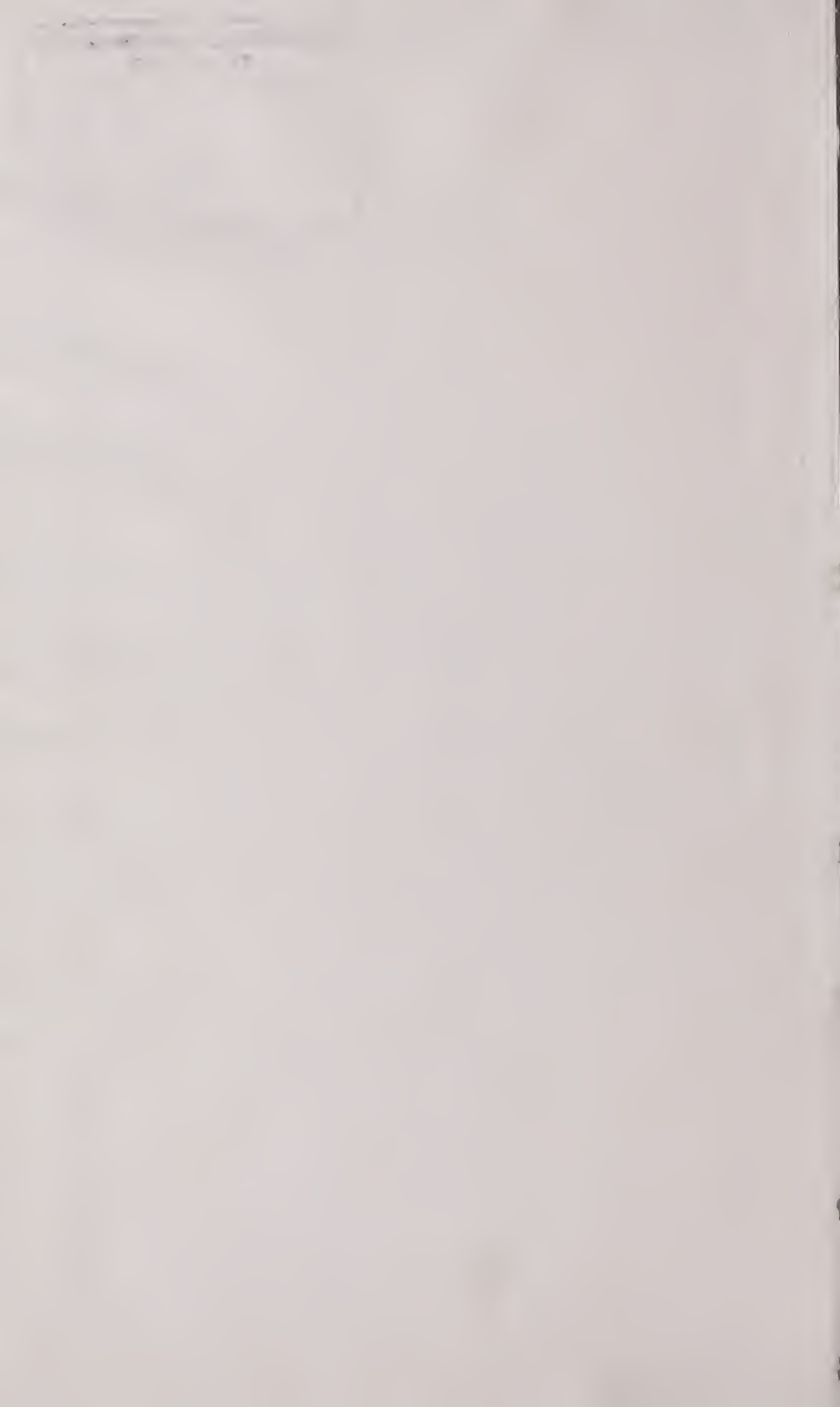


AKADEMIESE INLIGTINGSDIENS
TYDSKRIFTE
UNIVERSITEIT VAN PRETORIA

2003 -09-03

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Hedendaagse
Romeins-
Hollandse Reg**

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AKADEMIESE INLIGTINGSDIENS
TYDSKRIFTE
UNIVERSITEIT VAN PRETORIA


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HR HR

REDAKSIONEEL

..... 1

ARTIKELS

Presumptions in the South African law of evidence
(2) – by *CRM Dlamini* 3

Nalatige persoonlikheidskrenking – *deur JC Knobel*..... 24

Equality and non-discrimination in the new South
African constitutional order (3): The saga continues
– by *G Carpenter* 37

Die regsraad van prestasie –
deur JE du Plessis 59

Can the Family Advocate adequately safeguard our
children’s best interests? – by *N Glasser*..... 74

The admissibility at the subsequent criminal trial of
evidence tendered by the accused for purposes of bail
proceedings (1) – by *Wium de Villiers*..... 87

AANTEKENINGE

Dwang as verweer teen ’n klag van moord in ’n tyd
van geweld – *deur LC Coetzee* 99

Die reg of psigoseksuele outonomie, herroeping van
toestemming en die vraagstuk van verkragting deur
’n late – *deur JMT Labuschagne* 113

VONNISSE

Supermarkets and customer safety –
Monteoli v Woolworths (Pty) Ltd –
by *JR Midgley* and *B Leinius*..... 119

Ongeoorloofde vervreemdings en artikel 32 van die
Insolvensiewet – *Lane v Dabelstein* – *deur AL Stander* 123

Closure of illegal casinos, interpretation of the gaming
legislation and the role of the national gambling
board – The Supreme Court of appeal has spoken –
*Grand Slam Entertainment Centre v Minister
of Safety and Security* – *deur Marita Carnelley* 134

BOEKE

F Viljoen and *A Nienaber* (eds) *Plain legal language
for a new democracy*..... 144

PRYSWENNERS

..... 145

H R

H R

ARTIKELS

Presumptions in the South African law of evidence (2) – by CRM Dlamini	147
Drucilla Cornell's "imaginary domain": Equality, freedom and the ethic of alterity in South Africa – by N Bohler-Muller	166
Equality and non-discrimination in the new South African con- stitutional order (4): Update – by G Carpenter	177
International humanitarian and human-rights law pertaining to child civilians in armed conflict: An overview – by JA Robinson	186
The admissibility at the subsequent criminal trial of evidence tendered by the accused for purposes of bail proceedings (2) – by W de Villiers	203
Die interpretasie van artikel 2C van die Wet op Testamente 7 van 1953 (1) – deur J Jamneck	223

AANTEKENINGE

HIV/AIDS: the right to privacy versus the right to life – by M Blackbeard	232
Verkragting, dwang en geslagsomgang met 'n persoon in 'n toestand van bewusteloosheid of onmag – deur JMT Labuschagne	241
Laesio enormis outdated, enormous profits not – by PhJ Thomas	247
Some principles regarding the "requester" of access to a record and related issues in terms of the Promotion of Access to Information Act 2 of 2000 – by PJ Visser	254

VONNISSE

Nalatigheid as aanspreeklikheidsvereiste vir die <i>actio iniuriarum</i> – <i>Marais v Groenewald</i> – deur J Neethling	260
Toepassing van die Grondwet op die deliktereg – <i>Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)</i> – deur J Neethling en JM Potgieter	265
Die regsplig van die staat om die reg op die fisies-psigiese integriteit teen aantasting deur derdes te beskerm: Twee teenstrydige beslissings – <i>Van Eeden v Minister of Safety and Security</i> en <i>Seema v Lid van die Uitvoerende Raad vir Gesondheid, Gauteng</i> – deur J Neethling en JM Potgieter	273
Die vereiste van afweergeregtigheid by noodweer – <i>BGH, Beschl v 8/3/2000, NStZ 2000, 365</i> – deur JMT Labuschagne	278
A new trend in the admissibility of evidence to determine the meaning of words in a document – <i>Curren v Jacobs</i> – by S Cornelius	281
Protection of the right to accrual sharing – <i>Reeder v Softline</i> – by S Ferreira	287
Stretching the scope of the <i>condictio ob turpem?</i> – <i>FNB v Perry</i> – deur GTS Eiselen	292
Who is accountable to whom? – <i>Hamilton-Browning v Denis Barker Trust</i> – by S Scott	298
The winding-up of a body corporate established in terms of the Sectional Titles Act – <i>In re: Body Corporate of Caroline Court</i> – by A Boraine and P O'Brien	307
Omskepping van toonderdokument in orderdokument – <i>Cutfin (Pty) Ltd v Sangio Pipe CC</i> – deur CJ Nagel	317

AANKONDIGING

259

ERRATUM

259

HR HR

ARTIKELS

The onus of proof in bail proceedings under South African and Canadian law (1) – <i>by W de Villiers</i>	321
Betekenis en grondslae van die reg op toegang tot inligting – <i>deur BV Roberts</i>	339
Hersiening van besluite geneem ingevolge die Wet op Bevordering van Toegang tot Inligting 2 van 2000 – <i>deur MP Ferreira</i>	354
The influence of free and foreign trade on the development of Roman law – <i>by R van den Bergh</i>	373
Die interpretasie van artikel 2C van die Wet op Testamente 7 van 1953 (2) – <i>deur J Jamneck</i>	386
Good faith and equity in the law of contract in the civilian tradition – <i>by P du Plessis</i>	397

AANTEKENINGE

Het die Angelsaksiese regtersamp 'n verleentheid vir regstaatlke waardes geword? – <i>deur JMT Labuschagne</i>	413
A comparative perspective on the attempted exclusion of foreign involvement in the South African private security industry – <i>by PJ Visser</i>	419
Legaliteit en Golgota: Moderne perspektiewe oor die verhoor van Jesus Christus – <i>deur E Bertelsmann en B Bekink</i>	423

VONNISSE

Setting the boundaries for expert evidence in support or defence of medical negligence – <i>Michael v Linksfield Park Clinic (Pty) Ltd</i> – <i>by P Carstens</i>	430
Die leerstuk van regverdigbare verwagting en die reg op 'n billike aanhoring – <i>Nortje v Minister van Korrektiewe Dienste</i> – <i>deur DM Pretorius</i>	436
The delictual liability of a union for advice given to its members – <i>Sikhwele Jada v SAMWU</i> – <i>by SA Hakime and L Steynberg</i>	446
Moving towards recognition of constructive expropriation? – <i>Steinberg v South Peninsula Municipality</i> – <i>by AJ van der Walt</i>	459
Die Hoogste Hof van Appèl gee hoop vir die teleurgestelde begunstigde (“disappointed beneficiary”) – <i>BOE Bank Ltd v Ries</i> – <i>deur J Neethling en JM Potgieter</i>	473
Strafregtelike aanspreeklikheid en die verweer van tydelike nie-patologiese ontoerekeningsvatbaarheid – verlies van konatiewe geestesfunksie onderskei van blote verlies van humeur – <i>S v Eadie (1)</i> – <i>deur J le Roux</i>	478
The Constitutional Court deliberates on the constitutionality of the Hague Convention on the Civil Aspects of International Child Abduction – <i>LS v AT</i> – <i>by CMA Nicholson</i>	482
Registrasie van onroerende trustgoed in naam van “trustees van tyd tot tyd” – <i>Joubert v Van Rensburg</i> – <i>deur P de W van der Spuy en A van der Linde</i>	485
Kredietooreenkomste – Paaiementsgewyse betaling van die deposito – <i>Van der Westhuizen v BOE Bank Bpk</i> – <i>deur S Renke</i>	493

HR HR

ARTIKELS

The onus of proof in bail proceedings under South African and Canadian law (2) – <i>by W de Villiers</i>	497
The constitutional concept of co-operative government and its application in education – <i>by E Bray</i>	514
Die interpretasie van artikel 2C van die Wet op Testamente 7 van 1953 (3) – <i>deur J Jamneck</i>	532
Juridiese denkpatriene as oorblyfsels van oerreligieuse rites: 'n Regsantropologiese perspektief op die behoefte aan angswerende meganismes by regspraak – <i>deur JMT Labuschagne</i>	539
The child's right to be heard in custody and access determinations – <i>by A Barratt</i>	556
Aanspreeklikheid vir “nuwe” risiko's: Moontlikhede en beperkinge van die Suid-Afrikaanse deliktereg – <i>deur J Neethling</i>	574

AANTEKENINGE

Dignity and open court in undefended divorce proceedings: A proposal for reform – <i>by K Müller and M Tait</i>	593
Voordeel vir skuldeisers in geval van gedwonge sekwestrasie as gevolg van agterstallige heffings ingevolge die Wet op Deeltitels – <i>deur C Louw</i>	597
Enkele gedagtes oor die Komitee van die Regte van die Kind – <i>deur JA Robinson</i>	600
Voluntary winding-up of a company and “dismissals” in terms of the Labour Relations Act – <i>by BPS van Eck and A Boraine</i>	610
Notes on certain criminal prohibitions in the Private Security Industry Regulation Act 56 of 2001 – <i>by PJ Visser</i>	623
The freedom to propagate a religion or denomination as an element of the right to freedom of religion – <i>by G van der Schyff</i>	627
The noting of an appeal against a winding-up order: Suspension or continuation? – <i>by PA Delpont and DA Burdette</i>	632
Standing time clauses – where do we stand? – <i>by B Kuschke</i>	638

VONNISSE

Revaluation of conditions of title – <i>Camps Bay Ratepayers Association v Minister of Planning Western Cape</i> – <i>by J van Wyk</i>	642
Aspects of the “once and for all” rule in a contractual claim – <i>Signature Design Workshop CC v Eskom Pension and Provident Fund</i> – <i>by PJ Visser</i>	649
Die staat se beskermingsplig teenoor 'n aangehoudene met selfdodingsneigings – <i>Kudla v Poland EHRM</i> – <i>deur JMT Labuschagne</i>	652
Summary execution clauses in pledge and perfecting clauses in notarial bonds – <i>Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd</i> – <i>by S Scott</i>	656
Pharmaceutical tablet shapes as trade marks – <i>Triomed (Pty) Ltd v Beecham Group plc</i> – <i>by H Blignaut</i>	665
.....	573

ERRATUM

INLICHTING AAN OUTEURS

Bydraes vir publikasie en korrespondensie met die redakteur moet gestuur word aan professor CJ Nagel, Die Redakteur THRHR, Fakulteit Regsgeleerdheid, Universiteit van Pretoria, Pretoria, 0002; e-pos cnagel@hakunaup.ac.za. Inskrywings op die blad en advertensies moet gerig word aan Butterworths, Posbus 792, Durban 4000.

Die redakteur moet volledig ingelig word indien 'n publikasie reeds elders in die geheel of gedeeltelik gepubliseer is, of vir publikasie voorgeleë is.

Outeurs word versoek om manuskripte so ver moontlik volgens die styl van die *Tydskrif* voor te berei. Volledige riglyne aan outeurs verskyn in 1985 *THRHR* 122-126. Die algemene riglyne wat op hierdie bladsy verskyn en 'n onlangse uitgawe van die *Tydskrif* kan ook in geval van onsekerheid geraadpleeg word. Die redakteur kan bydraes op vertroulike grondslag aan kundige arbiters voorleë om geskiktheid vir publikasie te bepaal. Die redaksie sal manuskripte wysig om met die styl van die *Tydskrif* ooreen te stem, taalfoute reg te stel en waar nodig duidelikheid te bevorder.

Artikels moet in die reël nie langer wees nie as 7 000 woorde (ongeveer 20 bladsye getik soos hieronder voorgeskryf). 'n Artikel moet voorsien wees van die outeur se voorletters en van, sy akademiese kwalifikasies, 'n beskrywing van sy betrekking en die naam van die instansie waaraan hy verbonde is, en 'n kort opsomming (ongeveer 300 woorde) in Engels as die artikel in Afrikaans geskryf is, en omgekeerd. Die opsomming moet ook van 'n vertaalde titel voorsien word. *Voetnote* moet op aparte bladsye (dws nie onderaan die bladsy waarop hulle betrekking het nie) getik word.

Aantekeninge, vonnisbesprekings en boekresensies: Die outeur se naam en die instansie waaraan hy verbonde is, moet voorsien word. Voetnote moet glad nie gebruik word nie – alle verwysings moet in die teks, tussen hakies, ingewerk word. *Vonnisbesprekings* word ook van titels voorsien, met die naam van die vonnis as subtitel. By *boekbesprekings* dien die titel van die boek wat geresenseer word, as titel. Die naam van die boek se outeur, uitgawe (indien nie die eerste uitgawe nie), uitgewer, plek van uitgawe, jaar van publikasie, getal bladsye en die prys (harde- en sagteband waar nodig) moet verskaf word. (Raadpleeg 'n onlangse uitgawe van die *Tydskrif*.)

Die volgende geld vir alle manuskripte:

- *Formaat* Manuskripte moet dubbelgespasieerd getik wees op net een kant van A4-grootte papier. Dit geld ook vir die opsomming, aanhalings en voetnote. Bydraes moet ook óf op skyf ("stiffie") óf per e-pos ingedien word.
- *Afkortings* verskyn nie in die teks nie; in *voetnote* (en gedeeltes tussen hakies wat dieselfde doel as voetnote dien) soveel erkende afkortings moontlik. Geen punte word by afkortings gebruik nie. Sowel aanmeekaar-geskrewe as aparte woorde word sonder spasie afgekort: bv, asb, km, tap, tov, aw, VSA, *THRHR*, RSA, BA, LLB, Unisa, *SALJ*. *Voorbeelde:* a vir artikel(s), bl vir bladsy(e), ev vir en volgende, par vir paragraaf(we), 2e uitg vir tweede uitgawe, R vir regter, AR vir appèlregter, RP vir regter-president, WnAR vir waarnemende appèlregter, HR vir hoofregter, reg vir regulasie, hfst vir hoofstuk, vgl vir vergelyk, WnR vir waarnemende regter.
- *Aanhalings* word presies soos in die oorspronklike weergegee, dit wil sê met die kursiverings, hoofletters,

punte ensovoorts onveranderd. enige verandering of invoeging in 'n aanhaling word tussen reghoekige hakies aangebring, byvoorbeeld "[I]n..." Outeurs word versoek om aanhalings noukeurig te kontroleer.

- *Hoofletters* Die gebruik van hoofletters in Afrikaanse bydraes word sover moontlik beperk: die regter, die appèlhof, die parlement, die minister, die hof, die regter-president. Alle voetnote begin met 'n hoofletter.
- *Opskrifte* Raadpleeg hierdie uitgawe vir voorbeelde.
- *Aanhalingstekens* Gebruik dubbel aanhalingstekens, met enkel aanhalingstekens *binn*e 'n aanhaling. By volsinaanhaling kom die aanhalingsteken ná die punt; by ander aanhalings vóór die komma, dubbelpunt, kommapunt ensovoorts.
- *Kursivering* Aanhaling (ook uit Latyn) word *nie* gekursiveer (onderstreep) nie; woorde en uitdrukkings uit 'n ander taal as dié van die bydrae word gekursiveer: *dolus, fait accompli, Grundnorm, rule of law*.

Verwysings

- *Vonnisse* Die name van die partye en die v daartussen word gekursiveer (of onderstreep). Die woorde "and another", "en ander", "NO" ensovoorts word wegelaat. Die Engelse verwysings vir voor-1947-vonnisse word ook in Afrikaanse bydraes gebruik. *Voorbeelde:* *Botha v Botha* 1979 3 SA 792 (T); *Talbot v Von Boris* 1911 1 KB 854; *Ex parte F* 1963 1 PH B9 (N); *Re Waxed Papers Ltd* 1937 2 All ER 481 (CA); *Shatz v Josman* 1935 NPD 142.
- *Boeke* Dit is onnodig om die voorletters van 'n boek se outeur(s) te verskaf (behalwe as die weglating tot verwarring kan lei). Die titels van boeke word gekursiveer (onderstreep). Net die eerste woord begin met 'n hoofletter, behalwe waar eiename (ook as byvoeglike naamwoorde) in die titel voorkom. Slegs die datum van die uitgawe kom tussen hakies: Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989).
- *Artikels* Titels van artikels word tussen aanhalings-tekens geplaas. Soos by boeke, begin net die eerste woord met 'n hoofletter: Joubert "Aspekte van die aanspreeklikheid van vennote" 1978 *THRHR* 291.
- *Tydskrifte* Name van tydskrifte word gekursiveer (onderstreep) en volledig uitgeskryf (behalwe *LJ, LR en Univ*): *Harvard LR, Yale LJ, De Rebus, De Jure*. Maar: *THRHR, SALJ, TSAR, CILSA, SASK, SA Merc LJ, LQR, TRW*. Die bandnommer word wegelaat (behalwe waar die bladsynommers van 'n tydskrif nie jaarlikse deurlopend is nie – soos by *Codicillus*): 1971 *THRHR* 12; 1979 *SALJ* 307; 1987 (2) *Codicillus* 13.
- *Wetgewing* Die naam en nommer van 'n wet word nie gekursiveer nie en word só weergegee: Die Wet op Prokureursordes 71 van 1975; die Maatskappywet 46 van 1926. Verwysings na wette in die loop van die teks kan egter ook informeel wees (sodra dit vir die leser duidelik is na watter wet verwys word): die 1926-wet, die Maatskappywet van 1926.
- *Ou bronne* Sien 1985 *THRHR* 125.

REDAKSIONEEL



Aankondigings en vermeldings

Die onlangse Algemene Jaarvergadering van die Vereniging Hugo de Groot het verskeie belangrike veranderings rakende *Tydskrif* opgelewer.

Getrou aan die spreekwoord dat alle goeie dinge tot 'n einde kom, het Gretchen Carpenter besluit om die redakteurskap neer neer te lê. 'n Ou gesegde maan dat die waarde van water eers besef word nadat die fontein opgedroog het. Op haar beskeie manier het Gretchen egter aangedring dat geen *laudatio* in hierdie rubriek aan haar opgedra word nie. Daarom word volstaan met 'n opregte woord van dank en waardering vir die onbaatsugtige wyse waarop sy haar oor die jare aan *Tydskrif* toegewy het. Dit was voorwaar vir almal 'n voorreg om met haar as assistent-redakteur en later as redakteur saam te werk. Die vertroude word uitgespreek dat sy haar nutgevonde vrye tyd met vrug sal aanwend om al die boeke en artikels te publiseer waarvoor daar oor die jare geen tyd was nie!

Steeds aan die verlieskant het die uitgewer bekend gemaak dat, hoofsaaklik weens 'n daling in die getal intekenaars, *Tydskrif* teruggesny word tot 144 bladsye per band ten einde te verseker dat dit steeds ekonomies lewensvatbaar is. (Hierdie probleem is nie uniek aan *Tydskrif* nie en al die Suid-Afrikaanse regstydskrifte gaan onder dieselfde probleem gebuk.) Vir outeurs – veral akademici wat vir elke bydrae subsidie verdien - is dit waarskynlik 'n skok, aangesien soveel minder bydraes voortaan per jaar geplaas kan word. Bydraes sal, soos in die verlede, sover moontlik geplaas word in die chronologiese volgorde waarin dit ontvang is. Die moontlikheid word egter ondersoek om meer as die 144 bladsye te publiseer deur outeurs te akkommodeer wat hul bydraes vroeër geplaas wil hê. Dit sal egter inhou dat bladgelde van sodanige outeurs verhaal sal moet word. Volledige inligting in hierdie verband sal in 'n volgende uitgawe bekend gemaak word. Ten einde ruimte optimaal te benut, sal die gereelde “Inligting aan Outeurs” en “Redaksionele Kommentaar” nie meer in elke uitgawe verskyn nie. Outeurs word gevolglik aangemoedig om korter bydraes vir publikasie voor te lê.

Aan die bonuskant is die pryse verander en verhoog. Daar is voortaan pryse vir die beste eersteling-artikel, die beste bydrae in Afrikaans, die beste bydrae algeheel en die beste korter bydrae (dws 'n aantekening of vonnisbespreking). Pryse wissel van (regs)boekbewyse ter waarde van R1500 tot 'n jaarlikse intekening op *Tydskrif*.

Die redakteur ontvang graag kommentaar van intekenare, lesers en outeurs oor die *Tydskrif* self: Voldoen dit byvoorbeeld aan sowel die praktisyn as die akademikus se behoeftes? Is die onderwerpe wat daarin gedek word relevant? Moet *Tydskrif* steeds pog om Afrikaans as regstaal te bevorder? Indien wel, hoe kan dit gedoen word en wat van ander amptelike tale as regstale? Is *Tydskrif* se naam steeds gepas? Wat van byvoorbeeld bloot *Tydskrif vir Hedendaagse Reg / Journal of Contemporary Law*?

Redaksionele beleid

- 1 Die *THRHR* stel hom ten doel om uitmuntendheid in navorsing op alle gebiede van die Suid-Afrikaanse reg te bevorder deur bydraes van gehalte te publiseer, hetsy as vollengte-artikels, hetsy as korter aantekeninge of vonnisbesprekings. Vollengte-artikels in Engels of Afrikaans word voorsien van opsommings in Afrikaans en Engels onderskeidelik. Waar gepas, kan opsommings in enige van die ander amptelike tale van Suid-Afrika ook voorsien word.
- 2 Die tydskrif verskyn vier keer per jaar (in Februarie, Mei, Augustus en November).
- 3 Bydraes deur buitelandse skrywers word verwelkom.
- 4 Die gehalte van publikasies word verseker deur bydraes te onderwerp aan beoordeling deur erkende deskundiges in die betrokke veld. Veral waar minder ervare skrywers se werk ter sprake is, word bydraes wat nie publiseerbaar bevind is nie saam met die beoordelaar se kommentaar aan die skrywer teruggestuur en word die skrywer 'n geleentheid gegun om die bydrae weer voor te lê nadat dit omgewerk is.
- 5 Bydraes in Engels en Afrikaans is ewe welkom; geen voorkeur word aan enige van die tale verleen nie.
- 6 Bydraes wat reeds elders verskyn het, word in die reël nie vir publikasie aanvaar nie; hulle kan egter wel oorweeg word indien die redakteur meen dat die onderwerp en die gehalte van die item dit regverdig.
- 7 Bydraes wat vir publikasie aanvaar is, sal gewoonlik verskyn in die volgorde waarin hulle ontvang is; die redakteur kan egter by geleentheid van hierdie praktyk afwyk om wat inhoud betref die balans te behou tussen die verskillende items wat in 'n bepaalde uitgawe verskyn, of om 'n bydrae wat buitengewoon aktueel is, te akkommodeer.
- 8 Navorsing deur minder ervare skrywers word aangemoedig deur die uitloof van 'n prys vir die beste bydrae deur 'n eersteling-bydraer wat die rang van senior lektor of laer bekleer ten tyde van die voorlegging van die bydrae.
- 9 Daar word 'n prys uitgelooft vir die beste artikel ongeag onderwerp of taalmedium.
- 10 Die voortgesette ontwikkeling van Afrikaans as regstaal word aangemoedig deur die uitloof van 'n prys vir die beste bydrae in Afrikaans.
- 11 Die skryf van nuttige bydraes van meer beperkte omvang word aangemoedig deur die uitloof van 'n prys vir die beste aantekening of vonnisbespreking.
- 12 Wat bogenoemde pryse betref, kan meerdere bydraes deur een skrywer saam oorweeg word. Die redaksie hou egter die reg voor om geen prys in 'n bepaalde kategorie toe te ken nie indien dit van mening is dat die gehalte van die bydraes wat ontvang is, nie die toekenning van die prys regverdig nie.

Presumptions in the South African law of evidence (2)

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4 PRESUMPTIONS IN SOUTH AFRICAN LAW

4.1 Introduction

Although presumptions have been used extensively in the South African criminal process, few writers have attempted to settle definitively the definitional content of the term. Because of the changes wrought by the new Constitution, it will be necessary to deal with the position before and after the adoption of the Bill of Rights.

4.2 The classificatory and definitional controversy

Different authors define the term "presumption" differently, although in my view there are certain elements common to the various definitions.

Quoting McCormick's *Handbook of the law of evidence*, Van der Merwe *et al* define a presumption as "a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts".¹ The definition is satisfactory in so far as it focuses on the role of the presumption in the process of reasoning. But it is incomplete because it makes no reference to the legal nature of the presumption in the evidential system, that is, that the application of a presumption imposes a legal duty to reason in a certain way.

Schmidt has defined a presumption as "n voorlopige aanname wat die regter maak".² This definition, while focusing correctly on the legal nature of the presumption, fails to focus correctly on the effect of a presumption. Not all presumptions have a provisional effect. Some of the so-called irrebuttable presumptions have a final effect, in that once they are applied they foreclose the production of evidence on the point in issue. A judge cannot provisionally accept the content of such a presumption, since its effect is final. If a judge accepts the logical directives of such a presumption, he must apply them to the exclusion of all other evidential matter which may factually compete with the contents of the accepted presumption. Moreover, not only a judge, but also any other officer presiding over a court of law, is entitled to employ presumptions to resolve factual issues presented to him or her for decision.

1 371-372.

2 1963 *THRHR* 269.

Perhaps realising the unsatisfactory nature of his definition, Schmidt later reviewed and refined it. In his later work on evidence,³ he defines a presumption as

“’n aanname wat die hof maak omtrent ’n feit wat nie regstreeks deur getuienis bewys word nie. Dit is derhalwe ’n middel waarmee bewys verskaf word sonder dat getuienis gelewer is van die feit wat bewys word”.

Schmidt’s latter definition, though seeking to avoid the unsatisfactory features of the former, is, however, itself unsatisfactory. This is because the definition omits to mention the compulsory nature of the “aanname”. Schmidt’s definition is nevertheless more acceptable than other definitions since it focuses, correctly, on a presumption as a “means” of furnishing legal proof.

Lansdown and Campbell⁴ categorise presumptions into various classes and then define each class of presumption separately. According to them, presumptions can be divided into presumptions of law and presumptions of fact. Presumptions are inferences “of fact which the law requires a court to draw from a proved or assumed fact”.⁵ Presumptions of fact are “merely permissible inferences drawn from common concatenations of circumstantial evidence”.⁶ A criticism which seems justifiable of the manner in which Lansdown and Campbell treat the subject of presumptions is that they do not analyse the concept critically and do not show how presumptions may affect the all-important facets of onus and *quantum* of evidence in a lawsuit.

Hoffmann and Zeffert⁷ basically follow the format adopted by Lansdown and Campbell. However, they divide presumptions into three categories, namely irrebuttable presumptions of law, presumptions of fact, and rebuttable presumptions of law. They define the various classes separately, to wit: “An irrebuttable presumption of law is simply an ordinary rule of substantive law formulated to look like a rule of evidence.”⁸ This definition is unacceptable because rules of evidence are rules of law in the sense that they are normative guidelines which compulsorily govern the proffering of the means of proof or control the effect of such means within the courtroom milieu. Rules of evidence are as much rules of substantive law as any other rules of law. For example, the rule of substantive criminal law that one may not murder a human being has the same legal import as the rule that hearsay evidence cannot be admitted to prove the guilt of a citizen, in that both govern human action under different legal circumstances, and their infraction leads to a legal sanction.⁹ It is further submitted that the definition given by Hoffmann and Zeffert of an irrebuttable presumption in terms of the basic classification of legal rules into substantive and adjectival rules is incorrect, for it focuses, not on the functional role of presumptions, but on the formal categorisation of rules of law, the function of which is no more than to act as an aid to understanding the various rules of law.¹⁰ To elevate intellectual convenience to the status of a definitional element is surely insupportable.

3 *Bewysreg* (1982) 145.

4 915–920.

5 915.

6 919.

7 *Evidence* 414.

8 *Ibid.*

9 9 *LAWSA* 321.

10 Schmidt 6–7 and 7 fn 6.

Hoffmann and Zeffertt proceed to define rebuttable presumptions of law as rules of law "compelling the provisional assumption of a fact".¹¹ This definition is open to the criticism that, according to the categorisation by Hoffmann and Zeffertt of presumptions, irrebuttable presumptions are rules of substantive law, whereas it is not clear from the definition of rebuttable presumptions whether rebuttable presumptions are rules of law falling into the same category as irrebuttable presumptions. Are rules of law rules of substantive law? If so, what is the basis of the distinction between the two categories in terms of the Hoffmann and Zeffertt formulation? If not, then what is the difference?

A second criticism of this definition is that it seems to imply that presumptions may be applied in a vacuum, whereas presumptions always operate on the basis of certain proven facts, and always supply some missing evidential link, thereby facilitating the process of legal proof and decision-making in a court of law by indicating the factual proposition to be accepted by the court when there are two or more competing factual propositions.

Hoffmann and Zeffertt finally define a presumption of fact as "a mere inference of probability which the court may draw if on all the evidence it appears to be appropriate".¹² According to Hoffmann and Zeffertt, a presumption of fact is nothing but a factually permissible inference depending on the logic of, and circumstances posed by, each and every case. Hoffmann and Zeffertt, however, correctly point out that our highest court has disapproved of the tendency to elevate these permissible factual inferences into rules of law¹³ by the simple conceptual stratagem of labelling them "presumptions".

Hoffmann and Zeffertt are aware that the so-called presumptions of fact are not presumptions.¹⁴ Why they persist in maintaining this category is not clear, even though they aver that they do so "merely for the negative purpose of identifying them as such and establishing that they are not true presumptions or presumptions of law".¹⁵ This category of presumption does not deserve to exist in our legal terminology, and to persist in maintaining it simply because some of the authoritative works on evidence emanating from the Western common-law jurisdictions maintain it is not correct.¹⁶

O'Dowd divides presumptions into presumptions of law and presumptions of fact.¹⁷ He realises, however, that the maintenance of a category of "presumptions of fact" is logically untenable.¹⁸ The same criticism that has been levelled at Hoffmann and Zeffertt may therefore be levelled at O'Dowd for maintaining this category.

O'Dowd's definition of a legal presumption is worth noting:

"[A] presumption is a rule of substantive law which lays down that if certain facts are proved, certain conclusions must under all circumstances be drawn, or certain conclusions must . . . be drawn unless they are disproved by further evidence."¹⁹

11 417.

12 415.

13 416-417. See *Fourie* 1937 AD 31 42 44; *Sacco* 1958 2 SA 349 (N); *Sigwahla* 1967 4 SA 566 (A) 569H; *Snyman* 1968 2 SA 582 (A) 589H; *De Bruyn* 1968 4 SA 498 (A) 507F.

14 416-417.

15 417.

16 414.

17 106.

18 106. "It is, however, preferable to use the term 'presumption' only for presumptions of law."

19 *Ibid.*

According to O'Dowd, therefore, so-called rebuttable and irrebuttable presumptions are all rules of substantive law. This part of the definition is to be criticised for the same reasons advanced when criticising the Hoffmann and Zeffertt definition of irrebuttable presumptions. In any event, if the distinction between "substantive law" and "adjectival law" is maintained, then the definition is clearly wrong because the "presumption" that a child under the age of 7 years is *doli incapax*, and therefore incapable of committing a criminal offence, is clearly different from the true presumption *pater est quem nuptiae demonstrant*. Secondly, to equate the two categories as rules of "substantive law" is clearly wrong because their effects are completely different. Thirdly, the definition is open to criticism because it is illogical. In a court of law, a conclusion cannot be drawn and then disproved. Once drawn, a conclusion embodies a proposition of fact accepted by the court as correct, and upon which the court is prepared to base a factually determinative decision. The conclusion is drawn after all the available evidential matter, including presumptions, has been placed on record. The effect of rebutting evidence is to prevent the drawing of a factual conclusion which would otherwise be drawn.²⁰ Rebutting evidence does not disprove a conclusion; it prevents the drawing of the conclusion. O'Dowd is therefore incorrect.

It is incorrect to speak of disproving a conclusion for a further reason. A conclusion is not evidence. A conclusion is the determination by the trier of fact of what the disputed state of fact was at a given moment in the past. The determination is done by the trier of fact after listening to various assertions of fact pertaining to the disputed state of fact. The assertions of fact made by witnesses to the disputed state of fact may be disproved, that is, demonstrated to be incorrect by the proffering of more convincing assertions of fact which contain contrary averments.

A conclusion does not embody any evidential averment, since the trier of fact is not a witness. It is therefore logically impossible to disprove a conclusion. Thus O'Dowd is incorrect when he avers that a conclusion may be disproved by evidence.

Joubert *et al*²¹ define presumptions much more acceptably when they state that "a presumption is a method of reasoning or a legal device whereby the existence of a fact is assumed".²² But even this definition, more acceptable than the others though it is, is not satisfactory in all respects. A "method of reasoning" is a logical device which is employed whenever the inference of certain facts is made from proven facts. Such a device logically provides a sufficient basis for the drawing of an inference, and thus establishes the logical integrity or validity of the conclusion. It cannot be equated with a presumption, as Joubert *et al* seem to do. While a "method of reasoning" and a presumption may have the same value in logic, they do not have the same effect in evidence. A presumption is a device that must or may be employed in the law of evidence in certain circumstances in order to arrive at a conclusion regarding disputed facts. Thus a presumption is something more than merely a "method of reasoning". Had Joubert *et al* omitted from their definition the words "is a method of reasoning or", the result would have been a correct definition of a presumption, that is, "a legal device whereby the existence of a fact is assumed".

20 Schmidt 147.

21 9 LAWSA 321.

22 *Ibid.*

Most South African authors do not express an opinion on which of the three categories of so-called presumptions ought to be regarded as true presumptions. Only Schmidt follows the English writers, declaring unequivocally: “Die weerlegbare regsvermoede, *praesumptio iuris tantum* of eenvoudige *praesumptio iuris*, is die egte vermoede as regsreël.”²³

In view of the criticism levelled at so-called irrebuttable presumptions of law and at so-called presumptions of fact by respected commentators,²⁴ it is submitted that South African law in the past followed English law in regarding rebuttable presumptions of law as true presumptions.²⁵ Rebuttability was, in South African law, as in English law, the distinguishing characteristic of a presumption.

4 3 Effect of presumptions

In South African law, the usual effect of a presumption is either to assist a party in discharging an onus or to place an onus or duty to adduce evidence on his opponent.²⁶ Clearly, therefore, the application of a presumption affects the “incidence of the onus”²⁷ or creates “an artificial duty to adduce evidence on certain issues”.²⁸ In South African law, presumptions therefore affect the incidence of both the persuasive legal and evidential burdens. The effect of presumptions can be observed in both common law and statute law.²⁹

4 3 1 *Common-law presumptions and their effects on South African criminal law*

As stated in the previous paragraph, presumptions, at common law, affect the incidence of the burden of proof. As the expression “burden” has two possible meanings,³⁰ a question which arises is: in South African common law, may a presumption impose both the persuasive and the evidential burden? Hoffmann and Zeffertt are in no doubt that a distinction can be made at common law between those presumptions which impose a persuasive burden and those which impose an evidential burden.³¹

4 3 1 1 The persuasive burden imposed by common-law presumptions

There seems to be a difference of opinion among some of our eminent commentators regarding the incidence of the persuasive burden as a result of the application of a presumption. According to Schmidt, in criminal proceedings the state bears the onus of proof (persuasive burden) in all matters that the state must establish in order to obtain a conviction, save where a statute absolves the state of the duty to establish such facts, or in cases where an accused relies on mental instability in order to escape criminal liability. The persuasive onus of proving insanity rests on the accused.³² Therefore, according to Schmidt, in South African common law, no

23 147.

24 Hoffmann and Zeffertt 414–419; Schmidt 145–185; Lansdown and Campbell 915–920.

25 Hoffmann and Zeffertt 414. See also *Michelson* 1939 AD 10 14–15.

26 *De Sa* 1982 3 SA 941 (A).

27 Hoffmann and Zeffertt 419.

28 *Ibid.*

29 *Idem* 418.

30 *Idem* 385–386.

31 *Idem* 418.

32 Schmidt 56.

persuasive onus rests on an accused except in the one exceptional case referred to. Joubert *et al*, in another authoritative work, agree with Schmidt.³³ According to this view of the law then, South African law is identical to the English common law. But is this not too simplistic a view of South African law, and an overbroad generalisation of the effect of *Ndhlovu's* case?

The question is pertinent because another view is advanced by Hoffmann and Zeffertt, that is, that an onus of proof may be cast on an accused person by a common-law presumption.³⁴ In this connection, the expression "onus" is understood to be used by Hoffmann and Zeffertt to mean the persuasive burden because that is how the authors themselves use the term.³⁵ According to them, in criminal matters the onus of proof of illegitimacy is cast on the husband as a result of the application of the presumption *pater est quem nuptiae demonstrant*, and an onus of proof is cast upon a man who admits sexual intercourse with the mother but denies paternity of an illegitimate child.³⁶ Hoffmann and Zeffertt cite supreme court authority³⁷ in support of their view, but their reliance on that authority for their view that an onus of proof rests on the husband is misconceived.

Although in *Van der Merwe* the court spoke about "[d]ie aard van die bewyslas wat op appellant in hierdie saak rus",³⁸ it is clear that the court was not in fact referring to the nature of the onus of proof which rested on the husband, but rather to the standard of persuasiveness which evidence led by the husband must attain in order that he may be adjudged to have rebutted the applicable presumption. On a careful reading of the relevant passage in the judgment, it is abundantly clear that the "onus" referred to is nothing more than an onus to rebut, namely an onus to adduce evidence. The court persistently talks about "rebutting" an onus. The persuasive onus cannot, however, be rebutted, only discharged. The notion of rebuttal is strongly associated with the leading of counterevidence in a lawsuit.³⁹ Clearly, the so-called "onus" referred to is not the persuasive onus but the evidential burden.⁴⁰

In *Isaacs*⁴¹ the court held that the presumption *pater est quem nuptiae demonstrant* placed an onus on the husband. The court went on to say:

"All that such a person has to do in order to shift such an onus is to satisfy the Court, on a preponderance of probability, that his version is the correct one."

Scientifically, the burden of proof cannot shift because the onus of proof is fixed at the commencement of the trial once the issues have been determined.⁴² Therefore, the onus referred to in *Isaacs* is the evidential burden, not the persuasive onus. Clearly, Hoffmann and Zeffertt err when they consider that a persuasive onus rests on the man. Their mistake is attributable to "the inaccurate use of the word onus and to misconceptions flowing therefrom".⁴³

33 9 LAWSA 338.

34 418–419.

35 418, 424.

36 386.

37 425.

38 1952 1 SA 647 (O) 652C. See also *Isaacs* 1954 1 SA 266 (N).

39 *Van der Merwe's* case.

40 *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA 534 (A) 548B.

41 1954 1 SA 266 (N) 270A–B.

42 Hoffmann and Zeffertt 195; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA 548A–C.

43 *South Cape Corporation* case 1977 3 SA 546C–D; Schmidt 57.

A far more difficult issue is the assertion by Hoffmann and Zeffertt that the onus rests on the man to prove that he is not the father of an illegitimate child if he admits sexual intercourse with the child's mother. There is eminent authority for this assertion.⁴⁴ The onus that rests on the man was a creation of Van den Heever JP in *Pie's* case. The decision has been consistently followed, but its correctness is to be doubted. The rule saw the light of day in *MacDonald v Stander*,⁴⁵ a judgment of Van den Heever J when he was a judge of the High Court of South West Africa. The judgment was taken on appeal to the Appellate Division and it is quoted fully in the report of the Appellate Division judgment under the same name.

In *MacDonald* the defendant was sued for damages for seduction, lying-in expenses and maintenance for the child. The defendant admitted intercourse with the woman but denied that she had been a virgin when he had had sex with her, and denied that he was the father of her child. In the court *a quo*, Van den Heever J declared:

"Luidens ons regsvoorskifte, soos ek hulle verstaan, is dit dus onnodig om na te gaan of eiseres geloofwaardig is by die aanwysing van die vader. Verweerder kan die regsgevolge van sy erkende byslaap ontduik slegs deur bewys van die onmoontlikheid daarvan dat die kind van hom ontvang is."⁴⁶

It is to be noted that at that stage no explicit onus was placed on the man by the judge. All that was required of him was proof that it was impossible for the child to be his. The Appellate Division decided the matter on the evidence and considered that it was unnecessary to go into the issue of the credibility of the woman on which Van den Heever J had expended so much energy.⁴⁷ One gets the distinct impression that the Appellate Division was signalling to Van der Heever J that it was not impressed by his efforts. The Appellate Division chose to keep the matter open,⁴⁸ but it did state:

"Dus skyn hy te verskil van die mening uitgespreek in die gemelde reeks van beslissinge insover hulle die ongeloofwaardigheid van die vrou die deurslag laat gee."⁴⁹

It is submitted that this was an indication that, although it chose to keep the matter open, the Appellate Division considered Van der Heever J's views incorrect.

In 1945 the Appellate Division delivered judgment in *Ndhlovu*⁵⁰ which, following *Woolmington*, laid down that the onus was "on the Crown to prove all averments necessary to establish"⁵¹ the guilt of an accused person. The highest court having laid down that the only exception to the foregoing rule was the defence of insanity, one would have expected that all courts would have considered themselves bound by that judgment and would have followed it. But not Van der Heever J. In *Pie*⁵² he continued the argument that he had advanced in *MacDonald*. Not only did he single-handedly create a presumption⁵³ against the man, but he imposed a persuasive onus

44 *Pie* 1948 3 SA 1117 (O); *Swart* 1965 3 SA 454 (A); *Holloway v Stander* 1969 3 SA 291 (A).

45 1935 AD 325.

46 330.

47 334.

48 *Swanepoel* 1954 4 SA 31 (A) 38F.

49 *MacDonald* 335.

50 1945 AD 369.

51 386.

52 1948 3 SA 1117 (O).

53 *Jeggels* 1962 3 SA 704 (C) 706F-G.

on the accused to establish his innocence.⁵⁴ This judgment flew in the face of the ratio of *Ndhlovu* and was, it is submitted, clearly wrong. In mitigation, it can be stated that *Pie* was a judgment on review, so that the court did not have the benefit of adversarial argument, which could perhaps have ventilated the issues more effectively. But it can hardly be accepted that Van der Heever J was unaware of *Ndhlovu* and its import in criminal law, since the judgment in *Ndhlovu* was already three years old.

Van den Heever J was a very influential judge. In *Swanepoel*⁵⁵ the accused was charged under section 16(2) of the Children's Act 31 of 1937 in that he had failed to pay maintenance. He was convicted in the magistrate's court and then appealed. On appeal, the import of *Ndhlovu* was specifically argued.⁵⁶ Horwitz J, however, chose to follow Van der Heever J,⁵⁷ holding that an onus rested on the appellant who had admitted intercourse with the complainant to show that he "could not have been the father of the child so born".⁵⁸ The appeal was dismissed, as the court held that the appellant had failed to discharge the onus that rested on him.

In *Jeggels*⁵⁹ the court followed *Pie*, declaring that "[t]he common law is very clear on this point".⁶⁰ The influence of *Pie* can be discerned in a series of cases in different divisions.⁶¹ It was against this background that the Appellate Division delivered the judgment in *Swart*.⁶² The facts of the case were simple. The accused was charged with contravening section 18(2) of the Children's Act 33 of 1960. The provision was similar to section 16(2) of Act 31 of 1937.

Potgieter AJA, after referring to the various decisions, analysed the authorities in detail. He held that a presumption of paternity is created by the admission of sexual intercourse. Although he referred to the onus which rested on a man who admitted intercourse, the judge also stated for the guidance of litigants:

"Indien die man kan bewys dat hy nie die vader van die kind kan wees nie, het hy hom van die bewyslas gekwyt. Dit kan hy op verskeie maniere doen; byvoorbeeld, deur te bewys dat hy nie met die vrou gedurende die bevrugtingstydperk geslagsverkeer kon gevoer het nie omdat hy uitlandig was of om enige ander gegronde rede; of al het hy met haar gemeenskap gehad, maar kan bewys dat hy steriel was en haar bygevolg nie kon bevrug het nie; of dat by wyse van 'n bloedtoets dit bewys kan word dat hy nie die vader kan wees nie."⁶³

Potgieter AJA's judgment was an attempt to clear the air. It is to be noted that he was at pains to show the source of the presumption, namely the admission of sexual intercourse. He did not try to justify the rule by reference to authority. The presumption, it is submitted, clearly was tacitly admitted to be a recent creation.

What is important is the meaning attached to the onus by Potgieter AJA. The judge clearly suggests rebuttal⁶⁴ of presumed facts, not proof to the contrary of

54 "Die bewyslas om die presumpisie van vaderskap te onsen rus op die beskuldigde": *Pie* 1948 3 SA 1118.

55 1954 4 SA 31 (O).

56 36A-B.

57 39E-F.

58 41E-F.

59 1962 3 SA 704 (C).

60 706D-E.

61 *C v R* 1956 1 PH H4; *Sambo* 1962 4 SA 93 (E); *Quata* 1964 1 PH H100 (T).

62 1965 3 SA 454 (A).

63 460C-E.

64 I find support for this view in Davids "Strict liability in paternity cases? Or *Nemo me impune tangit*" 1965 SALJ 448 449.

presumed facts. If the onus of proof is the onus of rebuttal, it follows that the onus is nothing but an evidential burden. The wording of the judgment, as well as its apparent support for previous decisions which placed a persuasive onus on the man, can influence one to consider that the persuasive onus rests on a man who admits intercourse with the mother of an illegitimate child to prove that he is not the father of that child. Authority seems to incline to this view. The better view therefore seems to be that a persuasive onus is cast on the man by his admission of intercourse.

Were it not for the unfortunate persuasive onus cast on the man who admits intercourse when accused of paternity by the mother of an illegitimate child, South African law relating to the effect of the common-law presumptions would be identical to English law. South African law therefore differs from English law in that two exceptions exist to the general rule, whereas in English law there is only one.⁶⁵

In the common law of all three legal systems (English, American and South African), a legal provision which casts a persuasive burden on an accused person is not as a rule countenanced. By way of exception, English law acknowledges an exception and South Africa acknowledged two. South African law therefore did not follow English and American law slavishly.

4 3 1 2 *Quantum* of evidence required to discharge the persuasive burden imposed by a common-law presumption

It is generally agreed that the *quantum* of evidence which must be led by the accused in a criminal case to discharge a persuasive burden is evidence which satisfies the trier of fact on a balance of probabilities.⁶⁶ According to Van der Merwe *et al*, the evidential burden arises as soon as the “evidence or a presumption of law or an inference creates the risk that a litigant may fail”.⁶⁷ The risk of failure arises when one side has, by evidence or by operation of a presumption, made out a *prima facie* case.⁶⁸ In what circumstances it can be said that a *prima facie* case has been established is a matter which depends on the experience of the trier of fact. Except in cases of insanity and the admission of intercourse by a man, where a persuasive onus is cast on the accused, all the common-law presumptions cast only evidential *onera* on the accused.

4 3 1 3 *Quantum* of evidence necessary to discharge the evidential burden imposed by a common-law presumption

The question of the *quantum* of evidence required to rebut a *prima facie* case created by a common-law presumption in a criminal case has apparently not been crisply decided. It seems reasonably clear, however, that the evidence must be of such a nature that “there is a reasonable possibility that it may be substantially

65 *Ndhlovu* 1945 AD 386–387. The matter has seemingly been settled by legislation. S 1 of the Children’s Status Act 82 of 1987 casts an *onus* on the man who admits intercourse. But the *onus* seems to be an evidential one only. However, since the relevant phrases in the section are capable of being interpreted to cast a persuasive *onus* on the man, it is suggested that the common law remains unchanged.

66 9 LAWSA 338. See also *Ex parte Minister of Justice: In re R v Bolon* 1941 AD 345 360–361; *Von Zell* 1953 3 SA 303 (A) 310–311; Schmidt 88.

67 426–427.

68 Hoffmann and Zeffertt 402.

true".⁶⁹ This is the normal evidential standard that the evidence of an accused person must satisfy to entitle him to an acquittal. There is no reason to believe that there is any difference between an evidential onus created by the preponderance of evidence⁷⁰ and the evidential onus created by a common-law presumption. If the *onus* created by the two factual situations are identical, then the *quantum* of evidence required to rebut must also be the same. In principle, therefore, the test should be the same.

4 3 2 *Statutory presumptions in South African law*

Legislative supremacy has been an undeniable constituent of the constitutional reality of South Africa. Nothing was exempt from the legislative competence of Parliament. No legal principle was sacrosanct. The legislature could therefore make inroads into established law and procedure at will, and the courts would sustain and enforce such inroads. Consequently, the legislature could reverse, by means of a statutory presumption, what would otherwise be the ordinary incidence of the burden of proof.⁷¹

The South African statute book is positively replete with legislatively imposed presumptions.⁷² Statutory presumptions did not enjoy much study and analysis in South African legal writing, however, because (it seems) the subject was regarded as one of simple statutory construction.⁷³ In view of the extreme importance of presumptions in the adversarial process of tendering of proof, an analysis of the various formulations adopted by the legislature in imposing evidential presumptions as well as their evidential effects must be undertaken. It is necessary to do so because it is a matter of vital importance "to consider whether they place an onus or merely a duty to adduce evidence upon the party against whom the presumption operates".⁷⁴ As Williamson J has put it:

"As anyone with experience of the workings of criminal law knows, the practical consequence of a statutory shift of onus from the State to an accused is to present such accused with an obstacle not only formidable but not infrequently well high insurmountable."⁷⁵

It will also be necessary to analyse the effect of changes brought about by the new Constitution on presumptions.

The legislature uses a number of well-recognised verbal formulations. But the fact that similar or identical words are used in different statutes does not necessarily indicate that the meaning and effect of each are similar or identical.⁷⁶ Depending on the context and the policy of each statute in which a word or a phrase is used, that word or phrase may assume any meaning.

When the legislature imposes presumptions, it usually uses the following verbal formulations: "*prima facie* proof", "shall be deemed", "presumed", "presumed until the contrary is proved", "it is proved", "unless and until the contrary is proved", "he proves" and "in the absence of evidence to the contrary".

69 *M* 1946 AD 1023 1027.

70 *Difford* 1937 AD 370 373.

71 *Hoffmann and Zeffertt* 402.

72 *Ibid*; *Van der Merwe et al* 380.

73 *De Sa* 1982 3 SA 941 (A) 948C–D; *Hoffmann and Zeffertt* 440.

74 *Hoffmann and Zeffertt* 440; *Van der Merwe et al* 373.

75 *Mpetha (2)* 1982 2 SA 406 (C) 408 B–C.

76 *Hoffmann and Zeffertt* 440.

4 3 2 1 *Prima facie* proof or *prima facie* evidence

Numerous burden-imposing statutes adopt this formulation, which does not seem to have elicited much comment from legal writers regarding the propriety of using the word “proof” as the linguistic equivalent of “evidence”.⁷⁷ It is submitted that this linguistic usage is incorrect and displays a lamentable lack of concern for linguistic accuracy. Moreover, it is difficult to understand why this usage should be retained in as the Supreme Court has clearly distinguished between “proof” and “evidence”.⁷⁸ Evidence can never be “proof”. Evidence is one of the means of supplying proof of a disputed fact.⁷⁹ The end result of evidence is proof,⁸⁰ namely the degree of conviction in the mind of the trier of fact which is created by the force of the evidence tendered that a certain disputed fact transpired as alleged. The two concepts, as logical entities, are not identical. They should never be used interchangeably, as such usage causes confusion. Furthermore, the term *prima facie* carries a notion of provisionality within itself.⁸¹ Evidence can never be provisional because, once evidence is accepted, it forms part of the record and cannot be expunged unless the court specifically orders this. Such evidence constitutes a final assertion of an alleged state of affairs. Evidence, it is submitted, can consequently never be *prima facie*. It is the conviction that the evidence creates which may be provisional, because if the trier of fact has heard one side of a case, the evidence that has been tendered may create a certain view of the alleged state of affairs which may be altered if the opposing side presents its own evidence. This is because the evidence tendered in opposition may reduce or nullify the view created in the mind of the trier of fact by the evidence of the side that tendered evidence first. Accordingly, if the intention to juxtapose evidential roles on certain issues is manifested in the use of the concept of “*prima facie* evidence” or “*prima facie* proof”, the latter concept must always be used because it is the correct one.

4 3 2 2 The meaning of *prima facie* evidence or proof

According to Hoffmann and Zeffertt, *prima facie* proof of a *factum probandum* means that “in the absence of some evidence to the contrary the fact in issue either may or must be taken to be proved”.⁸² Schmidt agrees.⁸³ Clearly, *prima facie* proof of the fact in issue by one party casts a duty on the other party to lead some evidence, failing which the trier of fact either may or must accept that the situation of fact contended for by the party who has led evidence is the correct factual situation, to be relied on in resolving the dispute between the parties.

The position seems to be clear enough, but the situation is complicated by the apparent separation by Hoffmann and Zeffertt of “*prima facie* evidence”⁸⁴ from “*prima facie* proof”. Hoffmann and Zeffertt assign two meanings⁸⁵ to the concept

77 Schmidt 95.

78 *Ibid.* Van der Merwe *et al* 33 half-heartedly suggest that the practice is wrong.

79 *Epstein* 1951 1 SA 278 (O) 284B–C; V 1958 3 SA 474 (GW) 479B–F; *Nzuza* 1963 3 SA 631 (A) 634G–H; *Mokgeledi* 1968 4 SA 335 (A) 337H.

80 *Epstein* 284B–C; Ferreira *Strafproses in die laer howe* (1979) 419.

81 According to Ferreira *idem* 419, proof is “die doel . . . wat nagestreef word”.

82 Hoffmann and Zeffertt 441.

83 95. “The term *prima facie* case means that the party who had first adduced evidence has led enough evidence upon which a reasonable man *might* find for him” (my emphasis); Van der Merwe *et al* 429.

84 Cf Schmidt 95; Van der Merwe *et al* 386.

85 468.

“*prima facie* evidence”: “evidence upon which a reasonable man could find in favour of the party adducing it” and “evidence capable of being supplemented by inferences drawn from the opposing party’s failure to reply”. The question arises whether “*prima facie* evidence” is something totally different from “*prima facie* proof” as evidenced by the two alleged meanings of the phrase “*prima facie* evidence”.

It is submitted that the expression “*prima facie* evidence” as used by Hoffmann and Zeffertt has the same conceptual value as “*prima facie* proof”. The confusion is created by the failure of Hoffmann and Zeffertt to distinguish between “evidence” and “proof”. It is submitted that the two alleged meanings of “*prima facie* evidence” constitute nothing more in essence than a restatement, albeit in separate conceptual strands, of the ordinary meaning of *prima facie* proof, that is, the capacity of evidence to satisfy the trier of fact, and the possibility of displacement of that conviction by subsequent evidence.

4 3 2 3 *Prima facie* proof and the Supreme Court

As Hoffmann and Zeffertt point out,⁸⁶ the phrase “*prima facie* proof” or “*prima facie* evidence” is in constant use in our judicial parlance. Virtually no thought is devoted to its meaning, with the result that one sometimes encounters startling misconceptions of its meaning even amongst experienced practitioners. Our courts have attempted to provide a lead in laying down its meaning with some precision.

The leading decision is *Ex parte The Minister of Justice: In re R v Jacobson and Levy*.⁸⁷ In 1928 the appellants had been convicted by a magistrate for making preferential dispositions in contravention of section 139(1) of the Insolvency Act 32 of 1916. They appealed to the Transvaal Provincial Division. The court dismissed the appeal but in the course of its judgment decided that if a statute imposed a burden of proof on an accused person, he could discharge that onus by making out a *prima facie* case. Clearly, such an onus could be no more than an evidential burden. In 1931 the Transvaal Provincial Division came to a contrary conclusion regarding the nature of the onus imposed on the accused in terms of section 139(1) of Act 32 of 1916.⁸⁸ The court on that occasion decided that the accused must prove his case beyond a reasonable doubt, that is, that there was a persuasive onus on the accused. In order to achieve uniformity and certainty in the law, the Minister of Justice stated a case in terms of section 388 of the Criminal Procedure and Evidence Act 31 of 1917 to enable the Appellate Division to determine the issue. The Appellate Division was thus faced squarely with a need to interpret the expression “*prima facie*”. Although the court was unanimous as to the result, there were significant differences of interpretation between Wessels ACJ and Stratford JA, both of whom delivered judgments. The remaining members of the court, Roos JA and Hutton AJA, merely concurred in the result.

Wessels ACJ gave an uncharacteristically confusing judgment which did not reflect the analytical ability one expects from a judge of such learning. According to him the term “*prima facie* proof” could be used to mean that certain evidence could be led at a jury trial. The phrase could also be used to mean “a case where there is a presumption of law in favour of the one party which (until rebutted)

⁸⁶ *Ibid.*

⁸⁷ 1931 AD 466.

⁸⁸ 469.

establishes his case”.⁸⁹ This statement is incorrect, as not all *prima facie* cases result from the application of presumptions. Nor is *prima facie* “the equivalent of a presumption of law in favour of either plaintiff or defendant or of the Crown or an accused”.⁹⁰ But it was when Wessels ACJ declared that

“[i]f this phrase ‘*prima facie* evidence’ is intended to convey that the insolvent need not fully prove that he had no intention to prefer: that it is enough if he brings evidence to show that he may not have had such intention, so as to raise a doubt in the mind of the Court, then it is wrongly used”⁹¹

that Stratford JA dissented. He did so obviously because the remarks of Wessels ACJ seemed to be general and not specific to the issue at hand, namely the interpretation of section 139(1) of Act 32 of 1916. And if that interpretation received the *imprimatur* of the Appellate Division, then a very high standard of proof would be mandatory in all cases – even where no onus of proof was cast, but only an evidential burden. Wessels ACJ evidently failed to distinguish between the two quite distinct *onera*.

Stratford JA drew attention to the lack of clarity in the judgment of Wessels ACJ, stating at the beginning of his judgment that “it is desirable to state clearly what [the] question [submitted to the court] was intended to be”.⁹² He decided that “[s]ome burden of proof on the issue”⁹³ was imposed on the accused. (It seems reasonably clear that the reference was to the particular facts of *Jacobson and Levy*.) That the judge chose to be ambiguous as to the exact burden imposed, that is, whether the burden was an evidential or a persuasive one, is vexing. The impression is created that Stratford JA was not certain that the onus was a persuasive one, as he later decided. Seen in that light, his judgment becomes a weak precedent. What seems strange is that Stratford JA chose to decide the issue of the exact nature of the onus placed on the accused by comparing the standards of persuasiveness of the evidence to be led by the accused in order to discharge the onus cast on him. According to Stratford JA, what had to be decided was whether the onus cast on the accused was to be discharged by the accused’s leading of evidence which raised a doubt as to his intention, or whether the accused had to prove affirmatively, beyond a reasonable doubt, the absence of the intention to prefer.⁹⁴ The analysis by Stratford JA clearly illustrated the difference between the evidential burden and the persuasive onus. The “affirmative proof beyond a reasonable doubt” test is a test of the persuasive onus and the “reasonable doubt” test relates to the evidential burden.

By deciding that, in terms of section 139(1) of Act 32 of 1916, an onus rested on the accused to prove affirmatively beyond a reasonable doubt the absence of an intention to prefer, the court signified in one stroke (a) the exact nature of the onus (the persuasive onus), and (b) the standard of persuasiveness required of the evidence of the accused in order to discharge the onus in terms of the Act.

The court then proceeded to instruct the lower courts as to the meaning of the term “*prima facie*”. By emphasising the provisionality⁹⁵ of the factual conviction which may arise in the mind of the trier of fact as a result of evidence that

89 473.

90 *Ibid.*

91 *Ibid.*

92 478.

93 *Ibid.*

94 *Ibid.*

95 478–479.

establishes a fact *prima facie*, the court pointed out the logical untenability of the application of the so-called *prima facie* standard to evidence led by an accused when that evidence is assessed in conjunction with, and in comparison to, the state's evidence at the end of the evidence-gathering process (that is, when both the accused's and the state's cases are closed). To speak of an accused establishing a *prima facie* case in those circumstances is simply a misnomer and a misuse of words, since at that stage no further evidence may be led. Thus, in the view of the court, the Transvaal Provincial Division's use of the phrase had been incorrect.

Although Stratford JA's judgment cleared the air to some extent, it also contained a logical inconsistency in that it confused *prima facie* proof and *prima facie* evidence as conceptual entities. However, Stratford JA's definition of *prima facie* proof has stood the test of time and has repeatedly been approved by the courts.⁹⁶ Centlivres JA put it more felicitously when he stated that the words "*prima facie* proof" mean that "credible evidence" is required,⁹⁷ thereby indicating that the evidence led must be satisfactory, and not merely any mendacious or otherwise unsatisfactory evidence.

4 3 2 4 The evidential import of "*prima facie* proof"

Most commentators are *ad idem* that a *prima facie* provision imposes an evidential onus ("evidential burden; burden of rebuttal; duty of adducing evidence"⁹⁸) on the party against whom such a provision operates.⁹⁹ However, it is necessary to refer to the guidance of the Supreme Court in view of some of the differences of opinion that have developed.

Again, the leading case on this matter is *Jacobson and Levy*. As has been pointed out in the previous article in this series, Stratford JA accepted that "[s]ome burden of proof"¹⁰⁰ was cast on the accused, and that in that particular case it was necessary to decide whether the burden was an evidential one or a persuasive one. But Stratford JA was not unequivocal on this issue. In his usual manner of deciding the issue indirectly by referring to the degree of persuasiveness of the evidence which must be led to discharge the burden, Stratford JA held that "[i]t is not, however, in every case that the burden of proof can be discharged by giving less than complete proof".¹⁰¹ According to him, the nature of the burden cast upon a party by *prima facie* proof of the disputed fact by the other party is defined by the degree of persuasiveness the evidence led by the former party must attain. That evidence may amount to "less than complete proof on the issue".¹⁰² The evidence to rebut the burden may therefore be complete proof of an issue, although it may, in certain circumstances, be less than complete proof of an issue. This oblique reasoning on the part of Stratford JA, unsatisfactory and disorganised as it is, points at the essential difference between an evidential burden and a persuasive onus. But *Jacobson and Levy* left open the question whether *prima facie* proof of a disputed fact imposed an evidential burden or a persuasive one. *Jacobson and Levy* cannot be taken as direct authority for the proposition that a *prima facie* case imposes an

96 *Koen* 1937 AD 211 213; *Salmons v Jacoby* 1939 AD 588 593; *W v W* 1976 2 SA 308 (W) 315.

97 *Abel* 1948 1 SA 654 (A) 661.

98 Engelbrecht "Straf- en prosesreg: Bewyslas en -maatstawwe" 1988 *De Rebus* 385.

99 *Idem* 388.

100 1931 AD 466 478.

101 479.

102 *Ibid.*

evidential onus.¹⁰³ To adopt the contrary view (as Schmidt does) is to extend the authority of the case unduly.

*Abel*¹⁰⁴ is another case where the meaning is disguised but from which it can be gleaned that a *prima facie* provision casts no more than an evidential burden. According to Centlivres JA:

“When, however, there is other evidence, . . . a Court, in trying the accused, must take into consideration all the evidence produced and is not entitled to convict unless it is satisfied on the evidence as a whole that the Crown has discharged the onus which rests on it of proving the guilt of the accused beyond a reasonable doubt.”¹⁰⁵

In terms of this *ratio*, *prima facie* proof of a disputed fact by the state requires the accused only to lead such evidence as will cause the trier of fact, after considering both the evidence of the state and that of the defence as a whole, not to be satisfied that the state has proved its case beyond a reasonable doubt. The duty of the accused after the establishment of a *prima facie* case against him is, evidentially, to prevent a hardening of *prima facie* proof to proof beyond a reasonable doubt. To do so, he must lead such evidence as to cause the trier of fact to be uncertain of the correctness of the facts alleged to constitute *prima facie* proof. He must therefore lead evidence to create a reasonable doubt in the mind of the court, for a doubtful mind is not a mind that may convict, since the mind must be convinced beyond a reasonable doubt. The burden on the accused is clearly an evidential one.

In *Ismail*¹⁰⁶ Schreiner JA, dealing with a *prima facie* provision in a statutory enactment, said:

“But when the defence case has been closed, with or without the leading of evidence, what has to be decided is whether there is in the mind of the trier of fact any reasonable doubt”¹⁰⁷

The judge further decided that “*prima facie* proof of a sale of liquor by the accused, does not place on him the burden of disproving that he sold liquor”.¹⁰⁸ There has been no more explicit explanation by the Appellate Division of the onus placed on an accused by a *prima facie* provision and the *quantum* of evidence required to discharge it than that.¹⁰⁹

However, a fly was apparently introduced into the ointment by Steyn CJ in *Chizah*.¹¹⁰ There the accused was charged in the native commissioner’s court under section 12(1) of the Blacks (Urban Areas) Consolidation Act 25 of 1945 in that he, being a native who had not been born in the Union or in South West Africa, had entered a proclaimed area without the necessary permission. The accused denied that he was a native and that he had not been born in the Union or in South West Africa. Evidence was called by the state of an inspector of natives employed by the City Council of Cape Town, who stated that the accused, on his looks, was a native. Evidence was also led that some documents had been found in the accused’s possession, one of which was a driver’s licence issued in Bulawayo to “Mubvumbi alias Jackson X.14825 Makoni of 38, 7th Street, Byo. Location”. A state witness

103 See *Abel* 1948 1 SA 654 (A).

104 661.

105 663.

106 1952 1 SA 204 (A).

107 209*pr.*

108 208H.

109 See also *Jones* 1956 3 SA 208 (GW) 210D–G.

110 1960 1 SA 435 (A). See Schmidt 69; Hoffmann and Zeffertt 441–442.

who was himself a native, born in Southern Rhodesia, gave evidence that he knew the accused as Jackson Chizah and that the accused was a son of the witness's uncle. The accused denied most of the state's evidence, alleging that he was coloured, that he had been born in Beaufort West, and that his birth had been registered in Beaufort West. His birth certificate was not produced in court. The native commissioner's court rejected the accused's version and convicted him. He appealed to the Cape Provincial Division. His appeal was dismissed, and he appealed further to the Appellate Division.

The court decided that the birth certificate constituted an important element of the accused's case regarding his descent and place of birth,¹¹¹ because an onus of proof rested on him to show that the provisions of section 12(1) of Act 25 of 1945 did not apply to him. Obviously, the onus was a persuasive one. His failure to produce his birth certificate had the consequence that he failed to rebut the onus which rested on him in terms of the definitional provisions of section 1 of Act 25 of 1945.

Obviously, the issues presented by the case did not directly impinge on the vexed question of what standard of persuasiveness evidence led in response to *prima facie* proof of a disputed fact must attain in order to rebut the *prima facie* proof. But Steyn CJ, in an *obiter dictum*, also set out to discuss what would have been the effect of production of a birth certificate in terms of section 40(2) of the Births, Marriages and Deaths Registration Act 17 of 1923 had the accused produced it at the trial. The chief justice said:

"Luidens art. 40(2) geld 'n behoorlik ondertekende sertifikaat in alle geregshowe as *prima facie* bewys van die besonderhede daarin vermeld. Dit beteken dat 'n regterlike beampte die besonderhede as juis moet aanvaar totdat hy oortuig is dat hy nie op hul kan staatmaak nie. Of so 'n oortuiging geregverdig is, moet afhang van die getuienis wat die inhoud van die sertifikaat weêrlê of in twyfel trek."¹¹²

One can be "convinced" ("oortuig") only if one is persuaded. When one doubts, one is not convinced. Steyn CJ's *dictum* therefore suggests that the *prima facie* provision in section 40(2) of Act 17 of 1923 imposed a persuasive burden on whoever disputed the contents of a birth certificate, in that that party had to convince the court that it could not rely on the contents of the certificate. This is obviously a higher degree of proof than proof which merely creates a doubt in the mind of the trier of fact. That interpretation of the duty which rests on a party as a result of a *prima facie* provision would, as Schmidt points out, be a departure from the generally held view.¹¹³

Hoffmann and Zeffertt¹¹⁴ doubt that that is the interpretation Steyn CJ wished to convey. In the first place, Steyn CJ reiterated the provisional nature of the acceptance of the evidence of the birth certificate, to wit "aanvaar totdat hy oortuig is".¹¹⁵ Its provisional nature is the one great distinguishing characteristic of the evidential burden. Secondly, Steyn CJ repeated the *quantum* test of the evidential onus, that is, it would depend on "die getuienis wat die inhoud van die sertifikaat weêrlê of in twyfel trek".¹¹⁶ If evidence must create a doubt in order to rebut an onus, the onus rebutted must inevitably be evidential. Accordingly, the alleged

111 442A.

112 442E–G.

113 69.

114 442.

115 *Ibid.*

116 *Chizah* 442F–G. See also Hoffmann and Zeffertt 441.

departure by the Appellate Division in *Chizah* from its previous authoritative *dicta* on the onus imposed by *prima facie* statutory provisions was more apparent than real. Nothing was changed. The views of Schmidt and Hoffmann and Zeffertt were unnecessarily alarmist. Moreover, it is submitted, the *dictum* of Steyn CJ could have been distinguished on the ground that it was *obiter*.¹¹⁷

In *Mtiyane*¹¹⁸ the matter was put in the correct perspective when Fannin J remarked:

"I . . . say again that proof of the facts referred to in that section amount[s] to no more than *prima facie* proof of the sale of liquor by the appellant. *It casts no onus of proof upon the accused*" (my emphasis).¹¹⁹

4 3 2 5 The *quantum* of evidence necessary to discharge an evidential onus imposed by a *prima facie* statutory provision

Although, as stated earlier, *Abel* is not unequivocal authority, one may glean from it that the evidential duty cast on the accused by a *prima facie* provision is discharged by the leading of "other credible evidence".¹²⁰ Apparently, such evidence must cause the court not to be satisfied that the guilt of the accused has been proved beyond a reasonable doubt.

Ismail emphasises the creation by the accused of a reasonable doubt in the mind of the trier of fact.¹²¹ However, *Ismail* is not a strong precedent. Centlivres CJ refused to consider the meaning and import of the words "*prima facie* proof" on the ground that there had been no argument on the point, and on the further basis that there had been no need for the state to rely on the "*prima facie*" provision in section 145(c) of the Liquor Act 30 of 1928.¹²² Van den Heever JA doubted the correctness of Schreiner JA's analysis of that section.¹²³ The matter was therefore left open by the majority in the Appellate Division. Schreiner JA's judgment stands unsupported in principle by his colleagues. Virtually the only issue the various judges agreed on was the fact that the appeal in *Ismail* should be dismissed. However, the lower courts, although being aware of the equivocal significance of *Ismail* as regards the meaning and effect of a "*prima facie*" provision, have adopted, evidently *ex libertate hominis*, the meaning inferred from *Abel*.¹²⁴

4 3 3 "Deeming" provisions

4 3 3 1 Introduction

Very often the legislature premises a provision thus: "It shall be deemed". The use by the legislature of that formulation may have serious evidential consequences for a party to a lawsuit because the deeming provision normally relates to a fact which may be in issue. This is so because of the effect a deeming provision may have.

117 *Mtiyane* 1969 1 SA 243 (N). See also *Jones* 1956 3 SA 208 (GW) 210C-E; *Matsaneng* 1966 1 SA 46 (O) 50A-B.

118 1969 1 SA 243 (N).

119 247A.

120 1948 1 SA 654 (A) 661.

121 1952 1 SA 204 (A) 209A-G.

122 206H-207pr.

123 211C-E.

124 *Jones* 1956 3 SA 208 (GW) 210 in fine.

4 3 3 2 The legal meaning of “deem”

There is generally no serious dispute as to meaning of the word “deem”. The *dictum* in *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics*¹²⁵ that the concept “must be here taken in its general sense as meaning ‘considered’ or ‘regarded’” seems to be generally accepted.¹²⁶

4 3 3 3 The effect of a deeming provision

A deeming provision may be used by the legislature compulsorily to attribute certain qualities to certain objects, or to prescribe the correctness of certain states of fact. Used in this manner, a deeming provision has the effect that it denotes that “the persons or things to which it relates are to be considered to be what really they are not”.¹²⁷ In these circumstances, a legal fiction is created.¹²⁸ The fiction operates in such a way that the trier of fact is required to accept that a certain state of fact exists, and the person against whom the deeming provision operates is not allowed “om die objektiewe waarheid in stryd met die fiksie te bewys nie”.¹²⁹ The party in question may have evidence to show that the fiction is incorrect and ought to be rejected by the court, but he or she cannot lead that evidence because the deeming provision prevents it. The effect of the deeming provision is therefore akin to the effect of the so-called irrebuttable presumption.¹³⁰ The importance of this is that where the legislature resorts to the use of a deeming provision, the evidentiary foreclosure referred to above operates to the prejudice of the citizen.

South Africa has frequently resorted to deeming provisions. These sometimes mandate the acceptance by the court of important elements of statutory crimes without proof and prevent the defence from disputing the existence of such elements, thus preventing the accused from securing an acquittal. A typical deeming provision is the one contained in section 57(3)(b) of the Internal Security Act 74 of 1982. In terms of section 57(1) it was an offence for anyone to convene a gathering after the gathering had been prohibited in terms of section 46 of the Act. The effect of the deeming provision in section 57(3)(b) was that, if it was proved by evidence that the accused orally invited the public to assemble, then it was no longer open to him to deny that he convened the gathering. Obviously “convening a gathering” is a material element of the offence. It was possible that the accused could, as a defence, argue that his acts did not amount to the convening of a gathering, and could lead evidence to show why his acts did not amount to the convening of a gathering. However, this course of action was denied the accused by legislative *fiat*. A system of criminal law that routinely resorts to this stratagem cannot be said to show great respect for the rights of the individual because it reduces the individual’s capacity to clear him- or herself of guilt.

125 1911 AD 13 33.

126 *Voigt* 1965 2 SA 749 (N) 752G–H; *Buren Uitgewers (Edms) Bpk v Raad van Beheer oor Publikasies* 1975 1 SA 379 (C) 382F.

127 *Chotabhai* 1911 AD 13 33.

128 *Van der Merwe* 1960 1 SA 565 (C) 568A–B; Schmidt 68 fn 6. Vermooten AJ has remarked that “every case of legislative deeming must be dealt with in terms of the particular statute in which it occurs”: *Posel* 1977 4 SA 476 (N) 488D.

129 Schmidt *ibid*.

130 *Buren Uitgewers (Edms) Bpk v Raad van Beheer oor Publikasies* 1975 1 SA 382D–E; *Posel* 1977 4 SA 489A; 9 LAWSA 339.

4 3 4 Examples of deeming provisions

4 3 4 1 Simple presumptive provisions (sc those provisions that do not link “presume” with any modifying adverbial clause such as “until the contrary is proved” or “unless the contrary is proved”)

On the face of it, a presumptive provision which mandates or permits the trier of fact to “presume” that a certain state of fact (which may or may not be in dispute) has been established should not give rise to any problem of linguistic interpretation or legally effectual interpretation. After all, “presumption” is nothing but an abstract noun derived from the verb “presume”. Since the noun expresses the same idea as the verb from which it is derived, it follows that the effect of either ought, in the final analysis, to be the same. In comparable situations, *mutatis mutandis*, “to presume” ought to have the linguistic value of a “presumption”.

Common-law presumptions impose an evidential burden which may be discharged by the accused by simply leading sufficient evidence to raise a reasonable doubt in the mind of the trier of fact. It follows that legislative provisions which mandate the “presumption” of a certain fact must be interpreted with reference to the common law and in conformity with it. Such provisions must be so interpreted that

“sover doenlik . . . sy bepalinge met die bestaande reg ooreenstem, of so min moontlik daarvan afwyk. Vir ’n verandering van die bestaande reg is ’n duidelike bepaling of wetsduiding nodig”.¹³¹

Therefore such provisions must be so interpreted as to have an identical legal effect to common-law presumptions.

The question arises whether such provisions have been so interpreted by our courts. It is apparent that this enquiry poses fundamental questions such as: (1) Is the presumption rebuttable or not? (2) Does it cast any onus on the accused? If so, what onus? (3) What is the *quantum* of evidence that is necessary to discharge the onus?

4 3 4 2 Is a presumptive provision rebuttable?

The standpoint taken in this article is that rebuttability is the distinguishing characteristic of the true presumption in South African common law. Logically, statutory presumptions must as a general rule be held to be rebuttable, depending at all times on the clear intention of the legislature as evidenced in the provision that is being interpreted by the court.¹³² By and large, this has been the approach of our courts.¹³³ It seems, though, that there may very well be a difference if the presumptive provision is couched in the passive voice, that is, “it is presumed” or “it shall be presumed”. The leading case in this connection is *De Sa*.¹³⁴

In *De Sa* the court had to interpret the effect of the phrase “shall be presumed to have permitted the playing of games of chance for stakes at such place”. The Cape

131 Van Tonder *et al Steyn Die uitleg van wette* (1981) 97.

132 “[W]here the Legislature, as in para. (e), wished to prescribe that a state of affairs prevailing at a particular point of time must be regarded as irrebuttable in determining how a person is accepted it did so in clear and unequivocal terms. I have little doubt that had the Legislature entertained a similar intention in regard to the presumption created in para. (d) it would have expressed such intention in equally clear terms”: *Pitcher v Secretary for the Interior* 1968 4 SA 238 (C) 244A–B.

133 *Moore* 1960 4 SA 304 (E) 306D; *Mtiyane* 1969 1 SA 243 (N) 246D–F.

134 1982 3 SA 941 (A).

Provincial Division had held that that provision created an irrebuttable presumption against the accused. The conviction of the accused by a magistrate had therefore been upheld, and the accused had appealed to the Appellate Division. The Appellate Division agreed with the Cape Provincial Division's finding of interpretative irrebuttability and dismissed the appeal. The court, however, emphasised that the finding of irrebuttability applied to the interpretation of the phrase as it was employed in the particular statute¹³⁵ involved in *De Sa*. It certainly was not the intention of the court that the words were to be given the effect of irrebuttability generally in whatever statute they might occur. In view of the prestige of the court, it was unlikely in the past that another court, especially a lower court, would easily deviate from the *ratio* of this decision when faced with the need to interpret a similar provision occurring in another statute. The decision therefore introduced an element of uncertainty into our law regarding the effect of simple presumptive provisions.

4 3 4 3 What onus is cast on an accused by a simple presumptive provision?

Pursuant to the rule that a provision must be interpreted in conformity with the existing law, one would expect ordinarily that the onus cast on an accused person by a presumptive provision must be an evidential one.

There was in the pre-constitutional era a paucity of reported cases in which the onus cast by simple statutory presumptive provisions was analysed.¹³⁶ There was little doubt, however, that the onus cast on the accused was a persuasive one.¹³⁷ This conclusion is drawn, not from the explicit wording of the judgment referred to, but from the test applied when the assessment of the accused's evidence was undertaken. It is trite that the test of a balance of probabilities is the applicable test when an accused person is required to discharge a persuasive onus. Furthermore, the foregoing statement of the law relates to those cases in which presumptive provisions were couched in the active voice and were held to create rebuttable presumptions.

The interpretation of simple presumptive provisions to cast a persuasive onus on the accused is to be regretted. It is trite law that a legal provision must be so interpreted

“dat sy bepalings met die bestaande reg ooreenstem, of so min moontlik daarvan afwyk. Vir 'n verandering van die bestaande reg is 'n duidelike bepaling of wetsduiding nodig”.¹³⁸

The simple word “presume” is of itself and by itself devoid of any burden-casting nuances. The word ought therefore to have been interpreted so as to have the effect of a common-law presumption: it ought to have been interpreted to create a presumption rebuttable by the leading of evidence sufficient to create a reasonable doubt in the mind of the trier of fact.

4 3 4 4 The onus cast by passive simple presumptive provisions

Presumptive provisions which are couched in the passive voice would appear to require different treatment. Since they create irrebuttable presumptions, the accused

135 952B–C.

136 See eg *Moore* 1960 4 SA 304 (E) 306B–C.

137 *Mtiyane* 1969 1 SA 243 (N) 246E.

138 *Steyn* 97–99 and 98 fn 105. See also *Stadsraad van Pretoria v Van Wyk* 1973 2 SA 779 (A) 784C–E.

is prevented from leading any rebutting evidence on the facts that are irrebuttably presumed. There is therefore no sense in talking about an onus cast on the accused. There is no onus because there is no possibility of rebuttal.

The simple presumptive provision, as interpreted in our law, sometimes casts a persuasive onus on the accused and sometimes prevents the accused from leading evidence at all. It is submitted that both results are aberrations in terms of the common law. The simple presumptive provision ought to cast no more than an evidential burden on the accused, and what is more, ought always to be rebuttable. Irrebuttability and the imposition of a persuasive onus are against the basic ideology of our common law.

4 3 4 5 The “contrary is proved” provisions

Very often, the legislature mandates the court to regard as correct, that is, to presume or deem, a state of fact unless or until the contrary is proved. In principle, one must expect that a provision which mandates a judicial officer to presume a disputed state of fact *until* the contrary is proved must be different in effect from one which mandates the judicial officer to presume the disputed state of fact *unless* the contrary is proved. By the same token, a deeming provision logically must also be so construed. What is more, “presume” and “deem” are not linguistically identical.¹³⁹ There must be a differential interpretation because the negative hypothetical conjunction “unless” is quite different in effect from the time or prepositional conjunction “until”. In a sentence, “unless” has a conditional adverbial effect which modifies the preceding predicate. Except if the condition imposed by the following adverbial clause is effectuated, the state of affairs posited by the predicate controls. Although the prepositional “until” also has a modifying effect on the predicate, it has a different linguistic import. Its meaning of “up to a time that” merely introduces a time scale within which the state of affairs posited by the predicate will remain in effect. It must therefore be assumed that the legislature has good grounds for using the one formulation in one statute and the other formulation in another. It is clear that whatever formulation is adopted in a statute, somebody must prove some element which contradicts the element posited by the predicate. Naturally, the question is who must prove, and to what degree. It is in the attempt to answer that question that a great many problems arise.

(To be continued)

139 *De Sa* 1982 3 SA 941 (A) 942D-E.

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SUMMARY

Negligent infringement of personality interests

This contribution revisits the question whether all negligent infringements of personality interests should be actionable in private law. It is argued that the influence of the decision in *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) should reach much further than liability of the media for defamation, and should impact on defamation law in general, as well as on other aspects of personality law. Most personality interests are afforded a more restricted protection than patrimonial interests, because intent is generally required for infringement of the former, whereas negligence is sufficient for infringement of the latter. This situation can be questioned in the light of the current constitutional recognition of personality rights as fundamental rights. The decision in *Marais v Groenewald* 2001 1 SA 634 (T) is a welcome first indication that the South African courts are willing to extend liability for negligent personality infringements beyond the liability of media defendants for defamation.

1 INLEIDING

Die twee belangrikste deliksaksies wat in geval van persoonlikheidskrenking in die Suid-Afrikaanse reg ingestel kan word, is die *actio iniuriarum* en die aksie weens pyn en lyding.¹ Eersgenoemde aksie bied beskerming aan 'n wye spektrum van persoonlikheidsbelange wat gewoonlik in drie welbekende kategorieë, te wete die *corpus, fama en dignitas*, ingedeel word.² Die aksie weens pyn en lyding is gerig op die vergoeding van liggaamlike besering en bied dus net beskerming aan 'n aantal persoonlikheidsbelange in die *corpus*-kategorie.³

Vir 'n beroep op die *actio iniuriarum* moet opset as skuldvorm gewoonlik bewys word.⁴ Vir die aksie weens pyn en lyding is nalatigheid voldoende.⁵ Aangesien die

1 Burchell *Principles of delict* (1993) (hierna: *Burchell Delict*) 12-13; Neethling, Potgieter en Visser *Law of delict* (1999) 8; Neethling *Persoonlikheidsreg* (1998) 100; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 226; Van der Walt en Midgley *Delict: Principles and cases vol I* (1997) 2. As vermoënskade uit persoonlikheidskrenking voortspruit, kan dit met die *actio legis Aquiliae* verhaal word; vgl Neethling 99; Van der Merwe en Olivier 238.

2 Vgl Burchell *Delict* 149 ev; Burchell *Personality rights and freedom of expression* (1998) (hierna: *Burchell Personality*) 133 ev; Neethling, Potgieter en Visser 13 ev; Neethling 49 ev; Van der Merwe en Olivier 236 ev; Van der Walt en Midgley 2.

3 Vgl Burchell *Delict* 12-13; Neethling, Potgieter en Visser 18-19; Neethling 61 134; Van der Merwe en Olivier 341 ev; Van der Walt en Midgley 2.

4 Neethling, Potgieter en Visser 15; Neethling 50 70 ev; Van der Merwe en Olivier 237; Van der Walt en Midgley 2.

5 Neethling, Potgieter en Visser 5; Neethling 61; Van der Merwe en Olivier 242; Van der Walt en Midgley 2.

meerderheid van persoonlikheidsbelange net deur die *actio iniuriarum* beskerm word, en dié aksie in die oorgrote meerderheid van gevalle opset vereis, kan 'n mens sê dat opset die belangrikste skuldvorm vir die beskerming van persoonlikheidsbelange in die Suid-Afrikaanse reg is.

Die doel met hierdie bydrae is om opnuut opset as skuldvereiste vir privaat-regtelike persoonlikheidsbeskerming te bevraagteken. Dit word aan die hand gedoen dat nalatigheid in die meerderheid van gevalle – indien nie in alle gevalle nie – 'n bevredigender grondslag vir persoonlikheidsbeskerming is. Hierdie gedagte is nie regtig nuut nie,⁶ maar twee onlangse ontwikkelings in die Suid-Afrikaanse reg het 'n herbesinning oor die rol van opset by persoonlikheidsbeskerming nou meer aktueel as ooit tevore maak. Dié twee ontwikkelings is (1) die vervanging van skuldlose aanspreeklikheid van die media vir laster deur aanspreeklikheid gebaseer op nalatigheid; en (2) die erkenning van persoonlikheidsregte as fundamentele regte in die nuwe grondwetlike bedeling. In die hieropvolgende paragraawe word kortliks op 'n paar implikasies van hierdie ontwikkelings gefokus. Daar word ook kortliks op ontwikkelings in twee ander regstelsels gewys. Die belang van die onlangse beslissing in *Marais v Groenewald*⁷ kry aandag, en laastens word die onnoukeurige gebruik van terminologie onder die loep geneem. Persoonlikheidsbeskerming in die deliktereg is 'n wye veld, wat nie hier aandag geniet nie. Verder is dit moontlik dat intensiewer navorsing nuwe lig kan werp op sake wat wel aangeroe word. Die doel kan nie wees om finale antwoorde te gee nie; dit is veel meer om verdere nadenke, debat en navorsing oor hierdie onderwerp te stimuleer.

2 DIE VERVANGING VAN SKULDLOSE AANSPREEKLIKHEID VAN DIE MEDIA VIR LASTER DEUR AANSPREEKLIKHEID GEBASEER OP NALATIGHEID

2.1 Agtergrond: Die opkoms van skuldlose aanspreeklikheid van die media vir laster

Die lasterreg is een van die mees dinamiese gebiede van die persoonlikheidsreg. Daar word algemeen aanvaar dat die Suid-Afrikaanse aksie vir laster die *actio iniuriarum*, met sekere Engelsregtelike invloede, is.⁸ *Animus iniuriandi*, oftewel opset, word as skuldvorm vereis.⁹ Die dader moet dus (subjektief beoordeel) sy wil op die publikasie van lasterlike materiaal aangaande die eiser rig, en verder moet hy ook beseft (weer eens subjektief beoordeel) dat dit onregmatig is (of kan wees)¹⁰ 'n Logiese implikasie hiervan is dat dwaling wat onregmatigheidsbewussyn uitsluit, die

6 Vgl Neethling 72-74; Pauw *Persoonlikheidskrenking en skuld in die Suid-Afrikaanse privaatreë* (1976) 211-215; Van der Merwe en Olivier 246; Visser "Nalatige krenking van die reg op die fama" 1982 *THRHR* 174.

7 2001 1 SA 634 (T).

8 Burchell *Delict* 12-13; Burchell *The law of defamation in South Africa* (1985) (hierna: Burchell *Defamation*) 3 ev; Burchell *Personality* 133-135; Neethling, Potgieter en Visser 347; Neethling 158 vn 6.

9 Burchell *Delict* 159 183 ev; Burchell *Defamation* 149 ev; Burchell *Personality* 303 ev; Neethling, Potgieter en Visser 347 ev; Neethling 197 ev; Van der Merwe en Olivier 428 ev; Van der Walt en Midgley 91.

10 Burchell *Delict* 184; Burchell *Defamation* 166; Burchell *Personality* 303; Neethling, Potgieter en Visser 348; Neethling 199-200; Van der Merwe en Olivier 433 ev.

dader vry laat uitgaan.¹¹ Waar die verweerder 'n koerant of uitgewersmaatskappy of 'n uitsaaikorporasie is, is dit vir die eiser besonder moeilik om opset te bewys, veral as die verweerder dwaling pleit. Boonop is die omvang van benadeling besonder groot omdat mediaverweerders 'n baie groot gehoor bereik.¹² In die lig hiervan bevraagteken die destydse Appèlafdeling in *Suid-Afrikaanse Uitsaaikorporasie v O'Malley*¹³ die wenslikheid van opset as skuldvereiste in 'n lastergeding teen die media; en beslis toe in *Pakendorf v De Flamingh*¹⁴ dat die eenaar, uitgewer en redakteur van 'n koerant skuldloos aanspreeklik gehou moet word vir lasterlike berigte wat in die koerant verskyn. Daarmee is skuldlose aanspreeklikheid van die media in die Suid-Afrikaanse reg gevestig.

Dié ontwikkeling is gekritiseer, veral omdat dit 'n te groot inperking van die media se vryheid van uitdrukking meebring.¹⁵ Sommige skrywers¹⁶ het oortuigend geargumenteer dat dit beter sou wees om aanspreeklikheid van die media vir laster op nalatigheid te baseer. Die kritiek kry 'n nuwe stukrag toe die reg op vryheid van uitdrukking in die nuwe grondwetlike bedeling as 'n fundamentele reg erken word.¹⁷

2.2 Die val van skuldlose aanspreeklikheid van die media vir laster

In *National Media Ltd v Bogoshi*¹⁸ kom die vraag of die media se skuldlose aanspreeklikheid vir laster in die nuwe grondwetlike bedeling regverdigbaar is, aan die orde. Appèlreger Hefer aanvaar as aksiomaties dat die lasterreg 'n balans tussen die reg op die goeie naam en die reg op vryheid van uitdrukking moet bewerkstellig.¹⁹ Hy kom tot die gevolgtrekking dat skuldlose aanspreeklikheid van die media onverdedigbaar is in die lig van die demokratiese imperatief van 'n ongehinderde vloeï van inligting.²⁰ In hierdie opsig is die *Pakendorf*-beslissing duidelik verkeerd en moet dit omvergewerp word.²¹ Die hof oorweeg middellike aanspreeklikheid en *dolus eventualis* as alternatiewe grondslae van aanspreeklikheid en verwerp beide.²² Ten slotte beslis die hof dat dit gepas is om mediaverweerders aanspreeklik te hou as hulle nalatig was.²³

11 Burchell *Delict* 184; Burchell *Defamation* 166; Neethling, Potgieter en Visser 348-349; Neethling 201-202; Van der Merwe en Olivier 434 ev.

12 Vgl Van der Walt "Die aanspreeklikheid van die pers op grond van laster" in Coetzee (red) *Gedenkbundel HL Swanepoel* (1976) 41 ev.

13 1977 3 SA 394 (A) 404-405 407.

14 1982 3 SA 146 (A) 156-158.

15 Vgl Burchell *Defamation* 185 ev; Burchell "Strict liability for defamation by the media and freedom of the press" 1980 *SALJ* 212 ev; Van der Merwe en Olivier 439-441; daarteenoor veral Van der Walt in Coetzee (red) 41 ev..

16 Vgl Burchell *Defamation* 155-157 189 193-194; Burchell 1980 *SALJ* 212-217; Van der Merwe en Olivier 440; Visser 1982 *THRHR* 342; Kemp "Die skuldvereiste by laster: 'n onlangse belangwekkende beslissing" 1982 *De Jure* 142.

17 Vgl Midgley "The attenuated form of intention: A constitutionally acceptable alternative to strict liability of the media" 1996 *THRHR* 635-636; Neethling en Potgieter "Aspekte van die lasterreg in die lig van die grondwet" 1995 *THRHR* 713-714; Van Aswegen "Implications of a bill of rights for the law of contract and delict" 1995 *SAJHR* 62; Van der Walt en Midgley 22-24.

18 1998 4 SA 1196 (HHA).

19 1207.

20 1210.

21 1211.

22 1213-1214.

23 1214.

2.3 Implikasies van die vervanging van skuldlose aanspreeklikheid van die media vir laster deur aanspreeklikheid gebaseer op nalatigheid

Skrywers soos Burchell²⁴ en ook Neethling en Potgieter²⁵ het die *Bogoshi*-saak verwelkom as realities en regverdig.²⁶ Hulle meen dat die uitspraak 'n gesonde balans teweegbring tussen die beskerming van die reg op die goeie naam aan die een kant, en die reg op vryheid van uitdrukking aan die ander kant. Dit lyk nie of hulle enige bedenkinge daaroor het dat die *Bogoshi*-uitspraak wesenlik afwyk van die gemenerereg nie, vir sover nalatigheid nou, weliswaar net in redelik eng omskrewe gevalle, voldoende kan wees vir toepassing van die *actio iniuriarum*.

Daar word heelhartig met die positiewe reaksie op die *Bogoshi*-uitspraak saamgestem. Die aanvaarding van skuldlose aanspreeklikheid van die media was bes moontlik 'n oorreaksie teen die onbetwisbare tekortkominge van opset as skuldvereiste.²⁷ Die pendulum het nou teruggeswaai na 'n middelposisie tussen die uiterstes van opset aan die een kant en skuldlose aanspreeklikheid aan die ander, en in hierdie middelposisie moet dit nou, meen ek, te ruste kom. Die meerderheid Suid-Afrikaanse juriste se regsgevoel sal waarskynlik deur die huidige posisie bevredig word.

Die belang van *Bogoshi* strek waarskynlik veel verder as net die lasterreg. Vir die persoonlikheidsreg as geheel kan hierdie saak van fundamentele belang word. Twee vrae kom na vore. Eerstens: Skuldlose aanspreeklikheid het ook op ander gebiede van die persoonlikheidsreg opset as aanspreeklikheidsvereiste verdring. Die vraag is nou of – in die lig van die wysheid wat *Bogoshi* gebring het – ons nie dalk op daardie gebiede ook met 'n oorreaksie teen die tekortkominge van opset te doen het nie, en indien wel, of nalatigheid nie dalk 'n gesonder grondslag van aanspreeklikheid sal wees nie. Maar tweedens kan die belang van *Bogoshi* selfs verder strek om ook daardie vorme van persoonlikheidskrenking ten opsigte waarvan opset nog altyd as skuldvereiste erken is, te betrek. Hier is die vraag of daar nie dalk redes is om aan te beweeg na aanspreeklikheid gebaseer op nalatigheid nie, sonder om eers na die uiterste van skuldlose aanspreeklikheid te neig. In die volgende paragrafe word op hierdie twee vrae uitgebrei.

2.3.1 Ander gevalle van persoonlikheidskrenking waar skuldlose aanspreeklikheid erken word

Onregmatige vryheidsberowing²⁸ en onregmatige beslaglegging op goed²⁹ is twee vorme van persoonlikheidskrenking waar afwesigheid van onregmatigheidsbewussyn

24 "Media freedom of expression scores as strict liability receives the red card: *National Media Ltd v Bogoshi*" 1999 *SALJ* 5 ev.

25 "Die lasterreg en die media: Strikte aanspreeklikheid word ten gunste van nalatigheid verwerp en 'n verweer van mediaprivilegie gevestig" 1999 *THRHR* 448.

26 Midgley "Media liability for defamation" 1999 *SALJ* 211 vertolk die uitspraak anders. Sien par 5 hieronder.

27 Vgl Van der Merwe en Olivier 440.

28 Vgl bv *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 154-157; *Tödt v Ipsier* 1993 3 SA 577 (A) 588; *Ramsay v Minister van Polisie* 1981 4 SA 802 (A) 818-819; Neethling, Potgieter en Visser 336-337; Neethling 139 ev; Pauw "Kwaadwillige vervolging ('malicious prosecution') en die *actio iniuriarum* - 'n ander standpunt" 1978 *THRHR* 398 ev; Van der Merwe en Olivier 550 ev; Van der Walt en Midgley 87- 88.

29 Vgl bv *Trust Bank van Afrika Bpk v Geregsbode, Middelburg* 1966 3 SA 391 (T) 393; *Minister of Finance v EBN Trading (Pty) Ltd* 1998 2 SA 319 (N) 329; *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 154; Burchell *Delict* 202-205; Neethling, Potgieter en Visser 352-353; Neethling 227-229.

nie 'n vereiste vir aanspreeklikheid is nie, al word aanvaar dat die *actio iniuriarum* die toepaslike aksie is. Ook by 'n eis weens privaathedskending van 'n aangehouende was die houe al bereid om die vereiste van onregmatigheidsbewussyn te negeer.³⁰ Soms word gesê dat 'n verskraalde of afgeskaalde vorm van opset in hierdie soort gevalle vereis word, in die sin dat die dader steeds sy wil op die veroorsaking van die onredelike gevolg moet rig, maar dat 'n besef van die onregmatigheid van sy optrede nie vereis word nie.³¹ Hierdie sogenaamde verskraalde vorm van opset is myns insiens glad nie opset in 'n regstegniese sin nie. Dit dui slegs aan dat die dader 'n bepaalde gevolg doelbewus teweeggebring het. 'n Mens kan dié soort "opset" ook ten opsigte van 'n regmatige gevolg hê.³² So gesien, is dit dus skuldlose aanspreeklikheid wat in hierdie gevalle erken word.³³ Die onderliggende rede vir dié toedrag van sake is, analoog aan die geval van laster deur die media, te vinde in die enormiteit van die eiser se taak om onregmatigheidsbewussyn aan die kant van die dader – wat hier gewoonlik 'n staatsorgaan is – te bewys, tesame met die geweldige omvang van die potensieële nadeel wat die eiser bedreig.

Net soos in die geval waar 'n eiser deur die media belaster word, kom dit onbillik voor dat 'n eiser wat deur die staatsmasjinerie onregmatig van sy vryheid of besittings of privaathed beroof word, opset en dus onregmatigheidsbewussyn moet bewys. Maar is daar nie tog maar 'n mate van huiwering as die staat dan effektief met skuldlose aanspreeklikheid opgesaal word nie? In 1997 het ek my – versigtig en met voorbehoud – ten gunste van sodanige aanspreeklikheid van die staat vir sekere delikte teen onderdane gepleeg, uitspreek.³⁴ Vandag, na *Bogoshi*, wonder ek of nalatigheid nie ook by onregmatige vryheidsberowing of beslaglegging op goed 'n minder ekstreme en redeliker grondslag van aanspreeklikheid sou wees nie.³⁵

30 Vgl *C v Minister of Correctional Services* 1996 4 SA 292 (T); Neethling, Potgieter en Visser 356 vn 266; Neethling 130 vn 262 303 vn 230; Knobel "HIV-toetse, toestemming en onregmatigheidsbewussyn" 1997 THRHR 535-536.

31 Bv *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 154: "It is clear that without *dolus* the action for *injuria* would lie neither in Roman law nor in Roman-Dutch law . . . It is equally clear, however, that in a limited class of *injuriae* the current of precedent has in modern times flowed strongly in a different direction. In this limited class of delicts *dolus* remains an ingredient of the cause of action, but in a somewhat attenuated form, in the sense that it is no longer necessary for the plaintiff to establish consciousness on the part of the wrongdoer of the wrongful character of his act. Included in this limited class are cases involving false imprisonment and the wrongful attachment of goods"; vgl Midgley 1996 THRHR 635.

32 Om so 'n soort "opset" as 'n vorm van *animus iniuriandi* te bestempel is mi 'n *contradictio in terminis*: Dit is beslis 'n *animus* van een of ander aard, maar dit is te betwyfel of dit 'n *animus iniuriandi* kan wees.

33 Die stelling van die destydse Appèlafdeling in *Minister of Justice v Hofmeyer* 1993 3 SA 131 (A) 154 dat "in a limited class of delicts *dolus* remains an ingredient of the cause of action, but in a somewhat attenuated form" is mi onakkuraat en verwarrend. Veel duideliker is beslissings van die Kaapse afdeling van die destydse hooggeregshof wat onomwonde verklaar dat aanspreeklikheid hier skuldloos is, bv: *Shoba v Minister van Justisie* 1982 2 SA 554 (K) 559: "Onregmatige vryheidsberowing word egter as uitsondering behandel weens onder meer die hoë waarde wat die houe aan die vryheid van die individu heg. Sodanige eiser hoef nie skuld aan die kant van die verwerder te bewys nie"; *Donono v Minister of Prisons* 1973 4 SA 259 (K) 262: "As is the case with unlawful arrest, the plaintiff need not allege or prove fault, either in the form of *dolus* or *culpa*, on the part of the defendant." Vgl Neethling, Potgieter en Visser 337; Neethling 146-148 227; Pauw 1978 THRHR 400; Van der Merwe en Olivier 551 ev; daarteenoor Van der Walt en Midgley 87.

34 1997 THRHR 536.

35 Vgl Van der Merwe en Olivier 553 vn 5.

'n Mens sou kon argumenteer dat die feit dat die verweerder in hierdie tipe gevalle dikwels 'n staatsorgaan is, 'n verskil behoort te maak. Miskien is skuldlose aanspreeklikheid van die staat hier juis in ooreenstemming met 'n nuwe regskultuur van staatsverantwoording in 'n nuwe grondwetlike bedeling.³⁶ Maar miskien ook nie. Immers, as nalatigheid vereis word, sal die staat se optrede aan die redelikheidstoets van die redelike persoon getoets word. Die objektiewe voorsienbaarheid en voorkombaarheid van skade sal aanspreeklikheid bepaal,³⁷ en die verweerder sal hom nie kan beroep op dwaling wat onregmatigheidsbewussyn uitsluit nie – tensy die redelike persoon in dieselfde omstandighede ook sou gedwaal het, en die dwaling dus objektief redelik was. Moet die staat werklik aanspreeklik wees as die dwaling van sy amptenare objektief redelik was in die sin dat die redelike persoon dieselfde fout sou gemaak het? Is nalatigheid nie dalk weer eens die goue middeweg waar die balans gevind word tussen die noodsaak om die onderdaan teen ongebreidelde staatsoptrede te beskerm aan die een kant, en aan die ander kant die noodsaak om die reeds oorlaaide wetstoepassingsarm van die staat se taak nie onnodig (onredelik) verder te bemoeilik nie en, verder, om die beperkte staatskas (en bygevolg die onderdane wat daartoe bydra) nie onnodig (onredelik) verder te belas nie?

Skuldlose aanspreeklikheid word ook erken ingevolge 'n aantal eiesoortige aksies wat reeds in die Romeinse reg in gebruik was. Van hierdie groep aksies is die *actio de pauperie* die enigste een wat redelik dikwels in die Suid-Afrikaanse hofverslae voorkom. Met hierdie aksie kan 'n eiser wat deur 'n ander se huisdier benadeel is, sowel vermoënskade as nie-vermoënskade van die eienaar van die dier verhaal, sonder dat skuld in enige vorm aan die kant van die eienaar vereis word.³⁸ Weer eens word dit bevraagteken of skuldlose aanspreeklikheid hier die billikste oplossing is. Die vraag is of ons werklik in 'n moderne regstelsel die eienaar van 'n dier aanspreeklik wil hou vir skade wat die dier veroorsaak het maar waaraan die eienaar geen skuld gehad het nie. Skep die eienaar van 'n dier werklik so 'n groot risiko van benadeling dat aanspreeklikheid skuldloos moet wees? Is dit werklik so moeilik om te bewys dat die eienaar van die dier nalatig was? Skiet die toets van redelike voorsienbaarheid en voorkombaarheid van skade tekort, of bied dit 'n redelike en logiese grondslag van aanspreeklikheid ook in hierdie geval? Miskien het dit tyd

36 Vgl (tov onregmatige beslaglegging) *Minister of Finance v EBN Trading (Pty) Ltd* 1998 2 SA 319 (N) 329: "It seems to me to accord better with the human rights culture of the new South Africa, which is stressed in both the interim and the final Constitutions of the Republic, that in cases involving wrongful imprisonment or the wrongful detention of goods that it should no longer be 'necessary for the plaintiff to establish consciousness on the part of the wrongdoer of the wrongful character of his act'." Let daarop, dat - dalk inkonsekwent? - die hof tog nie op "strikte" aanspreeklikheid wil steun nie: "Upholding [this] principle . . . does not create strict liability for the Commissioner. For example, in this action the plaintiff will still have to establish that it is not, in fact, liable to the Commissioner for the payment of any customs duty or vat. Moreover, . . . the plaintiff will still have to establish the element of causation and that its damages are not too remote. All this will protect the Commissioner against unjustified and excessive claims." Die hof verwys na onregmatigheids- en kousaliteitsvraagstukke ten einde te motiveer dat strikte aanspreeklikheid nie voorhande is nie. Strikte aanspreeklikheid word egter gewoonlik verstaan as aanspreeklikheid sonder skuld, en dus is dié motivering misplaas. Onregmatigheid en kousaliteit was (hopelik) nog nooit in gedrang nie; skuld wel. En steeds word gevoel dat 'n nalatigheidsvereiste billiker sal wees as óf opset óf skuldlose aanspreeklikheid, ook (en veral) in 'n nuwe grondwetlike bedeling.

37 Vgl in die algemeen Burchell *Delict* 31; Neethling, Potgieter en Visser 127 ev; Van der Merwe en Olivier 126 ev; Van der Walt en Midgley 133 ev.

38 Vgl Burchell *Delict* 250 ev; Neethling, Potgieter en Visser 363 ev; Van der Merwe en Olivier 486 ev; Van der Walt en Midgley 26.

geword om te besin of die *actio de paupiere*³⁹ nog naas die aquiliese aksie, *actio iniuriarum* en aksie weens pyn en lyding 'n bestaansreg het.^{40 41}

Daar word nie te kenne gegee dat alle vorme van skuldlose aanspreeklikheid noodwendig ongesond is nie. Wat wel aangevoer word, is dat dit – in die lig van *Bogoshi* – sinvol is om te oorweeg of nalatigheid nie dalk in baie van die bestaande gevalle 'n beter grondslag vir aanspreeklikheid kan bied nie.

2 3 2 Gevalle van persoonlikheidskrenking waar opset vereis word

Waar laster deur 'n nie-mediaverweerder gepleeg word, was *animus iniuriandi*, oftewel opset, nog altyd 'n aanspreeklikheidsvereiste. Of dié posisie bevredigend was, is 'n ander vraag. Dit is betekenisvol dat appèlregter Hefer in *Bogoshi* die vraag ooplaat of enige verweerder op afwesigheid van onregmatigheidsbewussyn weens nalatigheid kan steun, en nog die moontlikheid uitspreek dat die posisie van mediaverweerders dalk tog nie soveel van dié van ander verweerders verskil nie.⁴² Dit lyk onbillik om 'n dader wat 'n ander belaster het, vry te laat uitgaan as hy nie opset gehad het nie, maar die redelike persoon in dieselfde posisie wel die eiser se persoonlikheidsnadeel sou voorsien en voorkom het. Soortgelyke sentimente is al per geleentheid in die howe⁴³ en deur skrywers uitgespreek.⁴⁴

39 Om nie eers te praat van die ander ou skuldlose aksies nie. Sien Burchell *Delict* 253 ev; Neethling, Potgieter en Visser 366 ev; Van der Merwe en Olivier 494 ev; Van der Walt en Midgley 27 ev.

40 Vgl Van der Merwe en Olivier 493; "Hoeseer ook al in ons regspraak ingeburger, bestaan skaars behoeftes aan, of regverdiging vir, aanspreeklikheid onder die *actio de pauperie*. Waarom per slot van rekening 'n groter verantwoordelikheid op 'n eenaar plaas vir skade deur sy roerende goed in die vorm van huisdriere veroorsaak as deur sy ander roerende goed, bv in die vorm van vaatjies buskruit? Ooreenkomstig die beginsels van die onregmatige daad behoort die eenaar telkens slegs aanspreeklik gehou te word indien hy op skuldige wyse die nadeel teweeggebring het."

41 Seduksie is moontlik 'n verdere voorbeeld van 'n persoonlikheidskrenking waar skuldlose aanspreeklikheid van toepassing is. As die verweerder verkeerdlik gemeen het dat die eiser nie 'n maagd was nie, kan eersgenoemde hom nie op afwesigheid van onregmatigheidsbewussyn beroep nie (vgl Neethling, Potgieter en Visser 335; Pauw 1978 *THRHR* 401). Weer eens skep die subjektiewe aard van die toets vir opset probleme, en weer eens lyk dit of aanspreeklikheid na skuldlose aanspreeklikheid neig. Sommige skrywers meen dat die aksie vir seduksie nie meer 'n bestaansreg het nie (vgl Neethling 109 vn 64; Van der Merwe en Olivier 96 451).

42 1214-1215.

43 Bv in *Hassen v Post Newspapers (Pty) Ltd* 1965 3 SA 562 (W) 570: "I am here concerned . . . with the question whether . . . in all defamation cases the test of liability is purely subjective. If that is so, a person injured by a defamatory statement will be without remedy (unless he can formulate a claim within the scope of the *Lex Aquilia*) if the defendant is able to show that the publication was made by him in the belief (albeit a mistaken belief) that circumstances existed which justified or excused the damaging publication. Considerations of equity would seem to require that any loss which arises from such an error should be borne by the person who made the error, rather than by its victim, at any rate if the error was an unreasonable one, or was imputable to the recklessness or negligence of the person who made it"; en dan word verder gegaan (576): "From that case [*Nasionale Pers (Bpk) v Long* 1930 AD 87] I deduce the following rule: A defamation is not actionable if it was published in the honest, though mistaken, belief in the existence of circumstances which would have justified or excused its publication; but that is so only if the mistake is not attributable to the recklessness or negligence of the defendant, or of those for whose acts or omissions he is responsible." In die *Hassen*-saak was die verweerder wel 'n lid van die media, maar dit lyk nie of Colman R beoog het om sy pas aangehaalde *dicta* tot mediaverweerders te beperk nie. Vgl *Suttonmere (Pty) Ltd v Hills* 1982 2 SA 74 (N) 79: "I do want to suggest that the time has come for those concerned with law reform to give some thought to a situation of which the present case is an example. The business leviathan's organisms are machines and computers which are technological masterpieces, but

Dieselfde soort vroe kan gevra word ten aansien van elke ander persoonlikheidskrenking waar opset of *animus iniuriandi* vereis word: belediging, privaatheidskending, krenking van die gevoelslewe, en so meer.⁴⁵ Op al hierdie gebiede kan die verweerder hom te maklik op afwesigheid van onregmatigheidsbewussyn beroep. Telkens is die subjektiewe toets vir opset die Achilleshiel van beskerming. Slegs dwaling wat objektief redelik is, behoort die verweerder vry te laat gaan. Daarvoor is 'n nalatigheidstandaard nodig.

3 DIE ERKENNING VAN PERSOONLIKHEIDSREGTE AS FUNDAMENTELE REGTE IN 'N NUWE GRONDWETLIKE BEDELING

In die nuwe Grondwet⁴⁶ word verskeie persoonlikheidsregte wat lank reeds in die gemenerereg beskerm is, nou boonop as fundamentele (mense)regte erken. Die reg op die vryheid en veiligheid van die persoon (wat die reg op liggaamlike en psigiese integriteit insluit),⁴⁷ die reg op menswaardigheid⁴⁸ (wat volgens algemene beskouing belange soos die eer en goeie naam bekserm)⁴⁹ en die reg op privaatheid⁵⁰ is 'n paar voor-die-hand-liggende voorbeelde. Verder word sekere vermoënsregte, soos die reg op eiendom,⁵¹ ook in die Grondwet beskerm. By implikasie word die gemelde persoonlikheidsregte in die Grondwet as ten minste ewe belangrik as vermoënsregte soos eiendomsreg geag.

In die delikterereg, daarenteen, geniet die meerderheid van persoonlikheidsbelange 'n minder omvattende beskerming as vermoënsbelange, en juis omdat opset by die krenking van eersgenoemde vereis word, terwyl nalatigheid by laasgenoemde voldoende is. Die reikwydte van opset is immers veel kleiner as dié van nalatigheid, en boonop is dit gewoonlik moeiliker om opset as nalatigheid te bewys.

Die vraag is of dié posisie in die nuwe grondwetlike bestel regverdigbaar is. 'n Sterk saak kan daarvoor uitgemaak word dat persoonlikheids- en vermoënsbelange nou gelyke beskerming in die privaatreg behoort te geniet deur die toepassing van 'n eenvormige skuldvereiste. Die Grondwet⁵² lê die howe die verpligting op om die gemenerereg te ontwikkel ten einde die bepalings van die handves van fundamentele regte op natuurlike en regs persone toe te pas. In die lig hiervan het die howe nou die

they are operated by fallible human beings whose negligence can result in the business reputations of innocent individuals being destroyed. There are other fields in which the individual's right to an unsullied reputation ought to be protected against the negligence of others, but it seems to me that it is important that a person who negligently harms the reputation of another by unwarranted resort to litigation should be made to bear the consequences of his negligence." In *Pakendorf v De Flamingh* word net gesê dat "'n oplossing gevind sal moet word vir die geval waar die afwesigheid van die wederregtelikheidsbewussyn veroorsaak is deur nalatigheid aan die kant van die verweerder".

44 Vgl by Pauw 212-213; Van der Merwe en Olivier 433 435 vn 85; Visser 1982 *THRHR* 168 ev.

45 Vgl by Visser 1982 *THRHR* 174.

46 Wet 108 van 1996.

47 A 12.

48 A 10.

49 Vgl Neethling, Potgieter en Visser 21 vn 134; Neethling 95.

50 A 14.

51 A 25.

52 A 8.

bevoegdheid om die toepassingsgebied van die *actio iniuriarum* na gevalle van nalatige persoonlikheidskrenking uit te brei.⁵³

4 DIE UITSPRAAK IN *MARAIS V GROENEWALD*

Die onlangse Transvaalse uitspraak in *Marais v Groenewald*⁵⁴ verg nou nadere beskouing. Die saak handel oor laster gepleeg deur 'n verweerder wat nie 'n lid van die media is nie. Daar was nietemin wye publikasie deurdat die gewraakte bewerings in 'n skriftelike stuk opgeneem is, en dié stuk na die provinsiale kantore van 'n politieke party, en na bewering ook na lede van die algemene publiek, versprei is. Regter Van Dijkhorst oorweeg die vraag of die onlangse ontwikkelings in *Bogoshi*

53 In Duitsland was dit juis die inwerkingtreding van die *Grundgesetz* in 1949 wat tot 'n groot verruiming van privaatregtelike persoonlikheidsbeskerming aanleiding gegee het. Die *Bürgerliches Gesetzbuch* a 823(1) het bepaal dat iemand wat op onregmatige wyse, opsetlik of nalatig, op die lewe, liggaam, gesondheid, vryheid, eiendom of 'n soortgelyke reg van 'n ander inbreuk maak, verplig is om die daaruitspruitende skade van die ander te vergoed. Aanvanklik het die Duitse houe ontken dat ander persoonlikheidsbelange as dié wat uitdruklik in a 823(1) genoem is, ingevolge dié artikel privaatregtelike beskerming kan geniet. In die grondwet is die menslike eiewaarde en vrye ontplooiing van die persoonlikheid egter as fundamentele regte erken, en onder dié invloed het die Duitse houe so ver gegaan as om 'n algemene persoonlikheidsreg - waaronder 'n wye verskeidenheid van persoonlikheidsbelange tuisgebring is en waaruit nuwe besondere persoonlikheidsregte kan ontwikkel - ingevolge a 823(1) *BGB* te beskerm. Vgl Palandt *Bürgerliches Gesetzbuch* (2000) 997 ev; Staudinger *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (1999) 185 ev; Markesinis *The German law of torts* (1990) 55-58; Neethling *Persoonlikheidsreg* (1985) 11 ev; Pauw 103 ev. In 1976 skryf Pauw 212-213: "Mens kom dus tot die gevolgtrekking dat die *actio iniuriarum* in die Suid-Afrikaanse reg nie meer dinamies kan werk nie, maar as gevolg van 'n historiese moment verengend werk. Die regsbegrip het naamlik nie tred gehou met die verandering in die waarde van die menslike persoonlikheid nie. Die *actio iniuriarum*, soos dit in die sewentiende eeu na Suid-Afrika gekom het, het in wese nog nie verander nie . . . Vir die sewentiende eeu was die bedoeling om iemand 'n *iniuria* aan te doen en die rol van die weerlegbare vermoede om die verweerder aanspreeklik te hou, waarskynlik genoegsaam om voldoende beskerming te verleen teen aantasting van die persoonlikheid. Destyds was daar nog geen tegnologiese samelewing en massamedia wat die persoonlikheid van 'n regs subjek baie maklik en baie verreikend kon aantast nie . . . Die beperking van die historiese moment in die Suid-Afrikaanse reg word voortgesit deur die houe wat nie mag reg skep nie, dog slegs bestaande reg interpreteer. Dit kan vergelyk word met die posisie in Duitsland. In 1900, met die inwerkingtreding van die *BGB*, het daar die gevoel geheers dat aantasting van die persoonlikheid behoort tot die terrein van die strafreg; in 1954 bestaan daar al die gedagte in die regspraak dat die privaatrek ook die persoonlikheid moet beskerm. Gelukkig het die *Grundgesetz* in 1949 tot stand gekom en daardeur is die menslike persoonlikheid hoog aangeskryf. Hierdeur het die regspraak die kans gekry om op 'n gekunstelde wyse 'n radikale nuwe sisteem van persoonlikheidsbeskerming in die privaatrek daar te stel. In Suid-Afrika sal so 'n omswaai nie moontlik wees nie: die houe is beperk binne die presedenstestelsel. Daar bestaan ook nie die unieke situasie wat in die Duitse reg ontstaan het na die invoering van die *Grundgesetz* nie. Ontwikkeling by wyse van regspraak word dus effektiewelik aan bande gelê. Al oplossing wat daar dus vir die Suid-Afrikaanse reg voorlê, is om die reg aangaande persoonlikheidskrenking in 'n wet vas te lê, ten einde aan die persoonlikheid die maksimum moontlike beskerming te verleen." Vgl Neethling 73; Van der Merwe en Olivier 246 vn 8; Visser 1982 *THRHR* 173. Mi is die posisie in Suid-Afrika vandag vergelykbaar met dié in Duitsland na inwerkingtreding van die *Grundgesetz*, en is wetgewing nie meer die enigste oplossing nie. Die Grondwet het die pad vir die houe oopgemaak om privaatregtelike persoonlikheidsbeskerming te hervorm, en *Bogoshi* wys wat moontlik is.

54 2001 1 SA 634 (T).

uitgebrei moet word om ook vir nie-mediaverweerders te geld. Hy stem saam met Neethling⁵⁵ dat nalatigheid as aanspreeklikheidsvereiste vir die *actio iniuriarum* erken moet word. Dit sal verhoed dat 'n verweerder wat willens en wetens 'n ander se goeie naam skend terwyl hy selfs grof nalatig in die waan verkeer dat wat hy doen regmatig is, vry uitgaan. Hy meen die feit dat *Bogoshi* juis die media uitsonder vir spesiale behandeling, nie verhinder dat "die Rubicon oorgesteek word" nie, aangesien lasterlike bewerings ook deur nie-mediaverweerders (soos die partystrukture in die feite voor die hof) wyd versprei kan word. Ten einde die reg op menswaardigheid verskans in artikel 10 van die Grondwet, vir sover dit die goeie naam omvat, te eerbiedig, beskerm en verweselik soos 'n gereghof geroepe is om te doen, is dit noodsaaklik dat publikasie van lasterlike stellings aanspreeklikheid onder die *actio iniuriarum* meebring in gevalle waar onregmatigheidsbewussyn weens nalatigheid afwesig is, al sou opset by moontlikheidsbewussyn ook in sulke gevalle ontbreek. Hierdie ontwikkeling van die gemenerereg strek ter bevordering van die gees en oogmerke van die Handves van Regte soos voorgeskryf in artikel 39(2) van die Grondwet, en werk nie benadelend in op die vryheid van spraak verskans in artikel 16(1) nie. Regter Van Dijkhorst vind dit onnodig om hom uit te laat oor die vraag of geringe nalatigheid (*culpa levissima*) dieselfde gevolg behoort te hê.

Hierdie uitspraak moet verwelkom word. Die Transvaalse hoë hof het hier sy bereidwilligheid bewys om die ontwikkeling wat met die *Bogoshi*-uitspraak begin het, uit te brei sodat ook die aanspreeklikheid van nie-mediaverweerders vir laster op nalatigheid gebaseer kan word. Die uitspraak bevat ook welkome wyer stellings oor die wenslikheid van nalatigheid as skuldvereiste by die *actio iniuriarum* in die algemeen. 'n Mens kan maar net die hoop uitspreek dat die ander afdelings van die hoë hof, asook die Hoogste Hof van Appèl, ook dié ingeslane rigting sal volg.

As 'n mens kritiek teen die *Marais*-uitspraak moet opper, moet dit gaan oor die gebruik van verwarrende terminologie op plekke. Die spore van dié probleem gaan egter veel verder terug, en daarom word dit onder 'n volgende opskrif bespreek.

5 VERWARRENDE TERMINOLOGIE

Net nadat regter Van Dijkhorst in die *Marais*-beslissing 'n saak uitgemaak het dat ook nie-mediaverweerders vir laster aanspreeklik moet wees in gevalle waar hulle weens hul eie nalatigheid nie onregmatigheidsbewussyn het nie,⁵⁶ maak hy dan 'n bevinding wat in dié konteks redelik verrassend is: "Dit volg dus dat die . . . verweerders laster ten aansien van die eiser gepubliseer het en *nie die vermoede dat hulle dit opsetlik gedoen het weêrlê het nie*."⁵⁷ Waarom sal 'n lang bespreking oor *nalatigheid* onmiddellik gevolg word deur 'n bevinding dat 'n vermoede van *opset* nie weêrlê is nie? 'n Leidraad is vroeër in die *Marais*-uitspraak te vinde, waar die belang van die *Bogoshi*-beslissing in die volgende woorde verduidelik word:

"In die plek van die bestaande skuldlose aanspreeklikheid is die toets van *animus iniuriandi* met 'n bewyslas op die pers om afwesigheid daarvan te bewys ingevoer."⁵⁸

55 *Persoonlikheidsreg* (1998) 72 ev.

56 646-647, soos in die voorafgaande paragraaf bespreek.

57 647, my beklemtoning.

58 644.

Die stelling word later gekwalifiseer:

“Media-verweerders sal hulle slegs op afwesigheid van *animus iniuriandi* kan beroep indien hulle nie nalatig was by die nagaan of die stof waar is nie.”⁵⁹

Gaan ’n mens egter die bewysplaas in *Bogoshi*⁶⁰ na waarop regter Van Dijkhorst hom beroep, staan daar:

“[I]t is necessary to raise the question left open in *Pakendorf* . . . whether absence of knowledge of wrongfulness can be relied upon as a defence if the lack of knowledge was due to the negligence of the defendant . . . Defendant’s counsel, rightly in my view, accepted that there are compelling reasons for holding that the media should not be treated on the same footing as ordinary members of the public by permitting them to rely on the absence of *animus iniuriandi*, and that it would be appropriate to hold media defendants liable unless they were not negligent in the circumstances of the case.”

In *Bogoshi* word dus gesê dat die verweerder nie op afwesigheid van onregmatigheidsbewussyn (dwaling) kan steun as dit aan sy nalatigheid te wyte was nie. Dit beteken nie (soos wat skynbaar in *Marais* te kenne gegee word) dat die dader *animus iniuriandi* het as hy weens sy eie nalatigheid nie onregmatigheidsbewussyn gehad het nie. Dit beteken wel dat hy dan op ’n ander grondslag aanspreeklik is, naamlik dat ’n ander vorm van skuld, te wete nalatigheid, by hom teenwoordig is. Om nog verder uit te brei: As die dader *animus iniuriandi* het – wilsgerigtheid plus onregmatigheidsbewussyn – is hy aanspreeklik. As hy weens dwaling nie onregmatigheidsbewussyn gehad het nie, het hy nie *animus iniuriandi* nie, maar as sy dwaling nalatig was, kan hy hom nie op dié dwaling beroep om aanspreeklikheid vry te spring nie, want opset is nie meer die enigste skuldvereiste vir aanspreeklikheid nie – nalatigheid is nou voldoende.

Die oorsprong van die verwarring lê in ’n onpresiese gebruik van terminologie. Die spoor van dié verwarring kan ten minste tot by *Hassen v Post Newspapers (Pty) Ltd*⁶¹ terug gevolg word. Die *Bogoshi*-uitspraak is self ongelukkig ook nie vry daarvan nie.⁶² Wat veral verwarrend werk, is die herhaling in sowel *Bogoshi* as *Marais* van die tradisionele uitgangspunt dat die bewys van publikasie van *prima facie* lasterlike materiaal twee vermoedens laat ontstaan, onder andere ’n vermoede van *animus iniuriandi*.⁶³ Die howe sal baie tot groter duidelikheid bydra as hulle

59 645.

60 644B-I.

61 1965 3 SA 562 (W) 574: Eers word “doel” of “oogmerk” met “intent” gelyk gestel, en dan voortgegaan: “The next question is which *intents* are sanctioned by law . . . It will suffice if I mention some situations in which, I conceive, the law does not sanction the publication of matter injurious of another. The law clearly does not sanction such a publication if it is made out of spite or ill-will. But nor, I think, does the law sanction a defamatory publication which, though not tainted with spite or ill-will, was made *unreasonably, recklessly or negligently*” (my beklemtoning). Let op die verwarrende manier waarop opset en nalatigheid in die aangehaalde gedeelte gekoppel word.

62 Bv 1214-1215. Vgl die verwarrende opeenstapeling van begrippe soos “absence of knowledge of wrongfulness”; “lack of knowledge . . . due to the negligence of the defendant”; “defence of lack of *animus injuriandi*”; “ignorance or mistake on the part of the defendant regarding one or other element of the delict”; “ignorance and mistake at the level of lawfulness”; “negligence . . . may well be determinative of the legality of the publication”; “defence of absence of *animus injuriandi*”; “negligent”; “defence of absence of knowledge of unlawfulness due to negligence”. Vgl verder Burchell 1999 SALJ 5 ev; Midgley 1999 SALJ 211 ev.

63 Die ander (en eerste) vermoede wat ontstaan, is ’n vermoede van onregmatigheid. Vgl Burchell *Delict* 159; Burchell *Personality* 207; Neethling, Potgieter en Visser 342-343 348; Neethling 173 200; Van der Walt en Midgley 91.

nou, in die era na *Bogoshi*⁶⁴ en *Marais*,⁶⁵ hierdie beginsel herbewoord om te lui: Bewys van die publikasie van *prima facie* lasterlike materiaal laat onder andere 'n vermoede van *skuld* ontstaan. Die verweerder kan die vermoede alleen weêrlê deur te bewys dat hy nie *animus iniuriandi* gehad het nie en *ook nie nalatig was nie*.

Die dubbelsinnigheid wat uit die verwarrende taalgebruik voortspruit, het dit ook vir Midgley⁶⁶ moontlik gemaak om 'n ander uitleg aan die *Bogoshi*-uitspraak te gee as dié wat deur Burchell,⁶⁷ Neethling en Potgieter,⁶⁸ en in hierdie bydrae gevolg word.⁶⁹ Midgley huldig die standpunt dat die hof in *Bogoshi* eintlik teruggekeer het na die posisie voor *O'Malley* en *Pakendorf* en dat die hof *animus iniuriandi* as skuldvereiste in ere herstel het. Hy meen dat die hof se beslissing dat 'n mediaverweerder nie op afwesigheid van onregmatigheidsbewussyn kan steun as dié afwesigheid aan sy nalatigheid te wyte was nie, opset as skuldvorm bevestig, eerder as om dit deur nalatigheid te vervang. Die nalatigheid waarna die hof verwys, het volgens Midgley⁷⁰ net betrekking op die *dwaling* van die verweerder met betrekking tot die onregmatigheid van sy optrede; dit het nie betrekking op die *publikasie* van die lasterlike materiaal nie.

Daar kan nie met dié interpretasie saamgestem word nie. As die dader dwaal oor die onregmatigheid van sy optrede, het hy nie opset in die regstegniese sin nie, want opset vereis onregmatigheidsbewussyn. Die toets is suiwer subjektief. As die redelike persoon in die dader se posisie sou besef het dat sy optrede onregmatig is of kan wees, maar subjektief het die dader self dit nie besef nie, het die dader nie opset nie, maar – objektief beoordeel – is hy wel nalatig. En uiteindelik het sy nalatigheid nie net betrekking op sy *dwaling* nie, maar tog ook op die skade wat hy deur die publikasie van die onregmatige materiaal veroorsaak het. Hy het immers die materiaal gepubliseer juis omdat hy gedwaal het en nie besef het dit is onregmatig of kan onregmatig wees nie. As die redelike persoon in dieselfde posisie egter nie so sou gedwaal het nie, sou die redelike persoon verder nie net voorsien het dat die publikasie 'n ander skade kan berokken nie, maar sou die redelike persoon ook anders opgetree het om die skade te voorkom. As die dader in sodanige omstandighede aanspreeklik gehou word, is die grondslag van sy aanspreeklikheid

64 1202.

65 644.

66 1999 SALJ 211.

67 Sien vn 24 hierbo.

68 Sien vn 25 hierbo.

69 By 'n vroeër geleentheid het Midgley 1996 *THRHR* 635 'n "verskraalde" of "afgeskaalde" vorm van opset – waarby onregmatigheidsbewussyn nie vereis word nie – as skuldvereiste by lasterlike gepropageer. Dié standpunt lyk op die oog af aantreklik, maar mi is so 'n verskraalde opset by nadere beskouing nie werklik 'n vorm van skuld nie, en kan gebruik van dié begrip verdere verarring veroorsaak. Sien par 2 3 1 hierbo.

70 222: "One is not assessing whether the defendant's conduct – the publication of defamatory matter – is objectively reasonable, nor is one assessing whether such conduct was blameworthy in the sense that it was negligent: instead, one is assessing whether the defendant's *lack of intention* was reasonable in the circumstances; put differently, whether the defendant was negligent in making the mistake, not negligent in publishing the material. This, of course, means that any thought of negligence forming the basis of media liability for defamation is ruled out. Fault in the form of intention remains the basis of liability for all defendants, and the intention retains its subjective nature. However, if media defendants wish to rebut the presumption of intention by pleading ignorance or mistake, such ignorance or mistake must have been subjectively reasonable in the circumstances: the defendant must not have been negligent in being ignorant or in making the mistake."

geleë in sy nie-voldoening aan die sorgsaamheidsstandaard van die redelike persoon. Die dader se aanspreeklikheid is dus op nalatigheid gebaseer, en dit, meen ek, is presies wat appèlregter Hefer in *Bogoshi* beoog het.

6 SLOTGEDAGTES

Ten slotte en ter afronding word 'n paar losstaande gedagtes gelug, sommige waarvan reeds aangeroei is.

Die toets vir nalatigheid is vanweë die objektiewe aard daarvan, makliker om toe te pas as die veel subjektiewer toets vir opset. Uit die hofverslae blyk duidelik dat ons howe en regspraktisyns gemaklik is met en bedrewe is in die hantering van die nalatigheidstoets. Dit is gewoonlik billik om die optrede van 'n verweerder in 'n delikteregsaak nie net aan 'n onregmatigheidstoets te onderwerp nie, maar ook aan 'n nalatigheidstoets. Beide toetse het ten doel om tussen redelikheid en onredelikheid van skadeveroorakende optrede te onderskei, en beide toetse benut objektiewe standaarde om hierdie oogmerk te bereik. Tog is daar belangrike verskille tussen die twee toetse. By die beoordeling van regmatigheid/onregmatigheid word as 't ware teruggekyk na die voltooide gewraakte gedrag, met inagneming van die skadelike gevolge wat daaruit voortgevloeit het en al die omstandighede wat tydens die uitvoering van die gedrag teenwoordig is. By die ondersoek na die teenwoordigheid of afwesigheid van nalatigheid word die fiktiewe redelike persoon in die posisie van die dader geplaas ten tyde van die pleging van die nog onvoltooide daad, en dan word die redelikheid al dan nie van die dader se optrede deur 'n vooruitkyk bepaal, met inagneming van die gevolge wat die redelike persoon op daardie stadium sou voorsien het, en die omstandighede waarvan die redelike persoon op daardie stadium bewus sou gewees het. Alhoewel altwee redelikheidstoetse in wese objektief is, is die toets vir nalatigheid dus tog subjektiewer as dié vir onregmatigheid. In die meerderheid van delikteregsake, ook in geval van die meerderheid van persoonlikheidskrenkings, is dit alleenlik redelik om die dader privaatregtelik aanspreeklik te hou as sy optrede aan altwee redelikheidstoetse gemeet is, en ten opsigte van altwee toetse tekortgeskiet het.

Waarskynlik geld ander oorwegings in die strafreg. Die doel van die strafreg is om te straf, en dus is 'n vereiste van opset by die meeste misdade miskien meer gepas.⁷² Die doel van die deliktereg is vergoeding, en dié doel word myns insiens beter deur 'n nalatigheidstandaard van skuld gediën. Skrywers het al daarop gewys dat die *actio iniuriarum* 'n gedeeltelike strafkarakter behou het, en dat die verklaring van die opsetsvereiste by dié aksie in dié historiese gegewe gesoek moet word.⁷³ Nietemin is dit 'n algemene standpunt onder deliktereggeleerdes dat moderne deliksaksies nie meer strafelemente behoort te bevat nie.⁷⁴ In die lig van die onlangse ontwikkelinge op die gebied van die lasterreg, asook die verskansing van persoonlikheidsregte in die Grondwet, is die tyd ryp om te herbesin oor die wenslikheid van opset as skuldvereiste by persoonlikheidskrenkings. Miskien is die dag nou nader waarop die *actio iniuriarum* sy laaste strafelemente afskud, en alle nalatige persoonlikheidskrenkings in beginsel aageerbaar word.

71 Vgl in die algemene Neethling, Potgieter en Visser 151 ev.

72 Vgl Burchell *Defamation* 167-168 171.

73 Vgl Neethling 72 vn 206; Van der Merwe en Olivier 238.

74 Vgl bv Van der Merwe en Olivier 246; Van der Walt en Midgley 4; Van der Walt "Die voordeeltorekeningsreël - knooppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding" 1980 *THRHR* 23-24; daarteenoor Visser "Genoegdoening in die deliktereg" 1988 *THRHR* 488; Visser en Potgieter *Skadevergoedingsreg* (1993) 178-179.

Equality and non-discrimination in the new South African constitutional order (3): The saga continues

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OPSOMMING

Gelykheid en nie-diskriminasie in die nuwe Suid-Afrikaanse grondwetlike bedeling (3): Die sage duur voort

In hierdie aflewering word vier uitsprake van ietwat uiteenlopende aard bespreek: *Larbi-Odam v Member of the Executive Council for Education, North-West Province* (diskriminasie teen nie-burgers), *City Council of Pretoria v Walker* (indirekte diskriminasie op grond van ras) en die twee *Gay and Lesbian Coalition*-uitsprake (*National Coalition for Gay and Lesbian Equality v Minister of Justice* en *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*) (diskriminasie op grond van seksuele oriëntering). In *Larbi-Odam* is diskriminasie teen permanente inwoners op die gebied van werksgeleenthede as onbillik bevind, en die bevel is ook op persone met tydelike verblyf van toepassing gemaak. Die posisie wat ander regte betref, asook die posisie van onwettige immigrante, is nie aangespreek nie. In *Walker* is beslis dat differensiasie ten aansien van munisipale tariewe tussen inwoners van oorwegend blanke voorstede en inwoners van oorwegend swart gebiede nie as onbillike diskriminasie bestempel kan word nie; die selektiewe invordering van verskuldigde gelde wel. In albei die *Gay and Lesbian*-sake is diskriminasie op grond van seksuele oriëntering onbillik bevind: in die eerste uitspraak het dit beteken dat die gemeenregtelike misdaad sodomie ongrondwetlik bevind is, en in die tweede 'n statutêre bepaling wat immigrasievoordele aan pare van dieselfde geslag in 'n permanente verhouding ontken het.

1 INTRODUCTION

The two previous articles in this series contained an analysis of the early cases and of the benchmark cases of *Hugo*, *Prinsloo v Van der Linde* and *Harksen v Lane*, in which the Constitutional Court articulated and developed its dignity-based approach to the issue of unfair discrimination. Attention is now focused first of all on *Larbi-Odam v Member of the Executive Council for Education (North-West Province)*,¹ (discrimination against non-citizens); next, *Pretoria City Council v Walker*² (indirect discrimination based primarily on race); thirdly, *National Coalition for Gay & Lesbian Equality v Minister of Justice*³ (sexual orientation – constitutionality of the offence of sodomy) and finally *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs*⁴ (sexual orientation – immigration permits for same-sex partners).

1 1997 12 BCLR 1655 (CC).

2 1998 3 BCLR 257 (CC).

3 1998 12 BCLR 1517 (CC) (the sodomy case).

4 2001 1 BCLR 39 (CC) (the immigration case).

**2 DISCRIMINATION AGAINST NON-CITIZENS: LARBI-ODAM
v MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION
(NORTH-WEST PROVINCE)⁵**

This case involved a challenge to a regulation prohibiting non-citizens from being permanently employed in state schools. The finding was of importance, not least because foreigners had been denied the protection of the administrative justice clause⁶ in a number of previous decisions.⁷

Non-citizenship was not a specified ground of prohibited discrimination under the 1993 Constitution. There was therefore no presumption of unfairness that operated in favour of a complainant once discrimination had been proved. However, the court (per Mokgoro J) held that there was no doubt that the differentiation between citizens and non-citizens in terms of the regulation constituted discrimination under section 8(2). The judge noted that foreigners in South Africa are a vulnerable group, a minority with little political muscle (as in the rest of the world).⁸ As regards the question of unspecified grounds of discrimination, Mokgoro J said that citizenship is a personal attribute which is – if not immutable – difficult to change. Furthermore, the foreign teachers were subjected to threats and intimidation which exacerbated their vulnerability. Discrimination based on non-citizenship was therefore found to have the potential to impair the fundamental human dignity of the persons to whom the regulation applied.⁹ Focusing on persons who had been granted permanent residence, the court found that to deny them job security after their application for permanent residence had been approved and their commitment to South Africa confirmed, constituted unfair discrimination.¹⁰

The limitation clause (s 33(1) (IC)) was then applied. The government argued that the limitation of the equality right was justified because employment for South African citizens enjoyed priority. The court rejected this argument, holding that, while the aim of reducing unemployment among citizens was a legitimate aim, the primary aim of the statute in question was to provide quality education to children, and that this was more important than the secondary aim of reducing unemployment.¹¹ It is clear that the court felt that permanent residents should, in this regard at least, be treated on the same basis as citizens: Mokgoro J emphasised that unemployment “among South African citizens *and permanent residents*” must be addressed by government.¹²

The position of temporary residents was not addressed with the same degree of specificity. The regulation that was being challenged in fact discriminated against temporary residents to a greater extent than against permanent residents. However, the court decided to invalidate the entire regulation as being discriminatory, so that the benefit of the judgment extended to temporary residents as well. One factor was mentioned as a possible justification for discrimination between citizens and

5 1997 12 BCLR 1655 (CC).

6 S 24 of the Constitution of the Republic of South Africa (the interim Constitution) – hereafter IC.

7 See *Xu v Minister van Binnelandse Sake* 1995 1 BCLR 62 (T), 1995 1 SA 185 (T); *Naidenov v Minister of Home Affairs* 1995 1 BCLR 891 (T); *Parekh v Minister of Home Affairs* 1996 2 SA 710 (D). However, cf *Foulds v Minister of Home Affairs* 1997 10 BCLR 1429 (W).

8 Para 19.

9 Para 20.

10 Para 24.

11 Para 30.

12 Para 31, emphasis in original.

non-citizens in the sphere of employment opportunity: “political sensitivity”. Since the posts in question could not be described as politically sensitive, there was no need to deal with this further. It is clear, however, that any measure which reserves employment opportunities for citizens (and arguably for permanent residents as well) should state with sufficient clarity the justification for excluding non-citizens, whether for reasons of political sensitivity or for practical reasons. In terms of Mokgoro J’s approach, the issue of political sensitivity will arise in the limitation stage of the enquiry, that is, once it has been established that the discrimination is unfair.

2.1 Comment

At first glance, this seems a fairly straightforward case. There are nevertheless a few points worth mentioning. The first is that, as was to be expected, the value of human dignity played an important part in the court’s approach: non-citizens are not to be regarded as less worthy of constitutional protection purely by dint of their status.

Secondly, the rather obvious point is that, in principle, all constitutional rights except those specifically reserved for citizens in the Constitution itself, may be invoked by non-citizens, whether these are permanent residents, temporary residents, visitors or even undocumented aliens. The limitation of the rights of non-citizens must therefore meet the constitutional criteria. This should not be taken to mean that non-citizens will be able to claim equal treatment with citizens in every respect, but merely that the fact of non-citizenship is not sufficient *per se* to justify the denial of any particular right to foreigners. Since citizenship remains an unspecified ground of discrimination, the onus will remain on the aggrieved party to show that any discrimination on the ground of citizenship is unfair. It must, of course, also be borne in mind that the decision in *Larbi-Odam* dealt specifically with the equality rights of permanent residents only, although the order of the court extended to temporary residents as well. Furthermore, the only issue at stake was equality in the employment sphere. It is not clear how far the court would be prepared to go to extend the benefits of the equality provision to temporary residents – whether in terms of section 9(1) of the Constitution¹³ (the equal protection and benefit clause) or section 9(3) and (4) (the anti-discrimination clauses). It could even be asked whether certain forms of differentiation between citizens, visitors and temporary residents would be justified: for example, could schools and universities legitimately charge foreign students higher fees? The position of undocumented aliens (illegal migrants) is even more uncertain – while there is no doubt that they are entitled to protection as regards certain rights, the extent of their equality rights will still have to be decided.¹⁴

The *Larbi-Odam* judgment has wide-ranging implications, mostly of a legislative nature. All legislation that imposes restrictions on non-citizens will have to be scrutinised carefully to determine its constitutionality.¹⁵ Any decision involving the

13 The Constitution of the Republic of South Africa, 1996 (the so-called final Constitution) – hereafter FC.

14 Questions that immediately come to mind are: What is the extent of their right to medical treatment other than emergency treatment? Are children of such persons entitled to attend public schools? To what extent are such persons entitled to invoke the administrative justice clause (s 33)?

15 For a more detailed discussion see Klaaren “Non-citizens and constitutional equality: *Larbi-Odam v MEC for Education (North-West Province)*” 1998 SAJHR 286.

equality rights of non-citizens will further have to take into account those provisions of the Constitution that expressly confer certain rights on citizens only. The most obvious of these is section 19 of the Constitution, which relates to political rights; there is also section 21(3) and (4) (the right to enter, remain in and to reside anywhere in the Republic and the right to a passport, respectively); and section 22 (the right to *choose* one's trade, occupation or profession). However, it may be argued that section 22 does not mean that the right of a non-citizen to *practise* a particular profession is automatically excluded.

In short, the comparative status of citizens and the various categories of non-citizens needs to be addressed by the legislature to achieve a greater measure of clarity.

3 INDIRECT DISCRIMINATION BY LOCAL AUTHORITY: *PRETORIA CITY COUNCIL v WALKER*

This was the first important case to deal with discrimination based on race, albeit indirect discrimination. Two previously black townships had been amalgamated with the area that had comprised the City of Pretoria. Prior to the amalgamation, the provision of municipal services to black townships, and the recovery of service charges in such areas had differed radically from that prevailing in the "old" Pretoria: no meters for measuring electricity and water consumption had been installed in the townships and a "flat rate" was charged for the services. This situation continued after the amalgamation and, although some meters had been installed in the former black townships, a flat rate was still levied for services in these areas. A consumption-based rate was charged in the previously white areas.

Appellant, a resident in a previously white area, considered that this practice constituted unfair discrimination. He therefore adopted the practice of paying no more than the flat rate charged in the former black townships. He fell into arrears and eventually the City Council instituted action in the magistrate's court for the outstanding balance. The appellant then raised the alleged unfair discrimination as a defence to the claim.¹⁶

The magistrate found that although the City Council had discriminated between the inhabitants of old Pretoria and the former black townships, such discrimination had been based, not on race, but on geographical area. The discriminatory action had been found to be objectively reasonable and there had been no deliberate intention to discriminate unfairly for the wrong reasons.

An appeal was lodged against this decision to the High Court.¹⁷

It must be borne in mind that at the time when this case was heard, the court did not yet have the benefit of the Constitutional Court judgments in *Van der Linde v Prinsloo* and *Harksen v Lane*. The approach laid down in those cases was therefore not followed here.

The court (per Van Dijkhorst J) put the issue before the court as follows:

"Was hier diskriminasie? Artikel 8(2) en (4) is hier ter sprake maar by die uitleg daarvan is artikel 8(1) en (3)(a) toepaslik."¹⁸

16 A good deal of attention was paid to the question whether a magistrate's court had jurisdiction under the interim Constitution to adjudicate on alleged violations of fundamental rights. This issue is not pertinent here.

17 *Walker v Stadsraad van Pretoria* 1997 3 BCLR 416 (T).

In other words, the provisions in issue were section 8(2) (the non-discrimination clause)¹⁹ and section 8(4).²⁰ Section 8(1) (the equal protection clause) and section 8(3)(a) (which made provision for affirmative action measures to be constitutional) were seen as not directly applicable, but relevant only to the interpretation of section 8(2) and 8(4).

The judge continued to explain that the Constitution contained no definition of unfairness and (quoting the judgment in *Hugo*) that what the Constitution proscribed was not any form of discrimination, but only *unfair* discrimination. As to the determination of unfairness:

“Of daar ongelyke behandeling is, is ’n feitevraag. Daar is ’n onus op hom wat dit beweer om dit te bewys. Of die ongelyke behandeling onbillik is, is ’n waarde-oordeel wat gevel word aan die hand van norme wat in die samelewing geld. Die norme word nie empiries bepaal nie maar leef in die regsgevoel van die gemeenskap en word gevgestalt in die uitspraak van sy howe.”²¹

According to the judge, section 8(3) was not in issue, except as an indication that the Constitution defined departures from the basic principle of equality strictly. In other words, the court was not called upon to consider whether the system of cross-subsidisation of residents of poorer suburbs by residents of more affluent suburbs (one which was accepted practice in the old Pretoria) constituted a form of affirmative action. The choice of words here is also rather interesting: one gains the impression that affirmative action measures were indeed perceived by the judge as departures from the basic principle of equality before the law, rather than as affirmation of that principle.

Reference was made to section 15 of the Canadian Charter of Rights and Freedoms, but it was pointed out that the latter specifically restricted the ban on unfair discrimination to enumerated and analogous grounds based on personal characteristics. The South African Constitution, by contrast, contained no indication that the operation of section 8(2) should be limited in the same way: the built-in limitation in section 8(2) lay in the concept of *unfairness* and not in the concept of differentiation or *discrimination* as such or in the classes of victims of discrimination identified in the provision.²² Van Dijkhorst J therefore did not endorse a narrow approach to unlisted grounds of discrimination.

As mentioned above, the court did not distinguish between the differentiation enquiry (s 8(1)) and the discrimination enquiry (s 8(2)) (as was subsequently done by the Constitutional Court), but went straight to the question whether there had been discrimination in the sense of unequal treatment. It found that there had been such discrimination; the question was whether it was unfair. It was emphasised that the levying of a flat rate for charges for municipal services for some residents and a metered tariff rate for others was not unfair *per se*. The fairness of differentiation

18 427J.

19 “No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.”

20 “*Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.”

21 428I-J.

22 429I.

or discrimination between residents would have to be determined with due regard to all relevant circumstances; in other words, in the context as a whole. However, the judge felt that the case in point was different from that where individuals were treated differently: here the emphasis was on distinctions between *geographical areas*, and that “[b]y die beklemtoning is uit die oog verloor dat die Grondwet individue se regte teenoor die owerheid beskerm, nie gebiede nie”. However, he continued:

“Net so min as dit regverdigbaar is om onderskeid te tref tussen blanke woonbuurte onderling is dit te regverdig indien onderskeid getref word tussen blanke en swart woonbuurte wat heffing en verhaling van dienstegeelde betref, mits, natuurlik, dit vir gelykwaardige dienste is.”²³

He found that the services were indeed on par and the discrimination therefore *prima facie* unfair:

“Dit is *prima facie* duidelik ’n geval van onbillike diskriminasie wat val onder die algemene verbod van artikel 8(2). Ek laat buite rekening dat dit waarskynlik ook kan neerkom op indirekte rassediskriminasie en dus sou val onder die spesifieke gronde.”²⁴

In other words, though this is not altogether clear from the words used (“die algemene verbod van artikel 8(2)”), unfair discrimination on an unlisted ground had been established. It is perhaps a pity that the issue of indirect discrimination based on race was not explored further, since this was in reality what the applicant was averring.

The judge continued: “Dit volg dat die Stadsraad ’n weerleggingslas dra om die *prima facie* onbillikheid te regverdig.” Again this is not altogether clear. The presumption of unfairness on *prima facie* proof of such unfairness applied only to listed grounds of discrimination in terms of section 8(4), so this provision was not relevant here. So why the reference to a burden of rebuttal rather than a burden of proving unfairness, since the onus of proving infringement of a constitutional right rests on the aggrieved party in the first or threshold stage of a fundamental rights enquiry? And if the threshold stage had been completed and unfairness fully established, why no treatment of the limitation clause (s 33(1) (IC))? The use of the word “regverdig” (justify) may be taken to signify that the justificatory stage was being dealt with, but none of the criteria contained in section 33(1) (law of general application, reasonableness and justifiability etc) was mentioned. The court merely found that the grounds for justification put forward were wholly unconvincing. It also found that the selective collection of debts by the Council was not necessarily unfairly discriminatory.

Not surprisingly, the matter was taken to the Constitutional Court.²⁵ The judgment of the court was delivered by Langa J, who emphasised that an enquiry into whether there had been a breach of section 8 (IC) could not be made in a vacuum, “but should be based both on the wording of the section and in the constitutional and historical context of the developments in South Africa”.²⁶ (As mentioned earlier, the judgments in *Hugo, Van der Linde v Prinsloo, Harksen v Lane* and *Larbi-Odam* were all delivered after that in the court *a quo*.)

23 431E.

24 431G-H.

25 *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC).

26 Para 26.

The respondent (Walker) argued that there was no rational connection between the measures taken by the City Council and a legitimate governmental purpose. In particular, it was contended that the Council's conduct could not have been authorised by section 8(3)(a) (IC), since they had not been "designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination". The Council argued that there was indeed a rational connection to the legitimate objective of dealing with transition; the required changes were being phased in in order to achieve equality between the residents of the respective areas.

Langa J, referring to *Prinsloo*, responded by saying that the issue of rationality is relevant to the question whether section 8(1) had been breached. (The court *a quo* had, of course, not taken this route.) He emphasised that the rationality criterion as adopted in *Prinsloo* was equally applicable whether one was dealing with the first leg of section 8(1) (equality before the law) or the second (equal protection of the law). Applying this to the facts of the case, he found that the differentiation complained of did indeed meet the rationality criterion. However, the matter did not end there, since section 8(2) could still be invoked.²⁷

The judge then mentioned that this was the first time the Constitutional Court had had to consider indirect discrimination, the difference between direct and indirect discrimination and the possible bearing that such a difference may have on a section 8 analysis.²⁸ He observed that

"[T]he inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) evinces a concern for the *consequences* rather than the *form* of conduct"²⁹

and added that the emphasis which the Constitutional Court had placed on the impact of discrimination in its previous judgments was consistent with this concern. However, he felt it was not necessary to attempt to formulate a precise definition in the case before them:

"[T]he conduct which differentiated between the treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race. The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was indirect . . . [I]ts impact was clearly one which differentiated in substance between black residents and white residents."³⁰

Commenting on the view expressed by Sachs J that the differentiation was based purely on area and not on race, Langa J said: "To ignore the racial impact of the differentiation is to place form above substance."³¹ He continued to say that any differentiation on one of the specified grounds gives rise to the presumption of unfairness contained in section 8(4), thus disagreeing with Sachs J, who required some "identifiable disability" or potential disadvantage before the presumption could be operative.³² Further, that there is no reason to distinguish between direct

27 Para 27.

28 Indirect discrimination had featured in the judgment in *S v Makwanyane*, albeit not specifically. See the first article in this series (2001 *THRHR* 409).

29 Para 31, emphasis supplied.

30 Para 33.

31 Para 33.

32 See the discussion of Sachs J's judgment below.

and indirect discrimination in this regard – both are covered by section 8(4). The council therefore bore the onus of rebutting the presumption that the discrimination was unfair.³³

In his discussion of the question whether the council had been guilty of unfair discrimination, Langa J emphasised that the intention to discriminate is not an essential element of unfairness in South African law. He referred here to the United States, where it has been held that in cases where indirect discrimination is in issue under the equal protection clause, the conduct complained of must not only have had a discriminatory effect, but must have been motivated by a discriminatory purpose. In cases dealing with discriminatory practices in employment, however, the US Supreme Court has adopted a different approach. The judge pointed out that the 1993 Constitution differed from that of the United States in that it had both an equal protection clause (s 8(1)) and an anti-discrimination clause (s 8(2)).³⁴

In Canada, the Supreme Court has held that proof of intention to discriminate was not needed, and the European Court has held that where there is evidence of indirect discrimination, it is incumbent on the respondent to show that the discrimination is based on objectively justified factors.³⁵

Langa J then emphasised that the purpose of section 8(2) is to protect against unfair discrimination, not to punish those responsible for the discrimination. He pointed out that indirect discrimination would quite often be unintentional; the protective purpose of the constitutional provision would be defeated if the victims of discrimination needed to prove not only that they had been unfairly discriminated against but also that the treatment had been intentionally unfair. Finally, as the judge pointed out:

“It is also consistent with the presumption in section 8(4) which would be deprived of much of its force if proof of intention was required as a threshold requirement for the proof of discrimination.”³⁶

Obviously, though, the presence of an intention to discriminate is not irrelevant to the enquiry; it can certainly exacerbate the impact of the discrimination as well as being an indicator of unfairness.³⁷

The court found that the respondent belonged to a group that has not been disadvantaged by past discrimination, and is in an *economic* sense neither disadvantaged nor vulnerable.³⁸ However, he belonged to a racial minority that could be regarded as vulnerable in the *political* sense.³⁹ The judge hastened to add that one should distinguish between the promotion and protection of equality and the protection of privilege in a manner that perpetuates inequality and disadvantage. He acknowledged that the case involved a complex mixture of advantage and disadvantage. Measures such as those resorted to by the council must be directed at eliminating disparities and disadvantages that are a consequence of the policies of the past. In other words, there will always be disparities and disadvantages in society; not all of these can be cured by restorative measures. (Although the judge made no

33 Para 35.

34 Para 40.

35 Paras 41 and 42 resp.

36 Para 43.

37 Para 44.

38 Para 47.

39 Para 48.

reference to section 8(3) in this context, he seems to have had the kind of criteria in mind that this provision prescribes for “affirmative action”. One question that arises is whether measures that were not initially aimed at affirmative action can claim the protection of section 8(3) if challenged subsequently.)

The respondent did not query the validity of the flat rate charged – he merely demanded that the same rates should apply to all residents. The court found that this would not necessarily have been fair to all users.⁴⁰ It also found that cross-subsidisation (such as that of the residents of poorer areas by those of more affluent ones) was not inherently unfair. The principle of cross-subsidisation is one that is firmly established in regard to the levying of taxes, for example, and, according to Langa J, to say that cross-subsidisation will inevitably be unfair would be to take a formal rather than a substantive view of the right to equal treatment. (One could argue that it would offend even against the classic Aristotelian approach of treating equals equally!) In any case, if a flat rate of charges were to be implemented, this would involve a certain degree of cross-subsidisation between those who used up more resources and those who used less.

Finally, the court found no evidence that the respondent had been in any way negatively affected by the flat rate policy of the council. There had been no invasion of his dignity nor had he been affected in a manner comparably serious to an invasion of his dignity.⁴¹

The matter of selective enforcement of rates was a different issue, however. Langa J reiterated that equality is one of the core values of our Constitution and that the guarantee the Constitution contains extends to all sections of the community and not only to those disadvantaged in the past:

“Whilst there can be no objection to a council taking into account the financial position of debtors in deciding whether to allow them extended credit, or whether to sue them or not, such differentiation must be based on a policy that is rational and coherent.”⁴²

He continued to say that although section 8(3) permits the adoption of special measures to address past discrimination, and although this was mentioned in argument, it was not part of the council’s case that the selective enforcement of arrear charges was a measure adopted with a view to addressing the disadvantage suffered by the residents of black townships in the past. The reasons put forward for the policy were purely pragmatic.

It transpired that the officials responsible for the policy had acted without the necessary authority. The court found that this did not, in itself, make the policy unfair. In other words, according to the judge, if the policy would not have been unfair if implemented in terms of council policy, the fact that it was implemented without the council’s authority would not make it unfair. However,

“the fact that the policy is contrary to a fair and rational council resolution and is implemented in secrecy and contradiction of public statements issued by the council officials, makes the burden of proving the policy not to be unfair more difficult to discharge than it might otherwise have been”.⁴³

This statement raises a number of questions about actions tainted with unlawfulness: certainly lawfulness does not guarantee fairness, and the mere presence of fairness

40 Para 53.

41 Para 68.

42 Para 73.

43 Para 76 *in fine*.

cannot cure any illegality. Likewise, the presence of unfairness is not necessarily fatal to legality – since even unfair discrimination can, in theory at any rate, be saved by the limitation clause. The crisp issue is whether the fairness of the policy was an issue at all, since the action of the officials was clearly *ultra vires*. The question may be asked why the respondent did not invoke the right to administrative action that is lawful (s 24 (IC)).

It was once again emphasised, as it was in *Hugo*,⁴⁴ that the protection of the equality clause extended to all, not only to those who had previously borne the brunt of discrimination:

“No members of a racial group should be made to feel that they are not deserving of equal ‘concern, respect and consideration’ and that the law is likely to be used against them more harshly than others who belong to other race groups.”⁴⁵

The court found that the council had not discharged the burden of proving that the selective enforcement policy was fair; the conduct complained of therefore constituted unfair discrimination in terms of section 8(2). The council’s action furthermore could not be justified in terms of the limitation clause (s 33(1)); since it was not authorised, it did not qualify as “law of general application”.⁴⁶ It also found that it was unnecessary to decide whether the provisions of section 178(2) (IC) had also been infringed, since nothing turned on this.⁴⁷

The question of appropriate relief posed a problem, but this will not be discussed here. However, it is clear that some warning bells were sounded.

Sachs J delivered a separate judgment in which he concurred with the majority, except as regards the finding that selective enforcement of debt recovery constituted unfair discrimination. He described as “jurisprudentially incongruous” the idea that the complainant could have been the victim of unfair discrimination in such a process: he had not been disturbed in his enjoyment of residence in an affluent suburb, nor had he been deprived of the benefit of regular municipal services as a result of the council’s action.⁴⁸ He felt that although the respondent had been treated differently from residents in historically black areas, the council’s action was not unfair, even if it could be classed as discriminatory.

He emphasised that this did not mean that the council could act as it pleased as long as its motive was to address inequalities. Section 8 contained at least two principles to be adhered to in any measure aimed at achieving substantive equality via preferential treatment of those who had previously been disadvantaged by discrimination: section 8(1) required laws to be administered and implemented impartially and even-handedly, and section 8(3)(a) required affirmative action programmes to be such that they were designed to achieve adequate protection and advancement of those previously disadvantaged. Sachs J therefore regarded section 8(3)(a) as relevant to the case in point even though it had not been seriously argued that the council had acted as it had in pursuance of a programme contemplated in the subsection.⁴⁹

44 See the discussion in the second article in this series (2001 *THRHR* 619).

45 Para 81.

46 Para 82.

47 Para 86. S 178(2) empowered a local government authority (such as the council) to levy and recover rates, taxes etc, and required that such charges be based on a uniform structure for its area of jurisdiction.

48 Para 103.

49 Para 104.

Sachs J in fact held that the complainant had not suffered discrimination at all, whether direct or indirect, since the council's selective enforcement policy had been based, not on the race of the residents in question, but on "the identification of objectively determinable characteristics of different geographical areas".⁵⁰ He continued:

"The mere coincidence in practice of discrimination and race, *without some actual negative impact* associated with race, is not, in my view, enough to constitute indirect discrimination on the grounds of race."⁵¹

It should be noted that where indirect discrimination is alleged, the judge required actual or potential prejudice to be present before *discrimination* can be found to exist; only then, in his view, does the issue of unfairness arise. He acknowledged that there may be sound historical reasons for treating *direct* discrimination on one of the listed grounds as *prima facie* proof of discrimination without requiring further proof of prejudice. However, in the light of the fact that discrimination on any of the listed grounds is presumed to be unfair,⁵² he felt that to approach indirect discrimination in the same way would be undesirable, "because it is not the presumption that gives rise to the discrimination, but proof of the discrimination that invokes the presumption".⁵³

He continued:

"The concept of indirect discrimination cannot be an open-ended one to be applied in a decontextualised and formulaic manner so as automatically to trigger the presumption of unfairness in section 8(4) independently of real impact . . ."⁵⁴

Looked at in its historical setting, the text makes it clear that equality is not to be regarded as being based on a neutral and given state of affairs from which all departures must be justified . . . [T]he presumption of unfairness makes perfectly good sense when there is either overt or direct differentiation on one of the specified grounds such as race or sex, or where patterns of disadvantage based on such grounds are being reinforced without express reference but as a matter of reality. On the other hand, the presumption makes no sense at all when invoked to shield continuing advantage gained as a result of past discrimination from the side-winds of remedial social programmes designed to reduce the effect of such structured advantage."⁵⁵

He repeated that even though section 8(3) had not been invoked to justify the council's actions, its provisions could not be ignored when interpreting section 8 as a whole:

"In particular, sections 8(2) and (4) must be read in the light of the clear support that section 8(3) gives to the principle of substantive equality which this Court has repeatedly supported in other matters. Section 8(3) . . . indicates that, if anything, a presumption of fairness rather than unfairness should attach to measures [contemplated in the provision]. The value system clearly enunciated by section 8 read as a whole would be inverted if the spectre of indirect discrimination was automatically raised each and every time a measure had some differential impact, even if only tangential and psychological, on the advantaged groups in society."⁵⁶

50 Para 105.

51 Para 105 *in fine*, internal footnotes omitted and emphasis added.

52 S 8(4) (IC); s 9(5) (FC).

53 Para 107.

54 Para 108.

55 Para 109.

56 Para 112.

In short, the judge foresaw an anomalous situation: section 8(3) authorises intentional and direct discrimination to overcome disadvantage; it would be illogical to treat similar differentiation which is indirect and unintentional as *prima facie* unfair under section 8(2). This, in his view, would undermine the very purpose of the presumption of unfairness.⁵⁷

Sachs J summed up his approach to indirect discrimination as follows:

“[T]o establish that the impact of the indirect differentiation is *prima facie* discriminatory on grounds specified in section 8(2), the measure must at least impose identifiable disabilities, burdens or inconveniences, or threaten to touch on or reinforce patterns of disadvantage, or in some proximate and concrete manner threaten the dignity or equal concern or worth of the persons affected.”⁵⁸

He explained that the concept of indirect discrimination had been developed to deal with the kind of situation where discrimination lay behind facially neutral criteria or where persons already prejudiced by discrimination had their disadvantage entrenched by measures not overtly aimed at discriminating against them.⁵⁹ He also warned that an undue enlargement of the scope of indirect discrimination would result in a flood of challenges against everyday laws and regulations, and would place the state in the invidious position of having to justify perfectly rational and “ordinary” differentiation. He advocated a well-focused construction of section 8(2) directed at practices and situations that perpetuate historically-created disadvantage rather than what he termed a “crude reduction of every measure designed to deal with intrinsically difficult social issues to the dimensions of race”.⁶⁰

The judge then applied the criteria laid down in *Harksen v Lane*⁶¹ to the case in point. Again it was acknowledged that all minorities are potentially vulnerable, and stressed that persons who benefited from systematic discrimination in the past were by no means excluded from the protection of section 8. Of course, the more vulnerable the group adversely affected by a discriminatory measure, the more likely a finding of unfairness will be. Conversely:

“The less directly invasive the discrimination, the more substantial its legitimate social function, the less it reinforces or creates patterns of systematic disadvantage, the less likely it is to be unfair.”⁶²

Sachs J was prepared to accept that the selective enforcement policy was aimed at overcoming rather than perpetuating equality by attempting to change a culture of non-payment into one of payment and responsibility. He found no contradiction in this, and quoted Ronald Dworkin⁶³ in support of his argument:

“There is nothing paradoxical . . . in the idea that an individual’s right to equal protection may sometimes conflict with an otherwise desirable social policy, *including the policy of making the community more equal overall.*”⁶⁴

As far as he was concerned, the council’s decision not to act against residents in the former black townships did not impact upon the complainant in this way. It imposed no burdens, denied no benefits, did not undermine his dignity or self-worth. In short: “It did not discriminate against him; it did not even reach him.”⁶⁵

57 See the comment below.

58 Para 113.

59 Para 115.

60 Para 118.

61 1997 11 BCLR 1489 (CC).

62 Para 132.

63 *Taking rights seriously* (1977).

64 Para 126, emphasis supplied by Sachs J.

65 Para 113.

Sachs J concluded by saying that he could not see how the complainant's rights had been affected or his fundamental dignity impaired by his receiving a summons for a debt he owed. Nor did he suffer any other injury of comparable seriousness.

Interestingly, the judge put forward the view that the complainant could have had more success had he based his argument on section 8(1) rather than on section 8(2) and challenged differential enforcement via the equal protection provision rather than the anti-discrimination clause:

“ [E]ven without becoming entangled in the patterns of advantage and disadvantage that lie at the heart of unfair discrimination as prohibited by section 8(2), such differential enforcement could violate the element of impartiality that underlies the rule of law as protected by section 8(1) . . .⁶⁶

Had the complainant's objective been to seek the aid of the court in achieving equal and impartial enforcement of the law, and not . . . to get its approval for equal and impartial non-enforcement of the law, different considerations could well have come into play. Put another way, if the complainant had sought to secure enforcement of the responsibilities of *others* rather than to achieve absolution from *his own*, the trial court would not have been obliged to focus on the artificial question of whether the complainant had ended up suffering unfair disadvantage because of his being white . . . The question then would have been the correct one of whether the law was being impartially applied and administered, not the inappropriate one of whether the complainant's dignity had been attacked.⁶⁷

Sachs J concluded by saying that if a council wishes to apply the law differentially to residents, it should develop a coherent and serious strategy which is capable of advancing substantive equality. Any systematic deviation from the principle of equal and impartial application of the law would have to be done via a law of general application that meets the criteria of the limitation clause. Interestingly, he did not refer to section 8(3) here.

3.1 Comment

It may seem somewhat odd to devote more attention to a concurring minority judgment than to the judgment of the court. However, some of the views expressed by Sachs J merit further analysis – in particular, his approach to section 8(3) (IC).

First of all, his statement that section 8(3) may be used to interpret section 8 as a whole. At first glance, this does not seem to be problematic. Arguably, purposive and contextual interpretation requires that the entire context be considered in the interpretive process. The fact that section 8(3)(a) was not directly in issue would therefore not preclude its use as an aid to the interpretation of the rest of section 8 and is in fact necessary. However, the way in which section 8 was worded (and the same applies to s 9 (FC)) creates some difficulties, particularly in regard to onus. It is by now trite law that the applicant in an equality issue must prove entitlement, differentiation, discrimination, and, if the discrimination is on an unlisted ground, unfairness. If the discrimination is on a listed ground, unfairness is presumed. Any section 8(3) issue is bound to involve differentiation and almost certainly discrimination, on a listed ground. Say that an applicant has established discrimination on a listed ground: the discrimination is presumed to be unfair and the respondent

⁶⁶ Para 137.

⁶⁷ Para 138, emphasis applied.

must prove fairness. If the respondent contends that the discrimination is in fact “affirmative action”, what becomes of the presumption? Presumably the respondent must now show that the requirements of the affirmative action clause have been met in order to rebut the presumption of unfairness. This seems to imply that section 8(3)/ 9(2) should be pleaded if it is to be used as a defence, which makes it rather difficult to use the affirmative action clause in interpretation.

Secondly, the problems with the dignity-based approach to discrimination still raise questions in a case such as this, where there is no doubt that the applicant’s dignity has not been violated.⁶⁸ Financial or material disadvantage need not be accompanied by an invasion of dignity (though of course it may). The modification of the dignity criterion for unfairness by the addition of the “comparably serious prejudice” criterion does not really add anything: all it says is that the Constitution only protects against serious discrimination – even if discrimination is on a listed ground, it will not be found unfair if it is of a trifling nature. Invasion of dignity so often accompanies unfair discrimination that its presence is a certain pointer to unfairness.

X 4 THE RIGHT NOT TO BE DISCRIMINATED AGAINST ON THE GROUND OF SEXUAL ORIENTATION – NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY v MINISTER OF JUSTICE

In this case the common law offence of sodomy and the provisions of section 20A of the Sexual Offences Act 23 of 1957, the inclusion of sodomy as an item in Schedule 1 of the Criminal Procedure Act 51 of 1977 and in the schedule of the Security Officers Act 92 of 1987 were challenged as being in conflict with section 9 of the Constitution.

Ackermann J delivered the unanimous judgment of the court and Sachs J a separate concurring judgment. Ackermann J began his enquiry into the possible infringement of the equality guarantee by confirming that although section 8 (IC) and section 9 (FC) are not identically worded, the equality jurisprudence developed by the Constitutional Court in regard to section 8 (IC) is equally applicable to any analysis of section 9 (FC). Both provisions envisage a substantive rather than a passive or purely negative concept of equality.⁶⁹ He then referred to the multi-stage enquiry that had been laid down first in *Prinsloo v Van der Linde*⁷⁰ and confirmed in *Harksen v Lane NO*.⁷¹ However, the judge then added that it was always necessary to engage in the first stage of that enquiry (the rational connection stage, in which it is established that the provision being challenged differentiates between people or categories of people, and, if it does, whether the differentiation bears a rational connection to a legitimate government purpose). He therefore proceeded immediately with the enquiry whether the differentiation brought about by the law governing sodomy constitutes unfair discrimination and added that, although no-one had contended that such discrimination was indeed fair, the court still has to be satisfied that fairness has not been established.⁷²

68 See the critique of this approach discussed in the previous article in this series.

69 Para 16.

70 1997 6 BCLR 759 (CC); see the discussion of this case in the previous article in this series (2001 THRHR 619).

71 1997 11 BCLR 1489 (CC); see the discussion of this case in the previous article in this series (2001 THRHR 619).

72 Para 18.

It was emphasised that

“it is the impact of the discrimination on the complainant or the members of the affected group that is the determining factor regarding the unfairness of the discrimination, the approach to be adopted . . . is comprehensive and nuanced”.⁷³

Ackermann J continued by saying that the desire for equality is not a striving for the elimination of all differences but requires an understanding of the situation of “the other” in society. Discriminatory prohibitions on sexual relations between men reinforce existing societal prejudices and increase the negative effects of such prejudices.⁷⁴ The impact of discrimination on gays and lesbians is exacerbated by the fact that they are a political minority with little political clout and therefore very vulnerable.⁷⁵ The impact of the discrimination was then summed up as follows:

- “(a) The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate.
- (b) The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.
- (c) The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.”⁷⁶

It is unsurprising that the court had little difficulty in concluding that the law governing sodomy discriminated unfairly against gay men.

The next aspect to receive attention was the question whether the common-law offence of sodomy infringed the right to dignity and privacy in addition to the equality right. Ackermann J reiterated the importance of dignity as a corner-stone of the Constitution. Although, as he admitted, it is a difficult concept to capture in precise terms, the constitutional protection of dignity implies, at the very least, that society must acknowledge the value and worth of all individual members. The existence of a law which punishes a form of sexual expression for gay men inflicts both symbolic and real harm on such men. It degrades and devalues them in society and is therefore a palpable invasion of their dignity and constitutes a breach of section 10 of the Constitution.⁷⁷

The privacy argument was somewhat trickier. The judge referred to the contention that this argument may possibly have a negative impact:

“[T]he privacy argument may subtly reinforce the idea that homosexual intimacy is shameful or improper: that it is tolerable as long as it is confined to the bedroom – but that its implications cannot be countenanced outside. Privacy as a rationale for constitutional protection therefore goes insufficiently far, and has appreciable drawbacks even on its own terms.”⁷⁸

73 Para 19.

74 Paras 22-23.

75 Para 25.

76 Para 26.

77 Para 28.

78 Cameron “Sexual orientation and the Constitution: A test case for human rights” 1993 *SALJ* 450 464, cited by the court para 29.

The judge stressed that the above remarks should be understood in the context in which they were made, namely, while negotiations about a new Constitution were still in progress. The author was arguing that discrimination on the ground of sexual orientation should not be founded purely on the right to privacy.

Ackermann J concluded that the offence of sodomy was unconstitutional because it infringed the rights to equality, dignity and privacy and added that this illustrates the relationship between the right to equality and dignity as well as between dignity and privacy.⁷⁹ However, he warned that this does not mean that the law cannot place a criminal ban on certain forms of sexual conduct: citing the court's earlier judgment in *Bernstein v Bester*,⁸⁰ he said that rights must not be construed absolutely or individualistically in a manner which denied that individuals are members of a broader community and that such membership defines rights in significant ways.⁸¹

The next step was to determine whether the discrimination, albeit unfair, could be justified in terms of section 36(1). Ackermann J confirmed that although the wording of section 36(1) (FC) differed in certain respects from that of section 33(1) (IC), its application still involves the process described in *S v Makwanyane*⁸² as a "weighing up of competing values, and ultimately an assessment based on proportionality . . . the calls for the balancing of different interests".⁸³ The judge pointed out that the various elements of the balancing process are now expressly stated in section 36(1); the latter does not materially alter the approach in *Makwanyane*, except for the addition of paragraph (e), which requires the court to have regard to less restrictive means to achieve the purpose of the limitation. He added that although section 36(1) does not specifically mention the importance of the right (only the nature of the right is referred to), the importance of the right must obviously be considered in any evaluation of proportionality.

In applying the provisions of section 36(1) to the case, Ackermann J found that the rights of gay men to privacy, dignity and freedom were severely limited by the law governing sodomy. He could not find any legitimate purpose for the limitation and therefore concluded there was nothing in the proportionality enquiry to weigh against the extent of the limitation and its harmful effect. He conceded that "the issues in this case touch on deep convictions and evoke strong emotions".⁸⁴ However, no matter how sincere such views, they cannot prevail over what the Constitution provides about discrimination based on sexual orientation.

Ackermann J then examined the jurisprudence of other "open and democratic countries based on human dignity, equality and freedom"⁸⁵ and came to the conclusion that in most of these there has been a definite trend towards the decriminalisation of sodomy between consenting adults.⁸⁶ This fortified the conclusion he had already reached. He added that the breach of the equality right alone would have been sufficient for this conclusion; the fact that the rights to

79 Para 30.

80 1996 4 BCLR 449 (CC).

81 Para 31.

82 1995 6 BCLR 665 (CC) para 104.

83 Para 104, quoted by the court at para 33.

84 Para 38.

85 In terms of s 36(1).

86 The United States of America was the only exception to this trend cited by the judge. However, as he pointed out, the Constitution of the US contains no express privacy and dignity guarantees, and no express reference to discrimination based on sexual orientation.

dignity and privacy had also been infringed merely placed justification further out of reach.

The *amicus curiae* had argued that section 9(1) differed materially from its predecessor because of the addition of the words “and benefit” to “equal protection” [of the law]. This was rejected out of hand. Ackermann J added that the term “substantive equality”, which features so strongly in the jurisprudence, is a contested expression which is not found in either section 8 (IC) or section 9 (FC). He once again highlighted the importance of this concept, however, and emphasised that the removal of statutory measures of a discriminatory nature would not ensure the achievement of substantive equality; the initial causes of inequality would, unless remedied, continue indefinitely. That is the reason for the inclusion of provisions aimed at remedial or restitutionary equality in both the 1993 and the 1996 Constitution.

The judge therefore concluded that the Constitutional Court gave effect to substantive equality in its interpretation of section 8 (IC); that that analysis is no less applicable to section 9 (FC), and that the addition of the words “and benefit” takes the matter no further; there was therefore no need to fashion a new interpretation of section 9.⁸⁷

The rest of Ackermann J’s judgment deals with issues beyond the purview of this article.

Once again Sachs J handed down a separate concurring judgment. I will deal with it in some detail because of the important and interesting philosophical rather than technical issues he raised. He started off by saying:

“At a practical and symbolical level [this case] is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.”⁸⁸

He stated his intention to deal with three issues: the relationship between equality and privacy; the connection between equality and dignity; and the meaning of the right to be different in the open and democratic society contemplated by the Constitution.

First, the relationship between equality and privacy. Male homosexuality had been repressed for its perceived symbolism rather its proven harm. Proof of this is that only sodomy, and not certain other similar sexual acts, was criminalised. Thus it was not the act itself that was punished, but the particular persons performing it, resulting in a significant group of the population being singled out for discrimination.

While accepting that it was understandable that the applicants should base their challenge mainly on violation of the equality provision, the judge nevertheless deprecated the fact that the infringement of the right to privacy was treated as a “poor second prize”.⁸⁹ This suggestion a suggestion that

“homosexuality is shameful and therefore should only be protected if it is limited to the private bedroom; [the argument] tends to limit the promotion of gay rights to the decriminalisation of consensual adult sex, instead of contemplating a more comprehensive normative framework that addresses discrimination against gays; and

87 Para 64.

88 Para 107.

89 Para 110.

it assumes a dual structure – public and private – that does not capture the complexity of lived life, in which public and private lives determine each other, with the mobile lines between them being constantly amenable to repressive definition”.⁹⁰

The reasons for this, according to the judge, are, first of all, that the equality and privacy rights are subjected to inappropriate sequential ordering and secondly, that the scope and significance of the privacy right are undervalued. The idea that rights must be compartmentalised and then ranked in descending order of value was strongly criticised. Sachs J emphasised that the law governing sodomy violated the right to equality and the right to privacy simultaneously, because they “deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy”.⁹¹ For this reason, human rights should be approached and defended in an integrated rather than a disparate fashion. This requires that rights and violations of rights be approached from a person-centred rather than a formula-based angle and analysed contextually, not abstractly.⁹²

Taking this argument further, the judge explained at some length how an integrated approach based on context and impact leads to the recognition that grounds of discrimination can intersect and overlap. A contextual rather than a category-based approach demonstrates how overlapping vulnerability can produce overlapping discrimination and how a single situation can lead to “multiple, overlapping and mutually reinforcing violations of constitutional rights”.⁹³ In such cases it would be artificial to treat categories of discrimination as alternative rather than interactive; the interaction and overlapping exacerbate the extent and impact of the infringement. In other cases, where conflicting rights have to be weighed up against one another, the context demands a somewhat different approach (the balancing of one right against another).

In short, to treat privacy as a poor relation to equality is to adopt an impoverished concept of the right to privacy:

“Just as ‘liberty must be viewed not merely “negatively or selfishly as a mere absence of restraint, but *positively* and socially as an adjustment of restraints to the end of freedom of opportunity”’, so must privacy be regarded as suggesting at least some responsibility on the State to promote conditions in which personal self-realisation can take place.”⁹⁴

Privacy, said the judge, is closely related to the concept of identity; however, this does not mean that there are no limits to personal privacy or that the law may not proscribe what is unacceptable, even in the sanctum of the home.⁹⁵

Sachs J then addressed the link between equality and dignity. He described dignity as the motif which runs through the protection provided by the Constitution, and as the concept that links equality and privacy. The Constitutional Court’s approach to equality, which gives dignity and self-worth a central place in the determination of equality issues, had been criticised by the Centre for Applied Legal Studies, on the ground that this approach reduced section 9 from that of “guarantor

90 *Ibid.*

91 Para 112.

92 *Ibid.*

93 Para 114. This point was also made by O’Regan J in *Brink v Kitshoff* 1996 6 BCLR 752 (CC) – see the first article in this series (2001 *THRHR* 409).

94 Para 116, emphasis in original, internal footnotes omitted.

95 Para 119.

of substantive equality to that of a gatekeeper for claims of violation of dignity"⁹⁶ and that the equality clause's main focus should be the protection of equality, not dignity (which is the function of the dignity clause).⁹⁷

Sachs J denied the validity of the critique, and referred to the judgment of Ackermann J in regard to the averred failure of the court to promote substantive rather than formal equality. He further distinguished between the use of dignity in the context of the equality clause and the protection of the right to dignity in terms of section 10; in the former, the focus is on the impact of a measure on a historically vulnerable group which is discriminated against because of certain personal characteristics – the inequality of treatment both leads to and is proved by the indignity. By contrast, section 10 contemplates a much wider range of situations:

“These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.”⁹⁸

He reiterated that the equality principle and the dignity principle should be seen as complementary rather than competitive, and that a situation-sensitive approach to human rights permits one to focus on reality rather than on abstract categories. He insisted that the commonality which unites different experiences of discrimination is the injury to dignity based on membership of a group which is seen by more powerful members of the community as inferior or as outsiders because of stereotyping or for whatever other reason. The discrimination against gay men is based on different premisses and perceptions to discrimination based on race and sex, for example. It is, according to the judge, based on societal pressure to remain invisible. Because sexual orientation becomes a moral focus in the constitutional order (since power or poverty is not necessarily in issue), the question of dignity is central to that of equality in this specific context.⁹⁹ Sachs J felt that the Centre's approach would fail to capture the idea that to penalise people for what they are is to be profoundly disrespectful of the human personality and therefore violates equality.

The third issue touched on by Sachs J was the treatment of difference in an open society. He stressed that equality should not be confused with uniformity – on the contrary: “[e]quality means equal concern and respect *across* difference”.¹⁰⁰ In the end, according to the judge, the success of the constitutional endeavour will depend on how successfully we are able to reconcile sameness and difference. This does not mean that the state cannot make moral judgments or enforce moral standards:

“A State that recognises difference does not mean a State without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system.”¹⁰¹

While the state cannot proscribe the holding of certain beliefs by any sector of the community, the Constitution does not allow the *state itself* to impose such beliefs on the whole of society and thus to institutionalise prejudice such as that aimed at the gay and lesbian community.

96 Para 120.

97 Criticism of the dignity-based approach is dealt with in the second article in this series (2001 *THRHR* 619).

98 Para 124.

99 Para 128.

100 Para 132 – emphasis supplied.

101 Para 136.

4 1 Comment

The link between equality and dignity is very much in evidence in this case. But then so is the link between privacy and equality, and between freedom and equality, and all the rest. It still does not do justice to those cases of inequality in which dignity is not in issue – hence the modifier “or equally serious impact”. The fact that both Ackermann J and Sachs J made it plain that the dignity right is not to be collapsed into the equality right, and stressed that dignity in terms of section 10 has a much wider scope than the dignity concept which is used to determine unfairness, perhaps points to the validity of the distinction made by Susie Cowen¹⁰² between dignity as a right and dignity as a value. The fact that dignity will leap out at one in the majority of equality cases in South Africa in particular, should not lead to the conclusion that one can only claim equality protection only if some violation of the right to dignity can be construed. Surely this would lead to an attenuated concept of equality? Will the protection of equality where dignity is not in issue always amount to perpetuation of privilege?

5 SEXUAL ORIENTATION AND IMMIGRATION LAWS – *NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY* *v MINISTER OF HOME AFFAIRS*¹⁰³

This was a sequel to the case discussed above, in which discrimination based on sexual orientation was found to be unconstitutional in the context of the common-law crime of sodomy. Here the issue was the constitutionality of section 25(5) of the Aliens Control Act 96 of 1961, which provided for the issue of an immigration permit to the spouse or dependent child of a person permanently and lawfully resident in the Republic. Section 28(8) provided for exemptions in the case of “special circumstances” and the Department of Home Affairs (the respondent) had at one time accommodated persons in same-sex relationships with permanent residents in this way. However, the respondent had since changed its stance. Applicants sought an order declaring section 25(5) inconsistent with the Constitution and therefore invalid to the extent of its inconsistency, as well as an order directing the respondent to grant the applicants exemptions in terms of section 28(8) in the interim.

The court was unanimous in its finding that the challenge was justified. Ackermann J began by saying that there were two important issues before the court: the first was whether it was unconstitutional for immigration authorities to facilitate immigration into the country by spouses of permanent residents but to deny the same benefits to persons in same-sex partnerships. The second was whether the court, on finding the provisions in a statute unconstitutional, may read words into the legislation to remedy the unconstitutionality.¹⁰⁴

As regards the first issue, the judge referred to the astonishing contention by counsel for the respondents that as a sovereign independent state, the Republic was lawfully entitled to exclude foreign nationals from the state; that it had an *absolute* discretion to do so that was beyond the reach of the Constitution and the courts; and that where Parliament had adopted legislation to permit foreigners to reside in South Africa, this was done in the exercise of the above discretion and that such legislation was likewise beyond the reach of the courts.

102 “Can ‘dignity’ guide our equality jurisprudence?” 2001 *SAJHR* 34. See the discussion in the previous article in this series (2001 *THRHR* 619).

103 2000 1 *BCLR* 39 (CC).

104 This question is one that is of crucial importance to the development of constitutional interpretation in South Africa, and merits detailed analysis. However, this will not be undertaken here, since it does not impact directly on the equality issue.

This argument may have had some viability before 1994, but the supremacy of the Constitution placed an insuperable obstacle in the path of these contentions. The respondents argued that certain provisions of the Constitution conferred rights only on citizens of the Republic.¹⁰⁵ This argument was rejected out of hand by Ackermann J, who found that even if it were correct it would not avail the respondents, since the applicants in the present case did not fall into the categories covered by the constitutional provisions in question; they were persons in intimate life partnerships with permanent residents. The judge emphasised that the legislation impacted not only on the foreign partners, but on the South African partners as well. Thus both could invoke the Constitution.

The court then proceeded to enquire whether section 25(5) violated sections 9 (equality) and 10 (dignity) of the Constitution. The approach adopted to the equality challenge was that which had been finally articulated in *Harksen v Lane*. The differentiation brought about by section 25(5) was found to be of a negative nature, in that it did not proscribe conduct on the part of same-sex life partners or enact provisions that had negative consequences for them, but failed to extend to them the same benefits it extended to spouses.¹⁰⁶ The argument that the differentiation was based not on sexual orientation but on marriage, and that there was nothing to prevent the applicants from entering into marriages with persons of the opposite sex and thus to enjoy the benefits of the legislation, was also given short shrift by the judge:

“[This argument] confuses form with substance and does not have proper regard for the operation, experience or impact of discrimination in society. Discrimination does not take place in discrete areas of the law, hermetically sealed from one another, where each aspect of discrimination is to be examined and its impact evaluated in isolation. Discrimination must be understood in the context of the experience of those on whom it impacts.”¹⁰⁷

Ackermann J pointed out that marriage represents only one form of life partnership, that the legislature has in recent years increasingly begun to confer recognition on same-sex partnerships (although there is still no adequate recognition in law of the same-sex partnership as a *relationship*). Same-sex partners are also still in a different position from heterosexual partners who have not formalised their relationship by getting married.

The judge found that there was much to be said for regarding this as a case of discrimination on the single ground of sexual orientation, but preferred the view that it was overlapping or intersecting discrimination on the grounds of both sexual orientation and marital status, and that the two grounds are not mutually exclusive. He reiterated what had been said in the sodomy case about the impact of the discrimination on the applicants and quoted with approval the dictum of Cory J in the Canadian case of *Vriend v Alberta*:

“It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet as soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities

105 Ss 21(3) (the right to enter, remain in and reside anywhere in the Republic), 21(4) (the right to a passport), 19 (certain political rights) and 22 (the right freely to choose a trade, occupation or profession). See the discussion of the *Larbi-Odam* case above.

106 Para 32.

107 Para 35.

and all of . . . society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.”¹⁰⁸

Ackermann J continued to discuss the nature of family life that is protected by section 25(5) and came to the conclusion that the values sought to be protected are equally to be found in same-sex life relationships. The argument that procreative potential is a defining characteristic of a conjugal relationship, and therefore that same-sex relationships should be excluded on this ground, was rejected as deeply demeaning to couples, whether married or not, who for whatever reason are incapable of procreating or who do not wish to procreate.

He then summarised as follows:

“Gays and lesbians have a constitutionally protected right to equality and dignity; sexual orientation is a ground of discrimination which is expressly proscribed; the criminal proscription of sodomy has been struck down as unconstitutional; persons in same-sex life partnerships are as capable as heterosexual couples of forming enduring relationships similar to those between spouses; gays and lesbians are individually able to adopt children (and lesbians to bear them). In short, they are able to establish a *consortium omnis vitae* and are capable of establishing a family and benefiting from family life.¹⁰⁹ The impact of section 25(5), by denying this and reinforcing existing prejudices and stereotypes, constitutes a ‘crass, blunt, cruel and serious invasion of their dignity’.”¹¹⁰

No rational connection was found between the exclusion of same-sex partners and the legitimate government interest sought to be protected. (It was emphasised, however, that concern for the protection of same-sex relationships by no means implies any disparagement of the traditional institution of marriage.)

Finally, a very brief section 36(1) analysis was undertaken. The judge had no difficulty in finding that there was no ground on which the unfair discrimination or the violation of dignity could be justified.

The position of partners in permanent heterosexual relationships was left open by the court, as was the issue of whether the law should give formal institutional recognition to same-sex partnerships.

The appropriate remedy was found to be reading in the words “or partner, in a permanent same-sex relationship” after the word “spouse” in section 25 (5).

5 1 Comment

Very little need be said here, since the finding was really rather obvious. Once again, as in the sodomy case, the court emphasised overlapping grounds of discrimination which compounds the disadvantage caused.

6 CONCLUSION

The judgments discussed here perhaps do not represent the same measure of “revolutionary” progress in South African equality theory as those discussed in the previous article. A landmark case on racial discrimination has not yet come before the Constitutional Court, but the *Walker* judgment proved how often rights issues, and race issues in particular, may turn out to be essentially “undecidable”.

108 (1998) 156 DLR (4th) 385, quoted at para 43.

109 Para 53.

110 Para 54.

Die regs aard van prestasie*

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SUMMARY

The legal nature of performance

The established view in South African law is that performance is a bilateral act, which can only take place with the co-operation and agreement of both debtor and creditor. It is therefore not sufficient that the debtor does what he is supposed to do: the parties must further conclude a “debt-extinguishing agreement” (*skulddelgende ooreenkoms*). It is argued that this approach does not only rest on weak historical foundations, but is also outdated from a comparative perspective. Its practical benefits are not clear, it is subject to notable exceptions, and at times it amounts to no more than a fiction. In most cases it is clear that a particular benefit should serve to fulfil a particular obligation, and it is simply unnecessary to ask whether a debt-extinguishing agreement existed between the parties. Obviously, if the parties do conclude such an agreement, effect can be given to it, but this does not imply that it should be required in all cases of performance. In conclusion, an alternative approach to the legal nature of performance is proposed. This approach makes provision for a much more direct determination of whether performance has taken place, and takes into account the need to protect certain interests of the parties, such as the reliance that performance has taken place, even though there is no debt-extinguishing agreement.

1 PROBLEEMSTELLING

Een van die betekenis van die woorde “prestasie” of “performance” is om iets tot stand te bring of te bereik. In die konteks van die verbintenisreg beteken die woord “prestasie” meer spesifiek die totstandbring of bereiking van die nakoming van ’n regsplig of verbintenis. ’n Eenvoudige voorbeeld illustreer hierdie betekenis. As ek iets koop, is ek verplig om daarvoor te betaal. Hierdie plig kom ek na deur die koopsom aan die verkoper te oorhandig. Regtens sou ons sê dat ek die verbintenis tussen my en die verkoper om die koopsom te betaal, nagekom het of, kortweg gestel, dat ek presteer het. As ons prestasie so beskou, is dit duidelik dat elkeen van ons daagliks regtens presteer. Ons presteer deur te werk, en sodoende ons dienskontrakte na te kom; ons presteer deur goedere wat ons verkoop het te lewer, of deur ons verbandskuld en huur, of kredietkaart- en oortrokke bankrekenings te betaal. Deur dan so te presteer word ons van ons verbintenis bevry.¹

* Hierdie artikel is gebaseer op my professorale intreerede, wat op 2000-09-27 in die Ou Hoofgebou van die Universiteit van Stellenbosch gehou is. Ek wil graag my besondere dank teenoor Gerhard Lubbe en Charl Hugo uitspreek vir hul waardevolle advies en ondersteuning.

1 Sien *Harrismith Board of Executors v Odendaal* 1923 AD 530 539. Die wortels van hierdie gedagte van bevryding lê dan ook diep in ons reg. In die vroeë Romeinse tye, toe ’n verbintenis of *obligatio* gemanifesteer is deur die fisiese vasbind van die skuldenaar, het prestasie of *solutio* dan ook niks minder nie behels as die losbind of losknoop van die skuldenaar nadat die skuld betaal is (sien Zimmermann *The law of obligations – Roman foundations of the civilian tradition* (1990) 748 sqq).

Die doel van hierdie bydrae is om die regsraad van prestasie van nader te ondersoek, en veral die heersende beskouing daarvan in die Suid-Afrikaanse reg. Alhoewel die vraag of prestasie plaasgevind het gewoonlik nie besonder problematies is nie, is daar gevalle waar dit glad nie so duidelik is of prestasie regtens geskied het nie. Sulke gevalle sluit in die toedeling van 'n enkele bevoordeling waar meerdere verbintenisse tussen die partye bestaan, die aanbod of ontvangs van bevoordelings deur persone wat nie daartoe bevoeg of gemagtig is nie, asook probleme teweeggebring deur die gebruikmaak van sekere meer komplekse betaalmiddels soos tjeks of elektroniese oordragte. In die hantering van hierdie probleemgevalle is 'n regstelsel se beskouing van die aard van prestasie van besondere belang.

Hierdie vraagstuk word vanuit drie perspektiewe beskou. Die eerste perspektief is histories: dit vra waar die gevestigde benadering tot prestasie vandaan kom – nie net omdat kennis van die verlede 'n begrip van die hede vergemaklik nie – maar ook omdat 'n oordeel dan gevel kan word oor die geldigheid van bronne wat die bestaande regsreëls ten grondslag lê. Die tweede perspektief, wat in 'n sekere mate met die eerste saamhang, is regsvergelijkend. Dit ondersoek verwante regstelsels, in die verwagting dat uit hul ervarings geleer kan word om sodoende ons eie reg te verryk. Derdens word gekyk hoe die Suid-Afrikaanse howe die gevestigde benadering tot die regsraad van prestasie toepas, en veral of dit werklik bygedra het tot die oplossing van 'n geskil. Ter afsluiting word dan in die lig van hierdie bevindinge 'n paar gevolgtrekkings gemaak oor die pad vorentoe, en veral oor hoe ons kan verseker dat die regsreëls oor prestasie sekere belangrike onderliggende beginsels en waardes dien. Maar voor enigsins verder gegaan word, is dit noodsaaklik om vas te stel wat die heersende beskouing oor die regsraad van prestasie hoegenaamd is.

2 DIE HUIDIGE BENADERING: DIE SKULDDELGENDE OOREENKOMS

Een van die mees diepgaande ontwikkelinge in die Suid-Afrikaanse reg was seker die verskyning van die eerste uitgawe van De Wet en Yeats se werk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1947). Hierdie handboek het in vele opsigte die fundamente van die moderne Suid-Afrikaanse kontraktereg gelê. Dit verbaas dus nie dat die heersende benadering tot die regsraad van prestasie na hierdie werk teruggevoer kan word, en meer spesifiek na die volgende sin wat in daardie eerste uitgawe verskyn het, asook feitlik onveranderd in die verdere uitgawes:

“Behoudens enkele uitsonderinge, is voldoening 'n tweesydigte regshandeling, wat alleen met die medewerking en wilsooreenstemming van albei partye kan plaasvind.”²

Aldus De Wet. Wat dus hier gesê word, is dat voldoening, oftewel prestasie, nie net behels dat jy feitlik doen wat jy veronderstel is om te doen nie. Jy en jou skuldeiser moet hierbenewens *saamwerk* en albei *bedoel* dat die skuld gedelg word. Soos met soveel ander van De Wet se gedagtes, is ook hierdie gedagte daarna deur akademiese en die howe gevolg. So het die destydse appèlafdeling in *Saambou-Nasionale*

2 De Wet en Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1947) 166. Sien ook 5e uitg (1992) vol 1 263.

3 Sien Van der Merwe, Van Huyssteen, Reinecke, Lubbe en Lotz *Kontraktereg algemene beginsels* (1994) 361; Joubert *General principles of the law of contract* (1987) 274 sq; Reinecke “Minderjariges se kontrakte” 1964 *THRHR* 133; Lubbe en Murray *Farlam and Hathaway Contract - cases, materials and commentary* (1988) 716.

*Bouvereniging v Friedman*⁴ gesê dat prestasie 'n "ooreenkoms" tussen die partye vereis, terwyl die Hoogste Hof van Appèl onlangs weer in *Pfeiffer v First National Bank of South Africa Limited*⁵ dit op soortgelyke wyse stel dat prestasie 'n tweesydigde handeling is wat die samewerking van beide partye vereis. Hierdie stellings steun op die ou end almal op De Wet.⁶ Die beskouing dat prestasie in wese 'n skulddegende ooreenkoms vereis, is deesdae dan ook fundamenteel in ons privaatreë. Dit is deel van die stapelvoedsel van elke regstudent, en dogmaties vergelykbaar met die stelling dat mens vir kontraktuele aanspreeklikheid in beginsel 'n verbintenisskeppende ooreenkoms vereis en vir eiendomsoorgang 'n saaklike ooreenkoms.

Voor hierdie beskouing uit 'n historiese perspektief benader word, moet daarop gedui word dat De Wet darem sy stelling oor die regspraak van prestasie kwalifiseer met die woorde "behoudens enkele uitsonderings". Hy bied dus nie 'n allesomvattende teorie nie. In uitsonderlike gevalle kan prestasie volgens hom sonder sodanige ooreenkoms geskied. Dit is dan die gevalle waar 'n persoon juis verplig is om iets nie te doen nie (die sogenaamde *obligatio non faciendi*) en sekere gevalle waar prestasie sonder enige medewerking van die skuldeiser kan geskied (vermoedelik die lewering van 'n diens).⁷ Na hierdie kwalifikasie word egter later teruggekeer.

3 HISTORIESE PERSPEKTIEF: DE WET, SCHORER EN LAUTERBACH

Vir eers is dit nodig om die horlosie terug te draai ten einde vas te stel waar De Wet se beskouing vandaan kom dat prestasie nie net behels dat jy feitlik doen wat jy moet doen nie, maar ook die wedersydse medewerking en ooreenkoms van die partye. De Wet verwys na net een bron, by name die agtiende-eeuse Romeins-Hollandse skrywer Schorer.⁸ Meer spesifiek steun hy op die volgende stukkie kommentaar op 'n stelling deur die beroemde Romeins-Hollandse juris Hugo de Groot:

"[O]m betaling behoorlik te laat geskied word die wil van beide vereis" (*ut illa [dws solutio] recte perficiatur, requiritur utriusque voluntas*).⁹

As mens egter kyk na De Groot se stelling, is dit duidelik dat dit glad nie gaan oor 'n ooreenkoms tussen die partye gemik op delging van 'n skuld nie. De Groot sê slegs dat prestasie nie deur of aan iemand gemaak kan word wat nie daartoe bevoeg

4 1979 3 SA 978 (A) 993A-B ("Daar kan ook op gewys word dat in die algemeen in ons reg selfs betaling (voldoening) 'n ooreenkoms behels"); sien ook *Italtile Products (Pty) Ltd v Touch of Class* 1982 1 SA 288 (O) 292H-293A en die minderheidsuitspraak van Olivier AR in *Nedperm Bank Ltd v Lavarack* 1996 4 SA 30 (A).

5 1998 3 SA 1018 (A); sien ook *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank)* 1991 3 SA 605 (A) 612C-E ("betaling is 'n tweesydigde regshandeling wat, tensy anders ooreegekom, die medewerking van beide partye verg"); *Matador Buildings (Pty) Ltd v Harman* 1971 2 SA 21 (K) 25H ("Payment is a bilateral transaction in which both the payer and the payee must cooperate").

6 Sien bv die kruisverwysings na *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 993A-B in *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank)* 1991 3 SA 605 (A) 612C.

7 Sien De Wet en Van Wyk (1992) 183 263; Lubbe en Murray 716; Joubert 274; Van der Merwe *et al* 361 sq.

8 Sien De Wet en Van Wyk (1992) 263 vn 74.

9 *Aantekeningen van Mr Willem Schorer over de Inleidinge tot de Hollandsche Rechtsgeleerdheid van Mr Hugo de Groot, door den aanteekenaar aanmerkelijk vermeerderd en uit het Latijn vertaald door Mr JE Austen* (1784) vol 1 3 39 7.

of “bequaem” is nie. ’n Baba of kranksinnige sou met ander woorde nie eiehandig kon presteer nie. Waar kry Schorer dan hierdie idee vandaan? Hy verwys op sy beurt ook maar net na een bron, naamlik die sewentiende-eeuse Duitse regsgeleerde Lauterbach. Dit blyk dan ook dat Lauterbach inderdaad steun vir Schorer se stelling bied. Volgens hom is die “aanleidende oorsaak” of *causa efficiens* van betaling die wil van die een wat gee en die wil van die een wat ontvang. Hy kom dan tot die gevolgtrekking dat

“vir prestasie die instemming van beide partye beslis vereis word” (*utriusque voluntas omnino ad solutionem requiratur*).¹⁰

Dit is bykans dieselfde woorde wat Schorer later gebruik het. As mens egter die draadjie verder volg, en vra waar Lauterbach op sy beurt die idee vandaan gekry het dat prestasie die wil van beide partye vereis, bereik mens ’n verbasende gevolgtrekking. Die wil waarna Lauterbach verwys is nie die wil om ’n skuld te delg nie, maar die wil om eiendomsreg oor te dra.¹¹ Hierdie onderskeid mag dalk vir nie-regsgeleerdes subtiel voorkom, maar regtens is daar ’n fundamentele verskil tussen ’n saaklike ooreenkoms, wat ’n vereiste is vir die oordrag van eiendomsreg, en ’n skulddelgende ooreenkoms, wat veronderstel is om gerig te wees op voldoening of prestasie. ’n Verdere probleem met die interpretasie wat Schorer, en indirek, De Wet, aan die teks gee is dat die Romeinsregtelike titels waarna verwys word, nie duidelik so ’n interpretasie steun nie. Daar is reeds op gewys dat mens nie bloot uit die stelling dat iemand bevoeg moet wees om prestasie te ontvang kan aflei dat prestasie ’n skulddelgende ooreenkoms vereis nie. Tekste wat hierna verwys steun dus nie dié uitleg nie.¹² Ander tekste vereis weer dat betaling in die naam van die skuldenaar moet geskied,¹³ of gaan oor spesifieke probleme by uitwinning¹⁴ en voorwaardelike betaling.¹⁵ Om die waarheid te sê, as mens na ander Romeinse tekste

10 *Collegium theoretico-practicum* (1725) Lib XLVI Tit III n III.

11 *Ibid*: (“Solutionis, quatenus totum significat negotium, causa efficiens est voluntas dantis, vel debitoris, & accipientis, vel creditoris. Nam ut solutio perfecta, & obligatio per solutionem sublata videatur, rei in solutum datae dominium debet esse translatum . . . Ex quo sequitur, quod utriusque voluntas omnino ad solutionem requiratur” - vry vertaal lui dit soos volg: “Die aanleidende oorsaak van betaling, vir sover dit die geheel (van ’n) transaksie aandui, is die instemming van die een wat gee, of skuldenaar, en van die een wat ontvang, of skuldeiser. Want om betaling as voltooi, en die verbintenis as deur betaling opgehef, te beskou, behoort eiendomsreg van die saak wat in betaling gegee is, oorgedra te wees. Hieruit vloei dan voort dat vir prestasie die instemming van beide partye beslis vereis word”). Daar word dan verwys na D 44 7 55, waar dit gestel word dat die oordrag van eiendomsreg (*dominium*) ’n ooreenstemming in die bedoeling (*affectus*) van die partye vereis.

12 Sien die verwysing na I 2 8 2 (’n pupil is nie bevoeg om sonder toestemming van sy voog iets te vervreem of ontvang nie), D 26 8 9 2 (waar ’n pupil sonder toestemming van sy voog betaal, is die handeling ongeldig, aangesien hy nie eiendomsreg kan oordra nie; waar die skuldeiser te goeder trou die geld verbruik, word die pupil bevry), asook die verwysing in Lauterbach *Collegium theoretico-practicum* Lib XLVI Tit III n IV na I 3 29.

13 D 46 3 17. Hierdie teks handel oor ’n lasgewer wat veronderstel is om geld wat iemand aan hom gegee het in daardie persoon se naam aan daardie persoon se skuldeiser te betaal, maar dit dan in sy eie naam betaal. Daar word dan gesê dat daardie persoon nie van die skuld bevry sal word nie, omdat betaling nie in sy naam geskied het nie.

14 D 46 3 46 *pr*. Hier word gesê dat indien iemand aan ’n gewillige ontvanger een ding in plaas van ’n ander sou presteer, en dit wat presteer is daarna uitgewin word, die oorspronklike verbintenis bly voortbestaan. Selfs al sou die uitwinning gedeeltelik wees, bly volle aanspreeklikheid vir die geheel voortbestaan: want die skuldeiser ontvang nie ’n ondeelbare saak tensy dit in sy geheel syne word nie.

15 D 46 3 55. Volgens dié teks word die een wat so presteer dat hy mag terugvorder, nie bevry nie, aangesien munte wat gegee is om weer teruggevorder te word nie oorgedra is nie.

oor betaling kyk, dan blyk dit eerder dat geen sodanige bedoeling vereis word nie – die uitgangspunt is eenvoudig dat om te presteer beteken om te doen wat jy beloop het om te doen.¹⁶ Verder, sover ek kon vasstel, maak geen ander gemeenregtelike skrywer 'n soortgelyke stelling as dié van Schorer of Lauterbach nie. Hul volg eerder die eenvoudige benadering van die Romeinse reg, en vereis nie 'n meersydige handeling of ooreenkoms by prestasie nie.¹⁷

Alles in ag genome, lyk dit dus nie of De Wet se stelling op stewige gemeenregtelike fundamente rus nie. Dit is natuurlik nie te sê dat die standpunt noodwendig verkeerd is nie. Dit is immers niks vreemd dat ons howe en academici selektief te werk gaan in hul beroep op gemeenregtelike bronne ten einde die een of ander standpunt te steun nie. Dit kom egter wel vreemd voor dat 'n konstruksie wat deesdae so algemeen aanvaar word, oënskynlik op so weinig gesag steun.

4 REGSVERGELYKENDE PERSPEKTIEF: DIE DUITSE ERVARING

Maar genoeg eers oor prestasie uit 'n historiese perspektief. Hoe vaar die idee dat prestasie 'n skulddelgende ooreenkoms vereis wanneer dit uit regsvergelykende perspektief benader word? Mens sou seker die posisie in 'n magdom stelsels kon ondersoek, maar in so 'n ondersoek is die kool meermale nie die sous werd nie. Dit loon mens eerder om te fokus op daardie stelsels wat, gegewe 'n gedeelde herkoms, begrippe-struktuur en waardestelsel, antwoorde sal bied wat vir ons stelsel die meeste waarde inhou. Vir doeleindes van hierdie bydrae is dan besluit om veral te fokus op die posisie in die Duitse reg, wat nie net meermale hierdie eienskappe toon nie, maar waarskynlik meer grondig as enige ander sivielregtelike stelsel die regsraad van prestasie ondersoek het.

Toe die samestellers van die Duitse privaatrekkode, die *Bürgerliches Gesetzbuch*, aan die einde van die negentiende eeu die regsraad van prestasie moes oorweeg, het hulle doelbewus 'n besluit daaroor vermy, en verkies om dit eerder in die hande van regswetenskaplikes te laat om dié vraagstuk op te los.¹⁸ Dit het daartoe gelei dat in die loop van die twintigste eeu 'n teoreties besonder gesofistikeerde debat oor hierdie probleem gevoer is. Hierdie debat het egter grootliks by Suid-Afrikaanse regsgeleerdes verbygegaan. Omdat dit vir doeleindes van hierdie bydrae van besondere belang is, word die volgende oorsig daarvoor kortliks gegee.

Die teorie wat aanvanklik die grootste gewildheid geniet het, en eintlik maar aangesluit het by die pre-gekodifiseerde Duitse gemene reg, was die sogenaamde

16 “Solvete dicimus eum, qui fecit quod facere promisit” (*D* 50 16 176; sien ook Thomas *Textbook of Roman law* (1981) 343; Zimmermann 748; Joubert 274; in vn 1 hierbo is gewys op die meer formele en letterlike vroeëre betekenis van *solutio*).

17 Sien Voet 46 3 1 (1707 uitg): “Betalings, in die korrekte sin van die woord, vir sover dit verskil van kwytstelling, novasie en ander maniere van verbintenisse tot niet maak, is die fisiese gee van wat verskuldig is”; Pothier *Traité des obligations* (saamgevat in sy *Oeuvres* 1844) § 494 (“betaling is die verrig of doen wat mens verbind is om te doen”); Huber *Hedendaegse regsgeleertheit* (1768) 3 3 8 3 (“betaling is bloot om te veroorsaak dat 'n ander juis dit verkry wat ons skuld”); Van der Linden *Koopmans handboek* 1 18 1 (“betaling is die werklike doen wat mens jou verbind het om te doen”).

18 Sien Heinrichs *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (1994) vol 2 § 362 par 5, en oor die Duitse reg in die algemeen par 1-14; Bassenege *et al* (reds) *Palandt - Bürgerliches Gesetzbuch* (1996) § 362 par 5-7; Larenz *Lehrbuch des Schuldrechts Band I Allgemeiner Teil* (1987) § 18 I (daar word die vraagstuk as “außerordentlich streitig . . . seit langem” bestempel).

'ooreenkoms'-teorie of *Vertragstheorie*.¹⁹ Hierdie teorie is ook onderliggend aan die idees van Schorer wat ons nou net in oënskou geneem het, en is dus eintlik reeds aan ons bekend. Volgens hierdie teorie vereis prestasie nie net dat jy doen wat jy onderneem het om te doen nie, maar boonop 'n aparte ooreenkoms tussen die partye dat 'n bepaalde verbintenis of skuld sodoende vervul of gedelg sal word. In die geval van koop sou die blote lewering van die koopsaak of oorhandiging van die geld nie voldoende wees nie: die partye moet dit boonop eens wees dat deur lewering van die saak, of deur oorhandiging van die geld, die verbintenis aan voldoen sal word.

Hierdie teorie geniet in die moderne Duitse reg geen aanhang meer nie.²⁰ Dit kan eenvoudig nie verklaar hoekom 'n skuldeiser 'n ontasbare prestasie soos die lewering van 'n diens, of die nakom van 'n plig om jou van iets te weerhou, moet "aanvaar" nie. As 'n tuinier 'n heining op instruksies van die eienaar, maar in sy afwesigheid, sny, behoort prestasie tog plaas te vind toe die heining gesny is, ongeag of die eienaar afwesig was, en dus nie daartoe in staat was om die prestasie te aanvaar nie. Mens kan seker die skuldeiser se aanvaarding reeds voor prestasie, en in afwagting daarop postuleer, maar dit is 'n fiksie wat die houdbaarheid van die teorie duidelik ondermyn. Ander gebreke sluit in die ietwat ingewikkelde gevolg dat by 'n eenvoudige ruilkontrak die verbintenis deur nie minder nie as vier ooreenkomste tot 'n einde kom: twee om elk van die oordragte te bewerkstellig en nog twee waarvolgens daar ooreengekom word dat elk van die oordragte ter vervulling van 'n verbintenis gemaak word.²¹ Dit is natuurlik nie te sê dat die teorie moontlik op 'n indirekte wyse poog om sekere onderliggende belange of waardes te dien wat wel beskermingswaardig is nie, maar die wyse waarop dit gedoen word, is duidelik problematies. Daar word later na hierdie punt teruggekeer.

Mettertyd is gepoog om sommige van die probleme van die "ooreenkoms"-teorie te bowe te kom deur die toepassingsveld daarvan te beperk. Hierdie nuwe teorie het as die "beperkte ooreenkoms-teorie" bekend gestaan,²² en is dan ook die teorie wat De Wet vir die Suid-Afrikaanse reg voorgestaan het. In wese behels dit dat die lastige voorbeelde van die lewering van 'n diens, of die nakom van 'n plig om nie iets te doen nie, eenvoudig as uitsonderings beskou word. 'n Skulddeigende ooreenkoms word dan slegs vereis waar jy in elk geval nie sonder ooreenkoms kan doen wat jy onderneem het om te doen nie. As mens byvoorbeeld 'n saak wil lewer het jy in elk geval 'n saaklike ooreenkoms nodig voordat eiendomsreg sal kan oorgaan. Dit is dan slegs in so 'n geval dat die reg nou boonop 'n skulddeigende ooreenkoms sal vereis. Hierdie dualistiese teorie het egter nooit noemenswaardige steun in Duitsland geniet nie.²³ Dit is immers geen algemene teorie van prestasie nie, en hoekom die skulddeigende ooreenkoms die reël moet wees, en nie die uitsondering nie, word eenvoudig nie duidelik gemaak nie.

Tot sover dan wat betref die mislukte modelle gebaseer op 'n skulddeigende ooreenkoms. In 'n poging om van die gebreke van hierdie modelle te ontsnap, is

19 Oor die voorstanders sien Larenz § 18 I par 2; Heinrichs § 362 par 6 vn 12; Gernhuber *Die Erfüllung und ihre Surrogate* (1983) 101 vn 37; sien ook RGZ 60, 24 (28).

20 Sien Heinrichs § 362 par 6.

21 Sien Gernhuber 102.

22 Dit is die benadering van die *beschränkte Vertragstheorie* in die Duitse reg. Die hoofvoorstanders is Lehmann, Jackisch, Fikentscher en die redakteurs van Palandt (vn 18 hierbo) tot by die 37ste uitgawe (vir besonderhede sien Larenz § 18 I; Heinrichs § 362 par 7 vn 13; Gernhuber 103 vn 41).

23 Gernhuber 103.

daar geargumenteer dat dit nie nodig is dat die partye 'n ooreenkoms (of *Vertrag*) moes sluit om die skuld te delg nie.²⁴ Vir sommige het die antwoord daarin gelê om die skuldeiser buite die prentjie te laat en slegs te fokus op die skuldenaar. Volgens die “finale prestasieteorie” is die sleutelvraag dan net of die skuldenaar bedoel het om met 'n bepaalde bevoordeling 'n skuld te delg.²⁵ Daar moet toegegee word dat hierdie teorie natuurlik voordelig is wanneer daar 'n verskeidenheid verbintenis is, en bepaal moet word aan watter een 'n bevoordeling toegedeel moet word. Die suksesvolle hantering van so 'n uitsonderingsgeval kan egter beswaarlik as voldoende grond beskou word om nou die aanwys van die doel van 'n bevoordeling tot die norm te verhef.²⁶ Die feit dat iemand die doel van 'n prestasie kan aanwys, beteken immers nie dat hy dit *moet* doen nie.²⁷ Daar is egter 'n meer diepliggende oorweging wat hierdie teorie aantreklik maak, naamlik dat dit uniformiteit teweegbring in die wyse waarop die Duitse verbintenisreg en verrykingsreg die begrip prestasie of *Leistung* beskou. Baie kortweg gestel, beskou die Duitse verrykingsreg 'n *Leistung* as die bewuste en doelgerigte vermeerdering van die vermoë van 'n ander. Waar nie in hierdie doel geslaag word nie, word 'n remedie genaamd die *Leistungskondition* verleen.²⁸ Daar kan nie hier verder op hierdie probleem ingegaan word nie, maar ek wil tog net opmerk dat die bestaande beskouing van die prestasie-begrip in die Duitse verrykingsreg beslis nie onomstrede is nie,²⁹ met die gevolg dat hierdie gerieflike ooreenstemming weldra mag wegval. Maar kom ons vergeet vir 'n oomblik van dogmatiese gerief en dink net aan 'n praktiese voorbeeld om hierdie teorie te toets. Veronderstel ek kontrakteer met 'n rekenaartegnikus om 'n komponent van my rekenaar te herstel. Hy doen dit dan, maar dink foutiewelik dat dit 'n ander se komponent of sy eie is. Hy het sekerlik nie in die doel waarmee hy dit reggemaak het geslaag nie, maar dit klink hoogs eienaardig om dan te sê dat hy in sulke omstandighede nie presteer het nie.

24 Dit is die benadering van die *Zweckvereinbarungstheorie*, wat nie ver weg beweeg het nie, aangesien dit vereis dat die partye dit eens moet wees oor die doel van die bevoordeling. Voorstanders sluit in Ehmann, Weitnauer en (in wese) Rother (vir kort uiteensettings sien Larenz § 18 I; Heinrichs § 362 par 8 vn 14; Gernhuber 106). Die gedagte is dus dat die partye 'n bepaalde voordeel toewys aan 'n bepaalde verbintenis. Hierdie teorie sukkel om te verduidelik hoekom die skuldeiser die doel moet aandui van 'n bevoordeling wat eensydig kan geskied, en gaan ooglopend mank aan dieselfde gebreke as die *Vertragstheorie*: Gernhuber 106.

25 Voorstanders van die *Theorie der finalen Leistungsbewirkung* sluit in Gernhuber 106 sqq en Beuthien (vir besonderhede sien Larenz 18 I par 238; Heinrichs § 362 par 10 vn 16). Oor die verwante teorie van die “eensydige vervullingshandeling” (*Theorie des einseitigen Erfüllungsgeschäfts*) sien Gernhuber 103. Al wat dit vra, is of die skuldenaar sy wil so uitgeoefen het dat 'n voldoeningshandeling verrig is. Ons sit egter hier nog steeds met 'n probleem wat betref gevalle soos die lewering van 'n diens of *omissio*. Hier is dit moeilik om in te sien watter verskil die vereiste van 'n “eensydige vervullingshandeling”, wat nogal 'n regshandeling moet wees, nou eintlik gaan maak. Mens sou seker 'n uitsondering vir laasgenoemde gevalle kon skeep, maar die ou probleem met 'n dualistiese benadering duik maar net weer van vooraf op.

26 Heinrichs § 362 par 13; Larenz § 18 I.

27 Sien Brox *Allgemeines Schuldrecht* (1998) § 163.

28 Oor die *Leistung*-begrip en die *Leistungskondition* in die Duitse reg, sien oor die algemeen Medicus *Schuldrecht II Besonderer Teil* (2000) § 125 II; Reuter en Martinek *Ungerechtfertigte Bereicherung* (1983) § 4 II; Zimmermann en Du Plessis “Grondtrekke en Kernprobleme van die Duitse Verrykingsreg” 1992 *Acta Juridica* 57 75 sqq en “Basic Features of the German Law of Unjustified Enrichment” (1994) *Restitution LR* 14 15 sqq.

29 Sien Canaris *Lehrbuch des Schuldrechts* (1994) vol 2(2) § 67 III 1; Du Plessis “Fraud and duress” in Zimmermann en Johnston (reds) *Comparative law of unjustified enrichment* (2001).

Ons kan nou ons oorsig oor Duitse teorieë oor die regsraad van prestasie afsluit deur kortliks te kyk na die teorie wat tans algemene aanvaarding onder die Duitse howe³⁰ en akademici³¹ geniet. Dit staan bekend as die “reële prestasieteorie” oftewel *Theorie der realen Leistungsbewirkung*. Hiervolgens word geensins vereis dat die skuldenaar of skuldeiser moes bedoel het om ’n skuld te delg, of die doel van ’n prestasie moes aandui nie.³² Daar word bloot gekyk na die gedrag van die skuldenaar, en gevra of hy in ’n “reële” of werklike sin presteer het. Voldoening of prestasie word bereik as die bevoordelende handeling dan op ’n erkenbare wyse aan ’n bepaalde verbintenis toegewys kan word.³³ Waar ’n saak byvoorbeeld ingevolge ’n koopkontrak gelewer moet word, vind prestasie plaas wanneer eiendomsreg in die saak oorgedra word aan die koper.³⁴ Geen verdere meersydige regshandelinge of ooreenkomste word vereis nie. So ’n benadering is nie net eenvoudiger nie, maar kom ook die probleme te bowe wat ons voorheen raakgeloop het met die gevalle waar daar werklik geen samewerking van die skuldeiser vereis hoef te word nie, soos die lewering van die diens of die nakom van ’n plig om iets nie te doen nie.³⁵

5 PRESTASIE EN DIE HOWE: EVALUERING VAN DIE REGSPRAAK

Tot sover dan wat die Duitse reg betref. Kom ons neem net kortliks bestek van ons bevindinge. Ons het gesien dat die hedendaagse Suid-Afrikaanse beskouing oor die regsraad van prestasie nie net uit ’n historiese perspektief op wankelrige fundamente rus nie, maar ook uit regsvergelijkende perspektief gebrekkig en verouderd voorkom. Daar kan egter geargumenteer word dat dit nie nodig sou wees om van die hedendaagse benadering af te wyk indien dit tog suksesvol in die regspraktiek toegepas word nie. Dit is dan teen hierdie agtergrond dat ek nou graag wil oorgaan tot ’n evaluering van die toepassing van hedendaagse benadering in die moderne Suid-Afrikaanse regspraak.³⁶ Die beslissings kan geriefshalwe in drie kategorieë ingedeel word.

30 BGH, *NJW* 1991, 1294 1295; *NJW* 1992, 2698 2699; *NJW* 1983, 1860; *BAG NJW* 1993, 2397 2398.

31 Moderne voorstanders van hierdie teorie sluit in Larenz § 18 I; Medicus § 23 IV 3; Heinrichs § 362 par 12; Palandt § 362 par 6 *sqq* en Von Caemmerer “Irrtümliche Zahlung fremder Schulden” in Von Caemmerer *et al* (reds) *Festschrift für Hans Döle* (1963) vol 1 135. Oor die ontstaan van die teorie sien Gernhuber 104 vn 44.

32 Sien Larenz § 18 I; Medicus § 23 IV 3.

33 Spesifieke reëls geld igv ’n veelvoud soortgelyke verbintenisse (sien § 366 I *BGB*).

34 Of eiendomsreg oorgegaan het of nie word volgens die reëls van die sakereg bepaal – sien § 929 *BGB*. § 398 *BGB* (*Abtretung*) geld tov sessie.

35 Dit is slegs indien die skuldeiser nie die bevoegdheid of vermoë het om die voordeel self te ontvang dat prestasie nie kan plaasvind nie –bv waar die saaklike ooreenkoms wat noodsaaklik is vir eiendomsorgang van weë kranksinnigheid of minderjarigheid nie gesluit kan word nie – sien Larenz § 18 I 5.

36 Alhoewel dit hier gaan oor beslissings waar ’n skulddelgende ooreenkoms of tweesydigte handeling vereis is, is daar ’n handjievol beslissings wat (soos De Wet) aantoon dat hierdie benadering nie konsekwent toegepas kan word nie. So is dit deur Wessels AR in *Thienhaus v Metje & Ziegler Ltd* 1965 3 SA 25 (A) 45E duidelik gestel dat die registrasie van ’n verband volg op ’n eensydige handeling van die verbandgewer. Dit is wel ’n minderheidsuitspraak, maar die punt vorm nie die kern van die geskil nie. Daar is ook al beslis dat ’n derde ’n skuld namens ’n skuldenaar kan betaal, selfs al is die skuldenaar geheel en al onbewus van die betaling. Sien die uitspraak van De Villiers HR in *Bousfield v The Divisional Council of Stutterheim* (1902) 19 SC 64 70-71 (mvn Voet 46 3 1); Christie *The law of contract in South Africa* (1996) 451. In die beslissing van Goldstone WnR (soos hy toe was) in *Rosen v Barclays National Bank Ltd* 1984 3 SA 974 (W) 979E is beweer dat betaling kan geskied sonder die kennis van die

Die eerste kategorie is redelik maklik om af te handel. Dit dek die geval waar daar nie eens 'n fisiese bevoordeling was nie. Die beslissing in *Matador Buildings (Pty) Ltd v Harman*³⁷ bied 'n goeie illustrasie hiervan. In 'n poging om hul huurgeld betyds te betaal, stuur 'n restaurant een van die kelners op 'n Saterdagoggend na die kantoor van die verhuurder se verteenwoordiger, Mnr Poiet. Toe hy egter daar aankom, was niemand binne nie. Die kelner besluit na bewering daarop om die huurgeld onder die geslote kantoordeur te druk, maar verander kort daarna van gedagte en herwin die tjek met behulp van 'n liniaal.³⁸ Die hof bevind dat die restaurant nie geldig die huur betaal het nie. Onder andere word dan gewys op die afwesigheid van 'n meersydige handeling wat nodig sou wees om prestasie te bewerkstellig. Dit is egter voor-die-hand-liggend dat hier in elk geval nie sprake kan wees van enige fisiese bevoordeling nie: die tjek is immers nie eens gelewer nie. Om nou bykomend nog te vra of hier 'n meersydige regshandeling of ooreenkoms gemik op die bereik van voldoening was, is dus eenvoudig oorbodig. Kortom, die verwysing na so 'n teorie dra niks by tot die oplossing van die geskil nie.

'n Tweede kategorie handel oor 'n aangeleentheid wat ons reeds in die oorsig oor die Duitse reg teëgekomp het, naamlik die toewysing van meerdere betalings aan bepaalde skulde. Dit was die probleem ter sprake in *Italtile Products v Touch of Class*.³⁹ Hier het waarnemende regter Viljoen geen probleem gehad om te bevind dat 'n telegrafiese oordrag van R5907,95 'n skuld van R5907,95 gedelg het nie. Daar word nou wel afgelei of vermoed dat die skuldenaar hierdie toewysing moes bedoel het,⁴⁰ maar niks is gesê oor 'n ooreenstemmende bedoeling aan die kant van die skuldeiser nie. Die toewysing is egter so voor-die-hand-liggend dat dit myns insiens kwalik nodig is om nog te probeer vasstel of so 'n bedoeling aanwesig was of nie. 'n Meer problematiese aspek van hierdie saak is die toewysing van sekere ander bedrae wat per telefoniese oordrag geskied het, maar waarvan die skuldenaar nie die doel aangedui het nie. Moes hierdie bedrae aangewend word ter betaling van ander gedishonoreerde tjeks of ter vermindering van die skuldenaar se "ope rekening"? Die skuldenaar het betoog dat die toewysing primêr in sy belang gemaak moes word, wat dan sou beteken dat die mees beswarende skulde (volgens hom die skuld wat in verband staan met die gedishonoreerde tjek) eerste betaal moes word. Waarnemende regter Viljoen verwerp egter hierdie argument, en met verwysing na onder andere De Wet en Yeats, bevestig hy dat die toedeling van betaling, oftewel prestasie, gebaseer is op 'n ooreenkoms tussen die partye. Steun vir hierdie gedagte kan dan volgens hom in twee aanvaarde reëls oor toedeling gevind word, naamlik

skuldeiser, en dus by implikasie sonder 'n skulddegende ooreenkoms. Hierdie beslissing is egter uitdruklik deur die appèlafdeling verwerp in *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank 1991 3 SA 605 (A) 612C-E*.

37 1971 2 SA 21 (K).

38 Dit mag terloops bygevoeg word dat die kelner wat hierdie bewerings gemaak het voor die verhoor verdwyn het, maar dat Diemont R opgemerk het dat hy "subsequently had taken to dagga" (25F) en dus in elk geval 'n onbetroubare getuie sou wees. Daar is wel na die tyd gepoeg om te betaal deur die geld direk in die verhuurder se bankrekening in te betaal, maar hierdie optrede was volgens Diemont R strydig met die uitdruklike bepalings van die huurkontrak, en het gevolglik ook nie betaling bewerkstellig nie. Die vraag ontstaan egter wat die situasie sou wees indien geen plek vir betaling bepaal was nie, en die huurder dan die geld in die verhuurder se bankrekening inbetaal het. Dit klink hoogs onbillik dat dan nog steeds gesê sou kon word dat solank die skuldeiser nie van die betaling bewus was nie, daar geen geldige betaling kon geskied het nie.

39 1982 1 SA 288 (O); sien ook *Nedperm Bank Ltd v Lavarack and others* 1996 4 SA 30 (A).

40 1982 1 SA 288 (O) 291A-B.

dat betaling eers aan rente toegedeel word, en daarna aan kapitaal, en dat dit ook eers toegedeel word na ouer, en daarna na jonger skulde. Volgens hom begunstig hierdie reëls nou wel die skuldeiser eerder as die skuldenaar, maar, word daar gesê,

“they are in accordance with equity and what the parties would have replied at the time the debts arose had the bystander who is sometimes referred to asked: ‘To what debt will payments first be appropriated?’”⁴¹

Die hof bevind dus eintlik dat die toewysing ingevolge stilswyende bedinge moes geskied. Deesdae word aanvaar dat sulke bedinge nie noodwendig die ware bedoeling van die partye hoef te weerspieël nie, maar dat die howe, platweg gestel, hierdie bedinge in die kontrak kan inlees. Dit kom dus voor of die verwysing na die bedoeling van die partye eintlik net ’n dekmantel is vir ’n toewysing wat van regsweë geskied. In die onlangse beslissing van die Hoogste Hof van Appèl in *Pfeiffer v First National Bank of SA Ltd*⁴² word verwysing na stilswyende bedinge dan ook geheel en al vermy. Al wat gesê word, is dat indien die partye nie self aandui hoe ’n betaling toegewys moet word nie, sekere reëls oor die toewysing van betaling outomaties toegepas moet word. Geen poging word aangewend om hierdie reëls op die gefikseerde bedoeling van die partye te baseer nie. Ook in *Nedperm Bank v Lavarack*⁴³ word ’n poging om op stilswyende bedinge te steun beskou as onvanpas waar ’n leningsooreenkoms in groot besonderhede die verhouding tussen die partye reguleer. Die meerderheid het deur uitleg van die ooreenkoms bepaal hoe die toewysing van betalings moes geskied, weer eens sonder dat dit nodig was om ooreenstemmende skulddelgende bedoelings ten opsigte van elke betaling te konstrueer.

’n Derde kategorie sake handel spesifiek oor die effek van die aflasting van betaling of, soos dit in die omgangstaal bekend staan, die “stop” van ’n tjek. Die aflasting van betaling van ’n tjek kan aanleiding gee tot besonder komplekse probleme. Wanneer iemand ’n tjek ter betaling van ’n skuld uitskryf en aan die nemer lewer,⁴⁴ geskied betaling onmiddellik, maar onderworpe aan die voorwaarde dat die tjek gehonoreer sal word.⁴⁵ As die tjek inderdaad gehonoreer word, is daar dan betaling vanaf die oomblik van ontvangs. As dit nie gehonoreer word nie, het betaling nooit geskied nie. Die probleem by die aflasting van betaling van ’n tjek is dat die skuldenaar na lewering van die tjek, en strydig met die indruk wat hy aanvanklik geskep het dat die tjek as betaling gaan dien, nou die bank aansê om nie die tjek uit te betaal nie. Om te bepaal wat die effek van die aflasting van betaling

41 293; daar word oa verwys na die welbekende toets in *Reigate v The Union Manufacturing Co* (1918) 1 KB 592.

42 1998 3 SA 1018 (A) 1025 sq.

43 1996 (4) SA 30 (A).

44 By lewering kom daar ’n wisselkontrak tot stand. Waar die tjek ter betaling van ’n skuld aangewend moet word, word gesê dat hierdie wisselkontrak die hulpooreenkoms is, terwyl die kontrak wat die skuld beliggaam (bv ’n lening), die hoofooreenkoms is. Hierdie hoofooreenkoms is dan die *causa* of (redelike) oorsaak vir die hulpooreenkoms. ’n Tjek kan natuurlik ook gelewer word om ’n skuld tot stand te bring (*credendi causa*), of as ’n skenking (*donandi causa*). Sien oor die algemeen Malan “Evolusie van die wisselreg” 1976 *TSAR* 1 17-19, “The liberation of the cheque” 1978 *TSAR* 107 121 sq; Oelofse “Die verband tussen tjekverbintenis en grondliggende verbintenis”, 1982 *MBL* 30; Malan en Pretorius *Malan on bills of exchange, cheques and promissory notes in South African Law* (1997) 18 sq 320 sq.

45 Sien die uitspraak van Holmes AR in *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 3 A 685 (A) 693, *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A) 286B en Van Zyl “Payment by cheque – cash or credit?” 1974 *SALJ* 337 338.

op prestasie is, het die howe dan by geleentheid ondersoek ingestel of daar aan die een of ander skulddelgende ooreenkoms gevolg gegee is.⁴⁶ Die vraag ontstaan weer eens of so 'n ondersoek nodig is ten einde die gewenste resultaat te bereik. In dié verband is die onlangse beslissing van die Hoogste Hof van Appèl in *B & H Engineering v First National Bank of SA Ltd* van besondere belang.⁴⁷ Hier het 'n skuldenaar betaling van 'n tjek wat hy aan die skuldeiser oorhandig het, afgelas, maar die skuldenaar se bank het per ongeluk die tjek nog steeds uitbetaal. Die bank probeer toe hierdie betaling van die skuldeiser terugvorder. So 'n eis sou egter net kon slaag indien die skuldeiser verryk was, en dit sou volgens die reëls van die verrykingsreg slegs kon geskied indien die opbrengs van die tjek sonder delging van die skuld behou is. Om te bepaal of die skuld gedelg is, vra die hof dan of die skulddelgende ooreenkoms wat by die oorhandiging van die tjek gesluit is, nagekom is.⁴⁸ Daar word dan bevind dat dit wel gebeur het, selfs al is betaling van die tjek na lewering afgelas. Die skulddelgende bedoeling word dus blykbaar geag voort te bestaan het, selfs al het die skuldenaar dit by die oomblik van uitbetaling nie meer gehad nie.⁴⁹ Aan die kant van die skuldeiser word vermoedelik weer aanvaar dat hy bedoel het dat die skuld by die ontvangs van die bevoordeling gedelg moet word, al is betaling afgelas. Hierdie gevolgtrekkings oor die inhoud van die skulddelgende ooreenkoms kom, met die grootste respek, ietwat geforseerd voor, en blyk by 'n meer noukeurige lees van die uitspraak 'n dekmantel te wees vir 'n veel belangriker oefening, naamlik die opweeg van onderliggende belange van skuldeiser en skuldenaar. Myns insiens kon die hof die beslissing dat betaling wel geskied het op 'n veel direkter wyse regverdig, naamlik deur na so 'n opweeg van belange te bevind dat voorkeur verleen moet word aan die skuldeiser se vertrouwe dat hy die opbrengs van 'n tjek wat hy te goeder trou van sy skuldenaar ontvang het, kan behou.⁵⁰

Dit is dan in hierdie stadium dat aangedui moet word dat daar niks vreemd is aan die gedagte dat die vertrouwe van die nemer van 'n tjek beskerm moet word, selfs al

46 In *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank)* 1991 3 SA 605 (A) is beslis dat betaling van 'n tjek nie geskied op die oomblik dat die bank op wie die tjek getrek is (intern) besluit om dit te betaal nie. Indien die kliënt na die tyd betaling aflas, het sy bank nog steeds die bevoegdheid om die skuldeiser se bank binne 'n bepaalde spertydperk in te lig dat die tjek nie uitbetaal gaan word nie. Hierdie beslissing volg duidelik uit die aard van die klaringsooreenkoms tussen die banke, en mens sou kwalik dink dat dit verdere regverdiging benodig (sien die oorwegings genoem 612G-613A). Tog word ter ondersteuning van hierdie beslissing gestel dat betaling 'n tweesydigde regshandeling is wat, tensy anders ooreengekom, die medewerking van beide partye verg (612). Dit was egter geensins nodig om hierdie stelling te maak ten einde die beslissing te bereik nie.

47 *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A).

48 286J-287F 291G-H 292D 293E; sien ook *First National Bank of South Africa Ltd v East Coast Design CC* 2000 4 SA 137 (D) 142.

49 Vir 'n alternatiewe uitleg, waarvolgens die skulddelgende ooreenkoms blykbaar deur die aflasting van betaling van die tjek beëindig word, sien Pretorius "Payment by a bank on a countermanded cheque and the *condictio sine causa*" 1995 *THRHR* 733 740-743.

50 Vir oorwegings onderliggend aan hierdie vertrouensbeskerming sien veral *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A) 291C-F; sien ook Goode "The banks' right to recover money paid on a stopped cheque" 1981 *LQR* 254; vgl egter ook Pretorius 1995 *THRHR* 733 738 en Van Zyl "Unauthorised payment and unjust enrichment in banking law" 1998 *TSAR* 177 189 195 sq, wat dui op oorwegings wat weer ten gunste is van die beskerming van die belange van die skuldenaar. Vir huidige doeleindes is dit nie van primêre belang welke van dié twee benaderings nou eintlik korrek is nie. Die punt is dat die oplossing van die probleem of prestasie plaasgevind het, nie in 'n skulddelgende ooreenkoms gesoek moet word nie.

is daar geen ooreenkoms met die trekker van die tjek oor hoe dit aangewend moet word nie. Dit is nie moontlik om hier in besonderhede in te gaan op die welbekende uitspraak van appèlregter Jansen in *Saambou-Nasionale Bouvereniging v Friedman*⁵¹ nie, maar dit blyk myns insiens duidelik uit daardie beslissing dat die aanwesigheid van 'n beskermingswaardige vertrouwe by die nemer van 'n tjek, of die skep van 'n risiko deur die trekker, dat iets met 'n tjek sou skeefloop, byvoorbeeld deur gebruik te maak van 'n onbetroubare bode, die afdwing van 'n tjek sou regverdig, *selfs al was daar geen ooreenkoms tussen die partye oor hoe die tjek aangewend moet word nie*.⁵² Daar is ook ander beslissings soos *Karabus Motors (1959) Ltd v Van Eck*⁵³ en *Commissioner for Inland Revenue v Visser*⁵⁴ wat dui op 'n bereidwilligheid om 'n *bona fide* nemer te beskerm, selfs al was die besluit oor die aanwending van die tjek teweeggebring deur die bedrog van 'n derde. Hierdeur wil ek nie te kenne gee dat die beskerming van so 'n vertrouwe altyd die deurslaggewende faktor by betaling per tjek is nie,⁵⁵ maar net die eenvoudige punt beklemtoon dat betaling per tjek geldig kan geskied, selfs al is 'n ooreenkoms tussen die partye oor hoe die opbrengs van die tjek aangewend moet word onbehoorlik verkry, of, nog erger, geheel en al afwesig. Kortom, dit sou in sulke gevalle eenvoudig gevaarlik wees om die bestaan van 'n skulddelgende ooreenkoms of meersydige handeling as maatstaf te gebruik om te vas te stel of betaling, oftewel prestasie, geldig geskied het.

6 ALTERNATIEWE BENADERING TOT DIE REGSAARD VAN PRESTASIE

Tot sover dan 'n oorsig van die regspraak. Ons het gesien dat die howe meermale sê dat prestasie, en veral betaling, 'n skulddelgende ooreenkoms of meersydige handeling vereis, maar dat hierdie stelling telkens óf nie bygedra het tot die oplossing van 'n geskil nie, óf as dekmantel gedien het vir 'n toewysing wat eintlik van regsweë geskied het. By tye is selfs bevind dat presteer is sonder enige sprake van 'n skulddelgende ooreenkoms of meersydige handeling. Op die ou end kan mens dus nie anders as om die houdbaarheid van die bestaande benadering tot die

51 1979 3 SA 978 (A).

52 Sien veral *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 993 sq 997 sq.

53 1962 1 SA 451 (K). Hier het Van Eck 'n tjek ten gunste van Karabus Motors getrek en gelewer ter delging van 'n derde se skuld. Die rede hiervoor is dat die derde vir Van Eck bedrieg het deur hom wys te maak dat hy op sy beurt sekere bedrae aan die derde geskuld het. Hier was dus wel 'n ooreenkoms tussen trekker en nemer oor die doel van die tjek, maar die ooreenkoms is net deur die bedrog beïnvloed. Die hof verleen egter nog steeds nampittissement aan Karabus Motors, wat blykbaar wel 'n geldige vordering teen die derde gehad het.

54 1959 1 SA 452 (A). Hier het Visser 'n tjek ten gunste van die Ontvanger van Inkomste getrek nadat sy boekhouer hom bedrieglik wysgemaak het dat dit nodig is om sy belasting mee te delg. Die boekhouer gaan wend toe die tjek aan ter betaling van 'n ander persoon se belasting. Die appèlafdeling bevind dat Visser nie die betaling met die *condictio indebiti* kon terugvorder nie. Die moontlikheid bestaan egter dat die trekker die tjek sou kon opeis indien betaling nog nie geskied het nie (sien *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 1002A en die verwysing daar na *John Bell & Co Ltd v Esselen* 1954 1 SA 147 (A)).

55 Let veral op die klem wat Jansen AR in *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) plaas op die vraag wie hom as trekker van die tjek voordoet. Oor die effek van vreesaanjaging, veral in die Skotse reg, sien Du Plessis *Compulsion and restitution* (PhD-tesis Universiteit van Aberdeen 1997) 91.

regsaard van prestasie te betwyfel nie.⁵⁶ Veral problematies is dat geen van die voorstanders van die bestaande teorie nog ooit gepoog het om dit op 'n duidelike beginselgrondslag te fundeer nie. Die reël word bloot herhaal, asof dit vanselfsprekend geregverdig is. Tradisioneel is dit wel so dat in ons kontrakteregdogmatiek sterk klem gelê word op wilsooreenstemming, met 'n gepaardgaande afkeer van die skep of verander van pligte sonder die instemming van die partye. Moontlik moet De Wet se beskouing van die regsaard van prestasie ook in hierdie dogmatiese lig beskou word. Mens wil ook dadelik toegee dat waar die partye *werklik ooreengekom* het om 'n bevoordeling aan 'n bepaalde skuld toe te wys, dit sin maak om aan so 'n ooreenkoms gevolg te gee.⁵⁷ Hieruit kan egter nie afgelei word dat prestasie in beginsel 'n skulddelgende ooreenkoms *moet vereis* ten einde geldig te wees nie. Die implikasie is bloot dat *waar so 'n ooreenkoms bestaan* daaraan gevolg gegee word.⁵⁸ Andersins sal daar maar gedurig op kunsmatige wyse gepoog word om die een of ander bedoeling aan die partye toe te dig, en dan te maak of prestasie op grond daarvan plaasgevind het, terwyl 'n bevoordeling eintlik van regsweë aan 'n bepaalde verbintenis toegedeel is.⁵⁹

Dit is dan hier dat ek wil terugkeer na die gevolgtrekking wat uit die regsvergelijkende oorsig duidelik geblyk het, naamlik dat dit heeltemal moontlik is om te bepaal of presteer is deur eenvoudig te vra of 'n bevoordeling op 'n erkenbare wyse aan 'n spesifieke verbintenis toegewys kon word. Ervaring elders het getoon dat so 'n toewysing meestal voor-die-hand-liggend is – veral indien die skuldenaar se bevoordeling presies ooreenstem met dit wat presteer moet word. Hierbenewens ondervang so 'n benadering ook maklik die gevalle van die verpligting om iets nie te doen nie, en om 'n diens te lewer – gevalle wat die teorie van die skulddelgende ooreenkoms nog nooit bevredigend kon hanteer nie. En laastens (alhoewel nie hier verder daarop ingegaan kan word nie) kom dit tog voor of dit meer gepas is vir gesofistikeerde moderne elektroniese betaalstelsels,⁶⁰ wat geldbedrae meganies toewys sonder dat die persoon wat die bevoordeling ontvang hoegenaamd daarvan bewus is. Om in sulke gevalle 'n skulddelgingsbedoeling, veral aan die kant van die bevoordeelde, te konstrueer, kom ietwat werklikheidsvreemd voor. Weer eens sou dit veel makliker wees om te bepaal of prestasie plaasgevind het deur bloot te vra of die bevoordeling op 'n erkenbare wyse aan 'n spesifieke verbintenis toegewys kon word.⁶¹

56 Daar moet in gedagte gehou word dat ons howe wel die bevoegdheid het om 'n verkeerde uitleg van die gemene reg te verbeter, al is die reël 'n aansienlike tydperk gevolg (*Du Plessis NO v Strauss* 1988 2 SA 105 (A) 141-142; so 'n verandering is veral moontlik indien dit nie gesê kan word dat persone hul sake “ingerig” het op grond van die betrokke reël nie (sien *Smit v Abrahams* 1994 4 SA 1 (A) 16)).

57 sien in dié verband ook Heinrichs § 362 par 12. So sal ons weet of 'n bevoordeling een van 'n meerdere aantal skulde gaan delg, en of die aanbied van iets wat minder of anders is as wat ooreengekom is, tog as prestasie sou kon geld. Dit is die klassieke geval waar die skuldenaar minder as wat ooreengekom is as volle en finale vereffening (“full and final settlement”) van die skuld aanbied, en die skuldeiser dit dan op hierdie grondslag aanvaar. Oor die geval waar daar nie so 'n verstandhouding is nie, sien vn 62 *infra*.

58 Hierdie onderskeid blyk nie uit die beslissing van Nienaber AR in *Pfeiffer v First National Bank of SA Ltd* 1998 3 SA 1018 (A) 1025I-1026A nie.

59 sien ook, wat soortgelyke ontwikkelings in die wisselreg betref, Malan 1976 *TSAR* 1 11 sq.

60 Vir 'n oorsig oor moderne betaalmiddels of -stelsels in die Suid-Afrikaanse reg, sien Visser “The evolution of electronic payment systems” 1989 *SA Merc LJ* 189; Meiring “The South African payment system” 1996 *SA Merc LJ* 164; vir 'n inleidende oorsig oor die posisie in die VSA sien Lawrence *An introduction to payment systems* (1997).

61 sien in dié verband veral die bespreking in die teks by vn 42 en 43 oor beslissings wat handel oor die toewys van meerdere betalings aan bepaalde skulde.

Daar sal egter nou en dan gevalle wees waar die toewysing nie voor-die-hand-liggend is nie, en dan bestaan daar tog 'n behoefte aan riglyne oor hoe so 'n toedeling moet geskied. Uit ons oorsig oor die regspraak blyk dit dat die versoeking hier vermy moet word om op kunsmatige wyse die een of ander ooreenkoms oor die toewysing van 'n bevoordeling te gaan inlees. Teen die agtergrond van hierdie oorsig word ten slotte aan die hand gedoen dat dit noodsaaklik is om in sulke gevalle die relevante belange van sowel die skuldeiser as skuldenaar te identifiseer, en dan die beskerming van hierdie belange as riglyn aan te wend by die bepaling of prestasie geskied het. As ons eerstens kyk na die posisie van die skuldenaar, is dit duidelik dat sy vertrou dat 'n voordeel op 'n bepaalde grondslag aanvaar is, beskerming verdien. Veronderstel hy dui aan welke van 'n groot aantal skuldeur 'n bepaalde bevoordeling gedelg moet word, of dat 'n minder-as-verskuldigde bevoordeling as volle en finale vereffening aangebied word, sonder om nog enige verdere aanspreeklikheid in dispuut te laat. As hierdie bevoordeling fisies aanvaar word, kan geargumenteer word dat voldoening geskied het soos deur hom aangedui, *sels al was daar nie werklik 'n ooreenkoms tussen die partye oor die aanwending van die betaling nie*.⁶² Hierdie erkenning aan die beskermingswaardigheid van die vertrou van die skuldenaar en sy belang by bevryding vind ook uiting in die reël dat 'n *bona fide* skuldenaar geldig teenoor 'n sedent (die ou skuldeiser) kan presteer.⁶³ Die bestaande opvatting oor die regspraak van prestasie kan nie hierdie gevolg bevredigend verklaar nie – daar kan tog geen skulddelgende ooreenkoms wees as die sessionaris (die nuwe, ware skuldeiser) nie eens van die bevoordeling weet nie en beslis nie daarmee akkoord sou gaan nie. Hierdie probleem word egter vermy as mens van die bestaande benadering afsien, en aanvaar dat die vertrou van die skuldenaar dat hy regtens presteer het genoegsame regverdiging vir sy bevryding bied.⁶⁴ Laastens, wat die posisie van die skuldenaar betref, moet ook die geval oorweeg word waar hy geensins aandui hoe die bevoordeling toegewys moet word nie. Hier het hy nog steeds 'n belang daarby dat dit op die mins beswarende wyse moontlik aangewend word. Die beskerming van hierdie belang is dan ook niks vreemd nie: die bestaande reëls wat die toedeling van betalings reguleer in die afwesigheid van 'n ooreenkoms oor hoe toedeling moet geskied (byvoorbeeld die reël dat rente gedelg word voor kapitaal), is juis hierop gemik.⁶⁵

62 Daar is aanduidings in die regspraak dat die skuldoorsaak in die “volle en finale vereffening”-geval eers omvorm moet word by wyse van 'n skikking voor delging van die geheel deur die aanbieder van 'n mindere bedrag sou kon geskied (sien Van der Merwe *et al* 367 *sq.*). 'n Skikking berus egter op *ooreenkoms*, en dit is moeilik om sodanige ooreenkoms af te lei as die ontvanger die bevoordeling aanneem maar tegelykertyd aandui dat hy nie bedoel om te skik nie (sien *idem* 368 *sq.*). In so 'n geval is dit veral moeilik om 'n skulddelgende ooreenkoms, ter vervulling van hierdie skikking, in te lees. Hierdie probleem kan vermy word deur te aanvaar dat prestasie wel geskied indien 'n skuldeiser deur ontvangs van 'n mindere voordeel 'n beskermingswaardige vertrou by die skuldenaar laat ontstaan dat die geheel van die skuld gedelg is.

63 *Sien* *bv Illings (Acceptance) Co (Pty) Ltd v Ensor* 1982 1 SA 570 (A) 578F.

64 Om bloot te sê dat mens hier met 'n billikheidsgebaseerde uitsondering op die gevestigde benadering te doen het, is besonder vaag (sien Joubert *Die regsbetrekkinge by kredietfaktoring* (1986) 445). Mens sou soos Nienaber AR “The inactive cessionary” 1964 *Acta Juridica* 99 kon argumenteer dat die skuldenaar hom op estoppel kon beroep indien die sessionaris op 'n skuldige wyse versuim het om hom betyds van die sessie in kennis te stel, maar so 'n benadering bied vanweë die aandrang op skuld te min ruimte vir beskerming van die skuldenaar (sien Joubert “Die relevansie van kennisgewing by sessie” 1985 *Responsa Meridiana* 36 - sien ook die verwysing aldaar na *Brook v Jones* 1964 1 SA 765 (N)).

65 Hierbenewens moet ook in ag geneem word dat 'n skuldenaar se belang by vervulling meer direk beskerm kan word deur te vind dat hy inderdaad presteer het, as deur hom te dwing om die skuldeiser op grond van kontrakbreuk in die vorm van *mora creditoris* te dagvaar indien hy nie meewerk met prestasie nie.

Beweeg ons oor na die posisie van die skuldeiser, blyk dit dat gevalle bestaan waar dit wenslik is om te bevind dat prestasie geskied het al het die skuldenaar nie werklik bedoel om te presteer nie – ons het reeds gekyk na gevalle waar die bedoeling op 'n onbehoorlike wyse gevorm was, of waar dit selfs by die oomblik van bevoordeling (soos in die geval van die aflasting van betaling van 'n tjek) afwesig was. 'n Belang wat in hierdie gevalle swaar blyk te weeg, is die beskerming van die vertroue van die skuldeiser dat hy 'n bevoordeling wat hy op grond van 'n bestaande skuld ontvang het, kan behou. Vir diegene wat dalk besorg is dat daar nou te ver weg beweeg word van die beskerming van die outonomie van beide partye, net die volgende: hierdie soort vertrouensbeskerming is niks vreemd in die verbintenisreg nie. Die howe het byvoorbeeld deur erkenning van die beginsel in *Smith v Hughes*⁶⁶ al 'n geruime tyd toegelaat dat kontraktuele aanspreeklikheid ook op grond van die redelike vertroue van konsensus kan ontstaan. Ons het nie gekyk na gevalle waar 'n skuldeiser te goeder trou 'n bevoordeling van iemand met gebrekkige bevoegdheid ontvang het nie, maar moontlik is ook hier ruimte vir 'n beroep op vertrouensbeskerming ten einde aan te dui hoekom prestasie ondanks die betrokke gebrek kon geskied het.⁶⁷ Mens dink veral aan die reëls van die familiereg oor prestasie deur minderjariges, of die reëls van die korporatiewe reg oor handeling deur persone wat nie volgens die konstitusie van 'n korporatiewe entiteit daartoe gemagtig is nie. Dit is egter nie nodig om hier op die bogenoemde reëls in te gaan nie. Die eenvoudige punt waarmee hierdie uiteensetting van 'n alternatiewe benadering tot die regspraak van prestasie saamgevat kan word, is dat dit op 'n veel eenvoudiger en direkter wyse as die gevestigde benadering aandui of prestasie plaasgevind het al dan nie.

Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observe fundamental rights and acts both ethically and accountably should not be understated.

President of the Republic of South Africa v South African Rugby Football Union 2000 1 SA 1 (CC) *para*133.

66 (1871) LR 6 QB 597. Sien veral die toepassing van hierdie beginsel in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 3 SA 234 (A); Hutchison "Contract formation" in Zimmermann en Visser (reds) *Southern Cross - civil law and common law in South Africa* (1996) 192 sq. Oor die belang en beskerming van vertroue in die verbintenisreg as geheel, sien Cockrell "Reliance and private law" 1993 *Stell LR* 41.

67 Sien Wessels *The law of contract in South Africa* (1951) vol 2 § 2149.

Can the Family Advocate adequately safeguard our children's best interests?

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OPSOMMING

Is die Gesinsadvokaat bevoeg om die beste belange van die kind te beskerm?

Die kantoor van die Gesinsadvokaat is in die lewe geroep ter erkenning van die feit dat die akkusatoriese stelsel nie noodwendig verseker dat howe voldoende ingelig is om die gunstigste besluite ten opsigte van kinders in egskedingsake te neem nie.

'n Belangrike motiveringsfaktor vir die totstandkoming van hierdie kantoor was om te verseker dat besluite gebaseer sou wees op 'n juiste begrip van die sosiale komponent wat op families inwerk. Dit sou verweselik word deur middel van ondersoek en verslae deur die kantoor van die Gesinsadvokaat ten opsigte van alle omstandighede. Proefondervindelike navorsing, oor sowel die struktuur as die *modus operandi* van die kantoor van die Gesinsadvokaat, in die twee provinsies van die Wes-en Oos-Kaap, het aangetoon dat die kantore in beide provinsies nie ten beste toegerus is om hierdie funksie(s) optimaal te verrig nie. Tekortkominge in tegnieke en vaardighede van onderhoudsvoering word ondersoek en die gevolge van 'n gebrek aan hulpbronne word belig. Ander struikelblokke wat die effektiewe funksionering van die kantoor verhinder, word ook oorweeg.

Ten slotte word voorstelle gemaak wat die kantoor in staat sal stel om doeltreffender te funksioneer en hulle oorspronklike doel, naamlik om toe te sien dat die belange van die kind te alle tye beskerm word, te verseker.

1 INTRODUCTION

Children, the voiceless members of society, are at times the innocent victims in divorce. The protection of their interests is left to the direction given to the courts by warring parents, whose emotional state cannot always guarantee the paramountcy of those interests.

"[T]hey are often tossed around between the parents. They are used by the parents to score points off each other and in addition are often used as a means of blackmail."¹

Yet decisions made regarding the arrangements for children can have consequences that affect them for the rest of their lives.² To protect children in these vulnerable situations, the Mediation in Certain Divorce Matters Act was promulgated in 1987.³ This Act created the office of the Family Advocate, whose brief is to protect the interests of all minor and dependent children in all divorce cases and other disputes

1 *Hansard* 1987-05-25 col 430.

2 Bosman "In the interest of the child" 1992 (5) *RSA Policy Review* 29.

3 Act 24 of 1987. Although promulgated in 1987, the Act came into operation only on 1990-10-01.

about custody, guardianship or access. It was sought to minimise the impact of the arrangements on the children through the intervention of this office, which would ensure that decisions about their future were founded on a full assessment of all the circumstances, and more specifically, those criteria central to ensuring that the child's best interests were served. To what extent, however, does the intervention of the Family Advocate in fact safeguard the primacy of the child's best interests? Is the office properly equipped to execute its brief? This article examines how the Family Advocate's office operates in practice – what shapes the assessment process, what criteria are deployed in the evaluation process, what factors influence the reporting process, and what constraints impinge on its efficacy. The focus is on an examination of actual functioning, as measured against the experiences of the caring profession and the legal profession. As part of a five-year study, the Centre for Socio-Legal Research is conducting a study of the operation of the Family Advocate's office in two provinces. In particular, the Centre has examined the interaction between the legal and caring practitioners and the Family Advocate's offices in the Western Cape and the Eastern Cape.⁴ This article includes a comparison between the different constraints, methods of operating and criteria used in these two economically and demographically contrasting provinces.

The Centre's research involved the conducting of comprehensive interviews between 1995 and 2000 with all of the Family Advocates and all but two of the Family Counsellors in both the Western and the Eastern Cape offices, including replacement staff. In addition, a sample of 76 attorneys from 73 firms specialising in family work were interviewed in Cape Town and its surrounds, Grahamstown, Port Elizabeth and East London.⁵ Also interviewed were 37 caring private practitioners from both provinces who were involved either in custody assessments and /or with the Family Advocate's office.

During the period of our research, the Western Cape office operated out of one office situated in Cape Town, and the Eastern Cape office operated from one office in Port Elizabeth and two satellite offices in East London and Grahamstown.⁶

2 BACKGROUND TO THE ESTABLISHMENT OF THE OFFICE OF THE FAMILY ADVOCATE

The Mediation in Certain Divorce Matters Act was a direct consequence of the recommendations made by the 1983 Hoexter Commission,⁷ which was concerned

4 Publications to date on this subject include the following: Burman and McLennan "Supporting children within the family" in UWC Community Law Centre (eds) *The rights of a child to a secure family life* (1995) 17; Burman and McLennan "Providing for children? The Family Advocate and the legal profession" 1996 *Acta Juridica* 69; Burman, Derman and Swanepoel "Only for the wealthy? Assessing the future for children of divorce" 2000 *SAJHR* 535; Burman and Derman "Deciding for children: The Family Advocate and the caring professions" in Jones-Pauli (ed) *The impact of court administrators in Africa on judicial proceedings* (forthcoming).

5 For statistical purposes, only 51 of the interviews with attorneys were used.

6 Although the former homelands of the Ciskei and Transkei were incorporated into the Eastern Cape during this time, necessitating two additional satellite offices in Bisho and Umtata, their establishment took place too late for our research to include a study into the functioning of those offices.

7 Commission of Inquiry into the Structure and Functioning of the Courts RP 78/1983 para 8 11 4. In 1997 a second Commission of Inquiry under the chairmanship of Mr Justice G G Hoexter was mandated to inquire into the rationalisation of the provincial and local divisions of the Supreme Court. The report of this Commission (RP 200/1997) is referred to as the 1997 Hoexter Commission Report.

that the courts could not properly discharge their function in divorce matters of ensuring that the

“provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances”.⁸

Acknowledging that the adversary system of litigation hampered the adjudication of family matters, particularly in divorces where tensions run high, the Commission sought to ensure that all the relevant issues were placed before the courts.⁹ Given that the courts could adjudicate only on the evidence placed before them, and that the majority of divorces are uncontested,¹⁰ the Commission questioned the suitability of determining the proposed provisions for minor children “purely in the light of the plaintiff’s one-sided testimony”.¹¹ Endorsing various submissions made by the legal fraternity, the Commission acknowledged that mere representation by attorneys and advocates was, in itself, no guarantee that the court would be provided with a complete overview of the real problems at issue. Attorneys and advocates rarely hear evidence from both parties, and in addition are often not taken into their own clients’ full confidence. Inevitably, the client is on his/her best behaviour when in their presence and does not disclose all the facts, particularly those adverse to his/her case.¹² To counter these shortcomings, the Commission was of the view that it was necessary not only to amend the divorce procedure to compel the presence of both parties in divorce actions, but also to involve an independent social agency. The latter would be obliged to carry out an investigation into the welfare of the minor children and the circumstances of both parties and furnish the court with a report of its findings.¹³ In addition, the Commission was of the opinion that it was necessary to create an independent legal representative termed the Children’s Friend to “see to the proper protection of the rights of minor or dependent children”.¹⁴ The Commission felt that the main aim of the proposed Children’s Friend, which was modelled on the Canadian Family Advocate concept, would be

“to intervene on behalf of a child, to give legal advice, to provide legal assistance in a family crisis situation, and to attempt to resolve issues in the best interest of the child and the family”.¹⁵

The Commission’s recommendations on the amendment of the procedure were contained in a 1985 bill, but nothing came of the bill.¹⁶ The recommendations pertaining to the establishment of the office of a Children’s Friend were, however, partly taken up and embodied in a statute – the 1987 Mediation in Certain Divorce Matters Act.¹⁷ This Act established the office of the Family Advocate, with the

8 S 6(1)(a) of the Divorce Act 70 of 1979.

9 1983 Hoexter Commission Report para 8 9 5.

10 In 1987 it was estimated that about 98% of all divorce cases were undefended (*Hansard* 1987-05-25, col 442). This figure remains valid. In terms of the statistics furnished by the Cape Town High Court for the years 1998 and 1999, approximately 97% of all divorces finalised were undefended.

11 1983 Hoexter Commission Report para 8 10 1.

12 Paper delivered by attorney Van der Post at the Golden Jubilee Conference of the National Council for Child Welfare at the University of South Africa on 1974-10-23, quoted with approval in the 1983 Hoexter Commission para 8 10 3.

13 1983 Hoexter Commission Report para 8 10 3.

14 *Idem* para 8 11 4.

15 *Idem* para 8 11 5.

16 Divorce Amendment Bill 63 of 1985.

17 Act 24 of 1987.

stated aim of reviewing all applications made under the 1979 Divorce Act and every divorce case in the High Court where minor children are involved, in order to safeguard the best interests of the child.¹⁸ This was to be achieved through investigating all relevant material, reporting and recommending to the court, thereby enabling the court to come to a more informed decision in the interests of the child. In addition to contributing by way of a report and recommendations, the Family Advocate could safeguard the child's interests by appearing in court as an independent authority and by cross-examining witnesses. Although the function of the Family Advocate has been described as threefold, namely "to monitor, to mediate and to evaluate"¹⁹, the pivotal function is the evaluation, which informs the other functions.²⁰ Central to a proper evaluation by the Family Advocate is an understanding of the social component, and particularly the fundamental needs which are required to meet the best interests of the child. The Hoexter Commission sought to cover this by means of an independent investigatory report by an approved social agency. To render this additional input possible, the Act makes provision for the supplementary expertise of Family Counsellors.²¹ In introducing the bill to Parliament, the then Minister of Justice explained the *raison d'être* of the Family Counsellors as follows:

"Since the family advocate is primarily a legal person, and because the problems of a broken home fall mainly within the scope of the work of the social sciences discipline, clause 3 makes provision for the appointment of family counsellors to assist the family advocate in his function."²²

The inference to be drawn seems to be that a collaborative interdisciplinary assessment is essential if the Family Advocate is to be able to inform the court properly. As highlighted in the debates in the House of Assembly:

"Seldom if ever is the judge made aware of the real tensions and animosity which may have led to the destruction of the family unit. Hardly if ever is a judge allowed to appreciate the respective positions of the man and the woman which led to the settlement which is put before him being entered into. A judge has no knowledge of the bargaining power of the respective parties, or of the pressures which have been exerted by the one over the other or by either of them in order to finalise the settlement, thus avoiding protracted and expensive litigation. He is truly unaware of the factual situation relating to minor children born of the marriage and has little opportunity to test properly the suitability of the arrangements which have been made."²³

It was never intended that the office of the Family Advocate would usurp the role of the High Court as upper guardian of all minor children. Its prime function is to act as "an additional instrument or aid that will constantly ensure that the best interests of the children are served".²⁴

18 All civil-law divorces were heard in the High Court except those of Blacks, who could go to either the High Court or the cheaper Black Divorce Court, which had three divisions and a status analogous to a Regional Magistrate's Court. The Black Divorce Court left much to be desired. See Burman "Roman Dutch law for Africans: The Black divorce court in action" 1984 *Acta Juridica* 171.

19 Bosman "The Family Advocate and mediation" in Hoffmann (ed) *Family mediation in South Africa: Present practices and future vision: Papers from the Third National Conference of the Association of Mediators in Family Matters, 1991* (1992) 55.

20 For a useful commentary on the role and functioning of the office, see Kaganas and Budlender *Family Advocate* (Law Race and Gender Research Unit, University of Cape Town 1996).

21 S 3 (1).

22 *Hansard* 1987-05-25 col 423.

23 *Idem* cols 432--3.

24 *Idem* col 435.

3 STRUCTURE AND *MODUS OPERANDI* OF THE FAMILY ADVOCATE'S OFFICE

In terms of the Act, a regional Family Advocate's office, consisting of Family Advocates assisted by Family Counsellors, may be appointed by the Minister of Justice to serve each division of the High Court.²⁵ Family Advocates are required to have specific legal qualifications, together with experience in family law, whereas the Family Counsellors have no prescribed qualifications.²⁶ In justifying the absence of any specific prescribed qualifications for Family Counsellors, the then Minister of Justice explained that, although the ideal was to fill the posts with people who were both academically qualified in the social sciences and who specialised in family counselling,

"[i]n order to make allowance for maximum participation on the part of the community, no specific academic qualifications are prescribed".²⁷

Both the Eastern Cape and the Western Cape Family Advocate's offices commenced operation in the early 1990s. At the time of writing, the Western Cape office in Cape Town was staffed by five Family Advocates and three Family Counsellors, and the Eastern Cape office at Port Elizabeth by three Family Advocates and three Family Counsellors, a factor that has largely influenced the different methods of operation.²⁸ The latter office was supplemented by generic social workers acting as Family Counsellors in Grahamstown and East London.²⁹ In addition, both offices make use of the services of state social workers for investigating rural cases. The Family Advocates are all qualified Advocates of the High Court employed by the Department of Justice. In contrast, the Family Counsellors, who are in fact all qualified social workers, are employed by the provincial Social Service Departments and seconded to the Department of Justice as Family Counsellors. Although the Family Counsellors are employed independently, they do not act independently within the process, but report to and fall under the supervision of the Family Advocate. In terms of the enabling statute, the involvement of the office is limited to all divorce proceedings instituted in the High Court, applications arising from such proceedings, and applications to vary, rescind, or suspend an order made under the 1979 Divorce Act.³⁰ The Act expressly excludes involvement in divorce actions adjudicated in the lower courts.³¹ Similarly, issues relating to questions of adoption, guardianship outside of divorce, maintenance, custody of children born out of wedlock, religious unions and, until recently, customary marriages, fall outside the ambit of the Family Advocate.³² In order to ensure their involvement in the specified High Court matters, the Registrar is obliged to forward to the office copies of all founding documents in

25 S 2(1).

26 Ss 2(2) and 3(1).

27 *Hansard* 1987-05-25 col 423.

28 The composition of the staff in the Cape Town office is currently in a state of flux, and changed temporarily during the time of writing.

29 These statistics exclude any additional staff occasioned by the establishment of the satellite offices in Bisho and Umtata.

30 S 4.

31 S 1A(1). In terms of s1A(2), the Minister may extend the jurisdiction of the Family Advocate to include divorces adjudicated in a Family Court. The rules applicable to the Family Court are currently being redrafted to accommodate this extension. Although the extension has been necessitated by the diminished demand on the High Court, there is no indication as to when this will take place.

32 The Recognition of Customary Marriages Act 120 of 1998 came into effect on 2000-11-15.

those matters, together with a prescribed form which parties are required to complete.³³ Although this form contains specific questions regarding the current and intended maintenance of the children, their schooling details and intended access by the non-caretaking parent, minimal detail is required. These documents are perused by the Family Advocate, who then determines whether or not an investigation is indeed necessary. In the Western Cape Office this initial evaluation is undertaken by the Family Advocate only, whereas in the Eastern Cape the initial evaluation is sometimes undertaken by the Family Advocate in conjunction with the Family Counsellor. If at this initial assessment the Family Advocate detects a problem or irregularity in any proposed custody arrangements, he/she may apply to court for leave to institute an inquiry.³⁴ Alternatively, should the Family Advocate not deem an inquiry necessary, the court itself, or any party to the proceedings, may precipitate an investigation simply by requesting that the office institute an inquiry and furnish the court with a report and recommendations regarding the welfare of any minor or dependent child.³⁵ Early research in the Cape Town office revealed that the majority of inquiries were initiated by the parties themselves.³⁶ From the most recent statistics available, the position seems to have been reversed, and more inquiries were initiated by the Family Advocate's office than were requested by the parties or the courts.³⁷ In contrast, in the Port Elizabeth office the parties themselves have always initiated the majority of cases,³⁸ although initially this may well have been as a result of a policy of an earlier Chief Family Advocate "that the Family Advocate should preferably not initiate investigations because parties are then reluctant to co-operate".³⁹

Research has indicated that there is no set procedure followed in conducting an inquiry. Owing to the disparity in the ratio between Family Advocates and Family Counsellors in the Western Cape, a number of inquiries are perforce conducted by the Family Advocate only. The senior Family Advocate decides whether or not a case needs the added input of a Family Counsellor. Contrary to the practice of private practitioners, parents are typically interviewed together, either by the Family Advocate or jointly by the Family Advocate and a Family Counsellor when both have been assigned to a case. Teenagers are interviewed separately, either by the Family Advocate or by the Family Advocate together with the Family Counsellor. Younger children are not normally interviewed. Their interaction with siblings and both parents is observed while they are in the reception area. When a Family Counsellor has been assigned to a matter, the Family Counsellor observes the younger children and usually also conducts telephonic interviews of any collateral references.⁴⁰ In the Eastern Cape, cases are always investigated by a Family

33 Reg 2.

34 S 4(2).

35 S 4(1).

36 Burman and McLennan 1996 *Acta Juridica* 72.

37 The most recent statistics obtained from the office for the period Jan–Dec 2000 reflected that out of a total of 319 cases, in 123 cases courts initiated the inquiry, in 537 cases the parties requested their involvement, and in 659 the Family Advocate was the initiator.

38 The statistics furnished by the Port Elizabeth Family Advocate's office reflected that for the year 2000 the office initiated 16 inquiries, 52 inquiries were initiated by the court, and 317 by the parties. In 1993 the office initiated 11 inquiries and the parties 41.

39 Interview held on 1996-11-27.

40 Burman and McLennan in *The right of a child to a secure family life* (1995) 17; interviews with the Family Advocate's Office in the Eastern and the Western Cape 1995–2000.

Advocate and a Family Counsellor who, as a rule, interview parents separately.⁴¹ Usually only the Family Counsellors interview teenagers, and simply observe younger children. Initially, in the Western Cape, it was felt necessary to employ Family Advocates and Family Counsellors from a similar cultural background to the parties to ensure empathy and understanding.⁴² Later research revealed that cases were subsequently assigned purely on a roster basis.⁴³ In the Eastern Cape, files have always been allocated on a roster basis.

4 CRITERIA USED IN DETERMINING THE CHILD'S BEST INTERESTS

The office of the Family Advocate is charged with aiding the court by means of a written report as to the best custody and access arrangements to be made for the child or children based on an investigation into all the circumstances. The extent of the investigation and the criteria adopted by the Family Advocate in determining the best arrangements are therefore of prime importance, particularly in view of the weight attached to their recommendations. According to all the attorneys interviewed in both provinces, the judges invariably follow the Family Advocate's recommendations.⁴⁴ Interestingly, these recommendations are, according to a widespread perception of the attorneys interviewed, in turn often influenced by the Family Advocate's opinions of what the judges would accept. Moreover, attorneys in both provinces frequently intimated that, in their view, the recommendations were also not founded on proper investigations. The main reason cited for not conducting proper investigations was lack of time and understaffing. This appeared to be especially the case in the majority of divorces where a settlement had been reached and a consent paper filed. Concern was repeatedly expressed that the Family Advocate tends simply to endorse or "rubber-stamp" deeds of settlement. This concern was shared by the caring practitioners, many of whom were equally concerned that insufficient home visits were undertaken and that all the relevant people were not always interviewed. Although these concerns were corroborated by conclusions drawn from court monitoring, investigations are none the less undertaken in certain uncontested matters and in a meaningful number of contested matters.⁴⁵ An assessment of criteria used in determining the child's best interests is therefore necessary if the protection of those interests is to be properly ensured, in at least the affected cases.

What constitutes "the child's best interests" is a question of fact to be established in each case. Clearly, there cannot be an absolute list of criteria, a fact borne out by interviews with the Family Advocates. Interviews with members of the professions did, however, reveal certain predominant criteria, irrespective of the peculiar facts of each case.

The majority of attorneys in both provinces felt that the "tender years" principle (the principle that a child aged seven or younger is best off with his or her mother) was an overriding factor taken into account by Family Advocates. In contrast, the

41 Family Counsellors are used in all the main offices and satellite offices, and private and state social workers are used in the rural areas.

42 Burman and McLennan 1996 *Acta Juridica* 74.

43 Interview held on 2000-06-01.

44 Burman, Derman and Swanepoel *idem* 539--540.

45 A total of 1 137 finalised cases in the Cape Town pilot project Divorce Court were monitored from the time of the court's inception until August 1999.

majority of Family Advocates believed that the principle should not unduly influence their recommendations. As expressed by one Family Advocate, "the tender age principle is not cast in cement and the psychological bonding of a child is more important".⁴⁶ Interestingly, our earlier research revealed the same contradictory perceptions prevailing among both the legal profession and the Family Advocates.⁴⁷

A minority of the Family Counsellors and Family Advocates in the Western Cape considered the employment of parents as significant. None of the Family Advocates in the Eastern Cape deemed this to be an important determinant, a noteworthy factor in the light of the high rate of unemployment, particularly in that province. As one Family Advocate said,

"the question of employment is irrelevant to custody. The issue is whether the party can provide the [same] physical and emotional needs as the other party can contribute".⁴⁸

Attorneys' perceptions of the weight attributed to employment by the Family Advocate accorded with the sentiments of the advocates.

The majority of Family Advocates did, however, take into consideration the relevant support structures enjoyed by the respective parents. Similarly, the majority of the Family Counsellors looked beyond the nuclear family and investigated the *de facto* living arrangements of the children, a necessity, given the reality of many families in South Africa where a supportive extended family system is the norm.⁴⁹ Large numbers of families, particularly those living in poverty, contain three and four generations, with the middle generation missing because they are away, working or dead.⁵⁰ A peculiar feature of these families is that family boundaries become fluid and grandparents and other non-parent caregivers play a very active role in parenting many children.⁵¹

The majority of the Family Counsellors in the Western Cape cited customary, Muslim and Hindu law as important influences in determining custody. This view was not shared by the Family Advocates in either province, or by Family Counsellors in the Eastern Cape. Very few of the attorneys believed that the Family Advocate took these laws into consideration, admitting frequently, however, that owing to their own client-base profile, they were not really in a position to comment. Caring practitioners in both offices frequently expressed concern about the lack of training of the Family Advocates in psychology and child-development issues. It was felt that this often resulted in incorrect emphasis being placed on issues relevant to the best interests of the child, and in reports that reflected a concentration on the material needs of children and ignored their cognitive and emotional development. Caring practitioners were also disapproving of the use of generic social workers on the basis that they, too, lacked the necessary training that would enable them to conduct thorough custody assessments. These concerns were corroborated by findings from interviews with the respective Family Advocates' offices specifically directed at identifying which criteria governed their determination of what is in the

46 Interview held on 1998-06-05.

47 Burman and McLennan 1996 *Acta Juridica* 74.

48 Interview held on 2000-06-05.

49 Van Heerden "The parent child relationship", a discussion paper prepared for the SA Law Commission 110, and presented on 1999-03-12 in Cape Town.

50 Report of the Lund Committee on Child and Family Support RP7/1996 17-18.

51 Burman "Childcare by the elderly and the duty of support in multi-generational households" 4 *Southern African Journal of Gerontology* (April 1995) 13-17.

child's best interests. In evaluating parenting capacity, the majority of the Family Counsellors in the Eastern Cape indicated that the parent-child relationship was a significant criterion, whereas the majority of Family Advocates in both provinces, and Western Cape Family Counsellors, did not refer to this criterion. Virtually no mention was made of any consideration being given to the primary caregiver by any of the Family Advocates, although approximately half of the Family Counsellors in both provinces did take the question of the primary caregiver into account. Significantly, very little mention was made by Family Counsellors of evaluating the parents' involvement in the child's life or even the child's psychological needs, whereas, particularly in the Western Cape, strong emphasis was placed on the parents' ability to provide consistent and continuous care.

The majority of members of the legal profession in both provinces believed that the Family Advocate had sufficient grasp of issues affecting children to equip them to assess the overall needs of children. The caring profession did not share their confidence. This finding was consistent with earlier research, which revealed that the caring profession believed not only that reports failed to address the current child developmental needs but also that "traditional and conservative bias" impacted on the sensitivity of the office to issues affecting the child.⁵² Many attorneys felt that lack of funding and understaffing were the factors most seriously impacting on the offices' ability to investigate properly. Some attorneys believed, however, that the fact that the Family Advocate did not conduct home visits, coupled with lack of training, prohibited them from fully identifying with the real needs of people. These sentiments found expression in phrases such as "she would not go beyond her own perspective of life", "[there was no] reference to the broader context of society in which the child lives", "the office is very black and white, and in murky areas they tend to go for the preferred choices", "lack of life experience inhibits the Family Advocate" and that "because of [my] clients' particular profiles, the Family Advocate cannot identify with certain of their problems".⁵³

5 IMPEDIMENTS TO THE PROPER FUNCTIONING OF THE FAMILY ADVOCATE'S OFFICE

Many of the Family Advocates make constant reference to being guided by the catch-all phrase "the child's best interests". Despite this, it is quite clear that there are no fixed criteria, and much falls to their untrained discretion to determine what constitutes this complex concept. In the Western Cape this is further exacerbated by the disparity in the ratio between Family Counsellors and Family Advocates, which places a heavy responsibility on the Family Advocates to investigate thoroughly. Large sections of the population in both the Eastern and Western Cape are subjected to the activities of criminal gangs. Alcohol and drug abuse is rife, and poverty and unemployment, particularly in the Eastern Cape, are on the increase. This means that the Family Advocate often needs to look beyond the immediate circumstances to the developmental needs of the child, and necessitates conducting complex and in-depth investigations requiring specialist skills. In the absence of specific training for the Family Advocates, this function should fall on properly trained Family Counsellors.

From their inception, the offices of the Family Advocate in both the Western and the Eastern Cape have not been able to rely on the ancillary input of properly trained

52 Interview held on 1997-05-30.

53 Interviews held on 1998-07-21, 1998-08-13, 1998-09-10 and 1998-10-27.

Family Counsellors. The Western Cape office has never been staffed with an equal ratio of Family Advocates and Family Counsellors, and is dependent on the assistance of undertrained generic social workers in all rural cases. Although the main office of the Eastern Cape employs equal ratios, because of the large geographic area it serves it is also heavily reliant on the services of outside social workers. The problem that there are too few Family Counsellors was identified as early as June 1997, when each of the offices of the Family Advocate made written submissions to the Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court.⁵⁴ As highlighted by the head of the Durban Family Advocate's office in her submission,

“[t]his lack of Family Counsellors is a problem experienced by every office throughout the country and has been going on for the past five years that we have been in operation”.⁵⁵

To overcome the shortage, the offices have had to resort to various expedients, including relying on voluntary services of private caring practitioners and the assistance of social workers in non-governmental organisations to conduct inquiries on their behalf. None of these has proved satisfactory. As the services of both groups are not paid for, the office cannot insist on speedy reports, and when they are received, the offices have to draft their reports based on an assessment made by a social worker whose expertise and level of competence is unknown. A third alternative has been to conduct inquiries unassisted, which negates one of their main justifications. As indicated by the Commission, in such instances “the manifest advantage of a recommendation by a multi-disciplinary team is lost”.⁵⁶ The situation is further complicated in both provinces by matters extraneous to interview techniques and skills. The total lack of a supporting social infrastructure severely limits the options available for alternate recommendations. In those instances where neither parent is a suitable custodian, there are very few choices open to the Family Advocate. There are hardly any institutional homes in which children can be placed in such situations.⁵⁷ The limited number that do exist are already filled to capacity, and given the effects of the AIDS/HIV crisis, there will be an even greater demand on these homes. In addition, all recommendations are dependent upon their financial sustainability. Although the private maintenance system is premised on the principle that parents are responsible for the maintenance of their children, it is widely acknowledged that the system is in complete disarray.⁵⁸ Apart from the administrative shortcomings of the system, enforcement of payment of private maintenance is further undermined by a strong prevailing culture of non-payment by non-custodial parents, and the percentage of defaulters remains alarmingly high. The situation is further exacerbated by inadequate social security. Although the new child-support grant is now available to primary caregivers, there are many problems associated with this grant. Broadly speaking, these are: first, the *quantum*, which is unrelated to the real needs and costs of support of poor children;⁵⁹ secondly, the means test

54 1997 Hoexter Commission Report para 4 1 para 4 8 8 2.

55 *Idem* para 4 6 9.

56 *Idem* para 4 6 10 2.

57 Burman “Intergenerational family care: Legacy of the past: Implications for the future” 1996 (22) *Journal of Southern African Studies* 4 585–598. There were only 21 children's homes in the Eastern Cape and 16 in the Western Cape during 1998/1999 (*South African Survey 2000/01* (South African Institute of Race Relations, Johannesburg 2001) 245).

58 Report of the Lund Committee *idem* 49.

59 The grant replaces the old state maintenance grant in terms of which the beneficiary, who had to be a parent, received R135 per month per child together with a parent allowance of R430 per month. The child-support grant amounts to R100 per month per beneficiary and is to be

which, based on household income, discriminates against extended and larger households; and thirdly, its two-tiered threshold, which increases administrative complexity. Fourthly, and perhaps the most serious, is the age cohort which is extremely restrictive and excludes all children over the age of seven.⁶⁰ Lastly, the excessively onerous application requirements and conditions severely obstruct access to this grant. As a consequence, it is estimated that 45 per cent of the poorest children are excluded from its scope.⁶¹

Perhaps the greatest problem for both the Western and Eastern Cape offices is their limited ambit. As a result of mounting public concern to deal more favourably with women and children, compounded by a steadily increasing number of divorces, five pilot project Family Court Centres consisting of Divorce, Maintenance, Family Violence and Children's Courts were established as a matter of urgency during the last two years. One of these centres was set up in Cape Town on 29 January 1999 and one in Port Elizabeth on 23 June 2000. Owing to the urgency of the project, it was decided that existing resources and existing legislation had to be used for the centres.⁶² The existing Maintenance, Family Violence, and Children's Courts of the magistrates' courts, together with the newly deracialised Southern Divorce Courts, thus formed the basis for these pilot project courts. These latter courts were situated at regional court level and staffed with presiding officers at regional magistrate's level, thereby falling outside the jurisdiction of the Family Advocate.

The jurisdiction of the Family Advocate's office is statutorily defined, and participation in the Family Court is expressly excluded. In the absence of any legislative obligation for the Family Advocate to become involved, the task of ensuring that the best interests of the child are always served has had to be left to the individual vigilance of the presiding officers and any informal arrangements into which they may choose to enter. The presiding officer of the Cape Town pilot project Divorce Court encourages all clients with minor children to complete the necessary documents which will ensure that their matter passes through the Family Advocate's office. In addition, she has secured the Family Advocate's court attendance once a week. On the remaining court days, the Family Advocate advises the presiding officer, by way of memorandum, of any matters requiring investigation. The Port Elizabeth presiding officer does not encourage parties to complete the necessary documents to reroute their matter via the Family Advocate's office. He chooses, rather, to postpone problematic matters involving minor children to a specific day of the week to enable the Family Advocate to liaise with the family on that day.⁶³

These pilot project courts were set up because of a pressing need to establish a more accessible and more affordable family court, which could deal with the family in a holistic manner. That need has been overwhelmingly demonstrated by the

increased to R110 in the current financial year. Minister Manuel: Budget 2001 (National Assembly) 2001-02-21 [./pubs/speech/2001/index.aspza](#).

60 The state maintenance grant was available in respect of a child until the child was 18. The reduced age cohort means that there is no social assistance available for children between the ages of 7 and 18.

61 Report of the Inter-Departmental Task Team: *Investigation into an integrated, comprehensive social security system*. July 1999. Of the 3m children eligible, by March 2000 only 314 209 children were receiving the grant: Department of Welfare, Annual Report 1999/2000.

62 Loots, Department of Justice, Family Court Project "Concept document outlining the principles and procedures which are applied in establishing a pilot project" 1977-11-06.

63 These arrangements apply only to the pilot project Divorce Courts where we conducted our research. Other presiding officers may have made different arrangements.

extensive use made of the pilot project Divorce Court. For example, in the first six months of 1999, 2 840 undefended divorces were finalised in the Cape Town High Court compared with 670 in the Cape Town Family Court. During the second half of that year a slightly increased number was finalised in the High Court, namely 3 794. In sharp contrast, the number finalised in the Family Court increased dramatically from 670 to 2 227. This increased usage of the Family Court has continued, and in 2 000, 5 712 divorces were finalised in that court compared with 1 385 finalised in the High Court.⁶⁴

Against this rising demand for the services of the Family Court, the involvement of the Family Advocate in safeguarding children's best interests cannot be left to informal arrangements, a fact expressly acknowledged by the Hoexter Commission. In assessing the pivotal function of the Family Advocate, the Commission was quite clear that

"[w]hatever form a Family Court may ultimately assume, it is clear that the Family Advocate's Office must be its core".⁶⁵

This is particularly so since initial research indicated that 54,7 per cent of those using the Cape Town pilot project Divorce Court were unrepresented. Subsequent enquiries reveal that this figure has now increased to approximately 80 per cent.⁶⁶ This high percentage of unrepresented people places a particularly onerous burden on the court to ensure that it is fully apprised of all the relevant circumstances in order to safeguard the primacy of the child's best interests.

6 RECOMMENDATIONS

Clearly, on the strength alone of the numbers of families and children affected, the Family Advocate's involvement needs to be extended to the Family Courts. In addition, it is arguable that the constitutional imperative guaranteeing the paramountcy of the child's best interests requires that the Family Advocate's participation should be extended to all matters affecting children.⁶⁷ The solution, however, does not lie in simply extending the jurisdiction of the office of the Family Advocate. Despite the best intentions of very dedicated staff, the offices are presently are not equipped to cope with any increased workload. No matter how good in design and extensive in application, a programme will fail if there is insufficient capacity to carry it out. As a result of being severely underresourced, the current Family Advocate's offices in both provinces lack this capacity on account of insufficient and poorly trained staff and inadequate equipment. There are no computers, and the offices are not electronically linked to any other offices, departments, welfare organisations or even other courts dealing with family matters.⁶⁸ Consequently, reports are handwritten, and without the benefit of all the relevant information that a central database would reveal. Investigations are duplicated, and already overstretched staff are further extended. Inevitably, the necessary improvements will have budgetary implications. To empower the office to operate fully will necessitate computerising the offices and proper training of both

64 Statistics compiled by the Registrar of the pilot project Divorce Court for the Steering Committee, pilot project Family Court Cape Town.

65 1997 Hoexter Commission Report para 7 5 1.

66 Telephonic interview, Presiding Officer, April 2001.

67 S 28(2) of the Constitution of the Republic of South Africa, Act 108 of 1996.

68 The Eastern Cape offices have a few stand-alone computers, which are used only for word-processing purposes.

Family Advocates and Family Counsellors, particularly in the fields of anthropology and psychology. There also needs to be an improved ratio of Family Counsellors to allow for home visits and follow-up work, and increased personnel to enable them to extend their operations to all courts. Failing this, the endeavours of the office of the Family Advocate will remain mere lip-service to the notion of safeguarding children's best interests. More importantly, those interests will continue to be subject to the whim of warring parents and partly informed judges and presiding officers, and our courts will be failing to honour the commitment to the "children first" undertaking contained in our Constitution.

The fundamental question that has to be addressed . . . is why there is such an offence as scandalising the court at all in this day and age of a constitutional democracy . . . Indeed, if one takes into account that the judiciary, unlike the other two pillars of the State, are not elected and are not subject to dismissal if the voters are unhappy with them, should not judges pre-eminently be subjected to continuous and searching public scrutiny and criticism?

The answer is both simple and subtle. It is, simply, because the constitutional position of the judiciary is different, really fundamentally different. In our constitutional order the judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete . . . Having no constituency, no purse and no sword, the judiciary must rely on moral authority.

Kriegler J in S v Mamabolo 2001 5 BCLR 449 (CC) paras 15–16.

The admissibility at the subsequent criminal trial of evidence tendered by the accused for purposes of bail proceedings (1)*

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OPSOMMING

Die toelaatbaarheid by die opvolgende strafverhoor van getuienis wat deur die beskuldigde vir doeleindes van borgverrigtinge aangebied is

Artikel 60(11B)(c) van die Strafproseswet 51 van 1977, wat bepaal dat die getuienis wat die beskuldigde tydens borgverrigtinge aangebied het deel vorm van die getuienis by die verhoor, het vanuit verskeie oorde skerp kritiek ontlok. Hierdie artikel ondersoek die meriete van sodanige kritiek en of hierdie ernstige inbreuk op die vryheid en sekuriteit van 'n beskuldigde deur die Suid-Afrikaanse en Kanadese grondwette goedgekeur word. Die artikel bepaal ook of getuienis verkry *as gevolg van* getuienis deur die beskuldigde tydens die borgverrigtinge aangebied, by die opvolgende verhoor gebruik mag word. Ter afsluiting vergelyk dit die posisie onder die Kanadese en Suid-Afrikaanse reg.

1 INTRODUCTION

Section 60(11B)(c) of the Criminal Procedure Act,¹ which provides that evidence tendered at a bail application by an accused forms part of the evidence at the subsequent criminal trial, has been severely criticised from various legal quarters since its introduction.² This article investigates whether there is merit in the criticism, and whether this serious inroad into the freedom and security of an accused is sanctioned by the South African and Canadian constitutions.³ Central to this discussion is the right against self-incrimination. The article also determines whether evidence obtained *as a result of* evidence tendered by the accused during

* This series of articles is based on the author's doctoral thesis *Problematic aspects of the right to bail under South African law: A comparison with Canadian law and proposals for reform* (UP 2000).

1 Act 51 of 1977.

2 See eg *S v Schietekat* 1998 2 SACR 707 (C); *S v Joubert* 1998 2 SACR 718 (C); Snyckers "Criminal procedure" in Chaskalson *et al Constitutional law of South Africa* (1996) 27-91ff. S 60(11B)(c) seems to provide for the whole bail record to become part of the trial record. See the discussion in section 3 1 of this article.

3 The Constitution of the Republic of South Africa, Act 108 of 1996, and the (Canadian) Constitution Act 1982.

the bail application, may be used at the subsequent trial.⁴ In conclusion, it compares the positions under Canadian and South African law.

Unlike countries with inquisitorial systems such as Holland and Italy, where the right against self-incrimination is not afforded the same value, this right has been a prominent feature of both the Canadian and South African legal systems and has been taken up in the constitutions of both countries.⁵

Griswold refers to the right against self-incrimination as follows:⁶

"I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilised. As I have already pointed out, the establishment of the privilege is closely linked historically with the evolution of torture. But torture was once used by honest . . . public servants as a means of obtaining information about crimes which would not otherwise be disclosed. We want none of that today, I am sure. For a very similar reason we do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull a lever which springs the trap on which he stands. We have through the course of history developed a considerable feeling for the dignity and intrinsic importance of the individual man. Even the evil man is a human being."

The privilege against self-incrimination is not without its critics, however. This is evident from the comments of the well-known 19th-century political philosopher, Jeremy Bentham:⁷

"[It is one] of the most pernicious and irrational rules that ever found its way into the human mind . . . If all criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking as guilt invokes the privilege of silence."

The conceptual relationship between the right to silence,⁸ the right against self-incrimination and the presumption of innocence has caused some problems. For example, it has been held that the right to silence is the governing principle.⁹

In *R v Director of Serious Fraud Office, ex parte Smith*¹⁰ Lord Mustill expressed the opinion that the "right to silence" did not denote any single right, but referred to a "disparate group of immunities". The immunities differed in nature, origin, incidence and importance.¹¹

4 Where the evidence itself is not allowed.

5 Eg MacIntosh *Fundamentals of the criminal justice system* (1995) 389 eg indicates that under the inquisitorial system in Italy, the accused is forced to testify at his trial and may be questioned about the offence by the presiding officer.

6 In his book *The Fifth Amendment today* (1955) as cited by MacIntosh *ibid*. Griswold was Dean of the Harvard Law School during the 1950s. MacIntosh *ibid* indicates that Griswold expressed the philosophy underlying the right to remain silent in the paragraph cited. MacIntosh indicates that the right to remain silent is sometimes referred to as the accused's freedom from self-incrimination as guaranteed by s11(c).

7 As quoted by Salhany *The origin of rights* (1986) 99.

8 S 35(3)(h) of the 1996 Constitution provides that every accused has a right to a fair trial, which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings.

9 See the decision of the House of Lords in *R v Brophy* 1982 AC 476 (HL) 481, 1981 2 All ER 705.

10 1993 AC 1 (HL) 30--31.

11 The six identified immunities are:

- a universal immunity from being compelled on pain of punishment to answer questions;
- a universal immunity from being thus compelled to answer questions which may incriminate;

continued on next page

In *R v Herbert*¹² the Supreme Court of Canada indicated that the right to remain silent is protected as a fundamental principle of justice under section 7 of the Canadian Constitution. It is broader than both the common-law confession rule and the rule against self-incrimination. This decision may, however, confuse, since it contends that the underlying theme of both the common-law confession rule and the privilege against self-incrimination is the individual's right to choose whether to make a statement to the authorities or to remain silent. This the court coupled with a concern for the repute and integrity of the judicial process.¹³

The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*,¹⁴ when confronted with the constitutional validity of section 60(11B)(c) of the Criminal Procedure Act, also indicated that the right to remain silent was the governing principle. The court explained that the issue was not so much the right of an arrested person to be released on bail,¹⁵ but the different constitutional right enjoyed by every person, upon arrest and thereafter, to remain silent. The court indicated that this right was expressed in the following number of complementary ways in the Constitution:

- to remain silent while under arrest;¹⁶
- not to be compelled while under arrest to make any confession or admission which could be used in evidence against that person;¹⁷
- to be presumed innocent, to remain silent, and not to testify at trial;¹⁸ and
- not to be compelled to give self-incriminating evidence at trial.¹⁹

The silence and self-incrimination rights at trial are, however, based on the presumption of innocence. This was correctly endorsed by the Constitutional Court in *S v Zuma*²⁰ as follows:

“[T]he common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself. These rights, in turn, are the

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- a specific immunity of suspects undergoing interrogation from being thus compelled to answer questions;
 - a specific immunity possessed by accused people at trial from being thus compelled to testify and answer questions;
 - a specific immunity possessed by a person charged with an offence from being interrogated;
 - a specific immunity possessed by an accused in certain circumstances from having adverse comment made on his or her failure to answer questions prior to the trial or at the trial.

12 1990 2 SCR 151, 57 CCC (3d) 1 34 (SCC).

13 What the court did not indicate or accept was that the underlying principle in s 7 is the presumption of innocence. It is that principle which underlies the right to remain silent, the right not to incriminate oneself, and the common-law confession rule. See, however, Chaskalson *et al* 27–41ff; *Park-Ross v Director: Office for Serious Economic Offences* 1995 2 BCLR 198 (C) 210ff, 1995 2 SA 148 162ff; the decision of the Australian High Court in *Pyneboard (Pty) Ltd v Trade Practices Commission* 1983 152 CLR 328 346 (per Murphy J); *R v Jones* 1994 2 SCR 229 249 (Can) (dissenting decision by Lamer CJ).

14 1999 7 BCLR 771 (CC), 1999 4 SA 623 (CC).

15 Under s 35(1)(f) of the Constitution.

16 Under s 35(1)(a).

17 Under s 35(1)(c).

18 Under s 35(3)(h).

19 Under s 35(3)(j).

20 1995 4 BCLR 401 (CC), 1995 2 SA 642 (CC) para 33.

necessary reinforcement of Viscount Sankey's 'golden thread' – that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt . . . Reverse the burden of proof and all these rights are seriously compromised and undermined."

For practical and analytical purposes, it can be said that the right to silence deals with the prohibition against compelling a person to testify, and whether inferences may be drawn from a failure to testify.²¹ Self-incrimination deals with the extent to which an accused can be said to be compulsorily conscripted against himself by any given procedure. It is therefore clear that we are here dealing with the right not to incriminate oneself.

2 CANADIAN LAW

2.1 General

Section 13 of the Canadian Charter²² provides that "a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings".²³

The Canadian Charter deals expressly with the privilege against self-incrimination in two contexts, namely in sections 11(c) and 13.²⁴ This does not preclude the

21 See *S v Brown* 1996 11 BCLR 1480 (NC), 1996 2 SACR 49.

22 Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11, hereinafter referred to as the "Canadian Charter" or "Charter".

23 Except in a prosecution for perjury or the giving of contradictory evidence. The primary provision, s 13 of the Charter, is not the only provision that affords protection in this context. S 5(2) of the Canada Evidence Act RSC 1985, c C-5, which was in place long before the Charter, provides: "Where with respect to any question a witness objects to answer on the ground that his answer may tend to incriminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or any provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence." S 5(2) guarantees a witness at a bail hearing that his testimony will not be admissible or used for any purpose against him at the subsequent criminal trial. S 5(2), however, will apply only when invoked by *objecting to answer questions* at the bail hearing on the ground that the answer might tend to incriminate or establish liability under civil proceedings. S 5(2) therefore affords protection only to the answer given to a question of the Crown or presiding officer. It does not cover the testimony which the applicant of his own accord chooses to submit in order to obtain bail (whether he carries the burden of proof or not). It seems that if an applicant for bail, for example, testifies in order to obtain bail, but refuses to answer a question by the Crown on the merits of the case and is overruled, the answer will be shielded from the trial by s 5(2). However, except perhaps in the instance where an accused has objected to answering a question at the bail application and the answer is used to test only the credibility of an accused during cross-examination at trial, s 13 of the Charter affords much wider protection in this context including the protection afforded by s 5(2). See generally sections 2.1 and 2.2 of this article.

24 The common-law right was a right not to testify if the answers might tend to incriminate the witness. Canadian constitutional law has recognised *the right of an accused* not to testify, and that right has been enshrined in s 11(c) of the Charter. Canadian law has recognised *the right of a witness* not to be incriminated by evidence he has been compelled to give in another proceeding. That right was taken up in s 2(d) of the Canadian Bill of Rights SC 1960. S 13 of the Charter has given that protection constitutional status. See the decision by the British Columbia Court of Appeal in *Haywood Securities Inc v Inter-Tech Resource Group Inc; Haywood Securities Inc v Brunnhuber* 1985 24 DLR (4th) 724 (BCCA) 747.

implication of a similar and wider protection against self-incrimination in section 7.²⁵

The rights adumbrated in sections 8 to 14 are specific examples of emanations of the general right to life, liberty and security of the person protected by section 7. The specific mention of these rights serves to reinforce the general rights secured by section 7 rather than to restrict them. The right to remain silent is therefore embedded in the right to liberty and security of the person within the meaning of section 7. The specific rights in sections 11(c) and 13 are afforded an additional measure of sanctity. When section 7 affords protection, the rights may be restricted in accordance with the principles of fundamental justice. The specific rights in sections 8 to 14 are not so limited.²⁶

The phrase “security of the person” in section 7 includes a right to personal dignity and a right to an area of privacy or individual sovereignty into which the state must not make arbitrary or unjustified intrusions. These considerations also underlie the privilege against self-discrimination.²⁷

If the relationship between section 7 and the other sections is considered, it is suggested that section 11(c) does not preclude a right not to be compelled to be a witness against oneself from arising before a person is charged. Rather, section 11(c) provides additional protection by setting the point at which the right not to be compelled to be a witness against oneself is no longer subject to possible deprivation in accordance with the principles of fundamental justice.

Similarly, section 13 guarantees to a witness the specific right not to have self-incriminating evidence used against him in other proceedings. This is a separate right, which arises regardless of whether the witness testified voluntarily or under compulsion.²⁸ Unlike section 5(2) of the Canada Evidence Act,²⁹ section 13 does not

25 See *RL Crain Inc v Couture and Restrictive Trade Practices Commission* 1983 6 DLR (4th) 478 (SCQB) per Schebel J; *British Columbia Securities Commission v Branch* 1995 123 DLR (4th) 462 (SCC); *Thomson Newspapers Ltd v Canada (Director of Investigation & Research Restrictive Trade Practices Commission)* 1990 67 DLR (4th) (SCC) 161; *Dubois v The Queen* 1985 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, 1986 1 WWR 193, 23 DLR (4th) 503 (SCC).

26 The specific mention of the rights in ss 8-14 ensures their sanctity. The requirements for fundamental justice are furthermore determined by the specific rights themselves. See my thesis para 5 2 1 2.

27 *RL Crain Inc v Couture and Restrictive Trade Practices Commission* 1983 6 DLR (4th) 478 (SCQB) 480.

28 *RL Crain Inc v Couture and Restrictive Trade Practices Commission* 480; *Dubois v The Queen* 1985 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, 1986 1 WWR 193, 23 DLR (4th) 503 (SCC) 525; *R v Sicurella* 1997 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div) CCC 422. See also *R v Carlson* 1984 14 CRR 4 (BCSC) 5-6 where McKay J held that it had no bearing on the matter that the witness initiated the earlier proceedings and was under no compulsion to testify. It is significant to note that during the first part of the 1980-1982 drafting process, this part of the section read “when compelled to testify”. It was only in January 1981 when the revised resolution was placed before the Joint Committee of the Senate and House of Commons by the federal government that the wording was changed to “who testifies”. See McLeod, Takach, Morton and Segal *The Canadian Charter of Rights: The prosecution and defence of criminal and other statutory offences* (1993) 14-4. It is submitted that the protection has been broadened to cover all witnesses at the first or earlier proceedings, whether they were compelled at that time to testify or not.

29 RSC 1985, c C-5.

require any objection on the part of the person giving the prior testimony.³⁰ It is applicable even where the witness in question is unaware of his rights.³¹ It is also of no consequence whether the accused is compelled at the subsequent trial to testify or not.³² The use of the accused's prior testimony at the trial is a violation of section 13 of the Charter.

The protection in section 13 inures to an individual at the moment an attempt is made to utilise previous testimony to incriminate him.³³ Furthermore, the determination whether the use of testimony is incriminating is to be considered from the point of view of the second proceeding. It is of no consequence whether the evidence was or was not incriminating in the first proceeding.

In *Dubois v The Queen* the Supreme Court, when faced with the question whether the Crown was correct to have used the accused's testimony from his first trial as part of the evidence-in-chief at the new trial, explained that section 13 was a specific form of protection against self-incrimination.³⁴ Section 13 must be viewed in the light of the related rights provided for in section 11(c) and 11(d) of the Canadian Charter. To allow such evidence could result in the violation of section 11(c) and 11(d).³⁵ Section 11(d) provides for the right to be presumed innocent until proven guilty, and imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he need respond, either by testifying or by calling other evidence. This burden on the Crown to establish guilt and the right to silence³⁶ also underlie the non-compellability right. The important protection is therefore that the Crown must prove its case before there can be any expectation that the accused respond. The case to meet is therefore common to sections 11(c), 11(d) and 13. In the context of sections 11(c) and 13, it means specifically that the accused enjoys "the initial benefit of a right of silence" and its corollary, protection against self-incrimination.³⁷

Viewed in this context, the purpose of section 13 is to protect individuals from being indirectly compelled to incriminate themselves, and to ensure that the Crown will not be able to do indirectly that which section 11(c) prohibits expressly.³⁸

The court held that any evidence tendered as part of the case against the accused was clearly incriminating evidence. The Supreme Court, however, did not specifically

30 See *Dubois v The Queen* 1985 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, 1986 1 WWR 193, 23 DLR (4th) 503 (SCC) 524. Prudent counsel may advise a witness who is concerned that he might incriminate himself to object to answer questions subject to being ordered to do so in terms of s 5 of the Canada Evidence Act (and provincial counterparts). He would then also enjoy the protection of s 5.

31 *Dubois v The Queen* *ibid.*, in the dissenting judgment of McIntyre J SCR 377.

32 *R v Sicurella* 1997 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div).

33 *Dubois v The Queen* 1985 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, 1986 1 WWR 193, 23 DLR (4th) 503 (SCC) 523.

34 In this case the accused had been convicted but his conviction was overturned and a new trial ordered by the court of appeal. Before the Supreme Court, the accused argued that the use of his previous testimony in the second trial was a violation of s 13 of the Canadian Charter.

35 504 DLR.

36 The concept of a case to meet is an essential element of the presumption of innocence.

37 521ff DLR.

38 523 DLR. The right provided for in s 11(c) of the Canadian Charter reflects the common-law privilege against self-incrimination previously safeguarded by s 2(d) of the Canadian Bill of Rights. (The provincial Evidence Acts are in compliance with s 11(c).) An accused is not a competent witness for the prosecution and may therefore not be compelled to testify.

address the question whether previous testimony could be used for purposes of cross-examination if the accused chose to testify in his own defence at the subsequent trial.³⁹ I now turn to this issue.

2.2 The use of prior testimony for purposes of cross-examination

The courts have accepted that if prior testimony is used to incriminate an accused during cross-examination at the later hearing, section 13 will function to prohibit such use. But it is not precisely clear whether section 13 will prohibit recourse to previous testimony during cross-examination if the purpose is other than to incriminate the accused. On a plain reading, section 13 would not seem to prohibit the use of the prior testimony for another reason.

In *R v Mannion*⁴⁰ the Supreme Court had the opportunity to deal with the matter. The court had to decide whether the Crown was correct to have used the testimony by Mannion in the earlier trial for purposes of cross-examination at the later trial. McIntyre J⁴¹ found that the purpose of the cross-examination was to incriminate the respondent. The court accordingly held that the evidence was relied on to establish the guilt of the accused. Section 13 of the Canadian Charter clearly applied to exclude the incriminating use of the evidence of these contradictory statements. But it seems that the Supreme Court might also have granted protection against the use of previous testimony if used for reasons other than to incriminate the accused. The court referred to section 5 of the Canada Evidence Act and two cases that interpreted its effect.⁴² It was there held that an accused may not be cross-examined or examined in chief on evidence given at a previous hearing where he had invoked the protection of section 5. The court held that the Charter should not be construed as a limiting factor upon rights which existed prior to its adoption.

The British Columbia Court of Appeal in *Re Johnstone and Law Society of British Columbia*⁴³ did not interpret the *Mannion* decision as affording protection when the previous testimony was used during cross-examination for purposes of challenging credibility. The court held that a lawyer who was subject to a disciplinary hearing could be cross-examined on his previous testimony⁴⁴ for the purpose of determining his credibility.⁴⁵ However, if the main purpose of the cross-examination is to incriminate him, then the cross-examination is contrary to section 13. In *R v B (WD)*⁴⁶ the Saskatchewan Court of Appeal agreed with *Johnstone*, holding that an affidavit sworn in a civil proceeding could be used to attack the credibility of an accused testifying in a criminal trial.

The Ontario Court of Appeal in *R v Kuldip*⁴⁷ disagreed with the interpretation of *Mannion* in *Johnstone*. The court held that before the Charter, a witness who invoked section 5(2) of the Canada Evidence Act could not be cross-examined on the prior testimony at the subsequent criminal proceeding either to incriminate him or to challenge his credibility. But the witness enjoyed the protection only if he

39 528 DLR.

40 1986 2 SCR 272 (Can).

41 On behalf of the unanimous court (279–281).

42 See *R v Wilmot* 1940 74 CCC 1 (Alta CA) and *R v Coté* 1979 50 CCC (2d) 564 (Que CA).

43 1987 5 WWR 637 (BCCA).

44 Before the Registrar of the Supreme Court of British Columbia in a taxation of costs.

45 *Per* Craig JA (652). The other judges were in substantial agreement.

46 1987 45 DLR (4th) 429 (Sask CA).

47 1988 62 CR (3d) 336 (Ont CA).

objected to the testimony, a position that had been subject to some criticism. The court indicated that one of the purposes of section 13 was to redress the unfairness which resulted if an uneducated witness or a witness who did not have the benefit of legal aid failed to invoke section 5(2). If the effect of section 13 were so restricted, it would mean that a sophisticated witness would continue to enjoy the benefit of section 5(2). An unsophisticated witness, on the other hand, who did not know that he had to object, would not.

The court also pointed out that where the prior evidence is used ostensibly to break down the credibility of the accused, it nevertheless assists the Crown in its case and, in a broad sense, may help the Crown to prove guilt. It is often difficult to distinguish when prior testimony is used to incriminate the accused and when it is used to attack his credibility.⁴⁸

But do the expressions “testifies” and “evidence so given” used in section 13 with reference to the prior proceedings include all forms of evidence? It must also be determined whether a bail application constitutes “any proceedings” as indicated in the wording of section 13, and whether the subsequent criminal trial constitutes “other proceedings” in relation to the prior bail application.

2.3 “[T]estifies” and “evidence so given”

In this section of the article, I consider the following questions:

- Do the phrases “testifies” and “evidence so given” limit the availability of the protection to the witness who gives *viva voce* testimony under oath in the first or earlier proceedings, or is protection afforded to, for example, statements made from the bar?
- Is the wording broad enough to include other forms of evidence, for example documentary evidence produced or identified by the witness in the earlier proceedings?
- Does the performance of an act during prior testimony qualify for protection?

As to the first question, in *R v Carlson*⁴⁹ McKay J, during a manslaughter trial, excluded evidence of certain incriminating statements made at a post-suspension hearing under section 16 of the Parole Act.⁵⁰ The accused had appeared before the Parole Board whose procedures do not require testimony under oath. The court held that a person “testifies” for the purposes of section 13 of the Canadian Charter whether such testimony is made under oath or not, as long as the person is giving evidence “before a tribunal or officially constituted body”.⁵¹

In *R v Sicurella*⁵² the accused brought an application to prevent the introduction of voice-identification evidence which arose out of verbal communications of the accused while under oath and before a judicial officer in the course of a bail hearing and subsequent bail review. The Crown attempted to submit at the trial the evidence of an officer who had overheard the accused testify on these two occasions. The officer had also heard the voice of the accused during authorised intercepted communications and wanted to testify that he believed the voice to be that of the accused.

48 346–347. But s 13 specifically indicates that it prohibits the use of the prior testimony to *incriminate* the witness at the subsequent proceedings. S 5(2) is not so limited.

49 1984 14 CRR 4 (BCSC).

50 RSC 1970, c P-2.

51 5–6.

52 1997 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div).

Renaud Prov Div J ruled that this evidence was inadmissible, indicating that the case law supported the view that the prosecution could not advance the tape of what was stated at the bail hearings to support a prosecution. The preliminary inquiry judge concluded that it was fundamental to emphasise that the courts must be vigilant to discern and to promote the calculus underlying the Charter. This must be done even at the stage of the preliminary inquiry, in order that the right to silence should not be undermined. To permit the prosecution to look to what the accused has said, in the course of a judicial proceeding, is to assist the Crown. It serves only to impair the right to silence and to shift the *onus* of proof. For the reasons given, the court applied section 13 of the Canadian Charter and did not permit the Crown to adduce in evidence anything said by the accused in the course of the judicial proceedings held before a justice of the peace. It therefore seems that the protection afforded goes much further than testimony under oath, and includes anything said by the accused at the prior proceedings even if used only for voice-identification purposes.

As to the second question, in deciding whether documentary evidence is included in "testifies" and "evidence so given", the provision in section 5(2) of the Canada Evidence Act is taken into account.⁵³ Section 5(2) protects "the answer so given". This would presumably cover the testimony identifying the document. But does it cover the contents of the document? The policy in this regard was discussed in the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*.⁵⁴ The report indicates that most of the Evidence Acts made no reference to the privilege against self-incrimination in so far as it relates to documents. According to the report, this creates doubt about the intention of the legislators. The report indicates that the *Law Reform Commission Evidence Code* is likewise silent and, because it is a code, its silence must be understood as limiting the privilege to testimony. The report justifies this position on the ground that there is an intrinsic difference between compelling a person to condemn himself out of his own mouth and using documents already in existence to do the same thing. Documents as evidence do not involve the risk of perjury and therefore are similar to real evidence.

But the task force argued that whether a witness is asked to provide information to the court in the form of testimony or in the form of a document, it is still information which is being produced for the particular purpose of the case at bar. That compulsion to produce a document should not be used as a means of laying a foundation for a subsequent case against the witness. It was therefore concluded that the documentary evidence should be treated in exactly the same way as testimony in so far as the privilege is concerned.

It seems that the courts have previously not considered the production of documents to be within the scope of the privilege against self-incrimination.⁵⁵ These cases, however, were all decided before the commencement of section 2(d) of the Canadian Bill of Rights and section 13 of the Canadian Charter.

53 RSC 1985, c C-5 and corresponding provisions of the Provincial Evidence Acts.

54 (1982) 440-441.

55 See eg *Attorney-General Quebec v Bégin* 1955 SCR 593, 112 CCC 209, 21 CR 217, 1955 5 DLR 394 (SCC); *Curr v The Queen* 1972 SCR 889, 7 CCC (2d) 181, 18 CRNS 281, 26 DLR (3d) 603 (SCC); *Reference under the Constitutional Questions Act; Re validity of section 92(4) of the Vehicles Act, 1957* (Sask) 1958 SCR 608, 121 CCC 321, 15 DLR (2d) 225 (SCC).

In *Re Ziegler and Hunter*⁵⁶ the Federal Court of Appeal compared and analysed section 2(d) of the Canadian Bill of Rights and section 13 of the Canadian Charter. The court concluded that section 13 extended to cover the production of incriminating documents at the prior appearance pursuant to a subpoena *duces tecum*.⁵⁷

In *R v Sicurella*⁵⁸ Renaud Prov Div J found that Parliament by way of section 13 wished to protect the actual testimony and evidence arising out of such testimony.⁵⁹ It therefore seems that other forms of evidence arising out of the testimony will be protected by section 13.

With regard to the third question,⁶⁰ it is likely that the performance of an act such as the giving of a handwriting sample during prior testimony will qualify for protection. The accused is therefore likely to be protected from the use of that evidence at trial.⁶¹

2.4 “[A]ny proceedings” and “any other proceedings”

On a plain reading of the term “any proceedings”, a bail application will qualify as “any proceedings” for the purposes of section 13. Hogg,⁶² referring to the same wording in section 14 of the Canadian Charter, indicates that it presumably includes proceedings before both administrative tribunals and courts.⁶³

The meaning of the phrase “any other proceedings” has proved more troublesome. The word “other” has led some judges to hold that certain proceedings in the criminal process were not “other” proceedings in relation to the earlier proceedings. None of the judges seems, however, to indicate that a criminal trial does not constitute “any other proceedings” in relation to the prior bail hearing.⁶⁴

56 1983 39 CPC 234, 8 DLR (4th) 648, 51 NR 1 (Fed CA), leave to appeal to SCC refused 1984 39 CPC 234n, 8 DLR (4th) 648n.

57 DLR 675.

58 1997 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div).

59 CCC 427. See also the reasoning of the court *supra*, in my discussion of the first question.

60 See the questions at the beginning of this section.

61 See the reasoning by the task force on the uniform rules of evidence *supra*, and the reasoning in *R v Sicurella* 1997 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div). See also Paciocco *Charter principles and proof in criminal cases* (1987) 462, cited by McDonald *Legal rights in the Canadian Charter of Rights and Freedoms* (1989) 579.

62 *Canada Act 1982 annotated* 49, cited by McLeod, Takach, Morton and Segal 14-6.

63 49.

64 It is not clear whether a bail application would qualify as “other proceedings” in s 13 in relation to the prior trial. Would the prior testimony be “used to incriminate that witness in any other proceedings”? It seems not. In *Donald v Law Society of British Columbia* 1984 2 WWR 46, (additional reasons at 1985 2 WWR 671 (BCCA)), Hinkson JA had to consider whether a disciplinary proceeding against a lawyer qualified for the second proceeding in terms of s 13. He held that the Charter should not be restricted to criminal proceedings but should rather be given a broader meaning extending its operation to include any proceeding where an individual is exposed to a criminal charge, penalty or forfeiture as a result of having testified in earlier proceedings. Soon thereafter he held that s 13 extended to include all proceedings (54). Anderson JA, also on behalf of the British Columbia Court of Appeal, similarly held (57) that the plain and ordinary meaning of s 13 was that evidence given by a witness in any proceedings shall not be used to “incriminate” that witness “in other proceedings”. He then pointed out that the specific disciplinary proceedings were penal in nature. This decision was followed by Estey J in *Bank of NS v Miller* 1985 6 WWR 574 (Sask QB). Gallant J in *Johnson v Law Society of Alberta* 1986 66 AR 345 (Alta QB) 351 held that a lawyer appearing before a disciplinary committee does not enjoy the protection of s 13. He indicated that the reference in s 13 to “incriminating evidence” and “incriminate” reinforced the interpretation that the rights in s 13

In *R v Yakelaya*⁶⁵ the Ontario Court of Appeal held that a preliminary enquiry and a trial on the same charges are not, *vis-à-vis* each other, “other proceedings”. In *R v Protz*⁶⁶ the Saskatchewan Court of Appeal held that sentencing procedures are not “other procedures” in relation to the trial before conviction.

This issue ultimately came to be decided by the Supreme Court in *Dubois v The Queen*.⁶⁷ McIntyre J, in a dissenting judgment, held that the retrial of an accused was not another proceeding for the purposes of section 13 of the Canadian Charter. McIntyre J explained that the term “proceeding” in section 13 for purposes of a criminal case meant all judicial proceedings taken “upon one charge to resolve and reach a final conclusion on the issue therein raised between the same party and the crown”.⁶⁸ In this McIntyre J included the preliminary hearing, the trial, an appeal and a new trial. McIntyre J further explained that as the new trial was on the same indictment, between the same parties and raising precisely the same issues, the new trial could not be considered “another proceeding”.⁶⁹ All six of the other presiding judges found, however, that a retrial on the same offence fell within the meaning of the words “any other proceedings”. According to the majority, another viewpoint, in the context of the facts before court, would result in the accused being conscripted against himself and would indirectly violate the accused’s rights in terms of section 11(c) and 11(d) of the Charter.⁷⁰

2.5 Derivative evidence

Another related issue is whether evidence of facts obtained as a result of testimony in the bail hearing may be used at the subsequent trial.⁷¹

In *R v Crooks*⁷² O’Driscoll J stated that the law of Canada in this area was not analogous to the position in the United States of America.⁷³ Under American law no information directly or indirectly derived from testimony or other information may be used against a witness in any criminal case.⁷⁴ The prohibition is against evidence given and derivative evidence. This protection goes further than the position created by sections 7, 11(c) and 13 of the Canadian Charter.⁷⁵

related to criminal and penal matters. But in *R v Sicurella* 1997 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div) it was specifically held by Renaud Prov Div J that a bail hearing and bail review, in the light of the broad interpretation that the expression “proceedings” has received, fell within the meaning of “other proceedings” in s 13 of the Charter.

65 1985 20 CCC (3d) 193 (Ont CA) (per Martin JA).

66 1984 13 CCC (3d) 107 (Sask CA) (per Vancise JA).

67 1985 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, 1986 1 WWR 193, 23 DLR (4th) 503 (SCC). The facts appear from fn 35.

68 DLR 505.

69 *Ibid.*

70 See the discussion in section 2.1 of this article.

71 In *R v S (RJ)* [1995] 1 SCR 451 (can) the Supreme Court explained that derivative evidence was evidence found, identified or understood as a result of the “clues” provided by compelled testimony. Derivative evidence is therefore by definition independent of compelled testimony.

72 1982 39 OR (2d) 193, 2 CRR 124 (Ont HC), confirmed 2 CRR 124 125 (CA), leave to appeal to SCC granted, 46 NR 171, confirmed 2 CCC (3d) 57 64 N (CA).

73 See the US Constitution, Fifth Amendment, and 18 US Code 6002 (Immunity Statute).

74 Except in a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. 18 US Code 6002 prohibits the subsequent use of “information directly or indirectly derived from such testimony or other information”.

75 See also *Ruben v R* 1983 24 Man R (2d) 100 (Man QB) (per Hewak J).

In *Thomson Newspapers Ltd v Canada (Director of Investigation & Research Restrictive Trade Practices Commission)*⁷⁶ La Forest J⁷⁷ explained that section 7 did not provide inflexible protection against the subsequent use of evidence derived from testimony.⁷⁸ The use of derivative evidence in subsequent trials does not automatically affect the fairness of those trials, and complete immunity against such use is not required by the principles of fundamental justice. Derivative evidence exists independently of the compelled testimony, meaning that in most cases it could also have been discovered independently of any reliance on the compelled testimony. Its use by the prosecutor does not raise the same concerns as those in respect of the use of pre-trial evidence. Admittedly, there will be some situations in which the derivative evidence is so well concealed or inaccessible as to be virtually undiscoverable without the assistance of the wrongdoer. For practical purposes, the subsequent use of such evidence would be indistinguishable from the subsequent use of pre-trial compelled testimony.

La Forest J added that the principles of fundamental justice do not require an absolute prohibition against the use at trial of all derivative evidence on the ground that admission of such evidence can in some cases affect the fairness of the trial.⁷⁹ He held that the trial judge's power to exclude derivative evidence where appropriate was all that was necessary to satisfy the requirements of the Charter. This solution achieves an appropriate balance between the individual's right against self-incrimination and the state's legitimate need for information about the commission of an offence.⁸⁰ In this case La Forest J grounded his approach on the common-law power of judges, now constitutionalised in section 11(d) of the Canadian Charter, to ensure a fair trial by excluding evidence after considering its prejudicial effect and probative value.⁸¹

The presiding officer in subsequent criminal proceedings can therefore exclude derivative evidence where appropriate.⁸² It seems, however, that the Ontario Provincial Division in *R v Sicurella*⁸³ had stronger views on this issue.⁸⁴ Renaud Prov Div J indicated that Parliament intended to protect evidence arising out of testimony, in addition to the actual testimony itself.

76 1990 67 DLR (4th) 161 (SCC).

77 On behalf of the majority of the court. Lamer and Sopinka JJ dissented in part, and Wilson J dissented *in toto*.

78 163.

79 *Ibid*.

80 163. The Supreme Court in *R v S (RJ)* 1995 1 SCR 451 (Can) 563ff confirmed this earlier approach by the Supreme Court. But the court also observed that evidence such as self-incriminating evidence, which impacts on the fairness of a trial, is almost always excluded. The court therefore found it likely that derivative evidence which could not have been obtained but for a witness's testimony will be excluded. See also *British Columbia Securities Commission v Branch* 1995 2 SCR 3, 123 DLR (4th) 462 (SCC).

81 See also *R v S (RJ)* *ibid*.

82 See also *Mead v Canada* 1991 81 DLR (4th) 757 (Fed Ct TD) 757.

83 1997 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div).

84 CCC 422 ff. The court seems to have been unaware of the decision of the Supreme Court.

AANTEKENINGE

DWANG AS VERWEER TEEN 'N KLAG VAN MOORD IN 'N TYD VAN GEWELD

1 Inleiding

Die vraag of dwang as verweer teen 'n klag van moord kan dien, word al vir eeue deur die mens beredeneer. Hierdie hoogs omstrede vraag is onlangs weer onder die loep geneem in *S v Mandela* 2001 1 SASV 156 (K). Wanneer die beskuldigde wat die verweer van dwang teen moord opper, boonop 'n lid van 'n bende was, word die vraagstuk verder gekompliseer. In 'n ander redelik onlangse gewysde, *S v Lungile* 1999 2 SASV 597 (SCA), het die Hoogste Hof van Appèl op die vraag ingegaan of 'n beskuldigde wat homself vrywillig by 'n bende aangesluit en aan die uitvoering van 'n misdaad deelgeneem het, suksesvol kan steun op die verweer van dwang indien hy in die uitvoering van die misdaad beveel is om 'n handeling ter bevordering van die misdaad te verrig. In *Lungile* is die verweer van dwang egter nie teen 'n moordklag geopper nie, maar teen 'n roofklag. In *Mandela* het regter Davis te kenne gegee dat die benadering wat in *Lungile* gevolg is, ook in die onderhawige geval gevolg moes word.

In hierdie bydrae word daar in besonderhede ingegaan op die beslissing in *Mandela*. Daar word eerstens 'n kort uiteensetting van die feite en die bevindinge van die hof gegee, waarna 'n aantal aspekte rondom die *ratio* en die *obiter dicta* in meer besonderhede bespreek word. Aangesien die hof in sy uitspraak in *Mandela* sterk op die in *Lungile* gesteun het, sal daar op die tersaaklike plekke ook na laasgenoemde verwys word.

2 *Mandela* – die feite

Die beskuldigde is in die hooggeregshof op onder meer twee aanklagte van moord aangekla. Daar is beweer dat hy twee slagoffers enkele dae uitmekaar doodgeskiet het. Die moorde was polities geïnspireer.

Die beskuldigde het onskuldig gepleit en hom op die verweer van dwang beroep. Hy het onder meer beweer dat hy ingelig is van 'n plan om die eerste slagoffer om die lewe te bring, dat hy onwillig was en dat hy toe geïntimideer is deurdat daar aan hom gesê is dat 'n vuurwapen op hom gebruik sou word, dat hy sou sterf (159) en dat geweld op hom toegepas sou word met dodelike gevolg (162). (Later in die verslag (163–164) vermeld die regter ook dat die beskuldigde ter verduideliking van sy versuim om die polisie in te lig oor die dreigende moorde beweer het dat een van die lede van die “moordbende”, ook bekend as “the boss”, aan hom gesê het dat indien hy nie sou saamwerk nie, hy doodgemaak sou word en dat Kaapstad te klein was vir hom om in weg te kruip.) In die loop van die uitvoering van hierdie

moorddadige plan op die daaropvolgende dag is hy aangesê om die slagoffer te skiet, wat hy toe ook gedoen het. Wat die tweede slagoffer betref, het die beskuldigde getuig dat hy tydens 'n vergadering wat na die moord op die eerste slagoffer plaasgevind het, ingelig is oor 'n plan om hom te vermoor (162). By daardie geleentheid is daar aan die beskuldigde gesê dat iemand anders die vuilwerk sou doen, en dat hy net hulp moes verleen. Op die noodlottige dag is die tweede slagoffer in 'n motor gelaai en na 'n begraafplaas geneem, waar hy uit die motor gestoot is. 'n Skoot het afgegaan, maar die beskuldigde het ontken dat hy die skoot afgevuur het en het beweer dat een van die ander persone in die motor dit gedoen het (163). Sy getuienis het daarop neergekom, so bevind die hof (164), dat hy erken het dat hy deel was van die plan om die twee slagoffers te vermoor.

Die staat het aangevoer dat die beskuldigde bewustelik opgetree het, 'n gewillige lid van 'n moordbende was, dat hy nie gedreig is nie, en dat daar in elk geval nie 'n voldoende basis was vir getuienis dat hy doodgemaak sou word indien hy nie met die moordbende sou saamwerk nie (164).

3 Die uitspraak

Die hof bevind dat die beskuldigde, volgens sy eie weergawe van die gebeure, hom met die ander lede van 'n bende vereenselwig het en 'n sleutelrol gespeel het in die uitvoering van die plan om die twee slagoffers te vermoor (165; sien ook Burchell "Heroes, poltroons and persons of reasonable fortitude – juristic perceptions on killing under compulsion" 1988 SAS 18 33 (hierna Burchell *Heroes*); Burchell "Dress and intentional killing" 1977 SALJ 282 290 (hierna Burchell *Dress*)). Die hof is van mening dat dieselfde benadering wat in *Bradbury* 1967 1 SA 387 (A) en *Lungile* 1999 2 SASV 597 (SCA) gevolg is, hier van toepassing is en dat die beskuldigde skuldig bevind moet word (165). Skynbaar teenstrydig met hierdie "beslissing", vervolgt regter Davis dan dat die beskuldigde op sy eie weergawe van die gebeure skuldig bevind moet word, "unless a defence of compulsion can be properly raised" (165). Die regter sê dat selfs indien die beskuldigde se eie weergawe van die gebeurtenisse aanvaar word (wat die hof inderdaad bereid is om te doen), daar steeds uitgemaak moet word of daar 'n voldoende basis gelê is vir 'n bevinding van die aanwesigheid van dwang wat 'n onskuldigbevinding regverdig (165).

Die hof verwys na *Goliath* 1972 3 SA 1 (A) waar die appèlafdeling beslis het dat dwang 'n volkome verweer teen 'n moordklag kan bied, en merk op dat die "betreklik lae standaard" wat in *Goliath* aanvaar is met betrekking tot die gedrag wat verwag kan word van 'n beskuldigde wat op die verweer van noodtoestand steun, nie universele goedkeuring wegdra nie (166). In Suid-Afrika sou die huidige klimaat van geweld en blatante minagting van menslike lewe 'n rede kon bied vir die inperking van die verweer waar lewe ter sprake kom. Die hof voeg egter by (167):

"But this factor must be counterbalanced against the right to life enshrined in s 1 [sic] of the Republic of South Africa Constitution Act 108 of 1996. A person faced with the most agonizing . . . choice of safeguarding his own right to life at the expense of another's right to life may be regarded as not having the requisite *mens rea* (although he may have *culpa* when he fails an objective test). However, given the exquisite balance between the conflict between the two right bearers of this most precious of rights, a Court can only find necessity to be a defence, such that the accused then lacks the requisite culpability, in circumstances where the danger of death cannot be averted, save by acts of heroism which extend beyond the capacity that should, and can, be demanded of the reasonable person."

Die hof bevind dat dit nie op die toepassing van die standaard van heldhaftige optrede sou neerkom om van die beskuldigde *in casu* te verwag om sekere stappe te doen om te voorkom dat die slagoffers sterf nie (167–168). Die beskuldigde kon naamlik die polisie of die oorledene van die dreigende teregstellings inlig, of hy kon sommige ander stappe doen in die tyd wat daar tot sy beskikking was. Die hof beslis dat, anders as in *Goliath*, daar geen onmiddellik lewensbedreigende dwang aanwesig was nie. Volgens regter Davis sou die hof, indien hy sou bevind dat die verweer van dwang slaag, daaraan skuldig wees om baie min te verwag van lede van 'n gemeenskap – nou 'n konstitusionele gemeenskap – wat op fundamentele beginsels (insluitende dié van vryheid, waardigheid, *ubuntu* en respek vir lewe) geskoei is. Indien die verweer van noodtoestand so uitgebrei sou word dat die gedrag van die beskuldigde binne die toepassingsgebied daarvan tuisgebring kan word, sou dit 'n verlaging van die agting van lewe impliseer en 'n “undermining of the very fabric of the attempt to build a constitutional community”, waar elke persoon geregtig is op gelyke belang en respek (168).

Die verdediging het aan die hand gedoen dat die vraag of die beskuldigde aanspreeklik gehou moet word al dan nie, aan die hand van die normatiewe skuldteorie bepaal moet word (168). Die hof beslis dat selfs indien 'n normatiewe toets, gebaseer op die voorstelling van wat van 'n gewone persoon in die gemeenskap verwag kan word, aanvaar sou word, die beskuldigde steeds op albei moordklagtes skuldig bevind sou moes word: op sy eie weergawe is daar geen verduideliking verskaf oor waarom hy versuim het om alternatiewe stappe te doen nie (169). Die beskuldigde is gevolglik op (onder meer) albei klagte van moord skuldig bevind.

4 Bespreking

4.1 Inleiding

Hierdie is een van daardie netelige gevalle waar die beskuldigde hom op die verweer van noodtoestand teen 'n klag van moord beroep. Net soos in 'n hele aantal ander sake, het die gebeure in hierdie saak in die konteks van benedebedrywighede afgespeel (sien bv *Bradbury* 1967 1 SA 387 (A); *Peterson* 1980 1 SA 938 (A); *Sauls* 1981 3 SA 172 (A); *Mongesi* 1981 3 SA 204 (A); *Bailey* 1982 3 SA 772 (A)). Die *locus classicus* met betrekking tot dwang as verweer teen 'n klag van moord is *Goliath* 1972 3 SA 1 (A). In laasgenoemde saak is die appèlafdeling gevra om uitsluitel te gee oor die vraag of dwang ooit 'n volkome verweer op 'n aanklag van moord kan wees en of dit *in casu* die optrede van die beskuldigde kon regverdig. Die appèlafdeling het die onskuldigbevinding van *Goliath* bevestig. Daar is beslis dat dwang 'n volledige verweer teen 'n klag van moord kan wees, afhangende van die omstandighede van die geval.

4.2 Die aanwesigheid van *dolus eventualis*

Regter Davis meen (164–165) dat die volgende bevinding in *Lungile* 1999 2 SASV 597 (SCA) 603 in die onderhawige saak van toepassing is:

“In my view, an inference is inescapable that the first appellant did foresee the possibility of the death of an employee of Scotts: he knew that at least two of his co-conspirators were armed with firearms; he knew that Scotts is in the main street of Port Elizabeth and that it is immediately opposite a police station; and he knew that the robbery would take place in broad daylight. He nevertheless participated in the robbery, helping to subdue some of the victims. The State has consequently proved the necessary *mens rea* in the form of *dolus eventualis* beyond reasonable doubt.”

Hierdie bevinding is myns insiens hoegenaamd nie op die onderhawige geval van toepassing nie. In hierdie gedeelte van die uitspraak in *Lungile* het appèlregter Olivier bevind dat die eerste appellant inderdaad opset om te dood in die vorm van *dolus eventualis* gehad het. In daardie saak was die eerste appellant een van 'n viertal wat 'n winkel beroof het. In die loop van die rooftog het 'n polisieman sy opwagting op die toneel gemaak, en 'n skietery het tussen die tweede appellant en die polisieman uitgebreek. 'n Werknemer van die winkel is in die kruisvuur doodgeskiet. (Die verhoorhof kon nie vasstel uit wie se vuurwapen die doodskoot afgevuur is nie, en die Hoogste Hof van Appèl was bereid om te aanvaar dat die doodskoot deur die polisieman afgevuur is (605).) Die eerste appellant is buite die voordeur van die winkel aangekeer met die gesteelde geld en juweliersware in sy besit. Hy is aan roof en moord skuldig bevind en het teen albei skuldigbevindings geappelleer. Een van die verwerers wat namens hom teen die skuldigbevinding aan moord geopper is, is dat selfs indien hy die gemeenskaplike oogmerk van die bende gedeel het om die roof te pleeg, daar nie bewys is dat hy die nodige *dolus* gehad het om aan moord skuldig bevind te word nie (602–603). Appèlregter Olivier verwerp hierdie verweer en kom tot die gevolgtrekking dat die eerste appellant inderdaad die moontlikheid van dood voorsien het en roekeloos was met betrekking daartoe. Die gedeelte van die uitspraak wat regter Davis aanhaal, het te doen met die bevinding insake die aanwesigheid van *dolus eventualis*.

Lungile verskil van *Mandela* ten opsigte van die aanwesigheid van *dolus eventualis*. In *Lungile* was die eerste appellant deel van 'n bende wat 'n beplande rooftog uitgevoer het. Die vraag was of die eerste appellant ook opset met betrekking tot die *doodslag* van die oorledene (en nie bloot die roof nie) gehad het. In *Mandela* was dit, volgens die beskuldigde se weergawe van die gebeure, reeds voor die uitvoering van die moord vir hom duidelik dat die slagoffers om die lewe gebring sou word. (Die enigste moontlike verweer wat die beskuldigde sou kon opper met verwysing na die aanwesigheid van opset, is dié van afwesigheid van wederregtelikheidsbewussyn. Hy sou naamlik kon aanvoer dat hy in putatiewe noodtoestand opgetree het, met ander woorde, dat hy geglo het dat hy binne die perke van noodtoestand as regverdigingsgrond optree. Vgl Visser en Maré *Visser and Vorster's general principles of criminal law through the cases* (1990) 216.)

4.3 Die verweer van dwang en die beskuldigde se vrywillige aansluiting by 'n bende

Dit is interessant dat die verweer van dwang ook in *Lungile* teen die klag van roof geopper is (600–601), hoewel hierdie aspek geen bespreking in *Mandela* geniet nie. Die eerste appellant het naamlik beweer dat hy in die loop van die rooftog deur een van die ander rowers opdrag gegee is om sekere items wat geroof word, bymekaar te maak. Hy het beweer dat die rower wat die opdrag gegee het, gewapen was en dat hy (die eerste appellant), uit vrees dat sy makker hom sou skiet, nie kon weier om sy opdragte uit te voer nie. Die hof beslis dat dit nie op die verweer van dwang neerkom nie. Vir 'n suksesvolle beroep op die verweer van dwang word daar vereis dat die beskuldigde inderdaad gedreig is en dat “threatened harm was imminent or had commenced” (601). Volgens die hof was daar nooit enige bewering gemaak wat op die aanwesigheid van hierdie twee elemente van die verweer dui nie. Die hof benadruk dus dat daar nie aan hierdie vereistes voldoen word nie indien bloot gesuggereer is dat die beskuldigde gevrees het dat hy geskiet sou word, maar nooit gedreig is nie. Die hof gaan voort (602) om daarop te wys dat die eerste appellant 'n lid van 'n groep van vier was wat die winkel binnegegaan het ten einde roof te

pleeg. Nadat hulle die winkel binnegegaan het, het hy (die eerste appellant) hom met die handeling van die ander rowers vereenselwig deur sommige van die werknemers wat op die vloer gelê het (en wat deur hom of een van die ander gedwing is om dit te doen) te bewaak. Die hof wys daarop dat dit nooit deel van die pleitverduideliking was nie en nooit aan die staatsgetuie gestel is dat die eerste appellant hierdie handeling onder dwang verrig het nie. In die lig hiervan sê die hof by monde van regter Olivier (601):

“A person who voluntarily joins a criminal gang or group and participates in the execution of a criminal offence cannot successfully raise the defence of compulsion when, in the course of such execution, he is *ordered* by one of the members of the gang to do an act in furtherance of such execution” (eie beklemtoning).

In hierdie verband verwys die regter na *Bradbury* 1967 1 SA 387 (A) 404H waar appèlregter Holmes gesê het:

“As a *general proposition* a man who voluntarily and deliberately becomes a member of a criminal gang with knowledge of its disciplinary code of vengeance cannot rely on compulsion as a defence or fear as an extenuation” (eie beklemtoning).

Dit is tog jammer dat appèlregter Olivier nie meld of dit van belang is dat daar ’n verband bestaan tussen die aansluiting van die beskuldigde by die bende en die deelname aan die bepaalde misdaad nie. Dit is belangrik om daarop te let dat regter Olivier die woord “ordered”, en nie “threatened” nie, gebruik. Regter Olivier se stelling met betrekking tot die verweer van dwang kom eintlik maar net op ’n formulering van die vanselfsprekende neer. *Lungile* was ooglopend nie ’n geval waarin dwang ter sprake gekom het nie.

Wat appèlregter Holmes se stelling betref, word die algemene geldigheid daarvan grootliks ondermyn deur die byvoeging van die woorde:

“But each case must be judged on its own facts. The present case has some unusual features. The appellant described how he was gradually drawn and coerced into the gang.”

Dit word verder ondermyn deur sy eie minderheidsbevinding, naamlik dat die dwang waaraan die beskuldigde in *Bradbury* onderwerp is (of in elk geval, die vrees wat dit by hom gewek het) as strafversagtend beskou moet word (408; Milton “Compulsion and the gangster” 1967 *SALJ* 145 148). (Hou in gedagte dat *Bradbury* ’n geval was van ’n appèl teen die vonnis (die doodvonnis) wat die beskuldigde opgelê is, en dat die appèlafdeling nie toestemming vir appèl teen sy skuldigbevinding verleen het nie. *Bradbury* dateer uit ’n tyd voordat daar erken is dat dwang ’n volkome verweer teen ’n klag van moord kan bied.) Uit *Bradbury* blyk verder dat die beskuldigde jare lank deel van ’n bende was, dat hy goed met die dissiplinêre kode van die bende vertrou was en dat hy deeglik bewus was van die feit dat die bende gewetenlose moordenaars was. Hierdie soort faktore behoort myns insiens by die bepaling van die aanspreeklikheid van die beskuldigde in ag geneem te word. Zeffertt “Duress as a criminal defence” 1975 *SALJ* 321 325 onderskei *Bradbury* van ander gevalle van noodtoestand deur daarop te wys dat *Bradbury*, hoewel hy onder dwang opgetree het, hom deur sy voorafgaande optrede in die posisie geplaas het waar hy aan druk onderwerp kon word. (Vgl ook Burchell *Heroes* 23 waar hy op die belang van die beskuldigde se voorafkennis van die gewelddadige aktiwiteite dui. Op 33 vn 72 meen hy dat die redelike persoon nie by ’n gewelddadige bende sou aansluit nie. Burchell *Duress* 287 merk op dat “particularly in this age of violence and gangsterism, public policy favours the protection of society against such conduct, and thus dictates that duress should not be a defence to a gang member who participates in an intentional killing”. Hy meen

egter dat dit nie soseer 'n uitsondering op die beskikbaarheid van die verweer van dwang daarstel nie. Volgens hom is dit eerder 'n erkenning dat een van die elemente van die verweer ontbreek, dws dat "the threat must not be caused by die accused's fault".)

Daar word in oorweging gegee dat appèlregter Olivier se stelling korrek is vir sover dit te kenne gee dat die blote feit dat 'n bendelid opdrag gegee is om 'n handeling ter bevordering van 'n misdaad te verrig, nie die verweer van dwang tot daardie lid se beskikking stel nie. Dit beteken egter dat die stelling nie vir *Mandela* van belang is nie, aangesien Mandela beweer het dat hy wel gedreig is. Daar word verder in oorweging gegee dat appèlregter Holmes se stelling (te) algemeen in strekking is en nie voorsiening maak vir al die moontlike gevalle van dwang binne bendeverband nie. (Burchell *Duress* 287 wys bv daarop dat die beskuldigde 'n lid kon word van 'n bende wie se doelstellings aanvanklik nie geweld ingesluit het nie.) Die stelling moet dus altyd saamgelees word met die woorde wat regter Holmes daarop laat volg het: "But each case must be judged on its own facts." In *Mandela* is daar geen aanduiding dat die "bende" reeds voor die gewraakte moorde by ander misdade betrokke was nie (wat die vraag laat ontstaan of daar voor die beplanning van die roof enige "bende" bestaan het) of dat die beskuldigde reeds voordat hy oor die moord ingelig is, deel was van die "bende" nie.

'n Mens sou kon redeneer dat die situasie in *Mandela* verskil van dié in *Lungile* vir sover *Mandela* (op sy eie weergawe van die gebeurde) *van die begin af, dit wil sê van die beplanningsfase van die misdaad* (die oomblik van aansluiting by die "bende"?), reeds onwillig was om daarby betrokke te wees, terwyl dit baie duidelik is dat die eerste appellant in *Lungile* die winkel binnegegaan het met die opset om aan die rooftog deel te neem (601) en beweer het dat hy *in die loop van die uitvoering van die rooftog* beveel is om sekere items van die slagoffers af te neem. Ongelukkig wys die hof nie hierdie verskil uit nie. 'n Mens kan jou afvra wat die posisie sou wees in die volgende geval: X sluit homself vrywillig aan by 'n bende wat hul voorneem om 'n bank te beroof. Tydens die uitvoering van die rooftog word hy uit die bloute deur een van sy gewapende makkers aangesê om 'n burgerlike wat in die bank aangehou word, te verkrag. By die afwesigheid van enige dreigement (in teenstelling met 'n blote opdrag), wil dit voorkom of X nie op dwang sal kan steun nie. *Lungile* sal egter nie as gesag vir die voorafgaande gebruik kan word nie, omdat X nie aangesê is om 'n handeling "in furtherance of such an execution" te verrig nie. Trouens, "deelneming" voorveronderstel in elk geval skuld, aangesien slegs daders en medepligtiges aan die pleging van 'n misdaad "deelneem" en skuld vereis word om as dader of medepligtige te kwalifiseer. Ook in hierdie sin is appèlregter Olivier se stelling dus maar net 'n bevestiging van die vanselfsprekende. Maar gestel hy word wel deur sy bendemakker gedreig: Indien X hom in so 'n geval nie op die verweer van dwang kan beroep nie, sou dit myns insiens op 'n verontagsaming van die skuldvereiste neerkom om hom sonder meer aanspreeklik te hou. Of oorweeg die volgende geval: X sluit hom vrywillig aan by 'n bende motordiewe wat gereeld motors steel maar nooit gewapen is nie. X neem (opsetlik) deel aan 'n motordiefstal. Y ('n ander bendelid) gee opdrag aan X om die voertuig oop te breek. X merk op dat Y gewapen is. In die afwesigheid van enige dreigement van Y se kant, kan X hom nie op dwang beroep nie (*Lungile*). Maar indien Y vir X dreig (dwing) om teen 'n doodsveragende snelheid weg te jaag en X gevolglik iemand doodry, sou dit myns insiens op 'n toepassing van *versari in re illicita* neerkom om X, in navolging van appèlregter Holmes se stelling in *Bradbury*, aanspreeklik te hou sonder om eers op die vraag in te gaan of hy opset met betrekking tot die oorledene se

doodsveroorsaking gehad het (vgl De Wet en Swanepoel *Strafreg* (1985) 91; Burchell *Duress* 287: "Once the case involves membership of a gang whose objects are clearly of a violent nature or the accused foresees the possibility of such violence, then the considerations which were referred to in *Bradbury* must be taken into account.") (In Ig geval sal *Lungile* nie toepassing kan vind nie.)

Hoe dit ook al sy, regter Davis meen dat die benadering wat in *Lungile* en *Bradbury* gevolg is hier van toepassing is en dat die beskuldigde onder meer aan die moordklagtes skuldig bevind moet word. Maar dan vervolg hy tog, en heel onlogies, dat die beskuldigde skuldig bevind moet word *tensy die verweer van dwang behoorlik geopper kan word* (165).

"On his own version, Mr Mandela associated with the other members of a gang and played a key role in the implementation of the plan that he well knew was designed to murder Mr Mbewana and Ms Gexu. *Absent a defence of compulsion*, the same approach adopted in both *Bradbury* and *Lungile* is of application and he should be convicted on all the first four counts . . . [O]n Mr Mandela's version he must be found guilty *unless a defence of compulsion can be properly raised*" (eie beklemtoning).

Om hiervan enigsins sin te maak, is nie maklik nie. Wat die ware *ratio* van die hof in *Mandela* was, bly raaiselagtig. Die benadering in *Lungile* kom daarop neer dat die verweer van dwang uitgesluit word waar die beskuldigde vrywillig by die bende aangesluit het, aan die misdaad deelgeneem het, en daar geen bewering van dwang gemaak is nie. Daar *cadit quaestio*. Die benadering in *Lungile* kan egter slegs toegepas word in gevalle waar die beskuldigde tydens die misdaadpleging bloot aangesê is, en nie gedreig is nie, om 'n handeling ter bevordering van daardie misdaad te verrig. Daarteenoor was appèlregter Holmes se benadering in *Bradbury* om in weerwil van die algemene stelling wat hy in die saak geformuleer het, dwang as 'n strafversagende omstandigheid te beskou.

Toepassing van die benadering in *Lungile* bring 'n mens nooit uit by die ondersoek na die vraag of daar van Mandela verwag kon word om sy eie lewe op te offer nie. Anders gestel: in die afwesigheid van enige dwang kom die vraag nooit te berde of daar van die beskuldigde verwag kon word om ten spyte van dwang sy eie lewe op te offer nie. Indien regter Holmes se benadering in *Bradbury* gevolg word, is dit te vroeg om op hierdie punt van die uitspraak reeds te bevind dat die verweer van dwang afwesig is en dat die beskuldigde aan moord skuldig is.

4 4 *Dwang as verweer teen 'n moordklag: regverdigingsgrond of skulduitsluitingsgrond?*

In *Goliath* het appèlregter Rumpff (meerderheidsuitspraak) hom uitdruklik daarvan weerhou om te verklaar of noodtoestand in daardie geval 'n skulduitsluitingsgrond of 'n regverdigingsgrond was (25H–26A). Die toets wat hy in daardie geval toegepas het, is egter 'n objektiewe redelikheidstoets en sou versoen kon word met die toets vir wederregtelikheid (Snyman "The attack on German criminal legal theory – a retort" 1985 *SALJ* 120 124–125; De Wet en Swanepoel 89; Van der Merwe "Die 'psigologiese' v die 'normatiewe' skuldbegrip in die lig van *S v Bailey* 1982 (3) SA 772 (A)" 1983 *SASK* 33 40–41) en nalatigheid (Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 84). Dit sou ook versoen kon word met die redelik verwagbare gedrag-kriterium wat in die ondersoek na die aanwesigheid van skuld ooreenkomstig die normatiewe skuldteorie aangewend word (Van der Westhuizen *Noodtoestand as regverdigingsgrond in die strafreg* LLD-proefskrif UP (1979) 369; Snyman *Strafreg* (1986) 123). Anders as in *Goliath* het die hof in *Mandela*, sonder om uitdruklik te verklaar dat die

normatiewe skuldteorie toegepas word, 'n toets geformuleer waarin alleenlik vir die uitsluiting van skuld voorsiening gemaak word. Die maatstaf stem steeds wesenlik ooreen met dié in *Goliath*, en sou gevolglik ook versoen kon word met die toets vir wederregtelikheid, nalatigheid, of 'n verskoningsgrond ooreenkomstig die normatiewe skuldteorie. Die hof beslis naamlik dat

“given the exquisite balance between the conflict between the two right bearers of this most precious of rights [ie the right to life], a Court can only find necessity to be a defence, such that the accused then lacks the requisite culpability, in circumstances where the danger of death cannot be averted, save by acts of heroism which extend beyond the capacity that should, and can, be demanded of the reasonable person” (167d; eie beklemtoning).

Hierdie benadering met betrekking tot noodtoestand as skulduitsluitingsgrond hang saam met die normatiewe skuldteorie. Aanhangers van die normatiewe skuldteorie beweer dat noodtoestand óf 'n skulduitsluitingsgrond, óf 'n regverdigingsgrond kan wees (Snyman “Die normatiewe skuldbegrip in die strafreg – 'n antwoord” (hierna Snyman *Normatiewe skuldbegrip*) 1996 *THRHR* 638 643). Waar die beskuldigde 'n ander onder dwang (in noodtoestand) doodgemaak het, kan dwang (noodtoestand) slegs 'n skulduitsluitingsgrond wees. Dit sou die geval wees indien daar nie van die beskuldigde, wat opsetlik en met wederregtelikheidsbewussyn gehandel het, verwag kon word om anders op te tree nie (Van der Westhuizen 369; vgl ook Bertelsmann “Noodtoestand: Die regverdigingsgrond en die skulduitsluitingsgrond” 1981 *THRHR* 413 418; Snyman *Normatiewe skuldbegrip* 642–643). Aanhangers van die psigologiese skuldteorie daarenteen, is van mening dat dwang 'n regverdigingsgrond kan wees, of die wederregtelikheidsbewussyn van 'n beskuldigde kan uitsluit, of 'n faktor kan wees wat by strafoplegging in oorweging geneem kan word (sien Visser en Maré 216). 'n Aantal skrywers oor die Suid-Afrikaanse reg aanvaar in beginsel dat noodtoestand ook in die geval waar die beskuldigde 'n ander gedood het, 'n regverdigingsgrond kan wees (Maré “Noodtoestand as verweer teen 'n aanklag van moord” 1993 *SAS* 165; Visser en Maré 216; Van der Westhuizen 696; vgl ook die delikteregskrywers Neethling, Potgieter en Visser *Law of delict* (1999) 89 vn 294; Van der Merwe en Olivier 84; Boberg *The law of delict* (1984) 794). Volgens die psigologiese skuldteorie kan dwang dus ook die uitwerking hê om skuld uit te sluit, maar ten einde vas te stel of dit die geval is, moet daar ondersoek ingestel word na die subjektiewe voorstelling wat die beskuldigde gehad het aangaande die wederregtelikheid van sy handeling. Daarenteen is die kriterium wat volgens die normatiewe skuldteorie toegepas word ten einde te bepaal of skuld uitgesluit is, dié van redelik verwagbare gedrag (ook genoem die “vergbaarheidskriterium” – Snyman *Normatiewe skuldbegrip* 642–643). Regter Davis se formulering is moeilik te rym met die siening van De Wet en Swanepoel 92. Hoewel dié skrywers van mening is dat doodslag in noodtoestand nooit geregverdig kan word nie, leer hulle dat noodtoestand in geval van doodslag ook nie *per se* 'n skulduitsluitingsgrond is nie. Hulle standpunt kom daarop neer dat noodtoestand nie skuld kan uitsluit sonder inagneming van die effek van die bedreiging op die besondere persoon se geestes- en gemoedstoestand in die besondere geval nie. (Hierdie standpunt toon ooreenkomstig met die standpunte van sekere delikteregskrywers: Neethling, Potgieter en Visser 89 vn 294, ofskoon dié skrywers tog meen dat noodtoestand 'n regverdigingsgrond kan wees in die geval van doodslag.) Volgens regter Davis se formulering van die voorwaardes vir skulduitsluitende noodtoestand, kan skuld net uitgesluit word indien sekere objektief omskrewende omstandighede aanwesig is. Die ondersoek na die aan- of afwesigheid van skuld vereis dus nie 'n ondersoek na die geestes- en gemoedstoestand van die beskuldigde in die besondere geval nie. (Daar moet ook

gewys word op die siening van Burchell. In Burchell en Milton *Principles of criminal law* (1997) 174 spreek hy die opinie uit dat die konsep van “excuse” van groot praktiese waarde kan wees, maar in *Heroes* 1988 SAS 18 33 meen hy dat dit nie nodig of wenslik is om die normatiewe skuldteorie in te voer nie.)

Regter Davis het die maatstaf wat neergelê is in *Goliath* beskryf (of is dit gekritiseer?) as “relatively low” en in dieselfde asem gemeld dat dié maatstaf nie universele goedkeuring wegdra nie (166–167). Hy verwys na *R v Howe* [1986] 1 QB 626 (HL) waar die House of Lords beslis het dat dwang (“duress”) geen verweer is teen ’n aanklag van moord nie, asook na *R v Gotts* [1992] 1 All ER 832 (HL) (verkeerdelik as *R v Gotz* aangehaal) waarin die House of Lords geweier het om dwang as ’n verweer teen ’n aanklag van poging tot moord te aanvaar. Dit is nie duidelik wat regter Davis met hierdie beskrywing bedoel nie. Indien hy bedoel dat dwang nie ’n verweer teen ’n klag van moord behoort te wees nie, is die beskrywing van die maatstaf as “relatively low” ’n eufemisme. Geen maatstaf sou ooit hoog genoeg kon wees nie. As maatstaf vir die erkenning van noodtoestand as verweer, is dié in *Goliath* egter myns insiens ’n juiste maatstaf; enigiets hoër sou van die onderdaan die heroïese verwag. Burchell en Milton 174 beskryf weer die Engelse benadering as een wat “lays down an apparently unrealistic blueprint for saintliness” (vgl Burchell *Heroes* 19–23). Appèlregter Rumpff benadruk immers:

“Wanneer op ’n aanklag van moord ’n vrypraak op grond van dwang kan plaasvind, sal afhang van die besondere omstandighede van elke saak en die hele feitekompleks sal noukeurig ondersoek moet word en *met die grootste omsigtigheid beoordeel moet word*” (25; eie beklemtoning).

In die lig daarvan dat regter Davis na oorweging van die fundamentele regte van die slagoffer en beskuldigde ’n wesenlik ooreenstemmende maatstaf formuleer, was hierdie beskrywing van die maatstaf nie regtig nodig nie. Dit skep die indruk dat ons Grondwet ook maar betreklik lae standaarde aan lede van die gemeenskap stel.

Die regter gaan voort (168):

“[Counsel for the accused] submitted that what must be decided by this Court is a decision based on an approach similar to that adopted in the *boni mores* test: that is the Court must decide as to whether the accused should be held liable for the death on the basis of a normative theory of criminal capacity. I took him to mean in this regard a view which looks somewhat more objectively at the question of culpability than would the psychological test with which Courts generally work.”

In sy uiters deeglik nagevorste reeks artikels (“The psychological fault concept versus the normative fault concept: *Quo vadis* South African criminal law?” 1995 *THRHR* 361 en 569), het Van Oosten reeds daarop gewys dat die normatiewe skuldteorie nie alleen in ’n hoë mate ingewikkeld, omstrede, vaag en teenstrydig is nie, maar ook onversoenbaar en strydig met die grondbeginsels van die Suid-Afrikaanse strafregspraktyk is vir sover dit onder meer skuld en die onderskeie ander elemente van die misdaad met mekaar verwar en vereenselwig (sien ook Visser en Maré 451; Van der Merwe 39–40). Uit die gedeelte wat hierbo aangehaal is, blyk weer iets hiervan: die verdediging vra vir die toepassing van die normatiewe skuldteorie, maar noem dit ’n “normatiewe teorie van toerekeningsvatbaarheid”. Dat dit hier hoegenaamd nie om toerekeningsvatbaarheid gaan nie, behoeft geen betoog nie. (Sien egter De Wet en Swanepoel 92 vn 131 waar die skrywers meen dat ’n persoon tog dermate in angs kan verkeer dat hy tydelik ontoerekeningsvatbaar is; vgl ook Van der Westhuizen 368.) Die verdediging se submissie is dat “’n benadering soortgelyk aan die *boni mores*-toets” gevolg moet word. Die verwarring wat hieruit blyk, is voor die hand liggend: hier word skuld (of dan opset) verwar met wederregtelikheid; skuld moet ingevolge hierdie siening van die normatiewe

skuldteorie vasgestel word aan die hand van iets soortgelyk aan die *boni mores*-toets (welke toets eintlik die algemene wederregtelikhedskriterium vergestalt). Maré 182 het reeds gewaarsku dat die erkenning van verskoningsgronde daartoe aanleiding kan gee dat die maatstaf van redelikheid twee keer toegepas word, naamlik eers om te toets vir wederregtelikheid en daarna om te toets vir verskoningsgronde. Maré het kennelik nie in gedagte gehad dat daar sover gegaan sal word as dat “’n benadering soortgelyk aan die *boni mores*-toets” twee maal toegepas word nie, maar bloot dat redelikheid ’n gemene deler van die *boni mores*-kriterium en die redelik verwagbare gedrag-kriterium is. (Bertelsmann 418, self ’n aanhanger van die normatiewe skuldbegrip, redeneer dat “[o]f verwytbaarheid uitgesluit is, behoort nie eers oorweeg te word voordat wederregtelikheid vasstaan nie”.) Regter Davis se vertolking van die normatiewe skuldteorie is “’n beskouing wat ietwat meer objektief na die skuldkwessie kyk as wat die psigologiese toets daarna sou kyk”. Die verdediging “urged that a normative test demanding that the Court develops a test based on a conception of what can be expected of an ordinary person in our society should indeed be followed” (169). (Dit was natuurlik glad nie nodig vir die verdediging om te vra vir die ontwikkeling van ’n toets wat gebaseer is op dit wat van die gemiddelde persoon in ons gemeenskap verwag kan word nie. Hierdie toets is reeds in *Goliath* geformuleer en toegepas. Dit is naamlik dieselfde toets wat regter Davis *in casu* toepas, en wat hy as ’n betreklik lae standaard beskryf.) Die betoog kom daarop neer dat die hof moet besluit of daar van iemand wat in die posisie van die beskuldigde is, wat weet dat indien hy sou weier om saam te werk, hy sy lewe sou prysgee, verwag kon word om sy lewe prys te gee en te weier om saam te werk; om te vlug en die kans te waag dat hy doodgemaak word; om die slagoffer te waarsku en die kans te waag om doodgemaak te word; of om die saak onder die polisie se aandag te bring en die kans te waag dat hy later aangeval sou word (169). Die verdediging voer aan dat die beskuldigde op grond van die toepassing van die normatiewe skuldteorie onskuldig bevind moet word omdat daar nie van hom verwag kon word om sy lewe in gevaar te stel ten einde die lewe te beskerm van ander (wie se lewens gelykwaardig is aan sy eie) nie (169). Hierop reageer regter Davis soos volg (169e):

“Even if this theory is adopted, the problem remains; did Mr Mandela’s conduct comply with the standard that society can expect from an average person, in this case an average person living in the turbulent context of Khayelitsha?”

Dit is duidelik dat die regter hier wegstrem van ’n uitdruklike bevinding dat die teorie wel toegepas moet word, maar dat hy tog die kriterium van redelik verwagbare gedrag toepas om tot sy besluit te kom. Die toepassing van dié kriterium is eger ook te versoen met die psigologiese skuldteorie waar dit aangewend word ten einde die aanwesigheid al dan nie van wederregtelikheid vas te stel. Regter Davis wil dus nie uitdruklik beslis dat hy die normatiewe skuldteorie toepas nie (let op die woorde “[e]ven if”), maar, soos ons vroeër gesien het, maak hy glad nie voorsiening vir noodtoestand as regverdigingsgrond teen ’n klag van moord nie.

Dit is ironies dat die toepassing van die normatiewe skuldteorie in geval van doodslag in noodtoestand bepleit word omdat dit kwansuis ’n beter teoretiese oplossing sou bied vir die geval waar dit om die afweging van gelyke belange (twee lewens) gaan, en daar daarom geen regverdiging vir doodslag in sulke omstandighede kan bestaan nie (Snyman *Strafreg* (1999) 172), en in die onderhawige geval deur die verdediging bepleit word. Waarom vra die verdediging vir die toepassing van die normatiewe skuldteorie? Sou dit wees vanweë ’n persepsie dat die beskuldigde meer toegeeflik behandel sal word indien die

normatiewe skuldteorie toegepas sou word? In die regsliteratuur van sommige Anglo-Amerikaanse stelsels word die toepassing van die normatiewe skuldteorie bepleit omdat noodtoestand nie gesien word as 'n regverdigingsgrond (of verweer) teen 'n klag van moord nie (sien De Wet en Swanepoel 84). Dit beteken dat die beskuldigde aan moord skuldig bevind moet word, tensy daar 'n ander verweer tot sy of haar beskikking is. Sekere skrywers het dan die idee, afkomstig uit die Duitse reg (sien De Wet en Swanepoel 84–87), dat noodtoestand 'n skulduitsluitingsgrond kan wees aangegryp om die heil van die beskuldigde in sulke gevalle te probeer verseker (sien Maré 172–174; Snyman *Strafreg* 121–123). In daardie regstelsels waar noodtoestand nie 'n verweer teen 'n klag van moord kan wees nie, sou die invoering van die normatiewe skuldteorie dus beteken dat die beskuldigde meer toeskietlik benader word. In Suid-Afrika staan dit reeds sedert *Goliath* vas dat dwang wel 'n verweer teen 'n moordklag kan bied, hoewel *Goliath* nie uitsluitel gegee het oor die vraag of noodtoestand 'n regverdigingsgrond of 'n skulduitsluitingsgrond is nie. Anders as in die Anglo-Amerikaanse jurisdiksies wat nie noodtoestand as verweer teen 'n moordklag erken nie, en waar die toepassing al dan nie van die normatiewe skuldteorie die verskil tussen aanspreeklikheid en vrypraak beteken, beteken die toepassing al dan nie van die normatiewe skuldteorie in die Suid-Afrikaanse reg slegs die verskil tussen noodtoestand as regverdigingsgrond en noodtoestand as skulduitsluitingsgrond. Albei lei tot 'n onskuldigbevinding. Die verdediging se aandrag op die toepassing van die normatiewe skuldteorie laat die vraag ontstaan of die toets wat ingevolge dié teorie toegepas word enigszins verskil van dié wat ingevolge die psigologiese skuldteorie toegepas word, of eersgenoemde meer toeskietlik is as laasgenoemde. Maré 182 is van mening dat, aangesien gedrag wat verskoon word nie die goedkeuring van die reg wegdra nie, terwyl gedrag wat deur 'n regverdigingsgrond geregverdig is, wel die reg se goedkeuring wegdra, gedrag baie meer gereedelik verskoon sal word as wat dit as regmatig aanvaar sal word. Sonder om die algemene geldigheid van die stelling te bevraagteken, moet daar net op gewys word dat dit in geval van die doding van 'n ander in noodtoestand nie kan geskied tensy die kriterium in *Goliath* neergelê gewysig sou word nie. Dit is immers die maatstaf wat neergelê is vir die erkenning van dwang as volkome verweer wat bepaal hoe gereedelik die beskuldigde vrykom, en nie die teorie wat poog om die maatstaf te verklaar nie. Die regsmaatstaf wat op die onderhawige situasie toegepas moet word, het dus eerste gekom, en is, soos ons reeds gesien het, versoenbaar met sowel die idee dat noodtoestand of dwang skuld kan uitsluit as met die siening dat dit die wederregtelikheid van 'n handeling kan uitsluit. Van Oosten 575 toon aan dat ware noodtoestand as 'n verweer teen skuld eerder as teen wederregtelikheid tot dieselfde gevolg aanleiding gee as noodtoestand as verweer teen wederregtelikheid eerder as teen skuld. Die antwoord is dus nee. Tewens, onderliggend aan die gedifferensieerde benadering tot noodtoestand (waarvolgens noodtoestand óf 'n regverdigingsgrond óf 'n skulduitsluitingsgrond kan wees) is die idee dat 'n stigma kleef aan 'n onskuldigbevinding op grond van 'n verskoningsgrond, in teenstelling met 'n onskuldigbevinding op grond van 'n regverdigingsgrond (Maré 171; Eser en Fletcher *Rechtfertigung und Entschuldigung: Rechtsvergleichende Perspektiven / Justification and excuse: comparative perspectives* (1987) vol 1 23). Dit maak dus nie eintlik sin dat die verdediging vra vir die toepassing van die normatiewe skuldteorie nie. So 'n versoek sou dus (in 'n geval soos die onderhawige) eerder vanuit die geleedere van die staat verwag word, soos in *Bailey* 1982 3 SA 772 (A).

Indien die hof sou bevind dat ware noodtoestand nie teenwoordig was nie, maar wel putatiewe noodtoestand, sal die toepassing van die psigologiese skuldteorie

onder bepaalde omstandighede voordeliger wees vir die beskuldigde as die toepassing van die normatiewe skuldteorie. Dit sal die geval wees indien die beskuldigde in vermybare of onredelike onkunde van die reg opgetree het of 'n vermybare of onredelike regsdwaling begaan het. Ingevolge die normatiewe skuldteorie bied 'n vermybare putatiewe noodtoestand die beskuldigde, ten spyte van die afwesigheid van wederregtelikheidsbewussyn, geen verweer nie en kan die beskuldigde steeds aan 'n opsetsmisdaad skuldig bevind word. Hierdie implikasie van die normatiewe skuldteorie is onregverdig en onrealisties (sien Visser en Maré 451; Van Oosten 581). Ingevolge die psigologiese skuldteorie ontbreek wederregtelikheidsbewussyn en gevolglik opset, en moet die beskuldigde onskuldig bevind word (vgl Van Oosten 574).

4.5 *Die verweer van dwang in 'n klimaat van geweld en minagting van die lewe*

Regter Davis se uitspraak dat “[i]n the context of South Africa, the current climate of violence and blatant disregard for human life would tend to provide a reason to curb the defence when life is involved” (167b–c), verdien ook aandag. Myns insiens kan die klimaat van geweld en die minagting van die lewe geen verskil maak aan die beskikbaarheid van die verweer nie. Die normale maatstawwe van die substantiewe reg moet toegepas word ten einde individuele geregtigheid te bereik. Die feit dat daar 'n klimaat van geweld en minagting van menslike lewe heers, behoort nie daartoe te lei dat die individuele beskuldigde wat optree om werklik sy of haar eie lewe te red, 'n verweer ontsê word nie. Anders gestel: die feit dat daar sodanige klimaat heers, behoort nie te impliseer dat ons nou van lede van die publiek die heroiëse moet verwag nie. Wat wel vasgestel moet word, is of die betrokke beskuldigde opgetree het met blatante minagting van die lewe van sy of haar slagoffer. Indien wel, kan daar heel moontlik bevind word dat die beskuldigde nie in noodtoestand opgetree het nie. 'n Klimaat van geweld en minagting kan nie dien ter uitkakeling van die verweer waar die betrokke individu nié met minagting van die lewe van sy of haar slagoffer opgetree het nie. Dit kan wel 'n faktor wees wat in aanmerking geneem word by strafoplegging, en wel omdat afskrikking en voorkoming oogmerke van straf is. So 'n benadering blyk byvoorbeeld uit *Bradbury* 1967 1 SA 387 (A) 395 waar hoofregter Steyn die volgende sê:

“In this case there are, of course, the unusual factors of the influence of fear of reprisals on the one hand, and on the other hand the need for a sentence which would be a deterrent to this kind of gangsterism, so disruptive in its effect on the rule of law and on the precepts by which the lives of civilised men and women are governed”

(vgl Holmes AR se soortgelyke benadering op 407–408). Soos Snyman tereg aanvoer, is die bestrawwing van die doding van 'n ander onder dwang (soos in *Goliath*) futiel, omdat die beskuldigde hom nie sal laat afskrik deur die vrees vir straf nie – veral nie as hy weet dat dwang in elk geval 'n versagende uitwerking op die strafmaat het nie (Snyman *Strafreg* 122; Maré 180). Hierdie idee is reeds in die filosofie van Kant te vinde. Hy is van mening dat 'n strafregsreël wat op 'n situasie soos die *Karneades*-voorbeeld, waar twee skipbreukelinge om 'n enkele drywende plank moet meeding ten einde te oorleef, gerig is, nooit effektief kan wees nie, omdat die bedreiging van 'n euwel wat nog onseker is (soos die veroordeling van 'n regter) nie kan opweeg teen die vrees vir 'n onmiddellike en sekere nadeel (soos verdrinking) nie (sien Gregor se vertaling van Kant *The metaphysics of morals* (1986) 28; vgl Van der Westhuizen 200; Burchell *Heroes* 34). Hierteenoor staan die siening van lord Griffiths in *R v Howe* [1987] 1 All ER 771 (HL) dat “it would have been better had [the development of the defence of duress] not taken place and that

duress had been regarded as a factor to be taken into account in mitigation". Hierdie siening word ook deur lord Jauncey gehuldig in *R v Gotts* [1992] 1 All ER 832 (HL) 839 (waarna Davis r verwys; vgl ook die uitspraak van lord Browne-Wilkinson 853).

4 6 Fundamentele regte en die verweer van dwang teen 'n klag van moord

Teen die oorweging (of "faktor") dat die huidige klimaat van geweld en blatante minagting van die lewe sou neig om 'n rede te verskaf vir die inperking van die verweer waar lewe betrokke is, wil regter Davis die reg op lewe (a 11 Wet 108 van 1996) opweeg (167c). Aan die een kant van die skaal het ons dus 'n neiging om 'n rede te verskaf om die verweer in te perk, en aan die ander kant het ons twee (of meer) mense se reg op lewe wat in botsing kom. Geen wonder kom nie sover om die opweging te maak nie. Uit sy uitspraak blyk dat die grondwetlike dimensie wat hy aan die vraagstuk rondom dwang as verweer teen 'n klag van moord gee, die saak niks verder voer nie. Die kriterium wat hy uiteindelik toepas, stem steeds wesenlik ooreen met dié wat in *Goliath* toegepas is.

In die loop van sy betoog dat die doding van 'n ander mens in noodtoestand nie geregverdig kan word nie, spreek Snyman *Strafreg* 122 (vgl ook *Normatiewe skuldbegrip* 643) die mening uit dat die reg nie die standpunt behoort in te neem dat een mens se lewe waardevoller as 'n ander mens s'n kan wees nie. So 'n standpunt sou volgens Snyman onversoenbaar wees met artikel 9 van die Grondwet, wat bepaal dat elkeen gelyk voor die reg is en dat elkeen die reg op gelyke beskerming en voordeel van die reg het. Hy meen dat die bepalings van artikels 10 en 11, wat voorsiening maak vir 'n reg op menswaardigheid en lewe onderskeidelik, die standpunt versterk dat een mens se lewe nie belangriker geag mag word as dié van 'n ander nie. Regter Davis se uitspraak raak ongelukkig glad nie hierdie aangeleentheid aan nie. Dit was nie noodsaaklik om op hierdie aangeleentheid in te gaan nie, omdat die hof slegs die omstandighede waaronder noodtoestand 'n skuldsluitingsgrond kan uitmaak, ondersoek.

5 Gevolgtrekking

Daar word in oorweging gegee dat die beskuldigde tereg skuldig bevind is op die twee klage van moord. Die toepassing van die maatstaf van dit wat van 'n gewone mens verwag kan word, is realisties en is reeds sedert 1971 deel van ons reg. Die grondslag van die hof se bevinding is egter onduidelik. Myns insiens is die kruks van die saak die bevinding dat daar, anders as in *Goliath*, geen lewensbedreigende dwang wat onmiddellik dreigend was, aanwesig was nie (168) en dat daar geen rede verskaf is vir die beskuldigde se versuim om ander stappe te doen nie (169). Daar word in oorweging gegee dat *Lungile* nie gesag is vir die bevinding van die aanwesigheid van *dolus eventualis* in *Mandela* nie, en dat die *ratio* (en gevolglik ook die benadering) in *Lungile* ook nie van toepassing is op 'n feitstel soos die onderhawige, waar die hof bereid was om te aanvaar dat die beskuldigde wel met die dood gedreig is nie. Daar word verder in oorweging gegee dat die stelling van appèlregter Holmes in *Bradbury* baie algemeen in strekking is, en dat dit met groot omsigtigheid toegepas moet word, aangesien, soos regter Holmes self bygevoeg het, elke geval op sy eie feite beoordeel moet word. Regter Holmes se stelling kan, indien onoordeelkundig aangewend, die spook van *versari* laat herrys en aanleiding gee tot die verontagsaming van die skuldvereiste.

Die hof is onwillig om te verklaar dat hy die normatiewe skuldteorie toepas. Nogtans maak die hof glad nie voorsiening vir die moontlikheid dat noodtoestand 'n regverdigingsgrond kan wees nie. Dit blyk gevolglik dat die hof tog in beginsel

die maatstaf wat reeds sedert *Goliath* toegepas word met die normatiewe skuldteorie in verband bring. Die hof beperk hom tot die formulering van die omstandighede waaronder dwang (noodtoestand) 'n skulduitsluitingsgrond kan wees. Dit is opmerklik dat die hof geen bevinding maak met betrekking tot die aanwesigheid al dan nie van wederregtelikheidsbewussyn nie. Dit is myns insiens belangrik om wel 'n bevinding ten aansien van wederregtelikheidsbewussyn te maak, aangesien die afwesigheid van wederregtelikheidsbewussyn volgens die psigologiese skuldteorie tot 'n onskuldigbevinding lei. Volgens die normatiewe skuldteorie is die aanwesigheid van wederregtelikheidsbewussyn ook 'n vereiste vir 'n skuldigbevinding. Die afwesigheid van wederregtelikheidsbewussyn as gevolg van dwang lei egter nie noodwendig tot 'n onskuldigbevinding nie, aangesien die beskuldigde steeds skuldig bevind kan word indien sodanige afwesigheid aan 'n onredelike en vermybare regsdwaling toe te skryf is (sien bv Bertelsmann 418).

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The rights [to one's dignity and reputation] are absolute and primordial rights; they are not created by, nor dependent for their being upon, any contract; every person is bound to respect them; and they are capable of being enforced by external compulsion. Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character or moral or soical worth to which he may rightly lay claim and of that respect and esteem of his fellow men of which he is deserving, and against degrading and humiliating treatment; and there is a corresponding obligation on all others to refrain from assailing that to which he has such right.

Melius de Villiers The Roman and Roman-Dutch law of injuries (1899) quoted with approval in both *National Media v Bogoshi* 1998 4 SA 1196 (SCA) 1207E-H and *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) 23D-H.

DIE REG OP PSIGOSEKSUELE OUTONOMIE, HERROEPING VAN TOESTEMMING EN DIE VRAAGSTUK VAN VERKRAGTING DEUR 'N LATE*

1 Inleiding

Die outonome (vrye) menslike persoonlikheid, wat met waardigheid toegerus is, word deur die Duitse Konstitusionele Hof (*Bundesverfassungsgericht*; *BVerfG*) as hoogste menseregterlike waarde gepostuleer (Urt v 5/6/1973, *BVerfGE* 35, 22). Genoemde menseregterlike waarde het 'n dinamiese onderbou en betree voortdurend nuwe terreine (*BVerfG*, *Beschl v 23/1/1980*, *NJW* 1980, 2070 2071). Blykens die Duitse howe vorm die individuele mens se reg op psigoseksuele outonomie (en selfbeskikking) 'n belangrike aspek van die vrye menslike persoonlikheid (BGH, *Beschl v 20/7/1995*, *NStZ* 1996, 32; BGH, *Urt v 19/11/1996*, *NStZ-RR* 1997, 98; *Sick Sexuelles Selbstbestimmungsrecht und Vergewaltigungsbegriff* (1993) 336; *Willmer Sexueller Mißbrauch von Kindern* (1996) 19–21). Aangesien hierdie standpunt so basies aan 'n effektiewe en dinamiese menseregterkultuur is, kom dit nie as 'n verrassing nie dat ons howe, hoewel nog nie eksplisiet geartikuleer nie, klaarblyklik in dieselfde rigting beweeg (*Gardener v Whitaker* 1994 5 *BCLR* 19 (E) 36; *Bernstein v Bester* 1996 4 *BCLR* 449 (CC) 483–484; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 *SACR* 556 (CC) 576 ev. Sien ook tav Italië Everhart “Predicting the effect of Italy’s long-awaited rape law reform on ‘the land of machismo’” 1998 *Vanderbilt J of Transnational L* 671 692 ev).

In die onderhawige bydrae word die vraag aan die orde gestel of, spesifiek met verwysing na verkragting (en analoë vorme van seksuele aanranding) 'n persoon van genoemde psigoseksuele outonomie onherroeplik afstand kan doen, met ander woorde: kan 'n toestemmende party in die proses van seksuele omgang genoemde toestemming herroep? In 'n neutedop saamgevat: is verkragting deur 'n late moontlik? Die begrip “psigoseksuele” word deurgaans gebruik, juis om ook die seksuele gevoelslewe van die betrokkenes, soos byvoorbeeld beliggaam in hulle seksuele oriëntasie en onskadelike “afwykende seksuele gedrag”, op die voorgrond te stel. Die onderhawige bydrae moet ook gelees word teen die agtergrond van my voorafgaande publikasies waarna hierin verwys word. Onnodige duplikasie van inligting en analise word doelbewus hier vermy (sien bv “Die insestasie in 'n regstaat: Regsantropologiese kantaantekeninge” 1999 *SA Tydskrif vir Etnologie* 59; “Psigoseksuele outonomie en die dinamiese aard van die inhoud van die toestemmingsbegrip by verkragting” 1999 *THRHR* 603; “Sekstoerisme, die kind se reg op waardigheid en vrye psigoseksuele ontplooiing en kulturele en ekonomiese magmsmisbruik” 2000 *THRHR* 264; “Die strafregterlike spanningsveld tussen die kind

* 'n Deel van hierdie navorsing is in 2000 met die finansiële steun van die Universiteit van Pretoria aan die University of Pennsylvania in die VSA onderneem. Die menings hierin uitgespreek, word nie noodwendig deur genoemde instansies gedeel nie.

se reg op vrye psigoseksuele ontplooiing en behoefte- en magsmisbruik: Is die Duitse reg navolgingswaardig?" 2000 *Stell LR* 284; "Die geweldsbegrip en psigoseksuele outonomie by omskrywing van geslagsmisdade" 2000 *TSAR* 360).

2 Gewysdereg in die VSA

In *State v Way* (297 NC 293; 254 SE 2d 760 (1979)) is die Supreme Court (SC) van die VSA-deelstaat North Carolina met die volgende feitestel gekonfronteer: W en sy vriend M het om 14:30 die klaagster en haar vriendin P, by klaagster se huis opgelaai en na M se woonstel gegaan. Dit was die eerste keer dat W en klaagster uitgegaan het, hoewel hulle gereeld telefonies gekommunikeer het. Getuienis het daarop gedui dat W vir klaagster gevra het om saam met hom boontoe te gaan. Sy het saam met hom gegaan en hulle het, terwyl hulle in die kamer was, vir ongeveer 30 tot 40 minute gesit en gesels. Daarna het hulle hulle klere uitgetrek en geslagsomgang gehad. Klaagster het W meegedeel dat sy 'n maagd was, maar hy was onder die indruk dat sy 'n grap gemaak het. Gedurende die daad van geslagsomgang het klaagster weens pyn op haar maag, begin skree. W het vervolgens vir P gevra om klaagster te kom help. Hulle het haar daarna hospitaal toe geneem. W het ontken dat hy klaagster aangerand en haar tot geslagsomgang gedwing het. W is deur die jurie aan verkragting in die tweede graad skuldig bevind en tot tien jaar gevangenisstraf gevonnisd. Die hof van appèl het egter die skuldigbevinding en straf in orde gevind. By diskresionêre hersiening wys regter Copeland van die SC van North Carolina daarop dat die verhoorregter se opdrag aan die jurie dat "consent initially given could be withdrawn and if the intercourse continued through use of force or threat of force and that the act at that point was no longer consensual that would constitute the crime of rape" verkeerd was. Hy verduidelik die regsposisie in North Carolina vervolgens soos volg:

"It is uncontroverted that there was only one act of sexual intercourse involved in this case. Under the court's instruction, the jury could have found the defendant guilty of rape if they believed Beverley had consented to have intercourse with the defendant and in the middle of that act, she changed her mind. This is not the law. If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape, although he may be guilty of another crime because of his subsequent actions. The court's instruction on this matter was erroneous, entitling the defendant to a new trial" (NC 296-297; SE 2d 761-762).

Sou daar egter twee afsonderlike dade van geslagsomgang (penetrasie) gewees het en die eerste het met die klaagster se toestemming plaasgevind, maar die tweede nie, was 'n skuldigbevinding aan verkragting egter in orde (sien ook *State v Long* 93 NC 542 (1885). Sien verder die New Jersey-saak *State v Auld* 2 NJ 426; 67 A 2d 175 (1949)).

Die volgende saak wat in onderhawige verband relevant is, is dié van die Court of Appeals (CA) van die deelstaat Maryland in *Battle v State* (287 Md 675; 414 A 2d 1266 (1980)) wat uit sewe regters saamgestel is. Die beslissing van die hof word deur regter Smith gelewer. In dié beslissing is redelik breedvoerig ingegaan op die tydstop waarop toestemming by verkragting afwesig moet wees. In sy uitspraak verwys die regter (287 Md 678; 414 A 2d 1268) na *Hazel v State* (221 Md 464, 469; 157 A 2d 922 (1960)) waarin regter Horney namens die hof opmerk dat

"[w]ith respect to the presence or absence of the element of consent, it is true, of course, that however reluctantly given, consent to the act at any time prior to penetration deprives the subsequent intercourse of its criminal character. There is, however, a wide difference between consent and a submission to the act. Consent may

involve submission but submission does not necessarily imply consent" (eie kursivering).

In sy uitspraak stel regter Smith (287 Md 682; 414 A 3d 1269) dit egter duidelik dat toestemming ten tyde van die penetrasie moet bestaan en verduidelik:

"Given the fact that consent must precede penetration, it follows in our view that although a woman may have consented to a sexual encounter, even to intercourse, if that consent is withdrawn prior to the act of penetration, then it cannot be said that she has consented to sexual intercourse. On the other hand, ordinarily if she consents prior to penetration and withdraws the consent following penetration, there is no rape."

In 'n beslissing van 'n Kaliforniese appèlhof (Court of Appeal of California, Fifth Appellate District) in *People v Vela* (172 Cal App 3d 237; 218 Cal Rptr 161 (1985)) het die moontlikheid uit die getuienis geblyk dat die 14-jarige klagster, M, aanvanklik tot geslagsomgang met die 19-jarige beskuldigde, V, toegestem het, maar dat sy gedurende die proses van geslagsomgang haar toestemming herroep het en dit aan V meegedeel het. V het hom egter nie onttrek nie en met die geslagsdaad voortgegaan. Terwyl die jurie hulle beslissing oorweeg het, het hulle 'n nota aan die verhoorregter deurgestuur waarin hulle die vraag stel of sodanige optrede van V tot 'n skuldigbevinding aan verkrachting aanleiding sou kon gee. Die verhoorregter het egter nie die jurie se vraag na behore beantwoord nie. In die lig hiervan word 'n herverhoor deur die betrokke appèlhof beveel. In sy uitspraak namens laasgenoemde hof wys regter Best, na 'n analise van voorafgaande gesag in ander VSA-jurisdiksies, wat hierbo uiteengesit is, en na die beslissing van die Kaliforniese SC in *People v Stanworth* (11 Cal 3d 588, 604–605; 114 Cal Rptr 250, 522 P 2d 1058 (1974)) waarin artikel 263 van hulle Strafkode ontleed is en verduidelik word dat "the essential guilt of rape consists in the outrage to the person and feelings of the female". In die lig hiervan het die SC beslis dat seksuele penetrasie van 'n dooie liggaam nie verkrachting kan daarstel nie omdat geen skending (belediging) van haar (die lyk se) gevoelsluwe moontlik is nie. Teen dié agtergrond vat regter Best (172 Cal App 3d 243; 218 Cal Rptr 165) die regsposisie in Kalifornië soos volg saam:

"[T]he essence of the crime of rape is the outrage to the person and feelings of the female resulting from the nonconsensual violation of her womanhood. When a female willingly consents to an act of sexual intercourse, the penetration by the male cannot constitute a violation of her womanhood nor cause outrage to her person and feelings. If she withdraws consent during the act of sexual intercourse and the male forcibly continues the act without interruption, the female may certainly feel outrage of the force applied or because the male ignores her wishes, but the sense of outrage to her person and feelings could hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood . . . Our conclusion that no rape occurs under these circumstances does not preclude the perpetrator from being found guilty of another crime or crimes warranted by the evidence. Consent at the moment of penetration does not give the male a license to commit any act of force upon the female."

In *State v Jones* (521 NW 2d 662 (1994)) moes die SC van South Dakota onder andere beslis oor die vraag of die verhoorregter fouteer het deur te weier om aan die jurie opdrag te gee dat die aanvanklike toestemming deur die klagster, al sou sy later haar toestemming herroep het, die moontlikheid van 'n skuldigbevinding aan verkrachting uitskakel. In sy uitspraak wys regter Amundson daarop dat die nodigheid van dié tipe opdrag steun op gesag in 'n ander jurisdiksiegebied, naamlik op die Kaliforniese saak *People v Vela*, waarna hierbo verwys is, en vervolg:

"This court has never held that initial consent forecloses a rape prosecution and, based on the facts of this case, we choose not to adopt the position of the *Vela* case. Therefore, the trial court did not err by refusing this instruction" (521 NW 2d 672).

Hierdie beslissing van die SC van South Dakota is, sover vasgestel kon word, die eerste waarin die moontlikheid van strafregtelike aanspreeklikheid aan verkragting deur 'n late in die VSA erken is.

In *State v Siering* (35 Conn App 173; 644 A 2d 958 (1994)) het die appèlhof van Connecticut met 'n soortgelyke probleemvraag te doen gekry. Regter O'Connell, wat namens die hof uitspraak lewer, wys daarop dat die betrokke wetgewing in Connecticut nie bepaal dat geslagsomgang by penetrasie voltooi is nie, maar bloot dat die geringste mate van penetrasie voldoende is om geslagsomgang daar te stel (vgl ook *State v Mackor* 11 Conn App 316 319–320; 527 A 2d 710 (1987)). Teen hierdie agtergrond verduidelik hy die regsposisie soos volg:

“We do not construe this to mean that only the initial penetration constitutes intercourse. The defendant's argument would mean that the act that commences intercourse is also the act that simultaneously concludes intercourse. It is axiomatic that statutes are not to be interpreted to arrive at bizarre or absurd results . . . The defendant's construction of the statute would mean that if intercourse is continued by force after the victim withdrew consent, it would not constitute sexual assault unless the victim, upon revoking consent and struggling against the defendant, succeeds in momentarily displacing the male organ, followed by an act of repenetration by the defendant . . . The absurdity of this construction is demonstrated not only by the difficulty involved in the close evidentiary determination required but also because it protects from prosecution a defendant whose physical force is so great or so overwhelming that there is no possibility of the victim's causing even momentary displacement of the male organ. Furthermore, the defendant's argument does not furnish us with terminology to describe the state of continued presence of the male organ in the female organ following initial penetration. The defendant's argument would not permit the nomenclature of sexual intercourse to be applied to that situation” (35 Conn App 182–183; 644 A 2d 961–962).

In 1995 is ook die appèlhof (Court of Appeals) van die deelstaat Minnesota met dié probleem gekonfronteer. In *State v Crims* (540 NW 2d 860 865 (1995)) is naamlik die standpunt ingeneem dat “rape includes forcible continuance of initially-consensual sexual relations”. Die mees onlangse saak in onderhawige verband is dié van 'n Kaliforniese appèlhof (Court of Appeal, First District, Division 4) in *People v Roundtree* (91 Cal Rptr 2d 921 (2000)). In hierdie saak is die Kaliforniese beslissing van 1985 in *People v Vela*, hierbo bespreek, in heroorweging geneem. In sy uitspraak kontrasteer regter Hanlon die beslissings van ander state in die VSA, wat hierbo bespreek is. Hy wys daarop dat artikel 261(a)(2) van die Kaliforniese Strafkode verkragting omskryf as

“an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . where it is accomplished against a person's will, by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person”.

Hy verduidelik vervolgens dat, in die lig van artikel 263 van genoemde Strafkode, “[t]he essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape”.

Teen dié agtergrond konkludeer hy dat die *Vela*-beslissing nie korrek was nie en motiveer:

“The crime of rape . . . is necessarily committed when a victim withdraws her consent during an act of sexual intercourse but is forced to complete the act. The statutory requirements of the offense are met as the act of sexual intercourse is forcibly accomplished against the victim's will. The outrage to the victim is complete” (924).

Uit bogaande oorsig van die ontwikkeling in die gewysdere in die VSA blyk dit dat daar 'n duidelike beweging in die rigting is van erkenning, eerstens, van die reg van

'n party om toestemming tot 'n seksuele aktiwiteit terug te trek en, tweedens, indien die ander party nie daaraan gehoor gee nie, met ander woorde nie onttrek nie, hy hom (of sy haar) aan die pleeg van 'n misdaad, wat die tradisionele verkragting insluit, skuldig kan maak (vgl in die algemeen tav seksuele misdade in die VSA *Torca Wharton's Criminal law* vol 3 (1995) (met 'n 1999-supplement) par 276–292). Uit Engelse gewysdes blyk 'n soortgelyke benadering (*R v Cooper and Schaub* [1994] Crim LR 531 (CA); *Kaitamoki v R* [1984] Crim LR 564 (PC)).

3 Die Suid-Afrikaanse reg

Uit *R v Handcock* 1925 OPD 147 blyk dit dat 'n man wat met haar toestemming met 'n vrou geslagsomgang het nie aan verkragting skuldig is nie, indien hy, nadat sy haar toestemming teruggetrek het, weier om hom te onttrek (vgl *R v M* 1953 4 SA 393 (A) 397–398; Labuschagne “Verkragting deur 'n late?” 1995 *SALJ* 217). Die Suid-Afrikaanse appèlhof het egter nog nie uitsluitel gegee oor die vraag of verkragting deur 'n late, as gevolg van herroeping van toestemming, moontlik is nie. In die lig hiervan sou die eerste stap wees om teen die agtergrond van die algemene beginsels rakende late-aanspreeklikheid in die strafreg wat ons howe ontwikkel het, te oorweeg of verkragting deur 'n late konstrueer- en verantwoordbaar is (vgl ook Labuschagne “Brandstiging deur 'n late” 1983 *De Jure* 61). Die verkrachtingsmisdad is tans nog 'n gemeenregtelike misdaad in Suid-Afrika en geen statutêre plig, wat tot late-aanspreeklikheid aanleiding kan gee, kon in dié verband opgespoor word nie (sien Snyman *Strafreg* (1999) 58–59; Burchell *et al South African criminal law and procedure* vol 1 (1997) 50–51).

Verkragting is hedendaags in Suid-Afrika (nog steeds) 'n eie-liggaamlike misdaad, dit wil sê slegs 'n man wat self die slagoffer met sy geslagsorgaan *per vaginam* penetreer, kan aan verkragting skuldig bevind word. Die stelreël *qui facit per alium facit per se*, dit wil sê dit wat jy deur 'n ander doen word jou toegereken, is gevolglik nie by verkragting van toepassing nie (sien Rabie se bespreking van die Rhodesiese saak *R v D* 1969 2 SA 59 (RA) in 1969 *THRHR* 309 en die Engelse saak *R v Clarkson* [1971] 3 All ER 344 (C-MCA); Snyman *Strafreg* (1999) 273). 'n Ander party wat by die pleeg van verkragting betrokke is, sou slegs as medepligtige skuldig bevind kon word (sien Rabie *Die deelnemingsleer in die strafreg* (LLD-proefskrif Unisa 1989) 429; *S v Williams* 1980 1 SA 60 (A) 63 ev; *S v Mahlangu* 1995 2 SASV 425 (T) 43 47; Burchell *et al* 322–327). 'n Persoon wat 'n beskermings- of toesighouplig teenoor die slagoffer het en wat 'n verkragting van haar oogluikend toelaat, sou insgelyks as 'n medepligtige skuldig bevind kon word (sien Burchell *et al* 47 ev en 326; Snyman “Strafregtelike aanspreeklikheid vir 'n late – opmerkings oor die sistematiese van misdade gepleeg deur 'n late” 1996 *SAS* 333 338–341). Sou die penetrasievereiste by verkragting uit die misdaadomskrywing weggelaat word en slegs by straftoemeting ter sprake kom, sou late-aanspreeklikheid (van seksuele aanranding) volgens die huidige stand van die Duitse reg wel moontlik wees (sien a 177 van die Duitse Strafkode; Lenckner “Das 33 Strafrecht-sänderungsgesetz – das Ende einer langen Geschichte” 1997 *NJW* 2801; Dessecker “Veränderungen im Sexualstrafrecht” 1998 *NSiZ* 1; *S v A* 1993 1 SASV 600 (A) 607 ev; Labuschagne “Aanranding en misdaadkondensering: Opmerkinge oor die strafregtelike beskerming van biopsigiese outonomie” 1995 *De Jure* 367). In die lig van die reël deur ons appèlhof neergelê in *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597, naamlik dat die regsoortuiging van die gemeenskap bepaal of late-aanspreeklikheid in 'n besondere geval regverdigbaar is, sou dit in ieder geval nie veel vindingrykheid van 'n hof verg om late-aanspreeklikheid by verkragting te

konstrueer nie (sien ook *S v A* 1993 1 SA 600 (A) 605–606; Burchell “The role of the police: Public prosecutor or criminal investigator?” 1995 *SALJ* 211; Snyman 1996 *SAS* 333). Sou ’n hof sodanige stap doen, beteken dit nie dat herroeping van toestemming gedurende die proses van geslagsomgang noodwendig tot ’n skuldigebevinding aan verkragting aanleiding sou gee indien die man weier om hom te onttrek nie. ’n Willekeurige handeling is ’n voorwaarde vir strafregtelike aanspreeklikheid in Suid-Afrika, soos trouens in alle beskaafde regstelsels (*S v Johnson* 1969 1 SA 201 (A) 204–205; *S v Chretien* 1981 1 SA 1097 (A) 1104). Uit *R v Dhlamini* 1955 1 SA 120 (T) 121 blyk dit dat iemand wat meganies optree regtens nie willekeurig optree nie en in *R v Ngang* 1960 3 SA 363 (T) 365 verduidelik regter Bresler dat ’n persoon wat “involuntarily and automatically” optree nie strafregtelik aanspreeklikheid kan opdoen nie. Dat ’n dader wat in die proses van geslagsomgang is hom op outomatisme sou kon beroep, sou hy met die handeling voortgaan indien hy versoek word om hom te onttrek, is voor die hand liggend. Dit sal eger in die lig van die feite van elke spesifieke saak beoordeel moet word. Van wesenlike belang in dié verband sou spesifiek ook wees die stadium waarin die dader in die geslagsomgangsproses verkeer het.

4 Konklusie

Die standpunt wat ’n verskeidenheid howe in die VSA in die onlangse verlede in beginsel ten aansien van die vraag of verkragting deur ’n late moontlik is, indien die slagoffer haar toestemming gedurende die proses van geslagsomgang herroep, ingeneem het, bevestig die primêre status van die psigoseksuele outonomie van individue in die strafreg. Die primitiewe penetrasievereiste, al sou dit in ’n aangepaste vorm wees, wat hedendaags nog in ’n verskeidenheid jurisdiksies wêreldwyd as voorwaarde vir aanspreeklikheid by geslagsmisdade gestel word, vorm ’n struikelblok in die weg van sinvolle respektering van die individu se psigoseksuele outonomie in die strafreg. Die strafregtelike uitgangspunt behoort te wees dat die outonomie wat die individu oor die beskikking van sy/haar psigoseksuele integriteit het regtens onverpandbaar is (sien Labuschagne “Die penetrasievereiste by verkragting heroorweeg” 1991 *SALJ* 148; “Heromskrywing van die handeling by geslagsmisdade in Nederland: Beklee die vrou steeds ’n minderwaardige posisie?” 1994 *SALJ* 614; “Die opkoms van die abstrakte penetrasiebegrip by geslagsmisdade” 1997 *SALJ* 461; “Tongsoen as verkragting? Opmerkinge oor die eenaardige konsekwensies van die penetrasievereiste by geslagsmisdade in Nederland” 1999 *SALJ* 738). Aanspreeklikheid weens verkragting deur ’n late kan, by herroeping van toestemming gedurende die daad, tot grootskaalse misbruik aanleiding gee. Dáárop moet die polisie, die aanklaer en die hof voortdurend bedag wees. Die dader sou hom/haar in iedere geval in gepaste omstandighede op outomatisme as verweer kon beroep.

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VONNISSE

SUPERMARKETS AND CUSTOMER SAFETY

Monteoli v Woolworths (Pty) Ltd 2000 4 SA 735 (W)

The facts in *Monteoli v Woolworths (Pty) Ltd* 2000 4 SA 735 (W) were that the appellant had slipped on one of three green beans which a customer had dropped on the floor of the respondent's store, falling and injuring herself. She sued the respondent for damages, alleging that it had failed in its duty to keep the floor of the store reasonably safe for the public using the store. The trial judge found that the appellant had failed to prove that the respondent had been negligent and ordered absolution from the instance. On appeal, a full bench of the Witwatersrand Local Division was divided. The majority, Willis and Labe JJ, dismissed the appeal with costs, finding that the respondent had not been negligent, although for reasons different from those of the trial court. Goldblatt J adopted a minority view: applying the maxim *res ipsa loquitur*, he found that a *prima facie* inference could be drawn that the respondent had been negligent, and the mere fact that a cleaning system existed was not sufficient to negate the inference. The conflicting views of the presiding judges stem primarily from contrasting approaches regarding the effect of a previous decision in the same division, *Probst v Pick 'n Pay Retailers (Pty) Ltd* 1998 2 All SA 186 (W), also a supermarket case, and the role of the *res ipsa loquitur* maxim in establishing negligence. This note will focus on those differences, and seek to establish whether any policy conclusions might be drawn in respect of the liability of supermarkets towards their customers.

Common to both of the opposing approaches is the trite proposition that a plaintiff must prove negligence on a balance of probability (742C). It was common casue that plaintiffs could be assisted by the *res ipsa loquitur* maxim in certain instances, that is, where the plaintiff is not in a position to produce evidence on a particular aspect that, usually, is peculiarly within the knowledge of the defendant (742D–E). While the onus none the less remains with the plaintiff, less evidence will suffice to establish a *prima facie* case, and the law places an evidentiary burden on the defendant to show that the steps which were taken complied with the standards to be expected in the circumstances (742F–G). According to Willis J,

“the maxim of *res ipsa loquitur* can only come into operation where an inference is at least suggested from the evidence produced. . . . The maxim does not place any *onus* on the defendant to explain or rebut anything” (742G–I).

It appears that Goldblatt J would agree (738B–C, having quoted from *Probst* 1998 2 All SA 186 (W) 198*b–d*, with reference to *Ward v Tesco Stores Ltd* 1976 1 All ER 219 (CA), to that effect).

So what gave rise to the difference of opinion? At first blush, the cause appears to be a factual one. According to Goldblatt J, following *Probst*, proof that the appellant had slipped in a spillage on the shop floor, and had fallen, was sufficient to justify the inference that the slippery spillage had remained on the floor longer than was reasonably necessary to discover it and clear it up (737E–G 741D–F). The majority, on the other hand, believed that

“the mere fact that there were three green beans (upon one of which the plaintiff stood and slipped) in close proximity to a large brick pillar at the entrance to the defendant’s food hall does not, in itself, create the inference of negligence on the part of the defendant. The occurrence does not speak for itself; there is nothing in the facts themselves that suggests that the defendant was negligent. In other words, the applicability of the maxim of *res ipsa loquitur* does not arise” (742I–743B).

So, instead of applying the maxim to infer negligence, Willis J held (743C–E) that before an inference of negligence could be drawn, the plaintiff must prove that the defendant, at the time of the accident

- (1) ought to have taken steps to prevent the presence of beans on the floor from occurring; *alternatively*,
- (2) knew, or
- (3) ought to have been aware, of their presence; and
- (4) failed to take reasonable steps to remove the offending items forthwith.

This conclusion is merely a restatement of the test in *Kruger v Coetzee* 1966 2 SA 428 (A) adapted to the circumstances of this case and, as formulated, requires proof of negligence before an inference of negligence can be drawn. This would render the maxim superfluous, for if negligence is proved, then no inference of negligence is required. In our view, the requirements for the operation of the maxim, as set out by the majority, place too stringent a burden on plaintiffs. The majority approach in effect eliminates the use of the maxim in supermarket cases. That surely could not have been the intention.

The real reason for the discrepancy might well lie in other judicial comments. In *Probst* Stegmann J relied on the majority judgment in the English Court of Appeal case *Ward v Tesco Stores Ltd* for the view that mere proof that the plaintiff had slipped would give rise to an inference of negligence (1998 2 All SA 197e–g). After noting that the approach might not, strictly speaking, be logical, Stegmann J went on to say (197g–198d):

“Of this result some may be tempted to repeat the adage that hard cases make bad law. In my judgment, however, the case should rather be seen to illustrate a more positive, and considerably more important, adage, to the effect that the genius of the common law is not logic so much as experience. There is a sound reason of legal policy why the majority view should be followed: it is that in such a case the plaintiff generally cannot know either how long the slippery spillage had been on the floor before it caused his fall, or how long was reasonably necessary, in all of the relevant circumstances (which must usually be known to the defendant), to discover the spillage and clear it up. When the plaintiff has testified to the circumstances in which he fell, and the apparent cause of the fall, and has shown that he was taking proper care for his own safety, he has ordinarily done as much as it is possible to do to prove that the cause of the fall was negligence on the part of the defendant who, as a matter of law, has the duty to take reasonable steps to keep his premises reasonably safe *at all times when the members of the public may be using them* (cf *Alberts v Engelbrecht* [1961 2 SA 644 (T)]). It is therefore justifiable in such a situation to invoke the method of reasoning known as *res ipsa loquitur* and, in the absence of an explanation from the defendant, to infer *prima facie* that a negligent failure on the part of the

defendant to perform his duty must have been the cause of the fall. As explained in *Arthur v Bezuidenhout and Mieny* [1962 2 SA 566 (A)], this does not involve any shifting of the burden of proof on to the defendant: however, it does involve identifying the stage of the trial at which the plaintiff has done enough to establish, with the assistance of reasoning on the lines of *res ipsa loquitur*, a *prima facie* case of negligence on the part of the defendant, so that unless the defendant meets the plaintiff's case with evidence which can serve, at least, to invalidate the *prima facie* inference of negligence on his (the defendant's) part, and so to neutralise the plaintiff's case, judgment must be entered for the plaintiff against the defendant. In this situation the defendant does not have to go so far as to establish on a balance of probabilities that the accident occurred without negligence on his part: it is enough that the defendant should produce evidence which leads to the inference that the accident which caused harm to the plaintiff was just as consistent with the absence of any negligent act or omission on the part of the defendant as with negligence on his part. The plaintiff will then have failed to discharge his onus, and absolution from the instance will have to be ordered."

Of this passage Willis J had the following to say (741G–J):

"Although counsel for both parties took the view in the trial and, initially, during the appeal, that the case of *Probst v Pick 'n Pay Retailers (Pty) Ltd* . . . was a correct reflection of the law and neither expressly abandoned this position, it became clear during the course of argument that the correctness of this judgment is not beyond question. It is not clear whether the learned Judge in that case (Stegmann J) was applying a maxim (*res ipsa loquitur*) or making a rule of policy. Furthermore, in my opinion, the views expressed in that case at 197g–198c go too far. The application thereof may be apposite when considering absolution from the instance at the close of the plaintiff's case. This I need not decide. It must, however, be offensive to policy to find negligence on the part of a defendant by the artificial application of a maxim at the end of a trial when the defendant has given evidence. This is particularly the case where common sense indicates that, upon an overview of the facts as a whole, there probably was none."

It appears to us that Stegmann J did indeed set out a policy in respect of supermarket cases – in respect of when the *res ipsa loquitur* maxim is activated, and the content of the inference – and that this policy reflects the attitude which our courts had adopted up to that time. The negligence lies, not in the failure to clean up the spillage immediately, but in allowing it to remain on the floor for longer than was reasonably necessary to discover it and clean it. Since it was not possible for the plaintiff to know (or prove) how long the spillage had been on the floor, policy dictates that the inference should be drawn as soon as it is shown that the plaintiff has slipped in circumstances where he or she had taken proper care for his or her own safety. In the absence of an explanation from the defendant, who has a legal duty to keep the premises reasonably safe, it is reasonable "to infer *prima facie* that a negligent failure on the part of the defendant to perform his duty must have been the cause of the fall" (*Probst* 197i–j). (In passing, it should be noted that the policy should not be restricted by the words "in circumstances where he or she had taken proper care for his or her own safety". The defendant's negligence does not depend upon the plaintiff's lack of negligence, so similarly, it should not affect the drawing of an inference of negligence. Where a plaintiff fails to take care of him- or herself, the rules governing contributory negligence assist the defendant.)

One must agree with Willis J's assertion that common sense dictates that in the circumstances of the case, the respondent had probably not been negligent. The store had an adequate cleaning system and there is no indication that it was not functioning properly on the day in question. (It was up to the respondent to prove this, which it did not, and this led Goldblatt J to find that the respondent had not

displaced the inference of negligence.) The policy set out by Stegmann J therefore does not produce results which accord with one's sense of justice. Yet the solution offered by Willis J goes too far. Circumstances should therefore be developed in which the *res ipsa loquitur* maxim can function properly.

Hoffmann and Zeffertt *The South African law of evidence* (1988) 551 set out the conditions under which the maxim may be invoked:

"If an accident happens in a manner which is unexplained but which does not ordinarily occur unless there has been negligence, the court is entitled to infer that it was caused by negligence."

It is important to remember that the maxim gives rise to an inference, not a presumption (*MacLeod v Rens* 1997 3 SA 1039 (E)). A presumption need not be the only logical conclusion that can arise, and usually places an onus on the other party to rebut the presumption. Instead, an inference stemming from an application of the *res ipsa loquitur* maxim is a conclusion which is drawn, and must be self-evident from the facts at one's disposal. Only reasonable possibilities can be inferred and a particular conclusion cannot be reached if there is evidence indicating the contrary (1046E-I). If two or more reasonable possibilities exist, then no conclusion can be drawn merely on those facts. Other evidence would have to be presented to indicate which conclusion is more probable. (This was done in *R v Blom* 1939 AD 188 in respect of circumstantial evidence.)

One must agree with the majority that the mere presence of vegetable matter on a shop floor does not constitute *prima facie* evidence of negligence, or put differently, does not warrant an inference of negligence. Such spillages are common, and may occur in a number of ways – through the conduct of shop employees, through customers' conduct (as in the case under discussion) or through other extraneous circumstances, such as a leaking roof. Where it is proved that a shop employee was responsible for the spillage (eg by hacking vegetable matter on to the floor as in *Gordon v De Mata* 1969 3 SA 285 (A), or leaving wet polish on the floor as in *Alberts v Engelbrecht* 1961 2 SA 644 (T)), it is submitted that an inference of negligence can readily be drawn. The conduct in respect of which the inference of negligence is sought to be drawn is the original conduct which created the potential danger. A reasonable inference, in the absence of anything indicating otherwise, would be that the shop employee ought to have foreseen the possibility of someone slipping on the spillage and ought to have taken steps to guard against it.

In the other two instances, however, or where the cause is unknown, greater care ought to be taken. If a shop is to be held liable in damages, then the only delictual conduct in question would be the shop employees' failure to clean up the spillage. Shops ought to foresee that customers might drop items which could constitute hazards to other shoppers, and the mere presence of spillage, in our view, justifies an inference in respect of the first (foreseeability) component of the *Kruger v Coetzee* test for negligence. So ordinarily a shop which does not have a cleaning system in place would fail to meet the first requirement of the test and ought to be found negligent – *res ipsa loquitur*.

Where, on the other hand, a shop has taken steps to deal with the foreseeable harm, the shop's negligence will usually lie in the fact that inadequate steps were taken or that the system was not functioning properly at the time. Such facts do not ordinarily lie within a plaintiff's knowledge. While it is conceded that the shop's negligence is not an inevitable conclusion, or the only reasonable one, there is much to be said for requiring the shop to present evidence which would negate such a conclusion. After all, the shop is in a position to produce the best evidence regarding

the incident, not the plaintiff. Since this is an evidentiary burden only (742F), this should not be too difficult to discharge. It is submitted that public policy favours this alternative over the other option, that is, that a plaintiff would have to prove that the shop was, or ought to have been, aware of the spillage and failed to take steps to guard against it. If this is not the case, plaintiffs would have great difficulty in proving claims against shops, even where the shops are negligent.

Shops should be encouraged to enhance consumer safety, but the impact of the majority view will be not to do so. In our view, when balancing the four policy considerations influencing an assessment of negligence – the degree of risk created, the gravity of the consequences, the utility of the conduct and the burden of eliminating the risk (Van der Walt and Midgley *Delict principles and cases* (1997) I *Principles* para 105), it is better to err on the side of the consumer. In any event, shops are in a far better position to deal with the loss allocation in such instances for, unlike the customers, they are in a position to insure against such events.

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**ONGEORLOOFDE VERVREEMDINGS
EN ARTIKEL 32 VAN DIE INSOLVENSIEWET**

**Lane v Dabelstein
1999 3 SA 150 (HHA)**

1 Die partye

Ene Holz is 'n besigheidsman van Grosshandsdorf, Duitsland. Hy het hierdie aansoek gebring in belang van homself, Heick, 'n besigheidsman van Hamburg, Duitsland en 'n maatskappy, Rekur Kliniek van Keulen, Duitsland. Na hulle sal as die applikante verwys word.

Die eerste tot elfde respondente is almal verwant en woonagtig in Duitsland. Die twaalfde en dertiende respondente is albei Duitse maatskappye wat in Hamburg gesetel is. Die eerste respondent is die besturende direkteur van die genoemde maatskappye. Gerieflikheidshalwe word na die eerste tot dertiende respondente as die “Dabelsteins” verwys, alhoewel hulle nie altyd gesamentlik opgetree het nie. Die veertiende respondent, prokureurs Fairbridge, Ardene & Lawton, se aanvanklike opponering is teruggetrek deur 'n kennisgewing wat behoorlik geliasseer is.

2 Feite

Die feite wat die agtergrond van die aansoek vorm, het betrekking op die aktiwiteite van Harksen, 'n Duitse burger. Harksen en sy vrou was vir 'n geruime tyd in Kaapstad woonagtig. Sy boedel is op 16 Oktober 1995 gesekwestreer. Die kurators is voorlopig aangestel om sy insolvente boedel te administreer. Volgens Holz (die

applikant) het die Dabelsteins (die respondente) sowat DM 5,8m by Harksen (die insolvent) in sy hoedanigheid as beleggingsadviseur belê. Die belegging is gemaak voordat Harksen na Suid-Afrika gevlug het om arrestasie in Duitsland in November 1993 te keer. Aangesien Harksen versuim het om terugbetaling aan die Dabelsteins te maak, het hulle 'n aksie teen hom aanhangig gemaak (saakno 3433/1994). Die saak is op 31 Maart 1994 geskik toe Harksen onderneem het om DM 3,5m aan die Dabelsteins te betaal. Hy het die bedrag inderdaad ook by die veertiende respondent in trust vir die Dabelsteins inbetaal. Dit was ses maande voor die sekwestrasie van Harksen se boedel. Holz het beweer dat Harksen se skulde sy bates toe reeds oorskry het. Die betaling het derhalwe die uitwerking gehad dat die Dabelsteins bo die ander skuldeisers van Harksen bevoordeel is.

Soortgelyke oorwegings het toepassing gevind met betrekking tot 'n verdere betaling van DM 500 000 aan die Dabelsteins op 23 Augustus 1995. Dit het gedien as 'n *quid pro quo* omdat die Dabelsteins ingestem het tot die opheffing van 'n voorlopige sekwestrasiebevel teen Harksen se boedel.

Vervolgens het Harksen gehandel op advies van sy prokureurs en het hy die voorlopige kurators (hierna die kurators) gevra om die betaling tersyde te laat stel as 'n onbehoorlike vervreemding. Aanvanklik het die kurators gemeen dat die versoek geregverdig was. Dit word gestaaf deur 'n brief gedateer 26 Februarie 1996 en geadresseer aan prokureurs Kurz van die veertiende respondent (wat sy opponering teruggetrek het). In hierdie brief is beweer dat die betalings aan die Dabelsteins kragtens artikel 29 of 30 van die Insolvensiewet 24 van 1936 tersyde gestel kon word. Hulle het dus die betaling van DM 4m plus rente geëis. Niks het eger van hierdie eis gekom nie.

Op grond van 'n brief gedateer 31 Januarie 1997 van die prokureurs van die kurators aan die prokureurs wat namens die applikante optree, het dit voorgekom dat die kurators onwillig geword het om met hierdie aksie teen die Dabelsteins voort te gaan omdat hulle nie seker was of hulle op die meriete sou slaag nie. Boonop het hulle nie voldoende fondse ontvang om hulle in staat te stel om die beoogde litigasie te finansier nie. Verdere korrespondensie tussen die partye het geen litigasie opgelewer nie. Die kurators se versuim van twee jaar het die applikante tot die gevolgtrekking laat kom dat hulle besluit het om nie meer 'n aksie in te stel nie. Gevolglik het die applikante besluit om op grond van artikel 32 van die Insolvensiewet op te tree en die aksie teen die Dabelsteins in te stel. Om dit te kan doen, moes die applikante sekuriteit stel om die kurators teen alle koste in die geding te vrywaar. (Hulle moes maw skadeloosstelling waarborg.) Hulle prokureur, De Rooy, het namens hulle sekuriteit gestel. Dit was in tyd en bedrag 'n onherroepbare en onbeperkte skadeloosstelling. Nadat die applikante kennis geneem het van ontevredenheid oor die genoegsaamheid van die sekuriteit, het die applikante self ook sodanig sekuriteit gestel en dit uitdruklik aan die Suid-Afrikaanse reg onderworpe gemaak.

Aangesien die Dabelsteins almal *peregrini* (dit is persone wat buite die jurisdiksie van die hof val) was, was dit noodsaaklik om op geld of ander bates wat aan hulle behoort het beslag te lê sodat die hof jurisdiksie oor die saak kon vestig en/of herbevestig. In hierdie verband is alle fondse wat deur die veertiende respondent namens die Dabelsteins in trust gehou is, geïdentifiseer, tesame met die Dabelsteins se eis teen die insolvente boedel van Harksen.

Vervolgens het die applikante by die Provinsiale Afdeling Kaap die Goeie Hoop voor waarnemende regter Viljoen *ex parte* (dit is sonder kennisgewing aan enige party, ook nie aan die voorlopige kurators nie) aansoek gedoen om

- (a) verlof om kragtens artikel 32 van die Insolvensiewet 'n aksie in te stel om die vervreemding, naamlik die betaling van geld aan die respondente, tersyde te laat stel; en
- (b) beslaglegging *ad fundandam vel confirmandam jurisdictionem* van sekere fondse wat in trust gehou word vir die respondente en hul eis teen die insolvente boedel.

'n Bevel *nisi* met hierdie strekking is toegestaan. 'n *Interim*-beslaglegging van hierdie eis is gemaak en die veertiende respondent is met 'n interdik belet om die trustfondse te gebruik, hangende die keerdatum van die bevel *nisi* wat toegestaan is.

3 Respondente se verweer

Die argumente wat die respondente geopper het, was die volgende:

- (a) Die applikante het versuim om 'n volledige blootlegging van alle relevante feite te maak. Hulle het ook irrelevante, kwaadwillige en skandalige verklarings gemaak en daarby probeer om op 'n onbehoorlike wyse en wel volgens 'n *ex parte* aansoek regshulp te kry.
- (b) Die aansoek is voortydig aangesien die tweede vergadering van skuldeisers nog nie plaasgevind het nie. Sodoende sal die applikante onbehoorlik bo die ander skuldeisers in die insolvente boedel van Harksen bevoordeel word.
- (c) Op 3 April 1998 het 'n ander groep Duitse skuldeisers by name "Hülse-Reutters" ingevolge artikel 18(3) van die Insolvensiewet verlof van die hof verkry om namens die kurators dagvaarding teen die respondente uit te reik op dieselfde feite as die huidige aansoek.
- (d) Die respondente se eis teen die insolvente boedel van Harksen is nie vatbaar vir beslaglegging deur die kurators in litigasie tussen die kurators en die respondente nie.
- (e) Geen *prima facie*-saak teen die respondente is uitgemaak nie want die betwiste vervreemding was gemaak kragtens 'n hofbevel wat behoorlik verkry is en nie tersyde gestel kan word nie.
- (f) Die kurators is steeds slegs voorlopig aangestel en dus het hulle ingevolge artikel 18(3) van die Insolvensiewet die toestemming van die hof nodig voor die aksie ingestel kan word. Aangesien die kurators in gebreke gebly het om toestemming te verkry, is die aansoek defektief.
- (g) Dit sal meer gerieflik vir sowel die applikante as die respondente wees indien die verrigtinge in Duitsland in plaas van Suid-Afrika ingestel word. Die Kaapse Hoë Hof is nie die geskikste forum om hierdie litigasie in te voer nie.
- (h) Die applikante het versuim om die kurators behoorlik te vrywaar teen alle kostes in die geding. Hierby ingesluit is die kostes waarvoor die insolvente boedel aanspreeklik sal wees indien die aksie teen die respondente nie slaag nie.
- (i) By wyse van die bogenoemde skikkingsooreenkoms met Harksen het die respondente te goeder trou afstand gedoen van eiendom, sekuriteit en regte wat hulle teen Harksen, sy vrou en ander entiteite gehad het. Hulle is dus nie verplig om enige bates of voordele terug te gee tensy die kurators hulle ingevolge artikel 33(1) van die Insolvensiewet skadeloos gestel het nie.

4 Regsvrae

Die twee vrae voor die hof was derhalwe:

- (a) of verlof van die hof kragtens artikel 18(3) van die Insolvensiewet 'n voorvereiste is vir die bring van 'n aansoek ingevolge artikel 32(1)(b) van die Wet; en indien nie
- (b) of die skadeloosstelling wat deur die aplikante aangebied is, voldoen het aan die voorvereiste wat deur artikel 32(1)(b) van die Wet gestel word.

5 Bespreking

5.1 Toepassing van artikel 18(3) van die Insolvensiewet

In Engels lui artikel 18(3) soos volg:

“A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct.”

Regter van Zyl meen die woorde “or for the purpose of obtaining such authority” onverstaanbaar is in die konteks waarin hulle voorkom. Dit is alombekend dat die Afrikaanse teks van die Wet die getekende teks is. Die woorde wat in hierdie teks in artikel 18 verskyn is:

“'n Voorlopige kurator het die bevoegdheid en verpligtinge van 'n kurator soos hierdie wet bepaal, behalwe dat hy sonder magtiging van die hof geen ander regsgeding mag instel of verdedig nie as om sodanige verlof te verkry en dat hy sonder magtiging van die hof of van die Meester geen goed wat aan die betrokke boedel behoort, mag verkoop nie. Sodanige verkoping moet verder voorafgegaan word deur kennisgewings en is onderworpe aan die voorwaardes wat die Meester mag voorskrywe.”

Dit is my mening dat die wetgewer hiermee bedoel het dat 'n voorlopige kurator in geen geval *sonder* die toestemming van die hof 'n regsgeding mag instel of verdedig nie. Maar hoe sal hy die toestemming verkry? Tog deur 'n aansoek voor die hof te bring. Sy bevoegdheid om sodanige toestemming te vra is onbeperk. Waarskynlik is die woorde in die artikel ingevoeg omdat die wetgewer bedoel het dat “regsgeding” 'n wye betekenis moet dra.

Die volgende vraag wat die regter vra is waarom die wetgewer, wat die verskyningsbevoegdheid van die voorlopige kurator betref, net toestemming van die hof vereis, terwyl, wat die bevoegdheid van die voorlopige kurator met betrekking tot die verkoop van bates van die boedel betref, die toestemming van die hof óf die meester voldoende is. Klaarblyklik het hierdie bepaling die praktiese effek van 'n verkoop van bates as motivering. Die meester het 'n beter begrip van die omvang en omstandighede van die insolvente boedel as die hof. Die meester kan derhalwe 'n goeie oordeel vel met betrekking tot die verkoop al dan nie van bates. Volledige inligting rakende die boedel is tot sy beskikking *via* die verslag van die kurator, notules van vergaderings en ondervragings, ensovoorts. Om toestemming by die meester te kry vir die verkoop van bates, veral in uiters dringende gevalle (soos by bederfbare produkte, lewende hawe en effekte wat op die aandelebeurs verhandel word) is makliker en vinniger.

In hul verweer het die respondente gesteun op die beslissing van regter Traverso in *Lane NO v Harksen* 1998 4 SA 7 (K) te dien effekte dat die skuldeisers wat

kragtens artikel 32(1)(b) in die naam van die voorlopige kurators optree die toestemming van die hof nodig het om hul beoogde verrigtinge te begin. Regter Traverso het bevind dat artikel 18(3) net een doel het en dit is om die regte en belange van die algemene liggaam van skuldeisers te beskerm. Dit is inderdaad so. Vir hierdie stelling is ondersteuning gevind in die beslissing van *Harrington v Fester* 1980 4 SA 424 (K). Ek stem egter met regter Van Zyl saam om te verskil met die *ratio* van regter Traverso waar laasgenoemde onder andere sê:

“It is in my view fallacious to argue that where a creditor is by means of a statutory provision *obliged* to bring legal proceedings *in the name of the provisional trustee* his or her powers will not be curtailed in exactly the same manner as that of the provisional trustee” (162; eie beklemtoning).

Artikel 32 handel oor die verrigtinge om ongeoorloofde vervreemdings ter syde te stel. Artikel 32 lui soos volg:

“(1)(a) ’n Geding tot vernietiging van ’n vervreemding van goed kragtens artikel 26, 29, 30 of 31, of tot invordering van skadevergoeding of ’n boete kragtens artikel 31, kan deur die kurator ingestel word.

(1)(b) As die kurator in gebreke bly om so ’n geding in te stel, dan kan ’n skuldeiser dit namens die kurator instel, nadat hy die kurator teen alle koste in die geding gevrywaar het.”

Regter Van Zyl wys daarop dat wanneer ’n kurator ingevolge artikel 32(1)(b) optree, hy dit vir sy eie voordeel doen en nie vir die voordeel van die algemene liggaam van skuldeisers nie. Dít word duidelik gestel deur artikel 104(3) van die Insolvensiewet:

“As ’n skuldeiser kragtens subartikel (1) van artikel 32 ’n geding ingestel het om kragtens artikel 26, 29, 30 of 31 die vervreemding van goed tot niet te maak of om kragtens artikel 31 skadevergoeding of ’n boete in te vorder, dan kan ’n skuldeiser wat nie aan daardie geding deelgeneem het nie, geen voordeel trek uit geld of die opbrengs van goed wat as gevolg van daardie geding verkry is nie, voordat die vordering en koste van elke skuldeiser wat aan bedoelde geding deelgeneem het, ten volle betaal is.”

Die regter is van mening dat daar geen sprake is van ’n *concursum creditorum* wat ’n rol speel wanneer verrigtinge volgens artikel 32(1)(b) voor die hof gebring word nie. Die skuldeiser wat die verrigting volgens hierdie artikel inisieer, doen dit op eie risiko. As hy suksesvol is, verkry hy alleen die voordele. Na my mening is hierdie interpretasie korrek.

Die hof stem saam dat die skadeloosstelling van artikel 32(1)(b) die plek geneem het van die artikel 18(3)-beskerming en dit oorbodig maak. Dit is inderdaad so. Die hoofdoelwit van artikel 18(3) is om die skuldeisers te beskerm teen aanspreeklikheid vir kostes aangegaan en verkwisting van bates, veroorsaak deur ’n kurator se ondeurdagte litigasie. Artikel 32(1)(b) bring mee dat sulke kostes nie op die skuldeisers van die insolvente boedel afgewentel word nie. As die aksie nie slaag nie, “verloor” die boedel, kurator en ander skuldeisers niks. As die aksie slaag, “wen” hulle ook niks nie (tensy iets oobly na die appliserende skuldeiser se eis en koste ten volle betaal is), want die kurator het niks gedoen of sou in elk geval niks gedoen het nie en dan was die bate in elk geval vir die ander skuldeisers verlore.

Regter Van Zyl beslis dat die applikant nie verlov van die hof benodig as voorvereiste vir die instel van die aksie kragtens artikel 32(1)(b) nie. Ek stem saam. Daarom dink ek dit was nie vir die hof nodig om verder te gaan nie en te verklaar dat as dit wel nodig is, daar volgens die relevante feite en omstandighede ’n behoorlike saak uitgemaak is vir die toestemming wat gesoek word, en dat die toestemming vir sover dit nodig is, toegestaan word.

5.2 Die genoegsaamheid van die skadeloosstelling

Dit is die enigste geskilpunt wat deur die kurators geopper is in die aansoek vir die tersydestelling van die bevel *nisi*. Die respondente het met die kurators geassosieer deur te beweer dat die skadeloosstelling wat die applikante daargestel het nie volgens artikel 32(1)(b) van die Wet voldoende was nie. Soos reeds genoem, is die doel van die skadeloosstelling om te verseker dat die kurators nie aanspreeklik sal wees vir enige kostes in die aksie wat die skuldeisers in die naam van die kurators voer nie.

Artikel 32(1)(b) vereis bloot dat 'n skuldeiser wat die verrigtinge in die naam van die kurator instel laasgenoemde skadeloos moet stel teen alle koste daarvan. Regter Van Zyl wys daarop dat daar geen voorsiening in artikel 32 of selfs elders in die Insolvensiewet gemaak is wat verwys na die aard van die skadeloosstelling wat voorsien word nie. Heel duidelik moet dit egter voldoende wees om die koste wat uit die verrigtinge voortspruit en waarvoor die kurators aanspreeklik sal wees, te dek. Die hof gee die volgende riglyn: As die kurator en die applikant ooreen kan kom oor 'n vasgestelde kwantifisering van die voorsiene koste, sal die skadeloosstelling die vasgestelde bedrag moet dek. Is hulle nie in staat om dit te doen nie, kan 'n algemene of selfs 'n onbeperkte skadeloosstelling vereis word.

Die hof is van mening dat, alhoewel dit nie in die wet gedek word nie, die kurators tevrede moet wees dat die skadeloosstelling voldoende is vir die doeleindes van artikel 32(1)(b)-verrigtinge. Of 'n besondere skadeloosstelling voldoende is of nie, sal afhang van 'n objektiewe evaluasie van die aard, omvang en effek daarvan. Dit sal gewoonlik vasgestel word deur 'n bestudering van die dokument waarin die terme vervat is. As dit *ex facie* die dokument nie duidelik is of die skadeloosstelling voldoende is vir die kurator om op te steun nie, kan hy verby die dokument kyk vir die bewys van die genoegsaamheid daarvan. As 'n persoonlike skadeloosstelling byvoorbeeld gegee word deur 'n skuldeiser wat die verrigtinge kragtens artikel 32(1)(b) wil instel, kan die kurator dit verwerp op grond van die skuldeiser se ontoereikende finansiële posisie.

Die regter wys ook daarop dat die Insolvensiewet geensins spesifiseer wanneer, waar en op watter manier die skadeloosstelling uitvoerbaar moet wees nie. Volgens hom is daar geen suggestie dat dit onmiddellik uitvoerbaar moet wees nie. Hy meen tereg dat vir die uitvoerbaarheid van die skadeloosstelling 'n redelike tyd voldoende is. Dit beteken of impliseer dat die applikante hul verpligting ingevolge die skadeloosstelling moet uitvoer binne 'n redelike tyd nadat hulle sodanig kennis vanaf die kurator gekry het. Wat 'n redelike tyd is, sal volgens die hof afhang van die feite en omstandighede van elke geval. Ek stem saam.

Die regter sê dat dieselfde oorwegings toepassing sal vind met betrekking tot die plek waar en die wyse waarop die skadeloosstelling uitgevoer moet word. Hy is van oordeel dat dit nie saak maak waar en hoe die skadeloosstelling uitvoerbaar is nie, solank die applikante in staat is om aan hul verpligtinge te voldoen binne 'n redelike tyd nadat dit van hulle gevra word. Die hof meen dat die gesamentlike en volledige skadeloosstelling daargestel deur die applikante en hul prokureur genoegsaam is vir die doeleindes van beskerming van die kurators.

Wat egter onthou moet word is dat die applikante Duitse burgers is wat in Duitsland woonagtig is. Regter Van Zyl voorsien geen probleme met die bykomende sekuriteit wat deur die Duitse applikante gestel is nie. Na beoordeling daarvan kom hy tot die gevolgtrekking dat dit as genoegsaam aanvaar kan word. Faktore in die

skadeloosstellingsonderneming van die Duitse applikante wat die regter waarskynlik beïnvloed het, is die volgende:

- (a) 'n Onderneming dat die betaling van die skadeloosstelling sal geskied binne tien dae vanaf ontvangs van 'n skriftelike versoek vir die volle bedrag verskuldig.
- (b) Die onherroepbaarheid en onbeperktheid van die onderneming vir skadeloosstelling.
- (c) Die aanvaarding in die onderneming vir skadeloosstelling dat die Suid-Afrikaanse reg toepassing sal vind.
- (d) Die aanvaarding in die onderneming vir skadeloosstelling dat die Kaapse Hoë Hof jurisdiksie sal hê.
- (e) Die aanvaarding in die onderneming vir skadeloosstelling dat 'n sertifikaat van die Griffier van die Kaapse Hoë Hof met betrekking tot die koste en uitgawes as 'n likiede dokument beskou sal word wat die effek het van 'n *vollstreckbare Urkunde* in die Duitse reg.
- (f) Die rugsteun van die skadeloosstelling deur 'n aantal Duitse finansiers en besigheidslui wie se finansiële sterkte nie bevraagteken is nie.

5.3 *Die versuim om 'n volle blootlegging van relevante feite te maak*

Volgens die respondente het net die eerste, derde, twaalfde en dertiende respondent voordeel getrek deur die betaling wat ingevolge die skikking tussen Harksen en die respondente op 31 Maart 1994 gemaak is. Hulle verklaar ook dat die DM 500 000 wat later aan die respondente betaal is van 'n ander bron as Harksen gekom het. Die respondente het voorgestel dat bogenoemde feite wesenlik was en deur die applikant blootgelê moes word. Die hof het nie hiermee saamgestem nie. Die feite was in die woorde van die hof van belang, maar kon nie as substansieel in die algemene konteks van die saak van die applikant beskou word nie. Regter Van Zyl meen daar is geen meriete in die verweer nie.

5.4 *Die toelaatbaarheid van artikel 32-verrigtinge voordat die tweede vergadering van skuldeisers gehou is*

Die respondente het gesuggereer dat die aansoek voortydig was aangesien die tweede vergadering van skuldeisers nog nie plaasgevind het nie. Hulle het beweer dat die applikante 'n onregverdige voordeel bo die ander skuldeisers in Harksen se boedel het. Volgens die respondent het baie skuldeisers nog nie 'n kans gehad om hul eise teen die boedel van Harksen te bewys nie en sou hulle moes wag tot die tweede vergadering. Sulke skuldeisers behoort die geleentheid te hê, word geargumenteer, om die kurators aanwysings te gee om 'n aksie teen die respondent in te stel of in die alternatief met die applikante saam te gaan om die aksie te bring.

Die regter is van mening dat hierdie verweer ook geen meriete het nie. Tereg wys die regter daarop dat daar geen bepaling in die Wet is dat sulke verrigtinge slegs na die tweede vergadering van skuldeisers ingestel mag word nie. Die kurators het daarby ook uitdruklik besluit om nie met die eis teen die respondente voort te gaan nie. Hy verklaar ook dat ander skuldeisers in elk geval te enige tyd met die applikante in die aksie gevoeg kan word. In elk geval, verder, kan die kurators nie deur die skuldeisers gedwing word om 'n aksie ingevolge artikel 32 in te stel nie. Dit is korrek. Dit is voorwaar jammer vir daardie skuldeiser wat moontlik nie van die verrigtinge weet nie of te laat daarvan uitvind. Dit beklemtoon net dat dit op die

skuldeiser se skouers rus om die sekwestrasieproses van die boedel nougeset te volg en dat hy moet beseftig dat die onus op hom is om die beste daarvan te maak.

Die hof wys ten slotte daarop dat die respondente nie in hul stukke aangedui het wie hierdie skuldeisers kan wees nie. Dit is suiwer spekulatief of hulle by die applikante sou wou aansluit en hul sou wou onderwerp aan die risiko dat die aansoek kan faal.

5 5 *Die effek van die Hülse-Reutters-aansoek*

Soos reeds genoem, het Hülse-Reutters op 3 April 1998 ingevolge artikel 18(3) verlot van die hof ontvang om kragtens artikel 32(1)(b) verrigtinge teen die Dabelsteins in te stel. Die respondente se verweer was vervolgens dat dit regtens ontoelaatbaar en onhoudbaar is om twee aksies tussen dieselfde partye en op dieselfde feite vir dieselfde remedie te hê. Die respondente het aangevoer dat geen skuldeiser blootgestel moet word aan die gevaar van sulke konkurrente aksies nie. Dié verweer word ook verworp.

Regter Van Zyl wys daarop dat die kurator van Harksen se boedel reeds met verrigtinge begin het om die Hülse-Reutters-prosedure op grond van onreëlmatigheid tersyde te laat stel. Laasgenoemde se skadeloosstelling was ná die applikant s'n gegee. Derhalwe het die applikant volgens die regter prioriteit. Aan die ander kant wil die regter nie spekulêr oor die vooruitsigte van sukses van die kurator om die Hülse-Reutters-prosedure tersyde te laat stel nie, en ook nie oor die vraag wie eerste was om *genoegsame* skadeloosstelling te stel nie. Dan sê hy, ten beste vir Hülse-Reutters en ten slegste vir die applikante, sal daar 'n keuse gemaak moet word tussen hul botsende aansoeke. Wie hierdie keuse moet maak en wanneer dit gemaak moet word, word nie genoem nie. Die regter verklaar net dat sodra die een of die ander suksesvol is, daar geen konkurrente aksies is nie. Die onsuksesvolle skuldeiser behoort geregtig te wees om met die suksesvolle skuldeisers in die aksie gevoeg te word, met die volle konsekwensies van so 'n voeging ingevolge artikel 104(3) van die Insolvensiewet.

5 6 *Die beslaglegbaarheid van die respondente se eis*

Die basis van hierdie verweer is dat die eise van die respondente teen die boedel van Harksen nie deur die kurators in beslag geneem kan word nie, ten minste nie vir doeleindes van litigasie tussen die voorlopige kurators en die respondente nie. Die respondente het aangevoer dat die eise nie vatbaar is vir beslaglegging as bates nie omdat dit eise teen die kurators is. Omdat die kurator die belange van die skuldeisers verteenwoordig en pligte verskuldig is aan die bewese skuldeisers as algemene liggaam, kan hulle nie eise teen die boedel wat hulle administreer in beslag neem vir die doel om jurisdiksie te vestig of bevestig nie.

Die hof wys tereg daarop dat die kurators in die aansoek bloot nominaal is en die applikante nie in die hoedanigheid van die algemene liggaam van skuldeisers optree nie. Die hof meen dat die eise van die respondente teen die insolvente boedel van Harksen duidelik vir beslaglegging vatbaar is. Hierby ingesluit is die eis van DM 3,5 miljoen wat uit die skikkingsooreenkoms tussen die respondente en Harksen op 31 Maart 1994 ontstaan het.

5 7 *Het die applikante 'n prima facie saak uitgemaak?*

Die submissie dat daar geen *prima facie* saak teen die respondente uitgemaak is nie, is primêr gebaseer op die feit dat die vervreemding wat die applikante van plan is om tersyde te laat stel, 'n vervreemding kragtens 'n bevel van die hof was. Die

argument is dat daar geen saak uitgemaak is vir tersydestelling van die bevel op grond daarvan dat dit op 'n onbehoorlike manier verkry is nie. Net soos enige ander bevel, bly die bevel geldig en bindend totdat dit tersyde gestel word. Die respondent verwys vervolgens na die definisie van “vervreemding” uit hoofde waarvan 'n vervreemding tot voldoening aan 'n hofbevel uitdruklik uitgesluit word. Verder voer die respondente aan dat geen saak uitgemaak is in die applikant se funderende verklaring dat daar samespanning was met 'n oogmerk om bedrog teen Harksen se skuldeisers te pleeg nie.

Op laasgenoemde argument antwoord die applikante dat hulle nie op samespanning (a 31 Insolvensiewet) steun nie, maar op 'n vernietigbare voorkeur (a 29) of onbehoorlike voorkeur (a 30). Volgens hulle was die ooreenkoms, om op die eerste argument te antwoord, tussen die respondent en die insolvent nie *bona fide* nie. Beide partye het geweet dat Harksen ten tye van die ooreenkoms effektief insolvent was.

Wat die vervreemding ingevolge 'n hofbevel betref, verwys die hof na *Sackstein en Venter NNO v Greyling* 1990 2 SA 323 (O) 327 waar die volgende beslis is:

“Dit kom my voor dat die wetgewer met die uitsluitende bepalings in artikel 2 beskerming wou bied aan die persoon aan wie die regte oorgedra is. 'n Skuldeiser wat sy vordering in die hof afdwing het en lewering van 'n bate ontvang het ter voldoening aan die bevel wat in sy guns gegee is, behoort die sekerheid te hê dat die toedrag van sake nie versteur sal word deur die latere insolvensie van sy skuldenaar nie. Indien dit anders sou wees, sou dit aanleiding kon gee tot regsonsekerheid. Die bewoording wat gebruik is dui ook nie daarop dat die beskerming van toepassing is waar die hofbevel verkry is nadat 'n *bona fide* skikkingsooreenkoms aangegaan is nie. Dit kan egter nie die bedoeling van die wetgewer gewees het om die beskerming ook te bied aan die skuldeiser wat op bedrieglike wyse saamwerk met die skuldenaar om 'n bevel te verkry ten einde ander skuldeisers te benadeel nie. . . Dit mag by die verhoor aan die lig kom dat verweerderes en die insolvent bedrieglik opgetree het, in welke geval verweerderes haar nie op die beskerming van die uitsonderingsklousule sal kan beroep nie. Ek kan nie saamstem . . . dat die hofbevel eers tersyde gestel moet word nie . . . Afwesigheid van bewerings van bedrog of kwade trou maak ook na my mening nie die besonderhede van vordering eksipieerbaar nie. Die bewerings word gemaak dat die oordrag van die bates vervreemding van bates was. Die getuiens kan aantoon dat nieteenstaande die hofbevel die oordrag van bates wel vervreemding binne die bepalings van die Insolvensiewet was. Getuienis kan dus die skuldoorsaak wat pleit is uitmaak en die pleitstuk is in so 'n geval nie eksipieerbaar nie.”

Regter Van Zyl meen tereg dat die *ratio* in die bogenoemde saak korrek is en verwerp die respondent se bewering dat geen *prima facie* saak uitgemaak is nie. Ek stem saam. Ek wil my vereenselwig met die bevinding van die hof in *Muller v John Thompson* 1982 2 SA 86 (D) 92 waarin die volgende gesê is:

“*Prima facie*, if an insolvent, in plainly insolvent circumstances, were to make an arrangement which would constitute what would in the ordinary course of events be a voidable disposition clearly preferring one creditor above others, the fact that it had by consent been made an order of Court would seem to open the door to considerable abuse if that were to be regarded as excluding any payment, or other disposition made in compliance with the order, from attack under the Insolvency Act.”

In lyn hiermee is ook die volgende uitlating van die hof (92):

“This may not be a complete account of the matter if it is correct to say, for example, that a consent order, or a payment made in compliance with a consent order, is protected. If, however, the consent order is the result of a *bona fide* compromise, . . . that is still not inconsistent with the reason I have suggested for the existence of the protection from attack of dispositions in compliance with orders of Court.”

Dit is hier van belang om te wys op die verslag van die Regskommissie *Project 63: Review of the Law of Insolvency Draft Bill* vol 2 (2000). Daarin word die omskrywing van die begrip “disposition” (vervreemding) sodanig gewysig dat ’n vervreemding ter voldoening aan ’n bevel van die hof nie meer as uitsondering kwalifiseer nie. Dit is egter my mening dat die hantering van ’n bevel van die hof as uitsondering op ’n “vervreemding” in bogenoemde twee sake en veral in die *Sackstein*-saak voldoende is om hierdie soort gevalle te bereg. Ek meen dat so ’n uitsondering tog in die definisie van “vervreemding” moet voorkom, ter wille van ’n skuldeiser wat *bona fide* en nougeset sy sake bedryf, sodat hy regsekerheid kan hê dat die toedrag van sake nie deur die latere insolvensie van sy skuldenaar versteur sal word nie. So ’n benadering plaas nie ’n swaarder las op die kurator van ’n insolvente boedel nie. Die kurator hoef slegs te bewys dat die skuldeiser en die insolvent bedrieglik opgetree het om ’n bevel te verkry ten einde ander skuldeisers te benadeel, in welke geval die skuldeiser hom nie op die beskerming van die uitsonderingsklousule sal kan beroep nie.

5 8 Die gerief van die forum

Die regter meen dat die Dabelsteins nie die jurisdiksie van die hof verwerp nie. Die bewering wat gemaak word, is dat die meeste van die rolspelers, met die uitsondering van die kurators, Duitse burgers is. Dit sal dus geriefliker wees indien die verrigtinge in Duitsland eerder as Suid-Afrika gehou word. Die hoë koste vir die Dabelsteins en die ander Duitse partye is aangevoer as die hoofrede vir die bewering. Hy wys daarop dat die applikante (Duitse skuldeisers) hierdie hof gekies het om hul aksie in te stel. Hulle het hul verder aan die hof se jurisdiksie en die Suid-Afrikaanse reg onderwerp soos blyk uit die skadeloosstelling wat hulle voorsien het. Verder is Harksen se boedel deur hierdie hof gesekwestreer en die kurators is amptenare van hierdie hof. Die regter sê verder dat hy reuse probleme voorsien indien die saak na ’n Duitse hof oorgeplaas word vir beregting volgens die Suid-Afrikaanse reg. Regter Van Zyl is van oordeel dat die verweer geen meriete het nie. Ek stem saam. Die werkswyse wat die applikante gevolg het is in lyn met die prosedure soos voorgestel word in die wetsontwerp vir transnasionale insolvensies (sien Cross-Border Insolvency Act 4 van 2000 SK 20862 Feb 2000).

5 9 Die skadeloosstelling ingevolge artikel 33(1)

Artikel 33(1) van die Insolvensiewet lees soos volg:

“Iemand wat as vergoeding vir ’n vervreemding wat kragtens artikel 26,29,30 of 31 tot niet gemaak kan word, goed of sekuriteit wat hy besit het, afgestaan het of ’n reg teenoor ’n ander persoon verloor het, is, as hy te goeder trou gehandel het, nie verplig om enige goed of ander voordeel wat hy deur die vervreemding verkry het, terug te gee nie, tensy die kurator hom weens die afstand van daardie goed of sekuriteit of verlies van daardie reg skadeloos gestel het.”

Die respondente beweer nou dat hulle in die loop van die verskillende hofprosedures, sowel hier as in Londen, afstand gedoen het van substansiële bates, insluitende die vrystelling van beslaglegging in hul guns. Dit maak hulle geregtig op skadeloosstelling kragtens die bogenoemde artikel. Die applikante betoog dat die genoemde artikel nie van toepassing is nie aangesien die respondente *prima facie* nie goeie trou openbaar het soos deur die artikel vereis nie. Verder is hul bewering aangaande die verlore bates vaag en onoortuigend. Die hof stem saam.

Drie feite moet vir skadeloosstelling kragtens artikel 33(1) bewys word:

- (a) in ruil vir enige vervreemding wat tersyde gestel kan word, (b) is afstand gedoen van bates/regte teen ’n ander persoon, en (c) is daar te goeder trou opgetree.

Die hof bevind dat die respondente nie die bates wat hulle vaagweg noem, afgestaan het *in ruil* vir die vervreemding wat op die punt staan om tersyde gestel te word nie. Ten opsigte van (b) vind die hof die verduideliking ook vaag en onoortuigend. Ten opsigte van (c) is daar in die woorde van regter Van Zyl sterk aanduidings dat die respondente nie te goeder trou opgetree het nie toe die ooreenkoms gesluit is wat die basis van die vervreemding in geskil gevorm het. Die verweer word van die hand gewys omdat die respondente hulle nie van die onus gekwyt het nie.

6 Bevinding van die hof

Die regter maak die volgende bevel:

- (a) Die bevel *nisi* word bevestig.
- (b) Die eerste tot dertiende respondente word beveel om die koste van die aansoek te betaal.
- (c) Die koste as gevolg van die tussentrede van die voorlopige kurators as respondente is kostes in die aansoek vir tersydestelling van die vervreemding kragtens paragraaf 1(e) van die bevel *nisi*.

Die hof sê dus hiermee dat dit nie nodig was om eers toestemming van die hof te vra om die aksie vir die tersydestelling van die vervreemding in te stel nie. Ek meen dat die applikante waarskynlik die *ex parte* aansoek gebring het om 'n spoedige *interim* beslaglegging te kry.

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The constitutive role of freedom relates to the importance of substantive freedom in enriching human life. The substantive freedoms include elementary capabilities like being able to avoid such deprivations as starvation, under-nourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on. In this constitutive perspective, development involves expansion of these and other basic freedoms.

AK Sen Development as freedom (1999) 36.

CLOSURE OF ILLEGAL CASINOS, INTERPRETATION OF THE GAMING LEGISLATION AND THE ROLE OF THE NATIONAL GAMBLING BOARD – THE SUPREME COURT OF APPEAL HAS SPOKEN

Grand Slam Entertainment Centre v Minister of Safety and Security
1996 2 BCLR 213 (O); OPD 20 April 2000,
case numbers 4369/95, 532/96 and 2734/99,
unreported;

OPD 18 May 2000,
case number 1324/00, unreported;
SCA 10 October 2000,
case numbers 199/00 and 1324/00, unreported

Supreme Gaming CC v Minister of Safety and Security
SECLD 3 April 1999, case number 698/99, unreported;
SCA 12 May 2000, case number 166/99, unreported

American Palace v Minister of Safety and Security
2000 4 SA 88 (B); 2000 2 SACR 288

National Gambling Board v Free State Gambling Board
OPD 15 January 2000, case numbers 4633/98 and 4858/98, unreported;
SCA 26 March 2001, case number 68/00, unreported

1 Introduction

1 1 Two of the main problems confronting the regulated gaming industry in South Africa have been the uncertainty of the role of the National Gambling Board *vis-à-vis* the provinces and the continued operation of unlicensed and illegal casinos in some of the provinces. In an industry that claims regulation, licensing and policing, this state of affairs has made a travesty of the legislation and of regulators in the affected provinces. The litigation discussed in this note stemmed mainly from police action against unlicensed operators. Money generated from illegal operations enables the culprits to use the judicial process to test the legislation and to challenge regulators, sometimes to the limit. On the one hand, litigation could be regarded as positive, since it assists in the building of a body of jurisprudence relating to this relatively new area of gaming law and ensures just administrative action by the regulatory boards in the broader sense. On the other hand, it undermines and postpones the completion of the licensing process and creates a negative international perception of an unreliable regulatory and judicial system.

1 2 The aim of this discussion is to give a brief background to the problem of illegal gaming, and to show how the Supreme Court of Appeal recently gave judicial backing to the regulated industry. As three of the cases discussed in this note are unreported, the facts in each case will be dealt with briefly. One further case, although not heard by the Supreme Court of Appeal, is added to the discussion as it affirms the preferred interpretative approach to gaming statutes.

Before I discuss the judgments, some background to the regulated and illegal gaming industry is necessary. The first case under discussion involves a controversial

judgment in the Free State whereby the court granted an unlicensed operator an interim interdict to continue with its illegal operation pending further litigation that never materialised (*Grand Slam Entertainment Centre v Minister of Safety and Security*). The second case deals with an attack on the legality of Eastern Cape provincial legislation which resulted in some confusion in the industry and among the prosecuting authorities in that province (*Supreme Gaming CC v Minister of Safety and Security*). Both these matters were finalised in the Supreme Court of Appeal, resulting in the legal position becoming more certain. A third case (*American Palace v Minister of Safety and Security*), although not dealt with by the Supreme Court of Appeal arose from the closure by the SAPS of an unlicensed gaming operation. The judgment afforded some much-needed insight into the interpretation of provincial gaming legislation. The last of the cases discussed here, *National Gambling Board v Free State Gambling Board*, settled the issue of the granting of special licences to unlicensed operators, pending the issuing of final limited-payout machine and/or casino licences. This case is important in so far as it sets out the role of the National Gambling Board in relation to the provincial legislation and provincial regulatory boards. Where a judgment has not been reported, the references in brackets are to page numbers of the typescript of the judgment in question.

2 Background

2.1 Gaming is and always has been a popular pursuit in society. Since early in the previous century, however, most forms of gaming were prohibited in South Africa, first by provincial ordinances and later by section 6(1) of the (now repealed) Gambling Act 51 of 1965. Nevertheless, the lure of economic gain resulted in illegal casinos continuing to operate. In order for illegal operators to continue operating when faced with prosecution, ingenious legal arguments were devised. One such contention was that the operations were designed to fall within the ambit of the one possible defence of "non-habitual social gambling" (s 6(2) of Act 51 of 1965). A good example of this argument may be found in the last reported case on this section, *Soundprop 1239 CC t/a 777 Mobile Casino v Minister of Safety and Security* [1997] 2 All SA 619 (C). The operator unsuccessfully argued that his casino was non-habitual and did not fall within the prohibition set out in section 6(1), as it comprised a mobile casino that moved around to various venues and was thus "non-habitual" in terms of the Act.

In the 1980s and 1990s illegal casinos increased within the borders of the country, often in conspicuous places where these operations could scarcely go unnoticed. Mostly, the SAPS and prosecuting authorities deliberately turned a blind or "listless" eye towards these illegal operators (*Atlantic Slots v Member of Executive Council for Economic Affairs (North-West Province)* 1997 2 BCLR 176 (B) 178H). No statistics are available in this regard, but by early 1993, the SAPS was aware of approximately 2 000 illegal casinos (Commission of Enquiry into Lotteries, Sport Pools, Fund-raising Activities and Certain Matters Relating to Gambling (RP 80/1993) 14).

2.2 New legislation, first made possible by section 126, read with Schedule 6, of the Constitution of the Republic of South Africa, Act 200 of 1993, has been introduced since 1995, including the National Gambling Act 33 of 1996 and nine provincial gaming statutes that relate to the regulation of casinos. The rules for the gaming industry changed. Gaming, although legalised, was restricted. It is strictly regulated, controlled, policed and licensed, with casino licences specifically limited in number

to 40 (s 13(1)(j) of the National Gambling Act) and limited-payout machines to 50 000 in terms of section 13(1)(k) of the National Gambling Act, read with the regulations promulgated in terms of the Act. Provincial gaming boards were established by provincial statutes to license and oversee these gaming operations and eventually, by implication, to assist with the taking of action against illegal operators.

2 2 1 The legalisation and regulation of gaming made the eradication of illegal gaming important for the legal gaming industry. Without enforcement of the regulations, the principle of limited legalisation and regulation of gaming would be a farce. Apart from the broader principle of the rule of law, the reasons for the necessity of enforcement and the closure of illegal operations are the following: first, with a regulated industry, the punters and society at large are protected against overstimulation of the industry, excessive gaming and unscrupulous operators; secondly, the state receives taxes and levies from legal operators; and thirdly, regulation and policing protects the licensed casino owners' exclusive rights and their investment in the country.

2 2 2 The opportunity to operate legal casinos did not have the desired effect, namely, the closure of the illegal casino market. It should be noted that there has been some frustration in the gaming industry as a result of the limited number of, and strict requirements relating to, legal casinos, as well as delays in the issuing of licences for casinos in some provinces and the national limited-payout-machine market (December 1999/January 2000 *Gaming for Africa* vol 33 3 6). The reasons for these delays are complex, but two main causes were litigation and political expediency. For unlicensed operators faced with these delays, or unlicensed operators who could not, or did not want to, operate one of the 40 casino licences, there were only two choices: not to operate at all, or to operate illegally, without a licence. Operators in the Free State and Northern Cape had a third option, namely special licences.

2 2 3 Current, post-legalisation statistics relating to illegal gaming are not available, and estimates vary among the sources of these statistics. It has been approximated that South Africa lost in the region of R1,7bn–R3bn in 1999 as a direct result of money wagered at illegal operators (Roger Farrell, International Business Manager of Gaming Laboratories International Incorporated at the April 2000 National Gambling Conference, Midrand). In February 2000, the turnover of illegal slot machines alone was estimated at R4,5m per annum. Whichever estimate is endorsed, it is accepted that the current illegal market is substantial (February/March 2000 *Gaming for Africa* vol 28 28).

2 2 4 The unlicensed operators did not take the change in legislation or prosecutorial attitudes lying down. Nationally, several dozen cases were brought to court by illegal operators in the course of attempts to remain functioning. As I have already mentioned, these cases arose from SAPS action to close unlicensed premises and seize the gaming equipment. Notwithstanding the new legislation, not all the provinces have been equally successful in the fight to close illegal operators (December 1999/January 2000 *Gaming for Africa* vol 33 22).

2 2 4 1 In some provinces the new legislation did result in a marked increase in the attempted prosecution of illegal operators. Gauteng seems to be the most successful in this regard. In the six months from August 1999 to February 2000, in Johannesburg and Soweto alone, the SAPS confiscated gaming machines and tables to the value of R4,5m, and accepted admission-of-guilt fines to the value of R73 500. During this time only three cases ended up in court for hearing and sentencing. The

sentences ranged from R300 000 or three years' imprisonment, of which R200 000 or two years' imprisonment was suspended for five years, to R2 000 or six months' imprisonment suspended in their entirety (statistics supplied by the Anti-corruption Unit of the SAPS).

2 2 4 2 In the Eastern Cape, as a result of the legal challenge to the legislation in the *Supreme Gaming* case, prosecutions of illegal operators were for the most part suspended. In KwaZulu-Natal illegal operations had been a common occurrence and the non-prosecution of these operations had been a political bone of contention. Recently evidence has surfaced in the media about a secret agreement between the SAPS, a few illegal operators and the State Attorney to the effect that the illegal casinos would not be raided and closed without warning (*Mail and Guardian* 2001-03-23-29 3). It was only after the exposure of this agreement and subsequent uproar within the regulated industry that these illegal operations were closed down (*Mail and Guardian* 2001-03-30-2001-04-05 12; *Electronic Mail and Guardian* 2001-04-19).

3 Interim legal sanction for the continued operation of an unlicensed casino – the end of the *Grand Slam* saga

3 1 The courts generally found that unlicensed gaming establishments were illegal and had to close down, as these establishments had no *prima facie* right to remain open pending further litigation (*Soundprop 1239 CC t/a 777 Casino v Minister of Safety and Security* 1996 9 BCLR 1177 (C) 1187C-D; *Strakas v Minister van Veiligheid en Sekuriteit*, case no 635/96 (T) 9; *Zacombu Entertainment v Minister of Safety and Security* 1997 2 BCLR 289 (O); *Gaming Association of South Africa (KwaZulu-Natal) v Premier of KwaZulu-Natal* 1997 4 BCLR 548 (N); *Raymond Luef t/a Entertainment Centre v Minister of Safety and Security*, case no 1374/96 (O) 9). The exception was the 1995 *Grand Slam* judgment by the court of first instance. Although the other courts either criticised or distinguished the original *Grand Slam* judgment, the issue remained clouded.

The history of the *Grand Slam* saga began in November 1995 when the court of first instance granted an unlicensed casino operator an interim interdict to proceed with its gaming activities in Harrismith. It prohibited the SAPS from interfering in the activities of the applicant pending the determination of the constitutionality of certain sections of the Gambling Act 51 of 1965 by the Constitutional Court. The main argument was that the applicant had a *prima facie* right to free economic activity in terms of the interim (1993) Constitution. The case was, however, referred from the Constitutional Court to the Free State High Court, but the issues raised in 1995 were never brought to a head until the Free State Gambling Board joined the proceedings in October 1999. Until that time, the unlicensed "Grand Slam" casino continued with its operations.

3 2 The *Grand Slam* saga finally came to a head in 2000 when Musi J in the court of second instance gave judgment on a counterapplication by the Board for the revocation of the interim interdict. The court found in favour of the Board and set the 1995 interim interdict aside (14). Musi J based his decision on the law applicable at the time of the decision: gaming *per se* was legal but subject to regulation, and non-licensed casinos were unlawful and prohibited. In the exercise of its discretion whether or not to lift the interdict, the court had to balance equity and convenience (13). The court specifically noted that non-regulation would impact adversely on the morality and welfare of society as the legislation was enacted in order to provide the necessary mechanisms to ensure that the negative and adverse impact of gambling

was minimised (7). Other aspects that played a role were the fact that the Gambling Act 51 of 1965 had since been repealed and that determination by the Constitutional Court of the constitutionality of that Act would be of academic interest only, and would serve no purpose (14).

Leave to appeal against the judgment was refused on 18 May 2000 by Musi J in the court of third instance, and by the Supreme Court of Appeal in October 2000.

3.3 The judgment should be welcomed as it confirms, at the level of the Supreme Court of Appeal, that the continuation of unlicensed casinos will not be allowed, not even temporarily, as continuation will in effect amount to the toleration of illegal gaming operations. Any uncertainty that might have existed as a result of the decision of the court of first instance has therefore been cleared up. Unless there is a constitutional challenge to a provincial gaming Act, which seems unlikely in the light of the *Supreme Gaming CC* judgment discussed below, no unlicensed gaming operations will be condoned by the courts.

4 The legality of the promulgation of the Eastern Cape provincial legislation – *Supreme Gaming CC v Minister of Safety and Security*

4.1 In May 2000 the Supreme Court of Appeal heard an appeal from the South Eastern Cape Division arising from a criminal prosecution of the applicant for contravention of the provisions of the Gambling and Betting Act 5 of 1997 (Eastern Cape). The applicant was prosecuted for operating an unlicensed casino in Port Elizabeth. The matter was remanded pending the outcome of a decision on the legality of the promulgation of the provincial Act (the judgment *a quo* at 2). The constitutionality of the provincial Act was not challenged.

The applicant argued that the attachment and removal of the gaming machines was unlawful. The provincial Act had, it was contended, no force or effect, as it had not been promulgated properly. The applicant argued further that the Premier was not empowered to put any section of the Act into operation, because the empowering section of the Act itself was of no force or effect, for lack of “promulgation”. The court *a quo* rejected the argument as illogical, since it would lead to an absurdity. The court found that the Act itself, apart from the suspended sections, took effect on the date of publication (5).

On appeal, the Supreme Court of Appeal found that the “appeal has no redeeming features” and dismissed it with costs. If the argument of the applicant had been allowed to succeed, it would have created a legal Catch-22 situation where Acts could never be promulgated (the appeal judgment at 6).

4.2 Apart from illustrating the extent to which some unlicensed operators would go in order to litigate, the judgment finally lifted the uncertainty hanging over the Eastern Cape gaming legislation. In both of the above cases, the intervention of the provincial gaming board was instrumental in the closing-down of the unlicensed operator.

5 *American Palace v Minister of Safety and Security*

5.1 As with the cases already discussed, this matter came before the court when the SAPS raided the unlicensed gaming operations of the applicant and seized numerous gaming machines. The issue before the court was whether the premises required a licence and whether its operations were unlawful. Section 54 of the North West Casino, Gaming and Betting Act 13 of 1994 prohibits any “game of chance”. The definition of a “game of chance” specifically excludes any game conducted in a

casino. A “casino” is defined in the Act as the business premises upon which gaming is conducted under a casino licence. The applicant argued that section 54 was not applicable to its operations, since it operated machines found in a casino, which was specifically excluded from the definition (2000 4 SA 93C–F; 2000 2 SACR 292a–c).

The court, in its analysis of the gaming legislation and the interpretation of the section, read the relevant sections within the context of other sections in the Act, and placed the provincial Act within the national context. The court held that the concepts “game of chance”, “gambling”, “gaming” or “betting” did not undergo a metamorphosis once they were played in a casino, nor did they change their original essence or character. These activities remained “games of chance”. The court found that any other interpretation of the Act which granted the applicant the right to conduct gaming without a licence would be “divested of any efficacy or legality” (2000 4 SA 99B; 2000 2 SACR 298b–c). Despite some terminological shortcomings, the aim of the legislation was clear, namely to regulate and control gaming (2000 4 SA 98D–E; 2000 2 SACR 297d–e), and specifically to prevent “gambling and wagering” in instances where no licence was granted (2000 4 SA 98I–J; 2000 2 SACR 297i–j).

The court found that the applicant had contravened section 54 of the Act by operating and running gaming machines without a licence. Although “casino” meant the business premises upon which gaming was conducted under a casino licence, section 34 included the operation of a gaming machine within the ambit of activities requiring a licence. The presence of 50 gaming machines on the premises of the applicant did not establish his premises as a casino. However, the lack of a licence on the part of the applicant for the running and operation of the machines resulted in section 34 being contravened. It was accordingly held that the activities of the applicant constituted an offence in terms of sections 34 and 54 of the Act (2000 4 SA 100I–101C; 2000 2 SACR 300a–e).

The applicant’s second contention was that some of the provisions of the provincial Act relating to the (alleged) lack of infrastructure were unconstitutional. This argument was based on the decision in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC). The court distinguished the *American Palace* case from the *Pharmaceutical Manufacturers* judgment in various aspects: the necessary gaming-licence infrastructure is already in place, the provincial regulatory board is operational, and the Act makes provision for people in the position of the applicant to apply for a licence (2000 4 SA 104B; 2000 2 SACR 303e–f). The court further held that the Act is not repugnant to the Constitution of the Republic of South Africa Act, 108 of 1996, and was passed lawfully. The Act prevents the proliferation of unlicensed gaming, and to strike down any of the sections would result in an upsurge of gaming that would be detrimental to society (2000 4 SA 101F–G; 2000 2 SACR 300h–i). The court noted that although the facts concerning the infrastructure for the licensing of gaming machines were not made available to the court, the proper remedy, if the necessary infrastructure was lacking, would have been to apply for a *mandamus* to put the infrastructure in place (2000 4 SA 101G; 2000 SACR 300i–j).

5 2 It is submitted that the issue of available infrastructure needs clarification. Two types of licence should be distinguished: casino licences and licences for limited-payout machines (LPMs). LPMs are gaming or slot machines to be placed outside casinos at smaller venues. In practice, the infrastructure for the licensing of casinos is available in provinces, although there might be some delays as a result of, *inter*

alia, litigation. The infrastructure for the licensing of LPMs is, however, not yet operational. The national regulations have been passed, but the infrastructure will be fully operational only at the end of 2001. As the regulations relating to LPMs are national regulations, not provincial ones, any *mandamus* in relation to the LPM infrastructure would have to be sought against the National Gambling Board, not provincial board. This decision is in line with *Mngoma v Premier of KwaZulu-Natal* case no 2200/97 (N) where the court refused a *mandamus* against the provincial board as the promulgation of (national) regulations did not fall within its powers. As the infrastructure is currently in its final stages of development, the likelihood of success of such a *mandamus* would be debatable.

5 3 The *American Palace* judgment reiterated the principle that gaming without a licence is illegal (2000 4 SA 104B; 2000 2 SACR 303e-f). This reaffirms the finding in the *Grand Slam* matter. The importance of the *American Palace* judgment also lies in the manner in which the court dealt with the interpretation of the gaming legislation, specifically the provincial Act. The provincial gaming legislation was not considered in isolation, but interpreted in the light of historical developments as well as the national legislation. The broader aim and purpose of the legislation, both nationally and provincially, played a key role in the judgment of the court. This contextual or purposive approach to interpretation, as opposed to the textual or literal approach, is preferred and is in line with recent developments in the area of legal hermeneutics (*Matiso v Commanding Officer, Port Elizabeth Prison* 1994 4 SA 592 (SE) 597E-I; *Hoban v ABSA Bank Ltd t/a United Bank* 1999 2 SA 1036 (SCA); *Stopforth v Minister of Justice*; *Veenendal v Minister of Justice* 2000 1 SA 113 (SCA) 121F-G; *Standard Bank Investment Corporation Ltd v Competition Commission*; *Liberty Life Association of Africa Ltd v Competition Commission* 2000 2 SA 797 (SCA) 810H-811A 816B-C; *Botha Statutory interpretation: An introduction for students* (1998) 31-32). The court further emphasised the importance of protecting society against the unchecked proliferation of gaming opportunities, which is in line with one of the guiding principles contained in the National Gambling Act, that is, that the society at large should be protected against the overstimulation of gaming (s 13(1)(c) of Act 33 of 1996).

6 *National Gambling Board v Free State Gambling Board*

6 1 In both the Northern Cape and Free State provinces, provincial legislation provided for the issuing of special licences.

6 1 1 In the Free State, the Free State Gambling Board invited applicants to apply for these special licences. More than 90 applications were received. As a result of pressure by the National Gambling Board, the Free State Gambling Board changed its mind about issuing these licences and asked the court for a declaratory order on the legality of special licences. The respondents (the special-licence applicants) contended that the Free State Gambling Board was legally bound to grant these licences and sought a counter-declaratory order and a *mandamus* to compel the board to consider and issue special licences (*National Gambling Board v Free State Gambling Board*).

The court *a quo* held that the Free State Gambling Board is empowered by the provincial statute to issue special licences – especially since the national legislation is silent on the issue. The Free State Gambling Board is therefore bound to consider the applications and to issue the special licences (83). The court went further and noted that the role of the National Gambling Board is limited to the giving of advice and the provision of guidelines to the provinces. It does not have the power to challenge the clear wording of the provincial legislation (16-17).

6 1 2 This decision was followed by the Northern Cape high court in *Magango h/a Level 69 Gaming v Die Voorsitter van die Noord-Kaapse Raad op Dobbelaar en Wedrenne* case no 415/00 (NC). This case differs on the facts, in that the gaming board in the Northern Cape had previously awarded special licences to the applicants. These licences were renewed for a further 18 months as a result of political interference by the provincial cabinet. The board thereafter did not renew the applicants' special licences, and refused to consider any applications for such licences. The SAPS raided and closed the then unlicensed operators that previously operated under special licences. The applicants asked the court for a continuation of their special licences on the same conditions, pending judicial review of the decision by the board. The board subsequently heard and refused all the special-licence applications (21–26).

The court was asked to answer two questions: could the court order the board to issue special licences pending review of the decision of the board not to hear the applications, and could the court make an order to the effect that the applicants could proceed with their unlicensed gaming activities pending such review (5)? The court answered both these questions in the affirmative in the light of *National Gambling Board v Free State Gambling Board* (46–50). The court found that there was strong *prima facie* evidence that the board had acted in a grossly irregular manner in dealing with the special licence issue, as the applicants were entitled to accept that the board condoned the current situation. As the legislative infrastructure regarding LPMs had not been completed, there was no reason for the applicants to expect a change with regard to the special licence (54). The court seems to have implied that the respondents had a legitimate expectation that the board would persist with the *status quo*, as the legislative circumstances had not yet changed. The broader national principles were, however, not taken into account.

6 2 The effect of these two high court decisions was that the two provinces in question could also issue, apart from the normal gaming licences, an unlimited number of special licences. These licences were cheaper than other licences, and the requirements for the grant of a licence less stringent, as the provisions relating to a central monitoring system did not need to be adhered to. This situation made a mockery of the limited nature and exclusivity of gaming licences, as well as the strict licensing and regulatory environment envisaged in the national legislation.

6 3 The National Gambling Board was understandably displeased with these judgments, and appealed against the decision in *National Gambling Board v Free State Gambling Board*. On appeal, Harms JA (with Vivier, Schutz, Scott and Cameron JJA concurring) overturned the decision of the court *a quo*. The court held that since the national and provincial legislatures have concurrent legislative competence, legislation from the one does not take precedence over the other, but both must be read together, each supplementing the other. The National Gambling Board, in terms of the National Gambling Act, provides guidelines to the provinces regarding “any gambling licence” (s 11(c)(iii)). The court concluded that the Free State Gambling Board had exceeded its powers by attempting to issue special licences with the aim of circumventing the other provisions of the Act, such as the requirements for a central monitoring system (8). As a special licence is a gaming licence, the norms and standards of the National Gambling Act are applicable to special licences. By issuing special licences, the Free State Gambling Board had attempted to issue more gaming licences than envisaged by the national legislation (9). The court acknowledged that its interpretation limits the scope of special

licences, but found it to fit within the general scheme of the legislation, both nationally and provincially (10).

In regard to the *locus standi* of the National Gambling Board in this case, the court confirmed that the National Gambling Board has a "direct and material interest" in the administration and policing of all gambling licences in all the provinces (11). This finding is important for the National Gambling Board. The national board was established only after most of the provincial legislation and regulatory boards were already functioning. This made the object of the National Gambling Board to bring about uniformity of the provincial legislation an "anachronism" (Brand *Gambling laws of South Africa* vol 1 (1996) 1-3). There was uncertainty on the part of the provincial regulatory boards as to what the relevance, powers and duties of the (new) National Gambling Board were, especially in relation to the powers and licensing duties of the provincial regulatory boards. The judgment in the *Free State Gambling Board* case assisted in this regard, but it should not be interpreted to mean that the National Gambling Board can take over licensing responsibilities of the provinces. It merely means that the National Gambling Board must ensure that the provinces exercise their responsibilities within the broader, national context and limits.

64 This case is of importance for three reasons. First, the role of the National Gambling Board has been rightfully recognised; secondly, the supplementary nature of the national and provincial legislation has been confirmed; and thirdly, the issuing of special licences was placed within the national context. Special licences may not be used in order to circumvent the national norms and guidelines for the South African gaming industry. The ghost of special licences haunting other gambling-licence holders has, one hopes, been put to rest since the *Magango* judgment and that of the court *a quo* in the *Free State Gambling Board* case were effectively nullified by the Supreme Court of Appeal.

7 Conclusion

The above judgments, in their interpretation of the legislation, reaffirmed certain fundamental principles relating to the gaming legislation that would create greater legal certainty within the gaming industry. First, gaming is legal only if it is properly licensed within the norms and principles of the national and provincial legislation. Secondly, national and provincial legislation must be read together and interpreted holistically. In the interpretation of the provincial legislation specifically, the contextual interpretative approach should be followed, bearing in mind the norms and principles contained in the national legislation. Thirdly, the courts will not accept technical legal arguments on the part of unlicensed operators the effect of which will be to condone their gaming operations. Fourthly, unlicensed operators are not entitled to interim relief pending further litigation. Although the move towards legal certainty is encouraging, it cannot be said that all illegal casinos have *de facto* been closed. Enforcement of the law is, however, not the subject of this discussion.

The important role of the National Gambling Board and the nine provincial gambling boards has been and should be observed. Each board has its own unique role to play. The role of the National Gambling Board focuses on the provision of guidelines to provinces and is the final body responsible for ensuring that the legislation is adhered to by all the players in the industry, including the provincial gambling boards. The role of the provincial boards is to license and to supervise gaming within the province. Although these boards do not have the power to

prosecute illegal operators, and although they have to rely on the SAPS and the prosecuting authorities, from a practical point of view their involvement and expertise is vital for the successful prosecution of unlicensed and illegal operators. There is an inherent duty on all these boards, as regulators, to create a political and prosecutorial will to ensure strict policing of the legislation. Only then can the boards ensure that the public, the industry and the licensed operators are protected, and only then can it be claimed that gaming in the country is in reality "regulated, licensed and policed".

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The democratic process through which public involvement in various aspects of Government is secured often requires compliance with what may seem to be elaborate procedures and may result in irksome delays. Administrative authority will, understandably, find these tiresome, especially when, broadly speaking, it is acting in what it considers to be the public interest. It is, however, when public participation in Government is denied that all the undesirable consequences of a system of closed and rigid administrative control ensue.

Steyn J in McCarthy v Mustheights (Pty) Ltd 1974 4 SA 627 (C) 628.

BOEKE

PLAIN LEGAL LANGUAGE FOR A NEW DEMOCRACY

by

F Viljoen and A Nienaber (eds)

Protea Book House Pretoria 2001, 180 pp: price R99,95

During July 1999, the Faculty of Law of the University of Pretoria hosted the Plain Legal Language Conference and Workshop: Making South African Law More Accessible and Understandable.

While this publication brings together most of the publications presented at the conference, it is not a typical presentation of conference proceedings. It goes much further than typical conference proceedings do.

Where the conference was divided into four themes, namely the international context, the South African context, plain legal language and business and the workshop, this publication has reworked and added to those themes so that it can be divided into the following 9 parts:

- a general introduction highlighting the extent to which the plain legal language approach is taking root in South Africa;
- an introduction to the main features of plain language communication;
- plain legal language in an international context;
- practical examples of the progress made in South Africa with regard to the implementation of plain legal language;
- presentation of the results of a project sponsored by the National Research Foundation entitled "Plain language for a multilingual South Africa";
- a conclusion speculating on future possibilities;
- a list of plain language sources;
- biographical details of the contributors;
- an index.

In our country where we are so aware of language - in the context of the variety of languages spoken, in the politicisation of language and because legal language is complicated and inaccessible - we must do something to make the law clearer and more accessible. The starting point is in the legislation and in the decisions of our courts. This book contains a wealth of information and examples of how we can make legal language more understandable, and therefore, more accessible.

I would recommend that every lawyer - because every lawyer writes - should take careful note of the contents of this book and apply that in his or her profession whether that be as a practising attorney or advocate, a legal draughtsperson, a legal adviser, a magistrate or a judge.

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PRYSWENNERS

Die Butterworths-prys vir die beste eerstelingbydrae is toegeken aan doktor Wium de Villiers vir sy artikel "Are the Canadian Charter and Charter jurisprudence suitable sources of reference for human rights and particularly criminal procedure and evidence rights in South Africa?" (Aug en Nov 2001).

Die Hugo de Groot-prys vir die beste bydrae oor die Grondwet is toegeken aan professor Christa van Wyk vir haar artikel "Guidelines on medical research ethics, medical 'experimentation' and the Constitution" (Feb 2001).

Die prys vir die beste Afrikaanse bydrae is toegeken aan professor Callie Snyman vir sy artikel "Die herlewing van vergelding as regverdiging vir straf" (Mei 2001).

Presumptions in the South African law of evidence (3)*

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4 3 5 1 The “presumed unless the contrary is proved” provision determining meaning

Despite an assiduous search through the law reports, I have not been able to trace a single decision in which the conceptual meaning of the expression “presumed unless the contrary is proved” has been authoritatively established. It seems that judges refrain from attempting such a thankless task. Their attitude seems to be encapsulated in the *dictum* of Cillie JP that “it is difficult to interpret the final words of the sub-section, ‘unless the contrary is proved’”.¹

It seems, therefore, that the judges have elected not to be drawn into conceptual and linguistic controversies since the legal import of the phrase is reasonably fixed. Their attitude is regrettable, since no guidance is afforded by a reading of the law reports when one is faced with a problem of interpretation of the negative hypothetical conjunction and the prepositional conjunction when they are used in different sections, sometimes in the same Act.

I suggest that it is wrong to interpret the expression “unless the contrary is proved” in isolation, without bearing in mind the context of the rest of the passage in which it occurs. The phrase is normally adverbial and as such modifies the predicate “presume”. Its meaning must affect the meaning of the predicate, and its own meaning must necessarily be affected by the predicate.

4 3 5 2 Legal effect of “presumed unless the contrary is proved”

While the conceptual meaning has not been authoritatively determined, the effect of the phrase has been authoritatively laid down. According to Henochsberg J:

“The term ‘unless the contrary is proved’ connotes an onus which is not discharged by evidence sufficient merely to raise a doubt in the mind of the Court; while that high degree of proof which is basically demanded of the Crown in the requirement that it shall prove beyond reasonable doubt is not demanded, there must, however, be such evidence as lends to the defence a balance of probabilities.”²

* See 2002 *THRHR* 3 for part 2.

1 *F* 1970 2 SA 484 (T) 486D.

2 *Olivier* 1959 4 SA 145 (D) 145H–146pr; see also *Nene* 1979 2 SA 521 (D) 524C–D; *Yolelo* 1981 1 SA 1002 (A) 1009F–G; *Nyembe* 1982 1 SA 835 (A) 840E–H; *Mphahlele* 1982 4 SA 505 (A) 512B–C; *Mothabakwe* 1985 3 SA 188 (NC) 196I–J.

A careful reading of the relevant decisions leads one to the conclusion that the courts speak of an "onus" which is cast on the accused person by the words, but the courts do not spell out in so many words whether the onus referred to is the onus of proof or the evidential onus. It is only by reference to the applicable standard of proof, *sc* proof on a balance of probabilities (which the courts repeatedly affirm to be the applicable standard), that one can determine whether the onus imposed is the true onus of proof (the persuasive onus and not merely an evidential onus³), for an evidential onus merely requires the accused to lead enough evidence to raise doubt in the mind of the court.

It is to be noted that prior to the passing of the Criminal Procedure Act 51 of 1977, although the formulation "presumed unless the contrary is proved" was used extensively by the legislature, judicial comment on its meaning was relatively scarce. But with the enactment of sections 217 and 219A of the Act, the meaning and/or effect of the words have received frequent attention from the courts.

It is further to be noted that the courts did not set out to interpret the phrase, but simply referred to previous authority that the phrase casts an onus of proof on an accused person.⁴ The source of authority for the rule is the Appellate Division judgment in *Ex parte Minister of Justice: in re Rex v Jacobson and Levy*.⁵ It is worth noting that the words which required interpretation in *Jacobson and Levy* were "deemed . . . unless the contrary is proved".

The effect of the deeming provision has already been dealt with. It is suggested that in passing section 59(1) of Act 29 of 1926, the legislature had had in mind the toughening of the law to make it difficult for an accused person to be acquitted where he dealt with property in such a way that there was an unlawful preference of creditors.

The legislature had not desired to achieve that end by enacting an evidential foreclosure, which it could have done by passing a simple deeming provision. The legislature had decided to strike a balance between a formula which operated in such a way that on proof of a certain jurisdictional threshold of facts by the state, a conviction followed automatically, and a formula which made it more difficult for the accused to secure an acquittal, but which still held out at least the possibility of an acquittal.

The legislature had therefore decided on a deeming provision by coupling it with a modifying clause. Therefore, instead of using the simple deeming provision, the legislature had added the qualificative negative hypothetical conjunction. The predicate "deem" was qualified and its ordinary import of foreclosure was modified to the extent that the qualificative imposed a persuasive onus of proof on the accused. The effect of that onus was that the accused was required to establish positively certain aspects of his defence and not merely to raise a

3 Schmidt 538-539; *De L'Etang* 1954 4 SA 430 (N) 431A; *Lephatswa* 1973 2 SA 96 (O) 98C-E; *Khomo* 1975 2 SA 45 (T) 49A-D; *Bapela* 1985 1 SA 224 (C) 236B-C.

4 "The position differs from that created when the statute provides that a presumption shall operate 'unless the contrary is proved'. The operative idea in these words is that proof has to be adduced, as opposed merely to the requirements, as in *Epstein's* case, that 'contrary evidence' could be adduced" (*Nduku* 1972 1 SA 231 (E) 233E-F).

5 *Nene* 523H.

doubt not merely to raise a doubt about the veracity of the state's case.⁶ The purpose of the legislature was achieved by imposing a burden of proof, the satisfaction of which required a lower *quantum* of proof than the normal burden of proof in criminal cases. The very imposition of a burden of proof on the accused is, however, in itself gravely prejudicial to an accused person.

The phrase "unless the contrary is proved" was therefore not a word of art which had a constant, settled meaning. It was simply a formula adopted by the legislature to reduce the rigour of a deeming provision. The phrase should not be interpreted in isolation to mean that it casts an onus of proof on the accused wherever it is used by the legislature in circumstances in which some evidential duty is imposed on the accused.

The use by the courts and writers⁷ of certain words and catch phrases as trigger words imposing burdens simply by their appearance in statutes is, in my view, an incorrect approach. All words and phrases must be interpreted in their context in each and every enactment. No word or phrase has a constant legal meaning.

It is difficult to understand why a passive phrase should be interpreted to cast an active burden on the accused. Surely the expression "unless the contrary is proved" does not denote that any party is required to prove the contrary. It is true that the accused would, all things being equal, be the person who would be most interested in having the contrary proved. He would in ordinary circumstances strive to see that the contrary is proved. In an adversarial situation the accused can elicit evidence from his opponent's witnesses and, by means of such evidence, the contrary can be proved without the accused giving or calling evidence. This was surely the intention of the legislature, so that if there is evidence, from whatever source, which establishes a fact contrary to a presumed fact, the presumed fact cannot stand. It is rebutted and evidentially reduced to nil. Such intention certainly is not effectuated by the adoption of an interpretation that casts an onus on the accused.

It is, however, surely correct to regard the phrase as casting a persuasive onus on an accused person only in those circumstances where the simple presumptive provision is interpreted to have the effect of a deeming provision, because its effect then is to ameliorate the drastic effect of foreclosure and to render the provision more in accord with the common law.

In those cases where the phrase modifies a simple presumptive provision which is interpreted as creating a rebuttable presumption, it is suggested that the position ought to be different. The phrase "unless the contrary is proved" is neutral of burden-imposing nuances. Its legal effect must therefore be determined by interpretational reference to the predicate that it modifies and to the circumstances, hermeneutical or otherwise, present and influencing meaning in each case. The attitude adopted in this article is that the word "presume" ought to create a statutory presumption, the effect of which is identical to a common-law presumption.

6 Which in normal circumstances would be all that he would be required to do in order to secure his acquittal. Obviously, that is a much easier thing to do than to establish a defence positively.

7 Hoffmann and Zeffert 443.

According to accepted canons of interpretation, the intention to alter the common law must be stated explicitly in the provision that is being interpreted or must be irresistibly inferred from the terms of the provision.⁸

It is therefore submitted that since the phrase “unless the contrary is proved” is neutral, it cannot, when coupled with the word “presume”, result in a persuasive burden-imposing provision merely as a result of such coupling *simpliciter*. Since the court in every case would be engaged in ascertaining the intention of the legislature, it would assume such a meaning, but it could not, as a matter of generality, assume such a meaning whenever the expression was used by the legislature. Generally, it is submitted, the phrase should be interpreted in such a way that only an evidential onus is cast on the accused rather than a persuasive one.

4 3 6 1 The “presumed until the contrary is proved” provision

The linguistic difference between “presumed unless the contrary is proved” and “presumed until the contrary is proved” has already been referred to. Little purpose would be served by repeating the difference here.

4 3 6 2 Determining the meaning of “presumed until the contrary is proved”

This formulation is not often resorted to by the legislature. Consequently, the courts do not often have the opportunity of expressing themselves on the hermeneutics of the phrase. The phrase was used in both section 32 of the previous Arms and Ammunition Act⁹ and section 40 of the present Arms and Ammunition Act,¹⁰ and the courts have already expressed their views on the meaning of the two sections. It is therefore proposed to examine decisions pertaining to the interpretation of these sections since it seems that the courts will follow them when the matter comes to be decided under other statutes.

Though the phrase “until the contrary is proved” is used in both sections, the predicate it modifies under section 32 of the 1937 Act is “deem”, whereas under section 40 of the 1969 Act the phrase modifies the predicate “presume”. Clearly, therefore, though the phraseology of both sections is similar, the change from “deem” to “presume” must have been deliberate and must have been intended to have some meaning or effect.

Furthermore, in applying the two sections, the courts place emphasis on the phrase “until the contrary is proved”,¹¹ and not on the compound phrase including the predicate that it modifies. The interpretation of the phrase in a vacuum, separate from the predicate that it modifies, is inclined to create an impression that the phrase on its own has a separate meaning, the legal effect of which is separate from the rest of the phrase in which it occurs. This is liable to cause conceptual and interpretational difficulties.

On a proper reading of the judgments, however, it is clear that the courts refrain from undertaking a textual examination of the provisions in issue.

8 *Cassery v Stubbs* 1916 TPD 310 312; *Dhanabakium v Subramanian* 1943 AD 160 167; *Menell, Jack Hyman and Co v Geldenhuys* 1972 1 SA 132 (C) 137D–E; *Cockram Interpretation of statutes* 140–141.

9 28 of 1937.

10 75 of 1969.

11 *Ramara* 1965 4 SA 472 (C) 473G.

Although they pay lip service to determining the meaning of the phrase,¹² they nevertheless only propound the legal effect of the phrase and not the meaning of it.

4 3 6 3 The legal effect of “presumed until the contrary is proved”

Due to the differing opinions of the courts, there is some uncertainty in our law as to the legal effect of this phrase. According to the majority of the decisions, the phrase casts an onus of proof, *sc* a persuasive burden on the accused, which can be discharged by the accused on a balance of probabilities.¹³ There is, however, a minority view which holds that the onus cast is merely evidential and that such onus may be discharged by evidence that does no more than raise a doubt.¹⁴

4 3 6 4 Critical evaluation of the decisions

In *Ras*¹⁵ the court was required to interpret section 147 of Ordinance 18 of 1957 where the phrase “presumed . . . until the contrary is proved” appeared. The court held that where the state led evidence that the road was a public road,

“the accused person will have to contradict that fact if he wishes to be acquitted on the ground that the offence was not committed on a public road . . . There would be a slight difference in the degree of proof required. But if the section had wished only to deal with the degree of proof and not the burden of proof, it would no doubt have said so.”

It is difficult to follow the reasoning of the court. Surely there is nothing in the section which indicates that the legislature intended to juxtapose the ordinary incidence of the onus of proof. No doubt the onus can be changed only if the legislature specifically lays that intention down, or by necessary implication. Clearly, therefore, the assumption that the legislature intended to juxtapose the onus of proof is untenable. The conclusion that the section intend to affect, not the degree of proof required, but the onus of proof itself, is not justified. *Ras* cannot therefore be regarded as a persuasive decision regarding the effect of the “until the contrary is proved” provision.

In *Mtshizana*¹⁶ the court had to decide on the effect of section 32 of Act 28 of 1937. Relying, *inter alia*, on *Schama and Abramovitch*,¹⁷ Wynne J said:

“These authorities make it clear that our appellate division recognises the principles of *R v Schama and Abramovich, supra*, as affording the proper basis of adjudication upon the explanation tendered by the accused, and establish that there cannot validly be a conviction where the accused’s explanation may reasonably be true.”¹⁸

The court therefore unequivocally came to the conclusion that the onus cast was merely an evidential one, since the *quantum* of evidence required to entitle the accused to an acquittal was evidence which raised a doubt.

12 *Mhlongo* 1967 4 SA 412 (N) 415H–416D; *Nduku* 1972 1 SA 231 (E) 233H.

13 *Ramara* 474B; *Nduku* 233H; *Mhlongo* 416B; *Vilbro* 1957 3 SA 223 (A) 227H; *Ras* 1964 4 SA 502 (T) 503E–F; *Natha* 1965 4 SA 447(T) 448F; *Makhanya v Bailey* 1980 4 SA 713 (T) 716E–F.

14 *Mtshizana* 1965 1 SA 413 (E).

15 1964 4 SA 503E–F.

16 1965 1 SA 413 (E).

17 1915 CAR 45.

18 418C–D.

In *Ramara* the court came to the opposite conclusion, holding that the words “until the contrary is proved” cast an onus on the accused “to satisfy the court on a balance of probabilities that he was not the possessor of the arm”.¹⁹ This conclusion was supported in *Mhlongo*.²⁰ Both decisions explicitly held that *Mtshizana*’s case had been wrongly decided. Hoffmann and Zeffertt agree.²¹

While the judgment in *Mtshizana* appears to be incorrect, the error made in *Mtshizana* is to be preferred to the correctness of *Ramara* and *Mhlongo* both in result and in the reasoning employed to reach the result.

Mtshizana’s case is wrong because it obviously failed to follow the binding Appellate Division precedent in *Ex parte Minister of Justice: In re Rex v Jacobson and Levy*, which was directly in point as both cases dealt with the legal import of the phrase “deemed until the contrary is proved”.

It is not clear from the report, however, whether the court in *Mtshizana* deliberately ignored *Jacobson and Levy* or not. There is no indication in the report that the court’s attention was drawn to the precedent. The omission, it seems, should be excused since the circumstances that gave rise to the omission do not appear from the report with sufficient clarity to persuade an interested observer that the court had flouted precedent. The presumption that the court knows the law is a very difficult one to apply.

A second, less excusable fault is that the court appears to have interpreted a phrase which was not in issue in the case, sc “deemed unless the contrary is proved”, whereas the phrase which had to be interpreted was “deemed until the contrary is proved”. But this error seems not to have exercised the mind of the courts in *Ramara* and *Mhlongo*. Criticism of the judgment, on this ground, cannot be taken too far in view of the fact that this *ratio* of criticism was not referred to in the opposing cases.

What is admirable in *Mtshizana*’s case is the reference to most sources of authority on the subject to support the conclusion that the words that were being interpreted merely cast an evidential onus on the accused. The court went to great lengths to justify its finding.

It is submitted that such a conclusion is in accord with the basic ideology of our criminal justice system, namely that no persuasive onus of proof is cast on the accused. It is submitted that it is always preferable for a court to err *in favor-em libertatis hominis*.

On the other hand, the two decisions ranged against *Mtshizana*’s case refer to very little authority to support the conclusion reached. *Ramara* relies on a passage from a textbook²² and *Mhlongo* cites no authority for the view propounded.

On the basis of the foregoing, I suggest that that there is a difference of opinion as to the legal effect of the expression “deemed until the contrary is proved”. *Mtshizana*’s case is, however, the more acceptable precedent and it is to be hoped that this case will be followed in the future.

19 474B.

20 415H–416D.

21 443 fn 19.

22 474A.

The decisions which have been analysed are not in point, however, in so far as the legal effect of the phrase "presumed until the contrary is proved" is concerned, because they all referred to the interpretation of sections in which the phrase "deemed until the contrary is proved" occurred.

A judgment directly in point was *Nduku*. The judgment is fully researched and is very persuasive. Nevertheless, it is not above criticism. First, Cloete J referred to *Schama and Abramovich* as the *fons et origo* of the interpretation of the words "in the absence of evidence to the contrary".²³ Secondly, having criticised *Mtshizana's* case for misapprehending the meaning of certain phrases, which misapprehension had obviously led to an incorrect decision, Cloete J himself fell into the same trap. He relied on *Jacobson and Levy*²⁴ to justify his conclusion. That case, however, had not involved an interpretation of the phrase Cloete J was called upon to interpret in *Nduku*. I suggest that "deemed unless the contrary is proved" and "presumed until the contrary is proved" are disparate conceptual and legal entities. The meaning and legal effect attributed to them must be different. Seen in this light, Cloete J's judgment is unsupported by authority and no reasons are advanced for his rejection of the *Mtshizana* precedent, which was in point, preferring instead to follow a precedent that was obviously distinguishable.

4 3 7 1 The "deemed unless the contrary is proved" provisions determining meaning

As mentioned before, the conceptual meaning of "deem" is settled. The conceptual import of "deemed unless the contrary is proved" does not seem, however, to have exercised the mind of the court to any great extent. In some cases the courts appear to want to embark on the exercise, only to recoil from it.²⁵ The conceptual meaning of the expression accordingly does not seem to be settled.

4 3 7 2 The legal effect of "deemed unless the contrary is proved"

According to Schmidt²⁶ there are also

"gevalle waar die uitleg van die bepaling aantoon dat die wetgewer bedoel het om die bepaling die werking van 'n statutêre vermoede te gee – en dit is veral wanneer hy verorden het dat A geag word B te wees 'tensy die teendeel bewys word'".

It is correct that the decisions treat the "deemed until the contrary is proved" provision as a presumption.²⁷ But the conclusion that the phrase creates a presumption is reached without a textual analysis of the legislation concerned. The intention of the legislature is not properly ascertained by bringing to bear on the relevant section all the applicable canons of interpretation. The phrase is simply given a legal effect which presupposes that it has a constant meaning.

Surely this is incorrect. As Schmidt indicates, a textual analysis is always required to determine the intention of the legislature, since the incidence of the

23 233A.

24 233F–G.

25 See eg *Van Niekerk* 1981 3 SA 787 (T) 789–790A.

26 68.

27 *Blaauw* 1972 3 SA 83 (C) 250A; *Jeffreys* 1973 4 SA 629 (N) 630E; *Mkhize* 1975 1 SA 517 (A) 523A; *January* 1975 3 SA 324 (T) 330A; *Ndlovu* 1982 2 SA 202 (T) 204B–C.

onus of proof is always a crucial issue in any proceeding. Therefore, if there is an intention to juxtapose it, such intention must be suitably displayed. It is suggested that the phrase should not be interpreted to create a presumption. In our common law, a presumption always casts an evidential onus on the accused. Any provision in statute law which creates an evidential stratagem imposing something more than the common-law burden ought not to be dignified with the name "presumption", since it is nothing of the sort. Its effect is radically different from that of its common-law counterpart, and it is clearly incorrect to regard it as the equivalent of a common-law presumption.

Schmidt refers to an intention on the part of the legislature to give the phrase the effect of a "statutory presumption". The impression created by Schmidt's use of the phrase "statutory presumption" in tandem with the sentence "hierdie woorde dui onteenseglik op weerlegbaarheid en op die feit dat die party wat weerlegging beoog, die bewyslas dra"²⁸ is that statutory presumptions always impose an onus of proof (that is a burden of persuasion) whereas this is not always the case.²⁹ Sometimes a statutory presumption imposes no more than an evidential onus.

Furthermore, Schmidt's view as expressed in the passage quoted seems to be that the "onus to rebut" is the same as the "onus of proof". The view advanced here is that the two are different. The onus to rebut is the evidential onus, and the onus of proof is the onus of persuasion. Notwithstanding such differences of interpretation of the onus, Schmidt is correct in stating that our courts consider that the presumption created by the phrase casts an onus of proof on a balance of probabilities upon the person against whom it operates.³⁰

In view of the standpoint adopted here regarding the meaning and effect of *Jacobson and Levy*, the interpretation adopted by the courts does, to a degree, ameliorate the burden cast on an accused person and enhances the prospects of an acquittal. But this is not enough, since it is difficult for an accused person to prove his innocence even where the onus cast is to be discharged only on a balance of probabilities. Moreover, this persuasive burden-imposing interpretation of the phrase by the courts has been adopted without extensive or authoritative hermeneutical analysis, and, for that reason, is unsatisfactory.

4 3 8 1 The "deemed until the contrary is proved" provision

As in the case of the companion phrase "deemed unless the contrary is proved", the courts have not embarked on a conceptual analysis of the phrase under discussion. No useful purpose would be served by a further attempt at conceptual analysis of the phrase.

4 3 8 2 The legal effect of "deemed until the contrary is proved"

Our decisions are virtually unanimous in the view that the use of the phrase creates a presumption which imposes a persuasive onus capable of being discharged

28 68.

29 *Epstein* 1951 1 SA 278 (O).

30 *Mkhize* 1975 1 SA 517 (A) 523 (C); *Ex parte Minister of Justice: In re R v Jacobson and Levy*.

by the accused only on a balance of probabilities.³¹ The criticisms of the interpretation of the phrase are valid. In *Mabuya*,³² however, Erasmus J seems to suggest that differences of opinion exist as to the onus created by the phrase. The conflict is, however, more apparent than real.

The decisions quoted by Erasmus J relate to terms significantly different from the phrases under this section.³³

From the foregoing, while it is clear that the addition of the phrase under discussion to a simple deeming provision has an ameliorative evidential effect, frequent recourse to its use by the legislature will produce a legal system where the burden of proof is cast on the accused as a matter of statutory course.

4 3 9 1 The "absence of evidence to the contrary" provisions

The leading case on the interpretation of this phrase is *Epstein*.³⁴ There the court sought to fix conceptual value to the phrase by comparing it with the phrase "absence of proof". The elliptical phrase "in the" preceding "absence of proof" seems to have been assumed by the judge because if that were not so, the comparison would not have been proper as the expressions compared would have differed. According to Horwitz J, the crucial difference between the two phrases was the difference between "evidence" and "proof". According to Horwitz J:

"Generally as was contended on appellant's behalf, evidence is the means by which the result – proof – is attained; the absence of evidence must result in the lack of proof, but the mere existence of evidence need not necessarily result in proof."³⁵

Evidence is therefore merely the means to establish a disputed state of affairs, whereas proof is the established state of affairs.

4 3 9 2 The legal effect of "absence of evidence to the contrary" provision

According to Horwitz J, the question to be decided in order to determine the meaning of the phrase was whether "in the absence of evidence" was synonymous with "absence of proof".³⁶ Horwitz J held that the two phrases were not identical. The difference could be seen in their evidential effect. The effect of the phrase "absence of proof" was that it placed an onus on the accused which could not be discharged by the creation of a doubt. On the other hand, "in the absence of evidence to the contrary" means that "what is required of an accused person is something less than proof even by a preponderance of probability".³⁷ The test applied is whether a reasonable doubt is created by the evidence of the accused.

It is therefore clear that the effect of the phrase according to *Epstein's* case is identical to the effect of a common-law presumption. This, it is suggested, is a welcome departure from the tendency to interpret so-called statutory presumptions so as to cast a persuasive burden on the accused.

31 *Khumalo* 1949 1 SA 620 (A) 626; *Radzilane* 1950 3 SA 795 (T) 796D–H; *Mnguni* 1962 3 SA 662 (N) 664B; *Ngcobo* 1965 2 SA 728 (N) 732G–H; *Mhlongo* 1967 4 SA 412 (N) 413D–F; *Bruhns* 1983 4 SA 580 (NC).

32 1965 4 SA 736 (O) 738F–H.

33 In *Epstein* the phrase concerned was "in the absence of evidence to the contrary . . . it shall be presumed". In *Zulu* the onus cast on an accused person to give a satisfactory account of his possession of goods reasonably suspected to be stolen, was in issue.

34 1951 1 SA 278 (O).

35 284.

36 284B.

37 285B–C.

4 3 10 1 The “unless and until the contrary is proved” provision

It has been suggested above that “unless” and “until” are disparate linguistic entities and that their legal effect is different. Their effect when they are used in tandem with the trigger concepts of “presume” and “deem” has been analysed, and it is clear that it is not possible to fix the meaning to be attributed to the compound concepts because the courts, being the authoritative interpreters of legal texts, avoid textual hermeneutics. The problem is compounded by the fact that the phrase in question is very rare. In fact, the legislation in which it appears has already been repealed, and I could find no decision in which the phrase was analysed as used in those statutes.³⁸ It is suggested that the use of the conjunction “and” introduces an element of ambiguity in the meaning of the compound phrase, because it seems to equate the hermeneutical value of the negative hypothetical conjunction with the hermeneutical value of the prepositional conjunction.³⁹ The suspensive conditional grammatical effect of the former is surely different from the resolute grammatical effect of the latter. If the phrase is to be interpreted literally, both suspensive and resolute effect must be attributed to the presumption created. Since the linguistic effect of the conjunctively coupled clauses is different, it follows that the coupling obfuscates conceptual clarity.

4 3 10 2 The legal effect of the “unless and until the contrary is proved” provision

The effect of the above phrase is the same as that of the expressions “deem unless the contrary is proved” and “presume unless the contrary is proved”. All that happens is that in one sentence, two successive persuasive burdens are imposed instead of the usual one.

4 4 The accused’s presumptive onus to prove his defence beyond a reasonable doubt

The general rule of the onus of proof has often been emphasised. It has been shown that South African law and English law are slow to impose an onus of proof on the accused. Even when such an onus is held to be imposed legislatively, the onus may be discharged quantitatively on a balance of probabilities. American law would not countenance an onus of proof placed on an accused. American law would be horrified at an onus cast on an accused to prove any fact necessary for his defence beyond a reasonable doubt. While British law countenances an onus of proof on an accused, it would be equally horrified at an onus cast on an accused to prove any fact beyond a reasonable doubt. Such an evidential requirement is considered to be the prerogative of the state.

The position in South African law before 1966 was generally analogous to the British position. In 1966 and 1967, however, the South African legislature passed certain laws which radically altered the position as regards certain so-called political crimes. Section 3 of Act 62 of 1966 inserted section 12(1)*ter* into

38 S 11 of Act 33 of 1927, repealed by s 38 of Act 41 of 1950; s 30(1) of Act 18 of 1936, repealed by s 26 of Act 42 of 1964.

39 The ambiguity of the phrase can be observed in the difficulty created by the similar phrase “unless or until” (see *Moore v Minister of Co-operation and Development* 1986 1 SA 102 (A) 116C).

the Internal Security Act of 1950.⁴⁰ In terms of section 12(1)*ter*, in any prosecution of a person for having committed an offence under section 11(b)*ter* of Act 44 of 1950, if it was proved that the accused had left the Republic in contravention of any provision of Act 34 of 1955, it would be presumed until the contrary was proved beyond a reasonable doubt that the accused had undergone or attempted, consented to or taken steps to undergo proscribed training.

Section 3 of Act 24 of 1967 inserted section 12(3A) into Act 44 of 1950. In terms of section 12(3A), in any prosecution under section 11(I) of Act 44 of 1950, if it was proved that the accused communicated with a "banned" person, it would be presumed that the accused had communicated with such banned person unless the contrary was proved beyond a reasonable doubt.

The real kingpin of the radical political criminalisation provisions, though, was section 2 of the Terrorism Act.⁴¹ Section 2(1) created the offence of terrorism.⁴² But it was section 2(2) that raised the ire of procedural jurists.⁴³ What outraged jurists was not only the fact that the substantive criminalising provisions were so vague that the citizen would be hard pressed to understand them,⁴⁴ but also the fact that an onus was placed on the citizen to prove beyond a reasonable doubt the lack of intent to commit terrorism if an ostensibly innocent act was proved against him.

4 5 The approach of the Supreme Court

The courts' approach was to recognise that the presumptive provisions of section 2(2) of the Terrorism Act constituted a radical alteration of the general rule of tendering of proof,⁴⁵ but nevertheless to regard the overall problem as one of interpretation of the statute. One searches in vain in the judgments for disapproval of such a radical departure from settled judicial doctrine. Although the courts tried to limit the wide scope of the substantive criminalising provisions,⁴⁶ they made no attempt to restrict the ambit of the evidential provisions of section 2(2).

4 6 The demise of the presumptive provision in section 2 of the Terrorism Act

Mercifully, wise counsel prevailed in the corridors of power. Fifteen years after the offending provisions were enacted, the Internal Security Act⁴⁷ and the Terrorism Act⁴⁸ were repealed *in toto*, except for a few formal matters, by Act 74 of

40 Act 44 of 1950.

41 Act 83 of 1967.

42 This provision has been severely criticised. Matthews "The terrors of terrorism" 1974 *SALJ* 381 has even called it "the statutory jumble of words that constitute the crime of terrorism". Criticism of the substantive criminal provisions falls outside the scope of this article.

43 "This trend has, however, been given considerable acceleration by section 3 of the Suppression of Communism Amendment Act 24 of 1967, and section 2(2) of the Terrorism Act 83 of 1967, both of which require the accused to establish his innocence beyond a reasonable doubt": Davids "Law of evidence" 1967 *Annual Survey* 377.

44 Mathews 381; *Ffrench-Beytagh* 1972 3 SA 430 (A) 457E-458A; Mathews *Freedom, state security and the rule of law* (1971) 37; Mathews 1974 *SALJ* 382-383.

45 *Ffrench-Beytagh* 457F-G; *Essack* 1974 1 SA 1 (T) 18A-C; *Cooper* 1976 2 SA 875 (T) 876H-877B.

46 Mathews (1971) 33-34; Mathews 1974 *SALJ* 387.

47 44 of 1950.

48 83 of 1967.

1982. The offending evidential provisions were re-enacted in substantially altered form in section 69 of Act 74 of 1982. It is significant that all the presumptions in section 69 operate unless or until the contrary is proved. No mention is made of the accused having to prove any matter beyond a reasonable doubt.

47 The effect of the new Constitution

Section 35(3)(h) and (j) of the Constitution provides that everyone has a right to a fair trial which includes, *inter alia*, the right to be presumed innocent, to remain silent, not to testify during the proceedings and not to be compelled to give self-incriminating evidence.

There is no doubt that these provisions are in conflict with the presumption that shifts the onus of proof on to the accused. There are cases on this issue that were decided in terms of a similar provision in the interim Constitution, and which struck down the presumptions as unconstitutional and therefore invalid. The leading case is that of *Zuma*.⁴⁹ There the accused were charged with murder and robbery. At the trial they pleaded not guilty, but they had each made a confession to a magistrate. They claimed that their confessions had not been made freely and voluntarily because they had been assaulted and threatened by policemen. The police denied this and the accused could not prove that they had not made their confessions freely and voluntarily. The case was referred to the Constitutional Court.

The court had to consider the validity or constitutionality of section 217(1)(b)(ii) of the Criminal Procedure Act⁵⁰ which stipulated that, if a confession had been made to a magistrate and reduced to writing by him, or had been confirmed and reduced to writing in the presence of a magistrate, the confession would be presumed to have been made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto, unless the contrary was proved. This is called a "reverse onus".

In considering the constitutionality of this proviso, Kentridge AJ referred to American and Canadian case law. He had to interpret these in the light of the provisions of section 25 of the interim Constitution of 1993, which was similar to the provisions of section 35 referred to above. He also had to consider the effect of the limitation clause in section 33 of the interim Constitution.

The judge considered the effect of the "rational connection" test which has been referred to in the Canadian courts in the interpretation of their Charter of Rights. The judge found the Canadian case law on the reverse onus provisions to be more helpful not only because of their persuasive reasoning, but also because section 1 of the Charter has a limitation clause which is analogous to section 33 of the interim Constitution. This called for a two-stage approach, *sc* whether there had been a violation of the guaranteed right, and if so whether this was justified under the limitation clause. The single-stage approach of the US Constitution, the judge held, may require a more flexible approach to the construction of the fundamental rights, whereas the two-stage approach may require a broader interpretation of the fundamental rights, qualified only at the second stage.

49 1995 3 SA CLR 1 (CC).

50 51 of 1977.

Among the Canadian cases Kentridge AJ referred to *R v Oakes*,⁵¹ where the Supreme Court of Canada had to consider an Act which provided that if a person was proved to be in unlawful possession of a narcotic, then he was presumed to be in possession of it for the purposes of trafficking unless he proved the contrary on a balance of probabilities. The presumption was held to be in conflict with the presumption of innocence guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms. In this regard, Dickson CJC had to say that the presumption of innocence is aimed at protecting the fundamental liberty and human dignity of any person accused by the state of criminal conduct. This was so because an individual charged with a criminal offence faced grave social and personal consequences such as potential loss of physical liberty, subjection to social stigma and ostracism from the community and other social, psychological and economic harms. Owing to the gravity of these consequences, the presumption of innocence was regarded as being crucial since it ensured that until the state has proved the accused's guilt beyond all reasonable doubt, he or she was innocent. This was indispensable in a society committed to fairness and social justice.

If, on the other hand, the accused bore the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for him to be convicted in spite of the existence of a reasonable doubt. This would be the case if the accused led adequate evidence to raise a reasonable doubt on his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue. He held further that the "rational connection" test, although useful at the stage when the state sought to justify an infringement of a guaranteed right in terms of section 1 of the Charter, was not in itself an adequate protection for the constitutional presumption of innocence. This is so because, although a basic fact may rationally tend to prove a presumed fact, it might not prove its existence beyond a reasonable doubt. This could lead to an accused being convicted despite the presence of a reasonable doubt, in violation of the presumption of innocence.

Another Canadian case to which Kentridge AJ referred is *R v Whyte*⁵² which related to a statute creating the offence of having care or control of a motor vehicle while one's ability to drive was affected by alcohol. In terms of this statute, if it could be proved that the accused occupied the driver's seat he was deemed to have the care and control of the vehicle unless he proved that he did not enter the vehicle with the purpose of setting it in motion. This presumption was also held to violate the right to be presumed innocent. The Supreme Court held that it was irrelevant that the presumption did not relate to an essential element of the offence. In the words of Dickson CJC:

"In the case at bar, the Attorney-General of Canada argued that since the intention to set the vehicle in motion is not an element of the offence, s 237(1)(a) does not infringe the presumption of innocence. Counsel relied on the passage from *Oakes* where the accused was required to disprove an element of the offence.

"The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the s 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.

51 1986 26 DLR (4th) 200.

52 1988 51 DLR (4th) 481.

“The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.”⁵³

A further Canadian case to which Kentridge AJ referred was *R v Downey*.⁵⁴ In this case, the Canadian Supreme Court dealt with a statutory presumption that a person who lived with or was habitually in the company of prostitutes was, in the absence of evidence to the contrary, committing an offence of “living on the avails (ie proceeds) of another’s prostitution”. This presumption was also held to violate the presumption of innocence, although it was held by a majority to be in all the circumstances a justified infringement. Cory J summarised the principles extracted from the authorities in seven propositions of which Kentridge AJ quoted the first three:

“I. The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.

“II. If by the provision of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities, either an element of an offence or an excuse, then it contravenes s11(d). Such a provision would permit a conviction in spite of a reasonable doubt.

“III. Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of an offence.”⁵⁵

Kentridge AJ further traced the development of the common-law rule placing the onus of proving the voluntariness of a confession on the prosecution, from English legal history. This developed over three hundred years and was a reaction to the oppressive way in which confessions were extracted by the court of the Star Chamber in the seventeenth century. Together with this there developed the privilege against self-incrimination and the right to silence. This ultimately found its way into South African law. After this survey, Kentridge AJ came to the conclusion that the common-law rule in regard to the burden of proving that a confession was voluntary was not a fortuitous one, but was

“an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey’s ‘golden thread’ – that is for the prosecution to prove the guilt of the accused beyond reasonable doubt (*Woolmington’s case, supra*). Reverse the burden of proof and all these rights are seriously compromised and undermined”.

For this reason, Kentridge AJ regarded the common-law rule on the burden of proof as being inherent in the rights mentioned in section 25(2) and (3)(c) and (d) of the Constitution, and as forming part of the right to a fair trial. He further regarded this interpretation as promoting the values which underlie an open and democratic society, and as being entirely consistent with the language of section 25. Consequently, he declared section 217(1)(b)(ii) of the Criminal Procedure

53 493.

54 1992 90 DLR (4th) 449.

55 461.

Act to be in violation of the provisions of the Constitution. What he omitted to do, however, was reconcile English legislature's approach to using presumptions that are in conflict with the common law. Obviously the doctrine of parliamentary sovereignty facilitated this. England has no Bill of Rights and the English courts have therefore no authority to declare parliament's wishes, as clearly evidenced in an enactment, unconstitutional.

In coming to the conclusion he reached, Kentridge AJ was quick to add that he did not consider the meaning and scope of the right to silence during trial. He regarded it as unnecessary to consider whether section 217(1)(b)(ii) violated such a right.

Kentridge AJ further considered whether, if the proviso in question violated the fundamental rights, it was not saved by section 33(1) of the interim Constitution. He was not prepared to regard the presumption as being saved by that provision (the limitation clause). He felt that the rights interfered with were fundamental to our concepts of justice and forensic fairness, and have existed in our country for more than 150 years. A harsh result of the application of section 217(1)(b)(ii) is the possibility that an accused could be convicted despite the reasonable doubt of the court as to his guilt. The judge found no justification for this, especially since it had not been shown that it is in practice impossible or unduly burdensome for the state to discharge its onus. On the contrary, this had been successfully done in a number of trials under the common-law rule. The reverse onus, according to the judge, could be attributed to the Botha Commission into Criminal Procedure and Evidence.⁵⁶ According to this report, the reverse onus was aimed at shortening or eliminating the extent of trials-within-a-trial and at preventing accused people who had made confessions freely and voluntarily from denying those confessions because of the influence of others. Kentridge AJ did not regard the above as sufficient justification for departing from the well-established common-law rule, and the consequent infringement of the fundamental rights in question. For this reason, he concluded that section 217(1)(b)(ii) did not comply with the criteria laid down in section 33(1) of the interim Constitution. On the contrary, section 217(1)(b)(ii) was in conflict with the Constitution. The decision in *Zuma* was followed in a number of subsequent cases dealing with presumptions.⁵⁷ A few of these will now be discussed in detail.

In *Scagell v Attorney-General Western Cape*⁵⁸ the accused were charged under section 6(1) of the Gambling Act 51 of 1965. This section, *inter alia*, stipulated that it is an offence to allow unlicensed gambling. The section also created a number of presumptions. Section 6(3) stipulated that if gambling equipment was found at a place, this would be evidence that the person in charge of the place allowed gambling there. Section 6(4) provided that if a policeman was prevented from entering a specific a place, it would be presumed that the person in charge

56 RP78/1971.

57 *Nortje v Attorney-General of the Cape* 1995 2 BCLR 236 (C); *Scagell v Attorney-General of the Western Cape* 1996 11 BCLR 1446 (CC); *Bhulwana, Gwadiso* 1996 1 SA 388 (CC), 1995 12 BCLR 1579 (CC); *Julies* 1996 4 SA 313 (CC), 1996 7 BCLR 899 (CC); *Menissa* 1996 4 SA CLR (C); *Mbatha, Prinsloo* 1996 2 SA 464 (CC), 1996 3 BCLR 293 (CC); *Ntsele* 1997 3 SACR 740 (CC), 1997 11 BCLR 1543 (CC); *Osman v Attorney-General Transvaal* 1998 2 BCLR 165 (T); *Mumbe* 1997 7 BCLR 966 (W); *Manamela* 2000 1 SACR 414 (CC).

58 1996 11 BCLR 1446 (CC).

of the place permitted gambling to take place there. Section 6(5) stated that if the prosecution proved that there was gambling, it would be presumed that the gambling game was played for stakes. In terms of section 6(6) anyone acting as a "porter, doorkeeper or servant" at a place where gambling took place would be deemed to be in control or in charge of such place.

The accused contended that these sections in the Gambling Act were unconstitutional because they assumed that the accused were guilty before the trial commenced. They consequently contended that the sections infringed the right to a fair trial, and especially the right to be presumed innocent and to remain silent.

O'Regan J decided that sections 6(3) and 6(4) of the Gambling Act were unconstitutional because they violated the right to a fair trial and the right to be presumed innocent. She said that section 6(4) infringed section 25(3) of the interim Constitution due to the fact that, instead of being presumed innocent, accused people were presumed guilty. This implied that the prosecution did not have to prove that the accused allowed gambling, but the accused would have to prove that they had not permitted gambling. This had previously been found to be unconstitutional.

In the opinion of the judge, section 6(3) did not presume that the accused was guilty, but it placed an evidential burden on the accused. It implied that the accused would have to give evidence to the court that they had not been gambling. O'Regan J found this to be in violation of the right to a fair trial. It meant that a completely innocent person could be compelled to defend himself in court just because he had a pack of cards. Defending oneself in court could be inconvenient, expensive and bad for one's reputation even if one is innocent.

The state argued that illegal gambling is bad for society, but it did not adduce any evidence to prove that those sections of the Gambling Act were really needed by the police or the prosecution to investigate and to prosecute illegal gambling. For this reason, O'Regan J concluded that the relevant sections were not reasonable, justifiable or necessary in terms of the limitation clause. From the reasoning of O'Regan J, it would appear that if the prosecution had led evidence showing that it would be difficult to prosecute crimes successfully without this presumption, the court might have held otherwise.

The cases of *Bhulwana* and *Gwadiso*⁵⁹ were joined and decided simultaneously by the Constitutional Court. In both cases the accused were found guilty of possession of dagga. They were also found guilty of dealing in dagga, although it was not proved that dealing had taken place. This was as a result of the application of the presumption that if a person has more than 115g of dagga in his possession, he can be presumed to be dealing in it.

In *Bhulwana*, the accused had been found with nearly a kilogram of dagga in his possession. He was convicted of dealing in dagga. On appeal, the judge found that he would not have been found guilty of dealing had it not been for the presumption that he was dealing. In the case of *Gwadiso*, the accused had been found with nearly half a kilogram of dagga. He was also found guilty of dealing. On appeal, the judge concluded that *Gwadiso* would also not have been found guilty of dealing were it not for the presumption.

The presumption was contained in section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992, which stipulated that if a person was found in possession of more than 115 grams of dagga it would be presumed, unless the contrary was proved, that he was dealing in dagga and not merely in possession of it. This provision would be in conflict with section 25(3) of the 1993 Constitution, which provided that every person had a right to a fair trial, including the right to be presumed innocent and to remain silent during the trial.

O'Regan J, who delivered the decision of the court, decided that the presumption in section 21(1)(a)(i) of the Drugs and Drug Trafficking Act was unconstitutional because it violated the accused's right to be presumed innocent. In coming to this conclusion, the judge considered a number of factors. She felt that if the state wanted the accused to have to establish his innocence, then the state must give good reasons why that should be the case.

The reasons advanced by the state in support of the presumption were, *inter alia*, that it is extremely important for the government to control the trade in illegal drugs, that a person who is found guilty of dealing can receive a heavier sentence than someone found guilty of possession only, and that the presumption facilitates the conviction of people on charges of dealing in drugs.

While O'Regan J conceded that illegal drugs posed a serious problem in society, she could not see how the presumption contributed to the solution of the problem. She pointed out that the maximum sentence for dealing was 25 years, whereas it was 15 years for possession. Fifteen years was, in the opinion of the judge, already a severe sentence, and it was unlikely that judges would sentence people to longer than 15 years where the presumption was used. She also disagreed that the presumption assisted in procuring convictions that the state could not otherwise obtain. A person first had to be convicted of possession before he could be convicted of dealing. For a person to be convicted of possession, the state had to prove possession; it could not be presumed.

For this reason, the judge held that it is not logical to say that the presumption was necessary to convict drug offenders. While it might be necessary to secure a conviction for the more serious offence of dealing, that was not sufficient to justify the violation of section 25. She also said that it was not logical to presume that a person found in possession of 115g of dagga was likely to be dealing in dagga. The quantity of 115 grams was an arbitrary figure and there was no reason why, if a person was found with 115g, he or she should be considered a dealer, whereas a person with only 90g of dagga was not.

A similar decision was reached in a short judgment in *Julies*.⁶⁰ In this case the accused had been caught with three mandrax tablets and had been found guilty of both possession and dealing because of the presumption in section 21(1)(a)(iii) of the Drugs and Drug Trafficking Act 140 of 1992, to the effect that where a person was found in possession of an undesirable dependence-forming substance, it would be presumed that he was dealing in the substance. In the Constitutional Court it was argued that section 21(1)(a)(iii) was unconstitutional because it was in conflict with section 25(3)(c) of the 1993 Constitution, which gave the accused the right to be presumed innocent and to remain silent during his trial. As the law compelled a person to prove that he was not dealing in

drugs, that person's right to be presumed innocent and to remain silent was infringed.

Kriegler J concurred with the cases of *Bhulwana* and *Gwadiso*. He said that it made no sense to assume that a person who was in possession of a drug, no matter what the quantity, was presumed to be dealing in that drug.

In *Menissa*⁶¹ the accused had been charged in the magistrate's court with a contravention of section 5(b) of Act 140 of 1992 for dealing in 33 mandrax tablets, an undesirable dependence-producing substance, alternatively for a contravention of section 4(b) of the Act for being in possession of the tablets. The magistrate found him guilty of dealing because he mistakenly believed that the presumption contained in section 21(1)(a)(iii) of Act 140 of 1992 was still in force. On review, the court found this reliance to be misplaced as the section had previously been found by the Constitutional Court in *Julies* to be unconstitutional on account of its being in conflict with section 25(3)(c) of the 1993 Constitution.

These decisions were followed in *Mello*⁶² which dealt with the provisions of section 20 of Act 140 of 1992. That provision stipulated that "(i)f in the prosecution of any person for an offence under this Act it is proved that any drug was found in the immediate vicinity of the accused, it shall be presumed, until the contrary is proved, that the accused was found in possession of such drug". The effect of this presumption was that it imposed a duty on the accused to prove on a preponderance of probabilities that he or she did not in fact possess the drug, thereby imposing a reverse onus on the accused to an essential element of the crime.

Mogoro J found that the presumption created by section 20 violates the very essence of the right to a fair trial, which includes the right to be presumed innocent. She further found that section 20 could be saved by the provisions of section 33(1) of the interim Constitution only if it constituted a limitation which was reasonable, necessary and justifiable in an open and democratic society based on freedom and equality. This section was found to be unjustifiable in an open and democratic society because it hit at the core of the right to be presumed innocent until proven guilty, a right which protects the basic values of justice in an open and democratic society.

5 CONCLUSION

In the area of presumptions, it is clear that American law is decidedly hostile towards them. The constitutional mandate is incompatible with the use of presumptions. But even in American law, the reality of evidential necessity is acknowledged and thus presumptions are accepted, but only under the most stringent conditions. In American law, however, presumptions (whether common-law or statutory presumptions) can never impose anything more than an evidential onus. American law therefore adheres very closely to the basic ideology of the criminal law of Western jurisdictions that an accused is innocent until proven guilty and that the state, being the initiator of the criminal process, must demonstrate the guilt of the accused.

English common law is not as hostile to presumptions as American law. Nevertheless, the English common law is similar to American law in the sense

61 1996 4 SA CLR 50 (C).

62 1998 3 SA 712 (CC).

that the onus cast by a presumption is evidential only. Statutory presumptions, however, are a different kettle of fish because English law recognises the authority of Parliament to impose a persuasive burden on the accused. The courts seem to be overzealous in approving and applying statutory presumptions of this kind. This is a significant departure from the common-law ideology already averted to.

South African law has followed English common law so far as common law presumptions are concerned, save that South African law admits one more exception to the general rule than English law. In the sphere of statutory presumptions, South African law in the past also followed the English legal tradition of parliamentary supremacy. Statutory presumptions were created with gusto by Parliament and other subsidiary legislative organs, and were interpreted so as to cast persuasive *onus* on the accused.

Because of the great number of statutory presumptions and their effect, one often felt that the basic ideology of South African criminal law had been turned around and that more often than not the accused had to establish his innocence in order to escape punishment.

The proof-beyond-a-reasonable-doubt presumptive provision operative against an accused person seems to have been an overreaction on the part of the security establishment to threatening political phenomena. As soon as the security establishment felt confident of its ability to manage the phenomena in question, it jettisoned the infamous provisions which had damaged the reputation of South African law. Over a period of about fifteen years, South Africa returned to the fold of the Western tradition to the extent that it did away with provisions which seemed to call upon an accused person to prove his innocence beyond a reasonable doubt. This was taken a step further when a number of presumptions shifting the onus on to the accused were declared unconstitutional as being in conflict with section 25(3)(c) of the interim Constitution and consequently section 35(3) of the final Constitution, in that they violated the accused's right to be presumed innocent and to remain silent. These are rights that protect the basic values of justice in an open and democratic society based on freedom, equality and human dignity. Effectively, this has returned the situation to the position where the state has to prove the guilt of the accused beyond a reasonable doubt. This means that in order to be of force and effect, presumptions have to comply with the provisions and core values enshrined in the constitution. These are safeguards which are meant to protect the liberty of the individual and to minimise erroneous convictions.

Many centuries of experience has taught banks that vanity, foolishness and greed may lead a manager off the path of strict probity. Hence at least some . . . internal restrictions and procedures have been designed to prevent or limit consequent harm. A thieving bank manager is not a common figure but he is not unknown, and a bank knows that if it has had the misfortune to employ such a one, he will have the machinery and the status that it has placed at his disposal, to attempt to accomplish his ends.

Schutz JA in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 1 SA 396 (SCA) para 34.

Drucilla Cornell's "imaginary domain": Equality, freedom and the ethic of alterity in South Africa*

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"Let nothing be called natural
In an age of bloody confusion
Ordered disorder, planned caprice,
And dehumanized humanity, lest all things
Be held unalterable."

Bertolt Brecht

1 INTRODUCTION

The Constitution of the Republic of South Africa, Act 108 of 1996¹ contains a Bill of Rights in Chapter 2 which completed what has been termed South Africa's negotiated revolution.² The Constitution was signed into law by President Nelson Mandela at Sharpeville on 4 February 1997, marking the beginning of a constitutional democracy in South Africa based on, *inter alia*, values of dignity, equality and freedom.

In section 9 of the Constitution – the equality clause – provision is made for legislative and other measures designed to protect or advance people, or categories of people, disadvantaged by unfair discrimination and to promote the achievement of equality.³ Effect was given to this by the passing of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000⁴ some three years after the signing of the Constitution.

* This article was inspired by the film *The X-Men*. The film opens with a scene in a Polish prison camp during 1944 where a young Magneto is separated from his parents, and in his desperate but unsuccessful attempt to reach them, mangles a gate which separates them through the sheer power of his mind. This chilling opening scene puts the story in context: it is a narrative about freedom from (unfair) discrimination and the need for the equal recognition of unique identities without denying the difference of others. The culmination of the movie at the Statue of Liberty has obvious symbolic significance. The individuals affected by these mutations are diverse, but one common "X factor" exists amongst them – their difference and minority status as feared outsiders: "Nature made them unique. Society made them outcasts . . . They are the next step in the human evolution – born with fantastic powers and abilities – [they] question everything – including the wisdom and ideals of those who have come before" in "Revolution" *Marvel Comics* # 102 May 2000.

1 Hereinafter referred to as "the Constitution".

2 See De Waal *et al* *The Bill of Rights handbook* (2001) ("De Waal *et al*") ch 1.

3 See s 9(2).

4 Hereinafter referred to as "the Equality Act".

The primary objective of the Equality Act is "to give effect to the letter and the spirit of the Constitution, especially the founding values of achieving equality and human dignity".⁵ The preamble to the Equality Act makes it clear that the eradication of systemic social and economic inequalities and unfair discrimination underlies the establishment of a constitutional democracy, especially one that is based on the values of human dignity, equality, freedom and social justice in a united, non-racist and non-sexist society.

In this article an attempt will be made to expand upon the development of a transformative constitutional jurisprudence in South Africa. In particular, the inter-relationship between equality, freedom and privacy as constitutional rights and values will be investigated. This will be done within a philosophical framework and with reference to the recent decision by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.⁶ The postmodern school of thought that has emerged in the last fifty years or so will be used to illustrate the problems inherent in a universal recognition of human rights.

2 DRUCILLA CORNELL'S "IMAGINARY DOMAIN"

The right and value of equality as recognised in our Bill of Rights is a complex one. What does it mean legally to guarantee equality for all? In her latest book,⁷ Drucilla Cornell expands upon her theory of the "imaginary domain" as a means of ensuring that all individuals are considered to be of equal and unique value.⁸ This domain "takes us beyond hierarchical definitions of self, whether given by class, caste, race, or gender".⁹ The concept of the imaginary domain as a *right* is to allow the freedom of each individual to live a uniquely self-created life – an essential right of personality.¹⁰

For Cornell the imaginary domain is the space of the "as if", in which beings imagine who they may be if they made themselves their own end.¹¹ The further recognition of the imaginary domain is the political and ethical basis of self-representation of one's (sexuate) being. This links up with the Kantian ideal that the most precious of rights is the right to freedom, and that individuals may be legally coerced to harmonise their freedom with that of others.¹² This subjective aspect of right has perhaps been the most controversial in traditional human-rights discourse since it may be perceived to threaten the ideal of community by replacing it with a Western capitalist notion of the possessive and defensive individual.¹³ Cornell, however, explains that the recognition of the imaginary domain does not necessarily go hand in hand with a subjective conception of right. The author acknowledges the

5 See the Memorandum on the Objects of the Promotion of Equality and Prevention of Unfair Discrimination Bill.

6 1998 12 BCLR 1517 (CC), 1999 1 SA 6 (CC).

7 *At the heart of freedom; Feminism, sex and equality* (1998) ("Cornell (1998)").

8 See also Cornell *The imaginary domain: Abortion, pornography and sexual harassment* (1995) ("Cornell (1995)").

9 Cornell (1998) ix.

10 *Ibid.*

11 Cornell (1998) 8.

12 For Kant the subject was a Cartesian "thinking thing" (*cogito ergo sum*). Kant's *Critique of practical reason* (1956) is one of the foundations of modern jurisprudence according to which the moral will is free because it finds all its determinations in itself.

13 Cornell (1998) 159.

importance of community and of close personal relationships¹⁴ and argues that the right to represent one's own (sexuate) being legally allows intimate associations that have historically been prohibited by the law.

In the chapter dealing with human rights,¹⁵ Cornell addresses the question whether the imaginary domain is a Western, liberal concept based on imperialist principles and the central value of the individual. Cornell's central argument in defence of the imaginary domain turns us back to what Rawls¹⁶ would call a philosophical conception of our equal worth as people/individuals. The demand of her theory of justice is that women (and men) must be "imagined and evaluated as free persons, and that all forms of egalitarian legislation must be tailored so as to be consistent with their freedom".¹⁷

The imaginary domain is thus a Utopian ideal – a vision of something truly new, "a world in which we all share in life's glories".¹⁸ Cornell maintains that it is the dream itself which proves that change may be possible.¹⁹ The author is concerned with the imaginary projection of an ideal self, regardless of the denial by the law of the wholeness of the subject. She argues that controversial legal and human-rights issues should be understood in the light of the imaginary domain (of women) which is the projected bodily integrity and sexual imago that the operation of the Lacanian mirror stage²⁰ installs in each of us in early life:²¹

"The imaginary domain recognises that literal space cannot be conflated with psychic space and reveals that our sense of freedom is intimately tied to the renewal of the imagination as we come to terms with who we are and who we wish to be as sexuate beings. Since, psychoanalytically, the imaginary is inseparable from one's sexual imago, it demands that no-one be forced to have another's imaginary imposed upon herself or himself in such a way as to rob him or her of respect for his or her sexuate being."²²

14 167.

15 *Op cit* ch 6 151ff.

16 See *A theory of justice* (1972), in which Rawls constructs the fiction of natural man contracting behind a "veil of ignorance" which conceals all individualising characteristics from the contractors. Rawls thus seeks to express his concept of justice by concentrating on what people would agree to *if they were free to make that choice*. Rawls has been criticised for the liberal individualism inherent in this theory.

17 Cornell (1998) 159.

18 186.

19 *Ibid*.

20 See Lacan *The ethics of psychoanalysis* (1992). According to Sigmund Freud's Oedipal structure, the subject comes into existence through the intervention of the father who disrupts the mother-child dyad by prohibiting the child's desire for the mother. See "Totem and taboo" in *The origins of religion* (1985). Lacan reads this primary repression in linguistic terms. According to him, the primal union between mother and child is broken and the subject comes into being by entering the symbolic order, typically a combination of language and law. The symbolic separates baby from mother – something termed symbolic "castration" – and this separation causes loss, absence and lack within the self. This lack is, however, partially addressed through the baby's identification with signifiers, words and images. In the famous "mirror stage", the child between six and 18 months experiences a sense of jubilation when she first recognises her own image in a mirror or in the gaze of her mother and, through the reflection, comes to identify with a whole and complete bodily existence. But this image is external to the body and different from the child's sensual experience of a disjointed body. Thus identity and bodily integrity are not a given, but are constructed through a mirroring process and the repeated recognition of self by the other who appears to be complete.

21 See Cornell (1995) ch 1.

22 *Idem* 8.

Cornell's imaginary domain is a space of limited legal intervention. This is useful in explaining the right to sexual respect and integrity. No legal intervention is allowed which would impinge on the imaginary domain of an individual, which is necessary for identity formation. A universal position on these issues is, however, impossible and a uniform response to different and conflicting imaginary domains is morally wrong. For example, her imaginary domain may thus be used to explain the importance of the right to be free of unfair discrimination based on sexual orientation. This is discussed in more detail below.

3 THE END OF HISTORY AND HUMAN RIGHTS?

Douzinas²³ attempts to extend the recognition of the imaginary domain beyond the mere non-interference with the development of a sexual identity to include a coherent imaginary *social identity* in which body and self are integrated, and *all* aspects of the self are recognised by others.²⁴ The imaginary domain of human rights is that of the complete human. According to the author, this imaginary wholeness is a fantasy constructed by human rights and an ideal of the future free from formalistic liberalism.²⁵

The author argues that the "imaginary domain of human rights"²⁶ is Utopian and similar to conceptions of radical natural law

"in which the present foreshadows a future not yet and, one should add, not ever possible. The future projection of an order in which man is no longer a 'degraded, enslaved, abandoned or despised being' links the best traditions of the past with a powerful 'reminiscence of the future'. It disturbs the linear concept of time and, like psychoanalysis, it imagines the present in the image of a prefigured beautiful future which, however, will never come to be."²⁷

This is the "not yet" of Utopia. The space of the imaginary of rights is between the legal fragmentation and disassembly of self and the fantasy scenario of a complete human.²⁸ But, as Douzinas submits, attempts to revive the imaginary domain and link it with human rights, as Cornell does, is a difficult task:

"Not only have human rights been hijacked by governments and international committees and their early connections with the utopianism of radical natural law . . . been severed, but utopia also is not doing too well . . . The concept of utopia was dealt the first debilitating blow in the fifties and sixties when the Soviet gulags and mental asylums became widely known. It was deleted from the political dictionary with the collapse of communism."²⁹

In this anti-Utopian climate, Fukuyama has stated that the purpose of history has come to an end:

"Today, we have trouble imagining a world that is radically better than our own, or a future that is not essentially democratic and capitalist. We cannot picture to ourselves a world that is *essentially* different from the present one, and at the same time better."³⁰

23 *The end of human rights* (2000) ("Douzinas (2000)").

24 Douzinas (2000) 336.

25 *Ibid.*

26 337.

27 *Ibid.* See also Laclau and Mouffe *Hegemony and the socialist strategy* (1985) *passim*.

28 Douzinas (2000) 338.

29 *Ibid.*

30 *The end of history and the last man* (1992) ("Fukuyama (1992)") 46.

Fukuyama thus states that history has finally come to an end, not in the literal sense, but owing to the triumph of Western liberal democracy over communism and, by implication, over Marxism too. Thus, according to Fukuyama's writing in the 1980s, humankind has reached the consummation of our ideological evolution with the collapse of communism and the end of the Cold War, symbolised by the tearing down of the Berlin Wall.³¹ The author's response to the problems posed by cultural differences is to dismiss them as a consequence of unequal social development, to be overcome by "a continuing convergence in the types of institutions governing most advanced societies".³²

Other postmodern thinkers have also been attracted to the idea of the end of history. For example, Baudrillard³³ dismisses tradition altogether in a radical vision of the end of history in which he advocates that history should be abolished, as it is in history that we are alienated.³⁴ For Baudrillard the solution to political conflict is thus to be ahistorical and apolitical.³⁵ But

"[o]pting out of political action (which Baudrillard strongly recommends as a mode of existence in several of his later works), at the very least, his critics also observe, makes life considerably easier for those controlling the status quo. Adopting the Baudrillard line would result in much less active opposition to the political establishment's plans, after all. To abolish history is at the same time to abolish the *possibility of political change*".³⁶

Sim³⁷ also discusses Lyotard's take on the end of history. In *The inhuman*³⁸ Lyotard describes a world where the forces of techno-science and advanced capitalism are concerned above all else to prolong life past the end of the universe. In order to achieve this, thought must be made possible without the restrictions of the human body, which is inherently weak, vulnerable and ultimately destructible. Therefore, human bodies, under the dispensation of the death of the sun, are a liability. The "father of postmodernism" sketches a scenario in which computers take over from humans,³⁹ given that machines are less vulnerable and more productive and efficient than humans.⁴⁰ The human body becomes the outmoded "hardware", and thought (divorced from the body) becomes the prized "software".⁴¹ The techno-scientific world could very well prove to be the grand narrative beyond all other alleged grand narratives where techno-science moves humanity beyond itself – where dissent ceases to be a factor, in the absence of the human.

It should be noted that Lyotard's vision of the end of history is a particularly negative one.⁴² It can also be said that the development of scientific knowledge is a positive thing. An "unfinished universe"⁴³ still holds possibilities and should not

31 "The end of history?" 1989 (16) *The National Interest* 3ff.

32 Fukuyama (1992) 338.

33 See Foss and Patton (trans) "The year 2000 will not take place" in Grosz *et al* (eds) *Future fall: Excursions into post-modernity* (1986).

34 Sim *Postmodern encounters: Derrida and the end of history* (1999) ("Sim (1999)") 23.

35 *Ibid.*

36 *Idem* 25 (my emphasis).

37 *Ibid.*

38 Bennington and Bowlby (trans) *The inhuman: Reflections on time* (1991).

39 Known in science-fiction circles as the "singularity" which is illustrated in the film *The Matrix*.

40 *Op cit* 69.

41 Or "wetware", as information technologists have termed human thought divorced from the body.

42 Sim (1999) 28.

43 *Idem* 29.

be seen as merely running to its predetermined end. There is still a possibility of transformation. The end of history can therefore always be deferred.

Anti-Utopian sentiment has been strongly criticised by the deconstructionist Derrida in *Spectres of Marx*.⁴⁴ As Sim points out:

"It becomes relatively easy to see why Derrida would object to the 'end of history', given that it transgresses so many of the principles of deconstruction . . . There is the matter of its claiming to be an unproblematical concept, for example, whose meaning cannot be misconstrued (a classic example of the metaphysics of presence, therefore); of its being able to mark the boundaries of a process, and grasp the totality of that process, as if *differance* (differing/deferring) did not apply; and of assuming, as Fukuyama clearly does, that one is in possession of the authority to render all other interpretations of a particular phenomenon invalid. The world of discourse is infinitely more complex, and certainly far messier, to a deconstructionist than it is to an 'end of history' advocate."⁴⁵

Marx (as an opponent of the grand narrative of Western liberal capitalism) is highly symbolic to Derrida. The "spectre" of Marxism is something that we cannot escape from, ignore, or claim finally to have overcome. Marxism, and capitalism for that matter, cannot merely come to an "end". It cannot simply be "edited out of our cultural heritage" as Marxism "haunts" us,⁴⁶ even after the drawing apart of the Iron Curtain. Derrida is therefore of the opinion that it is not history itself that is ending but a certain *conception* of history. This, of course, does not exclude the possibility of yet other conceptions of history.

Derrida is particularly critical of Fukuyama's optimism about the triumph of Western liberalism:

"For it must be cried out, at a time when some have the audacity to neo-evangelize in the name of the ideal of a liberal democracy that has finally realized itself as the ideal of human history: never before have violence, inequality, exclusion, famine, and thus economic oppression affected as many human beings in the history of the earth and humanity."⁴⁷

What Derrida is seeking is "a link of affinity, suffering, and hope"⁴⁸ that leads back to Marxist concerns – by an insistence on the spirit rather than the letter of Marx's cultural critique. Instead of proclaiming with triumph the "end of history", we should continue to find new ways of being and contest the powers that be. There is no place for the complacency of declaring history as having ended.

As Douzinas argues, the postmodern Utopian hope has ontological importance:

"[I]t promotes the integrity of unique beings in their existential otherness, by promoting the dynamic realisation of freedom *with others*. While the individual imaginary helps build an other-dependent identity, the social imaginary supports a social organisation in which human relationships will respect and promote the uniqueness of the participants."⁴⁹

The postmodern human-rights Utopia promises to shelter human relations from reification where humans are the subjects of other masters.⁵⁰ The Utopian hope, on

44 (1994).

45 Sim (1999) 37–38.

46 *Idem* 41. See also Derrida's *Spectres of Marx* 107, where he refers to Marx's "spectropolitics" and "genealogy of ghosts".

47 Derrida *Spectres* 85.

48 *Ibid.*

49 Douzinas (2000) 341.

50 342.

the other hand, promotes ways of being (in relationships) in which people experience their lives as if they were "free from necessity".⁵¹

"Human rights, based as they are on the fragile sense of personal identity and the – impossible – hope of social integrity, link integrally the individual and the communal. Like all utopias they deny the present in the name of the future, which means that they paradoxically deny the rights of laws and states in the name of the plural humanities yet to come."⁵²

The human rights of the Other

Douzinis submits that there cannot be positive rights, as all rights are relational. Rights are a recognition that before the rights of an individual there come the rights of others.⁵³ Thus human rights in the Utopian sense have the ability to create new worlds, by continuously pushing the boundaries of society, identity and the law. Human rights create new values and meanings, and make space for novel situations and experiences, but only if human rights are not used as a political instrument of complacency.⁵⁴ In Utopian terms the right of the Other always precedes my right:

"The non-essential essence of human rights, the fleeting universal involved in all particular right-claims could be the recognition of the priority of the other person whose existence before mine makes me ethically bound and opens me to the domain of language, intersubjectivity and right. This other cannot be the universal 'man' of liberalism nor the abstract and formalistic 'subject' of law. The other is always a unique, singular person who has place and time, gender and history, needs and desires. If there is something truly 'universal' in the discourse of human rights, if a metaphysical trait survives their deconstruction, this could perhaps be the recognition of the absolute uniqueness of the other person and my moral duty to save and protect her."⁵⁵

Douzinis associates this "non-essential essentialism" with the phenomenology of Levinas.⁵⁶ Levinas's "ethics of alterity" starts with the Other and challenges the various ways in which the Other has been reduced to the same. The premiss is that the Other comes first. He or she precedes me, and the sign of the Other is the face: "Absolutely present, in his face, the Other – without any metaphor – faces me".⁵⁷ The face of the Other cannot be made my own – it is always outside me and beckoning me to my (unique) responsibility.⁵⁸ As Douzinis puts it:

"Each time I turn to the concrete other, my self takes a new direction, I become who I am. My *principium individuationis* is my unavoidable call to responsibility. My uniqueness is the result of the direct and personal appeal the other makes on me and of my subjection *not to the law* but to the other. It is me that the other addresses and

51 *Ibid.*

52 *Ibid.*

53 *Idem* 343.

54 *Ibid.*

55 *Idem* 348. See also Douzinis and Warrington *Justice miscarried* (1994) *passim*.

56 See Lingis (trans) *Totality and infinity* (1969) and *Otherwise than being or beyond essence* (1991). For uses of the ethics of alterity in law, see Douzinis and Warrington "A well-founded fear of justice: Ethics and justice in postmodernity" 1991 *Law and Critique* 115, "The face of justice: A jurisprudence of alterity" 1994 *Social and Legal Studies* 405 and *Justice miscarried* (1994); Diamantides "Ethics in law: Death marks on a 'still life'" 1995 *Law and Critique* 209.

57 Levinas, quoted in Derrida "Violence and metaphysics" in *Writing and difference* (Bass (trans)) (1978) 100.

58 See also Levinas "The rights of man and the rights of the other" in *Outside the subject* (Smith (trans)) (1993).

not a universal ego or legalistic personhood . . . To be free is to do what none else can do in my place."⁵⁹

According to this phenomenology, human rights are the instrument of ethics. Human rights should in fact reflect ethical concern for the Other,⁶⁰ whether the Other be Jewish or Palestinian. And uniqueness and freedom are the result of my answering the call of the Other that is addressed only to me. Douzinas refers to the community of human rights as a "community of hostages to the other".⁶¹ Human rights therefore allow the experience of freedom, but at the same time they institutionalise the ethic of alterity and the duty to respect the singular and unique existence of the Other. A human-rights society in this sense would always look to redefinitions and reconceptualisations, and to new possibilities and subjectivities.⁶²

"[T]he time of such societies is the future because their principle is always-still to be declared and met. But a society of human rights operates also a (non-essential) theory of the good, and becomes a community of obligation to the singular, unique other and her concrete needs."⁶³

It is therefore argued that the justice of human rights is based on a position of proximity, not disinterested detachment, on concern and closeness, not abstract universality. The concrete needs of the Other are what must come first, according to this interpretation:

"When the apologists of pragmatism pronounce the end of ideology, of history or utopia, they do not mark the triumph of human rights; on the contrary, they bring human rights to an end. The end of human rights comes when they lose their utopian end."⁶⁴

If we use the ethic of alterity as a basis for the operation of the recognition of the rights of the Other, it is possible to move away from liberal formalism and universalism and also to move beyond the atomistic individual.

This poses the question as to how the recognition of an imaginary domain and an ethic of alterity would assist our courts in the adjudication of issues centred on the right to equality.

4 A SOUTH AFRICAN CASE

In *National Coalition for Gay & Lesbian Equality v Minister of Justice*⁶⁵ the Constitutional Court considered an aspect of the right to be left alone, namely the right to make decisions concerning sexual relationships. In considering the constitutional validity of the common-law offence of sodomy, and of various statutory provisions based on the offence of sodomy, the Constitutional Court decided to focus on the right not to be unfairly discriminated against on the basis of sex and sexual orientation as contained in section 9 of the Constitution, as well as on the rights to privacy and dignity:

"Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality

59 Douzinas (2000).

60 *Idem* 353.

61 Douzinas (2000) 355.

62 *Idem* 356.

63 *Ibid.*

64 Douzinas (2000) 380.

65 1998 12 BCLR 1517 (CC), 1999 1 SA 6 (CC).

is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.”⁶⁶

However, Cameron⁶⁷ has pointed out that the concerns of gays and lesbians go much further than a demand that the “law should stop at the bedroom door”. There are therefore limitations to the privacy argument in the particular context of sexual orientation. Cameron states that the privacy argument does not contribute toward the transformation of society to one in which sexual orientation is no longer stigmatised.⁶⁸

“On the one hand, the privacy argument suggests that discrimination against gays and lesbians is confined to prohibiting conduct between adults in the privacy of the bedroom. This is manifestly not so. On the other hand, the privacy argument may subtly reinforce the idea that homosexual intimacy is shameful or improper: that it is tolerable so long as it is confined to the bedroom – but that its implications cannot be countenanced outside. Privacy as a rationale for constitutional protection therefore goes insufficiently far, and has appreciable drawbacks even on its own terms.”⁶⁹

In the *National Coalition* case, Ackermann J (and Sachs J, who wrote a separate concurring judgment) tried to answer these objections by pointing to the interrelationship between privacy and equality.

According to Sachs J, those who have difficulties with the privacy argument (such as Cameron) have an impoverished understanding of the right to privacy. The right to privacy, according to Sachs J, protects people, not places.⁷⁰ It is therefore not simply a negative right to occupy a private space free from government intrusion, but a right to get on with your life and to express your identity and personal preferences. It was this aspect of privacy, the *right to personal self-realisation*, that was undermined by the criminalisation of sodomy.⁷¹ The right to be left alone in body, home and private life⁷² therefore goes hand in hand with the right to the development of the individual personality.

The right to privacy should therefore allow individuals to be or to become, at a personal level, the kind of people they want to be. The implication is that the state may not compel individuals to conform to a stereotypical view of what the model citizen is. The right to privacy dictates that the state and society should be tolerant towards non-conformists.⁷³ The right to privacy is therefore predominantly a freedom right, and the state is not obliged to “assist” people in their quest for personal self-fulfilment.⁷⁴

66 Para 32. See *Bowers, Attorney General of Georgia v Hardwick* 478 US 186 (1986) for a contrasting point of view, where the court upheld Georgia’s sodomy laws as constitutional. Here it may be said that the concept of community was used in a conservative way to suggest that the “community” has a right to use the law to support its view of “ethical decency” (192–196). It is submitted that this is a dangerous stance to take, as it leads to the inevitable alienation of the outsider/other.

67 “Sexual orientation and the Constitution: A test case for human rights” 1993 *SALJ* 450.

68 *Idem* 464.

69 *Ibid.*

70 *National Coalition* para 116.

71 *Ibid.* See also Ackermann J: “The harm caused by the provision can, and often does, affect [a gay man’s] ability to achieve self-identification and self-fulfilment” (para 36).

72 As recognised in s 14 of the Constitution.

73 See De Waal *et al* 275.

74 But see Sachs J in *National Coalition* para 116: “[There must be] at least some responsibility on the State to promote conditions in which personal self-realisation can take place.”

What the Constitutional Court seems to be formulating here is a loose recognition of the imaginary domain of gays who wish to continue unhindered in their quest for a fulfilling life and lifestyle. It may therefore be argued that all individuals have an equal right to this imaginary domain and the freedom and privacy which it offers, especially with regard to the development of their unique sexual beings.

However, it should be remembered that the right to equality encompasses the right not only to formal equality, but also the right to substantive equality in the form of the recognition of past discrimination and disadvantage suffered by certain groups of people.⁷⁵ This is particularly important in the light of South Africa's oppressive political history.

In an *amicus curiae* submission, the Centre for Applied Legal Studies argued that by focusing on dignity (privacy and freedom), the Constitutional Court had not given enough weight to the concept of substantive equality, as the former rights are traditionally liberal and individualistic in nature. It was further argued that the court should adopt a new interpretation of section 9, since its interpretation of section 8 of the interim Constitution had failed to recognise substantive equality.⁷⁶ Judges Ackermann and Sachs rejected the *amicus curiae* argument. Ackermann J held that the court had recognised that the purpose of the equality clause is a remedial or restitutionary one,⁷⁷ and Sachs J argued that the court should continue to emphasise respect for dignity in respect of equality infringements.⁷⁸ In the latter case, therefore, the court is still reluctant to embrace equality as a right as such. This leads to a situation where the concept of equality has no unique and independent meaning, and the concept of dignity no longer has a settled meaning. It is submitted that the approach of protecting individual dignity and freedom is not a practicable one if systemic forms of discrimination are not dealt with initially. It is submitted that, in dealing with systemic forms of discrimination, the ethic of alterity would prove helpful. It is not sufficient in my view to recognise the rights of individuals without emphasising the *responsibility* that we have towards the Other as illustrated by the

75 The distinction between formal and substantive equality arises out of the critique developed by critical feminist scholars in respect of traditional liberal legal theory. See Albertyn and Goldblatt "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality" 1998 *SAJHR* 248 251–254. Critical feminist theorists in particular have argued that the liberal concept of the individual as inherently free and equal is misleading because it ignores actual social patterns of discrimination and disadvantage based upon factors such as race, sex, gender, sexual orientation, religion and disability. By rendering these factors legally irrelevant through the acceptance of an abstract concept of the individual, liberalism has failed to acknowledge the extent to which they sustain and perpetuate the patterns of disadvantage individuals experience in real lives.

76 See, in particular, the critique of *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC), 1997 4 SA 1 (CC) in Albertyn and Goldblatt *op cit*. It may be argued that the majority of the court neglected issues of social and legal transformation and continued to endorse the discriminatory stereotype of woman-as-mother.

77 See *National Coalition* para 60: "Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied". See also para 61.

78 See *National Coalition* paras 126 and 129.

discussion above. We are each called upon by the unique Other to recognise the human need for empathy and understanding. Without this recognition, the rights enumerated in the Bill are merely toothless paper tigers.

The *National Coalition* case may, however, also be perceived to be a move in the right direction, especially in view of the following comment by Ackermann J, on behalf of the majority of the court:

"[I]n the final analysis, it is the impact of the discrimination on the complainant or the members of the affected group that is the determining factor regarding the unfairness of the discrimination . . ." ⁷⁹

In "Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court," ⁸⁰ De Vos submits that the court's recognition of the centrality of human dignity is an open-ended rhetorical device used by the court as a guiding light and "catch-all phrase to capture the idea of humans as equally capable and equally deserving of concern, respect and consideration". ⁸¹ Perhaps the only way of doing this is to acknowledge the (potential existence of an) imaginary domain for each individual, and the responsibility to allow individuals to develop their own sexuate and social beings.

5 CONCLUSION

"No *jouissance* is given to me or could be given to me other than that of my own body. That is not clear immediately, but is suspected, and people institute around this *jouissance*, which is good, which is thus my only asset, the protective fence of a so-called universal law called the rights of man: no-one stops me from using my body as I see fit. The result of the limit . . . is that *jouissance* dries up for everybody." ⁸²

The right to and value of equality has been recognised as central to the development of a democratic South Africa. But this recognition is merely the first step on the journey towards an egalitarian society. In interpreting this right and value we must determine what kind of society we wish to live in. The task is therefore of the utmost importance. It is the duty of the members of the Constitutional Court and the presiding officers of the equality courts to rethink and re-evaluate their understanding of substantive equality in order to reflect the needs of individuals within communities (and not as legally isolated sovereignties), and to move away from applying universal principles and solutions to unique problems.

If we recognise the uniqueness of each individual's existence before the law, their history and context, if we allow the voices of the Other to reach us, that is the Utopia we deserve. Whether this is possible is, of course, debatable. But the struggle and search for *jouissance* must continue. ⁸³

79 Para 19.

80 2000 *THRHR* 62.

81 66.

82 Lacan, as quoted in Fink *The Lacanian subject* (1995) 101.

83 As Lacey *Unspeakable subjects* (1998) 248 puts it, we cannot yet imagine what the law would be like in a genuinely equal world peopled by relational subjects connected to each other by mutual respect for each other's *irreducible* differences. But the strategy would be to reconstruct the law and human rights ethically, and in this way to move closer to ethical ideals. Lacey advocates the use of projects such as critique, Utopianism and reformism to continue the struggle.

Equality and non-discrimination in the new South African constitutional order (4): Update

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OPSOMMING

Gelykheid en nie-diskriminasie in die nuwe Suid-Afrikaanse grondwetlike bestel (4): Opdatering

In die finale aflewering in hierdie reeks word die uitsprake in *Jooste v Score Supermarket Trading (Pty) Ltd* en *Hoffmann v South Africa Airways* behandel en die Promotion of Equality and Prevention of Unfair Discrimination Act aangeraak. Laastens word daar gewys op 'n aantal belangrike kwelpunte waaraan nog nie aandag bestee is nie. Die gevolg-trekking is dat daar aansienlike vordering gemaak is met die ontwikkeling van 'n eie Suid-Afrikaanse gewysdereg op die gebied van gelykheid en nie-diskriminasie en dat 'n gesonde basis geskep is waarop voortgebou kan word.

1 INTRODUCTION

In this, the final article in the series, the cases of *Jooste v Score Supermarket Trading (Pty) Ltd*¹ and *Hoffmann v South Africa Airways*² are dealt with, and the Promotion of Equality and Prevention of Unfair Discrimination Act³ is touched on briefly. Finally, a number of important equality issues which have not yet been addressed, will be highlighted.

2 JOOSTE v SCORE SUPERMARKET TRADING (PTY) LTD

Applicant had been injured in respondent's supermarket where she was employed. She claimed damages for her injuries, averring that these had been the direct result of the negligence of respondent's employees. Respondent, in a special plea, argued that applicant's claim was barred by section 35(1) of the Compensation for Occupational Injuries and Diseases Act,⁴ which precludes any action by an employee against an employer save under the provisions of the Act.

1 1999 2 SA BCLR 139 (CC). This case was reported before that of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC) (the immigration case), but the latter was discussed in the previous article in this series (2002 THRHR 37) because of its link with *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) (the sodomy case).

2 2000 11 BCLR 1211 (CC).

3 4 of 2000.

4 130 of 1993.

Applicant thereupon sought an order declaring section 35(1) to be inconsistent with (*inter alia*) section 8 of the interim Constitution⁵ in that it violated the right to equality before the law and to equal protection of the law and the right not to be unfairly discriminated against, because it differentiated unconstitutionally between persons who are employees and persons who are not. The court *a quo* had found that section 35(1) infringed both section 9(1) and 9(3) of the 1996 Constitution.⁶ (The Constitutional Court held that the matter fell to be decided under the 1993 Constitution, but this did not materially affect the issues in any way.)

The Constitutional Court (per Yacoob J) found that the judge in the court *a quo* had not followed the approach laid down by the Constitutional Court⁷ in cases where an infringement of section 8(1) and (2) (IC) (or s 9(1) and (3) (FC)) is alleged, but the differentiation is not based on a listed ground of discrimination: first of all, it must be asked whether a rational relationship exists between the differentiation and a legitimate government purpose. If there is none, the matter ends there – violation of the constitutional provision has been established. And, even if there is such a rational relationship, the differentiation may still be unconstitutional if the differentiation constitutes unfair discrimination. Finally, if unfair discrimination has been established, the discrimination may nevertheless be permissible if the measure in question meets the criteria for limitation contained in the limitation provision.⁸ Citing the sodomy case,⁹ the judge reiterated that the first stage (determination of a rational relationship) may be dispensed with entirely if the discrimination is so obvious that there is no need to undertake this enquiry.¹⁰

Applicant in the case in point did not allege that she had been unfairly discriminated against, but only that there was no rational connection between section 35(1) and any legitimate government purpose. Thus not all the three above-mentioned stages of the enquiry would be followed *in casu*: if a rational connection were to be established, the applicant would fail; but if no rational connection could be found, the applicant would succeed, since, even though no unfair discrimination had been alleged – so that the second stage of the enquiry falls away – the respondent had not proved that the differentiation was justified in terms of section 33 (IC).¹¹

Since the court found that there was indeed a rational connection between section 35(1) and a legitimate government purpose, the issue of justification did not arise. However, the idea that a differentiation that is found to have no rational connection to a legitimate purpose can still be subjected to limitation scrutiny (even if only in principle) is somewhat strange. Obviously section 36 (FC) will logically exclude such a possibility, since the rationality check is provided for in

5 The Republic of South Africa Constitution Act 200 of 1993 (hereafter IC).

6 The Constitution of the Republic of South Africa, 1996 (hereafter FC).

7 See *Prinsloo v Van der Linde* 1997 BCLR 759 (CC); *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC); in particular, *Harksen v Lane* 1997 11 BCLR 1489 (CC) paras 46–49; and the sodomy case. See also the discussion of these cases in the previous articles in this series.

8 S 33 (IC) or s 36 (FC) respectively.

9 See the sodomy case para 18.

10 Para 11.

11 *Ibid.*

subsection (1)(d);¹² but even though section 33(1) (IC) did not contain a similar provision, it may be argued that the absence of a rational connection would logically have proved fatal at the threshold stage in any event. It is difficult to imagine how any limitation that has failed the rationality test could ever be saved under a limitation provision requiring it to be reasonable and justifiable. This is particularly so in the light of the fact that the rationality test as applied by the Constitutional Court may be described as a fairly low hurdle. It is inconceivable that a party that cannot overcome this obstacle successfully would have any chance of success in terms of the limitation clause.

The limits of rationality review were clearly set out by Yacoob J:

“[T]he only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this inquiry whether the scheme chosen by the legislature could be improved in one respect or another.”¹³

It is clear from this that a challenge based purely on rationality will avail a party only if the infringement is very obvious and very crass. It will surely be very rare (under the present Constitution, at any rate) for a differentiation between persons or classes of persons not to be based on some demonstrably legitimate government purpose. In most cases, therefore, litigants would be well-advised to ensure that they have at least a fighting chance of proving unfair discrimination in cases where the differentiation is not based on a specified ground.

The judge's reference to the irrelevance of the possibility that a different legislative scheme could have been a “better” one, immediately brings to mind the fifth factor in section 36(1) (IC), namely “less restrictive means to achieve the purpose [of the limitation]”. Yacoob J emphasised that the question whether one particular legislative scheme is better than another involves a policy choice which falls within the province of the legislature, not the courts. Of course, the judge was here referring only to one aspect of review, namely, rationality; and, as is pointed out above, the rationality test as applied by the Constitutional Court is a fairly “thin” criterion: the court will make a finding of irrationality only when the irrationality is manifest. However, section 36(1)(e) (FC) would appear to blur the line somewhat between judicial function and legislative function.

3 *HOFFMANN v SOUTH AFRICAN AIRWAYS*

Appellant (applicant) had applied to South African Airways (respondent) for employment as a cabin attendant. His application was turned down because a blood test showed that he was HIV-positive.¹⁴ Respondent's policy was not to reject all HIV-positive applicants out of hand; but they were not accepted for positions as flight crew. Respondent sought to justify this policy on the basis of the inherent operational requirements of the job, international practice in the airline industry, safety considerations and respondent's international and domestic

12 S 36(1) requires that limitation of a constitutional right must be in terms of law of general application, and be “reasonable and justifiable . . . taking into account all relevant factors, including . . . (d) the relation between the limitation and its purpose”.

13 Para 16.

14 In more technical terms, because he was found to be living with the Human Immuno deficiency Virus.

civil aviation obligations. Appellant averred that he had been unfairly discriminated against, particularly because his infection was still in an early stage and did not render him unable to perform the tasks the job required.

The High Court¹⁵ found for respondent, concluding that SAA's practice and policy did not discriminate unfairly; furthermore, that even if it did, such discrimination would be justifiable under section 36 of the 1996 Constitution.

The matter was then taken on appeal to the Constitutional Court. The court dealt first of all with the medical evidence.¹⁶ The consensus among the experts¹⁷ on the nature of HIV, its progression and so on, was such that SAA conceded that its employment practice as stated above could not be justified on medical grounds and that its refusal to employ appellant because he was living with HIV was unfair. In consequence, the only question addressed by the court was whether any constitutional rights had been violated by the refusal to employ appellant as a cabin attendant. Appellant alleged that the rights to equality, human dignity and fair labour practices had been violated.

The section 9 enquiry

Subsections (1), (3) and (5) of section 9 were dealt with by the court (per Ngcobo J). Subsection (1) provides that everyone is equal before the law and is entitled to equal protection of the law. Subsection (3) proscribes unfair discrimination by the state: since Transnet, of which SAA is a business unit, is a statutory body under control of the state, exercising public powers and performing public functions in the public interest, it is an organ of state in terms of section 239 of the Constitution. In terms of section 8(1), it is bound by the provisions of the Bill of Rights. It is therefore expressly prohibited from discriminating unfairly. Subsection (5) creates a presumption of unfairness once discrimination on one of the specific grounds listed in subsection (3) has been established.

The judge started by setting out the process that has been adopted by the Constitutional Court in equality issues.¹⁸ The first stage involves an enquiry whether the action or provision being challenged differentiates between persons or groups of persons and, if so, whether the differentiation bears a rational connection to a legitimate government purpose. Counsel for the appellant contended that SAA's policy, which differentiated between persons who were living with HIV and persons who were not, was irrational for two reasons: first of all, it excluded from employment as cabin attendants all HIV positive persons, regardless of the medical evidence which shows that not all such persons are unsuitable for such employment; secondly, the policy excluded prospective cabin attendants but not existing cabin attendants living with HIV.

The court could have concluded, at this point, that the policy was clearly irrational and therefore that it was unnecessary to argue the issue any further.

15 *Hoffmann v South African Airways* 2000 2 SA 628 (W).

16 Paras 11–15.

17 Including its own expert! One wonders why, then, the matter could not have been resolved at an earlier stage.

18 *Harksen v Lane* 1997 11 BCLR 1489 (CC).

However, the judge decided that, because of his view of the discrimination involved *in casu*,

“it is not necessary to embark upon the rationality enquiry or to reach any firm conclusion on whether it applies to the conduct of all organs of state, or whether the practice in issue was irrational”.¹⁹

In other words, section 9(3) may be relied on without first invoking section 9(1), and even if a party relies on both section 9(1) and 9(3), the court may go direct to subsection (3). It would nevertheless appear to be wise for a litigant not to rely entirely on one or the other.

The judge then went on to enquire whether the appellant had been unfairly discriminated against with reference to the criteria laid down in *Harksen v Lane*.²⁰ He emphasised the prejudice to which persons living with HIV and AIDS have been subjected in South Africa, and concluded that the stigmatisation which accompanied life with HIV furthermore constitutes an assault on the dignity of the persons concerned. He cited section 34(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act,²¹ which contains a directive principle on HIV/AIDS (*inter alia*) and requires that,

“in view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status . . .

(a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of ‘prohibited grounds’ by the Minister”.

He also referred to section 6(1) of the Employment Equity Act²² which specifically lists HIV status as a prohibited ground of discrimination, and the national policy on HIV/AIDS issued by the National Department of Education in terms of section 3(4) of the National Education Policy Act²³ which prohibits unfair discrimination against learners, students and educators with HIV/AIDS.

However, HIV/AIDS is not a listed ground of discrimination in terms of the Constitution itself. It may be argued that full-blown AIDS can be categorised as a disability, which is indeed a listed ground, but it is clear from the medical evidence cited in this case that HIV status does not preclude the sufferer from living a normal life, particularly in the early stages of the infection. A party with HIV invoking section 9(3) therefore does not enjoy the benefit of the presumption of unfairness contained in section 9(5) and consequently bears the onus of proving unfairness. While one cannot quarrel with the court’s finding that the discrimination in the case in point was “manifestly unfair”,²⁴ it is submitted that the court should have made it clear that it was up to the appellant to establish the unfairness (and that he had done so).

19 Para 26. Likewise, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) (the immigration case), the Constitutional Court had held (para 18) that it was not always necessary to undertake the rationality test, particularly where the court makes a finding of unfair and unjustifiable discrimination.

20 *Supra* para 41.

21 4 of 2000. This provision came into operation on 2000-09-01.

22 55 of 1998.

23 27 of 1996.

24 Para 32.

As regards the argument put forward by the respondent that the commercial operation of the airline, public perceptions about it and similar policies of other airlines should be considered when determining the unfairness of the discrimination, the judge stated emphatically that, while legitimate commercial requirements are an important consideration when the appointment of an individual is in issue, this does not justify "allowing stereotyping and prejudice to creep in under the guise of commercial interests".²⁵ Furthermore,

"[t]he constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV. Nor can it be dictated by the policies of other airlines not subject to our Constitution."²⁶

The judge also referred to the provisions of international instruments on the elimination of discrimination, and mentioned that South Africa has ratified a number of Conventions in this regard;²⁷ in addition, that item 4 of the SADC Code of Conduct on HIV/AIDS and Employment (1977) provides specifically that HIV status may not be a factor in job status, promotion or transfer.²⁸ (The court is indeed obliged to consider international law when interpreting the Bill of Rights;²⁹ but why this was done under the discussion of the appropriate remedy to be granted in the case, is somewhat obscure.)

The final avenue open to the respondents was to show that the discrimination, albeit unfair, was justifiable in terms of the limitation provision (s 36(1)). This possibility was given short shrift by the judge, who stated simply that this third enquiry did not arise, since there was no law of general application on which the justification could be based. He cited the judgment in *August v Electoral Commission*³⁰ in which Sachs J had held that there could be no justification of a threatened infringement of rights "in the absence of a disqualifying legal provision".³¹ While there seems little doubt that there was indeed no question of any "law of general application" in *Hoffmann* (respondent's employment policy can hardly qualify as "law"), it could be argued that Sachs J's interpretation is rather narrow. Section 36(1) refers to *law* (of general application), not to *a law* or *legislation* or, indeed, to *a legal provision*. A rule of common law should certainly not be excluded out of hand – after all, the presence of law of general application is only the first hurdle to be negotiated by the party seeking to justify a limitation. In the context of equality issues, in particular, where the dividing line between the enquiry into unfairness and the justification enquiry is anything but clear, a narrow interpretation of section 36 could lead to issues that logically belong in the justification stage being "sneaked into" the unfairness enquiry. This could have unsatisfactory consequences, both in theory and in practice.

25 Para 34.

26 Para 36.

27 The African Charter on Human and Peoples' Rights (1981); the Convention on the Elimination of All Forms of Discrimination Against Women (1979); the International Covenant on Civil and Political Rights (1966); the International Convention on the Elimination of All Forms of Racial Discrimination (1966); and ILO Convention 11, Discrimination (Employment and Occupation) Convention (1958).

28 Para 50.

29 S 39(1)(b) of the Constitution.

30 1999 4 BCLR 363 (CC).

31 Para 23, emphasis supplied.

4 THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT

This Act (hereafter the Equality Act), which was enacted to give effect to the obligation imposed by section 9(4) of the Constitution,³² has been put into operation piecemeal.

The Equality Act has been commented on in some detail in a monograph published by the Centre for Applied Legal Studies at the University of the Witwatersrand.³³ It would serve no purpose to repeat here what they have already said. It may be predicted, however, that the Act will prove extremely difficult to implement, for a number of reasons: first of all, its provisions are very widely worded.³⁴ There is no doubt that unfair discrimination by persons and entities other than the state is a major scourge in South African society, but whether legislation such as this can ever prove to be a panacea for these ills is questionable, particularly when the discrimination is committed by an individual rather than an organised group or association of private individuals. It must be noted that among the factors listed in section 14 of the Act to determine unfairness are the following:

- “(f) whether the discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - (ii) accommodate diversity.”

This kind of provision is clearly inappropriate to purely private or domestic relationships, and this should be more clearly reflected in the legislation. Albertyn *et al*³⁵ provide a list of unfair practices which are common in ten sectors in South African society. It is certainly true that freedom of choice and the right to freedom of association, in particular, may easily be used as a pretext to mask unfair discrimination.

Secondly, the issue of indirect discrimination could prove to be a nightmare. It is difficult enough where the state or organisations of a semi-public nature are involved.³⁶

32 The Constitution of the Republic of South Africa, 1996. S 9(4) proscribes unfair discrimination by *any person* (not only by the state) and adds: “National legislation must be enacted to prevent or prohibit unfair discrimination.”

33 Albertyn, Goldblatt and Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001).

34 The Act does not apply to any person to whom and to the extent to which the Employment Equity Act 55 of 1998 applies (s 5(3)). This eliminates a considerable number of potential problems that could arise in relation to the application of the Act.

35 Ch 8.

36 See Bonthuys “Labours of love: Child custody and the division of matrimonial property at divorce” 2001 *THRHR* 192. Although the author does not refer to the discrimination clause at all, since her focus is elsewhere, the article illustrates the way in which indirect discrimination can affect the situation of women in relation to divorce and child custody.

5 CONCLUSION

An examination of the post-1994 equality jurisprudence of our courts, and of the Constitutional Court in particular, shows that a number of ironies as well as a number of issues still remain to be addressed. Among the ironies are the fact that the only allegation of discrimination based on race to have engaged the attention of the Constitutional Court was brought by whites;³⁷ that so many cases were on unspecified grounds of discrimination;³⁸ that most of the women who alleged discrimination based on sex and gender were in fact persons from privileged sectors of society;³⁹ and that two of the most important cases dealing with gender issues were brought by males.⁴⁰ Thus the Constitutional Court has not had many opportunities to deal directly with factual situations of the kind that were a characteristic of pre-1994 South Africa.

Among the issues that have not been resolved are, first, the relationship between section 9(1) and 9(3). Although this has featured in some of the cases, a wholly satisfactory answer has, to my mind, still to be found. The most important outstanding issue, however, remains that of "affirmative action" or the achievement of substantive equality via measures designed to protect or advance those disadvantaged by unfair discrimination in the past. In keeping with the idea that such measures are indeed a consummation of the right to equality and not an exception to or limitation of the right not to be unfairly discriminated against, section 14(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, provides expressly:

"It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons."

This provision does make one thing clear: it will not be possible for a party challenging such a measure to argue that the recipient of the benefit did not personally suffer any disadvantage. This could prove to be a bone of contention, particularly as time goes by and more people enjoy the benefits of equality from birth. But apart from this, the interpretation of "designed" (both in the Constitution and in the Act) remains to be clarified: is it sufficient, for example, for legislation to state in the preamble or the long title that the legislation is intended to protect or advance those previously disadvantaged, or is there some more objective meaning to be assigned to the word "designed"? In other words, must the measure be appropriate? Capable of serving the purpose it sets out to serve?

Finally, if an affirmative action measure is to serve as a defence to a challenge of unfair discrimination, it is suggested that it would have to be specifically pleaded.⁴¹ Furthermore, it would have to be shown that the measure was *designed*, right from the outset, to serve this purpose, and not that it merely happened to have a beneficial, "affirmative" spin-off which was not contemplated initially.

37 *Pretoria City Council v Walker* 1998 3 BCLR 257 (CC).

38 *Eg Larbi-Odam v Member of Executive Council for Education* 1997 12 BCLR 1655 (CC); *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC); *Jooste v Score Supermarket Trading (Pty) Ltd supra*; *Hoffmann v SA Airways supra*.

39 *Eg Harksen v Lane* 1997 11 BCLR 1489 (CC).

40 *Fraser v Children's Court, Pretoria North* 1997 2 BCLR 153 (CC); *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC).

41 See the comment on Sachs J's judgment in the *Walker* case in the previous article in this series.

South Africa's equality jurisprudence has come a long way since the commencement of the interim Constitution in 1994. Among the most obvious achievements must be mentioned that marital status, which was not a listed ground of discrimination under the 1994 Constitution, was included in this category in the 1996 Constitution, as a direct result of judgments such as that in *Brink v Kitshoff*.⁴² Furthermore, even though the perceived shortcomings of the Constitutional Court's dignity-based approach to equality have given rise to a great deal of debate, there is no doubt that, by emphasising the link between equality and human dignity, the court has created a climate in which the values of the Constitution can permeate through the legal system and thus reach society at large.

It is the right of all citizens to observe and carry out their religious practices when burying their dead. But the Court was referred to no legal provision or authority for the proposition that everyone is totally free to choose where such burials are to be effected. A burial requires an appropriately-sized piece of ground to be available. Everyone living within a municipal area can only acquire the necessary ground in a lawfully established cemetery. Burial elsewhere requires not only the necessary acquisition of a site but special permission as well. Outside the jurisdiction of a local authority one is necessarily dependent on the consent of the land owner, be it the State, a juristic person or an individual. These are legal constraints that bind everyone. No one religion can demand more than another. Although the [Extension of Security of Tenure] Act aims to treat occupiers specially, the right of religious freedom is the right of all . . . My conclusion, therefore, is that the right to freedom of religion and religious practice has internal limits. It does not confer unfettered liberty to choose a grave site nor does it include the right to take a grave site without the consent of the owner of the land concerned.

Howie JA in Nkosi v Bührmann 2002 1 SA 372 (SCA) paras 47 and 49.

42 1996 6 BCLR 752 (CC).

International humanitarian and human-rights law pertaining to child civilians in armed conflict: An overview

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"There is a dichotomy between rhetoric and reality. The rhetoric is one of virtual world-wide acceptance and promotion of children's rights through the medium of the United Nations Convention on the Rights of the Child, but the reality is one in which children are constantly subjected to the full brutality of war. The outstanding question is, of course, how might better protection be given to children caught up in armed conflict? This requires considerations both of changes to humanitarian law and of alternative means of addressing the needs of children in situations of armed conflict. Given the wide ratification of the United Nations Convention on the Rights of the Child, it presents a real avenue for reform."¹

OPSOMMING

Die internasionale humanitêre reg wat vir die beskerming van kinders as slagoffers in gewapende konflik voorsiening maak, word hoofsaaklik in die Geneefse Konvensies 1949 en die Addisionele Protokolle daartoe, 1977, aangetref. Die Konvensie oor die Regte van die Kind 1989 vergestalt internasionale "human rights law" en artikel 38 van hierdie instrument handel spesifiek oor die regte van kinders in gewapende konflik. Ongelukkig bestaan daar wesenlike gebreke in hierdie instrumente wat daartoe meewerk dat die beskerming wat aan kinders gebied word, gebrekkig is. Selfs die feit dat sommige bepalinge wat op die beskerming van kinderslagoffers betrekking het gewoontegtelike status het (kan hê?) bring geen beduidende verskil nie.

1 INTRODUCTION

Children are increasingly becoming the direct and indirect victims of armed conflict. Notwithstanding the fact that in both humanitarian law and human-rights law provision is made for the protection and special treatment of child civilians, statistical evidence that has become available indicates that the position of such children is worsening steadily.

Children are caught up in conflicts in which they are not merely bystanders, but indeed targets. Some children are victims of a general onslaught against civilians, while some die as part of a calculated genocide. Others suffer the effects of sexual violence or the multiple deprivations of armed conflict that expose

¹ Hamilton and El-Haj "Armed conflict: The protection of children under international law" 1997 *The Int J of Children's Rights* 35.

them to hunger or disease. Referring to certain statistical figures, Maçhel² concludes:

“These statistics are shocking enough, but more chilling is the conclusion to be drawn from them: more and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values; a space in which children are slaughtered, raped and maimed; a space in which children are starved and exposed to extreme brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink . . .

“The lack of control and the sense of dislocation and chaos that characterize contemporary armed conflicts can be attributed to many different factors. Some observers point to cataclysmic political upheavals and struggles for control over resources in the face of widespread poverty and economic disarray. Others see the callousness of modern warfare as a natural outcome of the social revolutions that have torn traditional societies apart. The latter analysts point as proof to many African societies that have always had strong martial cultures. While fierce in battle, the rules and customs of those societies, only a few generations ago, made it taboo to attack women and children.”

2 PATTERNS AND CHARACTERISTICS OF CONTEMPORARY ARMED CONFLICTS

The patterns and characteristics of modern armed conflict increase the risks for children. Vestiges of colonialism and persistent economic, social and political crises substantially contribute to the disintegration of public order.³ Furthermore, contemporaneous armed conflicts indicate that the traditional distinctions between combatants and civilians are disappearing in battles fought from village to

2 Maçhel “Impact of armed conflict on children”. Report of the Expert of the Secretary-General, Ms Graça Maçhel, submitted pursuant to General Assembly Resolution 48/157 (1996) paras 3 and 4. Further on the effect of war on children, see Leavitt and Fox *The psychological effects of war and violence on children* (1993) 3ff; Cairns *Children and political violence* (1996) 32; Parker “The patient who cannot express pain” in *The emotional stress of war, violence and peace* (1972) 71ff. Van Bueren “International legal protection of children in armed conflict” 1994 *ICLQ* 809, recounts that in the First World War only 5% of the casualties were civilian. By the end of the Second World War this figure had risen to approximately 50%. Out of the 20 million people killed in 150 armed conflicts between 1945 and 1982, the majority were women and children. In the ten years between 1984 and 1994 internal armed conflicts have led to 1.5 million child deaths, to the disablement of 4 million children as a result of war wounds, and to the displacement of 5 million children to refugee camps in order to escape conflicts.

3 Maçhel paras 22–23. Maçhel further conveys that, undermined by internal dissent, countries caught up in conflict today are under severe stress from a global world economy that pushes them ever further towards the margins. The collapse of functional governments in many countries torn by internal fighting and the erosion of essential service structures have fomented inequalities, grievances and strife. In addition, the personalisation of power and leadership and the manipulation of ethnicity and religion to serve personal or narrow group interests have had similarly debilitating effects on countries in conflict. These elements contribute to conflicts between governments and rebels, between different opposition groups vying for supremacy and among populations at large in struggles that take the form of widespread civil unrest. Many of these struggles drag on for indefinite periods with no clear beginning or end, subjecting successive generations to endless struggles for survival. See also Maher “The protection of children in armed conflict” 1989 *Boston College Third World LJ* 297.

village or street to street.⁴ The proportion of war victims who are civilians have leapt, as a consequence, from five per cent to over 90 per cent.⁵ Unbridled attacks on civilians and rural communities lead to mass exoduses and the displacement of entire populations who flee conflict in search of sanctuaries, often outside national borders. It is estimated that 80 per cent of the uprooted are women and children.⁶

More often than not, the rights of children are violated in war. Suffice it here to refer to certain particular rights enshrined in the United Nations Convention on the Rights of the Child 1989.⁷ Article 6(1) provides that every child has the inherent right to life. Article 6(2) obliges States Parties to the Convention on the Rights of the Child to ensure to the maximum extent possible the survival and development of the child. The new patterns and characteristics of modern armed conflict explained above lead, however, to a rise in the number of fatalities, and while many child deaths are attributable to such hostilities, many more children are indirect victims because of disease, malnutrition or starvation.⁸

In terms of article 24, States Parties to the Convention on the Rights of the Child recognise the right of the child to the highest attainable standard of health and to facilities for the treatment of illness and the rehabilitation of health. States Parties must strive to ensure that no child is deprived of his or her right of access to such health-care services. Skilled professionals, including medically trained personnel, however, often flee war zones. As a result, the medical facilities that are still functioning become understaffed, while the number of patients in need, including children, is rapidly rising, and human resources become insufficient to rehabilitate the physical and psychological effects of war-related trauma.

Article 27(1) provides that States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Needless to say, economic crises nearly always accompany armed conflict, leading to dislocation of services and increasing difficulties in providing supplies to conflict-affected areas for service delivery.

4 Kuper *International law concerning child civilians in armed conflict* (1997) 75. See also Hamilton and El-Haj 3; McCoubrey *International humanitarian law: The regulation of armed conflicts* (1990) 171.

5 Maçhel para 24.

6 Maçhel paras 26 and 63–65. Such displacement has a profound physical, emotional and developmental impact on children. At the beginning of the 1980s there were 5.7 million refugees worldwide. By the end of that decade the number had risen to 14.8 million and today there are more than 27.4 million. The number of internally displaced people has escalated in recent years and is now reaching an estimated 30 million. At least 50% of all refugees and displaced people are children. In the course of displacement, such children are often separated from their families, abused physically, exploited and abducted into military groups. They even perish from hunger and disease. See also Maher 299; McCoubrey 171; Garbarino, Kostelny, Dubrow *No place to be a child: Growing up in a war zone* (1991) 1ff.

7 With the exception of the USA and Somalia, this Convention has been ratified by all states to the United Nations, in total 191 States Parties.

8 Hamilton and El-Haj 3. The authors refer to a 1980 study in a war zone in Uganda. Only 2% of the deaths were attributable to violence, whereas 20% were caused by disease and 78% by hunger. Many children die because humanitarian relief does not arrive or is not let in. See also Van Bueren 817; Ramos-Horta "Children of war" 1998 *Family and Conciliation Courts R* 333; Kalshoven "Review of child soldiers: The role of children in armed conflicts" in 1995 *Am J of Int L* 849; Maher 299.

In terms of article 28(1), States Parties recognise the right of the child to education. The destruction of schools, the displacement of the population and the fact that teachers are members of a professional class who are often among the first to leave zones of conflict, frequently result in a total loss of schooling for children.⁹

3 RELEVANT PROVISIONS OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law, the law of armed conflict, is a branch of international law that governs the conduct of war in the sense that it sets out the parameters of what is legally permissible during hostilities. It limits the choice of means and methods of conducting military operations and obliges belligerents to spare people who do not, or who no longer, participate in hostilities.¹⁰ These standards are reflected in the four Geneva Conventions of 12 August 1949 and the two 1977 Protocols Additional to these Conventions. The Fourth 1949 Convention (GC IV) applies primarily to conflicts between states, but Common Article III contained in the Convention, also applies to internal conflicts.¹¹

3.1 The 1949 Geneva Conventions (GCs), more particularly GC IV

The law of Geneva, *qua* body of law, relates to the protection of victims of war, wounded and sick, wounded, sick and shipwrecked, prisoners of war and categories of civilians who have as a result of some situation or other been rendered outside the conflict. Motives leading to the development of humanitarian law

9 Various other rights that are enshrined in the Convention on the Rights of the Child are also infringed. In terms of art 34, States Parties must take all appropriate measures to protect children from sexual exploitation. Maçhel paras 91–110 explains, however, that rape and sexual humiliation are continual threats to women and girls in armed conflict. In fact, “rape has been down-played as an unfortunate but inevitable side effect of war”. In para 30 she states that war violates every right of a child – the rights to life, to be with family and community, to health, to the development of the personality, and to be nurtured and protected. See also Van Bueren 821.

10 Maçhel para 211; Maher 297; Dinstein “Human rights in armed conflict” in Meron *Human rights in international law* (1991) 347; McCoubrey 145; McCoubrey and White *International law and armed conflict* (1992) 12; Pictet *Development and principles of international humanitarian law* (1985) 49.

11 A distinction can roughly be drawn between so-called Hague law and Geneva law. “Hague law”, in contrast to “Geneva law”, is concerned with limitations upon the means and methods of the conduct of warfare, including weapons limitations, rather than the protection *per se* of the victims of armed conflict. As such, it establishes the rights and duties of belligerents in the conduct of operations and it limits the choice of means to injure the enemy. It has a wider field of application than the law of Geneva but possesses a humanitarian character, because its principal object is to attenuate the evils of war and of violence which is unnecessary for the purpose of war – to weaken the resistance of the adversary. See Pictet 49; McCoubrey 145. A further distinction that needs to be drawn is that between humanitarian and human-rights law. The relationship between the two branches of law is close, but the detail of the relationship is both unclear and controversial. It is suggested that there are basic principles common to “Geneva law” and the general law of human rights. They are the principles of inviolability (of life, integrity (both physical and moral) and of the attributes inseparable from the personality), of non-discrimination (in that all people must be treated without any discrimination based on race, sex, language, social standing, wealth, political, philosophical or religious opinions), and of security (in that everyone has the right to security of the person). See Pictet 63ff; McCoubrey 184.

include humanity; self-interest; military necessity; concern for the wounded, sick and victims of war; and professionalism.¹²

The Fourth Geneva Convention (GC IV) pertains to the protection of civilians in time of war and is one of the main sources of protection of children. It has been ratified by 186 states and it aims primarily to protect

“[p]ersons . . . who, at any given moment and in any manner whatsoever, find themselves, in the case of conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals”.¹³

Prior to the 1949 Conventions, international humanitarian law made no specific mention of children as a particularly vulnerable group requiring special protection. GC IV remedies this omission and contains numerous provisions dealing with the protection of children.¹⁴

In considering the value of the protection afforded to children in terms of the four Geneva Conventions, one must bear in mind that the Law of Geneva purports to render protection to those who are vulnerable. Regrettably, though, the notion of vulnerability is narrowly defined as it includes only the sick, wounded and shipwrecked. It is only GC IV that extends the notion of vulnerability to include civilians, albeit only a specific group of civilians. The concept of vulnerability was not readily conceived to include all civilians, even though an argument may be made out that all civilians are vulnerable in that they are by definition unarmed and therefore not in a position to protect themselves.¹⁵

12 Pictet “The new Geneva Conventions for the protection of war victims” 1952 *Am J of Int L* 462ff; Van Bueren *The international law on the rights of the child* (1995) 329. Hamilton and El-Haj 7 explain that there are two competing ideologies at work within humanitarian law (each with its own agenda) which at times converge and compromise, resulting in, *inter alia*, conventions such as the Geneva Conventions. On the one hand, there is compassion for the suffering of victims. In this line of argument, key phrases are humanity, civilisation and public conscience. On the other hand, one finds the argument of military necessity, which sees war as a necessary evil. It accepts rules governing armed conflict, but its acceptance does not derive from compassion: at times it accepts the rules as necessary given the cost/benefit analyses; at times it accepts rules out of a sense of honour and chivalry. A compromise between these two lines of argument takes place when the protagonists of the second argument are profoundly shocked by specific horrifying events – when the militarily inclined cannot reconcile what they have witnessed with any rationalisation; when the moral arguments of self-justification ring hollow. See also Doswald-Beck “The value of the 1977 Geneva Protocols for the Protection of Civilians” in Meyer (ed) *Armed conflict and the new law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (1989) 153ff; McCoubrey and White 1.

13 Art 4. See also Dinstein 347; Sandoz *International Dimensions of Humanitarian Law* (1988) 268ff.

14 Eg art 14, which provides that Parties may establish hospital and safety zones to protect children under the age of 15 from the effects of war. In terms of art 17, Parties must endeavour to conclude local agreements for the removal of children and maternity cases from besieged or encircled areas. Art 23 provides for the compulsory permission of free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers and maternity cases. Art 24, which is the only article that singles out children specifically, obliges Parties to take the necessary measures to ensure that children under 15 who are orphaned or separated from their families as a result of war are not left to their own resources. See also Dinstein 346.

15 Hamilton and El-Haj 9; Dinstein 347; Kalshoven 849.

Pictet¹⁶ further explains that the main function of GC IV is to protect a strictly defined category of civilians from arbitrary action on the part of the enemy, not from the dangers attributable to military operations as such. This result flows from the fact that the Convention is part of the Law of Geneva which

“serves to provide protection for all those who as a consequence of armed conflict, have fallen into the hands of the adversary. The protection here is, hence, not protection against the violence of war itself, but against the arbitrary power which one belligerent party acquires in the course of the war over persons belonging to the other party”.¹⁷

Quite correctly, it is submitted, Hamilton and El-Haj conclude that protection from the conduct of hostilities itself falls outside the scope of GC IV.¹⁸ They contend that even Part II of the Convention (which affords general protection against certain consequences of war to the civilian population) does not provide protection from military operations. In fact, even though this is the only section of the Convention that applies equally to a State Party’s own civilian population, the protection offered is of an extremely limited nature.¹⁹

The principle of children’s entitlement to special treatment is not provided for in GC IV. The Convention does indeed contain provisions laying down special treatment in specific situations,²⁰ but one searches in vain for a general definition of childhood or an acknowledgement of children’s entitlement to special treatment.²¹

It is clear that the protection afforded by GC IV is limited in nature and that it covers only a restricted group of children in the population.

“When one looks at the actual provisions of the Fourth Geneva Convention and analyses their applicability to the child population affected by armed conflict, one is faced with the sobering conclusion that the Fourth Geneva Convention is inadequate in assuring the protection of children and the promotion of children’s rights as envisaged in the United Nations Convention on the Rights of the Child: it fails to protect every child in his or her status as a child, and very little attention is paid to children’s special needs. In addition, as protection from the conduct of hostilities is outside the scope of the Convention, it does not protect children from military operations as such. One must confront the inevitable conclusion that children are not a focus of the Convention. Indeed, they are barely recognised as a separate group and are treated as only one segment of the vulnerable part of the civilian population.”²²

16 Pictet “The new Geneva Conventions for the Protection of War Victims” 1951 *Am J of Int L* 468ff.

17 Hamilton and El-Haj 10.

18 *Ibid.*

19 Art 15 provides that any Party to a conflict may propose to the adverse Party the establishment of neutralised zones. In terms of art 25, all people in the territory of a Party to the conflict, or in a territory occupied by it, “shall be enabled to give news of a strictly personal nature” to members of their families. Art 26 provides for each party to a conflict to facilitate enquiries made by members of families dispersed owing to the war. See also Van Bueren 811; Maher 302.

20 See fn 14 supra.

21 Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1998) 649. Part III of GC IV aims at providing protection to the civilian population generally, including children. However, in as much as it relates to the description of “protected persons” in art 4 (see the text to fn 13 supra), it protects only the general population in the hands of the enemy, not a Party’s own civilian population. See Hamilton and El-Haj 11.

22 Hamilton and El-Haj 12ff. The authors further convey that what is most likely to lie behind the omission of children as a separate category “is quite simply other, greater concerns accompanied by a degree of indifference to the needs of children”.

3.2 Common Article III

Common Article III provides that in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound, as a minimum, to treat persons taking no active part in the hostilities humanely without any adverse distinction founded on race, colour, religion, faith, sex, birth or wealth. To this end, a variety of acts, including violence to life and person, murder of all kinds, mutilation, cruel treatment and torture, are prohibited.

Common Article III was a compromise between countries favouring absolute autonomy for internal disputes and countries calling for uniform adherence to international standards. In reality, however, this article does little more than protect the most fundamental human values, and it prescribes no extensive codification of standards applicable to belligerents in internal conflicts. Its provisions are severely limited because they do not oblige sovereign governments to permit intervention, with the result that enforcement of any norms of humane action would rely almost entirely on prescriptions of domestic law.²³

3.3 The Additional Protocols of 1977

International humanitarian treaty law first expressed the broad principle of children's entitlement to special treatment in international armed conflicts in article 77(1) of Geneva Protocol I (GP I). This article applies widely to all children in the territories of parties to the conflict, and articulates the fundamental precept that children "shall be the object of special respect and shall be protected against any form of indecent assault". Parties to the conflict "shall further provide them with the care and aid they require, whether because of their age or for any other reason".²⁴ This provision was intended to prevent injury to children and to provide for their normal development as far as is possible in situations of armed conflict.²⁵

Article 77(1) reflects the general precept of the entitlement of all children in the power of parties to a conflict to special treatment. Previously, particular

²³ Maher 303.

²⁴ Art 77(1). Further protection for children is expressed in art 77(2)–(5), reading as follows:

- (2) The parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces . . .
- (3) If, in exceptional cases . . . children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the protection accorded by this article, whether or not they are prisoners of war.
- (4) If arrested, detained or interned for reasons relating to armed conflict, children shall be held in quarters separate from the quarters of adults . . .
- (5) The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed."

²⁵ Kuper 80; Maher 320; Sandoz 269ff. See also Happold "Child soldiers in international law: The legal regulation of children's participation in hostilities" 2000 *Netherlands Int LR* 31.

provisions under GC IV applied only to children who fell within specific categories of protected people, for example children in occupied territory.²⁶

3.3.1 Additional Protocol I (GP I)

GP I applies only to international armed conflicts. In essence, it requires that fighting parties must at all times distinguish between military and civilian objects,²⁷ and further that civilians and civilian objects may not be the object of attack.²⁸ The only targets that may lawfully be attacked are therefore those which by their nature, purpose, location, or use make an active contribution to military action, and whose total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage.²⁹ This exposition makes it clear that the protection afforded by GP I extends only to civilians, who may not be the direct or intended targets of attack.

The true significance of article 77 must be established against the background of the aims of GP I. Hamilton and El-Haj are of the opinion that the protection value for children is minimal. Various arguments are put forward to substantiate this conclusion:

- 01 Article 77(1) provides for children to be the object of "special respect". This term, however, has no definite meaning, and no definition of it is to be found. It may mean no more than that children should be treated differently in the ways specified in humanitarian law, for example that children should not be imprisoned or detained or recruited under the age of 18, and that they should be among the first to receive relief.
- 02 The term "protection" cannot be equated with, and is fundamentally at odds with, the meaning given to protection in international children's instruments.

"Protection" in Protocol I is, in the end, a compromise between humanitarian ideals and military necessity. Any provision which allows for loss of civilian life, provided that the loss is not excessive in relation to the concrete and military advantage anticipated, is essentially incompatible with the right to life provisions of the United Nations Convention on the Rights of the Child and the earlier 1924 Declaration of Geneva and the 1959 Declaration on the Rights of the Child . . . The right to life has the nature of an intransgressible norm (*jus cogens*). This is not,

26 Kuper 80. See also Maçhel para 215. GP I affords protection to civilians in so far as they do not take part in hostilities. GC IV, on the other hand, relates to "extreme vulnerability" as the key for qualifying for protection. See also Maher 310; McCoubrey 164. The Inhumane Weapons Convention of 1980 forbids the indiscriminate use of mines, booby traps and other devices, which may not be used against the civilian population or individual civilians. Art 6(b)(v) specifically forbids booby traps associated with children's toys or other portable objects or products specifically designed for the feeding, health, hygiene, clothing or education of children. See also Maslen "The international law protection of children from landmines" in 1996 *Int J of Children's Rights* 129ff; Detrick 449.

27 Maçhel para 216; Hamilton & El-Haj 18; Happold 31.

28 Art 52(1) defines "civilian objects" as "all objects which are not military objectives". Art 52(3) elaborates to some extent on this exposition by stating that "[i]n case of doubt whether an object which is normally dedicated to civilian purposes, such as place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used".

29 McCoubrey 147, 164; Maher 312; Happold 31. Hamilton and El-Haj 18-19 refer to various problems that arise out of this description.

however, reflected in the definition of 'protection' under Protocol I, which does not uphold a child's fundamental right to life or their right to survival."³⁰

- 13 The Declaration on the Rights of the Child 1959 is not mentioned anywhere in the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. There is also no suggestion that any parts of the Declaration should be expressly incorporated into the Protocol, notwithstanding the fact that the drafters were aware of the existence of the documents. Different approaches attach to the lack of incorporation. On the one hand, it can be said that the drafters took the view that there was little need to legislate for children as they would not be directly targeted. As such, they were not considered to be intended victims of war. The Protocol bears out this line of argument by recognising only the indirect nature of their victimisation. It provides that they should be given relief as a matter of priority (thus meeting the requirements of article 8 of the Declaration), and that foreign children may be evacuated if there are compelling reasons relating to their health or medical treatment or, except in occupied territory, if their safety so requires. On the other hand, it can be argued that the preamble to the Declaration refers to children needing special safeguards and care, including appropriate legal protection, because of their physical and mental immaturity. Indeed, it is the need for care deriving from "vulnerability" that is recognised as the basis for provisions relating to children in both Protocol I and Protocol II. The preamble to the Declaration also provides, however, that "mankind owes the child the best it has to give". There is no indication that the Protocols seek to uphold this notion. In fact, given that armed conflict often infringes upon the rights of children to life, freedom, dignity, particular services, and so on, it is clear that all that Protocol I can provide are minimum standards, and not the maximum possible levels of protection for children.

It can be concluded, therefore, that even though article 77 appears at first glance to be a powerful tool, it is likely to achieve little owing to its generality:

"Protocol I has, from a children's rights perspective, most of the failings to be found in the Fourth Geneva Convention: it does not incorporate children's rights as they are understood today or as they were understood in 1977, and it does not really extend children much protection in their status as children, nor is the protection offered afforded to all children equally. Further there is no consideration of the need to act in the child's best interests."³¹

3.3.2 *Additional Protocol II (GP II)*

Up to 1977 there was no protection of children in non-international armed conflicts other than that contained in Common Article III of GC IV.³² This left children who were caught up in internal wars without proper legal protection, as its humanitarian principles came to be regarded as too general and incomplete to

30 Hamilton and El-Haj 22–23. There is, however, a less pessimistic view of the value of GP I. The Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 states that in view of its character, art 77 serves as a development of both GC IV and other rules of international law which govern the protection of fundamental human rights in times of armed conflict. See also Happold 32.

31 Hamilton and El-Haj 26; Happold 32.

32 See the text to fn 23 *supra*.

provide an adequate guide to the conduct of hostilities in internal armed conflicts. Protocol II is meant to supplement Common Article III. It is, however, a watered-down version of Protocol I.³³ Article 4(3) of Protocol II is the first provision in international law that deals with children *qua* children. It reflects a summary of some of the care provisions regarding children in international armed conflict as set out in GC IV and Protocol I. It states that children shall be provided with the care and aid they require, yet makes no mention of children's need for special respect and for protection from indecent assault, as does article 77(1) of Protocol I.³⁴ Elaborating on the principle of the child's entitlement to the provision of necessities in situations of non-international armed conflict, article 4(3) lists various entitlements and prohibitions relating to children. These include:

- 14 the right to education, including religious and moral education, in accordance with the views of their parents or other responsible adult;³⁵
- 15 a proviso for appropriate steps to be taken to facilitate family reunion;³⁶
- 16 a prohibition on recruitment and participation in hostilities of child soldiers under the age of 15;³⁷
- 17 a provision that child soldiers who are under the age of 15 (in contravention of article 4(3)(c)) should not forfeit the special protection of that article if captured;³⁸ and
- 18 an entitlement to temporary evacuation in the care of a responsible adult from the area in which hostilities are occurring to a safer area in the country, subject to certain conditions. This should be undertaken, if possible, only with parental consent or with the consent of the people primarily responsible for the child's care. The child should furthermore be accompanied by someone responsible for his or her safety and wellbeing.³⁹

Kuper expresses the view that the brevity of the article reflects the difficulties faced by those drafting the 1977 Protocols in achieving consensus on detailed measures to be observed by states in non-international armed conflicts. As with

33 McCoubrey 174ff; Happold 38. Hamilton and El-Haj 27 relate this somewhat lower status of Protocol II to the fact that international law had traditionally viewed the domestic affairs of a state as *prima facie* beyond the scope of its jurisdiction. Civil wars are a sensitive issue as every state sees the suppression of those who challenge its authority as its legitimate right. The very issue of the sovereignty of states leads to Protocol II being less exhaustive than Protocol I. As a result, the authors point out,

- 11 there are no definitions of civilians and of combatants;
- 12 there is no explicit obligation to minimise civilian losses; and
- 13 there is no specific prohibition of reprisals against civilians.

34 Kuper 96.

35 Art 4(3)(a).

36 Art 4(3)(b).

37 Art 4(3)(c). In this regard, reference should be made to arts 1 and 2 of the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography of 2000-05-16, in terms of which States Parties must take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities. Such states must also ensure that people who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

38 Art 4(3)(d).

39 Art 4(3)(e).

Protocol I, however, the provisions of Protocol II do not incorporate even the relatively weak rights contained in the 1959 Declaration on the Rights of the Child. In fact, Protocol II affords little more protection than that contained in GC IV. The only specific development is the generalisation of protection in article 4(3)(a)⁴⁰ and the addition of article 4(3)(e).⁴¹ However, like GC IV and Protocol I, the definition of “child” extends only to people below the age 15, and not to all those below the age of 18.

Various problems arise from the limited application of Protocol II:

- 09 In terms of article 1(2), Protocol II does not apply to situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence, and other acts of a similar nature. Protocol II would, therefore, apply only if
- (a) there is an armed conflict not covered by article 1 of Additional Protocol I;
 - (b) the armed conflict takes place in the territory of a High Contracting Party;
 - (c) the conflict involves the armed forces of a High Contracting Party and dissident armed forces or other organised armed groups;
 - (d) the dissident armed forces are under a responsible command; and
 - (e) such armed groups have control over a part of the territory of the High Contracting Party so as to enable them to carry out sustained and concerted military operations and to implement Protocol II.⁴²

In essence, Protocol II would apply only if the armed conflict is waged between a government and dissident groups that meet the requirement of being under responsible command and having control over a part of the territory of the government *qua* High Contracting Party to the Protocol, so as to enable them to carry out sustained and concerted military operations. It is clear that the dissident group must have progressed quite far in its struggle to satisfy the stringent requirement of territorial control. The view has been expressed that Protocol II would not apply to the majority of civil wars currently being fought in various countries.⁴³

- The Additional Protocols have not been ratified as widely as the Conventions, and because of the fact that states view the suppression of those who challenge their authority as a legitimate right, they do not readily concede that a situation within their territory amounts to an armed conflict, thereby meeting the requirements set out above. For children, however, the limited applicability of Protocol II is particularly disturbing:

40 See the text to fn 35 *supra*.

41 See the text to fn 39 *supra*.

42 Art I(1). Art 1(2) provides that GP II shall not apply to situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence, and other acts of similar nature, as such conflicts are not armed conflicts. McCoubrey 183 explains that it is indisputable that there are situations of internal strife which do not fall within the circumstances of application set out in GP II. Such cases, involving large-scale organised violent conflict not otherwise meeting the criteria set out in the Protocol, would still fall within the minimum provisions of Common Article III, which refers simply to “armed conflict not of an international character”. But this too involves some form of conflict between organised forces rather than mere terrorism or banditry.

43 Hamilton and El-Haj 29; Maher 299ff. McCoubrey 172 points out that under this Protocol, the Red Cross, Red Crescent Societies, and other relief organisations established in the territory of a state affected by internal armed conflict are entitled to perform their “traditional functions” in relation to the victims of armed conflict.

“For a child caught up in such situations there may, however, be little distinction. The effects of war are not limited by their classification under humanitarian law.”⁴⁴

3.4 Conclusion

Humanitarian law does not aim at protecting and furthering the rights of children as a specific group. It was never intended to do this. Consequently, the guiding principle of “the best interests” of children as envisaged in article 3 of the United Nations Convention on the Rights of the Child 1989 does not find a place in humanitarian law.⁴⁵ Furthermore, current humanitarian law conflicts with the fundamental principle of non-discrimination in article 2 of the United Nations Convention. Protection under humanitarian law, especially under GC IV, depends on the child’s relationship to a party to the conflict. To adhere to the accepted norms required by children’s rights, however, the protection given to children should depend solely on the fact that the child is a person under the age of 18 years.

4 HUMAN-RIGHTS LAW

Article 38 of the UN Convention on the Rights of the Child 1989 is the focal point regarding the protection of children in situations of armed conflict. It has been described as “the most publicised of all aspects of the text” and as the article which “has come to symbolise the whole Convention for many”. Regrettably, however, it is also a most controversial provision.⁴⁶ Article 38(4) deals specifically with child civilians in armed conflict. It provides:

“In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.”

44 Hamilton and El-Haj 29. The authors proceed to explain that exposure to violence is not the only distressing aspect of political violence. Surveys showed that many children have experienced cold and hunger to the point that they thought they might die. This experience was for some more distressing than the fear of violence. See also McCoubrey 172; Maçhel para 137; Maher 313.

45 Maher 298 describes the obstacles relating to the maintenance of humanitarian law as follows: “The most striking problem of humanitarian law today is its general lack of applicability. In the past fifteen years several internal and international conflicts have occurred. However, in almost every case at least one of the parties to the conflict did not consider international humanitarian law to be applicable.” See also Hamilton and El-Haj 33; Pictet (1985) 61.

46 Eg art 38(1) provides that States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. This article raises numerous problems of interpretation. It does not distinguish between international and non-international conflicts and appears *prima facie* to apply to any armed conflict. However, by using the term “armed conflict” and relating it to “international humanitarian law applicable to them”, art 38(1) appears not to extend to internal disturbances. Furthermore, as the Convention on the Rights of the Child applies only to States Parties who have ratified it, non-governmental entities that are engaged in armed conflict are not generally bound by its provisions. The qualifying phrase “applicable to them” is also not clear. Does it mean, for example, that the relevant rule depends on ratification by a specific country of the 1949 GCs and the 1977 GPs, or does it refer to the customary-law obligations of all states? (See s 5 of this article.) Moreover, the precise content of the rules of international law that are relevant to the child is by no means clear. See Detrick 651; Kuper 99ff; Happold 41.

The rights contained in article 38(4) are not innovative – they are, in fact, very disappointing. The primary concern with the article relates to the use of the phrase “feasible measures”. Clearly, the article does not impose an absolute duty on States Parties, but instead a very low standard. From the *travaux préparatoires* it is evident that the members of the working group were not *ad idem* on the level of protection to be imposed on States Parties regarding the protection of child civilians, there being a very strong argument put forward to require that States Parties take “all necessary measures”.⁴⁷

It is further pointed out that the lack of a provision providing for derogation in the Convention on the Rights of the Child may lead to further difficulties in interpreting article 38. This omission raises the question whether States Parties who have ratified the Convention should continue to be bound by provisions containing general rights for children once armed conflict has broken out within their jurisdictions.⁴⁸ An argument may well be raised that article 38 applies only in wartime situations, so that once armed conflict begins, the particular State Party ceases to be bound to implement the other stipulations of the UN Convention on the Rights of the Child. This conclusion stems from the argument that if all the articles on the protection and care of children apply at all times, the necessity for article 38(4) may be doubted. According to this line of argument, it would not be unreasonable to suppose that the drafters of the Convention expected that the Convention would be subject to derogation during armed conflict.⁴⁹

47 The *travaux préparatoires* of this article show that consensus could not be reached in the relevant working group on the question whether the article should refer to “feasible” or to “necessary” measures. The US representative expressed a strong preference for the word “feasible”, arguing that it would be impossible to fulfil a duty to take all “necessary” measures to protect child civilians, as armed conflicts inevitably have harmful consequences for civilians and it would be impossible to ensure their protection. He further argued that a duty to take all “necessary” steps might even undermine a state’s inherent right to self-defence. On the other hand, the argument was raised by the representative of the International Committee of the Red Cross that the inclusion of “feasible” postulated a weakening of international humanitarian law. The International Committee considered it a vital aspect of law that parties to an armed conflict must at all times distinguish between the civilian population and combatants, and that civilians may never be the object of attack. The representative stressed that the right to care and assistance is absolute. The UN record of the debate reflects that representatives of some 20 countries together with the representative of the International Committee felt that the word “necessary” more accurately reflected the absolute nature of protection which international instruments should accord civilians in times of armed conflict. In view of the lack of consensus, the chairperson put forward the weaker version that allowed for “feasible” measures. At the second reading, immediately following the working group’s adoption of the weaker version, the Swedish representative asked for a transcript of the meeting “since we adopted an article . . . on the basis of a debate which I do not think is reflected in that decision”. See Kuper 104; Hamilton and El-Haj 36; Detrick 654; Happold 34; Van Bueren 819ff.

48 Such rights would include the rights of protection, provision and participation. The application of certain articles may, however, be limited in certain circumstances. The right to leave the country (art 10(2)), the right to freedom of expression (art 13), the right to freedom of religion (art 14) and the right to freedom of association and peaceful assembly (art 15) may be limited on the basis of protection of national security, public order, public health, morals and the rights and freedoms of others. See Pictet (1982) 63ff; McCoubrey 184.

49 Hamilton and El-Haj 38. See also Detrick 713; Van Bueren 399; Dinstein 350.

On the other hand, the argument that is favoured by the Committee on the Rights of the Child takes the view that a child does not cease to have basic rights once an armed conflict has broken out. Human-rights treaties consequently continue to be applicable even if derogations may be permitted. A member of the Committee explains it thus:

“Article 38 specifically addresses the situation of children in armed conflicts, for instance, the problem of conscription. However, all other articles of the Convention are relevant. In fact, there is no derogation clause in this Convention, it applies in its entirety also in times of war and emergency. The child has a right to family environment, to go to school, to play, to get health care and adequate nutrition – also during the armed conflict. The principles of the Convention are valid as well: that all children without discrimination should enjoy their rights, that the best interests of the child be a primary consideration in decisions, that the right to life, survival and development be protected and that the opinions of the child be respected.”⁵⁰

5 THE CUSTOMARY STATUS OF PARTICULAR PRINCIPLES PERTAINING TO CHILD CIVILIANS

There are principles relating to the protection of child civilians that may be considered to have customary status.⁵¹ These principles are found in both human-rights law and humanitarian law, and include the right not to be arbitrarily deprived of life, the entitlement of children to special treatment generally, the entitlement of civilians to protection in situations of armed conflict, and the entitlement of child civilians to special treatment in situations of armed conflict.

5.1 The right not to be arbitrarily deprived of life

There appears to be general consensus that, notwithstanding controversy about the precise principles which constitute customary human-rights law, the right not

50 Hammarberg “Keynote Speech: Children as a zone of peace – What needs to be done?” in Aldrich and Van Baarda *Conference on the rights of children in armed conflict* (1994) 11. With reference to the interpretational difficulties caused by the lack of a derogation clause, the problem arises what the position is where the ability of a State Party to implement the Convention is non-existent, eg where the state technically has control over the territory, but its infrastructure and organisation no longer exist. See, in this regard, Hamilton and El-Haj 38.

51 The customary status of particular norms generally renders them binding on all states, even those states that are not party to treaties articulating such norms. Once enshrined in a treaty, such norms cannot be subject to derogation, reservation or withdrawal. See Kuper 112 for a brief exposition of the nature of customary law. See further McCoubrey 192; Happold 43; Dinstein 357; Pictet (1985) 63ff. From a South African perspective, the question when state practice can be considered to have customary status was addressed comprehensively in *S v Petane* 1988 3 SA 51 (C) 61D–E where the court, deciding that no customary rule had come into existence, said: “One must . . . look for State practice at what States have done on the ground in the harsh climate of a tempestuous world, and not at what their representatives profess in the ideologically overheated environment of the United Nations where indignation appears frequently to be a surrogate for action”. What is required, therefore, is the consideration of the action or practice of states, not their rhetoric, since “[c]ustomary international law is founded on practice, not on preaching” (59F–G). See also Dugard *International law: A South African perspective* (2000) 29; Van der Vyver “Constitutional protection of children and young persons” in Robinson (ed) *The law of children and young persons in South Africa* (1997) 318; Booysen “Protokol I tot die Geneefse Konvensies van 1949 – gewoontereg telike volkereg?” 1988 *THRHR* 244.

to be arbitrarily deprived of life is a customary principle. As a principle of human-rights law, the prohibition on arbitrary deprivation of life applies equally in times of war and peace, even to states that are not party to treaties which express this norm. States are therefore in principle obliged to observe this norm in all conflict situations, including internal disturbances.⁵² Against this background, it is clear that article 6(1) of the Convention on the Rights of the Child, which provides that States Parties recognise that every child has the inherent right to life, enjoys customary status.

5.2 The entitlement of children to special treatment generally

Evidence indicating the existence of a customary norm supporting the special treatment of children may be gleaned from, *inter alia*, the wide acceptance within the international community of both human-rights and humanitarian conventions that articulate the principle of special care and assistance for children,⁵³ relevant UN resolutions, reports of international conferences,⁵⁴ government approval of and involvement in international organisations concerned with children, and the prevalence of domestic legislation that provides for special treatment.

There is a pattern of international-treaty ratification and the adoption of other international instruments which affirm the general notion that children should benefit from preferential treatment in a broad range of circumstances. It is particularly after the unprecedented state support for the Convention on the Rights of the Child that this general notion should be accepted as, at least, an evolving norm of international customary law. As a human-rights norm, it would apply in times of peace and in situations of armed conflict, and also in relation to internal disturbances.⁵⁵

5.3 The entitlement of civilians to protection in situations of armed conflict

Contrary to sections 5.1 and 5.2 of this article, which relate to human-rights law, this section and section 5.4 relate to humanitarian law. Child civilians should be protected under international humanitarian law, both as members of the civilian population and as a particularly vulnerable category of civilian.

General customary principles in this regard encompass the limited right of belligerents to adopt means of injuring the enemy,⁵⁶ and the precepts of military

52 Kuper 117; Pictet (1985) 40.

53 In this regard, reference may be made to the many states that have ratified or unanimously supported the relevant legal instruments. Even though such ratification or support does not necessarily indicate acceptance of the detailed content of the relevant legal instruments as customary norms, it may be seen as recognition of a customary principle. On this line of reasoning, support may be said to exist for the proposition that children are entitled to special treatment generally. Eg global human-rights instruments, particularly the 1924 and 1959 Declarations on the Rights of the Child and the 1989 Convention on the Rights of the Child support the broad concept that children are entitled to special treatment. See Kuper 118; McCoubrey 194; Happold 46.

54 Eg reports and debates of the 1990 World Summit for Children, the 1992 Rio Conference, the 1993 Vienna Conference, the 1994 Cairo Conference, the 1995 Copenhagen Summit, and the 1995 Beijing Conference all reflect state practice indicating a consensus that the special requirements of children must be considered and separately provided for.

55 Kuper 119.

56 As set out in GP I (1977). See also "Minutes of workshops on the military protection of hospital zones and on the setting-up of hospital and safety zones" in Aldrich and Van Baarda 51-79.

necessity,⁵⁷ humanity⁵⁸ and chivalry⁵⁹ that should be observed in the conduct of armed conflict. In essence, these precepts establish a framework for the limitation of certain methods of armed conflict, as well as for the protection of civilians, including that civilians should not be directly attacked and that, where possible, they must be shielded from the effects of attack.⁶⁰

Regarding the principle of non-combatant immunity, various articles of GP I have been identified as customary.⁶¹ Certain provisions of GC IV may also be considered as representing customary norms,⁶² as may aspects of Common Article III. Included here is subarticle (1)(a)–(c), which provides for humane treatment, and for the prohibition of violence to life and person, the taking of hostages, and outrages against personal dignity. In fact, Common Article III has been found to constitute a minimum yardstick applying to both international and non-international armed conflict.⁶³

5.4 The entitlement of child civilians to special treatment in situations of armed conflict

The principles of international human rights and humanitarian law as discussed in sections 5.1–5.3 of this article may amount to an evolving customary norm that children are entitled to special treatment in situations of armed conflict.⁶⁴ This conclusion may be substantiated by the support given by governments to the Geneva Conventions 1949, the Geneva Protocols 1977 and the Convention on the Rights of the Child,⁶⁵ by the *travaux préparatoires* to and the commentaries on these treaties,⁶⁶ by UN resolutions and reports of international

57 Which is defined as the principle that only that degree and kind of force not otherwise prohibited by the law of armed conflict, which is required for the partial or complete submission of the enemy, may be applied with a minimum expenditure of time, life and physical resources. See Kuper 120. See further McCoubrey 198ff for a comprehensive discussion of this principle.

58 This principle prohibits the employment of any kind or degree of force not required for the purpose of the partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources. See Kuper 119 fn 32.

59 The principle of chivalry forbids dishonourable (treacherous) means, dishonourable expedients, and dishonourable conduct during armed conflict. See Kuper 119 fn 33.

60 Kuper 120.

61 Eg arts 48 51 57 59 60 75.

62 Arts 27 32 33 51.

63 *Nicaragua* case [1986] ICJ Rep 14 para 218, referred to in Kuper 122. See also Dugard 29 fn 5.

64 Even though statistical evidence and state practice may militate against this conclusion, it must be borne in mind that inconsistent state practice does not necessarily negate the existence of a customary norm, so that the norm may remain valid provided that the evidence indicates that failure to abide by it is not a denial of the norm, but rather a failure to observe it while none the less accepting it in principle.

65 Kuper 124 is of the view that, although certain measures in the Convention on the Rights of the Child cannot be considered customary, art 38, in confirming the obligation of governments to observe the relevant existing international law, strengthens the customary status of such law. See also Happold 47.

66 Fns 46 and 47 *supra* depict the *travaux préparatoires* as revealing serious disagreement on the level of state obligation. It is clear, however, that there was no dispute about the fundamental principle that child civilians are entitled to particular protection in situations of armed conflict in accordance with international humanitarian law. See Detrick 656; Kuper 124.

conferences,⁶⁷ and by various aspects of state practice. The obligation to provide child civilians with special treatment, particularly in relation to the provision of necessities, is therefore both a treaty rule and, arguably, a customary norm. This norm can be seen to consist, as a minimum, of two elements: (1) when children in situations of armed conflict are deprived of necessities, strenuous efforts must be made, by governments or others responsible, to remedy this; and (2) in circumstances where necessities are being supplied to civilians in situations of armed conflict, children must be among those given priority. A government, or indeed a non-governmental organisation (NGO), not acting in accordance with these principles should therefore be subject to intense international pressure and censure, both through purely political channels and, perhaps, through more formal complaints procedures where possible.

6 CONCLUSION

The unfortunate position of child victims in armed conflict is clearly explained in the following exposition by Pictet:

“Unfortunately we live in a time when formalism and logorrhea flourish in international conferences, for diplomats have discovered the advantages they can derive from long-winded, complex and obscure texts, in much the same way as military commanders employ smoke screens on battlefields. It is a facile way of concealing the basic problems and creates a danger that the letter will prevail over the spirit.”⁶⁸

Humanitarian law, like the law of human rights, is a protective law. While rules have always been formulated with the utmost stringency, it is rather persuasion and conciliation which “guide the steps of those who strive to ensure that it is applied and respected”.⁶⁹ In practice, its implementation has rarely given rise to international disputes requiring judicial settlement. International justice in the institutional and procedural sense of the term is in this respect synonymous with failure, since helping victims is so much more urgent than any appeal that might be envisaged in the interests of international jurisprudence. Humanitarian law, *qua* law inspired by compassion, becomes, on implementation, a very strict law of international justice – *inter arma caritas, per armis justitia*. Regrettably, however, humanitarian law suffers from the same congenital weakness as do all branches of humanitarian law – a lack of comprehensive and effective systems capable of verifying that its provisions are being observed.

“It remains, and this has often been demonstrated by the horror and tragedy of recent events, true that recognition should be given to the right to humanitarian assistance, both national and especially international, of the victims of armed conflict and of its direct and indirect consequences, particularly since these victims are the primary concern of humanitarian law. It must also be clearly acknowledged that such situations give rise, beyond dispute, to the application of humanitarian law. The new human right [sic], like any other, would be able to resist all sources of power, whether public and governmental or private. Nothing could demonstrate more effectively the complementarity of the two bodies of law – humanitarian law and the law of human rights – than the recognition of the right of all men and women to appeal to their brothers and sisters for help. It is indeed tragic that this all too human right should require legal endorsement.”⁷⁰

67 See fn 54 *supra*.

68 Pictet 59.

69 Vasak in Sandoz 298.

70 *Ibid.*

The admissibility at the subsequent criminal trial of evidence tendered by the accused for purposes of bail proceedings (2)*

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3 SOUTH AFRICAN LAW

3.1 General

Section 60(11B)(c) of the Criminal Procedure Act (“CPA”) provides as follows:

“The record of bail proceedings, excluding the information in paragraph (a),¹ shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.”

It seems that the legislature in section 60(11B) intended to deal with testimony by the accused.² The first part of section 60(11B)(c) provides, however, that the record of the bail proceedings (which would, for example, include testimony by the investigating officer objecting to the granting of bail) forms part of the record in the subsequent criminal trial. On a literal interpretation, the record of

* See 2002 *THRHR* 87 for part 1.

1 The information consists of details as to previous convictions, pending charges and whether the accused has been released on bail in respect of those charges.

2 S 60(11B) provides:

“(a) In bail proceedings the accused, or his or her legal adviser, is compelled to inform the court whether—

(i) the accused has previously been convicted of any offence; and
(ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.

(b) Where the legal adviser of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not.

(c) [see text]

(d) An accused who wilfully—

(i) fails or refuses to comply with the provisions of paragraph (a); or
(ii) furnishes the court with false information required in terms of paragraph (a), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.”

proceedings at the bail hearing, excluding testimony by the accused, will therefore in any event form part of the trial record. If the accused is informed of the consequences and he elects to testify, that testimony is admissible at the subsequent criminal trial. Only the admissibility of evidence tendered by the accused will be considered here.

Even though it is not indicated for what purpose the prior testimony may be used at the trial, I do not think that the intention of the legislature was that the evidence presented at the bail hearing by the accused should form part of the state case at the trial.³ Using the evidence as part of the state case would clearly be an unjustifiable infringement of section 35(3)(h) and (j) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Final Constitution, referred to below as "FC").⁴ It therefore seems that the intention must have been to use the prior testimony for purposes of cross-examination. I am of the opinion that the use of prior testimony to incriminate an accused during cross-examination at trial would similarly be an unjustifiable infringement of section 35(3)(h) and (j).⁵ But section 60(11B)(c) does not differentiate between the use of prior testimony to incriminate or to test the credibility of the accused at trial. It would therefore seem to afford the right both to incriminate and to test the credibility of the accused who elects to testify at trial.

When deciding on the admissibility of evidence given by an accused at bail proceedings for purposes of the subsequent criminal trial, section 60(11B)(c) must be considered in the light of sections 12⁶ and 35(3)(j) of the FC. In terms of section 35(3)(j) "every accused person has a right to a fair trial, which includes the right not to be compelled to give self-incriminating evidence".⁷ Regard must also be had to sections 235 and 203 of the CPA.

3.2 Section 235 CPA

Section 235, under the heading "Proof of judicial proceedings", states:

"It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribes such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be *prima facie* proof that any matter purporting to be recorded thereon was correctly recorded."

3 Also not the prior evidence by the state opposing bail. Any other view would allow evidence without the accused having had the opportunity to contest that evidence at the trial.

4 See my discussion in para 3.9, and the Canadian supreme court judgment in *Dubois v The Queen* 23 DLR (4th) 503 504 and 521ff. But this view is not universally accepted. The high court in *S v Dlamini* 1998 5 BCLR 552 (N) allowed the state to prove prior statements made by the accused at the bail application as part of the state case at the subsequent criminal trial.

5 See my discussion in para 3.9.

6 See my thesis ch 6.

7 The Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution, referred to below as "IC") granted similar rights in s 25(3)(d). The section provided that every accused person shall have the right to a fair trial, which includes the right to adduce and challenge evidence, and the right not to be compelled to be a witness against oneself.

In terms of section 235 of the CPA the evidence so given at judicial proceedings⁸ may be proved⁹ by producing a copy of the record of those proceedings properly certified in terms of the requirements stated in section 235. Section 235 describes how judicial proceedings may be proved but does not determine what may be proved. This principle was not always accepted in the pre-constitutional era. In *S v Adams*¹⁰ and *S v Venter*¹¹ it was held that the record of the bail application was admissible against the accused at trial in terms of section 235, and this was not affected by the accused's right against self-incrimination in terms of section 203.

After the advent of the Interim Constitution ("IC"), Vivier JA in *S v Nomzaza*¹² deviated from this finding by holding as follows:

- Evidence given by an accused will be admissible in terms of section 235 only if otherwise admissible.
- Each case must be decided on its own facts.
- In the light of the Constitution, there will be cases where the admission of the bail proceedings will render the trial unfair.

Because section 235 in any event allowed a certified copy of the bail record to be handed in at trial, the Constitutional Court in *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat*¹³ saw the first part of subsection (11B)(c) as an unremarkable procedural provision. The court indicated that subsection (11B)(c) merely acted as a shortcut for the incorporation of the bail record into the trial record.

It is therefore suggested that, as in the case of section 235, the prosecution will be able to rely on section 60(11B)(c) only if the bail record contains otherwise admissible evidence.

3 3 Section 203 CPA

Section 203, under the heading "Witness excused from answering incriminating question", provides:

"No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of May, 1961,¹⁴ have been compelled to answer by reason that the answer may expose him to a criminal charge."

8 It is submitted that the term "judicial proceedings" is wide enough to include a bail application.

9 Although the copy shall be *prima facie* proof that any matter recorded thereon was properly recorded, the copy does not constitute *prima facie* proof of any fact recorded.

10 1993 1 SACR 611 (C).

11 1996 1 SACR 664 (A).

12 1996 3 All SA 57 (A).

13 1999 7 BCLR 771 (CC).

14 The reference to 30 May 1961 in s 203 entails that the law of evidence as at that date, with inclusion of the then-accepted English law of evidence, prevails with regard to the privilege against self-incrimination. The history of the rule is described by Wigmore (1961) para 2250 as a long story woven across a tangled warp. It is partly composed of the contrivances of the early canonists, the severe contest between the courts of the common law and the church and "the political and religious issues of that convulsive period in English history, the days of the dictatorial Stuarts".

Whereas the 1955 Act¹⁵ protected a witness against any questions the answer to which might expose him to "any pains, penalty, punishment or forfeiture, or to a criminal charge, or to degrade his character",¹⁶ section 203 presently confines the privilege to answers which may expose one to a criminal charge.¹⁷ The protection has, however, been limited by sections 204, 205 and, lately, 60(11B)(c).

3 4 Pre-constitutional jurisprudence

The pre-constitutional nature and scope of the privilege against self-incrimination was considered at some length by the Appellate Division in *S v Lwane*¹⁸ and *Magmoed v Janse van Rensburg*,¹⁹ some 26 years later.

Even though section 203 does not require a witness to be cautioned in respect of self-incriminating evidence,²⁰ Thompson JA in *S v Lwane*²¹ held that such a general rule of practice existed in South Africa.²² The rule was based on the consideration that, in South Africa, the vast majority of persons who enter the witness box are likely to be ignorant of the privilege against self-incrimination.²³ The effect of the non-observance of the rule was to be determined on the basis of the particular facts of each case. In this enquiry, the nature of the incriminating statement and the ascertained or presumed knowledge of his rights by the deponent will always be important factors.²⁴

15 By way of s 234.

16 See Du Toit *et al* 23–47; Hiemstra *Suid-Afrikaanse strafproses* (1993) 491.

17 S 200 of the CPA expressly provides that a witness in criminal proceedings may not refuse to answer a question on the ground that the answer may expose him to civil liability. See *Wessels v Van Tonder* 1997 1 SA 616 (O) 620–621. Many varied considerations for this particularly English institution have been given throughout the years. The modern rationale for this rule has been said to be the belief that "the coercive power of the state should not be used to compel a person to disclose information which would render him liable to punishment". See *May Criminal evidence* (1990) 245. In *Miranda v Arizona* 384 US 436 (1966) 705–706 the American supreme court indicated that the idea that a man should be compelled to give answers exposing himself to the risk of criminal punishment is probably still repellent to public opinion, even though it was no longer based on the unpopularity of the Star Chamber. The court also considered that people must be encouraged to testify freely. In the absence of some kind of privilege against incrimination, they might not be prepared to come forward as witnesses. Supporters of the rule have also argued that the rule encourages the search for independent evidence. If the police cannot rely on the evidence given by the suspect, they would have to procure the evidence themselves. It has been unclear, however, to what extent police resort to other investigations if the accused is not willing to assist. It has also been argued in support of the rule that an accused should not be asked to account for himself unless a *prima facie* case has been established against him. Another reason which has been advanced by the supporters of the rule was that the rule relieves the courts of false testimony. If an accused cannot bring himself to admit the crime, he should therefore have the option to refrain from testifying rather than perjure himself. See Zuckerman *The principles of criminal evidence* (1989) ch 15.

18 1966 2 SA 433 (A).

19 1993 1 SA 777 (A), 1993 1 SACR 67 (A).

20 There is no rule in the pre-30 May 1961 English law of evidence that a court must warn a witness that he is not obliged to answer questions which might incriminate him. See *R v Coote* 1873 LR 4 (PC) 599.

21 1966 2 SA 433 (A) 440.

22 See also *R v Ramakok* 1919 TPD 305 308, where the existence of the rule was confirmed much earlier. The rule was also confirmed in *R v Nshangela* 1961 4 SA 592 (A) 598H.

23 1966 2 SA 439F ff.

24 1966 2 SA 440G–441A.

It would therefore seem that proof that an uncautioned witness was actually aware of his rights would ordinarily render the incriminating evidence admissible, despite non-observance of the rule of practice.²⁵ In a separate concurring judgment, however, Holmes JA in *Lwane* indicated that non-observance of the duty of the court to inform a witness of his right against self-incrimination was an irregularity which would ordinarily²⁶ render the incriminating evidence inadmissible in a prosecution against the witness.²⁷

In *Magmoed v Janse van Rensburg*²⁸ Corbett CJ explained that the criminal-justice system and decisions of the courts evinced a general policy of concern for an accused person in a criminal case. This policy includes the rule that an accused should be fairly tried, as well as various rules which exclude certain types of evidence on the ground that it would *inter alia* be unduly prejudicial to the accused. These measures place limitations on the power of the prosecution to obtain a conviction. They ensure that the accused is not wrongly convicted.

The court held that one such privilege in the sphere of the law of evidence was the privilege against self-incrimination in terms of section 203 of the CPA. The court described the privilege as "a personal right to refuse to disclose admissible evidence".²⁹ The privilege is that of the witness and has to be claimed by him.³⁰ Where the privilege is claimed by the witness, the court must rule on it. Before allowing the claim of privilege, the court must be satisfied from the circumstances of the case and the nature of the evidence that there are reasonable grounds to apprehend danger to the witness if he is compelled to answer.³¹ The witness should be given considerable latitude in deciding what is likely to prove to be an incriminating reply.

The court held that where a witness objects to answering a question on the ground of the privilege against self-incrimination, and the objection is overruled by the presiding officer who compels the witness to answer the question, then his reply, if incriminating, will not be admissible in subsequent criminal proceedings against him.³²

The court also restated the established rule of practice that the court should inform a witness of his right to decline to give an answer which might be incriminating. This practice arose due to the fact that, in South Africa, many uneducated people enter the witness box.³³ If, however, the witness was not ignorant of this right, it was not necessary to caution him in this regard.

25 The same approach seems to have been adopted in *Magmoed*.

26 In principle it has been stated that if the accused is represented or otherwise deemed to know of his right against self-incrimination, non-observance of this rule will not render the incriminating evidence inadmissible at the later proceedings.

27 1966 2 SA 444F.

28 1993 1 SA 777 (A), 1993 1 SACR 67 (A).

29 1993 1 SA 819I.

30 *Ibid*.

31 See also *R v Boyes* 1861 1 B&S 311 330, 121 ER 730 738. The danger must be real and appreciable, not imaginary and of insubstantial character (*S v Carneson* 1962 3 SA 437 (T) 439H). The privilege may therefore not be claimed where the possibility of criminal liability has been removed (eg where indemnity has been granted in terms of s 204). See *R v Hubbard* 1921 TPD 433 439.

32 1993 1 SA 821E.

33 1993 1 SA 820G-I.

With regard to statements made at a bail application, the full bench in *S v Steven*³⁴ indicated that the accused could have invoked the privilege against self-incrimination. They chose not to do so. As they were represented by counsel, there was no question of whether the magistrate should have advised them of their rights. The court indicated that the question was not whether the magistrate had committed an irregularity, but rather whether the accused would have a fair trial if the record of the bail application was admitted in evidence. It was common cause between the state and counsel for the accused, however, that where an accused gives evidence in a bail application, he retains the privilege against self-incrimination.

3 5 Case law after the Interim Constitution

3 5 1 General

After the advent of the IC, both the Constitutional Court and the supreme court had the opportunity to consider the nature and scope of the right against self-incrimination in the context of bail applications. The Constitutional Court also had the opportunity of discussing the link between the right against compelled pre-trial self-incrimination and the trial, and some divisions of the supreme court pronounced on the compulsion requirement.

3 5 2 The right against self-incrimination in the context of bail

In *S v Zuma*³⁵ the Constitutional Court restated the policy that the testimony of an applicant for bail is inadmissible against him at his later trial if he was unaware of his right against self-incrimination. Kentridge AJ explained that the accused cannot have a fair trial if he is cross-examined on the incriminating evidence he gave at the bail application, where the evidence was given while the accused was ignorant of the right to refuse to answer incriminating questions. Kentridge AJ saw the question as being whether the accused was unaware of the rule against self-incrimination.³⁶

In *S v Nyengane*³⁷ the supreme court, in applying the same policy, refused to admit the testimony of an applicant for bail at his subsequent criminal trial.³⁸ The magistrate had failed to warn the accused that he was not obliged to answer questions that may be self-incriminating. The court held that the fact that the accused was represented made no difference, since his legal representative was an inexperienced candidate attorney whose ignorance could not be held against the accused.

In *S v Botha (2)*³⁹ the court refused to allow the state to use the record of the bail application as evidence against the accused because the accused had been ignorant of his right to refuse to answer incriminating questions.⁴⁰ The magistrate at the bail hearing did not warn the accused that he had the right to refuse to

34 Case A1237/93 (W) unrep 20.

35 1995 2 SA 642 (CC).

36 651J-652D.

37 1996 2 SACR 520 (E).

38 The court also indicated that there was no provision in the CPA which permitted the accused's testimony in the bail application to be used at the subsequent trial.

39 1995 2 SACR 605 (W).

40 609-610.

answer incriminating questions. The accused also alleged that his legal representatives, with whom he had consulted for a mere 10 to 15 minutes before the bail application, had also not informed him of such right. Consequently, the accused was cross-examined on the merits and gave incriminating answers.⁴¹ Myburgh J held that the accused could not have a fair trial if such evidence was to be received.

Even though Myburgh J fell back on the old principles, he also pointed to the dilemma that the accused faced.⁴² The accused had a right to remain silent and a right against self-incrimination. He also had a right to bail. If he exercised the first of these rights, then he could be refused bail. If, on the other hand, he decided to testify in order to obtain his release on bail, then his evidence could be used against him at the subsequent trial. The court indicated that the way to avoid burdening the accused with this choice is to follow the procedure adopted in relation to the evidence of an accused given at a trial-within-a-trial. In this way, the bail application would be insulated in a watertight compartment with no spillover to the subsequent trial.⁴³

The courts in the era of the IC therefore treated the right against self-incrimination in the same way as before. If the accused was aware, or was deemed to be aware, of his right to refuse to answer self-incriminating questions at the bail application, his testimony would be admissible at the ensuing trial. One division of the supreme court did, however, point out that the accused, after the advent of the IC, had the right to apply for bail and the right against self-incrimination. If the evidence from the bail application were allowed to spill over to the trial, it would mean that the accused would have to choose between his right to bail and his right against self-incrimination. It is therefore important to investigate whether there is a link between compelled pre-trial self-incrimination and the trial, and whether the exercise of this choice amounts to the sort of compulsion required by the right against self-incrimination. These issues were discussed by the courts in the same era.

3 5 3 *The link between the right against compelled pre-trial self-incrimination and the trial*

The link between the right against compelled pre-trial self-incrimination and the trial was explained by the Constitutional Court in *Ferreira v Levin; Vryenhoek v Powell*,⁴⁴ *Bernstein v Bester*,⁴⁵ and *Nel v Le Roux*.⁴⁶

In *Ferreira v Levin; Vryenhoek v Powell* the constitutional validity of section 417(2)(b) of the Companies Act 61 of 1973 was examined. In terms of this section an examinee was required to answer, on pain of a fine or imprisonment or both, any question put to him notwithstanding that any answer to such question might be used in evidence against him in subsequent criminal proceedings. Chaskalson P, on behalf of the majority, held that the section infringed the rule

41 608.

42 611. This was some three years before the commencement of s 60(11B)(c).

43 As to the isolation of a trial-within-a-trial, see *R v Dunga* 1934 AD 223 226; *R v Brophy* 1982 AC 476, 1981 2 All ER 705 (HL) 709D–E; *S v De Vries* 1989 1 SA 228 (A) 233H–234A; *S v Sithebe* 1992 1 SACR 347 (A) 341a–c, per Nienaber JA.

44 1996 1 SA 984 (CC), 1996 1 BCLR 1 (CC).

45 1996 2 SA 751 (CC), 1996 4 BCLR 449 (CC) para 60f.

46 1996 3 SA 562 (CC), 1996 4 BCLR 592 (CC), 1996 1 SACR 572 (CC).

against self-incrimination.⁴⁷ He explained that the rule against self-incrimination was “not simply a rule of evidence” but “a right” which, by virtue of the provisions of section 25(3) of the IC, was a constitutional one. He also indicated that it was “inextricably linked to the right of an accused to a fair trial” and it existed to protect that right.⁴⁸ The reason why the evidence given by an examinee at an inquiry held under section 417(2)(b) could not be used against him if he was subsequently prosecuted, flows from this connection between the privilege against self-incrimination and the right to a fair trial.⁴⁹

In a minority judgment, Ackermann J concluded that “the right of a person not to be compelled to give evidence which incriminates such person is inherent to the rights mentioned in section 25(2) and (3)(c) and (d) of the Interim Constitution”.⁵⁰ The judge cited with approval the decision in *R v S (RJ)*⁵¹ where the Canadian supreme court discussed the right against self-incrimination in terms of protecting the person concerned “against assisting the Crown in creating a case to meet”. Ackermann J did not agree, however, that the constitutionality of section 417(2)(b) could be challenged in terms of section 25(3) of the Constitution.⁵² He decided that section 417(2)(b) violated the widely interpreted provisions of section 11(1) of the IC. In this regard, Chaskalson P pointed out that the reasoning which led Ackermann J to conclude that section 417(2)(b) was inconsistent with section 11(1) would also have led him to conclude that it was inconsistent with section 25(3).⁵³

At provincial division level it was also held that the compulsion of some classes of evidence does not violate the right against self-incrimination. In *Msoni v Attorney-General of Natal*⁵⁴ the division between “real” and “communicative” evidence made by the Canadian courts in dealing with fingerprints was invoked.⁵⁵ The court in *Msoni* held that only the compulsion of “communicative” evidence could be regarded as violating the right against self-incrimination.⁵⁶ But in *S v Hlalikaya*⁵⁷ there was a deviation from the “communicative”

47 Para 159 of the judgment.

48 *Ibid.*

49 Paras 159–160.

50 Para 79. See also *S v Zuma* 1995 1 SACR 568 (CC) para 33 and *R v Camane* 1925 AD 570 575.

51 1995 1 SCR 451, 26 CRR (2d) 1 76.

52 Ackermann J held that s 25(3) rights accrued to an “accused person” only when that person became an accused in a criminal prosecution. An examinee at a s 417 enquiry was not an “accused person”. Ackermann J explained that only when such evidence was tendered at the criminal trial did the threat to any s 25(3) right against self-incrimination arise.

53 In *Parbhoo v Getz* 1997 4 SA 1095 (CC) *Ferreira's* case was followed and applied in respect of s 415(3) and (5) of the Companies Act in relation to the corresponding section of the FC, s 35(3). The court in *S v Mathebula* 1997 1 BCLR 123 (W) 147 also accepted this principle as part of the right to a fair trial.

54 1996 8 BCLR 1109 (N).

55 See *Collins v The Queen* 1987 1 SCR 265, 33 CCC (3d) 1 (SCC). See also *S v Huma* 1996 1 SA 232 (W) and *S v Maphumulo* 1996 2 BCLR 167 (N).

56 *Msoni* followed the American decision in *Schmerber v California* 384 US 757 (1966) (blood sample not self-incrimination). In Canada, this reasoning was also applied by the Ontario Court of Appeal in *R v Altseimer* 1982 1 CCC (3d), 142 DLR (3d) 246, 38 OR (2d) 783 to a breath sample. The supreme court of Canada in *R v Therens* 1985 13 CRR 193, 1985 1 SJR 613 held, however, that a breath sample amounted to conscription of the accused against himself. See also *R v Dersch* 1993 3 SCR 768, 85 CCC (3d) 1 (SCC) (blood sample) and *R v Greffe* 1990 1 SCR 755, 55 CCC (3d) 161 (SCC) (object extracted from

requirement where a suspect's participation in an identity parade was regarded as having a dimension of self-incrimination. A wider meaning regarding compulsory self-incrimination was also given in *S v Melani*,⁵⁸ where the court viewed conscription by the accused against himself as occurring "through some form of evidence emanating from himself".⁵⁹

3 5 4 *The compulsion to testify*

In *Davis v Tip*⁶⁰ the applicant was charged with misconduct and had to appear in a disciplinary enquiry. He had, however, been criminally charged in respect of the same charges, and those proceedings had not been finalised. At the enquiry it was submitted that the applicant's right in terms of section 25(3)(c) IC would be violated if the inquiry proceeded since he might of necessity be called upon to answer evidence against him if he wished to avoid a finding of misconduct. This evidence could then be used against him in the criminal proceedings.⁶¹

Nugent J held that the exercise of this choice, even if it is an unpleasant one, to defend the applicant's interest in the disciplinary enquiry did not amount to the sort of compulsion required for the violation of "the right to remain silent".⁶² The reasoning of the court in coming to this conclusion is not convincing. The finding by the court, in the first instance, that the two Canadian cases referred to by the applicant do not provide authority for the proposition that forcing on an accused person such an illusory choice is tantamount to violating the applicant's "right to silence", is astonishing.⁶³ The two Canadian cases say in so many words that such a choice amounts to no choice at all, and that the applicant will thus be forced to waive his "right to silence".⁶⁴ Furthermore, the court, while accepting that an accused may not be placed under compulsion to incriminate himself, perplexingly based its findings on the right to silence⁶⁵ rather than on the right against self-incriminating evidence.⁶⁶ In addition, the distinction the court attempted to make between the "compulsion to testify" as required by "the right to silence" and "the choice to testify" as in the application before the court, seems contrived and unconvincing.

rectum). In the latter cases the self-incrimination principles were entangled with the violations of the right to counsel. In England the privilege against self-incrimination at common law is interpreted as not extending to the compelled production of intimate samples. See *Smith* 1985 81 Cr App R 286 (CA); *Apicella* 1985 82 Cr App R 295 (CA); and *Cooke* 1995 1 Cr App R 318 (CA).

57 1997 1 SACR 613 (SE).

58 1995 4 SA 412 (E), 1996 2 BCLR 174 191 (E), 1996 1 SACR 335 (E).

59 Snyckers in Chaskalson *et al* 27-46 submits that a distinction should be drawn between real evidence obtained independently of the person of the accused, and real evidence intimately connected with his person. He submits that compelled production of the former does not by itself amount to self-incrimination, but compelled production of the latter may be a different matter.

60 1996 1 SA 1152 (W), 1996 6 BCLR 807 (W).

61 1996 1 SA 1154-1155.

62 1996 1 SA 1158H-J. See also *S v Mbolombo* 1995 5 BCLR 614 (C).

63 1996 1 SA 1158C. Counsel for the applicant referred to the decision of the Nova Scotia Court of Appeal in *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* 1993 18 CRR (2d) D-6 Digest and the Nova Scotia Supreme Court in *Williams v Deputy Superintendent of Insurance* 1993 18 CRR (2d) 315.

64 See *Williams* 331 337. *Williams* followed *Phillips*.

65 Entrenched in s 25(3)(c) IC.

66 1996 1 SA 1158G-H.

The court explained that what distinguished “compulsion to testify” from “making a choice to testify”, was whether the alternative which presented itself constituted a penalty that served to punish a person for choosing a particular route as an inducement to him not to do so.⁶⁷ In the present case the applicant might be required to choose between incriminating himself or losing his employment. But his loss of employment would be the consequence of his being found guilty of misconduct and was not a punishment the aim of which was to induce him to speak.⁶⁸

In *Seapoint Computer Bureau (Pty) Ltd v McLoughlin*⁶⁹ the applicant applied to stay a civil proceeding pending the determination of a criminal case. The applicant contended that the cross-examination during the civil proceeding would expose him to the risk of making incriminating statements which would prejudice his position in the criminal proceedings that might follow. In this case the court, relying heavily on the *Davis* decision and the analysis in it, also held that only actual coercive compulsion to answer questions, as opposed to the exercise of a choice, amounted to the sort of compulsion required for the violation of “the right to remain silent”.⁷⁰ The court in the *Seapoint* case seemed, however, to base its decision on the equation of the common-law right to silence with the right against self-incrimination.⁷¹

3.6 Case law under the Final Constitution

During the period between the advent of the FC and the commencement of section 60(11B)(c) of the Criminal Procedure Second Amendment Act, the High Courts were also called on to decide whether submissions made by an applicant for bail should be admissible against him at his subsequent trial.⁷²

It was contended before Vahed AJ in *S v Dlamini*,⁷³ that an accused person should be free to say whatever he wants at a bail application in order that he may feel comfortable and secure in procuring his freedom at that stage.

Vahed AJ referred to the decision of the Appellate Division in *S v Nomzaza*,⁷⁴ where it was held that, in general, everything said by the accused at the bail application was admissible at the later trial unless there were circumstances rendering such statements inadmissible. The court was furthermore of the opinion that *Botha's* case⁷⁵ did no more than take the proposition one step further.⁷⁶ The court

67 1996 1 SA 1158H-J.

68 1996 1 SA 1159A-B.

69 1996 8 BCLR 1071 (W).

70 See also *Osman v Attorney-General of Transvaal* 1998 11 BCLR 1362 (CC), where the actual coercion to speak was also decisive.

71 1081ff.

72 The judgment in *S v Dlamini* 1998 5 BCLR 552 (N) was delivered on 1998-04-09, after the Criminal Procedure Second Amendment Act 85 of 1997 was assented to on 1997-11-26, but before the date of commencement of, *inter alia*, subsec (11B)(c), which commenced with the remainder of the Act on 1998-08-01.

73 1998 5 BCLR 552 (N).

74 1996 3 All SA 57 (A).

75 *S v Botha (2)* 1995 2 SACR 605 (W).

76 *Botha's* case pointed to the dilemma faced by the accused because of the conflict between the two rights in question. The court held that if the conflict was real and material to the extent that the admission of the record in the bail proceedings might render the trial unfair, that question could be determined during the course of a trial-within-a-trial.

said that such a process was always available to the accused, and to impose a blanket rule as suggested by counsel would bring the administration of justice into disrepute. He saw this as a necessary consequence of a situation in which the public would witness accused individuals, who had been fully informed of their rights, making incriminating admissions during the course of bail proceedings without those admissions being capable of proof against them at their subsequent trials.

The court also emphasised that it had to be assumed that the framers of the Constitution had been mindful of the possibility of including a provision similar to that of section 13 of the Canadian Charter in the Constitution. The framers had, however, deliberately refrained from doing so.⁷⁷ If an accused who applies for bail is placed in the dilemma referred to in *Botha's* case, this might have the effect of limiting one or other of the rights in question, but that limitation was justifiable in the interests of not bringing the administration of justice into disrepute. It followed that there was no warrant for adopting a blanket rule to the effect that evidence given by an accused at bail proceedings would be inadmissible at his later trial.

3.7 The constitutionality of section 60(11B)(c)

The Criminal Procedure Second Amendment Act 85 of 1997, including section 60(11B)(c), came into operation on 1 August 1998. In light of the constitutional right not to be a compellable witness against oneself, the framers of the Act presumably accepted that an applicant for bail could not be "forced" to forego his right against self-incrimination in pursuing his right to bail. Here, I consider whether section 60(11B)(c) can withstand constitutional scrutiny.

The first two cases on section 60(11B)(c) were both decided by Slomowitz AJ in the Cape Provincial Division, on the same reasoning.⁷⁸ In *S v Schietekat*⁷⁹ Slomowitz AJ explained that no person may be required to be a witness against himself. There was no inquisition, for a bail proceeding was not a Star Chamber. Slomowitz AJ commented that whatever the purpose of Parliament may have been in enacting section 60(11B)(c), its effect was malevolent. He indicated that an accused who elects to exercise his right to apply for bail runs the risk of being interrogated on the merits of the case against him. His own testimony will then be used against him as part of the state's case when he eventually faces a trial. Slomowitz AJ asked the question whether the provision was fashioned to discourage those who seek their liberty. An accused who testifies might well incriminate himself, whether it be in relation to the crime charged or, more

77 The court does not seem to have been aware of the decision in *Dubois v The Queen* 1985 2 SCR 350, 23 DLR (4th) 503 (SCC). In both *Dlamini* and *Dubois* the use of the record in bail proceedings as part of the state case had to be dealt with. This argument does not hold water when the admissibility of the bail record as part of the state case at trial comes to be decided. The supreme court of Canada held that in this instance, s 13 merely ensured that the Crown would not be able to do indirectly that which s 11(c) prohibits. The use of the testimony from a prior proceeding during the Crown case at the later trial was therefore in any event prohibited by s 11(c). It accordingly seems that the right created in s 35(3)(j) is sufficient to prohibit the use of prior proceedings as part of the Crown case, and does not call for a right similar to s 13 of the Canadian Charter to be taken up in the Constitution.

78 *S v Schietekat* 1998 2 SACR 707 (C); *S v Joubert* 1998 2 SACR 718 (C).

79 714.

seriously, in relation to other offences unknown and uncharged. In conclusion, the court felt bound to hold that the section violated the Constitution.

The constitutional validity of section 60(11B)(c) ultimately came before the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*.⁸⁰ In this decision, which dealt with various constitutional challenges, the court saw fit to discuss the law regarding bail in general. Of importance, for present purposes, is the court's introductory comments to the new section 60(11B)(c):⁸¹

"Further, in a new sub-s (11B), another legislative innovation was introduced: an applicant for bail became obliged to furnish information to the court (upon pain of imprisonment for withholding it or furnishing it untruthfully) and the record of bail proceedings was made part of the trial record."

Be that as it may, when the court dealt specifically with the admissibility of bail proceedings at trial,⁸² it disagreed with the reasoning and conclusion reached in *Botha's* case that the record of bail proceedings should be kept distinct from the evidence as to guilt. The court thus did not agree that it should be kept apart, on the analogy of evidence in a trial-within-a-trial, for example as to whether a confession is voluntary or not.⁸³

The court did accept, however, that the evidence given at a bail hearing might return to haunt the accused at the trial.⁸⁴ The court could not deny that there is a certain tension between the right of an arrested person to make an effective case for bail by adducing all the requisite supporting evidence, and the battery of rights under sections 35(1) and (3) of the Constitution. Yet the court did not see that kind of tension as unique to people applying for bail. The court reiterated that people living in democratic and open societies are often called upon to make hard choices.

Kriegler J, on behalf of the unanimous court, explained that litigation in general, and defending a criminal charge in particular, can present a minefield of hard choices.⁸⁵ He saw it as an inevitable consequence of the high degree of autonomy afforded to the prosecution and the defence in a predominantly adversarial system of criminal justice. An accused who, ideally, is assisted by a competent legal representative in substance conducts the defence independently. He has to take many key decisions whether to speak or to keep silent. Does one volunteer a statement to the police or respond to police questions? If one applies for bail, does one adduce oral or written evidence, and if so, by whom? Does one, for the purposes of obtaining bail, disclose the defence (if any), and in what terms? Later, at the trial, does one disclose the basis of the defence under section 115 of the CPA? Does one adduce evidence – one's own or that of others? The court explained that each and every one of these choices could have decisive consequences.⁸⁶ They therefore pose difficult decisions. But the court points out that the choice remains that of the accused and cannot be forced on him.

80 1999 7 BCLR 771 (CC).

81 Para 15.

82 Para 86ff.

83 Para 93.

84 *Ibid.*

85 Para 94. This approach closely follows the argument by the Director of Public Prosecutions.

86 *Ibid.*

Kriegler J commented that the reasoning in *Botha* wished to give the accused the best of both alternatives, or as it was bluntly put in *Dlamini*, the right to lie. One can therefore present any version of the facts without any risk of a comeback at the trial. At trial the accused can choose another version with impunity. The court did not consider the right to remain silent in the Constitution, or the right not to be compelled to confess or make admissions, as offering blanket protection against having to make a choice. Still, the court agreed that the principal objective of the Bill of Rights was to protect the individual against the abuse of state power. It does so, *inter alia*, by shielding the individual faced with a criminal charge against having to help prove that charge. The court indicated that the shield against compulsion does not mean that an applicant for bail can choose to speak but not be quoted.⁸⁷ As a matter of policy, the prosecution must prove its case without the accused being compelled to furnish supporting evidence. But if the accused, acting freely and in the exercise of an informed choice, elects to testify in support of a bail application, the right to silence is in no way impaired. Nor is it impaired, retrospectively as it were, if the testimony voluntarily given is subsequently admitted against the accused.⁸⁸

Referring to the ills that befell the accused in *Botha*, *Dlamini* and *Schietekat*, the court indicated that there was no need, in propounding a broad and radical remedy, for an ill to be treated conservatively and selectively. The court agreed with the Supreme Court of Appeal in *S v Nomzaza*⁸⁹ that

- there was no general principle at common law excluding from the evidence at trial incriminatory or otherwise prejudicial evidence given by an accused at a prior bail hearing; but
- if the admission of such evidence would render the trial unfair, the trial court ought to exclude it.

The court indicated that it was not the right to silence which was imperilled by the accused's election to speak, and found no warrant for creating a general rule that, according to the court, would exclude cogent evidence against which no just objection can be levelled. But if there is a valid objection in particular circumstances, the trial court should disallow such evidence. In *Botha's* case, for example, where the accused did not know of his right not to answer incriminatory questions and effectively convicted himself, the incriminatory evidence should be excluded at trial.

The court accordingly found that the record of bail proceedings is not automatically excluded from, nor automatically included in, the evidentiary material at trial. Whether or not it is to be included depends, according to the court, on the principles of a fair trial.⁹⁰

87 See also para 3 5 4.

88 Para 95.

89 1996 3 All SA 57 (A).

90 Van der Merwe in Du Toit *et al* 9-34B approves this approach (in revision service 22, which seems to have been published soon after this decision on 3 June 1999). He argues that s 60(11B)(c) and 60(11) create special difficulties. An accused who has to testify in terms of s 60(11) in order to obtain bail finds himself in the position that his testimony and answers in cross-examination may be used against him at the subsequent trial. He says that the argument that there is nothing wrong with this conflict overlooks the fact that evidence supporting bail differs "in ambit, objective and detail from testimony on the merits where guilt or innocence is the issue". He foresees the possibility that an accused who testifies at his trial is not fully aware of the "allegations of fact" which he would face at the trial

The Constitutional Court referred with approval to the flexible approach advocated by Ackermann J in *Ferreira v Levin; Vryenhoek v Powell*,⁹¹ and indicated that that approach should be followed. The court therefore found no inevitable conflict between section 60(11B)(c) of the CPA and any provision of the Constitution.

3.8 Derivative evidence

What about evidence deriving from evidence given by the accused at the earlier bail application? May that evidence be used against the accused at trial? This situation will present itself where the evidence given by the accused is ruled inadmissible, but certain evidence has emanated from such inadmissible evidence.⁹²

In *Ferreira v Levin; Vryenhoek v Powell* the court⁹³ held that it had the discretion to exclude derivative evidence obtained because of compelled statements, where the statements themselves would be immune from use in order to ensure a fair trial.⁹⁴

In this regard, section 35(5) FC provides: "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."⁹⁵

against him. This is said to be the case especially where the charge sheet has not been drawn up, or where no indictment or summary of facts has been served, or where the accused is denied access to the police docket in terms of s 60(14). He therefore argues that the mere fact that an accused has been warned that his testimony may be used at trial cannot *ipso facto* make that evidence admissible. He argues that the final test is contained in s 35(5) of the Constitution. If the admission of the evidence would be unfair or otherwise detrimental to the administration of justice, it must for that reason be excluded.

91 1996 1 SA 984 (CC), 1996 1 BCLR 1 (CC). This decision was endorsed by the Constitutional Court in *Bernstein v Bester* 1996 2 SA 751 (CC), 1996 4 BCLR 449 (CC).

92 Eg where the accused had been unaware at his earlier bail application that he had the right to refuse to answer incriminating questions.

93 1996 1 SA 984 (CC), 1996 1 BCLR 1 (CC) (relying on Canadian authority). See *R v S (RJ)* 1995 1 SCR 451, 26 CRR (2d) 1 (SCC).

94 The Constitutional Court's decision superseded the decision of the Supreme Court in *Park-Ross v The Director, Office for Serious Economic Offences* 1995 2 SA 148 (C) 162, 1995 2 BCLR 198 (CC), where it was held that the preferred view, which served the right against self-incrimination best, and which coincides with the position under American and English law, is that derivative evidence emanating from self-incriminating evidence should be excluded.

95 In the decision as to what could be detrimental to the administration of justice, it is relevant to look at the public's perception of justice, although this is not decisive. In *S v Melani* 1996 1 SACR 335 (E) and *S v Ngcobo* 1998 10 BCLR 1248 (N) the courts dealt with illegally obtained evidence under the IC. The courts (352 and 1254F-G resp) held that public opinion would probably show that the majority of the South African population at this stage in the history of the country would be quite content if the courts allowed unconstitutionally obtained evidence. The Constitutional Court in *S v Makwanyane* 1995 3 SA 391 (CC) para 88 indicated, however, that the fundamental values of the criminal-justice system are not subject to public outcries and polls. The question to be asked is whether the admission of the evidence would bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances. See *S v Malefo* 1998 2 BCLR 187 (W) 213A and *Collins v The Queen* 1987 28 CRR 122 136-137.

No distinction is made between direct and derivative evidence. Once it is determined that the evidence was obtained in an unconstitutional manner, it must be decided whether the admission of such evidence will render the trial unfair or be detrimental to the administration of justice. If the answer to either of the two legs of the question is positive, the evidence must be excluded.

In *Ferreira v Levin; Vryenhoek v Powell* Ackermann J⁹⁶ indicated that derivative evidence, “though not created by the accused and thus not self-incriminating by definition”, was “self-incriminating nonetheless because the evidence could not otherwise have become part of the Crown’s case”.⁹⁷

In principle, it therefore seems that derivative evidence will have been obtained in an unconstitutional manner.⁹⁸

On the basis of the reasoning of the court in *Ferreira v Levin* in allowing derivative evidence emanating from a section 417 enquiry, however, it may be argued that derivative evidence⁹⁹ emanating from a bail application should be allowed.¹⁰⁰

- The hearing of a bail application serves an important public purpose and cannot be equated with evidence obtained as a result of unlawful conduct. Where the evidence was, for example, obtained as a result of torture, public policy might dictate that it be excluded even if the fact(s) can be proved independently. A different approach would allow the end to justify the means.¹⁰¹ Whereas the admission of evidence under the latter circumstances would bring the administration of justice into disrepute, the same cannot be said of the evidence emanating from a bail application.
- The state has a responsibility to protect its citizens against crime. To allow such evidence at trial cannot be said to bring the administration of justice into disrepute.¹⁰²
- South Africa does not nearly have the resources to combat crime as effectively as the United States, where derivative evidence is not admissible.¹⁰³ The use of such evidence may in certain cases be the only way to combat crime effectively.¹⁰⁴

39 Critical appraisal

It is clear that the record of bail proceedings is inadmissible as evidence at trial if the accused was unaware of his right against self-incrimination. Section 60(11B)(c), however, now obliges the court to warn the accused at the bail application that the evidence may be used against him if he elects to testify.¹⁰⁵

96 Again relying on *R v S (RJ)* 1995 1 SCR 451, 26 CRR (2d) 1 (SCC).

97 Para 145.

98 The limitations clause must be applied before the Constitution’s exclusionary rule comes into play.

99 And, for that matter, direct evidence given at the bail application.

100 See also Malan *Fundamental rights: Themes and trends* (1996) E12–41 ff.

101 Para 150.

102 The court explained that the public, and especially the victims of crime, might find a denial of the right to use such evidence inexplicable (para 151).

103 See para 152. In this regard it must be remembered that Canada has similar resources to the United States to combat crime but the use of derivative evidence is allowed only under certain circumstances.

104 Para 152.

105 See the latter part of the wording of s (11B)(c): “must inform . . . and such evidence becomes admissible.”

Section 60(11B)(c) therefore sets stricter requirements and, if the court does not warn the accused, the evidence is inadmissible irrespective of whether or not the accused was aware of his rights. It therefore follows that if a witness at the bail proceedings knew of his right against self-incrimination, but was not warned and elected to testify, his evidence is not allowed at his future trial.

It also seems that where an arrested person is compelled to submit evidence before trial in this context, the absence of use immunity in the criminal proceedings cannot be justified under the limitation provision in the Constitution.¹⁰⁶ At common law also, an accused could not be compelled to give self-incriminating evidence. The right against self-incrimination therefore operated only at the trial at which the incrimination might occur. No complaint based on self-incrimination, if any, outside that context had any meaning.¹⁰⁷

If it is accepted that the underlying principle is the presumption of innocence and that the state bears the full burden of proving its case, the individual should not be obliged to assist the state in any way in proving its case against him. The state is not only the prosecutor but also the investigator of the crime. Against this, the accused has a purely adversarial role to play. This approach must be applied to all forms of evidence emanating from the accused, including derivative evidence. The presumption of innocence, as the governing principle, should therefore determine the extension and development of the scope of the right against self-incrimination.

Since the advent of the fundamental-rights era, the question whether the record of bail proceedings should be admitted at the subsequent trial rests on a different footing. The FC provides that an accused has a right to a fair trial, which includes the right against self-incrimination. The arrested person also has a right to bail in terms of section 35(1)(f) FC. The accused now faces a dilemma. If he fails to give evidence or refuses to answer incriminating questions at the bail application, he may be refused bail and in the instance of some more serious offences where he carries the burden of proof, he will be refused bail.¹⁰⁸ If he elects to testify or submit other evidence or answers incriminating questions in order to procure his release on bail (to which he has a right), he foregoes his right not to be compelled to give self-incriminating evidence, for the testimony may be used at his subsequent trial.

The reasoning of, and conclusions reached by, the Constitutional Court in *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat*¹⁰⁹ cannot be supported. Even though it is without doubt true that criminal litigation presents a litigant with

106 S 36.

107 See *Nel v Le Roux* 1996 3 SA 562 (CC), 1996 4 BCLR 592 (CC), 1996 1 SACR 572 (CC), where it was held that the applicant could not validly object to answering self-incriminating questions in view of the transactional indemnity and use of immunity provisions in s 204(2) and (4) of the CPA. See also *Dabelstein v Hildebrandt* 1996 3 SA 42 (C) 66 in the context of Anton Piller orders. It is submitted that one could still validly refuse to answer questions at pre-trial proceedings if other rights would be affected by the answers, unless the threatened violation would be upheld as justified under limitation analysis. See *Bernstein v Bester* 1996 4 BCLR 449 (CC) para 61 and *Nel v Le Roux* 1996 1 SACR 572 (CC) para 6ff.

108 Kotzé 1998 *De Jure* 188 seems to be of the similar view that the cumulative effect of s 60(11) and (11B)(c) is to violate the right against self-incrimination.

109 1999 7 BCLR 771 (CC).

difficult choices, the examples given by the court in paragraph 94 of the judgment are not comparable to the situation under discussion. One would not in any of the examples given have to forego one constitutional right in order to exercise another. Does an accused therefore in one of the given examples have a constitutional right to submit written evidence and also a constitutional right to adduce oral evidence? Would an accused have to abandon the one in order to exercise the other? Can he not do both? In this example given by the Constitutional Court, it is but a choice that an accused has to make within one fundamental principle, sc his right to be heard at the bail application.

The accused can, furthermore, obtain the legal remedy he pursues by submitting either oral or written evidence. It is merely a question of tactics dictating what would be appropriate in specific circumstances. He is not forced to do the one or the other, on pain of not being granted a remedy.

On the reasoning of the Constitutional Court it also seems that a witness under section 417(2)(b) of the Companies Act has a right to lie, but that in that instance it is acceptable.¹¹⁰ In light of the judgment by the Constitutional Court, it furthermore seems that the witness under section 417(2)(b) has a choice: does he answer questions now and escape conviction and sentence under section 417(2)(b), or should he rather keep quiet and escape possible conviction and sentencing later because of his non-assistance?¹¹¹

The evidence given at the bail hearing is surely not voluntary if it is furnished under pain of not receiving bail. An applicant in bail proceedings is obliged to give evidence or answer questions in order to obtain bail, and is therefore “forced” to do so.¹¹² In principle there should be no difference whether one faces a fine or imprisonment under section 417(2)(b), or imprisonment when one fails to testify at a bail application. In both cases the right against self-incrimination is offended, and the testimony or answers should not be allowed at the subsequent trial.

In addition, if an accused confesses because he has been threatened with incarceration should he refuse, the confession will not be allowed because it was not made voluntarily. If an applicant for bail is told that he will be incarcerated if he does not give evidence, it would similarly be a case of involuntariness, and the evidence must be excluded.¹¹³ In both these instances, the choice is between incarceration and assisting the prosecution. If policy does not allow the one, the other should not be allowed either. Because of the inextricable link between the right against self-incrimination and the right of an accused to a fair trial, there will in both these instances not be a fair trial if the evidence is allowed.

I am therefore of the view that the common-law rule in regard to the burden of proving that a confession was voluntarily made, should also be applied here. This rule is not accidental, but an integral part of the right not to be a compellable witness against oneself. This in turn reinforces the underlying principle of

110 In para 94 Krieglner J commented that if an accused was allowed to present any version of facts at the bail application without any risk of comeback at trial, the accused would have the right to lie. See para 3 7. But in *Ferreira v Levin*; *Vryenhoek v Powell* 1996 1 SA 984 (CC) para 159–160 the Constitutional Court ruled that the testimony given at a s 417(2)(b) enquiry is protected from use at any subsequent trial. See para 3 5 3.

111 Where the charges may be more serious and personal liability for the company’s debt may be incurred.

112 Especially where he bears the burden of proof.

113 The fact that the threat might not have emanated from a person in authority should not change the principle.

the presumption of innocence, which entails that an accused is not obliged to assist the state in proving its case. This is also how section 12 would inform the interpretation of section 35(3)(j).

For the reasons given, I believe that section 60(11B)(c) offends the right against self-incrimination, and that it cannot be saved by the limitation clause set out in section 36(1) FC.

Although the level of criminal activity is a "pressing and substantial"¹¹⁴ concern, and clearly a relevant and important factor in the limitations exercise undertaken in respect of section 36,¹¹⁵ there are other factors relevant to that exercise. One must be careful to ensure that the alarming incidence of crime is not used to justify extensive and inappropriate invasions of individual rights.¹¹⁶

Section 36(1)(a) requires that the nature of the right which has been infringed must be taken into account. This is not only a separate enquiry but also an indication of how stringently the other factors must be viewed. If the right to be limited, as here, is crucial to the constitutional project, it must be understood to mean that the other limitation requirements must be fortified accordingly.¹¹⁷ It will therefore be more difficult to justify the infringement of a right that is of particular importance regarding the ambition of the Constitution to create an open and democratic society based on human dignity, equality and freedom.

Out of concern for the position of an accused person in a criminal trial, our courts and legal scholars have indicated that it is unacceptable for an accused to be compelled to assist the state in obtaining a conviction. It has on many occasions also been indicated that this right was inextricably linked to the right of an accused to a fair trial. Non-compliance with this view offends the underlying principle, *sc* the presumption of innocence.

In addition, section 36(1)(c) provides that the nature and extent of the limitation must be taken into account. This factor ensures that where a serious infringement of a right occurs, the infringement will carry a great deal of weight in the exercise of balancing rights against justifications for its infringement. From the point of view of the individual affected by this invasion, his right against self-incrimination is taken away completely in this instance.¹¹⁸

114 See *R v Oakes* 1986 26 DLR (4th) 200 (SCC), where it was indicated that the objective had to be "pressing and substantial".

115 See s 36(1)(b), which provides that "the importance of the purpose of the limitation" must be taken into account. No fixed order in which the factors must be considered is prescribed. The following order has been proposed by Woolman in *Chaskalson et al* 12–49 to ensure that the correct questions be asked at the correct time:

- "the nature of the right;"
- "the importance of the purpose of the limitation;"
- "the relation between the limitation and its purpose;"
- "the nature and extent of the limitation;"
- "less restrictive means to achieve its purpose."

Theme Committee Four seems, however, to have softened any rigidity in approach with statements like: "the list of factors should remain open-ended", "none of the factors should be regarded as a conclusive test", and "care should be taken not to formulate these factors as tests".

116 See *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 7 BCLR 771 (CC) para 68.

117 See also Woolman "Limitations" in *Chaskalson et al* 12–50.

118 Under the IC, the "essential content" requirement reminded the court that there is a point beyond which the government may not go in limiting a fundamental right, notwithstanding how important and pressing the government's objectives might be. See Woolman in *Chaskalson et al* 12–16. The focus is thus taken away from the plight of the government, and

It is well established that section 36 requires a court to counterbalance the purpose, effects and importance of the infringing legislation, on the one hand, against the nature and importance of the right limited, on the other.¹¹⁹

If the object of the government is to control the violent and serious crimes mentioned in Schedules 5 and 6, it seems that the government could have used some means less restrictive of the rights of accused.¹²⁰ In the first instance, an accused can be prevented from saying one thing with impunity at the bail hearing and another at the trial without invading his right against self-incrimination. This can be done by allowing the record of the bail proceedings only in order to test the credibility of the accused at trial. There also does not seem to be an obvious need to cast the net so widely as to include the record of all bail proceedings, whatever the charge, in the trial record. There seems to be no common-sense connection between these “lesser” crimes and the purpose of the legislature.

It is therefore submitted that this is one instance where the equilibrium between the freedom and security of the accused and the interests of society is out of balance, and needs to be corrected.

4 CONCLUSION

Under Canadian law the testimony by an accused at the bail hearing may not be used as part of the Crown case at trial, or to incriminate the accused during cross-examination. This prohibited testimony includes oral testimony, whether

regard is had to the detrimental effect that the limitation may have on the position of right-holders. But the “essential content” requirement in the IC has been deleted, and therefore does not appear in the FC. This was attributable to the inability of the courts and legal scholars to give substance to this requirement. See, for example, *S v Makwanyane* 1995 3 SA 391 (CC), where four different opinions were given. Chaskalson P (446G–448A) explained that the purpose of the provision was to ensure that rights may not be taken away altogether and that a meaningful distinction can be drawn between the objective and subjective content of a right. Kentridge AJ (470) rejected Chaskalson P’s understanding and found it difficult “on any rational use of language” to explain the essential content of a right in terms of a subjective dimension. Ackermann J (458F–H) disagreed with Chaskalson P on the objective and the subjective content. Mahomed DP (496G–J) indicated that there might be a third way in which to understand the term “essential content”. The court found, however, that the “essential content” requirement could be established by simply applying the remainder of the tests more stringently during limitation analysis. See also De Waal “A comparative analysis of the provisions of German origin in the Interim Constitution” 1995 *SAJHR* 18–21. When the FC was written Theme Committee Four and the Constitutional Assembly also recognised that at least one of the factors recognised by the court in *Makwanyane* (and adopted in s 36) could be utilised to perform the same function. This, the Theme Committee said, could be done by taking into account “the nature and extent of the limitation”, and dropped the “essential content” requirement from the limitation clause.

¹¹⁹ This requirement was explained by the court in *S v Williams* 1995 7 BCLR 861 (CC) 880D–E. The court indicated that the test relied on proportionality. It is a process of weighing the individual’s right, which the State wishes to limit, against the objective that the State seeks to achieve by such limitation. This evaluation must necessarily take place against the backdrop of the values of South African society as articulated in the Constitution.

¹²⁰ See s 36(1)(e) and my thesis para 8 3 5 3. It has been indicated that the State has to prove the requirement of minimal intrusion. See also *Brink v Kitshoff* 1996 6 BCLR 752 (CC) 770–771; *Mohlomi v Minister of Defence* 1996 12 BCLR 1559 (CC). See *Tétreault-Gadoury v Canada (Employment and Immigration Commission)* 1991 4 CRR (2d) 12 26 (SCC), *Rodriguez v British Columbia* (Attorney-General) 1994 17 CRR (2d) 193 222 and 247 (SCC) and *R v Laba* 1994 120 DLR (4th) 175 179c (SCC) on the position in Canadian law.

under oath or not, documentary evidence introduced, and other acts performed while testifying. It is not clear whether section 13 of the Canadian Charter allows the use of the prior testimony to test the credibility of the accused during cross-examination. But section 5(2) of the Canada Evidence Act protects an accused at the trial from the use of an answer given at the bail hearing, where he objected to answering the question on the ground that the testimony might tend to incriminate him or establish his liability in a civil proceeding. Such an answer may therefore not be used to test the credibility of the accused during cross-examination at trial.

Under South African law the intention does not seem to have been that the record of the bail proceedings should form part of the state case at trial. But it seems that the evidence presented by an applicant who has been informed of his right against self-incrimination, and who wishes to exercise his right to obtain bail, may be used to incriminate or to test the credibility of an accused who elects to testify at his trial. All the evidence that forms part of the record of the bail proceedings is allowed. While the evidence may be excluded under South African law in the interests of justice, it is usually not seen to be in the interests of justice where the applicant has so been informed. Under the same circumstances, Canadian law prohibits the use at the trial of the previous testimony at the bail hearing. Where, however, the use of evidence is prohibited under South African law (for example where the accused was unaware of his right against self-incrimination), the admissibility of derivative evidence at the subsequent criminal trial is on a similar footing to that which applies under Canadian law. Here the courts under both systems have the discretion to exclude the evidence in order to ensure a fair trial.¹²¹

121 An evaluation of the applicable principles indicates that modern Canadian law has extended the doctrine of protection against self-incrimination beyond the common-law principle that protects a witness from being compelled to respond to questions that might incriminate him. Since the advent of the Canadian Charter, s 13 has guaranteed that the prior testimony of a witness (including an applicant for bail) may not be used to incriminate that witness at any other proceeding, whether it was given freely or under compulsion. As this right is at odds with the aim of the prosecutor to secure the conviction of the guilty, this extension under Canadian law must be ascribed to the fact that prosecutors in Canada can function effectively without any assistance from the accused. Under Canadian law, the administration of justice therefore has the luxury of being able to benefit from both the extended right against self-incrimination and a capable prosecution. On the other hand, South African law, by admitting the record of the bail hearing at the trial, has fallen short of the same common-law principle that has been taken up in our law. See my arguments in para 3 9. *Prima facie*, this heavy blow has come about because the Constitutional Court has found that the Hobson's choice faced by an applicant for bail does not amount to the type of compulsion required for the violation of the right against self-incrimination. Even if the indication by the Constitutional Court seems to be that the common-law principle is not to be derogated from, one cannot help but wonder whether public opinion and an ineffective prosecution in recent times has anything to do with the conclusion of the court.

Die interpretasie van artikel 2C van die Wet op Testamente 7 van 1953 (1)

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SUMMARY

The interpretation of section 2C of the Wills Act 7 of 1953

South African law distinguishes between two forms of substitution, namely fideicommissary substitution and direct substitution. Statutory substitution is seen as a form of direct substitution and is regulated by section 2C of the Wills Act 7 of 1953. Section 2C replaces section 24 of the General Law Amendment Act 32 of 1952. Although some of the problems experienced under section 24 have been resolved, some still persist and some new ones have been created. These new problems include (1) the interpretation of section 2C(2), with specific reference to the phrases "subject to the provisions of subsection (1)" and "a benefit"; (2) the fact that subsection (1) does not mention the nomination of beneficiaries as members of a class; (3) the absence of the provision "unless otherwise indicated by the context of the will" from subsection (1), despite being included in subsection (2); (4) the meaning of the word "will" in section 2C; (5) the position of descendants who died before the execution of the will in question; and (6) the meaning of "would have been entitled to a benefit if he or she had not predeceased the testator".

It would appear that the interpretation of section 2C(2) is the most problematic as it is not clear what is meant by the phrase "subject to the provisions of subsection (1)". The correct interpretation seems to be that the descendants of a descendant of the testator represent him in the case of his being disqualified from inheriting from the testator or being predeceased, even if he is named to take the benefit together with the surviving spouse. A surviving spouse will, therefore, not receive the benefit in the case of the descendant being disqualified or predeceased. The beneficiary's descendants will also represent him in the case of his repudiation of the benefit, if the testator is not survived by a spouse.

The fact that subsection (1) does not mention the nomination of beneficiaries as members of a class, seems to have been an oversight on the part of the legislature and the intention must be that even beneficiaries nominated by name should be substituted in terms of section 2C(1). The absence of the provision "unless otherwise indicated by the context of the will" from subsection (1), also indicates an oversight as it could not have been the intention of the legislature to vary the common law more than required and the common law has always given preference to the intention of the testator.

Although attempts have been made in the past to construe the meaning of the word "will" in the old section 24 and now in section 2C as including antenuptial contracts, it is abundantly clear from the definition of "will" in section 1 of the Wills Act 7 of 1953 as well as from section 15 of the Law of Succession Amendment Act 43 of 1992, that documents other than wills are not included within the ambit of section 2C.

It is also clear that section 2C only applies to beneficiaries who had been alive at the time of the execution of the will and not to those who had died before such execution. The

meaning of the phrase "would have been entitled to a benefit if he or she had not predeceased the testator", creates an interesting question with regard to *commorientes* but it is suggested that *commorientes* be treated as persons having predeceased each other, for the purposes of section 2C(2).

1 INLEIDING

Die bepalinge van artikel 2C van die Wet op Testamente 7 van 1953 is deur die Wysigingswet tot die Erfreg 43 van 1992 ingevoer.¹ Die oogmerk daarvan is klaarblyklik om statutêre substitusie te reël maar die bepalinge is so onduidelik geformuleer dat 'n hele aantal interpretasieprobleme geskep word. In hierdie bydrae sal gepoog word om enkele van hierdie probleme uit te wys en moontlike oplossings voor te stel.² In die proses sal daar gekyk word na sowel die gemene-reg as die verslae van die Suid-Afrikaanse Regskommissie³ ten einde helderheid te probeer bekom.

2 SUBSTITUSIE

In die erfreg vind substitusie plaas indien 'n bevoordeelde die plek van 'n ander bevoordeelde inneem.⁴ Die Suid-Afrikaanse erfreg onderskei tussen twee vorme van substitusie, naamlik direkte⁵ en fideikommissêre substitusie.⁶ Fideikommissêre substitusie vind plaas wanneer 'n testateur in sy testament beveel dat sy hele nalatenskap, of 'n deel daarvan, of bepaalde bates, na sy dood agtereenvolgens aan 'n hele reeks erfopvolgers⁷ in eiendom moet toekom sodat die bemaking van

1 Sien SA Regskommissie *Verslag oor die hersiening van die erfreg*: Projek 22 (Jun 1991) 117.

2 A 1(6) en (7) van die Wet op Intestate Erfopvolging 81 van 1987 is ook deur a 14 van die Wysigingswet ingevoeg en stem grootliks ooreen met a 2C(1) en (2). Die opmerkings hier tov a 2C geld dus ook in 'n groot mate tov a 1(6) en (7) van Wet 81 van 1987.

3 Daar sal gekyk word na sowel die finale verslag (sien vn 1) as sommige van die voorlopige verslae. Hoewel daar nie geredelik na verslae van kommissies verwys word ten einde 'n wet te interpreteer nie (sien *R v Ristow* 1926 EDL 173; *Hleka v Johannesburg City Council* 1949 1 SA 42 (A); Steyn *Die uitleg van wette* (1981) 134 ev) is dit in hierdie geval noodsaaklik omdat die Wet inoewerings in die Suid-Afrikaanse erfreg inbring (sien hieronder) wat nie in die gemene-reg bestaan het nie en daar geen duidelikheid uit die bewoording van die wet self, al word alle hulpmiddels by die uitleg van die wet uitgeput, te verkry is nie.

4 Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 286 maak die stelling dat "[m]et substitusie word te doen gekry indien 'n erflater 'n bevoordeelde in die plek van 'n ander bevoordeelde aanwys". Dié stelling is nie heeltemal korrek nie aangesien die erflater nie altyd die aanwysing van die vervangende bevoordeelde behartig nie. Een bevoordeelde kan ook *ex lege* 'n ander vervang, soos sal blyk uit die bespreking van a 2C hieronder. Die rede vir die besondere bewoording van die definisie is waarskynlik te vinde in die feit dat substitusie *ex lege* gesien word as 'n vertakking van gewone direkte substitusie (sien De Waal, Schoeman en Wiechers *Law of succession* (1996) 99; Van der Merwe en Rowland 292). 'n Beter definisie word verskaf deur De Waal, Schoeman en Wiechers 96: "Substitution occurs if the testator or the rules of the law of succession nominate someone to inherit in the place of the appointed beneficiary (*institutus*) under certain circumstances" (my kursivering).

5 Ook genoem "vulgêre" substitusie: Van der Merwe en Rowland 286.

6 *Ibid*; Corbett ea *The law of succession in South Africa* (1980) 198.

7 Erfgename of legatarisse.

die een erfopvolger (die *fiduciarius*) op die ander erfopvolger (*fideicommissarius*) oorgaan.⁸ Die verskillende erfopvolgers erf gevolglik na mekaar dieselfde vermoë van die testateur. 'n Voorbeeld van fideikommissêre substitusie lui soos volg:

“Ek bemaak my plaas aan my seun Ben. By sy dood, na my dood, moet die plaas na sy oudste seun Carel gaan.”⁹ Indien Ben na die testateur se dood nog lewe en die bemaking aanvaar, gaan eiendomsreg op hom oor en sal hy oor die genot en gebruik van die plaas beskik¹⁰ tot by sy dood, waarop die eiendomsreg op sy seun, Carel, sal oorgaan.”¹¹

Direkte substitusie vind plaas indien 'n testateur in sy testament 'n substituuat aanwys om te erf indien die ingestelde erfgenaam of legataris nie erf nie.¹² Die substituuat erf indien die ingestelde erfgenaam of legataris repudieer of onbevoeg¹³ is om die voordeel kragtens die testament te erf of voor die erflater te sterwe kom.¹⁴ In 'n direkte substitusie word twee of meer begunstigdes in die

- 8 Joubert “Direkte substitusie of fideikommissêre substitusie” 1954 *THRHR* 244 en “Die fideicommiss, die trust en die stigting” 1952 *THRHR* 182–190; Jamneck “Fideicommissum, vruggebruik en *modus*: Kerkraad van die Nederduitse Gereformeerde Kerk, Douglas v Loots 1990 3 SA 451 (NK)” 1991 *THRHR* 316 en “Die onderskeid tussen voorwaardes, *modus*, fideicommissum en trust in die Suid-Afrikaanse erfreg” 2001 *THRHR* 87. Die erflater maak dus die oorgaan van die voordeel vanaf die een erfopvolger na die volgende onderworpe aan die verloop van 'n bepaalde termyn of aan die vervulling van 'n bepaalde voorwaarde (Jamneck 2001 *THRHR* 88; Van der Merwe en Rowland 293; Corbett ea 196).
- 9 Sien ook *Ex parte Berrange* 1938 WLD 39; *Estate Smith v Estate Follett* 1942 AD 364; *Barnhoorn v Duvenhage* 1964 2 SA 486 (A); *Oost v Reek en Snideman* 1967 1 SA 472 (T); *Ex parte Ward-Smith v In re Estate Ward-Smith* 1968 4 SA 165 (W); *Wasserman v Sackstein* 1980 2 SA 536 (O); *Du Plessis v Strauss* 1988 2 SA 105 (A); Cronjé en Roos *Erfreg vonnisbundel* (1997) 271; Van der Merwe en Rowland 293; Corbett ea 197 vir voorbeelde.
- 10 Hoewel die *fiduciarius* by lewering of oordrag van die voordeel aan hom eienaar daarvan word, is sy eiendomsreg beperk. As algemene reël kan die *fiduciarius* nie die eiendom vry van die fideikommissêre beperking vervreem nie. Hy kan egter wel sy beperkte reg vervreem. Sien *Ex parte Wessels* 1949 2 SA 99 (O); *Crookes v Watson* 1956 1 SA 277 (A); Jamneck 2001 *THRHR* 88; Van der Merwe en Rowland 320.
- 11 Joubert 1954 *THRHR* 242; Van der Merwe en Rowland 293; Corbett ea 197.
- 12 Dit is dikwels moeilik om te bepaal of die erflater die skepping van 'n direkte of 'n fideikommissêre substitusie in gedagte gehad het. Elke testament moet gevolglik op sy eie beoordeel word ten einde die testateur se bedoeling vas te stel (*Robertson v Robertson's Executors* 1914 AD 503 507; *Estate Kemp v McDonald's Trustee* 1915 AD 491 505. Sien ook *Cuming v Cuming* 1945 AD 201; *Coetzee v Die Meester* 1982 1 SA 295 (O); *Cohen v Roets* 1992 1 SA 629 (A)). Indien daar redelike twyfel bestaan of die testateur 'n direkte substitusie of 'n fideikommissêre substitusie bedoel het, bestaan daar 'n vermoede tgv direkte substitusie omdat dit minder beswarend op die erfgenaam inwerk (*Van Zyl v Van Zyl* 1953 3 SA 288 (A); *Schaumberg v Stark* 1956 4 SA 462 (A); Joubert 1954 *THRHR* 250; Van der Merwe en Rowland 299; Corbett ea 266–267). Vir die onderskeid tussen *fideicommissum* en *modus*, sien *Holley v Commissioner for Inland Revenue* 1947 3 SA 119 (A); *Kommissaris van Binnelandse Inkomste v Van Blommestein* 1999 2 SA 367 (HHA); Jamneck 2001 *THRHR* 91–96. Vir die onderskeid tussen die *fideicommissum* en vruggebruik, sien *Van Staden v Van Staden* 1984 4 SA 507 (T); Jamneck 1991 *THRHR* 316.
- 13 Vir voorbeelde van onbevoegdheid, sien *Taylor v Pim* (1903) 24 NLR 484; *Ex parte Steenkamp and Steenkamp* 1952 1 SA 744 (T); *Caldwell v Erasmus* 1952 4 SA 43 (T); *Ex parte Wessels and Lubbe* 1954 2 SA 225 (O); *Gafin v Kavin* 1980 3 SA 1104 (W); *Ex parte Meier* 1980 3 SA 154 (T); *Casey v The Master* 1992 4 SA 505 (N).
- 14 Joubert 1954 *THRHR* 242.

alternatief aangestel. Indien een begunstigde nie erf nie, erf die ander onvoorwaardelik. Sodra een van hulle die voordeel kry, verloor die ander enige verwagting om die voordeel op enige stadium te verkry.¹⁵ Dus, indien 'n testateur in sy testament bepaal: "Ek bemaak my plaas aan Ben. Indien hy dit nie erf nie, gaan die plaas aan Carel", het ons te make met uitdruklike direkte substitusie. Sodra Ben die bemaking na die testateur se dood aanvaar, kan Carel nie verwag om ooit die plaas te kry nie. Indien Ben die bemaking repudieer, of indien hy voor die testateur oorlede is, sal Carel onvoorwaardelik op die plaas geregtig wees.¹⁶ Die doel van direkte substitusie is om te voorkom dat intestate erfopvolging intree,¹⁷ om legate uit die restant van die boedel te hou¹⁸ en die reg van aanwas uit te sluit.¹⁹

'n Direkte substitusie kan *uitdruklik*, soos in die voorbeeld hierbo,²⁰ of *stilswyend* geskied.²¹ Voorts tref ons ook direkte substitusie aan wat deur die reg gereël word. Dié vorm van substitusie is vroeër gereël deur artikel 24 van die Algemene Regswysigingswet 32 van 1952²² en word tans deur artikel 2C van die Wet op Testamente 7 van 1953²³ gereël. Artikel 2C is ongelukkig nie duidelik geformuleer nie en skep 'n aantal interpretasieprobleme. Ten einde te poog om dié probleme op te los, is dit wenslik dat kortliks na die geskiedenis daarvan verwy word.

3 GESKIEDENIS

In die gemenerereg was die reël dat 'n erfgenaam alleen gerepresenteer of gesubstitueer kon word indien hy voor die erflater oorlede is.²⁴ Daar was dus geen

15 Gevolglik verval die direkte substitusie sodra die ingestelde erfgenaam die voordeel aanvaar en die substituuat nie meer in aanmerking kom om te erf nie (*Baumann v Baumann's Estate* 1903 TS 443; *Van der Venter v Vorster's Executors* 1912 CPD 946; *Ex parte Swanepoel* 1948 1 SA 1141 (O); Joubert 1954 THRHR 242; Van der Merwe en Rowland 287; De Waal, Schoeman en Wiechers 93.

16 Sien ook Van der Merwe en Rowland 286, De Waal, Schoeman en Wiechers 94 en Corbett ea 197 vir voorbeelde.

17 *Ridley v Registrar of Deeds, Natal* 1988 2 SA 262 (N); Van der Merwe en Rowland 287.

18 Igv legatarisse wat nie afstammeling van die testateur is nie, val die legaat van 'n bevoegde legataris (of een wat repudieer) in die restant van die boedel en erf die erfgename die voordeel indien die testateur nie 'n substituuat aangewys het nie (*Mosse v Estate Ebden* 1913 CPD 567; *Ex parte James Kerr* 1942 NPD 412; *Ex parte Adams* 1964 2 SA 135 (C); Corbett ea 245). Igv afstammeling van die testateur vind a 2C toepassing – sien die bespreking hieronder.

19 Waar medelegatarisse aangewys is wat nie afstammeling van die testateur is nie, sal aanwas plaasvind indien die testateur nie direkte substitute aangewys het nie (Corbett ea 250).

20 Corbett ea 209.

21 *Idem* 212–213.

22 Dié wet het op 1952-06-05 in werking getree. Die Wet op Testamente wat op 1954-01-01 in werking getree het, het geen soortgelyke of wysigende bepaling bevat nie en dus het a 24 gegeld tot die wysiging van die Wet op Testamente deur die Wet tot Wysiging van die Erfreg 43 van 1992.

23 Dié artikel is ingevoer deur die Wet tot Wysiging van die Erfreg 43 van 1992 wat geld tot testamente van testateurs wat na 1992-10-01 te sterwe kom (Prok 113 SK 14312 van 1992-09-24).

24 Die gemeenregetelike vereistes alvorens substitusie kon plaasvind was die volgende: (1) Die persoon wat gerepresenteer moes word, moes voor die erflater gesterf het; (2) die persoon wat die vooroorledene se plek moes inneem, moes 'n afstammeling van die vooroorledene gewees het. Igv 'n man kon dit slegs sy wettige afstammeling wees, maar igv 'n

sprake van representasie of substitusie indien die erfgenaam nog in die lewe was maar onbevoeg was om te erf of sy erfenis gerepudieer het nie.²⁵ Voorts het 'n weerlegbare vermoede bestaan dat wanneer 'n erflater 'n direkte bemaking aan sy "kinders" in die algemeen²⁶ gemaak het, dit sy waarskynlike wil was dat 'n vooroorlede kind deur sy afstammeling gerepresenteer²⁷ (gesubstitueer) moes word. Die woord "kinders" het dus kleinkinders en verdere desendente ingesluit. In sodanige geval kon substitusie gevolglik plaasvind.²⁸ Dieselfde beginsel het gegeld indien die testateur bloedverwante in die sylinie in die algemeen as erfgename ingestel het.²⁹ Substitusie kon egter nie plaasvind indien die testateur sy kinders by name benoem het nie, aangesien aangevoer is dat die testateur se waarskynlike bedoeling in so 'n geval was dat representasie nie moet plaasvind nie.³⁰ 'n Vooroorlede fideikommissaris kon ook nie deur sy kind gesubstitueer word nie.³¹

Die gemeenregtelike beginsels is egter nie konsekwent deur die Suid-Afrikaanse howe toegepas nie³² en gevolglik het aansienlike verwarring ontstaan. Dié verwarring het 'n hoogtepunt bereik in *Galliers v Rycroft*³³ waar sir Henry de Villiers die beginsel wat vir fideikommissêre substitusie gegeld het, toegepas het op 'n geval wat volgens hom direkte substitusie was. Op dié wyse is die gemeenregtelike posisie verwar omdat die reël wat vir fideikommissêre bemakings gegeld het nou op alle bemakings ten gunste van 'n testateur se kinders van toepassing was. Dit het beteken dat 'n testateur se vooroorlede kinders ook nie in 'n direkte bemaking deur hulle kinders (dus die testateur se kleinkinders) gesubstitueer kon word nie.³⁴ Hierdie beslissing is deur die Geheime Raad gelewer, wat beteken het dat al die Suid-Afrikaanse howe daaraan gebonde was. Dit is dan ook by verskillende geleenthede gevolg³⁵ alhoewel dit soms teënsinnig geskied het.³⁶

vrou kon dit ook haar buite-egtelike kinders wees. Let daarop dat dit nie 'n vereiste was dat die kinders die afstammeling van die testateur moes wees nie – broerskinders kon ook hulle vooroorlede ouer vervang (sien die bespreking hieronder); en (3) die persoon wat die vooroorledene vervang, moes self bevoeg gewees het om van die erflater te erf. Dit was nie 'n vereiste dat hy bevoeg moes wees om van die vooroorledene te erf nie. Sien Joubert "Artikel 24 Algemene Regswysigingswet 32 van 1952" 1954 *THRHR* 19.

25 Vir 'n volledige bespreking van die gemenerereg sien Joubert 1954 *THRHR* 1 ev.

26 Dws sonder om name of getalle te noem: Joubert 21.

27 *Idem* 19.

28 Vir 'n gedetailleerde bespreking van die gemenerereg, sien *idem* 1 ev.

29 Sien *idem* 23 en gemeenregtelike gesag aldaar.

30 Van Someren *Tractatus de repraesentatione* cap 5 15; Joubert 22 vn 36.

31 Voet 36 1 22; Joubert 24.

32 Sien *In re Insolvent Estate of Beck* (1828) 1 Menzies 332; *Spengler (Trustee) v Executor of Higgs* (1864) 1 Roscoe 221; *Pretorius v Executors of Pretorius* (1883) 2 SC 293; *Eksteen v Eksteen's Executors* (1885) 4 SC 13; *In re Berg* (1890) 7 SC 305; *Michau v Michau's Executors* (1894) 11 SC 362; *Galliers v Rycroft* (1900) 17 SC 569.

33 (1900) 17 SC 569.

34 Vir 'n bespreking van die saak, sien Joubert 1954 *THRHR* 38–40; Hahlo en Kahn "A new presumption in the law of testamentary succession: Section 24 of the General Law Amendment Act, 1952" 1952 *SALJ* 396.

35 Sien *Estate Welsford v Estate Wright* 1930 OPD 162; *Cannon v Norris* 1947 4 SA 811 (A); *Ex parte Wessels* 1949 2 SA 99 (O).

36 In *Ex parte Wessels* 1949 2 SA 99 (O) 103 is daarna verwys as "'n growwe skending van die grondbeginsels van die Romeins-Hollandse reg".

Die wetgewer het probeer om die gemeenregtelike posisie te herstel deur artikel 24 van Wet 32 van 1952 op die wetboek te plaas maar die poging was nie baie geslaagd nie. Dié artikel het soos volg gelui:

“Wanneer volgens die bepalings van die testament van ’n testateur wat na die datum van die inwerkingtreding van hierdie Wet sterwe, ’n vooroorlede kind van daardie testateur op ’n bemaking onder daardie testament geregtig sou geword het as hy die testateur oorlewe het, dan is die wettige afstammeling van daardie kind *per stirpes* geregtig op daardie bemaking tensy die bepalings van die testament ’n daarmee strydige bedoeling aantoon.”

Artikel 24 het dus ook slegs vir die geval van vooroorledenes voorsiening gemaak en die gemeenregtelike reëling dat geen substitusie in geval van onbevoegdheid en repudiasie kon geskied nie, het dus steeds gegeld.

Artikel 24 was egter gebrekkig en by verre nie die oplossing nie. Joubert³⁷ het die probleme wat uit artikel 24 sou voortspruit vroeg reeds aangedui as:

(1) Die artikel was net van toepassing waar die testateur se *eie* kinders voor hom oorlede is. Dit was onduidelik of die artikel sou geld waar die ingestelde kind ’n kleinkind of broerskind of ’n kind van iemand anders was aangesien die artikel nie ’n definisie van die woord “kind” gegee het nie en slegs “’n vooroorlede kind van die erflater” genoem het.

(2) Artikel 24 het slegs melding gemaak van die geval waar die vooroorlede kind ingestel was om ’n bemaking onder die testament te ontvang sonder om te bepaal of dit ook gegeld het ten opsigte van ’n kind wat by name genoem is.³⁸

(3) Artikel 24 het bepaal dat slegs die “wettige afstammeling van daardie kind” ’n vooroorlede kind mog representeer. Gevolglik sou selfs ’n vooroorlede dogter van die erflater nie deur haar buite-egtelike kinders gerepresenteer kon word nie.

(4) Artikel 24 het dit nie duidelik gestel of dit ook van toepassing was in die geval van ’n ingestelde *fideicommissum* nie. Volgens Joubert³⁹ was die bewoording van die artikel wyd genoeg om dit so te interpreteer dat dit ook op *fideicommissa* van toepassing sou wees, hoewel so ’n interpretasie op ’n radikale wysiging van die Romeins-Hollandse reg sou neerkom. Die hof het egter in *Reek v Registrateur van Aktes Transvaal*⁴⁰ beslis dat die artikel nie op *fideicommissa* van toepassing was nie.⁴¹

37 1954 *THRHR* 41–43; sien ook Cronjé en Roos 259.

38 Volgens Joubert 1954 *THRHR* 41 was daar geen rede waarom ’n kind wat spesiaal ingestel is (hetsy by name of *bwv* beskrywing) nie ook gesubstitueer kon word nie. Indien dít wel die bedoeling van die wetgewer met a 24 was, het die artikel die Romeins-Hollandse reg gewysig aangesien ’n spesifiek benoemde bevooroorlede nie volgens die Romeins-Hollandse reg gesubstitueer kon word nie (sien die bespreking hierbo).

39 1954 *THRHR* 42.

40 1969 1 SA 589 (T). In dié saak het Hill R beslis dat a 24 nie op *fideicommissa* van toepassing was nie. Boshoff en Rabie RR wou egter nie so ver gaan nie, maar het wel beslis dat die artikel nie op die bepaalde geval voor hulle van toepassing was nie. Rabie R (599): “Alhoewel ek, met respek, geneë voel om hiermee saam te stem, wil ek nie my beslissing op so ’n breë grondslag probeer plaas nie. Ek sou in ieder geval ook graag wou byvoeg dat so ’n sienswyse betreffende *fideicommissa* beperk moet word tot voorwaardelike *fideicommissa*.” Hy verwys verder na ’n geval wat dikwels voorkom en waarop a 24 moontlik van toepassing sou kon wees: “Dit is nl die geval waar ’n testateur sy kind as *fidusiêre* erfgenaam van sy goed instel en dan bepaal dat die goed ná laasgenoemde se dood na sy kinders moet gaan: as die *fidusiêre* erfgenaam nou voor die testateur sterf, sou hy op die

Die Suid-Afrikaanse regskommissie het in sy *Verslag oor hersiening van die erfreg*⁴² ook op enkele addisionele punte van kritiek teen artikel 24 gewys:

(1) Die artikel het slegs voorsiening gemaak vir gevalle waar 'n bevoordeelde op 'n voordeel geregtig sou geword het "volgens die bepalings van 'n testament". Bevoordelings wat in 'n huweliksvoorwaardekontrak of *donatio mortis causa*⁴³ ter spake gekom het, het dus nie onder artikel 24 geval nie. Die kommissie het aan die hand gedoen dat alle bevoordelings wat deur 'n oorledene bedoel is om na sy dood in werking te tree dieselfde hanteer behoort te word of dit nou in 'n testament voorkom of nie.⁴⁴

(2) Artikel 24 het slegs gegeld indien die erfgenaam vooroorlede was en nie ook indien hy gerepudieer het of onbevoeg⁴⁵ was om te erf nie.

Die regskommissie het uiteindelik aanbevelings gemaak wat gelei het tot die invoeging van artikels 2C(1) en (2) in die Wet op Testamente.⁴⁶

4 DIE BEPALINGS VAN ARTIKEL 2C

Artikel 2C bepaal:

"(1) Indien 'n afstammeling van 'n erflater, uitgesonderd 'n minderjarige of 'n geestesongestelde afstammeling, wat saam met die oorlewende gade van die

bewoording van art 24 'n vooroorlede kind genoem kan word wat op 'n bemaking geregtig sou geword het as hy die testateur oorleef het en sou sy afstammeling derhalwe in sy plek daarop geregtig word. So 'n resultaat sou eger niks nuuts wees nie, maar sou daarenteen in ooreenstemming wees met 'n regsposisie wat lank reeds erken word (kyk *White v Landsberg*, 1918 CPD 211; *Lubbe v Executor of Beukes and Another*, 1924 OPD 136 op 139). Dit is baie onwaarskynlik dat die Wetgewer art 24 op die wetboek sou geplaas het om voorsiening te maak vir representasie in 'n geval waar dit lankal reeds erken word." Sien ook Cronjé en Roos 258 ev.

41 In hierdie bydrae sal nie ingegaan word op die posisie tov die verhouding tussen a 24 van Wet 32 van 1952, a 2C van Wet 7 van 1953 en die *fideicommissum* nie aangesien dié posisie 'n afsonderlike bespreking regverdig.

42 Projek 22 (1991) 106 ev.

43 'n *Donatio mortis causa* is 'n skenking wat gemaak word met die oog op die skenker se dood. Dit is dikwels baie moeilik om vas te stel of 'n persoon in 'n gegewe geval 'n donasie *inter vivos* (dus 'n gewone skenkingskontrak tussen lewendes) of 'n donasie *mortis causa* bedoel het. Daar is verskeie faktore wat van belang is by 'n oorweging of 'n besondere vervreemding 'n donasie *inter vivos* of 'n donasie *mortis causa* is. In beginsel sal dit in twyfelagtige gevalle geredelik as 'n donasie *inter vivos* vertolk word. Die rede is dat 'n donasie *mortis causa* ongeldig is tensy dit in 'n dokument wat aan die vereistes van 'n geldige testament voldoen, vervat word en aangesien daar in die meeste grensgevalle nie aan die formaliteite vir 'n testament voldoen word nie, is die howe, wat graag die geldigheid van die regshandeling wil handhaaf, geneig om voorkeur te gee aan die *donatio inter vivos*-vertolking. Oor die onderskeid tussen die *donatio inter vivos* en die *donatio mortis causa* en die toetse wat gebruik word om te onderskei, sien *Meyer v Rudolph's Executors* 1918 AD 70; *Oost v Reek en Snideman* 1967 1 SA 472 (T); *Jordaan v De Villiers* 1991 4 SA 396 (K).

44 *Verslag* 106.

45 Sien *Taylor v Pim* (1903) 24 NLR 484; *Ex parte Steenkamp and Steenkamp* 1952 1 SA 744 (T); *Caldwell v Erasmus* 1952 4 SA 43 (T); *Ex parte Wessels and Lubbe* 1954 2 SA 225 (O); *Gafin v Kavin* 1980 3 SA 1104 (W); *Ex parte Meier* 1980 3 SA 154 (T); *Casey v The Master* 1992 4 SA 505 (N); Schoeman "Nalatige doodsveroorsaking: Statutêre hervorming van die erfreg?" 1994 *THRHR* 114; Sonnekus "Verwaarlosing, representasie en onbevoegdheid in die intestate erfreg" 1997 *THRHR* 504 en Cronjé en Roos 143 ev.

46 7 van 1953. (Die wysigings is ingevoer deur die Wet tot Wysiging van die Erfreg 43 van 1992.)

erflater op 'n voordeel ingevolge 'n testament geregtig is, afstand doen van sy reg om so 'n voordeel te ontvang, vestig sodanige voordeel in die oorlewende gade.

(2) Indien 'n afstammeling van die erflater ingevolge die bepalings van 'n testament, hetsy as lid van 'n klas of andersins, ten tyde van die dood van die erflater op 'n voordeel geregtig sou gewees het indien hy geleef het, of nie onbevoeg was om te erf nie, of nie na die erflater se dood afstand gedoen het van sy reg om so 'n voordeel te ontvang nie, dan is die afstammeling van daardie afstammeling, behoudens die bepalings van subartikel (1), staaksgewyse geregtig op die voordeel, tensy uit die samehang van die testament anders blyk."

Die formulering van dié twee subartikels skep 'n paar interpretasieprobleme waarvoor die howe tot nou toe nog nie oplossings gebied het nie.

5 INTERPRETASIEPROBLEME

5.1 Inleiding

Die interpretasie van artikel 2C lyk met die eerste oogopslag betreklik eenvoudig, maar by nadere ondersoek blyk dit dat daar 'n hele aantal interpretasieprobleme bestaan wat waarskynlik nog meer problematies kan wees as dié verbonde aan sy voorganger, artikel 24. Die eerste vraag is egter of die nuwe artikel die probleme van artikel 24 opgelos het.

5.2 Ou probleme opgelos?

5.2.1 *Eie "kind van 'n erflater"*

Die eerste stap om die kritiek teen artikel 24 stil te maak, was om die toepassingsgebied uit te brei om nie alleen op die afstammeling van *eie* "kinders" van 'n erflater van toepassing te wees nie, maar om *alle* "afstammeling" in te sluit. Enige afstammeling van 'n testateur wat in die testament benoem is, hetsy dit 'n kind, kleinkind of agterkleinkind is, kan dus nou gerepresenteer word.

5.2.2 *"Wettige afstammeling"*

'n Afstammeling van die erflater kan ook deur enige van sy afstammeling gerepresenteer word en nie alleen deur "wettige afstammeling" nie. Die ontwikkeling is allerweë verwelkom in die lig van die vroeëre kritiek⁴⁷ en sowel sosiale as sivielregtelike ontwikkelings⁴⁸ waarvolgens alle kinders oor dieselfde status beskik.

5.2.3 *Verwante in die sylinie*

Artikel 2C strek egter nie verder as afstammeling van die erflater nie en is dus nie van toepassing op byvoorbeeld broerskinders nie.⁴⁹ In dié opsig het artikel 2C dus nie daarin geslaag om die gemeenregtelike posisie te kodifiseer nie. In die lig van die vermoede dat die wetgewer nie die bestaande reg meer wil wysig as wat nodig is nie,⁵⁰ wil dit voorkom asof die gemeenregtelike posisie dat 'n

47 Sien Joubert 1954 *THRHR* 42.

48 Sien Sonnekus "Voorgestelde statutêre wysiging van die erfreg" 1992 *TSAR* 173.

49 Cronjé en Roos 260.

50 Die wetgewer moet uitdruklik verklaar dat hy die gemenerereg wil wysig indien dit wel die geval is (Kellaway *Principles of legal interpretation* (1995) 335; *Casserley v Stubbs* 1916 TPD 310 312; *Kaplan v Incorporated Law Society, Transvaal* 1981 2 SA 762 (T) 770; *S v vervolg op volgende bladsy*

afstammeling van 'n benoemde erfgenaam wat in die sylinie aan die erflater verwant is, sodanige erfgenaam in geval van sy vooroorlye kan representeer, dus geldend bly.⁵¹

(Word vervolg)

[I]n the business of micro-lending there is apparently a high risk that loans will not be repaid. To reduce that risk the appellant's business model provides for loans to be made only to persons who are in fixed employment and whose earnings are paid into a bank account which is capable of being drawn against at an automatic teller machine by using a cash-card linked to a personal identification number ("PIN"). The technique for ensuring the repayment of the loan is to require the borrower to surrender his cash-card and disclose his PIN to the lender, and to require him to authorise the lender to use the card to draw against the account in recovery of the debt. On the date that the loan becomes due for repayment, which usually coincides with the date upon which the borrower's earnings are paid into his account, the lender will use the cash-card and the PIN to recover the debt from an automatic teller machine . . . The respondents submitted that that technique (which is apparently almost indispensable to the successful conduct of such a business) is contrary to public policy . . . [because] it is contrary to public policy for a lender to have access to the borrower's account, principally because it allows for what was said to be a form of parate executie. In my view, that analogy is misplaced. The practice of drawing upon the debtor's bank account in collection of the debt does not constitute parate executie nor does it share its objectionable features. Moreover, it is implicit in the authority that is granted by borrowers in the present case that the card may be used only to withdraw what is lawfully due . . . and, in my view, the practice that is now in issue is not contrary to public policy only because it creates the opportunity for [fraud] to occur.

Nugent AJA in De Beer v Keyser 2002 1 SA 827 (SCA) paras 23–27.

Marais 1982 SA 988 (A) 1017; *S v Khumbisa* 1984 SA 670 (N) 680). Dié vermoede is weerlegbaar igv onduidelike of dubbelsinnige bewoording (*Popatlall Kara (Pty) Ltd v Essay* 1969 3 SA 593 (D); *Kruger v Santam Versekeringsmaatskappy Bpk* 1977 3 SA 314 (O) 320; *Glen Anil Finance (Pty) Ltd v Joint Liquidators Glen Anil Development Corp Ltd* 1981 1 SA 171 (A); *Krige v Smit* 1981 4 SA 409 (C) 413; *Kellaway* 335).

51 Sien Joubert 1954 *THRHR* 23.

1 Introduction

The individual's right to privacy and the principle of doctor-patient confidentiality are of considerable value to every democratic society that cherishes human rights. Medical confidentiality is universally recognised as a value worth protecting, and there is widespread agreement that physicians should not, in principle, announce to the world information which their patients have confided in them. Problems arise, however, where a physician holds confidential medical information which might help, for instance, to prevent the spread of HIV/AIDS and so save the lives of others.

In 1995 a non-governmental organisation in India – the Indian Law Institute – drafted the New Delhi Declaration in which it was proposed that a model global AIDS law be drafted to protect the human rights of all people at risk of HIV infection and prohibit discrimination based on HIV.

The Declaration recognised that one of the most effective strategies for changing behaviour and preventing the spread of HIV infection lies in the protection of those at risk. It sets forth a role for law in the context of HIV which entails, *inter alia*, that law must protect human rights and empower individuals so that by their co-operation the spread of HIV infection is contained.

The Declaration identifies eight areas that require priority attention by means of legislative action in various countries. These include, *inter alia*, anti-discrimination, privacy and confidentiality legislation for people living with HIV, and protection for women in the context of marriage where their status increases their vulnerability to infection. It therefore includes both areas of law with which we are concerned, sc the right to privacy and the right to life (in other words, the right to be protected against harm).

If an HIV-positive person refuses to inform his or her sexual partner of the outcome of HIV tests, may a doctor treating the infected person inform his or her sexual partner of the true position? In other words, is the duty of confidentiality of a doctor towards the person with HIV/AIDS stronger than the right to life of the sexual partner? If the right to life of the sexual partner takes precedence, then another question arises: to whom may the information that a patient is HIV-positive be disclosed? May it be disclosed only to the current sexual partner or also to a future sexual partner if the HIV-positive person is engaged to be married, or perhaps also to all past sexual partners? This note will consider the position in the USA, Israel, India and South Africa. The position with regard to the disclosure of the HIV-positive status of the patient by the doctor to the employer of the patient is not discussed.

2 United States of America

In the USA there is statute law pertaining to notification of the HIV-positive condition of a person to his or her current or future sexual partner. In addition, there is a common-law duty to take care of one's sexual partner.

The Ryan White Comprehensive AIDS Resources Emergency Act of 1990 ("the CARE Act") provides that in order to be eligible for CARE grant funding, states must take administrative or legislative action requiring a good-faith effort to notify the spouse of a known HIV-infected patient that such spouse may have been exposed to HIV and should seek testing (Publ 1 No 104-146 12(a), 1996 USCCAN (110 Stat) 1346, 1373, amending 42 USC 300ff-76(4)). The definition of a spouse includes not only the current marriage partner but also previous marriage partners of the infected person for a period of ten years prior to the diagnosis of HIV infection (Webber "HIV and public health law" in Webber (ed) *Aids and the law* (1997) 82).

Since 1989, the Federal Government and 19 states have passed HIV-specific criminal statutes, most classifying the crime as a felony. For example, in Arkansas (Ark Code Ann 5-14-123) it is a class A felony to expose another person to HIV infection through the transfer of blood or blood products or to engage in sexual penetration with another person without first having informed the other person of the presence of HIV. In Florida (Fla Stat Ann 384.24) it is a first-degree misdemeanour to have sexual intercourse knowing of HIV-infection or other sexually transmitted diseases, having been informed of the risk of transmission and in the absence of the informed consent of the other party.

The statutes range from a simple prohibition against the knowing or intentional transfer or attempted transfer of HIV to another person (Wash Rev Code Ann 9A.36.021) to very detailed statutes which seek to specify the exact conduct proscribed (Ark Code Ann 5-14-123). Only four states require specific intent (for example Wash Rev Code Ann 9A.36.021). Most of the states merely require that the defendant acted in the knowledge that he or she was infected with HIV, and of these states only two require proof that the defendant knew of the infection as a result of an HIV-positive blood test (eg Ark Code Ann 5-14-123).

Most of the statutes expressly permit the defendant to use the defence that he or she informed the victim regarding the HIV infection, and that the victim consented to the exposure. Only North Dakota requires that, in addition to obtaining the victim's informed consent, the defendant must also use a condom or other appropriate prophylactic device (ND Cent Code 12.1-20-17(3)). The use of a condom is not in itself a defence in any of the states (McColgin and Hey "Criminal law" in Webber (ed) *Aids and the law* (1997) 287-289).

Many states have proposed measures such as imposing HIV testing as a prerequisite to marriage, or forbidding marriage with persons infected with HIV (Webber 54). The state of Illinois previously imposed HIV testing as part of the required premarital examination, but those provisions were repealed (Ill Rev Stat ch 40 204 (1987)); so also in Louisiana (La Rev Stat Ann 9:229 (West 1991)). Many people avoided these tests by applying for marriage licences in neighbouring states where HIV testing was not required. Illinois now provides free brochures on HIV for marriage-licence applicants (20 Ill Comp Stat Ann 2310/55.55).

Some states are of the opinion that one cannot force people to be tested for HIV, and therefore require instead that HIV counselling be provided to prospective marriage partners. For example, California has required, since 1987, that applicants for marriage certify that they have received an offer of HIV testing from the physician who conducted the premarital examination (Cal Fam Code Ann 358 (West 1994)). In West Virginia, the marriage-licence issuer must provide the applicants with information on HIV testing. The provision of educational

materials must then be documented together with the marriage-licence forms (W Va Code Ann 16-3C-2(g) (1995)).

The common law has developed in such a way that there is a duty on an HIV-positive person to take care of his or her sexual partner or future sexual partner.

In general, a person can be held liable for committing a negligent act when he breaches a duty of care to another by engaging in conduct in which a similarly situated reasonable person would not engage (*Restatement (second) of torts* (1985) 282-283; Page, Keeton *et al Prosser and Keeton on the law of torts* (1984) vol 2 173-176). This means that in order to succeed in his claim, the plaintiff need prove, not that the defendant intended to cause harm, but only that the defendant engaged in conduct which was unreasonable. With regard to HIV/AIDS, the sexual partner or future sexual partner need only prove that the HIV-positive person engaged in unreasonable conduct, sc by not informing him or her of the HIV-positive status. This very broad standard encompasses many different types of factual situation, such as one lover suing another.

Each case, despite different sets of facts, turns on the same basic questions, sc did the defendant have a duty of care towards the plaintiff; did the defendant act unreasonably; and did the defendant's unreasonable act cause harm to the plaintiff? With regard to the question of duty, the court in *Doe v Johnson* 817 F Supp 1382 (WD Mich 1993) 1382 1393-1395 found that a person has a duty to inform a sexual intimate that he knows himself to be HIV-infected, that he has recognisable symptoms, or that a prior sexual partner was infected with HIV. A person has no duty, however, to reveal the mere fact that he is sexually very active and therefore in a high-risk group (Sternlight "Negligence and intentional torts" in Webber (ed) *AIDS and the law* (1997) 352-353). A motion to dismiss claims for negligent transmission of HIV was denied. The court held that the defendant had actual knowledge that he was HIV-infected, had symptoms of the disease or had knowledge that a previous sexual partner had been diagnosed as HIV-infected.

The onus is therefore on a person with HIV/AIDS to inform a sexual partner of his or her condition, as he or she has a duty to take care of a sexual partner or future sexual partner, since a similarly situated reasonable person would reveal his or her condition to a sexual partner or future sexual partner.

Although there are many statutory provisions regarding the notification of a sexual partner or future sexual partner, what is the position of a physician who is aware that an HIV-positive patient refuses to inform a sexual partner or future sexual partner of the patient's infected status? Does he or she have a choice whether or not to inform the sexual partner or future sexual partner, or is there a duty on him or her to provide this information? The First Amendment of the Constitution protects all truthful statements from defamation claims but in *Time, Inc v Hill* 385 US 374 (1967) the court recognised the possibility of allowing a tort action for truthful publication by stating that revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notion of decency (Sternlight 373). If a physician refrains from informing the patient's sexual partner or future sexual partner of the HIV-positive status of the patient, it would outrage the community's notion of decency.

A person who is HIV-positive may, in general, institute an action for defamation against a party who has revealed the former's HIV-positive status. Truth is generally a complete defence. As such, a physician will be able to defend himself

or herself owing to the fact that the revelation of the HIV-positive status of a patient is the truth. But a person who distributes a statement that is entirely true may also be subject to liability for invasion of privacy or for violation of state HIV-confidentiality statutes if the information is inappropriately communicated. Every effort must therefore be made by a physician or those who possess HIV-related information to ensure not only that the information is accurate but also that it is appropriately communicated (*idem* 372).

Would a physician be liable for invasion of privacy if he or she reveals the HIV-positive status to a sexual partner of the person infected with HIV? The common-law tort of invasion of privacy is generally defined as the public disclosure of private facts if such a disclosure would be highly offensive to a person of reasonable sensitivities and there exists no public interest in the disclosure of the information (*Restatement (second) of torts* 652(D); Sternlight 374). In this instance, it may be argued that a public interest exists in the disclosure of the information, as the life of an innocent person may thereby be saved.

Invasion-of-privacy claims often turn on the question whether those to whom the information was deliberately released had a need to know that information. It would, for instance, be justifiable to release an AIDS diagnosis to hospital employees directly involved in the patient's care, but it would be actionable to release the information more broadly, for instance to neighbours (*Doe v Town of Plymouth* 825 F Supp 1102 (D Mass 1993); Sternlight 375).

A physician may therefore disclose the fact that a patient is HIV-positive to the sexual partner or future sexual partner of the patient, but not to the public.

The release of private information can also be made negligently. In *Behringer Estate v Princeton Medical Center* 592 A 2d 1251 (NJ Super Ct 1991) the court held that the defendant hospital was liable for failing to establish a charting policy to protect the privacy of its patients. Within hours of his release from hospital for treatment of an AIDS-related opportunistic infection, the plaintiff, a plastic surgeon who also operated at the hospital, received phone calls from numerous wellwishers who indicated an awareness of his condition. The court held that the hospital's general confidentiality policy was insufficient to restrict access to HIV-test results, or charts containing such results.

3 Israel

Israeli law lacks direct regulation regarding the ethicality of HIV reporting. The issue is handled according to the broad principle of doctor-patient confidentiality. Section 20(a)(5) of the Patients' Rights Law of 1996 states that a health-care provider or a medical institution may disclose medical information to others if the Ethics Committee has established, after giving the patient an opportunity to address it, that disclosure of medical information regarding him or her is necessary for protecting public health or the health of others, and the need for such disclosure takes priority over the value of non-disclosure. All cases must be referred to a mandatory multidisciplinary ethics committee rather than being decided by individual healthcare providers. Individual healthcare providers are therefore denied authority over such decision making. Procedural provisions were established regarding the process of deciding upon third-party reporting of confidential medical information (Hildesheimer "AIDS policy in Israel: Partner notification and gender issues" Paper read at the 13th World Congress on Medical Law *Book of proceedings* (2000) 477).

Recently, two different institutional ethics committees were approached by healthcare providers who proposed non-consensual HIV reporting. The two committees differed considerably in their approach. The first committee was confronted with a case where a woman who had embarked upon casual sex with many partners discovered that she was HIV-positive. The committee emphasised the importance of public health and justified violating her privacy. They found in favour of notifying third parties of her HIV status (Hildesheimer 478). The methods of disclosure were not specified but rather left to the healthcare providers who decided to report her name and health status to four of her previous sexual partners, and summoned them to be tested for HIV. They also considered publishing her name in the press.

The second committee was motivated by sensitivity to the human rights of the parties involved, so three members of the Ethiopian community in Israel. They were all respectively involved in monogamous relationships in which the partners of the HIV carriers tested negative. The carriers refused to inform the partners of their positive status and protective measures were not taken. The committee decided that these types of relationship fell within the scope of permitted infringements of the HIV patient's right to privacy (*idem* 481).

These cases emphasise the need for clear guidelines to be adopted and consistently implemented by all committees considering such cases in Israel (*idem* 484).

4 India

Mr X v Hospital Z (Civil Appeal No 4641 of 1998 of the Supreme Court of India Civil Appellate Jurisdiction, as discussed in 2000 (3) *International Bar Association Human Rights Law* 4) dealt with the confidentiality of AIDS-related information. In August 1995 the appellant proposed marriage to Ms Y, which she accepted. The marriage was called off, however, when Hospital Z disclosed to Ms Y and her family that Mr X was HIV-positive. Several other people then became aware of the fact that Mr X was HIV-positive, which led to criticism and ostracism in his local community and caused him to move away to another city.

The appellant instituted an action against the hospital on the basis that its staff, being members of the medical profession, owed a duty of care to him. This duty includes the duty to maintain the confidentiality of information concerning patients. Since this duty was breached, the respondent was liable in damages to the appellant. The appellant's right to privacy had been infringed by the unauthorised disclosure of his HIV status, and this infringement had resulted in the denial of his right to marry.

The court held that the origin of the medical profession's duty of confidentiality can be found in the Hippocratic oath and the International Code of Medical Ethics. In India, the Indian Medical Council Act empowers the council to prescribe standards of professional conduct and etiquette, and a code of ethics for medical practitioners. The council has a code of medical ethics which provides that a medical practitioner may not disclose the secrets of a patient that have been learnt in the exercise of his or her profession. This may be disclosed only in a court of law under orders of the presiding judge.

The court found that there is a duty of confidentiality imposed on the medical profession, with a correlative right on the part of the patient to have his or her confidentiality maintained. But this right is subject to certain implied exceptions.

One such exception arises where maintenance of the patient's confidentiality gives rise to a health risk to another person. The proposed marriage carried a health risk to Ms Y, as she had to be protected from the communicable disease from which the appellant suffered. The appellant's right of confidentiality, if any, was not enforceable under these circumstances.

The court recognised the existence of the right to privacy (a 21 of the Indian Constitution read with Directive Principles of State Policy). The right to privacy may be lawfully restricted for the prevention of crime or disorder, or for the protection of health, morals or the rights and freedoms of others. The court held that there was no violation of the appellant's right to confidentiality or his right to privacy as Ms Y, with whom the appellant was likely to be married, was saved in time by the disclosure, otherwise she too would have been infected with the disease.

The court further held that the protection of the appellant's rights to privacy and confidentiality would result in a breach of Ms Y's right to life. Her right to life was stronger than his right to privacy.

The court even went so far as to hold that sections 269 and 270 of the Indian Penal Code, which criminalise negligent and malignant acts likely to spread diseases that are dangerous to life, impose a positive duty on a person not to marry. There is thus a positive duty on an HIV-positive person such as Mr X not to marry.

The court also held that in these circumstances, the respondent's silence regarding the appellant's HIV infection would have had the effect of making the respondent a party to a criminal act by the appellant. It was therefore justified for the hospital to inform Ms Y and her family of Mr X's HIV-positive status.

The Lawyers' Collective, Bombay, have appealed against this decision as they believe that it adversely affects the fundamental human rights of people living with HIV/AIDS. The outcome of this appeal is awaited.

5 South Africa

5 1 The Constitution of the Republic of South Africa, Act 108 of 1996

In South Africa the breach of the duty of confidentiality of AIDS-related information may infringe upon a person's right to privacy. It depends on the circumstances of each case.

Everyone has a constitutional right to privacy which includes the right not to have the privacy of their communications infringed (s 14(d) of the Constitution). This right to privacy is not absolute and may be limited to the extent that the limitation is in the form of a law of general application and is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose (s 36).

The right to privacy is generally applied to all people and the limitation on it – to inform the future spouse of the HIV-positive status of a person – is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. One could argue that the purpose of the limitation is to save the life of the future spouse. There are no other less restrictive means to

achieve this purpose. Everyone has the right to life. The future sexual partner/spouse would have a right to know about the HIV-positive status of his or her future spouse, as his or her life could be at stake if safe sex is not practised (s 11).

5.2 Common law

Despite the constitutional right to privacy, every person has a common-law right to privacy. This is recognised as an independent personality right, which the courts have included within the concept of *dignitas* (Neethling, Potgieter and Visser *Law of delict* (2001) 354). A distinction is made between wrongful invasion of privacy by means of intrusion (when an outsider himself becomes acquainted with the individual or his personal affairs) and by means of disclosure (eg the disclosure of private facts which have been acquired by a wrongful act of intrusion) (*idem* 355; Neethling *Persoonlikheidsreg* (1998) 268–269). Disclosure of information that a patient is HIV-positive would be a wrongful invasion of privacy by means of the revelation of private facts contrary to the dictates of a confidential relationship (Neethling 274). The more necessary it is for a person to impart private facts to an outsider, the more pressing it becomes for protection against the disclosure of those facts to third parties by the outsider. (Certain other rights of an HIV-positive person may also be compromised, such as the right to his or her good name. Only the right to privacy is discussed here.)

As far as the right to privacy is concerned, specific confidential relationships are recognised, for example the relationship between doctor and patient. Because the patient is compelled to inform the doctor of certain facts about himself, a legal duty of confidentiality as the corollary of the patient's right to privacy rests on the doctor (*idem* 276–277). The wrongfulness of an infringement of privacy is determined by the *boni mores* test or reasonableness criterion (Neethling, Potgieter and Visser 355). In upholding the individual's right to privacy, a doctor must therefore treat as confidential all information concerning a patient's health. In principle, the doctor's general duty concerning confidentiality exists in respect of every third party. Thus, he or she may not inform the spouse and children of the patient (or sexual partners or former sexual partners) that the patient has tested positive for HIV. Divulging such information could lead to a claim in delict.

The presence of a ground of justification, however, excludes the wrongfulness of an invasion of privacy (Neethling 288). This common-law duty of confidentiality is therefore not absolute, since there are other interests that may be more important and that may justify or necessitate the violation of a duty of confidentiality. Disclosure may be justified, *inter alia*, if the remarks are in the public interest, or in cases of necessity (*idem* 289 292–294).

The court in *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A) held that the right of the patient to privacy and the doctor's duty of confidentiality are not absolute, but relative. Conflicting interests are weighed up against each other and a doctor may be justified in disclosing his knowledge where his obligations to society would be of greater weight than his obligations to the individual because the action of injury is one which *pro publica utilitate exercetur* (Neethling 294 fn 183). One may argue that in weighing up the conflicting interests, the doctor may be justified in disclosing his knowledge of the HIV-positive status of his or her patient to a sexual partner or future sexual partner because the doctor's obligation to society to prevent the sexual partner from contracting HIV carries more

weight than his obligation to his patient to keep the doctor-patient relationship confidential. The right to life must take precedence over the right to privacy since the result of not adhering to the right to life would be death, which is irreversible, whereas an actionable breach of the right to privacy would mean that damages could be claimed.

What is in the public interest will depend on the legal convictions of the community (*boni mores*) (Neethling, Potgieter and Visser 355). One could argue that it would be in the public's interest – and especially in the interest of the sexual partner or future sexual partner – to know about the HIV-positive status of the patient, as this could save the life of the sexual partner or future sexual partner. In this instance, the legal convictions of the community would require that the life of the sexual partner be saved.

In the case where remarks are made out of necessity, the defendant (the doctor) is placed in a position whereby he can protect his own or others' legitimate interests (perhaps those of the sexual partner or future sexual partner of the patient with HIV/AIDS) only by violating the patient's legal interests, so his or her privacy. If a reasonable alternative were available, the violating act would then not be justified (Neethling 289). Where the sexual partner or future sexual partner of an HIV-patient is in danger of contracting the disease and the patient refuses to inform the partner of his HIV-positive status, it can be argued that no other alternative exists by means of which the doctor can prevent the patient's partner from being infected by the disease.

The state of necessity must really exist. The question is not whether it was caused by human action. It is uncertain, however, whether the defendant may rely on the state of necessity if he himself created the situation (Neethling, Potgieter and Visser 87). In this instance the defendant (the doctor) did not create the state of necessity. The possible state of necessity must be determined objectively (Neethling, Potgieter and Visser 88). A further requirement is that the state of necessity must be present or imminent (*idem* 89). In this instance it is clearly imminent, as the spread of a killer disease must be stopped. The defendant may act out of necessity not only in protecting his own interests, but also in protecting the interests of others (*ibid*). It is submitted that in a situation like this, the interests of the sexual partner or future sexual partner are protected. Not only life or physical integrity may be protected, but also other interests (*ibid*). In this situation it is the life of the sexual partner or future sexual partner that is protected.

The defence of necessity may not be raised if the person in question is legally compelled to endure the danger, ie lacks the power to avoid the state of necessity (*idem* 90). The interest sacrificed (the right to privacy of the patient) must not be deemed to be more valuable than the interest protected (the right to life of the sexual partner or future sexual partner). The principle of proportionality of interests is applicable as the defendant may not cause more harm than is necessary (*ibid*). One could argue that in this instance the right to life carries more weight than the right to privacy, and that a doctor may reveal information as to a patient's HIV-positive condition only to that patient's sexual partners (past, present and future) for, by giving this information to the public at large, he may cause more harm than is necessary. The act of necessity must be the only reasonable means of escaping from the danger (*idem* 92). In this case the doctor has no other reasonable means available to prevent the infringement of the patient's interests.

Mellows "AIDS and medical confidentiality" 1995 *Juta's Business Law* 59 is also of the view that if a doctor reveals a patient's HIV status, he may use necessity as a defence. All the prerequisites of the defence of necessity must then be met in order to justify revealing a patient's HIV status. It must be shown that the information was divulged to a person who was actually in danger of suffering harm, that such harm was both imminent and unlawful, and that the information was necessary to protect the rights of the endangered person.

To date there is only one reported case in point in South Africa. It dealt, however, with disclosure to third parties who were not sexual partners of the person with HIV/AIDS. In *Jansen van Vuuren v Kruger* (also known as the *McGeary* case) a general practitioner informed two colleagues (who in the past were only occasionally involved with the care of an infected patient) as to the HIV-positive status of a patient. The patient instituted an action, contending that there had been a breach of the terms of an agreement establishing the doctor-patient relationship, and that the disclosure of the test result amounted to a breach of the patient's right to privacy and his rights of personality. The practitioner pleaded that the disclosure had been justified in law, *inter alia* on the ground that it was made on a privileged occasion and that it constituted truth for the public benefit.

The court held that AIDS is a dangerous condition, but the lethal and incurable nature of AIDS does not detract from the infected person's right to privacy (especially where this right is based on the doctor-patient relationship), and that a patient can still expect his or her doctor to act in accordance with the ethical standards of the medical profession. It was therefore held that the communication by the practitioner to his colleagues was unreasonable and accordingly unjustified and wrongful.

If the lethal and incurable nature of AIDS does not detract from the HIV-positive person's right to privacy, it will be an infringement of his privacy and a breach of the doctor's duty of confidentiality to disclose his HIV-positive status to third parties not personally involved with him. But what about a sexual partner or future sexual partner? One could argue that the very fact that HIV/AIDS is incurable gives the right to life precedence over the right to privacy, and justifies disclosure.

According to McLean "HIV infection and a limit to confidentiality" 1996 *SAJHR* 452-466 there was no reason for the doctor in *McGeary* to inform those he did of the patient's HIV status. If there is an identifiable third party (for example a sexual partner) whose life is endangered by the HIV-positive status of the patient, there should be a restriction on the duty of confidentiality by means of a countervailing duty, *sc* to inform the third party. This duty can be seen as a claim of basic moral decency.

6 CONCLUSION

In all of the countries discussed, the law seeks to protect the life of the sexual partner or future sexual partner of the HIV-positive person rather than the right to privacy of the person infected with HIV/AIDS.

We are dealing with conflicting interests, *sc* the right to privacy of an HIV-positive person versus the right to life of a sexual partner or future sexual partner. Where a conflict between different interests must be resolved, a balancing process may be necessary in order to determine which interest should prevail.

This requires a clear identification of the competing interests involved. The disclosure of a patient's medical confidences may affect the patient's autonomy and privacy. Disclosure can be justified only in order to avert a danger to an interest that is of a higher value than medical confidentiality, for instance the potential victim's right to life and bodily integrity. There seems to be almost universal agreement that the interest in privacy and autonomy is outweighed by the interest in life and physical integrity. Notification is therefore justified, but nevertheless involves a wide range of legal and ethical considerations.

General human-rights principles must be re-evaluated when applied to each case. It must always be borne in mind that revealing a person's HIV status can be extremely harmful to him. Disclosure usually results in stigmatisation, discrimination and ostracism of the patient.

In each instance it depends on the question to whom the information must be revealed. If it is to a sexual partner or future sexual partner, disclosure may be justified on the ground that the right to life must outweigh the right to privacy. If disclosure is made to the community, or to people not involved with the HIV-positive person on a sexual level, the right to privacy will reign supreme as there will be no direct threat to the right to life of those to whom the communication is made. Only an individual whose right to life is at stake has a right to know.

It does not seem necessary for South Africa to enact legislative measures in order for the right to life to be protected, as the protection provided in terms of the common law and the Constitution is sufficient. It will depend upon the circumstances of each case whether disclosure to third parties was fair. Should a doctor inform an identifiable third party at risk of contracting HIV/AIDS from the patient of the HIV-positive status of the patient, a delictual claim may be instituted for breach of confidentiality against the doctor, but the defences of necessity or public interest should succeed. Should a constitutional claim be instituted, the right to privacy may be limited in terms of section 36 of the Constitution, as disclosure is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

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VERKRAGTING, DWANG EN GESLAGSOMGANG MET 'N PERSOON IN 'N TOESTAND VAN BEWUSTELOOSHEID OF ONMAG

1 Inleiding

In 'n beslissing van 12 Junie 2001 (NJ 2001, 528) deur die Hoge Raad in Nederland was die feite soos volg: FV, die slagoffer is, toe sy haar woning binnestap, van agter deur die beskuldigde met 'n wurggreep om haar nek vasgegryp. Hy het vervolgens met sy ander hand 10 tot 12 slaappille in haar mond gedruk en later in haar keel afgeforseer, waarna hy haar die slaapkamer ingesleep en op die bed

neergegooi het. Sy het bewusteloos geraak en toe sy later bykom, het sy op haar maag naak op die bed gelê. Sy het gevoel dat hy besig was om sy penis in haar vagina te plaas wat sy as pynlik beleef het. Sy het magteloos gevoel en kon nie haar vingers beweeg nie. Volgens haar sou sy weerstand gebied het as sy kon. Sy het daarna haar bewussyn verloor en die volgende oggend eers wakker geword. Beskuldigde is vervolgens van oortreding van artikel 242 van die Nederlandse Strafwetboek (*Sr*) aangekla. Teen die agtergrond van die beslissing van die Hoge Raad, die hoogste regsprekende liggaam in Nederland, word die begrip “dwang” in die konteks van verkragting en veral met verwysing na die liggaamspenetrasie van ’n slagoffer wat in ’n toestand van bewusteloosheid of onmag verkeer in hierdie aantekening onder die loep geneem. Hierdie kommentaar moet vervolgens as ’n glos gelees word op my vorige publikasies waarna hier verwys word. Onnodige duplikasie van inligting en analise daarin opgeneem, word hier doelbewus vermy.

2 Die Nederlandse reg

Artikel 242 *Sr* bepaal soos volg:

“Hij die door geweld of een andere feitelijkheid of bedreiging met geweld of een andere feitelijkheid iemand dwingt tot het ondergaan van handelingen die bestaan uit of mede bestaan uit het seksueel binnedringen van het lichaam, wordt als schuldig aan verkrachting gestraft . . .”

In sy voorlegging aan die Hoge Raad (HR) wys advokaat-generaal Jörg daarop dat daar slegs van dwang sprake kan wees indien die dader “opzettelijk heeft veroorzaakt dat het slachtoffer de in die bepaling bedoelde handelingen tegen haar wil heeft ondergaan” (par 9). In sy uitspraak bevestig die HR hierdie standpunt (par 4 2). Verskeie vorige beslissings van die HR is hier relevant. In ’n beslissing van 29 November 1994 (NJ 1995, 201) was die feite kortliks soos volg: Klaagster en beskuldigde het op 31 Desember 1991 gaan skaats. Na afloop daarvan het hulle na die parkeergarage gegaan waar hulle in die beskuldigde se motor gaan sit het. Beskuldigde het toe met klaagster ’n weddenskap aangegaan dat hulle nie vir 5 minute stil sou kon sit nie. Na enige minute het beskuldigde gesê dat hy dit nie meer kon volhou nie en dat sy ook “zo moeilijk om van af te blijven” is. Hy het vervolgens sy hand in haar broek geplaas en met sy vinger haar vagina binnedring. Gedurende hierdie optrede het beskuldigde die deur met die sentrale sluitstelsel afgesluit. In dié saak het dit wesenlik gegaan oor die vraag na die betekenis van die begrip “door . . . een andere feitelijkheid . . . dwingt” in artikel 242 *Sr*. Die HR word in finale instansie, na strydige beslissings van voorafgaande howe, genader om dié vraag te beantwoord. In sy uitspraak verwys die HR na dokumentasie, onder andere die *Memorie van Antwoord*, wat die invoeging van dié begrip in artikel 242 *Sr* voorafgegaan het (par 6 1). Die HR verduidelik dat hieruit blyk dat die afsluiting van ’n motor deur middel van ’n sentrale deurvergrendeling onder omstandighede ’n feitelijkheid kan oplewer waardeer ’n slagoffer tot die ondergaan van handeling, soos bedoel in artikel 242 *Sr*, gedwing sou kon word (par 6 2). Die HR beklemtoon egter:

“Van door een feitelijkheid tot het ondergaan van handelingen als in art. 242 *Sr* doeld dwingen in de zin van die bepaling kan . . . slechts sprake zijn indien de verdachte door die feitelijkheid opzettelijk heeft veroorzaakt dat het slachtoffer die handelingen tegen haar/zijn wil heeft ondergaan” (par 6 3).

Die HR verwys vervolgens die saak terug na die hof *a quo* vir afhandeling teen die agtergrond van hierdie interpretasie van die relevante dele van artikel 242 *Sr*. Vir onderhawige doeleindes is dit van wesenlike belang om daarvan kennis te

neem dat 'n kousale verband tussen die (opsetlike) skep van die feitelikheid en die uitskakeling van die wil van die slagoffer vereis word.

Op 24 Maart 1998 (NJ 1998, 533 544) het die HR twee sake aangehoor wat vir doeleindes van hierdie uiteensetting ter sake is. In die eerste saak het die beskuldigde doelbewus die slagoffer in 'n toestand van onmag gebring deur voor te stel dat hy haar kon behandel deur in 'n toestand van hipnose 'n ontspanningstegniek op haar toe te pas. Terwyl sy in dié toestand was, het hy onder andere sy vinger in haar vagina geplaas. In dié saak het dit egter nie gegaan oor oortreding van artikel 242 *Sr* nie, maar oor artikel 247 *Sr* (oud) wat ten doel gehad het om diegene wat 'n toestand van onmag by 'n persoon vir seksuele doeleindes misbruik aan 'n strafsanksie te onderwerp. Die HR bevestig die skuldigbevinding en verduidelik soos volg:

“Deze bewezenverklaring geeft niet blijk van een onjuiste opvatting omtrent die wetsbepaling, in aanmerking genomen dat een vrouw in staat van onmacht verkeert in de zin van art. 247 (oud) *Sr* indien zij zich bevindt in een toestand van fysieke weerloosheid welke voortvloeit uit een bij haar zelf bestaand lichamelijk onvermogen tot handelen en dat daarvan ook sprake kan zijn indien tengevolge van beïnvloeding van haar bewustzijn de oorzaak van dit lichamelijk onvermogen (mede psychische aard is” (par 5 6).

In die tweede beslissing van die HR wat op 24 Maart aangehoor is, was die feite soos volg: Die beskuldigde het hom teenoor die klagster voorgedoen as haar vriend en terwyl sy in 'n toestand van slaapdrunkenskap was onder andere sy geslagsdeel in haar vagina geplaas. Hy is van oortreding van artikel 242 *Sr* aangekla, maar is vrygespreek. Die prokureur-generaal van die Gerechtshof te Leeuwarden het gedurende die appèl daarop gewys dat die dwing van 'n persoon deur 'n ander feitelikheid op 9 Oktober 1991 in artikel 242 *Sr* ingevoeg is en dat geen eenduidige omskrywing van die begrippe “feitelikheid” of “door een feitelijkheid dwingen” in die parlementêre stukke aangetref word nie. Die HR verklaar, by bevestiging van die onskuldigbevinding, onomwonde dat van “zodanig dwingen kan slechts sprake zijn indien de verdachte opzettelijk heeft veroorzaakt dat het slachtoffer de in art. 242 *Sr* bedoelde handelingen tegen haar wil heeft ondergaan” (sien ook JdH se kommentaar op dié saak in NJ 1998, 3073). Daarvan is geen sprake indien die half-aan-die-slaap slagoffer deur die dader oor sy identiteit mislei is nie (sien ook Labuschagne “Dwaling ten aansien van die identiteit en beroepstatus van die dader en die vraagstuk van toestemming by gewelds- en geslagsmisdade” 1999 *SALJ* 230, “Dwaling ten aansien van toestemming as verweer by verkragting: 'n Strafregtelike en regsantropologiese evaluasie” 1999 *SAS* 348 en “VIGS, gevolgsaanspreeklikheid, bedrieglike weerhouding van inligting en die vraagstuk van toestemming by gewelds- en geslagsmisdade” 2001 *TSAR* 558). Dit moet voortdurend in gedagte gehou word dat dit hier gegaan het oor die afwesigheid van 'n kousale verband tussen die bewerkstelling deur die dader van die toestand waarin die slagoffer verkeer het en die dwing van die slagoffer tot duldning van die betrokke handeling(e). 'n Persoon wat, byvoorbeeld, 'n toestand van slaap by 'n vrou bewerkstellig met die opset om haar liggaam in daardie toestand seksueel binne te dring en dit inderdaad doen, sou aan oortreding van artikel 242 *Sr* skuldig bevind kon word (sien JdH 3073 en HR 28 November 1989, DD 90 134). 'n Insiggewende saak in dié verband het op 3 November 1998 (NJ 1999, 125) voor die HR gedien. In dié saak het die beskuldigde die slagoffer se kamer, waar sy gelê en slaap het, binnegegaan, bo-op haar gaan lê en sy penis in haar vagina geplaas. Sy het wakker geword, die beskuldigde herken en hom beveel om van haar af te klim, wat hy nie gedoen het nie. Hy is in die Gerechtshof te Leeuwarden aan oortreding van artikel 242 *Sr*

skuldig bevind en tot 12 maande gevangenisstraf gevonniss. By 'n onsuksesvolle hoër beroep wys die HR ten aanvang daarop dat voor die 1991-wysiging van artikel 242 *Sr* vleeslike gemeenskap as vereiste gestel is. "Vleeslike gemeenskap" is sedertdien vervang deur "die ondergaan van handeling wat bestaan uit of mede-bestaan uit die seksuele binnedring van die liggaam", wat beteken dat benewens geslagsomgang ander vorme van seksuele binnedring van die liggaam binne die trefkrag van artikel 242 *Sr* gebring is. Volgens die HR lei dit geen twyfel nie dat artikel 242 *Sr* voor die wysiging in 1991 nie slegs die aanvang van geslagsomgang nie maar ook die voortdoring daarvan strafregtelik verbied het en vervolg:

"Die bepaling strekte zich dus ook uit tot het geval waarin eerst sprake is van dwang nadat de geslachtsgemeenschap is aangevangen en het slachtoffer dus wordt gedwongen tot voortzetting van geslachtsgemeenschap, die aanvankelijk zonder dwang, als bedoeld in art. 242 *Sr*, is totstandgekomen. Gelet op de ratio van genoemde wetswijziging is er geen aanleiding om aan te nemen dat de wetgever het bereik van het huidige art. 242 *Sr* in dat opzicht heeft willen beperken" (par 4 1).

Ons het hier te doen met 'n verkragting deur 'n late. Dit is hedendaags nie meer 'n seldsame verskynsel nie en word in effek in verskeie regstelsels erken, al sou dit by implikasie wees (sien Labuschagne "Verkragting deur 'n late?" 1995 *SALJ* 217 en *People v Roundtree* 91 Cal Rptr 2d 921 (2000)). In 'n beslissing van 16 November 1999 (NJ 2000, 125) is die beskuldigde daarvan aangekla dat hy die slagoffers oor 'n tydperk van ongeveer ses jaar tot onder andere geslagsomgang, *fellatio* en *cunnilingus* gedwing het. Hy was 'n predikant wat by die slagoffers die status van 'n profeet gehad het en was terselfdertyd 'n vadersfiguur. Hy het 'n oorweldigende invloed op hulle uitgeoefen en as hy nie sy sin gekry het nie, het hy woede-uitbarstings gekry, op hulle geskree, hulle gedreig en verkleineer. Die slagoffers had volgens die beskuldigde 'n uiters negatiewe selfbeeld en hy wou aan hulle sekuriteit en geborgenheid verskaf. Hy het nie die seksuele handeling ontken nie, maar beweer dat hy slegs op uitnodiging daarby betrokke was. Die hof *a quo* het hom egter weens oortreding van artikel 242 *Sr* tot vier jaar gevangenisstraf gevonniss. Die HR bevestig hierdie bevinding en wys daarop dat uit die getuienis blyk dat die slagoffers telkens deur die beskuldigde in sodanige toestand gebring is met die doel dat hulle van hom afhanklik kon wees en hulle daardeur gedwonge gevoel het om die seksuele handeling te ondergaan. Die gedraginge van die beskuldigde kan aangemerkt word as feitlikhede soos bedoel in artikel 242 *Sr* (par 4 2).

In die saak waarmee die onderhawige bespreking ingelei is, verwys advokaat-generaal Jörg by wyse van analogie ook na artikel 243 *Sr*. In dié artikel word persone wat in 'n staat van bewusteloosheid of onmag verkeer teen seksuele misbruik beskerm. Onder die begrippe "bewusteloosheid" en "onmag" word verstaan 'n toestand van fisieke weerloosheid wat voortvloei uit die slagoffer se liggaamlike onvermoë om te handel. In 'n saak wat op 24 Maart 1998 (NJ 1988, 533) deur die HR aangehoor is, en wat hierbo bespreek is, is 'n toestand van hipnose as sodanige toestand beskou. In 'n vroeëre beslissing van die HR (4 Desember 1990, DD 91 124) is 'n pasiënt 'n verdowende inspuiting gegee, wat die effek gehad het dat sy nog tot 'n mate bewus was van wat om haar aangaan maar sy was nie by magte om haar fisies teen die dokter te verweer nie (sien ook par 12 van die mening van advokaat-generaal Jörg in die saak waarmee die onderhawige bespreking ingelei is). In dié saak het die voorafgaande hof die volgende standpunt ten aansien van die inhoud van die begrip "onmag", in artikel 243 *Sr* gebruik, ingeneem:

“Onmacht in art. 243 *Sr* betref nie louter een fisieke weerloosheid die haar oorsaak vind in een bij het slachtoffer bestaand lichamelijk onvermogen tot handelen als gevolg van een ziektoestand, doch omvat evenzeer een dergelijke fisieke weerloosheid, welke het gevolg is van een van buiten komende oorsaak. Voorts is het Hof van oordeel dat een staat van onmacht als genoemd in bedoeld art. niet is beperkt tot de situasie waarin die vrouwe zich in het geheel niet meer van haar omgewing bewus is of waarin zij in het geheel geen magt meer heeft over haar lighaam, doch ook die situasie omvat-zoals i.c.- waarin die vrouwe zich nog wel enigerlei bewus is van haar omgewing en nog wel enigermate in staat is tot lighaamsbeweging, doch bij magte is zich fisiek teen die vleselike gemeenskap te verzetten.”

Hierdie standpunt word in hoër beroep deur die HR bevestig (sien ook HR 28 November 1989, DD 90 134). Volgens advokaat-generaal Jörg beteken die feit dat die slagoffer as gevolg van die gedwonge inname van die slaappille in 'n staat van bewusteloosheid, soos vereis in artikel 243 *Sr*, verkeer het nie dat 'n veroordeling weens oortreding van artikel 242 *Sr* as sodanig uitgesluit is nie (par 13). Hy verduidelik die kernverskil tussen artikels 242 *Sr* en 243 *Sr* in dié verband soos volg: Anders as die geval waar die dader die toestand van slaap (dronkenskap), waarin die slagoffer reeds verkeer het, bloot misbruik het, het die beskuldigde in dié saak self die toestand by die slagoffer geskep as gevolg waarvan sy nie in staat was om kenbaar te maak dat sy geen gemeenskap met hom begeer nie of haar teen hom te verset nie. Hy vat saam:

“Indien er causaal verband is tussen die gedwongen inname van die slaappillen en die daarop volgende onvrijwillige geslachtsgemeenskap kan het geweld waarmee iemand die slaappillen in de mond van het slachtoffer heeft gebracht en haar heeft gedwongen tot het doorslikken daarvan (van welk geweld het slachtoffer zich wust is geweest en welk geweld door haar als dwang is ervaren), worden aangemerkt als geweld waarmee die persoon het slachtoffer heeft gedwongen tot het ondergaan van handelingen die (mede) hebben bestaan uit het seksueel binnedringen van het lighaam als bedoeld in art. 242 *Sr*” (par 14).

Die HR onderskryf dié benadering (par 4 5–6). Wat vir die lyn van denke wat in onderhawige verband gevolg word van wesenlike belang is, is die feit dat, volgens die Nederlandse reg, 'n persoon wat 'n ander wat in 'n toestand van bewusteloosheid of onmag verkeer, aantref, en die deur die wet genoemde seksuele handeling verrig, nie aan dieselfde misdaad skuldig is as diegene wat sodanige toestand geskep het juis met die doel om sodanige seksuele handeling te verrig nie.

3 Die Suid-Afrikaanse reg

'n Behoorlike analise en evaluering van die hedendaagse Suid-Afrikaanse positiese reg ten aansien van die seksuele misbruik van 'n persoon wat in 'n toestand van bewusteloosheid of onmag verkeer, asook die aanbevelings van die Suid-Afrikaanse Regskommissie, vereis 'n kort historiese agtergrond. In die Romeins-Europese reg is onderskei tussen verkragting (*stuprum violentum*) en gekwalifiseerde *stuprum*. Verkragting het bestaan uit gewelddadige geslagsomgang met 'n vrou. Die geweld kon bestaan uit geweldstoevoeging (*vis ablatival absoluta*) of uit geweldsbedreiging (*vis compulsiva*). Die dreigemente moes van 'n ernstige aard wees, naamlik dreigemente met die dood of ernstige liggaamlike letsel of ander dreigemente wat 'n gebalanseerde meisie (*constans puella*) tot geslagsomgang sou dwing (Van Leeuwen *Censura forensis* (1741) 1 5 23 10; Carpzovius *Verhandeling der lyfstraffelyke misdaden* (1712, Van Hogendorp

vert) hfst 68 5; Leyser *Meditationes ad Pandectas* (1784) *spec* 634 12; Boehmer *Meditationes in CCC* (1744) 119 3; Van der Keessel *Praelectiones ad ius criminale* (1972-uitg Beinart en Van Warmelo) 48 5 25). Die slagoffer moes deur die geweld of geweldsbedreiging tot die geslagsomgang gedwing of weerloos gelaat gewees het, met ander woorde, die slagoffer se wil moes uitgeskakel of lamgelê gewees het (Voet 48 5 2; Van Leeuwen *RHR* (1780) 4 36 5; Leyser *spec* 634 2; Boehmer 119 1; Püttmann *Elementa iuris criminalis* (1802) par 589). 'n Verskeidenheid seksuele misdade, wat nie binne die trefkrag van verkrachting geval het nie, is onder die oorkoepelende misdaad gekwalifiseerde *stuprum* gestraf. In soverre dit die onderhawige ondersoek betref, blyk dit dat 'n persoon wat 'n vrou dronk maak met die doel om met haar geslagsomgang te hê en dit inderdaad doen, asook geslagsomgang met 'n slapende vrou, as gekwalifiseerde *stuprum* strafbaar was (Voet 48 5 2; Moorman *Verhandelingen over de misdaden* (1764) 2 16 6; Boehmer 119 4; Leyser *spec* 634 24; Püttmann par 575. Vgl Labuschagne "Seksuele kontak tussen psigoterapeut en pasiënt: Opmerkinge oor die strafregtelike beskerming van psigoseksuele outonomie" 2000 (2) *TRW* 55 58–59 oor die posisie van geesteskrankes in ons gemenerereg). In die Nederlandse en Duitse reg, wat dieselfde gemeenregtelike basis as ons reg het, het 'n veelheid afsonderlike geslagsmisdade eger uit gekwalifiseerde *stuprum* ontwikkel (sien a 242–249 *Sr*; a 174–182 *StGB*). Onder invloed van die Engelse reg en weens die oningeligtheid oor sowel die (destydse) Engelse reg as ons gemenerereg van sekere lede van die regsprekende gesag, het ons geslagsmisdade ontwikkel in 'n karikatuur van fiksies en gekunsteldhede (sien bv Labuschagne "Enkele strafregtelike aspekte van ontug met jeugdige meisies" 1974 *Speculum Iuris* 40, "Nie-konsensuele geslagsmisdade: 'n Misdaadsistematiese herwaardering" 1981 *THRHR* 18, "Seksuele selfbestemmingsreg van die geesteskranke: 'n Strafregtelike en huweliksregtelike evaluasie" 1990 (1) *TRW* 123, "Dwaling ten aansien van die identiteit en beroepstatus van die dader en die vraagstuk van toestemming by gewelds- en geslagsmisdade" 1999 *SALJ* 230 en "Strafregtelike beskerming van gevangenes teen seksuele misbruik van hulle gesagsondergeskikte status" 2000 *SAS* 99).

In *R v Ryperd Boesman* 1942 1 PH H63 (SWA) het regter Hoexter opgemerk dat geslagsomgang met 'n slapende vrou of 'n vrou wat onder die invloed van verdowingsmiddels verkeer verkrachting kan daarstel (sien ook *R v C* 1954 4 SA 117 (O)). In *R v K* 1958 3 SA 420 (A) 421 het appèlregter Schreiner laat blyk dat 'n vrou wat "insensible from any cause" is, nie tot geslagsomgang kan toestem nie. 'n Man wat derhalwe met 'n vrou geslagsomgang het wat as gevolg van byvoorbeeld geesteskrankheid, hipnose, dwelms of alkoholiese drank nie by haar positiewe ("insensible") is nie, sou aan verkrachting skuldig bevind kon word. Die seksuele misbruik van 'n posisie van weerloosheid of onmag waarin die slagoffer verkeer, soos wanneer sy in aanhouding is, kan volgens ons howe ook verkrachting daarstel, selfs al het sy nie weerstand gebied of beswaar gemaak nie. In *S v S* 1971 2 SA 591 (A) 596–597 het S, 'n polisiekonstabel, byvoorbeeld geslagsomgang gehad met 'n vrou wat in arres en onder sy beheer was. Sy het aangevoer dat dit vergeefs vir haar sou wees om weerstand te bied of selfs beswaar te maak. S is aan verkrachting skuldig bevind, aangesien die getuienis volgens die hof voldoende was om te bewys dat hy "ten volle besef het dat sy nie tot die geslagsverkeer instem nie maar slegs sy gewetenlose bevele uitvoer" (sien ook *S v Faassen* 1989 2 PH H54 (A); Labuschagne "Die misdaadkonkurrensie van afpersing en verkrachting" 1993 *SAS* 326; Snyman *Strafreg* (1999) 462–463).

In artikel 2(1) van die voorgestelde wetgewing van die Suid-Afrikaanse Regskommissie (*Sexual offences: The substantive law* (Project 107, Discussion Paper 85, 12 August 1999) 266–274) word verkragting omskryf as die opsetlike en wederregtelike verrig van 'n handeling van seksuele penetrasie met 'n ander persoon of beweging van 'n ander om sodanige handeling te verrig. Volgens artikel 2(2) is seksuele penetrasie *prima facie* wederregtelik as dit in enige omstandighede met dwang plaasvind (“if it takes place in any coercive circumstances”). Blykens artikel 1(1)(iii)(e) sluit omstandighede van dwang die gevalle in waar 'n persoon se geestelike vermoë (“mental capacity”) aangetas is deur (i) slaap; (ii) dwelms, alkoholiese drank of 'n ander middel; of (iii) sy/haar geestelike of liggaamlike onvermoë, tydelik of permanent; (iv) of enige ander toestand, hétsy tydelik hétsy permanent, tot so 'n mate aangetas is dat hy/sy in 'n onvermoë verkeer om die aard van die penetrasiehandeling te begryp of in 'n onvermoë is om dit te weerstaan of sy/haar onwilligheid daartoe aan te dui. Om van die veronderstelling uit te gaan dat seksuele penetrasie van 'n persoon wat, byvoorbeeld, onder narkose is as sodanig met dwang plaasvind, is 'n belediging vir die rasionele vermoë van regsonderdane. Diegene wat, byvoorbeeld, 'n vrou bewusteloos slaan met die doel om haar seksueel te misbruik, is, volgens die regskommissie se aanbevelings, aan dieselfde misdaad skuldig as diegene wat toevallig op 'n bewustelose vrou afkom en haar liggaam seksueel penetreer. Die regskommissie het 'n gulde kans deur die vingers laat glip om weg te doen met die kaleidoskoop van fiksies en rasonele verspothede wat die geslagsmisdade in die Suid-Afrikaanse reg kenmerk. Waarom vir regsvergelykende doeleindes oorwegend na Anglo-Amerikaanse regstelsels verwys is, is onbegryplik. Sonder die nodige beskeidenheid en die bereidwilligheid om soveel as moontlik te leer, is vordering op die weg van geregtigheid en sinvolle regsontwikkeling beswaarlik moontlik. Fiksies en werklikheidsvreemde rasionalisasies is 'n regstaat onwaardig (sien Labuschagne “Regmatige verwagting, redematige administratiefregspiegeling en die menseregtelike status van fiksies” 1997 *SAPR/PL* 522 en “Onpartydige regspraak in 'n plurale regstaat: Opmerkinge oor die geregtigheidsonvriendelike kant van die redelike persoon-toets” 2000 *Obiter* 135). Die mense van Suid-Afrika verdien iets beter! Gelukkig is die Regskommissie se ondersoek nog nie gefinaliseer nie en sou nuwe voorstelle nog oorweeg kon word.

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**LAESIO ENORMIS OUTDATED,
ENORMOUS PROFITS NOT**

1 Introduction

The study of legal history should prevent the reinvention of the wheel and teach the so-called original thinker humility. Sometimes explained as vertical comparative law, it shows a wider *scala* of legal solutions than one contemporary legal system provides. Furthermore, the legal historian is in a position to observe the emergence of new law and the abolition and/or obsolescence of outdated segments. An

unfortunate aspect of formal abolition is that the “outdated doctrine” in question cannot be dusted off and taken out of the cupboard as is the case with old but suddenly fashionable-again clothes. One such instance which keeps coming to mind in various instances, is the abolished doctrine of *laesio enormis*.

2 The fourth variation of Malevich’s *Black Square*

In *Time* magazine of 26 February 2001 under the heading “A Dark Deal in Russia. Why is a masterpiece by Malevich about to sell for a fraction of its real value?” the Moscow correspondent relates an interesting footnote in Russia’s post-Soviet capitalist society. During the early nineties the country’s happy few amassed the spoils of the Soviet empire, and these new and newly-rich collected art. However, in Russia’s subsequent financial crises many of these new enterprises went under, among them the Inkobank of Vladimir Vinogradov. The essence of the reportage is that in the bankruptcy sale a world-famous painting may be sold for a fraction of its value.

The work in question is the fourth variation of the *Black Square* painted by Kazimir Malevich during the early twentieth century in his Suprematist period. The bank’s entire art collection has been appraised in view of the bankruptcy sale at \$1,5 million, which leads the reporter to the rather strange conclusion that the *Black Square* under discussion may be sold for “perhaps as little as \$2 million”. The latter statement is explained by the \$17 million price realised in May 2000 by Malevich’s *Suprematist Composition* in New York, which leads to the speculation that the *Black Square* may fetch \$20 million. The apparent reason for the discount price is the prediction by anonymous, press-shy officials at the Ministry of Culture that the state would not grant an export license for a Malevich, which forms part of the national heritage. Cynics point out that Malevich’s works have left the country before, and have been sold at a profit outside Russia. The article hints at shady dealings.

However, the most interesting part of the story is found in the first acquisition of the canvas under discussion.

Georgi Nichi, a Moscow art critic assisted the bank in its purchase of *Black Square*. During the early 1990s he was involved in Moscow’s first commercial art fairs and he was phoned by a woman offering a Malevich for sale. It was discovered that this woman was a relative of the sister of the artist’s widow, and Nichi together with other experts travelled to Samara. Moscow’s Tretyakov Gallery authenticated the painting and Inkobank paid a reported \$250 000 to the relatives of the artist.

The remarkable point of this story is that this purchase price escapes the indignation of art experts, Malevich lovers, international collectors and *Time*.

Although information gleaned from magazines is far from reliable and *Time* only states amounts in US dollars, the fact remains that the original owners were paid approximately one tenth of the “firesale” price and about one hundredth of the estimated market value, which makes one long for the theory of the just price.

3 *Laesio enormis* and just price

The Roman orator, politician, philosopher and part-time jurist Cicero writes in *De officiis* 3 17 that it is contrary to nature, which he held to be a source of law, to make a profit from the ignorance of another. In this work on moral philosophy addressed to his son, Cicero preaches the ethics of Stoa, which had become

assimilated into Roman culture. The ethics of Stoa made Ulpian declare that the basic principles of law are to live honourably, not to harm another and to render to each his own (*D* 1 1 10 1).

In 285 AD the same moral philosophical principles caused the emperors Diocletianus and Maximianus to answer the petition by Aurelius Lupus that it is humane that where land had been sold for less than half the real value, the contract can be rescinded by a court, unless the buyer makes up the difference to the real value. The same emperors answered in 293 AD in a similar vein to the petition of Aurelia Euodia. These opinions made new law and were in conflict with previous opinions of Paulus, Ulpianus, Pomponius and Hermogenianus who had held in *D* 19 2 22 3, 4 4 16 4 and 19 2 23 that non-fraudulent circumvention of the other party regarding the price in contracts of sale and lease, was allowed.

Whatever the intermediate fate of the two rescripts may have been, both were considered important enough to be included in the title *De rescindenda venditione* of book 4 of the *Codex* of Justinianus.

I have on an earlier occasion (“*Fin de siècle* of funksionele Romeinse reg?” 1997 *THRHR* 209–210) pointed out the underlying ideologies and the conflicting legal doctrines in regard to the above matter. The same article refers to the generalisation of the rescripts in Canon and learned law during the Middle Ages and refers to the publication of Christoph Becker *Die Lehre von der laesio enormis in der Sicht der heutigen Wucherproblematik* (1993).

From the *Code* of Justinian, the doctrine was embraced by medieval Canon law and learned law alike and found with considerable extensions its way into the law of the province of Holland. From De Groot to Van der Keessel, Van Leeuwen to Van der Linden, all authoritative old Dutch jurists make unequivocal mention of *laesio enormis* or *verkorting over de helft*.

4 *Tjollo Ateljees (Edms) Bpk v Small* 1949 1 SA 856 (A)

Thus it is remarkable that the vestiges of *laesio enormis* were abolished in South African law by section 25 of Act 32 of 1952. The direct cause of this Act was the decision of the Appellate Division in *Tjollo Ateljees (Edms) Bpk v Small*.

This case deserves the greatest possible attention, not only since several important aspects of the South African common law were addressed, but because a new age was heralded. Furthermore, the method employed and manner in which the decision was reached may to a large extent explain the lack of credibility suffered by the common law during the last decennium.

It was common cause that the doctrine of *laesio enormis* formed part of the common law in the (then) provinces of Transvaal and Natal.

Although abolished in the Cape Colony and the Orange River Colony in 1879 and 1902 respectively, by way of legislation, the continued existence was recognised by the Magistrates' Courts Act 32 of 1917 (order 15 r 2(5)(h)) and the Prescription Act 18 of 1943 (s 3(2)(b)(iv)). However, when the case under discussion reached the Appellate Division, it appears that the court had made up its mind that the time was ripe to prepare abolition of the just price theory.

This rather harsh view is supported by both the language and method used by the court. Thus Schriener JA stated that “*laesio enormis* is out of place in the modern world, with its highly complicated commercial organisation and its ingenious selling devices” (860), while Hoexter AJA held that it is obvious that it

“does not accord with our modern ideas of contract” (882). However, the axe was wielded by Van den Heever JA who, in an impressive misuse of the sources of the common law and abuse of learning, provided the antagonists of the common law with ample ammunition.

The facts of the case were rather pathetic. Mrs Small, who was married in community of property, ordered from a door to door salesman two enlarged photographs at the price of 9 pounds and 9 shillings. When he became informed of this purchase, Mr Small attempted to cancel the transaction but was made to believe by the salesman that this was illegal. He was in consequence persuaded by the promise of payment in instalments to reach a compromise and to make the additional purchase of three framed paintings and two picture frames for the enlargements, for the total price of 27 pounds and 16 shillings 6 dimes (873 ff).

Small sued Tjollo Ateljees for rescission of the contract of purchase and sale on the ground of *laesio enormis* and obtained judgment in the magistrate’s court. The appeal of the company in the Transvaal Provincial Division was not successful, but the deep pockets of “the highly complicated commercial organisation of the modern world” (to paraphrase Schreiner JA) made the granted leave to appeal a reality.

The appeal was allowed since the respondent did not prove that the price paid was more than double the value of what he received, but the vast amount of research displayed in the judgment of Van den Heever convinced his brethren, as well as the legislature that the time was ripe to abolish the doctrine in Transvaal and Natal.

The above accusation of misuse of sources and abuse of learning is substantiated by the following analysis of Van den Heever’s judgment.

The starting point for research on the common law was clearly stated by Wessels J in *Master v African Mines Corporation Ltd* 1907 TS 925 928 and approvingly cited by Van den Heever JA (865):

“Now this Court administers the Roman-Dutch law, and not the Roman law of Justinian. If the courts of Holland have placed a certain interpretation upon a lex in the Digest, and by virtue of that interpretation a certain practice was adopted, then this Court should follow the interpretation of the Dutch courts, rather than that which modern investigators give to the text.”

Van den Heever JA made some reservations to this rule and stressed the reference to practice (865 ff). In view of the fact that publications of court decisions were rather limited during the Dutch republic, an important extension to the rule should be that the difference between Roman law and Roman-Dutch law is not only found in the interpretation by the Dutch courts, but to a larger extent in the interpretation of Roman law by the authoritative Roman-Dutch authors, who developed Roman-Dutch law and whose works are the primary source material of the South African common law.

However, in spite of the parameters thus set, Van den Heever JA commenced by remarking that the rescripts by Diocletianus en Maximianus were not incorporated in the *Codex Theodosianus* and agreed with Hymans (a 19th century Dutch author on the law of obligations) that the emperors never made the decrees or that the rescripts fell into desuetude or were abrogated before the reign of Theodosius (862). The judge was furthermore convinced and stated with authority that “[n]o Roman would have conceived or entertained such a remedy; it is redolent of the *cerebrina aequitas* of Constantinople or Berytus” (862).

Although this author is under the impression that cerebrine equity is a positive concept, the judge continues to throw suspicion on the Justinianic vision of equity by dragging in *Novella* 122, which introduced wage controls (863).

Van den Heever JA described the doctrine of *laesio enormis* in the following terms: “the uneconomic and vague rule”, “inherently arbitrary and preposterous”, “on a superficial view it sounds so equitable and satisfying to the demands for symmetry; on closer inspection, however, it appears to be full of pitfalls and anomalies” (863), “a facile and pleasingly sentimental notion”, “a nebulous and elusive concept” (865), and held that “lip service to a vague and nebulous notion is not enough to establish it as a rule of law” (865). He was also of the opinion that “the benefit based on *laesio enormis* was conceived centuries ago in a community which operated with primitive and visionary economic theories”, and that “Justinian who lived in a decadent and tralatician age was often motivated by the Byzantine brand of *cerebrina aequitas*”, revived the doctrine which “was designed to function in an arbitrary manner” (873).

Such and similar statements appear to have been motivated by the learned judge’s belief that the Roman law did not encroach upon the autonomy of the subject in regard to transactions which were not tainted with bad faith; he cites the Dutch government’s belief in the sanctity of contract expressed during the parliamentary discussions of the 1838 *BW* that agreements concluded by adults ought to be inviolable as long as there is no proof of fraud, duress or mistake (866 ff), which he rephrases as follows: “In my opinion the doctrine that persons of full legal capacity can resile from contracts into which they have solemnly entered in the absence of fraud, duress or excusable mistake was never part of the law of South Africa and in the few cases in which it was applied, it was done so by mistake” (871), and “in *laesio enormis* a person of full legal capacity, whose free exercise of volition was in no way impaired or restricted, seeks relief not against a wrong, but against his own lack of judgment, ineptitude or folly. Since the alleged rule encourages a party to divest himself of obligations which he has freely and solemnly undertaken, I do not consider it in harmony with immanent reason or public policy” (873).

However, since the rule appeared to be generally recognised by the authors of Holland during the 17th and 18th centuries, Van den Heever JA decided to undermine this authority. To this effect he cited extensively from De Spinetto’s work *The political snuff-box before the waxen nose of justice*. Although granting that this work is a satire, the judge nevertheless maintains that the author was learned in law and appears to prefer his opinions over and above those of De Groot and Voet. He refers to him “not because of his authority, but for convenience” (863), but omits to mention during what period this satire was published, in which legal system the author was trained and whether his interpretation of the doctrine of *laesio enormis* was adopted by the courts of Holland. Roberts *A South African legal bibliography* (1942) 290 mentions a German translation titled *Apothecario de Venetia Politische Schupf-Tobacs-Dose vor die Wächserne Nase der Justitz in sich fassend Juristische Streifragen in Handel en Wandel von denen Kauf- und Mieth- oder Pacht- auch andern Contracten mit Satyrischer Feder entworfen und aus den Italianischen ins Teutsche übersetzt. Mundus vult decepti* (1739). He is also of the opinion that this is a serious work and states that both sides of the questions discussed are given “Prise – Left nostril, right nostril, both nostrils” (Roberts 290). However, this author remains sceptical whether this work can indeed be taken seriously and suffices with

noticing that it remained unmentioned in the highly useful and instructive introduction to Van der Linden's *Rechtsgeleerd practicaal en koopmans handboek te dienste van regters, practizijns, kooplieden en allen die een algemeenen overzigt van regtskennis verlangen* (1806; transl Juta as *The institutes of Holland, or manual of law, practice and mercantile law* (1891)) where Van der Linden gives the necessary instructions for the foundation both of the study of jurisprudence and of a select law library, sections IX, X, XI and XII of which deal with Van der Linden's *Modern law*.

The important point is that paying lip service to the sources of Roman-Dutch law did not prevent the court from searching beyond these parameters. This is an obvious ploy since the wider the net is thrown, the greater the possibility to find contradictory texts, even though such contradictions may be limited to minor detail. The principle of *laesio enormis* was nowhere queried, but the conflicting details made Van den Heever profess:

"I know of no law of citations which could aid us in making a selection between these warring authorities. Where they make conflicting statements on a useful and rational institute, we may choose to rely upon these opinions which appear to us to be more conformable to reason. Here the authorities are engaged in a dispute upon an alleged rule which is superficially attractive but which upon closer examination appears to be rank unreason" (874).

The most poignant point of the *Tjollo* case is the paradigm shift of the Appellate Division away from equity towards law and economics, as expressed by repeated references to modern commercialism.

Abrogation of the doctrine of *laesio enormis* limits the possibilities for redress for the unfortunate ignorant seller to *error*. The vicissitudes of this approach are well-documented in the Dutch *Kanthalos* case.

5 The *Kanthalos* case

In 1943 a workman dredged an old cup from the Meuse. He sold it to a collector of curiosa. The latter's niece inherited the cup and sought an expert opinion on the material of the cup. One of the experts, the Director of the Dutch Gold and Silver Museum opined that the cup was made of silver, but of little value. Eventually the cup was sold for fl 125- to the other expert, Mr Brom, a gold and silversmith in Utrecht, who was a member of the board of the museum. Mr Brom approached a professor of archaeology of the University of Utrecht and it was eventually determined that the cup was a Hellenistic *Kanthalos* of the second century BC and of immense artistic and historical value. Scientific and popular publications followed and upon learning the true value of the cup the seller, Mrs van der Linden, instituted an action against Mr Brom. In the absence of *laesio enormis*, which was not enacted in the Dutch codification of 1838, she based her claim alternatively on fraud, delict and mistake. The first two grounds were rejected, but the court of first instance decided that the contract had been void on the basis of mistake. This decision was reversed on appeal (HR 19 June 1959 NJ 1960 59; Feenstra "The Dutch *Kanthalos* case and the history of error in substantia" 1974 *Tulane LR* 846-858).

6 More than just art and antiques

It should be kept in mind that in Roman-Dutch law the doctrine of *laesio enormis* applied to all bilateral contracts and the following instance may convince those sceptics who hold that arts and antiques are only worth what a fool is prepared to pay.

In *Mort NO v Henry Shields-Chiat* 2000 1 SA 464 (C) another encounter is found where the rule of the profit motive predominated over *cerebrissima aequitas*.

A minor on a motor cycle collided with a Mercedes Benz. The child suffered severe, permanent physical damage. His father approached a firm of attorneys in view of a claim for damages and signed an agreement relating to fees and disbursements. The claim was settled and the Multilateral Motor Vehicle Accident Fund paid the amount of R1 120 000 into the attorney's trust account in respect of loss of earnings and general damages incurred by the minor. The respondent deducted various disbursements and a professional attorney/client fee of R225 000 – VAT excluded (465I–466I).

The dispute before the court was whether respondent could deduct fees directly from the amount paid by the fund or whether he was required to pay over the total amount and could thereafter claim fees pursuant to a taxed bill (467B and C). The validity, scope and ratification of the mandate as discussed by the court fall outside the scope of this note. The doctrine of *bona fides* was raised by Davis J (474A), but he reached the conclusion that even the existence of the constitutional community has not given this concept enough content to trump sanctity of contract (475G–J 476F–J).

This brings us to some other facts of the case. The respondent was admitted as an attorney in 1985. During 1998 he was claiming an hourly rate of R925 – while the high court tariff allowed for a fee of R400 per hour. The fee parameters issued by the Cape Bar Council which applied until August 1998 allowed for senior council with up to five years experience to charge consultation fees between R550 and R700 per hour, while the tariffs in respect of attorneys representing the Road Accident Fund in litigation of this nature allowed an hourly fee of R500 (476A–E).

7 Conclusion

Times change. Madonna is no longer the mother of Christ, but the *Material Girl*. As a result of the victory of the market the tribulations of the little person in every-day private law-life have become a forgotten corner in a foreign country. The most remarkable aspect of the *Tjollo* case was that Mr Small actually went to court to state his case, which step in the present time would be unaffordable. Over and above this hard fact of economic reality, it is to be regretted that even in our constitutional community the courts do not feel mandated to employ the concept of *bona fides* in such a manner as to rectify the blatant inequality of resources, whether material or intellectual, of contracting parties. Although Davis J states that he arrived at his conclusion with some difficulty since this case illustrates the problem of a distressed and desperate parent signing a mandate in terms of which an attorney can charge huge fees on a contingency basis after a motor accident involving a child, he was unable to find sufficient evidence to invoke the doctrine of good faith to alter the terms.

It is obviously out of the question to clamour for the reintroduction of the doctrine of *laesio enormis*, but introduction of legislation to shape the concept of *bona fides* as proposed in 1989 by the project team under the leadership of CFC van der Walt in their report relative to Project 47 on unfair contract terms, delivered to the South African Law Commission, may well fall within the constitutional mandate.

Finally it should be noted that the constitutional values of human dignity, equality and freedom do to a large extent overlap with the fundamental principles of Roman law, as expressed by Ulpianus in *D 1 1 10* "to live honourably, not to harm any other person, to render to each his own".

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**SOME PRINCIPLES REGARDING THE "REQUESTER" OF ACCESS
TO A RECORD AND RELATED ISSUES IN TERMS OF THE
PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000**

1 Introduction

The Promotion of Access to Information Act 2 of 2000 (with the exception of four sections) came into operation on 9 March 2001 (see Proc R20 of 2001 in GG 22125 of 2001-03-09). It represents an ambitious, sophisticated and far-reaching attempt to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights (see s 32 of the Constitution).

The Promotion of Access to Information Act ("the Act") is a highly technical piece of legislation. Practical experience will be necessary to identify shortcomings in its application. These may then be addressed through appropriate legislative amendments. In addition, judicial interpretation will in due course provide the necessary clarity and guidance regarding the interpretation and application of the provisions of the Act.

The Act has been passed to set the parameters of the rights of various parties (who qualify as requesters) within our society to demand information from other parties. The right which is fostered in the Constitution to information in the possession of other parties, is sought to be canalised and/or given articulation to by means of this Act. The very complicated nature of the Act with, *inter alia*, its many provisos and time limits, its procedural machinery, its reference to public bodies and private bodies and the meaning thereof, reflect the fact that this Act, whilst seeking to promote the availability of information, is also designed to ensure that parties are not put to needless time, trouble and expense and that parties are not unnecessarily called upon to give up information which is otherwise confidential or alternatively which they are simply entitled to refuse to give out unless for sufficient reason (see generally on the constitutional aspects De Waal, Currie and Erasmus *The Bill of Rights handbook* (2000) 436; Devenish *A commentary on the South African Bill of Rights* (1999) 442).

The object of this note is to identify and briefly discuss and evaluate a number of issues regarding the *requester* of access to a record. It is not intended to provide a schematic analysis or guide to the Act (see generally on aspects of the Act

Gaum "The right to access to information: *Korf v Health Professions Council of South Africa*" 2001 *THRHR* 146).

2 Access to records

Although the short title of the Act uses the expression "access to information" and the Act gives content to the constitutional right to "information", the legislation in question provides for access to "records" containing information. A "record" is defined as "any recorded information" irrespective of the form or medium used and that is in the possession or under the control of a public body or a private body (s 1). This suggests that this legislation cannot be used to gain access to non-recorded information – for example, the sending of a list of questions aimed at extracting information or the non-recorded reasons for a decision.

The right to access is carefully qualified, not merely in terms of the grounds which may justify a refusal of access (see eg part 2 ch 4), but also with reference to the nature of the body that has to grant such access, namely a "public" or a "private" body.

3 Public bodies and private bodies

In section 1 a requester is defined in relation to the entity which has to provide access to a record, namely a "private body" or a "public body." It is thus necessary to ascertain the statutory meaning and interpretation of these concepts. There may also be entities that do not fall into any of these two categories – and from whom access to a record may not be demanded in terms of the Act.

Three types of public bodies are recognised in terms of the Act. The significance of this classification will be referred to further on. The *first* category of entities is a department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government (s 1(a)). The *second* is any other "functionary" or "institution" (these concepts are not defined), but only *when* exercising a power or performing a duty in terms of the Constitution or a provincial constitution (s 1(b)(i)). The *third* type is any other functionary or institution *when* exercising a public power or performing a public function in terms of any legislation.

The following should be noted:

In some instances the expression "public body" is a relative concept depending on the nature of the functions performed. In other words, a body may be a public body only in regard to certain records.

- The first type of public body (namely a department of state, administration, et cetera) is not qualified in any sense and is thus an "absolute" concept. For example, it would not make any difference whether a record to which a requester requires access relates to the purely commercial actions of the public body or to any other function or fact.
- The second type of public body (namely any person or other entity that qualifies as a "functionary" or "institution" in the ordinary sense of these expressions) is a public body only when it exercises a "power" or performs a "duty" in terms of the national Constitution or a provincial constitution (and not in terms of any other law). This means, for example, that when not exercising a "power" or performing a "duty" (these terms will be interpreted with reference to the Constitution or the provincial constitution concerned) the functionary or institution will not be a public body and records with information on its activities in such a capacity will not be the records of a public body.

- The third category of public body provides for any functionary or institution when it exercises a “public” power or performs a “public” duty in terms of any legislation. The use of the qualification “public” should be noted – this does not appear in the description of the second type of public body referred to above. The implication is that when a functionary or institution exercises a power that is not “public” (for example in the sense of pertaining to the members of the public or a part of the members of the public, or “public” in some other legal sense), or performs a function (activity) that is not performed in regard to the public or a segment of the public, or performs a public function that is not based on a legislative provision, it is *not* a public body – with the corollary that its records in this capacity are not the records of a public body.

One of the questions that arises from the above, is what the status of a functionary or institution is when it is *not* a public body. Does it then automatically become a “private body” (referred to below) or is it neither of the two? The answer to this depends, *inter alia*, on whether there is a general concept of “body” with public and private bodies as its two mutually exclusive sub-concepts.

In order to answer this question, as well as deal with other relevant matters, the definition of a private body should be considered. The definition reads (s 1):

- “(a) [A] natural person who carries on or who has carried on any trade, business or profession, but only in such capacity;
 - (b) a partnership which carries or has carried on any trade, business or profession;
 - (c) any former or existing juristic person;
- but excludes a public body.”

The following may be observed in this regard:

- The definition recognises that “private body” is a relative concept when it relates to a natural person. This means that records in the possession of a natural person that do not deal with issues concerning “trade”, “business” or “profession” (which terms are not defined in the Act) will not be the records of a private body and may accordingly not be requested in terms of the Act.
- The principle relating to a partnership speaks for itself.
- Any “former or existing” juristic person qualifies as a private body – irrespective of the nature of its activities. It should be noted that since a “former” juristic person no longer exists, it would not be able to deal with a request for access to its records. The apparent principle here is to oblige some other person or entity in possession of the records of the former juristic person to grant access to them to a requester in terms of the Act.
- The qualifier at the end of the definition (excluding a public body) may indicate a number of things. It may, for example, signify that an entity cannot be a public body and a private body at the same time (in other words, as far as a particular activity and records pertaining to such an activity are concerned). In addition, it may mean that when a body which generally qualifies as a public body in a particular sphere in terms of the relative description of such a body (see the second and third classes of public bodies referred to above), it will not be a private body either. This latter interpretation is probably not correct, in view, *inter alia*, of the wording in section 8(1) of the Act which provides that the third class of public bodies referred to above, or a private body, may either be a public body or a private body in relation to a record of that body

and may in one instance be a private body and in another instance a public body, depending on whether the record relates to the exercise of a power or the performance of a function as a public body or as a private body. This does not seem to contemplate a situation where the body is neither of the two. If a body were neither of the two, the Act would not be applicable to it.

4 A requester

Only a person or entity qualifying as a “requester” has the right of access to records as contemplated in the Act (see ss 11 and 50). To be recognised as a requester in respect of a record, one must fall within the definition of this concept in section 1 of the Act:

“[R]equester, in relation to –

(a) public body, means –

(i) any person (other than a public body contemplated in paragraph (a) or (b)(i) of the definition of ‘public body’, or an official thereof) making a request for access to a record of that public body; or

(ii) a person acting on behalf of the person referred to in subparagraph (i);

(b) a private body, means –

(i) any person, including, but not limited to, a public body or an official thereof, making a request for access to a record of that private body; or

(ii) a person acting on behalf of the person contemplated in subparagraph (i).”

The definition of “person” in section 1 of the Act must be read in conjunction with the above. It is different from the general definition of “person” contained in the Interpretation Act 33 of 1957 and includes only a natural person or a juristic person (and not a body of persons whether corporate or incorporate). This means, for example, that a partnership or an association of persons not having the status of a juristic person, will not be able to utilise the machinery of the Act to access a record. However, in practice this should not create much of a problem as a natural person associated with a partnership or association may act as requester (provided that all other requirements are satisfied).

A differentiation is made between various categories of public bodies for the purposes of gaining access to a record. For the purpose of accessing the records of a “public body” it will only be a public body qualifying as a “person” and falling within the scope of section 1(b)(ii) (a body exercising a public power or performing a public function in terms of any legislation) that is entitled to use the procedures of the Act. Why the other public bodies or their officials should be excluded, is not immediately evident. It is assumed that they would be able to gain access through other legal measures. As far as accessing the records of a “private body” is concerned, all public bodies and their officials qualify as a “requester” – provided, it would seem, that the requester is also a natural or a juristic person.

Since the definition of requester is linked to a “public body” or a “private body” that has to grant access to a record, it is clear that a person cannot be a requester in regard to an entity that does not qualify as either. The following are examples of this: a natural person in his or her capacity other than the carrying on of a trade, business or a profession; an association of persons not having the status of a juristic person (and which is not a partnership); an organisation or body which is not a public body and which does not qualify as a juristic person (eg a trust).

The representative of a "requester" also falls within the definition of a requester. However, it should be noted that for the purpose of gaining access to a record in practice such a representative must submit proof of the capacity in which the requester is making the request (ss 18(2)(f) and 53(2)(f) of the Act).

The Act also recognises a "personal requester". This is defined (s 1) as a requester seeking access to a record containing personal information about the requester. The Act contains certain provisions to give easier access to records in the case of a personal requester (see eg s 22(1)).

A requester requesting access to the record of a private body has to demonstrate that the record is required for the exercise or protection of any rights (s 50(1)(a)). The Act does not expressly state that it must be the requester's right that is to be exercised or protected. In this regard the Act follows the wording of section 32 of the Constitution. The failure to refer to the requester's right may have been intended to cover the situation where X requests access to a record on behalf of another person. However, outside this field, it could not have been the intention of the legislature that X may request information for the protection or exercise of a right by Y.

The position regarding "reasons" for access is different in the case of access to the record of a public body. In such a situation the requester does not have to indicate the purpose for which the record is requested. This suggests that even if access is requested for purposes other than the protection of a right or interest, the request is not invalid. In fact, section 11(3) provides that a requester's right of access to the record of a public body is not affected by the reasons given for the request or the information officer's belief as to what the reasons are. However, it should be noted that this provision is not without its difficulties. For example, a request for access may be denied if it is manifestly frivolous or vexatious (s 45 of the Act). What is the position if the reasons provided by the requester demonstrate this fact? It could hardly have been the intention of the legislature, despite the general language used in section 11(3), that the requester's reasons or the beliefs of the information officer will not be relevant *vis-à-vis* the application of section 45.

5 Concluding observations

It will not be surprising if problems are experienced in the practical application of the concepts and principles relating to a "requester" referred to above.

For example, it will in some instances be crucial to distinguish between a public body and a private body to determine the status of a requester and whether a valid reason (the protection or exercise of a right) has to be provided (as well as the applicability of other provisions in the Act). The Act does not really provide much assistance in differentiating between certain public bodies and private bodies. The concepts "public" and "private" have been used through the ages. However, they are still not clearly defined or absolute legal concepts. Judicial interpretation and practical experience will be necessary to bring greater clarity for the purposes of this Act.

One may, for example, question whether a parent of a learner that is enrolled at a public school (as envisaged in the South African Schools Act 84 of 1996) qualifies as a requester in respect of *any* financial documentation of the school in question. A public school is a juristic person (see s 15 of the South African Schools Act). The question is whether all its financial records relate to a public

function or a public power in terms of any legislation. It would seem, without analysing this issue in detail, that some of these records would indeed be so related but that others may fall outside this field. However, the question is where the line is to be drawn.

The effect of the exclusion of voluntary associations from the definitions of requester and "private body" is something which will have to be evaluated over time. Every provision of the Promotion of Access to Information Act will have to be tested against the Constitution. It is so that section 8 of the Constitution only provides for fundamental rights (including the right of access to information) in respect of natural and juristic persons. However, there is nothing that prevents the legislature from going beyond the minimum prescribed by the Constitution as far as "requester" is concerned.

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AANKONDIGING

Die vorige uitgawe se redaksionele rubriek het in die vooruitsig gestel dat meer as die "toegelate" 144 bladsye moontlik teen die betaling van bladgelde gepubliseer sal kan word. Die omvang van hierdie uitgawe toon dat dié moontlikheid bewaarheid is. Bykomstige bladsye kan in eenhede van sestien ingekoop word met 'n maksimum van 32 bladsye per uitgawe. Die redaksionele beleid om gekeurde bydraes te plaas in die chronologiese volgorde waarin dit ontvang is, bly desondanks van krag. Die plasing en volgorde van bydraes berus steeds in die diskresie van die redaksie. Navrae in hierdie verband kan aan die redakteur gerig word.

ERRATUM 2002 *THRHR* 123:

1999 3 SA 150 (K) ipv 1999 3 SA 150 (HHA)

VONNISSE

NALATIGHEID AS AANSPREEKLIKHEIDSVEREISTE VIR DIE *ACTIO INIURIARUM* BY LASTER

Marais v Groenewald 2001 1 SA 634 (T)

“Eendrag maak mag, maar tweedrag breek krag. Die leuse lê vergete, verberg onder die stof van gestoei in Afrikanergeleedere.”

So lui die aanvangswoorde van regter Van Dijkhorst se uitspraak oor die maandelange, heftige politieke twis wat die hofszaak in *Marais* voorafgegaan het. Vir huidige doeleindes is dit nie nodig om enige besonderhede oor hierdie konflik te verskaf nie. Wat wel van kardinale belang is, is die regter se beslissing oor die skuldvereiste by laster.

Ten aanvang skaar die hof (644B–F) hom by gevestigde reg dat die publikasie van lasterlike woorde wat op die eiser betrekking het, afgesien van die vermoede van onregmatigheid, ook die vermoede skep dat die publikasie *animus iniuriandi* geskied het (sien bv ook *SAUK v O'Malley* 1977 3 SA 394 (A) 401–402; *Herselman v Botha* 1994 1 SA 28 (A) 35; Neethling *Persoonlikheidsreg* (1998) 200). (Terloops, anders as igv die vermoede van onregmatigheid wat 'n volle bewyslas – en nie bloot 'n weerleggingslas (of voortgangsverpligting) nie – op die verweerder plaas (sien *Neethling v Du Preez*; *Neethling v The Weekly Mail* 1994 1 SA 708 (A) 767–769; Neethling *Persoonlikheidsreg* 173 vn 136), het 'n mens by die vermoede van *animus iniuriandi* waarskynlik steeds met 'n weerleggingslas te make (sien *Neethling* 768–769). Die *Neethling*-saak bevestig dus die gevestigde standpunt in hierdie verband (sien bv *O'Malley supra* 401–403; *Herselman supra* 35).)

In die lig van *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) waar nalatigheid as grondslag vir aanspreeklikheid van die massamedia weens laster aanvaar is, stel regter Van Dijkhorst (644F–645F) vervolgens die vraag – wat deur die Hoogste Hof van Appèl oopgelaat is – of aanspreeklikheid van ander verweerders weens laster in die afwesigheid van *animus iniuriandi* nie ook tot nalatigheid uitgebrei moet word nie. Hy verklaar (645H–647A):

“Die klassieke onderskeid tussen die *actio iniuriarum* (waaronder ons lasterreg resorteer) en die gewone deliktuele aanspreeklikheid van die *actio legis Aquiliae* het gelê op die vlak van die skuldvereiste en die vlak van genoegdoening/skadevergoeding. By die *actio iniuriarum* was die skuldvorm opset. By die aquiliese aksie is die mees voorkomende skuldvorm nalatigheid en speel opset 'n mindere rol. By die *actio iniuriarum* het opset twee elemente. Die wilsgerigtheid op die gevolg (by laster die skending van die goeie naam) en die onregmatigheidsbewussyn (in die lasterreg die wete dat wederregtelik opgetree word) . . .

Die suiwer benadering is wat die media betref in ons lasterreg om goeie rede laat vaar. Eers is skuldlose aanspreeklikheid ingevoer in *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A) en dit is onlangs getemper in *National Media Ltd and Others v Bogoshi* (*supra*) deur die vereiste van *animus iniuriandi* te stel, maar te bepaal dat die afwesigheid van onregmatigheidsbewussyn nie opgewerp mag word waar daar nalatigheid aan die kant van die verweerder was nie. Dieselfde benadering is al te vind in *Hassen v Post Newspapers (Pty) Ltd and Others* 1965 (3) SA 562 (W).

Die effek is dus dat die onderskeid tussen aquiliese aanspreeklikheid en aanspreeklikheid onder die *actio iniuriarum* wat skuld betref in dié opsig vervaag het. Dit is gedoen om doelmatigheidsredes, maar dit is ook geheel in ooreenstemming met die regsgevoel.

Soos vermeld is die vraag of die grondslag van nalatigheid in die lasterreg universele werking moet kry oop gelaat in twee beslissings van ons Hoogste Hof. 'n Insiggewende oorsig van die gesag en literatuur oor die vraag is te vind in Neethling *Persoonlikheidsreg* 4de uitg para 4.2.3.2. Wat die lasterreg betref stem ek saam met die geleerde skrywer se gevolgtrekking (vóór *Bogoshi*) dat nalatigheid as aanspreeklikheidsvereiste vir die *actio iniuriarum* erken moet word. Dit skep myns insiens 'n gesonde balans tussen die grondwetlik beskermde persoonlikheidsreg op die integriteit van 'n goeie naam en die reg op vryheid van spraak. Dit verhoed die met die regsgevoel botsende situasie dat 'n verweerder wat wilens en wetens 'n ander se goeie naam skaad terwyl hy selfs grof nalatig in die waan verkeer dat wat hy doen regmatig is, skotvry bly.

Mag met die standpunt die Rubicon oorgesteek word in die lig van die feit dat *Bogoshi* juis die media uitsonder vir spesiale behandeling (op 1214F) op grond van die vernietigende invloed wat hul vals beriggewing op 'n persoon se goeie naam kan hê, vergeleke met die beperkte invloed van laster deur gewone burgers? Dit is egter 'n kwessie van graad. Skriftelike laster kan anders as deur die media – soos hier deur partystrukture – tog ook wyd versprei word en 'n goeie naam skaad. Publikasie kan so veel wyer wees as in 'n plaaslike koerantjie. Daar is geen beginselverskil nie. Die remedie is doelmatigheidshalwe aangepas na gelang van die veronderstelde omvang van die kwaad.

Ten einde die reg op menswaardigheid verskans in art 10 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996, insoverre dit die goeie naam omvat, te eerbiedig, beskerm en verweselik soos 'n geregshof geroepe is om te doen, is dit myns insiens noodsaaklik dat aantasting daarvan deur publikasie van valse stellings aanspreeklikheid op grond van laster onder die *actio iniuriarum* meebring by afwesigheid van onregmatigheidsbewussyn wat nalatiglik ontstaan, al sou opset by moontlikheidsbewussyn ontbreek.

Hierdie ontwikkeling van die gemenereg strek myns insiens ter bevordering van die gees en oogmerke van die Handves van Regte soos voorgeskryf in art 39(2) van die Grondwet en werk nie benadelend in op die vryheid van spraak verskans in art 16(1) daarvan nie.

Oor die vraag of ook geringe nalatigheid (*culpa levissima*) dieselfde gevolg behoort te hê hoef ek my nie uit te laat nie. By die beoordeling van die vraag of daar nalatigheid is kan met vrug ag geslaan word op die stappe voorgeskryf in *Bogoshi* ten opsigte van die redelikeheidsmaatstaf daar genoem."

Hierdie *dictum* verg die volgende kommentaar:

- (a) Tradisioneel word *animus iniuriandi* as vereiste vir die *actio iniuriarum* by laster gestel (*Marais* 645H–J; sien ook *O'Malley supra* 401–403 409; *McNally v M&G Media (Pty) Ltd* 1997 4 SA 267 (N) 273; *Kyriacou v Minister of Safety and Security* 1999 3 SA 278 (O) 288–289 290–291; *Majolica Pottery (Venda) (Pty) Ltd v Barrow & Coetzee* 1999 1 SA 1166 (K) 1177–1181; *Burchell Personality rights and freedom of expression. The modern*

actio iniuriarum (1998) 303 ev). Nalatigheid is in die reël dus onvoldoende om die dader aanspreeklik te stel (*O'Malley supra* 407; *Marais* 644D–E).

- (b) Mettertyd is uitsonderings op die reël erken. In eerste instansie is nalatigheid as voldoende skuldverwytyt geag vir die aanspreeklikheid van die verspreiders en verkopers van leesstof (soos koerante en tydskrifte) wat lasterlike bewerings bevat (vgl bv *Trimble v Central News Agency Ltd* 1933 WLD 88 91–92 (1934 AD 43 48); *O'Malley supra* 407). Tweedens was daar beslissings – wat oor aanspreeklikheid van die pers weens laster handel – dat 'n nie-opsetlike, nalatige dwaling steeds aanspreeklikheid vestig (sien *Hassen v Post Newspapers (Pty) Ltd* 1965 3 SA 562 (W) 576; vgl *Vorster v Strydipers Bpk* 1973 3 SA 482 (T) 486–487). Die *Hassen*-saak is onlangs in *Bogoshi supra* deur die Hoogste Hof van Appèl bekragtig. Appèlregter Hefer beslis naamlik dat *Pakendorf v De Flamingh* 1982 3 SA 146 (A), wat as *locus classicus* vir die skuldlose aanspreeklikheid van die pers weens laster gedien het, duidelik verkeerd is. Die hof is egter nie bereid om bloot die gemeenregtelike posisie van aanspreeklikheid gegrond op *animus iniuriandi* te herstel nie, aangesien die media hulle dan maklik op afwesigheid van onregmatigheidsbewussyn as verweer sou kon beroep. Gevolglik word besluit om nalatigheid as aanspreeklikheidsgrondslag van die media vir laster te erken (vir besprekings van *Bogoshi*, sien Burchell *Personality rights* 210 ev 320 ev en “Media freedom of expression scores as strict liability receives the red card: *National Media Ltd v Bogoshi*” 1999 SALJ 1 ev; Neethling en Potgieter “Die lasterreg en die media: strikte aanspreeklikheid word ten gunste van nalatigheid verwerp en 'n verweer van media-privilegie gevestig” 1999 THRHR 447–448; Neethling “Die lasterreg, die Grondwet en *National Media Ltd v Bogoshi*” 1999 TRW 113–118; Midgley “Media liability for defamation” 1999 SALJ 212–215 221–223; sien ook Neethling, Potgieter en Visser *Law of delict* (1999) 371–372).
- (c) Afgesien hiervan, het ander pleidooie ook opgegaan om nalatigheid as voldoende skuldverwytyt vir laster in minstens besondere gevalle te erken (sien hieroor Neethling *Persoonlikheidsreg* 198 vn 322). In byvoorbeeld *Suttonmere (Pty) Ltd v Hills* 1982 2 SA 74 (N) 79 laat regter Kriek hom soos volg *de lege ferenda* in hierdie verband uit:
- “I do want to suggest that the time has come for those concerned with law reform to give some thought to a situation of which the present case is an example. The business leviathan's organisms are machines and computers which are technological masterpieces, but they are operated by fallible human beings whose negligence can result in the business reputations of innocent individuals being destroyed. There are other fields in which the individual's right to an unsullied reputation ought to be protected against the negligence of others, but it seems to me that it is important that a person who negligently harms the reputation of another by unwarranted resort to litigation should be made to bear the consequences of his negligence.”
- (d) Regter Van Dijkhorst se bevinding (646D–I) – waarmee uiteraard volmondig saamgestem word (sien Neethling *Persoonlikheidsreg* 72–74) – dat nalatigheid deurgaans as skuldvereiste vir die *actio iniuriarum* by laster aanvaar moet word, stel die logiese eindpunt van die voorafgaande ontwikkeling daar. Dit is miskien wenslik om die belangrikste oorwegings wat sy bevinding rugsteun, weer uit te stippel:
- (i) Eerstens bewerkstellig sy standpunt 'n billiker (gesonder) balans tussen die reg op die goeie naam en die reg op vryheid van uitdrukking

op die onderhawige regsgebied (*Marais* 646E; Burchell *Principles of delict* (1993) 184). Dit lyk naamlik na die beste kompromie tussen strikte aanspreeklikheid wat voorkeur aan die beskerming van die goeie naam verleen, en aanspreeklikheid gegrond op *animus iniuriandi* wat die klem op die handhawing van die reg op die vryheid van spraak plaas (Neethling *Persoonlikheidsreg* 74).

- (ii) Uit 'n regspolitiese hoek bevredig dit die reggevoel dat 'n nalatige lasteraar nie skotvry uitgaan nie (*Marais* 646E). Die posisie in *Hasen* illustreer hierdie oorweging goed. Hier het die verweerder per abuis 'n foto van die eiser gepubliseer as dié van 'n berugte verhoorafwagtende. Regter Colman aanvaar dat *animus iniuriandi* 'n vereiste vir laster is en dat dwaling *animus iniuriandi* in beginsel uitsluit. Hy meen egter dat dwaling slegs as verweersgrond aanvaar kan word as die dwaling redelik of nie aan nalatigheid te wyte was nie. Hy bevind dat die verweerder *in casu* nalatig was, dat hy hom dus nie op dwaling kon beroep nie en dat hy aanspreeklik is. Indien *animus iniuriandi* inderdaad as vereiste toegepas sou gewees het, sou die verweerder nieteenstaande klaarblyklik verwytbare (nalatige) optrede vry uitgetgaan het (sien ook *Marais* 646E).
- (iii) In beginsel is daar geen verskil of 'n persoon se goeie naam deur die massamedia dan wel deur 'n enkeling aangetas word nie. Toegegee dat die omvang van die krenking in eersgenoemde geval waarskynlik meesal groter as in laasgenoemde geval sal wees, bring dit nie, soos die regter tereg uitwys (646G), 'n beginselverskil mee nie. Die omvang van 'n lasterlike publikasie speel wel 'n rol by die bepaling van die bedrag *solatium* of genoegdoening *ex aequo et bono* wat aan die eiser verskuldig is (sien Neethling *Persoonlikheidsreg* 206 vn 373 207 vn 381 en die gesag aldaar).
- (iv) Bedoelde standpunt is ook in ooreenstemming met die waardes wat die grondwetlike Handves van Regte onderlê (*Marais* 646H-I; *Bogoshi supra* 1214; vgl Neethling, Potgieter en Visser *Delict* 372 vn 103). Die horisontale werking van die Handves (Grondwet, 1996 hfst 2) kan op 'n direkte en indirekte wyse geskied. Direkte werking beteken dat die howe, deur die toepassing en waar nodig ontwikkeling van die gemenerereg, gevolg moet gee aan fundamentele regte wat relevant is tot of verband hou met die lasterreg (sien Grondwet a 8(3); Neethling, Potgieter en Visser *Delict* 20 vn 128; Neethling *Persoonlikheidsreg* 92 vn 378). Wat die lasterreg betref, is die reg op vryheid van uitdrukking (Grondwet, 1996 a 16(1)) en die reg op die goeie naam van kardinale betekenis. (Soos bekend, word die reg op die goeie naam nie *eo nomine* deur die Grondwet van 1996 verskans nie. Desnietemin word hierdie reg, soos die geval ingevolge die tussentydse Grondwet reeds was (bv *Bogoshi supra* 216-1217; sien ook Neethling 1999 (2) *TRW* 105-106), tereg onder die reg op (mens)waardigheid van die Handves van Regte (a 10) tuisgebring (*Marais* 646H; sien ook *Van Zyl v Jonathan Ball Publications (Pty) Ltd* 1999 4 SA 571 (W) 591; *Van den Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 2 SA 242 (HHA) 253; Burchell *Personality rights* 39; Neethling, Potgieter en Visser *Delict* 21 vn 134).) Nou is dit onvermydelik dat hierdie twee direk teenoorstaande fundamentele

regte in voortdurende botsing is en daarom aan 'n noukeurige en korrekte (billike, gesonde) balansering of afweging onderwerp moet word (vgl Neethling *Persoonlikheidsreg* 96; *Van Zyl supra* 591–593). Hierdie oogmerk word inderdaad in *Marais* bereik aangesien, soos hierbo aangedui, die erkenning van nalatigheid as aanspreeklikheidsvereiste vir laster – en sodoende die ontwikkeling van die gemenerereg in hierdie verband – 'n gesonder balans tussen die reg op die goeie naam en die reg op vryheid van uitdrukking bewerkstellig.

Met die indirekte werking van die Handves van Regte word bedoel dat alle privaatregtelike beginsels, reëls en norme – inbegrepe die wat die lasterreg beheers – onderworpe is aan, en daarom inhoud gegee moet word aan die hand van die basies waardes vervat in hoofstuk 2. Sowel die beperkings- as uitlegklousule van die Grondwet (a 36(1) en 39(1)) vereis die oorweging en bevordering van waardes wat 'n oop en demokratiese gemeenskap gebaseer op menswaardigheid, gelykheid en vryheid ten grondslag lê. Voorts moet die houe by die ontwikkeling van die gemenerereg die gees, strekking en oogmerke van die Handves van Regte bevorder (a 39(2)) (sien ook Neethling *Persoonlikheidsreg* 93 vn 379; Neethling, Potgieter en Visser *Delict* 23). Soos regter Van Dijkhorst (646I) tereg aandui, strek die ontwikkeling van die gemenerereg in *Marais*, wat juis 'n gesonder balans tussen bedoelde twee fundamentele regte bereik, ter bevordering van die gees en oogmerke van die Handves van Regte.

- (e) Die hof (646J–647A) wou hom nie uitspreek oor die vraag of geringe nalatigheid ook 'n lastereis behoort te funder nie. Na my mening behoort die verweerder se graad van verwytbaarheid of afwyking van die standaard van die redelike persoon – net soos by die *actio legis Aquiliae* (vgl Neethling *Persoonlikheidsreg* 84 207; Neethling, Potgieter en Visser *Delict* 262 328) – nie 'n invloed op die *vestiging* van aanspreeklikheid weens laster te hê nie. Indien eenmaal aanvaar word dat nalatigheid 'n voldoende skuldverwyt is, is dit tog die logiese konsekwensie. Die omgekeerde standpunt kan net 'n oneindige geredekawel veroorsaak oor watter graad van nalatigheid dan voldoende sou wees en dit kan tot regsonsekerheid lei. Wat wel sin sou maak, is dat die graad van nalatigheid 'n faktor behoort te wees – verswarend of versagend – by die bepaling van die omvang van die bedrag *solutum* of genoegdoening *ex aequo et bono* (vgl Neethling *Persoonlikheidsreg* 295 ev oor die faktore wat by laster 'n rol speel).
- (f) Volgens *Marais* 647A kan daar by die beoordeling van die nalatigheidsvraag met vrag ag geslaan word op die stappe wat in *Bogoshi* (*supra* 1212–1213) voorgeskryf word ten opsigte van die redelikhedsmaatstaf aldaar genoem (sien ook Neethling 1999 (2) *TRW* 109–113). Die erkenning van nalatigheid as aanspreeklikheidsvereiste vir laster naas die onregmatigheidsvereiste, noop egter dat daar in hierdie verband 'n duidelike onderskeid tussen dié twee delikselemente gemaak moet word. Die feit dat 'n dader onredelik vir doeleindes van onregmatigheid opgetree het (*boni mores*-kriterium), beteken nie dat hy ook onredelik vir doeleindes van nalatigheid gehandel het nie (redelike voorsienbaarheid en voorkombaarheid van nadeel) (sien Neethling, Potgieter en Visser *Delict* 151–152; Neethling 1999 (2) *TRW* 117–118). Daar moet dus in elke geval waar die onregmatigheid van laster deur die media vasstaan, opnuut vasgestel word of die krenking van

die eiser se reg op die goeie naam ook redelikerwys voorsien- en oorkombaar was. Indien nie, gaan die verweerder weens gebrek aan nalatigheid vry uit. Dit sal byvoorbeeld die geval wees waar die publikasie van lasterlike onwaarhede onredelik was, maar die verweerder weens 'n redelike dwaling onder die indruk verkeer het dat die publikasie regmatig was (dws die redelike man sou ook gedink het dat hy geregtig was om bedoelde laster te publiseer) (Neethling 1999 (2) TRW 118; vgl Burchell 1999 SALJ 7 wat verklaar dat "the defence of reasonable lack of knowledge of unlawfulness is open to the media"). Gesonde regsontwikkeling op die onderhawige gebied noop dus dat onregmatigheid en nalatigheid suiwer onderskei moet word. Burchell 1999 SALJ 7 is met betrekking tot die aanspreeklikheid van die media weens laster ingelyks ten gunste van

"a more scientific assessment of the role of the fault element of negligence, being essentially a factual enquiry into foreseeability in the circumstances, as opposed to unlawfulness, involving essentially a policy-based, ex post facto inquiry".

Die hoop word uitgespreek dat die Hoogste Hof van Appèl, in opvolging van die gesonde benadering wat hy met betrekking tot die nalatigheidsaanspreeklikheid van die massamedia weens laster in *Bogoshi* toegepas het, die rigtinggewende uitspraak in *Marais* sal bevestig.

J NEETHLING

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TOEPASSING VAN DIE GRONDWET OP DIE DELIKTEREG

Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening) 2001 4 SA 938 (CC)

A is brutaal deur C aangerand terwyl sy by haar moeder (B) gekuier het. C was vantevore skuldig bevind aan huisbraak en onsedelike aanranding op grond waarvan hy beboet en tot opgeskorte gevangenisstraf gevonnissen is. Ten tyde van die aanranding was daar ook 'n klag van verkragting hangende teen hom maar hy is op aanbeveling van die ondersoekbeampte op eie verantwoordelikheid deur die landdros vrygelaat. Kort na sy vrylating het B die polisie versoek om C hangende sy verhoor aan te hou. Die polisie het die saak met die aanklaer bespreek maar laasgenoemde het B meegedeel dat tensy C 'n verdere misdaad pleeg, niks gedoen kan word nie. Kort hierna – na 'n selfmoordpoging en 'n onderhoud met die aanklaer waaruit ernstige seksuele afwykings geblyk het – word C gearresteer en vir waarneming na 'n psigiatriese hospitaal verwys. Die verslag van die hospitaal het C nóg as 'n gevaar vir die gemeenskap bestempel, nóg aanbeveel dat hy hangende die verkragtingverhoor aangehou moet word. Hierbenewens het die prokureur-generaal, wat in besit was van die dokumentêre bewyse van die erns van die verkragting en die omvang van C se seksuele afwykings, nie die aanklaer opdrag gegee om borgtog teen te staan nie. Gevolglik word hy weer deur die landdros op eie verantwoordelikheid vrygelaat. Hierna het onder andere A en B nogmaals op verskeie geleenthede tevergeefs gepoog om

die polisie en aanklaer te oordeel om C in aanhouding te plaas. Weens C se aanranding van A terwyl hy op vrye voet was, stel sy 'n eis teen die Staat in op grond daarvan dat die polisie en aanklaers 'n regsplig gehad het om haar teen C te beskerm, welke plig op onregmatige en nalatige wyse verbreek is.

Sowel die hof *a quo* as die Hoogste Hof van Appèl (vgl *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (HHA) (sien vir besprekings Neethling "Die regsplig van die polisie om die reg op die fisies-psigiese integriteit te beskerm" 2000 *THRHR* 153 en "Die regsplig van die staat om die reg op die fisies-psigiese integriteit teen derdes te beskerm: Die korrekte benadering tot onregmatigheid, nalatigheid en feitelike kousaliteit" 2001 *THRHR* 491–492) beslis dat die polisiebeampte en die aanklaers nie onregmatig gehandel het nie omdat daar in die betrokke omstandighede nie 'n regsplig op die betrokkenes gerus het om die applikante te beskerm nie. Die Hoogste Hof van Appèl is van mening dat omdat die besluit om C hangende die verhoor vry te laat by die landdros berus het, die regsplig wat die polisie en aanklaers na bewering teenoor A verskuldig was, oënskynlik beperk was tot die plig van die polisie om volle inligting oor die saak aan die aanklaers te verskaf, en die plig van die aanklaers om borgtog teen te staan en die hof van alle inligting omtrent C in hierdie verband te voorsien (497). Appèlreger Vivier besluit dat die polisie bedoelde plig nagekom het.

Volgens die regter was die volgende feite bepalend met betrekking tot die vraag na die bestaan van 'n regsplig op die aanklaers: C het net een vorige veroordeling van onsedelike aanranding – sonder gepaardgaande fisiese beserings – teen hom gehad; die psigiatryse verslag het C nóg as 'n gevaar vir die gemeenskap bestempel nóg aanbeveel dat hy hangende die verkragtingverhoor aangehou moet word; die prokureur-generaal het nie die aanklaers opdrag gegee om borgtog teen te staan nie; en die prokureur-generaal se instruksie dat alle verhoorafwagende gevangenes die reg het om vrygelaat te word tensy vrylating "contrary to the interests of justice" sou wees (sien 497–498; vgl 494–495). Appèlreger Vivier kom tot die slotsom dat dit nie onredelik was van die aanklaers om C se vrylating nie teen te staan nie, en dat die aanklaers bygevolg nie 'n regsplig teenoor A gehad het om borgtog teen te staan of C se herarrestasie te bewerkstellig nie. Hierdie slotsom word volgens die hof gerugsteun deur die feit dat daar nie 'n "spesiale verhouding" tussen die aanklaers en A bestaan het nie (499).

Teen hierdie bevinding appelleer die eiseres na die Konstitusionele Hof. Haar skuldoorsaak word soos volg deur regters Ackermann en Goldstone omskryf (950):

"The applicant's claim is founded in delict. The direct cause of the damages she suffered was the assault by [C]. However, the applicant wishes to hold the respondents liable because of the alleged wrongful acts or omissions of the police officer (Klein) or the prosecutors (Louw and Olivier) at times when they were acting in the course and scope of their employment with the State. In order to succeed, the applicant would have to establish at the trial that:

- (1) Klein or the prosecutors respectively owed a legal duty to the applicant to protect her;
- (2) Klein or the prosecutors respectively acted in breach of such a duty and did so negligently;
- (3) there was a causal connection between such negligent breach of the duty and the damage suffered by the applicant."

Die kern van die eiseres se beswaar teen die bevinding van beide die verhoorhof en appèlhof is dat dié howe nagelaat het om relevante bepalinge van die tussen-tydse Grondwet 200 van 1993 en die Grondwet 108 van 1996 (oa dié wat haar regte op lewe, menswaardigheid, vryheid en sekuriteit, privaatheid en vryheid van beweging verskans) toe te pas by die bepaling of die polisie en aanklaers 'n regsplig om haar te beskerm aan haar verskuldig was. In die besonder was daar 'n grondwetlike verpligting op beide howe om die gemenerereg in hierdie verband te ontwikkel met inagneming van die gees, strekking en oogmerke van die Handves van Regte. Volgens die eiseres sou beide howe bevind het dat daar 'n regsplig was om haar te beskerm indien die gemenerereg op bedoelde wyse ontwikkel is (951F–G). Voorts steun die eiseres op artikel 215 van die 1993 Grondwet wat onder andere 'n plig op lede van die polisie plaas om misdaad te voorkom (952E–F), asook op die verpligting wat op die Staat rus om vroue teen geweldsmisdade, veral verkragting, te beskerm. In hierdie verband verklaar hoofregter Mahomed in *S v Chapman* 1997 3 SA 341 (HHA) 344–345:

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution . . . and to any defensible civilisation. Women in this country are entitled to the protection of these rights.”

Regters Ackermann en Goldstone bevind dat nóg die verhoorhof, nóg die Hoogste Hof van Appèl oorweging geskenk het aan die betrokke grondwetlike bepalinge (953C–D). Volgens die Konstitusionele Hof rus daar ingevolge artikel 39(2) van die 1996 Grondwet inderdaad 'n grondwetlike plig op howe om die gemenerereg te ontwikkel met inagneming van die gees, strekking en oogmerke van die Handves van Regte (953 ev). By implikasie beteken dit dat waar die gemenerereg afwyk van hierdie gees, oogmerk en strekking, die howe verplig is om die afwyking reg te stel deur die gemenerereg dienooreenkomstig te ontwikkel (954A). By die uitoefening van hul bevoegdheid om die gemenerereg te ontwikkel, moet regters egter deeglik voor oë hou dat

“the major engine for law reform should be the Legislature and not the Judiciary. In this regard it is worth repeating the dictum of Jacobucci J in *R v Salituro* [(1992) 8 CRR (2d) 173], which was cited by Kentridge AJ in *Du Plessis v De Klerk* [1996 3 SA 850 (CC)] par 61]: ‘Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform . . . The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society’” (954D–F).

Aansluitend hierby verklaar die hof dat die algemene verpligting om die gemenerereg te ontwikkel, nie beteken dat 'n hof in elke geval waar die gemenerereg ter sprake is, 'n onafhanklike ondersoek moet loods of die gemenerereg ontwikkel moet word of nie (955H). Indien 'n party tot 'n geding egter aanvoer (soos *in casu*) – of die hof uit eie beweging bevind – dat sodanige ondersoek nodig is, het 'n mens met 'n tweeledige proses te make, naamlik eerstens of die bestaande gemenerereg in die lig van grondwetlike oogmerke hersiening verg, en indien wel, hoe sodanige ontwikkeling moet plaasvind (956A–B).

Wat die eerste vraag betref, vind die vasstelling van 'n regsplig om benadeling vir 'n ander te vermy, volgens geëgte delikterereg plaas deur 'n afweging van die belange van die partye in die lig van die openbare belang (sien *Minister of Law*

and Order v Kadir 1995 1 SA 303 (A) 318; Neethling, Potgieter en Visser *Deliktereg* (2002) 41–44). Hierdie is 'n proporsionaliteitstoets waarby verskeie faktore 'n rol kan speel. Hierop laat registers Ackermann en Goldstone volg (957B–F 959H–960B):

“Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the ‘spirit, purport and objects of the Bill of Rights’ and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.

Under both the [tussentydse Grondwet] and the Constitution, the Bill of Rights entrenches the rights to life, human dignity and freedom and security of the person. The Bill of Rights binds the state and all of its organs . . .

It follows that there is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection . . .

Fears expressed about the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the requirements of foreseeability and proximity. This exercise in appropriate cases will establish limits to the delictual liability of public officials. A public interest immunity excusing the respondents from liability that they might otherwise have in the circumstances of the present case, would be inconsistent with our Constitution and its values. Liability in this case must thus be determined on the basis of the law and its application to the facts of the case, and not because of an immunity against such claims granted to the respondents.”

Die Konstitusionele Hof se gevolgtrekking dat die deliktereg aanpassing verg, noop vervolgens 'n ondersoek na die vraag oor die wyse waarop sodanige ontwikkeling moet geskied ten einde grondwetlike oogmerke te verwesenlik (961H–962A 962C–963B):

“This requires not only a proper appreciation of the Constitution and its objective, normative value system, but also a proper understanding of the common law. We have previously cautioned against overzealous judicial reform . . .

There are notionally different ways to develop the common law under section 39(2) of the Constitution, all of which might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law. Before the advent of the [tussentydse Grondwet], the refashioning of the common law in this area entailed ‘policy decisions and value judgments’ which had to ‘reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people’. A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what ‘the [c]ourt conceives to be society’s notions of what justice demands’. Under section 39(2) of the Constitution concepts such as ‘policy decisions and value judgments’ reflecting ‘the wishes . . . and the perceptions . . . of the people’ and ‘society’s notions of what justice demands’ might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.

Following this route it might be easier to cast the net of unlawfulness wider because constitutional obligations are now placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected. However, it is by no means clear how these constitutional obligations on the state translate into private law duties towards individuals. A consequence of such an approach might be:

- (a) to accentuate the objective nature of unlawfulness as one of the elements of delictual liability, particularly in the context of a bail hearing where the roles and general duties of investigating officers and prosecutors are more clearly defined than would normally be the case;
- (b) to define it more broadly; and
- (c) to allow the elements of fault and remoteness of damage to play the greater role in limiting liability."

In die lig hiervan ontstaan die vraag of die verhoorhof en die appèlhof in hierdie saak absolusie van die instansie moes verleen het. Volgens die Konstitusionele Hof is daar bepalings in sowel die tussentydse Grondwet (a 215) as die Polisie-wet 7 van 1958 (a 5) wat pligte op lede van die polisiemag plaas om misdaad te voorkom (963I-964C), insluitend 'n plig om die aanklaer volledig in te lig oor feite wat vir 'n landdros van belang kan wees by sy borgbeslissing (967A).

Voorts rus daar 'n plig op aanklaers om alle toepaslike inligting rakende borgverlening al dan nie voor die hof te plaas. Die hof verklaar (967C-968F):

"[P]rosecutors have always owed a duty to carry out their public functions independently and in the interests of the public. Although the consideration of bail is pre-eminently a matter for the presiding judicial officer, the information available to the judicial officer can but come from the prosecutor. He or she has a duty to place before the court any information relevant to the exercise of the discretion with regard to the grant or refusal of bail and, if granted, any appropriate conditions attaching thereto.

In considering the legal duty owed by a prosecutor either to the public generally or to a particular member thereof, a court should take into account the pressures under which prosecutors work, especially in the magistrates' courts. Care should be taken not to use hindsight as a basis for unfair criticism. To err in this regard might well have a chilling effect on the exercise by prosecutors of their judgment in favour of the liberty of the individual. There are far too many persons awaiting trial in our prisons either because bail has been refused or because bail has been set in an amount which cannot be paid . . .

That said, each case must ultimately depend on its own facts. There seems to be no reason in principle why a prosecutor who has reliable information, for example, that an accused person is violent, has a grudge against the complainant and has threatened to do violence to her if released on bail should not be held liable for the consequences of a negligent failure to bring such information to the attention of the Court. If such negligence results in the release of the accused on bail who then proceeds to implement the threat made, a strong case could be made out for holding the prosecutor liable for the damages suffered by the complainant."

Hierbenewens is die Konstitusionele Hof van mening dat indien volledige inligting oor C se agtergrond en seksuele probleme voor die landdros geplaas sou gewees het, borg moontlik geweer kon gewees het (969G-H). In die lig hiervan – en van die grondwetlike bepalings ter beskerming van die regte van die individu, en Suid-Afrika se plig ingevolge internasionale reg om in die besonder vroue en kinders teen aantasting van hul fundamentele regte deur geweldsmisdade te beskerm (964C-965B) – moes die hof *a quo* volgens die Konstitusionele Hof nie absolusie van instansie verleen het nie. Gevolglik word die saak na dié hof terugverwys sodat die verhoor kan voortgaan.

Die volgende aspekte van die beslissing verdien beklemtoning en kommentaar:

- (1) Die Konstitusionele Hof stel dit onomwonde dat daar in die lig van die Grondwet 'n algemene plig op houe rus om die gemenerereg te ontwikkel met inagneming van die gees, strekking en oogmerke van die Handves van Regte.

- (2) Hierdie algemene plig verleen egter nie *carte blanche* aan regters om die gemenerereg na willekeur te verander nie. Die hof beklemtoon dat die belangrikste dryfkrag vir regshervorming steeds die wetgewer is en nie die regsprekende gesag nie.
- (3) Die algemene plig hou ook nie in dat die hof in elke geval 'n onafhanklike ondersoek moet loods of die gemenerereg in die lig van die Handves ontwikkel moet word nie.
- (4) 'n Ondersoek na die wysiging van die gemenerereg moet net geskied indien 'n party dit versoek, of die hof uit eie beweging dit nodig ag.
- (5) Sodanige ondersoek behels 'n tweeledige proses. Eerstens moet vasgestel word of die bestaande gemenerereg in die lig van grondwetlike oogmerke hersiening verg, oftewel of ontwikkeling van die gemenerereg noodsaaklik is, en indien wel, hoe sodanige ontwikkeling moet plaasvind.
- (6) Hierdie proses kan onses insiens soos volg daar uitsien: Die Handves van Regte (a 8(2) 1996-Grondwet) bind natuurlike en regspersone en het daarom horisontale werking (sien Van der Walt en Midgley *Delict: principles and cases* (1997) 6; Neethling *Persoonlikheidsreg* (1998) 92-93 vn 378; Burchell *Personality rights and freedom of expression. The modern actio iniuriarum* (1998) 65 ev). Sodanige werking kan op 'n direkte en indirekte wyse geskied alhoewel daar as gevolg van onvermydelike oorvleueling nie 'n skerp onderskeid tussen direkte en indirekte toepassing gemaak kan word nie. Direkte werking beteken dat die howe, deur die toepassing en waar nodig ontwikkeling van die gemenerereg, gevolg moet gee aan fundamentele regte wat relevant is tot of verband hou met die privaatrek, inbegrepe die deliktereg (sien a 8(3) Grondwet; Neethling, Potgieter en Visser 21 vn 129; Neethling *Persoonlikheidsreg* 92 vn 378) waar, *in casu*, die regte op lewe, waardigheid, vryheid en sekerheid van die persoon, privaatheid en vryheid van beweging ter sprake kom.

Die verskansing van fundamentele regte in die Handves van Regte versterk hulle beskerming (wat bv kan bestaan in die verhoging van die vergoedingsbedrag vir die aantasting van 'n fundamentele reg, soos die reg op die goeie naam – vgl *Afrika v Metzler* 1997 4 SA 531 (NmHC) 539). In die besonder verplig die Grondwet (a 7(2) 205(3)) die Staat – waarvan die polisiediens en die Departement van Justisie bepaalde organe is – om die regte in die Handves van Regte te eerbiedig, te beskerm, te bevorder en te verwesenlik. Ter toeligtig kan die reg op sekerheid van die persoon dien. Verskeie skrywers het reeds verklaar dat die verskansing van dié reg sterk aanduidend is van 'n regsplig wat op die polisie rus om redelike stappe te doen ten einde die aanranding van 'n persoon deur derdes te verhinder. Visser (“Enkele gedagtes oor die moontlike invloed van fundamentele regte ten aansien van die fisies-psigiese integriteit op deliktuele remedies” 1997 *THRHR* 499-500; sien ook Carpenter “The right to physical safety as a constitutionally protected human right” in Carpenter (red) *Suprema lex: Opstelle oor die Grondwet aangebied aan Marinus Wiechers* (1998) 139 ev 146-158; Jones “Battered spouses’ actions for damages against unresponsive South African police” 1997 *SALJ* 356 ev 369-370; Neethling *Persoonlikheidsreg* 103 vn 6, 2000 *THRHR* 150 152) noem die volgende voorbeeld:

“Dit is duidelik dat as die polisie byvoorbeeld weet dat talle aanrandings in 'n bepaalde straat plaasvind, die Staat waarskynlik deliktueel aanspreeklik kan wees as dit blyk dat X skade gely het wat waarskynlik voorkom sou gewees het indien die

polisie nie versuim het om binne hulle vermoë redelike stappe te doen (bv deur patrolling, ens) om misdadigers beter af te skrik nie.”

Die gevolgtrekking is dus dat die direkte werking van die Handves voldoende regverdiging bied vir die Konstitusionele Hof se beslissing dat die gemenerereg ontwikkel moet word ten einde beter beskerming te verleen aan die verskanste regte wat in *Carmichele* ter sprake was.

Met die indirekte werking van die Handves van Regte word bedoel dat alle privaatregtelike beginsels, reëls en norme – inbegrepe dié wat die deliktereg beheers – onderworpe is aan, en daarom inhoud gegee moet word aan die hand van die basiese waardes vervat in hoofstuk 2. Inderdaad moet die howe, soos duidelik uit die onderhawige beslissing blyk, by die ontwikkeling van die gemenerereg die gees, strekking en oogmerke van die Handves van Regte bevorder (a 39(2)) (sien ook Neethling *Persoonlikheidsreg* 93 vn 379; Neethling, Potgieter en Visser 25). Uiteraard speel die regte wat uitdruklik in die Handves verskans word ’n belangrike rol by hierdie proses, soos dan ook in *Carmichele* gebeur het.

Die indirekte werking geld in die besonder by die toepassing van die sogenaamde “open-ended” of soepele deliksbeginsels, te wete die *boni mores*-toets vir onregmatigheid, die toerekenbaarheidstoets vir juridiese kousaliteit en die redelike-man-toets vir nalatigheid, waar beleidsoorwegings en faktore soos redelikheid, billikheid en regverdigheid ’n belangrike rol kan speel. Die basiese waardes wat hoofstuk 2 onderlê, sou dus goedsikks as belangrike beleidsoorwegings by die bepaling van onregmatigheid, juridiese kousaliteit en nalatigheid geïmplementeer kon word (sien Neethling, Potgieter en Visser 25).

Hierdie benadering word reeds in die regspraak gevolg. Voorbeelde is *Marais v Groenewald* 2001 1 SA 634 (T) 646 waar die hof bevind dat die erkenning van nalatighedsaanspreeklikheid vir laster ter bevordering van die gees en oogmerke van die Handves van Regte dien omdat dit ’n gesonde balans tussen die grondwetlik beskermde persoonlikheidsreg op die goeie naam en die reg op vryheid van spraak bewerkstellig; *Ntamo v Minister of Safety and Security* 2001 1 SA 930 (TkHC) 841–841 waar die hof onomwonde met betrekking tot doodslag in noodweer verklaar dat die “new constitutional dispensation certainly has a bearing on the *boni mores* of society. Surely, the legal convictions of the community on the issue under discussion are, at present, informed by, *inter alia*, the sanctity of life, a fundamental right enshrined in s 11 of the Constitution”; en *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (HHA) 1256–1257 1263 (sien ook *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 2 SA 54 (K) 64–67) waar die hof hom soos volg oor “breach of a statutory duty” uitlaat:

“It is well established that in general terms the question whether there is a legal duty to prevent loss depends on a value judgment by the court as to whether the plaintiff’s invaded interest is worthy of protection against interference by culpable conduct of the kind perpetrated by the defendant. The imposition of delictual liability (as Prof *Honoré* has pointed out) thus required the court to assess not broad or even abstract questions of responsibility, but the defendant’s liability for conduct ‘described in categories fixed by the law’. This process involves the court applying a general criterion of reasonableness, based on considerations of morality and policy, and taking into account its assessment of the legal convictions of the community and now also taking into account the norms, values and principles contained in the Constitution. Overall, the existence of the legal duty to prevent loss ‘is a conclusion of law depending on a consideration of all the circumstances of the case’ . . . [I]n deciding whether a statutory provision grounds a claim in damages the determination of the legal convictions of the community must take account of the spirit, purport and objects of the Constitution . . .”

Soos hierbo blyk, word hierdie benadering uitdruklik in *Carmichele* toegepas. Die hof doen trouens aan die hand (963A–B; hierbo aangehaal) dat die toepassing van die Handves van Regte op die deliktereg *in casu* tot gevolg kan hê dat dit die objektiewe aard van onregmatigheid as delikselement beklemtoon, en dat dié element duideliker en wyer omskryf sal word; asook dat skuld en juridiese kousaliteit 'n belangriker aanspreeklikheidsbegrensiingsrol behoort te speel. 'n Behoorlike toepassing van dié delikselemente, soos registers Ackermann en Goldstone tereg uitwys (959H–960B; hierbo aangehaal), behoort ook die vrees vir die ongebreidelde uitbreiding van veral staatsaanspreeklikheid (soos van die polisie en aanklaers) te besweer.

Die proses van herwaardering van veral die inhoud van onregmatigheid kan volgens die Konstitusionele Hof tot gevolg hê dat bestaande begrippe en norme óf vervang óf uitgebrei en verryk word deur die waardesisteen wat in die Grondwet beliggaam is. Aangesien die wetgewer – en nie die hof nie – die belangrikste dryfkrag vir die ontwikkeling van die gemenerereg in hierdie verband is, moet die proses van vervanging of verryking van bestaande norme met omsigtigheid hanteer word. Daarom word aan die hand gedoen dat by die uitoefening van hierdie proses, die algemene beginsels wat reeds met betrekking tot die redelikheds- of *boni mores*- (regsoortuigings van die gemeenskap) kriterium vir deliktuele onregmatigheid uitgekristalliseer het, steeds – ook in die lig van die gees, strekking en oogmerke van die Handves – as *prima facie* aanduiding beskou kan word van die redelikhed al dan nie van 'n handeling (vgl Neethling, Potgieter en Visser 23–24; Neethling *Persoonlikheidsreg* 69 95 vn 389). Hierdie standpunt blyk reeds uit *National Media Ltd v Bogoshi* 1998 4 SA 1196 (HHA) waar die Hoogste Hof van Appèl strikte aanspreeklikheid van die pers weens laster deur nalatighedsaanspreeklikheid vervang het, nie in die eerste plek omdat grondwetlike waardes die vervanging genoop het nie, maar omdat die gemeenregtelike lasterreg deur die invoer van nalatighedsaanspreeklikheid op sigself 'n behoorlike balans bewerkstellig tussen die reg op die goeie naam en die reg op vryheid van uitdrukking, selfs al word hierdie regte ook as grondwetlike waardes beskou (Neethling, Potgieter en Visser *Delict* 362 vn 104).

In die lig hiervan behoort die beginsels wat reeds in die regspraak met betrekking tot byvoorbeeld die vasstelling van die regsplig wat op die staat kan rus om persone teen aanranding deur derdes te beskerm, steeds as vertrekpunt te dien (sien Neethling 2000 *THRHR* 153–154, 2001 *THRHR* 489 en die gesag aldaar). Afgesien van die konstitusionele imperatief om die reg op die sekerheid van die persoon te beskerm, is die volgende faktore van belang: die algemene statutêre verpligting om misdaad te voorkom en onderdane te beskerm; Suid-Afrika se plig ingevolge internasionale reg om in die besonder vroue en kinders teen geweldsmisdade, veral verkragting, te beskerm; die wete (kennis) of waarneming van die aanranding of dreigende aanranding; 'n kontraktuele onderneming om 'n persoon te beskerm; feitlike beheer of kontrole oor 'n (potensieel) gevaarlike toestand; die waarskynlike of moontlike omvang van die nadeel wat die eiser kon ly; welke voorsorgmaatreëls redelikerwys (en uit 'n praktiese oogpunt) geverg kon word, wat die kans was dat die maatreëls suksesvol sou wees, en of die koste verbonde aan die neem van die maatreëls proporsioneel sou wees tot die skade wat die eiser kon ly.

Die Konstitusionele Hof se gebalanseerde benadering in *Carmichele* tot die toepassing van die Handves van Regte op die deliktereg verdien instemming. Dit verskaf naamlik die grondslag vir 'n gesonde wisselwerking tussen *de lege lata*

delikterebeginsels en die *de lege ferenda* rol wat die gees, strekking en oogmerke van die Handves op hierdie regsgebied moet speel.

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**DIE REGSPILIG VAN DIE STAAT OM DIE REG OP DIE FISIES-
PSIGIESE INTEGRITEIT TEEN AANTASTING DEUR DERDES TE
BESKERM: TWEE TEENSTRYDIGE BESLISSINGS**

**Van Eeden v Minister of Safety and Security 2001 4 SA 646 (T);
Seema v Lid van die Uitvoerende Raad vir Gesondheid, Gauteng 2002 1
SA 771 (T)**

Die regsplig van die staat om die reg op die fisies-psigiese integriteit van die publiek teen aantasting deur derdes te beskerm, het reeds voorheen aandag geniet (sien by Neethling “Die regsplig van die polisie om die reg op die fisies-psigiese integriteit te beskerm” 2000 *THRHR* 150; Neethling “Die regsplig van die staat om die reg op die fisies-psigiese integriteit teen derdes te beskerm: Die korrekte benadering tot onregmatigheid, nalatigheid en feitelike kousaliteit” 2001 *THRHR* 489). Hierdie onderwerp het nou weer in twee onlangs gerapporteerde, teenstrydige uitsprake, *Van Eeden* en *Seema*, (snaaks genoeg, beide van die Transvaalse Provinsiale Afdeling van die Hooggeregshof) ter sprake gekom. Hierdie beslissings is egter gelewer voordat die Konstitusionele Hof sy stempel in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) op die toekomstige ontwikkeling van die onderhawige regsplig afgedruk het (sien Neethling en Potgieter “Toepassing van die Grondwet op die deliktereg” 2002 *THRHR* 266 ev). Vandag sou dit ondenkbaar wees om enigiets oor die onderwerp te sê of te beslis sonder om – afgesien van wat in vorige sake van waarde kan wees (sien by *Minister van Polisie v Ewels* 1975 3 SA 590 (A); *Mtati v Minister of Justice* 1958 1 SA 221 (A); *Nkumbi v Minister of Law and Order* 1991 3 SA 29 (OK); *Mpongwana v Minister of Safety and Security* 1999 2 SA 794 (K); *Moses v Minister of Safety and Security* 2000 3 SA 106 (K)) – die beginsels en riglyne wat aldaar aan die hand gedoen is, deeglik in ag te neem.

Van Eeden: Die eiseres is aangeval, onsedelik aangerand, verkrag en besteel deur ’n man (M) wat uit polisie-aanhouding ontsnap het. M was ’n gevaarlike verdagte wat weens verskeie ernstige misdade (soos huisbraak, diefstal, *crimen iniuria*, onsedelike aanranding, verkragting en gewapende roof) gearresteer was. Sy ontsnapping is moontlik gemaak deurdat die polisie versuim het om ’n sekuriteitshek te sluit. Omdat die ontsnapping maklik voorkom kon word deur eenvoudig die hek gesluit te hou, het die polisie erken dat hulle versuim het om redelike sorg aan die dag te lê en dus nalatig opgetree het. Die enigste vraag waaroor die hof moes beslis, was of daar in die omstandighede ’n regsplig op die

polisie gerus het om deur redelike optrede te voorkom dat M uit aanhouding ontsnap, dit wil sê die vraag na onregmatigheid (648E 649I). (Terloops, indien nalatigheid ook in geskil was, sou die logies-korrekte benadering gewees het om eers vir onregmatigheid en daarna vir nalatigheid te toets (Neethling, Potgieter en Visser *Deliktereg* (2002) 131 vn 6).)

As uitgangspunt aanvaar regter Swart (649I–651E) – met verwysing na onder andere *Ewels supra* en *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27 – die tradisionele toets vir onregmatigheid by aanspreeklikheid weens 'n late. Die vraag is naamlik of daar volgens die regsopvatting van die gemeenskap (*boni mores*) 'n regsplig op die dader gerus het om benadeling van die verweerder te voorkom. Regter Swart maak dit duidelik dat redelike voorsienbaarheid van benadeling – anders as subjektiewe voorsienbaarheid van benadeling – nie bepalend vir die vasstelling van 'n regsplig is nie. Hy verduidelik dit tereg soos volg (sien ook Neethling, Potgieter en Visser 48 319 vn 154 en in die algemeen 165–168 oor die onderskeid tussen onregmatigheid en nalatigheid):

“It is common cause that the question of defendant's liability cannot be settled on the basis of foreseeability alone. I quote from *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 307D–308A:

‘The Court, in so doing, erred by elevating the mere foreseeability of harm to the only test for wrongfulness of the actions of Wessels and Lategan. (It is not alleged against the appellant that the police officers knew or subjectively foresaw that damage/harm would result from their omission.) In Joubert (ed) *The Law of South Africa* vol 8 para 22 at 27 this approach is said to be untenable:

‘The foreseeability of harm is a factor which is taken into consideration; it is, however, not the sole criterion. The paramount importance of the policy-based concept of duty of care necessarily prevents rigid adherence to the untenable proposition inherent in the foreseeability test that all harm caused to another which could reasonably have been foreseen and guarded against is in principle recoverable.’

(Our emphasis). (Compare Neethling, Potgieter & Visser *Law of Delict* 2nd ed at 283 as to the decisive weight of knowledge or subjective foresight.) The Court a quo confused the policy-based concept of duty of care with the fact-based duty of care as explained by Milner *Negligence in Modern Law* (1967), and quoted by Foxcroft J in *Tsimatakopoulos v Hemingway, Isaacs and Coetzee CC and Another* 1993 (4) SA 428 (C) at 431:

‘The duty concept in negligence operates at two levels. At one level it is fact-based, at another it is policy-based. The fact-based duty of care forms part of the enquiry whether the defendant's behaviour was negligent in the circumstances. The whole enquiry is governed by the foreseeability test and ‘duty of care’ in this sense is a convenient but dispensable concept.

On the other hand the policy-based or notional duty of care is an organic part of the tort; it is basic to the development and growth of negligence and determines its scope, that is to say, the range of relationships and interests protected by it. Here is a concept entirely divorced from foreseeability and governed by the policy of the law. ‘Duty’ in this sense is logically antecedent to ‘duty’ in the fact-determined sense. Until the law acknowledges that a particular interest or relationship is capable in principle of supporting a negligence claim, enquiries as to what was reasonably foreseeable are premature.”

Wat die beleidsfaktore betref wat volgens regter Swart wel 'n rol by die vasstelling van die regsplig speel, verlaat die regter hom (652E ev) feitlik geheel en al op die uitspraak van appèlregter Vivier in *Carmichele v Minister of Safety and*

Security 2001 1 SA 489 (HHA). In *Carmichele* was die vraag – waar die eiseres deur ene Coetzee aangeval is wat op borg vrygelaat is – of daar ’n regsplig op die staat (polisie en aanklaers) gerus het om Coetzee se borgaansoek hangende sy verhoor teen te staan. Vir ons doeleindes is van belang die beklemtoning in *Carmichele* dat daar vir die bestaan van ’n regsplig ’n sogenaamde spesiale verhouding (“special relationship”) tussen die eiseres en die polisie en aanklaers moet bestaan het. Appèlregter Vivier (498–499) laat hom soos volg oor die noodsaak van ’n spesiale verhouding uit, welke *dictum* met goedkeuring in *Van Eeden* (654C–H) aangehaal word:

“There is another reason why the circumstances of the present case are not capable of establishing the legal duty contended for. This is that there was no special relationship shown to exist between the prosecutors . . . and the appellant [eiseres]. That there must be some relationship between the person who owes the legal duty and the person to whom the duty is owed, the breach of which would expose the latter to a particular risk of harm in consequence of an omission, which risk is different in its incidence from the general risk of harm to all members of the public, is well-established in English law and is also in accordance with our law . . . Counsel for the appellant did not challenge the requirement of a special relationship. Indeed, he submitted that a special relationship existed in view of the fact that the appellant was attacked at Noetzi where, because of its isolation, women were at greater risk. If women at Noetzi were more at risk than, say, women at Knysna or elsewhere, this by itself is not sufficient to establish the special relationship required for imposing a legal duty. Coetzee was released on 18 April 1995 and the attack took place some three and a half months later on 6 August 1995 after he had been at large in the neighbourhood for most of that time and there was only the prowling incident to speak of. The assault was clearly committed in the further pursuance of Coetzee’s general criminal career on one of a number of the female general public who were at risk from his criminal conduct. As was pointed out . . . where the class of potential victims of a particular criminal is a large one, the precise size of it cannot in principle effect the issue. All house-holders are potential victims of an habitual burglar and all females, those of an habitual rapist. In the absence of evidence that the appellant was at any special distinctive risk the fact that the attack occurred at a secluded village where she was a visitor, is insufficient to establish the special relationship contended for. The mere fact that complaints and requests for Coetzee’s rearrest were made to the prosecutors, is also insufficient to establish a special relationship . . .”

In *Van Eeden* ag regter Swart hom gebonde aan die Hoogste Hof van Appèl se vereiste vir die bestaan van ’n “special relationship” en kom tot die slotsom dat daar weens afwesigheid van ’n spesiale verhouding tussen die eiseres en die polisie geen regsplig op die polisie gerus het om haar benadeling te voorkom nie (661A–B). Haar eis word gevolglik van die hand gewys.

Dit is jammer dat regter Swart se uitspraak voor die Konstitusionele Hof se beslissing in *Carmichele supra* gelewer is. Anders as wat regter Swart beweer, te wete dat “[t]he law of delict is to be found in the law of delict” (658D), word die deliktereg vandag nie meer uitsluitlik in die deliktereg gevind nie. Die nuwe grondwetlike bedeling, veral die Handves van Regte, het ’n nuwe dimensie vir die deliktereg teweeggebring (sien oor die direkte en indirekte toepassing van die Handves van Regte Neethling, Potgieter en Visser 21–25; Neethling en Potgieter 2002 *THRHR* 266; sien ook adv Dunn se betoog in *Van Eeden* 656G–659H). In *Carmichele* 953 ev maak die Konstitusionele Hof dit naamlik duidelik dat daar in die lig van die Grondwet (a 39(2)) ’n algemene plig op howe rus om die gemenereg te ontwikkel met inagneming van die gees, strekking en oogmerke van die Handves van Regte. Hierdie algemene plig verleen egter nie *carte blanche*

aan regters om die gemenereg na willekeur te verander nie. Die hof beklemtoon dat die belangrikste dryfkrag vir regshervorming steeds die wetgewer is en nie die regsprekende gesag nie. Die algemene plig hou ook nie in dat die hof in elke geval 'n onafhanklike ondersoek moet loods of die gemenereg in die lig van die Handves ontwikkel moet word nie. 'n Ondersoek na die wysiging van die gemenereg moet net geskied indien 'n party dit versoek, of waar die hof dit uit eie beweging nodig ag (sien verder Neethling en Potgieter 2002 *THRHR* 266). Spesifiek wat die deliktereg betref, laat regters Ackermann en Goldstone hulle soos volg uit (961–962 962–963):

“There are notionally different ways to develop the common law under section 39(2) of the Constitution, all of which might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law. Before the advent of the [tussentydse Grondwet], the refashioning of the common law in this area entailed ‘policy decisions and value judgments’ which had to ‘reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people.’ A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what ‘the [c]ourt conceives to be society’s notions of what justice demands.’ Under section 39(2) of the Constitution concepts such as ‘policy decisions and value judgments’ reflecting ‘the wishes . . . and the perceptions . . . of the people’ and ‘society’s notions of what justice demands’ might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.

Following this route it might be easier to cast the net of unlawfulness wider because constitutional obligations are now placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected. However, it is by no means clear how these constitutional obligations on the state translate into private law duties towards individuals. A consequence of such an approach might be:

- (a) to accentuate the objective nature of unlawfulness as one of the elements of delictual liability, particularly in the context of a bail hearing where the roles and general duties of investigating officers and prosecutors are more clearly defined than would normally be the case;
- (b) to define it more broadly; and
- (c) to allow the elements of fault and remoteness of damage to play the greater role in limiting liability.”

In die lig hiervan was daar in *Van Eeden* 'n plig op regter Swart om onregmatigheid as delikselement wyer te vertolk. Onses insiens was die volgende faktore naamlik sterk aanduidend daarvan dat daar 'n regsplig op die polisie gerus het om die eiseres se reg op haar fisies-psigiese integriteit teen aantasting deur M te beskerm: Die konstitusionele imperatief wat op die staat rus (Grondwet a 7(2)) om die regte op die sekerheid van die persoon en menswaardigheid te beskerm (a 10 en 12 van die Handves van Regte); die algemene statutêre verpligting van die polisie om misdaad te voorkom en onderdane te beskerm; Suid-Afrika se plig ingevolge internasionale reg om in besonder vroue en kinders teen geweldsmisdade, veral verkragting, te beskerm (vgl *Carmichele* CC 963–965); die polisie se wete (kennis) dat M 'n gevaarlike misdadiger was (*Van Eeden* 649D); die feit dat die polisie beheer of kontrole oor M as gevaarlike persoon uitgeoefen het; die waarskynlike of moontlike omvang van die nadeel wat die eiseres (of 'n persoon in haar posisie) kon ly; en die feit dat voorsorgmaatreëls redelikerwys (en uit 'n praktiese oogpunt) van die polisie geveerg kon word: die koste en moeite om die veiligheidshek gesluit te hou, was onbeduidend (sien ook die faktore vermeld deur adv Dunn in *Van Eeden* 656 ev; Neethling 2000 *THRHR*

153–154, 2001 *THRHR* 489; Neethling en Potgieter 2002 *THRHR* 266; en in die algemeen Neethling, Potgieter en Visser 63 ev). Gevolglik behoort die hof die polisie se versuim as onregmatig te gebrandmerk en die eiseres gelyk te gee het.

Soos gemeld, het regter Swart, in navolging van die Hoogste Hof van Appèl in *Carmichele*, veral klem gelê op die belangrike – feitlik deurslaggewende – rol wat ’n “spesiale verhouding” tussen die polisie en ’n benadeelde lid van die publiek by die bepaling van ’n regsplig speel. Na ons mening is ’n spesiale verhouding maar net een van vele faktore wat op die bestaan van ’n regsplig kan dui (sien *Ewels supra* 597; Neethling, Potgieter en Visser 74–75; sien ook die betoog van adv Dunn in *Van Eeden* 655J–656A). Daarom behoort hierdie faktor nie ’n belangriker rol as ander faktore toegedig te word nie, soos oënskynlik in die Engelse reg gebeur. In *Van Eeden* was daar, soos aangedui, selfs in die afwesigheid van ’n spesiale verhouding meer as voldoende gronde om die polisie se optrede as onregmatig te beoordeel.

Seema: Die eiser se minderjarige dogter is uit haar ouerhuis ontvoer en verkrag deur ene B, ’n potensieel gevaarlike pasiënt van ’n nabygeleë psigiatriese hospitaal. B, wat na bewering tydens die aanval ernstig versteurd was, is net voor die verkragting uit ’n sekuriteitsaal oorgeplaas na ’n oop saal wat hom toegang gegee het tot die hospitaalterrein wat nie behoorlik omhein of bewaak was nie. Potensieel gevaarlike pasiënte kon vryelik na die naburige woongebied, waar die eiser se huis geleë was, beweeg. Die hof moes onder andere beslis of daar ’n regsplig op die verweerder en sy personeel gerus het om behoorlike voorsorgmaatreëls te tref ten einde te verseker dat sy pasiënte nie die publiek skade berokken nie en, indien wel, of hulle versuim het om die regsplig na te kom.

Soos regter Swart in *Van Eeden*, aanvaar regter Van Dyk (met verwysing na oa *Ewels supra* 596 ev; *Minister of Law and Order v Kadir* 1995 1 SA 303 (A); en *Coronation Brick (Pty) Ltd v Strachan Construction (Pty) Ltd* 1982 4 SA 371 (D) 384) die tradisionele toets vir onregmatigheid by aanspreeklikheid weens ’n late (781I–783C). Anders as regter Swart kom hy egter tot die slotsom dat, toegepas op die feite, daar *in casu* wel ’n regsplig op die staat (hospitaalowerheid) gerus het om die aantasting van die dogter se fisies-psigiese integriteit, en bygevolg die eiser se skade, te voorkom. Hy stel dit soos volg (783C–G):

“Om dus op te som op die getuienis voor my is ek tevrede dat die gemeenskap vereis dat daar ’n regsplig op die verweerder was om voorsorgmaatreëls te tref dat sy pasiënte nie vrylik uit die hospitaalterrein heen en weer kan beweeg nie en sodoende in staat gestel sou word om die algemene publiek leed aan te doen. En waar die getuienis . . . was dat daar eenvoudig geen behoorlike voorsorgmaatreëls getref was om die hospitaalterrein te omhein of te bewaak en sodoende te verhoed dat pasiënte wat potensieel gevaarlik is daaruit kan beweeg en die publiek skade mag aanrig en deur te versuim om dit te doen, het die verweerder myns insiens, om te verwys na die woorde van die geleerde Rumpff HR [sien *Ewels supra* 597] die reg gehad om moreel verontwaardig te wees, en het ek tot die slotsom gekom dat die regsdoortuiging van die gemeenskap op die getuienis voor my inderdaad sodanig was dat hulle vereis het en verwag het van die verweerder om behoorlike voorsorgmaatreëls te tref. Die getuienis is dat die verweerder daardie regsplig van hom skromelik nagelaat het en dat hy derhalwe gefaal het om behoorlike voorsorgmaatreëls te tref wat aanleiding gegee het daartoe dat [B] in staat gestel was terwyl hy steeds ’n potensieel gevaarlike persoon was om hierdie dogtertjie te ontvoer en te verkrag. Dit het die gevolg gehad dat die eiser skade gelyk het en myns insiens is die verweerder verplig om daardie skade aan die eiser te vergoed.”

Dit is opvallend dat regter Van Dyk geredelik, sonder om hoegenaamd na die invloed van die Grondwet op die deliktereg te verwys, dieselfde resultaat bereik as

wat ons hierbo met inagneming van die Grondwet ten aansien van *Van Eeden* aan die hand gedoen het. In *Seema* het twee tradisionele faktore (sien hierbo) wat op die bestaan van 'n regsplig dui naamlik die deurslag gegee, te wete dat die verweerders kontrole oor potensieel gevaarlike pasiënte uitgeoefen het, en dat behoorlike voorkomingsmaatreëls van die verweerder geverg kon word (bv om die terrein te omhein of te bewaak). (Interessant genoeg, het die aan- of afwesigheid van 'n spesiale verhouding tussen die verkragte kind en die verweerder geen aandag geniet nie.) Hieruit blyk dat die proses van ontwikkeling van die delikterege net waar nodig met uitdruklike inagneming van die Grondwet onderneem hoef te word. Daarom word weer eens aan die hand gedoen (sien Neethling en Potgieter 2002 *THRHR* 266) dat by die uitoefening van hierdie proses, die algemene beginsels wat reeds met betrekking tot die redelikeheids- of *boni mores* (regsoortuigings van die gemeenskap) -kriterium vir deliktuele onregmatigheid uitgekristalliseer het, steeds as *prima facie* aanduiding beskou kan word van die redelikeheid al dan nie van 'n handeling (vgl Neethling, Potgieter en Visser 23–24; Neethling *Persoonlikheidsreg* (1998) 69 95 vn 389; *National Media Ltd v Bogoshi* 1998 4 SA 1196 (HHA)).

J NEETHLING

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DIE VEREISTE VAN AFWEERGERIGTHEID BY NOODWEER

BGH, Beschl v 8/3/2000, NStZ 2000, 365

Inleiding

Die beskuldigde, wat saam met sy vriendin en ander meelopers na besoek aan verskeie kroë in Düsseldorf in Duitsland onderweg was, het die klaer (K), wat sterk onder die invloed van drank was, raakgeloop. K het die beskuldigde se vriendin aan haar boarm gegryp waarop die beskuldigde hom verwoed toegetakel het. Beskuldigde het hom, as gevolg van die aggressiewe houding van die persone wat K vergesel het, onttrek maar K en drie van sy meelopers het egter besluit om dié optrede van beskuldigde nie ongestraf te laat bly nie. Beskuldigde het 'n sakmes met 'n lem van 8cm lank en 4cm breed by hom gehad. Voordat hy dit egter gereed kon kry, het 'n meeloper van K 'n bierbottel op sy kop stukkend geslaan en hy is ook geskop. 'n Groepbakeleiry het vervolgens uitbreek. Beskuldigde, wat op die grond gelê het, het sy mes intussen gereed gekry, opgestaan en dit rondgeswaai. Hoewel sy meelopers hulle onttrek het, het K, wat ongewapen was, woedend en aggressief op beskuldigde afgestorm. K het vyf snywonde in dié proses opgedoen, maar het hom nie laat afskrik nie. Beskuldigde, omdat hy nog ontstig was oor K se optrede teenoor sy vriendin, wou hom 'n les leer. Voordat K nog 'n fisiese aanval kon uitvoer, het beskuldigde hom in die maag gesteek, as gevolg waarvan hy kort daarna 'n noodoperasie moes ondergaan. Beskuldigde is in die *Landgericht* (LG) te Düsseldorf aan die misdadig veroorsaking van 'n gevaarlike liggaamlike besering skuldig bevind en 'n

opgeskorte vonnis van 18 maande gevangenisstraf opgelê. Hy appelleer vervolgens suksesvol na die hoogste Duitse hof, naamlik die *Bundesgerichtshof* (*BGH*). Die beslissing van die *BGH* in dié saak word in hierdie bydrae onder die loep geneem. Daarna word gewys op die belang daarvan vir die Suid-Afrikaanse reg.

Die beslissing van die *BGH* binne konteks van die Duitse reg

Die *BGH* wys ten aanvang daarop dat die *LG* se konklusie dat die toedien van die vyf snywonde nie binne die trefkrag van noodweer geval het nie, twyfelagtig is. Die *LG* se opvatting oor die omvang van noodweer is volgens die *BGH* te eng.

Hoewel die voorafgaande liggaamlike onderonsie tussen die twee groepe beëindig was, het K, en ten minste twee van sy meelopers op 'n vyandige wyse op beskuldigde afgestorm, nieetenaande die feit dat hy gewapen was. Daar het volgens die *BGH* 'n dreigende en teenwoordige liggaamsgevaar vir beskuldigde ontstaan en die aanwending van 'n mes was in die omstandighede van pas, aangesien die aanval daar en dan afgeslaan moes word en, in die lig van die afstand wat hulle vanaf sy liggaam was en die heen-en-weer-beweging van hulle liggame, was dit ook vir beskuldigde die beste wyse om die afweer te bewerkstellig. In geval van 'n stryd met 'n onbepaalbare uitkoms word nie van 'n aangevallene verwag om homself in te hou nie. Die feit dat K ongewapen was en hy sy arm nog nie ter aanval opgelig het nie, is, in die lig van die voorafgaande gebeure asook K en sy meelopers se dreigende houding, nie van deurslaggewende belang nie. Uit die omstandighede blyk ook dat nie van beskuldigde verwag kon word om te vlug nie. K was, daarbenewens, nie tot so 'n mate besope dat beskuldigde se reg tot noodweer daardeur begrens is nie (365–366; sien ook Roxin *Strafgerrecht ATI* (1997) 578–579).

Wat vir onderhawige doeleindes van wesenlike belang is, is die feit dat die *BGH* beslis het dat beskuldigde met 'n afweerswil (“Verteidigungswille”) gehandel het. Beskuldigde het die liggaamlike strydsituasie ook as 'n geleentheid gesien om K vir sy voorafgaande optrede teenoor sy vriendin te straf. Daarom het hy nieetenaande 'n getalle-oorwig die aanvallers die stryd aangesê. Hoewel die aanwending van die mes in die konkrete situasie later ten doel gehad het om K en sy meelopers op 'n afstand te hou en beskuldigde se optrede in hoofsaak daarop afgestem was om K te bestraf, dit wil sê wraak te neem, is beskuldigde se afweerswil nie volledig op die agtergrond gedwing nie. Ten slotte bevestig die *BGH* die algemene benadering van die Duitse strafreg dat optrede in noodweer, soos beskryf in artikel 32 van hulle Strafwetboek (*Strafgesetzbuch; StGB*), ook dan toelaatbaar is indien die dader, benewens die afweerswil, ook ander doelstellings of motiewe navolg of indien emosies, soos woede, teenwoordig is. Sou die aanvanklike afweerswil van die dader egter deur genoemde ander doelstellings of motiewe (of emosies) volledig op die agtergrond gedwing word, verval 'n aanspraak op noodweer as verweer.

Interessantheidshalwe kan hier ook na artikel 33 *StGB* verwys word. Volgens hierdie artikel word 'n noodweerdader wat die noodweergrense uit verwarring, vrees of verskrikking oorskry van strafregtelike aanspreeklikheid onthef. Nie alle gemoedstoestande is hier ter sprake nie. Steniese gemoedstoestande (“sthenische Affekte”), soos toorn, woede en veglustigheid kan nie by die oorskryding van die noodweergrense tot opheffing van strafregtelike aanspreeklikheid aanleiding gee nie (sien verder hieroor Roxin 855ev; Bergenthuin *Provokasie as verweer in die*

Suid-Afrikaanse strafreg (LLD-proefskrif UP 1985) 231; BGH, Urt v 3/2/1993, NStZ 1993, 333; Labuschagne "Strafregtelike effek van die noodweerdader se emosionele belewenis van die aanval op die oorskryding van die noodweersgrense" 1995 *TSAR* 754).

Belang vir die Suid-Afrikaanse strafreg

Die vraag of 'n noodweersopset- of gerigtheid 'n vereiste vir 'n geldige beroep op noodweer as strafregtelike verweer is, is nog nooit direk deur ons howe beantwoord nie. Uit *Moolman v De Waal* 1954 4 SA 124 (N) sou in die algemeen die afleiding gemaak kon word dat 'n dader haar slegs op 'n verweer by die vraag na deliktuele aanspreeklikheid kon beroep indien sy bewus was van die teenwoordigheid van die voorwaardes van sodanige verweer, met ander woorde: 'n persoon wat haar byvoorbeeld op optrede in noodweer beroep moet bewus gewees het daarvan dat sy aangeval word en haar optrede moes op die afweer van die aanval gerig gewees het.

Suid-Afrikaanse skrywers ondersteun oor die algemeen die standpunt dat 'n geldige beroep op noodweer as strafregtelike verweer veronderstel dat die dader se optrede op die afweer van die aanval gerig moes gewees het (sien bv Morkel en Verschoor "Oor die 'bedoeling om te verdedig' by noodweer" 1981 *TRW* 73; Van der Merwe "Die verband tussen mens rea en skuld" 1976 *SALJ* 280 282; Van der Westhuizen *Noodtoestand as regverdigingsgrond in die Strafreg* (LLD-proefskrif UP 1979) 602; Van Oosten "Wederregtelikheid – 'n skuldtoets?" 1977 *THRHR* 90 93; Snyman *Strafreg* (1999) 110–111). Ek het by vorige geleenthede ook dié siening ondersteun. 'n Ander siening sou, eerstens, tot gevolg hê dat 'n toevalligheid tot opheffing van strafregtelike aanspreeklikheid aanleiding kon gee. Neem byvoorbeeld die volgende hipotetiese voorbeeld: A, wat 'n wrok teen B koester en op die punt staan om hom daar en dan te vermoor, word deur B gedood. B was nie bewus van A se voorneme nie. Sou B strafregtelike aanspreeklikheid op grond van optrede in noodweer vryspring, sou dit op suiwere toeval gefundeer moes word. Diegene wat 'n ander uitlok of andersins manipuleer om hom aan te val, met die doel om hom in noodweer te dood of te beseer, sou, tweedens, 'n geleentheid gebied word om die strafreg te misbruik indien 'n afweringsgerigtheid nie as vereiste vir noodweer gestel word nie. 'n Konsekwente en sinvolle aanwending van die beginsels onderliggend aan die hedendaagse strafteorieë verg, daarbenewens, dat 'n dader bewus moet wees dat sy in noodweer optree (Labuschagne "Oorskryding van die grense van noodweer" 1979 *SASK* 271 272–273; "Die uitskakeling van toeval by strafregtelike aanspreeklikheid" 1985 *De Jure* 155–160; "Die proses van dekonkretisering van noodweer in die strafreg" 1999 *Stell LR* 56 65–67).

Konklusie

Hoewel daar in Suid-Afrika nog geen direkte gewysdereg telike gesag bestaan dat 'n afweerswil of -gerigtheid 'n voorwaarde vir 'n geldige beroep op noodweer as verweer in die strafreg is nie, word dit oor 'n wye front in sowel kontinentale as Anglo-Amerikaanse regstelsels as vereiste erken (sien bv a 41 van die Nederlandse Straf wetboek; Rummelink *Inleiding tot de studie van het Nederlandse strafrecht* (1996) 314; *R v Dodson* (1850) 4 Cox CC 358; Christopher "Unknown justification and the logical necessity of the *Dodson* principle in self-defence" 1995 *Oxford Journal of Legal Studies* 229; *Vigil v People* 143 Colo 328 P 2d 82 (1960); LaFave en Scott *Substantive criminal law* (1986) 654; *Moscoco*

v City of New York 29 F Supp 2d 310, 314 (SDNY 2000)). Dit is te betwyfel of 'n ander benadering hoegenaamd strafsinnig en aan die eise van geregtigheid sou kon voldoen. Die standpunt wat die *BGH* in die onderhawige saak ingeneem het, naamlik dat aan die vereiste van 'n afweerswil of -gerigtheid by noodweer voldoen is, selfs al sou ander doelstellings, motiewe of emosies ook teenwoordig wees, is onderskryfbaar, bloot omdat dit die menslike aard verdiskonteer. Veral woede en verontwaardiging vergesel dikwels die noodweerdader se optrede teen 'n ongevraagde of onregmatige aanval. Die begrip "afweerderigtheid" word as alternatief tot "afweerswil of -bedoeling" gebruik, aangesien 'n aanval dikwels reflektief afgeslaan word sonder dat daar 'n geleentheid vir besinning of afweeg van opsies bestaan.

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**A NEW TREND IN THE ADMISSIBILITY OF EVIDENCE TO
DETERMINE THE MEANING OF WORDS IN A DOCUMENT**

Curren v Jacobs [2000] 4 All SA 584 (SE)

1 Introduction

Arguably some of the most controversial issues relating to the legal interpretation of documents, concern the admissibility of extrinsic evidence. In our law it is generally accepted that as far as interpretation is concerned, there is no distinction between various kinds of documents so that the same basic rules apply to the interpretation of any document (*Southwell v Bowditch* (1876) 1 CP 374; *In re Friend's Settlement* (1906) 1 Ch 47 52; *Van Rensburg v Taute* 1975 1 SA 279 (A) 303D-E; *Schultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George* 1983 4 SA 689 (C) 710C-D; *Isaacson v Creda Press (Pty) Ltd* 1991 4 SA 470 (C) 477B). In particular, this seems to be the case so far as the admissibility of extrinsic evidence as an aid in the interpretation of a document is concerned.

At present two related rules apply in this regard. First, there is the rule which prevents a party from presenting extrinsic evidence to contradict, add to, detract from, modify or redefine the terms or provisions contained in a document (Kellaway *Principles of legal interpretation of statutes, contracts and wills* (1995) 75-77 215 574). In terms of the other rule, extrinsic evidence is inadmissible to alter the clear and unambiguous meaning of the words contained in the document (Kellaway 75 229 425-426 577).

If one considers a number of recent cases concerning the interpretation of wills and contracts, it would appear that our courts are beginning to move in a new direction with regard to the admissibility of extrinsic evidence to assist with the interpretation of a document. *Curren v Jacobs* seems to be the next instalment in a saga that may yet take decades to conclude.

2 Facts

Curren v Jacobs concerned the interpretation of a will. Paragraph 1 of the will provided *inter alia*:

"I give and bequeath the residue of my estate to my said wife, subject to the condition that on her death or remarriage, whichever shall first occur, the residue shall devolve upon my children, or them failing to their issue *per stirpes*" (585d).

The defendant (wife) remarried two years after the testator's death and the above condition took effect. The plaintiff called upon the defendant to restore the full amount which she had received as the residue of the estate, and argued that it is generally the duty of a fiduciary to restore what has been received under the fideicommissary bequest upon termination of his or her fiduciary interest. The defendant contended that she did not have to return the full amount as the bequest constituted a *fideicommissum residui*. As a result she further contended that she was entitled to utilise the bequest in her discretion and that she was only obliged to turn over to the children the residue of the bequest left over at the date of her remarriage. The plaintiff excepted to this defence on the ground that the will was not reasonably capable of being interpreted as a *fideicommissum residui*. Ludorf J dismissed the exception and indicated that the second reference to "residue" in paragraph 1 of the will, could have been ambiguous and allowed the matter to go to trial (585b-i).

3 Judgment

Jones J applied the ordinary rules of interpretation and concluded that the possibility of ambiguity was so remote that he regarded it as highly improbable (586c). He paid particular attention to the presumption that a word in a text should have the same meaning throughout the same text. Based on this presumption, Jones J indicated that a testator would not be held to have created a *fideicommissum residui* unless there were some words to indicate that the fideicommissary was to inherit only so much of the fideicommissary property as may have been left at the death of the fiduciary or upon the termination otherwise of his or her fiduciary interest. In this regard, one would have expected words such as "what may be left thereof" or "whatever shall remain" or "what is then to be found" or "such as it may be on the death of the survivor" to justify the conclusion that a *fideicommissum residui* had been created. He summarised his finding by indicating that

"[t]here are a number of cases where the courts have held that the testator intended to create a *fideicommissum residui*. Almost invariably they are concerned with a will which chooses words which make this intention plain. I have not been able to find a single case where the courts have construed a will to create a fideicommissum residui in the absence of such words. This will contains no words whatever to show that the testator's children are to receive only so much of his estate as may be left on the remarriage of his wife. There is no suggestion that the fiduciary may sell the assets at her discretion; no words such as 'what remains of the residue on her death or remarriage'. There is no indication anywhere that the testator wanted his children to receive only whatever may be left over, and there is not a single word anywhere in his will to convey that this was the intention which the words in his will expresses" (587d-f).

Jones J correctly concluded that the testator's intention as expressed by the plain meaning of the words used in his will, had been to create a *fideicommissum* and not a *fideicommissum residui*. This should have been the end of the matter and, indeed, for many years this would have been the end of it. In reaching his

conclusion the judge applied sound principles of interpretation that have been tried and tested in our law for almost a century, coming to the same conclusion that courts have reached in numerous other cases.

However, for some reason, Jones J did not let the matter rest there, electing instead to add an afterthought to his judgment: "If I am wrong, and if the word 'residue' is indeed ambiguous, extrinsic evidence is admissible to ascertain its meaning" (588e).

He then continued to consider the evidence which had been presented, and in particular the testimony of one Mr Els (who had drafted the will) and to some notes which he had made during interviews with the testator and which he had used when he actually drafted the will. According to the testimony and notes, Mr Els had explained the difference between a *fideicommissum* and a *fideicommissum residui* to the testator, took certain instructions from him, and then drafted the will in language which, according to Mr Els, was appropriate to the creation of a *fideicommissum* and not a *fideicommissum residui*. The evidence clearly indicated that the intention of the testator was not to create a *fideicommissum residui* (588g–589c). Counsel for the defendant (in my view correctly) objected to the admissibility of the notes made by Mr Els, but Jones J dismissed the objection and in doing so cited the dictum by Corbett J (as he then was) in *Allen v Estate Bloch* 1970 2 SA 376 (C) 380A–E where he stated that

"the duty of the Court is to ascertain not what the testator meant to do when he made his will but what his intention is, as expressed in his will. Consequently, where his intention appears clearly from the words of the will, it is not permissible to use evidence of surrounding circumstances or other external facts to show that the testator must have had some different intention. At the same time no will can be analysed *in vacuo*. In interpreting a will the Court is entitled to have regard to the material facts and circumstances known to the testator when he made it: it puts itself in the testator's armchair. Moreover, the process of interpretation invariably involves the ascertainment of the association between the words and external objects and evidence is admissible in order to identify these objects. This process of applying the words of the will to external objects through the medium of extrinsic evidence may reveal what is termed a latent ambiguity in that the words, though intended to apply to one object, are in fact equally capable of applying to two or more objects (known technically as an 'equivocation') or in that the words do not apply clearly to any specific object, as where they do not describe the object or do not describe it accurately. In both these instances additional extrinsic evidence is admissible in order to determine, if possible, the true object of the bequest, but, except in the case of an equivocation, such evidence may not include extrinsic declarations of the testator's intention" (589c–g).

Reference to this passage to justify the admissibility of extrinsic evidence concerning the testator's intention is strange indeed, if one takes into account that Jones J had already concluded that the plain meaning of the words in the will were clear and certain. Perhaps the judge was correct in his conclusion that the arguments presented on behalf of the defendant resulted in an equivocation. However, if mere arguments on the part of a defendant could introduce an equivocation, it would mean that there would be an equivocation in every instance where the parties dispute the meaning of a word or expression in a document. This would have the effect that extrinsic evidence would always be admissible, effectively nullifying the rule that prohibits evidence to determine the meaning of a word in a document. Obviously then, on the law as it stands, Jones J erred in concluding that the arguments on the part of respondent introduced an equivocation which would have rendered evidence admissible to resolve that equivocation. The fact

remains that the will was clear, and despite any (eventually rejected) arguments on behalf of the defendant, on the law as it stands Mr Els should not even have been allowed to testify, or his notes admitted in evidence (*Ex parte Eksekuteure Boedel Malherbe* 1957 4 SA 704 (C); *Povall v Barclays Bank (DC&O)* 1965 3 SA 322 (C); *Aubrey-Smith v Hofmeyr* 1973 1 SA 655 (C)).

4 Discussion

In *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 1 SA 1182 (SCA), Harms JA remarked (1187E-F) that perhaps the time had come to reconsider the admissibility of extrinsic evidence in interpreting documents. It seems that the *Pangbourne* case was the first judicial crack in the wall which holds back the flood of evidence that could assist or swamp the courts whenever they are called upon to interpret a document.

From Jones J's judgment in *Curren*, one gets the impression that he (consciously or subconsciously) took up the challenge which Harms JA had posed in *Pangbourne*. While one gets the impression that Jones J was in favour of admitting evidence to determine the meaning of a word (ignoring the second rule as opposed to the first rule which disallows evidence to contradict, add to, detract from, modify or redefine the terms), it would have been a bold step indeed for him to defy the Supreme Court of Appeal and reject a rule which has been stated and restated on numerous occasions by that court. As a result, he had to disguise his resort to extrinsic evidence to avoid any conflict with the Supreme Court of Appeal.

Jones J seems to have based his interpretation of the will on the evidence presented, and then sought legal rules to justify his interpretation. This is not as strange as it seems, since one often gets the impression that a court first decides what its judgment would be in a given case and then searches for authority to justify it (Lategan "Die uitleg van wetgewing in hermeneutiese perspektief" 1980 *TSAR* 107 109). *In casu* Jones J did not have to search far to justify the interpretation which he had reached, based on the evidence which had been presented, since the evidence served to confirm the position as it would have been in terms of the existing law. What would he have done if the evidence indicated the contrary? Any answer to this question would be purely speculative, but his approach to the present case and his reasoning in allowing the evidence, provides some strong indications. In my opinion he would have concluded that the use of the word "residue" was ambiguous and that he was therefore justified in referring to the evidence.

However one looks at this case, the fact remains that on a proper application of the presumptions, rules of interpretation and existing precedents, the terms of the will were clear and certain. In terms of our existing law there should have been no place for the application of extrinsic evidence in this case. The fact that Jones J was willing to consider such evidence, albeit in disguised form, poses a question to the Supreme Court of Appeal. Sooner or later, whether as a result of *Curren* or not, the Supreme Court of Appeal will have to sit back and rethink the rule relating to the admissibility of extrinsic evidence to determine the meaning of words contained in a document.

Obviously our courts will approach the matter with caution so that the legal certainty and reliability of documents will not be destroyed in the process. Modern day commerce is to a substantial extent based on the use of documentation, whether it be old-fashioned paper based or modern electronic documentation. It

would effectively destroy commerce as we know it if parties could no longer depend on the reliability of documentation. Interference with the rules which limit the admissibility of extrinsic evidence to assist with the interpretation of a document, could threaten that reliability if it is not done carefully. However, as I have already indicated in respect of contracts ("A reconsideration of the admissibility of extrinsic evidence in the interpretation of written contracts" 1999 *TSAR* 344), the value of a document is based on the reliability of that document as record of a particular transaction or action. It is in the contents of the document that the transaction or act concerned is recorded. A court or other interpreter should never lay words in the mouth(es) of a document's author(s) by contradicting, adding to, detracting from, modifying or redefining the terms or provisions contained in the document, as that would effectively destroy the reliability and value of documents in our law.

It should be borne in mind that language is not a precise instrument (Van den Bergh "Die gebruikswaarde van bepaalde struktuuranalitiese metodes vir wetsuitleg" 1981 *TSAR* 136). Authors choose the words and constructions which they apply to express their intentions. However, they are not bound to follow the rules of grammar (Kerr *The principles of the law of contract* (1998) 29 *et seq*). Overgenerality, vagueness, ambiguity and a generalised usage of poorly defined terms are unavoidable features of the natural language used by legal norms (Zuleta-Puceiro "Statutory interpretation in Argentina" in MacCormick and Summers (eds) *Interpreting statutes: A comparative study* (1991) 35 and La Torre, Pattaro and Taruffo "Statutory interpretation in Italy" in MacCormick and Summers 217).

One often finds that words have more than one meaning so that it is not always possible to determine precisely what message the author meant to convey with the words he or she had used. Words are symbols of meaning that can never attain quantitative precision, so that it is difficult to express ideas in words with complete accuracy (Devenish *Interpretation of statutes* (1992) 2–3). Consequently, all words are capable of causing difficulty in the application thereof (Williams "Language and the law" 1945 *LQR* 71). Language does not fix meaning, but only circumscribes the limits of possible meanings (Cowen "Prolegomenon to a restatement of the principles of statutory interpretation" 1976 *TSAR* 131 164). There is also the semantic problem that words may mean different things to different people, at different times and in different situations. The ordinary meaning attached to a word in a document may, for example, not be the popular meaning of that word (Kellaway 14). Kellaway further explains that

"too often expressions and words are used by persons . . . who think they are conveying something which they intend, when their language and expressions, in fact, make that "intention" perplexingly obscure" (15).

People frequently use words that are not suitable for the context in which they are applied, or that do not ordinarily have the meaning which they assign to them (Wiechers *Die uitleg van testamente met besondere verwysing na coniecturae* (LLD-thesis UP (1977) 36). Furthermore, authors of legal documents are not always consistent or coherent in their use of language, with the result that internal contradictions occur within a text (Zuleta-Puceiro 35). According to Aarnio "Statutory interpretation in Finland" in MacCormick and Summers 130

"the possible *interpretational alternatives* (the semantic alternatives) can be clarified linguistically, but it may remain unclear which is the best or right alternative" (author's emphasis).

Van Dunné *Verbintenissenrecht deel 1* (1993) 119 refers to the case where the parties reach different interpretations in respect of the same text and states:

“Dit blijkt evident . . . dat de uitleg-kwestie daardoor niet uitsluitend een taal- of rechtsfindingsprobleem is dat partijen verdeeld houdt, maar dat zij tegelijkertijd een *belangenconflict* is” (author’s emphasis). (It seems evident . . . that the question of interpretation is not exclusively a problem of finding the language or the law which thereby divides the parties, but that it is also a conflict of interests.)

Because of these ambiguities and difficulties, the court or any other interpreter is left with the task of endeavouring to ascertain from the language exactly what it was that the author(s) attempted to convey. If, as in *Curren*, evidence could assist a court in determining the correct meaning of the language which the author(s) had intended, it would make little sense to exclude such evidence. In fact, ignoring such evidence would certainly in many cases mean that the actual intention of the author(s) would be disregarded and replaced with a hypothetical intention imposed by the court. This would contradict our courts’ repeated insistence that the purpose of the interpretation of any document is to determine the intention of the author(s) and to give effect thereto.

While a court or interpreter should be limited by the language used in a document, it should not be limited to it (*Côté The interpretation of legislation in Canada* (1984) 199. See also *Pacific Gas & Electrical Company v GW Thomas Drayage & Rigging Company Inc* 40 ALR 3d 1373). While a court can determine the possible semantic alternatives by linguistic treatment of a document, it may remain unclear which, if any, is the alternative intended by the author(s). There should be some scope for a court to manoeuvre within the limits imposed by the text contained in the document concerned. In this regard, it should be borne in mind that a party who asserts that a word or phrase was used to mean something other than the ordinary meaning which that word or phrase would normally have, bears the heavy burden of having to prove that meaning. The more a proposed meaning deviates from the meaning which is usually ascribed to a certain word or phrase, the stronger and more persuasive the evidence needs to be in this regard.

5 Conclusion

In *Curren* the court was faced with a conflict of interest which led the parties to reach different interpretations of a term in a will which, on the face of it, seemed clear and unambiguous. Although the court was able to settle the matter in favour of the applicant by applying the presumptions and rules of interpretation that have been tried and tested for many years, it was still able to confirm its interpretation on the basis of the evidence which had been presented. This case is a prime example of a court that was willing to take a more modern, liberal approach to interpretation and allowed the intention of the testator to succeed. If the court had simply followed the traditional approach and rejected the evidence, the respondent may well have felt cheated as a result of strict and technical application of unforgiving rules. However, as a result of its willingness to consider the available evidence, the court was able to demonstrate that it has complied with the actual expressed intention of the testator. This approach indicates that the court was interested in achieving actual justice in the particular case, rather than a broad justice in a legal-technical sense. Perhaps sometime in future the Supreme Court of Appeal will get the opportunity of endorsing this approach, not

only in respect of wills, but also in respect of statutes, contracts and other legal documents.

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PROTECTION OF THE RIGHT TO ACCRUAL SHARING
Reeder v Softline [2000] 3 All SA 105 (W)

Introduction

The Matrimonial Property Act 88 of 1984 (“the Act”), which came into effect on 1 November 1984, introduced the accrual system into South African law. Before then, if spouses did not wish to share their assets, they had to enter into an antenuptial contract excluding community of property and community of profit and loss, which meant that they remained in the same financial position after the marriage as the position they were in prior to the marriage. In other words, there was a complete separation of property even upon the dissolution of the marriage – which often resulted in one party being prejudiced financially upon dissolution of the marriage.

The accrual system was introduced in order to try to alleviate this problem, with both spouses sharing, on dissolution of their marriage, the assets amassed during the subsistence of the marriage. Since the legislative introduction of the accrual system, a marriage entered into in terms of an antenuptial contract which excludes community of property and community of profit and loss is automatically subject to the accrual system. Therefore, if the parties still want complete separation of property to operate in their marriage, they have to stipulate this expressly in their antenuptial contract.

One would assume that after being in operation for more than seventeen years, the principles of the accrual system would be fairly well entrenched in our legal system. The fact, however, is that there are still a number of misconceptions about its operation, some of which are clearly illustrated by *Reeder v Softline* [2000] 3 All SA 105 (W).

Facts and decision

The applicant (the wife) and the second respondent were married out of community of property subject to the accrual system and were in the process of becoming divorced. The applicant launched urgent motion proceedings against the respondents. The dispute revolved around the ownership of shares in a public company to which the second respondent had become entitled while he was employed by the first respondent. The applicant sought an order in terms of section 8(1) of the Act for the immediate division of the net accrual of the second respondent’s estate, alternatively for an order directing that the shares to which the second respondent had become entitled be handed to the applicant’s attorney to be kept in trust pending the outcome of the divorce action. The second respondent undertook not to deal with the shares pending the outcome of the application.

With regard to the primary relief sought by the applicant, it is important to note the provisions of section 8(1):

“A court may on the application of a spouse whose marriage is subject to the accrual system and who satisfies the court that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this Chapter or on such other basis as the court may deem just.”

The court held that an order in terms of section 8(1) could not be granted, as a result of a fundamental dispute of fact on the papers. The second respondent alleged that the property claims of the applicant had been settled previously by agreement between the parties’ attorneys, but the applicant disputed that the agreement was binding on her.

In relation to the alternative relief, the applicant’s case was that the second respondent had previously sold other shares to which he had become entitled and had squandered the money. The applicant alleged that the second respondent would do the same if he obtained control of the shares in question. The court decided, however, that the applicant was not entitled to the relief sought by her in the alternative. It stated (109i) that

“[t]he nature of the alternative relief sought – that the shares be handed to the applicant’s attorney pending resolution of the divorce proceedings – reveals a fundamental misconception, apparent also from the applicant’s founding affidavit in which she says that if the second respondent obtains possession of the shares, then:

‘He will . . . have in his possession almost R3 million, *half of which belongs to me* [my emphasis], in terms of our matrimonial regime.’

The parties are not married in community of property. *The applicant has no vested right in the shares or their proceeds* [my emphasis], or indeed in any other item in, or portion of, the second respondent’s estate. Subsection 3(1) of the Act makes it clear that the right of a spouse to claim half of the nett accrual of the other spouse’s estate is acquired ‘at the dissolution of the marriage . . . by divorce or death’ and subsection 3(2) provides that (subject to the provisions of section 8(1)), ‘a claim in terms of subsection (1) arises at the dissolution of the marriage’. Pending the dissolution of the marriage or the finalisation of a claim in terms of section 8(1), a spouse who alleges that her estate has shown no accrual or a smaller accrual than the estate of the other spouse, and who (whether in divorce proceedings or in terms of section 8(1)) claims half the difference of the accrual between the two estates, has a contingent right and not a vested right”.

Cloete J explained the difference between a contingent right and a vested right by referring to two cases (*Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 and *Durban City Council v Association of Building Societies* 1942 AD 27) and concluded that a contingent right describes the conditional nature of someone’s title to a right, and that a vested right means that a person is the owner of that right. He stated that the applicant’s right would become a vested right only if the following contingencies materialised:

- dissolution of the marriage by divorce;
- the existence, at the date of divorce, of an accrual in the estate of the second respondent which was greater than the accrual in the estate of the applicant; and
- the absence of an order declaring the applicant’s right to participate in the accrual forfeited in whole or part.

Clearly, these contingencies had not materialised and the applicant's right was still conditional. She therefore had no vested right to the shares of the applicant or the proceeds of those shares.

The court compared the position of the applicant to that of an insolvent who may become entitled to the residue in his or her estate if there is a surplus of assets over liabilities, or a fideicommissary who may, for instance, interdict the sale of the fiduciary property. The court said that it would grant an interdict to protect a contingent right which arises by statute (as in the case of the Insolvency Act 24 of 1936) or at common law (for example the rights of a fideicommissary). A spouse married out of community of property subject to the accrual system has a contingent right to share in the accrual of the estate of the other spouse, and that right is conferred by the Act. The right would thus also be protectible by an interdict *pendente lite*.

The judge pointed out that the applicant had two possible remedies under the current circumstances, namely to apply for an interdict *pendente lite* or to apply for the second respondent to be declared a prodigal. In this case, the applicant did not seek an interdict. She did not even quantify the value of her alleged right. The applicant also did not seek to have the second respondent declared a prodigal. The alternative relief which the applicant sought pending the trial was based on the incorrect assumption that she had a vested right in particular assets which formed part of the second respondent's estate. The court concluded that the applicant had erred in believing that she had a vested right in particular assets forming part of the second respondent's estate. She did not have a vested right, and the application was accordingly dismissed with costs.

Discussion of sections 3 and 8(1)

It is evident from the facts of this case that there is some confusion about the interpretation and operation of the Matrimonial Property Act 88 of 1984 in so far as accrual-sharing is concerned.

Although much has been written about the accrual system in general, it seems that the very important distinction between the patrimonial position of the spouses during the marriage and their position at the dissolution of the marriage has been neglected. To understand the distinction clearly, we need to consider the wording of section 3. This section provides:

"(1) At the dissolution of a marriage subject to the accrual system . . . the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a *claim* [my emphasis] against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

"(2) Subject to the provisions of section 8(1), a *claim* [my emphasis] in terms of subsection (1) arises at the dissolution of the marriage and the *right* [my emphasis] of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse."

The section refers to a *claim* in subsection (1), and to a *claim* and a *right* in subsection (2). What is the significance of the words *claim* and *right* in this context? When does the *right* originate? Is it the same as the *claim* and, if not, what is the difference? Unfortunately, the Act does not define these words.

In *The Oxford concise dictionary of law* (1983) a *claim* is defined as "[a] demand for a remedy or assertion of a right" (61) and *right* is defined as "[a]ny . . . interest or privilege recognised and protected by law" (320). According to Claassen

Dictionary of legal words and phrases (1997) C-123, a contingent right "is used to describe the conditional nature of someone's title to the right".

Cronjé and Heaton *South African family law* (1999) 120 fn 73 explain the difference between the *right* to share in the accrual and the actual *claim* very clearly when they say that

"section [3(2)] refers to the *claim* which one spouse has against the other . . . and to the *right* of a spouse to share in the accrual of the other spouse's estate. The *claim* differs from the *right*. S[ection] 3(2) makes it clear that the *claim* arises only at dissolution of the marriage. However, in respect of the *right* it refers to the position during the subsistence of the marriage. The implication clearly is that the *right* to share in the other spouse's accrual has a separate existence from the *claim* and the *right* exists during the subsistence of the marriage".

They further state that

"[a] spouse's claim to share in the accrual of the other spouse's estate only arises at the dissolution of the marriage, except when the protective measure provided for in section 8 is applicable. During the subsistence of the marriage this claim consequently is not an asset in the estate of the ultimate recipient" (120).

Section 8(1) entitles a spouse to apply to court for the immediate division of the accrual when he or she, during the subsistence of the marriage, has reason to believe that his or her *right* to share in the accrual is being or will be prejudiced if no division is made. In order for section 8(1) to have any significance at all, a *right* would therefore have to exist during the subsistence of the marriage, not only on dissolution of the marriage. The *claim* arises, however, only at the dissolution of the marriage.

Van der Vyver and Joubert *Persone- en familiereg* (1991) 567 interpret section 3 differently when they say that "[d]ie reg [right] om in die aanwas van die ander eggenoot te deel, ontstaan eers by die ontbinding van die huwelik". This viewpoint is shared by Visser and Potgieter *Introduction to family law* (1998) 48, who are of the opinion that "[a] right to share in the accrual of the other spouse's estate comes into being only at the dissolution of the marriage" and that, as long as the marriage subsists, the spouses do not yet have any claim to each other's assets. These writers do not seem to make any distinction between the *right* to share in the accrual and the *claim*.

A number of articles have also touched on this aspect. Van Aswegen "The protection of a spouse's right to share in the joint estate or accrual" 1987 *De Rebus* 59 62 states that the right of a spouse, married under the accrual system, to share in the accrual "only comes into existence at the dissolution of the marriage". She confirms this remark by stating that a spouse's "right to share in the accrual does not exist during the marriage but arises only at dissolution" (63). She further states that, while the marriage exists, each spouse has full control over his or her own separate estate, and the *interest* of the other spouse therein is "a mere *spes*", which leaves the interest of a spouse in sharing eventually in the other's accrual "vulnerable and virtually unprotected". She then refers to the measures which can be applied to protect this *interest* during the subsistence of the marriage, stating that

"a spouse whose *interest* to share in the accrual of the estate . . . is being (or will probably be) seriously prejudiced . . . can apply to the [S]upreme [C]ourt for an immediate division of such accrual".

Van Aswegen adds that this measure "is practically identical to division of the joint estate in terms of s 20".

Section 20 of the Act deals with spouses married in community of property and the power of the court to divide the joint estate if the *interest* of a spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse. As both spouses in a marriage in community of property automatically acquire ownership of the assets in the joint estate, the *interest* referred to in section 20 clearly is not the same as the *right* in section 8. When Van Aswegen calls the *right* referred to in section 8 a *spes*, she herself makes a distinction between the two sections. The only analogy that can be drawn between section 8(1) and section 20 is that in both instances, if there is reason to believe during the subsistence of the marriage that a spouse is doing something which prejudices or probably will prejudice either the joint estate or the right of the other spouse to share in the accrual, the other spouse can approach the court. It is clear, however, that section 20 is aimed at protecting a *vested* right whereas the aim of section 8(1) is to protect a *contingent* right.

In Van Wyk "Community of property and accrual sharing in terms of the Matrimonial Property Act, 1984: Part 2" 1985 *De Rebus* 59 60 we read that the *claim* to share in the accrual is a "*ius in personam*, which only arises at dissolution of the marriage". Schulze "Some thoughts on the interpretation and application of section 8(1) of the Matrimonial Property Act 88 of 1984" 2000 *THRHR* 116 also touches briefly on this aspect when he states that the system "takes effect only on dissolution of the marriage, when the claim to share in the accrual arises". The viewpoints of these writers are in line with the intention of the legislature.

Although there are conflicting views on the interpretation of the Matrimonial Property Act, there is undoubtedly a distinct difference between a *right* and a *claim* as referred to in section 3. The claim against the other spouse arises at the *dissolution* of the marriage, but the right of a spouse to share in the accrual of the estate of the other spouse exists as soon as a *marriage* has been concluded subject to the accrual system.

Let us now consider the judgment in *Reeder* again. The court concluded that a claim in terms of section 3(2) for half of the net accrual of the other spouse arises at dissolution of the marriage. In this regard, we can be satisfied that the correct judgment was handed down, but it is imperative for future cases that this issue is understood and that a clear distinction is drawn between the right to share in the other spouse's accrual and the actual accrual claim.

Although this discussion deals with the interpretation of sections 3 and 8(1) of the Act, it is important to take note of the fact that, when the applicant in *Reeder* sought an order directing that the *shares* to which the second respondent had become entitled should be kept in trust pending the outcome of the divorce action, there was a mistaken assumption that she was entitled to certain assets which formed part of the second respondent's estate. Section 4(1)(a) of the Act makes it clear that

"[t]he accrual of the estate of a spouse is the *amount* [my emphasis] by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage".

Nowhere does the Act give a spouse the right to claim any specific asset(s) from the other spouse. This means that the applicant in this case did not at any stage have the right to lay claim to the shares which formed part of the second respondent's estate. If the applicant had any claim at all, it was to a portion of the net value of the second respondent's estate.

Conclusion

When the accrual system was incorporated into our legal system, the aim was to try to eliminate the problem that a spouse who is married subject to complete separation of property has no legal right to the growth in the other spouse's estate despite her having contributed to its increase, and to achieve this result in such a way that the advantages of a marriage out of community of property are not lost. The accrual system may not be perfect, but it has certainly gone a long way towards achieving patrimonial fairness in a marriage. Careful attention should, however, be given to the wording of the Matrimonial Property Act in order to ensure that it is correctly interpreted, and in order to avoid injustice to spouses in a marriage subject to the accrual system, as was illustrated clearly by *Reeder*. If the applicant had received the correct legal advice initially, she probably would have been in a far more favourable position to try to prevent the second respondent from squandering money to which she ultimately would have a claim. She would probably have applied for an interdict *pendente lite* immediately, which would have meant that there was a far greater chance of receiving legal assistance before it was too late to mean anything.

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**STRETCHING THE SCOPE OF THE *CONDUCTIO OB TURPEM*?
FNB v Perry NO Case No 99/00 (SCA)**

1 Introduction

The facts in the *Perry* case are not unique in the current South African climate of high levels of white collar crime, but pose interesting unjustified enrichment questions which have as yet not been satisfactorily answered. The mere fact that the facts gave rise to a "hydra-headed particulars of claim" which is an ordeal to read is indicative of the dilemma in which the original drafters of the pleadings found themselves.

The case deals with the issue of dealing with and tracing the proceeds of fraud, the classification of the particular enrichment action to be applied, the requirements of the *conductio ob turpem vel iniustam causam* and the role of innocent possessors of the proceeds of fraud. Although there are aspects of the judgment which may be criticised, the decision of Schutz JA brings welcome clarity in this area of our unjustified enrichment law.

2 Facts

The case deals with an exception against the particulars of claim of the plaintiff, First National Bank (FNB), namely that the particulars did not disclose a cause of action against the various defendants. The following facts were alleged in the particulars of claim: A cheque of the Government of KwaZulu-Natal (KwaZulu-Natal) was stolen and forged by an unknown person. Thereafter it was handed by

one Dambha to a firm of stockbrokers, Frankel Pollak Vinderine Incorporated (FPV). Dambha held a managed account with FPV and his account was credited with the amount. Both KwaZulu-Natal and FPV held accounts with the appellant (FNB) (the plaintiff in the case). FPV deposited the cheque into their FNB account and the funds were collected by FNB from the KwaZulu-Natal account and credited to the account of FPV.

On instruction of Dambha, FPV made out three cheques, one in favour of Standard Bank Limited, one in favour of a trust of which Dambha was a trustee (the Abdul Razac Family Trust) and one in favour of himself. The cheques were deposited in accordance with the instruction of Dambha with Standard Bank, Nedbank Ltd (a defendant in the case) and New Republic Bank. Nedbank credited the account of the Trust, part of the proceeds being used to offset the overdraft of the Trust. The Trust and Dambha were both insolvent at the time that this action was lodged.

At the time the claim was lodged Nedbank was still in possession of the funds collected by it on behalf of the Trust and was interdicted from dealing with it pending the finalisation of the claim.

FNB further alleged that Dambha, in his personal capacity and as trustee at all times knew that the funds deposited on behalf of the trust were the proceeds of fraud and were collected for his own benefit or the benefit of the Trust. As a result of the fraud FNB or alternatively, FPV had suffered damages of R5 873 501,41. FPV had ceded any claims that it may have had against any of the defendants to FNB. Schutz JA held that if there were any enrichment claims indeed, they were the claims by FPV against the various defendants which had been ceded to FNB and therefore FPV had to be considered the "real claimant" in this case.

The case as argued on appeal mainly concerned the ceded claim by FNB against Nedbank for the funds received by Nedbank from FPV on behalf of the Trust.

3 The issues

In the court *a quo* FNB achieved limited success in that Magid J held that in so far as the amount of R485 278,35 was concerned which had been appropriated by Nedbank in respect of the accounts which were in overdraft, the particulars of claim did contain sufficient allegations to found an enrichment claim against Nedbank. This finding was confirmed on appeal. However, in respect of the main part of its claim, namely in respect of the major part of the funds still held by Nedbank, the court found that the particulars of claim contained insufficient facts to found a claim against Nedbank or any of the other defendants and that the particulars of claim were therefore excipiable.

This discussion will not deal with the principles regarding exception which Schutz JA quite correctly deals with in paragraphs 6 and 35–37 of the decision based on *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 2 SA 493 (A) 500E–F. Rather, the discussion will focus on the unjustified enrichment analysis and exposition made by the court in paragraphs 15 to 35.

Arising from these facts the discussion of the court focused on the following enrichment issues:

- whether it is permissible or possible to trace the funds or their remains in the hands of successive recipients where those funds have been transferred in ownership due to *commixtio* and the money lost its identity as a result;
- the bank's obligation to a fraudulent accountholder whose account has been credited;
- the nature of the enrichment action to be used under these circumstances;
- the requirements for the *condictio ob turpem vel iniustam causam*; and
- whether it can be said that the bank remains enriched where it has credited an account of a third party with fraudulent proceeds.

Whether FNB was entitled to reverse the amount credited to FPV or had to bear that loss itself and the consequences of that analysis is not discussed by the court. The court simply accepts that FPV is the party impoverished as the funds had been transferred from their Standard Bank account to the various recipients. This seems correct as the three cheques were not drawn on their FNB account but a different Standard Bank account. Whether FNB was entitled to claim in their own right as the party defrauded or as cessionary would have made no difference to the eventual outcome of the case.

4 Treatment of the enrichment aspects

4.1 Tracing funds in the hands of successive recipients

Although the doctrine of tracing as it is known in English law is not part of South African law, there is probably no need for this doctrine if the principles of the law of delict or unjustified enrichment are correctly applied. Ever since the *negotium* requirement which required some kind of dealing between the impoverished and enriched party, was dropped in the Roman-Dutch law in respect of the *condictio sine causa specialis* (see De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 75–77), it became possible for an impoverished party to follow the property or its value, including a fund, in the hands of successive possessors. In my opinion there is a strong argument in modern South African law for jettisoning this requirement in its entirety. That will render the need for a doctrine like tracing in South African law unnecessary because the same result will be achieved by this development. There is certainly an indication that the court would have been willing to follow this course in this case if necessary (see paras 18 and 29).

In this case the issue of tracing did not really arise because the funds transferred from the FPV Standard Account into the trust account with Nedbank still remained in the hands of Nedbank. The court quite correctly held that the mere fact that the trust account was credited with the amount was not a transfer of ownership of the funds to the trustees, but merely the creation of a personal right, an obligation, on the face of it entitling the trust to deal with the money by withdrawing it or writing cheques (see paras 19 and 31). No real right such as Nedbank had obtained was conferred on the funds.

However, the court goes on to compare the position of funds transferred through several intermediaries, with that of the possession of an identifiable thing passing through the hands of several intermediaries (paras 18 and 29). In the latter instance the owner is of course entitled to claim physical control of the thing with the *rei vindicatio* from the person in possession. In the former case this is not possible because of the money having been transferred in ownership

through operation of law (*commixtio*) once it loses its identity. Importantly though Schutz JA holds that just as the owner is entitled to follow its thing wherever it goes, an impoverished party who has transferred money or a fund, is entitled to follow or trace that fund wherever it goes as long as it remains an identifiable fund. Secondly, referring to *Leal & Co v Williams* 1906 TS 554 and *Aspeling NO v Joubert* 1919 AD 167 171, he holds that just as an intermediary is liable in delict to the owner if he parted with goods knowing about the tainted title, an enriched party who parts with the goods or funds knowing about the enrichment remains liable to the impoverished party (para 29). He cannot part with the goods or funds with impunity as he holds for the benefit of the impoverished party, at least until the enrichment claim has been finalised.

4.2 *The bank's obligation to a fraudulent accountholder whose account has been credited*

One of the defences raised by Nedbank in argument before the court *a quo* was that there was no obligation on the bank to enquire into the sources of the funds of its clients. As a general point of departure this is correct, but the bank cannot simply be allowed to wash its hands in innocence where circumstances arise alerting the bank or which should have alerted the bank that the funds in a specific account may be the proceeds of crime, be it theft, fraud or money-laundering. In this case FNB had informed Nedbank of the fraud and had in addition interdicted the money in the possession of Nedbank. There is therefore no ground for Nedbank to plead innocence under these circumstances.

Schutz JA does not directly deal with this aspect of the judgment *a quo* but his stance on this issue can be clearly perceived from paragraphs 18, 19 and 29 of the judgment where he deals with the bank's liability toward the fraudulent party and the bank's liability to the impoverished party. The court shows that on the assumption that the bank is not liable to the fraudulent party, the bank is enriched and cannot simply be allowed to retain the money. Nor can the bank be allowed to part with the money with impunity. As stated above, the bank will remain liable to the impoverished party if it parts with the funds knowing about the enrichment claim. The ostrich tactics adopted by Nedbank will not be countenanced by the law.

The entitlement of an aggrieved party to an interim interdict in respect of funds in the hands of a party in the possession of such funds, first established in *Lockie Bros Ltd v Pezaro* 1918 WLD 60 and confirmed in *Henegan v Joachim* 1988 4 SA 361 (D) 365B–C is confirmed by the court. The doubt expressed in *Stern and Ruskin NO v Appleson* 1951 3 SA 800 (W) 812F–H about the correctness of the *Lockie* case is correctly rejected by the court.

What is unusual in this case, is that Nedbank did not simply adopt the stance of a stakeholder letting the impoverished party and the fraudster or thief fight out the claim, but actively opposed FNB's claim.

4.3 *The nature of the enrichment action to be used under these circumstances*

Part of the confusion in this case arose from the hydra-headed nature of the particulars of claim, from which it was difficult to ascertain exactly what the nature of the enrichment action against Nedbank was. It is trite law that the name of the action need not be mentioned in the pleadings, but that sufficient facts to support the action relied on need to be pleaded. When drafting particulars of claim the draftsman is therefore faced with the task of discerning which enrichment

action will be relied on and to make sure that sufficient facts covering all the requirements of the particular action is pleaded. It is quite clear that under the circumstances the draftsman did not have a clear idea of the particular action that would be relied on.

Schutz JA laments that, just as he had pointed out in *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 SA 482 (SCA), far too much time is spent trying to establish which enrichment action should be used in a particular case. And then counsel frequently err, and so do the courts according to academics and so do some academics! However, the point is that until such time as the different enrichment actions are jettisoned and all enrichment claims brought under the umbrella of a general enrichment action, such classification exercises will remain necessary due to the different requirements of the different actions.

In this case appellant relied on two different enrichment actions, namely the *condictio indebiti* and the *condictio sine causa specialis*, but the court held that a third action – the *condictio ob turpem* – was the correct one.

4 3 1 Non-applicability of the *condictio indebiti* and the *condictio sine causa specialis*: presence of a *causa*

From paragraph 22 of the judgment it is clear that the court *a quo* was of the opinion that it was dealing with either the *condictio indebiti* or the *condictio sine causa specialis*, having been misled either by the way the particulars of claim were drafted or in argument. Schutz then holds that neither of these actions are appropriate.

According to his view the definitive requirement of the *condictio indebiti* is that a payment is made under a *mistaken belief* that payment is due whereas it is not. That is quite correct. The definitive requirement of the *condictio sine causa specialis* is that payment is made where there is *no cause at all*, not even a factual but mistaken cause as with the *condictio indebiti* or unlawful cause as with the *condictio ob turpem vel iniustam causam*.

Whether the latter point of view is correct, may be doubted if regard is had to the uncertainty surrounding the requirements for this action and the established fields of application of the *condictio sine causa*.

Two examples will illustrate this. The most common area of application of the *condictio sine causa* is in the case of cheques which have been stopped or fraudulently drawn and paid out by the bank. In both these instances there is a *causa* as defined by Schutz JA in that the bank relies on the perceived but mistaken mandate contained in the stopped or fraudulent cheque. The second example is the case of the fuller who has mislaid the clothes of a client and has paid compensation to the client, only at a later stage to find the clothes again (see the discussion of D 12 7 1 in *Snyman v Pretoria Hypotheek Maatschappij* 1916 OPD 263 270). Another area of application is where a valid *causa* existed at the time of payment but where that *causa* subsequently fell away. According to some analyses the case of the fuller is covered by this instance.

The court holds that in this case there is a factual *causa* present, namely the unlawful agreement of mandate between FPV and Dambha which gave rise to the payment from FPV to Nedbank and that therefore there is no mistaken payment on the part of FPV, nor is there an absence of a *causa*. This being so neither the *condictio indebiti* nor the *condictio sine causa specialis* is applicable. Although this conclusion is correct, the reasoning is not. It is well established

that where an agreement is void for want of compliance with formalities, but which does not render the agreement unlawful, the correct action is the *condictio indebiti* because there is a mistaken payment untainted by illegality. However, as soon as the agreement is void due to illegality, the correct action to apply is the *condictio ob turpem vel iniustam causam*.

The field of application of the *condictio sine causa specialis* is limited to its rather uncertain requirements, but secondly, and that is clear, by the requirement that it can only be used in circumstances where none of the other *condictiones sine causa generales* like the *indebiti* or the *ob turpem* can be used. Thus where a *causa* is absent due to the illegality of the transaction, the correct *condictio* to use is the *ob turpem* and not the *sine causa*. It is excluded by definition.

In all cases where enrichment actions arise there is an absence of a legally valid *causa*. That is one of the general requirements for any enrichment claim, under whatever *condictio*. The court's differentiation between factual *causae* and legal *causae* is therefore mistaken and not supported by any authority. This fact is borne out by the very description of the enrichment actions in Roman and Roman-Dutch law as *condictiones sine causa generalis* (which generically described the *indebiti*, the *causa data causa non secuta* and the *ob turpem*) and the *condictio sine causa specialis*. There is also no need for this differentiation.

4 3 2 Requirements: turpitude on the part of the recipient

The court points out in paragraph 22 that the only real difficulty in applying the *condictio ob turpem* in these circumstances is the requirement of turpitude on the defendant's part, as there is none on the part of Nedbank on these facts. The bank was totally unaware of Dambha's fraudulent scheme and intent at the time that the money was received from FPV. It only became aware of these facts at a much later stage.

It is not clear what the authority for this perceived requirement of turpitude on the part of the defendant is. The court seems to understand this as an implication of the common modern formulation of the action, namely that "the property has been *transferred* under an illegal agreement". Why there should be an implication of turpitude on the part of the defendant according to this formulation is not clear.

If regard is had to the formulation of the action in Roman and Roman-Dutch law, there is no hint that such a requirement was ever a prerequisite for this action whether it was viewed as one or two actions (see De Vos *Verrykingsaanspreklikheid* 22–23 68 161–162). The fact that an agreement is tainted by illegality does not necessarily mean that either party's actions need be tainted by turpitude. Both parties may be innocent or at most negligent about the illegality of their agreement, which neither saves the agreement from voidness nor excludes an enrichment claim under this action (see *idem* 161–162). The introduction of this requirement into our law at this stage, if this were to be the effect of this decision, should be rejected.

The court softens the blow of this perceived requirement in paragraphs 24 and 25 by interpreting the common law authorities in such a way that where an innocent defendant obtains knowledge of the illegality of the agreement while still in possession of the goods or funds, he becomes liable under this action. Knowledge of the illegality of the transaction does not protect the defendant from a claim under this action, but merely from liability where the enrichment has been

lost. The requirement of knowledge on the part of the defendant therefore does not relate to a requirement of the *condictio ob turpem*, but rather to the question on whether the defendant is still enriched or may be held liable even though he is no longer enriched.

4.4 Continued enrichment of the bank

The final issue dealt with by the court is the continued enrichment of the bank under the circumstances as described above. It is clear that where the bank has no obligation to make any payment to an accountholder due the fact that the proceeds of an account is the fruit of fraud, theft or other illegal activities, the bank remains enriched at the expense of the person from whom the funds were obtained by fraud or theft. If the bank were to pay out such funds innocently, it will be able to set up the defence that the enrichment has fallen away or has been lost (non-enrichment), but where it does so negligently or with knowledge of the illegality it will remain liable to the impoverished party. These are simply the application of well established principles of the law of unjustified enrichment, quite correctly applied in paragraph 29 of the judgment.

5 Conclusion

This judgment is to be welcomed in that it brings clarity to the nature and circumstances of the enrichment claim to be used in circumstances which have become a common occurrence in South African banking. This case should not be seen as a widening of the scope of the application of the *condictio ob turpem*, as it certainly is not, nor should the introduction of a new requirement for this action be accepted. The action in its common law form as developed in our practice is sufficiently wide in its scope to make provision for circumstances like those encountered in this case. It is unfortunate that this important direction-giving decision should be clouded by the misleading statements about the requirements of this *condictio* and the *sine causa* requirement.

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WHO IS ACCOUNTABLE TO WHOM?

Hamilton-Browning v Denis Barker Trust [2001] 1 All SA 618 (N)

1 Introduction

A very basic confusion of an *emptio spei* with an *emptio rei speratae* appearing in a seemingly unimportant case (*Hamilton-Browning v Denis Barker Trust* [2001] 1 All SA 618 (N)) initially induced me to read the judgment more thoroughly. On this closer reading, gloom descended on me. I think that I am in a state of occupational depression! As a law teacher taking my profession seriously, I cannot refrain from commenting on the judgment – I (no longer) have to publish to improve my *curriculum vitae*, or for subsidy reasons only (apparently some judges think that this is the reason for the proliferation in

academic publications see: Nienaber "Regters en juriste" 2000 *TSAR* 190 196). On scrutinising the judgment I discovered more serious flaws which prompted me to reflect on accountability in the legal fraternity in general (see also Carpenter and Botha "The 'Constitutional attack on private law': Are the fears well-founded?" 1996 *THRHR* 126 135).

However, I was reluctant to embark on the probably somewhat futile exercise of writing a case note. The lighthearted and, no doubt, well-intended article of Nienaber JA was still fresh in my memory. In this article the judge discusses the role of judges and jurists in the law. Apparently judges regard academics as jurists, not in the Roman law sense of the word, of course, since judges today do not rely on academics for advice. In a rare display of openness and of engagement in academic debate which I truly appreciate, Nienaber JA informs jurists that we have a role to play, but that, in general, our views are no longer valued highly (2000 *TSAR* 190 191) and judges in South Africa, for various reasons, do not really take note of what we write (*idem* 194). Some apparently even think that academics are helots! I have no problem to be a serf, my only concern would be who is my master!

On the brink of relinquishing my proposed case note, however, I also recalled articles by Cameron JA urging academics to nurture and maintain our precious heritage of criticism, inquiry and challenge ("Lawyers, language and politics – in memory of JC de Wet and WA Joubert" 1993 *SALJ* 51, "Academic criticism and the democratic order" 1998 *SAJHR* 107 109, "Our legal system – precious and precarious" 2000 *SALJ* 371). Cameron JA places a heavy burden on our shoulders, telling us that we have a responsibility to remind the new generation of "fallible judges and fallible practitioners" of their human frailties (1998 *SAJHR* 107 109). Presumably we must also be mindful of our own human frailties! Some people describe the characteristics of professors in the following words:

"Hoogleraren zijn bijzondere mensen. Niet omdat zij zo knap zijn, want dat zijn slechts enkelen onder hen, maar op grond van hun afwijkend gedrag en uiterlijk. Zij zijn vaak afwezig, slordig, ongemanierd, bits, ijdel; zij zien er niet zelden uit als ongewassen clochards, stokoude, pluizige spaniels of adellijke jagers" (Reincke Wybo *Een met de uni* (1999) CPO Catholic University of Nijmegen).

My translation:

"Professors are special people. Not because they are so bright, because only a few are bright, but because of their aberrant ways and appearances. They are often absentminded, slovenly, ill-mannered, acrimonious, vain; they often look like unwashed vagabonds, very old spaniels giving off fluff, or aristocratic hunting dogs."

Possibly my frailties are arrogance (to think people will read what I write) and greed (writing for subsidy reasons)? I prefer to believe that a more positive attribute, namely my sense of academic responsibility, played a decisive role. In this discussion of the above case I shall briefly summarize the judgment, evaluate it and try to arrive at a positive conclusion which will, hopefully, alleviate my melancholy state of mind.

2 Summary of judgment

The facts of the case are as follows: H (plaintiff in the magistrate's court and appellant in this case) bought a portion of a farm from D (defendant in the magistrate's court and respondent in this case). H took occupation of the land. At a later stage H instituted action against D for compensation for improvements effected on the farm. H alleged that the sale was null and void in terms of section 3(e) of the

Subdivision of Agricultural Land Act 70 of 1970 which expressly prohibits the sale of a portion of land without the minister's consent.

By agreement the parties requested the magistrate to decide, as a preliminary issue, on the legality of the sale. The magistrate held that the sale was subject to a suspensive condition and therefore not void *ab initio*. H appealed against this finding. The appeal was heard by Magid J.

As a starting point the judge correctly pointed out that the legislature in the above Act intended a sale of a portion of agricultural land without the consent of the minister to be void *ab initio* (*Schierhout v Minister of Justice* 1926 AD 99 109)(623D). He then referred to *Tucker's Land & Development Corporation (Pty) Ltd v Strydom* 1984 1 SA 1 (A) for the effect of a suspensive condition on a contract. The judge summarised the position as stated by the Appellate Division as follows:

"It was there held that if a contract contained a suspensive condition it could not be regarded as a contract of sale for the purpose of legislation prohibiting sales until the fulfilment of the condition *unless the context indicated that the legislature had intended to include in the prohibition contracts subject to a suspensive condition*" (623g-h) (my italics).

Magid J subsequently performed his duty to give reasons for his judgment (see Corbett "Writing a judgment – Address at the first orientation course for new judges" 1998 *SALJ* 116) and fully addressed counsel for the defendant's contention that the sale in question contained a suspensive condition because: (1) on a proper construction of the contract it contained an express suspensive condition, or (2) alternatively, if it did not contain an express term to that effect, a tacit term could be implied, or further, (3) that in terms of the common law a suspensive condition can be construed in this case (623h-i).

The judge held that there was no express clause in the contract subjecting the contract to a suspensive condition (624g). He further pointed out that a litigant who relies on a tacit term in a contract must plead it and that this was not done in the case under discussion (625c). In an *obiter dictum* Magid J expressed the opinion that this contention would in any case have been ineffectual if the "of-ficious bystander" test were to be applied to the facts of the case (625j). The final contention that this sale was an *emptio rei speratae* and therefore subject to a suspensive condition, was countered with reference to the fact that an *emptio spei* is an unconditional sale (626a-d). The judge then also indicated that on the facts the object of the sale was in any event an existing *merx* (sale object), not a future object (626e-f). His remarks on the latter issue were therefore *obiter*.

Magid J concluded:

"I am therefore satisfied that the magistrate's ruling that the agreement was subject to a suspensive condition relating to the Minister's consent was wrong, and that the agreement was in fact illegal" (626g).

I thoroughly agree with this conclusion.

3 Evaluation

The reader may ask: If you agree, why do you criticize? Is there any sense in writing a critical evaluation of the case in question? The outcome is correct, albeit on the wrong assumption of the legal position, but is it an example of efficient and fair administration of justice? The judge followed his "gut-feeling" or "legal intuition" (Nienaber 2000 *TSAR* 190 191 informs us that legal intuition

plays a significant role in determining what the legal position should be) and came to the correct conclusion. Counsel's seemingly complete ignorance of the law, fortunately, did not determine or influence the judge's legal intuition.

Therefore, why do I wish to bring the case to the attention of other people? I think it is because this apparently unimportant case illustrates how the legal fraternity can fail members of society – not only in the sphere of criminal or constitutional law, but in all spheres of law where we are involved. This case should never have been before the court. If all branches of the legal fraternity act responsibly and with due regard to the serious consequences of their acts, a case like this will never proceed to the litigation stage. The case is an exposure of incompetence, not of human frailty. As lawyers we should then ask: who is accountable or responsible?

In principle, all lawyers have a responsibility to society at large. Academics also have that responsibility, but have additional responsibilities to their students and to the legal system. Responsibility to our students also means responsibility to the legal fraternity (see also Carpenter and Botha 1996 *THRHR* 126 135). This responsibility, as well as our concern with the legal system, places a duty on academics to "comment and criticize". I therefore agree with Nienaber JA 2000 *TSAR* 190 191 where he states that jurists are primarily concerned with the legal system as such ("Die juris, daarenteen, is primêr begaan oor die stand van die reg, oor tese, sintese en hipotese"). However, this is not our only concern.

As law teachers, academics have a responsibility to their students to equip them to the best of their abilities so that they can fulfil their roles as future lawyers. Indirectly, this responsibility is also a manifestation of academics' obligation to society. Debates on the shortcomings of our legal training and accusations relating to failure in this regard abound. There seems to be general consensus that academic legal education fails to "produce graduates with the most *basic* complement of analytical and practical skills" (see eg Woolman, Watson and Smith "'Toto, I've a feeling we're not in Kansas any more': A reply to Professor Motala and others on the transformation of legal education in South Africa" 1997 *SALJ* 30 33).

On the "why" and "how" of this problem there is no unanimity. Without entering this debate, I merely would like to mention three of my concerns which directly impact on legal education today. These are: the reasons for studying law, the quality of law students and how ill-equipped graduates are to assist their clients and judges.

Recently I asked a class of first-year students: why do you study law? First, there was no reaction and then they reluctantly tendered the answer: "For the money! We want to become rich!" (Cameron 2000 *SALJ* 371 375 refers to the fact that "practice as an advocate or an attorney, undoubtedly offer opportunities to prosper, and even to become affluent" and warns the profession of the negative effect this may have on future legal development.) Needless to say, I gave my students a talk on issues such as "justice" and "societal responsibility", but I am not convinced that I have changed their hearts.

Most law lecturers with whom I have spoken over many years are appalled by the caliber of the students who enrol for legal studies. At most universities there are no selection procedures, or entry requirements are very low. I am not going to elaborate on this issue here, but merely wish to stress the fact that the students' (and later the practitioners') inherent capabilities are of the utmost importance.

If I read the list of qualities that judges expect from lawyers, I can only say most of these are sadly lacking in many of my students and many of these in myself:

“They are: Experience. Scholarship. Dignity. Rationality. Forensic skill. Some measure of humility. Capacity for articulation. Discipline. Diligence. Intellectual integrity. Intolerance of injustice. Emotional maturity. Courage. Objectivity. Energy both intellectual and physical. Rigour. Wisdom. Efficiency. A sense of relevance. The moral ability to distinguish right from wrong and sometimes the more agonizing ability to weigh two rights or two wrongs against each other” (Mahomed “The role of the judiciary in a constitutional state” 1998 *SALJ* 11; see also *idem* “The independence of the judiciary” 1998 *SALJ* 659 666).

In judging law teachers’ accountability, these limiting factors cannot be ignored. Nevertheless, we owe responsibility to society at large, students and the legal profession. Undoubtedly we owe society a duty, since its members pay for the education of students. More important, we create the impression to members of the broader community that once these students have qualified, they are equipped to serve the interests of the people consulting them for advice.

Judging the circumstances of and financial implications for the parties of this case, I must conclude that we fail dismally in serving the interests of the community, in equipping students and in assiting the legal profession. However, this discussion is not a theoretical reflection on legal education, the syllabi or the “the practical vs theoretical debate”. It is an enquiry into the question: where did what go wrong in this case and why did it happen?

If I say that academic, practitioner and judge failed the parties in the litigation under discussion, why is this so? In this case the basics are not there. What are the basics? Do academics equip students to solve a practical situation? When I refer to dealing with a practical situation, I do not intend to discredit the theory of the law. When a lawyer is asked for advice on a set of facts, she cannot give an answer on her gut-feeling. As a starting point she can use her legal intuition (as judges do). Nienaber JA mentions a long list of attributes that determine a judge’s legal intuition. Only towards the end of his discussion of this list the judge refers to knowledge of the relevant legal rule which to my mind is the principal ingredient of legal intuition (2000 *TSAR* 190 191–193).

Academics lack, particularly, one of the attributes that shapes legal intuition – years of experience in practice. This does not mean that for me as a jurist the facts, or solving the litigation flowing therefrom, are unimportant. However, in teaching my students and evaluating cases I do place a very high premium on knowledge of the theory. Solid theory is therefore always a *sine qua non* (I thoroughly agree with the views expressed on this issue by Woolman *et al* 1997 *SALJ* 30 34: “Theory, properly understood, stands at the heart of a curriculum which must give students the skills they need to build the arguments they will have to make as lawyers. Whatever else it may be, it is not a luxury.”) This latter observation applies equally to practitioners and judges.

Knowledge of the applicable law is therefore essential. Where knowledge of the legal rules applicable to a particular set of facts is lacking, which is often the case with all of us, the next obvious step is to find the law (theory). This is a very basic step, but in the case under discussion it nevertheless seems to have been a problem.

Most lawyers and some judges (see eg *Ex parte Hay Management Consultants (Pty) Ltd* 2000 3 SA 502 (W) 506C) start with textbooks. I also tell my students

to start there, because they give you the general principles and refer you to other sources such as statutes and case law. Here some judges and jurists apparently part ways. Nienaber JA 2000 TSAR 190 informs us that judges do not really consult textbooks, apart from LAWSA:

“Wat oor regstydskrifte gesê is, geld eweseer, dalk des te meer, vir handboeke. Geeneen van die registers met wie ek gesels het, koop nog stelselmatig – behalwe vir die LAWSA-reeks – handboeke, veral nie losblad-handboeke nie, en niemand lees meer ’n nuwe handboek net vir die lekker daarvan van voor tot agter deur nie.”

I assume that judges only rely on LAWSA as a starting point for what the law is. It is indeed a good starting point, but nevertheless a starting point! The law as stated in LAWSA is only as reliable as the author of the particular topic. It is to be noted in this regard that in most cases of the first re-issue the original authors were not prepared to do the update. Students may possibly rely on the correctness of the information of textbooks and LAWSA, but practitioners and judges have to consult the original sources.

In the case under discussion under “Notes” in the editor’s summary reference is made to LAWSA (Vol 5 (1) First Re-issue (1994) paras 124–362). This is a reference to the section on “contract”. The paragraph dealing with suspensive conditions (para 191) alludes to the controversy surrounding the interpretation of contracts concluded subject to suspensive conditions, but does not deal in any way with the Subdivision of Agricultural Land Act 70 of 1970. In Volume 14 of LAWSA (First re-issue 1999 para 66) it is stated that the Act has been repealed by the Subdivision of Agricultural Land Act Repeal Act 64 of 1998. In the old Volume 14 of LAWSA (1981) dealing with “land”, the position is stated as it was before the Act was amended in 1981 to include suspensive sales under “sale”. The source of the problem can possibly be found in the fact that the Butterworths statutes no longer contain the 1970 Act, but the 1998 one. However, it indicates that it has not been promulgated. On my enquiry to the departments of land and agriculture I was told that the repeal will not become effective in the foreseeable future. This means that the 1970 Act is still in operation. It is still incorporated in the Jutastat CD-ROM version with a note that it has been repealed and that the repealing Act will come into operation on a date to be proclaimed by the resident by proclamation in the *Gazette*.

For judges and, especially for practitioners, it is of the utmost importance to verify the sources on which they rely. We therefore also teach students to read the sources to which they refer and never to rely on secondary sources. This is essential, because a practitioner

“has a duty towards the judiciary to ensure the efficient and fair administration of justice – see the remarks of De Villiers JP in *Cape Law Society v Vorster* 1949 3 SA 421 (C) 425. As was observed by James JP in *Swain’s case* (*supra*), in a passage since followed *inter alia* in *Society of Advocates of Natal and another v Merret* 1997 4 SA 374 (N) 383 and *Pienaar v Pienaar* 2000 1 SA 231 (O) 237, the proper administration of justice could not easily survive if the professions were not scrupulous of their dealings with the court” (*Toto v Special Investigating Unit* [2000] 2 All SA 91 (E) 100d–f).

For various reasons judges increasingly rely on practitioners in this regard and the latter should take note of how Wunsh J recently (in *Ex parte Hay Management Consultants (Pty) Ltd* 2000 3 SA 502 (W) 506A–507A) reprimanded counsel:

“The submissions were made two days later by counsel, who still insisted that a consent to jurisdiction always required an attachment to be effective. She said that she could not find the report of the case I had referred to. This is not acceptable.

Because I was a member of the Court in *American Flag plc v Great African T-Shirt Corporation CC*; *American Flag plc v Great African T-Shirt Corporation CC*: *In re Ex parte Great African T-Shirt Corporation CC* 2000 (1) SA 356 (W) previously reported on 4 January 1999 in [1999] 1 B All SA 26 (W), I was aware of the decision. Had I not known of it, counsel's ignorance of its existence and failure to bring it to my attention could have misled me. While counsel and attorneys may not be expected to read the law reports as they are published and recall their contents or effect, if they have to present argument on a matter, the least that is expected of them is to consult the relevant textbooks, the consolidated indexes of and noters-up to the ordinary law reports and the indexes of and noters-up in weekly or monthly reports which have been published after the effective date of the latest consolidated index and noter-up. I do not mention the computer services that are available to retrieve material. If counsel does not possess his or her own copies of the reports, the Bar library or the Court library can be consulted. Regrettably this is a shortcoming which happens too often. I consider apposite the following words of Brooke LJ in *Copeland v Smith* [2000] 2 All ER 457 (CA) in an appeal from a judgment which had been delivered on 31 March 1999 by a Judge who had not been told of a relevant decision of the Court of Appeal (reported in [1998] 2 All ER 124 (CA) and [1998] 1 WLR 1540).

'It is going to be increasingly important with the regime under the new Civil Procedure Rules that Judges dealing with interlocutory issues are afforded up to date assistance on the law by advocates appearing in front of them . . .

In these circumstances it is quite essential for advocates, who hold themselves out as competent to practise in a particular field, to bring and keep themselves up to date with recent authority in their field. By "recent authority" I am not necessarily referring to authority which is only to be found in specialist reports, but authority which has been reported in the general law reports. If a solicitors' firm or barristers' chambers only take one set of the general reports, for instance the Weekly Law Reports as opposed to the All England Law Reports, or the All England Law Reports as opposed to the Weekly Law Reports, they should at any rate have systems in place which enable them to keep themselves up to date with cases which have been considered worthy of reporting in the other series. If this is not done, Judges may be getting the answer wrong through the default of the advocates appearing before them.

The English system of justice has always been dependent on the quality of the assistance that advocates give to the Bench. This is one of the reasons why, in contrast to systems of justice in other countries, English Judges are almost invariably in a position to give judgment at the end of a straightforward hearing without having to do their own research and without the State having to incur the cost of legal assistance for Judges because they cannot rely on advocates to show them the law they need to apply.' (At 462e – 463a.)

The same position should apply in this country where the volume of work, especially in the Motion Court, usually necessitates judgments being given immediately after a hearing. It is not only in contested cases that counsel has a duty to direct the Court's attention to any relevant authority. For the Motion Court of April 4 I had to read 127 Court files. The Judge in a Motion Court relies on counsel, especially in *ex parte* applications and in those cases where there is no appearance for the respondents, to inform the Court of any cases of which the effect may be that they are not entitled to the orders that they seek."

This brings me to the accountability of counsel to their clients and to the judge. If the legal advisers of the parties had informed the parties correctly from the outset (2 December 1995), the sale in the case under discussion would never have been concluded. Surely the starting point for any practitioner dealing with contracts of sale of sub-divisions of agricultural land would be to consult the relevant Act, in this case the Subdivision of Agricultural Land Act 70 of 1970. In section 1 of the Act "sale" is defined as including a sale subject to a suspensive

condition and it is stated that "sold" shall have a corresponding meaning. This definition was inserted by section 1(c) of Act 18 of 1981. Therefore, even sales subject to suspensive conditions fall within the ambit of section 3(e) of the Subdivision of Agricultural Land Act 70 of 1970. Furthermore, if the practitioner concerned failed to consult this Act at the time of the conclusion of the contract, he/she definitely should have done so before advising his/her client to go to court (some time after 15 December 1996).

The initial inexcusable oversight by the practitioner was perpetuated by counsel, the magistrate and the judge. Up to a point such an omission is excusable, but having referred to, and presumably having read, the judgment in *Tucker's Land & Development Corporation (Pty) Ltd v Strydom supra* 18E-F, counsel should have been on the alert and consulted the Act itself. Obviously neither the magistrate nor the judge discovered the oversight because they relied on counsel for the correctness of the legal position (and counsel, possibly relied on the Buterworths statutes?).

How did this whole unfortunate situation arise? At the heart of the matter lies a poor knowledge and understanding of the law. Who bears the responsibility for this? From the discussion above, it is clear that judges rely heavily on practitioners in this regard, and obviously the client also relies on the practitioner for correct information. However, the question arises whether it is fair to place such a heavy burden on the shoulders of practitioners. I do not think so. The whole legal fraternity should take responsibility.

To some extent poor legal education should take the blame for the inefficient administration of justice in this case. Obviously, here the academics fail the profession and society as a whole. However, this deficiency can account only partly for the bungling of the practitioners in this case. Certainly the public can expect every lawyer to have a basic knowledge of the law? Lawyers at all times should be conscious of this duty to the public. If they are uncertain of their expertise in advising a client on a specific legal issue, they should investigate the issue thoroughly. This entails responsible and proper research. My friends in practice reproach me that some clerks have never seen a law report or a statute in the original and that they do not know how to use the sources of the law! However, some practitioners are also negligent (or at least not diligent) in performing their task of advising clients on legal matters and in assisting them in litigation. In this case the incorrect information imparted to both parties when the contract was concluded, as well as the advice to litigate on the matter resulted in unnecessary costs (eg, the following cost order against the defendant (respondent): "The defendant is to pay plaintiff's costs of and incidental to the argument as to the legality of the agreement, including noting judgment thereon" (626j)).

The practising lawyer is, of course, the only member of the legal fraternity who runs the risk of being held liable in terms of contract or on delict based on negligence (see in general for this liability Midgley *Lawyers' professional liability* (1992)). The practitioner, in particular, should therefore always act with utmost diligence.

Clearly, academics and practitioners undoubtedly share responsibility to impart correct information on legal matters. But what about the judge? Is it unreasonable to expect a judge to determine the legal position by consulting, for example, the statute which he/she is applying? On his legal intuition the judge came to the correct finding. His finding was not based on the correct legal position and his reasoning was wrong. However, had he consulted the Act, he could

have avoided expressing himself on the nature of contracts subject to suspensive conditions, the intricacies of tacit terms and, especially, the nature of an *emptio rei speratae*. His excursion into the latter issue is particularly disastrous. One can excuse the judge for relying on counsel for the content of the Act, but his complete confusion on the difference between an *emptio rei speratae* and an *emptio spei* is very unfortunate for future legal development (here I am most certainly concerned with the development of the law: see Nienaber 2000 *TSAR* 190 191). Fortunately, Magid J's view on the difference between an *emptio rei speratae* and an *emptio spei* is *obiter*, as I indicated above. The reason for the judge's error in this regard puzzles me. He refers to Kerr *Law of sale* 26–28 who clearly explains the age-old distinction between the two even with reference to Pomponius! The judge nevertheless confused the two or, rather, regarded the two concepts as synonymous.

The judge could have avoided the above criticism if he had heeded the former chief justice's advice to new judges:

"Moreover, where the case entails legal issues, an extempore judgment demands that the judge should be completely au fait with the relevant principles of law and in a position to state them accurately and apply them appropriately . . . *If there is any law involved, devote as much time as you can to studying the law so that when it comes to the argument stage you are well able to test and assess counsel's submissions on this aspect of the case.* If you are able to do so, formulate in writing the essential legal principles appropriate to the case, citing the relevant authority" (my italics) (Corbett 1998 *SALJ* 116 119).

4 Conclusion

Evaluating this case confirmed, once again, my belief that the legal fraternity in many ways fails to serve society properly. Of course, we all advance (valid) reasons for this: academics blame the poor quality of the students and the new LLB. Practitioners blame their inadequate legal education and time constraints. Judges blame their work load which obliges them to rely on counsel for proper legal research.

At the heart of the matter lies a general superficiality and lack of accountability in all spheres of life. Another reason can be found in the lowering of standards on various terrains of the legal profession. However, it is politically incorrect to canvass this issue. South African society has over many years lost confidence in the law and the legal profession for various diverse reasons. Now that we have an opportunity to replace this distrust with faith in the legal system, we seem unprepared and unable to meet the challenge. Surely closer cooperation between academia, practice and judiciary is a first step in the right direction! At least judges and jurists seem to agree on this issue:

"Regters en juriste streef almal dieselfde einddoel na: 'n regstelsel wat suiwer en 'n regspleging wat gesond is. Die regter het dalk die laaste seggenskap, die juris het dikwels die laaste sê. Wat beide gerus kan nastreef, is komplementêre funksies"(Nienaber 2000 *TSAR* 190 204).

How to achieve this, judge? That is the issue.

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**THE WINDING-UP OF A BODY CORPORATE
ESTABLISHED IN TERMS OF THE SECTIONAL TITLES ACT
In re: Body Corporate of Caroline Court [2002] 1 All SA 49 (SCA)**

1 Introduction

In *In re: Body Corporate of Caroline Court* [2002] 1 All SA 49 (SCA) the Supreme Court of Appeal was called upon to consider the winding-up of a body corporate established in terms of section 36 of the Sectional Titles Act 95 of 1986 (the Act). The body corporate launched an *ex parte* application in the Witwatersrand local division of the high court for an order that its affairs be provisionally wound up on the grounds of its inability to pay its debts. The body corporate also sought certain provisions of the Companies Act 61 of 1973 to be made applicable to the winding-up. In addition it sought *inter alia* an order that, upon its dissolution following on the winding-up, a new body corporate be declared to be in existence comprising existing owners of individual units (par 2).

The application was dismissed *in toto* by the court of first instance. The Supreme Court of Appeal concluded that the court *a quo* was indeed correct in dismissing the application. Although it reached the same conclusion, the Supreme Court of Appeal approached the matter quite differently from the court *a quo*. The Supreme Court of Appeal also posed a number of questions in respect of the winding-up of bodies corporate. Unfortunately none of these questions were answered and the appeal was ultimately decided on a very narrow procedural ground. The aim of this case note is not to attempt to answer all the questions posed by the court, but rather to make a few observations regarding the winding-up of bodies corporate. However, it is necessary to first refer to the most important provisions of the Act to which the court referred, in order to place them in their proper context.

2 The relevant provisions of the Act and their context

Section 36, to which reference was made above, forms part of part VIII of the Act, which is comprised of sections 35 to 43. The heading to part VIII is "Rules and bodies corporate". In terms of section 36(1), a body corporate for a sectional titles scheme is deemed to be established with effect from the date on which any person other than the developer becomes an owner of a unit in a scheme. The developer and such person become the first members of the body corporate and thereafter every person who becomes an owner of a unit in the scheme also becomes a member of the body corporate. When a person ceases to be an owner of a unit in the scheme, he ceases to be a member. The developer ceases to be a member of the body corporate once ownership in every section is held by any person or persons other than the developer (s 36(2) read with s 34(2)).

Subject to the provisions of the Act, a body corporate is responsible for the enforcement of the rules referred to in section 35, and for the control, administration and management of the common property for the benefit of all owners (s 36(4)). Section 36(5) provides that the provisions of the Companies Act 61 of 1973 "shall not apply in relation to the body corporate". Part VIII of the Act proceeds to deal *inter alia* with the functions (s 37) and powers (s 38) of bodies corporate, but not with their dissolution and/or winding-up.

Part IX of the Act, comprising sections 44 to 51, has as its heading "Owners, administrators and buildings". Section 47(1) provides for the joinder of the members of the body corporate in their personal capacities as joint judgment debtors, if a judgment obtained against a body corporate remains unsatisfied.

The heading to section 48 is "Destruction of or damage to buildings". Section 48(1) defines when the building or buildings comprising a scheme will be deemed to be destroyed for purposes of the Act. Not surprisingly, the building or buildings will firstly be deemed to be destroyed upon its or their physical destruction (s 48(1)(a)). Secondly, the building or buildings will be deemed to be destroyed when the owners by unanimous resolution so determine, provided that all holders of registered sectional mortgage bonds and any persons with registered real rights agree, in writing, with the owners (s 48(1)(b)). Thirdly, section 48(1)(c) provides that the court may be approached to make an order that the building or buildings are deemed to have been destroyed. The court may make such an order if it is satisfied that, having regard to all the circumstances, it is just and equitable that the building or buildings will be deemed to be destroyed. When making such an order, the court is empowered by section 48(2) to impose such conditions and give such directions as it deems fit for the purpose of adjusting the effect of the order between the body corporate and the owners and among the owners, the holders of registered sectional mortgage bonds and persons with registered real rights.

Section 48(3) contemplates the situation in which the building or buildings comprising a scheme are damaged or destroyed, and some of the owners or other interested parties (who will be discussed in detail below) want the scheme to continue. The owners may by unanimous resolution authorise a scheme for the rebuilding and reinstatement in whole or in part of the building or buildings (s 48(3)(a)(i)), and for the transfer of the interests of owners of sections which have been wholly or partially destroyed, to the other owners (s 48(3)(a)(ii)). The court may also be approached for an order authorising such a scheme. The owners may pass such resolutions, or the court may grant such orders, as may be necessary or expedient to give effect to a scheme for the rebuilding and transfer of the relevant owners' interests (s 48(3)(b)). This includes making provision for the application of insurance monies received by the body corporate in respect of damage to or the destruction of the building or buildings (s 48(3)(i)).

Section 48(4) defines who an interested party is for purposes of any application to court under section 48. The parties mentioned in this regard are the body corporate, any owner, any holder of a registered sectional mortgage bond or a registered lease, any insurer who has effected insurance on the building or buildings, and the local authority. Section 48(5) provides that an insurer who has effected insurance on the building or buildings or any part thereof, has the right to intervene in any application to the court under section 48.

Section 48(6) then provides:

- (a) The Court may, on the application of a body corporate or any member thereof or any holder of a registered real right concerned, or any judgment creditor, by order make provision for the winding-up of the affairs of the body corporate.
- (b) The Court may, by the same or any subsequent order, declare the body corporate dissolved as from a date specified in the order."

Section 48 thus contemplates four possible applications to court. Firstly, an application may be brought for an order that the building or buildings comprising a scheme are deemed to be destroyed. Secondly, the court may on application make an order authorising a scheme for the rebuilding and reinstatement of

damaged or destroyed buildings, or for the transfer of the interests of owners of sections which have been wholly or partially destroyed, to the other owners. Thirdly, the court may on application make an order for the winding-up of the affairs of the body corporate. Finally, an application may be brought simultaneously with, or subsequent to, the application for winding-up for an order declaring the body corporate dissolved as from a specific date.

The definition in section 48(4) of an interested party for the purposes of section 48 and the statutory right afforded by section 48(5) to an insurer to intervene in proceedings, are stated to be applicable in respect of all four possible applications (but see the contrary view of Van der Merwe referred to below), as are the provisions of section 48(7). The latter subsection provides that a court may, with regard to any application under section 48, make such order for the payment of costs as it deems fit.

The first and second possible applications referred to above can clearly only be entertained by the court if the buildings comprising the scheme have been damaged or destroyed, as the relevant subsections expressly contain words to that effect (ss 48(1)(c) and 48(3)). The difficulty is that section 48(6), which provides for winding-up and dissolution respectively (to which the third and fourth possible applications relate), does not refer to damaged or destroyed buildings. If the legislator, for example, prefaced section 48(6)(a) and (b) with the expression "Where the building or buildings is or are damaged or is or are destroyed within the meaning of subsection (1)" (which is the expression with which section 48(3) commences), there would have been no doubt as to the application of the subsection. It would then have been clear that section 48(6) contains an alternative to section 48(3): if the body corporate or other interested parties wish a scheme to continue, they proceed in terms of section 48(3); if they do not, an application (or applications) for the winding-up of the affairs of the body corporate and dissolution of the body corporate may be brought in terms of section 48(6). (It is, of course, also conceivable that some interested parties may favour a rebuilding or transfer of certain owners' interests, whilst others may favour a winding-up. In such a case the court must decide which of the applications should succeed.)

The question is thus whether the absence of words in section 48(6) which expressly limit the application of the subsection to instances in which buildings are damaged or destroyed, means that section 48(6) applies generally to the winding-up of bodies corporate, including the ground of inability on the part of a body corporate to pay its debts. This is what the applicant in the *Caroline* case contended. Van der Merwe *Sectional titles, share-block and time-sharing* (1995) par 16-15 also submits that section 48(6) empowers the court to deal with the winding-up of a body corporate on general grounds and not only specifically in connection with damage to or actual or notional destruction of the building. He indicates that this view is strengthened by the fact that the Act contains no other provision for the winding-up of the affairs of the body corporate.

However, the context of section 48(6) appears to indicate otherwise and suggests that the subsection applies only to the case where buildings are damaged or destroyed. Firstly, section 48(6) forms part of part IX of the Act which, according to its heading, deals with "owners, administrators and buildings". One would have expected a provision of general application to be included in part VIII, dealing with "rules and bodies corporate". Secondly, the heading to section 48 refers to destruction of or damage to buildings. The subsection is, thirdly,

sandwiched between other subsections which expressly address the issue of damaged or destroyed buildings, namely subsections (1) to (3) discussed above and subsection (8). The latter subsection contains a deeming provision which applies to all the provisions of section 48. Where only one or part of one of the buildings of a scheme comprising two or more buildings is damaged or destroyed, the provisions of section 48 are to be applied *mutatis mutandis* as if the buildings were one building and part of such building has been damaged or destroyed. Fourth, no provision is made for a creditor other than a judgment creditor to apply for winding-up in terms of section 48(6). This is not what is expected from a provision which applies generally to the winding-up of bodies corporate. Fifth, section 48(6) provides no ground for the winding-up, whilst one would have expected a generally applicable provision relating to winding-up to mention such grounds. This suggests that the ground for winding-up contemplated in section 48(6) should be sought in section 48 itself, that is, section 48(6) is only applicable where the building or buildings comprising a scheme are damaged or destroyed.

Since section 48(4) specifies which parties may approach the court in respect of any application under section 48 (thus also in respect of an application under section 48(6)), the question arises why section 48(6)(a) contains a list of parties who may approach the court for a winding-up order. Van der Merwe *Sectional titles* 16-3 submits that the list of parties contained in section 48(4) applies only for purposes of the first and second possible applications to court (ie those in terms of s 48(1)(c) read with s 48(2) and (3)). Section 48(4) does not, according to him, apply to the applications for winding-up and dissolution referred to in section 48(6). According to Van der Merwe only the parties mentioned in section 48(6) may therefore apply for winding-up and dissolution of a body corporate. He also submits that the right of the insurer to intervene in proceedings conferred in section 48(5), does not apply in respect of applications in terms of section 48(6). These submissions are contrary to the wording of section 48(4) and (5), and the question therefore arises whether another interpretation should not be preferred.

Both subsections (4) and (6) begin by conferring *locus standi* on the body corporate. However, section 48(6) firstly states that the application can be brought by the body corporate "or any member thereof". When a building has been destroyed, it is conceivable that it may be difficult to have the necessary resolutions adopted to enable the body corporate to bring an application to court. If the application is one for a scheme authorising the rebuilding or transfer of certain owners' interests to others, one would nevertheless expect the members to be sufficiently interested in the success of the application for the adoption of the necessary resolutions. This is not necessarily the case when it comes to an application for winding-up. It is therefore not surprising that the legislator afforded a member the necessary *locus standi* to proceed with such an application without his having to take steps to have a *curator ad litem* appointed to conduct proceedings on behalf of the body corporate (cf s 41). It is therefore submitted that the legislator did not intend the term "member" in section 48(6) to simply be a synonym for the term "owner" used in section 48(4), but intended rather to extend the term "body corporate" used in section 48(4). Secondly, section 48(4) refers to the holder of a registered sectional mortgage bond or a registered lease, whilst section 48(6) refers to a holder of a registered real right. The latter class encompasses holders of registered sectional mortgage bonds or

registered leases, but also includes other holders of registered real rights. Thirdly, section 48(6) includes judgment creditors in the list of parties who may apply for winding-up, whilst they are not included in section 48(4). It would therefore appear that the legislator intended, by virtue of the list contained in section 48(6), to broaden the categories of parties who have *locus standi* to approach the court for a winding-up order. The list of parties mentioned in section 48(6) is therefore not intended to replace the list of parties mentioned in section 48(4) (after all, s 48(4) provides that it applies to any application for the purposes of section 48), but intends to extend it. Therefore, although the insurer and the local authority are not mentioned in section 48(6), it is submitted that they may bring an application for winding-up. If this interpretation is correct, a party who falls within the extended classes of section 48(6), but not within section 48(4), may apply for winding-up in terms of section 48(6), but not for an order that the building or buildings are deemed to have been destroyed or for the authorisation of a scheme for rebuilding or transfer of certain owners' interests to others (s 48(3)). A judgment creditor, for example, may not apply for the authorisation of a scheme for rebuilding or transfer (s 48(3)). He may, however, apply for winding-up (s 48(6)(a)) if the building or buildings have been physically destroyed (s 48(1)(a)), or if the owners by unanimous resolution (and with the agreement of the relevant holders of real rights) have determined that the building or buildings have been destroyed (s 48(1)(b)).

The construction of section 48 leaves much to be desired. Subsections (1) and (8) contain definitions. Logically these should be grouped together. The subsections which are stated to apply to all four possible applications (s (4), (5) and (7)) are interspersed between the subsections dealing with the four applications (s (2), (3) and (6)). Structurally, it would have made more sense to deal *seriatim* with the four possible applications and then group together the subsections which are applicable to all of them.

3 The facts of *Caroline*

There were 34 units in the building comprised in the sectional title scheme which formed the subject matter of the appeal. The total market value of all the units was estimated to be R340 000. Many units were subject to mortgage bonds. Some owners of units had over the years defaulted on the payment of their contribution levies. The consequence was that the appellant was unable to pay all water and electricity charges and assessment rates. As at 29 April 1999, the body corporate owed approximately R1 million to the relevant local authority in respect of arrear charges and rates. In May 1998 the appellant made an offer to settle its indebtedness to the local authority on specified terms, *inter alia* that the amount of R577 000 then owing was to be paid over a ten-year period without interest accruing. The offer included an undertaking by the appellant that upon acceptance of the offer it would embark on major renovations. The local authority did not respond to the offer. In the interim the building had had its electricity supply intermittently suspended by the local authority. The appellant asserted that the local authority might reject its offer of settlement with the attendant risk of further suspensions of the electricity supply. The appellant faced mounting debts that it was unable to pay. Owners of units continued to default on the payment of their levies. Attempts by the appellant to execute judgments obtained by it against some defaulting owners had come to nought. In a number of instances this was due to the attitude adopted by bondholders. The appellant had no cash reserves. The appellant stated that although it was unable to pay its

debts, a winding-up of its affairs would benefit the general body of creditors since a liquidator would be able to take effective steps to recover monies from debtors and would be in a better position to reach agreement with the local authority on the settlement of its account.

The court found it necessary to mention that it appeared that many bodies corporate established in terms of the Act found themselves in a chaotic financial position similar to that of the appellant (par 7). In this regard the court quoted the following extract from an article:

“Bodies corporate have always had to contend with members who have not been able to maintain payment of regular monthly levies because of financial difficulties. However, in the past few years a tendency has developed for some owners to refuse to pay levies. This has occurred very often when most of the purchase price of the unit has been funded by a bank loan. In some instances the owners who are members of the body corporate fail to recognize that the body corporate is their alter ego, namely the corporate representative of all the owners of the units in the scheme. Instead the body corporate has been seen as an alien body to which no allegiance is owed. Failure to recognise the obligations of communal living and to pay levies has resulted in several sectional title schemes being placed in jeopardy. The members of the scheme who have been diligent in paying their levy contributions have been prejudiced” (Green and Feuilherade “Lost property” 2001 *De Rebus* 18).

The authors also state (20) that there has been a tendency on the part of some bondholders to be obstructive when a body corporate attempts to sell a defaulting member's unit in execution. The authors note that in some schemes, members of the body corporate who are in arrears with payment of their levies and are in the majority, have themselves elected as trustees of the body corporate and choose not to take action against defaulting members, resulting in the financial affairs of the body corporate becoming chaotic.

4 Judgment

4.1 *Court a quo*

As stated above, the court *a quo* dismissed the *ex parte* application (par 2). In doing so, the court held that section 48(6) only applied when the building to which it attached was damaged or destroyed. This was not the position *in casu*. The court *a quo* also relied on section 36(5), which states that the provisions of the Companies Act “shall not apply in relation to the body corporate” (par 3).

4.2 *Supreme Court of Appeal*

On appeal the body corporate contended that in terms of section 48(6), alternatively in terms of section 48(1)(c) read with section 48(6), a court is empowered to wind-up the affairs of a body corporate due to its inability to pay its debts (par 4).

It was clear to the court from reading the founding papers that the trustees of the body corporate held the view that an order winding-up its affairs would be a speedy and simple solution to its financial predicament. They thought that after a new body corporate had been established, it could continue with its business unburdened by the previous debts. The court made it clear that this view of the trustees was unfounded. What the trustees failed to appreciate was that in the event of a winding-up, a court might hold that the individual owners could be pursued for such debts as were owing by them to the body corporate. This meant

that there was a risk that individual units would have to be sold to recover the amounts owing. (See s 47 which provides for the joinder of the members of the body corporate in their personal capacities as joint judgment debtors if a judgment remains unsatisfied – par 8).

However, according to the Supreme Court of Appeal the fate of the appeal rested on a procedural issue that had been overlooked in the court *a quo* (par 5). This related to the *ex parte* procedure which had been adopted by the body corporate. Its notice of motion was addressed only to the registrar of the court and had not been served on any other person. The court held that this offended the principle of our law that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest. (It is submitted that this principle, in turn, is a manifestation of the *audi alteram partem* rule.) This principle finds expression *inter alia* in rule 6(2)(a) of the Uniform Rules of Court, which states that where it is necessary or proper to give any person notice of an intended application, the notice shall be addressed to both the registrar and such person (par 9).

On the body corporate's own version, there were numerous interested parties who in the ordinary course would have been entitled to receive notice of the intended application. These included the local authority (which was the major creditor); the individual owners (particularly having regard to the potential personal risk they faced, as was explained in the judgment); and the bondholders (par 10).

It was submitted on behalf of the body corporate that the *ex parte* procedure which had been adopted was in line with the generally accepted procedure followed in applications for the winding-up of a company and the sequestration of individuals. In those matters provisional orders are granted *ex parte* with standard directions that the order be served on interested parties, including creditors, pending a return date. However, the court found this analogy to be unfounded (par 11).

The main distinguishing fact highlighted by the court was that the law regulating the winding-up of companies and close corporations and the sequestration of the estates of individuals is largely settled and the procedure well established. However, this is not the case when it comes to the present matter. Section 48 is complex in structure, and its provisions concerning a winding-up of the affairs of a body corporate are brief to the extent of inadequacy. No court has yet pronounced on the interpretation of section 48(6). Even a brief and limited consideration of section 48 shows that difficult questions arise when the interpretation and application of that section are to be decided (par 12 – see the more detailed discussion below). This situation does not begin to compare with the asserted analogous situation of an *ex parte* application for the provisional winding-up of a company or a provisional order for the sequestration of a debtor's estate (par 14).

A further distinguishing fact identified by the court is that in the case of a company being wound-up or an individual's estate being sequestrated, it is usually the debtor whose assets have to be surrendered so that they may be sold to meet his debts. A body corporate represents its members and usually incurs debts on behalf of them. Members of a body corporate have assets apart from those of the body corporate. The body corporate's assets will usually be negligible when viewed against the collective assets of its members (par 14). (In this regard the court had pointed out earlier that the members were personally at risk in respect of the body corporate's debts.)

4.3 *Questions regarding the winding-up of a body corporate posed by the Supreme Court of Appeal*

A brief and limited consideration of the relevant provisions of the Act led the court to state that the following questions readily present themselves (par 12):

- (i) Do the circumstances referred to in the appellant's affidavit in support of the application justify an order in terms of section 48(1)(c), or would this be stretching (the concept of) notional destruction beyond the provisions of the Act?
- (ii) Do the provisions of section 48(2), which prospectively regulate the relationship between affected parties, indicate that section 48(1)(c) operates only in circumstances in which it is envisaged that the scheme will either come to an end or not continue in its existing form, and consequently that they do not apply in circumstances such as the present, where it is intended that the scheme will continue as before?
- (iii) Does section 48(6) enjoy an existence and application independent of the rest of the section of which it is part?
- (iv) Does the heading of section 48 assist in the interpretation of section 48(6)?
- (v) Does the distinction drawn between the persons who may bring an application in terms of section 48(1)(c), and those who may bring an application in terms of section 48(6), support a contrary conclusion?
- (vi) What is meant by the expression "winding-up of the affairs of the body corporate" as it appears in section 48(6)? Does it relate to the relationship between the members and the body corporate and to their position as joint debtors as set out in section 47?
- (vii) Assuming that it is held that a winding-up of the affairs of a body corporate based on its inability to pay its debts is competent, is the court at liberty to fashion directions for such a winding-up?
- (viii) May the court, in giving such directions, have regard to such mechanisms as are set out in the Companies Act and employ them despite the provisions of section 36(5)?
- (ix) In particular, what happens to the *pro rata* liability of an owner for the debts of other owners provided for in section 47?
- (x) How, in formulating directions, does the court deal with the body corporate in relation to its members and what directions may it give insofar as individual defaulting and non-defaulting unit owners are concerned?
- (xi) Should the court consider other remedies that the Act provides to owners, bondholders, members, trustees and local authorities when it considers whether to grant a winding-up order?
- (xii) What are the circumstances which, in terms of section 48(6)(b), will justify a court granting an order for the dissolution of a body corporate at the same time as it grants an order for the winding-up of its affairs?
- (xiii) What are the circumstances that will justify a court withholding an order for the dissolution of the body corporate at the time that it grants an order that its affairs be wound-up?
- (xiv) What happens after a body corporate's affairs are wound-up?

These questions were not meant to be exhaustive, but were used to demonstrate how necessary it is for such issues as may arise from the interpretation of section 48 to be fully ventilated among all interested parties. The court lamented the fact that the legislator neglected to deal with questions which would obviously arise (par 13). The court therefore said that it was impossible to deal in this application, like the court *a quo* attempted to do, with a manifestly incomplete set of facts in the absence of a range of interested parties who might have wished to present argument on a novel issue of public importance concerning the interpretation of legislation which raised more questions than it answered (par 14).

A primary question was whether the court was empowered in the circumstances of this case to issue any winding-up order, provisional or otherwise. The court held that the basic principle of our law is that interested parties who may be prejudiced by an order issued by a court should be joined in the suit as expressed in rule 6(2)(a) of the Uniform Rules of Court (par 14). Although this was the approach that the court *a quo* should have followed, its decision to dismiss the application remained unaffected and the appeal was dismissed (par 15).

The case was decided upon this narrow procedural issue rather than by applying rules of substantive law. The judgment left open all the above questions it posed.

5 Comment

It is a pity that the Supreme Court of Appeal did not at least rule on whether or not section 48(6) was applicable *in casu*, which issue was discussed in some detail above. The court referred to the subsection and its heading, namely "Destruction of or damage to buildings" and the other subsections which deal with the destruction of the buildings in a scheme (par 12). An answer to, or at least some indication of the possible answers to, the question of whether section 48(6) is generally applicable to the winding-up of bodies corporate, could at least have pointed to a way out of this muddle.

Although the Companies Act and the Close Corporations Act contain winding-up provisions, both also contain sections which make the operation of the insolvency law (including the Insolvency Act 24 of 1936) applicable to matters not covered by them (s 339 of the Companies Act; s 66 of the Close Corporations Act). There is no such section in the Sectional Titles Act; in fact, section 36(5) excludes a body corporate from the application of the Companies Act for the purposes of winding-up.

However, a case may be made out for treating an insolvent body corporate as a debtor as defined in section 2 of the Insolvency Act, since it is not specifically excluded from that definition. Under the Insolvency Act, a debtor is a person or partnership or the estate of a person or partnership that is a debtor in the usual meaning of the word, except for a company, an association of persons or other juristic person *that may be wound-up in terms of the Companies Act*. The estate of any other debtor, including a trust, a club or a juristic person, can be sequestrated in terms of the Insolvency Act, where no other statute, such as the Companies Act or Close Corporations Act, provides for their winding-up (*Cassere v United Party Club* 1930 WLD 39; *Magnum Financial Holdings (Pty) Ltd (In Liquidation) v Summerly* 1984 1 SA 160 (W) 163; *Lawclaims (Pty) Ltd v Rea Shipping: Schiffskommerz Aussenhandelsbetrieb Der VVB Schiffbau Intervening* 1979 4 SA 745 (N) 751).

If section 48(6) only applies when a building of the body corporate has been destroyed or is deemed to be destroyed, it means that there is no way to deal with the liquidation/sequestration of an insolvent body corporate other than by treating it as a "debtor" in terms of the Insolvency Act. However, this may raise a number of further questions, particularly in view of the legal relationship between a body corporate and its members and the possibly joint liability of the members and the body corporate for the latter's debts to third parties.

If, on the other hand, it is concluded that section 48(6) applies generally to the winding-up of bodies corporate, the question arises as to how the court is to make provision by order for the winding-up of the affairs of the body corporate. The minister of agriculture was faced with a similar situation when it was decided to wind-up the affairs of the Ciskei Agricultural Corporation, and to dissolve it. The relevant proclamation by the minister provided for the appointment of liquidators and conferred upon them *inter alia* the same powers as those mentioned in section 386 of the Companies Act. (See in this regard *Sunny South Cannery (Pty) Ltd v Mbangxa* 2001 2 SA 49 (SCA).) The proclamation may provide an example of issues to be addressed by a court when making provision for the winding-up of the affairs of a body corporate in terms of section 48(6). The incorporation of certain provisions of the Companies Act into the order may be a convenient and practical way to deal with the matter. However, this will require consideration of whether such a course of action is precluded by section 36(5) by virtue of which the provisions of the Companies Act 61 of 1973 "shall not apply in relation to the body corporate".

What is clear is that the legislator failed to deal satisfactorily with the issues raised by the court and other problems indicated in this note. (See also the criticism of Van der Merwe *Sectional titles 16-17-16-24* of the manner in which the legislator deals – or perhaps more accurately, does not deal – with damaged and destroyed buildings and the dissolution of sectional title schemes.) It is interesting to note that the previous decision of the Supreme Court of Appeal in which certain provisions of the Act were considered in some detail, also arose in an insolvency context. The decision reached by the court in that case was that upon the sequestration of the estate of an owner of a unit, a body corporate can insist on payment of all its outstanding levies and even legal costs before any proceeds of the sale of the unit will be available for distribution to a bondholder (*Barnard v Die Regspersoon van Aminie* 2001 3 SA 973 (SCA), [2001] 3 All SA 433 (SCA)). This was clearly not good news for financial institutions whose business is *inter alia* to provide finance for the acquisition of sectional title units. They are now also faced with the uncertainties arising from the *Caroline* case. In view of the financial mismanagement of many schemes, and in order to provide certainty for the sake of all parties interested in sectional title schemes, it is submitted that the legislator should pay serious and urgent attention to the issues raised by the court and in this note.

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OMSKEPPING VAN TOONDERDOKUMENT IN ORDERDOKUMENT
Cutfin (Pty) Ltd v Sangio Pipe CC [2002] 2 All SA 186 (D)

1 Inleiding

Vyf en twintig jaar gelede het Cowen “Two cheers (or maybe only one) for negotiability” 1977 *THRHR* 19 35 die volgende kernvrae oor die wissel- en tjekreg gestel en hom ook oor die nodige kennis van hierdie vakgebied uitgespreek:

“Laymen, and – let it be whispered – many experienced lawyers, ask: (i) why try to make a cheque ‘not transferable’; (ii) why make it payable ‘to bearer’ or ‘to order’; (iii) when should these latter words be omitted or struck out; (iv) why cross a cheque generally or specially, indeed why cross it at all; (v) why mark it ‘not negotiable’, and in any event, what is the difference between ‘not negotiable’ and ‘not transferable’; (vi) why ‘a/c payee only’? What purpose is served by these markings? And, above all, who stands to benefit from their use? . . . Probably not more than one in a thousand persons having a bank account could answer these practical questions fully and accurately. And it is certain that not more than one in a hundred has any clear and accurate knowledge how best to protect himself when writing out a cheque. Yet this knowledge is greatly needed.”

Dat bogenoemde vrae vandag nog aktueel en deels onbeantwoord is, blyk uit die saak onder bespreking waarin onder andere vrae (ii) en (iii) hierbo ter sprake gekom het.

2 Feite

Die verweerder het ’n tjek ten gunste van M Smith “of Toonder/or Bearer” getrek. Die woorde “of Toonder/or Bearer” is deurgehaal en die tjek is op naam aan die eiser geëndosseer. Nadat die tjek onteer is, is die verweerder (trekker) deur die eiser aangespreek wat onder andere beweer het dat hy die reëlmatige houër van die tjek was. Die trekker het aangevoer dat iemand anders die gewraakte woorde na lewering van die tjek aan die nemer deurgehaal het. Volgens hom het hierdie optrede op ’n wesenlike verandering van die dokument binne die raamwerk van artikel 62 van die Wisselwet 34 van 1964 neergekom. Die trekker het gevolglik die eiser se reëlmatige houerskap ontken en ook ontken dat laasgenoemde op die vermoede van reëlmatige houerskap in artikel 28(2) van die Wet kon steun. (’n Verdere verweer, naamlik onreëlmatighede mbt die endorsement, word nie verder hier behandel nie – dit het in elk geval misluk.)

3 Beslissing

Alhoewel die hof aanvanklik onseker was of die onderhawige woorde nie dalk deur die trekker self deurgehaal is voor lewering van die tjek aan die nemer nie, het waarnemende regter Richings tog voortgegaan en die aangeleentheid beslis op die basis dat die deurhaling nie deur die trekker geskied het nie.

Voordat hy die tersaaklike regspraak aanspreek, wys die regter daarop dat die begrip “wesenlike verandering” nie in artikel 62(1) omskryf word nie. Hy wys egter op artikel 62(2) wat bepaal dat ’n wesenlike verandering insluit

“enige verandering van die datum, die bedrag betaalbaar, die tydstip van betaling, die plek van betaling, en, indien ’n wissel sonder enige beperking geaksepteer is, die byvoeging van ’n plek van betaling sonder toestemming van die akseptant”.

Sy gevolgtrekking is dat ’n wesenlike verandering een is wat die regte en verpligtinge van die partye tot die dokument wesenlik verander. Sy formulering van die regspraak is eenvoudig: “The question is whether the conversion of a bearer instrument into an order instrument by the striking out of the words [“of Toonder/or Bearer”] constitutes a material alteration” (190g). Hy antwoord terstond: “I do not think that it does.”

Die regter laat hom lei deur sekere bepalings van die Wisselwet. Eerstens verwys hy na artikel 31(1) waarvolgens die houër van ’n orderdokument dit in blanko kan endosseer en sodoende in ’n toonderdokument kan omskep. Vervolgens verwys hy na artikel 31(4) wat bepaal dat indien ’n dokument ’n blanko endossement bevat, die houër sodanige endossement in ’n endossement op naam kan omskep, as gevolg waarvan die dokument dan ’n orderdokument word. Sy gevolgtrekking is:

“I can see no difference in principle between a holder of a bill acting in terms of section 31 and converting a blank endorsement into a special endorsement and a payee to whom a bill has been issued and who is the *a fortiori* holder, achieving the same effect by striking out the words “of Toonder/or Bearer” (190i).

Die regter meen derhalwe dat alhoewel die deurhaling van die tersaaklike woorde wel ’n verandering is, dit nie vir doeleindes van artikel 62(1) ’n wesenlike verandering is wat die “business effect” van die dokument raak nie (lg is ’n verwysing na die omskrywing van ’n wesenlike verandering deur lord Brett in *Suffel v Bank of England* (1882) 9 QB 555 568).

Nie die advokate of die regter self kon enige beslissing plaaslik of oorsee vind wat direk oor hierdie punt handel nie. Die sake wat wel kortliks aangehaal word, “[do] not appear to state this specifically” (191a), of handel met ander aspekte soos akseptasie (191c) en sertifisering van tjeks (191d–f) en is myns insiens irrelevant.

Die regter hou egter vir hom ’n agterdeur oop en beslis dat selfs indien sy bevinding verkeerd is en die deurhaling wel ’n wesenlike verandering daarstel, die regsposisie deur artikel 62(1) gereël sou word. Volgens hierdie artikel is ’n party wat nie tot die wysiging toegestem het nie, slegs volgens die oorspronklike strekking van die stuk aanspreeklik. Dit sou beteken dat *in casu* die verweerder se aanspreeklikheid beoordeel moes word asof geen wysiging aangebring is nie en dat die tjek dus ’n toonderdokument gebly het. In so ’n geval sou dit sonder enige endossement aan die eiser verhandel kon word (191h). Met hierdie redenasie is daar niks verkeerd nie. Die regter se eerste gevolgtrekking, naamlik dat die deurhaling deur iemand anders as die trekker (bv die nemer of ’n latere houër) nie ’n wesenlike verandering is nie, verdien egter kommentaar.

4 Kommentaar

Dit is belangrik om kennis te neem van die wyse waarop die Wisselwet die omskepping van een tipe dokument in ’n ander reël. Daarvolgens is dit moontlik om ’n *orderdokument*, wat vir endossering vatbaar is, deur middel van ’n blanko endossement in ’n *toonderdokument* (a 31(1)) te omskep. Soos die regter *in casu* aandui, kan hierdie toonderdokument, *wat aanvanklik ’n orderdokument was*, weer in ’n orderdokument terugverander word deur die blanko endossement in ’n endossement op naam te verander (a 31(4)). Die beginsel is duidelik: Die Wet

sanksioneer die omskepping van 'n orderdokument in 'n toonderdokument by wyse van 'n blanko endossement.

Die teenkant van bostaande beginsel is egter nie waar nie: Die Wet bepaal nie dat 'n toonderdokument, dit wil sê 'n dokument wat aldus betaalbaar gestel is (bv Betaal X of Toonder) deur 'n endossement op naam in 'n orderdokument omskep kan word nie. Dit is geëykte reg en is in die regspraak bevestig. (Sien *Interlease Ltd v Massyn* 1979 3 SA 810 (O) en *Pienaar v Maritz h/a Coal Suppliers* 1985 1 SA 547 (T)). Hierdie uitsprake het heelwat akademiese kommentaar ontlok. Die bronne word nie hier herhaal nie – vgl die volledige bespreking in Malan en Pretorius *Malan on bills of exchange, cheques and promissory notes* (1997) 141–147 en gesag aldaar.)

Waarom dus die verskil? Waarom kan 'n orderdokument deur die houër (endossant) in 'n toonderdokument verander word deur dit in blanko te endosseer, maar kan 'n (aanvanklike) toonderdokument nie deur die houër op naam geëndosseer word ten einde dit in 'n orderdokument te verander nie?

Myns insiens is die bedoeling van die trekker deurslaggewend. Indien hy die tjek as 'n toondertjek trek, vergemaklik hy sy betalingsverpligting ingevolge die dokument: Indien hy vir betaling aangespreek word, kan hy 'n reëlmatige betaling maak aan enige persoon (toonder) wat die dokument in sy besit het (selfs 'n dief). Indien dit 'n ordertjek is, is die betalingsverpligting moeiliker: Daar kan nie nou sommer aan enige persoon betaal word nie – die trekker sal hom moet vergewis van die aanbieder se identiteit en houerskap (dws geldigheid van endossemente ens). Die Wet laat dus nie toe dat die trekker se aanvanklik maklike verpligting by 'n toonderdokument deur 'n latere houër verswaar word deur dit in 'n orderdokument te omskep nie. Omskepping van 'n orderdokument in 'n toonderdokument vergemaklik egter wel sy verpligting – daarom laat die Wet dit toe. (Sien Malan en Pretorius *supra* en vgl veral Reinecke se vonnisbespreking van *Interlease* 1979 TSAR 260; sien ook my vonnisbespreking van *Pienaar* 1985 *De Jure* 189.)

Ongelukkig sien die regter *in casu* geen verskil in die situasies deur hom geskets nie: In een geval is dit 'n aanvanklike orderdokument – wat vir endossering vatbaar is – wat eers deur 'n blanko endossement in 'n toonderdokument omskep word en later weer 'n orderdokument word wanneer die blanko endossement soos deur die Wet veroorloof in 'n endossement op naam verander word. Dit verskil hemelsbreed van die situasie waar 'n toonderdokument, wat nie vir endossering vatbaar is nie en waarop 'n endossement hoogstens 'n garansie – maar geen transportfunksie vervul nie (sien Malan en Pretorius *supra*) ter sprake is. My standpunt (na analogie van bg gesag) is dat die nemer of latere houër nie die bevoegdheid het om die trekker se aanvanklike opdrag om aan toonder te betaal, te verander deur die woorde “of Toonder/or Bearer” te skrap nie.

Toegepas op die feite *in casu*, is dit dus my mening dat die deurahaling wel op 'n wesenlike verandering neergekom het (na analogie van *Interlease* en *Pienaar*; sien ook my standpunt 1985 *De Jure* 189 191). Daarom het ek hierbo met die regter se tweede gevolgtrekking saamgestem.

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The onus of proof in bail proceedings under South African and Canadian law (1)*

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OPSOMMING

Die bewyslas in borgverrigtinge in die Suid-Afrikaanse en Kanadese reg

Die vraag na die bewyslas in borgverrigtinge was seker die mees kontensieuse aspek rakende borg in die nabye verlede. Dit is veral sedert die inwerkingtreding van die Interim Grondwet dat dit onseker was wat die korrekte posisie is. Dit is duidelik dat waar die bewyslas op die beskuldigde rus, die getuienis deur die staat en die rol van die ondersoek-beampte van sekondêre betekenis is. Al wat nodig is, is dat die staat borg teenstaan. Indien die staat borg teenstaan, is dit die taak van die beskuldigde om die hof op 'n oorwig van waarskynlikhede te oortuig dat hy op borg vrygelaat behoort te word. Die insidensie van onus is dus 'n belangrike aanwyser van die balans wat tussen die belange van die gemeenskap en die individu se reg tot borg bestaan. Die onus was ook een van die vernaamste wapens in die hande van die Suid-Afrikaanse regering toe die vereistes vir, en die procedure in verband met borg, verskerp is. In hierdie artikel word die vraag na onus in die Kanadese en Suid-Afrikaanse reg bespreek en vergelyk.

1 INTRODUCTION

The question of onus has probably been the most contentious issue concerning bail under South African law in recent times. It is especially since the advent of the Interim Constitution¹ that it has been unclear what the proper situation is. No research into bail would therefore be complete without reference to this issue.

The question of onus is of the utmost importance in bail applications (as it is in respect of any court procedure). In its ordinary sense the onus of proof allocates the duty which one or other of the parties has of finally satisfying the court that he is entitled to succeed with his claim, application or defence.²

In *Pillay v Krishna*³ Davis AJA held that the only correct use of the word "onus" is in its true and original sense as described in *D 31 22*. According to Davis AJA it is the duty that is cast upon the particular litigant, in order to be

* This article is based on the author's doctoral thesis *Problematic aspects of the right to bail under South African law: A comparison with Canadian law and proposals for reform* (UP 2000).

1 Constitution of the Republic of South Africa Act 200 of 1993 (referred to as IC).

2 Hoffmann and Zeffert *The South African law of evidence* (1992) 495.

3 1946 AD 946 952.

successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be. It is not in the sense merely of his duty to adduce evidence to combat a *prima facie* case made by his opponent.

In other words, the incidence of the burden of proof decides which party will fail on a given issue if, after hearing all the evidence, the court is left in doubt. Wigmore⁴ referred to it as "the risk of non-persuasion". Other writers⁵ have referred to it as a "persuasive burden". Schmidt⁶ indicates that the burden of proof will determine which party will suffer a defeat if insufficient grounds are tendered before court for a decision regarding a factual dispute.

It is clear that where the onus of proof rests on the accused, the testimony by the state and the role of the investigating officer is of secondary importance. All that is needed is for the state to oppose the granting of bail.⁷ If the state opposes bail it is up to the accused to satisfy the court on a balance of probabilities that he should be released on bail.

The incidence of onus is therefore an important indicator of the balance that exists between the interests of society and the individual's right to bail. It has also been one of the main weapons in the hands of the South African government in tightening the requirements for and the procedures in respect of bail.

In this article the question of onus under Canadian and South African law is discussed and compared. Part 1 investigates the position under Canadian law. In part 2 the position under South African law is discussed and compared to the position in Canada.

The much clearer and more settled position under Canadian law is demonstrated. Under South African law the unsettled history of the provisions regarding the onus in bail proceedings is shown along with an opinion on the correct interpretation of the relevant present provisions. Consideration is also given under South African law as to whether the reverse onus in terms of section 60(11) of the Criminal Procedure Act⁸ withstands constitutional scrutiny.

2 CANADIAN LAW

2.1 Before the Bail Reform Act

While the accused was entitled to bail as of right in the case of misdemeanours at Canadian common law, the justice under the Criminal Code, prior to 1970, had a discretion to grant bail in the case of summary conviction offences if he decided to postpone or adjourn proceedings. In the instance of indictable offences the justice had to enquire into the charge. The justice had the discretion to grant bail at any time before committal for trial. The decision to grant bail was a judicial one and no onus was cast on any party.⁹

4 *Evidence* (1940) para 2485.

5 Williams *Criminal law: The general part* (1961) ch 23.

6 *Bewysreg* (1989) 23.

7 See also Cowling "Bail reform: An assessment of the Criminal Procedure Second Amendment Act 75 of 1995" 1996 *SACJ* 50 53.

8 51 of 1977.

9 See Teed and Shannon "Criminal law – bail – old and new legislation – Bail Reform Act – can a person not in custody be detained on first appearance before a justice?" 1982 *Can Bar R* 720 721–722 and Salhany *Canadian criminal procedure* (1968) 47ff.

The bail granted by a justice only lasted until the completion of the preliminary enquiry and once the accused was committed to stand trial following a preliminary enquiry, a new bail application had to be lodged. On hearing the application the magistrate or a judge had the discretion to grant bail and, if granted, the discretion to determine the terms of bail. Where only a judge of a superior court could grant bail in the instance of a serious offence, the presiding officer also had the discretion to determine if bail should be granted and, if granted, the terms thereof.¹⁰

2 2 The Bail Reform Act 1970-71-72 (Can) c 37

2 2 1 General

The Bail Reform Act introduced a liberal and enlightened system of pre-trial release in which the onus is on the prosecution to justify the detention of the accused.¹¹

Section 457(1) of the Criminal Code¹² set out the duties of a justice before whom a person in custody was taken. In terms of this provision an accused had to be released on the order of a justice upon his giving of an undertaking without conditions, unless the prosecution, having been given a reasonable opportunity to do so, showed cause otherwise.¹³ The principle of release before trial was affirmed, and it was up to the prosecutor to convince the judge that incarceration was necessary and that none of the intermediary solutions was appropriate.¹⁴

With regard to the standard of proof that rests on the Crown, a contention that section 11(e) of the Canadian Charter¹⁵ raises the standard to more than the civil standard, was rejected by the Provincial Court of Nova Scotia.¹⁶

2 2 2 The Criminal Law Amendment Act 1974-75-76 (Can) c 93

2 2 2 1 General

After some four years of experience with the Bail Reform Act, Parliament, in response to concern expressed by some segments of the public, modified the original legislation by way of the Criminal Law Amendment Act. Parliament placed the onus on the accused in a limited number of offences, including murder, to show that his detention was not justified.¹⁷ This was done by way of sections 457(5.1) and 457.7 of the Criminal Code.¹⁸

¹⁰ *Ibid.*

¹¹ Under the Criminal Code RSC 1970, c C-34 ss 457-459.1 governed what is called judicial interim release. Under the Criminal Code RSC 1985, c C-46 judicial interim release is governed by ss 515-523.

¹² As amended. When the Revised Statutes of Canada (1985) were proclaimed the section number changed to 515(1), but the provision remained the same.

¹³ Unless a plea of guilty is accepted (ss 457(1)[1970] and 515(1)[1985]).

¹⁴ The intermediary solutions were: An undertaking with conditions; a recognisance to pay a sum of money with or without sureties; and the deposit of a sum of money.

¹⁵ Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11 (referred to as the Canadian Charter or Charter).

¹⁶ *R v Paul Daniel Sparks* (1982) 8 WCB 182 (NS Prov Ct) per Kimball Prov J.

¹⁷ See *R v Quinn* (1977), 34 CCC (2d) 473 476, 34 NSR (2d) 481 (NS Co Ct).

¹⁸ RSC 1970, c C-34. Now provided for by ss 515(6) and 522(2) RSC 1985, c C-46 respectively.

But there has been some disagreement as to the constitutionality of these provisions. In 1982 Tarnopolsky and Beaudoin observed that the provisions of the Code with respect to pre-trial release do not in themselves appear to conflict with section 11(e). They were of the opinion that the reversal of the burden of proof in certain cases appeared to be justified.¹⁹

However, the Law Reform Commission of Canada in its Working Paper 57²⁰ was unimpressed with the reverse onus and recommended that it be repealed. They found it inconsistent with fairness and the values of the Canadian Charter. They furthermore found it unjustified, whether at the trial or pre-trial stages, that the accused should show cause. Moreover, they did not think that placing the onus on the Crown was an onerous burden, or that it would pose a threat to public safety.

At the time of the enactment of the Canadian Charter in 1982, sections 457(5.1) and 457.7 had been enforced for some years. Although these reverse onus provisions were on many occasions challenged before the courts as being offensive to section 11(e) of the Charter, these provisions were never challenged as being offensive to section 2(f) of the Bill of Rights.²¹

The "reverse onus provisions" under the Criminal Code RSC 1970 and 1985 will now be discussed.

2 2 2 2 The Criminal Code RSC 1970, c C-34

2 2 2 2 1 Section 457(5.1)

Section 457(5.1) of the Criminal Code²² applied to most indictable offences other than murder, offences relating to acts done while on judicial interim release, and acts done under the Narcotic Control Act.²³ This section provided that a justice of the peace "shall order that the accused be detained in custody until he is dealt with according to law, unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified".

A number of courts found that the reverse onus provision contained in section 457(5.1) did not contravene the Canadian Charter.²⁴

2 2 2 2 2 Section 457.7

Section 457.7 of the Code provided as follows:²⁵

19 *Canadian Charter of Rights and Freedoms* (1982) 320.

20 *Compelling appearance, interim release and pre-trial detention* (1988) 37-38 as cited by *Friedland and Roach Criminal law and procedure* (1997) 198.

21 See *R v Bray* (1983) 2 CCC (3d) 325 329. The wording of s 2(f) is virtually identical to that of s 11(e) and has the same meaning. This might raise the argument that the Charter would have employed different language if it was considered that the reverse onus provision offended the guaranteed right not to be denied bail without just cause. But the Canadian Bill of Rights is not a constitutional, but a "quasi-constitutional document" and the argument does not seem convincing.

22 RSC 1970, c C-34, s 457(5.1) [enacted 1974-75-76, c 93, s 47; amended 1985, c 19, s 84].

23 RSC 1970 c N-1.

24 See *R v Lundrigan* (1982), 67 CCC (2d) 37, 2 CRR 92 (Man Prov Ct); *Ibrahim v Attorney-General of Canada* (1982) 1 CRR 244 (Que SC); *R v Frankforth* (1982) 70 CCC (2d) 448 (BC Co Ct).

25 As amended when the courts in *R v Bray* (1983), 2 CCC (3d) 325, 40 OR (2d) 766 and *R v Pugsley* (1982), 2 CCC (3d) 266, 144 DLR (3d) 141 dealt with the constitutionality of the reverse onus provisions in s 457.7 of the Criminal Code.

“(1) Notwithstanding anything in this Act, where an accused is charged with an offence punishable by death, an offence under sections 50 to 53 or sections 76.1 to 76.3 or non-capital murder, no court, judge or justice, other than a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is so charged, may release the accused before or after committal for trial.

(2) Where an accused is charged

- (b) with an offence mentioned in subsection 1 other than the offence of having committed a murder, and the offence is alleged to have been committed while he was at large awaiting trial for another indictable offence,
- (c) with an indictable offence mentioned in subsection 1 other than the offence of having committed murder, and is not ordinarily resident in Canada,
- (d) with an offence under any of subsections 132(2) to (5) that is alleged to have been committed while he was at large awaiting trial for an offence mentioned in subsection 1 or
- (d.1) with the offence of murder or the offence of conspiring to commit murder, and he is not required to be detained in custody in respect of any other matter, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged shall order that the accused be detained in custody unless . . .
- (f) in the case of an accused to whom any of paragraphs (b),(c), (d) or (d.1) applies, the accused having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 457(7).”

The Ontario Court of Appeal in *R v Bray*²⁶ and the Nova Scotia Supreme Court, Appeal Division, in *R v Pugsley*²⁷ had opportunity to discuss the reverse onus in section 457.7(2)(f). In both these judgments it was argued that section 457.7(2)(f) contravened section 11(e) of the Canadian Charter.

In the view of the court in *R v Bray* section 457.7(2)(f) did not contravene the provisions of section 11(e) of the Charter. The court indicated that section 11(e) provided that a person charged with a criminal offence shall not be denied bail without “just cause”. “Just cause” is constituted by the primary and secondary grounds specified in section 457(7).²⁸ The court held that section 11(e) did not address the issue of onus and said nothing about onus. Furthermore, the legal rights guaranteed by the Charter are not absolute and under section 1 are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

The court found the reverse onus provision in section 457.7(2)(f) a reasonable limitation even if *prima facie* it conflicted with section 11(e). The reverse onus provision entailed that the accused must satisfy the judge, on a balance of probabilities, that his detention is not justified on either the primary or secondary ground, a burden which the court found to be in the accused’s power to discharge.

Contrary to the decision in *R v Bray*, the court in *R v Pugsley* found a glaring inconsistency between section 457.7(2)(f) of the Code and section 11(e) of the Canadian Charter. The court, by way of the application of section 52 of the

26 (1983), 2 CCC (3d) 325, 40 OR (2d) 766, 769.

27 (1982), 2 CCC (3d) 266, 144 DLR (3d) 141, 145.

28 See my thesis para 7 2 5. Under the RSC 1985 the section number changed to 515(10).

Constitution Act 1982, found the provision contained in the Code to be of no force or effect. The court found that under the Charter a person who is charged with an offence is entitled to reasonable bail unless the Crown can show just cause for the continuance of his detention. The court therefore found that section 457.7(2)(f) placed a very substantial burden on the accused, and this the court found to be unconstitutional.

2 2 2 3 The Criminal Code RSC 1985, c C-46²⁹

2 2 2 3 1 Section 515(6)

Under the provisions of section 515(6) an accused charged

- “(a) with an indictable offence, other than an offence listed in section 469,
 - (i) that is alleged to have been committed while at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 or 680, or
 - (ii) that is an offence under section 467.1 or an offence under this or any other Act of Parliament alleged to have been committed for the benefit of, at the direction of or in association with a criminal organization for which the maximum punishment is imprisonment for five years or more,
- (b) with an indictable offence, other than an offence listed in section 469 and is not ordinarily resident in Canada
- (c) with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while he was at large after being released in respect of another offence pursuant to the provisions of this Part or section 679, 680 or 816, or
- (d) with having committed an offence punishable by imprisonment for life under subsection 5(3) or (4), 6(3) or 7(2) of the Controlled Drugs and Substances Act or the offence of conspiring to commit such an offence”;

must be detained unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified.

In *R v Pearson*³⁰ the supreme court found that section 515(6)(d) was a departure from the basic entitlement to bail. The court found it sufficient to conclude that there was a denial of bail for the purposes of section 11(e) and that this denial of bail must be with “just cause” in order to be constitutionally justified. Instead of requiring the prosecution to show that pre-trial detention is justified, it requires the accused to show that pre-trial detention is not justified. The very wording of section 515(6)(d) has the effect of denying bail in certain circumstances. In terms of the section “the justice shall order that the accused be detained in custody” in certain circumstances. It now becomes necessary to determine whether there is just cause for this denial.³¹ The court gave two reasons for its conclusion that there is just cause for the denial of bail by section 515(6)(d).³²

Firstly bail is only denied in a narrow set of circumstances. Secondly, the denial of bail is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system.

29 As amended.

30 (1992) CRR (2d) (SCC) 1.

31 19.

32 20.

The court said that section 515(6)(d) applies only to a very small number of offences, all of which involve the distribution of narcotics. The court further held that not all persons in this category were denied bail but that it rather denied bail only when these persons were unable to demonstrate that detention was not justified having regard to the specified primary or secondary grounds. The narrow scope of the denial of bail under section 515(6)(d) was deemed essential to its validity under section 11(e). The basic entitlement of section 11(e) could therefore not be denied in a broad or sweeping exception.³³

The court found that the offences included under section 515(6)(d) had specific characteristics that justify differential treatment in the bail process. These characteristics were described by the *Group de travail sur la lutte contre la drogue*.³⁴ The report indicates that drug trafficking in Quebec is generally under the control of members of organised crime. They are responsible for the distribution of drugs in all areas. Using well-organised networks, the capacity to finance major deals allows them to import large quantities of drugs, often even using legitimate businesses as a cover. For some time they have invested and pooled their resources to optimise the financial return on their investments. The cartels go so far as to plan a type of risk insurance that allow them to distribute losses suffered in police raids amongst themselves. They act as importers, wholesalers and retailers at the same time, and sell the drugs by the ton, by the kilo and even by the gram through outlets controlled by themselves. They are particularly active in cannabis and heroin trafficking. While the traffickers in this category are of various origins, arrests since 1985 of foreign nationals who maintained ties with producing countries, have become more frequent. These international ramifications enable organised crime to be active in both the producing and consuming countries and in this regard one cannot ignore the existence of links between the Montreal Mafia and the criminal elements in certain South American countries.

The court elaborated on the unique characteristics of drug offenders indicating that these offences were committed in a very different context than most other crimes.³⁵ In contrast to most other crimes these crimes are committed systematically and within a highly sophisticated commercial setting. It is usually a way of life, and the huge incentives are conducive for continued criminal behaviour, even after arrest and release on bail. The normal process of arrest and release on bail will therefore not normally be effective in bringing an end to criminal behaviour. Special rules are required to establish a bail system that maintains the accused's right to pre-trial release, while discouraging continuing criminal activity.

The court concluded that there is a marked danger that a person charged with the offences under section 515(6)(d) will abscond, rather than appear for trial.

As accepted in South Africa,³⁶ the supreme court of Canada found that the primary purpose of any system of pre-trial release was to ensure the appearance

33 *Ibid.*

34 *Rapport du groupe de travail sur la lutte contre la drogue* (1990) 18 19 as cited in *Pearson* 20.

35 21.

36 See eg Van der Merwe in Du Toit *et al Commentary on the Criminal Procedure Act* (loose-leaf updated to 1998-09-30) 9-2 and Neveling and Bezuidenhout in Nel and Bezuidenhout *Policing and human rights* (1997) para 20 4 1.

of the accused at trial. The system must therefore be structured to minimise the risk that an accused will abscond rather than face trial.

The court distinguished the risk of absconding when arraigned on one of the offences mentioned from most other offences.³⁷ The court indicated that the risk that an accused will abscond when arraigned on another offence was minimal. It is not easy to abscond from justice in Canada. The accused must either remain a fugitive from justice for the rest of his lifetime, or must flee to a country, that does not have an extradition treaty with Canada.³⁸ Alternatively the accused must remain in hiding. Neither of these prospects is possible unless the accused is wealthy or part of a sophisticated organisation that can assist him in the difficult task of absconding. Unlike drug importers and traffickers, the ordinary offender is neither wealthy nor is he a member of a sophisticated organisation. Accordingly these offenders pose a significant risk of absconding rather than facing trial.³⁹

Proulx JA in the court of appeal expressed concern about the scope of section 515(6)(d). He contended that it was inequitable to treat a person who distributes a few joints of marijuana in the same manner as a person running a sophisticated network to traffic cocaine. The supreme court found these concerns to be legitimate saying that the scope of the Narcotic Control Act was very broad.⁴⁰ The court also indicated that "narcotics" included both hard and soft drugs. Furthermore, under section 2 of the Narcotic Control Act "trafficking" means to "manufacture, sell, give, administer, transport, send, deliver or distribute" a narcotic or to offer to do any of the above.⁴¹

Section 515(6)(d) therefore also applies to "small fry" drug dealers – from someone who shares a single joint of marijuana at a party, to hardened drug traffickers.

However, the supreme court found that these arguments do not lead to a conclusion that section 515(6)(d) violates section 11(e). The "small fry" and "generous smoker" will normally have no difficulty in justifying their release and to obtain bail. Section 515(6)(d) does not mandate a denial of bail in all cases and therefore does allow deferential treatment based on the seriousness of the offence. The court deemed it reasonable to place the onus on the "small fry" or "generous smoker" to convince the court that he is not part of a criminal organisation engaged in distributing narcotics, as he is most capable of providing this information.

In summary it can therefore be said that the specific characteristics of the offences subject to section 515(6)(d) suggests that special bail rules are necessary to create a bail system which will not be subverted by continuing criminal activity and by the absconding of accused.⁴² The special bail rules do not have any outside

37 21–22.

38 Or whose extradition treaty does not cover the specific offence that the accused is alleged to have committed.

39 See 22 and 23 of the report for a discussion of the evidence in the USA and Australia which demonstrate that those charged with narcotic offences, pose a particular danger of absconding while on bail.

40 23.

41 In *R v Lauze* (1980), 60 CCC (2d) 468, 17 CR (3d) 90 (Que CA) the court found that trafficking can even be committed by giving a narcotic to a friend for safekeeping.

42 However, the *Report on the systemic racism in the Ontario criminal justice system* (1996), as cited by Friedland and Roach 206, calls for the repeal of the reverse onus for these offences because of the dramatic difference in admission rates between white and black adult males.

purpose to the bail system, but rather merely establishes an effective system for specific offences for which the normal bail system will not provide.⁴³

2 2 2 3 2 Section 522(2)

Where an accused is charged with one of the serious offences listed in section 469,⁴⁴ he may not be released other than by a judge of or a judge presiding in a superior court of criminal jurisdiction.⁴⁵ In these cases the burden also rests on the accused to convince the court of his release.⁴⁶

In *R v Beamish*⁴⁷ the court examined whether the reverse onus requirement in section 522(2) of the Criminal Code does not offend section 11(e) of the Charter. Section 522 compels an individual charged with murder to show cause why his detention in custody is not justified within the meaning of section 515(10)⁴⁸ of the Criminal Code.⁴⁹

Jenkins J held that the denial of bail occurred only in a narrow set of circumstances, one of which is the offence of murder as listed in section 469. Section 522 does not deny bail to all those persons who are charged with murder. It rather denies bail only to those accused, who after having been given a reasonable

43 The supreme court also discussed the question whether s 515(6)(d) violated s 9 of the Charter. The court found that there was no question that s 515(6)(d) provided for a person to be “detained” within the meaning of s 9 of the Charter. What had to be decided was whether the persons were detained “arbitrarily”. The court referred to *R v Hufsky* (1988), 32 CRR 193 [1988] 1 SCR 621, 40 CCC (3d) 398 (SCC) where the meaning of “arbitrarily” was discussed. In *Hufsky* the court found that a random police spot check of motor vehicles constituted arbitrary detention under s 9 because the selection was in the absolute discretion of a police officer. A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise. The court found it arbitrary because of the unstructured discretion of the police officer. The court in *R v Pearson* found s 515(6)(d) not to be arbitrary, because the section sets out a process with fixed standards. The process is in no way discretionary and specific conditions for bail are set out. The court found that this section was also subject to very exacting procedural guarantees (ss 516, 518(1)(b), 523(2)(b)) and to review by a superior court (ss 520 and 521). The court accordingly concluded that s 515(6)(d) did not violate s 9.

44 The offences are treason, “alarming Her Majesty”, “intimidating Parliament or a legislature”, “inciting to mutiny”, “seditious offences”, piracy, “piratical acts” and murder. Also included are accessory after the fact to high treason or murder, bribery by the holder of judicial office, attempt to commit the first six offences mentioned, and conspiracy to commit the first seven offences mentioned.

45 S 522(1): Where an accused is charged with an offence listed in s 469, no court, judge or justice, other than a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is so charged, may release the accused before or after the accused has been ordered to stand trial.

46 S 522(2): Where an accused is charged with an offence listed in s 469, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of s 515(10).

47 (1995-07-19), Doc GSS-3344 (PEITD) as cited by Mcleod, Takach, Morton and Segal *The Canadian Charter of Rights: The prosecution and defence of criminal and other statutory offences* (1993) 16–25.

48 See my thesis para 7 2 5.

49 Jenkins J adopted the same reasoning as Martin JA speaking for the court in *R v Bray* (1983) 40 OR (2d) 766 769 (Ont CA).

opportunity to do so, failed to show cause why their detention in custody is not justified within the meaning of section 515(10). Section 522 appropriately applies to the charge of murder where a human life has been taken, and a penalty upon conviction would be life imprisonment. In this instance the normal bail system does not function properly. It thus meets the second requirement of just cause by establishing a set of special bail rules.

The court explained that in the circumstances there is a significant motivation to flee. As the accused already faces the maximum penalty that could be imposed, the normal penalty which acts to deter further criminal acts, is no longer operative.

As to the nature of the crime, the court indicated that the planned deliberate taking of life strikes at the very foundation of society. There can be no greater crime. The concern of all citizens that justice be done, and that individual members of the public are protected and are safe, is of paramount consideration.

The onus on the accused is reasonable in that it requires him to provide information on the factors which are set out in section 515(10) as the primary and secondary grounds that he is most capable of providing.

The court concluded that section 522(2) of the Criminal Code as it relates to a section 235 offence of murder, does not violate section 11(e) of the Charter.⁵⁰

The justice, magistrate or judge therefore had the discretion to grant bail prior to 1970 under Canadian law. The Bail Reform Act⁵¹ introduced a liberal and enlightened system of pre-trial release in which the onus is on the prosecution to justify the detention of the accused. The original legislation was modified some four years later by the Criminal Law Amendment Act,⁵² in that the onus was placed on the accused in a number of offences to show that his detention was not justified. Although the reverse onus provisions were on many occasions challenged before the courts as being offensive to section 11(e) of the Charter, the majority of courts have found that these provisions withstand constitutional scrutiny. At present there is a basic but circumscribed constitutional entitlement to bail before conviction, where the onus is on the state to justify continued incarceration except in certain prescribed instances.

3 SOUTH AFRICAN LAW

3 1 Before the Interim Constitution

3 1 1 General

Before the advent of section 25(2)(d) of the Interim Constitution, it was commonly accepted that an arrested person bore the onus on a balance of probabilities⁵³ to

50 In *Re Kent and The Queen* (1985), 23 CCC (3d) 178, 36 Man R (2d) 246 (Man QB), and *R v Kevork* (1984), 12 CCC (3d) 339 (Ont H CJ) per Ewaschuk J, it was also held that s 457(1) and (2) of the Criminal Code did not contravene the requirements of s 11(e) of the Charter.

51 1970-71-72 (Can) c 37.

52 1974-75-76 (Can) c 93.

53 In some cases the impression was created that a bail applicant charged with murder carried a heavier burden of proof. See *R v Mtatsala* 1948 2 SA 585 (E). This impression is correctly criticised by Hiemstra *Suid-Afrikaanse strafproses* (1987) 143. He indicates that it is an unscientific way of putting it. Hiemstra explains that the burden of proof of the applicant for bail was simply more onerous according to the gravity of his probable sentence and the strength of his defence. This view is supported by Nel *Borgtog in die*

show that he should be granted bail.⁵⁴ The bail procedure was regarded as a form of civil application.⁵⁵ The accused had to bring a bail application and in accordance with the South African civil procedure the applicant bore the onus on a balance of probabilities.⁵⁶ In accordance with the normal principles, the party that bore the onus of proof had the duty to begin with evidence.⁵⁷ The state could rebut this evidence by leading evidence as to why the accused should not be released on bail.⁵⁸

It must be agreed with Cowling that there was a tendency on the part of the courts to rubber-stamp the investigating officer's decision to release on bail.⁵⁹ This happened because of time constraints and the inability of the bulk of the accused appearing before the criminal courts to successfully argue a bail application.

However, bearing in mind that the principle of bail rests on the presumption of innocence, and the right to individual liberty that are well-known principles of our common law, the South African courts started to move away from the prescribed formal approach even before the Interim Constitution. In *S v Hlongwa*⁶⁰ the court held that one should lean towards granting bail, unless there is a likelihood that the interests of justice will be prejudiced. In *S v Hlopane*⁶¹ it was taken further in that the judicial officer remarked that one cannot rely on an accused's silence to justify a failure to inquire into bail. This meant that there was a duty on the judicial officer to inquire *mero motu* into bail. It was therefore no longer accepted that bail is a form of civil application and that the accused solely bore the responsibility for initiating such application.⁶² But in view of earlier decisions, one may ask why the accused was burdened with an onus of proof.⁶³

Suid-Afrikaanse strafprosedure (LLM dissertation US (1985)) 100. In *Ali Ahmed v Attorney-General* 1921 TPD 587 590 it was pointed out that in judging the likelihood of the accused not standing trial, a court should ascribe to the accused the ordinary motives that sway human nature. The standard of proof does not vary, but the possibility of the death sentence makes it more probable that the accused might not stand his trial.

54 See *S v Hudson* 1980 4 SA 145 (D) 146A; *De Jager v Attorney-General Natal* 1967 4 SA 143 (D) 149G; *S v Maharaj* 1976 3 SA 205 (N) 208A; Van der Merwe in Du Toit *et al* 9-28.

55 Cowling (1996) 51.

56 See Van der Berg *Bail – A practitioner's guide* (1986) 6.

57 Schmidt 23.

58 See Van der Merwe in Du Toit *et al* 9-28. There seems to have been some fear to burden the state with the onus. If the state bore the onus, the state would have to begin and adduce evidence justifying a refusal to grant bail. If the state failed to do so the accused would automatically be entitled to be released on bail. The obvious inherent dangers in this approach has to a large extent been canceled by s 50 of the Criminal Procedure Act in terms of which the bail application may be postponed. See my thesis para 2 6 3 2.

59 See Cowling (1996) 52.

60 1979 4 SA 112 (D).

61 1990 1 SA 239 (O).

62 Cowling "Law reform: Bail and the search for a new theoretical approach" 1991 *SACJ* 65 67.

63 In *McCarthy v R* 1906 TS 657 659 Innes CJ, on behalf of the full bench, held that a court was always desirous to allow an accused bail if it is clear that the interests of justice will not be prejudiced. More particularly, if it thinks upon the facts before it that he will appear to stand his trial in due course. However, in cases of murder, great caution is always exercised in deciding upon an application for bail. In this decision, as in *Kaspersen v R* 1909 TS 639, no mention is made of a burden of proof.

3 1 2 *The origin of the burden of proof on an applicant for bail*

It seems that the onus of proof that rests on an accused originated from *Ali Ahmed v Attorney-General*,⁶⁴ where the accused was arraigned on two charges of rape. Wessels JP held that the court could not possibly tell with certainty whether a man charged with murder, rape, or high treason would stand his trial or not, and that the court could only guess. He indicated that some courts have gone so far as to say that where the penalty is a very severe one, they will presume that a person would prefer to abscond across the border, rather than stand trial.

The court indicated that it was not concerned with whether that presumption was justified or not. It has been one of the underlying principles, and therefore the courts have scanned the evidence in order to see what penalty would in all probability be inflicted. If the court is satisfied from the evidence as tendered at the preparatory examination that a severe penalty is not likely to follow, then the court will, as a rule, grant bail. If there is any uncertainty in the mind of the court as to what penalty will eventually be imposed, then the court in the three cases mentioned ought not to grant bail.⁶⁵

Wessels JP concludes that on taking these circumstances into consideration, the applicant has not discharged the onus that lies upon him of satisfying the court that he will stand his trial, and that the idea of his escaping from justice is a very remote one.⁶⁶

In *Perkins v R*⁶⁷ Matthews AJP for the full bench placed an onus on the accused to convince the court that he will stand his trial if bail was granted. In *R v Mtatsala*⁶⁸ Lewis J held the following:⁶⁹

“Judged by the long line of decisions in this Court, I venture to think that in a case where the Crown opposes an application for bail the onus is cast upon the accused to satisfy the Court that, if bail is granted, he will not abscond or tamper with the Crown witnesses.”

The accused in the last-mentioned case were also arraigned on a charge of murder, and were therefore not entitled to bail. However, the court had a discretion to grant bail.

3 2 The Interim Constitution

3 2 1 *General*

The Interim Constitution came into force on 27 April 1994 and provided that every person arrested for the alleged commission of an offence, shall have the right to be released from detention with or without bail, unless the interests of justice require otherwise.⁷⁰

64 1921 TPD 587 (according to the majority decision in *Ellish v Prokureur-Generaal, Witwatersrand* 1994 5 BCLR 1 (W)).

65 588.

66 589. Under the law at the time of these decisions, a court had the discretion to grant bail for rape, murder or treason, if the court was of the opinion that justice will prevail in a specific instance. The point of departure was that if an accused was arraigned on any of these charges, the accused should rather be kept in custody than be granted bail.

67 1934 NPD 276.

68 1948 2 SA 585 (E).

69 592.

70 S 25(2)(d).

This section led to conflicting supreme court decisions as to whether

- the concept of onus in the true sense is appropriate in bail proceedings, and
- whether the onus rested on the accused to establish that he is a suitable person to be released on bail,⁷¹ or whether the state bore the onus of showing that the accused should not be released on bail.⁷²

The Constitutional Court in *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat*,⁷³ in order not to get caught up in the debate, deliberately refrained from using the term “onus” when it referred to the position under the Interim Constitution. However, the Constitutional Court did accept that the starting point was that an arrested person was entitled to be released.

The two viewpoints most frequently held by the high courts were that a bail application was not amenable to an onus in the true sense, and that the effect of the constitutional provision was to shift the onus onto the state. These two viewpoints will now be discussed.

3 2 2 *Bail application not amenable to an onus in the true sense*

In *Prokureur-Generaal van die Witwatersrandse Plaaslike Afdeling v Van Heerden*⁷⁴ the concept of an onus was found to be inappropriate in bail proceedings. Eloff JP explained that the notion that an arrested person should be released where possible was nothing new, and in this respect section 25(2)(d) of the Constitution did not reflect a new philosophy. The court indicated that bail application proceedings were judicial proceedings and not criminal proceedings, and in these proceedings the question of an onus did not play a comparable role with that in criminal proceedings.⁷⁵ The court required that the state should place indications before the court why the interests of justice require that the person in question should not be released.⁷⁶ However, it was said that the state was not burdened with an onus in the true sense of showing that the interests of justice were stronger than those of the applicant.⁷⁷ The state must first be given the opportunity of motivating and substantiating its position. If it did not do so the inference would probably be drawn that the interests of justice did not stand in the way of a release on bail. If the state did place evidentiary matter before the court which required an answer or explanation, the court should then give the applicant an opportunity to place evidentiary material before the court. If he did not do so an adverse inference could be drawn. In this sense there was an onus and an onus of rebuttal.

In *S v Njadayi*⁷⁸ Jennett J seemed to agree with the above approach by Eloff JP. The court stated that it may be accepted that if at the end of the day the court

71 See *S v Mbele* 1996 1 SACR 212 (W) and my discussion in para 3 3 4.

72 As will be shown legal scholars did also not agree on the question of onus in bail proceedings. However, it seems that it was mostly accepted that a basic entitlement to bail was bestowed by the provision.

73 1999 7 BCLR 771 (CC).

74 1994 2 SACR 469 (W).

75 479e–f.

76 480g.

77 479c.

78 1994 5 BCLR 90 (E). The judgment was delivered on 1994-07-17.

cannot say that the interests of justice require otherwise, bail should be granted. To this extent the court considered that there was an onus on the state. The state had to adduce evidence that will ultimately satisfy the court that bail should not be granted, if that was indeed the attitude of the state.

In *S v Mabaza*⁷⁹ Swart J, before the full bench decision in *Ellish*, came to the conclusion that the judgment of Eloff JP was correct and had to be followed, and set out additional reasons in support of the view expressed by Eloff JP.⁸⁰ He indicated that if it were intended to place an onus on the state, explicit wording to that effect would have been expected. To imply an onus on the state from the portion of the section introduced by the word “unless” might be superficially attractive, but was unsound. Rather than creating a right to bail qualified by an “exception” (such that the authority relying on the exception had to bring the case within its terms), the framers of the Constitution had merely given recognition to the right and its qualification in one and the same provision. Section 25(2)(d) provided simultaneously with the recognition of the right to bail the circumstances in which the right could not be claimed. Such a construction was consistent with the scheme of section 25 in general. The other rights created in section 25 were without qualification and could be enforced by a mandamus or interdict. It was significant that in delineating the right in section 25(2)(d), the framers of the Constitution had built in the limitation on it.

In *Ellish v Prokureur-Generaal, Witwatersrand*⁸¹ Van Schalkwyk J for the majority concluded that the approach adopted by Eloff JP in the court *a quo* was correct. The court concluded that there is no onus in a bail application. The presiding officer is expected to exercise a discretion in weighing the interests of the applicant in his freedom against the interests of the community in the administration of criminal justice. The latter interest is no less important than the former. As regards procedure, section 25(2)(d) requires that the state should begin. If at the end of the day the scales are evenly balanced, the applicant must be granted bail. This result follows from the provisions of section 25(2)(d) and not from the failure to discharge an onus.⁸²

It was thus held by Van Schalkwyk and Mynhardt JJ that bail proceedings were *sui generis* proceedings in which the issue of a burden of proof did not arise.⁸³

79 1994 5 BCLR 42 (W). The judgment was delivered on 1994-08-11.

80 The court sitting alone added that the question remained what the framers of the Constitution intended by s 25(2)(d).

81 1994 4 SA 835 (W); 1994 (5) BCLR 1 (W); 1994 2 SACR 579 (W). The judgment was delivered on 1994-08-19.

82 Viljoen in the *Bill of Rights compendium* 9–30 indicates that this is nothing but a burden of proof. Van der Merwe in Du Toit *et al* 5B-41 argues that this issue can only be solved by imposing an onus. He contends that s 25(2)(d) creates a right to bail which can only be denied if the interests of justice so require. Furthermore, it is the state that seeks detention pending investigation or trial. There is an onus, and it should rest on the state.

83 The court referred to the decision in *Buch v Buch* 1967 3 SA 83 (T) where Claassen J decided that there was no onus of proof in maintenance proceedings. This is so because there is a duty on the presiding officer to act inquisitorially. At 87D–F the court held as follows: “In view of these provisions it seems to me it is no longer correct to speak of an onus resting on a party in connection with proceedings before a maintenance court. The responsibility of placing evidence before the court no longer rests only on the parties concerned, but is

Van Schalkwyk J for the majority in *Ellish* explained that a bail application was unique.⁸⁴ Testimony can be presented in an informal manner. It can be done by way of hearsay or documentary evidence. An accused applying for bail can, as in the present instance, motivate his application by way of a sworn statement. The test to be applied at every bail application is focused on the probable future conduct of the detainee. Will he attend his trial? Will he probably interfere with state witnesses or try and defeat the ends of justice? Will he probably commit further crimes while awaiting trial? In the past as well as in the present no bail application could be completed before attention has been given to one or more of these three issues.

Apart from the onus of proof the court found it clear that a presiding officer has a duty to see that justice prevails. It means that care must be taken that the right of the detainee to be released is weighed and balanced against the interest of the community that justice will prevail. A presiding officer does not comply with this task by merely observing how two competing parties argue while none of them necessarily strive for justice. The accused is set on freedom, and the prosecution is set on an eventual conviction. The interests of the accused are not the same as the interests of justice. The interests of the state and of the accused at a bail application, even if vigorously pursued, are therefore not necessarily going to deliver an answer as to what really is in the interests of justice. It is ultimately the task of the presiding officer to make sure that justice prevails. The question whether justice may be advanced or defeated is a weighty issue that in the answering thereof demands all the legal skills and knowledge of men that is available to the presiding officer. It is a value-judgment that is not susceptible to the application of an onus of proof.

The court explained that the process of reasoning that the presiding officer has to apply must be directed at the probable future conduct of the accused. This is determined by way of certain details that concern the present and the past. The official therefore has to venture a prediction on the basis of his human knowledge and the presented details. That which is adjudicated is not a fact or a set of facts but merely a future perspective that is speculative in nature even though it is based on proven facts. The court held that to talk of a burden of proof in this regard would be a misappreciation of this concept that could easily lead to the neglect of his duty by the presiding officer.

It has already been found that a magistrate should be inquisitorial at a bail application and if important information is not available he should take steps to obtain the information. It necessarily follows that he must have the authority to take the necessary steps to obtain such information after the state and the accused have presented the evidence of their choice.⁸⁵

shared by the maintenance officer and the presiding judicial officer. Thus even where the parties are legally represented the maintenance officer and the presiding officer may have to call relevant evidence not called by the legal representatives. Then at the conclusion of all the evidence the presiding officer will decide whether to make an order to pay maintenance or vary an existing order to pay maintenance. In doing so he will no doubt consider all the relevant factors. These I need not enlarge on here, but in general he will look after the interests of children and see that justice is done between the parties in accordance with their means and ability to pay."

84 SA 841.

85 In deliberation the court *inter alia* referred to the position in England which has no bill of rights, and where the position with regards to bail is regulated by the Bail Act of 1976. The

This approach is accepted by at least one legal author. Hiemstra states the following:⁸⁶

“Die vraag kan trouens gestel word of daar hoegenaamd ’n bestaansrede vir ’n bewyslas by ’n borgaansoek is. Die voortydig, interlokutêre, informele, inherent dringende, toekomsgerigte en andersins unieke aard van die verrigtinge pas ten ene male nie in ’n gerieflike nis nie.”

3 2 3 *Onus on the state*

In *Magano v District Magistrate, Johannesburg (2)*⁸⁷ the court accepted that section 25(2)(d) of the Interim Constitution reversed the onus, and that the onus now rested upon the state to establish that the interests of justice require the continued detention of an accused. If the state failed, bail should be granted.⁸⁸ Van Blerk AJ explained that the word “unless” added weight to the argument that the onus rests on the state. He was of the view that section 35(3) of the Interim Constitution enjoined a court to uphold the rights of an accused to freedom at least until there is a finding of guilt.⁸⁹

In *S v Maki (1)*⁹⁰ Froneman J gave the same interpretation to section 25(2)(d). Froneman J held that the recent trend, to place the onus on the person causing a deprivation of liberty, should apply to bail applications. The presumption of

premise of the Act is that bail should be granted to an accused. Although it is referred to as a “presumption in favour of bail” it is not deemed to be an onus of proof. However, certain exceptions are made in sch 1 para 9 of the Bail Act in which event bail may be refused: “In taking the decisions required by para 2 of this part of this Schedule, the Court shall have regard to such of the following considerations as appear to it to be relevant; that is to say –

- (a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it),
- (b) the character, antecedents, associations and community ties of the defendant,
- (c) the defendant’s record as respects the fulfilment of his obligations under previous grounds of bail in criminal proceedings,
- (d) except in the case of a defendant whose case is adjourned for enquiries or a report, the strength of the evidence of his having committed the offence or having defaulted, as well as any others which appear to be relevant.”

The court also referred to Chatterton *Bail: Law and practice* (1986) 53–54 where the function of a court is described as follows: “The Court will consider the gravity of the offence, the evidence against the accused and the likely sentence, the circumstances, antecedents and any criminal record of the accused. It will determine also whether it has sufficient and accurate information to arrive at a proper decision. On these facts it will test the exceptions to bail – absconding, committing further offences or interfering with the course of justice. If the Court finds that there are no substantial grounds for remanding the accused in custody, it shall grant him bail, with or without conditions.” In a report compiled by the British Home Office under the heading “Bail Procedures in the Magistrate’s Court” (Report of the Working Party 1974) the following is stated (44): “The bail decision . . . should be based on the fullest possible information about the defendant, if the Court is to arrive at a rational decision.” The majority in *Ellish* took statements such as these into consideration when it decided that there was an obligation in the English law on the presiding officer to make sure that he obtains all possible relevant information.

86 Kriegler *Suid-Afrikaanse strafproses* 5 ed (1993) 150.

87 1994 4 SA 172 (W); 1994 2 BCLR 125 (W); 1994 2 SACR 308 (W).

88 BCLR 128E–G.

89 S 35(3) under the heading “[i]nterpretation” provided as follows: “In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.”

90 1994 2 SACR 630 (E).

innocence in chapter 3 of the Interim Constitution reinforced this argument. Fromeman J accepted that considerations of proper administration of justice present themselves at bail applications that were not necessarily relevant in other instances of loss of freedom. This merely meant that in specific instances the burden of proof on the state was probably easier to discharge in bail applications than in other instances. Consequently the court approached the application on the basis that the burden was on the respondent to show that the incarceration of the applicants was necessary for the proper administration of justice, in the sense that it could probably lead to the applicants not standing their trial.⁹¹

The minority judgment in *Ellish*⁹² also favoured this approach.⁹³ Southwood J found the language in section 25(2)(d) to be clear and unambiguous. The court indicated that an arrested person was entitled to be released from detention subject to one qualification – that the interests of justice do not require otherwise. The words following “unless” defined the exception to this right. The person who, or authority which, sought to continue the detention must show why, and it cannot be expected of the arrested person who has a right to be released from detention with or without bail to prove that his release is not contrary to the interests of justice. Southwood J found this the only reasonable construction of the wording of the section itself. The fact that bail proceedings are *sui generis* and inquisitorial in nature, does not affect the fact that at the end of the inquiry the court may be left in doubt as to whether the evidence justifies the refusal to release the arrested person or not. The court furthermore indicated that an onus in the true and original sense as described in *Pillay v Krishna*⁹⁴ must be placed on the state. The state must accordingly also lead evidence first.⁹⁵

91 641f–i.

92 1994 4 SA 835 (W); 1994 5 BCLR 1 (W); 1994 2 SACR 579 (W).

93 SA 850–852; SACR 596D–597A.

94 1946 AD 946 952–953.

95 Van der Merwe in Du Toit *et al* 9–30 found much merit in this approach put forward by Southwood J. He contends that in bail proceedings there is a clearly defined issue. Is the arrested person entitled to his freedom or not? Two parties, the arrested person and the state are eminently interested in the issue and are entitled to lead evidence and to be heard on the issue. The fact that bail proceedings are *sui generis* and inquisitorial in nature does not affect the fact that at the end of the inquiry the court hearing the bail proceedings may be left in doubt as to whether the evidence justifies the refusal to release the arrested person or not. The use of a true onus as described in *Pillay v Krishna* 1946 AD 946 952–953 to resolve the issue is therefore both practical and juridically sound. Van der Merwe indicates that the use of an onus in this sense will not change the nature of the proceedings conducted when an arrested person seeks his release. As authority he refers to the history of bail procedure in South Africa, as outlined by Van Schalkwyk J in his judgment. For many years the courts have accepted that the accused bears the onus but that has not resulted in any change in the inquisitorial nature of the proceedings. There is no reason to think that if the onus is now shifted to the state, the court will cease to play the role that it did before the Constitution came into force. As long as the court bears in mind that it is not required to simply play a passive role, the use of an onus will not result in any injustice. He indicates that on the approach of Van Schalkwyk J, injustice may in any event arise if the court simply plays a passive role in bail proceedings. Van der Merwe agrees with Van Schalkwyk J that a court hearing an application for the release of a detained person must always bear in mind that its task is to ensure that justice is done. He contends that by clearly placing an onus on the state as suggested above, it becomes absolutely clear that it is the state which must lead evidence first. That is the usual consequence of the onus in its true and original sense. It will also have no effect on the role of the court in such proceedings.

3 2 4 Appraisal of viewpoints

It appears that these two different views were the result of a different understanding of the concept of an onus rather than a fundamental difference in opinion as to the mechanics of a bail hearing brought about by section 25(2)(d) IC. The proponents of the view that an onus is not amenable to a bail application appear to hold the view that an inquisitorial approach as applied in bail applications under South African law, and the fact that testimony can be presented in an informal manner, is not compatible with a true onus. The proponents of the other view see no problem in combining these principles.

The true and original use of the word “onus” as described in *D 31 22* casts a duty on a particular litigant to finally satisfy the court if he is to succeed in his claim or defence as the case may be.⁹⁶ While I do not understand this to mean that testimony must be presented in a formal manner, it can possibly be argued that the original use of the term does not leave room for an inquisitorial approach where the presiding officer has a duty to see that justice prevails. However, both views agree that if at the end of the day the presiding officer is left in doubt as to whether the arrested person should be released, the arrested person is entitled to release. In this sense there is an onus on the state.

In the final analysis it may be a question of semantics, as the two views agree on the basic mechanics of a bail hearing under section 25(2)(d) IC. It is understood that there is a basic entitlement to bail. If no evidence is therefore presented the arrested person is entitled to bail. If the state wishes to oppose bail the state has to start and submit evidence. If the evidence requires an answer the arrested person must be given the opportunity to submit evidence. If information that the presiding officer deems important is not available, he must take steps to obtain this information. If at the end of the day the presiding officer is left in doubt as to whether the arrested person should be released, the arrested person must be released.

An Anton Piller order is a drastic and extreme measure with enormous potential for harm, since it would quite frequently be granted not only in camera and in the absence of a respondent, but also at the instance of a competitor who would not be astute to see that no harm comes to the respondent. One could add that constitutional considerations, such as respect for the rights to human dignity, privacy and property are also highly relevant. Therefore execution must be meticulous and according to the letter of the order.

Van der Westhuizen J in Retail Apparel (Pty) Ltd v Ensemble Trading [2002] 1 All SA 186 (T) 191f–g.

96 See also the other definitions in para 1.

Betekenis en grondslae van die reg op toegang tot inligting

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SUMMARY

Meaning and foundations of the right of access to information

The right of access to information has gained great prominence in South Africa since the dawn of the new dispensation and the right's subsequent inclusion in the Constitution. It is generally accepted that this right is of critical importance in any democratic society as it fosters openness and accountability in government administration. This article identifies two main types of information and provides a brief exposition of the liberal philosophical foundations on which the right of access to information (in terms of its vertical application between individual and government) is based. This is followed by a definition of the phrase "right of access to information". Finally the importance and value of the right of access to information in modern society are investigated. Reference is made to its role in the maintenance of public accountability, the legitimisation of government action and the promotion of public participation, administrative justice and transparency.

1 INLEIDING

Inligting vervul 'n kritieke rol in 'n demokratiese samelewing. Dit word allerweë as onontbeerlik beskou vir die handhawing van bepaalde demokratiese vereistes soos die afdwinging van aanspreeklikheid en burgerlike deelname. In hierdie bydrae word gefokus op die reg op toegang tot inligting – 'n onvervreembare mensereg en die sentrale tema van hierdie bydrae. Dit is 'n aspek wat gegrondves is in die liberale filosofiese teorie en wat as sodanig 'n kort uiteensetting van die uitgangspunte van dié denkringting regverdig. Dit word gevolg deur 'n omskrywing van die reg op toegang tot inligting, waarna afgesluit word met die belang en waarde van dié reg – vir sowel owerheid as individu – binne die konteks van publieke administrasie.

2 INLIGTINGTIPES

Vir die doeleindes van hierdie bydrae kan daar breedweg tussen twee soorte inligting onderskei word, naamlik persoonlike inligting en owerheidsinligting.

2.1 Persoonlike inligting

Persoonlike inligting is inligting wat betrekking het op 'n individu se private lewe en wat hy/sy nie noodwendig wil openbaar maak nie.¹ Ingevolge artikel 1

1 Du Plessis *Die reg op inligting en die openbare belang* (1986) 14.

van die Wet op die Bevordering van Toegang tot Inligting 2 van 2000 (hierna die "Inligtingwet" genoem) sluit dit die volgende in:

- Inligting wat handel oor nasionale, etniese of sosiale herkoms, kleur, ras, geslagtelikheid, geslag, seksuele oriëntasie, swangerskap, huwelikstaat, ouderdom, godsdienst, gewete, oortuiging, kultuur, taal, fisiese of geestelike gesondheid, welsyn, gestremdheid en geboorte van 'n individu.
- Inligting aangaande die opvoeding of die kriminele, mediese of werksgeskiedenis van 'n individu of inligting in verband met finansiële transaksies waarby 'n individu betrokke was.
- Enige nommer, simbool of ander besonderheid wat aan 'n individu toegeken is en waardeur hy/sy identifiseerbaar is.
- Die adres, vingerafdrukke of bloedgroep van 'n individu.
- Die persoonlike menings, standpunte of voorkeure van 'n individu.
- Korrespondensie van 'n individu wat van vertroulike aard is.

In Suid-Afrika, soos in ander lande, word individue deur verskeie wette verplig om inligting van 'n persoonlike aard (bv gegewens oor inkomste, huwelikstatus en ouderdom) aan die owerheid bekend te maak.² Die bekendmaking van sodanige inligting berus op die veronderstelling dat die owerheid (en in besonder die amprenare wat direk daarmee werk) dit vertroulik en met die grootste omsigtigheid sal hanteer om te verseker dat 'n persoon se reg op privaatheid nie geskend word nie.³ Dit impliseer onder meer dat persoonlike inligting nie sonder die toestemming van die betrokke individu aan 'n derde party verskaf mag word nie en nie vir 'n ander doel as waarvoor dit aanvanklik ingesamel is, gebruik mag word nie.⁴

2.2 Owerheidsinligting

Owerheidsinligting verwys na die somtotaal van inligting wat in besit en onder beheer van die owerheid is.⁵ Dit sluit onder meer die volgende in:

- Wetgewing en ander publikasies wat deur die owerheid daargestel word.
- Inligting wat deur die owerheid gegeneer of ingesamel word met die oog op die bevrediging van funksionele behoeftes.
- Inligting wat verkry is na aanleiding van navorsings- en ontwikkelingsprojekte wat gedeeltelik of algeheel deur die owerheid gerugsteun en gefinansier is.
- Inligting wat verkry is deur die verwerking van gegewens wat deur private bronne gehou word of deur inligting woordeliks van private databasisse oor te neem en in owerheidsdatabasisse te stoor.
- Inligting wat deur die owerheid geskep is op grond van persoonlike gegewens wat deur individue verskaf is (bv tydens 'n sensusopname).⁶

2 McQuoid-Mason *The law of privacy in South Africa* (1985) 158.

3 De Giorgi *Beheer van die diskresionêre bevoegdhede van staatsamptenare: Rol van die Grondwet van die Republiek van Suid-Afrika, 1993 (Wet 200 van 1993)* (1997) 128.

4 Sing en Bayat "Computer technology and information privacy rights of the individual" 1992 *TRW* 82-83.

5 Michael "Interests of third parties: the extent to which government should keep information secret for the sake of third parties" in Riley en Relyea (reds) *Freedom of information trends in the information age* (1983) 138.

6 Herson "Government information: A field in need of research and analytical studies" in McClure, Herson en Relyea (reds) *United States government information policies: Views and perspectives* (1989) 8.

Vir doeleindes van hierdie artikel omvat owerheidsinligting ook daardie inligting waarna as “openbare inligting” verwys word. Volgens Van Graan⁷ is openbare inligting “inligting oor enige aspek van die bedrywighede van die openbare sektor”. Op grond van sodanige inligting word ’n individu in staat gestel om ’n oordeel oor owerheidsbedrywighede te vel – ongeag of die inligting hom/haar in ’n persoonlike hoedanigheid of in sy/haar hoedanigheid as onderdaan van die staat raak.⁸

Die term “owerheidsinligting” word weliswaar nie uitdruklik in die Inligtingswet gebruik en verklaar nie, maar die betekenis wat ingevolge artikel 1 van die Wet aan “rekord” geheg word, stem ooreen met dié van “owerheidsinligting” soos hierbo verduidelik. Hiervolgens verwys “rekord” na enige opgetekende inligting – in enige vorm of medium – in besit of onder beheer van ’n owerheidsinstelling (of ’n privaatinstelling), ongeag of sodanige inligting deur daardie instelling geskep is al dan nie.

Die fokus van hierdie bydrae val op owerheidsinligting, en in besonder die toeganklikheid daarvan vir die publiek. Dit sluit in toegang tot persoonlike inligting wat deur die owerheid gehou word (en wat as sodanig deel van owerheidsinligting is).

3 FILOSOFIESE GRONDSLAE VAN DIE REG OP TOEGANG TOT INLIGTING

Ten einde ’n volledige en omvattende begrip te vorm van wat die reg op toegang tot inligting behels, is dit allereers nodig om ondersoek in te stel na die filosofiese grondslae daarvan.

Die gedagte dat owerheidsinligting geredelik aan die publiek bekend gemaak en beskikbaar gestel behoort te word, kan teruggevoer word na die liberalisme as denkriktig.⁹ Die fundamentele beginsels van liberalisme het hulle oorsprong reeds by die klassieke Grieke gehad, maar die moderne liberalisme het eers gedurende die agtiende en negentiende eeu beslag gekry.¹⁰ Die liberalisme is gegrond op die onwrikbare geloof in die intrinsieke waarde en waardigheid van die mens.¹¹ Dié denkriktig beklemtoon voorts die vryheid en outonomie van die individu. Trouens, vryheid word hoër geag as enige ander waarde in die samelewing – insluitend gelykheid en geregtigheid.¹² Vryheid is immers noodsaaklik om die individu in staat te stel om tot volle selfverwesenliking te kom en om sy/haar natuurlike vermoëns en talente ten volle te ontwikkel en uit te leef. Dit strek nie net die individu tot voordeel nie, maar ook die samelewing aangesien ’n persoon deur persoonlike selfverwesenliking ’n groter bydrae tot die samelewing kan lewer.¹³

7 Van Graan *Die verskynsel van geheimhouding van die bedrywighede van die openbare sektor met besondere verwysing na die Republiek van Suid-Afrika* (1984) 6.

8 Du Plessis 16.

9 Robertson *Public secrets: A study in the development of government secrecy* (1982) 17.

10 Ackron *Negentiende eeuse Britse utilisme as liberale denkriktig* (1980) 46.

11 *Idem* 1.

12 Spitz *The real world of liberalism* (1982) 213.

13 Ackron 10 19.

Dit is belangrik om te besef dat liberaliste nie absolute vryheid voorstaan nie. Gesag en reëls word nie verwerp nie – solank dit nie die persoonlike ontwikkeling en geestelike verryking van die individu aan bande lê nie. Vryheid en gesag word dus nie as onversoerbare teenpole beskou wat nie naas mekaar kan bestaan nie. Die uitdaging is daarin geleë om 'n gesonde balans en harmonie tussen gesag en vryheid te bewerkstellig. Dit impliseer dat sowel vryheid as gesag noodgedwonge beperk moet word.¹⁴

Volgens die liberaliste is vryheid noodsaaklik in die soeke na waarheid en vir die ontwikkeling, handhawing en bevordering van kritiese denke.¹⁵ Dit is egter nie moontlik om die waarheid na te streef en krities te wees oor sake van openbare belang indien die inligting aan die hand waarvan dit moet geskied, nie beskikbaar of bekend is nie. Die liberaliste is daarom sterk voorstanders van die reg op toegang tot inligting vir elkeen wat moontlik daaruit voordeel kan trek.¹⁶ Twee van die vernaamste eksponente van die liberale denkskool, naamlik Jeremy Bentham en John Stuart Mill, het hulle veral sterk uitgespreek ten gunste van publisiteit, openbare ondersoeke na die werksaamhede en rekords van uitvoerende instellings, vrye besprekings en die konstante vloei van akkurate inligting na die publiek.¹⁷

Vanuit 'n liberale perspektief is inligting ook 'n voorvereiste vir die ontwikkeling van individuele vermoëns en begaafdhede ten einde tot volle selfverwesenliking te kom.¹⁸ Bay¹⁹ haal uit John Stuart Mill se bekende *On liberty* aan ter ondersteuning van dié standpunt: "If only truth is left free to combat error in an open marketplace of ideas, humanity is bound to become more enlightened and better off in the long run." In geval van verteenwoordigende regering is dit eweneens belangrik dat inligting vrylik beskikbaar sal wees om burgers in staat te stel om rasonale besluite te neem en om sinvol aan die politieke proses deel te neem.²⁰ Dit vereis uiteraard dat daar vryheid van spraak en meningsuiting, vryheid van assosiasie en vryheid van uitdrukking (wat vryheid van die pers en ander media insluit) moet wees.²¹ Ofskoon liberaliste nie gesag verwerp nie is hulle immer wantrouig teenoor persone in gesagsposisies, weens onder meer die gevaar van misbruik van bevoegdhede, arbitrêre beperking van individuele vryhede en die nastrewing van eiebelang ten koste van die openbare belang. Daarom word groot waarde geheg aan toegang tot inligting waarvolgens die individu owerheidsoptrede kan beoordeel en kan bepaal of die owerheid sy/haar belange voortdurend nastreef en voorop stel.²² In wese kom dit daarop neer dat die onderdaan in staat gestel moet word om die owerheid aanspreeklik te hou vir optrede en besluite.

14 *Idem* 9; Ebenstein en Ebenstein *Great political thinkers: Plato to the present* (1988) 900.

15 Spitz 213 215.

16 Bay "Access to political knowledge as a human right" in Galnoor (red) *Government secrecy in democracies* (1977) 29.

17 Wiggins *Freedom or secrecy* (1964) xi; Everett *Great lives and thought: Jeremy Bentham* (1966) 84 87.

18 Robertson 17.

19 Bay 29.

20 *Ibid.*

21 Ackron 27.

22 Spitz 214; Robertson 18.

4 BETEKENIS VAN DIE REG OP TOEGANG TOT INLIGTING

Die reg op toegang tot inligting is 'n frase wat dikwels in die literatuur gebruik word, sonder dat dit op behoorlike en akkurate wyse omskryf word. Omskrywings neig in die algemeen om bloot die voor-die-handliggende te verklaar (met ander woorde dít wat reeds onomwonde uit die frase self blyk). Riley²³ se definisie bied 'n voorbeeld van so 'n niksseggende verklaring: "What it [access to information] means is that legislation which provides for this right guarantees to the citizen a right to information." Ander omskrywings fokus weer op die noodsaaklikheid, waarde en belangrikheid van die reg op toegang tot inligting sonder om 'n bondige en sinvolle verduideliking te bied van wat die reg in werklikheid behels.²⁴ Vir onderhawige doeleindes en in die lig van 'n gebrek aan verklarings in die literatuur, is die volgende omskrywing geformuleer: Die reg op toegang tot inligting kan beskou word as die wetlik-afdwingbare aanspraak van 'n lid van die publiek teenoor die owerheid om geredelik van inligting voorsien te word oor sake van sowel openbare as persoonlike belang ten einde 'n rasonale mening te kan vorm en 'n akkurate oordeel te kan vel oor owerheids-werksaamhede.

Die reg op toegang tot inligting is 'n fundamentele mensereg en is as sodanig in verskeie internasionale, regionale en nasionale menseregte-aktes opgeneem. Dit is onder meer ingesluit in die Universele Verklaring van Menseregte (1948), die Europese Konvensie van Menseregte (1950) en die Afrika-Handves van Mense- en Personeregte (1981).²⁵ In die Engelse literatuur word deurgaans eerder na "vryheid van inligting" ("freedom of information") as "toegang tot inligting" ("access to information") verwys. Dieselfde betekenis word weliswaar aan die twee frases geheg, maar laasgenoemde is verkieslik bo "vryheid van inligting" aangesien dit enersyds só in die 1996-Grondwet vervat is en andersyds omdat dit 'n akkurate frase is wat nie, soos "vryheid van inligting", vir 'n verskeidenheid interpretasies vatbaar is nie.

5 BELANG EN WAARDE VAN DIE REG OP TOEGANG TOT INLIGTING

Binne die konteks van publieke administrasie is geredelike toegang tot owerheidsinligting van onskatbare waarde. Dit fasiliteer nie net die handhawing en bevordering van bepaalde demokratiese vereistes soos die afdwinging van aanspreeklikheid, burgerlike deelname en deursigtige owerheidsopptrede nie, maar is ook onontbeerlik in die voorkoming van arbitrêre owerheidsopptrede wat die publiek tot nadeel kan strek. Die vrye vloei van inligting verleen voorts legitimiteit aan owerheidsopptrede en bied aan die owerheid toegang tot die kennis en kundigheid van individuele lede van die samelewing. Dit is dus nie verbasend dat toegang tot inligting as 'n noodsaaklike voorvereiste vir 'n demokrasie beskou word nie. Vervolgens word in meer besonderhede ingegaan op die waarde en belang van die reg op toegang tot inligting – vir sowel die onderdaan as die owerheid.

23 Riley "Foreword: What is this thing called FOI?" in Riley en Relyea (reds) 2.

24 Kyk bv Robertson 11–13; Devenish *A commentary on the South African Bill Of Rights* (1999) 439 445; Du Plessis 409; Riley 2.

25 United Nations *United Nations action in the field of human rights* (1988) 222; Hannikainen en Myntti "Article 19" in Eide, Alfredsson, Melander, Rehof en Rosas (reds) *The Universal Declaration of Human Rights: A commentary* (1992) 281.

5 1 Afdwinging van aanspreeklikheid

Aanspreeklikheid in die algemene sin behels verduideliking of regverdiging van optrede of bedrywighede wat reeds plaasgevind het, wat tans onderneem word of wat in die toekoms beoog word.²⁶ Binne die konteks van publieke administrasie verwys dit na die vereiste dat alle owerheidsinstellings (en by implikasie alle openbare funksionaris of ampsbekleërs) in die finale instansie aan die publiek moet rekenskap gee oor die wyse waarop die funksies wat daaraan opgedra is, uitgevoer is.²⁷ Volgens McCandless²⁸ kom aanspreeklikheid dus in wese neer op “the obligation to answer publicly for the discharge of responsibilities that affect the public”. Die fundamentele uitgangspunt is dat owerheidsinstellings en hulle bedrywighede met die belastingbetalers se geld gefinansier word en dat daar dus ’n verpligting op derglike instellings rus om in die openbaar verantwoording te doen oor hulle werksaamhede – vandaar ook die verwysing na aanspreeklikheid as “die afdwinging van openbare verantwoordelikheid”.²⁹ Aanspreeklikheid is nie net gemik op die bekendmaking en verduideliking van negatiewe aspekte nie, maar het ook ten doel die openbaarmaking van positiewe resultate en prysenswaardige optrede.³⁰ Dit is voorts ten nouste verweef met beheeruitoefening, dit wil sê die toepassing van bepaalde maatreëls, tegnieke en meganismes met die oog op die bereiking van voorafgestelde doelwitte op doeltreffende en effektiewe wyse.³¹

’n Voorvereiste vir die handhawing van aanspreeklikheid is die bekend- of openbaarmaking van inligting aan die hand waarvan die optrede en werksaamhede van owerheidsinstellings beoordeel en aan kritiek en openbare debatvoering onderwerp kan word.³² Loots³³ omskryf inligting tereg as “the currency of accountability”. Aanspreeklikheid in die ware sin van die woord kan nie afdwing word indien net staatgemaak word op inligting wat van owerheidsweë beskikbaar gestel word nie.³⁴ Die moontlikheid bestaan immers dat die owerheid inligting kan manipuleer of dit op ’n selektiewe basis kan gebruik deur byvoorbeeld net inligting vry te stel wat die owerheid in ’n goeie lig stel en wat opponente se geloofwaardigheid ondermyn. Daarom behoort voorsiening gemaak te word vir ’n wetlike reg op toegang tot owerheidsinligting waardeur die publiek (in persoonlike hoedanigheid of deur middel van die media en belangegroep) in staat gestel sal word om die ware toedrag van sake te bepaal ten einde owerheidsoptrede objektief te beoordeel.³⁵

26 Jackson *The political economy of bureaucracy* (1982) 220.

27 Cloete *Accountable government and administration for the Republic of South Africa* (1996) 18; Schwella *Die rol van die nuusbladpers in die handhawing van openbare verantwoordelikheid ten opsigte van die Suid-Afrikaanse uitvoerende gesag* (1988) 39.

28 McCandless “Auditing to serve public accountability” 1993 *Int J Government Auditing* 14.

29 Fox en Maas *Entrepreneurship and public management* (1997) 55; Cloete 19.

30 Cloete 19.

31 Van Heerden *Die wenslikheid van geregtelike beheer oor die werksaamhede van staatsdepartemente met besondere verwysing na die Departement van Binnelandse Sake* (1994) 65–66.

32 Schwella 60.

33 “The role and place of auditing in a changed organisation structure” 1991 *SAIPA* 202.

34 Schwella 63–64.

35 Robertson 11.

5.2 Bevordering van burgerlike deelname

Aktiewe deelname aan die regeer- en administreerproses deur die publiek is een van die vernaamste kenmerke van 'n demokratiese bestel.³⁶ Deelname impliseer egter meer as net die uitbring van 'n stem tydens verkiesings – dit veronderstel ook voortgesette belangstelling en deelname in sake van openbare en individuele belang, en waar moontlik, die beïnvloeding van owerheidsbesluite en -optrede.³⁷ Burns³⁸ tref 'n onderskeid tussen individuele en openbare deelname. Individuele deelname vind plaas in gevalle waar 'n individu byvoorbeeld 'n verhoor van 'n administratiewe tribunaal moet bywoon om sy/haar kant van die saak te stel of waar 'n besluit of optrede net 'n uitwerking op 'n besondere individu het, byvoorbeeld die toestaan of weiering van 'n lisensie of permit. Openbare deelname verwys na deelname deur die publiek in sake wat die openbare belang wesentlik raak – soos byvoorbeeld beleid insake misdaad of omgewingsaangeleenthede.

'n Voorvereiste vir rasonale en sinvolle deelname – hetsy op individuele of openbare grondslag – is dat inligting beskikbaar moet wees.³⁹ Geheimhouding werk apatie en onkunde in die hand wat nie bevorderlik vir die behoud van die demokrasie is nie. Lede van 'n samelewing wat oningelig is, sal waarskynlik onwillig wees om aan besluitnemingsprosesse deel te neem, en selfs al sou hulle gewillig wees om deel te neem, sal hulle nie daartoe in staat wees nie, omdat hulle nie oor die nodige kennis beskik nie.⁴⁰ Waar inligting geredelik beskikbaar gestel word, kry individue meer insig in die doen en late van die owerheid en word hulle die geleentheid gebied om deur deelname (in die vorm van bv protesoptrede, voorleggings en petisies) beheer oor owerheidsoptrede uit te oefen en beleidsbesluite en optrede te beïnvloed.⁴¹ Aktiewe deelname skep ook die ideale teelaarde vir persoonlike ontwikkeling en groei van individue, waarby die hele samelewing weer kan baat.⁴² Die voordele van deelname, gebaseer op inligting wat aan die publiek bekend gemaak word, word soos volg deur Wiggins⁴³ saamgevat:

“The civic consciousness of the people is quickened. The appreciation of the difficulties that confront government is sharpened. Their readiness to comply with or submit to necessary measures is increased.”

Die reg op toegang tot inligting met die oog op groter deelname deur die burgers beteken nie dat laasgenoemde bekend moet wees met elke moontlike brokkie inligting oor owerheidsaangeleenthede nie. Soos ander regte, geld die reg op toegang tot inligting in elk geval nie absoluut nie – dit kan onder bepaalde omstandighede beperk word. Die publiek behoort hoofsaaklik toegang tot daardie inligting te hê wat hulle in staat stel om 'n oordeel oor owerheidswerksaamhede en -besluite te vel, sinvol aan die regeer- en administrasieproses deel te neem en politieke keuses uit te oefen. Dit impliseer onder meer dat die publiek oor die vaardigheid behoort te beskik om te onderskei tussen belangrike of waardevolle inligting en inligting wat van onbelangrike of nuttelose aard is.⁴⁴

36 *Idem* 12; Theart “Aspekte van persvryheid” 1980 *Ecquid Novi* 111.

37 Bathory en McWilliams “Political theory and the people’s right to know” in Galnoor (red) 5.

38 Burns “Administrative justice” 1994 *SAPL/PR* 347.

39 Theart 111–112.

40 Robertson 12.

41 Du Plessis 156.

42 Robertson 12.

43 Wiggins 20.

44 Bathory en McWilliams 8.

5 3 Voorkoming van arbitrêre optrede en bevordering van administratiewe geregtigheid

Een van die uitstaande kenmerke van die moderne staat is dat die uitvoerende gesag met omvangryke diskresionêre bevoegdhede beklee word.⁴⁵ Die toekenning van sodanige bevoegdhede is enersyds 'n uitvloeisel van die uitbreiding van owerheidsaktiwiteite. Andersyds word dit genoodsaak deur 'n behoefte aan gespesialiseerde kennis om op doeltreffende en effektiewe wyse aan owerheidsfunksies uitvoering te gee.⁴⁶ Die uitoefening van diskresie hou egter die gevaar in dat bevoegdhede oorskry kan word en dat gesag op arbitrêre wyse uitgeoefen kan word. Daarbenewens word dit ook geassosieer met onvoorspelbaarheid, onsekerheid, wispelturigheid en teenstrydighede.⁴⁷ Dit is derhalwe nodig dat bepaalde maatreëls sal bestaan om te voorkom dat daar as 'n resultaat van diskresie-uitoefening, op onregmatige wyse inbreuk gemaak word op die regte, vryhede en belange van enkelinge.⁴⁸ Die oogmerk is om te verseker dat beslissings en optrede deur die uitvoerende gesag (en in besonder die amptenary wat op 'n daaglikse grondslag met die publiek in aanraking is) aan die vereistes van administratiewe geregtigheid voldoen. Hierdie vereistes behels dat die handelinge en besluite van die amptenaar te alle tye redelik, billik en rasioneel regverdigbaar moet wees.⁴⁹ Administratiewe geregtigheid impliseer voorts dat daar volgens prosedurele voorskrifte opgetree moet word en dat die reëls van natuurlike geregtigheid nagekom sal word.⁵⁰

In 'n poging om administratiewe geregtigheid te bevorder, word sterk gesteun op die beginsel van toegang tot inligting. Vir administratiewe optrede om prosedureel billik te wees, moet daar onder meer aan 'n persoon wat van voorneme is om byvoorbeeld aansoek te doen om 'n lisensie of 'n permit, inligting verskaf word aangaande die beleid en prosedures wat in die oorweging van sy/haar aansoek gevolg sal word.⁵¹ Dié praktyk het die verdere voordeel dat dit vertroue in die administratiewe proses in die hand werk – die applikant word gerus gestel dat sy/haar aansoek nie op 'n lukrake of willekeurige wyse hanteer sal word nie, maar wel volgens vaste voorskrifte. Een van die fundamentele reëls van natuurlike geregtigheid⁵² is dat 'n betrokke party die geleentheid gebied moet word om sy/haar saak behoorlik te stel (die *audi alteram partem*-beginsel).⁵³ Derhalwe moet die party kennis ontvang dat optrede teen hom/haar beoog word en moet hy/sy op hoogte gestel word van die redes vir die voorgename optrede.⁵⁴ Alle

45 Burns 350.

46 De Giorgi 2.

47 Burns 350.

48 De Giorgi 68.

49 Brynard "Administratiewe geregtigheid: moontlikheid of onwaarskynlikheid?" 1996 SAIPA 27; Boule "Administrative justice and public participation in American and South African law" 1986 TSAR 137.

50 Burns 351; Boule 137.

51 Brynard 29.

52 Baxter *Administrative law* (1984) 541–542 sit die reëls van natuurlike geregtigheid in twee oorhoofse beginsels uiteen, nl die *audi alteram partem*-beginsel en die vereiste dat die besluitnemer vry van vooroordeel moet wees (*nemo iudex in sua causa*). Wiechers *Administratiefreg* (1984) 241 identifiseer 'n verdere reël, nl die verskaffing van redes aan 'n belanghebbende party vir 'n bepaalde beslissing wat deur 'n tribunaal of amptenaar geneem is.

53 Brynard 29.

54 Baxter 546.

feite en oorwegings waardeur 'n party nadelig geraak kan word, moet voorts aan hom/haar bekend gemaak word ten einde hom/haar in staat te stel om hom/haarself teen sodanige feite en oorwegings te verweer.⁵⁵

Ofskoon Baxter net twee oorhoofse reëls van natuurlike geregtigheid identifiseer, toon hy ook aan dat natuurlike geregtigheid impliseer dat die redes vir 'n bepaalde besluit bekend gemaak moet word.⁵⁶ Redes wat in dié verband verstrekkend word, kan as 'n besondere vorm of 'n faset van inligting beskou word,⁵⁷ en dra op verskeie wyses by tot die bevordering van administratiewe geregtigheid. Indien 'n bepaalde beslissing geneem word sonder dat redes daarvoor verstrekkend word, mag die persepsie ontstaan dat sodanige beslissing van 'n amptenaar of tribunaal die resultaat van arbitrêre besluitneming was. Deur die verskaffing van redes kom die ware gronde vir 'n bepaalde besluit na vore en word onsekerheid en negatiewe spekulاسie by die publiek uitgeskakel.⁵⁸ Hierbenewens word vertroue in die openbare besluitnemingsproses bevorder deurdat die publiek insae kry in besluite wat hulle ten nouste raak.⁵⁹ Terselfdertyd word die ideaal van groter openheid en toeganklikheid in die openbare sektor bevorder,⁶⁰ wat op sigself as 'n beheermaatreël ter voorkoming van die misbruik van bevoegdhede dien. 'n Individueel kan voorts die redes wat verstrekkend is, ontleed om te bepaal of sy/haar saak behoorlike oorweging geniet het en of alle tersaaklike feite en getuienis in berekening gebring is by die neem van 'n beslissing.⁶¹ In gevalle waar 'n ongunstige beslissing geneem is, bevorder die verskaffing van behoorlike redes berusting en word die gedagte by die betrokke party tuisgebring dat sy/haar saak ten minste deeglike oorweging geniet het.⁶²

Volgens Baxter⁶³ het die verskaffing van redes ook opvoedkundige waarde. 'n Party kan sy/haar saak aan die hand van die redes wat verstrekkend is, ontleed ten einde die leemtes daarin te identifiseer en die nodige regstellings vir toekomstige doeleindes aan te bring. Die vereiste om redes te verskaf dwing ook beredeneerde besluitneming af. Om sinvolle redes te opper, verg immers deeglike oorweging van en aandagbesteding aan 'n bepaalde aangeleentheid. Só word diskresie-uitoefening gestruktureer (en in werklikheid beheer) ten einde ondeurdagte, wispelturige of meganiese besluitneming uit te skakel.⁶⁴ 'n Opgaaf van redes maak dit

55 Wiechers 239.

56 541–542 568.

57 *Idem* 541–542 tref 'n onderskeid tussen redes en inligting. Volgens hom verwys inligting na daardie besonderhede op grond waarvan 'n saak beredeneer en oorweeg word en wat aan 'n party bekend gemaak behoort te word *alvorens* 'n besluit geneem word. Redes word beskou as daardie gegewens wat verstrekkend word *nadat* die besluit geneem is. Die onderskeid word bevestig deurdat die Grondwet in twee verskillende artikels voorsiening maak vir die reg op toegang tot inligting (a 32(1)(a)) en die reg op die verskaffing van redes (a 33(2)). Nogtans kan nie ontken word dat redes 'n besondere vorm van inligting verteenwoordig nie. Ter staving van die argument dat toegang tot inligting administratiewe geregtigheid bevorder, word redes dus as 'n faset van inligting beskou.

58 Stander "Die wenslikheid vir die verskaffing van redes vir administratiewe handeling" 1992 *Stell LR* 100.

59 Nel en Bezuidenhout *Menseregte vir die polisie* (1995) 313; Stander 98.

60 Brynard 30.

61 Nel en Bezuidenhout 314.

62 Stander 102.

63 Baxter 228.

64 Stander 96 98 106.

verder vir 'n persoon moontlik om te bepaal of daar gronde vir appèl is en verhoog die doeltreffendheid en effektiwiteit van die reg op appèl deurdat die regs- en feitlike aspekte in 'n geskil duidelik na vore kom. Op dié wyse word die appèlinstelling in staat gestel om 'n beter beslissing te gee. In geval van hersiening, vergemaklik duidelike redes die taak van die hersieningshof om te bepaal of die aanvanklike beslissing geldig was al dan nie. Redes kan byvoorbeeld 'n aanduiding verskaf of relevante oorwegings in aanmerking geneem is en of die funksie wat ingevolge wetgewing aan 'n amptenaar of administratiewe tribunaal toegeken is, korrek begryp is.⁶⁵

Die verskaffing van inligting (in algemene verband en in die vorm van redes) in gevalle waar diskresie-uitoefening ter sprake is, plaas weliswaar 'n bykomende las op amptenare in die sin van koste, tyd en vaardighede.⁶⁶ Die voordele daaraan verbonde – en veral die potensiaal om die misbruik van diskresionêre bevoegdhede te voorkom of te verminder, en ten einde by te dra tot 'n groter mate van administratiewe geregtigheid – behoort egter swaarder te weeg as die werkslading.

5.4 Voorkoming van die euwels van geheimhouding en bevordering van deursigtigheid

Geheimhouding binne die konteks van hierdie bydrae verwys na die bewustelike weerhouding van openbare inligting om openbaarmaking daarvan te voorkom – hetsy vir regmatige of onregmatige doeleindes.⁶⁷ Tefft⁶⁸ omskryf geheimhouding bloot as die proses waartydens die vloeï van inligting geïnhibeer word. Daar word allerweë aanvaar dat geheimhouding in die openbare sektor tot verskeie euwels aanleiding gee. So bevorder dit volgens Schwella⁶⁹ wanadministrasie en werk dit traë owerheidsoptrede in die hand. Geheimhouding word voorts ook geassosieer met korrupsie en magsvergrype en kan dien as dekmantel om te verhoed dat aantasting van die basiese regte en vryhede van individue aan die lig kom.⁷⁰ Deur inligting geheim te hou, word een van die fundamentele vereistes van die demokrasie, naamlik die afdwinging van openbare aanspreeklikheid ook verhinder.⁷¹ Rourke⁷² stel dit soos volg:

“Democracy assumes that citizens can hold government officials accountable for what they do and can expel them from office when their policies do not meet with public approval. By shielding official action from public knowledge and review, secrecy makes such accountability impossible. Citizens can scarcely influence decisions they know nothing about. Where secrecy reigns, government officials are in a position to rule at virtually their own discretion.”

Inligting is 'n noodsaaklike voorvereiste om die owerheid in staat te stel om sy regeertaak na behore te vervul. Dit beteken dat groot hoeveelhede inligting op 'n deurlopende grondslag deur die owerheid ingesamel, gegeneer, verwerk en

65 *Idem* 102–103.

66 Du Plessis en Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 169.

67 Van Graan 9.

68 Tefft *Secrecy: A cross-cultural perspective* (1980) 126.

69 37.

70 Olivier “Geregtelike beheer oor die werksaamhede van openbare instellings” 1990 *SAIPA* 232; Wiechers “Waardes, norme en standaarde: die grondslae van 'n stabiele staat” 1993 *SAIPA* 253.

71 Kyk par 7.1 *supra*.

72 Rourke “The United States” in Galnoor (red) 119.

versprei moet word.⁷³ Inligting verteenwoordig mag en die omvang van inligting in besit van die owerheid plaas dit in 'n buitengewoon magtige posisie *vis-à-vis* die publiek.⁷⁴ So stel dit die owerheid onder meer in staat om inligting na willekeur te manipuleer deur byvoorbeeld bepaalde inligting te weerhou en ander vir eie gewin bekend te maak. Op dié wyse word die publiek en die openbare mening deur die owerheid beheer in plaas daarvan dat die owerheid aan beheer deur die publiek onderwerp word.⁷⁵ Monopolisering en manipulering van inligting vir propaganda-doeleindes is weliswaar 'n kenmerk van totalitêre state, maar in 'n demokrasie is so 'n situasie onaanvaarbaar. Dit is daarom noodsaaklik dat 'n klimaat van deursigtigheid geskep word sodat die publiek insae kan verkry in die werksaamhede, beleid en besluite van die owerheid en sodoende beheer daaroor kan uitoefen. Dit is egter nie moontlik indien daar nie geredelike toegang tot inligting bestaan nie. Betroubare, omvattende, tydige en verstaanbare inligting oor owerheidsbedrywighede is immers noodsaaklik om die kieserskorps in staat te stel om 'n akkurate oordeel te vel oor die werkverrigting ("performance") van die owerheid en om die huidige en toekomstige implikasies daarvan te kan beoordeel.⁷⁶ Dit is belangrik om aan te toon dat deursigtigheid nie net behoort te geld ten opsigte van algemene owerheidsake of aangeleenthede wat van openbare belang is nie. Dit behoort eweneens die norm te wees waar individue in hulle private hoedanigheid op 'n daaglikse grondslag in verbinding is met amptenare oor sake wat hulle ten nouste raak. Deursigtigheid hou dus ook onlosmaaklik verband met die bevordering van administratiewe geregtigheid.⁷⁷

Deursigtigheid word beskou as die antiese van geheimhouding en as sodanig is dit volgens Davis⁷⁸ "the natural enemy of arbitrariness and a natural ally in the fight of injustice". Dit word ook geag 'n onontbeerlike waarborg teen wanadministrasie en korrupsie te wees.⁷⁹ Dié opvatting oor die waarde van deursigtigheid is gebaseer op die feit dat dit enersyds die blootlegging van ongerymdhede fasiliteer en andersyds bydra tot die voorkoming of vermindering van onreëlmatighede vanweë die afskrikkings effek daarvan.⁸⁰ Waar 'n klimaat van deursigtigheid heers, sal amptenare byvoorbeeld daarop bedag wees om wel oorwoë besluite te neem en op so 'n wyse op te tree dat hulle dit in die openbaar sal kan regverdig. Sodoende word voorkom dat besluite en optrede op arbitrêre wyse geskied en dat die regte, vryhede en belange van individue aangetas word.

Geheimhouding in die openbare sektor word dikwels geregverdig deur aan te voer dat dit doeltreffendheid en effektiwiteit bevorder.⁸¹ Hiervolgens word dus eintlik geïmpliseer dat deursigtigheid die teenoorgestelde uitwerking het. Dié standpunt is egter aanvegbaar. Volgens Matthews⁸² gaan geheimhouding met soveel euwels gepaard dat dit die sogenaamde voordele daaraan verbonde (synde

73 Weingarten "Federal information policy development: the congressional perspective" in McClure, Hernon en Relyea (reds) *United States government information policies: Views and perspectives* (1989) 83.

74 Tefft 126.

75 Rourke vii xi.

76 Kopits en Craig *Transparency in government operations* (1988) 1.

77 Par 7 3 *supra*.

78 Davis *Discretionary justice: A preliminary inquiry* (1969) 98.

79 Baxter 234.

80 Peters *The politics of bureaucracy* (1995) 295–296.

81 Rourke *Secrecy and publicity: Dilemmas of democracy* (1966) 38; Peters 297.

82 Van Graan 48.

die bevordering van doeltreffendheid en effektiwiteit) in elk geval uitkanselleer. Deursigtigheid kan weliswaar tot gevolg hê dat bepaalde administratiewe prosesse vertraag word (deurdat inligting of redes bv aan belanghebbendes verskaf word en hulle reaksie daarop afgewag word), maar dit beteken nie noodwendig dat doeltreffendheid en effektiwiteit daardeur ingeboet word nie. Doeltreffendheid en effektiwiteit word immers nie net gemeet aan die spoed waarmee 'n saak afgehandel word nie, maar ook aan die deeglikheid waarmee dit hanteer is en die tevredenheid van die publiek oor die uitkoms daarvan. Daar kan dus geargumenteer word dat deursigtigheid juis doeltreffendheid en effektiwiteit bevorder omdat dit weldeurdagte besluite en optrede noodsaak.

5 5 Legitimering van owerheidsoptrede

Die vrye vloei van inligting bevoordeel nie net die publiek nie. Die owerheid baat ook daarby. Geredelike beskikbaarstelling van inligting behoort by te dra tot 'n groter mate van deelname deur die publiek wat weer groter geloofwaardigheid en legitimititeit aan owerheidsoptrede behoort te verleen. Deur inligting – hetsy van negatiewe of positiewe aard – op 'n deurlopende en eerlike grondslag te verskaf, word vertroue in die owerheid gekweek. Daar word aanvaar dat 'n owerheid wat geredelik inligting beskikbaar stel, niks het om weg te steek nie en dit skep weer die persepsie dat daar voortdurend (of ten minste meeste van die tyd) in die openbare belang opgetree word.⁸³

Na aanleiding van inligting wat die owerheid beskikbaar stel, vloeï inligting weer van die publiek na die owerheid. Volgens Wiggins⁸⁴ verkry die owerheid op dié wyse toegang tot die wysheid en kundigheid van die publiek oor bepaalde aangeleenthede. Dit geskied byvoorbeeld deur middel van bydraes of briewe in die pers, petisies of voorleggings. Deur belanghebbendes te raadpleeg met die oog op die verbetering van konsepwetgewing of -regulasies, word ook waardevolle inligting verkry. 'n Magtigingswet kan byvoorbeeld bepaal dat die betrokke minister of lid van 'n provinsiale uitvoerende raad en die amptenare wat verantwoordelik is vir die opstel van gedelegeerde wetgewing, persone, organisasies, verenigings of instellings wat belang by die gedelegeerde wetgewing mag hê, moet raadpleeg.⁸⁵ Artikel 29 van die Wet op die Lisensiëring van Lugdiens 115 van 1990 bepaal byvoorbeeld dat die Minister van Vervoer die regulasies wat hy/sy van voorneme is om uit te vaardig, by kennisgewing in die *Staatskoerant* moet publiseer. Na publikasie van die regulasies kan belanghebbendes binne die voorgeskrewe tydperk skriftelike verhoë tot die Direkteur-generaal van die Departement van Vervoer rig. Sodanige verhoë word oorweeg en afhangende van die meriete daarvan, word die regulasies aangepas of onveranderd gelaat, waarna dit in finale vorm in die *Staatskoerant* gepubliseer word. Deur konsultasie van dié aard trek die owerheid dan voordeel uit die kennis en ondervinding van kundige persone of instansies wat dikwels op voetsoolvlak betrokke is by lugdiensaangeleenthede, en wat as 'n resultaat daarvan, waardevolle insette kan lewer insake die regulering van bepaalde aspekte van die bedryf. Die waarde van die praktyk van konsulering blyk uit die feit dat dit gereeld gevolg word – selfs al word dit nie deur wetgewing vereis nie.⁸⁶

83 Du Plessis 156; Riley 2.

84 Wiggins 20.

85 Hough "Die ontwikkeling en kontemporêre betekenis van die leerstelling van verdeling van staatsgesag" 1978 *De Jure* 358.

86 Baxter 205.

Die bestaan van 'n reg op toegang tot inligting verbeter ook die beheer van die wetgewende gesag oor die uitvoerende gesag. Die Watergate-skandaal in die VSA gedurende die sewentigerjare kan as illustrasie in dié verband dien. Deur die beskikbaarstelling van dokumentasie ingevolge die Freedom of Information Act van 1966 is ondersoeke na die voorval deur die Kongres aansienlik vergemaklik en het dit uiteindelik gelei tot die blootlegging van onreëlmatighede en die misbruik van bevoegdhede deur amptenare van die Nixon-administrasie teen politieke opponente.⁸⁷

5 6 Toegang tot inligting as voorvereiste vir demokrasie

Een van die kenmerke van 'n demokratiese owerheidsvorm is die klem wat op die intellektuele ontwikkeling en morele opvoeding van die onderdaan geplaas word sodat hy/sy 'n bydrae tot die samelewing as 'n geheel kan lewer. Dit beteken dat geleenthede aan die individu gebied moet word waardeur hy/sy kan ontwikkel en tot volle selfverwesenliking kan kom.⁸⁸ Om dit te kan doen moet onder meer verseker word dat die publiek enersyds geredelike toegang tot inligting het en dat hulle andersyds deurlopend aan die regeer- en administreerproses kan deelneem.

Die vrye vloei van inligting in 'n samelewing bemagtig die publiek in hulle soeke na waarheid aangaande owerheidsoptrede en -besluite. Dit stel hulle in staat om nie bloot feite en idees wat deur die owerheid as die waarheid aan hulle voorgehou word blindelings te aanvaar nie, maar om krities daaromtrent te wees en dit voortdurend te bevraagteken en uit te daag.⁸⁹ Op dié wyse word die demokrasie lewend gehou. Deur die oordrag, uitruil en ontvangs van inligting (tussen individu en owerheid, maar ook tussen individue onderling) word individuele denke vanselfsprekend gestimuleer en persoonlike ontwikkeling bevorder. Ander fundamentele demokratiese vereistes soos vryheid van spraak en assosiasie en vryheid van die media wat daartoe lei dat menings voortdurend uitgedaag, gekritiseer of bevestig word, lewer 'n belangrike bydrae in dié verband.

Deelname aan die politieke prosesse in die staat is 'n noodsaaklike voorvereiste vir die voortbestaan van 'n demokrasie en bied aan onderdane die ideale geleentheid om 'n wesentlike bydrae tot die samelewing te maak.⁹⁰ Sodra onderdane aktief aan die politieke prosesse begin deelneem en hulle insig en kennis oor openbare sake as 'n resultaat daarvan verbreed, groei hulle selfvertroue en word hulle in staat gestel om self oplossings vir probleme te soek in plaas daarvan om dit bloot aan ander oor te laat.⁹¹ Daarbenewens kweek deelname 'n meer verantwoordelike, kundige en volwasse burgerskap wat, in die woorde van John Stuart Mill, "[a] better and higher form of national character" ontwikkel.⁹²

Sowel persoonlike ontwikkeling as deelname is van deurslaggewende belang in 'n demokratiese samelewing, maar dit kan nie sonder geredelike toegang tot inligting plaasvind nie. Op grond hiervan kan dus met reg aangevoer word dat toegang tot inligting as 'n kritiese noodsaaklikheid in die instandhouding en bevordering van 'n demokrasie beskou kan word.

87 Devenish 453.

88 Gericke "John Stuart Mill (1806–1873)" in Faure, Gey van Pittius, Kriek, Louw en Wainwright (reds) *Die Westerse politieke tradisie* (1987) 400 408.

89 Ebenstein en Ebenstein 629.

90 Van Graan 60.

91 Gericke 408.

92 Robertson 12; Gericke 408.

6 SAMEVATTING

Twee oorhoofse tipes inligting word onderskei, naamlik persoonlike inligting en owerheidsinligting. Persoonlike inligting kan ook as private inligting beskou word en sluit byvoorbeeld inligting aangaande etniese of sosiale herkoms, seksuele oriëntasie, ouderdom, godsdiens, finansiële situasie en mediese of werks-geskiedenis in. Owerheidsinligting verwys onder meer na wetgewing of ander publikasies wat deur die owerheid daargestel word, asook enige inligting wat deur die owerheid gegenerer word – hetsy deur middel van navorsings- en ontwikkelingsprojekte of deur inligting van private bronne oor te neem. Persoonlike inligting wat noodgedwonge aan die owerheid beskikbaar gestel moet word en dus in besit van die owerheid is, vorm ook deel van owerheidsinligting.

Die reg op toegang tot inligting is 'n fundamentele mensereg waarvan die oorsprong teruggevoer kan word na die liberalisme as denkriktig. Dié denkriktig plaas die klem op die vryheid en outonomie van die enkeling wat geag word 'n noodsaaklike voorvereiste te wees in die soeke na waarheid, die bevordering van kritiese denke en persoonlike ontwikkeling. Om die waarheid na te streef en krities te wees vereis egter dat inligting geredelik aan die individu beskikbaar gestel moet word en hieruit het die gedagte van die reg op toegang tot inligting ontwikkel. Daar blyk 'n leemte in die literatuur te wees wat betref die sinvolle omskrywing en verklarings van die reg op toegang tot inligting en dit was derhalwe nodig om vir doeleindes van hierdie bydrae 'n gepaste dog bondige omskrywing te formuleer. Die reg op toegang tot inligting veronderstel 'n wetlik afdwingbare aanspraak van die individu teenoor die owerheid om van inligting van persoonlike of openbare aard voorsien te word sodat hy/sy owerheids-werksaamhede kan beoordeel.

Besondere waarde word aan die reg op toegang tot inligting geheg en wel om bepaalde redes. Deur geredelike toegang tot inligting word die publiek op hoogte gehou met die doen en late van die owerheid en word hulle in staat gestel om die owerheid aanspreeklik te hou vir optrede of die gebrek daaraan. Dit is egter wenslik dat die owerheid nie die enigste bron van inligting moet wees nie om te voorkom dat inligting gemanipuleer of vir propaganda-doeleindes aangewend word. Die media vervul 'n onontbeerlike rol in dié verband.

Aktiewe deelname aan die regeer- en administrasieproses in die staat is noodsaaklik vir die voortbestaan van die demokrasie. Die burgers kan egter nie rasonale besluite neem en op sinvolle wyse deelneem indien hulle nie oor die nodige inligting beskik nie. Dit is derhalwe noodsaaklik dat betroubare inligting op 'n deurlopende grondslag aan hulle verskaf sal word. Deur ingelig te wees en deel te neem word persoonlike groei en ontwikkeling van die individu ook bevorder waardeur die samelewing in geheel weer baat vind.

Die reg op toegang tot inligting is ook deurslaggewend in die voorkoming of vermindering van arbitrêre optrede en die bevordering van administratiewe geregtigheid. Dit behels onder meer dat 'n individu vooraf ingelig sal word oor beleid en prosedures en dat alle feite en oorwegings waardeur 'n party geraak mag word, beskikbaar gestel moet word sodat die persoon sy/haar kant van die saak kan stel. Die vereiste dat redes – 'n besondere faset van inligting – vir 'n bepaalde beslissing of optrede verskaf moet word, dra eweneens by tot administratiewe geregtigheid. Dit dwing amptenare om 'n saak behoorlik te oorweeg en om weldeurdagte, beredeneerde en rasonale besluite te neem. 'n Benadeelde kan dan ook bepaal of daar gronde vir appèl bestaan, terwyl die hersiening van beslissings ook daardeur vergemaklik word. Een van die vernaamste uitvloeisels van die geredelike verskaffing van inligting in sake waar die regte, vryhede en

belange van die publiek ter sprake kom, is dat dit vertroue in die administratiewe proses in die hand werk en negatiewe persepsies oor die openbare sektor verminder.

Deur op 'n deurlopende grondslag inligting oor sake van sowel individuele as openbare belang te verskaf, word geheimhouding in die openbare sektor teëgewerk en 'n groter mate van deursigtigheid bewerkstellig. Deursigtigheid vergemaklik die blootlegging van onreëlmatighede en dra by tot die voorkoming of vermindering van ongerymdhede weens die afskrikkingseffek daarvan. Dit stel ook die publiek in staat om op grond van die inligting wat na vore kom, beheer oor die werksaamhede, beleid en besluite van die owerheid uit te oefen.

Dit is nie net die publiek wat baat by die vrye vloei van inligting nie. Die owerheid trek ook besliste voordeel daaruit. So lei die geredelike beskikbaarstelling van inligting byvoorbeeld tot verhoogde deelname deur die publiek wat weer groter legitimiteit aan owerheidsoptrede verleen. Die oordrag en ontvangs van inligting is 'n tweerigtingproses en as sodanig vloei inligting ook van die publiek na die owerheid. Op dié wyse kan die owerheid vasstel wat die openbare mening oor 'n bepaalde saak is, terwyl dit ook toegang verkry tot die wysheid en kundigheid van die publiek oor aangeleenthede van gespesialiseerde aard.

In 'n demokrasie word daar besondere klem geplaas op die persoonlike groei en ontwikkeling van die individu. Dit impliseer dat die owerheid 'n klimaat behoort te skep wat bevorderlik is vir die ontwikkeling en uitleef van natuurlike talente en vermoëns. Sodoende kan enkelinge tot volle selfverwesenliking kom wat hulle weer in staat stel om 'n bydrae tot die samelewing te lewer. Sonder geredelike toegang tot inligting waardeur individuele denke gestimuleer word en op grond waarvan waarhede wat deur die owerheid voorgehou word, uitgedaag kan word, is dit egter nie moontlik nie. Inligting is voorts onontbeerlik om aktiewe deelname – een van die fundamentele kenmerke van die demokrasie – deur die burgers moontlik te maak. In die lig van die noodsaaklikheid van inligting om enersyds persoonlike ontwikkeling te bevorder en andersyds om deelname te fasiliteer, kan die afleiding gemaak word dat geredelike toegang tot inligting inderwaarheid 'n voorvereiste is vir 'n samelewing om as demokraties getipeer te word.

It is necessary to be mindful that we are now blessed with a Constitution. It is trite that the Constitution imports a radical movement away from the previous state of our law. The Constitution is not simply some kind of statutory clarification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is justifiable in an open and democratic society based on freedom and equality. It is premised on a legal culture of accountability and transparency.

Pienaar AJ in Barkhuizen v Independent Communications Authority of SA [2002] 1 All SA 469 (E) para 14.

Hersiening van besluite geneem ingevolge die Wet op Bevordering van Toegang tot Inligting 2 van 2000

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SUMMARY

Review of decisions made in terms of the Promotion of Access to Information Act 2 of 2000

Administrative justice plays an important role in any democracy. In terms of section 33 of the Constitution of the Republic of South Africa, 1996, everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(2) requires that legislation must be enacted to give effect to the rights in section 33(1). For this purpose the Promotion of Administrative Justice Act 3 of 2000 was promulgated. Section 1(b)(hh) of the Act provides that any decision taken, or the failure to take a decision, in terms of any provision of the Promotion of Access to Information Act 2 of 2000, is excluded from the definition of administrative action in section 1 of the Act. The legislature probably excluded the Promotion of Access to Information Act because its review procedures are considered to be sufficiently fair. Dutch law supports a culture of openness. Although Dutch law does not acknowledge a fundamental right of access to information, the *Wet Openbaarheid van Bestuur* of 1991 provides for a general right of access to information. South African and Dutch legislation display certain similarities and a study of the application of the *Wet Openbaarheid van Bestuur* can make an important contribution to the implementation of the right of access to information in South Africa. In the Netherlands the *Algemene Wet Bestuursrecht* of 1994 applies to decisions taken in terms of the *Wet Openbaarheid van Bestuur*. Because the Promotion of Administrative Justice Act and the Promotion of Access to Information Act were promulgated to give effect to two different fundamental rights, it is submitted that the provisions of these two acts should not be integrated into one act. However, the interpretation of the Promotion of Administrative Justice Act should be considered important for a discussion of the Promotion of Access to Information Act. The Promotion of Administrative Justice Act may for example be relevant to the interpretation of section 25 of the Promotion of Access to Information Act which provides for the giving of reasons when a request for access to information is refused. There should thus be interaction between these Acts regarding the application of similar provisions.

1 INLEIDING

Die Grondwet van die Republiek van Suid-Afrika, 1996 maak in artikel 33 van die Handves van Regte voorsiening vir 'n reg op regverdige administratiewe optrede en bepaal:

“(1) Elkeen het die reg op administratiewe optrede wat redelik en prosedureel billik is.

- (2) Elkeen wie se regte nadelig geraak is deur administratiewe optrede het die reg op die verskaffing van skriftelike redes.
- (3) *Nasionale wetgewing moet verorden word om aan hierdie regte gevolg te gee, en moet—
 - (a) voorsiening maak vir die hersiening van administratiewe optrede deur 'n hof, of waar dit gepas is, 'n onafhanklike en onpartydige tribunaal;
 - (b) die staat verplig om aan die regte in subartikels (1) en (2) gevolg te gee; en
 - (c) 'n doeltreffende administrasie bevorder.”

Afgesien van artikel 33 word die beginsels van regverdige administratiewe optrede ook deur ander bepalings van die 1996-Grondwet ondersteun. Artikel 1 verklaar dat verantwoordingspligtigheid, 'n responsiewe ingesteldheid en openheid die kern van die veelparty-demokrasie in Suid-Afrika is. Dit geld ook vir die openbare administrasie as deel van 'n veelparty-demokrasie. Artikel 195 bepaal dat die openbare administrasie beheers word deur die waardes en beginsels wat in die Grondwet verskans is. Die verwesenliking van die individu se reg op regverdige administratiewe optrede en die gevolglike konkretisering van die beginsels in artikel 195, is in belangrike opsigte afhanklik van die voorskrifte van artikel 32, ingevolge waarvan elkeen oor die reg op toegang tot inligting wat deur die staat en deur privaatpersone gehou word, beskik. Artikel 195 bevat 'n uitgebreide lys van beginsels waaraan die openbare administrasie moet voldoen. Die bevordering van billikheid, deursigtigheid, verantwoordbaarheid en deelname in die openbare administrasie kan as die kern van hierdie beginsels geïdentifiseer word. Daar word voorts in hoofstuk 9 van die Grondwet voorsiening gemaak vir 'n aantal staatsinstellings ter ondersteuning van grondwetlike demokrasie. Hierdie liggame sluit onder andere die Openbare Beskermer, die Mense-regtekommissie en die Ouditeur-generaal in. Al hierdie instellings oefen in 'n mindere of meerdere mate 'n kontrolefunksie oor die funksionering van die openbare administrasie uit.

Administratiewe geregtigheid kan omskryf word as daardie beginsels waaraan owerheidsoptrede behoort te voldoen ten einde redelik, billik en onpartydig te wees.¹ Rawls² beskou geregtigheid as billikheid en meen dat die demokratiese regstaat die basiese owerheidsstruktuur is om geregtigheid te waarborg. Die owerheid is dus verplig om individue billik te behandel aan die hand van prosedures wat daargestel is vir die neem en implementering van besluite. Die aanhef van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 het pertinent bepaal dat Suid-Afrika 'n soewereine en demokratiese regstaat is. Daar word egter nie in die 1996-Grondwet uitdruklik bepaal dat Suid-Afrika 'n regstaat is nie. Ten spyte hiervan huldig Venter³ die mening dat die potensiaal vir die ontwikkeling van 'n Suid-Afrikaanse regstaat bestaan:

“It is submitted that the absence from the constitutional text of 1996 of the Afrikaans term ‘regstaat’ and its English equivalent ‘constitutional state’ should not be understood to imply the end of the short history of the development of the

1 Brynard “Administratiewe geregtigheid: moontlikheid of onwaarskynlikheid?” 1996 *SAIPA* 27.

2 Rawls *A theory of justice* (1988) 195.

3 Venter “Aspects of the South African constitution of 1996: An African democratic and social federal Rechtsstaat?” 1997 *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht* 78 ev.

idea of the *Rechtsstaat* in South Africa . . . The Constitutional Court has demonstrated an ability and willingness to develop the notion of the *Rechtsstaat* in the South African context. It is to be hoped that the judicial utilisation of its terminology and ideas under the 1993 Constitution will serve as a platform for carrying it into the future."

Die wetgewing wat kragtens artikel 33(3) vereis word ten einde aan die regte vervat in artikel 33 gevolg te gee is in die vorm van die Promotion of Administrative Justice Act 3 van 2000⁴ gepromulgeer. Die doel van die Wet is om gevolg te gee aan die reg op regverdige administratiewe optrede ten einde 'n effektiewe administrasie en goeie regering te bevorder en om voorts 'n kultuur van verantwoordbaarheid, openheid en deursigtigheid in die openbare administrasie en in die uitoefening van 'n openbare bevoegdheid of in die verrigting van 'n openbare funksie te bevorder.⁵ Hangende die promulgering van die Wet was daar kragtens item 23 van bylae 6 van die 1996-Grondwet, 'n voorskrif met grootliks dieselfde bewoording as artikel 24 van die 1993-Grondwet van toepassing.⁶

Soos later in hierdie bydrae aangetoon word, bepaal artikel 1(b)(hh) van die Promotion of Administrative Justice Act dat enige besluit geneem, of die nalate om 'n besluit te neem ingevolge 'n bepaling van die Wet op Bevordering van Toegang tot Inligting 2 van 2000 van die definisie van administratiewe optrede uitgesluit is.⁷ Artikel 3(5) van die Promotion of Administrative Justice Act bepaal:

"Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure."

4 Aangesien daar nie 'n Afrikaanse teks beskikbaar is nie word daar deurlopend in hierdie bydrae na die Engelse titel, Promotion of Administrative Justice Act, verwys.

5 Vgl die aanhef van die Promotion of Administrative Justice Act.

6 Die volledige voorskrif het soos volg gelui: "Elke persoon het die reg – (a) op regsgeldige administratiewe optrede waar enige van hul regte of belange geraak of bedreig word; (b) op prosedureel billike administratiewe optrede waar enige van hul regte of regmatige verwagtings geraak of bedreig word; (c) om skriftelik voorsien te word van redes vir administratiewe optrede wat enige van hul regte of belange raak, tensy die redes vir daardie optrede openbaar gemaak is; en (d) op administratiewe optrede wat regverdigbaar is met betrekking tot die redes wat daarvoor gegee word, waar enige van hul regte geraak of bedreig word." Wat die inhoud van hierdie voorskrif betref, het die hof in *Romans v Williams* 1998 1 SA 270 (K) 284I–285A beslis: "Administrative action, in order to prove justifiable in relation to the reasons given for it, must be objectively tested against the three requirements of suitability, necessity and proportionality which requirements involve a test of reasonableness. Gross unreasonableness is no longer a requirement for review. The constitutional test embodies the requirement of proportionality between the means and the end. The role of the Courts in judicial review is no longer confined to the way in which an administrative decision was reached but extends to its substance as well." Vir 'n verdere bespreking van die inhoud van a 24 van die 1993-Grondwet vgl De Ville "The right to administrative justice: An examination of section 24 of the interim constitution" 1995 *SAJHR* 264 ev; De Waal "Is there a general and residual right to procedural fairness in South Africa?" 1997 *SAJHR* 228 ev; Corder "Administrative justice in the final constitution" 1997 *SAJHR* 28 ev; Ferreira "Grondwetlike waardes en sosio-ekonomiese regte met verwysing na die reg op 'n skoon en gesonde omgewing" 1999 *TSAR* 285; Burns *Administrative law under the 1996 Constitution* (1998) 182–196.

7 Vgl par 3 2 hieronder.

Die wetgewer het die Wet op Bevordering van Toegang tot Inligting waarskynlik uitgesluit omdat daar gemeen is dat die prosedures waarvoor dit voorsiening maak billik genoeg is.⁸

Ten opsigte van die gevolge van die uitsluiting kan daar twee moontlike standpunte geformuleer word. Eerstens kan daar geargumenteer word dat hierdie uitsluiting tot gevolg het dat artikel 33 van die 1996-Grondwet waaraan gevolg gegee word deur die Promotion of Administrative Justice Act, nie aangewend kan word om 'n besluit ingevolge die Wet op Bevordering van Toegang tot Inligting juridies te bevraagteken nie. Aan die ander kant kan die standpunt gehuldig word dat, ten spyte daarvan dat die Promotion of Administrative Justice Act nie op besluite geneem kragtens die Wet op Bevordering van Toegang tot Inligting van toepassing is nie, daar steeds 'n beroep op artikel 33 gedoen kan word. Daar word aan die hand gedoen dat laasgenoemde argument eerder ondersteun behoort te word. Kragtens artikel 8(1) van die 1996-Grondwet is die Handves van Regte bindend op die wetgewende, uitvoerende en regsprekende gesag en alle staatsorgane. Artikel 33 is 'n belangrike instrument om die optrede van die uitvoerende gesag te kontroleer. Dit sal derhalwe 'n moontlike ondermyning van die gesag van die Grondwet tot gevolg hê indien optrede van die uitvoerende gesag uitgesluit word van die werking van artikel 33. Die howe sal dus noodsaak wees om 'n eie inhoud aan artikel 33 buite-om die Promotion of Administrative Justice Act te verskaf, ten einde optrede van die uitvoerende gesag ingevolge die Wet op Bevordering van Toegang tot Inligting te kontroleer.

2 NEDERLAND

Nederland ondersteun 'n kultuur van openbaarheid en alhoewel daar nie in die Nederlandse grondwet vir 'n reg op toegang tot inligting voorsiening gemaak word nie, beskik Nederland reeds vir etlike jare oor wetgewing wat toegang tot staatsinligting reël. Artikel 110 van die Grondwet voor het Koninkrijk der Nederlanden, 1987 bepaal slegs dat owerheidsorgane verplig is om in die uitvoering van hulle werksaamhede die reg op toegang tot staatsinligting te eerbiedig, in ooreenstemming met die reëls soos neergelê in wetgewing.⁹ Toegang tot inligting in besit van die staat word in Nederland deur die Wet Openbaarheid van Bestuur van 1991 gereël.¹⁰

8 De Waal, Currie en Erasmus *The Bill of Rights handbook* (2001) 505 (hierna De Waal ea) wys daarop dat "[t]he exclusion of decisions taken under the Promotion of Access to Information Act 2 of 2000 is aimed at immunising decisions under that Act from review under the AJA as well as exempting decisions by information officers from the procedural requirements of the AJA. The Information Act contains its own specific review mechanisms and procedures for the consideration of requests for information and it therefore simplifies matters considerably to exclude the AJA from operating additionally in respect of these". (Die afkorting AJA verwys na Administrative Justice Act, 'n verkorting van die Promotion of Administrative Justice Act.)

9 Sommige skrywers meen dat die reg op toegang tot inligting uit die reg op vrye meningsuiting in a 17 van die Nederlandse grondwet afgelei kan word. Hiervolgens beskik die individu oor die vryheid om sy mening en gedagtes in die openbaar te uiter. Vryheid van meningsuiting is ook 'n kenmerk van die demokrasie. Daar moet 'n gelyke mate van inligting aan almal verskaf word sodat ope gesprek tav aangeleenthede kan plaasvind. Vgl Du Plessis "Die Nederlandse Wet Openbaarheid van Bestuur" 1987 *SAPR/PL* 124-139.

10 Die sentrale doelstelling van die Wet Openbaarheid van Bestuur is die bevordering van goeie en demokratiese bestuur. Die uitgangspunt is dat inligting in besit van bestuursorgane

Die Suid-Afrikaanse Wet op Bevordering van Toegang tot Inligting en die Nederlandse Wet Openbaarheid van Bestuur toon bepaalde ooreenkomste. Aangesien daar weinig Suid-Afrikaanse literatuur beskikbaar is wat handel oor die reg op toegang tot inligting kan 'n ondersoek na die Nederlandse wetgewing 'n belangrike bydrae tot die implementeringsproses in Suid-Afrika lewer.¹¹

Die Nederlandse Algemene Wet Bestuursrecht van 1994 is wel van toepassing op besluite geneem kragtens die Wet Openbaarheid van Bestuur.¹² Die Nederlandse wetgewer is egter van voorneme om die Wet Openbaarheid van Bestuur in die vierde wysiging van die Algemene Wet Bestuursrecht te vervat. Die teks van die Wet Openbaarheid van Bestuur sal in 'n groot mate ongewysig gelaat word.¹³

In Nederland is 'n groot aantal algemene beginsels van behoorlike bestuur oor jare heen deur die howe geformuleer. Hierdie beginsels is in belangrike opsigte vergelykbaar met die Suid-Afrikaanse gronde vir geregtelike hersiening en sluit onder andere die volgende in: die verbod op *vooringenomendheid*, die verbod op *détournement de pouvoir*, die verbod op willekeur, die gelykheidsbeginsel, die materiële sorgvuldigheidsbeginsel of die eweredigheidsbeginsel, die vertrouens- of materiële regsekerheidsbeginsel, die motiveringsbeginsel, die formele regsekerheids- of duidelikeheidsbeginsel, die formele sorgvuldigheidsbeginsel, die *fair-play*-beginsel en die verbod op *détournement de procedure*.¹⁴

openbaar is. Dit het tot gevolg dat besluitneming deur bestuursorgane deursigtig gemaak word. Die Wet Openbaarheid van Bestuur stel burgers dus in staat om aan die besluitnemingsproses deel te neem en dit te kontroleer. Vgl ook Kortmann en Bovend'eert *Inleiding constitutioneel recht* (1998) 125–126; Holterman *Constanten in het publiekrecht met het oog op besturen* (1995) 169; Stolk *Wet Openbaarheid van Bestuur* (1997) 97.

- 11 Vgl Ferreira *Die openbare administrasie en die reg op toegang tot inligting* (LLM-verhandeling PUCHO 2001) (hierna Ferreira (LLM)).
- 12 Ten Berge *Bescherming tegen de overheid Nederlands algemeen bestuursrecht* (1997) verduidelik: "Daar waar een wettelijk voorschrift in het algemeen aan een burger een recht of aan een bestuursorgaan een plicht oplegt, impliceert een besluit van een bestuursorgaan over dat recht of de plicht in concreto een besluit. Zo zijn besluiten tot weigering van openbaarheid van overheidsdocumenten op grond van de WOB besluiten in de zin van de Awb." Vgl ook Versteden *Inleiding algemeen bestuursrecht* (1993) 46; Hofman "Openbaarheid van bestuur" in Damen ea (reds) *Ars aequi Cahiers staats en bestuursrecht* (1997) 34–35.
- 13 In die *Voorontwerp Algemene Wet Bestuursrecht vierde tranche commissie wetgeving algemene regels van bestuursrecht* (1999) 32 word die rede vir hierdie integrasie soos volg gemotiveer: "De Wob geeft regels die bestuursorganen jegens burgers in acht dienen te nemen op het vlak van de openbaarheid. Deze regels gelden voor alle bestuursorganen. Aldus bevat de Wob algemene regels van bestuursrecht als bedoeld in Artikel 107 van de Grondwet. Daarmee is de belangrijkste reden voor opnemning van de Wob in de Awb gegeven . . . Ook overigens bestaat een sterke verwevenheid tussen de regels in de Wob en die in de Awb." Vgl ook Bergfeld, Kaspersen en Lodder *Wob en ICT: Onderzoek naar de gevolgen van toepassing van informatie- en communicatie technologie voor de Wet Openbaarheid van Bestuur* (2000) 10.
- 14 Vgl Nicolai *Beginselen van behoorlijk bestuur* (1990) 319–378; De Haan, Drupsteen en Fernhout *Bestuursrecht in de sociale rechtsstaat deel 1* (1996) 80–128; Van der Does "Algemene beginselen van behoorlijk bestuur" in Koeman (red) *Praktijkboek bestuursrecht band 1* (2000) III-1–III-21 vir 'n volledige bespreking van die inhoud van die beginsels van behoorlike bestuur.

Hierdie hydrae het nie ten doel om 'n volledige ontleding van die Promotion of Administrative Justice Act te verskaf nie. Daar word derhalwe slegs 'n kort ontleding van die relevante bepalings van die Promotion of Administrative Justice Act onderneem ten einde vas te stel of die bepalings van hierdie Wet nie tog, soos in Nederland, op besluite geneem ingevolge die Wet op Bevordering van Toegang tot Inligting van toepassing behoort te wees nie.

3 ADMINISTRATIEWE OPTREDE

Kragtens artikel 33 van die 1996-Grondwet het elke persoon die reg op administratiewe optrede wat regmatig, redelik en prosedureel billik is. Ten einde die toepassingsgebied van artikel 33 te bepaal, sal die presiese betekenis van die begrip *administratiewe optrede* vasgestel moet word.

3.1 Grondwetlike betekenis van administratiewe optrede

Du Plessis en Corder¹⁵ huldig die mening dat die begrip *administratiewe optrede* in sowel artikel 24 van die 1993-Grondwet as artikel 33 van die 1996-Grondwet aangewend word om uitdrukking te gee aan die wydste moontlike reeks van administratiewe optrede.¹⁶ Voor die promulgering van die Promotion of Administrative Justice Act het die howe nie 'n eenvormige standpunt ten opsigte van die inhoud van administratiewe optrede gehuldig nie.

Ook volgens Van Wyk¹⁷ is die uitdrukking *administratiewe optrede* vatbaar vir 'n wye uitleg. Hy wys daarop dat die Konstitusionele Hof tot op hede egter 'n beperkte uitleg daaraan verleen het. In *Bernstein v Bester*¹⁸ huldig regter Ackermann die mening dat artikel 24(a) en (b) van die 1993-Grondwet impliseer dat regte, belange of regmatige verwagtings wat geraak of bedreig word, 'n voorvereiste vir regsgeldige en prosedureel billike administratiewe optrede is. Derhalwe beslis die Konstitusionele Hof dat 'n ondersoek ingevolge artikels 417 en 418 van die Maatskappywet 61 van 1973 waarskynlik nie as administratiewe optrede geklassifiseer kan word nie deur soos volg op te merk:

"I have difficulty in seeing how the enquiry in question can be characterised as administrative action. It forms an intrinsic part of the liquidation of a company . . . I have difficulty fitting this into the mould of "administrative action" . . . it is hard to envisage an administrative action taken by the commissioner in respect whereof it would make any sense to furnish reasons. The enquiry is to gather information to facilitate the liquidation process. It is not aimed at making decisions binding on others."¹⁹

15 Du Plessis en Corder *Understanding South Africa's transitional Bill of Rights* (1994) 168.

16 Vgl die ooreenstemmende standpunt van De Waal ea 457: "Administrative action is therefore, put at its simplest and narrowest, the conduct of the administration. However, for the purposes of the constitutional right to administrative justice, 'administrative action' should be interpreted expansively so as to impose the constitutional duty to act lawfully, reasonably and with fair procedures on the widest possible variety of actions and actors. This requires an institutional test; is the institution (the person or the entity) whose conduct is in question part of the administration? If yes, then its conduct is administrative action." Die skrywers huldig derhalwe die mening dat die begrip *administratiewe optrede* die optrede van sowel openbare liggame as dié van privaat persone of entiteite, wat 'n openbare bevoegdheid uitoefen of 'n openbare funksie verrig, insluit (454). Vgl ook Devenish, Govender en Hulme *Administrative law and justice in South Africa* (2001) 24–25 (hierna Devenish ea).

17 Van Wyk "Administrative justice in *Bernstein v Bester* en *Nel v Le Roux*" 1997 SAJHR 254.

18 1996 4 BCLR 449 (KH).

19 Par 96–97.

Van Wyk²⁰ meen dat hierdie argument tot gevolg het dat administratiewe optrede afhanklik gestel word van faktore wat selfs nie in die gemenereg op die definisie daarvan van toepassing was nie. Die benadering van die hof in *Bernstein*²¹ laat dit lyk asof die gemeenregtelike betekenis van administratiewe optrede verskil van die betekenis daarvan kragtens die Grondwet.

In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*²² beslis die Konstitusionele Hof dat administratiewe optrede soos beoog in artikel 33 van die 1996-Grondwet, nie wetgewende handeling deur 'n grondwetlik ingestelde wetgewende liggaam insluit nie. In *Nel v Le Roux*²³ meen die hof op sy beurt dat die summiere vonnisprosedure nie administratiewe optrede nie, maar 'n judisiële handeling is en dat die bepalings van artikel 33 dus nie daarop van toepassing is nie. Die hof bevind in *SA Metal Machinery Company Ltd v Transnet Ltd*²⁴ dat die tenderprosedure in die onderhawige geval nie administratiewe optrede daarstel nie. In *Aquafund (Pty) Ltd v Premier of the Western Cape*²⁵ en *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd*²⁶ huldig die hof egter telkens die standpunt dat die tenderprosedure wel as administratiewe optrede beskou moet word.²⁷

In *Bushbuck Ridge Border Committee v Government of the Northern Province*²⁸ meen die hof dat politieke partye nie aan die reëls van administratiewe geregtigheid gebonde is nie en dus by implikasie nie 'n administratiewe handeling verrig nie. Daar word egter aan die hand gedoen dat daar in so 'n geval vasgestel sal moet word wat die politieke en beleidsinhoud van die betrokke optrede is. Die hof is normaalweg nie geneë om met politieke en beleidsformulering in te meng nie. Thornton²⁹ meen dat die aard van die reg op regverdige administratiewe optrede afhanklik is van die betekenis van administratiewe optrede. Sy stel voor dat die begrip uitgelê moet word om sowel openbare as private administratiewe optrede in te sluit. Volgens haar maak die aard van administratiewe optrede daarvoor voorsiening dat die reg ook teenoor politieke partye afdwingbaar is. Hierdie standpunt van Thornton is in lyn met die definisie van administratiewe optrede in die Promotion of Administrative Justice Act³⁰ wat uitdruklik bepaal dat ook 'n regs persoon wat nie 'n staatsorgaan is nie, administratiewe optrede kan verrig.

Die Konstitusionele Hof formuleer in *President of the Republic of South Africa v SARFU*³¹ die toets om te bepaal of die betrokke optrede administratiewe optrede daarstel, soos volg:

20 Van Wyk 1997 SAJHR 255.

21 1996 4 BCLR 449 (KH).

22 1998 12 BCLR 1458 (KH) par 28–42.

23 1996 4 BCLR 592 (KH) par 24.

24 1999 1 BCLR 58 (W) 65J–66D.

25 1997 7 BCLR 907 (K) 915H–915I.

26 1997 10 BCLR 1429 (W) 1436E–1436G.

27 Vgl ook *Claude Neon Ltd v Germiston City Council* 1995 3 SA 710 (W) 720I–721A waar die hof beslis dat die oorweging van die meriete van 'n tender deur die stadsraad 'n "purely administrative function" is.

28 1999 2 BCLR 193 (T) 200B.

29 Thornton 1999 SAJHR 356.

30 A 1 Promotion of Administrative Justice Act.

31 1999 10 BCLR 1059 (KH).

"In section 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*³² that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not the arm of government to which the relevant actor belongs, but the nature of the power he or she is exercising."³³

Volgens Henderson³⁴ bied die uitspraak in *Cekeshe v Premier for the Province of the Eastern Cape*³⁵ 'n oplossing vir die onsekerheid rakende die betekenis van administratiewe optrede. Regter Van Zyl beslis dat dit onnodig is om 'n uitgebreide of presiese definisie aan die begrip *administratiewe optrede* te verleen en verklaar:

"In my opinion, and bearing in mind that it would be undesirable to attempt to provide any precise test by which in every instance of the distinction between 'legislative action' and 'administrative action' can be determined for the purposes of section 33, the question may be answered with reference to the nature of the function and the nature and the effect of the decision under the statutory scheme. It is not to be determined by having regard to the authority exercising the power or the instrument used to publish the action or decision. It is the substance and not the form or the name that matters. Accordingly, the fact that the statutory power, as in the instant matter, was exercised by the Premier and issued by way of proclamation is in itself insufficient to conclude that it is legislative action."³⁶

In die lig van die uitspraak in *Cekeshe*³⁷ meen Henderson dat die aard en effek van die betrokke optrede bepalend is vir die vraag of dit administratiewe optrede is. Die aard van die liggaam wat die optrede uitvoer en die aard van die instrument wat gevolg gee aan die optrede, word dus nie as riglyn gebruik nie.³⁸ Die onderliggende rasionaal van die uitspraak deur regter Van Zyl is dat administratiewe optrede geïdentifiseer word met verwysing na die mate waarin die optrede onderhewig is aan kontrole deur die wetgewer. Indien die wetgewer 'n geringe rol speel met betrekking tot die omskrywing en die magtiging van die betrokke optrede sal 'n hof dit waarskynlik as administratiewe optrede klassifiseer.³⁹

3.2 Betekenis van administratiewe optrede kragtens die Promotion of Administrative Justice Act

Voor die promulgering van hierdie Wet is dit aan die howe oorgelaat om die betekenis van administratiewe optrede te bepaal, wat tot groot onsekerheid aanleiding gegee het. Die Wet ruim nou grootliks hierdie onsekerheid uit die weg deur in artikel 1 die begrip *administratiewe optrede* soos volg te definieer:

32 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (KH).

33 Par 141.

34 Henderson "The meaning of 'administrative action'" 1998 SALJ 635.

35 1997 12 BCLR 1746 (Tk).

36 1766D-1766F.

37 1997 12 BCLR 1746 (Tk).

38 Henderson 1998 SALJ 638.

39 *Idem* 642.

- “(1) administrative action means any decision taken, or any failure to take a decision, by—
- (a) an organ of state, when—
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
 - (b) a natural or juristic person, other than an organ of state, when exercising a public power or a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.”⁴⁰

Dit blyk dat die Wet die aard en effek van die betrokke optrede beklemtoon en dus in ooreenstemming is met die *SARFU* uitspraak⁴¹ en die standpunt van Henderson⁴² dat die aard en effek van die optrede bepalend is van die vraag of dit as administratiewe optrede geklassifiseer kan word.

Die omskrywing van administratiewe optrede en die uitsluitings in die Wet is egter nie sonder onsekerhede nie. Dit is byvoorbeeld onduidelik wat onder die begrippe *openbare bevoegdheid* en *openbare funksie* verstaan moet word en wat die verskil tussen *administratiewe optrede* en *uitvoerende optrede* is. Die begrippe *openbare bevoegdheid* en *openbare funksie* hou waarskynlik in 'n groot mate verband met die begrip *openbare belang*. In *Korf v Health Professions Councils of South Africa*⁴³ verwys regter Van Dijkhorst na die begrip *openbare funksie* in die omskrywing van 'n staatsorgaan in artikel 239 van die 1996-Grondwet en verklaar:

“There is no reason to give the word ‘public’ when used in conjunction with ‘function’ . . . a meaning that would take it outside the context of ‘engaged in the affairs or service of the public’ and give it the meaning of ‘open to or shared by all the people’.”⁴⁴

Die onderskeid tussen *administratiewe optrede* en *uitvoerende optrede* hou verband met die beleidsinhoud van die betrokke optrede. Aangesien die beleidsinhoud van uitvoerende optrede normaalweg hoër is as dié van administratiewe optrede is die howe meer huiwerig om uitvoerende optrede aan hersiening te onderwerp. Daar rus dus 'n moeilike taak op die howe om die omskrywing van die begrip *administratiewe optrede* in artikel 1 van die Wet te vertolk en inhoud daaraan te gee.⁴⁵

Ook die betekenis van die frase *direct external legal effect* is nie duidelik nie. De Waal, Currie en Erasmus⁴⁶ wys daarop dat hierdie begrip sy oorsprong in die Duitse reg het en dat dit in die Promotion of Administrative Justice Act opgeneem

40 Vgl De Waal ea 500–509 vir 'n ontleding van die verskillende komponente van hierdie omskrywing.

41 1999 10 BCLR 1059 (KH) par 141. Vgl ook *Cekeshe v Premier for the Province of the Eastern Cape* 1997 10 BCLR 1746 (Tk) 1766D–1766F.

42 Henderson 1998 SALJ 638.

43 2000 3 BCLR 309 (T).

44 315A. Devenish ea 150 verduidelik dat “[t]he more the function impacts on and affects the lives of the public, the more likely it is that the function will be deemed to be a public function”.

45 Vgl ook Ferreira (LLM) 51–55.

46 De Waal ea 508.

is ten einde te verseker dat die Wet slegs van toepassing is op *finale* besluite wat ten opsigte van die publiek geneem word. Volgens die Duitse wetgewing beteken *direct external legal effect* dat die betrokke optrede regsgevolge vir iemand anders as die administratiewe funksionaris teweeg moet bring. Die skrywers verduidelik soos volg:

“A decision has a legal effect, if it entails a binding determination of somebody’s rights or duties. Recommendations, opinions, proposals made by the administrator therefore do not have legal effect. A decision has a direct effect if it has an immediate impact on somebody’s rights. Therefore, preparatory steps in a decision-making process usually have no direct effect. External effect means, inter alia, that the person affected has to be someone other than the administrator. This does not exclude members of the administration . . . from challenging administrative action if their individual rights have been affected by a decision . . . The measure must affect outsiders and should not be a purely internal matter of departmental administration.”⁴⁷

Dit is duidelik dat besluite van inligtingsbeamptes om kragtens die Wet op Bevordering van Toegang tot Inligting toegang tot rekords toe te staan of te weier, binne die omvang van die definisie van administratiewe optrede in die Promotion of Administrative Justice Act tuisgebring kan word. Soos reeds opgemerk is, het die wetgewer waarskynlik besluite ingevolge die Wet op Bevordering van Toegang tot Inligting van die werking van die Promotion of Administrative Justice Act uitgesluit, aangesien die Wet self vir hersieningsprosedures voorsiening maak.⁴⁸ Daar kan egter verwag word dat kontrole van administratiewe optrede ingevolge die Promotion of Administrative Justice Act deur die houe as rigtinggewend vir die toepassing van die Wet op Bevordering van Toegang tot Inligting beskou sal word.

4 HERSIENING EN DIE WET OP BEVORDERING VAN TOEGANG TOT INLIGTING

4.1 Inleiding

Daar word aan die hand gedoen dat die standpunt van De Waal, Currie en Erasmus⁴⁹ dat dit onwaarskynlik is dat die Grondwet beoog om geregtelike hersiening, soos ontwikkel deur die gemenerereg, met die bepalings van artikel 33 te vervang, korrek is. Die skrywers huldig die mening dat die Promotion of Administrative Justice Act die hoofbron van die reg op regverdige administratiewe optrede is, maar dat die gemenerereg aangewend moet word om die bepalings van die Wet uit te lê.⁵⁰

47 Vgl ook Devenish ea 150.

48 Vgl par 1.

49 De Waal ea 453.

50 Van Wyk 1997 SALJ 251 wys daarop dat sommige uitsprake duidelik daarop dui dat die fundamentele reg op administratiewe geregtigheid die moontlikheid skep vir die kreatiewe ontwikkeling van die Suid-Afrikaanse administratiewereg. In ander beslissings (vgl oa *Xu v Minister van Binnelandse Sake* 1995 1 SA 185 (T); *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting* 1996 3 SA 800 (T)) meen die houe egter dat die fundamentele reg nie ’n betekenisvolle wysiging van die gemenerereg teweegbring nie. In *President of the Republic of South Africa v SARFU* 1999 10 BCLR 1059 (KH) par 135–136 beklemtoon die Konstitusionele Hof dat a 33 nie as ’n kodifikasie van die gemeenregtelike beginsels beskou moet word nie: “Although the right to just

Gedurende die vorige bedeling het die hooggeregshof oor die inherente gemeenregtelike bevoegdheid beskik om administratiewe optrede te hersien. Gemeenregtelike hersiening is van toepassing op alle administratiewe handelinge, ongeag die aard daarvan. Die algemene gronde vir gemeenregtelike hersiening is magsoorskryding en onreëlmatigheid, wat die nie-nakoming van enige van die geldigheidsvereistes vir die verrigting van administratiewe handelinge, behels.⁵¹ Ten einde met 'n gemeenregtelike aksie te kon slaag, het die onus op die applikant gerus om die ongeldigheid van die administratiewe optrede te bewys. Vir hierdie doel kon die applikant hom op enige van die gemeenregtelike gronde vir hersiening beroep.⁵²

Artikel 33(3)(a) van die 1996-Grondwet vereis dat die nasionale wetgewing wat aan die regte in artikel 33 gevolg gee, voorsiening moet maak vir die hersiening van administratiewe optrede deur 'n hof, of waar dit gepas is, 'n onafhanklike en onpartydige tribunaal. Artikel 6(1) van die Promotion of Administrative Justice Act bepaal dat enige persoon administratiewe optrede deur 'n hof of 'n tribunaal kan laat hersien. Hierdie bepaling is in ooreenstemming met artikel 38 van die 1996-Grondwet ingevolge waarvan 'n persoon namens iemand anders wat nie in eie belang kan optree nie, of in die belang van 'n groep of klas persone of in die openbare belang 'n hof kan nader en aanvoer dat daar op 'n reg in die Handves van Regte inbreuk gemaak is.⁵³

Kragtens artikel 173 van die 1996-Grondwet beskik die Konstitusionele Hof, die Hoogste Hof van Appèl en die hoër howe oor die inherente jurisdiksie om, met inagneming van die belang van geregtigheid, hul eie proses te beskerm en te reël en die gemenerereg te ontwikkel. Voorts verleen artikel 39(3) in die Handves van Regte erkenning aan ander regte of vryhede wat deur die gemenerereg, gewoontereg of wetgewing erken of verleen word, in dié mate waarin sodanige regte of vryhede met die Handves bestaanbaar is. Die implikasie van die genoemde grondwetlike bepaling is dat 'n verontregte persoon die betrokke administratiewe optrede kan aanval op grond van die ongrondwetlikheid daarvan, deur hom op die fundamentele reg op regverdige administratiewe optrede te beroep of deur die geldigheid van die optrede op grond van die gemeenregtelike gronde vir hersiening aan te val.⁵⁴

administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, determining not only the scope of section 33, but also its content. The principle function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedure followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades."

51 Wiechers *Administratiefreg* (1984) 300.

52 Burns 203. Vgl *Hira v Booysen* 1992 4 SA 69 (A) vir 'n opsomming van die gemeenregtelike posisie mbt hersiening van administratiewe optrede.

53 Kragtens a 38 kan 'n persoon namens iemand anders wat nie in eie naam kan optree nie, in die belang van 'n groep of klas persone of in die openbare belang 'n hof nader en aanvoer dat daar op 'n reg in die Handves van Regte inbreuk gemaak is. A 38(d) wat bepaal dat die betrokke persoon 'n hof kan nader op grond daarvan dat hy/sy in die openbare belang optree, dui daarop dat die 1996-Grondwet voorsiening maak vir die *actio popularis*.

54 Burns 205.

Artikel 8(3) van die 1996-Grondwet bepaal dat, by die toepassing van 'n bepaling van die Handves van Regte op 'n natuurlike of regs persoon, 'n hof verplig is om, ten einde aan 'n reg in die Handves gevolg te gee, die gemenerereg toe te pas, of indien nodig te ontwikkel, in die mate waarin wetgewing nie aan die reg gevolg gee nie. Op grond van hierdie bepaling is dit dus vir 'n hof moontlik om die gemeenregtelike hersieningsgronde uit te brei.

Die hof huldig in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd*⁵⁵ die mening dat die gemeenregtelike gronde vir geregtelike hersiening van administratiewe optrede voortbestaan ingevolge die grondwetlike reg op administratiewe geregtigheid. Die hof onderskei tussen gemeenregtelike hersiening en grondwetlike hersiening van administratiewe optrede en verklaar:

“Judicial review under the Constitution and under the common law are different concepts. In the field of administrative law constitutional review is concerned with the constitutional legality of administrative action, the question in each case being whether it is or is not consistent with the Constitution and the only criterion being the Constitution itself. Judicial review under the common law is essentially also concerned with the legality of administrative action, but the question in each case is whether the action under consideration is in accordance with the behests of the empowering statute and the requirements of natural justice. The enquiry in this regard is not governed by a single criterion.”⁵⁶

In *Pharmaceutical Manufacturers of SA; In Re: Ex Parte Application of President of the RSA*⁵⁷ verwerp die Konstitusionele Hof die standpunt van die hof in *Container Logistics*.⁵⁸ Die hof beslis by monde van regter Chaskalson:

“The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.”⁵⁹

4 2 Hersieningsgronde

Die Promotion of Administrative Justice Act maak in artikel 6(2) voorsiening vir 'n aantal gronde vir geregtelike hersiening. Geregtelike hersiening van die administratiewe optrede is onder andere moontlik indien die administratiewe funksionaris bevooroordeel was of daar redelikerwys vermoed word dat hy of sy bevooroordeel was, die betrokke administratiewe optrede prosedureel onbillik was, die administratiewe funksionaris *mala fide* opgetree het of die administratiewe optrede onredelik, ongrondwetlik of ongeldig⁶⁰ was. Die vraag is eger of die

55 1999 8 BCLR 833 (HHA).

56 Par 20.

57 2000 3 BCLR 241 (KH).

58 1999 8 BCLR 833 (HHA).

59 Par 33.

60 Die Promotion of Administrative Justice Act gebruik die begrip *unlawful* wat vir doeleindes van hierdie bydrae eerder met die begrip *ongeldig* as met die begrip *onregmatig* vertaal word.

gronde in artikel 6(2) die gemeenregtelike hersieningsgronde uitsluit. Daar word aan die hand gedoen dat hierdie gronde nie die gemeenregtelike gronde vir geregtelike hersiening vervang nie en ook nie 'n *numerus clausus* daarstel nie, maar dat die howe, vir sover die statutêre gronde daarmee ooreenstem, die gemeenregtelike gronde vir geregtelike hersiening sal gebruik om inhoud aan die gronde in artikel 6(2) te gee. Die wye formulering van artikel 6(2)(i) wat bepaal dat ongrondwetlike of ongeldige administratiewe optrede 'n grond vir geregtelike hersiening daarstel, is 'n verdere aanduiding dat die howe die gronde in artikel 6(2) kan interpreteer en uitbrei.⁶¹

Die Wet op Bevordering van Toegang tot Inligting maak in artikel 25(3)(c) voorsiening vir die hersiening van besluite wat ingevolge daarvan geneem is. Ingevolge hierdie bepaling moet die kennisgewing aan die aansoeker dat die versoek om toegang tot inligting geweier is, ook meld dat die versoeker interne appèl kan aanteken of 'n aansoek by 'n hof kan indien teen die weiering van die versoek. Die prosedure vir die aantekening van die interne appèl of die indiening van die aansoek moet ook in die kennisgewing uiteengesit word. Die Wet sit egter nie 'n lys van hersieningsgronde soos dié in die Promotion of Administrative Justice Act uiteen nie. Die howe sal dus van die gemeenregtelike hersieningsgronde gebruik moet maak.

Kragtens artikel 15 van die Wet Openbaarheid van Bestuur moet 'n individu wat teen besluite geneem ingevolge die Wet wil appelleer, van bestaande administratiefregtelike prosedures gebruik maak. Soos daar reeds opgemerk is, beskik Nederland oor 'n aantal algemene beginsels van behoorlike bestuur wat deur die howe geformuleer is en met die Suid-Afrikaanse gronde vir geregtelike hersiening vergelyk kan word.⁶² Sekere van hierdie beginsels is reeds in die Algemene Wet Bestuursrecht gekodifiseer.⁶³

Die Afdeling Rechtspraak van die Raad van State kan beskou word as 'n gespesialiseerde administratiewe regbank. Aangesien gespesialiseerde administratiewe regbanke onbekend aan Suid-Afrika is, word die funksie van hierdie regbanke deur die gewone howe in Suid-Afrika vervul.⁶⁴

61 Ogv die uitlegreël *expressio unius est exclusio alterius* (die insluiting van die een is die uitsluiting van die ander) kan geargumenteer word dat die gronde in a 6 wel 'n *numerus clausus* is. Hierdie reël word egter met groot omsigtigheid deur die howe aangewend, aangesien dit slegs 'n *facie prima* aanduiding van die wetgewer se bedoeling is en nie afdoende bewys daarvan nie. Vgl Steyn *Die uitleg van wette* (1981) 50; Du Plessis *The interpretation of statutes* (1986) 156; Botha *Wetsuitleg 'n inleiding vir studente* (1996) 145.

62 Vgl par 2.

63 De Haan, Drupsteen en Fernhout 83 verduidelik die funksie van die beginsels van behoorlike bestuur soos volg: "De abb zijn in de rechtspraak en het administratief beroep ontwikkeld als toetsingscriteria voor het bestuursoptreden. Ze zijn als beroepsgronden geformuleerd in de bestuursrechtelijke rechtsbeschermingswetten. Door de algemene erkenning die zijn hebben verwoven is hun functie verbreed tot algemene rechtsnormen voor het optreden van het bestuur. Als zodanig zijn ze dan ook voor een deel in positieve bewoordingen in de Awb gecodificeerd."

64 Kummeling "Wet Openbaarheid van Bestuur" in Koeman (red) *Praktijkboek bestuursrecht* (2000) XXVII-87 verduidelik die funksie van die *Afdeling Rechtspraak* tov die verstreking van inligting soos volg: "Uit jurisprudentie blijkt dat de Afdeling slechts ter beoordeling staat of aan een verzoek om informatie terecht wel of niet is voldaan."

4.3 Verskaffing van skriftelike redes

Gemeenregtelik bestaan daar geen definitiewe beginsel wat administratiewe amptenare verplig om redes vir hulle besluite te verskaf nie. Derhalwe het die hofte die benadering gevolg dat 'n administratiewe orgaan wat 'n wye diskresie uitoefen, nie redes vir sy besluite hoef te verskaf nie. Dit spreek vanself dat hierdie situasie tot nadeel van die individu gestrek het.⁶⁵

Die versuim van 'n administratiewe funksionaris om redes vir 'n administratiewe besluit te verskaf, het egter in sommige gevalle 'n negatiewe afleiding deur die hof tot gevolg gehad. In hierdie verband beslis die hof in *WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board*:⁶⁶

"It has repeatedly been held that a body like the Commission is not obliged to give reasons for its decision. By not giving reasons it may run the risk of an adverse inference being drawn . . . Whether or not to give reasons is a matter which it must make out for itself in the circumstances of each particular case. Where as here, the only evidence presented is impressive and acceptable, remains unchallenged in cross-examination and uncontradicted by other evidence, then the failure to give reasons does tend to support an inference that the evidence was ignored."⁶⁷

Ingevolge artikel 33(2) van die 1996-Grondwet het iedereen wie se regte nadelig deur administratiewe optrede geraak is, die reg op die verskaffing van skriftelike redes.⁶⁸ Artikel 33(2) is enger geformuleer as artikel 24(c) van die 1993-Grondwet wat bepaal het dat elke persoon die reg het op die verskaffing van skriftelike redes indien hulle *regte of belange* deur die administratiewe optrede geraak is. Artikel 24(c) het ook nie, soos artikel 33(2), vereis dat die *nadelige* effek van die administratiewe optrede bewys moet word nie.⁶⁹

Volgens De Ville⁷⁰ het die nie-nakoming of onvoldoende nakoming van hierdie bepaling nie tot gevolg dat die betrokke besluit ongeldig is nie, maar stel dit wel 'n grond vir die verkryging van 'n *mandamus*⁷¹ daar. Die onus rus in so 'n geval op die staat om die geldigheid van die administratiewe optrede, asook die feit dat 'n fundamentele reg nie aangetas is nie, te bewys.

Artikel 5 van die Promotion of Administrative Justice Act gee inhoud aan die reg op die verskaffing van skriftelike redes. Ingevolge artikel 5(1) kan enige persoon wie se regte *materieel en nadelig* deur administratiewe optrede geraak is, die verskaffing van redes vir die optrede versoek. Die Wet voeg dus die begrip *materieel* by die formulering van die reg op skriftelike redes in artikel 33(2) van

65 Burns 196.

66 *WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board* 1982 4 SA 427 (A). Vgl ook *Nasionale Vervoerkommissie van Suid-Afrika v Salz Gossow Transport (Edms) Bpk* 1983 4 SA 344 (A); *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board* 1984 3 SA 402 (N).

67 448C-448D.

68 Daar moet duidelik onderskei word tussen die verskaffing van redes en die verskaffing van inligting. Redes en inligting moet verder onderskei word van die subreël van die *audi alteram partem*-reël wat inhou dat benadelende feite en oorwegings aan die individu bekend gemaak moet word. Vgl in hierdie verband Ferreira (LLM) 55-57.

69 Asimow "Administrative law under South Africa's final constitution: The need for an administrative justice act" 1996 *SALJ* 619 vn 30; Corder "Administrative justice in the final constitution" 1997 *SAJHR* 31-32.

70 De Ville "The right to administrative justice: An examination of section 24 of the interim constitution" 1995 *SAJHR* 71.

71 'n Interdik dat die staat 'n statutêre verpligting moet nakom.

die 1996-Grondwet. De Waal, Currie en Erasmus⁷² wys daarop dat hierdie toevoeging 'n beperking op die individu se reg op skriftelike redes plaas. Die skrywers meen egter dat hierdie beperking regverdigbaar is deur soos volg te verduidelik:

“A duty to give reasons for every conceivable action or decision would place an enormous burden on administrators. The addition of the term ‘materially’ will allow administrators to avoid giving reasons for a number of decisions that fall within the category of administrative action, but that are trivial and mundane in their effect.”

Kragtens artikel 5(3) skep die versuim van 'n administratiewe funksionaris om redes vir die administratiewe optrede te verskaf tydens geregtelike hersiening die vermoede dat die administratiewe optrede sonder 'n goeie rede uitgeoefen is. Hierdie bepaling is in ooreenstemming met die standpunt van De Ville dat die versuim om redes te verskaf nie sonder meer die ongeldigheid van die betrokke administratiewe optrede tot gevolg het nie. Die onus sal dus in so 'n geval op die staat rus om te bewys dat die administratiewe optrede geldig is.⁷³

Wat die omvang van die redes betref, het die hof in *Moletsane v The Premier of the Free State*⁷⁴ soos volg beslis:

“[T]he more drastic the action taken, the more detailed the reasons which are advanced should be. The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished.”⁷⁵

Kragtens artikel 5(4) van die Promotion of Administrative Justice Act kan 'n administratiewe funksionaris afwyk van die verpligting om voldoende redes te verskaf, indien die afwyking onder die omstandighede redelik en regverdigbaar is. Ten einde laasgenoemde vas te stel, identifiseer die Wet sekere faktore wat deur die administratiewe funksionaris in ag geneem moet word.⁷⁶

72 De Waal ea 522.

73 Ingevolge a 6 van die Promotion of Administrative Justice Act is die verskaffing van redes vir administratiewe optrede 'n afsonderlike hersieningsgrond. A 6(c) bepaal dat administratiewe optrede harsien kan word indien die optrede prosedureel onbillik was. Voorts bepaal a 6(f)(ii)(dd) dat die administratiewe optrede harsien kan word indien dit nie rasoneel verbind kan word aan die redes wat die administratiewe amptenaar daarvoor gee nie. Kragtens a 6(e)(i) kan die administratiewe optrede ook harsien word indien die optrede onderneem is vir 'n rede wat nie in ooreenstemming met die magtigende bepaling is nie. Dit blyk dat die redes in laasgenoemde geval nie dui op redes wat deur die administratiewe funksionaris vir die optrede verskaf word nie, maar na die oogmerk waarmee die funksionaris die optrede uitvoer, verwys.

74 *Moletsane v The Premier of the Free State* 1996 2 SA 95 (O).

75 98G–98H.

76 Hierdie faktore sluit kragtens a 5(4)(b) die volgende in: “(i) [T]he objects of the empowering provision; (ii) the nature, purpose and likely effect of the administrative action concerned; (iii) the nature and the extent of the departure; (iv) the relation between the departure and its purpose; (v) the importance of the purpose of the departure; and (vi) the need to promote an efficient administration and good governance.” Dit is duidelik dat hierdie bepaling die fundamentele reg op die verskaffing van skriftelike redes beperk. Die vraag is egter in welke mate hierdie beperking met die algemene beperkingsbepaling in a 36 van die Grondwet versoenbaar is. Alhoewel die faktore in a 5(4)(b) in 'n groot mate met die faktore in a 36 ooreenstem, blyk dit dat a 5(4)(b) 'n uitbreiding van die faktore in a 36 daarstel. Dit spreek vanself dat die bepalings van die Grondwet, as hoogste reg van die Republiek, nie deur wetgewing uitgebrei kan word nie. Daar word derhalwe aan die hand gedoen dat die grondwetlikheid van die bepaling deur die Konstitusionele Hof getoets behoort te word.

Indien 'n versoek om toegang tot inligting ingevolge die Wet op Bevordering van Toegang tot Inligting deur 'n inligtingsbeampte geweier word, moet die aansoeker kragtens artikel 25(3)(a) van die Wet dienooreenkomstig in kennis gestel word en onder andere voorsien word van voldoende redes vir die weiering, insluitende die bepaling van die Wet waarop gesteun word. Die wyse waarop hierdie bepaling vertolk moet word, is egter onseker. Eerstens kan dit daarop dui dat die gronde vir die weiering, met ander woorde die spesifieke statutêre voorskrif waarop gesteun word, deel van die redes moet vorm. In die tweede plek kan dit daarop dui dat daar tussen die gronde vir die weiering en die redes vir die weiering onderskei moet word. Dit beteken dus dat die redes vir die weiering 'n verduideliking is waarom dit in die betrokke geval geregverdig is om op 'n spesifieke grond te steun. Voorts is dit vreemd dat artikel 25(3)(b) bepaal dat enige verwysing na die inhoud van die rekord van die redes uitgesluit moet word.⁷⁷

In teenstelling met artikel 32(2) van die 1996-Grondwet en artikel 5(1) van die Promotion of Administrative Justice Act word die omstandighede waaronder 'n persoon skriftelike redes kan versoek nie deur artikel 25 van die Wet op Bevordering van Toegang tot Inligting gekwalifiseer nie. Die implikasie hiervan is dat die enorme administratiewe las waarna De Waal, Currie en Erasmus⁷⁸ hierbo verwys wel deur hierdie bepaling op openbare beamptes geplaas word, aangesien daar selfs vir besluite wat 'n geringe effek het redes versoek kan word.

In Nederland is die motiveringsbeginsel een van die beginsels van behoorlike bestuur wat reeds in die Algemene Wet Bestuursrecht gekodifiseer is. Artikel 3:46 van die Wet bepaal dat 'n besluit of toegang tot inligting verleen kan word, op behoorlike redes gebaseer moet wees. Soortgelyk aan artikel 5(4) van die Promotion of Administrative Justice Act word daar ook 'n beperking op hierdie verpligting geplaas. Ingevolge artikel 3:48(1) kan die verstrekking van redes agterweë gelaat word indien daar redelikerwys aangeneem kan word dat daar nie 'n behoefte aan die verstrekking van redes bestaan nie. Indien 'n belanghebbende party egter binne 'n redelike tyd redes sou vereis, moet dit kragtens artikel 3:48(2) so gou moontlik verstrek word.

De Haan, Drupsteen en Fernhout⁷⁹ wys daarop dat die motiveringsbeginsel in drie sub-beginsels verdeel kan word. Hierdie beginsels behels dat die besluit in

77 De Waal ea 542–543 merk in hierdie verband op: “Clearly the requirement of adequate reasons and exclusion of any reference to the content when giving reasons are in tension. What might be required by ‘adequate reasons’ beyond a mere reference to the exclusion of provisions of the Act that are relied on? One possibility is the operation of the provisions of the Act apart from the grounds of refusal. For instance adequate reasons could refer to the fact that a record is not reasonably severable in terms of a 28. A more far reaching possibility is that the Administrative Justice Act might override the exclusion of any reference to the content of the record. While this is theoretically possible in terms of s 5 of the Act, it is unlikely, given that the Administrative Justice Act and the Access to Information Act were drafted and enacted more or less simultaneously and ought to be interpreted as being in conformity with each other. The only real challenge to the command of s 25(3)(b) would [be] based on the constitutional right of access to information. Such a challenge would also be unlikely to succeed since deference should be shown to the rationale for such an exclusion where that rationale includes the effective implementation of the Act and indeed the constitutional right itself.”

78 *Idem* 522.

79 De Haan ea 118.

die algemeen gemotiveer moet word, dat die redes die besluit moet regverdig en dat die redes duidelik en verstaanbaar geformuleer moet word.⁸⁰

4.4 Uitputting van interne remedies

Wat die uitputting van interne remedies as voorvereiste vir geregtelike hersiening betref, was daar in die verlede nie eenstemmigheid in die Suid-Afrikaanse reg nie. Burns⁸¹ wys daarop dat die howe in sommige gevalle op die uitputting van interne remedies aangedring het, terwyl die mening in ander uitsprake gehuldig is dat, indien die dispuut in alle opsigte beregbaar is, die applikant gedurende enige stadium van die verrigtinge om geregtelike hersiening aansoek kan doen. In hierdie verband merk die hof in *Lawson v Cape Town Municipality*⁸² op:

“[C]ases are reported from time to time in which it is held that an extra-judicial appeal, allowed by a particular piece of legislation, ousts or postpones judicial review . . . In considering the question whether, on the proper construction of a statute, judicial review is excluded or deferred, Courts have regard to a number of factors. Among these are: the subject matter of the statute (transport, trading licences, town planning and so on); the body or person who makes the initial decision and the bases on which it is to be made; the body or person who exercises appellate jurisdiction; the manner in which that jurisdiction is to be exercised, including the ambit of ‘re-hearing’ on appeal; the powers of the appellate tribunal, including its powers to redress or ‘cure’ wrongs of a reviewable character; and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which an applicant complains.”⁸³

Artikel 7 van die Promotion of Administrative Justice Act ruim nou alle onsekerheid uit die weg deur uitdruklik die uitputting van interne remedies verpligtend te maak. Artikel 7(2) bepaal dat geen hof of tribunaal administratiewe optrede sal hersien alvorens die applikant alle interne remedies uitgeput het nie. Artikel 7(2)(c) bepaal egter dat ’n hof of tribunaal in uitsonderlike omstandighede en op versoek van die betrokke persoon, indien dit in die belang van geregtigheid is, afstand kan doen van die verpligting dat interne remedies uitgeput moet word.⁸⁴

80 Die skrywers verduidelik die inhoud van hierdie sub-beginsels soos volg (118–120): “Het eerste is dat besluiten moeten worden gemotiveerd; de motiveringsplicht. Deze motiveringsplicht geldt overigens niet algemeen. In gevallen waarin wordt besloten conform de aanvraag en belangen van derden geen rol spelen, behoeft de beslissingen geen nadere motivering . . . Als tweede subregel geldt dat een gegeven motivering het besluit moet kunnen dragen. Dit betekent dat de motivering innerlijk consistent moet zijn en geen tegenstrijdigheden mag bevatten, uit moet gaan van een juiste feitelijke grondslag en van een juiste interpretatie van toepasselijke wettelijke voorschriften en inzicht moeten bieden in de wijze waarop feitelijke en juridische elementen zijn gehanteerd . . . In de derde plaats zal de motivering voor de betrokkene kenbaar moeten zijn. Dit betekent dat de motivering aan de betrokkene ter kennis moet worden gebracht of dat deze voor hem zonder veel moeite achterhaalbaar moet zijn.” Vgl ook Van der Does III-12–III-13.

81 Burns 222.

82 *Lawson v Cape Town Municipality* 1982 4 SA 1 (K).

83 6H-7A.

84 In *Lawson* was die probleem dat die orgaan waarop die interne beroep gedoen is, nie geskik was om die saak aan te hoor nie. Die Promotion of Administrative Justice Act bied egter geen oplossing vir hierdie probleem nie en daar word aan die hand gedoen dat die faktore in *Lawson* aangewend word om vas te stel of daar in die betrokke omstandighede afstand gedoen kan word van die verpligting dat interne remedies uitgeput moet word.

Ingevolge artikel 25(3)(c) van die Wet op Bevordering van Toegang tot Inligting moet die kennisgewing aan die aansoeker meld dat die versoeker, na gelang van die geval, 'n interne appèl kan aanteken of 'n aansoek by 'n hof kan indien teen die weiering van die aansoek. Aangesien daar 'n keuse aan die aansoeker gestel word om interne appèl aan te teken of 'n hofaansoek in te dien, kan die afleiding gemaak word dat die uitputting van interne remedies nie verpligtend gemaak word nie. Die feit dat die uitputting van interne remedies nie verplig word nie skyn vreemd te wees, aangesien hierdie verpligting juis ten doel het om onder andere die las op die howe te verlig en sowel tyd as koste vir die individu te bespaar.⁸⁵

In Nederland wil dit voorkom asof die Algemene Wet Bestuursrecht wel die uitputting van interne remedies verpligtend maak. Kragtens artikel 7:1 moet 'n persoon wat na 'n administratiewe hof wil appelleer eers 'n kennisgewing van beswaar teen die besluit by die bevoegde administratiewe liggaam inhandig.

5 SAMEVATTING

Die Promotion of Administrative Justice Act gee inhoud aan die reg op regverdige administratiewe optrede soos in artikel 33 van die 1996-Grondwet verskans. Voor die promulgering van die Wet is dit aan die howe oorgelaat om die betekenis van administratiewe optrede vas te stel, wat tot onsekerheid aanleiding gegee het. Die Wet ruim nou in 'n groot mate hierdie onsekerheid uit die weg deur in artikel 1 'n definisie van administratiewe optrede te verskaf. Die definisie dui daarop dat die aard en effek van die betrokke optrede bepalend is van die vraag of dit as administratiewe optrede geklassifiseer kan word of nie.

Ten spyte daarvan dat besluite deur inligtingsbeamptes ingevolge die Wet op Bevordering van Toegang tot Inligting onder die omskrywing van administratiewe optrede in die Promotion of Administrative Justice Act tuisgebring kan word, word hierdie besluite steeds van die werking van die Promotion of Administrative Justice Act uitgesluit.⁸⁶

In Nederland is die Algemene Wet Bestuursrecht wel van toepassing op besluite wat ingevolge die Wet Openbaarheid van Bestuur geneem is.⁸⁷ Aangesien hierdie wette gepromulgeer is ten einde aan twee verskillende fundamentele regte inhoud te gee, word daar aan die hand gedoen dat dit nie wenslik is om, soos in Nederland, die bepalinge van die Promotion of Administrative Justice Act en die Wet op Bevordering van Toegang tot Inligting in een wet te integreer nie. Die uitleg van die Promotion of Administrative Justice Act behoort egter ook as van belang vir die uitleg van die Wet op Bevordering van Toegang

85 Wiechers 304–305 merk op: “Interne beroep is 'n wyse van kontrolering van administratiewe handeling wat aan die gegriefde onderdaan, of selfs in sommige gevalle aan die administratiewe orgaan, 'n eenvoudige, informele en gewoonlik maklike manier van bylegging van administratiewe dispute verskaf. Die hoër hersienende orgaan is self met die betrokke vertakking van die staatsadministrasie gemoeid en dit is vanselfsprekend dat dié orgaan die beste en mees diepgaande kontrolering sal kan verskaf.”

86 Vgl par 3.

87 Vgl par 2.

tot Inligting beskou te word. Die Promotion of Administrative Justice Act kan byvoorbeeld rigtinggewend wees vir die wyse waarop die verskaffing van redes kragtens artikel 25 van die Wet op Bevordering van Toegang tot Inligting uitgelê behoort te word.⁸⁸ Daar behoort dus wisselwerking tussen die twee wette te wees met betrekking tot die uitleg van soortgelyke bepalings.

Mens kry verskillende soorte gordyne. Sommige is swaar, dik en lank en as hulle toegetrek is bedek hulle die hele venster en sluit dit lig en sig van buite en binne uit. Ander is weer dun en deursigtig en soms nie eens groot genoeg om die hele venster te bedek nie. As die wind waai en die gordyn na binne waai kan 'n persoon binne klim sonder dat die gordyn aan hom raak. Soms het die gordyne so 'n vorm dat dit slegs dele van die venster bedek en kan 'n persoon die huis binne gaan sonder om aan die gordyn te raak . . . Dit bevestig myns insiens dat 'n gordyn nie werklik 'n obstruksie is nie.

Regter Basson in S v Madini [2000] 4 All SA 20 (NK) 23f-g.

88 Vgl par 4 3.

The influence of free and foreign trade on the development of Roman law¹

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OPSOMMING

Die invloed van vrye en buitelandse handel op die ontwikkeling van die Romeinse reg

Die ontwikkeling van die Romeinse reg het hand aan hand gegaan met die uitbreiding van vrye en buitelandse handel. Die eng en formele *ius civile* wat net op Romeinse burgers van toepassing was, was Rome se enigste regstelsel tot op die stadium toe daar begin is met uitbreiding buite die grense van die Italiaanse skiereiland. Teen die tyd van Augustus het die Romeinse ryk die hele Middellandse Seegebied ingesluit en handel het globale afmetings aangeneem. Uitbreiding van die Romeinse ryk en die handel het 'n "Romanseringsproses" tot gevolg gehad. Enkele van die aspekte wat daartoe aanleiding gegee het, word in hierdie artikel bespreek. Die ontwikkeling en uitbreiding van die Romeinse regstelsel was waarskynlik die belangrikste aspek, en besondere aandag word geskenk aan die invoering en ontwikkeling van die *ius gentium*.

1 INTRODUCTION

"Globalisation" is a contemporary buzzword in law and politics which implies *inter alia* the lowering and removal of trade barriers between countries as well as monetary unions. One of the important results of this process is the gradual phasing out of cultural and other differences between different peoples and nations, and it is often said that the world is consequently becoming a "global village". Various factors come into play in this process and in this article some of these elements as found in Roman history will be discussed briefly.

2 HISTORICAL BACKGROUND

The Roman empire – the *imperium Romanum* – lasted from the traditional foundation of the city in 753 BC until 476 AD in the west, and the fall of Constantinople in 1453 AD in the east. Its influence on the language, law, literature and architecture of Europe and elsewhere cannot be underestimated.

In 753 BC Rome was merely one of many small city-states in Italy. Gradually, however, it grew stronger and bigger, and during the fifth and fourth centuries it conquered most other Italian city-states, finally establishing Roman supremacy in Italy during the third century BC. Supremacy in the Western Mediterranean followed

1 This article is based on the author's inaugural lecture held at Pretoria on 2001-08-02.

on the end of the Third Punic War in 146 BC, while the last of the four Macedonian wars, waged between 214 BC and 146 BC, saw the Eastern Mediterranean fall to Roman rule. Many more wars were successfully waged, for example against Syria, Egypt, Gaul, Germania, Parthia and Britain. As a result, during the reign of emperor Trajan when the empire was at its zenith, it consisted of 40 to 60 million people² and covered millions of square kilometres.³ Whilst all these previously independent states were ruled by Rome, they were not governed by a uniform system of government. Many states were dealt with as senatorial provinces, some as imperial provinces and others as client states under their own kings. There were also free cities, some of which attached themselves to the Romans as friends from the outset, while the Romans themselves granted others freedom as a mark of honour. In some cases local dynasts, tribal chieftains and priestly rulers continued to rule their own people along traditional lines, but subject to Rome.⁴

Although the administration tried to create some measure of uniformity within these territories, the empire still consisted of a variety of regional societies which differed in language, culture, mentality as well as in legal status and social stratification. Usually both imperial and local government restricted their activities to the maintenance of law and order, the levying of taxes and tributes, the administration of higher justice and the defence of frontiers.⁵ The restrictions of this approach had both an ideological and a pragmatic basis: Ancient political theory confined the scope of public policy to these activities, and Rome neither wanted, nor could it afford, an all-encompassing bureaucracy for the provinces.⁶

When Augustus finally established the Roman empire which consisted of the nations surrounding the Mediterranean, trade took on a global dimension.⁷ It can indeed be said that the single greatest blessing for the economic life of the Empire was the era of peace which Augustus secured.⁸ The conditions of the *pax Romana* were very beneficial to the empire's economy which reached its zenith during the first and second centuries. A single political administration, coinage system, safe sea routes and a continually improving road system all contributed to the economic structure throughout the empire.⁹ Moreover, aside from the government-controlled grain trade, commerce was largely unregulated; taxes were low, and port and customs duties were fair. In fact, the traders' worst enemy was the weather!¹⁰

2 Maier "Megaorganisation in antiquity: The Roman empire" 1995 *J of Institutional and Theoretical Economics* 704; Levick *The government of the Roman empire* (1985) 1.

3 Maier 704: "From the time of Augustus to Theodosius (27 BC–395 AD) the Roman empire stretched from the Scottish borders, the banks of the Rhine and the Danube to the fringes of the Sahara and the Sudan; and from the Iberian peninsula to eastern Anatolia, the Euphrates and Transjordan. The Mediterranean formed its centre, allowing easy commerce by sea."

4 Cf Strabo *Geography* 14, 5–6; 17/18, 3, 24–25; Cassius Dio *Roman history* 50, 8, 1–3; 53, 12, 7–9; 53, 14, 1–4; 53, 15; 53, 11–18; Suetonius *Augustus* 46; 47–48; Tacitus *De Germania* 41–42. See also Levick 7.

5 Maier 707.

6 *Ibid.*

7 Although international trade had been going on for at least 4000 years, new requirements for the "globalisation" of trade were set since the beginning of the 4th century BC. Cf Marek "Die ersten Global Players. Griechen, Araber, Inder und der Welthandelsplatz Alexandria" 24/25 Feb 2001 *Neue Zürcher Zeitung* 54. See also Scullard "Rome" in *The Oxford classical dictionary* (1991) 932.

8 Cf Caesar *De bello civili* 3 57 4: "If he should do this everyone would put down to his sole credit the tranquillity of Italy, the peace of the provinces, the safety of the empire."

9 Boren *Roman society. A social, economic and cultural history* (1992) 209.

10 *Idem* 210.

During the time of Diocletian 372 main roads, stretching over some 85 000 km, were recorded.¹¹ Roads which were originally built by and for the army to aid speedy movement and heavy transport, and which were then developed by successive governments for communication and general administrative purposes, also came to the assistance of trade.¹² However, road transport was slow and expensive, subject to brigands and to frequent tolls. Long distance travel thus relied mostly on rivers¹³ and the sea,¹⁴ and transport by water was preferred wherever possible. After having established peace in the Roman empire, one of the first tasks Augustus set himself was to create a well-organised navy.¹⁵ A key duty of the navy was to guard the trade routes.¹⁶ During the next two hundred years these were traversed by the mightiest merchant marine fleet the Mediterranean had ever seen, and was to see for more than twelve centuries. Although sailing was a seasonal activity, usually restricted to the summer months when weather conditions were stable and the winds were predominantly northerly, strong competition among merchants ensured that transport by sea continued even during the dangerous winter months. The Mediterranean, the Black Sea and the Atlantic teemed with Roman ships.

Rome's rapid expansion between 264 BC and 133 BC was marked by important – one may even say revolutionary – changes in the economic and social life of Rome and of Italy. As Rome's political suzerainty extended over the Mediterranean world, the population of Italy was inevitably brought into closer contact with the older culture and more advanced economic development of the Greek east. The economy, too, was stimulated by all the wars.

Because of the rural nature of their society, the Romans started late with coinage,¹⁷ and it was probably only to meet the needs of the empire that the Romans abandoned their coinage based on a bronze standard for one based on a silver standard, which was common among the Hellenistic states. The first silver coins were minted in Rome only during the Pyrrhic War, around 275 BC. The development of coinage in Rome and her victories in major wars are thus to a large degree linked. This was a direct result of the expansion of the Roman empire, and the concomitant needs of the Roman armies in foreign countries. The purity of the metal coin was maintained and gradually, as the empire grew, the *dinarius* became the most familiar coin in the Mediterranean.¹⁸ Roman currency speedily supplanted the coin of other Italian mints, but never quite displaced local coinages, especially in the eastern cities. It did, nevertheless, win for itself a dominant position throughout the Mediterranean.

11 Chevallier *Roman roads* (1989) 131 205.

12 Cf Strabo 4 6 6 on Augustus' extension of the road system throughout Italy, an important step towards better administration and unification. See also Procopius *Historiae* 5 147; Strabo 5 3 8; Plutarch *Gaius Gracchus* 7; Statius *Silvae* 4 40–55; *Corpus Inscriptionum Latinarum* 3 7203, 3 8267.

13 See Strabo 4 1 14; Pliny *Litterae* 10 41 1–2; Tacitus *Annales* 13 53 2–4.

14 Cf Pliny *Naturalis historiae* 16 201–202; Lucian *The ship* 5; Josephus *My life* 15. See also Crook *Law and life of Rome* (1967) 225.

15 Casson *The ancient mariners. Seafarers and sea fighters of the Mediterranean in ancient times* (1991) 186.

16 *Idem* 191.

17 Boren 67.

18 *Idem* 69. See also Boak *A history of Rome to 565 AD* (1955) 93–94.

Free trade within the Roman empire and also between Rome and other independent countries was advanced by several important factors. The fact that peace had been established, that there was so much money in circulation, that people could travel freely, and that there were very few trade barriers all contributed to this. The money markets were open and various possibilities for joint ventures existed. The imperial family invested considerable sums in the grain trade for example, although they themselves never actually engaged in trade. Also the Roman elite was not blind to the profits that commerce could bring. Maritime loans as investments in shipping could be very profitable. For example, Marcus Porcius Cato, censor from 234 to 149 BC, speculated by underwriting for ships. According to Plutarch,¹⁹ those who wished to borrow money from Cato were obliged to form an association, and when membership reached fifty, which also represented 50 ships, Cato would take one share in the company. He thus drew a large profit, while at the same time spreading his risk and never venturing more than a fraction of his capital.²⁰

Roman peace therefore had many positive spin-offs for the empire's economy as well as the economies of most of the independent countries with which Rome traded. The Roman empire formed a vast, fairly uniform economic zone with low customs barriers; the state interfered as rarely as possible with business, trade and industry; and a stable currency was preserved for more than two centuries.²¹

Taxes were levied in the conquered areas in order to finance various projects: not only the costs of conquests and organisation, but groups and individuals also took a profit.²² Under the empire individuals accepted salaried posts as imperial procurators and supervised the collection of taxes by local officials. Uniformity with regard to taxation could not be expected over an area as diverse as the Roman empire: type of produce, economic development and degree of monetarisation all varied, and the Romans found diverse schemes of taxation operating in the provinces they created.²³ Provincial administration improved because more taxes were collected directly and the emperor took an interest in supervising his governors.²⁴

Generally, the Roman authorities were not very concerned with trade and commerce and did not pursue any specific economic policy to protect the interests of Roman manufacturers or merchants.²⁵ The interest of the state was mainly limited to the supply of grain to the city of Rome and the armies, and to the

19 *Cato the Elder* 21 5–6.

20 Cf also Plautus *The merchant* 64–74; Dio Chrysostomus *Discourses* 7 104.

21 A book written in Greek between 40 and 70 AD, *Periplus maris Erythraei*, by an author, probably an Alexandrian, who had also taken part in some of these trips and who obviously knew much about trade, gives interesting information about this globalised trade. The author discusses, eg, trade customs of different countries as well as exports and imports of different harbours. Taxes, prices and other costs are discussed, as well as wholesale dealers and capital sponsors. Trade with Greek-speaking inhabitants of the Roman empire, as well as with Arabians, Jews, Aramaeans, Egyptians, Indians and Chinese is discussed. The fact that all these people from different nations were brought together in Alexandria for trade purposes, and lived there, created a multicultural city where foreigners also absorbed the local customs and culture.

22 Levick 69.

23 *Idem* 70.

24 Alston *Aspects of Roman history AD 14–117* (1998) 243.

25 Meijer and Van Nijf *Trade, transport and society in the ancient world* (1992) 8.

income generated from tolls and other indirect taxes which traders had to pay on their merchandise. The collection of indirect taxes was in the hands of private contractors. There was considerable diversity in the indirect taxes levied in provinces and dependencies, for example sales tax,²⁶ property tax, poll-tax, market and customs duties²⁷ were all obvious sources of revenue.

Although Latin was the official language of the Roman empire, Greek was not neglected. Suetonius,²⁸ for example, reports that emperor Caligula held a contest in both Greek and Latin oratory at Lugdunum in Gaul, and that in Augustodunum schoolboys were already studying Latin and Greek. Tacitus,²⁹ too, reports that young Gallic men were given a liberal education – a clear indication that the study of Latin and Greek was promoted in the empire.³⁰ The sons of the local chieftains were taught Latin and Greek, and, proud to receive special attention and treatment, they proved eager students. They were also complimented when dressing like Romans, and soon learned to take to the colonnades, bath-houses and elaborate banquets. It is interesting to note that in many cases the Romans promoted assimilation and Romanisation not by force, but through praise.

It may be accepted that Latin and Greek were used for official purposes in the Roman empire. However, it is not clear to what extent these languages were spoken or understood on the streets and in the villages of the empire.³¹ In general, most officials were probably able to help themselves in Latin or Greek, and it may be accepted that traders and merchants of necessity also had to learn at least one of these languages. It is clear from later developments and eastern sources that pre-conquest languages continued to be in common use in Africa, Egypt and Syria and we may assume similar continuities in Celtic areas.

In Rome, the capital city of the empire, many languages were spoken. Greek was widely accepted in legal dealings.³² For example, in the case of *stipulatio*, a very formal institution of the *ius civile*, Greek was accepted and parties could make use of their own language provided that it was understood by all the parties.³³ By the end of the second century AD the only issue was whether other languages, such as Phoenician or Hebraic, should also be allowed.³⁴

26 For sales tax which was levied in Carthage; cf Musurillo *The acts of the Christian martyrs* (1966) 6: “[I]f I buy anything I duly pay the tax on it since I recognise my Lord, the Emperor of kings and all peoples.”

27 Cf *Corpus inscriptionum Semiticarum* 2 3 3913.

28 *Caligula* 20. Cf, however, Valerius Maximus *Memorable deeds and sayings* 2 2 2 according to whom Roman magistrates only spoke Latin to the Greeks. In order to maintain their dignity and the sovereign power of the Roman people, they forced them to speak through an interpreter so to diffuse the Latin language among all peoples and to make it more respectable.

29 *Annals* 3 431.

30 A knowledge of Latin was in many cases a requirement: Suetonius *Claudius* 16 2 says that an important Greek was struck off the role of jurors as well as off the list of citizens because of his ignorance of Latin. See also Cassius Dio 60 17 3f.

31 Alston 301–302.

32 See Bürge “Sprachenvielfalt und Sprachgruppen im Rechtsleben der Stadt Rom – Gedanken zu D.14.3.11.3 und zum Umgang mit Fremdsprachen im heutigen bürgerlichen Recht” *Mèlanges Fritz Sturm* (1999) 53ff. Cf also Wacke “Gallisch, Punisch, Syrisch oder Griechisch statt Latein?” 1993 *ZSS (RA)* 14ff; *D* 46 4 8 4.

33 Cf Gaius *Inst* 3 93; Kaser *Ius gentium* (1993) 146.

34 *D* 45 1 1 6.

Under the principate Rome was a cosmopolitan city. Concentrations of wealth and political power attracted the ambitious, the adventurous, and the curious from many countries. Whole quarters were occupied by various nationalities, such as Greeks, Syrians and Jews, each speaking their own languages and plying their native trades. It is interesting to note that Suetonius mentions the fact that both Julius Caesar and Augustus organised stage-plays in various wards of the city, making use of actors of all languages so as to accommodate all the different language groups.³⁵

Roman rule was accepted in the Roman empire. Acceptance was fostered, to a very large degree, by emperor-worship which, in Rome, gave the ruler superhuman authority to which subservience was due.³⁶ The fact that monarchy had been, throughout the ancient world, the standard form of political organisation, also facilitated acceptance. Rome was a tolerant ruler: she seldom compelled any of the subject peoples to do anything. As long as they behaved, they were allowed to practise most of their customs, religions and legal systems. However, in the end the influence of Rome on all these areas did indeed permeate society to a greater or lesser degree. It can probably be said that the level of civilisation of a newly incorporated country and its peoples determined the degree of Rome's influence on such a country, its customs and its peoples. The new government and its influences were often welcomed.

3 ASPECTS OF ROMANISATION IN THE ROMAN EMPIRE

The most important agent of acceptance was the process of Romanisation – the adoption of Roman civilisation and ways of life throughout the empire. In town and country, in language and religion, in art, food and drink, we see evidence of the assimilation of Roman culture in the west.³⁷ It is doubtful whether the Roman government or emperors ever actively conceived of or planned such a process. "Romanisation" should rather be seen as an inevitable result of imperial expansion over a long period. Nor were the results of this process in any way homogeneous in the various regions of the empire. It may rather be said that Romanisation was the consequence of different levels of development. The superior Roman civilisation had a far greater influence upon regions where there were less advanced civilisations,³⁸ just as the Romans and their Italian allies had, earlier, felt the impact of Hellenistic civilisation in all its aspects and hastened to adopt, for good or ill, whichever of its features appealed to them. It follows that Roman influence on the Greek east was far less marked than in other regions.

A few of the most important factors which contributed to this process of Romanisation will now be discussed.

3.1 Expansion of trade

The first to be mentioned is the expansion of *trade* in and beyond the empire. Trade led to the integration of the imperial economy and goods of non-local

35 *Divus Julius* 391; *Divus Augustus* 43 1.

36 See Maier 711. Cf also Namatianus *Poem on his homecoming* 1 47–58; 63–66; and Aristides *Oration 26: Panegyric on Rome* 30–33.

37 Alston 300.

38 See for this grateful attitude in the 4th century, the Egyptian Claudianus (*Carmen* 24 154–159): "To [Rome's] rule of peace we owe it that the world is our home, that we can live where we please . . . thanks to her we may drink the waters of the Rhone or of the Orontes, but thanks to her we are all one people."

origins found their way to local markets.³⁹ Roman goods spread beyond the frontiers of the empire. Roman wine, for example, circulated in Britain before the conquest, and Roman trade routes extended into Scandinavia and India. Although these regions were not necessarily Romanised to any significant extent, Rome did have an influence on the way in which the local people lived. The fact that many goods which were traded were not of Italian origin, but originated in regions such as Spain and Gaul, and that goods circulated in the east without ever going near Rome or Greece, meant that there was an ongoing process of globalisation, of equalisation in the empire, and that differences were continually becoming less significant and were, in some cases, even phased out.

3 2 Roman roads

Secondly, it is very important to note that the extent of Romanisation was closely connected, both as a cause and as an effect, with the impressive Roman system of *roads*. Roads, indeed, formed the essential framework for human settlement and land division, and by easing the transport of commodities, led to the accumulation of wealth. Simultaneously, as men and goods moved from place to place, there came in their train influence of another, more subtle nature, in the realm of art and religion, which tended to unify the whole empire.⁴⁰ Roads brought innovation, but they also conserved and unified. However, political unification was the most important, and may be summed up in the famous dictum: "All roads lead to Rome."⁴¹ Roman roads made it possible for the army to advance, for commerce to flourish and were the binding force between races and cultures. They unified the Roman world, and, eventually, Europe.⁴²

3 3 Extension of citizenship

Thirdly, Romanisation of the empire was one of the most important consequences of the *gradual extension of citizenship in the provinces*. Initially citizenship was granted to local chieftains as a reward for services rendered, and to encourage local people to learn Latin. The contribution of money and manpower of the provinces had to be recognised. Generally subjects were eager to emulate their rulers and to become Roman citizens.⁴³ Changes occurred with regard to various aspects: language, dress, food, housing. It can be debated whether areas

39 Alston 299.

40 Chevallier 204.

41 This can perhaps be ascribed to Cicero: cf *Pro Balbo* 12 29, speaking of Rome's universal appeal: "For since from every state there is a road open to ours, and since a way is open for our citizens to other states, then indeed the more closely each state is bound to us by alliance, friendship, contract, agreement, the more closely I think it is associated with us by sharing our privileges, rewards and citizenship."

42 Chevallier 206. Cf Pliny the Elder *Historia naturalis* 14 2: "Roman power has given the world unity. All must recognise the services that she has made to men, by improving their contacts and making it easier for them to enjoy in common the benefits of peace"; and *Naturalis historia* 27 3 on the majesty of the Roman peace. Cf too Namatianus *De reditu suo*: "Hear me, O magnificent queen of the world subject to thy laws, O Rome, who hast taken a place beside the gods in heaven. Thou hast welded the most diverse nations into one country. Thou hast offered conquered peoples a share in thy civilisation and made one city of what was the universe", and Aelius *Oratio de urbe Roma* 108: "Greeks and barbarians can move around freely. Travelling meant going from one homeland to another."

43 Levick 152. Cf Aristides *To Rome* 11–13 on Rome as the emporium of the world.

were Romanised because of the extension of privilege, or whether privileges were extended because the local people were Romanised.⁴⁴ The initially superior Greek culture in the east makes it difficult to answer this question for that region. Elsewhere, especially in Spain, the provinces of Gaul, the Danubian provinces, and North Africa west of Egypt, the Latin language and Roman customs penetrated significantly, paving the way for the extension of citizenship and other privileges. A hybrid civilisation developed in the provinces, merging both peoples and cultures with an overlay of the Latin language and Roman ways, which gave the appearance of Romanisation.

3 4 Influence of the Roman army

Fourthly, the *army* was, of course, at all times at the forefront of the expansion of the empire, and as such it was also one of the most influential agents in the spread of material and cultural aspects of Roman civilisation.⁴⁵ The great high-ways of the empire, bridges, fortifications and numerous public works of other sorts were constructed by soldiers. Every Roman camp was a centre for the spread of the Latin language and Roman institutions. Discharged auxiliaries whose time of service had expired, continued to augment the number of Roman citizens in the provinces. Organised communities of Roman veterans, with all the institutions and material advantages of municipal life, developed in the villages of the civilian hangers-on of the army corps. Furthermore, the constant movement of troops from one part of the empire to another furnished a ready medium for the exchange of cultural, and especially religious, ideas.

3 5 Development of the Roman legal system

Finally, one of the most important factors in this process of Romanisation was the *development and expansion of the Roman legal system*. Initially, when Rome was but a city state, it had one legal system, the *ius civile*, a rigid and very formal system which applied only to Roman citizens. However, once the Roman empire started expanding many people became subjects of Rome as more and more countries were incorporated into the Roman empire. The fact that the *ius civile* could not be applied to them had serious and far-reaching consequences, among which the following: (1) Many legal transactions taking place regularly did not enjoy any validity in law; (2) in Rome foreigners, or people who were not Roman citizens, had no legal rights or protection since they were excluded from the *ius civile*; and (3) as Rome extended her territory, foreign trade and commerce increased and demanded legal protection and acknowledgement.

There were various attempts to resolve the problem of legal rights and protection for foreigners in Rome. As stated, all commercial dealings in Rome amongst foreigners themselves and also those between a foreigner and a Roman citizen were regarded as informal transactions since foreigners were excluded from the *ius civile*. These informal legal transactions were based on good faith between man and man.⁴⁶ However, *bona fides* as such had not yet become a source of law in Rome. Since commercial transactions were expanding all the time, it became

44 Boren 234.

45 Boak 353–354.

46 Sohm *The Institutes. A textbook of the history and system of Roman private law* (transl Ledlie 1935) 64–65.

clear that something needed to be done to grant legal validity to such transactions. This need became even more urgent in view of the fact that Roman citizens were involved in many of these informal transactions: either with a foreigner as the other party, or with another Roman citizen.

One of the ways in which this problem was initially recognised and partly solved, was the conclusion of international commercial treaties with other states in terms of which members of these states were allowed to engage in commerce in the Roman market.⁴⁷ Legal protection and legal capacity, also termed the *ius commercii*, were thus granted to members of the communities concerned. In Rome, the courts of the *recuperatores* secured this legal protection.⁴⁸ For example, three commercial treaties were concluded between Rome and Carthage in terms of which every Roman citizen in Carthage was granted the same private law rights as a Carthaginian citizen, and Carthaginians enjoyed equivalent rights in Rome.⁴⁹ Roman traders also concluded agreements in Sardinia and Africa with the aid of heralds and scribes.

The fact that the *ius commercii* was granted to certain foreigners only, who were subsequently allowed the privileges of the *ius civile*, meant that most of the foreigners in Rome, together with the Romans who preferred informal transactions, still enjoyed no legal protection.

After 250 BC this solution was used less and less since Rome had by then become a great power which only rarely condescended to deal with other powers on an equal footing. Conquered nations were incorporated into the Roman empire without treaties and their citizens were not placed on equal footing with Roman citizens. The problem consequently became more serious and increased significantly: there were even more foreigners in Rome and trade and commerce were expanding rapidly.

The Romans tried to solve this problem by means of *hospitium*.⁵⁰ In terms of this institution, a foreigner could, in case of a legal conflict, appeal for assistance to a friend who was a Roman citizen. He would then be accompanied by his host when going to court.⁵¹ However, this was not a suitable solution for the circumstances present in Rome in the middle of the third century BC.

In the long run, legal recognition of informal transactions was secured by foreign trade carried on in Rome on an ever increasing scale. Since the third century BC, as a political and economic power, Rome was at the centre of Hellenistic world trade. Roman traders entered the east of the Mediterranean and foreign traders came to Rome. From the Punic Wars until the time of Augustus, Rome experienced a period of growth which was also reflected in the development of its private law. This development lasted deep into the third century AD, and it was during this period of growth as well as during its golden age that Roman law reached the heights which contributed to its role in the history of world legal

47 Honsell Mayer-Maly and Selb *Römisches Recht* (1987) 58; Schiller *Roman law. Mechanisms of development* (1978) 527; Kunkel *An introduction to Roman legal and constitutional history* (1975) 75.

48 Sohm 66.

49 Polybius 3 22–3 26 1 mentions the first treaty which was concluded in 509 BC. The second was concluded in 348 BC and the third in 279 BC.

50 Kunkel 75; Honsell Mayer-Maly and Selb 58.

51 Leonhard "Hospitium" in *Pauly's Real-Encyclopedie der classischen Altertumswissenschaft* (1913) vol 16 2493–2498.

systems.⁵² The development of Roman private law was influenced, *inter alia*, by the expansion of political and imperial power which had to provide for legal relations between and legal protection of foreigners. With imperial expansion came a new kind of trade and business. Contact with other peoples and their customs influenced the Roman economy which was no longer determined by the farming community, but by trade and money.⁵³ This, in turn, led to a city community which demanded new concepts in the field of private law. Whereas a farming community could be satisfied with a limited number of business transactions, the greater number of people, expanded trade, and credit movement demanded a wider variety of well-developed and practical transactions governed by principles of justice and fairness. Thus the development of the contract of sale, contract of letting and hiring, partnership and mandate: all consensual agreements based on *bona fides*. However, it should be noted that in spite of the contact with and influence of other nations, and the resulting development of the Roman legal system, Roman private law maintained its Roman characteristics.

An enormous amount of daily trade existed in Rome as well as in the rest of the Roman empire, and contracts needed to be concluded which would be valid in practice and which could be enforced in court. Although in the Greek east this problem of different legal systems had long been solved and a common system had been developed, by 242 BC the *ius civile* remained the only legal system in existence in Rome. This system did not provide for international legal relations.⁵⁴ For the maintenance of the economic life of the empire a new legal system with many legal innovations was needed. Foreign trade thus emerged as an "independent power" which confronted the *ius civile* with distinct legal customs and distinct juristic acts.⁵⁵ It was no longer possible to ignore these transactions or to say that they were not legally binding: given the scale on which they were taking place, it was imperative that they be recognised in terms of some acknowledged legal system. Recognition was therefore given to legal rules which had developed over time and which followed custom: in many cases international custom where trade was concerned.

Finally, this necessarily led to the development of a new legal system which could be applied to foreigners and Romans alike. In 242 BC a special praetor, the *praetor peregrinus*, was appointed to act as special judge for foreigners in Rome.⁵⁶ As already explained, there was a need for a legal system that applied to everyone, that is, free citizens of other nations who were subject to Rome but not Roman citizens, as well as Roman citizens. The *praetor peregrinus* was not bound by the *ius civile*, and the restrictions of the *ius civile* were not to be taken into consideration. In dispensing justice to foreigners, this praetor was now moulding and giving effect to a "new" or alternative legal system which had to regulate the informal transactions daily concluded in Rome. Every year the praetor promulgated an edict, and in these edicts the new system was taking shape and being codified. In this way, a new system, called the *ius gentium*, was acknowledged alongside the *ius civile*. The contents of this new system was to a large degree determined by such laws and customs as had come to regulate the

52 Kaser *Das Römische Privatrecht* (vol 1) (1971) 177.

53 *Ibid.*

54 *Ibid.*

55 Sohm 67.

56 *D* 1 2 2 28. Cf also Kaser 1984 *ZSS* (RA) 1 15ff.

rights of foreigners in other commercial centres at the time. Once these laws and customs had been accepted by the *praetor peregrinus*, they were regarded as Roman rules and became part of the *ius gentium*.⁵⁷ This new legal system was also in line with the principle of tolerant rule usually followed by Rome. Rome governed with a light hand so as to cause as little disturbance and resistance as possible, and the new legal system was fair and just, pliant and equitable. The result was that it was easily accepted when applied, and since it was called the *ius gentium*, the subject peoples felt that the new law was not solely the law of the conqueror, but also their own. Contracts of sale, service, loan and the like were customarily concluded and observed among other nations too, and it was easy to assume that the obligations arising from these transactions rested on legal principles which were more or less the same everywhere. Therefore the implication was that it was the law of all peoples, universal in both principle and application.

The *ius gentium* was, moreover, also influenced by the *ius civile*. This was the legal system which the *praetor peregrinus* was familiar with, and it was the model by which he was guided in shaping the new system. The most important changes he introduced were the new consensual contracts and the fact that the *ius civile* was stripped of its formalism and rigidity. Legal ideas underlying the existing civil law could subsequently be carried into the new legal system with better effect, and be brought into closer contact with modern and "international" ideas of justice. At this stage Rome was expanding into the east, and foreign – especially Greek – ideas were incorporated into its legal thought. Rome became the capital of the new world empire, and with it came the *ius gentium*, a universal law for all mankind. Legal recognition of informal transactions was secured. These transactions depended not on form, as had those of the *ius civile*, but on the will of the parties themselves. This meant a constant "cross-pollination" between the *ius gentium* and the *ius civile*. When legal disputes concerning foreigners came before the Roman courts, the *ius gentium* was applied. This was done in many cases on an *ad hoc*-basis, by expanding existing rules, as well as creating new rules necessitated by new circumstances.

This new legal system which was gradually introduced, consisted of a number of juristic acts which were all characterised by formlessness, ease of application and adaptability. Its adoption was due to contact between the commerce of Rome and the rest of the world. The *ius gentium* was in fact a portion of positive Roman law to which commercial usage and other sources of law, more specifically the edicts of the *praetor peregrinus*, had given legal recognition.⁵⁸ This meant that as adapted the *ius civile* discarded its national peculiarities and was transformed into a general law for the civilised world.⁵⁹ The *ius gentium* represented

57 Honsell Mayer-Maly and Selb 58. Cf also Cicero *De officiis* 3 17-69: "It is for this reason that our forefathers chose to understand one thing by universal law and another by the civil law. The civil law is not necessarily also the universal law, but the universal law ought to be also the civil law."

58 Kaser *Privatrecht* 202-203: The *ius gentium* was no "foreigner's" law: it was also applicable to Roman citizens. Nor was it some kind of private international law, since it was law that was immediately applicable. The name of this legal system was first found with Cicero, and then taken over by the jurists. The developed concept was used in three meanings, namely (1) private law institutions; (2) manifestations of human togetherness which were common to everyone since it was based on the *naturalis ratio*; and (3) interstate public law which is still called public law today.

59 Sohm 71.

the *ius aequum*. The law common to all mankind was based on the nature of things, and the general sense of equity obtaining among all men, exacting recognition everywhere by virtue of its inherent reasonableness.⁶⁰ The final change of the original *ius civile*, as influenced by the *ius gentium*, into a new *ius civile*, over a period of more than 500 years, was an uninterrupted process of development: the result of a vast series of small changes. The characteristic Roman sense of moderation and legality ensured that the new system constituted a body of principles in a firm harmonious structure, governed by the rules of natural equity. The ultimate result was the consequence of three factors which worked simultaneously and successively, namely the praetorian edict, Roman scientific jurisprudence, and imperial legislation.⁶¹

The *ius gentium* was of extreme importance for Roman private law in the sense that it was accepted that the requirements of consensual obligations were the same for all nations.⁶² Of course this did not mean that the Romans necessarily knew much, or anything at all, about other legal systems. It was only accepted to be so for practical reasons. What they regarded as the *ius gentium* and applicable to all peoples, was in fact nothing more than Roman law in both origin and nature. Economic life and legal practice did indeed change as a result of the world trade and contact with the Hellenistic legal system, but foreign legal rules were never simply incorporated into Roman law.⁶³ It can rather be said that contact with foreigners and their legal systems was but an impetus in the direction of creating new legal rules which were typical of the *ius civile*.⁶⁴

4 CONCLUSION

In conclusion it can be said that the establishment of peace was the single most important factor leading to the development of free foreign trade. The expansion of foreign trade and concomitant with it free trade was just an extension and further proof of typical tolerant Roman rule. In the resulting process of Romanisation, we find many of the features by which globalisation is characterised today: Extensive imperial and international commerce; a single political administration; a single empire and a single currency; and the gradual phasing out of cultural differences.

Legal protection was needed for the inhabitants of conquered countries who became subjects of Rome and for Rome's new trading partners. Furthermore, new legal institutions were necessitated by the blooming foreign trade. This resulted in the introduction and development of a new legal system, the *ius gentium*.

60 *Ibid.*

61 Sohm 73. Cf Cicero *De officiis* 3 17; Gaius *Inst* 1 1.

62 Kunkel 76–77.

63 *Idem* 77. Greek philosophy also had an influence on the development of Roman law, the most important being the introduction of writing (Kaser *Privatrecht* 179). So, eg, in the case of credit agreements between foreigners and Romans, promissory notes were used and they were regarded as binding by Roman courts (*idem* 374–375), although Roman law as such still clung to the oral *stipulatio* (the Romans at all times required that the formal demands of the *stipulatio* be complied with: cf *D* 45 2 11 1; *D* 24 1 57; *D* 45 1 134 2; *C* 8 37 1; *D* 2 14 7 12). But especially in the east, and not only there, it was accepted that the instrument of debt is quite sufficient without a *stipulatio*. This was derived from the general concept of justice which was based on the *naturalis aequitas* (*D* 12 4 3 7; *D* 12 6 15pr), *bonum et aequum* (*D* 12 1 32; *D* 12 6 65 4), *bona fides* (*D* 23 3 50pr), or the *ius gentium* (*D* 12 6 47; *D* 25 5 25).

64 Kunkel 77.

Although it was made up to a large degree of the legal rules of the *ius civile*, adjusted and rendered less rigid and more equitable, the new system also included a fair number of new rules. These were taken over from existing legal rules regarding trade and commerce which had long been accepted in the more advanced and developed eastern part of the empire. This *ius gentium* may also be regarded as the predecessor of the international *lex mercatoria*, the purpose of which is to bring together the most important legal norms governing the activities of international trade. Specific reference should also be made of present-day attempts by official organisations such as the *Institut du Droit International*, the *United Nations Commission on International Trade Law* and the *International Law Association* to unify areas of law which have bearing on international trade.

The aspects of globalisation which were touched upon in this paper clearly show the way for modern globalisation. It is, in fact, remarkable to note that so many of the characteristics of modern globalisation were already in place almost two thousand years ago. The present-day European Union seems, in many instances, merely to have stepped into the shoes of the Roman Empire. The final irony is that it was by a treaty called the Treaty of Rome that the European Community was established on 25 March 1957.

I would be shirking my responsibilities if I did not show my displeasure by ordering that Advocate Brown pays part of the costs of this application de bonis propriis. He allowed himself to be personally involved in his client's case. He did not approach applicant's case with the necessary detachment and professionalism. He should have withdrawn from the criminal case as soon as the applicant gave him conflicting instructions but certainly at the latest when information impinged upon his ears or mind that his client has accused him of dishonourable conduct. To have gone ahead to settle the papers in this application smacks of saving his own blushes irrespective of the potential prejudice to his client. He, in addition, abandoned his duty towards the court. I find it hard to separate him from his client in this whole sordid affair.

Kgomo J in Wilson v Director of Public Prosecutions [2002] 1 All SA 73 (NC) para 27.

Die interpretasie van artikel 2C van die Wet op Testamente 7 van 1953 (2)*

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1 INLEIDING

In die vorige bespreking is daar gewys op die onderskeie vorme van substitusie in die Suid-Afrikaanse erfreg asook op die gemeenregtelike posisie rondom substitusie. Die probleme ondervind met die vorige artikel 24 van die Algemene Regswysigingswet¹ is aangedui en die nuwe bepalings van artikel 2C(1) en (2) is uiteengesit. Daar is ook aangedui in welke mate artikel 2C daarin geslaag het om die probleme geskep deur artikel 24 op te los. Vervolgens word nou oorgegaan tot 'n bespreking van die nuwe probleme geskep deur artikel 2C.

2 NUWE PROBLEME

2.1 Repudiasie teenoor vooroorlye en onbevoegdheid

Die probleem

Die algemene onderliggende gedagte met artikel 2C was klaarblyklik om nie net vir die gemeenregtelike reël rondom vooroorlede afstammeling voorsiening te maak soos in artikel 24 nie, maar om ook die gevalle te behandel waar 'n benoemde afstammeling sy erfenis repudieer of onbevoeg is om te erf.

Nuwe verwarring word deur artikel 2C(1) en (2) geskep deur die feit dat artikel 2C(1) slegs verwys na 'n situasie waar 'n erfgenaam repudieer terwyl artikel 2C(2) ook van toepassing is waar die erfgenaam onbevoeg of vooroorlede is. Voorts word die woorde "behoudens die bepalings van subartikel (1)" amper as 'n nagedagtenis by artikel 2C(2) bygevoeg. Dit is klaarblyklik hierdie ondeurdagte byvoeging van dié woorde asook die betekenis van die frase "'n voordeel"² wat tot verwarring lei.

Volgens een interpretasie beteken artikel 2C(2) dat die desendente van 'n afstammeling wat onbevoeg is om te erf, of wat van sy reg om te erf afstand gedoen het, of wat voor die erflater oorlede is, net sal erf indien daar nie 'n oorlewende gade is nie.³ 'n Mens kan jouself afvra hoekom twee subartikels dan nodig was. Het die feit dat die wetgewer in artikel 2C(1) spesifiek verwys na die geval waar die afstammeling sy voordeel repudieer dalk daarmee iets te doen?

* Sien 2002 *THRHR* 223 vir die eerste bydrae in die reeks.

1 32 van 1952.

2 Sien die bespreking hieronder.

3 Cronjé en Roos *Erfreg vonnisbundel* (1997) 260.

Moet ons dit nie eerder interpreteer dat artikel 2C(2) van toepassing is al is daar 'n oorlewende gade maar die afstammeling het nie sy voordeel gerepudieer nie, maar was onbevoeg om te erf of het voor die testateur te sterwe gekom? Neem 'n praktiese voorbeeld: Die testateur bemaak sy huis aan sy vrou en sy seun. Dié seun vermoor egter die testateur en is gevolglik onbevoeg om te erf.⁴ Die testateur word oorleef deur sy weduwee maar ook sy twee kleinseuns (die moordenaar se kinders). Volgens die eerste interpretasie, indien ons die feit dat artikel 2C(1) slegs na repudiasie deur die erfgenaam verwys ignoreer, beteken dit dat die vrou die huis alleen erf. Heg ons egter waarde aan die repudiasievereiste, beteken dit dat die moordenaar nie gerepudieer het nie en gevolglik moet die twee kleinseuns hulle vader se gedeelte erf. Die tweede interpretasie is aanvanklik deur Cronjé en Roos⁵ (en verskeie ander skrywers⁶) aan die artikel geheg:

“Voorsiening word verder gemaak vir representasie in 'n geval waar 'n afstammeling onbevoeg is om te erf of waar hy repudieer. Waar die afstammeling repudieer, sal die voordeel, in die omstandighede waarvoor artikel 2C(1) voorsiening maak, na die oorlewende gaan en as daar nie 'n oorlewende gade is nie, na die repudierende afstammeling se afstammeling, gaan. Waar die afstammeling voor die erflater oorlede is, of onbevoeg is om te erf omdat hy byvoorbeeld die erflater vermoor het, sal die voordeel in sy afstammeling vestig en *nie in die erflater se oorlewende eggenoot nie*.”⁷

Ook Sonnekus⁸ dui op genoemde interpretasie as 'n moontlikheid. Volgens hom is die invoeging van die woorde “na die erflater se dood” in artikel 2C(2) alleen sinvol

“indien die statutêre aanwas ten gunste van die langsliewende gade van die testateur ingevolge subartikel (1) nie aanwending sal vind in alle gevalle waar die repudians en die langsliewende gade bloot in dieselfde testament gemeld word nie maar inderdaad binne die eng aanwending van die gemeneregtelike *coniecturae* sogenaamd *re et verbis* gevoeg was. Andersins gaan in talle gevalle die herformuleerde statutêre substitusie ten gunste van die repudians se afstammeling, waarvoor in subartikel (2) voorsiening gemaak word, nie in werking tree nie”.⁹

Lees 'n mens die verslag van die Regskommissie¹⁰ wil dit voorkom asof die kommissie dalk ook dié interpretasie in gedagte gehad het. Die kommissie was naamlik van mening dat die posisie moet ooreenstem met die posisie wat ten opsigte van die intestate erfreg in die praktyk ingeburger geraak het.¹¹ Volgens dié praktyk kan kinders hulle erfenisse ten gunste van 'n langsliewende eggenoot *repudieer*.¹² Dit wil dus voorkom asof die gedagte was dat 'n langsliewende eggenoot 'n afstammeling moet representeer in die geval waar die afstammeling 'n voordeel *repudieer*.

4 *Ex parte Steenkamp and Steenkamp* 1952 1 SA 744 (T).

5 *Erfreg vonnisbundel* (1993) 238.

6 Sonnekus “Voorgestelde statutêre wysiging van die erfreg” 1992 *TSAR* 173; Schoeman “Bevoegdheid van persone om erfregtelik bevoordeel te word” 1992 *De Jure* 54; Roos “Hersiening van die erfreg” 1993 *THRHR* 113; De Waal, Schoeman en Wiechers *Law of succession* (1996) 101.

7 My kursivering.

8 1992 *TSAR* 173.

9 *Ibid.*

10 *Verslag oor die hersiening van die erfreg*: Projek 22 (1991) 118–121.

11 121.

12 Die posisie in die intestate erfreg is ook gewysig op sterkte van dié verslag. Die bevoording van a 1(6) en (7) van die Wet op Intestate Erfopvolging 81 van 1987 wat deur die Wysigingswet tot die Erfreg 43 van 1992 ingevoer is, is egter bykans identies met dié van a 2C(1) en (2) en weinig hulp is dus daaruit te verkry.

Dit bring ons by die vraag of laasgenoemde interpretasie inderdaad korrek is. Dit blyk dat Cronjé en Roos later¹³ 'n ander interpretasie as hulle aanvanklike interpretasie aan artikel 2C geheg het. Hulle verklaar dat die feit dat artikel 2C(2) onderworpe aan artikel 2C(1) gestel is

“beteken dat die afstammeling van 'n afstammeling wat voor die erflater oorlede is, of wat onbevoeg is om te erf, of wat van sy of haar reg om te erf afstand gedoen het, *net* sal erf as daar nie 'n oorlewende gade is wat kan erf nie”.¹⁴

Ook Van der Merwe en Rowland¹⁵ wys op die probleem:

“Dit is egter nie duidelik of die ‘voordeel’ waarom dit gaan dieselfde voordeel moet wees nie, of die testateur met ander woorde bedoel het dat die afstammeling en die gade die voordeel gesamentlik moes bekom het, dan wel of die bepaling van die subartikel ook in werking tree waar beide testamentêr bevoorreedes is, maar ten opsigte van afsonderlike goedere. Indien laasgenoemde die geval is, is dit onduidelik waarom die tempering van die omvang van subartikel (2) nie ook gevalle van vooroorlye en onbevoegdheid van die afstammeling dek waar daar 'n bevoorreedde gade in die lewe is nie. Indien eersgenoemde die bedoeling van die wetgewer weerspieël, val dit insgelyks vreemd op dat subartikel (1) nie ook gevalle van vooroorlye en onbevoegdheid van die gade in die prentjie bring nie.”

Dié stelling van Van der Merwe en Rowland bring ons by 'n aantal verdere probleme waarop die aandag gevestig moet word, alvorens gepoog kan word om aan te dui welke van bogemelde interpretasies as korrek beskou moet word.

Die eerste van die verdere probleme met die klaarblyklik ondeurdagte byvoeging van die frase “behoudens die bepaling van subartikel (1)” in artikel 2C(2), is die vraag of representasie van 'n erfgenaam deur die oorlewende gade ook kan geskied selfs waar die erfgenaam nie saam met die gade ten opsigte van dieselfde voordeel benoem is nie. Die antwoord op dié vraag hang saam met die antwoord op 'n probleem waaroor daar geensins duidelikheid bestaan nie, naamlik of die wetgewer bedoel het om die geval te reël waar die gade en die afstammeling benoem word om *dieselfde* voordeel te erf, en of die artikel ook van toepassing is waar *verskillende* voordele aan die afstammeling en die gade in dieselfde testament bemaak word.¹⁶ Indien die testateur dus sy plaas aan sy vrou bemaak en sy strandhuis aan sy seun en die seun repudieer sy erfenis, gaan die strandhuis aan die gade (volgens artikel 2C(1)) of word die seun deur sy afstammeling gerepresenteer (volgens artikel 2C(2))? Die bewoording van artikel 2C is geensins duidelik op hierdie punt nie aangesien slegs van “'n voordeel” melding gemaak word.¹⁷ Die gemenerereg kan ook nie hier van hulp wees nie aangesien sowel representasie deur 'n oorlewende eggenoot as representasie in geval van repudiasie innoverings eie aan artikel 2C is.¹⁸ Word die betekenis van “'n voordeel” beskou as synde dat die gade en die afstammeling op *dieselfde* voordeel geregtig moet

13 *Erfreg vonnisbundel* (1997) 260.

14 Cronjé en Roos (1997) 260. Sien ook Roos “Hersiening van die erfreg” 1993 *THRHR* 113.

15 *Die Suid-Afrikaanse erfreg: Byvoegsel* (1992) 31.

16 Dit wil voorkom asof die interpretasie van a 2C in sy geheel grotendeels afhanklik is van die interpretasie van die frase “'n voordeel” – sien die bespreking hieronder.

17 Vir 'n volledige bespreking sien Sonnekus 1992 *TSAR* 172 ev. Sien ook Roos 1993 *THRHR* 113; Van der Merwe en Rowland *Byvoegsel* 31; Cronjé en Roos (1997) 260.

18 Sodanige representasie was onbekend aan sowel a 24 van die Algemene Regswysigingswet 32 van 1952 as die gemenerereg. Sien Joubert “Artikel 24 Algemene Regswysigingswet 32 van 1952” 1954 *THRHR* 40 ev en Sonnekus 1992 *TSAR* 159 172 ev; Van der Merwe en Rowland *Byvoegsel* 31.

wees, beteken dit dat die gade in geval van repudiasie deur die afstammeling die hele voordeel erf indien hulle vir dieselfde voordeel benoem is. Dié interpretasie beteken ook dat indien die gade en die afstammeling op twee verskillende bemakings ingevolge die testament geregtig is en die afstammeling repudieer sy afsonderlike voordeel, hy ingevolge artikel 2C(2) deur sy afstammeling gerepresenteer sal word. Word dit egter geïnterpreteer om ook die geval te dek waar hulle op verskillende bemakings geregtig is, beteken dit dat die afstammeling se afstammeling hom nie representeer indien hy sy afsonderlike voordeel repudieer nie, maar dat die gade hom representeer.

Veral twee reëls van uitleg van wette tree op die voorgrond, naamlik dat die bedoeling van die wetgewer gevind moet word¹⁹ en dat woorde in hulle gewone, alledaagse gebruik geïnterpreteer moet word ten einde die bedoeling vas te stel.²⁰ Die wetgewer praat slegs van “’n voordeel” in die enkelvoud en sê ook dat die gade en die afstammeling “saam” op ’n voordeel geregtig moet wees. Dit wil dus voorkom asof die gade en die afstammeling op *dieselfde* voordeel geregtig moet wees. So ’n interpretasie sou egter strydig wees met die vroeëre praktyksposisie²¹ dat ’n afstammeling enige voordeel ten gunste van die oorlewende eggenoot kon repudieer en aangesien dit klaarblyklik die wetgewer se bedoeling was om dié posisie in te bring, sou dit ook strydig met die wetgewer se bedoeling wees. Die enkelvoud sou ook nie kon verklaar wat die posisie sal wees indien die erflater byvoorbeeld bepaal: “Ek bemaak my plaas, my strandhuis en my voertuig aan my vrou en kinders” nie aangesien hier sprake is van meerdere voordele waarop die gade en die afstammeling “saam” geregtig is. Die aanvanklike bewoording van die voorgestelde artikel 1(6) en (7) van die Wet op Intestate Erfopvolging dui ook daarop dat die Regskommissie waarskynlik meerdere voordele in gedagte het.²² In dié klousules word gesê dat die gade en die afstammeling saam op die “boedel” geregtig moet wees – dus op meerdere voordele. Hoewel dit dus uit die aanvanklike bewoording van artikel 1(6) en die Regskommissie se stelling dat die praktykreëling ingebring moet word, wil voorkom asof die kommissie moontlik ook die geval waar die afstammeling en die eggenote op verskillende voordele geregtig is in gedagte gehad het, blyk dit nie duidelik uit die Wet nie. Cronjé en Roos²³ stel voor dat “’n voordeel” geïnterpreteer moet word om ook te verwys na die geval waar die gade en die afstammeling ingevolge verskillende testamentêre bepalinge op verskillende voordele geregtig is.

Sonnekus²⁴ stel voor dat die probleem opgelos kan word deur die invoeging van die woorde “tensy uit die samehang van die testament en omringende omstandighede anders blyk” omdat die hof daardeur in staat gestel sal word om die bedoeling waarmee die afstammeling repudieer in aanmerking te neem. Indien die afstammeling dus bedoel om ten gunste van die eggenoot te repudieer, kan die eggenoot representeer selfs al is sy en die afstammeling vir twee afsonderlike

19 *Farrar's Estate v Commissioner for Inland Revenue* 1926 TPD 501; *R v Thamae* 1927 EDL 173; *R v Westenraad* 1941 OPD 105; Steyn *Die uitleg van wette* (1981) 2; Devenish *Interpretation of statutes* (1992) 43–35.

20 *Union Government v Mack* 1917 AD 731; *Sigcau v Sigcau* 1941 CPD 344; *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 1 SA 925 (A); Steyn 6; Devenish 28.

21 Sien Regskommissie *Verslag* 119.

22 *Idem* 146. Sien ook die aangehaalde klousules hieronder.

23 *Erfreg vonnisbundel* (1997) 260.

24 1992 TSAR 173.

voordele benoem. Aangesien dié bewoording egter nie tans in die Wet voorkom nie sal die tyd moet leer hoe die howe artikel 2C(1) sal interpreteer.

Vir doeleindes van verdere bespreking word die eenvoudigste voorbeeld as basis vir die bespreking aanvaar, naamlik waar die testateur bepaal: "Ek bemaak my huis aan my vrou en my kinders."

Aanvaar ons dat dit hier gaan om 'n enkele voordeel waarop die gade en die afstammeling geregtig is, kan ons terugkeer na die oorspronklike probleme, naamlik:

- (1) Kan afstammeling van 'n afstammeling hom representeer waar hy (a) saam met die oorlewende gade benoem is; (b) daar 'n oorlewende gade is; en (c) hy repudieer?
- (2) Kan afstammeling van 'n afstammeling hom representeer waar hy (a) saam met die oorlewende gade vir 'n enkele voordeel benoem is; (b) daar 'n oorlewende gade is; en (c) waar hy onbevoeg of vooroorlede is?

Daar is geen twyfel dat die antwoord op die eerste vraag ontkenkend is nie aangesien die situasie daar beskryf, die besondere situasie is waarvoor artikel 2C(1) voorsiening maak. Indien 'n afstammeling repudieer terwyl hy saam met 'n oorlewende gade op dieselfde voordeel geregtig is, word hy deur die oorlewende gade gerepresenteer en nie deur sy afstammeling nie.

Die antwoord op die tweede vraag is egter meer problematies aangesien dié situasie deur artikel 2C(2) gedek word maar dit nie duidelik is wat met die woorde "onderworpe aan die bepalings van subartikel (1)" in artikel 2C(2) bedoel word nie. Maak dit slegs voorsiening vir die geval waar die afstammeling repudieer (soos in artikel 2C(1) bepaal) of beteken dit dat die ander twee gevalle, naamlik waar die afstammeling vooroorlede of onbevoeg is, ook onderworpe is aan die bepaling dat die eggenote in die afstammeling se plek moet erf? Anders gestel: Is artikel 2C(2) net onderhewig aan die vereiste dat daar 'n oorlewende gade moet wees of is dit onderhewig aan die geheel van artikel 2C(1), naamlik dat die afstammeling moet repudieer *en* dat daar 'n oorlewende gade moet wees? Volgens Cronjé en Roos²⁵ se oorspronklike interpretasie, asook dié van Sonnekus,²⁶ is die antwoord dat die afstammeling van die afstammeling hom wel sal representeer al is daar 'n oorlewende eggenoot indien hy onbevoeg of vooroorlede is. Hulle beskou dus artikel 2C(2) as onderworpe aan artikel 2C(1) in sy geheel gelees.

Die latere interpretasie van Cronjé en Roos,²⁷ naamlik dat 'n vooroorlede, onbevoegde of repudiërende afstammeling slegs gerepresenteer kan word deur sy afstammeling indien daar nie 'n oorlewende eggenoot is nie, kom dus daarop neer dat artikel 2C(2) as slegs onderhewig aan die bepaling in artikel 2C(1) dat daar 'n oorlewende gade moet wees, beskou word.

Indien dié latere interpretasie van Cronjé en Roos²⁸ korrek is, bly die vraag waarom twee subartikels dan nodig was, onbeantwoord. Dit sal beteken dat die langsliewende gade in alle gevalle (ongegag of die afstammeling repudieer, onbevoeg of vooroorlede is) in die plek van die afstammeling moet erf indien hulle saam

25 *Erfreg vonnisbundel* (1993) 238. Sien die bespreking hierbo.

26 1992 *TSAR* 173.

27 *Erfreg vonnisbundel* (1997) 260. Sien die bespreking hierbo.

28 *Ibid.*

benoem is om 'n bepaalde voordeel te neem.²⁹ Op sy beurt bring so 'n interpretasie 'n radikale wysiging van die gemenerereg deur die wetgewer mee.³⁰

Word die Regskommissie se verslag³¹ bestudeer, kom daar effens meer helderheid. Die agtergrond tot die opstel van artikel 2C blyk die oorweging van die voormalige artikel 1(4)(c) van die Wet op Intestate Erfopvolging³² te wees. Volgens dié artikel kon die afstammeling van 'n afstammeling wat onbevoeg was om te erf of wat sy voordeel gerepudieer het, nie sodanige afstammeling representeer nie. (Dit was ook die posisie in artikel 24 ten opsigte van die testate erfreg.) Deur middel van artikel 1(4)(c) is 'n onderskeid dus getref tussen repudiasie en onbevoegdheid aan die een kant teenoor die posisie van 'n vooroorledene kragtens die gemenerereg aan die ander kant. Artikel 1(4)(c) het dus die ou gemeenregtelike posisie³³ bevestig. Die aanbevelings van die kommissie in dié verband was dat die onderskeid uit die weg geruim moet word en dat dieselfde reël moet geld ongeag repudiasie, vooroorlye of onbevoegdheid van die erfgenaam. Voorts moes daar ook voorsiening gemaak word vir die praktykreëling dat 'n afstammeling ten gunste van 'n langsliewende gade kon repudieer. Die aanbevelings ten opsigte van die intestate erfreg is *mutatis mutandis* deur die Regskommissie op die testate erfreg van toepassing gemaak,³⁴ behalwe dat die voorgestelde wetsartikels anders bepaal het.

Daar is voorgestel dat die artikels rakende die intestate erfreg soos volg bepaal:³⁵

“(6) Indien 'n afstammeling van 'n oorledene . . . wat saam met die oorlewende gade van die oorledene op 'n intestate boedel geregtig is, van sy reg om so 'n erfgenaam te wees afstand doen, vestig enige sodanige voordeel in die oorlewende gade.

(7) In geval van 'n persoon wat onbevoeg is om 'n erfgenaam van die intestate boedel van die oorledene te wees, of wat van sy reg om so 'n erfgenaam te wees afstand doen in omstandighede waar subartikel (6) nie geld nie, vererf enige voordeel wat hy sou ontvang het as hy nie aldus onbevoeg was of afstand gedoen het nie, asof hy onmiddellik voor die erflater se dood gesterf het en, waar toepaslik, terwyl hy nie aldus onbevoeg was nie.”

Hieruit blyk duidelik dat daar nie uitdruklik voorsiening gemaak is vir die posisie waar die afstammeling vooroorlede is nie, aangesien die gemenerereg duidelik was, naamlik representasie deur die afstammeling se afstammeling vind plaas. Daar was dus geen ruimte vir plaasvervulling deur die langsliewende gade nie. Voorts is dit ook duidelik dat subartikel (7) net geld waar die erfgenaam repudieer in “omstandighede waar subartikel (6) nie geld nie”, dit wil sê representasie deur afstammeling vind plaas slegs in die geval waar die erfgenaam wat *repudieer* nie deur 'n langsliewende gade vervang kan word nie. Dit is dus duidelik dat die oogmerk van die kommissie nie was om die gemenerereg onnodig te wysig nie maar eerder om die posisie in geval van repudiasie of onbevoegdheid in lyn te bring met

29 Selfs al word die frase “'n voordeel” geïnterpreteer as ook verwysend na verskillende voordele, sal dié interpretasie tot dié gevolg lei.

30 Sien die bespreking hierbo.

31 Projek 22 (1991) 118–121.

32 81 van 1987.

33 Sien Joubert 1954 *THRHR* 19.

34 *Verslag* 121.

35 Kl 12 van die wetsontwerp; *Verslag* 146.

die gemenerereg ten opsigte van vooroorlye. Voorts is 'n nuwe beginsel in geval van repudiasie ingevoer, naamlik dat die langsliewende in die eerste plek die afstammeling moet representeer en daarna, by gebrek aan 'n langsliewende, moet die afstammeling van die erfgenaam hom representeer. Ook die aanvanklike voorgestelde bewoording van artikel 2C(2) lui dat dit van toepassing is "behalwe waar subartikel (1) van toepassing is". Dit wil dus voorkom asof Cronjé en Roos³⁶ en Sonnekus³⁷ se aanvanklike interpretasie tog korrek was.

Soos reeds aangedui, blyk dit nóg uit die voorgestelde artikel 1(6) nóg uit die voorgestelde artikel 2C(2) wat met "'n voordeel" bedoel word, hoewel dit wil voorkom asof die kommissie moontlik ook die geval waar die afstammeling en die eggenote op verskillende voordele geregtig is in gedagte gehad het.³⁸

Korrekte interpretasie?

Die vraag kan nou gestel word of die interpretasie hierbo voorgestel na 'n ontleding van artikel 2C(2) korrek is. Om dié vraag te beantwoord kan ons artikel 2C(2) soos volg verdeel en ontleed:

- 1 Indien 'n afstammeling (ontleding: enige afstammeling – nie slegs eie kinders nie)
- 2 van die erflater (ontleding: slegs die testateur se eie afstammeling en nie ook broerskinders nie, word deur artikel 2C geraak)
- 3 ingevolge die bepalings van 'n testament (ontleding: *slegs* 'n testament is hier ter sprake)³⁹
- 4 hetsy as 'n lid van 'n klas of andersins (ontleding: selfs as afstammeling by name benoem is, geld die bepaling dus)⁴⁰
- 5 ten tyde van die dood van die erflater op 'n voordeel geregtig sou gewees het indien hy geleef het (ontleding: die posisie by 'n feitestel soos in *Ex parte Graham*⁴¹ laat die vraag na die toepassing van artikel 2C ten opsigte van *commorientes* ontstaan)⁴²
- 6 op 'n voordeel (ontleding: die betekenis van dié frase is sentraal tot die interpretasie van die artikel maar is onduidelik; suiwer gebaseer op die reëls van uitleg van wette, gesien in die lig van die bedoeling van die Regskommissie, is hier waarskynlik sprake van meerdere voordele)⁴³
- 7 geregtig sou gewees het indien hy geleef het, (ontleding: dws om voorsiening te maak vir die geval waar die afstammeling vooroorlede⁴⁴ is)
- 8 of nie onbevoeg was om te erf nie, (ontleding: om voorsiening te maak vir onbevoegdheid wat nie deur die gemenerereg aangespreek is nie; om voorsiening te maak vir die geval waar die afstammeling byvoorbeeld die testateur vermoor het of by die verlyding van die testament⁴⁵ betrokke was)

36 *Erfreg vonnisbundel* (1993) 238. Sien die bespreking hierbo.

37 1992 TSAR 173.

38 Sien die bespreking hierbo.

39 Sien die bespreking van addisionele probleme hieronder.

40 Die bepaling verskil dus van die posisie in die gemenerereg – sien die bespreking hierbo en -onder.

41 1963 4 SA 145 (D).

42 Die vraag word in deel 3 van hierdie reeks bydraes bespreek.

43 Sien die verduideliking hierbo en -onder.

44 Of saam met die erflater gesterf het – sien die bespreking hieronder.

45 Ingevolge a 4A(1) van die Wet op Testamente 7 van 1953 is 'n getuie tot 'n testament, 'n persoon wat die testament in opdrag van die testateur onderteken, of wat die testament of

- 9 of nie na die erflater se dood afstand gedoen het van sy reg om so 'n voordeel te ontvang nie, (ontleding: om voorsiening te maak vir repudiasie deur die afstammeling)
- 10 dan is die afstammeling van daardie afstammeling, (ontleding: enige afstammeling mag 'n afstammeling representeer en nie slegs wettige afstammeling nie)
- 11 behoudens die bepalings van subartikel (1), (ontleding: dws onderworpe daaraan dat indien (a) die afstammeling saam met die oorlewende gade van die erflater op 'n voordeel ingevolge 'n testament geregtig is, en (b) dat hy afstand gedoen het van sy reg om so 'n voordeel te ontvang (dus gerepudieer het), sodanige voordeel in die oorlewende gade vestig)
- 12 staaksgewyse geregtig op die voordeel,
- 13 tensy uit die samehang van die testament anders blyk (ontleding: 'n Afstammeling van die testateur mag dus ingevolge a 2C(2)⁴⁶ net gerepresenteer word as die bepalings van die testament nie 'n teenstrydige bedoeling openbaar nie).⁴⁷

Uit dié ontleding wil dit tog voorkom asof bogemelde interpretasie (die eerste interpretasie van Cronjé en Roos⁴⁸ en Sonnekus⁴⁹) korrek is.⁵⁰

Aangesien die onderhawige probleem egter nog nie voor die hof gedien het nie word die interpretasie van die howe getrig afgewag.

2.2 Bevoordeeldes by name benoem

Nog 'n nuwe probleem wat uit artikel 2C voortspruit, is die feit dat daar 'n diskrepansie bestaan tussen artikel 2C(1) en 2C(2) wat betref die vraag of representasie kan plaasvind indien die erflater sy afstammeling by name⁵¹ ingestel

enige gedeelte daarvan in sy eie handskrif uitskryf, en die persoon wat tydens die verlyding van die testament die gade van sodanige persoon is, onbevoeg om enige voordeel kragtens daardie testament te ontvang. Ingevolge a 4A(2) kan die hof egter sodanige persoon of sy gade bevoeg verklaar om 'n voordeel ingevolge die testament te ontvang as die hof daarvan oortuig is dat sodanige persoon of sy gade nie die erflater by die verlyding van die testament bedrieg of onbehoorlik beïnvloed het nie. Tweedens is 'n persoon of sy gade nie onbevoeg om 'n voordeel kragtens die testament te ontvang nie as hy intestaat van die erflater sou geërf het ingeval die erflater intestaat gesterf het. Sodanige persoon of sy gade is egter nie daarop geregtig om meer te erf as wat hy intestaat sou geërf het nie. Derdens is 'n getuie of sy gade nie onbevoeg om ingevolge die testament te erf as die betrokke testament onderteken is deur minstens twee ander bevoegde getuies wat geen voordeel kragtens die testament ontvang nie. Indien 'n afstammeling wat betrokke was by die verlyding van die testament nie ogv een van genoemde redes bevoeg verklaar word om kragtens die testament te erf nie (of indien hy slegs sy intestate gedeelte erf), sal hy deur sy afstammeling gesubstitueer word kragtens a 2C(2).

46 Sien kommentaar hieronder oor die gebrek aan die voorbehoudsbepaling by a 2C(1).

47 Neem die volgende voorbeeld in 'n testament: "Ek bemaak my huis aan my seun Dawid. As hy dit nie erf nie moet die huis na my dogter Caroline gaan." As Dawid nou voor die testateur sterf en 'n kind Ben nalaat, sal Ben nie vir Dawid kan representeer nie, aangesien die testateur in sy testament 'n teenstrydige bedoeling geopenbaar het. Sien ook Roos 1993 *THRHR* 113.

48 *Erfreg vonnisbundel* (1993) 238.

49 1992 *TSAR* 173.

50 Dws die interpretasie soos aanvanklik voorgestel deur Cronjé en Roos *Erfreg vonnisbundel* (1993) 238, Sonnekus 1992 *TSAR* 172 ev en Roos 1993 *THRHR* 113.

51 Oor die gemeenregtelike posisie in die algemeen sien Joubert 1954 *THRHR* 19 ev.

het. Soos reeds aangedui⁵² was die posisie in die gemenerereg dat 'n vooroorlede afstammeling nie deur sy afstammeling gerepresenteer kon word indien die testateur hom by name benoem het om 'n voordeel te ontvang nie. Die motivering hiervoor was dat die feit dat die testateur die erfgenaam by name genoem het, aangedui het dat sy bedoeling was dat dié besondere erfgenaam moes erf en dat hy nie deur iemand anders (sy afstammeling) vervang kon word nie.

Artikel 2C(1) maak slegs voorsiening vir die geval waar 'n "afstammeling" "afstand doen" van sy voordeel (dit sluit dus nie onbevoegdheid of die feit dat hy vooroorlede mag wees, in nie). In artikel 2C(2) word egter spesifiek aangedui dat representasie (in geval van vooroorlye, onbevoegdheid of repudiasie) wel kan plaasvind indien die bevoordeelde benoem is "hetsy as lid van 'n klas of andersins". Dié byvoegsel ontbreek dus by artikel 2C(1). Die vraag is gevolglik of 'n testateur se oorlewende gade sy afstammeling kan representeer waar die testateur 'n bemaking aan "my vrou en my seun, Jan" gemaak het en Jan dan repudieer. Is die testateur se bedoeling dus, soos in die gemenerereg ten opsigte van vooroorledenes beskou, dat alleen die betrokke seun en niemand anders in sy plek mag erf nie? Aangesien representasie deur 'n gade 'n innovering is wat nie in die gemenerereg gegeld het nie,⁵³ kan aanvaar word dat die gemeenregtelike interpretasie nie van toepassing is nie. Dit wil voorkom asof die bedoeling van die wetgewer is dat repudiasie ten gunste van die gade moet kan plaasvind, ongeag of die erfgenaam by name of as lid van 'n klas benoem is.⁵⁴ Word daar ook gekyk na die geheel van artikel 2C, dit wil sê ook die bepalinge van artikel 2C(2), wil dit voorkom asof die bedoeling van die wetgewer wel was om voorsiening te maak vir die geval waar die erfgename by name genoem word aangesien in artikel 2C(2) vermeld word dat afstammeling "hetsy as lid van 'n klas of andersins" betrokke is. Dié redenasie ter syde, kan daar waarskynlik ook geargumenteer word dat enige testateur wat sy vrou en 'n afstammeling benoem om te erf, sal antwoord dat sy vrou die hele voordeel moet erf indien die afstammeling weier om te erf. Die waarskynlike bedoeling van die testateur verskil dus in hierdie situasie van die waarskynlike bedoeling wat in die gemenerereg ingelees is in geval van vooroorlede afstammeling wat by name benoem is. Dit is gevolglik waarskynlik dat substitusie deur 'n oorlewende gade moontlik is waar 'n afstammeling repudieer (dus in die omstandighede genoem deur artikel 2C(1)), selfs al het die testateur die afstammeling by name benoem.

Wat artikel 2C(2) betref, bestaan daar egter geen twyfel dat dit, in die geheel beskou, alle moontlikhede dek en die gemeenregtelike posisie⁵⁵ wysig nie aangesien daar uitdruklik bepaal word dat 'n afstammeling "hetsy as lid van 'n klas of andersins" benoem kan word. Vandag is dit duidelik dat representasie deur 'n afstammeling se afstammeling moontlik is in die omstandighede genoem in artikel 2C(2), selfs al het die testateur die bevoordeelde by name benoem.

2.3 Gebrek aan voorbehoudsbepaling by artikel 2C(1)

Artikel 2C(2) bepaal dat representasie van 'n afstammeling deur sy afstammeling in geval van sy vooroorlye, onbevoegdheid of repudiasie plaasvind "tensy uit die

52 Sien die bespreking van die gemeenregtelike posisie hierbo en Joubert 1954 *THRHR* 22.

53 Sien Van der Merwe en Rowland *Byvoegsel* 31.

54 In die lig van die feit dat die regskommissie se oogmerk was om voorsiening te maak vir die geval waar 'n erfgenaam repudieer juis met die doel om die eggenote te bevoordeel (sien *Verlag* 119).

55 Joubert 1954 *THRHR* 21–22 41–42.

samehang van die testament anders blyk". Indien 'n testateur dus bepaal:⁵⁶ "Ek bemaak my huis aan my seun Dawid. As hy dit nie erf nie moet die huis na my dogter Caroline gaan" bestaan daar 'n duidelike teenstrydige bedoeling. As Dawid nou voor die testateur sterf en 'n kind Ben nalaat, sal Ben nie ingevolge artikel 2C(2) vir Dawid kan representeer nie, aangesien die testateur in sy testament 'n teenstrydige bedoeling geopenbaar het.⁵⁷

Dieselfde voorbehoudsbepaling verskyn egter nie by artikel 2C(1) nie. Die vraag is dus of die wetsbepaling voorrang sal geniet selfs al blyk 'n teenstrydige bedoeling uit die bepaling van die testateur. Neem die volgende voorbeeld: "Ek bemaak my huis aan my vrou en aan my seun Jan. Indien Jan nie sy gedeelte kan of wil neem nie, bemaak ek dit aan my dogter Daleen." Hieruit blyk duidelik 'n strydige bedoeling met dit wat deur die Wet in die vooruitsig gestel word. Weeg die wetsbepaling nou die swaarste of word daar, soos allerweë in die erfreg, aan die bedoeling van die erfflater gevolg gegee?⁵⁸

In die Suid-Afrikaanse erfreg word volkome testeervryheid, onderhewig aan enkele uitsonderings, erken.⁵⁹ Dié uitsonderings behels dat 'n bepaling wat *contra bonos mores*, onmoontlik, te vaag of in stryd met die reg is, nie uitgevoer sal word nie.⁶⁰ Afgesien van dié uitsonderings word 'n hoë premie op testeervryheid geplaas en is 'n testateur volkome vry om oor sy goed te beskik soos hy wil. Die hooggeregshof het geen algemene bevoegdheid om toe te stem dat die testateur se testament deur sy begunstigdes daarkragtens in stryd met sy uitdruklike wil gewysig of verander word nie⁶¹ en selfs al stem die begunstigdes daartoe in, kan die hof nie die bindende bepalings van 'n testament verander nie.⁶²

Dit wil nou voorkom asof die bepalings van artikel 2C(1) inbreuk maak op dié hoë premie wat nog altyd op testeervryheid geplaas is. Dié artikel saamgelees met die algemene regsreël dat 'n handeling in stryd met 'n wet nietig is,⁶³ skep die indruk dat die testateur nie meer vry is om self te bepaal wie in 'n afstammeling se plek mag erf indien daardie afstammeling saam met 'n gade benoem is om 'n voordeel te neem en hy sy voordeel repudieer nie. Die verklaring vir die oorsig van die wetgewer om die bepaling "tensy uit die testament anders blyk" by te voeg, is waarskynlik daarin te vinde dat die artikels oorspronklik opgestel is om vir die intestate erfreg voorsiening te maak en toe,

56 Duidelikheidshalwe word die voorbeeld in vn 47 hierbo herhaal.

57 Sien ook Sonnekus 1992 *TSAR* 173; Roos 1993 *THRHR* 113.

58 'n Beter voorbeeld, wat 'n mens dalk meer hieroor sal laat wonder, is die volgende: "Ek bemaak my huis aan my seun Dawid. As hy dit nie erf nie moet die huis na my sekretaresse Nicole gaan."

59 *De Wet v De Wet* 1951 4 SA 212 (K); *Bydawell v Chapman* 1953 3 SA 514 (A); *Ex parte Van der Merwe* 1962 4 SA 690 (N); *Ex parte Jewish Colonial Trust Ltd: In re Estate Nathan* 1967 4 SA 397 (N); *Van der Merwe en Rowland* 612; *De Waal, Schoeman en Wiechers* 85.

60 *Grusd v Grusd* 1946 AD 465; *Levy v Schwartz* 1948 4 SA 930 (W); *Ex parte Mouton* 1955 4 SA 460 (A); *Stevenson v Greenberg* 1960 2 SA 276 (W); *Ex parte Dessels* 1976 1 SA 851 (D); *De Klerk v De Witt* 1973 SA 865 (NK).

61 *Ex parte Loewenthal* 1939 TPD 250; *Jewish Colonial Trust v Estate Nathan* 1967 4 SA 397 (N); *Ex parte Kruger* 1976 1 SA 609 (O).

62 *Bydawell v Chapman* 1953 3 SA 514 (A); *Ex parte Watling* 1982 1 SA 936 (K).

63 Steyn 195; Devenish 224.

blykbaar sonder veel nadenke, op die testate erfreg van toepassing gemaak is.⁶⁴ In die intestate erfreg is daar natuurlik nie sprake van 'n teenstrydige bedoeling van die testateur nie en dus was dit nie nodig om die voorbehoud by te voeg nie.

Hopelik sal die houe wanneer die onderhawige subartikel geïnterpreteer moet word, aandag skenk aan die reël van uitleg dat die Wet as geheel gelees moet word⁶⁵ en die vermoede dat die wetgewer nie die bestaande reg meer wil wysig as wat nodig is nie.⁶⁶ Indien die geheel van artikel 2C gelees word en die bepaling in artikel 2C(2) in ag geneem word, sal die hof hopelik beslis dat die bedoeling met artikel 2C(1) nie is dat die testateur nie 'n strydige bepaling in sy testament kan maak nie.

(Word vervolg)

I must also say that I do not consider the standard form of summons used in the magistrates' courts to be a particularly user-friendly document. In my view, consideration should be given to amending both the High Court and Magistrates' Courts rules to require service with the summons of a form similar to Form 9 of the Land Claims Court rules. This form incorporates a warning of the significance of the documents being served and the need to act on them urgently. The form is in all eleven official languages.

Dodson J in Van Zyl NO v Maarman [2000] 4 All SA 212 LCC 251b-c.

64 Dié afleiding word gemaak uit die oorweging wat aan die intestate erfreg geskenk is en die aanbevelings wat gemaak is in die verslag van April 1985 en die feit dan daar in Werkstuk 19 van Projek 22 van September 1987 net aanbeveel is dat die "reëling in artikel 24 moet ooreenstem met die reëling by intestate erfopvolging" (78). Dit was ook die aanbeveling in die finale verslag van 1991. Dit is ook uit die onderskeie verslae duidelik dat genoeg oorweging aan a 24 en substitusie deur die gade in die intestate erfreg geskenk is, maar dat die innovasie van substitusie deur die gade by testate erfreg eers by die finale verslag (1991) ter sprake gekom het en dat dáár nie aandag gegee is aan die interpretasie van artikels soortgelyk aan dié vir doeleindes van die intestate erfreg se effek op die testate erfreg nie.

65 *Lloyd's Trustee v Kimberley Licensing Board* 1930 GWL 17; *Hleka v Johannesburg City Council* 1949 1 SA 842 (A); *S v Looij* 1975 4 SA 703 (RA); Steyn 137.

66 *Seluka v Suskin and Salkow* 1912 TPD 265; *Casserley v Stubbs* 1916 TPD 312; *The State v Moodie* 1962 1 SA 587 (A); *Joss v Board of Executors* 1979 1 SA 780 (C); Steyn 97 ev.

Good faith and equity in the law of contract in the civilian tradition

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OPSOMMING

Goeie trou en billikheid in die kontraktereg

In hierdie bydrae word 'n historiese oorsig van die ontwikkeling van *bona fides* in die kontraktereg gebied. Daar word ondersoek ingestel na die betekenis van hierdie begrip in die geskiedenis van die Europese *ius commune* met die doel om 'n beter begrip van die aard en werking van *bona fides* in die Suid-Afrikaanse kontraktereg te bied. In verskeie onlangse Suid-Afrikaanse hofbeslissings is die noodsaak vir 'n onafhanklike kontraktuele norm waaraan die inhoud van kontrakbedinge getoets kon word, bepleit. Hoewel die Suid-Afrikaanse Regskommissie reeds verskeie pogings aangewend het om *bona fides* deur middel van wetgewing in die Suid-Afrikaanse kontraktereg in te voer, is hierdie pogings met agterdog teengestaan. In hierdie bydrae word die heersende standpunte rakende *bona fides* in die Suid-Afrikaanse kontraktereg geïllustreer aan die hand van onlangse regspraak. Daar word ook enkele aanbevelings gemaak rakende die toekomstige ontwikkeling van *bona fides* in die Suid-Afrikaanse kontraktereg.

1 INTRODUCTION

In a recent decision by Davis J, the role of *bona fides* in the South African law of contract was briefly examined and the need for a substantive contractual defence based on considerations of equity was reiterated.¹ While the state of *bona fides* in the South African law of contract was highlighted in this decision, little was said on the history of principles such as good faith and equity in the civilian tradition. Since South African law is a mixed legal system partly founded on the civilian tradition, the historical development of these concepts has greatly influenced current perceptions of good faith and equity in the South African law of contract. To contribute to a better understanding of the nature of these principles in South African law, a brief historical overview of good faith and equity in the law of contract in the civil tradition will be given in this article.² The article also includes an overview of the role of good faith and equity in the law of the Netherlands to illustrate how these principles are regulated in a codified civil law system. Since normative concepts such as good faith and equity have in the past often been coloured by philosophical perceptions dominating different periods in

1 *Mort v Henry Shields-Chiat* 2001 1 SA 464 (C) 474-475.

2 For the purposes of this article, the term equity will be limited to contractual equity, while good faith will be employed as the manifestation of equity in the law of contract.

history, it is virtually impossible to speak of a linear and coherent historical development of these principles.³ One should rather attempt to explore the meanings attached to these terms during different periods in history to gain a better understanding of current perceptions of good faith and equity. South African law is strongly rooted in the civilian tradition owing to its vibrant Roman-Dutch heritage and Roman law will therefore serve as a starting point.

2 THE ROMAN HERITAGE

Roman law was initially governed by the *ius civile*, a formalistic system of law available only to Roman citizens. The oldest procedure in Roman law (the *legis actio*) with which the *ius civile* was enforced, was characterised by strict formalism and ritual utterances. During the third century BC, this procedure was supplanted by a flexible formulary procedure. After the implementation of the formulary procedure, the success of one party no longer depended on ritual formalism, but on a written presentation of the facts as expressed in the *formula*.⁴ The formulary procedure comprised two stages. During the first stage, both parties approached the *praetor* to obtain a *formula* on the matter at hand. The *formula* was a written document that contained an exposition of all the allegations and areas of dispute, which the judge had to consider during the second stage of the trial. He had to examine the case described in the *formula* and give a decision based on the defences and contentions made by both parties to the claim. Whereas the *legis actio* procedure allowed little room for development outside the confines of the *ius strictum*, the *formula* procedure provided opportunity for adaptations since the *praetor* was able to alter the content of the *formula* at the beginning of his term of office.

During the course of the praetorian adaptation of the *ius civile*, actions based on good faith were allowed. It is difficult to speculate when the transition took place from actions based on the *ius civile* to actions based on *bona fides*. The phrase *iudicia bonae fidei* initially referred to claims devoid of foundation in the *ius civile*, presumably grouped together by the *praetor* during the second century BC to govern liability arising from praetorian adaptation of the formalistic civil law.⁵ A distinguishing characteristic of *iudicia* was the *clausula ex fide bona* in the *intentio* of the *formula*, which governed the operation of *bona fides* in these actions. The *intentio* of the *formula* served to establish the scope of the debtor's obligation and the phrase *ex fide bona* extended the capacity of the judge to consider the facts of the case. In passing his verdict, the *iudex* was not bound solely by the existence of certain facts, but had to consider individual circumstances to ensure that the verdict conformed to the precepts of fairness and equity.⁶

The Romans had a thorough understanding of the content of the phrase *bona fides*, and the acknowledgement of liability *ex fide bona* did not destabilise their

3 It is accepted that the development of these concepts may be linked to the rise and fall of the will theory in the law of contract as well as the emergence of capitalism, but these topics fall outside the scope of this article.

4 Johnston *Roman law in context* (1999) 113–115.

5 Zevenbergen *Karakter en geschiedenis der iudicia bonae fidei* (LLD thesis Vrije Universiteit Amsterdam 1920) 27; Wieacker "Zum Ursprung der bonae fidei iudicia" 1963 ZSS (RA) 1ff 40. See also Lombardi *Dalla fides alla bona fides* (1961) 179 for the controversy surrounding the emergence of *bona fidei iudicia*.

6 Van Zyl *Justice and equity in Greek and Roman legal thought* (1991) 132.

legal system or result in legal uncertainty and arbitrary decisions.⁷ In support of this statement it is necessary to examine the social context of the Roman system of law.

Roman society was founded on rigid class and social distinctions interspersed with a plethora of status and fiduciary relationships.⁸ Roman law did not interfere with the internal aspects of these relationships, since they were sufficiently regulated by principles such as *pietas*, *fides*, *reverentia* and *mores*. Roman society regarded *fides* in a general sense as the main component of perseverance (*constantia*), the central virtue of man.⁹ This virtue entailed steadfastness, constancy and a resolution to keep one's word. *Fides* was a principle with religious, ethical and legal implications that influenced various aspects of Roman life. The transition from the early Roman concept of *fides* to *bona fides* in the law of contract implied a legalisation and internalisation of the concept, possibly under the influence of *pistis* (the Greek concept of *fides*).¹⁰ The nature of rights and duties in the Roman law of lease necessitated a continuous adjustment of what were considered to be the parties' interests. In the Roman law of obligations, *bona fides* initially referred to the standard of conduct required in contractual relationships. *Bona fides* functioned as the criterion with which to assess whether one's conduct had breached the expectation of a reasonable man in a contractual relationship.¹¹ It furthermore served as a standard of honesty and fidelity in contractual obligations as determined by the *iudex* in accordance with society's precepts of fairness and equity. *Bona fides* in early classical Roman law was therefore a concept with moral and legal facets, forming part of the broader concept of *aequitas*.¹²

During the second century BC, *bona fides* ceased to be merely a subsidiary criterion used by judges to assess the conduct of the contracting parties.¹³ The principle now exercised a far more fundamental effect on consensual contracts.¹⁴ The reason for the change in the function of *bona fides* may be attributed to the institution of the office of *praetor* and his equitable adaptations of existing law. Since *bona fides* governed consensual contracts, a judge could interfere with the contractual rights and duties arising from agreements by employing the

7 Schermaier "Bona fides in Roman contract law" in Zimmermann and Whittaker *Good faith in European contract law* (1996) 77.

8 Maine *Ancient law* (1936) 100; Schermaier 78–79.

9 Schulz *Principles of Roman law* (transl Wolff 1936) 223–238; Demangel "Variations sur la [pistis]" 1949 *RIDA* 223ff; Gruen "Greek [pistis] and Roman fides" 1982 *Athenaeum* 50ff; Van Zyl *Justice* 135; Kelly *A short history of western legal theory* (1992) 52–57.

10 Pringsheim "Ius aequum und Ius strictum" 1921 *ZSS* (RA) 643ff 651; Wieacker *Zum Ursprung* 20; Pernice *Labeo – römisches Privatrecht im ersten Jahrhundert der Kaiserzeit* (1963) II 209; Van Zyl *Justice* 132; Daube *Roman Law – Linguistic, social and philosophical aspects* (1996) 132.

11 Nörr "Mandatum, fides, amicitia" in Nörr and Nishimura *Mandatum und Verwandtes* (1993) 13ff 45.

12 Beck "Zu den Grundprinzipien der Bona Fides im römischen Vertragsrecht" in Amiaud and Goodhart (eds) *Aequitas und Bona Fides* (1955) 9ff 24; Lombardi *Bona fides* 180–182; Nörr *Mandatum* 27 and recently Schermaier 63–93.

13 Schermaier 74.

14 Hoetink "De beperkende werking van de goede trouw bij overeenkomsten" 1928 *TR* 417ff 432; Zevenbergen *Aard en werking der goede trouw in hetromeinsche verbintenissenrecht* (1942) 1–33; Abas *Beperkende werking van de goede trouw* (LLD-thesis Universiteit van Amsterdam 1972) 92.

expansive and corrective functions of good faith. Where good faith dictated that the rights of one contracting party had to be extended in order to satisfy Roman society's precepts of fairness and equity, the judge could employ the expansive working of *bona fides* to effect such an extension.¹⁵ The rights of a party could also be limited through the corrective working of good faith where it came into conflict with precepts of fairness and equity.¹⁶ The expansive and corrective effect of *bona fides* operated *in tandem* in all consensual contracts.¹⁷

3 MEDIEVAL LEARNED LAW

The sophisticated system of contractual equity that existed in Roman law was absorbed into medieval learned law, but medieval scholars struggled to grasp its full extent, partly due to the formalistic methodology of scholasticism. Medieval scholasticism propagated a rationalistic system of rules and exceptions based on authority in its study of Roman law. Each text fragment was regarded as a complete entity of which the meaning could only be uncovered by interpreting it in relation to other text fragments linked to it. Although the principles of equity and its contractual manifestation, good faith, were incompatible with this somewhat formalistic attitude towards the study of Roman law, they were studied in medieval learned law. Medieval learned law consisted of Roman and canon law that were taught at medieval centres of learning. The difference between these branches of law was responsible for two schools of thought in medieval learned law. Scholars of the medieval period either adhered to the traditional casuistic interpretation of the text fragments (the orthodox school of thought) or attempted to apply liberal interpretations to Roman law in order for it to conform to existing customary provisions and canon law (the unorthodox school of thought).¹⁸ References to principles such as good faith and equity are especially evident in the works of the unorthodox school of thought.

In medieval learned law the *ius civile* (that is, the Roman law as interpreted by the medieval Italian law schools) was increasingly influenced by theological values such as *benignitas*, *humanitas*, *clementia* and *moderatio*.¹⁹ Because of this, the distinction between civil and canon law became less absolute as each branch of law influenced the other. Christianity added an ethical dimension to medieval law, possibly supplemented by the remnants of Stoicism in classical Roman law.²⁰ Despite widespread textual evidence that the concepts of good

15 See eg Cicero *De officiis* III 17 9–10.

16 *Inst Gai* III 137 IV 63 IV 114; *I IV* 6 30; *D* 44 7 5pr; Hoetink *Beperkende werking* 434; Abas *Goede trouw* 102.

17 *Inst Gai* III 155; *D* 19 1 11 1–2.

18 The original proponent of the latter view was Gosia, an early glossator who favoured equitable alternatives to existing interpretations of text fragments. *Aequitas gosiana* was not arbitrary equity, but rather a principle that propagated similar rights in similar cases – Halbeek *Audi domine martine! – Over aequitas gosiana en het beding ten behoeve van een derde* (2000) 6ff.

19 Mortari "Aequitas e ius nell'umanesimo giuridico francese" in *Atti della academia nazionale di Lincei* IX 9 (1997) 147.

20 Stoic philosophers were generally empiricists and rationalists who believed that virtue was the sole good of man's existence. Since virtue resided in a man's will, as the Stoics believed, all events whether good or bad depended on man himself. Stoic ethics defined virtue as acting in accordance with *logos*. It was intrinsically connected to the remaining

faith and equity operated in medieval learned law, there were apparently no authoritative definitions of these principles and medieval jurists had to rely on their own definitions. Equity thus remained a fairly static principle in early medieval learned law.²¹ Medieval authors struggled to define *bona fides* or *aequitas*, and the concepts remained amorphous.²²

The Glossators generally distinguished between two forms of equity in their glosses on Roman law. *Aequitas constituta* referred to the entrenched equitable basis of civil law, while *aequitas rudis* referred to the sense of equity shown in the judge's decision.²³ In spite of this distinction, it is virtually impossible to pigeonhole the different forms of equity in the works of the Glossators. In spite of strides towards defining these terms in early medieval law, the majority of the Glossators treated equity, and by implication good faith, as ethical yardsticks, which did not take precedence over a traditional interpretation of the text.²⁴

Early medieval jurists agreed that good faith and equity referred to certain standards of conduct required in any contractual relationship.²⁵ For example, both parties to a contract had to keep their word, refrain from taking undue advantage of the other and abide by the obligations that any honest person would recognise in a contractual relationship. These standards of conduct were, however, mere indications of the functioning of good faith in medieval learned law and again the content of the term remained undefined. In addition, attempts at developing these standards of conduct conflicted with the rule-based system of contract propagated by the *Corpus iuris civilis* and often resulted in formalistic compromises with existing Roman law.²⁶ Canon law experienced similar difficulties with good faith and equity. During the early medieval period, this branch of

branches of Stoic philosophy, namely logic and physics in that only a clear grasp of reality would allow a person to be virtuous. The Stoics generally believed that one should not regret any unavoidable suffering or deprivation as they were part of the overall purpose of things – Mautner (ed) *The Penguin dictionary of philosophy* (2000) on Stoicism. See also Störig *Geschiedenis van de filosofie* (1974) 181ff; Russel *History of Western philosophy* (1961) 260ff.

21 For a comprehensive list of recent authors on equity in medieval Roman law, see Mortari 145 fn 1.

22 Wohlhaupter *Aequitas canonica: eine Studie aus dem kanonischen Recht* (1931); Gordley "Good faith in contract law in the medieval *ius commune*" in Zimmermann and Whittaker 93ff.

23 "In promulgatione materia est aequitas – rudis seu iam constituta, sive illud pro lege et iure habetur, aequitas quidem huic operi materiam prebet; ea ratione quid sit aequitas videndum est. Aequitas enim est rerum convenientia, quae cuncta coequiparat [et in paribus causis paria iura desiderat]. Quae est iustitia est ita demum, si ex voluntate redacta sit: quicquid enim aequum, ita demum iustum, si est voluntarium. Rudis aequitas est de qua nondum quicquam dictum erat, set per princeps tantum ad sanctionem redacta est, ut in rebus divinis. Aequitas constituta est de qua iam tractatum erat, veluti a lege XII tabularum vel a populo vel a plebe vel a senatoribus vel a praetoribus pro lege et iure servantur" – *Summa Codicis* I 1 2–5 in Fitting *Summa Codicis des Irenius* (1894) 3–4; Mortari 148; Hallebeek *Aequitas gosiana* 7.

24 "Dissentiunt in CJ 3 1 8. Dicunt enim quidem, quod ibi loquitur de iustitia, quae est a lege constituta et non de ea, quam quis excogitat ex ingenio suo: nam illi etiam strictum ius praefertur . . . alii contra, et dicunt idem in omni iustitia, scilicet ut stricto iuri praefertur, sive scripta sit sive non, quum etiam, si non sit scripta, bene debet servari" – Hänel *Dissentiones dominorum* (1834) para 91.

25 Gordley *Good faith* 95.

26 *Idem* 94–104.

law incorporated various elements from the *ius civile* and consequently developed a unique character. Theological values absorbed from canon law influenced concepts such as the *ius divinum*, *ius naturale* and the *ius gentium*, which in turn inspired authors from both branches of law to re-evaluate the role and function of equity in medieval learned law.²⁷ The Decretalists associated equity with morality, a clean conscience and the precepts of the Christian faith.²⁸ The *aequitas canonica* of the twelfth and thirteenth centuries consisted of a mixture of *aequitas*, *misericordia* and *epieikeia* (the Greek concept of *aequitas*). However, as in the case of civil law, the role of good faith in canon law was never fully elucidated and the conclusions drawn by civil law authors on good faith were generally followed by the Decretalists.²⁹

A uniform definition of equity in medieval learned law was first attempted by the commentator Baldus, under the influence of the newly rediscovered works of Aristotle as adapted by Thomas Aquinas (ob 1274).³⁰ To understand subsequent interpretations of Aristotle's ethical doctrines, introductory remarks on Aristotle's perceptions of justice and equity are required.³¹ In Book 5 of the *Nicomachean ethics*, Aristotle distinguished between justice in general and particular justice. In a general sense, justice included all the characteristics of a good citizen such as courage, honesty, loyalty and virtues such as sobriety. In a particular sense, justice was seen as a virtue and Aristotle distinguished two forms of particular justice. Distributive justice (*dianemetikon dikaion*) operates in a society and allocates benefits and burdens fairly, while commutative (or corrective) justice (*diorthotikon dikaion*) operates between two parties and maintains or restores the balance. In voluntary transactions such as commercial contracts, this entailed that each party keeps his side of the bargain. Thus, equity was seen as a corrective of legal justice where the universality of laws gave rise to inequity.³² Distributive and corrective justice were two interrelated concepts.³³ While distributive justice allocated benefits, corrective justice maintained this allocation. Where burdens or wealth had been distributed, such a distribution had to be maintained in order to ensure social stability. Corrective justice therefore operated

27 Mortari 152.

28 See in general Caron *Aequitas romana, misericordia patristica ed epieikeia aristotelica nella dottrina del aequitas canonica* (1971) 44ff.

29 Gordley *Good faith* 94–104; Mortari 149–150.

30 See Horn *Aequitas in den Lehren des Baldus* (1968) 32–47; Mortari 153.

31 Mautner *Philosophy* on Aristotle and justice.

32 "The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission – to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice – not better than absolute justice, but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality" – Aristotle *Nicomachean ethics* (transl Ross 1953) 10 1137–1143.

33 Heidt "Corrective justice from Aristotle to second order liability: who should pay when the culpable cannot?" 1990 *Iowa LR* 347ff 349.

whenever the distribution had been disturbed. The agent of corrective justice was the judge who had to ensure that the balance created by distribution be restored by employing corrective justice. Corrective justice operates by means of equality of quantities.³⁴ The focus is on quantity as it represents the restoration to the original owner of something which is now in the possession of a third party as a result of the disturbance in the allocation. Equality in quantities entails that each party should be given his dues. It does not require mathematical equality in the sense that each party should be given exactly the same amount. It merely involves a return to the *status quo ante*.

Aristotle's work on ethics was rediscovered in Western Europe at the end of the twelfth century. The Glossators, who were unfamiliar with the Greek language, apparently did not have access to it.³⁵ The works of the fourteenth-century *Ultramontani* exhibit some Aristotelian influence, but the Commentators of the fifteenth and sixteenth centuries were the first scholars who fully applied Aristotelian philosophy to Roman law problems without synthesising the different branches of thought.³⁶ For example, Baldus based the *causa* doctrine in the medieval law of contract on the ideas of Aristotle.³⁷ In terms of Thomas Aquinas's interpretation of Aristotle's ethics, the fulfilment of a promise (an exchange) resulted in the exercise of commutative justice or liberality.³⁸ Whenever the parties performed during the course of a contract, an act of commutative justice or liberality was performed. Therefore the basis of each contract was a *causa*, which could be founded either in liberality or commutative justice. Where a party to an agreement gave an object to another without expecting some performance in return, the *causa* of the agreement was liberality. However, if the party expected to receive an equivalent performance in return, the *causa* of their agreement was commutative justice.³⁹

Thomas Aquinas's adaptation of Aristotle's concept of commutative justice was absorbed into the medieval doctrine of equality in exchange. This doctrine, evolving from Aristotle's notion of equality in quantities, required that the value of a performance be equal to the value of the counter-performance in terms of the contract. It was founded on Aristotle's notion of commutative justice and the Roman law remedy of *laesio enormis* described in C 4 44 2.⁴⁰

34 Weinrib "Corrective justice" 1992 *Iowa LR* 403ff 408.

35 See Otte "Die Aristoteleszitate in der Glosse: Beobachtung zur philosophischen Ver- bildung der Glossatoren" 1968 *ZSS (RA)* 368ff.

36 Gordley *The philosophical origins of modern contract doctrine* (1991) 31ff.

37 There is some controversy on the extent of the influence of *epieikeia* (the Greek concept of equity) on the development of *aequitas* in medieval Roman law. Despite the Greek influences on Roman law, the term *epieikeia* was never incorporated into any legal literature and it does not occur in the works of medieval jurists. Mortari 156–157 rejects Horn's examples of *epieikeia* in the works of Baldus and proposes that little evidence exists to support the author's view that the concept was widely absorbed into medieval Roman law.

38 See Gordley *Origins* 73ff. Commutative justice, also called corrective justice or rectifi- catory justice, concerns all kinds of exchange. Aristotle included in Bk 5 of the *Nicomachean ethics* exchanges freely undertaken, like payment for services, but also compensa- tion for damage incurred and punishment for a crime. In all of these, justice consists in ob- serving the right proportion, maintaining a balance, observing a certain equality – Mautner *Philosophy* on commutative justice.

39 Horn 203–217.

40 Gordley "Equality in exchange" 1981 *California LR* 1587 1588.

Laesio enormis was probably a product of Justinian's ideal of a welfare state, even though the text fragments on which it is based predate Justinian.⁴¹ Roman law granted the seller a right to rescind the sale where the price offered was less than half of what would have been a reasonable price.⁴² The roots of this remedy appear akin to the teachings of Christianity and stoic moral philosophy that dictated that the poor and disadvantaged had to be aided. The remedy therefore gave the seller the right to rescind the contract where the object of sale had been sold for less than half its true value (*iustum pretium*). The purchaser could, however, avoid the termination of the contract by augmenting the price. The latter remedy originally applied to the sale of property at less than half its true value, but the Glossators extended it to all consensual contracts. Thus, before the rediscovery of Aristotle's works, Roman law provided a general remedy based on C 4 44 2 where a considerable disparity between performance and counter-performance existed.⁴³ The Glossators did not have a theory to explain the existence of *laesio enormis*, but specific circumstances were listed in which it would apply.⁴⁴ They equated the fair price (*iustum pretium*) of an object with the common market price of the goods.⁴⁵ The link between commutative justice and *laesio enormis* was probably established by the beginning of the thirteenth century.⁴⁶ Commutative justice was thereafter frequently cited as justification for the existence of *laesio enormis*, although the reality was that the doctrine had been crystallised before the rediscovery of Aristotelian philosophy in the West.⁴⁷ The medieval law of contract was also influenced by the *clausula rebus sic stantibus*.⁴⁸ It functioned as an implied condition, which dictated that a contract did not have to be honoured if the circumstances of the agreement had changed substantially. The *clausula*, which was unknown to Roman law, originated in thirteenth-century canon law from the basic principle derived from various classical texts.⁴⁹ It was incorporated via the works of St Augustine into the *Decretum Gratiani* and introduced to civil law by Bartolus, who limited its applicability to *renuntiatio*.⁵⁰ The *clausula rebus sic stantibus* was later expanded to cover all forms of promises, and by the end of the fifteenth century it was widely applied to all consensual contracts.

4 HIGHLIGHTS OF THE SIXTEENTH AND SEVENTEENTH CENTURIES

The legal humanists of the sixteenth and seventeenth centuries were a group of authors from across Western Europe who all applied a similar methodological approach to the exegesis of Roman law. Their work was a reaction against the exaggerated scholasticism of medieval learned law which negated the historical

41 Zimmermann *The law of obligations: Roman foundations of the civilian tradition* (1990) 259; see also Thomas "Laesio enormis outdated, enormous profits not" 2002 THRHR 248.

42 Schulze *Die laesio enormis in der deutschen Privatrechtsgeschichte* (1973) 13–14.

43 Gordley *Equality* 1638ff.

44 See *idem* 1640–1641 for a comprehensive discussion of this aspect.

45 Gordley *Origins* 65ff.

46 Feenstra and Ahsmann *Contract: Aspecten van de begrippen contract en contractsvrijheid in historisch perspectief* (1988) 26ff.

47 Gordley *Equality* 1638.

48 Feenstra *Contract* 21ff.

49 Seneca *De beneficiis* IV 35 3; Cicero *De officiis* 3 25 95.

50 Zimmermann *Obligations* 579.

development and the philosophical roots of legal institutions.⁵¹ Unlike the scholasticism of the medieval Italian law schools (*mos italicus*), the legal humanists (*mos gallicus*) attempted to restore classical Roman law to a complete and living system of law. The movement, based in the French city of Bourges, was characterised by its philological exegeses of Roman law and a return to original Latin and Greek sources. The rediscovery of the ethical works of Aristotle also led to a re-evaluation of the role of *epieikeia* and its connection to *aequitas*.⁵² As in medieval learned law, however, the concepts of good faith and equity remained nebulous, and scholarly views on their function varied considerably. Writers of the sixteenth and early seventeenth centuries either established connections between Roman *aequitas* and Greek *epieikeia* or defined these concepts with a view to legal practice.⁵³

The founder of the French legal humanist movement, Budaeus (*ob* 1540) imported the concept of *epieikeia* into humanist legal science.⁵⁴ He equated *epieikeia* with *aequitas*, but also linked it to the discretion of the judge. In defining good faith and equity, Budaeus drew from various sources on equity in Roman law, especially the *bona fidei iudicia* where reference was made to both *aequitas* and *bona fides*. Cujacius, on the other hand, interpreted *aequitas* as an ethical-theological concept, which could be employed to correct the *ius strictum*.⁵⁵ In general, however, legal humanism employed *aequitas* and *bona fides* as corrective measures to curb the rigidity of strict law and as criteria to aid the practical development of law. Despite this, there were no fixed definitions of good faith and equity.⁵⁶

5 ROMAN-DUTCH LAW

From the writings of the sixteenth and seventeenth-century humanists, we turn towards a system of law that profoundly influenced the development of good faith and equity in the South African law of contract. Roman-Dutch law was inherently equitable, but equity as a principle did not override established rules of law.⁵⁷ In the administration of justice, the courts paid due regard to the considerations of equity, but only in so far as these considerations did not conflict with the principles of Roman-Dutch law.⁵⁸ Early Roman-Dutch authors drew from views on equity prevalent in medieval learned law and sixteenth-century legal humanism. As indicated in the previous section, there were two schools of

51 Maffei *Gli inizi dell'umanesimo giuridico* (1968) 177–193; Troje “Die europäische Rechtsliteratur unter dem Einfluß der Humanismus: in Coing (ed) *Ius commune: Veröffentlichungen des Max-Plancks-Instituts für Europäische Rechtsgeschichte* III (1970) 33–63, “Humanistische Kommentierungen klassischer Juristenschriften” *idem* IV 51–72; Kisch *Studien zur humanistischen Jurisprudenz* (1972) 17–58; Feenstra “Romeins recht en Europese rechtswetenschap” in Spruit (ed) *Coniectanea Neerlandica iuris Romani* (1974) 117–123.

52 Coing *Europäisches Privatrecht* I (1985) 67–69.

53 Mortari 159ff.

54 *Ibid* 159ff.

55 *Idem* 219–235.

56 See eg Kisch *Erasmus und die Jurisprudenz seiner Zeit* (1960) 18–54.

57 Voet 1 1 6; Huber *Praelectiones iuris civilis* 1 1 17, 18, 21; Van der Keessel *Th* 24 on Grotius 1 2 22.

58 McGregor “Aequitas – billijkheid – rede” 1938 *THRHR* 1; Van der Merwe “Die realiteit van die billikheidsideaal in die burereg” 1982 *De Jure* 307.

thought regarding equity during the sixteenth and early seventeenth century: certain authors drew parallels between *epieikeia* and *aequitas* while others defined these concepts independently with a view to legal practice. Hugo Grotius, a protagonist of the natural-law doctrine of the seventeenth century, was influenced by the moral theology of the Spanish scholasticism based on Aquinas's interpretation of Aristotelian philosophy.⁵⁹ The main difference between the natural law doctrine of the seventeenth century and the natural law propagated by the Spanish scholastics was the source from which natural law was derived. While the Spanish scholastics regarded divine inspiration as the basis of natural law, the supporters of the natural law doctrine of the seventeenth century looked towards human reason as the source of law.⁶⁰ The scholastics were mostly theologians rather than jurists, but their philosophical ideas were seamlessly integrated into Roman-Dutch law in the works of Grotius.

In Grotius's *Prolegomena juri Hollandico praemittenda*, equity in Roman-Dutch law was carefully defined. In terms of Grotius's definition of equity, the general application of laws frequently resulted in shortcomings that could only be corrected by employing the virtue that was equity.⁶¹ This definition of equity emulated Aristotle's definition of *epieikeia* in his *Ethics*.⁶² Grotius interpreted equity as a regulatory concept that corrected strict law and curtailed acts that conflicted with a superior law.⁶³ Prominent Roman-Dutch jurists such as Dionysius van der Keessel,⁶⁴ Johannes Voet,⁶⁵ Ulrik Huber⁶⁶ and Johannes van der Linden⁶⁷ later adopted the regulatory function of equity and applied it to the various fields of Roman-Dutch law. When taking the influence of Grotius's concept of equity into account, it seems that equity in Roman-Dutch law was viewed as a sophisticated regulatory concept with prohibitive and corrective functions that could be employed to address inequality in performance.⁶⁸

6 TOWARDS THE CODIFICATION OF GERMAN LAW

Before stepping into the twentieth century, the prevailing views on good faith and equity in nineteenth century Germany need to be examined since these perceptions of the role of normative principles in a legal system (especially the views of the Pandectist movement) influenced many of the twentieth-century South African jurists who studied in Germany. The Pandectist movement departed from the methodology of the Historical School towards the development

59 Feenstra and Ahsmann *Contract* 17–20.

60 Dias *Laesio enormis* 52.

61 "Proprie vero et singulariter aequitas est virtus voluntatis correctrix ejus in quo lex defecit propter universitatem; aequum autem est ipsum quo lex corrigitur" – Grotius *Prolegomena juri Hollandico praemittenda* § 3 in Feenstra "Een handschrift van de inleiding van Hugo de Groot met de onuitgegeven Prolegomena juri Hollandico praemittenda" 1967 *TR* 444ff; Scholtens "Hugonis Grotii De aequitate, indulgentia et facilitate liber singularis" 1968 *TR* 117ff; Du Toit "Die aequitas en regulatiewe regsbeginfels" 1976 *TRW* 38ff 43.

62 See fn 32 *supra*.

63 Grotius *Prolegomena* § 9; Schotte *Die Aequitas bei Hugo Grotius* (1963) 224ff.

64 Van der Keessel *Praelectionum* I 82.

65 Voet I 1 6.

66 Huber *Hedendaegse rechtsgeleertheit* I 1 12–21.

67 Van der Linden *Supplementum ad Voet commentarius* (1793) I 1 6.

68 Voet *De statutis* 3 4 1–10; Neels "Regsekerheid en die korrigerende werking van redelikeid en billikeid (deel 1)" 1998 *TSAR* 702 714.

of a systematic private law.⁶⁹ The Pandectists regarded law to be a formalistic science, the rules and methods for application of which were derived from the system itself. Principles of good faith and equity operated outside a closed system of law and therefore had little influence on its development. The Pandectist movement favoured black letter law and focused on the application of law as a system of concepts and general principles. Ethical considerations were largely marginalised and the system of law was reduced to a *numerus clausus* of legal institutions and principles. The first text of the German Civil Code, promulgated in 1896, did not fully reflect the intellectual and social conditions of the period.⁷⁰ The original drafters of the German code did not believe that private law should have any specific social function. The emphasis placed on economic concerns is reflected throughout the code. It is especially evident in the German code's treatment of the law of obligations where only a single reference is made to freedom of contract. The ethical side of the law of contract was totally ignored. Dubious doctrines such as *laesio enormis* and the *clausula rebus sic stantibus* were abolished and the principle of equivalence in performance propagated by the Spanish scholastics was rejected.⁷¹

7 SOUTH AFRICAN LAW

Case law and academic contributions have in the past reiterated that all contracts in South African law are *bonae fidei* and that *bona fides* is an important principle underlying the law of contract.⁷² However, the meaning of this statement has remained obscure since the courts have generally been reluctant to define the role of *bona fides* in contracts due to its perceived interference with the parties' freedom of contract, traditionally regarded as the cornerstone of the South African law of contract.⁷³ When the courts in the past did interfere with sanctity of contract, justification for such an interference was usually found in the pursuits of justice and harmonising the conflicting interests of the parties as well as the social implications of a contract.⁷⁴ Although South African courts professed to have an equitable discretion in contractual matters, in reality the court's discretion only operated insofar as it did not conflict with the principles of South African common law based on limited Roman-Dutch notions of good faith and equity.⁷⁵ Remedies such as the *exceptio doli* were therefore used to import good faith and equity into the South African law of contract. In Roman law the *exceptio doli* was a defence based on considerations of equity, which was introduced by the *praetor* to redress the injustice that arose from the enforcement of *stricti*

69 Wieacker *Private law* 341–387.

70 *Idem* 376; Zimmermann *Obligations* 374.

71 *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuch für das Deutsche Reich* (1896) II § 534.

72 *Meskin v Anglo-American Corporation of South Africa Ltd* 1968 4 SA 793 (W) 804; Cockrell "Substance and form in the South African law of contract" 1992 *SALJ* 41; Hutchison "Good faith in South African law of contract" in Brownsword (ed) *Good Faith in contract* (1999) 213–242 fn 4.

73 Van Huyssteen and Van der Merwe "Good faith in contract: Proper behaviour amidst changing circumstances" 1990 *Stell LR* 244 245; *Tuckers Land and Development Corporation v Hovis* 1980 1 SA 654 (A) 650; Carey Miller "Judicia bonae fidei: A new development in contract?" 1980 *SALJ* 531 537.

74 Van Huyssteen and Van der Merwe 245.

75 Hutchison 214ff.

iuris contracts where considerations of equity did not apply.⁷⁶ Although the distinction between *bonae fidei* and *stricti iuris* contracts had ceased to exist in Roman-Dutch law, South African courts continued to apply the *exceptio doli* as a contractual defence based on considerations of equity. However, the *exceptio* was mainly employed as a subsidiary defence when all other defences had been exhausted.⁷⁷ In 1988, the validity of the *exceptio* as a substantive contractual defence was challenged in the landmark decision of *Bank of Lisbon*.⁷⁸ In this decision, Joubert JA examined the foundation of the *exceptio doli* and concluded that justification for the existence of this defence had ceased with the abolition of the distinction between *bonae fidei* and *stricti iuris* contracts in medieval learned law. The court refused to acknowledge *bona fides* as an independent legal norm and the role of good faith in South African law was obscured by this decision. The court effectively found that *bona fides* was merely an ethical norm that influenced the substantive legal rules of the law of contract.⁷⁹

Since the court refused to acknowledge *bona fides* as a substantive legal norm in the law of contract, other avenues had to be found to introduce considerations of equity into the South African law of contract. The minority decision of *Bank of Lisbon*, delivered by Jansen JA, commented that the application of the *exceptio doli* might overlap with other defences based on public policy.⁸⁰ The link between good faith and public policy was conventionally negated since public policy favoured absolute freedom of contract without room for equitable intervention.⁸¹ However, the court concluded in *Sasfin v Beukes*⁸² that where a contract was so inequitable that it conflicted with public policy, judicial intervention had to be allowed to correct its application. In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*⁸³ the court per Rabie CJ defined public policy as a dynamic concept reflecting the changing attitudes of society which functioned as the essential factor in determining the legality of contract. The connection between good faith and public policy was further elucidated in the *Eerste Nasionale Bank*⁸⁴ decision. The court found that the role of good faith was to express the community's sense of what is fair and reasonable in the law of contract. *Bona fides*, as a component of the broader public policy concept, therefore has a dynamic role in ensuring that the law remains sensitive to the needs of the community. Attempts by the courts to introduce good faith into the South African law of contract after the *Bank of Lisbon* decision are clear indications that a need for such a normative

76 Zimmermann and Visser *Southern cross: Civil and common law in South Africa* (1996) 218ff.

77 Hutchison 217; *Rand Bank v Rubenstein* 1981 2 SA 207 (W) 214B–215C; *Edwards v Tuckers Land and Development Corporation Pty Ltd* 1983 1 SA 617 (W) 627.

78 *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 605–610.

79 Lubbe "Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg" 1990 *Stell LR* 79.

80 617F–H.

81 Hutchison 222; Van der Merwe and Lubbe "Bona fides and public policy in contract" 1991 *Stell LR* 91–101.

82 1989 1 SA 1 (A).

83 1984 4 SA 874 (A) 893ff.

84 *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 3 SA 391 (SCA) 406. See, however, the criticism against the *bona fides* approach in Glover "Good faith and procedural fairness in contract – *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 3 SA 391 (SCA)" 1998 *THRHR* 328ff.

concept, which could be used to interfere with sanctity of contract, exists. However, the scope and function of good faith in the South African law of contract remain a contentious issue.

There are numerous views on the topic of good faith in the South African law of contract. The traditionalist view, supported by case law such as *Bank of Lisbon*, continues to maintain that good faith has by no means become a general principle in South African law used to alter an agreement between contracting parties purely because *bona fides* requires it.⁸⁵ This view is based on a mindset reminiscent of the nineteenth-century German Pandectist movement, and still refuses to admit that good faith as an independent contractual norm could contribute to the development of the South African law of contract rather than give rise to legal uncertainty and arbitrary decisions. According to the traditionalist view, good faith remains a relative concept, varying in content depending on the view of the community in which it operates.⁸⁶ It is merely a controlling consideration based on the community's sense of decency that forms the basis and content of technical rules and expressions and supplies a moral and theoretical basis for the law of contract.⁸⁷ Proponents of the traditionalist view are generally prepared to accept that good faith has shaped South African law of contract in a subtle manner by slightly altering existing legal concepts within the law of contract. Implied contractual terms imposed *ex lege* refer to contractual terms which do not originate from the *consensus* of the parties, but which are imposed by law. These terms are usually called the *naturalia* of the contract as they define the rights and duties of the parties in a specific type of contract.⁸⁸ Most of the *naturalia* in the South African law of contract originate from Roman law and therefore contain Roman law concepts of what is fair and equitable in a given case.⁸⁹

A modernist approach is proposed by Neels. This approach is based on the Dutch model of *redelijkheid en billikheid*.⁹⁰ He shows that the supportive and corrective functions of good faith exist in South African law, although *bona fides* is not recognised as a substantive contractual norm.⁹¹ The supportive function of good faith is mainly employed by South African courts to alter or insert implied contractual terms into agreements, while the corrective function curtails the rights of parties when they conflict with public policy.⁹² Neels, however, stops short of advocating that good faith in the South African law should be developed into a similar model as the one currently used in a codified system of civil law such as the law of the Netherlands. To understand the fundamentals of the Dutch approach, a short overview of good faith in the law of contract of the Netherlands is given.

85 Zimmermann and Visser 241; Hutchison 229; *NBS Boland Bank Ltd v One Berg River Drive CC*; *Deeb v Absa Bank Ltd*; *Friedman v Standard Bank of South Africa Ltd* 1999 4 SA 928 (SCA) 937F–G; Lubbe *Bona fides* 20.

86 See Zimmermann and Visser 241 fn 167.

87 Hutchison 227.

88 Zimmermann and Visser 244ff.

89 Vorster "The influence of English law on the implication of terms in the South African law of contract" 1987 *SALJ* 588ff 592; Hutchison 234.

90 Neels "Regsekerheid en die korrigerende werking van redelijkheid en billikheid (deel 1)" 1998 *TSAR* 702 711.

91 Neels "Die aanvullende en beperkende werking van redelijkheid en billikheid in die kontraktereg" 1999 *TSAR* 684 695; Neels 1998 *TSAR* 706 fn 33.

92 See Neels 1999 *TSAR* 697.

Equity in the civil law of the Netherlands is an extensive concept that finds its content in various principles outlined in different branches of the law. In the law of obligations, equity manifests itself in the concept of good faith. In the 1992 Dutch Civil Code, the antiquated term *goede trouw* (good faith) has been supplanted by the term *redelijkheid en billijkheid*. This is an important principle, which permeates every aspect of the Dutch law of obligations.⁹³

Good faith fulfils various functions in a system of law.⁹⁴ It not only functions as a source of law or a standard of conduct, but also influences the application of legal rules through its expansive and corrective functions. The application of legal rules generally has an equitable result, but circumstances may necessitate an interference with the contractual freedom of the parties. Hence, section 6:2 *Burgerlijk Wetboek* (*BW*) states that each party to an agreement has to conduct himself in accordance with good faith.⁹⁵ Subsection 2 provides that rights and obligations arising from a contract only apply in so far as they do not conflict with the demands of good faith. In ascertaining the demands of good faith, the court has to examine established principles of law, public policy and relevant social and individual interests. The expansive function of good faith in Dutch civil law is governed by section 6:248 *BW*.⁹⁶ Subsection 1 of section 6:248 *BW* provides that any agreement in Dutch civil law does not only contain the rights and duties expressly agreed on by the parties, but the court may also impose additional rights and duties on an agreement when good faith demands it. The corrective function of good faith should, however, operate within a sophisticated system of legal norms, which aims to promote equity in general rather than attempting to rectify casuistic manifestations of inequity. Thus, a good faith clause is usually an open-ended normative principle, the content of which is determined by the circumstances of a given case. This does not imply, however, that the judge has an unbridled discretion in this regard. Most civil law systems have implemented sophisticated methods to deduce the demands of equity in a given case.

Whenever a *lacuna* exists in a contractual relationship between the creditor and debtor, the demands of justice and equity may impose certain additional rights and duties. These *lacunae* may exist due to the nullity of certain provisions or on account of the parties' omission to regulate every aspect of their contractual relationship where law or custom does not provide an answer. The assessment of a *lacuna* requires an extensive analysis of the agreement. Where parties

93 Van der Ginten *Redelijkheid en billijkheid in het overeenkomstenrecht* (1978); Van der Werf *Redelijkheid en billijkheid in het contractenrecht* (1982).

94 Hesselink *De redelijkheid en billijkheid in het Europese privaatrecht* (LLD-thesis Rijksuniversiteit Utrecht 1999) 370ff.

95 S 6:2 *BW*: "(1) Schuldeiser en schuldenaar zijn verplicht zich jegens elkaar te gedragen overeenkomstig de eisen van redelijkheid en billijkheid. (2) Een tussen hen krachtens wet, gewoonte of rechtshandeling geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn."

96 S 6:248 *BW*: "(1) Een overeenkomst heeft niet alleen de door partijen overeengekomen rechtsgevolgen, maar ook die welke, naar de aard van de overeenkomst, uit de wet, de gewoonte of de eisen van redelijkheid en billijkheid voortvloeien. (2) Een tussen partijen als gevolg van de overeenkomst geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn."

have expressly excluded certain rights and obligations from the agreement, however, good faith may not be employed to reintroduce these rights or duties. The nature of the agreement, coupled with the interest of the parties and the circumstances of the case, will serve as the criteria to assess which rights and duties have to be deduced from the demands of justice and equity. The test employed to determine the demands of justice and equity is objective.⁹⁷ A judge first has to assess the legal position in question. He then has to compare the inequity of this result with a proposed interference with the contractual freedom of the parties. The judge has to exercise his discretion sparingly and only in cases where the inequity of the proposed result is manifest. Subsection 2 of section 6:248 *BW* furthermore provides that obligations in terms of a contract, which would otherwise bind the parties to an agreement, may be limited where justice and equity demand it. Even express provisions contained in an agreement may be altered or limited by the corrective function of good faith. The corrective function of good faith has become increasingly important in instances of changed circumstances arising after the conclusion of an agreement.

The South African Law Commission appears to have adopted the Dutch model in an attempt to introduce good faith in the South African law of contract. In 1983, the commission launched an investigation into good faith in contracts (Project 47: Unreasonable stipulations in contracts and the rectification of contracts) which resulted in *Working paper 54* (1994) which proposed that the courts should be given the competence to refuse to enforce and even change the content of contracts which were manifestly in conflict with good faith. Such a competence would include all commercial contracts and could not be excluded by agreement. In the most recent *Discussion paper 65* (1996) § 1–26, the proposed competence received severe criticism and the matter has yet to be resolved. The scope and function of good faith in South African law clearly remain unresolved. Important lessons may be learnt from civilian systems where good faith has been absorbed as an independent contractual norm by way of legislation, but the biggest disadvantage is that this model is specifically geared towards a codified system of law. This could be one of the reasons why the proposal of the South African Law Commission has been received with little enthusiasm. Since the South African legal system is uncoded and based only in part on the civilian tradition, an alternative model might be required.

The decision by Davis J in *Mort* is therefore interesting because it is one of the few cases where the values of the civilian component of the South African common law such as *boni mores* and *bona fides* were contextualised in terms of the values enshrined in the Constitution.⁹⁸ According to Davis J, the 1996 Constitution has affected the perception of the role and function of *bona fides* in the South African law of contract. The Constitution is the supreme law of the country and all Acts should be tested against the constitutional values of freedom, equality and dignity. While freedom, as a constitutional value seems to support contractual freedom, the remaining two constitutional values clearly support the view that the social implications of a contract should also be taken into account. Davis J seems to advocate that on the basis of the values enshrined in the Constitution, courts should be able to interfere with the terms of an agreement when they conflict with public policy and good faith.

97 Hesselink 370ff.

98 *Mort* 475D–E.

8 CONCLUSION

In Roman law good faith was a sophisticated regulatory concept with expansive and corrective functions which constituted an independent contractual norm that could be used to interfere with agreements that were manifestly unjust. This sophisticated concept of good faith was absorbed into medieval learned law, but scholars battled to grasp the function and extent of the concept. Concepts such as good faith and equity were ill-defined and circumstances were mainly deduced where good faith and equity would apply. With the rediscovery of the works of Aristotle, the notions of commutative justice and equality in exchange shifted the focus from the expansive and corrective functions of good faith. However, these notions were frequently associated with nebulous doctrines such as *laesio enormis* and the *clausula rebus sic stantibus*.

Good faith and equity initially remained limited concepts in Roman-Dutch law. Good faith was not regarded as an independent contractual norm, but under the influence of Grotius and the natural law doctrine of the seventeenth century it again became a regulatory concept. Due to the unpopularity of medieval doctrines such as *laesio enormis* and the *clausula rebus sic stantibus* and their close association with principles such as good faith and equity, the last-mentioned concepts were given a severe blow in many of the civilian codifications of the nineteenth century. German jurists of the late nineteenth century were wary of the influence of normative principles on a codified system of law and attempted to eradicate all references to good faith and equity from the first draft of the German Civil Code.

South African law adopted the limited Roman-Dutch concepts of good faith and equity into its law of contract and the situation was aggravated further by a deep mistrust of the function of good faith and equity. The situation was compounded by the *Bank of Lisbon* decision that effectively refused to acknowledge good faith as an independent legal norm. Although good faith in the South African law of contract survived *Bank of Lisbon*, other avenues such as public policy had to be opened to import considerations of equity into the South African law of contract. The brief overview of the law of the Netherlands has indicated that in a codified civilian system, good faith and equity may be incorporated as an independent contractual norm that could be used to interfere where the provisions of a contract are manifestly unjust. Although the South African Law Commission has attempted to follow this route by introducing good faith by way of legislation, it has received widespread resistance. Perhaps it would be prudent to support the position of Davis J in this regard by marrying the common-law value of contractual equity and good faith with constitutional values such as equality and dignity, rather than attempting to regulate it solely through legislation.

AANTEKENINGE

HET DIE ANGELSAKSIESE REGTERSAMP 'N VERLEENTHEID VIR REGSTAATLIKE WAARDES GEWORD?*

1 Inleiding

In 'n onlangse beslissing, *S v Mamabolo* (saak CCT 44/00), is die Suid-Afrikaanse Konstitusionele Hof (KH) onder andere met die vraag gekonfronteer of skandalisering van die regbank, as verskyningsvorm van die misdaad minagting van die hof, versoenbaar is met die Grondwet van die Republiek van Suid-Afrika 108 van 1996. Hoewel die wyse van argumentering en kennisbegrensing van die hof in die eerste instansie regstegnies van aard is, dit wil sê dit geskied binne konteks van die bepaling van die Grondwet en die ander bronne van die bestaande struktuurreg (gemenereg, voorafgaande gewysdereg en wetgewing), word ook verwys na die posisie in ander regstelsels, (ongelukkig) hoofsaaklik na dié van voormalige Britse kolonies (vgl spesifiek par 20 van die uitspraak). Regter Kriegler lewer uitspraak namens die meerderheid van die hof, met net regter Sachs wat enkele afsonderlike opmerkings maak. As gevolg van regter Kriegler se pragtige en helder taal- en formuleringsvermoë, kan 'n mens maklik uitgelok word om by sy denkyne en konklusies in te val. Daarop moet mens egter voortdurend bedag wees. Die vraag of skandalisering van die regsprekende gesag 'n misdaad behoort daar te stel, word in die onderhawige aantekening teen die agtergrond van agterliggende en dieperliggende sosio-juridiese prosesse (en verskynsels) aan die orde gestel. Hierdie prosesse (en verskynsels) figureer nog sterk binne konteks van moderne regstelsels en miskien nog meer so in Anglo-Amerikaanse regstelsels wat, om veral historiese redes en die bestaande magswanbalans binne die internasionale gemeenskap, in verskeie opsigte, maar tog nie deurgaans nie, uiters konserwatief en vooruitgangsinhiberend en selfs onderdrukkend is. Die problematiek van 'n regstegniese aard en juridiese oppervlakargumente en -oorwegings in dié verband, dit wil sê die sogenaamde "lawyer's law"-argumente en -oorwegings, is vroeër reeds deur skrywer aangespreek en word nie weer aan die orde gestel nie (sien "Minagting van die hof: 'n Strafregtelike en menseregterlike evaluasie" 1988 *TSAR* 329–353, "Minagting *in facie curiae*. Het so 'n misdaad werklik bestaansreg?" 1991 *SALJ* 405–410 en "Minagting *in facie curiae* en regterlike onpartydigheid" 1994 *De Jure* 207–209).

* 'n Deel van dié navorsing is in 2001 met die finansiële ondersteuning van die Alexander von Humboldt-Stiftung en die Universiteit van Pretoria aan die Ludwig-Maximilians-Universität te München (Duitsland) deurgevoer. Die menings in hierdie bydrae uitgespreek, word egter nie noodwendig deur genoemde instellings gedeel nie.

2 Evaluasie van die status van die regtersamp

Regter Kriegler wys daarop (par 14) dat die rede vir die bestaan van minagting van die hof as misdaad teruggevoer kan word tot die volgende opmerkings van regter Wilmot in 1765 in die Engelse saak *R v Almon* 97 ER 94 100:

“The arraignment of the justice of the Judges, is arraiging the King’s justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men’s allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King’s justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.”

Hierdie tipe selfaanprysing en -bewondering, asook die koppeling van die regtersamp aan die wysheid en eerbaarheid van die koning, was sekerlik in daardie tydperk nie ’n seldsame verskynsel nie (vgl Labuschagne “Evolusielyne in die regsantropologie” 1996 *SA Tydskrif vir Etnologie (SATE)* 40–45 en “Die begrip ‘godsdiens’ in godsdiensvryheid: ’n Bewussynsantropologiese ekskursie na die evolusiekern van die reg” 1997 *De Jure* 118–132). In *Coetsee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prisons* 1995 4 SA 631 (KH) par 61 verwys die KH na die instelling van minagting van die hof as van “ancient and honourable” geskiedenis, al sou dit by geleentheid misbruik gewees het. Aan die regtersamp, grootliks as gevolg van sy direkte verbintenisse met die heerser- of koningsamp, is vroeër oor ’n wye front ’n heilige en goddelike status toegeken (sien bv Hailsham *Halsbury’s laws of England* vol 3(1) (1989) par 433; Huhn “Vor der Standes – zur Klassenjustiz” in Kusserow (red) *Richter in Deutschland* (1982) 15). Dit is tot ’n groot mate nog steeds die posisie in die inheemse gemeenskapslewe in Suider-Afrika (sien Mqeke “Myth, religion and the rule of law in the precolonial Eastern Cape” 2001 *De Jure* 87 88–94). Hierdie status is deur die Judaïsme, en godsdiens wat daaruit ontspring het, voortgesit. So blyk duidelik, wat die Christelike godsdiens betref, uit Mattheus 25: 31–34 dat God self oor die regspleging toesig hou. Vandaar ook die Duitse spreukwoord: “Der Richter steht an Gottes Statt” (die regter neem die plek van God in). Kragtens artikel 1569 van die *Codex iuris canonici* verteenwoordig die Pous die hoogste judisiële gesag in die Katolieke kerk (sien Wagner *Der Richter* (1959) 1–2). ’n Anonieme kommentator het by geleentheid opgemerk dat (Angelsaksiese) regters “share with the bishops the homage paid to those who are felt to have peculiar relations with the other world” (“Paraphernalia” 1884 *Manitoba LJ* 129). Regsgeskoolde regters is eers vanaf die vyftiende eeu geleidelik in Europa ingefaseer en die idee van ’n onafhanklike regbank het eers aan die begin van die negentiende eeu in ’n omvattende sin begin posvat (Stölzel *Die Entwicklung des gelehrten Richtertums* bd 1 (1872) 22–23; De Groot-Van Leeuwen *De rechterlijke macht in Nederland* (1991) 30). Die heilige en tradisioneel bykans onaantasbare status van die regtersamp het ’n lang geskiedenis wat wesenlik teruggevoer sou kon word tot die sosio-emosionele oorsprongspit van die mens, waarvan oorblyfsels hedendaags nog duidelik in sosio-juridiese waardestrukture sigbaar is (sien in die algemeen Labuschagne 1997 *De Jure* 118 ev). Die invloed van dié oorblyfsels is

nog so kragtig dat dit die rasonale op sypore kan rangeer of selfs geheel en al kan onderdruk. Die rasonale as funderingsbasis van 'n dinamiese geregtigheidsbegrip, asook gevolglik van die regspleging as sodanig, is uiteraard onontbeerlik (sien Esser "Traditionale und postulative Elemente der Gerechtigkeitstheorie" in Gernhuber (red) *Tradition und Fortschritt im Recht* (1977) 113). Regter Kriegliger verklaar in *Mamabolo* (par 16):

"In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the state."

Insiggewend is egter dat uit die geskiedenis blyk dat die regsprekende gesag die misdaad minagting van die hof self ontwikkel en die wyse en omvang van sy beskerming in dié verband bepaal het en nog steeds kan bepaal. Morele gesag ("moral authority") kan in die tydvak waarin ons lewe slegs effektief wees, en dit in 'n groeiende mate word, indien dit sinchroniseer met die evolusie van die rasonale in die menslike gemeenskapslewe. Mag as sodanig word in 'n toenemende mate in liberale demokrasieë en regstate ondergeskik gestel aan die rasonale. 'n Demokrasie is nie 'n verkiesing nie en 'n regstaat word nie deur 'n akte van menseregte as sodanig geskep en in stand gehou nie. Dit kan slegs deur effektiewe en rasonale kontrolemeganismes, 'n menseregte-vriendelike en -ingelichte burgery en, in finale instansie, deur die menslike wil en gewete daargestel en in stand gehou word. Benda wys tereg in dié verband daarop dat in 'n regstaat hoë eise aan 'n regter gestel word en dat "(der) Richter . . . Treuhänder des Gesetzes" is, dit wil sê die regter is in finale instansie die persoon wat geregtigheid moet waarborg ("Richter im Rechtsstaat" in 'n publikasie van die Deutsche Richterbund *Kurskorrekturen im Recht* (1980) 235 243, 248). Aansluitend hierby wys Spiegel tereg daarop dat dit die taak van die regsprekende gesag is om die pluralisme-etiek ("die Ethik des Pluralismus") te fundeer en te verwesenlik ("Die Rolle der Justiz in unserer Gesellschaft" 2001 *Deutsche Richterzeitung (DRiZ)* 233 238). Hierdie pluralisme-etiek speel in die meerderheid Anglo-Amerikaanse regstelsels, in vergelyking met byvoorbeeld die moderne kontinentale regstelsels, 'n uiters ondergeskikte rol of is totaal afwesig. Die anachronistiese konsep van nasiebou of ander vorme van kultuur- en taalimperalisme mag nie aangewend word om die pluralisme-etiek te ondergrawe nie (vgl Mokgoro "The protection of cultural identity in the Constitution and the creation of national unity in South Africa: A contradiction in terms?" 1999 *SMU LR* 1549; Labuschagne "Taalregte in die regsproses" 2000 *THRHR* 517). Wat duidelik behoort te blyk, en wat elders in meer besonderhede beredeneer is, is dat genoemde kontrolemeganismes nie tot die juridiese beperk is nie, met ander woorde: Ook buite-juridiese kontrolemeganismes speel 'n wesenlike rol by kontrolering en gevolglike funksie-omlyning van die regsprekende gesag (vir meer besonderhede sien Labuschagne "Tussen onafhanklikheid en tirannie: Opmerkinge oor die kontrolemeganismes van die regsprekende gesag" 1993 *De Jure* 347–362, "Regterlike onafhanklikheid en die vraagstuk van objektiewe regspleging" 2000 *SAPR/PL* 208–213. Vgl Bovend 'Eert "Raad voor de rechtspraak"

2001 *NJB* 39–46; Bilda “Unabhängigkeit des Richters – ein Mythos?” 2001 *Juristische Rundschau* 89–93; Voss “Wenn Richter über Richter urteilen” 2001 *Zeitschrift für Rechtspolitik* 183–184). In Suid-Afrika bestaan byvoorbeeld onversoerbare waardesisteme en redestrydige (irrasionele) geregtigheidsaansprake in ’n enkele regstaat (sien hieroor Labuschagne “Geloof in towery, die regsbewussyn draende persoonlikheid en die voorrasonale onderbou van die regsorde: ’n regsantropologiese evaluasie” 1998 *SATE* 78 en “Die spanningsveld geskep deur die selfverantwoordelike en verantwoordelike deflektiewe persoonlikheidstipes in ’n plurale en liberale regstaat: Regsantropologiese kantaantekeninge by die soeke na ’n legitieme regsbedeling vir Suid-Afrika” 2001 *De Jure* 292. sien ook De Kock en Labuschagne “Ubuntu as a conceptual directive in realising a culture of effective human rights” 1999 *THRHR* 114). Van hierdie waardesisteme manifesteer ook in protesoptrede, optogte en dreigende geweldsoptrede wat, blykens mediaberigte, voortdurend by hofgeboue plaasvind en wat op intimidasie van die regsprekende gesag gerig is of sodanige effek kan hê (sien die insiggewende navorsing van Van Niekerk *Intimidation as a factor in the liberation struggle in South Africa with special reference to Bela Bela (Warmbaths): An anthropological perspective* (MA-verhandeling Unisa 1999) veral 207 ev).

3 Skandalisering van die regbank as misdaad

Regter Kriegler (par 18–19) wys daarop dat die regsprekende gesag slegs met die ondersteuning en vertroue van die publiek kan funksioneer. Teen dié agtergrond vervolg hy:

“Therefore courts have over the centuries developed a method of functioning, a self-discipline and a restraint which, although it differs from jurisdiction to jurisdiction, has a number of essential characteristics. The most important is that judges speak in court and only in court. They are not at liberty to defend or even debate their decisions in public. It requires little imagination to appreciate that the alternative would be chaotic. Moreover, as a matter of general policy judicial proceedings of any significance are conducted in open court, to which everybody has free access and can assess the merits of the dispute and can witness the process of its resolution. This process of resolution ought as a matter of principle to be analytical, rational and reasoned . . . All decisions of judicial bodies are as a matter of course announced in public; and, as a matter of virtually invariable practice, reasons are automatically and publicly given for judicial decisions in contested matters . . . Ordinarily the decisions of courts are subject to correction by other, higher tribunals, once again for reasons that are debated and made known publicly . . . This manner of conducting the business of the court is intended to enhance public confidence. In the final analysis it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die. Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute.”

Feit van die saak is egter dat gedwonge en geveinsde “ondersteuning” van en “vertroue” in die regsprekende gesag nie net oneffektief en teenproduktief nie, maar ook potensieel gevaarlik is. ’n Mens kan nie anders as om saam te stem met die vermaarde regter Frankfurter van die Supreme Court van die VSA waar hy na die misdaad skandalisering van die hof as “English foolishness” verwys nie (*Bridges v State of California* 314 US 252 (1941) soos aangehaal deur die

Zimbabweese hoofregter Gubbay in *S v Chinamasa* 2001 1 SACR 278 (ZSC) 288). Dit is interessant om daarop te let dat, nie teenstaande die feit dat die Supreme Court van die VSA in *Bush v Gore* 121 SCt 525 (2000) in effek op die hoogste vlak 'n politieke geskil moes beredder, die regsprekende gesag in die VSA deur die regsonderdane steeds hoër aangeslaan word as enige ander afdeling van die staatsgesag (Yoo "In defense of the court's legitimacy" 2001 *Univ Chicago LR* 775 777–778). Die geestelik-intellektuele diskoers, wat onontbeerlik vir 'n effektiewe en funksionele demokrasie en 'n plurale en liberale regstaat is, kan slegs gedy in 'n gemeenskap wat aan vryheid van spraak en meningsvorming 'n primêre status toeken (sien vir meer besonderhede Labuschagne "Menseregtelike en strafregtelike bekamping van groepsidentiteitmatige krenking en geweld" 1996 *De Jure* 23). Genoemde geestelik-intellektuele interaksie vind nie slegs fundering in die regstaatlike waardes van vryheid van spraak en gedagte- en gewetensvorming nie, maar ook in dié van menslike waardigheid en gelykheid (sien verder Labuschagne 2001 *De Jure* 292 en Botha *The legitimacy of law and the politics of legitimacy: Beyond a constitutional culture of justification* (LLD-proefskrif UP 1998) 1 ev; vgl Cummings en Eagly "A critical reflection of law and organizing" 2001 *UCLA LR* 443 488–490). 'n Regsobjek mag nooit deur die staat, wat die regsprekende gesag insluit, tot 'n objek gedegradeer word nie. Daarom word die vrye menslike persoonlikheid, wat met waardigheid toegerus is, deur die Duitse konstitusionele hof as die hoogste menseregtelike waarde beskou (*BVerfG*, Urt v 11/6/1958, *BVerfGE* 7 370 405; sien ook Schubert "Demokratie braucht Justiz" 2001 *DRiZ* 239 241). Die regsprekende gesag bestaan nie in finale instansie uit howe nie, maar uit feilbare mense wat bepaalde openbare funksies vervul en teenoor die gemeenskap verantwoording verskuldig is of behoort te wees (vgl Van Houten "Rechter en wetgever: Een nieuwe balans" 2001 *RM Themis* 3–15; Corstens "Reorganisasie van de rechterlijke macht" 2001 *NJB* 124–125; Van Dijk, Keijzer en Van de Mortel "Rechtspraak in beweging" 2001 *NJB* 219–221). Vir aanstelling in die regtersamp behoort *meriete*, gebaseer op juridiese, sosiale en intellektuele vaardighede en veral integriteit, in alle omstandighede deurslaggewend te wees (vgl Legg "Judges for the new century" 2001 *Public Law* 62 68–70; Nel "Die samestelling van die regbank in die hoër howe in die lig van die strewe om dit meer verteenwoordigend van die gemeenskap te maak" 2001 *De Jure* 29 46–48).

4 Konklusie

Die geskiedenis toon aan dat die heilige en onaantasbare status van die regtersamp geleidelik geërodeer en die mens agter die "hofmasker" blootgelê is. Daarom word die staat, en soms ook die regspreker self, in verskeie lande in gepaste omstandighede deliktueel aanspreeklik gehou vir foute van die regsprekende gesag. Verskeie Angelsaksiese regstelsels het nog nie hierdie regstaatontbeerlike en progressief-geregtigheidsvriendelike fase betree nie (sien hieroor Labuschagne "Die deliktuele sanksie as kontrolemeganisme van die administratiefregspiegeling en die regsprekende gesag" 1996 *SAPR/PL* 582, "Onregmatige regspraak en die vraagstuk van judisiële immuniteit in 'n regstaat: Regsantropologiese kantaantekeninge" 2000 *SAPR/PL* 540; "Deliktuele aanspreeklikheid van die staat vir ongemotiveerde hofbeslissings" 2001 (2) *TRW* 290; Motala "Judicial accountability and court performance standards: Managing court delay" 2001 *CILSA* 172). Die ingeligte en rasonale burgers aanvaar in 'n groeiende mate dat een of ander (feilbare) mens of 'n groep mense by regsgeskille 'n finale beslissing sal moet gee en dat die betrokke partye daarby

sal *moet* berus. Wat siviele gedinge betref, maak genoemde lede van die burgery al hoe meer gebruik van arbiters, dit wil sê in effek kies hulle die persoon of persone in wie se (juridiese) oordeelsvermoë hulle vertrou kan stel, dit wil sê: Die betrokke partye kies self hulle regter(s). (Vgl Seligman "The nontrial adversarial model" 2001 *Law and Contemporary Problems* 97.) Die werklike aansien wat 'n lid van die regsprekende gesag by die praktisynskorps het, blyk *dikwels* uit die arbitrasiefunksies wat hy/sy na aftrede vervul. Dit is nie uitgesluit dat staatlake inmenging by regsgeskilte, ook (eventueel) in strafgedinge, in die toekoms geheel en al op die agtergrond sal tree of selfs uitgeskakel sal word nie (sien Labuschagne "Konsensuele strafregspiegeling: Opmerkinge oor die spanningsveld tussen regstaatlikheid en doelmatigheid" 1995 SAS 158 en verwysings aldaar).

Nieteenstaande die feit dat die tradisionele Angelsaksiese regtersamp, en tereg ook, oor 'n wye front hoog aangeslaan word en respek afdwing, blyk duidelik dat, om 'n toekomstige verleenheid vir die regsplegeling as sodanig te neutraliseer, regstaatlike waardes en geregtigheid, wat in finale instansie deur geestelik-intellektuele interaksie gegeneer word, verg dat die sosio-juridiese status daarvan hersien en ook aansienlik afgeskaal sal *moet* word. Trouens, dáársonder sou die volgende vlak in die evolusieproses van regstaatlike waardes en geregtigheid nie bereikbaar wees nie (sien hieroor Labuschagne "*Audi alteram partem* in die administratiefreg: Opmerkinge oor die mensinteraktiewe dimensie van geregtigheid" 1992 *De Jure* 183 354). Viehweg "Schritte zu einer rhetorischen Rechtstheorie" in Herren, Kienappel en Müller-Dietz (reds) *Kultur. Kriminalität. Strafrecht* (1977) 3 6 verklaar in dié verband tereg dat interaktiewe kreatiwiteit ("die kommunikatiewe Kreation") bevorder en nie geïnhibeer moet word nie. Interaksie, waarin ook die burgery insette behoort te kan lewer, is 'n *sine qua non* vir 'n effektief-dinamiese en geregtigheidsoriënterende regsbedeling (sien verder hieroor Schünemann "Die Gesetzesinterpretation im Schnittfeld von Sprachphilosophie, Staatsverfassung und juristischer Methodenlehre" in Kohlmann (red) *Festschrift für Ulrich Klug* (1983) 169; Frohn *Rechtliches Gehör und rechtliche Entscheidung* (1989) 131ev).

Die wetenskap, kennis in die algemeen en ontwikkelende gemeenskapswaardes moet in 'n effektiewe en funksionele geregtigheidsbegrip verdiskonteer word. In dié verband merk Coles tereg op: "Als Subsystem der Gesellschaft hat sich das Recht dem Entwicklungsstand der übrigen Bereiche anzupassen" (vry vertaal: "As subsisteem van die gemeenskap behoort die reg by die ontwikkelingsvlak van ander terreine (vakgebiede) aan te pas") (*Folgenorientierung im richterlichen Entscheidungsprozeß* (1991) 252. Sien ook Reich "Reflexives Recht? Bemerkungen zur einer neuen Theorie von Gunther Teubner" in Broda *et al* (reds) *Festschrift für Rudolf Wassermann* (1985) 151).

Geen regsinstelling kan in die langtermyn op dwang as sodanig en op pretensie oorleef nie. Die opmars van die rasonale en die geregtigheidsdinamiek wat dit in die sosio-juridiese organisasie en waardestrukture van die mens genereer, is daarvoor bloot te kragtig. Die regsprekende gesag moet in finale instansie ook teen homself beskerm word (vgl Voss "Im Blickpunkt: Rechtsstaat und Richter" 2001 *DRiZ* 189 193). Die kategoriese stellings ("sweeping statements") wat 'n mens dikwels teëkom, dat die Suid-Afrikaanse regsprekende gesag in die verlede op 'n arbitrêre wyse en *per se* teen persone van kleur gediskrimineer het, is as sodanig ongegrond. Trouens, my persoonlike ondervinding as staatsadvokaat aan die einde van die 1960's en begin 1970's in Johannesburg was dat die howe dikwels agteroor gebuig het om sodanige persone se belange te

beskerm. Ongelukkig, as gevolg van die teenwoordigheid van die mensfaktor in die regspleging soos in alle menslike organisasies, het daar, en soms te veel, uitsonderinge voorgekom en kom dit nog steeds voor (vgl ook die opmerkings van Sachs R par 76 vn 15 in *Mamabolo*).

Die aanmoediging van onverskrokke en openlike kritiek van en openbare diskoersvoering oor die regspleging, soos byvoorbeeld in kontinentale regstelsels en veral in VSA-reg gemanifesteer, stel myns insiens 'n onmisbare regstaatlike waarde en 'n dinamiese en progressiewe geregtigheidsdeterminant daar (sien tav die debat wat in die Nederlandse reg aan die gang is Ten Kate en Haak "De modernisering van de rechtsprekende macht" 2000 *NJB* 1607–1610 en tav Pakistan, Armytage "Pakistan judicial reform project" 2001 *Australian LJ* 452–456). Hierdie sienswyse sinchroniseer ook met die standpunt wat Heyns huldig, naamlik dat regstaatlike waardes (menseregte) hul oorsprong in die (kontinue) legitieme weerstand – wat myns insiens as 'n verskyningsvorm van 'n interaktiewe konfronteringsinset beskryf sou kon word – van die regsonderdane het ("A 'struggle approach' to human rights" in Soeteman (red) *Pluralism and law* (2001) 171 188. Sien ook Spiegel 234; Schubert 241; Voss 2001 *DRiZ* 195). Ons regsprekende gesag, indien die tradisionele integriteitsvlak en die juridiese, sosiale en intellektuele vaardighede daarvan in stand gehou sou kon word, sal met gemak in sodanige milieu kan oorleef en, sonder dwang of pretensie, in status en aansien kan groei. Aan die nodige mensemateriaal, wat in die ganse bevolkingspektrum manifesteer, hoef nie getwyfel te word nie!

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**A COMPARATIVE PERSPECTIVE ON THE ATTEMPTED
EXCLUSION OF FOREIGN INVOLVEMENT IN THE SOUTH
AFRICAN PRIVATE SECURITY INDUSTRY**

1 Introduction

Parliament considered the Private Security Industry Regulation Bill during its second session in 2001. The Bill was aimed at replacing the regulatory framework in respect of the private security industry created by the Security Officers Act 92 of 1987. The Bill was finally passed by the National Council of Provinces on 16 November 2001. It came into operation on 14 February 2002 as the Private Security Industry Regulation Act 56 of 2001 (GN R10 in GG 23120 of 2002-02-14).

During October 2001 the news media carried many reports on the policy of the Minister for Safety and Security to exclude all foreign involvement from the South African private security industry. After strong pressure from different sources, including the Government of the United Kingdom, the policy was abandoned. The object of this note is to provide some details concerning certain legal issues, in a comparative context, regarding the attempted exclusion of foreign involvement.

2 Factual position

By October 2001 the South African private security industry, which has experienced exponential growth over the past decade, consisted of approximately 200 000 registered individual security officers and 5 500 registered security businesses. The turnover of the lucrative local security industry was said to be R13 billion in 2001. Five of the largest private security companies in South Africa were (and still are) controlled by foreigners, mostly from the United States, the United Kingdom and Singapore. The foreign investment in the security industry in these companies was estimated at approximately R2 billion (see generally a report from *Credit Suisse First Boston (Europe)* of 2001-02-07). There could, of course, be much more capital invested in any number of the thousands of security businesses without there being any public record of this fact.

It was clear that any strategy to exclude foreign control could not merely be intended to prevent foreign control of South African security businesses from being established, but would have had to create a mechanism to transfer the existing foreign shareholding or interest to South African control.

3 Draft legal provisions aimed at dealing with foreign involvement

The drafters of the Private Security Industry Regulation Bill added a number of provisions to the Bill to deal with foreign involvement. It should be pointed out that this was a difficult task since, the Bill did not in principle deal with the concept of *ownership* of security businesses. Whilst many aspects of the security industry have been subject to regulation over the past 12 years, ownership as such has not been one of them. The challenge was therefore not merely to exclude foreign ownership, but to deal with the concept of ownership itself, for example of the shares in a security company.

The Bill as introduced by the Minister for Safety and Security, initially addressed the role of foreigners only on the basis of excluding foreign individuals not having permanent resident status in South Africa from registration as security service providers (see now s 23(1)(a) of the Act which is in stark contrast with ss 11 and 12 of the repealed Security Officers Act 92 of 1987 which did not require citizenship or permanent residence for registration and involvement in the local security industry). Companies or close corporations can in terms of the new Act only be registered if they are incorporated in terms of South African law. There is no such requirement in regard to other entities used for business purposes such as partnerships, trusts and foundations.

The following clauses were added to the Bill on 4 October 2001 to give expression to the intended exclusion of foreign ownership:

“38A. (1) Neither any natural person who is not a South African citizen and who does not have permanent resident status in South Africa, nor any foreign juristic person, is allowed to have shares or any other interest in the ownership of a security business.

(2) Any shares or other interest acquired in contravention of subsection (1) is forfeited to the State, unless the Minister is satisfied that the interested party should not be blamed for the acquisition and allows the sale thereof to a competent person, subject to such conditions as the Minister may determine.

(3) No person may either directly or indirectly receive or solicit funds for use in a security business from a person who is neither a South African citizen nor the holder of permanent resident status in South Africa.”

4 Some comments on the draft provisions

The constitutionality or otherwise of the far-reaching and drastic draft provisions will not be considered in this contribution. However, it may be observed that even though section 22 of the Constitution recognises a fundamental right to freely choose one's trade, occupation or profession only in regard to South African citizens (see Devensih *A commentary on the South African bill of rights* (1999) 301–307 for a general discussion), other fundamental rights could obviously have been relied upon to mount a challenge on the draft provisions. Such a challenge could, for example, have been based on the effect of the provisions in preventing foreign involvement as well as its treatment of existing foreign involvement and funding.

The draft provisions did not unequivocally take away the minister's discretion to exempt, *inter alia*, "any person or entity from any or all the provisions of this Act" (see cl 1(2) of the Bill and s 1(2) of the Act – even though cl 1(2)(b) which has not been enacted referred at that stage to an "exemption [the minister] is authorised to give"). The power to grant an exemption (also contained in s 20(5) of the Act) could theoretically have been used to limit the effect of excluding foreigners from the local security industry.

The exclusionary provisions did not impose a duty on existing companies to provide information on their shareholding to the State. This would have caused practical problems in identifying existing businesses falling under the draft provisions.

Wide ranging as the draft provisions were, they did not deal with South African non-security businesses controlled by foreigners or with foreign involvement having "in-house" security divisions – such as mining companies. This was the position because of the restriction of the draft provisions to "security businesses".

It may be assumed that there would have been many attempts to evade the ban on foreign ownership of shares through, for example, nominees acting on behalf of foreigners or other schemes. The intended ban on foreign funding of a security business would obviously have been extremely difficult to police.

5 The position in certain foreign jurisdictions

In this paragraph brief reference is made to legal provisions applied in certain foreign jurisdictions regarding the involvement of foreigners in their private security industries (see generally Ottens, Olschok and Landrock *Recht under Organisation privater Sicherheitsdienste in Europa* (1999) *passim*; George and Button *Private security* (2000) *passim*).

In Argentina different legal measures (see eg a Presidential Decree of 1999, a 7(1)) require that a natural person seeking authorisation to act in the private security industry must be a citizen of the Republic of Argentina with two years actual residence.

In terms of the legislation applicable to the autonomous city of *Buenos Aires* (a 4 of the relevant law), a natural person may only render a security service if such a person is, *inter alia*, an Argentinean citizen with two years actual residence and is domiciled in Buenos Aires. In the case of a juristic person, it must have established legal domicile in Buenos Aires and must also submit an affidavit containing the list of partners involved in the business, stating the share percentage of each (a 6). A security business must report any transfer of stock or shares in such business to the regulating authority within 30 days.

The law of the province of Buenos Aires provides that the partners, directors, members of control bodies, managers and representatives of a private security company must be citizens of Argentina (a 5). A private security company is, *inter alia*, required to have a head office in the province of Buenos Aires and must be established in terms of certain commercial laws (a 24). A security company must obtain prior authorisation in respect of any changes to the composition of partners and directors as well as the payment of corporate capital by shareholders (a 28).

In Brazil it is a legal requirement for a security guard to be a Brazilian national. In terms of Law 7.102 of 1983, dealing with the regulation of "cash-in-transit" security services, foreign nationals are expressly excluded from the *ownership and administration* of firms providing such services. This is the only example in the foreign laws considered for comparative purposes where all foreign ownership of a security business appears to be prohibited.

As far as Spain is concerned, it may be pointed out that in terms of article 7(1) of Law 23 of 1992, all security companies that provide services with security personnel must be "Spanish companies". Article 8 of the same law stipulates that the administrators and directors of security companies must be persons physically resident in Spain. According to article 9 security companies must inform the Minister of the Interior of any change that comes about in the ownership of their shares (within 15 days after the event). Security personnel must be of Spanish nationality (a 10).

As a result of the exclusion of persons from member states of the European Union (EU) from the Spanish security industry, the Court of Justice of the EU ruled in 1998 that Spain had to modify the legal provisions referred to above to ensure compatibility with the laws applicable to member states of the EU. In view of the common citizenship of the EU, security companies must now have "nationality" of a member of state of the EU (or of a state that is party to the Agreement on the European Economic Environment). Natural persons must have nationality of a member state of the EU. The ban on foreigners outside the EU from involvement in the Spanish security industry still appears to be in force.

In France the position is that no person may render a security service or be a director or manager (whether *de jure* or *de facto*) of a firm that renders such services unless he/she is of French nationality or a national of a state that is a member of the European Union (a 5 of Law no 83-629). Foreign security firms are also not allowed, unless they are from a member state of the EU. In terms of a new draft French law on private security submitted to its parliament in 2000, authorisation to render a security service may only be granted to a natural person who is a French citizen or a citizen of an EU state (a 7).

In Belgium a person may only be active in the private security industry if such person has Belgian nationality or the nationality of a member state of the EU. In this regard there is also a requirement on domicile or usual residence in Belgium. Foreign security firms are also not allowed, unless they are from a member state of the EU.

In the Australian state of Victoria, a corporation applying for a licence to render a security service must appoint as nominee the officer residing in Victoria who is in *bona fide* control of the business in Victoria (s 9 of the Private Agents Act, 1966).

In Germany there appears to be no citizenship requirement for being issued with a licence to render a security service. However, before an applicant will be issued with a licence he or she must successfully attend a training seminar that is held through medium of the German language, and must have a sufficient command of the German language.

Citizenship is required in respect of private investigators in the United States (see Siebrits *Regulation of the private security industry* (doctoral thesis Unisa 2001) 257).

6 Conclusion

The draft provisions intended for South African legislation on banning foreign ownership could have been defended on the basis of comparison with certain foreign jurisdictions. The position in Spain and Belgium is clearly based on the concept of the EU being a super national state, and cannot really be cited as examples of allowing foreign involvement in the respective local security industries. In Brazil one finds a provision banning foreign ownership in regard to a sector of the security industry.

However, the South African draft provisions were not well thought through. They were too simplistic in nature and, as stated, they would most probably not have survived the inevitable constitutional challenge.

Even though concerns on foreign control over the South African private security industry are understandable from a national interest point of view, and even though the existing foreign investment has not really in practice created any jobs, a much more sophisticated and realistic legal mechanism would have had to be found to control foreign involvement on the level of ownership of security businesses.

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LEGALITEIT EN GOLGOTA: MODERNE PERSPEKTIEWE OOR DIE VERHOOR VAN JESUS CHRISTUS

1 Inleiding

Die aanbreek van die 21ste eeu word wêreldwyd gekenmerk deur omvangryke uitdagings en knelpunte. In Suid-Afrikaanse verband is daar ook talle vernuwinge en uitdagings. Veral die ontwikkeling van 'n nuwe demokratiese regsorde, die bekamping van misdaad en die opheffing van sosiale lewenstandaarde staan op die voorpunt van hierdie uitdagings. Mens kan inderdaad aanvoer dat die staat en sy gemeenskap voor verskeie kruispaaie rakende sy bestaan en regsontwikkeling gekom het. Dit is juis na aanleiding van hierdie kruisbeeld-metafoor dat mens onwillekeurig na seker die bekendste kruisbeeld van sowat twee duisend jaar gelede terugdink. Gegewe die huidige jaartal is dit gepas om kortliks die regsomstandighede en gebeure rakende die verhoor van Jesus Christus in herinnering te bring en om sekere aspekte daarvan, vanuit 'n regs oogpunt, onder die loep te neem.

Die moderne Suid-Afrikaanse gemeenskap is 'n kaleidoskoop van tale, kulture en godsdienste. Hierdie aspekte word van groot belang beskou binne die nuwe demokratiese staat, en is selfs in die Grondwet as hoogste gesag opgeneem (sien a 2 Wet 108 van 1996). Talle verwysings na 'n Godheid kom in die Grondwet voor (sien bv die aanhef). Ook die Handves van Regte bepaal dat godsdiens een van die gronde is waarop daar nie deur die staat, regstreeks of onregstreeks, onbillik gediskrimineer mag word nie. (Sien bv a 9(3) Grondwet.) Eweneens verleen artikel 15 die reg aan elkeen op vryheid van gewete, *godsdiens* (eie beklemtoning), denke, oortuiging en mening. Dit is derhalwe duidelik dat godsdiens en godsdienstige oortuigings as 'n belangrike deel van die algemene publieke belang beskou en as sodanig beskerm word. Vanweë die sensitiewe aard van godsdiens as onderwerp, is dit nie die bedoeling in hierdie bydrae om een godsdiens hoër as 'n ander te stel nie, maar om bloot sekere interessante aspekte ten opsigte van die strafverhoor van Jesus Christus in herinnering te bring. Dit is ook interessant om te onthou dat dit juis die geboorte van Christus is wat gebruik word as maatstaf om die moderne jaartellings te bereken. In dit wat hierop volg word die historiese bronne rakende Christus se lewe en verhoor kortliks vermeld, waarna kortliks op bepaalde regsaspekte van Sy gevangeneeming en verhoor gelet word.

2 Bronne rakende Christus se lewe en verhoor

Daar is relatief min bronne beskikbaar waarin die agtergrond en gebeure rakende die lewe van Christus volledig aangehaal en beskryf word. Dié wat wel beskikbaar is, is kripties en bevat min agtergrondinligting en verduidelikings. In die praktyk word die beskikbare bronne in twee kategorieë verdeel. Eerstens is daar die sogenaamde Christelike bronne wat hoofsaaklik in die Nuwe Testament van die Bybel opgeteken is. Hierteenoor is daar ook enkele nie-Christelike bronne wat verwysings en inligting oor Christus bevat. (Vir meer hieroor sien Le Gasse *The trial of Jesus* (1997) 2–4.) Veral twee nie-Christelike verwysings is van interessante waarde rakende Christus se lewe. Die eerste is die *Annales* van Tacitus, die bekende Romeinse historikus, waar hy verwys na Christus se lewe en sy verhoor voor Pontius Pilatus (*Annales* XV 44). Die tweede verwysing word gevind in 'n brief van 'n Siriëse wysgeer aan sy seun wat in Edessa gestudeer het. In die brief, wat ongeveer 100 nC gedateer is, word die volgende aanhaling gevind:

“What good did it do the Athenians to kill Socrates, for which deed they were punished with famine and pestilence? What did it avail the Samians to burn Pythagoras, since their country was entirely buried under sand in one moment? Or what did it avail the Jews to crucify their wise King, since their kingdom was taken away from them from that time on? God justly avenged these three wise men. The Athenians died of famine, the Samians were flooded by the sea, the Jews were slaughtered and driven from their kingdom, everywhere living in dispersion. Socrates is not dead thanks to Plato, nor Pythagoras because of Hera's statue. Nor is the wise king, because of the new law which he has given” (Le Gasse 3–4).

Ten spyte van die beperkte brondokumente (buiten die Bybel) is die gebeure en lewe van Christus wêreldwyd bekend. Die regsaspekte rakende Sy gevangeneeming en verhoor is egter nie so wyd bekend nie en word vervolgens bespreek.

3 Regspleging tydens Christus se lewe

Soos hierbo vermeld, is die lewensverhaal van Christus seker een van die bekendste gebeurtenisse wat nog opgeteken is. Meer mense in die wêreld weet daarvan as van enige ander verhaal en die effek daarvan is vandag nog onmeetbaar.

Vanuit dié gebeure het 'n godsdienst ontwikkel wat twee duisend jaar later oor die ganse wêreld bekend is. Tog is daar baie mistiek en soms onsekerhede oor Christus se lewe en kruisdood. Mens vergeet maklik dat Hy 'n man was wat deur mense "verhoor" was op grond van bepaalde regsreëls en bepaalde regstelsels en daarna om die lewe gebring is.

Palestina, die streek waar Christus die meeste van sy sendingwerk gedoen het, was deel van die magtige Romeinse ryk en het die "heilige stad" Jerusalem as hoofstad gehad. Alhoewel die Jode onder Romeinse gesag gestaan het, het hulle wel beperkte bevoegdhede gehad om oor hulle eie plaaslike aangeleenthede gesag uit te oefen. Hierdie gesag was oorwegend in die hande van die owerpriesters, tesame met die Joodse Raad oftewel Sanhedrin. Die Joodse Raad het reeds sowat twee eeue voor Christus se geboorte sy ontstaan gehad. Die raad is bekend as die hooggeregshof van Palestina en het ook sterk wetgewende bevoegdhede gehad. Die raad is saamgestel uit al die owerpriesters, die ouderlinge en die skrifgeleerdes (Markus 14: 53). Daar was altesaam 71 raadslede, insluitende die hooflid oftewel hoëpriester. Ten spyte van Romeinse heerskappy kon die Sanhedrin in sekere gevalle die doodsvonnis oplê. Sodanige vonnis moes egter eers deur die Romeinse goewerneur bekragtig word alvorens dit voltrek kon word. (Vir meer besonderhede sien Dunn *Jesus, Paul and the law* (1990) 89 ev.)

'n Interessante aspek was die feit dat die Sanhedrin met so min as 23 lede sake kon aanhoor. Siviele sake kon deur óf die eiser óf die verweerder geopen word, maar strafsake kon slegs deur die verdediging geopen word. In siviele sake was 'n meerderheid van een stem voldoende om 'n geldige uitspraak daar te stel. Strafsake het egter 'n meerderheid van een vereis vir 'n kwytskelding, terwyl 'n meerderheid van ten minste twee vir 'n skuldigbevinding benodig was. Dit was verder ook gebruikelik dat strafsake gedurende die dag aangehoor word en dat uitspraak vir een dag voorbehou kon word, tensy die beskuldigde vrygespreek is, in welke geval hy of sy onmiddellik vrygelaat moes word. In geval van 'n skuldigbevinding kon die beskuldigde nie dadelik gestraf word nie en moes strafoplegging tot die volgende dag uitgestel word. Vanweë hierdie reëling was dit strydig met die Joodse reg om strafsake op die vooraand van die Sabbat of ander heilige dae te begin, want geen persoon kon op sulke dae gevonnissen en gestraf word nie. In die Sanhedrin het die hoëpriester se argumente en sienings deurslaggewende effek gehad en is daar selde van afgewyk. Sake voor die raad is beslis op grond van die Joodse reg van die tyd wat bepaal het dat geen skuldigbevinding gemaak kon word sonder die bevestigende getuïenis van onafhanklike en onpartydige persone nie. Strafoplegging was swaar en die doodstraf was meestal die enigste voorgeskrewe strafopsie. Sodanige vonnis is dan deur verbranding, steniging, onthoofding of verwurging ten uitvoer gebring. Die algemeenste van hierdie metodes was steniging. (Brandon *The trial of Jesus of Nazareth* (1968) 33 ev.) Soos reeds genoem, moes alle doodsvonnisse voor voltrekking eers deur die Romeinse goewerneur bekragtig word, wat gewoonlik 'n blote formaliteit was. (Sien Watson *Jesus and the law* (1996) 54 ev; sien ook Johannes 18: 31.)

Die Joodse en Romeinse reg het gelyktydig gegeld. Die Romeinse regsreëls was in beginsel as onveranderlik en van goddelike afkoms beskou. Bestaande reg kon nie herroep word nie maar nuwe regsreëls kon wel gemaak word. Die reg was vir eeue mondelings oorgedra en is eers baie later in die *Corpus iuris civilis* van Justinianus gekodifiseer (Van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1983) 30).

Tydens Jesus se lewe was die Romeinse reg sowat sewehonderd jaar oud. Keiser Tiberius was aan bewind en die tydperk was bekend as die sogenaamde “Prinsipaat” (Van Zyl 14). Rome is gekenmerk deur ongekende groei en welvaart. Ten spyte van relatiewe min inmenging met die Jode se interne aangeleenthede, het die Jode die Romeinse heerskappy verpes en was hulle volgens die Ou Testamentiese geskrifte die Messias te wagte.

4 Christus se “verhore” in ’n neutedop

Dit is interessant dat die Bybelteks self nie die woord “verhoor” gebruik nie, maar dat die verrigtinge voor Pilatus slegs in ’n opskrif van een van die hoofstukke as sodanig bestempel word (sien Mattheus 27). Pilatus was as goewerneur nie net die militêre gesagvoerder nie maar ook die hoogste regsprekende gesag in Judea. Teen sy uitsprake kon daar slegs in sommige gevalle na die keiser self geappelleer word. Soos reeds hierbo aangedui, was Christus se verskynings voor die hoëpriesters en die Sanhedrin in stryd met die geldende Joodse reg van die tyd (sien par 3 hierbo).

Dit blyk uit die staanspoor dat mens nie in Jesus se geval van ’n verhoor in ’n regstegniese sin kan praat nie. Hy is nooit werklik geleentheid gegun om Hom te verdedig nie en daar is ook geen grondige klage en getuienis teen Hom ingebring nie. Dit was veel eerder ’n sameswering om Hom om die lewe te bring as ’n strafregtelike vervolging wat teen Hom ingestel is (Markus 14: 55).

Volgens die Bybel is Jesus in die tuin van Getsémané gevange geneem nadat Hy deur die dissipel Judas Iskariot verraai is (sien Mattheüs 26: 47–56; Markus 14: 43–52; Lukas 22: 47–53; Johannes 18: 1–11). Volgens die Joodse reg was Jesus se arrestasie van meet af onwettig, omdat die Joodse reg bepaal het dat ’n persoon nie na sonder gearrester kon word nie. Die gevangeneeming het gedurende die nag plaasgevind. Die Joodse owerpriesters en skrifgeleerdes was Jesus kwaadgesind en wou Hom in die geheim om die lewe bring. Omdat hulle dit nie kon regkry nie, het hulle Hom laat gevange neem en gehoop dat die dissipels hulle met geweld teen die gevangeneeming sou verset. Dit sou die regmatige geleentheid bied om Christus en Sy dissipels te dood. Christus het egter alle gewelddadige verset onmiddellik afgekeur (Mattheüs 26: 52; Johannes 18: 10–11). Sonder gewelddadige verset en verlies van geheimhouding het die Jode geen ander alternatief gehad as om Christus voor die Joodse Raad te bring en aan te kla nie.

Na Sy arres is Christus eers na die voormalige hoëpriester Annas gebring wat Hom aanvanklik uitgevra het oor sy dissipels en leerstellings. Daarna is Hy na die hoëpriester Kájafas gestuur (Johannes 18: 13 19 24). Weer eens strydig met die Joodse reg van die tyd, is Jesus op die vooraand van die Sabbat gevange geneem. Die hoofklag teen Hom was dat Hy godslasterlik opgetree het deur te verklaar het dat Hy die Seun van God was. Geen grondige getuienis is egter aangebied dat sy optrede wel godslasterlik was nie. (Dit is ook interessant om daarop te let dat getuies wat in sake getuig het nie ’n eed oor die korrektheid daarvan moes aflê nie maar dat die Jode bloot op die negende gebod, wat die aflê van valse getuienis verbied, staatgemaak het.)

Nadat Christus deur Kájafas en sy mederaadslede ondervra is, het hulle Hom aan godslastering “skuldig bevind” en Hom na die Romeinse goewerneur Pontius Pilatus geneem (Johannes 18: 28–31). Hierdie gebeure word ook in Tacitus se *Annales* bevestig. Pilatus het Christus verskeie kere ondervra en het Hom selfs na koning Herodus gestuur, maar nóg Pilatus nóg Herodus kon enige

skuld by Hom vind nie (Lukas 23: 4; Johannes 19: 4-6). Alhoewel die hoëpriesters en skrifgeleerdes Christus aanvanklik voor Pilatus van aanhitsing tot rebellie en as 'n vyand van die Romeinse ryk aangekla het, het hulle weldra agtergekom dat Pilatus Christus nie sonder meer skuldig wou bevind nie en het hulle Pilatus persoonlik aangeval. Hulle het onder meer aangevoer dat as Pilatus vir Christus sou loslaat, hy nie 'n vriend van die keiser sou wees nie, wat tot gevolg gehad het dat Pilatus se persoonlike goewerneysposisie ook op die spel geplaas is (Lukas 23: 22).

Wat die verhoor voor Pilatus betref, is dit nie duidelik presies welke prosedure gevolg is wanneer hy 'n doodvonnis bekragtig het wat in ooreenstemming met die Joodse reg opgelê is, of wanneer hy Romeinse reg toegepas het in militêre en strafsake nie. Dit is hoogs waarskynlik dat die proses oorheersend inkwisories was.

Meet 'n mens nou die verrigtinge wat voor Pilatus plaasgevind het aan die bepalings van die Grondwet 108 van 1996 en die Strafproseswet 51 van 1977, word dit gou duidelik dat daar van 'n werklike verhoor in terme van ons heden daagse opvatting hoegenaamd geen sprake kon wees nie.

Toegee, Pilatus was aanvanklik heeltemal bereid om reg aan 'n persoon te laat geskied wat volgens hom klaarblyklik 'n onskuldige – miskien geestelik ietwat versteurde – persoon was. Dit is duidelik dat Pilatus, toe Christus voor hom gebring is, nog nie besluit het welke regstelsel hy sou toepas nie en of hy die klag wat teen Jesus gebring is volgens die Joodse of die Romeinse reg sou beoordeel nie. Die “beskuldigde” het dus nie eers geweet volgens welke norme Hy beoordeel of verhoor sou word nie.

Aanvanklik wil dit voorkom asof Pilatus die Joodse reg wil toepas, maar hy verneem direk van Christus self of hy hom aan enige wandaad skuldig gemaak het al dan nie. 'n Klagstaat, 'n behoorlik geformuleerde uiteensetting van 'n beweerde oortreding en 'n omskrewe feitestel wat die Beskuldigde met die daaruitvoortspruitende regsgevolge ten laste gelê word, bestaan dus hoegenaamd nie.

Dit is duidelik dat die Beskuldigde geen geleentheid gegun word om Homself op hoogte van die aanklag teen hom te bring nie, dit te oorweeg of 'n oorwoë antwoord daarop voor te berei nie. Van regsverteenvoering is daar geen sprake nie. Daar word aan die Beskuldigde geen verduideliking verstrekk oor die wyse waarop die verhoor sy loop mag neem, welke moontlike uitsprake teen Hom ingebring mag word en wat die gevolge van 'n skuldigbevinding mag wees nie.

Geen behoorlike verduideliking word deur die klaers of die hof aan die Beskuldigde verstrekk waarom Sy verhoor summier moet plaasvind nie. Geen geleentheid word aan Hom gebied om Sy verdediging voor te berei en getuies te vind of om met hulle te konsulteer nie. Ook die dringendheid van die saak word nie deur die klaers voor Pilatus gemotiveer nie.

Die verhoor neem 'n aanvang deur 'n algemene beskuldiging wat nie net deur een klaer nie, of een verteenwoordiger van 'n amptelike instansie ingebring word nie: die Hoë Raad, vergesel van 'n skare wat net-net oproerig wil raak, lig Pilatus in dat Christus godslaster gepleeg het en Hom tot koning wil verhef.

Van behoorlike bewyslewering en kruisverhoor is daar dus geen sprake nie. Pilatus ondervra die Beskuldigde self, en na hierdie inkwisoriese optrede kom hy tot die gevolgtrekking dat Jesus onskuldig is. Dis duidelik dat Pilatus op hierdie stadium nog die regte stap wil doen, ongeag of hy die Joodse of die Romeinse reg toepas. Hy lig die hoëpriesters in dat hy geen skuld by Jesus kan vind nie (Lukas 23: 4). Selfs nadat hy Jesus eers as 'n vermeende Galileër na

Herodus gestuur het om van die probleem te probeer ontslae raak, sê hy, toe Jesus die tweede keer voor hom verskyn dat Jesus onskuldig is (Lukas 23: 14).

Dit is duidelik dat die Sanhedrin en die hoëpriesters op hierdie stadium sou kon aandrang daarop dat Pilatus hom moet rekuseer, aangesien hy die indruk geskep het dat hy bevooroordeel was. Maar hulle dring daarop aan dat Jesus onmiddellik tereggestel word. Hier word dit duidelik dat Romeinse reg aangewend sal word en dat daar 'n growwe diskriminasie toegelaat is omdat 'n Romeinse burger nie gekruisig kon word nie maar Joodse burgers wel. Die oplegging van die doodsvonnis sou in ons huidige bedeling onmoontlik wees, maar selfs toe dit nog bestaan het, sou dit slegs in uiterste gevalle opgelê word (sien *S v Makwanyane* 1995 3 SA 391 (KH)).

Pilatus se ernstige pogings om die ergste vir Jesus te vermy, deur hom te gesel en daarna los te laat, is uit die aard van die saak 'n verkragting van die beginsel dat die regspreker onafhanklik moet wees en hom nie mag laat beïnvloed of dreig nie. Die geseling self is 'n wrede, martelende proses ten opsigte waarvan Pilatus nie eers aanspraak maak dat dit 'n straf is nie. Hierdie lukrake wreedheid word gepleeg om die bloeddorstigheid van die oproerige skare, aangevuur deur sy geestelike leiers, te probeer les. Dit het egter die teenoorgestelde uitwerking: die aandrang dat Jesus gedood moet word, word al hoe sterker. Pilatus besef dat daar geen bewyse teen Jesus ingebring is nie, maar abdikeer sy regsprekende funksie deur die was van sy hande. Weer eens word die beginsel van 'n onafhanklike regbank verkrag en kan daar van 'n verhoor as sodanig geen sprake wees nie.

Dat daar op hierdie stadium geen geleentheid aan die beskuldigde gegun word om sy saak te stel en hom op 'n regverdige regter te beroep nie, is opsigtelik. Ook die reg van appèl word die Beskuldigde ontsê. Die getuienis wat voorgelê is, is uitsluitlik hoorsê en behalwe die erkenning wat Christus maak dat hy 'n koning is, is daar geen tasbare bewys van enige aard teen hom nie.

Die verhoor word 'n totale bespotting van enige regstelsel as 'n mens in aanmerking neem dat daar geen betoog aan die einde van die saak is nie, dat die verhoor uitloop op 'n vonnis wat almal besef onregmatig is, waar die beskuldigde se uitoefening van die reg op stilsweye hom verkwalik word en waar 'n vonnis opgelê word sonder dat daar ooit 'n behoorlike skuldigbevinding aan enige misdryf op rekord geplaas word.

Benewens die feit dat die vonnis in vae terme gevel is, word daar geen benedeneerde en gemotiveerde uitspraak gelewer nie en word daar ook nie uitdruklik bepaal hoe die vonnis uitgevoer moes word nie. Dit staan die soldate en die mensemasse vry om die veroordeelde Christus te hoon, te spot en na hartelus te martel alvorens hy tereggestel word. Van menswaardige behandeling is daar geen sprake nie. Dat die geseling, die aanranding en die bespotting die fundamentele menseregte wat in ons Handves van Regte veranker is, met voete vertrap, is vanselfsprekend.

5 Slotopmerkings

Dit blyk duidelik uit voormelde dat die menswaardigheid van Christus regdeur die regsproses geminag is, dat hy geboei voor sy regter moes verskyn, dat die oproeriges toegelaat is om op Hom te skreeu en dat die gebeure 'n mens net tot een gevolgtrekking laat kom: Pilatus het Christus nie verhoor nie, maar laat vermoor. Pilatus was wel 'n onwillige medewerker van die ander moordenaars,

die skrifgeleerdes en hoëpriesters, maar het homself uit angs en vrees vir sy eie posisie tot werktuig van 'n polities gemotiveerde groepie opruiers en 'n opge-ruide gepeupel gemaak. Jesus is nie tereggestel nie. Teregstelling veronderstel 'n behoorlike regsproses. Jesus is vermoor! (Dit is interessant om daarop te let dat volgens sommige bronne Pilatus later tot bekering gekom het en self 'n martelaarsdood moes ly. Hy word daarom tot vandag in die Koptiese en sommige Ortodokse kerke as heilige vereer.)

E BERTELSMANN

Regter van die Hooggeregshof

BERNARD BEKINK

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Success or failure of the government or any other litigant is neither grounds for praise nor for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is an unfortunate tendency for decisions of Courts with which there is disagreement to be attacked by impugning the integrity of the Judges, rather than by examining the reasons for the judgment. Our courts furnish detailed reasons for their decisions, and particularly in constitutional matters, frequently draw on international human rights jurisprudence to explain why particular principles have been laid down or applied. Decisions of our courts are not immune from criticism. But political discontent or dissatisfaction with the outcome of a case is no justification for recklessly attacking the integrity of judicial officers . . . The Judiciary as an institution is one of the principal defenders of the Constitution, with a uniquely important role in its interpretation and application. During the present period of institution-building, unjustified and unreasonable attacks on individual members of the Judiciary, whatever their background or history, are especially to be deplored.

The court in President of the Republic of South Africa v South African Rugby Football Union 1999 4 SA 147 (CC) paras 68–69.

SETTING THE BOUNDARIES FOR EXPERT EVIDENCE IN SUPPORT OR DEFENCE OF MEDICAL NEGLIGENCE *Michael v Linksfield Park Clinic (Pty) Ltd 2001 3 SA 1188 (SCA)*

1 Introduction

As a general rule of evidence a plaintiff in a medical negligence action is required to present expert medical evidence in support of allegations thereof. In this regard expert medical evidence is pivotal in support or defence of medical negligence. The primary function of the medical expert is to guide the court to a correct decision on questions falling within the expert's specialised field. (See Hoffmann and Zeffert *The South African law of evidence* (1988) 97; Schmidt and Rademeyer *Bewysreg* (2000) 463; *S v Gouws* 1967 4 SA 527 (E).) The value a court should attach to expert medical evidence with regard to the proof of medical negligence (that is, to determine whether the defendant medical practitioner's actions or omissions were negligent or not with reference to the yardstick of the average competent reasonable medical practitioner in the same circumstances) is contentious. In the leading South African case on medical negligence, *Van Wyk v Lewis* 1924 AD 447-448, Innes CJ ruled explicitly:

"The testimony of experienced members of the [medical] profession is of the greatest value in questions of this kind. But the decision of what is reasonable under the circumstances is for the Court; it will pay high regard to the views of the profession, but it is not bound to adopt them."

The probative value of expert medical evidence is dependent upon the qualifications, skill and level of experience of the expert and the ability of the court to assess this testimony. More often than not the medical expert's testimony will be so technical in nature that the court will find it difficult to draw its own reliable inferences. This is particularly the case where medical experts who are called upon to testify on behalf of a plaintiff or the defendant medical practitioner in a medical negligence action, have conflicting opinions or represent different but acceptable schools of thought in medical practice. (See *Webb v Isaac* 1915 ECD 273; *Coppen v Impey* 1916 CPD 309; *Pringle v Administrator Transvaal* 1990 2 SA 379 (W); *Castell v De Greef* 1994 4 SA 408 (C) 409I; Barlow "Medical negligence resulting in death" 1948 *THRHR* 178; Carstens "Nalatigheid en verskillende gedagterigtings binne die mediese praktyk" 1991 *THRHR* 673; see also Strauss *Doctor patient and the law* (1991) 122; Claassen and Verschoor *Medical negligence in South Africa* (1992) 26; Van Oosten *International encyclopaedia of laws* (1996) 89). Although the approach to expert evidence has been the subject of judicial scrutiny in various medical negligence cases, the Supreme Court of Appeal in the case under discussion again had the opportunity to authoritatively enunciate the general applicable considerations in assessing expert medical evidence.

2 Facts

The plaintiffs' 17-year-old son (the patient) sustained an injury to his nose while taking part in sport. He consulted a plastic and reconstructive surgeon who recommended a rhinoplasty. The object was to remove a hump on the dorsal aspect of the nose and to correct a deviated septum. The operation was to be performed at the first defendant's clinic. The plastic surgeon was to be assisted by the second defendant, a specialist in anaesthesiology. Both specialists were in private practice. Among the first defendant's employees involved in the operation, were two registered nurses.

After the patient was fully and generally anaesthetised by the second defendant, the plastic surgeon injected a local anaesthetic (lignocaine and adrenaline) into the nose of the patient and inserted at the back of each nostril a plug of ribbon gauze soaked in a cocaine solution. The use of cocaine had a two-fold purpose: it is a local anaesthetic and a vasoconstrictor. The blood vessels of the nasal lining bleed very readily and it was necessary to constrict them to ensure a clear field for the surgeon. It should be noted that cocaine, either in overdose or in patient overreaction, has cardio-toxic effects which can lead to cardiac arrest (see 1193G-1194B).

While surgery was in progress, bleeding in the nose suddenly occurred in the right nostril of the patient which obscured the surgical field and brought the operation to a stop. With the bleeding there was a dramatic and alarming increase in the patient's heart rate and blood pressure. These symptoms were indicative of a hypertensive "crisis". The second defendant diagnosed too light anaesthesia as the cause of the crisis. He deepened the degree of anaesthesia to bring down the heart rate and blood pressure. He also injected a further one milligram of propranolol into the drip line. The heart rate and blood pressure came down as intended but thereafter continued to decline. The second defendant instructed the plastic surgeon to undertake cardio-pulmonary resuscitation (CPR) by way of external heart massage of the patient. The second defendant considered that there had been an over-action by the propranolol and to counter it he started administering, in conjunction with the CPR, a sequence of different drugs to try to raise the heart and blood pressure by removing the beta blockade. All these measures failed and the patient's heart went into cardiac arrest. This prompted the second defendant to employ a defibrillator to shock the patient's heart into normal momentary asystole in order to restore normal heart beat spontaneously. The Lohmeier defibrillator was therefore brought into action. The second defendant instructed one of the nurses to set the device to deliver a charge of 200 joules. The defibrillator was activated but appeared to be defective. One of the nurses was instructed to fetch another defibrillator from the intensive care unit. With the new defibrillator shocks were administered to the patient. These elicited a body reaction and, in addition, a heart beat. Further resuscitation was required in the intensive care unit with the result that the operation was not completed. The nasal wounds were simply closed and the patient's nose was plugged and splinted. It appeared that by the time resuscitation had restored heart function the patient had sustained major brain damage as a result of cerebral anoxia. The patient had been left in a permanent vegetative state.

The patient's parents sued for damages in the high court. The private company owning the clinic where the operation was performed was cited as the first defendant and the anaesthetist as the second defendant. Negligence was alleged

on the latter's part in relation to the cardiac arrest, and joint negligence was alleged in respect of the resuscitation process (see 1196H–1197G). By agreement between the parties the trial judge was asked to determine only the question of liability. Having found that none of the alleged negligence had been proved, the claim was dismissed but leave was granted to appeal.

3 Judgment

3 1 *The issues for decision*

3 1 1 Cause of cardiac arrest and medical negligence

The Supreme Court of Appeal considered various issues: the first essential issue was to determine the cause of the cardiac arrest. In this regard the court confirmed the finding of the trial court that the cause of the cardiac arrest was in all probability cocaine toxicity (1198I). The court, in assessing the actions and/or omissions of the second defendant, observed that the real question was whether the cardiac arrest was foreseeable as a reasonable possibility, meaning a possibility which a reasonable anaesthetist would foresee and guard against. In the final instance the court ruled that if the cause of the arrest was cocaine toxicity and the arrest was indeed foreseeable in that sense, the question would then be whether the arrest was reasonably avoidable (1197I). The court confirmed the finding of the trial court that the evidence of various experts (by reason of relevant concessions made by them during the trial) supported the notion that the second defendant's respective diagnoses of too light anaesthesia, of over-action of propranolol and of the heart's arrested state as asystole, were reasonable (1199H).

With regard to the action taken by the second defendant and the employees of the first defendant pertaining to the resuscitation of the patient, the court confirmed that the measures taken to combat the diagnosed asystole were appropriate and that it had been reasonable to resort to, and persist with, defibrillation after that (1199I–J). The court referred to the finding of the trial judge that it was impossible to determine when the patient's heart became susceptible to defibrillation, and therefore it could not be proved that the patient's heart was in fact susceptible at any time when the Lohmeier defibrillator was used. The trial court made no firm finding that the Lohmeier defibrillator was in working order and since the first defendant had done everything reasonable to ensure that its staff was acquainted with the Lohmeier's "idiosyncratic" functioning, the trial court did not consider whether further defibrillation with a properly functioning Lohmeier would have restored the patient's heartbeat and whether such restoration would have occurred any earlier than was in fact the case (1200A–C). The Supreme Court of Appeal concurred with the findings of the trial court and concluded that the trial judge was right to dismiss the claim – hence the appeal was dismissed (1201I–J).

3 1 2 The approach to expert evidence

It goes without saying that the evidence of medical experts was pivotal in the decision of this case. In this regard five expert witnesses testified on behalf of either the plaintiffs or the defendants. All were specialist anaesthetists, holding academic appointments as heads of departments of anaesthesiology at local or overseas universities. The approach to expert evidence followed by the Supreme Court of Appeal in this case can be summarised as follows:

- In delictual claims the issue of reasonableness or negligence of a defendant's conduct is one for the court itself to determine on the basis of the various and often conflicting expert opinions presented (1200D–E).

- As a rule, that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the court reaching its own conclusion on the issues raised (1200 D–E).
- In the case of professional negligence, the governing test is the standard of conduct of the reasonable practitioner in the particular professional field, but that criterion is not always a helpful guide to finding the answer (1200 F–G).
- What is required in the evaluation of expert evidence bearing on the conduct of such persons is to determine whether and to what extent the opinions advanced are founded on logical reasoning (1200I–J).
- The court is not bound to absolve a defendant from liability for allegedly negligent professional conduct (such as medical treatment or diagnosis) just because evidence of expert opinion, albeit genuinely held, is that the conduct in issue accorded with sound practice (1201A–B).
- The court must be satisfied that such opinion had a logical basis, in other words that the expert has considered comparative risks and benefits and has reached a defensible conclusion. If a body of professional opinion overlooks an obvious risk which could have been guarded against, it will not be reasonable, even if almost universally held (1201A–B).
- A defendant can be held liable despite the support of a body of professional opinion sanctioning the conduct in issue if that body of opinion is not capable of withstanding logical analysis and is therefore not reasonable. However, it will very seldom be correct to conclude that views genuinely held by a competent expert are unreasonable (1201C–E).
- The assessment of medical risks and benefits is a matter of clinical judgment which the court would not normally be able to make without expert evidence, and it would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support (1201D–E).
- Only where expert opinion cannot be logically supported at all will it fail to provide the benchmark by reference to which the defendant's conduct fails to be assessed (1201E).
- Finally, it must be borne in mind that expert scientific witnesses tend to assess likelihood in terms of scientific certainty, and not in terms of where the balance of probabilities lies on a review of the whole of the evidence (1201E–F).

It should be noted that the court emphasised the fact that in this case none of the experts was asked, or purported to express, a collective or representative view of what was or was not accepted as reasonable in South African specialist anaesthetist practice in 1994 (1200F). The court observed that apart from the absence of evidence of what practice prevailed, one is simply not dealing in this case with what the standard of the reasonable attorney or advocate would be, where the court would be able to decide for itself what was reasonable conduct. The court evaluated the standard to establish the conduct and views of the notional reasonable anaesthetist without a collective or representative opinion. The court observed that the difficulty of determining this standard was exacerbated by the fact that the primary function of the experts who testified was to teach with only limited opportunity for part-time practice, leaving counsel with little option but to elicit individual views of what the respective expert witnesses considered to be reasonable (1200F–H).

In setting a standard to be applied to the expert evidence, the court relied on the decision of the House of Lords in the medical negligence case of *Bolitho v City and Hackney Health Authority* 1998 AC 232 (HL). In this case it was held that a court is not bound to absolve a defendant from legal liability for allegedly negligent medical treatment or diagnosis just because evidence of an expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached a "defensible conclusion" (1201A–B).

The court also highlighted the essential difference between the scientific and judicial measure of proof with reliance on another decision of the House of Lords in the Scottish case of *Dingley v The Chief Constable, Strathclyde Police* 200 SC 77 (HL) where the following was said:

"One cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved . . . instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence" (1201G–H).

It should be noted that the court also dealt extensively with the issue of costs and the granting of a special order thereto by reason of dishonest conduct by second defendant during the legal proceedings (see 1201I–1207D). However, this part of the judgment falls outside the discussion of the approach to expert evidence and is therefore not pursued.

4 Comments

4.1 *The court's approach to expert medical evidence*

In principle the court has set the boundaries for expert evidence in support or defence of medical negligence. In essence the court affirmed the general applicable principles already enunciated in leading South African medical case law (see *Van Wyk v Lewis supra*; *Webb v Isaac supra*; *Coppen v Impey supra*; *Pringle v Administrator Transvaal supra* and *Castell v De Greef supra*) that the proof of medical negligence has to be determined with reference to expert evidence of members of the medical profession, but that such determination in the first instance is for the court who is not bound to adopt the opinion of such testimony. The court correctly states the rule that such determination will involve the examination of the expert opinions, and the analysis of their essential reasoning, preparatory to the court reaching its own conclusion on the issues raised. The court also correctly reiterates the governing test for professional medical negligence, being the standard of conduct of the reasonable practitioner in the particular field. In this regard the court clearly recognises the interdependency of the test for medical negligence and the proof thereof by means of expert evidence.

However, it is in the analysis of the nature of the expert evidence in relation to the test for medical negligence that the judgment is problematic in the sense that the context in which it is applied by the court is somewhat clouded. It is submitted that this also rings true with regard to the court's assessment of conflicting schools of thought in medical practice. The court correctly ruled that it must be satisfied that the tendered medical opinion must have a *logical* basis, in other words that the expert has considered comparative risks and benefits and has reached a defensible conclusion. However the court added the following

rider to this ruling: a defendant can be held liable if the supporting body of expert opinion is not capable of withstanding *logical analysis* and is therefore *not reasonable* (1201C-E). It is submitted that this statement whereby *logic* is indicative of reasonableness (conversely that the absence of logic is indicative of unreasonableness) is problematic.

It is conceivable that expert medical opinion based on *logic* is not necessarily indicative of reasonableness or unreasonableness within the realm of accepted medical practice. *Logic* refers to a process of reasoning/rationality based on scientific or deductive cause and effect. Therefore a given result or inference is either logical or illogical. *Reasonableness* on the other hand is a value judgement indicative of or based on an accepted standard or norm. While it is true that logic more often than not is an integral part of reasonableness, it does not necessarily follow that logic can be equated to reasonableness. The distinction is illustrated with reference to the concepts of "medical misadventure" and "professional errors of judgment" within medical practice, where even "illogical" medical mishaps/errors of judgment have been held to have been reasonable in terms of accepted medical practice (see *S v Lombard* unreported Pretoria Magistrate's Court 1979 discussed by Strauss 265; also cf Gordon Turner and Price *Medical jurisprudence* (1953) 118; Nathan *Medical negligence* (1957) 43; Strauss and Frydom *Die Suid-Afrikaanse geneeskundige reg* (1967) 293; Holder *Medical malpractice law* (1978) 72; Giesen *Arzthaftungsrecht* (1981) 167; Strauss 249; Gieseler and Grubb *Medical law – text and materials* (1994) 369; Zaslow "What is malpractice in general surgery" 1976 *Legal Medicine Annual* 260; Whitehouse and Jordan 1981 1 All ER 267 (HL); *Roe v Minister of Health* 1954 2 QB 66). It should also be emphasised that medical negligence should not be determined "in the air", but with reference to the particular circumstances of each case. It is also highly improbable that any party to a medical negligence action would call an expert medical witness whose opinion is based on an *illogical* foundation – hence the ruling by the court that it will very seldom be correct to conclude that views genuinely held by a competent expert are unreasonable (1201C-D).

It is submitted that the true test for expert medical opinion in medical negligence actions, is that the opinion should objectively and clinically reflect the standard or norms of accepted medical practice in the particular circumstances; that is to say whether the plaintiff's claim can succeed with reference to the standard of the reasonable competent anaesthetist in the same circumstances, alternatively whether the defendant-anaesthetist's actions or omissions are defensible with reference to the same yardstick. In the event of conflicting expert opinion or different schools of thought in medical practice, it appears that even a conflicting and minority school of thought or opinion will be acceptable, provided that such opinion accords with what is considered to be reasonable by that branch of the medical profession. In this regard guidance can be sought from *Van Wyk v Lewis supra* 438 where the following was said:

"The court cannot lay down for the profession a rule of practice. It must assume that the generally adopted practice is the outcome of the best experience and that which is best suited to attain the most satisfactory results . . . The general rule of law is that where a reasonable trade usage is of universal application in a community where a form of professional practice is generally adopted by a particular profession, a person who deals with the trade of profession is impliedly bound by the usage or practice of the profession. The court can only refuse to admit . . . a universal practice if in its opinion it is so unreasonable and dangerous that it would be contrary to public policy to admit it."

The court's concern that it would be wrong to decide a case by simple preference where there are conflicting views on either side, both being capable of logical support (1201D-E), could be overcome by strictly applying the ordinary rules of evidence. If both conflicting views on either side are capable of logical support (or rather are indicative of accepted or reasonable medical practice) the question arises whether the plaintiff has proven his or her case against the defendant medical practitioner on a preponderance of probabilities. The judgment then depends on the credibility and reliability of the expert witnesses. If the scales are evenly tipped on a review of the whole of the evidence, then absolution from the instance should be ordered. It is submitted that difficulties in assessing expert medical testimony should not erode the application of the ordinary rules of evidence.

4.2 *The court's failure to refer to South African law*

Although counsel referred the court to a plethora of relevant South African case law, the court in its judgment only referred to two judgments of the House of Lords, omitting any reference to or discussion of relevant South African case law. This omission is regrettable, as the Supreme Court of Appeal had the opportunity to extensively review leading cases on medical negligence in which the approach to expert medical evidence was paramount (see *Van Wyk v Lewis*, *Webb v Isaac*; *Coppen v Impey*; *Pringle v Administrator Transvaal* and *Castell De Greef supra*). It is not often that cases on medical negligence serve before the Supreme Court of Appeal, and although the principles pertaining to the approach to expert medical evidence have generally been reaffirmed, it is specifically the approach to conflicting opinions representing different but acceptable schools of thought in medical practice that still remains open-ended.

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DIE LEERSTUK VAN REGVERDIGBARE VERWAGTING EN DIE REG OP 'N BILLIKE AANHORING

Nortje v Minister van Korrektiewe Dienste 2001 3 SA 472 (HHA)

1 Inleiding

Die gemeenregtelike beginsels van natuurlike geregtigheid en meer bepaald die *audi alteram partem*-beginsel, het onlangs in die onderhawige saak ter sprake gekom. In breë trekke bepaal die *audi*-reël dat wanneer 'n statuut magtiging verleen aan 'n openbare liggaam of amptenaar om 'n handeling te verrig of om 'n besluit te neem wat 'n persoon se bestaande regte, vryheid, eiendom of regverdigbare verwagting ("legitimate expectation") nadelig aantast, die betrokke persoon 'n billike geleentheid gegun moet word om sy of haar kant van die saak te stel voor die uitoefening van daardie statutêre bevoegdheid plaasvind. Hierdie reël is normaalweg van toepassing tensy die betrokke statuut uitdruklik of by

noodwendige implikasie anders bepaal (*Contract Support Services (Pty) Ltd v Commissioner, South African Revenue Services* 1999 3 SA 1133 (W) 1145J-1147B; *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 4 BCLR (W) 352B-C).

Drie aspekte van die uitspraak van waarnemende appèlregter Brand in *Nortje* verg oorweging. Eerstens gee die uitspraak aanleiding tot die vraag of die *audi-reël* hoegenaamd van toepassing is indien die uitoefening van die betrokke statutêre bevoegdheid nadelige gevolge vir 'n persoon inhou sonder dat sy of haar bestaande regte, vryheid, eiendom of regverdigbare verwagting nadelig geraak word. Tweedens is dit nodig om ondersoek in te stel na die omstandighede waarin daar gesê kan word dat 'n persoon 'n regverdigbare verwagting het wat deur die uitoefening van die betrokke bevoegdheid aangetas kan word. Derdens is die uitspraak gemoeid met die vraag of nakoming van die *audi-reël* kan geskied deur aan die persoon wat nadelig geraak word deur die uitoefening van die betrokke bevoegdheid 'n geleentheid tot aanhoring te bied nadat daardie bevoegdheid reeds uitgeoefen is (eerder as voor sodanige uitoefening, soos normaalweg die geval sal wees).

Feite

Die tersaaklike feite was soos volg: Die twee appellante is albei skuldig bevind aan ernstige strafbare oortredings. Die eerste appellant is in Junie 1996 tot lewenslange gevangenisstraf gevonnis. Die tweede appellant is in Augustus 1992 drie maal ter dood veroordeel asook gevangenisstraf van 22 jaar opgelê. (Ten tyde van die aansoek in die hof *a quo* kon die doodstraf nog opgelê word.)

Aanvanklik is die appellante in die algemene afdeling van die maksimum-veiligheidsgevangenis in Pretoria aangehou. Op 13 November 1997 het hulle voor die inrigtingskomitee van die gevangenis verskyn. Na hierdie verskyning is die twee appellante (verkeerdelik, het dit later geblyk) geklassifiseer as sogenaamde A-kategorie gevangenes. As gevolg van hulle status as A-kategorie gevangenes het die appellante sekere voorregte en vergunnings geniet wat aan gevangenes in kategorieë B, C en D ontsê word.

Op 27 November 1997 is die appellante sonder enige waarskuwing oorgeplaas na 'n spesiale afdeling van bogenoemde gevangenis wat bekend staan as die C-Max afdeling. Kort na hulle oorplasing het die appellante die Transvaalse Provinsiale Afdeling van die Hooggeregshof genader vir 'n bevel waarvolgens die besluit om hulle na die C-Max afdeling oor te plaas, tersyde gestel word. Dit het uit die getuienis geblyk dat die instelling van die C-Max afdeling nodig geword het omdat daar, na die afskaffing van die doodstraf, buitengewoon lang termyn gevangenisstraf opgelê word aan oortreders wat ernstige misdade begaan. Baie van hierdie gevangenes het weinig hoop dat hulle die tronk ooit lewend sal verlaat. Gevolglik het die ontsnapping van ernstige misdadigers 'n wesenlike risiko geword. Die C-Max afdeling is ingerig om die hoogste vlak van sekuriteit te bevorder. Weens die wyse waarop C-Max ingerig is en bedryf word, is daar beperkings op die vergunnings en voorregte wat aangehoudenenes hier geniet. Derhalwe het die appellante, met hulle oorplasing na C-Max, heelwat van die vergunnings en voorregte wat hulle voorheen geniet het, verloor, hoewel hulle klassifikasie as A-kategorie gevangenes nie formeel gewysig is nie.

Teen hierdie agtergrond was die grondslag waarop die appellante die hof *a quo* onsuksesvol genader het vir die tersydestelling van hulle oorplasing na

C-Max dat die Adjunk-Direkteur van die Departement van Korrektiewe dienste op 'n prosedureel-onbillike wyse opgetree het toe hy die besluit ten opsigte van hulle oorplasing geneem het. Meer bepaald het die appellante aangevoer dat die adjunk-direkteur versuim het om die vereistes van die *audi*-beginsel na te kom alvorens hy besluit het dat hulle na C-Max oorgeplaas moet word.

Dit was gemeensaak dat die nakoming van die *audi*-beginsel 'n voorvereiste vir die geldigheid van die Adjunk-Direkteur se gewraakte besluit was. Volgens die respondente was die rede vir die appellante se oorplasing na C-Max dat albei van hulle 'n hoë ontsnappingsrisiko inhou. Ter motivering van die oorplasing is beweer dat beide appellante reeds by twee geleenthede onsuksesvolle pogings aangewend het om te ontsnap. Die appellante het erken dat hulle by een geleentheid gepoog het om te ontsnap, maar het ontken dat sodanige ontsnappingspoging by 'n tweede geleentheid herhaal is.

Dit was ook gemeensaak dat die appellante nie vooraf in kennis gestel is van die respondente se voorneme om hulle na C-Max oor te plaas nie, en dat hulle ook geen geleentheid gegun is om voorleggings te maak voordat 'n besluit in hierdie verband geneem is nie. Die verklaring wat die respondente aangebied het vir hulle versuim om die appellante vooraf in te lig van hulle voorgename oorplasing is dat dit nie prakties doenlik is om gevangenes aan te hoor voordat hulle na C-Max oorgeplaas word nie, omdat kandidate vir oorplasing desperate pogings aanwend om hulle beoogde oorplasing te verhoed of te vertraag. Daar is onder meer aangevoer dat sulke gevangenes geneig is om hulself te beseer, of om te probeer ontsnap, of om ander gevangenes of bewaarders te beseer ten einde 'n verskyning in die hof te bewerkstellig. Voorts het die respondente beweer dat die appellante 'n geleentheid tot aanhoring gebied is 'n paar dae nadat hulle na C-Max oorgeplaas is. Die enigste geskilpunt was of hierdie beweerde *ex post facto*-aanhoring behoorlike nakoming van die *audi*-beginsel daargestel het.

3 Uitspraak

Regter Brand was van mening dat elke gevangene wat van een afdeling van 'n gevangenis na 'n ander oorgeplaas word nie noodwendig op 'n geleentheid tot aanhoring kan aanspraak maak nie. Elke geval moet op die grondslag van sy eie feite beoordeel word. Nietemin is bevind dat in die omstandighede van die onderhawige geval, die geldigheid van die besluit om die appellante na C-Max oor te plaas afhanklik was van behoorlike nakoming van die *audi*-beginsel (479B). Die rede wat vir hierdie gevolgtrekking aangevoer is was die volgende:

Volgens artikel 33 van die Grondwet van 1996 het elke persoon die reg op administratiewe optrede wat prosedureel billik is. Met verwysing na *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 2 SA 674 (KH); 2000 3 BCLR 241 (KH) verklaar die hof dat, ten spyte van die veranderde grondwetlike bedeling, gemeenregtelike beginsels steeds rigtinggewend is oor wat in 'n bepaalde geval prosedureel billik sal wees (479D). Die hof konstateer dan dat die toepaslike gemeenregtelike beginsels soos volg in *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) en *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A) geformuleer is:

“[D]ie *audi*-reël [vind] toepassing waar die administratiewe besluit 'n persoon tot so 'n mate kan benadeel dat die besluit, ooreenkomstig die persoon se gebillikte verwagting ('legitimate expectation'), nie geneem sal word sonder om hom aan te hoor nie. Dit staan vas dat [die adjunk-direkteur] se besluit 'n ingrypende inkorting

teweggebring het van die voorregte en vergunnings wat die appellante tot op daardie stadium geniet het. In die omstandighede het appellante die gebillikte verwagting gehad dat so 'n besluit nie geneem sou word nie tensy hulle die geleentheid tot aanhoring gebied is" (479E–G).

Die aspek van die uitspraak wat in die aangehaalde stelling vervat is verg nadere ondersoek en word aanstons onder die vergrootglas geplaas.

Vervolgens het die regter die vraag of daar wel in bogenoemde omstandighede aan die *audi*-beginsel voldoen is, aangespreek. In hierdie verband word tereg daarop gewys dat die *audi*-beginsel soepel en aanpasbaar is en dat die inhoud van die beginsel (of, overgeset synde, die maatreëls wat die betrokke openbare liggaam of amptenaar moet tref ten einde aan die beginsel te voldoen) bepaal moet word met verwysing na die samehang van die relevante feite (479I–480B). Die vraag in elke geval waar die *audi*-reël van toepassing is, is of die persoon wat nadelig geraak is deur die betrokke besluit 'n regverdige en billike geleentheid gehad het om sy kant van die saak te stel (480D). In hierdie opsig verwys die hof na die bekende opsomming van die vereistes van natuurlike geregtigheid deur Lord Mustill in *Doody v Secretary of State for the Home Department* 1993 3 All ER 92 (HL), 1994 1 AC 531 (HL) wat met goedkeuring aangehaal is in *Du Preez v Truth & Reconciliation Commission* 1997 3 SA 204 (A) 231–232. (Sien ook *Park-Ross v Director: Office for Serious Economic Offences* 1998 1 SA 108 (K) 126F; *Harksen v President of the Republic of South Africa* 1998 2 SA 1011 (K) 1040G; *Cekeshe v Premier, Eastern Cape* 1998 4 SA 935 (TkD) 960C; *Premier, Eastern Cape v Cekeshe* 1999 3 SA 56 (TkD) 94H; *Mbebe v Chairman, White Commission* 2000 7 BCLR 754 (Tk) 778F; *Evans v Llandudno/Hout Bay Transitional Metropolitan Substructure* 2001 2 SA 342 (K) 350B–E.)

Ter afsluiting noem die regter met verwysing na *Visagie v State President* 1989 3 SA 859 (A) 865B–C dat dit (alhoewel slegs bvw uitsondering) moontlik is om aan die *audi*-reël te voldoen deur aan die benadeelde persoon 'n geleentheid tot aanhoring te bied eers nádat die betrokke besluit reeds geneem is (480G–H; sien ook *De Verteuil v Knaggs* 1918 AC 557; *Registrar of Motor Vehicles v Canadian American Transfer Ltd* 1972 26 DLR 3d 112). In die omstandighede van die onderhawige geval word egter bevind dat die appellante in der waarheid geen geleentheid hoegenaamd gegun is om hulle saak te stel nie – selfs nie eens nadat hulle oorgeplaas is na C-Max toe nie – en dat daar gevolglik nie aan die vereistes van natuurlike geregtigheid voldoen is nie. Om hierdie rede is die respondente se besluit ten opsigte van die oorplasing van die appellante na C-Max tersyde gestel.

4 'n Aanhoring ná die besluit

Gerieflikheidshalwe word die derde vraag wat in die inleiding hierbo gestel is eerste aangespreek.

Dit behoef geen betoeg nie dat 'n aanhoring ná die betrokke besluit slegs in uitsonderlike gevalle aan die *audi*-beginsel sal voldoen. Die bewysplase vir hierdie standpunt is veelvuldig (sien bv *Attorney-General, Eastern Cape v Blom* 1988 4 SA 645 (A) 668D–E). Die rede vir hierdie benadering is voor die hand liggend: dit is 'n natuurlike menslike geneigdheid om voet by stuk te hou as 'n besluit eers geneem is (sien *Traub* 750C–D; *Davies v Administrator, Cape Province* 1973 3 SA 804 (K) 809B). Dit beteken (soos die regter tereg op 480H noem) dat dit moeiliker is vir die benadeelde persoon om die besluitnemer van 'n reeds-genome besluit te laat afsien as wat dit sou wees vir hom of haar om 'n

gunstige beslissing te bekom deur voorleggings aan die besluitnemer te maak voordat laasgenoemde reeds standpunt ingeneem het oor die betrokke aangeleentheid. Daar is ook 'n ander, funksionele rede waarom die benadeelde persoon 'n geleentheid tot aanhoring gegun moet word vóórdat 'n beslissing gemaak word: hierdie praktyk bevorder ingeligte besluitneming (sien Baxter *Administrative law* (1984) 587).

As 'n algemene vertrekpunt veroorsaak 'n late deur die maghebbende liggaam of amptenaar om die *audi*-beginsel na te kom voordat 'n besluit geneem word dat die besluit ongeldig is (Baxter 587). Daar is wel 'n paar uitsonderings op hierdie reël, maar hulle vind uiters beperkte toepassing (Baxter 587–588; Wade en Forsyth *Administrative law* (2000) 524–525; DeSmith, Woolf en Jowell *Principles of judicial review* (1999) 368–372).

Afgesien van bogenoemde beperkte uitsonderings, moet daar ook onderskei word tussen finale beslissings (wat normaalweg deur nakoming van die *audi*-beginsel voorafgegaan moet word) en gevalle waar die gemagtigde liggaam of amptenaar bloot 'n *prima facie* siening huldig. In laasgenoemde geval is daar in der waarheid nog geen besluit geneem nie en daarom is dit toelaatbaar om die benadeelde persoon aan te hoor nadat sodanige *prima facie* standpunt gevorm is maar voordat 'n finale besluit geneem word. In hierdie verband kan daar verwys word na *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2000 4 SA 621 (K) 641I–642B, waar die hof die volgende stelling maak:

“[I]t is not bias *per se* to hold certain tentative views about a matter. It is human nature to have certain *prima facie* views on any subject. A line must be drawn, however, between mere dispositions or attitudes, on the one hand, and pre-judgment of the issues to be decided, on the other. Bias or partiality occurs when the tribunal approaches a case not with its mind open to persuasion nor conceding that exceptions could be made to its attitudes or opinions, but when it shuts its mind to any submissions made or evidence tendered in support of the case it has to decide. No one can fairly decide a case before him if he has already prejudged it.”

Insgelyks kan daar verwys word na *Mamabolo v Rustenburg Regional Local Council* [2000] 4 All SA 433 (HHA) 439c–e. Hier verklaar waarnemende appèlregter Mthiyane dat die Hoogste Hof van Appèl dit reeds in *Blom* duidelik gestel het dat 'n *ex post facto* geleentheid tot aanhoring selde 'n voldoende plaasvervanger is vir behoorlike nakoming van die *audi*-beginsel voordat die betrokke besluit geneem is. Die regter beklemtoon egter dat dit 'n perd van 'n ander kleur is as die gewraakte besluit in wese voorlopig was, en nie finaal nie. Solank die besluit slegs voorlopig van aard is, die benadeelde persoon uitgenooi word om die besluitnemer toe te spreek voordat 'n finale besluit geneem word en die besluitnemer se gemoed ontvanklik is vir voorleggings wat tot heroorweging van die voorlopige besluit kan lei, word aan die reëls van natuurlike geregtigheid voldoen (439f–440a). (Sien ook *Loggenberg v Robberts* 1992 1 SA 393 (K) 406B.)

5 Die reg tot 'n aanhoring

Soos blyk uit die aanhaling uit die uitspraak van regter Brand hierbo, verklaar hy dat die *audi*-reël toepassing vind “waar die administratiewe besluit 'n persoon tot so 'n mate kan benadeel dat die besluit . . . nie geneem sal word sonder om hom aan te hoor nie” (479E–F).

Volgens die tradisionele formulering van die *audi-reël* is dit nie van toepassing in iedere en elke geval waar 'n administratiewe besluit nadelige gevolge vir 'n persoon kan inhou nie (sien *SARFU 96H-97E*; *Deacon v Controller of Customs & Excise 1999 6 BCLR (SOK) 644I-645F*). In *Contract Support Services* waarna in die inleiding hierbo verwys is, het die hof die gesaghebbendste onlangse bewysplase ten opsigte van die toepassingsveld van die *audi-reël* in die Suid-Afrikaanse reg aangehaal. Volgens dié gewysdes is die *audi-reël* slegs van toepassing wanneer 'n statuut magtiging verleen aan 'n openbare liggaam of beampte om 'n handeling te verrig of om 'n besluit te neem wat 'n persoon se bestaande regte, vryheid, eiendom of regverdigbare verwagting nadelig aantast. In hierdie omstandighede moet die betrokke persoon 'n regverdige geleentheid gegun word om sy of haar saak te stel alvorens daardie statutêre bevoegdheid uitgeoefen word.

Dit is opvallend dat die *audi-reël* soos in *Nortje* geformuleer 'n breër toepassingsveld vir die reël beoog. Volgens hierdie formulering sal die reël nie net geld wanneer die uitoefening van statutêre bevoegdhede 'n persoon se regte, vryheid, eiendom of regverdigbare verwagting aantast nie, maar ook wanneer sodanige uitoefening daardie persoon "tot so 'n mate kan benadeel dat die besluit . . . nie geneem [moet] word sonder om hom aan te hoor nie". Hoewel hierdie benadering nie heeltemal strook met die tradisionele opvatting ten opsigte van natuurlike geregtigheid nie, vind dit weerklank in *Director: Mineral Development, Gauteng Region v Save the Vaal Environment 1999 2 SA 709 (HHA) 718D-719A*. Hier verklaar die hof dat 'n bloot voorlopige beslissing (wat nie *per se* enigiemand se regte, vryheid, eiendom of reverdigbare verwagting aantast nie) nogtans onderworpe is aan die *audi-reël* indien dit die nodige grondslag lê vir 'n moontlike beslissing wat ernstige gevolge ("serious consequences" of "grave results") vir 'n belanghebbende persoon kan inhou, of wat so 'n persoon aan moontlike gevaar kan blootstel ("potential jeopardy"). Dit blyk uit hierdie *dicta* in *Nortje* en *Save the Vaal* dat, hoewel die toepassingsveld van die *audi-reël* uitgebrei word, die reël nie geld ongeag die aard of uitwerking van die betrokke beslissing nie. Intendeel, die beslissing moet die betrokke persoon "tot so 'n mate kan benadeel dat die besluit . . . nie geneem [moet] word sonder om hom aan te hoor nie", of moet "ernstige gevolge" vir 'n belanghebbende persoon inhou (my kursivering). Met ander woorde, 'n administratiewe besluit wat geen of geringe benadeling vir 'n persoon inhou is nie onderworpe aan nakoming van die *audi-reël* nie.

Die feit dat die *audi-reël* nie by elke uitoefening van statutêre bevoegdhede van toepassing is nie vind ook uitdrukking in artikel 3 van die Wet op die Bevordering van Administratiewe Geregtigheid 3 van 2000. Hierdie bepaling (wat enger geformuleer is as bogenoemde stelling van die *audi-reël*) vereis dat administratiewe optrede wat 'n persoon se regte of regverdigbare verwagtinge "weselik en nadelig" raak volgens 'n billike prosedure of handelswyse geneem moet word. Die woordoms krywing van "administratiewe optrede" verwys ook na beslissings wat 'n persoon se regte nadelig raak en wat "direkte, uitwendige regsgevolge" het. (Hierdie omskrywing herinner 'n mens aan die benadering gevolg in sake soos *Minister of the Interior v Mariam 1961 4 SA 740 (A) 751B*, waar gesê is dat die *audi-reël* geld ten opsigte van besluite "affecting rights or involving legal consequences to persons". Sien ook Steyn *Die uitleg van wette* (1981) 250 en *Administrateur van Suidwes-Afrika v Pieters 1973 1 SA 850 (A) 860G*.)

6 Regverdigbare verwagting

Die leerstuk van regverdigbare verwagting speel 'n betreklik onbeduidende rol in die uitspraak in *Nortje*. Nogtans plaas die uitspraak weer eens die soeklig op die genoemde leerstuk. Die uitspraak gee veral aanleiding tot die vraag na die omstandighede waarin daar gesê kan word dat 'n persoon 'n regverdigbare verwagting het: Hoe ontstaan 'n regverdigbare verwagting?

Die leerstuk van regverdigbare verwagting het sedert die beslissing van voormalige hoofregter Corbett in *Traub* 'n sleutelrol gespeel in die ontwikkeling van ons gemeenregtelike beginsels van natuurlike geregtigheid. Meer bepaald het hierdie leerstuk die toepassingsveld van die *audi alteram partem*-reël uitgebrei. Tradisioneel was die *audi*-beginsel slegs van toepassing in omstandighede waar 'n persoon se bestaande regte, eiendom of vryheid nadelig aangetas is deur die uitoefening van statutêr-verleende magte (sien Baxter 569–577; *Blom* 662H). Volgens hierdie leerstuk kan 'n persoon egter in sekere ander omstandighede ook daarop aandrang om deur die gemagtigde liggaam of amptenaar aangehoor te word, ondanks die feit dat die uitoefening van die betrokke bevoegdheid nie bogenoemde gevolge sal hê nie (sien *Traub* 761D–F; *South African Roads Board v Johannesburg City Council* 10H; *Du Preez v Truth & Reconciliation Commission* 231). Dit sal naamlik die geval wees wanneer die betrokke persoon 'n (prosedurele) regverdigbare verwagting het dat hy of sy aangehoor sal word alvorens die uitoefening van daardie bevoegdheid geskied, of wanneer hy of sy 'n (substantiewe) regverdigbare verwagting het dat 'n beslissing in sy of haar guns geneem sal word. Die vraag waaraan nou oorweging geskenk moet word, hou verband met die juiste omstandighede waarin gesê kan word dat só 'n regverdigbare verwagting bestaan.

Soos hierbo aangedui is, meld die hof in *Nortje* dat die *audi*-reël van toepassing is waar die administratiewe besluit 'n persoon tot so 'n mate kan benadeel dat die besluit, “ooreenkomstig die persoon se gebillikte verwagting”, nie geneem sal word sonder om hom of haar aan te hoor nie:

“Dit staan vas dat [die adjunk-direkteur] se besluit 'n ingrypende inkorting teweeggebring het van die voorregte en vergunnings wat die appellante tot op daardie stadium geniet het. In die omstandighede het appellante die gebillikte verwagting gehad dat so 'n besluit nie geneem sou word nie tensy hulle die geleentheid tot aanhoring gebied is” (479E–G).

Met ander woorde, dit wil voorkom asof die hof van die veronderstelling uitgaan dat die appellante 'n verwagting gehad het dat hulle aangehoor sou word voor hulle oorplasing na C-Max, juis omdat sodanige oorplasing 'n inkorting van die voorregte en vergunnings wat die appellante tot op daardie stadium geniet het, veroorsaak het. Volgens hierdie benadering is dit die bewarende gevolge van die administratiewe besluit wat *ipso facto* aanleiding gee tot 'n verwagting tot aanhoring. Ten spyte van die feit dat daar 'n mate van gesag vir hierdie opvatting is (sien *Traub* 761I–762B; *Foulds v Minister of Home Affairs* 1996 4 SA 137 (W) 149H; *Attorney-General (NSW) v Quin* 1990 170 CLR 1), word aan die hand gedoen dat dit verkeerd is.

Die bewysplase wat as gesag dien vir die teenoorgestelde siening is oortuigend. In die beslissing van die Geheime Raad in *Attorney General of Hong Kong v Ng Yuen Shiu* 1983 2 All ER 346 350h–j neem Lord Fraser byvoorbeeld die standpunt in dat 'n regverdigbare verwagting “may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision”.

In die toonaangewende uitspraak van die House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* 1984 3 All ER 935 herhaal Lord Fraser hierdie standpunt (944a–b):

“Legitimate . . . expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue” (met goedkeuring aangehaal in *Traub* 756l).

In dieselfde saak spreek Lord Diplock ’n soortgelyke beginsel uit (949f–h):

“To qualify as a subject for judicial review the decision must have consequences which affect some person . . . by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

In *Re Westminster City Council* 1986 1 AC 668 is nog ’n saak waarin die House of Lords onomwonde verklaar het dat die blote moontlikheid dat ’n administratiewe besluit nadelige gevolge vir ’n persoon kan inhou onvoldoende is om ’n regverdige verwagting daar te stel. In hierdie saak sê Lord Bridge die volgende met goedkeurende verwysing na *Council of Civil Service Unions* (692F): “The courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or an established practice of consultation.” In *casu* is daar aangevoer dat die betrokke party ’n verwagting van aanhoring gehad het weens die omvang van die gewraakte besluit en die verband waarin daardie besluit geneem sou word. Die regter verwerp hierdie argument (692H–693B):

“If the courts were to extend the doctrine of legitimate expectation to embrace expectations arising from the ‘scale’ or ‘context’ of particular decisions, the duty of consultation would be entirely open-ended and no public authority could tell with any confidence in what circumstances a duty of consultation was cast upon them. The probable reaction of authorities to such an extension of the doctrine would be to opt for safety and assume a duty of consultation whenever there was room for doubt, to the detriment of the efficient conduct of public business. The suggested development of the law would . . . be wholly lamentable.”

(Sien ook die uitspraak van die Engelse Court of Appeal in *R v Devon County Council, ex parte Baker*; *R v Durham County Council, ex parte Curtis* [1995] 1 All ER 73 (CA) 88f–h 89e–f; *R v Secretary of State for Education & Employment, ex parte Begbie* [2000] 1 WLR 1115 (CA) 1125H; *R v North & East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622 (CA) 645C–E 651A–B.)

Dit is so dat die Engelse howe soms in die afwesigheid van enige belofte of gevestigde praktyk (en in die afwesigheid van enige inbreuk op bestaande regte, eiendom of vryheid) daarop aandring dat administratiewe besluitneming deur natuurlike geregtigheid gekenmerk moet word. Hierdie benadering het eger niks te make met “legitimate expectation” nie, en moet nie verwar word met ’n sienswysse dat ’n regverdige verwagting kan ontstaan selfs waar daar geen belofte of gevestigde praktyk was nie. Intendeel, hierdie benadering is gebaseer op die Engelse howe se aanvaarding dat, benewens bestaande regte en regverdige verwagtings, daar sekere belange is wat regtens beskermenswaardig is en wat nie aangetas mag word deur administratiewe besluite nie tensy voldoen is aan die *audi-reël* (sien *Devon County Council* 88j–89d; Elias “Legitimate expectation

and judicial review” in Jowell en Oliver (reds) *New directions in judicial review* (1988) 40–41; *Halsbury's laws of England* vol 1(1) (1989) par 81; DeSmith, Woolf en Jowell 300–302). Daar is geen duidelike aanduiding in ons regspraak dat hierdie onderskeid ook in ons reg getref word nie.

Dit staan gevolglik soos 'n paal bo water dat 'n regverdigbare verwagting slegs bestaanbaar is waar die gemagtigde liggaam of amptenaar 'n verwagting in die gemoed van die onderdaan geskep het dat die betrokke bevoegdheid op 'n bepaalde wyse (of volgens 'n bepaalde prosedure) uitgeoefen sal word, of dat die uitoefening van die bevoegdheid 'n bepaalde gevolg sal hê (gewoonlik dat 'n beslissing gunstig vir die onderdaan gemaak sal word). Sodanige verwagting word normaalweg geskep deur optrede deur die gemagtigde liggaam of amptenaar wat die uitoefening van die bevoegdheid voorafgaan, dikwels in die vorm van 'n belofte, onderneming, voorstelling of gerusstelling, hetsy uitdruklik of stilswyend deur middel van 'n gevestigde praktyk (sien *Sisulu v State President* 1988 4 SA 731 (T) 737H–I; *Lunt v University of Cape Town* 1989 2 SA 438 (K) 450B; *Ngema v Minister of Justice, KwaZulu* 1992 4 SA 349 (N) 360; *Claude Neon Ltd v City Council of Germiston* 1995 5 BCLR 554 (W) 562A–B; *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole v Premier van die Provinsie Vrystaat* 1996 2 BCLR 248 (O) 271G; *Tettey v Minister of Home Affairs* 1999 1 BCLR 68 (D) 76G–77A; *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (KH), 1999 2 BCLR 151 (KH) par 33; *IMATU v MEC: Environmental Affairs, Developmental Social Welfare & Health of the Northern Cape Province* 1999 6 BCLR 664 (NK) 683A–C; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (KH) 94C; *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 354C–D; DeSmith, Woolf en Jowell 300–306 474–476; Wade en Forsyth 495–497; Craig *Administrative law* (1999) 618–620; Engelman *Commercial judicial review* (2001) 37–38).

Hierdie benadering strook met die uitsprake in *Castel v Metal & Allied Workers Union* 1987 4 SA 795 (A) 810I–811A en *Lamprecht v McNeillie* 1994 3 SA 665 (A) 670–672, waar die toenmalige appèlafdeling aangedui het dat 'n subjektiewe en objektiewe feitlike grondslag vir die beweerde verwagting 'n *sine qua non* vir die erkenning en beskerming van sodanige verwagting is. Enige argument tot die teendeel is dogmaties onsinnig, soos blyk uit die volgende ontleding van die feite in *Nortje*: Die appellante het feitlik geen subjektiewe verwagting gehad dat hulle oorplasing deur 'n aanhoring voorafgegaan sou word nie, en het skynbaar ook nie beweer dat hulle so 'n verwagting gehad het nie. Die rede is voor die hand liggend: hulle het nie kennis gehad van hulle voorgename oorplasing nie. Daar was ook geen objektiewe feitlike grondslag vir enige verwagting wat hulle dalk kon gehad het nie, want daar was geen getuienis dat die respondente aangedui het dat enige moontlike oorplasing deur 'n aanhoring voorafgegaan sou word nie. Intendeel, volgens die (blykbaar onbestrede) getuienis was dit die respondente se beleid om geen aanhoring toe te staan voordat gevangenes na C-Max oorgeplaas is nie. Dit is moontlik dat hierdie beleid nie uitdruklik aan gevangenes oorgedra is nie. Dit is egter waarskynlik dat hierdie beleid wel in die praktyk toegepas is en dat die appellante dus nie sou kon beweer dat daar enige presedent geskep is wat 'n verwagting tot aanhoring in hulle gemoedere sou daarstel nie. By ontstentenis van 'n subjektiewe of objektiewe grondslag vir die beweerde verwagting sou dit onlogies wees om te sê dat die appellante 'n verwagting gehad het dat hulle aangehoor sou word. (Op die keper beskou was dit, in elk geval, onnodig vir die hof om eens na die leerstuk

van regverdige verwagting te verwys. Die feit dat die appellante se oorplasing na C-Max 'n inkorting van hulle voorregte en vergunnings teweeg gebring het beteken dat, volgens die tradisionele formulering van die *audi-reël*, hulle geregtig was op 'n geleentheid tot aanhoring, omdat hulle bestaande regte aangetas is.)

In *SARFU* par 216 het die Konstitusionele Hof die volgende in hierdie verband gesê:

“To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a ‘legitimate expectation of a hearing’ exists is therefore more than a factual question. It is not whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is, whether the duty to act fairly would require a hearing in those circumstances.”

Hierdie stelling is slegs gedeeltelik korrek. Soos hierbo verduidelik, is die vraag of die betrokke persoon 'n subjektiewe verwagting gehad het dat die maghebbende liggaam of amptenaar op 'n bepaalde wyse sou optree wel 'n tersaaklike oorweging. Indien daar nie só 'n subjektiewe verwagting was nie, sou dit tog hoegenaamd nie sin maak om van 'n verwagting te praat nie. In hierdie opsig is 'n subjektiewe verwagting aan die kant van die betrokke individu 'n *sine qua non* vir die bestaan en beskerming van die beweerde regverdige verwagting. So 'n subjektiewe verwagting is egter nie *per se* voldoende nie: die verwagting moet ook objektief regverdigbaar wees in die sin dat daar 'n feitelike grondslag vir die individu se subjektiewe verwagting moet bestaan. Of daar voldoen word aan hierdie objektiewe vereiste sal gewoonlik bepaal word deur vas te stel of die maghebbende instansie of amptenaar se voorafgaande optrede (normaalweg in die vorm van 'n belofte of gevestigde praktyk) aanleiding gegee het tot die individu se subjektiewe verwagting. Indien nie, kan daar kwalik beweer word dat die verwagting regverdigbaar is. Die Konstitusionele Hof fouteer dus deur te sê dat die regverdigbaarheid (“legitimacy”) van die verwagting afhang daarvan of die maghebbende liggaam of amptenaar se plig om billik op te tree (“duty to act fairly”) 'n aanhoring vereis. Indien hierdie benadering van die Konstitusionele Hof korrek was, sou dit beteken dat die leerstuk van regverdige verwagting oorbodig is: die vraag of die betrokke persoon geregtig is op 'n aanhoring sou dan beantwoord kon word bloot aan die hand van die vereistes van billikheid, en dit sou glad nie nodig wees om staat te maak op die leerstuk van regverdige verwagting nie (sien Forsyth “The provenance and protection of legitimate expectations” 1988 *Cambridge LJ* 238 239).

Daar word dus aan die hand gedoen dat ons howe se benadering tot die leerstuk van regverdige verwagting ongelukkig nie altyd dogmaties suiwer en bevredigend is nie. Enersyds is dit noodsaaklik dat aanvaar word dat 'n regverdige verwagting slegs kan ontstaan uit die voorafgaande optrede van die maghebbende liggaam of amptenaar, normaalweg in die vorm van 'n belofte of 'n gevestigde praktyk. Die blote feit dat 'n administratiewe besluit nadelige gevolge vir 'n persoon kan inhou skep op sigself geen grondslag vir 'n regverdige verwagting nie. As die howe nie hierdie perk stel op die omstandighede waarin daar op die leerstuk van regverdige verwagting staatgemaak kan word nie, is daar 'n wesenlike gevaar dat die leerstuk 'n “unruly horse” sal word, soos hoofregter Corbett in *Traub* gewaarsku het (761F–G). Dit is ook om hierdie rede dat die oppervlakkige benadering tot die toepassing van die leerstuk in *Kock v Department of Education, Culture & Sport of the Eastern Cape* 2001 7 BLLR 756 (LC) 763 verwerp moet word.

Andersyds is dit belangrik dat die verhouding tussen, aan die een kant, die leerstuk van regverdigbare verwagting en, aan die ander kant, die reël dat 'n administratiewe liggaam of amptenaar onder 'n verpligting is om billik op te tree duidelik verstaan word. Alhoewel daar soms groot gewag gemaak word van laasgenoemde reël, is dit haas onmoontlik om enige oortuigende en gesaghebbende bewysplase te vind waar 'n administratiewe besluit tersyde gestel is bloot omdat daar nie aan daardie reël voldoen is nie. 'n Administratiewe besluit sal, in hierdie konteks, slegs ongeldig verklaar word indien die *audi*-reël, in sy tradisionele formulering, verontagsaam is of as strydig met die betrokke persoon se regverdigbare verwagting opgetree is. In der waarheid het die reël dat 'n administratiewe liggaam of amptenaar verplig is om billik op te tree geen onafhanklike bestaansreg nie, in dié opsig dat daardie reël slegs oortree word as die *audi*-reël of die leerstuk van regverdigbare verwagting oortree word (sien *Traub* 758H; *Zondi v Administrator, Natal* 1991 12 *ILJ* 497 (A) 505C). Met ander woorde, die billikheidsplig is werklik sinoniem met die *audi*-reël en die leerstuk van regverdigbare verwagting (sien Wade en Forsyth 487-488; Craig 409-412; *Furnell v Whangarei High Schools Board* 1973 AC 660 (PC) 679G; *O'Reilly v Mackman* 1983 2 AC 237 (HL) 275F 276E). Die *audi*-reël en die leerstuk van regverdigbare verwagting is maatstawwe wat aangewend word om te bepaal in welke omstandighede 'n billikheidsplig bestaan en, indien so 'n plig in 'n bepaalde geval bestaan, wat die inhoud daarvan is. Indien nóg die *audi*-reël nóg die leerstuk van regverdigbare verwagting van toepassing is kan daar nie werklik enige verpligting tot billike optrede op die betrokke administratiewe liggaam of amptenaar geplaas word nie – tensy ons howe bereid is om (soos hulle Engelse eweknie) te aanvaar dat, benewens bestaande regte, vryheid, eiendom en regverdigbare verwagtinge, daar belange is wat regtens beskermenswaardig is en wat gevolglik nie aangetas mag word deur administratiewe optrede nie sonder dat die benadeelde persoon 'n billike geleentheid tot aanhoring gebied is. Andersins kan ons howe 'n soortgelyke resultaat bewerkstellig deur 'n uitgebreide betekenis te gee aan die konsepte van bestaande regte (sien *Noble en Barbour v South African Railways & Harbours* 1922 AD 527 536; *Conjwa v Postmaster General, Transkei* 1998 7 *BLLR* 718 (Tk) 732C-D; *Secretary for Inland Revenue v Kirsch* 1978 3 SA 93 (T) 94E-G), eiendom (sien *Administrator, Natal v Sibibiya* 1992 4 SA 532 (A) 539A-B; *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 9 *BCLR* 1235 (Tk) 1246; Baldwin en Horne "Expectations in a joyless landscape" 1986 *MLR* 685) en vryheid (Baxter "Fairness and natural justice in English and South African law" 1979 *SALJ* 607 622-623). In ieder geval sou só 'n ontwikkeling van ons reg losstaan van die leerstuk van regverdigbare verwagting.

DM PRETORIUS
Bowman Gilfillan Ing

**THE DELICTUAL LIABILITY OF A UNION FOR ADVICE GIVEN
TO ITS MEMBERS**

Sikhwele Jada v SAMWU (unreported)

1 Introduction

On 23 November 1999 a Springs magistrate ordered the South African Municipal Workers' Union (SAMWU) to pay five million Rand to its members who had

been dismissed after embarking on an illegal strike called by the Union. Two days thereafter 100 Durban traffic officers also instituted legal action against SAMWU in a similar case. Considering that *Sikhwele Jada v SAMWU* appears to have been the first case of its kind in South Africa, that is, the first time that a union has been held delictually liable, it is worth exploring further, especially when taking into account that the decision affects the entire trade union movement and could open the floodgates for a number of claims on this basis.

According to the spokesperson for the Congress of South African Trade Unions (COSATU), Sphiwe Mgcina, in an interview on Cape Talk Radio on 26 September 2000, COSATU is urging its affiliates to revise their constitutions since in the past two years five unions have been sued for more than sixty million Rand by members and employers. These actions pose a serious threat to the labour movement since a number of COSATU-affiliated unions could collapse if they lose these law suits. The outcome of the appeal in *Jada* is therefore critical.

This case note by no means purports to be a comprehensive review of the particular subject matter dealt with under each heading, but rather the aim is to highlight certain aspects pertaining to *Jada*.

2 Facts

In September 1992 the workers of the City Council of Springs (the Council) engaged in a march through the streets of Springs. This was not approved by the Council and ultimately led to the charging of and suspension of four shop stewards from SAMWU, these four being deemed responsible for the industrial action (typescript 2).

To deal with the issue of the four shop stewards the Council elected the compulsory arbitration route. The union organiser, Mr Letsimo, on the other hand, was dissatisfied with the decision of the Council and indicated that there would be further industrial action. He wanted the suspension of the four shop stewards to be referred to private arbitration. Accordingly, several work stoppages were embarked upon with the view to bringing pressure upon the Council to change its decision (2 7).

On 1 June 1993 a union meeting was held, presided over by Mr Letsimo, who informed the members that they had to strike to force the Council to forego its decision on compulsory arbitration. On 2 June 1993 the workers gathered outside the Council and began to "toy-toyi", putting forward their demands to the Council. The strike continued the following day (3 June 1993). Mr Letsimo arrived in the afternoon and discussions ensued, which proved fruitless and the strike resumed for the third continuous day. It was on this day that the Council decided to concede to the demand made by the Union and in addition to issue its ultimatum in terms of which the workers were required to return to work on Monday 7 June 1993 at 07:00, failing which they would be dismissed. This was communicated to the Union representatives who in turn informed their members (that is, those who were striking).

Despite having been requested to do so by the workers, the Council refused at that time to provide any written confirmation of their agreement to refer the dispute to private arbitration. However, a telefax was sent later that Friday to the office of Mr Letsimo, who received it on the Saturday following.

The workers failed to report for work on the Monday but instead continued to gather outside the Council in continuance of the strike. The workers, and Council

alike, awaited the arrival of Mr Letsimo who at the time was in Boksburg attempting to resolve another dispute. At or about 10:00 the Council informed the workers that they were in breach of their employment contracts and were consequently dismissed. Mr Letsimo arrived after this announcement and asked the Council to rescind its decision. When this request was denied, the Union and ten members made an urgent application to the high court, but this failed. A subsequent appeal was also unsuccessful.

The workers remained without work for some ten months until the Council re-employed them. After having obtained legal advice, they then brought a claim against the Union for the equivalent in money of lost wages. This was heard in the Springs magistrate's court. Having heard the evidence, the court decided in favour of the plaintiffs and awarded them five million Rand.

3 Contractual or delictual claim?

One of the main disputes between the parties was whether the claim was framed in contract or delict.

3.1 Plaintiffs' arguments

Plaintiffs' argument was that their claim was based on delict. They argued that the Union's constitution did not encompass the full range of its duties, but was important from the point of view of establishing the "special relationship" that existed between the parties and as a result of which the defendant had a legal duty to prevent the plaintiffs from suffering damage. Given that the constitution did not expressly provide for the claim being sought to be enforced by the plaintiffs, (nor was it argued that the duty was an implied term thereof) the action had to be based on delict. In fact, the plaintiffs agreed that if they had to rely on contract they would not have had a claim because of the constitution being silent on the matter (44). The plaintiffs *inter alia* relied on *Lillicrap, Wassenaar and Partners v Pilkington Brothers* 1985 1 SA 475 (A) to support their argument.

3.2 Defendant's arguments

Defendant argued that since the constitution of the Union regulated the relationship between it and its members, the dispute should be settled according to the terms of the constitution. The Union's constitution did not impose upon it a legal duty, coupled with liability, to persuade the plaintiffs to terminate their wildcat strike after they (the plaintiffs) had been issued with an ultimatum requiring them to return to work or be dismissed. Alternatively, the defendant argued that there were no policy considerations favouring the extension of Aquilian liability to disputes between unions and their members where that dispute concerned an allegation of breach of a duty of care and a claim for damages, and where the relationship between the parties was already regulated by contract. In this regard the defendant also relied on *inter alia* the *Lillicrap* case. As a further alternative the defendant argued that the Union should not be held delictually liable in circumstances where the plaintiffs refused to comply with the ultimatum issued by their employer but instead continued with their wildcat strike despite the fact that their demand had been acceded to by their employer (44).

For the sake of completeness, mention needs to be made of another submission put forward by the defendant. It was argued that, by the plaintiffs' participation (and continued participation, notwithstanding an ultimatum) in a strike prohibited by law and which they knew to be unlawful, they could not claim

their lost wages because of the legal principle that persons may not benefit from unlawful, criminal or wrongful conduct. This is in accordance with the legal maxim: *nemo ex suo delicto meliorem conditionem facere potest*. (See *Parity Insurance Ltd v Marescia* 1965 3 SA 430 (A) 435; *Stauffer Chemicals Chemical Products Division of Chesebrough-Ponds (Pty) Ltd v Monsanto Company* 1988 1 SA 805 (T) 812.) The court did not deal with this aspect as a separate issue presumably because it was of the view that the plaintiffs had not known any better, and were relying on the advice of the union organiser, Mr Letsimo.

3.3 Lillicrap

It is an accepted principle in our law today that breach of contract may also give rise to delictual liability between the parties to the contract (see Neethling, Potgieter and Visser *Law of delict* (1999) 7). This was held to be expressly possible in principle by the Appellate Division (as it was then known) in *Lillicrap* (see also *Van Wyk v Lewis* 1924 AD 438; Midgley "Concurrent claims: tests for establishing independent liability in delict" 1993 *SALJ* 66). In *Lillicrap* the question arose whether the breach of contractual duties to perform professional work by a firm of structural engineers was actionable in delict. The majority of the court confirmed that "our law . . . acknowledges that the same facts may give rise to a claim for damages *ex delicto* as well as one *ex contractu*, and allows the plaintiff to choose which he wishes to pursue" (496G). However, this principle was qualified. In order to recognise delictual liability for breach of contract, the plaintiff needs to show "that the facts pleaded establish a cause of action in delict" (496H). In other words, all the requirements for delictual liability (see *Boberg The law of delict* (1984) 24) must have been met, namely a wrongful act or omission, fault (which may consist in either intention or negligence), causation, which must not be too remote, and damage.

In examining whether a breach of contract would qualify as wrongful for purposes of Aquilian liability, the court in *Lillicrap* (with reference to *Van der Walt 5 LAWSA* para 5 7) held that this would be so only where the conduct of the defendant constitutes "both an infringement of the plaintiff's rights *ex contractu* and a right which he had independently of the contract" (499I). The requirements of the "independent delict test" are satisfied where a breach of contract constitutes an infringement of a plaintiff's rights of property or person. However, in *Lillicrap* the court was faced with the situation where the breach of contract gave rise to pure economic loss. Pure economic loss is patrimonial loss that does not result from any damage to property or injury to personality or where it does result from damage to property or injury to personality, it does not involve the plaintiff's property or person (Neethling *et al* 294). The court had to decide whether the extension of the Aquilian action was justified or not in such an instance and it is usual for policy considerations to play a major role in this type of decision.

In considering the "positive policy considerations" which would render it desirable to extend the Aquilian action, the court was of the view that there had to be a need therefor (500F) and concluded that no such need existed insofar as liability arose while there was a contractual *nexus* between the parties. It held that each party to the contract could, while the contract persisted, invoke the contractual remedies which the court regarded as "adequate and satisfactory" (500G). When parties enter into a contract, they have in mind that their contract should set out their respective rights and obligations and in so doing would "define, expressly or tacitly, the nature and quality of the performance required from

each other" (500I). An important aspect in this regard was the court's statement that contracts are mostly concluded by businessmen (501G). For this reason Grosskopf AJA was of the view that a court should "be loath to extend the law of delict" (501F) and thereby circumvent provisions which the parties had clearly considered necessary for their protection. As such, the court arrived at the decision that there were no "positive policy considerations" warranting the extension of the Aquilian action in the instance before it.

The decision in *Lillicrap* seems therefore to deny the possibility of delictual liability for breach of contract causing pure economic loss. (Cf Van Aswegen "Professional liability to clients: the implications of concurrence" 1997 *THRHR* 399.) In other words, the wronged person will, as a general rule, have recourse to only the contractual action.

4 The decision in *Jada*

4.1 Contractual or delictual claim?

A substantial part of the court's judgment (44–76) was dedicated to determining whether the plaintiffs' claim was founded in contract or in delict. Several cases and academic authorities were examined after which the court concluded that it is possible for the plaintiff to sue in delict even though a contractual relationship exists. The plaintiff may elect to sue either on the basis of contract or delict. Accordingly, the court accepted this part of the plaintiffs' argument, holding that the claim was based in delict. Although the court did research the matter in some depth, the possibility of a concurrence of claims for damages arising from breach of contract and delict had, in principle, already been recognised in South African law. Ultimately the issue to be decided was whether or not in the light of *Lillicrap* there were policy considerations favouring the extension of the Aquilian action in the case before it. Given that

- both the plaintiffs and defendant relied on *Lillicrap* (amongst others) to support their respective arguments;
- there existed a contract between the parties as amplified in the Union's constitution, which regulated their relationship;
- the plaintiffs suffered financial loss in the form of pure economic loss; and
- due to *Lillicrap* it would appear that where the breach of contract is not accompanied by damage to property or person, a court will on the grounds of policy considerations not readily recognise delictual liability

there should have been more emphasis on this very important area of the law. In other words, was this a proper case in which the Aquilian action should have been made available to the plaintiffs? The court's reference to *Lillicrap* was somewhat superficial, the court erroneously being of the view that it had already dealt with the case at some length. What reference there was, had however been made to the judgment of the court *a quo*, which had been overturned on appeal (59 65). Unfortunately, it is somewhat difficult to follow the court's reasoning given that certain authorities cited were relevant, whilst others were not, and there is no indication how the court distinguished between these or what motivated the court to adopt the course of action it finally did.

In addition, it would have been necessary for the plaintiffs to have advanced "positive policy considerations" for the extension of Aquilian liability to their case (failing which the law of contract would apply). This they did not do. On

the other hand the defendant set out policy considerations why the scope of the Aquilian action should not be extended to the facts of this particular case. These were:

- The plaintiffs themselves had acted unlawfully.
- In future, the Union would be reluctant to intervene in wildcat strikes if they could be held delictually liable. This could lead to unregulated conduct at the workplace, which in turn would be undesirable for sound industrial relations.
- Imposing the duty of care (which the plaintiffs sought) could constitute unnecessary interference with the internal decision-making process of the Union since it could result in a union organiser unilaterally taking decisions for members. This of course is not authorised by either the constitution of the Union or the union organiser's employment contract. In addition, it could possibly lead to alienation of the membership from the Union.
- Holding the Union delictually liable would impact upon its resources to such an extent that it would affect its ability to deliver a range of services to all its members (including the plaintiffs); thereby destroying the very reason for the Union's existence in the first place.

In the plaintiffs' favour, on the other hand, cognisance could be taken of the fact that this was not a contract concluded between businessmen (as was the situation in *Lillicrap*); the Union's constitution does not make provision for instances such as the current dispute nor does its constitution contain adequate remedies as may be found in a business contract; and that in reality members are likely to be dependent upon the experience of union officials.

Although the court accepted that a contract existed between the parties (75), it is not clear why the court concluded that in this instance the contract was only necessary to establish the relationship between the parties regarding a duty of care.

4.2 Duty of care as test for wrongfulness

It is trite law that the general test for wrongfulness in South African law is the legal convictions of the community or the *boni mores*. (See Neethling *et al* 37–38; Boberg 33; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 384D.) This is an objective test based on the criterion of reasonableness and also serves as a device to control the range of liability. According to Neethling *et al* 38 the issue is whether “according to the legal convictions of the community and in light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in a reasonable or an unreasonable manner”. This general *boni mores* test is seldom applied directly to establish wrongfulness because more precise methods have been developed to determine the legal convictions of the community, namely the infringement of a subjective right or the non-compliance with a legal duty to act (Neethling *et al* 46). In cases of liability for the causing of pure economic loss (as in *Jada*) wrongfulness is normally determined by asking whether the defendant had a legal duty to prevent the loss (Neethling *et al* 55). However, the test to determine whether such a legal duty to prevent loss exist, must not be confused with the test to determine the existence of a “duty of care”.

The term “duty of care”, originating in English law, has on occasion caused a blurring of the distinction in South African law between wrongfulness and fault (see *Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 4 SA 745 (O);

Government of the Republic of South Africa v Basdeo 1996 1 SA 355 (SCA)) since the term has at times been used in relation to wrongfulness: “to the existence of a legal duty to take steps to prevent loss, determined objectively and *ex post facto*” (Neethling *et al* 55 fn 86), and at other times in relation to negligence: “to the duty to take reasonable care – to foresee and prevent the loss” (Neethling *et al* 55 fn 86). For this reason, the submission has been made that the term “duty of care” be avoided and instead replaced with the term “legal duty” (see Boberg 30; Neethling *et al* 55; Van der Walt and Midgley *Delict: Principles and cases* (1997) paras 54–55) or “regspelig” (which is the term used by Rumpff CJ in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A)). (For the correct approach see *Administrateur, Natal v Trust Bank van Afrika Bpk supra*; also Neethling “Onregmatigheid, nalatigheid; regspelig, ‘duty of care’; en die rol van redelike voorsienbaarheid – praat die Appèlhof uit twee monde?” 1996 *THRHR* 686 *et seq* and “Nogmaals ‘duty of care’ – onregmatigheid en nalatigheid by aanspreeklikheid weens ’n late” 1997 *THRHR* 730 *et seq.*)

This confusion is particularly evident in *Jada* 76–97. Although Neethling’s cautionary advice against confusing the different criteria for wrongfulness and fault is referred to (79–82), the court relies on cases where this very distinction is blurred (*Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 4 SA 745 (O) and *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (SCA)). The court also quotes cases where the correct approach is used, but the difference does not appear to be acknowledged by the court. Notwithstanding the court’s use of the word “regspelig” (legal duty) the test for determining negligence is applied as opposed to the test for determining wrongfulness (97–110, particularly 100 where the court asks whether Mr Letsimo had acted as the reasonable person would have acted, “[m]et ander woorde het daar ’n regspelig op Mnr Letsimo gerus?”).

Each case is to be decided on its own merits and effectively entails policy decisions and value judgements. What public policy demands in a particular situation depends on “considerations of justice, equity, good faith, reasonableness, common sense and the like” (*Faiga v Body Corporate of Dumbarton Oaks* 1997 2 SA 651 (W) 668D, although admittedly initially there was a mixture of the two approaches of wrongfulness and fault caused by reliance on the “duty of care” concept; see also *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 318F). In other words, consideration needs to be given to an interplay of many factors. It is not only the interests of the parties *inter se* that need to be considered but these need to be weighed against those of the community and a balance struck in accordance with what the court believes to be society’s notions of justice. Neethling *et al* 67 point out further that the existence of a special relationship between the parties, for instance a contractual relationship, may indicate that there is a legal duty upon the one party towards the other to prevent harm (see *Cathkin Park Hotel v JD Makesch Architects* 1993 2 SA 98 (W) 100D; *Joubert v Impala Platinum Ltd* 1998 1 SA 463 (BHC) 472F–G) – an argument put forward on behalf of the plaintiffs in *Jada*. However, the court in *Jada* did not apply the *boni mores* test at all and applied a possible “regspelig” (legal duty) test incorrectly. It is further a moot point whether the legal convictions of the community would expect the interests of the plaintiffs to be protected given their conduct, that is, striking illegally and ignoring the ultimatum issued to them by their employer.

4.3 *Duty of care as test for negligence*

In the case of negligence, a person “is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence, because, by giving insufficient attention to his actions he failed to adhere to the standard of care legally required of him” (Neethling *et al* 128). This is an objective standard and as such the idiosyncrasies, qualities or experience of the defendant are in principle irrelevant.

The test for ascertaining negligence was pronounced by Holmes JA in *Kruger v Coetzee* 1966 2 SA 428 (A) 430E–F as follows:

“For the purposes of liability *culpa* arises if (a) a *diligens paterfamilias* in the position of the defendant (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps.”

Burchell 25 fn 2 notes the distinction between the reasonableness issue in the inquiry into unlawfulness and the reasonable foreseeability issue in the inquiry into negligence. The former inquiry is made after the damage-causing event has taken place and incorporates a policy-based investigation of the reasonableness of the defendant’s conduct. The inquiry into negligence is made in the circumstances which the defendant faced at the time of the alleged wrongful conduct and incorporates essentially a fact-based investigation into whether the defendant could reasonably have foreseen harm to the plaintiff and whether reasonable steps to guard against such harm should have been taken.

However, it has happened on occasion that, instead of applying the “reasonable person” test, our courts have applied the English doctrine of “duty of care” (see Boberg 274; Neethling *et al* 147; Neethling 1996 *THRHR* 682 *et seq* and 1997 *THRHR* 730 *et seq*); a concept that is foreign to the principles of Roman-Dutch law upon which our law of delict is based. In terms of the English approach it is necessary to first establish the existence of a duty of care (would the reasonable person in the position of the defendant have foreseen that his/her conduct might have caused damage to the plaintiff?) and thereafter to establish whether it had been breached by the defendant (did the defendant exercise the standard of care that a reasonable person would have exercised to prevent harm?). If the answers to both questions are in the affirmative, then the defendant is said to have been negligent.

As stated by Boberg 274 and Neethling *et al* 147 the application of the “duty of care” in our law should be rejected, since not only does it confuse the test for wrongfulness with the test for negligence; but negligence may be ascertained far more easily by use of the “reasonable person” test than by the convoluted approach inherent in the “duty of care” concept. Applying the “duty of care” doctrine in *Jada* resulted in the distinction between wrongfulness and fault being obscured.

Turning to the facts of *Jada*, the court had regard to the following: the inexperience of the workers in matters of this nature and their dependence on the Union organiser; that had Mr Letsimo instigated the strike, he should have been in a position to end it; that Mr Letsimo’s timeous presence on the Monday would have made a difference; that agreement had already been reached in Boksburg the previous Friday; the reasons for the existence of trade unions and their aims; as well as the constitution of the Union. Having considered these factors, the court was of the view that Mr Letsimo must have foreseen the possibility of his actions causing harm to the plaintiffs and that he failed to take steps to prevent

this (the test for negligence) (109). Since another Union official, a Mr Matsoso, knew of the ultimatum but also failed to do anything, the court believed that “in ’n sekere mate het daar ’n plig op die unie gerus” (that is, a legal duty) (109). Finally, the court (not having applied the test for wrongfulness correctly) held that the Union, via Mr Letsimo, had a legal duty which it failed to discharge (110). Whilst public policy might certainly demand the kind of legal duty from a union that the plaintiffs contended for, it is doubtful, for the reasons stated earlier, whether in this particular instance a finding of wrongfulness on the part of the Union would be harmonious with the public’s notion of what justice demands. Since wrongfulness has not been established, the necessity for enquiring into the possibility of negligence on the part of the Union accordingly falls away.

4.4 *Element of causation ignored?*

Causation comprises two elements, namely factual causation and legal causation. (See Neethling *et al* 180 *et seq*; Van der Walt and Midgley para 102 *et seq*; *Minister of Police v Skosana* 1977 1 SA 31 (A) 34E–G; *S v Mokgethi* 1990 1 SA 32 (A) 39I. But cf Boberg 447 where he argues that the tests of remoteness (legal causation) are superfluous.)

In short, factual causation concerns itself with whether on a balance of probabilities, the harm flowed from the act. In this regard it is not necessary to show that the defendant’s conduct is the only cause or the main cause of the damage sustained by the plaintiff. On the other hand, legal causation is concerned with whether the defendant should be held liable for the harm he/she has caused in a wrongful and culpable manner (Neethling *et al* 182 fn 51), that is, to limit the boundaries of legal liability, in which process considerations of policy may play a part. In essence, notwithstanding the existence of a factual causal nexus between the defendant’s conduct and the harmful consequences, the court is still required to “strike a proper and equitable balance between the interests of the wrongdoer and of the innocent victim” (Van der Walt and Midgley 105) – to establish which consequences should be imputed to the defendant.

In determining legal causation a flexible approach (Neethling *et al* 184 *et seq*; Van der Walt and Midgley para 105; Boberg 439 *et seq*) has been favoured by the Appellate Division in *S v Mokgethi* (40C–J per Van Heerden JA) with an emphasis on legal policy, reasonableness, fairness and justice. Rather than designating one theory as being the correct one, the court in *Mokgethi* recommended an approach where that theory which would serve justice and reasonableness best in the given circumstances, taking into account considerations of policy, should be applied.

In examining the facts of *Jada*, the following needs to be noted:

- Ordinarily a union cannot force its members to embark upon a strike, notwithstanding the persuasiveness of the officials. If it is accepted that unions are essentially democratic institutions, the decision of the members effectively determines what action is to be taken. In *Jada* there was no evidence of any unwillingness on the part of the members (the plaintiffs) to strike.
- On Friday 4 June 1993 when the plaintiffs received the ultimatum, they knew that their demands had been met by the Council and that they ran the risk of dismissal if they did not comply with the ultimatum by resuming work on Monday 7 June 1993.

- The plaintiffs chose not to comply with the ultimatum, despite being aware of the consequences, but continued with the strike on the Monday even though there was no longer any need to strike.
- No evidence was led to the effect that only the Union could call off the strike and order/advise the plaintiffs to return to work.

Weighing up these factors, it would seem that the element of causation, in particular legal causation which is basically policy-based, may not have been satisfied. However, this was not dealt with explicitly by the court.

4.5 Contributory negligence on the part of the members

With the passing of the Apportionment of Damages Act 34 of 1956 the principle of apportionment of liability for damages was introduced. Section 1(1)(a) of the Act provides:

“Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.”

The effect of this provision is that the plaintiff's negligence could reduce the extent of the defendant's liability: it does not necessarily extinguish liability altogether. Clearly this presupposes that the plaintiff has suffered harm partly as a result of his/her own fault and as a consequence of the defendant's fault. The extent to which a plaintiff's damages should be reduced in terms of section 1(1)(a) of the Apportionment of Damages Act on account of his/her contributory negligence was considered in *General Accident Verskeringsmaatskappy SA Bpk v Uijs* 1993 4 SA 228 (A). The Appellate Division stated that section 1(1)(a) did not provide that the plaintiff's damages had to be reduced in proportion to his/her degree of negligence, but rather to such extent as the court may deem just and equitable, having due regard to the degree to which he/she was at fault (235A). Hence, in *Jada*, had it been found that the plaintiffs themselves had also acted negligently, it could well have been argued that their claim should have been reduced accordingly.

Where a defendant has intentionally caused harm to the plaintiff, he/she may not ask for a reduction in damages on the basis of contributory negligence on the part of the plaintiff. (See *Neethling et al* 156; *Van der Walt and Midgley* para 117. See also *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418C; *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 570E.) There is no reason to believe that this was the case in *Jada*. Where both the plaintiff and the defendant acted intentionally, the position is not clear. According to *Neethling et al* 156 it would seem that the legislature did not intend to provide for the defence of contributory intent, but only for the defence of contributory negligence (but cf *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 591 (W) 606E-I; cf further *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W) 672J-673F).

However, of more concern for purposes of this discussion, is what happens where a plaintiff intentionally contributed towards his/her own loss while the defendant was merely negligent. According to *Van der Walt and Midgley* para 119 and *Neethling et al* 156-157 the law is clear: the plaintiff forfeits his/her claim. It could be argued in *Jada* that the plaintiffs knew the risk involved and

yet decided not to comply with the ultimatum but continue with the strike independent of the Union. The plaintiffs were in fact the authors of their own fate and on this basis it could be argued that they intentionally contributed to their own loss or damage. According to Neethling *et al* 165 “[a]lthough the defendant is also at fault, he is not held liable towards the plaintiff because of the fact that the plaintiff himself acts intentionally. The contributory intent . . . or assumption of risk by the plaintiff therefore cancels the defendant’s fault”. However, the court in *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank* (which dealt with the issue of joint wrongdoers) was of the view that the Apportionment of Damages Act could be applied to instances where one wrongdoer had been negligent whilst the other had acted intentionally (672J). The court stated that apportioning liability between intentional and negligent wrongdoers was not an impossible task, but merely “a question of assessing the relative degree of blameworthiness” (673E). Although this case was distinguished from *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd* (where there was *dolus* on both sides) it is nonetheless interesting that the court stated that there appeared not to be any reason not to give effect to the ordinary meaning of the word “fault” so as to include *dolus*, notwithstanding the references to negligence in the long title of the Apportionment of Damages Act as well as the headings of chapter 1 and section 1 thereof (606G–J). On the contrary, the court was of the view that applying section 1(1)(a) produced a result which was fair and which the language of the statute indicated the legislature must have intended (607D).

4.6 Vicarious liability of the trade union

Vicarious liability occurs where one person (natural or legal) is held liable for a delict committed by another. This liability arises when a relationship exists between these two persons or entities. For present purposes the discussion is confined to the employer-employee relationship since union officials/shop stewards are employees of the union. The requirements are (see Neethling *et al* 373–376):

- (a) Existence of an employer-employee relationship. An employment relationship is present when two parties enter into a contract in terms of which the one party (the employee) undertakes to render services to the other (the employer), and remain under the latter’s authority in return for which he/she receives remuneration. This relationship is manifested within the context of a trade union.
- (b) Delict committed by union official/shop steward. The union official/shop steward must have committed an act which causes harm in a wrongful and culpable way to another.
- (c) Union official/shop steward must act within the scope of his/her employment. An employer is responsible for the wrongful actions of his/her employee committed in the course of employment. This will not be the case where the employee acts for his/her own interests and purposes and outside his/her authority even though the act might well have been performed during his/her employment. The standard test for vicarious liability is generally used to determine whether the employee acted within the course and scope of his/her employment.

In *Minister of Police v Rabie* 1986 1 SA 117 (A) 132G the court stated that the cardinal question was whether the respondent was doing the State’s work, namely police work, when he committed the wrongs in question. (See *SAR & H v*

Marais 1950 4 SA 610 (A) where the court was of the view that the test was whether the act or omission complained of constituted a negligent performance of the work entrusted to the servant regardless of whether the servant disobeyed the master's instructions as to the manner in which the work was to be done. See also *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 591 (W) 600D–I where the bank was held vicariously liable for its employee who pursued her own interests whilst performing precisely the functions for which she was employed, albeit in an improper fashion.) Although an act done by a servant solely for his own interests and purposes might fall outside the course or scope of his/her employment, even though occasioned by it, liability may ensue if there was a sufficiently close link between the servant's acts for his/her own interests and the business of his/her master (134D–E). Nevertheless, the dominant question before the court was whether the sergeant's acts fell within the risk created by the State in employing him as a policeman, thereby shifting the emphasis from the precise nature of the sergeant's intention and the link between his acts and police work. On this approach it was held that the sergeant's acts fell within the purview of the risks created by the State in appointing him as a member of the police force (134I–135B).

In a more recent case, the Supreme Court of Appeal in *Viljoen v Smith* 1997 1 SA 309 (SCA) pointed out that the general principle (standard test for vicarious liability) does not mean that every act of an employee performed for his/her own interests during the time of employment, necessarily falls outside the course and scope of his/her employment (315F). Whether or not the employee has abandoned his/her employment in favour of following his/her own interests, was a factual question ultimately to be decided on the basis of the degree to which the employee has digressed from his/her employment (316J–317A). (The court in *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 4 SA 21 (SCA) 25B cited this with approval.)

In *Viljoen* climbing through fences and trespassing on neighbours' property for the purpose of *inter alia* relieving oneself, was strictly prohibited by the employer. Notwithstanding this prohibition, the worker did exactly that and at the same time attempted to light a cigarette, starting a veld fire. The Supreme Court of Appeal held that the worker's actions were not such a material digression that it could be stated that he had temporarily abandoned his employment, that is, not acting in the course and scope of his employment (317I–318F). In the circumstances the employer was held vicariously liable for the damage caused to the neighbour's farm.

Applying the foregoing discussion to the circumstances in which trade unions find themselves, it is evident that unions too could face similar actions. After all, if the union official/shop steward is an employee of the union, then the union as employer in this context, could be held liable for the wrongful actions of its employees. The question which would have to be answered is whether or not the union official/shop steward was acting within the course and scope of his/her employment.

The court in *Jada* seemed to accept that Mr Letsimo had incited the members to strike but at no stage did the court consider whether Mr Letsimo, in so acting, had acted in the course of his employment. Not every act of an employee performed for his/her own interests during the time of employment, necessarily falls outside the course and scope of his/her employment. This depends upon the

degree to which the employee has digressed from his/her employment. Whilst an argument could be made to the effect that Mr Letsimo had acted in contravention of his employment contract and even contrary to the Union's constitution, it is equally true that Mr Letsimo was performing the functions for which he was employed, albeit possibly in an improper manner. The case law discussed above would then seem to favour an argument that the Union should be held liable for the actions of Mr Letsimo. However, this still ignores the principle that the members are supposedly the union, and therefore determine the course of action to be taken; an aspect that was unfortunately not discussed in the judgment.

5 Conclusion

Jada is undoubtedly an important case because of the far-reaching consequences that it could have for the trade union movement, for office bearers of the union, for shop stewards and for members, besides the obvious financial implications. Should this decision be upheld on appeal, this would truly be setting a new precedent in South African labour law.

In the event of a member suffering damage because of the union's negligence (via its officials), the fact that the member may have recourse to the remedies available in the union's constitution (that is, request for the disciplining or recalling of the shop steward/union official) would seem of little help, even more so where the member loses his/her job. Further, to rely on the fact that a member may leave the union should he/she be dissatisfied with the way in which the union is operating, is hardly an adequate or satisfactory answer. This is particularly so where the member has already been financially prejudiced or where the member belongs to a union which is party to a closed shop agreement. In the latter instance, should a member leave the union, he/she would lose his/her job as well. In deciding whether a union should be held delictually liable, these factors should of necessity be weighed against those factors that could militate against holding a union delictually liable.

It would seem that in arriving at its decision, the court downplayed the contention of the plaintiffs that Mr Letsimo, the union organiser, had incited them to strike. Arguably he would have acted contrary to the Union's constitution as well as contrary to his employment contract. More importantly, his actions would have run counter to the whole notion of a union, that is, "the members are the union", if indeed this principle is accepted. In this event the argument that the Union could not be held vicariously liable for Mr Letsimo's actions, would not necessarily be without merit. It is unfortunate that the court did not explore whether Mr Letsimo had indeed acted in the course and scope of his employment.

In the light of the foregoing, it is with more than a little interest that the outcome of the appeal is awaited.

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MOVING TOWARDS RECOGNITION OF CONSTRUCTIVE EXPROPRIATION?

Steinberg v South Peninsula Municipality 2001 4 SA 1243 (SCA)

1 The legal question

Any judgment on constitutional property is certain to attract attention at the moment, given the paucity of case law in this complex and confusing field of law. (S 28 of the 1993 Constitution was referred to in *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 9 BCLR 1235 (Tk) (suggested that "property" was wide enough to include state contracts, pension benefits and employment rights); *Transvaal Agricultural Union v Minister of Land Affairs* 1996 12 BCLR 1573 (CC) (the Constitutional Court refused to deal substantively with a claim that sections of the Restitution of Land Rights Act 22 of 1994 were in conflict with s 28 of the Constitution; see Roux "Turning a deaf ear: The right to be heard by the Constitutional Court" 1997 SAJHR 216–227). The most substantial discussion of s 28 appeared in *Harksen v Lane NO* 1997 11 BCLR 1489 (CC), where the Constitutional Court held that s 21 of the Insolvency Act 24 of 1936 does not authorise an expropriation without compensation in conflict with s 28 (see Van der Walt and Botha "Getting to grips with the new constitutional order: Critical comments on *Harksen v Lane NO* and another" 1998 SAPL 17–41). In *First Certification Case (In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) the Constitutional Court dismissed three objections against the validity of s 25 of the 1996 Constitution (that it did not make explicit provision for a right to acquire, hold and dispose of property, that the provisions concerning expropriation and compensation were inadequate, and that there was no explicit guarantee for immaterial property rights), holding that there wasn't a single universal standard or formulation with which the provision had to comply, and that its current formulation satisfied the certification criteria. See Van der Walt *Property clauses* 322 fn 7 323 336–339 (hereafter *Property clauses*). The property clause in s 25 was analysed and discussed more extensively in three recent cases: *First National Bank of SA t/a Wesbank v Commissioner for the South African Revenue Service* 2001 7 BCLR 715 (C) (a statutory lien for unpaid taxes does not constitute an unconstitutional expropriation); *Joubert v Van Rensburg* 2001 1 SA 753 (W); *Katazile Mkgangeli v Joubert* 2001 2 SA 1191 (CC) (the question raised whether the land rights created by land reform legislation constitute an arbitrary deprivation of property); and *Bührmann v Nkosi* 2000 1 SA 1145 (T); *Nkosi v Bührmann* case no 1/2000 SCA @ <http://www.uovs.ac.za/faculties/law/appeals/25-09015.html>). The last three cases are discussed separately in articles or notes forthcoming in 2002 SAJHR; 2002 SALJ and 2002 Stell LR respectively.)

Steinberg v South Peninsula Municipality 2001 4 SA 1243 (SCA), which deals with the expropriation provision in subsections 25(2) and (3) of the 1996 Constitution, is especially interesting because it raises the question whether the distinction between *deprivation* and *expropriation* of property (in s 25(1) and 25(2) of the 1996 Constitution respectively) still leaves room for the development of a doctrine of constructive (or regulatory or indirect) expropriation. Section 25 of

the Constitution distinguishes between two kinds of state interference with private property, namely *deprivation* and *expropriation*. Compensation is only required for the latter, allowing the state to regulate the use of property without incurring liability for compensation. It is usually said that expropriation is undertaken in terms of the power of eminent domain, which allows the state to acquire property unilaterally against compensation; while regulatory deprivation of property results from the exercise of the state's police power, which may cause some loss or use restriction for owners, but does not require compensation. The question is whether there is room for a middle category of interference, variously referred to as constructive, regulatory or indirect expropriation or inverse condemnation, in terms of which the state does not directly or explicitly or formally expropriate the property, but imposes a regulatory deprivation that is nevertheless of such a nature that it is considered just and fair to treat the deprivation as an expropriation and either require compensation or invalidate the deprivation. (See Van der Walt "Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings" 1999 *SAPL* 273–331 for a more complete explanation and an overview of comparative case law.) In *Steinberg* this question was raised explicitly for the first time since the introduction of the new constitutional order. Given the fairly categorical distinction between deprivation and expropriation that was adopted by the Constitutional Court in *Harksen v Lane NO* 1997 11 BCLR 1489 (CC) (on the basis of the question whether the state actually acquired the property in question; see *Harksen* para 37 1505A–B), the odds seemed to be stacked against the adoption of a doctrine of constructive expropriation, but interestingly enough the Supreme Court of Appeal adopted a more open-minded (if somewhat ambiguous) approach in *Steinberg*.

2 Facts, decision and reasoning

The appellant applied for an order directing the respondent to take all steps necessary "to complete the expropriation process implemented in respect of" or to expropriate immovable property owned by the appellant. The property is situated in the area of jurisdiction of the respondent, a local authority, and is affected by a road scheme that was first proclaimed in 1969 and approved in 1974. The existence of the road scheme does not bind the local authority to ever implement the scheme or build the road, but if and when the road scheme is implemented, a road will cut across the appellant's property and expropriation of part or all of the property will follow. The appellant, who was at all times aware of the existence of the road scheme, purchased the property in 1994 and took transfer in 1997 (*Steinberg* para 10 1249A).

The appellant's complaint is that she is unable to sell or develop the property. She claims that she is unable to sell because of the uncertainty created by the existence of the road scheme, and that she is unable to build on or develop the property because of the restrictions imposed by the road scheme. The court points out that the former allegation was not established on the facts, while the latter allegation is wrong on the facts. In terms of the road scheme, the appellant is allowed to build on or develop the property, provided the improvements do not come within five metres from the statutory width of the approved road or, if they do fall within that area, provided the appellant obtains prior approval (in which case compensation may not be payable for the value of those improvements if the property is eventually expropriated). (See *Steinberg* para 10 1248D–E for an explanation of the appellant's position and the relevant provisions of the provincial ordinance.)

Somewhat confusingly, the appellant's case is based on the doctrine of inverse condemnation or constructive expropriation, in terms of which she applies for what looks like a *mandamus* or court order to force the local authority to either expropriate or complete the expropriation of her property (*Steinberg* para 1 1245E–F). This does not really make sense in the context of the doctrine of constructive expropriation at all, because the notion of constructive expropriation implies that the action complained of already amounts to an expropriation, and that it should either be compensated or declared invalid. The fact that this notion was relied upon here to try and force the local authority to complete an expropriation process, was perhaps an early sign that the application was misconceived. However, stated somewhat differently, the appellant's case seems to be that (a) the road scheme proclaimed and approved by the local authority does not constitute a proper expropriation, but (b) it amounts to a constructive expropriation, and (c) as such it entitles her to a remedy in terms of the constitutional property clause.

The application for the order set out above was dismissed in the Cape High Court (per Traverso J), and again in the Supreme Court of Appeal, but for different reasons (per Cloete AJA, with Hefer ACJ, Harms JA, Mpati JA and Brand AJA concurring). The main aspects of the Supreme Court of Appeal's decision can be summarised as follows:

- “A fundamental distinction is drawn in s 25 between two kinds of taking: a deprivation and an expropriation. It is only in the case of an expropriation that there is a constitutional requirement for compensation to be paid. The purpose of the distinction is to enable the State to regulate the use of property for the public good, without the fear of incurring liability to owners of rights affected in the course of such regulation” (*Steinberg* 1246B–C para 4, references omitted).
- “The principle of constructive expropriation creates a middle ground, and blurs the distinction, between deprivation and expropriation. According to that principle a deprivation will in certain circumstances attract an obligation to pay compensation even although no right vests in the body effecting the deprivation” (1246G–1247A para 6).
- “Despite the clear distinction made in s 25 of the Constitution between deprivation and expropriation, there may be room for the development of a doctrine akin to constructive expropriation in South Africa – particularly where a public body utilises a regulatory power in a manner which, taken in isolation, can be categorised as a deprivation of property rights and not an expropriation, but which has the effect, albeit indirectly, of transferring those rights to the public body” (1247G–H para 8).
- “However, development of a more general doctrine of constructive expropriation, even if permissible in view of the express wording of s 25 of the Constitution, may be undesirable both for the pragmatic reason that it could introduce confusion into the law, and the theoretical reason that emphasis on compensation for the owner of a right which is limited by executive action could for instance adversely affect the constitutional imperative of land reform embodied in ss (4), (6) and (8) of s 25 itself” (1248A–B para 8).
- “It is, however, not necessary in the current case to decide whether a doctrine of constructive expropriation can or should be developed in South Africa and, if it is developed, to which limitations this doctrine should be subjected, because the appellant's case in the present matter is undermined by a more

fundamental problem, namely that the proclamation and approval of the road scheme does not amount to either an expropriation or (if it were recognised) a constructive expropriation. This is so because the approval of the road scheme amounts to nothing more than "advance notification of a possible intention to construct a road, which, if implemented in the form approved, would result in a taking" (1248C para 9 1249E–F para 12).

This conclusion finds support in the Zimbabwean decision in *Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZSC) 237C–D, where it was also decided that notification of the listing of property for future expropriation does not in itself amount to expropriation. The finding on this last point probably means that the findings on the first four points are *obiter*.

3 Comment

3.1 Terminology

Terminology concerning expropriation is always fraught with difficulty and uncertainty, and the situation is even worse in the context of regulatory or constructive expropriation. (See Van der Walt *Property clauses* 18–19 for a brief overview of terminology.) Generally speaking, comparative analysis in the context of expropriation is complicated by the fact that different terms are used to refer to exercises of the power of eminent domain in different constitutions, for example *expropriation* in South African and German law (*Enteignung*), *taking* in US law (which includes both *expropriation* in the narrow sense and *regulatory taking* in the sense of constructive expropriation), *compulsory acquisition* in most Commonwealth countries, and *deprivation* in French and European Convention law (as opposed to other countries such as South Africa and Malaysia, where *deprivation* is distinguished from *expropriation*). (See Van der Walt 1999 *SAPL* 273 320–331 for examples from different constitutions.) This lack of uniformity is exacerbated by the fact that these terms actually have different meanings in different constitutional contexts (eg *taking* in US law refers to a wide category that includes both *expropriation* and *regulatory taking* or constructive expropriation; the Commonwealth term *compulsory acquisition* has a much stronger implied connotation of property actually being acquired than is the case with the US term *taking*, while *expropriation* is more neutral and open; and *compulsory acquisition* may have different meanings even within one and the same Commonwealth constitution, depending where in the constitutional text it appears and how the property clause is constructed and interpreted (see Van der Walt "‘Double’ property guarantees: A structural and comparative analysis" 1998 *SAJHR* 560–586).

In the area of constructive expropriation the terminology becomes even more complex, with various terms used to refer to the middle ground between uncompensated regulation or deprivation and compensated expropriation of property: *inverse condemnation* (only applicable in the context of the now outdated term *condemnation* for expropriation); *regulatory taking* (only suitable in the US context where *taking* is a wide category referring to expropriations and some regulatory deprivations); *regulatory expropriation*, *indirect expropriation* and *constructive expropriation*. Any of the last three terms could be suitable for the South African context to indicate that it concerns a deprivation that does not formally constitute an expropriation, but is nevertheless treated as an expropriation because it in fact amounts to an expropriation or has the same effects. (The origin and meaning of the notion of a regulatory taking or constructive

expropriation is explained by Van der Walt 1999 *SAPL* 273 277–280, followed by an overview of countries where this notion has been adopted in case law in one form or another.)

In view of the considerations above it is obviously important to try and reduce terminological confusion as far as possible, and therefore the Supreme Court of Appeal should be commended for its fairly consistent use of the term *constructive expropriation*. On the other hand the court uses the term *taking*, which has absolutely no place in the South African common law or constitutional context, loosely in two or three passages (see eg *Steinberg* 1246B para 4 1249F para 12). The court's use of the term *taking* is all the more ill-advised for being inconsistent and mistaken: In US law it would have been correct to ask whether the approval of the road scheme in *Steinberg* amounted to or constituted a (regulatory) taking (*Steinberg* 1249F para 12), but it would have been senseless to describe the distinction between deprivation and expropriation in section 25 of the Constitution as “two kinds of taking” (*Steinberg* 1246B para 4) – the point is rather that US law distinguishes between regulatory deprivations of property and the two categories of taking (namely expropriations proper and regulatory takings). In South African law, the term *taking* has no place or function, and it can only cause further confusion and uncertainty.

In summary, the best terminology for South African constitutional property law seems to be the following:

- *Deprivation* (in the sense of s 25(1) of the Constitution) refers to cases where the state interferes with (and may detrimentally affect) private property for the sake of police-power regulation of the use of property. This kind of state interference may have quite serious implications and even cause loss for the property owner, without incurring a duty for the state to pay compensation. Characteristically, this kind of action will affect all or most property owners (in a particular category, eg landowners) equally, and it is exercised for a public purpose that benefits all, such as planning and building controls and regulations, health and conservation legislation, and so on. (The term deprivation can also have a wider meaning, that includes both deprivation in the narrow sense of regulation and expropriation, but for the sake of clarity the wider category of interferences or limitations should be distinguished clearly from the narrower category of deprivations as described above.)
- *Expropriation* (in the sense of s 25(2) and (3) of the Constitution) refers to cases where the state exercises its power of eminent domain to unilaterally (without the owner's permission or cooperation) terminate the owner's ownership and (usually) acquire the property for public use or for some public purpose such as land reform oriented redistribution of land or the building of dams and roads. Characteristic of expropriation is that one owner is singled out by the detrimental action for the benefit of the whole community. Expropriation has to be accompanied by compensation as determined by section 25(3).
- *Constructive expropriation* is a good term for the uncertain category in the middle, where a state interference with private property is not structured formally as an expropriation (eg the action is not undertaken in terms of expropriation legislation or procedures, and no provision is made for compensation), but nevertheless has the same effects and impact as an expropriation. In these situations it becomes important to distinguish between situations where the state acquires the property or the benefit of its destruction

(eg the creation of a state monopoly, illustrated by cases such as *Government of Malaysia v Selangor Pilot Association* [1977] 1 MLJ 133; or the statutory extinction of a state debt, illustrated by cases such as *Hewlett v Minister of Finance* 1982 1 SA 490 (ZSC)), and situations where there is no benefit for the state at all (eg the statutory extinction of a state debt in order to pay the debt to the real creditor, illustrated by cases such as *Mutual Pools & Staff v The Commonwealth of Australia* (1994) 179 CLR 155; or where dangerous or unlawful possessions are seized and destroyed, illustrated by forfeiture cases such as *Re Director of Public Prosecutions; Ex Parte Lawler* (1994) 179 CLR 270). The likelihood that the latter category will be classified and treated as constructive expropriations is remote. Characteristic of the constructive expropriation situations is that there is no formal expropriation, but the affected property owner claims that the effect or impact of the regulatory action is so excessive or unfair that it should be treated as an expropriation in any event, either to enforce payment of compensation or (where that is impossible or unrealistic, eg when the action amounted to extinction of a money debt) to invalidate the regulatory action.

3.2 Foreign authorities referred to

The Supreme Court of Appeal refers to a range of comparative authorities in reaching its decision. Given the extraordinary problems with terminology and differences in constitutional and legal contexts within which the problem of constructive expropriation arises, use of comparative case law is simultaneously absolutely necessary and impossibly difficult. A few general remarks on the use of case law in *Steinberg* illustrate the point:

- *Harksen v Lane NO* 1997 11 BCLR 1489 (CC): Next to the comparative materials, *Harksen* is the only more or less substantial decision of the Constitutional Court on the property clause, and therefore immensely important. However, the decision should be treated with circumspection because of two fairly restrictive assumptions concerning the distinction between deprivations and expropriations in the property clause: first, that expropriations are permanent rather than temporary, and second, that expropriations are characterised by the fact that the state actually acquires the property in question. (*Harksen* 1504E–F para 36 1505A–B para 37; and cf Van der Walt and Botha 1998 *SAPL* 17 19–26; Van der Walt *Property clauses* 336–340.) The second aspect seems to preclude the possibility of developing a doctrine of constructive expropriation, except perhaps for instances where the state acquires the property despite not having expropriated it formally. This seems to have been at the back of the Supreme Court of Appeal's mind in *Steinberg* as well, as the rather confusing passage at 1247G–1248B para 8 seems to suggest that a doctrine of constructive expropriation might be developed for situations where the state does acquire the property, but not for other situations. (See the last section of the note below for a discussion of this point.)
- *Hewlett v Minister of Finance* 1982 1 SA 490 (ZSC): South African commentators and courts like to refer to *Hewlett*, especially on the distinction between deprivation and expropriation (see *Harksen* 1502G–1503E para 33 for an example), but in fact the authority of this decision is questionable. Roux "Constitutional property rights review in Southern Africa: The record of the Zimbabwe Supreme Court" 1996 *African J Int & Comp L* 755–788 argues quite convincingly that it was morally justifiable for the Zimbabwe legislature

and supreme court to deprive the complainant in *Hewlett* of the property in question (a state debt arising from a judicial award of damages under legislation dating back to the Zimbabwe liberation war), but in fact that is not the basis on which the case was decided. (See the last section of the note below on the question of reform-oriented deprivation of property.) Moral considerations concerning the origin of the debt aside, *Hewlett* is authority for the proposition that statutory cancellation of a state debt is not an expropriation because the state does not acquire the property in question. (Van der Walt *Property clauses* 485–489.) This proposition seems mistaken both in law and in logic, since the state obviously did benefit from the cancellation of the debt and from being relieved of the duty to pay, and to say that the state did not acquire the property (in the sense that a debt can be “acquired” by the debtor) is sophistry. To follow the Zimbabwean *Hewlett* case blindly as authority for the proposition that the state must actually acquire the property in question before the action qualifies as an expropriation is also dubious in the South African context, because the South African Constitution refers to expropriation and not to compulsory acquisition in the property clause (although a strong case can be made that the term compulsory acquisition is restricted to situations where the property is actually acquired, the same is not true of the term expropriation, which seems much more neutral). Furthermore, the *Hewlett* interpretation is arguably unnecessarily restrictive even with reference to the term acquisition, as is illustrated by recent Australian case law (not referred to or considered in *Harksen* or *Steinberg*) that presents more useful and logical perspectives. It is now accepted in Australian case law that the state acquires property – in the sense of a compulsory acquisition that requires compensation – not only when the state actually takes over the property, but whenever the state acquires from the extinction or destruction of the complainant’s property some property, advantage or benefit, however slight or insubstantial (*Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 305; see Van der Walt 1999 *SAPL* 273 304–306. (See further Van der Walt “The constitutional property clause and police power regulation of intangible commercial property – A comparative analysis of case law” in Jackson and Wilde *Property law: Current issues and debates* (1999) 208–280 (hereafter *Current issues*); Allen *The right to property in Commonwealth constitutions* (2000) 162–200 for a discussion of the distinction between deprivation and acquisition in the context of intangible property.)

- *Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZSC): The facts in *Davies* were similar to those in *Steinberg*, as the property was also affected by a law that allowed for the preliminary listing of immovable property with a view to possible later expropriation, combined with certain restrictions being placed on the land in the meantime. In *Davies* the Zimbabwe Supreme Court also held that such listing does not in itself constitute expropriation. This is good authority for the finding in *Steinberg*, and all that really still needs to be added is that neither case should be interpreted as authority for the categorical, definitional proposition that such a preliminary notification of possible future expropriation could never in itself amount to or constitute an expropriation – in certain circumstances, the preliminary notification and its accompanying restrictions on the use of the land could (especially when combined with an indeterminate time frame) impose such a debilitating burden on the landowner as to raise the question whether it amounts to a constructive expropriation.

- *Government of Malaysia v Selangor Pilot Association* [1977] 1 MLJ 133: Once again, *Selangor* is a favourite of South African commentators and courts (it is cited via *Hewlett* in *Harksen* 1503C para 13), usually for the proposition that not every deprivation of property that causes loss for the property owner is an expropriation that requires compensation. (The property clause in the Malaysian constitution distinguishes explicitly between deprivation and expropriation of property, much like the South African clause.) Like *Hewlett*, *Selangor* offers a context for the argument that reform-oriented state interferences with private property should not be frustrated by demands for compensation, but again the authority of the case is questionable as it was not decided on the moral basis of the transformation argument, but on the technical finding that the state did not acquire the property in question. As in *Hewlett* this finding is open to criticism in law and in logic, since the state termination of private pilotage licences in Selangor apparently constituted a state monopoly, thereby acquiring a clear advantage or benefit for the state at the cost of the former property owners. (Van der Walt *Property clauses* 271–273, 1999 *SAPL* 273 306–307, *Current issues* 208–280; Allen 162–200.) Recent Australian case law suggests, as was pointed out earlier, that it is possible to analyse and apply the acquisition requirement with more finesse, and recent Mauritian case law (esp *La Compagnie Sucriere de Bel Ombre v Government of Mauritius* [1995] 3 LRC 494 (PC), discussed in the last section of the note below) suggests that the decision might well today go the other way, since it is possible to recognise constructive expropriation and still serve the purposes of land reform.
- *Pennsylvania Coal Co v Mahon* 260 US 393 (1922): In this decision the US Supreme Court first set out the basis of the doctrine that regulations that go too far may be seen and treated as takings, thereby abandoning the notion that the distinction between expropriation and deprivation is a clear-cut, categorical one (black or white, all or nothing), and accepted the view that this distinction refers to two points on a continuum, with a wide area of shading over from one into the other in between. The *Steinberg* court is therefore quite correct to refer to *Mahon* as the basis for the doctrine of constructive expropriation.
- *Penn Central Transportation Co v New York City* 438 US 104 (1978): *Penn Central* is referred to (with *Kaiser Aetna v United States* 444 US 164 (1979); *Hodel v Irving* 481 US 704 (1979); and *Lucas v South Carolina Coastal Council* 505 US 1003 (1992)) as one of the central cases in which the doctrine of regulatory takings (constructive expropriation) was developed in US law subsequent to *Mahon*. Interestingly, the Supreme Court of Appeal refers to these cases almost in passing, laconically noting (1247B–C para 7) that it is

“extremely difficult to distil any single principle from the body of case law built up by the Supreme Court of the United States of America around the Fifth Amendment and the Fourteenth Amendment to the Constitution (usually referred to as the ‘Due Process Clause’ and the ‘Takings Clause’ respectively)”.

(Actually it is the other way round; the Fifth Amendment is referred to as the Takings Clause and the Fourteenth as the Due Process Clause.) Most US commentators would agree wholeheartedly that it is almost impossible to distil a single principle from the voluminous and complex body of US constitutional property case law, but some would add that it is unrealistic to try and distil a single principle from any body of case law on any topic in any event, and that some sense can in fact be made from the case law in question, even if the result does not present a nice, simple, single principle to apply. A useful

example of how the US case law can be interpreted appears in the majority opinion of Scalia J in *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) 1014 [1]–1016 [2] (see Van der Walt *Property clauses* 427–429 for a summary). According to this overview, regulatory limitations imposed on property will be judged as going too far and viewed as takings that require compensation, without context-specific inquiry into the public purpose served by the limitation or the actual effect of the limitation on the property owner, in three categories of cases (the so-called *per se* takings): when the regulation imposes a permanent physical occupation or invasion of the property; when the regulation destroys or denies the owner of all economically viable use of the property; and when the regulation destroys a core entitlement such as the right to leave the property to one's heirs upon death. (*Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982); *Agins v City of Tiburon* 447 US 255 (1980) and *Hodel v Irving* 481 US 704 (1987) are the principal authorities for each of the three categories above.) When none of the three categories of *per se* takings is present, the *ad hoc*, open-ended inquiry laid down as the baseline test for all regulatory takings applies, and a three-factor test is applied to determine whether the regulation in question goes too far and should be treated as a taking. (The *ad hoc* test derives from *Penn Central Transportation Co v City of New York* 438 US 104 (1978), and is based on the original principle enunciated in *Mahon*.) This three-factor test involves an investigation into the nature of the government action involved, the diminution of value resulting from the regulation, and the extent to which the regulation interferes with reasonable, investment-backed expectations of the property holder. (See Van der Walt *Property clauses* 437–440 for a detailed explanation and references.) There are other views according to which the redline-type classification of *per se* takings in *Lucas* should be avoided, so that the *ad hoc* balancing approach of *Penn Central* applies in all regulatory takings cases, but even then there are at least some guidelines in terms of which regulatory takings (or constructive expropriations) can be identified – US law is not a completely useless muddle.

- *Palazollo v Rhode Island* US Supreme Court case no 99-2047 28 June 2001 @<http://www.supct.law.cornell.edu/supct/html/992047.ZS.html>: The Supreme Court of Appeal has to be commended for finding and referring to the latest authority on regulatory takings so quickly. It is still unclear exactly what impact *Palazollo* will have on the development of regulatory takings law, but superficially it seems likely that the two aspects of the decision that have most relevance for South African law are, firstly, that a complainant in a constructive expropriation case is not barred from claiming because he or she has failed to first explore all possible options for permission to develop the property in a different way (this would apply if the complainant were forced to apply for a development or building permit first before bringing the case); and, secondly, that such a complainant is not barred from the claim because he or she was aware of the existence of the limitation when acquiring the property (as was the case in *Steinberg*). Both principles can only be relevant once the South African courts accept the development of a doctrine of constructive expropriation, but assuming that such a doctrine is developed, these principles may have interesting implications. Most important of these is perhaps the possibility that even owners who acquired property after a regulatory limitation has been imposed, and who therefore have or are deemed to have knowledge of the limitation, can in certain circumstances still proceed

with a claim based on the doctrine of constructive expropriation, based on the notion that future generations should not be barred from challenging restrictions imposed on the use of property in the past. The application of this principle was left open in *Steinberg* (1249F–1250B para 13) because of the finding that there was no actual or constructive expropriation in any event.

3.3 *Reasons for disapproving of the development of "a wider doctrine"*

In *Steinberg* the Supreme Court of Appeal did not approve of the development of a doctrine of constructive expropriation wholeheartedly, but on the other hand the court did not exclude the possibility of such a development either. (In *Harksen* the Constitutional Court seems to have endorsed an absolute or categorical distinction between deprivation and expropriation on the basis of the question whether or not the state actually acquired the property involved, which precludes the development of a doctrine of constructive expropriation to a large degree (although not completely), since the development of such a doctrine depends on the notion that the distinction represents two points on a continuum rather than two watertight categories. A similar categorical approach is preferred, with reference to *Harksen* and both pre- and post-constitutional case law, by Southwood *The compulsory acquisition of rights* (2000) 14–15.) As was pointed out earlier in the summary of the decision, the *Steinberg* court made the following two statements concerning the development of this doctrine in South African law:

- Despite the clear distinction in section 25 between deprivation and expropriation, there may be room for the development of constructive expropriation, particularly where a deprivation of property rights has the indirect effect of transferring the rights to the state (*Steinberg* 1247G–H para 8).
- However, development of a general doctrine of constructive expropriation may be undesirable for the pragmatic reason that it could introduce confusion into the law, and the theoretical reason that emphasis on compensation for the owner of a right which is limited by executive action could adversely affect land reform (1248A–B).

Although these statements are somewhat confusing and not altogether as clear as one may have wished, they seem to establish that (i) the court does not exclude the possibility that a doctrine of constructive expropriation could be developed within the framework of the distinction between deprivation and expropriation as set out in section 25 of the Constitution; (ii) this possibility is particularly strong in situations where there is no formal expropriation of property, but a property owner is nevertheless deprived of property that is effectively (directly or indirectly) transferred to the public body undertaking the action; (iii) however, a wider doctrine that includes situations where the owner is deprived of the property without transferring it to the public body; in other words, where the deprivation consists of a state action that destroys or extinguishes the property, may be undesirable. Two reasons are provided by the court for the distinction between the two situations where a doctrine of constructive expropriation could apply, and for restricting the development of such a doctrine to the first situation only:

- the pragmatic reason: a wider doctrine could introduce confusion into the law (1248A–B); and
- the theoretical reason: emphasis on compensation for the owner of a right that is limited by executive action could adversely affect land reform (1248B–C). (Despite the court's formulation, limitations could be imposed on property by

legislation as well as by executive action, and in fact the former is probably more likely than the latter.)

Scepticism regarding the introduction of a doctrine of constructive expropriation in South African law is understandable, particularly in view of the concerns raised by the court and the reasons why it considers the development of a wider doctrine inadvisable. However, several other arguments need to be considered in addition to the court's rather abrupt and categorical statement of the reasons for its scepticism or concern about a wider doctrine of constructive expropriation. This is not the time or the place to develop or defend a complete argument in favour of the development of such a wider doctrine, and therefore a brief summary of some of the counter-arguments will have to suffice.

Tradition-based arguments that rely on settled judicial interpretations of what expropriation meant in the pre-constitutional era cannot carry much weight in a situation where our courts are confronted by something completely new, namely a constitutional property clause with a new, constitutional provision regarding expropriation and a new, constitutional distinction between deprivation and expropriation of property (cf Southwood 14–15 who seems to favour such a tradition-based argument). The authority of pre-constitutional case law on the definition of expropriation must necessarily be extremely limited.

In the new constitutional order the continuum approach to the distinction between deprivation and expropriation (regulation and taking) followed by the US Supreme Court in *Mahon* seems preferable to the categorical approach apparently favoured by the South African Constitutional Court in *Harksen*. This is a complex and difficult argument to make, but in essence it means that the new constitutional order demands a more flexible, context-sensitive approach to interpretation and not the abstract, definitional approach in terms of which the effects of a state action are deduced from the abstract characteristics of the category into which it is classified. A continuum approach assumes that the line between deprivations and expropriations is always notional and not real, and that cases will inevitably arise in which that line is blurred and impossible to define with clarity or certainty. Contrary to the statement in *Steinberg*, the distinction between deprivation and expropriation is blurred in any event, even when the courts should not develop a wider doctrine of constructive expropriation – the difference between the two categories is only clear in easy cases, but it is always blurred in hard cases. A suitable theory (rather than a doctrine) of constructive expropriation will not necessarily make the courts' work easier, but it could provide useful beacons and signposts that can assist the courts in a difficult journey into uncharted terrain. However, it should be clear that it is not a doctrine of constructive expropriation that muddles the supposedly clear distinction between expropriation and deprivation – the distinction is artificial from the beginning, and assuming that it is clear or simple amounts to sticking the judicial head in the sand of avoidance, which will definitely not make the difficult cases easier.

The court's second concern is that a wider doctrine of constructive expropriation will obstruct or frustrate land reform. This is a serious concern, but perhaps it is overstated, because there are several reasons why the development of a theory of constructive expropriation need not have a detrimental effect on land reform. Firstly, judging from experience elsewhere, the likelihood is that a doctrine of constructive expropriation would not find all that much application in land reform cases, and that it will apply more often to cases involving commercial property. (See Van der Walt *Current issues* 208–280 for examples.)

Even in situations where a doctrine of constructive expropriation does involve land reform it is not clear why it should necessarily frustrate the land reform effort, which is after all clearly sanctioned and authorised explicitly by the property clause in the Constitution, and which relies on the expropriation format quite extensively in land reform legislation. The only situation that comes to mind where a regulatory deprivation imposed by land reform legislation could possibly be construed as a constructive expropriation, would be where landowners' common-law rights or entitlements are curtailed for the sake of land reform objectives such as security of tenure (eg restrictions on the right to obtain an eviction order, see Van der Walt "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation" forthcoming 2002 *TSAR*; "Exclusivity of ownership, security of tenure, and eviction orders: A critical evaluation of recent case law" forthcoming 2002 *THRHR* for an analysis), and even there the constructive expropriation question should not raise unnecessary problems. With the assistance of a suitable theoretical model, the courts should be able to work out when a deprivation goes too far and should be treated as an expropriation, and in making this decision the land-reform oriented principles and obligations in the Constitution and in land reform legislation should provide guidance to balance the claim for compensation against the public interest in effecting the reforms in question. The fact that a theory of constructive expropriation may be used to extract compensation or to invalidate a deprivation, does not mean that landowners will always succeed with their claims against the land reform laws – it will be up to the courts to interpret and apply the laws, with due recognition of the reform- and transformation-oriented context, in the light of the theory of constructive expropriation, on a case-by-case basis.

A point of some importance is that the purpose in raising the constructive expropriation argument could be either to extract compensation for a regulatory deprivation that has the same effect as an expropriation, or to have the regulatory deprivation invalidated because it has the same effect as an expropriation while it does not and cannot assume the prescribed form of an expropriation (eg payment of compensation, which is required for expropriations but may be impossible under the circumstances). The point is therefore not always to extract expropriation, and even when a landowner should succeed with a claim for compensation, the property clause provides adequate guidelines in section 25(3) for the courts to calculate the compensation award with due regard to all the relevant contextual factors, including the land reform process and the possibility of historical imbalances and inequities. If a particular regulatory deprivation in the land reform legislation is treated as a constructive expropriation under circumstances where payment of compensation would be unreasonable and unjust, it should be possible to reach and justify a suitable order in terms of section 25(3); if compensation seems to be required for the sake of fairness, its award and quantum should be justifiable in the same fashion.

Where the state does not acquire the property (or any property or benefit or advantage) at all (the "wider doctrine" referred to in *Steinberg*), the likelihood of succeeding with a claim based on constructive expropriation must be remote, although it should not be excluded from the realm of possibility too quickly. It is foreseeable that the state could destroy or extinguish private property without acquiring the property and without acquiring any advantage or benefit from its extinction, simply to punish or harm the existing owners. If such a case should arise, the courts could decide the matter in much the same way as any other case

based on constructive expropriation, by inquiring whether the deprivation goes too far and has the effect or impact of an expropriation on the property owner, even though the state does not acquire any property or advantage or benefit. And, if the first answer is affirmative, the next question should be whether the discrepancy (an action intended and structured as a regulatory deprivation but which has the effect of an expropriation) should be addressed by way of a compensation award, or by way of a legitimacy inquiry where compensation is not the issue. In German law it is impossible (because of the requirements in the Constitution) to extract compensation for a regulatory action that goes too far and has the effect of an expropriation, but the notion of regulatory excess is still recognised in the sense that such a regulatory action is then declared excessive, unconstitutional and invalid. (Van der Walt *Property clauses* 144–145 and 1999 *SAPL* 273 286–290.) In a legitimacy inquiry of this nature, the question is whether a deprivation is valid when it has the same effects as an expropriation, under circumstances where it is impossible to view and treat the deprivation as a constructive expropriation (eg because a compensation award is out of the question). Such an inquiry need not frustrate legislative purposes, for it may often prove that the action is justified by the Constitution or by law (eg when property is seized and forfeited or even destroyed for being dangerous or prohibited contraband). In most cases, this kind of justification would terminate the inquiry, but the benefit of a theory of constructive expropriation is that it may prove useful in more difficult cases, for instance where the seizure and forfeiture of the property is apparently authorised by law, but the matter is complicated because the property belongs to an innocent third party, or because the state benefits from the use or sale of the seized and forfeited property. (See Van der Walt “Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause” 2000 *SAJHR* 1–45 for a discussion and examples.) In these circumstances a balanced and subtle theory of constructive expropriation could assist the courts in distinguishing between different situations and contexts in order to reach a justifiable outcome.

Legitimacy inquiries could also be approached from a different angle, without involving the theory of constructive expropriation, by inquiring whether a particular deprivation (which is deemed excessive because it has the effects of an expropriation) is arbitrary as meant in section 25(1), and therefore unconstitutional and invalid. The result is the same, and therefore either option is acceptable as a solution. So far, the courts have given no indication whether they would be willing to interpret and apply the proscription of arbitrary deprivation in section 25(1) in this way.

4 Conclusion

The use of comparative case law is difficult and dangerous in the context of a theory of constructive expropriation, but at the same time it is inevitable. The strongest arguments in support of development of a theory of constructive expropriation, both in situations where the state acquires the property or some other advantage or benefit and in situations where the state does not derive any advantage or benefit at all, comes from case law in other jurisdictions. This is not the time or the place to develop a full comparative analysis (see Van der Walt 1999 *SAPL* 273–331 for further examples), and two examples of case law that can simultaneously reduce anxiety about the development of such a theory and provide useful guidelines for its development will have to suffice.

Firstly, Australian case law provides an excellent theoretical framework for a reasonable and feasible theory of constructive expropriation in all situations where the state acquires either the property or another advantage or benefit, however slight or insubstantial, as a result of the regulation. If the South African courts develop a theory of constructive expropriation, it would be useful to refer to the Australian cases and use the wisdom already developed there, albeit under different circumstances. (The most important cases in this regard are *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *Mutual Pools & Staff v The Commonwealth of Australia* (1994) 179 CLR 155; *Re Director of Public Prosecutions: Ex Parte Lawler* (1994) 179 CLR 270; *Georgiades v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 and *Australian Capital Television v The Commonwealth of Australia; The State of New South Wales v The Commonwealth of Australia* (1992) 177 CLR 106, all discussed by Van der Walt *Property clauses* 46–58 and 1999 *SAPL* 273 304–306.) This source of comparative law would be especially useful in moving away from the rather unimaginative and restrictive approach to the *acquisition* requirement adopted in *Harksen*; a move that is a prerequisite for the development of a doctrine of constructive expropriation.

Secondly, Mauritian case law presents a useful example of a sound theoretical argument in support of a theory of constructive expropriation that can function in a land-reform or social-transformation oriented context. In *La Compagnie Sucrerie de Bel Ombre v Government of Mauritius* [1995] 3 LRC 494 (PC) (discussed by Van der Walt *Property clauses* 286–291 and 1999 *SAPL* 273 308–310; Allen 196–198), the Privy Council decided that certain regulatory controls over the use of property need not be compensated, even when they cause quite serious losses for the property owners. This is particularly the case when a regulation achieves a fair balance between the interests of the individuals whose property interests are affected and the interests of the community. (The interests of the community in the case concerned the modernisation of the Mauritian sugar industry.) The required balance was said to be a matter of fact and of degree: when regulatory deprivations achieve a suitable balance between public interest and individual interest in pursuit of a legitimate government goal, they do not require compensation even when they cause harm, but when they go too far (according to a proportionality test), they should be compensated, even though they do not result in formal state acquisitions of the property. This test, although developed in a different constitutional context, provides interesting possibilities for the development of a South African theory of constructive expropriation that can serve the purposes of land reform and other legitimate government purposes while still making it possible to protect individual property interests in a creative and context-sensitive way. Similarly instructive guidelines (eg the German test whether an individual is required to bear the burden of a regulation that benefits society as a whole) can be gleaned from other comparative sources and used to good effect in the development of a theory of constructive expropriation.

However, if such a theory is to be developed the courts will have to adopt a more flexible and contextual view of the difference between expropriation and deprivation in section 25 of the Constitution, and abandon the categorical distinction apparently favoured in *Harksen*. It would also require a reconsideration of the difficult relationship between section 25 and the general limitation provision in section 36 of the Constitution – if it were true that section 36 has no application in the context of the property clause (as claimed by De Waal, Currie and Erasmus *The Bill of Rights handbook* (2001) 426–428), it would be much more difficult to interpret and apply the property clause with due recognition of a

theory of constructive expropriation, simply because proper, context-sensitive application of such a theory would often require full investigation of the proportionality issues currently reserved for second-stage limitation analysis.

The by now trite observation that the Constitution and its attendant reform legislation must be interpreted in a purposive framework seems to imply that a context-sensitive, flexible and open-minded interpretation model is preferable to an abstract, categorical and strict one, which in turn suggest that the development of a suitably context-sensitive theory of constructive expropriation should be welcomed rather than feared. In this regard *Steinberg* must be seen and welcomed as a step in the right direction.

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**DIE HOOGSTE HOF VAN APPÈL GEE HOOP VIR DIE
TELEURGESTELDE BEGUNSTIGDE (“DISAPPOINTED
BENEFICIARY”)**

BOE Bank Ltd v Ries 2002 2 SA 39 (HHA)

In sy bespreking van *Ries v Boland Bank PKS Ltd* 2000 4 SA 955 (K), “The disappointed beneficiary smiles at last” 2000 *SALJ* 193, verwelkom Hutchison die uitspraak van waarnemende regter Erasmus as “clear, cogent and convincing, and . . . fully in tune with the legal convictions of the South African community, as the academic writings and case law to date indicate”. Alhoewel die Hoogste Hof van Appèl nie met regter Erasmus saamgestem het nie, maak die volgende *dictum* van appèlregter Schutz in *Ries* 46A–C dit nogtans onomwonde duidelik dat dié hof in beginsel nie afsydig staan teenoor die erkenning van ’n deliktuele eis deur die benadeelde begunstigde nie, en dat sodanige eis sal slaag waar dit aan die gewone deliktsvereistes (veral onregmatigheid, nalatigheid en kousaliteit) voldoen:

“Most of the judgment *a quo* . . . is taken up with a review of the ‘disappointed beneficiary’ decisions and literature, both in South Africa and abroad. A useful collation is to be found there. I do not intend to repeat it, interesting as much of the thinking on display is, as *I have little doubt that when an appropriate case, such that a duty of care is owed to the plaintiff, arises, this Court will accept that a disappointed beneficiary has a delictual action for his loss.* Indeed the appellant in this case, the bank, accepts as much, that is, as a matter of principle. There are also decisions of our Courts supporting such a view. They are *Arthur E Abrahams & Gross v Cohen and Others* 1991 (2) SA 301 (C) and *Pretorius v McCallum* [2002 2 SA 423 (K)]” (ons kursivering).

In die bespreking wat volg word eers kortliks aandag aan *Cohen* en *McCallum* gegee, daarna word die *Ries*-verhoorhofsak onder oë geneem en ten slotte word gefokus op die onderhawige appèlhofuitspraak.

Cohen: In hierdie saak het ’n prokureursfirma wat namens die eksekuteurs van ’n bestorwe boedel die bereddering daarvan behartig het, versuim om die nodige

stappe te doen om die opbrengs van sekere polisse binne 'n redelike tyd aan die begunstigdes te laat uitbetaal – *in casu* het die uitbetaling eers vyf jaar na die testateur se dood geskied – en het hulle dientengevolge finansiële verlies gely. 'n Eksepsie dat die eis nie 'n skuldoorsaak openbaar nie, word deur regter Marais verwerp. Volgens hom is daar in beginsel geen beswaar teen die verlening van 'n deliktuele eis op grond van suiwer ekonomiese verlies in 'n geval soos die onderhawige nie. Die kernvraag was of daar 'n regsplig op die verweerder gerus het om sodanige verlies te voorkom. Faktore wat volgens regter Marais (311–312) 'n rol by die bepaling van die regsplig speel, is onder andere dat die verweerder inderdaad gewet of subjektief voorsien het dat sy optrede die eisers kon benadeel; die relatiewe gemak waarmee die verweerder maatreëls kon tref om die verlies te voorkom; en dat daar nie 'n gevaar van onbeperkte aanspreeklikheid was nie. (Vir besprekings van *Cohen*, sien Neethling “Professionele aanspreeklikheid teenoor derdes” 1996 *THRHR* 196–200; Neethling, Potgieter en Visser *Deliktereg* (2002) 315 vn 134, 317 vn 142, 319 vn 153, 320 vn 155, 321 vn 159.)

McCallum: Hier het die eiseresse deliktuele skadevergoeding geëis van die prokureur wat die testament opgestel het waarin hulle as bevoordeeldes benoem is. Omdat die testament nie behoorlik verly was nie – die prokureur het as getuie nie al die bladsye daarvan geteken nie – was die testament ongeldig. Die boedel moes toe intestaat vererf met die gevolg dat die eiseresse veel minder of niks uit die boedel geërf het nie. Daarom eis hulle as skadevergoeding die verskil tussen dit wat hulle testaat sou geërf het en dit wat hulle nou intestaat erf. In eksepsie word aangevoer dat ons reg nie 'n aksie deur 'n teleurgestelde bevoordeelde teen 'n nalatige prokureur erken nie. Na 'n deeglike ondersoek van vreemde en eie beslissings – ook *Cohen supra* – en literatuur oor die onderwerp, kom regter Conradie (430) eger tot die slotsom dat daar

“geen beginselbeswaar in die Suid-Afrikaanse reg [is] teen die ontvanklikheid van 'n vordering gegrond op 'n regsplig van 'n prokureur om te sorg dat 'n beoogde bevoordeelde se verwagtinge bewaarheid word nie. Daar is geen rede waarom ons reg nie die pad sou loop wat reeds deur regstelsels in die VSA, Kanada, Australië, Nieu-Seeland en Engeland (maar met die uitsondering van Skotland) bewandel is nie. Dit is dan ook die standpunt van al die plaaslike skrywers wat akademiese bydraes oor die onderwerp gelewer het”.

(Vir besprekings van *McCallum* sien Hutchison 2000 *SALJ* 189; *Ries a quo supra* 967.)

Ries a quo: Die feite in *Ries* was kortliks soos volg: Die tweede verweerder (G) was 'n versekeringsmakelaar in diens van die eerste verweerder, Boland Bank (nou BOE Bank). Die eiseres se gade (R) het G ingelig dat hy die genomineerde bevoordeelde in 'n polis deur die eiseres wou vervang. R en G het afgespreek dat G dieselfde middag die nodige vorm aan R sou besorg sodat dit voltooi kon word. R het nie die afspraak nagekom nie en ook nie gereageer op G se boodskap dat hy die vorm by G moes gaan teken nie. As gevolg hiervan het die eiseres die opbrengs van die polis na die dood van haar gade verbeur.

Waarnemende regter Erasmus bevind (966–968) dat daar in beginsel geen beletsel is teen die verlening van 'n deliktuele eis aan 'n teleurgestelde begunstigde nie. Dit beteken dat daar 'n regsplig rus op 'n derde party (bv 'n prokureur) om nie vermoënskade vir 'n begunstigde te veroorsaak weens die nie-nakoming van 'n kontraktuele beding ten behoeve van die begunstigde tussen 'n erflater en die derde party nie. Hier gaan dit uiteraard oor aanspreeklikheid weens die veroorsaking van

suiwer ekonomiese verlies waar al die delikselemente, veral onregmatigheid, teenwoordig moet wees om aanspreeklikheid te vestig. Wat onregmatigheid betref, volg regter Erasmus die geykte benadering deur te vra of daar in die omstandighede 'n regsplig op die verweerders gerus het om finansiële verlies vir die eiseres te vermy. Hier word van die hof vereis "to exercise a value judgment embracing all relevant facts and involving considerations of policy" (968; vgl *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 797). 'n Wye spektrum van faktore kan by die neem van hierdie besluit 'n rol speel waarvan die volgende volgens regter Erasmus in die onderhawige saak op die bestaan van 'n regsplig dui (968-969):

- (i) G het geweet van die eiseres se beoogde bevoordeling en geweet dat dit sou faal indien die versekeraar nie daarvan in kennis gestel sou word nie. Met verwysing na Neethling, Potgieter en Visser *Law of delict* (1999) 297 is die regter van mening dat die subjektiewe wete of kennis van die verweerder dat sy nalatige gedrag skade vir die eiser kon veroorsaak, "a very important part and perhaps even a decisive role in the determination of a legal duty" speel (969).
- (ii) Daar was 'n deurlopende (professionele) verhouding tussen R en BOE Bank ingevolge waarvan die bank dienste aan R gelever het. Regter Erasmus vervolg (969):

"He was entitled to rely on the first defendant to render those services in such a manner that effect was given to his intentions. In my view, the *boni mores*, the legal convictions of the community, require that persons or bodies in the position of the defendants exercise their skill and knowledge responsibly so as not to affect adversely persons whose rights and interests are certain and foreseeable. It was argued on behalf of the defendants that the change of beneficiary on an insurance policy requires no particular skill or knowledge and that [R] could himself have taken the necessary steps. That may be so, but a person is also entitled to draw and execute his own will. [R] elected to make use of the superior knowledge, skill and experience of the defendants."
- (iii) Daar was geen gevaar dat die verweerders aan die risiko van onbeperkte aanspreeklikheid blootgestel sou word nie (970).
- (iv) Indien hierdie regsplig nie erken sou word nie, sou dit 'n ernstige *lacuna* in ons reg laat (970).
- (v) Die erkenning van 'n regsplig teenoor begunstigdes sou nie 'n bykomende las op 'n persoon in die posisie van die verweerder plaas nie: "No more is required than proper performance of the obligation towards, in this case, the insured" (970).

Met betrekking tot nalatigheid pas regter Erasmus (971) die toets toe soos geformuleer deur appèlregter Olivier in *Mukheiber v Raath* 1999 3 SA 1065 (HHA) 1077:

"For the purposes of liability *culpa* arises if –

- (a) a reasonable person in the position of the defendant –
 - (i) would have foreseen harm of the general kind that actually occurred;
 - (ii) would have foreseen the general kind of causal sequence by which that harm occurred;
 - (iii) would have taken steps to guard against it, and
- (b) the defendant failed to take those steps."

Toegepas op die feite, en aan die hand van die redelike deskundige- (versekeringsmakelaar-) toets, bevind regter Erasmus dat G nalatig opgetree het (971–972) en uiteindelik dat die verweerders deliktueel aanspreeklik is. (Vir bespekings van *Ries a quo supra* sien Hutchison 2000 SALJ 186 ev; Neethling, Potgieter en Visser 141 vn 58, 315 vn 134, 317 vn 142, 318 vn 147 149, 319 vn 153, 320 vn 156, 321 vn 159, 322 vn 164 165.)

Ries (HHA): In die Hoogste Hof van Appèl vind appèlregter Schutz dit slegs nodig om die onregmatigheidsvraag te ondersoek (46 ev). Ten aanvang onderstreep hy (46E–G) die gevestigde regsposisie dat, terwyl die aantasting van 'n persoon of saak *prima facie* onregmatig is, dit nie die geval met suiwer ekonomiese verlies is nie. Hy beklemtoon verder dat gedrag in die vorm van 'n late insgelyks *prima facie* regmatig is en dat dit slegs onregmatig kan wees waar daar 'n regsplig was om positief op te tree. Hy vervolg (46H–47A):

“In most delict cases that come before the courts the element of wrongfulness is uncontentious and may not deserve a mention, the only real issues being negligence and causation. But in the case before us it is the first issue, particularly because the claim is for pure economic loss and is based on an omission. Foreseeability alone cannot provide the answer. Nor, if one might consider that a moral duty rested on [G] to do more than he did, is that in itself enough. Something more is needed. The Court must be persuaded that the legal convictions of the community demand that the conduct ought to be regarded as unlawful: *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A–C, *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 317C–318A and *Cape Town Municipality v Bakkerud* ([2000] 3 SA 1049 (SCA)) at 1054C–1057G. Put another way, the Court has to be persuaded that the defendant owes a legal duty and not only a moral duty to the plaintiff. This involves forming a value judgment.”

Toegepas op die feite bevind appèlregter Schutz (47B–H 48F–J), anders as regter Erasmus in die hof *a quo*, dat daar nie 'n professionele (kontraktuele) verhouding tussen die oorledene en G was ingevolge waarvan die oorledene op G se besondere vaardighede kon staatmaak nie. Volgens hom het G die oorledene bloot 'n guns bewys wat nie op 'n formele kontrak met die oorledene gebaseer was nie en sou die gemeenskap nie van 'n hof verwag om 'n regsplig op hom te lê om meer te doen het nie. Van 'n analogie met die posisie van 'n prokureur wat in opdrag van 'n kliënt 'n testament opstel, was daar ook geen sprake nie. (Terloops, in hierdie verband wys die appèlhof op die gevaar van gevolgtrekkings wat slegs by wyse van analogie gemaak word. Sodanige analogie is ten onregte deur die hof *a quo* gemaak tussen 'n prokureur wat 'n testament in geval van 'n teleurgestelde begunstigde opstel aan die een kant, en die eiseres en G aan die ander kant. Dit het daartoe gelei dat die hof *a quo* op begrippe staatgemaak het wat by die teleurgestelde begunstigde ter sprake kom eerder as op die werklike feite voor die hof (48A–B 49A–C).)

Alhoewel appèlregter Schutz die subjektiewe kennis of wete van G dat die eiser benadeel kon word weens sy nalatige versuim om die versekeraar van die nuwe bevoordeelde in kennis te stel, as 'n belangrike faktor by die bepaling van die onderhawige regsplig beskou, is dit op sigself nie voldoende nie (47I 49C–D). Hy verklaar:

“Such foreseeability is often an important, even a decisive factor in deciding whether wrongfulness has been established, but it is not in itself enough, and its presence in this case does not, in my opinion, have the effect of thrusting on [G] an obligation that he did not assume. Had he failed in performing such duties as he did undertake the case may have been otherwise.”

Twee ander faktore waarop regter Erasmus steun vir sy bevinding dat daar wel 'n regsplig op G gerus het – naamlik dat daar geen sprake van onbepaalde aanspreeklikheid was nie en dat ons reg in die afwesigheid van die erkenning van 'n deliktsaksie vir die teleurgestelde bevoordeelde 'n ernstige leemte sou hê – help volgens regter Schutz (49D–H) ook nie die eiser *in casu* nie. Insgelyks verskil regter Schutz van regter Erasmus se standpunt dat die regsplig erken behoort te word omdat dit nie 'n bykomende las of verpligting op G sou plaas nie. Hy stel dit soos volg (49H–50A):

“The correctness of that view depends on what it was that [G] undertook to do. I have already sought to demonstrate that he did all that he said he would do. What the plaintiff's complaint really comes to is that [G] should have reminded, or perhaps kept reminding, the deceased to sign and deliver the form. To my mind he had performed his act of neighbourliness. That did not make him the deceased's keeper. It would be an extraordinary result in a case such as the one before us if the legal duty in a delictual claim having found its foundation in a contract with the deceased (if there was one) should be wider than the duties imposed by the contract itself.”

Kommentaar: Nieteenstaande die afwysing van die eis in *Ries* – wat instemming verdien – is dit verblydend dat die Hoogste Hof van Appèl die deur oopgemaak het vir die erkenning van die aksie van die teleurgestelde begunstigde waar aan al die algemene deliktsvereistes voldoen word. Veral die onregmatigheids-element, naas nalatigheid en kousaliteit, is van besondere belang. Wat onregmatigheid betref, gaan dit in die onderhawige gevalle duidelik oor aanspreeklikheid weens suiwer ekonomiese verlies wat nie *prima facie* onregmatig is nie (sien ook *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 26; *Ries* (HHA) 46F–G; Neethling, Potgieter en Visser 317). Daarom moet in elke besondere geval volgens die omstandighede vasgestel word of daar 'n regsplig bestaan het om suiwer ekonomiese verlies te vermy. Die maatstaf wat by hierdie beoordeling aangewend moet word, is die *boni mores*-kriterium wat vereis dat die hof 'n waarde-oordeel (“value judgement”) moet maak (*Indac supra* 797; sien ook *Ries a quo supra* 968–969; *Ries* (HHA) 47A; Neethling, Potgieter en Visser 318–319). Verskeie faktore kan by hierdie waarde-oordeel 'n rol speel (sien Neethling, Potgieter en Visser 319 ev). By die bepaling van die regsplig in geval van die teleurgestelde begunstigde is veral die volgende faktore van belang:

- (i) Die bestaan van 'n geldige (profesionele) kontrak tussen die verweerder en 'n begunstiger (testateur) wat 'n verpligting op die verweerder plaas om met die nodige sorg (profesionele vaardigheid) te verseker dat 'n bepaalde (testamentêre) voordeel die begunstigde toekom (vgl *Ries* (HHA) 47B–H 48F–J 49H–50A; sien ook *Ries a quo supra* 969; vgl *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 878; Neethling, Potgieter en Visser 320).
- (ii) Die verweerder se subjektiewe kennis of wete dat nalatige optrede aan sy kant die begunstigde sal benadeel. Hierdie faktor speel 'n baie belangrike en selfs deurslaggewende rol by die bepaling van die regsplig (*Ries* (HHA) 47I 49B–D; *Ries a quo supra* 969; *Cohen supra* 311; vgl *Kadir supra* 307–308; Neethling, Potgieter en Visser 319).
- (iii) Praktiese maatreëls wat die verweerder kon tref om die benadeling te voorkom, waarby byvoorbeeld die relatiewe gemak of lae koste waarmee die ekonomiese verlies afgeweer kon word, 'n rol speel (*Ries a quo supra* 970; *Cohen supra* 312; Neethling, Potgieter en Visser 320).

(iv) Die afwesigheid van 'n gevaar van oewerlose aanspreeklikheid (*Ries a quo supra* 970; *Cohen supra* 311–312; vgl *Ries* (HHA) 49D–E; *Indac supra* 798; Neethling, Potgieter en Visser 321).

Die delikselement nalatigheid word in *Ries a quo supra* met verwysing na die redelike persoon (deskundige) bepaal. Soos gesien, word die formulering van die nalatigheidstoets in *Mukheiber supra* aanvaar. Alhoewel ons met hierdie konkrete benadering tot nalatigheid saamstem (Neethling, Potgieter en Visser 151–152; sien ook Neethling en Potgieter “Die toets vir deliktuele nalatigheid onder die soeklig” 2001 *THRHR* 483), het die Hoogste Hof van Appèl na *Mukheiber* weer die gesaghebbende abstrakte benadering in *Kruger v Coetzee* 1966 2 SA 428 (A) 430 bevestig (sien bv *Mkhatswa v Minister of Defence* 2000 1 SA 1004 (HHA) 1111–1112; *Mostert v Cape Town City Council* 2001 1 SA 105 (HHA) 118–119; *Du Pisanie v Rent-a-Sign (Pty) Ltd* 2001 2 SA 894 (HHA) 899; *Kruger v Carlton Paper of South Africa (Pty) Ltd* 2002 2 SA 335 (HHA) 341; sien verder Neethling, Potgieter en Visser 141 vn 58). Uit 'n praktiese hoek behoort dit nietemin nie 'n verskil te maak of die konkrete dan wel die abstrakte benadering gevolg word nie aangesien beide dieselfde resultaat behoort te lewer – albei benaderings vereis naamlik die voorsienbaarheid van die algemene aard van die nadelige gevolg(e) en van die algemene wyse waarop dit ingetree het (sien Neethling, Potgieter en Visser 152 vn 110).

In verband met onregmatigheid en nalatigheid is dit ook verblydend dat die Hoogste Hof van Appèl in *Ries* die “sequentially appropriate”-benadering (*Bakkerud supra* 1055) toepas deur eers vir onregmatigheid en daarna vir nalatigheid te toets (Neethling, Potgieter en Visser 131 vn 6; Neethling en Potgieter 2001 *THRHR* 480–481; Neethling “Die regsplig van die staat om die reg op die fisies-psigiese integriteit teen derdes te beskerm: Die korrekte benadering tot onregmatigheid, nalatigheid en feitelike kousaliteit” 2001 *THRHR* 493–494).

Uit bostaande blyk duidelik dat die aksie van die teleurgestelde begunstigde nou op die hoogste vlak erkenning geniet en dat sodanige begunstigde se hoop op sukses nie beskaam sal word nie mits sy of haar aksie aan die algemene deliksvereistes voldoen.

J NEETHLING

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**STRAFREGTELIKE AANSPEEKLIKHEID EN DIE VERWEER VAN
TYDELIKE NIE-PATOLOGIESE ONTOEREKENINGSVATBAARHEID
– VERLIES VAN KONATIEWE GEESTESFUNKSIE ONDERSKEI VAN
BLOTE VERLIES VAN HUMEUR
S v Eadie (1) 2001 1 SACR 172 (K)**

1 Inleiding

Die onderhawige beslissing plaas die soeklig op padwoede (“road rage”) as moontlike verweer. In besonder word die vraag aangespreek of padwoede aanduidend is van tydelike nie-patologiese ontoerekeningsvatbaarheid en derhalwe as volkome verweer op 'n aanklag van moord kan dien. Die onderskeid tussen die verwe-

van nie-patologiese ontorekeningsvatbaarheid en nie-patologiese oftewel gesonde outomatisme is egter *verkeerdelik* vertroebel. (Sien ook Goldstone Wn AR se uitspraak in *S v Wiid* 1990 1 SASV 561 (A) 569D ev.)

2 Feite

Die beskuldigde, Eadie, is 'n 35-jarige man. Hy staan tereg op twee aanklagte, naamlik moord en regsverdeling of regsbelemmering. Die gebeure aanleidend tot hierdie aanklagte is die volgende: In die vroeë oggendure van 12 Junie 1999 was die beskuldigde, sy vrou en hul twee jong seuns per motor op pad huis toe. Die beskuldigde het 'n ander motor se hoofligte in sy truspieël gewaar. Die bestuurder van die ander motor (Duncan (54)) het sy motorligte vir Eadie geflits terwyl hy sy motor teen 'n hoë spoed ingehaal en op die laaste oomblik op 'n soliede streep verbygesteek het. Later, op dieselfde pad, het Eadie weer vir Duncan gewaar aangesien laasgenoemde toe weer aansienlik stadiger gery het. Eadie het vir 'n wyle agter Duncan se motor gery, wat intussen tot ongeveer 40 km/h verstadig het. Eadie het derhalwe Duncan se motor verbygesteek. Hierna het Duncan spoed vermeerder en vir 'n paar honderd meter reg agter die beskuldigde se motorbuffer gery met sy hoofligte aan. Die beskuldigde het spoed vermeerder in 'n poging om weg te kom maar is uiteindelik weer deur Duncan verbygesteek. Die hele proses is hierna herhaal totdat Duncan vlak voor die beskuldigde se motor remme aangeslaan het. Uit vrees vir 'n moontlike motor-kaping het die beskuldigde Duncan vir 'n tweede keer verbygesteek. Die beskuldigde het hierna so vinnig moontlik gery in 'n poging om weg te kom maar Duncan het kort op sy hakke gebly. By 'n rooi verkeerslig het die beskuldigde stilgehou met Duncan, steeds met sy motor se hoofligte aan, teen die beskuldigde se motorbuffer.

Die beskuldigde het sy hokkiestok van agter sy motorsitplek geneem en uitgeklim. Volgens hom was hy teen hierdie tyd uitermate kwaad en was sy aanvanklike voorneme om die ander motor se ligte stukkend te slaan. Terwyl hy nader gestap het, het hy egter van plan verander en besluit om die motor se voorruit stukkend te slaan. Op daardie oomblik het Duncan sy motordeur oopgemaak en die beskuldigde het sy hokkiestok op die motordeur stukkend geslaan. Hierna het die beskuldigde die motordeur, wat intussen toegegaan het, weer oopgepluk waarna Duncan met albei voete na die beskuldigde geskop het. Die beskuldigde het Duncan herhaaldelik met sy vuus teen die kop en in die gesig geslaan. Hierna het die beskuldigde vir Duncan uit sy motor gesleep en, terwyl laasgenoemde op die grond lê, hom met die hak van sy skoene in die gesig getrap en op sy neusbrug geskop. Die beskuldigde en sy familie het hierna huis toe gery maar die beskuldigde het onmiddellik na die misdaadtoneel teruggekeer.

Hy kon geen polsslag by Duncan waarneem nie. ('n Staatspatoloog het later getuig dat Duncan weens veelvuldige hoofbeserings beswyk het.) Lede van die publiek en die polisie het hierna op die toneel aangekom en die beskuldigde het aan hulle verduidelik dat hy 'n onskuldige verbyganger was wat bloot sy hulp wou aanbied. Nadat die beskuldigde sy besonderhede aan die polisie verskaf het, is hy toegelaat om huis toe te gaan. Hy het egter eers die gebreekte hokkiestok onopsigtelik van die toneel verwyder en in digte bosse 2,5 km daarvandaan gaan weggooi. Die beskuldigde het later tydens ondervraging aan die polisie voorgesê dat hy die hokkiestok by die misdaadtoneel gelaat het asook dat die skoon denimbreek wat hy toe gedra het dieselfde een was wat hy tydens die noodlottige voorval gedra het. Later het dit geblyk dat die denimbreek wat hy tydens die voorval gedra het bloedbesmeerd was en deur hom versteek is.

3 Verweer

Die beskuldigde het beweer dat hy tydens die aanval beheer oor homself verloor het en derhalwe nie in staat was om sy daad te beheer nie. Hy opper dus tydelike nie-patologiese ontoerekeningsvatbaarheid weens verlies van sy konatiewe geestesfunksie as verweer.

4 Regsposisie

Die toerekeningsvatbaarheid van die dader tydens misdadpleging is 'n voorvereiste vir strafregtelike aanspreeklikheid. 'n Persoon is toerekeningsvatbaar as hy/sy tydens die daad oor die geestesvermoë beskik om die aard van sy optrede te besef, om die ongeoorloofde aard van sy optrede te besef (kognitiewe bewussynsfunksie) asook om sy optrede dienooreenkomstig hierdie besef van ongeoorloofdeheid te rig (konatiewe bewussynsfunksie). Volgens die algemene toerekeningsvatbaarheidsmaatstaf wat in die strafreg geld, val die klem tans nie soseer meer op die *oorsaak* van die ontoerekeningsvatbaarheid nie, maar op die ontoerekeningsvatbaarheid self. Een gevolg hiervan is dat daar in onlangse sake dikwels as verweer gesteun is op ekstreme provokasie wat aanleiding sou gee tot die tydelike nie-patologiese ontoerekeningsvatbaarheid van die dader tydens die daad (sien bv *S v Arnold* 1985 3 SA 256 (K); *S v Wiid* 1990 1 SASV 561 (A); *S v Kalogoropoulos* 1993 1 SASV 12 (A); *S v Kensley* 1995 1 SASV 646 (A); *S v Di Blasi* 1996 1 SASV 1 (A); *S v Cunningham* 1996 1 SACR 631 (A) en *S v Francis* 1999 1 SACR 650 (A).

Regter Griesel merk tereg op dat daar verwarring bestaan tussen die verwere van tydelike nie-patologiese ontoerekeningsvatbaarheid en nie-patologiese oftewel gesonde outomatisme (sien bv *S v Wiid supra* 569D ev en *S v Francis supra* 651H ev). 'n Strafregtelike handeling, synde 'n willekeurige menslike *commissio* of *omissio*, vorm die grondslag van strafregtelike aanspreeklikheid. Outomatisme (hetsy gesonde of kranksinnige outomatisme) is 'n handelingsuitsluitingsgrond aangesien dit willekeurigheid uitsluit. *Willekeurigheid* dui daarop dat die menslike spierbewegings deur die wil of intellek beheers word. Die onderhawige hof poneer, *verkeerdelik* na my mening, dat bogenoemde twee verwere wesenlik dieselfde is en derhalwe kan oorvleuel:

"At the same time, however, it is clear that in many instances the defences of criminal incapacity and automatism coincide. This is so because a person who is deprived of self-control is both incapable of a voluntary act and at the same time lacks criminal capacity. . . It is not surprising, therefore, to see that the two defences are sometimes relied on in the alternative, eg in *S v Arnold* 1985 (3) SA 256 (C). The clearest indication that it may be a distinction without a difference is to be found in the latest judgment of the Supreme Court of Appeal on the topic, namely *S v Francis* 1999 (1) SACR 650. In para [1] of the Court's judgment (at 651h) reference is made to the defence of *temporary non-pathological criminal incapacity* with the words 'sane automatism in brackets'" (178B-C).

Kritiek op hierdie stelling volg hieronder.

Die hof ag homself voorts nie gebonde aan die deskundige getuienis van die psigiaters wat namens die Staat en die beskuldigde onderskeidelik getuig het nie. Die hof is van mening dat psigiatryse getuienis net onontbeerlik en van kardinale belang is waar beweer word dat die beskuldigde tydens die pleeg van die daad aan 'n patologiese geestesversteuring gely het. Dit sou die geval wees waar kranksinnige outomatisme of patologiese ontoerekeningsvatbaarheid tydens die daad as verweer geopper word. Waar 'n nie-patologiese toestand tydens die daad

egter as verweer geopper word (soos in die onderhawige geval) vervul psigiatriese getuienis egter *nie* so 'n kardinale rol nie en besluit die hof self, na inagneming van alle bewese feite, of die Staat die afwesigheid van nie-patologiese ontoerekeningsvatbaarheid tydens die daad bo redelike twyfel bewys het (sien *S v Calitz* 1990 1 SACR 119 (A) 127C).

5 Beslissing

Die hof verwerp die verweer van nie-patologiese ontoerekeningsvatbaarheid tydens die daad. Dit beskou die beskuldigde as 'n onbetroubare getuie en is van mening dat die hokkiestok waarskynlik gebreek het *nadat* die beskuldigde die oorledene daarmee aangerand het. Die hof beskryf die beskuldigde as "someone who does not hesitate to resort to lies and deceit if this is perceived as a way to assist himself in evading criminal liability". Die beskuldigde het volgens die hof slegs sy humeur – en nie sy konatiewe bewussynsfunksie en bygevolg sy toerekeningsvatbaarheid nie – tydens die daad verloor. Skuld in die vorm van *dolus eventualis* ten opsigte van die oorledene se dood was voorts by die beskuldigde aanwesig. Die hof bevind die beskuldigde derhalwe skuldig aan moord en aan poging tot regsverydelling of regsbelemmering ten opsigte van die versteekte hokkiestok en denimbreek.

6 Kritiek

Hierbo (par 4) is genoem dat verskil word van die hof se siening dat nie-patologiese ontoerekeningsvatbaarheid gelykstaande aan gesonde outomatisme is.

Soos reeds verduidelik, is gesonde outomatisme 'n handelingsuitsluitingsgrond aangesien dit willekeurigheid uitsluit. Willekeurigheid beteken bloot dat die mens se spierbewegings deur die wil of intellek beheer word. Daarenteen kan 'n persoon ontoerekeningsvatbaar optree weens een van twee redes: omdat hy nie oor die geestesvermoë beskik om die aard van sy daad of die ongeoorlooftheid daarvan te begryp nie (dws verlies van die kognitiewe geestesfunksie) of omdat hy nie oor die geestesvermoë beskik om sy optrede ooreenkomstig hierdie besef van ongeoorlooftheid in te rig nie (dws verlies van die konatiewe geestesfunksie).

Die mening word hier gehuldig dat onwillekeurigheid, synde spierbewegings wat nie deur die wil beheers word nie, *nie dieselfde is* as 'n verlies aan wilsbeheervermoë of weerstandskrag nie. Trouens, waar 'n persoon (beskuldigde) 'n ander aanrand totdat laasgenoemde persoon sterf (soos in die onderhawige saak) is dit aanduidend dat so 'n beskuldigde op die slagoffer gefokus was en inderdaad willekeurige, "gewil-de" beserings toegedien het. Die logiese, en na my mening korrekte, afleiding is dat so 'n dader inderdaad beheer oor sy spierbewegings gehad het en dus wel willekeurig opgetree het. Die konklusie is dan dat 'n persoon wat tydelik nie-patologies ontoerekeningsvatbaar is omdat hy tydelik sy weerstandskrag of wilsbeheervermoë kwyd is, *steeds willekeurig optree* en dus nie in 'n staat van gesonde outomatisme verkeer nie.

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**THE CONSTITUTIONAL COURT DELIBERATES ON THE
CONSTITUTIONALITY OF THE HAGUE CONVENTION ON THE
CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

LS v AT 2001 2 BCLR 152 (CC)

1 Introduction

The Hague Convention on the Civil Aspects of International Child Abduction, 1980 (the Convention) was implemented in South Africa by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 (the Act), which came into operation on 1 October 1997. The need to reconcile Constitutional provisions with Convention principles has long been recognised. Article 3 of the Convention which requires the summary return of children wrongfully removed or retained may potentially come into conflict with section 28(2) of the Constitution of the Republic of South Africa Act 106 of 1996 (the Constitution). (Nicholson *The recognition and enforcement of foreign custody orders and the associated problem of international parental kidnapping: A model for South Africa* (LLD Thesis Unisa 1998) 93, "Can South Africa follow England's example and apply a strict interpretation of article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction?" 1999 *De Jure* 248 257; Labuschagne "International parental abduction of children: Remarks on the overriding status of the best interests of the child in international law" 2000 *CILSA* 333 337ff; Nicholson "The Cape Provincial Division of the High Court makes a determination under the Hague Convention on the Civil Aspects of International Child Abduction (1980)" 2001 *THRHR* 332 337.) The Constitutional Court gave attention to the reconciliation of the Convention article and section 28(2) of the Constitution in *LS v AT* 2001 2 BCLR 152 (CC).

2 The facts

In 1989 a South African woman, the applicant in this matter, married an Italian man, the first respondent, in South Africa. One child was born of the marriage. Having lived in Italy for some time the parties emigrated to Canada in 1997. The marriage foundered in 1998. The supreme court of British Columbia, the parties' place of habitual residence at the time of the breakdown of the marriage, made a consent paper an order of the court in 1999. In terms of this order:

- the applicant was granted sole custody of the minor child and the respondent was granted access to the child;
- the parties were made joint guardians of the child; and
- the parties were prohibited from removing the child from Canada for a period exceeding 30 days, without a further court order or the written consent of both parties.

The couple was finally divorced in 2000 and the 1999 custody order was left unchanged. After further developments the respondent sought an order to prevent the applicant from removing the child from the country. The court ordered that the applicant could remove the child to South Africa for a stated period, that

there should be an urgent investigation into the custody and access to the child, and that the matter should be set down for a trial date as soon as possible.

This order stated that should the applicant fail to return to British Columbia on or before a stipulated date the respondent would be awarded sole custody of the child and the sum of money deposited as security for her return would immediately be paid to the first respondent.

The applicant brought the child to South Africa and failed to return to British Columbia in accordance with the provisions of the court order. The first respondent approached the supreme court of British Columbia for an order awarding him sole guardianship and custody of the child and an order for the applicant's arrest should she fail to deliver the child to him. The first respondent then approached the Central Authority for Canada to initiate Convention proceedings for the return of the child.

The Family Advocate, the Central Authority for South Africa, immediately took steps to secure the return of the child to Canada, the child's place of habitual residence, in accordance with the mandatory return procedures set out in the Convention. Voluntary return of the child could not be secured.

The applicant applied to the high court for custody and the first respondent counter-claimed to have the order of the supreme court of British Columbia, made an order of the high court and to have the minor child returned to him immediately. The Family Advocate brought an urgent application before the high court for an order in terms of article 12 of the Convention, requiring the child's immediate return to British Columbia, Canada. By agreement this was the only application heard by the court (*LS v AT and the Family Advocate* case 1980/2000 unrepre (SE)).

The applicant challenged the Family Advocate's application on the basis that the order violated section 28(2) of the Constitution which required the court to act in the child's best interests in all cases. The court *a quo* determined that as the Convention also regarded the interests of the child as paramount in custody cases, there was no conflict between the documents. The Convention is premised upon the view that it is in the child's best interests to have the custody determined by the court best placed to dispose of the case, the place of habitual residence. The court thus found that there was no evidence to suggest that this was not the case in the present instance and granted the Family Advocate's application and ordered the child's immediate return. This judgement is consistent with the findings of the court in *K v K* 1999 4 SA 691 (C), a non-convention case.

3 The Constitutional Court decision, grounds of appeal and findings of the court

The appellant lodged an appeal from the findings of the high court with the Constitutional Court. In terms of the appeal she alleged:

- (1) That the Convention was not applicable in this case as the respondent did not have "custody rights" as contemplated in the Convention and that the removal and retention of the child were therefore not wrongful. This argument was rejected by the high court. The court found that the non-removal clause in the custody order effective between the parties, together with the interim

custody agreement between them, in terms of which the appellant undertook to return the child to the place of habitual residence before a specified date, effectively created custody rights. These rights arising from both the non-removal clause and the agreement between the parties made the failure on the appellant's part to return the child in accordance with the agreement, wrongful and the Convention was applicable. The Constitutional Court endorsed this view (160A–161B).

- (2) That the Act in terms of which the Convention is implemented in South Africa is unconstitutional in that it is inconsistent with section 28(2) of the Constitution. The appellant alleged that the effect of the Act was to require the courts to act in a manner that fails to recognise the paramountcy of the best interests of the child. The Constitutional Court reaffirmed the supremacy of the Constitution (161D–E) and indicated that the only basis upon which the court might find an inconsistency to be constitutionally valid would be in circumstances in which the proportionality test established in section 36 was satisfied (161E).

The court indicated that in matters concerning the best interests of the child the court would have to evaluate both the short-term and long-term best interests. The Convention clearly emphasises the best interests of the child in its preamble. The Convention envisages that the long-term best interests of the child will best be served by the determination of custody being made by the court best placed to have access to all relevant information. The Convention determines that this court is the court of the child's place of habitual residence immediately preceding the wrongful removal or retention. However, the appellant alleged that it is conceivable that circumstances might arise in which the short-term best interests of the child are not served by an immediate return. In this event the Convention might require that the court order a return in contradiction with the provisions of section 28(2) of the Constitution (162D–E). Without deciding whether or not this argument was valid the Constitutional Court proceeded to a proportionality analysis of the relevant circumstances.

The Court examined the limitation, if any, of section 28(2) of the Constitution and weighed it against the purpose of the Convention. The court found that to allow the Convention proceedings to be converted into a custody hearing would be contrary to the intentions of the Convention (162F–163B). There exists a close relationship between the means employed and the purpose of the Convention (163C). Any limitation is mitigated by the exceptions contained in the Convention (a 13 and 20). The exceptions contained in the Convention are informed by section 28(2) of the Constitution (163C–164E).

- (3) The provisions of the Convention do not require the return of the child to British Columbia. The mother alleged that in the event that the Convention was applicable to the matter it would not require the return of the child. To return the child would be to expose her to grave risk of psychological harm and place her in an intolerable situation (164F–G). As regards this allegation the court found that the mother had failed to prove a grave risk of psychological harm beyond that harm normally experienced by children involved in matrimonial disputes involving custody disputes (166H 167E–F). Grave harm requires harm of a serious nature (167B). The court found that the mother had failed to prove the requirements for an article 13 exception (167G–168G).

4 The order of the Constitutional Court

The Constitutional Court thus found, per Goldstone J, that the Convention was applicable, that any limitation of the Constitutional protections afforded by section 28(2), if any, would be justifiable on the basis of the proportionality test and that there would be no section 13 exception. As a consequence of these findings the court ordered that the child should be returned to British Columbia but only after certain steps had been taken to ensure that the appellant could return with the child without risk of arrest and prosecution in criminal proceedings. Thus the court varied the order of the high court in order to afford the mother greater protection in the event that she chose to return to Canada with the child to permit the Court of British Columbia to make a custody determination (170G-174F). The other judges concurred with Goldstone J.

5 Conclusion

This judgement is to be welcomed as a valuable contribution towards the development and clarification of the South African law relating to international parental child abduction. The judgement clearly demonstrates that the courts will not allow Convention proceedings to be converted into custody hearings. Furthermore, it is clear that Convention exceptions will be restrictively interpreted.

In addition, the case clearly sets out the process by which the reasonableness of a limitation on constitutional protections will be determined in terms of section 36 of the Constitution.

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**REGISTRASIE VAN ONROERENDE TRUSTGOED IN NAAM VAN
"TRUSTEES VAN TYD TOT TYD"
Joubert v Van Rensburg 2001 1 SA 753 (W)**

1 Inleiding

Alhoewel ook ander regsaspekte in dié saak ter sprake kom, word in die bespreking volstaan met die bevindings van die hof omtrent die praktyk om onroerende trustgoed te registreer in naam van die "trustees van tyd tot tyd". Die feite kan soos volg opgesom word: In 'n poging om grond te voorsien aan 'n groep van ongeveer 1 500 hawelose individue is 'n trust deur die respondent opgerig en is oordrag geneem van 'n spesifieke eiendom met die trustees as eienaars. Alhoewel die trustdokument nie uitdruklik bepaal het wie die bevoordeeldes sou wees nie, kon die trustees wel in hul absolute diskresie enige Suid-Afrikaanse burger as bevoordeelde aanwys. Die bevoordeelde het geen aanspraak op die trusteiendom nie en kan nie daarmee handel nie. Die trustees het die bevoegdheid om die trustfonds te administreer en beheer oor die trustgoed te verkry. Vervolgens het die trustees by wyse van kontrakte okkupasie van die betrokke grond toegelaat teen betaling van 'n bedrag van R1 000. Aplikante,

synde eienaars en okkupeerders van aangrensende eiendom, bring 'n aansoek vir die uitsetting van genoemde besetters. As basis vir die aansoek beweer applikante dat die grond onregmatig geokkupeer word in stryd met die bepalings van die toepaslike stadsbeplanningskema, en die onregmatige oorlas wat die okkupasie teweegbring. Hulle beweer verder dat die grond onregmatig geokkupeer word deurdat registrasie van onroerende goed in die naam van "trustees for the time being of the Itsoseng Community Development Trust" ontoelaatbaar is (767I par [9.1]). Die grond is gevolglik nooit aan die "trust" oorgedra nie.

2 Bevinding van hof

As uitgangspunt bevestig die hof, met verwysing na die Appèlhofbeslissing *Crookes NO v Watson* 1956 1 SA 277 (A), dat die trust *inter vivos* (sg "consensual trust") in beginsel 'n kontrak is, met die oprigter en trustee as kontrakspartye wat ten behoeve van 'n derde, die begunstigde, optree (768A-C par [9.2]; sien ook meer onlangs *Hofer v Kevitt* 1998 1 SA 382 (HHA) 386-387). Die hof bevestig voorts dat eiendomsreg nie aan die "trust" oorgedra kan word nie (768E-F par [9.3]). Benewens artikel 16 van die Registrasie van Aktes Wet 47 van 1937 (hierna Akteswet) wat net voorsiening maak vir oordrag aan "'n ander (persoon)" is dit reeds geykte reg dat die trust nie 'n regspersoon is nie en dat die trustee die eienaar van die "trustgoed" is. Hoewel die hof dit nie uitdruklik so gestel het nie, is dit die posisie in geval van die sogenaamde "eiendomstrust" oftewel die trust soos voorsien in artikel 1(a) van die Wet op die Beheer oor Trustgoed 57 van 1988. (Sien in dié verband oa *Commissioner of Inland Revenue v MacNeilies' Estate* 1961 3 SA 833 (A) 840F-G; *Kohlberg v Burnett* 1986 3 SA 12 (A); *Commissioner of Inland Revenue v Friedman NNO* 1993 1 SA 353 (A) 370. Die ander moontlikheid is natuurlik dié van die sg "bewindtrust" waar eiendomsreg oorgedra word aan die trustbevoordeelde soos voorsien in a 1(b) van gemelde Wet.)

Hieruit volg, volgens die hof, dat 'n trustee nie in 'n bepaalde "hoedanigheid" trustbates hou nie, maar dat hy eienaar word as 'n individu *omdat* hy 'n "trustee" is. Die hof beslis (768I par [9.5]):

"He becomes owner as an individual because he is a 'trustee' and not as an office-holder (of a legal institution which does not exist). He operates as a principal in a contract and not as a functionary or agent."

Die hof wys vervolgens daarop dat registrasie in die naam van "trustees van tyd tot tyd" blote praktyk is (769B par [10.1.1]) en die verslag van die Registrateur van Aktes en dat dit nie in die Akteswet gesanksioneer word nie. Artikel 16 van die Wet vereis oordrag aan 'n ander (persoon) en is dus "intolerant of recording what is not anybody's name but a collection of words describing a certain fiduciary involvement by undefined persons" (770A par [10.2]). Trouens, die beskrywing bevat geen aanduiding hoegenaamd van die identiteit van die persoon(e) in wie eiendomsreg vestig nie (770B par [10.2]). Die wyse van registrasie *in casu* gee volgens die hof aanleiding tot regsonsekerheid deurdat eiendomsreg en oorgang daarvan bloot die produk van ooreenkoms is en onderworpe is aan voortdurende veranderinge waarvan geen rekord in die registrasiestelsel voorkom nie. Dié onsekerheid is in stryd met die registrasiestelsel wat hoofsaaklik ten doel het om eiendomsreg buite geskil te plaas (770F-H par [10.4]). Die registrasiestelsel het verder ten doel om die houer van saaklike regte te beskerm teen ander aanspraakmakers. Dit noop die hof tot die volgende opmerking aangaande die praktyk onder bespreking (770I par [10.5.1]): "The method employed in this case

permits a party to assert real rights or the competencies thereof without obtaining any entry in the deeds registry.”

Registrasie behoort dus te geskied in die persoonlike name van die trustee van die trust op die oomblik van registrasie totdat oordrag na 'n volgende trustee geskied in die geval van byvoorbeeld die afsterwe of bedanking van 'n trustee (771A–E par [10.6] en [10.7.1]). Wat die effek hiervan betref, verklaar regter Flemming (772A–B par [10.8]):

“I realise that my comments are likely to rock the boat. If the result is not attractive, it underlines the justification for legislation which either gives legal personality to a consensual trust, the trustee being liable *in solidum* for some or all trust liabilities, or which creates a cheap system of transferring real rights to a successor. Considerations which call for a more flexible procedure can justify statutory amendments, but do not justify the Registrar, in the name of desirabilities, creating or continuing a practice which cuts across everything the Deeds Registries Act stands for.”

Die hof kom dan egter tot 'n verrassende gevolgtrekking deur te beslis dat die registrasiemetode *in casu* gebruik was “to cause those persons who were trustees of the Itsoseng trust at the time of transfer and whose names are today known, and no one else, to be owners of Itsoseng” (772G par [11.1]). In hierdie saak beslis die hof dat die agt oorspronklike trustees by registrasie eienaars geword het (772H par [11.2]).

3 Bespreking

3.1 *Trust inter vivos as suiwer kontraktuele verhouding*

Hierbo (par 2) is reeds daarop gewys dat die hof die uitgangspunt bevestig dat die trust *inter vivos* neerkom op 'n spesifieke tipe ooreenkoms, naamlik die beding ten behoeve van 'n derde. Die vraag is egter of die aard en werking van die trust nie vereenselwig en verwar word met die mees algemene ontstaansbron van die trust *inter vivos* nie (Van der Spuy in Abrie, Graham en Van der Spuy *Boedels – Beplanning en bereddering* (2000) 32 hierna Van der Spuy). Só verklaar Honoré en Cameron *Honoré's South African law of trusts* (1992) 26:

“On reflection it is plain that the point being made is that a trust *inter vivos* is usually created by way of a contract which contains a stipulation in favour of the beneficiary, who on acceptance acquires an indefeasible right under the trust” (eie kursivering).

In dié verband kan verder geargumenteer word dat die regsverhoudinge wat uit 'n trust *inter vivos*-reëling voortvloei nie net kontraktueel van aard is nie (Van der Spuy 26). Die trust is ook 'n publiekregtelike instelling in die sin dat die trustee se beheer oor trustgoed onderworpe is aan die toesig van die meester en die hof (Honoré en Cameron 26). Bowendien beklee die trustee 'n vertrouensposisie, wat uit die oog verloor word indien die trust bloot as 'n kontraktuele verhouding gesien word (Van der Spuy 33).

In *Hofer v Kevitt* 1998 1 SA 382 (HHA) waar die geldigheid van wysigings aan 'n trustakte deur die oprigter en trustee betwis is, omdat dit tot die nadeel van potensiële bevoordeeldes (wat nog nie geadieer het nie) geskied het, was hierdie aspek dan ook die vernaamste argument van die bevoordeeldes (385E–G). Só is geargumenteer dat 'n trustee, vanweë sy fidusiêre amp slegs tot 'n herroeping of wysiging van 'n trustakte mag toestem indien dit in die belang van die bevoordeeldes of potensiële bevoordeeldes is (386G). Die argument word egter deur die hof verwerp met verwysing na *Crookes v Watson* 1956 1 SA

277 (A). Volgens die hof is die vraag nie of die trustee teenoor die begunstigdes aanspreeklik is vir 'n beweerde vertrouensbreuk nie, maar of die wysigings geldig is (386G–H). Aangesien die wysigings in *Hofer* gedoen is voordat enige voordele nog deur begunstigdes aanvaar is, bevind die hof dit geldig (387B).

Die vraag wat egter ontstaan, is of die kategoriese gelykstelling van 'n trust *inter vivos* met die beding ten behoeve van 'n derde, nie die oprigtingsmoontlikhede van 'n trust *inter vivos* onnodig verskraal nie. Die oprigting van 'n trust by wyse van 'n ooreenkoms tussen die oprigter en die *trustbevoordeeldes* word byvoorbeeld so uitgesluit. Hierdeur kan 'n verpligting op die oprigter geplaas word om sekere trustgoed aan 'n ander (hetsy die trustee of die *trustbevoordeeldes*) oor te dra om deur die trustee geadmistrateer te word tot voordeel van die *trustbevoordeeldes* (Van der Spuy 32). Dit kan meebring dat die *bevoordeeldes ab initio* persoonlike regte verkry wat nie sonder hulle medewerking gewysig kan word nie (Die posisie soos dit tans daar uitsien is reeds wyd bespreek en het kritiek uit verskillende oorde ontlok. Vir 'n nuttige samevatting sien Cronjé en Roos *Erfreg vonnisbundel* (1997) 336–340.)

3.2 Optrede van trustee in bepaalde "hoedanigheid"

Volgens die hof word die trustee nie eienaar in 'n bepaalde *hoedanigheid* nie: Hy word eienaar as 'n indiwidu *omdat* hy 'n trustee is en nie as 'n ampsdraer van 'n regsinstelling wat nie bestaan nie. Hy funksioneer as 'n prinsipaal in 'n kontrak en nie as 'n funksionaris of agent nie (768I par [9.5]). Die posisie van die trustee word vervolgens kortliks in oënskou geneem. Honoré en Cameron verklaar:

"The fundamental difference between a trust and a fideicommissum is that trusteeship is a quasi-public office" (44; sien ook Cameron "Constructive trusts in South African law: The legacy refused" 1999 *Edinburgh LR* 341 348).

Volgens Honoré en Cameron (45) is die element van trusteeskap as 'n amp sentraal tot die Suid-Afrikaanse trustreg. Die vraag is egter wat dit presies beteken en hoekom dit so belangrik is. De Waal "The core elements of the trust: Aspects of the English, Scottish and South African trusts compared" 2000 *SALJ* 548 566 meen dit beteken dat die trust 'n publiekregtelike element het wat by gewone kontrakte afwesig is. Die belangrikste manifestasie hiervan is die rol wat die hof speel by die behoorlike administrasie en uitvoering van trustbepalings. Indien 'n trustee versuim om sy verpligtinge na te kom, kan die hof, indien daartoe versoek en indien oortuig dat dit in belang van die *trustbevoordeeldes* is, die trustee van sy amp onthef (a 20(2) van die Wet op Beheer oor Trustgoed). Indien die situasie ontstaan waar die trust geen trustee het nie (agv dood of bedanking) kan die meester of die hof nuwe trustee aanstel. Gevolglik is daar 'n wesenlike verskil tussen die hof se betrokkenheid by trusts eensyds en gewone kontrakte andersyds. Volgens Honoré en Cameron (45) behels die element van trusteeskap as 'n amp nog meer as die blote toesighoudende rol van die hof in die uitvoering van trusts. Dit gee verder 'n verduideliking vir die feit dat 'n trust nie tot 'n einde kom sou daar geen trustee meer wees nie asook vir die algemene pligte van die trustee. Dit is verder die sleutel tot die verstaan van die konsep van afsonderlike private en trustboedels. Laastens maak dié feit dit duidelik hoekom 'n trust tot stand kom sonder dat eiendomsreg in die trustbates noodwendig in die trustee vestig (De Waal 2000 *SALJ* 548 566).

Die volledige aanvaarding van die feit dat trusteeskap 'n amp is, word deur die bepaling van die Wet op die Beheer oor Trustgoed (hierna "die Wet") gereflekteer. Die belangrikste bepaling van die Wet wat dié feit beklemtoon is (a) die

vereiste dat trusts by die meester ingedien en geregistreer moet word (a 4(1)); (b) die bepaling dat 'n persoon wat as trustee aangestel is, slegs in daardie *hoedanigheid* mag optree indien deur die meester skriftelik daartoe gemagtig (a 6(1)); (c) die omvangryke bepalings rondom die stel van sekerheid deur trustees; (d) die bevoegdheid van die meester om trustees en mede-trustees aan te stel (a 7(1) en (2)); (e) behoudens enkele uitsonderings moet 'n trustee in sy boekhouding die goed wat hy in sy *hoedanigheid* van trustee hou, duidelik aandui (a 11(a)); (f) die bevoegdheid van die hof om trustbepalings te wysig (a 13); (g) die bevoegdheid van die meester om 'n trustee tot rekskap te verplig (a 16); (h) die bevoegdheid van die meester en die hof om trustees uit hul amp te onthef (a 20); en (i) 'n trustee is ten opsigte van die verrigting van sy *ampspilte* geregtig op vergoeding (a 22).

Dat trustees in 'n bepaalde *hoedanigheid* optree blyk ook uit die regspraak. In *Kohlberg v Burnett* 1986 3 SA 12 (A) wat handel met die vraag of 'n trust 'n bevoorrede in 'n testament kan wees, beslis die hof: "The trustees . . . are in law entitled to act on behalf of the trusts and to hold, in their *capacities as trustees*, property for the purposes of the trusts" (19G; eie kursivering).

In *Van der Westhuizen v Van Sandwyk* 1996 2 SA 490 (W) het die vraag na die sitering van trustees in regsdinge na vore gekom. Die hof beslis:

"'n Trust soos die onderhawige is geen regspersoon nie en die bates van die trust vestig in die trustees in hulle *hoedanigheid as trustees* . . . Hieruit volg die vereiste gestel deur Honoré . . . dat al die trustees gevoeg moet word in 'n aksie om 'n reg af te dwing wat die trust toekom" (495D; eie kursivering).

Alhoewel met die hof saamgestem kan word dat die trustee as prinsipaal in 'n kontrak optree en nie as agent nie (sien ook *Hoosen v Deedat* 1999 4 SA 425 (HHA) 431G; Honoré en Cameron 57–58), wil dit tog voorkom asof die trustee eienaar word in sy *hoedanigheid* as trustee, 'n amp wat beskou word as een van die kernelemente van die trust (De Waal 2000 SALJ 548. In *Man Truck and Bus (SA) Ltd v Victor* 2001 2 SA 562 (NK) tref die hof 'n interessante vergelyking deur te beslis dat 'n trustee in 'n trust in dieselfde posisie is as 'n (besturende) direkteur van 'n maatskappy en bevind dat die *Turquand*-reël op die onderhawige geval van toepassing is. Sodanige stelling is egter problematies deurdat dit bydra tot die verwarring rondom die juridiese aard van die trust (sien in dié verband in die algemeen De Waal "Anomalieë in die Suid-Afrikaanse Trustreg" 1993 *THRHR* 1)).

3.3 Wyse van registrasie van eerste oordrag aan trustees

Uit bostaande blyk dat die hof van mening is dat die eiendom in die spesifieke name van die oorspronklike agt trustees van die trust *inter vivos* geregistreer moes gewees het. Die feit dat trusteeeskap betrokke is, moet volgens die hof kragtens die bepalings van artikel 11(1)(b) van die Wet wel genoem word, maar die registrasie behoort in die werklike name van die trustees te geskied het.

Die standpunt dat registrasie in die name van die trustees moet geskied, is waarskynlik *obiter* in die lig van die hof se ietwat verrassende slotsom dat die oorspronklike agt trustees tog eiendomsreg verkry het, nieteenstaande die registrasie in die naam van "die trustees van tyd tot tyd". Die wyse waarop eiendomsreg aan trustees oorgedra word, is vir die trust- en aktespraktyk van groot belang. Daarom verdien hierdie *obiter* standpunt van regter Flemming verdere ondersoek. Ter aanvang moet dit duidelik gestel word dat dit in hierdie bespreking gaan oor die sogenaamde "eiendomstrust" en nie die "bewindtrust" nie (sien a 1 van die Wet wat beide trustvorme erken).

Die wyse van registrasie wat *in casu* gevolg is, is 'n gevestigde aktesprosedure wat reeds vir meer as 'n eeu nagevolg word. Honoré en Cameron verduidelik die oorsprong hiervan só:

“(P)robably by analogy with pre-Union statutes, the practice grew up of registering land in the name of the trustee *as trustee*. In modern practice, transfer is made to the trustees in their capacity as trustees or to the trust in its own name. It would therefore be improper for a trustee to secure registration of land subject to a trust in his or her personal capacity” (228).

Jones *The law and practice of conveyancing* (1976) 460, 'n voormalige registrator van aktes, bevestig hierdie gebruik: “Vesting of land . . . must be in the trustees without quoting the names of the trustees, eg ‘The trustees for the time being of the Horses’ Home Trust’.” Hierdie praktyk word bevestig in die nuutste uitgawe van gemelde werk (Nel Jones *Conveyancing in South Africa* (1991) 365).

Heyl *Grondregistrasie in Suid-Afrika* (1977) 262 stel dit ook onomwonde dat die naam van die trustee nie in die vestigingsklousule van 'n titelakte genoem word nie:

“Net soos in die geval van die testamentêre trust word die naam van die administrateur (‘trustee’) van 'n trust *inter vivos* nooit in die oordragsklousule genoem nie. (Dit word lankal nie meer gedoen nie en skrywers wat die teenoorgestelde beweer . . . het uit voeling geraak met die ontwikkeling op registrasiegebied in hierdie opsig.)”

Alhoewel regter Flemming korrek is dat die Akteswet nie uitdruklik die betrokke registrasiewyse magtig nie, word dit ons insiens ook nie uitdruklik verbied nie. Trouens, in die vergelykbare geval van 'n oordrag aan (die eksekuteurs van) 'n bestorwe gemeenskaplike boedel, bepaal die Akteswet uitdruklik dat die transport moet geskied aan “die gemeenskaplike boedel” en nie aan die eksekuteurs (met vermelding van hulle name) van die bestorwe boedel nie (a 17(3)). Indien die standpunt korrek is dat die eiendomsreg van stoflike boedelmaterie in die eksekuteur *qua* eksekuteur vestig (De Waal en Schoeman *Erfreg studentehandboek* (1996) 6 en gesag aldaar), dui die bepalinge van artikel 17(3) daarop dat eiendomsreg tog aan 'n persoon, sonder vermelding van sy naam, oorgedra kan word indien hy in 'n sekere hoedanigheid eienaar word. Soos hierbo aangedui, kan dit nie vandag meer betwyfel word dat 'n trustee van 'n eiendomstrust ingevolge ons positiewe reg in 'n *hoedanigheid* eienaar van die trustmaterie is nie. Dit impliseer egter nie dat die trustee as 'n *verteenwoordiger* van 'n prinsipaal eienaar is nie of dat dit neerkom op die Engelsregtelike erkenning van dubbele eiendomsreg (“legal ownership” en “beneficial ownership”) in 'n saak nie, soos wat Heyl 307 te kenne gee. Dit impliseer ook nie dat die trustee noodwendig 'n *nudum dominium* hou nie (sien Heyl 299 ev oor dié standpunt). Die bevoorreedes ingevolge 'n eiendomstrust het hoogstens vorderingsregte teenoor die trustee wat, anders as beperkte saaklike regte, nie die eiendomsreg van die trustee ingevolge die “subtraction from the dominium”-toets beperk nie (sien bv *Ex parte Geldenhuys* 1926 OPD 155 164). Die feit dat 'n trustee eienaar *qua* trustee is, beteken wel dat hy in 'n fidusiêre hoedanigheid eienaar is en dat die trustmaterie nie deel vorm van sy *persoonlike* boedel nie (a 12 van die Wet). Die praktyk om onroerende trustgoed te transporteer ten gunste van die trustee *qua* trustee sonder vermelding van sy naam, gee ons insiens uiting aan die feit dat die trustee in 'n vertrouenshoedanigheid eienaar word.

Regter Flemming se beroep op artikel 16 van die Akteswet om aan te toon dat die name van die trustees in die transportakte vermeld moet word, is nie oortuigend nie. Die doel van artikel 16 is om te bepaal en te onderskei hoe eiendomsreg en

beperkte saaklike regte (uitgesonder 'n verbandreg) in grond "van een persoon op 'n ander oorgedra word". Eiendomsreg word oorgedra deur middel van 'n transportakte terwyl beperkte saaklike regte deur middel van 'n notariële akte oorgedra word. Die doel van artikel 16 is om die *tipe akte* vir die oordrag van eiendomsreg en beperkte saaklike regte, onderskeidelik, voor te skryf en nie die wyse waarop die oordragnemer beskryf moet word nie. Bowendien is die oordrag van grond deur 'n persoon aan 'n trustee (sonder die noem van sy naam) van 'n trust nie strydig met die hierbo aangehaalde bewoording van artikel 16 nie.

Die hof se beswaar dat die wyse van registrasie *in casu* dit onmoontlik maak om die identiteit van die eienaar (trustee) in die aktekantoor vas te stel, is feitelik korrek in geval van 'n trust *inter vivos*, aangesien die trustakte nie by die aktekantoor ingedien hoef te word nie. In geval van 'n testamentêre trust moet 'n gesertifiseerde afskrif van die testament wel by die aktekantoor ingedien word (Nel 364). Dit behoort minstens die identiteit van die oorspronklike trustee(s) te openbaar. Die bepaling van die identiteit van opvolgende trustees word hieronder bespreek. Ons insiens is publisiteit van die feit dat eiendomsreg in 'n fidusiêre hoedanigheid gehou word, onontbeerlik vir die bevordering van regsekerheid en die beskerming van die belange van derdes met betrekking tot die betrokke onroerende trustgoed (vgl a 11(1)(b)). Die noem van die trustee se eie naam mag moontlik juis hierdie fidusiêre hoedanigheid verdoesel (vgl DM "Registration of immovable property owned by a trust" Jun 2001 *The Taxpayer* 105 112).

3.4 Oorgang van eiendomsreg op opvolgende trustees

Soos hierbo aangedui, is regter Flemming van mening dat die eiendomsreg van die oorspronklike trustees slegs deur formele registrasie van transport aan opvolgende trustees oorgedra kan word. 'n Bedanking deur 'n trustee het ook nie sonder meer tot gevolg dat sy eiendomsaandeel op die oorblywende trustees oorgaan nie. Registrasie in die naam van "die trustees van tyd tot tyd" verander ook nie die prentjie nie. Regter Flemming verwerp dus onomwonde die aktespraktyk waarvolgens in so 'n geval aanvaar word dat by die ontruiming van die trustee-amp, die eiendomsreg van die betrokke trustee oorgaan op die oorblywende of opvolgende trustee(s) (sien Heyl 263 291).

Dit moet toegegee word dat dit moeilik is om te verklaar hoe 'n trustee se opvolger eienaar word van die grond wat aanvanklik geregistreer is ten gunste van die "trustees van tyd tot tyd" (sien Honoré en Cameron 229). Artikel 16 van die Akteswet bepaal dat eiendomsreg slegs deur die registrasie van 'n transportakte oorgedra kan word. Oordrag van eiendomsreg is 'n afgeleide wyse van eiendomsverkryging wat die bestaan van 'n saaklike ooreenkoms gerig op eiendoms-oordrag tussen die oordrager en die oordragnemer vereis (sien *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 3 SA 917 (A) 922E-F).

Dit behoort duidelik te wees dat by eiendomsverkryging deur opvolgende (of oorblywende) trustees, daar dikwels nie sprake sal wees van *eiendoms-oordrag*, waarby die trustee, wat die trustee-amp ontruim, noodwendig 'n party moet wees nie. Indien 'n trustee byvoorbeeld teen sy sin deur die meester van sy amp onthef word, is dit hoogs onwaarskynlik dat hy die *animus transferendi* sal hê. Gevolglik sal daar nie 'n saaklike ooreenkoms aanwesig wees nie.

Ons insiens word 'n trustee-opvolger eienaar van onroerende trustgoed, nie omdat die onroerende saak aan hom oorgedra is nie, maar eenvoudig uit hoofde van die trustee-amp wat hy nou bekleed. Indien aanvaar word dat ingevolge die aktekantoorgebruik so 'n opvolgende trustee deur ampsaanvaarding eiendomsreg

vestig, is die enigste moontlike verklaring daarvoor dat eiendomsorgang *ex lege* geskied. In hierdie verband moet in gedagte gehou word dat ons reg wel gevalle van eiendomsorgang, sonder 'n meegaande eiendomsdrag, erken. Eiendomsverkryging van grond deur verkrygende verjaring en oteiening is voorbeelde hiervan.

Die probleem is dat die Akteswet nie uitdruklik so 'n outomatiese oorgang van eiendomsreg op 'n trustee deur regswerking magtig of reël nie. Aan die ander kant kan geargumenteer word dat die Akteswet ook nie so 'n eiendomsorgang verbied nie, aangesien artikel 16 slegs handel met die oordrag van saaklike regte wat volgens ons benadering nie hier te sprake is nie. In die afwesigheid van 'n uitdruklike verbod kan geredeneer word dat eiendomsorgang deur regswerking ten gunste van "trustees van tyd tot tyd" deur gewoonte in ons reg gevestig is (vgl Heyl 296). Dit is 'n erkende beginsel dat Suid-Afrikaanse houe akteskantoor-gebruike so ver moontlik rugsteun (sien bv *Standard Bank van SA Bpk v Breitenbach* 1977 1 SA 151 (T)). In die lig van die huidige onsekerheid sal dit egter verstandiger wees om die regsposisie uitdruklik statutêr te reël (vgl Flemming R se suggestie 772A-C, Honoré en Cameron 23, Olivier *Trust law and practice* (1990) 66-67) en die hoofregistrator se omsendbrief 3 van 2001). Ons insiens kan dit gedoen word deur 'n wysiging van die Akteswet wat uitdruklik bepaal dat 'n oordrag of ander registrasie van saaklike regte in grond ten gunste van die "trustees van die XYZ-trust" (sonder vermelding van die trustees se name) tot gevolg hê dat die betrokke regte ten tye van registrasie in die trustees vestig en sonder meer deur regswerking op opeenvolgende ampsdraers oorgaan. Ons insiens is dit onnodig om die sinsnede "van tyd tot tyd" as 'n vereiste te stel (vgl Honoré en Cameron 230). Die feit dat die trustees in 'n fidusiêre hoedanigheid reghebbendes is, blyk reeds voldoende uit die voorgestelde wyse van sitering.

Regter Flemming (771) voorsien verskillende praktiese probleme indien eiendomsreg nie in die spesifieke name van die trustees geregistreer word nie. In die praktyk sal dit egter net soveel probleme veroorsaak indien registrasie wel in die name van die trustees moet geskied. 'n Aktevervaardiger sal nog steeds met behulp van die trustdokument en ander dokumentasie van geval tot geval moet vasstel of die geregistreeerde trustee-eienaar steeds 'n trustee is en/of volgens die trustdokument en trustee-besluite bevoeg is om 'n voorgename regshandeling met betrekking tot die trustbates te verrig. Bowendien aanvaar die aktevervaardiger wat die voorbereidingsertifikaat op 'n akte onderteken, verantwoordelikheid vir die korrektheid van die aanstelling en bevoegdheid van 'n trustee van 'n *inter vivos* trust (a 15A saamgelees met reg 44A van die Akteswet). Hierdeur word die belange van derdes beskerm.

Die voorgestelde wetswysiging sal sekere probleemvrae steeds onopgelos laat. Dit sal byvoorbeeld nie 'n antwoord bied op die vraag in wie die eiendomsreg van onroerende trustbates vestig wanneer die laaste trustee sy amp ontruim nie. Hierdie probleem is natuurlik nie uniek aan die eiendomstrust nie maar bestaan in beginsel ook ten aansien van 'n bestorwe boedel. Regsteoreties is die mees bevredigende oplossing vir hierdie en die ander probleme wat hierbo bespreek is, die erkenning van regspersoonlikheid met betrekking tot die trust (sien Van Zyl "Die regsobjek van 'n trustvermoë" *Gedenkbundel HL Swanepoel* (1976) 1; Olivier 64). Van Zyl 11 doen byvoorbeeld aan die hand dat die regsobjek van 'n eiendomstrust 'n *bestuursliggaam*, beklee met regspersoonlikheid, is. Die individuele trustees is hiervolgens slegs organe van die regspersoon. 'n Verandering, afsterwe of bedanking van trustees sal geen invloed hê op die vestiging van regte in die trustgoed nie. Die eiendomsreg en ander regte in trustgoed vestig in die

regspersoon wat onveranderd bly voortbestaan. In die lig van die howe se on-dubbelsinnige ontkenning van regs persoonlikheid ten aansien van die trust, sal so 'n innovasie in ons reg vandag waarskynlik slegs deur wetgewing kan geskied. Erkenning van regs persoonlikheid met betrekking tot die trust sal egter velerlei implikasies hê wat deeglike ondersoek sal verg. In hierdie verband moet ook in gedagte gehou word dat die regsteoretiese behoefte aan die erkenning van regs-persoonlikheid slegs ten aansien van die eiendomstrust, en nie die bewindtrust nie, bestaan.

Die aangeleentheid het intussen voor die Hoogste Hof van Appèl gediën (on-gerap 2002-03-25 saaknr 220/2001). Volgens Brand WnAR wat namens die hof uitspraak gee, was die ondersoek na die gevestigde aktespraktyk onder bespreking "clearly *obiter* and *prima facie* wrong" (9). Die hof beslis verder (9): "Ownership of trust property depends on the terms of the trust instrument . . . According to the trust deed . . . Itsoseng (the property) vests in the trustees."

Die hof beslis voorts dat selfs indien die trustees nie tegnies die eienaars is nie, was hulle duidelik die persone in beheer van die grond soos bedoel in artikel 1(1) van die Wet op die Uitbreiding van Sekerheid van Verblyfreg Wet 62 van 1997. Hulle toestemming was gevolglik voldoende om die appellante as okkupeerders te laat kwalifiseer. Onder dié omstandighede vind die hof dit onnodig om te beslis oor die korrektheid al dan nie van die hof *a quo* se bevindings betreffende die geldigheid van die bestaande aktekantoorpraktyk.

Regter Brand se *obiter* opmerking dat eiendomsreg van trustgoed deur die bepaling van die trustdokument bepaal word, bring geen helderheid oor die geldigheid van die bestaande aktekantoorpraktyk nie. Die trustdokument sal waarskynlik aandui of die eiendomsreg van onroerende trustgoed aan die trustees (igv 'n "eiendomstrust") of aan die trustbevoordeeldes (igv 'n "bewindtrust") oorgedra moet word. In eersgenoemde geval sal die trustdokument egter nie 'n antwoord bied op die vrae *hoe* die eiendomsreg regsgeldig aan die eerste trustees oorgedra moet word nie en hoe die eiendomsreg op latere trustees oorgaan nie.

Die onsekerheid in dié verband bestaan dus voort en regverdig die voorgestelde wysiging van die Akteswet.

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**KREDIETOOREENKOMSTE – PAAIEMENTSGEWYSE
BETALING VAN DIE DEPOSITO
Van der Westhuizen v BOE Bank Bpk 2002 1 SA 876 (T)**

1 Inleiding

In hierdie saak is die betaling van die voorgeskrewe deposito, vereis deur die Wet op Kredietooreenkoms 75 van 1980 ten einde 'n geldige of afdwingbare kredietooreenkoms daar te stel, in oënskou geneem. In die besonder is aan die tydstop van betaling van die aanvanklike betaling (deposito) en die gevolge wat nie- (tydige) betaling daarvan mag inhou, aandag geskenk. Ten einde hierdie

beslissing en die belang van die bespreking daarvan (sien die slotopmerkings) in perspektief te plaas, word 'n kort oorsig van die historiese aanloop tot die saak vervolgens gegee.

In *Croxon's Garage (Pty) Ltd v Olivier* 1971 4 SA 85 (T) (beslis ingevolge die Huurkoopwet 36 van 1942) is beslis dat nie-betaling van die deposito nietigheid van die kontrak tot gevolg het. Die deposito mag wel na die datum van kontraksluiting, selfs by wyse van paaieimente, betaal word. Sodra genoeg paaieimente betaal is om as die voorgeskrewe deposito te dien, word die ooreenkoms geldig. Die beslissing is op die gewysigde artikel 7(1)(a) van die Huurkoopwet 36 van 1942, waarvolgens geen kontrak geldig is voordat die voorgeskrewe deposito betaal is nie, gebaseer. Die Huurkoopwet 36 van 1942 is deur die Wet op Kredietooreenkomste ("die Wet") herroep.

Artikel 6(5) van die Wet bepaal:

"Geen kredietooreenkoms is bindend totdat die kredietontvanger ten minste die aanvanklike betaling . . . wat by regulasie voorgeskryf is, betaal het nie."

Die regsposisie het dus geblyk dieselfde as ingevolge die Wet se voorganger te bly. Nogtans is in *Nel v Santambank Bpk* 1986 2 SA 28 (O) (nagevolg in *Schutte v Bank van die Oranje-Vrystaat Bpk* 1988 1 SA 467 (N)) na aanleiding van die definisie van "aanvanklike betaling" in artikel 1 van die Wet ("die bedrag wat deur 'n kredietopnemer betaal moet word *op datum van 'n kredietooreenkoms*"') (my kursivering) beslis dat die deposito nie op die tydstip waarop die ooreenkoms aangegaan word, betaal hoef te word nie. Betaling van die deposito kan ook daarna geskied, mits dit op dieselfde dag as die datum van kontraksluiting plaasvind. Indien laasgenoemde voorwaarde nie nagekom word nie, word die ooreenkoms nie geldig nie.

Hierna het die wetgewer die definisie van "aanvanklike betaling" in die Wet gewysig na "die bedrag wat deur die kredietopnemer betaal moet word *in die geval van 'n kredietooreenkoms*" (my kursivering). Dit het volgens Otto "Commentary" *Credit Law Service* (1991) par 23 tot gevolg gehad dat die beslissing in *Nel* ongedaan gemaak is en dat *Croxon* weer eens die regsposisie weerspieël het.

2 Van der Westhuizen v BOE Bank Bpk

2.1 Feite

Die appellant (Van der Westhuizen) het ingevolge 'n skriftelike afbetalingsverkoop-ooreenkoms (AVO) 'n motorvoertuig op krediet by die respondent (BOE) aangekoop. Die totale koopsom was in 46 maandelikse paaieimente terugbetaalbaar. Die AVO het geen bepaling aangaande die betaling van die aanvanklike betaling (deposito) bevat nie. Geen deposito is eenmalig tydens die sluiting van die ooreenkoms betaal nie. Die volgende feite was gemeensaak:

- Die respondent is die eienaar van die voertuig.
- Die appellant het lewering van die voertuig geneem.
- Die bepaling van die Wet is op die AVO van toepassing.
- Op die datum van die dagvaarding het die appellant reeds maandelikse paaieimente ten bedrae van R9 629,23 betaal.

2.2 Hof a quo

Die respondent het in die hof *a quo* beweer dat die AVO nietig is weens nie-betaling van die deposito. Hy het gevolglik teruggawe van die voertuig gevorder

teen terugbetaling van die reeds betaalde bedrag van R9 629,23. Die appellant het beweer dat die voorgeskrewe deposito reeds by wyse van paaiement betaal is. Die respondent se teenargument was dat die deposito nie by wyse van paaiement betaal kan word nie.

Die hof *a quo* het beslis dat die AVO nietig is vanweë nie-betaling van die deposito en het teruggawe van die voertuig teen terugbetaling van die reeds-betaalde bedrag gelas.

2 3 Hooggeregshof

In hoër beroep teen die beslissing van die hof *a quo* is dieselfde argumente as hierbo deur onderskeidelik die appellant en respondent aangevoer.

Regter Basson se uitspraak kan in die volgende hoofpunte verdeel word:

- (a) Die gevolge van nie-vermelding van die aanvanklike betaling in die skriftelike AVO.
- (b) Die tydstip waarop die deposito betaalbaar is.
- (c) Die gevolge van aanvanklike nie-betaling en die daaropvolgende betaling van die deposito.

2 3 1 Gevolge van nie-vermelding van die aanvanklike betaling in die AVO

Met verwysing na artikel 5(1)(c) en 5(2) van die Wet wat onderskeidelik bepaal dat 'n kredietooreenkoms die aanvanklike betaling moet vermeld en dat 'n kredietooreenkoms wat nie aan 'n vereiste van artikel 5(1) voldoen nie, nie bloot weens daardie rede ongeldig is nie, het regter Basson (mvn *Oosthuizen v Standard Credit Corporation Ltd* 1993 3 SA 891 (A) 905E–F) beslis dat die nie-vermelding van die deposito in die AVO *in casu*, nie die AVO ongeldig maak nie (879J–880B).

2 3 2 Tydstip waarop die deposito betaalbaar is

Regter Basson het in sy uitspraak die historiese ontwikkeling van die deposito-vereiste by kredietooreenkomste in oënskou geneem (880C–882E). Nadat hy veral die regsposisie na aanleiding van *Croxon* met die regsposisie ingevolge *Nel* vergelyk het en die wysiging van die definisie van “aanvanklike betaling” behandel het, het regter Basson soos volg beslis:

- (a) Artikel 7(1)(a) van die herroepe Huurkoopwet stem grootliks met artikel 6(5) van die Wet op Kredietooreenkomste ooreen (882E).
- (b) Die wysiging van die definisie van “aanvanklike betaling” het tot gevolg dat die deposito wel op 'n stadium na die datum van kontraksluiting betaal kan word (882F–G). Hierdie bedoeling kan ook in artikel 5(1)(c) van die Wet ingelees word wat bepaal dat 'n kredietooreenkoms die bedrag moet vermeld wat as aanvanklike betaling betaal is *of moet word* (Basson R se kursivering). Volgens die regter slaan laasgenoemde woorde op 'n toekomstige betaling (882G–H).
- (c) Die feite *in casu* stem grotendeels met die feite van *Croxon* ooreen (885D).
- (d) In *Croxon* is beslis dat die voorgeskrewe deposito by wyse van die voortgesette betaling van die kontraktuele paaiemente gedelg kan word (sien *infra*). Hierdie beginsel herleef ingevolge die bepalings van die Wet (885D–E).
- (e) Dit is nie nodig dat die aanvanklike betaling op 'n sekere tydstip betaal moet word nie (885E).

2 3 3 Gevolge van aanvanklike nie-betaling en die daaropvolgende betaling van die deposito

Het die aanvanklike nie-betaling van die deposito 'n kredietooreenkoms wat 'n *nudum pactum* en onafdwingbaar is tot gevolg, of 'n ongeldige ooreenkoms wat *ab initio* nietig is?

Volgens regter Basson kan die bewoording van artikel 7(1)(a) van die herroepe Huurkoopwet, te wete nie "geldig" nie, 'n nietigheidsbedoeling aandui (soos in *Croxon* bevind is). Nie "bindend" nie in artikel 6(5) van die Wet, dui eerder op 'n bedoeling van onafdwingbaarheid (soos in *Nel* bevind is (884B-C)).

Regter Basson het beslis dat dit *in casu* in beginsel geen verskil maak welke gevolg (ongeldigheid of onafdwingbaarheid) aan die aanvanklike nie-betaling van die deposito toegedig word nie. In wat die kruks van sy beslissing uitmaak, het regter Basson beslis dat artikel 6(5) van die Wet duidelik ten doel het dat die kredietooreenkoms (selfs al is dit nietig) herleef sodra die deposito betaal word (883H-I 884C-D). Betaling van die deposito by wyse van paaieimente sal dieselfde resultaat tot gevolg hê (885E-G).

Artikel 6(6)(a) van die Wet verbied deelname aan 'n kredietooreenkoms ingevolge waarvan die tydperk waarbinne die volle prys ingevolge die ooreenkoms betaalbaar is, oorskry word. In *Oosthuizen v Standard Credit Corporation Ltd supra* is beslis dat nie-nakoming van artikel 6(6)(a) van die Wet nietigheid van die kredietooreenkoms tot gevolg het.

Artikel 6(6)(b) van die Wet (wat deelname aan 'n kredietooreenkoms verbied ingevolge waarvan die deposito nie betaal is nie) het op die aanvanklike betaling betrekking. Dit moet gevolglik, volgens regter Basson, met artikel 6(5) van die Wet saamgelees word. As gevolg hiervan het die regter beslis dat daar nie 'n analogie tussen die onderhawige saak en die *Oosthuizen*-beslissing *supra* getref kan word nie. Nie-nakoming van artikel 6(6)(b) van die Wet het nie nietigheid van die ooreenkoms tot gevolg nie (880F-I 883G-I).

Die wetgewer wil deur die skepping van 'n statutêre misdryf ingevolge artikel 23 van die Wet, aanvanklike nie-betaling van die deposito ontmoedig. Dit beteken volgens regter Basson egter nie dat die verbode handeling *ipso iure* nietig is nie (*Standard Bank v Estate van Rhyn* 1925 AD 266 274 toegepas). Artikel 6(5) van die Wet dui op die teendeel (883A-F).

Regter de Villiers het met die beslissing om die appèl met koste te handhaaf, saamgestem.

3 Slotopmerkings

Hierdie beslissing, wat myns insiens korrek is, het nie 'n verandering in die regsposisie teweeggebring nie. De Wet 1965 *Annual Survey* 129 se "legal monstrosity" (soos Basson R dit gestel het, 'n kontrak wat, totdat gedeeltelik presteer word, hinkende in die lug bly hang hetsy as nietige hetsy as onafdwingbare kontrak (882I-J)) bly voortbestaan. *Croxon's Garage* weerspieël steeds die regsposisie.

Dit is egter die eerste beslissing (sedert *Nel v Santambank Bpk* en die wetswysiging insake die aanvanklike deposito wat daarop gevolg het) wat pertinent bevestig dat die regsposisie ingevolge artikel 6(5) van die Wet en die regsposisie ingevolge artikel 7(1)(a) van die herroepe Huurkoopwet een en dieselfde is.

The onus of proof in bail proceedings under South African and Canadian law (2)*

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3 3 The Criminal Procedure Second Amendment Act 75 of 1995

3 3 1 General

This Act, which has numerous and detailed provisions dealing with bail, was enacted to clarify certain aspects of bail and, it seems, with the purpose of bringing the law pertaining to bail in line with the Constitution. It also guided the courts in the light of the judgments referred to previously.¹ The Act moved away from the traditional approach under which the accused was required to initiate bail proceedings. It also established grounds that would justify his release.²

3 3 2 Section 60(1)(a) of the Criminal Procedure Act

The wording of section 60(1)(a) of the Criminal Procedure Act was changed by the amendment in that the words "shall apply" were substituted with "shall . . . be entitled to be released on bail".³

In view of the decision in *Ellish v Prokureur-Generaal, Witwatersrand*,⁴ does this mean that the state bears the onus? I will deal with the view of the legal academics first.

Viljoen submits that section 60(1)(a) was amended in such a way that the onus in bail proceedings is placed on the state in accordance with section 25(2)(d) of the Interim Constitution.⁵ There was no longer a duty to make an application for bail. It therefore follows that if no evidentiary material is brought the accused should be released.⁶ The duty of the state to start bail proceedings is therefore clarified. It is not for the accused to "apply" anymore, but for the state to show

* See 2002 *THRHR* 321 for part 1.

1 The Act came into operation on 1995-09-21.

2 Cowling (1996) 52.

3 The amended s 60(1)(a) provides: "An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6) and (7), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, unless the court finds that it is in the interests of justice that he or she be detained in custody."

4 1994 4 SA 835 (W); 1994 5 BCLR 1 (W); 1994 2 SACR 579 (W).

5 See the *Bill of Rights compendium* 5B-41.

6 *Ibid.*

why the "entitlement" to bail should not be enforced. It can therefore be said that section 60(1)(a) confirms the rights entrenched in section 25(2)(d).⁷

However, according to Cowling,⁸ it appears that section 60(1)(a) confirmed that the state ultimately carried the burden of persuasion in a very general sense. It did not bear any onus in the narrow sense. Cowling further submits that this is in keeping with the trend that bail applications should take the form of an inquisitorial hearing where the evidence of both sides is weighed and balanced against each other.⁹

3 3 3 Section 60(11) of the Criminal Procedure Act

The legislator also introduced section 60(11) by way of the Criminal Procedure Second Amendment Act in order to curtail bail for suspects in serious cases. This provision came into force on 21 September 1995. Section 60(11) dealt with accused charged with an offence referred to in Schedule 5,¹⁰ or in Schedule 1,¹¹ an offence which was allegedly committed whilst he was released on bail. According to this provision, the court shall, notwithstanding any provision of the Act, order that the accused be detained in custody, until he is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, satisfied the court that the interests of justice do not require his detention in custody.

Two questions arose. Did this place an onus on the accused and secondly, if so, did this not infringe on the accused's rights entrenched in terms of section 25(2)(d)? Again I deal with the views of legal academics first.

7 S 25(2)(d) obviously enjoys overriding application.

8 (1996) 53.

9 It can be argued that the legislator agreed with the interpretation of s 25(2)(d) of the IC in *Ellish v Prokureur-Generaal Witwatersrand* 1994 4 SA 835 (W); 1994 5 BCLR 1 (W); 1994 2 SACR 579 (W) and for that reason formulated s 60(1) of the Criminal Procedure Act (CPA) in a similar fashion.

10 Sch 5 was added by s 14 of Act 75 of 1995 and lists the following crimes: Treason. Murder involving the use of a dangerous weapon or firearm as defined in the Dangerous Weapons Act 71 of 1968. Rape. Robbery with aggravating circumstances and robbery of a motor vehicle. Any offence referred to in ss 13(f) and 14(b) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992). Any statutory offence relating to the trafficking of, dealing in, or smuggling of firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament. Any offence relating to exchange control, corruption, fraud, forgery, uttering or theft involving amounts in excess of R500 000.

11 Sch 1 lists the following crimes: Treason. Sedition. Public violence. Murder. Culpable homicide. Rape. Indecent assault. Sodomy. Bestiality. Robbery. Kidnapping. Child stealing. Assault, when a dangerous wound is inflicted. Arson. Malicious injury to property. Breaking or entering any premises, whether under the common law or statutory provision, with intent to commit an offence. Theft, whether under the common law or a statutory provision. Receiving stolen property knowing it to have been stolen. Fraud. Forgery or uttering a forged document knowing it to have been forged. Offences relating to the coinage. Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment whereof may be a period of imprisonment exceeding 6 months without the option of a fine. Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this schedule or is in such custody in respect of the offence of escaping from lawful custody. Any conspiracy, incitement or attempt to commit any offence referred to in this schedule.

Cowling submits that, as in the case of section 60(1)(a), there should be a move away from speaking about an onus in bail applications,¹² and instead the term “burden of persuasion” should be used. According to Cowling this does not detract from the fact that the state had to initiate the bail inquiry, or that the presiding judicial officer actively had to elicit information and evidence from both sides. This he says was confirmed by the amendments. Cowling argues that the accused’s right entrenched in section 25(2)(d) was preserved in this way. However, at the end of the day it is incumbent upon the accused to show that, notwithstanding the seriousness of the offence, he should nonetheless be entitled to bail.¹³

Cowling furthermore argues that the provisions of the Criminal Procedure Second Amendment Act, including section 60(11), attempted to strike a balance between crime control and a due process of law. Cowling sees these sections as a message to the court to give grave consideration to granting bail to persons who have committed certain serious offences. In other words, this fact will weigh more heavily on the accused in the final balancing process. Cowling argues that it cannot be construed as imposing an onus of proof on the accused. This Cowling says is further confirmed by the long title of the Act.¹⁴

However, Van der Merwe¹⁵ and Viljoen¹⁶ are convinced that section 60(11) places an onus of proof on the accused.

Van der Merwe indicates that the proceedings are of an inquisitorial nature and that the accused carries the burden of proof on a balance of probabilities.¹⁷ He deems section 60(11) to be in conflict with the constitutional presumption of innocence and the constitutional right to bail as contained in section 25(3)(c) and 25(2)(d) of the Interim Constitution. However, he accepts that constitutional rights are not absolute and argues that section 60(11) may be a permissible limitation as provided for in section 33(1) of the Interim Constitution.

Viljoen sees the wording of section 60(11) diametrically opposed to that of section 60(1), and in accordance with his arguments as stated earlier, he argues that the accused will carry the onus in the instance of section 60(11) and that in all other instances the onus will be on the state.¹⁸

3 3 4 Court decisions

In *S v Mbele*,¹⁹ Leveson and Stegmann JJ considered the implications of section 60(1) and 60(11). With regard to section 60(1) the court accepted that it was bound by *Ellish v Prokureur-Generaal, Witwatersrand*.²⁰ However, the court criticised the reasoning and finding of the majority in *Ellish*, stating that a bail application can become formal, and would then more closely resemble a trial.

12 (1996) 54.

13 Again it may be argued that this is nothing else than a burden of proof.

14 Cowling must have referred to the part that reads “to empower a court to, in respect of certain serious offences, order the accused to satisfy the court that the interests of justice do not require his or her detention in custody”.

15 In *Du Toit et al* 9–31.

16 In the *Bill of Rights compendium* para 5B–41.

17 In *Du Toit et al* 9–32.

18 In the *Bill of Rights compendium* para 5B–41.

19 1996 1 SACR 212 (W).

20 1994 4 SA 835 (W); 1994 5 BCLR 1 (W); 1994 2 SACR 579 (W).

The court explained that if the application is opposed both parties were entitled to lead their evidence through witnesses in the ordinary way. All witnesses could also be subjected to cross-examination. In these instances the inquiry ceases to be informal and the proceedings resemble a trial. The court could see no reason why the rules and procedures pertinent to a trial hearing could not be employed.²¹

According to Stegmann J the approach by Eloff JP and the majority in *Ellish* had practical shortcomings. Stegmann J explained that the judicial officer faced with the decision will not know what to do in a case in which the interests of justice, which favour the release of the applicant pending his trial,²² are almost evenly balanced by the other interests of justice which favour his continued detention.²³ The court pointed to the law as stated before 27 April 1994. Judges replete with the wisdom of two or three generations refused an applicant release with or without bail pending his trial, unless an applicant succeeded in persuading a court that the interests of justice which favoured the protection of his liberty, outweighed the interests of justice which would be put at risk by his release.

However, the court indicated that under the law as stated in *Ellish's* case, to which the court respectfully acknowledged to be bound, accumulated wisdom has ceased to reflect the law. The applicant is no longer required to persuade the court to release him. Neither is the attorney-general or his representative, as the respondent, required to persuade the court not to release him. It is left to the magistrate or judge to decide the issue. He must take the initiative and conduct an inquisitorial proceeding. If the first stages of the inquiry reveal a more or less equal balance between those interests of justice which favour the release of the applicant with or without bail, and those interests of justice which do not, the inquisitor is presumably required to keep on digging until his inquiry satisfies him one way or the other.²⁴

The court found that section 25(2)(d) of the Constitution did not deal with the question of onus at all, expressly or by implication. Stegmann J based his interpretation of section 25(2)(d) of the Constitution on the fact that the specific provision was essentially aimed at securing a situation where neither the executive nor the legislator could ever again be permitted to take away or truncate the jurisdiction of the courts.²⁵ For this reason no conflict between section 25(d) of the Constitution and section 60(11) of the Criminal Procedure Act could ever arise. The court accordingly interpreted "satisfy" in section 60(11) to mean

21 216E-F.

22 The court defined these interests as the interests of justice in protecting the liberty of the individual and upholding the presumption of his innocence until the contrary is proved.

23 The court indicated these interests as essentially being considerations to ensure that the trial can duly take place and that it will be of a quality that will have a good chance of getting at the truth.

24 236g-237c.

25 The court thought the purpose of the section to be to ensure compliance with the doctrine of separation of powers and referred to the example where the executive power locked out judicial discretion to grant bail in s 30 of the Internal Security Act (74 of 1982). The primary function of s 25(2)(d) is to ensure that the individual enjoys the "benefits of the ordinary law of bail as administered by the Courts" (234f-g). The court also mentioned the now repealed s 61 of the CPA as an example.

that the accused must satisfy the court on a preponderance of probability where the interests of justice lie. The court therefore found that a clear onus was placed on the accused.

This decision can therefore be understood as indicating that section 25(2)(d) was not intended to revolutionise the relevant principles of law governing bail applications and had nothing to do with the determination of onus of proof or persuasion in bail applications. The overall effect of this decision would be that the traditional and well-established principle, whereby an accused bears the onus of persuading a court in a bail application, remains unaltered and hence section 60(11) does not violate the Interim Constitution.

In *S v Vermaas*²⁶ Van Dijkhorst J held that the amendment to the Criminal Procedure Act had been passed amidst a full-blown debate regarding bail, bail conditions and the onus in bail cases. The court also acknowledged that at the time of the passing of the Act there were conflicting decisions on the question of onus. In the circumstances one had to accept that the wording of section 60 as a whole, and section 60(11) in particular, had been well chosen. The general rule set out in section 60(1)(a) was that the accused was entitled to be released on bail unless the court found that it was in the interests of justice that he be detained in custody. This wording the court said created an onus. The onus rested upon the person who asserts that the accused should not be released, that is, the state. In the case of section 60(11) the converse applied. Section 60 was expressly worded as an exception by the use of "notwithstanding any provision of this Act" and was limited to the crimes stated in Schedule 5 and the commission of crimes set out in Schedule 1 while out on bail. The wording of section 60(11) is imperative: "The Court shall order the accused to be detained."

The accused was burdened to satisfy the court that the interests of justice did not require his detention in custody. The judge furthermore remarked that clearer wording could not be sought for an onus on the accused.

In *S v Shezi*²⁷ Els J reiterated that section 60(11) could not be interpreted otherwise than to indicate that there is an onus of proof on the accused. It is for the accused to convince the court that the interests of justice do not require his further incarceration. Els J, referring to section 60(11), said that the court was obliged to hold a person in custody when he is charged with an offence in Schedule 5, or Schedule 1, which offence was committed while out on bail. The court furthermore concluded that a distinction must be drawn between a burden to begin and a burden of proof. Before a burden rests on the accused in terms of section 60(11), the state must show that the accused is arraigned on charges mentioned in Schedule 5, or those mentioned in Schedule 1 referred to above.

In *Prokureur-Generaal, Vrystaat v Ramokhosi*²⁸ Edeling J discussed the present legal position in respect of bail. He contended that the starting point in every bail application was that the arrested person was *prima facie* entitled to be released on bail in terms of section 25(2)(d) of the interim Constitution. It was only in those instances where the interests of justice required that bail be denied. In each case the state was required to take the initiative to place material before

26 1996 1 SACR 528 (T) on 1995-12-22.

27 1996 1 SACR 715 (T). The judgment was delivered on 1996-02-21.

28 1996 11 BCLR 1514 (O) on 1996-07-25.

the court in regard to whether circumstances existed to justify further detention. This did not imply that the state bore an onus. The fact that the right contained in section 25(2)(d) was qualified was significant. The qualification was no less important than the right. The framers of the Constitution intended that the rights of the individual had to be balanced against those of the community. Any person desiring the continued detention of an arrested person (and therefore desiring a denial of bail) had to do more than simply place such material before the court. The opposition to bail would not succeed if the court did not, or could not find, that the interests of justice required further detention. Depriving an unconvicted person of his freedom by arrest constituted a drastic curtailment of a fundamental right.

The court also held that the court itself had to conduct inquiries if necessary, in order to gather the material required to determine whether the interests of justice required further detention. The court did not have to find that the interests of justice did not require further detention before an application for bail could be granted. If it could not find that the interests of justice required further detention, the arrested person was entitled to his release. This applied in all cases, but section 60(1) of the Criminal Procedure Act created on the face of it an exception. It appeared to the court that this provision might not be constitutional. In any event, the court stated that the inquisitorial approach must also be applied to section 60(1), even if this section does place an onus on the accused.

3 4 The Final Constitution²⁹

3 4 1 General

Section 35(1)(f) of the Final Constitution provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. Even though section 35(1)(f) replaced section 25(2)(d) of the Interim Constitution, section 60(1)(a) of the Criminal Procedure Act was not amended correspondingly. While section 60(1)(a) still echoes the former provision, the constitutional right to be released from custody now depends on whether the interests of justice permit.

The qualifying reservation "unless" of the Interim Constitution has therefore been substituted with the word "if" under section 35(1)(f).³⁰ Under the Interim Constitution an applicant for bail also had the right to be released on bail unless the interests of justice "required" otherwise. Release from detention under section 35(1)(f) depends on whether the interests of justice "permit". The question arises whether these amendments influenced the question of onus.

3 4 2 The influence of section 35(1)(f) on onus

From the wording it seems that the right of an arrested person is considerably weaker and that section 60(1)(a) favours liberty more than the minimum required by the Constitution. The Constitutional Court in *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekai*³¹ accordingly indicated that the position changed from the position that one was entitled to be released, to a more neutral position.

29 Constitution of the Republic of South Africa Act 108 of 1996 (also referred to as FC).

30 This wording appeared for the first time in the draft of 1996-04-15.

31 1999 7 BCLR 771 (CC).

The court, in watering down the right further, indicated that the Constitution did not create an unqualified right to personal freedom. It rather created a circumscribed one. Section 35(1)(f) therefore inherently sanctioned the loss of liberty required to bring a person suspected of an offence before a court of law. The court held that section 35(1)(f) established that unless the equilibrium is displaced, an arrested person is not entitled to be released.

If the right would be so weakened as to place an onus on the accused, some may argue that section 60(11) of the Criminal Procedure Act may survive constitutional scrutiny in terms of the 1996 Bill of Rights on just this argument alone.³²

In the certification process the bail provision was challenged in that it was said to place an onus on the applicant. However, the Constitutional Court declined to answer this question in the first certification judgment.³³ It rejected the challenge in a single paragraph as having "no merit" since the only ground for denying certification to the clause would be if it failed to recognise a "universally accepted fundamental right", and the right to bail was not universally formulated.

Viljoen approaches this problem by asking the following question: "Does the arrested person who must prove that he should be granted bail have the right to be 'released from detention if the interests of justice permit?'"³⁴ He argues that the golden thread running through our criminal justice system is that an arrested or accused person is presumed to be innocent until proven guilty. This entails that the interests of justice permit the release of all arrested persons on bail. This also falls within the right to freedom and security of the person.³⁵ Viljoen concludes that by placing an onus on the arrested person to show reasons for his release, section 35(1)(f) is *prima facie* violated. The state would therefore have to show why this limitation is reasonable.³⁶

In line with his previous arguments, Van der Merwe³⁷ contends that the onus remains on the prosecution in all instances except those provided for in section 60(11) of the Act. He also argues that section 60(11) may be a permissible limitation on the right to bail.

Snyckers asks the question whether the new section 35(1)(f) does not place an onus on the applicant.³⁸ If so, he argues, it would be a lamentable inversion of the ordinary operative presumption in favour of liberty in the sphere closest to its core. He refers to both foreign³⁹ and local⁴⁰ authorities. He therefore argues that

32 De Waal, Currie and Erasmus *The Bill of Rights handbook* (1998) 430.

33 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC), 1996 10 BCLR 1253 (CC) para 88.

34 See the *Bill of Rights compendium* 5B-43.

35 S 12 FC.

36 S 36 FC.

37 In Du Toit *et al* 9-31.

38 In Chaskalson *et al Constitutional law of South Africa* (loose-leaf updated to 1998-09-30) 27-56.

39 In *United States v Salerno* 107 S Ct 2095 (1987) the discussion was premised upon the constitutional necessity that the state would be required to prove the applicability of the grounds for refusing bail. In *R v Pearson* [1992] 3 SCR 665 691 (Can) the Canadian Supreme Court referred to a "basic entitlement to be granted reasonable bail unless there is just cause to do otherwise". The International Covenant on Civil and Political Rights (1966) in art 9 (3) provides that "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial".

40 See *Prokureur-Generaal, Vrystaat v Ramakosi* 1996 11 BCLR 1514 (O) 1531 where it was said that an onus upon a bail applicant as a provision had no place in the new democratic constitutional order.

section 35(1)(f) should not be read as placing an onus on the applicant for bail.⁴¹ However, he is certain that it could not be read as placing an onus on the state as indicated by some decisions and authors with regard to the Interim Constitution. Snyckers is convinced that the *travaux préparatoires* was aimed at the view that the onus was on the state to prove grounds for refusing bail.⁴²

He also refers to the reasoning that it has to be accepted that there must be an onus at least in the sense of a default position in cases of extreme uncertainty. Snyckers submits a new view, which he considers to be the best. He contends that this section should be interpreted in such a manner that the applicant has to present evidence indicating his likely appearance at trial, which entails a threshold level of adequacy. Once such evidence has been submitted, which may be oral, the court must adopt an inquisitorial approach and must then decide whether the interests of justice permit release or require detention. The court must, in deciding whether the interests of justice permit release or require detention, accord much weight to the status of the applicant's presumed innocence. The "end of the day onus" is explained by the author as follows:⁴³

"The problem of an 'end of the day onus' can be solved by considering the peculiar nature of the *probandum* – 'the interests of justice permit'. It is submitted that this *probandum*, to the extent that it is one, possesses a build-in default position. The use of the word 'permit' rather than 'require' confirms this view. Uncertainty that what the interests of justice *require* means they *permit* release. If the court is left in a state of uncertainty, then the interests of justice permits release on bail. The interests of justice would then permit detention as well. But the applicant has to show only that release is permitted. The applicant would then have discharged any burden of persuasion entailed by the formulation. In this way the settled structure of rights analyses requiring the applicant to prove the application of a right (and its violation if alleged) can be maintained without entailing the unacceptable conclusion that uncertainty about what the interests of justice require should mean they do not permit."

In *S v Tshabalala*⁴⁴ Comrie J on behalf of the full court held that section 35(1)(f) of the Constitution did not establish an onus of proof, but entrenched a standard.⁴⁵ An arrested person was entitled to be released from detention "if the interests of justice permit" and subject to conditions which were reasonable. Every decision allowing or refusing bail had to be informed by the entrenched standard and had to endeavour to match it, whatever the bail legislation might at any given time provide. In the case of conflict, the constitutional standard had to prevail. The court also held that the language of section 35(1)(f), especially when contrasted to its predecessor, allowed Parliament to enact bail legislation that casts an onus or burden of proof on the arrested person in appropriate cases. The legislative provision in question had to be analysed in order to determine whether or not it departed from the constitutional standard. Only if the provision failed that test, did the issue of a limitation under section 36 of the Constitution arise. *In casu* Schedule 5, which triggered the reverse onus provision under section 60(11), contains only serious crimes which did not create the impression, especially in these times, that Parliament had cast its net wider than was necessary.

41 In Chaskalson *et al* 27–56.

42 See the explanatory memorandum to the early Draft Bill of Rights of 1995–10–09.

43 Chaskalson *et al* 27–56.

44 1998 2 SACR 259 (C). The judgment was delivered on 1998-06-19.

45 263ff.

The court held that section 60 of the Act places some kind of onus, or burden of proof, on the state or the applicant for bail. This conclusion was reached while taking into account that section 60(3) vested the court hearing the application with an inquisitorial function where relevant. According to the court there had to be a practical burden on the state to adduce evidence or to submit information to show the likelihood that the accused would conduct himself in the way described in the four paragraphs of section 60(4) in the cases not governed by section 60(11). If the state failed that, section 60(9) would seldom assist because the factors mentioned there were mainly in favour of the accused. The court decided that if this was not an onus of proof then surely it was something very close thereto. If section 60(11) applied, it reversed the aforesaid onus. The applicant for bail in this instance had to satisfy the court that the interests of justice mentioned in section 60(4) did not require his continued detention, and that it was improbable that he would conduct himself in that particular way.

At first glance it seems that the substitution of “unless” under the Interim Constitution with “if” in section 35(1)(f) may well influence the constitutional position concerning onus. Under the Interim Constitution the right to bail existed and could only be taken away if the interests of justice dictated otherwise. Under section 35(1)(f) the right to bail has been made subject to the interests of justice. It may well be argued that if the equilibrium is not displaced an arrested person may be entitled to bail under the Interim Constitution but not under section 35(1)(f).

However, this would be a deplorable inversion of the right to freedom and security of the individual that is at the core of the criminal procedure rights including the right to bail.⁴⁶ These criminal procedure rights are merely illustrative of the protection of the freedom and security of the individual. As such one would expect the right to bail to confer at least a basic entitlement to bail. If the provision does not provide a basic entitlement to bail but rather sanctions the loss of liberty it should have no place alongside the right to freedom and security of the individual and the other criminal procedure rights in the Bill of Rights. However, I do not think that it was the intention of the legislature to do away with the basic entitlement to bail heralded by the Interim Constitution. In watering down this right the legislature rather wished to create a playing-field which allowed Parliament more room in which to act against serious crime. The fact that section 60(1)(a) of the Criminal Procedure Act was not amended correspondingly confirms this view. The amendments should therefore not be seen as imposing an onus on an applicant for bail.

3 5 The Criminal Procedure Second Amendment Act 85 of 1997 and the position as at 30 June 1999⁴⁷

3 5 1 General

This Act which commenced on 1 August 1998 did not change the wording of section 60(1)(a) and did therefore not influence the question of onus with regard to offences not provided for by section 60(11).

⁴⁶ See my thesis ch 6. (See 2002 *THRHR* 321 fn 1 for detail.)

⁴⁷ As amended by the Judicial Matters Amendment Act 34 of 1998.

However, this Act replaced section 60(11) with an even more stringent provision.⁴⁸ No changes have subsequently been effected. Section 60(11) now provides:

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to—

- (a) in Schedule 6,⁴⁹ the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
- (b) in Schedule 5,⁵⁰ but not in Schedule 6, the court shall order that the accused be detained in custody until her or she is dealt with in accordance with the law,

48 Sch 6 was added by s 10 of Act 85 of 1997.

49 Sch 6 lists the following offences: Murder, when— (a) it was planned or premeditated; (b) the victim was— (i) a law enforcement officer performing his functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his holding such a position; or (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in sch 1; (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences: (i) rape; or (ii) robbery with aggravating circumstances; or the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy. Rape— (a) when committed— (i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice; (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; (iii) by a person who is charged with having committed two or more offences of rape; or (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus; (b) where the victim— (i) is a girl under the age of 16 years; (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or (iii) is a mentally ill woman as contemplated in s 1 of the Mental Health Act 18 of 1973; involving the infliction of grievous bodily harm. Robbery, involving— (a) the use by the accused or any co-perpetrators or participants of a firearm; (b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or (c) the taking of a motor vehicle. Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm. An offence referred to in Sch 5 – (a) and the accused has previously been convicted of an offence referred to in Sch 5 or this Sch; or (b) which was allegedly committed whilst he was released on bail in respect of an offence referred to in Sch 5 or this Schedule.

50 Sch 5 was added by s 14 of Act 75 of 1995 and substituted by s 9 of Act 85 of 1997. Sch 5 lists the following offences: Treason. Murder. Attempted murder involving the infliction of grievous bodily harm. Rape. Any offence referred to in s 13(f) of the Drugs and Drug Trafficking Act 140 of 1992, if it is alleged that— (a) the value of the dependence-producing substance in question is more than R50 000,00; or (b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or the offence was committed by any law enforcement officer. Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament. Any offence in contravention of s 36 of the Arms and Ammunition Act 75 of 1969, on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in s 39(2)(a)(i) of that Act. Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft— (a) involving amounts of more than R500 000,00; or (b) involving amounts of more than R100 000,00 if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance

unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.”

The Act differentiates between the extremely serious cases listed in Schedule 6 and serious cases in Schedule 5. The legislature also provided procedural teeth by allowing for a mechanism to establish whether one is dealing with a Schedule 6 or 5 offence.⁵¹

If one looks at the operative part of the new section 60(11), it is in the first instance clear that the last part of the direction has been changed from “satisfied the court that the interests of justice do not require his or her detention in custody” to “adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release”⁵² and “adduces evidence which satisfies the court that the interests of justice permit his or her release”.⁵³ Before the amendment the accused could satisfy the court not only by way of oral testimony under oath but also by way of other forms of evidence traditionally allowed in bail applications that he should be released. Does this mean that the accused in this instance is now obliged to adduce evidence in the normal understanding thereof to satisfy the court, and cannot do so by merely making submissions from the bar or in any other way which will not be “evidence”? I submit that the legislature did not intend such a result but included the words “adduces evidence” to indicate that the applicant has the duty to begin and form part of a provision that burdens the detained person with the onus of proof.⁵⁴

However, it may be argued that the legislator, by introducing these words, intended to indicate that in the case of section 60(11), the burden of proof is not only on the accused but in this instance the proceedings are not of an inquisitorial nature. This view would be supported by the first part of section 60(11) that reads: “Notwithstanding any provision in this Act.” The accused therefore has the duty to introduce evidence. Without this evidence he may not be released from custody. However, it seems that the introduction to section 60(11) was merely inserted to remove any clash with section 60(1)(a).⁵⁵

of a common purpose or conspiracy; or if it is alleged that the offence was committed by any law enforcement officer— (i) involving amounts of more than R10 000,00; or (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy. Indecent assault on a child under the age of 16 years. An offence referred to in sch 1(a) and the accused has previously been convicted of an offence referred to in Sch 1; or which was allegedly committed whilst he was released on bail in respect of an offence referred to in Sch 1.

51 S 60(11A).

52 S 60(11)(a).

53 S 60(11)(b).

54 Kotzé “*S v Jonas* 1998 2 SASV (SOK); *S v C* 1998 2 SASV 721 (K); *S v Nompumza* (ongerap saakno CA+R57/98 (CK) 1998-11-16)” 1999 *De Jure* 188 seems to confirm the view that the accused does not have to present evidence in its narrow sense. He proposes that a communication from the bar, or confirmation from the legal representatives should be sufficient where the accused carries the burden of proof, and the facts are not in dispute. He argues that another interpretation would be absurd and waste valuable court time.

55 This view seems to be supported by Kotzé *ibid*. In discussing s 60(11)(a), he indicates that even where the facts are not in dispute, the presiding officer has to decide for himself whether bail should be granted or not.

I therefore submit that there is an onus on an applicant charged with a Schedule 5 or 6 offence to convince the presiding officer on a balance of probabilities that he is a suitable candidate for release.⁵⁶ But, due to the *sui generis* nature of bail hearings, the adjudicator is expressly not a passive umpire and must make up his own mind.

Still, it may also be argued that in order to obtain bail the accused would have to start and adduce evidence. The court will have to act inquisitorially in accordance with the Act and determine whether circumstances exist for the interests of justice to permit his release. If at the end of the day there is uncertainty about what the interests of justice require it means that they do not permit release. In this instance there will not be an onus proper.

While dealing with the constitutional acceptability of various provisions in section 60(11)(a), the Constitutional Court in *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekar*⁵⁷ accepted that there was a formal onus on an applicant falling under section 60(11)(a) to "satisfy the court".⁵⁸ Kriegler J on behalf of the court remarked that it was not suggested by defence counsel that the imposition of a reverse onus on an applicant for bail was constitutionally objectionable. Kriegler J added that such a contention would in any case not have been sustained. Referring to section 35(1)(f) of the Constitution, Kriegler J indicated that section 60(11)(a) did not create something with regards to onus that did not exist before. It merely described how it had to be discharged and added to its weight.

3.5.2 The present position

In my endeavour to interpret the relevant provisions I have taken into account that:

- The South African right to bail seems to have borrowed from its Canadian equivalent. Under Canadian law the Crown has to show cause why the accused has to remain in custody. Where a person is charged with certain serious offences the applicant is burdened to convince the presiding officer that he should be released.
- Notwithstanding the burdens of proof under Canadian law the presiding officer has the right to act inquisitorially under Canadian law but is not obliged to make enquiries as is expected under South African law in some instances by the Criminal Procedure Act.
- The right to bail must be regarded as part of specific instances of the right to freedom and security of the person. Section 12 of the Final Constitution therefore should assume the character and status of a generic and residual "due process" right, which acts independently, and indicates how section 35 should be interpreted.⁵⁹

56 A number of courts confronted with Sch 6 offences have subsequently supported this view. See *S v Jonas* 1998 2 SACR 677 (SE); *S v H* 1999 1 SACR 72 (W); *S v Swanepoel* 1999 1 SACR 311 (O).

57 1999 7 BCLR 771 (CC).

58 See para 61 and 78ff of the judgment.

59 In ch 6 of my thesis I submit that a due process wall was incorrectly erected between ss 11 IC (12 FC) and 25 IC (35 FC) by the Constitutional Court. It furthermore seems that some scholars and courts have taken the view that the presumption of innocence (being the cornerstone of our criminal justice system) is not limited in its content at the bail stage to the wording of s 35(1)(f). They require that a person's rights are not impeded before he is proven guilty according to accepted principles (including the principle that the state should start and adduce evidence).

- The Amendment Acts and the Final Constitution were enacted amidst a full-blown debate concerning the question of onus and in many respects the provisions were in response to the debate. It is therefore reasonable to expect that the wording of the relevant sections had been deliberate.
- The Criminal Procedure Act must be interpreted so as to be in line with the Constitution.⁶⁰

My understanding of the correct situation is that with regards to section 60(11)(a) and (b) the accused has to adduce evidence. This the legislature has made clear. It is submitted that he would also have to begin and carries the burden of proof.⁶¹ In the case of section 60(11)(a) exceptional circumstances would have to be proven on a balance of probabilities. Notwithstanding the formal onus, the presiding officer is expressly instructed to act inquisitorially. This is possible because of the interlocutory and inherently urgent nature of a bail application.

This interpretation would be in line with section 35(1)(f) and also the general international trend to build inquisitorial elements into the accusatorial system.⁶²

With regard to offences outside section 60(11) it is submitted that there is no “real onus” and that the proceedings are clearly inquisitorial in nature. This can be seen from the wording of the Amendment Acts.⁶³ The state must present evidence first in line with the wording of section 60(1)(a).⁶⁴ If at the end of the day it is uncertain what the interests of justice require, release is permitted. This is borne out by the change of wording from “require” in the Interim Constitution to “permit” in the Final Constitution. It is furthermore submitted that, in view of the fierce debate, the legislature would specifically have placed a burden on the state if it desired that result.⁶⁵

60 This was confirmed by the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 7 BCLR 771 (CC). A similar principle existed in Roman-Dutch law where a statute was ambiguous and was expressed in the maxim *in ambigua voce legis ea potius accipienda est significatio, quae vitio caret*. The meaning which avoids invalidity of the provision in question was thus preferred.

61 It is to be noted that the Director of Public Prosecutions (DPP) considers the approach by Snyckers with regards to the existence of an implied onus and the quantum thereof to be the best one for s 60(11)(a) and (b) (see para 5 2 of the heads of argument by the DPP in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 7 BCLR 771 (CC) and para 3 4 2 for the approach by Snyckers). On this interpretation they argue that the inquisitorial elements that have been introduced by the new Act, act as security.

62 By using this model the advantage of the best characteristics of both the Anglo-American and Continental legal systems can be obtained. One might suggest the “modest approach” as under American law with regards to the trial stage. The judges are explicitly given the duty to further accurate fact-finding by seeking and presenting information the advocates failed to develop. However, they are not invested with Continental-style powers such as the authority to call and first question witnesses or otherwise direct the course of the trial. In this instance a bigger responsibility is placed on the presiding officer to ensure that bail is granted or denied judiciously.

63 S 60(1)(c); 60(3) etc of the Criminal Procedure Second Amendment Act 85 of 1997.

64 This is in line with the majority decision in *Ellish v Prokureur-Generaal Witwatersrand* 1994 4 SA 835 (W); 1994 5 BCLR 1 (W); 1994 2 SACR 579 (W) decided on 1994-08-18. It is submitted that the legislature agreed with this interpretation, and, in spite of many opportunities to rectify the situation only changed the position with regards to certain offences.

65 In the Canadian Criminal Code the legislature specifically provides that a person shall be released in certain circumstances and if not released *the State must convince* the court that the accused must not be released.

3 5 3 Constitutional scrutiny of the "reverse onus" in section 60(11)

If it is accepted that section 35(1)(f) places a burden on the accused, the onus in section 60(11) would survive constitutional scrutiny on that basis alone. However, even if it is submitted that section 35(1)(f) does not impose a burden of proof, the onus in section 60(11) will be saved by the limitation clause.⁶⁶

Constitutional analysis under the Bill of Rights takes place in two stages. The applicant first has to prove that the activity for which protection is sought falls within the sphere of activity protected by a fundamental right, and also that government action actually impedes that right.⁶⁷ The government now has an opportunity to justify this *prima facie* infringement under section 36(1), which is the general limitation clause:⁶⁸

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open

66 Under s 33 IC a stricter level of scrutiny for certain rights, including the right to bail, was required. However, this notion has been abandoned in the FC. In order for any restriction on the right to bail to survive under the IC the infringement had to be both "necessary" and "reasonable and justifiable in an open and democratic society based on freedom and equality". Under the FC the infringement to the right to bail does not have to be "necessary". The infringement needs only be "reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality" (see s 36 discussed in this paragraph).

67 See *S v Zuma* 1995 2 SA 642 (CC), 1995 4 BCLR 401 (CC) 414; *S v Makwanyane* 1995 6 BCLR 665 (CC) 707D-E.

68 As South African limitation analysis borrowed heavily from the Canadian Charter the guidelines in *R v Oakes* [1986] 1 SCR 103, 26 DLR (4th) 200 227-228 (SCC) were quoted by many South African courts when dealing with limitation issues. See eg *Qozeleni v Minister of Law and Order* 1994 3 SA 625 (E); *S v Majavu* 1994 4 268 (Ck). See also *Kauesa v Minister of Home Affairs* 1995 1 SA 51 (Nm). See *R v Chaulk* [1990] 3 SCR 1303, 62 CCC (3d) 193 216-217 (SCC) for a concise exposition of the limitation test under Canadian law. The guidelines in *Oakes* were crucial in applying the "more vague" limitation clause (s 33) in the IC and were inevitably, *via* the judgment in *S v Makwanyane ibid*, discounted in the more detailed s 36 of the FC. The *Oakes* test requires the following: "To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom' . . . The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at the minimum, that an objective relates to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, once a sufficiently significant objective is recognized, then the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test' . . . Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals or groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly the means even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'."

and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

Chaskalson indicates that the limitation test is driven by two primary concerns.⁶⁹ In the first place it provides a vehicle for subjecting infringements of fundamental rights to vigorous review. In the second instance it provides a mechanism which permits the government or some other party to undertake actions which, though *prima facie* unconstitutional, serve pressing public interests. Chaskalson indicates that one can expect any limitation test to pose roughly the same kind of questions. Firstly, whether the objective of the law under scrutiny warrants the infringement of the right. Secondly, whether the means employed to realise that objective are rationally connected to that objective. Thirdly, whether the government or some other party defending the law at issue could have used some means less restrictive of the rights of the aggrieved party.⁷⁰

A quick glance at Schedules 5 and 6 will reveal that it is predominantly in the instance of very serious or damaging offences that the burden of proof is to be reversed.⁷¹ While deliberating whether the much graver intrusion of the combined effect of section 60(11)(a) was saved by the limitation clause,⁷² the

⁶⁹ See Chaskalson *et al* 12–47.

⁷⁰ Under contemporary Canadian law the limitation test is also less strictly interpreted. The *Oakes* test required that the government go to great lengths to answer the questions satisfactorily. After *Oakes* the courts saw the requirement of impairing the right “as little as possible” as mandating the government to find and employ the least restrictive means to achieve its objectives. Because of this, the courts soon criticised this requirement saying that it invited significant intervention into legislative policy-making, a task for which the courts are not suited. In their quest to eradicate the problem of judicial interference the courts called for a more flexible approach which would give them more room in which to maneuver. This approach was introduced in *Edward Books & Art Ltd v The Queen; R v Nortown Foods Ltd* [1986], 2 SCR 713, 35 DLR (4th) 1 (SCC) and *Irwin Toy Ltd v Quebec (Attorney-General)* [1989], 1 SCR, 927; 94 NR 167; 24 QAC 2, 58 DLR (4th) 577 (SCC). In *Edward Books* the court changed the test from “as little as possible” to “as little as reasonably possible” (my italics). See also *Reference re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act (Alta)* [1987], 1 SCR 313 392, 38 DLR (4th) 161 (SCC). The court in *Edward Books* did also not require the same standard of proof and held that the same questions need not be asked in every case. See also *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)* [1990], 1 SCR 1123 1138, 56 CCC (3d) 65 (SCC) and *RJR-MacDonald Inc v Canada (Attorney-General)* [1995], 3 SCR 199; 127 DLR (4th) 1 (SCC); Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte (1997) 627ff.

⁷¹ It also operates “in a narrow set of circumstances” as was required by the Canadian Supreme Court in *R v Pearson* (1992) 12 CRR (2d) 1 and *R v Morales* (1992) 12 CRR (2d) 31.

⁷² It has been indicated that it had not been suggested by anyone that the imposition of an onus was in itself constitutionally objectionable. The court in any event found that such a submission could not be sustained. In its deliberation the court pointed to the fact that the objection against a reverse onus was the risk of a wrong conviction. As there was no such risk in a bail application the root of the unacceptability disappears.

Constitutional Court in *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat*⁷³ pointed to the grim statistics which show that our society is racked by a surge in violent criminal activity that has made ordinary law abiding citizens fearful for their safety and that of their loved ones.⁷⁴ The Constitutional Court reiterated that the seriousness of the offence, and with it the heightened temptation to flee because of the severity of the possible penalty, have always been important factors relevant to deciding whether bail should be granted.

There is no doubt that the effect of widespread violent crime is deeply destructive of the fabric of our society. Accordingly all steps that the Constitution allows must be taken to curb violent crime.

Provision is also made for the burden to be placed on the applicant where the applicant is a repeat offender, the alleged offence is committed while out on bail or where there is some kind of common purpose or conspiracy.⁷⁵

The arguments by the Canadian courts in favour of limiting a person's right to bail by placing the burden of proof on the applicant when charged with certain crimes are even more convincing when applied to the South African situation. Generally South Africa has a far greater incidence of crime and specifically of serious and violent crime. Coupled to this are an ineffective police force and criminal justice system. There is a real risk that the perpetrators of the crimes under scrutiny will abscond rather than face trial. Where it may be difficult to abscond from justice in Canada I submit that it is not as difficult in South Africa.

It is further noted that bail is only denied to those applicants that cannot demonstrate that detention is not in the interests of justice. Although this burden might well be in an accused's power to discharge, one must not forget that the majority of accused in South Africa are unsophisticated and come before the lower courts without legal representation. This problem is to a large extent eliminated when the presiding officer acts inquisitorially.

The answer is of course to bring the police force and criminal justice system up to par, resulting in many spin-offs. A proper functioning criminal justice system would ensure that the prosecution is ready to contest a bail application. If the prosecution is able to place the necessary facts before the court there would be no need to place the onus on the accused. The serious nature or otherwise of the offence and the influence thereof would then be factors that the court has to take into account to determine whether the state has proved that incarceration is necessary. Failing that, one would have to resort to measures such as those mentioned to make the system function.

4 CONCLUSION

Before the advent of section 25(2)(d) of the Interim Constitution in 1994 it was commonly accepted that an arrested person bore the onus to show on a balance of probabilities that he should be granted bail. However, it does seem that a bail applicant was not always burdened with an onus of proof but that the onus originated from a decision by the Transvaal Provincial Division in 1921, and was

73 1999 7 BCLR 771 (CC).

74 In this judgment the Constitutional Court found even the combined effect of s 60(11)(a) to be saved by the limitations clause.

75 See para 2 2 2 2-2 2 2 3 for the very similar tendencies under Canadian law.

followed by the other courts thereafter. In line with a civil application, the applicant had to start leading evidence. Yet, even before the advent of the new Constitutional era some courts have indicated views more in favour of granting bail. Under Canadian law prior to 1970 the justice, magistrate or judge had the discretion to grant bail.

Under both systems there is at present a basic but circumscribed entitlement to bail before conviction, where the onus is on the state to justify continued incarceration, except in certain prescribed instances.⁷⁶ However, under South African law this may not be an onus in the true sense.

While the onus is reversed under both Canadian law and South African law in the instance of certain serious offences, the list of offences where the burden is reversed, is much more extensive under South African law. The onus under both systems is also cast upon the applicant where he is a repeat offender, the alleged offence is committed while out on bail, or where there is some kind of common purpose or conspiracy.⁷⁷

[16] *[Dit is] inderdaad so dat Olivier AR [in sy minderheidsuitspraak in Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO 1997 4 SA 302 (HHA)]'n pleidooi gelewer het dat aan goeie trou 'n meer prominente plek in die kontraktereg toegedeel moet word. Die slotsom waartoe hy vir die doeleindes van sy uitspraak kom, nl dat 'n handelsbevoegde persoon op grond van oorwegings van billikheid van aanspreeklikheid verskoon kan word, is dan ook ingrypend. Ons insiens, moet die standpunte in sy uitspraak met omsigtigheid benader word. In die eerste plek is dit 'n minderheidsuitspraak wat die siening van 'n enkel Regter verteenwoordig gebaseer op 'n uiteensetting van die feite waarmee die ander vier Regters dit nie eens was nie. Ten tweede is die aspek nie in daardie saak betoog nie. Ten derde het die meerderheidsuitspraak geen aanduiding gebied dat die regsuiteensetting juis is nie . . . Die sienings in die uitspraak van Olivier AR verteenwoordig dus nog steeds net dié van 'n enkel Regter.*

Harms AR, Streicher AR en Brand AR in Brisley v Drotsky 2002 4 SA 1 (HHA) par [16].

76 Even if it is accepted that s 35(1)(f) of the SA Constitution does not confer a basic entitlement to bail, s 60(1)(a) of the CPA surely does so. See discussion para 3 4 2. Under Canadian law it is afforded by the Canadian Charter and the Criminal Code of Canada.

77 The greater responsibility resting on the presiding officer to act inquisitorially under South African law has been shown in my thesis chs 2 and 4. In South Africa the presiding officer is tasked to ensure that justice prevails. In the essentially adversarial system under Canadian law the judicial role is mainly passive. The presiding officer approaches the dispute with an open mind, leaving it to the parties to convince the court that bail should be granted or denied. Because of the lesser ability of the prosecution and the applicant in South Africa to present the presiding officer with the necessary facts, the greater responsibility on the presiding officer is better suited to achieve equitable criminal justice. It is especially the many uninformed and unrepresented applicants for bail who would be unable to present their case and who therefore cannot ensure that justice prevails.

The constitutional concept of co-operative government and its application in education¹

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OPSOMMING

Die grondwetlike begrip van samewerkende regering en die toepassing daarvan op onderwys

Onderwys in Suid-Afrika word binne die oorkoepelende konteks van die Grondwet bestuur en beheer. Die nasionale, provinsiale en plaaslike regeringsfeer word verplig om te voldoen aan die beginsels van samewerkende regering en interregeringsverhoudings wanneer die land regeer word. Die Konstitusionele Hof het 'n belangrike verpligting om in hierdie verband 'n kultuur van samewerking wat gebaseer is op respek, wedersydse vertroue en goeie trou te koester en te bevorder – 'n rol wat die hof gewillig en bevoeg is om in te neem soos beslis is in die *First Certification-* en *National Education Policy-*saak.

Die konkurrente funksionele gebied van onderwys waar wetgewende bevoegdthede deur beide die nasionale en provinsiale regeringsfeer gedeel word, reflekteer 'n belangrike gebied van samewerking maar spesifieke bepalings gee ook leiding oor hoe konflik hanteer moet word. Op grond van hierdie samewerkende verhouding is die nasionale regeringsfeer verplig om die provinsies by te staan en te ondersteun om bevoegde, effektiewe en volwaardige deelgenote van samewerkende regering te word. Nietemin frustrer politieke en ander faktore die stelsel en veroorsaak dat tradisionele gesentraliseerde tendense weer gevestig raak.

Samewerkende regering verskaf 'n basis vir subsidiariteit: dit is 'n voorstander van sterk provinsiale onderwysregering wat 'n balans in die magsdeling in onderwys wil bewerkstellig en onderwys aan bevoegde en bekwame provinsies en hulle mense toevertrou. Hierdie proses is egter nie 'n intuïtiewe proses nie maar een wat voortdurende en intensiewe opleiding en ondersteuning verg.

1 INTRODUCTION

Education is vitally important for meaningful human existence: it enables individuals to develop whole and mature personalities and empowers them to fulfil roles that are self-enriching and beneficial to society. Education is characterised by a number of activities, but in essence it fulfils both a socialisation and qualification (accreditation) function: it provides access to culture and exposure to different cultures in a particular society, and provides access to knowledge, skills

1 Inaugural lecture presented at the University of South Africa on 2001-09-06. My thanks to colleagues who have commented on previous drafts, including Rassie Malherbe, Gretchen Carpenter, Henk Botha and Dawid van Wyk.

and the acquisition of a qualification in preparation for employment.² Education is without any doubt an integral part of the socio-economic, cultural and political character of the community it serves.

Although education is principally a national concern, its national and regional boundaries have been transcended to provide universal rules and standards that are essential for the advancement of education and training worldwide. Various international agreements have flown from this and South Africa is a party to a number of these and has incurred specific obligations in this regard.³ The South African education system functions within the overarching context of the South African Constitution⁴ which provides for matters such as a fundamental right to education,⁵ the establishment and organisation of structures and institutions⁶ and the distribution of their functions.⁷ To this end, the Constitution determines that government in the Republic consists of the national, provincial and local spheres

2 Akkermans "Education and international conventions" in De Groof (ed) *Subsidiarity and education – aspects of comparative educational law* (1994) 69; Bray "Law, education and the learner" in Davel (ed) *Introduction to child law in South Africa* (2000) 267–268; Malherbe and Beckmann "Introduction: Education, law and education law" (unpublished paper 2001) 1–3.

3 Eg the Universal Declaration of Human Rights (1948) provides a right to education that is aimed at understanding, tolerance and friendship among nations, racial or religious groups (a 26); the Convention Against Discrimination in Education (1960) aims at combating discrimination in the admission of learners/students, defines the role of governments in education and also the rights of parents and minorities in this regard; the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) reads: "No person shall be denied the right to education" (a 2). The African (Banjul) Charter on Human and Peoples' Rights (1981) provides that every individual has a right to education, may freely take part in the cultural life of his community and also places duties on the state in respect of education (a 17).

4 The Constitution of the Republic of South Africa Act 108 of 1996. Before the Constitution could come into operation, the Constitutional Court had to certify that it complied with the Constitutional Principles contained in Sch 4 of the interim Constitution: *In re: Certification of the Constitution of the RSA, 1996* 1996 10 BCLR 1253 (CC) – hereafter the *First Certification* case – the Constitutional Court held that the constitutional text did not comply in all respects with the constitutional principles set out in Sch 4 of the interim Constitution. The text was resubmitted on 4 December 1996 and finally certified in *Certification of the Amended Text of the Constitution of the RSA, 1996* 1997 1 BCLR 1(CC) – hereafter the *Second Certification* case. See also Currie, De Waal *et al The new constitutional and administrative law* (2001) (Vol 1: *Constitutional law*) 66–71.

5 S 29 of the Bill of Rights: every person has the right to education; it is a complex right with specific internal qualifiers (eg the right to basic education, including adult basic education; and to further education, which the state through reasonable measures, must make progressively available and accessible); it does not apply absolutely and may be limited in terms of the general limitation provision (s 36). See De Waal, Currie and Erasmus *The Bill of Rights handbook* (1998) 112–129 365–369; Malherbe "The Education Clause in the South African Bill of Rights: Background and contents" in De Groof and Malherbe (eds) *Human rights in South African education* (1997) 53–67; Liebenberg "Education" in Cachalia and Cheadle (eds) *Fundamental rights in the new Constitution* (1994) 296.

6 Eg a national minister of education (ss 91 and 92) and a member of the executive council (MEC) for education in the province (ss 125 and 132); the establishment of independent (private) educational institutions (s 29(3)).

7 Eg "education at all levels excluding tertiary education" is a concurrent functional area (s 104(1) read with Sch 4); all spheres of government must observe and adhere to the principles of co-operative government (s 40(2)).

of government which have to co-operate in governing the country. Particular spheres of government share powers and responsibilities over specific functional areas. Education (excluding tertiary education) has been designated as a "concurrent" functional area, for which both the national and provincial governments are responsible. This means that government bodies responsible for education (eg the national and provincial departments of education) must comply with certain constitutional principles of co-operative government when they exercise their authority over education as a concurrent functional area. The local sphere of government is not directly vested with any education functions, although nothing prevents the national or provincial sphere to assign such functions to local government.

The focus of this article is on the principles of co-operative government in chapter 3 of the Constitution; and how the spheres of government and organs of state responsible for education must co-operate when they exercise concurrent powers and responsibilities in respect of education. "Concurrent" in this sense means powers and responsibilities that exist alongside each other; "education" refers to education provided in bands 1 to 4 on the National Qualification Framework (NQF) – including further education and training to the equivalent of grade 12.⁸ Tertiary (or higher) education is excluded from the concurrent domain, as it is an exclusive competence of the national government.⁹

From the outset it must be acknowledged that co-operative government is a difficult concept, and proves to be even more difficult to apply in government practice. Although it is enshrined in the Constitution as the kingpin of inter-governmental relations, and has been given effect to in different laws, co-operative government is not working properly, or is not working at all according to a number of constitutional and political critics. There are many reasons for its poor performance: for example, the most obvious and general one is that people (including those in power) are used to doing things independently and without the interference (and frustration) of working together with others or in teams; another reason is that government in South Africa has traditionally been centralised in a unitary system with distinct and rigid hierarchical lines reflecting "top-down" power. This has left little room for co-operation between levels of government and for public participation in government. Lastly, "law" with its supporting enforcement mechanisms (esp the courts of law) traditionally and inherently sets boundaries and sets parties up against each other. Co-operative government, on the other hand, requires problems and disputes to be handled in a different manner. This creates a degree of tension with most organs of government intuitively resorting to law rather than co-operation. This unsatisfactory situation and the unhealthy state of co-operative government affects us all and compels a re-examination of what the Constitution determines in this respect.

8 Included are: the Early Childhood Development level (ECD) which encompasses programmes for children from birth to the age of 9; the General Education and Training (GET) level which constitutes band 1 on the National Qualifications Framework (NQF) and represents 9 years of compulsory school attendance, usually from age 7 to 15; and the Further Education and Training (FET) level which consists of various learning and training programmes and constitutes band 2 to 4 on the NQF, including the schooling programme from gr 10–12.

9 The Higher Education and Training (HET) level represents bands 5 to 8 on the NQF and includes all learning programmes which lead to qualifications higher than gr 12. See eg the Higher Education Act 101 of 1997.

2 THE CONSTITUTIONAL CONCEPT OF CO-OPERATIVE GOVERNMENT

2.1 Constitutional background

The Constitution is the supreme law of the Republic.¹⁰ It entrenches constitutional democracy,¹¹ enshrines democratic values and norms such as human dignity, equality and freedom,¹² and incorporates a justiciable Bill of Rights (ch 2) which entrenches political, socio-economic and peoples' (solidarity) rights which the state must respect, protect, promote and fulfil.¹³ The Constitution was adopted in a spirit of co-operation and reconciliation; it strives to heal the divisions of the past and create a society based on democratic values to improve the quality of life of all citizens, free the potential of all people and build a united and democratic South Africa able to take its rightful place as a sovereign state in the international realm.¹⁴ Apart from co-operative government,¹⁵ which forms the mainstay of this article, other features of particular relevance here include the following:

- A public administration (ch 10) which applies to the different spheres of government and organs of state (eg the administration in the national and provincial education departments). The public administration must be governed in accordance with democratic values and principles enshrined in the Constitution.¹⁶
- A judiciary which consists of a system of courts responsible for the administration of justice. The courts are the watchdogs of democracy and have to

10 The Constitution abolished the previous system of parliamentary sovereignty and determines that all government bodies, including Parliament, are subject to the supreme Constitution. S 2 reads: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." See also Wiechers *Staatsreg* (1981) 22; Corder "Towards a South African constitution" 1994 *MLR* 491-533; Rautenbach and Malherbe *Constitutional law* (1999) 16-20.

11 Eg on constitutional transition see: Du Plessis and Corder *Understanding South Africa's transitional Bill of Rights* (1994); Corder (1994) 491-533; Van Wyk *et al* (eds) *Rights and constitutionalism: The new South African legal order* (1994); Carpenter "The Republic of South Africa Constitution Act 200 of 1993 - an overview" 1994 *SAPR/PL* 222-232; Venter "Milestones in the evolution of the new South African Constitution and some of its salient features" 1994 *SAPR/PL* 211-221; De Villiers (ed) *Birth of a constitution* (1994).

12 Eg the Preamble, s 1 and the Bill of Rights (ch 2). Also Botha "The values and principles underlying the 1993 Constitution" 1994 *SAPR/PL* 233-244.

13 Human rights important to education governance include: education (s 29); children's rights (s 28); equality (s 9); human dignity (s 10); freedom and security of the person (s 12); privacy (s 14); freedom of religion, belief and opinion (s 15); freedom of expression (s 16); just administrative action (s 33) and the limitation clause (s 36). For a discussion of these rights see eg: De Waal, Currie *et al* (1998); Currie and De Waal (2001) 345-418; Chaskalson, Kentridge, Klaaren *et al Constitutional law of South Africa* (1996) 14-1-41-55; Devenish *A commentary on the South African Bill of Rights* (1999).

14 Rautenbach and Malherbe *What does the Constitution say?* (1998) 1-5.

15 Ss 40 and 41.

16 Ch 10 provides that the administration in every sphere of government and of organs of state and public enterprises must be democratic, transparent, development-oriented and accountable: Burns *Administrative law under the 1996 Constitution* (1998) 68-69. See also Davies *Administration of the education system and school governance* (1999) 14-15.

maintain and promote the spirit and purport of the Bill of Rights.¹⁷ Of special importance is the Constitutional Court which is competent to resolve disputes between organs of state in the national or provincial spheres of government and to decide on the constitutionality of national and provincial bills.¹⁸

2.2 The nature/scope of co-operative government

Chapter 3 of the Constitution deals with co-operative government and inter-governmental relations. It is a new feature and has been hailed by the Constitutional Court as the “new philosophy” of the South African constitutional model.¹⁹ It describes the character of the three spheres of government, provides principles for co-operation in intergovernmental relations and determines ways and means to resolve uncertainties and possible conflict amongst the spheres of government.²⁰

Section 40 provides that government in the Republic is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. This means that the relationship among the spheres of government should be one of close co-operation within a larger framework that recognises the distinctiveness of every sphere as well as the interrelatedness and interdependence of them all. For example, the national government functions on a nationwide basis, whereas provincial and local government functions within their respective demarcated regions or areas.²¹ Section 41 contains principles for co-operative government and intergovernmental relations and stipulates that these principles must be observed and adhered to by all spheres of government and all organs of state within any sphere in the performance of their functions. They include the following:

- to preserve the peace, national unity and indivisibility of the Republic;
- to secure the well-being of the people of the Republic;
- to provide effective, transparent, accountable and coherent government for the Republic as a whole;²²

17 Eg s 8 provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. When interpreting any legislation, and developing the common law or customary law, courts must promote the spirit, purport and objects of the Bill of Rights (s 39(2)). See also Malherbe “A constitutional perspective on higher education” 1999 *Stell LR* 328–353.

18 See s 167(4) – the court’s role in resolving intergovernmental disputes in the concurrent functional area of education, eg.

19 See the Constitutional Court in the *First Certification* case para 469; see also *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 BCLR 1 (CC) para 40.

20 The concept and principles of co-operative government derives mainly from German constitutional law and the German constitutional court developed the principle of *Bundestreue* (federal comity): Blair *Federalism and judicial review in West Germany* (1980); Karpen (ed) *The constitution of the Federal Republic of Germany* (1988).

21 Eg the geographical division in the regional (provincial) sphere affords the inhabitants of provinces more autonomy (self-governance), counters the concentration of powers in the national sphere, brings decision-making closer to the people and facilitates more effective exercise of government authority: Rautenbach and Malherbe (1999) 95–100.

22 Eg the National Education Policy Act 27 of 1996 provides for the determination of national education policy in accordance with the provisions of the Constitution (s 3); consultation prior to the determination of policy (s 2); co-operation among education departments (ss 3 and 4); and intergovernmental liaison and consultation (ss 6 and 11).

- to be loyal to the Constitution and not to assume any power or function not conferred on them by the Constitution;
- to respect the constitutional status, institutions, powers and functions of government in the other spheres;²³
- to exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;²⁴ and
- to co-operate with one another in mutual trust and in good faith and to avoid legal proceedings against one another.²⁵

It is apparent that co-operative relations among the spheres of government are characterised by consultation, co-ordination and mutual support.²⁶ In *The National Education Policy Bill* case, which dealt with education as a “concurrent” functional area in the interim Constitution, the Constitutional Court explained this by stating: “Where two legislatures have concurrent powers to make laws in respect of the same functional area, the only reasonable way in which these powers can be implemented is through co-operation.”²⁷ While numerous informal structures have already been established for co-operation on a bi- and multilateral basis,²⁸ national legislation must still be adopted to regulate this matter comprehensively.²⁹

The Constitution compels organs of state to make every reasonable effort to use appropriate mechanisms and procedures to resolve their intergovernmental disputes and to exhaust all other remedies before they turn to the court to resolve

23 The principles do not diminish the power of one organ of state at the expense of another but rather impose obligations on all organs, and power given to an organ of state for a specific purpose (eg education) may not be used for another purpose: *In re: The National Education Policy Bill No 83 of 1995* 1996 4 BCLR 518 (CC) – hereafter *The National Education Policy Bill* case – the Constitutional Court held that such conduct would be regarded as an abuse of power (para 33).

24 In *Premier of the Province of the Western Cape v President of RSA* 1999 4 BCLR 382 (CC) – hereafter *Premier of the Province of the Western Cape* case – the court held that the purpose of ch 3 is, amongst others, to prevent one sphere using its powers in ways which would undermine other spheres of government and prevent them from functioning effectively. However, it added that the functional and institutional integrity of each sphere must be determined with due regard to its place in the constitutional order, particularly in the light of its powers and functions in that order (para 58).

25 Eg in *Premier of the Province of the Western Cape* case the court held that administrative and political matters in intergovernmental relations lend themselves to good faith negotiations (para 56 fn 76).

26 Eg see also the role of the National Council of Provinces in this regard (s 146).

27 Paras 27 and 34. The court then held that the provision in the Education Policy Bill which made provision for consultation and co-operation was “wholly consistent” with the interim Constitution.

28 Eg the National Education Policy Act makes provision for the Committee of Education Ministers (CEM) which consists of the Minister of Education (chairperson), the Deputy Minister of Education, the nine provincial MECs responsible for education as well as their respective advisors (s 9); the Heads of Education Departments Committee (HEDCOM) is chaired by the Director-General of Education and consists of Deputy Directors-General of the national department as well as the nine provincial heads of education departments (s 10). See also Davies (1999) 25–32.

29 S 41(2) which includes the establishment of structures and institutions to promote and facilitate intergovernmental relations and provide appropriate mechanisms and procedures for the settlement of intergovernmental disputes.

the dispute.³⁰ In both the *First Certification* case³¹ and *Premier of the Province of the Western Cape* case³² the Constitutional Court acknowledged its constitutional obligation in this regard³³ but emphasised that intergovernmental administrative and political matters lend themselves to negotiations in good faith and should be resolved at a political level rather than by adversarial litigation. In enforcing its constitutional duty, the court may, if it is not satisfied that all reasonable intergovernmental remedies have been exhausted, refer the dispute back to the organs of state.³⁴ The Constitutional Court therefore has an important constitutional duty (as watchdog over the Constitution and other branches of government) actively to promote the culture of co-operative government and compel organs of state to adhere to the prescriptions for co-operative government.³⁵

The Constitution imposes obligations on all spheres of government and organs of state to work together and shape their attitudes to fit the new model of co-operative government and provides the principles of co-operative government as a definite framework within which all intergovernmental relations must be conducted.³⁶ The concurrent area of education is one of the vital areas in which co-operation as required by the Constitution has to take place.

In summary, modern states, such as South Africa, are dynamic entities and their internal power relationships complex. They use various methods to distribute authority between spheres (or levels) of government³⁷ and it is often difficult to categorise a system of government in terms of a constitution alone. What is more important is to understand how the allocation of legislative and executive responsibilities between spheres of government is effected and co-ordinated (particularly where responsibilities are shared), what co-operative government means, what provision is made for maintaining good intergovernmental relations and how possible conflict between spheres of government, especially in areas of shared responsibilities, is resolved.³⁸

3 CO-OPERATIVE GOVERNMENT AND THE SHARING OF CONCURRENT POWERS IN EDUCATION

3.1 Introduction

The co-operative relationship in education must be contextualised within the broader public service and within the general education and training sector of the public service. In this sector the national and provincial education departments

30 S 41(3).

31 Para 291.

32 Para 56 fn 76.

33 S 41(3) read with s 167(4)(a) and (b).

34 S 41(4).

35 See Van Wyk "Subsidiarity – in South Africa?" in *Constitution and the law III* (1999) 55–56.

36 Malherbe "The South African National Council of Provinces: Trojan horse or white elephant?" 1998 *TSAR* 77–85; Malherbe "The South African Constitution" 2000 (55) *Zeitschrift für öffentliches Recht* 61 72–73.

37 Eg in the United States, the powers of the federal government are defined in the US Constitution and the remainder of powers (not mentioned in the Constitution) vests in the states (a I(8)); in the case of Canada, the opposite method of distribution of authority has been used (ss 91–94 of the Canadian Constitution).

38 Currie and De Waal (2001) 122–124.

administer public education and are obliged to comply with the democratic principles and norms of the Constitution, especially those in chapter 10. Education authorities must, for example, promote and maintain a high standard of professional ethics in the administration of public education, promote efficient economic and effective use of education resources, respond to people's needs and encourage their participation in education policy-making, be development-oriented and seek to redress the imbalances of the past to achieve broad representation in the public education sector.³⁹ Education authorities must also be accountable and must foster transparency by providing the public with timely, accessible and accurate information regarding the administration of education.

3 2 Concurrent legislative competences of the national and provincial legislatures in education

3 2 1 General

The Constitution determines that the legislative authority of the Republic is vested in the legislative bodies of the three spheres of government. Parliament functions in the national sphere and consists of the National Assembly and the National Council of Provinces,⁴⁰ commonly referred to as the second house of Parliament and formally representing the provinces on issues which affect them (eg national bills and legislation affecting school education in the provinces).⁴¹ Although Parliament has the widest legislative authority in the state, it remains subject to the Constitution and has to act within its constitutional limits.⁴² In the provincial sphere of government, each of the nine provinces has its own provincial legislature which also derives its authority to make law from the Constitution.⁴³ Provincial legislatures function for all intents and purposes like the national legislature.⁴⁴

3 2 2 Concurrent competences

The constitutional distribution of legislative authority affects education directly. The national and provincial legislatures are vested with concurrent legislative competences in the functional area of education; however, the term "functional area" does not refer to specific matters in education but to "education at all levels, excluding tertiary education". This implies that the national and provincial spheres share legislative competences and have to co-operate when they envisage adopting legislation on school education, for example.⁴⁵ To share powers does not entitle Parliament to exclude the provincial legislatures from enacting legislation on school education, and neither does Parliament have a veto over the

39 S 195(1).

40 S 44.

41 Eg ss 67 73 74 146. The National Council of Provinces consists eg of 90 indirectly elected members, 10 per province. See also Malherbe "A fresh start II: Issues and challenges of education law in South Africa" 2000 (9) *European J for Education L and Policy* 57 64-65.

42 S 44.

43 Ss 40(1) and 103(1).

44 Eg it may pass a constitution for the province, pass legislation within a functional area listed in Schs 4 and 5; and may pass legislation on any matter outside those functional areas and assigned to it by national legislation (s 104(1)).

45 See *The National Education Policy Bill* case para 34; *First Certification* case para 290; *Premier of the Province of the Western Cape* case paras 54-55.

provinces in this regard.⁴⁶ If Parliament adopts legislation on school education (eg the South African Schools Act of 1996) it cannot exclude or stop the provincial legislatures from adopting their own provincial laws on school education.⁴⁷ The sharing of powers also does not take away the provincial legislature's initiative to enact on its own legislation that is necessary for the effective exercise of school education in its province (eg the names of schools, syllabuses, assessment, discipline or powers of public school governing bodies).⁴⁸ The fact that neither the national nor the provincial legislature exercises complete legislative authority over concurrent matters implies that if a province does not make laws to provide for school education in its province, Parliament may step in and adopt such laws – for example, in a case where a province does not or cannot exercise all its legislative powers on school education. The fact that some provinces may then exercise more legislative competences than others could affect provincial autonomy and implies that an asymmetrical relationship may develop between the national and provincial spheres of government, resulting in some provinces having more autonomy than others.⁴⁹ The important practical effect of sharing concurrent legislative powers is that provincial and national legislation on school education can (and should) exist alongside each other.

The Constitution explains how national bills which may affect provincial affairs (eg bills on school education) must be dealt with during the national legislative process. In practice an extensive system of intergovernmental liaison mechanisms and procedures has been developed to facilitate consultation and co-operation before these bills are introduced in Parliament – for example, a committee consisting of the national Minister of Education and the nine provincial MECs (MINMEC) must agree and take a consensus decision on such a bill.⁵⁰ During the parliamentary process the National Council of Provinces plays a decisive role where, for example, the national school bill encroaches upon the concurrent powers of the provinces. If, after the correct procedures have been followed,⁵¹ the National

46 Eg if a province wants to take the initiative on school education (eg on assessment and discipline in provincial schools) and the national government disagrees, the province must still be able to go ahead with it.

47 All the provinces have promulgated their own school laws, eg Gauteng School Education Act of 1995, Northern Province School Education Act 9 of 1995, Western Cape School Education Law 10 of 1994.

48 S 104(4) provides that the provincial legislature may pass provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Sch 4; such legislation is for all purposes legislation with regard to a matter listed in that Schedule.

49 The notion of asymmetry illustrates that differences among provinces or regions with regard to factors such as size, population figures, resources and financial and administrative capacity should be reflected in their powers or the extent of their autonomy within the country. However, in most states (excluding eg Canada, Malaysia and Spain) regions are formally regarded as equal and they have the same powers: Mullins and Saunders "Different strokes for different folks?: Some thoughts on symmetry and difference in federal systems" in De Villiers (ed) *Evaluating federal systems* (1994) 41 *et seq*; Boase "Faces of asymmetry: German and Canadian federalism" *idem* 90 *et seq*; also Rautenbach and Malherbe (1999) 276–277.

50 Malherbe (2000) 65.

51 Before the bill goes to the National Council of Provinces, it must be referred to the provincial legislatures for consideration to enable them to confer mandates on their delegates on how to vote on such a bill in the National Council. The bill is then referred to the

Council still rejects the bill (or an amended version of it) and the National Assembly is unable to support it with a supporting vote of at least two-thirds majority of its members, the bill lapses. The President may also refer a bill that affects provincial school education back to Parliament if he has reservations about its constitutionality and may in the final instance refer it to the Constitutional Court for a decision on its constitutionality.⁵² If the Constitutional Court decides that the bill is constitutional, the President is obliged to assent to and sign it.⁵³

3 2 3 Conflict

When spheres of government share powers, the possibility of conflict arises. In section 146, the Constitution makes special provision on how to deal with irreconcilable conflict between national and provincial legislation on concurrent matters. It stipulates that national legislation on a concurrent power (eg a school education law) that applies uniformly to the country as a whole, prevails over conflicting provincial legislation if such a national law:⁵⁴

- (a) deals with a matter that cannot be regulated effectively by provincial legislation;
- (b) deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides such uniformity by means of establishing norms, standards, frameworks or national policies; or
- (c) is necessary for the maintenance of national security and economic unity, the protection of the environment, the common market in respect of the mobility of goods, services, capital and labour, the promotion of economic activities across provincial boundaries and equal opportunity or equal access to government services.

National legislation will also prevail over provincial legislation if the national law is aimed at preventing unreasonable action by a province that is prejudicial to the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policy.⁵⁵ When a dispute arises about whether national legislation is necessary for the purpose set

National Council which has the power to pass the bill, pass an amended bill or reject the bill. If eg the National Council rejects the bill, such a bill must be referred to the Mediation Committee. If the Mediation Committee agrees on the bill or agrees on another version of it, such a bill must be sent back to the National Assembly and the National Council for approval (s 76(1)).

52 In terms of the powers of the Constitutional Court in s 167(4) and (5).

53 S 76 read with s 79. In *The National Education Policy Bill* case certain provisions of the National Education Bill came under scrutiny because they allegedly encroached upon the legislative competence (s 126 read with Sch 6) and the executive authority (s 144) of the provinces in terms of the interim Constitution. The Constitutional Court held that the bill was not unconstitutional and did not encroach on provincial powers and the President had to sign it. See Dufresne, Prinsloo and Visser "National Education Policy Bill deemed Constitutional" 1999 *Education and Law J* 291–297.

54 In the interim Constitution this provision determined that a provincial law would prevail unless the national law complied with the stated criteria (now national legislation prevails if it complies with the conditions). There is no difference between the two phrases and the burden of proof remains on the party that alleges that national legislation must prevail to establish that such legislation complies with the criteria in s 146(2). Rautenbach and Malherbe (1999) 278–279.

55 S 146(3) – it is doubtful whether education legislation would fall under this category.

out in (c) above,⁵⁶ and such a dispute comes before the Constitutional Court for resolution, the court will take notice of the approval or rejection of the legislation by the National Council of Provinces.⁵⁷

Section 146 does not impose conditions on Parliament and provincial legislatures in the exercise of their concurrent legislative authority, nor does it limit their legislative authority.⁵⁸ In this respect it is clearly stated that a decision by the court that one law prevails over the other does not invalidate the other law, but that such a law will be inoperative for the duration of the conflict.⁵⁹ It also provides that the court must prefer any reasonable interpretation of the legislation that avoids a conflict over any alternative interpretation that results in a conflict,⁶⁰ and if the court cannot resolve the conflict, the national law prevails over the provincial law.⁶¹ One may therefore contend that national legislation does not prevail automatically over a conflicting provincial law, but that the onus will always rest on the national government to prove that its national legislation complies with one of the conditions listed in section 146, otherwise the provincial law will prevail.⁶²

3 2 4 Summary

The overall objective of section 146 is to give effect to the principles of co-operative government, specifically by providing a platform for promoting among the spheres of government mutual respect for each other's constitutional status and powers, and trust and good faith in their intergovernmental relations. It also provides the assurance that appropriate procedures and mechanisms in the form of internal (governmental) and judicial "checks and balances" are available for dealing with uncertainties and conflict.⁶³ The Constitutional Court remains the final arbiter in the case of conflict, and has honoured its constitutional obligations by stressing in the *First Certification* case⁶⁴ that where conflict arises between national and provincial legislation on concurrent matters, both a subjective and an

56 S 146(2)(c).

57 It is often difficult for the court to determine when legislation is "necessary". The German and American courts have resolved that this matter should rather be dealt with through political structures than the judicial process: Rautenbach and Malherbe (1999) 279–280. The burden on South African courts has been alleviated in this regard by the inclusion of s 146(4) which provides that in a dispute over the question whether national legislation is necessary, the court must have due regard to the approval or rejection of the legislation by the National Council of Provinces.

58 Although s 146 refers to "legislation" which implies subordinate legislation, it is undesirable that a regulation or proclamation should prevail over laws adopted by an elected legislature. To avoid this result, s 146(6) provides that subordinate legislation will prevail only if it has been approved by the National Council of Provinces in accordance with specified procedures.

59 S 149. This approach was first applied in the case of the interim Constitution in *The National Education Policy Bill* case paras 16–20; see also *Papachristoforou v MEC for Finance and Economic Affairs North West Province* 1998 10 BCLR 1237 (CC) 1246F–1247D and Currie and De Waal (2001) 222.

60 S 150.

61 Including the provincial constitution (s 148).

62 S 146(5).

63 Referred to in both the *First Certification* case (para 337) and *Premier of the Province of the Western Cape* case (eg para 54).

64 Paras 337 and 480.

objective test should be applied to determine whether national legislation on a concurrent matter that applies uniformly in the country prevails over provincial legislation on the same matter. The court held that it is necessary to consider the substance or essence of the legislation (which also depends on its purpose and effect) to determine whether it falls within a particular functional area and whether it is in conflict with another law.⁶⁵ In this regard it was subsequently found that a law which is incidental to (relates to) a particular functional area is deemed to deal with that functional area.⁶⁶

3 3 Executive authority over education as a concurrent area

3 3 1 General

The Constitution states that the executive authority in the national sphere of government vests in the President who, as head of the Cabinet, exercises the national executive authority together with the other members of the Cabinet.⁶⁷ The President also assigns executive authority to the ministers to enable them to exercise their powers and perform their functions; they, in return, are responsible to the President for the exercise of their duties and may be dismissed by him if they fail in their duties.⁶⁸ All executive organs of state in the national sphere of government (eg the Department of Education) are accountable to the National Assembly, but members of the Cabinet (eg the Minister of Education) are accountable individually and collectively to Parliament.⁶⁹

Generally speaking, the provisions of the Constitution applicable to provincial executive authorities correspond in principle to those of the national executive authority.⁷⁰ A provincial executive must act in accordance with the Constitution and its provincial constitution⁷¹ and a minister may also assign any power or function to be exercised in terms of an Act of Parliament to the MEC of a province.⁷² Executive powers of provincial authorities include: to initiate, prepare and implement legislation on concurrent matters (eg provincial school legislation), develop and implement school policy and co-ordinate functions of provincial education departments and their administrations.

65 See eg *Ex parte Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2000 4 BCLR 347 (CC) paras 36 *et seq* – hereafter *DVB Behuising* case; the *Liquor Bill* case paras 63–68; *In Re: KwaZulu-Natal Amakhosi and Iziphahkanyiswa Amendment Bill of 1995; In Re: Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill 1995* 1996 7 BCLR 903 (CC) para 19.

66 *Liquor Bill* case paras 63–68.

67 Ss 85(1) and (2) and 91(1). The President is the head of state and must uphold, defend and respect the Constitution as the supreme law of the Republic (s 84).

68 Ss 91 and 92. The President does not have the authority to determine how these powers should be exercised; that is determined by the Constitution and other relevant legal principles.

69 S 92. In principle, the President and the other members of the Cabinet are individually responsible to Parliament for powers exercised individually (eg the Minister of Education in terms of ordinary education legislation – national norms and standards for school education), and collectively for powers exercised collectively (eg for national education policy which needs the approval of the Cabinet). See in general Currie and De Waal (2001) 245–257.

70 Ch 5 on national executive authority and ss 125–141 on the provincial executive.

71 If such a provincial constitution has been passed (s 125(6)).

72 S 99 read with ss 100 and 125.

3 3 2 Concurrent powers and executive capacity

National legislation within the concurrent functional area of education and which has been transferred to the provinces and administered by them, becomes provincial legislation and may be amended or repealed by a provincial legislature unless certain conditions prevail.⁷³ If the President refuses such a transfer, the province may adopt its own provincial school law to be executed by its provincial executive authority, as mentioned above. However, the provinces do not automatically enjoy full executive authority over a concurrent functional area and will, for example, have executive authority over a national school-education law only to the extent that it has the administrative capacity to assume effective responsibility for it. The Northern Province, for example, must have the executive capacity to administer the South African Schools Act in its province but if it lacks the required capacity, an obligation is placed on the national government to assist the province by way of legislation and other measures to develop the necessary administrative capacity for the effective exercise of its powers.⁷⁴ For a province to govern its provincial school affairs effectively, it is entitled to an equitable share of the national revenue, and in determining that share, it must ensure that the province is able to provide the services and perform the functions allocated to it.⁷⁵ Any dispute regarding the administrative capacity of a province must be referred to the National Council of Provinces for resolution.⁷⁶

3 3 3 Intervention

Under certain narrowly defined circumstances, the national government may intervene in provincial affairs. Section 100 states that the national executive exercises supervision over provincial administrations and may intervene to ensure proper fulfilment by the provinces of their executive obligations in terms of legislation and the Constitution.⁷⁷ The National Council of Provinces must be notified of such an intervention and must approve, review or terminate it.⁷⁸

73 Eg where s 146 applies in the case of conflict between national and provincial legislation. See also the transitional provisions of the Constitution item 14, Sch 6; *DVB Behuising* case paras 16 20–21.

74 S 125(3). This provision aims to prevent the so-called unfunded mandate problem where a function is allocated to a particular authority without the funds or administrative capacity to perform that function effectively; Malherbe (2000) 64.

75 Ss 214(2)(d) and 227(1)(a). There is strict treasury control over finance and all governments must follow recognised accounting practices and adhere to uniform expenditure classifications and uniform treasury norms and standards. The Treasury may stop funds to any government on account of serious or persistent material breach of the treasury directives. See also s 100 below.

76 S 125(4); such a dispute may in the final instance be resolved by the court.

77 Steps taken by the national executive in terms of s 100 include: (a) issuing a directive to the provincial executive in which the extent of the failure and the steps required to meet the obligations are set out and (b) assuming responsibility for the relevant obligation to the extent that it is necessary for meeting and maintaining minimum standards for rendering the service; maintaining economic unity and national security; or preventing the province from taking unreasonable action that is prejudicial to the interest of another province or the country as a whole.

78 S 100(2). The intervention by the national executive must end unless it is approved by the National Council of Provinces within 30 days. During that time the National Council must review the matter and may make appropriate recommendations to the national executive. National legislation may further regulate the process of intervention (s 100(3)).

Intervention by the national government in provincial affairs remains rather contentious and should be used only in exceptional circumstances. In the *First Certification* case the court held that the national government's power of intervention is subject to the principles of co-operative government, emphasising that consultation and co-operation with the province must take place to assist and enable it to fulfil its executive duties and prevent such an intervention.⁷⁹

3 3 4 Summary

The provinces are not merely "delivery agents" of the national government and must be respected by it. The Constitution established the provincial government as a distinctive and autonomous sphere of government which is vested with specific legislative and executive authority. Strong provincial government is a critical factor in provincial economic growth and effective provision (delivery) of education.

4 CONCLUSION AND CHALLENGES FACING EDUCATION GOVERNMENT

Co-operative government envisages co-operation, co-ordination and support among the spheres of government to promote and maintain effective government. It binds together the spheres of government and forces them to work together in interrelated and interdependent relationships, showing mutual respect for each other's distinctive character. Co-operative government does not allow the national sphere of government to expand its powers and authority at the expense of the provinces, nor does it allow the national government to undermine the provincial governments, or one sphere to dominate any other. In fact, within the context of the Constitution and its principles of co-operative government, in deciding where authority vests and who should act, the bias should be in favour of empowering and supporting the sphere of government or organ of state closest to the people.⁸⁰ Co-operative government further endeavours to strike a balance between "self rule" and "shared rule",⁸¹ implying that the spheres act together in solidarity as the government of the Republic and with the knowledge that if one sphere succeeds, they all succeed, but if one fails, all of them fail.

Co-operative government takes place in various ways and across the entire spectrum of government authority. Its application is not limited to concurrent functional areas, although the sharing of concurrent powers and responsibilities between spheres of government in education offers one of the best examples to illustrate the workings of co-operative government. From the discussion of the constitutional principles of co-operative government, it has transpired that in the concurrent functional area of education:

79 Paras 254–257 262–266. The power of the national government to intervene in provincial affairs must be interpreted restrictively: it serves a limited purpose, enabling the national government to take appropriate executive action only in certain circumstances where the provincial government is unable or unwilling to do so itself. See Currie and De Waal (2001) 260–261.

80 Eg the Constitutional Court has left room for the development of such a "culture" in *The Executive Council of the Province of the Western Cape v The Minister for Provincial Affairs and Constitutional Development* 1999 12 BCLR 1360 (CC).

81 Van Wyk "Subsidiariteit as waarde wat die oop en demokratiese Suid-Afrikaanse gemeenskap ten grondslag lê" in Carpenter (ed) *Suprema lex: Essays on the Constitution presented to Marinus Wiechers* (1998) 251.

- national government participates on a limited basis in decision-making in provincial government;
- national government is obliged to assist provincial government;
- national government may delegate powers to provincial government to facilitate co-operation;
- under certain narrowly defined circumstances, national government may intervene in provincial government affairs; and that
- the Constitutional Court has a determinant role to play in overseeing and enforcing co-operative government and cultivating a culture of co-operative government.

What are the challenges facing education government?

- The principles of co-operative government must be applied correctly.

Provinces must not feel powerless in their intergovernmental relations with the national government and must ensure that they are not bulldozed in their negotiations with the national education government.⁸² The validity or constitutionality of the national government's views and proposals must be examined and it must be determined if, or to what extent, these are within its powers.

- Constitutionally, the provinces enjoy a certain degree of autonomy which must be used and exploited, where appropriate.

The provinces must take the initiative in the area of school education, for example, and use the space that the Constitutional Court has created to develop the content and scope of education as a functional area in terms of Schedule 4.⁸³ They must be given the opportunity to accept and develop their education responsibilities and given room to exercise more powers in education in line with their capacities.⁸⁴

- A province must use and promote its distinctiveness to develop its autonomy.

Provincial distinctiveness lies, for example, in a province's special characteristics, its assets and people, an own provincial constitution and unique constitutional structures. The nature and degree of provincial autonomy is determined by the Constitution and the provinces must ensure that this is respected and developed accordingly. In this regard the national government must be articleled on matters which could

82 In practice, legislative initiatives are mainly taken by the national government and MINMEC becomes a body where provincial executives are informed of national initiatives and brought into line. Owing to their lack of capacity, the provinces are unable to hold their own against centralist tendencies on the part of the national government: Malherbe (2000) 65.

83 The Constitutional Court is the final arbiter in co-operative government disputes and has over the last few years provided valuable workable guidelines for the development of the education system. However, as a watchdog of the Constitution, it has an important task actively to promote the culture of co-operation in education government and admonish recalcitrant governments to "toe the co-operative-government line".

84 Eg in the *First Certification* case the court reiterated that the principle of co-operative government does not invade provincial autonomy (para 292). In practice, the main challenge is to achieve a balance between national government control and provincial autonomy without compromising the overall goals of education transformation and development. The development of the intergovernmental systems is a process and individual provinces will have to find ways of articleling their specific needs within the context of co-operative government: Motala "Co-ordination or conflict? Governing education reform" 2000 (17) *Education Monitor: Indicator South Africa* 77 82-83.

affect provincial autonomy: for example, the adoption of Acts of Parliament which would give provinces more say in money bills,⁸⁵ the establishment of structures and institutions to promote and facilitate intergovernmental relations and provide appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.⁸⁶ Constitutional obligations which the national government still has to fulfil must also be articulated: for example, the adoption of legislative and other measures to assist and develop the administrative capacity of the provinces.⁸⁷ National government's delay in this regard constitutes a major stumbling block in the development of effective provincial government and frustrates the delivery of education services in the provinces.

To the extent that the above-mentioned laws and obligations create opportunities for the development of administrative capacity, the national government must be admonished – it must assist the provinces with developing education management and governance skills and capacity.⁸⁸ In a similar vein, special attention must be given to eradicate extreme disparities between the provinces and to rectify imbalances that would raise the standard of education in specific “weaker” provinces and provincial education standards, generally.⁸⁹

- Co-operative government offers many opportunities for the sharing of expertise and improving government to deliver better education services.

Modern governments face complex issues that demand greater co-operation and better co-ordination, joint planning and sharing of scarce resources. In this context co-operation means strength, not weakness. But if the provinces (and local government) are not developed and their individual capacities increased, they will not be able to take their rightful place in co-operative government relations and this could result in skewed relationships in which the traditionally

85 In terms of such an Act the taxing powers of provincial legislatures must be regulated and adopted in terms of procedures for bills affecting provinces (see s 77(2) read with s 76(4)(b)). The debate on provincial taxation continues and government remains cautious and argues that new taxes to provinces does not necessarily guarantee greater accountability and efficiency in spending (Budget Speech 2000). Nevertheless, without proper education, training and commitment of both politicians and public officials, as well as proper recruitment of the necessary expertise, there will not be the necessary financial management skills to implement new finance laws: Nevhutalu, Centre for Policy Studies, (quoted in *Development update: The voluntary sector and development in South Africa (Annual Review) 3/3 (1998) (2001) 5–16.*

86 Eg s 41(2). Eg, in terms of s 185 a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities must be established.

87 S 125(3). The Constitution determines that obligations in terms of the Constitution must be fulfilled and performed diligently and without delay (s 2 read with s 237).

88 There is a need to develop sound management capacity in provincial government to ensure co-operative governance and meaningful systemic change. Problems hampering the delivery of quality education include: a lack of capacity and skills, particularly in financial management; unclear boundaries between political and administrative authority; insufficient training for senior and middle management; and senior provincial public servants being perpetually engaged in crisis management in stead of strategic planning to build long-term and sustainable systems: Motala *Discussion paper of the Centre of Education and Policy Development Conference (1998) Wits EPU/CEPD.*

89 Van Wyk (1998) 251. The capacity gaps in the provinces are real and they operate largely as implementing agencies for national (central) government which set the direction in health, education and welfare. At best, provinces decide how best to follow: Friedman in 1999 (4) *SIYAYA!* (quoted in *Development update (2001) 14.*

stronger sphere (eg national government with its superior expertise and resources) would once again dominate government relations, and education affairs could, for example, become centralised.⁹⁰ Therefore, the Constitution requires that there must be effective provincial education departments, their education management and development officers properly trained, and equitable budget allocations made to enable them to govern their education affairs effectively. A shortage of skills, funds and infrastructure in education management in South Africa means that there will always be competition among spheres to get the best, and the danger exists that the national government will almost always win.⁹¹

Finally, developing strong and effective spheres of government and ensuring that each one fulfils its constitutionally assigned role in a system of co-operative government, may be one of the greatest challenges facing government in South Africa. Co-operative government creates a platform for subsidiarity and is compatible with the principle of subsidiarity which has received international acclaim in the Maastricht Treaty on European Union.⁹² Subsidiarity is a nuanced concept which, in a modern context, has lost many of its classical hierarchical or centralist features. In terms of this principle political decisions are devolved to the lowest practical level (eg the provinces), but not in the traditional fashion of "top-down" devolution (as if all powers originate from the top), but within the modern co-operative government context which requires co-operation, transparency, accountability, and mutual respect and trust for each sphere's constitutional status.⁹³ It is within this framework that education (esp school education) has been assigned to the respective spheres of government as a concurrent power, but

90 Political analyst and journalist Ivor Powell argued that since becoming president of the ANC, Thabo Mbeki had "systematically consolidated central authority within the party – often at the expense of the democratic process" 25 June–1 July 1999 *Mail and Guardian*. Yet minister Kader Asmal in his first report to the President entitled "Call to action: Mobilising citizens to build a South African education and training system for the 21st century" (July 1999) outlined nine priorities for the Department of Education, the first being "making provincial systems work by making co-operative government work": see *Development update* (2001) 12 130. Sadly, none of the existing education laws takes co-operative government as the point of departure for good education government.

91 Van Wyk (1998) 266–267. Most of the national education laws adopted over the last few years have come about in this fashion as a result of the lack of capacity in the provinces. Although provinces have adopted their own school education laws, the national laws form the basis and provide the overall policies for further development in education. It is in this respect that the provinces have failed adequately to defend and enforce their unique provincial needs and requirements: Malherbe (2000) 65.

92 For international ideas on the principle of subsidiarity in education see: De Groof "The scope of and distinction between art 126 and 127 of the Treaty on European Union and the implementation of the Subsidiarity Principle" in De Groof (ed) (1994) 77; Lenaerts "Subsidiarity and community competence in the field of education" *idem* 117; Füssel "Co-operative federalism in education" in De Groof, Bray, Motala and Malherbe (eds) *Power sharing in education: Dilemmas and implications for schools* (1998) 139.

93 Its application in the constitutional context of co-operative government is of particular importance: eg "tiers" or "levels" of government has been replaced by "spheres" of government; no reference is made to "caretaker government" or "subordinate administrations". In fact, subsidiarity requires friendly relations, respect for each other's constitutional status, powers and integrity and seeks to achieve effective, transparent, accountable and co-operative government in the Republic. See Swaelen "Subsidiarity as policy principle" in De Groof (ed) (1994) 423 424; Van Wyk (1998) 259 266–267 and Van Wyk "Subsidiarity – in South Africa?" in *Constitution and law III* (1999) 53.

with the instruction to and undertaking from the national government to assist the provinces and their people to develop and attain the necessary capacity to govern school education effectively and, ultimately, to enhance their autonomy and political credibility in education. Although one understands the importance of achieving "effective" government and service delivery and its priority on the political agenda, subsidiarity should not be used as a trade-off for effective government, because subsidiarity and effectiveness should complement each other in a co-operative government system. Subsidiarity could (and should) become an underlying value of an open and democratic society in order to achieve a balance in education power-sharing and place the government of school education in the hands of capable provinces and their people.⁹⁴

When the authorities cited above are considered it is clear that the rule relating to release of a surety as a result of prejudicial conduct by the creditor is rooted in equity. What might initially have been a product of English equitable jurisprudence, however, has been received by, and become firmly entrenched, in South African law. This has not, I venture to say, been a particularly difficult process, since equity is a fundamental value underlying much of the Roman-European civil tradition that constitutes a substantial part of our South African common law . . . [E]quity goes hand in hand with what I regard as its natural concomitants, namely justice, reasonableness, good faith (bona fides) and good morals (boni mores) or public policy. These values occur with consistent frequency in private law in general, and in the law of contract in particular. The concept of prejudice, in the context of a surety's release from contractual obligations in terms of an agreement of suretyship, is in fact an excellent example of how these values work in unison to achieve a fair and just result.

Van Zyl J in Di Giulio v First National Bank of SA Ltd [2002] JOL 9861 (C) paras 37 and 38.

94 Van Wyk (1998) 267-269.

Die interpretasie van artikel 2C van die Wet op Testamente 7 van 1953 (3)*

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1 INLEIDING

Tot dusver is drie nuwe probleme wat uit die interpretasie van artikel 2C voortspruit bespreek, naamlik (1) die interpretasie van artikel 2C(2) en spesifiek die frases “behoudens die bepalings van subartikel (1)” en “’n voordeel”; (2) die probleem dat artikel 2C(1) nie melding maak van benoeming van bevoorreedes “hetsy as lede van ’n klas of andersins” nie; en (3) die gebrek aan die voorbehoudsbepaling “tensy uit die samehang van die testament anders blyk” in artikel 2C(1).

Vervolgens word na die volgende vrae gekyk: (1) die betekenis van “testament” in artikel 2C; (2) afstammeling wat voor verlyding van die testament oorlede is; en (3) die betekenis van die frase “ten tyde van die dood van die erflater op ’n voordeel geregtig sou geword het indien hy geleaf het”.¹

2 VERDERE ONDUIDELIKHEDE

2.1 “Testament”

Daar is reeds gedui² op die legio probleme wat onder artikel 24 van die Algemene Regswysigingswet, die voorloper van artikel 2C, ondervind is. Een van die probleme wat vroeg reeds geïdentifiseer is, was dat die artikel slegs voorsiening gemaak het vir gevalle waar ’n bevoorreedde op ’n voordeel geregtig sou geword het “volgens die bepalings van ’n testament”.³ Joubert⁴ het spoedig na die inwerkingtrede van die Algemene Regswysigingswet⁵ aangedui dat die houe sal moet beslis of artikel 24 ook van toepassing sou wees op testamentêre bepalings vervat in huweliksvoorwaardeskontrakte. Dieselfde vraag geld ook ten opsigte van die toepassing van artikel 2C aangesien dié artikel ook slegs verwys na “’n voordeel ingevolge ’n testament”.⁶ ’n Verdere vraag wat hierby gevoeg kan word, is of dit ook van toepassing sou wees op bepalings vervat in *inter vivos*

* Sien 2002 *THRHR* 223 en 386 vir die eerste twee bydraes in hierdie reeks.

1 ’n Verdere aspek, nl die verhouding tussen a 2C en *fideicommissa*, behoeft ook aandag maar word nie in hierdie bydrae aangespreek nie.

2 Sien deel 1 van hierdie reeks 2002 *THRHR* 223.

3 Beoordelings wat in ’n huweliksvoorwaardeskontrak of *donatio mortis causa* ter spake gekom het, het dus nie onder a 24 geval nie.

4 “Artikel 24 Algemene Regswysigingswet 32 van 1952” 1954 *THRHR* 42.

5 32 van 1952.

6 Sien die aanhaling van a 2C in deel 1 (vn 1 hierbo).

trustdokumente wat voor die oprigter se dood reeds in werking getree het en daarna voortduur, of wat eers na die oprigter se dood in werking tree.⁷

Die regs kommissie het aan die hand gedoen dat alle bevoordelings wat deur 'n oorledene bedoel is om na sy dood in werking te tree dieselfde hanteer behoort te word, of dit nou in 'n testament voorkom of nie.⁸ Dit wil egter voorkom asof die aanbeveling nooit in die uiteindelijke wetgewing ingesluit is nie aangesien artikel 2C(1) slegs verwys na 'n voordeel waarop die oorlewende gade en die afstammeling "ingevolge 'n testament geregtig is" en artikel 2C(2) ook slegs die bewoording "ingevolge die bepaling van 'n testament" gebruik. Wat voorts vreemd opval, is die bepaling in artikel 2D(2) wat uitdruklik voorsiening maak dat "[b]y die toepassing van hierdie artikel⁹ beteken 'testament' enige geskrif van 'n persoon waarvolgens hy na sy dood oor sy goed of 'n deel daarvan beskik". Geen soortgelyke bepaling verskyn by artikel 2C nie. Daar kan dus nie saamgestem word met Roos¹⁰ dat dié bepaling saamgelees met artikel 2C beteken dat artikel 2C ook slaan op enige geskrif waarvolgens 'n persoon na sy dood oor sy goed beskik nie.¹¹

Dit blyk gevolglik dat artikel 2C nie van toepassing is op, onder andere, huweliksvoorwaardeskontrakte nie. Daar heers dus onsekerheid oor die posisie van 'n afstammeling en 'n gade wat in 'n huweliksvoorwaardeskontrak saam benoem word om 'n voordeel te ontvang en die afstammeling repudieer of waar afstammeling benoem word en die omstandighede genoem in artikel 2C(2) aanwesig is. Hoewel 'n mens graag aan die hand sou wou doen dat artikel 2C tog in die lig van die regs kommissie se aanbevelings¹² geïnterpreteer moet word as synde ook van toepassing op huweliksvoorwaardeskontrakte, aangesien daar 'n oorsig blyk te wees¹³ en sodanige interpretasie 'n billike gevolg sou hê, kom 'n mens te staan voor die probleem dat die bewoording van die Wet duidelik is. Artikel 2C verwys slegs na 'n "testament" en die Wet definieer 'n "testament" slegs as "ook 'n kodisil en enige ander testamentêre geskrif".¹⁴ Daar kan alleen verby hierdie definisie en uitdruklike bewoording geredeneer word indien 'n "huweliksvoorwaardeskontrak" as 'n "testamentêre geskrif"¹⁵ ingevolge die Wet

7 Indien a 2C op meer as net testamente van toepassing moet wees, is daar 'n hele paar interessante argumente rondom die verhouding tussen die bepaling van a 2C en trusts wat aanduidend is van die magdom probleme wat deur die interpretasie van a 2C veroorsaak kan word. Aangesien dit wil voorkom asof a 2C nie op ander dokumente as testamente van toepassing is nie (sien die bespreking hieronder) sal daar nie hier verder daarop ingegaan word nie.

8 *Verlag oor die hersiening van die erfreg*: Projek 22 (1991) 106.

9 Dws a 2D(1).

10 "Hersiening van die erfreg" 1993 *THRHR* 112.

11 sien ook Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) *Byvoegsel* (1992) 15 asook Barker *The drafting of wills* (1993) 11.

12 *Verlag* 106.

13 Deurdat dieselfde bewoording wat by a 2D ingevoeg is, nie ook by a 2C verskyn nie, nl: "By die toepassing van hierdie artikel beteken 'testament' enige geskrif van 'n persoon waarvolgens hy na sy dood oor sy goed of 'n deel daarvan beskik."

14 A 1 Wet 7 van 1953; a 1 Wet 43 van 1992.

15 Oor wat tradisioneel as 'n "testamentêre geskrif" beskou word, sien *Ex parte Estate Davies* 1957 3 SA 471 (N); *Oosthuizen v Die Weesheer* 1947 2 SA 434 (O); De Waal, Schoeman en Wiechers *Law of succession* (1993) 41.

gesien kan word.¹⁶ Aangesien so 'n argument baie moeilik regverdigbaar is¹⁷ en dié debat 'n bydrae op sy eie kan uitmaak, word met hierdie enkele opmerkings volstaan.

Die toepassingsbepalings van die Wysigingswet tot Wysiging van die Erfreg blyk ook die probleem op te los. Hoewel die Wet op Testamente slegs bepaal dat dié wet op die eerste dag van Januarie 1954 in werking tree,¹⁸ bepaal die oorgangsbepaling van die Wet tot Wysiging van die Erfreg¹⁹ dat dié wet "nie van toepassing [is] nie op 'n testament waarvan die erflater voor die inwerking-treding van hierdie Wet oorlede is". Dit is dus duidelik dat artikel 2C slegs op testamente soos deur die Wet gedefinieer, van toepassing is en nie ook op huweliksvoorwaardeskontrakte of enige ander bepalinge wat ná 'n testateur se dood in werking tree nie.²⁰ Dit bly dus steeds onseker wat die posisie is ten opsigte van substitusie by (byvoorbeeld) 'n huweliksvoorwaardeskontrak waarin testamentêre beskikkings gemaak word,²¹ en daar word met verwagting uitgesien na 'n beslissing van die hof.²² Gelukkig wil dit voorkom asof erfregtelike bepalinge nie in die moderne samelewing meer in huweliksvoorwaardeskontrakte ingesluit word nie²³ en gevolglik is die beste plan van aksie waarskynlik om kliënte te adviseer om liefs nie sodanige bepalinge in huweliksvoorwaardeskontrakte in te sluit nie.

16 Dit mag miskien moontlik wees in 'n geval waar 'n huweliksvoorwaardeskontrak grootliks uit 'n *pactum successorium* bestaan. Sien oor Ig Van der Merwe en Rowland 585 ev.

17 Gesien in die lig van die feit dat 'n testament 'n eensydige regshandeling is terwyl 'n huweliksvoorwaardeskontrak 'n meersydige regshandeling is (sien Corbett, Hahlo, Hofmeyr en Kahn *The law of succession in South Africa* (1980) 30. Sien egter Van der Merwe en Rowland 151 586 ev.

18 A 9 Wet 7 van 1953.

19 A 15 Wet 43 van 1992, soos gepubliseer in SK 13920 van 1992-04-15.

20 Dié gevolgtrekking veroorsaak op sy beurt 'n anomaliese posisie tov trusts: Volgens genoemde gevolgtrekking sal a 2C op trusts *mortis causa* van toepassing wees aangesien sodanige trusts bvw testamente in die lewe geroep word. Die artikel sal egter nie op trusts *inter vivos* van toepassing wees nie, selfs waar sodanige trust 'n bepaling bevat waarvolgens 'n voordeel tydens die oprigter (erflater) se lewe op 'n inkomstebegunstigde oorgaan en na die erflater se afsterwe steeds voortgaan om op sodanige begunstigde oor te gaan aangesien sodanige trust nie 'n "testament" is nie. Daar word vir die oomblik met hierdie opmerking volstaan aangesien verdere bespreking buite die bestek van hierdie bydrae val.

21 Sien Van der Merwe en Rowland 151 en *Byvoegsel* 15. Volgens dié skrywers (*Byvoegsel* 15) is dit duidelik dat a 2D ook van toepassing is op 'n huweliksvoorwaardeskontrak maar aangesien dié artikel nie op formaliteite betrekking het nie, bly die posisie wat dit aanbetref onseker. Dieselfde opmerking kan tov a 2C en substitusie gemaak word. Barker 120 se opmerking tov a 2D geld ook hier: "One can foresee controversies and litigation springing from this provision."

22 Dit is goed moontlik dat 'n huweliksvoorwaardeskontrak wat 30 of 40 jr gelede opgestel is erfregtelike bepalinge bevat wat vandag ter sprake kan kom. Die vraag sal dan wees of a 2C van toepassing is aangesien dié artikel van toepassing is waar die erflater na 1992-10-01 te sterwe kom. (Die Wet tot Wysiging van die Erfreg is van toepassing op testamente van testateurs wat na dié datum te sterwe kom.)

23 Sien Van der Merwe en Rowland 596. Wat trusts aanbetref, geld die praktyk ook dat aan die trustee magte verleen word om met gevalle waar bevoordeeldes wegval diskresionêr te handel.

2.2 Oorlye van 'n afstammeling voor verlyding

Die vraag na die bevoegdheid van afstammeling van 'n kind van die erflater om sodanige kind te representeer indien daardie kind vóór verlyding van die testament te sterwe gekom het, het ook reeds onder artikel 24 ter sprake gekom. In *Nel v The Master*²⁴ is beslis dat artikel 24 nie op so 'n situasie van toepassing is nie aangesien dit uitdruklik bepaal het dat 'n vooroorledene "onder daardie testament" op 'n voordeel geregtig moes gewees het. As 'n testateur byvoorbeeld sy hele boedel aan sy "kinders" bemaak het, kon die kind van die testateur se seun, wat gesterf het vóór die testament verly is, nie *per stirpes* in die plek van sy ouer van die testateur erf nie. In genoemde situasie sou die testateur se seun nie op 'n voordeel ingevolge die testament geregtig geword het nie, want hy is dood voor die testament verly is.²⁵ Hoewel daar nie uitdruklik van dié probleem in artikel 2C gewag gemaak word nie, is bykans dieselfde bewoording as dié in artikel 24 in artikel 2C behou. Artikel 2C(1) en (2) verwys daarna dat die vooroorledene op die voordeel geregtig moet wees "ingevolge 'n testament"²⁶ of "ingevolge die bepalings van 'n testament".²⁷ Die posisie soos beslis in *Nel v The Master*²⁸ bly dus onveranderd en is een van die min duidelikhede van artikel 2C.

2.3 Die betekenis van die frase "ten tyde van die dood van die erflater op 'n voordeel geregtig sou gewees het indien hy geleef het"

Artikel 2C(2) maak voorsiening vir substitusie van 'n afstammeling wat "ten tyde van die dood van die erflater op 'n voordeel geregtig sou gewees het indien hy geleef het". Uit die samehang van die Wet en die agtergrond tot die artikel, blyk dit dat die bedoeling van die Wetgewer hier was om voorsiening te maak vir die geval waar 'n afstammeling voor die testateur in die lewe was en te sterwe gekom het.

'n Interessante probleem maak egter sy opwagting in geval van persone wat gelyktydig te sterwe kom – die sogenaamde *commorientes*.²⁹ In 'n geval waar dit moontlik is om te bewys wie eerste te sterwe gekom het of dat hulle gelyktydig te sterwe gekom het, is die reël duidelik dat hulle nie van mekaar kan erf nie.³⁰ Aangesien 'n afstammeling wat 'n *commoriens* van die erflater is, "ten tyde van die dood van die erflater op 'n voordeel geregtig sou gewees het indien hy geleef het", kan hy ingevolge artikel 2C(2) deur sy afstammeling gerepresenteer word. Die probleemvraag ontstaan egter in 'n geval waar dit nie moontlik is om te bewys welke persoon eerste gesterf het nie.

In *Ex parte Graham*³¹ is bevind dat die gemeenregtelike vermoedens aangaande die volgorde van oorlye nie meer bestaan nie³² en dat die hof, in die

24 1975 3 SA 271 (T).

25 Sien ook *Verseput v De Gruchy* 1977 4 SA 440 (W).

26 A 2C(1).

27 A 2C(2).

28 1975 3 SA 271 (T).

29 Van der Merwe en Rowland 18–19. Die begrip word soms uitgelê om persone wat agv dieselfde ramp sterf in te sluit (sien *Greyling v Greyling* 1978 2 SA 114 (T)). Sien ook *Ex parte Graham* 1963 4 SA 145 (D); Schoeman "Commorientes in heroënskou" 1999 *De Jure* 108.

30 Die rede is dat 'n persoon moet leef tydens *delatio*. Sien Van der Merwe en Rowland 12 en die bespreking van die gemenerereg in deel 1 van hierdie reeks (vn 1 hierbo).

31 1963 4 SA 145 (D).

32 In die gemenerereg is bv vermoed dat 'n kind onder puberteitsouderdom nie sy ouers oorleef nie, maar 'n kind bo puberteitsouderdom wel (sien *Ex parte Graham* 1963 4 SA 145 (D)).

afwesigheid van getuienis tot die teendeel, geen ander keuse het nie as om te bevind dat sodanige persone gelyktydig gesterf het.³³ Daar is voorts bevind dat *commorientes* "onbevoeg"³⁴ is om van mekaar te erf. Die vraag is dus nou: Wat is die implikasie daarvan dat *commorientes* geag word gelyktydig te gesterf het, vir hulle desendente? Kan die desendente van 'n *commoriens* van die ander *commoriens* erf deur hom/haar te representeer? Schoeman³⁵ verduidelik dat die antwoord afhang van drie moontlikhede, naamlik (1) of *commorientes* as onbevoeg beskou word om van mekaar te erf; (2) of oor en weer as vooroorlede beskou word; en of (3) hulle dalk bloot net weggedink word vir doeleindes van die erfreg.

Representasie sal kan plaasvind as die *commorientes* oor en weer as vooroorlede of as onbevoeg beskou word, maar nie as hulle geëlimineer (of "weggedink") moet word vir doeleindes van die erfreg nie. Artikel 2C(2) bepaal dat indien 'n afstammeling van die erflater geregtig sou gewees het op 'n voordeel uit 'n testament as hy nie vooroorlede was nie of nie onbevoeg was nie, dan is die afstammeling van daardie afstammeling staaksgewys op die voordeel geregtig, tensy uit die samehang van die testament 'n teenstrydige bedoeling blyk. Die gevolg hiervan is dat hy of sy deur sy of haar desendente gerepresenteer kan word. Die probleem kan geïllustreer word aan die hand van 'n voorbeeld. Gestel 'n testateur, Tiaan, het twee kinders, Sarel en Daan. Sarel het twee kinders, Ben en Clara. Tiaan en Sarel boer saam op Tiaan se plaas. Tiaan en Sarel sterf saam in 'n ontploffing op die plaas. Gestel Tiaan het 'n testament nagelaat waarin hy bepaal het dat sy kinders sy plaas in gelyke dele erf. Sal net Daan erf, of sal Ben en Clara ook kan erf deurdat hulle Sarel representeer? Dieselfde vraag kan geopper word waar 'n testateur in 'n testament voorsiening maak vir representasie in geval van 'n erfgenaam wat vooroorlede is. Moet so 'n klousule geïnterpreteer word om ook die erfgenaam in te sluit wat gelyktydig met die erflater dood is?³⁶

Op die oog af is dit die uiteindelijke resultaat wat in *Ex parte Graham*³⁷ bereik is. In *Graham* het 'n vrou en haar aangenome seun in 'n vliegcrash gesterf. Die vrou se moeder is in haar testament aangewys as direkte substituut ingeval die seun vooroorlede was. Die hof het beslis dat die vrou se moeder wel die boedel moes erf. 'n Mens sou dus *Graham* as gesag kan beskou vir die stelling dat waar twee persone gelyktydig omkom (of geag word gelyktydig te gesterf het), hulle oor en weer as vooroorlede beskou moet word. Gevolglik sal artikel 2C(2) toepassing vind en sal 'n *commoriens* van die erflater wat 'n afstammeling is en

33 Volgens Cronjé en Roos (1997) 6 is die resultaat van hierdie beslissing dat daar geen vermoede van óf gelyktydige dood óf oorlewing is nie. Sien ook Warner R in *Ex parte Graham* 1963 4 SA 145 (D). Schoeman 1999 *De Jure* 118 is egter van mening dat die implikasie van die reël dat hulle geag word gelyktydig te gesterf het, 'n vermoede van gelyktydige afsterwe skep.

34 Schoeman 1999 *De Jure* 112 dui tereg aan dat die "onbevoegdheid" waarvan hier sprake is, nie onbevoegdheid in die algemene sin (bv omdat 'n persoon betrokke was by die verlyding van die testament of omdat hy die erflater vermoor het nie) is nie, maar onbevoegdheid omdat die persoon oorlede is by *delatio*.

35 *Ibid.*

36 Met erkenning aan kollega Anneliese Roos wat dié voorbeeld uitgewerk het ter voorbereiding van die volgende uitgawe van Cronjé en Roos se *Vonnisbundel*.

37 1963 4 SA 145 (D).

op 'n voordeel geregtig sou gewees het indien hy geleef het, deur sy afstammeling gerepresenteer kan word.³⁸

3 GEVOLGTREKKING

Uit die voorgaande bespreking blyk dat die poging wat aangewend is om die probleme ondervind met artikel 24³⁹ op te los, in sekere opsigte geslaagd was,⁴⁰ maar in ander uiters lomp aangepak is en tot verdere twyfel ly. Op die keper beskou, wil dit voorkom asof artikel 2C(2) van toepassing is wanneer 'n begunstigde wat 'n erfgenaam van 'n testateur is, vooroorlede of onbevoeg is om 'n voordeel kragtens die testament te neem. In so 'n geval word die afstammeling dus deur sy afstammeling gesubstitueer, selfs al word die testateur deur 'n gade oorleef wat saam met die begunstigde tot 'n voordeel benoem is. Indien sodanige afstammeling egter die voordeel waarop hy geregtig is, repudieer, word hy slegs deur sy afstammeling gerepresenteer indien die gade saam met wie hy op die voordeel geregtig is, nie meer leef nie. Leef die gade egter, substitueer hy/sy die begunstigde ten opsigte van sy voordeel ingevolge artikel 2C(1).

Daar word aan die hand gedoen dat die werking van artikel 2C(1) en (2) deur die aanduiding van 'n strydige bedoeling in die testament ter syde geplaas kan word, ten spyte daarvan dat artikel 2C(1) nie 'n bepaling tot dien effekte bevat nie. Die oorsig van die Wetgewer om nie die strydigheidsbepaling by artikel 2C(1) te voeg, soos wat dit inderdaad by artikel 2C(2) verskyn nie, beteken nie dat 'n testateur nie 'n strydige bepaling in sy testament kan insluit nie. Die bedoeling van die Wetgewer kon onmoontlik gewees het om een van die bekendste reëls van die erfreg, naamlik dat die bedoeling van die testateur altyd gevind en nagevolg moet word,⁴¹ te wysig deur nie die voorbehoudsbepaling by te voeg nie.

Hoewel 'n groot deel van die uitleg van artikel 2C afhanklik van die betekenis van "'n voordeel'" blyk te wees, bly die korrekte interpretasie daarvan uiters onduidelik. Ten spyte daarvan dat die gewone wetsuitlegreëls rondom die gebruik van die enkelvoud nie die probleem kan oplos nie, wil dit voorkom asof die bedoeling van die Wetgewer was om ook vir gevalle waar 'n bevoordeelde saam met 'n gade op meerdere voordele geregtig is en selfs ook vir die gevalle waar hulle op verskillende voordele geregtig is, voorsiening te maak.

Hoewel daar nie in artikel 2C(1) voorsiening gemaak word vir die benoeming van 'n bevoordeelde "hetsy as lid van 'n klas of andersins" nie, kan geargumenteer word dat die gemeenregtelike reël dat 'n bevoordeelde wat by name benoem is, nie gerepresenteer kan word nie, tog deur die Wetgewer gewysig is en wel om twee redes: Eerstens, aangesien substitusie in geval van repudiasie en substitusie deur 'n oorlewende eggenoot nuwe innovasies is wat nie in die

38 Daar moet dus met Schoeman 1999 *De Jure* 116 saamgestem word dat die korrekte benadering in die Suid-Afrikaanse reg sal wees dat begunstigdes wat gelyktydig sterf as oor en weer vooroorlede of onbevoeg beskou moet word en ook gerepresenteer kan word (sien ook *idem* 108 119 122 123).

39 Wet 32 van 1952.

40 Bv die onderskeid wat getref is tussen "wettige" en ander kinders is uit die weg geruim en die probleem dat a 24 slegs igv vooroorlye van 'n erfgenaam van toepassing was, is aangespreek.

41 *Robertson v Robertson's Executors* 1914 AD 503; *Cuming v Cuming* 1945 AD 201; *Bydowell v Chapman* 1953 3 SA 514 (A); *Campbell v Daly* 1988 4 SA 714 (T).

gemener eg bestaan het nie; tweedens, blyk dit ook uit die samehang van artikel 2C en die Wet as geheel dat die bedoeling van die Wetgewer was om ook vir sodanige gevalle voorsiening te maak.

Laastens blyk dit duidelik dat artikel 2C slegs op testamente van toepassing is, hoewel daar reeds onder die ou artikel 24 bespiegel is oor die toepassing daarvan op erfregtelike bepalings in huwelikvoorwaardeskontrakte.⁴²

Met apologie aan Joubert⁴³ kan ons ook verklaar: "Met belangstelling sien ons uit na die regspraak wat sal groei om artikel 2C heen."

It was contended, however, that because magistrates lack institutional independence they are not competent to preside at criminal trials . . . [T]here are provisions of the Magistrates' Courts Act, the Magistrates Act and the regulations made in terms of the [latter] that are inconsistent with institutional independence. That does not mean, however, that magistrates' courts must stop functioning, that all decisions taken by magistrates must now be set aside as nullities, and that the persons convicted by magistrates of criminal offences must be released from jail . . . It is clearly in the interests of justice that the magistrates' courts and the regional courts should continue to function. There is no reason to believe that the magistrates presiding in those courts will not administer justice, as they have done in the past, impartially, independently and in accordance with the law.

Chaskalson P in Van Rooyen v S 2002 8 BCLR 810 (CC) paras 260 and 262.

42 Sien Joubert 1954 *THRHR* 42 en die bespreking hierbo.

43 *Idem* 43.

Juridiese denkpatriene as oorblyfsels van oerreligieuse rites: 'n Regsantropologiese perspektief op die behoefte aan angswerende meganismes by regspraak*

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SUMMARY

Patterns of legal thought as remnants of primitive religious rituals: An anthropological perspective on the need for anxiety averting mechanisms in judicial decisions

This article points out that the reasons provided by the judiciary for a decision are often inflated. Some reasons are introduced into the judgment merely to decorate or pad the real reasons for a decision. It is submitted that these inflated reasons are ritual remnants dating back to the cradle of legal systems, when the transgressor was ritually sacrificed to avert the wrath of the ancestral spirits or gods. As man progresses on the road of science and reason the need for padding and rationalisations is dwindling.

1 INLEIDING

Die problematiek wat in die onderhawige artikel onder die loep geneem word, kan verduidelik word aan die hand van die feitestel, asook die chronologie en wyse van motivering van die betrokke beslissing, in 'n saak wat op 30 November 2000¹ voor 'n Oberlandesgericht (OLG) te Karlsruhe in Duitsland gedien het. In dié saak was die relevante feite soos volg: A, 'n transseksueel wat in 1957 gebore is, is in Januarie 1981 weens moord en seksuele aanranding tot lewenslange gevangenisstraf gevonniss. Hy het vervolgens onsuksesvol by 'n laerhof aansoek gedoen om 'n terapeutiese prosedure, wat deur die gevangenisowerheid afgekeur is, te magtig wat hom in staat sou stel om uiteindelik 'n chirurgiese geslagsverandering te ondergaan. Die OLG, dit wil sê die hof in hoër beroep, neem egter 'n ander standpunt in en wys ten aanvang daarop dat transseksualiteit as 'n siektetoestand erken word. Die transseksueel identifiseer hom/haar psigologies volledig met die teenoorgestelde geslag as wat sy/haar liggaam uiterlik reflekteer.

* 'n Deel van dié navorsing is in 2001 met die finansiële ondersteuning van die Alexander von Humboldt-Stiftung en die Universiteit van Pretoria aan die Ludwig Maximilians-Universität te München (Duitsland) deurgevoer. 'n Verdere deel van dié navorsing is met die finansiële steun van die Universiteit van Pretoria in 2000 aan die University of Columbia in New York in die VSA deurgevoer. Die menings hierin uitgespreek, word egter nie noodwendig deur genoemde instellings gedeel nie.

1 StraFo (*Strafverteidiger Forum*) 2001, 180.

Anders as 'n homoseksueel, 'n transvestiet en 'n fetisjies beleef hy/sy sy/haar geslagsdele as 'n fout van die natuur.² Die konflikterende verhouding tussen die geestelik-psigologiese en liggaamlike toestand van so 'n persoon is sekerlik nie sprekend van 'n gesonde mens nie. Die oorsprong en etiologie van die fenomeen transseksualisme is nog in onsekerheid gehul, hoewel onlangse navorsing in die rigting van endokrinologiese oorsake dui. 'n Akute behoefte aan behandeling bestaan egter nie in alle gevalle van transseksualisme nie.³ Die OLG⁴ wys daarop dat A as gevolg van sy transseksuele toestand ernstig ly en dat hierdie lyding sekerlik as 'n siektetoestand aangeteken moet word. Dit het reeds ten tyde van sy gevangensetting geblyk en verskeie deskundige menings het sedertdien bevestig dat behandeling in sy geval noodsaaklik is. Die OLG verduidelik vervolgens dat die feit dat transseksualisme nie volgens bestaande mediese standaarde "geneesbaar" is nie, nie beteken dat A nie in beginsel op mediese versorging aanspraak kan maak nie, aangesien behandeling volgens artikel 58(1) *StVollzG*⁵ ook geregverdig is indien dit verligting vir die pasiënt teweegbring. Hormoonterapie en geslagsveranderingschirurgie skep tans die enigste moontlikheid vir ('n meer omvattende) verligting van die lyding van 'n transseksueel en dit sou ook vir A die aangewese terapie wees. Sodanige terapie is volgens die OLG nóg onnodig nóg onekonomies nóg ondoelmatig en die koste daarvan, indien medies geregverdig, word, as algemene reël, volledig deur mediese fondse gedra. Dit sluit psigoterapeutiese behandeling in. Wat vir onderhawige doeleindes van wesenlike belang is, is die feit dat die OLG in die eerste instansie die mediese en andersins wetenskaplike kennis rakende die fenomeen van transseksualisme, asook die behandelings- en verligtingsopsies en -prosedures daarvoor, uiteensit. Daarna word relevante bepalinge van die Duitse Grondwet, wat fundamentele regte (menseregte) waarborg, onder die loep geneem en word verduidelik op grond van welke sodanige regte⁶ A op terapie geregtig is. Wat myns insiens duidelik uit die chronologie en wyse van motivering in dié uitspraak blyk, is dat die mediese en andersins wetenskaplike kennis die werklike grondslag van die beslissing gevorm het en dat die identifisering van sekere fundamentele regte as gevolg waarvan A op terapie geregtig sou wees, wesenlik op *ex post facto* rasionalisasies neerkom. Die vraag is: waarom dié rasionalisasies? Rasionalisasies is 'n tipiese verskynsel by, in besonder ook juridiese, besluitneming. So wys Simon⁷ daarop dat (regs)beslissings die neiging het om oorinklusief te wees aangesien dit motiverings omvat wat nie deur die regter by die vorming van die beslissing in berekening gebring is nie. Dit is 'n algemene eienskap van menslike besluitneming

2 Sien Labuschagne "Eengeslaghuwelike: 'n Menseregtelike en regsevolutionêre perspektief" 1996 *SAJHR* 534.

3 Labuschagne "Menseregtelike beskerming van seksuele oriëntasie en die huweliksregtelike status van die transseksueel" 1996 *SALJ* 229, "Transseksualisme en ouerskap" 1998 *SALJ* 627 en "Transseksueel as verkrachtingslagoffer" 1998 *De Jure* 166.

4 181.

5 *Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung (Strafvollzugsgesetz)* van 1976-03-16 (BGBl 1, 581).

6 Die OLG verduidelik (181) dat uit die reg op menswaardigheid en die reg op vrye ontplooiing van die individu se persoonlikheid (a 1 en 2(1) van die Duitse Grondwet) die gebod volg dat 'n persoon se geslag deur die owerheid aangeteken word as daardie geslag waartoe sy/haar psigiese en sy/haar liggaamlike (ook chirurgies veranderde) samestelling behoort. Die individuele besluit tot welke geslag 'n persoon wil behoort, moet deur die staatsorgane, insluitend die gevangenisowerheid, gerespekteer word.

7 "A psychological model of judicial decision making" 1998 *Rutgers LJ* 135.

dat, nadat die besluit geneem is, die besluitnemer tot rasionalisering van die besluit oorgaan. Dit is tipies van hierdie *ex post facto* rasionalisasies dat, byvoorbeeld, oorgegaan word tot selektiewe soektogte vir inligting en dat bevooroordeelde afleidings gemaak word:

“Judges are likely no exception; it is broadly believed that judges (or their clerks) introduce reasons into opinions merely to decorate, or pad them. This padding of opinions makes it very difficult to determine which of the reasons furnished were actually active in the decision making process and which were not. There seems to be no good way to distinguish between the two types. It must be acknowledged, however, that padding is essentially an exaggeration of the number of reasons contained in the judicial opinion. Its effect on the opinion is mostly quantitative, and it can be generally corrected by recognizing that the number of active reasons is lower than the number offered in the opinion.”

Hierdie dekorering van beslissings kom ook voor waar die regter of ander besluitnemer sy eie waardes en gewete volg indien dit op een of ander wyse strydig met die toepaslike reëls sou of kon wees.⁸ In die onderhawige artikel word ’n verdere en emosioneel diepliggende grondslag vir die dekorering van of die gegorrel (op Engels: “padding”) rondom ’n beslissing geïdentifiseer. Dit kom veral ter sprake by beslissings wat verreikende gevolge vir die betrokke(n) inhou of, in geval van innoverende beslissings, wat op ’n ingrypende wyse strydig is met tradisionele gemeenskapsopvattinge, -waardes of -houdings of oorlewinge.⁹ By laasgenoemde kom in besonder mites ter sprake. Denkskole, soos byvoorbeeld die Frankfurtse skool in Europa en die kritiese regstudie beweging (Critical Legal Studies; CLS) in die VSA wat basies dieselfde rigting ingeslaan het, is daarop gefundeer om regsmites en ander kunsmatighede en rasonale onhoudbaarhede in die reg bloot te lê en uiteindelik uit te faseer.¹⁰ Een van die groot geregtigheidsinhiberende mites, naamlik dat die regter bloot ’n meganiese funksie by regsuitleg vervul en gevolglik slegs die wetgewer se bedoeling vind en toepas, is reeds oor ’n wye front blootgelê en gediskrediteer.¹¹ Trouens, dit word toenemend aanvaar dat die regter ’n belangrike en finale

8 Sien bv Green “The role of personal values in professional decisionmaking” 1997 *Georgetown J of Legal Ethics* 19 55–56.

9 Sien Jacob “Ancient rhetoric, modern legal thought, and politics: A review essay on the translation of Viehweg’s ‘Topics and Law’” 1995 *Northwest Univ LR* 1622 1644, 1671–1672; Johnson “Teaching creative problem solving and applied reasoning skills: A modular approach” 1998 *Calif West LR* 389; Dreier “Irrationalismus in der Rechtswissenschaft” in Arnaud, Hilpinen en Wróblewski (reds) *Juristische Logik, Rationalität und Irrationalität im Recht* (vol 8 (1985) *Rechtstheorie*) 179 185. Vgl Simon 21: “Typically, decision processes do not end as soon as the person decides which outcome to choose. The dominance of the winning decision alternative is further intensified by a subsequent phase of *rationalization*. This subsequent rationalization is grounded in both a personal need to increase one’s confidence and a public need to enhance the acceptability of the decision by the relevant constituents. The psychological model suggests that this familiar phenomenon of rationalization is of secondary importance. The model focuses on the initial phase of arriving at the decision.”

10 Sossin “The politics of imagination” 1997 *Univ Toronto LJ* 523–24; Howes “Legal reasoning as ‘mythologic’” 1993 *J of Legal Pluralism and Unofficial Law* 213.

11 Sien Labuschagne “Vrees, selfbedrog, pretensie en die dinamiese aard van geregtigheid: ’n Regsantropologiese evaluasie van die evolusie van die reëls van wetsuitleg” 1999 *SAPR/PL* 1; Greenawalt “Are mental states relevant for statutory and constitutional interpretation?” 2000 *Cornell LR* 1609.

skakel in die regsformingsproses vorm.¹² In 'n interessante en insiggewende artikel¹³ konkludeer Strong, na 'n uitvoerige analise, dat regsdenke, in ooreenstemming met dit wat deur die wetenskap bewys is as 'n fundamentele en organies-gebaseerde onderskeiding van die wyses waarop die mens inligting prosesseeer, in twee groot domeine ("grand domains") ingedeel kan word. Die een domein, naamlik dié van analitiese denke, "is well-mapped, often explored, and universally acknowledged". Die ander domein, naamlik dié van die nie-analitiese denkwêreld, is nog grootliks ongetabelleerd en beslis 'n minder populêre diskussie-aspek van die juridiese gees ("legal mind"). Nie-analitiese denkprosesse speel egter 'n belangrike rol in die daaglikse arbeid van 'n juris.¹⁴ In die onderhawige artikel word juis, soos duidelik sal blyk uit die uiteensetting wat volg, 'n kernaspek van die nie-analitiese of nie-raselele onderbou van juridiese denkprosesse of -patrone onder die loep geneem. Schlag¹⁵ verwys na 'n wyse van regsdenke waardeur die denker poog om iets te vestig of tot stand te bring wat hy/sy innig begeer. Dit kan een van verskeie dinge wees, soos die oppergesag van die reg, objektiwiteit by regsuitleg, individuele outonomie of progressiewe regsverandering. Tipies van juriste word op dié intense begeerte gereageer op 'n wyse waarmee hulle uitblink, naamlik by wyse van die konstruering van argumente waarmee genoemde begeerte in vervulling kan gaan. Teen dié agtergrond beweer Schlag:¹⁶

"My claim is that these legal arguments bear an uncanny and disturbing similarity to various proofs of God. Specifically, they resemble *the cosmological proof, the*

12 Labuschagne "Regsdinamika: Opmerkinge oor die aard van die wetgewingsproses" 1983 *THRHR* 422. Schapp "Die Juristische Methode als der Weg zum Verstehen und Anwenden des Rechts" 2001 *Jura* 217 221 praat in dié verband van die "Wertungsarbeit des Richters". Sien ook Vesting "Kein Anfang und kein Ende. Die Systemtheorie des Rechts als Herausforderung für Rechtswissenschaft und Rechtsdogmatik" 2001 *Jura* 299 304; Pavcnik "Legal decisionmaking as a responsible intellectual activity: A continental point of view" 1997 *Washington LR* 481 487; Allan "Legal interpretation and the seperation of law and morality: A moral sceptic's attack on Dworkin" 1997 *Anglo-American LR* 405 429-430; Warner "Legal reasoning, drift, drive and the rule in *Rylands v Fletcher*" 1998 *Juridical R* 201.

13 "The lawyer's left hand: nonanalytical thought in the practice of law" 1998 *Univ Colorado LR* 760 797-98.

14 Vgl Strong 798: "There is an irony in any use of science to defend the importance of art: in any use of language to describe processes of mind that work largely in silence; and, certainly in any attempt to analyze the nonanalytical. It is a natural irony, however, that has its root in the special power of science, language, and analysis to explain and justify. This power extends even to matters that themselves have more to do with art than with science, more to do with vision than with speech, and more to do with the perception of a whole than with the dissection of its parts. The right hand gives voice to (and therefore often takes credit for) the silent discoveries and perceptions of the left. It is perhaps for this very reason that the fingerprints of the lawyer's left hand have for so long remained an invisible, though an immensely significant, presence in the product of the lawyer's work."

15 "Law as the continuation of God by other means" 1997 *Calif LR* 427.

16 427-428. Vgl Burke *Permanence and change* (1954) 179 aangehaal en geredigeer deur Schlag 427: "Even if one ascribes the rise of an orientation to its usefulness, one cannot conclude that it necessarily serves the ends of use. It may survive from conditions for which it was fit into conditions for which it is unfit (cultural lag) . . . The members of a group specifically charged with upholding a given orientation may be said to perform a priesthood function . . . The function is mainly performed by our college professors, journalists, public relations councilors . . . many of whom will usually fume at the hypocrisy of the medieval Church while excusing their own position on the grounds of necessity."

argument from design, and the ontological proof. Thus, despite its secular pretensions, legal thought is in part a kind of theological activity. A more controversial and perhaps more surprising point is that, *for those who believe in law*, there is no alternative but to participate in this covertly theological discourse.¹⁷

Ek glo nie daar kan twyfel bestaan nie dat die reg, asook regsdenkpatrone wat dit onderlê, ook in ekonomiese en tegnologiese hoogs ontwikkelde liberale regstate, nog steeds 'n sterk religieuse onderbou het, al sou dit nie noodwendig (deurgaans) op bewussynsvlak wees nie.¹⁸ Die verdere bespreking moet spesifiek ook teen dié agtergrond beoordeel word.

Die voormalige Engelse hoofregter Coke het in die 17de eeu na regsdenke verwys as “artificial Reason and Judgment of Law which requires long Study and Experience before a Man can attain to the Cognizance of it”. Hutchinson¹⁹ wys daarop dat hiermee in die algemeen bedoel word dat die reg 'n eie spesifieke wyse van dink het wat dit in 'n belangrike opsig onderskei van ander dissiplines en denkwyses, soos byvoorbeeld dié van die ekonomie, natuurwetenskap(pe), logika, sosiologie en politiek. Volgens Carter²⁰ bestaan daar vier “main building blocks of all legal reasoning”. Eerstens is daar die bewese feite in die betrokke geskil. Tweedens is daar die sosiale agtergrondsefeite en, derdens, die toepaslike regsreëls. Laastens is van belang die relevante algemeen geldende morele waardes en sosiale beginsels. Volgens Carter is hierdie vier faktore of elemente altyd teenwoordig, selfs al word almal nie uitdruklik te berde gebring nie. Hy bied vervolgens die volgende omskrywing van regsdenke (“legal reasoning”) aan:²¹

“Legal reasoning describes how a legal opinion combines the four elements: the facts established at trial, the rules that bear on the case, social background facts, and widely shared values. When a judge reasons well, the opinion harmonizes or ‘fits together’ these four elements.”

Hierdie omskrywing oorbeklemtoon die feitelike, rasonale en (objektiewe) regs- en ander reëls of -waardes, dit wil sê die bewussynskant van regsdenke. Ek stem met Weinberger²² saam dat daar nie so iets soos denkdigte, afsonderlike en tipiese regslogika en -denkprosesse is nie. Unger²³ deel insgelyks hierdie uitgangspunt:

“There is no such thing as ‘legal reasoning’: a permanent part of an imaginary organon of forms of inquiry and discourse, with a persistent core of scope and method. All we have are historically located arrangements and historically located conversations. It makes no sense to ask ‘What is legal analysis?’ as if discourse (by lawyers) about law had a permanent essence. In dealing with such a discourse, what we can reasonably ask is ‘In what form have we received it, and what should we

17 Kursivering deur die skrywer self.

18 Sien Labuschagne “Die begrip ‘godsdienst’ in godsdienstvryheid: 'n bewussynsantropologiese ekskursie na die evolusiekern van die reg” 1997 *De Jure* 118, “Geloof in towery, die regs-bewussynsdraende persoonlikheid en die voorrasionele onderbou van die regsorde: 'n regsantropologiese evaluasie” 1998 *SA Tydskrif vir Etnologie (SATE)* 78 en “Die spanningsveld geskep deur die selfverantwoordelike en verantwoordelikeheidsdeflektiewe persoonlikheidstipes in 'n plurale en liberale regstaat: regsantropologiese kantaantekeninge by die soeke na 'n legitieme regsbedeling vir Suid-Afrika” 2001 *De Jure* 292.

19 “The reasoning game: Some pragmatic suggestions” 1998 *Modern LR* 263 (’n resensie van Sunstein *Legal reasoning and political conflict* (1996)).

20 *Reason in law* (1997) 8.

21 8.

22 *Rechtslogik* (1989) 38–39.

23 *What should become of legal analysis* (1996) 36 soos deur Sossin 524–527 geredigeer en geresenseer.

turn it into?' In this book, I argue that we now can and should turn it into a sustained conversation about our arrangements."²⁴

Hoewel die aard en wyse van regsdenke (of suiwerder gestel: -denkpatrone) kultuur- en tradisiegebonde is, is, wat genoem kan word, 'n internasionale en transkulturele regstruktuur en -denkwyse, teen die agtergrond van veral die internasionale menseregtebeweging, aan die ontwikkel.²⁵ Dit skep 'n vrugbare bodem vir interkulturele en interstaatlike interaksie en diskoersvoering wat ook tot deurlopende herevaluering en verryking van juridiese denkwyses of denkpatrone aanleiding kan gee.²⁶ Die konfliktdinamika wat sodanige diskoersvoering onderlê, is egter diep en wyd oor die ganse regsterrein versprei. Kulturele en juridiese geringagting van andere en pogings tot gedwonge (regs) akkulturasie²⁷ kan 'n verreikende nadelige effek op die vryheid en waardigheid van individue asook op die strukturering en funksionering van kulture en state hê.²⁸ In dié verband moet die volgende waarskuwings van Pavcnik²⁹ voortdurend voor oë gehou word:

"A theory of argumentation is sensible only if it is continuously examined and reexamined. It can only be productive if it is aware that legal decisionmaking is conditioned by history and implanted in a particular cultural milieu, and both starting points of deciding – the normative and the factual – are open as to their meaning. A theory that is not aware of these limitations overlooks the fact that

24 Vgl Grey "Modern American legal thought" 1996 *Yale LJ* 493 503: "What marked adjudication off from more political forms of decision was a process of articulate, reasoned elaboration of the varied and flexible norms of the system by judges who were inculcated with craft standards and dedicated to resisting the temptations of political partisanship. Though not purely logical in nature, this process of decision based on articulate justification was sufficiently constraining to allow effective criticism of judges on rational (nonpolitical) grounds, and it was the filtering of the output of the political system through this process of impartial reasoning that put government under the rule of law." Grey se artikel beliggaam wesenlik 'n resensie van Duxbury se werk *Patterns of American jurisprudence* (1995).

25 Mastronardi "Recht und Kultur: Kulturelle Bedingtheit und universaler Anspruch des juristischen Denkens" 2001 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 61.

26 Sien Hohmann "The nature of the common law and the comparative study of legal reasoning" 1990 *Am J Comp L* 143 169–170; Jacob 1672; Mastronardi 71; Langenbucher "Argument by analogy in European law" 1998 *Cambridge LJ* 481; Coetzee "Uncovering rationality: A perspective in African thought" 2000 *SATE* 63 78.

27 Labuschagne "Regsakkulturasie en wetsuitleg" 1985 *THRHR* 64.

28 Vgl ook Howes 227: "What can be concluded on the basis of the present study is that when a legal doctrine or precedent is transmitted from one country to another, and there exist differences of social organizations or way of life, which make the doctrine difficult to communicate, it begins to become impoverished and confused. This is what happened in the case of the common law right to intellectual and artistic property being transmitted from England to America, and there being transformed into the right to privacy. But one can find a limiting situation in which instead of being finally obliterated by losing all its outlines, the doctrine is inverted and regains part of its precision. As we have seen, by giving rise to the right of publicity, the garbled doctrine has regained part of its precision. All of this goes on quite independently of the conscious intention of judges, who conceive of themselves as simply contributing to the 'growth' of the law, never recognizing how in so doing they may be stripping us of notions it took centuries to perfect. In the instant case what has been lost is the notion of the person as a conscience and a consciousness, as distinct from a commodity."

29 503.

every legal solution is also a *decision* by somebody, and that as a decision it always entails a choice between two or more possibilities, performances, or shades of meaning. In this sense, the decision can never be *just* the realization or the establishment of a completely preexisting solution. If someone does claim to have knowledge of such a solution, this claim is but precursor to the imposition of a particular, and therefore contingent, system of values masquerading as objectively absolute. Historical experience in Europe and elsewhere has proven that the generalized tendency to impose such value systems does not have much in common with human rights and human dignity."

2 RELIGIE, ANGS, RITES, REGSBEWUSSYN EN DIE IRRASIONELE

Inligting dui daarop dat die doodstraf die oerstraf was, wat gesien is as 'n "magic-religious means directed at sacrificing of the offender".³⁰ Die prototipe oermisdad was dan ook beliggaam in heiligskennis,³¹ waarin die evolusiekern van moderne regstelsels klaarblyklik gesetel was.³² Aangesien geglo is (en nog geglo word) dat die mens 'n onsterflike siel het, is die doodstraf in ieder geval nie as finaal beskou nie.³³ Die offer- of strafprosedure het met uitgebreide rites gepaard gegaan. Rites het nie slegs die effek om die kosmos te vereenvoudig en verstaanbaar te maak nie,³⁴ maar is van die begin af as 'n elementêre wyse van kommunikasie beskou, veral met die onsigbare en die bonatuurlike, met die voorouergeeste en gode derhalwe.³⁵ Rites ontlaai menslike emosies en lei tot 'n gevoel van reiniging.³⁶ Dit verlig naamlik vrees, verlaag die mens se angsvlak en skep by hom die gevoel dat hy in beheer van sy lewe is.³⁷ Gay³⁸ maak die volgende opmerking ten aansien van religieuse rites:

"Religious rituals . . . aid the ego because they quiet one of the greatest fears, that of being unloved by the superego."

Iewers is daar iets heiligs, absoluuts of onaantasbaar, dit wil sê die superego waarna Gay verwys, wat deur rituele aktiwiteite gedien of bevredig moet word. Hierdie opmerking begrond 'n sentrale tema van die problematiek wat in die onderhawige artikel aangesny word. Angswerende rites, of die behoefte daartoe, is diep in die menslike gees, asook by sekere diersoorte, ingebed en het die effek

30 Neuburger "Psychological and criminological consideration on the death penalty" in Association Internationale de Droit Penal *La peine de mort* (1987) 699. Sien ook Sellin *The penalty of death* (1980) 9; Nathanson *An eye for an eye?* (1987) 129.

31 Leder *Todesstrafe* (1980) 65; Radcliffe-Brown *Structure and function in primitive society* (1963) 213; Maine *Ancient law* (1885) 371-372; Makarewicz *Einführung in die Philosophie des Strafrechts* (1906) 175.

32 Labuschagne "Die begrip 'godsdien' in godsdienstryheid: 'n Bewussynsantropologiese ekskursie na die evolusiekern van die reg" 1997 *De Jure* 118.

33 Leder 16.

34 Kertzer *Ritual, politics and power* (1988) 2.

35 Lorenz *Die Rückseite des Spiegels* (1983) 275; Smith *To take place: toward theory in ritual* (1978) 2.

36 McCarthy *The orgy: Ritualized forms of emotional release* (1989) 7; Henry "Religious experience, archetypes, and the neurophysiology of emotions" 1986 *J Religion and Science* 47 69.

37 Lorenz 262-263. Kertzer 131-132.

38 "Ritual and selfesteem in Victor Turner and Heinz Kohut" 1983 *J Religion and Science* 271 279.

om voort te bestaan selfs waar die oorspronklike angsbasis reeds verdwyn het.³⁹ Oerreligieuse rites het nie met die koms van groot wêreldgodsdienste verdwyn nie, maar het dikwels in 'n aangepaste vorm bloot bly voortbestaan.⁴⁰ In rudimentêre gemeenskappe was die stamhoof/koning/keiser nie slegs hoof van religieus-rituele aktiwiteite nie, maar hy was ook hoof van die regsprekende gesag. Die religieuse en sakrale oorsprong van die regtersamp het tot vandag toe behoue gebly.⁴¹ Vandaar die Duitse spreukwoord: *der Richter steht an Gottes Statt* (die regter neem die plek van God in).⁴² Wat onmiskenbaar blyk, is dat religie (en godsdienste), rites en die reg vanaf die oorsprong van die menslike beskawingsgeskiedenis intiem ineengeveef was en nog is.⁴³ Sheleff,⁴⁴ na verwysing na die navorsing van Malinowski⁴⁵ wat aangetoon het dat magie, religie en wetenskap raakpunte in alle gemeenskappe het, merk op:

“And beyond this, and perhaps as an extension of Malinowski’s theme, there is a need to search for those aspects of the irrational in social life, all social life, including the modern world – where we must indeed reexamine the role of such factors as religion, magic, mythology, the occult. Thus as modern split-brain research divulges two aspects of the brain, the left-side focusing on the rational, the right on the non-rational aspects, so there is perhaps an urgent need for modern societies to re-examine their priorities in the field of education and of socialization processes.”

Hoe dit ook al sy, hedendaags word algemeen deur psigoloë, sosioloë en verwante wetenskaplikes⁴⁶ aanvaar dat juridiese denkpattrone nie uitsluitlik rasioneel van aard is nie.⁴⁷

39 Marks *Fears, phobias, and rituals* (1987) 244–246, 427–431; Merkelbach en De Jong “Evolutionary models of phobias” in Davey (red) *Phobias. A handbook of theory, research and treatment* (1997) 323–347. Vgl Birmingham “Folk psychology and legal understanding” 2000 *Connecticut LR* 1715 1717: “The field of evolutionary psychology exploits the fact that our brains are optimized to respond to conditions in the past of our species, rather than to modern circumstances, to which they have had insufficient time to adapt.”

40 Sien Mattheus 25: 31–34; Makdise “Legal logic and equity in Islamic law” 1985 *Am J Comp L* 63–64; Mühlmann *Rassen, Ethnien, Kulturen* (1964) 116–167; Lee *Korean shamanistic rituals* (1981) 1; Ehrenzweig *Psychoanalytic Jurisprudence* (1971) 186; Levine “*Teshuva*: A look at repentance, forgiveness and atonement in Jewish law and philosophy and American legal thought” 2000 *Fordham Urban LJ* 1677.

41 Wagner *Der Richter* (1959) 1; Schild *Alte Gerichtsbarkeit. Vom Gottesurteil bis zum Beginn der modernen Rechtsprechung* (1985) 74; Devlin “A layman’s view on judicial robes” 1955 *Oklahoma Bar Ass J* 1319 1320; Holten en Lamar *The criminal courts* (1991) 42; Labuschagne “Die heilige oervader, regsevolusie en redematige administratiefregspeling” 1995 *SAPR/PL* 144.

42 Wagner 1.

43 Sien ook Seagle *Weltgeschichte des Rechts* (1969) 166–181; Habermas *Wahrheit und Rechtfertigung* (1999) 320; Von Hippel *Rechtstheorie und Rechtsdogmatik* (1964) 249 ev; Lange *Die Anfänge der modernen Rechtswissenschaft. Bologna und das frühe Mittelalter* (1993) 41 ev.

44 “Irrationality in law and society” in Arnaud, Hilpinen en Wróblewski (reds) 231 246.

45 *Magic, science and religion* (1959) 1 ev.

46 Perlin “Morality and pretextuality, psychiatry and law: Of ‘ordinary common sense’, heuristic reasoning, and cognitive dissonance” 1991 *Bulletin Am Acad Psych and Law* 131; Labuschagne 1998 *SATE* 78 en verwysings daarin opgeneem.

47 Vgl Jabbari “Reason, cause and principle in law: The normativity of context” 1999 *Oxford J Legal Studies* 203 234: “It is possible to talk of the ‘logic’ of the actions of a person, who may rationalize her actions on other grounds. Similarly, legal doctrines have a ‘logic’ that is not reducible to the explicit reasons supplied by those who participate in judicial

Namate die heilige en onveranderbare status van die religieuse taboe en die rites en ander gebruike wat dáárom gewef is deur veral die wetenskap op die agtergrond geskuif is en toenemend word, is die mens onverpoos op soek na die sekuriteit van 'n ander "onaantasbare en heilige absolute of onveranderlike" waaraan emosioneel en andersins vasgeknoop kan word.⁴⁸ 'n Sodanige alternatief bied byvoorbeeld die natuurreg: *jura naturae sunt immutabilia* (die (regs)reëls van die natuur is onveranderbaar).⁴⁹ Vir onderhawige doeleindes is Schlag⁵⁰ se opmerking dat "reason comes to serve the psychological and the spiritual needs previously serviced by a deity"⁵¹ besonder insiggewend. Moderne filosofiese rigtings poog om enige vorm van 'n *absolute* te diskrediteer en te elimineer.⁵² Die emosionele oorblyfsels en die effek van tradisionele absolutes, al sou dit mites wees, sal nog lank in die gemeenskapslewe van die mens teenwoordig wees. Die opmerking wat Delgado⁵³ in dié verband maak, onderstreep op 'n treffende wyse die gedagtelyn wat in die onderhawige artikel ontwikkel word:

"Sometimes legal (and other) actors experience personal anxiety over what they are about to do. Normativity is a perfect vehicle for stilling this anxiety. It hides the person of the judge, who can reason that the decision was compelled by some principle outside himself or herself. I deeply regret that I cannot help the noble civil disobedient, but this other universal principle . . . must govern."

Dit is ten slotte in onderhawige verband van belang om enkele opmerkings oor die regsgevoel en gevoelsmatige besluitneming ("decision by a hunch") te maak. Simon,⁵⁴ onder die titel "deciding by hunches", voer aan dat onderskei behoort te

decision-making. What a psychoanalytic approach emphasized is the importance of understanding these other reasons for action, not by neglecting the conscious reasons but by integrating conscious and subconscious reasons into a unified picture of an appropriate response to a matrix of facts."

48 Vgl Wendel "Value pluralism in legal ethics" 2000 *Washington Univ LQ* 113 209–210. In *Demmers v Wyllie* 1978 4 SA 619 (D) 629 vind ons die volgende bekentenis: "A Judge would doubtless hesitate to see himself as the epitome of all 'right-thinking' persons, or to say so at any rate. He is seldom likely, on the other hand, to attribute to the 'right-thinking' a viewpoint sharply in conflict with his own. More often he decides what he personally thinks is right, and then imputes it to the paragons." (Hierdie passasie is deur my kollega prof PD de Kock onder my aandag gebring.) Die "paragons" waarna verwys word, is duidelik bloot 'n ander naam vir 'n "heilige kapstok" waaraan die werklike redes opgehang kan word.

49 Orth "Did Sir Edward Coke mean what he said?" 1999 *Constitutional Commentary* 33 34.

50 *The enchantment of reason* (1998) 92 soos bespreek deur Anoniem "Let us reason together" in 1999 *Harvard LR* 958 959.

51 Sien ook Schlag 1997 *California LR* 439. In 'n ander artikel ("Normativity and the politics of form" 1991 *Univ Pennsylvania LR* 801 884) verduidelik Schlag: "It is very easy for legal thinkers to forget that they are performers in an enterprise whose characters, roles, and action are always already largely scripted. In part that is because most legal thinkers do not see themselves as engaged in theater in the first place. And they do not think that they are engaged in theater because of the kind of theater they are already doing: they are doing the *theater of the rational*. The theater of the rational is precisely the kind of theater that is grounded in the forgetting of its own theatricality. To play a part in this theater is to rule out the recognition that one is doing theater."

52 Vgl Meyer "Is practical reason mindless?" 1998 *Georgetown LJ* 64 75.

53 "Norms and normal science: Toward a critique of normativity in legal thought" 1991 *Univ Pennsylvania LR* 933 943–944. Vgl Simon 36–37.

54 95–97. Sien ook Hutcheson "The judgment intuitive: The function of the 'hunch' in judicial decision" 1929 *Cornell LQ* 274; Stewart "Is judgment inscrutable?" 1998 *Canadian J Law and Jurisprudence* 417 423–424.

word tussen die inhouds- en prosesbewussyn (“awareness of the *content* of the decision and awareness of the *process* that leads to it”). Navorsing toon dat besluitnemers ’n redelik goeie toegang tot die inhoud van hulle geestestoestand (“mental states”) het, dit wil sê hulle kan die konklusies, oortuigings (“beliefs”) en die beslissing wat hulle bereik het weer oproep. Dit is ’n bekende feit dat regters duidelik bewus is van die argumente wat hulle beslissings ondersteun. Aan die ander kant is mense nie altyd bewus van die prosesse wat tot hulle konklusies, oortuigings en beslissings gelei het nie.⁵⁵

“This discrepancy between awareness of content and awareness of procedural knowledge might provide the key to understanding the notion of the hunch. People frequently resort to the hunch, or the intuition, to describe their decision making technique. Indeed, serious and insightful judges . . . have described their decisions as being determined by hunches and intuitions. The notion of the hunch is often understood in legal theory to mean unprincipled, whimsical decision making or unfettered discretion . . . I suggest that, given the decision maker’s particular state of awareness, the hunch is an intuitive and reasonable way to account for a decision. With the lopsided mental models in mind, the decisionmaker is strongly aware of the content of the decision. He feels confident that one decision is compelled by the legal materials. In contrast, he cannot describe the process that brought him to this state. While the decision seems obvious, this obviousness is inexplicable. This somewhat bizarre feeling is what people describe as a hunch. The hunch, then, is a candid way to describe the feeling of being sure about something while being incapable of adequately accounting for that feeling.”⁵⁶

Die individu se regsgevoel, soos elders aangetoon,⁵⁷ ontvou in konfrontasie van ’n spesifieke feitestel met sy/haar regsbeewussyn. Die individuele regsbeewussyn beliggaam nie slegs die resultaat van kognitiewe of rasionele kennis en prosesse nie, maar ook dit wat op nie-beewussynsvlak bestaan en werksaam is. Dit betrek inderdaad die individuele mens – wat in geval van regspraak (en -vorming) die regter(s) is – se geestelike pit.⁵⁸ Alhoewel ’n mens dit graag anders sou wou wens, blyk duidelik dat die regsgevoel en -beewussyn, en bygevolg die reg, nie ’n suiwere rasionele fenomeen is nie.⁵⁹

3 JURIDIESE DENKPROSESSE, RASIONALITEIT EN DIE KENNISLANDSKAP

Die reg was aanvanklik intiem met die religie en elementêre oorlewingswaardes geïntegreer, indien dit hoegenaamd funksioneel onderskeibaar was. Met die tydsgang het die reg op ’n onafhanklike bestaan en ’n afsonderlike funksioneringsgebied, naamlik ’n op-eie-voete-staande normatiewe en begripswêreld, aanspraak gemaak. As ’n komiese klimaks in dié ontwikkeling sou verwys kon word na die arbeid van Langdell en sy kollegas by die Harvard Universiteit. Hulle het die reg naamlik gesien as ’n intellektuele dissipline wat onafhanklik van teologie,

55 Simon 95–96.

56 Vgl ook Farber “Do theories of statutory interpretation matter? A case study” 2000 *Northwest Univ LR* 1409; MacCormick “The limits of rationality in legal reasoning” in Arnaud, Hilpinen en Wróblewski (reds) 161 173–177; Sheff 233; Minda “One hundred years of modern legal thought: From Langdell and Holmes to Posner and Schlag” 1995 *Indiana LR* 353.

57 1998 *SATE* 78 en verwysings daarin opgeneem.

58 Sien ook Labuschagne 2001 *De Jure* 293 ev en verwysings daarin opgeneem.

59 Gast *Juristische Rhetorik. Auslegung, Begründung, Subsumtion* (1992) 258–259.

moraalfilosofie, ekonomie en politieke wetenskappe bestaan het en afgestem was op die toepassing van wetenskaplike metodes op gemeenregtelike stof.⁶⁰ Werklikheidsvreemd soos dit mag voorkom, en inderdaad ook is, het hierdie benadering myns insiens iets van 'n oorgangsroete, al sou dit by wyse van pretensie wees, vanaf die oorweldigende religieuse grondslag van primigene regstelsels tot die groeiende impak van die wetenskap en rasionaliteit, (analitiese) kennis derhalwe, op hedendaagse regstelsels bewerkstellig. Grey⁶¹ verduidelik in dié verband:

“Langdellian legal theory has sometimes been treated as an intellectual joke, but it was a relatively coherent jurisprudence that emphasized three qualities many desire in a legal system. First, law should be *formal*, producing outcomes by the application of rules to facts without any intervening exercise of discretion. Second, law should be *systematic*, its rules descending deductively from a small number of coherently interrelated fundamental concepts and principles. Third, the resulting system should be *autonomous*, its principles derived from distinctively legal materials, not resting on politically or philosophically controversial claims or methods.”

Dat die reg egter iets van 'n eie identiteit het en dat diegene wat dit praktiseer, asook diegene wat regspraak beoefen, besondere kennis en vaardighede moet besit, sou nie ontken kon word nie.⁶² In lig van dié eie identiteit of aard van die reg, asook van die feit dat die reg nie in kennisisolasië kan funksioneer en ontwikkel nie, gebruik Vesting⁶³ die begrippe “operatiewe geslotenheid”

60 Sien Grey 495: “Langdellian legal science was not only academically ambitious, but also, despite its apparently unworldly character, had impressive practical advantages. After the collapse of the common law writ system, it delivered to American lawyers and judges a new classification and formulation of private law doctrine. As a pedagogy, it sorted law students out according to their facility in quickly making analogies and distinctions among fact situations, which tracked the analytical abilities needed in the corporate and financial work that had become the mainstay of big-city practice. Finally, Langdellism supplied to a conservative bar and bench a classically liberal (which by that time meant politically conservative) legal ideology, providing an up-to-date scientific basis for the common law system’s emphasis on the protection of property and on freedom of contract.”

61 495–496. Vgl ook Burton *An introduction to law and legal reasoning* (1985) 59 en Chapman “Chance, reason and the rule of law” 2000 *Univ Toronto LJ* 469 487 vn 29.

62 Vgl Alexander “The banality of legal reasoning” 1998 *Notre Dame LR* 517 523–524; Morton “Teaching creative problem solving: A paradigmatic approach” 1998 *Calif West LR* 375 379–380; Brouwer “Coherence in legal reasoning” 1995 *Rechtsfilosofie en Rechtstheorie* 185 187–189; Schauer “Prediction and particularity” 1998 *Boston Univ LR* 773; Hutchinson 263. Vgl ook Leiter “On the value of normative theory” 1998 *Legal Theory* 241; Gunasekara “Judicial reasoning by analogy with statutes: Now an accepted technique in New Zealand?” 1998 *Statute LR* 177 193–197. Schneider *Logik für Juristen* (1991) 172–186 wys op verskeie juridiese denkpatrone of -uitgangspunte wat die waarheid kan ondergrawe: bv, *petitio principii* (aanname van 'n “waarheid” wat nie bewys is nie); *error fundamentalis* (dwalings van 'n grondbeginsel); *post hoc, ergo propter hoc/fallacia de non causa ut causa* (bv in die verlede is met vere geskryf en die veer word dan beskou as 'n oorsaak van dit wat geskryf is); *fallacia consequentis* (verkeerde afleidings).

63 301–302: “Nun bedeutet operative Geschlossenheit des Rechtssystems natürlich nicht, dass das Recht Beziehungen zu seinen Umwelten unterhalten würde. Das Rechtssystem kann Beziehungen zur Gesellschaft aber nur auf Grund von Eigenleistungen herstellen. Es muss eigene Übersetzungsmöglichkeiten finden und ausbilden, über die es die Umwelt in sich hineinspiegeln kann. Dies ist aber nur im Vollzug rekursiv vernetzter Operationen möglich, also nur im Rahmen operativer Geschlossenheit. Offenheit ist infolgedessen nur durch Geschlossenheit möglich und umgekehrt: Geschlossenheit nur durch Offenheit . . . Um diese Paradoxie bewältigen zu können, kombiniert das Rechtssystem normative Geschlossenheit mit kognitiver Offenheit.”

(die operative Geschlossenheit) en kognitiewe openheid (die kognitive Offenheit). Volgens hom kan 'n regsistiem nuwe relevante kennis wat beskikbaar word, dit wil sê wat bekom en geëvalueer is, deur kognitiewe openheid sinvol en funksioneel binne konteks van sy normatiewe strukture, by wyse van operatiewe geslotenheid derhalwe, bruikbaar maak. Die hedendaagse ontplooiing van (wetenskaplike) kennis het die effek dat die opmars van die rasonele in die menslike gemeenskapsorganisasie, waarin die reg 'n prominente rol speel, in 'n kontinue versnellingsproses gekom het.⁶⁴ Die kennislandskap waarin die reg moet funksioneer word al hoe groter, intenser en meer gekompliseerd.⁶⁵ 'n Mens kan maar net kyk na die invloed wat sosiologiese⁶⁶ en psigologiese⁶⁷ navorsing en diskoersvoering die afgelope eeu op regsdenke en die regspleging gehad het. Dit geld vir die ganse kenniswêreld, insluitend die ekonomie en natuurwetenskap(pe).⁶⁸ Trouens, 'n regstelsel wat die veranderende kennislandskap ignoreer, is tot disintegrasie gedoem.⁶⁹ Dat die regsprekende gesag hiervan bewus is, blyk uit die groterwordende rol wat die getuienis van deskundiges in die regspleging speel.⁷⁰

4 GEESTELIK-INTELLEKTUELE INTERAKSIE (DISKOERSVOERING) EN REGSDINAMIKA

Ek het by vorige geleenthede⁷¹ daarop gewys dat vier (universele) regsantropologiese evolusieprosesse in die sosio-juridiese waardestelsel(s) van die mens werksaam is, naamlik dié van dereligiëring (en deritualisering), dekonkretisering, individualisering en humanisering. Twee subsidiêre prosesse, naamlik dié van egalisering en outonomisering, wat wesenlik die resultaat van die sameeloo van hierdie prosesse is, verdien, veral as gevolg van hulle hedendaagse aktualiteit, afsonderlike vermelding. Hierdie prosesse beliggaam die kerndinamika van 'n regstelsel.⁷² Hoewel hierdie prosesse nie in denkdigte kompartemente funksioneer nie, is veral die dereligiëeringsproses, waarby die deritualiseringsproses inbegrepe is, in onderhawige verband van primêre belang. Die verwesenliking

64 Sien Helsper *Die Vorschriften der Evolution für das Recht* (1989) 21; Müller *Juristische Methodik* (1989) 248; Alexy *Theorie der juristischen Argumentation* (1978) 356 ev; McCormick 177.

65 Wellmer *Methodologie als Erkenntnistheorie. Zur Wissenschaftslehre* (1972) 203 ev; Habermas 327 ev.

66 Vesting 299; Grey 501; Guthrie, Rachlinski en Wistrich "Inside the judicial mind" 2001 *Cornell LR* 777 778 ev; Cooper "Towards a new architecture: Creative problem solving and the evolution of law" 1998 *Calif West LR* 297 319–323.

67 Guthrie, Rachlinski en Wistrich 780–830; Heath "The structure of normative control" 1998 *Law and Philosophy* 419 421.

68 Vesting 302; Birmingham 1715: "Law lags science."

69 Möllering "Grenzüberschreitungen – Ein Weg aus dem Dogma" in Arnold, Burkhardt, Gropp en Koch (reds) *Grenzüberschreitungen* (1995) 79 88; McCloskey "Visualizing the law: Methods for mapping the legal landscape and drawing analogies" 1998 *Washington LR* 163 191.

70 Cromberg "Rechters en deskundigen" 1998 *Nederlands Juristenblad* 1659; Meintjes-Van der Walt "Pre-trial disclosure of expert evidence: Lessons from abroad" 2000 *SAS* 145 en "Decisionmaker's dilemma: Evaluating expert evidence" 2000 *SAS* 319.

71 Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 1992 (1) *TRW* 27, "Regsnavorsing: 'n Meerdimensionele en regsevolusionêre perspektief" 1994 (1) *TRW* 91 en "Evolusie in die regsantropologie" 1996 *SATE* 40.

72 Dit vorm deel van breëre biososiologiese evolusieprosesse – vgl Hovenkamp "The mind and heart of progressive legal thought" 1999 *Iowa LR* 149 151.

van geregtigheid, wat uiteraard self 'n dinamiese grondslag het,⁷³ in 'n spesifieke geval voorhande bly voortdurend die ideaal waarna gestreef (moet) word. Die presedentestelsel⁷⁴ en analogiese⁷⁵ denkprosesse word dikwels as werkswyses aangewend om te verseker dat die reg, en in gepaste omstandighede selfs geregtigheid, in sinchronisasie met die veranderende regslandskap ontwikkel.⁷⁶ Esser⁷⁶ onderskei tussen wetgewingsgeregtigheid (*die legislative Gerechtigheit*) en beslissings- of oordeelsgeregtigheid (*die Urteilsgerechtigheit*). Hiermee kan akkoord gegaan word. Dit is soos elders aangetoon, die hof se taak om toe te sien dat 'n betrokke regsgekil tot 'n sinvolle en 'n geregtighedsgerigte einde kom.⁷⁷

Om funksioneel en aanpasbaar te wees, moet geregtigheid onvermydelik 'n rasionele basis hê.⁷⁸ So verklaar Schlag:⁷⁹

“From the perspective of the rule-of-law ideal, the exhaustion of reason is tantamount to an admission that legal actors do not know what they are doing – that law is, in a word, lawless.”

Die rasionele sou slegs optimaal vir geregtighedsdoeleindes benut kon word indien omvattende en effektiewe ruimte vir kontinue geestelik-intellektuele interaksie, dit wil sê vir wat Viehweg⁸⁰ kommunikatiewe skepping (*die Kommunikative Kreation*) noem, geskep word.⁸¹ Hierdie interaksie het die effek – of behoort dit te hê – dat die rasionele en meer in besonder die kennis wat daardeur gegeneer word en die kennisverwerking wat dit tot gevolg het op besluitneming impakteer.⁸² Eike von Savigny⁸³ se opmerking is korrek dat waardeveranderinge 'n effek op die uitkoms van 'n argument in 'n regstelsel kan hê, met die gevolg dat geakkumuleerde kennis nie noodwendig met dieselfde vanselfsprekendheid daar en dan in die regs wetenskap as in empiriese wetenskappe toepassing vind nie.⁸⁴ Hierdie geestelik-intellektuele interaksie, wat uiteraard nie tot suiwer intellektuele aktiwiteite beperk is nie, staan vakkundig bekend as retoriek of retorika wat nie uitsluitlik 'n regsbegrip is nie, maar wat (in 'n toenemende mate) sonder

73 Vgl Robbers *Gerechtigheit als Rechtsprinzip* (1980) 157–158; Zippelius *Juristische Methodenlehre* (1994) 102; Jabbari “Radical particularism: A natural law of context” 1999 *Northern Ireland LQ* 454.

74 Labuschagne “Die spanningsveld tussen regsekerheid en geregtigheidsekerheid: 'n regsantropologiese evaluasie van die evolusie van die *stare decisis*-reël” 2000 *THRHR* 347.

75 Case *Understanding judicial reasoning. Controversies, concepts and cases* (1997) 69; Sherwin “A defense of analogical reasoning in law” 1999 *Univ Chicago LR* 1179 1193–1197.

76 “Traditionale und postulative Element der Gerechtigkeit” in Gernhuber (red) *Tradition und Fortschritt im Recht* (1977) 113 130.

77 Labuschagne “Vrees, selfbedrog, pretensie en die dinamiese aard van geregtigheid: 'n Regsantropologiese evaluasie van die evolusie van die reëls van wetsuitleg” 1999 *SAPR/PL* 1 en verwysings daarin opgeneem.

78 Esser 113.

79 *The enchantment of reason* (1998) 37 soos aangehaal deur Chapman 469.

80 “Schritte zu einer rhetorischen Rechtstheorie” in Herren, Kienappel en Müller-Dietz (red) *Kultur. Kriminalität. Strafrecht* (1977) 3 6.

81 Sien ook Feteris “A dialogical theory of legal discussions: Pragma-dialectical analysis and evaluation of legal argumentation” 2000 (8) *Artificial Intelligence and Law* 115 132–133.

82 Gast 339–344.

83 “Recht und Gerechtigkeit als wissenschaftstheoretisches Problem der Rechtswissenschaft” in Lenk (red) *Neue Aspekte der Wissenschaftstheorie* (1971) 248.

84 Vgl Eastman “Organization life and critical legal thought: A psychopolitical inquiry and argument” 1992 *R of Law and Social Change* 721 790.

vakwetenskaplike grense funksioneer.⁸⁵ Habermas⁸⁶ verwys in dié verband na argumentatiewe of diskoersiewe rasionaliteit. Dworkin⁸⁷ merk, sover dit die regspraktik betref, soos volg op:

“Of course, law is a social phenomenon. But its complexity, function, and consequence all depend on one special feature of its structure. Legal practice, unlike many other social phenomena, is argumentative.”⁸⁸

Jacob,⁸⁹ met beroep op die ekonoom McCloskey,⁹⁰ wys daarop dat retoriek nie ’n metodologie daarstel nie, maar inderdaad ’n antimetodologie. Hy verduidelik die belang hiervan vir regsdenke myns insiens tereg soos volg:

“Such an embracing of antimethodology is of special relevance to legal thought; it underlines the extent to which in legal thought and discourse we ride on the surface of all the grand political indeterminacies. One may ask, then, how does this ‘indeterminacy’ of the topics compare with the indeterminacy of legal rules that is one of the central doctrines of a large number of critical legal theorists. It is comparable, of course. Most rules are indeterminate at some level of consideration although for many purposes and in many ways a great mass of rules is quite clear, in the sense that all the parties involved agree about them; thus, there are many easy cases . . . For the dynamic of invention as a way of looking at what we do when grappling with new facts and claims is that we proceed by questioning only some issues; and in doing so we rely on other facts and rules that we can take as given.”

Nuwe filosofiese denkrigtings wat die relatiewiteit van die reg en veral die rol wat die (subjektiewe) mensfaktor in die regspleging en besluitneming in die algemeen speel beklemtoon, het ’n herlewing van (die klassieke) en belangstelling in retoriek tot gevolg gehad.⁹¹ Aangesien retoriek ook ’n waardedimensie het, is die aard daarvan en reëls daaraan verbonde nie deurgaans in alle kulture en religieuse groeperinge gelykluidend nie.⁹² Dit kan gevolglik veral in regstate waarin kulturele

85 Jacob 1625.

86 102. Gast I omskryf retoriek as “die Technik Einverständnis herzustellen”.

87 *Law's empire* (1986) 13 aangehaal deur Van der Merwe “A rhetorical-dialectical conception of the common law – An introduction” 2001 *TSAR* 428.

88 Sien ook Jacob 1635–1636: “Rhetoric is the word for a discipline intended to increase the practitioner’s ability to develop, in any given situation, accounts and arguments that are plausible and persuasive. The heightened ability aimed at by the discipline is to be produced in part by insight into the elements and nature of such accounts and arguments, and in part by practice. The practice repeatedly involves the person under training in the very active process of such development and in each case takes off from one or more starting points, notional and emotional, that are relevant to the evaluation of the situation. Traditional rhetoric is then completed by the more directly compositional study of style, rhythm, and the structure and organization of a particular work.”

89 1669.

90 *The rhetoric of economics* (1985) 51–52: “Rhetoric is not a new methodology. It is antimethodology. It points out what we actually do, what seems to persuade us and why . . . To repeat: ‘There are no rules and regulations for being reasonable.’ Being reasonable is weighing and considering all reasons, not merely the reasons that some methodology or epistemology or logic claims to be stations of the cross along the one path to Justified True Belief.”

91 Jacob 1622–1635; Van der Merwe “Jurisprudence as rhetoric. Ancient antecedents, modern applications” 2000 *Fundamina* 22. Van der Walt “Piracy, property and plurality: Re-reading the foundations of modern law” 2001 *TSAR* 524 546 vn 81 verwys tereg na laasgenoemde artikel van Van der Merwe as ’n “excellent discussion of legal reasoning as rhetoric”.

92 Sien Mastronardi 76–82; Jacob 1627 ev; Van Zyl “The significance of the concepts ‘justice’ and ‘equity’ in law and legal thought” 1988 *SALJ* 272 290; Eastman 769–770. Vgl Van der Walt 2001 *TSAR* 524.

en religieuse groeperinge van substansie aangetref word tot 'n verskeidenheid probleme aanleiding gee. Hierdie probleme is elders⁹³ aangespreek. In die onderhawige bydrae word nie weer op dié problematiek ingegaan nie.

Jacob⁹⁴ verwys na argetipiese retoriekgeleenthede en verduidelik:

“Judicial rhetoric corresponds to the realm of the law courts; and like the work of the courts, it is characterized by its inquiry into particular past facts and the determination of justice in the particular case. Another archetypal occasion occurs when policy questions are debated in public and includes debate in legislative assemblies and the composition of laws. The traditional third type of rhetorical occasion is less tied to immediate action; it forms the discourse type of public talk that is oriented to the praise and dispraise of general features of civic life. Many have argued that this rhetorical occasion, traditionally called epideictic rhetoric, is essential to civic life because it is speech designed to bind and bond audience together.”

Vir onderhawige doeleindes is in besonder laasgenoemde vorm van retoriek insiggewend. 'n Voorbeeld hiervan is hofaktiwiteit wat kulmineer in die beslissing van die regter. Soos in bogaande uiteensetting⁹⁵ aangedui, was genoemde beslissing daarop gerig om die toorn van die bonatuurlike, dit wil sê die godheid of voorvadergeeste, af te weer. In 'n latere fase van ontwikkeling het dit ook ten doel gehad om die vredebreuk, wat deur die regskenning in die gemeenskap bewerkstellig is, te herstel.⁹⁶ Die rites wat met strafoplegging en -uitvoering gepaard gegaan het, het ook ten doel gehad om die gemeenskap weer saam te bind en te versoen. 'n Duidelike band tussen oerreligieuse rites en retoriek, wat (blykbaar) van 'n latere fase van ontwikkeling was, blyk duidelik.

5 KONKLUSIE

Regstelsels en -tradisies is gebou op 'n verskeidenheid mites en veronderstellings wat in 'n toenemende mate nie met die rasonale en veranderende kennislandskap waarin dit moet funksioneer, kan sinchroniseer nie. Mites en veronderstellings wat in stryd is met bewese kennis, het geen kans op oorlewing nie.⁹⁷ Funksionele en effektiewe reg moet in die empiriese werklikheid ingebed wees.⁹⁸ Regsreëls wat op volkpsigologie⁹⁹ gebaseer is of wat steun op ongesubstansieerde anachronistiese

93 Sien Labuschagne “Die geregtighedsalliansie van etnologie en strafreg” 1997 *SATE* 55 en “Besnydenis en die grense van religieuse en kulturele gebruike in 'n regstaat: 'n regsantropologiese perspektief” 2000 *SATE* 55; 2001 *De Jure* 292.

94 1636–1637.

95 2 *supra*.

96 Sien Lampe *Das personale Unrecht* (1967) 256; Otto “Personales Unrecht, Schuld und Strafe” 1975 *ZStW* 539 541. Sien ook Labuschagne en Van den Heever “Die oorsprong van en die onderskeid tussen die fenomene misdaad en delik in primigene regstelsels” 1991 *Obiter* 80.

97 Schäffer “Rationalisierung der Rechtssetzung” in Schäffer *Theorie der Rechtssetzung* (1988) 199 236 ev.

98 Bjarup *Skandinavischer Realismus* (1978) 34 ev; Jacob 1640–1641: “Thus, both law and rhetoric are doubly dependent on things outside themselves. No one can produce anything from rhetoric or from legal thought operating in a vacuum. Every legal and rhetorical situation has its given elements and works against an existing framework of authoritative beliefs, dogmas, rules, and principles. Each rule and principle may itself be subjected to question and even rejection.”

99 Birmingham 1726.

religieuse dogmas,¹⁰⁰ wat nie binne konteks van die veranderende kennislandskap waarin dit moet funksioneer, verantwoordbaar is nie, het nie 'n toekoms nie, in ieder geval nie oor die langtermyn nie.¹⁰¹ In 'n land soos Suid-Afrika, waar 'n verskeidenheid kulture en religieuse en filosofiese uitgangspunte, en bygevolg ook 'n veelheid mites en anachronistiese veronderstellings, aangetref word, stel die soeke na gemeenskaplike diskoersplatforms in sigself 'n akute diskoersbehoefte daar.¹⁰² Selfs die begrip, aard en inhoud van iets so basies soos fundamentele of menseregte¹⁰³ skep nie vanselfsprekend 'n gemeenskaplike diskoersplatform nie.¹⁰⁴

In die beslissing van die OLG te Karlsruhe, waarmee die onderhawige bespreking ingelei is, is die wetenskaplike kennis, in veral mediese en psigologiese verband, aanvanklik bespreek en as sodanig aanvaar. Aangesien die reg met dié bewese kennis as deel van sy rasonale landskap moet sinchroniseer, is dit duidelik dat die hof nie sinvol 'n ander beslissing, in soverre dit dié punt raak, kon gee nie. Die hof gaan egter voort om sy beslissing ook aan sekere fundamentele regte te knoop. Dit is egter baie kort en kompak gedoen.¹⁰⁵ Menseregte het in 'n staat soos Duitsland die status van iets absoluuts en heiligs, wat die "gewete" (die *superego*) van die gemeenskap verteenwoordig. Dit behoort duidelik te wees dat ons hier met 'n oorblyfsel van 'n oerreligieuse rite te maak het wat daarop gerig was om die diepgewortelde angsk vir vergelding van die bonatuurlike, die onaantasbare, teen te werk.¹⁰⁶ Hoe meer ingrypend 'n beslissing van die volkpsigologiese en religieuse sienings en waardes, veral dié wat

100 Alexander 533.

101 Sien in die algemeen Farber "Shocking the conscience: Pragmatism, moral reasoning, and the judiciary" 1999 *Constitutional Commentary* 675 wat 'n bespreking is van Posner *The problematics of moral and legal theory* (1999).

102 Sien Labuschagne 2001 *De Jure* 292; Jacob 1641–1644.

103 Vgl Mastronardi 79: "Sind die Menschenrechte eurozentrisch, weil sie aus Europa stammen? Das allein würde nicht genügen. Aber sie vertreten eine typische Denkweise, die sich von jener anderer Kulturen unterscheidet. Der Rationalismus der Aufklärung ist zunächst einmal europäisch; ob sein Universalitätsanspruch gerechtfertigt ist, kann nicht aus ihm selber begründet werden. Universalität kann sich nur daraus ergeben, dass andere Kulturen wesentliche Elemente europäischer Rationalität in ihrem eigenen Denken wiederfinden und der europäischen These in einem offenen Diskurs zustimmen. Der Kampf um die Menschenrechte in der westlichen Welt kann nur ein Beispiel sein für das Ringen um den Schutz von Menschenwürde in der modernen Welt. Ob es zugleich Vorbild sein kann, entscheiden die andern."

104 Sien die beslissing van die Europese Hof vir die Regte van die Mens in *Denmark v Turkey* 2000 *Human Rights LJ* 58 wat op 5 April 2000 gelewer is.

105 181.

106 'n Mens moet voortdurend in gedagte hou dat die hofproses self 'n rituele funksie het. Vgl Mastronardi 64–65 se opmerkings tav Afrikaregstelsels: "Rechtssubjekt und Subjekt der Moral ist im traditionellen Afrika nicht der Einzelne, sondern die Familie, der Clan, die Gesellschaft. So vereinigt z.B. die Heirat eher zwei Clans als zwei Individuen. Diese sind zwar nicht schutzlos, aber ihre Achtung ergibt sich aus der gegenseitigen Abhängigkeit von Chef und Clan. Entsprechend der traditionellen Gesellschaftsstruktur Afrikas sind Rechte grundsätzlich nicht staatsgerichtet, sondern beziehen sich auf das Horizontalverhältnis innerhalb der Gesellschaft. Der Rechtsbegriff ist weniger auf materielle Ansprüche ausgerichtet, als darauf, dass ein Verfahren durchgeführt wird, in welchem die Standpunkte ausgetragen werden. Wichtig sind das vermittelnde Ritual des Verfahrens und die Wiederherstellung einer lebensstauglichen Ordnung."

tradisioneel sterk en oor 'n langtermyn in 'n gemeenskap gevestig¹⁰⁷ was, afwyk, hoe groter word die behoefte aan rituele meganismes om die gejaardgaande en diepliggende angs en onsekerheid teen te werk.

Shapiro¹⁰⁸ wys daarop dat 'n gemiddelde hofbeslissing in Frankryk uit slegs 300 woorde bestaan, dié in Duitsland uit 2000 woorde en dié in die VSA (die meerderheidsuitspraak) uit 8000 woorde. Wat die werklike rede hiervoor is, is nie duidelik nie. Dit wil tog voorkom of in sekere gemeenskappe 'n groter behoefte aan rasionalisasies en rites bestaan. In Nederland, wat as een van die morele leiers in die wêreld beskou sou kon word, bestaan blykbaar nie 'n openbare behoefte aan omvattende rasionalisasies of "motiverings" om 'n tree in die (morele) toekoms in te gee nie. So is deur die Hoge Raad sonder 'n groot omhaal van woorde aan 'n pasiënt wat aan 'n dodelike en ongeneeslike siekte ly, ondraaglike pyn verduur en die opregte en ingeligte begeerte het om sy/haar lewe te beëindig, 'n reg tot aktiewe eutanase toegeken.¹⁰⁹ Vergelyk 'n mens dit met die uitspraak van die Konstitusionele Hof van Suid-Afrika in *S v Makwanyane*,¹¹⁰ waarin die doodstraf¹¹¹ afgeskaf is, dan val die omvang van laasgenoemde uitspraak onmiddellik op.¹¹² Hierdie uitspraak beliggaam 'n pragtige voorbeeld waar diepliggende angs klaarblyklik 'n kaleidoskoop van rituele rasionalisasies, motiveringdekorasies en gegorrel¹¹³ bewerkstellig het, al was die doodstraf reeds vir dekades in 'n groot menigte lande afgeskaf wat normaalweg die effek van angs en daaruitvoortvloeiende onsekerheid grootliks behoort te gebuffer het. Dit wil voorkom of in regstelsels waarin die rasonale en morele outonomie van die individu hoog aangeslaan word die behoefte aan angswerende rites in regspraak (en uiteraard -vorming) aan die afneem is en dat wetenskaplike kennis 'n groter direkte rol in die regslewe speel.¹¹⁴ Die behoefte aan rituele *ex post facto*-rasionalisasies, dekorering van motiverings en gegorrel neem dan klaarblyklik ook af.

107 In die tydvak waarin ons tans leef, bied die regsakkommodering van persone van homoseksuele oriëntasie oor die ganse veld van menslike interaksie 'n goeie voorbeeld hiervan. Beslissings in dié verband, indien dit die geverifieerde (wetenskaplike) kennis rakende die permanensie daarvan en die feit dat dit nie 'n kwessie van keuse is nie vir regsdoeleindes aanvaar, sou noodwendig in stryd met 'n magdom oeroue mites en anachronistiese veronderstellings wees – vgl ook Carter 175.

108 "Fear of theory" 1997 *Univ Chicago LR* 389 399.

109 Daar bestaan nog ander vereistes ook – sien Labuschagne "Regstaatlike waardegradering van die menslike lewe en lewenskwaliteit: Opmerkinge oor noodtoestand as verweer by aktiewe eutanase" 2000 *THRHR* 133 137–138 en verwysings daarin opgeneem.

110 1995 3 SA 391 (KH).

111 Wat vir milleniums as straf erken is, maar toe reeds in 'n groot aantal regstate afgeskaf was.

112 Wetenskaplike inligting en kennisgronde sou voldoende kon wees om die doodstraf as "rasioneel te riskant" of as "irrasioneel" af te skaf – sien Labuschagne "Die doodstraf: 'n Penologiese evaluasie" 1989 *SAS* 164 veral 175–176.

113 Die woord "gegorrel" word nie in 'n degraderende sin nie, maar as sinoniem vir die Engelse woord "padding" gebruik – sien Kritzinger *et al Groot woordeboek* sv "padding".

114 Vgl Labuschagne "Die mens se kwynende vrees vir die nadoode en die effek daarvan op die regstatus van 'n lyk" 2001 *De Jure* 353.

The child's right to be heard in custody and access determinations¹

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OPSOMMING

Die kind se reg om gehoor te word by die vasstelling van toesig en toegang

Artikel 12 van die Verenigde Nasies se Konvensie vir die Regte van die Kind gee aan kinders die "reg om gehoor te word". Hierdie reg bestaan uit twee sub-temas, naamlik 'n waardeskatting van 'n kind se volwassenheid en die balansering van outonomie en ander belange (a 12(1)); en die voorsiening van paslike meganismes om die kind se mening te ontlok (a 12(2)). Hierdie elemente is onlosmaaklik verbind. 'n Oorsig van die Suid-Afrikaanse sake ten opsigte van toesig en toegang toon dat die howe in die verlede nie genoegsame aandag aan die mening van die kind gegee het nie, maar dat in resente tye meer waarde aan die voorkeure van kinders geheg is. Die prosedurele meganismes waardeur die kind 'n mening kan lug is egter onvoldoende. Meer aandag moet geskenk word aan die kind se deelname aan besluitneming. Totdat prosedures aansienlik verbeter word, sal die kind nie 'n sinvolle geleentheid hê om gehoor te word nie.

1 INTRODUCTION

Article 12 of the United Nations Convention of the Rights of the Child (1989)² obliges State Parties to assure to a child who is capable of forming his or her own views, the right to express these views freely in all matters affecting that child, the views of the child being given due weight in accordance with his or her age and maturity.³ For this purpose, the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.⁴

1 This study is part of a larger inter-disciplinary research project on legal decisions about children, being conducted by a consortium of universities in South Africa and abroad. The research was sponsored by the National Research Foundation and the University of Cape Town Research Committee, which we acknowledge with thanks. The views expressed in this work and the conclusions drawn are those of the author and should not be regarded as those of the sponsors.

2 UN Doc A/44/49 (1989) (hereafter the Convention).

3 A 12 (1).

4 A 12 (2).

This provision, which has been described as the "linchpin" of the Charter⁵ and possibly its "most significant article",⁶ reflects a paradigm shift in the law's approach to children.⁷ While for most of the twentieth century, children's law focused on the protection of children, viewing the child as a passive being, the new trend is to look at children as social actors and to recognise and respect their "personhood, integrity, and autonomy".⁸ As expressed by Freeman: "[C]hildren are persons, not property; subjects, not objects of social concern or control; participants in social processes, not social problems."⁹

This paper discusses some of the implications of article 12 for South African family law. An overview of case law concerned with custody and access matters suggests that the South African courts have not given due regard to the "voices" of the children involved, and have not paid enough attention to the question of children's participation in decision-making. Furthermore, current divorce procedures are not conducive to meaningful participation by children. Decisions concerning custody and access may have a critical impact on a child's future. If children are to be treated with dignity and respect, as demanded by the Convention (and by the Constitution), they should be given an opportunity to participate in the making of such decisions, should they desire this.

2 THE "RIGHT TO BE HEARD"

Article 12 promotes children's autonomy interests by giving them a "right to be heard" in matters that affect them. This "right to be heard" comprises a number of sub-themes. The first group of themes, raised by article 12(1), includes an assessment of the child's maturity, and the weighing-up of the child's autonomy interests against other considerations such as the child's long-term "best interests". Children may want things that adult decision-makers do not think are good for them, and there is a potential conflict between safeguarding the "best interests of the child" as objectively determined on the one hand,¹⁰ and giving effect to the child's own wishes on the other.¹¹ Clearly, article 12 does not give

5 Freeman "Introduction: Children as persons" in Freeman *Children's rights: A comparative perspective* (1996) 13.

6 Freeman "Introduction: Rights, ideology and children" in Freeman and Veerman *The ideologies of children's rights* (1992) 3 5. See also Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 1995 *SAJHR* 401 403.

7 Freeman *The moral status of children* (1997) ix.

8 See eg Freeman "The sociology of childhood and children's rights" 1998 *Int J Children's Rights* 433 434-435.

9 *Ibid.*

10 In terms of a 3 of the Convention, the best interests of the child should be the primary consideration in all actions concerning children. While these "best interests" are not defined in the Convention, it would appear that these are to be determined by adult decision-makers, and based on objective criteria rather than the child's subjective wishes. See eg Sloth-Nielsen 403.

11 See eg Thomas and O'Kane "When children's wishes and feelings clash with their best interests" 1998 *Int J Children's Rights* 137-154; Freeman *The moral status of children* (1997) 153. This apparent dichotomy should not be overstated, however. The child's autonomy rights are an integral aspect of his/her "best interests". See eg Eekelaar "Children's rights: From battle cry to working principle" *Liber amicorum Marie-Therese Meuldere-Klein: Droit compare des personnes et de la famille* (1998) 197-215, in which he points out that respect for autonomy should lie at the centre of a conception of rights. These issues are explored in more detail below.

the child an unequivocal right to be heard, the right being restricted to those children who are "capable of forming [their] own views".¹² Furthermore, the child's preference, once expressed, will not be decisive but will be given weight according to the child's age and maturity.¹³ And thirdly, even in the case of children considered competent to make informed choices in other contexts, the expressed wishes of the child may nevertheless be overridden should her choice in a particular instance be deemed unwise.

These limitations to the child's autonomy, and the way in which they are linked to the child's decision-making capacity in general, or the wisdom of a particular choice, have tended to focus discussion on questions of competence, and on whether or when the wishes of the child can triumph over the decisions of adult decision-makers. However, Melton argues that these concerns miss the true importance of article 12. The central issue is not whether the child's wishes will be decisive, but whether he or she will be treated with respect.¹⁴ What article 12 demands is that when a decision is taken that affects a child, he/she is given an opportunity to express a view, and this view is given serious consideration. Article 12 may best be understood as a right of participation.¹⁵

Viewing article 12 as a participation right, links the first group of sub-themes to those in article 12(2), which raises a number of procedural questions concerning the manner in which the child's views should be expressed. These procedural issues are integrally connected to the question of competence and the balancing of autonomy and other interests. Whether a child is heard directly or through a representative, for example, may depend on his/her age and maturity, as may the choice of representative (eg, an attorney, social worker, family advocate or parent).¹⁶ Similarly, the question of whether the child's representative should advocate the child's own wishes, or should adopt a paternalist stance and advocate the child's "objective best interests", is shaped by considerations of competence, maturity, and the balancing of self-determination and other interests.¹⁷ Furthermore, the child's very competence to form and express a view may depend on the procedural opportunities provided, for example on whether the child was afforded a supportive, empowering environment in which to discuss and consider the options available to him/her.¹⁸ These links between the procedural aspects of decision-making (a 12(2)) and the issues of competence and autonomy (a 12(1)) may be further illustrated through the arguments of Eekelaar and Margulies.

12 Melton "Parents and children: Legal reform to facilitate children's participation" 1999 *Am Psychologist* 935 939 argues that it is not a particularly demanding yardstick: "All that is required is the ability to express a preference."

13 Sloth-Nielsen 403.

14 Melton 936.

15 Van Bueren "The United Nations Convention on the Rights of the Child: An evolutionary revolution" in Davel *Introduction to child law in South Africa* (2000) 202 203.

16 Griffiths and Kandel "Legislating for the child's voice: Perspectives from comparative ethnography of proceedings involving children" in Maclean (ed) *Making law for families* (2000) 161 162.

17 *Ibid.*

18 See generally Margulies "The lawyer as caregiver: The child client's competence in context" 1996 *Fordham LR* 1473-1504.

Eekelaar argues that the restriction of a child's immediate "autonomy interests" may be justified if these threaten his/her long-term autonomy, defined as "the condition which allows each individual to determine his or her goal or life plan".¹⁹ Thus, the child's "basic" and "developmental interests"²⁰ may need to be prioritised in order to "bring the child to the threshold of adulthood with the maximum opportunities to form and pursue life goals which reflect as closely as possible an autonomous choice".²¹ Children may not have the life-experience or psychological development required for a full understanding of how they want to live their lives. Neither will they always have the knowledge or cognitive ability to predict the behaviour of others and thus assess whether their goals are achievable.²² Children may be considered incompetent to make certain decisions if their choices are mistaken, unrealistic, the result of excessive pressure, or if they fail to take into account likely changes in circumstances, including their own development.²³

But while the child's immediate wishes may need to yield to his/her long-term autonomy interests, this does not imply that the decision-maker can simply ignore the child's point of view. Not only should the decision-maker respect the developing autonomy of the child, who should be afforded at least some opportunity to decide what is in his/her own "best interests",²⁴ but the nurturing of a potentially autonomous being requires more than the protection interests such as health and intellectual development. It also demands "maximizing opportunities for self-determination in establishing relationships and self-identity".²⁵ Thus the decision-making process should allow children to contribute to the outcome (although within safe boundaries that do not threaten their opportunities for making choices once they are fully competent).²⁶ Indeed, the child's experience in contributing to such decisions will enhance his/her ultimate autonomy by developing his/her capacity to formulate goals.²⁷ This participation should take place in an environment where properly trained professionals can assess the child's competence and personality and thus interpret the "child's expressed wishes (if any), their stability and their consistency with the process of self-realization occurring within the child".²⁸ Eekelaar further suggests that decisions involving children may need to be taken gradually, possibly through a sequence of decisions over time, allowing for changes in circumstances and the child's own point of view.²⁹

19 Eekelaar "The interests of the child and the child's wishes: The role of dynamic self-determinism" in Alston *The best interests of the child: Reconciling culture and human rights* (1994) 42 50 53.

20 See Eekelaar "The emergence of children's rights" 1986 *Oxford J Legal Studies* 161 170, where he defines "basic interests" to include "physical, emotional and intellectual care" and "developmental interests" to include the opportunity to maximize available resources (such as education) so that the child's capacities are developed to his/her best advantage.

21 Eekelaar (1994) 53, (1986) 171.

22 *Idem* (1994) 51-52 55.

23 *Idem* (1994) 51 53 55-56, (1998) 206.

24 *Idem* (1994) 42-43 48.

25 *Idem* (1998) 207, (1994) 53.

26 *Idem* (1994) 47, (1998) 206.

27 *Idem* (1994) 53-54.

28 54.

29 48.

Margulies links the issues of competence and autonomy to the procedural context provided, with specific reference to the role of lawyers. He points out that competence is context specific. A child may be considered competent to make certain choices, but not others. A child might even be permitted to make mistakes, provided that the consequences are not irreversible, as making mistakes may have an educational value and contribute to the child's growing self-awareness and identity formation. Most importantly, he argues that "[l]awyers do not discover competency; they *make* it. A lawyer representing children can enhance or injure competency".³⁰ Like Melton, he stresses that adult decision-makers must respect the child's voice; "her sharing of experience and insight".³¹ This implies the child's participation in decision-making, and "a sense that others value one's opinions and sentiments".³²

These contributions suggest that the participation of the child in the decision-making process may be more important than whether his/her views ultimately prevail; that the assessment of the child's competence is only meaningful within a specific context and should be undertaken by someone with appropriate training; that the decision-making process should be designed to enhance the child's capacity to make short-term decisions and to develop his/her growing autonomy interests; that where the child's choices will not impair his/her long-term autonomy interests, they should be given serious weight,³³ and that the mapping out of a child's future may require a sequence of decisions over an extended period.

3 THE VOICE OF THE CHILD IN SOUTH AFRICAN CUSTODY AND ACCESS CASES

On the face of it, South African family law has long focused on the needs of the child. In *Fletcher v Fletcher*³⁴ the court rejected an approach to child custody that seemed to suggest that the child was a "mere chattel" to be claimed by one of the parents. The court held that in a custody dispute, the welfare of the child was the primary consideration, thus confirming a principle which has been used in South African family law since the late nineteenth century.³⁵ The "best interests of the child" standard therefore has a long history in custody and access decision-making.

For at least thirty years the courts have also been willing to take note of the child's views when making such decisions. In the 1971 custody case, *French v French*,³⁶ the court held that the most important consideration when determining the child's best interests, was the child's sense of security, of feeling loved and wanted. The suitability of the parents and material considerations should also be examined, and "finally the wishes of the child will be taken into account", in the

30 Margulies 1476-1477.

31 1475-1476.

32 1482.

33 Whether they will be decisive will depend on the context. The balancing of the child's wishes against those of others (particularly his/her parents in a custody and access dispute) will not be discussed here.

34 1948 1 SA 130 (A).

35 See eg *Simey v Simey* 1881 1 SC 171 176.

36 1971 4 SA 298 (W).

case of "more mature children" through consideration of their "well-informed judgement, albeit a very subjective judgment".³⁷ The prevailing legal view by the end of the 1970s was that "the child's personal preference is entitled to consideration, its weight depending on the age of the child".³⁸

In 1994, the court in *McCall v McCall*³⁹ examined the question of the child's expressed preference in some detail, and held that

"with reference to the child's preference . . . if the Court is satisfied that the child has the necessary intellectual and emotional maturity to give in his or her expression of a preference a genuine and accurate reflection of his feeling towards and relationship with each of his parents, in other words, to make an informed and intelligent judgement, weight should be given to his or her expressed preference".⁴⁰

This *dictum* has been cited and followed in a number of cases.⁴¹

However, in the vast majority of custody and access matters, the wishes of children have not been mentioned at all, or, if they were mentioned, have been afforded little weight, have been inadequately investigated, or have even been overridden by violent coercion. The overall impression of South African case law since the *French* judgment in 1971 does not reflect concern or respect for the voice or autonomy of the children involved, nor a recognition of the importance of children's participation in decisions that may have an enormous impact on their future.

Some manifestations of this include:

The child's wishes are not mentioned in the reported judgment

The majority of reported judgments concerning custody and access do not mention the wishes of the children at all. In the case of very young children, it could be argued that their views are considered indirectly and are implicitly assessed when considering factors such as whether the child has bonded more closely with a particular parent, or seems happy and content in his or her company.⁴²

Where older children are concerned, it is difficult to conclude from the reported judgment whether or not the child has been consulted. The child may have been interviewed by social workers, psychologists, or the family advocate despite the lack of reference to this in the judgment. The judge may have heard oral testimony about the child (and may even have interviewed the child in chambers), and will often have had access to a report. However, empirical evidence suggests that the wishes of the child are seldom put before the court.⁴³

37 *Supra* 299H.

38 Boberg *The law of persons and the family* (1977) 425. Hahlo expresses the same principle in *The South African law of husband and wife* (1975) 460.

39 1994 3 SA 201 (C).

40 *Supra* 207H-J.

41 *Meyer v Gerber* 1999 3 SA 650 (O); *Lubbe v Du Plessis* 2001 4 SA 57 (C); *I v S* 2000 2 SA 993 (C); *Hlope v Mahlalela* 1998 1 SA 449 (T); *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C); *Van Rooyen v Van Rooyen* [2001] 2 All SA 37 (T).

42 See eg the approach in *Pinion v Pinion* 1994 2 SA 725 (A); *Venton v Venton* 1993 1 SA 763 (D). This was also the approach in *French v French supra* 299H where the court held that the wishes of young children would be assessed, as a "constituent element in the enquiry as to where they will attain a sense of security".

43 See discussion *infra*.

Furthermore, a failure to mention the child's views in a reported judgment would tend to suggest that the judge has not considered the child's opinion when deciding the issue.

In his controversial judgment in *Van Rooyen v Van Rooyen*⁴⁴ for example, Flemming J ruled that the mother's same-sex partner should not share her bedroom during the weekends when the children visited their mother, and should not live in the house during the holidays which the children spent there. This was intended to protect the children from "confusing signals" concerning sexuality.⁴⁵ However, the opinions and preferences of the children, then aged eleven-and-a-half and nine-and-a-half, are not referred to. Similarly, in *Godbeer v Godbeer*,⁴⁶ where the mother wanted to emigrate to the United Kingdom with her two children aged 14 and 11, there is no mention of the children's preferences. Other cases in which the preferences of older children have been ignored in the judgment include: *Schlebusch v Schlebusch*,⁴⁷ where the court notes that the views of the children should be given "due weight", but in practice gives no consideration to the wishes of children aged 13 and 16; *Manning v Manning*,⁴⁸ where the child's preferences are mentioned as a possible factor for consideration, but were not considered in practice (the child concerned was almost ten); and *Baart v Malan*⁴⁹ where the views of children aged 15, 13, 11 and nine were not considered.

The wishes of children are ignored because the evidence of their preferences is contradictory or insufficient

At times, the court has deliberately decided not to consider children's preferences on the grounds that it has insufficient evidence thereof, or that the evidence presented was contradictory. The courts have held that they can accord no weight to the wishes of the children where there is uncertainty as to what these are.

For example, in *Stock v Stock*⁵⁰ Diemont JA remarked that

"I do not think any great weight can be attached to the preferences of these two children [aged 17 and 14 years] they did not give evidence, and I do not know what influence, if any, has been brought to bear on them and what motives they had for making their decision. In any event the Court [*a quo*] misdirected itself in attributing to Ariane a 'preference' for France [as other evidence suggested that she had no such preference"].⁵¹

The child's wishes are not taken into account because the child is regarded as too immature to express an opinion, or the expressed preference is deemed unwise

Where the courts have examined the substance of the children's views, they have focused their attention on the "first set" of themes identified above – on questions

44 1994 2 SA 325 (W).

45 *Supra* 329A–330B.

46 2000 3 SA 976 (W).

47 1988 4 SA 548 (E).

48 1975 4 SA 659 (T).

49 1990 2 SA 862 (E).

50 1981 3 SA 1280 (A).

51 *Supra* 1297A.

concerning the child's competence and the wisdom of the child's expressed preference. The central question is framed as "what weight must be attached to the wishes of the children?"⁵²

Authors such as Freeman warn against a tendency to underestimate a child's capacity to make a sensible choice,⁵³ and against an overzealous protection of what the adult decision makers regard as the child's objective best interests.⁵⁴ Past decisions of the South African courts show a tendency to underestimate the child's competence and a related tendency to accord little weight to the child's views. On many occasions the courts seem to have concluded on the basis of chronological age *per se* that the child concerned will not have a view worth considering. In *Matthews v Matthews*,⁵⁵ for example, the wishes of a 13-year-old were held not to "carry much weight"⁵⁶ although the capacity of the child had not been investigated. In *Greenshields v Wyllie*⁵⁷ the court held that it was "not inclined to give much weight to the preferences of children of 12 and 14".⁵⁸ The court offered no opinion on the maturity of the individual children concerned, but based its conclusion on "generations" of child-development research by psychologists and social workers, and, in particular, on the judge's personal experience as the father of four daughters.⁵⁹ The courts' assumptions, based on the physical ages of the children involved in these cases, may be contrasted with the provisions of the Child Care Act 74 of 1983 which provide that a children's court may not make an adoption order unless "the child, if over ten years, consents to the adoption and understands the nature and import of such consent".⁶⁰

In other reported cases, the child's chronological age has not been decisive in itself. Rather, the court has looked both at physical age and at the maturity of the individual concerned.⁶¹ An early case that examined the links between maturity, competence and the balancing of short term wishes and long-term autonomy (the "first set of themes" above), raises several issues that may be examined in the

52 *I v S* 2000 2 SA 993 (C) 997D. See also *Meyer v Gerber* 1999 3 SA 650 (O) 655J.

53 See eg Freeman "The best interests of the child? Is the best interests of the child in the best interests of children?" 1997 *Int J Law, Policy and the Family* 360 367 where he cites a number of empirical studies on the capacity of children to make reasonable choices. A 1982 study by Weithorn and Campbell compared the responses of children and young adults aged 9, 14, 18 and 21 to hypothetical decision-making problems concerning medical and psychological treatment. They found that 14, 18 and 21 year olds exhibited the same capacity to make choices as adult respondents. Furthermore, 9 year olds were as competent as the average adult with respect to evidence of a choice and reasonableness of choice.

54 Freeman *The moral status of children* (1997) 96-98.

55 1983 4 SA 136 (SE).

56 *Supra* 141B.

57 1989 4 SA 898 (W) 899F.

58 *Supra* 899F.

59 See also *Stock v Stock* 1981 3 SA 1280 (C) 1297B where the court held that "the two younger children [aged 11 and 8] . . . naturally have neither the insight nor the perception to express any view on their future home".

60 S 17(4)(e).

61 Schäfer *The law of access to children* (1993) 54 points out that a 13 year old child may be better able to express a view than a 17 year old, while Van Heerden *Boberg's law of persons and the family* (1999) 542 stresses that the maturity of the child, rather than physical age, is the important consideration. Placing undue emphasis on age alone may subvert the best interests criterion.

light of Eekelaar's approach. *Germani v Herf*⁶² concerned a child who refused to spend a weekend per month with his father as specified in his parents' divorce decree. The court held that although the child was almost 14 years of age, he was "still young, immature in mind, impressionable and, notwithstanding his stubbornness, unable to decide for himself what is in his best interests".⁶³ These would be served best by building a relationship with his father. The court concluded that the boy's reluctance to see his father was the result of his mother's influence and that he could be persuaded to change his mind, if his mother adopted a "firm, disciplinary attitude . . . when he refuses to submit to [his father's] access", and permitted the use of "reasonable, moderate force if necessary".⁶⁴ The court thus decided to disregard the child's expressed wishes, and held that he must be compelled to spend the specified weekends with his father.

In terms of Eekelaar's approach the decision-maker might well have a duty to compel the child to do something contrary to his short-term wishes if irreversible consequences, restricting his choices upon the attainment of full autonomy, would otherwise ensue.⁶⁵ A rejection of his father might have made it impossible to rebuild the relationship at a later date. Furthermore, the boy would have only have one adolescence. He might have come to regret losing the opportunity to develop a relationship with his father during his formative adolescent years. If the boy's decision had been unduly influenced by his mother, or based on misinformation, this would have undermined his competence to decide the issue.

However, a disturbing feature of *Germani* is its tone, which shows little respect for the child or his developing autonomy. This is highlighted by the court's condonation of the violent coercion used previously by the father (and his attorney) to put the child "bodily . . . into his motor car", for the purposes of a scheduled contact weekend. This amounted to "quite a violent struggle" in a police station, during the course of which the father hit his son in the face in order to "subdue him and stop his screaming".⁶⁶

While even violent coercion might be appropriate at times (eg, where the child's behaviour threatens his life or health or is dangerous to others), it is difficult to accept that the child's interests were well served, or that his feelings were taken into account in any meaningful way by forcing him to submit to an access arrangement which he clearly found disturbing. The court relied on psychologists' reports based on interviews held more than two years previously, and had no evidence as to whether the boy's attitude remained a mere reflection of his mother's. In any event, only one of the psychologists had suggested this possibility. The other had reported that the child "was not easily susceptible to outside influences".⁶⁷ Nor did the court rely on professional opinion in reaching the conclusion that the boy could be persuaded to change his mind through the application of force.

62 1975 4 SA 887 (A).

63 899E.

64 900C-D.

65 Other cases which adopt a "future orientated consent" approach (ie that the child must be compelled to do something he/she does not want to do now, but will eventually come to realise that it is in his/her own best interests) include *Evans v Evans* 1982 1 SA 370 (W); *Greenshields v Wyllie* 1989 4 SA 898 (W) and *Haskins v Wildgoose* [1996] 3 All SA 446 (T).

66 *Supra* 895G-J. This case has been cited with approval fairly recently. See *Haskins v Wildgoose supra*.

67 *Germani v Herf supra* 899H.

It is submitted that a serious consideration of the child's views should have included additional psychological interviews and assessments. A more child-centered and respectful approach to the matter might also have suggested that the boy's very strong feelings should have been given more serious consideration. Removing the boy by force would not appear to be conducive to the forging of a healthy father-son relationship. Perhaps the father's access rights could have been temporarily postponed, and the boy's receptiveness to his father reassessed at a later date, thus taking a longer-term view of the decision-making process.

In *Märtens v Märtens*⁶⁸ the court was persuaded by 11-year old twins, who told the judge in chambers that they did not want to return to Germany with their mother. The children had been abducted by their father several years earlier, and hardly knew their mother when the case came to trial. The court found the girls to be "attractive, talented, intelligent young children . . . who were able to speak their minds spontaneously . . . and express their views without prompting or suggestion". One might question whether the court's assessment of the children amounted to a serious consideration of their competence to choose, in the light of evidence given by a psychologist and a social worker who had described the children as angry and confused.⁶⁹

In *Van Rooyen v Van Rooyen*⁷⁰ two boys, aged eight and ten, had expressed their dissatisfaction with their mother's plan to move them to Australia. The court did not take their expressed preference into consideration, referring to their reasons (which are not given in the judgment) as "so childishly immature that I am satisfied that it would be unwise and indeed irresponsible to have any regard to such preferences as are supposed to have been expressed".⁷¹ While the court's decision not to give *effect* to the children's wishes may have been reasonable in the circumstances, a child-centered approach to the issue of the child's "voice", premised on respect for the children and their point of view, should at the very least militate against the dismissive tone evident here.

The child's expressed preferences are not taken into consideration on the grounds of undue parental influence

Children of tender years are regarded as susceptible to undue parental influence. As a result of this, they may express the view held by their custodial parent, or may express different views to each parent respectively. In such cases the court will not regard the child as having the necessary capacity to form a mature, independent opinion. Such concerns were a factor in cases such as *Van Rooyen v Van Rooyen*⁷² (children aged eight and ten), *Hlope v Mahlalela*⁷³ (child aged 12), *H v R*⁷⁴ (child aged eight) and *Evans v Evans*⁷⁵ (child aged ten). In *Märtens v Märtens*⁷⁶ and *Van Rooyen v Van Rooyen*⁷⁷ the court specifically mentions that

68 1991 4 SA 287 (T).

69 290E I-J.

70 1999 4 SA 435 (C).

71 439J.

72 *Supra*.

73 1998 1 SA 449 (T).

74 2000 3 SA 623 (C).

75 1982 1 SA 371 (T).

76 1991 4 SA 287 (T): children aged 11.

77 [2001] 2 All SA 37 (T): child aged 17.

the children concerned did not seem to be parroting the views of a particular parent. This was a factor in the court's decision to give effect to the children's wishes.

4 RECENT CHANGES IN APPROACH

There seems to be a discernible shift in the case law since the mid-1990s. The views of children are mentioned more frequently and there is a greater tendency to give them serious consideration. In *McCall v McCall*,⁷⁸ the court set out a list of factors that could usefully be considered when assessing the best interests of the child. This *dictum* has been influential⁷⁹ and its inclusion of the wishes of the child as one of these factors has, at the very least, brought this issue to the courts' attention. *McCall* was referred to in *Hlope v Mahlalela*,⁸⁰ for example, and the question of the children's wishes put before the court on this basis. In *Van Rooyen v Van Rooyen*⁸¹ it appears that all the "McCall criteria" were weighed up, and the wishes of the child were examined in some detail and given effect to.⁸² But the *McCall dictum* does not provide a "shopping list" and the court is not obliged to consider all the factors mentioned there.⁸³ In *Ex parte Critchfield*,⁸⁴ for example, the court gave judgment "having regard to all the factors enumerated in *McCall v McCall*".⁸⁵ However, the wishes of the very young children (aged seven and three respectively) are not mentioned.

In addition to examining the children's wishes more frequently than in the past, the courts also appear to be giving these preferences more serious consideration, with the tone of the judgments reflecting greater respect for the children and their autonomy, especially where older children are involved. In *Meyer v Gerber*⁸⁶ the court gave effect to the expressed preferences of a 15-year old boy, who had persisted in his desire to be placed in the custody of his father. The court considered the boy himself to be intellectually and emotionally mature and characterised his conduct as that of "n volwasse en verantwoordelike jongman". His expressed wish was the product of long and thoughtful consideration, and he was not acting on a whim, or giving effect to "n emosionele eenogige en irrasionele uiting van sy frustrasies of kwellinge".⁸⁷

In *I v S*⁸⁸ the children's wishes were permitted to override what the court might otherwise have considered to be in their objective best interests.⁸⁹ In this

78 1994 3 SA 201 (C) 204J–205G.

79 See eg *Bethell v Bland* 1996 2 SA 194 (W); *Krasin v Ogle* [1997] 1 All SA 557 (W); *Madiehe (born Rathogo) v Madiehe* [1997] 2 All SA 153 (B); *Lubbe v Du Plessis* 2001 4 SA 57 (C); *Van Pletzen v Van Pletzen* 1998 4 SA 95 (O); *Meyer v Gerber* 1999 3 SA 650 (O); *Ex Parte Critchfield* 1999 3 SA 132 (W); *Kirsh v Kirsh* [1999] 2 All SA 193 (C); *K v K* 1999 4 SA 691 (C); *Van Rooyen v Van Rooyen* [2001] 2 All SA 37 (T).

80 *Supra* 461G.

81 [2001] 2 All SA 37 (T).

82 See also *Meyer v Gerber* 1999 3 SA 650 (O) 655.

83 See *Ex parte Critchfield supra* 145C. Also *V v V* 1998 4 SA 169 (C) 187E–F where the court stresses that the *McCall* list serves only as a guide.

84 1999 3 SA 132 (W).

85 145C.

86 1999 3 SA 650 (O).

87 656D–F.

88 2000 2 SA 993 (C).

89 There are some earlier cases where the wishes of the children have been given serious consideration and may be viewed as a decisive element in the court's order. These include the wishes of a 17-year-old girl in *Matthews v Matthews* 1983 4 SA 136 (SE), where

case the court regretted its decision to refuse a father access to his children, which was contrary to the family advocate's recommendation that he participate in counselling so that he could become a better parent, and in time be reconnected with his children.⁹⁰ Rather, the expressed wishes of the children had to be adhered to. The children, aged 13, 16 and 19, had been described in the psychologist's report as "sufficiently mature and old enough to give an independent opinion as to their refusal to have any contact with their father". In contrast to the *Germani* judgment 25 years earlier, the court chose to cite an English judgment,⁹¹ where it had been held that "it cannot be in their interest that all this cumbersome machinery of the law should be put into operation in order to make boys of 10 and 8 do what they refuse to do. It can only be slightly ridiculous".⁹² The court concluded that, objective factors notwithstanding, the children's best interests would best be served by giving effect to their expressed preference.

A third way in which recent judgments demonstrate greater regard for the child's preferences is by demanding clear evidence of the child's wishes rather than simply ignoring contradictory claims. In *B v P*,⁹³ for example, the court refused to make an order without better evidence of the child's wishes. A central concern was whether or not the child refused to see her father. The court held that it could not make a decision as it had insufficient evidence. It ordered an investigation into the child's best interests and specifically required that the child be interviewed in this regard.

A recent unreported case in the Cape high court⁹⁴ provides an especially strong endorsement of the courts' obligation to give serious regard to the expressed views of the child. Van Heerden J held that where the child has "the requisite 'intellectual and emotional maturity to give in his expression of a preference a genuine and accurate reflection of his feelings . . . [and] to make an informed and intelligent judgment'⁹⁵ then the court should give serious consideration to the child's expressed preference and not lightly give an order which overrides this".⁹⁶

Furthermore, the court explicitly linked this to "one of the key tenets of the Convention on the Rights of the Child", citing part of article 12 as follows:

"[A] child 'who is capable of forming his or her own views [has] the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'."⁹⁷

factors such as having to change syllabus in the middle of her matriculation year might otherwise have suggested an alternative course of action; and *McCall v McCall supra* where the father's previous history of violent conduct towards his son might have suggested that he should not have custody of this child, had the boy not expressed a desire for such an arrangement.

90 It is a strong presumption of South African case law that it is in the best interests of the child to maintain a relationship with both parents. See eg *Duncombe v Willies* 1982 3 SA 311 (D); *Wicks v Fisher* 1999 2 SA 504 (N); *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C); *T v M* 1997 1 SA 54 (A).

91 *Churchyard* 1984 FLR 635 (CA).

92 *Supra* 997I.

93 1991 4 SA 113 (T).

94 *Lubbe v Du Plessis supra*.

95 Citing *McCall v McCall supra* 207H-J.

96 *Lubbe v Du Plessis supra* 25.

97 *Ibid*.

This judgment thus reflects a clear commitment to "hearing" the "voice of the child" and to interpreting South African law in the light of international children's rights law.⁹⁸

Recent judgments thus tend to show a greater regard for the child's competence to express a preference, and an increasing awareness of the importance of giving the views expressed their due consideration. These trends are encouraging. However, one problem would seem to lie in ensuring that the child's views are presented to the court (or other decision-makers) in the first place. The Convention's wording places a positive duty on states to provide children with the opportunity to be heard.⁹⁹ It is submitted that, in addition to giving the views of the child their due consideration once they have been presented to the court, the courts must also ensure that the child has had an opportunity to participate, should he/she desire this. In cases like *Van Vuuren v Van Vuuren*¹⁰⁰ and *Hoyi v Hoyi*¹⁰¹ the courts have reprimanded counsel or the family advocate for failing to investigate the children's best interests sufficiently. Failure to canvass the views of the children adequately should be an additional ground on which to demand further investigation.

5 PROCEDURAL POSSIBILITIES FOR CHILDREN'S PARTICIPATION

A particular weakness in "hearing the child" that does not appear to have improved in recent years, is the way in which the child's opinion has been elicited. As discussed above, the "procedural sub-themes" raised by article 12 are as important as the issues of "competence" and "balancing of interests". True respect for the autonomy rights of the child requires that children be given meaningful opportunities to participate in decision-making. Until these procedural matters are properly attended to, children will not be provided with a real opportunity to be heard.

At present the South African legal system provides several procedural mechanisms through which the child's voice might be heard in divorce matters. These include:

- the child may appear before the judge in person and be interviewed in chambers, or called as a witness in open court;
- a legal representative may be assigned to the child;
- the child may be interviewed by private psychologists or other experts and his/her views presented to court through their reports; and
- the child's view may be canvassed by the office of the family advocate and presented to court in his/her report.

These possibilities will be examined briefly below.

98 Although the provisions of a 12 have not yet been officially incorporated into our divorce law, see Robinson and Ferreira "Die reg van die kind om gehoor te word: Enkele verkennende perspektiewe op die VN Konvensie oor die Regte van die Kind (1989)" 2000 *De Jure* 54 62, where the authors argue that the Convention can be used as persuasive authority, even in the absence of enabling legislation.

99 A 12(1) begins with the words: "States parties shall assure to the child the opportunity to be heard", while a 12(2) provides that "the child shall in particular be provided the opportunity".

100 1993 1 SA 163 (T).

101 1994 1 SA 89 (E).

5.1 Judicial interview of the child

Judges have ascertained the views of the children involved through personal interviews with the children in chambers.¹⁰² However, this practice is not generally well-regarded.¹⁰³ Children may feel intimidated by the judge and may not feel free to state their minds. In addition, the judge does not usually have the specialised training needed to assess either children or their expressed views.¹⁰⁴

Testimony by the child in open court may suffer the same disadvantages, especially when conducted in a clumsy way. In *Hlope v Mahlalela*¹⁰⁵ the court refused to take cognizance of the views expressed by a 12-year old child from the witness box. It is submitted that this was the correct approach, as the circumstances under which the child testified were not conducive to ascertaining her true preferences. As reported in the judgment:

“The child was called to the witness stand by Mr Jordaan and was only asked one question: ‘where would you prefer to stay?’ to which she replied ‘with my grandparents’.”¹⁰⁶

Opposing counsel, by request of her client, chose not to cross-examine the child as this would have been too traumatic for the child in the client's view.

A courtroom is probably an inappropriate environment for enhancing the decision-making capacity of children and helping them to articulate a preference in the ways discussed above. Bearing in mind the problems inherent in judicial interviewing, and the fact that fewer than 10% of divorce-related matters are contested in court,¹⁰⁷ this cannot be regarded as a suitable vehicle for the meaningful participation of children in custody and access decision-making.

5.2 The appointment of legal representation for the child

The court may appoint a legal practitioner to represent the interests of the child in divorce proceedings¹⁰⁸ at state expense, otherwise “substantive injustice” would result.¹⁰⁹ Van Heerden argues that in certain cases such appointment will be necessary to ensure that the children involved have “a proper opportunity to express and explain their views”.¹¹⁰

As discussed above, the appropriateness of appointing legal counsel for the child, and the approach adopted by this representative, will depend on the child's

102 See eg *McCall v McCall supra*; *Märtens v Märtens supra*; *Van Rooyen v Van Rooyen* [2001] 2 All SA 37 (T).

103 Chisholm “Children's participation in family court litigation”: paper delivered at the International Society of Family Law, 10th World Conference, Brisbane, Australia 2000-07-09-13 7.

104 *Idem* 7-8. See also Burman, Derman and Swanepoel “Only for the wealthy? Assessing the future for children of divorce” 2000 *SAJHR* 535 555 where they report that many private psychologists in the Western Cape felt that judges had an insufficient understanding of child psychology.

105 1998 1 SA 449 (T).

106 461E.

107 In 1987 it was estimated that about 98% of all divorce cases were undefended. (*Hansard* 1987-05-25 col 442). In terms of statistics furnished by the Cape high court for the years 1998 and 1999, approximately 97% of all divorces finalised were undefended.

108 Divorce Act 70 of 1979 s 6(4).

109 Constitution of the Republic of South Africa Act 108 of 1996 s 28(2)(h).

110 Van Heerden 542 fn 165.

age and maturity. A vast literature exists on the proper role of such representatives. Some of the issues include the question of whether counsel should advocate the child's wishes or the child's "objective best interests", and whether the child's attorney is bound to keep a child-client's confidences.¹¹¹

The question of professional qualification is of particular importance. Attorneys who represent children need special training and appropriate experience. Children's attorneys must be able to:

- communicate effectively with a child, providing him/her with the information he/she needs to make an informed choice, and assisting him/her to reach a decision;
- understand and interpret what the child is saying, contextualising this within a knowledge both of child development and the child's social environment, including factors pertaining to the child's cultural and economic background;
- develop a relationship of trust with the child-client, which may require time, skill and patience; and
- be able to liaise with other professionals involved with the child such as psychologists, social workers and teachers.¹¹²

As noted above, attorneys have the capacity to enhance or diminish the child's competence.

Green and Dohrn conclude that "many [American] lawyers are professionally unqualified to represent children".¹¹³ It is unknown to what extent South African lawyers possess the skills listed above.¹¹⁴ Adequately trained counsel might be appropriate in some situations, although it might prove impractical to appoint children's representatives as the routine mechanism through which children's voices are heard.

5.3 Private psychological investigation

The appointment of private psychologists to interview children and report to the court has several advantages. Their professional training should equip them with the necessary skills for effective communication, understanding, assessment and capacity building. A major disadvantage is the cost of a private psychologist. At present such services are accessible "only to the wealthy",¹¹⁵ and for this reason would appear to be impractical as the routine procedure through which children are heard.

111 Eg if the child reports abuse. See Green and Dohrn "Children and the ethical practice of law" 1996 *Fordham LR* 1281-1288, and generally "Recommendations of Conference on Ethical Issues in the Legal Representation of Children" *idem* 1301-1323.

112 See generally Margulies 1996 *Fordham LR* 1473-1504; Zaal, Noel and Skelton "Providing effective representation for children in a new constitutional era: Lawyers in the criminal and children's courts" 1998 *SAJHR* 539-559 (although this article focuses on the attorney's role in the criminal and children's courts); Green and Dohrn 1286-1296.

113 *Idem* 1286.

114 Private psychologists in the Western and Eastern Cape, however, have suggested that lawyers need additional training in issues of child psychology and the social environment of the child: Burman, Derman and Swanepoel 555.

115 See generally Burman, Derman and Swanepoel.

5.4 Office of the family advocate

The office of the family advocate was established in terms of the Mediation in Certain Divorce Matters Act 24 of 1987, which provides for the investigation of the welfare of the children in divorce and custody related matters, and for reports of these investigations to be put before the court. The Family Advocate is a trained lawyer, has experience in family matters and can request investigations into the custody arrangements made by the parents. The inquiries are conducted by her own staff of family counsellors, trained as social workers.¹¹⁶ The existing family advocate machinery would thus appear to be an appropriate vehicle for children's participation.¹¹⁷

At present, however, there appears to be many areas of the family advocate's work that would need to be changed or improved in order to give children an effective "voice" in custody decision-making. Some of these problems include:

The existing family advocate machinery does not provide sufficient opportunity for children to express a preference

Palmer has pointed out that the present machinery does not afford adequate opportunity for the child to indicate whether he or she is satisfied with the custody arrangements made by the parents, or wishes to state a preference.¹¹⁸ In terms of the Mediation in Certain Divorce Matters Act, parents are required to complete "Annexure A", and submit this with their summons. Palmer regards "the tenor of the entire form [as] parent-orientated, rather than child-orientated", with the child-related questions covering issues such as the names of the children, their gender and dates of birth, present and proposed living arrangements; education; physical and mental problems and proposed access and maintenance arrangements. The parents are asked whether they are in agreement concerning the proposed arrangements. However, the form does not provide for the views of the children themselves.¹¹⁹

While all Annexure A forms are perused by the family advocate's office, only a small minority of cases are investigated further.¹²⁰ If the parents agree on the arrangements made for the children, the family advocate is unlikely to pursue the matter. As a result of this, the children involved will have no opportunity to express their views to decision-makers within the legal system, regardless of their age or competence. Since well over 90% of divorces are uncontested,¹²¹ this affects the vast majority of children.

116 Burman and McClennan "Providing for children? The family advocate and the legal profession" 1996 *Acta Juridica* 69-81.

117 See eg Zaal and Skelton 540; Robinson "Children and divorce" in Davel *Introduction to child law in South Africa* (2000) 65-82. Note that while the services of the family advocate have not yet been formally extended beyond the high court, in practice, the advocate has provided services to certain lower courts (Burman, Derman and Swanepoel 536 fn 3).

118 Palmer "The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985-1995" 1996 *Acta Juridica* 98-112.

119 *Idem* 113.

120 During the period 1992-1994, eg, the Cape Town office of the family advocate gave final evaluation reports in only 1595 of the 13135 cases referred to it (ie in 12% of cases): Burman and McLennan 72.

121 In 1987 it was estimated that about 98% of all divorce cases were undefended. (*Hansard* 1987-05-25 col 442). In terms of statistics furnished by the Cape high court for the years 1998 and 1999, approximately 97% of all divorces finalised were undefended.

The family advocate attaches little importance to the child's wishes

If the case is investigated by the family advocate's office, an older child will probably have an opportunity to state his/her views. In Cape Town, for example, teenage children are interviewed by the family advocate or by the latter together with the family counsellor, and younger children are observed while interacting with their parents in the waiting room.¹²² Home visits are arranged in about 10 per cent of cases.¹²³

However, even if the child has the opportunity to express a view to the family advocate and family counsellor, this does not imply that this view will be given much weight. A study of family advocate reports for the period 1996 to 1999 (inclusive) examined the criteria used by the family advocate and family counsellors when recommending the best interests of the child in custody and access matters. Ten main themes were identified, including factors such as parental involvement with the child, socio-economic resources and the child's wishes. Of these factors, the child's wishes ranked tenth – that is, it was the least commonly used criterion for making recommendations – and had been referred to in only 17% of the reports (as compared to "parental involvement", the most commonly used criterion, which had been used in 79% of the reports).¹²⁴

It would thus appear that family advocates and family counsellors do not place sufficient emphasis on the child's right to be consulted, and that any preferences that are expressed do not necessarily receive due consideration.

The context of the family advocate interview is not conducive to meaningful participation

As argued earlier, many children cannot participate in decision-making in a meaningful way without the right environment in which to do so. Children need to feel comfortable, and to build a relationship of trust with the person conducting the interview. This may require a long-term process rather than a single session. Indeed, meaningful participation in decision-making is not a single event, but a skill that the child develops over time. This may require a more therapeutic context than is possible within the present family advocate machinery.

Family advocates and family counsellors lack the expertise required to elicit the child's views and interpret them correctly

As discussed above, interviewing children requires expertise. It can be difficult to assess the child's competence or truly understand what the child is saying and the implications thereof, without a knowledge of child development and the child's social environment. Encouraging children to participate in decision-making, and developing their decision-making skills, require expert training. Caring practitioners have commented on the family counsellors' and family advocates'

122 Glasser "Can the Family Advocate adequately safeguard our children's best interests?" 2002 *THRHR* 74.

123 Burman, Derman and Swanepoel 545.

124 Africa, Dawes and Swartz "The custody decision making process in the Cape Town family advocate's office: A thematic analysis of family counsellors' reports" unpublished paper presented at the Third Workshop on Legal Decisions on Children, University of Cape Town, April 2001. The authors caution, however, that many of the cases examined for the study concerned very young children.

lack of training in child psychology, which results in the use of inappropriate interview techniques and an inadequate consideration of issues of child development and the social context of the child.¹²⁵

6 CONCLUSION

Compliance with article 12 requires that procedural mechanisms are put in place to give children a meaningful opportunity to express their views. While the office of the family advocate should be the logical setting for children's participation, at present it appears to be incapable of performing this function. Already, the family advocate machinery is under considerable pressure. As a result of time pressures and heavy caseloads, family advocate reports are very often inadequately investigated, superficial and unprofessional.¹²⁶ The existing pressures would be exacerbated were the office expected to take on the additional responsibility of providing children with a real opportunity to be heard. It has been suggested that the family advocate's office needs far better funding so that it can improve equipment, employ more staff (including child psychologists) to allow for more in-depth investigations and train all staff so that they can perform such investigations properly.¹²⁷

The provision of adequate machinery through which children can express their views will cost money. This project may be viewed as low-priority given that the basic needs of children to food, housing, medical care and education have not yet been met. However, given the increasing number of divorces in South Africa,¹²⁸ and the growing number of children involved, it is appropriate that the means employed to safeguard the best interests of children should be substantially improved as "the decisions made about custody disputes not only decide a great deal for the rest of the children's lives, but may cast a long shadow beyond their generation".¹²⁹ In the process of effecting improvements to decision-making forums, attention must be paid to the child's right to participation, so that the decision-making process includes children to the fullest extent possible, and the child is treated as a person whose views about his or her own future are taken seriously and treated with respect.

125 Burman, Derman and Swanepoel 545 553.

126 *Idem* 545.

127 *Idem* 552-554.

128 Which now exceeds a third of all marriages contracted. See Burman, Derman and Swanepoel 557.

129 *Ibid.*

ERRATUM

2002 *THRHR* 166: Skrap asseblief LLD (UPE)

Aanspreeklikheid vir “nuwe” risiko’s: Moontlikhede en beperkinge van die Suid-Afrikaanse deliktereg¹

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SUMMARY

Liability for “new” risks: possibilities and limitations of the South African law of delict

According to the traditional, established view of the law of delict in South Africa liability for new risks is based on the principle of fault, unless the risk can be brought within the ambit of one of the recognised instances of strict liability (as exception to the fault principle). This state of affairs creates serious *lacunae* which can in certain cases (such as products liability) probably be bridged by the courts, supported by the constitutional Bill of Rights, to create strict liability. In other cases, especially where an extensive legislative regulation is desirable (as with data protection), the legislature should intervene. Ultimately the legislature should also bring into being a general principle – based on risk creation – for strict liability so that the generalising approach of our law of delict can also be established in this field.

1 INLEIDING

Volgens die *HAT* beteken *risiko* “gevaar, bv van skade of verlies”, terwyl die *WAT* *gevaar* omskryf as onder meer ’n kans, moontlikheid of waarskynlikheid dat uit bepaalde omstandighede iets nadeligs kan voortspruit, of ’n ongeluk, onheil of ramp kan voorkom; en na woordluid omvat *nuwe* risiko’s gevare wat tot onlangs toe nog nie bekend was of voorgekom het nie, of onbekende gevare wat in die toekoms kan realiseer, en wat uiteraard in die moderne, komplekse samelewing wyd uiteenlopend kan wees.² Nou is dit natuurlik so dat nie alle risiko’s vir die reg – in die besonder die deliktereg – van belang is nie, maar dat die deliktereg net kennis neem van risiko’s wat ’n regsfeit, hier ’n onregmatige daad of delik, uitmaak.³ Van der Walt⁴ is trouens van mening dat ’n delik,

1 Hierdie bydrae is ’n verwerking van ’n referaat gelewer tydens ’n internasionale konferensie oor *Ius commune: Suid-Afrikaanse en Europese perspektiewe* by die Universiteit van Stellenbosch op 2002-02-13.

2 Dink maar aan die (tans dikwels onbekende) risiko’s wat bv VIGS, seltelefone, oorhoofse hoogspannings- (elektriese) drade, medisyne en mediese behandelings, stres in werksverband, owerheidsoptrede (of gebrek daaraan) by misdaad en deskundige rekenaarstelsels kan inhou.

3 Sien Neethling, Potgieter en Visser *Deliktereg* (2002) 3 vn 5.

4 “Enkele gedagtes oor die grondslag van deliktuele aanspreeklikheid” 1969 *THRHR* 334–336, *Risiko-aanspreeklikheid uit onregmatige daad* (1974) 10.

oftewel die grondslag van deliktuele aanspreeklikheid, geleë is in die onregmatige veroorsaking van nadeel deur 'n juridies-relevante riskante aktiwiteit, of, anders gestel, deur 'n juridies-relevante risikoskepping. Volgens hom is risikoskepping juridies relevant indien dit óf met skuld (opset of nalatigheid) gepaard gaan – die tradisionele, gevestigde standpunt van die Suid-Afrikaanse deliktereg – óf indien dit op strikte of skuldlose aanspreeklikheid (as uitsondering op die skuldleer) gegrond kan word.⁵ Hiermee word nie uit die oog verloor nie dat risikoskepping wat 'n dreigende onregmatige daad daarstel in beginsel ook as regsfeit geld.⁶

Ten einde insig te verkry oor hoe die Suid-Afrikaanse deliktereg nuwe risiko's sal benader, maak dit sin om vas te stel, eerstens welke beginsels reeds met betrekking tot (bepaalde) juridies-relevante riskante aktiwiteite uitgekristalliseer het; en tweedens op welke wyse leemtes in die positiewe reg, indien enige, gevul behoort te word. Langs hierdie weg kan *de lege lata* bepaal word watter moontlikhede én beperkinge die huidige positiewe reg bied, asook welke *de lege ferenda* oplossings gesonde regsontwikkeling kan stimuleer. Hierdie werkswyse geld ten aansien van sowel die skuld- as strikte grondslag van deliktuele aanspreeklikheid. Ter toeligtig word in die besonder verwys na risiko's wat in die moderne tyd op die voorgrond geplaas is deur defekte produkte (inbegrepe deskundige rekenaarsstelsels – "expert systems") en (persoonlike) dataprozessering. Sodoende word ook die toepassingsgebiede van die drie grondpilare van die Suid-Afrikaanse deliktereg, te wete die *actio legis Aquiliae*, die *actio iniuriarum* en die aksie weens pyn en lyding,⁷ in die huidige verband onder die soeklig geplaas. Soos sal blyk, staan die Suid-Afrikaansregtelike beskerming teen sowel defekte produkte as dataprozessering nog in sy kinderskoene, terwyl omvattende wetgewing in byvoorbeeld Engeland, Nederland en Duitsland die risiko's besweer wat hierdie aktiwiteite teweegbring het.

2 SUID-AFRIKAANSE REG: MOONTLIKHEDE EN BEPERKINGE

2.1 Inleidende opmerkings

2.1.1 Skuldgrondslag

Dit is 'n fundamentele eienskap of karaktertrek van die Suid-Afrikaanse deliktereg dat die kwessie van deliktuele aanspreeklikheid generaliserend benader word. Dit beteken dat algemene beginsels of vereistes aanspreeklikheid op grond van 'n onregmatige daad beheers.⁸ Hierdie beginsels geld in die reël ongeag welke individuele belang aangetas word, en ongeag die oorsaak van die aantasting (dit wil sê, die aard van die risikoskeppende of riskante aktiwiteit is normaalweg irrelevant) of die wyse waarop die aantasting geskied. Enige "nuwe" risikoskepping wat op onregmatige wyse nadeel veroorsaak en boonop met skuld gepaard gaan, stel dus 'n gedingsvatbare delik daar.⁹ Ontbreek daarenteen enige

5 Sien ook Neethling, Potgieter en Visser *Deliktereg* 4 vn 10 389–390; vgl *Loriza Brahman v Dippenaar* 2002 2 SA 477 (HHA) 484.

6 Sien oor die interdik Neethling, Potgieter en Visser *Deliktereg* 279–280.

7 *Idem* 5–6 9–20.

8 Sien Van der Walt en Midgley *Delict: Principles and cases* (1997) 2.

9 Die generaliserende benadering van die Suid-Afrikaanse reg blyk duidelik uit die volgende *dictum* in *Perlman v Zoutendyk* 1934 CPD 151 155: "Roman-Dutch Law approaches a new problem in the continental rather than the English way, because in general all damage caused unjustifiably (*injuria*) is actionable, whether caused intentionally (*dolo*) or by negligence (*culpa*)."

van die algemene deliktsvereistes, te wete die handeling, onregmatigheid, skuld, kousaliteit (feitelik en juridies) en nadeel, is daar van 'n onregmatige daad, en bygevolg van aanspreeklikheid weens enige (ook 'n nuwe) riskante aktiwiteit, nie sprake nie.¹⁰

Vanweë die generaliserende benadering kan die Suid-Afrikaanse deliktereg veranderde omstandighede wat nuwe risiko's meebring relatief maklik hanteer. Die rede hiervoor is dat die algemene beginsels juis weens hulle buigsaamheid en vloeibaarheid meesal net 'n aanpassing of nuwe toepassing deur die houe verg.¹¹ Daarom kon aanspreeklikheid weens byvoorbeeld suiwer ekonomiese verlies (nalatige wanvoorstelling inbegrepe),¹² privaatheidskending¹³ en psigiese letsels (of emosionele skok)¹⁴ wat eers in die moderne tyd meer op die voorgrond getree het, met gemak onder die toepassingsgebiede van onderskeidelik die Aquiliese aksie, die *actio iniuriarum* en die aksie weens pyn en lyding tuisgebring word. In *Union Government (Minister of Railways and Harbours) v Warneke*¹⁵ laat appèl-

10 Neethling, Potgieter en Visser *Deliktereg* 4-5; Neethling "Tort law in South Africa – The mixing of the general and the particular" in Smits (red) *The contribution of mixed legal systems to European private law* (2001) 81-82; vgl Van der Walt en Midgley *Delict* 2; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) l; Burchell *Principles of delict* (1993) 10; Smits *Europees privaatrecht in wording* (1999) 239.

11 Vgl Van der Walt en Midgley *Delict* 19 20 vn 10.

12 Sien by *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A); *Minister of Law and Order v Kadir* 1995 1 SA 303 (A); *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 26-28 31-34; *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 877-878 881-882 (2000 3 SA 274 (HHA)); *BOE Bank Ltd v Ries* 2002 2 SA 39 (HHA); *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A); *Standard Bank of South Africa Ltd v OK Bazaars (1929) Ltd* 2000 4 SA 382 (W); *Mukheiber v Raath* 1999 3 SA 1064 (HHA); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A); *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A); *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A); *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A). Sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* 12-13 315 ev 322 ev; Van der Walt en Midgley *Delict* 77 ev; Boberg *The law of delict: Vol 1 Aquilian liability* (1984) 103 ev.

13 Sien by *National Media Ltd v Jooste* 1996 3 SA 262 (HHA); *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A); *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 4 SA 451 (A); sien in die algemeen Neethling *Persoonlikheidsreg* (1998) 46 ev 265 ev; Neethling, Potgieter en Visser *Deliktereg* 381-383.

14 Sien by *Bester v Commercial Union Versekeringsmaatskappy van Suid-Afrika Bpk* 1973 1 SA 769 (A); *Barnard v Santam Bpk* 1999 1 SA 202 (HHA); *Road Accident Fund v Sauls* 2002 2 SA 55 (HHA); sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* 20 309 ev; Neethling "Delictual liability for psychological lesions in South African law" in Magnus en Spier (reds) *European tort law – Liber amicorum for Helmut Koziol* (2000) 209 ev.

15 1911 AD 657 664-665; sien ook *Latham v Sher* 1974 4 SA 687 (W) 694; *Zinnat Insurance Co Ltd v Chawanda* 1991 2 SA 825 (ZSC) 829-833 (1990 1 SA 1019 (ZH)). Ter toelichting kan ook na die resente uitbreidings van die aksie van afhanklikes – as verskyningsvorm van Aquiliese aanspreeklikheid – verwys word (sien *Amod v Multilateral Motor Vehicle Accidents Fund (Commissioner for Gender Equality Intervening)* 1999 4 SA 1319 (HHA); *Santam Bpk v Henery* 1999 3 SA 421 (HHA); *Metiso v Padongelukfonds* 2001 3 SA 1142 (T)). In *Legal Insurance Company Ltd v Botes* 1963 1 SA 608 (A) 614 laat Holmes AR hom soos volg oor hierdie remedie uit: "In its present form, robust and practical, the remedy illustrates the growth and flexibility of the system of law, basically Roman-Dutch, which we have as a heritage in this country." Sien ook Davel "Die ontwikkeling van die aksie van afhanklikes" in Scott en Visser (reds) *Developing delict: Essays in honour of Robert Feenstra* (2000) 158 ev; Neethling en Potgieter "Uitbreiding van die toepassingsgebied van die aksie van afhanklikes" 2001 *THRHR* 484 ev; Neethling "Aksie van afhanklikes: bemoeiing met 'n kontraktuele onderhoudsreg" 2002 *TSAR* 156 ev.

regter Innes hom soos volg oor die uitbreidingspotensiaal van die *actio legis Aquiliae* uit:

“The position of our law with regard to negligence to-day is the result of the growth and the regulated expansion of the original provisions of the *Lex Aquilia*. Crude and archaic in some respects, their operation was gradually widened by the application of the *utilis actio*, and by the interpretation of the Roman jurists. The broadening process was continued by Dutch lawyers on the same lines; and there is no reason why our Courts should not similarly adapt the doctrine and reasoning of the law to the conditions of modern life, so far as that can be done without doing violence to its principles.”

Hoe ook al, naas die generaliserende benadering is ’n sekondêre eienskap van ons deliktereg dat vir doeleindes van die praktiese hanteerbaarmaking van die algemene beginsels op ’n bepaalde gebied van deliktuele aanspreeklikheid – en die bevordering van regsekerheid – besondere verskyningsvorme van delik (soos onregmatige mededinging, nalatige wanvoorstelling, emosionele skok, aanranding, laster, belediging, privaatheidskending, onregmatige vryheidsberowing, owerspel, ensovoorts)¹⁶ tot stand gekom het waarvoor konkrete, eiesoortige reëls ontwikkel is.¹⁷ Sodanige ontwikkeling is ook gewens met betrekking tot ’n nuwe riskante aktiwiteit wat nie onder die toepassingsgebied van ’n bestaande verskyningvorm van delik tuisgebring kan word nie.¹⁸ ’n Belangrike kwalifikasie is uiteraard dat die konkrete reëls met die algemene deliksbeginsels versoenbaar moet wees.¹⁹

2 1 2 Skuldlose grondslag

Aangesien lewensverhoudings hulle eenvoudig nie deur onbuigsame beginsels of reëls laat beheers nie, is dit goed begryplik dat uitsonderings op die skuldgrondslag mettertyd ontwikkel het. Een van die belangrikste ontwikkelings wat die afgelope agt, nege dekades op die terrein van die deliktereg plaasgevind het, was juis die ontstaan en erkenning van gevalle van strikte, skuldlose deliktuele aanspreeklikheid.²⁰ Die fenomenale industriële en tegnologiese ontwikkeling sedert die tweede helfte van die negentiende eeu wat tot die meganisering en vertegnisering van feitlik alle lewensterreine gelei het, en die daarmee gepaardgaande ongekende hoë risiko van benadeling waaraan die individu blootgestel word sonder dat hy enige seggenskap daaroor het en waarteen hy hom skaars kan weer, het die aandag pertinent op die ongenoegsaamheid van die skuldteorie gevestig.²¹

16 Sien hieroor Neethling, Potgieter en Visser *Deliktereg* 297 ev 351 ev.

17 Sien Neethling in Smits (red) 81 ev 102; Neethling, Potgieter en Visser *Deliktereg* 5 vn 12; vgl Neethling “Vertroue op die skynverwekking van beveiliging: ’n Faktor by aanspreeklikheid weens ’n late” 1999 *THRHR* 146 mbt *Longueira v Securitas of South Africa (Pty) Ltd* 1998 4 SA 258 (W) 262–263. Interessant genoeg, het die kasuïstiek en besonderhede van die Engelse “law of torts” juis hier ’n belangrike en vrugbare rol gespeel. Hierdie vermenging van die “algemene” en die “besondere” vergestalt dan ook die hibriede karakter van ons deliktereg waar Romeins-Hollandse reg en Engelse “common law” tot ’n harmonieuse eenheid verbind is (sien ook Smits *Europees privaatrecht in wording* 241–242).

18 Vgl Neethling in Smits (red) 102.

19 Sien *bv Van Heerden en Neethling Unlawful competition* (1995) 64–65; Neethling, Potgieter en Visser *Deliktereg* 5 vn 12.

20 Sien Neethling, Potgieter en Visser *Deliktereg* 5 vn 10 389 ev.

21 Sien Van der Walt *Risiko-aanspreeklikheid* 25 ev, “Strict liability in the South African law of delict” 1968 *CILSA* 51 ev.

Soos in ander ontwikkelde lande, het die groter behoefte aan beskerming vir die individu ook in die Suid-Afrikaanse reg tot die skepping van enkele gevalle van strikte aanspreeklikheid deur die wetgewer²² en howe²³ gelei. Alhoewel die Romeinse reg ook reeds verskyningsvorme van skuldlose aanspreeklikheid geken het,²⁴ het die generaliserende benadering nog nie tot die onderhawige gebied deurgedring nie.²⁵ Tensy die wetgewer ingryp, kan nuwe risikoskeppings dus nie maklik op 'n skuldlose deliktuele grondslag geplaas word nie.

2.2 Besondere gevalle

2.2.1 Vervaardigersaanspreeklikheid

Risikoskepping wat eie aan die moderne geïndustrialiseerde samelewing is, fundeer die aanspreeklikheid van die vervaardiger vir vermoënskade (en persoonlikheidsnadeel) berokken deur middel van 'n defekte produk (sogenaamde "products liability").²⁶ Toenemende industrialisasie en meganisering het naamlik 'n permanente daaglikse benadelingspotensiaal meegebring in die vorm van die onvermydelike risiko wat defekte verbruikersgoedere vir die individu skep. Hierdie risiko of gevaar van defekte produkte is, sonder sy keuse of medegenskap, elke individu se konstante metgesel.²⁷

Die regspraak plaas vervaardigersaanspreeklikheid binne die trefgebied van die Aquiliese aksie en die aksie weens pyn en lyding.²⁸ Gevolglik moet al die elemente van 'n onregmatige daad aanwesig wees om die vervaardiger aanspreeklik te stel. Die Suid-Afrikaanse reg staan nietemin op hierdie gebied nog in sy kinderskoene. Vir die besondere toepassing van die algemene deliksbeginsels

22 Soos vir skade veroorsaak deur lokomotiewe, vliegtuie en kernkrag (Neethling, Potgieter en Visser *Deliktereg* 409 ev).

23 Bv vir skade veroorsaak deur oorlas, onregmatige vryheidsontneming en werknemers (Neethling, Potgieter en Visser *Deliktereg* 398 ev).

24 Soos vir skade veroorsaak deur diere (Neethling, Potgieter en Visser *Deliktereg* 392 ev).

25 Sien in die algemeen oor strikte aanspreeklikheid in die Suid-Afrikaanse reg, Van der Walt *Risiko-aanspreeklikheid* 25 ev, 1968 *CILSA* 51 ev; Neethling, Potgieter en Visser *Deliktereg* 389 ev; Neethling "South Africa" in Koch en Koziol (reds) *Unification of tort law: Strict liability* (2002) 269 ev.

26 Sien in die algemeen Van der Walt "Die deliktuele aanspreeklikheid van die vervaardiger vir skade berokken deur middel van sy defekte produk" 1972 *THRHR* 224 ev; Boberg *Delict* 193 ev; De Jager *Die deliktuele aanspreeklikheid van die vervaardiger teenoor die verbruiker vir skade veroorsaak deur middel van 'n defekte produk* (1977) *passim*, "Die grondslae van produkte-aanspreeklikheid *ex delicto* in die Suid-Afrikaanse Reg" 1978 *THRHR* 347 ev; Snyman "Products liability in modern Roman-Dutch law" 1980 *CILSA* 177 ev; Hartzenberg *Die opkoms van die risikobeginsel op die gebied van deliktuele vervaardigersaanspreeklikheid* (1979) *passim*; Neethling, Potgieter en Visser *Deliktereg* 345 ev.

27 Van der Walt 1972 *THRHR* 224.

28 Sien bv *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (HHA) 470-471; *Wagener and Cuttings v Pharmicare Ltd* [2002] 1 All SA 66 (K) 68; *Bayer South Africa (Pty) Ltd v Viljoen* 1990 2 SA 647 (A); *A Gibb and Son (Pty) Ltd v Taylor and Mitchell Timber Supply Co (Pty) Ltd* 1975 2 SA 457 (W); vgl *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 4 SA 185 (T); *Doornbult Boerdery (Edms) Bpk v Bayer South Africa (Edms) Bpk en Ciba-Geigy (Edms) Bpk* saaknr I 5452/1976 (T); *Lennon Ltd v BSA Company* 1914 AD 1; *Cooper and Nephews v Visser* 1920 AD 111; *Herschel v Mrupe* 1954 3 SA 464 (A) 486-487. Sien in die algemeen De Jager *Vervaardigersaanspreeklikheid* 581 ev; Snyman 1980 *CILSA* 186-189; Hartzenberg *Risikobeginsel* 160 ev.

en bygevolg die uitbouing van reëls op hierdie nuwe terrein kan dus veel waarde uit regsvergelyking geput word.²⁹ Sodanige benadering kan reeds in die regspraak bespeur word.³⁰ Die delikselemente word vervolgens kortliks van naderby bekyk:

Die vervaardiger se risikoskeppende *handeling*, as willekeurige menslike gedraging, bestaan uit die beheer en toesig oor en organisasie van die komplekse proses van industriële produksie.³¹ Die toepassing van hierdie element is oënskynlik nie problematies nie.

Onregmatigheid is in ons reg óf in die skending van 'n subjektiewe reg óf in die verbreking van 'n regsplig geleë, en word basies aan die hand van die regsopvatting van die gemeenskap (*boni mores*) of redelikeidsmaatstaf bepaal.³² Hiervolgens het die vervaardiger 'n plig om redelikerwys te voorkom dat gebrekkige produkte die mark bereik en die belange van die verbruiker skend.³³ Daarom is skadeberokkening deur middel van 'n defekte produk – synde 'n verbreking van die regsplig – in beginsel onregmatig. In *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*³⁴ verwoord appèlregter Nienaber en waarnemende appèlregter Conradie dit so:

“Dat . . . 'n vervaardiger volgens die regsoortuiging van die gemeenskap verkeerd en dus onregmatig optree indien hy 'n produk kommersieel beskikbaar stel wat in die loop van sy bestemde gebruik en as gevolg van 'n gebrek vir die verbruiker daarvan skade veroorsaak, volg eintlik vanself.”

'n Produk is defek of gebrekkig indien dit volgens gemeenskapsoortuiging en -ervaring³⁵ 'n onredelike risiko van benadeling skep of onredelik gevaarlik is,³⁶ en 'n produk is onredelik gevaarlik indien dit in die omstandighede nie aan die verwagtinge van die deursnee-verbruiker met betrekking tot sy veiligheid voldoen nie.^{37 38} By die bepaling van die onredelikheid van die risiko wat nuwe produkte

29 Veral die regsontwikkeling in die VSA, Engeland en ander EU-lidlande (soos Nederland en Duitsland) bied baie goeie aanknopingspunte vir die toekomstige ontplooiing van produkte-aanspreeklikheid in ons reg (sien Neethling, Potgieter en Visser *Deliktereg* 346–348; De Jager *Vervaardigersaanspreeklikheid passim*; Hartzenberg *Risikobeginsel passim*; Alheit *Issues of civil liability arising from the use of expert systems* (1997) *passim*; Koch en Koziol “Comparative conclusions” in Koch en Koziol (reds) 395 ev).

30 *Bv A Gibb and Son (Pty) Ltd v Taylor and Mitchell Timber Supply Co (Pty) Ltd* 1975 2 SA 457 (W) 461–464.

31 Sien hieroor De Jager *Vervaardigersaanspreeklikheid* 613 ev, 1978 *THRHR* 352–354; Van der Walt 1972 *THRHR* 239; Alheit *Expert systems* 502; vgl Neethling, Potgieter en Visser *Deliktereg* 29–30 vn 6 oor die handeling van 'n regsposon.

32 Sien Neethling, Potgieter en Visser *Deliktereg* 40 ev.

33 De Jager *Vervaardigersaanspreeklikheid* 627 ev, 1978 *THRHR* 354 ev, veral 359; sien ook Alheit *Expert systems* 502–503.

34 2002 2 SA 447 (HHA) 470.

35 Van der Walt 1972 *THRHR* 241.

36 De Jager 1978 *THRHR* 360, *Vervaardigersaanspreeklikheid* 632 ev; Alheit *Expert systems* 503–504.

37 Vgl Van der Walt 1972 *THRHR* 242. Dit is die posisie in die Amerikaanse reg (vgl par 402A van die *Second Restatement of Torts*) en in die EU Direktief (Alheit *Expert systems* 369–370 504).

38 Hieruit volg dat produkte wat volgens hulle vorm (soos 'n mes, lemmetjie of saag) of inhoud (soos sigarette of sterk drank) onvermydelik gevaarlik is, nie as defektief geag word nie. Hierteenoor kan selfs tekortkominge in die ontwerp van 'n produk of onvoldoende waarskuwings of inligting oor produkte as defekte geld (vgl Van der Walt 1972 *THRHR* 242; sien verder De Jager *Vervaardigersaanspreeklikheid* 630 ev).

skep – veral op mediese gebied waar nuwe medisyne met onsekere newe-effekte onvermydelik skadelik kan wees – moet die stand van menslike wetenskap en tegniek en die noodsaaklikheid van eksperimentering nie uit die oog verloor word nie.³⁹

Daar moet vanselfsprekend 'n *kousale verband* tussen die vervaardiger se handeling – die vervaardiging van 'n defekte produk – en die benadeling van die eiser (as gevolg van die defek) wees.⁴⁰ Feitelike kousaliteit word deur middel van die “but for”- of *conditio sine qua non*-toets bepaal.⁴¹ Regsoorsaaklikheid word weer aan die hand van 'n soepel maatstaf bepaal waar die kernvraag is of daar 'n genoegsame noue verband tussen die dader se handeling en die gevolg bestaan dat die gevolg die dader met inagneming van beleidsoorwegings gegrond op redelikheid, billikheid en regverdigheid toegereken kan word. Die bestaande juridiese kousaliteitstoetse (soos redelike voorsienbaarheid) kan wel 'n subsidiêre rol speel by die bepaling van regsoorsaaklikheid aan die hand van die soepel maatstaf.⁴²

Laastens moet die vervaardiger (minstens) *nalatig* gehandel het om aanspreeklikheid te vestig.⁴³ Die vervaardiger se optrede moet dus getoets word aan die sorg wat die redelike persoon in die besondere omstandighede aan die dag sou gelê het; en hier gaan dit om die redelike voorsien- en voorkombaarheid van skade.⁴⁴ Dit is meestal egter uiters moeilik om skuld aan die kant van die vervaardiger te bewys – óf omdat skuld (opset of nalatigheid) dikwels by die produksieproses eenvoudig nie aanwesig is nie, óf omdat die benadeelde in 'n geweldige bewysnood verkeer vir sover die tegnologiese produksieproses vir hom ontoeganklik en gekompliseerd is.⁴⁵ Daarom behoort die bewysnood van die benadeelde, soos in die Anglo-Amerikaanse reg, verlig te word deur 'n besondere toepassing van die leerstuk van *res ipsa loquitur*, wat 'n ommekeer van die bewyslas deur 'n vermoede van nalatigheid aan die kant van die vervaardiger bewerkstellig.⁴⁶ Indien hierdie effek nie in Suid-Afrika haalbaar is

39 Van der Walt 1972 *THRHR* 242.

40 Sien De Jager *Vervaardigersaanspreeklikheid* 651–652.

41 Sien hieroor in die algemeen Neethling, Potgieter en Visser *Deliktereg* 186 ev – ook vir kritiek op hierdie sg “toets” vir feitelike kousaliteit.

42 Sien hieroor in die algemeen *idem* 196 ev. Sien ook *idem* 348 vn 324 oor vervaardigersaanspreeklikheid.

43 *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (HHA) 471; *Wagener and Cuttings v Pharmicare Ltd* [2002] 1 All SA 66 (K) 68; De Jager *Vervaardigersaanspreeklikheid* 640 ev.

44 Boberg *Delict* 194; De Jager *Vervaardigersaanspreeklikheid* 595–596; Alheit *Expert systems* 507 ev; *A Gibb and Son (Pty) Ltd v Taylor and Mitchell Timber Supply Co (Pty) Ltd* 1975 2 SA 457 (W) 464–465. Sien in die algemeen oor nalatigheid Neethling, Potgieter en Visser *Deliktereg* 140 ev. In hierdie verband sal nadeel wat voortvloei uit die abnormale gebruik van 'n produk waarskynlik in die reël nie redelikerwys voorsienbaar wees nie (vgl De Jager *Vervaardigersaanspreeklikheid* 659).

45 Van der Walt 1972 *THRHR* 242–243.

46 Hierdie leerstuk skep in die Anglo-Amerikaanse reg twee vermoedens teen die vervaardiger: die vermoede dat hy 'n ongeskikte produksieproses gebruik het en die vermoede dat sy werknemers sy produksieproses nalatig uitgevoer het. Die vervaardiger moet albei vermoedens weerlê. Omdat dié weerleggingslas uiters moeilik is, word die skuldbeginsel ondergrawe en 'n vermomde skuldlose aanspreeklikheid tree na vore (Van der Walt 1972 *THRHR* 233). Sien in die algemeen verder *idem* 248–249; De Jager 1978 *THRHR* 361 ev, *Vervaardigersaanspreeklikheid* 640 ev; Boberg *Delict* 194; Alheit *Expert systems* 511–514; Hartzenberg *Risikobeginsel* 143.

nie,⁴⁷ word aan die hand gedoen dat die *res ipsa loquitur*-afleiding van nalatigheid ten minste gemaak behoort te word waar 'n verbruiker bewys dat hy deur 'n defekte (onredelik gevaarlike) produk benadeel is en dat die produk reeds in hierdie toestand was toe die vervaardiger sy beheer daarvoor prysgegee het.⁴⁸

Uiteindelik behoort vervaardigersaanspreeklikheid, soos in die EU-lidlande⁴⁹ en die VSA,⁵⁰ op 'n *skuldlose grondslag* geplaas te word.⁵¹ Verskeie faktore regverdig hierdie grondslag:⁵² Die vervaardiging van defekte produkte skep 'n buitengewoon hoë risiko van benadeling vir die verbruiker; dié risiko is veelal onvermydelik, óf omdat die verbruiker hom nie daarteen kan weer nie, óf omdat die vervaardiger in elk geval sorgsaam (en dus nie nalatig nie) opgetree het; dit is uiters moeilik om skuld aan die kant van die vervaardiger te bewys; die verbruiker se fisies-psigiese welsyn – veral ook as grondwetlik verskanste fundamentele reg⁵³ – vereis die grootste mate van beskerming teen defekte produkte; die bemarking en advertensie van produkte skep die vertroue by die publiek dat hulle veilig is; strikte aanspreeklikheid dien as aansporing vir die vervaardiger om die uiterste mate van sorg aan die dag te lê; en die vervaardiger is, vanuit ekonomiese oogpunt gesien, die beste in staat om die skadelas te absorbeer en te versprei deur prysverhoging en versekering.⁵⁴

Bostaande uiteensetting van die generaliserende benadering ten aansien van produkte-aanspreeklikheid kan volgens Alheit⁵⁵ met vrug ook op een van die relatief resente produkte van die rekenaartegnologie toegepas word, naamlik deskundige rekenaarsstelsels. Die unieke aard van hierdie rekenaarprogramme

47 In *Bayer South Africa (Pty) Ltd v Viljoen* 1990 2 SA 647 (A) 661–662 is die Appèlhof in beginsel nie gekant teen die toepassing van die leerstuk waar beleidsoorwegings dit regverdig nie; nietemin wil Milne AR, anders as in die Anglo-Amerikaanse reg, die leerstuk tot die "normale" gebruik daarvan beperk, dws dat dit net toepassing vind in gevalle waar die feite van 'n saak sodanig is dat dit op sigself tot 'n afleiding van nalatigheid aanleiding gee. In *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 4 SA 185 (T) staan die hof insgelyks nie afkeurend teenoor sodanige benadering nie. Myburgh R verklaar trouens (190): "I need not deal with the acts of negligence alleged, it being assumed that these can be proved at the trial by reason of *res ipsa loquitur* or otherwise."

48 De Jager 1978 *THRHR* 364.

49 Koch en Koziol "Comparative conclusions" in Koch en Koziol (reds) 402 verklaar: "All jurisdictions but South Africa have some strict liability rule for damage caused by defective products, most of them implementing European Directive no. 85/374 (which has not led to entirely identical solutions, however)." Vir voorbeelde sien Cousy en Droschout "Belgium" *idem* 50; Rogers "England" *idem* 110; Du Perron "Netherlands" *idem* 243; Fedtke en Magnus "Germany" *idem* 156–157; Widmer "Switzerland" *idem* 328 334; Koch en Koziol "Austria" *idem* 13 20.

50 Sien Schwartz "United States" *idem* 354.

51 Sien Alheit *Expert systems* 334 ev 363 ev 514–515; De Jager *Vervaardigersaanspreeklikheid* 648; vgl *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (HHA) 471, aangehaal *infra* vn 87.

52 Sien Van der Walt 1972 *THRHR* 243; Hartzenberg *Risikobeginsel* 136 ev; vgl De Jager 1978 *THRHR* 365–366.

53 Hierop word *infra* par 3 1 ingegaan. Sien in die algemeen oor die beskerming van die fisies-psigiese integriteit as hoogste persoonlikheidsgoed in ons reg, Neethling *Persoonlikheidsreg* 31–32 103 ev.

54 Die moontlikhede vir die toekomstige erkenning van skuldlose vervaardigersaanspreeklikheid in die Suid-Afrikaanse reg word hieronder (par 3) bespreek.

55 *Expert systems* 499 ev.

bestaan in hulle vermoë om die gebruiker van deskundige hulp of advies te dien ten einde 'n probleem op te los of 'n taak uit te voer. Uiteraard kan die stelsels op 'n verskeidenheid terreine toegepas word, vele waarvan verband hou met die veiligheid van die gebruiker of derde partye, soos outomatiese vliegstelsels op vliegtuie of mediese deskundige stelsels om siektes te diagnoseer. Volgens Alheit⁵⁶ is dit dus duidelik dat "a grave risk of potential personal injury exists in the event of a fault in the ES [expert system]". Aangesien die stelsels – meer nog as by vele ander produkte – hoogs gekompliseerd en tegnies baie ingewikkeld is, is dit feitlik onmoontlik om skuld aan die kant van die ontwikkelaar te bewys. Daarom bepleit Alheit⁵⁷ ook hier die aanvaarding van strikte aanspreeklikheid vir ons reg.

2 2 2 Persoonlike dataprozessering

Die beskermingsbehoefte van die individu met betrekking tot die prosessering van data oor homself deur 'n ander persoon of instansie – wat, om die knoop deur te hak, veral sy privaatheid as persoonlikheidsgoed betrek – het sedert die sewentigerjare van die vorige eeu in alle geïndustrialiseerde lande besondere aandag begin geniet. Die verwickeldheid van die moderne samelewing het naamlik al hoe meer redes laat ontstaan waarom die staat of 'n individu 'n belang in inligting rakende 'n ander persoon het. Ten einde dié data te bekom en sodoende die belange te bevredig, het 'n nuwe nywerheid ontstaan, die praktyke waarvan 'n risiko vir die individu skep – veral deur middel van die gebruik van die elektroniese rekenaar as terminus van die gebergde data – wat haas onoorsienbaar is. In die besonder skep geïntegreerde databanke die moontlikheid van 'n blootlegging ("visibility") van die individu se private lewe (sy sogenaamde rekenaarprivaatheid) soos nooit tevore nie.⁵⁸ In die meeste Westerse lande bestaan daar dan ook vandag uitvoerige wetgewende maatreëls om privaatheid in hierdie verband te beskerm.⁵⁹ In Suid-Afrika het die wetgewer nog nie ingegryp nie en is 'n mens dus op algemene deliksbeginsels, asook die Grondwet, aangewese.

Privaatheid word as persoonlikheidsreg in ons reg erken.⁶⁰ Om aanspreeklikheid weens privaateidskending op grond op dataprozessering te vestig, moet

56 *Idem* 537.

57 *Idem* 541–542.

58 Miller 1972 *Int So Sci J* 429 vn 1 stel dit treffend: "The computer with its insatiable appetite for information, its image of infallibility, its inability to forget anything that has been put into it, may become the heart of a surveillance system that will turn our society into a transparent world in which our home, our finances, our associations, our mental and physical condition are laid bare to the most casual observer." Sien in die algemene Neethling *Persoonlikheidsreg* 321 ev, "Databaseskerming: Motivering en riglyne vir wetgewing in Suid-Afrika" in Strauss (red) *Huldigingsbundel vir WA Joubert* (1988) 105 ev, "Die reg op privaatheid en universiteit" in Van Wyk (red) *Nihil obstat: Feesbundel vir WJ Hosten* (1996) 132–139; Roos "Data protection for South Africa: Expectations created by the Open Democracy Bill, 1998" in Burns (red) *The constitutional right of access to information* (2001) 41 ev.

59 Bv Nederland, Duitsland, Engeland: sien Neethling *Persoonlikheidsreg* 327 vn 52.

60 Sien bv *National Media Ltd v Jooste* 1996 3 SA 262 (A) 271; *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A) 849; *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A) 462–463; sien in die algemene Neethling *Persoonlikheidsreg* 265 ev; Burchell *Personality rights and freedom of expression. The modern actio iniuriarum* (1998) 371 ev. Sien ook a 14 van die Grondwet, 1996 wat die reg op privaatheid uitdruklik in die Handves van Regte verskans (Neethling *Persoonlikheidsreg* 268; Neethling, Potgieter en Visser *Deliktetreg* 381 vn 259).

aan al die algemene deliksbeginsels voldoen word. Die gewraakte optrede moet in die eerste plek dus onregmatig wees. Soos gesê, is onregmatigheid, afgesien van regspligskending, in die skending van ’n subjektiewe reg geleë – hier die reg op privaatheid – wat basies aan die hand van die redelikeheids- of *boni mores*-maatstaf bepaal word.⁶¹ As uitgangspunt word aanvaar dat die ongemagtigde prosessering van persoonsinligting prinsipieel *contra bonos mores* en bygevolg *prima facie* onregmatig is.⁶² *Prima facie*-onregmatigheid kan uiteraard deur die aanwesigheid van ’n regverdigingsgrond opgehef word. Sodanige gronde doen hul trouens dikwels voor op die terrein van dataprosessering.⁶³ Van besondere betekenis is dat óf die geregverdigde belange van individue of instansies, óf die openbare belang dataprosessering kan regverdig. Besondere reëls wat die toepassing van die *boni mores*-maatstaf hier kan vergemaklik, is die volgende: die belang wat ter regverdiging van die dataprosessering dien, moet regtens erkenning en beskerming geniet; die dataprosessering moet redelikerwys verband hou met, en noodsaaklik wees vir, die beskerming van die belang (daarom mag data nie gebruik of gekommunikeer word op ’n wyse wat nie met dié beskerming te versoen is nie, of geprosesseer word vir langer as wat vir die beskerming nodig is nie); en die data moet waar wees, nie misleidend wees nie en op ’n regmatige wyse verkry gewees het.⁶⁴

Handel die dader (data-industrie) volgens bostaande beginsels onregmatig, moet die eiser, afgesien van kousaliteit en nadeel, ook bewys dat die privaatheidskending opsetlik of *animus iniuriandi* geskied het ten einde met die *actio iniuriarum* vir genoeëdoening of *solatium* te kan slaag.⁶⁵ Dit sal egter baie moeilik wees om opset by die dader tuis te bring omdat hy hom meesal op afwesigheid van onregmatigheidsbewussyn as element van opset sal kan beroep.⁶⁶ Daarom kan as eerste stap oorweeg word, soos inderdaad in *National Media Ltd v Bogoshi*⁶⁷ met betrekking tot aanspreeklikheid van die pers weens laster gebeur het, om opset deur nalatigheid as aanspreeklikheidsvereiste vir privaatheidskending deur die

61 Sien Neethling *Persoonlikheidsreg* 268–269 329.

62 *Idem* 329.

63 In *S v Bailey* 1981 4 SA 187 (N) 189, wat spesifiek oor persoonlike dataprosessering gegaan het, verwoord Broom R hierdie algemene beginsel soos volg: “In all these cases it is the unlawful interference against which the individual’s privacy is protected. Clearly . . . there is no unqualified right to privacy. This right, like so many others, survives only until such time as it is overshadowed by some superior legal right. Many examples of lawful interference spring to mind such as arrest, search, taking of finger prints or blood samples under the Criminal Procedure Act, the furnishing of the mass of detail required in the income tax return forms, and so on” (my kursivering).

64 Sien Neethling *Persoonlikheidsreg* 330–333.

65 *Idem* 303–304 333; Neethling, Potgieter en Visser *Deliktereg* 383.

66 Sien oor opset Neethling, Potgieter en Visser *Deliktereg* 135–138; Neethling *Persoonlikheidsreg* 70–71.

67 1998 4 SA 1196 (HHA) 1210–1211 (vir besprekings van *Bogoshi*, sien Neethling, Potgieter en Visser *Deliktereg* 374; Burchell “Media freedom of expression scores as strict liability receives the red card: *National Media Ltd v Bogoshi*” 1999 *SALJ* 1; Midgley “Media liability for defamation” 1999 *SALJ* 211; Neethling “Die lasterreg, die Grondwet en *National Media Ltd v Bogoshi*” 1999 (2) *TRW* 104; Neethling en Potgieter “Die lasterreg en die media: Strikte aanspreeklikheid word ten gunste van nalatigheid verwerp en ’n verweer van media-privilegie gevestig” 1999 *THRHR* 442); sien ook *Marais v Groenewald* 2001 1 SA 634 (T) 644–646 (vir bespreking sien Neethling “Nalatigheid as aanspreeklikheidsvereiste vir die *actio iniuriarum* by laster” 2002 *THRHR* 260 ev).

data-industrie te vervang. Uiteindelik behoort skuld egter nie as aanspreeklikheidsvereiste by genoegdoenings- en skadevergoedingseise gestel te word nie, en wel om die volgende oorwegings: Die versameling en gebruik van persoonlike data (veral deur middel van elektroniese databanke) skep 'n buitengewone hoë risiko van individuele privaathedskending; dit is moeilik om skuld aan die kant van die verweerder te bewys; elke persoon se reg op privaatheid – veral ook as grondwetlik verskanste fundamentele reg⁶⁸ – verg die grootste mate van beskerming teen onregmatige dataprozessering; strikte aanspreeklikheid dien as aansporing vir die data-industrie om die uiterste mate van sorg aan die dag te lê; en die data-industrie is, vanuit ekonomiese oogpunt gesien, die beste in staat om die skadelas te absorbeer en te versprei.⁶⁹

Hoe ook al, daar is eensgesindheid dat die algemene deliksbeginsels op die gebied van databeskerming van weinig betekenis is indien die individu nie ook regtens in staat gestel word om regstreekse beheer oor sy geprosesseerde data uit te oefen nie. Ten einde hom in staat te stel om sodanige kontrole uit te oefen, moet aan minstens vyf vereistes voldoen word.⁷⁰ Die individu moet naamlik (i) bewus wees van die bestaan van 'n databeeld oor homself; (ii) bewus wees van die doel (of doeleindes) waarvoor die data geprosesseer word; (iii) bevoeg wees om insae in sy databeeld te verkry;⁷¹ (iv) bevoeg wees om kennis te verkry van welke persone toegang tot sy databeeld gehad het; en (v) bevoeg wees om 'n wysiging of skraping van bepaalde data te bewerkstellig (bv onware data, of verouderde data, of data wat op onregmatige wyse verkry is, of data wat nie redelikerwys verband hou met of noodsaaklik is vir die beskerming van 'n geregverdigde belang nie). Hieruit blyk dat die aktiewe kontrole-maatreëls geheel en al van die algemene beginsels van die *actio iniuriarum* verskil en gevolglik uniek op die gebied van privaathedbeskerming is. Uit die aard van die saak kan hierdie maatreëls daarom net by wyse van wetgewing geskep word.

3 TOEKOMSBLIK

3.1 Inleiding

Uit bostaande blyk duidelik dat die feit dat die Suid-Afrikaanse deliktereg met betrekking tot nuwe risiko's steeds stewig op die skuldbeginsel gefundeerd is, tekortkominge in ons reg skep, veral wat die ontwikkeling en erkenning van strikte

68 Hierop word *infra* par 3.1 en 3.2 ingegaan. Sien in die algemeen oor die beskerming van privaatheid as persoonlikheidsgoed in ons reg, Neethling *Persoonlikheidsreg* 36 ev 265 ev; Neethling, Potgieter en Visser *Deliktereg* 381–383; vgl verder McQuoid-Mason "Invasion of privacy: Common law v constitutional delict – does it make a difference?" in Scott en Visser (reds) 227 ev.

69 Die moontlikhede vir die toekomstige erkenning van skuldlose aanspreeklikheid op die huidige gebied word hieronder (par 3) bespreek.

70 Sien Neethling *Persoonlikheidsreg* 328 334–337.

71 Die fundamentele reg op toegang tot enige inligting wat deur die staat gehou word, of wat deur enige ander persoon gehou en benodig word vir die uitoefening of beskerming van enige regte (a 32(1)(a) en (b) van die Grondwet, 1996), verskans nou die datasubjek se bevoegdheid tot insae in sy databeeld – insae in sy databeeld is ongetwyfeld noodsaaklik ten einde die datasubjek te bemagtig om kontrole oor sy persoonsinligting te kan uitoefen en aldus sy grondwetlike reg op privaatheid te beskerm (vgl in die algemeen Roos in Burns (red) 41 ev oor die bepaling van die ontwerp van die Wet op Bevordering van Toegang tot Inligting 2 van 2000).

aanspreeklikheid in verdienstelike gevalle (soos produkte-aanspreeklikheid) betref. In die verlede is sommige leemtes deur die wetgewer aangevul (soos by risiko's geskep deur lokomotiewe, kernkrag, vliegtuie en vroeër elektrisiteit).⁷² In ander gevalle (bv risiko's veroorsaak deur oorlas, onregmatige vryheidsberowing en beslaglegging op goed, en die verhoudings wat middellike aanspreeklikheid fundeer) het die howe, hoofsaaklik as gevolg van die invloed van die Engelse reg, die leiding geneem (die jongste waarvan die middellike aanspreeklikheid van die motorvoertuigeienaar vir die nalatige bestuur van die motorvoertuigbestuurder is).⁷³ Die vraag ontstaan in hoever die howe, veral as gevolg van imperatiewe van die Grondwet van 1996, verdere ontwikkeling op die gebied van strikte aanspreeklikheid kan fundeer, en of die nodige regs hervorming voor die deur van die wetgewer lê.

3.2 Howe

Die Grondwet van Suid-Afrika is die hoogste reg van ons land en verskans sekere fundamentele regte in hoofstuk 2 (Handves van Regte). Die Handves is van toepassing op alle reg – dus ook die deliktereg – en bind vertikaal onder andere die regsprekende gesag en alle staatsorgane.⁷⁴ Omdat die Handves, waar toepaslik, ook op natuurlike en regspersone van toepassing is,⁷⁵ het dit boonop horisontale werking. Die vertikale en horisontale werking kan op sowel 'n direkte as indirekte wyse plaasvind, alhoewel daar as gevolg van onvermydelike oorvleueling nie 'n skerp onderskeid tussen direkte en indirekte toepassing gemaak kan word nie. Vertikaal beteken die direkte werking dat die staat verplig is om die fundamentele regte te respekteer⁷⁶ wat op die gebied van die deliktereg geld vir sover die betrokke regte nie ingevolge die Handves van Regte beperk is nie.⁷⁷ Direkte horisontale werking weer hou in dat die howe, deur die toepassing en waar nodig ontwikkeling van die gemenerereg, gevolg moet gee aan fundamentele regte wat relevant is tot of verband hou met die deliktereg in die mate waarin wetgewing dit nie doen nie.⁷⁸ Met die indirekte werking van die Handves word bedoel dat alle privaatregtelike beginsels en reëls – inbegrepe dié wat die deliktereg beheers – onderworpe is aan, en daarom inhoud gegee moet word aan die hand van die basiese waardes vervat in hoofstuk 2. In hierdie verband moet

72 Sien Neethling, Potgieter en Visser *Deliktereg* 409 ev.

73 Sien by *Messina Associated Carriers v Kleinhaus* 2001 3 SA 868 (HHA) 875; Neethling, Potgieter en Visser *Deliktereg* 408–409.

74 Sien Grondwet a 2 en 8(1); Neethling, Potgieter en Visser *Deliktereg* 20; Van der Walt en Midgley *Delict* 6; Neethling *Persoonlikheidsreg* 92.

75 Sien Grondwet a 8(2); Van der Walt en Midgley *Delict* 6; Neethling *Persoonlikheidsreg* 92–93 vn 378; Burchell *Personality rights* 65 ev.

76 Dws, “not to perform any act that infringes these rights”: *Carmichele v Minister of Safety and Security (Centre for Legal Studies Intervening)* 2001 4 SA 938 (KH) 957. Die hof vervolg: “In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection.” Sien ook Carpenter “The right to physical safety as a constitutionally protected human right” in Carpenter (red) *Suprema lex: Opstelle oor die Grondwet aangebied aan Marinus Wiechers* (1998) 153–154 oor staatsaanspreeklikheid weens die inwerking op die reg op die fisies-psigiese integriteit deur 'n late en die rol wat die beperkingsklousule (Grondwet a 36(1) – sien volgende vn) hier speel.

77 Grondwet a 36(1).

78 Sien Grondwet a 8(3); Neethling, Potgieter en Visser *Deliktereg* 21 vn 129; Neethling *Persoonlikheidsreg* 92 vn 378.

die howe by die ontwikkeling van die gemenerereg die gees, strekking en oogmerke van die Handves van Regte bevorder.⁷⁹

Teen hierdie agtergrond moet die beslissing van die Konstitusionele Hof in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)*⁸⁰ in oënskou geneem word. Die volgende aspekte is vir huidige doeleindes van belang. Die hof stel dit onomwonde dat daar in die lig van die Grondwet 'n algemene plig op howe rus om die gemenerereg te ontwikkel met inagneming van die gees, strekking en oogmerke van die Handves van Regte. Hierdie algemene plig verleen egter nie, en dit is belangrik, *carte blanche* aan regters om die gemenerereg na willekeur te verander nie. Die hof beklemtoon dat die belangrikste dryfkrag vir regshervorming steeds die wetgewer is en nie die regsprekende gesag nie.⁸¹ 'n Ondersoek na die wysiging van die gemenerereg behels 'n tweeledige proses. Eerstens moet vasgestel word of die bestaande gemenerereg in die lig van grondwetlike oogmerke hersiening verg, oftewel of ontwikkeling van die gemenerereg noodsaaklik is, en indien wel, hoe sodanige ontwikkeling moet plaasvind.

Die direkte toepassing van die Handves⁸² het tot gevolg dat die beskerming van verskanste regte versterk word,⁸³ in die besonder ook deur die grondwetlike imperatief⁸⁴ wat die staat verplig om die regte in die Handves te eerbiedig, te beskerm, te bevorder en te verwesenlik. Ter toeligtig kan die reg op sekerheid van die persoon (inbegrepe die reg op die fisies-psigiese integriteit) dien.⁸⁵ Daar kan naamlik 'n sterk saak uitgemaak word dat die verskansing van dié reg sterk aanduidend is van byvoorbeeld 'n regsplig wat op die staat (soos die polisie of 'n hospitaalowerheid) rus om redelike stappe te doen ten einde die aanranding van

79 Sien Grondwet a 39(2); sien ook Neethling *Persoonlikheidsreg* 93 vn 379; Neethling, Potgieter en Visser *Deliktereg* 25.

80 2001 4 SA 938 (KH); vir besprekings sien Neethling en Potgieter "Toepassing van die Grondwet op die deliktereg" 2002 *THRHR* 265 ev; Neethling, Potgieter en Visser *Deliktereg* 21 25 42 45 62 72; Leinius en Midgley "The impact of the Constitution on the law of delict: *Carmichele v Minister of Safety and Security*" 2002 *SALJ* 17 ev; Pieterse "The right to be free from public and private violence after *Carmichele*" 2002 *SALJ* 27 ev.

81 Die hof verklaar (954) dat "the major engine for law reform should be the Legislature and not the Judiciary. In this regard it is worth repeating the dictum of Iacobucci J in *R v Salituro* [(1992) 8 CRR (2d) 173], which was cited by Kentridge AJ in *Du Plessis v De Klerk* [1996 3 SA 850 (KH)] par 61: 'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform . . . The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society'; vgl *Wagener and Cuttings v Pharmacare Ltd* [2002] 1 All SA 66 (K) 71-72.

82 Sien *supra* vn 76-78.

83 Wat bv kan bestaan in die verhoging van die vergoedingsbedrag vir die aantasting van 'n fundamentele reg, soos die reg op die goeie naam – vgl *Afrika v Metzler* 1997 4 SA 531 (NmHC) 539.

84 Grondwet a 7(2) 205(3).

85 Grondwet a 12; sien Neethling *Persoonlikheidsreg* 103 ev; Neethling, Potgieter en Visser *Deliktereg* 356-358.

’n persoon deur derdes te verhinder.⁸⁶ Die Konstitusionele Hof se beslissing in *Carmichele* dat die gemenerereg ontwikkel moet word om beter beskerming te verleen aan die verskanste regte wat *in casu* ter sprake was, onder andere die reg op sekerheid van die persoon en die reg op privaatheid, verdien dus instemming. Daarom rus daar waarskynlik ook ’n plig op die howe om aan die verbruiker se fisies-psigiese welsyn die grootste mate van beskerming teen defekte produkte te verleen, en dit kan gedoen word, soos hierbo aangedui, deur die gebrekkige skuldgrondslag deur strikte vervaardigersaanspreeklikheid te vervang.⁸⁷ Sodanige stap sou op een lyn wees met wat die howe in die verlede reeds ten aansien van die ontwikkeling van strikte aanspreeklikheid vermag het,⁸⁸ en kan beskou word as een van “those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society”, sonder om op die terrein van die wetgewer te oortree.⁸⁹

Die regte wat uitdruklik grondwetlik verskans word, speel uiteraard ook ’n belangrike rol by die proses van indirekte toepassing van die Handves van Regte,

86 Sien Neethling en Potgieter “Die regsplig van die staat om die reg op die fisies-psigiese integriteit teen aantasting deur derdes te beskerm: twee teenstrydige beslissings” 2002 *THRHR* 273 ev; Neethling “Die regsplig van die polisie om die reg op die fisies-psigiese integriteit te beskerm” 2000 *THRHR* 153, “Die regsplig van die staat om die reg op die fisies-psigiese integriteit teen derdes te beskerm: Die korrekte benadering tot onregmatigheid, nalatigheid en feitelike kousaliteit” 2001 *THRHR* 491–492; Carpenter in Carpenter (red) 139 ev 146–158; Jones “Battered spouses’ actions for damages against unresponsive South African police” 1997 *SALJ* 356 ev 369–370; Neethling *Persoonlikheidsreg* 103 vn 6; Visser “Enkele gedagtes oor die moontlike invloed van fundamentele regte ten aansien van die fisies-psigiese integriteit op deliktuele remedies” 1997 *THRHR* 499–500. Vgl ook die volgende relevante beslissings wat in hierdie bydrae die aandag geniet: *Seema v Lid van die Uitvoerende Raad vir Gesondheid, Gauteng* 2002 1 SA 771 (T); *Van Eeden v Minister of Safety and Security* 2001 4 SA 646 (T); *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (HHA); *Moses v Minister of Safety and Security* 2000 3 SA 106 (K); *Mpongwana v Minister of Safety and Security* 1999 2 SA 794 (K); *Minister van Polisie v Ewels* 1975 3 SA 590 (A); *Mtati v Minister of Justice* 1958 1 SA 221 (A); *Nkumbi v Minister of Law and Order* 1991 3 SA 29 (OK).

87 Hetsy direk, of langs die omweg van *res ipsa loquitur* indien die toepassing van dié metode dmv ’n onweerlegbare vermoede van nalatigheid vermoede strikte aanspreeklikheid skep (vgl *Van der Walt Risiko-aanspreeklikheid* 433–435). Dat die Hoogste Hof van Appèl bereid is om so ’n stap by ’n geskikte geleentheid nader te ondersoek, blyk uit *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (HHA) 471, waar Nienaber AR en Conradie Wn AR verklaar: “Of, en onder presies watter skakeringe van omstandighede, daar om regspolitieke redes ’n behoefte tot ’n radikale frontverandering ten gunste van strikte aanspreeklikheid van die vervaardiger bestaan, is in hierdie saak nie ondersoek nie en kom dus streng gesproke nie ter sprake nie.” *Contra* nietemin *Wagener and Cuttings v Pharmicare Ltd* [2002] 1 All SA 66 (K) 69–72.

88 Sien die teks *supra* vn 73. Afgesien van hierdie gevalle, het die howe agv Engelsregtelike beïnvloeding ook vroeër *animus iniuriandi* as materiële vereiste vir aanspreeklikheid van die massamedia weens laster deur skuldlose aanspreeklikheid vervang (sien *Pakendorf v De Flamingh* 1982 3 SA 146 (A) 156–158; vgl ook *SAUK v O’Malley* 1977 3 SA 394 (A) 404–405 407; Neethling *Persoonlikheidsreg* 203–204). In *National Media Ltd v Bogoshi* 1998 4 SA 1196 (HHA) 1210–1211 (vir besprekings van dié saak, sien *supra* vn 67) word egter beslis dat *Pakendorf* duidelik verkeerd is en dat *nalatigheid* as aanspreeklikheidsgrondslag erken moet word (sien ook Neethling, Potgieter en Visser *Deliktereg* 374; *Marais v Groenewald* 2001 1 SA 634 (T) 646; Neethling 2002 *THRHR* 260 ev).

89 Sien *supra* vn 81.

soos dan ook in *Carmichele* gebeur het. Die indirekte werking geld in die besonder by die toepassing van die sogenaamde “open-ended” of soepele deliksbeginsels, te wete die *boni mores*-toets vir onregmatigheid, die toerekenbaarheidstoets vir juridiese kousaliteit en die redelike persoon-toets vir nalatigheid, waar beleidsoorwegings en faktore soos redelikheid, billikheid en regverdigheid ’n belangrike rol kan speel. Die basiese waardes wat hoofstuk 2 onderlê, sou dus goedskiks as belangrike beleidsoorwegings by die bepaling van onregmatigheid, juridiese kousaliteit en nalatigheid geïmplementeer kon word.⁹⁰ Hierdie benadering word reeds in die regspraak gevolg⁹¹ en is uitdruklik in *Carmichele* toegepas. Die hof⁹² doen trouens aan die hand dat die toepassing van die Handves van Regte op die deliktereg *in casu* tot gevolg kan hê dat die objektiewe aard van onregmatigheid as delikselement beklemtoon, en dat dié element duideliker en wyer omskryf sal word; asook dat skuld en juridiese kousaliteit ’n belangriker aanspreeklikheidsbegrensiingsrol behoort te speel. ’n Behoorlike toepassing van dié delikselemente, soos tereg uitgewys word,⁹³ behoort ook die vrees vir die ongebreidelde uitbreiding van aanspreeklikheid te besweer. Die proses van herwaardering van veral die inhoud van onregmatigheid kan volgens die Konstitusionele Hof tot gevolg hê dat bestaande begrippe en norme óf vervang óf uitgebrei en verryk word deur die waardesisteen wat in die Grondwet beliggaam is. Aangesien die wetgewer – en nie die hof – die belangrikste dryfkrag vir die ontwikkeling van die gemenerereg in hierdie verband is, moet die proses van vervanging of verryking van bestaande norme nietemin met omsigtigheid hanteer word.

Die Konstitusionele Hof se benadering in *Carmichele* tot die toepassing van die Handves van Regte op die deliktereg, verskaf die grondslag vir ’n gesonde wisselwerking tussen *de lege lata* delikteregbeginsels en die *de lege ferenda* rol wat die gees, strekking en oogmerke van die Handves op hierdie regsgebied moet speel. Wat die toekoms betref, moet die beskerming van nuwe risiko’s deur die hof sekerlik op hierdie grondslag benader word, veral waar die risiko’s grondwetlik verskanste fundamentele regte (soos die reg op die fisiese integriteit of die reg op privaatheid) bedreig. Waar beleidsoorwegings dit regverdig, kan dan selfs weggedoen word met die skuldgrondslag van die deliktereg en strikte aanspreeklikheid gevestig word.

90 Sien Neethling, Potgieter en Visser *Deliktereg* 25.

91 Voorbeelde is *Marais v Groenewald* 2001 1 SA 634 (T) 646 (Neethling 2002 *THRHR* 260 ev); *Ntamo v Minister of Safety and Security* 2001 1 SA 930 (TkHC) 841–841 (Neethling, Potgieter en Visser *Deliktereg* 25 42 vn 22 90 vn 240); *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (HHA) 1256–1257 1263 (Neethling en Potgieter “Die Handves van Regte en deliktuele aanspreeklikheid weens verbreking van ’n statutêre voorskrif” 2002 *TSAR* 381 ev); *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 2 SA 54 (K) 64–67 (Neethling, Potgieter en Visser *Deliktereg* 25 43); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervention)* 1999 4 SA 1319 (HHA) 1327–1330 (waar die aksie van afhanklikes teen die agtergrond van konstitusionele waardes uitgebrei is tot Moslemhuwelike: vgl *supra* vn 15). Sien verder Neethling en Potgieter 2002 *THRHR* 271–272; Neethling, Potgieter en Visser *Deliktereg* 25.

92 963.

93 969–970.

3 3 Wetgewer

3 3 1 Inleiding

Van der Walt is 'n groot voorstander daarvan dat deliktuele aanspreeklikheid vir nuwe risiko's primêr deur middel van wetgewing gereguleer moet word. Hy verduidelik:⁹⁴

"Die risiko's in 'n moderne samelewing is basies die produk van tegnologiese industriële omwenteling. Die snelheid en intensiteit van die moderne tegnologiese industriële revolusie maak snelle en radikale regsingryping noodsaaklik. Dit kan uiteraard vandag slegs deur wetgewing geskied. Met die grondbeginsel van risiko-aanspreeklikheid, juridies-relevante risiko-skepping, as motief, sal die wetgewer toenemend, soos die behoefte ontstaan, nuwe gevalle van risiko-aanspreeklikheid [dws strikte aanspreeklikheid] moet reël. Die prinsipiële sterk gelding van die skuldleer vereis dat afwykings duidelik en seker geskep word. Vir hierdie doel is wetgewing besonder geskik. Wetgewing bied die verdere geleentheid om met die oog op regsekerheid 'n betreklik uitvoerige reëling ten aansien van die geval te tref."

Dit behoeft geen verdere betoog nie dat sodanige wetgewing ten opsigte van persoonlike dataprozessering – wat reeds in die meeste Westerse lande bestaan – in Suid-Afrika dringend noodsaaklik geword het, veral ook omdat die noodsaaklike kontrole wat 'n persoon oor sy data behoort te kan uitoefen, net deur die wetgewer in die lewe groep kan word.⁹⁵ Trouens, dit kom voor of die grondwetlike verskansing van die reg op privaatheid in artikel 14 van die Grondwet 'n verpligting op die wetgewer plaas om stappe in hierdie verband te inisier.⁹⁶

3 3 2 Algemene beginsel

Ten slotte ontstaan die vraag of die kwessie van strikte aanspreeklikheid vir nuwe risiko's net op 'n kasuïstiese wyse benader moet word, en of daar nie ruimte vir die ontwikkeling van 'n algemene beginsel is nie. Volgens Van der Walt⁹⁷ is daar veel te sê vir so 'n algemene beginsel omdat die leemtes wat in 'n geval-sisteem bestaan, dan prinsipiël ondervang kan word. Aangesien die daarstelling van 'n algemene beginsel 'n radikale afwyking van die bestaande regsposisie teweeg sal bring, is 'n mens ook hier op die wetgewer – en nie die howe nie – aangewese.

Die verskerpte aanspreeklikheid wat skuldlose aanspreeklikheid vir die dader meebring, word geregverdig aan die hand van wyd uiteenlopende faktore,⁹⁸ onder andere die risiko- of gevaarteorie. Hiermee word bedoel dat waar 'n persoon se aktiwiteite 'n aansienlike verhoging van die risiko of gevaar van benadeling – oftewel 'n verhoogde benadelingspotensiaal – meebring, daar genoegsame regverdiging bestaan om hom in beginsel, selfs in die afwesigheid van skuld, vir

94 *Risiko-aanspreeklikheid* 431–432.

95 Sien die teks *supra* by vn 70.

96 Konsepwetgewing word inderdaad nou in *Project 124: Privacy and data protection* van die Suid-Afrikaanse Regskommissie aangepak. Interessant genoeg, het die skrywer van hierdie bydrae al sewe en twintig jaar gelede aan die hand gedoen dat wetgewing oor databeskerming in Suid-Afrika "dringend noodsaaklik" is (*Die reg op privaatheid* (proefskrif 1975) 406, met WA Joubert as promotor).

97 *Risiko-aanspreeklikheid* 432.

98 Sien hieroor Koch en Koziol "Comparative conclusions" in Koch en Koziol (reds) 407 ev; Van der Walt *Risiko-aanspreeklikheid* 192 ev.

skadeveroorsoaking aanspreeklik te stel.⁹⁹ Hierdie teorie bied 'n bevredigende verklaring vir die meeste gevalle van skuldlose aanspreeklikheid wat in ons reg¹⁰⁰ – tewens in ander regstelsels¹⁰¹ – bestaan. Hierbenewens word die nuttigheidsfunksie en praktiese waarde van risiko-aanspreeklikheid in gepaste gevalle deur die Hoogste Hof van Appèl onderstreep.¹⁰² In *Loriza Brahman v Dippenaar*¹⁰³ stel appèlregter Olivier dit met betrekking tot die *actio de pauperie* soos volg:

“Dat dit skuldlose aanspreeklikheid daarstel, is as sodanig geen rede om dit in die ban te doen nie; die verskynsel van risiko-aanspreeklikheid brei in die moderne tyd uit en vervul op gepaste terreine 'n nuttige funksie. Aanspreeklikheid vir skade aangerig deur mak diere is so 'n gebied . . . As dit 'n mens se dogmatiese vertrekpunt is dat alle 'deliktuele' aanspreeklikheid op die skuldbeginsel moet berus, dan kom die *actio de pauperie* natuurlik as onelegant en anomalies voor. As die vertrekpunt daarenteen 'n breër visie van 'deliktuele' aanspreeklikheid is, wat *verdienselike gevalle van risiko-aanspreeklikheid kan insluit*, dan is die vraag slegs of die *actio de pauperie* vanuit 'n praktiese oogpunt 'n verdienstelike rol speel.”

Volgens Van der Walt¹⁰⁴ dui die voorgaande daarop dat 'n substantiewe beginsel – die risikobeginsel – bedoelde gevalle van strikte aanspreeklikheid beheers.¹⁰⁵

99 Neethling, Potgieter en Visser *Deliktereg* 390–391; Van der Walt 1968 *CILSA* 55; vgl Koch en Koziol “Comparative conclusions” in Koch en Koziol (reds) 407–409 413.

100 Die risikobeginsel verklaar nl skuldlose aanspreeklikheid vir skade veroorsaak deur diere (Van der Merwe *Skuldlose aanspreeklikheid vir skade veroorsaak deur diere* (1970) 260 ev; Van der Walt *Risiko-aanspreeklikheid* 360 ev; *Loriza Brahman v Dippenaar* 2002 2 SA 477 (HHA) 485, aangehaal *infra* vn 103), voorwerpe wat uit of van 'n gebou gegooi of gegiet word of val (Van der Walt *Risiko-aanspreeklikheid* 363–363), oorlas (Neethling, Potgieter en Visser *Deliktereg* 398–399; Van der Walt *Risiko-aanspreeklikheid* 404–405), onregmatige vryheidsberowing en beslaglegging (Neethling *Persoonlikheidsreg* 146–148; Van der Walt *Risiko-aanspreeklikheid* 383), werknemers (Scott *Middellike aanspreeklikheid in die Suid-Afrikaanse reg* (1983) 30 ev; Neethling, Potgieter en Visser *Deliktereg* 401 406–407; vgl egter *Minister of Law and Order v Ngobo* 1992 4 SA 822 (A) 832–834; *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* 2001 1 SA 1214 (HHA) 1218–1219), verteenwoordigers (Scott *Middellike aanspreeklikheid* 268–270; *Randbank Bpk v Santam Versekeringsmaatskappy Bpk* 1965 4 SA 363 (A) 372), motorvoertuigbestuurders (*Paton v Caledonian Insurance Co* 1962 2 SA 691 (D) 695; Neethling, Potgieter en Visser *Deliktereg* 408–409), lokomotiewe (vgl Van der Walt 1968 *CILSA* 68 71–72; Neethling, Potgieter en Visser *Deliktereg* 409), vliegtuie en kernenergie (Neethling, Potgieter en Visser *Deliktereg* 409–410; Van der Walt *Risiko-aanspreeklikheid* 422 ev).

101 Koch en Koziol “Comparative conclusions” in Koch en Koziol (reds) 408 verklaar: “Dangerousness . . . might . . . be used as the first test for establishing strict liability since it seems to underlie most varieties thereof.” Dit geld bv Duitsland, Oostenryk, België, Engeland, Frankryk en die VSA (*idem* 408 vn 98).

102 Sien nietemin Knobel “Nalatige persoonlikheidskrenking” 2002 *THRHR* 27–30 wat nalatigheid as aanspreeklikheidsgrondslag in die plek van strikte aanspreeklikheid vir onregmatige vryheidsberowing en beslaglegging op goed en die *actio de pauperie* bepleit.

103 2002 2 SA 477 (HHA) 485 (my kursivering).

104 *Risiko-aanspreeklikheid* 428.

105 Waarmee nie te kenne gegee word dat gevaarlikheid tot onontbeerlike of uitsluitlike maatstaf vir strikte aanspreeklikheid verhef moet word nie. Koch en Koziol “Comparative conclusions” in Koch en Koziol (reds) 413 (sien ook 408) verduidelik: “As could be seen, there are several possible justifications both in favour of and against strict liability. Some of these arguments are overlapping, depending on the point of view taken. We believe

Die presiese formulering van so 'n algemene beginsel is volgens hom grootliks 'n vraag van regstegniek.¹⁰⁶

Daar word tentatief aan die hand gedoen dat die volgende algemene formulering vir ons reg oorweeg word:¹⁰⁷ 'n Persoon is skuldloos aanspreeklik indien hy deur 'n besonder gevaarlike of riskante aktiwiteit¹⁰⁸ onregmatig¹⁰⁹ nadeel vir 'n ander veroorsaak. 'n Aktiwiteit is besonder riskant of gevaarlik indien dit 'n groot risiko van benadeling inhou, die omvang van moontlike nadeel ernstig sal wees,¹¹⁰ en daar 'n onvermoë is om die nadeel selfs deur die uitoefening van redelike sorg te verhinder.^{111 112}

that all of them should be considered in a flexible way, thereby allowing flexible results. While dangerousness might still serve as a suitable factor in most cases, it should be used as a range of stronger or weaker arguments rather as a rigid hurdle on the way to strict liability. The same is true for the other factors mentioned." Vgl ook Neethling, Potgieter en Visser *Deliktereg* 391.

106 Van der Walt *Risiko-aanspreeklikheid* 432.

107 Sien ook Neethling in Koch en Koziol (reds) 278. Hierdie formulering is grotendeels gebaseer op para 519–520 van die Amerikaanse *Second restatement of torts*, soos hergeformuleer in par 20 van die *Tentative draft no 1: Third restatement of the law – Torts: Liability for physical harm* (2001) 293 (vgl Schwartz in Koch en Koziol (reds) 359; *infra* vn 112), a 50 van die resente Switserse ontwerp (sien Widmer in Koch en Koziol (reds) 333; *infra* vn 112) en die sienings van Duitse en Nederlandse skrywers (sien Van der Walt *Risiko-aanspreeklikheid* 61–65 432 vn 2). Vir kommentaar – positief en negatief – op die Amerikaanse par 519–520 en die Switserse a 50, sien Koch en Koziol (reds) 37 97 122–124 142 172 203–204 251–252 267 347–348 359.

108 Algemene gevaarlikheid is natuurlik nie voldoende nie aangesien dit ook die skuldgrondslag van deliktuele aanspreeklikheid onderlê (sien weer Van der Walt 1969 *THRHR* 10, *Risiko-aanspreeklikheid* 334–336; *supra* vn 4). Daarom word besondere gevaarlikheid vereis, welke gevaarlikheid ter wille van regsekerheid uiteraard nadere omskrywing verg. Koch en Koziol "Comparative conclusions" in Koch en Koziol (reds) 408 verklaar: "We . . . need to find some way to measure the degree of danger, no matter whether we look for a 'special', 'considerably increased', or 'abnormal' risk." Sien verder Rogers in Koch en Koziol (reds) 116 123; Fedtke en Magnus in Koch en Koziol (reds) 157; Neethling in Koch en Koziol (reds) 273–274; die Amerikaanse *Second Restatement of Torts* par 519 (1); Schwartz in Koch en Koziol (reds) 355 ("highly risky activity"); Widmer in Koch en Koziol (reds) 332 ("specific qualified dangerousness").

109 Dit is ondenkbaar dat 'n persoon wat regmatig skade veroorsaak, deliktueel (skuldloos of andersins) aanspreeklik gestel word. Daarom behoort regverdigingsgronde wat onregmatigheid ophef, in beginsel steeds tot die verweerder se beskikking te staan. Dit blyk tans die posisie mbt gemeenregtelike gevalle van skuldlose aanspreeklikheid in ons reg te wees (sien Neethling in Koch en Koziol (reds) 275–276). Voorbeelde is noodweer en noodtoestand as regverdigingsgronde by onregmatige vryheidsberowing (sien *Robertse v Minister van Veiligheid en Sekuriteit* 1997 4 SA 168 (T); Neethling *Persoonlikheidsreg* 142–146), en *volenti non fit iniuria* as regverdigingsgrond by die *actio de pauperie* (sien *Maartens v Pope* 1992 4 SA 883 (N); *Joubert v Combrinck* 1980 3 SA 680 (T); Neethling, Potgieter en Visser *Deliktereg* 394). By statutêre gevalle van strikte aanspreeklikheid word verweerder uiteraard beperk tot dié wat in die betrokke statuut vermeld word (vgl *Black v Kokstad Town Council* 1986 4 SA 500 (N) 502).

110 Sowel die waarskynlikheid van skade as die erns van (moontlike) skade word beskou as minimum vereistes vir die bepaling van wat as 'n besonder gevaarlike aktiwiteit kwalifiseer (sien Koch en Koziol "Comparative conclusions" in Koch en Koziol (reds) 408; a 50 van die Switserse ontwerp (*infra* vn 112)). Schwartz *Tentative draft no 1: Third restatement of the law – Torts: Liability for physical harm* 302 verklaar: "Both the likelihood of harm and the severity of possible harm should be taken into account in ascertaining whether an activity entails a highly significant risk of physical harm."

111 Indien die risiko nie deur redelik sorgsame optrede uitgeskakel kan word nie, is daar voldoende aanduiding dat die aktiwiteit besonder (feitlik onafwendbaar) gevaarlik is (sien

4 SLOTSOM

Aanspreeklikheid vir nuwe risiko's word in Suid-Afrika volgens die tradisionele, gevestigde standpunt van die deliktereg op die skuldgrondslag geplaas, tensy die risiko binne die trefgebied van een van die erkende gevalle van strikte aanspreeklikheid (as uitsondering op die skuldleer) gebring kan word. Hierdie toedrag van sake skep ernstige leemtes wat in sekere gevalle (soos produkte-aanspreeklikheid) waarskynlik deur die howe, gerugsteun deur die grondwetlike Handves van Regte, oorbrug kan word om strikte aanspreeklikheid te skep. In ander gevalle, veral waar 'n omvattende wetgewende reëling gewens is (soos by databeskerming), moet die wetgewer ingryp. Uiteindelik behoort die wetgewer ook 'n algemene beginsel – gegrond op risikoskepping – vir strikte aanspreeklikheid in die lewe te roep sodat die generaliserende benadering van ons deliktereg ook op hierdie gebied beslag kan kry.

Tweedens is daar die kwessie van borgappèlle na die [Hoogste Hof van Appèl]. Soos in die huidige geval, is so 'n appèl meestal op feite en afleidings daaruit gebaseer en behels nie enige regsrae nie. So 'n appèl vanaf die uitspraak van 'n regter van die Hooggeregshof, as hof van eerste instansie, kan veel sneller en goedkoper deur die betrokke volle bank afgehandel word. Daar is tans nie 'n meganisme waarvolgens sodanige appèlle na die volle bank van die Hooggeregshof gekanaliseer kan word nie. Ek doen aan die hand dat die Departement van Justisie dringend aandag aan hierdie aspek skenk.

Olivier AR in Viljoen v S Saakno 286/02 (HHA) par [26].

Widmer in Koch en Koziol (reds) 333; Schwartz *Tentative draft no 1: Third restatement of the law – Torts: Liability for physical harm* 302–305; vgl Koch en Koziol “Comparative conclusions” in Koch en Koziol (reds) 409–410). Sien ook *supra* par 2 2 1 waar aangedui is dat die vervaardiging van defekte produkte 'n buitengewoon hoë risiko van benadeling vir die verbruiker skep, oa omdat die vervaardiger in elk geval veelal sorgsaam (en dus nie nalatig nie) opgetree het.

- 112 A 50 van die Switserse ontwerp lui soos volg (sien Widmer in Koch en Koziol (reds) 333): “An activity is deemed to be particularly dangerous if, by its nature or by the nature of substances, instruments or energies used thereto, it is prone to cause frequent or serious damage, notwithstanding all care which can be expected from a person specialised in this field; such assumption is justified, in particular, where another statute already provides a special liability for a comparable risk.” Vgl ook par 20 van die *Tentative draft no 1: Third restatement of the law – Torts: Liability for physical harm*: “(a) A defendant who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity. (b) An activity is abnormally dangerous if: (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not a matter of common usage.” Die beperking van skade tot liggaamlike nadeel in par 20 lyk te eng (sien Widmer in Koch en Koziol (reds) 348). Ook is dit debatteerbaar of par 20(b)(2) werklik sinvol is (sien hieroor Schwartz *Tentative draft no 1: Third restatement of the law – Torts: Liability for physical harm* 306–308).

AANTEKENINGE

DIGNITY AND OPEN COURT IN UNDEFENDED DIVORCE PROCEEDINGS: A PROPOSAL FOR REFORM

1 Introduction

The late Etienne Mureinik 1994 *SAJHR* 32 wrote:

“If the new Constitution [the interim Constitution, Act 200 of 1993] is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.”

To this Cameron 1998 *SAJHR* 108 enjoins that the Constitution (Act 108 of 1996) emphasises the attainment of social justice, and this confronts every judge, legal practitioner, academic researcher and writer with the question whether legal institutions and procedures assist in attaining social justice in our society.

It is in the light of these sentiments that this note seeks to question the practice in uncontested divorce actions in terms of which a plaintiff is required to divulge private, intimate and embarrassing evidence in open court in order to persuade the court that his or her marriage has irretrievably broken down. It will be argued that this practice does not pass the test of justification referred to above and, therefore, does not serve to bring about the social justice espoused in the Constitution. Instead, it can be argued that this practice undermines the fundamental value of human dignity and, therefore, the ideal to which the Constitution aspires.

2 Problem

Dignity, it will be argued, is a value worthy of protection against any unnecessary infringement. In suing for an order of divorce, the plaintiff must prove to the satisfaction of the court that there has been an irretrievable breakdown of the marital relationship and that there is no reasonable prospect of restoring a normal relationship between the parties (s 4(1) of the Divorce Act 70 of 1979). In order to satisfy the court that the marriage relationship has deteriorated to this extent, evidence of an acutely personal and even embarrassing nature must be presented. This may include, for instance, testimony regarding sexual abuse, extra-marital relationships and wife and/or husband battering. In fact, due to the very personal nature of the evidence, evidence which would in normal circumstances not be classified as embarrassing, can be so for the litigant involved in the action. A litigant in divorce proceedings is required to prove that his or her

marriage has broken down irretrievably – the onus is therefore upon the individual to prove that he or she has failed. This process if further exacerbated by the fact that undefended divorce proceedings are perceived to be a production line with a large number of such actions moving through court on any particular day. Litigants are seen as little more than objects in the process and this de-humanising of the individual is surely an affront to dignity when evidence is led in the manner and about issues as aforementioned. It is this lack of respect for dignity displayed by the process in undefended divorce actions, that needs to be addressed.

3 Dignity

It is well established that, together with equality and freedom, dignity is a pre-eminent value protected by the Constitution (see esp ss 7(1); 36(1) and 39(1)). These founding values find articulation in the Bill of Rights. Dignity is specifically acknowledged as a right in section 10 of the Constitution, which holds that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”. Being inherent in a person, dignity is an attribute of life, and not a privilege granted by the state (Chaskalson 2000 *SAJHR* 196). Chaskalson P states in *S v Makwanyane* 1995 6 BCLR 665 (CC) para 144:

“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3 [the chapter of the interim Constitution, Act 200 of 1993, which contained the Bill of Rights]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the state in everything it does . . .”

The protection of human dignity then, is the normative premise upon which constitutionalism as a system of limited government is founded (Davis, Cheadle and Haysom *Fundamental rights in the Constitution: Commentary and cases* (1997) 70). The relationship between state and individual is therefore of primary importance, with the state existing for the people and not *vice versa*. This relationship requires the state to treat individuals as “the recipients of rights and not as objects or pawns” (Devenish *A commentary on the South African bill of rights* (1999) 82). The normative role of dignity has been described by O’Regan J (*S v Makwanyane supra* para 328) as follows:

“The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is the acknowledgement of the intrinsic worth of a human being; human beings are entitled to be treated as worthy of respect and concern.”

The concept of dignity is an elusive one, and a precise definition or description of dignity is not necessary for the purpose of this note. An exercise of this nature will in all likelihood meet without success because of the fact that dignity underlies and informs most, if not all, of the other fundamental rights. (See in this regard Devenish 81; Albertyn and Goldblatt 1998 *SAJHR* 258; and *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC)). It is sufficient for this note to accept that “[a] person’s dignity embraces subjective emotions” (Devenish 82).

It is this understanding of dignity that enjoys constitutional protection, and there is a duty upon the state to ensure that this right is not infringed by any organ of the state. Moreover, in terms of section 7(2) of the Constitution the state has the duty to “respect, protect, promote, and fulfil the rights in the Bill of

Rights". This clearly places a positive duty on the state to advance the fundamental rights of people. (See in this regard also *Advance Mining Hydraulics (Pty) Ltd v Botes NO 2000 2 BCLR 119 (T) 126B-127C*.) The court, as the final protector of the values and rights enshrined in the Constitution, bears the onerous duty of protecting the right to dignity against any infringement, not only by individuals but by the courts themselves in their dealings with individuals. However, the courts also have the duty to promote and advance these rights where possible and appropriate.

4 Open court

The principle of conducting court proceedings publicly is an old and well-established right accorded to a litigant, and is entrenched in section 34 of the Constitution which provides that everyone has a right to have their disputes settled in a fair public hearing. The reason for conducting court proceedings in public is to ensure that the administration of justice is open to public scrutiny and that evidence is trustworthy and complete (*S v Leepile (1) 1986 2 SA 333 (W) 338D-F*).

The right to a public trial is not absolute and can be limited to ensure the protection of other, more compelling interests in particular cases. The decision whether a particular litigant's right to a public hearing should be limited, will involve a careful weighing-up of the factors. The right of a litigant to a public trial will be weighed up against those interests which may be harmed by such publicity.

Exceptions to the right to a public trial are to be found in both criminal and civil proceedings. In criminal proceedings, for instance, section 153 of the Criminal Procedure Act 51 of 1977 provides for a criminal trial to be closed to the public where it would be in the interest of the state to do so; where a witness would be harmed by giving evidence in public; where the witness is a complainant in a case relating to indecency; and where the witness is under the age of eighteen.

Limitations to this right are also to be found in civil proceedings. For example, section 65A of the Magistrates' Courts Act 32 of 1944 provides for an inquiry into a judgment debtor's financial position to be made in chambers. This phrase has been interpreted to mean that the hearing must not take place in open court (*Erasmus and Van Loggerenberg The civil practice of the magistrates' courts in South Africa* (1988) 253). If the legislature intended to protect the privacy of judgement debtors in these circumstances, how much more the need to protect the privacy of litigants in divorce proceedings. In fact, section 12 of the Divorce Act provides that only the names of the parties to divorce proceedings may be published. No other details may be published unless for the purposes of the administration of justice; in a *bona fide* law report; or for the advancement of a profession or science (s 12 (2)).

5 Proposal

Having to provide intimate and embarrassing details to prove that a marriage has broken down irretrievably (and having to do so publicly and in the presence of complete strangers) is not only a humiliating experience, but it is also an affront to dignity. It is submitted that this problem may be significantly remedied by introducing minor changes to the procedures adopted in uncontested divorce actions. It is proposed that uncontested divorce proceedings should be conducted *in camera* so that litigants can be protected from having to divulge intimate information in an open court before a public gallery.

This proposal may produce the added advantage of the court gaining a more detailed understanding of each case as the privacy will contribute to greater participation by the litigants. More complete information regarding custody and/or maintenance arrangements in a deed of settlement can be obtained from affected persons in a more informal manner. It will be easier for a litigant to provide reasons for the desirability of a particular divorce, custody and/or maintenance arrangement, especially where the reasons are intimate and personal. The defendant, if present and if it is opportune, may also be allowed to make an input so as to assist the court further.

It may be argued that this proposal will result in an increased delay in the proceedings brought about by a seemingly slower process. It is submitted that time loss will be minimal, as parties will know who is next on the court roll and will be required to wait outside the courtroom so that they can enter immediately the previous case has been disposed of. The length of any delay will depend on the effectiveness of the officer managing the court and the court load. The advantages of a more complete assessment in appropriate circumstances with greater participation by all parties concerned must be measured against a minimal time loss.

This note is primarily concerned with the dignity of litigants. Permitting a litigant in uncontested divorce proceedings to testify *in camera*, out of the glare of the public, will be a concrete display of respect and concern by the court for the dignity of the individual parties. It is by no means suggested that the courts disregard the dignity of an individual in open court proceedings. Rather, it is submitted that because of the very nature of the proceedings, this may be perceived to be so by the litigants themselves.

Mention has been made of a few instances where the legislature has come to the assistance of parties caught in (potentially) humiliating situations. However, similar protection is not provided to a party who has to divulge the deeply personal reasons that have culminated in divorce proceedings, or for that matter to the other party (defendant) who may or may not be present.

6 Conclusion

Divorce proceedings are by their very nature deeply personal. They are the concrete culmination of a failed relationship. The reasons for the failure are personal to the parties and usually involve intimate and embarrassing details. Requiring parties to present this information in the presence of members of the public is an affront to dignity and it is submitted that the courts respect the individual's right to dignity and privacy by allowing him or her to testify *in camera*. The court structure and process convey a hermeneutical message of power. By displaying more overtly a respect for the dignity of the involved parties the hermeneutical message of authoritarian power becomes one of persuasive power, thus enhancing the respect for and the faith in the legal system and courts.

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VOORDEEL VIR SKULDEISERS IN GEVAL VAN GEDWONGE SEKWESTRASIE AS GEVOLG VAN AGTERSTALLIGE HEFFINGS INGEVOLGE DIE WET OP DEELTITELS

1 Inleiding

In 'n groot aantal gedwonge sekwestrasie-aansoeke is die applikant 'n regs-persoon kragtens die Wet op Deeltitels 95 van 1986 ("Deeltitelwet"). Die aan-soek om gedwonge sekwestrasie van die boedel van 'n eienaar van 'n deeltitel-eenheid (hierna "skuldenaar"), is gewoonlik gebaseer op die feit dat die skuldenaar nie sy heffings ("levies") kan betaal nie. Die regs persoon het gewoonlik alle ander stappe gedoen ten einde agterstallige heffings in te vorder en in baie gevalle vonnis teen die skuldenaar verkry. Die skuldenaar het gewoonlik geen bates om op beslag te lê nie, behalwe die deeltiteleenheid wat in die meeste gevalle onderhewig is aan 'n verband ten gunste van 'n finansiële instelling.

Die vraag wat ontstaan, is watter tipe voordeel vir skuldeisers bewys moet word alvorens die hof 'n finale sekwestrasiebevel sal toestaan en, meer spesifiek, of daar 'n voordeel vir skuldeisers in rand en sent moet bestaan alvorens die hof 'n finale sekwestrasiebevel sal toestaan.

2 Deeltitelskemas

Artikel 36 van die Deeltitelwet bepaal dat 'n regs persoon geskep word vir 'n deeltitelskema sodra 'n ander persoon as die ontwikkelaar 'n eienaar in die skema word. Die beheerliggaam ("body corporate") word in die Wet beskryf as die regs persoon. Artikel 37 bepaal dat die regs persoon 'n fonds moet instel waaruit die uitgawes van die regs persoon betaal moet word, wat insluit instand-houding, betaling van belastings, tariewe, water, elektrisiteit, versekering, ensovoorts. Die regs persoon mag kragtens artikel 37 bedrae hef van eienaars van deeltiteleenhede, ten einde die fonds in te stel en te onderhou. Die heffings staan in die omgangstaal bekend as "levies".

Reël 31(5) van die bestuursreëls in aanhangsel 8 van die Deeltitelwet bepaal dat 'n eienaar aanspreeklik is vir die betaling van alle regskoste, wat insluit prokureur- en kliëntkoste, invorderingskommissie en uitgawes en koste aange-gaan deur die regs persoon met die verhaal van agterstallige heffings of enige agterstallige bedrae deur sodanige eienaar aan die regs persoon verskuldig.

3 Insolvensiewet

3.1 Kragtens artikel 10 van die Insolvensiewet 24 van 1936 ("Insolvensiewet") kan die hof die boedel van 'n skuldenaar onder voorlopige sekwestrasie plaas indien die applikant *prima facie* kan bewys (a) dat hy 'n gelikwildeerde vordering teen die skuldenaar het; (b) dat die skuldenaar insolvent is of 'n daad van insolvensie begaan het; en (c) dat daar rede bestaan om te aanvaar dat die sekwestrasie tot voordeel van die skuldeisers sal strek.

3.2 Kragtens artikel 12 kan die hof 'n finale sekwestrasiebevel toestaan indien hy op 'n oorwig van waarskynlikhede tevrede is dat aan bogenoemde drie vereistes voldoen is.

3 3 Die enigste vereiste wat vir doeleindes van hierdie bespreking van belang is, is die derde vereiste, naamlik voordeel vir skuldeisers. Die vraag wat in hierdie bydrae aangespreek word, is of voordeel vir skuldeisers noodwendig voordeel in rand en sent beteken.

3 4 *Regspraak*

3 4 1 Die vereiste dat daar rede moet bestaan om te aanvaar dat sekwestrasie tot voordeel van die skuldeisers strek, is by verskeie geleenthede deur die hof geïnterpreteer.

3 4 2 In *Meskin & Co v Friedman* 1948 2 SA 555 (W) 558 bevind die hof die volgende ten aansien van voordeel vir skuldeisers:

“Under Section 10, which sets out the powers of the Court to which the petition for sequestration is first presented, it is only necessary that the Court shall be of the opinion that *prima facie* there is such ‘reason to believe’. Under Section 12, which deals with the position when the rule *nisi* comes up for confirmation, the Court may make a final order of sequestration if it is satisfied that there is such reason to believe. The phrase ‘reason to believe’, used as it is in both the sections, indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the Court must be satisfied, it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is a reason to believe that it will be so.”

3 4 3 In *ABSA Bank Ltd v Rheebokskloof (Pty) Ltd* 1993 4 SA 436 (K) 448A–C bevind die hof:

“It remains to make one point under this head and that relates to the question as to whether or not the sequestration of Key’s Estate would be to the advantage of the general body of his creditors. This is perhaps a bit widely put; what ABSA is required to do is to satisfy the Court that there is reason to believe that sequestration would be to the financial advantage of creditors (see *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 558) or, to state it differently, is there a reasonable prospect, not too remote, that some not negligible pecuniary benefit will be obtained by creditors (see *Epstein v Epstein* 1987 (4) SA 606 (C) at 609B–E)? Quite apart from the requirement that there be some prospect of a pecuniary benefit to creditors, it could well be to the advantage if an enquiry were conducted into Key’s financial affairs where there is a prospect of undisclosed assets being brought to light.”

3 4 4 In *Behrman v Sideris* 1950 2 SA 366 (T) 371 bevind die hof:

“In the present case, the benefit I refer to is not a mere power of investigation, but it is the control of all the assets of the insolvent and the power to dispose of them, and I consider that, that is a benefit in terms of the Act. There is a further advantage to creditors in that, if sequestration is ordered, it will be a sequestration not merely of the partnership estate but of the private estate of the partners.”

3 4 5 In *Pelunsky & Co v Beiles* 1908 TS 370 372 bevind ’n volbank van die Transvaalse Provinsiale Afdeling:

“But it is not essential for the petitioning creditor to show that he would benefit personally by sequestration. There are other grounds which would justify a sequestration order, apart from the mere prospect of receiving a dividend. The examination of the insolvent for instance, might reveal assets which are not in his schedules and are not at present within the knowledge of creditors. The petitioner stands on the legal rights he has already secured. He is a judgment creditor, he has a return of *nulla bona*, and he is entitled to employ all legal means to obtain

payment of his debt. The onus is on those opposing him to show that it would be for the benefit of the whole body of creditors, including the petitioning creditor, that a sequestration order should not be issued or that there are other good reasons which would induce the court not to sequestrate.”

3 4 6 Dit word ter oorweging gegee dat daar *prima facie* rede bestaan om te aanvaar dat sekwestrasie tot voordeel van die skuldeisers sal wees. Die voordeel is eerstens daarin geleë dat daar rede bestaan om te glo dat daar 'n finansiële voordeel sal wees en tweedens is daar ook ander voordele vir skuldeisers soos hierbo uiteengesit.

3 5 Die beginsels soos hierbo na verwys, is bevestig in *Ex parte Anthony en Ses Soortgelyke Aansoeke* 2000 4 SA 116 (K) 121H–122D.

4 Ander voordele vir skuldeisers

4 1 Selfs indien daar nie 'n voordeel in rand en sent vir skuldeisers bestaan nie, kan daar ander voordele vir hulle bestaan, onder andere die behoorlike ondersoek van 'n skuldenaar se boedel en die moontlike opsporing van verdere bates.

4 2 In geval van 'n skuldenaar wat 'n deeltiteleienaar is, is daar moontlik ook ander voordele wat deur die hof in ag geneem behoort te word by oorweging van die vraag of daar voordeel vir skuldeisers is. Daar is ten eerste 'n voordeel vir die regspersoon (beheerliggaam) indien die skuldenaar gesekwestreer word omdat die regspersoon dan in staat is om die volle agterstallige heffings ingevolge die Deeltitelwet in te vorder. Artikel 15(3)(a) bepaal:

“Die Registrateur registreer nie oordrag van 'n eenheid of van 'n onverdeelde aandeel daarin nie, tensy daar aan hom voorgelê word—

(a) 'n sertifikaat deur 'n transportbesorger waarin bevestig word dat op datum van registrasie—

(i) (aa) indien 'n regspersoon ingevolge artikel 36(1) geag word ingestel te wees, daardie regspersoon gesertifiseer het dat alle gelde wat aan die regspersoon deur die transportgewer verskuldig is ten opsigte van bedoelde eenheid betaal is of dat voorsiening vir die betaling daarvan tot bevrediging van die regspersoon gemaak is.”

4 3 Die effek van hierdie bepaling is dat die regspersoon daarop geregtig sal wees dat alle agterstallige heffingsgelde en invorderingskoste daaraan verbonde, soos hierbo uiteengesit, eers betaal word alvorens oordrag van die eiendom kan plaasvind. In praktyk het dit tot gevolg dat wanneer die skuldenaar se deeltiteleenheid verkoop word, die regspersoon se eis vir agterstallige heffings eers betaal word. Die balans van die koopprys gaan dan gewoonlik aan die finansiële instelling in wie se naam 'n verband oor die deeltiteleenheid geregistreer is.

4 4 Dit het ook in die tweede plek 'n voordeel vir die verbandhouer (finansiële instelling). Die voordeel is daarin geleë dat die ongesonde situasie waarin heffingsgelde eenvoudig ooploop, gestaak word. Indien die ongesonde situasie eenvoudig bly voortbestaan, sal, wanneer die verbandhouer uiteindelik die eiendom verkoop as gevolg van wanbetaling deur die skuldenaar, al die agterstallige heffingsgelde eers betaal moet word, wat bykans die hele koopprys van die deeltiteleenheid kan opneem.

4 5 Daar kan selfs geargumenteer word dat bogenoemde twee voordele ook neerkom op 'n finansiële voordeel in rand en sent aangesien minstens twee skuldeisers daardeur bevoordeel word. Die hof wat 'n aansoek van hierdie aard moet oorweeg, moet ook in ag neem dat die praktyksvereiste van 'n voordeel van

10 sent in die rand, eerder toepassing vind by vrywillige boedeloorgawe of by sogenaamde vriendskaplike sekwestrasies waar die finansiële posisie van die skuldenaar aan die applikant bekend is.

5 Gevolgtrekking

Wanneer 'n aansoek om gedwonge sekwestrasie, in omstandighede soos hierbo uiteengesit, oorweeg word, moet daar nie vasgekyk word teen 'n voordeel wat in rand en sent klingel nie. Daar is ook ander voordele vir skuldeisers soos hierbo uiteengesit, wat indirek tog 'n finansiële voordeel vir skuldeisers daarstel. Daar kan selfs 'n saak uitgemaak word dat dit in die openbare belang is dat lede van 'n deeltitelskema, wat nie in staat is om hul heffingsgelde te betaal nie, gesekwestreer word. Dit is erg nadelig vir ander lede van die deeltitelskema indien sommige lede nie die heffingsgelde betaal nie, aangesien dit die verpligting op die ander lede verswaar en verder tot gevolg het dat die geboue (deeltitel-eenhede) nie na behore onderhou word nie.

Die openbare belang wat hier ter sprake is, is uit die aard van die saak nie iets wat direk deur die hof by 'n aansoek om gedwonge sekwestrasie oorweeg moet word nie, aangesien sodanige aansoeke binne die kader van die Insolvensiewet oorweeg moet word. Daar kan moontlik geargumenteer word dat dit oorweeg behoort te word onder die vereiste van voordeel vir skuldeisers en meer spesifiek die beheerliggaam (regspsoon) wat die deeltitelleienaars verteenwoordig.

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ENKELE GEDAGTES OOR DIE KOMITEE VAN DIE REGTE VAN DIE KIND*

1 Inleiding

Die Konvensie oor die Regte van die Kind (1989) (hierna Konvensie) is die mees gesaghebbende internasionale instrument oor die regte van die kind. As sodanig stel dit standarde vir implementering van die regte van kinders teen die agtergrond van 'n dualistiese beskouing van kinders. Vanuit 'n meer tradisionele perspektief word kinders as die objek van beskerming gesien terwyl daar vanuit 'n meer progressiewe perspektief na kinders gekyk word as selfstandige draers van regte. Die progressiewe aard van die Konvensie kom daarin na vore dat dit kinders ten aansien van sekere aspekte bemagtig. Dit handel in hierdie verband

* Die volgende bronne is ter finalisering van hierdie aantekening gebruik: Le Blanc *The Convention on the Rights of the Child* (1995) 185 *et seq*; Nylund "International law and the child victim of armed conflict – Is the 'First Call' for children?" 1998 *Int J Children's Rights* 23; Van Bueren *The international law on the rights of the child* (1995) 1ff; *Report of the Committee on the Rights of the Child CRC/C/15/Add 122* Jan 2000; Kuper *International law concerning child civilians in armed conflict* (1997) 130ff.

hoofsaaklik oor die reg op vryheid van geloof, uitdrukking en gewete. Daarteenoor is dit veel sterker georiënteerd ten gunste van 'n tradisioneel paternalistiese beskouing van kinders deurdat dit sterk klem lê op die beskerming van kinders in hulle ekonomiese en sosiale omstandighede welke omstandighede hulle aan verskeie vorme van misbruik en mishandeling bloot kan stel.

Ten einde praktiese gestalte aan die implementering van die regte van kinders in state wat die Konvensie geratifiseer het te gee, maak die Konvensie voorsiening vir die Komitee aangaande die Regte van die Kind (hierna Komitee). Dit is veral artikel 43 tot 45 van die Konvensie wat die Komitee binne die raamwerk van die Verenigde Nasies stel, wat bepalings aangaande die nominasie en verkiesing van komiteelede bevat en wat voorskrifte oor die finansiering en funksionering van die Komitee daarstel.

2 Die Komitee in die raamwerk van die VN

Artikel 43(2) maak dit duidelik dat die Komitee outonoom ("uninstructed") is. Dié artikel lui dat die Komitee uit lede bestaan wat in hulle persoonlike hoedanigheid en nie as verteenwoordigers van bepaalde regerings nie, verkies word. Dit lei meteen daartoe dat daar van komiteelede verwag word om onpartydig en objektief te wees in die hantering van komitee-aangeleenthede, selfs aangeleenthede wat hulle eie regerings raak. (Dit is natuurlik geen uitgemaakte saak dat lede wel so onpartydig sal wees nie. Nieteenstaande die feit dat lede 'n eed van onpartydigheid aflê en dat hulle onderneem om nie deel te hê aan die evaluering van hulle eie regerings se verslae nie en voorts dat die Komitee openbare verslae moet publiseer, bly dit steeds 'n feit dat lede in die vakatures verkies word en dat die nominasie en verkiesingsprosedures deur die regerings van die partye tot die Konvensie beheers word. Politieke oorwegings speel derhalwe 'n besondere rol in die nominasie en verkiesingsprosedure en lede se persoonlike integriteit bied in die finale instansie die belangrikste waarborg vir hulle onpartydigheid.) Daar word algemeen aanvaar dat 'n outonome liggaam eerder effektief is in die beskerming en bevordering van fundamentele regte. Een outeur sit die situasie soos volg uiteen:

"Instructed bodies 'contain a built-in brake on effective protection of human rights. The foxes (states) are charged with protecting the chickens (human rights)' . . . This arrangement is unsatisfactory because the states, which are 'generally interested in protection of power and national sovereignty' are 'in a position to elevate those interests over human rights'."

Uit hoofde van artikel 43(10) vergader die Komitee gewoonlik by die hoofkwartier van die VN of enige plek wat die Komitee self aanwys. Die Komitee vergader normaalweg by die hoofkwartier van die VN te Genève omdat die Sentrum vir Menseregte (Centre for Human Rights) daar geleë is en die sentrum sekretariële dienste aan die Komitee bied. Die sub-artikel bepaal verder dat die vergaderings jaarliks plaasvind en dat die duur van die vergaderings deur die deelnemende state tot die Konvensie bepaal word onderhewig aan die goedkeuring van die Algemene Vergadering. Gedurende die eerste vergadering van die Komitee is 'n liberale uitleg aan artikel 43(10) geheg sodat daar gewoonlik twee vergaderings per jaar gehou word wat elk gewoonlik twee weke tot drie weke duur. Indien nodig word spesiale vergaderings gehou en daar word ook voorsiening gemaak vir "presessional working groups" wat die voorlopige evaluering van verslae wat ontvang word moet hanteer. Die Komiteelede was inderdaad daarvan bewus dat om twee vergaderings per jaar te hou sou meebring dat

toestemming van die Algemene Vergadering verkry moes word. Dit bring mee dat state wat nie die Konvensie geratifiseer het nie aan debat kan deelneem en kan stem oor aangeleenthede wat die Komitee raak. Aangesien die Komitee se werksaamhede uit die algemene begroting van die VN gefinansier word en al die ledestate stemreg ten aansien daarvan het, is daar nietemin besluit om finansiering langs dié weg te reël.

Die International Instruments Section van die Sentrum vir Menseregte in Genève voorsien die ondersteuning wat deur die Komitee benodig word. Hierdie afdeling se werksaamhede kom egter tans onder ernstige druk vanweë die toename in ooreenkomste waarin dit hulp moet verleen en voorts ook as gevolg van die toename in state wat tot menseregte konvensies toegetree het. 'n Belemmerende faktor op die werksaamhede van die Komitee binne hierdie konteks is dat die VN minder as een persent van sy begroting op aktiwiteite rondom fundamentele regte bestee.

3 Nominasie en verkiesing van komiteelede

Artikel 43(2)–(5) bevat voorskrifte rondom die nominasie en verkiesing van komiteelede. Artikel 43(2) lui:

“The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to principal legal systems.”

Slegs state wat die Konvensie geratifiseer het kan persone vir verkiesing tot die Komitee nomineer. Uit hoofde van artikel 43(3) mag 'n staat een persoon nomineer welke persoon 'n burger van die betrokke staat moet wees. Die proses vir nominasie en verkiesing word in sub-artikels (4) en (5) voorgeskryf.

Die voorskrif in artikel 43(2) dat die lede van die Komitee deskundiges van hoë morele karakter moet wees wie se bevoegdheid ten aansien van die Konvensie erken word, is redelik in die lig daarvan dat die lede deskundiges is wat in hulle persoonlike hoedanigheid dien. Dit is daarom vanselfsprekend dat genomineerdes sowel akademies as prakties oor besondere opleiding en ervaring beskik.

Komiteelede word vir 'n termyn van vier jaar verkies. Die dienstermyne van die onderskeie lede word egter verstel sodat die volledige Komitee nie meteen hoef te verander nie. Hierdie resultaat word bereik deurdat die eerste termyn van vyf van die lede op twee jaar gestel is, maar dat lede van daar af elke vier jaar sal wissel. Die Konvensie bevat geen bepalinge aangaande die verwydering van lede vanweë enige rede nie. Die Komitee het egter self 'n reël daarvoor gemaak wat lui dat

“if in the unanimous opinion of the other members, a member has ceased to carry out his functions for any cause other than absence of a temporary character, the chairman of the Committee shall notify the Secretary-General, who shall then declare the seat of that member to be vacant”.

In geval van 'n vakature moet die staat wat die betrokke vakature gevul het, 'n deskundige vanuit sy burgery aanstel om vir die restant van die termyn te dien. Langs hierdie weg word steeds gepoog om gevolg te heg aan die “equitable geographical distribution” in die samestelling van die Komitee.

Artikel 43(2) verwys na sowel “equitable geographical distribution” as “principal legal systems” by die aanwys van lede van die Komitee. Nie een van hierdie kriteria maak werklik sin nie. Daar kan byvoorbeeld gevra word waarna “equitable” verwys. Slaan dit op die hoeveelheid state in ’n bepaalde geografiese gebied, of op die hoeveelheid state wat partye tot die Konvensie is in ’n bepaalde gebied? “Principal legal systems” is eweneens ’n vae en misleidende begrip. Normaalweg beteken dit die belangrikste regstelsels in die wêreld en ofschoon dit kan saamhang met eersgemelde konsep, hoef dit nie noodwendig die geval te wees nie. Ongeag die vaagheid inherent aan die twee vereistes, word dit algemeen in instrumente van hierdie aard aangetref en bied dit in die praktyk geen besondere probleem nie. Trouens, hulle is van besondere politieke waarde en die vaagheid lei tot vloeibaarheid in die toepassing daarvan. Gegewe die feit dat daar besondere kompetisie tussen state bestaan in die verkiesingsproses, is die vraag steeds

“how well competing interests can be balanced so that the principle of equitable geographical distribution can be given due regard at the same time that people who are genuine experts in their field are elected”.

Sommige outeurs doen aan die hand dat die feit dat sekere state swaarder dra aan die finansiële verpligtinge van die VN, voldoende motivering bied vir afwyking van ’n streng uitleg van die vereiste van “equitable geographical distribution”.

4 Funksies van die Komitee

Die Komitee is spesifiek in die lewe geroep “for the purpose of examining the progress made by States Parties in achieving the realisation of the obligations” wat hulle opgehoop het deur ratifikasie van die Konvensie. Terwyl artikel 43(1) hierdie doelstelling uiteensit, skryf artikels 44 en 45 voor op welke wyse die evaluering van die vordering van state moet geskied, naamlik deur die evaluering van periodieke verslae waarin state die maatreëls uiteensit wat hulle getref het om die regte wat in die Konvensie verskans is, te bevorder en ook die vordering wat hulle gemaak het vir die uitoefening van die regte.

Daar bestaan uiteenlopende sienings oor die effektiwiteit van so ’n stelsel waarvolgens state moet rapporteer. ’n Meer positiewe benadering lê daarop klem dat dit daartoe meewerk dat ’n raamwerk daardeur geskep word waarvolgens bepalinge van die Konvensie uitgelê kan word. Daarbenewens bied dit ’n basis vir kritiek van ’n staat se beleid en praktyk aangesien state hulle verslae voor die Komitee moet verdedig. Daarteenoor word daar geargumenteer dat so ’n stelsel nie werklik effektief is nie aangesien state hierdie verslae gebruik om die indruk te wek dat hulle begaan is oor die beskerming van die regte van kinders, terwyl hulle in werklikheid geen besorgdheid daaroor het nie. Daarmee saam word geargumenteer dat hierdie verslae slegs daardie inligting bevat wat ’n betrokke staat in ’n positiewe lig stel. Die verslae is voorts in bepaalde gevalle van swak gehalte en daar word voorts gevind dat sommige state nie hulle verslae (tydig) indien nie. Aangesien die verslagdoeningstelsel vry algemeen gebruik word, val dit egter nie eienaardig op dat die opstellers van die Konvensie dieselfde stelsel gekies het nie.

4.1 Die verpligting van state om verslag te doen

Uit hoofde van artikel 44(1) onderneem deelnemende state aan die Konvensie om aan die Komitee verslag te doen “on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the

enjoyment of those rights". Die eerste verslag van die betrokke staat moet voorgelê word binne twee jaar nadat die Konvensie vir daardie staat van krag geword het (deur ratifikasie daarvan) en daarna elke vyf jaar.

Sekerlik een van die knellendste probleme rakende die funksionering van die stelsel van verslagdoening is die groot en groeiende aantal agterstallige verslae. Die motivering vir die hoë frekwensie van die nie-verslagdoening is dat die las te swaar is. Die rede word veral deur Derde Wêreld-lande voorgelê. Ofskoon dit so is dat daar in verskeie van die armste lande 'n gebrek aan opgeleide personeel bestaan, maak een skrywer die opmerking dat die hoë vlakke van nie-verslagdoening eerder op onwilligheid van sodanige state dui om hulle verpligtinge ernstig op te neem. Hierdie laksheid van sommige state skep bepaalde spanning in die stelsel van verslagdoening deurdat dit juis die bedoeling met die Konvensie fnuik.

Die benadering van die Komitee is om die proses van verslagdoening eerder as 'n geleentheid te sien om met 'n betrokke staat tot die Konvensie in gesprek te tree. Daar word van die standpunt uitgegaan dat 'n staat die verslagdoening nie as 'n las behoort te beskou nie, maar eerder as 'n geleentheid om bestek op te neem van sy beleid en praktyk rondom die beskerming van die regte van kinders. Daar word derhalwe met redelike tegemoetkoming teenoor state opgetree wat laat is met die indiening van hulle verslae. Die optrede is hoogstens ook van administratiewe aard en is daarop gerig om sodanige state aan te moedig om hulle verslae voor te lê.

In die lig van die groot aantal verslae en die duur wat die evaluering van elk in beslag neem, het die Komitee besluit om die verslae wat voorgelê word binne redelike tyd af te handel en dat elke verslag binne een jaar na ontvangs in behandeling geneem moet word. Ten einde te verseker dat die teiken haalbaar is, word "pre-sessional working groups" gebruik wat ongeveer agt tot ses weke voor die vergadering van die Komitee byeenkom om voorlopige oorweging aan verslae te gee en om die vernaamste kwessies te identifiseer wat met verteenwoordigers van die betrokke staat opgeneem moet word. In die geval waar 'n staat weier of versuim om 'n verslag voor te lê, word daar van administratiewe oordedingsmetodes gebruik gemaak. Daar bestaan egter geen effektiewe afdwingingsmeganisme om te verseker dat verslae (betyds) ingedien word nie.

4.2 Inhoud van die verslag

Dit spreek vanself dat die inhoud van verslae volledig moet wees. Die gevolgtrekkings wat daar uit die verslae gemaak word, maak dit vir die Komitee moontlik om bepaalde gevolgtrekkings te bereik en om aanbevelings vir toekomstige optrede te maak. Artikel 44(1)–(4) bevat die relevante voorskrifte in hierdie verband. Artikel 44(1) skryf voor dat state verslag moet doen aangaande die maatreëls wat hulle getref het om uitvoering te gee aan die regte wat in die Konvensie uiteengesit word en aan die vordering wat gemaak is om gestalte aan die uitoefening van daardie regte te gee. Uit hoofde van artikel 44(2) moet state faktore en probleme identifiseer wat die nakoming van hulle verpligtinge beïnvloed. State moet ook voldoende inligting bekend maak om die Komitee in staat te stel om 'n volledige begrip van die implementering van die Konvensie in die betrokke staat te vorm. Die Komitee kan ingevolge artikel 44(4) verdere besonderhede van 'n staat verlang as die verskafte inligting rakende die implementering van die Konvensie onvolledig of onbevredigend is. Uit hoofde van artikel 44(3) hoef state wat aanvanklik 'n volledige verslag voorgelê het, nie die basiese inligting wat voorheen voorsien is in latere verslae te herhaal nie.

Dit is duidelik dat wat geveerg word, nie 'n blote uiteensetting van huishoudelike regsvoorskrifte is nie, maar inderdaad 'n volledige beskrywing van die feitelike situasie waarin kinders in die betrokke staat hulleself bevind met verwysing na die vraag rondom die implementering van die bepalings van die Konvensie. Ten einde gestalte aan hierdie vereiste te gee, het die Menseregte Kommissie van die VN bepaalde riglyne neergelê waarvolgens state wat uit hoofde van 'n menseregte-verdrag waarvolgens hulle die verpligting dra, verslag moet doen. Hierdie riglyne behels die volgende aspekte:

- die grondliggende eienskappe van die land en die mense, insluitend demografiese en etniese kenmerke;
- die belangrikste sosio-ekonomiese en kulturele kenmerke;
- die algemene politieke bestel in die betrokke jurisdiksie;
- die raamwerk waarbinne fundamentele regte beskerm word (insluitend die judisiële en administratiewe instellings wat jurisdiksie het aangaande fundamentele regte);
- die aard van die remedies wat tot die beskikking van individue is;
- hoe internasionaal erkende verpligtinge met betrekking tot fundamentele regte in die nasionale reg verdiskonteer word; en
- welke stappe gedoen word om 'n bewusmaking en bevordering van fundamentele regte in die gemeenskap en by relevante owerhede teweeg te bring

Die Komitee het hierdie algemene riglyne soos volg verfyn om aan die bepalings van die Konvensie gevolg te gee. (Ter wille van volledigheid word dit *verbatim* aangehaal.)

“1 General measures of implementation, including information about the measures that have been taken ‘to harmonise national law and policy with the provisions’ of the convention; the existing or planned mechanisms at all levels ‘for co-ordinating policies relating to children and for monitoring the implementation’ of the convention; and the measures that states have planned or are taking to publicise information about the convention and to spread awareness of their reports to the committee.

2 Definition of the child, including information concerning the attainment of majority and the legal age for such things as compulsory education, marriage, employment, imprisonment, etc.

3 General principles, including information about the principal legislative, administrative, judicial and other measures that are in force or are planned for implementing the general principles of the convention, e.g., non discrimination, and the right to life, survival and development.

4 Civil rights and freedoms, including information about the principal legislative, administrative, judicial and other measures that are in force, and the difficulties encountered and progress achieved in implementing the civil rights and freedoms of the convention, e.g., the rights to a name and nationality, freedom of expression, thought conscience, assembly, etc.

5 Family environment and alternative care, including information about the principal legislative, administrative, judicial and other measures that are in force, and the difficulties encountered and progress achieved in implementing rights that are relevant to the family and alternative care, e.g., parental responsibilities, adoption, and illicit transfer of children.

6 Basic health and welfare, including information about the principal legislative, administrative, judicial and other measures that are in force, the institutional infrastructure for implementing policy in this area, and the difficulties encountered and progress achieved in implementing rights relevant to health and welfare, e.g., survival and development of the child, health and health services, social security, etc.

7 Education, leisure and cultural activities, including information about the principal legislative, administrative, judicial and other measures that are in force, the institutional infrastructure for implementing policy in this area, and the difficulties encountered and progress achieved in implementing provisions of the convention regarding such things as education, leisure and cultural activities of children.

8 Special protection measures, including information about the principal legislative, administrative, judicial and other measures that are in force, and the difficulties encountered and progress achieved in implementing provisions of the convention that relate to refugee children, children in armed conflicts, and children subjected to exploitation of various kinds."

4.3 *Verspreiding van inligting en verslae*

Artikel 44(6) vereis dat die verslae wat deur state voorberei word, "widely available to the public" gemaak word. Daarmee word gepoog om openbare debat oor huishoudelike beleid en praktyke aangaande kinders te stimuleer. Hierdie subartikel moet saamgelees word met artikel 42 wat vereis dat state onderneem om aktief op te tree om die bepalinge en beginsels van die Konvensie "widely known" te maak aan sowel kinders as volwassenes.

Die Komitee moet elke twee jaar aan die Algemene Vergadering van die VN verslag doen oor sy aktiwiteite. Hierdie praktyk staan onder verdenking. Nie een menseregte konvensie is deur al die state van die VN geratifiseer nie. Teen hierdie agtergrond word gevra waarom daar aan die Algemene Vergadering verslag gedoen moet word. Volgens hierdie benadering sou dit in orde wees om slegs aan die state tot die betrokke konvensie verslag te doen. Die praktyk word egter verdedig deur daarop te wys dat die Konvensie deur die Algemene Vergadering aanvaar is en dat die effektiewe implementering daarvan gevolglik wel op die tafel van die Algemene Vergadering tuishoort.

4.4 *Evaluering van state se verslae*

Artikel 45 skryf die posisie voor wat gebeur by ontvangs van die verslag van 'n staat. Die artikel lui:

"In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialised agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialised agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite specialised agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

(b) The Committee shall transmit, as it may consider appropriate, to the specialised agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications.

(c) The Committee may recommend to the General Assembly to request the Secretary General to undertake on its behalf studies on specific issues relating to the rights of the child.

(d) The Committee may make suggestions and general recommendations based on information received . . . Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.”

Regeringsamptenare speel 'n besondere rol wanneer die Komitee die verslag van 'n staat oorweeg. Gewoonlik was sodanige amptenare instrumenteel in die voorbereiding van die verslag. Die Komitee verkies ook om verslae met hoëvlak amptenare te behandel, verkieslik van die ministeries wat 'n rol te speel het by die implementering van die Konvensie. Die Komitee oordeel dat sodanige gesprekke sal bydra tot meer effektiewe en konstruktiewe dialoog.

Alvorens die vergadering tussen die Komitee en regeringsamptenare plaasvind, word die betrokke staat se verslag eers deur 'n werkgroep bestudeer. Hierdie groep word bygestaan deur 'n tegniese adviesgroep wat bestaan uit afgevaardigdes van liggame van die Verenigde Nasies en nie-regeringsorganisasies. Hierdie groep stel 'n lys van vrae op wat dan aan die betrokke regering gestuur word. Die bedoeling met hierdie lys is om 'n konstruktiewe gesprek tussen die Komitee en die betrokke regeringsamptenare te verseker wanneer die verslag in behandeling geneem word.

Die rol van nie-regeringsorganisasies verdien besondere oorweging. Daar was geen eenstemmigheid tydens die onderhandelinge rondom die Konvensie oor hierdie aangeleentheid nie. Die United Nations Children's Fund en verskillende nie-regeringsorganisasies het geargumenteer dat nie-staatlike rolspelers wel die Komitee behoort by te staan in die evaluering van die implementering van die Konvensie. Hulle betrokkeheid sou lei tot 'n “dynamic and innovative approach” tot die implementering van die Konvensie. Die argument was voorts dat die Komitee toegang tot so veel as moontlik inligting behoort te hê en dat hierdie organisasies in staat is om daardie inligting te verskaf.

Teenoor bovermelde argument word geargumenteer dat die verantwoordelikheid vir die implementering van die Konvensie inderdaad dié van die betrokke staat is. Die Konvensie vergestalt 'n ooreenkoms tussen state, sodat net state oor die nakoming van die bepalings daarvan toesig kan hou.

Artikel 45 verwys nie uitdruklik na nie-regeringsorganisasies nie. Die opstellers van die Konvensie het egter die woorde, “other competent bodies” so verstaan dat dit in besonder, maar nie spesifiek nie, na nie-regeringsorganisasies verwys. Hierdie begrip moet volgens die opstellers in die wydste moontlike sin verstaan word om interstaatlike en nie-regeringsorganisasies in te sluit. Die Komitee het hierdie uitleg van artikel 45 so aanvaar deur in sy eie prosedurele voorskrifte te bepaal dat “other competent bodies” ook “intergovernmental organs outside the United Nations system and non-governmental organizations” insluit. Sodanige organisasies word in elk geval nie toegelaat om deel te hê aan die oorweging van 'n verslag van 'n staat nie.

Die voorskrifte van artikel 45 is enigsins onduidelik oor die vraag wat die Komitee te doen staan na afhandeling van die gesprek met die regeringsamptenare. Wat kan byvoorbeeld gedoen word as die Komitee oordeel dat die betrokke staat nie voldoende vordering met die implementering van die Konvensie maak nie? Kan dit toeligting gee waarom tot 'n bepaalde gevolgtrekking gekom is of kan dit aanbevelings maak rakende stappe wat 'n staat behoort te doen?

Artikel 45(d) bied die antwoord, ofskoon nie besonder duidelik nie, op hierdie vrae. Dit magtig die Komitee “to make suggestions and general recommendations” op

sterkte van al die inligting wat voor die Komitee gelê is. Dit beteken derhalwe dat die voorstelle en aanbevelings kan berus op die inhoud van die verslae van die betrokke staat en op inligting wat bekom is van enige van die genoemde nregeringsorganisasies. Die onduidelikheid is egter daarin geleë dat dit onseker is of die Komitee spesifieke voorstelle aan individuele state mag maak, of algemene voorstelle aan individuele state of algemene aanbevelings aan al die state tot die Konvensie gesamentlik.

Die Komitee is van oordeel dat dit uit hoofde van dié sub-artikel gemagtig word om algemene stellings (“statements”) met betrekking tot die artikels van die Konvensie te maak en algemene aanbevelings ten aansien van die regte van die kind. Dit het voorts besluit dat na evaluering van die verslag van ’n staat, dit “concluding observations” sal uitreik wat “an authoritative comment with the purpose of defining outstanding problems and discussing remedies” sal wees. Hiermee word in die vooruitsig gestel dat hierdie waarnemings die basis vir gesprek oor tegniese advies of bystand moet vorm. Dit behoort voorts as ’n vertrekpunt te dien vir die opvolgende verslag van die betrokke staat wat na vyf jaar ingedien moet word.

4 Evaluering van die Suid-Afrikaanse verslag deur die Komitee

Die Komitee het die verslag van Suid-Afrika wat op 4 Desember 1997 voorgelê is, gedurende Januarie 2000 bespreek. Ofskoon die Komitee enkele positiewe aspekte aanmerk, is die oorwegende beeld wat aangaande die posisie van kinders geskets word ’n betreklik somber een. Die Komitee spreek sy waardering uit vir die regshervorming wat op vele terreine plaasvind en moedig die bespoediging daarvan aan. Veral artikel 28 van die Grondwet van Suid-Afrika 108 van 1996 word positief vermeld. Verdere wetgewing wat die plaaslike reg in ooreenstemming met die voorskrifte van die Konvensie sal bring, word ook spesifiek vermeld. Die Komitee spreek ook sy waardering uit vir die vestiging van die Menseregte Kommissie en die aanstelling van ’n direkteur wat spesifiek gemoeid is met die regte van kinders. ’n Belangrike verdere aspek is die erkenning van die Komitee van die “challenges faced by the State Party [Suid-Afrika] in overcoming the legacy of apartheid which continues to have a negative impact on the situation of children”. Die besondere ekonomiese en sosiale ongelykhede wat tussen segmente in die gemeenskap bestaan en die hoë vlakke van werkloosheid en armoede wat die volledige implementering van die Konvensie negatief beïnvloed, word ook genoem.

In paragrawe 10 tot 43 hanteer die Komitee aspekte aangaande die posisie van kinders wat aandag van die regering moet kry. Daar word hierin slegs by enkele van die aspekte stilgestaan.

- Die Komitee het waardering vir die wetgewing wat voorgestel word om die regsposisie plaaslik in ooreenstemming met die voorskrifte van die Konvensie te bring. ’n Kommerwekkende aspek wat die Komitee hier noem is dat veral die inheemse reg nie die beginsels en voorskrifte van die Konvensie weer-spieël nie (par 10).
- Nieteenstaande die implementering van die Nasionale Plan van Aksie, bevind die Komitee dat daar nie voldoende programme in die gemeenskap in werking gestel word nie. Daarbenewens is die pogings wat aangewend word om “community based organisations” in die implementering van die Konvensie te betrek, onvoldoende. Die Komitee maak voorts die bevinding dat daar onvoldoende skakeling tussen die verskeie staatsdepartemente wat met die implementering van die Konvensie gemoeid is plaasvind (par 12).

- Ofskoon die Menseregte Kommissie 'n besliste stap in die regte rigting is, kom die Komitee tot die gevolgtrekking dat daar onvoldoende middele tot die Kommissie se beskikking gestel word om sy mandaat na behore uit te voer. Die Komitee spreek voorts sy bekommernis daaroor uit dat daar nie 'n duidelike prosedure uiteengesit word waarvolgens kinders inbreukmaking op hulle regte voor die Kommissie kan bring nie. Die Komitee beveel daarom aan dat "clear, child-friendly procedures" in werking gestel word sodat kinders wel in staat gestel word om hulle klagtes voor die Kommissie te lê (par 13).
- Die Komitee neem kennis van die voorgestelde wysiging om die ouderdom vir strafregtelike aanspreeklikheid van sewe na tien jaar te verhoog. Die Komitee meen egter dat die ouderdom steeds te laag is. Die Komitee oordeel ook dat die ouderdomme van 14 (seuns) en 12 (meisies) waarop toestemming tot seksuele verkeer gegee mag word, te laag is (par 17).
- Die Komitee is besorg daaroor dat tradisionele houdings en gebruike steeds die implementering van artikel 12 van die Konvensie kortwiek. Dié artikel maak voorsiening vir die reg van die kind om gehoor te word in alle aangeleenthede wat hom of haar raak (par 19). Daarbenewens is dit 'n kommerwekkende feit dat nie alle geboortes geregistreer word nie. Die regering word opgeroep om dit vir alle ouers moontlik te maak om die geboorte van hulle kinders te registreer (par 20).
- Die Komitee spreek voorts sy besorgdheid uit oor die toename in enkelouer en kind-as-familiehoof families. "The insufficient support and counsel in the areas of parental guidance and responsibilities" is eweneens aangeleenthede wat kommer wek. Die regering word aangemoedig om sy pogings te verskerp "in developing family education" en om alle nodige stappe te doen om kind-as-familiehoof gesinne sowel te verminder as by te staan (par 22). Verdere aspekte handel oor die afdwinging van onderhoudsbevele (par 23), welsynsdienste (par 24), alternatiewe sorg (par 25), plaaslike en interstaatlike aan-neming (par 26), lyfstraf (par 28), primêre gesondheidsorg (par 29), omge-wingsaangeleenthede en besoedeling (par 30), adolessensie (par 31), kinders met gebreke (par 32) en opvoeding en ontspanning (par 34).
- In paragraaf 27 vermeld die Komitee sy besorgdheid oor die hoë vlak van gesinsgeweld en die mishandeling van kinders. Hierby word ook seksuele molestering van kinders inbegryp. Die regering word aangemoedig om op omvattende wyse hierop te reageer deur voldoende maatreëls in plek te stel om die euwel te bekamp en om die gemeenskapsopvatting hieromtrent te wysig. Van besondere belang in hierdie verband is die aanbeveling van die Komitee "(t)hat cases of domestic violence and ill-treatment and abuse of children, including sexual abuse, be properly investigated within a child-friendly judicial procedure and sanctions applied to perpetrators, with due regard given to protecting the right to privacy of the child".
- Tradisionele praktyke rakende besnydenis van seuns word in sommige gevalle onder onveilige mediese omstandighede uitgevoer. Die Komitee is daaroor besorg dat "the traditional practice of virginity testing" die gesondheid van meisies bedreig en ook hulle waardigheid en privaatheid aantast. Die Komitee beveel stappe deur die regering aan om die veiligheid van seuns onder hierdie omstandighede te verseker en 'n studie oor "virginity testing" te doen om die fisiese en sielkundige uitwerking daarvan op meisies te bepaal. Die rege-ring word ook aangemoedig om die praktyk van "female genital mutilation" (FMG) uit te roei (par 33).

- In paragrawe 35 tot 41 word aspekte soos kinders as vlugteling, kinders in gewapende konflik, kinderarbeid, dwelmmisbruik, seksuele uitbuiting, verkoop van en handeldryf in kinders en kinders as lede van minderheidsgroepe bespreek. In paragraaf 37 maak die Komitee spesifiek melding daarvan dat daar meer as 200 000 kinders tussen die ouderdomme van 10 en 14 jaar is wat werk, hoofsaaklik in die kommersiële landbou en huishoudelike dienssektore.
- In paragraaf 42 het die Komitee dit oor “juvenile justice”. Onder hierdie hoof dui die Komitee verskeie tekortkominge aan waar plaaslike regspleging tekortskiet aan die standaard wat in die Konvensie gestel word en stel dit voorts stappe voor wat gedoen behoort te word om die regsposisie in ooreenstemming met die voorskrifte van die Konvensie te bring.

5 Slot

Die Komitee het ooglopend die verslag van Suid-Afrika indringend behandel en die reaksie daarop is 'n gesaghebbende evaluering van die stand van kinderregte in Suid-Afrika. Die verslag van die Komitee lê nie alleen gebreke bloot nie, maar moedig die regering ook aan om omvattende stappe te doen om dit reg te stel. Ongelukkig kan die identifisering van die vele gebreke nie as onverwags beskou word nie aangesien akademië, nie-regeringsorganisasies en ander belanghebendes reeds vir geruime tyd sodanige gebreke op verskeie wyses uitgelig het. Die regering het nou vyf jaar voordat daar weer aan die Komitee verslag gedoen moet word. Die hoop word uitgespreek dat die verslag van die Komitee spoedige en grondliggende hervorming teweeg sal bring sodat die beste belang van die kind werklik van deurslaggewende belang sal wees in elke aangeleentheid wat die kind raak.

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VOLUNTARY WINDING-UP OF A COMPANY AND “DISMISSALS” IN TERMS OF THE LABOUR RELATIONS ACT

1 Introduction

Generally speaking, insolvency law aims to protect the interests of creditors as a group in that the sequestration or liquidation order is said to bring about a *concursum creditorum*. (Unless specified otherwise, liquidation or winding-up refers to a company that is unable to pay its debts.) In the words of Innes CJ

“[t]he sequestration order crystallises the insolvent’s position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order” (*Walker v Syfret* 1911 AD 141 166).

Insolvency law thus being a collective debt collecting device, aims at dealing collectively with the interests of the creditors as a group in order to bring a *fair*

distribution of the proceeds of the assets about when the debtor is insolvent (see *Richter v Riverside Estates (Pty) Ltd* 1946 OPD 209). Within its framework insolvency law distinguishes between the various categories of creditors, secured and unsecured creditors being the principal categories. However, within the class of unsecured creditors the claims of some are preferred above others due to a variety of reasons and by means of statutory enactment. (See ss 96-102 of the Insolvency Act 24 of 1936, hereafter the "Insolvency Act".)

Although workers are usually also creditors in the event of the estate of the employer being sequestered or liquidated, labour law on the other hand seeks to protect the rights of workers in a myriad of ways. Employees are, amongst others, protected against unfair dismissal on grounds of misconduct and operational requirements. (See ss 185-197 of the Labour Relations Act 66 of 1995, hereafter "LRA". Also see the "Code of Good Practice: Dismissal" and the "Code of Good Practice on Dismissal based on Operational Requirements" published in terms of s 203 LRA.) It is one of the primary purposes of the provisions regulating retrenchment to seek alternative measures to avoid it from happening and to minimise the hardships caused by such action. (See ss 189 and 197 LRA and s 41 of the Basic Conditions of Employment Act 75 of 1997, hereafter the "BCEA".) Problems arise when the different philosophies of insolvency law and labour law find application to the same set of facts, and it is often difficult to reconcile the principles inherent to the different fields of the law.

Whereas labour law seeks to promote job security and continuity of employment, the ultimate aim of insolvency law is to realise and distribute the estate assets although modern corporate insolvency law is moving towards a business rescue culture (see Flessner *Philosophies of business bankruptcy law: An international overview in current development in international and comparative corporate insolvency law* (ed Ziegel 1994)). It is to be noted that South Africa is still somewhat out of touch with the latest international trends towards adopting and embracing a rescue culture (see Kloppers "Judicial management – A corporate rescue mechanism in need of reform?" 1999 *Stell LR* 417; "Judicial management reform – steps to initiate a business rescue" 2001 *SA Merc LJ* 359. See also *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (C); 2001 2 SA 727 (C)). Within this context, labour law with its constitutional backing is, however, increasingly becoming the catalyst in reforming insolvency law. Until now the courts have had the onerous task of reconciling some of the conflicts inherent to the difference in philosophy between these important areas of law.

It must, however, be noted that a new package of amendments to current statutory enactments are underway that will endeavour to address some of the problems that currently exist. The new paradigm seeks to improve the legal position of employees of insolvent employers by means of the suspension of contracts of employment at the time of insolvency, even though the estate of the employer is being wound-up. Apart from this, when the employer is sequestered or liquidated, the claims of workers have also been improved within the ladder of rankings of payments. To a large extent this can be attributed to the fact that the Insolvency Act is now well over 60 years old whilst our labour law is said to be one of the most modern and progressive systems in the world. Tensions are therefore bound to arise. In a recent case, *National Union of Leather Workers v Barnard and Perry NNO* 2001 4 SA 1261 (LAC), this tension and interplay between labour and insolvency law once again emerged. Apart from discussing the impact of this case, this note will address the shortcomings of the current

provisions taking into consideration the legal position until 30 June 2002 with a brief reference to the proposed amendments.

2 The *Leather Workers* case

2.1 Facts

The facts before the Labour Appeal Court were as follows: On 9 March 1998 the shareholders of Vittmar Industries (Pty) Ltd ("the company") passed a special resolution which provided that the company be wound up in terms of section 349 read together with section 351 of the Companies Act 61 of 1973 ("the Companies Act") as a voluntary winding-up by creditors. The resolution was duly registered by the Registrar of Companies on 13 March 1998, on which date the winding-up of the company commenced in terms of the provisions of section 352(1) of the Companies Act. In consequence of this winding-up, the contracts of employment between the company and its employees terminated on 13 March 1998 (see s 38 Insolvency Act read with s 339 Companies Act).

2.2 The issue

The preliminary and only issue which was required to be decided by the court *a quo* was whether or not the termination of these contracts of employment in the circumstances described, constituted dismissal in terms of section 186(a) LRA read together with section 213 thereof.

In the judgment of the court *a quo*, Soni AJ found that the termination of the contracts of employment in question did not constitute a dismissal as contemplated in section 186(a) of the LRA (1263 para 3). It was held that it was not the decision of the employer to institute proceedings which terminated the contracts of employment and it could consequently not be brought within the ambit of section 186(a) LRA.

On appeal, and on behalf of the appellant, it was argued that the decision of the shareholders to voluntarily wind up the company always constituted an act of termination of a contract of employment which brought it within the ambit of section 186(a). The respondent, on the other hand, submitted that the contracts were not terminated by some action or another of the employer, but that they had been terminated by operation of law in terms of section 38 of the Insolvency Act.

Having considered these arguments, the court accepted that section 38 of the Insolvency Act was the legal source for the termination of the contracts. However, according to the court this was not the ultimate question to be answered. The real issue that had to be decided was whether the initial act which resulted in the voluntary winding-up of the company was an act which fell within the scope of section 186(a) LRA.

After considering the law relating to the voluntary winding-up of companies, the court drew a distinction between a procedure leading to a compulsory winding-up of a company in which a court has a clear discretion as to whether to grant such an order, and a voluntary winding-up where the court cannot interfere with the right which the Companies Act bestows on the requisite majority of shareholders. In the last instance the prescribed majority of shareholders may effect a winding-up once the proper procedures have been followed (1266 para 17–1267 para 19).

The court accepted Brassey's comments on section 186(a) LRA where he submits that section 186(a) means that an employee is dismissed only when the

employer brings the contract of employment to an end in a manner recognised by the law. (See *Brassey Employment and labour law* Vol 3 A8:8 1267 paras 21–22.) In consequence, the court found that the decision to pass the special resolution caused the contracts of employment to be terminated in that they were brought to an end by a valid action recognised by the law, namely the decision to wind up the company. This led to the termination of the contracts in terms of section 38 of the Insolvency Act (1268 paras 24–25).

In the view of the court, this procedure is entirely different from that which applies in the case of a compulsory winding-up. In such a case, the court plays a major role in the ultimate decision to wind up a company in that it has a statutory discretion whether or not to grant such an order. Under these circumstances it could probably not be said that the act of the employer brought about the termination of the contracts of employment in that there existed a *novus actus interveniens*, namely the decision of the court which in terms of the Companies Act is interposed between the initial application to wind up and the termination of the contracts of employment (1268 para 26).

In conclusion the court ruled that the termination of the respondent's employees' contracts of employment on 13 March 1998 thus constituted a *dismissal* as contemplated in section 186(a) read with section 213 LRA. The reason given was that the decision to place the company in voluntary liquidation was one taken entirely by the shareholders and this had the effect that the employer in effect directed the process (1269 para 29).

This judgment poses a number of questions. Firstly, what is the difference between a voluntary winding-up by creditors and an application for winding-up before the courts for the purposes of a dismissal? Secondly, does a voluntary winding-up amount to a dismissal of employees? Thirdly, what are the practical consequences of this case regarding labour law? Finally, what are the consequences for the law of insolvency? In what follows, it will be attempted to give some direction in this regard. The proposed amendments to the Insolvency Act, the LRA and the BCEA will also be considered briefly in view of this judgment.

3 The difference between a voluntary winding-up by creditors and an application for winding-up before the courts

In essence the court adopted the approach that the resolution by members of a company leading to its voluntary winding-up, ultimately causes the contracts of employment to terminate. Since such a resolution is within the sole discretion of the members, it amounts to a termination of the contracts of employment and this in turn amounts to a dismissal in terms of the LRA.

It is submitted that the court did not adequately consider the various forms and reasons for winding-up of a company. The court should have distinguished between a voluntary winding-up by members that becomes a voluntary winding-up by creditors if the company cannot secure its outstanding liabilities, and a voluntary winding-up by members where the company has no outstanding debts or where the company can pay such debts. In the first instance, section 38 of the Insolvency Act would have become operative since section 339 of the Companies Act would activate the insolvency law, in this case section 38, where the company is *unable to pay its debts*. In this sense, it would have made no difference if the company was wound up voluntarily or by means of a court order. Section 38 would only become operative if the company was unable to pay its debts. The fact that the court has a discretion in an application for

winding-up, as opposed to the voluntary winding-up procedure, made all the difference in deciding that the second instance would amount to a termination of the contracts of employment. It is suggested, however, that the distinction drawn by the court is artificial and that it is rather the inability of the company to pay its debts that ultimately causes contracts of employment to terminate. (It is to be noted that a new section 38 of the Insolvency Act is envisaged that would initially cause the contracts of employment to be suspended.)

The court also made no attempt to distinguish between the various grounds to wind up a company by means of a court order. Suffice it to mention that a company may apply for its own winding-up following a members' resolution to this effect. On this basis, it would also be a resolution by members that would set the procedure in motion. The fact that the court referred to the court's discretion in this regard is superficial. Section 344(f) provides for the winding-up of a company if it is unable to pay its debts. The position nevertheless remains the same, whatever the reason for winding-up and whatever the procedure followed: section 339 will trigger section 38 of the Insolvency Act if the company is unable to pay its debts.

It should also be noted that the court used misleading terminology by referring to winding-up without a court order as voluntary, and a winding-up by court order as compulsory. The Companies Act refers to a winding-up by the court or voluntary winding-up (s 343(1)). The position in the case of corporate insolvency law is, however, quite different from the position in the Insolvency Act where the estates of debtors (as defined in the Insolvency Act) may be sequestrated either by means of voluntary or *compulsory* sequestration. (See the criticism expressed by O'Brien in 2002 *ABLU insolvency law update* (RAU) compiled by O'Brien and Boraine.)

A resolution by the members to voluntarily wind up a company that is unable to pay its debts may be in the best interests of all the parties concerned. It may for instance save some legal costs for the company instead of following the court application route, thus making more funds available for distribution amongst its creditors, including the employees.

4 Does a voluntary winding-up by creditors amount to a dismissal of employees?

The case under discussion was not the first dealing with the question of the relationship between liquidations, insolvencies and dismissal. In *SA Agricultural Plantation & Allied Workers Union v HL Hall & Sons* (1999) 20 ILJ 399 (LC) the union lodged an application for an interdict against a group of employer companies from dismissing employees who were involved in a protected strike. The parent company (HL Hall & Sons (Group Services) Ltd) was in the process of applying to the high court for the liquidation of the parent company's subsidiary companies, the second, third and fourth respondents, on the ground that they were insolvent and unable to pay their debts. As background, it should be mentioned that the subsidiary companies were set up to engage labour to work on the parent company's farms. This was done in an attempt to protect the parent company from labour problems. The parent company merely paid the subsidiary companies a fee for the provision of services and the subsidiary employees were responsible for the acquisition of labour and the dealing with its own labour responsibilities (Whitear-Nel "The effect of insolvency on a contract of employment" (2000) 21 ILJ 845 846). All four companies were different legal entities.

The employees of the subsidiary companies went on a protected strike that was protracted in nature, without an end in sight.

The court considered the effect of liquidation on the workers' contracts of employment and held that section 339 of the Companies' Act and section 38 of the Insolvency Act applied in the case of the winding-up of a company unable to pay its debts. Counsel on behalf of both the applicant and the respondents were in agreement that the *employment relationship* (not the contracts of employment) continued even after liquidation. It was also submitted on behalf of the applicant, that should the liquidator decide not to continue with the whole workforce of the companies, the liquidator should dismiss employees in accordance with the provisions of the LRA (paras [9]–[12]).

The court found that the liquidation of the companies would *ipso jure* terminate the contracts of employment of the employees and that the labour court could not interdict the termination of the contractual relationship (para [21]). It was also held that the LRA did not expressly deal with the termination of contracts of employment and that no conflict existed between the LRA and the Insolvency Act. (S 210 LRA provides that should "any conflict, relating to the matters dealt with in this Act, arise between this Act and the provisions of any other law save the Constitution . . . the provisions of this Act shall prevail".) In addition to this, the court made the following wide-ranging statement, namely that "the reach of the Labour Relations Act 1995 halts once insolvency enters the picture. Thereafter the law of insolvency, administered in this instance by the High Court, takes over" (para [22]). Accordingly, the application was dismissed with costs.

It is submitted that this statement, in its unqualified format, may have created confusion in the minds of both insolvency law and labour law practitioners. The impression was created that the LRA does not become relevant regarding any aspect of the employment relationship when the prospect of insolvency comes into play. This decision created the impression that once insolvency or liquidation comes into play, the provisions of the Insolvency Act trumps those of the LRA, with the effect that the provisions governing the termination of contracts of employment do not become applicable at all. This prompted Whitear-Nel (2000) 21 *ILJ* 849 to comment that, based upon section 210 of the LRA, this decision was arguably incorrect. *HL Hall* has also subsequently been rejected by the Commission for Conciliation, Mediation and Arbitration ("CCMA"), the Labour Court and ultimately also by the Labour Appeal Court in *Leather Workers*.

In *Hammond v L Suzman Distributors (Pty) Ltd* (1999) 20 *ILJ* 3010 (CCMA) *HL Hall* was questioned by the CCMA on grounds of equity and constitutional principle. In this case the provisional liquidator employed the employees on fixed term contracts between the date of provisional liquidation and the date of final liquidation. Upon termination of employment by the liquidator the employees claimed that they were entitled to severance pay. Some employees had almost 40 years of service with the insolvent employer. Based upon *HL Hall* the employer argued that the contracts of employment had terminated *ipso iure* on date of provisional liquidation and that the provisions of the LRA halted once insolvency entered the picture. Although the arbitrator conceded that it was not desirable to stray from precedent set by the Labour Court, it held that an adherence to this decision would result in a gross inequity (3017G). The Commissioner held that the effect of section 38 of the Insolvency Act was the culmination of a process and not the initiating factor that resulted in the termination of the contracts of employment. The directors of the company passed

a resolution authorising the application and they were in effect the pilots steering the process (1018C). It was also pointed out that section 38 of the Insolvency Act constitutes a *prima facie* violation of the fundamental right to fair labour practices as set out in section 23(1) of the Constitution 108 of 1996 (3017J). In conclusion it was held that the termination of contracts of employment by reason of the employer's insolvency is based on economic needs falling within the definition of dismissals for operational requirements (3019A; also see *Waverley Blankets Ltd v CCMA* (2000) 21 ILJ 2738 (LC) para [27] where the constitutionality of s 38 Insolvency Act was also questioned). Consequently, it was held that the employees were entitled to severance pay.

HL Hall was also questioned in *Ndima v Waverley Blankets Ltd* [1999] 6 BLLR 577 (LC). *In casu* the Labour Court considered the effect of section 197 of the LRA in circumstances where a company is provisionally liquidated. In this instance the respondent informed its workforce that their contracts of employment had been terminated after it was provisionally liquidated. The provisional liquidator concluded temporary contracts with the majority of the former employees but not with the applicants in the matter. The court noted that section 197 envisages that in the event of the transfer of a business as a going concern, the new employer assumes the rights and obligations that the old employer had *vis à vis* all of its employees prior to the transfer (580A–C). With reference to *HL Hall*, the respondents raised the point *in limine* that the court has no jurisdiction to entertain the applicants' claims. The court did not agree with this contention and held that in as far as it was stated in *HL Hall* that once insolvency has entered the picture, the LRA comes to a halt, this part of the decision was *obiter* and it did not form part of the *ratio decidendi* of the judgement. (Para [22]. Also see *Waverley Blankets Ltd v CCMA* above para [9] where the court came to a similar conclusion.) It accepted that the provisions of the LRA are applicable to instances of provisional liquidations and the objection to the jurisdiction of the Labour Court was rejected (para [27]). The judge in this matter found that the real issue in dispute was the interpretation of the words "[i]f a business is transferred" which appears in section 197(2)(b) of the LRA. Although reluctant to do so, the court came to the conclusion that a transfer of shares did not amount to a transfer of a business as a going concern as contemplated in section 197 of the LRA. (See Anderson "Unravelling the proposed amendments to the Insolvency Act" (2001) 22 ILJ 868 870.) In conclusion the court held that there is a "crying need" for an amendment of labour legislation or section 38 of the Insolvency Act (para [77]). An option proposed by the court was that legislation be amended to provide that contracts of employment are suspended on provisional liquidation and only terminated on final liquidation. (See the proposed amendments in this regard in the discussion that follows.)

From the first part of the discussion, it is clear that the Labour Appeal Court is also of the opinion that the provisions of the LRA do not cease to be applicable in all circumstances when employers become insolvent or when they are liquidated. However, it is questionable whether the court was correct in basing its decision on an artificial differentiation between circumstances of voluntary winding-up of companies and the winding-up of companies by means of court application. It is suggested that the court would have been more correct to base its finding upon the overriding constitutional principle of every person's broad right to fair labour practices. However, as will be seen from the discussion of the proposed amendments to the LRA, the BCEA and the Insolvency Act below, the distinction is not drawn along the lines of the case under discussion and the debate as to whether or not insolvency falls within the description of dismissal, may become irrelevant.

5 Consequences of the *Leather Workers* case regarding labour law

Why is it deemed to be so important to know whether the decision to wind up a company constitutes a dismissal in terms of section 186 of the LRA? The answer to this is twofold: The first is that the legal principles in relation to fair and unfair dismissals would become relevant; and the second is that different claims could be instituted depending on whether the termination is deemed to be a dismissal or not.

If it is to be accepted that the voluntary winding-up of a company amounts to a dismissal in terms of section 186(a), Chapter VIII of the LRA, which regulates the issue of unfair dismissal of employees, automatically becomes relevant. As a starting point, section 185 of the LRA provides that “every employee has the right not to be unfairly dismissed”. The right not to be unfairly dismissed is given content in section 188(1). It provides for the two foundations of any fair dismissal, namely that there must be a *fair reason* for dismissal and it must be affected in accordance with a *fair procedure*. Financial hardship of any employer would be recognised as a fair reason for dismissal based on the employer’s operational requirements (see Du Toit, Woolfrey, Murphy, Godfrey, Bosch and Christie *Labour relations law* (2002) 380; Grogan *Workplace law* (2001) 185; *Hammond v L Suzman Distributors (Pty) Ltd* (1999) 20 ILJ 3010 (CCMA) 3019A). However, quite often employers are unable to prove that the dismissal of employees based on operational requirements was preceded by fair procedures.

Section 189 of the LRA spells out these procedures. Section 189(1) stipulates that as soon as an employer “contemplates dismissing one or more employees” on the ground of operational requirements, the employer must consult with the employees or their representatives, with the view of reaching consensus on a number of issues, including measures to avoid or minimise dismissals, the method of selecting the dismissed employees and the severance pay for dismissed employees (s 189(1)–(2)). In addition, section 189(3) places an obligation on employers to disclose in writing to the other consulting party all relevant information, including but not limited to the reason for dismissal, the number of employees likely to be affected, the proposed selection criteria, the severance pay proposed and the possibility of the future re-employment of the employees who are to be dismissed. (In *Johnson & Johnson Ltd v CIWU* (1998) 19 ILJ 89 (LAC) para 27 it was held that “all these primary formal requirements are geared to . . . achieve a joint consensus-seeking process”.)

If an employee is able to prove that the termination of his or her contract is in fact a termination as contemplated by the LRA (s 192(1)), and the employer is unable to prove that the dismissal is fair, the employee would become entitled to specific statutory remedies in terms of the LRA. Amongst others, reinstatement or compensation of up to 12 month’s remuneration may be claimed by the employees for an unfair dismissal (ss 193 and 194).

In addition, retrenched employees become entitled to statutory severance pay in the amount of at least one week’s remuneration for each completed year of continuous service with that employer (s 41 BCEA). The status that claims would enjoy in insolvency is usually defined either in the Insolvency Act or sometimes in other pieces of legislation (see the discussion on claims in insolvency in para 6).

For the sake of completeness it is suggested that an employee would be entitled to the following list of claims against its employer once it is accepted that the voluntary winding-up of a company is a dismissal:

- (a) An employee would have a common-law claim for all outstanding payments in terms of the contract of employment, such as salary, bonus, benefits and payment for overtime and Sundays worked.
- (b) The employee would have a claim for remuneration for any period of annual leave due in terms of section 20(2) BCEA that the employee has not taken (s 40(c) BCEA). Section 20(2) makes provision for at least 21 consecutive day's paid annual leave for every leave cycle of 12 months or one day of annual leave for every 17 days worked.
- (c) Every employee would be entitled to a statutory prescribed notice period in terms of section 37 BCEA. An employee who has been employed for one year or more, is entitled to 4 weeks written notice. Instead of giving an employee notice, the employer may pay the employee the remuneration the employee would have received during the notice period (s 38 BCEA). "Remuneration", for purposes of the calculation of leave pay (discussed in (b) above) and notice pay, includes the cash value of any payment in kind but excludes gratuities and discretionary payments (s 35(5) BCEA).
- (d) In terms of section 41(2) BCEA every employer must pay an employee who is "dismissed" for reasons based on the employer's operational requirements, severance pay equal to at least one week's remuneration for each full year of continuous service with the employer. It is important to note that an employee who unreasonably refuses to accept an employer's offer of alternative employment with that or any other employer, is not entitled to severance pay (s 41(4) BCEA).
- (e) As mentioned above, every employee who was subjected to an unfair dismissal becomes entitled to statutory prescribed compensation in terms of the LRA. In case of dismissal on the ground of operational requirements, this compensation is capped at a maximum of 12 month's remuneration in terms of section 194 LRA. Presently, section 194(1) provides that if the dismissal was unfair in a procedural sense only, compensation must be equal to the remuneration that the employee would have received from date of dismissal to the last day of the hearing of the arbitration or the adjudication. (In *Johnson & Johnson Ltd v CIWU supra* para 40 it was held that if dismissal is unfair solely for want of a proper procedure, the decision-maker has a discretion to award compensation or not. It is either "all or nothing".) If compensation is awarded in the absence of a fair reason, compensation must be just and equitable but not more than the equivalent of 12 month's remuneration (s 194(2); a new s 194(1) in terms of the Labour Relations Amendment Bill B 70B-2001 proposes to remove the distinction between procedurally and substantively unfair dismissal and it is proposed that just and equitable compensation be awarded in both circumstances). If a dismissal is classified as an "automatically unfair dismissal" (s 187 LRA lists the different categories) compensation in respect thereof is capped at a maximum of 24 months' remuneration (s 194(3)).

If the voluntary winding-up of a company was not deemed to be a dismissal, the employees affected by the termination of their contracts of employment would be in a different position in relation to the claims that they could institute. Although they would still be entitled to institute claims for (a) unpaid salary, (b) unpaid leave and (c) payment in lieu of notice, such employees would not be entitled to (d) severance pay and (e) compensation for unfair dismissal. The effect of the *Leather Workers* case is that employees, in the case of a voluntary winding-up of a company, would also become entitled to the latter two claims against their employer.

It should be noted, however, that at the time of the writing of this note, legislative amendments have already been introduced to parliament to amend the position as set out above.

6 The possible consequences of the *Leather Workers* case for the law of insolvency

In terms of section 98A of the Insolvency Act, the employees would apart from a preference regarding salaries in arrear, under these circumstances now also qualify for a preference regarding retrenchment. In this sense *Leather Workers* has created an additional claim for retrenchment under the circumstances that will afford the employees a statutory preference in terms of the Insolvency Act.

Section 98A of the Insolvency Act was introduced by the Judicial Matters Second Amendment Act 122 of 1998 and the section came into operation on 1 September 2000. In the absence of a special wage guarantee fund in South Africa, this section improved the ranking of workers within the ladder of payments by moving their preference up, thereby ranking them before certain preferences in favour of the State that used to rank prior to the same kind of preferent claims of employees (see s 99 Insolvency Act).

In terms of section 98A(1)(a) an employee who was employed by the insolvent is (as from 1 September 2000) entitled to a preference for:

- (i) salary or wages in arrears for a period not exceeding 3 months (maximum R12 000);
- (ii) payment in respect of any period of leave or holiday due to the employee which has accrued as a result of his or her employment by the insolvent in the year of insolvency or the previous year (maximum R4 000);
- (iii) any payment due in respect of any other form of paid absence for a period not exceeding 3 months prior to the date of liquidation (maximum R4 000);
- (iv) any severance or retrenchment pay due to the employee in terms of any law, agreement, contract or wage regulating measure, will rank directly after the claim of the sheriff (maximum R12 000).

The maximum amounts of these preferences will be determined from time to time by the Minister of Justice by notice in the *Government Gazette* (such adjustments are subject to a process of consultation as provided for in s 98A(2)).

The claim in paragraph (i) enjoys preference above the claims in paragraphs (ii) to (iv) in terms of section 98A(4)(a). The latter claims rank equally and abate in equal proportions if necessary (s 98A(4)(b)). Unfortunately the legislator did not introduce a similar abatement rule in case of a possible shortfall in the free residue with regard to salaries or wages in arrear (see Smith "An omission from section 98A of the Insolvency Act 1936: Equal ranking and proportional abatement of salary and wages claims" 2001 *SALJ* 661).

An employee is entitled to these payments even though he has not proved his claim in terms of section 44, but the trustee may require an affidavit in support of the claim (s 98A(3)). This concession applies to preferent claims only and an employee must still formally prove a claim to qualify for a dividend on a concurrent claim.

According to *HL Hall* it was rather clear that workers would not necessarily enjoy a preferential claim for severance pay since section 38 of the Insolvency

Act terminated the contracts of employment. However, with this case subsequently being challenged, it became clear that workers would therefore now enjoy an additional preferential claim in the case of voluntary liquidation. It must however be noted that these preferences are all limited as indicated above. Any worker will have to decide if he or she wants to submit a claim for the balance, that is, the non-preferential portion which will rank as concurrent claims. For these claims such a worker may however become liable to pay a contribution if the free residue is insufficient to meet the costs of sequestration and administration. As would appear from the list of possible claims enjoyed by employees as stated in paragraph 5, not all such claims will enjoy a statutory preference and as such those not mentioned in section 98A will be of a concurrent nature.

7 The effect of the proposed law reform

It is our submission that the proposed amendments to the BCEA, the LRA and the Insolvency Act have all been made in an attempt to resolve the underlying differences in philosophy between insolvency law and labour law in this respect. Trustees and liquidators appointed in terms of the Insolvency Act and the Companies Act will have to take note of their proposed onerous quasi-labour lawyer duties that will be imposed upon them if all the amendments are put into effect.

The Basic Conditions of Employment Amendment Bill [B70B-2001] proposes to widen the entitlement to severance pay beyond dismissals based on operational requirements to include contracts of employment terminated in terms of section 38 of the Insolvency Act. The new section 41(2) of the BCEA will direct that “[a]n employer must pay an employee who is dismissed for reasons based on operational requirements or whose contract of employment is terminated in terms of section 38 of the Insolvency Act, severance pay equal to at least one week’s remuneration for each completed year of continuous service with that employer”. These amendments will in any event introduce the effects of *Leather Workers* in all sequestration and liquidation cases.

Although not directly relevant for the purposes of this note, cognisance must be taken that the Labour Relations Amendment Act [B77B-2001] will introduce a provision dealing with the “Transfers of contracts of employment in circumstances of insolvency” in the new section 197A. This section will become especially relevant when any scheme of arrangement or compromise is being contemplated in order to avoid winding-up or sequestration for reasons of insolvency. Before returning to section 197A, it is necessary to briefly refer to the proposed new section 197 which sets out the general principles in relation to transfers of businesses as a going concern. In the event of the transfer of a business or part thereof, and unless otherwise agreed, *all contracts* of employment in existence directly before the date of transfer, as well as *all rights* and obligations in respect of the old employer (which include liability for unfair dismissal and discrimination by the old employer) will be transferred to the new employer. As a whole, conditions of employment may not be less favourable with the new employer than with the old employer (s 197(3) Labour Relations Amendment Act). If a contrary agreement is reached, it must be in writing and concluded between the old and/or new employer and the trade union or employee representatives (s 197(6)). It should be taken into account that parties could possibly agree upon less favourable conditions of employment and even possibly not to follow pre-retrenchment consultations.

A new section 187(1)(g) will include any unfair transfer-related dismissal (in terms of both ss 197 and 197A) under automatic unfair dismissals. This will have the effect of placing the maximum cap of 24 months' remuneration on these types of dismissals.

According to the new section 197A(1), if the old employer is insolvent or a scheme of arrangement or compromise is being considered, all contracts of employment before provisional winding-up or sequestration, as well as all rights and obligations with the old employer, will be transferred to the new employer. As is the case with section 197, a contrary agreement can be reached with the employees regarding the provision of less favourable conditions of employment. An important difference between sections 197 and 197A is the fact that liability in relation to unfair dismissal and discrimination by the old employer will not be transferred to the new employer.

Section 197B(1) will provide that any employer that is facing financial difficulties that could result in winding-up or sequestration, has to notify the employees that may be effected thereby of such possibility. Section 197B(2) will add that if an employer were to apply to be wound up, any employee consulting party would have to be provided with a copy of the application.

The Insolvency Amendment Bill [B14-2002] will also introduce changes that will dramatically change the present situation. As was suggested in *Ndima* discussed above, contracts of employment will no longer terminate automatically upon the insolvency of the employer. The proposed section 38(1) provides that "the contracts of employment of employees whose employer has been sequestrated are suspended with effect from the date of the granting of a sequestration order". During the period of suspension, employees will not be required to render services and will not become entitled to remuneration or employee benefits for the duration of the suspension (s 38(2) Insolvency Amendment Bill). All contracts shall, subject to the sale of a part or the whole of the business of the insolvent employer, or a scheme or compromise referred to in section 311 of the Companies Act, be terminated 45 days after the date of the appointment of a trustee in terms of section 56 of the Insolvency Act (see the proposed s 38(10)).

Apart from this, the Insolvency Act will also for the first time prescribe retrenchment procedures akin to those contained in section 189 of the LRA, to be followed by any trustee appointed in terms of the Insolvency Act. In terms of the proposed section 38(6), a trustee will not be entitled to terminate a contract of service unless he has consulted with any person whom the insolvent employer was required to consult with in terms of a collective agreement, a workplace forum, a registered trade union or the employees who are likely to be affected by the termination of the contract of service. (This section is almost identical to section 189(1) LRA). The suggested section 38(7) will provide that the mentioned consultations between the trustee and the employee representatives must take place with the view of reaching consensus on measures to save or rescue the whole or a part of the business of the insolvent employer, by the sale or transfer of a part or whole of the business or the setting up of a scheme or compromise in terms of the Insolvency Act.

8 Concluding remarks

From the above discussion it is clear that any perceptions that may have been created in *HL Hall* that insolvency law principles override labour law principles

totally when liquidation or insolvency comes into play, have been removed by the Labour Appeal Court in *Leather Workers*. It is also apparent that the proposed legislative amendments seek to modify mainly the insolvency law in order to bring it more in line with constitutional imperatives introduced into the South African law.

The two main effects of *Leather Workers* will be that employees affected by the voluntary-winding-up of a company would become entitled to a further *preferential* claim for severance pay against the liquidated or sequestered estate of the employer, and to be afforded fair pre-retrenchment procedures – upon non-compliance of these procedures, a claim for compensation against the free residue of the estate of the employer will be available. However, its application remains limited since the case only dealt with the voluntary liquidations of companies, and the effect of this judgment is also limited to this form of winding-up.

However, it is clear that that the proposed amendments to existing legislation would actually take the finding in *Leather Workers* further by introducing its effects (on the current legal principles in cases of voluntary liquidation) to all the instances where the estate of the employer is either sequestered or liquidated due to an inability to pay debts. The amended BCEA confirms that employees of insolvent employers become entitled to severance pay, and both the amendments to the LRA and the Insolvency Act will ensure that some form of pre-retrenchment procedures will have to be followed during the process of liquidation and sequestration of the insolvent employer.

It is particularly worth mentioning that the amendments to the Acts under discussion do not propose to differentiate between the voluntary winding-up of companies and other methods of winding-up along the artificial lines mentioned in *Leather Workers*.

On the one hand labour law initiatives are revolutionising the position of employees with regard to their claims and their general legal position against the insolvent estates of employees, and on the other hand provisions like the current section 197 as well as the proposed amended version thereof and the proposed section 38 *inter alia* seek to provide some type of job security to employees in the employ of insolvent employers in the short term. Within this context labour law is also somehow setting the scene for more business rescue initiatives. However, it is questionable whether South African law at present provides sufficient business rescue procedures to assist failing businesses adequately and whether the proposed provisions will therefore render proper relief in this context.

Whilst the courts and the legislator are battling to find the appropriate balance between the new labour law imperatives and the current insolvency law provisions, only the practical implementation of the new labour driven provisions will ultimately decide their success within the ambit of insolvency.

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NOTES ON CERTAIN CRIMINAL PROHIBITIONS IN THE PRIVATE SECURITY INDUSTRY REGULATION ACT 56 OF 2001**1 General**

1 1 The Private Security Industry Regulation Act 56 of 2001 (“the new Act”) came into operation on 14 February 2001, replacing the Security Officers Act 92 of 1987, and abolishing the Security Officers’ Interim Board in favour of the Private Security Industry Regulatory Authority. The objects of the Authority in regulating the vast private security industry are set out in section 3 of the new Act.

1 2 Regulation generally means that important aspects of the nature and activities of the security industry, including who is allowed to participate in the industry (registration requirements and de-registration norms) and the standard of conduct expected of them (training requirements and ethical rules), are controlled and shaped through enforcement strategies and actions in accordance with values, principles and standards contained in the relevant legislation.

1 3 Criminal prohibitions on certain forms of conduct by members of the security industry are not part of regulation in a narrower and more technical sense, since they are enforced by the criminal justice system and not by the regulatory body. However, criminal prohibitions form part of regulation in a broad sense as they supplement the civil disciplinary mechanisms at the disposal of the regulatory body (such as a statutory code of conduct) to ensure compliance with norms and standards in the security industry.

1 4 The purpose of this note is to investigate and assess the meaning of certain prohibitions in the new Act when compared to the situation that prevailed in terms of the previous dispensation when the Security Officers Act 92 of 1987 was still in force.

2 Prohibition on rendering a security service if unregistered

2 1 Central to the criminal provisions in the new Act is section 20(1)(a) read with the prohibition contained in section 38(3)(a):

“No person, except a Security Service contemplated in section 199 of the Constitution (Act No. 108 of 1996), may in any manner render a security service for remuneration, reward, a fee or benefit, unless such a person is registered as a security service provider in terms of this Act.”

The maximum penalty on a first conviction is a fine of R100 000 or imprisonment for five years, and on a second or subsequent conviction a fine of R200 000 or imprisonment for ten years (or both).

The corresponding provision in the Security Officers Act 92 of 1987 is contained in the following formulation (s 10(1) read with s 35(a)):

“As from a date determined by the Minister by notice in the *Gazette*—

- (a) no person shall render a security service unless he, and if such a person is a company or close corporation, it and every director of the company or it and every member of the close corporation, are registered with the Board as a security officer; and

- (b) no employee of a person rendering a security service shall allow that he be used in the course of his employment for the rendering of a security service unless he is registered with the Board as a security officer."

The maximum penalty on conviction here was a fine of R3000 or imprisonment for a period of six months (or both).

2 2 An important difference between the prohibitions in the laws referred to above, is that in terms of Act 92 of 1987 it was a criminal offence for a registered security company, of which one of the directors was not registered as a security officer, to render a security service. In the new Act this prohibition has fallen away and the security company would not be committing a criminal offence in these circumstances. The appropriate remedy in such a situation at the disposal of the authority, is to withdraw the registration of the security company in question because one of its directors is not registered (see s 26(4)(e) and (f) of the new Act). The director would also be guilty of an offence if it could be said that the director rendered a security service in the form of managing, controlling or supervising the rendering of a security service by someone else (see s 1(1)(l) of the Act for this type of security service).

2 3 A further difference between the two laws is the deletion of the prohibition on *employees* to allow themselves to be used for the rendering of a security service. However, this is covered by section 20(1)(a) of the new Act.

2 4 It should be noted that for a (registered) security business to use or employ unregistered security officers in the rendering of a security service, was not a separate criminal offence in terms of Act 92 of 1987 and is not an offence in terms of the new Act. However, this constitutes a contravention of rule 2(10) of the Code of Conduct for security officers published in *Government Gazette* 15951 of 9 September 1994 (which is still in force by virtue of s 44(2)(c) of the new Act until it is replaced). It may be argued that if a security business knowingly uses unregistered security officers to render a security service, it will be guilty of the crime of complicity if all the requirements for such liability are met. There is also the possibility of bringing a charge in terms of section 18(2)(b) of Act 17 of 1956, which provides that anyone who "incites, instigates, commands, or procures any other person to commit any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable".

3 Using untrained security officers

3 1 Neither Act 92 of 1987 nor the new Act prohibits the rendering of a security service by a person who is not in possession of the necessary security training. Criminal prohibitions on the rendering of a security service without the necessary training or the use of such security officers, are contained in regulation 23D (published in *GG* 14877 of 25 June 1993). The maximum penalty on conviction is a fine of R1000 or imprisonment for six months. This regulation is still in force on account of the transitional provisions in section 44(2)(c) of the new Act.

4 Prohibition on contracting for a security service

4 1 Section 38(3)(g) of the new Act provides as follows:

"Any person who . . . knowingly or without the exercise of reasonable care contracts for the rendering of security services contrary to a provision of this Act or the Levies Act . . . is guilty of an offence."

In addition to the criminal sanction (a maximum fine of R100 000 or five years imprisonment for a first offence, and a fine of R200 000 or ten years imprisonment for a second or subsequent offence) section 20(3) of the new Act stipulates that “any contract, whether concluded before or after the commencement of this Act, which is inconsistent with a provision contained in subsections (1), (2) or section 44(6), is invalid to the extent to which it is so inconsistent”. It is added by section 20(4) that the invalidity of a contract as described above does not affect the applicability of any provision of the new Act (this would include the criminal provision discussed below).

42 The interpretation of section 38(3)(g) is not as simple as it may appear. The following observations may be made:

- Our courts will interpret this section in the same manner as it interprets criminal provisions, namely in a restrictive sense consistent with the principle of legality (see generally Burchell *South African criminal law and procedure* Vol 1 29).
- The offence may be committed by “any person”. The unexpressed purpose of this provision was to cover instances where *clients* of security businesses conclude contracts contrary to law. An argument to restrict this provision to security service providers would be contrary to the phrase “any person”. The question whether “any person” *includes* security service providers, will be dealt with below.
- The offence requires either intention or negligence on the part of a person who is a party to a contract.
- The prohibited conduct and factual circumstances (*actus reus*) (see generally Burchell 46 *et seq*), are the contracting for the rendering of a security service contrary to a provision of the new Act or the Levies Act (which has not yet been approved by Parliament and will deal with the imposition of levies on registered security service providers to provide funding for the regulation of the security industry).
- In order to interpret the *actus reus* and factual circumstances, it has to be ascertained when a contract or some of its elements regarding the rendering of security services would be “contrary” to the relevant legislation. In other words, either a person contracting or the contracting in respect of the rendering of a security service as a contractual performance, must be contrary to a relevant legislative provision (s 20(3) of the new Act which refers to “inconsistency”).
- What does the relevant legislation stipulate in this regard? It is obvious that as an unregistered person (or a person whose registration is suspended) may not render a security service, a contract for such services would indeed be “contrary” to section 20(1)(a) of the new Act quoted above.
- Would the use of *unregistered security officers* (or officers whose registration has been suspended) by a registered security business in the rendering of a security service fall under the provision under discussion? As there is no section in the Act directly dealing with this (see para 8 above), the answer is in the negative. In any event, it is important to note that section 38(3)(g) does not directly deal with the actual rendering of a security service which is contrary to a legislative provision, but with the “contracting” in respect of such service.

- Would the same conclusion be reached in regard to the use of *untrained security officers*? As indicated earlier (para 9) there is a prohibition in the regulations in this regard, maintained through the transitional provisions in the new Act, and if these regulations are interpreted as a “provision of this Act” the situation would probably be covered by section 38(3)(g) under discussion – if there is “contract” providing for the rendering of such security services.
- From the above it is clear that section 38(3)(g) must be restricted to the “contracting” for a service to be rendered contrary to the new Act (the Levies Act and any other legislative measure falling under the definition of “this Act” – such as a Code of Conduct made in terms of s 28 of the new Act). In other words, where a party to the contract is not registered (or its registration is suspended) and may thus not render a service, whether on its own or through someone else, it is clear that the parties have contracted as contemplated in section 38(3)(g) – namely “contrary” to a relevant provision. However, it would be uncommon to find a contract providing for the rendering of a security service through the use of unregistered or untrained personnel. It frequently happens that such personnel are in fact *used* by security businesses, but the contract would hardly provide for this or contemplate such a possibility. On the contrary, written contracts normally provide for the rendering of services through the use of registered and trained security officers. When a service is then rendered through the use of unregistered security officers, it clearly constitutes a breach of contract (in the form of positive mal-performance). However, if no-one has “contracted” in this regard section 38(3)(g) would not be applicable, and could consequently not have been contravened.
- A situation which commonly occurs is that the contractual remuneration in return for which a security service is rendered, is so low that it clearly indicates that the security business would not be paying its employee security officers the minimum statutory wage (as contemplated in Sectoral Determination 6 published in GG 22873 of 30 November 2001). However, it would be incorrect to conclude that the contract for the security services to be rendered is contrary to a provision of the new Act because of the illegal remuneration paid by the security business to its employees used to render the service. This would clearly be *res inter alios acta* as far as the contracting client of the security business is concerned. What could possibly be required here for the applicability of section 38(3)(g), is a new regulation dealing with the contractual remuneration applicable to a contract between a security business and its clients.
- It is not clear what relevance, if any, the provisions of the future Levies Act will have in regard to section 38(3)(g).
- A *security business* may possibly also fall foul of the criminal prohibition in section 38(3)(g). However, all the elements referred to above will have to be satisfied. It must also be considered that sections 20(1)(a) and 38(3)(a) discussed above already criminalise the conduct of an unregistered person *rendering* a security service, and the question may arise why the legislature would have intended to punish the same act in terms of two provisions of the same Act. This simply does not make sense. Section 38(3)(g) should accordingly only cover that which is not already covered by section 20(1)(a), namely “contracting” to render a security service and not the actual rendering of a security service. Thus, the only instance where a security business may

possibly be seen as contravening section 38(3)(g) will be in the case of an unregistered business concluding a contract to render security services. As stated, it would be strange to encounter a registered security business who “contracts” in some other sense to render a service contrary to the new Act.

- It may be concluded that section 38(3)(g) may well have to be re-considered when amendments to the new Act are considered. It should, for example, be stated that someone who accepts the rendering of a security service which is contrary to law is guilty of an offence – thus moving away from the restricted application suggested by the current wording of section 38(3)(g).

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THE FREEDOM TO PROPAGATE A RELIGION OR DENOMINATION AS AN ELEMENT OF THE RIGHT TO FREEDOM OF RELIGION

1 Introduction

The argument has been advanced that the right to freedom of religion, as evidenced by section 15 of the South African Constitution of 1996, consists of five distinct freedoms; namely, the freedoms of religious autonomy, religious choice, religious observance, religious teaching and the freedom to propagate a religion or denomination (see Van der Schyff *The right to freedom of religion in South Africa* (LLM dissertation RAU 2001) 57–160). The aim of this contribution is to highlight the freedom to propagate a religion or denomination as a fundamental element of the broader right to religious liberty. (The contribution is based on my dissertation 155–160.)

2 Recognition of the freedom

The right to freedom of religion includes the right to propagate a religion or denomination in the hope of converting other people to a particular persuasion. For instance, Meyerson *Rights limited. Freedom of expression, religion and the South African Constitution* (1997) 29 opines that “[r]eligious freedom clearly implies the freedom to teach one’s religion, including the freedom to try to convert others. ‘Zeal in spreading the faith’ – the original meaning of proselytism – is a way of manifesting one’s religion” (see also Smith “Freedom of religion” in Chaskalson, Kentridge, Klaaren, Spitz and Woolman *Constitutional law of South Africa* (1999) 19–i 19–2). The Constitutional Court (per Chaskalson P, in the seminal decision of *S v Lawrence; S v Negal; S v Solberg* 1997 10 BCLR 1348 (CC), 1997 4 SA 1176 (CC) para 92) has also approved of a Canadian definition of freedom of religion that recognises the dissemination of belief as the manifestation of religion (see also Shelton and Kiss “A draft model law on freedom of religion, with commentary” in Van der Vyver and Witte *Religious human rights in global perspective* vol 1 (1996) 559 562 563). The right to propagate a faith and to attempt to convert other people is also recognised in foreign law. For example, the German Federal Constitutional Court recognised

the right to proselytise (see BVerfGE 24 236 (1968); Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (1997) 446). Section 28 of the Constitution of Russia (1993) also recognises the right to disseminate religious belief, while section 19(1) of the Constitution of Zambia (1991) and section 25(1) of the Constitution of India (1950) recognise the right to “propagate” religion. (See also Nsereko “Religious liberty and the law in Botswana” 1992 *J of Church and State* 843 847 regarding the position in Botswana.) Recognition of the right is also forthcoming in international law. For example, article 12(1) of the American Convention on Human Rights (1969) expressly recognises the right to “disseminate one’s religion”. Article 18 of the Universal Declaration of Human Rights (1948), article 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and article 18(1) of the International Covenant on Civil and Political Rights (1966) guarantee the right to teach religion.

Dinstein “Freedom of religion and the protection of religious minorities” in Dinstein and Yoram (eds) *The protection of human rights and minorities* (1992) 145 150 argues that the freedom to teach religion is not limited to teaching the faithful but includes “the right to propagate the faith among the uninitiated, in other words, there is a right to proselytise – or undertake missionary activities in order to gain converts”. The latter argument is also seemingly supported by the joint dissenting opinion of Foighel and Loizou JJ in *Kokkinakis v Greece* 17 EHRR 397 (1993) 439, *contra* the opinion (430). (See Reid *A practitioner’s guide to the European Convention on Human Rights* (1998) 346; note also Van der Vyver “Religious freedom and proselytism” 1998 *Ecumenical Review* 419 who deduces the right from the Universal Declaration.)

3 Protected conduct and interests of the freedom

It should also be borne in mind that the right to freedom of religion ought to be interpreted generously, as a restrictive interpretation would lead to the under-protection of the right by unrealistically cutting down protected conduct and interests and thus negating the protection afforded by the right. A generous interpretation would also create an opportunity for the proper application of the limitation provisions rather than actually limiting the right under the pretext of interpreting its ambit (see Van der Schyff 25–35; Rautenbach *Handves van regte. Studiemateriaal* (2000) 86ff).

Bearers of the right are thus entitled to spread information about their religion or denomination (see Van der Schyff 42–56 regarding the bearers of the right to freedom of religion). Such information could include the history, tenets and theories of a faith. A particular persuasion may be propagated in order to encourage understanding and tolerance of that faith or to attempt to convince non-adherents to adopt the propagated views. Arguably, the right would not only protect the message propagated but also the method of propagation, as Krishnaswami *Study of discrimination in the matter of religious rights and practices* (1960) 41 also argues.

The broad interpretation of the right would arguably extend the protection afforded to a host of methods employed to advance a religious belief. For example, adherents and institutions may elect to disseminate belief by tracts, books, broadcast media and door-to-door visits. Article 6(d) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) recognises the right to write, issue and disseminate

publications, thereby protecting methods of propagation (see also Lerner "Proselytism, change of religion and international human rights" 1998 *Emory International LJ* 477 486).

The right to propagate religion should be viewed as an important element of religious liberty, as the propagation of faith in the hope of attracting converts is required by many religions of their followers. The right may also possibly be exercised to attract members from different denominations of a particular faith to one of its other denominations; for example, an Anglican may attempt to attract Presbyterians. However, adherents of a certain faith may attempt to convert someone belonging to an entirely different religion; for example, a Christian may attempt to convert a Hindu to Christianity. It may also be argued that religions may attempt to convert the secular, non-religious and unconcerned to a particular religion or one of its denominations. A religion may also be propagated in order to ensure and encourage the continued loyalties of current adherents or to motivate lapsed adherents.

Important contextual rights would include the right to freedom of expression allowing views and ideas to be spread and communicated (see s 16(1)(b) of the Bill of Rights; Shelton and Kiss 577). The freedom to express a belief would serve to bolster the right to propagate religion by further enabling religious adherents to convey their views in the hope of gaining converts. The right to communicate with other religious people and institutions would also feature as a contextual right enabling the dissemination of religious views and the organisation of missionary activities. (See Van der Schyff 102ff; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) a 6(i); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) a 2(5); Lerner 534.)

However, the most important contextual right amplifying the right to the propagation of religion is arguably the right to change one's religion or belief. (See Van der Schyff 119–122; Gildenhuis "The freedom to change one's religion or belief in international human rights law" 2000 *SAPL* 151ff; Du Plessis and Corder *Understanding South Africa's transitional Bill of Rights* (1994) 156; Walkate "The right of everyone to change his religion or belief" 1983 *Netherlands International LR* 146 regarding the right to change one's religion.) There would be very little use for the right to propagate religion in order to gain converts if the right of people to convert to a particular religion or faith was not recognised. The freedom should thus exist not only to invite people to join a particular religious creed, but also for the invited to accept the invitation rendering meaning to the exchange of ideas. Freedom of religious choice would obviously allow the addressed to decline the invitation, as well as to refuse to listen to the dissemination of a religious belief.

4 Limitation of the freedom

The propagation of religion has a violent and turbulent history (see Buckingham *Realising religious freedom: the application and limitations of the Canadian understanding of religious freedom to South Africa* (LLD thesis Stell 1998) 92 106 regarding the history of proselytism in South Africa; Stubbs "Persuading thy neighbour to be as thyself: Constitutional limits on evangelism in the United States and India" 1994 *UCLA Pacific Basin LJ* 360 363ff 371ff regarding the history of proselytism in India and the United States; Behr *The last emperor* (1987) 50 regarding China). Some countries even banned, and still ban,

proselytism, such as Vietnam (Lerner 530). Instances of forced conversions continue to be reported (cf *ibid* regarding forced conversions in Egypt; and *The Weekly Telegraph* 2001-02-13 regarding forced conversions in Indonesia). Apostasy is also considered punishable under threat of death by some. Zubaida "Trajectories of political Islam: Egypt, Iran and Turkey" in Marquand and Nettler (eds) *Religion and democracy* (2000) 69 notes an example in Egypt where it was argued that apostasy should be punished with death. The propagation of faith is evidently a sensitive issue calling for proper and sensible limitation in the handling of a potentially explosive situation. However, a total ban on the propagation of religion and attempts to gain converts would in all probability fail constitutional muster as an important element of religious liberty would be extinguished, thereby denying the manifestation of religion. (See Van der Schyff 174 regarding the importance of the right to freedom of religion in context of s 36(1)(a) of the general limitation provision.) Limits, arguably, may thus be prescribed not only for the message propagated but also the method whereby that message is propagated.

The religious message propagated may be limited in order to avoid the denigration and belittlement of other religions and denominations. Thus, the importance of the purpose of the limitation is considered as required under section 36(1)(b) of the Bill of Rights. In other words, the content of a message may be limited to protect the right to religious dignity of others (see Van der Schyff 108 regarding the right to religious dignity). A person may, for instance, aim to insult other people and religions rather than genuinely raise issues and arguments in the propagation of a faith in the hope to convert people. The content of the message may also be so malicious and crude as to cause grave offence and hurt, thereby requiring the limitation of the message to protect public order by dissuading the offended from taking matters into their own hands. Importantly, a message may be limited by requiring its modification, but a general religious message ought not to be suppressed *in toto*. For example, the negative and hurtful elements of a message aimed at other beliefs may be excised to sanitise the message, rather than to deny an entire religion or denomination the right to propagate its beliefs. In other words, less restrictive means should be considered and employed in terms of section 36(1)(e) in limiting the right to propagate a religion, but at the same time protect the religious dignity of others.

The right to freedom of expression, section 16(1)(b), will obviously be of crucial importance in limiting the propagation of a religious message. However, a message of religious propagation that incites religious hatred and war does not enjoy constitutional protection in terms of section 16(1)(a) to (c), thereby not requiring constitutional limitation of such expression. Interestingly, article 20 of the International Covenant on Civil and Political Rights (1966) prohibits advocacy based on religious hatred (Lerner 515). International law is seemingly more restrictive than South African law, as it bans such advocacy, whereas the Constitution merely does not extend protection to such speech.

The method employed to propagate a message would also be susceptible to limitation where such is reasonable and justifiable in terms of the substantive test as prescribed under section 36 of the Constitution. For example, it may be argued that the use of loudspeakers mounted on vans to convey a message be limited to ensure peace and quiet and the orderly flow of traffic, thereby applying section 36(1)(b). The harassment of unwilling passers-by on a street may also justify the limitation of the right in order to protect public order. (See Van der Schyff 178 regarding public order as a goal in the limitation of religious liberty.) It may also

be argued that any religious propagation must be devoid of coercion. For example, Chaskalson P in *S v Lawrence* (par 104) prohibited coercion in religious matters. Coercion in religious matters is also prohibited in international law. *The general comment of the Human Rights' Committee* (1993) has condemned practices resulting in coercion to recant one's faith or to convert someone to a particular faith (quoted in Labuschagne "Religious freedom and newly-established religions in Dutch law" 1997 *Netherlands Int LR* 168 174). (Note also Lerner 481, as well as the International Covenant on Civil and Political Rights (1966) a 18(2); Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion and Belief (1981) a 1(2).) It is submitted that coercion in religious matters may never pass constitutional muster. It is difficult, if not impossible, to conceive of a purpose so important in an open and free democratic society that it is capable of endorsing coercion in religious propagation. Religious freedom is an intensely personal right and coercion aimed at negating basic freedom of religious choice to adhere to a faith of one's choice must be decried. Malherbe "Die grondwetlike beskerming van godsdiensvryheid" 1998 *TSAR* 673 680, Stubbs 360, Nsereko 845 and Sachs *Protecting human rights in a new South Africa* (1990) 43 all note the personal nature of the right to freedom of religion.

However, it is important to note that the mere propagation of religion and suggestion of proposals are not to be equated with coercion. In other words, true religious propagation does not entail coercion. Coercion may be evidenced by a variety of practices, such as crude coercion in the form of forced conversions in the acceptance of a faith, the compulsion to attend sermons or to observe alien religious practices or the threat of penalties such as excommunication from the family or community (see Lerner 486 505 529). Coercion may also be more sophisticated, such as economic and financial inducements aimed at gaining converts. Financial aid should, as a matter of course, not be viewed as an impermissible coercive method. In other words, charitable religious activity should not automatically be proscribed as an impermissible method of propagation, as it would negate the manifestation of religious duty in the form of charity as practised by some. (See the discussion of economic coercion by Gildenhuys 163ff. The German Federal Constitutional Court has also prohibited a prisoner from bribing fellow inmates to renounce their religion for tobacco (BVerfGE 12 1 (1960)); De Waal, Currie and Erasmus *The Bill of Rights handbook* (2001) 296.)

Coercion should thus be viewed as a method whereby the freedom to change or maintain a religion is impaired, whether by physical or other means of compulsion.

The right to privacy contained in section 14 should be considered in determining the limits imposed on the right to propagate religion. Lerner 484 opines, with regard to privacy, that the individual's and "religious groups' privacy, intimacy, isolation or [a] strong desire to defend its religious identity against any intrusion . . . constitutes an important consideration when attempting to establish the scope and limits of the right to proselytism".

It is submitted that a case by case approach be followed in order to determine the merits of a particular situation in order to evaluate whether the message propagated, as well as the method of propagation, meet constitutional requirements in limiting the freedom to propagate a religion or denomination.

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THE NOTING OF AN APPEAL AGAINST A WINDING-UP ORDER: SUSPENSION OR CONTINUATION?

1 Introduction

The present position in South Africa is that a dualistic system is used in the case of a winding-up of a company that is unable to pay its debts. This means that all the provisions relating to the winding-up are not contained in a particular statute (eg the Companies Act 61 of 1973 or the Close Corporations Act 69 of 1984) but that in certain instances a particular section, such as section 339 of the Companies Act, makes the Insolvency Act 24 of 1936 applicable. At a time when South Africa is faced with having to elect between retaining a dual system of insolvency law or to introduce a unified statute, a recent high court decision has once again highlighted the problems that arise when a dualistic system of insolvency law is employed.

Although this note deals specifically with the effect of an appeal against a final liquidation or winding-up order placing a company in liquidation (s 66 of the Close Corporations Act will not be discussed here, although basically the same rules will apply), it also highlights some of the problems involved in employing more than one statute for the purposes of insolvency (for a discussion of the advantages and disadvantages of dual and single insolvency statutes, see Keya "To unify or not to unify insolvency legislation: International experience and the latest South African proposals" 1999 *De Jure* 62 and Burdette "Unified insolvency legislation in South Africa: Obstacles in the path of the unification process" 1999 *De Jure* 44).

2 Application of insolvency law to winding-up

In South Africa the central statute governing the administration of insolvent estates is the Insolvency Act, but it only applies to the estates of individuals and partnerships as is evident from the definition of "debtor" in section 2 of the Act. The law relating to the winding-up of companies is contained in the Companies Act, but these provisions are not complete in the sense that they do not contain all the substantive law needed to wind up the affairs of an insolvent company. It is for this reason that section 339 of the Companies Act was promulgated (see *Woodley v Guardian Assurance Co of SA Ltd* 1976 1 SA 758 (W)); although this decision dealt with the equivalent of s 339 under the previous Companies Act, viz s 182 of the Companies Act 46 of 1926, it still applies today). Section 339 of the Companies Act provides as follows:

"In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specifically provided for by this Act."

In order to determine whether section 339 of the Companies Act incorporates the Insolvency Act under specific circumstances, a two-step procedure must be followed. The first step is to determine whether or not the specific provision (of the Insolvency Act) is capable of application in the circumstances. For example, provisions relating to rehabilitation, exempt property and the like, are for obvious reasons not capable of application. The next step is to determine whether

or not the matter being dealt with is specifically provided for in the Companies Act for the particular mode of winding-up. (See *Townsend v Barlows Tractor Co (Pty) Ltd* 1995 1 SA 159 (W) for an example of where there was uncertainty as to whether the proviso to s 104 of the Insolvency Act, dealing with the late proof of claims, was capable of application to companies in terms of s 339 of the Companies Act, or whether s 366 of the Companies Act applied exclusively.) Therefore, if the provision in question only applies to a company unable to pay its debts, it must be established that the company in question is in fact unable to pay its debts before the provision can be applied.

If the above questions are answered in the negative, the provisions of the Insolvency Act and/or the common law (cf *Ex parte Liquidators of Parity Insurance Co Ltd* 1996 1 SA 463 (W) 470 and *Millman NO v Twigg*s 1995 3 SA 674 (A)) must be applied *mutatis mutandis* (see Meskin *Henochsberg on the Companies Act* (1994) updated to 1999-09-30 667).

Section 348 of the Companies Act provides that the winding-up of a company by the court is deemed to commence at the time the application is lodged with the court, the effect of this section being that the commencement of the winding-up becomes retrospective to the date upon which the application is lodged with the court (see Meskin 739). In so far as section 339 can be applied to a company unable to pay its debts, the winding-up therefore only commences once a winding-up order is granted, and not, despite the provisions of section 348 of the Companies Act, when the application is lodged with the Registrar of the High Court (*Lawclaims (Pty) Ltd v Rea Shipping Co SA: Schiffskommerz Aussenhandelsbetrieb der VVB Schiffbau Intervening* 1979 4 SA 745 (N) 750B-C; *Vermeulen v CC Bauermeister (Edms) Bpk* 1982 4 SA 159 (T) 162 and *Kalil v Decotex (Pty) Ltd* 1988 1 SA 943 (A) 961-962).

3 The effect of an appeal against a winding-up order

After a court has made a final winding-up order it is still possible to appeal against the order. This only applies to a final order because in the case of a provisional order the affected party has the opportunity of opposing the granting of a final order on the return date of the rule *nisi*, which excludes the possibility of an appeal (see s 150 of the Insolvency Act and *Gottschalk v Gough* 1997 4 SA 562 (C)). The question is therefore what the status of the winding-up order is, pending the appeal. From our common law rules of practice and rule 49(11) of the Uniform Rules of Court, it is clear that in the case of an appeal against a decision, the effect and execution of such order is suspended pending the hearing of the appeal (see eg *Reid v Godart* 1938 AD 511 and *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA 534 (A), cited by Wunsh J in *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd* 2001 2 SA 768 (W)). Rule 49(11) reads as follows:

“Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a Court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the Court which gave such order, on the application of a party, otherwise directs.”

However, in the case of insolvency the situation differs from what is stated in rule 49(11). Section 150 of the Insolvency Act contains specific provisions relating to appeals, and provides as follows:

- “(1) Any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may, subject to the provisions of section 20(4) and (5) of the Supreme Court Act, 1959 (Act 59 of 1959), appeal against such order.
- (2) Such appeal shall be noted and prosecuted as if it were an appeal from a judgment or order in a civil suit given by the court which made such final order or set aside such provisional order, and all the rules applicable to such lastmentioned appeal shall *mutatis mutandis*, but subject to the provisions of sub-section (3), apply to an appeal under this section.
- (3) When an appeal has been noted (whether under this section or under any law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned.
- (4) If an appeal against a final order of sequestration is allowed, the court allowing such appeal may order the respondent to pay the costs of sequestrating and administering the estate.
- (5) There shall be no appeal against any order made by the Court in terms of this Act, except as provided for in this section.”

From this section, and especially from sub-section (3), it is clear that the legislature intended that an appeal against a final sequestration order should not delay the administration process of the insolvent estate in question. According to Wunsh J in *Choice Holdings supra*, the reason for section 150(3) can be found in the judgment of Innes CJ in *Foley v Hogg's Trustee* 1907 TS 791 where it was held that, as a general rule, an appeal does not alter the nature of the judgment, only its execution, sequestration itself being a form of execution. It is submitted that there may be many reasons for the enactment of section 150(3), but it is clear that the legislature wanted to exclude the possibility that an insolvent may be able to frustrate or delay the administration process merely by noting an appeal against his or her sequestration. If the debtor was in a position to cause such delay it could, for example, lead to the debtor dissipating the estate assets, thereby causing further losses to the creditors of the estate.

It is uncertain as to whether section 150(3) also applies to a winding-up order for a company, and whether the liquidator would in this instance be able to continue with the administration process; only needing the directors' or members' written consent before selling the assets of the company. The situation is, however, not clear, as the Companies Act does not contain a provision similar to section 150(3) of the Insolvency Act.

Following the guidelines set out above in order to determine whether or not section 339 of the Companies Act should be applied (and consequently also the provisions of s 150(3) of the Insolvency Act) the first question that needs to be asked is whether section 150(3) is capable of being applied to the matter under consideration. Since the answer to this question is in the affirmative, the next question is whether the Companies Act specifically provides for the matter under consideration. The answer to this question is in the negative, and it is therefore clear that the provisions of the Insolvency Act (and the common law, if applicable) must be applied *mutatis mutandis*. This then has the effect that section 150(3) of the Insolvency Act should also apply to companies in liquidation, provided the company in question is unable to pay its debts. However, the courts have had to deal with this specific aspect in the past, and the differing decisions illustrate the problems that can be encountered in a dualistic system.

In *Choice Holdings* Wunsh J approaches the question as to whether section 150(3) applies to companies that are being wound up, from various angles. His first step in answering this question is to determine what the underlying policy of section 150(3) is, and this he does by referring to the comments made by Innes CJ in *Foley v Hogg's Trustee supra*:

"No doubt as a general rule an appeal does stay execution. But if that rule were applicable to sequestration orders some very remarkable results would follow. The granting of the order vests the estate in the Master or the provisional trustee, as the case may be. The provisional trustee, we will suppose, takes possession, or the Sheriff lays an embargo on the property. Under the Ordinance an insolvent has twenty-one days within which to note an appeal, and three months within which to prosecute it. If the mere lodging of an appeal stayed the operation of the sequestration order great confusion would result" (793-794).

Having referred to this passage with approval, Wunsh J states: "There is no reason why the same reasoning should not apply today and why it should not apply to a company against which a winding-up order has been made on the grounds of its insolvency" (771E).

In the next step of his analysis, Wunsh J addresses the meaning in section 339 of the words "in the winding-up of a company", as well as their application regarding an appeal against a winding-up order (771F). With reference to *Kalil supra* he states (771G):

"To decide whether s 150(3) has any operation where a company has been wound up because of its inability to pay its debts the question that has to be answered is whether you are dealing with a step in the legal proceedings which leads to a grant of the order or with 'the process of liquidation which commences when an order of winding-up has been granted'."

He reaches the conclusion that where a final winding-up order has been granted, the step of noting an appeal falls within the process of liquidation, and that section 150(3) of the Insolvency Act read with section 339 of the Companies Act will apply (771H):

"In this case a final winding-up order was granted. As soon as that happened the process of liquidation commenced. What happened to the applicant thereafter happened in its winding-up. By noting an appeal the applicant seeks to put a stop to the winding-up process which was then in operation and eventually to have it set aside. But s 150(3) says that the operation of the order remains despite the noting of the appeal."

Counsel for the applicant in this case having referred to the case of *Rentekor (Pty) Ltd v Rheeder and Berman NNO* 1988 4 SA 469 (T) as authority for the proposition that section 150(3) of the Insolvency Act did not apply, Wunsh J continued by explaining why *Rentekor* was not authority for the case in point. Without going into any detail, *Rentekor* was found not to be relevant because the company had been wound up on the ground that it was just and equitable to do so. Because the company was not one that was unable to pay its debts, section 339 of the Companies Act did not apply.

Wunsh J had the advantage of previously having considered the same question in an unreported *ex tempore* judgment in *Baby Angel CC v Fleecytex Johannesburg CC* (case no 98/1785 (W), 1998-01-23), where he also held that section 150(3) of the Insolvency Act applies to insolvent companies being wound up by the court. It is interesting to note that although *Baby Angel* was not appealed against, one of the members of the applicant in that case did launch an unsuccessful application in the Constitutional Court to have section 150(3) declared unconstitutional (see *Bruce v Fleecytex Johannesburg CC* 1998 2 SA 1143 (CC), 1998 4 BCLR 415 (CC)).

Having considered all the authority on the case in point as well as the opinions of various authors (Meskin 731; Blackman 4 *Lawsa* (first re-issue) paras 154 and 163), Wunsh J adheres to the opinion he expressed in *Baby Angel supra* namely that section 150(3) applies when an appeal is noted against the order winding-up a company that is unable to pay its debts (775D).

4 Conclusion

Because various consequences follow the granting of a final winding-up order that places a company in liquidation, the decision in *Choice Holdings* is to be welcomed. The facts of *Choice Holdings* actually highlight one of these consequences, namely the holding of an interrogation. It is clear that the directors of the company that had been liquidated were facing a section 417 enquiry, and that the reason for the application to suspend the effect of the winding-up order was to delay the holding of such an enquiry. If section 150(3) had been found not to be applicable, it would mean that any director of a company could note an appeal against the granting of a liquidation order merely to buy him- or herself some time. Drastic, prejudicial results could flow from such a delay, as in many cases the holding of an interrogation is based on urgency. For example, it may be necessary to hold an interrogation without delay because of the probability that assets may be removed or evidence may be destroyed.

In a nutshell, *Choice Holdings*

- confirms that winding-up can only commence after the granting of a winding-up order (*Kalil supra*);
- confirms that section 339 of the Companies Act only applies in cases where a company is unable to pay its debts;
- holds that an appeal against a (final) winding-up order takes place within the liquidation process, and is not a legal proceeding that leads to or gives rise to the grant or refusal of a winding-up order; and
- holds that the noting of an appeal against a final winding-up order does not suspend the operation thereof, thereby making the provisions of section 150(3) of the Insolvency Act also applicable to companies being wound up in terms of the Companies Act.

Despite the positive ruling made by the court in *Choice Holdings*, it is submitted that the whole matter could have been avoided, had it not been for the fact that South Africa has a dualistic system of insolvency law. If all the provisions relating to insolvency were incorporated into a single statute, the problem of interpretation and the possible application of the Insolvency Act (brought about by s 339 of the Companies Act) would not have been necessary.

Since a single insolvency statute has now been proposed (see *Final report containing proposals on a unified Insolvency Act* (Jan 2000) compiled by the Centre for Advanced Corporate and Insolvency Law at the University of Pretoria on behalf of the Standing Advisory Committee on Company Law, a copy of which is available in the Merensky Library at the University of Pretoria), it is interesting to note that a similar problem would not have presented itself if a unified statute had been in operation.

Clause 178 of the proposed unified statute, which is based on the current section 150(3) of the Insolvency Act, reads as follows (this clause is a duplication of cl 105 of the Draft Insolvency Bill published by the South African Law Commission in *Commission Paper 582* vol 2 Project 63):

- (1) Any person aggrieved by a final liquidation order, or by a refusal to grant a provisional order or to grant a liquidation order without a provisional liquidation order, or by an order setting aside a provisional liquidation order, or any other appealable order made in terms of this Act may, subject to the provisions of section 20(4) and (5) of the Supreme Court Act, 1959 (Act No. 59 of 1959), appeal against such order.
- (2) The rules applicable to appeals from judgments or orders given in civil matters by the court concerned shall, subject to subsection (3), mutatis mutandis apply to appeals contemplated in subsection (1).
- (3) Notwithstanding the provisions of any other law, the noting of an appeal against a final liquidation order shall not have the effect of suspending the operation of any provision of this Act: Provided that pending judgment on appeal no property belonging to the insolvent estate shall be realised without the written consent of the debtor or, failing such consent, permission granted by order of court on an application by an interested person who has furnished security to the satisfaction of the court for restitution in the event of the appeal being successful.
- (4) If an appeal against a final liquidation order is allowed, the respondent may be ordered to pay all liquidation costs."

Since the proposed unified statute applies to all types of debtors, including companies and close corporations, there would not have been any confusion (as in *Choice Holdings*) as to whether the provision applies also to companies. Another interesting aspect of the proposed clause 178 is that sub-clause (3) clearly states that it applies "notwithstanding the provisions of any other law", which would by its very definition exclude the possibility of applying rule 49(11) of the Uniform Rules of Court.

The proposed unified statute also obviates the need to determine whether or not the noting of an appeal is part of a legal proceeding in order to bring about the liquidation of a company, or whether it is a proceeding in the liquidation process, as there is no section 339 of the Companies Act that needs to be applied. Finally, the deeming provision contained in the current section 348 of the Companies Act, which states that winding-up is deemed to have commenced at the time the application for winding-up is lodged with the Registrar, will also no longer be problematic. In terms of clause 1 of the proposed unified statute, which contains the definitions, the date of liquidation for all types of debtors will be "the date of the first liquidation order or, in the case of a voluntary liquidation by resolution, the date of the registration of the liquidation resolution". This means that the date of liquidation in a unified statute will be the date on which the actual liquidation order is granted. A liquidation order is then defined as being "an order of a court whereby the estate of a debtor is placed under liquidation and includes a provisional liquidation order when it has not been set aside".

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STANDING TIME CLAUSES – WHERE DO WE STAND?

A new type of clause, called a standing time clause, is making its appearance in construction and engineering contracts (contracts of *locatio conductio operis*). Standing time clauses, which stand apart from other penalty clauses, are currently found especially in software engineering and development contracts. In these contracts the co-operation of the employer or client (as creditor of the contractor's performance) is of the utmost importance to the contractor (as debtor of the performance) in order to enable the latter to deliver his performance on time. As pressure mounts on the client to timeously assist and co-operate with the contractor, so do the needs of the contractor to be protected against possible delays caused by the client. For example, where the contractor requires access to the client's premises or access to the client's business systems to produce the work required by contract, the contractor may suffer severe delays in delivering his performance should this access be delayed for whatever reason. The parties may, during contractual negotiations, include a standing time clause in their agreement to protect the contractor in these circumstances. The form of breach of contract against which a standing time clause seeks to protect, is therefore *mora creditoris* or default by the creditor.

Upon closer examination it is clear that a standing time clause is nothing but a penalty clause. The standing time clause, which serves to penalize the client, has been developing as a separate clause above and beyond the normal penalty clauses which usually focus on the contractor's delays, and not on the client's delays regarding his co-operation in the delivery of the contractor's performance. Because standing time clauses are usually found in a separate clause and not under the heading "penalty clauses", one might lose sight of the fact that the principles that apply to all penalty clauses also apply to standing time clauses.

The value of a penalty clause in a contract lies in the fact that such a clause eliminates problems that arise in the calculation and proof of damages, enables the prejudiced party to claim a monetary amount immediately upon breach of contract without the assistance of the court, and also serves as a deterrent for breach of contract.

The principles that apply to all penalty clauses are briefly discussed below. Penalty clauses in general are not well drafted in practice. All the provisions of the Conventional Penalties Act 15 of 1962 are usually not complied with, and it appears as if most lawyers fail to realize the implications this might have on their client's legal position once the penalty clauses need to be enforced.

Penalty clauses in general only mention when penalties become due, as well as the amount of penalties to be claimed. The amount must be determined, or at least determinable according to a proper formula or method of determination. Upon examination many contracts contain clauses which only indicate that a penalty is claimable, but with no certainty as to the exact amount due. Some also indicate that the parties may later, only upon breach of contract, agree to the amount of penalties payable. This is a dangerous practice as such an agreement might never be reached, causing the possibility of actually claiming penalties to fall away.

The Conventional Penalties Act states three important principles. Firstly, penalties may never exceed the actual *prejudice* suffered. Section 3 of the Act provides:

“If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such an extent as it may consider equitable in the circumstances.”

Should the penalty exceed the prejudice suffered, a court may reduce the penalty as it sees fit under the circumstances. The benefit of a penalty clause lies in the fact that one can claim more than the actual *damage* suffered. In addition, an amount may be claimed immediately upon breach, without having to approach the court for assistance to determine the *quantum* of damages due.

Secondly, penalties (once claimed) are claimed in lieu of damages. Common law damages for breach of contract may only be claimed instead of the agreed penalties if the penalty clause expressly so provides. Section 2(1) of the Act provides:

“A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages, or, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty.”

This is a cause of great concern, especially when it appears that the penalties agreed upon are not sufficient to recover the damages suffered, or where the penalties are capped and the maximum is not sufficient. The opportunity to then rather claim common law damages instead of enforcing the agreed penalties, will be lost.

Thirdly, general penalties are claimed in lieu of performance. In such a case the party prejudiced by the breach of contract must return any performance already received before claiming penalties, and may not keep the partial or defective performance and claim penalties unless the penalty clause states expressly that this may be done for that specific breach of contract. Section 2(2) of the Act provides:

“A person who accepts or is obliged to accept defective or non-timeous performance shall not be entitled to recover a penalty in respect of the defect or delay, unless the penalty was expressly stipulated for in respect of that defect or delay.”

Penalty clauses are almost always drafted to refer to breach of contract in general and not to refer to specific detailed instances of breach.

Well-drafted penalty clauses would therefore have to contain more provisions than they usually do, namely only the occurrence or trigger when the clause may be enforced, as well as the determined (or at least the determinable) amount of the penalty.

An example of a properly drafted penalty clause would be the following:

“Where the contractor does not complete Phase 1 of the works on the due date, the client will be entitled to retain whatever the contractor has already delivered and to claim a penalty in the amount of R20 000 per day of delay until such date as Phase 1 is completed, or to claim common law damages for the delay should the client wish to do so. The client shall be entitled to set-off the amount of penalties due by the contractor to the client against any amount due by the client to the contractor for the completion of Phase 1 of the works.”

In addition to the above, a standing time clause should seek to protect the debtor in three ways:

- By allowing the debtor additional time for the completion of his performance due to the delay caused by the creditor;
- By allowing the debtor to claim an agreed monetary penalty for the delay caused; and
- By prescribing a method to be used for notification of the delay in order to inform the correct persons or management line within the creditor's business of the delay, with the purpose of having the delay dealt with as speedily as possible.

As stated, a classic standing time clause remains a penalty clause in nature and therefore also falls within the ambit of the Conventional Penalties Act. A standing time clause should contain the following:

- An agreed time extension of at least one day per day of the delay, or more depending on the facts and circumstances. Where the client's delay causes the contractor's project to be delayed in such a way that restarting his project will require more than a day per day of delay, the clause should adequately provide for this eventuality.
- An exact or at least determinable amount claimed either per day of delay or an amount claimed per delay occurrence. As it is very difficult to predetermine an amount equal to the actual costs incurred, contracts often only provide for the payment of the reasonable actually incurred costs. This does not then serve as a penalty, but rather serves to reimburse the contractor for his unforeseen expenses due to the delay he suffers. This clause serves as a liquidation of damages clause that also falls within the ambit of the Conventional Penalties Act. Section 1(1) of the Act provides:

"A stipulation. Hereinafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of another person, hereinafter referred to as the creditor, either by way of a penalty or as liquidated damages, shall, subject to the provision of this Act, be capable of being enforced in any competent court."

- A proper notification schedule, as the client is usually a business entity with a complicated structure and many personnel. Forcing the contractor to follow a certain notification process once a delay occurs, enables the client's senior management to become aware of the delay and to deal with it as soon as possible. The problem causing the delay can then be addressed and standing time payments reduced. In addition, it is often agreed that standing time only becomes payable after a certain process has been followed and the delay thereafter still continues. Such a provision is obviously of great benefit to the client.

An example of a properly drafted standing time clause would therefore be the following:

"Should the Client or any of its agents, employees, independent contractors or subcontractors delay the project in any way, the Contractor shall be liable to claim the following:

(a) one day time extension of the contractual due dates per day of delay, unless the Contractor can prove that such a delay has prejudiced its position in such a way that more than one day per day delay is required to get back on schedule, in which event the additional time required shall be allowed by the Client; and

(b) payment by the Client to the Contractor of an amount of R20 000 per day of delay (OR all reasonable actually incurred standing time costs). The Contractor undertakes to limit standing time costs as far as is reasonably possible. The Contractor shall calculate the extent of the standing time costs once the delay ceases and shall notify the Client of such costs, which shall become due and payable within 7 (seven) days from date of notification by the Contractor of the extent of the standing time costs due. The Contractor may claim either standing time costs or common law damages. The Contractor may also retain whatever performance from the Client he has already received as well as claim standing time costs.

(c) When the Contractor becomes aware of a delay caused by the Client as mentioned above, the Contractor shall immediately notify the Project Manager in writing of the delay. Should the problem causing the delay not be solved within a period of 24 (twenty four) hours from date of notification, the Contractor shall immediately notify the Managing Director of the Client of the delay. Once the Contractor has so notified the Managing Director and the problem causing the delay is not solved within 24 (twenty four) hours from date of such notification, the Contractor shall be entitled to claim standing time costs according to the provisions of clause (b) above, from initial date of delay until such a delay ceases.”

Simply by adhering to the provisions contained in the Conventional Penalties Act if and where applicable, and by adapting the clause to suit the needs of the contractor where one acts on the latter's behalf, or to suit the needs of the client where one acts on the client's behalf, one can ensure that the interests of these parties are tended to and that no claim for professional negligence can be made against the drafter of these clauses.

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Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual Judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another Judge – should interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

Dickson CJC in The Queen in Right of Canada v Beauregard (1986) 30 DLR (4th) 161 481 (SCC), quoted by Ackermann J in De Lange v Smuts NO 1998 7 BCLR 779 (CC) para 70.

VONNISSE

REVALUATION OF CONDITIONS OF TITLE *Camps Bay Ratepayers Association v Minister of Planning Western Cape* 2001 4 SA 294 (C)

1 Introduction

The oldest tool of the trade of land-use management is the condition of title – introduced into South Africa from England during the 1880s. For a very long time its nature, purpose and function remained consistent but, over the past decade or two, it has lost much of its value. In fact, since *Malan v Ardconnel Investments* 1988 2 SA 12 (A) it has not enjoyed much commentary by the courts; and in practice, judging from the large number of illegal land uses, it has lost much of its significance. In the face of its devaluation other land-use management tools such as zoning schemes, integrated development plans and spatial development frameworks have enjoyed increased significance. The new ethos brought about by the introduction of the Development Facilitation Act 67 of 1995, which is scheduled for further refinement with the introduction of a proposed Land Use Management Act, has further devalued conditions of title.

However, the recent decision in *Camps Bay Ratepayers Association v Minister of Planning Western Cape* 2001 4 SA 294 (C) (judgment handed down on 1998-08-04) has addressed most of the issues relating to conditions of title. Furthermore, it has placed conditions of title in a constitutional context where planning decisions are all subject to the provisions of the just administrative action provisions in the Constitution. It also raises the question as to the civil liability of municipalities for decisions wrongly taken.

The findings of Griesel J are to be welcomed and their implications heeded.

2 Facts

Camps Bay was developed in 1902, mainly as a residential township. Upon establishment of the township conditions of title were imposed on the erven, including the disputed condition which provided

“(a) that [the transferee and any future proprietors] shall not erect any building on any lot of less value than £800 sterling . . . such building moreover must be a dwelling house and no two or more dwelling houses shall be erected under one roof, nor shall more than one dwelling house be erected on any one lot and such dwelling houses shall not be used as a flat or flats . . .”

In 1941 a zoning scheme was introduced into the area covering many of the same issues as the conditions of title. Most erven were zoned “general residential”.

During 1984 a previous owner of erf 2319 Camps Bay had applied to consolidate three erven and then subdivide the consolidated land into three separate

portions. In order to do this the owner had to apply for the removal of certain conditions of title which prohibited subdivision. Application for the removal of the condition relating to the subdivision was made in terms of the Removal of Restrictions Act 84 of 1967 in October 1984. During the application process the Director of Local Government suggested to the owner that certain other conditions – one of which related to the prohibition against the erection of flats on the erf – could be simultaneously removed. Naturally the owner agreed and the application process proceeded, but without being altered to include the amendments relating to the erection of the flats. Consequently the prohibition on the erection of flats was removed during 1985 without compliance with the statutory requirements.

When the developer (third respondent) purchased the property on 4 April 1996, there were no conditions of title registered against the property prohibiting the erection of flats. It was the developer's specific intention to erect luxury flats on the property and to that end it obtained three bonds totalling R12 million. A demolition permit was obtained and the developer started demolishing the buildings on the property. Building plans were also drawn up, submitted to the municipality and approved on 11 February 1997.

On 13 March 1997 certain interested parties applied to review the 1985 removal of the conditions of title. While that review process was pending the developer applied, in May 1997, for the removal of those conditions of title which had been irregularly removed in 1985. On 13 January 1998 the application for the removal was approved – this process is the subject of the decision under discussion.

In the meantime a declaratory order had been granted to the effect that the developer was bound by the 1985 conditions which had been erroneously removed. An interdict was also granted by Ngcobo J restraining the developer from erecting or continuing to erect any building on the property which was not a single dwelling house. On 24 February 1998 the developer applied for the discharge of the interdict granted by Ngcobo J, based on the changed circumstances, namely the approval of the application for the removal of 13 January 1988. The opposed application was granted by Van Zyl J (see *RBC Sub Eleven (Pty) Ltd v Barend* 1998 CLR 237 (C)). Although both the applicants and the respondents had appealed against the decisions of both Ngcobo J and Van Zyl J, the parties agreed to settle by withdrawing their various appeal applications.

Applicants (previous respondents) then applied for the review and setting aside of the decision of the Western Cape Minister of Planning, Culture and Administration of 13 January 1998.

3 Finding

The court held that the decision to remove the conditions made on 13 January 1998 be set aside, that the developer be interdicted and restrained from erecting or continuing to erect any building on erf 2319 Camps Bay, that the developer may apply to court for discharge of the interdict on the grounds of changed circumstances, and that applicants may apply to court for an order directing the developer to demolish the building work (329G–J).

4 Terminology

Throughout the judgment Griesel J uses the terms “restrictive condition”, “restrictive title deed conditions”, “title deed conditions”, “restrictive title conditions”,

“conditions of title” interchangeably to refer to the prohibition on the erection of flats on erf 2319 Camps Bay contained in the title deed. The impression this creates is that of a variety of types of “conditions”.

The term “restrictive” relates to the idea that there is a limitation or prohibition on some or other action by an owner of an erf. Such restrictions originated from the English-law “restrictive covenants” which relate specifically to statutory restrictions placed on the ownership of land which are imposed in the process of township establishment and inserted into the title deeds of the land. The statutory successors of restrictive covenants in South Africa may be described as “conditions of title” (proper) (see further Van Wyk *Planning law* (1999) 17–18).

“Condition of title” is a term also often used in a wide sense, referring to all limitations on ownership – or title – of land. It therefore includes all conditions, whether inserted into the title deed or not, namely town-planning conditions, restrictive covenants, servitudes and conditions of title (proper). “Title deed condition” is also a wide term which may refer to all conditions inserted into a title deed including servitudes and conditions of title (proper).

Perhaps the term “condition of title” should be used consistently and to prevent confusion (see also 10 below for a discussion on the nature of such a condition – is it a praedial servitude or is it possibly something else?).

5 Grounds of review

Outlined as the point of departure is the constitutional background, namely item 23(2)(b) of Schedule 6 to the 1996 Constitution which reads as follows:

“Every person has the right to—

- (a) lawful administrative action where their rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.”

Griesel J indicates that the question for determination is whether the relevant administrative action measures up to these constitutional requirements. The answer to this question will be found in an examination of the statutory regime regulating the procedure for the removal of title deed conditions. Then the procedure actually followed in the case will be compared in order to determine whether the administrative action was both lawful and procedurally fair. Finally the reasons furnished by the minister must be examined to determine whether his decision was justifiable in relation to the reasons given (314A–C).

With regard to the statutory regime the court found that the prescribed procedures had been departed from in numerous respects, *inter alia* that the process of notification and calling for objections had taken place before consideration of the application by the municipality, whereas it should have taken place after receipt of the comments and recommendations from the municipality (317C–F); the delegation of the powers to an assistant director in the department was found to be unlawful (317G–318D); notice to affected parties had not been wide enough (318E–I) and certain objections had not been considered (318J–320E). As a result Griesel J held that the decision was fatally flawed and fell to be set aside on that ground alone (317A–320G).

Griesel J also found that the minister's decision to grant the application was not justifiable in relation to the reasons furnished by him (327G). This finding was based on the reasons given by the minister in a letter against the background of the relevant provisions of the Removal of Restrictions Act 84 of 1967.

6 Removal of Restrictions Act 84 of 1967

Section 2(1) of the Removal of Restrictions Act 84 of 1967 provides that

“the Premier may, of his or her own accord or on application by any person, by Proclamation in the *Provincial Gazette*, alter, suspend or remove, permanently or temporarily, conditionally or unconditionally, restrictions or obligations registered against the title deed of land which relate to the subdivision of land, or the purpose for which the land may be used, or the requirements to be complied with or to be observed in connection with the erection of buildings or the use of the land”.

Section 2(1)(a) provides that before the premier may do this, “he or she must be satisfied that it is desirable to do so in the interest of the establishment or development of any township or in the interest of any area, or in the public interest”.

With reference to this subsection Griesel J states that “unless the minister is as a fact satisfied as to the presence of one or more of these circumstances, a jurisdictional fact for the exercise of his power to remove conditions is absent”. Should the minister be subjectively satisfied, then “this view is susceptible to review if his conclusion was, objectively speaking, unreasonable”(321B–C).

In this context Griesel J indicates that the personal interest of the applicant for the removal is irrelevant and that the interest which must be served by the removal is the broader interests of the township, the area or of the public. The fact that a removal may not be undesirable does not mean that it is as a fact desirable. The test that can be laid down is a positive one, namely there must be a positive advantage served by the granting of the application and not the absence of a negative advantage (321C–E).

In the context of the removal of conditions of title and other restrictions, this test is a significant one. In applying for the removal of any restrictions – including conditions of title and restrictions imposed in terms of town planning schemes – in terms of the Removal of Restrictions Act 84 of 1967 a developer will have to show that an envisaged development will be desirable in the broader interests of a township, an area or the public. The test is a strict one because a positive advantage, not the mere absence of a negative advantage, will have to be shown.

A heavy burden will rest on the shoulders of authorities who will be making the decisions on such applications.

In my view this is a positive development. Many of our residential areas, so threatened at present, will only benefit from this decision.

7 Conformity with existing developments

One of the reasons given by the minister was that the proposed development would conform to a large number of existing developments in the area (321J). Griesel J found that the fact that a new development conforms with existing developments does not show that the new development is in the interests of the township, the area or the public. The existing developments may themselves be detrimental to those interests. There is no positive advantage (323D).

8 General character of the area

A point which is often raised is that restrictions should not be removed where the character of the area will be detrimentally affected. Van Wyk 234 (with reference to Cunningham, Stoebuck and Whitman *The law of property* (1993) 481) explains the so-called "character of the neighbourhood concept" as follows: a restrictive condition should not be removed or rezoning should not be permitted where the character of the area will be negatively altered by such removal. Conversely, when the neighbourhood in which the affected property is situated has so changed, the court should declare the condition terminated or at least refuse to enforce it.

This concept is usually referred to in the positive sense, in the context of preserving the character of the neighbourhood which is pleasing and attractive, and which symbolises all the ideals of a neighbourhood to which one wants to return.

Griesel J found that the general character of the area is still "overwhelmingly of a single residential nature. It is the professed aim of the association to try to preserve that character and, in my view, they are entitled to do so" (324C).

9 Conformity with zoning scheme

It was argued by the respondents that since the development was in conformity with the zoning scheme, the restrictions were "at odds" with the zoning scheme. Griesel J correctly held that "where there is a conflict between a zoning scheme and the title deed conditions, the latter clearly enjoy preference" (325A).

Van Wyk *Planning law* 25–26 has analysed the principles as laid down by the courts. They accord with the findings of Griesel J: a town-planning scheme does not override the conditions of title where there is a conflict between the two (*Kleyn v Theron* 1966 3 SA 264 (T) 270H–272C; *Shell South Africa (Pty) Ltd v Alexene Investments (Pty) Ltd* 1980 1 SA 683 (W) 689H; *Malan v Ardconnell Investments (Pty) Ltd* 1988 2 SA 12 (A) 40E).

Furthermore the significance of title deed restrictions lies therein that there can be no automatic removal of title deed restrictions (*Ex parte Nader Tuis (Edms) Bpk* 1962 1 SA 751 (T); *Kleyn v Theron* 1966 3 SA 264 (T) 272A–C). This is justification for the fact that the developer had to apply for removal of the non-existent conditions, namely those that had been wrongly removed in 1985 (see facts above).

10 Nature of title deed conditions

Perhaps one of the central issues is the nature of a title deed condition which, as is stated by Griesel J, "ha[s] the same status and legal effect as praedial servitude, which can be enforced by any owner of property in that township against any other owner who may be acting in breach of those conditions" (324J).

Although the end result is the same in the sense that they are limited real rights enforceable by other parties, the origin, purpose and nature of conditions of title are different from praedial servitudes in the traditional sense, and conditions of title should be classified as a separate group of limited real rights (Van Wyk *Planning law* 18–20; Kleyn and Boraine *Silberberg and Schoeman The law of property* (1992) 393–394).

Some of the reasons why conditions of title cannot be classified as servitudes are that conditions of title are recognized as planning tools (Van der Westhuizen "Locus standi in iudicio van persone wat nakoming van beperkende voorwaardes eis" 1990 *THRHR* 130–136 132), whereas praedial servitudes are not (Van der Walt and Pienaar *Introduction to the law of property* (1999) 276–279; Van der Merwe *Sakereg* (1989) 458); in the case of conditions of title each erf is simultaneously seen as a dominant and a servient tenement, whereas in the case of traditional servitudes there is normally one servient and one dominant tenement and two pieces of land are seen as an absolute requirement (Van der Merwe 460); a requirement for the validity of a servitude is that the servient tenement must be useful to the dominant tenement so that its enjoyment and usefulness may be increased (Van der Merwe 469–470). In the case of conditions of title the usefulness purpose is stated in very specific terms, namely the retention of the specific character of the neighbourhood (Van der Westhuizen 132); traditional servitudes require the servient and the dominant tenements to be contiguous (De Waal "Vicinitas of nabuurskap as vestigingsvereiste vir grondserwitute" 1990 *TSAR* 186–206; Neels "Naburigheid as vereiste vir erfdiensbaarhede" 1990 *TSAR* 254–263), whereas conditions of title can be enforced against any other owner in a township which means that another erf could be some distance away; conditions of title create mutual and reciprocal rights whereas with praedial servitudes the right attaches to a person as owner of a specific dominant tenement (Van der Merwe 459–460); conditions of title have a distinct public law character, which servitudes do not have (Van der Merwe 505).

11 Conditions of title obsolete

A further argument raised by the minister was that since conditions of title are a relic of the past they should be abolished in favour of the zoning scheme (324H). This argument has been made before, but in the context of the Removal of Restrictions in Townships Act 48 of 1946. Since the 1946 Act was the subject of criticism it was replaced by the present (1967) Act. The stated reasons for the enactment of the 1967 Act were first that effective town planning and provision of houses should not be hampered by obsolete restrictive conditions on land, and secondly to eradicate the confusion which had resulted from decisions under the repealed 1946 Act (*House of Assembly Debates* 1967 cols 7524–7525. See also Scholtens "Law of property" 1967 *Annual Survey of South African Law* 181). Griesel J correctly rejects the view that conditions of title are obsolete and emphasises that this view does not reflect the philosophy of the present Act, particularly where he states that the status and legal effect of conditions of title are the same as praedial servitudes (324H; see also 10 above).

12 Metropolitan Spatial Development Framework (MSDF)

One of the reasons why the minister had approved the application was that the Metropolitan Spatial Development Framework (MSDF) put forward a policy of densification for the area which would be in the interests of the broader public rather than in the interests of property owners in the township.

Griesel J indicates that the MSDF "has no statutory or legal force. The broad brush strokes with which the MSDF treats various areas of the Peninsula makes it, at best, a questionable tool for land use planning at local level and for land planning of particular properties". If a plan to manage land use does not have legal force it cannot be enforced and it remains a mere policy document.

Many local authorities throughout South Africa are in a similar position – do Land Development Objectives (LDOs) in terms of the Development Facilitation Act 67 of 1995 have legal force? It is foreseen that the same question will be raised with regard to Integrated Development Plans (IDPs) at present being prepared in terms of the Local Government: Municipal Systems Act 32 of 2000 (see also Van Wyk 144).

The only certainty with regard to which plans have legal force is that most town planning schemes or zoning schemes in operation throughout South Africa have legal force. A town-planning scheme can be classified as administrative legislation because it deals with general relationships, legislative acts must be published, legislative acts in general are subject to specific procedures, and such specific administrative procedures are laid down for the operation of a town-planning scheme (see van Wyk 21–23 and the authorities mentioned there).

13 Liability of local authority for negligence

From the findings of the court in terms of which the respondent developer was “interdicted and restrained from erecting or continuing to erect any building . . . which is a block of flats”, and the fact that the applicants “may apply to court at any time for an order directing the third respondent forthwith to demolish all building work on erf 2319 Camps Bay, which relates to the block of flats or which is otherwise in conflict with the restrictive conditions which the first respondent purported to remove and/or amend” (329G–J), it is clear that the developer has suffered (and probably still will suffer) financial loss as a result of the wrong decision made by the municipality. This is even more significant, because at the time of the purchase of the property the developer had not been aware of the condition of title since it had previously been wrongly removed.

In the light of *Knop v Johannesburg City Council* 1995 2 SA 1 (A), *Beck v Premier, Western Cape* 1998 3 SA 487 (C), *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 2 SA 54 (C) and *Olitsky Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA) the question arises as to what the position of a municipality is with regard to the damage occasioned by the wrongful decision (see also Neethling and Potgieter “Deliktuele onregmatigheid by die nie-nakoming van ’n statutêre voorskrif” 1995 *THRHR* 528–532; Neethling and Potgieter “Die Handves van Regte en deliktuele aanspreeklikheid weens brekking van ’n statutêre voorskrif” 2002 *TSAR* 381).

In *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 2 SA 67 (C) 67C–D, Davis J stated:

“Assuming that the facts are properly proved, it could be that a local authority should be held liable when it negligently approved an application in circumstances where it knew or ought reasonably to have known that the successful applicant would rely upon this decision to initiate building operations such that, if the decision was later to be set aside, the successful applicant would suffer damages.”

Cameron JA, in *Olitsky Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA) 1263C–F, supports the observations of Davis J in *Faircape* that

“in deciding whether a statutory provision grounds a claim in damages the determination of the legal convictions of the community must take account of the spirit, purport and objects of the Constitution, and that the constitutional principle of justification embraces the concept of accountability. This in turn must of course weigh in the balance when determining legal responsibility for the consequences of public malfeasance . . . The principle of public accountability is central to our new constitutional culture and there can be no doubt that the accord of civil remedies securing its observance will often play a central part in realizing our constitutional vision of open, incorrupt and responsive government”.

14 Conclusion

Proper land-use management and planning depends on proper decision-making and proper methods of enforcement. As a tool for land-use management the condition of title, as a limited real right, can play a significant role if recognised and enforced, and where removed results in a positive advantage for the area or the public.

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ASPECTS OF THE "ONCE AND FOR ALL" RULE IN A CONTRACTUAL CLAIM

**Signature Design Workshop CC v Eskom Pension and Provident Fund
2002 2 SA 488 (C)**

1 Facts

In essence, the facts of this matter are as follows: The plaintiff and the Tygervalley Centre ("the centre"), a regional shopping centre situated in Bellville, concluded a written agreement regarding the erection of advertising display units on premises of the defendant. In terms of the agreement the plaintiff was entitled, for its own account, to let the space to any prospective advertiser. It was specifically agreed between the parties that the centre would not grant permission for the display of any other advertising units in or on the premises covered by the agreement.

Despite the restriction referred to above, the centre concluded an agreement with the fourth defendant in this case in terms of which the centre permitted the fourth defendant to erect tri-vision advertising units on its premises. After the erection of advertising structures on the premises, the fourth defendant displayed signage thereon.

At some stage (March 1996) the plaintiff brought an urgent application against the defendants (including the centre) in which it sought, and was eventually granted, an order interdicting and restraining the centre from permitting the display of advertisements by the fourth defendant (490D-E).

As a result of the conduct of the defendants, so the plaintiff alleged, it was unable to rent out the advertising space from September 1996 to October 1997. This was allegedly caused by the agreement between the centre and the fourth defendant. The plaintiff further averred that had there been compliance by the centre, the centre would have concluded an agreement with the plaintiff (as opposed to the fourth defendant) which would have entitled the plaintiff to erect tri-visions on its premises and to sell advertising space thereon for its own account for a period of not less than 10 years or, alternatively, a period not less than 5 years. By reason of the alleged breach, the plaintiff contended that it had suffered loss in the sum of R71 751,68 in respect of lost rental income from the sale of the plaintiff's existing advertising units together with a sum of approxi-

mately R3,1m, representing income from the hypothetical renting of the trivisions. The plaintiff further claimed damages from the fourth defendant on the basis of its knowledge of the agreement between the plaintiff and the centre.

2 Legal issue

The only legal question considered for the purposes of this discussion, is the defence raised on behalf of the centre (the first defendant) that the "plaintiff had an election, either to seek enforcement of the agreement or to cancel the agreement and claim damages" (491H-I). By seeking an interdict, so the defendant contended, the plaintiff was barred from approaching the court for damages on the same contract and the same breach thereof. In terms of this application of the *res judicata* doctrine (often referred to as the "once and for all" rule in this context), the plaintiff allegedly abandoned any prospect of recovering damages in future by seeking an interdict. The defendant relied mainly on *Boshoff v Union Government* 1932 TPD 345 and *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 3 SA 462 (A).

The plaintiff argued that the "once and for all" rule was not one of principle but one of convenience and could be departed from whenever necessary. Reference was made to *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) (see also Van der Walt *Die sommeskadeleer en die "once and for all"-reël* LLD thesis Unisa (1977) 523; Loubser *Extinctive prescription* (1996) 85).

For the purposes of the present discussion the issues concerning the *quantum* of damages, the delictual liability of the fourth defendant and the joint and several liability of the defendants are not considered (499-509). It may merely be added that the plaintiff was successful in its claim, but for a much lower amount.

3 The court's response to the legal issue

The court accepted that the decisions in *Shembe* and *Evins* referred to above were binding on it. However, the real issue was whether these cases applied to the dispute *in casu* – namely the question whether an interdict would preclude a later claim for damages on the same contractual breach (496G).

In evaluating the applicability of these two cases (see also Visser and Potgieter *Law of damages* (1993) 128 136 142-143), the court concluded that *Shembe* was distinguishable from the legal issue facing the court *in casu* and that *Evins* was concerned with a common-law action for damages in delict (496H-497B). The court added that in the *Boshoff* case referred to earlier the defence of *res judicata* was properly pleaded since the same issue (namely whether the defendant had repudiated the contract and ejected the plaintiff from the premises) had been conclusively established in the first litigation (497F).

The court summarised the plaintiff's claim *in casu* as follows:

"During March 1996 the plaintiff brought an urgent application in which it sought an order interdicting and restraining [the centre] from permitting the display of the advertisements by the fourth defendant. The application was dismissed. Almost two years' later on 10 February 1998 the Full Bench gave judgment in favour of [the] plaintiff and granted the interdict which initially had been sought. In the present dispute plaintiff's claim is that it was unable to rent out advertising space during the period September 1996 to the end of its contract with [the centre], namely 31 October 1997. In other words, during the period after the dismissal of the urgent application in March 1996 until that decision was reversed by the Full Bench, defendants continued to breach the agreement" (497G-H).

The court concluded that a rigid application of the “*Shembe* approach” to the present case would unquestionably work considerable injustice and would place an “innocent party” in the position of the plaintiff in an untenable position (497J–498A). The court then stated the obvious, namely that had the interdict been granted on the original application, “the damages [*sic*] which allegedly followed pursuant to the breach could not have occurred” (498B).

The court also recalled that:

“[T]he policy considerations which underpin the ‘once and for all’ rule were developed with the purpose of the prevention of a multiplicity of actions based on a single cause of action and the assurance that there would be a definite end to litigation” (498C).

The court accepted the argument on behalf of the plaintiff that the breach by the defendant was of a continuing nature (498G) and the suggestion that a plaintiff who applies for an interdict to prohibit contractual breach, is in essence asking for specific performance in the negative form of non-performance of the act inconsistent with the terms of the content of the contract. Thus, so the court continued, it is open to the plaintiff to subsequently pursue a claim for damages where there is non-compliance with the order of specific performance (498J–499A). Permitting such a claim may be based on one of the “exceptions which should be allowed in respect of the ‘once and for all’ rule” (499B).

4 Evaluation

The history and application of the “once and for all” rule is considered in detail by Van der Walt *passim* (see also Visser and Potgieter 121–146). The rule is derived from English law but has been recognised and applied for so long that it is not possible to question or oppose it on historical grounds. The rule applies in regard to all types of claims, whether based in delict, contract or any other cause of action. Despite severe criticism of the “once and for all” rule (see esp Van der Walt *passim*), our legal practice still generally accepts this rule as well as the principles regarding causes of action which underpin its operation (Visser and Potgieter 122).

There are various exceptions to the rule, which are usually articulated with reference to delictual claims (see eg *Symmonds v Rhodesia Railways* 1917 AD 582; *Slomowitz v Vereeniging Town Council* 1966 3 SA 317 (A); *Reddy v Durban Corporation* 1933 AD 293 (interdict); *Johannesburg City Council v Vucinovich* 1940 AD 365 (interdict); *Wade v Paruk* 1904 NLR 219; *De Villiers v Barlow* 1929 OPD 45; *Oslo Land Co v Union Government* 1938 AD 584; and see Visser and Potgieter 130–134 for other cases).

There have been various cases on the application of the “once and for all” rule in the law of contract (see, in addition to the case referred to by the court *in casu*, Visser and Potgieter 141–144; *Kantor v Welldone Upholsterers* 1944 CPD 388).

The decision *in casu* is clearly justified by the application of current law to the facts. Although the court could and should probably have referred in more detail to the matter of causes of action underpinning the application of the “once and for all” rule, the defence of *res judicata* raised on behalf of the defendants (see also for the relationship between *res judicata* and the “once and for all” rule, *Union Wine Ltd v E Snell & Co* 1990 2 SA 189 (C); *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd* 1983 3 SA 197 (W) 200–201), was so clearly ill-founded and even preposterous, that the court may be forgiven for omitting a more detailed study of the relevance of causes of action. A

consideration of the principles of causes of action in terms of the *facta probanda* approach generally preferred by our courts (see eg *Evins supra* 839), would have clearly revealed the fallacy of the defendants' arguments: the claim for the interdict and the claim for damages caused by the same breach of contract are based on different causes of action (since there are materially different requirements for succeeding with the interdict and with the damages claim), and that would render the "once and for all" rule inapplicable in any event.

The court was also clearly correct in its assessment that as the application for an interdict to keep the defendant to its contract initially failed, the attempted reliance on that remedy could in no way prevent the subsequent institution of a claim for damages (499C). It is trite that the purpose of an interdict is to prevent damage (Neethling, Potgieter and Visser *Law of delict* (2001) 261; see also *Boiler Efficiency Services CC v Coalcor (Cape) (Pty) Ltd* 1989 3 SA 460 (C) 475 for observations on the interplay between an interdict and a claim for damages), and when this remedy does not achieve the desired result, any reference to the "once and for all" rule or the doctrine of *res judicata* in this context is obviously ill-founded.

The court *in casu* did not really create a new category of exceptions to the "once and for all" rule in denying the defence of *res judicata* (499B). The court merely applied existing law correctly to the facts proved in the proceedings before it. The exception of "continuing wrongful conduct" is well known to the law of damages as far as delictual liability is concerned (see Visser and Potgieter 129–130) and there is obviously no good reason why this should not be applicable to damages on account of breach of contract.

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**DIE STAAT SE BESKERMINGSPLIG TEENOOR
'N AANGEHOUDENE MET SELFDODINGSNEIGINGS**

**Kudla v Poland EHRM no 30210/96
26 Oktober 2000, NJW 2001, 2694**

1 Inleiding

Die relevante feite in dié saak is kortliks soos volg: Die applikant, A, is in Augustus 1991 gearresteer en as verhoorafwagtende aangehou. Aangesien hy aangedui het dat hy 'n depressielyer is, is hy medies ondersoek en geskik bevind vir aanhouding. In Oktober 1991 het hy gepoog om homself te dood. Hy is hierna herhaaldelik medies ondersoek en vir 'n tydperk na 'n hospitaal oorgeplaas. Na verskeie onsuksesvolle aansoeke vir sy ontslag is hy in Julie 1992 ontslaan op grond van 'n deskundige verslag waarvolgens hy voortdurend die gevaar loop om homself om die lewe te bring. Hy het in Februarie 1993 nagelaat om vir sy verhoor op te daag. Aangesien hy nie gereeld binne die vasgestelde termyn die verlangde mediese verslae voorgelê het nie, is hy weer gearresteer en as verhoorafwagtende aangehou. Hy bring vervolgens verskeie onsuksesvolle

aansoeke om weer vrygelaat te word. In Januarie 1995 poog hy weer eens om homself om die lewe te bring. A se hieropvolgende aansoek om vrylating word afgewys op grond van die waarneming dat hy daarmee slegs aandag wou trek. Ook verdere sodanige aansoeke word afgewys. In Junie 1995 word hy deur 'n laerhof te Krakau in Pole aan bedrog en vervalsing skuldig bevind en tot ses jaar gevangenisstraf gevonniss. In September 1995 word hy opnuut medies ondersoek en word daar aanbeveel dat hy vir behandeling na 'n hospitaal oorgeplaas word. In 1996 hef 'n intermedieë hof te Krakau egter A se skuldigbevinding en straf op en verwys die saak terug na die laerhof vir 'n nuwe verhoor. In Mei 1996 word borgtog van 10 000 Poolse Zlotys vasgestel. A bring egter weer eens 'n onsuksesvolle aansoek om die bedrag te verminder en beroep hom op die selfdodingsgevaar. In Oktober 1996 word hy na voldoening aan die voorwaardes op borgtog vrygelaat. In Desember 1998 word hy weer deur die verhoorhof tot ses jaar gevangenisstraf, wat later tot vyf jaar verminder word, gevonniss.

Reeds op 12 April 1995 het A hom tot die Europese Menseregtekommissie gewend en aangevoer dat verskeie artikels van die Europese Verdrag vir die Regte van die Mens (EVRM) geskend is. Hy het onder andere aangevoer dat artikel 3, waarin die folterverbod beliggaam is, geskend is. Hy het in dié verband in besonder daarop gesteun dat hy nie toereikende psigiatriese behandeling kon bekom nie en dat hy uitermate lank as verhoorafwagte aangehou is. In 'n verslag van 26 Oktober 1999 huldig die Kommissie die mening (14 teen 13 stemme) dat artikel 3 EVRM geskend is. Hierdie aangeleentheid land in finale instansie by die Europese Hof vir die Regte van die Mens (EHRM). Die beslissing van laasgenoemde hof rakende die vraag of artikel 3 EVRM geskend is, word in die onderhawige kommentaar onder die loop geneem (sien ook Meyer-Ladewig "Rechtsbehelfe gegen Verzögerungen im gerichtlichen Verfahren – zum Urteil des EGMR Kudla/Polen" 2001 *NJW* 2679). Daar word vervolgens ook op die belang van dié beslissing vir Suid-Afrika gewys.

2 Die EHRM se beslissing

Die EHRM wys ten aanvang daarop dat artikel 3 EVRM 'n grondbeginsel van 'n demokratiëse bestel waarborg. Dit verbied naamlik folter en onmenslike of vernederende behandeling of straf sonder inagneming van die omstandighede en gedrag van die slagoffer (par 90) (sien ook *V v United Kingdom* [GC], no 24888/94, ECHR 1999-IX par 69). In *Labita v Italy* [GC] no 26772/95, ECHR 2000-IV, par 119 verklaar die EHRM soos volg in dié verband:

"As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols . . . Article 3 makes no provision for exceptions and no derogation from it is permissible . . . even the event of a public threatening the life of the nation . . . The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct . . . The nature of the offence allegedly committed by the applicant was therefore irrelevant for the purposes of Article 3."

Hierdie benadering is duidelik ook in ooreenstemming met die Suid-Afrikaanse reg (sien a 12(1)(d) en (e) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996; *S v Makwanyane* 1995 3 SA 391 (CC) par 93; *S v Williams* 1995 3 SA 332 (CC) par 20; Chaskalson *et al Constitutional law of South Africa* (1999) 28–31 ev; De Waal, Currie en Erasmus *The Bill of Rights handbook* (2001) 259–261).

Volgens die EHRM moet aan 'n sekere minimum graad van ernstigheid/gewigtigheid voldoen word voordat artikel 3 EVRM geskend word. Hierdie minimum graad is van 'n relatiewe aard en hang van die omstandighede van elke besondere geval af, asook van die aard, duur en konteks van die gewraakte behandeling en die toepassing daarvan, die psigiese en geestelike effek daarvan en dikwels van die geslag, ouderdom en gesondheidstoestand van die slagoffer (par 91; sien ook *Raninen v Finland* no 152/1996/771/972, 1997-VIII, par 55). Die EHRM wys vervolgens daarop dat vroeër beslis is dat behandeling as onmenslik beskou word indien dit onder andere opsetlik en vir ure aaneen sonder onderbreking plaasgevind het en liggaamlike letsels of intensiewe fisieke of psigiese lyding veroorsaak het. Behandeling is as vernederend beskou indien dit sodanig was dat dit by die slagoffer 'n gevoel van angs, beklemming of onderdanigheid gewek het en daarop gerig was om hom/haar te ontmoedig of te verneder. Die toegevoegde lyding en vernedering moes ook nie noodwendig met 'n bepaalde vorm van behandeling of straf verbonde gewees het nie (par 92; sien ook *Soering v United Kingdom*, 7 Julie 1989, no 1/1989/161/217, Series A, no 161, par 100). Artikel 3 EVRM kan nie so uitgelê word dat 'n prinsipiële verpligting die owerheid opgelê word om 'n aangehoudene om gesondheidsredes te ontslaan of na 'n hospitaal vir behandeling oor te plaas nie (par 93). Die EHRM verduidelik vervolgens:

“Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the *unavoidable* level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance” (par 94; sien ook *Aerts v Belgium* 30 Julie 1998, no 61/1997/845/1051, 1998-V, par 64–67).

Die EHRM aanvaar dat A voor en gedurende sy aanhouding chronies depressief was en dat hy by twee geleenthede gedurende aanhouding gepoog het om homself om die lewe te bring. Die diagnose van sy toestand dui op neurotiese of persoonlikheidssteuringe en 'n toestand van depressie wat as reaksie op sy aanhoudingsituasie ontstaan het. Dit blyk ook dat hy op versoek gereeld deur medici uit verskeie vakrigtings, insluitend psigiaters, ondersoek en behandel is. Hy is na sy eerste selfdodingspoging, wat nie deur nalatigheid van die gevangenispersoneel veroorsaak is nie, vir ongeveer twee en 'n half maande vir spesiale waarneming na 'n gevangenis-hospitaal te Wroclaw oorgeplaas. Hy is daarna aan twee verdere kontrole-ondersoeke onderwerp. Die EHRM bevind dat ook die tweede poging van A om sy lewe te neem nie aan nalatigheid van die gevangenispersoneel toegeskryf kan word nie. A is minstens een maal per maand terwyl hy in aanhouding was deur 'n psigiater ondersoek (par 95–98). Die EHRM erken vervolgens dat A as gevolg van sy psigologiese toestand meer kwesbaar was as 'n gemiddelde gevangene en dat die aanhouding sy leed, angs en beklemmingsgevoel in 'n merkbare mate versterk het, asook sy risiko vir selfdoding of poging daartoe verhoog het. Dit kan egter nie gesê word dat, in die lig van al die feite van die betrokke saak, bewys is dat A op so 'n wyse behandel is dat artikel 3 EVRM geskend is nie (par 99–100).

3 Die regsposisie in Suid-Afrika

Gevangenisstraf word hedendaags as sodanig as 'n strafvorm beskou. Die inperkings van die gevangene stel die straf daar en hy/sy word nie na die gevangenis gestuur om gestraf te word nie (sien in die algemeen in dié verband Els

Gevangenisstraf in die Suid-Afrikaanse strafreg (LLD-proefskrif UP 1990) 1 ev en Van Zyl Smit *South African prison law and procedure* (1992) 1 ev). Die basiese menseregte van die gevangene, binne konteks van sy/haar status as sodanig, word in 'n toenemende mate gerespekteer (sien Labuschagne "Deliktuele beskerming van die bewegingsvryheid van die gevangene" 1993 *Stell LR* 130 en "Strafregtelike beskerming van gevangenes teen seksuele misbruik van hulle gesagsondergeskikte status" 2000 *SAS* 99). In die VSA, en tereg ook, kan 'n gevangene indien sy/haar regte geskend word onder sekere besondere omstandighede selfs regmatig ontsnap (vir gesag en vir meer inligting in dié verband sien Labuschagne "Medemensdwang as strafregtelike verweer" 1997 *Stell LR* 205 215–216). Selfdodingsneigings as gevolg van die ongerief en uitsigloosheid van die gevangenisregverdig egter nie as sodanig die reg om te ontsnap nie (sien die Engelse saak *R v Roger and Rose* [1998] 1 Cr App R 143 en Labuschagne "Noodtoestand, ontsnapping en selfdodingsneigings" 1998 *Obiter* 363). Dieselfde beginsels geld uiteraard vir 'n verhoorafwagende wat in aanhouding verkeer en vir 'n persoon wat ter wille van sy/haar of die gemeenskap se veiligheid aangehou word (Labuschagne "Deliktuele beskerming van bewegingsvryheid en die regsposisie van die geestesranke" 1998 (1) *TRW* 234). Op die staat rus 'n regsplig om binne redelike omstandighede te voorkom dat 'n aangehoudene nie deur 'n ander aangehoudene aangerand word nie (*Mtati v Minister of Justice* 1958 1 SA 221 (A) 229). Daar rus ook 'n regsplig op die staat om te verseker dat 'n aangehoudene wat beseer of siek is so gou as moontlik die nodige mediese behandeling verkry (*Minister of Police v Skosana* 1997 1 SA 31 (A) 36). Soos elders geargumenteer, het die staat ook 'n plig om selfbesering en -doding van 'n aangehoudene te voorkom (sien Labuschagne "Die staatlike regsplig om selfbesering en -doding van 'n aangehoudene te voorkom" 1999 (2) *TRW* 221 en verwysings daarin opgeneem. Sien ook *Washington v Glucksberg* 117 S Ct 2258, 138 LEd 2d 772 (1997)). Dit wil voorkom of die howe, binne konteks van liberale regstaatbeginsels, 'n deliktuele plig op veral die polisie plaas om regsonderdane teen andere, en ook teen hulleself, te beskerm (sien vir meer inligting Neethling "Die regsplig van die polisie om die reg op fisies-psigiese integriteit te beskerm" 2000 *THRHR* 150 en "Die regsplig van die staat om die reg op die fisies-psigiese integriteit teen derdes te beskerm: Die korrekte benadering tot onregmatigheid, nalatigheid en feitelike kousaliteit" 2001 *THRHR* 489).

4 Konklusie

Die onderhawige beslissing van die EHRM is nie slegs rationeel verantwoord nie, maar is ook versoenbaar met regstaatlike beginsels. Dit blyk in die lig hiervan duidelik dat die staat 'n regsplig het om 'n aangehoudene met selfdodingsneigings teen hom- of haarself te beskerm en van bevredigende psigiatriese en ander mediese behandeling te voorsien. Uiteraard, soos ook in geval van deliktuele pligsuitoefening in die algemeen, hoef die staat slegs, binne konteks van die betrokke geval, redelike voorsorg te tref. Selfdodingsneigings bied egter nie aan 'n aangehoudene as sodanig (in Nederland) 'n reg op vrylating nie en 'n selfdodingsbehoefte bied ook nie as sodanig 'n reg op aktiewe eutanase nie (Labuschagne "Langtermyn gevangenisstraf, psigiatriese lyding en die reg op hulpverlening by selfdoding" 1998 *SALJ* 270). 'n Groot paradoks rondom hierdie problematiek word aangetref in die feit dat die staat hedendaags blykbaar nie 'n plig en reg het om in geval van 'n aangehoudene wat hom- of haarself deur 'n eetstaking om die lewe wil bring, in te gryp nie (Labuschagne "Gewetensnood as

strafregtelike verweer" 1996 *SALJ* 607). Die erkenning van 'n reg op hulpverlening by selfdoding sou miskien in die toekoms vir mense wat in lang en uitsiglose gevangenskap verkeer 'n uitkoms kon bied (sien Labuschagne "Strafregtelike aanspreeklikheid van die oorlewende van 'n selfdodingspakt" 1995 *SALJ* 16, "Die strafregtelike verbod op hulpverlening by selfdoding: 'n Menseregtelike en regsantropologiese evaluasie" 1998 *Obiter* 45 en "Regstaatlike waardegradering van die menslike lewe en lewenskwaliteit: Opmerkinge oor noodtoestand as verweer by aktiewe eutanasie" 2000 *THRHR* 133).

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SUMMARY EXECUTION CLAUSES IN PLEDGE AND PERFECTING CLAUSES IN NOTARIAL BONDS

Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd 2001 1 SA 251 (E)

1 Introduction

This case surely let the cat loose in the pigeon cote! Let us hope that reason will prevail and that this judgment, which is patently wrong and contrary to case law, even to appeal court cases, will not be followed.

The facts of the case are simple: in terms of a perfecting clause in a notarial bond, the bondholder applied to the court for an order entitling it to perfect its security by taking possession of the debtor's movables and to dispose of these movables by public auction, public tender, private treaty or otherwise. On the return day of the rule *nisi*, Froneman J thought it fit to intervene *mero motu* and raise the issue of whether such a clause should be regarded as constitutional. The judge found the clause to be unconstitutional and refused to confirm the rule *nisi*.

To decide on the constitutionality of such clauses, Froneman J referred to Constitutional Court cases dealing with statutory measures allowing the state (or state organs) to seize the movable and immovable property of certain debtors. He went on to equate perfecting clauses in notarial bonds with summary execution clauses (*parate executie* clauses) in a pledge. Froneman J questioned the common-law principles allowing summary execution clauses in the case of a pledge on the basis that if the state is not allowed to "seize", without recourse to the courts, movable (and immovable) property belonging to its debtors, then the common law cannot allow this (attachment for perfection purposes in terms of a court order) (see *Findevco* 256E–F).

With brief and cursory remarks the judge cast doubt on the leading case of *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531. *Osry* is, however, an example of an excellent judgment by a man "of intellectual ability and deep learning and culture, who place[s] [his] full endeavours at the service of justice" (see Hahlo and Kahn *The South African legal system and its background* (1968) 40 on the characteristics of a good judge). Froneman J wrongly inferred that Kotze J regarded the basic principle against self-help in *Osry* unimportant. He further

created the impression that *Osry's* approach to summary execution clauses was criticized in *Iscor Housing Utility Co v Chief Registrar of Deeds* 1971 1 SA 613 (T). The judge replied to counsel for applicant's argument that applicant is not seeking to bypass the courts, but to enforce an order for specific performance, as follows:

"All these submissions, in my view, beg the question. If the clause in the bond which purports to allow the sale of the movable property is valid and not disputed, there is no issue between the parties which needs to be determined by me. If, however, the clause in the bond is invalid (as I consider it is), then it cannot logically be validated by asking the Court to ignore its constitutional invalidity and give effect to it. Courts cannot enforce specific performance of invalid contractual clauses"(256H-I).

The judgment in *Findevco* is wrong and ill considered. If it were to be followed, it would have far-reaching implications for the law of real security. I appreciate the judge's concern with the Constitution and his duties as a judge in this regard. I am also fully aware that private law principles are not "so sacrosanct that they should enjoy special protection even when they give rise to arrant discrimination and injustice" (see Carpenter "The 'Constitutional attack on private law': are the fears well founded?" 1996 *THRHR* 126). Obviously these principles have to be evaluated and tested, where necessary, against the values of the Constitution. But, surely, in doing so a judge should consider carefully all relevant aspects and indicate clearly where earlier case law is wrong and exactly why certain principles are in conflict with the Constitution. In judging private law issues judges should have regard for the Constitution, but in questioning the validity of generally-accepted sound legal principles, they should give good reasons for deviating from existing law.

In this case Froneman J was so concerned with the Constitution that he did not pay sufficient attention to the basic private law principles involved. He disregarded the principles of *stare decisis*, without providing reasons for his deviation. His analogies are false. He did not evaluate the consequences in practice of his decision on established principles and on the general administration of justice in the courts. For example, if it is not possible to apply to the court for an order enforcing specific performance of a perfection clause in a notarial bond that is not regulated by the Security by Means of Movables Act 57 of 1993, this form of security will surely become worthless as a form of real security. Furthermore, if all pledgees had to go to court for execution orders, the already overburdened courts will be totally swamped. In South Africa the backlog in the courts are already causing a serious lack of trust in the judicial system. Can we afford to burden the courts further with trivial matters that may be solved satisfactorily in other ways? Did the judge consider the cost implications of his approach to debtors?

2 Evaluation

2.1 *Confusion of different legal and factual situations*

2.1.1 Introduction

The judge did not distinguish between perfection clauses, statutory measures empowering the state to seize, without the intervention of the courts, movable and immovable property from unwilling debtors, and summary execution clauses in pledge agreements. There is a big difference between the three. In the case of

perfection clauses the debtor remains in control of the movable property, but agrees to relinquish the property to the creditor, should it become necessary, that is when the debtor is in default. The debtor can relinquish the property voluntarily or, where he/she is unwilling to do so, the creditor may approach the court for an order for specific performance of the contract.

As regards the statutory measures under discussion, the state empowered itself by statute to seize, without the court's intervention and against the will of the debtor, movable and immovable property in the hands of the debtor. Where a summary execution clause has been inserted in the pledge agreement, the debtor voluntarily hands movable property to the creditor and authorizes the creditor to sell the property when the debtor is in default.

I shall now examine the case law dealing with these issues.

2 1 2 Statutory powers to seize

Froneman J relied on Constitutional Court judgments dealing with statutory provisions empowering the state (or state organs) with unacceptable wide powers to seize and sell movable and immovable property belonging to the debtor (see *Lesapo v North West Agricultural Bank* 1999 12 BCLR 1420 (CC) 1423G–1424C and *First National Bank of South Africa Ltd v Land and Agricultural Bank of Southern Africa; Sheard v Land and Agricultural Bank of South Africa* 2000 3 SA 626 (CC)). Academics had criticized these measures long before the Constitution was accepted as being harsh and unjust. A fundamental aspect of these measures is the fact that one is dealing with the state as opposed to an individual. The individual has no say in the matter. Also, these measures exclude intervention of, or recourse to, the courts. They apply to movable, as well as immovable property. Furthermore, bear in mind that in these statutory seizure situations the debtor is in possession (control) of the property to be seized. In summary execution clauses the debtor has willingly parted with his/her movable property and has authorized the sale of the property. There is therefore no taking of possession (spoliation) by the creditor.

In *Lesapo* the creditor (the North West Agricultural Bank), without going to court, could seize and sell the debtor's movable and immovable property of which the debtor was in lawful and undisturbed possession (see s 38(2) of the North West Agricultural Bank Act 14 of 1981 quoted 1423G–1424C). In the other case, *First National Bank of South Africa Ltd v Land and Agricultural Bank of Southern Africa; Sheard v Land and Agricultural Bank of South Africa supra*, the creditor (the Land Bank) was empowered to require any sheriff or any other person designated by the Land Bank to attach and sell movable and immovable property in execution, without recourse to a court of law (see s 34 of the Land Bank Act 13 of 1944).

Mogoro J handed down both Constitutional Court judgments. Her reasoning in *Lesapo* is particularly relevant and Froneman J relied on this judgment and quoted extensively from it. The principle against self-help is central to the judge's decision. Correctly, it is her starting point. She repeatedly stressed the following issues in her argument against the validity of these statutory measures: the *exclusion of recourse to the courts* (see eg paras [10] [14] [19] [22] [25]); the *seizure of property from the debtor against his/her will* (see eg 1425I: "to seize and sell the debtor's property of which the debtor was in lawful and undisturbed possession"; 1427C: "That protection extends to the circumstances in which property may be seized and sold in execution"; 1428D: "and the seizure of

property against the will of a debtor in possession of such property for that purpose without an order of court amounts to self-help"; 1431B: "goods subject to seizure") and the state's involvement. She expressed this involvement as follows:

"The Bank, as an organ of State, should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help. Respect for the rule of law is crucial for a defensible and sustainable democracy. In a modern constitutional state like ours, there is no room for legislation which, as in this case, is inimical to a fundamental principle such as that against self help" (1427H-I).

Clearly we are dealing here with the vertical application of the Constitution and there is no indication in any of the cases that they should apply horizontally to perfection clauses and agreements in terms of which the debtor voluntarily hands possession of a movable to his/her creditor with the further agreement that, should the debtor fail to pay the principal debt, the creditor may sell the property in execution. I shall refrain from entering the debate on the horizontal application of the Constitution. For argument's sake I shall assume that it does have limited horizontal application. Even so, it should be noted that Mokgoro J explicitly stated that the rule against self-help applies to legislation empowering an organ of state to seize a debtor's property against his/her will and without recourse to the court.

In *Sheard Mokgoro J* confirmed the arguments in *Lesapo*. I can further add the judgment of Van Coller J, which was overlooked by Froneman J (see *First National Bank of South Africa v Land and Agricultural Bank* 2000 6 BCLR 586 (O)). In this judgment the judge also limited his discussion to the Land Bank Act 13 of 1944 and was clearly of the opinion that the Act provided for self-help by means of spoliation where the debtor was in peaceful and undisturbed control of his property (589H-J). He stressed that such actions were not only unconstitutional, but that they were also inconsistent with the fundamental principles of our common law. He referred to a very old Free State judgment where this principle against self-help was formulated (590A-C). The Dutch quotation can be translated as follows:

"This is one of the most important cases that could ever be brought before the court or has been brought before the court. Its importance lies not so much in the value of the goods involved, but in the important principles embroiled in it. When a gang of 18 persons would have been allowed in the capital of the Orange Free State to remove, without authority, goods to which they were not entitled from other persons' control, then one could almost say that the courts of justice should just as well be closed, because then 'the strongest man is the master'. This approach would attack the root of the safety of society."

None of the above cases have any direct influence on *Findevco* or *Osry*. Obviously, in a wide sense, it may be argued that the principle against self-help is of general application and should therefore be taken into consideration whenever (possession of) property is seized from a possessor against his/her will. This has always been a basic principle of the common law (see *Nino Bonino v De Lange* 1906 TS 120 122; *Yeko v Qana* 1973 4 SA 735 (A); see further Kleyn *Die mandament van spolie in die Suid-Afrikaanse Reg* LLD thesis UP (1986) 331 *et seq* and Van der Walt *Die ontwikkeling van houterskap* LLD thesis PU for CHE (1985) 725).

2 1 3 Perfection clauses

The effectiveness of notarial bonds as real security depends on perfection clauses. "Perfection" is the term that denotes the moment at which a real right of

security is constituted. In the case of notarial bonds, other than those contemplated in section 1(1) of the Security by Means of Movables Act 57 of 1993, registration of such bonds does not confer real rights on the bondholders, but merely affords them preferential treatment in the case of insolvency. To create a real right over the bonded articles, the creditor will have to perfect his/her claim. He/she must obtain control of the bonded articles, in which event he/she will be treated as a pledgee. To obtain such control a clause to the effect that, under certain circumstances, the bondholder will be entitled to take control of the bonded articles will have to be included in the bond. (For a very interesting discussion of the possible constructions that can be given to a perfection clause, see Sonnekus "Sekerheidsrege – 'n nuwe rigting?" 1983 *TSAR* 230 252–253 and Roos "The perfecting of securities held under a general notarial bond" 1995 *SALJ* 169, who examine the validity of such clauses in the case of general notarial bonds. Although such clauses are, and should be, included in special notarial bonds, and should also be carefully worded, I think the courts will not be as strict in their interpretation as in the case of general notarial bonds in terms of which all the movables of the debtor are encumbered. See further Février-Breed "The end of the common-law special notarial bond" 1993 *THRHR* 144 146 and Sonnekus "Die notariële verband, 'n bekostigbare figuur teen heimlike sekerheidstelling vir 'n nuwe Suid-Afrika?" 1993 *TSAR* 110 114 on the influence of *Cooper v Die Meester* 1992 3 SA 60 (A) on the courts' interpretation of perfection clauses.) Upon realisation of the foreseen circumstances, the bondholder may take control of the articles, if the debtor allows him to do so, or, if he/she refuses, the bondholder may approach the court for an order for specific performance and an attachment order. In terms of this order the creditor may then acquire control and, in doing so, he/she will perfect his/her real right of security. The bondholder is now in the position of a pledgee.

A creditor can perfect its notarial bond without intervention of the court where the debtor consents to perfection or, with intervention of the court where the debtor refuses. In such an instance the creditor will apply for an order granting specific performance (see eg *Cooper NO v Merchant Trade Finance Ltd* 2000 3 SA 1009 (SCA) and *Chesterfin (Pty) Ltd v Contract Forwarding (Pty) Ltd* 2002 1 SA 146 (T)).

This is exactly what the applicant in *Findevco* tried to achieve. Froneman J rejected this application on very questionable grounds. The question arises whether it is therefore no longer possible to perfect notarial bonds in terms of perfection clauses. I do not think so. The recent appeal court case referred to above indicates the contrary. As Froneman J acknowledged, the issue here is self-help. How can an application to the court to enforce a clause in a security agreement providing for the creditor to take possession amount to self-help? Should Froneman J's approach to the problem be adopted, it effectively excludes notarial bonds as instruments of real security.

This line of reasoning is clearly wrong and also in conflict with established legal principles and case law. The judge, unfortunately, did not restrict his remarks to perfection clauses, but also questioned the validity of summary execution clauses in pledge agreements.

2 1 4 Summary execution clauses

It is trite law that a summary execution clause is invalid in mortgages of immovable property, but valid in pledges of movables (see the leading case of *Osry v*

Hirsch, Loubser & Co Ltd supra 547 regarding a pledge of movables and *Iscor Housing Utility Co v Chief Registrar of Deeds supra* regarding a mortgage of immovable property). Unfortunately, Van der Walt and Pienaar *Introduction to the law of property* (1999) 297 do not make this important distinction.

Osry has been followed and commended in other cases (see eg *Aitken v Miller* 1951 1 SA 153 (SR) 155G–H; *Sakala v Wamambo* 1991 4 SA 144 (ZHC) 147–148). In *Aitken* Beadle J, after examining case law and textbooks on the issue, accepted the validity of such clauses and concluded: “Moreover, I have had the opportunity of studying *Osry*’s case and, if I may say so with respect, it does seem to me that the reasoning of Sir John Kotze in that case is logical and is supported by the authorities.” I agree.

Froneman J neither evaluated *Osry*, nor did he indicate why it should be departed from. He merely referred to *Iscor supra*. This case dealt with a summary execution clause in a mortgage bond of immovable property. In such a situation the mortgagor normally remains in possession (control) of the property and summary execution clauses are regarded as invalid. The debtor will have to approach the court for foreclosure and an execution order. If the mortgagee sells the immovable property without a court order and against the will of the debtor, registration cannot take place and delivery to the buyer will have to be effected by means of spoliation.

In *Iscor Claassen J* in fact confirmed the rule in *Osry* (see 616B–C). He took issue with Kotze J on a specific example used by Kotze J, which was in any event irrelevant to the facts in *Iscor*. I quote the relevant portion from *Osry*:

“A pressing creditor, who for instance obtains from his debtor the right to take a horse or cow from his field in order to sell it to the best advantage in settlement of the debt due, and to hand over any balance of the proceeds to the debtor, is in no different position from one who has stipulated for parate execution, and yet he is at full liberty to sell the horse or cow and give legal title to the purchaser. In neither case can it with reason be said that the creditor is taking the law into his own hands, for in both instances he is acting with the full consent of the debtor and owner” (541).

Claassen J distinguished the two sets of fact on the basis that according to the first set of facts, the debtor was already in default when he agreed to the sale of the animal. The judge referred to *Mapenduka v Ashington* 1919 AD 343 353 – dealing with *pacta commissoria*. The reasoning in *Mapenduka* was that, after a debtor is in default, he/she is free to enter into these kinds of agreements with the creditor, because the creditor can no longer take advantage of his/her impecunious position. The debtor cannot be forced to agree to certain clauses. *Mapenduka* substantiated the validity of such clauses with reference to the first reason for introducing prohibitions against agreements between the creditor and debtor in relation to the pledged article, that is to protect debtors and prevent creditors taking undue advantage of the impecunious position of their debtors.

Kotze J used this example to illustrate that in both factual situations there is no self-help, since “in both instances he (the creditor) is acting with the full consent of the debtor and owner” (541 *in fin*). In other words, Kotze J was not disregarding the rule against self-help, he was merely saying that in a pledge where the pledgee is in control and the pledgor has authorized him/her to sell the pledged article in a summary execution clause, the pledgee is not taking the law into his/her own hands. The judge did not say, “we need not attach any importance thereto” (see *Iscor* 616G) or considered “the rule against self help . . . unimportant” (see *Findevco* 256F–G).

In a summary execution clause in a pledge of movables there is no spoliation (no self-help), since the pledgor has already voluntarily parted with his/her possession and has authorized the pledgee to sell the property at an execution sale.

Furthermore, Froneman J lost sight of the fact that even in such cases the aggrieved party may still approach the court if there were any irregularities in the actions of the pledgee (see *Osry* 547):

“The conclusion at which I have arrived is that an agreement for the sale, by means of *parate execution*, of movables delivered to a creditor by his debtor is valid in law. It is, however, open to the debtor to seek the protection of the Court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights.”

2 2 Use of authority – stare decisis

2 2 1 Constitutional Court cases

The supremacy of the Constitutional Court is undisputed. A judge, therefore, has to follow judgments of this court. The Constitutional Court cases on which Froneman J relied, however, have no bearing on the issue he had to decide. His reliance on these cases is therefore wholly inappropriate. They apply to statutory powers to seize and sell, without court intervention, movable and immovable property belonging to a debtor. Perfection clauses deal with voluntary agreements between creditors and debtors entitling the creditor to take control of movables with the debtor’s permission or, in the absence of such permission, with the court’s permission. There is no provision for the creditor to take the law into his/her own hands by despoiling the debtor of his/her property against his/her will.

2 2 2 *Osry*

Osry deals with a summary execution clause in a pledge agreement where the pledgee is in control of the property and is authorized by the pledgor to sell the property. Since *Findevco* deals with perfection clauses, it has no effect on the correctness of *Osry* and the cases that followed it. Kotze J in his very learned and substantiated judgment did not regard the rule against self-help as unimportant. Someone with such a sound knowledge of the law, and in particular, of the Roman-Dutch law, as Kotze J, would never have regarded this fundamental principle of the law unimportant. His example and explanation is also contrary to such an interpretation.

Even before *Osry*, the Eastern Districts Local Division (in *Ranuga v Love and Hobson* 1912 EDL 144) followed *Van Wyk’s Executors v Joubert* 1897 4 Off Rep 360 and held that summary execution clauses in pledge agreements are valid and enforceable. In principle, Froneman J is bound by that decision unless he indicates why it is wrong.

2 2 3 *Iscor*

Iscor deals with summary execution clauses in mortgage bonds where immovable property is concerned. It did not reject *Osry* on the validity of such clauses in a pledge of movables. Even if it did, such a rejection would have been an *obiter dictum*. Reliance on this case is therefore also inappropriate.

2.3 Legal principle involved

In criticizing Froneman J, I do not wish to trivialize, in any way, the importance of the Constitution and its effect on the common law. I merely wish to stress that time-honoured and tried legal principles should not be discarded with a superficial reference to the Constitution and reliance on Constitutional Court judgments that have nothing to do with the principles that are being discarded. The fundamental principle against self-help, which has been entrenched in the Constitution, is, however, not new to the South African legal system or the Roman-Dutch law. It has been applied consistently in the courts where it is applicable. The paradigm within which it operates should, however, be observed carefully. The rule applies where a person is, without a court order, despoiled of his/her property against his/her will.

This principle is as old as the law itself. It is the cornerstone of the law in any organized society. It was the foundation of the law long before there were constitutions determining the rights of citizens in society. It was and it is not a deterrent for the validity of summary execution clauses in countries with a much older constitutional tradition (see eg para 1235 of the German *BGB*).

The existence of these clauses in pledge agreements is based on expediency and the freedom of contract. If a person is willing to part with his/her property voluntarily to secure a debt, why should that person not be allowed to authorize the creditor to sell the property without recourse to the courts, should the debtor be in default? The counter argument obviously is that the creditor and debtor are not in equal bargaining positions. This is true, but, on the other hand, the debtor, for example, is not compelled to borrow money from a creditor. A creditor has no duty to provide credit. The interests of both parties should be taken into consideration. The costs involved in approaching the court for judgment in many of these cases will only worsen the position of the debtor. This does not mean that the debtor is left to the mercy of unscrupulous creditors. In terms of *Osry*, the debtor can approach the court if he/she has been prejudiced.

Furthermore, the pledgee in these circumstances is generally regarded as the representative of the pledgor (see eg *Sakala v Wamambo supra* 148B: "The provision in an agreement for a parate executie by its nature creates a relationship of a principal and agent between the pledgor and pledgee. Consequently the pledgee is not at liberty to deal with the pledged movable property as if it were his own"). The pledgee in this situation is therefore bound by the general duties of a representative (see eg Silke *De Villiers and Macintosh's The law of agency in South Africa* (1981) arts 42 43 45; Kerr *The law of agency* (1991) ch 8).

3 Conclusion

Although I am critical of a haphazard rejection of accepted legal principles, I am not saying that, for the sake of history or certainty, the law cannot and should not be changed (see also Gilmore "Legal realism: its cause and cure" 1961 *Yale LJ* 1037 1048: "Law cannot be, since society never is, stable. A system which works well for a generation or a century must sooner or later come in for repairs. This is what I call the process of renewal"). I applaud the Constitutional Court's rejection of the Draconian measures usurped for itself by the state in the statutes concerned. The courts have in the past moulded, and should continue to mould, old rules to fit modern notions. As lawyers we should continually adapt the law to changing realities in a responsible manner.

I reject Froneman J's view that perfection clauses in notarial bonds are unconstitutional. Such an approach would make notarial bonds valueless as real security and serves no purpose. As long as the perfection takes place with the cooperation of the debtor, or in the absence of such cooperation, with the court's intervention, there can be no objection to this procedure.

Instead of outright rejecting summary execution, certain aspects of such clauses in pledge agreements may be reconsidered. I wish to emphasize that the basis for determining the validity of such clauses is not whether one is dealing with movables or immovables, but rather the initial voluntary parting with control (possession) of the property, coupled with the authorization to sell. In other words, it has more to do with the question of control (possession) by the creditor, than with the value of the property. The underlying reason for invalidity in the case of immovables is not the old-fashioned idea that immovables are generally more valuable than movables. Value cannot be the criterion, since shares, for example, may be much more valuable than a piece of land. One should therefore emphasize the form of security opted for, that is, one where control (possession) is relinquished, as opposed to one where it is retained.

The method of sale should also be considered. In German law, for example, a public auction (or sale at the market price) with a thirty-day notice to the debtor and certain other requirements are provided for (see paras 1233–1240 of the *BGB*). In *Osry* the feathers were sold at a public market. Such a sale is preferable to a private sale, since there is the possibility of open competition (the judge in *Sakala supra* 148B–C also seems to prefer a public auction).

Some textbooks require a sale at a public auction to the highest bidder (see eg Sonnekus and Neels *Sakereg vonnisbundel* (1994) 751), while others (see eg Scott 17 *Lawsa* (2nd revised ed) para 539) state that the pledged article may be sold privately. Kotze J mentions that Van Bynkershoek refers to the common practice to insert “a clause that the creditor may sell the pledge, either publicly or privately, through a broker without any judicial decree” (see *Osry* 544). On the other hand, it may be argued that a public sale is not necessary, since the debtor can always approach the court if there were any irregularities in the sale. To avoid unnecessary litigation it is advisable that creditors should sell the pledged property at a public sale or at market value (eg in the case of shares), at least in the case of valuable objects.

The *Findevco* judgment is patently wrong and should not be followed. The judgment should therefore not be cause for concern to credit institutions or debtors. Especially not for debtors, because at the end of the day the court's approach will detrimentally affect debtors also.

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PHARMACEUTICAL TABLET SHAPES AS TRADE MARKS**Triomed (Pty) Ltd v Beecham Group plc
2001 2 SA 522 (T)****1 Introduction**

Shapes and sizes, colours and configurations! Is it possible to register these characteristics of goods as trade marks? The Trade Marks Act 194 of 1993 incorporated these qualifications into South African trade mark legislation for the very first time and, by doing so, widened the field of registrable trade marks considerably. By being able to register the shape and configuration of goods as trade marks, a trade mark does not necessarily have to be "something symbolic" anymore. Traditionally trade marks were used to identify goods and therefore connoted something other than the goods itself (as decided in *Weber-Stephen Products Co v Registrar of Trade Marks* 1994 3 SA 611 (T) 617H). With the relatively new definition of the concept "mark" (for trade mark purposes), the shape and configuration of the goods itself can now constitute a trade mark.

2 Facts

The applicant (Triomed) and the first respondent (Beecham) are trade competitors. Beecham was the registered proprietor of a trade mark, registered in class 5 in respect of antibiotics. The trade mark consisted of a tablet (Augmentin) with an elliptical shape, a curvature which is bi-convex and a band around its circumference. It was registered to include all colours and dimensions of the tablet. After Beecham's patent expired, Triomed adopted the trade mark "AugMaxcil" for its generic equivalent of Augmentin (the registered trade mark of Beecham). For all practical purposes the shape of the AugMaxcil tablet directly resembled that of the Augmentin tablet. Triomed contended that Beecham aspired to monopolise a shape of tablet, which other pharmaceutical manufacturers were using or may reasonably wish to use in the normal course of the pharmaceutical trade. Triomed also alleged that the registered trade mark was non-distinctive and could therefore not distinguish the pharmaceutical products of Beecham from similar products of other pharmaceutical manufacturers. The shape of the tablet also has functional features, for example it facilitates the coating of the tablet, assists swallowing and the band reduces the risk of crumbling. Triomed consequently brought an urgent application to expunge the trade mark of Beecham, after which Beecham filed a counter-application based on trade mark infringement.

3 Decision

Smit, J reaches the conclusion that Beecham's trade mark should be removed from the trade mark register and bases his decision on the following reasons:

3 1 1 The registration of the mark violated the provisions of section 10(2)(a) of the Trade Marks Act 194 of 1993 (the Act). The trade mark was not inherently capable of distinguishing or capable of distinguishing due to the use of the mark prior to the date of application for registration. Consequently the trade mark did not comply with the requirements for registration as stipulated by section 9 of the Act.

3 1 2 In an attempt to determine the distinguishing capability of the mark, the judge follows the reasoning of Harms JA in *Cadbury (Pty) Ltd v Beacon Sweets & Chocolates (Pty) Ltd* 2000 2 SA 771 (SCA) 778G–H and poses the following question:

“[I]s mark 95/13154 the shape or configuration of the tablet or is it the shape or configuration of the first respondent’s tablet?” (532I).

Smit J answers this question by stating:

“In my view there is a lack of compelling evidence that the interested public, including doctors, pharmacists and patients, regard the shape in all its dimensions as being a trade mark of the first respondent and not simply as the goods themselves” (540E–F).

3 1 3 Due to the lack of authority in South Africa as to the test to be applied in determining whether a particular shape is inherently distinctive or not, Smit J considered a test that was considered by a court in the United Kingdom in *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 281 (Ch). A mark will be inherently capable of distinguishing when it can in fact do the job of distinguishing without the public being made aware at the outset that the sign is a trade mark. Another important consideration would be whether competitors in the same sphere of business and in the ordinary course of trade would reasonably wish to use the same mark or a mark similar enough to it to cause confusion, in relation to their own goods.

3 1 4 Concerning the issue of the distinguishing capability of a trade mark, Smit J further states:

“I am of the view that it is a fallacy to equate the recognition of an article with the article’s capacity to fulfil the trade mark purpose or function of being capable of distinguishing that article from the same article produced by another manufacturer” (534C–D)

and reaches the conclusion that “[f]eatures of appearance must indicate to potential buyers that the goods are those of the first respondent and not those of any other manufacturer” (534E–F). Medicine is not dispensed with reference to the shape of the tablet, container, capsule, etcetera. The trade mark was neither inherently capable of distinguishing nor had it become capable of distinguishing through use.

3 2 1 Smit J also found in terms of section 10(1) of the Act that the shape mark of Beecham Group is an unregistrable trade mark, because the mark did not constitute a trade mark as defined in section 2(1) of the Act. He referred to the judgment of Aldous LJ in *Philips Electronics v Remington Consumer Products (Ltd)* [1999] RPC 809 (CA) in which the following was said:

“The more the trade mark describes the goods, whether it consists of a word or shape, the less likely it will be capable of distinguishing those goods from similar goods of another trader . . . Shapes such as shown in the trade mark are pictorial descriptions of products. The test for registrability is the same for such shapes as that for word marks . . . In my view a shape of an article cannot be registered in respect of goods of that shape unless it contains some addition to the shape of the article which has trade mark significance. It is *that addition* which makes it capable of distinguishing the trade mark owner’s goods from the same sort of goods sold by another trader” (my emphasis).

3 2 2 The description of the trade mark was deemed to be too vague for the mark to be represented graphically for the purpose of a valid registration (539D). Beecham endeavoured to obtain a monopoly in the shape of the Augmentin tablet.

To allow that would have been unreasonable towards its competitors. It would be detrimental to the development and advancement of the pharmaceutical industry.

3 3 1 The provisions of section 10(2)(b) of the Act also necessitated the expungement of the shape mark from the register of trade marks. This provision serves as a bar against the registration of any sign or indication that consists exclusively of descriptive characteristics. The underlying principle behind this section is once again the preservation of fair competition. A monopoly in the use of certain words, signs, and marks which other manufacturers reasonably desire to utilize for the description and marketing of their own goods, should not be allowed.

3 3 2 As Smit J puts it:

“This section, it seems to me, seeks to preserve the rights of traders to use in trade what may be termed the non-capricious features of the article in question. The elements of the trade mark in question are not capricious but are generic qualities of the tablet.”

The fact that other manufacturers in the same sphere of business also use these features (*viz* the functional features of the tablet shape) was deemed to be sufficient evidence for this statement. The shape mark did not comply with the provisions of section 10(2)(b) in that it was seen as an exclusive indication of the kind of goods for which the mark was registered. The mark highlighted the quality, characteristics and intended purpose of the tablets and therefore this section served as a further ground for the expungement of the trade mark.

3 4 1 It was decided that the trade mark also offended against the provisions of section 10(2)(c). This section precludes the registration of a trade mark which consists exclusively of a sign or an indication which has become customary in the current language or in the *bona fide* and established practices of the trade.

3 4 2 Many different pharmaceutical manufacturers have adopted the elliptical shape of the tablet. Nothing suggested that their adoption of the shape and configuration was anything more than the *bona fide* adoption of a customary shape. Triomed also showed that a patient preference existed for an oval shaped tablet.

3 5 1 Triomed mainly relied on section 10(5) of the Act as a ground for the relief sought. Section 10(5) provides:

“[A] mark which consists exclusively of the shape, configuration, colour or pattern of goods where such shape, configuration, colour or pattern is necessary to obtain a specific technical result, or results from the nature of the goods themselves . . . shall . . . be liable to be removed from the register.”

The parties were *ad idem* that the trade mark consisted exclusively of the shape and configuration of the tablet. All that had to be shown, was that the shape itself was necessary to achieve a technical result for *certain* dimensions of the tablet and *not all* of it as it was registered for (my emphasis).

3 5 2 Smit J explains the *ratio* behind this section by saying:

“The exclusion provided for in s 10(5) has its genesis in the principle which pervades trade mark law that a balance should be preserved between the protection of the right of a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others and the recognition of the general right of free competition, including the right to copy (see *Cointreau et Cie SA v Pagan International* 1991 4 SA 706 (A) 712E–F). This idea also finds expression in the common-law principle that, as a matter of public policy, features of an article

dictated solely by function are not protected by an action of passing off" (see *Agriplas (Pty) Ltd v Andrag & Sons (Pty) Ltd* 1981 4 SA 873 (C) 882A–884H).

3 5 3 A particular monopoly must as a matter of principle be justified in the public interest. Free competition will be inhibited and prevented by allowing a competitor or a few competitors to monopolise all the best or most appropriate functional features of an article.

3 5 4 In an attempt to determine the meaning of "necessary to achieve a technical result" as used in section 10(5) of the Act, Smit J makes use of the question: "does the shape *solely* achieve a technical result?" (my emphasis).

3 5 5 Functional features of the tablet shape include:

- The bi-convex shape facilitates the coating of the tablet.
- The "band" or wall-thickness prevents the crumbling of the tablet and reduces wear.
- The elliptical shape of the tablet is such that it is easy and safe to swallow.

Due to the abovementioned functional features of the tablet, the shape can be regarded as being intrinsic to the tablet and as primarily utilitarian or functional. A prohibition on the copying of this shape will inhibit competition and will create a monopoly of a primarily or essentially utilitarian or functional shape and this is according to Smit J "not in accordance with public policy". The shape of the tablet is necessary to achieve a technical result and the trade mark accordingly also offended against the provisions of section 10(5) of the Act.

3 6 1 Section 10(11) of the Act prohibits the registration of

"a mark which consists of a container for goods or the shape, configuration, colour or pattern of goods, where the registration of such mark is or has become likely to limit the development of any art or industry".

Due to the functional features of the tablet shape, Triomed contended that the shape of the tablet has competitive advantages, which should be open to all in the market place (543H). It is very important for any technological advance that no undue restrictions are placed on legitimate competition and that no competitor is precluded from taking advantage of characteristics which are inherent in the goods and which give substantial value to it.

3 6 2 The trade mark clearly offended against the provisions of section 10(11) of the Act. To allow a monopoly in the shape in question would be to limit developments in the pharmaceutical industry. The following was seen as indications inhibiting the pharmaceutical trade:

- The primarily utilitarian shape of the tablet (which was registered for all dimensions);
- the fact that the shape was reasonably required for use in the pharmaceutical trade; and
- the shape of the tablet enjoyed patient preference and complied with the need for safety in using a tablet.

3 6 3 Smit J reaches the conclusion that the shape mark offended the provisions of section 10(11) of the Act and justly states that:

"The monopolisation of a shape is likely to limit the development of an art or industry where there is reasonably a competitive need to use the specific shape or configuration concerned."

In casu the granting of a monopoly in the shape of the tablet would most likely be a limitation on the development of the pharmaceutical industry.

371 In reaction to the counter-application of Beecham, Smit J held that the resemblance between the two trade marks was not similar enough to deceive or cause confusion. In my opinion he rightly states this by saying:

“A comparison must be made, through the eyes of the notional customer, between Augmentin on the one hand and AugMaxcil on the other – the notional customer in this case being the medical practitioner who prescribes the pharmaceutical product and the pharmacist who dispenses it, and not the patient. In my view, there is no evidence to indicate that any medical practitioner or pharmacist would confuse Augmentin with AugMaxcil. The two marks, in my judgment, are so different in appearance, sense and sound that there is no reasonable probability or even possibility of any confusion or deception between Augmentin and AugMaxcil.”

No evidence showed that doctors prescribe medication with reference to the shape of the tablets or containers. Consequently it was found that no infringement was committed in terms of either section 34(1)(a) or 34(1)(c) of the Act. Due to the nature of the relief sought and the fact that there was no basis for it Smit J also ruled that there was no room for an application of section 35 of the Act (provision regarding the infringement of “well known” trade marks). No relief pertaining to unlawful competition was granted to Beecham Group and consequently its trade mark had to be expunged from the register.

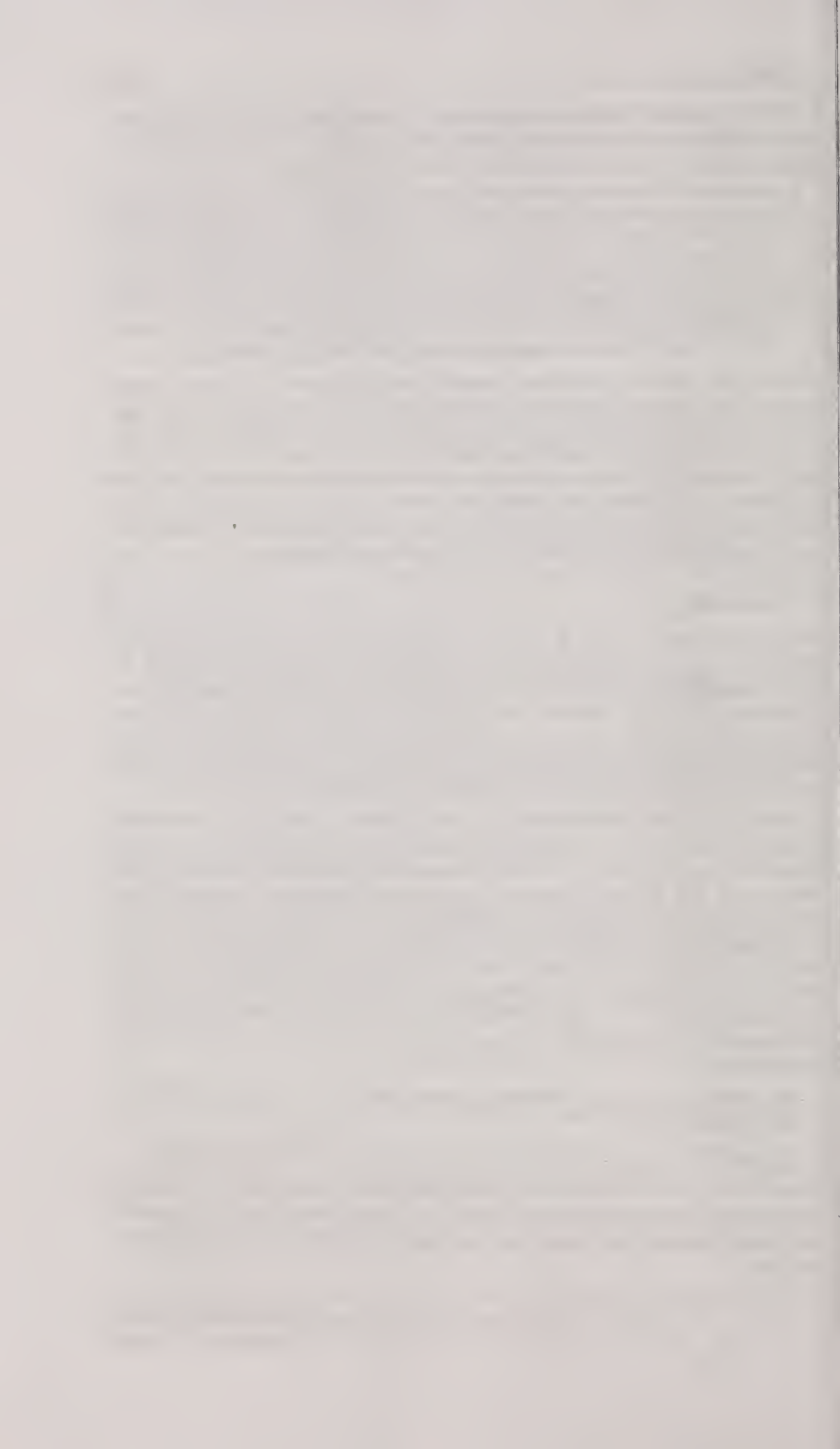
4 Conclusion

Beecham applied for leave to appeal against this decision. Smit J granted his permission and the current matter will be decided in the Supreme Court of Appeal towards the end of 2002. If one looks at the straight and analytical way of reasoning the judge followed then it is hard to imagine the Supreme Court of Appeal doing anything else but confirming the decision of the court *a quo*. All the relevant provisions were considered and applied. This case was a first in South Africa under the 1993 Act and has also drawn a lot of international attention.

In his comment (“Pharmaceutical Tablet Shape Trade Mark Registration Crumbles Under Attack” at http://www.spoor.com/articles/tra_art_1.htm) Charles Webster of the firm Spoor & Fisher, Pretoria (who represented Triomed in this case) states that Triomed’s success in expunging Beecham’s registered trade mark “must not be interpreted as the death-knell of tablet shapes as trade marks”. A multitude of tablet shapes have been identified to qualify as trade marks; the conditions for registrability being not to be required for general use by competitors in the normal course of trade and not consisting of mainly individual functional features. According to Webster there are other lessons to be learnt by pharmaceutical manufacturers wishing to register tablet shapes as trade marks, namely that:

- the specification of goods should be limited (which was done by Beecham in this instance) and;
- the specific colours and dimensions of the registration should be restricted.

Therefore it is indeed possible to register tablet shapes as trade marks. However, every case has to be decided on its own facts. Consequently the final decision is eagerly awaited and a new precedent is ready to be added to the South African case law.



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