in these circumstances is the realisation that performance is beyond the power of the debtor to carry out. No court can sensibly order the performance of an impossible performance, and therefore, the right of the plaintiff to an order of specific performance must be subordinated to the practical considerations which necessarily intrude.⁶⁸

3.7.7. Cases Which do not Fall Within the Suggested Principles.

Certain cases exist which do not appear to have been decided on the basis of the principles set out above, and which therefore cannot be explained in terms thereof.

In *Mohr v Kriek*⁶⁹ the performance sought was the completion and delivery of a promissory note for one thousand pounds. The court refused to order specific performance, giving as the reason that performance of the undertaking could not actually be enforced even if performance were ordered, as was possible in the case of a negative (as distinct from positive) obligation. It is submitted that there is no substance in the distinction

66. Kerr, *Contract*, p 324.

67. See section 3.4 above.

68. Christie, *Contract*, p 501. It may be argued that if performance is impossible, then there is no need for the exercise of a discretionary power, and that the refusal of an order of specific performance *must* follow from the impossibility. However, the explanation for including these circumstances as an instance of the exercise of the courts discretionary power lies in the fact that a contractual obligation exists despite the impossibility of performance. *Prima facie*, therefore, the plaintiff is entitled to an order of specific performance, but the court may exercise its discretionary power and refuse to make such an order when it finds that performance is impossible in the circumstances of the case.

drawn between positive and negative obligations in relation to ordering specific performance, and it is simply not correct to argue that only negative obligations are enforceable by means of an order of specific performance. Orders *ad factum praestandum* are made all the time.⁷⁰

Secondly, it was said by Quenét J in *Mohr v Kriek* that the performance of which enforcement was sought entailed "more than a formality" and no appropriate official could be authorised to perform the undertaking in defendant's stead if he himself refused to perform. It is submitted that this constitutes no bar to an order of specific performance. There are many cases in which substitute performance by some other person is not possible, and in such cases, compliance with the court's order depends on coercion by means of the threat of civil imprisonment.

The difficulty with *Mohr v Kriek* is that there does not appear to be any underlying hidden reason, or consideration of equity, which can be said to justify the refusal to order specific performance in the circumstances of this case. The defendant had undertaken to sign and deliver a promissory note and stop order in agreed terms at a future date. Such an undertaking to incur specified obligations in the future itself gives rise to legally enforceable obligations, which, it is submitted, are sufficiently certain to be specifically enforceable.⁷¹ It is therefore submitted, with respect, that on the facts of *Mohr v Kriek*, an order of specific performance ought to have been issued.

One can distinguish cases in which future obligations are contemplated but are not defined in sufficiently certain terms to be legally enforceable. Examples of such cases include a sale

69. 1953 (3) SA 600 SR at 601.

70. So says Coetzee J in *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 (3) SA 850 W at 880 I.

71. *Thompson v Van der Vyver* 1954 (2) SA 192 at 194 B. An offer to sell may not be withdrawn if, by means of a collateral contract, the offeror undertakes not to withdraw the offer.

of goods at a price to be fixed by an unnamed third party,⁷² or an insurance contract where the value of the goods or the extent of the cover is not yet agreed.⁷³ In such cases an order of specific performance will not be made because no enforceable obligation exists. There is no need for the court to exercise a discretion in refusing the order. When the terms of a future undertaking are clearly agreed, however, and the parties have bound themselves to enter into the undertaking, such agreements ought to be specifically enforced if the plaintiff desires specific performance.⁷⁴

A case which requires explanation is *Coronation Syndicate Ltd v Lillienfield and the New Fortuna Co Ltd*,⁷⁵ in which a company director bound himself to a third party to vote at a company meeting in support of a particular resolution. However, by the time the meeting of the company was to be held, the director no longer believed that to support the resolution was in the best interest of the company. In deciding whether or not to order the specific performance of the directors undertaking to support the resolution, the court assumed, without deciding, the validity of the contractual undertaking in this regard. However, it was not possible for the director to carry out his undertaking to the third party, and also to carry out his fiduciary duties to the company. The duties to the third party and the duty to the company shareholders were mutually incompatible.

The court held that it was not justified in making an order of specific performance which

^{72.} *Faatz v Est Maiwald* 1933 SWA 73 at 90. The contracting parties agreed that the price of the property sold would be determined by a commission of three people, but did not agree on the membership of the commission. It was held that no enforceable contract had been concluded.

^{73.} *Barker v Beckett* 1911 TS 151 at 164. The amount for which buildings were to be insured was not stated in the contract, and the terms of the agreement were therefore held to be not sufficiently certain to be enforceable. Cf *Van Achterberg v Walters* 1950 (3) SA 734 T.

^{74.} Many such agreements have been specifically enforced, for example, *J W Taylor Co's Liquidator v Taylor* 1906 WLD 149 at 150, in which specific performance of an obligation to endorse a bill of lading was granted; *Diner v Dublin* 1962 (4) SA 36 N at 41 ff, in which specific performance was ordered of an obligation, *inter alia* to deliver share certificates together with a share transfer form signed in blank by the defendant, and to cause the plaintiff to be appointed as a director of the defendant's company.

^{75.} 1903 TS 489.

would effectively interfere with the fiduciary duty owed by a director to a company. However, having made the assumption, for the purposes of the judgement, that the contract to support the resolution was valid, (and remarking *obiter* at page 497 that even if specific performance was refused, the director might nevertheless be liable for damages in lieu of performance) the court did not, it is submitted, make clear the legal basis on which the order of specific performance was refused.

An explanation is therefore now put forward. It is thought that the underlying reason for refusing to order specific performance may have been that the director's agreement to support the resolution gave rise to an undertaking that was, in fact, illegal. The court decided that the director could not be compelled to vote in a way that conflicted with his fiduciary duty to the company, and in effect, this rendered the agreement contrary to law. However, since mention was made of the possibility of liability in damages, the agreement does not appear to have been treated as void because of the illegality, but merely unenforceable by means of specific performance. This is consistent with the different possible effects of illegality on the validity of an agreement, and thus on the availability of an order of specific performance, or alternative remedies, as indicated previously in this work.⁷⁶

3.7.8. The Onus of Proof When an Order of Specific Performance is Sought.

In cases involving the specific enforcement of contractual obligations, both plaintiff and defendant may be required to discharge a particular onus, depending on the circumstances of the case. It is too great a simplification merely to say that a person seeking an order of specific performance is entitled to that remedy unless the defendant can show that the circumstances justify a refusal to make the order sought.⁷⁷ This statement does not take account of the various factors which may intrude.

⁷⁶. Section 3.4 above.

Before an order of specific performance will be made, the person seeking the order is required to allege and prove the essential elements of his claim.⁷⁸ A plaintiff claiming an order of specific performance must allege and prove all the facts necessary to entitle him to a judgement for specific performance which could be carried into effect.⁷⁹ These are, firstly, the existence of a legally enforceable contractual obligation in terms of which the defendant is required to render a performance. This requirement, that the obligation which it is sought to enforce be legally enforceable, does not imply that the plaintiff has the onus of proving the absence of circumstances which would justify a refusal to order specific performance.⁸⁰ All that is required is that the facts averred and proved disclose the existence of a contractual obligation which is *prima facie* enforceable. Unless plaintiff can discharge this onus, there is no entitlement to an order of specific performance, whatever other circumstances may be in existence.⁸¹

In addition to proving the existence of a legally enforceable obligation, the plaintiff must also prove that performance of the obligation is due to be performed. In particular, the person seeking the order of specific performance must aver his own readiness to perform any reciprocal obligations. The fact that a plaintiff is suing for an order of specific performance is not, in itself, sufficient to imply his own readiness to perform his own obligations.⁸²

77. Joubert, *LAWSA*, Vol 5, para 236.

78. Section 3.3.5 above.

79. *Gorfil v Maxwell & Others* 1958 (2) PH F 74 N.

80. Cf the interpretation is put on *Gorfil v Maxwell* 1958 (2) PH F 74 N by Joubert, *LAWSA*, Vol 5, para 236 footnote 4.

81. *Cassimjee v Cassimjee* 1947 (3) SA 701 N. This case involved a claim for the specific performance of a contract of sale. The agreement entered into between the parties was held to be legally unenforceable because of uncertainty as to the price agreed. Because no contract of sale came into existence, no enforceable obligations existed, and the order of specific performance was refused.

82. *Pickup NO v Scheckter* 1932 CPD 93 at 97; *SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* 1955 (3) SA 541 at 544 B.

Finally, the plaintiff must aver that performance has not already been rendered.

The question that arises is, what onus of proof rests on the defendant if he is unable to controvert the plaintiff's averments, but nevertheless wishes the court to exercise its judicial discretion against issuing an order of specific performance. It has been held that the onus of proving circumstances which would justify a refusal to order specific performance rests on the defendant.⁸³ If this statement correctly reflects South African law, it follows that, if the defendant fails to raise and prove the circumstances referred to, the court will not be in a position to exercise its judicial discretion against issuing an order of specific performance. This is an unsatisfactory conclusion to reach, because the courts have made it abundantly clear that refusal to order specific performance is a matter for the courts own discretion, and the courts will not allow this discretion to be fettered by technicalities of onus. Thus, even if a defendant fail to prove, on a balance of probabilities, the existence of circumstances in which an order of specific performance would be, for example, unjust, the court may nevertheless wish to exercise its discretion against the issue of the order. Accordingly, it is necessary to define the onus that rests on the defendant in this regard more narrowly. In fact, the Appellate Division has done so, in *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd*⁸⁴. The onus on the defendant is now considered to consist, in the first instance, of raising the circumstances on which he relies in urging the court to refuse to order specific performance.

83. *Thompson v Pullinger* 1 OR 298 at 302; *Shill v Milner* 1937 AD 101 at 106. In this case it was said by De Villiers JA that if the defendant was unable to specifically perform the obligation because performance was impossible, the onus would lie on the defendant to prove the impossibility.

84. 1982 (1) SA 398 A at 442 - 443. Miller JA said at 443 C:

"In a case in which the defendant requires the consent of a third party to enable him to perform effectively, and at the end of the case, the defence of impossibility having been raised and canvassed, the probabilities in regard to that issue appear to be evenly balanced, the Court, it appears to me, might justifiably take the view that refusal of specific performance was preferable to the grant of an order which as likely as not would prove to be ineffectual. A rule that a defendant pleading impossibility as answer to a claim for specific performance must necessarily discharge the *onus* of proving it if he is to avoid such a decree might hamper and inhibit the Court in the exercise of its discretion."

Also see *Van Rooyen v Baumer Investments (Pty) Ltd* 1947 (1) SA 113 W at 120 - 121.

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If the court, in the exercise of its discretionary power, considers that sufficient evidence of grounds exists for refusing the order of specific performance, it is at liberty to do so. Thus, even if the evidence adduced by the defendant goes no further than establishing that an order of specific performance is as likely as not to be unjust, or impossible to accomplish, the court may still properly refuse to order specific performance.⁸⁵

85. *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 A at 442 - 443.

3.8. ENFORCING SPECIFIC PERFORMANCE OF CONTRACTS IN RESTRAINT OF TRADE.

3.8.1. Contracts in Restraint of Trade not Void in South African Law.

Until relatively recently it has not been clear what the correct approach in South African law is to agreements which have the effect of restricting free commercial activity, commonly referred to as agreements, contracts, pacts, or covenants in restraint of trade.¹ One approach has been to treat such agreements as *prima facie* void, on the grounds that they are contrary to public policy (that is, a policy which protects freedom of commercial activity). This approach appears to have been adopted from English law, and there do not seem to be any Roman-Dutch authorities which support it.²

1. The different terminology encountered in this context perhaps reflects the uncertainty that has surrounded the question of the legal status of agreements in restraint of trade. Christie, *Contract*, p 352, uses the term "contracts" which implies legal validity for such agreements. Kerr, *Contract*, p 109 ff uses the terms "covenant" and "agreement" in restraint of trade, apparently to distinguish them from legally enforceable contracts. In this section, the word "agreement" is used in a neutral sense, so that it neither necessarily implies legal enforceability nor lack of it.

2. Wessels, *Contract*, Vol 1, para 539; Christie, *Contract*, p 352. On the question of Roman or Roman-Dutch authority for treating an agreement in restraint of trade as *ipso facto* void: *Katz v Efsthimiou* 1948 (4) SA 603 O at 610; *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A at 890 E - 891 C. In this latter case, Rabie CJ reaches the following conclusion at 891 B after a review of the authorities:

"Dit volg dus dat daar in ons gemene reg nie gesag te vind is vir die benadering wat al so lank deur ons Howe gevolg word nie, naamlik dat 'n bepaling in 'n ooreenkoms wat 'n beperking op die handelsvryheid van 'n party plaas, *prima facie* ongeldig of onafdwingbaar is. Dit is 'n benadering wat in navolging van die Engelse reg gevolg word."

On English law on agreements in restraint of trade generally, see Heydon, *The Restraint of Trade Doctrine*.

An alternative approach to restraint of trade agreements is to accept that such agreements are *prima facie* legally valid, and therefore generally enforceable, unless, in the circumstances of each case, enforcement of the particular agreed terms would be contrary to public policy, in which case agreement is not legally enforceable.³

The uncertainty that has obtained until recently in South African law, over whether to treat agreements in restraint of trade as *prima facie* valid or invalid, is demonstrated by the fact that it is possible to cite cases in support of both approaches.⁴ However, since the Appellate Division decision in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis*,⁵ it is now clear that the correct approach is that agreements in restraint of trade *prima facie* give rise to valid contractual obligations, and are therefore legally enforceable.⁶ However, it was said

3. Kerr, *Contract*, p 110, says that, even if the agreement in restraint of trade is considered to be *prima facie* valid, the effect of showing it to be unreasonable in its terms, and therefore contrary to public policy, is to render it void. It is submitted that this conclusion is not necessarily the only possible one. If a court finds that the terms of an agreement in restraint of trade are contrary to the public interest, it may be that the obligations are rendered legally unenforceable, rather than wholly void *ab initio*. The difference between the agreement being void, and being unenforceable, is that voluntary performance of an unenforceable agreement does not occur *sine causa*. In *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A (decided after the publication of Professor Kerr's work on Contract) the Appellate Division preferred to describe terms of a restraint of trade clause that are damaging to the public interest as "onafdwingbaar" (unenforceable) rather than as "void".

4. Cases which treat agreements in restraint of trade as void include *Supersafes (Pty) Ltd and Others v Voulgarides and Others* 1952 (2) SA 783 W at 785 D - F; *Shacklock Phillips-Page (Pvt) Ltd v Johnson* 1977 (3) SA 85 R at 89 D; *National Chemsearch (SA) (Pvt) Ltd v Borrowman and Another* 1979 (3) SA 1092 TPD at 1099; *Admark (Recruitment) (Pty) Ltd v Botes* 1981 (1) SA 860 W at 861.

Cases in which agreements in restraint of trade were not treated as void are *Roffey v Caterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 N at 503 H; *Poolquip Industries (Pty) Ltd v Griffin and Another* 1978 (4) SA 353 W at 358 H; *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 C at 311 E; and *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A.

5. 1984 (4) SA 874 A.

6. *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A at 893 H. Coenraad Visser, "The Principle *Pacta Servanda Sunt* in Roman and Roman Dutch Law, with Specific Reference to Contracts in Restraint of Trade", (1984) 101 *SALJ*, 641. To the extent that the courts refuse to enforce contracts on restraint of trade, they are weakening the principle of sanctity of contracts. When the principle of freedom of trade and the principle of sanctity of

in the *Magna Alloys* case that the general enforceability of the terms of such agreements is subject to the proviso that the courts will not enforce any particular restraint of trade terms that, in the opinion of the court, are damaging to the public interest. This is a significant decision, and it is worthwhile to reproduce the summary of the main points that Rabie CJ includes in his judgement.⁷

"(1) In ons gemene reg is daar niks te vind wat verklaar dat 'n bepaling in 'n ooreenkoms wat 'n party se handelsvryheid inkort, ongeldig of onafdwingbaar is nie. (2) Die benadering wat in talle Suid-Afrikaanse beslissings gevolg is dat 'n bepaling in 'n ooreenkoms wat 'n beperking op die handelsvryheid van 'n party plaas, *prima facie* ongeldig of onafdwingbaar is, is 'n benadering wat uit die Engelse reg afkomstig is. (3) Die Engelse reg hou in dat elke inkorting van 'n party se handelsvryheid *prima facie* onafdwingbaar is as synde teen die openbare belang, en dat 'n party wat so 'n bepaling wil afdwing, die las dra om te bewys dat die bepaling *inter partes* redelik is. Wat die kwessie van bewyslas betref, geld die verdere reël dat die party wat beweer dat 'n beperkende bepaling teen die openbare belang is, moet bewys dat dit so is. (4) Dit is 'n beginsel van ons reg dat ooreenkomste wat teen die openbare belang is, nie afdwing kan word nie, en 'n mens sou dus kon sê dat 'n ooreenkoms wat iemand se handelsvryheid inkort teen die openbare belang, en dus onafdwingbaar is, indien die omstandighede van die betrokke geval sodanig is dat die Hof van oordeel is dat die afdwing van die ooreenkoms die openbare belang sou skaad. (5) Dit is in die openbare belang dat ooreenkomste wat vryelik aangegaan is, nagekom moet word. Dit is egter ook, in die algemeen gesê, in die openbare belang dat iedereen hom vir sover moontlik vryelik in die handels- en beroepswêreld moet kan laat geld. Dit kan aanvaar word dat 'n beperking van 'n persoon se handelsvryheid wat onredelik is, waarskynlik ook die openbare belang sou skaad indien die betrokke persoon daaraan gebonde gehou sou word. (6) Die vraag of 'n beperkende bepaling afdwingbaar is, moet in ons reg beoordeel word in die lig van die vraag of die afdwing daarvan die openbare belang sou skaad. (7) Anvaarding van die sienswyse in (6) hierbo genoem, bring sekere gevolge mee, onder andere dat wanneer iemand beweer dat hy nie gebonde is aan 'n beperkende bepaling waartoe hy in 'n ooreenkoms toegestem het nie-(a) hy die las dra om te bewys dat die afdwing van die bepaling teen die openbare belang sal wees; (b) die Hof moet let op die omstandighede wat geld op die tydstip waarop hy gevra word om die beperking af te dwing; en (c) die Hof nie daartoe beperk is om te bevind dat 'n beperkende bepaling in sy geheel afdwingbaar of onafdwingbaar is nie, maar ook by magte is om te beslis dat 'n gedeelte van so 'n bepaling afdwingbaar of onafdwingbaar is."

If it is correct to describe as unenforceable, rather than as void,⁸ those obligations which are

contract conflict, some compromise must be found to balance them. In South African law, the principle of sanctity of contracts is given precedence over the principle of freedom of trade. English law appears to take the opposite view, by considering such agreements *ipso facto* void.

7. At 897 F - 898 E.

created by an agreement in restraint of trade, and which, if enforced, would damage the public interest, then an important question arises. Is the refusal by the court to enforce such terms of the agreement, in the circumstance set out by Rabie CJ in the *Magna Alloys* case, an instance of the court's discretionary power to order specific performance (in which case, other remedies, such as an award of damages in lieu of performance, might be available)? Or is the refusal better understood to be an instance of the inability of the plaintiff to establish the existence of a legally enforceable contractual obligation, without which, not only specific performance, but any other remedy based on the existence of such an obligation, is unavailable. It is submitted that the better view is that, when considerations of what is damaging to the public interest render the terms of an agreement in restraint of trade wholly or partially unenforceable, the agreement is rendered unenforceable, not only by means of an order of specific performance, but also by means of any remedy, including a claim for damages, which requires that an enforceable obligation exist before the remedy is available.⁹ The point is illustrated by the analogy of a gambling agreement, which gives rise to valid legal consequences if voluntarily performed, but which does not give rise to enforceable contractual obligations, and is not therefore enforceable either by means of an order of specific performance, nor by means of a claim for damages in lieu of such performance.¹⁰

8. It is not explained in the *Magna Alloys* case why the effect of considerations of what is damaging to the public interest should not render the contract void *ab initio*, as is the general rule in South African law when considerations of public policy are taken into account. See the authorities cited in 3.7.2. However, for the purposes of this discussion, it is assumed that, by using the word "onafdwingbaar", Rabie CJ intended to distinguish between agreements which are wholly void, and those, like gambling contracts, which are not void, but unenforceable.

9. Rabie CJ, in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A, does not qualify, and thus limit, the unenforceability that results if the court is of the opinion that the agreed restraint terms are damaging to the public interest. It must therefore be concluded that if the terms of the agreement are found to be damaging to the public interest, the terms are legally unenforceable by any means.

10. On the attitude of the law to gambling agreements, see *Sonnenberg v Flower* 1875 (5) Buch 4; *Estate Wege v Strauss* 1932 AD 76. Christie, *Contract*, p 368. Joubert, *Contract*, p 139 says the following:

"An important characteristic of the wagering contract is that, even though it is not enforceable, it does not have a turpis causa. This means that it can serve as the causa for some other agreement."

Important consequences flow from determining which of the alternative legal bases is relied on when refusing to enforce the terms of a restraint agreement which are damaging to the public interest. For example, the legal basis adopted affects the reasoning process by which the courts decide whether or not to order specific performance of cases involving restraint of trade agreements. Also dependent on the legal basis are matters regarding onus of proof, questions of enforcing partial enforcement of such agreements, and the availability of alternative remedies to an order of specific performance.¹¹

It is important, at this stage, to distinguish between an order of specific performance, in terms of which an obligation to perform an act (including an act of restraint) is enforced,¹² and the granting of an interdict, which operates to prevent unlawful interference with any legal right held by another person, or any unlawful conduct which could injure the legally protected rights of another person. In order to obtain an interdict, the applicant must prove not only the existence of his legal right, but also that he will suffer injury or loss if the interdict is not granted. He must also prove that he does not have an alternative remedy.¹³ These latter two requirements do not apply when the remedy sought is an order of specific performance, even if the performance involved is an act of restraint.

Although the term "interdict" is often encountered in the context of enforcing contracts in restraint of trade, the appropriate remedy by means of which such contractual obligations can be enforced is thought to be an order of specific performance.¹⁴ This is because the enforcement of such agreements in reality involves the enforcement of contractual obligations, by means of a prohibitory order (an order which restricts the specified activity).

11. See section 3.8.6 below on the enforcement of part of agreed restraint terms, and section 3.8.8 on alternative remedies when specific performance of restraint terms is refused.

12. Section 3.1.9 above.

13. Section 3.1.9 above. Also see Christie, *Contract*, p 514; Joubert, *LAWSA*, Vol 11, para 316 and 323.

It is submitted that the term "interdict" is better reserved to describe the remedy in terms of which one party aims at preventing another party from unlawfully interfering with his legal rights, and is therefore not appropriate in the present context.¹⁵

3.8.2. The Onus of Proof in Enforcing Contracts in Restraint of Trade.

Questions relating to the onus of proof in enforcing contracts in restraint of trade are affected by the rule that such agreements give rise to enforceable obligations. In English law, the rule is that agreements in restraint of trade are *prima facie* contrary to public policy and therefore void. It follows that an onus lies on the person who wishes to enforce an agreement containing terms of restraint to allege and prove that the terms are in fact reasonable, and therefore not contrary to public policy. If this onus of proof is successfully discharged, then the terms of the agreement are not void, but are legally valid and enforceable.¹⁶

In South African law, it has, in the past, been argued that English law principles ought to be followed, placing the onus of proving the reasonableness of restraint of trade terms on the person seeking to enforce those terms by means of an order of specific performance.¹⁷ This approach was rejected in *Roffey v Caterall, Edwards & Goudre (Pty) Ltd.*¹⁸ Although

14. In appropriate cases, (that is, when the contract *is* enforceable), an alternative remedy to an order of specific performance such as an award of damages for breach of the undertaking may also be available. See section 3.8.8 below.

15. Cf *Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll en 'n Ander* 1986 (1) SA 673 at 689 E. Joubert, *Contract* p 145:

"The normal remedy granted in respect of a restraint of trade clause is an interdict."

16. Heydon, *The Restraint of Trade Doctrine*, p 37 - 44.

17. Christie, *Contract*, p 356 - 357 argues that the decision in *Van de Pol v Silbermann* 1952 (2) SA 561 A supports this view. Other cases in which the onus of proving the reasonableness of restraint of trade terms has been held to rest on the person seeking specific performance are: *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 (3) SA 1092 T at 1101 G; *Allied Electric (Pty) Ltd v Botes* 1981 (1) SA 860 W at 863 A.

Roffey's case may have appeared to be a departure from the general trend of thinking at the time it was decided, it is now clear that Didcott J's reasoning in that case foreshadows, to some extent, the Appellate Division's decision in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis*¹⁹ This last mentioned case introduced the important difference in the fundamental approach between English and South African law, that is, of treating agreements in restraint of trade as generally valid and enforceable in South African law. It must follow that the only initial onus on a person seeking an order of specific performance of such an agreement is to establish, firstly, the existence of the agreement, including its terms; secondly, the fact that performance is due; and thirdly that the obligation has not been discharged. No reason exists for requiring the plaintiff to discharge an additional onus of proving the reasonableness of the terms involved, since they are considered *prima facie* to be legally enforceable. Once the plaintiff has established the terms of the agreement in restraint of trade, it is then possible for the defendant, who wishes to avoid the performance sought, to raise the question whether the terms of the restraint are sufficiently unreasonable to justify a refusal by the court to order specific performance. Rabie CJ said the following in *Magna Alloys and Research (SA) Pty) Ltd v Ellis* :²⁰

"...waner iemand beweert dat hy nie gebonde is aan 'n beperkende bepaling waartoe hy in 'n ooreenkoms toegestem het nie... hy die las dra om te bewys dat die afdwing van die bepaling teen die openbare belang sal wees;..."

It is submitted that Rabie CJ is saying in this passage that, to the extent that there exists an onus of proof regarding the effect on the public interest of enforcing restraint terms, this onus rests on the debtor rather than the creditor. With respect, this statement appears to be

18. 1977 (4) SA 494 N.

19. 1984 (4) SA 874 A at 893 D. There are other cases in which agreements in restraint of trade have been held to be valid rather than void, and the onus of proving unreasonableness has been held to rest on the defendant: *Roffey v Caterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 N at 504 A; *Stewart Wrightson (Pty) Ltd and Another v Minnitt* 1979 (3) SA 399 C at 405 E; *Poolquip Industries v Griffin and Another* 1978 (4) SA 353 W *obiter* at 359 H; *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 C at 313 B;

20. 1984 (4) SA 874 A at 898 C - D

consonant with basic principle. Whether a court is itself entitled to raise the question of damage to the public interest, that is to say, if the defendant fails to do so, is considered below.²¹

3.8.3. No Need in South African Law to Define Contracts in Restraint of Trade.

Because agreements in restraint of trade are considered, in English law, to be *prima facie* contrary to public policy, it becomes necessary, in English law, to be able to *identify* agreements in restraint of trade. These agreements must be able to be defined or described sufficiently precisely, so that a court can recognise them and refuse to enforce them, unless, of course, the person seeking an order of specific performance can prove the reasonableness of the terms.²² Because agreements in restraint of trade occur in such a variety of forms, defining or describing them generally, so as to facilitate classification of such agreements, can be extraordinarily difficult.²³

In South African law the recognition of contracts in restraint of trade as *prima facie* legally valid and enforceable diminishes (although does not entirely obviate: see below in this section) the need to distinguish this type of agreement from any other.²⁴ Since such agreements are *prima facie* lawful and enforceable, the courts are not required to separate

21. Section 3.8.5 below.

22. See, for example, the approach of the court in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1967] 1 All ER 699 at 727. Also see Christie, *Contract*, p 353 - 355.

23. Heydon, *The Restraint of Trade Doctrine*, p 48 ff. Heydon quotes A D Neale, "The Antitrust Laws of the USA (2nd ed, 1970) p 18 - 19 to describe the difficulties:

"..."restraint of trade" is a legal term of art, deriving its meaning from the current decisions and constructions making up the particular body of law in which it appears...the logic of the term is not that of a description, like "expansion of trade" or "trade depression" but rather that of a term like "offside" in football which you cannot use appropriately until you know whether you are dealing with Rugby, Association, American or Australian football, and until you are provided with the current rule book for the code in question and are familiar with the construction put on the rules by the best referees...."

and distinguish them from other agreements, and to insist on special proof of their reasonableness, before ordering specific performance of the obligations involved. A refusal to order specific performance of an agreement involving restraint of trade terms does not depend, in South African law, on classifying the agreement as being of a certain type, but on whether the particular terms which it is sought to enforce will, in the opinion of the court, be damaging to the public interest.²⁵ It is submitted that, by acknowledging the rule that agreements in restraint of trade are *prima facie* legally valid and enforceable, the Appellate Division has done away with the troublesome (sometimes seemingly insoluble) problem of defining such agreements so as to make them a reliably identifiable species.

However, because an agreement which restricts freedom of trade, but which is damaging to the public interest, is considered to be *unenforceable* rather than wholly void *ab initio*, it is not possible to dispense altogether with the idea of agreements in restraint of trade as a category of agreement. It is suggested that, like gambling agreements, agreements in restraint of trade which are damaging to the public interest are recognised in law, to the extent that they are voluntarily performed. By contrast, other, more general, agreements, which are contrary to public policy are considered to be void *ab initio*,²⁶ and any performance rendered in terms thereof is considered to have been rendered without legal *causa*.

24. Cf Christie, *Contract*, p 355. Professor Christie suggests the following:

"...it should now be regarded as a standard and necessary practice first to inquire whether the contract regulates and promotes or restrains trade; whether it absorbs or sterilises production or services."

25. Section 3.8.4 below.

26. See the authorities cited in section 3.7.2.

3.8.4. The General Principles Governing a Refusal to Order Specific Performance of Restraint of Trade Terms.

Once it is realized that, in South African law, contracts which restrict an individual's freedom to engage in commercial activity are valid and enforceable in the same way as other contractual agreements, (unless to enforce the terms of such contracts would be damaging to the public interest) it follows that the general principles and rules which govern the remedy of specific performance ought to be applicable to cases involving restraint of trade terms. Of course some special considerations might exist in respect of restraint of trade terms, which considerations may not apply to every type of undertaking, but nevertheless the pursuit of *elegantia* in legal thought suggests that there ought to be a fundamental unity of principle which governs all cases in which the same remedy is sought.

The logical result of the above proposition is that, in addition to the possibility of a court refusing to enforce a restraint agreement because no enforceable obligation exists in the particular circumstances of the case, it ought also to be possible for a court to refuse to order the specific performance of a restraint agreement even if the agreement *does* give rise to enforceable obligations. Put another way, the general principles which govern a court's discretionary power to refuse to order the specific performance of enforceable contractual obligations ought to apply to all contracts, including contracts involving restraint of trade terms. It is submitted that, in fact, the general principles governing the discretionary power of a court to refuse an order of specific performance *are* applicable to all cases, and *do* give appropriate results. However the truth of this proposition has been somewhat obscured by a combination of factors, some already mentioned, such as the influence of English law, which takes a different approach to South African law, and the use of the term "interdict" to describe the enforcement of a restraint agreement, which tends to imply that the remedy involved when enforcing contracts in restraint of trade is something other than an ordinary

order of specific performance.

However, if it is true that the general principles governing the discretionary power to refuse to order specific performance apply equally to all types of undertaking, including agreements in restraint of trade, then it is open to the courts to consider refusing to order the specific performance of a restraint of trade agreement, *even if the agreement is legally enforceable*. In other words, instead of a court being restricted to considering whether the enforcement of an agreement in restraint of trade would be damaging to the public interest, and if so, treating the agreement as wholly unenforceable at law,²⁷ a court might find that enforcement of an agreement in restraint of trade is not against the public interest, but, even so, decide to exercise its discretion against issuing an order of specific performance.²⁸ Such a refusal would be justified if the court is of the opinion that, to enforce the agreement would produce injustice, or be inequitable in all the circumstances of the case, perhaps by operating unduly harshly on the defendant.²⁹ Further, a court might also properly take into account what is within the capacity and power of the defendant to do before ordering specific performance.³⁰

It is thus suggested that treating an agreement in restraint of trade as wholly unenforceable, because of considerations of what is damaging to the public interest, is not the sole legal

27. That is to say, unenforceable by means of any legal remedy, not only by means of an order of specific performance.

28. *Kemp, Sacs & Nell Real Estate v Soll en 'n Ander* 1986 (1) SA 673 O. It is submitted that this case is in point, even though Van Coller J refers to the order as an interdict, rather than an order of specific performance. However, it must be noted that, although the learned judge indicated the factual circumstances which led him to refuse to order performance of the terms, such as that the agreed period of restraint was about to expire, it is not clear which of the principles set out in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A which justify such a refusal was relied on.

29. Section 3.7 above.

30. These are, of course, the factors identified in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 A as relevant to the exercise of judicial discretion against issuing an order of specific performance. It is also possible, in view of *Benson's* case, that considerations of public policy may be taken into account by a court in order to refuse an order of specific performance, even if the court does not go so far as to say that the agreement is wholly unenforceable. See section 3.7.2 above.

basis for refusing to enforce specific performance of agreements in restraint of trade. It is only *one* of the possible reasons which may justify a refusal to order specific performance (or any other remedy requiring the existence of an enforceable legal obligation) of a restraint of trade agreement. This is important, because the alternative of exercising a discretionary power to refuse an order of specific performance provides flexibility. This alternative relieves the courts of any need to force every case involving restraint of trade agreements into the framework and vocabulary of what is against the public interest, to the extent of being wholly unenforceable. For example, if the terms of a particular undertaking in restraint of trade are not found to be so extensive that enforcement would damage the public interest, it may nevertheless be that a court will find that to order specific performance of the terms would produce injustice, or be inequitable, in the circumstances of the case. In particular factual circumstances, this may be a more appropriate finding and explanation of a refusal to order specific performance than a finding that the agreement is completely unenforceable.³¹

There is a further advantage recognising the availability of the court's discretionary power to refuse to order the specific performance of legally enforceable restraint of trade agreements. The cases show that the courts have regard to the detailed circumstances of each particular restraint agreement in order to decide whether an order of specific performance ought to be issued or not. Also, it is not just the particular terms of restraint themselves which are relevant, but also the circumstances in which they are to operate. It may thus happen that similar terms of restraint are acceptable, and therefore enforceable in one set of circumstances, but not in another. It is submitted that while it is relatively easy to see that enforcement of similar terms may give rise to injustice or inequitable results in one set of circumstances, but not in others. However, it is not easy to explain why the enforcement of similar terms should be damaging to the public interest in one case, but not in another. By

31. If this proposition is accepted, it also follows that, if an agreement in restraint of trade is not wholly unenforceable, but a court exercises its discretion against ordering specific performance, the plaintiff might nevertheless be entitled to claim an award of damages for breach of the terms of the agreement. See section 3.8.8 below.

employing alternative principles and explanations where appropriate, the courts need not become embroiled in attempts to define categorically exactly where considerations of public interest begin and end.

3.8.5. Refusal to Enforce Specific Performance not Dependent on the Discharge of an Onus of Proof by Defendant.

It has been explained above that, in South African law, unlike English law, there is no need for a rule that, in cases involving the enforcement of an agreement in restraint of trade, an onus rests on the plaintiff to prove that the agreement is reasonable, and therefore not contrary to public policy. It has also been stated by the South African Appellate Division that, in South African law, any such onus rests on the defendant who wishes to avoid performance.³² However, it is submitted that it does not necessarily follow that a court only has a power to refuse to order specific performance provided that the defendant discharges the onus of proving that enforcement of the particular restraint terms would be damaging to the public interest. This may be so if the legal basis for refusing the order is the general legal unenforceability of the restraint agreement. However, if the refusal is based on the courts discretionary power to refuse an order of specific performance, the considerations differ. It is submitted that such a requirement would result in an unacceptable limitation on the discretionary power of the courts. A court which, on the basis of the evidence heard, forms the opinion that an order of specific performance would, in the circumstances of the case, produce injustice, ought not to consider itself bound to order and enforce that performance merely because the defendant has failed to raise and prove the unreasonableness of the agreed terms of restraint.³³

32. *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A at 898 C - D. Also see section 3.8.2 above.

33. An example of a refusal by the courts to have their discretionary power bound is a case in which the parties stipulate in their contract that the restraint terms are reasonable. In *David Whul (Pty) Ltd and Others v Badler and Another* 1984 (3) SA 427 WLD at 434 G it was held that such stipulations are, at best, only one of the factors which may be taken into account together with all the circumstances in order to decide questions of enforceability.

In fact, it may be arguable that the same reasoning must apply if a court is asked to enforce a restraint agreement which the court perceives to be damaging to the public interest. Even if this issue has not been specifically canvassed by the defendant, it is difficult to suppose that the court would ignore its own perceptions and mechanically enforce the agreement. While it may be that it is for the defendant, *rather than the plaintiff*, to raise such issues if he wishes to be assured that the court will consider them, it is submitted that it is going too far to conclude that the discharge of such an onus is a prerequisite of the exercise of the court's discretionary power to refuse an order of specific performance.

It would therefore be preferable to explain the relevant rule of South African law thus: that while it is open for a defendant to raise any fact that has a bearing on the enforceability (either generally, or by means of an order of specific performance) of a restraint agreement, it is open to a court *meru motu* to find that an agreement is either wholly unenforceable, or, if it is enforceable, that it would be appropriate to exercise a judicial discretion and refuse an order of specific performance. The court is not restricted by questions of pleading, or onus, in this regard.

3.8.6. Partial Enforcement of Restraint of Trade Agreements.

In some decided cases, the courts have indicated a willingness to partially enforce the obligations arising from a restraint of trade agreement, when complete enforcement of all the agreed terms would be refused. For example, in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* Rabie JA says the following:³⁴

34. 1984 (4) SA 874 A at 898 D; *J Louw and Co (Pty) Ltd v Richter and Others* 1987 (2) SA 237 at 243. In this lastmentioned case, Didcott J said the following at 243 B:

"Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work. In so far as it has that effect, the covenant will not therefore be enforced."

"...die Hof nie daartoe beperk is om te bevind dat 'n beperkende bepaling in sy geheel afdwingbaar of onafdwingbaar is nie, maar ook by magte is om te beslis dat 'n gedeelte van so 'n bepaling afdwingbaar of onafdwingbaar is."

In effect, the possibility raised in this passage is that, rather than refusing to order specific performance of an entire obligation, a court may consider itself able to order the specific performance of a part of it. In order to understand the related issues, it is important to make a preliminary distinction between divisible obligations and non-divisible obligations.³⁵

Obligations are considered to be divisible unless the parties intended that they should exist as an inseparable unity, bearing in mind the purpose and objectives which performance of those obligations was intended to achieve. Divisible obligations are enforceable independently of each other. Where the terms of a restraint of trade agreement give rise to a number of divisible obligations, there is no difficulty in ordering the specific performance of only some of the independent obligations in order to avoid the undesirable effect that the obligations may have cumulatively. Thus, if the obligations taken together are such that to order specific performance would be contrary to public policy, (or result in injustice) enforcement of some of the independent obligations may be possible without this effect. The distinction between divisible and indivisible obligations seems to have been the thinking behind the following passage by Greenberg J:³⁶

"In deciding whether different stipulations are or are not severable, the court will not carve out from an area which is too wide a portion which it holds would have been reasonable had the parties so agreed; it will not make a new contract for the parties as the act of severance must be the act of the parties and not of the court, but ... it will sever where the covenant is not "really a single covenant but is in effect a combination of several distinct covenants." "

If agreed restraint of trade terms give rise to *indivisible* obligations, then, if it is wished to

35. The distinction is dealt with in section 3.6.6 above.

36. *New United Yeast Distributors (Pty) Ltd v Brooks and Another* 1935 WLD 75 at 80 - 81.

avoid enforcing complete enforcement, it is necessary to involve the concept of partial enforcement of the indivisible obligation.

In order to understand the present law on the question of partial enforcement of obligations, something must be said of the various approaches that have been suggested in the past as appropriate for determining the manner and extent to which an indivisible obligation may be partially enforced. In *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* Botha J suggested the following approach to deciding how and to what extent partial performance can properly be ordered.³⁷

"The *ratio* of this approach I shall attempt to formulate as follows: when a restraint according to its terms as agreed upon is found to be unreasonably wide in its scope of operation, the court can, in a proper case, enforce the restraint partially, by issuing an order incorporating the addition of such limiting words to the restraint as agreed upon as are appropriate to restrict its scope of operation to what is found to be reasonable.

I have said "in a proper case", because it is clear that the Court's power of partial enforcement in the manner indicated must be subject to limitations. As I do not profess to be able to envisage, even approximately, the different situations that can arise in which the Court's power may be invoked, I shall make no attempt to circumscribe in general terms the circumstances under which the Court might or might not be prepared to exercise such power."

This approach to determining when partial enforcement ought to be ordered, as set out by Botha J, represented a wider, more flexible approach than the older "blue pencil rule" of English law, which is described by Professor Corbin as follows.³⁸

"...if the promise is so worded that the excessive restraint can be eliminated by crossing out a few of the words with a "blue pencil", while at the same time the remaining words constitute a complete and valid contract, the contract as thus "blue pencilled" will be enforced. By some occult process, the courts adopting this rule convinced themselves that partial enforcement without the aid of a "blue pencil" would be "making a new contract for the parties" while partial enforcement in the wake of a "blue pencil test" is not."

37. 1979 (3) SA 1092 T at 1116 D. It appears from the facts of this case that the rule is applied in the context of indivisible obligations.

38. Corbin, *Contracts*, Vol 6A section 1390. Also see Heydon, *The Restraint of Trade Doctrine*, pp 283 - 291.

This passage by Professor Corbin is quoted here, not because it is suggested that the "blue pencil" test should apply in South African law, but because the passage isolates the crucial difficulty that must be overcome in deciding when to order specific performance of part of an obligation and when not. The difficulty is that while it is considered acceptable to enforce only a part of original agreed terms, it is not considered permissible for a court to make a new contract for the parties in terms never contemplated or agreed by them.³⁹ At the same time, the notion of only allowing partial performance when the wording of the originally agreed terms is capable of editorial surgery, so as to excise the offending portions while leaving something less which still made sense, is too mechanical, and has not found favour in South African law.⁴⁰

Another approach to determining when and to what extent partial performance may be properly ordered has been for a court to distinguish, in appropriate cases, between material and non-material terms of the agreement. Even if the agreed terms are part and parcel of a single, indivisible obligation, it may well appear that the offending terms are not material, and that they can therefore be ignored while enforcing the material portion of the

39. The principle of party autonomy, which is fundamental to the law of contract, does not permit obligations to be created without the consent of the person involved, except in limited and well defined cases, such as quasi-contract. Christie, *Contract*, p 360 says the following:

"The fundamental rule that the court may not make a contract for the parties is a salutary one, the principle of which has probably never been seriously questioned. It is unthinkable that the courts should not only tell the parties what they ought to have done but then make them do it by enforcing the court's idea of what the contract ought to have been."

40. *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 (3) SA 1092 T at 1111 D and 1114 F - 1115 G. Botha J is emphatic in his rejection of the English law approach:

"In my opinion there is a great deal to be said for the view that the Court should have a general discretionary power to enforce a restraint partially, in accordance with what it considers to be reasonable, as a matter of substance, and without the necessity of resorting to formal rules relating to severability, eg that you may excise, but not add, words.... For the foregoing reasons I am firmly convinced, first, that the rules as to severability in restraint of trade cases as applied in our cases in the past are artificial, ill-defined, and "internally inconsistent (*Heydon (op cit at 290)*), and second, that they rest upon an unsound foundation.... This being so, in all the circumstances, I am constrained to hold that we should decline to follow the previous cases and decline to apply the traditional rules as to severability in restraint of trade cases in the present case."

obligation.⁴¹ The following statement by De Beer AJP in *Katz v Efthimiou*⁴² appears to have been based on the distinction between material and non-material terms:

"The authorities dealing with severance when a covenant or part thereof is held to be void seem to suggest that unless the covenant is unreasonable on a matter of lesser importance "and is not of the main purport and substance of the covenant" then the whole will be held to be unenforceable."

The distinction between material and non-material terms is not likely to provide a solution for *all* cases in which a court perceives that partial enforcement of a restraint of trade agreement may be possible even if total enforcement is undesirable. The difficulty is that the terms of a restraint agreement which relate to the extent of the protected area, the length of time during which restraint is to be observed and the type of activity that is prohibited are likely, by any test, to be considered as material terms of the restraint agreement. It would be highly artificial to treat such terms as uniformly non-material in all cases, regardless of circumstances, in order to allow the court to ignore or enforce such terms as may seem appropriate. Some other explanation is therefore required of the power of a court to issue an order which only partially enforces existing obligations.

It remains to consider what the present approach is of South African law to determining when, and to what extent, a court is permitted to issue an order of specific performance to enforce only a part of an indivisible agreement in restraint of trade. What principles apply, so that party autonomy is preserved, while at the same time, a flexible, non-mechanical approach is permitted?

It is submitted that the answer lies in the realization that there is nothing in principle which prohibits a plaintiff suing for the partial performance of an indivisible agreement,⁴³ in

41. Particulars of agreed terms can be considered non-material if they are not an integral or vital part of the undertakings and if they can be ignored without substantially affecting the nature of the agreement and the obligation.

42. 1948 (4) SA 603 O at 611.

circumstances where enforcement of complete performance would be refused. This is so even if the terms in his favour which he abandons are material, provided that the partial enforcement asked for consists of a part of the original undertaking, that is, a portion of what was actually agreed, and not some substitute or alternative that is different in nature from what the defendant originally undertook to do, or which increases his duty of performance. Accordingly, a plaintiff can properly ask for the enforcement of a restraint agreement for a shorter period of time than that originally undertaken, or within a smaller area than that originally stipulated, or in relation to only one of the specified prohibited activities.

In ordering partial performance of a restraint agreement which, in full, might necessitate a refusal to order specific performance, a court may be required to issue its order in words which are not identical to those contained in the original agreement entered into by the parties. For example an order of specific performance might stipulate restraint "anywhere in the Eastern Cape" rather than the original agreed term of "anywhere in South Africa". Such re-wording of the terms of an obligation in an order of specific performance has been the subject of some debate. For example, in the past the rule has been stated that a court may delete words, but is not entitled to add or change them.⁴⁴ This approach leads to severe restrictions on the power of the courts to draft an appropriate order, and has been criticised.⁴⁵ It is submitted that, provided the court does not go so far in the process of

43. *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A at 898 D. Kerr, *Contract*, p 407, citing *Wireohms SA (Pty) Ltd v Greenblatt and Another* 1959 (3) SA 909 C. Professor Kerr is talking of cases in which full performance is impossible to enforce, due to the fault of the defendant, but it is submitted that the principle is not altered if complete enforcement is legally impossible, that is, because the courts will not order it. Also see Kerr, *Introduction to the Law of Contract*, vol. 1 at p 77.

44. Referred to by Botha J in *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 (3) SA 1092 T at 1114 F.

45. *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 (3) SA 1092 T at 1114 F. Cf *Allied Electric (Pty) Ltd v Meyer and Another* 1979 (4) SA 325 W at 331 B - F, in which it was held that a court ought only to issue an order in the terms contained in the original agreement, since otherwise the court will be contracting for the parties. It is submitted that, in cases of partial performance, this view amounts to a restatement of the "blue pencil" test, and is unsatisfactory.

drafting an order of specific performance, so as to create new obligations which were never agreed to by the parties in the first place, there can be no valid objection to the formulation of an order of specific performance, which incorporates words and phrases not originally used by the parties, in order to partially enforce a restraint of trade agreement. It is not the *form of words* which matters so much as that the order of specific performance requires the same performance, even if in part only, that the defendant undertook when he entered the agreement, rather than something additional, or different in nature from what was originally contemplated. Put another way, the words used by the court in its order must have the effect of partially enforcing the originally agreed terms, not new terms.⁴⁶ While the courts are not constrained, in avoiding excessive terms, to the mechanical process of the "blue pencil" rule, neither are they entitled to create new undertakings for the parties, to which the parties have never given their assent.⁴⁷

The case of *Admark (Recruitment) (Pvt) Ltd v Botes*⁴⁸ provides a good illustration of a "difficult" case. The restraint clause in the employment agreement read as follows:

"It is a condition of your employment that you will have no contact with the clients of this company for a period of 12 months after leaving it."

46. Cf *Allied Electric (Pty) Ltd v Meyer and Another* 1979 (4) SA 325 W at 331 B - F.

47. *Ambrose & Aitken v Johnson & Fletcher*, 1917 AD 327. In this case, a contract was cancelled when ice-making machinery supplied was inadequate for the purposes which had been stipulated. The court *a quo* ordered a different machine to be installed, which would have produced the desired results. This new machine was not what the parties had agreed on, and the decision was therefore reversed.

The same limitations apply when the agreed terms are too uncertain to be enforceable. The courts are not entitled to re-draft the terms so as to make them precise, since the effect would be that the court was imposing an agreement on the parties to which they had never in fact consented: *Carthew-Gabriel v Fox & Carney (Pvt) Ltd* 1978 (1) SA 598 RAD at 602.

48. 1981 (1) SA 860 W. Also see *Allied Electric (Pty) Ltd v Meyer and Another* 1979 (4) SA 325 W at 331 B - F and *Freight Bureau (Pty) Ltd v Kruger and Another* 1979 (4) SA 337 W at 339 E. In this last case, the court refused to issue the order sought for the following reasons:

"...[the terms] would require major plastic surgery in the form of a drastic re-casting of the provisions of the agreement. The words required to do so are neither obvious nor capable of easy formulation."

An order was sought in the following terms:

"Restraining respondent, for a period of 12 months calculated from 1 July 1980, from having any contact with any of applicant's clients who were clients on the said date and with whom respondent had contact while she was employed by the applicant."

It was held that even in this form, the order sought would be unreasonably wide. The expression "have contact with" included all forms of contact, social as well as business. The court was not prepared to alter this expression and order the respondent not "to canvass or solicit business" from former clients.⁴⁹ It must be asked whether, if the court had considered the substance of what the parties had intended and agreed, rather than the words they used, it would not have been proper to order the respondent to refrain from canvassing or soliciting business from former clients. Surely this more limited restraint was well within what the parties intended. The respondent could hardly have argued, in the circumstances of this case, that she never agreed not to canvass former clients for business. That undertaking was certainly part of what she undertook. The fact that, in terms of the words used, she undertook far more, to the extent that a court found the restraint unreasonable, hardly justifies refusing to enforce the reasonable portion of the intended restraint. It is submitted that, properly understood and applied, the approach indicated in *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another*⁵⁰ and *Magna Alloys & Research SA (Pty) Ltd v Ellis*⁵¹ opens the way for cases such as the *Admark* case to be differently decided.

It is of prime importance to appreciate that the fundamental principle involved in deciding the extent to which partial performance of indivisible obligations can be ordered is that the performance ordered must be a portion of the terms actually agreed. If this is kept in mind as the guiding principle, there is no reason why undue emphasis should be placed on the form of words in which the order of specific performance is issued.⁵²

49. *Admark (Recruitment) (Pvt) Ltd v Botes* 1981 (1) SA 860 W at 862 G.

50. 1979 (3) SA 1092 T.

51. 1984 (4) SA 874 A

3.8.7. The Time at which the Enforceability of Restraint of Trade Agreements is Assessed.

It may be asked whether a court should assess the merits of refusing to order specific performance of a restraint of trade agreement in the light of the circumstances obtaining when the agreement was entered into, or in the light of the circumstances at the time enforcement is sought.⁵³ Since, in South African law, an agreement in restraint of trade is legally valid and enforceable, subject to the discretion of the court to refuse an order of specific performance, it follows that the court is entitled to consider not only those factors which existed at the time the agreement was entered into,⁵⁴ but also those which exist at the time when enforcement is sought.⁵⁵

52. This is not to suggest that the courts should not rely on the original words of the agreement in order to assess what the parties intended. The suggestion is that an order to enforce partial performance of such undertakings may need to be expressed in different terms.

53. In *Ailing and Streak v Olivier* 1949 (1) SA 215 T at 219, Price J, following English law and the view that a contract in restraint of trade is void *ab initio*, held that the validity of the agreement must be determined in the light of the circumstances that existed when the agreement was made. For the English law approach, see Heydon, *The Restraint of Trade Doctrine*, p 135; and *Gledhow Autoparts Ltd v Delaney* [1965] 3 All ER 288 at 295 D - F. By contrast, in *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 (3) SA 1092 T at 1106 - 1107, Botha J suggests that the appropriate time for making the assessment whether an agreement in restraint of trade should be enforced is the time when the Court is asked to make the order, taking into account the circumstances which exist at that time. Also see *Stewart Wrightson (Pty) Ltd and Another v Minnitt* 1979 (3) SA 399 C at 403 F; and cf *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 C and *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A.

54. For example, the relative bargaining strength of the parties to the restraint agreement: Kerr, *Contract*, 117.

55. For example, changed economic circumstances. Didcott J said the following in *J Louw and Co (Pty) Ltd v Richter and Others* 1987 (2) SA 237 N at 243 C:

"Whether it [the agreement] is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those which existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought."

The decision to refuse to issue an order of specific performance is not based on the notion that the legal obligation is void *ab initio*, but because the court is of the opinion that the order asked for will either result in injustice, or that enforcement is contrary to public policy or legal policy, or is beyond the power of the defendant to accomplish. The point is made by Van den Heever J in *Drewtons (Pty) Ltd v Carlie*.⁵⁶

"The contract is always valid. The only enquiry is whether the Court should compel compliance with a particular agreement or not at a given time. And times do change, admittedly; that is the basic reason for regarding public policy as a factual issue, not a set of immutable legal rules. As an example, an economy does not alter overnight from one in which too many people seek too few jobs and are therefore vulnerable to exploitation, into one where too many jobs chase too few people; so that the suggestion that what may have been reasonable at summons could be contrary to community interest at trial and judgment exaggerates the backlog in our system fancifully."

Thus it is unlikely that a court which, in the circumstances which exist at the time enforcement is sought, is of the opinion that an order of specific performance should be refused, will nevertheless order specific performance because in the circumstances that existed when the agreement was entered into it would have come to a different conclusion. The point can be illustrated by analogy. In *Haynes v Kingwilliamstown Municipality*,⁵⁷ the original agreement, that is, to release a certain quantity of water each day from a storage dam, did not constitute any undue hardship for the debtor. However, at the time an order of specific performance was sought to enforce that agreement, an unprecedented drought had altered the circumstances, and the court considered that to order specific performance would, at the time, be unduly harsh on the debtor. Accordingly, the order was refused. In restraint of trade cases, changed circumstances may have a similar effect on terms that were originally unobjectionable.

The converse must also be true. If circumstances change so that restraint of trade terms that

56. 1981 (4) SA 305 C at 312 D.

57. 1951 (2) SA 371 A.

a court may have originally refused to specifically enforce cease to be objectionable, there is no reason, it is submitted, for a court to refuse an order of specific performance, simply because, at some earlier point in time, a court would have exercised its discretionary power in that way.⁵⁸

3.8.8. The Alternative of an Award of Damages for Breach of a Restraint of Trade Agreement.

In English law, the failure of the person who seeks to enforce an agreement in restraint of trade to prove that the terms involved are reasonable results in the conclusion that there exists no enforceable obligation at all. In South African law, the refusal of the court to order specific performance of an agreement in restraint of trade does not necessarily imply any such thing. A refusal by a South African court to order specific performance may be based on one of two possible principles: either that no legally enforceable obligation exists, or, alternatively, that such an obligation does exist, but the court, in its discretion, refuses to enforce it *by means of an order of specific performance*⁵⁹ In the first type of case, no award of damages is logically possible, because there has been no breach of a legally enforceable contractual obligation. However, if an enforceable obligation *does* exist, but an order of specific performance is refused, there is no reason why the alternative remedy of an award of damages should not be sought and, in appropriate circumstances, granted. Of course, such damages would have to be proved, and this could be difficult, but it may well be possible for the parties to a restraint agreement to estimate the damages that would be payable in the event of a breach of the contract, and include a figure in the agreement as liquidated damages payable as an alternative to an order of specific performance.⁶⁰

58. *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 C at 312 D - 313 A; *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A at 897 - 898.

59. See section 3.9.1 below.

60. If the damages payable by agreement amount to a penalty, the Court has the power to reduce the award, in terms of section 3 of the Conventional Penalties Act, 15 of 1962. *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 A at 906 ff. In this case, the enforcement asked for was of the financial clauses of the restraint agreement: see page 886 A - B.

3.9. ASKING FOR ALTERNATIVE REMEDIES TO THE ENFORCEMENT OF SPECIFIC PERFORMANCE.

3.9.1. Considerations Affecting Whether to Ask for Alternative Relief When Seeking an Order of Specific Performance.

A plaintiff chooses his remedy by having regard first of all to what remedies are available in the circumstances of his case, and then by selecting the particular available remedy which affords the relief that is, in his view, most appropriate or desirable. Since different remedies each have their own essential requirements, which must exist and be proved before the remedy will be granted,¹ it is essential, if alternative remedies, or a combination of remedies, is sought, that the essential requirements for *each* are pleaded and proved.

Of course, in some cases, it may be sufficient for the plaintiff to ask for a single remedy, and thereby simplify his burden of proof, but considerations may exist which make it advisable for a plaintiff to ask for alternative remedies. For example, a plaintiff who wishes to enforce

1. Enforcing specific performance is a remedy which involves the discharge of obligations by means of the defendant giving actual effect to his undertakings, that is by performing the acts that he undertook to perform. Enforcing specific performance is therefore fundamentally different from *restitutio in integrum*, which operates on the basis of invalidating legal obligations by rendering them void *ab initio*. An order of specific performance is also different in its fundamental nature from an award of damages for breach of a personal obligation to perform or do, which remedy involves the discharge of the obligation by the payment of money, which substitutes economically for the actual performance promised. It is not surprising, therefore that each of these remedies has its own particular essential requirements that determine its availability.

specific performance may not be sure that the defendant will carry out the performance, even if ordered to do so.² It may also happen that, after an order of specific performance is issued, it turns out that the defendant has not the means to perform his undertaking.³

There is also always the possibility that a court will exercise its discretion against issuing an order of specific performance.⁴ Finally, the law itself may require that alternative remedies are asked for by a plaintiff.⁵ All of these considerations raise the question of when and in what combination alternative remedies should be asked for when an order of specific performance is sought as the primary remedy.

3.9.2. Alternative Relief may be Sought in the Same or in a Later Action.

In an action in the Supreme Court, a plaintiff who seeks to enforce the specific performance of a contractual obligation is not obliged to ask for alternative relief. If only an order of specific performance is sought and issued, but for some reason, the defendant fails to comply voluntarily with it, the plaintiff may thereafter institute proceedings against the defendant, in an attempt to coerce him to comply.⁶ However, if the plaintiff prefers to abandon the idea of further action to compel actual performance, he may bring a second action, not to enforce the order of specific performance, but in order to claim alternative relief, such as an award of damages in lieu of performance.⁷

2. *Leaman v Kieswetter* 1949 (4) SA 38 C. Also see *Industrial and Mercantile Corporation v Anastassiou Bros.* 1973 (2) SA 601 W at 609 H - 610 D.

3. *Papenfus v Luiken* 1950 (2) SA 508 O at 510. In this case, because the defendant was unable to perform as required by the order of specific performance obtained against him, plaintiff sued for cancellation of the contract of sale and costs. The court issued an independent order in those terms, without altering the previous judgement.

4. *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 A at 378 F.

5. For example, section 46 (2) c of the Magistrate's Court Act, No 32 of 1944, as amended. See section 3.9.2 below.

6. See section 3.3.4 above on methods of enforcing an order of specific performance.

7. *Schein and Sliom v Joubert* 1903 TS 428; *Evans v Hart* 1949 (4) SA 30 C; *Leaman v Kieswetter* 1949 (4) SA 38 C. In this last case, the plaintiff sold certain property to the

Although a creditor is entitled to bring an action for an award of damages if the debtor fails to comply with an order of specific performance, it is obviously disadvantageous for the creditor to initiate two separate actions since he may be penalised by an order as to costs.⁸ It is accordingly usually preferable for the plaintiff to ask for alternative remedies when he brings his first action, which he is entitled to do.⁹ A plaintiff who wants, as his first choice, to enforce specific performance of obligations need not fear that, by including a claim for an alternative remedy, he might lose his right to choose specific performance in preference to the alternative. Assuming the alternative of an award of damages, the request for damages as an alternative to an order of specific performance can be phrased in such a way that preserves the plaintiff's right to an order of specific performance as his primary remedy, and the defendant is not given the choice of how he will discharge his liability. The appropriate terminology is for the plaintiff to ask for "an order of specific performance, failing which, damages" rather than "an order of specific performance, alternatively, damages". The second phrase mentioned may be interpreted to allow the defendant to choose the form of his performance.¹⁰

defendant for an agreed price. Defendant paid a deposit, but thereafter failed to pay the balance of the price, and plaintiff obtained provisional sentence against defendant for payment of the price. Defendant failed to pay, and plaintiff decided that it was unlikely that he would get any further sum from him. He therefore sued for an award of R500 damages, in order to be entitled to retain the deposit. Searle J said at 39:

"A perusal of the authorities...satisfies me that a party who obtains a judgment for specific performance after a breach of contract, still has the right, if that judgment is not implemented, to claim cancellation and damages."

Also see *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 A at 378 F, *per De Villiers AJA*:

"It is, however, equally settled law with us that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod interest*."

8. *Industrial and Mercantile Corporation v Anastassiou Bros.* 1973 (2) SA 601 W at 610 D.

9. *Ras and Others v Simpson* 1904 TS 254 at 256.

10. *Sunjeevi v Wood* (1909) 30 NLR 76 at 81; Kerr, *Contract*, p 417.

Provided that damages are proved, an award of damages may be granted as an alternative to an order of specific performance even if the plaintiff includes a general prayer for "alternative relief". It may even be that the court has the power to grant alternative relief even if it is not specifically asked for,¹¹ but it seems unwise for a plaintiff to rely on this possibility.

In an action brought in the Magistrate's Court, a plaintiff seeking an order of specific performance may be required to ask at the same time for alternative relief, in terms of the provisions of section 46 of the Magistrate's Court Act.¹² These provisions read as follows:

"46. *Matters beyond the Jurisdiction* - (1)...

(2) A court shall have no jurisdiction in matters -

- (a) ...
- (b) ...
- (c) In which is sought specific performance without an alternative of payment of damages, except in -
 - (i) the rendering of an account in respect which the claim does not exceed R5000;
 - (ii) the delivery or transfer of property, movable or immovable, not exceeding R5000 in value; and
 - (iii) the delivery or transfer of property, movable or immovable, exceeding R5000 in value, where the consent of the parties has been obtained in terms of section 45;..."¹³

11. *National Butchery Co v African Merchants Ltd* 1907 EDC 57 at 61; *Du Pisani v Watson* 1914 EDL 242 at 247; *Hertzog and Another v Sir Cornelis Wessels' Estate* 1925 OPD 141 at 146.

12. Section 46 (2) (c) of Act 32 of 1944 as amended. The relevant section was introduced in 1984, and ameliorated the earlier provisions which required that a plaintiff seeking an order of specific performance in the Magistrate's Court always ask for alternative relief in the form of damages. See Christie, *Contract*, p 505 for a description of the situation before the 1984 amendment to section 46, and *Tuckers Land and Development Corporation (Edms) Bpk v Van Zyl* 1977 (3) SA 1041 T at 1050; *Olivier v Stoop* 1978 (1) SA 196 T at 202.

13. See section 3.3.4 above.

3.9.3. An Explanation of the Availability of Remedies Which are Based on Breach of Contract as Alternatives to an Order of Specific Performance.

It must be asked what basis is there in principle for allowing a court to order, as an alternative to an order of specific performance, a remedy which is based on an essential element, such as *breach* of a duty to perform, which, at the time of suing for specific performance, may not yet exist. The answer lies in analysing the effect of an order of specific performance on the contractual obligation involved, and on the significance of a failure to comply with an order of specific performance once made.

If a plaintiff sues only for an order of specific performance, the basis of a later, second action for alternative relief is the failure of the defendant to comply with the order of specific performance, which failure leaves the original obligation undischarged, and entitles the plaintiff to a second action.¹⁴ In asking for alternative relief, the plaintiff must plead and prove the essential elements for the alternative relief sought. For example, if an award of damages is sought, defendant's breach of the duty to perform the obligation, and the damages resulting therefrom, must be proved. In fact, a defendant's material failure to comply with an order of specific performance has been held to constitute a breach of the original contractual obligation to perform.¹⁵ For example, Horwitz AJP has said the following:

14. *Ras and Others v Simpson* 1904 TS 254 at 256; *Evans v Hart* 1949 (4) SA 30 C at 35 - 37. The issue of an order of specific performance does not extinguish the original obligation, which remains in existence until discharged, either by compliance with the order of specific performance, or in terms of some other remedy sought as an alternative to specific performance. *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 A at 944 H. A judgement enabling a creditor to enforce an obligation against a debtor ought not to be considered as a novation of the original obligation, in the sense that the original obligation is replaced by a new one. The original obligation is left intact by the judgement of the court, which has the effect only of strengthening or reinforcing the original obligation. The terms *novatio voluntaria* and *novatio necessaria* are useful for distinguishing the different consequences of novation by agreement, (*novatio voluntaria*) which creates a new obligation in the place of the old, by agreement, and the effect of a judgement on the original obligations that existed (*novatio necessaria*) which leaves the original obligation in existence. In summary, a plaintiff who has obtained an order of specific performance against a defendant is nevertheless entitled in South African law to bring another action for damages in lieu of the original right to enforce specific performance, if the original order is not complied with.

"Waar 'n hofbevel uitgereik is vir betaling van die koopsom en waar die verweerder nie aan die bevel kan voldoen nie dan dien dit as bewys van die feit dat hy die ooreenkoms in sy geheel repudieer. Dit dien dan ook as bewys van feite wat die eisers se terugtrekingsreg daarstel, d.w.s. daar bestaan nou 'n nuwe kontrakbreuk van so 'n aard dat dit die terugtrekingsreg in die lewe roep. En die dagvaarding vir kansellasië van die kontrak is kennisgewing dat die eisers in hierdie repudiasie berus wat hul dan die reg gee om die eis vir kansellasië, met of sonder skadevergoeding, in te stel."

The fact that material failure to comply with an order of specific performance is recognised as a breach of the obligation itself provides an explanation of why it is possible in principle for a plaintiff to claim a remedy which depends on a breach of the obligation to perform, such as an award damages, as an alternative remedy to an order of specific performance, in case the defendant fail to comply with an order of specific performance, rather than instituting separate proceedings later, even if no breach of the obligation to perform has yet occurred. A material failure to comply with an order of specific performance is itself a breach of the original obligation, and therefore conditionally satisfies the requirement of such an element for the alternative relief.

If an alternative remedy of an award of damages is asked for, the quantum of such damages must be ascertained and proved in the normal way.¹⁶ Cases in which the assessment of damages is difficult are therefore often those in which no alternative of an award of damages is asked for.

15. *Nieuwoudt NO and Another v Els* 1953 (3) SA 642 O at 645 G.

16. *Woods v Walters* 1921 AD 303 at 310. The damages claimed as an alternative to an order of specific performance are not considered to be punitive: *Du Pisani v Watson* 1914 EDL 242 at 247.

3.9.4. Choice of Remedies in Cases Involving Divisible Obligations.

In cases involving divisible obligations, a plaintiff is not obliged to seek only one remedy. The divisible parts of the obligation may be enforced by different remedies. For example, provided the obligations are independent of each other, an order of specific performance can be obtained to enforce a duty to deliver a portion of goods bought and sold, while damages can be sought to compensate for the non-delivery of the remainder.¹⁷

3.9.5. Supplementary Damages in Addition to an Order of Specific Performance.

In some cases a claim for damages may be added to a claim for an order of specific performance, not as an alternative to that order, nor as a remedy for part of a divisible obligation, but as a supplement to specific performance, in order to make good any financial disadvantage which may have accrued to the plaintiff because of the delay in rendering the performance due.¹⁸ Such damages are not inconsistent with the primary remedy sought, since they are not sought in lieu of the specific performance of the obligation, but are compensation for the failure of the defendant to perform timeously, or to compensate for some detail which enforcement of specific performance cannot make good.

17. *Ariefdien v Soeker* 1982 (2) SA 570 C at 579 D. In this case, the obligation to transfer immovable property bought and sold and the obligation to effect certain improvements on the same property were treated as divisible. Specific performance of the obligation to transfer the property was ordered, and damages as an alternative to an order of specific performance were awarded in respect of the improvements. A court will primarily protect the interests of the innocent party, so that even if the debtor wishes to insist on specific performance of all the obligations, a court will not enforce specific performance if the innocent party wishes to seek the alternative of an award of damages, and if it would be unjust in the circumstances to order specific performance. The damages must, of course, be ascertainable.

18. *Silverton Estates Co v Bellevue Syndicate* 1904 TS 462; *Eisle v Auret* 1904 TH 156; *Stacy v Sims* 1917 CPD 533; Kerr, *Contract*, p 413.