# "Methinks he doth protest too much"? Recovering unjustified payments made under duress and protest

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(published in 2006 *Tydskrif vir die Suid-Afrikkanse Reg* 135-151)

## 1 *Introduction*

The private law doctrine of duress, although mostly discussed in the context of the law of contract in South Africa,[1] is also relevant in the law of unjustified enrichment. Where an unjustified payment or transfer of some kind has been induced by duress, in a situation where there is no contractual relationship between the parties, the aggrieved party will be entitled to reclaim the payment or transfer. The principles of enrichment law will apply in such cases. One of the essential requirements that must be proved before an undue payment or transfer made under duress may be reclaimed in our law is that the transfer occurred involuntarily. This must be proved by showing that the aggrieved party made some protest at the time of the payment or transfer.

This situation creates some difficulties, for it is also possible in our law for a party to claim a return of an unjustified payment or transfer as a result of a reservation of rights by means of a protest, but without any need for proving duress. The way in which the law developed to this point, and the difficulties caused by this dual use of the concept of a protest, will be reviewed in this article.

## 2 *The recovery of undue payments or transfers made under duress*

### 2.1 Early developments

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1 See for example *Broodryk v Smuts NO* 1942 TPD 47; *Arend v Astra Furnishers (Pty) Ltd* 1974 1 SA 298 (C); *BOE Bank Bpk v Van Zyl* 2002 5 SA 165 (C); Kerr *The Principles of the Law of Contract* (2002) 318ff; Christie *The Law of Contract in South Africa* (2001) 349ff; Van der Merwe *et al Contract: General Principles* (2003) 103ff.

The first case in South African law concerning non-contractual payments or transfers made under duress was the decision of the Cape Supreme Court in *White Brothers v Treasurer-General*.[2] In this case, the plaintiffs claimed that customs officials had unlawfully coerced them into paying undue customs duties for the release of the plaintiff's goods, which had continuously been impounded by the authorities at Port St Johns. De Villiers CJ, in discussing the legal merits of the plaintiff's claim, said:

> "Now the only tangible ground upon which the plaintiffs can claim relief in the present case is that the payments were not voluntary, that they were made under a sort of duress, and that therefore the first of the grounds for restitution which I have just mentioned [*metus*] is in principle applicable. The plaintiffs, it has been fairly argued, were constrained to make the payments by the fear that they would not obtain their goods without such payments, and in order to induce the Collector of Customs to do that which he was bound to do without payment."[3]

From this dictum, two key aspects of the cause of action emerge. First, from a philosophical perspective, the entitlement of the aggrieved party to relief was grounded in the notion that such payments, when induced by duress, are "involuntary". Secondly, the requirement of protest was identified as a *sine qua non* of any successful claim for the return of money paid under duress of goods. These principles have consistently been affirmed by South African courts ever since, most notably in a trio of cases concerning payments allegedly made under duress heard in the Appellate Division in 1914 and 1915: *Benning v Union Government (Minister of Finance)*,[4] *Union Government (Minister of Finance) v Gowar*,[5] and *Caterers Ltd v Bell and Anders*.[6] As far as the cause of action is concerned, it is now considered settled law that the *condictio indebiti* has become the proper designation for an action for restitution of a non-contractual payment coerced by duress.[7]

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2 (1883) 2 SC 322.

3 (n2) 349.

4 1914 AD 420.

5 1915 AD 426.

6 1915 AD 698.

7 *Caterers v Bell and Anders* (n6), which was heard in the Appeal Court only six months after the *Gowar* decision, both Solomon JA and CG Maasdorp JA referred to the action as one brought in terms of the condictio indebiti (at 709, per Solomon JA, and 712, per CG Maasdorp JA). Other cases concerning payments made under duress, where the *condictio indebiti* was held to be the appropriate action, are: *Mattison v Mpanga* 1928 2 PH A44 (N); *Gluckman v Jagger and Co* 1929 CPD 44 47; *Cranbourne Road Council v Derbyshire Estates Ltd* 1967 1 SA 8 (R); *Port Elizabeth Municipality v Uitenhage Municipality*

2.2 The payment must be involuntary

A refrain that runs like a golden thread through the cases is that the payment must have been involuntary. In the *White Brothers* case, De Villiers CJ said:

> "I take it to be clear that although the mere duress of goods will not avoid a contract, a payment of money in order to obtain goods improperly obtained is not considered to be a voluntary payment, and is therefore recoverable."[8]

In other words, the person was placed in a position where he or she had no choice but to make the payment in order to secure the release of the property, which would otherwise have been withheld. This approach finds its origins in the 19th century English cases from which De Villiers CJ borrowed so heavily in the *White Brothers* case. In particular, his lordship relied on a dictum from *Parker v The Great Western Railway Company*[9] in adopting this terminology, which is indicative of the fact that at the time, the English doctrine of duress was philosophically grounded in the theory of the overborne will. The requirement that the payment must have been involuntary was repeated by Innes CJ in *Union Government (Minister of Finance) v Gowar*:

> "In every instance of duress of goods the person paying has other remedies, but the fact that he cannot forthwith possess his property unless he does pay, is considered sufficient to establish the involuntary

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1971 1 SA 724 (A) 741C; *Miller and Others v Bellville Municipality* 1973 1 SA 914 (C); *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 3 SA 641 (A) 646-7; and *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* 1996 4 SA 1151 (T) 1155. For academics who state that an action for duress is framed in terms of the condictio indebiti, see De Vos *Verrykingsaanspreeklikheid* (1987) 172; Hutchison *et al* (eds) *Wille's Principles of South African Law* (1991) 637; Eiselen and Pienaar *Unjustified Enrichment: A Casebook* 128; *LAWSA* Vol 9 para 79(b); Du Plessis *Compulsion and Restitution. A historical and comparative study of the treatment of compulsion in Scottish private law with particular relevance to the law of unjustified enrichment* (unpublished PhD thesis, University of Aberdeen, 1997) 136ff. The correctness or otherwise of this designation will not be discussed in this article.

8 *White Brothers v Treasurer-General* (n2) 351. The philosophical correctness of this principle will not be considered in this article.

9 7 M&G 253 at 293, where Parke B said: "We are of the opinion that the payment was involuntary." This passage is also quoted by both Innes CJ and Solomon JA in *Union Government (Minister of Finance) v Gowar* (n6) 434, 441. Wessels JA at 453 cites an early edition of the English text *Pollock on Contracts* to the effect that such payments are treated as involuntary in English law.

character of the payment. The fact that he elects to part with his money shows that, in his opinion, his interests will be prejudiced by the delay which preliminary proceedings would entail."[10]

Since then, the idea that a payment made under duress is an involuntary payment has become an established feature of any case of this kind.[11] And one simple question dominates the enquiry as to whether or not a payment was involuntary, to the exclusion of any other. That is the question whether the payment was made under protest.

## 2.3 The origins of the protest requirement

The roots of this protest requirement are once again to be found in the judgment of De Villiers CJ in the case of *White Brothers v Treasurer-General*.[12] The Chief Justice was adamant that proof of protest was critical to the plaintiff's claim in this context:[13] "I]t is impossible to know whether the payment is voluntarily or involuntarily made unless some unequivocal objection to the payment is made at the time it is made."

De Villiers CJ made it quite clear that an articulated protest is essential: an unexpressed mental reservation will not be sufficient. Ever since the *White Brothers* decision, it has been accepted almost unanimously, and generally without question, that the existence of some form of protest is a critical and inalienable factor to the success of a plaintiff's claim for the return of payments made under duress of goods.[14] To give two examples: in *Verster v Beaufort West Municipality*,[15] the plaintiff was able to

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10 (n5) 436.

11 See *Knapp and Kayser v Loonguana* (1892) 7 EDC 61 63; *De Beers Mining Company v Colonial Government* (1888) 6 SC 155 156; *Vergotinie v Ceres Municipality* (1904) 21 SC 28 29; *Cupido v Brendon* 1912 CPD 64 73; *Kama v Rose-Innes* 1913 CPD 393 396-7; *Benning v Union Government (Minister of Finance)* 1914 CPD 422 425-6; *Gowar v Minister of Finance* 1914 EDL 428 438-9, 441; *Benning v Union Government (Minister of Finance)* (n4) 422; *Union Government (Minister of Finance) v Gowar* (n5) 434, 435, 436, 441, 445, 453; *Caterers Ltd v Bell and Anders* (n6) 704; *Lilienfield and Co v Bourke* 1921 TPD 365 at 370-1; *Port Elizabeth Municipality v Uitenhage Municipality* (n7) 741D; *Miller v Bellville Municipality* (n7) 921; *CIR v First National Industrial Bank Ltd* (n7) 647D-F; *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* (n7) 1155H. See too Eiselen and Pienaar (n7) 138.

12 (n2). De Villiers CJ found authority for this requirement in English law, citing *Parker v The Great Western Railway* (n9); *Parker v Bristol and Exeter Railway* Co 6 Exch 702 and *Ashmole v Wainwright* 2 QB 837.

13 (n2) 351.

14 See *Knapp and Kayser v Loonguana* (n11) 63; *De Beers Mining Co Ltd v Colonial Government* (n11) 156; *Leicester Brilliant Syndicate v The Colonial Government and The New Elandsdrift Mining and Estate Co* (1898) 15 SC 121 at 122; *Vergotinie v Ceres Municipality* (n11) 29; *Van Mandelsloh v The African*

recover the amount of a fine paid to release his donkeys (that had been impounded by the defendants), since he had expressly objected to the fine and the attendant payment. However, in *Benning v Union Government (Minister of Finance)*,[16] the appellant failed to recover money paid over to customs officials to release his floor-surfacing machine, because there was absolutely no evidence that any protest had been made at the time the amount was paid. In *Benning*'s case, De Villiers CJ reaffirmed his *White Brothers* hypothesis:

> "[I]n every claim in which 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 evidence of some unequivocal protest at the time of payment."[17]

Any possible doubts about the need for protest in cases of this character were dispelled by Innes CJ in *Union Government (Minister of Finance) v Gowar*:

> "Where goods have been wrongly detained and where the owner has been driven to pay money in order to obtain possession, and where he has done so not voluntarily, as by way of gift or compromise, but with an expressed reservation of his legal rights, payments so made can be recovered back, as having been exacted under duress of goods. The *onus* of showing that the payments had been made involuntarily and there had been no abandonment of rights would, of course, be upon the person seeking to recover. And hence the importance of a protest or unequivocal statement of objection made at the time. Without such protest it is difficult to see how the plaintiff's state of mind could be established to the satisfaction of the court." [18]

2.4 The nature and effect of a protest

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*Banking Corporation Ltd* 1905 NLR 628 at 640; *Hopkins v The Colonial Government* (1905) 22 SC 424; *Cupido v Brendan* (n11) 73; *Lilienfield and Co v Bourke* (n11) 370; *Brakpan Municipality v Androulakis* 1926 TPD 658 at 663; *Mattison v Mpanga* (n11); *Miller v Bellville Municipality* (n7) 921C; *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* (n7) 1154; Cassim "Economic duress in the law of unjust enrichment in USA, England and South Africa" 1991*CILSA* 37 67.

15 1911 CPD 356.

16 (n4).

17 (n4) 423.

18 (n5) 434.

The circumstances in which the protest is made, as well as the interpretation that the court does place upon the protest, will determine the effect it has on the transaction between the parties. The protest that the aggrieved party makes can be interpreted in a number of different ways. In *CIR v First National Industrial Bank Ltd*,[19] Nienaber AJA described the first form of protest as follows:

> "The phrase can serve as confirmation that, in the broad sense, the payment was not a voluntary one or, in the narrower sense, that it was due to duress. The failure so to stipulate could support an inference that the payment was voluntary or that in truth there was no duress."[20]

In this scenario, the existence of a protest will provide the court with proof that the payment was made under duress (and therefore, in the opinion of the court, involuntarily). In this circumstance the protest is not generally made with the knowledge that it is a requisite element of a claim for unjustified enrichment. Typically, the person would protest indignantly as a matter of course to vent his or her frustration about the threat and the demand. An example of a successful claim that was brought under this particular category was that in *Hopkins and Co v The Colonial Government*.[21] The Railway Department refused to release a quantity of stone that it had transported from Queenstown to Cape Town until the plaintiff paid a higher transport tariff. Since the plaintiff needed the stone urgently for building purposes, it was forced to pay over the money immediately, which it did while expressing disgust at the state of affairs. Maasdorp J held that the plaintiff had had no option but to pay the extra money because of the deadlines that the company faced, and its complaints provided confirmation that the payment was indeed made involuntarily under duress.[22]

The second interpretation of a protest was described by Nienaber AJA in the following way:

> "It [the protest] can serve to anticipate or negate an inference of acquiescence, lest it be thought that, by paying without protest, the *solvens* conceded the validity or the legality of the debt, or his liability to repay it, or the correctness of the amount claimed. The object is to reserve the right to seek to reverse the payment."[23]

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19 (n7).

20 (n7) 649G.

21 (n14).

22 (n14) 431.

23 *CIR v First National Industrial Bank Ltd* (n7) 649H.

In this scenario, the aggrieved party who is being coerced into making the payment under duress realises that it is necessary for him to exhibit some protest at the time payment is made in order (a) to satisfy the protest requirement, and (b) to ensure that he has expressly reserved his right to reclaim the payment if it is subsequently challenged and found not to be valid. An example can be found in the case of *Union Government, Minister of Finance v Gowar*.[24] At the time Mrs Gower made her payment to get her usufruct registered, she noted her protest at the demand made by the Registrar of Deeds, reserved her rights to contest the Registrar's ruling, and, after the registration of the usufruct had been completed, she took legal proceedings to challenge the validity of the demand made upon her.[25] Innes CJ described Mrs Gowar's behaviour in similar terms to those used by Nienaber AJA to describe the general scenario above:

> "Had she parted with her money meaning to compromise or to waive her rights, or in ignorance of them, the payment would have been voluntary, but as she intended to reserve her right to demand registration without payment, and paid merely because she could not obtain registration forthwith in any other way, her payment was involuntary in the sense in which that word is used in the cases."[26]

Mrs Gowar was able to show, to the satisfaction of the court, that an unlawful threat had been made, that she could not secure registration of her right in any other way other than by making the payment, and that she had protested at the time she had paid, so demonstrating (in the eyes of the court) that her payment was involuntary. All the basic elements of the duress claim were present. But, as far as the protest is concerned, where this scenario differs from the first is that the protest is made deliberately and intentionally, in a calculated fashion, rather than as a spur-of-the-moment expression of disgust.[27]

Thirdly, protesting against a payment made on demand might not help the person at all. Simply saying that one is paying "under protest", and no more, when one hands over money is not sufficient to warrant a

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24 (n5).

25 (n5) 430.

26 (n5) 435-6.

27 See too *De Beers Mining Co v The Colonial Government* (n11). In that case, the defendants refused to allow transfer of diamond claims unless the plaintiffs paid just over £2000 in stamp duty. The plaintiffs paid the money, noting for the record that they were paying "under protest", and then took legal action to challenge the validity of the demand that had been made upon them. The court held that the duties were not payable, and the payments had been made involuntarily, since they had paid expressly under protest. As such, the plaintiffs were entitled to reclaim their money as having been paid under duress.

refund. Payment under protest does not equate to payment under duress. The plaintiff will have to show that all the elements necessary to make out a case of duress are proved, of which protest is but an aspect. At the very least, the plaintiff will have to show that he or she was put in a dilemma situation by some unlawful threat. This point was made by Wessels JP in *Lilienfield and Co v Bourke*.[28] Counsel for the plaintiff in that case had argued that all that was necessary to entitle a plaintiff to reclaim his money was to show evidence of protest. Counsel relied on a passage of De Villiers AJA's judgment in the *Gowar* case in support of this argument.[29] Wessels JP considered the remarks made by De Villiers AJA, and came to the conclusion that a mere protest would never be sufficient to justify a claim that a payment was made under duress. The Judge President's cutting response to Counsel was the following:

> "It is, however, true that this proposition [by counsel that a mere protest is sufficient] may be supported by what was said by Mr. JUSTICE DE VILLIERS in the case of *Union Government v Gowar*, and I must frankly confess, if one takes a portion of that judgment there is a good deal to support the contention, i.e., if you simply cut out of the judgment a few lines and wrest them from the context. But I do not think that the learned Judge meant to lay down the general rule that a protest always makes a payment under it an involuntary payment.... I do not think that if a person pays money simply saying that he pays it under protest, that that is equivalent to payment under pressure."[30]

This dictum has been described by a full bench of the Appellate Division in *PE Municipality v Uitenhage Municipality*[31] as "a correct statement of the law",[32] and was also cited with approval in *CIR v First National Industrial Bank Ltd.*[33] To justify a claim for repayment on the grounds of duress, the aggrieved party must prove this, and evidence of protest is but one ingredient of that cause of action.[34]

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28 (n11).

29 In *Union Government (Minister of Finance) v Gowar* (n5) 446, De Villiers AJA had said: "But if he pays under protest he is entitled to recover, for the protest is inconsistent either with the idea of a gift or of a compromise between the parties."

30 (n11) 370.

31 (n7).

32 (n7) 742A.

33 (n7) 650E-H. See too *Venter NO v Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Local Council* 1998 (3) SA 1076 (W) at 1079F-G.

34 See *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* (n7) 1155-6.

A good example of the practical application of this rule may be found in the case of *Vergotinie v Ceres Municipality*.[35] The plaintiff sought to reclaim a grazing fee of 10s levied against him by the Municipality, which he had paid under protest. At the trial, the plaintiff could lead no evidence that any threat had been made that his cattle would be impounded if he did not pay the licence money. De Villiers CJ (Hopley J concurring) held that mere protestations were not enough to justify the claim. There needed to be proof that his property had been subjected to duress: since no threats of any kind had ever been made, the plaintiff's appeal was dismissed.[36]

## 3 *Performances made under protest*

### 3.1 Early developments

In the discussion so far, the question whether money may be reclaimed if it was paid under protest has been discussed merely as a component of the broader question whether payments made under duress may be reclaimed. As shown above, it will not be possible for the aggrieved party to show that the payment was made under duress unless it is proved that the payment was accompanied by a protest. The protest requirement is thus but one building block in making out a cause of action based on duress. To say that one has made a payment "under protest", and no more, will not equate to a payment under duress.

However, this does not mean that making a payment "under protest" will be a nugatory or useless gesture, or that the party who made the payment in this manner will necessarily be deprived of an action. In fact, the law has developed to the point where a payment has been made "under protest", this will allow an aggrieved party to institute a *condictio indebiti* to reclaim money that was not in fact due, quite apart from duress, or indeed the classical cause of action under the *condictio indebiti*, mistake. Indeed, in *Venter NO v Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council*,[37] Flemming DJP has described the necessity of making out a case of duress as a technical straitjacket that may often be an unnecessary hindrance in cases where an aggrieved party seeks to reclaim an undue payment, but where there is no proof of a *bona fide* mistake.[38] But this development has been circuitous, and the precise nature and scope of this cause of action remains a matter of some debate. Since this matter

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35 (n11).

36 (n11) 29.

37 (n33).

38 (n33) 1080E-F.

has not been examined in any detail by any other South African authorities, it will be examined fully here, for the sake of clarification and completeness.

The seeds of this development may be found in the judgment of De Villiers AJA in *Union Government (Minister of Finance) v Gowar*.[39] Unlike his colleagues Innes CJ, Solomon JA and Wessels AJA, De Villiers AJA asserted that Mrs Gowar's claim for repayment of transfer duty in that case did not have to be decided in terms of the doctrine of duress at all. Rather, he felt that her problem fell squarely within the traditional ambit of the *condictio indebiti*:

> "Now, in my opinion, it is not necessary to consider whether in the present case the *actio quod metus causa* would lie, or whether the extraordinary remedy of *restitutio in integrum* could be resorted to, for where money has been paid under protest, the *condictio indebiti* lies."[40]

De Villiers AJA's primary authority for this viewpoint was to be found in the title of the *Digest* devoted to the *condictio indebiti*, and in particular a passage extracted from the writing of Ulpian.[41] Munro's translation of the passage is the following:

> "If a man pays on the understanding that if it should prove not to be due, or it should turn out to be a case where the *lex Falcidia* applies, the money should be returned, an action for the return will be in place, as there is a contract concluded between the parties."[42]

De Villiers AJA was not concerned with the *lex Falcidia*, but was more interested in the first situation described by Ulpian. He interpreted Ulpian's words to mean that it will be possible to reclaim a payment made under protest, when the facts show that the protest resulted in some understanding between the parties that the payment was *conditional*: ie that the other party would repay the money if it was

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39 (n5).

40 (n5) 444.

41 D12.6.2.pr.

42 Munro *The Digest of Justinian Vol II* (1909) 306. I have chosen to depart from the standard Watson's edition for a particular reason. That is, that Munro's version includes a translation of the clause "negotium enim contractum est inter eos". In Watson's edition of Mommsen and Kreuger *The Digest of Justinian* (1985) Book Twelve was translated by Professor Birks. Birks's translation of the Latin is as follows: "If a man makes a payment on the condition that if it turns out not to be owed or to be caught by the lex Falcidia it must be given back, an action will lie for its recovery." Birks did not translate the clause "negotium enim contractum est inter eos" at all. The significance of this clause for legal developments in South Africa will become apparent in 3.2 below.

subsequently proved that the money was not in fact due. Although ordinarily the *condictio indebiti* will fall away if a payment is made knowingly and voluntarily, this, said De Villiers AJA, will not apply to someone who has paid under protest, and, by doing so, has obtained a form of implied assurance that the money will be repaid if it should be proved that the payment was not due. He cited a number of common law authorities whose interpolations of the Roman writers support, to a greater or lesser extent, his views.[43] De Villiers AJA concluded his judgment as follows:

> "The result of the authorities therefore is ... if a person pays a debt not due knowingly and voluntarily he is not able to recover. But if he pays under protest he is entitled to recover, for the protest is inconsistent either with the idea of a gift or of a compromise between the parties. The other party was not bound to accept money so paid, *but if he accepts it he must be considered to have agreed that it should be recoverable if not due: in the language of the Digest, the negotium between the parties is a contractus.*"[44]

Even though De Villiers AJA's opinion was a minority one, the seeds of his theory soon began to germinate in the Provincial Divisions. Not more than a few weeks after judgment in the *Gowar* case was handed down, Juta JP (who had been on the Appellate Division panel in the *Gowar* case, but who had returned to his duties at the Cape) was faced with a case concerning a payment under protest in the matter of *Wilken v Holloway*.[45] The facts were such that it was not remotely possible to make out a case of duress or mistake. In the premises, Juta JP fell back on De Villiers AJA's suggestion that a payment under protest alone could be recovered if it could be shown that by accepting the payment, the person agreed that he or she would return it if he or she subsequently discovered it was not due. In Juta JP's words, a "tacit agreement"[46] arises in these circumstances between the person paying under protest and the person receiving the money, that it can be recovered if it is not due. Moreover, he agreed with De Villiers AJA's view that the appropriate action in such a case was one framed in terms of the *condictio*

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43 (n5) 445, he cites Donellus 14.14.52; Voet 12.6.6; Gothofredus *ad D* 6.2.2; Gluck *ad Pand* 12.7; Pothier *Pand* para 34. Voet's passage is worth recording. He said: "If a payor is in doubt whether or not he is indebted, there is still room for a reclaim. Hence also it was sometimes provided by express covenant that if the payment should have been shown not to have been due it should be returned." (My emphasis). See Gane *Selective Voet: A Commentary on the Pandects* (1955-8) ad 12.6.6.

44 (n5) 445-6 (my emphasis).

45 1915 CPD 418. A little-known fact is that Sir Henry Juta was in fact a nephew of Karl Marx. See Zimmermann and Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 129.

46 (n45) 422.

*indebiti.* But since no such conditional understanding could be inferred from the facts of the case, the plaintiff's claim was ultimately unsuccessful.[47]

De Villiers AJA's approach also received some support from Wessels JP (also back at work in the Transvaal Provincial Division, and coincidentally, of course, also a member of the panel in *Gowar*'s case) in an obiter dictum in *Lilienfield and Co v Bourke*.[48] The case turned on the duress question, so the question of conditional payments under protest was not before the court. Nevertheless, Wessels JP analysed what De Villiers AJA had said in the *Gowar* case before agreeing that a payment under protest could be actionable, if the protest resulted in an understanding that the payment was conditional:

> "The learned Judge [De Villiers AJA] shows clearly when dealing with the passages quoted from the Digest that what was meant was that if a person says 'I will pay you now subject to the condition that if it is afterwards found that this payment was not due, then we will consider it as if no payment had been made.' If the word protest is used as an abbreviation of that form of expression, if it is used to mean a payment under the condition that if it is found that the payment was not due it must be handed back, I have no quarrel with what was said by the learned Judge."[49]

In *Gluckman v Jagger and Co*,[50] Watermeyer J perpetuated the trend. As far as he was concerned, an action in terms of the *condictio indebiti* could be instituted in three circumstances: where the transaction was tainted by mistake, or duress, or where a conditional payment is made under protest:

> "The form of action which he [Gluckman] instituted was the *condictio indebiti*. As a general rule this action is available whenever a man pays money which is not due if he pays it by mistake or under duress *or when it is made a condition of the payment that if it is found not to be due it is to be returned*."[51]

This was certainly the most explicit judicial affirmation up to that point of the situations in which the *condictio indebiti* could be brought, and that a conditional payment under protest constituted one of those

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47 (n45) 423.

48 (n11). Cf too *Brakpan Municipality v Androulakis* (n15).

49 (n11) 370.

50 1929 CPD 44.

51 (n50) 47 (my emphasis).

situations. Once again, however, the facts in the *Gluckman* case did not support a finding of this nature, and so Watermeyer J was unable to put his views on the law to work in a practical fashion.

In fact, it was to be a long time before a case came before the courts where De Villiers AJA's thesis could be implemented. The opportunity finally came the Appellate Division's way in *Port Elizabeth Municipality v Uitenhage Municipality*.[52] The case concerned the Uitenhage Municipality's attempt to reclaim an increased electricity tariff that the Port Elizabeth Municipality had imposed upon its sister Municipality. The Uitenhage Municipality had paid the tariff, but had protested at the time, and expressly reserved its rights to reclaim the money if it were subsequently found that the increase had been unlawfully demanded. Thereafter, the Uitenhage Municipality commenced legal proceedings to determine the validity or otherwise of the extra tariff that had been charged. Its claim was ultimately successful, as the Appellate Division held that the increase had been affected for reasons not contemplated in the relevant statutory regulation. The final question that was faced by the court was whether the Uitenhage Municipality was entitled to a refund of the money it had paid to the Port Elizabeth Municipality.

Counsel for the respondents submitted that the money could be recovered on the basis of the *condictio indebiti*, either because of duress, or (in the words of Wessels JP in *Lilienfield*'s case) because the money had been paid subject to the condition that it would be recoverable if it were subsequently found not to be due.[53] Muller AJA rejected the allegation of duress as being without substance, holding that the payments were not made under threat (ie to withhold the supply of electricity) but rather to obtain the benefit of a discount allowed by the Port Elizabeth Municipality in the event of prompt payment.[54] However, the learned Judge held that a *condictio indebiti* could be instituted, and that the money was recoverable, on the basis that it had been paid subject to the condition that it would be recoverable if it was later found not to be due.[55] Muller AJA cited the dicta of both De Villiers AJA in the *Gowar* case, and Wessels JP in the *Lilienfield* case in support of this ruling. On examining the evidence, Muller AJA held that the respondents had not only denied liability and protested when making payment, but had, by Aexpress stipulation"[56] reserved the right to reclaim the money. Since the Port Elizabeth Municipality had noted these protests, but did not object to the respondent's reservation of its rights, "[i]t must, therefore, I think,

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52 (n7).

53 (n7) 741E.

54 (n7) 741E-F.

55 (n7) 741F.

56 (n7) 742A.

be regarded as having by implication agreed to accept the monies subject to the reservations made".[57] As a result, the Appellate Division held that the payments in excess of the original tariff that had already been made could indeed be recovered by the Uitenhage Municipality.

A new principle of law had finally emerged from the chrysalis of judicial suggestions in earlier cases. The Appellate Division had recognised (not only as a possibility, but now as a matter of law) that one can infer from the nature of the protest that a form of agreement had been reached in terms of which the plaintiff could be permitted to recover money paid when it was in fact not due. The question of duress was not relevant to this enquiry, since the payment in such cases is made without any fear of goods being detained or rights being withheld. The protest is made simply to reserve any rights to the money that may accrue if the payment is shown later not to be due. Yet, much like the arrival of a tiny butterfly into the world, this innovation met with little fanfare. Comment on the case was generally confined to matters of interpretation of statutes and administrative law.[58] Even De Vos in his monumental *Verrykingsaanspreeklikheid* mentions the case only in a footnote.[59] It was only in the case of *CIR v First National Industrial Bank Ltd*[60] that the scope and limits of the new cause of action were discussed in greater depth by the Appellate Division, in a case that was to split the court.

### 3.2 *CIR v First National Industrial Bank Ltd*

The facts of this case were as follows. There was a disagreement between the parties about whether a certain auto-card scheme run by the Bank constituted a "credit card scheme", and therefore attracted stamp duty.[61] Although the Bank was adamant that the scheme was not dutiable, it resolved to pay the relevant amount Aunder protest" when ordered to do so by the Commissioner, in order to avoid having to pay possible penalties that the Commissioner could impose.[62] The Commissioner accepted payment in

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57 (n7) 742C.

58 Goldblatt "Constitutional and Administrative Law" in 1971 *Annual Survey of South African Law* 7; Tager "General Principles of Interpretation of Statutes" in 1971 *Annual Survey of South African Law* 477.

59 De Vos (n7) 172n2.

60 (n7). For another review of the case, see Du Plessis (n7) 137.

61 In terms of s3 as read with Schedule 1 of the Stamp Duties Act 77 of 1968. See the judgment at 644C.

62 The payment was made together with a covering letter which said (644E): "As we have not yet finalised the matter with the authorities, in order to avoid any penalty in terms of the new s19 of the Stamp Duties Act,

this fashion. Having paid, the Bank formally reclaimed the money. The Commissioner rejected the claim. Thus, the Bank launched an application to have the money repaid to it in the courts.

The majority judgment was written by Nienaber AJA (with whom Corbett CJ, Botha and Kumleben JJA concurred). The majority held that an action for restitution based on duress could not be entertained, since they felt there was no evidence that there had been any threat made against the bank by the Commissioner. Nienaber AJA then cited the Port Elizabeth Municipality case as authority for the fact that the element of protest attached to a payment could, quite apart from the matter of duress, mean that another cause of action could lie for restitution of the payment. But it was at this point that Nienaber AJA departed significantly from his judicial predecessors. Previous judges had all been quite happy to hold that in a situation where it could be implied from a protest that the parties had agreed that the payment was conditional, the action for repayment was one to be prosecuted in terms of the *condictio indebiti*. Nienaber AJA disagreed. As far as he was concerned, the cause of action in such cases was one for specific performance of the implied contract, and not an enrichment action.

> "It [a protest] could serve as the basis for an agreement between the parties on what should happen if the contested issue is tested and resolved in favour of the *solvens*. Such an agreement would indeed create a new and independent cause of action."[63]

Nienaber AJA held that there were three provisos attached to the existence of such an independent cause of action. First, there had to be an agreement between the parties that the payee would return the money if it was later discovered that it was not due. Secondly, the agreement to repay had to be one subject to the condition that it should first be found that the payment was not due before any repayment could be claimed. Thirdly, the existence of such an agreement will have to be obvious from an examination of the negotiations and correspondence between the parties: mere evidence that a protest was made would not, on its own, be sufficient.[64]

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1968 (as inserted by the Revenue Laws Amendment Act, 1984) we hereby make payment, under protest, of stamp duty in respect of the ... debit entries to our Auto Card holders."

63 (n7) 649I.

64 For the discussion of these three provisos, see 651B-E of the judgment. For the law on tacit contracts, see *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1988 1 SA 276 (A) at 292B-C; *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd and Vorner Investments (Pty) Ltd* 1984 3 SA 155 (A) at 164-5; *Muller v Pam Snyman Estate Agents* 2001 1 SA 313 (C); Kerr (n1) 354; Christie (n1) 92ff.

The majority criticised the findings of some of the earlier cases, especially the dictum in *Gluckman v Jagger* cited above, concerning the basis of this cause of action.[65] They held that where such an agreement may be implied, the cause of action is now no longer the *condictio indebiti*, but the contract itself. Secondly, the condition does not attach to the payment by the debtor (as was stated in *Gluckman*'s case) but to the agreement to make restitution. The majority held that where a public official demands payment under a statute, and the debtor pays Aunder protest", the most likely inference that can be drawn is that an implied agreement has been concluded that if the payment is not due, a refund can be claimed.[66]

In conclusion, the majority of the court held, in favour of the Bank, that they were prepared to assume that the parties had indeed reached such an agreement.[67] This was so not because the Bank and the Commissioner had expressly reached such an agreement, but because the payments were made "under protest", ie the payments were made during the course of a heated and ongoing debate about the correct interpretation of the statute that governed the matter, and the Commissioner, being a public official acting under the enabling powers conferred upon him by statute, would have known that if he were proved to be wrong about the duties, he would be obliged to refund the money.[68] As a result, the majority found that the Bank was entitled to restitution of the money it had paid to the Commissioner.

In a powerful dissenting judgment, Nicholas AJA disagreed with the conclusion of the majority on three points, two of which are relevant to our enquiry. These were the findings of the majority that: (a) the cause of action in this case was not the *condictio indebiti*; and (b) the Bank's claim was based upon a new and independent cause of action in contract.

Nicholas AJA commenced by discussing whether the *condictio indebiti* was in fact the appropriate action in such cases. He conducted a thorough and exhaustive analysis of all the relevant authorities from the *Digest*, the Roman-Dutch law, through to the judgments of the courts in South Africa on the matter, which I have discussed above. He placed great store on the fact that in *D* 12.6.2 it is stated that if someone pays money over on the understanding that, if it should be discovered that the payment was not due, that person may reclaim it under the auspices of the *condictio indebiti*. Nicholas AJA pointed out that in the *Gowar* case, De Villiers AJA relied on this passage of the Digest to conclude that a payment made knowingly and voluntarily, but under protest, was recoverable by means of a *condictio indebiti*,[69] and that

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65 (n7) 651C-D.

66 (n7) 652E.

67 (n7) 652G.

68 (n7) 652B-D.

69 (n7) 656A-B.

De Villiers AJA had found explicit support for this principle in the writings of both Gluck[70] and Voet.[71] It was also pointed out that the principle had indeed subsequently been approved by two very eminent judges: Juta JP in *Wilken v Holloway*,[72] and Wessels JP in *Lilienfield and Co v Bourke*,[73] as well as by the Appellate Division in *Port Elizabeth Municipality v Uitenhage Municipality*.[74]

In the face of such considerable and consistent authority, Nicholas AJA held that the appropriate action in a case such as that before the court must be a *condictio indebiti*. But what of the majority's view that the *condictio indebiti* was not the relevant action, but the action was one based upon an independent implied contract? Nicholas AJA conceded that there was an implied agreement of sorts reached between the parties:

> "[The Bank] was tendering payment under protest, by which clearly it meant with reservation of its right to institute an action for repayment (*condicere, repetere*). The Commissioner, by accepting payment subject to that reservation, must be taken to have agreed thereto. In the words of *D* 12.6.2, *negotium enim contractum est inter eos*. But for such a contract, the Bank could, if it sued for repayment, have been met with an exception of no cause of action."[75]

But the learned judge held that the majority had misconstrued the nature and effect of this agreement:

> "The contract which was made was not independent, but was ancillary or subsidiary to the *condictio indebiti*: it did not create a substantive right but recognised that the Bank had the procedural right to seek a *condictio* (or *repetitio*) despite the fact that the *solutio* was being made voluntarily and with knowledge that it was made *indebite*."[76]

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70 *Ausführliche Erlänterung der Pandecten Vol 13* s384. See *Union Government (Minister of Finance) v Gowar* (n5) 445.

71 Voet 12.6.6.

72 (n45).

73 (n11).

74 (n7).

75 *CIR v First National Industrial Bank Ltd* (n7) 658B-C. Of course, any payment made *scienter*, or knowingly, without mistake, duress or reservation of rights, bars a claim in terms of the *condictio indebiti*.

76 (n7) 658G-H.

Nicholas JA's point is a subtle, yet significant one. This claim is not grounded in contract, but is one predicated on principles of unjustified enrichment. By making the payment under protest, and thereby reserving the right to claim repayment of the money should it subsequently be found not to be due, the Bank ensured that they would not be barred from instituting a claim for a *condictio indebiti*, on the basis that it had paid the money freely and voluntarily. The Commissioner, by accepting payment on these terms, impliedly agreed to the Bank's reservation of this right. This right to institute action for restitution was not an independent substantive right. The Commissioner, by accepting the payment, never undertook to do anything, nor made any promise to pay anything. Rather, the Commissioner impliedly agreed to recognise the Bank's procedural right to challenge the legality of the payment in court, and to seek restitution should the court, in any such action, find that the money was not due. Ultimately, the implied agreement was one that made the payment conditional. It was necessary in order to ensure that the right to institute a *condictio indebiti* was not lost.

The role of a protest in these circumstances, as well as the identification of the basis of a litigant's action where a payment is made under protest, has thus been thrown into a state of some uncertainty as a result of the *CIR* case. Not only was there dispute in the case itself as to whether the protest entitles the aggrieved party to an enrichment or a contractual action, but the case also departs quite significantly from the trends in previous precedents, in that the majority plumped for the view that the action is contractual.

Although there have been very few reviews of this particular case, those who have been disposed to comment on the decision are unanimously of the view that the minority opinion of Nicholas AJA is the better one. Eiselen and Pienaar describe the "independent contract" argument of the majority as highly artificial,[77] and Du Plessis states that it "smacks of fiction".[78] Both Lewis[79] and Cassim,[80] in addition to their disapproval of the independent contract approach of the majority, criticise the majority for rejecting the notion that a duress argument could have applied on the facts of the case. Lewis submits that since the Commissioner had a right to impose heavy penalties for late payment of the money that he had demanded (10% of the principal amount per month), this was a very real and persuasive motivation for making the payment immediately. Although no overt threat to impose penalties was made by the Commissioner, Lewis suggests that such a threat could easily have been implied.[81] If this were the case, she submits that

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77 Eiselen and Pienaar (n7) 138(c).

78 Du Plessis (n7) 139.

79 Lewis "Unjustified Enrichment" in 1990 *Annual Survey of South African Law* 125.

80 Cassim (n14) 69.

81 (n79). She states, quite rightly, at 125: "One does not take risks with the fiscus."

the payment could have been reclaimed by a *condictio indebiti* for duress. This approach would have meant that the court could have avoided the doctrinal difficulties in which it ultimately became entangled.

By way of comparison, the Aimplied contract" argument endorsed by the majority of the Appellate Division in *CIR v First National Industrial Bank Ltd* has also been mooted in English law. The one English case that stands as authority for this argument is the decision of the Court of Chancery in *Sebel Products Ltd v Commissioners of Customs and Excise*.[82] But this decision virtually stands on its own. Commentators do not consider it to be a significant argument for restitution in English law, and it is seldom mentioned.[83] Moreover, it is interesting to note that although the approach was referred to by the House of Lords in *Woolwich Equitable Building Society v Inland Revenue Commissioners*,[84] the decision of Vaisey J in *Sebel*'s case was criticised by Lord Goff on the basis that the learned judge in that case may have stretched the facts a little too far to find an implied agreement.[85] Lord Keith even went so far as to say he did not accept the implied contract theory as a proposition of law.[86] The status of the implied contract argument as a factor justifying restitution is thus unclear in English law: although the principle appears to exist, there is little authority for it, and the sentiments about it in modern times have been negative.

As far as South African law is concerned, it is my view that Nicholas AJA's view is the correct one, and that the implied contract argument is not appropriate. This is a classical example of a situation where the *condictio indebiti should* lie, since the performance has been discovered to have been made *indebite*. The plaintiff, by protesting and reserving his or her rights, ensures that he or she can defeat the error requirement, and reclaim that which was transferred *sine causa*. There is no need to create a fictional implied contract. This is not a situation where the law of contract needs to encroach hegemonically. The law of unjustified enrichment provides the appropriate action and justification for the aggrieved party's remedy.

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82 1949 Ch 409.

83 Goff and Jones *The Law of Restitution* (1998) 226 describe this as a situation where there is "a contract for repayment", but only discuss it in 3 lines. The only other authorities that mention it appear to be Birks "Misnomer" in Cornish *et al* (ed) Restitution *Past, Present, Future − Essays in Honour of Gareth Jones* (1998) 1 19; Jaffey *The Nature and Scope of Restitution* (2000) 204.

84 1993 AC 70.

85 (n84) 165-6. This is also the view of Birks (n83) 19.

86 (n84) 151. See too Goff and Jones (n83) 226n3.

Should the above position be correct, then there are obvious conceptual difficulties with requiring proof of protest as an element of a duress claim, as well as recognising a protest as a separate cause of action under the *condictio indebiti*. It is confusing, if nothing else. Furthermore, this confusion creates a difficulty for those wishing to draw up their pleadings. Upon what basis does one argue one's case? As has been pointed out above, even senior judges of our courts and senior academics have disagreed about whether a case amounted to one where duress ought to have been pleaded, or whether the alternative plea of protest alone is sufficient. A classic example is the *Gowar* case, where the facts could support both arguments. Indeed, whereas the majority plumped for the duress approach, De Villiers AJA adopted the protest argument, so setting the scene for the development of this anomaly that has been discussed in this article.

It is submitted that the most obvious way in which to avert such a difficulty is to jettison the protest requirement from the duress cause of action. The existence of a protest is only of marginal relevance to an enrichment claim for duress, and making proof of an unequivocal protest a requirement of a successful action seems erroneous. Windeyer J, in the Australian case of *Mason v The State of New South Wales*,[87] put the matter perfectly when he said:

> "[There is] no magic in a protest; for a protest may accompany a voluntary payment or be absent from one compelled ... Moreover the word 'protest' is itself equivocal. It may mean the serious assertion of a right or it may mean no more than a statement that the payment is grudgingly made."[88]

The seeds of the requirement were of course planted by De Villiers CJ in *White Brothers v Treasurer-General*. The Chief Justice relied upon three English decisions where the question of protest had been discussed.[89] However, in English law the existence of a protest was never in fact considered to be a requirement for a claim for money had and received under duress. Lord Reading CJ, who reviewed the English position in *Maskell v Horner*,[90] was clear on the matter:

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87 1959 102 CLR 108.

88 (n87) 143.

89 These were: *Parker v The Great Western Railway Company* (n9), *Parker v Bristol and Exeter Railway Company* (n12), and *Ashmole v Wainwright* (n12).

90 1915 3 KB 106.

> "I doubt whether ... there must be anything in the shape of an express notice or declaration to the defendant of the plaintiff's intention to keep alive his right to recover. It is clear ... that no express words are necessary and that the circumstances attending to the payments and the conduct of the plaintiff when making them may be sufficient indication to the defendant that the payments were made with the intention of closing the transaction."[91]

What happened in the *White Brothers* case, though, is that De Villiers CJ happened to cite a few cases where a protest had been made on the facts, and divined from this a general requirement that a protest had to have been made, as a matter of law. This finding was, from the point of view of principle, misconceived. In Du Plessis's words, De Villiers CJ "'imported' his own invention – the protest requirement".[92]

The difficulties with a requirement of protest in a duress claim are fairly obvious. Why should a failure to protest mean that there is no duress?[93] Proof of protest may very occasionally assist in providing inferential evidence of duress in borderline cases, but it is submitted that this is about as far as the utility of a protest can be stretched. In confrontational situations it may be wiser to keep quiet, rather than to antagonise the other party any further with complaints. And why should the aggressor be entitled to escape responsibility for his or her actions due to the fact that the party faced with a threat failed to complain? Making a protest a requirement could also have the effect of reducing the protest to a formality, rather than a heartfelt objection, which would deprive the protest of any real meaning.[94]

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91 (n90) 119. See also *Spanish Government v North of England SS Ltd* 1938 54 TLR 852.

92 Du Plessis (n7) 135-6.

93 It is worth remembering that Dwyer J in his dissenting opinion in *White Brothers v Treasurer-General* (n2) 335-6 made this very point.

94 For authorities, see *Universe Tankships of Monrovia Inc v International Transport Workers Federation* 1983 AC 366 400E; *Vantage Navigation Corporation v Suhail and Saud Bahwan Building Materials llc (The Alev)* 1989 1 Lloyd's Rep 138 146; *Murphy v The Brilliant Co* 83 NE 2d 166 (1948); Dalzell "Duress by Economic Pressure II" 1942 *North Carolina LR* 341 382n288 and "Duress by Economic Pressure I" 1942 *North Carolina LR* 237 244, 252; Halson "Opportunism, Economic Duress and Contractual Modifications" 1991 *LQR* 649 667; Bigwood "Coercion in Contract: The Theoretical Constructs of Duress" 1996 University of Toronto LJ 201 258; Furmston (ed) *Butterworths Common Law Series: The Law of Contract* ( 1999) 697.

## 5 *Conclusion*

As a result, it is submitted that the existence of an unequivocal protest ought no longer to be required where a plaintiff seeks to reclaim an undue payment or transfer made under duress in South African law. Duress cases ought to be treated on the basis of the general elements pertinent to the doctrine. In particular it should be determined whether an illegitimate threat was made, which left the aggrieved party with no reasonable or acceptable alternative but to succumb to the threat, and make the payment or transfer. As other jurisdictions have found, requiring proof of a protest at either a substantive or an evidentiary level serves little to aid the true enquiry as to whether or not there has been coercion which induced the payment or transfer. Removing the protest requirement from the duress cause of action would make it easier for courts to distinguish between the cases of duress, on the one hand, and cases where the issue is a reservation of rights by means of a protest, on the other hand. If this approach were to be adopted, it might go some way towards clearing up the confusion that currently affects our understanding of the *condictio indebiti* in its contemporary guise.

**SAMEVATTING**

DIE TERUGVORDERING VAN BETALINGS WAT ONDER DWANG EN PROTES GEMAAK IS

In gevalle waar ‘n orgeregverdige betaling of oordrag deur dwang veroorsaak is, en daar geen kontraktuele verband tussen die partye is, sal die benadeelde party gematig wees om die betaling of oordrag terug te eis. Die beginsels van die reg op onegregverdige verryking sal in hierdie situasie van toepassing wees. Een van die noodsaaklike vooreistes vir ’n eis in hierdie verband is dat die betaling of oordrag onvryvillig gemaak was. Om hierdie vooreiste suksesvol te bewys, sal die benadeelde party moet bewys dat hy of sy die betaling of oordrag onder protes gemaak het. Die probleem in hierdie verband is dat ’n party kan ook ’n ongeregverdige betaling terugeis in ’n situasie waar hy of sy die betaling onder protes gemaak het, maar sonder die behoefte om dwang te bewys. In hierdie artikel sal die manier hoe die reg in hierdie verband ontwikkel het, nagegaan word. Daar sal voorgestel word dat die vooreiste van protes nie langer ’n aspek van die dwang-eis hoort te wees nie, in ‘n poging om die reg in die verband minder verwarrend te maak.