CASE NO.110/99

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

McCarthy Retail Ltd Appellant

and

Shortdistance Carriers CC Respondent

Before: Smalberger ADCJ, Harms, Olivier, Schutz and Cameron JJA

Heard: 27 February 2001
Delivered: 16 March 2001

Garage's action for necessary and useful expenses against owner with whom it has no contract - repaired in mistaken belief insurance company had instructed it - enrichment proved - irrelevance of insurance policy - question of whether enrichment at the expense of not arising - obiter dicta on acceptance of general enrichment action- and overruling of Gouws v Jester Pools - postponement of appeal refused.

W P SCHUTZ

J U D G M E N T

SCHUTZ JA:

[1] The dispute is whether the appellant, McCarthy Retail Ltd ("the garage"),

has an enrichment claim for repairs to a Peterbilt truck owned by the respondent, Shortdistance Carriers CC ("the owner"). The agreed value of the repairs is R 186 000.

[2] The truck was damaged in an accident in December 1995, after which the owner took it to Dan Perkins Trucks (Pty) Ltd, an agent of the garage, which together with its principal will also be referred to as "the garage". No instruction to repair was given by the owner, who had insured the truck with Truck and General Underwriting Managers (Pty) Ltd ("the insurer") and paid the premiums. On 12 December 1995 the owner submitted a claim. An insurance loss-adjuster, Mr Hamilton, was employed by the insurer to inspect the truck at the garage. At the trial there was a dispute whether he instructed the garage, represented by Mr Dinkel, to proceed with the repairs on behalf of the insurer. The trial judge, Booysen J, accepted Hamilton's evidence that no such instruction was

given, but held that Dinkel had laboured under the *bona fide* but mistaken belief that he had. The garage effected the repairs, which were completed by the end of January or early February 1996. The repaired truck was delivered to the owner by the garage at the end February or early March. During December an agreement had been concluded between Dinkel and Mr Ramdhani, a member of the owner. The excess payable by the owner under the policy was R 50 000, but Dinkel agreed to reduce the amount to R 25 000 at the expense of the garage, which amount the owner paid in two instalments.

[3] The garage, believing it had a contract with the insurer, submitted its invoice to it. On 2 April 1996 the insurer repudiated the owner's claim in a letter addressed to his insurance broker. This triggered the operation of a clause of the policy which provided that if legal action were not commenced within six months of the rejection of a claim, all benefits under the policy would be forfeited. This meant that under the policy the owner had until about 2 October 1996 to launch legal action. Ramdhani's undisputed evidence was that he did not know of the letter of repudiation until his broker transmitted a copy of it to him in September 1996. His further undisputed evidence was that although a Mr Buchanan from the

garage asked him for a copy of the claim form in August 1996, Buchanan did not tell him that there was a problem with regard to the payment of the claim. This despite the fact that Dinkel learned of the repudiation in the middle of June 1996, and had throughout been conducting the dealings with the insurer and informing Ramdhani of progress. The owner did not institute action against the insurer.

[4] On appeal it is common cause that Booysen J was correct in holding that the insurer was not entitled to repudiate the policy on the grounds that it did. (This has nothing to do with the six months period. The grounds of repudiation alleged were that the owner was not in possession of a certificate of fitness or an operator's card as required by the policy.) What remained in issue was whether a direct contract of repair was concluded between the garage and the insurer.

[5] With regard to this issue Booysen J held:

> "It was equally clear from the evidence that no contract existed between Truck and General/Global and Dan Perkins pursuant to which Defendant's truck was repaired. Mr Dinkel, the manager of Dan Perkins, gave evidence to the effect that Mr Hamilton, claims assessor, authorised Dan Perkins to repair the truck. It is quite clear though that even if he had done so, he had no mandate or authority from the insurance company to do so. I am, however, in any event, satisfied that Mr Hamilton did not authorise the repairs. His evidence is clear and credible. It accords with the contemporaneous notes and correspondence. He came across in the witness box as a

> careful man with a perfect understanding of his duties and mandates. Having seen him give evidence I have no doubt that he did not, as Mr Dinkel claims, instruct the latter to do the repairs. Mr Dinkel, it was clear from his evidence, was an impatient and somewhat impulsive man who, I could see, could easily have jumped to the conclusion that he had the necessary authority to proceed with the repairs when such conclusion was not justified. One could see him misunderstanding what was said to him by Hamilton."

I find nothing to criticise in this finding and conclude that there was no contract between the garage and the insurer, although, as the judge also found, Dinkel *bona fide* believed that there was.

[6] Accordingly, the essential facts are: The owner took his damaged truck to the garage but did not instruct it to repair the truck, made a claim on his insurer, but took no active part in the dealings between the garage and the insurer thereafter. The garage repaired the truck believing that the insurer had instructed it to do so, but it was wrong. There was no contract. Before the insurer repudiated the claim the garage returned the truck to the owner. The value of its repairs was R 186 000. The insurer communicated its repudiation to the owner's broker on 2 April 1996, but the broker did not inform the owner until September. In the meantime the six months period for instituting action had been running, so as to expire by 2 October. The owner did not institute an action at any stage. There had been no basis for the insurer's repudiation before 2 October and the policy was a valid

policy. Despite its knowledge of the repudiation by June 1996, the garage did not alert the owner to the existence of a difficulty about the one or other of them recovering the cost of the repairs from the insurer. Do these facts support an enrichment claim by the garage against the owner?

[7] Booysen J held that they did not, saying:

> "As I understood the argument advanced on behalf of the Plaintiff, it was conceded that if the insurance company had not been entitled to repudiate the claim, no unjust enrichment could be said to have taken place. I agree. In that event the Plaintiff would have repaired the vehicle under the mistake that it was doing so at the request of the insurance company, and the Defendant on the other hand received the repaired vehicle in terms of its contract with the insurance company. It thus received the benefit for which it had paid its premiums and was not unjustly enriched or enriched *sine causa*."

In its notice of application for leave to appeal the statement that the garage had made the concession recorded by the judge *a quo* was challenged as a misdirection. Leave to appeal was granted by him and the appeal proceeded on the footing that no such concession is made.

<u>What are the foundations of our enrichment law?</u>

[8] Unlike other branches of our law, the rich Roman source material has not led to an unqualified judicial recognition (with a few exceptions) of a unified general principle of unjustified enrichment, from which solutions to particular instances may be derived. Rather there has been an

augmentation of the old causes of action, from case to case, usually with reference to rules treated as being of general application. This has led to a more or less unified patchwork (the "lapwerk" according to Professor de Vos *Verrykingsaanspreeklikheid in die SA Reg* 3ed). And although there has been no unequivocal recognition of a general enrichment action, time and again unjustified enrichment principles have been treated as a source of obligations being the basis for creating a new class or sub-class of liability in particular circumstances. No better example of this can be found than the minority judgment of Ogilvie Thompson JA in *Nortje en 'n Ander v Pool NO* 1966(3) SA 96 (A) - the majority judgment in which is still sometimes held out as having given the final death-blow to a general enrichment action. The question whether such an action should be recognized was passed by in *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere* 1994(3) SA 283 (A), but Botha JA made it clear that the piecemeal extensions of the old actions, which have been proceeding for over a century in South Africa, have not been impeded by the decision in *Nortje's* case (at 331 B - 333 E). See also *Bowman, de Wet and du Plessis NNO and Others v Fidelity Bank Ltd* 1997(2) SA 35 (A) at 40 A - B. One of the restraints upon the acceptance of a general action is

the belief, or fear, that a tide of litigation would be let loose. Initially there may be some surge of litigation, particularly under the emotive banner of "unjust enrichment." But it should not last long, once the restrictions even on a general action are appreciated. My opinion is that under a general action only very few actions would succeed which would not have succeeded under one or other of the old forms of action or their continued extensions. For this reason, if it be a good one, the acceptance of a general action may not be as important as is sometimes thought, save, of course, that its denial may lead to occasional individual injustices. A more daunting consequence of acceptance is the possible need for a re-arrangement of old-standing rules. Are the detailed rules to go and new ones to be derived from a broadly stated general principle? Or are the old ones to stand, and be supplemented by a general action which will fill the gaps? The correct answers to these questions are not obvious. But I would support the second solution. In a rare case where even an extension of an old action will not suffice I would favour the recognition of a general action. The rules governing it should not be too difficult to establish - see de Vos ch VII for an outline. We have been applying many of them for a long time.

[9] How we have reached our present state is a matter of history. The Roman law, although containing several general affirmations of liability for unjustified enrichment, did not evolve a general action. Nor did the mediaeval writers, although there are some who would challenge this statement. But there is a strong, if by no means unanimous, body of academic opinion that Grotius, influenced by Spanish jurists and theologians, had come to accept unjustified enrichment as an independent source of obligations, just as contract or delict were. The case for Grotius is persuasively stated in Feenstra's chapter *Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: its Origin and its Influence in Roman-Dutch Law* p 197, contained in Vol 15, *Unjust Enrichment The Comparative Legal History of the Law of Restitution* (1995) edited by Schrage, in the *Comparative Studies in Continental and Anglo-American Legal History* series. Whether Professors Feenstra and Scholtens are right about Grotius need not be determined, because the latter has demonstrated quite convincingly, in my opinion, that by the eighteenth century the Hooge Raad had come to accept the existence of what we would call a general enrichment action, although the descriptions of it by individual judges differed - see Scholtens "The General Enrichment Action That

Was" (1966) 83 SALJ 391, Feenstra (op cit) 228-235. The main reason why this development did not affect the evolution of Roman-Dutch Law in Southern Africa, up to and including *Nortje's* case, is that the decisions recorded by Bynkershoek and Pauw lay unpublished for two centuries and more. This reveals the weaknesses of a practice (that of Holland at the time) which did not require judges to give full reasons for their decisions and which lacked systematic law reporting. We now know from the hard print that there is a common law basis for the acceptance of a general enrichment action, at least one of a subsidiary nature. In this respect the decision of the majority in *Nortje's* case at 139 G - H has been shown by the then largely dormant authority to be clearly wrong.

[10] However, if this court is ever to adopt a general action into modern law, it would be wiser, in my opinion, to wait for that rare case to arise which cannot be accommodated within the existing framework and which compels such recognition. If once a general action is accepted much less energy, hopefully, will be devoted to the correct identification of a *condictio* or an *actio* than at present and more time to the identification of the elements of enrichment. This does not mean, however, that the old structure's relatively few distinctive rules applying only to particular forms

of action, such as the requirement in the *condictio indebiti* that the mistake should be reasonable, will disappear.

The case before us

[11] The case before us can be solved by reference to established principles. Appellant's counsel, as also the trial judge in granting leave, suggested that the appropriate action is the *condictio sine causa*. This presents a difficulty:

> "The object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was *ab initio* unenforceable or has subsequently become inoperative (*causa non secuta*; *causa finita*)".
> Per van den Heever J in *Pucjlowski v Johnston's Executors* 1946 WLD 1 at 6.

[12] The case before us was presented as if it was the delivery of the repaired truck which was the defining event. That delivery transferred neither the truck (which was already owned by the recipient) nor the repairs (which had already become the property of the owner by accession). What we are concerned with is a typical instance of necessary and useful improvements made to an owner's property without a contract between the repairer and owner. In the Roman and Roman-Dutch law the *bona fide* possessor could exercise a lien for the amount of his necessary and useful

expenses or the increase in market value brought about, whichever was the lesser (de Vos 96). This principle applied also to the improvement of movables (de Vos 97, Grotius 2.10.4, van der Linden 1.7.2). The Roman-Dutch law developed on the Roman law in the respect that the improver was not confined to the defensive remedy of exercising his lien, but was granted an action (de Vos 98). Thus the fact that in the case before us the garage has given up possession voluntarily does not leave it remediless. It may sue, as it has done.

[13] A further development in modern South African law has occurred in the case of occupiers (as opposed to possessors). A *bona fide* possessor believes that he holds as owner, although he is mistaken as to his ownership. An occupier does not have that belief, but nonetheless has or believes he has some lesser right to possess. If he in fact has such a right he is a lawful occupier. If he *bona fide* believes he has but is mistaken, then he is a *bona fide* occupier (de Vos 246-7). Both have rights of defensive possession and action similar to those accorded *bona fide* possessors (de Vos 259 et seq and 249 et seq respectively). De Vos 263 asserts that none of these actions is to be seen as an application of the *condictio sine causa*. But see Scholtens "Enrichment at Whose Expense?"

(1968) 85 SALJ 371 at 374 and O'Brien "A Generally Applicable Condictio Sine Causa for South African Law?" 2000 TSAR 752 at 760. (Both these articles are in part a reaction to the refusal of a general action in *Nortje*. There is an attempt to inspan the *condictio sine causa* in an extended form in its place. A few spadefuls of earth are thrown over the course of the enrichment stream. In no time little rivulets advance to penetrate over, round or through the dam. Have we not been defying gravity?)

[14] On the facts the garage was a lawful occupier. The owner placed it in possession of the truck in the contemplation that it should be repaired, even though it did not itself instruct those repairs. The fact that Dinkel then made a *bona fide* mistake in believing that the insurer had instructed him to repair does not affect that position. At worst for the garage it was a *bona fide* occupier. It makes no difference which of the two it was.

[15] Are the four general requirements for an enrichment action, as listed in the title "Enrichment" by Lotz (revised by Horak) Lawsa Vol 9 First Reissue para 76, satisfied? The owner's arguments on these points largely hinge upon the role of the insurance policy.

[16] The first and fourth requirements in Lawsa are enrichment of the

defendant and the lack of a *causa* for that enrichment. The owner was impoverished when his truck was damaged in an accident. Had he not been insured he would have had to bear the cost of repair. Had he contracted for repairs he would not have been enriched when the repaired truck was returned to him as he would have had to pay the agreed contract price. As it was put by Rose-Innes J, following de Vos, in *Govender v Standard Bank of South Africa Ltd* 1984(4) SA 392 (C) at 404 D, "In assessing whether defendant has been enriched by the payment, account must be taken of any performance rendered by defendant which was juridically connected with his receipt of the money". See also *B&H Engineering v First National Bank of SA Ltd* 1995(2) SA 279 (A) at 294 I-J, in which *Govender's* case was approved.

[17] But in the case before us the owner did not enter into a contract with the garage in respect of the repairs not covered by the excess, so that he did not have to pay a contract price therefor. On the face of it he was enriched by the receipt of the repaired truck without there being a countervailing performance on his part, juridically connected with that enrichment. However, says the owner, but what of my insurance policy for which I had to pay premiums? This is said to be the cause of the enrichment. The

answer is that it was not the policy or the payment of the premiums which procured the repairs, but the mistaken belief of Dinkel that the insurer had instructed him to proceed. The policy was something quite extraneous when it did not give rise to the repairs. Its purpose was to reimburse the owner in one way or another should his truck be damaged. As far as the garage was concerned all that the payment of the premiums procured was a visit by an insurance assessor, who may have agreed what a reasonable price for the repairs would be, but who did not instruct that they be effected. The upshot is that the owner was enriched *sine causa.* The amount of the enrichment was agreed at R 186 000. By clear implication this meant that the market value of the damaged truck was agreed to have been raised by that amount by necessary and useful expenditure.

[18] Much of the argument was devoted to the part played by the insurance policy and it was central to the court *a quo's* judgment. I have sought to demonstrate that upon a proper analysis it is irrelevant to the case before us. My decision depends upon that conclusion. However, I would point out, without incorporating it in my decision, that had the owner availed himself of the rights for which he had expended premiums he should have had not only the repaired truck but also a good claim

against his insurer, the proceeds of which he could have used to pay the garage's enrichment claim. He had actual notice of the repudiation of the policy in September 1996, some time before the six months period expired on 2 October 1996. He may be deemed to have known even earlier, if his broker's knowledge is to be attributed to him. Although the existence and extent of enrichment is usually taken at the date of the summons (August 1997 in the case before us), one of the exceptions is where the defendant permits the enrichment to be lost at a time when he should have allowed for the possibility that the benefit he had received might later prove to constitute an unjustified enrichment: Lawsa para 76 p 63, de Vos 336-7. In my opinion a reasonable person in the owner's position would have anticipated that the garage had not been paid and might look to him; and would then have studied his policy and instituted action within the six months period. The record contains no suggestion that he did so. Instead he chose to ward off the garage's claim. On the face of it he could have saved himself. On appeal it was common cause (although it was in issue in the court below) that the insurer was not entitled to repudiate the policy on the grounds originally relied on. Had his action succeeded, no enrichment problem would have arisen. He would have had the funds to pay the

garage, there being no suggestion that the insurer would not have been able to pay the claim. And also for the reason of the insurer's solvency, had the facts been that there was a contract between the insurer and the garage, again there would have been no enrichment problem, as the garage would have been paid by the insurer and would not have sued the owner. During argument mention was made of the Scottish case of *Kirkland Garage (Kinross) Ltd v Clark* 1967 Scots Law Times 60. The facts in that case were similar to those in the case before us, save in the respects that there was a contract between the insurer and the garage, and the insurer was insolvent. The case accordingly has no bearing on our situation, which does not present the sort of case, to be described more fully below, the "type one" case, where an intermediate party has absconded or is insolvent.

[19] The next requirement postulated by Lawsa is that the plaintiff should be impoverished. Clearly the garage was impoverished.

[20] The remaining and sometimes vexed question is whether the owner's enrichment was at the expense of the garage. How to handle cases of "indirect enrichment", in which three or more parties are involved has caused considerable debate. At the one extreme is the "subcontractor" class of case, represented in this court by *Buzzard Electrical (Pty) Ltd v*

158 Jan Smuts Avenue Investments (Pty) Ltd en 'n Ander 1996 (4) SA 19 (A). A, a property owner, had contracted with B to perform certain work on his property. B subcontracted the electrical section of the contract to C, who performed his obligations. C was unable to recover from B, which had been liquidated, so it sued A as owner for enrichment. The action failed, on the footing that the primary source of A's enrichment was not C, but the main contract between A and B (at 29 F-G). (The proposition was also expressed in an alternative form, that because A had got exactly what he had bargained for with B, any enrichment was not *sine causa* (at 29 G)). The reasoning has been criticised as being "very rigid" by and Visser and Miller "Between Principle and Policy: Indirect Enrichment in Subcontractor and 'Garage-Repair' Cases" (2000) 117 SALJ 594 at 605, on the ground that even though the enrichment could never be *sine causa* vis-à-vis the main contractor, it could conceivably be so vis-à-vis the subcontractor, whose entitlement would be subject to the policy considerations relevant to the particular situation. However that may be, we are not concerned with a *Buzzard* situation, called by van Heerden JA a "type two" situation.

[21] Of more immediate interest are the remarks made in *Buzzard* about

the "type one" case, with which the subcontractor "type two" case was contrasted (at 25 H- 26 A and 27 D - E). Type one arises (I take the most typical example) when A contracts with B to improve property of another (the owner) and A claims from the owner for his enrichment, B having disappeared or gone insolvent. Van Heerden JA found it unnecessary to make a finding on the "type one" situation and assumed for the sake of argument that an action would lie in such a case (*Buzzard* at 27 C). A sharp dispute of opinion underlies this assumption. In a long-standing series of decisions in type one or analogous situations, among which may be mentioned *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 and *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* 1970 (3) SA 264 (A), it has been held that a type one improver may exercise an enrichment lien against the owner in order to procure payment of his necessary and useful expenses. But in *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T), a Transvaal full bench held that the improver in a comparable situation had no action, because, such was the reasoning, the enrichment of the owner had not been at the expense of A (the plaintiff) but at the expense of B, as the enrichment flowed from the performance by A of a contract with B. This reasoning, of which he was a

long-time proponent, was welcomed by de Vos 343 and 350 - 1.

[22] The result was that the defensive remedy of a lien was available but not its counterpart of action. The attempt in the *Brooklyn House* case to reconcile this anomaly was stigmatised in *Buzzard* at 26 I - L as wrong. Neither a lien nor an action can exist without an underlying liability for unjust enrichment, so that they were either both good or both bad (at 26 J - 27 B). See also *Singh v Santam Insurance Ltd* 1997 (1) SA 291 (A)at 297 D - E.

[23] Either *Gouws v Jester Pools* must go, or many or all of the long list of cases represented by the *United Building Society* case must go, or so it seems to me. De Vos 347, 351 expresses concern that the heresy (as he sees it) embodied in the lien cases may yet contaminate the action cases, leading to the jettisoning of the "at the expense of" requirement in both situations. The case before us does not require us to decide the question which line of approach is to be accepted. De Vos himself expresses disquiet, in at least some situations, in which the improver does work and cannot recover, whilst the owner holds the improved goods without being liable to anyone (351 - 2). For myself I think there is much to be said for the justice of the lien cases, an unsophisticated justice though it may be,

but with which we have lived for a long time. A improves a car at the instance of B, wrongly believing him to be owner. C claims the car by virtue of his ownership. Is he to get it scot-free? Or is he to first pay A his necessary and reasonable expenses; A's claim being moderated by the increase in market value cap, by the limitation to expenses to the exclusion of the market price, and by the operation in the last resort of the *jus tollendi* (the right to compel removal of materials)? The question whether C is enriched at the expense of A or of B in the example given, is in any event a matter of semantics (I do not dispute that the manner in which the question is answered can have practical consequences). When A improves C's vehicle the ownership in the improvements passes at once to C's estate by accession and it seems to me to pass there directly from A's estate. Is it not a fiction that it passes through the estate of B, even though A owes a contractual obligation to him to effect the repairs? (Cf Bregstein *Ongegronde Vermogensvermeerdering* (1927) 218). Or take a case of necessary expenses - *Acton v Motau* 1909 TS 841. By keeping Motau's donkeys alive and well in putting them to graze on his land, Acton there and then enriched Motau, and had he established that in so doing he had incurred expense, instead of turning them into a field of withered grass

which would soon have been burned, he would have established his lien and his right to compensation. Innes CJ and Bristowe J found no difficulty in the fact that there was a B in the case - that Acton had come into possession of the donkeys under a contract of pledge with one Jonas, so that Acton was obliged to look after them. The fact that Acton was *mala fide*, in that he knew that Jonas's title was disputed, does not affect the matter.

[24] However, the questions I have raised need not be answered in the case before us, because it is not a multi-party case. There is no B in the equation. There was no contract between the garage and the insurer or indeed with anyone. There is no-one else at whose expense the owner could have been enriched. Accordingly, in the case before us the "at the expense of" problem, sometimes encountered, does not arise.

[25] All the general requirements for enrichment liability being present, the garage's action should have succeeded.

Application for a postponement

[26] On the day before the hearing of the appeal (set down for 27 February 2001) a letter was placed before us on behalf of the respondent "the owner". It stated:

> "We confirm that our counsel in this matter is Piet van Rooyen [the heads had been signed by Mr G R Thatcher, who had appeared at the trial]. Counsel has only just recently perused the papers in this matter and he firmly believes that it is one of an intricate nature and accordingly since he has only been instructed recently, more adequate preparation has to be done on behalf of the Respondent.
>
> In the circumstances our Counsel will be seeking a postponement tomorrow."

[27] Inevitably the application for postponement, which was opposed, was dismissed and the appeal proceeded with Mr van Rooyen, whose submissions on the merits were in the event of material assistance to the court, still appearing for the owner. Reasons for the dismissal of the application were to follow. These are the reasons.

[28] A party opposing an application to postpone an appeal has a procedural right that the appeal should proceed on the appointed day. It is also in the public interest that there should be an end to litigation. Accordingly, in order for an applicant for a postponement to succeed, he must show a "good and strong reason" for the grant of such relief: *Gentiruco A G v Firestone SA (Pty) Ltd* 1969 (3) 318 (T) at 320 C - 321 B. The more detailed principles governing the grant and refusal of postponements have recently been summarised by the Constitutional Court in *National Police Service Union and Others v Minister of Safety and*

Security and Others 2000 (4) SA 1110 (CC) at 1112 C - F as follows:

> "The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed."

[29] When the appeal was called Mr van Rooyen informed us that he had been briefed on appeal on the previous day. Despite the fact that he informed his attorney that a formal application for postponement would have to be filed, nothing further has been done and all that we have by way of explanation is the letter already quoted and Mr van Rooyen's statements from the bar: that the owner's former attorney had not been placed in funds, that he had withdrawn and that the new attorney had been placed in funds only some days before the appeal.

[30] In opposing the postponement Mr King, for the garage, handed in an

affidavit by his attorney. This showed that after receiving notice of the former attorney's withdrawal on 19 January 2001, more than five weeks before the appeal date, she took steps to ascertain whether the owner was aware of the date and to inform him of it if he was not so aware. By 12 February she had established that the owner knew of the appeal and intended to instruct a new attorney. In the end she supplied the new attorney with a copy of the record and the heads of argument.

[31] The application for postponement falls short on all counts. There is not even a serious attempt to provide a "full and satisfactory explanation" for the owner's unpreparedness or the lateness of the application. Nor is such explanation as there is, on oath, notwithstanding counsel's advice to the new attorney.

[32] The interests of other litigants and the convenience of the court are also important. The record and heads have been read by five judges, variously months or weeks before the appeal date. The fact that this case was placed on the roll meant that another case had to wait for the following term and if a postponement is granted this consequence will extend into succeeding terms.

[33] Moreover, if the appeal were to be postponed, the garage would be

prejudiced by not obtaining a final determination of its claim and payment, should it succeed.

[34] These are the reasons why the postponement was refused. The owner will have to pay the costs of the unsuccessful application, of the communications referred to in the affidavit of the garage's attorney and of the affidavit itself.

[35] The appeal is allowed with costs, including the costs of the postponement application, which latter are to include the communications referred to in the affidavit of Ms Kunst and the affidavit itself.

The order of the court *a quo* is altered to read:

"The defendant is ordered to make payment of
(1) R 186 000;
(2) Interest at the rate of 15.5% per annum *a tempore morae*;
(3) Costs of suit."

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
OLIVIER JA
CAMERON JA

SMALBERGER ADCJ:

I agree, for the reasons given by Schutz JA, that the appeal should be allowed applying established principles. I express no opinion on, or concurrence with, the remarks of Schutz JA, sound though they may seem, in relation to the foundation of our enrichment law or the correctness of the majority decision in *Nortje en 'n Ander v Pool NO* 1966(3) SA 96 (A). I do so principally because the matters touched upon were not raised or fully argued before us and their consideration is not essential to the determination of the appeal. Nor do I consider it necessary to express any view with regard to the "at the expense of" requirement for enrichment where there is multi-party involvement for, as Schutz JA points out, that does not arise in the context of the present appeal.

I concur in the order made.

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J W SMALBERGER
ACTING DEPUTY CHIEF JUSTICE

HARMS JA:

[1] Although I agree with the order proposed I am, with some diffidence, unwilling to concur with everything said in the judgment of Schutz JA. My hesitation flows from a number of considerations. Counsel were prepared to argue the *condictio sine causa* and little else; although seemingly an unusual case, upon reflection it becomes clear that the matter can be accommodated under well-established principles; and, I believe, this area of the law should develop incrementally and not in leaps and bounds. That does not mean, however, that Schutz JA's prophetic views are incorrect.

[2] I agree with him that the garage's case fits neatly within the niche of the action of the bona fide occupier who expended money and material on the improvement of another's property (9 *Lawsa* re-issue par 102). There appears to me to be no logical reason why A, who mistakenly believed that he had a contract with B, is entitled to an enrichment claim in respect of what he has expended on improving B's property (*Rubin v Botha* 1911 AD 568) but not if he believed that he had a contract with C (the effect of the judgment *a quo*). The remaining question is whether the general requirements underlying all enrichment actions are present. They are that (a) the defendant must be enriched, (b) the plaintiff must be impoverished, (c) the defendant's enrichment must be at the expense of the plaintiff and (d) the enrichment must be without cause (*sine causa*), i e unjustified (*op cit* par 76).

[3] The owner did not place the first two requirements in issue but concentrated on (d), as did the trial Judge, and relied to a lesser extent on (c). The Court below postulated two scenarios. The first was based upon the finding (which is now accepted by both parties) that the repudiation of

liability under the insurance policy was not justified. In that event, it held that the garage -

". . . would have repaired the vehicle under the mistaken impression that it was doing so at the request of the insurance company, and the [owner] on the other hand received the repaired vehicle in terms of its contract with the insurance company. It thus received the benefit for which it had paid its premiums and was not unjustly enriched or enriched sine causa."

In the alternative and on the assumption that the insurer was entitled to repudiate, the same would apply because -

"(t)he [owner] accepted delivery of the repaired vehicle acting in terms of its contract with the insurance company. When delivery was taken the insurance company had not repudiated liability. The insurance policy was the primary source of the performance of the work and enrichment."

[4] These findings may by implication equate the *sine causa* requirement with causation. Since the owner (or for that matter, the insurer) had no right against the garage to have the vehicle repaired and because the garage had no other claim against either of them, the shift of assets was without any legal ground and therefore *sine causa*. We are not concerned with what the position would have been had there been no repudiation or if the insurer had given the garage an instruction to repair because -

"[d]ie vraag of appellant deur die bewaring van die meubels deur die respondent verryk is, moet in die lig van die omstandighede wat in werklikheid geheers het, bepaal word, en nie in die lig van omstandighede wat sou geheers het indien mev. Bond nie in gebreke sou gebly het om haar kontraktuele verpligtings na te kom nie.

Waar, byvoorbeeld, die eienaar van 'n saak dit in die sorg van 'n opsigter laat wat teenoor die eienaar teen vergoeding kontraktueel verbind is om dit te bewaar, en in gebreke bly om sy verpligtings behoorlik na te kom, met die gevolg dat die saak aan beskadiging blootgestel word, kan die eienaar klaarblyklik nie teenoor die *negotiorum gestor*, wat die saak in bewaring neem en uitgawes aangaan vir die behoud en beskerming daarvan, aanvoer dat hy nie deur die bewaarneming van die saak deur die *gestor* verryk is nie aangesien hy die opsigter, wat kontraktueel verplig was om die saak teen beskadiging te bewaar, reeds ten volle vir sy bewaarneming vergoed het. Hy sou ewe min kon beweer dat die bewaarneming deur die *gestor* onnodig sou gewees het indien die opsigter nie in gebreke sou gebly het nie om sy verpligtings na te kom."

Per Botha JA in *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* 1970 (3) SA 264 (A) 272A-D. The facts of that case are instructive. Mrs Bond had purchased goods on hire-purchase from the appellant. In breach of this contract she entered into a storage agreement with the respondent. The latter was entitled to assert a right of retention (since Mrs Bond had failed to pay the storage fees) against the appellant although, had Mrs Bond complied with her contract with the appellant, the appellant would have stored the goods at less cost.

[5] As far as causation is concerned, I agree with Schutz JA that the enrichment of the owner was not juridically connected to the insurance policy. It took place regardless, and not because, of the existence of the policy. The shift of assets occurred between the garage and the owner and that indicates that the owner was enriched at the expense of the garage. This view is in conformity with *Brooklyn House* (at 273 in fine - 274A):

"Dat verryking van die eienaar ten koste van die besitter, wat die noodsaaklike of nuttige uitgawes aangegaan het, 'n vereiste vir die totstandkoming van so 'n rentensiereg is, moet toegegee word. Dit is byna vanselfsprekend dat verryking van die eienaar deur die besteding van nuttige of noodsaaklike uitgawes aan die saak, ten koste is van die persoon wat die uitgawes aangegaan het, en na my oordeel is dit, met betrekking altans tot die bestaan, al dan nie, van so 'n retensiereg, nie ter sake nie dat die uitgawes aangegaan is ingevolge 'n geldige kontrak met 'n derde teen vergoeding."

And at 275G-H:

"Dit sou dus, met betrekking tot die vraag of 'n retensiereg teen die eienaar tot stand gekom het, nie verkeerd wees nie om te aanvaar dat, totdat die besitter deur òf die eienaar òf die derde persoon behoorlik vergoed word, die verryking van die eienaar in werklikheid ten koste van die besitter is wat die saak verbeter of bewaar het. In iedere geval, 'n besitter wat, ingevolge so 'n ooreenkoms met 'n derde, besit van die saak vir verbeterings of bewaring kry, kom nie op onregmatige wyse in besit daarvan nie, en bewaar of verbeter hy die saak ten voordele van die eienaar, voldoen hy aan al die vereistes vir die totstandkoming van 'n retensiereg teen die eienaar."

[6] The fact that *Brooklyn House* was wrong to the extent that it held that a lien could exist independently of an enrichment action (cf *Buzzard*

Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd en 'n Ander 1996 (4) SA 19 (A) 26I-27C) and that these passages focus on liens, does not affect the validity of the underlying principles. At the end of the day the owner had the repaired vehicle as well as a claim under the policy. His failure to have pursued the claim cannot be laid at the door of the garage.

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L T C HARMS
JUDGE OF APPEAL