Aantekeninge

GEDAGTES OOR FEITELIKE KOUSALITEIT IN DIE DELIKTEREG

1 *Inleiding*

Kousaliteit speel 'n belangrike rol in die toepassing van die deliktereg. Die doel met hierdie aantekening is om kortliks 'n kritiese oorsig te verskaf van sekere beginsels betreffende feitelike kousaliteit.

Alhoewel hierdie bydrae beperk word tot 'n aantal opmerkings oor feitelike kousaliteit vir die bepaling van aanspreeklikheid *ex delicto*, is kousaliteit ook relevant by heelwat ander kwessies in die deliktuele skadevergoedingsreg. So dui "juridiese kousaliteit" op die begrensing van aanspreeklikheid aangesien die reg 'n dader nie onbeperk aanspreeklik kan hou vir 'n eindelose ketting van skade-inhoudende gebeurtenisse wat deur sy doen of late veroorsaak is nie (sien bv Neethling *et al Deliktereg* (2002) 196 ev vir 'n volledige bespreking). Voorts is kousaliteit van belang by nalatigheid aangesien een van die bene van die nalatigheidstoets is of die redelike persoon in die posisie van die dader redelike stappe sou gedoen het om die gewraakte gevolg te voorkom (*Kruger v Coetzee* 1966 2 SA 428 (A) 430). Waar redelike stappe in elk geval nie die skade sou kon voorkom nie, is daar nie nalatigheid nie, of het nalatigheid nie "kousale relevansie" nie (sien bv *Welkom Municipality v Masureik and Herman t/a Lotus Corporation* 1997 3 SA 363 (HHA) 373; Neethling *et al* 164-165). Kousaliteit kom ook ter sprake by medewerkende skuld waar vasgestel moet word of die skade ook deur die eiser se eie "skuld" veroorsaak is soos bedoel in artikel 1(1)(a) van die Wet op die Verdeling van Skadevergoeding 34 van 1956.

Voorts is daar verskillende fasette van skadebepaling en die berekening van skadevergoeding waar kousaliteit relevant is. By voordeeltoerekening gaan dit byvoorbeeld onder meer daaroor of dit weens die verweerder se delik is dat die eiser sekere voordele ontvang het of gaan verkry (Visser en Potgieter *Skadevergoedingsreg* (2003) 207-208; Reinecke "Nabetragting oor die skadeleer en voordeeltoerekening" 1988 *De Jure* 230), en by die eiser se sogenaamde plig om sy skade te beperk deur redelike optrede kom kousaliteit ooglopend ter sprake. Die relevansie van kousaliteit by skadebepaling en die berekening van skadevergoeding is nie onverwags nie aangesien dit onmoontlik is om van skade te praat sonder dat kousaliteit relevant is aangesien skade noodwendig deur iets veroorsaak moes gewees het (sien Visser en Potgieter 44-45). Aan die ander kant het dit nie sin om kousaliteit te oorweeg sonder dat die skade wat aan die eindpunt van die kousale ketting staan, terselfdertyd in die prentjie is nie (*contra* Kock *The Reduced Utility of a Life Plan* (1993) 47 wie se siening nie behoorlik gemotiveer word nie en dus onaanvaarbaar is).

Ten slotte word daar in die deliktuele skadevergoedingsreg dikwels gewerk met kousaliteit by skade of verlies soos in statutêre bepalings vervat (bv a 17(1) van die Padongelukfondswet 56 van 1996; a 60(1) van die Suid-Afrikaanse Skolewet 84 van 1996). Die korrekte betekenis moet in sodanige gevalle aan kousaliteit gegee word in die lig van die doel met die betrokke wetsbepaling.

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2 *Algemene opmerkings en sienings oor feitelike kousaliteit*

Wetenskaplikes buite die juridiese terrein het hulle uiteraard al dikwels oor kousaliteit uitgelaat. Calaprice (*The Quotable Einstein* (1996) 180) haal die volgende opmerking deur Albert Einstein aan:

> "Development of Western science is based on two great achievements: the invention of the formal logical system (in Euclidean geometry) by the Greek philosophers, and the discovery of the possibility to find out causal relationships by systematic experiment (during the Renaissance)."

Niles (*Genetics* (1922) 259-261) omskryf kousaliteit soos volg: "Causation has been popularly described to express the condition of association, when applied to natural phenomena ... Causation is correlation ... [P]erfect correlation, when based on sufficient experience, is causation in the scientific sense."

Waddington (*The Scientific Attitude* (1941) 9) maak die volgende waarneming:

> "Science is the organised attempt of mankind to discover how things work as causal systems. The scientific attitude of mind is an interest in such questions. It can be contrasted with other attitudes, which have different interests; for instance, the magical, which attempts to make things work not as material systems but as immaterial forces which can be controlled by spells; or the religious, which is interested in the world as revealing the nature of God."

Van Rensburg (*Juridiese Kousaliteit en Aspekte van Aanspreeklikheidsbegrensing by die Onregmatige Daad* (1970 proefskrif Unisa) *passim* en 290-299 vir 'n nuttige opsomming) het 'n belangrike teoretiese bydrae gelewer om helderheid oor die aard en vasstelling van kousaliteit in die deliktereg te skep. Volgens hom (sien Van Rensburg 1) is daar waarskynlik geen ander gebied van die reg waar halfgebakte idees van ander dissiplines soveel verwarring saai as by kousaliteit nie (sien ook die siniese opmerkings in hierdie verband deur Rümelin *Die Verwendung der Causalbegriffe in Straf- und Civilrecht* (1900) 1). Hy het dan ook gepoog om teorieë en metodes oor kousaliteit wat volgens hom onhoudbaar was en die debat vertroebel, uit die weg te ruim en 'n meer verantwoordbare benadering tot feitelike (en juridiese) kousaliteit te formuleer. In besonder het Van Rensburg die logiese gebreke en denkfoute in die sogenaamde *conditio sine qua non*-teorie doeltreffend aan die kaak gestel.

3 *Feitelike kousaliteit as delikselement*

Volgens die gangbare siening oor deliktuele aanspreeklikheid, is feitelike kousaliteit of oorsaaklikheid een van die algemene "elemente" of vereistes vir sodanige aanspreeklikheid (saam met 'n "handeling", "onregmatigheid", "skuld", "skade" en "juridiese kousaliteit" – sien bv Neethling *et al* 29 185 ev). Alhoewel kousaliteit uiteraard van ander delikselemente onderskei kan word, het dit nogtans 'n besondere verband met elkeen van hulle wat nie uit die oog verloor moet word nie aangesien geen delikselement in 'n vakuum funksioneer nie.

Elke skadelike gevolg word feitelik daargestel deur 'n oneindige aantal medewerkende of samelopende faktore. Die deliktereg is uiteraard meestal gefokus op die kousale werking van die handeling van die verweerder as deel van die skadestigtende gebeurtenis. Die gebruiklike beklemtoning van 'n oorsaaklike verband bloot tussen 'n "handeling" en "skade", is dus nie volkome juis nie. Dit sou meer akkuraat wees om te verwys na 'n kousale verband tussen 'n

''skadestigtende gebeurtenis'' en ''skade''. 'n Skadestigtende gebeurtenis het wel 'n willekeurige menslike gedraging as kernbestanddeel, maar 'n handeling moet nietemin as deel van 'n feitekompleks gesien word waar die menslike doen of late beoordeel word in die lig van byvoorbeeld die kousale instrument(e) wat dit gebruik of in werking stel, sowel as die ander relevante omstandighede waarbinne dit plaasvind (sien in die algemeen oor 'n skadestigtende gebeurtenis Visser en Potgieter 19 25 ev).

4 *Die bepaling van feitelike kousaliteit deur die howe*

Oor die vraag *hoe* feitelike kousaliteit vasgestel moet word, is daar meningsverskil. Ons howe beskryf in die algemeen die metode om kousaliteit te bepaal as 'n toepassing van die sogenaamde *conditio sine qua non*-teorie of die ''but for''-toets (sien bv *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (HHA) 327 ev; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (HHA) 449; *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (HHA) 230-241). Nietemin het die howe ook al aanvaar dat die *conditio sine qua non*-benadering nie die enigste wyse is om feitelike kousaliteit te bepaal nie (sien bv *Minister of Police v Skosana* 1977 1 SA 31 (A) 35 43-44; *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 917-918 waar beklemtoon word dat ''common sense standards'' gebruik moet word waar *conditio sine qua non* ontoepaslik is; vgl in die algemeen Van der Walt en Midgley *Principles of Delict* (2005) 201 n 15).

Volgens *conditio sine qua non* is 'n handeling die oorsaak van 'n gevolg indien die handeling nie weggedink kan word sonder dat die gevolg ook verdwyn nie (sien Neethling *et al* 187; vgl ook Van Oosten ''Oorsaaklikheid in die Suid-Afrikaanse strafreg – 'n prinsipiële ondersoek'' 1982 *De Jure* 4 239, 1983 *De Jure* 36). Nogtans is dit nie altyd duidelik welke interpretasie ons howe presies aan die *conditio sine qua non*-metode wat hulle voorgee om toe te pas heg, watter variant van hierdie metode gebruik word, of hoe die ''toets'' presies werk nie.

In *International Shipping Co (Pty) Ltd v Bentley* (1990 1 SA 680 (A) 700F-H) formuleer die hof die *conditio sine qua non*-benadering soos volg:

> ''The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter,* if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise.''

In die geval van ''positiewe'' optrede of 'n ''doen'' deur 'n verweerder ('n *commissio*), moet die positiewe optrede dus weggedink word om te probeer vasstel of die gewraakte gevolg nog sou intree. In die geval van 'n late (*omissio*) berus *conditio sine qua non* eerder op die ''indink'' van 'n hipotetiese positiewe handeling in die bepaalde feitestel – wat waarskynlik ook gesien kan word as die ''wegdink'' van die late van die verweerder. Waar hipotetiese positiewe

optrede van die verweerder die skade kon voorkom, kan gesê word dat die verweerder se nalate oorsaak van die skade was. In *Minister of Safety and Security v Van Duivenboden* (2002 6 SA 431 (HHA) 449D-F) het die hoogste hof van appèl in meer detail ingegaan op die benadering tot feitelike kousaliteit by 'n late:

> "There are conceptual hurdles to be crossed when reasoning along those lines [soos in *International Shipping Co (Pty) Ltd v Bentley* hierbo aangehaal] for, once the conduct that actually occurred is mentally eliminated and replaced by hypothetical conduct, questions will immediately arise as to the extent to which consequential events would have been influenced by the changed circumstances. Inherent in that form of reasoning is thus considerable scope for speculation which can only broaden as the distance between the wrongful conduct and its alleged effect increases. No doubt a stage will be reached at which the distance between cause and effect is so great that the connection will become altogether too tenuous, but, in my view, that should not be permitted to be exaggerated unduly. A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics."

Daar is heelwat regspraak wat die vasstelling van feitelike kousaliteit by 'n nalate illustreer (bv *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) 587 waar die polisie versuim het om 'n gearresteerde persoon te boei en die hof die vraag stel of die aangehoudene nog nadeel sou veroorsaak het indien hy inderdaad geboei was – welke vraag negatief beantwoord word en gevolglik is 'n kousale verband tussen die versuim en die skade aanwesig; *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 1 SA 515 (HHA) waar oorweeg moes word of indien die polisie 'n aangehoudene betyds mediese behandeling laat kry het, sy dood verhinder sou kon word).

In *Minister of Safety and Security v Carmichele* (2004 3 SA 305 (HHA)) moes die hof probeer uitmaak of die landdros voor wie 'n borgaansoek deur 'n gevaarlike misdadiger gedien het, sodanige aansoek sou geweier het indien die staat behoorlike submissies en inligting aan hom voorgelê het. Appèlregter Harms benader die vasstelling van die kousale verband basies korrek in die lig van objektiewe en subjektiewe faktore, *facta probanda* en *facta probantia* en die waarskynlikhede van die geval (par 60 ev):

> "The solution to the conundrum appears to be this: The inquiry is subjective in the sense that a court has to determine what the relevant magistrate *on the probabilities would have done* had the application for bail been opposed. In this regard the *ex post facto* evidence of the magistrate would generally amount to an inadmissible opinion as to what his or her state of mind would have been at some time in the past. To the extent that the evidence is admissible it would generally be unhelpful because it would be speculative.
>
> [61] Courts of appeal are often called upon to decide what a reasonable judicial officer should have done and this they do by establishing what a reasonable judicial officer *would* have done. It may be presumed factually that judicial officers conform to that norm and it is fair to deduce that any particular judicial officer (even if his or her identity cannot be established), on the probabilities and as a matter of fact, would have so acted. The proper inquiry is, thus, what the relevant judicial officer, who is factually assumed to make decisions reasonably, would, on the probabilities, have done. We know from experience how few bail appeals emanate from magistrates' courts and that a small percentage succeeds and it is thus fair to assume that magistrates on the whole tend to get bail matters right. This factual presumption has to yield in

> the face of cogent evidence pointing in another direction. An extreme example would be the case of the maverick magistrate.
>
> [62] To determine causation requires that we transpose ourselves back to March 1995. The law relating to bail, at the time, was in flux (the interim Constitution had been but a year in operation) and accused persons were being released on bail because some courts were overawed by the constitutional right every accused had under s 25(2)(*d*) of the interim Constitution 'to be released from detention with or without bail, unless the interests of justice require otherwise'."

In *Minister of Safety and Security v Van Duivenboden* (449E-F) word kousaliteit ook korrek benader:

> "A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs."

Ondanks die populariteit van *conditio sine qua non*-terminologie is daar al uit verskillende oorde in Suid-Afrika en Europa heelwat logiese kritiek daarteen ingebring. Daar is naamlik onteenseglike bewyse dat die wegdinkmetode van *conditio sine qua non* nie werklik 'n kousaliteitstoets is nie maar bloot 'n wyse om 'n voorafbepaalde kousale verband uit te druk (sien bv Van Rensburg 9 ev; Visser "*Conditio sine qua non*" 1989 *THRHR* 558; Neethling *et al* 188 ev; Snyman *Criminal Law* (2002) 78; Van der Walt en Midgley 200).

Nogtans het die bykans onweerlegbare logiese kritiek tot nou toe nie ons howe beweeg om van die terminologie van *conditio sine qua non* afstand te doen nie. Die basiese redes hiervoor is redelik voor die hand liggend: Eerstens is die betrokke terminologie so ingeburger dat die hoogste hof van appèl waarskynlik nie kans sien om hiervan af te wyk sonder dat daar 'n noodsaaklike praktiese grond hiervoor is nie – wat nog nie te voorskyn gekom het nie aangesien feitelike kousaliteit gewoonlik geen besondere probleme in die praktyk oplewer nie – en die laer howe dit volgens die presedentestelsel nie kan doen nie. Tweedens blyk dit uit die meeste gerapporteerde sake dat die howe ondanks hulle lippediens aan *conditio sine qua non* nie werklik die onwerkbare "wegdink"-metode van hierdie toets gebruik nie en eenvoudig die korrekte metodes wat hulle wel aanwend as 'n "toepassing" van *conditio sine qua non* aansien en beskryf. 'n Verwerping van *conditio sine qua non* as denkmetode of ware toets vir kousaliteit is dus nie nodig om die korrekte resultate in die praktyk te kry nie.

Die toets wat die howe in die algemeen gebruik om feitelike kousaliteit vas te stel, is die vanselfsprekende een, naamlik om op die relevante getuienis en waarskynlikhede te bepaal of een feit uit 'n ander volg (sien Neethling *et al* 194-195). Vervolgens word hierdie kwessie in meer detail oorweeg.

5 *Algemene opmerkings oor die die wyse waarop feitelike kousaliteit vasgestel behoort te word*

By die beantwoording van die vraag hoe feitelike kousaliteit vasgestel moet word, moet daar eers duidelikheid verkry word wat hierdie begrip beteken. Feitelike kousaliteit dui op 'n bepaalde tipe verband tussen ten minste twee feite of feitekomplekse, naamlik die verband wat bestaan wanneer een feit uit 'n ander volg.

Anders gestel, as feit X 'n rede is waarom feit Y bestaan of in 'n bepaalde

vorm bestaan of op 'n bepaalde tyd ontstaan het, kan gesê word dat X 'n feitelike oorsaak van Y is. Daar is natuurlik heelwat ander verbande of korrelasies tussen feitekomplekse wat nie met feitelike kousaliteit verwar moet word nie. Voorts moet feitelike kousaliteit nie beperk word tot dit wat natuurwetenskaplikes as ''kousaliteit'' beskryf nie aangesien dit die pistiese, linguistiese, sosiale, psigiese en geestelike aspekte van feitelike kousaliteit ten onregte misken (sien ook Van Rensburg 62).

Dit spreek vanself dat weens die dinamiese en komplekse aard van die werklikheid dit nie moontlik of nodig is om 'n universeel-geldende ''toets'' te vind of te formuleer waarmee kousaliteit in die algemeen, orals of altyd bepaal sou kon word nie. In 'n bepaalde feitekompleks is dit uiteraard wel nodig om aan te toon waarop die gevolgtrekking berus dat feit X, byvoorbeeld die gewraakte handeling van die dader met 'n voertuig, die relevante gevolg Y, byvoorbeeld die skade wat die eiser gely het, veroorsaak het. Die bestaan van 'n feitelike kousale ketting moet uiteraard gedemonstreer kan word in die lig van die bewese relevante feite. 'n Toets vir feitelike kousaliteit hang dus af van die feite van elke geval en is nie iets algemeen wat op alle feitestelle van toepassing is nie. Anders gestel, daar is soveel toetse vir kousaliteit as wat daar feitelik kousale verbande bestaan. 'n Geldige en realistiese toets vir kousaliteit in 'n bepaalde geval moet dus in staat wees om op wetenskaplik aanvaarbare wyse (in die wydste sin van die woord) te demonstreer hoe een feit uit 'n ander volg.

Dit kan nie korrek wees om te betoog dat 'n toets vir feitelike kousaliteit ook ''normatiewe'' elemente het nie (soos Van der Walt en Midgley 199 doen). In die algemeen neem die reg kennis daarvan dat feitelike kousaliteit iets is wat bestaan of nie bestaan nie en geen regsreëls, ander norme of teoretisering kan hieraan verander nie aangesien die reg die feitelike werklikheid moet aanvaar. Die posisie is natuurlik anders by juridiese kousaliteit waar dit gaan oor aanspreeklikheid vir bepaalde verwyderde gevolge en die reg voorsiening maak vir billike norme om aanspreeklikheid te begrens.

Neethling *et al* (194-195) laat hulle as volg uit oor die bepaling van kousaliteit:

> ''Dit spreek vanself dat vir die vasstelling van 'n kousale verband sowel *kennis en ervaring* as relevante en betroubare getuienis nodig is. Hierdie kennis kan van 'n algemene of 'n deskundige aard wees. Sonder kennis dat 'n sekere antesedent 'n bepaalde gevolg *kan veroorsaak*, is dit onmoontlik om in 'n konkrete geval te bepaal of 'n sekere handeling wel 'n gewraakte gevolg *veroorsaak het*. Aangesien daar geen towerformule is aan die hand waarvan 'n kousale verband in die algemeen bepaal kan word nie, sal die bestaan van sodanige verband *van die feite van 'n bepaalde geval afhang*; en, soos gestel, word die bestaan van 'n kousale verband daardeur gekenmerk dat die een feit uit 'n ander volg. Of dít die geval is, moet dan bepaal word deur middel van menslike ervaring en kennis in die algemeen en dié van die beoordelaar van die feite in die besonder. In die praktyk word die bestaan van 'n kousale verband dus net soos ander regsfeite op grond van *getuienis* deur die hof vasgestel.''

Alhoewel hierdie benadering logies is en dit in beginsel ook die wyse is waarop feitelike kousaliteit gewoonlik deur die howe bepaal word, moet in gedagte gehou word dat waarskynlikhede en kennis van veroorsaking in die verlede of in die algemeen, bloot hulpmiddels is om die gebeure van 'n bepaalde geval te rekonstrueer, te verklaar of te evalueer en dat dit uiteraard nie in die plek kom van wat werklik gebeur het nie. Byvoorbeeld, die feit dat 'n koeël in die kop gewoonlik noodlottig is, beteken tog nie dat dit altyd hierdie gevolg het nie (vgl Van Rensburg 293). Die verskil tussen wat bewys moet word en waarmee

dit bewys word, moet dus noukeurig uitmekaar gehou word in die rekonstruksie van feite ten einde kousaliteit te bepaal.

6 *Slotopmerking*

Daar kan min twyfel wees dat ons howe gewoonlik feitelike kousaliteit by die toepassing van die deliktereg korrek bepaal. Die enigste aanvegbare kwessie bly die onvanpaste gebruik in sekere gevalle van die terminologie van die *conditio sine qua non*-benadering. Dit is egter onwaarskynlik dat die howe hulle ooit deur die teoretiese of akademiese kritiek in hierdie verband sal laat beïnvloed. Vir die howe is die *conditio sine qua non*-toets blykbaar die verstaanbaarste algemene wyse waarop met feitelike kousaliteit omgegaan kan word. Alhoewel hierdie benadering logieserwys verkeerd is, het dit geen afkeurenswaardige praktiese gevolge nie en kan die howe se metodes wat werklik gebruik word om kousaliteit te bepaal ook nie in die algemeen gekritiseer word nie. Akademiese puriste sal dus maar vrede moet maak met die howe se gebruik van die terminologie van *conditio sine qua non*.

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TAXI SECTORAL DETERMINATION: (RE)AFFIRMING SOCIAL SECURITY AND LABOUR LAW PROTECTION FOR THE TAXI SECTOR

1 *Introduction*

On 1 July 2005 a sectoral determination establishing conditions of employment and minimum wages for the taxi sector came into force (sectoral determination 11: taxi sector 2005 (hereinafter the determination)). The determination was promulgated pursuant to section 51(1) of the Basic Conditions of Employment Act 75 of 1997. This section provides the minister of labour with discretion to issue a sectoral determination establishing basic conditions of employment for employees in different industries. The determination comprises thirty-four clauses classified under eight parts (ie application, minimum wages, particulars of employment, hours of work, leave, prohibition of employment of children and forced labour, termination of employment, and general provisions). For the purpose of this contribution, the determination will be discussed under the following headings: scope of application, minimum wages, hours of work, leave, prohibition of employment of children and forced labour, and termination of employment. This will be followed by general observations.

2 *Scope of application*

The determination applies to all employees in South Africa working in the taxi sector (cl 1 and 2), save for owner-drivers, employers and employees in the

metered sector, and any person employed in activities covered by another sectoral determination or by a bargaining council agreement (cl 4). The determination defines the "taxi sector" as "the sector in which employers and employees are associated for the purpose of conveying for reward on any public road any person by means of a self-propelled vehicle intended to carry not more than 35 persons, including the driver simultaneously, and includes all operations incidental thereto or consequent thereon but excludes the metered taxi industry" (cl 34(1)). An "employee" in the taxi sector includes, but is not limited to taxi drivers; administrative staff; rank marshalls; employees engaged to clean vehicles, premises, machinery, tools, or any other articles used in relation to taxi operations; and employees who check and collect fares from passengers and who manage the loading of passengers into different taxi vehicles (cl 1(3)).

The determination makes provision for a presumption as to who is an employee:

> "A person who works for, or renders services to, any other person in the taxi sector is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present – the manner in which the person works is subject to the control or direction of another person; the person's hours of work are subject to the control or direction of another person; the person forms part of the employer's organisation; the person has worked for that other person for an average of at least 40 hours per month over the last three months; the person is economically dependant on the other person for whom that person works or renders services; the person is provided with tools of trade or work equipment by the other person; or the person only works for or renders services to one person" (cl 32).

This presumption embraces to a large extent various tests (eg the control test) developed over the years in South Africa to distinguish between an employee and an independent contractor (see, for further reading about these tests, Grogan *Workplace Law* (2005) 19-23, *R v AMCA Services* 1959 4 SA 207 (A), *Colonial Mutual v McDonald* 1931 AD 412 and *Smit v Workmen's Compensation* 1979 1 SA 51 (A)).

3 *Minimum wages*

3.1 Minimum wage level

The determination prescribes minimum wages for taxi sector employees (cl 2). These, together with the respective annual increments (cl 3), are set as follows:

Minimum wages for employees in the Taxi Sector							
Minimum rate for the period 1 July 2005 to 30 June 2006				Minimum rate for the period 1 July 2006 to 30 June 2007		Minimum rate for the period 1 July 2007 to 30 June 2008	
	Monthly	Weekly	Hourly				
Drivers	R1,350.00	R311.56	R6.49	Drivers	Previous year's wage + CPIX* + 2%	Drivers	Previous year's wage + CPIX* + 2%

Admin workers	R 1,350.00	R311.56	R6.49	Admin workers	Previous year's wage + CPIX* + 2%	Admin workers	Previous year's wage + CPIX* + 2%
Rank marshals	R 1,080.00	R249.24	R5.19	Rank marshals	Previous year's wage + CPIX* + 2%	Rank marshals	Previous year's wage + CPIX* + 2%
Workers not elsewhere specified	R 945.00	R218.09	R4.54	Workers not elsewhere specified	Previous year's wage + CPIX* + 2%	Workers not elsewhere specified	Previous year's wage + CPIX* + 2%
*CPIX is the Consumer Price Index, excluding interest rates on mortgage bonds for metropolitan and other urban areas as reported by Statistics SA six weeks before the increases become effective.							

In the light of the fact that there are taxi drivers who earn in excess of the minimum wage stipulated by the determination, employers are urged to refrain from lowering such wages in view of matching the minimum wage level since such an act could amount to an unfair labour practice (speech given by the minister of labour at the African Window Conference Centre – launch of the taxi sectoral determination on 28 April 2005).

3.2 Payment of wages and related issues

3.2.1 Payment of wages

A taxi sector employer has a duty to pay an employee: in South African currency; daily, weekly, fortnightly or monthly; and in cash, by cheque or by direct deposit into an account designated by the employee (cl 5(1)). Any payment in cash or by cheque must be given to the taxi sector employee at the workplace or at a place he or she agreed to in writing, during working hours and in a sealed envelope which becomes the property of the taxi sector employee (cl 5(2)).

3.2.2 Information concerning pay

On every payday the employer must give the taxi sector employee a statement showing: the employer's name and address; the employee's name and occupation; the employee's wage rate, overtime rate and allowance rate; the period in respect of which payment is made; the number of ordinary hours worked by the employee during that period; the number of overtime hours worked by the employee during that period; the number of hours worked by the employee on a public holiday or on a Sunday; the employee's total wage for the period; details of any other pay arising out of the employee's employment; details of any deductions made; the employer's registration number with the Unemployment Insurance Fund (hereinafter the Fund) and the employer's contribution to the Fund; and the actual amount paid to the employee (cl 6(1)). An employer has a duty to retain a copy or record of each statement for three years (cl 6(2)).

3.2.3 Prohibited acts concerning pay

The taxi sector employer may not commit the following acts regarding an employee's pay: withhold any payment from an employee or require an em-

ployee to pay the employer or any other person in respect of the employment or training of that employee, the supply of any work equipment or tools, or the supply of anything necessary to ensure compliance with health and safety requirements; levy a fine against an employee; or require or permit an employee to repay any amount paid except for overpayments previously made by the employer resulting from an error in calculating the employee's pay or acknowledge receipt of an amount greater than the pay actually received (cl 7(1)).

3.2.4 Deductions

The employer may: on the written request of an employee deduct an amount which the employer has paid or undertaken to pay to a third party (eg trade union subscriptions); with the agreement of the employee deduct an amount not exceeding one-tenth of the wage due to the employee on the pay-day concerned, towards the repayment of any amount loaned or advanced to the employee by the employer; deduct any amount which the employer is required to subtract by law or in terms of a court order or arbitration award; or with the written agreement of the employee deduct to reimburse himself or herself for the loss or damage which occurred in the course of employment and due to the fault of the employee (cl 8).

4 *Hours of work*

4.1 Ordinary hours of work

An employer may not require or permit an employee to work more than 48 hours in any week; and ten hours on any day if the employee works for five days or less in a week; or eight hours on any day if the employee works for more than five days in any week (cl 11(1)). In case of employees who regularly work on Sundays or public holidays, the determination considers work on those days – unless there is an agreement to the contrary – as part of ordinary hours worked (cl 11(2)). Even so, the determination requires that work on Sundays or public holidays be paid at the rates it prescribes. An employer has an obligation to pay an employee who works on a Sunday, if the employee works for five hours or less, the employee's ordinary daily wage and, if the employee works for more than five hours, one and a half times the employee's ordinary daily wage (cl 14(1)). Notwithstanding the foregoing, an agreement may permit an employer to grant an employee who works on a Sunday paid time off equivalent to the difference in value between the pay received by the employee for working on the Sunday and the pay that the employee is entitled to (cl 14(2)). As regards work on public holidays, no employer may require an employee to work on a public holiday except in accordance with an agreement (cl 15(1)). In the event that a public holiday falls on the day on which an employee would ordinarily work, the determination imposes an obligation on the employer to pay: an employee who does not work on the public holiday at least the wage that the employee would ordinarily have received for work on that day; an employee who does work on the public holiday at least double the abovementioned amount (cl 15(2)). Furthermore, the determination directs an employer to pay an employee who works on a public holiday on which such an employee would not ordinarily work an amount equal to the employee's ordinary daily wage plus the amount earned by the employee for the work per-

formed that day, whether calculated by reference to time worked or any other method (cl 15(3)). The determination requires an employer to pay an employee for a public holiday on the employee's usual payday (cl 15(4)).

4.2 Overtime

No employer may require or permit an employee to work overtime except in accordance with an agreement concluded by the employer and the employee; to work more than 15 hours overtime a week; or to work more than twelve hours, including overtime, on any day (cl 12). The determination imposes a duty on an employer to pay an employee at least one and one-half times the employee's wage for overtime worked (cl 13(1)). An agreement may, however, provide for an employer to pay an employee not less than the employee's ordinary wage for overtime worked and grant the employee at least 30 minutes time off on full pay for every hour of overtime worked; or grant an employee at least 90 minutes paid time off for each hour of overtime worked (cl 13(2)).

4.3 Night work

An employer in the taxi sector may, according to the determination, only require or permit an employee to perform night work by agreement and if the employee is compensated by the payment of an allowance, which may be a shift allowance, or by a reduction of working hours, and transportation is available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift (cl 16(2)). Clauses 16(1) and 34(1) of the determination define ''night work'' as ''work performed between 20h00 and 05h00''.

4.4 Meal and rest breaks

Employees in the taxi sector who work continuously for more than five hours are entitled to a meal interval of at least one continuous hour (cl 17(1)). For the purposes of this provision, a driver is deemed not to be working continuously if for a period of at least one hour the driver's only duty is to be in charge of the vehicle, which the driver drives, or in charge of its load (cl 17(3)). The meal interval, which must be paid for (cl 17(5)), may be taken at a specific agreed time or whenever it is practicable to do so, but no later than six hours after the employee began work (cl 17(2)). Employees are, in addition to meal intervals, entitled to a daily rest period of at least twelve consecutive hours between ending work and starting work the next day and a weekly rest period of at least thirty-six consecutive hours, which, unless otherwise agreed, must include a Sunday (cl 18(1)).

5 *Leave*

Taxi sector employees are entitled to annual leave (cl 19), sick leave (cl 20) and family responsibility leave (cl 21). Female employees are also entitled to maternity leave (cl 22). The dismissal of an employee due to her pregnancy, intended pregnancy, or any reason related to her pregnancy is automatically unfair (s 187(1)(e) of the Labour Relations Act 66 of 1995 (see *Botha v A Import Export International CC* (1999) 20 ILJ 2580 (LC); *Mashava v Cuzen*

& Woods Attorneys (2000) 21 ILJ 402 (LC); *Masondo v Crossway* (1998) 19 ILJ 171 (CCMA)). Employers may, however, dismiss a pregnant employee for inherent requirements of the job or incapacity (see *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC)).

6 *Prohibition of employment of children and forced labour*

The employment in the taxi sector of children under fifteen years of age or who are under the minimum school leaving age in terms of any law (if this is 15 or older) is prohibited (cl 23(1). See s 31(1) of the South African Schools Act 84 of 1996). The determination, in addition, proscribes the provision of work to a child (in any employment) in the taxi sector that is inappropriate for a person of that age as well as work that places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development (cl 23(2); South Africa has ratified the Minimum Age Convention 138 of 1973 and the Worst Forms of Child Labour Convention 182 of 1999). Alongside the prohibition of child labour, the determination bars all forced labour (cl 24). South Africa has ratified the Forced Labour Convention 29 of 1930 and the Abolition of Forced Labour Convention 105 of 1957. This prohibition is, however, subject to the Constitution of the Republic of South Africa of 1996 (cl 24). Any person who employs children or engages in any form of forced labour in contravention of the determination commits an offence (cl 25).

7 *Termination of employment*

The determination, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of: not less than one week if the employee has been employed for six months or less; two weeks if the employee has been employed for more than six months but not more than one year; and four weeks if the employee has been employed for one year or more (cl 26(1); an analogous provision may be found in s 37(1) of the Basic Conditions of Employment Act). Notice of termination of a contract of employment given by an employer must not be issued during any period of leave to which the employee is entitled and must not run concurrently with any period of leave to which the employee is entitled in terms of the determination, except sick leave (cl 26(4)). In addition, the notice of termination of a contract of employment must be in writing (cl 26(3)(a)). This requirement does not apply in a situation whereby an illiterate employee gives notice of termination of employment (cl 26(3)(a)). The determination obliges that the notice of termination be explained orally by, or on behalf of, the employer to an illiterate employee in an official language the employee reasonably understands (cl 26(3)(b)). An employer may, instead of giving an employee notice, pay the wage the employee would have received had he or she worked during the notice period (cl 27). Moreover, an employer and an employee have the right to terminate a contract of employment without notice for any cause recognised by law (cl 26(5)(b)).

8 *General observations*

The South African taxi sector has informal sector origins (see, for example, Sekhonyane and Dugard "A violent legacy: The taxi industry and government at

loggerheads'' 2004 *South African Crime Quarterly* 13 and Fourie *Rethinking the Formalisation of the Minibus-Taxi Industry in South Africa* (2003 dissertation UP) 31-43). Accordingly, social security and labour law protection tend to be inadequate. Reasons for this state of affairs are manifold. Chief among them is that social security and labour laws which serve as gatekeepers to social security and labour protection often require a person to be an ''employee'' prior to granting access (see Olivier and Kalula ''Legal framework and scope of coverage'' in Olivier, Smit, Kalula and Mhone (eds) *Introduction to Social Security* (2004) 33 46-47). Secondly, employers in that sector rarely recognise the rights accorded to their employees and the obligations imposed on them by labour and social security laws (Barrett *Organizing in the Informal Economy: A Case Study of the Minibus Taxi Industry in South Africa* (International Labour Office (2003)) 10-11) such as the Basic Conditions of Employment Act, the Labour Relations Act, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Unemployment Insurance Act 63 of 2001. This is mainly due to the legislature's piecemeal and haphazard approach in extending social security and labour law protection to the informal sector. There are taxi sector employers and employees who are supposed to be covered by, for example, unemployment insurance and compensation for occupational injuries legislation as far back as 1988. The now repealed Wage Determination 452 for the Road Transportation Trade in Certain Areas of July 1988, subjected employees of the minority of owners of more than ten vehicles to COIDA and the UIA (Barrett 10-11). The mere fact that the aforementioned sectoral determination of 1988 was limited to each owner of more than ten vehicles excluded many individuals in the employment of owners of less than ten vehicles from the ambit of unemployment insurance and compensation for occupational injuries laws. Another point to be observed is that South Africa is notorious for its weak social security and labour law enforcement and monitoring mechanisms. (See, eg, International Confederation of Free Trade Unions ''South Africa: Annual survey of violations of trade union right'' (2003)). Consequently, most employers flout labour (and in certain instances social security) laws with apparent impunity (see, for example, Case *et al Organising in the Taxi Industry: The South African Experience* (International Labour Organization (2003))). It is, therefore, barely surprising that some of the taxi sector employers tend to disobey labour and social security laws largely without detection and/or retribution.

With the foregoing pronouncements in mind, the determination is to be welcomed. This assertion stems from the view that the determination is in step with the spirit of the constitution as well as international standards. The constitution, on the one hand, provides every person with the right to access to social security (s 27(1)(c) of the constitution) and accordingly obliges the state to take reasonable legislative measures and other measures, within its available resources, to achieve the progressive realisation of, among others, this right (s 27(2) of the constitution). (See Olivier *et al* ''Constitutional issues'' in Olivier, Smit, Kalula (eds) *Social Security: A Legal Analysis* ((2003) 49 71-76; Liffmann ''Social security as a constitutional imperative: an analysis and comparative perspective with emphasis on the effect of globalization on marginalization'' in Olivier *et al* (eds) *The Extension of Social Security Protection in South Africa: A Legal Enquiry* (2001) 29; Klinck ''It takes three to tango: the right to equality, social security and constitutional law in South Africa'' 2001 *European Journal of Law Reform* 163 164-166.) Furthermore, the determination endeavours to give effect to everyone's right to fair labour practices entrenched in section

23(1) of the constitution. International standards, on the other hand, require South Africa to extend the scope of protection afforded by its social security and labour laws to the excluded and marginalised members of its populace. The International Labour Organisation's eight fundamental labour conventions (ie Freedom of Association and Protection of the Right to Organise Convention 87 of 1948, the Right to Organise and Collective Bargaining Convention 98 of 1949, the Forced Labour Convention 29 of 1930, the Abolition of Forced Labour Convention 105 of 1957, the Minimum Age Convention 138 of 1973, the Worst Forms of Child Labour Convention 182 of 1999, the Equal Remuneration Convention 100 of 1951, and the Discrimination (Employment and Occupation) Convention 111 of 1958) apply to all workers irrespective of the sector they are engaged in. South Africa is a member of international and regional organisations – such as the United Nations Organisation (UNO), the International Labour Organisation (ILO), the African Union (AU) and the Southern African Development Community (SADC) – whose founding principles (and, in certain instances, conventions) directly or indirectly require the extension of social security and labour law protection. (See, eg the Constitution of the ILO (1919) and the Declaration of Philadelphia (1944); the African Charter on Human and People's Rights (1981); and the Charter of Fundamental Rights in the SADC (SADC Social Charter).)

Secondly, the determination explicitly elevates persons making a living in the taxi sector to the ranks of the formally employed. This effectively brings them within the reach of social security (eg unemployment insurance) and labour law (eg basic conditions of employment) protection. A statement like this should, however, be approached with caution, since the duties and entitlements contained in social security and labour laws do not automatically yield social security and labour protection. Employers and their employees need to be conversant with the obligations imposed and entitlements granted by the social security and labour laws so that they can abide by them and also take advantage of the benefits they offer. Furthermore, there must be effective monitoring, enforcement and adjudication mechanisms to, for example, ensure compliance. To this end, the government needs to intensify its efforts to improve the organisational capacity of the relevant government institutions to disseminate information relating to the taxi sector as well as to enforce and monitor applicable social security and labour laws.

9 *Conclusion*

The conclusion to be drawn is that the determination, apart from setting minimum wages, primarily reaffirms the labour and social security protection that applied only in theory to the taxi sector. The protection which it affords comes with entitlements that benefit taxi sector employers as well as their employees. Alongside these entitlements are obligations to comply with. Accordingly, the success of the determination will depend largely on the willpower of the taxi sector as a whole and the government's information-sharing endeavours, enforcement and monitoring mechanisms.

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